The Asia-Pacific Arbitration Review

2014

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The 8th annual edition of *The Asia-Pacific Antitrust Review* delivers specialist intelligence and research designed to help navigate the region's increasingly complex competition regimes. The growth in recent years of the Asia-Pacific economies and the importance of competition regulation in the region make the need for a clear and concise guide to its antitrust and trade laws. Leading practitioners put these into context by reviewing their application over the past year and analysing the developing case law. Senior officials from government agencies provide insight to current enforcement and discuss priorities for the year ahead.

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Introduction

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Summary

The past year has been yet another robust and fruitful year for Asian economies and the region's practice of international arbitration. Economies within the Asia-Pacific region have largely been resilient to the recent global economic crisis. Together with relatively stable signs in the economy, arbitration is, as ever, gaining more recognition and reliance from industries as the desired method of dispute resolution and risk management. Signs indicating a thriving arbitration industry abound in the region. Arbitral institutions throughout Asia-Pacific are expanding their infrastructure – physical as well as legislative – to cope with a steady increase in demand for arbitration and to foster further growth. State-of-the-art hearing facilities are being built and expanded; arbitral rules are being updated to implement newly developed and efficient procedures; and national legislation is being amended to improve efficiency and effectiveness in the arbitration procedure and the enforcement of arbitration awards. All of these efforts combine to promote the Asia-Pacific region as a vibrant arbitration community replete with innovative practices, a pro-arbitration infrastructure and an arbitral culture. These trends are likely to continue in the foreseeable future, and will contribute to raising Asia-Pacific's profile as one of the world's premier destinations for international arbitration.

New infrastructural developments

Korea

In response to the growing demand in quality international arbitration venues in north-east Asia, the Korean Bar Association, the Korean Commercial Arbitration Board, the Seoul metropolitan government and the Ministry of Justice have made a collaborative effort to launch the Seoul International Dispute Resolution Centre (Seoul IDRC), in operation since 27 May 2013. Located in the centre of downtown Seoul, with easy access to law firms, businesses, hotels and historical landmarks, Seoul IDRC provides world-class hearing facilities. Hearing rooms are equipped with the latest in document-sharing technology, video conferencing, real-time transcription and other services necessary to maximise efficiency, ease and accuracy during a hearing. Seoul IDRC is modelled after the success of Singapore's Maxwell Chambers, and hopes to provide a cost-effective option to parties, counsels and arbitrators to have hearings in north-east Asia. In particular, it hopes to host hearings of international arbitrations involving parties around the region such as Korea, China and Japan, as well as conferences and seminars. It has entered into cooperation agreements with major international arbitration institutions such as HKIAC, ICC, ICDR, LCIA, SIAC and WIPO.

Already known for its arbitration-friendly legal infrastructure and its pool of highly qualified arbitration practitioners, Korea is moving forward in playing its role to activate more interest in international arbitration in the region. The Seoul IDRC is but one of the many steps being taken to provide an optimum arbitration venue for international parties.

Singapore

The Singapore International Arbitration Centre (SIAC) has undergone a significant change under its new revised rules, which came into force on 1 April 2013. Under the new rules, SIAC has established the Court of Arbitration which will be responsible for the case administration, appointment and challenge of arbitrators, and other relevant policy matters. The board of directors has been established to oversee the operation and business development matters of SIAC.

In addition to the changes in its governance structure, SIAC is now expanding its operations in India. In April 2013 SIAC launched its first oversees office in Mumbai, India. Trade between India and Singapore has been active in recent years, and this has naturally led to the use of arbitration by Indian parties, especially under SIAC rules. The SIAC office in Mumbai does not administer arbitration cases but will be focused on the marketing and promotion of international arbitration within India.

China

With the adoption of the new 2012 CIETAC Rules, the oldest arbitral institution in China has recently been engaged in some significant changes, which will need to be considered when parties contemplate arbitration in China. Article 2.6 of the revised CIETAC Rules states that where the arbitration clause does not clearly state a designated sub-commission, CIETAC Beijing will administer the case. Opposing this new rule, CIETAC Shanghai and CIETAC South China have established their own office as an independent entity. CIETAC Shanghai unveiled its own panel of arbitrators and a new set of arbitration rules, effective from May 2013. It now goes under the name of SIETAC (Shanghai International Economic and Trade Arbitration Commission) but it also uses SHIAC as an alternate abbreviation. CIETAC South China is now named SCIETAC, but is also known as the Shenzhen Court of International Arbitration (SCIA); it adopted its own rules and panel of arbitrators on 1 December 2012. Recent rulings regarding arbitration clauses containing the former CIETAC Shanghai sub-commission have raised concerns regarding the new changes, and future developments should be monitored.
Legislative updates

To keep step with the growing use of international arbitration within the region, legislative initiatives are currently being undertaken by a few countries and are seen as welcome changes by those in the arbitration community.

China

China has taken a proactive step to fine-tune its arbitration regime by implementing some noteworthy changes in its Civil Procedure Law (CPL). Under Article 101 of the amended CPL, parties of a domestic arbitration case will no longer need to wait until arbitral proceedings have started to request a conservatory measure to preserve evidence or property. It is, however, unclear as to how this article will be applied to foreign-related arbitration cases.

Another significant change that will reinforce PRC's status as an arbitration-friendly jurisdiction is article 237. Article 237 has narrowed the scope of the grounds for refusing to enforce a domestic award, much like the grounds for setting aside the award under article 58 of its Arbitration Law. Furthermore, under article 154 of the CPL, when a PRC court refuses to enforce an award it is now obliged to state the reason for doing so – whereas before, a simple ruling was all that was required to set aside an arbitral award.

These significant changes in the legislation of the PRC are indications of China's willingness and proactive stance towards arbitration, and it is a welcome move that many have been waiting for in the region.

Hong Kong

Not one to fall behind its mainland counterpart, Hong Kong revised its Arbitration Ordinance in June 2011 to unify its domestic and international arbitral regimes based on the UNCITRAL Model Law and to stay current with the advancing field of international arbitration. However,

the Arbitration Amendment Bill 2013 was introduced to the Hong Kong Legislative Council in April 2013 and was passed on 10 July 2013.[1]

The main changes that were instituted include the following:

- Enforcement of a relief awarded by an emergency arbitrator would be possible, whether appointed under institutional rules or other arbitration rules and whether the decision is granted in or outside Hong Kong.
- If the costs of the arbitration are to be taxed, it will be done so on a 'party and party' basis.
- Awards in Macao and Hong Kong are now mutually enforceable following an agreement, signed in January 2013, called the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the Hong Kong SAR and the Macao SAR.[2]

Korea

In mid-2012, the Ministry of Justice organised a special task force to identify issues to be included in the amendment to the Arbitration Act, which was adopted in 1999 to reflect the 1985 UNCITRAL Model Law. This year, the Ministry expanded the task force into a special commission, composed of scholars, practitioners and officials, with a mandate to recommend possible amendment to the Arbitration Act reflecting the development in the international arbitration law and practice, including the 2006 UNCITRAL Model Law and recent amendments to laws of other major jurisdictions. It is expected that the committee make a recommendation in the first half of 2014.

Recent changes in institutional arbitration rules

HKIAC

The Hong Kong International Arbitration Centre (HKIAC) has played a prominent role is raising Hong Kong's status as a respected seat of arbitration. Initially administering international arbitral proceedings using the UNCITRAL Rules, HKIAC established its own Administered Arbitration Rules in 2008. In order to stay current with the developing international arbitral arena, HKIAC revised its rules under the review of the Rules Revision Committee, which will come into effect on 1 November 2013. The changes include the following:

- Additional parties may now be joined to an arbitration when requested by one of the existing parties, provided that the additional party is bound by a valid arbitration agreement.
- Upon the request of a party, claims from multiple contracts may be made in a single arbitration, provided that: parties are bound by each arbitration agreement; a common question of law or fact arises; the rights to relief arise out of the same transaction(s); and arbitration agreements are compatible.
- Where the amount in dispute does not exceed HK$25 million, or in cases of exceptional urgency, a party can request to have the case administered under the expedited procedure. A sole arbitrator will be appointed unless parties request otherwise, and the award is to be made within six months.
-

A party can apply for interim or conservatory relief prior to constitution of the arbitral tribunal, to preserve assets or evidence, and other forms of relief. An emergency arbitrator is appointed within two days, and a decision is made within 15 days.

KCAB

To promote international arbitration, the former rules of the Korea Commercial Arbitration Board (KCAB) were revised to facilitate reliable, cost-effective arbitration at a convenient location in northeast Asia. The most prominent feature of the revisions is the default application of the international arbitration rules when one of the parties, at the time of the conclusion of the arbitration agreement, has its place of business in a state other than Korea, or the place of arbitration expressed in the arbitration agreement is in a state other than Korea.

Another noteworthy feature of the KCAB International Rules is the new expedited procedure, detailed in Chapter VI. This speedy procedure applies if the claim amount does not exceed 200 million won, or if the parties agree to the procedure. A sole arbitrator is generally appointed by the secretariat, and the award is rendered within three months of the constitution of the arbitral tribunal.

Other revisions include a cap on administrative fees for cases at 150 million won, and the expanded role of the international arbitration committee which includes consultation regarding challenges, replacement, removal or appointment of arbitrators. The KCAB continues to update its services and its rules to facilitate an effective and satisfactory resolution for all parties involved, and all efforts are being made to promote international arbitration within the region.

One such effort is the organisation of the regional rounds of the Foreign Direct Investment Arbitration Moot Competition (FDI Moot regional rounds) in Seoul from 22–24 August, 2013. This year will mark the first regional rounds for the Asia-Pacific region, and 18 teams have currently registered. Together with the Korean Ministry of Justice, the Center for International Legal Studies (CILS) and the Korean Council of International Arbitrators (KOCIA), the KCAB will be hosting the regional rounds to promote interest in investment arbitration.

KLRCA

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) has also revised its arbitral rules to better enhance the procedural aspects of arbitrations administered under its rules. The revised rules, which came into effect on 2 July 2012, track the provisions of the Arbitration Amendment Act of 2011 that reinforced the enforceability of arbitral awards, and reflect the feedback and opinions that KLRCA has gathered from parties, arbitrators, and administrators. A few of the revisions are as follows:

- The period for appointment of arbitrator(s) has been reduced to 30 days.
- The arbitrators that are appointed by parties, or any appointing authority agreed by them, must now be confirmed by the director of the KLRCA. An agreement by the parties to appoint an arbitrator shall be deemed as a nomination, not an appointment.
- New provisions regarding challenge of arbitrators have been included in the revisions, which enable the KLRCA to administer challenge procedures and the KLRCA director to make the final decision.
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Procedural provisions relating to rendering of awards have been revised to better clarify with regards to the extension of time and delivery of arbitral awards and the release of awards.

An equally important achievement for the KLRCA is the launch of the KLRCA i-Arbitration Rules on 20 September 2012. The i-Arbitration Rules is the first set of rules that adopts the UNCITRAL Arbitration Rules, while also allowing for the resolution of disputes arising from any contract that may contain aspects of shariah law, including Islamic finance and halal products. The intent behind the creation of the i-Arbitration Rules is to provide for international commercial arbitrations for Islamic commercial transactions, premised on Islamic principles. As globalisation advances and cross-border transactions and disputes increase, the i-Arbitration Rules well suit those who wish to settle their disputes via arbitration while observing Islamic principles. The rules ensure a shariah-compliant adjudication of disputes by providing that, whenever the arbitral tribunal must form an opinion on an issue related to shariah principles or decide on a dispute arising from the shariah aspect of an agreement, the tribunal shall refer the matter to a shariah expert or advisory council, who will advise the tribunal as to the resolution of such issues.[3]

SIAC

As mentioned above, SIAC has unveiled its newly revised rules which include a number of noteworthy changes.[4] These changes include, among others, the following:

- Under Rule 22.5 of the new SIAC Rules, witness interviews prior to his or her appearance at the hearing are expressly permitted. This new change reflects current practices under institutional rules and guidelines, such as the IBA Rules of the Taking of Evidence in International Arbitration.
- The arbitral tribunal can now enjoy broader powers under Rule 24(e) of the new Rules regarding the inspection of any property or item. Unlike the former rule, which required the inspection to be conducted in the parties' presence by an expert or tribunal, the new rule does not require such a condition.
- Rule 24(n) enables the tribunal to decide any new issue that was not raised before in the submissions, as long as there is notice and the other party has been given sufficient opportunity to respond to such issue.
- It is now possible to review an award that has been published by SIAC under Rule 28.10. The names of the parties will, of course, be redacted but this opportunity to have access to the awards will be welcomed by many.

A welcome progression

Myanmar

Rich in minerals, gas and other natural resources, Myanmar has been the centre of attention for many foreign investors, and the recent decision to accede to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) has added another layer of stability for investors. Myanmar deposited the instrument of accession with the secretary-general of the United Nations on 16 April 2013 and the New York Convention will enter into force on 15 July 2013. Although Myanmar's Arbitration Act 1944 has not been amended to meet the global standards for best practices in international arbitration as of yet, the accession to the New York Convention is a step forward in providing investors with a sense of stability that foreign awards will now be enforceable in Myanmar.

Conclusion

Without a doubt, Asia's vibrant and dynamic economy has called for constant changes in legislation and institutional rules to better accommodate the growing needs of parties in international arbitration, and such demands are being met in various regions of Asia. Despite some growing pains, it is clear that international arbitration is considered a viable means of dispute resolution for the region, as reflected in the efforts of various governments to update and streamline their arbitral legislation and infrastructure. Although it remains to be seen how these changes will affect the use of international arbitration, it is clear that the constant development of innovative arbitral mechanisms is alive and well in the Asia-Pacific region.

1. 'Arbitration in Hong Kong and China: Recent Developments and Considerations for Asian Parties', Korean Arbitration Review, August 2013.
2. www.legislation.gov.hk/intracountry/eng/pdf/macaoe.pdf.
3. KLRCA i-Arbitration Rules: www.klrca.org.my/scripts/list-posting.asp?recordid=288.
4. SIAC Arbitration Rules 2013: www.siac.org.sg/index.php?option=com_content&view=article&id=427&Itemid=204-.

Seoul International Dispute Resolution Centre

Preface

Vivekananda Neelakantan

Singapore International Arbitration Centre

On a bright Monday morning in June 2012, the then-Attorney General of Singapore, Sundaresh Menon (now Chief Justice of Singapore) delivered a thought-provoking, award-winning opening address at the International Council for Commercial Arbitration (ICCA) Annual Congress in Singapore. He began by referring to the new age of arbitration for Asia – and elsewhere in the world – as its golden age. Perhaps as a testament to this, the 2012 ICCA Congress was the best-attended Congress ever and the first to be held in South East Asia.

Chief Justice Menon suggested that international arbitration practitioners should throw caution to the wind and consider issues of accountability and checks on arbitral institutions, the lack of a central organising structure or a regulatory body supervising the evolution of the body of investment arbitration law and the tenuous relationship between the judiciary and the arbitration world. His speech provoked intense debate over the next four days at the Congress and, thereafter, across the world.

Meanwhile, in Hong Kong, Dr Julian Lew QC spoke of the shift of economic power from the West to the East. Dr Lew predicted that countries that have adopted the Model Law will be at the vanguard of the development of international arbitration law and practice. He went on to say that Asian countries with the highest concentration of Model Law-based arbitration legislation were likely to be increasingly attractive arbitration destinations.

At the heart of it all, the Singapore International Arbitration Centre (SIAC) saw a record caseload in 2012 with 235 new cases filed with the institution in its 21st year: a 25 per cent increase on the previous year. 191 of these cases were administered by the SIAC. Parties from 39 jurisdictions were involved in cases at the SIAC with mainland Chinese and Indian parties featuring as the most frequent users. A total sum in dispute of S$3.61 billion was involved in these cases.

The HKIAC handled 293 cases for the same period, 68 of which were administered by the institution. The London Court of International Arbitration (LCIA) handled 265 new cases in 2012, of which 15 per cent of cases involved Asian parties. CIETAC Beijing handled 975 cases for the same period.

Arbitral institutions are expanding and new institutions are developing in Asia. The National Arbitration Centre in Cambodia was launched in March 2013. In May 2013, the SIAC opened its first overseas office in Mumbai, India, in a bid to reach out to users in that jurisdiction that has traditionally been the largest contributor of cases to the SIAC. In May 2013, South Korea saw the opening of a brand new arbitration hearing facility, the Seoul International Dispute Resolution Centre, which also plays host to offices of the SIAC, the HKIAC and the LCIA. Less encouraging, however, is the split between CIETAC Beijing and its sub-commissions in Shanghai and Shenzhen, a development that has raised (and is likely to continue to raise)

issues of enforcement of awards from the former sub-commissions that have since formed new independent bodies.

The ICC's International Court of Arbitration introduced a new set of rules in January 2012. The HKIAC is poised to introduce its own new set of rules in November 2013 for administered cases. Both institutional rules set out detailed provisions on arbitrations involving multiple parties and contracts and joinder of parties. The HKIAC will also introduce provisions for a default capped hourly rate for arbitrators. The SIAC also introduced a new set of rules in April 2013 bringing into effect changes to its governance structure with the introduction of a new Court of Arbitration consisting of 16 eminent international arbitration practitioners to oversee case management at the SIAC. The SIAC's new rules also streamlined various procedures, amended existing rules to bring them in line with recent Singapore law on arbitration and introduced provisions permitting the SIAC to publish awards in redacted form for the benefit of its current and potential users.

New measures to obtain interim relief through the appointment of an emergency arbitrator is a new, exciting area of arbitration law. The SIAC introduced such provisions in its 2010 rules and has, to date, received 27 applications requesting the appointment of an emergency arbitrator. In nine of these cases, the interim relief requested was not granted by the emergency arbitrator appointed by the SIAC. These provisions have proved quite popular with Asian parties, who – in 12 of these cases – have made the application requesting urgent interim relief. In their new rules, the ICC and the HKIAC follow suit with the introduction of provisions for the appointment of an emergency arbitrator. The ICC has received two cases thus far under these provisions.

There were also significant court decisions in 2012. In India, the Supreme Court handed down its now-famous decision in Balco to settle the position that, under the Indian arbitration legislation, Indian courts did not have jurisdiction to grant interim measures in respect of foreign-seated arbitrations or to deal with challenges to foreign awards. The Court firmly endorsed the seat as the 'centre of gravity' of an arbitration to determine jurisdiction of courts. Perhaps most important is the Court's elucidation of the interpretation of the phrase 'of the country in which, or under the law of which, that award was made' in article V(1)(e) of the New York Convention. While the phrase has been the subject of discussion worldwide, the Court took the view that there cannot be concurrent jurisdiction of two separate courts: at the seat and at the courts of the jurisdiction of the governing law of the arbitration – it can only be the court at the seat of arbitration that can exercise such jurisdiction to deal with a challenge. The Court, however, confined the application of its dicta to arbitration agreements executed after its decision (ie, after 6 September 2012). In doing so, the Court may not have found strong enthusiasts but the position remains. Nonetheless, the decision is a hugely positive development for India and brings the Indian position in line with international arbitration jurisprudence and understanding. In Australia, in March 2013, the High Court upheld the constitutional validity of its arbitration legislation in TCL Air Conditioner and confirmed the commitment of Australian courts to enforcing arbitral awards.

The period between now and 2014 promises to be exciting for international arbitration in Asia, and The Asia-Pacific Arbitration Review will provide greater detail on some of these recent developments in key jurisdictions in the region.

Singapore International Arbitration Centre

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Economic Damages

James Searby

FTI Consulting

Is market-based comparables analysis pertinent to oil company valuations?

One of the most common standards of value is 'fair market value', which may be loosely defined as the value that would be reached in an arm's-length negotiation between a willing buyer and seller, each acting in their own interest, neither under compulsion. Fair market value is often used as a proxy for the value that would be reached by anonymous market participants. The willing buyer and seller are assumed to be typical of the market as a whole and not to embody any specific characteristics. Thus, the fair market value of, say, a pipeline may differ from its value to the owner of the power station that depends upon the gas it delivers.

Two of the most commonly used methods for assessing the value of assets are discounted cash flow (DCF) modelling and market-based (or 'multiples') analysis.[1] A DCF model calculates a single monetary asset value, in present-day terms, by discounting a set of future cash flows at a rate that reflects their risk. Cash flows may be subject to a range of potential risks, whether they are 'macro' risks present in the asset's general environment, or 'micro' risks specific to the investment and the market(s) in which it operates. DCF models often incorporate assumptions that rely on the valuer's judgement and may be used to assess value under any standard, 'fair market' or otherwise.

Although markets exist for assets that are identical to one another (ie, commodity markets), most markets trade heterogeneous assets. No two pieces of real estate are the same; companies differ in their operations, customers and managements; bond prices vary with their issuer, maturity and coupon; the values of Picasso paintings differ from one to another, and from those of paintings by other artists. A market-based assessment of value is therefore often an inference based on prices of similar, but not identical, assets with publicly available prices.

A market-based approach to valuation seeks to identify the value of an asset from the market prices of comparable assets. A market-based valuation is expressed by reference to an appropriate characteristic (or 'metric') of the asset, such as its profits, sales or book value. For example, the value of a company might be expressed as, say, twice its sales or 12 times its earnings. Unlike a DCF model, a market-based approach assumes that market value is the appropriate valuation standard, although adjustments might be made to reflect the specific circumstances of a given transaction.

In the recent ICSID arbitration of Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador (the Occidental case), the Tribunal was confronted with both DCF and market-based approaches put forward by quantum experts appointed by the parties.[2],[3]

The case related to the termination (in 2006) of a participation contract between Occidental and PetroEcuador for the exploration and exploitation of Block 15 of the Ecuadorean

Amazon. In its award, the tribunal found that the termination of the contract constituted a breach of the US–Ecuador BIT and awarded Occidental compensation equal to 'the full fair market value of the Participation Contract as of the date of the Caducidad Decree, i.e., 15 May 2006'.[4]

In their submissions on quantum, the parties agreed that DCF analysis could be used to estimate the value of the contract. The respondent, however, submitted that the tribunal should also consider sales of comparable assets. In particular, the respondent alleged that comparable sales would allow 'the evaluator to test the reasonableness of the DCF assumptions against market conditions'.[5]

The claimants, however, averred that 'each oil and gas property presents a unique set of value parameters: size, quality of oil, type of contractual relationship, environmental or remedial obligations'.[6] In the claimants' view, it was not possible to identify sufficiently comparable companies upon which to base a market analysis. The tribunal agreed with the claimants, concluding that 'it can derive no assistance from an analysis of the seven transactions which the respondent has submitted as comparable sales'.[7]

This article comments on the circumstances in which it might be appropriate to use a market-based approach to assess the value of a natural resource property.

Overview of market-based analysis

Market-based analysis is underpinned by 'the law of one price', the economic principle that identical assets should sell at the same price. If shares in a gold mine are traded at, say, twice sales, an identical gold mine should exhibit the same ratio of value to sales. A market-based approach reflects market conditions at the date of valuation and provides a measure of the relative value of an asset.

There are two commonly used sources of pricing data for comparable assets:

- the trading prices of assets observed in public markets, whether bonds, companies or commodities (trading multiples); and
- the prices at which similar or identical assets have been sold in arm's length transactions (transaction multiples).

When using multiples analysis to value a privately held asset, it is implicit in the approach that the relative value of a publicly traded asset is close to the intrinsic value of the private asset. It is further assumed that market prices accurately reflect all the available information about an asset. If the price quoted by the market was distorted by, say, investor sentiment or imperfections in the functioning of the market, then the estimated multiple will be similarly distorted.

In practice, it is usually impossible to find an asset that is wholly identical to the target asset. Most individual assets are subject to specific risks that render them different to other assets and, very often, are unique. Care must therefore be taken to ensure that the assets from which value is to be inferred are sufficiently comparable to the target asset. There are few definitive rules for including an asset in the comparable set, and the construction of such a set requires the exercise of judgement by the valuer.

For these reasons, market-based analysis is most useful when there are a large number of transparently-priced comparable assets. The availability of comparable assets depends on several factors, including:

- the target's stage of development;
- the industry in which the target operates; and
- the country in which the target operates.

Most publicly traded companies are mature, with proven, stable revenues and profit streams. Multiples analysis may therefore be less useful when valuing young firms, which are often loss-making but display potential for strong short-term growth allied to higher-than-average risk. At the other end of the firm life cycle, in contrast, there are often publicly traded firms in mature or declining industries, or firms with large transactions in their shares.

Industry focus may also affect the availability of appropriate comparables: it may be easier to find comparables for a car manufacturer than for a supplier of precision electronics or an engineering consultancy. A similar observation applies to a firm's geographic situation: it is easier to find comparables for US firms than for those located in countries with small economies, or which lack well-developed capital markets.

A key attraction of market-based analysis is simplicity. Multiples are easy to calculate, particularly when based on readily available public information, and can quickly estimate an asset's value at a given point in time. Perhaps for this reason, they are commonly used as a reference point in equity research reports and merger discussions.

A major drawback of market-based multiples, however, is their lack of transparency. A company's earnings multiple, for example, embodies a set of assumptions about, inter alia, growth potential, cost drivers and risk. It is not possible, however, to 'unpack' the composite number, the multiple, into its constituent parts or to adjust for a change in any one of them. For example, market-based analysis cannot be used to determine the effect on a company's value of an increase in its expected growth rate from, say, 5 per cent to 8 per cent. Differences in accounting treatments between companies and, particularly, between countries can distort comparisons between companies that appear similar in other respects.

A lack of transparency renders multiples analysis potentially vulnerable to manipulation through the choice of comparable assets or the multiple used. The price/earnings multiples of the comparable set might imply one value for the target firm, the price/sales multiples another value altogether. For this reason, a valuer should have regard for the different values derived using different valuation metrics and should be satisfied that the valuation metric selected is appropriate for use.

Averages of multiples drawn from the comparable set of assets should also be used with care. Although an average may reduce the impact of asset-specific risks on the target valuation, it may also conceal relevant information about the reasons for dispersion in the comparable assets' values.

Even once an appropriate multiple has been estimated, it may still be necessary to adjust the estimated value of the company to reflect the context in which the asset is being valued. Such adjustments may include a discount for illiquidity or lack of marketability, a premium for control or a discount to reflect a specific risk associated with the target asset. Once again, the decision to adjust an asset's value, and the magnitude of the adjustment made, are matters of expert judgement.

Despite these drawbacks, market-based valuation is an essential part of the valuation landscape simply because it is based on the prices that market participants actually

pay for assets. In this respect, it is different from a DCF model, which is the product of a set of assumptions created by the valuer. Although a DCF calculation may use market-based assumptions, it is not necessarily aimed at an assessment of market value and may, intentionally or otherwise, use different assumptions from those used by market participants. In contrast, market-based evidence of value is by definition based on 'real-world' transactions and, for that reason, sometimes given primacy over or equal footing with other methods in a range of contexts.

Market-based valuations of resource companies

In principle, one might expect the major producers of any widely traded commodity to have a significant number of comparable companies. Most major commodities, such as oil and gas, are either sold on spot markets or under long-term contracts linked to the spot price. Many of these contracts, such as NYMEX gas futures or IPE Brent contracts, are highly liquid, financially speaking. A similar observation might apply to derivative contracts for metals or agricultural commodities.

As noted above, firm valuations may be expressed as a multiple of an appropriate metric, such as their sales or profits. In contrast, commodity company valuations are sometimes expressed as a multiple of their resources. For example, an oil company might be valued as a multiple of its proven and provable reserves, or its daily output of barrels of oil. In principle, this is possible for commodity or resource companies because of the largely homogeneous nature of their products. For the remainder of this article, we will focus on oil companies because they represent a well-known and widely traded set of assets based around a well-known commodity.

It might be thought that all oil companies have access to broadly similar technology and engineering equipment and are exposed to similar macroeconomic risks and opportunities. In consequence, it is possible that:

- companies' efficiency will tend to cluster around the average; and
- company valuations will tend to move up and down with the oil price.

If this were so, oil company valuations should be largely comparable to one another. Although there will be variations in the size, quality and location of each company's proven and probable reserves, this effect will show up in the magnitude of the valuation, not in its behaviour or driving forces. Put simply, these companies should be comparable to one another and market-based valuation could be used to identify their value.

To illustrate this, we have analysed the share price trends of five major oil companies; Exxon, Chevron, Royal Dutch Shell, BP and Sasol alongside the price of a barrel of oil between 1 January 2010 and 1 January 2013.

Figure 1: Indexed market capitalisation of Brent futures - 1 January 2010 = 100

Source: Capital IQ

From the chart, by observation, it seems that although there have been differences in the growth experienced by major oil companies, their indexed market capitalisations have generally tended to cluster. This is particularly true of those firms domiciled or listed in the developed world.

The notable exception in our sample is BP. Following the destruction of BP's Macondo oil rig in April 2010, BP's share price fell significantly and remains low. The Macondo disaster is a specific event that has affected the magnitude of BP's share price but is not the force driving it. The disaster affected BP's value in three main ways:

- it reduced its proven and probable reserves;
- it introduced a liability on to its balance sheet to pay compensation and penalties; and in consequence,
- it reduced the company's ability to invest in new value-creating projects for the future.

We would expect all three effects to be reflected in a one-off adjustment to value and, thereafter, for BP to trade again in line with its peers, as illustrated in the chart below.

Figure 2: Indexed market capitalisation of Brent futures - 1 January 2011 = 100

Source: Capital IQ

As discussed above, an average multiple may be used to value the target asset if it can be assumed that the asset-specific factors of the comparable set will tend to cancel each other out across the group. In the case of BP, however, it is possible that the distortion introduced by the Macondo disaster is so great that it would be more appropriate to exclude BP from a set of oil company comparables, certainly around the time of the Macondo disaster and perhaps for a longer period.

As highlighted by the Occidental–Ecuador decision, identifying a comparable set is even more difficult when it comes to valuing individual oil properties, rather than portfolios of properties, like most of the companies included in our sample. At the corporate level, oil companies are able to use a combination of hedging and diversification to minimise their exposure to the specific risks associated with individual properties. This still leaves them exposed to wider market risks that cannot be so easily diversified away. Thus, for many oil companies their operations and risk profiles are sufficiently similar for them to be considered comparable to one another.

This diversification is not possible at the level of individual resource properties. The specific characteristics of each property, such as its location, the quality of its reserves and the ease of extraction are therefore fundamental to its value. Each property is likely to have a unique

combination of these factors, making it difficult to be confident that a sufficiently comparable asset can be found. In these circumstances alternative valuations approaches, such as DCF models, may be more appropriate.

Nonetheless, for portfolios of oil companies, comparables analysis may still be appropriate if it can be demonstrated that there are common factors that tend to drive value. We sought to test this idea as a matter of principle using a simple regression analysis.
Are oil companies comparable to one another?

The extent to which each of these major oil companies, listed in the table below, is exposed to common underlying factors, such as commodity price, macroeconomic trends or developments in extraction technology can be illustrated using regression analysis. At the macroeconomic level, the returns to an oil company's share price are driven by, inter alia, the expected future price of oil and a broad set of general macroeconomic expectations about the growth of GDP, inflation, interest rates and consumer confidence. For the purposes of this analysis, we have assumed that movements in the MSCI World Index can be used as a proxy for changes in global market expectations, while recognising that this is an approximation.[9]

Our analysis indicates that the market capitalisations of the 10 companies considered are significantly influenced by the level of the MSCI World Index and the expected future oil price, measured by the prices for Brent Crude futures traded on the Intercontinental Exchange. The table below summarises the estimated coefficients and adjusted R-squared for each regression.[10]

The estimated coefficients in all of the regressions are jointly significant at the 5 per cent significance level. All of the estimated coefficients are individually statistically significant at the 5 per cent level unless marked with an asterisk.

		Estimated Coefficients		
	Domicile	MSCI World Index	Oil Futures Price	Adjusted R - squared
Exxon	N. America	0.79	0.07	0.55
Shell	Netherlands	1.00	0.05	0.54
Chevron	N. America	0.92	0.10	0.64
BP	UK	0.93	0.06	0.32
PetroChina	China	0.22	0.04*	0.05
Petrobras	Brazil	1.10	0.27	0.34
MedcoEnergi	Indonesia	0.43	0.05	0.04
Total	France	1.26	0.05	0.62
Sasol	South Africa	1.25	0.06*	0.45
Indian Oil	India	0.22	0.06	0.03

Notes

1.

The estimated coefficients in all of the regressions are jointly significant at the 5% significance level

2. all of the estimated coefficients are individually statistically significant at the 5% level unless marked with an *

Movements in the MSCI World Index significantly influence movements in the share price of these major oil companies. This suggests that each of the companies is, to some extent, exposed to a common set of global macroeconomic factors, which are also drivers of the MSCI World Index. The extent of the exposure, indicated by the estimated coefficient, varies but in each case is statistically significant.

The estimated coefficients for the MSCI World Index are noticeably lower for companies located outside the developed world. This suggests that, despite the global nature of oil exploration and production the drivers of demand and value depend on the market in which the company is based.

The Brent Crude futures price is also statistically related to the share prices of most of the oil companies. However, the estimated coefficients vary markedly across the companies. Sasol, PetroChina and Indian Oil have the lower coefficients, none of which is statistically significant. In one sense, this is surprising: Brent crude prices are used as a benchmark to determine the prices of crude oils from a wide range of countries and sources and is therefore of global, not regional significance. In another sense, however, it may be less surprising if companies with lower coefficients are primarily refiners and marketers of oil products. If a company has fewer reserves and resources of its own crude oil, it may not benefit from an uplift in the price of oil. Indeed, the reverse may be true if it needs to purchase most of its oil from overseas third parties and also faces domestic constraints on the prices it can charge for its products at home.

In 2012 PetroChina earned about 68 per cent of its revenues in mainland China. Similarly, Indian Oil sells over 90 per cent of its products within India. Sasol has very limited oil reserves of its own. It therefore appears that Sasol, PetroChina and Indian Oil are not global oil market players, but are instead refiners and marketers with a relatively narrow national market focus. A greater reliance on domestic markets may also explain why PetroChina and Indian Oil have relatively low exposure to the MSCI World Index.

Even for the companies for which the relationship is more significant, there is considerable variation in the strength of the relationship. There are three possible explanations for this variance.

First, Exxon, Chevron and BP earn a significant proportion of their revenues in the US. In 2012 these companies earned between 20 per cent and 39 per cent of their revenues in the US. In contrast, Total and Sasol earned only 7 per cent to 9 per cent of their revenues in the US. Oil prices in the US are often benchmarked against West Texas Intermediate prices, rather than Brent Crude prices. Although there is significant co-integration between US and European oil prices, it is not perfect and has weakened markedly since 2011. As a result, one would expect movements in the share prices of US-based oil companies to be less correlated with movements in the Brent crude oil price than movements in the share prices of non-US-based companies.

Second, all the firms in our analysis sell a diverse range of products, in particular natural gas. This product diversification reduces the firms' exposure to movements in the oil price. Of the companies included in our analysis, Petrobras is perhaps the most exposed to oil price fluctuations; in 2012 crude oil production accounted for approximately 84 per cent of Petrobras's output, compared to 51 per cent for Exxon and 50 per cent for Shell. Petrobras's relatively high reliance on oil production may help to explain its high estimation coefficient with the price of Brent.

Third, all major energy firms hedge their exposure to oil prices using a combination of long-term contracts and derivatives. Oil-producing firms may also be 'naturally' hedged through their diversification into downstream markets. Extensive hedging strategies reduce the effect of day-to-day fluctuations in the oil price and reduce the company's exposure to short-term fluctuations in the price of oil. The extent to which each of the companies in our analysis hedges its exposure to the oil price will depend upon, inter alia, their expectations regarding future oil price movements and their appetite for risk.

Conclusion

Multiples analysis can provide valuable insights into the prices at which arm's-length parties value specific assets, even if the asset itself is not traded on an open market. The results of multiples analysis can be very sensitive to the composition of the comparable set. For this reason, multiples analysis is best used in the presence of comparable, transparently priced assets.

We have demonstrated that there is some comparability across the oil firms included in our analysis: each of the major oil firms is exposed to a common set of macroeconomic factors. However, the extent of this exposure depends upon a range of factors, such as where the firm operates, the diversity of its product range, its relative strength in upstream and downstream activities and market appetite for risk. These factors must be taken into consideration when using comparables analysis to value a company or asset.

Even so, what is true at the level of a large resources company may not apply to any single property owned by that resources company. For that reason, any decision to use comparables to value individual resource properties must rely on the availability of good quality data about genuinely similar properties. Once the dissimilarities exceed a certain threshold (itself a matter of judgement), a DCF analysis tailored to the specific characteristics of the property may be more reliable than judgemental adjustments to a market-based valuation analysis.

The author would like to thank Montek Mayal, Avinaash Ravi, Jerome Tang and Oliver Watts for their assistance in researching and writing this chapter.

1. Other valuation approaches, such as cost-based or 'real options', are not discussed in this article.
2. Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador (ICSID Case No. ARB/06/11) (5 October 2012).
3. FTI Consulting was appointed to act for the claimants in these proceedings. It is not the purpose of the article, however, to review the facts, evidence or law of this case.
4. Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador (ICSID Case No. ARB/06/11) (5 October 2012), ¶458.
5. Ibid ¶780.

6. Ibid ¶781.
7. Ibid ¶787.
8. Although there may be marginal variation in firms' technological abilities, average technological capacity ought to be more similar as new technology takes time to be implemented across the properties in each company's portfolio.
9. The MSCI World Index is an index of about 1,600 stocks. The constituents are drawn from 24 developed markets, as defined by Morgan Stanley Capital International.
10. Adjusted R-squared provides an indication of how much of the variance in the share price movements is explained by variation in the change in the MSCI World Index and the oil future price.

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Arbitration In Asia

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International arbitration has firmly established its roots in Asia, with Hong Kong and Singapore featuring prominently at the vanguard of its continued development in the region. While other leading economies in Asia have stepped up development of their infrastructure to attract international arbitration, Hong Kong and Singapore have maintained an aggressive course to promote their respective jurisdictions as pro-arbitration and business-friendly communities. This article is based on the Arbitration in Asia chapter in this book's 2013 edition,[1] and introduces the major changes and significant developments in international arbitration undergone by both these jurisdictions since 2011.

Among the key developments in Singapore are the following. First, as of 31 December 2012, the Singapore International Arbitration Centre (SIAC) administered 235 new arbitration cases compared to 188 over the same period in 2011, demonstrating a significant increase. For the first time, Chinese parties, not Indian, accounted for the highest number of case fillings. Along with recent amendments to its arbitral rules and the opening of an overseas office in India, SIAC continues to strengthen its image as a major arbitral institution in the region. Second, key legislative changes have been introduced and two landmark decisions handed down (Kempinksi and Astro) that affirm Singapore's continued policy of 'minimal curial intervention'. Third, the appeal of Singapore as an arbitration hub has sparked the debate on how local and foreign talent can grow together by way of possibly establishing a new court.

In Hong Kong, the popularity of the Hong Kong International Arbitration Centre (HKIAC) continues to grow. According to statistics available on the HKIAC website, the HKIAC heard 293 arbitration matters in 2012. This was a slight increase on 2011, when they heard 275 arbitration matters.[2] The HKIAC opened its first overseas office in Seoul, Korea, to attract the growing arbitration cases in the country. In addition, having recently been added to India's official list of 'gazetted' states, Hong Kong will be competing with Singapore as a hub for India-related arbitration work.

Singapore and Hong Kong are at the forefront of Asia's growth. In 2008, the International Court of Arbitration of the International Chamber of Commerce (ICC) 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:

> We 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.[3]

Yet both Singapore and Hong Kong have their limitations, in spite of their best efforts. Singapore is a smaller jurisdiction, and it entered the international arbitration game later than Hong Kong, at a time when Hong Kong hosted a larger pool of arbitral expertise. Singapore

does not have the economic locomotive power of China at its disposal, fuelling its efforts to be Asia's arbitration hub of choice. Singapore also had to refute unsubstantiated claims that its judiciary is too closely identified with the country's long-governing political party.[4] In fact, Singapore has to work doubly hard to encourage foreign corporates and entities to arbitrate in Singapore for the same reasons that these entities may consider Hong Kong as an equally attractive alternative: a pro-arbitration attitude, 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 in 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.[5] The reality of these perceptions led a HKIAC spokesperson to say that 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'.[6]

Singapore's reputation as a world-class venue for international arbitration has attracted business entities from India and, to a lesser extent, Indonesia. In 2012, Chinese parties generated the highest number of case filings at SIAC, overtaking India for the first time. The rise in popularity of SIAC arbitration with Chinese parties and the continued popularity with Indian parties are both significant achievements. SIAC also received a significant number of new case filings from Hong Kong.[7] Section 44 of the Indian Arbitration and Conciliation Act 1996 requires that a country which has signed up to the New York Convention[8] must be reflected in India's Official Gazette if an award from that country is to be enforced. Singapore appears in India's Official Gazette. Previously Hong Kong did not appear; however, on 19 March 2012 the Indian Ministry of Law and Justice added China (including Hong Kong and Macao) to India's official list of 'gazetted' states.[9] As a result, arbitration awards made in China, Hong Kong and Macao on or after 19 March 2012 will be recognised as New York Convention awards in India. This is hardly surprising, given that there is already a voluminous level of trade between China and India (projected to reach US$100 billion in 2015). The recognition of Chinese awards would undoubtedly enhance Hong Kong's appeal as an arbitration centre for India-related disputes.

