The Asia-Pacific Arbitration Review

2015

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Written exclusively by leading arbitrators and legal counsel, this edition covers hot topics and developments in Australia, Bangladesh, China, Hong Kong, India, Indonesia, Japan, Korea, Malaysia, Nepal, New Zealand, Pakistan and Singapore.

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Introduction: SIAC

Lim Seok Hui
Chief executive officer of SIAC

Summary

SIAC: ONE OF THE FASTEST GROWING INSTITUTIONS FOR INTERNATIONAL COMMERCIAL ARBITRATION

LEGAL DEVELOPMENTS IN ASIA

In recent years the Asia-Pacific region has witnessed a rise in inward investment and trade transactions, resulting in an increase in the number of complex cross-border disputes.

In South East Asia, the ASEAN economies in particular have demonstrated resilient growth. In 2013, the combined ASEAN economies achieved an annual growth of 5 per cent, while the global economic growth was estimated to be less than 3 per cent. In 2013, foreign direct investment into the ASEAN-5[1] grew by 7 per cent to US$128.4 billion. Investment in infrastructure is also expected to increase, with US$1 trillion required through 2020 for Southeast Asia alone.

ASEAN is also working towards the development of the ASEAN Economic Community, believed to further integrate and transform ASEAN into a single regional market of 620 million people and a combined GDP of more than US$2.2 trillion. The proposed Trans-Pacific Partnership (TPP) currently being negotiated by 12 countries throughout the Asia-Pacific region envisages liberalising trade movement in goods, services, investments, government procurement, IP rights, and technical barriers to trade and competition policy.[2] Among the TPP countries, Singapore, Japan, US and Australia represent 40 per cent of the GDP and approximately one-third of total world trade.

Asia's escalating economic growth creates further opportunities for Singapore's continued development as Asia's international dispute resolution hub. Singapore is now the third most preferred seat of arbitration worldwide, and the Singapore International Arbitration Centre (SIAC) is the fourth most preferred arbitral institution worldwide.[3]

SIAC: ONE OF THE FASTEST GROWING INSTITUTIONS FOR INTERNATIONAL COMMERCIAL ARBITRATION

Since 2009, the SIAC has seen a steady increase in its workload and strengthened its position as a world-class international arbitral institution:

- The total sum in dispute for the 259 new cases filed at the SIAC in 2013 was S$6.06 billion.
- In 2013, the highest claim amount was S$3.5 billion.
- The average value of a dispute was over S$24.44 million, an increase of 60 per cent on the average sum in dispute of S$15.36 million in 2012.
- The average sum in dispute, excluding the S$3.5 billion case, was S$10.48 million, an increase from S$9.01 million in 2012.

With the introduction of the Emergency Arbitrator procedure in July 2010, the SIAC became the first Asian arbitral institution to introduce a special provision in its rules for urgent interim relief. The Expedited Procedure, also introduced in 2010, has been a huge success. As of 1 August 2014, the SIAC has received and administered 37 emergency arbitrator applications and accepted 96 of 143 applications for arbitrations using the Expedited Procedure under its rules.

India has consistently been one of the strongest jurisdictions to contribute towards the SIAC's increasing caseload. In 2013, Indian parties generated 85 of the 259 new cases received by the SIAC - approximately a third of SIAC's total caseload. That year also saw the SIAC explore new frontiers with the opening of its overseas liaison offices in Mumbai, India, and Seoul, South Korea. The new offices provide the SIAC with a unique opportunity to

interact more closely and share information on a regular basis with its current and potential users in these countries.

Recognising the need for dedicated expertise in cases dealing with intellectual property rights, the SIAC set up an exclusive panel of IP arbitrators in early 2014. The SIAC IP Panel complements the SIAC's existing multi-jurisdictional panel of over 360 leading arbitrators from 39 jurisdictions.

On 6 June 2014, the SIAC held its first ever Congress titled 'Dispute Resolution Asia - Innovation and Change in an Age of Opportunity - A View from the Lion City', attracting over 350 delegates from across the world. Singapore's minister for law, K Shanmugam praised the SIAC during his Q&A session for establishing itself as a 'global contender' in the arbitration field. Given Singapore's reputation as a 'neutral and convenient seat', the minister was confident that the newly proposed Singapore International Commercial Court (SICC) and the Singapore International Mediation Centre (SIMC) will offer parties a 'complete suite of dispute resolution offerings'. Singapore's government is currently working on several fronts to ensure the enforceability of SICC judgments.

With strong support from the Ministry of Law, the SIMC was established earlier this year as an independent, not-for-profit company. The SIMC, to be formally launched in November 2014, will provide world-class international commercial mediation services to complement arbitration and litigation. The non-adversarial nature of mediation means that the process can be business-oriented and parties can agree on legal and non-legal solutions suited to their interests and needs. Mediation at the SIMC will further give parties a unique benefit of enforceability. In conjunction with SIAC, the SIMC will offer parties an Arb-Med-Arb procedure, where settlement agreements may be transformed into consent awards in appropriate cases.

The highlight of SIAC's 2014 Congress Gala Dinner was the official launch of SIAC's innovative arbitration training video, conceptualised and developed by SIAC to depict the workings of a typical modern day international commercial arbitration administered under its rules. Since its launch in June 2014, training workshops in China and Korea have already adopted the video as an indispensable and well-received training tool. SIAC's arbitration video will continue to feature in workshops scheduled to take place throughout the rest of this year in Indonesia, India, the Philippines and Japan.

LEGAL DEVELOPMENTS IN ASIA

China

There are 225 arbitration commissions in China, only a few of which accept cases involving foreign-related disputes. In 2013, 1,596 cases - out of a total of 104,257 - involved Hong Kong, Macao, or Taiwanese elements or foreign-related elements.[4]

In 2013, the China International Economic and Trade Arbitration Commission (CIETAC) accepted 1,256 cases - 881 domestic and 375 involving a foreign element.[5]

In 2013, the Beijing Arbitration Commission (BAC) handled 1,627 cases, of which 44 were foreign-related. BAC has recently drafted a new set of Arbitration Rules, currently available for comments from arbitration researchers and practitioners.[6]

In April, after splitting from CIETAC, the CIETAC-Shanghai Commission was renamed the Shanghai International Economic and Trade Arbitration Commission (SHIAC). SHIAC

established the China (Shanghai) Pilot Free Trade Zone Court of Arbitration to perform arbitration services in the China (Shanghai) Pilot Free Trade Zone.[7]

Over the past few years, there has been much scepticism over the capability of foreign arbitral institutions to conduct arbitrations in China. In ***Longlide Packaging Co Ltd v BP Agnati SRL***,[8] the Supreme People's Court (SPC) reaffirmed the test laid down by the Higher People's Court of Anhui Province for determining the validity of an arbitration agreement if the parties chose a foreign arbitration institution to arbitrate their dispute in China. Under article 16 of the China Arbitration Act:

> an arbitration agreement shall contain three elements: 1) an expression of intention to apply for arbitration; 2) subject matters for arbitration; 3) a designated arbitration commission.

In this case, the SPC upheld the validity of the arbitration clause involving an ICC arbitration with the seat of arbitration in Shanghai but did not comment on the capacity of foreign arbitral institutions to hold arbitrations in China.

Hong Kong

In 2013, the Hong Kong International Arbitration Centre (HKIAC) handled 260 new arbitration cases, of which 81 cases were fully administered by the HKIAC. In May 2013, HKIAC opened a branch office in Seoul. In November 2013, HKIAC's new Administered Arbitration Rules (the HKIAC Rules) came into force.[9] The HKIAC Rules made several key changes addressing topical issues in international arbitration including joinder of additional parties, consolidation of claims and appointment of an emergency arbitrator. Pursuant to the Arbitration (Amendment) Ordinance 2013 passed by the Legislative Council of Hong Kong in July 2013, the amendments allow Hong Kong courts to enforce emergency relief granted by an emergency arbitrator either in or outside Hong Kong.[10]

India

Until relatively recently, international parties to arbitration agreements with Indian counterparties were typically wary of intervention by the Indian courts in the arbitral process, and with good reason. However, recent judicial decisions evince a developing maturity of non-interference and respect for the international arbitral process. Recognising the need to align recent judicial developments with the current lacuna in India's Arbitration and Conciliation Act, 1996 (the 1996 Act), the 20th Law Commission of India is currently in the process of recommending proposals to the Law Ministry that are aimed at harmonising the relationship between courts and the arbitral system. The proposed amendments hope to bolster the credibility of arbitration and fortify the process against interference by the Indian courts.

This year, in two pro-arbitration decisions, the ***Bombay High Court in HSBC v Avitel***,[11] and the Supreme Court of India in ***World Sport Group v MSM Satellite***,[12] both held that where allegations of fraud and malpractice are raised by one party, such issues should be properly dealt with by the arbitral tribunal in accordance with the parties' arbitration agreements, and not the courts. This view bodes well for a continuing pro-arbitration trend by Indian courts in the international context. Another aspect of the ***HSBC*** case worth noting is that the Bombay High Court, in exercise of its jurisdiction to grant interim measures of protection, ordered interim relief on similar terms as granted by an SIAC emergency arbitrator in that case.

In ***Reliance Industries v Union of India***,[13] the Supreme Court rejected the Indian government's application to set aside an UNCITRAL arbitral award, ruling that it must apply instead to the English courts. The Supreme Court's reasoning for declining jurisdiction was due to the parties' conscious decision to seat the arbitration in London and choose English law as the governing law of the arbitration agreement. The express choice of English law as the law governing the arbitration agreement appeared to be a key factor in the Supreme Court's decision to preclude the applicability of part I of the 1996 Act. This decision directly affects parties that have entered into arbitration agreements with Indian counterparties before 6 September 2012 (ie, prior to the ***BALCO*** decision),[14] but may not have expressly excluded part I of the 1996 Act. The ***Reliance Industries*** decision confirms the current trend in pro-arbitration jurisprudence emanating from India and clarifies the limits of Indian judicial authority over foreign-seated arbitrations.

In an altogether separate dispute between Reliance Industries and India,[15] the Supreme Court delivered an important decision concerning the exercise of the court's default power of appointing arbitrators pursuant to section 9 of the 1996 Act. As the party-nominated arbitrators were unable to agree on the appointment of a presiding arbitrator, the chief justice of the Supreme Court exercised his discretion to appoint a presiding arbitrator of neutral nationality in an attempt to ensure neutrality and impartiality. This is a welcome departure from the general practice of appointing retired senior Indian judges as arbitrators.

Adding to the suite of recent pro-arbitration decisions, the Supreme Court in ***Enercon India Ltd v Enercon GmbH***[16] observed that courts must adopt a pragmatic approach while interpreting or construing arbitration clauses, and try to give effect to the intention of the parties. In this case, a poorly drafted arbitration clause that failed to specify the procedure for appointment of a third arbitrator was not held 'unworkable' or pathological, given the obvious nature of the omission and the ease with which it could be rectified. This judgment also exemplifies the importance of explicitly identifying the 'seat' as opposed to the venue of arbitration, as well as the need to specify the law governing the arbitration agreement. The Supreme Court in this case retained supervisory jurisdiction over the dispute by holding India as the seat despite London being chosen as the 'venue', as Indian law was chosen as the law applicable to all aspects of the agreement and the conduct of the arbitration. It was therefore unlikely that the parties intended to fix the seat as London. The absence of any factors connecting the dispute to London besides being designated as the 'venue' was critical to the court's determination.

Japan

On 1 February 2014, the Japan Commercial Arbitration Association (JCAA) introduced amendments to its arbitration rules. Key changes include the addition of procedures dealing with emergency arbitrators, expedited procedures, interim measures, and the consolidation of claims and joinder of third parties. Unlike the rules of other leading arbitral institutions, the new rules provide that the parties may at any time agree to refer the dispute to mediation proceedings under the institution's own mediation rules, namely the JCAA's International Commercial Mediation Rules. No member of the respective arbitral tribunal may be appointed as the mediator, except where the parties agree. The arbitrator who serves as mediator in relation to the same dispute is not allowed to consult separately with any party unless all parties agree in writing. The amendments reflect the JCAA's desire to keep pace with current issues in international arbitration and to offer modern and efficient tools for the users of the JCAA rules.

Korea

The Seoul International Dispute Resolution Centre (SIDRC) was established in May 2013 to promote Seoul as North East Asia's international arbitration hub. A number of arbitral institutions have already claimed their spot at the SIDRC, including SIAC with the launch of its second overseas liaison office. Korea is currently in the process of amending its Arbitration Act[17] to incorporate the provisions of the UNCITRAL Model Law 2006. Proposed amendments mainly deal with expanding the arbitral tribunal's power to grant provisional measures, and ascertaining whether to recognise and enforce an arbitral tribunal's interim orders and awards.

In ***NDS v KT Skylife***,[18] the Seoul High Court recognised the validity of an arbitral award despite the lack of specificity required for its execution under Korean law. Under article 36(4) of the Korean Arbitration Act, an enforcement judgment limits applications to set aside the award and precludes any challenges against it. Therefore even for an award that cannot be practically executed, an enforcement judgment signifies the Court's recognition of the validity of the award.

In the ***Lone Star*** case,[19] the High Court refused to enforce an award on the basis of a lack of validity of the arbitration agreement between the parties, applying the law of the seat of arbitration to the arbitration agreement and not the governing law.

Malaysia

The Kuala Lumpur Regional Centre for Arbitration (KLRCA), established in 1978, has recently upgraded and improved its procedures, and as a result its number of arbitration cases has risen in recent years. In 2012, the KLRCA registered 85 new cases. It brought into force new arbitral rules in October 2013 which introduced an emergency arbitrator procedure. The KLRCA will move into new, modern facilities in the second half of 2014; the Sulaiman building will house state-of-the-art facilities with 19 hearing rooms and will open its doors to other institutions that wish to set up an office in Kuala Lumpur, in the same way as Maxwell Chambers has done in Singapore.

The Malaysian government is supportive of the developing arbitral institution. For example, the most recent amendments to the Legal Profession Act 1976 have followed the Singapore approach by relaxing the immigration rules to allow both foreign arbitrators and foreign lawyers to enter into Malaysia to participate in arbitral proceedings and to allow foreign law firms to open local bases in Malaysia (either as qualified foreign law firms or through joint ventures with local firms).

Mongolia

In March 2014, Mongolia's Ministry of Justice - together with the USAID, the Mongolian International and National Arbitration Center at the Mongolian National Chamber of Commerce and Industry (MNCCI/MINAC), and AmCham - co-organised the 'International Conference on Commercial Arbitration in Mongolia' in Ulan Bator, Mongolia. The conference provided a forum for stakeholders to learn, share and discuss best regional arbitration practices, and to forge a private-public sector consensus on the framework that should govern new arbitration reforms in Mongolia. In a pre-conference meeting, with representatives from the banking, construction and mining associations, as well as the MNCCI/MINAC arbitration centre, the SIAC's registrar, Tan Ai Leen, discussed regional and

international arbitration best practices and encouraged the private sector to settle disputes through arbitration proceedings.

The Mongolian government has engaged an international law firm to redraft the country's arbitration laws, along with one of its local firms. The law firms are working closely with the Mongolian Ministry of Justice to rework the existing regime, in a bid to drive foreign investment. Mongolia, better known for its rich mining resources, is said to be in dire need of a stable regulatory footing if it is to compete with other resource-rich nations.

Myanmar

The legal framework for arbitration in Myanmar is currently governed by legislation predating Myanmar's independence, namely the Arbitration Act 1944. In May 2014, the Myanmar parliament released a draft of its new Arbitration Bill (the Bill) almost a year after the country's accession to the New York Convention on 15 July 2013. The Bill represents an overhaul of Myanmar's present arbitration regime and demonstrates the government's commitment to conform to international arbitration regimes. No official English translation of the Bill is currently available. However, it is our understanding that the proposed legislation is closely based on the provisions of the UNCITRAL Model Law 1985.

