The Asia-Pacific Arbitration Review

2013

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Global Arbitration Review is delighted to publish The Asia-Pacific Arbitration Review 2013, 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, Middle Eastern and African 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.

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Generated: December 4, 2024

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Preface

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2011 proved to be another strong year for arbitration in Asia. All leading arbitral organisations in the region reported a healthy case load. SIAC received 188 new cases, a slight decrease from 198 commenced in the previous year. However the average amount in dispute increased significantly. Parties to SIAC arbitrations came from 41 countries. During the year SIAC appointed two emergency arbitrators and received 19 requests for application of its expedited procedure.

HKIAC handled 275 arbitration cases in 2011, 65 per cent of which were international and 35 per cent domestic. Of the total, 41 cases were administered by HKIAC in accordance with its rules. The top five jurisdictions, other than Hong Kong, where parties came from comprised China, United States, Singapore, BVI, Korea and Japan.

In 2011 KLRCA had 85 cases, an increase from the 73 cases in the previous year. International cases registered with the centre constituted about 20 per cent of the total number of cases. The JCAA registered 19 new international arbitration cases in 2011 - a drop from the record year of 2010 when 27 cases were received. ACICA, based in Sydney, had a successful year registering over 30 new cases. 2011 saw the launch of the new ACICA Arbitration Rules which include provision for the appointment of emergency arbitrators.

In mainland China, CIETAC received 965 domestic cases and 470 international cases (involving at least one foreign party) in 2011. The Beijing Arbitration Commission recorded 1433 new domestic cases and 38 international cases.

2012 promises to be another positive year for arbitration in Asia. Early indications suggest an increase in case numbers. From 10 to 13 June SIAC will host the ICCA Congress and some 800 participants are expected. SIAC will also revise its panel of arbitrators later in the year. HKIAC is undertaking an expansion of its premises which will involve taking over the remaining area of the 38th floor at Two Exchange Square. This will enable HKIAC to significantly increase its hearing facilities. HKIAC is also undertaking a review of the existing 2008 Rules.

A notable development in the region is the number of law firms from Europe and North America opening offices in Asia. This trend, which commenced several years ago, appears to be accelerating. It is a sign of confidence and an indication of growth in dispute resolution services in the region.

Singapore International Arbitration Centre

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Introduction

Chiann Bao

Hong Kong International Arbitration Centre

In the inaugural edition of The Asia-Pacific Arbitration Review five years ago, the overarching theme was the growth of arbitration in Asia. Since then, Asian companies conducting business with overseas counterparties have grown even more reliant on arbitration as an effective form of risk management. And Asian economies have continued to remain resilient, and in some cases grown, throughout these turbulent financial times. In fact, more than half of Next-11 countries,1 a grouping of emerging markets which show the highest economic potential, are located in the Asia-Pacific region.2 The momentous growth of Asian economies coupled with the willingness to adopt arbitration as the preferred method of dispute resolution has precipitated a growth in the leverage that Asian companies wield in negotiating a seat of arbitration that accounts for their preferences. Consequently, most arbitral jurisdictions in Asia have gone from strength to strength to such an extent that, when discussing arbitration in Asia, the conversation is no longer simply focused on the rise of arbitration in Asia but rather on how the larger arbitration community is starting to look to the Asian region for innovative developments in the practice of international arbitration.

Arbitral infrastructure

As a consequence of geographic proximity and cultural familiarity, Asian parties have been vying for, and successfully stipulating, Asian seats in arbitration clauses. This shift has been acceptable, and even somewhat palatable, to non-Asian contracting parties due to the maturation of the arbitration infrastructure in Asia.

Enforcement

One of the main concerns of users when choosing an Asian venue is enforcement. Nearly every jurisdiction in Asia is a signatory to the New York Convention, and many (notably Hong Kong and Singapore) have sophisticated judiciaries that recognise the importance of enforcing international awards, except in the limited circumstances prescribed by the New York Convention. However, not all Asian jurisdictions can claim such a pro-enforcement record. In fact, many still struggle with the full implementation of the Convention.

However, one jurisdiction with a problematic enforcement regime is looking likely to make notable strides in 2012. In March 2012, the Department of Legal Affairs of the Indian Government Ministry of Law and Justice added China (including Hong Kong) to the list in the Indian Official Gazette of territories to which the New York Convention applies. This development is significant because India will enforce New York Convention awards only if they are made in a Convention country that is also 'gazetted' in this way. 3 Until early 2012, China, also a signatory to the New York Convention, was not gazetted - a glaring omission that had resulted in uncertainty over the enforceability of a Chinese or Hong Kong arbitral award in India. Parties engaging with Indian parties now have clarity on the viability of China or Hong Kong as seats of arbitration. This development is expected to further enhance Sino-Indian trade relations by offering a convenient venue for arbitration.

In another welcome development, the Indian Supreme Court is also expected to reverse a decision that has long caused consternation in the international arbitration community. In early 2012, a specially-constituted bench of the Court began hearings in Bharat Aluminum v Kaiser Aluminum (Civil Appeal No. 7019 of 2005) to review its earlier, controversial judgment in Bhatia International v Bulk Trading SA. In Bhatia, the court held that the domestic law provisions of part I of the Indian Arbitration and Conciliation Act 1996 would also apply to offshore arbitrations, unless the parties impliedly or expressly excluded the applicability of the Act. Indian courts have applied the rationale in Bhatia to set aside foreign awards rendered outside India (even when the awards were not sought to be enforced in India) and also to appoint arbitrators in offshore arbitrations. The current hearing holds promise that the Supreme Court will rectify the ills emanating from Bhatia. Certainly clarification on both the application of the New York Convention to China and the reversal of a troubling decision will bring India one step closer to becoming a viable arbitration jurisdiction for international parties.

Hong Kong also recently received a welcome fortification of its enforcement regime. In reversing the lower court's decision in the by-now infamous case Grand Pacific Holdings v Pacific China Holdings,[4] the Hong Kong Court of Appeal (CA) strongly reasserted the pro-enforcement reputation of the Hong Kong judiciary. At first instance, the court had set aside an ICC award on the bases that the arbitral tribunal had denied the applicant an opportunity to present its case and that the tribunal had deviated from the procedure agreed upon by the parties. The lower court cited various case management decisions of the tribunal in holding that the tribunal had caused serious procedural irregularities, and that such irregularities established grounds for setting aside an award under article 34(2)(a)(ii) and (a)(iv) of the UNCITRAL Model Law. By equating the tribunal's conduct to a violation of article 34(2), the lower court raised concerns about the loss of arbitrators' discretion over matters of case management.

The Appeal Justices have assuaged the fears of the arbitral community by confirming that the Hong Kong courts will not readily review a tribunal's procedural decisions, and that they will set aside an arbitral award under article 34(2) only very rarely, where the conduct of the tribunal has been 'egregious'. The CA also placed a heavy emphasis on the broad, discretionary case-management powers of the arbitral tribunal, which are a fundamental feature of international arbitration.

The judgment leaves Hong Kong's law on setting aside in line with international standards, and as such is a welcome development for both Hong Kong and other Model Law jurisdictions.

Legislative framework

Certain jurisdictions in Asia have become increasingly attractive arbitration venues as a result of their comprehensive, pro-arbitration legal frameworks. The UNCITRAL Model Law has long served as the basis of the international arbitration law in many of these jurisdictions. Hong Kong blazed the trail when it adopted the UNCITRAL Model Law in 1990. And, when amendments to the UNCITRAL Model Law were made in 2006, Hong Kong, Singapore and Australia, quickly passed legislation to reflect the amendments and to further modernise their existing legal frameworks.

Singapore is again undergoing amendments to an already progressive piece of arbitration legislation and, in April 2012, the Singapore Parliament passed amendments to the

International Arbitration Act (IAA) which is expected to pass into law in late 2012 through the Singaporean legislative process. The bill amends the IAA in four areas, namely by:

- extending IAA's application to arbitration agreements concluded by any means, as long as the contents of the agreement are subsequently memorialised in writing;
- granting Singapore courts the right to review positive and negative jurisdictional rulings at any stage of arbitral proceedings and to make cost orders;
- clarifying the scope of tribunals' power to award interest; and
- providing legislative support for the 'emergency arbitrator' procedure by affording emergency arbitrators the same legal status and powers as those of a conventionally constituted arbitral tribunal, including the recognition and enforcement of their orders by Singapore courts, whether made in Singapore or abroad.

Arbitration Rules

2012 began with the much-anticipated revised ICC Arbitration Rules coming into effect. The main innovations of the new ICC 2012 Rules focused on three areas: complex disputes (consolidation and joinder), time and cost efficiency, and emergency arbitrators. The key amendments are highlighted below:

Complex disputes

- Any party can make claims against any other party in arbitrations with multiple parties.
- Under certain circumstances, claims arising out of or in connection with more than one contract can be merged into a single arbitration.
- The ICC Court may consolidate two or more ICC arbitrations.
- A party may apply to join an additional party to the arbitration at any stage before an arbitrator is confirmed or appointed.

Time and cost efficiency

- All participants in the arbitration are under an obligation to make every effort to contribute to expeditious and efficient proceedings.
- The new rules allow in most cases for the arbitral tribunal to directly rule on jurisdiction challenges, bypassing the ICC Court and thereby reducing the time span for determining jurisdiction.
- Parties are now required to include additional information about their claims or counter-claims at the outset of proceedings. This represents an attempt to front-load the arbitration process.

Emergency arbitrators

- The new rules provide for the appointment of an emergency arbitrator to order interim or conservatory measures on an urgent basis and before the tribunal is constituted.
- The emergency procedure applies, unless the parties have explicitly agreed to opt out.
- The rules set a short procedural timeframe for emergency proceedings: two days for the president of the ICC Court to appoint a sole emergency arbitrator, two days to establish a timetable, and 15 days to draft an emergency order.

The new ICC rules are responsive to the proliferation of complex disputes in international arbitration. The ICC has created effective provisions for governing disputes involving multiple parties to an underlying contract and multiple contracts between the same parties. Moreover, the addition of the emergency arbitrator provisions is in step with the trend of making such emergency arbitrator services available to users. ICDR and SCC were pioneers in introducing this concept and, since then, many institutions, including SIAC, ACICA, ASA and now ICC have followed suit.

CIETAC also introduced its updated Rules in 2012. This is its seventh revision since the CIETAC Rules were first established in 1954. CIETAC has taken steps to bring its rules into closer alignment with international standards and user expectations. Many of the revisions codify CIETAC's existing practice, as well as filling gaps when the parties cannot agree and the arbitration agreement is silent. The following amendments have been made:

- Seat of arbitration: If parties have not agreed upon a seat of arbitration or arbitration agreement is ambiguous as to seat of arbitration, CIETAC may make the determination by taking into account the circumstances of the case and choose any jurisdiction, including one outside of China. Previously in such circumstances, the seat would always be in China.
- Language of arbitration: Under the previous rules, if parties could not agree as to a language of arbitration, the default language was Chinese. Under the 2012 CIETAC Rules, CIETAC may now designate a language other than Chinese in appropriate circumstances.
- Designation of CIETAC Sub-commissions: Where the sub-commission or centre agreed upon by the parties does not exist, or where the agreement is ambiguous, the CIETAC Beijing will administer the arbitration.
- Interim measures: CIETAC tribunals now have power to grant interim measures under limited circumstances (that is, where PRC law does not apply, ie, where the seat is outside Mainland China).
- Evidence: Expert witnesses are now required to attend the hearing and give oral evidence if the tribunal considers it necessary. This will allow parties to cross-examine experts on their written reports. Previously, experts could not be compelled to give oral evidence.
- Consolidation: The CIETAC Rules now provide a mechanism for parallel proceedings to be consolidated into a single arbitration.
- Administration: CIETAC will administer arbitration under the rules of other tribunal institutions, as well as ad hoc arbitrations and arbitrations under its own rules. This provision provides clarity as to a controversial practice of one institution administering an arbitration under another institution's rules and, in particular, contradicts Article 1.2 of the ICC Rules which states that the ICC Court of Arbitration is the only body that is authorised to administer arbitrations under the ICC Rules of Arbitration.
- Med-arb: CIETAC can now conduct mediation during arbitration, with the parties' agreement and not involving the arbitrators (this provision is designed to be an alternative to 'med-arb', and thereby to address concerns about maintaining arbitrator neutrality in the event the dispute does not settle).

KLRCA has been swift to keep pace with the demands of its users by updating its fast-track rules, which were first established in 2010. These fast-track rules provide parties with the option of resolving disputes involving less than 1 million ringgit to be resolved in no more than 140 days. KLRCA has also injected more flexibility in this edition of the rules to address the needs of parties engaged in maritime disputes by, among other things, allowing for extensions of time and a tribunal of three if necessary.

Finally, the HKIAC is expected to promulgate amended HKIAC Administered Arbitration Rules later in 2012. Complex multi-party disputes involving significant underlying projects have presented opportunities for HKIAC to test the structural integrity of its rules and to expand its capabilities. Accordingly, the HKIAC initiated measures to update its Administered Arbitration Rules to ensure that the Rules give full effect to the provisions of the New Arbitration Ordinance and that the Rules comport with best practice trends in international arbitration. In preparation of revising the Rules, HKIAC conducted public consultation rounds to assess how the rules have been used in practice and identify how the rules could be modified for optimisation. Some of the key issues being considered include the following:

- scope of the rules;
- introduction of emergency arbitrator procedure;
- further development of provisions to cater to multiparty arbitrations; and
- enhancement on cost provisions and expedited proceedings.

Impetus for physical growth

As caseload continues to grow in the region, the demand for hearing space has also increased. Asian governments have acted on this demand by funding the construction of new premises and the expansion of existing facilities. There is no shortage of examples around the Asian arbitration community to illustrate this phenomenon. In 2010, Singapore introduced Maxwell Chambers and Australia established the Australian International Dispute Centre in Sydney. These hearing centres both bring modern facilities available for a neutral hearing space to Asia. In October 2012, HKIAC will be heralding a new chapter in its storied existence with the opening of its expanded premises. With approximately double the original space, the HKIAC will be able to cater to the increasing demand for suitable and neutral hearing space in Hong Kong. KLRCA is also scheduled to move to its new premises by early 2013. Availability of many neutral hearing spaces further enhances the attractiveness of keeping arbitration in Asia and, as has already been evidenced by the increased usage of the existing facilities in the region, it confirms the old adage that 'if you build it, they will come'.

Fostering arbitral culture

Not only has the arbitral infrastructure taken shape in Asia, but the thirst for arbitration knowledge is seemingly unquenchable. Hong Kong has had a long tradition of fostering the next generation of arbitration practitioners. The Chartered Institute of Arbitrators (East Asia Branch), with the largest membership of all branches, including London, holds multiple training courses throughout the year. The Vis (East) international arbitration moot is held annually in Hong Kong, with participants from all over the world. And, HK45, a young arbitration practitioners grouping affiliated with the HKIAC, has a membership base that has tripled since its inaugural event in late 2010. The arbitral culture in Hong Kong has been further enhanced in recent years with more and more dispute resolution practices of law firms finding their Asian home in Hong Kong. Notably, 44 of the GAR 100 law firms listed have a presence in Hong Kong.

Singapore also possesses a shining arbitration community which will be hosting the much-anticipated ICCA Conference in 2012. This event will not only showcase Singapore's many attributes but serve as a premier opportunity to engage with international arbitration practitioners from all over the world.

Australia is making innovative strides in bridging the gap between the arbitration community and the judiciary. ACICA set up a Judicial Liaison Committee ("JLC") which met for the first time in 2012. This committee has members from all the Courts States and Territories, except Tasmania, and the Federal Court. The principal objective of the JLC is to provide consistency between the courts in the application of arbitration laws, and to educate the judiciary with relevant updates in jurisprudence. To this end, the JLC is currently drafting rules for the interpretation and application of the International Arbitration Act, to be uniformly applied across each of the Australian jurisdictions.

Perhaps the most magnetic and rapidly growing arbitral culture can be found in Seoul. Since the 2011 IBA Arbitration Day, Korea has caught the attention of the arbitration world, not merely in Asia, but internationally. Within a decade, local Korean firms have produced eminent international arbitration practitioners who have created a strong platform for arbitration activity. With the recent ratification of the Korea-EU FTA in July 2011 and KORUS FTA in March 2012, countless new trade opportunities for Europe and the US have created an increasing demand for arbitration services and the opening of the legal industry has prompted American and British law firms to enter the market in Seoul. Evidence of the development of the Korean arbitration community can be found in the publication of Arbitration Law in Korea: Practice and Procedure, the first arbitration text dedicated to Korean arbitration. It is also worth noting that the inaugural 'Seoul International Arbitration Lecture' will feature Jan Paulsson as the keynote speaker.

Given the 2012 snapshot of the state of the global economy, the development of international arbitration in Asia as a whole will unlikely regress. Our legislatures have established arbitration legislation that comports with and reflects the UNCITRAL Model Law, making it user-friendly to foreign practitioners. Our courts have sought to support the arbitral process engaging in constructive interference and avoiding destructive interference. Our arbitral institutions have looked to cultivate a skilled and professional international arbitration community and have provided purpose-built physical premises for conducting arbitrations. Despite this framework and culture, pro-arbitration legislation has not been consistently implemented and enforcement continues to be a work in progress. It is in the best interest of all of the players in the region to work together to ensure that all jurisdictions rise to their potential such that all users have tools and resources to meaningfully engage in international arbitration.

Notes

1 Term coined by Goldman Sachs economist, Jim O'Neill: www.guardian.co.uk/global-development/poverty-matters/2011/feb/18/brics-next-11-economy-transformation-uk

2 Bangladesh, Egypt, Indonesia, Iran, South Korea, Mexico, Nigeria, Pakistan, the Philippines, Turkey and Vietnam.

3 From the Asia-Pacific region, Korea, Japan, Philippines, Malaysia, Singapore, Thailand and now China (and Hong Kong) are currently gazetted.

4 HCCT No.15 of 2010.

Hong Kong International Arbitration Centre

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Economic Damages

James Searby
FTI Consulting

Summary

THE IMPACT OF THE EFFICIENT MARKETS HYPOTHESIS ON DAMAGES

Damages: real or illusory?

Note

This paper sets out the facts of a hypothetical case and discusses the damages issues raised by it. This paper should not be construed as expressing opinions on matters of law, which are outside the scope of the author's expertise. Nor does this paper represent the view of FTI Consulting Inc or any of its experts, who have held a range of views on the matters discussed below and may be expected to do so in future.

The facts

In August 2008, Düsseldorf & Dortmund Holding (D&D), a consolidated vehicle manufacturer, agreed to sell a stake in its European truck manufacturing business to a Chinese investor, Guanzhou Big & Heavy (GBH). D&D would contribute the assets of its European truck manufacturing operations into the venture, including human resources and intellectual property, in exchange for 50 per cent of the equity in a new joint venture company. GBH was expected to contribute e100 million in exchange for the remaining 50 per cent of the venture, to be known as Glorious Life Term (GLT). The transaction was set to close around seven months later on 27 February 2009, the last business day of the month.

Between the signing of the contract and the closing of the deal, much work was done. New entities were created and the assets transferred to them. GLT's systems were separated from those of its former parent. Employee contracts were redrafted, once it was known which employees would leave D&D to join the GLT joint venture. Standalone support functions, such as finance, human resources and facilities management needed to be created from scratch. Nevertheless, the project was well managed and as the closing date loomed, D&D felt that it had done its best to comply with its obligations.

Around two weeks before the expected closing date the chairman of GBH, Li Feng, rang his counterpart at D&D, Gottfried Heinrich, late one evening. The news was bad, said Mr Feng. Although his board had previously given approval to proceed with the joint venture, the provincial authorities, who owned a golden share in the GBH business, had withdrawn their support for the venture. Mr Feng stressed that, although he personally remained in favour of the deal, he had been instructed that GBH must refrain from any further pursuit of the joint venture. If he refused to comply, Mr Feng said, he might be personally subject to criminal proceedings. For that reason, he regretted that GBH would have to withdraw from the transaction. Mr Heinrich, clearly shaken, immediately called his legal team. The following week, D&D filed for arbitration against GBH for breach of contract.

The case for damages

The main claim for loss advanced by counsel for D&D was for the 'lost bargain' implicit in the joint venture agreement.1 In between the signing of the joint venture agreement and GBH's withdrawal in February 2009, markets around the world had declined precipitously in the wake of the collapse of Lehman Brothers. The deal price, however, was agreed at a time before the full onset of what appeared to many investors as an unprecedented global financial crisis.

The foundation of D&D's claim for loss of a bargain was that GBH had pulled out of the joint venture because it believed that its 50 per cent stake in the business was no longer worth

e100 million. In the view of D&D's counsel, the difference between the contractually agreed price and the (lower) value of the assets at the date of GBH's withdrawal represented the true extent of D&D's loss. D&D claimed e41.7 million in damages, reflecting the fall in the Dow Jones Automotive Index (INAA.DE) between 1 August 2008 (25.54) and 27 February 2009 (14.90).

In its statement of claim, D&D relied on the Efficient Markets Hypothesis (EMH) and an assumption that its truck-making business was representative of the sector tracked by the German automotive index. D&D's expert, Jean Lannes of Investisseurs Rationnels Sàrl, said that:

> The Efficient Markets Hypothesis, which asserts that market prices are always indicative of fair value, is a cornerstone of modern finance and a sound basis on which to assess any change in the value of the joint venture's assets."

In its reply, GBH simply stated that it had been prevented by unnamed members of the provincial economic council, which exercised the rights conferred by the government's golden share, from proceeding with the transaction. It protested that it would have wished to pursue the transaction and expressed regret that the deal was no longer on the table today. Counsel for GBH pointed out that, since the deal fell through, the German automotive index had since recovered to reach new highs in excess of its level in August 2008, when the joint venture agreement was signed. For that reason, GBH argued that any damages at all would unjustly enrich the Claimant, which still retained 100 per cent of its (recently quite profitable) truck manufacturing business.

GBH's expert, Stephen Austin of Animal Spirits LLP, prepared a discounted cash flow (DCF) valuation model of the proposed joint venture truck manufacturing business. The model valued the business using projections made available to GBH at the time of the transaction, discounted by a cost of capital independently assessed by Mr Austin.

In his report, Mr Austin stated that although the market risk premium probably rose during the period of the financial crisis, risk-free rates fell, largely cancelling out any increase in expected risk. In consequence, his assessment of GLT's cost of capital remained constant throughout. He also noted that by 1 February 2012, the index relied upon by Mr Lannes stood at 30.74, suggesting, based on Mr Lannes' logic, that the business was today worth e120.4 million. Mr Austin concluded that:

> The value of 50 per cent of GLT's shares at the date of signature of the joint venture agreement, both at the date of the alleged breach and today was, and is, comfortably in excess of e100 million… Whatever irrational gyrations financial markets may have performed in late 2008 and early 2009, these had no impact on the long-term fundamentals driving the profitability of D&D's truck division over the 30 or more years of the planned joint venture. I therefore conclude that the value of GLT remained unaffected, aside from a temporary hiccup in sales around that time.

In its second memorial, D&D:

- conceded the first of Mr Austin's valuations, agreeing that at the date of signature of the joint venture, the price agreed by the parties in arm's length negotiations represented fair value;
-

maintained that its own expert's valuation at the date of GBH's withdrawal was fair and that the EMH was an appropriate basis from which to infer the fall in value of its truck division between the date of signature of the agreement and the alleged date of breach. Using Mr Austin's model and what he considered a more appropriate (and higher) cost of capital, Mr Lannes was able to calculate a valuation in February 2009 similar to the one implied by the decline in the market index. D&D asserted that, even if the loss was not crystallised at the date of breach, that made it no less real. Indeed, if it was a necessary test that the loss must be crystallised, the effect would be to encourage parties like GBH to renegotiate or breach contracts with impunity on any unfavourable turn of events; and

- noted, of the third valuation, that while the sector had in general recovered, the golden age of European truck making was now firmly over and, whatever short-term gains it might enjoy, D&D expected to lose ground in future to Far Eastern competitors. For that reason, it saw less reason to be optimistic about the business today than at the date of signature of the joint venture agreement. D&D concluded that the value today might be lower than it was in August 2008.

GBH's position remained unchanged in its final submissions. There was, it said, no loss of bargain. Although in good times, markets might be a useful indicator of fair value, it would be unsafe to rely on the unstable emotions driving markets in the months after Lehman Brothers' collapse. Finally, GBH said that the fairest way to consider damages was by reference to the value of the truck division today, given that D&D had enjoyed and continued to enjoy profits from the firm, possibly in excess of those expected at the time of signature of the joint venture agreement.

Market value and damages

One of the damages issues confronting the Tribunal is the appropriate date at which the loss should be measured. Clearly, if one is to adopt a valuation that takes into account market prices, that valuation will be sensitive to the date of measurement. Although the appropriate date of valuation is a matter of fact for the Tribunal, the selection of one date rather than another might lead the Tribunal to prefer one expert's assessment of damages over another and is therefore potentially a matter of great sensitivity.

The volatility in financial markets in recent years has meant that valuation conclusions based on financial market evidence can vary sharply with the date of measurement. For example, losses calculated on the basis of financial market data on 1 September 2008 (pre-Lehman), might differ by millions of dollars from those calculated using the same dataset a month later (post-Lehman).

It is not clear whether a Tribunal considering a case like D&D v GBH in 2012 should adhere to the pre-crisis asset price (reflecting the agreement between the parties), the post-crisis asset price (reflecting the impact of the crisis on value) or a later price that indicates whether the asset subsequently appears to have recovered in value (but which may not sit easily with the date of breach). When markets are calm, it might be easier for experts to agree that they are good indicators of fair value and for DCF valuations closely to approximate to market valuations. Outside of such periods, tribunals must choose their dates with greater care and, perhaps, with an eye as to whether the outcome implied by selecting a particular date is consistent with what it considers a 'fair' outcome.

In my view, however, tribunals should not fall into the trap set by Mr Austin. It seems likely that Mr Austin's DCF model shows an unchanged value throughout because it does not accurately reflect the drivers of business value. The reason why market values fluctuate is because they reflect changes in the 'consensus DCF model' adopted by investors. As market expectations change, whether about cost of capital, future economic growth, raw materials costs or wage inflation, so too do market values. A DCF model that does not reflect even the direction of changes in market value is unlikely accurately to have captured and modelled the factors that affect business value.

The strain in global financial markets in recent years has led some to question the appropriateness of using financial market data as the basis for measuring value in some, perhaps most, market conditions. There is a range of studies of 'market anomalies' which show that deviations from what might be termed 'fundamental' or 'real' long-term value may persist in markets for periods of months or even years.

There is also the issue of 'asset bubbles', in which asset prices are thought to be inflated above their 'intrinsic' value. Although some economists deny that bubbles occur at all, others are persuaded that financial history contains numerous examples of overpriced asset classes that subsequently rewarded investors poorly. Commonly cited examples include Dutch tulips (1630s), British railway stocks (1840s), dotcom shares (1990s) and Irish residential property (2000s).

If market prices of individual assets, or even whole asset classes, can 'undershoot' or 'overshoot' their 'fair value' for (possibly extended) periods of time, practitioners could more readily disagree about whether market value closely resembled 'fair value' at any given point in time. If 'fair value' could deviate from market value it might be be more appropriate to draw conclusions about value from non-market sources (such as DCF modelling).

The debate about market value is not confined to valuers and finance practitioners. There is also, for instance, a continuing debate in accounting circles as to whether the value of companies' assets should be 'marked to market' using financial market values at a given date. The mark to market debate is of particular importance to banks and insurance companies, whose very solvency may be threatened by unexpected and rapid changes in the market value of their assets.

There are three main potential pitfalls in using market data to value assets:

- market values can be volatile. While short-term volatility clearly matters to an investor seeking to trade in the market, it may be of less relevance to an investor who intends to hold the asset for a long period of time;
- many assets on companies' balance sheets are customised, such that there is no close proxy for them on any financial exchange. In these cases, judgment must be used to estimate the value of the customised asset, perhaps anchored to a market-traded proxy for the asset; and
- the accuracy and relevance of market valuations at a given point in time is sometimes questioned by certain academics and popular commentators. The debate about the accuracy of market valuations extends not just to small, emerging market stock exchanges but also to many of the companies listed on the largest financial markets in the developed world.

Members of the expert community differ as to the appropriate weight to award to financial market information in the assessment of damages. While there are those who believe that financial markets are 'always right', and therefore represent a sound foundation on their own for the assessment of value, others might consider that financial market prices are only one of a range of potential indicators of value. Sometimes, these differences between experts are a function of their views as to the accuracy of the EMH.

An outline of the EMH

What do we mean by an 'efficient market'?

A financial market, like a medieval cloth fair, exists to serve the needs of those who seek to convert cash into assets (or goods) and vice-versa. On a fundamental level, a properly functioning (or 'efficient') market would be expected to have a number of characteristics, such as:

- timely and accurate information about past transaction prices and volumes;
- high liquidity, the ability to buy or sell an asset quickly at a known price. The arrival of a new buyer or seller in the market should not move the price;
- absent new information, prices should not change from one transaction to the next, a feature known as 'price continuity';
- together,liquidity and price continuity are supported by 'depth', the presence of many potential buyers and sellers who enter and leave the market in response to changes in supply or demand, given their independent assessments of value;
- low transaction costs (as a proportion of the value of the trade); and
- prices that respond quickly to new information affecting supply or demand (ie, investors have 'rational expectations' about the future given their knowledge today). Because news is not able to be predicted, neither are stock prices.

Clearly, the larger volume securities traded on financial markets like the New York or Hong Kong stock exchanges, the Chicago Mercantile Exchange or Liffe meet all of the criteria above. Most of the world's securities and financial markets, however, do not because:

- there are only a few securities listed on the exchange;
- some or all of the securities that are listed are thinly traded;
- information is difficult to obtain;
- there are insufficient traders in the market for a given security;
- the market is split in some way, such that certain securities (or investors) trade on one 'board' of the exchange, while others trade on a different 'board'; and/or
- different market participants face different transaction costs or taxes that limit their willingness to trade in comparison to other market participants.

In reality, all markets are to some degree imperfect. Even on the NYSE, retail investors face different transaction costs and taxes from those of mutual funds. On any exchange, some stocks will be less frequently traded, potentially leading to wider bid-ask spreads and price movements even for relatively small trades. The issue is whether these imperfections significantly distort the price signals given by the market. In the case of large, developed

markets and large cap stocks, there is likely to be no significant distortion. For minor markets or for illiquid stocks, however, market prices may need to be treated with greater caution.

What is the EMH?

The Efficient Markets Hypothesis states that all available information about a security is reflected in its current price. Implicitly, the EMH assumes the existence of an 'efficient' market with the characteristics set out above.

There is no single EMH. Rather, there are three sub-hypotheses about efficient markets, which have been categorised as:2

Weak-Form EMH: current stock prices fully reflect all security market information, such as historical volumes, prices, rates of returns and large-size transactions. The implication of the Weak-Form EMH is that all systematic information is embodied in the price, so one cannot earn superior returns by following a trading rule based on past rates of return or market data;

Semistrong-Form EMH: security prices fully reflect all public information about the security including both market information (as in the Weak-Form EMH) and non-market information such as earnings, earnings ratios, dividends, stock splits, competitor announcements and economic or political news. Once information is public, therefore, prices should quickly adjust so that investors are not able to make superior profits. Investors in possession of non-public information about the security, however, may still earn superior returns (subject to legal constraints); and

Strong-Form EMH: security prices fully reflect all public and nonpublic information. The implication of the Strong-Form EMH is that no group of investors has access to superior price-setting information and so no group of investors can consistently earn superior returns. In the Strong-Form EMH, markets are not just 'efficient': they are perfect because all investors are assumed to have cost-free and simultaneous access to information.