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 today arguably on a par with that of Hong Kong.

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

Singapore – a relatively late entrant

The active promotion of international arbitration in Singapore is a fairly recent phenomenon, dating back about 25 years. Situated at the crossroads of South East 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 promoting Singapore as an arbitration hub for Asia.

Significantly, business community perceives Singapore 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 v Antig Investments Pte Ltd.[10]

> 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, renamed the Arbitration Act after Singapore's independence in 1965. The Act did not differentiate between local and foreign arbitrations; more specifically, it countenanced a relatively high level of judicial intervention.[11] 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. 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 superior to that which already existed in England.[12]

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 business people and lawyers, particularly those who 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.-

In January 1995, the International Arbitration Act (IAA) was duly passed,[13] replacing the Arbitration (Foreign Awards) Act 1986, with some modifications.

With the Model Law incorporated into the new IAA, 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 significantly, 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 IAA or the Arbitration Act, depending on each parties' desire concerning 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, but applying in circumstances where the Model Law did not.[14] In 2004, amendments were made to the Legal Profession Act allowing individuals previously not authorised to practise law in Singapore to represent parties in arbitration proceedings, including offering advice, documentary preparation and other assistance in relation to or arising out of arbitration proceedings.[15] Separately, foreign lawyers had already been allowed to represent parties in arbitration proceedings in cases where the governing law was not Singapore law since 1992.16 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.[16]

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

Building Singapore as an international arbitration hub

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 premier arbitration institution in Singapore. It primarily administers cases under that subscribe to its own rules, the latest version having been updated in 2013. It is also able to preside over arbitrations in accordance with the rules agreed to by disputants. The significance of the formation of 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, titled 'Singapore may be arbitration centre',[17] 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 (later to 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 a visit by Michael Gaudet, the then-chairman of the ICC International Court of

Arbitration in Paris who was quoted as saying, 'We 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.[18]

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 'pretrial 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, ICC data revealed Singapore to be the most popular arbitral seat for ICC arbitration in Asia.[19] The ICC International Court of Arbitration also reported that Singapore was one of the top five arbitration jurisdictions in the world.[20]

On 21 January 2010, Singapore officially opened Maxwell Chambers, the permanent home of SIAC as well as offices for a host of other world-class arbitral institutions. The idea for Maxwell Chambers originated from the legal services working group of the Economic Review Committee in 2002, chaired by the 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.[21]

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 leading arbitrators and arbitration counsel and chaired by the current SIAC chairman, Professor Michael Pryles. The appointments were made to bring new depth to the international expertise of SIAC, with a view to boosting its international reputation.[22]

Even as work was being carried out to get the infrastructure in place, the American Arbitration Association signed an agreement with 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:

> The 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.[23]

To date, Maxwell Chambers houses many international arbitration institutions from Singapore and around the world. Apart from SIAC, these include the ICC Court of Arbitration, the ICDR, the International Centre for the Settlement of Disputes (ICSID), the PCA, the London Court of Commercial Arbitration, the World Intellectual Property Organization Arbitration and Mediation Center, the Singapore Chamber of Maritime Arbitration, the Chartered Institute of Arbitrators, the Franchising and Licensing Association, and the Singapore Institute of Arbitrators.

The expansion of the arbitration space in Singapore is also a major reason for the presence of eight of the top 10 law firms (in terms of revenue) in Singapore.[24] In 2010, it was estimated that the number of new international arbitration cases in Singapore was expected to rise up to 20 per cent over the next few years,[25] an expectation confirmed by the recent SIAC annual report. As of 31 December 2012, SIAC was administering 235 new cases (compared to 198, as of 31 December 2009). For the 235 new cases filed in 2012, the total sum in dispute amounted to S$3.61 billion. This is a substantial increase from last year which involved claims totalling S$1.32 billion.

Separately, at the 2011 Singapore Academy of Law Conference, the Honourable Judge of Appeal Justice V K Rajah noted that 40 per cent of all international arbitrations that took place at 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.[26]

The SIAC issued new rules that came into force on 1 April 2013. The new SIAC 2013 Rules (fifth edition) were amended to reflect the functions of the Court of Arbitration by providing, inter alia, for the president of the Court to perform the roles previously assigned to the SIAC chairman.[27] The most relevant changes include the following:

- A new SIAC Court of Arbitration was created to oversee case administration and arbitral appointment functions of SIAC, and perform quasi-judicial functions such as deciding challenges to arbitrators and objections to the prima facie jurisdiction of SIAC, and determine matters of arbitration policy. The board of directors is made up of prominent local and international lawyers and corporate leaders, and will henceforth be solely responsible for the corporate and business development functions of SIAC.
- The SIAC registrar is now able to determine when an arbitration has commenced. The registrar is required to ensure that the notice of arbitration complies with the rule requirements.
- The registrar is now able to adjust the time limits stipulated under the rules.

- In the event that an arbitrator is removed, it is now possible under the rules to have a substitute. Previously, substitutes were appointed only in the event of an arbitrator's resignation or death.
- Party autonomy has been bolstered with respect to party representation. Party representatives, be it legal counsel or otherwise, no longer require 'proof of authority as the Registrar or the Tribunal may require'.
- There is no longer a mandatory law exception to conduct witness interviews prior to any hearing. Previously, interviewing witnesses before any hearing may not have been permitted if it fell under the mandatory provision of any applicable law.
- Jurisdictional objections now follow a two-step procedure. An objection will first go to the registrar, who will determine if it should be referred to the Court of Arbitration. If the Court then determines that there is a valid arbitration agreement, then the case goes forward without prejudice to the tribunal's decision on its own competence. Previously, the objection would not go through to the registrar, but straight to the committee of the board (now the Court).

Additionally, the decisions of the president, Court and registrar concerning all matters will be conclusive and binding upon the parties and tribunal and they are not required to provide reasons. In this respect, the parties would be taken as to have waived their right for appeal.
India – the friendly neighbour

In 2005, Singapore and India signed the Comprehensive Economic Cooperation Agreement (CECA). Even so, in 2006, only four India-related arbitrations were heard at 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 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.[28] Even Malaysia's Kuala Lumpur Regional Centre for Arbitration (KLRCA) has gone on road shows in Mumbai and Delhi with a view to attracting Indian parties to Malaysia for arbitration.[29]

Singapore is not 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 SIAC, and spoke again at a SIAC conference in Singapore later that year, discussing India as a global business destination. In early 2012, at another conference titled 'Arbitration India', organised by 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.[30]

In May 2013, SIAC opened its first overseas office in India. The Honorable Senior Minister for State Indranee Rajah was also present for the new opening of SIAC's Mumbai office, proving once again that Singapore has both the potential and the power to propel its arbitration skills to the rest of the world. The senior minister remarked that since Singapore and India share close economic, trade and investment ties, it would only be natural that SIAC was established there. Apparently, 'Indian companies now form the largest foreign corporate contingent in

Singapore with more than 5,000 registered Indian companies in Singapore'.[31] India has proven itself as one of Singapore's closest economic Asian partners.

Recent changes to the IAA

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'.[32] 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.[33]

The 2009 amendments to the IAA

In line with Singapore's reputation as an arbitration-friendly jurisdiction, the IAA 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:

> ...to 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.35 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,36 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 minimising 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.[34] 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 IAA 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 IAA 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 and the passing of the IAA 2012

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 IAA 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 study by Queen Mary, University of London, and sponsored by White & Case, which found that Singapore was Asia's top arbitration destination. The 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.[35]

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, conducted in 2006, is indicative of the progress made by the country in promoting itself as an international arbitration hub.

Four changes to the IAA were proposed in the International Arbitration Act (2011) Amendment Bill.[36] The Bill passed on in April 2012 resulting in the new IAA 2012.

Firstly, the definition of 'arbitration agreement' was expanded to include agreements concluded orally, by conduct or through other means (new Section 2A(4) of the IAA). Previously, the IAA only recognised 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 amendments are in line with the 2006 Model Law, or the 'hybrid approach', which extends the IAA's application by any means, including by conduct and orally, as long as their content is recorded in any form.

Secondly, parties are now able to appeal against an arbitral tribunal decision where the tribunal ruled that it has no jurisdiction (negative jurisdictional rulings) (Section 10 of the IAA was repealed and a new section 10 was substituted). This appeal can be made at any stage of the arbitral proceedings. Prior to the amendment, Singapore courts could only review positive jurisdictional rulings, where arbitral tribunals ruled that a Singapore court could hear the dispute in question. The Law Ministry eventually formed the view 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 IAA 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 SA40 which interpreted article 16(3) to allow appeals only with respect to positive rulings on jurisdiction.[37]

Thirdly, the arbitral tribunal's powers to award costs are enhanced. A tribunal may award simple or compound interest on the whole or any part of any sum awarded. This also applies to any sum already paid before the date of the award and costs awarded (the Bill repealed the old Section 20 of the IAA and inserted a new Section 20). 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.

Finally, emergency arbitrators are now recognised under the definition of an arbitral tribunal of the IAA (the Bill amended Section 2(a) of the IAA). This means that an emergency arbitrator will be given the same powers as an arbitral tribunal (such as the power to grant urgent relief). This development makes Singapore 'the first jurisdiction to expressly include an emergency arbitrator under the definition of an arbitral tribunal in its IAA.'42 The appointment of the 'emergency arbitrator' was introduced by the SIAC Rules 2010. This amendment seeks to ensure that an order to appoint an emergency arbitrator is enforceable under the IAA since previously the legal status of emergency arbitrators and the enforceability of their interim orders was 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. The FLPA was passed in April 2012 as well.

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 IAA 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 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.

'Minimal curial intervention' – Singapore judiciary stands strong

The recent Court of Appeal decision in PT Prima International Development v Kempinski Hotels SA and other appeals[38] paves the way for the structure of future pleadings and affects the arbitral awards that follow. It avoids the formalistic approach to pleadings in arbitration and instead focuses on whether the wronged party has been truly prejudiced by acts of the other party. Pleadings are not put under the spotlight as they are in litigation, but, as the Court of Appeal states, parties must still have the opportunity to understand and respond to the case against them in accordance with the principles of natural justice. This approach is in line with the continued support for 'minimal curial intervention' and enforcement of awards in Singapore, presumably to strengthen its attractiveness as an arbitration destination. With the current judgment, it will attract more arbitration proceedings since the requirement for pleadings will not be seen in par with litigation. Gerald Chien-Yi believes that this departure from a fact-based pleading system so often seen in litigation should be welcomed with open arms, because a key difference of international arbitration is

to cater to the parties of a different legal system which may have different concepts of rules in pleadings.[39]

Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others45 was a key decision by the High Court interpreting the UNCITRAL Model Law. A dispute arose out of a failed joint venture between two group companies, Astro and Lippo, to provide multimedia services in Indonesia. Lippo attempted to raise lack of jurisdiction during the recognition and enforcement stage as per article 36 of the Model Law. However, this was rejected by the High Court as article 36 did not have force of law in Singapore. Defences could have only been raised at the setting-aside stage (article 34) which had to be made within three months following the issuance of the award.

The decision once again highlights the Singapore courts' continued approach for 'minimal curial intervention'. The High Court noted:

> Mr Landau's [ie, the counsel for Lippo] approach draws strongly from the English position of increasing judicial intervention despite his admission that it is the UK which has broken rank with other Model Law countries in so doing. Singapore has chosen the path of less curial intervention, in line with the objectives of the Model Law.[40]

As a result, a party contesting the jurisdiction of the arbitral tribunal should promptly seek recourse under article 34 or article 16 of the Model Law. The party must adopt an 'active' approach with respect to challenging the tribunal's jurisdiction.

Enter foreign lawyers

Subject to the approval of the Singapore courts, QCs may be permitted to argue certain cases of specialty. The Astro case saw two prominent QCs argue before the Singapore High Court. In Re Joseph David QC,[41] the Singapore High Court allowed Astro's application to admit Mr David Joseph QC as its counsel because it considered that Mr Joseph QC 'appears particularly suited to address the issues arising in this case… because he is the author of Jurisdiction and Arbitration Agreements and their Enforcement [Sweet & Maxwell, 2005; second edition 2010], which is now widely considered to be a leading reference text in the complex field of arbitration law. This book has also been referred to by the Singapore courts as an authority for various legal propositions or views.' Similarly, Mr Toby Landau QC, who acted for the successful party in the UK Supreme Court case of Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan,-[42] was admitted as Lippo's counsel because the case was identified by the Singapore High Court as 'being a decision of the UK Supreme Court [which therefore] merits careful consideration… The application of Dallah in the resolution of this legal conundrum could have important implications for the arbitral and commercial communities here and perhaps elsewhere.'[43]

This was the first time British QCs had been allowed to appear before a Singaporean Court since the Legal Profession (Amendment) Bill in February 2012. The admission of both QCs reflect Singapore's current statutory scheme to admit QCs on an ad hoc basis if a matter contains issues of fact or law of 'sufficient difficulty and complexity' and if the circumstances of the case warrant it. VK Rajah JA noted that:

> Taking into consideration advancements in legal education, the ever greater exposure of Singapore advocates to increasingly complex areas of law at the frontiers of legal evolution as well as the commendable elevation of standards

> within the Bar, it has become increasingly difficult to satisfy the Court that the legal issues and/or facts are of sufficient difficulty and complexity to require elucidation and/or argument by a Queen's Counsel…Indeed, with the effluxion of time, it appears that local Senior Counsel or experienced lawyers with particular expertise in the respective areas of law will be able to handle competently most legal issues that arise before Singapore courts.[44]

The granting of foreign attorneys to argue highly complex areas of law before Singapore courts sets the spotlight on the country's growing prominence in the development of international arbitration law. Singapore has the potential to become the testing ground for addressing the most complex issues in international arbitration law. This can only be beneficial as the judgments, such as the Astro case, may be instructive for other jurisdictions to follow.

A new court?

The development of Singapore as a global international arbitration hub has been supported by initiatives that leverage on Singapore's attraction as a flexible and responsive jurisdiction. In the Opening of the Legal Year 2013 and Welcome Reference for the new Chief Justice Sundaresh Menon, he announced that one of his major priorities would be to develop a framework for the establishment of the Singapore International Commercial Court (SICC). He noted that:

> We've seen the great success of the efforts to promote Singapore as a hub for international arbitration. Much of this work emanates from abroad, but parties have chosen to arbitrate here. There are many factors that account for this and it's time to take fuller advantage of them… From my preliminary consultations, it appears there will be strong interest in this from the community of legal corporations operating throughout Asia. This promises to be an exciting and important step in our efforts to grow the legal services sector and to expand the scope for us to internationalise and export Singapore law.[45]

From the information that is currently available, the SICC would seek to service the wider Asia region and 'export' Singapore law and its legal sector. The initiative is currently being investigated by way of a working group set up by Justice V K Rajah and Indranee Rajah.

The sudden increase of foreign firms and foreign lawyers has made it ripe to review the future of the Singapore legal sector. The Chief Justice emphasised the need to foster collaboration between the foreign and local attorneys. The new court would seek to 'enhance the standing of the subordinate courts, and encourage larger commercial law firms and senior counsel to devote more time and financial support to pro bono efforts'.[46]

The exact implication of this initiative for arbitration in Singapore is unclear. However, it is without a doubt that the success of arbitration in Singapore has prompted the query on what else Singapore can offer to the international community. If the SICC proves to be a successful initiative, it would truly internationalise Singapore as a friendly jurisdiction and enhance its competitive edge against Hong Kong.

Hong Kong: Asia's most established arbitration venue?

Hong Kong has been 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 2012 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 more than 30 years.53 Hong Kong was also ranked as the world's most competitive economy by The World

Competitiveness Yearbook 2012 published by the International Institute for Management Development.[47]

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.[48] Infrastructure 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).[49] For its part, Beijing continues to render 'unwavering support to Hong Kong as a matter of national policy and interests'.[50] The Mainland and Hong Kong Closer Economic Partnership Agreement (CEPA), a free-trade agreement privileges Hong Kong products with zero import tariffs into China, 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 for 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.'[51]

As with 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 the 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.[52]

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 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 New York Convention was also incorporated into the Ordinance.

In 1979, the 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: HKIAC

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. On the financial front, about HK$1.5 million was raised from the private sector, with the government matching the contribution dollar for dollar.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 arbitration hearing in 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.[53]

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$19.1 million 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 the 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.[54]

In response, the Hong Kong government duly offered the HKIAC half of the 38th floor at Exchange Square. Today, the HKIAC has expanded by taking the entire 38th floor with a total floor space of over 1,200 square metres, effectively doubling its previous size.[55]

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.63 Among 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 to 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 than the surgical 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 that would apply the Model Law to domestic and international arbitration agreements as recommended by the 1992 HKIAC committee on arbitration law. They established a committee on Hong Kong Arbitration Law, supported by the HKIAC and the secretary for 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.[56]

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. Second, a unitary regime was in line with the international trend of reducing curial intervention in all forms of arbitral proceedings. Third, the international character of business in Hong Kong and the existence of a unitary regime would enable 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.[57]

After five years of work and consultation, the committee submitted its final report in April 2003 to the secretary for 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 'international commercial arbitration' as per Article 1(1).[58]

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.[59]

The paper was circulated to 60 entities including arbitration institutions, government departments, legal representatives and a 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 between July 2009 and May 2010 to deliberate the Arbitration Bill 2009, and some committee stage amendments to the 2009 Bill were introduced.[60] Some of the key amendments were as follows:[61]

- 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'.[62] 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.[63]

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.-[64] 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 ICC Court 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.[65]

The success of the HKIAC in promoting its services among the arbitration community has raised its profile internationally. In May 2013, HKIAC launched its first overseas office in Seoul (the Seoul International Dispute Resolution Centre), in an effort to harness the growing arbitration sector in Korea.[66] Additionally, the PCA held its first hearing at the HKIAC in July 2013 demonstrating the growing appeal that the HKIAC, and Hong Kong in general, has internationally.[67]

The most recent amendments to the HKIAC Administered Arbitration Rules were made in 2013. First, a revised provision is incorporated for the tribunal to join additional parties to an arbitration. Second, new provisions were introduced to allow the HKIAC to consolidate two or more arbitrations or to allow claims arising out of or in relation to multiple contracts to be raised in a single proceeding. Third, new provisions on emergency arbitrators were introduced. Finally, a fee cap was introduced for an arbitrator's agreed hourly rate at HK$6,500 per hour unless agreed otherwise by the parties.

The Arbitration (Amendment) Bill 2013 to the Arbitration Ordinance

The Arbitration Ordinance was recently amended by the Arbitration (Amendment) Bill 2013 (the 2013 Amendments). The 2013 Amendments introduced new provisions to address two important key features: the enforcement of arbitration awards made in the Macao Special Administrative Region of China (Macao) and, like Singapore's recent amendments to the IAA, the enforcement of emergency relief granted by an emergency arbitrator.[68]

The enforceability of foreign awards is undoubtedly a primary consideration in selecting the seat of arbitration. The New York Convention facilitates the mutual enforcement of arbitration awards among its member states. However, the New York Convention only applies as between states. Since Hong Kong and Macao were both returned to the PRC in 1997 and 1999 respectively, this presented the problem of mutual recognition and enforcement of arbitral awards between Hong Kong and Macao.[69]

This lacuna in the law was plugged when Hong Kong and Macao signed the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards Between the Hong Kong Special Administrative Region and the Macao Special Administrative Region78 on 7

January 2013 (the HK-Macao Arrangement). Article 1 of the HK-Macao Agreement provides that:

> The courts of the HKSAR shall recognise and enforce arbitral awards made in the Macao SAR pursuant to the arbitration laws and regulations of the Macao SAR and the courts of the Macao SAR shall recognise and enforce arbitral awards made in the HKSAR pursuant to the Arbitration Ordinance of the HKSAR.

The 2013 Amendments were thus made to enshrine the HK-Macao Arrangement in the Arbitration Ordinance.

Part 3A of the 2013 Amendments was enacted to keep up with both international and regional legislative developments in the enforcement of emergency arbitration awards. In particular, the new section 22B allows for an arbitrator to be appointed at short notice and commence the hearing and for the recognition of 'emergency relief' orders made pursuant to the emergency arbitrator's appointment. The provision of 'fast-track' arbitration services will certainly increase Hong Kong's attractiveness as an arbitration hub to commercial parties.

Recent cases in Hong Kong

In Pacific China Holdings v Grand Pacific Holdings,[70] the applicant argued that it had been prejudiced by the arbitral tribunal's violation of certain procedural rules on interlocutory matters. However, the Court of Appeal found that the violation had to be 'sufficiently serious or egregious so that one could say a party has been denied due process'.[71] This was affirmed on appeal to the Court of Final Appeal. The case demonstrates the limited intervention by the Hong Kong judiciary in arbitrations.

In Lin Ming v Chen Shu Quan,[72] the court dealt with anti-arbitration injunctions and demonstrated the restrictive approach taken by the Hong Kong courts in refusing to grant such injunctions:

> Further, granting the injunction sought by the first plaintiff would tend to undermine the object of the Arbitration Ordinance viz. to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense, and the principles upon which the Ordinance is based.[73]

These cases demonstrate the continued support of the Hong Kong courts to facilitate arbitration in the jurisdiction. However, the more pertinent cases relate to those arbitral proceedings involving Chinese parties and the perception problem that it creates for the Hong Kong arbitration community.

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 for 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.[74]

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.[75]

Hong Kong 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 Associates85 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, it 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, 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.[76] Equally, some argue that it is unlikely that state-owned Chinese corporations would be allowed to present a sovereign immunity claim before a Hong Kong court.[77]

Hong Kong's secretary for justice Wong Yan Lung also weighed in on the subject in a 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.[78]

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[79] sought to address concerns of Chinese bias.[80] 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 alleged judicial bias towards China.[81]

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 and the new HKIAC Rules, it 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 parties from countries like Korea, which are significantly closer to Hong Kong than Singapore, to settle arbitration disputes. The HKIAC's recent launch in Seoul will be useful in that objective. 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. The well-publicised split in 2012 between CIETAC Beijing and CIETAC Shanghai due to disagreements over the 2012 CIETAC Rules[82] could work in Hong Kong's favour in attracting more PRC-related disputes. Until then, with the introduction of the new Arbitration Ordinance 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.[83]

Conclusion

The eyes have truly turned on Asia, where it is determinedly becoming a popular arbitration destination, for both international and domestic proceedings. UK-based arbitrator Julian Lew commented that emerging economies are currently leading international arbitration due to many factors, including its low world debt – Asia has only 19 per cent of the world's debt.-[84] It can thus focus on its continuous effort to build its reputation as an arbitration haven with the ongoing EU crisis, while avoiding high bureaucratic and administrative cost when the fees could be less than half in Asia. Additionally, the influx of international firms in the aforementioned countries contributes to more expertise for expert arbitration advice in the whole region.

Lew also noted that, historically, Asian countries played a limited role in the negotiation of key international legal instruments on arbitration. For instance, the negotiation of the New York Convention consisted of former colonial powers and no independent Asian countries, with the exception of Pakistan, India, the Philippines, Sri Lanka and Vietnam.[85] However, the turning point came in the mid- to late 1980s when, unlike the Western arbitration hubs, most Asian jurisdictions based their arbitration legislation on the 1985 UNCITRAL Model Law. 'Asia has the highest concentration of Model Law countries in the World.'[86] This advantage will, as Lew predicts, result in the development of international arbitration law being spearheaded by the Asian countries and lead to conformity on the Model Law's application.[87] The Astro decision is a case in point.

The theme of competition has defined Singapore and Hong Kong's arbitration efforts, in particular, over the last few years. 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.

The Asian arbitration pie is only likely to get bigger. In 2011, Singapore law minister K Shanmugam even offered to support the KLRCA which ironically, was the first regional arbitration centre in Asia, having been set up in 1978.[88] Such synergistic thinking is likely to benefit both Singapore and Malaysia. His counterpart, Malaysian law minister Nazri Aziz, was also quoted as saying that disputes in niche areas like Islamic financial matters are likely to be arbitrated in Kuala Lumpur. He stated, 'Singapore and Kuala Lumpur are too near. We might as well have a good understanding and cooperation. It's better to work together rather than start competing.'[89] 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

In the past year, the internal conflict between the China International Economic and Trade Arbitration Commission (CIETAC) and its former Shanghai and Shenzhen sub-commissions has dominated the headlines. The conflict surfaced following the official release of CIETAC's new arbitration rules in March 2012 (2012 CIETAC Rules),[1] and has raised a number of concerns over conducting arbitrations in the People's Republic of China (PRC) – particularly for foreign parties.

At the same time, there have been a number of positive developments over the past year, including the coming into force of an amended PRC Civil Procedure Law (which contains improved arbitration-related provisions) and China's continued interest in promoting investment protections, both at home and abroad, pursuant to bilateral investment treaties (BITs) and free trade agreements (FTAs) that give investors the right to arbitrate claims directly against the state hosting their investment, for violations of the substantive protections contained in the BIT or FTA.

This chapter highlights the key arbitration developments and trends in China over the past year.

CIETAC Shanghai and CIETAC Shenzhen split from CIETAC Beijing

For many years, the leading arbitration commission in China handling foreign-related disputes has been CIETAC. CIETAC has its headquarters in Beijing (CIETAC Beijing), and previously had four sub-commissions in China: in Shanghai (CIETAC Shanghai), Shenzhen (CIETAC Shenzhen), Tianjin and Chongqing.

All sub-commissions were, until last year, in a position to accept and administer CIETAC arbitration cases. However, in March 2012, CIETAC issued the final version of the 2012 CIETAC Rules, and certain underlying tensions between CIETAC Beijing and its Shanghai and Shenzhen sub-commissions surfaced. The 2012 rules introduced a number of new provisions, but also made a significant amendment to the provision dealing with whether CIETAC Beijing, or one of its sub-commissions, would administer a CIETAC arbitration.

Under the previous version of the rules (2005 CIETAC Rules), where the parties had failed to stipulate which CIETAC body (ie, CIETAC in Beijing or one of CIETAC's sub-commissions) would administer the arbitration, the claimant was given the right to decide which of these bodies would administer its arbitration. The consequence of this provision was that a party would sometimes rush to file a claim before its opponent, so that it could choose which CIETAC body would administer its arbitration. This could sometimes cause inconvenience or unfairness to the other party in situations where the venue was more convenient for one party, or where one party was perceived as being more closely associated with a particular sub-commission.

Under the 2012 CIETAC Rules this position changed. CIETAC Beijing became the default administrator of cases, unless the parties had expressly agreed to arbitration before a particular sub-commission. Absent such agreement, the claimant no longer had the option to decide whether to submit its case to CIETAC Beijing or to one of the sub-commissions.

This was a significant amendment because, in practice, parties do not often expressly specify in their arbitration clauses that they will arbitrate before a specific CIETAC sub-commission. Instead, they usually simply agree to arbitrate under the auspices of CIETAC generally. Furthermore, once a dispute has arisen, it is also uncommon for parties to be able to agree to arbitrate before a particular sub-commission.

The consequence of the amendment was that CIETAC Beijing would by default administer many more CIETAC arbitrations, some of which would have previously been administered by a sub-commission. Correspondingly, this would significantly reduce the role of CIETAC's sub-commissions, and also reduce their revenue, due to a decrease in the fees which the sub-commissions received for administering cases.

This amendment attracted strong resistance from the Shanghai and Shenzhen sub-commissions, which are the two most popular branches after Beijing. The Shanghai and Shenzhen sub-commissions refused to follow the 2012 CIETAC Rules, and on 1 May 2012 (the same day that the 2012 CIETAC Rules came into effect), CIETAC Shanghai declared itself an independent arbitral commission, with CIETAC Shenzhen following suit shortly after. This resulted in a very public spat with CIETAC Beijing, and during this period various conflicting notices were issued by CIETAC Beijing and the former Shanghai and Shenzhen sub-commissions.[2] Pursuant to these notices, CIETAC Beijing announced its refusal to accept the independence of CIETAC Shanghai or CIETAC Shenzhen and, in a later notice, subsequently revoked their authorisation to accept and administer disputes or to use the CIETAC name, brand or logo.

Both CIETAC Shanghai and CIETAC Shenzhen have now formally split from CIETAC, and the current position is as follows:

- Following its secession from CIETAC Beijing, the breakaway CIETAC Shenzhen changed its name to the South China International Economic and Trade Arbitration Commission (SCIETAC), also known as the Shenzhen Court of International Arbitration (SCIA). SCIA's new arbitration rules and panel of arbitrators came into force on 1 December 2012.
- Similarly, the Shanghai International Economic and Trade Arbitration Commission, also known as the Shanghai International Arbitration Centre (SHIAC), is the new name for the old CIETAC Shanghai. SHIAC promulgated new arbitration rules and a new panel of arbitrators, both of which came into effect on 1 May 2013.
- CIETAC Beijing continues to accept and administer arbitrations where parties have agreed that the arbitration should be administered by CIETAC Shanghai or CIETAC Shenzhen, or have agreed upon CIETAC arbitration in Shanghai or Shenzhen (in which case, the arbitration will be administered by CIETAC Beijing but Shanghai or Shenzhen will serve as the geographical place of the arbitration).
- Both SCIA and SHIAC have also declared that they will accept cases where the arbitration agreement provides for arbitration administered by CIETAC Shenzhen or CIETAC Shanghai, or for CIETAC arbitration in Shenzhen or Shanghai.

Implications

The developments set out above are unfortunate, and introduce a large degree of uncertainty over CIETAC clauses, especially where they expressly refer to the CIETAC Shanghai or Shenzhen sub-commissions.

One overriding concern is that under the PRC Arbitration Law, one of the requirements for a valid arbitration agreement is that the arbitration agreement must contain clear provisions with respect to the designated arbitration commission. It is possible that the issues raised

above may lead to a party seeking to challenge the jurisdiction of the tribunal, on the grounds of an invalid arbitration agreement.

Similarly, the above uncertainty could lead to problems with enforceability – both in China and internationally under the New York Convention – on the grounds that the arbitration did not take place in accordance with the parties' agreement, or that the arbitration agreement was not valid. In the case of enforcement of SHIAC and SCIA awards in Hong Kong, there are also related concerns: both SHIAC and SCIA are currently absent from the list of arbitration commissions whose awards are recognised under the reciprocal enforcement arrangements that are in place between the PRC and Hong Kong (ie, the Arrangement of the Supreme People's Court on Reciprocal Enforcement of Arbitration Awards between the Mainland and the Hong Kong Special Administrative Region) (the Arrangement). Accordingly, there will be some uncertainty over whether a SHIAC award or a SCIA award will be enforced under that regime.

Recent court decisions

Three recent decisions of the Chinese courts illustrate the difficulties that the CIETAC split has created. They are as follows:

- In November 2012, the Shenzhen Intermediate People's Court held that SCIA is an independent arbitration commission (and that SCIA had correctly applied the 2005 CIETAC Rules, not the 2012 CIETAC Rules, as these were the only rules that SCIA recognised at the time the dispute was initially referred to arbitration).[3]
- In a similar decision of the Shenzhen Intermediate People's Court in November 2012, the Court stated that an arbitration clause specifying CIETAC Shenzhen as the administering body should be administered by the SCIA (as successor to the jurisdiction of CIETAC Shenzhen).[4]
- In conflict with the above two cases, in May 2013 the Intermediate People's Court in the city of Suzhou refused to enforce an arbitral award rendered by SHIAC in the case of Suzhou Canadian Solar v LDK Solar. In this case, the arbitration agreement between Suzhou Canadian Solar (SCS) and LDK Solar (LDK) provided that the parties had 'agreed to submit the case to CIETAC (place of arbitration: Shanghai, China) to arbitrate the case under the then-valid arbitration rules of that arbitration commission at the time of case filing'.

In July 2010, an arbitration was commenced at CIETAC Shanghai (ie, the CIETAC Shanghai sub-commission before the split) which duly accepted jurisdiction over the case. The arbitration then proceeded, pursuant to the 2005 CIETAC Rules.

After CIETAC Shanghai announced its independence from CIETAC Beijing, and subsequently formed SHIAC in April 2013, the arbitration continued under the administration of SHIAC. An award was then rendered in favour of LDK in December 2012.

In February 2013, as SCS had failed to comply with the award, LDK applied to the Suzhou Intermediate People's Court for enforcement. SCS challenged the application, on the basis that SHIAC did not have jurisdiction to administer the arbitration.

The Court agreed with SCS and dismissed the application. The Court held that SHIAC was not the arbitration commission named in the arbitration agreement, and accordingly, both parties had not consented to its jurisdiction. The only means by which SHIAC could administer arbitrations which were already pending at CIETAC Shanghai was if the parties had agreed to

change the arbitration commission administering the case. The parties did not do this and, as noted by the Court, SHIAC did not inform the parties of their right to choose an alternative arbitral body.

The decisions above are not binding on other PRC courts, so it remains to be seen how they will decide this issue.

Practical considerations

Given the uncertainty, parties and practitioners should consider taking the following practical steps, with respect to existing arbitration agreements and when negotiating the terms of new ones.

Existing Arbitration Agreements

In the case of existing arbitration agreements, the primary concern is with clauses that provide for arbitration administered by CIETAC Shanghai or CIETAC Shenzhen (or CIETAC arbitration in Shanghai or Shenzhen). A party wishing to refer the dispute to arbitration would be placed in a dilemma, given that CIETAC Beijing, SCIA and SHIAC are all prepared to accept and administer arbitrations pursuant to arbitration agreements that provide for arbitration before CIETAC Shanghai or CIETAC Shenzhen, or for CIETAC arbitration in Shanghai or Shenzhen.

One option would be to refer such disputes to CIETAC Beijing. However, at the time of writing, there is no published court judgment granting enforcement of a CIETAC award rendered by CIETAC Beijing in such a situation. There is therefore some doubt over whether the courts would uphold the validity of such an arbitration, or view it as contradicting the original arbitration agreement. This uncertainty is not helped by conflicting decisions of the Suzhou and Shenzhen courts, as discussed above.

Although SHIAC has obtained support from the Shanghai government that it is an independent arbitral institution, the decision in Suzhou Canadian Solar v LDK Solar would suggest that referring such an arbitration to SHIAC is best avoided, particularly if the award has to be enforced outside of Shanghai. As to SCIA, the Shenzhen Courts have recognised SCIA's jurisdiction to administer cases where CIETAC Shenzhen is named as the administering body in the arbitration agreement. This may give credence to commencing such an arbitration at SCIA, particularly where the award has to be enforced in Shenzhen. However, courts outside Shenzhen may take a different view, so one relevant factor is where the award will ultimately be enforced.

In any event, whichever commission is eventually selected, a defendant may still seek to challenge the jurisdiction of the administering body, or may even file a separate arbitration at one of the alternative commissions.

Accordingly, for parties who have already agreed a CIETAC Shanghai or CIETAC Shenzhen clause, the most prudent course of action would be to seek to renegotiate the clause and to agree to CIETAC Beijing (possibly with the place of hearing stated as Shanghai or Shenzhen, if preferred). Alternatively, parties could agree to replace the reference to CIETAC Shanghai or CIETAC Shenzhen with SHIAC or SCIA, but bearing in mind that this may lead to enforcement difficulties, such as under the Arrangement.

In the current circumstances, it is probably impractical for parties to seek to renegotiate all their arbitration agreements. Instead, parties are advised to focus on the higher-risk, higher-value agreements, and to consider whether it is practical to at least renegotiate the

arbitration agreements contained in those documents, to pre-empt a costly future dispute over jurisdiction and validity of the arbitration agreement. If a new agreement is reached between the parties, it will be important to ensure that this is clearly recorded in writing.

New Arbitration Agreements

In the case of new arbitration agreements, where parties wish to (or have no option but to) arbitrate in China, one obvious option is for them to agree to CIETAC arbitration, and to specifically state that the arbitration is to be administered by CIETAC Beijing.

If parties wish to agree to arbitration before SHIAC or SCIA, despite some of the concerns raised above, they should expressly refer to SHIAC or SCIA in their arbitration agreement, and avoid any reference to CIETAC Shanghai or CIETAC Shenzhen.

As a final note, it has been reported that the Supreme People's Court (SPC) is currently undertaking a consultation process on a draft opinion on the enforcement of arbitral awards, following the CIETAC split. It is hoped that this opinion will be issued shortly, and the issues above will be clarified.

CIETAC opens a Hong Kong office

One positive development which came out of CIETAC last year was the launch of its new office in Hong Kong, on 24 September 2012. The new office has been named the CIETAC Hong Kong Arbitration Centre.

CIETAC has stated that the CIETAC Hong Kong Arbitration Centre is a branch of CIETAC, established under Hong Kong law, and bears the role and responsibility of a sub-commission of CIETAC as stipulated under the 2012 CIETAC Rules.[5] It would seem that awards rendered will be Hong Kong awards (ie, foreign awards for purposes of PRC law) and on that basis, they should be enforceable in mainland China under the Arrangement, and elsewhere, under the New York Convention.

More generally, the new Centre is intended to provide a platform for cooperation between arbitration practitioners in Hong Kong and Mainland China.

The establishment of the CIETAC Hong Kong Arbitration Centre underscores CIETAC's intentions in growing its international presence and profile, and is consistent with the overall growth in the volume and complexity of CIETAC's cases over the past few years.

CIETAC caseload

In 2012, CIETAC accepted 1,060 cases, of which 729 were domestic cases and 331 were foreign-related cases.[6]

Although the 1,060 cases was a significant dip from the previous year (1,435 cases), and the lowest since 2006, the number of cases accepted by CIETAC Beijing (975) was the highest on record and accounted for over 90 per cent of all cases accepted by CIETAC in 2012.

In 2012, 720 cases were resolved under the auspices of CIETAC (ie, a final award was rendered or the dispute was resolved through, for example, mediation). Of these 720 cases, around 95 per cent were resolved by CIETAC Beijing, with the remainder resolved by one of the sub-commissions. Although the 331 foreign-related cases were less than the previous year (470), the proportion of foreign-related cases has remained steady, compared to 2011. That said, more generally, there has been an overall reduction in the proportion of foreign-related cases handled by CIETAC in recent years, and this is probably a reflection of the increasing number of cases brought by foreign-invested enterprises established in China

(including wholly foreign-owned enterprises and joint ventures), which for CIETAC purposes are classified as domestic cases.

Over the past year, the total amount in dispute rose from around 12 billion renminbi in 2011 to just short of 15.5 billion renminbi in 2012. This represents a 34 per cent increase. The average amount in dispute in each case rose from just under approximately 8.4 million renminbi in 2011 to approximately 14.6 million renminbi in 2012.

Lastly, CIETAC has also reported that after the 2012 CIETAC Rules came into effect, the number of cases applying the summary procedure has increased, accounting for almost 60 per cent of CIETAC's caseload.[7]

New legislation

One of the primary sources of PRC law governing arbitration in China is the PRC Civil Procedure Law (CPL).

The CPL, which was promulgated in 1991 and amended in 2007, is a comprehensive national statute governing all civil procedure matters. It is a primary source of arbitration law in China because it contains a number of arbitration-related provisions that lay down the legal basis for matters such as the enforcement and setting aside of arbitral awards.

Since 2011, the Standing Committee of the National People's Congress, China's legislature, has been considering draft amendments to the CPL, including amendments to its arbitration-related provisions. The CPL has now been amended, with effect from 1 January 2013. The three main arbitration-related amendments are described below.

Interim Measures – Preservation Of Property And Evidence

In the past, under PRC law, there were generally only two types of interim measures available to assist arbitrations seated in China: preservation of property and preservation of evidence. Only the PRC courts (not the tribunal or an arbitration commission) could grant these measures.[8]

Property preservation is useful where there is a real risk of one party dissipating assets, or hiding or transferring assets out of the jurisdiction, with the aim of avoiding the consequences of any adverse ruling made against it. Similarly, evidence preservation seeks to prevent evidence from being destroyed or concealed by one party, often to the detriment of the other.

Under the old CPL regime, property could be preserved in various ways by order of the court. These included sealing, seizing or freezing the asset. The amended CPL now expressly empowers the court, upon either party application or its own volition, to order mandatory or prohibitory injunctions in civil proceedings. It is expected that this provision will also apply to ongoing arbitrations.[9]

One important feature of the new CPL is that it appears to provide for the above interim relief (including injunctions) to be sought before arbitration proceedings have commenced.[10] This is in line with the position in certain arbitration-friendly jurisdictions, and differs from the position under the old CPL, in which interim relief could only be sought after commencement of the arbitration. The applicant must show that the case is one of 'urgency', ie, that it would suffer irreparable damage if the relief was not granted.