The Bill will apply to domestic and international arbitrations, whether ad hoc or administered. While parties to an 'international commercial arbitration' are free to select the substantive law of the arbitration, arbitrations seated in Myanmar do not fall within this definition and must adopt Myanmar law as the substantive law of the arbitration. The Bill also grants Myanmar courts the power to extend a contractual time bar to commence arbitration for arbitrations seated in Myanmar. There is no similar provision in the Model Law or Singapore's International Arbitration Act. The Bill further provides that awards made in Myanmar will be enforced where the court has refused to set aside the award or where the application to set aside the award has expired. Parties objecting to an award must therefore seek to set aside the award, rather than challenging the award's subsequent enforcement. The Bill remains subject to amendment before being passed into law. Nevertheless, it represents a positive step by Myanmar to develop a system for dispute resolution that will encourage inward foreign investment.

Singapore

The Singapore courts have shown their continued support for arbitration. The decisions in *TMM Division Maritima SA v Pacific Richfield Marine Pte Ltd* [2013] SCHC 186 and *BLB and another v BLC and others* [2013] SCHC 196 confirmed the courts' principle of minimal curial intervention when faced with applications to set aside arbitral awards. In considering the applications, the courts recognised their supervisory function in providing relief in cases of genuine challenges but stated that the principle of finality in arbitral proceedings meant that their power should only be exercised in meritorious cases where the statutory grounds for setting aside had been established.

In another recent decision, the Singapore courts demonstrated support for one of the fundamental principles of arbitration: the principle of party autonomy. The 'choice of remedies' was one of the more interesting legal issues arising out of the well-known case of *PT First Media TBK v Astro Nusantara International BV and others* [2013] SGCA 57. The result of the decision is that a party to an arbitration in Singapore who wishes to bring a jurisdictional challenge is free to choose between the 'active' remedy of immediately setting aside or challenging a preliminary ruling or the 'passive' remedy of waiting until the award is

enforced. The court was aware of the 'potential ramifications' of restraining party autonomy and said: 'This can have potentially far-reaching implications on the practice and flourishing of arbitration in Singapore.'

Vietnam

In June 2010, the Vietnam National Assembly passed the Law on Commercial Arbitration,[20] which took effect on 1 January 2011 (the New Law) and replaced the 2003 Ordinance on Commercial Arbitration. In July 2011, the government passed further implementing regulations to the New Law by virtue of Decree 63/2011/ND-CP. The New Law was passed to address the shortcomings of its predecessor. However, conflicting interpretations of the law and a sense of judicial interference rendered the intention of its drafters nugatory.

In January 2013, the Vietnamese Supreme Court published the draft Resolution 01 to provide additional guidance on the New Law, which was passed earlier this year by the Committee of Justice of the Supreme High Court of Vietnam.[21] Resolution 01 is considered to be an important resource to provide consistency in interpretations, and predictability in the application of the New Law.

Notes

1. Indonesia, Malaysia, the Philippines, Singapore and Thailand.
2. www.ustr.gov/tpp.
3. Ministry of Law, Singapore.
4. Song Lianbin, Shen Hongyu, Xiao Fang, 'Annual Review on Commercial Arbitration', *Commercial Dispute Resolution in China: An Annual Review and Preview 2014*, p1.
5. http://cn.cietac.org/AboutUs/About US4Read.asp.
6. www.bjac.org.cn.
7. www.shiac.org/English/NewsDetails.aspx?tid=7&nid=501.
8. SPC Docket Number: 2013-MinTa Zi No.13.
9. www.hkiac.org.
10. www.legco.gov.hk/yr12-13/english/ord/ord007-13-e.pdf.
11. *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd and others*, (Arbitration Petition No. 1062/2012, Judgment of 22 January 2014).
12. *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore)*, (Civil Appeal No. 895 OF 2014 arising out of SLP (C) No. 34978 of 2010).
13. *Reliance Industries v Union of India*, (Civil Appeal No. 5765 OF 2014 arising out of SLP (C) No. 20041 of 2013).
14. (2012) 9 SCC 552.
15. Arbitration Petition No. 27 of 2013 dated 31 March 2014.
16. Civil Appeal No. 2086 of 2014 dated 14 February 2014.
17. Act No. 6626, 26 January 2002.
18. Case No. 2013Na13506 (Seoul High Court), 17 January 2014.
19. *Lone Star Fin-Korea Deposit Ins Co v Korea Resolution & Collection Co*, Case No. 20 2012Na88930 (Seoul High Court), 16 August 2013.

20. No. 54/2010/QH12.
21. Resolution No. 01/2014/NQ-HDTP.

Chief executive officer of SIAC

Arbitration in Asia

Jawad Ahmad, **Kelvin Poon** and **Andre Yeap SC**
Rajah & Tann Singapore

Summary

EDUCATION AND INFRASTRUCTURE
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EDUCATION AND INFRASTRUCTURE

The last two years have seen the continued growth of arbitration in Asia. Many studies have reported impressive increases in the number and value of cases that are being handled by the leading arbitral centres in Asia.

Keeping pace with the growing caseload, Asian arbitration centres and institutions continue to develop both in terms of organising educational initiatives to promote and support international arbitration, and establishing new physical infrastructure to handle the increasing caseload.

It is not possible to exhaustively list all the efforts that have been undertaken in the past two years in this respect. What is key, however, are the efforts being undertaken by leading arbitral institutions and centres in developing Asian economies and the receptiveness with which these initiatives have been met. For instance, the National Commercial Arbitration Centre (NCAC) in Cambodia has completed work on its Arbitration Rules and its Code of Conduct and has recently announced that it 'is finally ready to take on its first case'.[1]

In Indonesia, BANI Arbitration Center (as the local organiser of ICCA) conducted, in October 2013, a Roadshow Seminar on the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in collaboration with the Indonesian Supreme Court and supported by the USAID programme Changes for Justice.[2] The seminar was aimed at expanding the knowledge and awareness of judges from various cities in Indonesia on the importance of international arbitration and the New York Convention. These are, no doubt, laudable developments that would go some way towards dispelling the perception that Indonesia is not arbitration-friendly.[3]

In terms of physical infrastructure, as noted in the 2014 edition of this review, the Seoul International Dispute Resolution Centre (SIDRC) opened in May 2013, providing a convenient and new venue to handle complex international arbitration cases.[4] In 2014, the Kuala Lumpur Regional Centre of Arbitration (KLRCA) intends to open its new arbitration centre at the Suleiman Building, which will boast state-of-the-art facilities.[5]

The continuing efforts by the Asian arbitration community to promote international arbitration through education and the construction of newer and more modern arbitration facilities reflect the common understanding of the vital importance that international arbitration plays in attracting foreign investment and, indeed, in growing Asian economies.

The enthusiasm with which these initiatives have been received also reflects the receptiveness of the business community to international arbitration and a greater awareness of the pivotal role it plays in the Asian century of economic growth.

UNCITRAL MODEL LAW IN ASIA

One key influence on the expansion of international arbitration in Asia is the adoption of legislation that provides for a framework that enables international arbitration to function effectively as a dispute resolution mechanism. This includes the effective recognition and enforcement of arbitration agreements and arbitration awards. In this regard, the 1985 UNCITRAL Model Law on International Commercial Arbitration (the Model Law) has played a central role.

UNCITRAL's objectives in adopting the Model Law were to address perceived inadequacies and disparities among national arbitration laws and to establish a 'vehicle for harmonisation'[6] that 'reflects a worldwide consensus on the principles and important issues of international arbitration practice'.[7] To the extent that the Model Law was intended to serve as a 'vehicle for harmonisation', there has been some measure of success in Asia.

As noted by Professor Julian DM Lew QC,[8] many Asian jurisdictions have based their arbitration laws on the Model Law. In fact, Asia has the highest concentration of Model Law-based arbitration laws. Given the sheer number of Asian jurisdictions that have adopted the Model Law, parties may be reluctant to submit to arbitration in Asian countries that have not enacted the Model Law. As such, the number of jurisdictions that will adopt the Model Law is expected to grow.

In this respect, 2014 has seen at least one notable development. Following its historic accession to the New York Convention on 15 July 2013, Myanmar recently circulated for public consultation a draft arbitration bill which largely tracks the Model Law.[9]

It should be noted that Myanmar currently does not have any enabling domestic legislation that would allow its courts to recognise and enforce arbitration agreements and foreign awards in accordance with its New York Convention obligations. This is despite the fact that Myanmar's existing Foreign Investment Law allows parties to refer their disputes to arbitrations seated in other jurisdictions. The proposed bill is thus set to radically change the landscape of Myanmar arbitration law.

One significant change is the adoption of the policy of minimal curial intervention. Under the existing Arbitration Act, the Myanmar court is given wide latitude to intervene in the arbitration process at various stages. By contrast, the new bill expressly provides that there shall be no court intervention in arbitrations except as provided for therein. In that regard, while the Myanmar court is empowered to grant interim relief to support arbitrations, the Myanmar court's scope of involvement in arbitration proceedings will otherwise be significantly reduced. The progressive and pro-arbitration stance is also evident from the bill not containing any restriction on the nationality of arbitrators, the language of the arbitration or the rules applicable to the arbitration.

Certain features of the arbitration bill, however, do not cohere well with established international arbitration practice. For instance, the bill does not incorporate article 16 of the Model Law, which entitles an aggrieved party to apply to the court to review the tribunal's ruling on jurisdiction. The arbitration bill permits the parties to only set aside any such award in accordance with article 34 of the Model Law. At first blush, this seems to limit the rights of a party objecting to jurisdiction to challenge a jurisdictional ruling on the limited grounds prescribed in article 34, whereas it is well-established in most jurisdictions that a plea that a tribunal lacks jurisdiction would be considered afresh.

Of course, it remains to be seen whether the arbitration bill will be passed in its present form. Nevertheless, the positive steps that Myanmar has taken only goes to demonstrate the growing importance of international arbitration in Asia and the need for Asian jurisdictions to update their laws to keep abreast of current international standards.

AN EMERGING MODEL LAW JURISPRUDENCE

While a sound legislative framework is necessary to any sustainable development and growth of international arbitration in Asia, the effectiveness of any such legislative regime

rests heavily on the courts that interpret and apply them. In light of the large number of jurisdictions that have adopted the Model Law in Asia, the courts in these Asian jurisdictions will be 'in the vanguard'[10] of the development of a 'global free-standing body of substantive arbitration law'[11] that Chief Justice Menon envisioned in his landmark Keynote Address to the ICCA Congress in Singapore in 2012. Professor Julian DM Lew QC states:

> This will be effected through reliance on the Model Law and the development of its principles when necessary through the courts of the Model Law countries. This will result in conformity in legal application and understanding among its adopters. It may also leave the traditional arbitration countries and venues on the side.[12]

Singapore currently stands at the forefront of the development of a uniquely Asian jurisprudence on the Model Law. In this regard, the Singapore Court of Appeal delivered two significant decisions in 2013 and 2014 that illustrates this drive to rely on the Model Law and to develop its principles.

The first is the decision in ***International Research Corp Plc v Lufthansa Systems Asia Pacific Pte Ltd*** [2014] 1 SLR 130. In ***International Research Corp***, the Court of Appeal was asked to determine whether an arbitration agreement contained in one contract could be incorporated by reference into another contract.

English law holds that a clear and express reference to an arbitration agreement is required before it can be incorporated by reference into another contract. The question that the Court of Appeal had to confront was the extent to which the 'strict approach' adopted by England (which is not a Model Law jurisdiction), applies in Singapore (which has adopted the Model Law). The Court of Appeal declined to follow the English approach in this case.

Referring to commentaries on the preparatory work of the Model Law, the Court of Appeal noted that it is sufficient if the reference in a contract to a document containing an arbitration agreement only refers to the document; specific mention of the arbitration clause therein is not necessary. The Court of Appeal also drew inspiration from the decision of Kaplan J in the Hong Kong case of ***Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd*** [1994] 3 HKC 328, which held that the English 'strict rule' did not apply in Hong Kong, a Model Law jurisdiction.

The Court of Appeal decision in ***International Research Corp plc*** clearly reflects what had been presaged by Professor Julian DM Lew QC of the move by Asian Model Law jurisdictions, such as Singapore, to rely on the Model Law and to develop its principles. This would result in conformity of the legal application and understanding of the Model Law, and ***International Research Corp plc*** demonstrates how Hong Kong and Singapore now share a common approach on the incorporation by reference of an arbitration agreement. The case also shows how legal principles emanating from traditional arbitration venues (in this case, England), where they conflict with Model Law principles, are being left on the side.

The second decision is ***PT First Media TBK v Astro Nusantara International BV and others*** [2014] 1 SLR 372 where the Court of Appeal was confronted with a novel question: can an award debtor resist an application for the enforcement of an award issued pursuant to international arbitration proceedings seated in Singapore on a jurisdictional point if it did not

apply to review the tribunal's decision on its jurisdiction pursuant to article 16 of the Model Law?

The answer to that question turned on the interpretation of section 19 of the Singapore International Arbitration Act and its interplay with the Model Law. The Court of Appeal held that the award debtor had a 'choice of remedies' between taking the active step of appealing against the finding on jurisdiction, and taking the passive step of resisting enforcement where the application is made.

Following the approach it had taken in***International Research Corp plc***, the Court of Appeal undertook a thorough and painstaking analysis of the preparatory work, the legal literature and cases pertaining to the Model Law, and found that the choice of remedies is not just a facet of the Model Law, but lies at the heart of the design of the Model Law enforcement regime.

The decision and analysis of the Court of Appeal in ***International Research Corp plc*** and ***Astro*** clearly reflects an effort by the Singapore courts to develop a harmonious and coherent body of legal principles that draws from the jurisprudence of other Model Law countries and Model Law literature.

A similar approach appears to be taking hold in Singapore's close neighbour, Malaysia. In a recent decision of the Kuala Lumpur High Court in ***Government of India v Cairn Energy India Pty Ltd*** [2014] 9 MLJ 149, the court had before it an application to set aside an award emanating from an arbitration seated in Malaysia. The Kuala Lumpur High Court declined to do so.

In reaching its judgment, the Kuala Lumpur High Court observed that the Malaysian Arbitration Act was based on the Model Law. It noted the following:

> [T]here is much assistance to be found in the preparatory materials to the Model Law, especially the explanatory note issued by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration (see UNCITRAL Yearbook Volume XVI - 1985), which though not issued as an official commentary on the Model Law, it is noteworthy. It provides background and understanding on the Model Law and why Nation States have reached such comity on the desirability in conformity in international commercial arbitration practice. This explanatory note remains relevant even though Malaysia adopted the Model Law only in 2005 vide the Arbitration Act of 2005, and even though it is with modifications.

As regards the relevance of decisions from other Model Law jurisdictions, the Kuala Lumpur High Court added the following:

> Therefore, the 'philosophy' of the Model Law as set out in the explanatory note ought to be borne in mind when approaching and considering the application at hand. At the same time, it cannot be denied that while Act 646 may have been enacted in 2005, the lessons and approaches of other supervisory courts in jurisdictions which have adopted and applied Model Law, be it wholesale or in parts, with or without modification, remain both useful and instructive.

> Further, it may be added that this approach in looking at the decisions of these other jurisdictions contribute to the larger object of ensuring consistency and certainty in the courts' approach to arbitration and arbitration related matters as explained in the explanatory note that was pointed out earlier. It cannot be gainsaid that this is vital to the promotion of investor or trader confidence especially in fast-paced and multifaceted international commerce and trade. The present case is no exception.[14]

Having set out the approach that it would take, the Kuala Lumpur High Court proceeded to analyse the various academic writings and decisions of the Singapore, English and Hong Kong courts before arriving at its decision.