Over the years, many tests of the EMH (in its various forms) have taken place. A crude summary of those investigations is that:

- there is a broad range of evidence to support the Weak-Form EMH and a series of studies have confirmed that trading rules cannot systematically beat the market, net of transaction costs;
- there is mixed evidence to support the Semistrong-Form EMH. Although prices appear to react fully to news events, corporate events or accounting changes, several studies have found a number of pricing anomalies (eg, repeatedly high returns in the month of January) that would not be expected under this version of the hypothesis; 3 and
- there is also mixed evidence to support the Strong-Form EMH. Some studies have indicated that corporate insiders and stock exchange 'specialists' (a group of large market makers on the NYSE) do experience superior returns (in defiance of the theory), while others indicate that security analysts and professional money managers do not (in support of it).

A description of the evidence is outside the scope of this paper. I note, however, that the issues associated with robust testing of the EMH are neither simple nor clear. For example, it can be difficult to know what investors' expectations really were at any given date in the past and, therefore, whether prices were appropriately set at that time. Overall, however, it

appears that violations of the EMH do occur, but that there is a substantial body of evidence in support, particularly of the Weak-Form EMH.

The EMH has been highly influential in financial theory in the last 40 or 50 years and forms part of what I shall term 'standard' financial theory today. Recently, it has come under attack from supporters of a group of theories known as 'behavioural finance', which have attracted interest, in part, as a result of the failure of 'standard' financial theory to account for recent observed market behaviour. For instance, in the second half of 2008, financial market swings occurred several times in a week that according to 'standard' theory should occur only once in thousands of years. Outcomes such as these might appear to be at odds with a premise of market 'efficiency'.
What might be wrong with the EMH?

Behavioural finance

Behavioural finance refers to a collection of theories that seek to understand how psychological and economic principles interact to affect financial market outcomes.

One example of the psychological effects that behavioural finance studies is heuristic bias, which lead people to draw incorrect conclusions based on the 'rules of thumb' that they have developed from experience and from which they draw inferences. For example, even though they are routinely told that historical returns are not a guide to the future performance of financial products, people, on average, tend to extrapolate from past performance of securities when considering their likely future performance. People are also prone to 'anchoring', in which they ascribe too much weight to their own past experience and so fail to react appropriately to new information.

A further example is frame dependence, people's tendency to choose form over substance. For example, faced with a (paper) loss of 10 per cent on a stock they own, people have a tendency to hold on to it in the hope that the stock will return to break-even terms. A more rational strategy, however, might be to crystallise the loss and invest in another security they think will perform better in future.

These psychological biases appear to be quite strong in many people, to the point where they may influence financial market outcomes through 'herding' behaviour. For instance, it has been shown that 'value investing', buying stocks that have generally performed poorly and so appear 'cheap' today, provides superior risk-adjusted returns to buying 'growth' stocks, which have generally experienced good past performance. It may be inferred that people neglect value stocks and pay too much attention to 'star performers' whose strong recent growth and high valuation multiples they expect, by extrapolation, to continue in future.

Other studies have shown that individual investors generally display excessive optimism (they don't buy enough insurance, especially life insurance), are overconfident (they trade too often, despite being at an informational disadvantage to professional investors) and discount diversification (they tend to pick too few stocks, hold too much of their employer's stock, focus too narrowly on domestic stocks and split their money naively between the available choices).

Collectively, these imperfections in investor behaviour drive patterns of returns at the market level that are sub-optimal and which have been observed to defy the accurate pricing of securities implicit in the EMH.

Is behavioural finance helpful?

In general terms, followers of behavioural finance assert that in the 'real world' investors are not always 'rational' (ie, profit-maximising and able to assess risk and return well). The implication is that markets are not always technically efficient, as explained above. Clearly, therefore, behavioural finance is at odds with the EMH. The question is whether this matters for the purposes of valuation and, if it does, when and why?

The first point to note about behavioural finance is that the subject is still evolving. Much research is continuing into the links between human psychology and market behaviour. There is no 'general theory' of behavioural finance that can be used by investors in the real world to guide them in selecting assets for their portfolios or strategies for their trading. Critics of behavioural finance sometimes observe that even if 'standard' financial theory is sometimes wrong, the new theories do not offer anything to replace it with.

The ideas underpinning behavioural finance may help to explain past market events that have fallen outside the boundaries of probability according to 'standard' financial theory. Even here, however, behavioural finance does not purport to offer a detailed explanation of (say) the extreme movements of financial markets following the collapse of Lehman Brothers. Rather, it is observed that they were caused by irrational behaviours, such as fear or herding instincts.

Equally, while the EMH can be misinterpreted to assert that 'the market is always right', the principles of behavioural finance are equally open to misinterpretation. Recently, the claimed 'inefficiency' of markets has been used as a pretext for state control and regulatory intervention. Whatever its claimed benefits, a ban on short selling will do nothing to make markets more efficient.

An assumption that 'irrational actors' influence market outcomes suggests that intelligent investors ('the smart money') should place their money differently, even contrarily, to the irrational actors ('the dumb money'). On this view, the price of a security on any given day may reflect transitory supply and demand between the smart money and the dumb money rather than an all-weather guide to fair value based on the latest information. Conclusions such as these make behavioural finance unsettling for 'standard' financial theory, but do not necessarily imply that behavioural finance is a superior guide to placing an accurate valuation on an asset.

Conclusion

Behavioural finance offers a number of painful truths to 'standard' financial theory. Clearly, 'standard' theory sometimes does not sit well with certain observed market behaviour. The problem with behavioural finance is that while it says why 'standard' financial theory may be wrong, it offers no alternative methods for assessing the value of assets in financial markets. To offer a valuation opinion today, a practitioner is still obliged to rely on theories, such as the Capital Asset Pricing Model (CAPM, used to calculate the cost of capital), which assume that investors are rational and markets efficient.

It is likely that most economists and finance practitioners largely agree that share prices are determined by rational agents in a competitive market using available public information. Many continue to concur with the stronger suggestion that stock prices reflect the 'fair value' of companies. Yet there is strong evidence not only that share prices are more volatile than would be expected given the price-influencing 'news' that emerges over time and also that share prices may be above or below their 'fair value' for extended periods, displaying irrational exuberance or pessimism and unbalancing the trade-off between risk and return.

Today, behavioural finance is perhaps best viewed as complementary to 'standard' financial theory rather than an alternative to it. Certainly, few in the industry have concluded from behavioural finance that the weight of investor opinion is so irrational that price discovery in markets has no informational content. The debate about how strictly EMH should be applied and, therefore, the weight that should be given to market prices in the assessment of value will therefore continue.

In the end, the best advice is to use more than one valuation method and then to seek to reconcile any differences in the resulting numbers. While neither 'standard' financial theory nor behavioural finance creates certainty about the fair value of an asset, the process of comparison and challenge obliges practitioners to reason, investigate and justify their conclusions about value.

In the case of D&D v GBH, such a process might have led the Tribunal to the conclusion that, although the value of D&D's truck business fell, as suggested by Mr Lannes' market-based analysis, a valuation based strictly on the market index might contain an element of 'irrational pessimism' (suggesting that Mr Austin's views about long-term value had some merit).

Notes

1
In addition, D&D filed subsidiary claims for wasted expenses and the marginal cost of the finance raised on usurious terms to replace the e100 million withheld by GBH. Beyond noting their existence, the article does not discuss these further claims.

2
See, for instance, Brealey, Myers & Allen, Principles of Corporate Finance, McGraw-Hill, 2008, International Edition, 9th Edition, Chapter 14, p359.

3
Market anomalies, once identified, tend to disappear as traders arbitrage them away. The dominance of program trading and large institutional investors in today's markets may mean that there are fewer market anomalies today than in the past.

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Arbitration in Asia

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Summary

SINGAPORE AND HONG KONG'S INTERNATIONAL ARBITRATION JOURNEY: A TALE OF TWO CITIES

SINGAPORE AND HONG KONG'S INTERNATIONAL ARBITRATION JOURNEY: A TALE OF TWO CITIES

The popularity of arbitration as a mechanism of dispute resolution has paralleled forces of globalisation that have unleashed a new wave of trade and commerce in Asia, particularly in China, India and Southeast Asia. Mention Singapore, Hong Kong and international arbitration in the same sentence and talk of competition almost inevitably floats into the discussion. Both jurisdictions enjoy firm support from the business community for their pro-arbitration attitude. The judiciary in Singapore and Hong Kong generally adopt a stance of non-interference in the arbitration process. Both the governments of Singapore and Hong Kong aggressively market the arbitration credentials of their jurisdictions, so much so that many international arbitral organisations find that it makes sense to reach out to both jurisdictions. According to the latest 2010 statistics available on the Hong Kong International Arbitration Centre (HKIAC) website, HKIAC heard 624 dispute resolution matters, of which 291 were arbitration matters. The Singapore International Arbitration Centre (SIAC) saw it administering 198 new arbitration cases over the same period.

In 2008, the International Court of Arbitration of the International Chamber of Commerce decided to locate their Asian offices in both Hong Kong and Singapore. In deciding to do so, Jason Fry, the secretary general of the ICC Court stated:

> (w)e are grateful for the encouragement we have received from the governments of Singapore and Hong Kong to come to the region. Both Singapore and Hong Kong are recognized hubs for international dispute resolution.1

Yet, both Singapore and Hong Kong have their limitations, in spite of their best efforts. Singapore is a comparatively smaller jurisdiction. It entered the international arbitration game later than Hong Kong. Hong Kong also hosts a larger pool of arbitral expertise. Singapore does not have the economic locomotive of China at its door-step, powering its efforts to be Asia's arbitration hub of choice. Singapore has also had to refute unsubstantiated claims that its judiciary is too closely identified with the country's long-governing political party.2 In fact, Singapore has to work doubly hard to encourage foreign corporate and entities to arbitrate in Singapore, for the same reasons these entities may consider Hong Kong as an equally attractive

alternative - pro-arbitration, general judicial reluctance to interference in arbitral decisions, good communication and transport links and strong government support for arbitration.

The China factor - although largely a boon for arbitration in Hong Kong - comes with its own baggage. For a number of years, the repeated concern by some quarters has paradoxically been Hong Kong's proximity to China, with doubts expressed over the prospects of a fair trial, including perceptions of bias in favour of China related entities. That such views resonate was somewhat evidenced on the back of a two-year HKIAC project that ended in 2008. Aimed at promoting Hong Kong as a centre for international arbitration in the United States, 30 per cent of those surveyed opined that Hong Kong was 'too close to China' and that they could 'not get a fair trial' there.3 The reality of these perceptions led a HKIAC spokesperson to say that a part of the HKIAC's remit was to stress the transparency of Hong Kong, its adherence to the rule of law and its 'separate status and independent legal system'.4

Singapore's reputation as a world class venue for international arbitration has attracted business entities from India and to a lesser extent, Indonesia. SIAC's 2010 statistics reveal that while 14 cases involved China-related parties, it heard 36 involving India-related parties over the same period. Section 44 of the Indian Arbitration and Conciliation Act 1996 requires that a country which has signed up to the New York Convention must be reflected in India's Official Gazette if an award from that country is to be ratified.5 Singapore appears in India's Official Gazette. Hong Kong does not. Over the last 10 years in particular, Singapore has moved in leaps and bounds, building world class infrastructure to support arbitration, opening up the legal sector to foreign competition and building up international arbitration expertise that is arguably on par with that of Hong Kong today.

As both Singapore and Hong Kong continue to look to scale up and make themselves impossibly attractive for international arbitration work, this paper takes a look back at their respective journeys, tracing how both jurisdictions worked assiduously to turn themselves into the arbitration powerhouses that both have become, with a focus on legislative evolution and infrastructure development.

Singapore: late bloomer shines brightly

The active promotion of international arbitration in Singapore is a fairly recent phenomenon, dating back about 25 years. Situated at the crossroads of Southeast Asia, and in between the sea-lanes of communication that sit astride China and India, Singapore's geography and trade links put it in a unique position to market itself as the premier arbitration hub for Asia. Its enviable geographic location is buttressed by a legal regime and legislative framework that is arbitration-friendly and fiercely observant of the rule of law. Underpinning this is a government that is dedicated to promote Singapore as an arbitration hub for Asia.

Significantly, Singapore is also perceived by the business community as a neutral venue for arbitration, and the repeatedly strong ranking of the country in corruption indices underpin the legislative environment. In turn, Singapore's legal regime is supported by a world class arbitration infrastructure in the shape of Maxwell Chambers, a purpose-built facility that houses a number of world-class arbitral institutions. The Singapore judiciary's philosophy towards arbitration was most succinctly captured in the Court of Appeal judgment in Tjong Very Sumito vs Antig Investments Pte Ltd [2008] SGHC 202:

> An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore….The role of the court is now to support, and not to displace, the arbitral process.

Tracing the evolution and establishment of international arbitration in Singapore necessitates a short trip down memory lane.

The UNCITRAL Model Law's journey to Singapore

In 1890, an Arbitration Ordinance was enacted for the Straits Settlements, which included the Crown colony of Singapore. This was replaced in 1953 by a new Arbitration Ordinance which was renamed as the Arbitration Act after Singapore's independence in 1965. The Act did not differentiate between local and foreign arbitrations, and more specifically, countenanced a relatively high level of judicial intervention.6 A distinction was first made with the enactment of the Arbitration (International Investment Disputes) Act of 1985 and the Arbitration (Foreign Awards) Act of 1986. This was a response to Singapore's accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards 1958 (more commonly known as the New York Convention). However, the Arbitration (Foreign Awards)

Act did not establish a legislative framework for the conduct of arbitration in Singapore involving foreign parties. Instead, it was enacted to deal with enforcement issues affecting arbitral awards made in countries that had already acceded to the New York Convention. The long-standing Arbitration Act was also amended in 1985, designed to specifically deal with domestic arbitrations.

The UNCITRAL Model Law was adopted by the United Nations Commission on International Trade Law on 21 June 1985. Having only recently reorganised and bifurcated its arbitration regimes to address local and foreign arbitrations, the Ministry of Law was tasked to look into the reform of local laws on commercial arbitration in 1991. It appointed a Sub-Committee to review arbitration legislation in Singapore which submitted its findings in 1993. The Committee looked closely at reports made by other national law review committees, especially the United Kingdom's Mustill Report, which had previously concluded that the Model Law did not offer a regime was superior to what was already in existence in England.7

In recommending the adoption of the Model Law, the Sub-Committee presciently recommended that Singapore had to adopt 'a world view of international arbitration' if it aimed to become an international arbitration centre, and could not take the UK position. At the second reading of the Bill, the parliamentary secretary of the Ministry of Law observed that the Model Law would appeal to international businessmen and lawyers, particularly those that would be unfamiliar with the common law and English concepts of arbitration, and that this would promote Singapore's role as a growing centre for international arbitration.8 In January 1995, the International Arbitration Act was duly passed, replacing the Arbitration (Foreign Awards) Act 1986, with some modifications.

With the Model Law incorporated into the new International Arbitration Act, the Ministry of Law set up the Review of Arbitration Act Committee in 1997, to assess the regime covering local arbitrations. Unlike the United Kingdom which legislated a single comprehensive arbitration framework in the form of the 1996 Arbitration Act, the Review of the Arbitration Act Committee consciously decided to maintain two separate regimes for arbitration in Singapore - one for local arbitrations and the other for international arbitration. The reason for maintaining this distinction was to allow for the prospect of a higher degree of curial intervention on domestic matters.

More substantively, it offered an option to parties to decide whether they wished to 'opt in' or 'opt out' of either regimes by making specific reference to either the International Arbitration Act of the Arbitration Act, depending on each parties' desire on the extent of curial supervision. The new Arbitration Act came into force in 2002 with a view to align the Act with the Model Law, yet applying in circumstances where the Model Law did not.9 In 2004, amendments were made to the Legal Profession Act allowing individuals previously not authorised to practice law in Singapore to represent parties in arbitration proceedings, including advice, documentary preparation and other assistance in relation to or arising out of arbitration proceedings.10 Separately, foreign lawyers had already been allowed to represent parties in arbitration proceedings in cases where the governing law was not Singapore law since 1992.11 Finally, in 2007, the government appointed a committee led by Justice V K Rajah to undertake a comprehensive review of the legal services sector to allow foreign law firms to vet and draft Singapore law agreements incorporating arbitration clauses and advising parties on their rights and liabilities in such agreements both before and after a dispute is arbitrated.12

Without doubt, the legal changes introduced in the years in between 1991 and 2007 fundamentally altered the arbitration landscape in Singapore. But what of Singapore's arbitration hardware?

Infrastructure and support: building a world-class arbitration infrastructure

Singapore's road to becoming a world class arbitration hub was by no means straightforward. In fact, the first step towards establishing a concrete presence only occurred in 1991 with the decision to set-up the not-for-profit SIAC. The SIAC is the premier arbitration institution in Singapore. It primarily administers cases under that subscribe to its own rules, the latest version having been recently updated in 2010. It is also able to preside over arbitrations in accordance with the rules agreed to by disputants. The significance of the formation of the SIAC was that it gave Singapore an institutional arbitration capability with a case administration arm and a trained panel of international arbitrators.

Local media reports are generally unclear about when Singapore first decided to pursue its aim of making Singapore an arbitration hub in Asia. However, one article published on 30 April 1987 in the main local daily, ***The Straits Times***, appropriately titled 'Singapore may be arbitration centre', does shed some light on when the first seeds were sown.

The article reported that Warren Khoo, then a council member of the Law Society of Singapore and the Singapore Institute of Arbitrators, but who would later serve on the High Court bench, disclosed the imminent establishment of a working committee to study the possibility of setting up an arbitration centre to settle international commercial disputes. This was on the back of visit by Michael Gaudet, the then chairman of the International Chamber of Commerce (ICC) Court in Paris who was quoted as saying,

'(w)e are very rewarded to see that the public authorities realise that this might well be the proper time to set up a centre here'.

Mr Khoo noted that the Singapore Economic Development Board had 'taken a lot of initiative in the idea' while the attorney general's chambers was 'very actively interested' and very supportive. Mr Khoo, who was also frank in his assessments of the arbitration landscape in Singapore, was quoted as saying:

> I think it is correct to say that Singapore is alone, among the major trading nations in Asia, not to have an established arbitral institution, an institution that people can readily refer to when drafting a contract or when a dispute has arisen and there is a need to consider arbitration….The closest thing we have is the Singapore Institute of Arbitrators, which was established a few years ago….But the institute assists arbitrations only of an ad hoc variety and in an ad hoc manner by providing, when requested to do so, a list of arbitrators on its panel.13

By the early 1990s, with a new chief justice at the helm, the local judiciary, in its drive to reduce the backlog of cases pursued the encouragement of dispute resolution through alternative dispute resolution (ADR). These efforts included mediation and arbitration, and institutionalising the concept of the 'pre-trial conference', with a view to explore other means of dispute resolution instead of litigation.

This drive in the direction of ADR was helpful, as local and international businesses operating in Singapore became increasingly aware of alternative dispute resolution mechanisms like arbitration. As the government worked to make Singapore arbitration friendly by investing in institutions and updating legislation, early results were beginning to show. According to

Professor Lawrence Boo, by the first half of the first decade of the new century, International Chamber of Commerce data revealed Singapore to be the most popular arbitral seat for ICC arbitration in Asia.14 The ICC International Court of Arbitration also reported that Singapore was one of the top five arbitrations jurisdictions in the world.15

On 21 January 2010, Singapore officially opened Maxwell Chambers, the permanent home of the SIAC and offices for a host of other world class arbitral institutions. The idea of Maxwell Chambers was incubated by the Legal Services Working Group of the Economic Review Committee in 2002, chaired by then Deputy Prime Minister Lee Hsien Loong who stressed the need for 'good infrastructure and facilities' to make Singapore a regional alternative dispute resolution service centre.16

By November 2005, the Ministry of Law started planning for an integrated dispute resolution complex, settled on a site and commenced design work in January 2007. Maxwell Chambers was completed in July 2009 and the first hearings took place shortly thereafter. The completion of Maxwell Chambers also coincided with the appointment of a new blue-ribboned SIAC Board comprising nine leading arbitrators and arbitration counsel chaired by the current SIAC chairman Professor Michael Pryles. The appointments were made to bring a new depth to the international expertise of SIAC with a view to boost its international reputation.17

Even as work on getting the infrastructure in place was taking place, the American Arbitration Association signed an agreement with the SIAC in 2006 to start a joint venture, known as the International Centre for Dispute Resolution (ICDR), giving Singapore's arbitration industry a noteworthy shot in the arm. In 2007, another world-renowned arbitral institution, The Permanent Court of Arbitration (PCA), based in The Hague, signed an agreement with the Singapore government to establish a virtual hearing centre in Singapore for PCA cases. According to Tjaco van den Hout, the secretary general of the PCA:

> (t)he decision to set up a facility (in Singapore was) a response to a more general request from the membership of our organisation to conduct an outreach to the region, and the choice of Singapore we considered a natural one because it is arbitration friendly and in itself has a flourishing arbitration industry.18

To date, Maxwell Chambers houses many international arbitration institutions from Singapore and around the world. Apart from SIAC, these include the Court of Arbitration of the International Chamber of Commerce, the International Centre for Dispute Resolution, the International Centre for the Settlement of Disputes (ICSID), the Permanent Court of Arbitration, the London Court of Commercial Arbitration, the World Intellectual Property Organisation Arbitration and Mediation Centre, the Singapore Chamber of Maritime Arbitration, Chartered Institute of Arbitrators and the Singapore Institute of Arbitrators.

The expansion of the arbitration space in Singapore is also a major reason which explains the presence of eight of the top 10 law firms in terms of revenue in Singapore. 19 In 2010, it was estimated that the number of new international arbitration cases in Singapore was expected to rise by up to 20 percent over the next few years.20

In 2011, the SIAC handled 188 new cases, involving claims of S$1.32 billion. This was slightly lower than in 2010, which saw the institute handle 198 cases with the claim amount reaching S$1.35 billion of which about 70 per cent were multi-jurisdictional in nature.21 On the 2011 figures, which were marginally lower that the 2010 numbers, SIAC chairman Michael Pryles

sounded an upbeat note, '(w)e feel we are in the A league now, and our total number of arbitrations is very close to the London Court of International Arbitration.'22

Separately, at the 2011 Singapore Academy of Law Conference, Court of Appeal judge, The Honourable Judge of Appeal Justice V K Rajah noted that 40 per cent of all international arbitrations that took place at the SIAC designated Singapore law as their governing law, marking a 10 per cent increase from previous years. A similar trend was also observed in ad hoc arbitrations; both developments highlighting the growing employment of Singapore law in regional transactions. Justice Rajah also stressed that the development of arbitration in Singapore required the legal community to strive continually so as to maintain the defining features of arbitration - speed, cost and flexibility.23

Playing up the India attraction

In 2005, Singapore and India signed the Comprehensive Economic Cooperation Agreement (CECA). Even so, in 2006, only four India-related arbitrations were heard at the SIAC. In stark contrast, five years later in 2011, most foreign arbitrations heard in Singapore were from India.

However, the large number of Indian disputes heard at the SIAC has not gone unnoticed. The London Court of International Arbitration set up its first independent subsidiary in New Delhi in 2009 and updated its arbitral rules in 2010, portending stiff competition with Singapore in the years to come.24 Even Malaysia's Kuala Lumpur Regional Centre for Arbitration has gone on road shows in Mumbai and Delhi with a view to attract Indian parties to Malaysia for arbitration.25

Not that Singapore is resting on its laurels. Top legal representatives continue to visit India to aggressively present Singapore's arbitration capabilities. Law Minister K Shanmugam was in Mumbai in 2010 to participate in a conference organised by the SIAC and spoke again at an SIAC conference later in the year in Singapore on India as a global business destination. In early 2012, at another conference aptly titled 'Arbitration India' organised by the SIAC and the Confederation of Indian Industry (CII), Justice Rajah informed delegates that all arbitral awards made by Singapore courts in 2011 had been upheld by the Indian courts, effectively restating the reliability of Singapore as a neutral venue for arbitration.26

Recent changes to the International Arbitration Act

Speaking at the inaugural Arbitration Dialogue organised by the Law Ministry in 2011, Minister K Shanmugam stated that Singapore intends to be at the 'leading edge of thinking in international arbitration.'27 The minister then went on to unambiguously outline the government's approach to arbitration.

> As I tell the arbitration practitioners we meet, our approach in Singapore is: we see a problem, and where it can be solved legislatively, we are in a position to do that within three to six months. For example, in almost every jurisdiction, you might get cases which sometimes are not consistent with how we want arbitration to be supported. We came across such a case from the High Court and the situation was sorted out legislatively within four months. That is the approach we take when we have a court system and judicial philosophy now which is extremely supportive of arbitration as well. They intervene in appropriate cases; they do not take a completely hands-off approach, but totally supportive and in line with international thinking.28

The 2009 amendments to the International Arbitration Act

In line with Singapore's reputation as an arbitration-friendly jurisdiction, the International Arbitration Act was amended in 2009. Interestingly, the purpose of the 2009 International Arbitration Act (Amendment) Bill was tellingly enunciated by the minister at the end of the second reading of the Bill, making it clear what the end-goal of the government was:

> (T)o keep our International Arbitration Act modern, effective and arbitration-friendly. This will in turn help to keep Singapore at the forefront as a top international arbitration centre.

Even though the 1985 Model Law underwent a revision in 2006, Singapore, after consultation with industry experts, decided against its full adoption.29 In fact, the only 2006 amendment to the Model Law that was incorporated into the International Arbitration (Amendment) Bill 2009 was the enactment of the Section 12A which expressly enables a Singapore court to grant interim orders in certain circumstances, in furtherance of arbitration hearings held outside Singapore. This lacuna in the law was hitherto most tellingly exposed in the case of Swift-Fortune v Magnifica Marine SA [2007] 1 SLR 629 where the Singapore Court of Appeal held that it did not have the power to grant interim orders to support such arbitrations.

In concert with the Singapore courts' approach to minimise curial intervention involving international arbitration hearings held in Singapore, the scope of section 12A is limited only to interim measures in support of arbitration, such as interim injunctions to preserve assets. These interim injunctions do not extend to procedural or evidential matters which determine the conduct of the arbitration such as discovery, interrogatories or security for costs.30 However, a reluctance towards curial intervention does not preclude the Singapore courts' from assisting in the arbitral tribunal, particularly when the latter has no power to act.

The 2009 amendments to the International Arbitration Act also saw the modernisation of the definition of an 'arbitration agreement' which now covers 'electronic communication'. While the Act refers to physical written forms of communication like letters, telexes, telegrams, etc, it also covers 'electronic communications' such as electronic mail and electronic data exchange.

The third key amendment to the International Arbitration Act in 2009 covered the authentication of 'made in Singapore' awards. This was in response to industry feedback that some parties were not able to enforce Singapore awards overseas as foreign courts required the awards to be authenticated before enforcement. The amendment allows the minister of law to prescribe designated bodies and institutions to authenticate awards made in Singapore.

The 2011 amendments to the International Arbitration Act

Even though the International Arbitration (Amendment) Act 2009 came into force in 2010, by late 2011, the Ministry of Law launched another public consultation exercise on additional amendments to the International Arbitration Act and proposed the enactment of a Foreign Limitation Periods Act (FLPA) that would apply to arbitration. The language employed by the Ministry in the public consultation paper was noteworthy. Acknowledging Singapore as a global venue for arbitration, the public consultation paper quoted a 2010 White & Case/Queen Mary study which found that Singapore was Asia's top arbitration destination. The Queen Mary survey assessed a number of criteria, especially factors which influence the choice of law, choice of seat, choice of arbitrators and arbitral institutions. Insofar as the seat of arbitration was concerned, it was noteworthy that the survey respondents rated national arbitration laws, a jurisdiction's record of enforcing arbitration agreements and awards, and

the perceived neutrality and impartiality of the jurisdiction as the most important factors. Singapore scored highly in each category.31

30 per cent of the survey respondents listed London as their preferred seat of international arbitration, followed by Geneva with 9 per cent. Singapore was ranked alongside Tokyo and Paris with 7 per cent listing it as their preferred seat, ahead of New York. The fact that Singapore was not even on the previous Queen Mary survey in 2006 is indicative of the progress made by the country in promoting itself as an international arbitration hub.

Four changes to the International Arbitration Act were proposed in the International Arbitration Act (2011) Amendment Bill.32 In its current form, the International Arbitration Act only recognises arbitration agreements made in writing, a point that does not accord with commercial reality in cases where arbitration agreements are often concluded orally, and put into writing later. The proposed changes are in line with the 2006 Model Law, or the 'hybrid approach', which extends the International Arbitration Act's application by any means, including by conduct and orally, as long as their content is recorded in any form.

Secondly, the International Arbitration Act does not permit a Singapore court to adjudicate the decisions of arbitration tribunals that rule the former have no jurisdiction hear a dispute, ie, negative jurisdictional rulings. This is in contrast to the Singapore courts' ability to review positive jurisdictional rulings, where arbitral tribunals rule that a Singapore court can hear the dispute in question. The Law Ministry's view was that an inequity is just as likely to arise from a negative jurisdictional ruling as it is from a positive jurisdictional ruling. The amendment seeks to allow parties to have recourse to Singapore courts in respect of both positive and negative jurisdictional rulings. Amending the International Arbitration Act to allow for negative jurisdictional rulings would differ from the Model Law position taken by the Court of Appeal in PT ***Asuransi Jasa Indonesia (Persero) v Dexia Bank*** SA [2007] 1 SLR 597 which interprets article 16(3) to allow appeals only with respect to positive rulings on jurisdiction.33

Thirdly, the Ministry of Law seeks to empower arbitral tribunals with the power to award simple or compound interest on monies claimed in arbitrations and orders for one party to pay the other party's legal costs. It is noteworthy that the Ministry's public consultation paper at paragraph 13 revealed that the draft provision was based on section 79 of the Hong Kong Arbitration Ordinance 2010.

The final substantive amendment covers the appointment of the 'emergency arbitrator' which was introduced by the SIAC Rules 2010. The proposal seeks to ensure that an order to appoint an emergency arbitrator is enforceable under the International Arbitration Act, as the current legal status of emergency arbitrators and the enforceability of their interim orders is unclear.

In concert with these latest amendments, the introduction of the FLPA seeks to clarify which country's limitation laws apply to disputes that are litigated in Singapore (either through court or arbitration), but which are governed by another country's laws. The Ministry of Law has recommended that the law which governs the dispute should apply.

A fascinating canard to the latest public consultation exercise is the Ministry of Law's readiness to float trial balloons for commentary and criticism. While not proposing the specific amendments, the Ministry is considering amending the International Arbitration Act to allow parties, by agreement, to waive their right to set aside arbitration awards, effectively excluding the prospect of appeal to the courts. It is noteworthy that the Ministry referred to

the new French Arbitration Act which contains that very provision in article 1522, so as to bring finality to disputes between parties. Another trial balloon floated in the recent exercise involved a move away from the doctrine of champerty to allow the qualified use of third party funding to fund litigation and arbitration. The 2011 amendments to the International Arbitration Act were read in Parliament a second time on 9 April 2012 and passed without changes.

The Ministry's desire to keep pace with international developments reiterates the pro-arbitration framework that Singapore seeks to build upon, so as to keep pace with other world-class arbitration jurisdictions around the world. That it will do so is hardly in doubt.

Hong Kong: Asia's most established arbitration venue?

Hong Kong has been the repeatedly ranked as the world's freest economy. Its long and deep history of commerce parallels its status as one of Asia's most mature legal jurisdictions. In its 2011 Economic Freedom of the World annual report, the Frasier Institute ranked Hong Kong in first place for economic freedom, a position it has retained for the last 33 years.-34 Hong Kong was also ranked as the world's most competitive economy by the ***World Competitiveness Yearbook*** 2011 published by the International Institute for Management Development.35

Hong Kong's judiciary, in particular, its Court of Final Appeal is served by pre-eminent lawyers from Hong Kong, including serving Supreme Court judges from the United Kingdom and retired Chief Justices from Australia. It is home to more than 8,000 lawyers with nearly 1,300 registered foreign lawyers from 28 jurisdictions.36Infrastructure remains second to none, and its communication and transport links are world class.