The new CPL provisions are not, however, entirely consistent with the current PRC Arbitration Law, which has not been amended since it was promulgated in 1994 (although

SPC interpretations have subsequently been issued). The Arbitration Law provides that applications for interim relief must be made via the arbitration commission administering the case, rather than directly to the court, as the new CPL provisions envisage. The arbitration commission will then pass the application on to the relevant court. This discrepancy will have to be clarified by future amendments to the PRC Arbitration Law (which have been proposed), or the issuance of an official interpretation or clarification by the SPC.

On the face of it, the amendments to the new CPL provision are potentially extensive, since they appear to envisage that both prohibitory and even mandatory interim injunctions may be issued by the courts. However, it remains to be seen how different courts in China will apply these provisions, when called upon to act.

Arbitrability

The PRC Arbitration Law provides that contractual disputes may, in general, be referred to arbitration, together with disputes over 'property rights and interests between citizens, legal persons and other organizations as equal subjects of law'.[11]

The amended CPL confirms that non-contractual disputes are arbitrable. Previously, the CPL provided that where parties have reached a written agreement to submit their contractual disputes to arbitration, the parties are not to refer the dispute to litigation. This provision has been revised so that the express reference to contract disputes has been removed.[12]

Enforcement

The new CPL has introduced a requirement that where the PRC court sets aside or refuses to enforce an award, the court must issue a written ruling containing the reasons for its decision.[13]

In the past, foreign companies have encountered difficulties in the enforcement of PRC arbitration awards in China, in part due to local protectionism. Similarly, enforcing foreign arbitral awards in China has proved less than straightforward. The position has improved somewhat, with the introduction of special 'reporting' provisions to reduce the scope for judicial protectionism and to prevent arbitrary refusal of enforcement of foreign-related awards and foreign awards,[14] and with the PRC courts' increasing familiarity with arbitration.

Nevertheless, concerns remain over how easily a foreign party can enforce an arbitration award in China. The new requirement for PRC courts to produce written reasons for any decision to refuse to enforce or set aside an arbitration award is a step in the right direction and should help increase the transparency and uniformity of the enforcement process and jurisprudence.

One other point to note on enforcement is that the new CPL (article 237) has narrowed the grounds for refusal to enforce domestic arbitration awards by removing two grounds – lack of evidence or wrongful application of laws – under which a People's Court could refuse enforcement of a domestic arbitral award. These have been replaced by two new grounds relating to the fabrication and concealment of evidence. For enforcement of a foreign-related arbitral award, the grounds for refusal remain unchanged. These procedural or jurisdictional grounds largely mirror those under the New York Convention, which governs foreign awards.
Investment treaties and free trade agreements

China, as a signatory to over 130 BITs and FTAs, is an active participant in the modern system of investment and trade treaties. Such treaties typically grant foreign investors the

right to conduct arbitration – often administered by the World Bank's International Centre for Settlement of Investment Disputes (ICSID) – directly against the state hosting their investment (the host state), for violations of the substantive protections of the BIT or FTA by the host state.

Six recent developments underscore the continuing interest of China, and Chinese companies, in BITs and FTAs, as discussed below.

Proposed EU–China BIT

Since the mid-1980s China has concluded BITs with all EU member states except the Republic of Ireland. Many of these BITs offer investors unconditional recourse to international arbitration against the host state.

In September 2012, at the 15th EU–China Summit in held Beijing, China and the EU confirmed their intentions to commence negotiations on a new EU–China investment agreement with the aim of streamlining the existing BITs between China and the 26 EU member states into a single, coherent text.[15]

Proposed China–US BIT

Conspicuously absent from China's arsenal of BITs is a treaty with the US. The two countries have held several rounds of negotiations, but the process has been on hold for the last few years while the Obama administration reviewed the US BIT programme. That review was recently concluded.[16]

Negotiations between China and the US have now resumed. On 3 June 2013, a ninth round of negotiations took place in Qingdao, China. A China–US BIT could obviously have enormous impact on cross-border investments. As both the chances of achieving a BIT and the timing are uncertain, a watching brief is important.

China–Canada BIT

On 9 September 2012, after nearly two decades of effort, China and Canada entered into a BIT. The China-Canada BIT contains all of the key substantive protections common to most other BITs (for example, national treatment, most-favoured nation treatment, fair and equitable treatment and compensation for expropriation) and grants foreign investors the right to conduct arbitration against the host state for violations of substantive protections in the BIT.[17]

Interestingly, the China–Canada BIT departs from the Canadian model BIT as it contains much narrower provisions with regards to the privacy and confidentiality of proceedings.

Trilateral Investment Agreement: China, Japan And South Korea

China is a major trading partner of both Japan and South Korea, and all three have had BITs with each other since 2007. After years of effort, China, Japan and South Korea recently entered into a Trilateral Agreement for the Promotion, Facilitation and Protection of Investment (Trilateral Agreement), which China's Ministry of Commerce (MOFCOM) has stated is 'a milestone in trilateral economic and trade cooperation between China, Japan and South Korea, as it is the first legal agreement and mechanism to enhance and protect investment between the three nations'.

The Trilateral Agreement consists of 27 articles and one additional protocol, covering the core aspects of international investment. The dispute resolution provisions allow for

a number of options, including investor-state arbitration in accordance with the ICSID Convention, the ICSID Additional Facility Rules and the UNCITRAL Rules; parties are also free to agree to arbitration in accordance with other arbitration rules.

The Trilateral Agreement is expected to be the foundation for the establishment of a free-trade area between China, Japan and South Korea, as discussed below.

Proposed China, Japan And South Korea FTA

FTAs, unlike BITs, cover more than investment protection. According to MOFCOM, China has entered into nine FTAs, and several others are under negotiation. One of the most significant is the 2010 ASEAN-China Free Trade Area. As part of the process of establishing a free-trade area, China and the ASEAN member states signed various agreements, including the 2009 ASEAN–China Investment Agreement, which provides for investor-state arbitration under ICSID or UNCITRAL Rules.

Recently, China, Japan and South Korea issued a joint statement setting out their intention to establish an FTA, which would provide 'a comprehensive and institutional framework in which a wide range of trilateral cooperation would evolve'. Reaching agreement on an FTA typically involves an arduous negotiation process – China, for example, has been in free-trade talks with Australia since 2005.

It is understood that discussions about the China, Japan and South Korea FTA will commence this year, following an agreement between the three countries at a summit in Beijing in January 2013.[18]

Ping An Insurance V Belgium

On 19 September 2012, ICSID registered a claim brought by one of China's largest insurance companies, Ping An, and a subsidiary, against Belgium, pursuant to the China-Belgium BIT. This is the first claim to be brought by a mainland Chinese investor at ICSID.[19]

Full details of the claim have not been made public, although it has been reported that the claim relates to Ping An's alleged losses (valued at over $2 billion) arising from its investment in Fortis, a Belgian–Dutch group which was subsequently dismantled and nationalised by the Belgium government.

On 26 February 2013 the tribunal was constituted, and it held its first session in London on 13 April 2013. The case is currently ongoing.

Conclusion

Over the past year, arbitration in China has involved some steps forward, but also some backwards. The breakaway of CIETAC's Shanghai and Shenzhen sub-commissions from CIETAC Beijing, and their re-establishment as independent arbitral commissions, named SHIAC and SCIA respectively, has created uncertainty and even apprehension among users of CIETAC arbitration. Guidance from the SPC on these issues would be a welcome development.

On a more positive note, the enhanced arbitration-related provisions in the amended CPL, CIETAC's strong caseload figures (including a significant increase in the total amount in dispute), the opening of the CIETAC Hong Kong Arbitration Centre and China's continued interest in investment and trade treaties which provide recourse to arbitration all demonstrate China's sustained commitment to improving its arbitral regime and to moving closer to meeting best international arbitral standards.

* The author would like to thank Adam Silverman for his assistance in this chapter.

1. See the news section of CIETAC's website (www.cietac.org/index.cms): 'New CIETAC Arbitration Rules to be Effective on 1 May 2012' (28 March 2012).
2. See the news/highlights & events sections of the respective websites of CIETAC (www.cietac.org/index.cms), SCIA (www.sccietac.org/main/en/) and SHIAC (-http://cietac-sh.org/English/default.aspx).
3. Case No. 225/2012.
4. Case No. 226/2012.
5. See the interview with Wang Wenying of the CIETAC Hong Kong Arbitration Centre: 'Building CIETAC's Global Role', China Law & Practice, April/May 2013.
6. In general, an arbitration is 'foreign-related' if it is seated in China and: (i) it involves at least one foreign party; or (ii) all the parties are Chinese parties, where (a) either the facts establishing, varying or terminating the legal relationship between the parties occurred in a foreign country; or (b) the subject matter in dispute is in a foreign country.
7. The summary procedure available under the 2005 CIETAC Rules was revised in the 2012 Rules, with the main revision being that, in the absence of party agreement, the summary procedure applies to any case where the amount in dispute does not exceed 2 million renminbi. Previously, the threshold was 500,000 million.
8. The 2012 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.
9. CPL 2013, Article 100.
10. CPL 2013, Articles 81 and 101.
11. PRC Arbitration Law, Article 2.
12. Certain disputes, however, are likely not arbitrable under PRC law. These include disputes over personal rights (including disputes concerning marriage, adoption, guardianship, maintenance and inheritance) and administrative disputes, which should be dealt with by administrative agencies.
13. CPL 2013, Article 154. It would be helpful for the SPC to confirm whether or not this requirement applies to both domestic and foreign-related arbitrations, given that the position is unclear.
14. In particular, in 1995, the SPC issued a Notice pursuant to which, if an Intermediate People's Court intends to refuse either to recognise or to enforce a foreign-related award or a foreign award, it must first submit a report to the Higher People's Court in that region. If the Higher People's Court agrees that the recognition or enforcement of the award should be refused, the Higher People's Court must report its review opinion to the SPC. Only after the SPC confirms the proposed refusal of enforcement of the award may the Intermediate People's Court issue a formal ruling to refuse enforcement of the award. On the other hand, if the Intermediate People's Court decides to enforce the award, it can directly issue a ruling to enforce it, without

reporting to its Higher People's Court or the SPC. Put simply, procedurally it is easier for a Chinese court to enforce an international or foreign-related award than to refuse to enforce it.

15. See European Commission, Directorate-General for Trade press release, 'Commission proposes to open negotiations for an investment agreement with China'. On 23 May 2013, the European Commission asked the member states for their agreement on a mandate to open negotiations on an investment agreement with China. At the same time, the Chinese authorities are conducting their own internal procedures for adopting a negotiating mandate.
16. The US negotiates BITs on the basis of a model treaty. Following a public review of the 2004 US model BIT led by the Department of State and the Office of the United States Trade Representative, the Obama administration in May 2012 released a new model BIT. Despite robust dialogue about the advantages and disadvantages of investor-state arbitration, the changes in the 2012 model BIT are relatively minor. A cornerstone of the 2012 model BIT remains investor-state arbitration under the ICSID Convention or the UNCITRAL Rules. Amendments have been introduced to allow for more public participation and greater transparency in arbitration proceedings.
17. Articles 20 to 32 set out in prescriptive terms the arbitration procedure which provides for (i) a mandatory 30-day consultation period following receipt of notice of intent to submit a claim; and (ii) arbitration pursuant to the Additional Facility Rules of ICSID (until such time as Canada ratifies the ICSID Convention) or the UNCITRAL Arbitration Rules. Other provisions cover the appointment of arbitrators, consolidation and interim relief.
18. On 24 May 2013, China and Switzerland signed a Memorandum of Understanding on completing negations over a China-Switzerland FTA.
19. Although in the case of Tza Yap Shum v The Republic of Peru (ICSID Case No ARB/07/6), a Hong Kong citizen brought a successful claim against Peru under the China–Peru BIT. Peru subsequently applied for the annulment of the award and the latest procedural development is that on 10 June 2013, an ad hoc ICSID annulment committee was reconstituted. A decision is still pending.

Singapore

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Summary

Introduction

International arbitration in Singapore has continued to flourish since last year's chapter. This year, we review the significant developments in Singapore from May 2012 to June 2013.

At the end of December 2012, the Singapore International Arbitration Centre (SIAC) had received a record total of 235 new cases, which represented a 25 per cent increase on new filings (from 2011). The total sum in dispute for new cases submitted in 2012 amounted to S$3.61 billion, with the highest claim amount for 2012 being S$1.5 billion. In 2012, the average value of a dispute before SIAC was S$15.36 million, more than double from that in 2011. The new cases were from parties in 39 different countries, with the highest number coming from China, India and Indonesia.

In June 2012, SIAC hosted the 21st ICCA Congress in Singapore, which attracted a record 1,059 participants from 59 countries. One of the highlights was the keynote speech of the then-attorney general Sundaresh Menon (now Singapore's chief justice) on 'International Arbitration: The Coming of the New Age for Asia (and Elsewhere)', which was the winner of Global Arbitration Review's Best Lecture or Speech Award for 2012 and which has generated much debate and discussion on whether there is a need for regulatory mechanisms in international arbitration.

There have been several significant developments in the form of further revisions to Singapore's International Arbitration Act (IAA) and a change to the Rules of Arbitration of SIAC (SIAC Rules) on 1 April 2013, which was published following the introduction of a new governance structure within SIAC. There were also a number of interesting matters before both the Singapore Court of Appeal and the Singapore High Court, reported in further detail below:

- The incorporation of an arbitration clause in one contract into another was considered in International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd & Anor [2012] SGHC 226.
- In Maldives Airports Co Ltd & Anor v GMR Malé International Airport Pte Ltd [2013] SGCA 16, the Court of Appeal had to decide whether it should grant a pre-arbitration interim injunction for the purpose of preserving assets under section 12A(4) of the IAA where the asset in question was contractual rights under a concession agreement.
- The confidentiality of arbitration proceedings was upheld in AZT & Ors v AZV [2012] SGHC 116, where the High Court had to consider an application to seal the court documents in respect of proceedings related to an earlier arbitration.
- In PT Pukuafu Indah & Ors v Newmont Indonesia Ltd & Anor [2012] SGHC 187, the High Court held that it did not have the power to set aside an interlocutory order made by an arbitration tribunal.
- The procedure to be adopted when an arbitration tribunal is asked to make an additional award was considered in LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd [2012] SGCA 57.
- In Astro Nusantara International BV v PT Ayunda Prima Mitra [2012] SGHC 212, the High Court considered, inter alia, whether a party could still resist the enforcement of an arbitral award in the seat on jurisdiction grounds when it had not exercised its right to appeal against a positive jurisdiction ruling under article 16(3) of the Model Law nor applied to set aside the final award under the IAA.

International Arbitration (Amendment) Act 2012

In last year's chapter, we discussed in some detail the key amendments featured in the International Arbitration (Amendment) Act 2012, which came into effect on 1 June 2012. By way of brief summary, some of the more important amendments were:

- broadening the definition of 'arbitration agreements';
- allowing parties to have recourse to Singapore courts in respect of negative jurisdictional rulings;
- clarifying the scope of an arbitral tribunal's power to award interest; and
- according emergency arbitrators with the same legal status and powers as any other arbitral tribunal and ensuring that orders made by emergency arbitrators are enforceable under the IAA regime.

New governance regime in SIAC and SIAC Rules 2013

SIAC released the fifth edition of SIAC Rules, which came into effect on 1 April 2013. These rules gave effect to a new governance structure, as well as introducing new rules for the conduct of arbitration, and apply to all arbitrations commenced on or after 1 April 2013.

Under the new governance structure, a court of arbitration (the SIAC Court) has been established to oversee the case administration and arbitral functions of SIAC, whilst the corporate and business development functions will continue to be run by the board of directors. The SIAC Court will undertake the functions previously undertaken by the chairman of SIAC, including determining challenges to arbitrators pursuant to rule 13 and to jurisdiction pursuant to rule 25. The determination of applications for expedited procedure pursuant to rule 5, and appointing arbitrators pursuant to rule 6 and emergency arbitrators pursuant to schedule 1 will now be functions of the SIAC Court president. Dr Michael Pryles has been appointed as the founder president of the SIAC Court, which comprises 16 leading arbitrators and practitioners from around the world.

The substantive changes include introducing a new rule 24(n) to apply the decision of the Singapore Court of Appeal in PT Prime International Development v Kempinski Hotels SA [2012] 4 SLR 98 in which it was held that a tribunal can have regard to issues in dispute which arise in the course of proceedings but which were not formally 'pleaded'. An arbitral tribunal can now decide, where appropriate, any issue not expressly or impliedly raised in the parties' submissions, provided the issue has been clearly brought to the notice of the other party and that party has been given adequate opportunity to respond.

Under the new rule 3.1(d), reference is now extended to disputes arising under an investment treaty or any other instrument conferring jurisdiction on SIAC, mirroring SIAC's efforts to promote itself as a centre for investment treaty arbitrations.

Amendments have also been made to extend certain powers of the registrar of SIAC. For example, under rule 2.5 the registrar may at any time extend or shorten any prescribed time limits, and rule 3.3 allows the registrar to deem that an arbitration has commenced, even where the notice of arbitration has not fully complied with the criteria in rule 3.1, as long as there has been 'substantial compliance'. Under rule 30.2, the registrar may fix separate advances on costs for claims and counterclaims respectively.

Arbitral tribunals may now, pursuant to the new rule 28.7, award interest in respect of any period deemed appropriate, including post-award interest. This amendment brings the SIAC Rules into line with the recent amendments to section 20 of the IAA.

Finally, a new rule 28.10 expressly authorises SIAC to publish any award with the names of the parties and other identifying information redacted. At the end of 2012, SIAC published its first volume of redacted awards – Singapore Arbitral Awards 2012 – which has been welcomed by practitioners as a significant resource. This new rule will assist in SIAC's efforts in publishing redacted awards as it is anticipated that the award digest will be published on an annual basis.

Case law

Construction Of An Arbitration Agreement

International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and Anor [2012] SGHC 226 was a case that concerned the challenge of an arbitral tribunal's ruling on jurisdiction pursuant to section 10 of the IAA. The gist of the challenge was whether an arbitration clause contained in one contract between two parties bound a third party who subsequently entered into a supplemental agreement with the two original parties.

The plaintiff (IRCP) and the second defendant (Datamat) were respondents in an arbitration instituted by the first defendant (Lufthansa), pertaining to payments due to Lufthansa under a cooperation agreement between Lufthansa and Datamat. Datamat was unable to meet its obligations and so the three parties entered into supplemental agreements whereby IRCP would pay Lufthansa for services rendered under the cooperation agreement in return for Datamat transferring to IRCP monies received pursuant to an agreement with Thai Airways.

Clauses 37.2 and 37.3 of the cooperation agreement contained a multi-tiered dispute resolution mechanism, with clause 37.3 providing that all disputes arising from the cooperation agreement would be settled by arbitration in Singapore. Lufthansa terminated the cooperation and supplemental agreements as a result of outstanding sums due from IRCP and commenced arbitration proceedings pursuant to clause 37.3. However, IRCP objected to being joined to the arbitration as it was not a party to the arbitration agreement contained in the cooperation agreement.

High Court Decision

The Singapore High Court noted that, generally, the approach towards incorporating an arbitration clause in one agreement into another was extremely strict and in the present case there were no clear words in the supplemental agreements that expressly referred to clause 37.3. Accordingly, if the Court was to apply the strict rule that clear words were required to incorporate an arbitration agreement it had to follow that clause 37.3 had not been incorporated into the supplemental agreements.

However, the Court held that it must determine whether the strict rule was applicable in every circumstance and particularly in this case. The fact that there was no specific reference to clause 37.3 in the supplemental agreements was not conclusive; the question was whether, by entering into the supplemental agreements and having regard to the factual matrix where the supplemental agreements were actually annexed to and formed an integral part of the cooperation agreement, the three parties had intended the terms of the cooperation agreement (and particularly the dispute resolution mechanism) to be binding on all three parties.

It was the Court's view in this case that the proper contextual interpretation, giving adequate regard to the plain language of the supplemental agreements and its background context, led to the conclusion that the parties had intended the same dispute resolution mechanism in the cooperation agreement to bind all three parties to the supplemental agreements. There was no denying the interdependence between the obligations in the supplemental agreements and those in the cooperation agreement. Further, the Court held that it made little commercial sense to have different dispute resolution mechanisms, the applicability of which depended on the identity of the parties.

The Court clarified that the strict rule still retained its utility and would apply in the majority of circumstances. However, whether an arbitration agreement was incorporated into one contract from another was effectively a function of the parties' intentions objectively ascertained and the absence of specific words should not be conclusive evidence that the parties did not intend to be bound by the arbitration agreement contained in a different contract.

Pre-arbitration interim injunction for the preservation of assets

In Maldives Airports Co Ltd and Anor v GMR Malé International Airport Pte Ltd [2013] SGCA 16, a dispute arose between GMR Malé International Airport Private Limited (GMR), who was granted a concession by the Republic of Maldives and Maldives Airports Company Limited (collectively the Maldives government) to expand and modernise the Malé International Airport.

The Maldives government gave seven days' notice to GMR to vacate the airport. Both parties commenced separate arbitration proceedings and pending constitution of the tribunal, GMR applied to the Singapore High Court (being the court of the seat) and obtained an interim injunction to restrain the Maldives government from interfering with the performance of its obligations under the concession agreement. An injunction was also sought against the Maldives government from taking possession or control of the airport or its facilities pending further order by the Singapore Court or while an arbitral tribunal constituted to resolve the dispute, but this was not granted.

This was appealed to the Singapore Court of Appeal. A jurisdiction issue was raised as to whether a Singapore court had the power to grant the injunction granted by the High Court against the government of a foreign sovereign state, on the basis of the Act of State doctrine. Further, in considering whether to uphold the injunction, the Court of Appeal had to consider whether a Singapore court had the jurisdiction and power to grant the injunction sought by GMR and if so, whether the balance of convenience was in favour of granting the injunction. The material provision was section 12A(4) of the IAA, read with section 12A(2) and section 12(1)(i), which provided that the High Court may grant an interim injunction if it was 'necessary for the purpose of preserving evidence or assets'.

Court Of Appeal Decision

The Court of Appeal dismissed the jurisdiction objection. It held that a state can waive immunity under section 15(3) of the State Immunity Act and that the Maldives government had done so when it agreed to clause 23 of the underlying concession agreement, which provided that:

> To the extent that any of the Parties may in any jurisdiction claim for itself… immunity from service of process, suit, jurisdiction, arbitration…or other legal or juridical process or other remedy…, such Party hereby irrevocably and

> unconditionally agrees not to claim and hereby irrevocably and unconditionally waives any such immunity to the fullest extent permitted by the laws of such jurisdiction.

In any case, the Court of Appeal held that the Act of State doctrine did not apply because the dispute was in fact private in nature where private law remedies were sought.

In determining whether a Singapore court had the power to grant the injunction, the Court of Appeal held that it had the power to do so pursuant to section 12A(4) of the IAA and considered that certain contractual rights could be regarded as an 'asset' for the purposes of a preservation order under that section. These contractual rights would be those which lend themselves to being preserved, or those that, if lost, would not be adequately remedied by an award of damages. If there were other reasonably available alternatives for securing the evidence or asset, then it could not be said that the order was necessary.

GMR had argued that the injunction was necessary to preserve the following contractual rights under the concession agreement which it asserted were 'assets' for the purposes of section 12A(4) of the IAA:

- the right to be served a proper termination notice;
- the right to have any dispute resolved by an arbitral tribunal before the contractual entitlements were destroyed; and
- GMR's interest in the land on which the airport was situated.

The Court of Appeal held that only the interest in land was a right which, if infringed, could not be remedied by an award of damages and could be considered an 'asset' for the purposes of section 12A(4) of the IAA as the concession agreement granted GMR a sublease with the 'exclusive right to occupy, use and peacefully enjoy the site' for a term of 25 years.

However, the Court of Appeal held that the balance of convenience did not favour an injunction being granted. It held that damages would have been an adequate remedy for the Maldives government's alleged breaches of the concession agreement, and that it was not practical to grant an injunction because the wide scope of the injunction meant that the parties were likely to repeatedly seek directions from a Singapore court on whether a particular act did or did not contravene the injunction. Further, the injunction could not be practically obeyed due to the breadth of the terms and the restrictions imposed on the Maldives government's state functions in operating the airport.

Open justice v the need for confidentiality

The parties to the application at issue in AZT & Ors v AZV [2012] SGHC 116 were co-respondents in a Singapore arbitration. The claimant belonged to a group of private equity funds and the arbitration concerned a dispute surrounding a shareholders' agreement between AZV and the claimant. AZT (as the majority shareholder of AZV) was not a party to the agreement, but agreed to be joined as a co-respondent.

The arbitral tribunal found in favour of the claimant, with AZT and AZV being jointly and severally liable for damages and costs. AZT reached an agreement with the claimant to pay S$65 million in full satisfaction of the arbitral award and subsequently commenced proceedings against AZV seeking a contribution.

AZT filed the application to seal the court documents in the case against AZV. It pointed out that certain matters canvassed in the Singapore arbitration would have to be discussed

in the proceedings against AZV, including the arbitration award, transcripts of the hearing, written submissions, the terms of reference and the relevant agreements. AZT argued that the court documents should be sealed so as to preserve the confidentiality of the arbitration proceedings.

High Court Decision

The Court held that, in deciding whether to seal the court documents in this case, the principle of open justice must be weighed against the need to preserve confidentiality in arbitration, with the latter being an important factor in the court's exercise of discretion. Sections 22 and 23 of the IAA reflected the public policy of keeping arbitrations, and all proceedings related to arbitration, confidential.

In the Court's view, there were several factors in this case that supported allowing the application to seal the files:

- both AZT and AZV were party to the arbitration;
- there was nothing to indicate that there was a legitimate public interest in not sealing the court documents, as the subject matter of the dispute was purely commercial; and
- AZV neither opposed nor consented to the application, as it was reserving the right to apply to stay the substantive proceedings on the grounds of lack of jurisdiction.

The Court held that the sealing of court documents in this case would not stifle the development of arbitration jurisprudence in Singapore and accordingly, found that there was no reason to compromise the confidentiality of the arbitration and related proceedings that had been agreed to by the parties.

Interlocutory order not an 'award' under IAA

In PT Pukuafu Indah & Ors v Newmont Indonesia Ltd & Anor [2012] SGHC 187, the dispute revolved around certain contracts between the plaintiffs and the defendants.

The plaintiffs were bound to discontinue two suits that had been commenced in the Indonesian courts, however, they did not do so and instead began proceedings for three more suits. The defendants then commenced proceedings before SIAC, seeking and obtaining an interim anti-suit injunction pursuant to rule 26.1 of SIAC Rules (the Order). The Order restrained the plaintiffs from continuing with all court proceedings that were pending in the Indonesian courts, or from commencing fresh proceedings, pending a full hearing on the merits.

The High Court granted leave to enforce the Order and the plaintiffs filed an application to set the order aside. The defendants opposed the application on the grounds that, inter alia, the court's jurisdiction to annul arbitral awards did not extend to the Order as it was an interim measure.

High Court Decision

The High Court agreed with the plaintiffs and held that, while it had the power to set aside an award of an arbitral tribunal, it did not have the jurisdiction to set aside an interlocutory order. This was because an interlocutory order was not an 'award' under the IAA. Section 2 of the IAA defines an 'award' as 'a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial awards but excludes any orders or

directions made under section 12'. Section 12 of the IAA lists the orders that are concerned with procedural matters or protective measures and do not determine the substantive merits of the claim. This includes 'an interim injunction or any other interim measure'.

The High Court held that the Order was an interlocutory order under section 12 of the IAA and accordingly was not an 'award' under the IAA. The Order was in effect an interim anti-suit injunction restraining the plaintiffs from continuing proceedings in the Indonesian courts and from commencing new proceedings pending arbitration and, as such, it had only interim effect. It was intended only to maintain the status quo until the arbitral tribunal could hold a full hearing on the merits.

Additional award set aside for breach of natural justice

Section 43(4) of Singapore's Arbitration Act (AA), which is in pari materia to article 33(3) of the UNCITRAL Model Law on International Commercial Arbitration (Model Law), provides that a party may request the arbitral tribunal to make an additional award as to claims presented during the arbitral proceedings but omitted from the award. This request must be made within 30 days from receipt of the award and notice must be given to the other party.

LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and Anor Appeal [2012] SGCA 57 involved an appeal by both parties relating to an additional award of 'pre-award' interest that was made by the arbitrator at the written request of the defendant almost four weeks after the issue of the substantive arbitral award. The award was made three days after receiving the defendant's request and without the arbitrator hearing the plaintiff's position.

The plaintiff objected to not having the opportunity to present its position on the issue of pre-award interest and filed proceedings in the High Court, praying that the award be declared a nullity in that it was not an award made for the purposes of section 43(4) of the AA, or alternatively that it should be set aside on the ground that it had been made in breach of natural justice. The High Court did not declare the award a nullity but set it aside for being made in breach of natural justice.

Court Of Appeal Decision

The Court of Appeal held that, while section 43(4) of the AA did not specifically stipulate that an arbitrator must hear additional evidence or arguments before making an award under that section, the requirement to give notice contained an implicit requirement that the other party be afforded the opportunity to respond to the requesting party's request for an additional award.

The Court held that section 43(4) therefore embodied the following:

- Upon receiving a request to make an additional award, the arbitrator must give the other party the opportunity to respond to the question of whether section 43(4) had been properly invoked in the sense that a claim presented for arbitration had been omitted.
- The arbitrator had no jurisdiction to make an additional award unless it could be shown that his initial award had indeed omitted dealing with a claim.
- Once the tribunal decides that a claim has been omitted from the award, it must make an additional award to deal with that omitted claim. It would not be required at this stage to call for or hear additional evidence or arguments; however, it was not prevented from doing so if it deemed this necessary.

In determining whether the award should be set aside for being in breach of natural justice, the Court held that there must be some causal connection between the breach of natural justice and the making of the award in order to establish actual or real prejudice. Further, the test for deciding whether there had been real prejudice was not whether the tribunal would have arrived at a different decision if the matter had been fully argued, but whether the breach of natural justice was merely technical and inconsequential or whether, as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real chance of making a difference to his deliberations. The issue was whether the material could reasonably have made a difference, rather than whether it would necessarily have done so.

In this case, the plaintiff could reasonably have argued that the arbitrator's award had already dealt with the question of pre-award interest, because the award had provided for post-award interest even though there was no need to do so. On the face of it, the express provision of only post-award interest might reasonably appear to be a deliberate decision not to award pre-award interest and such an argument, if made, may have reasonably resulted in a different outcome. The Court of Appeal agreed that the test of prejudice was satisfied and the award should be set aside.

Resisting an award at enforcement stage for lack of jurisdiction

Our chapter last year discussed the case of Re Joseph David QC [2011] SGHC 262, which 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 application succeeded and the substantive matter at issue came before the Singapore High Court in October 2012.

In Astro Nusantara International BV v PT Ayunda Prima Mitra [2012] SGHC 212, the plaintiffs and the defendants had been involved in a joint venture that had failed. This failure gave rise to a dispute between the parties that resulted in the claimants commencing SIAC arbitration proceedings in Singapore pursuant to an arbitration clause in the parties' agreement governing the joint venture (JVA).

Of the eight claimants, only the first to the fifth claimants were parties to the JVA. The sixth to the eighth claimants were affiliates of the first to the fifth claimants, but were not parties to the JVA. They had been involved in the provision of services envisaged under the JVA and were linked to the dispute. Instead of having separate civil litigation proceedings between the sixth to the eighth claimants and the three respondents (who were all parties to the JVA), the claimants applied to the arbitral tribunal to allow the sixth to the eighth claimants to be joined as parties to the arbitration, and to further decide on the claims of those claimants against the respondents pursuant to rule 24.1(b) of the SIAC Rules (2007 edition), which provided that a tribunal shall have the power to 'allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes among the parties in the arbitration'.

The respondents argued that the tribunal did not have the jurisdiction to make such a declaration. The tribunal, however, allowed the claimants' application and issued an award (the joinder award) finding that it did have the power to join the sixth to the eighth plaintiffs to the arbitration proceedings and that such joinder was desirable and necessary in the interests of justice.

Under article 16 of the Model Law, the respondents could have appealed to the Singapore courts against the joinder award within 30 days of the making of the award, on the basis that the tribunal did not have the jurisdiction to make it. However, they chose not to and instead proceeded to defend the substantive issues in the arbitration, although they claimed that their actions were to be taken 'without prejudice to [their] position that any tribunal which is constituted has and will have no jurisdiction over any of the matters, claims and reliefs' made by the sixth to the eighth claimants against them.

After a substantive merits hearing, four other final awards were subsequently made by the tribunal, including an award in favour of the claimants on the substantive issues in dispute between the parties. Long after the time stipulated for any setting-aside applications under article 34 of the Model Law, the claimants applied to enforce all five awards in Singapore (among other jurisdictions), and obtained leave to do so. The second respondent, PT First Media TBK (FM), then challenged the enforcement of the awards and invoked the tribunal's alleged lack of jurisdiction as a ground to resist enforcement. The question was whether it was still able to raise the jurisdiction issue at such a stage, or whether it was too late for it to do so.

High Court Decision

FM's case on resisting enforcement rested on a distinction which they tried to draw between actively applying to set aside an award and passively resisting at the point when the counterparty sought to enforce the award. The High Court, however, was not persuaded by this distinction. The Court first explained that, in respect of domestic international awards, the IAA provided that where an award had not been set aside under any of the specified grounds, it was recognised as final and binding and not subject to any further grounds for refusal of enforcement. Accordingly, any challenge to enforcement must also come as a challenge to the recognition of a domestic international award. The correct legal basis for a refusal to enforce was that there was no award to enforce (ie, the award had been set aside). A domestic international award could either be recognised and not set aside, or not recognised and set aside.

If FM wished to resist enforcement of the awards, it could only do so by taking positive steps to set them aside on one of the specified grounds set out in article 34 of the Model Law. However, in this case, this avenue was no longer available to it as it was outside the three-month time limit specified in article 34. Although FM argued that the grounds in article 34 were still available notwithstanding that the prescribed time limits had expired, it gave no valid reason why article 34(3), which established the three-month limitation period for the bringing of a challenge, should be divorced from article 34(2) where the grounds for setting aside were found. The Court agreed with the plaintiffs that recourse to a court under article 34 was subject to both paragraphs (2) and (3). It was clear that article 34 meant to limit the grounds for setting aside an award, as well as to ensure that any challenge was brought promptly within the period specified.

FM also argued that a party was free to choose between setting aside an award or resisting its recognition and enforcement. The Court noted that this argument was founded on both article 36 of the Model Law, which – separately from article 34 on the setting aside of awards – specified grounds for refusing recognition or enforcement of an award. However, this argument was not valid as article 36 had been expressly excluded from the IAA. It was therefore not possible to imply the article 36 grounds back into the IAA.

The Court also rejected FM's argument that it was entitled to wait, having reserved and retained the right to invoke lack of jurisdiction as a ground to resist enforcement. While the Court accepted that a party was not obliged to appeal under article 16(3), a party that chose not to do so was taken to accept the finality of the award on jurisdiction. There was no avenue under the Model Law to participate in a hearing on the merits under protest without having lodged an appeal under article 16 if a party wished to properly and effectively retain its right to raise an objection to the tribunal's jurisdiction. As FM had clearly confirmed the joinder award as final by participating in the hearing on the merits without appealing, there was no further challenge permitted.

The Court held that the plaintiffs were immediately entitled to have the joinder award recognised and enforced without any further challenge on jurisdictional grounds. Allowing FM to come in under the guise of refusal of recognition and enforcement to have a second bite at the cherry would be contrary to the finality principle promoted by the Model Law.

FM had appealed against the High Court's decision which was heard in April 2013; at the time of writing, the Court of Appeal's eagerly awaited decision has not been delivered.

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Pakistan

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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 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; however, it 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. 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 this case, further arbitration proceedings will become invalid if 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.

Initially, the New York Convention was implemented in the country through successive ad hoc presidential decrees, called ordinances. The last of such ordinances 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 parliament to fully implement in Pakistan the New York Convention.

The NYC Act applies to international arbitration agreements made at any time, and to foreign arbitral awards made on or after 14 July 2005. A local court has recently held that if a foreign arbitral award, otherwise covered by the New York Convention, is made pursuant to an arbitration agreement governed by Pakistani law, it would be treated as a domestic award and the provisions of the Arbitration Act would apply to such foreign arbitral award. This matter is now before the Supreme Court in appeal and it is likely that the court would overrule this decision.

The NYC Act 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 to direct the parties to refer the matter to arbitration unless the court finds that the arbitration agreement is void, inoperative or incapable of being performed.

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. However, as mentioned above, one Pakistani High Court has now held that the a foreign arbitral award made pursuant to an arbitration agreement governed by Pakistani law would be treated as a domestic award to which the NYC Act will not apply. The court held that, since the NYC Act did not specifically repeal the Arbitration Act, enforcement of such arbitral awards may be refused on any of the grounds laid down in the Arbitration Act. This judgment has indeed produced significant confusion on this particular issue and until such time that the Supreme Court gives its authoritative finding, ambiguity on this issue will continue.

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 developed in Pakistan on this issue generally favoured enforcement of international arbitration agreements; however, in some instances the local courts refused to enforce international arbitration agreements. Local courts generally considered the following factors for deciding whether or not to enforce international arbitration clauses of international agreements: the place where the disputed transaction was to be carried out; the place where relevant evidence was readily available; the balance of convenience; and the financial burden on the parties if they were referred to international arbitration.

The above position has significantly changed following the enactment of the NYC Act, which 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, such as, for instance, framing of issues and calling the parties to produce their oral and documentary evidence. While under the NYC Act the enforcement proceedings are supposed to be summary in nature in practice such proceedings have remained pending for several years in local courts. The federal government's failure to issue the required rules under section 9 of the NYC Act, which lay down the procedure to be applied by local courts for handling these matters, is one reason for the delays in the enforcement of foreign arbitral awards. There also appear to be capacity issues among local courts, which frequently treat enforcement proceedings in the same manner as they treat ordinary civil proceedings.

Recently, superior courts of Pakistan have started to proactively exercise their constitutional power of judicial review even in matters covered by international arbitration agreements. The courts generally exercise these powers in the public interest, mainly to protect the

public exchequer either suo moto or on the basis of petitions filed by third party pro bono publicos. It is observed that interested parties often approach local courts through fictitious pro bono publicos to wriggle out of their international arbitration agreements. Frequently, the government and government-owned entities use alleged corruption in the formation of contracts and their own non-adherence to internal governmental procedures as a basic for convincing a local court to declare void an international contract.

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. However, as per the requirements of Pakistani law, no legislation was enacted until the promulgation of 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 or 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 say, ambiguity surrounds this whole issue as the 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 in Pakistan earlier on dealing with international arbitration agreements providing for ICSID arbitration and enforcement of foreign arbitral awards issued

under the Washington Convention seems to have now 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 since it is a brand new piece of legislation. However, certain high-profile arbitration proceedings involving federal and provincial governments and foreign investors are currently pending before ICSID and ICC tribunals. When matters arising out of these arbitration proceedings would come before local courts the position of local courts on the AIID Act and the Washington Convention would be clarified.

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 that 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

One 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 granting of an interim injunction under section 41 of the Arbitration Act against any other party to such arbitration proceedings. An important question, 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 granting 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 those otherwise provided by any law that is currently 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 which 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 insofar 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 proceedings.

It is to be further noted that this is an extremely sensitive area of Pakistani law, as the Arbitration Act has a notorious reputation for 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 the Arbitration Act to international arbitration agreements for which this law is dreaded. A local court has already taken this path and held that since the NYC Act did not expressly repeal the Arbitration Act, the remedies available to a party under the Arbitration Act 1940 remain available.

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Khan & Associates

New Zealand

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Summary

Introduction

Overview Of Arbitration In New Zealand

Arbitration is widely used and understood in New Zealand, which was an early adopter of the UNCITRAL Model Law on International Commercial Arbitration 1985 (Model Law). As a practical matter, arbitration is increasingly selected for the resolution of significant contractual disputes in place of High Court litigation.

The Arbitration Act 1996 governs all forms of arbitration in New Zealand, whether commercial or consumer, domestic or international. The Act was drafted under the leadership of Sir Kenneth Keith, then the president of the New Zealand Law Commission and now a member of the International Court of Justice. The Act is closely based on the Model Law, which is incorporated (including the 2006 amendments) into schedule 1, with only minor modifications.

The express purposes of the Act include the promotion of consistency of arbitral regimes based on the Model Law, and between the international and domestic arbitral regimes in New Zealand. New Zealand courts and arbitral tribunals are expressly empowered to refer to the travaux préparatoires of the Model Law in interpreting the Act. New Zealand's judiciary has been sensitive to the fact that the Act is based on model legislation which aims at international harmonisation, and has generally sought to interpret the Act in an international context.

Structure Of The Arbitration Act 1996

The Act contains two primary schedules: a mandatory schedule 1, closely based upon the Model Law; and an optional schedule 2, incorporating additional procedural rules – including the possibility of an appeal on a question of law. By section 6 of the Act, schedule 2 applies to a domestic arbitration unless the parties agree otherwise; and to an international arbitration only if the parties so agree.