In India, the Supreme Court's decision in ***Bharat Aluminium Company v Kaiser Aluminium Technical Services (BALCO)*** (2012) 9 SCC 552 clarified the extent to which Indian courts could intervene with respect to foreign-seated arbitrations. Previously, Indian courts had jurisdiction over foreign-seated arbitrations unless the parties had expressly or impliedly agreed to the contrary. However, the Supreme Court has restricted this approach in the ***BALCO*** decision. Now, insofar as arbitration agreements entered into after 6 September 2012 are concerned, Indian courts may not grant interim measures, allow challenges to awards or make default arbitrator appointments in foreign-seated arbitrations. In arriving to this decision, the Supreme Court referred to the preparatory work of the Model Law and affirmed that the application of the Model Law was intended to be limited to the jurisdiction of the seat (known as the 'territorial principle').[15]

In ***TCL Air Conditioner (Zhongshan) Co Ltd*** (appellant)***v Castel Electronics Pty Ltd*** (respondent) [2014] FCAFC 83, the Full Court of the Federal Court of Australia upheld the decision of a primary judge of the same court to dismiss an application to set aside an award rendered in Australia. The appellant had argued that the arbitral tribunal's finding of certain facts were 'made in the absence of probative evidence, and were findings upon which TCL was said to have been denied an opportunity to present evidence and argument'.[16]

The Federal Court rejected the appellant's arguments. In identifying that the rules of natural justice were within the 'public policy' concept, the Federal Court went further to say something 'as to the content of the phrase "public policy", so as to understand the statutory context of the phrase "rules of natural justice"'.[17] The Federal Court recognised the views of leading authors on international arbitration that 'public policy' was to be limited to the fundamental principles of justice and morality within the international commercial arbitration context.[18] This was a different context from the exercise of public power under Administrative Law.[19] In this regard, the Federal Court stated:

> This approach to confining the scope of public policy has widespread international judicial support. Contrary to the submission of the appellant, it is not only appropriate, but essential, to pay due regard to the reasoned decisions of other countries where their laws are either based on, or take their content from, international conventions or instruments such as the New York Convention and the Model Law. It is of the first importance to attempt to create or maintain, as far as the language employed by Parliament in the IAA permits, a degree of international harmony and concordance of approach to international commercial arbitration. This is especially so by reference to the reasoned judgments of common law countries in the region, such as

> Singapore, Hong Kong and New Zealand [...] Such an approach accords with the objectives of the IAA in s 2D and with the interpretive approach referred to in s 17 of the IAA. It is also an approach required by Art 2A of the Model Law [...] Where, as with the Model Law, there has been extensive discussion and negotiation of a model law under the auspices of a United Nations body, such as UNCITRAL, and where the Model Law has been adopted by the General Assembly of the United Nations with recommendation of 'due consideration' by member states to advance uniformity of approach, the same appropriate respect for, and, where necessary, sensitivity or deference to, reasoned decisions of other countries, should be shown.[20]

The Federal Court drew inspiration from, among others, Singapore, New Zealand and Hong Kong in approaching the interplay between natural justice and public policy and, in particular, the appropriate balance that had to be struck in the court's interference when determining whether the rules of natural justice had been breached. For instance, the Federal Court referred to the Singapore Court of Appeal decision of ***LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*** [2013] 1 SLR 125:

> If a party has been denied a hearing on an issue, for instance, it is relevant to enquire whether, in a real and not fanciful way, that could reasonably have made a difference. It should be recalled that the proper framework of analysis for the IAA is the setting aside or non-recognition or enforcement of an international commercial arbitration. In that context, it is essential to demonstrate real unfairness or real practical injustice.[21]

HARMONISING ARBITRATION LAWS

While these cases may well suggest a trend among the courts of Asian Model Law jurisdictions to develop a 'global free-standing body of substantive arbitration law', much more remains to be done by the courts and arbitration practitioners alike.

Much of the above discussion centres on the decisions of courts that share a common law heritage. It should be noted that a vast majority of jurisdictions in Asia are not common law jurisdictions. Indeed, some jurisdictions with a significant involvement in arbitrations (whether domestic or international) are not common law jurisdictions (such as China, the Republic of Korea and Indonesia). There remains the task of harmonising the laws and practices of the common law jurisdictions with these jurisdictions.

To this end, the International Bar Association has formed a Working Group on the Harmonising of Arbitration Laws in the Asia Pacific Region. The work of the Working Group, as well as the initiatives being undertaken by other institutes of learning and arbitration, will no doubt go a long way towards developing a 'global free-standing body of substantive arbitration law' alongside this incredible growth of arbitration that we are witnessing in Asia.
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Summary

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EVERGREENING AND THE TRANSFER OF PATENT VALUE

The ongoing patent infringement suits between Apple and Samsung highlight the increasing importance of intellectual property rights to maintaining a competitive edge. In 2012, over 5,000 patent actions were filed before US Courts, an increase of over 29 per cent since 2011, representing compound annual growth of over 6 per cent since 1991.[1]

Between 2007 and 2012, the median damages award in patent infringement disputes in the US was just under US$5 million, and in 2012 three damages awards exceeded US$1 billion.[2] With such large sums at issue, attention has focused on the appropriate methods of assessing the value of patents and the effect of their alleged infringement.

In recent years, there has been increased interest in the role of intellectual property rights in Asia. Initially, at least from a public perspective, this was perhaps limited to counterfeit consumer goods and internet piracy. The growth of Asian disposable incomes, however, has resulted in growing demand not only for branded goods and electronic media but also for improved services, such as health care, that depend on patented and branded products and processes.

Broadly, a patent acts to protect an innovation while a brand is designed to communicate differentiation between products. Patents and brands can act independently of one another or in combination to grow or retain a market position and, as such, both are considered assets.

Two of the most commonly used approaches for assessing the value of assets are the market-based approach and the income-based approach, typically expressed in the form of a discounted cash flow (DCF) model.[3] A market-based approach estimates the value of an asset by reference to the prices at which similar or identical assets have been transacted in markets for which transparent price data is available.

Where reliable data is available about transactions involving the asset being valued, this generally provides the best evidence of value assuming that the transactions occurred close to the date of valuation and that expectations and market conditions have not changed materially between the date of transaction and the date of valuation.

Where there is no recent and reliable data on transactions involving the subject asset, a market-based approach requires the existence of sufficiently similar assets and the availability of information on the prices (and other terms) at which these similar assets were traded. A market-based approach is particularly difficult to implement in the context of a patent valuation. The prices at which patents are traded are rarely publically disclosed (unless the patent owner is willing to disclose the terms on which it licenses the innovation) and, by definition, no two patents are identical. However, a market-based approach is often useful in the valuation of other forms of intellectual property, such as trademarks, which are commonly licensed by the owner to third parties.

In addition, the value of patents covering functionally comparable innovations may vary considerably, for example, with the remaining life of the patent and its perceived legal enforceability. In relation to the latter, patents are rarely perfectly enforceable and there is often considerable uncertainty as to whether a patent (newly issued or otherwise) can be enforced. Therefore, the value of a patent typically increases markedly once it has been held to be valid in court proceedings and this uncertainty is reduced.[4] Similarly, the value of a

court-tested patent would be higher than the value of a patent covering a functionally similar innovation that has not been tested in court.

These complications make it unlikely that a valuer will be able to find reliable pricing information for relevant, closely comparable patents. A market-based approach may therefore be applicable only infrequently in patent valuation.

The primary alternative to a market-based valuation is an income-based valuation that seeks to identify the value of the incremental cash flows associated with a patent, for instance, by using a DCF model. A DCF model estimates the value of an asset by reference to the cash flows the asset is expected to generate from the date of valuation. A DCF model generally assumes that the patent holder has already exploited the patent to bring a commercially viable product to market and that the cash flows generated can be forecast to a tolerable degree of accuracy.

A third valuation approach, the 'option price' approach, assesses the value of a patent on the basis that its payoffs are similar to those of an option contract (in particular, a call option, which bestows the right, but not the obligation to purchase an asset at a future date at a known price). The option holder will choose to exercise the option if, and only if, the value of the underlying asset exceeds the strike price.

An option-based approach can be used to assess the value of a patent prior to the introduction of a commercial product. A patent grants its holder the exclusive right to develop and market a product or utilise a cost-saving process. The patent holder will choose to exploit the patent if, and only if, the expected cash flows from exploitation (the value of the underlying asset) exceed the costs of development (the option strike price). If this is not the case, the patent holder can delay development, at no incremental cost, until market conditions change and development is profitable (up until the expiry of the patent).[5]

Although distinct from the DCF method, the option price approach relies upon aspects of it. Indeed, in the context of patent valuation, it is often necessary to use a DCF model to estimate the value of cash flows that might be generated if the patent holder chooses to develop a product from the underlying patent.

When using a DCF method to value a patent, it is common to project the cash flows attributable to the patent up to the expiry of the patent. This approach has intuitive appeal; no commercial entity is likely to pay for a patent that has expired. However, there is a body of empirical evidence to suggest that a patent holder is able to derive value from the underlying innovation well after expiry of the original patent (and the loss of exclusivity).[6]

This chapter seeks to identify the circumstances in which a patent holder might be able to extract super-normal profits from the underlying innovation following the expiry of the patent, and assess whether it is appropriate to assign the value of those incremental profits to the original patent.

DCF VALUATIONS OF PATENTS

A patent holder can typically extract value from a patent in two ways, namely:

- it can choose to exploit the patent themselves; or
- it can choose to license the right to use the patent on exclusive or non-exclusive terms.

How the patent holder chooses to extract value from the patent will depend upon, inter alia, the nature of the innovation, the patent holder's appetite for risk, and whether the patent holder has sufficient commercial and technical expertise to exploit the patent successfully.

In theory, the value of the patent itself is independent from how the patent holder chooses to extract that value. Rather, the method of value extraction determines how the total value is allocated between the patent holder and the potential licensee. In one extreme, the patent holder might choose to bear all the risk associated with the development and launch of a viable product and therefore retains all of the value of the patent. Alternatively, the patent holder might choose to share the risks of commercial exploitation with the licensee, but also has to share the value of the patent.[7]

The value of any asset is a function of the amount, timing and risks of the cash flows that it is expected to generate. When valuing a stream of future cash flows, it is appropriate to discount the amount of future expected cash flows to a present value using an appropriate discount rate that reflects both the time value of money and the risks inherent in the projected cash flows. Ignoring timing and risk for the time being, the amount of the income stream is principally a function of the ease with which the patent can be exploited to develop a commercially viable product and the size of the potential market for that product.

In principle, DCF analysis can be applied to patents covering both products and processes. The future cash flows generated by a cost-saving process patent are equal to the net reduction in costs brought about by the innovation, less the costs to implement the process. For a product patent, the future cash flows are the incremental profits generated though the sale of products covered by the patent.

In the interest of simplicity, this chapter assumes that a patent can be associated with a clearly defined income stream, whether reduced costs or increased revenues. In reality, many products and processes use a suite of patents, and it may be difficult to clearly delineate the incremental value associated with any individual patent. For example, Gillette filed 22 patents in relation to its Sensor razor that were designed to be interlocking, making it impossible to duplicate the product and difficult to assign value to any specific patent.[8]

A further factor that will heavily influence the income generated from a patent is the extent to which the patent genuinely limits competitive entry into a market. Many patents generate only incremental improvements to an existing product, or can be bypassed using non-patented workarounds, severely restricting their value.

In cases where a patent effectively excludes competition from a market, the patent holder is commonly assumed to be able to exploit this monopoly position to earn super-normal profits for the patent's duration. Upon expiry of the patent, it is expected that competition will exploit the newly out-of-patent technology to enter the market and erode the incumbent's profit margins and market share. For this reason, when valuing a patent using DCF analysis, a valuator seldom forecasts cash flows beyond the expiry of the original patent.

However, there is an increasing body of literature to suggest that, in some circumstances, a patent holder might be able to enjoy monopoly profits for a period after the expiration of the patent.

EXTENSIONS OF EXCLUSIVITY

A patent holder can continue to earn monopoly profits for as long as it is able to prevent entry into a market, while maintaining prices above the level consistent with a competitive

market.[9] The prospect of continued monopoly profits encourages a patent holder to seek to extend the period of exclusivity beyond the expiry of the patent by deterring or preventing generic competition from entering the market.

Of the many strategies employed by patent holders to extend their exclusivity, one of the most commonly recognised is 'evergreening'. Patent evergreening refers to the practice of exploiting intellectual property law to extend the period of exclusivity. While examples of evergreening can be found across a range of industries, the practice is most commonly associated with the pharmaceuticals industry. Three major evergreening strategies employed in the pharmaceutical industry are:[10]

- stockpiling - the practice of obtaining multiple, separate patents covering different aspects of the same product. By staggering the expiry of these patents, the patent holder is able to extend the period of market exclusivity;
- line extensions - the efforts by pharmaceutical companies to gain additional periods of exclusivity by obtaining patents on modifications to the original drug, or its method of application; and
- franchise extension - the introduction of a new (or modified) and heavily marketed alternative to the original drug whose patent is about to expire. The intention under this strategy is to minimise the loss of market share and dissuade generic entry by switching customers away from the out-of-patent original.

Unsurprisingly, these strategies are contentious and often the subject of litigation. Empirical evidence shows that patents which do not cover a drug's active ingredient and serve primarily to extend the period of market exclusivity are more likely to be the subject of legal challenges.[11]

These legal challenges have undermined the effectiveness of evergreening strategies. In the US market, drugs for which the first generic entry occurred between 2001 and 2010 enjoyed an average nominal patent term, defined as the time between brand approval and the expiry of the latest expiring patent, of about 16 years. However, as the result of challenges to the evergreening patents, the period of market exclusivity enjoyed by these drugs was only about 12 years.[12]

Advertising expenditure and brand building can help reinforce the evergreening strategies discussed above. In particular, a strong, well-recognised brand can assist pharmaceutical companies in the successful introduction of brand or franchise extensions, extending the market exclusivity period enjoyed by the underlying innovation.

In recent years, concerns over the continued ability of pharmaceutical companies to develop new 'blockbuster' drugs, coupled with increasing development costs, has focused attention on the role of branding in the pharmaceutical industry in extending market exclusivity and deterring the entry of generics.

Strong brands enable firms to differentiate their products from generic competitors, strengthening their competitive position. This is particularly true in countries with decentralised health-care systems, where drug purchasing and treatment decisions are made by individual doctors or patients.

The benefits of developing a strong brand presence to augment franchise extension and diversification strategies are perhaps best illustrated by the AstraZeneca's marketing of

Prilosec. AstraZeneca introduced Prilosec, one of a new tranche of drugs known as proton pump inhibitors, in 1989. By 2001, sales of the drug had reached a peak of US$2.6 billion per annum. As early as 1995, AstraZeneca recognised the threat that generic competition might pose to its blockbuster drug and set about planning a mitigation strategy.[13]

Between 1997 and 2000, AstraZeneca spent between US$50 million and US$100 million per annum marketing Prilosec as the 'Purple Pill' solution for heartburn. In March 2001, AstraZeneca launched Nexium, a second generation proton pump inhibitor. Over the next six years, AstraZeneca spent up to US$240 million per year positioning Nexium as an improvement on, and natural successor to, Prilosec and 'today's purple pill'. Nexium sold for about US$5 per pill and was targeted at high-income customers.[14]

In November 2002, following a series of legal battles between AstraZeneca and generic manufacturers, the first generic substitutes for Prilosec entered the market at a discount to the pre-patent-expiry Prilosec price. AstraZeneca responded by introducing its own generic version of Prilosec for over-the-counter sales. The generic version retained the purple colour and brand identity of the original prescription drug, which AstraZeneca sold for US$0.71 per pill, significantly undercutting the generic competition.[15]

This strategy allowed AstraZeneca to capture the premium end of the market with Nexium while the generic version of Prilosec secured much of the low income, generic market. It is clear that the success of this strategy rested, in part, upon the success of the original Prilosec branding exercise. Notably, the opportunities to introduce extensions to a strong commercial brand are valuable, even if the firm has not yet decided to pursue such a strategy. In other words, the additional options provided by the brand are valuable in themselves.[16]

Even if they are eventually invalidated by the courts, evergreening strategies may oblige a potential generic entrant to engage in costly litigation proceedings before it is able to enter the market. The attractiveness of engaging in, and initiating challenges to, evergreening strategies depends, in part, upon the regulatory regime and legal framework within which the patents are contested.

In the US, the Hatch-Waxman Act grants a 180-day period of exclusivity to the first generic manufacturer to challenge a patent successfully. During this period, only the successful challenger and the original patent holder can market an authorised generic product. This encourages generic manufacturers to file patent challenges and to do so as quickly as possible after the patent is issued. In Europe, where no such provision exists, the incentives to challenge patents are accordingly reduced.[17]

Even if the patent holder does not actively engage in evergreening and the patent is not otherwise extended, there is often a lag between the expiry of the patent and the entry of generic competition. Regulatory frameworks play a significant role in determining the speed and ease with which a generic competitor can enter the market following the expiry of a patent.