In spite of misgivings about China and the role Beijing plays in determining economic policy in Hong Kong, business confidence has remained high even after 1997, when Hong Kong was returned to China. Hong Kong remains a global financial centre and has stuck to the common law system. It is also a separate customs territory from the rest of China. Its existence as a Special Administrative Region of China has not stopped the employment of common law precedents and various international treaties. Covenants on the protection of fundamental rights have been incorporated into Hong Kong law. Arbitral awards in Hong Kong are enforceable in China because of a mutual legal assistance arrangement signed in 1999.

In fact, Hong Kong's gravitas as an international arbitration centre under the 'one country, two systems' principle has increased, as it offers an ideal place for international arbitration bodies interested in the China-related work. In 2010, Hong Kong signed a cooperation agreement with the China Council for the Promotion of International Trade - one of the aims of which was to strengthen cooperation between Hong Kong's arbitral institutions and their China-based equivalents like the China International Economic and Trade Arbitration Commission (CIETAC).37 For its part Beijing continues to render 'unwavering support to Hong Kong as a matter of national policy and interests.'38 The Mainland and Hong Kong Closer Economic Partnership Agreement (CEPA), a free-trade agreement privileges Hong Kong products with zero import tariffs into China, and is one of the economic umbilical cords that make Hong Kong a gateway to the burgeoning growth in China. Tellingly, in the words of Secretary of Justice Wong Yan Lung, 'China is making full use of Hong Kong's strength in the legal field to enhance its own economic interests in the global arena.'39

Like Singapore, a peek into the past tells a fascinating story of Hong Kong's evolution into a premier arbitration centre in Asia.

Tracing Hong Kong's arbitral evolution

The colony of Hong Kong introduced its first Arbitration Ordinance in 1844, which gave the presiding Governor wide powers to refer any civil dispute to arbitration. Curiously, the Ordinance was not passed as an alternative to litigation but as a main means of dispute resolution since no civil litigation system existed in Hong Kong in 1844. In fact, it was enacted as an interim measure until a legal system took root in the colony and powers granted to the Governor would cease after the appointment of a Supreme Court judge in Hong Kong. Unfortunately as the Ordinance was not sanctioned by London, the Colonial Office rendered it otiose about five months after its enactment. 40

It was only with the enactment of the Civil Administration of Justice (Amendment) Ordinance in 1855 that arbitration as an alternative means of dispute resolution was recognised in Hong Kong. The 1855 Ordinance remained on the Hong Kong statute books until 1901. It was finally repealed in 1901 by the Code of Civil Procedure which incorporated many provisions found in the English Arbitration Act of 1889. The former was in turn repealed in 1950 by the Supreme Court (Amendment) Ordinance.

The Hong Kong Arbitration Ordinance (Cap 341) of 1963 was the first comprehensive arbitration legislation for the colony containing provisions that applied to domestic and international arbitrations. Based on the English Arbitration Act of 1950, it would remain in force until 2011. In the case of a domestic arbitration, the Ordinance gave the courts a discretion to stay court proceedings. In an international arbitration, however, a stay was mandatory. While remaining the backbone of Hong Kong's arbitration regime for almost 50 years, it was amended a number of times to support truly international arbitration in Hong Kong, rather than remaining distinctly English-based. In 1975, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards was also incorporated into the Ordinance.

In 1979, Attorney General John Griffiths QC appointed a Law Reform Commission to assess what new provisions ought to be included into the Hong Kong Arbitration Ordinance. The findings of the 1981 Report on Commercial Arbitration led to the Arbitration (Amendment) Ordinance becoming law in 1982, and it marked the first time Hong Kong's arbitration laws transitioned from the arbitration laws of England.

Shortly thereafter, the attorney general channelled his efforts to see how Hong Kong could develop into an international arbitration centre. A steering committee was set up under the late Justice David Hunter comprising two sub-committees; one to study the financial viability of a Hong-Kong based international arbitration centre and the other to look at what rules it should adopt.

Born in the private sector: the Hong Kong International Arbitration Centre

The Committee proposed arbitration facilities to be provided by private institutions in addition to courses provided by tertiary institutions to teach arbitration law and practice.-41On the financial front, about HK$1.5m was raised from the private sector, with the government matching the contribution dollar for dollar.42 The government also set aside a floor of the old Central Magistracy Building for the HKIAC, a company limited by guarantee subsequently granted charitable status, which heard its first arbitrations hearing from September 1985. The lack of experienced arbitrators was addressed by legislative changes

that enabled judges and civil servants to accept appointments as arbitrators in Hong Kong.-43

In the late 1980s, the financial capital that led to the establishment of the HKIAC was running out. As a result, in March 1990, the Finance Committee of the Legislative Council extended a one-time grant of HK$19.1m from which the institution draws an investment income. With financial hurdles out of the way, the HKIAC made representations to the government for larger premises as HKIAC's growth had rendered the Arbuthnot Road premises inadequate. After introducing the Model Law in 1990, 54 cases were heard at the HKIAC. In 1992, the number of administered cases grew rapidly to 185 cases.44

In response, the Hong Kong government duly offered HKIAC half of the 38th floor at Exchange Square. Today, with the increase in the number of arbitrations coming to Hong Kong, further expansion and refurbishment of the HKIAC is already underway, with the entire 38th floor to be taken up by the HKIAC, with a total floor space of over 1200 square metres, effectively doubling its current size.45

With the adoption of the UNCITRAL Model Law in 1985, the Law Reform Commission set up a specialist sub-committee to consider whether Hong Kong should adopt the Model Law. In September 1987, the Commission recommended the adoption of the Model with minor amendments. The Model Law was formerly enacted as the Arbitration (Amendment No. 1) Ordinance 1989, and it was incorporated as the Fifth Schedule to the Arbitration Ordinance. The Commission gave a number of reasons for doing so.46 Amongst others, adoption of the Model Law provided a sound framework for international arbitration and Hong Kong would benefit as a growing centre of international arbitration. In its proposals, the Commission also recommended that permanent funding be set aside for the HKIAC and that it be formally recognised as a part of Hong Kong's arbitration laws with a view to promote it as a Hong Kong institution nominated in arbitration clauses.

In 1992, the attorney general put together a committee of the HKIAC under the chairmanship of Justice Neil Kaplan to look into the prospects of amendments to the Arbitration Ordinance in concert with the May 1991 release of a new draft Arbitration Act in the United Kingdom. It was on this committee's recommendations that the Arbitration Ordinance underwent another significant update in 1997 with the enactment of the Arbitration (Amendment) Ordinance 1996, a few months before Hong Kong reverted to the People's Republic of China (PRC).

A number of new provisions were introduced to extend party autonomy and to limit the extent of curial intervention in arbitrations. A new Section 2AA was also introduced stating the objects and principles of the Arbitration Ordinance - to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expenses. Section 2AA(2) which outline the principles of the Ordinance stated that parties should be free agree how a dispute was settled bearing in mind the public interest and that the court's curial powers are as detailed by the Ordinance. The committee also recommended a fundamental reform of the Arbitration Ordinance for the long-term. However, as this proposal was significantly more complex that the surgical amendments of specific amendments to the Ordinance, it was held in abeyance, ultimately only seeing the light of day in 2011.

The 1997 handover did present one important problem. The return of Hong Kong to Chinese sovereignty meant that in the eyes of the New York Convention, Hong Kong was no longer a separate jurisdiction. This made it impossible to enforce a mainland China award in Hong

Kong and a Hong Kong award in mainland China after 30 June 1997. The matter was resolved nine days before the handover, when both jurisdictions signed a memorandum of understanding (MOU) known as the 'Arrangement concerning Mutual Enforcement of Arbitration Awards between Mainland and the Hong Kong SAR'. The MOU iterated that courts of Hong Kong would agree to enforce awards made with reference to the arbitral laws of the PRC. Likewise, PRC courts would agree to enforce awards made in Hong Kong in accordance with the Arbitration Ordinance. The provisions of the MOU were duly incorporated in the Arbitration (Amendment) Ordinance 2000.

Towards a unified arbitration ordinance

In 1998, the Hong Kong Institute of Arbitrators sought to look into the prospects of a unitary regime to that would apply the Model Law to domestic and international arbitration agreements as recommended by the 1992 Committee on Arbitration Law of the HKIAC. They established a Committee on Hong Kong Arbitration Law, supported by the HKIAC and the secretary of justice. Their terms of reference were to operationalise the recommendation of the 1992 Committee which proposed that:

> ... The Arbitration Ordinance, Cap. 341, as amended by the [Arbitration (Amendment) Ordinance (No. 75 of 1996)], should be completely redrawn in order to apply the Model Law equally to both domestic and international arbitrations, and arbitration agreements, together with such additional provisions as are deemed, in the light of experience in Hong Kong and other Model Law jurisdictions, both necessary and desirable. In the process, the legislation would keep pace with the needs of the modern arbitration community; domestically and globally, and would free Hong Kong from the outdated and illogically arranged English Arbitration Acts [1950-1979, now repealed], and the large body of case law on which their interpretation depends.47

On the need for a unitary regime, the committee cited a number of advantages. First, the question of whether the local or international regime applies is avoided. Secondly, a unitary regime was in keeping with the international trend of reducing curial intervention in all forms of arbitral proceedings. Thirdly, the international character of business in Hong Kong and the existence of a unitary regime would enable the both the business community and the legal profession to operate an arbitration regime that is in line with international arbitration development and practices. Finally, the Model Law would also attract lawyers from civil law, not just common law jurisdictions.48

After five years of work and consultation, the committee submitted its final report in April 2003 to the secretary of justice. The report also extended the scope of application beyond 'commercial arbitration' by referring specifically to 'an arbitration under an arbitration agreement', unlike the Model Law which refers specifically to in article 1(1) to 'international commercial arbitration'.49

In June 2005, the Department of Justice sought the input of the members of the Legislative Council Panel on Administration of Justice and Legal Services (AJLS) on the committee's report. With the AJLS' support, a Department of Justice Departmental Working Group was established to implement the report recommendations. A consultation paper was published in December 2007 and feedback was sought on the proposals made in the paper as well as the Department of Justice's consultation draft Arbitration Bill (Arbitration Bill 2007). The latter was unambiguous about the principal rationale of the Bill - one of which was to reinforce and promote Hong Kong as a leading regional centre for legal services and dispute resolution.50

The paper was circulated to 60 entities including arbitration institutions, government departments, legal representatives and to variety of private bodies. More than 40 submissions were received and the working group duly considered all submissions, which were in turn taken into account by the Department of Justice. After some revisions in light of feedback, the Arbitration Bill 2007, was then tabled before the Legislative Council in June 2009 as the Arbitration Bill 2009. The Bill's committee held 13 meetings from July 2009 to May 2010 to deliberate the Arbitration Bill 2009 and some committee stage amendments to the 2009 Bill were introduced.51 Some of the highlighted amendments were as follows52:

- Clause 18(2)(a)of the Arbitration Bill 2009 was amended to permit publication, disclosure or communication of information involving arbitral proceedings or an award if it was to establish a legal right or interest of a party or enforcing or challenging an award in court either within or outside Hong Kong.
- The reference to a 'written agreement' in clause 32 was replaced by 'arbitration agreement' to clarify that the provision applied to the appointment of a mediator as provided by the arbitration agreement.

While the legal industry had been proposing a unitary arbitration regime since the mid-1990s, the new Arbitration Ordinance also included a set of optional provisions in schedule 2. These allow parties to opt-in to some or all of the provisions which cover domestic arbitrations under the previous Arbitration Ordinance. The existence of schedule 2 was essentially a result of lobbying by the local construction industry. As a result, the provisions under Schedule 2 will apply for six years until 2017, if an arbitration agreement provides that it is a 'domestic arbitration'.53 Schedule 2 buttresses the view of some legal minds that the new Arbitration Ordinance is better conceived as evolutionary rather than revolutionary aimed at balancing the needs of all parties.54

The new Arbitration Ordinance also contains provisions that explicitly deal with confidentiality in arbitral proceedings and awards. This makes Hong Kong the first Asian jurisdiction to include such provisions in its arbitration regime. The only other jurisdictions worldwide that have express confidentiality are New Zealand, Australia, Scotland and Spain.-55 Insofar as the publication of awards are concerned, the new Arbitration Ordinance allows for this after parties give their consent to do so.

While the impending introduction of a unitary regime was debated, discussed and refined, the International Court of Arbitration of the International Chamber of Commerce decided to open two new Asia offices in 2008, one in Singapore and the other in Hong Kong. The ICC has opened a Secretariat of the Court in Hong Kong complete with a case management team to oversee and administer Asian cases under the ICC Rules of Arbitration.56

China and beyond: boon or bane?

Going forward, the economic opportunities afforded by many Chinese cities will keep Hong Kong's arbitral community buzzing. In December 2011, during an address in Seoul, Hong Kong's Secretary for Justice Wong Yan Lung put on record the intention to develop Hong Kong into the international arbitration hub of the Asia-Pacific. To this end, the secretary of justice cited the significant support Hong Kong has received from the Chinese government and China's Vice Premier Li Keqiang, referring to initiatives implemented in the Chinese city of Qinghai to encourage arbitral institutions in Hong Kong to provide their services to Chinese corporates with a view to popularise the use of Hong Kong law to settle commercial disputes.57

The comments of the secretary for justice in Seoul also reveal the desire for a deeper engagement in the arbitration realm with South Korea. His remarks were unambiguously direct:

> I understand Korean businessmen have been resorting to arbitration to resolve disputes for a long time. For international arbitrations, many of you are users of the ICC's facilities. The Korean legal community is active on the arbitration scene. This is certainly an area where closer co-operation between Hong Kong and Korea can be mutually beneficial and further explored.58

Hong Kong nonetheless faces a perception problem when it comes to Chinese awards. In 2011, this was tangentially raised in the case of Democratic Republic of the Congo v FG Hemisphere Associates FACV Nos 5, 6 & 7 which clarified the law covering sovereign immunity in Hong Kong. On the one hand, the court stated that while immunity applied to the enforcement of court judgments and arbitral awards, they would not apply to arbitral proceedings, meaning sovereign immunity cannot be pleaded as a bar to the jurisdiction of an arbitral tribunal. On the other hand however, the question remains whether the courts in Hong Kong could be prevented from exercising supervisory jurisdiction over a Hong Kong arbitration on the grounds of sovereign immunity. Even though the latter issue was not addressed by the court, some have argued that a claim of sovereign immunity would not stop the courts in Hong Kong from exercising supervisory jurisdiction.59 Equally, some argue that it is unlikely that state-owned Chinese corporations would be allowed to run a sovereign immunity claim a Hong Kong court.60

Hong Kong's Secretary of Justice Wong Yan Lung also weighed in on the subject in speech made on the occasion of the Opening of the Legal Year in January 2012:

Following the judgment, questions have been raised on the enforceability of arbitral awards in Hong Kong. Views such as those suggesting that Mainland state-owned enterprises stand to enjoy absolute immunity in Hong Kong by virtue of this decision are misconceived, as a Mainland state-owned enterprise is simply not an entity of a foreign state. Further, the fact is arbitration cases affecting foreign states are few in Hong Kong, and legislation has been introduced or enacted in jurisdictions such as the UK and the US to curb activities of buying and enforcing sovereign debts incurred by developing countries. In any event, parties are now better placed to organise their affairs when the law has been put beyond doubt.61

Equally noteworthy, in light of doubts about Hong Kong as a neutral arbitral venue in mainland China-related cases, the Court of Appeal decision in ***Shandong Hongri Acron Chemical Joint Stock Company Limited v PetroChina International (Hong Kong) Corporation Limited*** CACV 31/2011 went some way to addressing concerns of a China bias.62 In that case, the Court of Appeal enforced an arbitration award rendered against a mainland China state-owned company, squarely addressing the point about judicial independence and an alleged judicial bias towards China.63

The perception of Hong Kong's nexus with China is likely to be watched very closely by the arbitral community in the years to come, but if Hong Kong maintains its pro-arbitration norms, these perceptions are unlikely to lead to any decrease in its popularity as an arbitral seat of choice. As the legal community comes to terms with the new Arbitration Ordinance, the HKIAC is also due to introduce new rules of procedure. These measures should ensure that Hong Kong's arbitration regime remains up-to-date and attractive to business for years to come.

That said, the real test for Hong Kong will rest on how successful Hong Kong is in attracting clients from countries like Korea, which are significantly closer to it than Singapore, to settle arbitration disputes. If Hong Kong manages to assuage perceptions among the international business community of its China bias, it would stand out as the arbitration capital of Asia. Until then, with the induction of the new Arbitration Act into law and coupled with the increasing caseload of both the HKIAC and the Hong Kong branch of the ICC secretariat, Hong Kong is likely to be seen as the venue of choice involving disputes between Chinese and Western companies.64

Conclusion

The theme of competition has defined Singapore and Hong Kong's arbitration efforts over the last few years in particular. This is unlikely to go away anytime soon. A putatively arbitration-unfriendly judgment in Hong Kong or Singapore in the future will inevitably generate commentaries that devote a line or two for the reader to consider the other as a better arbitration destination. Likewise, a pro-arbitration judgment in either jurisdiction may well be amplified and employed as an agent of one-upmanship.

However, missing in the talk of competition is a much more obvious reality - that economic growth in Asia has powered both Hong Kong and Singapore into the league of premier and top international arbitration destinations of the world. This reality was perhaps captured most succinctly by Dr Michael Pryles, chairman of the SIAC, '(i)t is not surprising at all that the number of international arbitrations in Asia is increasing quite nicely. It's due to the economic development of the region.'65 Speaking to The Australian, Dr Pryles also added that Singapore was benefitting from an unjustified fear among some US corporations that China might interfere in arbitrations conducted in Hong Kong.66

In fact, the Asian arbitration pie is only likely to grow further. Last year, Singapore Law Minister K Shanmugam even offered to support the Kuala Lumpur Regional Centre for Arbitration (KLRCA) which ironically, was the first regional arbitration centre in Asia, having been set up in 1978.67 Such synergistic thinking is likely benefit both Singapore and Malaysia. His counterpart, Malaysian Law Minister Nazri Aziz was also quoted as saying that disputes in niche areas like Islamic banking and Islamic financial matters are likely to be arbitrated in Kuala Lumpur. He added, 'Singapore and Kuala Lumpur are too near. We might as well have a good understanding and cooperation. Its better to work together rather than start competing.'68 While it remains to be seen if Hong Kong or Singapore will go down this road, healthy competition between two of the world's freest economies, at the centre of the most economically dynamic region in the world today, should not be unexpected.

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China

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Summary

The release of the new arbitration rules of the China International Economic and Trade Arbitration Commission (CIETAC) in February this year was the most significant development for foreign parties in China this past year. Although the amendments are less significant than the changes made in the 2005 version of the rules, the new rules, which came into force on 1 May 2012, are nonetheless consistent with a steady pattern of the internationalisation of Chinese arbitral practice and procedure.

Such developments are not surprising given the continued popularity of arbitration for resolving commercial disputes in China, and of the increase in China-related arbitration cases in general. Nevertheless, and despite this, the law of the People's Republic of China (PRC), and specifically CIETAC arbitration, continue to demonstrate their own distinctive peculiarities.

This chapter highlights the key arbitration developments and trends since 2011 in China.

CIETAC caseload

CIETAC has for many years been the leading arbitration commission for foreign-related arbitrations in China.1 In recent years, its arbitration caseload has been increasing, although the recent number of foreign-related cases as a percentage of total cases is much lower than in previous years (for example, for the period from 2002 to 2004, CIETAC's caseload consisted of more foreign-related than domestic cases). According to CIETAC, this is due to many disputes now involving foreign parties that have established joint ventures and wholly foreign-owned enterprises which are categorised as domestic disputes.

According to CIETAC, in 2011 it accepted 1435 cases, of which 965 were domestic cases and 470 were foreign-related cases.2 Around 90 per cent of these cases were resolved under the auspices of CIETAC (ie, a final award was rendered, or the arbitration was resolved following, for example, a successful mediation). Over the last ten years, CIETAC's total caseload has more than doubled. However, CIETAC did suffer a small dip in its caseload figures in 2010, which, according to CIETAC, was caused by fewer contracts being entered into and parties deciding to settle their disputes without recourse to arbitration, both of which were in part due to the effects of the economic crisis. CIETAC expects its caseload to increase further in 2012, in parallel with the expected economic recovery and an increase in the number of investment contracts being entered into which refer disputes to CIETAC arbitration.

Revised CIETAC Panel of Arbitrators

CIETAC revises its Panel of Arbitrators every three years. A new Panel of Arbitrators became effective on 1 May 2011. It consists of just under 1,000 arbitrators, of which foreign arbitrators now make up approximately 25 per cent, although the number of foreign arbitrators actually accepting CIETAC arbitration appointments continues to be low. Under the CIETAC rules, however, parties can only nominate or appoint arbitrators from outside the Panel of Arbitrators by agreement, and subject to confirmation by the chairman of CIETAC.

The new CIETAC arbitration rules

To meet the demand for China-related arbitrations and to improve its arbitration procedure, CIETAC issued its revised arbitration rules in February 2012, after a longer than expected drafting process. The new rules come into force on 1 May 2012, seven years after the previous edition.

CIETAC's new arbitration rules expand on previous improvements to its arbitration procedure through new features. These features are in line with modern international arbitration

practice and are consistent with rules from a number of other major institutional arbitration bodies.

The following are the main changes to the new CIETAC rules:

Interim Measures

Under PRC law, there are only two types of interim measures available in arbitrations in China: preservation of (i) property and (ii) evidence and only the Chinese courts (not the tribunal or arbitration commission) can grant them. The new CIETAC rules include provisions empowering the tribunal, on a party's application, to order any interim measure it deems necessary or proper in accordance with the law that applies. This will be useful for arbitrations outside China, although it remains to be seen if such orders can be enforced (whether as awards or otherwise) in China. For arbitrations seated in China, under the current civil procedural law, it is unlikely that more extensive interim measures will be available from the tribunal.

Language Of The Arbitration

Under the previous CIETAC rules, where parties failed to agree on the language of the arbitration, the default language would be Chinese. This was unattractive to foreign parties because it limited the pool of foreign arbitrators to those fluent in Chinese. The new rules seek to address this by giving CIETAC the power to designate any language, in the absence of party agreement. In theory, this is sensible because it tries to ensure that a suitable language is adopted for each case, after taking into account factors such as the nationality of the parties and the subject matter in dispute.

Seat (place) Of Arbitration

In the absence of party agreement on the seat (place) of arbitration, or where the agreement is ambiguous, CIETAC can now choose any location. This reflects the fact that each year, CIETAC administers cases seated outside mainland China - although the number of these cases is nominal, it is likely to grow.

Summary Procedure

This has been revised, with the main revision being that, in the absence of party agreement, the summary procedure will now apply to any case where the amount in dispute does not exceed 2 million renminbi. Previously, the threshold was 500,000 renminbi. This takes into account the demand among arbitration users for expedited procedures and is in line with the higher threshold brought in by, for example, the new SIAC rules.

Multi-party Appointment Of Arbitrators

The previous rules, as drafted, could lead to unfairness in a deadlock situation, ie, if one side (typically, the respondent side) failed to appoint its party-arbitrator, it could lose its right to appoint, while the other side (typically, the claimant side) could retain this right. The new rules seek to avoid this by providing that if either side defaults in appointing its party-appointed arbitrator (or if both sides fail jointly to entrust the chairman of CIETAC to appoint), then the chairman of CIETAC will appoint all three arbitrators.

Consolidation

Under the new rules, CIETAC may consolidate two or more CIETAC arbitrations into one arbitration, either on the request of one party and with the agreement of all other parties, or

if CIETAC considers it necessary to consolidate and all parties consent. However, the effect of the consolidation provisions are likely to be limited, since a consolidation is possible only if all the parties consent at the time. A recalcitrant party can, therefore, easily derail or delay an arbitration by refusing to provide such consent.

Arbitration And Mediation

According to CIETAC, each year approximately 20 to 30 per cent of its caseload is resolved through a combination of mediation (conciliation) and arbitration. Given this relative success, the new CIETAC rules seek to clarify this process further. For example, parties can choose, once a tribunal has been constituted, to mediate their dispute without the arbitral tribunal, and may seek help from CIETAC to conduct the mediation (if the mediation fails, then the arbitration continues).

Substantive Law

The new CIETAC rules now expressly provide that the parties are free to agree on the governing law of the contract (which is consistent with PRC law, save for certain exceptions, as discussed below), and where there is no agreement, or the agreement is in conflict with a mandatory provision of the law, then the tribunal shall determine the substantive law. PRC law provides that domestic contracts must always be governed by PRC law. Although the parties to a foreign-related contract are in general free to choose the substantive law governing the contract, this is subject to certain exceptions ie, PRC law must apply to the following contracts: Sino-foreign equity joint venture contracts and Sino-foreign cooperative joint venture contracts.[3]

CIETAC In Beijing Or Sub-commission

Under the previous CIETAC rules, where the parties had failed to agree on the administering body, ie, CIETAC in Beijing or one of CIETAC's sub-commissions, the claimant was then given the choice of where to have the arbitration administered (ie, CIETAC in Beijing or at one of the sub-commissions). This allowed the claimant the opportunity to select its most preferred venue, which was sometimes perceived as causing unfairness to the other side. This rule has been amended by the new CIETAC rules as now, absent party agreement, or where such agreement is ambiguous, the 'Secretariat of CIETAC' will administer the case. Although not expressly defined in the new rules, it is understood that the Secretariat of CIETAC refers to the Secretariat of CIETAC in Beijing. It is understood that this amendment to the rules generated much internal debate between CIETAC in Beijing and the various sub-commissions; a likely outcome of the change will be that CIETAC in Beijing will handle more cases, whilst the sub-commissions will see a decrease in their caseload.

In revising its rules, CIETAC has considered the changes in other international arbitration rules, such as the UNCITRAL, SCC, ICC, HKIAC and SIAC rules. Naturally, due in part to the constraints of PRC law and CIETAC's distinctive character, CIETAC has not adopted all the amendments in other arbitration rules (ie, there are no provisions for appointing emergency arbitrators). Overall, the latest amendments are less significant than those introduced in the previous version in 2005. Nonetheless, the main amendments will likely be welcomed by CIETAC users and are in line with amendments to other international arbitration rules.

Investment treaty arbitration

Last year (July 2011) saw a final award rendered in the well-known ICSID arbitration, Tza Yap Shum v The Republic of Peru,[4] which was brought under the bilateral investment treaty (BIT) entered into between China and Peru (China-Peru BIT). This case dealt with a number

of important issues that arise in the context of many BITs entered into by China with other states.

The case concerned Mr Tza Yap Shum, who was the owner of a 90 per cent stake in a fish flour company, TSG Peru SAC (TSG). A dispute arose when Peru's national tax administration allegedly froze around US$4 million in TSG's bank accounts, a sum which the administration claimed was owed by the company in tax. Mr Tza claimed that the administration confiscated the company's assets while it was trying to challenge the charge within the legally prescribed time limit. Moreover, he claimed that the confiscation paralysed the company and amounted to an expropriation of the company, for which he demanded US$20 million in compensation.

On 19 June 2009, the tribunal rendered its Decision on Jurisdiction and Competence in relation to its interpretation of the China-Peru BIT. The tribunal held that the arbitration provision within the China-Peru BIT applied to a Hong Kong citizen such as Mr Tza and that it had jurisdiction over the expropriation claim (although the tribunal did agree with a number of Peru's other objections).

In its final award on the merits rendered last year, the arbitral tribunal found that the administrative seizures ordered by Peru's tax authority constituted indirect expropriation under the China-Peru BIT. Mr Tza was awarded damages in the sum of approximately US$786,000 plus interest (such figure being reflective of the adjusted book value of TSG immediately prior to the expropriatory acts). Peru subsequently applied for the annulment of the award, and a provisional stay of the enforcement of the award was granted pending the result of that application. An ad hoc ICSID annulment committee was constituted in January 2012 and a decision is still pending.5

Also in 2011, the first known investment treaty claim against China was filed at ICSID, by a Malaysian company, Ekran Berhad. The dispute reportedly related to a lease over land in the Chinese province of Hainan, with an estimated value of US$6 million. The lease was reportedly revoked by the local authorities in 2004 on the ground that the investor had failed to develop the land as stipulated under the local legislation. However, the case was suspended shortly after, on 22 July 2011, following agreement by the parties.

This year will see the continuation of the only other China-related investment dispute that has been known to have been commenced under the relevant BITs between China and other countries: China Heilongjiang International Economic & Technical Cooperative Corp, Beijing Shougang Mining Investment Company Ltd and Qinhuangdaoshi Qinlong International Industrial Co Ltd v Mongolia.

New Legislation

On 1 April 2011, the PRC Law on the Application of Law for Foreign-related Civil Relations (the PRC Law on Conflict of Laws) came into force. This statute consolidated Chinese conflict of law rules with respect to foreign-related contracts, which were previously scattered across various statutes, such as the PRC General Principles of Civil Law (1987) and certain interpretations and other documents issued by the Supreme People's Court. For domestic contracts, PRC law will always apply.

The PRC Law on Conflict of Laws is relevant to China-related arbitration as follows:

Substantive Law

As already discussed above, under PRC law, parties to a foreign-related contract are free to elect, subject to certain restrictions, any law as the substantive law of the contract. In the absence of express choice by the parties, article 41 of the PRC Law on Conflict of Laws states that the substantive law shall be:

- the laws at the habitual residence of the party whose fulfillment of obligations can best reflect the characteristics of the contract; or
- other laws which have the closest relation with the contract.

This rule applies to both litigations and arbitrations in China where the determination of the applicable substantive law is at issue.

Proof Of Foreign Law

Historically, most arbitrations in China have largely involved Chinese law, which is a law which the arbitrators and counsel will usually be familiar with. However, in recent years, issues of foreign law have increasingly arisen in foreign-related arbitrations held in China. Under PRC law, parties who choose to apply foreign law shall bear the burden of proof of the particular foreign law that they intend to apply, and, under article 10 of the PRC Law on Conflict of Laws, the following bodies shall ascertain the content of such foreign law: the People's Courts, the arbitration institutions and the relevant administrative authorities. If the foreign law cannot be ascertained by the methods set out under PRC law6, or there are no relevant rules in the applicable foreign law, then PRC law shall apply.

Law Governing The Arbitration Agreement

Under PRC law, the agreed law of the parties will be the law that will govern a foreign-related arbitration agreement. In the absence of party choice, article 18 of the PRC Law on Conflict of Laws states that the governing law shall be either:

- the law of the place where the arbitration commission is located; or
- the law of the place of the arbitration.

However, these new provisions have been criticised as:

- it deviates from the previous position under PRC law7 that the law governing the validity of a foreign-related arbitration agreement shall be, in order of priority: the law agreed by the parties, the law of the seat of the arbitration or the law of the place of the court;
- it is not clear whether article 18 of the PRC Law on Conflict of Laws is intended to change the previous position under PRC law (as stated immediately above);
- it fails to clarify how the governing law should be determined if the place of the arbitral institution differs from the seat of arbitration (ie, an ICC arbitration seated in London); and
- it fails to clarify what the proper law should be if the arbitration agreement in question is silent not only on the parties' choice of governing law, but also the seat of arbitration and the arbitration institution.

It remains to be seen how the issues above will be dealt with and determined by PRC courts (and tribunals) in the future.
Restrictions on PRC counsel

In 2010, the Ministry of Justice (MoJ) issued the Measures For Punishing Lawyers and Law Firm's Illegal Acts (Measures), and it remains a topic of great controversy for Chinese arbitration practitioners today. The Measures introduced a new restriction upon PRC local counsel whereby a registered PRC lawyer who serves as an arbitrator or has previously served as an arbitrator at one arbitration commission in China may be prevented from acting as an 'arbitration agent' (effectively, as arbitration counsel) in any case administered by that arbitration commission. This limits the breadth of work a PRC lawyer can engage in. In addition, PRC lawyers, in particular those with invaluable experience and technical know-how, are now hesitant to acting as arbitrators or being listed on the arbitrator panels of Chinese arbitration commissions.