This means that a simple arbitration clause selecting the seat of arbitration as New Zealand will, by default, be conducted under the Model Law. Whether additional procedural rules will also apply depends upon whether the arbitration is domestic or international.

The sections of the Act principally define its purposes (section 5), its scope of application to different classes of disputes (sections 6 to 11) and the general powers and liabilities of arbitrators (sections 12 and 13). They also include, as sections 14A to 14I, a confidentiality code inserted in 2007.

A third schedule to the Act annexes the arbitration treaties to which New Zealand is party, being the 1958 New York Convention, the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.

Arbitral Institutions And Rules In New Zealand

Most arbitration conducted in New Zealand is ad hoc and often conducted solely under the auspices of the Act. The use of ad hoc procedural rules, such as the UNCITRAL Arbitration Rules, is still relatively rare. Many users instead rely on the procedural rules and guidance provided by the Act, particularly the optional schedule 2 containing useful default rules, including for the appointment of arbitrators without court or institutional intervention and an optional appeal on a question of law.

The prevalence of international arbitration is increasing with the globalisation of New Zealand's economy, as greater numbers of New Zealand companies and offshore counterparties sign contracts containing arbitration clauses. Nevertheless, in practice, many arbitrations reflect a hybrid culture incorporating elements of domestic court practice as well as international arbitration best practice. This culture is evolving as documents such as the IBA Rules on the Taking of Evidence in International Commercial Arbitrations (IBA Rules) become increasingly widely known.

New Zealand has a local arbitration institution, the New Zealand Dispute Resolution Centre (NZDRC), which offers a variety of arbitration rules. The most popular international institutional rules would appear to be those of the International Chamber of Commerce (ICC) and the Singapore International Arbitration Centre (SIAC).

The Role Of The Courts

One of the purposes of the Act is to 'redefine and clarify the limits of judicial review of the arbitral process and arbitral awards'. The starting point in considering the role of the New Zealand courts with respect to arbitrations is article 5 of schedule 1: 'In matters governed by this schedule, no court shall intervene except where so provided in this schedule.'

A principal objective of this provision in the Model Law was to confirm that the only permissible recourse against an arbitral award was an application to have the award set aside on the limited grounds contained in article 34. This objective was deliberately moderated by the inclusion of clause 5 of schedule 2, which – where it applies – also permits an award to be appealed on a question of law.

The key areas of possible intervention in arbitral proceedings by a New Zealand court are the following:

- court assistance to uphold the arbitration agreement, including its enforcement through a stay of court proceedings (where the offending proceedings are brought in a domestic court: article 8(1), schedule 1) or the issuance of an anti-suit injunction (where the offending proceedings are brought in a foreign court);
- court assistance to ensure the proper commencement of the arbitration proceedings, including the appointment of the arbitral tribunal (article 11(1), schedule 1; see clause 1, schedule 2), considering challenges to tribunal members (article 13(3), schedule 1) and confirming replacement of arbitrators (article 14(1), schedule 1);
- court assistance with interim measures in support of the arbitration proceedings (articles 9, 17L and 17M, schedule 1);
- court assistance with the conduct of the arbitral proceedings themselves, primarily including assistance in obtaining evidence (article 27, schedule 1; and clause 3, schedule 2);
- court assistance in relation to the confidentiality of arbitration proceedings (principally, section 14E of the Act);
- court review of domestic arbitral orders and awards (articles 16(3) and 34, schedule 1; and clauses 4 and 5, schedule 2); and
- court recognition and enforcement of arbitral awards (article 36, schedule 1).

Commencing arbitration

Arbitration Agreements

Article 7 of schedule 1, which closely follows the Model Law, provides that an arbitration agreement may be made orally or in writing. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement. There are no known examples in New Zealand case law of any oral arbitration agreement having been proved where its existence was disputed by the parties.

Section 11(1) of the Act contains special provisions in respect of consumer arbitration agreements. These provisions apply where a person enters into a contract as a consumer and the contract contains an arbitration agreement. In this situation, the arbitration agreement is enforceable against the consumer only if two conditions are met:

- the consumer, by separate written agreement entered into by the consumer and the other party to the contract after a dispute has arisen out of, or in relation to, that contract, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it; and
- the separate written agreement must disclose (if it is the case) that all or any of the provisions of schedule 2 do not apply to the arbitration agreement.

For the purposes of section 11(1), a person enters into a contract as a consumer if that person is an individual and enters into the contract otherwise than in trade, and if the other party to the contract enters into that contract in trade.

Arbitrability

There are very few disputes that cannot be arbitrated. The term 'arbitration agreement' is defined in section 2(1) of the Act as meaning 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'. Virtually all disputes between parties involving alleged breach of civil obligations will meet this definition, and the obligation need not be contractual in nature. For instance, disputes involving antitrust and consumer protection legislation have been held amenable to arbitration.

Section 10 provides that a dispute may not be determined by arbitration if the arbitration agreement is 'contrary to public policy' or if, under any other law, the dispute is not capable of determination by arbitration. The 'public policy' threshold is a very high bar.

Appointing The Arbitral Tribunal

The parties may appoint the arbitral tribunal in accordance with whatever procedure they have agreed in the arbitration agreement.

Failing such agreement, the appointment rules in article 11 of schedule 1 are that, in an arbitration with three arbitrators and two parties, each party may appoint one arbitrator, and the two arbitrators thus appointed must appoint the third arbitrator. In an arbitration with a sole arbitrator the parties must agree; if they do not, the appointment must be made, upon request of a party, by the High Court.

The High Court is also empowered to make appointments where the parties' appointment machinery has failed (unless the parties' agreement on the appointment machinery provides other means for securing the appointment). There is no appeal from any appointments made by the High Court.

There is an alternative procedure for appointing the arbitral tribunal set out in clause 1 of the optional schedule 2. This provides that, for the purposes of article 11 of schedule 1, the parties are taken as having agreed on the procedure for appointing the arbitral tribunal as set out in clause 1, unless the parties agree otherwise. Clause 1 then sets out a default 'quick draw' procedure in the event of parties, including a third-party institution, failing to appoint any required arbitrators. This permits a party to specify by written communication the details of the party's or institution's default in appointment and to propose that, if the default is not remedied in a period of not less than seven days, a person named in the written communication shall be appointed as arbitrator. This is a form of self-help remedy which permits the appointment of a tribunal without the intervention of an institution or the High Court.

It also creates opportunities for gamesmanship. The first party to serve a valid notice can, in this way, seek to insist upon the identity of the relevant appointment. The High Court has confirmed, however, that a 'quick draw' notice cannot be served unless and until a party has been given a reasonable time to make an appointment. If served too early, the notice will be ineffective. Nonetheless, this uncertainty creates potential scope for confusion over precisely when a 'quick draw' notice will be valid and effective.

The two other relevant powers of the High Court are to assist in determining challenges to arbitrators (article 13(3)) and applications to remove an arbitrator who has become unable to act (article 14(1)). There is some (although relatively little) case law under either provision.

Article 12 of schedule 1 adopts the Model Law position, which requires a person who is approached in connection with that person's possible appointment as an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence. New Zealand law on how this provision is to be applied is now likely to be influenced by the leading case regarding judicial impartiality, Saxmere Company Ltd v Wool Board Disestablishment Company Ltd [2009] NZSC 122, [2010] 1 NZLR 76, in which the Supreme Court confirmed that apparent bias will be shown 'if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide'.

Court Assistance In Upholding The Arbitration Agreement

Article 8(1) of schedule 1 provides for a mandatory stay of New Zealand court proceedings commenced in breach of an arbitration agreement, subject only to the exceptions that:

- the arbitration agreement was null and void, inoperative or incapable of being performed; or
- that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

The second exception is one of the few changes made to the Model Law when it was adopted in New Zealand. This controversial exception was added to preserve a route for swiftly disposing of applications for a stay by a party who, although they wished to seek arbitration, has no arguable defence to claims made in that arbitration. It has been judicially interpreted to preserve the High Court's summary judgment jurisdiction.

The matter recently came before the Court of Appeal again in Zurich Australian Insurance Ltd v Cognition Education Ltd [2013] NZCA 180. After a careful examination of the countervailing policy arguments, the Court confirmed that a stay may be refused where summary judgment

can properly be granted. The impact of this decision on foreign parties may, however, be ameliorated by filing a protest to the jurisdiction of the New Zealand court. At the time of writing, leave to appeal that decision had been sought from New Zealand's highest court, the Supreme Court.

Interim Measures

New Zealand was the first country to adopt the 2006 UNCITRAL revisions on interim measures. Arbitrators have wide powers to issue interim measures and other forms of preliminary relief. Detailed provisions on interim measures and preliminary orders – corresponding to those now appearing in the Model Law – appear in articles 17 to 17M of schedule 1, which were inserted and came into force on 18 October 2007.

Unless otherwise agreed by the parties, the arbitral tribunal may grant an 'interim measure' at the request of a party. An interim measure is defined in article 17 as meaning 'a temporary measure (whether or not in the form of an award)' by which a party is required 'at any time before any award is made in relation to a dispute' to carry out all or any of the following specified tasks:

- (i) to maintain or restore the status quo pending the determination of the dispute;
- (ii) to take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings;
- (iii) to provide a means of preserving assets out of which a subsequent award may be satisfied;
- (iv) to preserve evidence that may be relevant and material to the resolution of the dispute; and
- (v) to give security for costs.

The standard that must be met for granting an interim measure is set out in article 17B. An applicant for an interim measure of the kinds mentioned in (i), (ii) or (iii), above, must satisfy the arbitral tribunal of three matters:

- that harm not adequately reparable by an award of damages is likely to result if the measure if not granted;
- that the harm substantially outweighs the harm that is likely to result to the respondent if the measure is granted; and
- that there is a reasonable possibility that the applicant will succeed on the merits of the claim.

Interim measures are applied for on notice to the other party and will be determined by the arbitral tribunal after hearing from both parties. However, there is also scope for the arbitral tribunal to grant a 'preliminary order' without notice to the respondent.

A 'preliminary order' is defined in article 17 as meaning 'an order directing a party not to frustrate the purpose of an interim measure'. Article 17C provides that a claimant may, unless otherwise agreed by the parties, apply for a preliminary order without notice to any other party when making a request for the interim measure to be granted.

The arbitral tribunal may issue a preliminary order if it considers that prior disclosure of the request for the interim measure to the respondent risks frustrating the purpose of the

measure. The applicant for a preliminary order must satisfy the arbitral tribunal of the same matters (modified as necessary) of which the tribunal must be satisfied when granting an interim measure (as set out in article 17B).

Article 9 of the Model Law (reproduced as article 9(1) of schedule 1 of the Act) makes no judgment as to whether the arbitral tribunal or the courts should have priority when it comes to issuing interim measures of protection. However, in practice, the parties should ordinarily apply first to the arbitral tribunal if it has been formed. The Act elaborates on article 9 of the Model Law by providing that where a party applies to the court for an interim measure of protection and the arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purpose of the application to the court.

Articles 17L and 17M provide for recognition and enforcement (and for grounds for refusing recognition and enforcement) of interim measures granted by the arbitral tribunal. Article 17L(1) provides that interim measures must be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to a competent court. The court may refuse recognition or enforcement of an interim measure on essentially the same limited grounds as for an award.

Article 17G provides that a provisional order (as opposed to an interim measure) is binding on the parties but is not enforceable by a court and does not constitute an award.
The arbitral proceedings

The Powers Of The Arbitral Tribunal

An arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that an arbitral tribunal may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court, as well as interest on that award (section 12). This confirms the ability of arbitrators to award relief under domestic statutes such as the Fair Trading Act 1986 and the Commerce Act 1986.

Where the parties have not agreed, before or during the arbitral proceedings, on relevant procedural matters, the arbitral tribunal is empowered to conduct the arbitration in such a manner as it considers appropriate, subject only to the mandatory provisions of schedule 1. Examples of provisions which expressly empower the arbitral tribunal to decide matters (sometimes only in the event the parties do not agree) include:

- article 19(2), relating to the default procedural powers of the arbitral tribunal in conducting the proceedings, including the power to 'determine the admissibility, relevance, materiality, and weight of any evidence';
- article 20, relating to the place of arbitration and the location of hearings;
- article 22, relating to the language of the arbitration;
- article 23(1), relating to the time for filing statements of claim and defence (and whether documentary evidence is filed simultaneously or at a later date);
- article 23(2), relating to whether an amendment of a statement of claim or defence should be allowed having regard to the delay in making it;
- article 24(1), relating to whether oral hearings should be held, and the nature of such hearings (but oral hearings must be held at the request of any party unless the parties have agreed that no hearings shall be held);

- article 31(5), whether a sum directed to be paid in an award shall carry interest; and
- article 32(2), when the proceedings terminate.

Mandatory Provisions Of Schedule 1

Some provisions of schedule 1 are mandatory. Articles 4 and 34(2)(iv) of schedule 1 refer to the existence of provisions 'of this schedule from which the parties cannot derogate'.

New Zealand case law has, generally in accordance with the travaux préparatoires to the Model Law, identified articles 18 and 24(2), 24(3) as mandatory, with the result that the article 34 and 36 standards for review and recognition are also non-derogable. The article 12 challenge right has also been identified as mandatory, presumably in the sense of establishing a minimum standard of impartiality and independence.

Confidentiality

Arbitrations are generally confidential. The Act contains a detailed code relating to confidentiality of arbitral proceedings and court proceedings involving arbitrations. Two general presumptions may be seen as underpinning the detailed confidentiality provisions. The first is that arbitrations are to be conducted in private and are to be subject to confidentiality. The second is that any court proceedings involving arbitral proceedings are generally to be conducted in public and are not subject to confidentiality obligations. Mechanisms to displace these presumptions in appropriate cases are provided.

By section 14A of the Act, arbitral proceedings must be conducted in private. Section 14B provides that arbitration agreements are deemed to provide that the parties and the arbitral tribunal must not disclose 'confidential information'.

'Confidential information' is defined widely in section 2(1) as meaning 'information that relates to the arbitral proceedings or to an award made in those proceedings' and includes: all pleadings, submissions, statements or other information that a party supplies to the arbitral tribunal; any evidence supplied to the arbitral tribunal; any notes made by the arbitral tribunal of submissions or evidence before it; any transcript of oral evidence or submissions given; and any rulings and awards of the arbitral tribunal.

Section 14C of the Act provides limited circumstances in which a party or an arbitral tribunal may disclose confidential information. Disclosure may be made to a professional or other adviser of the parties or in accordance with an order made or subpoena issued by a court. Disclosure may be made if authorised or required by law or a competent regulatory body, provided that the party (or tribunal) disclosing provides notification of the fact of, and reasons for, disclosure. Disclosure is also permitted where it is necessary to ensure that a party has a full opportunity to present its case, to establish or protect its legal rights in relation to a third party or to make an application to the court, but the disclosure must be no more than what is required to serve these purposes.

There is also a regime by which a party may apply to the arbitral tribunal, and the arbitral tribunal may determine an application, for permission to disclose confidential circumstances, otherwise than as permitted by the Act. If the arbitral tribunal refuses the application, the party may appeal to the High Court, whose decision is final. Application to the High Court for permission to disclose confidential information may also be made where the mandate of the arbitral tribunal has been terminated.

The High Court may make an order allowing disclosure of confidential information only if it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral tribunals is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed. The disclosure may not be more than what is reasonably required to serve those other considerations making it desirable for there to be disclosure.

Section 14F of the Act provides that court proceedings under the Act must be conducted in public unless the court makes an order that the whole or any part of the proceedings must be conducted in private. Such an order may be made only on application by a party and only if the court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private.

In determining whether the court proceedings should be conducted in private, the court is required under section 14H of the Act to consider a range of matters, including the open justice principle, the privacy and confidentiality of arbitral proceedings and the terms of any arbitration agreement.

Evidence, Privilege And Disclosure Rules

New Zealand evidential and court procedural rules are not applicable to arbitrations under the Act, unless the parties have elected to make them so. But New Zealand privileges and immunities for witnesses are applicable regardless of party agreement.

Schedule 1 of the Act is silent on document disclosure issues, stating in article 19 only the Model Law formulation that the parties are free to agree on the procedure to be followed by the arbitral tribunal – failing which the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate (in both cases, subject to the mandatory provisions of schedule 1, such as the equal treatment guarantee in article 18).

The optional schedule 2 provides that, for the purposes of article 19 of schedule 1, the parties shall be taken to have agreed that the powers conferred upon the arbitral tribunal include the power to 'order the discovery and production of documents or materials within the possession or power of a party'. In practice, parties to a domestic arbitration in New Zealand will often have access to equivalent discovery as that available under the New Zealand High Court Rules.

To provide clarity on the method and limits of disclosure, international arbitrations in New Zealand are often conducted with non-binding reference to the IBA Rules.

Court Assistance With Obtaining Evidence

Article 27 facilitates court assistance with obtaining witness or documentary evidence. It can be triggered only by request from the arbitral tribunal, or by a party with the approval of the arbitral tribunal.

Where this procedure is used, the High Court may issue a subpoena, or a district court may issue a witness summons, to compel the attendance of a witness before an arbitral tribunal to give evidence or produce documents. Alternatively, the High Court or a district court may order any witness to submit to examination on oath before the arbitral tribunal or before an officer of the court (or other person) for the use of the arbitral tribunal. Article 27(3) provides that the High Court or a district court shall have its ordinary powers to make orders for

discovery and interrogatories, the issue of a request for the taking of evidence out of the jurisdiction, or the detention, preservation, or inspection of any property or thing which is in issue in the arbitral proceedings.

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may also request the High Court or a district court for assistance with any of the powers conferred upon an arbitral tribunal in accordance with clause 3(1) of schedule 2. For those purposes, the respective courts have the same powers as they have in civil proceedings.

Awards, court review of awards and enforcement

Making An Award

Chapter 6 of schedule 1 sets out the rules for making awards and terminating the arbitral proceedings. Those provisions closely follow those of the Model Law.

The arbitral tribunal must decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute. If the parties have not designated which rules of law apply, the arbitral tribunal must apply the law determined by the conflict of laws rules which the tribunal considers appropriate.

If the parties have expressly so authorised, the arbitral tribunal may decide the dispute ex aequo et bono or as amiable compositeur (that is, according to considerations of general justice and fairness). Where an arbitral tribunal is given such a power, this will result in the modification of the strict language of the written contract to the extent of any inconsistency with a fair and equitable result (see A's Co Ltd v Dagger HC Auckland M1482-SD00, 7 March 2003, at [146]).

Where there is more than one arbitrator, any decision of the arbitral tribunal on the substance of the dispute must be made, unless the parties otherwise agree, by a majority of all its members. There is nothing expressly prohibiting arbitrators from issuing dissenting opinions to the award. Accordingly, a dissenting arbitrator may do so.

An award must be made in writing and signed by the arbitrator or a majority of the arbitrators, if the reason for any omitted signature is stated. The award must state the reasons on which it is based, unless the parties have agreed otherwise. The award must state its date and the place of arbitration and, once made, a signed copy must be delivered to each party.

Where the parties settle the dispute during the arbitral proceedings, the arbitral tribunal must terminate the proceedings. If requested by the parties, and if the arbitral tribunal does not object, the arbitral tribunal must record the settlement in the form of an arbitral award on agreed terms. An award on agreed terms must state that it is an award and must otherwise comply with the formal requirements for an award to be valid. It has the same status and effect as any other award on the merits.

The arbitral tribunal has a limited power to correct or interpret the award under article 33 of schedule 1, which follows the Model Law provisions.

Costs

Where the optional schedule 2 applies, clause 6 expressly provides that, unless the parties otherwise agree, the arbitral tribunal shall fix and allocate the costs and expenses of the arbitration (these being the legal and other expenses of the parties), the fees and expenses of the arbitral tribunal and any other expenses related either in its award under article 31 of schedule 1 or in any additional award under article 33(3) of schedule 1. In the absence

of any award or additional award-fixing and allocating costs and expenses, each party is responsible for its own legal and other expenses, and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.

In Casata Ltd v General Distributors Ltd [2006] NZSC 8, [2006] 2 NZLR 721, the majority of the Supreme Court held that, at least in this context, the arbitral tribunal has a duty to inquire into and make an award on costs, even where neither party expressly or impliedly claimed for costs.

Unless the parties otherwise agree, the arbitral tribunal can exercise discretion regarding who bears the costs of the arbitration. It is usual for the unsuccessful party to be ordered to pay a reasonable contribution towards the successful party's costs.

Where the optional schedule 2 applies, the High Court may, on the application of a party, vary the amount or allocation of the costs or expenses of the arbitration if the court is satisfied that the amount or allocation of the costs and expenses is unreasonable in all the circumstances. The arbitral tribunal is entitled to appear and be heard on such an application. The High Court's decision is final. Such applications are, however, rare.

Review Of Awards – Setting Aside

Unless the optional schedule 2 (permitting the possibility of appeals on questions of law) applies, the only way an award may be challenged is by applying to have the award set aside under article 34 of schedule 1. The application must be made within three months of the date on which the party making the application to have the award set aside received the award (although there is no time limit where the application to set aside is made on the ground that the award was induced or affected by fraud or corruption).

The grounds on which an award may be set aside are limited and essentially the same as those appearing in the Model Law. In particular, an award may be set aside where the High Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of New Zealand or the award is in conflict with the public policy of New Zealand.

The Court of Appeal has recently confirmed that an arbitral award will not be set aside on the basis that the arbitration agreement is invalid, where an invalid part of the arbitration agreement can be severed from the valid part (Gallaway Cook Allan v Carr [2013] NZCA 11). In that case, the arbitration agreement invalidly provided for an appeal on questions of 'fact', which is not possible under the Act. Nonetheless, the subsequent partial award was not set aside. At the time of writing, the Supreme Court has granted leave to hear an appeal from the Court of Appeal's decision, so further jurisprudence may emerge.

The courts have given some guidance on what is (or is not) in conflict with the public policy of New Zealand. The words 'public policy' require some fundamental principle of law and justice to be engaged. There must be some element of illegality, or enforcement of the award must involve clear injury to the public good or abuse of the integrity of the Court's processes and powers. (See Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd [2004] 2 NZLR 614 (CA) and Downer-Hill Joint Venture v Government of Fiji [2005] 1 NZLR 554 (HC).)

An award may also be in conflict with the public policy of New Zealand if (among other things) the making of the award was induced or affected by fraud or corruption, or a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award. This 'natural justice gloss' on the Model Law wording of the public

policy ground – which is found also in article 36 of schedule 1, relating to enforcement of awards – creates the risk of a broad discretion to set aside awards.

One High Court decision (Ironsands Investment Ltd & Anor v Toward Industries Ltd & Anor, HC Auckland CIV-2010-404-4879, 8 July 2011) has held that a breach of natural justice in itself constitutes a conflict with the public policy of New Zealand rendering an award liable to be set aside – albeit the court would be unlikely to exercise its discretion to do so where the breach was immaterial. A subsequent High Court decision in the same proceedings (Ironsands Investment Ltd & Anor v Toward Industries Ltd & Anor [2012] NZHC 1277) held that there was no absolute rule that natural justice required an arbitrator's findings to be based on probative evidence in the orthodox sense, and thus an award would not be set aside for this reason under the 'public policy' ground. The true scope of the 'natural justice gloss' has not yet been definitively settled by appellate authority.

An application to set aside the award does not operate as a stay of any enforcement proceedings. However, where both the setting aside and enforcement proceeding are being heard in the New Zealand court, it would be usual for them to be heard together. Where an enforcement proceeding is brought in a New Zealand court and an application to set aside the award is brought in the courts of the seat of arbitration, the New Zealand court may adjourn the enforcement proceeding pending the outcome of the setting aside application (article 36(2)).

The duration of any challenge proceedings depends on the nature of the challenge. But the courts will generally try to expedite the hearing of such matters, and they would typically be heard and determined within three to six months.

Review Of Awards – Appeals On A Question Of Law

The clause 5 appeal on a question of law is perhaps the most important rule contained in the optional schedule 2. Where it applies, the article 34 set aside procedure is not the exclusive recourse against an arbitral award.

Where schedule 2 applies, a party may appeal to the High Court on any question of law arising out of the award if:

- the parties agreed before the making of the award that an appeal as of right would lie;
- every party gives consent to the appeal after the award is made; or
- the High Court gives leave to appeal.

The High Court must not grant leave to appeal unless it considers, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties. The factors that the court will consider when deciding whether to grant leave are set out in the decision of the Court of Appeal in Gold & Resource Developments (New Zealand) Ltd v Doug Hood Ltd [2000] 3 NZLR 318 (CA). The case lays down eight non-exhaustive factors that should be considered when deciding whether to grant leave. The strength of the challenge or the nature of the point of law sought to be raised are among these factors.

An appeal may be on a question of law only. Clause 5(10), which was added in 2007, provides that a question of law for the purposes of an appeal against the arbitral award does not

include any question of whether the award was supported by any (or any sufficient) evidence, or whether the arbitral tribunal drew the correct factual inferences.

If leave to appeal is granted, the High Court may, in determining the appeal, confirm, vary or set aside the award or remit the award to the arbitral tribunal.

Recognition And Enforcement Of Awards

The recognition and enforcement of New Zealand and foreign arbitral awards in New Zealand is governed by articles 35 and 36 of schedule 1. Articles 35 and 36 are closely modelled on articles III and V of the New York Convention. Similar provisions therefore appear in many other jurisdictions, and not just those which have enacted legislation based on the Model Law.

Awards may be enforced by applying to the High Court for entry of judgment in terms of the award under section 35 of schedule 1. Application is made by originating application and must be accompanied by an affidavit containing duly certified copies of the award and of the arbitration agreement (if recorded in writing). If the award or the arbitration agreement is not in English, the application must also be accompanied by a duly certified translation into English of those documents.

Article 36 sets out the grounds on which recognition and enforcement may be resisted. The grounds for opposing enforcement or recognition are limited and are essentially those identified in the Model Law. They largely mirror the grounds on which the award may be set aside. In Hi-Gene Ltd v Swisher Hygiene Franchise Corp [2010] NZCA 359, the Court of Appeal confirmed that the threshold for determining whether the public policy ground in article 36 is triggered should be approached in a similar manner to the narrow reading given to the public policy ground in the article 34 context in the Court's earlier decision of Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd (discussed above). The Supreme Court refused leave to appeal from the Court of Appeal's decision (Hi-Gene Ltd v Swisher Hygiene Franchise Corporation [2010] NZSC 132).

Opposing the enforcement or recognition of the award does not operate as a stay per se. But enforcement or recognition by the High Court will not occur until any opposition has been determined.

Investment treaty arbitration

New Zealand has, to date, played a modest role in – and has therefore had only limited exposure to – the investment treaty arbitration system. No New Zealand investor has yet brought an investment treaty case against a foreign state, and no foreign investor has yet brought an investment treaty case against New Zealand.

New Zealand is a party to the ICSID Convention.[1] New Zealand has been a defendant to a sole ICSID arbitration, during the 1980s, at the suit of Mobil Oil NZ Limited, which arose out of an arbitration clause contained in a private agreement between Mobil and the New Zealand government. Mobil was successful in the ICSID arbitration (Mobil Oil Corporation & Ors v Her Majesty the Queen in Right of New Zealand, Findings on Liability, Interpretation and Allied Issues, Decision on Liability, 4 May 1989 (1997), 4 ICSID Reports 140), and also in staying New Zealand court proceedings filed by the New Zealand government seeking to prevent the ICSID arbitration taking place (Attorney-General v Mobil Oil NZ Ltd [1989] 2 NZLR 649).

New Zealand is a party to only two operative bilateral investment treaties (BITs): with China (1988) and Hong Kong (1995). New Zealand has also signed BITs with Chile and Argentina (both 1999), but these have not entered into force.

It is only in the past decade that New Zealand has begun to embrace the investment treaty arbitration system, which it has done within the context of comprehensive free trade or economic cooperation agreements (FTAs) rather than through negotiation of stand-alone BITs. The embedding of New Zealand's investment promotion agreements within FTAs reflects the prominence and success of the New Zealand free trade agenda, which has been pursued strategically and in a bipartisan manner. Since 2001, New Zealand has executed FTAs containing substantive investment chapters with the ASEAN countries collectively and also with Singapore, Thailand and Malaysia individually, along with China and, most recently, Taiwan. The strength and enforceability of these investment chapters is not uniform; but binding investor-state dispute resolution is provided for in the latter four agreements. Generally, New Zealand's FTAs are notable for broad protection of state regulatory power, including through the use of general exception clauses and annexes.

New Zealand is presently a party to negotiations for the Trans-Pacific Partnership Agreement, which evolved from the P4 Agreement between Brunei Darussalam, Chile, New Zealand and Singapore. Negotiating countries now include Australia, Canada, Japan, Malaysia, Mexico, Peru, the United States and Vietnam. Present indications are that this will include an investment chapter; however, this is still under negotiation.

1. New Zealand signed the ICSID Convention in 1970 and incorporated it into domestic law through the Arbitration (International Investment Disputes) Act 1979.

Chapman Tripp

Nepal

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Summary

Background

Nepalese Geography

Nestled in the Himalayan region between two giants, China and India, landlocked Nepal – with an area of 147,181 square kilometres and capped with the tallest mountain in the world, Mount Everest – has always remained independent. Because of this, Nepalese society has always demonstrated a unique nationalistic character. Due to its comparatively small agro-based economy, with a very low and unsustainable GDP growth rate constrained by various factors (eg, landlocked geography, poor infrastructural development, limited or untapped resources, lack of proper education and skill, mass of unskilled human resources, technological deficiency, unstable politics, inconsistent government policy, etc), Nepal's alarmingly fast-growing import market is resulting in an annual trade deficit – a trend that is ever-increasing. Nepal has considerable potential in its water resources, which can be attitributed to the rivers originating from the Himalayas; however, it has to date failed to prepare a strategic plan for the proper and timely development of this sector. Nepal also has untapped natural resources and is rich in botanical products. In the view of economists, a stable government with a stable policy, and the timely implementation of projects with considerably high investment, can boost growth in a sustainable manner.

The culture of mediation within the centralised community

Due to the mountainous and difficult terrain of Nepal, there have always been severe constraints for rulers in accessing remote areas. The alternative in areas where an effective state mechanism is absent is for communities to adopt a culture of resolving civil disputes locally, and accepting the decisions of local elderly civilians. In accordance with tradition, it is normally delivered by five such civilians who are called pancha, a term that has since fallen out of favour through misuse by the strong royal political regime whose rights were limited by the people's uprising of 1990. For centuries, this dispute settlement mechanism demonstrated access to justice in some form. Unless the court administers a mediation in civil disputes already pending, this mediation or dispute-resolving mechanism by the pancha has a moral and civil binding effect, rather than a legal one. The rural population has mostly respected and even willingly recognised such decisions taken in their community. Even in today's judicial and quasi-judicial proceedings, various facts related to issues or disputes are determined through the sarjamin (a fact-finding process in which the statements of local persons are recorded and a majority voice recognised). This socially acceptable form of dispute resolution mechanism has given rise to the acceptability of the arbitration process – which has not come as a surprise to Nepalese society.

Legal recognition of arbitration as mode of dispute settlement

The Development Board Act, 1956 (amended in 1964), enacted the provision of arbitration as dispute settlement mechanism in the contract in which a development board is a party. With this Act, the government of Nepal had the right to form a development board as an incorporated body and with limited autonomy for the purposes of implementation of any particular project or development work. It was obvious not only that several contracts were essential to implement the objective of the development board, but also that disputes could be expected. To alleviate the risk of delay in the settlement of disputes through normal court procedures, the Act envisaged the provision of arbitration.

Despite the fact that the Development Board Act, 1956, incorporated such provision, there was no specific law governing arbitration or the procedure to administer such arbitration. Even in the absence of a specific law governing arbitration, the Supreme Court in one decision

(Anang Man Sherchan v Chief Engineer, Nepal Law Digest/Ne Ka Pa, 2020, decision No. 220, Page 201, Full Bench) directed the parties to refer the dispute before arbitration, since they had mutually agreed to arbitratrate the dispute. This was a landmark development; however, there remained a risk for the execution of the arbitral award, because according to the normal execution procedure in the Civil Code only the decisions of the courts of Nepal were then executable.

The need for a separate law relating to arbitration

With growing imports from foreign countries, as well as the industrialisation and commencement of many developmental activities in the area of roads, irrigation, hydropower, transmission lines, exploration of minerals and petroleum products, etc, several contracts were signed in the 1960s. The parties also had to face a growing number of disputes arising out of the contract and the need was felt for specialised attention for resolution of such disputes. Many of the contracts were for the implementation of works funded by international funding agencies (eg, the World Bank, the Asian Development Bank, JICA, etc), and their respective procurement guidelines also required disputes under the contracts to be resolved by arbitration. Many agreements contained a dispute resolution mechanism by international arbitration rules (eg, the ICC Rules, the UNCITRAL Rules, etc). The Foreign Investment and Technology Act, 1981 (since replaced by the Foreign Investment and Technology Transfer Act, 1992) also required the settlement of disputes between foreign and local investors by arbitration under UNCITRAL Arbitration Rules, unless the Department of Industry consented to apply any other rules of arbitration. This new enactment prompted the need for a separate law to conduct arbitration in Nepal and also to enforce foreign awards.

Taking into consideration the requirements of the funding agencies and the Foreign Investment and Technology Transfer Act, 1981, the royal regime (as it then was), through the legislature, enacted the Arbitration Act, 1981 (since replaced by the Arbitration Act, 1999). It allowed the parties to decide the number of arbitrators in their arbitration agreement and, if the parties failed to prescribe such number, provided that statutorily there could be only one arbitrator under that Act. The district court (the trial court) was prescribed as the appointing authority in the event that the parties failed to name such appointing authority. The Act also prohibited the filing of any case in the courts of Nepal if the agreement had a pre-agreed provision for arbitration as the dispute settlement mechanism. In the absence of an arbitration agreement, the Contract Act required the parties to file their suits or claims before district courts; however, even if such case were already filed, the parties were given the liberty to agree to withdraw such pending cases from the court for referral to arbitration. While there was no provision for appeal against the arbitral award, the Act allowed the parties to file a review or revision petition at the (then) regional court (later converted into an appellate court by the Constitution of the Kingdom of Nepal, 1991), for the correction of the arbitral award under limited grounds.

An award was liable to be set aside if the court was satisfied that the award:

- was biased or mala fide;
- was secured in a fraudulent manner or under duress or undue influence;
- went against any prevailing law;
- was inherent with apparent legal errors;
- was vague and meaningless;

- went against any condition stipulated in the agreement; or
- was based on a wrong principle.

These conditions gave a wide range of authority to the court to nullify the awards; if so nullified, the court was allowed either to send the file back with a directive to the original arbitrator(s) to initiate fresh proceedings. In Krishna Chandra Jha v Dinesh Bhakta Shrestha (Nepal Law Digest/Ne Ka Pa, 2059 decision No. 7069, Page 285, Full Bench), the Supreme Court decided that the appellate court's authority, in the event of a challenge to the arbitral award, was limited to correctional jurisdiction only.

This Act introduced the procedure for execution of arbitral awards by the court as its own judgment.

Awards rendered in a foreign country, in agreements signed by a resident of Nepal that contained the provision of arbitration in any foreign country, in accordance with the law of that foreign country, were also made executable in Nepal by this Act. However, execution of a foreign arbitral award was allowed only if:

- the arbitrator had been appointed in accordance with the provision of the agreement or the law of the country where the award had been rendered;
- the parties had been informed of the proceedings in a timely manner as a right of the hearing;
- the award was based solely on the conditions stipulated in the agreement; and
- the award had attained finality under the law of the country where it was made.

As a reciprocity provision, the Act prohibited enforcement of an award rendered in any foreign country that did not itself enforce an award rendered in Nepal in accordance with the prevailing Nepalese law.

The need for a change

Because of the people's movement in 1990 for democracy, and following promulgation of the new Constitution of the Kingdom of Nepal in 1991 (which paved the way for a democratically elected government), a new dimension was opened in the commercial and industrial arenas in Nepal, with an enhanced scope for, and interest in, foreign investment. Advances in the fields of hydropower, infrastructure development and mineral exploration also gained momentum. As a result of these economic activities and the exposure of Nepal to the developed nations, imports of commercial and consumable goods and the export of Nepalese products substantially increased; consequently these activities gave rise to disputes. With increased interest from foreign financing agencies in development projects, and the expansion of economic activity beyond Nepalese borders, the nature of contracts and related disputes also changed significantly and the need for international arbitration gradually emerged. On 26 September 1997, the House of Representatives declared having acceded the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention 1958) and published this declaration in the Nepal Gazette on 27 September 1997. Besides this, court intervention during the arbitration process, as well as in nullifying the awards under the broad authority granted to the court by the law, became a big concern for litigant parties. There was a growing demand to limit court intervention in the arbitration process and in the review or correction of the award. With a fast-growing scope for domestic and international arbitration, such appropriate changes in

the arbitration law became inevitable. Consequently, the new Arbitration Act 1999 (2055 BS) was enacted, adopting the recognised principles and procedures of UNCITRAL Model Law. This Act repealed and replaced the Act of 1981.
The Arbitration Act 1999 (2055 BS)

Arbitration Agreement

The Act requires such arbitration agreement among the parties to resolve disputes by arbitration. For clarity, this Act defines the term 'agreement' and includes the following:

- any contract that contains a provision for arbitration or any separate agreement signed in connection therewith; or
- any letter, telex, telegram or telefax, or any other similar message, exchanged between the concerned parties through a mode of communication of which records can be maintained in a written form that provide for referral of their disputes to arbitration; and
- if one party submits a claim and refers any dispute to arbitration, and the other party submits their defence against the claim without rejecting the proposal to refer the dispute to arbitration, such conduct also amounts to an arbitration agreement.

If there is such arbitration agreement in the manner as detailed above, recourse to arbitration becomes mandatory and no suit in such a dispute may be filed in any court of Nepal. In Rakesh Kumar v Ram Krishna Rawal (Nepal Law Digest/Ne Ka Pa, 2066 decision No. 8078, page 272, Division Bench), the Supreme Court clearly established the principle that no court will have primary jurisdiction over a dispute arising out of a contract in which parties have agreed upon arbitration as the form of dispute resolution.

The Act also allows – indeed, it encourages – litigating parties, in a pending civil suit of a commercial nature that may be arbitrated, to separately agree to an arbitration agreement and apply to the court for withdrawal of the case for referral to an arbitrator or arbitral tribunal. Such application must contain the names of the agreed arbitrators and a declaration that the parties agree to abide by the arbitrators' conclusion. If the court is satisfied that the pending suit is of an arbitrable commercial nature, the court may order cancellation of the record of such civil suit and advance it for settlement through arbitration.

Rules Of Arbitration

Except where the prevailing law requires arbitration to be conducted in accordance with any specific arbitration rule, the parties to an arbitration agreement are free to choose the set of rules for such arbitration or to determine the procedure. In the event of failure to reach an agreement on the arbitral procedure, and unless any law prescribes such rule, the procedure contained in the Arbitration Act, 1999, has to be followed. Statutorily, under the Foreign Investment and Technology Transfer Act, 1992, disputes between permitted foreign and domestic investors must be resolved by arbitration conducted under the UNCITRAL Arbitration Rules with Kathmandu as the venue. However, this strict provision concerning the procedure of the arbitration rule and the venue is relaxed in the event of dispute between a foreign investor and the domestic investor of a joint venture company that contains fixed-asset investment exceeding 500 million Nepalese rupees, and where parties are allowed to select the arbitration rules and venue of their choice.

Notice Of Arbitration

There is no clear provision of a 'notice' requirement in the Act for arbitration, giving rise to a confusion when determining the date on which arbitration is deemed to have commenced. The Act simply states that the process of appointing an arbitrator shall commence within 30 days from the date that the cause of action for dispute resolution arose. Furthermore, in the event that the arbitrator or arbitrators are named in the arbitration agreement, the claim has to be presented before the arbitrator(s) within three months of the date on which such dispute arose. Similarly, in the event that no arbitrator has been named, the claim has to be filed within three months from the date the arbitrator(s) are appointed. In the latter case, though not expressly written in the Act, it is clear that the date for appointing the arbitrators should be the date of the last appointment that fully constituted the tribunal, if there is more than one arbitrator.

Courts in Nepal take the issue of statutory limitation extremely seriously. In Rajendra Man Sherchan v Appellate Court, Patan (Nepal Law Digest/Ne Ka Pa, 2064 decision No. 7823, page 326, Division Bench), the Supreme Court interpreted that, under Arbitration Act, 1999, the process of appointing an arbitrator must commence within three months from the date on which the dispute arose.

Appointment Of The Arbitrator

The arbitration agreement can prescribe the number of arbitrators; however it must be an odd number. If such agreement provides for an even number, the arbitrators so appointed must appoint one more so that the tribunal comprises an odd number of arbitrators. If the parties fail to determine such number in the arbitration agreement, statutorily the tribunal shall consist of three arbitrators: one to be appointed by each party and the third by the party-selected arbitrators. All arbitrators must take an oath of impartiality and independence before commencing arbitration. The format of such oath is statutorily prescribed in the Act.