In the US, the Hatch-Waxman Act lowered the barriers to generic entry by allowing potential generic entrants to demonstrate bioequivalence[18] to the original drug, rather than having to replicate the costly product testing undertaken by the original patent holder. To accelerate generic entry, the legislation granted generic manufacturers the right to conduct the necessary bioequivalence tests and trials prior to the expiry of the patent, thus reducing the lag between the expiry of the patent and the entry of a generic competitor.[19]

The situation in Europe varies between countries. In general, bioequivalence tests can only be conducted once the patent holder's data relating to pre-clinical tests and clinical trials is no longer protected. In cases where the patent was filed long before market authorisation for the product was obtained, this data protection period can extend beyond the life of the patent. Therefore, under the European system, exclusivity can stem from either the patent protection or data protection.[20] In practice, instances where exclusivity is solely reliant upon data protection are relatively rare. Nevertheless, the existence of data protection rights can serve to frustrate the rapid entry of generic competition following the expiry of a patent.

The speed of generic entry is also influenced by the size and structure of national markets. Empirical research has shown that the probability of generic entry is positively correlated with the revenue earned from the patented drug, and the delay between patent expiry and generic entry is negatively correlated with revenue earned.[21] Therefore, high revenue drugs are more likely to see generic entry, entry is likely to occur more rapidly following the expiry of the patent and entry first occurs in the largest national markets.

It is apparent that a combination of regulatory policy, market conditions, and the actions of patent holders can extend the period of market exclusivity beyond the expiry of the patent. As illustrated in table 1, these factors lead to significant international divergence in both the probability of entry and length of exclusivity across four national markets.

Table 1: Characteristics of generic entry

	United Kingdom		United States		Germany		Japan					
	1998–2002	2006–2009	1998–2002	2006–2009	1998–2002	2006–2009	1998–2002	2006–2009	1998–2002	2006–2009		
Proportion of molecules experiencing generic entry	18%	29%	22%	34%	21%	33%	30%	36%				
Length of exclusivity period (yr)	12	11.4	11.2	11.3	11.3	10.1	11.9	12.1				

Source: P Danzon and M Furukawa, 'Cross-national evidence on generic pharmaceuticals: pharmacy vs. physician-driven markets' (2011). NBER working paper 17226.

The data in table 1 shows that generic entry is by no means universal. Even in the United States, only about one-third of drugs experienced generic entry. However, the proportion of molecules experiencing generic entry increased over time in each of the four markets shown.

This perhaps reflects the increased regulatory tolerance of generic entry and the increasing rewards available to generic manufacturers.

Despite the increased prevalence of generic entry, the length of the exclusivity period enjoyed by patent holders has not declined uniformly across the four markets. Between 1998-2001 and 2006-2009, the UK and Germany saw declines in the average length of the exclusivity period, possibly reflecting changes in the European regulatory regime over that period as well as specific national policies to promote generic entry.

In contrast, in the US, the average length of the market exclusivity period remained relatively stable, increasing slightly from 11.2 years to 11.3 years. This is consistent with the findings of Hemphill and Sampat that legal challenges to the increased use of evergreening strategies have ensured that patent holders have been unable to significantly increase the period of market exclusivity enjoyed by their products.[22]

Outside of Japan, there is relatively little data about the length of market exclusivity periods enjoyed by patented products in Asia. Foreign pharmaceutical firms have typically been reluctant to introduce their patented products to less developed markets at prices affordable in those markets. This is in part because, in order to make the products affordable to consumers in less developed markets, patent holders would have to sell the drugs at a significant discount to the prices charged in more developed markets. Patent holders fear that such sales would undermine the monopoly prices they are able to charge in 'developed' markets, and perhaps encourage unauthorised parallel imports.

As Asian markets develop, it might be expected that they will exhibit stronger protections for intellectual property, and an increased ability and willingness to pay prices comparable to those prevailing in the US or Europe. Singapore's emergence as a regional hub for intellectual property transactions and management is perhaps indicative that this process is already taking place within Southeast Asia. Such developments might increase the willingness of pharmaceutical companies to introduce their patented products to these markets.

In the meantime, certain developing economies have sought to use compulsory licences to overcome this reluctance. Under a compulsory licence, the local government authorises a company to exploit a particular patent without the consent of the patent holder in return for a royalty set by the government. This process may be conducted with or without input from the patent holder. The circumstances in which a government may grant a compulsory licence without breaching international agreements were expanded significantly under the Agreement on Trade-Related Aspects of Intellectual Property Rights and the Doha Declaration.[23]

To date, political pressure, fear of retaliatory acts by the governments of developed countries, and the relative lack of manufacturing sophistication in developing counties have limited the instances of compulsory licensing. Between 1995 and 2011, there were 24 instances across 17 countries where compulsory licences were either publically contemplated by the local government or granted. The number of compulsory licences granted peaked in the 2003 to 2005 period and has declined markedly since 2006.[24]

The majority of compulsory licences have concerned treatments for HIV/AIDS.[25] For example, in 2006 Thailand granted a compulsory licence permitting Thailand's Government Pharmaceutical Organisation to import a generic version of the antiretroviral drug Efavirenz from India, even though the drug was still under patent in Thailand. In return, Merck, the

patent holder, was granted a royalty of 0.5 per cent of the total sales value of the medication imported or produced by Thailand.[26]

It is clear that, where they have been granted, compulsory licences undercut the ability of the patent holder to extract monopoly level profits from a market before and after patent expiry.

Implications for patent valuation

Although in some markets the period of exclusivity following expiry of the patent is seen to have declined in recent years, it is apparent even for those products that are challenged with generic entry, patent holders often enjoy a monopolistic position after the expiry of a patent. Hudson (2000) found that, from 1984 to 1996, this period averaged about 2.6 years in the US and UK compared witjh 3.4 years in Germany.

This has led some commentators to suggest that when valuing a patent one should also consider the 'post-expiry patent value' (PEPV). In DCF analysis, this would involve projecting cash flows beyond the expiry of the patent and assigning the value of these cash flows to the patent. Hudson (2000) has suggested weighting these cash flows in proportion to the perceived likelihood of generic entry following the expiry of the patent. The PEPV is thus a function of:[27]

- the probability of generic entry;
- the expected lag between patent expiry and the entry of generics;
- the expected profits if no generic entry occurs; and
- the expected profits following generic entry.

These factors in turn depend upon, for example, the geographic market covered by the patent, the demand for the patented product, and the expected behaviour of the patent holder. Such characteristics are, collectively, unique to each patented product and may vary considerably even across different products in the same geography and industry. It is therefore not possible to assess the PEPV without carefully considering how these factors relate to the specific product itself. In particular, it would not be appropriate to simply assume the existence of a PEPV without assessing the role played by each of these factors.

However, while Hudson's analysis elucidates the factors influencing the profits earned by the patent holder following the expiry of a patent, it is not clear that the value of these cash flows, where they exist, should be assigned to the patent itself.

Assigning the post-expiry cash flows to the patent implies that a commercial entity would be willing to pay a positive amount for an expired patent. This is not an intuitively appealing assumption. It can be safely assumed that no commercially rational entity will pay for a patent that grants it no enforceable intellectual property rights. On this basis, post-expiry cash flows should not be included in a patent valuation.

If the value of post-expiry cash flows is not embodied within the value of the patent, where might it lie? One possibility is that the value of post-expiry cash flows is attributable to the brand name under which the patented product is distributed. Thus, while a company may no longer be willing to pay for the original patent covering ibuprofen, it may be willing to pay for the Motrin, Advil or Nurofen brands under which the drug is sold. This view is consistent with the observation that pre-expiry advertising is one of the strategies used by firms to maintain their sales following generic entry.

CONCLUSIONS

Firms engage in a variety of strategies to extend the period over which their patented products enjoy market exclusivity. The success of these strategies depends, in part, upon the regulatory and legal framework with which intellectual property rights are enforced. However, empirical evidence suggests that, across jurisdictions, patent expiry is followed by a delay before generic entry occurs.

This delay allows the incumbent to continue to enjoy the benefits of a greater market share or higher prices than would be available in a competitive market, even after the expiry of the underlying patent. We have suggested that, rather than attributing the value of these post-expiry cash flows to the patent, they might be attributed to the brand covering the patented product.

The effective period of exclusivity enjoyed by patent owners can be extended considerably through the adroit use of branding and product differentiation. Empirical evidence has found a strong correlation between advertising expenditure and the firm's decision to launch a franchise extension.[28]

Branding is playing an increasingly important role in pharmaceutical firms' business models. Between 1996 and 2005, the total advertising expenditure by pharmaceutical companies in the US increased by 160 per cent to US$29.9 billion per annum. The most rapid growth was seen in direct-to-consumer advertising which increased by 330 per cent over the period.[29]

From 1990 to 2005, the returns earned by pharmaceutical companies on advertising expenditure were three times greater than the returns on R&D.[30]

Branding strategies, and the returns they produce, are predicated upon the enforceability of the underlying, original patent. The patent grants the holder a period of exclusivity during which it can develop its market position and build a sustainable brand. In circumstances where the patent holder is denied this exclusivity period, it may be unable to successfully develop a brand around the patented product.

In those circumstances, it may be denied both the post-expiry cash flows attributed to the brand, and the opportunities for franchise extensions provided by a strong brand presence. Thus, when considering the damages arising from patent infringements, it might be appropriate to consider both the cash flows attributable to the patent itself and the extent to which the infringement has denied the patent holder the commercial opportunities associated with a strong brand.

Notes

1. PwC 2013 Patent Litigation Study.
2. PwC 2013 Patent Litigation Study.
3. Other valuation approaches, such as the cost-based approach, are not discussed in this article.
4. Teece, D, Sherry E F, Royalties, evolving patent rights, and the value of innovation. Res Policy 33(2):179-191.
5. Strictly speaking, holding a dormant patent is not free. In many jurisdictions maintenance, or renewal fees, must be paid to ensure that the patent remains in force. However, these costs are payable regardless of whether the patent is exploited or

not and should therefore not factor in to the decision to exploit a patent, or leave it dormant.

6. See for example: Hudson, J (2000), 'Generic Take-up in the Pharmaceutical Market Following Patent Expiry: a Multi-country Study,' *International Review of Law and Economics* 20, 205-221.
7. I recognise that there may be instances where synergies between the operations of two entities may allow them to extract more value from a patent than either party could in isolation. A discussion of the different approaches to extracting value from a patent and their relative merits is beyond the scope of this article.
8. Rivette, K G, Kline, D, 2000a. Discovering New Value in Intellectual Property. *Harvard Business Review*, 78 (1), 54-67.
9. Assuming it does not incur significant costs in order to prevent entry (eg, marketing expenditure).
10. Dwivedi, G, Hallihosur, S, Rangan, L Evergreening: A deceptive device in patent rights (2010) *Technology in Society*, 32 (4), pp. 324-330.
11. Hemphill, C S, Sampat, B N. Evergreening, patent challenges, and effective market life in pharmaceuticals (2012) *Journal of Health Economics*, 31 (2), pp. 327-339.
12. Hemphill, C S, Sampat, B N. Evergreening, patent challenges, and effective market life in pharmaceuticals (2012) *Journal of Health Economics*, 31 (2), pp. 327-339.
13. Jain, D and Conley, G J, Patent Expiry and Pharmaceutical Market Opportunities at the Nexus of Pricing and Innovation Policy, Insead Working Paper.
14. Id.
15. Id.
16. Dias, S and Ryals, L. Options Theory and Options Thinking in Valuing Returns on Brand Investments and Brand Extensions (2002), Journal of Product and Brand Management 11(2), pp115-128.
17. Danzon, P and Furukawa, M, Cross-National Evidence on Generic Pharmaceuticals: Pharmacy vs. Physician-Driven Markets (2011), NBER Working Paper No. 17226.
18. Two drugs are considered 'bioequivalent' if they are chemically identical, allow approximately equal amounts of the active ingredient to reach the therapeutic site and have similar rates of therapeutic action.
19. Hudson, J. Generic take-up in the pharmaceutical market following patent expiry A multi-country study (2000) *International Review of Law and Economics* 20, pp 205-221.
20. Organisation for Economic Co-operation and Development (OECD). OECD policy roundtables: generic pharmaceuticals 2009. Paris: OECD Competition Committee; 2010; p143.
21. Hudson, J. Generic take-up in the pharmaceutical market following patent expiry A multi-country study (2000) *International Review of Law and Economics* 20, pp 205-221.
22. Hemphill, C S, Sampat, BN. Evergreening, patent challenges, and effective market life in pharmaceuticals (2012) *Journal of Health Economics*, 31 (2), pp. 327-339.

23. Beall R, Kuhn R (2012) Trends in Compulsory Licensing of Pharmaceuticals Since the Doha Declaration: A Database Analysis. PLoS Med 9(1): e1001154.

24. Id.

25. Id.

26. Steinbrook R. Thailand and the compulsory licensing of efavirenz. ***N Engl J Med*** 2007; 356:544-6.

27. Hudson, J. Generic take-up in the pharmaceutical market following patent expiry A multi-country study (2000) ***International Review of Law and Economics*** 20, pp 205-221.

28. Jain, D and Conley, G J, Patent Expiry and Pharmaceutical Market Opportunities at the Nexus of Pricing and Innovation Policy, Insead Working Paper.

29. Donohue J M, Cevasco M, Rosenthal MB (2007). A Decade of Direct-to-Customer advertising of prescription drugs.***N Eng J Med 2007***; 357:673-81.

30. Pattikawa, L (2007). ***Innovation in the Pharmaceutical Industry***. 1st ed.

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Summary

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This chapter introduces the new rules of the Japan Commercial Arbitration Association (JCAA) that came into force on 1 February 2014; the recent court decision involving arbitration; and developments on free trade agreements.

NEW JCAA RULES – READY TO OFFER UP-TO-DATE SERVICES

The 2014 JCAA Commercial Arbitration Rules came into effect on 1 February 2014 (the New Rules).[1] For the first time in a decade, the JCAA has comprehensively amended its rules to meet the demands and expectations of arbitration users. International arbitration institutions currently compete with each other by improving their rules, practices and facilities and providing better services to users. Given the number of institutions eager to help prospective disputants, it is a good time to be an arbitration user. Since 1 February 2014, JCAA users may also enjoy arbitration governed by a set of the most sophisticated arbitration rules.[2] The aim of the New Rules is to provide efficient and effective arbitration and to reflect the best practice in international arbitration.

KEY CHANGES AT A GLANCE

Efficiency And Effectiveness Of Procedures

- The 'Basic Date' system has been abolished.
- Awards must now be issued within six months from the formation of the tribunal (rule 39.1).
- The tribunal must fix a schedule (rule 39.2) and identify issues (rule 40) in the early stages of the proceedings.
- Electronic filing (rules 2 and 5) has been introduced.

Arbitrators

- The JCAA has introduced new screening of arbitrators (rule 25.3).
- The authority of the chair arbitrator on procedural issues (rule 7.3) has been clarified.
- The JCAA's practice of respecting a party's request that a sole or chair arbitrator not have the nationality of either party (rule 27.4) has been codified.

Dealing With Uncooperative Parties

- Constructive receipt of notices and submissions by a party refusing receipt (rule 5.4) has been introduced.
- Cost allocation taking into account the parties' conduct during the arbitration proceedings (rule 83.2) has been introduced.
- The treatment of a defaulting party (rule 48) has been clarified.

A Single Proceeding For Multiple Claims And Multiple Parties

- New requirements for bringing multiple claims in a single proceeding (rule 15) have been implemented.
- Scope of counterclaims (rule 19) and amendment to claims (rule 21) have been clarified.

- New requirements for consolidating proceedings (rule 53), appointment of arbitrators in multiple party arbitration (rule 29), and third-party joinder (rule 52) have been established.

Interim Measures And Emergency Arbitrators

- The scope, requirements and effect in respect of interim measures (rules 66-69) have been clarified.
- Emergency arbitrators provisions (rules 70-74) have been implemented.

Others

- Med-arb proceedings (rules 54, 55) have been refined.
- Expedited procedures: at the parties' choice, monetary thresholds are no longer applicable (rule 75.1).
- The scope of confidentiality obligations have been expanded to include confidentiality obligations of any persons involved in the arbitration proceedings, and exceptions from confidentiality obligations in the case of justifiable reason (rule 38.2) have been clarified.