It is understood that the Measures were hastily drafted by the MoJ and that there was no consultation process to include views and comments from Chinese arbitral bodies (including CIETAC). It is also understood that the MoJ has recognised the limitations of the Measures and the effect on the PRC arbitration community, and, as such, the impact of the Measures has been discussed by the relevant authorities, although no subsequent action has been taken.8 Nevertheless, at the time of writing, there has been no known case where these specific provisions of the Measures have been applied.

Future developments

As discussed above, under current PRC law, there are only two types of interim measures available to parties to arbitration in China, namely perseveration of property and preservation of evidence. Currently, pre-arbitral interim measures of protection are not available under PRC law. However, in October 2011, the Standing Committee of the National People's Congress (NPC), China's legislature, reviewed for the first time a draft amendment to the PRC Civil Procedure Law 2008.9 Proposed amendments include the power of the courts to order property preservation measures before an arbitration is commenced, in addition to the power to order injunctive relief. It is worth noting that the NPC had included in its legislative agenda a proposal to revise the PRC Arbitration Law. However, at the time of writing there has been no official announcement of when an amended PRC Arbitration Law will be promulgated.

Notes

1
Under PRC law, an arbitration is generally considered "foreign-related" if it involves: at least one foreign party; or if all the parties are Chinese parties, where: either the facts establishing the legal relationship between the parties occurred in a foreign country; or the subject matter in dispute is in a foreign country.

2
Despite the recent general downward trend of foreign-related cases as a percentage of total cases, as outlined above, the 2011 figure of 470 foreign-related cases is an increase on the 418 foreign-related cases from the previous year.

3
Article 126 of the PRC Contract Law (1999).

4
ICSID Case No ARB/07/6.

5
A procedural history can be found at http://icsid.worldbank.org

6
Article 193 of the Supreme People's Court Trial Opinions on Several Issues on the Implementation of the PRC General Principles of Civil Law (1988) which sets out the methods used to ascertain which foreign law is applicable, including: provision by the parties, by embassies (in the foreign country whose law will apply, or of that foreign country in China) and by legal experts, whether foreign or Chinese.

7

Article 16 of the Supreme People's Court's Interpretations of Several Issues in Applying the Arbitration Law of the PRC (2006).

8

See Moser J, Michael (ed), Business Disputes in China, Third Edition (Juris, 2011), pg.57.

9

See http://www.npc.gov.cn/npc/xinwen/syxw/2011-10/29/content_1678367.htm

Korea

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With explosive growth in international trade and commerce, Korea has become a country heavily dependent upon international transactions. Accordingly, disputes and conflicts with regard to such international transactions have greatly increased over time and such environment has made it extremely important for Korean companies as well as their worldwide business counterparts to resolve transaction-related disputes as quickly and efficiently as possible. Many statistics prove that arbitration has become the most preferred method of dispute resolution in Korea for business-related cases, both international and domestic, and the legal system in Korea has shown some impressive improvements with regard to arbitration, corresponding to the development of norms generally accepted in the international arbitration arena.

The Arbitration Act in Korea has been amended to adopt most of the provisions in the UNCITRAL Model Law on International Arbitration. Korea has also been a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) since 1973. Korean courts, in particular, including the Supreme Court of Korea, have maintained a position that is very friendly to arbitration in interpreting and applying arbitration-related laws.

Judgments rendered by Korean courts have consistently exhibited pro-arbitration tendencies in deciding the validity of arbitration agreements or arbitral awards, both domestic and foreign. Especially with regard to arbitration agreements, the Supreme Court of Korea has shown, over time, more proactive views in recognising the validity of arbitration agreements and such views became more obvious even in cases where the governing law of the arbitration agreement is a foreign law. Further, Korean courts have also interpreted arbitration clauses in order to expand the scope of arbitration agreements, which may potentially result in benefiting multiple parties engaged in a single of series of international transactions.

As a starting point of review on arbitration in Korea, it would be meaningful to study the various aspects of the arbitration agreement, which not only provide the basis for the initiation of arbitration but also shall be deemed as fundamental instrument, to which all the parties and arbitrators will be referring during the entire process of arbitration as well. The purpose of this article is to provide practical tips regarding arbitration agreements in connection with Korea-related transactions, by analysing the relevant laws of Korea and decisions rendered by the courts of Korea.

Significance of the arbitration agreement under the Arbitration Act

Article 3(2) of the Arbitration Act of Korea (the Act) defines an arbitration agreement as 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them out of defined legal relationships, whether contractual or not,' and article 35 of the Act provides that the arbitral award shall have the same effect on the parties as a final and conclusive judgment of a court. As can be concluded from such clauses of the Act, arbitration proceedings cannot be initiated and that the arbitral awards, which

have been issued despite of non-existence of the arbitration agreement, could be cancelled if it is found later that in the absence of the parties' clear stipulation to arbitrate.

Nevertheless, like in most countries, the following issues are frequently argued before a court or arbitral tribunal and considered as primary causes for delay in arbitration proceedings.

The existence or validity of an arbitration agreement

In general, a civil action which should have been the subject of arbitration is brought before a court under the following three circumstances: arbitration agreement exists but is not valid and effective; arbitration agreement exists but is not expansive enough to cover the subject matter of the case in question; and arbitration agreement exists and is valid but one of the parties decides to disregard and litigate anyway. The same issues may be posed even after an arbitral award has already been rendered, in which case the award may be subject to cancellation or refusal of the recognition and enforcement by a court if it turns out that an arbitration agreement does not exist or is not valid.

The scope of an arbitration agreement

It is not uncommon in international transactions for parties to execute multiple agreements. Unfortunately, however, dispute resolution clauses in the respective agreements, for various reasons mostly out of lack of attention at the drafting stage, are not aligned to cause all the disputes arising under the multiple agreements to be referred to a single dispute resolution mechanism. Likewise it is not uncommon in international transactions for multiple parties to execute various agreements in a series of transactions in unrelated projects. These situations inevitably force the parties to be engaged in contention and challenge on the scope of the arbitration agreement.

The so-called optional arbitration clause

A dispute resolution clause in various form contracts in Korea frequently used by many industrial associations include a so-called optional arbitration clause, under which either parties could opt for an arbitration or a civil action before the court as means of resolving disputes arising between or among the parties. The validity of this so-called optional arbitration clause by itself has been the source of dispute.

The paragraphs below will discuss specific provisions of the Act and decisions by Korean courts with respect to each of the foregoing issues.

The existence or validity of an arbitration agreement

Relevant articles of the Act

Dismissal of a civil action on the ground of an arbitration agreement

As briefly introduced above, according to article 9(1) of the Act, a court, before which a civil action is brought regarding a matter that should have been the subject of an arbitration agreement, shall dismiss the civil action when the respondent raises a defence on the ground of the existence of an arbitration agreement. However, if the court finds out that the alleged arbitration agreement does not exist, is null and void, has become invalid, or is incapable of being performed, the court shall not dismiss the civil action and instead shall proceed to decide the case on the merits. The Act in principle is applied to arbitrations seated in Korea, but it applies to all arbitrations, regardless of where they are seated, in case of article 9 (article 2(1) of the Act), ie, when the respondent raises a defence on the ground of the existence of an arbitration agreement.

Cancellation of an arbitral award - in case of domestic awards

In case of domestic arbitral awards, the award may be set aside by a court if the arbitration agreement is not valid under the law by which the arbitration agreement is agreed to be interpreted by the parties, or in case the parties have not indicated such law, under the laws of Korea (article 36(2)(1)(a) of the Act). Such arbitral awards subject to be set aside by a court shall also not be recognised or enforced (article 37(1) of the Act).

Recognition and enforcement in Korea - in case of foreign awards

Arbitral awards rendered in foreign countries shall be recognised and enforced in Korea only when they have been confirmed by the judgment of a court (article 37(1) of the Act). Article 39 of the Act categorises foreign awards into two categories: foreign awards subject to the New York Convention and ones not subject to the New York Convention. According to the same article, the recognition and enforcement of the former type of awards shall be governed by the New York Convention and those of the latter type of awards shall be governed by the general provisions under Korean Civil Procedure Act and Civil Execution Act regarding the recognition and enforcement of decisions by foreign courts. The foregoing articles of the Act, articles 37 and 39, are two other exceptional clauses to the principle that the Act applies to arbitrations seated in Korea.

In the case of foreign arbitral awards to which the New York Convention applies, the Korean courts give strong deference to the findings of the tribunal or foreign court on the validity of the arbitration agreement on which such awards are based acts at the time of the decision on the recognition and enforcement of foreign awards, because article 5(1)(a) of the New York Convention stipulates that 'recognition and the enforcement of the award may be refused when the said agreement is not valid under the law by which the arbitration agreement is agreed to be interpreted by the parties or, failing any indication thereon, under the law of the country where the award was made.'

The same principle applies to foreign awards not subject to the New York Convention.

Prerequisites for a valid arbitration clause

Arbitrability

It is clear from articles 1 and 3 (1) of the Act that the subject of arbitration is limited to disputes in private laws. All disputes in connection with private laws, whether civil or commercial, may be subject to arbitration under a valid arbitration agreement. However, disputes relating to public laws, ie, rights recognised under criminal procedure or laws regarding enforcement, are not the subjects of arbitration agreement, thus will be excluded from the subject matter of arbitrability.

Agreement in writing

Article 8 of the Act requires arbitration agreements to be in writing, and suggests an agreement in the form of a separate agreement or in the form of an arbitration clause in a contract as principle methods of such written agreement. However, taking under consideration the specific circumstances, the Act also recognises the following as written agreement: when an agreement is contained in a document signed by the parties; when an agreement is contained in an exchange of letters, telegrams, telex or other means of telecommunication which provide a record of the agreement; and when an agreement is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. Further, article 8(4) of the

Act recognises as valid agreement when there is reference in a contract to a document containing an arbitration clause.

In a case where it stated in the front of an agreement 'Please supply in accordance with the conditions to be specified in the reverse side of this contract' and there was an arbitration agreement in the reverse side, the Supreme Court of Korea held that such agreement was deemed as a valid arbitration agreement of which both parties had full understanding on (Judgment of April 10, 1990, 89DaKa20252 (Korean Supreme Court)). A recent case also held that arbitration agreement is recognised to be valid not only when it is stipulated as a part of a main agreement but when the main agreement cites other documents including an arbitration clause, such as standardized provisions, as well (Judgment of October 12, 2001, 99Da45543 (Korean Supreme Court)).

Mandatory details to be included in an arbitration agreement, as recommended by the KCAB

The KCAB (Korean Commercial Arbitration Board), which serves as a predominant institution handling arbitrations related to commercial disputes, recommends inclusion of details in the arbitration agreement mandates such as the manifestation of agreement to arbitrate by both parties, the arbitration institution, the place of arbitration and the arbitration rules.

In any case, an arbitration agreement becomes effective when it contains the manifestation of agreement to arbitrate and the arbitration institution, if the parties so opt for institutional arbitration. The Supreme Court of Korea held that an arbitration agreement stating 'when a party fails to perform the foregoing agreement, then the dispute shall be resolved by an arbitration by a third institution' was valid, on the grounds that 'arbitration agreement is valid when it shows clear intention of both parties to be subject to arbitration, even without the articulation of an arbitration institution, governing law or the place where arbitration shall be seated.' (Judgment of May 31, 2007, 2005Da74344 (Korean Supreme Court))

Separability of an arbitration agreement

Article 17(1) of the Act deals with the separability of the arbitration agreement from the main body of a contract by providing 'an arbitration clause which forms a part of a contract shall be treated as an agreement independent of the other terms of the contract.' Thus, whether the main contract is void or subject to be set aside does not affect the validity of an arbitration agreement.

General standard established by the Korean courts on the validity of an arbitration agreement

An arbitration agreement is null and void when it does not satisfy any of the prerequisites set forth above. The Supreme Court of Korea has proposed a very general standard for the determination of the validity of arbitration agreements as follows: 'Arbitration agreement is valid when the parties have agreed in writing to resolve the disputes in private laws which arose or will arise between them not by the judgment of a court but by arbitration. In order for an arbitration agreement to be valid, such specific matters shall be taken under consideration for the decision, as the substances of the arbitration agreement and the accounts leading to such agreement, established based on the information on the meaning of arbitration as defined by Arbitration Act and the characteristics or forms of the arbitration agreement.' (Judgment of May 13, 2005, 2004Da67264 (Korean Supreme Court))

Decisions by Korean courts in specific cases

The foregoing general standard is supplemented by a number of court decisions in specific cases on which the Korean courts applied a variety of standards on the nullification, non-existence, invalidity and incapability of performance, in order to decide on the dismissal of actions that should have been the subject of arbitration, cancellation of arbitral awards, and recognition and enforcement of foreign arbitral awards.

Following are the cases decided on the existence or lack of the valid existence or effectiveness of arbitration agreement as referred to under the Act.

Non-existence or loss of validity of an arbitration agreement

In a case decided by the Supreme Court of Korea in 1990, where an arbitration agreement was written in a bill of lading while the entity indicated in the bill of lading as consignee was holding the bill of lading for the mere purpose of securing the payment of an L/C, the Supreme Court ruled, pursuant to the laws of England recognised as the governing law of the arbitration agreement, that when the consignee was indicated for such purpose only, then the arbitration agreement contained in the bill of lading cannot be binding upon the consignee (Judgment of December 13, 1990, 88DaKa23735 (Korean Supreme Court)).

In another case, regarding the invalidity of an arbitration agreement, the Supreme Court held that a prior arbitration agreement between the parties cannot be viewed as invalidated merely by the fact that the parties subsequently agreed to resolve disputes by mutual consultation (Judgment of May 13, 2005, 2004Da67264,67271 (Korean Supreme Court)).

The above two cases strongly demonstrate that the Korean courts require arbitration agreements to be in writing and to be executed by the person allegedly bound by the agreement and further, that an arbitration agreement, once executed by the parties, will retain its validity until it is clearly rescinded by the parties.

Incapability of performance of an arbitration agreement

In a case where a designated arbitrator refused to perform his duties (Judgment of April 12, 1996, 96Da280 (Korean Supreme Court)) and a case where the parties agreed to resolve future disputes by arbitration by Korea Chamber of Commerce And Industry, which is not an official arbitration institution (Judgment of June 26, 1980, 80Na535 (Seoul High Court)), the courts of Korea held that the arbitration agreement in the respective cases were incapable of being performed, thus making it possible for a court to decide on the merits of the cases.

However it must be understood that the courts of Korea generally endeavours to interpret arbitration agreement to be capable of being performed, as long as the arbitration agreement clearly stipulates the parties' agreement to arbitrate and thus does not permit reasonable construction to the contrary.

For instance, the Seoul District Court held that even if an arbitration agreement designated more than one place of arbitration by stating the place of arbitration to be 'the KCAB and The Japan Shipping Exchange Inc', the expression should be interpreted as meaning the KCAB 'or' The Japan Shipping Exchange, which made the arbitration agreement still performable (Judgment of April 12, 1984, 83GaHap7051 (Seoul District Court)). Another decision by a lower court viewed an arbitration agreement as capable of being performed even when one of the parties to the agreement was under composition procedure, for the reason that such fact did not influence the party's legal capacity or capability to dispose of its property (Judgment of July 5, 2002, 2001GaHap6107 (Seoul District Court)).

Decision on the validity of an arbitration agreement related to foreign arbitral awards

As discussed earlier, under the Act, arbitral awards rendered in foreign countries shall be recognised and enforced in Korea only when they have been confirmed by the judgment of a court. As for the foreign awards subject to the New York Convention in particular, in order for the awards to be recognised and enforced, the arbitration agreement on which such awards are based upon shall be recognised to be valid under the law by which the arbitration agreement is agreed to be interpreted by the parties or, when the parties have failed to indicate such law, under the law of the country where the arbitration proceeding is seated.

The Korean courts retain the authority to examine if the arbitration agreement, based upon which the arbitral award in question has been rendered, is valid pursuant to the governing laws set forth in the arbitration agreement. Korean courts, as specified in cases introduced below, are believed to take a relatively liberal approach in interpreting the validity of arbitration agreements at the time of reviewing a petition to enforce foreign arbitral awards, resulting in facilitating the recognition and enforcement of such awards in Korea.

One of the decisions displaying such position of Korean courts is a judgment rendered by the Supreme Court in 2000 (Judgment of December 8, 2000, 2000Da35795 (Korean Supreme Court)). The facts of the case are as follows: plaintiff, a fish-importing company in China, and defendant, a merchant in Korea purchasing fish from the plaintiff, agreed in their purchase and sale contract that they would 'resolve future disputes by arbitration in China' and that the arbitral award would be final and binding on both parties. When a dispute actually occurred, an arbitral award was rendered by CIETAC (China International Economic and Trade Arbitration Commission) and plaintiff requested a Korean court to confirm the award for its enforcement in Korea. Upon presentation of the defendant's defence that the arbitration agreement was void under the law of China, the governing law of the arbitration agreement, because the agreement did not bear any specification regarding matters to be arbitrated and arbitration institution, the Supreme Court decided for the plaintiff, ruling that 'the arbitration agreement is fully valid even without the articulation on governing laws or an arbitration institution when there is a written agreement to resolve disputes by arbitration.'

However, the Supreme Court denied the validity of an arbitration agreement when there was no written agreement in the first place, ie, the agreement was not made in written form. The Supreme Court clarified that the mere fact that the parties did not raise any objection to arbitration procedure did not validate the arbitration agreement lacking the writing requirement (Judgment of December 10, 2004, 2004Da20180 (Korean Supreme Court)).

The scope of an arbitration agreement

Relevant articles of the Act

Article 3(2) of the Act, which defines an arbitration agreement as 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them out of defined legal relationships, whether contractual or not,' does not limit the scope of disputes to be settled by arbitration to the ones arising under the contract and opens the possibility of expanding the scope to disputes arising in connection with contractual performance or torts related to such performance.

Such phrase of article 3(2) was newly adopted when the Act was amended in 1999 in order to correspond to the related clauses of the UNCITRAL Model Law on International Arbitration.

It is not specified in the Act, however, which types of related disputes come under the scope of arbitration agreements, which leaves the interpretation of such scope to a court.

Decisions by Korean courts in specific cases

A lower court decision limited the scope of the arbitration agreement by interpreting that 'related disputes, other than disputes arising directly under the main contract, are under the scope of an arbitration agreement only when such disputes were foreseeable by the parties.' (Judgment of July 23, 1987, 86GaHap6660 (Seoul District Court)) However, the interpretation in recent judgments, including some by the Supreme Court, has shown development regarding the expansion of the scope of arbitration agreements.

Five years later, though, the Supreme Court in 1992 provided a standard of carving out the scope of arbitration agreements entirely different from that suggested by the above decision by Seoul District Court. It held that 'the scope of arbitration agreements is not limited to the main body of contract in which the agreement is included, but may be expanded to the disputes closely related to the formation, performance and effectiveness of the contract.' In this case, the plaintiff transferred his business, including a factory, to the defendant and the two parties agreed to resolve the legal disputes related to the business transfer contract by arbitration. After the transfer, the factory exploded and the employees of defendant were killed or injured by the accident. Arbitration was initiated upon a request by the defendant, an arbitral award in favor of the defendant was rendered, and the plaintiff filed a suit claiming the award be set aside because the dispute regarding the explosion was not in the scope of the arbitration agreement. The Supreme Court, applying the standard set forth above, held that the arbitration agreement applied to such disputes as well (Judgment of April 14, 1992, 91Da17146, 17153 (Korean Supreme Court)).

In another case where the Supreme Court applied the same principle (Judgment of January 21, 1992, 91Da7774, 7781 (Korean Supreme Court)), the plaintiff (buyer) and the defendant (seller) inserted an arbitration clause in their purchase and sale agreement. When the plaintiff refused to pay the defendant because of a defect found in the product, the defendant excluded the plaintiff from a bid process it was holding and the plaintiff requested for an arbitral award. The Supreme Court ruled that such dispute was closely related to the performance of the original contract and thus was under the scope of arbitration agreement, because whether it was legitimate for the defendant to exclude the plaintiff from the bid would depend on whether the plaintiff breached the original contract by not paying the defendant.

The so-called optional arbitration clause

Types of optional arbitration clauses

An optional arbitration clause is an agreement between the parties to resort to either arbitration or litigation in case a dispute shall arise. Optional arbitration clauses are generally understood to include a parallel optional clause, where the parties may choose from arbitration or litigation and one of the two methods chosen by an aggrieved party could be selected as a means of dispute resolution, provided the other party agrees thereto, and a step-by-step optional arbitration (or hybrid) clause where a priority shall be given to one of the two methods of resolution and the remaining one shall be requested only after the process regarding the first method has finished and one of the parties is dissatisfied.

In the case of a step-by-step optional arbitration clause, there may be three types of agreement in terms of the resolution methods the parties may choose from: a clause where the parties agree to resolve disputes by mutual consultation or mediation before resorting to

arbitration; a clause where the parties agree to arbitrate first, and then bring an action before a court in case one or both of the parties do not agree with the arbitral award; a clause where the parties agree to litigate first, and then arbitrate in case one or both of the parties do not agree with the court decision.

The foregoing situations require the court to examine if the parties have agreed or intended to clearly utilize the arbitration process to the exclusion of litigation proceedings before a court as their dispute resolution mechanism. Such issue is more obvious in parallel optional clauses where the intention of the parties is more likely to be vague.

Decisions by Korean courts in specific cases

The Supreme Court of Korea has not declared all optional arbitration clauses to be void. It applied the same general standard of deciding the validity of ordinary arbitration agreements to optional arbitration clauses. So far, it seems that one of the most important factors considered by the Supreme Court in determining the validity of an optional arbitration clause is the stage of the arbitration proceedings at the time that the case is brought before the court, in order to discern if the parties have manifested their clear intention to refer the dispute to arbitration instead of litigation. By ruling that 'an optional arbitration clause is valid only when one of the parties have chosen to request for an arbitral award, instead of a judgment by a court, and the other party has not objected to such request,' (Judgment of May 27, 2005, 2005Na12452 (Korean Supreme Court)) the Supreme Court shows the position that an optional arbitration clause is valid if the arbitration has proceeded considerably upon request by a party and the other party has not objected, either by silence or active reaction. The Supreme Court applied the same standard to both parallel optional clauses (Judgment of August 22, 2003, 2003Da318 (Korean Supreme Court)) and preliminary optional clauses (Judgment of November 11, 2004, 2004Da42166 (Korean Supreme Court)).

Summary of the decisions by Korean courts regarding an optional arbitration clause

The foregoing principle of the Korean Supreme Court regarding optional arbitration clauses can be applied to each type of optional arbitration clauses as follows.

In case of a parallel optional clause:

- If the case is brought before a court by one of the parties after or during the arbitration proceedings, the court will determine the validity of the optional arbitration clause and the arbitration proceeding which was initiated before the litigation depending on the stage of arbitration proceeding at the time of litigation.
- If the case is brought before an arbitral tribunal by one of the parties after or during the trial by a court, the tribunal is likely to determine the validity of the optional arbitration and the litigation process that began before arbitration in the same way that the court deals with the matter, as elaborated above.

In case of a step-by-step optional clause:

- A clause where the parties agree to resolve disputes by mutual consultation or mediation before resorting to arbitration will be determined to be valid at all times, because such clause shows clear intention of the parties as to the priority given to the listed resolution methods.
- The validity of a clause where the parties agree to arbitrate first, and then litigate in case one or both of the parties do not agree with the arbitral award will be decided in the same way as parallel optional clauses, as elaborated above.

- The validity of a clause where the parties agree to litigate first, and then arbitrate in case one or both of the parties do not agree with the court decision will be decided in the same way as parallel optional clauses, as elaborated above.

Conclusion

The regulatory regime in Korea relating to international and domestic arbitration is up to par with the system currently applicable in G20 countries. At the same time the judiciary in Korea has been very receptive to and in favour of arbitration as compared to litigation. As such the judiciary in Korea has been considering various factors, such as structure and specific wordings of arbitration agreements, transaction history between the parties, circumstances leading to specific dispute, reaction or inaction of the counterparty and the stage of the progress of the dispute resolution method, when a challenge or contention to the arbitration agreement is presented in an effort to search for existence, nonexistence, retraction, cancellation of the manifestation of the parties' clear and unequivocal manifestation of the intention to refer certain disputes to the arbitration.

We expect that the above trend that has been exhibited by the judiciary in Korea will continue and be augmented in the future. Nevertheless we would like to emphasise again the importance of drafting an arbitration agreement, wherein the parties' intention to refer to the arbitration is clearly expressed. This is the only method for the parties to save time and effort in obtaining the judiciary's subsequent confirmation or invalidation of the arbitration agreement.

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International arbitration continues to grow in Singapore. In a Parliamentary speech in April 2012, Singapore's Minister of Law, Mr K. Shanmugam, stated that Singapore's position 'as the leading centre for arbitration in Asia is now cemented'. In June 2012, Singapore will host the 21st Congress of the International Council for Commercial Arbitration and this underlines Singapore's status as one of the leading international arbitration venues in the world. In this article, we will review the significant developments in Singapore from September 2011 to April 2012.

International Arbitration (Amendment) Bill 2012

A key development was the tabling of the International Arbitration (Amendment) Bill (IA Amendment Bill) in Parliament. The IA Amendment Bill followed a public consultation that was held by the Ministry of Law in 2011. Once passed, the IA Amendment Bill will make various amendments to the International Arbitration Act (IAA) aimed at enhancing Singapore's status as an arbitration hub. The IA Amendment Bill primarily amends the IAA in four areas:

- by broadening the definition in the IAA for arbitration agreements;
- by allowing the Singapore courts to review a ruling by an arbitration tribunal that it does not have jurisdiction to hear a dispute (negative jurisdictional rulings);
- by clarifying the scope of arbitral tribunals' powers to award interest in arbitral proceedings; and
- by providing legislative support for the 'emergency arbitrator' procedure by according emergency arbitrators appointed under any arbitration rules the same legal status and powers as that of a conventionally-constituted arbitral tribunal.

Broadening of the definition of arbitration agreements

The IAA currently only recognises arbitration agreements that are made in writing. While most respondents to the public consultation supported the adoption of a more relaxed requirement, some gave feedback that the current written requirement did not accord squarely with commercial reality as arbitration agreements are often concluded orally and put into writing later.

Accordingly, the definition of an 'arbitration agreement' in the IAA will be amended to extend the IAA's application to arbitration agreements concluded by any means (orally, by conduct or otherwise), as long as their content is recorded in any form. For instance, an arbitration agreement made orally, but subsequently documented through an audio recording, will fall within the scope of the IAA. This approach is line with option I of article 7 of the 2006 Amendments to the 1985 UNCITRAL Model Law on International Commercial Arbitration.

Review of negative jurisdictional rulings

At present, the IAA does not permit a Singapore court to review negative jurisdictional rulings made by arbitral tribunals but only the review of positive jurisdictional rulings made by arbitral tribunals pursuant to article 16(3) of the Model Law. This inconsistent treatment of negative and positive jurisdictional rulings has been criticised by some practitioners and academics, who argue that inequity is just as likely to arise from a negative jurisdictional ruling that is erroneously made, as from an erroneous positive jurisdictional ruling.

The majority of respondents to the public consultation supported the proposed amendment to allow review of negative jurisdictional rulings. However, a few respondents felt that the review of negative jurisdictional rulings should not be permitted as it would potentially deprive a party of its right of access to the court. In support of its decision to retain the amendment, the Ministry of Law referred to the fact that the Singapore Academy of Law's Law Reform Committee's Report on the Right to Judicial Review of Negative Jurisdictional Rulings (January 2011) highlighted that to permit review of positive jurisdictional rulings but not negative jurisdictional rulings is both 'unfair and inconsistent'. One could also question if the right of access to the court is indeed denied in cases where the court overrules the tribunal and finds that the tribunal has jurisdiction - in such cases, the court itself has decided that the parties should be held bound by their arbitration agreement and have their dispute settled by arbitration and not the court. In the second reading of the IAA Amendment Bill, the minister of law, explained that the 'absence of recourse against [negative jurisdictional] rulings may defeat the parties' intention to arbitrate'.

The IA Amendment Bill seeks to rectify this perceived inconsistency by amending the IAA to allow parties to have recourse to Singapore courts in respect of both positive and negative jurisdictional rulings at any stage of the arbitral proceedings. Whilst this amendment does depart from the current position under the Model Law, it has been noted that other arbitration hubs such as France, England and Switzerland have adopted a similar approach. The IAA Amendment Bill will also empower the tribunal and the court to award costs against any party for the arbitral and/or court proceedings, when it rules that the tribunal has no jurisdiction.

Arbitral Tribunal's power to award interest

The IAA currently does not clearly define the scope of arbitral tribunals' powers to award interest and accordingly, the IA Amendment Bill aims to clarify the scope of these powers. In particular, the amendments will expressly prescribe that an arbitral tribunal has the power to grant simple or compound interest on monies claimed in arbitrations, and on orders for one party to pay the other party's legal costs. Full discretion is therefore given to an arbitral tribunal to award interest.

Emergency arbitrator

The SIAC had in 2010 introduced an 'emergency arbitrator' procedure that provides for the appointment of an interim arbitrator pending the constitution of the actual tribunal for situations where parties to a dispute require urgent relief before an arbitral tribunal is constituted. The IA Amendment Bill amends the definitions of 'arbitral tribunal' and 'arbitral award' to clarify the status of orders made by such 'emergency arbitrators'. The amendments accord emergency arbitrators with the same legal status and powers as that of any other arbitral tribunal and ensure that orders made by such emergency arbitrators are enforceable under Singapore's IAA regime.

A few respondents in the public consultation highlighted that amending the definition of 'arbitral tribunal' in the IAA to include emergency arbitrators may have the unintended

consequence of allowing parties to appeal to the High Court against the ruling of an emergency arbitrator as to his jurisdiction, which would unnecessarily protract the emergency arbitrator proceedings and defeat the purpose of the emergency arbitrator procedure. However, in accordance with treating emergency arbitrators on the same footing as other tribunals, it was felt that any jurisdictional ruling made by an emergency arbitrator should rightly be appealable. New provisions have however been introduced in the IA Amendment Bill to clarify that any appeal to the High Court or Court of Appeal on a jurisdictional ruling (including one made by an emergency arbitrator) shall not operate as a stay of proceedings.

Arbitration Dialogue 2011

Various arbitration practitioners and academics had voiced their views on the proposed changes to the IAA at the Ministry of Law's Arbitration Dialogue 2011 held at Maxwell Chambers on 1 November 2011. Panellists and participants were generally supportive of the proposed amendments and felt that they would be beneficial to and further modernise Singapore's legal framework for arbitration, although a few concerns were raised. There was particular interest in the new provisions of supporting the appointment of emergency arbitrators, and allowing parties to appeal to court against a tribunal's finding that it has no jurisdiction to hear a dispute.

Representatives from the SIAC, Singapore Chamber of Maritime Association (SCMA), Maxwell Chambers, Singapore Institute of Arbitrators (SiArb) and the Economic Development Board (EDB) also gave positive updates on Singapore's growing arbitration landscape. Justice Quentin Loh of the Singapore High Court spoke about the courts' role in developing a greater spirit of internationalism in arbitration cases by considering foreign and international sources of law, particularly civil law concepts. Participants also discussed how Singapore's alternative dispute resolution (ADR) system could be strengthened by developing other forms of ADR, such as mediation, in tandem with arbitration. Several potential areas for reform and development were also discussed, including the issue of contingency fees. In his opening speech, the minister of law outlined the dynamic approach in Singapore in resolving issues legislatively - '[when] we see a problem, and where it can be solved legislatively, we are in a position to do that within three to six months'.

The Arbitration Dialogue 2011 was another milestone in ongoing efforts to engage key stakeholders within the arbitration community and to provide a platform for the industry to network and contribute their views to further the development of Singapore as a legal services and international dispute resolution hub.

Foreign Limitation Periods Bill 2012

In conjunction with the tabling of the IA Amendment Bill, the Ministry of Law also tabled a Foreign Limitation Periods Bill (FLP Bill). The aim of this legislation is to clarify the applicable rules of limitation for not only arbitral, but also court proceedings. Specifically, once passed, the FLP Bill will clarify the issue of which country's limitation laws apply to disputes that are litigated in Singapore (either in court or through arbitration), but which are governed by the law of another jurisdiction. The provisions of the FLP Bill make it clear that the applicable limitation period will be the rules of the law that govern the dispute.