The Act also requires the parties to designate the appointing authority. In the case of a sole arbitrator, or if either party fails to appoint their arbitrator, or if the two arbitrators fail to appoint the presiding arbitrator, such appointing authority may be required to fill the void. If the parties have failed to name such appointing authority, the appellate court of the competent jurisdiction over the venue of arbitration acts as the statutory appointing authority. This has always prompted questions around the scenario where the governing rules of arbitration have been prescribed in the arbitration agreement, but the parties have failed to name the appointing authority. There are many instances where the incorrect drafting of an arbitration agreement or an erroneously named appointing authority has created extreme confusion and delay in resolving the dispute. The author of this chapter has seen some fundamental errors in some government as well as private contracts, where the Chief Justice of the Supreme Court of Nepal or some other court judge or attorney general was named as either the arbitrator or the appointing authority. Such incorrect drafting led the parties to resolve the fundamental procedural requirement through the normal legal recourses that excessively delayed dispute resolution by arbitration. In addressing the issue relating to the appointing authority in arbitrations where parties have agreed to follow some internationally accepted arbitration procedure, the Supreme Court, in Bikram Pandey v Ministry of Physical Planning and Construction (Nepal Law Digest/Ne Ka Pa, 2067 decision No. 8437, page 1346, Division Bench), took a stand that the parties may agree to adopt internationally recognised rules, such as the UNCITRAL Arbitration Rules, as an agreed condition in a contract to govern arbitration, but that such rules cannot have a superseding effect over the national law in terms of the appointing authority, unless the

appointing authority is clearly prescribed in the agreement. The Court further interpreted that even if the parties agreed to conduct arbitration under the UNCITRAL Arbitration Rules, their failure to name an appointing authority in the arbitration agreement will not give automatic authority under UNCITRAL Rules to designate an appointing authority. Thus, the party that fails to appoint an arbitrator under the UNCITRAL Arbitration Rules will not have the right to claim that the appointing authority in such situation should automatically be the Permanent Court of Arbitration. Instead, the Supreme Court concluded that the relevant party can move their petition to the appellate court against such failure to appoint an arbitrator, and that the appellate court shall have such statutory jurisdiction to appoint, all in accordance with Arbitration Act, 1999.

Once an arbitrator is appointed, the position may only fall vacant if the arbitrator resigns, refuses to act as arbitrator, dies, becomes disqualified or is removed by the arbitrator(s) or the appellate court. If the position falls vacant, the new appointment must be made by the same procedure with which the arbitrator was originally appointed. The appellate court is statutorily required to prepare a panel of potential arbitrators along with details of their qualifications, experience, addresses and other contact information. Such lists are also sent to the Supreme Court for their records.

Qualification Of Arbitrators

The Act states that persons who fall under the following criteria shall be disqualified for appointment as arbitrators:

- they are ineligible to sign a contract under prevailing laws;
- they have been punished by a court on criminal charges involving moral turpitude;
- they have become insolvent or been declared bankrupt;
- they have a personal interest in the dispute required to be settled through arbitration; or
- they do not have the eligibility or qualification as specified in the agreement.

Before signing the oath, the arbitrator must clarify any matters that may raise reasonable doubt about his or her impartiality or independence. This oath must be signed by arbitrators on two copies of a prescribed form, one of which has to be filed before the appellate court.

Removal Of Arbitrators

The Act allows the parties to prescribe the preconditions and procedures in the agreement for removal of arbitrators. In the absence of this, either party may apply before the arbitrators for removal of any arbitrator upon happening of an event where:

- an arbitrator clearly shows bias instead of working in an impartial manner;
- an arbitrator engages in improper actions or commits fraud in the course of arbitration;
- an arbitrator frequently makes mistakes or creates irregularities in the arbitration proceedings;
- an arbitrator fails to attend more than three meetings without providing satisfactory reason and with the intention of delaying proceedings;
-

an arbitrator takes any action that is opposed to the principles or rules of natural justice, or

- an arbitrator lacks the requisite qualifications or ceases to be qualified.

An application with reference to any of these criteria must be filed before the arbitrators within 15 days of being made aware of any of these conditions. If the arbitrator named in such complaint does not resign, or if the other party in the arbitration fails to accept such accusation, the arbitrators must take a decision within 30 days of the application. Against such decision, a complaint may be filed with the appellate court whose subsequent decision shall be deemed as final. This provision fails to address a situation where the arbitrator or the tribunal fails to take a decision within 30 days. Besides this, the unanswered question arises as to who may file such complaint against the decision of the tribunal to remove an arbitrator. It seems that the locus standi has also been intentionally left open to give the accused arbitrator an opportunity restore his or her reputation and for the disputing parties to be satisfied.

Cost Of Arbitration And Arbitrator's Fee

Parties have a right to determine how they intend to deal with the issue of fees while signing the arbitration agreement, but most contracts fail to do so. Therefore, the costs of arbitration and remuneration fees are fixed by the arbitrator in consultation with the parties; they also depend on the nature of the dispute and claim. In the absence of institutional arbitration, payments are made to an ad hoc bank account from which expenses are disbursed. In domestic arbitrations, the Nepal Council of Arbitration's (NECPA's) guidelines are mostly followed, while in arbitration involving international contracts the ICC Rules and UNCITRAL Rules are also taken as guideline to determine the remuneration. Except where otherwise provided in the agreement, the Act states each party must bear the expenses required for the arbitration proceedings in the proportion prescribed by the arbitrator, taking into account the relevant circumstances.

The Venue And Language Of Arbitration

The venue of the arbitration is the venue mentioned in the agreement; if no such venue is mentioned, however, then the parties shall determine the venue. In case of failure by the parties to agree on a venue, it shall be as determined by the arbitrator within 15 days of his or her appointment. For such determination of venue, the Act requires the arbitrator to consider relevant and reasonable circumstances. For the purposes of witness statements, expert opinions and the inspection of any document, object or place, the arbitrators may determine a place as they deem appropriate, unless the parties have made any other arrangements. This provision sometimes gives rise to the question of whether the arbitrators are free to hold their meetings and hearings in places other than the designated venue. During the 10 years of political conflict prior to the Comprehensive Peace Accord concluded between the government of Nepal and the Communist Party of Nepal (Maoist) on 21 November 2006, most arbitrations involving foreign parties or arbitrators conducted their hearings and sittings outside Nepal, citing security reasons, but still maintained that the venue would continue to be prescribed in the agreement. Practically, such sittings and hearings were conducted at other places with the consent of the parties and no disputes were reported to have arisen as a result.

The Act requires arbitration proceedings to take place in the language specified in the agreement; failing this, the parties may determine the language. If the parties fail to agree on this, then the language of the agreement shall be applied.

Claims, Defence, Counterclaims And Limitations

Unless the agreement provides otherwise, a claim before the arbitration must be filed in writing within three months from either the date on which the cause of dispute arose (in the event that the agreement names the arbitrator) or from the date on which the arbitrator was appointed (if the arbitrator has not been named in the agreement). Such a claim must be made in writing and provide in explicit detail the subject matter of the dispute, the remedy sought and the relevant evidence. A copy must be given to the other party. The respondent to this must submit its objection to or defence of the claim so filed, along with the counterclaim (if there is one), within 30 days of receipt of the claim. In the case of a counterclaim, the claimant may file a rejoinder against it within 15 days. On the reasonable request of the relevant party, and within 15 days the prescribed time having lapsed, the arbitrators may extend the period for submission of statement of defence, counterclaim or rejoinder by a maximum of seven days.

Even if the respondent fails to respond to the claim in writing within the prescribed period, the claims are not automatically deemed to be accepted and the arbitrators must make a decision having analysed the available evidence. The failure of any party to appear on the hearing date does not prohibit the arbitrators from deciding on the referred disputes.

The Arbitrator's Power To Determine The Jurisdiction

One of the unique features of the Act is the arbitrator's power to determine the jurisdiction. If any party claims that the arbitrator has no jurisdiction over the dispute referred to the him or her for settlement, or that the contract out of which the dispute has arisen is itself illegal or null and void, such claim on the jurisdiction has to be filed before the arbitrator prior to filing of the statement of defence and the counterclaim. The arbitrator has to address this issue prior to the commencement of further arbitration proceedings and take a decision on whether the arbitrator has jurisdiction and on the validity or effectiveness of the contract. There is no time limit prescribed for an arbitrator's decision on jurisdiction; however, once such decision is taken on a jurisdictional issue, the party that is not satisfied with the decision may file a petition before the appellate court within 30 days of receipt of the arbitrator's decision. If so challenged, the decision of the appellate court on the matter becomes final.

Even if the validity or effectiveness of a contract is questioned, a provision for the arbitration agreement for the settlement of disputes is regarded as a valid, independent agreement and remains unaffected, even if the arbitrator decides that the contract is illegal or null and void. On the other hand, the mere filing of a petition with the appellate court against an arbitrator's decision on jurisdictional issues does not prejudice the power of the arbitrator to continue the proceedings and pronounce the decision before the petition is finally disposed of by the court. Sometimes it poses a risk and all procedures adopted until then may become futile.

Arbitrator's Authority

The arbitrator's authorities under the Arbitration Act include all such requirements that normal procedural law provides to the trial courts. Under such authority, the arbitrator can: order the parties to appear and submit documents and record their statements as required; record statements of witness; appoint an expert and seek their opinion or

request examination on any specific issue; and inspect the concerned place, object, product, structure, production process or any other related matter which are connected with the dispute, etc. If there is any material or object that is likely to be destroyed or damaged, the arbitrator's rights extend to selling them in consultation with the parties and keeping the sale proceeds as a deposit. The arbitrator can also issue a certified copy of the document in his or her possession. At the request of either party, the arbitrator can also exercise the power to issue preliminary orders or interim or interlocutory orders on issues related to the dispute, and also to take a conditional decision. Such orders may be challenged to the appellate court within 15 days of the date of receipt of the decision. The appellate court's decision shall be deemed final.

Principles Of Justice And Conscience, And Natural Justice

If Nepalese law is the governing law for arbitration, the arbitrator has to follow substantive law, except otherwise provided for in the agreement. Arbitrators are allowed to settle the dispute according to the conditions stipulated in the relevant contract; for this purpose the arbitrator has to pay attention to the commercial usages applicable to the transaction concerned. However, the arbitrator can settle the dispute as per the principles of justice and conscience, or natural justice, provided the disputing parties explicitly authorise the arbitrator to do so. These provisions may give rise to various questions and in interpretations. In Krishi Samagri Company v Appellate Court Patan (Nepal Law Digest/Ne Ka Pa, 2064 decision No. 7905, page 1558, Division Bench), the Supreme Court required the interpretation of contracts as per the agreed conditions and, in its absence, the arbitrator may refer to the background of the contract, earlier correspondences, the generally accepted principles of the contract, international practices, court precedence, etc.

Issues That May Not Be Arbitrated

A circumstance may arise with any issue during arbitration that is inextricably linked with any other issue on which the arbitrator cannot pronounce a decision. If such situation arises, the arbitrator must refrain from taking a decision on that particular issue and the parties have to be informed accordingly. Either party is free to file a complaint petition to the appellate court within 35 days of receipt of notice. There is no time limit for the court to decide on such issue, but it is obvious that the arbitration will be on hold regarding that particular issue until the court delivers a decision.

Amicable Settlement During Pendency Of Arbitration

During the arbitral proceedings, parties may agree on a compromised settlement. For this, the parties may submit an application to the arbitrator explicitly stating the conditions under which they would like an amicable settlement. If the parties agree, they may sign a deed for such compromise before the arbitrator; this deed is not subject to challenge before the appellate court. However, on issues concerning actions not taken according to the deed of compromise, either party may approach the court in the event that the other party fails to comply with the same.

The Arbitral Award

If there are three or more arbitrators, it is preferable to have a unanimous decision. If not, then the majority decision prevails. However, if such majority cannot be ascertained due to the different opinions of the arbitrators, the Act recognises the opinion of the presiding arbitrator, unless there is any restriction or specified procedure already prescribed in the agreement itself. The arbitrator is free to express a dissenting opinion. Sometimes, an arbitrator may

either fail or refuse to sign for some reason; in this case the remaining arbitrators must sign the award, explaining the reason for the failure of any other arbitrator to sign.

All awards must contain:

- the brief particulars of the matter referred for arbitration;
- the issue of jurisdiction, if so raised by any party, and grounds for deciding that the matter falls under the jurisdiction of arbitration;
- the decision, and grounds of the decision, of the issue arbitrated;
- entitlement to and quantification of claims or counterclaims,
- the interest on the amount to be realised as per the agreement, along with the additional rate of interest to be charged pending execution of award following the expiry of the self-execution period (45 days from the date of delivery of the award); and
- the place and date of award.

While deciding on the pendente lite interest, the law allows the arbitrator to apply a normal commercial-bank interest rate. Such award has to be read out in the presence of the parties and a written copy has to be delivered to each party with a record of such delivery. In case any party is absent, or any party is present but refuses to receive a copy of such award, a notice must be formally served along with a copy of the award to said party, detailing the party's absence or refusal of acceptance.

While the arbitral award is regarded as final and binding, it may only be corrected by the decision of the appellate court requiring the arbitrator or the tribunal to correct such error of law or under provision of contract. Such order for correction can be issued by the appellate court after hearing the petition of either party for the setting aside of the award. In rare cases, the arbitral award and decision of the appellate court refusing to set aside the award have been challenged through a writ petition at the Supreme Court on the basis that the petitioner has exhausted all available remedies and that there were gross violations of law. In Ministry of Finance v Appellate Court Patan (Writ No. 2898 of 2059, Date of order 2069), the Supreme Court issued a writ of certiorari to cancel the arbitral tribunal's award on the ground that the award failed to identify the precise provision of the contract under which the award was based. Upon cancellation of the award, the Supreme Court ordered both parties to re-initiate the arbitration proceeding. However, it is rare for the Supreme Court to intervene in cases.

In the case of errors of arithmetic, printing or typing, or similar minor errors, and for insertion of omitted particulars that do not prejudice the substance of the decision in the case, such correction may be carried out if:

- the arbitrator finds there are such errors and decides to make appropriate corrections within 30 days of rendering the award; or
- either party observes any mistake in the award and applies to the arbitrator for a correction within 30 days of receipt of a copy of the award, and where the arbitrator agrees to such mistake.

The correction has to be made within 15 days of receipt of the application of the party. In addition, if the arbitrator has not given any decision on any issue from among the disputes raised in the claim of either party, the concerned party may obtain the consent of the other

party and submit an application for a decision limited to that issue within 30 days of the date of delivery of the decision by the arbitrator. In such case, a supplement to the award may be delivered within 45 days of the date of application on such issue only. The Act also allows either party to seek an explanation on any part of the award that the party considers ambiguous or vague. Such application should be filed before the arbitrator within 30 days from the date of delivery of award, with a copy of such petition to the other party. In the event of such request, the arbitrator may issue clarification within 45 days on such issues raised.

Setting Aside Of The Award By The Court

This is one of the major concerns of arbitrating parties. Since not all parties can always be satisfied, there is a trend to file a challenge or take up the matter with the court for final determination. For this reason, parties may attempt to have the award rejudged through court to satisfy themselves that the dispute has ultimately been heard by said court. Under the old Arbitration Act of 1981, the conditions for the setting aside of the award were very broad, and many cases had been filed against arbitral awards. In 1999, the new Arbitration Act limited the authority of the courts to set aside the award.

A party dissatisfied with the arbitral award may move an application, within 35 days, before the appellate court to set aside the award and correct it on the grounds that;

- any party to the agreement was not competent, for any reason, to sign the agreement when it was entered, or the agreement was not valid under the law of the nation that governed jurisdiction over the parties, or such law was not clear and the agreement was not valid under the laws of Nepal;
- due notice was not served to the party, in a timely manner, during the appointment of the arbitrator or concerning the arbitration proceedings;
- the decision was taken on a subject that was not referred to an arbitrator or against the mandate given to the arbitrator; or
- except when an agreement has been signed that is contrary to the laws of Nepal, the procedure to appoint an arbitrator or other procedures adopted therein failed to adhere to the agreement signed between the parties – or, if no such agreement is available, against provisions of this Act.

In addition to the above, the appellate court is also authorised to set aside the award if the dispute settled by the arbitrator was not within the arbitrator's jurisdiction and shouldn't have been decided by the arbitrator under the laws of Nepal, or if the decision taken by the arbitrator was likely to be detrimental to the public interest or public policy.

The Supreme Court has announced, repeatedly, that by the very nature of disputes referred to arbitration, they must be concluded based on merit and through that process only. In Roads Department v Waiba Construction Pvt Ltd (Nepal Law Digest/Ne Ka Pa, 2067 decision No. 8479, page 1685, Division Bench), it has been established that an arbitral award based on analysis and examination of the facts should not be judged by the courts, and that the arbitrator is the last judge in such matter. The reference was given in the matter of construction-related contract in which disputes of a technical nature arose.

Enforcement Or Execution Of Award

Domestic Arbitration Award

A fundamental requirement of arbitration is the need for self-execution within 45 days of receipt of a copy of an award. During this self-execution period, no interest accrues. However, if the award is not executed within the 45-day time limit, the concerned party may file an execution petition at the district court, having jurisdiction within 30 days from the date of expiry of the self-execution period of 45 days. While the Act envisages that the district court shall ordinarily execute the award within 30 days (as if it is its own judgment), practically speaking this is impossible since the district court has to check the finality of the award. In Anil Kumar Pokharel v District Court Kathmandu and others (Nepal Law Digest/Ne Ka Pa, 2064 decision No. 7836, page 460, Division Bench), the Supreme Court interpreted that where either party files a petition for the setting aside of an arbitral award, said award shall not be deemed final until the decision of the appeal court.

The Arbitration (Court Procedures) Rules, 2002 (2059 BS) require that such petition for the setting aside of the award must be heard within 15 days after the other party has been notified and has duly appeared at the court, but practically speaking it takes about a year to conclude the matter at the appellate court if the issues are of a complex or technical nature. Even after such final decision by the appellate court, the district court has to issue a 35-day notice to the relevant party for execution of the award, and an amount is demanded by the court for payment to the applicant as per the award. Because of a lack of strict procedure and accountability, many parties actually defy such notice in an attempt to frustrate the applicant. In such case, it is down to the applicant to find the property details of the other party against whom execution has been demanded and provide such information to the court for attachment. If the other party is a government, the execution becomes more and more complex since the court has limitations in, or will try to avoid, attaching government property. In many instances, government bodies (ministries, departments, etc) are found to have ignored such execution notices of the court for a long time. There are many instances where such execution has taken years. There is a need for strict compliance requirements and accountability with the government officials to expedite such procedure. This wait-and-see period is frustrating for the concerned party who have waited for long to secure an award.

Foreign Arbitration Award

A party intending to execute, in Nepal, an award from a foreign country, must submit an application to the appellate court along with an original or certified copy of the arbitrator's award; an original or certified copy of the agreement; and certified translations of both into Nepalese. Since Nepal has acceded to accept the New York Convention of 1958, it is obliged to execute the foreign award emanating in the countries that are party or have acceded to such convention. However, before ordering for execution, the court shall verify whether:

- the arbitrator was appointed and award was made according to the laws and procedure mentioned in the agreement;
- the parties were notified about the arbitration proceedings in time;
- the award was made according to the conditions mentioned in the agreement or upon being confined only to the subject matters referred to the arbitrator;
- the award was final and binding on the parties according to the laws of the country where the award was made;
- the laws of the country of which the petitioner is a national, or the laws of the country where arbitration proceedings were conducted, contain provisions under which arbitration award given in Nepal can be implemented; and

- the petition was filed for the execution of the award within 90 days from the date of award.

Only if the appellate court is satisfied that the above conditions are available shall it forward the award to the district court of competent jurisdiction for execution. However, no award rendered in a foreign country can be executed in Nepal if the issues on which the award has been rendered cannot be settled through arbitration under the laws of Nepal, and if the implementation of the award is detrimental to public policy. These circumstances are yet to be addressed by the courts of Nepal; hence, no clear interpretation of 'public policy' is available.

Fee For Enforcement Of Award

The statutory fee for enforcement of award through courts is 0.5 per cent of the amount received through the implementation of the award. If the amount of the award cannot be quantified, but its value can nonetheless be determined, a fee amounting to 0.5 per cent of the current market value or amount of the action to be taken shall be payable. If the value cannot be quantified, the execution fee shall be 500 Nepalese rupees. All amounts paid to the court may also be recovered from the other party if the concerned party files an application before the district court.

Record Of Arbitration

Upon completion of the arbitration proceedings and delivery of the award, the arbitrator shall prepare the case file of the document, evidence, statement of the concerned persons, award and all other relevant documents related to the arbitration and submit such case file to the district court, where such records are archived.

There are some institutional arbitrations involving the Nepalese government or, more recently, administered by International Chamber of Commerce (ICC)/the International Court of Arbitration (ICA). In such case, the case files retained by the ICC/ICA is not automatically transferred to the district court in Nepal. This lack of clarity amongst the parties, the arbitrators and the ICC has caused some inconvenience in matters of execution, because the court has to verify the submissions made by the party requesting execution and, in the absence of such original documents at the court, the execution procedure cannot proceed. For parties of ICC-administered arbitration, it is advisable to give this information to the arbitrators (mainly foreign nationals) and seek an order to send a duly certified copy of the arbitration documents for the district court's archive.

Court Interventions – A Growing Concern

Arbitration as an effective alternative dispute resolution mechanism is very slowly gaining momentum but is yet to gain a foothold – or the confidence of many. In many instances, court officials also treat arbitration as a parallel procedure competing with the court. This causes confusion and inconvenience in many instances and prompts court intervention whenever such opportunity arises. Sometimes parties who are uninterested in the arbitration attempt to misuse the court's jurisdiction and arrange for the interventions to frustrate the other party. Such interventions either are in the form of a petition for injunction and interim or stay order, or a repeated petition for determination of jurisdiction. In many instances the arbitral awards are nullified entering into the merit as if it is hearing an appeal; despite that, the scope for challenging the award is very limited and the court is not supposed to enter into merit of the dispute.

Under the Arbitration Act, a court's role is limited to;

- the appointment of an arbitrator, if so demanded by a party, or the appointment of a presiding or third arbitrator, or removal of arbitrator by acting on the petition of either party;
- challenging the arbitrator's determination of jurisdiction;
- challenging the issuance of preliminary orders, or interim or interlocutory orders, or a conditional decision;
- setting aside the award on limited grounds; and
- execution of the award.

Excepting the above, in theory no court has jurisdiction over any other matter required to be addressed by the Arbitration Act itself, but in practice time and again we find a court's interventions or interest in the arbitration process and award. There is a need for proper awareness in the legal community to alleviate such court intervention.

Institutions Providing Arbitration Support In Nepal

The Nepal Council of Arbitration (NEPCA) was founded in 1991 as a non-governmental and not-for-profit organisation to provide institutional support for arbitration for resolution of commercial disputes. It mainly provides administrative services for ad hoc arbitration. It also acts as an appointing authority at the request of the parties. It has maintained a panel of experts eligible to act as arbitrators and can provides a list thereof if so required. It aims to provide services for institutional arbitration; however, at present it is involved in ad hoc arbitration only. It has its own rules of arbitration that are presently being adopted in various contracts. The rules also provide the fee structure for arbitrators and for administering the proceedings.

Sinha-Verma Law Concern

Malaysia

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In the competition to become Asia's leading arbitration hub, some might view Malaysia as the underdog. The country would not compare itself to Singapore and Hong Kong; rather, it views itself in a league of its own. Malaysia retains certain key attractions that makes it a promising contender to become a major arbitration hub in the region. Such grandiose titles are not earned in a day, however, and Malaysia is continuously developing and recasting its rules and laws on arbitration, which makes it a place worth watching.[1] This article is based on the Malaysia chapter in this book's 2013 edition, and introduces the major changes and significant developments in international arbitration undergone by both these jurisdictions since 2011.

There have been several key developments in Malaysia. The Kuala Lumpur Regional Centre for Arbitration (KLRCA) has continued to innovate and set ambitious goals to develop the country as a premier arbitration hub. Not only has the KLRCA updated its Arbitration Rules, it has also broken new ground by introducing new rules to deal with Islamic disputes. In addition, despite recent news concerning bribery charges against an arbitrator, the prompt and efficient response from the arbitration community and institutions in Malaysia demonstrates its continued efforts to stand strong against corruption and bribery.

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 provisions of the 2005 Act and the 1952 Act remain, to a certain extent, interestingly at odds. 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 KLRCA. This chapter will also trace and discuss the history and progress of the KLRCA in promoting Malaysia as an arbitration-friendly country.

The appeal of Malaysia as an arbitration hub

Malaysia has been rigorously taking steps to develop itself into the preferred country for arbitration and is now fast becoming one of the key arbitration hubs in the Asia-Pacific region. 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, 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, it has a very transparent fee structure and the cost of conducting arbitral proceedings in the centre is only about 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. Having arbitral proceedings conducted in Malaysia is therefore affordable and accessible.[2]

Rise of arbitration: pre–1952

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 into the country.[3] The Arbitration Ordinance XIII of 1809 was subsequently replaced in the states of Penang and Malacca by the Arbitration Ordinance 1890.[4] 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 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, which became known as the Arbitration Act 1952. This was based on the English Arbitration Act 1950 and initially enacted as the Sarawak Ordinance No. 5 of 1952.[5] 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 during which the long-standing 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.'[6] 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 that ultimately led to its legal demise.

The discussion below on the 2005 Act will address some of the problems encountered by the judiciary when applying and interpreting the 1952 Act, which has now been superseded by the provisions of the 2005 Act. Notwithstanding the issues with the 1952 Act, the discussion on the 2005 Act will also highlight the need for additional clarification in terms of certain provisions of the 2005 Act.

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 before 15 March 2006 remains, albeit to a lesser extent, in flux as learned judges differ in their legal views.

To say that the 2005 Act simply repealed the 1952 Act would not give enough credit to the extensive work undertaken to not only replace the 1952 Act, but also improve upon the old regime. Given that the aim of the 2005 Act was to harmonise the laws governing arbitrations in Malaysia with other leading arbitration centres, the implementation of the provisions of the 2005 Act have proven very successful.

The 2005 Act or the 1952 Act?

Despite the improvements created by the provisions of the 2005 Act, its entry into force nonetheless generated some confusion and ambiguity with regard to arbitrations in Malaysia that commenced after 15 March 2006, but which arose from contracts and agreements entered into before this date.

This was observed in the case of Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd.[7] In arriving at its decision,[8] 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 Malaysian-language version of the 2005 Act, which clearly states that the 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-language version of the 2005 Act provided that the 2005 Act applies to all arbitral proceedings commenced on or after 15 March 2006 (without making distinctions on 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 version 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 [Malay] text but is a correlative by the [Malay] text to the interpretation of the defective provision in the English text by applying the purposive approach'.[9] This decision has been followed in the case of Hiap-Taih Welding & Construction Sdn Bhd v Boustead Pelita Tinjar Sdn Bhd (formerly known as Loagan Benut Plantations Sdn Bhd).[10]

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,[11] 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,[12] 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 Segamat Parking Services Sdn Bhd v Majlis Daerah Segamat Utara & Anor Case.[13] 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 party had referred certain questions of law to the court under the 2005 Act while the other 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 effective date 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 that began after 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 to, or after, the 2005 Act has been reduced. 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 which arise out of arbitration agreements entered into before the said date. It will be interesting to see 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 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.

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. It covers the 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, extensions of time for commencing arbitral proceedings and making of arbitral awards. Part IV (sections 47 to 51) covers 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 KLRCA Arbitration Rules were governed by section 34.[14] 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.[15]

The problems created by section 34 of the 1952 Act raised some serious doubts as to its purpose, since removing certain arbitrations from the reach and assistance of the judiciary could halt, and possibly set back, 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. Section 34 provided that such domestic arbitral awards would not be enforced in the same manner as a judgment or order to the same effect.[16] On the other hand, such domestic arbitral awards would not be capable of enforcement 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 with a foreign element.

In this regard, where the 1952 Act stumbles the 2005 Act picks up the baton 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. On the contrary, it expressly extends the reach of the court in certain situations; for instance, 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.

The distinction between international and domestic arbitrations

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 make the distinction in order to determine the applicability of the relevant 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. 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. Part III of the 2005 Act allows for greater intervention by the court, notwithstanding any limitations imposed by the arbitration agreement; for instance, by allowing any party to the arbitral proceedings to refer to it any question of law arising out of an arbitral award[17] and allowing the court to extend the time imposed for the commencement of arbitral proceedings[18] or the delivery of an arbitral award.[19]

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 those 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 arbitral panel shall consist of a sole 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 that, 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 those in the 2005 Act, it is advisable for an appointed arbitrator to disclose any interest which he or she might have in the outcome of the arbitration or circumstances 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 not to be impartial. 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, while 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 to parties 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.[20]

Section 14 of the 2005 Act makes it mandatory for a person who is appointed 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. This includes matters relating to the validity of the arbitration agreement. Section 18 of the 2005 Act also provides for the procedures and time limits for 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 & Anor[21] and CMS Energy Sdn Bhd v Poscon Corp[21] have all observed that under the 2005 Act, an arbitral tribunal may determine its own jurisdiction.

Unlike the 1952 Act, 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 the manner that 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,24 and the enforcement of arbitral awards.25 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 whether 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,[23] the court held that it had no power 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,[24] 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 given significant consideration in the case of Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd & Ors,[25] 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'.[26] 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'.30 Given that the 2005 Act did not expressly adopt article 1(2) of the UNCITRAL Model Law when it 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 states 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.[27] It should be noted that both these provisions are contained in Part III of the 2005 Act, which, by default, applies only

to domestic arbitrations but not to international arbitrations unless the parties expressly choose to exclude or include them respectively.

Views have persisted that intervention remain crucial when there is a 'patent injustice'[28] or if the court exercises its 'inherent jurisdiction'.[29] The amendment of section 8 may curtail these circumstances as it now restates the provision to read: 'No Court shall intervene in matters governed by this Act, except where so provided in this Act.'[30]

However, on the matter of granting injunctions, in the more recent case of Plaza Rakyat Sdn Bhd v Datuk Bandar Kuala Lumpur[31] which came after the amendments, the court held that injunctions do not amount to court intervention and serve to preserve the subject matter referred to arbitration. Indeed, the court did grant an injunction in the case in order to maintain the status quo.

Arbitral awards

Although there is no definition of 'award' in the 1952 Act, 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 is when a party making the setting-aside application proves one of the limited instances that justify the setting aside of the arbitral award. Such instances include 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 was not given, or that the arbitral award deals with a dispute not falling within the terms of the submission of arbitration.[32] 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 (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: 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,[33] 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 Applications[34] and Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd.[35] In the latter case, 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.'[36]

Similarly, in the case of Winsin Enterprise Sdn Bhd v Oxford Talent (M) Bhd[37] 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 Lembaga Pelabuhan Kelang v Kuala Dimensi Sdn Bhd & Another Appeal[38] 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 estoppel 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 in the case of CMS Energy Sdn Bhd v Poscon Corp[39] that 'there is unmistakable 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 Acts, 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 Cairn Energy India Pty Ltd v the Government of India,[40] 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.[41]

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 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 render the award capable of being set aside.

A similar position was adopted in Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd[42] 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 Bhd[43] where a mere filing of an affidavit to oppose registration, instead of making an application, is deemed insufficient to set aside an arbitral award.

In Asia Control Systems Impac (M) Sdn Bhd v PNE PCB Bhd and another appeal,[44] it is apparent that the Malaysian courts have adopted a pro-arbitration stance by endorsing the UNCITRAL Arbitration Rules. 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 Tan Kau Tiah v Tetuan Teh Kim Teh, Salina & Co & Anor,[45] 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 the documents pending the proceedings by the second respondent to remove or restrain the arbitrator as well to have the arbitral award set aside. In addition, the first respondent should continue to hold 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). Thus, the dispute between the parties ended with an arbitral award, the first respondent must by its own admission comply with it.

Arbitration developments: CREFAA Act[46]

The Convention on the Recognition and Enforcement of Foreign Arbitral Award (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 Sri Lanka Cricket v World Sports Nimbus Pte Ltd,[47] 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. This was required despite the fact that the state was indeed a signatory to the New York Convention. This decision was reaffirmed by the Court of Appeal in Alami Vegetable Oil Products Sdn Bhd v Lombard Commodities Ltd.[48] However, in late 2009, the Federal Court reversed the decision of the Court of Appeal in the latter case[49] 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, then the notification merely formed conclusive evidence 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 may be enforced by the High Court as a judgment thereof regardless of the arbitral seat. 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. 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 New York Convention 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 Convention would not be recognised and cannot be enforced under the 2005 Act.

The KLRCA

There are a number of professional bodies in Malaysia, such as the Malaysian Institute of Architects,[50] the Royal Institution of Surveyors Malaysia,[51] the Malaysian International Chambers of Commerce,[52] the Institute of Engineers Malaysia[53] and the Malaysian Rubber Board,[54] 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 (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.[55] 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.[56] 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.

A recent statement by the KLRCA director, Datuk Sundra Rajoo, indicates that the KLRCA aims to arbitrate 250 cases per year by 2016, an ambitious goal given its previous 100 cases in 2012.[57] In fact, the rise of arbitrations from 73 in 2010 to 85 in 2011 demonstrates the continuous growth the KLRCA wishes to embody as a significant competitor to its Singapore and Hong Kong counterparts. Half of the arbitrations in the KLRCA originate from the construction sector while the rest are made up of a mix of commercial, intellectual property, insurance and technology-related disputes. Among these arbitrations, about 20 per cent of the hearings in the KLRCA are international in nature. Additionally, the KLRCA introduced the i-Abitration Rules in 2012. These are based on shariah laws and are 'the first

set of rules that adopts the UNCITRAL Arbitration Rules, while allowing for the resolution of disputes arising from any contract that may contain Shariah (Islamic Law) issues'.

Adoption of the revised UNCITRAL Arbitration Rules 2010

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 had 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 fax, 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 (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 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.

The revised UNCITRAL Arbitration Rules have also seen additional provisions dealing with multiparty 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. 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.

Adoption of the revised UNCITRAL Arbitration Rules in KCLRA

In 2012, the KLRCA saw further development in its rules by enacting the KLRCA Rules for Arbitration 2012, which consolidated and updated several provisions based on the UNCITRAL Arbitration Rules 2010. It came into force on 2 July 2012, shortly after the new Arbitration (Amendment) Act 2011 was enacted, presumably to further emphasise and synchronise with the judiciary's non-interventionist and pro-enforcement stance. The latest rules see several key changes, among which are the following:[59]

- A new Rule 2 specifying the information, documents and fee required to register an arbitration with the KLRCA. Previously, the Rules only required that the party initiating the arbitration to send notice of arbitration to the KLRCA. It was then left to the KLRCA to follow up and request further information. The aim of this revision was to reduce the time usually taken by the initiating party in submitting the necessary documentation for the KLRCA's verification.
- Arbitrators appointed by the parties or any appointed authorities will now be treated as nominations of arbitrators, not an agreement to appoint.[60]
- The time for the appointment of arbitrators is now reduced to 30 days in line with the requirements under the Malaysian Arbitration Act 2005.
- A new Rule 5 providing for challenges to arbitrators. Such challenges will be administered by the KLRCA and the Director will determine those challenges.
- Parties and the arbitral tribunal have 30 days to agree on a schedule of fees from the time of the appointment of the tribunal, and to inform the KLRCA of such, failing which the KLRCA Schedule of Fees shall apply.

Thus we can see the KLRCA striving to ensure that its rules are on par with international standards. This demonstrates its motivation and positive effort to remain as a strong contender as an arbitration destination within Asia.

The KLRCA's helping hand

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 resulted 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 Gani Patail, the attorney general of Malaysia since 2002. The board comprises a total of six renowned and respected arbitrators who are active not just in Malaysia, but internationally as well. 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 destination.[61]

On 27 February 2012, the KLRCA launched its revised KLRCA Fast Track Rules. The KLRCA Fast Track Rules were revised after its 2010 predecessor delivered a much sought-after option to resolving commercial and transactional disputes in Malaysia.[62] 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, Datuk Sundra Rajoo, 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 (APRAG) on 8 July 2011. In addition, Mr Rajoo 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.[63] Addressing the situation at the time, Mr Rajoo openly admitted that 'even disputes which involved only Malaysian parties were going offshore to arbitral centres around the world'.[64] However, through Mr Rajoo's vision and striving for the betterment of the KLRCA's repute and standing, the KLRCA has progressed and grown speedily within just a few years. Mr Rajoo now heads a larger management team, exceeding 20 members, compared to a four-member team in 2009. Furthermore, the KLRCA had 556 arbitrators on its panel (mostly foreign arbitrators) as of 2011.

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.[65] Among the various factors in the KLRCA's appeal in relation to conducting arbitral proceedings, the biggest draw can be credited to the centre's stand in keeping costs to parties low, such as by capping arbitrators' fees under the KLRCA fee schedule.[66] 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, the administration and assistance of the KLRCA in the enforcement of arbitral awards, and, importantly, the final and binding nature of arbitral awards rendered by the KLRCA. The final and binding nature of the KLRCA's arbitral awards, coupled with Malaysia being a signatory to the New York Convention, enable the KLRCA's arbitral awards to be enforceable in countries which are also signatories.

Being ahead of the market – the KLRCA i-Arbitration Rules 2012

The KLRCA's i-Arbitration Rules are a very recent attempt to provide a unique forum for Islamic arbitration, particularly in jurisdictions such as Bahrain, Indonesia, Hong Kong, the Philippines, Qatar and the UAE, which also embrace shariah principles. The KLRCA was accorded Global Arbitration Review's 2012 Award for Innovation by an Individual or Organisation at the 3rd Annual GAR Awards in Bogota, Colombia.[67] This accolade may attract foreign disputes based in shariah principles to flock to this distinctive forum that is currently provided by the KLRCA only.

The i-Arbitration Rules supersede the 2007 KLRCA Rules for Islamic Banking and Financial Services Arbitration. Arbitral awards under the KLRCA i-Arbitration Rules are enforceable in the 149 countries[68] that are signatories to the New York Convention which recognise and enforce such an award. Malaysia possesses its own Shariah Advisory Councils, where

tribunals under the new provision in rule 8 must refer the matter to one of the two Councils currently in place.[69] This obliges tribunals to outsource shariah issues to the specialist council or expert agreed by the parties, reinforcing the idea that shariah law is at the heart of the arbitration resolutions. The specialist advice referral is undoubtedly important and will probably be used frequently to resolve disputes where the oil and gas, maritime, and construction sectors are influential, creating links with many pan-Asian and Middle Eastern nations. Another slight modification, compared with the conventional KLRCA rules, refers to the cost of reference. Insertion of a new Rule 10 provides that the arbitration costs shall include 'expenses reasonably incurred by the arbitral tribunal in connection with the reference to a Shariah Advisory Council or Shariah expert'.[70]

The KLRCA should be applauded for its efforts in revolutionising arbitration by integrating shariah-based laws in its rules. It will also familiarise different jurisdictions with how this new system would work and would demystify the complexity of shariah law as perceived internationally. It will certainly make a headway in Islamic arbitration, prompting other Islamic jurisdictions to perhaps adopt similar models within their regions. On top of its many 'products', the KLRCA is becoming increasingly attractive as an arbitral seat.

Why Malaysia as an arbitration seat?

As Malaysia strives to narrow the gap between itself and Singapore and 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) on the availability of the expedited procedure prior to the constitution of the arbitral tribunal,[71] 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.

Similarly, notable features of the 2005 Act are comparable to the newest Arbitration Ordinance of Hong Kong (the Hong Kong Arbitration Ordinance). This includes provisions which give arbitral tribunals the power to grant interim measures, such as to preserve assets or evidence or to maintain or restore the status quo.

In terms of national legislations and its significance to both the 1952 Act and 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.

Evolving roles in arbitration

The case of Sundra Rajoo v Mohamed Abd Majed and Persatuan Penapis Minyak Sawit Malaysia (Poram)[72] highlights the changing role in arbitration. This case demonstrates that challenges could be submitted by an arbitrator against another arbitrator in the same case. In this case, Mr Rajoo brought an action against Mr Majed who was to be on the panel of co-arbitrators in the proceeding involving Virgoz Oil and Fats Pte Ltd within Poram (arbitral institution) at the High Court at Kuala Lumpur. This was because Mr Majed had previously been appointed and nominated as the representative for Virgoz. Presumably, Mr Rajoo felt

that this would hinder the proceedings as a result of conflict of interests and requested in the present case for Mr Majed to disclose all previous appointments of Mr Majed by Virgoz. This request to the court was unusual because it was the first of its kind, and raises questions on when challenges can be made, and by whom. Eventually, the court decided to recognise the locus standi of Mr Rajoo and ordered Mr Majed to make the disclosures within seven days or he would be removed and disqualified.[73]

Conventionally, the right to submit challenges is vested only in parties to arbitration and it can be unusual to think of the arbitrator as a party to an arbitration. To overcome this, the court recognised the locus standi of Mr Rajoo by overcoming the hurdle in article 2 of the Malaysian Arbitration Act, which defines 'party' as party to an arbitration agreement. It cited two English cases; citing first Hobhouse J that 'all parties to the arbitration are as a matter of contract bound by the terms of the arbitration contract',[74] and second Sir Browne-Wilkinson in Norjarl v Hyunday where 'on appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral agreement'.[75] Evidently, the court was scrupulous to interpret the article in accordance with English dicta so that it could permit Mr Rajoo to initiate the challenge.