PROVISIONS TO EXPEDITE THE ARBITRATION PROCEEDINGS

The JCAA has abolished the Basic Date system whereby the counting of time limits set forth in the rules, such as the time limit for submissions, commenced on the the date immediately following the expiry of three weeks from the date on which the JCAA sent a notice of the request for arbitration.[3] Under the previous rules, the clock did not start ticking until three weeks had passed from the date on which the JCAA sent a notice of request for arbitration, even when the respondents had already received the request for arbitration. Under the New Rules, the counting of the time limit commences on the date when the respondents receive or are deemed to receive the notices in order to move things forward as soon as the respondents receive a proper notice for arbitration.

The JCAA now obligates the tribunal to use its reasonable efforts to render an award within six months from the date of constitution of the tribunal (rule 39.1). To achieve such time limit, the tribunal is also required to fix a schedule of the proceedings through consultation with the parties as soon as practicable (rule 39.2). The tribunal is encouraged to identify issues at an early stage of the proceedings upon consultation with the parties and may prepare terms of reference if it finds it appropriate (rule 40). Fixing a schedule in Procedure Order No. 1 and identifying the issues at an early stage of the proceedings are representative of the best practice in international arbitration, and the JCAA has codified such best practice to facilitate expeditious and efficient arbitration proceedings.

ARBITRATORS

The arbitrators chosen by the parties are at the core of party autonomy, one of the fundamental principles of international arbitration. The New Rules continue to respect party autonomy; however, the appointment of an arbitrator will not become effective unless and until the JCAA confirms the appointment (rule 25.3). This confirmation requirement applies equally to the appointment of an arbitrator by a party or by the agreement of parties or party arbitrators, and has been introduced to exclude an arbitrator the selection of whom is

apparently inappropriate due to obvious conflicts,[4] lack of availability or lack of competence at the outset of the proceedings. Since this is an exception to party autonomy, the JCAA's refusal to confirm the appointment of the arbitrators chosen by the parties is limited to extreme situations, and the JCAA may not refuse to confirm the appointment of an arbitrator without consulting with the parties and other party arbitrators (rule 25.3).

MEANS TO DEAL WITH UNCOOPERATIVE PARTIES

A party may protract a given case by failing to appear in the proceedings. In the event that a party fails to appear without sufficient cause, the tribunal may continue the arbitration proceedings and render an award based on the evidence submitted (rule 48). On some occasions, a party may become even more disruptive by refusing to receive any notices or submissions from the other party or from the arbitration institution. This could cause serious issues should the arbitration law or arbitration rules require that notices or submissions be received by an intended recipient party to put such notices and submissions into effect. An obstructionist party may deploy such tactics to frustrate the arbitration proceedings. In order to tackle those tactics, the JCAA has introduced the concept of constructive receipt of notices and submissions by an intended recipient in the event such intended recipient refuses receipt, whereby such party is deemed to have received the notices and submissions on the fourth day after the notices or submission were dispatched, or on the date when the intended recipient refused receipt, if such date is known (rule 5.4).

The concept of constructive receipt was also introduced to a party whose address is not ascertainable in spite of reasonable efforts exerted by a sending party. In this event, a party is deemed to have received the notices and submissions on the fourth day after the notices or submission were dispatched to the party's last known address (rule 5.5).

The New Rules further confirm the tribunal's authority to allocate the costs of arbitration, including attorneys' fees of the parties, taking into account a party's conduct during the arbitration. For example, should a party fail to comply with interim orders issued by the tribunal or disrupt the proceedings, the tribunal may, in essence, sanction the party by imposing a higher allocation of costs on the party regardless of the outcome of the proceedings (rule 83.2).

A SINGLE PROCEEDING FOR MULTIPLE CLAIMS AND MULTIPLE PARTIES

The New Rules offer the option of a single proceeding for multiple claims if:

- all parties to the multiple claims have agreed in writing;
- the multiple claims are subject to the same arbitration agreement; or
- the multiple claims arose between the same parties; and
    - the same or similar question of fact or law arises from such claims;
    - the arbitration agreements refer all such claims to be arbitrated at the JCAA or under the rules of the JCAA; and
    - a single proceeding for such claims is feasible in light of the arbitration agreements, considering factors such as the seat, the number of arbitrators, and languages prescribed in each of the arbitration agreements (rule 15.1).

Under the previous rules, the scope of claims that could be brought into a single proceeding was dictated by an arbitration agreement; namely, multiple claims may be arbitrated in a single proceeding if those claims arose from the same arbitration agreement. This principle remains the same; however, the New Rules introduced some flexibility such that a party may arbitrate multiple claims governed by separate arbitration agreements in a single proceeding when it is sensible and practicable to do so. For example, a party may now bring multiple claims governed by separate arbitration agreements in a single proceeding if such claims arise from separate but virtually identical individual contracts that involve similar and repeated transactions and are subject to one single master agreement. The New Rules apply essentially the same requirements as mentioned above to counterclaims (rule 19), amendment of claims (rule 21), third-party joinder (rule 52), and consolidation (rule 53), in each case, aiming to achieve efficient dispute resolution in one single proceeding.

INTERIM MEASURES

Interim measures have been provided in the JCAA rules; however, the New Rules have clarified the scope, requirements and effect for the interim measures by essentially incorporating Article 17 of 2006 UNCITRAL Model Law and Article 26 of the 2010 UNCITRAL Arbitration Rules (rules 66-69). A major difference between the UNCITRAL rules and the New Rules is that the New Rules explicitly exclude the option of ex parte interim measures, while the UNCITRAL Rules are silent on this point (rule 66.4). Please note that the Japanese Arbitration Act, which is consistent with the 1985 UNCITRAL Model Law, has not incorporated the 2006 UNCITRAL Model Law. As such, interim measures issued by the tribunal are not enforceable in a Japanese court as yet. However, the failure to comply with the interim measure could be sanctioned by way of an unfavorable allocation of costs and, at minimum, a non-compliant party is likely to be found in breach of an arbitration agreement, which constitutes another cause of action.

EMERGENCY ARBITRATORS

Following the trend of institutional arbitration rules, the JCAA has introduced emergency arbitrator (EA) proceedings, which are equally robust to those provided for by other institutional rules with respect to:

- a party being able to apply for EA proceedings even before filing a request for arbitration;[5]
- no person being able to be appointed as an EA if there are any circumstances likely to give rise to doubts as to impartiality or independence (unlike an arbitrator, who is disqualified only when there are any circumstances likely to give rise to justifiable doubts as to impartiality or independence)[6] of the EA;
- the JCAA, in principle, appointing an EA within two business days from its receipt of the application;
- an EA setting the procedural schedule immediately after the appointment and issuing an interim decision within two weeks from the appointment; and
- any such interim decision issued by an EA being treated as an interim measure issued by the full tribunal unless and until the tribunal amends, suspends or terminates such interim decision (rules 70-74).

Again, EA's interim decision is not yet enforceable in a Japanese court, a breach of an interim decision issued by an EA could be sanctioned in the course of apportionment of costs and constitute another cause of action. The fees for an EA are subject to cap of ¥2 million.[7]

ARBMED PROCEEDINGS

The JCAA has refined its rules on mediation conducted in the course of arbitration such that an arbitrator may not act as a mediator without a written agreement between the parties (rule 54.1). Once the parties agree to have an arbitrator serve as a mediator, such parties may not challenge the arbitrator on the ground that he or she acted as a mediator (rule 55.1). Furthermore, an arbitrator acting as a mediator is required to inform the parties of the existence of ex parte communications with either party (rule 55.2). The JCAA does not require an administration fee for mediation when an arbitrator of the pending arbitration is acting as a mediator (rule 55.4). The JCAA rules now clearly set forth a 'settlement negotiation privilege' (rule 54.3); namely, unless otherwise agreed to between the parties, communications made during the mediation proceedings or any settlement proposal made by a mediator are excluded from evidence in the arbitration proceeding.

EXPEDITED PROCEDURES

Expedited procedures at the JCAA were originally intended for small claims below ¥20 million whereby a sole arbitrator would render an award within three months from the appointment, having only a one-day hearing if necessary. This procedure is now open to all parties irrespective of the size of the claim so long as the parties agree in writing and notify the JCAA of their agreement within two weeks from the date of receipt of the arbitration request by the respondent (rule 75).

By incorporating the best practice in international arbitration into its New Rules, the JCAA is now better positioned to meet the needs and expectations of JCAA users.

JAPANESE COURTS – TOO FRIENDLY FOR ARBITRATION?

The Japanese courts have been consistently arbitration-friendly and have rarely intervened in arbitration proceedings or set aside, or refused to enforce an arbitration award even before Japan adopted the 1985 UNCITRAL Model Law in 2003.

Last year, the Tokyo District Court restated its basic approach by dismissing a claim based on an arbitration agreement. However, this case involved a 'pathological' arbitration agreement, and the court decision to uphold the pathological agreement should be questioned.

TOKYO DISTRICT COURT DECISION 23 AUGUST 2013

This case involved two sales contracts of silicon wafers for solar panels between a Korean company (the purchaser) and a Japanese company (the seller).[8] The purchaser filed a suit against the seller to seek repayment of the advance payment (approximately US$3.5 million) after terminating the sales contracts based on the alleged breach by the seller. The seller sought dismissal of this claim based on the arbitration clauses in the sales contracts, the dismissal of which the court granted. The arbitration clauses in the two sales contracts provided in essence as follows:

> 11 Arbitration

> 11.1 Both Parties shall do their best in order to settle any disputes and/or arguments, which may arise upon or in connection with the present Contract, by means of negotiations.
>
> 11.2 Any disputes arisen upon or in connection with the present Contract, including the disputes concerning the quality of the products should be submitted for recourse and final resolution to the International Commercial Arbitration Court.
>
> 11.3 The award of the Arbitration Court shall be final and binding for both Parties, but can be substituted by a friendly agreement between Parties, which agreement should be duly drawn up in writing and signed by both Parties. Language of the arbitral proceedings is English.

The arbitration clause refers the disputes to the International Commercial Arbitration Court and, according to the court decision, there were at least three arbitration institutions with the name 'International Commercial Arbitration Court' (ICAC), in Russia, Ukraine and Belgium. The purchaser claimed that it intended to arbitrate under ICC rules (as opposed to the ICAC rules) and the arbitration agreements were entered into by mistake and therefore should be found void. It would be unthinkable and against common business sense for a Korean party and a Japanese party entering into an arbitration agreement whereby either party may initiate arbitration before any of the three institutions in Russia, Ukraine or Belgium in relation to a sales transaction between Japan and Korea. Such a defective arbitration clause should be found void and should not have been permitted to stand even as an ad hoc arbitration agreement. On this point, the seller, although refusing to identify its intent in this arbitration clause (ie, whether or not the seller actually intended to arbitrate under the auspices of any of the three arbitration institutions in Russia, Ukraine or Belgium), argued that it is not uncommon to arbitrate in a neutral country (ie, a country other than the countries of the parties), and the parties should not have made a mistake twice in agreeing to the arbitration clause when the sales contracts involved a large sum of money. In endorsing the arbitration clause as it was, the court held that the minimum requirement for an arbitration agreement under the Japanese Arbitration Act is 'an agreement to arbitrate in writing' and the above arbitration clause unquestionably met such minimum requirement. In denying the 'mistake arguments', the court assumed that the parties must not have reviewed the arbitration clause carefully in entering into two contracts involving a large stake. The court further assumed that the parties may well have chosen to arbitrate in Russia, Ukraine or Belgium because the parties may have preferred to have arbitration in a neutral seat, and Russia, Ukraine or Belgium may well be chosen as the seat because, in particular, Russia and Ukraine had adopted the UNCITRAL Model Law.

THE COURT SHOULD UNDERSTAND THE BUSINESS REALITY

Pathological arbitration clauses are common issues, ironically, among arbitration-friendly countries. The arbitration-friendly court, being eager to respect party autonomy, often rushes to a conclusion that a pathological arbitration clause should survive as it is, or as a simple ad hoc arbitration clause, by removing the terms that frustrate the arbitration clause, or in a modified form after going through a 'surgical process' of interpreting the parties' true intent.

There is no single prescription to resolve the issue of a defective arbitration clause. However, as a starting point, the court should understand the business reality that it is quite possible that any party may by mistake execute a pathological arbitration clause and later either party may take advantage of such defective clause to frustrate the efficient resolution of disputes. Indeed, it is not unusual that dispute resolution is provided for in the miscellaneous provisions section at the very end of an agreement – sometimes referred to as 'a midnight clause' because the parties negotiated it at the very end of a negotiation that lasted days and nights. This is precisely the source of a pathological arbitration clause. The court should not merely assume that the parties should have reviewed and negotiated an arbitration clause carefully simply because the stakes involved are substantial. It is also important for the court to be familiar with arbitration practice, such as the preferred institutions, preferred seats and the fact that adoption of the UNCITRAL Model Law is one thing and arbitration practice up to international standards is quite another thing, and it is very uncommon for parties to have multiple options in choosing arbitration institutions as interpreted by the Tokyo District Court's findings.

AD HOC ARBITRATION IS NOT ALWAYS A SOLUTION

One may argue that the Tokyo District Court should have allowed the arbitration clause to survive as a straight forward ad hoc arbitration agreement (ie, sheer agreement to arbitrate). Again, the court should also understand and appreciate the practice of arbitration – which requires extensive cooperative between the parties to pursue – and the court, in allowing a defective arbitration clause to survive as an ad hoc arbitration clause, is not always a proper prescription. While an agreement to arbitrate in writing may be the minimum requirement for an arbitration agreement, when parties agree to an institutional arbitration, the parties have intentionally avoided ad hoc arbitration, and finding an ad hoc arbitration agreement could be a material deviation from parties' true intent. Indeed, a sheer agreement to arbitrate may result in an extremely costly and time consuming process should either party be an obstructionist. This is because every time a party does not cooperate, the other party has to resort to the court of the seat to move the proceeding forward, particularly before the tribunal is constituted. A court finding that there is an ad hoc arbitration clause may well force a party to give up dispute resolution altogether. The court should wisely discern the parties' real intent and whether it is fair and equitable to allow a pathological arbitration clause to survive and, if so, how.

INVESTMENT TREATIES AND FREE TRADE AGREEMENTS

One of the key economic policies for the Abe administration is tapping into the growth of emerging markets by promoting economic partnership with emerging countries.[10] Japan is currently aiming to raise its free trade agreement (FTA) ratio (ie, the ratio of trading countries having an FTA with Japan among all trading countries) from 19 per cent to 70 per cent by 2018. As part of this effort, on 8 July 2014, Japan and Australia entered into an economic partnership agreement.[11] On 22 July 2014, Japan and Mongolia came to a basic agreement on major issues in relation to the EPA currently subject to negotiation.[12] Detailed information on the concluded EPAs and ongoing negotiation of EPAs to which Japan is a party can be found at the Ministry of Foreign Affairs' website.[13] The government considers that the investment chapter in FTAs is critical not only to promote trade but also to secure stable supply of mineral and energy sources. As such, the importance of investment treaties and investment chapters in FTAs continue to rise. The Japanese government is now trying to increase awareness of recourses available to Japanese investors under

FTAs and BITs to support Japanese investors' negotiation with host states that owe treaty obligations to protect Japanese investors. In principle, Japanese companies continue to take a litigation and arbitration-averse approach, and no publicly available data shows that Japanese investors have initiated investment treaty arbitration since the ***Saluka*** case in 2006.[14] However, due to the rapid increase of investment in the area of energy and infrastructure, Japanese investors may soon be put in a position of having no choice but to initiate official investment treaty arbitration against host states.