Growth of international arbitration in Singapore

In 2011, the Singapore International Arbitration Centre (SIAC) consolidated its position as a preferred arbitration centre in Asia, handling 188 new cases. This is largely in line with the number of cases received in 2010, and shows that SIAC is maintaining the heights reached

by the exponential growth from 2009 onwards, which marked the start of a new phase of SIAC's development. For cases filed in 2011, the total sum in dispute amounted to S$1.32 billion. The average claim amount was S$7.03 million, an increase on S$6.82 million for 2010. The highest claim amount for 2011 was S$304 million, contrasting with the highest claim of S$261 million in 2010.1

In last year's chapter, we commented on the changes that SIAC introduced in the 2010 changes to its Arbitration Rules, ie, 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. 2011 saw the first batch of expedited procedure cases proceeding to hearings and awards in the 6 month time limit prescribed by Rule 5.1. This process has proved particularly popular and SIAC reports that 8 per cent of its administered cases filed this year were conducted pursuant to the expedited procedure, involving parties from 14 countries across Asia, Europe, the Middle East and the USA.

Another innovation that parties have found useful is that of the emergency arbitrator. In 2011, there were two applications for an emergency arbitrator pursuant to Rule 26.2 involving parties from Asia, Europe and the USA. The SIAC highlighted the usefulness of the procedure by way of reference to an application it received a few days before Chinese New Year. The application related to a cargo of coal sitting in a Chinese port and which was rapidly deteriorating as the long holiday period loomed. The applicant contacted SIAC in the morning indicating their intention to file the application, filed their papers at 2pm and by 5pm an arbitrator of neutral nationality (a very experienced shipping lawyer) was appointed. The arbitrator gave his preliminary directions that same evening, a hearing was scheduled for the next day, and an order made.2

The SIAC is also leading the way in the area of technology by the introduction of the SIAC iPhone, iPad and BlackBerry applications, which offer users a very convenient way to consult the SIAC 2010 Rules and the IAA on the go. They also allow users to calculate the estimated costs of a SIAC arbitration and provide access to the CVs of the SIAC Panel of Arbitrators.

Case law

While there have been no new significant case law developments directly involving international arbitration proceedings before the Singapore courts since the publication of our last chapter, pending proceedings arising directly from a complex international arbitration played a key role in a recent application to the Singapore High Court made pursuant to section 15 of the Legal Profession Act. Our firm acted for an English Queen's Counsel who sought to be admitted on an ad hoc basis to appear in the Singapore courts for the purpose of representing the claimants in setting aside proceedings that were taken out by one of the unsuccessful respondents in a SIAC arbitration. The High Court allowed the application and this decision was recently upheld by the Singapore Court of Appeal.

Re Joseph David QC [2011] SGHC 262 was the first application before the Singapore courts where the lead counsel in underlying arbitration proceedings was applying for ad hoc admission to appear in a Singapore court on matters immediately arising from the same arbitration proceedings. The respondent to this ad hoc admission application was the second respondent in the arbitration proceedings (the applicant under the setting aside proceedings) and vigorously objected to the ad hoc admission of David Joseph QC (the

applicant) on the ground that the proceedings were not of sufficient difficulty and complexity to warrant admission of a Queen's Counsel.

Justice of Appeal VK Rajah, sitting as a High Court judge, disagreed with the respondent and held that there were a number of factors that favoured the admission of the applicant. Rajah JA noted that there were at least three complex and difficult issues of law requiring determination in the setting aside proceedings, namely:

- whether a party was entitled to resist enforcement of an arbitration award in Singapore, when it did not take any steps to set aside the same within the statutorily prescribed period;
- whether a party had a right to revive its challenge based on the alleged lack of an arbitration agreement; and
- whether the enforcement of an award in Singapore was affected by a ruling in another country over the enforcement of the same award.

Rajah JA held that the issues which were identified were sufficiently complex and which justified the admission of a Queen's Counsel and gave weight to the fact that the applicant was the claimants' lead counsel throughout the lengthy and complex arbitration and had intimate knowledge of what had transpired. Another key factor in the High Court's decision was that both the Singapore Attorney General and the Law Society of Singapore, as objective non-parties to the proceedings, supported the application. The Attorney General stated that it saw no reason from the point of view of the public interest to object to the application. In fact, the Attorney General submitted that admitting the applicant for this purpose would be consistent with the many amendments that had been made to the laws of Singapore in order to enhance the attractiveness of Singapore as a venue for international commercial arbitrations.

Rajah JA held that in view of the very strong emphasis on developing international arbitration law in Singapore, it would be very much in line with the wider public interests to admit the applicant in relation to the pending setting aside proceedings. However, Rajah JA did caution that the grant of this application did not necessarily mean that in future, every application involving a Queen's Counsel for admission to argue in court proceedings related to arbitration proceedings in which the Queen's Counsel had been the lead counsel would similarly be favourably viewed. Each application had to be assessed based on its own merits. It should be noted that Re Joseph David QC is in fact the last ad hoc admission application made under the regime provided under section 15 of the Legal Profession Act. This section was amended with effect from 1 April 2012 to widen the scope for ad hoc admission of Queen's Counsel (and its equivalent) from overseas jurisdictions to appear in the courts in Singapore. The condition for the matter to contain sufficiently difficult and complex issues has now been removed and in its place, the following conditions apply (as set out in a notification published in the Government Gazette and issued by the chief justice after consulting the judges of the Supreme Court):

- the nature of the factual and legal issues involved in the case;
- the necessity for the services of a foreign senior counsel;
- the availability of any Senior Counsel or other advocate and solicitor with appropriate experience; and
-

whether, having regard to the circumstances of the case, it is reasonable to admit a foreign senior counsel for the purpose of the case.

This change was primarily brought about to improve the pool of specialist advocates in commercial and financial disputes. It would not be surprising if in the appropriate cases, an ad hoc admission application from a Queen's Counsel and their equivalent would be permitted for appearance in the Singapore courts in court proceedings concerning international arbitration matters.

Notes

1Statistics from the SIAC CEO's Annual Report 2011

2SIAC CEO's Annual Report 2011

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Australia

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Summary

Australia has a long-standing tradition of embracing arbitration as a means of alternative dispute resolution. While on a domestic level this is reflected by court-annexed and compulsory arbitration 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.

Arbitration in Australia has experienced significant growth in recent years. This can be attributed to the growing familiarity on behalf of legal practitioners and their clients of the importance and advantages of international arbitration. While the increasing use of arbitration, in conjunction with other forms of ADR, has not had a dramatic effect in terms of reducing litigation, industry attitudes suggest that arbitration is increasingly being relied on as the preferred dispute resolution mechanism.

In 2011, changes to the Australian arbitration landscape both internationally and domestically have helped to develop Australia as an attractive hub for international arbitration and put Australia at the forefront of international arbitration practice. Amendments to the International Arbitration Act 1974 (Cth) (IAA) and the introduction of the new Commercial Arbitration Acts (collectively referred to as the CAAs) represents a new dawn for arbitration in Australia. Coupled with the pro-arbitration approach taken by Australian courts, Australia is well positioned to keep pace with international standards, users' expectations and ready to grasp growing opportunities that arbitration has to offer.

Arbitration law reforms in Australia

In July 2010 the International Arbitration Amendment Act 2010 (Cth) (Amendment Act) introduced some major amendments to Australia's international arbitration legislation. The intention behind the revision of the IAA was to ensure that the IAA 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 of the 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 arising from the infamous decision of 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 the ICC Rules of Arbitration 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 (ie, the IAA). The transition to arbitration under the Model Law also means that practitioners of domestic arbitration in Australia will be able to transfer their procedural skills to the group of over sixty foreign jurisdictions where the Model Law is in force. For the parties involved in arbitration, these amendments will increase the efficiency of the arbitral process and translate into greater cost and time savings. At the time of publishing, the current progress of the CAAs through the Australian states and territories is detailed below:

In operation	Awaiting commencement	Bill in parliament	No action
New South Wales Commercial Arbitration Act (NSW) 2010	Northern Territory Commercial Arbitration (National Uniform Legislation) Act (NT) 2011	Western Australia Commercial Arbitration Bill (WA) 2011	Australian Capital Territory Yet to introduce a Bill into parliament
Victoria Commercial Arbitration Act (Vic) 2011	Tasmania Commercial Arbitration (Consequential Amendments) Act (Tas) 2011	Queensland Commercial Arbitration Bill (Qld) 2011	
South Australia Commercial Arbitration Act (SA) 2011			

Unlike the IAA, the CAAs includes confidentiality provisions, which apply unless the parties specifically opt-out and allow for an appeal from the arbitration award if certain pre-conditions are met. Another significant change under the CAAs 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 through the enactment of the Civil Dispute Resolution Act 2011 (Cth). The purpose of the Act 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 Act provides a non-exhaustive list of examples of 'genuine steps' which includes participation in arbitration, mediation or direct negotiations. The Act 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 the 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 follow 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 ACICA as the sole default appointing authority competent to perform the functions under article 11(3) and 11(4) of the Model Law which 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 which 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.
AIDC

More 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, Australian Maritime and Transport Arbitration Commission (AMTAC) and the Australian Commercial Disputes Centre (ACDC). The AIDC is a one-stop-shop offering full ADR services and working to ensure ADR processes deliver benefits of efficiency, certainty, expediency, enforceability and commercial privacy. The AIDC is available for ACICA, PCA, ICC, ICDR, LCIA, CIETAC, HKIAC, SIAC, AAA or any other arbitrations, mediations or other processes. In addition to state-of-the-art hearing facilities, the AIDC also provides all the necessary business support services including case management and trust account administration provided by skilled and professional staff.

In April 2007, 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, Australia is in a position 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. The facilitative role of AMTAC complements and is complemented by the role of the Australian courts in providing sure, reliable and impartial means to resolve disputes that arise in international trade.

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 of each state or territory where the arbitration takes place. Following amendments made in 1984 and 1993, the Commercial Arbitration Acts of the states and territories are largely uniform and are commonly referred to as the 'Uniform

Acts'. As mentioned above, the Commercial Arbitration Acts are currently undergoing significant reforms. With most states and territories having passed or in the course of passing the new legislation, the CAAs will ensure that Australia has a relatively consistent domestic and international arbitration regime based on the Model Law.

In the following paragraphs, any reference to the 'Uniform Acts' is therefore a reference to the domestic arbitration regime currently still in operation in Western Australia, Queensland and the Australian Capital Territory, all of which are yet to pass the new legislation. Reference to the newly enacted Commercial Arbitration Acts in all other states and territories will be referred to as the '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 '[a]n 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 CAAs requires an arbitration agreement to be in writing. However, in contrast to the Uniform Acts, the CAAs adopts the more expansive definition contained in article 7 of the Model Law. Additionally, the CAAs 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.

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), (formerly 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 CAAs, 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.

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 article 10 of the Model Law provide for a three-member tribunal, to be appointed. The appointment process for arbitrators will generally be provided in the institutional arbitration rules, or within the arbitration agreement itself. For all other circumstances, article 11 of the Model Law and section 8 of the 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 need 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).

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 section 12 of the CAAs, 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. This replaces the previous test, which required only a 'reasonable apprehension of bias' to be established.

Power Of Arbitrator To Act As Mediator, Conciliator Or Other Non-arbitral Intermediary

Like the Uniform Acts, the CAAs 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 CAAs, 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.

Liability Of Arbitrators

Both the Uniform Acts, at section 51, the CAAs, 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 Art 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 is the CAAs and the Uniform Acts operate domestically in Western Australia, Queensland and the Australian Capital Territory.

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 under 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 CAAs 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.

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 CAAs contains detailed provisions dealing with interim measures in Part 4A. The added advantage of the CAAs 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 CAAs make clear that it is not incompatible with an arbitration agreement for a party to request an interim measure of protection from a court.

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 which 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 CAAs 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).

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 CAAs 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 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.

As the Uniform Acts contain no confidentiality provisions, the common law position will apply to domestic arbitrations seated in states and territories that have not yet enacted the CAAs. In contrast, the CAAs 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 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 Model Law 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, 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.

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 Model Law 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, 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), on the basis that he is 'unable to perform his function or for any other reason fails to act without undue delay'.

Under article 29 of the Model Law, any decision of the arbitral tribunal shall be made by a majority of its members. In contrast, the Uniform Acts provides that the decision of a

presiding arbitrator shall prevail if no majority can be reached (section 15). The Model Law allows a similar power of the presiding arbitrator, though only with regard to procedural matters (article 29 of the Model Law).

Recourse against award

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 essentially requires 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 Westport Insurance Corp v Gordian Runoff Ltd [2011] HCA 37 (Westport), the High Court of Australia reinterpreted the test of 'manifest error of law on the face of the award' as required under the Uniform Acts and held that all that is required is that the error appear on the face of the award and the error be apparent to the understanding of the reader. The majority judgment held that 'An error of law either exists or does not exist; there is no twilight zone between the two possibilities' and disagreed that 'answers given by arbitrators upon difficult questions of law, which had been open to competing arguments, did not qualify as errors of law'. This represents a radical departure from the previous formulation under the Uniform Acts.

The judgment in Westport also considered the standard of reasons required from arbitral tribunals, confirming that an arbitrator's failure to provide adequate reasons may itself constitute an error of law and give rise to an award being appealed. 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 CAAs, 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 under the CAAs, 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 CAAs 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 CAAs or section 33 of the Uniform Acts for domestic awards, applies.

Under the 2010 amendments to the IAA, parliament neglected to confer any court with such an express power to enforce awards the enforcement of international arbitral awards made in Australia, referring only to a 'competent court' being required. This position was recently clarified in TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2012] FCA 21, where the Federal Court of Australia held that it has jurisdiction to enforce international arbitral awards made in Australia.

Recently, the Federal Court decision in Uganda Telecom Pty Ltd v Hi Tech Telecom Pty Ltd [2011] FCA 131 reinforced the finality of arbitral awards and Australia's pro-enforcement policy by holding that there is no general discretion to refuse enforcement; and the public policy ground for refusing enforcement under the Act should be interpreted narrowly and should not give rise to any sort of residual discretion.

Investor state arbitration

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 20 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 ASEAN-Australia-New Zealand FTA which came into effect in 2010. 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. While the lack of substantive safeguards may deter foreign investors from investing in Australia, the government has signalled that it will continue to support the principle of national treatment. This will ensure that foreign and domestic businesses are treated equally under the law and are not precluded from obtaining protections for investments in Australia.

CLAYTON UTZ

Pakistan

Mansoor Hassan Khan

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Domestic arbitral proceedings

The Arbitration Act, 1940 (Arbitration Act) governs and regulates the arbitration proceedings conducted in Pakistan and the enforcement of the domestic arbitral awards.

Subject to certain provisions of the Arbitration Act, the parties are free to adopt procedures of their choice for the conduct of arbitration proceedings. There are no notable national arbitral institutions, hence there are no rules relating to the conduct of any domestic institutional arbitrations. The Pakistani High Courts have formulated certain rules, mainly in the context of the Arbitration Act.

If the parties to an arbitration agreement cannot agree upon the appointment of an arbitrator within the prescribed time limit, either of them may approach a civil court which will then make the necessary appointment. Similarly, if an arbitrator or umpire fails to proceed with arbitration after a request by either party, a new appointment may be made with the intervention of the court. At the request of either party, a court may remove an arbitrator who unreasonably delays the arbitral process. The court may also remove an arbitrator who has committed misconduct (personal or relating to the proceedings). In such cases the court has the authority to fill in such vacancy.

An arbitrator may refer questions of law, or the draft award, to the court. The tribunal is not bound by the court's advice in relation to questions of law, but is bound by the court's review of the draft award. The parties may, in their arbitration agreement, exclude the right of the tribunal to refer the draft award to the court for its review. The court may, upon request of either party, modify or review an award where it appears that a part of the award is upon a matter not referred to arbitration, or where the award is imperfect in form or contains an obvious error or mistake. The court may itself remit an award where the award has left undetermined any matters that were referred to arbitration, or where it has determined any matters not referred to arbitration, or where the award is so indefinite as to be incapable of execution. The court may also remit an award that does not give reasons in sufficient details.

Under the Arbitration Act, the court will, on application of the arbitrator, summon the parties and witnesses to appear before the arbitrator. If the parties or witnesses fail to appear before the arbitrator and produce evidence, the arbitrator may make an award on the basis of whatever evidence is before him or her. The recalcitrant party will be subject to the same sanctions as are available in court proceedings, including the issue of a warrant of arrest requiring the party to appear and produce documents. The courts may order the preservation, interim custody or sale of any goods that form part of the subject matter of the arbitration. The courts may also order the detention, preservation or inspection of any property or thing that forms part of the subject matter of the arbitration.

The award given by an arbitrator or umpire is final and cannot be appealed on a point of law. However, appeals are permissible where there has been any procedural irregularity.

The Arbitration Act provides that if the court sees no cause to remit or set aside the award, after the expiration of the time allowed for either party to apply for the arbitral award to be set aside, the court will proceed to pronounce judgment and issue a decree. Such a decree may only be appealed if it is in excess of, or not in accordance with, the arbitral award. The decree passed by the court may be executed by a party in whose favour it is passed by filing an execution application before a civil court of competent jurisdiction in the manner laid down in the Code of Civil Procedure, 1908.

Where a party to an arbitration agreement governed by the Arbitration Act commences legal proceedings against another party to such arbitration agreement in respect of any matter agreed to be referred to arbitration, the Arbitration Act entitles such other party to apply to the judicial authority before which the proceedings are pending to stay the legal proceedings. However, such application has to be made before filing a reply or taking any other steps in such legal proceedings. The judicial authority is not bound to order stay of legal proceedings in every case and may proceed with the legal proceedings notwithstanding the arbitration agreement. In such a case, further arbitration proceedings will become invalid if a prior notice of the commencement of legal proceedings was given to the arbitrator.

The New York Convention regime

Pakistan is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention). Pakistan signed the New York Convention on 30 December 1958 and ratified it with significant delay on 14 July 2005.

Until recently, the New York Convention was being implemented in the country through successive ad hoc presidential decrees, called Ordinances. The last of such Ordinances, ie, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2010, was promulgated on 20 April 2010, which expired on 17 August 2010. On 15 July 2011, a permanent legislation, ie, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (the NYC Act) was enacted by the Parliament to fully implement in Pakistan the New York Convention. The NYC Act applies to arbitration agreements made at any time, and to foreign arbitral awards made on or after 14 July 2005. It obliges a local court seized of a matter covered under an international arbitration agreement to stay the judicial proceedings pending before it upon an application made by a party to such agreement and direct the parties to refer the matter to arbitration.

A High Court has exclusive jurisdiction to deal with all matters related to the NYC Act. A High Court is the second highest court of the country and the grant of exclusive jurisdiction to such a court reflects Pakistan's commitment to the regime established pursuant to the New York Convention. Section 6 of the NYC Act obliges a High Court, upon an application filed by a party in whose favour a foreign arbitral award is issued, to recognise and enforce the foreign arbitral award in Pakistan in the same manner as a judgment or an order of a Pakistani court. A foreign arbitral award enforceable under the NYC Act is treated as binding for all purposes on persons as between whom it was made. The court is entitled to refuse recognition and enforcement of a foreign arbitral award only on grounds mentioned in section 7 of the NYC Act, which are the same as laid down in article 5 of the New York Convention.

Prior to the enactment of legislation that enforced the New York Convention in Pakistan, the enforcement of international arbitration agreements was within a local court's discretion. The case law which had developed in Pakistan on this issue generally favoured enforcement of international arbitration agreements, however, in some instances the local courts had refused to enforce international arbitration agreements. Local courts generally considered

the following factors when deciding whether to enforce international arbitration clauses of international agreements: place where the disputed transaction was to be carried out; place where relevant evidence was readily available; balance of convenience between the parties; and financial burden on the parties if they were referred to international arbitration.

The above position has significantly changed after the enactment of the NYC Act. The NYC Act requires a local court seized of a matter covered under an arbitration clause to which the New York Convention applies to stay the local judicial proceedings and direct the parties to refer the matter to arbitration. The only ground upon which the local court is entitled to refuse stay of legal proceedings is where the arbitration agreement is null and void, inoperative or incapable of being performed. Clearly, the discretion which was allowed to the local courts in the old regime has now been severely curtailed.

The New York Convention has been enforced in Pakistan since 2005. The NYC Act provides an expeditious procedure for the enforcement of foreign arbitral awards covered under the New York Convention. As discussed above, local High Courts have exclusive jurisdiction in relation to all matters arising out of the New York Convention. Pursuant to the NYC Act these courts are not required to strictly follow the archaic and cumbersome procedures laid down in the civil procedure code in relation to the proceedings instituted under the NYC Act.

Despite the fact that the procedure for the enforcement of foreign arbitral awards has been streamlined in the NYC Act, local courts seem to be lagging behind in its enforcement. There have been instances in which local courts have applied certain stringent requirements of the civil procedure code in enforcement proceedings, for instance the framing of issues and calling the parties to produce their oral and documentary evidence. Enforcement proceedings which, under the NYC Act, are supposed to be summary in nature have remained pending for several years in local courts. There appear to be capacity issues among local courts, which frequently treat enforcement proceedings in the same manner as they treat ordinary civil litigation.

ICSID regime

Pakistan is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (the Washington Convention). Pakistan had signed the Washington Convention on 6 July 1965 and ratified it on 15 September 1966. Contrary to the requirements of Pakistani law, which requires local legislation for the enforcement of an international convention, no legislation was enacted until the promulgation of the Arbitration (International Investment Disputes) Ordinance, 2007 to incorporate the Washington Convention into the municipal laws of Pakistan.

Like the New York Convention, the Washington Convention too was initially implemented in Pakistan through successive ad hoc Ordinances until 28 April 2011, when a permanent legislation to implement the Washington Convention was passed by the Parliament called the Arbitration (International Investment Disputes) Act, 2011 (the AIID Act).

Section 3 of the AIID Act entitles a person seeking recognition and enforcement of an arbitral award issued by the International Centre for Settlement of Investment Disputes (ICSID) to have the arbitral award registered in a local High Court subject to proof of any matters that may be prescribed.

An arbitral award registered under section 3 of the AIID Act is treated as a judgment of a local High Court to be executed by the High Court in the same manner as its own judgments.

However, enforcement of an award against the government may be refused by the court on the grounds on which a local court judgment may not be enforced against it.

The AIID Act specifically debars the local courts from applying the provisions of the Arbitration Act to proceedings instituted under the Washington Convention. There is, however, no provision in the AIID Act prohibiting local courts from taking cognisance of matters and disputes which are covered under the Washington Convention. Similarly, the AIID Act does not contain any provision obliging the local courts to stay the legal proceedings instituted before them in respect of matters covered under the Washington Convention.

The AIID Act empowers the federal government to make rules regarding registration of arbitral awards issued pursuant to the Washington Convention and the standards of proof thereunder. No rules have so far been framed by the federal government in this regard. Needless to add that ambiguity surrounds this whole issue as the federal government has so far not shown any inclination of issuing any such rules.

The AIID Act does not contain any provisions regarding judicial assistance by the local courts for evidence gathering during arbitration proceedings conducted by ICSID. Similarly, there is no provision in the AIID Act empowering the local courts to order the preservation, interim custody or sale of any goods that form part of the subject matter of an ICSID arbitration or to order the detention, preservation or inspection of any property or thing that forms part of the subject matter of an ICSID arbitration.

The case law developed earlier on dealing with international arbitration agreements and enforcement in Pakistan of foreign arbitral awards seems to have become redundant on account of the new legal regime now in place in the country. No worthwhile case law has so far developed under the AIID Act, this being a brand new legislation.

Other foreign arbitral awards

Certain foreign arbitral awards may be enforceable in Pakistan under the Arbitration (Protocol and Convention) Act, 1937. A foreign arbitral award which is not covered under any of the aforementioned legalisations may still be enforceable in Pakistan through ordinary civil courts which can treat a foreign arbitral award as merely a cause of action.

Interim relief

In important issue is whether or not a recourse may be made to the provisions of section 41 of the Arbitration Act for obtaining an injunction in aid of actual or intended arbitration proceedings before an ICSID or an ICC tribunal? Section 41 of the Arbitration Act grants certain specific powers to a civil court in relation to arbitration proceedings. These powers include matters such as preservation, interim custody, sale of any goods which are subject matter of the reference, interim injunction, appointment of a receiver, etc.

A party to arbitration proceedings may approach the competent court for the grant of an interim injunction under section 41 of the Arbitration Act against any other party to such arbitration proceedings. An important issue which largely remains unanswered in Pakistan is whether or not a local court may be approached under section 41 of the Arbitration Act for the grant of an interim injunction in aid of arbitration proceedings being conducted outside of Pakistan.

Section 47 of the Arbitration Act states that the provisions of the Arbitration Act apply to all arbitrations and to all proceedings thereunder save in so far as is otherwise provided by any law for the time being in force. Section 7 of the AIID Act states that the provisions of the Arbitration Act shall not apply to proceedings pending pursuant to the Washington

Convention. In view of this provision it appears that a recourse may not be made to section 41 of the Arbitration Act for the grant of an interim injunction in aid of arbitration proceedings pending pursuant to the ICSID Convention.

There appears to be no provision in the AIID Act that may empower a local court to issue an interim injunction in aid of arbitration proceedings before an ICSID tribunal. Furthermore, the AIID Act does not contain an express provision obligating the local courts to implement any interim decision of an ICSID tribunal issued under article 47 of the ICSID Convention regarding provisional measures to preserve the respective rights of the parties.

It is important to note that no provision of the NYC Act specifically ousts the applicability of the Arbitration Act to matters governed by the NYC Act. While the provisions of the Arbitration Act, to the extent of inconsistency, do not apply to matters governed by the NYC Act, it appears that the provisions of the Arbitration Act may continue to apply in so far as they are not in conflict with the NYC Act. This may include a recourse to section 41 of the Arbitration Act for the grant of an interim injunction in aid of the arbitration proceedings before an ICC or any other tribunal excluding an ICSID tribunal. No case law has so far developed to clarify this issue. Such application of the Arbitration Act to matters related to international arbitration proceedings would be unusual as the Arbitration Act was not intended to deal with matters related to foreign arbitration agreements and foreign arbitration proceedings.

It is to be further noted that this is an extremely sensitive area of Pakistani law as the Arbitration Act has a very notorious reputation of stifling arbitration proceedings. For instance, section 34 of the Arbitration Act is frequently used to stay arbitration proceedings in cases in which the parties have valid arbitration agreements. The issue of making any recourse to the Arbitration Act is fraught with difficulty as once it is admitted that there is an application of the Arbitration Act to an agreement containing a foreign arbitration clause it would then be difficult to stop the court from applying those provisions of this law to international arbitration agreements for which it is dreaded.

* The author would like to thank Saqib Majeed, an associate in the firm, for his invaluable assistance in the writing of this article

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Malaysia

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Arbitration in Malaysia has come a long way in terms of its landscape and popularity. As most arbitration-friendly jurisdictions continue to innovate and re-sculpt their rules and laws on arbitration, Malaysia has been closely monitoring and catching up with the movement. A constant search for development and progress has seen Malaysia emerge as a promising destination in terms of alternative dispute resolution, for parties and arbitrators alike.

Arbitration in Malaysia is governed by the Arbitration Act 2005 (the 2005 Act) and, to some extent, the Arbitration Act 1952 (the 1952 Act). As will be discussed in this chapter, the interplay between the 2005 Act and the 1952 Act remains, to a certain extent, interestingly at odds with their respective and differing provisions. In addition, parties are at liberty to turn to institutional support such as choosing to have their arbitrations conducted in accordance with the arbitration rules under the Kuala Lumpur Regional Centre for Arbitration (the KLRCA). This chapter will also trace and discuss the history and progress of the KLRCA in promoting arbitration in Malaysia as well as the latter as an arbitration-friendly country.
Why Malaysia?

As will become apparent as the discussion proceeds, Malaysia has been rigorously undertaking steps to develop into the preferred arbitration nation and is now fast becoming one of the key arbitration hubs in the Asia-Pacific region. The progress is further enhanced by a supportive government and arbitration-friendly courts in Malaysia, which, coupled with the aggressive marketing of the KLRCA as the preferred arbitral institution by engaging companies in Malaysia and abroad to explain the advantages of utilising the KLRCA, will see the country soar to greater heights.

Apart from the robust push by the various establishments, one of the many advantages in choosing Malaysia as an arbitral forum is the savings in costs and expenditure. Taking the KLRCA as a prime example, the KLRCA has a very transparent fee structure and its cost of conducting arbitral proceedings in the centre is only approximately 60 per cent of what it would cost in Singapore. In addition, ancillary costs and expenses such as food, accommodation and transport are significantly lower in Malaysia as well. As a whole, having arbitral proceedings conducted in Malaysia is more cost-friendly, accessible, and attainable.
Rise of arbitration: pre-19521

Prior to the formation of the Federation of Malaya on 31 January 1948 and the subsequent enactment of the 1952 Act, the Arbitration Ordinance XIII of 1809 of the Straits Settlements was British Malaya's first piece of arbitral legislation. The acceptance of the Arbitration Ordinance XIII of 1809 came as a result of the many treaty arrangements that the sultans of the Malay states had entered into with the British, thereby introducing the British legal system to the country.2 The Arbitration Ordinance XIII of 1809 was subsequently replaced in the states of Penang and Malacca by the Arbitration Ordinance 1890.3 Thereafter, in 1950, the Arbitration Ordinance 1950 replaced the Arbitration Ordinance 1890 for all the states of the

Federation of Malaya. The Arbitration Ordinance 1950 was based on the English Arbitration Act of 1889.

In 1952, British North Borneo and Sarawak adopted the English Arbitration Act of 1950 as their respective legislation. Pursuant to North Borneo and Sarawak joining the Federation of Malaysia in 1963, Malaysia adopted the prevailing arbitration laws in Sabah and Sarawak on 1 November 1972 and it became known as the Arbitration Act 1952, which was based on the English Arbitration Act 1950 and initially enacted as the Sarawak Ordinance No. 5 of 1952.4 The 1952 Act governed arbitrations in Malaysia for over half a century, contributing to a substantial pool of arbitral authorities and decisions.

Out with the old: the Malaysian Arbitration Act 1952

In 2005, the Malaysian arbitration scene underwent an interesting phase whereby the longstanding 1952 Act was repealed by the current 2005 Act, making Malaysia 'the last major jurisdiction in the common law world to embark on a wholesale revision of its arbitration law.'5 Prior to its repeal, the regime under the 1952 Act was central to the evolution and advancement of the arbitral scene in Malaysia. However, the 1952 Act was also plagued with certain shortcomings which ultimately led to its legal demise.

The discussion below on the 2005 Act will expand its scope by addressing some of the problems encountered by the judiciary when applying and interpreting the 1952 Act which have now been superseded by the provisions of the 2005 Act. Notwithstanding the issues with the 1952 Act, the discussion on the 2005 Act would also highlight the need for additional clarification in terms of certain provisions of the 2005 Act given the lack in substantial judicial interpretation of the 2005-enacted provisions as well as their 2011 amendments.

In with the new: the Malaysian Arbitration Act 2005

The 2005 Act was enacted on 30 December 2005 and came into force on 15 March 2006. The 2005 Act, which is largely modelled after the UNCITRAL Model Law and the New Zealand Arbitration Act 1969, applies to all arbitral proceedings commenced on or after 15 March 2006. The application of either the 2005 Act or the 1952 Act to arbitral proceedings commenced prior to 15 March 2006 remains, albeit to a lesser extent, in a flux as learned judges differ in their respective legal views.

To say that the 2005 Act simply repealed the 1952 Act would not be giving enough credit to the extensive and intensive exercise undertaken to not only replace the 1952 Act but also, effectively, extend improvement upon the old regime. Given that the aim of the 2005 Act is to unify and harmonise the laws governing arbitrations in Malaysia with current practices among the international players, the reception and implementation of the provisions of the 2005 Act have proven to be considerably successful.