But perhaps a second and more interesting justification for the grant of locus standi is grounded in principles of natural justice, which YA Datuk Dr Haj Hamid Sultan Bin Abu Backer explains thus:

> The requirement of impartiality is a principle of natural justice, and in consequence the court has an inherent jurisdiction to check its breach or purported breach 'in limine' when the complaint comes from any interested party involved.[76]

Tibor Várady believes that relying on the 'natural justice' justification may be slightly far-fetched but also suggests that it may be good as a check and balance for impartiality.[77] He concludes that it matches rather closely the General Standard 7, section (c) IBA Guidelines on Conflicts of Interest in International Arbitration that an arbitrator is under a duty to make reasonable inquiries to investigate potential conflicts of interest. A similar provision can be found in the Canon I 2004 American Bar Association (ABA) Code of Ethics, which states: 'An arbitrator should uphold the integrity and fairness of the arbitration process.' Thus the outcome of the present case should not take anyone by surprise, since the preservation of the integrity of the tribunal should be upheld. However, it must be noted that a dispute between co-arbitrators could diminish the appeal of arbitration as an alternative dispute forum.

A strong response against bribery

On 23 June 2013, the KLRCA signed the Corporate Integrity Pledge (CIP) along with 40 other multinational corporations, committing to impartial tribunal proceedings and combatting corruption in the arbitration field.[78] It demonstrates the willingness of the KLRCA to promote transparent proceedings in its tribunals.

On 25 June 2013, Yusof Holmes Abdullah, a UK arbitrator in the KLRCA, was charged with bribery in the Penang Malaysian Sessions Court. Abdullah is accused of soliciting US$2 million from the director of a local company, JMR Construction, to rule in favour of JMR in an arbitration with a Chinese-owned dredging company, Syarikat Nanjing Changjiang Waterway Engineering Bureau.[79] Abdullah's charge is the first time an arbitrator has been charged with

corruption in Malaysia.[80] The KLRCA removed Abdullah from its list of arbitrators when it first learned of the allegations against the arbitrator in late 2012.

Many may speculate that this recent development could tarnish the reputation that Malaysia has built thus far if it appears that arbitrators are more susceptible to bribery and play in favour of gains. However, given that the KLRCA has maintained its pledge in the cracking down of corruption, along with the swift removal of Abdullah after the incident was revealed, there should be no concerns about the KLRCA's status as a dependable forum for arbitration, and the matter should not deter future arbitrations from taking place there.

Prepare to make space for your competitor

The KLRCA and Malaysia's arbitration landscape have seen a positive and much-needed change to empower it as another major forum for arbitration. The recent bribery charge demonstrates the vigilance of the arbitration community to stand firm against corruption and to project Malaysia as a fair and neutral jurisdiction. Additionally, the KLRCA's revised arbitration and fast-track rules suggest that the KLRCA has taken steps to improve the rules, ensuring smoother implementation and process. Its fast-track rules will appeal to parties who are keen to seek resolutions when issues need to be resolved urgently or simply because it still provides an overall shorter time period for the arbitration award to be handed out. Furthermore, the new i-Arbitration rules are worth keeping an eye on as there are many countries employing shariah law that may choose to conduct their disputes in a forum catering specifically for businesses in the Islamic world. In this regard, the KLRCA has the lead over the other arbitral contenders in Asia. The revamped 'products' within the KLRCA have readied it as a formidable opponent to the SIAC and HKIAC.

1. This article is an update of the Malaysia chapter in The Asia-Pacific Arbitration Review 2013, published by Global Arbitration Review.
2. Michael J Moser, Arbitration in Asia (Release No. 1, JurisNet, LLC 2009) MAL-3.
3. Michael J Moser, Arbitration in Asia (second edition, published by Juris Publishing 2008), chapter 14; www.jurispub.com/cart.php?m=product_detail&p=2754 (accessed 14 March 2012).
4. Tan Sri Cecil Abraham, 'Malaysia', National Report – World Arbitration Reporter (second edition, Juris Publishing, 2011).
5. Grace Xavier, Law and Practice of Arbitration in Malaysia (Sweet & Maxwell Asia 2008), pp 6–7.
6. W S W Davidson, 'The Malaysian Arbitration Scene: The Relationship between the Courts and the Arbitral Tribunals in the 21st Century' (Speech given on 16 November 2005), www.malaysianbar.org.my/adr_arbitration_mediation/the_malaysian_arbitration_scene_the_relationship_between_the_courts_and_the_arbitral_tribunal_in_the_21st_century.html (accessed 14 March 2012).
7. [2008] 7 MLJ 757.
8. The plaintiff and the defendant had entered into a building contract in 2002, which contained an arbitration clause making reference to the 1952 Act. In July 2007, legal proceedings in the High Court were commenced and an application was made under Section 10 of the 2005 Act for a stay of proceedings. In view of the fact that the building contract between the parties were entered into prior to the commencement

of the 2005 Act and the existence of the aforementioned express reference to the 1952 Act, the court took the view that the 1952 Act would apply.

9. [2008] 7 MLJ 757 at [56].
10. [2008] 8 MLJ 471.
11. [2007] 10 CLJ 318.
12. [2009] 1 LNS 420.
13. [2009] 1 CLJ 942.
14. Section 34 provides for the Act not to apply to certain arbitrations.
15. Section 34(1) Arbitration Act 1952.
16. Section 27 Arbitration Act 1952.
17. Section 42 Arbitration Act 2005.
18. Section 45 Arbitration Act 2005.
19. Section 46 Arbitration Act 2005.
20. Section 13(7) Arbitration Act 2005.
21. [2008] 1 MLJ 233.
22. [2008] 6 MLJ 561.
23. Section 6 Arbitration Act 1952 and Section 10 Arbitration Act 2005.
24. Section 13 Arbitration Act 1952 and Section 11 Arbitration Act 2005.
25. Section 27 Arbitration Act 1952 and Section 38 Arbitration Act 2005.
26. [1998] 2 MLJ 20.
27. [2002] 1 CLJ 433.
28. [2008] 5 CLJ 654.
29. [2008] 5 CLJ 654 at [10].
30. [2008] 5 CLJ 654 at [26].
31. Section 42(1A) Arbitration Act 2005.
32. Per Hamid Sultan, JC in Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd [2010] 5 CLJ 83, 98.
33. Per Abdul Malik Ishak, JCA in Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 7 CLJ 785, 799 to 804.
34. See also AV Asia Sdn Bhd v Pengarah Kuala Lumpur Regional Centre For Arbitration & Anor [2013] MLJU 183 at 11.
35. [2012] 7 MLJ 36.
36. See also Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd (TLL), a Thai Co & Anor [2013] MLJU 165 at 70–86.
37. [2009] 9 CLJ 32.
38. [2010] 5 CLJ 32.
39. [2010] 7 CLJ 785.

40. [2010] 7 CLJ 785 at [56].
41. [2010] 3 CLJ 634.
42. [2010] 9 CLJ 532.
43. [2008] 6 MLJ 561.
44. [2010] 2 CLJ 420.
45. [2010] 2 CLJ 420 at p440.
46. [2010] 5 CLJ 83.
47. [2009] 1 LNS 1321.
48. [2010] 4 MLJ 332.
49. [2010] 4 CLJ 914.
50. Also known as the New York Convention.
51. [2006] 3 MLJ 117.
52. [2009] 3 MLJ 289.
53. [2010] 1 CLJ 137.
54. Pertubuhan Akitek Malaysia, www.pam.org.my.
55. Royal Institution of Surveyors Malaysia, www.rism.org.my/.
56. ICC Malaysia, www.iccmalaysia.org.my/.
57. The Institution of Engineers Malaysia, www.myiem.org.my/.
58. Lembaga Getah Malaysia, www.lgm.gov.my/.
59. 'Corporate Info', Kuala Lumpur Regional Centre for Arbitration, www.klrca.org.my/scripts/view-anchor.asp?cat=2 (accessed 8 March 2012).
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Korea

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Using the international arbitration process to resolve commercial disputes is a widely acknowledged global trend. In line with this phenomenon, Korean companies, both multinational and domestic, are increasingly shifting their approach when it comes to reaching resolution of conflicts with foreign companies – from engaging almost exclusively in litigation to seeking resolution via international arbitration – as evidenced by the rising number of arbitration cases involving Korean companies. In response, Korea has made a concerted effort to invigorate the arbitration system in myriad respects. The main purpose of this article is to delineate such efforts as well as provide some signposts for potential changes in arbitration practice in Korea that will prove useful for practitioners. First, the Korean Commercial Arbitration Board (KCAB), the major arbitration institution authorised to administer domestic and international arbitrations in Korea, overhauled its International Rules in September 2011. The sweeping changes were meant to address the increasing international caseload in Korea by establishing rules consistent with international standards. Second, the Ministry of Justice commissioned a special committee charged with proposing amendments to the Arbitration Act of Korea (the Arbitration Act) to keep pace with rapid developments in arbitration practice. The special committee is currently considering, among others, the 2006 UNCITRAL Model Law, and expects to offer recommendations in 2014. Third, in May 2013, the Seoul Metropolitan Government, the Seoul Bar Association, and the KCAB opened the Seoul International Dispute Resolution Centre (SIDRC), a venue equipped with cutting-edge technology to host arbitration hearings seated in the region. Finally, Korean courts, by and large, have continued a long tradition of demonstrating an arbitration-friendly attitude. This is evident in their rulings, especially those with respect to the enforcement of arbitral awards. This article will set forth in more detail recent court rulings related to the recognition and enforcement of arbitral awards and the measures taken recently to ensure that arbitration practice in Korea is aligned with international expectations.

The 2011 amendments to the KCAB's International Arbitration Rules

In September 2011, the KCAB adopted significant amendments to its international arbitration rules. The changes were precipitated by the increase in international arbitration demand that the KCAB witnessed, as well as by the KCAB's internal discussions regarding the best practices of leading international arbitration institutions based abroad.

To understand the 2011 amendments, it is important to be aware that the KCAB separates arbitration cases under its administration into two general categories. If all the relevant parties have their principal offices or permanent residences in Korea, the case is subject to the domestic arbitration process and the KCAB Domestic Arbitration Rules (Domestic Rules). If, on the other hand, the place of business of one party to the arbitration is located in a foreign country, the case is deemed an international arbitration case, subject to the international arbitration process of the KCAB, and the KCAB International Arbitration Rules (International Rules). Before the 2011 amendments, however, even if one party was foreign, the International Rules would only apply if the parties expressly opted in to the International

Rules in the arbitration agreement. Since the 2011 amendments, however, even without the express agreement of the parties regarding the International Rules, so long as one party is foreign (or where the designated venue of arbitration lies outside Korea), the arbitration is considered an international arbitration case, and the International Rules automatically apply.[1]

In addition to welcoming this change in the International Rules, practitioners have also embraced the fact that parties can now select arbitrators outside the designated KCAB panel (the vast majority of whom are South Korean). The International Rules further provide that when the secretariat has to appoint an arbitrator, it may consult the KCAB's international arbitration committee (composed of prominent domestic and foreign arbitration practitioners) as to the most suitable candidates. Moreover, in situations where the secretariat is required to make a decision regarding the challenge, removal or replacement of an arbitrator under the International Rules, the secretariat is required to consult the committee. Another improvement made to the International Rules is the more accommodating position regarding fees. Specifically, administrative fees are now capped at 150 million won, and the previously fixed maximum amount of arbitrator fees has been repealed so that the pool of arbitrators would widen, and arbitrators in international cases would be adequately compensated for their work.

Another change seen as an improvement to the International Rules is the introduction of expedited procedures for international cases in which the amount sought, in either a claim or a counter-claim, does not exceed 200 million won or, alternatively, where the parties agree to be subject to the expedited procedures. In an expedited proceeding, unless otherwise agreed by the parties or deemed necessary by the secretariat, the default rule is that the secretariat shall appoint one arbitrator. Moreover, in principle, if the amount claimed does not exceed 20 million won, the dispute shall be resolved on the basis of documentary evidence alone, curtailing the length of the proceedings.[2] In addition, the award in a case governed by the expedited procedure must be made within three months from the date of the arbitral tribunal constitution. Finally, in case of an arbitration involving a claim valued at less than 200 million won, there is no required filing fee, and the administrative costs and remuneration of arbitrators have been lowered.[3]

In keeping with the trend even before the 2011 Amendments were adopted, the number of international arbitration cases filed with the KCAB has risen: there were 53 in 2005; 77 in 2011; and 85 in 2012. Moreover, the amount in dispute in international arbitration cases have concurrently increased, rising by 386.4 per cent from 2011 to 2012. Finally, the subject areas of the disputes are more varied than in the past, currently spanning the range of subjects from construction to technology to international trade to maritime affairs.

Amendments to the Arbitration Act currently under consideration

The Arbitration Act of Korea (the Arbitration Act), governing all arbitration proceedings seated in Korea and applicable to domestic and international arbitrations alike, came into force in 1966. Less than a decade later, in 1973, Korea acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), with two declarations and reservations: first, Korea would only recognise and enforce awards made in other states that were parties to the Convention; and second, the Convention would be applied exclusively to differences arising out of legal relationships, whether contractual or not, that were considered commercial under Korean law. In the decades that followed, Korea's economy and participation in international commerce grew at a rapid clip, and the

need to update the Arbitration Act to be consistent with developing international practice became clear. Thus, in 1999 the Arbitration Act was completely revised, broadly tracking the UNCITRAL Model Law on International Commercial Arbitration of 1985 (the 1985 Model Law). Under the 1999 amendments to the Arbitration Act, the grounds for a court to decline to recognise and enforce a foreign arbitral award were narrowed to more closely track the New York Convention and the 1985 Model Law. Since the international arbitration market has continued to expand markedly, and Korea is increasingly the centre of global trade and transactions, the Ministry of Justice recently commissioned a special committee to discuss possible amendments to the Arbitration Act. A special committee comprised of practitioners, scholars and officials are currently reviewing various clauses of the Arbitration Act, including the requirement under article 8 that an arbitration agreement must be in writing, eg, a document signed by all parties in the form of letters exchanged between the parties. Specifically, the special committee is debating whether and how to relax the Arbitration Act's current writing requirement to something along the lines of article 7 of the Model Law, adopted by the UNCITRAL in 2006 (the 2006 Model Law), which explicitly allows for an 'electronic communication' to meet its writing requirement and which broadly provides that an arbitration agreement is 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'. Options under consideration include either expressly including electronic communication within its writing requirement or, alternatively, discarding the writing requirement in toto.

The other amendments currently under discussion deal with a wide variety of issues, such as possible expansion of the arbitral tribunal's power to grant interim measures,[4] whether to mandate protective measures for consumers or employees who agree to arbitration clauses, the introduction of more streamlined enforcement procedures to expedite the enforcement of arbitral awards (such as allowing for awards of foreign countries that are parties to the New York Convention to be summarily enforceable in Korea), whether to expand the scope of disputes subject to arbitration beyond commercial disputes, more detailed guidance as to how (and the extent to which) courts may assist the arbitration proceedings by facilitating an evidentiary investigation, and whether the court that has jurisdiction over an arbitration-related issue should be at the district court level or at the appellate court level, given that arbitration is meant to provide an expeditious and cost-effective means to settle disputes.

It is anticipated that formal recommendations concerning amendments to the Arbitration Act will be made in 2014. Despite obvious uncertainty about which of the discussed amendments will be subsequently enacted, there is little doubt that any new amendments to the Arbitration Act will be aimed at keeping in line with modern international arbitration practice.

The Seoul International Dispute Resolution Centre (SIDRC)

The opening of the SIDRC is a response to an increasing number of South Korean companies resolving disputes with foreign companies through arbitration. For example, ICC statistics show that South Korean claimants filed 340 cases under ICC rules between 1998 and 2010, more than the number filed by parties from China or Japan. To address the level of interest in international arbitration, the Seoul metropolitan government, the Seoul Bar Association and the KCAB jointly built the SIDRC, which was granted a public service corporation licence from the Ministry of Justice. On 27 May 2013, the SIDRC opened, with a capacity of 510 square metres in the Seoul Global Tower Building, located in the centre of Seoul. The SIDRC has

eight sizeable conference rooms that accommodate up to 50 people each, equipped with a state-of-the-art video conferencing system and other technology. In other words, the SIDRC provides a convenient and suitable venue for complex international arbitration cases.

Global international arbitration institutions, such as the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC) and the American Arbitration Association (AAA)/International Centre for Dispute Resolution (ICDR), have located liaison offices in the SIDRC. In addition, the International Centre for Settlement of Investment Disputes (ICSID), an autonomous institution funded by the World Bank, has expressed its intention to utilise the hearing rooms in the SIDRC.

The modern capability and size of the SIDRC's arbitration facilities demonstrate Korea's commitment to arbitration as a vehicle of dispute resolution and its expectation that more international arbitration cases will be seated in Korea.

Korean court decisions regarding the enforceability of arbitral awards

Traditionally, Korean courts have shown great regard for the national policy behind the Arbitration Act to restrict court intervention in the arbitration process (following the UNCITRAL Model Law approach), and practitioners have seen minimal court interference in the arbitration process. For example, Korean courts generally respect the parties' decision to settle disputes by way of arbitration and tend to readily recognise the validity of an arbitration agreement, even when the agreement is not worded in a clear, specific manner. In one domestic arbitration case, a party challenged the existence of an arbitration agreement, arguing that the language ('in case of non-execution of the above agreement, the dispute shall be immediately subject to arbitration by a third-party institution') was too vague to create an arbitration agreement, but the Supreme Court disagreed. The Supreme Court declared:

> To the extent that there is an express intent to resolve potential disputes through arbitration, the requirements for a valid arbitration agreement are met, despite lack of specification of the institution, the governing law, or the seat of arbitration, considering that an arbitration agreement subject to the Arbitration Act is an agreement between the parties to resolve, through arbitration, a dispute between such parties, in part or in its entirety, that has already arisen or will arise in the future from certain legal relations, regardless of whether or not the dispute is related to the contract.[5]

The Supreme Court has also shown a tendency to interpret the scope of an arbitration agreement broadly. For example, a Supreme Court decision held that once an arbitration agreement is recognised, it is appropriate to assume that the parties concerned have agreed to resolve, through the arbitration process, any and all disputes arising from or in connection with legal relations between them, absent special circumstances, such as a clear and express limitation of the scope of the arbitration agreement.[6] In addition to demonstrating deference toward the choice of parties to enter into arbitration, Korean courts tend to recognise arbitral awards, and decline to recognise and enforce an award only if such interference is expressly permitted under the Arbitration Act. Grounds for setting aside domestic arbitral awards (governed by article 36(2) of the Arbitration Act) are very similar to the grounds for refusing to enforce foreign arbitral awards subject to the New York Convention (governed by article 39(1) of the Arbitration Act). Consonant with the policy underlying the New York Convention and the Arbitration Act, Korean courts generally reject

requests to review the merits of the arbitral awards or to correct errors in fact or law in awards. For example, the Supreme Court held that courts cannot exercise judicial control over the arbitration process unless otherwise permissible under the Arbitration Act, such as in cases where one party to the arbitration may seek court intervention on the grounds that the arbitration agreement does not exist or that it exists but is invalid or otherwise ineffective.[7]

Under article 39(1) of the Arbitration Act, the enforceability of foreign arbitral awards follows, by and large, the New York Convention (articles V(1) and V(2)), providing that foreign arbitral awards shall be recognised and enforced unless there are specific and narrowly defined grounds to decline to confirm them.

Korean courts have generally demonstrated respect for the narrow grounds set forth in the Arbitration Act and the New York Convention. For example, with respect to article V(1(b)) of the New York Convention (providing that lack of proper notice of the arbitration proceedings may serve as a ground to decline to enforce the arbitral award) and article 36(2) of the Arbitration Act, the Supreme Court ruled that article V(1(b)) of the New York Convention does not apply to cases in which a party's right to present its defence is infringed in an insignificant way, and that article V(1(b)) is only applicable to the limited instances in which a party's right to defend itself is violated to the extent that it cannot be tolerated.9 In light of the reasoning of this Supreme Court decision, in 2008 the Seoul Central District Court rejected the respondent's argument that it should not be held subject to the arbitral award because it had failed to respond to the arbitration process in a timely manner due to the fact that it had not received the arbitration form by e-mail and therefore pleaded ignorance of the arbitration proceedings. The Seoul Central District Court ruled that since the arbitration form was sent to the respondent's correct e-mail account the notice requirement had been met, regardless of whether the respondent had actually read the notice. Thus, the Seoul Central District reasoned that the arbitral award could stand as the respondent's rights had not been violated in an intolerable manner.[8]

With respect to article V(1(d)) of the New York Convention and article 36(2) of the Arbitration Act (providing for refusal to recognise and enforce an arbitral award if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties), Korean courts have similarly shown a reluctance to interfere with the arbitration process. For example, in a case before the Seoul Central District Court, the respondent argued that although the arbitration agreement specified three arbitrators, the arbitration process had been wrongfully handled by two arbitrators for the majority of the time, and the third arbitrator was appointed a mere two days before the arbitral award was issued, thereby establishing grounds for the court to refuse to recognise the award. However, the Seoul Central District Court disagreed and enforced the award. The Court based its decision on the following factors:

- the final arbitral award was rendered by three arbitrators;
- the applicable arbitration rules provide that two arbitrators may render an arbitral award without a third arbitrator, so long as the two arbitrators agree on the issues; and
- no hearing related to the substantive issues was held prior to the appointment of the third arbitrator.

In other words, only a significant defect in the arbitration proceedings that would be likely to affect the outcome of the hearing would be sufficient grounds for setting aside the arbitral award.[9]

With respect to article V(2(b)) of the New York Convention (providing that refusal to recognise and enforce an arbitral award may be based on public policy grounds) and article 36(2) of the Arbitration Act, the Supreme Court held that the overarching intention of the article is, first, to protect the fundamental morals and social order of the country where the enforcement is sought, and second, to suppress any disturbance of public order arising from enforcing certain arbitral awards. According to the Supreme Court, the decision of whether or not to refuse to recognise an arbitral award pursuant to article V(2(b)) of the New York Convention, should, therefore, take into consideration both domestic circumstances and the stability of international trade, and such recognition should be refused only in limited circumstances.[10]

Thus, while arguments to the effect that recognition of an award would violate Korea's fundamental morals and social order (ie, public policy) are frequently raised in Korean courts, they are rarely accepted. For example, in 2007, the Seoul Central District Court rejected the respondent's argument that enforcing the arbitral award would contravene Korea's public policy because the tribunal had refused to consider the respondent's evidence, and had rendered its decision relying solely on the claimant's evidence. The Court held that the respondent's evidence had not been submitted in time to be considered by the tribunal, and that enforcing such an arbitral award was not against public policy because the judiciary, pursuant to the Korean Civil Procedure Act, similarly does not have to take into consideration evidence that a party fails to submit on a timely basis.[11]

In 2003 practitioners saw a rare instance of a Korean court declining to recognise an arbitral award. In this case, the respondent had paid the claimant damages in the intervening period between the date the arbitral award was rendered and the date the court was asked by the claimant to recognise and enforce the award. Based on this fact, the Supreme Court refused to enforce the award and declared that it was basing its decision on the circumstances that existed as of the date of the court's hearing (ie, after the respondent had made payment to the claimant) and not as of the date the award was rendered.[12]

With notably rare exceptions, Korean courts have demonstrated a pro-enforcement policy for arbitral awards. Such minimal court interference in arbitration proceedings, combined with the opening of the SIDRC and the updated International Rules of the KCAB, as well as the forthcoming amendments to the Arbitration Act, highlight Korea's growing potential as a seat of international arbitration.

1. The International Rules also apply where the parties have agreed in writing to refer their disputes to arbitration under the International Rules.
2. The International Rules provide, however, that parties may request the tribunal to decide to hold a hearing, or that tribunal may decide this on its own initiative. Also, the tribunal, if deemed necessary, can hold more than one hearing.
3. Undoubtedly drawn to the cost-effective, efficient nature of the expedited procedures, since the 2011 Amendments to the International Rules came into effect on 1 September 2011, approximately 60 per cent or 30 out of the 52 international arbitration cases have been conducted under the expedited procedures.
4.

The Arbitration Act authorises a court to grant interim measures before and during an arbitration, upon the request of a party (article 10) and similarly empowers the arbitral tribunal to grant interim measures, including the posting of security (article 18).

5. Korean Supreme Court Decision 2005Da74344 (rendered 31 May 2007).
6. Korean Supreme Court Decision 2010Da76573 (rendered 22 December 2011).
7. Articles 6 and 7 of the Arbitration Act govern the extent to which courts may intervene in arbitration, setting forth seven instances which permit court action:
    - appointment of an arbitrator;
    - challenge to an arbitrator;
    - determination of an arbitrator;
    - review of an arbitral tribunal's ruling on jurisdiction;
    - challenge to an expert appointed by the arbitral tribunal;
    - taking evidence upon request by the arbitral tribunal; and
    - applications to set aside an award under article 36(1), or to enforce an arbitral award under article 37 to 39.
8. See Korean Supreme Court Decision 2003Da5634 (rendered 25 June 2004).
9. Korean Supreme Court Decision 89Daka20252 (rendered 10 April 1990).
10. Seoul Central District Court Decision 2008 Na 20361 (rendered 15 October 2008).
11. Seoul Central District Court Decision 2006Gahap97721 (rendered 7 March 2008).
12. Korean Supreme Court Decision 2001Da20134 (rendered 11 April 2003).
13. Seoul Central District Court Decision 2005Gadan273965 (rendered 26 July 2007).
14. Korean Supreme Court Decision 2001Da20134 (rendered 11 April 2003). A recent, more controversial instance in which a Korean district court declined to recognise an arbitral award was decided earlier this year. In the so-called Skylife case, the respondent argued that the Seoul Southern District Court should treat the arbitral award as if it were a court judgment, and, therefore, the court must abide by all provisions of the Korean Civil Procedure Act and Civil Execution Act when considering the execution of the award. The Seoul Southern District Court agreed with the respondent's argument and, on the basis that execution of the award would violate the Civil Execution Act, declined to enforce the award. However, practitioners should bear in mind that this decision is not final and is currently on appeal to the Seoul High Court, which will review the award de novo. Seoul Southern District Court Decision 2012Gahap15979 (rendered 31 January 2013).

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Japan

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Summary

This article gives a brief overview of current arbitration trends in Japan. Recently, two trends have been observed: first, an increase in the number of court decisions in Japan relating to international commercial arbitration; and second, an increase in awareness of investment treaty arbitration.

Increase in arbitration-related court decisions in Japan

Arbitration is becoming a viable option for Japanese parties to resolve disputes, particularly in the context of international transactions. Evidence of this can be seen in the increase in Japanese court decisions involving arbitration awards. We examine three court decisions in this article, which we believe will help readers to understand the matters of which they need to be aware when parties agree to have arbitration seated in Japan.

The Scope Of Arbitration Clause – Potential Pitfall In Joint Venture Agreement

In Tokio Marine & Nichido Fire Insurance Co, Ltd v an undisclosed entity,[1] the Tokyo District Court rendered an interim decision on jurisdiction, dismissing defendants' lack of jurisdiction defence based on the arbitration clause in the joint venture agreement. The issue resided in an interpretation of the scope of an arbitration agreement, from both subjective and objective perspectives, ie, the scope of the parties to be bound by the arbitration agreement and the scope of the claims to be subject to the arbitration agreement.

This case involved a joint venture company's contractual and product liability claims arising out of defective building material supplied by one of its shareholders. An Illinois-based company (a manufacturer and supplier of cement wall coverings) together with three other companies, formed a joint venture in Japan that was intended to be appointed as an exclusive distributor in Japan of such building material. However, the joint venture company was never appointed as an exclusive distributor, nor did it enter into a distribution agreement with the Illinois supplier and the joint venture company purchased the products indirectly from the Illinois supplier based on an individual sales order. The joint venture agreement had an arbitration clause which provided[2] that:

> Any and all disputes relating to this agreement shall be subject to arbitration seated in Japan in accordance with the arbitration rules of the International Chamber of Commerce. The arbitration award shall be final and binding on each party (including a new company should the new company be made a party to this agreement).

Due to defects in the products the joint venture company was required to provide repair services to house makers who purchased the products and thereby sustained damages. The Illinois supplier and its holding company agreed to compensate the joint venture company for expenses it incurred for the repairs of the defect; however, contrary to what was agreed, the Illinois supplier and the holding company only partially compensated the joint venture company, which sought reimbursement from an insurer. In return, the insurer sought compensation of the paid-out claim by subrogation and filed suit against the Illinois supplier and the holding company for recovery of the paid-out claim. The Illinois supplier and the holding company sought dismissal of the insurer's claim based on the arbitration clause in the joint venture agreement. The Tokyo District Court dismissed the lack of jurisdiction defence filed by the Illinois supplier and the holding company for two reasons: first, neither the joint venture company nor the holding company was a party to the arbitration agreement; and second, neither the contractual claim nor the product liability claim arising out of the

defective building material supplied by the Illinois supplier were covered by the arbitration agreement.

In terms of the parties to be bound by the arbitration clause, there are two parties at issue who did not execute the arbitration agreement: the joint venture company and the holding company.The arbitration agreement was executed by the Illinois supplier, the holding company's wholly owned subsidiary – not by the holding company itself. However, both the holding company and the Illinois supplier agreed to compensate the joint venture company for the damages that it sustained. Therefore, it was on this basis that the insurer attempted to recover the paid-out claim by suing the Illinois supplier and the holding company in Japan. The court held that neither the joint venture nor the holding company was a party to the joint venture agreement; therefore, neither was a party to the arbitration agreement in the joint venture agreement. Regarding the joint venture company, the Illinois supplier and the holding company argued that, under the joint venture agreement, it was expected that the joint venture company would be bound by said agreement because it had provisions regarding the operation of the joint venture company and, furthermore, the arbitration agreement explicitly provided that the joint venture company would be bound by the arbitration clause should it be made a party to the joint venture agreement. On this point, the court held that while the joint venture agreement did provide for the operation of the joint venture company, the joint venture company never executed said agreement nor was it appointed as an exclusive distributor of the product in Japan, as originally planned when the joint venture company was established. Therefore, the court concluded that the joint venture company was not a party to the arbitration agreement provided in the joint venture agreement. Regarding the holding company, the court held that no evidence substantiating that the holding company was acting together with the Illinois supplier, its wholly owned subsidiary in forming the joint venture, and the mere fact that its wholly owned subsidiary, the Illinois supplier, is a joint venture partner alone does not qualify the holding company to be a party to the arbitration agreement. This joint venture agreement has an entire agreement provision, and any amendment to the joint venture agreement requires a written agreement executed by the representative of each party. Since there was no such agreement executed by each representative to the effect that the joint venture company or the holding company would become a party to the agreement, neither the joint venture company nor the holding company could be subject to the arbitration agreement.

Regarding the subject matter of the agreement, the court again denied the claim. The court held that the claim to seek compensation and the product liability claim were not covered by the arbitration agreement. The court further held that, although the joint venture agreement provides for the establishment of a joint venture, and the appointment of a joint venture company as an exclusive distributor was anticipated at the time of the formation of the joint venture, the joint venture partners anticipated a separate distribution agreement governing the appointment of the joint venture company as the exclusive distributor and the terms and conditions of the sales of the products. Such distribution agreement was never executed; consequently, these claims to seek compensation arising out of the sales of defective products are not covered by the arbitration agreement.

The court strictly construed the arbitration agreement both in terms of the scope of the parties to be bound by the arbitration agreement and the subject matters of the arbitration agreement. Given the unique circumstances involved in this case, it is unclear to what extent this court decision will affect future cases involving similar issues. That said, it would always be prudent to ensure that a joint venture company executes the joint venture agreement itself

together with all the other ancillary agreements to the joint venture agreement, such that any disputes relating to the joint venture can be simultaneously resolved in one arbitration proceeding. In addition, the author always recommends that the arbitration agreement in a joint venture and ancillary agreements be carefully drafted such that each arbitration agreement will not be treated as an independent arbitration agreement, but any dispute relating to any of the joint agreement and the ancillary agreements can be heard in one proceeding.

Multi-tiered Dispute Resolution Provision

The Tokyo High Court decision dated 22 June 2011[3] addresses the issue of whether courts should dismiss a complaint when the parties failed to adhere to multi-tiered dispute resolution provisions in an agreement. The multi-tiered dispute resolution provision in dispute requires a 60-day negotiation period followed by private mediation prior to bringing a claim in the court; it does not involve arbitration. However, the author believes that this case is worth introducing because multi-tiered dispute resolution provisions are somewhat common in arbitration agreements, especially when Japanese parties are involved. The court held that the complaint should not be dismissed on the ground that the parties failed to meet the conditions to bringing a lawsuit, as provided in the agreement. This case involves a DRAM judgment-sharing agreement. Two Japanese DRAM manufacturers (the former joint venture partners) formed a joint venture in Japan to manufacture DRAM. The US subsidiary of the DRAM manufacturer formed by the former joint venture parties paid a substantial penalty to the US Department of Justice for alleged cartel activities. As the alleged cartel activities were conducted during the period when the former joint venture partners had control over the operation of the DRAM manufacturer, as well as its US subsidiary, the DRAM manufacturer entered into judgment-sharing agreement (JSA) civil DRAM cases with the former joint venture partners under which the parties agreed to settle the issue of how to share the settlement payment. The JSA required that parties first negotiate in good faith for 60 days; if such negotiations were unsuccessful, they were required to initiate private mediation. If, nonetheless, after the mediation, the parties still failed to settle the issue completely, the parties could bring litigation in the Japanese court. The DRAM manufacturer, after paying a settlement amount of more than $100 million, requested the former joint venture partners to share such settlement amount, and initiated the court-annexed mediation. This was, however, unsuccessful. As a result, the DRAM manufacturer brought a lawsuit against the former joint venture partners, seeking recovery of damages arising from the alleged cartel activities carried out under the control of the former joint venture partners. The district court dismissed the complaint because the DRAM manufacturer failed to meet the conditions to bring the lawsuit. However, the Tokyo High Court overturned the decision of the district court, holding that failure to meet the pre-litigation negotiation or mediation requirement cannot be the basis on which a court dismisses a complaint. This is because good faith negotiations and mediation, unlike arbitration, do not necessarily warrant the final resolution of the dispute because neither party is obligated to finally settle by negotiation or mediation, and if the court were to dismiss a matter due to the failure to meet preconditions to litigate, a party will, in effect, be unfairly deprived of a constitutional right to litigate. In relation to this, under the Alternative Dispute Resolution Act (the ADR Act), the court may stay the proceedings for up to four months upon the request of both parties to mediate. This means that, even when the parties agree to resolve a dispute using accreted ADR proceedings provided under the ADR Act, the court may not simply dismiss the complaint. Further, the court took into account that negotiation and mediation do not have a tolling effect (ie, they does not stop the statute

of limitations from running) and, once the complaint is dismissed, some of the claims are subject to the statute of limitations and possibly may no longer be brought to court. The court also stated that it would be unfair for the plaintiff as it could be required to pay the court fee twice, which will grow exponentially should the complaint dismissed.

This court decision concerns litigation, but the underlying principle would likely apply equally to multi-tiered dispute resolution provisions, where the ultimate dispute resolution procedure is arbitration. The principle in this case is that the pre-litigation negotiation or mediation requirements are a mere gentleman's agreement, as the negotiation or mediation does not warrant the final resolution of disputes, unlike litigation or arbitration. This multi-tiered dispute resolution provisions often becomes an issue in two instances: at the beginning of arbitration and upon enforcement of the arbitral award.

When the parties initiate the arbitration, it raises the issue of whether or not the request for the arbitration should be dismissed due to the failure to meet conditions before bringing the arbitration. At the point of enforcing the arbitral award, the issue is whether or not the award should be challenged or refused to be enforced on the ground of material procedural flaw – because the arbitration was brought without satisfying the condition. The latter issue is even more problematic as a successful challenge or refusal of enforcement may force the parties to restart the whole process from the beginning, which is quite inefficient. On this point, according to the Tokyo High Court decision, as long as the arbitration is seated in Japan it appears that such alleged procedural flaw would not be a basis to challenge or refuse to enforce the award. This is good news in the sense that it provides certainty in enforcing arbitration awards; however, treating a multi-tiered dispute resolution provision as a gentleman's agreement may require further consideration, because the parties intentionally structured the multi-tiered dispute resolution provisions such that there would be no pre-emptive strike by either party. Treating a multi-tiered dispute resolution provision as a mere gentlemen's agreement should undermine the parties' intent in structuring the dispute resolution provision as such. It would be a most prudent approach for the court if it were to stay the proceeding if a party, without going through negotiations or mediation, were to immediately initiate arbitration in Japan. Unfortunately, the laws of Japan do not necessarily explicitly authorise the court to stay proceedings where the parties have agreed to mediate prior to commencing litigation or arbitration. In fact, article 26 of the ADR Act authorises the court to stay proceedings for up to four months and only upon the request of both parties. We hope to see the court, at least in practice, delay hearing dates, such that the court may observe the development of the mediation proceedings, while not formally staying the proceedings so that the parties' intentions in such multi-tiered dispute resolution clauses may be better respected. In the interim, for those with arbitration agreements where the arbitration is seated in Japan, they should be aware that multi-layered dispute resolution provisions may not be implemented as anticipated by the parties.

Governing Law Of Arbitration Agreement Absent Governing Law Provision

The Tokyo High Court decision dated 21 December 2010,[4] dealt with three issues:

- the governing law of the arbitration agreement in the absence of explicit governing law provisions;
- whether the written requirement of an arbitration agreement is met when an agreement executed by the parties does not contain an arbitration agreement but simply cites another that contains the arbitration agreement; and

- whether the parties are deemed to have agreed to the arbitration in circumstances in which a party did not receive the form of the agreement containing the arbitration agreement cited in the agreement that the parties executed.

This case involved a time charter party between a Japanese harbour transport business company and a Korean shipowner for shipping between Japan and Nakhodka, Russia. The time charter party itself did not contain an arbitration clause; however, the executed time charter party referred to another charter party form which contained a New York arbitration clause; however, in that instance, the New York arbitration clause was deleted and replaced with a clause for arbitration in Tokyo under the rules of the Japan Shipping Exchange, Inc. However, this charter party form was not distributed among the parties until after the parties executed the time charter party. The Russian authorities seized the ship because of the captain's underclaiming of the freight volume. Consequently, the Japanese company terminated the time charter party and made a request for arbitration to seek recovery of damages against the Korean shipowner in Tokyo under the rules of the Japan Shipping Exchange, Inc. The shipowner refused to proceed to arbitration in Tokyo alleging that the arbitration should be seated in New York. As a result, the Japanese company initiated litigation in the Tokyo District Court. The High Court dismissed the Japanese company's claim. In reaching such conclusions, the High Court examined the three issues discussed below.

The first issue was the governing law. The court held that absent explicit provisions on the governing law, based on sections 44 and 45 of Japanese Arbitration Act,[5] the law of the seat of the arbitration should govern the arbitration clause.

The second issue relates to the written requirement of the arbitration agreement. On this issue, the High Court held that, pursuant to section 13(2) and (3) of the Japanese Arbitration Law, even if the executed agreement does not contain an arbitration clause, as long as the executed agreement cites another agreement that contains an arbitration clause, the written requirement of arbitration agreement is met.

The third issue is whether the parties are deemed to have agreed to the arbitration clause when the parties had not even received a copy of the cited form agreement in which the arbitration clause is provided. The High Court held that, in principle, if the agreement containing the arbitration clause cited is not shared among the parties, it is difficult to say that the parties have agreed to the arbitration clause. However, in this particular instance, the parties are sophisticated shipping companies, and in the shipping industry arbitration agreements are widely used; therefore, they must have been aware of the existence of the arbitration clause itself. Consequently, the High Court held that there was a valid arbitration agreement where the parties elected to proceed to arbitration via the Japan Commercial Arbitration Association. The High Court followed the decision rendered by the Supreme Court prior to the enactment of the Arbitration Act. In other words, if there is no governing law provision, then the arbitral seat is most pertinent to the arbitration clause; therefore, the laws of the arbitral seat should govern the arbitration clause. Consequently, this approach would warrant the consistent interpretation of arbitration clauses, both when the court reviews the issue of whether or not the litigation should be dismissed based on the arbitration clause, and when the court reviews the issue of whether or not the arbitration award should be set aside or refused to be enforced.