Notes

1. www.jcaa.or.jp/e/index.html. See JCAA Newsletter March 2014 (No. 31) at www.jcaa.or.jp/e/arbitration/newsletter.html. An annotation of the rules is available in Japanese atwww.jcaa.or.jp/arbitration/rules.html.
2. The New Rules apply to arbitration filed on and after 1 February 2014 (Supplementary provision of the New Rules).
3. www.jcaa.or.jp/e/arbitration/rules.html. JCAA arbitration rules as amended and effective on 1 January 2008.
4. For example, a case where an arbitrator's disclosure reveals conflicts set forth on the red list of the IBA Guidelines on Conflicts of Interest.
5. An applicant must file a request for arbitration within 10 days from the date of filing an application for EA proceedings (rule 70.7).
6. Rule 31.3 (challenge to arbitrators). The higher standards are imposed on EAs in order to avoid challenges to EAs subsequent to the appointment in light of the emergency nature of the proceeding.
7. The JCAA Regulation for Arbitrator's Remuneration, article 9.
8. 2012(wa)24603, 2013WLJPCA08238004.
9. www.tpprf-mkac.ru/en (Russia), www.ucci.org.ua/arb/icac/en/icac.html (Ukraine) and http://chea-taic.be/ (Belgium).
10. 'Japan Revitalization Strategy,' 14 June 2013. www.kantei.go.jp/jp/singi/keizaisaisei/pdf/en_saikou_jpn_hon.pdf.
11. www.mofa.go.jp/ecm/ep/page22e_000430.html The EPA between Australia does not contain an ISDS provision. Instead, the two countries have agreed, among other things, to revisit the dispute resolution mechanism between an investor and a host country if Australia enters into any multilateral or bilateral international agreement providing for a mechanism for the settlement of an investment dispute between Australia and an investor of another country or the other party to that agreement, with a view to establishing an equivalent mechanism under the Japan–Australia EPA.
12. www.mofa.go.jp/mofaj/files/000045892.pdf (Japanese only as of the date of this article).
13. www.mofa.go.jp/policy/economy/fta/index.html
14. *Saluka Investments B V v The Czech Republic*, UNCITRAL www.italaw.com/cases/961.

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Summary

ARBITRATION AGREEMENTS
NULLIFICATION OF AN AWARD BY COURTS IN NEPAL
ENFORCEMENT OF AN ARBITRAL AWARD BY THE COURTS
CONCLUSION

Arbitration is a legally and commercially accepted dispute resolution mechanism in Nepal, and its acceptance can be judged by the increased attention it is receiving from contracting parties and the growing number of arbitration proceedings conducted in the country. Parties aim for an arbitration clause that will produce mandatory consequences for the parties with no (or minimal) intervention from the judiciary prior to or after the award, a clear dispute settlement demarcating the parties' liability without further reference to any other cumbersome procedure, and speedy judicial enforcement. The Nepalese Supreme Court has repeatedly ruled that there is no right to appeal against an arbitral award and that the jurisdiction of the appellate court is of a correctional nature, not on the merits of the case, but on limited grounds, such as the validity and legality of the contract, the right to be heard, the issue of jurisdiction, the arbitrability of the dispute under Nepalese law and awards that are against public policy or the public interest. Even within that limited jurisdiction there is scope for interpretation, and many interpretations depend on the wisdom of judges.

In principle, arbitration is preferred because both parties have the right to appoint an arbitrator of their choice, who for the most part are recognised experts or experienced in the fields related to the dispute, or known to the parties. Apart from this, the statutory provision that the arbitration award can be enforced by courts as if it were a court decision gives confidence to the litigating party. Despite this background, in practice parties often find the process frustrating for various reasons. Some examples of the negative aspects of arbitration in Nepal are briefly explained in this article. This should not be taken as a criticism of any party to the contract, the court, the judges or the government, but as a warning to take appropriate measures at the time of signing the contract, for risk analysis, for conceptual clarity and so on. Some of the frustration can be attributed to the bad drafting of contract provisions, particularly the arbitration clause, or to the lack of conceptual clarity among parties to the contract, judges in court and even court officials, whether during the hearing of a challenge to an arbitral award or during its execution.

ARBITRATION AGREEMENTS

Some of the common issues that can render arbitration clauses defective are dealt with in this article. Such defective arbitration clauses, if not properly analysed or evaluated at the time of signing, or if simply 'cut and pasted' from other bad or irrelevant contracts, ultimately fail to deliver. Often the suffering party will blame the principles or concepts behind the arbitration, despite the fact that they had willingly signed the contract. Any arbitration provision in an agreement is expected to deliver a result, but in the absence of proper care at the time of the drafting of an agreement, and particularly the arbitration clause, a badly drafted arbitration provision will certainly increase uncertainty, take up a potentially unlimited amount of time and attribute unexpected costs to the parties. Such provision may ultimately result in the abandonment of arbitration or may never be enforceable as an arbitration clause. Such 'pathological clauses' also invite court intervention in many instances, and benefit the hostile party that does not wish to participate in the arbitration process, since that party may be in a beneficial position if arbitration does not take place. Recently, there have been many instances where courts have avoided unnecessary intervention before, during or even after arbitration, but there are a few examples of judges who see arbitration as a parallel or competitive process to court proceedings and they prefer to retain superiority in dispute settlement. In one example, an award was set aside after a challenge against it was heard only because, in the decision part of the process, the tribunal did not mention the particular clauses of the contract under which one party's entitlement was determined. Despite the

fact that all such clauses were mentioned in the claim, rejoinders and arguments by the parties and were even recorded in the award, the decision was set aside and sent back for correction because, in the last paragraph of the award, the relevant provisions of the contract were not mentioned. This did not change the outcome of the process, and only served to waste the time and money of the parties involved. In another contract in Nepal, the parties showed a clear intention to arbitrate and resolve the dispute arising from the contract, but the contract stated that the 'Chief Justice of Nepal shall be the sole arbitrator'. In another contract, the parties unilaterally stated that the 'Chief Justice of Nepal shall act as appointing authority'. Another example is that of a major contract in which the parties agreed to first refer all disputes to a dispute adjudication board (DAB), whose recommendations could only be challenged by invoking arbitration; but there was no provision to form the DAB. Unlike for the appointment of an arbitrator by the Appellate Court, as prescribed in the Arbitration Act, there is no similar provision for appointment of DAB members. Failure to name DAB members caused a substantial delay, until both parties mutually agreed in good faith to waive the DAB requirement so as to make arbitration provision workable. In another contract, it stated that a DAB decision, if not challenged, shall become final and binding and be enforceable by the courts of Nepal. Unfortunately, the Nepalese legal system does not provide any mechanism for the enforcement of DAB recommendations or decisions, and such enforcement is limited to foreign and domestic arbitral awards. On rare occasions, contracts have been drawn up where parties have accepted both platforms concurrently (ie, the court and arbitration). One such contract stated that the contract and arbitration would be governed by domestic laws, that the courts of a particular location should have jurisdiction and that the parties would have the choice as to whether to resort to arbitration or otherwise.

In yet another contract, parties agreed to refer the dispute to arbitration to be conducted by the Rules of the International Chamber of Commerce (ICC) in Paris. Whether the word 'Paris' indicated the venue of arbitration or the address of the ICC was subject to interpretation. The contract amount was fairly small and the claim was also minimal, meaning it was beyond the claiming party's capacity to resort to institutional arbitration in Paris. The claimant abandoned the right to claim because of the complexity and lack of capacity to deal with the arbitration proceeding in Paris. When asked, the party simply stated that they were in a hurry to sign the contract and never gave any importance to (and possibly never read) the dispute settlement clause during signing. The parties lacked even basic information about the difference between administered and ad hoc arbitration, number of arbitrators, method of selection, choice of arbitration rules and importance of designating the place of arbitration. Likewise, in a contract between a government department and a contractor for the construction of a bridge, the contract simply stated that arbitration should be conducted in accordance with the Arbitration Rules of Nepal. However, while there was an 'act' of Parliament (the Arbitration Act in force), the government had not formulated any 'rules' under such Act. As the government did not respond to the contractor's notice for the appointment of an arbitrator, the contractor had to approach the District Court (under the earlier Arbitration Act, 2038 of 1981), who appointed a Justice of the Appellate Court as arbitrator. Both parties accepted the appointment and cooperated with the arbitrator, but the award delivered by such arbitrator (a sitting judge) was ultimately nullified by the Supreme Court because the Constitution did not allow any sitting judge to be appointed for work other than in court (with only a few exceptions). The court further directed the government to formulate a rule to conduct such arbitration (Supreme Court Bulletin, year 10, vol 8, p 5) but without prescribing a time limitation. In the absence of such a rule being in place, the arbitration proceeding remained in limbo for a decade until a high-ranking government official took the initiative

to resolve the dispute under the new Arbitration Act. This new arbitration agreement paved the way for arbitration to begin and the dispute was ultimately resolved. This proves that a commitment from a responsible official in a government ministry or department can make a difference to getting disputes resolved more quickly, provided there is a will to resolve them.

These are a few instances that do not represent the level of intelligence or ability of the drafters of the contracts, the working of the judiciary, or the government or society as a whole. Recently, many employees and clients have emphasised this clause and taken time to analyse what provisions will deliver better results. There are also many responsible government officials who fully respect the courts and give importance to arbitration. These examples only serve to highlight for the reader how an alternative dispute resolution mechanism develops over a period of time, why conceptual clarity is essential and how important it is to carefully draft the arbitration clause in an agreement.

NULLIFICATION OF AN AWARD BY COURTS IN NEPAL

The courts adopt a conceptually modern approach that entails refraining from unnecessary intervention in arbitral proceedings so as to uphold the arbitration clause and make it effective, rather than adopting an interpretation that impugns such clause. Many court decisions have demonstrated a pro-arbitration approach, although few courts have considered the merits of disputes or interpreted their own findings.

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 ruled that, under the Arbitration Act, 1999, the process of appointing an arbitrator has to commence within three months from the date the dispute arises. Similar orders on limitation were issued in ***Nepal Industrial and Commercial Bank Ltd v Arbitrators and others*** (Writ No. 062-WO-2886, decision date BS 2069.6.1/17 September 2012) and certain other cases by the Supreme Court, therefore the contracting parties must remain extremely cautious as regards matters of limitation and the reasons for referring a dispute to arbitration, the time taken to appoint an arbitrator and the procedural time limitation for appointing an arbitrator or filing a claim.

In ***Bikram Pandey v Ministry of Physical Planning and Construction*** (Nepal Law Digest/Ne Ka Pa, 2067 Decision No. 8437, page 1346, Division Bench), the Supreme Court came up with a new interpretation to simplify the arbitration procedure. It ruled that internationally recognised rules like the UNCITRAL Arbitration Rules may govern arbitration, but when such rules come into conflict with domestic laws the provisions of domestic law will apply. The Supreme Court further ruled that, even if the parties agree 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 the UNCITRAL Rules to designate an appointing authority and that the Appellate Court will have jurisdiction to act as appointing authority.

In many recent challenges over arbitral awards against government organs or entities, the government has argued that the award would increase the financial liability of the Treasury, which was never considered at the time of the signing of the contract, and that such additional burden on the Treasury is against public policy as the burden will be shifted to the public and be collected via taxes. It can only be termed as an 'emotional encashment' of the situation, rather than a plea on the merits of the case.

ENFORCEMENT OF AN ARBITRAL AWARD BY THE COURTS

When statutory arbitration was first recognised by the Development Board Act, 1956 (amended in 1964), there was no supporting legal provision to enforce arbitral awards. After about three decades, the Arbitration Act, 2038 was enacted. Despite the fact that there was no legal backing to enforce an arbitral award, in ***Anang Man Sherchan v Chief Engineer*** (Nepal Law Digest/Ne.Ka.Pa. 2020, decision No. 220, page 201, Full Bench) the Supreme Court concluded that arbitration was an alternative remedy prescribed by the Development Board Act. At the same time, this decision could also have directed the District Court to execute the award as if it were a court decision. Had this been done, it may not have been necessary to wait for over two decades for enforcement of the Arbitration Act 2038, which required the District Court to enforce an arbitral award as if it were its own decision. The normal execution procedure for court decisions (or arbitral awards) is prescribed in the Civil Code (Muluki Ain) of 1963 in the chapter on punishment. No. 42 of the chapter on punishment has hardly been amended to cope with the spirit of alternative dispute resolution and developments in concepts and laws relating to arbitration, and it states that the party seeking enforcement from the other party should identify property from which the recovery has to be made. While the chapter on punishment that requires application for execution within three years to be filed at the District Court, the Arbitration Act contains a specific provision regarding applying for the execution of an award within 30 days if the award is not self-executed within an initial 45 days from the date of receipt of the award by the party against whom it has been delivered. Apart from the above time limitation, all other procedures for the District Court to execute an award are the same as under general law. There is no time limitation for the execution of an award. In many instances, often involving government ministries, departments or other entities, court notices do not even receive a response despite repeated reminders, and yet the District Court still finds it difficult to take immediate action to enforce the award. If the award is against any natural person or company or other public establishment, the person requesting execution of an award must locate the property, bank account numbers or other particulars of the property to be withheld and recovered, but this does not apply against the government.

Aside from such lengthy execution procedures where the property from which the recovery has to be made must be identified by the beneficiary, such execution becomes cumbersome if the recovery is to be made from a government ministry, department or project. In one of the rare but notable case in which an award was delivered over a decade ago, partial payment was made after an out-of-court settlement and the rest was withheld under various pretexts, including the issuance of tax deduction at source. In fact, there was no provision for tax deduction at source on the payment under court order and that tax liability should have been dealt with separately by the beneficiary. Even if the question of tax was raised, no such amount has been deposited with the tax authority for over two years. This raises the question of the accountability of the government officials who deal with it, although there are barely any mechanisms available to do so. Such actions only create confusion and raise questions of trust and faith in government authorities. This does not mean that all government bodies deal with courts in a similar fashion, but there are few who comply with court notices after the arbitral award has been finalised. 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, in the event that either party files a petition to set aside an arbitral award, such award shall become final after the Appellate Court endorses it. This means that the whole process of execution has to wait until the Appellate Court decides on the challenge, if any. If not challenged, the award becomes final and binding on the parties.

Therefore, even if, conceptually, arbitration is regarded as a faster process, the bottleneck is the execution of an award where the beneficiary has to identify the property from which recovery should be made, and in the absence of any specific authority that keeps such records it becomes investigative work for the party seeking recovery. For foreign companies or citizens, it becomes more difficult to perform such execution in a short time if the other party is hostile or disobedient.

Even in cases of disobedience by government authorities, there is hardly any strict and effective action that the aggrieved party can resort to. Complaints to constitutional bodies like the Commission for the Investigation of Abuse of Authority also do not give clear solution to the party seeking recovery of the entitlement. Those who favour development law concepts are of the opinion that nothing stops courts from initiating such suo moto contempt action if payment is not made and a property is not disclosed from which recovery may be made. Practically, it is for the development lawyers to convince the court to abandon the conventional procedure and adopt progressive action to ensure quick and effective execution. Unless courts take stricter action against defying parties who ignore court notices, it is unlikely that attitudes will change.

CONCLUSION

With growing interest of foreign investors in the field of infrastructure development, such as hydropower, airports and the aviation sector, and highways, it is essential to understand how arbitration works in Nepal and what protection can be taken by the parties. There is a growing need for the legislature to simplify legal provisions for the enforcement of arbitral awards designating specific timelines and for the government to show that it is committed to the execution of awards in all respects. Likewise, there is a dire need for capacity building of, and more exposure for, among others, judges, government and private development lawyers, contract drafters and court officials, so as to enhance public trust and faith in arbitration proceedings as a successful mode of dispute settlement.

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Summary

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A REVIEW OF THE KOREAN SUPREME COURT CASES OF ARBITRATION ISSUES

In the past, arbitration was not actively used to resolve international disputes in Korea due to a lack of confidence in the arbitration system and low awareness of its significance. However, the Korean government and legal professionals in Korea have made efforts to strengthen the human resources and material infrastructure relating to arbitration, and as awareness of the need for efficient dispute resolution has increased, international arbitration has been increasingly considered the most important method of resolving commercial disputes in Korea and, as a result, is becoming increasingly popular.

During this process of refining the arbitration system by broadening the awareness of arbitration and strengthening the human resources and material infrastructure relating to arbitration, the Korean courts aim to ensure that the efficiency of the arbitration system is not overlooked. Developments in the overall awareness of the arbitration system on the part of the Korean courts, as demonstrated in cases regarding the cancellation and enforcement of arbitral awards, are directly linked to the development of arbitration in Korea.

Korean courts have been in step with the international development of arbitration by recognising a relatively broad scope of validity with respect to arbitration agreements while recognising the separability of arbitration clauses, by taking a generous approach in evaluating the grounds for arbitration awards, and further by introducing the concept of international public policy through their rulings in major cases. This article will review the overall position of the Supreme Court of Korea with regards to issues such as arbitration agreements, governing laws, arbitration tribunals and the cancellation, recognition and enforcement of arbitral awards in connection with international arbitrations.