The 2005 Act or the 1952 Act?

Prior to highlighting the improvements injected by the provisions of the 2005 Act, the coming into force of the 2005 Act has nonetheless generated certain confusions and ambiguity with regard to arbitrations in Malaysia which were commenced after 15 March 2006 but arose from contracts and agreements entered into before the said date.

This was observed in the case of Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd.6 In arriving at its decision,7 the court considered the fact that the arbitration agreement, particularly clause 63.5, which made explicit reference to the 1952 Act, granted parties rights under the 1952 Act should any dispute arise between them. The court also took into consideration the different wording used in the Bahasa Malaysia version of the 2005 Act,

which clearly states that the 2005 Act does not apply to arbitral proceedings arising out of an arbitration agreement entered into before 15 March 2006 or to arbitral proceedings commenced before 15 March 2006. Although the English version of the 2005 Act clearly states that the 2005 Act applies to all arbitral proceedings commenced on or after 15 March 2006 (without distinguishing when the arbitration agreement was entered into) and Section 117 of the Interpretation Acts 1948 and 1967 clearly provides that in the event of any conflict or discrepancy, the English text will prevail, the court felt that this was 'not a situation where there is a conflict or inconsistency between the wordings in the English text and the Bahasa Malaysia text but is a correlative by the Bahasa Malaysia text to the interpretation of the defective provision in the English text by applying the purposive approach.'8

This decision has been followed in the case of Hiap-Taih Welding & Construction Sdn Bhd v Bousted Pelita Tinjar Sdn Bhd (formerly known as Loagan Benut Plantations Sdn Bhd).9

However, before the decision of Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd was delivered, the High Court in the case of Majlis Ugama Islam Dan Adat Resam Melayu Pahang v Far East Holdings Bhd & Anor,10 in deciding which statute was applicable to a dispute arising out of an agreement entered into by the parties in 1992, held that since the arbitral proceedings had commenced on 16 October 2006, the 2005 Act and not the 1952 Act would be applicable.

Further, in the case of Total Safe Sdn Bhd v Tenaga Nasional Bhd & TNB Generation Sdn Bhd,11 a decision made after the case of Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd, the court also held that the statute applicable to a dispute arising out of an agreement dated 5 July 2002 should be the 2005 Act as the arbitral proceedings had commenced subsequent to the 2005 Act coming into force.

It is also interesting to note the decision of the court in the case of Segamat Parking Services Sdn Bhd v Majlis Daerah Segamat Utara & Anor Case.12 In this case, the arbitral proceedings, which were governed by the 1952 Act, had ended. The parties to the arbitral proceedings being dissatisfied with the arbitral award given commenced separate judicial proceedings against each other. One of the parties had referred certain questions of law to the court under the 2005 Act while the other party had challenged the arbitral award pursuant to the provisions under the 1952 Act. The High Court ruled that the applicable statute was the 2005 Act as all proceedings (arbitration and court) relating to the final arbitral award were instituted after the coming into force of the 2005 Act.

As to the issue in Segamat Parking Services Sdn Bhd v Majlis Daerah Segamat Utara & Anor Case, the Arbitration (Amendment) Act 2011, with the insertion of section 51(4), had clearly taken notice. Section 51(4) of the 2005 Act now provides for the 2005 Act to apply to any court proceedings, relating to arbitration, which commenced after the commencement of the 2005 Act. This is notwithstanding that such court proceedings arose out of arbitral proceedings which commenced prior to the commencement of the 2005 Act.

In light of these decisions, the difficulty in reconciling the application of the 2005 Act and the 1952 Act in relation to arbitral proceedings commenced prior or after the 2005 Act had been minimised. However, there still appears to be ambiguity and inconsistency as to which Act would apply to arbitral proceedings commenced on or after 15 March 2006 but arising out of arbitration agreements entered into before the said date. It will be interesting to see the extent and how the courts in Malaysia will address this aspect of the law.

The 2005 Act - better than the 1952 Act?

There are quite a number of differences between the 2005 Act and the 1952 Act, and these differences, as briefly mentioned above, are necessary and welcome to enhance the reliability of the laws on arbitration in Malaysia. This chapter will not attempt to analyse in depth each provision of the 2005 Act and the 1952 Act. Instead, this chapter seeks to address the more prominent and noteworthy improvements introduced and implemented under the 2005 Act.

Apart from the legal differences between the 2005 Act and the 1952 Act, the structural differences are apparent as well. The 2005 Act is divided into four parts. Part I (sections 1 to 5) deals with preliminary issues such as key definitions, the commencement of arbitral proceedings and the arbitrability of the subject matter in dispute. Part II (sections 6 to 39) is where the essence of the 2005 Act lies as it covers the various important aspects of the arbitral proceedings, such as the arbitration agreement, composition of the arbitral tribunal, jurisdiction of the arbitral tribunal, the making of arbitral awards as well as the recourse against and enforcement of arbitral awards. Part III (sections 40 to 46) deals chiefly with judicial control over the arbitral proceedings such as the determination of preliminary points of law by the courts and extensions of time for commencing arbitral proceedings and making of arbitral awards. Part IV (sections 47 to 51) tends to miscellaneous issues such as the liability of the arbitrators and the immunity of arbitral institutions.

Court's assistance

Under the 1952 Act, all arbitrations held in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the ICSID Convention), the United Nations Commission on International Trade Law Arbitration Rules 1976 (the UNCITRAL Arbitration Rules) or the Rules of the Regional Centre for Arbitration at Kuala Lumpur (the KLRCA Arbitration Rules) were governed by section 34.13 As such, arbitrations governed by section 34 were not subject to judicial intervention, except for the purposes of enforcement of arbitral awards, as it was expressly provided that the provisions under the 1952 Act would not be applicable.14

The problems created by section 34 of the 1952 Act raised some serious doubts as to its purpose as removing certain arbitrations from the reach and assistance of the judiciary was to stagnate, and might possibly deteriorate, the progress made thus far. One of the difficulties in adhering to section 34 of the 1952 Act was in the enforcement of domestic arbitral awards which applied either the UNCITRAL Arbitration Rules or the KLRCA Arbitration Rules as it was provided that such domestic arbitral awards would not be enforced in the same manner as a judgment or order to the same effect.15 On the other hand, such domestic arbitral awards would not be able to be enforced under the ICSID Convention or the Convention on the Recognition and Enforcement of Foreign Awards (the New York Convention) as these conventions are only applicable to arbitral awards made and which possessed a foreign element.

In this regard, where the 1952 Act stumbles, the 2005 Act picks up the debris and, as such, does away with the exclusion of judicial assistance in international arbitrations. The 2005 Act does not seek to oust international arbitrations from the court's assistance; quite the contrary, it expressly provides for and extends the reach of the court in situations such as involving interim support for the arbitral proceedings, the consideration of the arbitrability of the subject matter of the dispute, and the determination of public policy in relation to the arbitral awards. Notwithstanding the foregoing, the necessity in distinguishing between domestic arbitrations and international arbitrations will be illuminated as the discussion progresses.

The distinction between international and domestic

Whereas the 1952 Act makes no distinction between domestic arbitrations and international arbitrations and applies to both, it is now necessary under the 2005 Act to distinguish domestic arbitrations and international arbitrations in order to determine the applicability of different sections of the 2005 Act.

Firstly, pursuant to section 3 of the 2005 Act, the applicability of part III hinges upon the question of whether or not an arbitration is 'international' or 'domestic'. In a domestic arbitration, part III of the 2005 Act applies by default unless the parties to the arbitral proceedings exclude its application in writing, that is, to opt-out. On the other hand, in an international arbitration, the default position is reversed and part III of the 2005 Act does not apply unless the parties to the arbitral proceedings agree otherwise in writing, that is, to opt-in. part III of the 2005 Act essentially allows for greater intervention by the court, notwithstanding any limitations imposed by the arbitration agreement, such as by allowing any party to the arbitral proceedings to refer to it any question of law arising out of an arbitral award,16 and allowing the court to extend the time imposed for the commencement of arbitral proceedings17 or the delivery of an arbitral award.18

Secondly, the distinction between domestic arbitrations and international arbitrations also goes towards deciding the outcome of the application of section 12(2) of the 2005 Act. Section 12(2) provides that in the event that parties to the arbitral proceedings fail to determine the number of arbitrators, the arbitral tribunal shall consist of three arbitrators in the case of an international arbitration and a single arbitrator in the case of a domestic arbitration.

Thirdly, section 30 of the 2005 Act provides that in respect of domestic arbitrations, the applicable substantive laws shall be that of Malaysia, unless the parties to the arbitral proceedings agree otherwise. With regard to international arbitrations, the applicable substantive laws shall be decided by the parties to the arbitral proceedings. In the event that the parties to an international arbitration fail to agree on the applicable substantive laws, the arbitral tribunal shall apply the law determined by the conflict of laws rules.

Finally, the characterisation of arbitral proceedings as either domestic or international is also necessary in order to determine the recognisability and enforceability of the arbitral award. An arbitral award made pursuant to an international arbitration in Malaysia does not fall within the ambit of sections 38 and 39 of the 2005 Act as will be explained below.

The Arbitral Tribunal

Both the 1952 Act and the 2005 Act recognise the principle of party autonomy. Section 8 of the 1952 Act provides that unless a contrary intention is expressed, an arbitration agreement is deemed to include a provision that the reference shall be to a single arbitrator. The 1952 Act also provides that in the event that the arbitration agreement makes reference to two or three arbitrators, there shall be an umpire appointed by the arbitrators chosen by both parties to the arbitral proceedings. Failing which or any agreement between the parties, section 12 of the 1952 Act provides that the High Court may appoint the same.

Although there are no specific provisions in the 1952 Act similar to that in the 2005 Act, it is advisable that an appointed arbitrator should disclose any circumstances or interest which he might have in the outcome of the arbitration that would cast doubt on his impartiality and independence. Otherwise, under section 25 of the 1952 Act, the court may grant relief to a party to the arbitral proceedings in the event that an arbitrator is found to be partial.

Such relief includes the granting of an injunction to restrain the arbitrator in question from proceeding with the arbitration.

Like section 12 of the 1952 Act, the same section under the 2005 Act states that parties to the arbitral proceedings are free to determine and decide on the number of arbitrators to preside over the arbitral proceedings. Section 12 of the 2005 Act also provides for instances where the parties to the arbitral proceedings are unable to agree on the number of arbitrators. As mentioned above, depending on whether it is a domestic arbitration or an international arbitration, the 2005 Act prescribes that a sole arbitrator shall be appointed for domestic arbitrations whilst three arbitrators shall be appointed for international arbitrations.

The procedures for the appointment of arbitrators are provided for under section 13 of the 2005 Act. Section 13 of the 2005 Act gives ample liberty for parties to the arbitral proceedings to determine the procedures that are to be adopted with regard to the appointment of arbitrators. Section 13 of the 2005 Act further provides for resolution mechanisms in the event that parties to the arbitral proceedings are unable to come to an agreement. For example, pursuant to section 13(7) of the 2005 Act, should the director of the KLRCA fail to appoint the relevant number of arbitrators under sections 13(4) and (5) of the 2005 Act, either party to the arbitral proceedings may then apply to the High Court for such an appointment.19

Section 14 of the 2005 Act makes it mandatory for a person who is appointed to act as an arbitrator to disclose any circumstances that are likely to give rise to justifiable doubts as to his impartiality or independence as this is a ground for challenging arbitrators. Section 14 of the 2005 Act also states that an arbitrator may be challenged if he does not possess the requisite qualifications agreed to by the parties.

Section 15 of the 2005 Act goes a step further and provides for the procedures that are to be adopted when challenging an arbitrator. Section 16 of the 2005 Act deals with when an appointed arbitrator fails to act or when it becomes impossible for the arbitrator to act whereas section 17 of the 2005 Act provides for matters relating to the appointment of a substitute arbitrator in the foregoing event.

Unlike the 1952 Act, which does not allow the arbitral tribunal to determine its own jurisdiction, the 2005 Act, by virtue of section 18, grants the arbitral tribunal the authority to rule on its own jurisdiction, that is, the concept of kompetenz-kompetenz, including matters relating to the validity of the arbitration agreement. Section 18 of the 2005 Act also provides for the procedures and time limits on raising objections to the arbitral tribunal's jurisdiction. It also provides for appeal to the court, which shall have the final say, with regard to the arbitral tribunal's ruling on its jurisdiction. The courts in the cases of Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor20 and CMS Energy Sdn Bhd v Poscon Corp21 have all observed that under the 2005 Act, an arbitral tribunal may determine its own jurisdiction.

Unlike the 1952 Act, which is silent on the issue, section 19 of the 2005 Act allows arbitral tribunals to grant interim measures, which, inter alia, include security for costs and discovery of documents. However, the 2005 Act is silent on whether or not an arbitral tribunal can grant any of the interim measures on an ex parte application.

The procedure for arbitration

Unlike the 1952 Act, the adoption of arbitration procedures is provided for under sections 20 to 29 of the 2005 Act. Section 21(1) of the 2005 Act provides that parties to the arbitral

proceedings are free to agree on the procedures to be followed by the arbitral tribunal in conducting the arbitral proceedings. Section 21(2) of the 2005 Act provides that the arbitral tribunal may conduct the arbitral proceedings in such manner as it considers appropriate if parties to the arbitral proceedings are unable to come to an agreement. These include powers of the arbitral tribunal to determine the admissibility, relevance, and materiality of any evidence as well as fixing and amending time limits.

Judicial intervention

Both the 1952 Act and the 2005 Act allow for the intervention of the judiciary in certain instances. Such intervention includes, inter alia, the staying of proceedings,22 granting of interim measures of protection such as security for costs and interrogatories,23 and the enforcement of arbitral awards.24 In terms of the changes introduced by the Arbitration (Amendment) Act 2011, section 11 of the 2005 Act has been amended to clarify that in order to secure the amount in dispute, the court may order the arrest of property, bail or other security before or during the arbitral proceedings. In particular, section 11(3) of the 2005 Act now empowers the court to make orders for any interim measures even if the seat of arbitration is outside Malaysia. This clarification in law will be of particular interest to parties involved in disputes relating to assets in Malaysia but which are being arbitrated in other jurisdictions, such as Singapore.

It is necessary to consider if limitations placed on the intervention by the court can be circumvented by the court invoking its inherent powers. Prior to the commencement of the 2005 Act, there were two conflicting decisions of the Court of Appeal. In the case of Sarawak Shell Bhd v PPES Oil and Gas Sdn Bhd,25 the court held that it had no powers to intervene unless it was statutorily empowered to do so. In contrast, in the case of Bina Jati Sdn Bhd v Sum Projects (Bros) Sdn Bhd,26 the Court of Appeal was of the view that the courts had a supervisory jurisdiction over arbitrations and arbitrators, and that the court may invoke Order 92, Rule 4 of the Rules of High Court 1980 to make any order that may be necessary to prevent injustice.

The issue has been discussed and given significant consideration in the case of Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd & Ors,27 where it was held that the High Court in Malaysia 'has no jurisdiction, statutory or inherent or by the exercise of residual powers to grant injunctive relief in matters where the seat of arbitration is outside Malaysia.'28 In reaching his decision, Badariah Sahamid JC compared section 8 of the 2005 Act to article 5 of the UNCITRAL Model Law and found that the rationale behind both provisions is to 'bring certainty to arbitration proceedings by setting out the specific parameters of court assistance or supervision in respect of such proceedings.'29 Given that the 2005 Act did not expressly adopt article 1(2) of the UNCITRAL Model Law when it had incorporated the other provisions, it cannot be said that the intention of the Parliament was to confer express jurisdiction to the courts where the seat of arbitration is not Malaysia. It remains to be seen how much further the courts will apply section 8 of the 2005 Act and whether its powers to intervene in arbitral proceedings would be limited to those that are specifically provided for under the Act.

Section 22 of the 1952 Act provides that the arbitrator or umpire may submit any question of law arising in the course of arbitration or from an arbitral award or any part thereof to the High Court. Similarly, section 41 of the 2005 Act provides that a party to the arbitral proceedings may apply to the High Court for the determination of any question of law arising in the course of arbitration with the consent of the arbitrator or all parties to the arbitral

proceedings. Additionally, section 42 of the 2005 Act, which provides that any party to the arbitral proceedings may refer any question of law arising out of an arbitral award to the High Court, also provides that one of the options available to the High Court after determining the question submitted is to set aside the arbitral award in whole or in part. However, the High Court shall dismiss such a reference if the question of law does not affect the rights of one or more of the parties to the arbitral proceedings.30 It should be noted that both these provisions are contained in part III of the 2005 Act, which, in default, applies only to domestic arbitrations but not to international arbitrations unless the parties expressly choose to exclude or include them respectively.

Arbitral awards

There is no definition of 'award' in the 1952 Act, although section 15 states that a reference to 'award' in the 1952 Act includes a reference to interim awards as well. Section 2(1) of the 2005 Act defines an arbitral award as a decision of the arbitral 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 17 of the 1952 Act and section 36(1) of the 2005 Act further provide that all arbitral awards are final and binding.

Unlike the 1952 Act, section 33 of the 2005 Act provides that an arbitral award should be in writing and signed by the arbitral tribunal. If there is more than one arbitrator, the signatures of the majority would be sufficient provided that the reason for any omission is stated. Section 33 further provides that the arbitral award should state the reasons upon which it is based unless the parties to the arbitral proceedings had agreed otherwise or if the arbitral award is on agreed terms. The arbitral award shall also state the date and the seat of the arbitration.

Both Section 18 of the 1952 Act and section 35 of the 2005 Act allow the arbitrator or umpire to correct any clerical error, accidental slip or omission in an arbitral award. Additionally, section 35 of the 2005 Act allows a party to request the arbitral tribunal to give an interpretation of a specific point or part of the arbitral award.

Section 37 of the 2005 Act provides two bases on which an arbitral award may be set aside. The first basis is when a party making the setting aside application provides proof of one of the limited instances that justify the setting aside of the arbitral award. Such instances include the proving that the other party to the arbitral proceedings did not have the capacity to enter into the arbitration agreement, the arbitration agreement was invalid under the laws of Malaysia, proper notice of the appointment or constitution of the arbitral tribunal or arbitral proceedings were not given, or that the arbitral award deals with a dispute not falling within the terms of the submission of arbitration. The second basis for setting aside the arbitral award is a finding by the court that the dispute is not capable of being settled by arbitration under the laws of Malaysia or that the arbitral award is in conflict with the public policy of Malaysia. It is to be noted that the grounds given under section 37 of the 2005 Act for setting aside an arbitral award do not relate to the merits of the case. In addition, as mentioned earlier, section 42 of the 2005 Act allows the court to set aside an arbitral award to which a question has been referred for its determination.

Enforcement of arbitral awards is dealt with under section 27 of the 1952 Act and sections 38 and 39 of the 2005 Act. Section 38 of the 2005 Act also provides for the procedures that a party to the arbitral proceedings needs to comply with when seeking to enforce an arbitral award. Section 39 of the 2005 Act sets out the grounds on which the recognition or enforcement of an arbitral award shall be refused.

It is also to be noted that the 2005 Act does not repeal the Reciprocal Enforcement of Judgments Act 1958 (the REJA 1958), which provides for the enforcement of an arbitral award from Commonwealth countries and scheduled countries as if it were a foreign judgment, provided that it is first registered in the courts of the country in which the arbitral award was given.

Pro-arbitration: local courts

Stay of legal proceedings

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 subject to an arbitration agreement. Unlike section 6 of the 1952 Act, section 10 of the 2005 Act makes it mandatory for the High Court to grant a stay unless the arbitration agreement is null and void, inoperative or incapable of being performed or if there exists no dispute between the parties with regard to the matters to be referred to arbitration.

In Chut Nyak Hisham Nyak Ariff v Malaysian Technology Development Corporation Sdn Bhd,31 the court took the occasion to restate the desire of the legislature to reform the law relating to arbitration and to give primacy to arbitral proceedings over court proceedings in circumstances where parties have agreed to resolve their disputes by arbitration. The High Court stated that it would be rare for a court not to grant a stay of legal proceedings under the 2005 Act. This is reaffirmed in both Renault Sa v Inokom Corporation Sdn Bhd & Anor and Other Applications32 and Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd33 where, in the latter, Abdul Malik Ishak JCA further emphasised the desirability of arbitration regardless of parties' motives in favouring arbitration over litigation. In coming to his decision, the learned judge held that the contract in dispute 'must be referred to arbitration. There are no two ways about it.'34

Similarly, in the case of Winsin Enterprise Sdn Bhd v Oxford Talent (M) Bhd35 the court noted that under the 1952 Act, the court would not grant a stay of court proceedings unless the applicant had demonstrated that he was ready and willing to arbitrate the dispute. While that is the position under the 1952 Act, there is no such similar requirement under the 2005 Act. The court held that in both the 1952 Act and the 2005 Act, a stay of court proceedings will not be granted if the applicant has taken part in the court proceedings.

In addition to the two instances provided for under section 10 of the 2005 Act, the decision in the case of Lembaga Pelabuhan Kelang v Kuala Dimensi Sdn Bhd & Another Appeal36 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 of the 2005 Act still stands, when parties to the arbitral proceedings have subsequently displaced their original discretion to refer their disputes to arbitration by expressly submitting to the jurisdiction of the courts, the doctrine of estoppels may be invoked to prevent a party from asserting otherwise.

All in all, the approach taken by the Malaysian courts in terms of their inclination towards arbitrations can be summed up by the words of the case of CMS Energy Sdn Bhd v Poscon Corp37 that 'there is unmistakeable intention of the legislature that the court should lean towards arbitration proceedings.'

Appeal against arbitral awards

There is no appeal procedure against an arbitral award in both the 1952 Act and the 2005 Act. However, there exists under both the 1952 Act and the 2005 Act, provisions relating to the

setting aside of an arbitral award. Section 24(2) of the 1952 Act states that an arbitral award may be set aside if the arbitrator or umpire has misconducted himself or if the arbitral award has been improperly procured. In the case of Cairn Energy India Pty Ltd v the Government of India,38 the Court of Appeal held that, under the 1952 Act, an arbitral award is ordinarily final and conclusive unless a contrary intention is provided for in the arbitration agreement. Accordingly, civil courts have no appellate jurisdiction over the arbitrator's decision if it has been fairly reached. However, the court may still decide to set aside an arbitral award if there was an error of law on the face of the arbitral award. This is based on common law principles. Jeffery Tan JCA stated:

> 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.39

The Court of Appeal, however, stressed that this was a limited exception and would be applied only if the court found in the arbitral award, or any documents actually incorporated into it, some legal proposition that formed the basis of the arbitral award and which was erroneous. The Court of Appeal was of the view that a question of construction was a question of law and if the question of construction itself was 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 did not in itself make it a bad arbitral award capable of being set aside.

A similar position was adopted in the case of Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd40 where the court held, inter alia, that the 2005 Act makes it compulsory for the courts to respect the decision of the arbitrator and that real proof is required before the courts would meddle with the recognition and enforcement of an arbitral award. The finality of an arbitral award is again observed in Ngo Chew Hong Oils & Fats (M) Sdn Bhd v Karya Rumpun Sdn Bhd41 in that a mere filing of an affidavit to oppose registration, instead of making an application, is deemed insufficient to set aside an arbitral award.

In the case of Asia Control Systems Impac (M) Sdn Bhd v PNE PCB Bhd and another appeal,42 it is apparent that the Malaysian courts have adopted a pro-arbitration stance by endorsing the UNCITRAL Arbitration Rules, which is indicative of a minimalist interventionist approach. The appellant had attempted to set aside an arbitral award made pursuant to the UNCITRAL Arbitration Rules and the KLRCA Arbitration Rules. The High Court dismissed the appellant's application and allowed the respondent's application for leave to enforce the arbitral award. On appeal, the Court of Appeal dismissed the appellant's appeal and held that section 34 of the 1952 Act excluded the application of the 1952 Act or other written law to any arbitration held under the UNCITRAL Arbitration Rules and the KLRCA Arbitration Rules.

Further, in the case of Tan Kau Tiah v Tetuan Teh Kim Teh, Salina & Co & Anor,43 the first respondent had given written undertakings to release the documents of title to the appellant when the matter was decided by an arbitrator or the court or both. The arbitrator handed down an arbitral award in favour of the appellant but the first respondent refused to hand over the documents and filed a 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 on to the documents of titles pending the 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. In addition, the first respondent ought to continue to hold on to the documents pending the proceedings by the appellant for leave to enforce the arbitral award against the second respondent. The appellant appealed against the decision of the High Court.

It was held by the Court of Appeal that the order for the immediate return of the documents of title was final and binding, irrespective of whether or not there was any pending appeal to have the order set aside. Once the arbitral order was handed down by the arbitrator, the undertaking of the first respondent would come into play and must be given effect. Further, as 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, when the dispute between the parties ended with an arbitral award, the first respondent must by their own admission comply with it.

Arbitration developments: international

The CREFAA Act

A brief discussion on the CREFAA Act, though repealed by the 2005 Act, is still relevant as it had, prior to the amendment of section 38(1) of the 2005 Act, provided for the enforcement of arbitral awards pursuant to arbitration agreements under the New York Convention or arbitrations held outside Malaysia in states that are party to the New York Convention.

In the case of Sri Lanka Cricket v World Sports Nimbus Pte Ltd,44 the Court of Appeal held that a gazette notification by His Majesty Yang Di-pertuan Agong was a prerequisite before enforcement of an arbitral award from a state is allowed under the New York Convention notwithstanding that the state was indeed a signatory to the New York Convention. This decision was reaffirmed by the Court of Appeal in the case of Alami Vegetable Oil Products Sdn Bhd v Lombard Commodities Ltd45. However, in late 2009, the Federal Court reversed the decision of the Court of Appeal in the latter case46 and held that a gazette notification pursuant to section 2(2) of the CREFAA Act is evidentiary in nature and not a precondition for the purposes of enforcing an arbitral award from a state that is a signatory to the New York Convention. If His Majesty Yang Di-pertuan Agong had issued a gazette notification declaring a particular state to be a signatory to the New York Convention, that gazette notification merely formed conclusive evidence of the fact that that state was a signatory, therefore, the issue of whether or not a state is a signatory to the New York Convention can be proved by adducing other evidence as may be appropriate.

The court in demonstrating its willingness to depart from the previous authority of Sri Lanka Cricket v World Sports Nimbus Pte Ltd opined that:

> 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 s 2(2) of the CREFA has to be read to mean 'must' or otherwise.

The Court of Appeal in Sri Lanka Cricket v World Sports Nimbus Pte Ltd construed the word 'may' as 'must', rendering it mandatory for His Majesty Yang Di-pertuan Agong to extend the benefit under the CREFAA Act to foreign arbitral awards in order for the same to be enforceable. However, in Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd,

the court elected to construe the word 'may' as simply conferring a power and proceeded to examine whether or not a duty to exercise the power is imposed. This effectively extended the ambit of the word 'may' and exemplified the court's pro-arbitration stance by construing the test in a manner which lowers the required threshold. The direction came as a welcome gesture making the recourse to foreign arbitrations more accessible in Malaysia.

There are no similar provisions in the 2005 Act which pertain to the gazette notification above. Section 38(1) of the 2005 Act states that on an application in writing, an arbitral award made in respect of an arbitration where the seat is in Malaysia or an arbitral award from a foreign state may be enforced by the High Court as a judgment thereof. Prior to the Arbitration (Amendment) Act 2011, section 38(1) of the 2005 Act was silent on whether or not it applied to arbitral awards of international arbitrations in Malaysia. It is also to be noted that with regard to arbitral awards from a foreign state, section 38(1) of the 2005 Act specifies that only arbitral awards from countries that are party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958 are recognised. Thus, it appears that arbitral awards from countries which are not signatories to the said convention would not be recognised and cannot be enforced under the 2005 Act.

The Kuala Lumpur Regional Centre for Arbitration

There are a number of professional bodies in Malaysia such as the Malaysian Institute of Architects,47 the Royal Institution of Surveyors Malaysia,48 the Malaysian International Chambers of Commerce,49 the Institute of Engineers Malaysia50 and the Malaysian Rubber Board51, which administer and handle arbitral proceedings. However, this chapter will focus on the KLRCA as the main arbitral institution in Malaysia and its contributions to the ever-changing arbitral landscape.

The KLRCA was established in 1978 under the auspices of the Asian-African Legal Consultative Organisation (the AALCO) to provide a forum for the settlement of trade, commerce and investment disputes within the Asia-Pacific region, which it continues to do. The KLRCA was the first regional centre established by the AALCO in Asia, which aimed to provide institutional support for the conduct of domestic and international arbitral proceedings in Asia.52 The AALCO is currently made up of 47 member countries and has to date five regional centres in Cairo, Lagos, Tehran, Nairobi, and of course Kuala Lumpur.

Governments of the countries with regional centres recognise the independent status of the regional centres and as such have accorded them privileges and immunities. The immense support given by the respective governments allow the regional centres to function as autonomous international organisations.53 While the KLRCA has the support of the Malaysian government, the KLRCA is a non-profit organisation and is neither a government branch nor agency. The status of the KLRCA as an independent arbitral institution for both domestic and international arbitrations is a clear policy under both the 1952 Act and the 2005 Act.

Adoption of the revised UNCITRAL Arbitration Rules

It was decided in 2006 that the UNCITRAL Arbitration Rules should be revised to meet the changes in arbitral practice that have occurred over the past 30 years. On 25 June 2010, the revised UNCITRAL Arbitration Rules were adopted, and were effective as of 15 August 2010, by the KLRCA, making it the first arbitral institution in the world to do so. With the KLRCA adopting the revised UNCITRAL Arbitration Rules, all changes made therein are relevant to and affect arbitrations being held by the KLRCA and under the KLRCA Arbitration Rules.

The revised UNCITRAL Arbitration Rules saw more provisions being added, with the aim of filling gaps that have become apparent over the years. The revision of article 2 of the UNCITRAL Arbitration Rules shows the rules taking into account modern technology with regard to issuing and serving notices of arbitration and other communications as well as the conducting of hearings. 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 also includes the addition of article 28(4), which provides that witnesses may 'be examined through means of telecommunication that do not require their physical presence at the hearing', with the example of teleconferencing being given.

Article 6 of the UNCITRAL Arbitration Rules has also been revised to reduce the time a party to the arbitral proceedings needs to wait before making a request to the Secretary General of the Permanent Court of Arbitration at the Hague (the PCA) with regard to disputes relating to the appointment of an appointing authority from 60 to 30 days. In addition, it is also now expressly stated that the PCA may be requested by the parties to the arbitral proceedings to act as an appointing authority. These changes are reflected in Malaysia under section 13 of the 2005 Act, which provides for the request for appointment to be made to the director of the KLRCA.

Among the significant additions to the revised UNCITRAL Arbitration Rules relating to the conduct of arbitral proceedings are articles 17(1) and (2) where it is provided that the arbitral 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' and the arbitral tribunal shall as soon as practicable establish a provisional timetable of the arbitration. There are also now additional provisions dealing with the issue of an arbitrator's conflict of interest, whereby model statements of independence pursuant to a new article 11 are annexed to the revised UNCITRAL Arbitration Rules. Further, article 16 of the UNCITRAL Arbitration Rules provides a clause excluding liability of the arbitral tribunal save for intentional wrongdoing. This would most certainly guarantee that the arbitrators are able to proceed with the arbitration without fear of any negative repercussions from the parties.

Excessive tribunal remuneration would also not be possible now that article 41 of the UNCITRAL Arbitration Rules states that the fees shall be reasonable in amount. The revised UNCITRAL Arbitration Rules also require the arbitral tribunal to inform the parties to the arbitral proceedings of how it proposes to determine its fees at the soonest after the arbitral tribunal has been constituted. The parties may refer the proposal or the determination of the fees of the arbitral tribunal to the appointing authority, such as the director of the KLRCA, for review.