The above is an introduction of some of the court decisions that would be useful for practitioners and arbitrators involved in arbitration seated in Japan. As an arbitration practitioner, the increase in the number of court decisions involving international arbitration is welcomed as it clarifies arbitration practice in Japan. Further guidance from the court in relation to arbitration would be helpful in deepening the practice and jurisprudence of arbitration in Japan.

Increased awareness of investment treaty options

Investment treaty arbitration, according to publicly available sources, has rarely been invoked by Japanese companies. The only reported case involving Japanese parties so far is Saluka Investments BV v the Czech Republic (UNCITRAL)[6] where Saluka, Nomura Securities Co Ltd's subsidiary in the Netherlands, filed a claim for a breach of fair and equitable treatment under the Czech Republic – Netherlands BIT against the Czech Republic. Since the Saluka case was handed down, no case involving Japanese entities has been reported.

In July 2013, Japan finally participated in negotiation of the Trans-Pacific Partnership Agreement (TPP). Such decision has generally been supported by the public, although a number of discussions, both for and against the TPP and FTAs in general, have arisen in Japan. One of these is the investment treaty arbitration that is afforded to investors. Some of those who are strongly against the TPP refer to the investor-state dispute settlement clause, alleging that the investment treaty arbitration will restrain the Japanese government's ability to introduce initiatives such as pro-environment or pro-consumer initiatives; therefore, the TPP may be said to unfairly benefit foreign investors at the expense of the public in Japan. Some of those arguments may not be well founded, or may be based on a misunderstanding of the facts and investment treaty cases. However, these heated debates seem to have a beneficial side effect of increasing awareness among Japanese companies of investment treaty arbitration.

The ministries in Japan have been promoting investment treaties via seminars and publications, but with little reaction so far. However, lively debate relating to the TPP has, apparently, increased the awareness of investment treaty arbitration. This does not necessarily suggest that Japanese companies will be immediately initiating investment treaty arbitration in the near future; however, at least Japanese companies will factor in investment treaty and ISD clauses more when structuring foreign investment, and will be seriously considering investment treaty claims to improve their positions in negotiations.

Conclusion

Arbitration has been a standard dispute resolution mechanism when it involves international transactions; arbitration has indeed been used by parties as is demonstrated by the increase in court decisions involving arbitration. We welcome this trend as it in fact reinforces that international arbitration practice is generally applied.

1. Tokyo District Court, Interim decision, 28 February 2012 (2010(wa)34309) 2012WLJPCA02288010.
2. This is an unofficial translation of the arbitration clause written in Japanese.
3. Tokyo High Court decision, 22 June, 2011 (2011(ne)330)2116 Hanrei Jiho 64.
4. Tokyo High Court decision, 21 December 2010, (2010(ne)2785), 2112 Hanrei Jiho 36. Neither party's identity was disclosed in the court decision.
5.

An unofficial translation of the Japanese Arbitration Act is available at www.jcaa.or.jp/e/arbitration/rules.html.

6. Partial Award, 17 March 2006 (http://www.italaw.com/cases/961).

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The legal framework for international arbitration

Indonesia has ratified the ICSID Convention by Law No. 5 of 1968.[1] According to article 3 (1) of Law No. 5 of 1968, which is in line with articles 53–55 of the ICSID Convention, the ICSID award is enforceable in Indonesia after the receipt of a 'certificate of enforceability' (exequatur) from Indonesia's Supreme Court.

Indonesia has also ratified the 1958 New York Convention by Presidential Decree No. 34 of 1981. Indonesia became a party to the New York Convention subject to reciprocity and commercial reservations.

Under the reciprocity reservation,[2] Indonesia will apply the Convention to arbitral awards made only in the territory of other contracting states. In other words, in Indonesia, foreign arbitral awards can only be enforced if the country deciding on the award is also a contracting state to the New York Convention.[3]

Under the commercial reservation, Indonesia will apply the New York Convention only to disputes that, according to Indonesian law, arise from 'commercial legal relationships of a contractual nature or a non-contractual nature'. Therefore, foreign arbitral awards can only be enforced in Indonesia if the awards pertain to differences arising out of legal relationships, either contractual or otherwise, which are considered commercial under Indonesian law.

In order to further encourage foreign investment from major investor countries, Indonesia has also signed bilateral investment treaties with Australia, Belgium, China, Denmark, Egypt, France, India, Italy, Malaysia, the Netherlands, Syria, Thailand, South Korea, the United Kingdom, Germany, Turkey, Singapore, Russia and many others. In order to provide the necessary legal certainty sought by investors, the treaties specifically provide arbitration as the preferred method of dispute settlement.

Realising the value of arbitration in international commercial relations, on 12 August 1999 the Indonesian government enacted and promulgated the first Indonesian national arbitration law (ie, Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution).[4] Pursuant to its closing provision, the Arbitration Law replaces articles 615–651 of the Dutch Code of Civil Procedure. The Arbitration Law provides for rules of ad hoc arbitration proceedings. Moreover, the Arbitration Law also provides provisions on international and national arbitration as well as the recognition and enforcement of these awards in Indonesia.

It is obvious that the Arbitration Law was designed to create a more pro-arbitration legal regime (ie, to minimise the intervention of the courts and to ensure the finality and enforceability of arbitral awards), which has been a highly controversial issue in the recent past, and has directly impacted commercial relations and investment costs in Indonesia.

Despite this, it should be noted that Indonesia is not a Model Law country. The Indonesian Arbitration Law did not take the UNCITRAL Model Law on International Commercial Arbitration into account.

The use of arbitration

History indicates that arbitration has long-established roots in Indonesia. Arbitration only began to receive a great deal of attention following the late 1970s, when Indonesian businesspeople started to actively take part in international trade and the government started to promote it. Due the increase of international commercial transactions done by Indonesian businesspeople, arbitration has gained acceptance.

Agreeing to have disputes resolved by arbitration is, apparently, the obvious and usually inevitable solution for foreign parties dealing with Indonesian companies. In international commercial contracts, the parties usually have no option other than to agree to arbitration in order to avoid court proceedings in any of the parties' jurisdictions.

Foreign parties are conscious that the prospect of bringing a claim arising out of an international business transaction before an Indonesian court is an unattractive one. The judges may not be familiar with sophisticated business transactions and the foreign party will not be able to be represented by lawyers of its own nationality, but instead will have to use the services of local lawyers. Furthermore, when cases are tried by an Indonesian court, all of the documents and evidence will have to be translated into Indonesian by an official translator before their submission to the court. Moreover, there is no international treaty signed by Indonesia for the enforcement of foreign judgments in case it can obtain or secure a favourable court judgment.

In Indonesia, the parties have complete freedom to choose ad hoc or institutional arbitration. Such decisions are left entirely to the parties to any dispute. Additionally, there is no prohibition on parties making use of any national or international arbitration institutions, if the contract between the parties so provides.

In practice, Indonesian parties usually choose institutional arbitration in their arbitration agreements, largely due to lack of their arbitration knowledge and experience. Some Indonesians still have the perception that arbitration must be under the administration of an institution. If the parties decide to choose ad hoc arbitration, they would usually refer to the UNCITRAL Arbitration Rules.

In Indonesia, some arbitral institutions have been established and have engaged in promoting arbitration. Of these, the Indonesian National Board of Arbitration (BANI) is the longest-established and handles the largest number of cases. BANI deals with disputes in the areas of trade, industry and commerce. During the last decade, BANI has experienced a steady increase in arbitration cases.

BANI is definitely not the only arbitration institution in Indonesia. The Indonesian Shariah Arbitration Board, initiated by the Indonesian Council of Ulemas (religious scholars) has been established. It handles various disputes including commercial and financial disputes based on shariah principles.

The Indonesian Capital Market Arbitration Board (BAPMI) is more recently established as an institutional arbitration body specifically for resolving disputes relating to capital market activities.

Smaller bodies exist for the purpose of settling claims in specialised areas such as insurance, capital markets and employment.

The judicial approach towards arbitration agreement

In Indonesia, there is a requirement that an arbitration agreement must be made in writing. The agreement may be in the form of an arbitration clause in the principal agreement providing for the arbitration of disputes that may arise in the future, or, in the case of a dispute already having occurred, the parties may decide for arbitration by a separate submission agreement.[6] It is specifically required that both parties sign the agreement,[7] although a submission agreement instead may be in the form of a notarial deed if the parties cannot sign8 for themselves.

Specifically, article 4 (3) of the Indonesian Arbitration Law states that an arbitration agreement may be concluded by the exchange of letters, telexes, telegrams, facsimiles, e-mails or other means of communication, provided that they are accompanied by 'a record of receipt of such correspondence by the parties'.

The Indonesian Arbitration Law acknowledges the notion of severability of the arbitration agreement from the rest of the contract. From the perspective of the Indonesian Arbitration Law, an arbitral clause is considered as an agreement independent from the main contract. Therefore, the invalidity of the main contract does not entail the invalidity of the arbitral clause.

Furthermore, under the Indonesian Arbitration Law, the existence of a valid arbitration agreement precludes the right of the parties to submit the dispute to the court. Legally, the parties are deemed to have waived their rights in order to have their dispute resolved by a national court when they agree to arbitration.

It is explicit in the Arbitration Law that the Indonesian courts have no jurisdiction over a dispute that is subject to an arbitration agreement. Article 11 (2) of the Indonesian Arbitration Law stipulates that: 'The district court, before which an action is brought in a matter which is the subject to arbitration, must not interfere and must reject the action as inadmissible, except for on certain matters as stipulated in [the Arbitration Law]'. In many recent cases, the court has refused to intervene in a dispute if the parties' contracts made a specific reference to arbitration.

The power of the Indonesian courts to intervene in arbitral proceedings is explicitly restricted to particular circumstances. Nonetheless, the Arbitration Law allows the parties to request the intervention of the court on the appointment of an arbitrator, in the event the parties fail to reach an agreement on the appointment of the arbitrator.

The judicial approach towards enforcement and challenges against international arbitral awards

Like arbitration law and practice in many other jurisdictions,[8] judicial intervention in Indonesia could also occur after the final award has been rendered. Such interventions are possible at two levels: (i) at the level of enforcement of the arbitral award when a party is seeking an exequatur against the party who does not want to honour the terms of the arbitral award; and (ii) at the level of taking a motion for cancellation or setting aside of the award.

Theoretically speaking, the results of an arbitration proceeding are difficult to challenge in an Indonesian court. The Indonesian Arbitration Law provides very limited grounds for the court to undertake judicial control over arbitral awards. In Indonesia, for example, a party is not

allowed to appeal to the court on any question of law arising out of an award made pursuant to an arbitration agreement.

Additionally, there is no provision in the Arbitration Law permitting court control over the decision of the arbitrators on the jurisdictional issue, similar to article 16 (3) of the UNCITRAL Model Law. Unlike the old regime (under the Dutch Code of Civil Procedure), arbitral awards on any kinds are not appealable 'at all', even if the decision-maker manifestly misapplied the law.[9] Article 60 of the Arbitration Law specifically states that an arbitral award shall have the same effect on the parties as the final and conclusive judgment of the court. It is also stipulated in the Arbitration Law that application to set aside an award may only be made within 30 days as from the date the award was registered at the court.

It is important to note that the grounds for refusing enforcement of arbitral awards are not similar to those enumerated in Article V of the New York Convention or article 36 of the Model Law.

Unlike the Model Law,[10] the Arbitration Law does not regulate a stay procedure in connection with the enforcement of an arbitration award.

It should also be considered that under the Arbitration Law, the grounds for annulment are not in line with the grounds for 'declining' to enforce awards. Articles 70-72 of the Arbitration Law governs the very limited grounds12 and procedure for annulment of arbitral awards.[11]

The Indonesian Arbitration Law specifically provides grounds for refusing the enforcement of domestic arbitration awards, while there is no provision within the Indonesian Arbitration Law that specifically regulates the grounds for refusing enforcement of an international arbitration award.

It is also worth highlighting that the Indonesian Arbitration Law does not contain any express provisions regarding the grounds for non-enforcement, similar to those as enumerated in article V of the 1958 New York Convention. Therefore, it can be said that the Indonesian Arbitration Law provides more limited means to challenge international arbitral awards than those in article V of the New York Convention[12] or article 36 of the UNCITRAL Model Law. This situation can effectively make any attempts to resist enforcement of domestic arbitral award in Indonesia easier.

Procedure for enforcement of international arbitral awards

The Arbitration Law makes a distinction between national (domestic) and international (foreign) arbitration. According to article 1.9 of the Arbitration Law, 'international arbitral awards' are 'awards rendered by an arbitration institution or by individual arbitrator(s) outside the jurisdiction of the Republic of Indonesia or awards by an arbitration institution or individual arbitrator(s) which, under the provisions of Indonesian law are deemed to be 'international arbitration awards'.

To date, there is no provision of law that would give the status of international arbitration to any arbitral award rendered within Indonesia. Hence, in practice, we can say that arbitral awards rendered outside of the jurisdiction of Indonesia are 'international' awards, and awards rendered within Indonesia are 'national' awards.

The procedure, as well as grounds for refusal of enforcement of international awards is not entirely similar to those for refusal of enforcement of national awards. It is apparent that there is a slightly different treatment of national and international awards in respect of the enforcement of arbitral awards.

Despite the foregoing, the enforcement procedure for both national and international arbitral awards must begin with registration. In this respect, the arbitral award is required to be registered by the arbitrator or his proxy with the clerk's office of the relevant district court before it can be enforced.

In Indonesia, an international arbitral award may only be enforced after the chairman of the competent court has recognised and ratified the award through the issue of exequatur.[13] Unless the Republic of Indonesia is a party to the arbitrated dispute, the Indonesian Arbitration Law vests in the District Court of Central Jakarta jurisdiction to issue exequatur to enforce foreign arbitral awards in Indonesia.

In practice, before the chairman of the Court issues an exequatur, he or she will first examine whether both the nature of the dispute and the agreement to arbitrate meet the requirements set out in the Indonesian Arbitration Law. Apart from the availability of a valid and enforceable arbitration agreement, which gives jurisdiction to the arbitrator, this clearly means that the arbitral award should not be contrary to good morals and public policy.[14] The dispute resolved by the arbitral award is a dispute in the commercial sector and concerning rights, which according to laws and regulations, are fully controlled by the parties.[15] Thus, if parties are not allowed to dispose of their rights by compromise pursuant to applicable laws and regulations, they cannot arbitrate them.[16]

The Indonesian Arbitration Law[17] suggests that in response to an application for the enforcement of an international arbitral award, the court has to grant its exequatur an order to enforce the award in accordance with the Indonesian normal procedural law, unless (i) the award is rendered in a state that is not bound by a bilateral or multilateral convention or treaty with recognition and enforcement of foreign arbitral awards, by which Indonesia is bound;[18] (ii) the legal relationship on which the award was based cannot be considered as commercial under Indonesian law; or (iii) the recognition or enforcement of the award would be contrary to public policy.[19]

In response to an application for the enforcement of an award, as a general rule, the court may not review the reasoning of the award.

In Indonesia, the courts will enforce arbitral awards in the same way as the judgments of state courts (eg, seizure of movables or immovables, as well as of money claims, of the defendant against third parties).

1. Under the ICSID Convention, disputes between a foreign investor or locally incorporated foreign investment company and a state can, with the consent of all parties, can be referred to ICSID.
2. Article I (3) of the New York Convention offers the possibility to the contracting states to reserve the applicability of the Convention to 'awards made only in the territory of another Contracting State'.
3. There are abundant examples of the application of the first reservation. A court of appeal in Germany, which has used the first reservation, refused to apply the Convention to an award made in the United Kingdom at a time when it had not adhered to the Convention. Similarly, the Federal Supreme Court of Germany did not apply the Convention to a award made in Yugoslavia, a country which has still not become a Party to the Convention. See Albert Jan van den Berg, The New York

Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation, Kluwer Law and Taxation Publishers, 1994, at 13.

4. The Arbitration Law has 82 articles, divided into 11 chapters as follows: general provisions; alternative dispute resolution; arbitration conditions, appointment of arbitrators and the right of refusal; the procedure before the arbitration tribunal; opinion and arbitral decision; enforcement; annulment; termination; costs; transitional provisions; and concluding provision. There also is an official elucidation, which is not legally binding.
5. See the cases Pertamina v KBC and Government of Indonesia v Newmont.
6. See article 1 (3) of the Indonesian Arbitration Law.
7. See article 4 (2) of the Indonesian Arbitration Law.
8. See article 9 (1) of the Indonesian Arbitration Law.
9. For example, in Malaysia, the courts have the authority to appoint or remove an arbitrator or to extend the time for rendering an award, in order to discover or compel the appearance of witnesses. See KR Simmonds et al, Commercial Arbitration Law in Asia and the Pacific, Paris, ICC Publishing Sa, 1987, p. 129
10. In some countries, an award can be appealed to the competent state court within three months of the notification of the award under specific circumstances, including:

    the absence of a valid arbitration agreement;

    denial of a party's fair chance to present its case;

    violation of statutory or contractual stipulations as to either the composition of the arbitral tribunal or the decision-making of such tribunal;

    the failure of the arbitrators to sign the original copy of the arbitration award;

    dismissal of the challenge of an arbitrator although sufficient reason for the challenge existed;

    excessive exercise of the arbitral tribunal's jurisdiction (ultra petita);

    violation of Austrian public order or statutory provisions of Austrian law which cannot be avoided, even if the parties agree on the application of foreign law; and

    special circumstances for the reopening of civil procedures (including, for example, false testimony of witnesses). However, this ground may be waived in the arbitration agreement if such agreement is entered into by businessmen.
11. Article 34 (4) of the Model Law states: 'The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside'.
12. Article 70 of the Arbitration Law regulates the reason that can be used by any of the parties to file an application to court for annulment of an award is a presumption that the arbitral award made against it contains elements of falsification, fraud or the hiding of facts/documents.
13.

These provisions often raise issues. Problems arise because these provisions are vague and seem inconsistent. For example, while article 70 appears to be drafted in an exhaustive (as opposed to inclusive) mode, the General Elucidation to the Arbitration Law however suggests otherwise. It states: 'Chapter VII regulates the annulment of an arbitral award. This is possible for several reasons, among others: [the subsections of Art. 70 are cited]'. The limitative nature of this provision is an area of considerable debate among legal practitioners.

14. Under the 1958 New York Convention, challenges to enforcement of foreign arbitral awards fall into two broad categories: first, that a dispute is not subject to arbitration in the first place (inarbitrability defence) and second, that enforcement would be contrary to the public policy of the state in which enforcement is sought (public policy defence).
15. As a rule, in response to an application for enforcement of a foreign arbitral award, the court is obliged to grant its exequatur in order to enforce the award in accordance with the Indonesian normal procedural law, unless: (i) the award is rendered in a state which is not bound by a bilateral or multilateral convention or treaty on the recognition and enforcement of foreign arbitral awards, by which Indonesia is bound; (ii) the legal relationship on which the award was based cannot be considered as commercial under Indonesian law; or (iii) the recognition or enforcement of the award would be contrary to public policy.
16. See article 62 (2) of the Indonesian Arbitration Law.
17. See article 5 of the Indonesian Arbitration Law.
18. This approach mimics the classical test used in many civil law jurisdictions.
19. See article 66 of the Indonesian Arbitration Law.
20. The main treaty referred to in article 66.a is the New York Convention. Indonesia, however, has also entered into the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which applies to the recognition and enforcement of arbitral awards rendered by tribunals established within the International Centre for the Settlement of Investment Disputes (ICSID). This Convention was ratified by Indonesia on 28 September 1968 through Law No. 5 of 1968 dated 29 June 1968.
21. See article 66.a, b, and c of the Indonesian Arbitration Law.

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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 18th century. The first attempt at codifying the arbitration law was also made during the British rule, by enacting the Bengal Regulation in 1772 (the Regulation), 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 (CPC) was enacted for India that contained express provisions relating to arbitration. The 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.

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, the 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 enabled 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:

- 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; and recourse against arbitral awards and enforcement. Part II, on the other hand, provides for enforcement of foreign awards, being largely restricted to 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, criminal, insolvency or 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, including for injunction or for any appointment of receiver, etc; the appointment of an arbitrator in the event that a party fails to appoint an arbitrator or if two appointed arbitrators fail to agree upon the third arbitrator; terminating the mandate of the arbitrator; and 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 for 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 the arbitrator or arbitrators. In case of appointment of a sole arbitrator, it can be a predetermined individual already named in the arbitration clause, or by consensus of the parties, or by the intervention of the court under section 11. 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 or her 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 Kompetenz-Kompetenz principle 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 the matter cannot be raised again 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, then the procedure will be 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 from a country that is a signatory to the New York Convention or the Geneva Convention and notified by the government of India. To date, the government of India has notified around 40 countries for the purposes of foreign award enforcement. 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 those 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.

The Supreme Court in Bhatia International v Bulk Trading SA[4] extended part I of the Act to international commercial arbitration held outside India; however, 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).

Meanwhile, the Supreme Court, vide the ONGC v Saw Pipes judgment, widened the scope of 'public policy' by including 'patent illegality' within the ambit of 'public policy', which is now one of the grounds available for setting aside an arbitral award. Until that point, 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,[6] wherein the power of the chief justice in appointing an arbitrator was held to a judicial power, not an administrative one. 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 various High Courts have assumed jurisdiction in arbitration matters both onshore and offshore.

In recent years the Supreme Court – in Dozco India P Ltd v Doosan Infracore Co Ltd,[7] Videocon Industries v Union of India[8] and Yograj Infrastructure Limited v Ssang Yong Engineering and Construction Company Limited[9] – has helped to blur the requirement of 'express exclusion' of part I of the Act which was initiated by the Bhatia International case. However, in the past year, the Supreme Court, and various High Courts, have rendered judgments which can be considered arbitration-friendly. The foremost step towards this approach has been the prospective over-ruling of the Bhatia International judgment (as discussed below).

The view taken in the Bhatia International and Venture Global judgments came into consideration before a constitution bench of the Supreme Court in Bharat Aluminium v Kaiser Aluminium,[10] wherein the Supreme Court, overruling said judgments, with prospective application ruled in favour of non-intervention by Indian courts in arbitrations seated outside India. The Court, relying on the principles of territoriality, party autonomy and minimal judicial intervention, held that Indian courts did not have power to intervene in foreign arbitrations by way of either providing interim relief or entertaining a challenge to foreign arbitral awards in India. The Bharat Aluminium judgment has laid down the position that no interim relief would be available in foreign arbitrations (ie, arbitrations seated outside India either under the Civil Procedure Code, 1908 or section 9 of the Act). In addition, the judgment also reinforces the fact that the seat of arbitration would be the determining factor in deciding the curial law and that part I and part II of the Act apply to arbitrations seated in India and outside India respectively. This judgment has gone a long way in clearing past ambiguity (as discussed above) in the judicial pronouncements preceding it.

The Delhi High Court in NNR Global Logistics (Shanghai) Co Ltd v Aargus Global Logistices Pvt Ltd and Ors[11] was faced with the issue of validity of an application for the setting-aside of a foreign arbitral award, the seat of arbitration for which was in Malaysia and the curial law being the Malaysian Law. Applying the Bharat Aluminium judgment, the validity of this application was upheld as said judgment is applicable only to arbitration agreements executed after 6 September 2012.

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.

Another landmark judgment in the field of arbitration of the Supreme Court – a full-bench judgment – was Chloro Controls (I) P Ltd v Severn Trent Water Purification[17] in September 2012, which clarified the scope of a judicial authority to make reference to arbitration in case of multiple multiparty agreements, as well as the judicial authority's power to make a reference in cases of non-signatories, in exceptional circumstances. A similar view has been taken by the Delhi High Court in Delhi High Court in HLS Asia Ltd v Geopetrol International Inc & Ors,[18] where non-operators were considered to be a necessary party to the arbitration proceedings arising out of the arbitration agreement between operators and contractors, in view of the interrelationship between the operator and the non-operators.

Also pertinent to note is the judgment in Shakti Bhog Foods Ltd v Kola Shipping Ltd & Anr,[19] in the High Court of Delhi; the court held that the arbitrator's failure to disclose the fact that he had been an arbitrator on behalf of the respondent in an arbitration on a related issue gave rise to justifiable doubts as to his independence and impartiality; hence, the arbitral award was set aside on the ground that the constitution of the arbitral tribunal was invalid. It was further held that an award rendered by an arbitrator of whose independence and impartiality there are justifiable doubts is opposed to the public policy of India.

The Bombay High Court, in its recent decision in Sahyadri Earthmovers v L&T Finance Ltd,[20] has ruled that a guarantor would also be subject to arbitration provisions contained in the loan agreement even if he is not a party to the loan agreement and the deed of guarantee does not contain an arbitration clause.

These decisions indicate that the Indian courts have been less keen to interfere in arbitration matters, thereby adopting a pro-arbitration approach.

Consultation paper on arbitration: Indian legislature's efforts to introduce better legislation

As discussed above, persistent judicial interpretation and constant undermining 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 Pipes,[21] which was misused for challenging arbitration awards and also saw the filing of frivolous applications for objecting the enforcement of foreign awards. This particular ground for a challenge of award granted under section 34 of the new Act is vehemently misused and contravening views of the different High Courts are being highlighted under this provision of law. 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. In recognition of all these pitfalls in the Act, the Indian Ministry of Law and Justice took the much-needed step in addressing

the challenges being faced by arbitration in India and released the consultation paper on proposed amendments to the Act in 2010. The amendments proposed are as follows.

Part I of the Act: applicable only to arbitrations taking place in India

This amendment was 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. However, the Constitution Bench of the Supreme Court in the Bharat Aluminium judgment has settled this conflict by holding that the part I of the Act is not applicable to foreign seated arbitrations.

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

In 2010 the then-law minister Veerappa Moily 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 for the government departments and the public sector undertakings. It points out that the main cause for delay in arbitration proceedings has been poor drafting of arbitration agreements and clauses, and urges that these issues must be addressed soon.

Establishment of the LCIA 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 the London Court of International Arbitration India (the LCIA India) and the introduction of its LCIA India Rules (the Rules) have 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.

SIAC in Mumbai

The Singapore International Arbitration Centre (SIAC) has opened its first overseas office in Mumbai. Unlike LCIA, SIAC would not have separate rules for India. The office will not administer cases itself but will promote SIAC arbitration in India and help grow awareness of international best practice.

Development of ICC India

The International Court of Arbitration (ICA) of the International Chamber of Commerce (ICC) recently hired its first Indian lawyer to address the problems of judicial intervention in India, and also to expand its increasing visibility in India. Over the last couple of years, there has been an increase in the number of arbitrations referred to the ICC, as opposed to other arbitral institutions in India, and the ICA's move would certainly add to the advancement of ICC India, while also helping to improve India's reputation as an arbitration destination.

Foreign lawyers visiting India

The Madras High Court, in AK Balaji v Government of India & Ors,[22] held that, under the Indian Advocates Act, 1961, foreign law firms and lawyers cannot practise law in India without first enrolling with the Bar Council of India. However, foreign lawyers can visit India for a temporary period on a 'fly in and fly out' basis to advise their clients on aspects of foreign law. With regard to the aim and object of the international commercial arbitration introduced in the Act, the Madras High Court took the view that foreign lawyers cannot be debarred from coming to India and conducting 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 the settlement of domestic and cross-border disputes. Recent key developments have, in addition, successfully brought about a long-awaited renaissance in arbitration in India, indicating that it may well be seen as an arbitration-friendly country.

The authors would like to thank trainee Ratul Das for his assistance in this chapter.

1. State of Orissa v Gangaram Chhapolia and Anr. AIR1982 Ori 277.
2. Firm Ashok Traders v Gurumukh Das Saluja (2004) 3 SCC 155.
3. (2005) 8 SCC 618.
4. 2002(4) SCC 105.
5. (2008) 4 SCC 190.
6. (2003) 5 SCC 705.
7. Supra at 4.
8. (2011) 6 SCC 179.
9. 2011 (2) Arb. LR 180 (SC).
10. Civil Appeal No. 7562 of 2011, arising out of SLP No. 25624 of 2010, decided on 1 September 2011 by the Supreme Court.
11. (2012)9 SCC 552.
12. 2012 VII AD (Delhi) 125.
13. Appeal No. 114 of 2013, Bombay High Court.

14. AIR 2010 SC 3400.
15. 2010 (112) Bom. LR 2258.
16. 2011 (1) Arb. LR 244 (Delhi).
17. 2011 (113) Bom LR 74.
18. (2011) 8 SCC 333.
19. (2013)1 SCC 641.
20. 196 (2013) DLT 52.
21. 193 (2012) DLT 421.
22. 2013(2) Mh.L.J 302.
23. (2003) 5 SCC 705.
24. WP 5614 of 2010 and MP Nos 1, 3 to 5 of 2010, decided by the Madras High Court on 21.02.2012.

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Summary

The 2013 HKIAC Administered Arbitration Rules (2013 HKIAC Rules) will come into force on 1 November 2013. These Rules, which have been released and are now available on HKIAC's website,[1] are the culmination of an extensive review and public consultation process led by the HKIAC Rules Revision Committee[2] and involving leading practitioners, arbitrators and other stakeholders.

The end result is a sophisticated and innovative set of Rules which not only respond to HKIAC users' feedback following five years' use of the 2008 HKIAC Rules and ensure consistency with the amended Arbitration Ordinance, but also reflect best practice in international commercial arbitration.

That is not to say that the spirit of the 'light touch' style embodied in the 2008 HKIAC Rules has been changed. Users confirmed that the HKIAC's 'light touch' administrative approach, which recognised the importance of party autonomy, had been working very well. Nonetheless, the HKIAC Rules Revision Committee took advantage of the review process to bring the HKIAC Rules completely up to date, and indeed innovate in the realm of international arbitration.

The key changes: an overview

The 2013 HKIAC Rules implement a number of key changes in the following areas:

- the scope of the 2013 HKIAC Rules (article 1);
- the arbitrator appointment process, including the introduction of standard terms of appointments for arbitrators and an hourly fee cap3 (articles 9 and 10, schedules 2 and 3);
- the introduction of provisions for the consolidation of arbitrations and single arbitrations under multiple contracts, as well as amendments to the existing joinder provisions (articles 27, 28 and 29);
- greater guidance on interim measures of protection (article 23) and the introduction of an express power of the tribunal to order security for costs (article 24);
- the introduction of emergency relief provisions (corresponding changes to the Arbitration Ordinance also came into effect on 19 July 2013) (article 23 and schedule 4);
- improvements (by expansion) of the expedited procedure, including raising the applicable monetary threshold for its application from US$250,000 to HK$25 million (article 41); and
- greater clarity on the obligations of confidentiality (article 42).

Practice notes

As confirmed by article 3.12 of the 2013 HKIAC Rules, HKIAC will also be issuing practice notes to supplement the Rules. These practice notes will be made available on HKIAC's website, and may be amended from time to time as required.

Scope Of Application – Article 1

The first amendment was introduced right at the very beginning in article 1.1. A minor, but not insignificant, change has been made to that article: the 2013 HKIAC Rules will apply where an arbitration agreement provides for arbitration 'administered by HKIAC' or words to 'similar effect', rather than merely the 'same effect'.

This change was implemented to address frequently encountered situations where arbitration agreements, particularly those drafted in Chinese, indicated that the parties appeared to intend the HKIAC (Administered Arbitration) Rules to apply, but did not expressly say so.

(Old) article 1.3 of the 2008 HKIAC Rules, which dealt with situations where arbitration agreements provided for the application of the UNCITRAL Rules but with administration by HKIAC, has been deleted from the 2013 HKIAC Rules.

(New) article 1.3 of the 2013 HKIAC Rules confirms the prima facie position that the 2013 HKIAC Rules shall come into force on 1 November 2013 and shall apply to all arbitrations (falling within article 1.1) in which the notice of arbitration is submitted on or after 1 November 2013, unless otherwise agreed by the parties. This is uncontroversial and follows the usual practice, including old article 1.4 of the 2008 HKIAC Rules. Article 1.3, however, is subject to (new) article 1.4.

article 1.4 of the 2013 HKIAC Rules expressly carves out the consolidation (article 28), single arbitration under multiple contracts (article 29) and emergency relief (article 23.1 and schedule 4) provisions from article 1.3, and provides that, absent express contrary agreement of the parties, those provisions shall not apply to arbitrations arising out of arbitration agreements concluded before 1 November 2013. This approach acknowledges that those provisions will be new to existing users of the 2008 HKIAC Rules and therefore will not apply automatically to arbitrations arising from arbitration agreements entered into before the 2013 HKIAC Rules come into effect, even if the notice of arbitration is submitted on or after 1 November 2013. Nonetheless, the parties can agree to opt in to those provisions in agreements made prior to 1 November 2013. In this author's experience, parties are already choosing to opt in to some of these provisions (particularly the emergency arbitrator provisions) in their arbitration agreements, in order to be able to take advantage of those provisions when the 2013 HKIAC Rules come into effect (if the need arises).

Commencement Of The Arbitration – Articles 5 And 6

articles 5 and 6 have also been amended. For example, it is the parties, rather than HKIAC, who are now responsible for serving their notice of arbitration and answer to the notice of arbitration on all the other parties to the dispute (article 4.3(i) and article 5.3 (g)).

The parties are also obligated to provide their proposal regarding the designation of a sole arbitration or their designation of the relevant party-appointed arbitrator in the notice of arbitration or answer thereto, as appropriate. If the parties do not do this, and do not rectify the position upon request from HKIAC to do so, the notice or answer (as the case may be) will be deemed incomplete and, if it is the notice which is incomplete, the arbitration will be deemed not to have commenced.

This in particular is a welcome change as it serves to speed up the arbitral process and the constitution of the tribunal.[3]

Appointment Of Arbitrators – Articles 7, 8, 9 And 10

Under the 2013 HKIAC Rules, HKIAC has maintained the two different systems for calculating the fees of the tribunal: (i) by reference to hourly rates (schedule 2); or (ii) pursuant to a schedule of fees calculated within a certain range by reference to the amount in dispute (schedule 3).

Thus, in accordance with articles 9 and 10 of the 2013 HKIAC Rules, the designation of an arbitrator shall be confirmed by HKIAC on the terms of either schedule 2 or schedule 3, and subject to the corresponding fee system: hourly rates as prescribed by schedule 2 or in accordance with the fee schedule set out in paragraph 6.1 of schedule 3.

Again, as with the 2008 HKIAC Rules, where the parties are unable to agree on the method of determining the fees and expenses of the tribunal, and thus inform HKIAC of such agreement within 30 days of the respondent's receipt of the notice of arbitration, the default position will be that the tribunal's fees and expenses will be calculated by reference to hourly rates and schedule 2. So far, this tracks the 2008 HKIAC Rules.

However, two important changes have been introduced by the 2013 HKIAC Rules. The first is the introduction of an hourly fee cap for arbitrators, currently set at HK$6,500.5 Higher rates can only be charged by express written agreement of all the parties, or if HKIAC so determines in 'exceptional circumstances'.6 It would be fair to say that this amendment received the most attention and gave rise to vigorous discussion during the consultation process. Nonetheless, the HKIAC Rules Committee felt that this fee cap, and corresponding control over fees, was vital to ensure HKIAC's continued success in an ever-more competitive arbitration arena.

The second change is the introduction of standard arbitrator terms of appointment, which are set out in schedule 2 and schedule 3. These terms are essentially the same but have been set out separately in each schedule for the parties' ease of reference, and thus enable each schedule and fee system to stand alone. These standard terms can only be varied by agreement of all the parties, as well as any changes which HKIAC considers appropriate (article 9.2).

HKIAC anticipates that the uniformity created by these two features will facilitate negotiations around the appointment of arbitrators and accordingly streamline this process and the commencement of the substantive arbitration proceedings.

Interim Measures Of Protection And Security For Costs – Articles 23 And 24

The tribunal's power to order interim measures of protection is dealt with by article 23. This mirrors to a large extent sections 35, 36, 39, 40, 41 and 42 of the Arbitration Ordinance, which in turn implement articles 17, 17A, 17D, 17E, 17F and 17G of the UNCITRAL Model Law.

There are a couple of differences: article 23.3 of the 2013 HKIAC Rules expressly includes an interim measure being given in the form of an order (as well as an award or other form), as well as providing that the types of interim measure listed in article 23.3 (a) to (d) are given only by way of 'example and without limitation'.This contrasts with article 17 of the UNCITRAL Model Law (given effect to by section 35 of the Arbitration Ordinance), which provides an apparently finite, albeit comprehensive, list of interim measures of protection.

The tribunal's power to award security for costs, which mirrors section 56(1)(a) of the Arbitration Ordinance, is contained in article 24 of the 2013 HKIAC Rules. In initial drafts of the Rules, this power was contained within article 23. However, during the consultation process, practitioners expressed a desire to have that power carved out into a separate article. Hence the creation of article 24 – Security for Costs.

Emergency Relief – Article 23.1 And Schedule 4

The 2013 HKIAC Rules

The 2013 HKIAC Rules introduce the ability of a party to seek urgent interim or conservatory relief (referred to as 'emergency relief') from an 'emergency arbitrator' prior to the constitution of the tribunal.

The power of the parties to apply for such emergency relief can be found in article 23.1, with the substantive emergency relief procedure being set out in schedule 4. As noted above, these provisions are not retrospective in that they do not apply automatically where the agreement to arbitrate was signed before 1 November 2013 (ie, before the 2013 HKIAC Rules come into effect).

The introduction of emergency relief provisions reflects attempts to offer 'fast-track' options to parties requiring urgent relief, when in reality it can take weeks, and sometime even months, to constitute the tribunal. As emphasised in paragraph 22 of schedule 4, the emergency relief procedure is not intended to exclude the role of the courts in providing emergency protection in appropriate circumstances. Indeed, certain types of interim relief (for example, ex parte applications for freezing injunctions) are, for obvious reasons, likely to remain the domain of the national courts. Nonetheless, statistics from institutions which have already implemented emergency relief provisions7 demonstrate that parties are increasingly taking advantage of the ability to invoke the assistance of an emergency arbitrator and that this avenue of relief can in many circumstances (and for many varied reasons) be more attractive than seeking the same relief from the national courts.

Key features of the emergency relief provisions set out in schedule 4 include the following:

- the application for emergency relief can be filed concurrent with, or following, the filing of the notice of arbitration and prior to the constitution of the tribunal (paragraph 1);
- the applicant must also pay the 'application deposit' stipulated by HKIAC on its website, consisting of HKIAC's administrative expenses and the emergency arbitrator's fees and expenses (paragraphs 1 and 6);
- the emergency arbitrator's hourly rate is capped at the same rate applicable to the tribunal,8 although HKIAC has the power to increase the emergency arbitrator's fees and its own expenses taking into account the nature of the case and the work performed by the emergency arbitrator (paragraph 6);
- if HKIAC determines that it should accept the application, it must seek to appoint an emergency arbitrator within two days after receipt of both the application and the 'application deposit' (paragraph 5);
- after appointment of the emergency arbitrator, HKIAC must notify the parties and transmit the file to the emergency arbitrator (paragraph 7);
- the emergency arbitrator has complete discretion to conduct the emergency relief proceedings in any manner which he or she considers appropriate (paragraph 11);
- the emergency arbitrator may give emergency relief in the form of a decision, order or award ('emergency decision'), and such relief must be given within 15 days from when HKIAC transmitted the file to the emergency arbitrator, subject to this period being extended by agreement of the parties or by HKIAC in appropriate circumstances (paragraph 12);
- any emergency decision shall have the same effect as an interim measure granted pursuant to article 23 of the Rules (paragraph 16);

- a party can apply to the emergency arbitrator or the tribunal (once constituted) for a modification, suspension or termination of an emergency decision (paragraph 18);
- any emergency decision ceases to be binding if the emergency arbitrator or the tribunal so decides, upon the tribunal giving a final award (unless the tribunal expressly decides otherwise), upon the withdrawal of all claims or the termination of the arbitration, or if the tribunal is not constituted within 90 days from the date of the emergency decision (paragraph 19). Although this latter period can be extended by agreement of the parties or, in appropriate circumstances, by HKIAC, the parties should keep a close watch on this time period to ensure that the emergency decision does not expire before the tribunal is constituted;
- the emergency arbitrator's powers cease upon the constitution of the tribunal (paragraph 20), save that an emergency decision may be made even if the file has been transmitted to the tribunal (paragraph 13). Moreover, an emergency arbitrator cannot act as arbitrator on the tribunal, unless otherwise expressly agreed by all the parties to the arbitration (paragraph 21); and
- in all matters not provided for in schedule 4, the emergency arbitrator is to act in the spirit of the 2013 HKIAC Rules (paragraph 24). This provision mirrors article 13.7 and is important, not least because it grants wide powers to the emergency arbitrator to deal with situations not expressly contemplated by the Rules.

Consequential Changes To The Arbitration Ordinance

In conjunction with the drafting of the emergency relief provisions, HKIAC worked closely with the Hong Kong Department of Justice to draft complementary amendments to the Arbitration Ordinance to ensure that emergency relief granted by an emergency arbitrator (whether in or outside Hong Kong) would be enforceable in Hong Kong.