ARBITRATION AGREEMENTS

Validity Of Arbitration Agreements

Whether an arbitration agreement exists between the parties to a dispute may be controversial in practice due to problems such as ambiguities in the proper construction of an arbitration agreement clause. The Supreme Court takes the following position in the event that there is disagreement on the proper interpretation of a contract between the parties concerned, to the point that the proper construction of the parties' intentions in that contract is ambiguous. One must comprehensively consider the detailed circumstances, such as the concept of arbitration under the relevant governing law of such arbitration, the contents of the arbitration clause in view of the characteristics and the method of the arbitration agreement, and the background of the arbitration agreement between the parties, in determining the validity of such arbitration agreement under the specific arbitration clause, while applying the general rules of construction of contract (eg, that the contents of wordings, the motive and backgrounds of the relevant contract, the intended purpose of the relevant contract and the parties' actual intentions should be comprehensively considered and reasonably construed from an empirical perspective).

In Supreme Court Decision 2004DA67264 rendered on 13 May 2005, with respect to the issue of the validity of an arbitration clause stating that:

> In the case of dispute resolution, both parties shall be subject to the arbitral awards issued by the Busan branch of the Korean Commercial Arbitration

> Board under the Arbitration Act, and the relevant lawsuit, if any, shall be submitted to the court having jurisdiction over the domicile of the Defendant, the contractor [...]

The Supreme Court held that:

> This arbitration clause cannot be deemed as an optional arbitration clause but rather shall be construed as an exclusive arbitration agreement, in light of the background of drafting of the relevant arbitration provision under the aforementioned legal principles. In the meantime, 'the relevant lawsuit, if any' in the above clause shall be construed as that both parties agreed on the forum of lawsuits relating to the procedural aspect of the arbitration and the arbitral award.

This indicates that the Supreme Court tends to recognise a broad scope of applicability of arbitration as a means for dispute resolution, upon the comprehensive review of the contents of the relevant dispute resolution clause and the background of the parties agreeing to such clause, in connection with whether the parties concerned have agreed to resolve a dispute through arbitration.

The Supreme Court takes a rather cautious approach to cases where 'implicit agreement' is deemed to be established if a party argues the existence of a valid arbitration agreement in the written application for arbitration and the other party does not contest it, even when no written arbitration agreement existed prior to the filing of the application for arbitration.

In Supreme Court Decision 2004DA20180 rendered on 10 December 2004, there was no written arbitration agreement between a Korean company and a Vietnamese company before they entered into arbitral proceedings on a dispute between them. The arbitration was referred to the Vietnamese Commercial Arbitration Board, the relevant arbitral proceedings commenced, and both parties produced the application for arbitration and the relevant answers without any objection. Thereafter, the arbitral award was made on that dispute and the Vietnamese company accordingly brought a lawsuit seeking recognition and enforcement of such arbitral award against the Korean company before the Korean courts. In this case, the Supreme Court held that:

> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the '1958 New York Convention') requires that the arbitration agreement under Article IV(1) be an 'agreement in writing' stated in Article II and further requires in Article II(2) that that written arbitration agreement shall be 'an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.' Accordingly, even when the Plaintiff, the Vietnamese company, filed an application for arbitration at the Vietnamese Commercial Arbitration Board and then the Defendant, the Korean company, did not file any objection thereto and an implicit agreement was made consequently, this implicit agreement shall not constitute a valid arbitration agreement under Article II of the 1958 New York Convention unless there are special circumstances that the arbitration agreement is confirmed through business or arbitration documents exchanged between

> the two companies prior to or after the application of the relevant arbitral proceedings.

Validity Of Optional Arbitration Agreements

The Supreme Court takes a cautious approach in dealing with cases involving the issue of the validity of 'optional arbitration agreements', which are designated as one of the optional methods together with other methods of dispute resolution in the arbitration clause, as opposed to being designated as the sole dispute resolution method.

In this regard, in Supreme Court Decision 2003DA318 rendered on 22 August 2003, where a dispute resolution clause under the supply agreement stated that 'the dispute shall be referred to adjudication/arbitration in accordance with the laws of the Purchaser's country' and the respondent continued to assert that there had been no arbitration agreement when arbitral proceedings commenced, the Supreme Court held that:

> The above optional arbitration clause is eventually effective as an arbitration agreement to the extent that (i) a party to that supply agreement opts not for court decision but for arbitral proceedings against the other party and requests dispute resolution in accordance with such proceedings and (ii) the other party responds to the such proceedings without any objection, and therefore if the other party strongly argues non-existence of arbitration agreement in the answer and objects to resolution by arbitration when one party files an application for arbitration, this clause shall not be deemed to be effective as an arbitration agreement.

The Supreme Court eventually held that an optional arbitration clause is valid to the extent that the other party engages itself in arbitral proceedings and does not file any other objections. Accordingly, if a party, as the respondent in arbitral proceedings, desires to resolve the dispute by means other than arbitral proceedings, such party needs to strongly argue the non-existence of an arbitration agreement (in its own answer) in the course of the arbitral proceedings and oppose dispute resolution by arbitration.

Separability Of Arbitration Agreements

As the Arbitration Act acknowledges the principle that an arbitration agreement is separable from other provisions if such arbitration agreement is stated in the form of an arbitration clause (article 17(1) of the Arbitration Act), the Arbitration Act expressly recognises the 'separability of an arbitration clause'.

In connection with this issue, in Supreme Court Decision 93DA53054 rendered on 14 February 1995, when the defendant in a lawsuit seeking enforcement of a foreign arbitral award argued that it was no longer a party to the relevant contract or the arbitration agreement became invalid as the main (master) contract that contains such arbitration agreement was comprehensively transferred to a third party, the Supreme Court held that:

> Judgment on whether an arbitration agreement is invalidated or not is inseparably linked to the merits of the case, and it should be determined in accordance with the decision of arbitrators (arbitration tribunal) pursuant to the decision made on the merits of the case.

In view of the above decision, for the purpose of persuading the Korean courts to accept the invalidation of an arbitration agreement it is necessary to argue that the arbitration agreement was invalidated by its governing law rather than there being grounds for invalidating or cancelling a main contract.

GOVERNING LAW (SUBSTANTIVE LAW APPLICABLE TO ARBITRATION AGREEMENT DURING THE STAGE OF APPROVAL AND ENFORCEMENT OF ARBITRAL AWARDS)

The 1958 New York Convention sets forth that recognition and enforcement of an award may be refused if the relevant arbitration agreement is invalidated by the governing law designated by the parties or, in the case of non-designation, under the law of the country where such award was made (article V(1)(a) of the 1958 New York Convention).

In connection with this issue, in Supreme Court Decision 89DAKA20252 rendered on 10 April 1990, relating to governing law, a sale and purchase contract stated on its reverse that:

> The validity, interpretation and performance of this Agreement shall be governed by the laws of England, and any dispute arising out of or in connection with this Agreement, including such validity, interpretation and performance, shall be subject to arbitration in accordance with the rules of the London Court of International Arbitration as of the date of execution of this Agreement.

The plaintiff sought execution of the arbitral award pursuant to the award made by the London Court of International Arbitration, and the defendant argued that the relevant arbitration agreement was withdrawn and no longer effective. The governing law became the key issue in determining whether or not withdrawal of the arbitration agreement was available.

In this case, the Supreme Court held that withdrawal of the arbitration agreement eventually relates to the effectiveness of such arbitration agreement. It considered that article V(1)(a) of the 1958 New York Convention states that such withdrawal shall be determined by the governing law designated by the parties in the first place, or the law of the country where such arbitral award was made in the case of non-designation of governing law, and furthermore that the sale and purchase contract in question stated on its reverse that '… any dispute arising out of or in connection with this Agreement, including such validity, interpretation and performance, shall be subject to arbitration in accordance with the rules of the London Court of International Arbitration as of the date of execution of this Agreement.' Thus, it was deemed that the parties concerned designated the law of England as the governing law.

As examined above, pursuant to article V(1) of the 1958 New York Convention, the Supreme Court deems the substantive law of an arbitration agreement for the recognition and enforcement of arbitral awards to be the governing law as agreed by the parties concerned and, if the parties did not designate a governing law, that the arbitration agreement shall be subject to the law of the country where the arbitral award was issued.

REVOCATION, RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

Cancellation Of Arbitral Awards Due To Infringement Of The Defence Right Or Violation Of Other Due Process

Under the Arbitration Act, arbitral awards shall have the same effect on the parties concerned as the final decision of the court (article 35 of the Arbitration Act). If a party intends to protest against an arbitral award, such party may file a suit seeking revocation of the relevant arbitral award before the court, within a certain period and only on certain prescribed grounds (article 36 of the Arbitration Act).

In particular, issues arise as to when an arbitral award may be set aside on the grounds that a party filing a suit for revocation of that arbitral award did not receive due notice of arbitral proceedings or was unable to defend itself on the merits of the relevant case due to other reasons, which would constitute infringement on the defence right or violation of due process (article 36(2)(i)(b)).

In Supreme Court Decision 89DAKA20252 rendered on 10 April 1990, the losing party did not receive the notice of arbitral proceedings, and failed to participate in such arbitral proceedings, but was aware of the progress of such arbitral proceedings and had sufficient time to prepare for them. The Supreme Court held that:

> Where 'the party against whom the award is invoked was not given proper notice of appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case,' stated as the reason for refusing recognition and enforcement in article V(1)(b) of the 1958 New York Convention (of which the Republic of Korea is also a signatory), indicates that not all of the cases that infringe on the defense right due to such reasons shall be refused of its recognition and enforcement but only those cases where the degree of infringement of the defense right are too serious shall be refused.

Accordingly, in order to set aside arbitral awards due to infringement of the defence right, the fact that there was such an infringement or a violation of due process is insufficient; the degree of such infringement should be so serious as to warrant the refusal of recognition or enforcement of such arbitral award. The level of seriousness of the degree of infringement on defence rights that warrants refusal shall be determined on a case by case basis.

Recognition And Enforcement Of Foreign Arbitral Awards Relating To Public Policy

Under the Arbitration Act, recognition and enforcement of a foreign arbitral award that is subject to the 1958 New York Convention shall be governed by the same Convention (article 39 of the Arbitration Act), and such recognition and enforcement may also be refused if the competent authority in the country where recognition and enforcement is sought has found that such recognition or enforcement would be contrary to the public policy of that country (article V(2)(b) of the 1958 New York Convention).

In connection with this issue, in Supreme Court Decision 93DA53054 rendered on 14 February 1995, the Supreme Court, with regards to the argument that the effective 30-year period of the relevant arbitral award under the laws of the Netherlands Antilles is longer than the mandatory provision under the Civil Act and against Korean public policy and therefore enforcement of such effective period should be refused, held that:

> Since the purpose of recognition or enforcement of a foreign arbitral award is to protect the enforcing country's fundamental moral and social order by preventing them from being damaged by such foreign arbitral award, approval

> of the foreign governing law in a foreign arbitral award shall not be forthwith refused even when such foreign governing law violates a mandatory provision under our positive law, and will be refused only to the extent that such approval consequently is against the public policy of Korea.

The Supreme Court further rendered that this case was not against the public policy of Korea.

When international commercial disputes arise it is vital to resolve such disputes, particularly by means of one-time efficient and professional arbitration proceedings in view of the nature of international transactions. Considering that Korea is also a member country of the 1958 New York Convention, which was introduced for effective recognition and enforcement of foreign arbitral awards in international commerce, and that it is commonly agreed that, in principle, foreign arbitral awards subject to this convention shall be in accordance with the principle of res judicata, the re-examination of the arbitrator's evaluation of facts and legal judgment shall be prohibited and the party challenging an arbitral award shall bear the burden of proof for arguing and proving the grounds for refusing the relevant recognition or enforcement.

Article V(2)(b) of the 1958 New York Convention provides that 'contrary to the public policy' shall be a ground for refusing the recognition and enforcement of foreign arbitral awards, however, the meaning of 'public policy' refers to 'international public policy' and is a narrower concept than 'domestic public policy.' Although it is commonly agreed that the public policy set forth in article V(2)(b) covers acquisition of arbitral awards by 'fraud', this notion may conflict with the principle of res judicata if fraud is interpreted broadly, because re-examination of whether fraud existed in the arbitral proceedings may amount to re-examination of the arbitral award in violation of the principle of res judicata. In connection with this issue, the Supreme Court has already rendered a judgment providing an extremely restrictive interpretation regarding the grounds for refusing recognition and enforcement due to fraud.

Specifically, the Supreme Court took a position that foreign arbitral awards made in connection with international commerce envisage dispute resolution by an impartial and professional arbitrator who is appointed by the parties. It also considered that, as (i) foreign arbitral awards are more autonomous than foreign court decisions, which are subject to foreign procedures; (ii) the 1958 New York Convention under which requirements are more lenient than those under the civil procedure laws was entered into as part of efforts to encourage recognition and enforcement of foreign arbitral awards; and (iii) the principle of impartiality, in place of uniform judgment pursuant to laws, may apply to arbitral awards to some degree,[1] foreign arbitral awards shall not be more broadly interpreted in determining the grounds for the refusal of enforcement than the approval and execution of foreign court decisions.

In this respect, Supreme Court Decision 2006DA20290 rendered on 28 May 2009 is one of the most important of the Court's decisions relating to international arbitration.[2] In this case, the Supreme Court rendered a judgment declaring the first legal principle with regards to this issue[3] by taking an active position in principle over whether the competent court has to issue a ruling pursuant to the adjudication stated in the foreign arbitral award, where a corporate rehabilitation proceeding was commenced against a party to such arbitration after the issuance of the foreign arbitral award, followed by a lawsuit seeking affirmation of the reported rehabilitation claims pursuant to such foreign arbitral award. Furthermore, this

decision explains the meaning of the phrase 'the recognition or enforcement of the award would be contrary to the public policy…' set forth in article V(2)(b) of the 1958 New York Convention, as well as the strict standards of interpretation of legal principles in connection with the judgment of the above provision.[4]

In addition, the Supreme Court maintained a very strict, restrictive approach in the interpretation of the issue relating to fraud in the above case. In this regard, this Court held that:

> The competent court in the country where an arbitral award is executed shall not wholly re-consider the rights and wrongs of substantive judgment, such as the arbitrator's evaluation of facts and application of law, for deciding whether the relevant foreign arbitral award was obtained by fraud, and then refuse to execute such award on the ground that this arbitral award has been obtained by fraud. However, the court may forthwith refuse to execute a foreign arbitral award without any other procedures to set aside or suspend such award to the extent that such award satisfies all the following requirements: (i) objective evidence with obvious proof clearly demonstrating that a party filing a motion to execute such foreign arbitral award has engaged in fraudulent acts that should be penalized in the course of arbitral proceedings; (ii) the other party was not aware of the above fraudulent acts of the filing party without negligence and as a result was not able to attack or defend them in the arbitral proceedings; and (iii) such fraudulent acts are related to the key issues of the arbitral proceedings.'

The Supreme Court's interpretation and approach in the above decision are very reasonable and significant in terms of international standards.

Time Of Decision On Revocation Of Arbitral Awards, Grounds For Refusing Recognition And Enforcement Of Arbitral Awards And Existence Of Grounds For An Objection To A Claim

Generally, the setting aside of an arbitral award is adjudicated at the conclusion of the pleading or hearing (as in the case of recognition and enforcement of an arbitral award), and where there are any grounds for an objection to a claim after an arbitral award is made, the key issue is whether recognition or enforcement of such arbitral award may be set aside due to such grounds.

In Supreme Court Decision 2001DA20134 rendered on 11 April 2003, the Supreme Court held that:

> Since there is a ground for objection to a claim under the law relating to execution, such as extinguishment of debts, after the arbitral award is established, and as a result it is revealed in the course of pleading in the trial that compulsory enforcement procedures pursuant to the written arbitral award are against the basic principle of our laws, the court may hold that such case is deemed contrary to public policy under Article V(2)(b) of the 1958 New York Convention and may refuse to execute the relevant arbitral award accordingly.

The Supreme Court takes the position that the above interpretation is more consistent with judicial economics, rather than commencing a separate litigation after final determination of the judgment of execution, and is more reasonable in light of the Korean judicial system, which requires judgment of execution to be rendered after pleading sessions.