In addition to the foregoing discussion, the revised UNCITRAL Arbitration Rules have also seen additional provisions dealing with, as well as those mentioned earlier, multi-party arbitration and joinder, objections to experts appointed by the arbitral tribunal, which, as a whole, aim to enhance procedural efficiency and uphold reasonableness in the conduct of arbitrations such as in the determination and assessment of costs of the arbitral proceedings. With a view to propelling its status in the arbitration community, the KLRCA Arbitration Rules were revised, with certain modifications and adaptations, in line with the updated UNCITRAL Arbitration Rules.

A new lease of life

Following on from the improvements made to its Arbitration Rules, the KLRCA saw further support, in particular, from the government of Malaysia in driving the centre forward.

This occasioned in the commissioning and appointing of an advisory board by the prime minister's Department of Malaysia with effect from 15 August 2011. The advisory board is currently chaired by Tan Sri Abdul GaniPatail who has been the attorney general of Malaysia since 2002. Together with Tan Sri Abdul GaniPatail, the advisory board consists of six renowned and respected arbitrators who are active not just in Malaysia but also internationally. The main function of the advisory board is to advise the KLRCA on the centre's strategic direction in its aim to be the preferred arbitral institution in the Asia-Pacific region as well as positioning Malaysia as an arbitration-friendly destination54.

On 27 February 2012, the KLRCA launched its revised KLRCA Fast Track Rules. The KLRCA Fast Track Rules were revised and improved after its 2010 predecessor delivered a much sought-after option to resolving commercial and transactional disputes in Malaysia.55 The revision was needed given that the 2005 Act was due for its own amendment namely the Arbitration (Amendment) Act 2011 and the coming of the Construction Industry Payment and Adjudication Bill 2011. Similar to the KLRCA Arbitration Rules, the KLRCA Fast Track Rules have been modified with the adoption of the articles of the revised UNCITRAL Arbitration Rules.

The success enjoyed thus far and the force behind the global ambition of the KLRCA can be attributed to its current director, Sundra Rajoo, who was appointed as the KLRCA's fifth director with effect from 1 March 2010. Mr Rajoo was also appointed as the president of the Asia Pacific Regional Arbitration Group (the APRAG) on 8 July 2011. In addition, the director of the KLRCA is serving on the panel of numerous international arbitral institutions and organisations and had earlier practised as an architect and town planner. Prior to March 2010 and despite being the first regional arbitral institution to be established, the KLRCA was trailing far behind the newer arbitral centres in Singapore, Hong Kong and Australia.56 In addressing the situation back then, Mr Rajoo openly admitted that 'even disputes which involved only Malaysian parties were going off-shore to arbitral centres around the world.'57 However, through Mr Rajoo's vision and strive for the betterment of the KLRCA's repute and standing, the KLRCA has progressed and grown speedily within a mere couple of years. Mr Rajoo 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, most of them foreign arbitrators, on its panel compared to less than 200 previously.

With the right people steering the course of the centre, submitting disputes to arbitrations under the KLRCA and its Arbitration Rules comes with it a multitude of advantages for the parties involved. Rejuvenation efforts have also seen a push for arbitration clauses referring disputes to the KLRCA to be included in contracts by government agencies and government-linked companies, marking the increased confidence in and prominence of the KLRCA.58 Among the various factors in the KLRCA's appeal in relation to conducting arbitral proceedings, perhaps the biggest draw can be credited to the centre's stand in keeping costs to parties low such as capping arbitrators' fees under the KLRCA fee schedule.59 Other benefits in choosing the KLRCA as the preferred forum include the fact that foreign lawyers are allowed to represent and appear in arbitral proceedings, the availability of a panel of experienced domestic and international arbitrators from diverse fields of expertise and experience, the administration and assistance of the KLRCA in the enforcement of arbitral awards, and, importantly, the finality and binding nature of arbitral awards rendered by the KLRCA. The finality and binding nature of the KLRCA's arbitral awards, coupled with Malaysia being a signatory to the New York Convention, enables the KLRCA's arbitral awards to be enforceable in countries which are also signatories.

Why choose Malaysia?

As Malaysia strives to narrow the gap between itself and Singapore as well as Hong Kong as an Asia-Pacific arbitral forum, there is no doubt that it has been zealously following the trend and manner in which both prominent arbitral nations have been advancing.

Like the introduction in the fourth edition of the Arbitration Rules of the Singapore International Arbitration Centre (the SIAC Arbitration Rules) of the availability of the expedited procedure prior to the constitution of the arbitral tribunal,60 which streamlined the procedures for limited-value disputes of S$5 million or less, the KLRCA has also introduced its own new 'products', such as the KLRCA Fast Track Rules (as discussed above), which were created in collaboration with the Malaysian Institute of Arbitrators. The KLRCA has acknowledged the issue with the length of arbitral proceedings and, as a result, has implemented the KLRCA Fast Track Rules to further enhance its arbitral attractiveness.

Similarly, notable features of the 2005 Act compared to and in relation to the newest Arbitration Ordinance of Hong Kong (the Hong Kong Arbitration Ordinance) include provisions which give arbitral tribunals the powers to grant interim measures such as to preserve assets or evidence or to maintain or restore the status quo. In addition, the 2005 Act as well as the KLRCA Arbitration Rules have been embraced with the potential praises of the 'hands-off' and 'party autonomy' approaches,61 which have cemented respect and trust in the Hong Kong's system of arbitration.

In terms of national legislations and its significance to both the 1952 Act and the 2005 Act, subject to the opting-in or opting-out mechanism of part III of the 2005 Act, the 2005 Act is more in line with the approach taken by Hong Kong in unifying both its domestic and international regimes in the Hong Kong Arbitration Ordinance of 1 June 2011. On the contrary, Singapore still maintains separate legislations for domestic arbitrations, which are governed by the Arbitration Act (chapter 10), and international arbitrations, which are governed by the International Arbitration Act (chapter 143A). The move in unifying and harmonising the laws of arbitration in Malaysia is indicative of a less complex and more accessible arbitral regime in its future.

It is also noteworthy to highlight the efforts of the KLRCA in establishing arbitration rules for the resolution of disputes relating to Islamic banking by the making of the Rules for Arbitration of Kuala Lumpur Regional Centre for Arbitration (Islamic Banking and Financial Services) (the KLRCA Arbitration Rules (Islamic Banking and Financial Services) or the KLRCA Rules for Islamic Banking and Financial Services Arbitration, which came into effect in 2007. Such facilitative mechanism for the resolution of disputes arising out of or in connection with any commercial contract, business arrangement or transaction that is based on Shariah principles is unique to Malaysia, therefore boosting its attractiveness on top of its other advantages.

The future is bright

Although Malaysia is still growing as an arbitral forum, its position among the regional players will no doubt rise as the Malaysian arbitration community continues to receive favourable feedback and support from its government, judiciary system and legal practitioners as well as traders and conglomerates. The road to success is inevitably long and tough, as along the way many obstacles and hurdles are to be expected and crossed. Given that Malaysia still has some way to go before it is able to reach the heights attained by the Singapore International Arbitration Centre and Hong Kong International

Arbitration Centre, a series of judicial implementations and determinations, clarifications and adjustments is, at the very least, necessary.

All the hard work and perseverance put in by dedicated members of the arbitration community in Malaysia is beginning to bear fruit. Notwithstanding the course ahead, and in light of the above, the hope and optimism shared among the arbitration community can summed up simply and confidently: the future is bright.

Notes

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India

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Summary

This article aims to provide a brief overview of the arbitration scene in India. The efforts taken by the Indian judiciary, executive and legislature in promoting arbitration as an effective means of dispute resolution has helped India in modelling its pro-arbitration attitude.

History of arbitration in India

The existence of the law of arbitration in India can be traced back to the eighteenth century. The very first attempt at codifying the arbitration law was also made during the British rule, by enacting the Bengal Regulation in 1772 (the Regulation), which was applicable only to the Presidency Towns. Vide the Regulation, disputes in relation to accounts could be arbitrated. Subsequently, numerous regulations were enacted which extended the scope of matters that could be arbitrated which included disputes in relation to land, rent and revenue.

It was only in 1859 when the first Code of Civil Procedure (the CPC) was enacted for India that contained express provisions relating to arbitration. CPC was revised in 1877 and further in 1882, however, the provisions relating to arbitration remained unchanged. The arbitration provisions provided for arbitration of disputes after they had arisen; there was no provision for reference to arbitration of future disputes. To remedy this, the Indian Arbitration Act, 1899 (1889 Act) was enacted based on the English Arbitration Act, 1889. However, the application of this 1889 Act was limited to Presidency Towns and was subsequently extended to a few more commercial towns. Consequently, the Civil Procedure Code of 1908 (the Code) was enacted which contained the provisions relating to arbitration in Schedule II. Considering the drawbacks in the existing provisions, a need for consolidation and amendment of the law and its codification in a separate enactment was sensed. This resulted in the enactment of the Indian Arbitration Act, 1940 (the 1940 Act) which repealed Schedule II of the Code.[1]

Prior to the enactment of the 1940 Act, in 1937, Indian legislature had enacted the Arbitration (Protocol and Convention) Act, 1937 (the 1937 Act) to give effect to the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Awards of 1927, as India was a signatory to these international agreements. Thereafter in 1961, Foreign Awards (Recognition and Enforcement) Act 1961 (the 1961 Act) was enacted to give effect to the New York Convention of 1958.

As a result, until 1996, the law governing arbitration in India consisted mainly of three statutes: the 1937 Act; the 1940 Act; and the 1961 Act. While the 1940 Act was the general law governing arbitration in India; the 1937 Act and the 1961 Acts were designed to enforce foreign arbitral awards.

The 1940 Act gave room to the parties to access courts at almost every stage of arbitration, defeating the very purpose of arbitration. The courts in India had therefore taken an interventionist approach rather than the intended supervisory approach. Therefore, in an effort to modernise the outdated 1940 Act, the legislature enacted the Arbitration and Conciliation Act, 1996 (the Act).

Overview of the Act

The Act is a comprehensive piece of legislation modelled on the lines of the UNCITRAL Model Law on International Commercial Arbitration, 1985. This Act repealed all the three previous statutes (the 1937 Act, the 1961 Act and the 1940 Act). The primary object of the Act was to encourage arbitration as a cost-effective measure and to act as a quick mechanism for the settlement of commercial disputes. The main objectives of the Act are as follows:

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to comprehensively cover both international and domestic and commercial arbitration and conciliation;

- to minimise the supervisory role of courts in the arbitral process; and
- to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court.

The Act is divided into four parts. The more significant provisions of the Act are to be found in Part I and Part II. Part I contains composite provisions for domestic and international commercial arbitration in India. Arbitrations conducted in India are governed by Part I, irrespective of the nationalities of the parties. Part I inter alia provides for arbitrability of disputes; non-intervention by courts; composition of the arbitral tribunal; jurisdiction of arbitral tribunal; conduct of the arbitration proceedings; recourse against arbitral awards and enforcement. Part II on the other hand, provides for enforcement of foreign awards and is largely restricted to enforcement of foreign awards governed by the New York Convention or the Geneva Convention. Part III deals with the conciliatory machinery, while Part IV contains supplemental provisions of the Act.

Most of the judicial decisions on arbitration in India are centred on the important provisions contained in Part I and Part II of the Act. A brief overview of the important features of the Act is discussed below.

Scope Of The Subject Matter Of Arbitration

Any commercial matter including an action in tort if it arises out of or relates to a contract can be referred to arbitration. However, matrimonial matters, criminal matters, insolvency matters, anti-

competition matters, (or matters related to disputes involving rights in rem) cannot be referred to arbitration. Likewise, employment contracts and matters covered by statutory reliefs through statutory tribunals are also non-arbitrable.

Minimal Judicial Intervention

One of the key features of the Act is that the role of the court has been minimised. Accordingly, section 8 of the Act provides that any matter before a judicial authority containing an arbitration agreement shall be referred to arbitration. Moreover, section 5 makes it clear that no judicial authority shall interfere, except as provided for under the Act. Parties can approach courts only for seeking any interim measure of protection or injunction or for any appointment of receiver, etc; or for the appointment of an arbitrator in the event a party fails to appoint an arbitrator or if two appointed arbitrators fail to agree upon the third arbitrator; for terminating the mandate of the arbitrator; for seeking court's assistance in taking evidence.

Interim Measures By Court And Arbitral Tribunal

Section 9 of the Act empowers the parties to seek interim measures by a court before or during the arbitral proceedings or at any time after making the arbitral award but before it is enforced. Interim measures sought can be in the nature of appointment of a guardian for a minor; preservation of any property or any goods which are the subject-matter of arbitration; securing the amount in dispute in the arbitration; interim injunction or appointment of a receiver, etc.

Under the Act, unlike the predecessor 1940 Act, the arbitral tribunal is empowered by section 17 to make orders amounting to interim measures as necessary in respect of the subject-matter of the dispute. The need for section 9, inspite of section 17 having been enacted, is that section 17 would operate only during the existence of the arbitral tribunal and it being functional. During that period, the power conferred on the arbitral tribunal and the court may overlap to some extent, but so far as the period pre and post arbitral proceedings is concerned, the party requiring an interim measure of protection would have to approach only the court.2

Appointment And Jurisdiction Of The Arbitral Tribunal

Section 11 of the Act prescribes the procedure for appointment of arbitrators. Parties are free to agree on a procedure for appointing arbitrator or arbitrators. For appointing an arbitral tribunal consisting of three arbitrators, each party appoints one arbitrator and the two arbitrators appoint the third arbitrator. However, if a party fails to appoint an arbitrator or the two arbitrators fail to appoint the third arbitrator; the appointment, upon a request of a party, is made by the chief justice of the High Court or his designate. Further, in case of an international commercial arbitration, the appointment of sole or third arbitrator is made by the chief justice of India or his designate.

As far as the jurisdiction of the arbitral tribunal is concerned, the kompetenz kompetenz principle holds good in India and the arbitral tribunal is empowered to rule on its own jurisdiction. However, owing to the decision of the seven-judge bench of the Supreme Court of India (the Supreme Court) in SBP & Company v Patel Engineering Limited,3 the principle of the kompetenz kompetenz was diluted as the Supreme Court declared that the power of the chief justice to appoint an arbitrator is judicial and not administrative in nature. Effectively, when an application is made before the chief justice for the appointment of an arbitrator and the chief justice pronounces that it has jurisdiction to appoint an arbitrator or that there is an arbitration agreement between the parties or that there is a live and subsisting dispute to be referred to arbitration, this would be binding and cannot be re-agitated by the parties before the arbitral tribunal. Therefore, when the arbitral tribunal is appointed by the parties, the arbitral tribunal can rule on its own jurisdiction; unlike when the appointment is made by the chief justice, as discussed above.

Conduct Of The Arbitral Proceedings

The parties are free to agree on the procedure to be followed by the arbitral tribunal. If the parties do not agree to the procedure, the procedure will be as determined by the arbitral tribunal. Section 19 explicitly states that the arbitral tribunal is not bound by the Code or the Indian Evidence Act, 1872. Also the Act makes it amply clear that the arbitral tribunal should give equal treatment to the parties and that each party should be given full opportunity to present its case.

Setting Aside Of Awards

The grounds for setting aside an award rendered in India as provided in section 34 of the Act are substantially the same as contained in article 34 of the UNCITRAL Model Law for challenging an enforcement application. An award can be set aside if:

- a party was under some incapacity;
- the arbitration agreement was not valid under the governing law;
-

a party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings;

- the award deals with a dispute not contemplated by or not falling within the terms of submissions to arbitration or it contains decisions beyond the scope of the submissions;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the subject matter of the dispute is not capable of settlement by arbitration; or
- the arbitral award is in conflict with the public policy of India.

A challenge to an award is to be made within three months from the date of receipt of the award. The courts may, however, condone a delay of maximum 30 days on evidence of sufficient cause. Subject to any challenge to an award, the same is final and binding on the parties and enforceable as a decree of the court.

Enforcement Of Foreign Awards

This is covered by Part II of the Act. As discussed earlier, a 'foreign award' is an award emanating from a country that is a signatory to the New York Convention or the Geneva Convention and notified by the government of India. Till date, the government of India has notified around 40 countries for the purposes enforcement of foreign award. A party in whose favour such a foreign award is passed can directly file an execution petition in India for its enforcement and the court on being satisfied that the award is enforceable shall deem the award as the decree of that court and proceed with its execution. Enforcement of a foreign award may be refused only at the request of the party against whom it is invoked, provided the party satisfies the grounds enumerated in section 48 of the Act which are more or less the same as that in section 34 for setting aside awards.

Role of the Indian judiciary in shaping arbitration

Until recently, the Indian judiciary was known to have adopted an interventionist approach in arbitration matters due to which most of the judicial decisions are not in tune with the spirit of the Act. Initially, the conduct of the judiciary was nowhere nearing the primary objective of the Act and this can be gauged by the decisions of the various Indian courts.

While the Supreme Court in Bhatia International v Bulk Trading SA,[4] extended Part I of the Act to international commercial arbitration held outside India; in Venture Global Engineering v Satyam Engineering,[5] which heavily relied on Bhatia International, the Supreme Court largely rendered superfluous the statutorily envisaged mechanism for enforcement of foreign awards by applying domestic arbitration law to foreign awards and consequently setting aside the foreign award (under Part I of the Act as against merely refusing to enforce the foreign award under Part II of the Act).

Thereafter, the Supreme Court, vide the ONGC v Saw Pipes[6] judgment, widened the scope of 'public policy', by including 'patent illegality' within the ambit of 'public policy', which is one of the grounds available for setting aside an arbitral award. Till then, the concept of 'public policy' was interpreted in a narrower sense, in line with the court's previous decisions which insisted that no new heads of 'public policy' should be easily created.

A further blow came by way of the Supreme Court's decision in SBP & Co v Patel Engineering Ltd,[7] wherein the power of the chief justice in appointing an arbitrator was held to a judicial

power and not an administrative power. This meant that Indian courts had to actually look into the validity of the arbitration agreement before proceeding to appoint arbitrators. Subsequently, there have been a number of instances where the Supreme Court and also various High Courts have assumed jurisdiction in arbitration matters both onshore and offshore.

However, in recent years, there has been a shift in this trend by the Indian courts. As regards the applicability of Part I to arbitrations held outside India, amongst other decisions of various High Courts in India, the decision of the Supreme Court in Dozco India P Ltd v Doosan Infracore Co Ltd,8 has more or less settled this position by holding that even if the parties to a foreign arbitration have not expressly excluded Part I, it would be deemed to have been excluded, if the parties have agreed to a foreign governing law of contract, and a foreign seat of arbitration.

This position was further confirmed by another decision of the Supreme Court in Videocon Industries v Union of India,9 wherein the Court went a step ahead and held that even if the law governing the contract is Indian law; Part I would be impliedly excluded if the parties have agreed to a foreign law governing arbitration and a foreign seat of arbitration. Likewise, recently in Yograj Infrastructure Limited v Ssang Yong Engineering and Construction Company Limited,10 the Supreme Court refused to entertain an appeal against an interim order passed by an arbitral tribunal seated outside India and concluded that the seat of arbitration being outside India and the law governing the arbitration proceedings being foreign law, Part I of the Act is impliedly excluded. Thus, these decisions have helped blur the requirement of 'express exclusion' of Part I of the Act which initiated by the Bhatia International. Also, a five-judge Constitution Bench of the Supreme Court in Bharat Aluminium v Kaiser Aluminium11 is reconsidering the decision in Bhatia International (supra) and will hopefully end this controversy.

Similarly, in matters dealing with domestic awards, one of the best examples of non-interference can be seen in Sumitomo Heavy Industires v ONGC,12 wherein the Supreme Court demonstrated that if the award by the arbitrator is a well-reasoned one then courts should not interfere.

As far as directing the parties to arbitration is concerned, the Bombay High Court in Parcel Carriers Ltd v Union of India,13 while dealing with severability of arbitration clause, made it amply clear that if the dispute is covered by prerequisites contained in section 8 of the Act (power of the court to refer the parties to arbitration), the judicial authority has no option but to refer the dispute to arbitration.

As regards favouring enforcement of foreign awards, the Delhi High Court in Penn Racquet Sports v Mayor International Ltd,14 refused the challenge to the enforcement of a foreign award by holding that the ground of 'public policy' must be narrowly interpreted when refusing enforcement of foreign awards. Subsequently in Pacific Basin Ihx (UK) Ltd v Ashapura Minechem Ltd,15 the Bombay High Court was faced with the dilemma of being technically forced to stay the proceedings seeking enforcement of a foreign award. The Bombay High Court ordered a stay, however, on the condition that the claim amount awarded should be deposited in full by the party seeking the stay.

Recently, a positive step towards favouring enforcement of a foreign award was taken by the Supreme Court in Fuerst Day Lawson v Jindal Exports,16 wherein it was held that no letters

patent appeal will lie against an order enforcing a foreign award. This is because section 50 of the Act provides for an appeal only against an order refusing to enforce a foreign award.

These decisions do indicate that the Indian courts have been less zealous to interfere in arbitration matters, thereby adopting a pro-arbitration approach.
Consultation paper on arbitration: Indian legislature's efforts to introduce a better legislation

As discussed above, persisting judicial interpretation and constant shredding of the Act has by and large resulted in defeating the object of the Act. For instance, the definition of 'public policy' was extended to cover 'patent illegality' in Oil and Natural Gas Company Limited v Saw Pipes17, which was misused for challenging arbitration awards and also saw filing of frivolous applications for objecting the enforcement of foreign awards. Also the absence of contractual exclusion of Part I provisions in an international commercial arbitration held outside India has hampered the growth of international commercial arbitration in India. Taking cognisance of all these pit-falls in the Act, the Indian Ministry of Law and Justice has taken a desired step in addressing the challenges being faced by arbitration in India and released the consultation paper on proposed amendments to the Act in the year 2010. The amendments proposed are as follows.

Part I of the Act applicable only to arbitrations taking place in India. This amendment is proposed to curtail the effect of conflicting decisions of the Indian courts on applicability of Part I of the Act where the seat of arbitration is outside India.

As seen above, Part I of the Act confers broad powers on the Indian courts to order interim measures, appoint and remove arbitrators, and to hear challenges to the arbitral awards. These powers have given rise to criticism and have also been a source of dissatisfaction among parties. Section 2 of the Act provides that Part I of the Act is applicable where the seat of arbitration is in India. Inspite of specifically providing so, the Supreme Court in judgments like Bhatia International and Venture Global (supra), held that Part I of the Act is also applicable to international commercial arbitration held outside India, unless expressly or impliedly excluded. Therefore, to curtail such judicial intervention, the proposed amendment explicitly ousts the applicability of Part I to arbitrations held outside India.

However, the proviso to the proposed amendment states that the provision for grant of interim reliefs by court and the provision for taking assistance of the court in taking evidence which are contained in Part I of the Act would also apply to international commercial arbitration held outside India.

Promoting Institutional Arbitration

This proposed amendment provides for an 'implied arbitration clause' in every commercial contract worth 50 million rupees and any dispute in relation to these contracts have to compulsory be referred to institutional arbitration. The arbitration in such cases is to be administered by an approved arbitral institution.

Narrower Meaning To Be Assigned To The Term 'public Policy'

The Consultation Paper proposes to rectify the extended definition given to 'public policy' in Saw Pipes (supra) by removing the ground of 'patent illegality' from the definition of 'public policy' while retaining it as a separate ground in a modified form.

No Automatic Stay On Enforcement Of Award

This amendment proposes to tackle the loophole of automatic stay on enforcement of an award, stipulated in section 36 of the Act. Section 36 provides that enforcement of an award is stayed when the other party files an application to set aside the award. In order to expedite the enforcement of awards, this amendment provides that filing of an application to set aside an award will not operate as an automatic stay on enforcement of award, unless upon a separate application being made, the court agrees to grant stay of the operation of the award for reasons to be recorded in writing.

Recent trends in arbitration in India

The executive, judiciary and legislature in their own rights have strived hard to bring in efforts to promote arbitration in India. Some of the recent trends in arbitration in India are discussed below.

Introduction Of The National Litigation Policy

The then law minister Veerappa Moily, in 2010, had announced the National Litigation Policy which aims to reduce the average length of proceedings from 15 years to three years. The policy also recommends the use of arbitration as a cost-effective and expeditious way to resolve disputes to the government departments and the public sector undertakings. It points out that cause for delay in arbitration proceedings has been due to poor drafting of arbitration agreements and clauses and urges that these issues must be addressed soon.

Establishment Of London Court Of International Arbitration - India: A Dawn For Institutional Arbitration In India

Out of the two arbitration procedures of ad hoc and institutional arbitration, India is still in the nascent stage as far as institutional arbitration is concerned as mostly ad hoc arbitration is followed. However, the launching of London Court of International Arbitration - India (the LCIA India) and the introduction of its LCIA India Rules (the Rules) has to some extent reinforced a global appeal to the existing structure of institutional arbitration in India. Although the Rules are largely based on the tried and tested LCIA Rules, they provide a well complemented approach to the ethos of arbitration in India. These provisions include setting forth obligations of the parties and tribunal to ensure fairness and expediency in arbitration and granting greater power to the LCIA Court to ensure an organised and a workable arbitral process.

Development Of International Chamber Of Commerce - India

Recently, the International Court of Arbitration (the ICA) of the International Chambers of Commerce (the ICC) hired its first Indian lawyer to address the problems of judicial intervention in India as also to expand its increasing visibility in India. Over a couple of years, there has been an increase in the number of arbitrations referred to ICC as opposed to other arbitral institutions in India; and this step of ICA would certainly add to the advancement of ICC India as well as help improve India's reputation as an arbitration destination.

Reconsideration Of The Bhatia International Judgment

As discussed above, the Supreme Court has recently referred a batch of consolidated appeals to a five-judge Constitution Bench of the Supreme Court, which includes the chief justice of India. The Constitution Bench is hearing the appeals with the intention of reconsidering the correctness of the precedent laid down in the Bhatia International judgment (supra) in which the Supreme Court had deviated from the legislation by holding that the provisions of Part I of the Act would apply in the case of international commercial

arbitrations held outside India unless the parties expressly or impliedly exclude all or any of its provisions. The Bhaita International judgment has been criticised as it increased judicial interference from the Indian courts in arbitrations held outside India. The arguments in the appeals have started in January 2012. It is hoped that the forthcoming judgment will put an end to the issue of applicability of Part I of the Act.

Foreign Lawyers Can Visit India For A Temporary Period On A 'fly In And Fly Out' Basis To Advise Their Clients On Foreign Law

The Madras High Court in AK Balaji v Government of India & Ors,18 held that foreign law firms/lawyers cannot practice the profession of law in India without enrolling with the Bar Council of India under the Indian Advocates Act, 1961. However, foreign lawyers can visit India for a temporary period on a 'fly in and fly out' basis to advise their clients in on foreign law. Having regard to the aim and object of the international commercial arbitration introduced in the Act, the Madras High Court took this view that foreign lawyers cannot be debarred to come to India and conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration.

By and large, arbitration in India has developed as an effective and effectual institution for settlement of domestic as well as cross border disputes. Also the recent key developments have successfully brought in a long-awaited renaissance in arbitration in India giving an indication that India may well be seen as one of the arbitration-friendly nations.

*The authors would like to thank trainees Shruti Thampi and Neha Samant for their assistance in this chapter.

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Japan

Yoshimi Ohara
Nagashima Ohno & Tsunematsu

Summary

Arbitration in Japan: an increased awareness

International arbitration has recently attracted further attention from Japanese businesses as a viable means to resolve complicated international disputes, which was mainly a result of the widely publicised filing by Suzuki Motor Corporation against Volkswagen AG of an arbitration request with the ICC in November of 2011. Following the announcement of such filing by Suzuki Motor Corporation, Japan has seen not just legal practitioners but also business people and media becoming more aware and interested in the resolution of international disputes by means of arbitration, as evidenced by the rise in the number of articles and information on this topic in media, such as business related periodicals and newspapers1.

International arbitration practitioners in Japan have welcomed this development, although it has taken about eight years since the Japanese Arbitration Act was amended in 2004 to reflect the UNCITRAL Model Law, with the hope of encouraging more arbitration in lieu of litigation. Accordingly, in this article we first discuss the tendencies of Japanese companies with respect to engaging in international arbitration to resolve disputes.

In conducting our research for this article, we contacted the major international arbitration institutions that are relatively frequently chosen by Japanese parties to administer the arbitration of their disputes and learned that for the past five years there have been approximately 500 cases filed with the major international arbitration institutions involving at least one Japanese party (see figure (B) in the table below). It should be noted that the number of cases in which Japanese parties are involved account for only 5 per cent of the total number of international arbitration cases filed each year (see figure (A) in the table below), which is rather small when one considers the substantial volume of international business transactions conducted by Japanese companies.

Total Number Of International Arbitration Cases Filed Between 2007 And 2011 That Involve A Japanese Party2

Name of institution	Total number of international arbitration cases filed between 2007 and 2011 (A)	Total number of international arbitrations involving at least one Japanese party (B)	Ratio of international arbitration cases involving a Japanese party to all arbitration cases (B/A%)
ICC	3,668	92	2.5
AAA3	3,048	188	6.2
SIAC	731	24	3.3
HKIAC	877	23	2.6
CIETEC Beijing4	1,317	67	5.1
LCIA	823	8	1.0
JCAA	91	86	94.5
Total	10,555	488	4.6

It has been said that Japanese companies tend to prefer the settlement of disputes without resorting to official dispute resolution proceedings, such as litigation and arbitration. The above data confirms this general tendency. However, interestingly, if the figures are examined in more detail the percentage of international arbitration cases involving a Japanese party as a claimant (see figure in the table below) account for more than 60 per cent of the total number of international arbitration cases in which a Japanese party is a participant, as filed with the international arbitration institutions (see figure (b) in the table below).

Total Number Of International Arbitration Cases Filed Between 2007 And 2011 Where A Japanese Party Is A Claimant5

Name of institution	Total number of international arbitration cases (a)	Total number of international arbitration cases involving a Japanese party (b)	Total number of international arbitration cases involving a Japanese party as claimant (c)	Ratio of international arbitration cases involving a Japanese party as claimant (c/b%)
ICC	3,668	92	48	52.2
SIAC6	386	20	13	65.0
HKIAC	877	23	14	60.9
LCIA	823	8	6	75.0
JCAA	91	86	64	74.4
Total	5,845	229	145	63.3

It is true that Japanese companies tend to appreciate settling disputes without resorting to litigation or arbitration, because it is believed to be a more cost-effective and efficient way to resolve disputes while also allowing the parties to continue to have an ongoing positive business relationship. At the same time, Japanese companies seem not to hesitate to file an arbitration request if the chances of an amicable resolution or settlement appear unlikely, which is also supported by the above relatively higher ratio of Japanese parties engaging in international arbitrations as claimant rather than respondent.

This also coincides with the statement made by certain arbitration institutions that Japanese parties in international arbitration may arbitrate quite aggressively, which contradicts the general notion that Japanese companies are overly conciliatory and conflict-averse.

As practitioners in Japan, we have the impression that Japanese companies are becoming less reluctant to arbitrate or litigate in situations where an amicable resolution appears unlikely. It is no longer surprising to see news of litigation involving major Japanese companies being widely publicised in the Japanese media.7 It appears that the trend of Japanese companies utilising arbitration and litigation as a means of resolving disputes will continue into the future, especially when one considers the recent dramatic growth of outbound investment in emerging markets by Japanese companies.

Arbitration-friendly court

The above trend should help Japan develop as a seat of arbitration, in particular with the support of its arbitration-friendly courts. Japanese courts have a long tradition of respecting parties' decisions to settle disputes by way of arbitration. The Tokyo District Court issued a decision on 10 March 2011[8] in line with such tradition, dismissing a plaintiff's tort claim based on the arbitration agreement in place between the plaintiff and one of the defendants.