The Arbitration (Amendment) Bill 2013 was introduced into the Legislative Council of Hong Kong (LegCo) in April 2013 and subsequently passed in July 2013. The provisions relating to the enforcement of emergency relief came into force on 19 July 2013.

The relevant amendments introduce a new part 3A into the Arbitration Ordinance entitled 'Enforcement of Emergency Relief'. Within that part 3A, new section 22A adds a definition of an emergency arbitrator and new section 22B deals with the enforcement of the emergency relief.

Pursuant to section 22B(1), emergency relief, whether granted in or outside Hong Kong by an emergency arbitrator, is enforceable, with leave of the court, in the same manner as an order or direction of the court that has the same effect. Section 22B(2) adds a proviso to the effect that the court will only grant leave to enforce emergency relief granted outside Hong Kong if it is satisfied that the nature of the emergency relief is such that it could have been granted in Hong Kong.9 This was added simply as a matter of policy, and mirrors section 61 of the Arbitration Ordinance dealing with the enforcement of a tribunal's orders or directions.

The extent of the amendments and the speed with which they were settled by the Department of Justice, introduced into LegCo and brought into force on 19 July 2013 are testimony to the Hong Kong government's commitment to the continued development of international commercial arbitration in Hong Kong.

Multiple Parties And Contracts – Articles 27 – 29

Perhaps the most innovative changes introduced by the 2013 HKIAC Rules (in addition to the emergency arbitrator provisions discussed above) are the changes in article 27 (Joinder of Additional Parties), article 28 (Consolidation of Arbitrations) and article 29 (Single Arbitration under Multiple Contracts). As noted above, articles 28 and 29 do not have retrospective application and do not, therefore, apply automatically to arbitrations arising out of agreements to arbitrate entered into before 1 November 2013.

Increasingly, claims raised are subsets of the same dispute, involving multiple parties and, sometimes, multiple contracts. The changes introduced by articles 27 to 29 are designed to reflect this development and generally to deal with the growing complexity of commercial disputes involving multiple parties and contracts.

Joinder

In respect of joinder, the joinder provisions have been strengthened and expanded. In summary:

- HKIAC has been given the express power to join an additional party to the arbitration proceedings where the request for joinder is received before the tribunal is constituted (article 27.8); and
- the tribunal has the power to allow an additional party to be joined to the arbitration, provided that such additional party is bound by an arbitration agreement under the 2013 HKIAC Rules giving rise to the arbitration. Article 27.1 confirms that this includes any arbitration under article 28 or article 29.

Consolidation

article 28 is entirely new. It gives HKIAC the power to consolidate two or more arbitrations at a party's request and after consulting with all parties. In essence, the factors which HKIAC must take into consideration in deciding whether to consolidate are similar to the joinder criteria with an additional ground provided by article 28.1(c), namely where 'the claims are made under more than one arbitration agreement, a common question of law of or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and HKIAC finds the arbitration agreements to be compatible'.The timing of the application will be relevant – see article 28.3. Thus, a request for consolidation will have more chance of success when the constitution of the tribunals of the different arbitrations being considered for consolidation is at an early stage.

Single Arbitration Under Multiple Contracts

article 29 is also entirely new.[4] article 29 provides that claims arising out of or in connection with more than one contract may be made in a single arbitration provided that the conditions set out in article 29.1(a) to (d) are met. Again, these conditions are similar to the criteria for consolidation, except that article 29.1(a) expressly provides that all the parties to the arbitration must be bound by each arbitration agreement giving rise to the arbitration.

Waiver – Appointment Of Arbitrators

In respect of both joinder and consolidation, the parties give power to HKIAC to revoke the appointments of any arbitrators already designated or confirmed.11 Thus, article 27.11 (joinder) provides that where an additional party is joined to the arbitration before the tribunal is confirmed, all parties to the arbitration shall be deemed to have waived their right to designate an arbitrator, and HKIAC may revoke the appointment of any arbitrators

already designated or confirmed and proceed to appoint a new tribunal. Similarly, article 28.6 (consolidation) provides that where HKIAC decides to consolidate two or more arbitrations, the parties thereto shall be deemed to have waived their right to designate an arbitrator, and HKIAC may revoke the appointment of any arbitrators already designated or confirmed and proceed to appoint a new tribunal in respect of the consolidated proceedings.

Waiver – Enforcement Of Award

In all cases of joinder (article 27.13), consolidation (article 28.8) or single arbitrations under multiple contracts (article 29.2), the parties expressly waive12 any objection to the validity or enforcement of any award made by the tribunal in the arbitration on the basis of joinder, consolidation or the commencement of a single arbitration, as the case may be. This waiver is an important one, and emphasises the fact that by agreeing to arbitrate under the 2013 HKIAC Rules (excluding arbitration agreements entered into before 1 November 2013) the parties are thereby fully accepting the associated application of the joinder, consolidation and single arbitration under multiple contract provisions, and cannot use any action taken under those provisions to resist enforcement in the future.

Expedited Procedure – Article 41

Consistent with the trends to enable more arbitration proceedings to be fast-tracked when it would be appropriate to do so, the 2013 HKIAC Rules expand the application of the expedited procedure.

In addition to raising the monetary threshold for the application of the expedited procedure from US$250,000 (article 38.1 of the 2008 HKIAC Rules) to HK$25 million, the expedited procedure will also apply where (i) the parties agree and (ii) in cases of exceptional urgency (to be determined by HKIAC after considering the views of the parties).

HKIAC expedited arbitration proceedings will have the following features:

- the appointment of a sole arbitrator (unless the arbitration agreement provides for a tribunal of three arbitrators, in which case HKIAC will invite the parties to agree to refer the case to a sole arbitrator) (article 41.2(a) and (b));
- HKIAC may shorten both the time limits provided for in the Rules, as well as any time limits which it has set (article 41.2(c));
- the presumption is that the tribunal shall decide the dispute on the basis of documentary evidence only and the tribunal will only have oral hearings if it considers it appropriate to do so (article 41.2(e)); and
- the award shall be rendered within six months from the date when HKIAC transmitted the file to the tribunal. HKIAC retains the power to extend this deadline, but will only do so in exceptional circumstances (article 41.2(f)).

Pursuant to article 41.3, however, and even where the monetary claims fall under the HK$25 million threshold, the expedited procedure will not apply to any proceedings consolidated under article 28 or to any arbitration commenced under article 29 of the 2013 HKIAC Rules, unless the parties expressly agree otherwise.

Confidentiality – Article 42

Finally, as highlighted in the introduction, the confidentiality provisions have been clarified and now expressly reflect section 18 of the Arbitration Ordinance.

article 42.2 confirms that the obligations of confidentiality also apply to HKIAC, the tribunal (and any tribunal secretary), any emergency arbitrator appointed, and any expert or fact witness.

article 42.5 retains HKIAC's power to publish awards.[5] Specifically, an award will only be published (whether in full form, summary form or by way of an extract) where a specific request has been made to HKIAC, the parties' names have been deleted from the award and no party to the award has objected to such publication within the time limit set by HKIAC. This is an important function and there was overwhelming support for its retention, but the parties similarly retain the power of veto should they wish to keep the award entirely confidential.

Conclusion

This article set out to explore whether the 2013 HKIAC Rules are a game-changer for Hong Kong arbitration; the author's personal view is that they are. That is not to say that the 2008 HKIAC Rules were not working well, because they were. Nonetheless, the 2013 HKIAC Rules are state of the art and have already generated a great deal of discussion and interest. There can be no doubt that Hong Kong has for a long time been a serious player in the world of international commercial arbitration, but the introduction of the 2013 HKIAC Rules – which follows hot on the heels of the unveiling of HKIAC's fabulous new premises – arguably puts Hong Kong at the forefront of arbitration centres worldwide.

1. www.hkiac.org.
2. HKIAC Rules Revision Committee: Chiann Bao (Secretary-General, HKIAC); Matthew Gearing (Council Member, HKIAC and Chairperson of HKIAC Rules Revision Committee); Peter Caldwell (Council Member, HKIAC); Justin D'Agostino (Council Member, HKIAC); Joe Liu (Allen & Overy, Hong Kong); Michael Moser (Honorary Chairperson, HKIAC); Kathryn Sanger (Council Member, HKIAC) and Briana Young (Herbert Smith Freehills, Hong Kong).
3. Currently HK$6,500 per hour.
4. Under the 2008 HKIAC Rules, the parties were given the option of designating their respective arbitrators, or giving their proposals as to a sole arbitrator.
5. This compares with the LCIA's current hourly rate of £450 (effective 30 March 2013). Pursuant to paragraph 9.4 of schedule 2, an arbitrator may increase his or her hourly rate by up to 10 per cent on each anniversary of the confirmation of his or her appointment. It should be borne in mind that this is a maximum sum, and that many arbitrators arbitrating under the 2013 HKIAC Rules will charge below this cap.
6. Paragraph 9.5, schedule 2.
7. Similar provisions can be found in the ICC Rules, SCC Rules, Swiss Rules and the SIAC Rules. SIAC reports that as at July 2013, 27 applications for emergency relief have been made since the SIAC Rules (4th Edition – which first introduced the emergency relief provisions) came into force on 1 July 2010.
8. Currently HK$6,500 per hour.
9. In this regard, section 22B(2) (a) – (f)) sets out a comprehensive but exhaustive list of interim measures recognised under the Arbitration Ordinance, taken from Sections 35, 40 and 56 of the Arbitration Ordinance.
10. article 29 is similar to article 9 of the 2012 ICC Rules.

11. Like all powers granted to HKIAC, this express power is granted by virtue of the parties' agreement to arbitrate under the 2013 HKIAC Rules, and is consistent with the provisions of the Arbitration Ordinance; see for example article 15 of the UNCITRAL Model Law, given effect to by section 28 of the Ordinance.
12. To the extent such waiver can validly be made.
13. See article 38.3 of the 2008 HKIAC Rules.

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Bangladesh

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Introduction

Economic growth in emerging countries like Bangladesh depends on a number of factors. One such important factor is the growth of foreign investments, which leads to foreign parties engaging in business ventures in Bangladesh. In the course of business, when disputes arise, these foreign parties do not necessarily want to submit their disputes to the local courts in Bangladesh. There are several reasons for this choice. One of the main reasons for this is the unacceptable delay in getting a dispute resolved through courts. Generally, local courts in Bangladesh are overburdened with cases and marred with delays. As a result, parties prefer to resolve their disputes through arbitration.

Arbitrations in Bangladesh are not new. However, the development of arbitration laws and the positive shift in the general attitude of the judiciary with respect to arbitrations in Bangladesh is a welcome change for the inexorably running litigants. Arbitrations in Bangladesh are governed by the Arbitration Act 2001 (the Act), which came into force on 10 April 2001. Before the Act, arbitrations in Bangladesh were governed by the Arbitration Act 1940 (the 1940 Act). The 1940 Act allowed the arbitration parties to seek the help of the courts at almost every stage of the arbitration causing enormous delay to the dispute resolution process, thereby defeating the very purpose of arbitration. In order to stop this interventionist approach of the local courts and to expedite the arbitral process, the legislature enacted the Act in an effort to modernise the outdated 1940 Act.

The Act attempts to synchronise Bangladesh's existing arbitration laws with the 1985 UNCITRAL Model Law on International Commercial Arbitration (the Model Law), which is widely used across the globe. To that effect, the Act's sections pertaining to the definition of arbitration agreements, arbitrator numbers, time limits and party autonomy are similar, often verbatim, from the Model Law. However, not all of the Model Law's provisions were adopted. The Act is still a work in progress and it is hoped that the legislature will make some changes in order to modernise the law even further and in line with the developed arbitral jurisdictions. This chapter purports to try and highlight some of the important points for foreign parties with respect to arbitrations in Bangladesh. Due to space restrictions, it is not possible to highlight all the sections of the Act. The author has used his own discretion to select certain areas for discussion which, from a practical point of view, foreign parties must know.

Application of the Arbitration Act 2001

Though the Act applies to both domestic and foreign arbitrations, it was enacted with the specific objective of addressing international commercial arbitration and recognising and enforcing foreign arbitral awards. It is noteworthy that, for an arbitral proceeding to be defined as an 'international commercial arbitration', one of the parties of the dispute must be one of the following:

- a national of, or habitual resident, of any country other than Bangladesh;
- a body incorporated in a country other than Bangladesh;

- a company whose central management and control is exercised in a country other than Bangladesh; or
- the government of a foreign country.[1]

It is therefore apparent from the wording of the statute that the Act relies on the nationality of the parties in order to give it the status of an international arbitration, as opposed to the international seat or nature of the dispute, as stated in article 1(3) of the Model Law. Therefore, while disputes between a Singaporean company and a company in Bangladesh may fall within the purview of the Act, a dispute between two Bangladeshi companies operating in London may not. It is also interesting to note that, for a dispute to come under the ambit of this provision, it must be considered to be a 'commercial dispute' under the laws of Bangladesh, which may be a more restrictive definition than that employed by the Model Law, where it is stated that the term 'commercial' must be given a wide interpretation so as to cover all matters of a commercial nature.

Moreover, the meaning of international commercial arbitration under the Act is further circumscribed by section 3(1) of the Act, which states that the Act 'shall apply where the place of arbitration is in Bangladesh'. Recognition and enforcement of foreign awards – ie, awards rendered in jurisdictions outside of Bangladesh – provides the only exception to this. Section 3 of the Act embodies a restrictive 'territorial principle', whereby only arbitration that is considered to take place in Bangladesh falls within the purview of the Act. This has caused considerable confusion as to what 'place... in Bangladesh' means. The High Court Division of the Supreme Court of Bangladesh, in the case of HRC Shipping Ltd v MVX-Press Manaslu and Others (HRC Shipping),[2] opted for a wide interpretation of the term. The reasoning behind the Court's view was that the Act was prepared, in the spirit of establishing an uniform legal framework, for the fair and efficient settlement of disputes arising in international commercial arbitration, as embodied in the Model Law. Drawing upon the reasoning used in the landmark Indian case, Bhatia International v Bulk Trading SA,[3] the Court held that the Act itself did not state that it will not apply if the place of arbitration is 'not' in Bangladesh or that it would apply 'only' if the place of arbitration is in Bangladesh. On a similar note, the Court further observed that a distinction had not been drawn between international commercial arbitration taking place in Bangladesh and that taking place outside Bangladesh. As a result, the Court gave a liberal interpretation to the scope of the Act.

In contrast, in a later judgment delivered in STX Corporation Ltd v Meghna Group of Industries Limited (STX Corporation),[4] another Bench of the High Court Division adopted a literal construction of section 3(1) of the Act. In support of such an interpretation, the Court cited the case of Unicol Bangladesh v Maxwell,[5] where the Appellate Division of the Bangladesh Supreme Court stated in unequivocal terms that 'the law in section 3(1)… is limited in application as to the arbitration being held in Bangladesh'.Thus, it can be seen that the Bangladeshi courts have come to conflicting decisions on the very same provision (ie, the scope of the Act). This has caused considerable consternation for the legal community and, in particular, foreign parties involved in foreign arbitration proceedings with Bangladeshi companies, as it is unclear what assistance the Bangladeshi courts may give to such proceedings.

The construction of section 3 of the Act in the STX Corporation case is regressive in terms of the development of arbitration laws in Bangladesh, as it leaves open the possibility that the innocent party, after undertaking expensive arbitration proceedings, is left with little more

than a paper award. To allow for such a result would be against the spirit of the New York Convention, to which Bangladesh is a party. These judgments have left a lurking danger for the international community as they may see themselves in a situation where they have successfully contested, or are contesting, an expensive international arbitration, but have no access to assets of the losing Bangladeshi party, as they have been transferred or sold before the award is enforced in Bangladesh. The issue is most prominent[6] in the case of interim remedies and will be briefly described in 'Interim measures', below.

Court's power to intervene in arbitrations

The 1940 Act allowed the Bangladeshi courts to have an interventionist role in arbitration proceedings but the Act curbed much of these powers in order to give the local courts a more supervisory role to facilitate arbitrations in Bangladesh. Section 7 of the Act restricts the court to decide matters where one of the parties to an arbitration agreement files the court proceeding. In the case of Bangladesh Jute Mills Corporation v Maico Jute and Bag Corporation & Others,[7] this principle was upheld. A caveat to this section has been inserted through section 7A of the Act, which empowers the local courts to make interim orders in respect of certain matters, such as, inter alia, interim injunctions to restrain the transfer of property which is likely to create an impediment to the enforcement of the arbitral award.

Section 10 of the Act complements section 7 of the Act and is closely modelled on article II (3) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Section 10 ensures that no Bangladeshi court shall interfere with a matter that is subject to an arbitration agreement between the contending parties. If a party to an arbitration agreement commences litigation in a Bangladeshi court over a certain matter and the other party objects to this before the filing of the statement of defence, then the Bangladeshi court shall, unless convinced that the agreement is void, inoperative or incapable of determination, stay the proceedings and refer the parties to arbitration. This section affirms the widely accepted principle that the right to seek arbitration is a contractual right and a contract cannot be unilaterally abrogated in order to bypass the arbitration clause. It is important to note here that the use of the term 'shall' implies that the local court is under a positive obligation to refer the parties to arbitration and not merely a discretion, which is to be exercised sparingly by the court. This positive obligation under section 10 of the Act reinforces the spirit and letter of the New York Convention.

Domestic cases have evinced the local court's intention to apply such principles strictly. For example, in the case of Civil Engineering Company v Mahkuta Technology & Others,8 it has been held that the court shall not interfere with a matter covered by an arbitration agreement and those who agree to settle their disputes through arbitration must be encouraged to follow that route. However, a limitation to this provision, as illustrated by Seafarers Insurance Co v Province of East Pakistan,[8] is that the party contending the suit must raise its objection with respect to the arbitration before the filing of the statement of defence. After that stage, there is no scope for referring the dispute to arbitration and the local court becomes vested with the jurisdiction for adjudicating the dispute. This is because, once the written statement has been submitted, the local court infers that the contending parties have agreed to supersede or abandon the arbitration agreement. However, a significant development in this respect is the amendment and the introduction of section 89B of the Code of Civil Procedure 1908. Under this section, if the parties to a suit, at any stage of the proceeding, apply to the court for withdrawal of the suit on the ground that they will refer the dispute to arbitration, then the local court shall allow the suit to be withdrawn and thereafter the dispute

shall be settled in accordance with the Act. This has been a recent welcome change by the legislature in order to promote the use of arbitrations in Bangladesh.

The New York Convention and the recognition and enforcement of foreign arbitral awards

An important yardstick for any country, in order to assess how developed its arbitration laws are, is the application of the New York Convention. This is an important question on the minds of many foreign investors and parties in arbitration agreements with their Bangladeshi counterpart. As many cross-border commercial disputes relating to Bangladesh are resolved through commercial arbitration in a foreign jurisdiction, it is necessary to consider and understand the enforcement regime of foreign awards in Bangladesh. Bangladesh ratified the New York Convention on 6 May 1992 and the Convention entered into force on 4 August 1992. This was a noteworthy step towards aligning Bangladesh's arbitration regime with that of the rest of the world.

The Arbitration (Protocol and Convention) Act 1937 and the Arbitration Act 1940, which were in force at the time when Bangladesh acceded to the New York Convention, were not designed to keep pace with the rapid strides that had been made in the international arbitration world since their enactment. Under such dated legislation, there were no mechanisms for enforcing foreign arbitral awards in Bangladesh. Also, there was no domestic statute which incorporated the New York Convention in municipal law, so as to create a scope for foreign arbitral awards to be enforced in Bangladesh. As a result of such legal lacunae, courts, such as the one in Bangladesh Air Service (PVT) v British Airways PLC,[9] did not show much inclination towards applying the New York Convention to the issues of recognition and enforcement of foreign arbitral awards.

To resolve such an impasse, the legislature incorporated most of the terms of the New York Convention into the Act. Section 45 of the Act embodies Article III of the New York Convention, in that, it makes a foreign arbitral award binding for all purposes on parties to the arbitration agreement and such an award can be executed by the local court as if it was a decree of the local court. This principle has been upheld in the case of Canada Shipping and Trading SA v TT Katikaayu and another (Admiralty Jurisdiction),[10] where it was held that, 'Once an arbitration proceeding in a foreign country is completed, the Arbitral Award, on an application by any party, will be enforced by a court of this country under the Civil Procedure Code in the same manner as if it were a decree of the court.' Thus, there is no requirement to obtain a separate permission from the local court for enforcement.

In terms similar to that in article V of the New York Convention, there are grounds on which local courts may refuse the recognition and enforcement of a foreign arbitral award. Under section 46 of the Act, the court may refuse to execute a foreign arbitral award if a party against whom such award is invoked is able to provide evidence that:

- they were not given proper notice of the appointment of the arbitrator or the arbitral proceedings;
- they were unable to present their case for reasonable causes;
- a party to the arbitration agreement was acting under some incapacity;
- the agreement is not valid under the law to which the parties have subjected it;
- the award contains decisions on matters beyond the scope of the issue(s) submitted to arbitration;
-

the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the arbitration agreement or in the absence of such an agreement, the law of the country where the arbitration took place;

- the award had not yet become binding on the parties; or
- it had been set aside by a competent authority of the country in which, or under the law of which, the award was made.

Additionally, the local court may also refuse to execute the arbitral award if the subject matter of the dispute cannot be settled under the existing laws of Bangladesh or is in conflict with the public policy of Bangladesh.[11]

Though the new Act embodies a concerted effort by Bangladesh to keep pace with the recent trends in international commercial arbitration, there are some respects in which the Act does not meet the standards of the New York Convention. For instance, the evidence required for filing an application under the Act to execute a foreign arbitral award is more onerous, whereby the applicant has to submit to the court 'such evidence as may be necessary to prove that the award is a foreign award',[12] in addition to filing the original or authenticated copy of the arbitral award, an original or certified copy of the arbitration agreement and duly certified translations of such documents, if required.

Under section 47 of the Act, foreign arbitral awards are defined as being awards made in pursuance of an arbitration agreement in the territory of any state other than Bangladesh, except such states specified by the government of Bangladesh through a gazette notification. Therefore, as the Act only considers the territoriality of the arbitral award rather than the lex arbitri under which the award was rendered, the scope of the Act is much narrower than either the Model Law or the New York Convention. Furthermore, the provision that the government of Bangladesh will be able to specifically exclude the foreign arbitral awards delivered in certain states means that courts will be able to disrupt the enforcement of foreign awards by finding that the arbitration has taken place on the territory of a specified state. If a member state of the New York Convention is so specified, then that will run contrary to the spirit of the New York Convention whereby arbitral awards rendered in a member state are enforceable in the jurisdictions of all other New York Convention member states.

Interim measures

Another interesting – and fairly topical – matter is that of interim remedies, and whether local courts in Bangladesh may issue them in order to aid or support an arbitration taking place outside of Bangladesh. As discussed above, Bangladeshi courts have come to conflicting decisions in respect of the scope of its powers over arbitration seated outside of Bangladesh. The two relevant decisions, HRC Shipping and STX Corporation, dealt with the role of Bangladeshi courts in arbitrations seated outside of Bangladesh. In both these cases, the Bangladeshi courts have reached decisions starkly different to one another. The controversy appears to have stemmed from the meaning of section 3 of the Act.

The HRC Shipping case arose out of a dispute in relation to the shipment of goods under a charter agreement. Under the relevant agreement, HRC shipped certain cargo in 53 containers to Sri Lanka from Bangladesh. However, much of the cargo was dropped into the sea and washed away when the ship was hit by a tsunami. HRC submitted that the loss was not only due to the tsunami but also due to the negligence of the ship's crew. As a result, HRC claimed compensation and damages, through the Bangladeshi courts, by instituting an admiralty suit. However, since the charter agreement contained an arbitration clause, the

defendant Nos. 5 and 6 commenced arbitral proceedings in London and applied for the suit to be stayed under section 10 of the Act. The issue before the Bangladeshi court in the suit was whether it should stay the local proceedings in favour of the arbitration in London. The defendant Nos. 5 and 6 argued that section 10 of the Act requires the suit to be stayed in favour of arbitration, whereas HRC argued that, since the arbitration proceedings were taking place in London, section 3 of the Act did not allow the court to stay the proceedings in favour of a foreign arbitration, seated outside of Bangladesh. Upon hearing submissions from both parties, the court concluded that section 10 of the Act requires the courts in Bangladesh to stay the local proceedings in favour of arbitration unless it finds that the arbitration agreement is void, inoperative or is incapable of determination by arbitration.

In contrast, the court in the STX Corporation case came to the exact opposite decision on the very same point. The STX case arose out of a supply contract between STX Corporation Ltd, a foreign company, and Meghna Group of Industries Limited, in Bangladesh. The contract contained an arbitration agreement under which any dispute in relation to the contract was to be resolved through arbitration in Singapore. Disputes arose under the contract and arbitration was thus commenced in Singapore. While the arbitration proceedings were pending, STX filed for an interim order in the Bangladeshi court against some of the respondents under section 7A of the Act to restrain those respondents from transferring or selling off their assets so as to prevent them from avoiding their obligations under the forthcoming arbitral award. The main issue for the court was whether interim remedies could be provided in cases of foreign arbitration, seated outside of Bangladesh, under the Act. In this case, STX argued that the court should adopt a purposive approach towards interpreting the Act. After hearing the parties, the court started with a plain reading of section 3 of the Act and held that the legislature intended for the Act to apply only when the arbitration proceeding is in Bangladesh. In relation to the interpretation of statutes, the court held that the literal construction of a statute is 'the golden rule of construction' and that when words in a statute are clear and unambiguous, they should be construed according to their tenor and meaning, as this most clearly reflects the intention of the legislature. The court further explained that, while interim measures for foreign arbitration were provided for in other jurisdictions, until and unless parliament enacts such a provision explicitly in the Act, such measures cannot be granted in Bangladesh. The court relied on the case of Uzbekistan Airways v Air Spain Limited, where the appellate division held that:

> In that view of the matter, it appears that the scope of section 10 of the Act is well settled and it has been decided more than once by the Appellate Division... that section 10 of the Act does not apply to foreign arbitral proceedings.

As a result, the court held that since the Appellate Division had categorically ruled on this issue, there was no further scope for the High Court to depart from their findings in light of the binding precedent rule enshrined in article 111 of the Constitution of the People's Republic of Bangladesh.

This stark difference in the court's approach is most important in the case of interim remedies as parties are unable to seek the protection of Bangladeshi courts if, for example, the losing party decides to transfer or sell their assets in order to frustrate the whole arbitral process, the very issue in the STX Corporation case. The importance of interim remedies cannot be understated. The purpose of such remedies is generally to uphold and support the arbitral process and prevent any steps from being taken by the losing party which may cause irreparable harm to the process by making the enforcement of the award impossible.

While arbitral tribunals can order interim relief, it is an accepted fact that there may be a number of situations where only local courts can effectively address the potential harm to the arbitral process.

Conclusion

This chapter considered some of the interesting key provisions of the Act and tried to show, along with the problems, how the Bangladeshi arbitration landscape has evolved over the years in line with the spirit of the New York Convention. Bangladesh is not the only South Asian state with problems relating to arbitration laws. In most cases, it is not the arbitration law itself but the interpretation of it by the judiciary which poses a threat to the development of arbitrations in South Asia. Ratifying the New York Convention is one thing; its efficient implementation by the local courts is quite another. There is no point in ratifying the New York Convention unless the concerned state is willing to honour the obligations thereof. The only way to deal with this is through advanced education and more regular judicial contacts with this area of law.

Nonetheless, Bangladesh is making excellent strides in the field of arbitration. We only hear of problem cases, since they provide for a more interesting read, and scholars tend to concentrate more on the pathological issues. In the vast majority of cases arbitrated in Bangladesh, awards are not regularly refused enforcement or set aside and local courts have been successful in keeping up the letter and spirit of the New York Convention.

The author would like to thank Morshed Mannan, a research assistant at Sattar&Co, for his assistance with this chapter.

1. Section 2(c) of the Act.
2. 1 LCLR [2012], Vol. 2, pp. 207-22.
3. 2002 AIR (SC) 1432.
4. 1 LCLR [2012] Vol. 2, pp. 159-178.
5. 56 DLR (AD) (2004) 166 at 171.
6. For a thorough discussion on interim remedies, please see S Sattar, 'Bangladeshi courts at odds in respect of its powers in relation to arbitrations seated outside of Bangladesh' [2013] IntALR, Issue 1, p.20.
7. 22 BLD (HCD) (2002) 320.
8. 14 BLT (HCD) (2006) 103.
9. 20 DLR (SC) (1968) 225 at 228.
10. 49 DLR (AD) (1997) 187 at 196.
11. 54 DLR (2002) 93 at 94.
12. For a thorough discussion on public policy in the Indian context (which carries persuasive authority in Bangladesh), please see S Sattar, 'Enforcement of arbitral awards and public policy: Same concept, different approach?', [2011] Vol. 8(5) Transnational Dispute Management Journal.
13. Section 45(2)(c) of the Act.
14. 10 BLC (2005) 614 at 616.

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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, with 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.

Since 2010, changes to the Australian arbitration landscape both internationally and domestically have helped to develop Australia as an attractive hub for international arbitration, and have 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) represent 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 and user expectations, and is ready to grasp the 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 amendment was to ensure that the IAA remains at the forefront of international arbitration practice, and to develop Australia's status as a major centre for international arbitration.

The Amendment Act introduced many significant changes to the IAA. Principally, the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration (Model Law) has now replaced 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 were therefore repealed. The enforcement of interim measures is now covered by article 17H of the Model Law.

There were 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 the authority for the proposition – under the old IAA – that where the parties selected the ICC Rules of Arbitration, they had contracted out of the Model Law. As a result, the domestic arbitration legislation of the states and territories, the largely uniform

Commercial Arbitration Acts, would have applied. More 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 have also taken 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 was a significant step forward in modernising Australia's domestic arbitration legislation and bringing domestic arbitration legislation into alignment with the federal system (that is, the IAA). The transition to arbitration under the Model Law has also meant that practitioners of domestic arbitration in Australia have been able to transfer their procedural skills to the 60-plus foreign jurisdictions where the Model Law is in force. For the parties involved in arbitration, these amendments have increased the efficiency of the arbitral process, which has translated into greater cost and time savings. The current progress of the CAAs through the Australian states and territories is as follows:

Passed and in operation	Passed but not yet in operation	No Action
Victoria: Commercial Arbitration Act 2011 (VIC)	Western Australia- : Commercial Arbitration Act 2012 (WA)	Australian Capital Territory: yet to introduce a bill into parliament
Victoria: Commercial Arbitration Act (Vic) 2011		
South Australia- : Commercial Arbitration Act (SA) 2011		
Northern Territory- : Commercial Arbitration (National Uniform Legislation) Act 2011 (NT)		
Tasmania: Commercial Arbitration (Consequential Amendments) Act 2011 (TAS)		
Queensland: Commercial Arbitration Act 2013 (QLD)		

Unlike the IAA, the CAAs include confidentiality provisions, which apply unless the parties specifically opt out, and allow for an appeal from the arbitration award if certain preconditions are met. Another significant change under the CAAs was that the exercising of the courts' power to stay court proceedings in the presence of an arbitration agreement was made compulsory, removing the courts' discretion to stay proceedings that was previously available.

Following these amendments to the IAA, the Commonwealth Parliament 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 more 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). Furthermore, ACICA has adopted an opt-in approach for these rules, requiring parties to explicitly select them (rather than the ACICA Rules) in their arbitration agreement.

ACICA has also updated its Arbitration Rules to include a set of 'Emergency Arbitrator' provisions which are found in schedule 2 of the ACICA Rules. 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 not only accept arbitration according to the ACICA Rules, but also agree 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 which must be made in writing and which must 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 have provided 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 removed 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.

In giving effect to its 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 the Federal Court of Australia, 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 will take place efficiently and that a nomination will 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 (CIArb) 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 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, the country 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 the 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, underwent a revision in 2010 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 has also provided 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 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 thus commonly referred to as the 'Uniform Acts'. As mentioned above, the commercial arbitration acts are currently undergoing significant reforms. With the vast majority of states and territories having passed or in the course of passing the new legislation, the CAAs will ensure that Australia has a largely 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 (which has passed but is yet to enforce the new legislation) and the Australian Capital Territory (which is yet to introduce a bill into parliament). 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 an 'arbitration agreement is in writing if its content is recorded in any form that provides a record of the agreement, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means'. Under the IAA, the term 'agreement in writing' has the same meaning as under the New York Convention.

Similarly, domestic arbitrations under both the Uniform Acts and the CAAs require an arbitration agreement to be in writing. However, in contrast to the Uniform Acts, the CAAs adopt the more expansive definition contained in article 7 of the Model Law. Additionally, the CAAs provide 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), (formally known as the Trade Practices Act 1974 (Cth) (TPA)), Australia's competition and consumer protection legislation. In IBM Australia v National Distribution Services (1991) 22 NSWLR 466, the New South Wales Court of Appeal held that certain consumer protection matters under the TPA are capable of settlement by arbitration. Further, the New South Wales Supreme Court in Francis Travel Marketing v Virgin Atlantic Airways (1996) 39 NSWLR 160, and the Federal Court in Hi-Fert v Kiukiang Maritime Carriers (1998) 159 ALR 142, confirmed that disputes based on misleading and deceptive conduct under section 52 of the TPA are arbitrable.

However, in Petersville v Peters (WA) (1997) ATPR 41-566 and Alstom Power v Eraring Energy (2004) ATPR 42-009, the Federal Court took a slightly different position. It held that disputes under part IV of the TPA for anti-competitive behaviour are more appropriately dealt with by the court, irrespective of the scope of the arbitration agreement. These decisions show that courts may be reluctant to allow the arbitrability of competition matters and may seek to preserve the courts' jurisdiction to hear matters that have a public dimension.

An increasingly common issue faced by the courts is that which arises when multiple claims are brought by one party, only some of which are capable of settlement. So far, the courts have approached this issue by staying court proceedings only for those claims it considers capable of settlement by arbitration (see Hi-Fert v Kiukiang Maritime Carriers (1998) 159 ALR 142).

Third parties

There are very limited circumstances in which a third party who is not privy to the arbitration agreement may be a party in the arbitral proceedings. One situation in which this can occur is in relation to a parent company where a subsidiary is bound by an arbitration agreement, though this exception is yet to be finally settled by Australian courts. There is, however, authority suggesting that a third party can be bound by an arbitration agreement in the case of fraud or where a company structure is used to mask the real purpose of a parent company (see Sharrment Pty Ltd v Official Trustee in Bankruptcy (1988) 18 FCR 449).

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

Similarly, under the CAAs, a party may obtain a court order compelling a person to produce documents under section 27A. The Uniform Acts also allowed 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 qualifications, 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, under section 18A, supplements the justifiable doubt test required by articles 12(1) and (2) of the Model Law by stating that a justifiable doubt as to the arbitrator's impartiality or independence exists only where there is 'a real danger of bias on the part of [the arbitrator] in conducting the arbitration'.

Where the parties fail to agree on the number of arbitrators to be appointed, section 10 of the CAAs provides for a single arbitrator to be appointed while section 6 of the Uniform Acts and article 10 of the Model Law provide for the appointment of a three-member tribunal. 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 sections 11 and 8 of the CAAs and Uniform Acts, respectively, 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 only 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 those found under article 11 of the ACICA Rules.

Challenge Of Arbitrators

For arbitrations under the IAA and the CAAs, a party can challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence. The parties are free to agree on a procedure for challenging arbitrators. Failing

such agreement, article 13(2) of the Model Law and section 13 of the CAAs prescribe the procedures for international arbitrations and domestic arbitrations respectively. These are substantially the same: initially the party must submit a challenge to the tribunal, but may then apply to a competent court if the challenge has been rejected.

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.

For domestic arbitrations under the Uniform Acts, 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).

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

Like the Uniform Acts, the CAAs contain 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

The CAAs, at section 39; the Uniform Acts, at section 51; and the IAA, at section 28 all 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 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, provided they comply with fundamental principles of due process and natural justice. Party autonomy is a fundamental principle of the Model Law and, subject to certain mandatory requirements, parties are free to determine the procedure to govern the arbitration (article 19 of the Model Law). The most significant limitation on party autonomy is the requirement of article 18 of the Model Law that parties be treated with equality and 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, with the exception of the Uniform Acts for Western Australia 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 of the Model Law);
- appoint arbitrators where the parties or the two party-appointed arbitrators fail to agree on an arbitrator (articles 11(3) and 11(4) of the Model Law);
- decide on a challenge of an arbitrator if so requested by the challenging party (article 13(3) of the Model Law);
- decide, upon request by a party, on the termination of a mandate of an arbitrator (article 14 of the Model Law);
- 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) of the Model Law);
- assist in the taking of evidence (article 27 of the Model Law); and
- set aside an arbitral award (article 34(2) of the Model Law).

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 under the Uniform Acts, courts have some additional powers, including discretion to stay proceedings (section 53 of the Uniform Acts) and power to review an award for errors of law (section 38 of the Uniform Acts).

Section 5 of the CAAs makes it clear that there is no scope for the court to intervene except in circumstances provided for under the Act, which include:

- applications by a party to set aside or appeal against an award (sections 34 and 34A of the CAAs);
- 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 (section 11 of the CAAs);
- deciding on a challenge to an arbitrator (section 13 of the CAAs);
- terminating the mandate of an arbitrator who is unable to perform the arbitrator's functions (section 14 of the CAAs);

- reviewing an arbitral tribunal's decision that it has jurisdiction (section 16 of the CAAs); and
- making orders in relation to the costs of an abortive arbitration (section 33D of the CAAs).

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 contain detailed provisions dealing with interim measures in Part 4A. Similar to the provisions under the Uniform Acts, section 19 of the CAAs allows the arbitral tribunal the freedom to conduct the arbitration in such manner as it considers appropriate and section 17 allows the tribunal to make interim awards unless the parties express an intention to the contrary. 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. Furthermore, 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 the 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 is much greater flexibility with regard to legal representation in international arbitrations than there is 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 governed by the Uniform Acts, however, 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 do not contain any confidentiality provisions, the common law position will apply to domestic arbitrations seated in Western Australia and the Australian Capital Territory. In contrast, the CAAs contain provisions in sections 27E to 27F that prohibit 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 both the CAAs and 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 Rules also suggest the adoption of the IBA Rules in the absence of any express agreement between the parties and the arbitrator.

The situation is slightly different with regard to domestic arbitrations. Despite the liberties conferred by section 19(3) of both the CAAs and 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 governed by the IAA, article 27 of the Model Law 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. While neither the Model Law, the CAAs nor the Uniform Acts prescribe time limits for delivery of the award, there are certain form requirements that awards must 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; be signed by the arbitrators; and contain reasons (section 31 of the CAAs and section 29 of the Uniform Acts). Unlike the Uniform Acts, wherein there is no express requirement for the award to state the date and place of the arbitration, the CAAs do make such a requirement (section 31 of the CAAs). Under the Uniform Acts, 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 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.

As mentioned above, there are no statutory time limits in either domestic or international proceedings for the making of an award. Under the Uniform Acts, where an arbitration agreement itself contains a time limit to this effect, a court would have the power to extend the time limit (section 48(1) of the Uniform Acts). The effect of such a time limit in proceedings under the IAA is not settled. According to 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 decide on the termination of the arbitrator's mandate (article 14(1) of the Model Law), on the basis that he or she 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 provide that the decision of a presiding arbitrator shall prevail if no majority can be reached (section 15 of the Uniform Acts). Both the Model Law and the CAAs allow a similar power of the presiding arbitrator, though only with regard to procedural matters (article 29 of the Model Law and section 29 of the CAAs).
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 require a violation of due process or a breach of public policy. The term 'public policy' in article 34 of the Model Law is qualified in section 19 of the IAA and requires some kind of fraud, corruption or breach of natural justice in the making of the award. The Model Law does not contemplate any right to appeal for errors of law.

The Uniform Acts allows for broader means to challenge an award. An appeal to the Supreme Court is possible on any question of law (section 38(2) of the Uniform Acts) with either the consent of all parties or where the court grants special leave (section 38(4) of the Uniform Acts). 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 authorities 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.

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 is 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 35 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 international arbitral awards made in Australia, referring

only to a 'competent court' being required. This requirement 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. This the position was reinforced in the corresponding appeal case of TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia & Anor [2013] HCA 5, where the High Court of Australia confirmed the Federal Court's jurisdiction.

Recently, the Federal Court's 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 currently a party to 23 bilateral investment treaties (BITs) and six free trade agreements (FTAs), with a further nine being negotiated. Australia has entered into FTAs with New Zealand, Chile, the United States, Malaysia, Singapore and Thailand, and is a party to the ASEAN–Australia–New Zealand FTA that came into effect in 2010. Further FTAs are currently under negotiation with China, India, Japan, Korea, Indonesia and the Gulf Cooperation Council, in addition to the Pacific Agreement on Closer Economic Relations (PACER) Plus, the Regional Comprehensive Economic Partnership 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.

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