Facts

The plaintiff, a company incorporated in Japan for the purpose of importing and distributing cosmetics in Japan (the distributor), and the defendant, a company incorporated in Monaco for the purpose of manufacturing and selling cosmetics (the Monaco Company), entered into an exclusive distributorship agreement on 1 March 2006, whereby the distributor agreed to purchase and distribute the cosmetics of the Monaco Company exclusively in Japan. The agreement contained an arbitration clause, which provided that:

> Any and all controversies or claims arising out of or relating to the breach of this Agreement shall be settled by arbitration in Monaco, in accordance with the rules of the International Chamber of Commerce where meaning [sic] performance, operation, rights and remedies relating to and the legal effect of this Agreement including its termination or cancelling shall be construed pursuant to the laws of Monaco, the [sic] if requested by Distributor, and in Tokyo, Japan in accordance with the rules of the Japan Commercial Arbitration Association, [sic] meaning, performance, operation, rights and remedies relating to, and the legal effect of this Agreement including its termination or cancelling, shall be construed pursuant to the laws of Japan, if requested by Principle [being the Monaco Company].

The distributor hired a person to assist in the business development of the Monaco Company's cosmetics in Japan (the individual). However, the sales of the Monaco Company's cosmetics were not as successful as originally expected, and the distributor dismissed the individual. Shortly after such dismissal, the Monaco Company terminated the exclusive distributorship agreement with the distributor and established its own subsidiary in Japan for the purpose of importing and selling its cosmetics and appointed the individual as the representative director of the new subsidiary. The distributor filed a lawsuit against the Monaco Company, its representative, its Japanese subsidiary and the individual who was the representative of the subsidiary, alleging that all the defendants conspired to jointly disrupt and interfere with the distributor's business.

Issues

There were two major issues in the lawsuit: firstly, which law should govern in determining whether the tort claim was encompassed by the arbitration clause; and, secondly, which law should govern in determining whether the Monaco Company's motion to dismiss, pursuant to the arbitration clause, was abusive.

Governing Law Of The Arbitration Clause

The court held that the arbitration clause covered the tort claim of undue business interference and dismissed the distributor's claim. In construing the arbitration clause,

the court applied the Act on General Rules for Application of Laws,9 a Japanese law regarding conflict of laws, and took the position that the court should first search for an explicit agreement on the governing law applicable to the arbitration agreement and, absent an explicit agreement, look for an implied agreement with respect to the governing law applicable to the arbitration agreement. In determining an implied agreement, the court also took the position that it should take into account various factors, such as, among others, an agreement as to the seat of arbitration. The court, in applying such rule, held that in this instance the lawsuit was brought by the distributor and, therefore, if such claim had been brought in arbitration, the seat would have been in Monaco. Accordingly, the governing law was held to be the laws of Monaco. Under the laws of Monaco, arbitration clauses may be applied to disputes and controversies arising out of or in connection with the underlying contract but may not be applied if the underlying contract is void or not applicable. On this point the distributor argued that the defendants' conspired interference with the distributor's business was extremely malicious and beyond the type of dispute that was anticipated under the agreement and hence neither arose out of or in connection with the underlying agreement. However, the Tokyo District Court dismissed the distributor's claims and in finding that the disputes were in connection with the underlying agreement held that the essence of the disputes was whether or not the Monaco Company breached its obligation to exclusively supply the cosmetics to the distributor and whether or not the Monaco Company effectively terminated the distributorship agreement.

The approach of the court in the aforementioned case to apply the law of the seat of arbitration in interpreting the arbitration clause, absent the parties' explicit agreement on the governing law of the arbitration clause, is consistent with a Supreme Court of Japan decision that also dismissed a Japanese party's tort claim against the representative of a US party by applying the law of New York state, which was the seat of the arbitration under the arbitration agreement between the two parties.10 In principle, motions to dismiss claims based on the existence of an arbitration agreement should be granted when such claims are covered by the arbitration agreement. On this point it could be said that the Japanese court's approach to apply the law of the seat of arbitration in construing the scope of an arbitration clause is consistent with the New York Convention, which obligates the contracting state to apply the law of the country where the award was made in determining whether an arbitration agreement is valid absent an agreement between the parties as to the governing law (article V, section 1, paragraph (a)).

Governing Law In Determining Whether Motion To Dismiss Based On Existence Of Arbitration Clause Was Abusive

The second issue was which law should apply in determining whether or not the Monaco Company's motion to dismiss was abusive. On this point the court applied Japanese law and dismissed the distributor's claim due to a lack of evidence supporting the alleged abusive nature of the Monaco Company's motion. The court applied the law of Japan in this instance because the question of whether the motion to dismiss based on the existence of the arbitration clause is abusive or not is a question of legal proceeding and, therefore, such issue should be determined under the law of the seat of the legal proceeding, which was Japan in this instance.

This decision of the Tokyo District Court sent yet another strong message to the international arbitration community that Japanese courts will respect parties' arbitration agreements, and parties may not easily evade arbitration clauses by formulating non contractual claims so

long as the essence of such non-contractual claims are in connection with or arising out the underlying contracts.11

Cross-arbitration Clauses

Lastly, we briefly discuss the arbitration clause that was at the center of the above dispute in the Tokyo District Court as well as the Supreme Court decision in the Ringling Circus case.12 The disputed arbitration clauses in these two cases provided that the seat of arbitration was the location of the respondent. This type of arbitration clause, sometimes called a 'cross arbitration clause', is relatively common where at least one of the parties is a Japanese company. Generally, parties agree to such arbitration clauses as a concession and with the hope that this type of arbitration clause will give the potential claimant pause before commencing arbitration proceedings, as it will then be required to attend such arbitration in a foreign jurisdiction.

A cross arbitration clause can sometimes create serious problems in the operation of arbitration if the clause is not properly drafted. As a matter of principle, absent an agreement between the parties as to the governing law, the parties will not definitively know which country's laws will govern the arbitration and, therefore, there will be uncertainty as to the validity and the scope of the arbitration agreement itself because such terms would be determined by the applicable laws of the seat of the arbitration. This issue can be even more problematic under an arbitration clause, such as those disputed in Tokyo District Court, where not only the seat of the arbitration, but also the applicable administering rules and governing law itself vary depending on which party initiates the arbitration. This type of arbitration clause can give rise to serious issues as the parties would not know the governing law of the underlying contract until, and unless, either party initiates arbitration proceedings. In other words, in the case discussed above, in the absence of any arbitration requests, it could be said that there was no agreement between the parties as to the governing law of their agreement, except that it would be either Monaco or Japan in the instant case.

As a matter of practice, a cross arbitration clause could also allow a respondent to threaten to file claims against the claimant by commencing parallel arbitration procedure in the jurisdiction of the claimant, instead of filing counterclaims in the already pending proceeding at the location of the respondent. Even where the arbitration clause provides to the parties the right to 'initiate' an arbitration in the location of the respondent, as opposed to 'file claims' in the location of the respondent, the respondent may still attempt to derail the proceedings and threaten the claimant by asserting its right to initiate arbitration proceedings in the location of the claimant, in accordance with the cross arbitration clause. Such cross arbitration clauses can complicate the situation even further where a particular project is governed by multiple agreements and each arbitration clause in each agreement is independently set forth. In principle, it is most efficient to resolve all related disputes in a single proceeding, rather than multiple arbitrations, at least if the parties in such multiple disputes are the same. This is, in fact, one of the key benefits of arbitration (ie, the ability to resolve multi-jurisdictional disputes in a single proceeding). If the use of a cross arbitration clause is unavoidable, such provision must be carefully drafted to ensure that it cannot be misused to impede or prejudice the arbitration process.

Conclusion

Increased interest in international arbitration, coupled with judicial support for arbitration, could set the ground for further development of international arbitration involving Japanese parties. In fact, the Japan Commercial Arbitration Association has launched a project to

revise its international arbitration rules to keep pace with the rapid developments in this field, which has been greatly welcomed by the international arbitration committee in Japan.

Notes

1
For example, a mock arbitration organised by the Japan Arbitration Association in Tokyo May 2012 was reported on the front page of the evening edition of the Nikkei Newspaper (one of the most widely circulated Japanese business newspapers in Japan, similar to The Wall Street Journal).

2
The figures included in this chart are based on information collected from each institution, and not all the figures have been published. We note that each institution has a slightly different means of calculating the number of international arbitration cases involving Japanese parties. Some institutions collect the data with respect to parties incorporated in Japan, while others include overseas subsidiaries of Japanese companies in addition to companies incorporated in Japan. In addition, each institution uses a different definition of 'international arbitration'. We give special thanks to Mr Lijun Cao of Zhong Lun Law firm, Beijing office, who kindly collected the figures from CIETAC.

3
For the AAA, this figure is the total number of international arbitration cases filed between 2007 and 2010.

4
The number shown in this table relating to CIETAC is the number of cases administered by CIETAC, Beijing. This information was collected from Mr Lijun Cao. According to Mr Cao, each year approximately 10 to 20 international arbitration cases that involve a Japanese party are filed at CIETAC, Shanghai. However, detailed statistical data based on the nationality of the parties were not readily available for CIETAC, Shanghai.

5
See note 2. For the AAA and CIETAC, information with respect to the number of cases where a Japanese party was a claimant was not readily available.

6
Figures with respect to SIAC reflect the total data collected from 2010 and 2011. Information with respect to the number of cases where a Japanese party was a claimant is not available for previous years.

7
The 25 April 2012 headline of the evening edition of Nikkei Newspaper was the filing by Nippon Steel Corporation, Japan's largest steel producing company, against POSCO, Korea's largest steel producing company, of a lawsuit for POSCO's alleged misappropriation of Nippon Steel's 'crown jewel' trade secrets.

8
Tokyo District Court Decision, 10 March, 2011, No. 1358 Hanrei Times pp 236-240.

9
Article 7 of the Act on General Rules for Application of Laws provides that 'the formation and the effect of a judicial act shall be governed by the law of the place chosen by the parties at the time of the act'. An English translation of the entire act is available at http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&co=01&ky=%E6%B3%95%E3%81%AE%E9%81%A9%E7%94%A8%E3%81%AB%E9%96%A2%E3%81%99%E3%82%8B%E9%80%9A%E5%89%87%E6%B3%95&page=1.

10
Nippon Kyoiku Co Ltd v Kenneth Feld, 51-8 Minshu 3657 (Supreme Court, 4 September, 1997, the so-called Ringling Circus case.

11
The court came to this conclusion by applying the law of Monaco this time. However, the court would come to the same conclusion had the law of Japan been applied.

12
See note 10. In both cases the scope of the arbitration clause was at issue.

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Summary

2011 was undoubtedly an interesting year for arbitration practitioners in Hong Kong. First, the new Hong Kong Arbitration Ordinance (Cap 609) came into force on 1 June 2011. Secondly, the Court of Final Appeal gave its landmark decision on sovereign immunity in Democratic Republic of Congo v FG Hemisphere Associates LLC (FACV Nos. 5, 6 & 7 of 2010), which in turn highlighted the important role that arbitration and agreements to arbitrate play when contracting with a foreign state or the Central People's Government. Thirdly, two judgments were handed down at first instance which sparked interest in arbitration circles: Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd (2011) HKLRD 611 in which the Honourable Mr Justice Saunders[1] set aside an International Chamber of Commerce (ICC) award under (as was then) article 34 of the UNCITRAL Model Law; and Gao Haiyan & Anor v Keeneye Holdings Limited & Anor [2011] HKCU 708 in which, in the context of PRC arbitration proceedings involving 'med-arb', the Honourable Mr Justice Reyes granted the respondents' application to set aside leave to enforce a Xian Arbitration Commission (XAC) award under section 40E(3) of the old Arbitration Ordinance, namely for being contrary to public policy.

These developments were discussed in more detail in the Hong Kong chapter of The Asia-Pacific Arbitration Review 2012.

2012 looks set to be just as interesting. The most significant development has been India's notification that the People's Republic of China (PRC), including the special administrative regions (SARs) of Hong Kong and Macao, is a territory to which the New York Convention applies under the India Arbitration and Conciliation Act 1996.

In addition, both the Pacific China case and the Keeneye case have gone to appeal.

This article discusses the effect of the India notification, and examines the Court of Appeal's decision in the Keeneye case, given at the end of 2011. At the time of writing, the Court of Appeal's decision in the Pacific China case had not yet been handed down.[2]

This article also highlights the Hong Kong International Arbitration Centre (HKIAC)'s proposals to revise its Administered Arbitration Rules (Rules).

India notification

On 19 March 2012, the Department of Legal Affairs of the Indian Government Ministry of Law and Justice issued a notification under section 44(b) of the India Arbitration and Conciliation Act 1996. This notification declared the PRC (including Hong Kong SAR and Macao SAR) to be a territory to which the New York Convention applies for the purposes of that Act in respect of any awards made in the PRC, Hong Kong or Macao on or after 19 March 2012.

This notification is important for Hong Kong. Although India is a signatory to the New York Convention, only awards made in territories that have been notified under the Official Gazette[3] may be enforced in India under the New York Convention. Further, although notification had historically been made of over 40 states, notably, out of the Asian jurisdictions, the PRC (and Hong Kong) was absent from that list until now. In cases, therefore, where enforcement in India might be relevant, this notification reinforces Hong Kong's appeal as a seat for international arbitration.

Gao Haiyan v Keeneye Holdings Ltd [2012] 1 HKLRD 627

As a form of alternative dispute resolution, mediation has become increasingly popular in South East Asia and, in Hong Kong in particular, its increasing importance is reflected in the recent Civil Justice Reform, where 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.

Similarly, one of the underlying intentions of the new Arbitration Ordinance is to encourage the use of mediation-arbitration (med-arb) (see section 32 of the new Ordinance), where a mediator is appointed to try to resolve the dispute before arbitral proceedings are commenced, and arbitration-mediation (arb-med) (see section 33 of the new Ordinance), where the arbitral tribunal assumes the role of mediator part way through the proceedings with a view to settlement of the dispute.

It was in this regard that the first instance decision in the Keeneye case generated concern over the use of med-arb (or arb-med) in arbitration proceedings, and whether this increased the risk that enforcement of any award would subsequently be refused.

Background

A Chinese husband and wife, Gao Haiyan and Xie Heping, (claimants) entered into share transfer agreements with Keeneye Holdings Ltd and another BVI company (respondents). The agreements were governed by PRC law and provided for arbitration at XAC. The arbitration was governed by the XAC Rules. Article 37 of the XAC Rules provides that arbitration-mediation is to be conducted either by the tribunal or presiding arbitrator, or, by agreement of the parties, by any other third party.

The claimants' claim in the arbitration was that they had been influenced into entering into the agreements whilst in detention in China. They sought revocation of the agreements pursuant to Article 54 of the PRC Contract Law, arguing that the respondents had taken advantage of their hardship in inducing the claimants to enter into the agreements.

The tribunal had two sittings. After the first sitting, on its own initiative, the tribunal suggested that the parties settle the dispute by the respondents paying 250 million renminbi to the claimants in return for non-revocation of the agreements.

Then, before the second sitting, a purported arb-med took place in the form of a private meeting over dinner at the Xian Shangri-la hotel. The dinner was attended by Pan Junxin (XAC's Secretary General (Pan)) (who allegedly hosted the dinner) and Zhou Jian (the claimant-appointed arbitrator) (Zhou). Zeng Wei (Zeng), a third-party 'related to' (???) the respondent, also attended at Pan's invitation. The parties had not agreed to appoint Pan to conduct any form of arb-med. Further, neither the respondent-appointed arbitrator nor the presiding arbitrator attended.

During dinner, Pan told Zeng of the tribunal's 250 million renminbi settlement proposal and asked Zeng to 'work on' the respondents. Ultimately, however, the parties were unable to settle. Following the second sitting, the tribunal made an award in the claimants' favour and, at the same time, 'recommended' that the claimants should pay 50 million renminbi to the respondents (ie, the opposite of its settlement proposal, which proposed the respondents making payment to the claimants in order to keep the agreements alive).

The respondents did not at any time complain to the tribunal about the arb-med dinner, fearing that if they did so this would antagonise the tribunal. The respondents did, however, apply to the Xian Intermediate People's Court to have the award set aside on the grounds of bias. The Xian Intermediate People's Court refused to set the award aside.

The claimants then came to Hong Kong and obtained leave to enforce the award in Hong Kong from the Hong Kong court.

The respondents applied to set aside the leave to enforce the award under section 40E(3) of the old Arbitration Ordinance (now section 95(3) of the new Arbitration Ordinance), arguing that enforcement of the award would be contrary to public policy because the award was tainted by bias or apparent bias.

Decision of the Court of First Instance

The respondents were successful at first instance.

Bias

On the question of bias, the main issue before Reyes J was whether the award was made in circumstances which would cause a fair-minded observer to apprehend a real possibility of bias on the part of the arbitral tribunal.

Reyes J held that a fair-minded observer would 'apprehend a real risk of bias' and that 'what happened at the Shangri-La[4] would give the fair-minded observer a palpable sense of unease.'

He based his conclusion on the following findings:

- The mediators made their proposal to an intermediary - Zeng - rather than to the respondents or the respondents' lawyers. As a result, 'the impartial observer would fear that Zeng was chosen as an intermediary because he was perceived as a person wielding influence over the respondents who could press the proposal of paying the applicants 250 million renminbi.'
- Asking Zeng 'to work on' the respondents to accept the settlement proposal suggested that the mediators were forwarding their own agenda rather than communicating a neutral plan.
- The mediators' 250 million renminbi settlement proposal was made 'without authorisation from the [claimants] or inkling as to whether the [claimants] were prepared to accept the same.' This suggested that the mediators were 'acting on their own on an initiative which favoured the [claimants].'
- There was no explanation for the lack of correspondence or proportionality between 50 million renminbi (said in the award to be the fair compensation payable to the respondents) and the 250 million renminbi settlement proposal (said to be what ought to be paid to the claimants in return for the agreements being treated as valid).
- The setting for the mediation was 'odd': 'A private dinner in a hotel has a connotation of 'wining and dining' a person to make a difficult proposal palatable.'
- Finally, 'the proof of the pudding is in the eating', in that eventually, when the respondents did not agree to settle by paying 250 million renminbi to the claimants, the award in the end went in the claimants' favour and, at the same time, merely recommended (but did not require) a payment to the respondents of 50 million renminbi.

Reyes J also cautioned that there was the 'potential for an appearance of bias' in the med-arb process, saying that 'the mediator who may be sitting as arbitrator in the same case must be particularly careful not to convey to one party or the other the impression of bias.'

Waiver And Estoppel

On the question of waiver, Reyes J also held that the respondents had not waived any right to raise the issue of bias in Hong Kong. He accepted as valid the argument that the respondents were anxious not to antagonise the tribunal. Further, he felt that it was not until the award was actually published that 'a fair-minded observer might feel that one's uneasiness over the conduct of the mediation process was more than the product of an over-active imagination.'

On the question of estoppel, Reyes J held that the Hong Kong court was entitled to consider the question of bias from the viewpoint of Hong Kong policy because: 'Hong Kong public policy may well be different from public policy in Xian'.

Based on his findings above, Reyes J set aside the claimants' leave to enforce the award on the public policy ground.

The claimants appealed.

Decision Of The Court Of Appeal

The Court of Appeal allowed the claimants' appeal and permitted enforcement of the award.

Public Policy

Applying the leading authority, Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111 (which was also concerned with the enforcement of a Mainland award), the Court of Appeal confirmed that enforcement should only be refused if to enforce the award would be contrary to the fundamental conceptions of morality and justice of Hong Kong. The Court of Appeal said that the fact that holding a med-arb over dinner at a Chinese hotel might give rise to an appearance of bias in Hong Kong, would not justify refusal of enforcement in Hong Kong.

The Court of Appeal referred to the following comments made in the Hebei judgment:

> However, the object of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced….the provisions of Article V, notably Article V. 2(b) relating to public policy, have been given a narrow construction. It has been generally accepted that the expression 'contrary to the public policy of that country' in Article V.2(b) means 'contrary to the fundamental conceptions of morality and justice' of the forum…
> (Sir Anthony Mason NPJ)

> The expression public policy as it appears in s.44(3) of the Ordinance[5] is a multi-faceted concept. Woven into this concept is the principle that courts should recognise the validity of decisions of foreign arbitral tribunals as a matter of comity, and give effect to them, unless to do so would violate the most basic notions of morality and justice. It would take a very strong case before such a conclusion can be properly reached, when the facts giving rise to the allegation have been made the subject of challenge in proceedings in the supervisory jurisdiction, and such challenge has failed…
> (Litton PJ)

In relation to the issue of proceedings in a supervisory jurisdiction, the Court of Appeal also placed weight on the fact that the Xian Intermediate People's Court, the supervisory court, had refused to set aside the award for bias.

The Court of Appeal referred to a English authority, Minmetals Germany GmbH v Ferco Steel Ltd [1999] CLC 647, which was concerned with an application by Ferco Steel Ltd not to enforce a China International Economic and Trade Arbitration Commission (CIETAC) award on the basis, inter alia, that it was unable to present its case, CIETAC had breached its procedural rules and because enforcement would be contrary to English public policy. There was also an unsuccessful application to the supervisory court (Beijing) to set aside the award. The Honourable Mr Justice Colman stated:

> In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration. If the award is defective or the arbitration is defectively conducted the party who complains of the defect must in the first instance pursue such remedies as exist under that supervisory jurisdiction. That is because by his agreement to the place in question as the seat of the arbitration he has agreed not only to refer to all disputes to arbitration but that the conduct of the arbitration should be subject to that particular supervisory jurisdiction. Adherence to that part of the agreement must, in my judgment, be a cardinal policy consideration by an English court considering enforcement of a foreign award.
>
> In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand.

Waiver

The Court of Appeal also held that a clear case of waiver had been made out because the respondents had kept a complaint about an alleged irregularity up their sleeve for later use.

Article 5 of the Xian Rules provides that a party waives his right to object where that party participates in or proceeds with the arbitration knowing that a provision of, or requirement under, the XAC Rules has not been complied with.

Again, the Court of Appeal referred to Sir Anthony Mason NPJ's judgment in the Hebei case:

> the factual foundation for the public policy ground arises from an alleged non-compliance with the rules governing the arbitration to which the party complaining failed to make a prompt objection, keeping the point up its sleeve, at least when the irregularity might be cured.
>
> Whether one describes the respondent's conduct as giving rise to an estoppel, a breach of the bona fide principle or simply as a breach of the principle that a matter of non-compliance with the governing rules shall be raised promptly in the arbitration is beside the point in this case.

In this case, subsequent to the meeting at the Xian Shangri-la hotel, the respondents submitted a 'Supplemental Submission' dated 13 May 2012 to the tribunal. In that submission, the respondents argued that the agreements were not manifestly unfair nor made contrary to the claimants' intention, and concluded as follows:

> The Arbitration Tribunal should dismiss the counterclaim of Xie and Gao according to law. Concerning the consideration of the share transfer, our company is willing to participate in mediation conducted by the Arbitration Tribunal. However, in light of Gao and Xie's personality, they will behave improperly whenever they have some money. We sincerely hope the Arbitration Tribunal gives Gao and Xie no more than RMB 60 million during mediation. We consider the offer very favourable given Gao and Xie are playing 'Karate'. He will laugh and wake up at midnight! Concerning people who don't know Gao and Xie and helped them to fight the lawsuits, we are willing to pay for all the costs they incurred. On 5th February this year in the afternoon, Xie Heping at a Hong Kong solicitor's firm said that he had spent costs of about RMB 7 million in the Xian Arbitration Tribunal case. We are willing to pay for that too.

There was also a hearing before the tribunal on 31 May 2010.

The Court of Appeal held that it was not the respondents' case that they had no apprehension of bias or impropriety, real or apparent, prior to the making of the award. Rather, the respondents were hoping for a satisfactory conclusion but feared that, should they antagonise the tribunal by complaining, that might result in an unfavourable or less favourable result. Nor was it is open to a litigant to wait and see how his claims turned out before pursuing his complaint of bias. The mischief in keeping silent had been identified by Sir Anthony Mason NPJ in his Hebei judgment in that it precluded an ascertainment in the arbitration of the respondents' complaint:

> Moreover, had the question been raised, it is possible that action may have been taken by the Tribunal to remedy the situation, assuming that such action was necessary or desirable.

The Court of Appeal held that this was very much so in this case. Moreover, the tribunal and the Xian Intermediate People's Court would have been in a much better position to ascertain the facts and to decide whether those facts established a case of actual or apparent bias. As noted above, the Court of Appeal felt that such finding, though not binding, would be entitled to serious consideration by the Hong Kong courts.

Bias

The Court of Appeal also considered the factors listed by Reyes J relevant to his finding of apparent bias and concluded that a sufficient case of apparent bias had not been made out, contrary to the fundamental conceptions of moral and justice in Hong Kong.

The Court of Appeal felt in particular that due consideration must be given to how mediation is normally conducted in the place where it was conducted. This was another reason why weight had to be given to the decision of the Xian Intermediate People's Court refusing to set aside the award.

Further and specifically, taking into account the relevant facts of this case, the Court of Appeal: considered that Zeng had participated in the mediation with the agreement or on the authority of the respondents; did not agree that the difference between 250 million renminbi

and 50 million renminbi would give rise to an apprehension by the fair-minded observer of apparent bias; and held that the expression 'work on' is a common expression in the Mainland.

Comment

Although the Keeneye case is rather unusual on its facts, the Court of Appeal's judgment demonstrates very clearly the long standing pro-enforcement attitude of the Hong Kong courts and their very narrow interpretation of what being contrary to public policy means. Moreover, this decision should reassure parties about the use of med-arb and arb-med as part of the arbitration process, so long as any procedure adopted is considered acceptable in the seat of the arbitration.

Revision of HKIAC Administered Arbitration Rules

On 1 September 2008, the Rules came into force. The Rules are for use by parties who 'seek the formality and convenience of an administered arbitration'[6] and their intention was to offer a 'light touch' administered approach, inspired by the approach of the Swiss Rules of International Arbitration. The Rules, which were designed especially with Chinese-foreign disputes in mind, are issued in Chinese and English versions. As the then chairman of the HKIAC, Dr Michael Moser said:

> The HKIAC Administered Arbitration Rules provide users with an additional option to consider when weighing different dispute solutions. The main impetus behind the Rules was a strong demand from parties in mainland China for a 'light touch' administered arbitration proceedings in Hong Kong.[7]

Three years after the implementation of the Rules, the HKIAC Council is considering what (if any) revisions should be made to the Rules. The HKIAC Council is not contemplating a wholesale revision of the Rules as the general view is that the Rules are working well. Rather, the aim is to modify the Rules drawing on just over three years' experience of their usage, as well as to take into account best practice in international arbitration and the provisions of the new Arbitration Ordinance.

In December 2011, the HKIAC posted a Consultation Paper on its website, and invited views from users on whether and to what extent amendments should be made. A number of firms and individuals have already submitted comments on the proposed amendments and the first consultation meeting was held on Wednesday, 28 February 2012 at the HKIAC.

The amendments which have been proposed include both modifications to the existing Rules and new provisions to ensure that the HKIAC is kept up to date with best trends in modern international arbitration practice.

The key possible proposed amendments to the already existing Rules have been identified as follows:

- Article 1 (Scope of Application, section I. General Rules): amending the scope of the Rules described in article 1.1. to address party disputes over whether the Rules do (or should apply) to the dispute in question.
- Article 8 (Appointment of Arbitral Tribunal, section III. Arbitrators and the Arbitral Tribunal): simplifying (and amending) the article 8.2 procedure for appointing arbitrators in a multi-party arbitration.
-

Article 14 (General Provisions, section IV. Arbitral Proceedings): expanding the provisions in Article 14 regarding joinder.

- Article 24 (Interim Measures of Protection, Section IV. Arbitral Proceedings): amending article 24:

- to give more guidance on what interim measures an arbitral tribunal is able to grant. Proposals include either clarifying that the jurisdiction to order interim measures includes the jurisdiction to grant security for costs, (section 56 of the new Arbitration Ordinance gives the arbitral tribunal power to order a claimant to give security for the costs of the arbitration); or stating that the power to order security for costs is a separate power of the arbitral tribunal; and
- to bring it into line with sections 35 and 36 of the new Ordinance, which in turn incorporate articles 17 and 17A of the UNCITRAL Model Law (as revised in 2006), regarding the power of the tribunal to order interim measures, including the conditions for granting such measures.
- Article 36 (Fees and Costs, section V. The Award; including the Schedule of Arbitrators' Fees annexed to the Rules): considering whether the parties should in article 36.2 be permitted to decide how the tribunal's fees should be determined, whether by applying the fee schedule or the arbitrator's hourly rate. Factors raised during the initial consultation process include whether fees should be centrally controlled and/or fully transparent; and whether the fee schedule annexed to the Rules should be revised.

In addition, the HKIAC Rules Revision Committee has identified a number of new matters for possible incorporation into the Rules:

- Emergency Arbitrator Procedure: provisions to establish a procedure for appointing an emergency arbitrator who would consider applications for interim relief between the service of the Notice of Arbitration and the constitution of the arbitral tribunal. This proposal reflects the trend of arbitral institutions in providing parties with a means of resolving urgent situations before the arbitral tribunal has been constituted. For example, similar provisions can be found in the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce which came into force on 1 January 2010 (SCC Rules 2010), the Arbitration Rules of the Singapore International Arbitration Centre which came into force on 1 July 2010, the International Chamber of Commerce Arbitration Rules which came into force on 1 January 2012 (ICC Rules 2012) (noting that the emergency arbitrator provisions in the ICC Rules allow a party to make an application for emergency relief even before it has submitted its Request for Arbitration) and the Swiss Rules of International Arbitration which came into force on 1 June 2012 (Swiss Rules 2012).
- Expedited formation of an arbitral tribunal: provisions for the expedited formation of an arbitral tribunal.
- Consolidation of arbitration proceedings: provisions for the consolidation of arbitration proceedings. Again, provisions dealing with consolidation can be found in the ICC Rules 2012, the Swiss Rules 2012 and the SCC Rules 2010.
- Enforcement of award: a provision conferring an express duty on the arbitral tribunal (and by extension on the HKIAC) to do everything possible to ensure that the award is enforceable.

- The new Arbitration Ordinance: finally, the HKIAC Rules Revision Committee has undertaken to review the HKIAC Rules against the new Arbitration Ordinance, and to consider whether any further amendments are necessary or appropriate following the coming into force of the new Arbitration Ordinance.

The consultation process is on-going. At the initial consultation meeting on 28 February 2012 the HKIAC Rules Revision Committee stated that it would circulate a revised draft of the HKIAC Rules, taking into account the comments received and issues discussed to date, for further comment and consultation. It is hoped that the revised Rules will be in place before the end of 2012.

Conclusion - enter the dragon

Hong Kong's Year of the Dragon has had an auspicious start in the arbitration sector: any enforcement risks associated with enforcement in India have been removed by India's notification of China (and Hong Kong) as being a Convention territory for the purposes of the 1996 Arbitration and Conciliation Act; the Court of Appeal's decision in the Keeneye case has further confirmed that 'public policy' is a narrow concept and enforcement of an arbitral award should only be refused on the contrary to public policy ground where to enforce the award would be 'contrary to the fundamental conceptions and morality and justice of Hong Kong';8 and the HKIAC is taking steps to ensure that its Rules reflect best practice and, most importantly, work well for those using them.

Hong Kong already as an excellent reputation for being an arbitration-friendly jurisdiction. The recent developments discussed above can only enhance that reputation.

Notes

1
The judge in Hong Kong then specialising in arbitration.

2
The appeal was heard in March 2012 and judgment was due to be handed down on 9 May 2012.

3
The PRC notification will be gazetted in the India Official Gazette.

4
Reyes J proceeded on the basis that what happened at the Shangri-la was part of an unsuccessful mediation, 'albeit with serious reservations' because the procedure followed by the tribunal was not strictly in accordance with Article 37 of the XAC Rules.

5
Section 44 of the old Arbitration Ordinance dealt with the enforcement of New York Convention awards, and followed the wording of section 40E.

6
Introduction to HKIAC Administered Arbitration Rules.

7
The Arbitration Law 1994 does not contain any reference to, or provision for, ad hoc arbitration and arbitration in the Mainland is essentially institutional, ie, administered by an arbitral institution such as CIETAC.

8
In March 2012, the Court of Appeal refused to give the respondents leave to appeal to the Court of Final Appeal.

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