Statement Of Grounds For Arbitral Awards

Unless there is an agreement to the contrary between the parties, arbitral awards shall basically state the grounds for such awards (article 32(2) of the Arbitration Act), and failure to state such grounds does not fall under the grounds for setting aside arbitral awards (article 36 of the Arbitration Act). Accordingly, issues may arise where grounds for arbitral awards are not stated, or the stated grounds are so ambiguous that it is impossible to figure out what the arbitral awards are based on and whether such arbitral awards may be set aside for such reasons.

In Supreme Court Decision 2007DA73918 rendered on 24 June 2010, the Supreme Court held that:

> Article 32(2) of the Arbitration Act states that 'each arbitral award shall state the reasons upon which it is based; provided, however, that this shall not apply if the parties have agreed that no reasons are to be given or the award is a settlement award on agreed terms under Article 31,' and under Article 36(2)(i)(d) of the Arbitration Act, an arbitration award may be set aside by the court if the party making an application for setting aside an arbitral award furnishes proof that 'the composition of the arbitral tribunal or arbitral proceedings were not in accordance with agreement of the parties, unless such agreement was in conflict with any mandatory provision of this Act from which the parties cannot derogate, or failing such agreement, were not in accordance with this Act.' Therefore, on the assumption that an arbitral award may be set aside if such arbitral award does not state its ground even without agreement thereupon by the parties, the situation when an arbitral award does not state its grounds refers to a situation (i) where there is no ground stated in a written arbitral award or (ii) even where such ground is stated they are so unclear that the factual or legal judgment of the relevant arbitral award cannot be identified or (iii) such ground is contradictory. If a ground is set forth in the written arbitral award, it is justifiable that such judgment is based on equity regardless of the rules of law. Also, such ground needs to simply show how the arbitrator has reached such judgment and does not have to provide clear, specific judgment on the rights and relations of the relevant case. Furthermore, unless such judgment is obviously senseless or contradictory, any unreasonableness or incompleteness in that judgment does not constitute non-statement of a ground for arbitral award.

Accordingly, where there is no ground stated in a written arbitral award, or where such ground is stated but is so unclear that the factual or legal judgment of the relevant arbitral award cannot be identified, or where such ground is contradictory, the arbitral award may be set aside. However, even in these situations, as long as a ground is set forth in the written arbitral award, it is justifiable that such judgment is based on equity regardless of the rules of law and such ground needs to simply show how the arbitrator has reached such judgment and

does not have to provide clear, specific judgment on the rights and relations of the relevant case. Unless such judgment is obviously senseless or contradictory, any unreasonableness or incompleteness in that judgment does not constitute a ground for setting aside such arbitral award.

Availability Of Preliminary Injunction For Suspension Of Arbitral Proceedings And Filing Of A Declaratory Action For Affirmation Of Unlawfulness Of Arbitral Proceedings

The current Arbitration Act does not contain any provision regarding whether a party who argues non-existence or invalidation of an arbitration agreement may seek a preliminary injunction or file a declaratory action for affirmation of the unlawfulness of the arbitral proceedings before the court for the purpose of suspending the arbitral proceedings prior to or in the course of such arbitral proceedings.

In connection with the issue of availability of a preliminary injunction for suspension of arbitral proceedings for unlawfulness, in Supreme Court Decision 96MA149 rendered on 11 June 1996, the Supreme Court held that:

> In view of the purport of Article 10 of the Arbitration Act stating that when a party argues that arbitral proceedings are not permissible, the arbitrator may proceed with arbitral proceedings and issue an arbitral award, even if the relevant arbitral proceedings are not permissible, it is not permitted to forthwith seek a preliminary injunction of such arbitral proceedings before the court on the ground of the unlawfulness of such arbitral proceedings, without referencing to such party's right to file a declaratory action against the other party for affirmation of the unlawfulness of such arbitral proceedings before the court or a suit seeking cancellation of the arbitral award after the issuance of the arbitral award on the grounds of such unlawfulness.

Meanwhile, in connection with the issue of availability of a right to file a claim for suspension or a declaratory action for affirmation of unlawfulness of the arbitral proceedings before the court, in Supreme Court Decision 2003DA5634 rendered on 25 June 2004, the Supreme Court held that:

> Even when there is no arbitration agreement, the court shall not exercise its judicial control over arbitral proceedings unless otherwise permitted by the Arbitration Act, and the declaratory action for affirmation of unlawfulness of the arbitral proceedings shall constitute a method of such judicial control and in turn shall not be permitted under Article 6 of the Arbitration Act.

Notes

1. Supreme Court Decision 2004DA67264 rendered on 13 May 2005 and Supreme Court Decision 98DA901 rendered on 10 July 1998.
2. In this case, the author filed an appeal before the Supreme Court for and on behalf of the plaintiff, or the losing party, and the Supreme Court accepted the author's argument and reversed the lower court's decision.
3. 'If corporate rehabilitation proceedings under the former Corporate Reorganization Act commence against a party to a foreign arbitral award, which is subject to the 1958

New York Convention, after such foreign arbitral award is made, and an objection is filed against the claims reported on such foreign arbitral award as of the date of investigation of claims, and a suit seeking affirmation of rehabilitation claims as filed, the competent court shall finally determine rehabilitation claims and the voting rights in accordance with the adjudication stated in that foreign arbitral award unless grounds for refusing recognition and enforcement set forth in Article V are acknowledged.'

4. Article V of the 1958 New York Convention lists grounds for refusing recognition and enforcement of arbitral awards within the limited scope and paragraph (2)(b) of this article provides that, when such recognition or enforcement is contrary to public policy, the competent court in the country where the relevant arbitral award is enforced may decline such recognition or enforcement. Since the purpose of this provision is to protect the enforcing country's fundamental moral and social order by preventing them from being harmed by recognition or enforcement of foreign arbitral awards, this provision shall be limitedly construed in view of domestic circumstances as well as stable, international commercial order, and the above recognition or enforcement may be refused only to the extent that its enforcement results in an effect in contravention of the public policy of the Republic of Korea.

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Summary

BRIEF OVERVIEW OF INVESTMENT TREATY CASES
CONCLUSION

It is a widely accepted position that foreign direct investment is a major contributor to the growth and development of any emerging country. With foreign direct investment comes capital, technology and management know-how, eventually leading to long-term benefits for the host country. This is particularly true for emerging countries such as Bangladesh. Since the beginning of the 1990s, Bangladesh has adopted a number of policies to facilitate the growth of the private sector and increase the inflow of foreign investment.

Bangladesh has also concluded a number of bilateral investment treaties (BITs) with different countries in order to promote foreign investments in its territory.At present, Bangladesh has concluded 29 BITs - 24 of which have come into force - and is currently negotiating with nine other countries. Most of the BITs signed by Bangladesh offer protection against expropriation and typically include prompt, adequate and effective compensation provisions for expropriation. It can be seen that although the BITs prohibit unlawful expropriation, no definition of 'indirect' expropriation is provided in these treaties. Although a number of nationalisations took place after the independence of Bangladesh in 1971, so far no cases of direct expropriation have been reported against Bangladesh.

Most BITs also contain provisions on full protection and security and the obligation to grant fair and equitable treatment, which is perhaps one of the most important standards of protection in international investment law. This standard of protection can also be found in Bangladesh's investment protection statute, the Foreign Private Investment (Promotion and Protection) Act 1980 (the Act). Article 4 of the Act explicitly grants 'fair and equitable treatment' to foreign private investments, which shall enjoy full protection and security.

As a step towards its commitment to the protection of foreign private investment, Bangladesh ratified the International Centre for Settlement of Investment Dispute (ICSID) Convention (the ICSID Convention), which came into force on 26 April 1980. The ICSID Convention is a multilateral treaty formulated by the World Bank to create an impartial international forum for the resolution of legal disputes between foreign investors and host countries either through conciliation or arbitration. At present, 159 countries have signed the ICSID Convention.

Since 1980, a number of international arbitration cases have been brought under the ICSID Convention by foreign investors against Bangladesh, all of them in the energy sector. Some of these cases shall now be discussed in turn.

BRIEF OVERVIEW OF INVESTMENT TREATY CASES

Saipem V Bangladesh (ICSID Case No. ARB/05/07)

The case of ***Saipem*** concerned a dispute between a Bangladesh state entity, Petrobangla, and the claimant in relation to the installation of a gas pipeline in Bangladesh. The contract provided for disputes to be resolved by arbitration in Dhaka under the ICC Rules. The completion of the project was delayed and a dispute arose between the parties over the compensation for such delay. Failing to reach any amicable settlement, the claimant invoked the arbitration agreement and initiated arbitral proceedings in Bangladesh.[1] During the course of the arbitration, and following applications made by Petrobangla, the Bangladesh courts revoked the authority of the arbitral tribunal on the ground that they had committed misconduct by denying certain procedural requests made by Petrobangla.

Notwithstanding the orders of the Bangladesh courts, the arbitral tribunal decided to continue with the arbitration. The arbitral tribunal's decision to continue was on the basis that the Bangladeshi courts did not have the necessary jurisdiction to revoke the authority of the arbitrators, which vested exclusively with the ICC International Court of Arbitration. Thereafter, Petrobangla resorted to the local courts for an injunction against the continuation of the ICC arbitration. The injunction was granted against the continuation of the arbitral proceedings. However, despite the injunction, the arbitral tribunal proceeded to render the award.

Following the arbitral award, Petrobangla filed an application to set aside the arbitral award before the Bangladeshi courts. The Bangladeshi court confirmed that the ICC award had no legal effect since the arbitral tribunal's authority had been revoked earlier by the local courts. As a result of this decision, the ICC award was a nullity for all purposes in Bangladesh.

Failing to receive any justice from the local courts, Saipem resorted to a claim under the ICSID Convention alleging violation of Bangladesh's obligations under the Bangladesh-Italy bilateral investment treaty. Saipem's claim was based on undue interferences by the local courts with its right to arbitration and its rights under the ICC award. In Saipem, the ICSID Tribunal had to consider novel arguments raised by the parties from the perspective of international law. Specifically, the ICSID Tribunal had to consider whether the facts alleged by Saipem could give rise to state liability under public international law.

In ***Saipem***, the ICSID Tribunal held that the vested rights of Saipem - namely, the right to arbitration and the right to the proceeds of the ICC award - were capable of being protected under international law.[2] In respect of the courts' actions, the ICSID Tribunal, following ***Allard v Sweden***,[3] was of the view that the actions of local courts could give rise to an international law claim.[4] In ***Saipem***, the main focus of the ICSID Tribunal was on the impact and effect of the local courts' decisions, which interfered with the claimant's arbitration with Petrobangla.

After analysing the decisions of the Bangladesh courts, the ICSID Tribunal held that they were in violation of international law, in particular the New York Convention. The ICSID Tribunal was satisfied that the Bangladesh court's decision to revoke the arbitrator's authority amounted to a flagrant violation of article II of the New York Convention since it had the effect of immobilising the arbitral process and frustrated 'the spirit of the Convention'.[5] The ICSID Tribunal's decision was reinforced by the fact that several injunctions were issued against the continuation of the ICC arbitration which frustrated the arbitration agreement. The ICSID Tribunal further noted that, although the local courts did have supervisory jurisdiction over the ICC arbitration and particularly in revoking the authority of the arbitrators, the exercise of their supervisory powers was illegal as the standard for revocation used by the Bangladesh courts and the manner in which the judge applied that standard to the facts were sufficient to constitute an abuse of right.[6] The ICSID Tribunal's decision seems to suggest that, since the Bangladeshi courts reached an illegal judgement under international law, the seat argument could not be relied upon to justify the interferences by the judiciary.

Chevron V Bangladesh (ICSID Case No. ARB/06/10)

Another interesting arbitration brought against Bangladesh under the ICSID Convention was the case brought by gas company, Chevron.[7] Chevron is one of the largest producers of natural gas in Bangladesh. It has been collaborating with Bangladesh to explore its natural gas and oil resources in order to meet the country's energy demands. The full text of this

award is not readily available, hence this commentary is based on the limited excerpts that are publicly available.

In the early 2000s, a dispute arose between Bangladesh and Chevron Bangladesh Block Twelve Ltd and Chevron Bangladesh Block Thirteen and Fourteen Ltd, two companies incorporated in Bermuda (collectively, Chevron), over the interpretation of two production sharing contracts (PSCs) and three gas purchase and sale agreements (GPSAs) that related to the exploration, extraction, purchase and sale of natural gas in Bangladesh. The crux of the dispute was whether Petrobangla was entitled to receive a 4 per cent tariff for allowing Chevron to use their pipelines to supply natural gas from a gas field, when Petrobangla itself was the buyer of the said gas. Chevron argued that such a tariff could only be charged by Petrobangla when its pipeline was being used to supply gas to third parties. As a result, Chevron sought to recover around US$240 million from Petrobangla, which was illegitimately deducted from their earnings.[8]

The negotiations relating to the PSCs and GPSAs reveal that such a tariff was envisioned from the very outset. The PSCs and the GPSAs contained provisions entitling Petrobangla to a tariff when the seller used a pipeline operated by Petrobangla to supply natural gas to Bangladesh's domestic market.[9] Following the commencement of gas production in February 1999, it became apparent that there was a dispute between Bangladesh and Chevron over the interpretation of the tariff clause. However, Chevron continued to make the tariff payments until 2003. In and around 2004, while the GPSAs were being negotiated, this point of contention was raised again by the parties and Chevron decided to settle this dispute through arbitration. A request for arbitration was filed at ICSID by Chevron on 17 March 2006. The ICSID Tribunal was constituted on 15 February 2007.

In the ICSID arbitration, Bangladesh initially refused to participate in the jurisdiction phase and obtained an anti-suit injunction from a local court to restrain the foreign arbitral proceedings. In response, the ICSID Tribunal referred to articles 26 and 41 of the ICSID Convention to establish that prior consent to ICSID arbitration excluded other remedies, such as domestic anti-suit injunctions, and that the ICSID Tribunal would itself determine whether it had jurisdiction or not. Bangladesh continued to abstain from the proceedings and a summary Decision on Jurisdiction was delivered on 21 August 2007, where the ICSID Tribunal upheld its own jurisdiction and scheduled a hearing date for the merits. At this juncture, Bangladesh decided to participate in the ICSID arbitration and withdrew the anti-suit injunction in the local court unilaterally.

After hearing the submissions of the parties, the ICSID Tribunal made its decision on two main grounds.

First, it considered Chevron's argument that Petrobangla was only allowed to charge a 4 per cent tariff as a wheeling charge when it supplied gas to third parties, not when the buyer was Petrobangla itself.The ICSID Tribunal determined that a literal reading of the PSCs and the GPSAs pointed towards a conclusion that the tariff was owed by Chevron regardless of who the purchaser was. Moreover, it was noted that, at that time, Chevron's only customer for the gas was Petrobangla, which in effect meant that Chevron were seeking not to be charged a tariff on their production at all.

Second, the ICSID Tribunal upheld Bangladesh's submission that Chevron was estopped from disputing the interpretation of the tariff provision as it had complied with the terms of the provision and made tariff payments for a number of years. According to a Petrobangla

press release, this decision on tariff payments allows Petrobangla to collect up to US$312 million from Chevron in the next 20 years.[10]

Although Bangladesh prevailed on the merits of the dispute, heavy costs were awarded against them for their intransigent stance at the jurisdiction phase of the arbitral proceedings. Notably, Chevron was awarded its costs for defending the suit in Bangladesh, its preparation for the hearing on merits that had been initially adjourned and the entirety of its costs from the jurisdictional phase of the arbitration, as Chevron had succeeded on that ground. The parties also had to equally share the fees and expenses of the ICSID Tribunal. While this is not unprecedented, in the opinion of Lindsey Marchessault, consultant of the ICSID, in the instant case, the equal division of costs was largely attributed to the behaviour of the parties during the arbitration, particularly Bangladesh's aforementioned dilatory actions.

Niko Resources (Bangladesh) Ltd V Bangladesh (ICSID Case No. ARB/10/11 And ICSID Case No. ARB/10/18)

A recent arbitration brought under the ICSID Convention against Bangladesh is the case brought by Niko Resources (Bangladesh) Ltd (Niko). Bangladesh was interested in developing its marginal and abandoned gas fields, and to that effect BAPEX, a wholly-owned subsidiary company of Petrobangla, concluded a Framework of Understanding with Niko on 23 August 1999. Pursuant to this Framework, a joint venture agreement (JVA) was entered into between BAPEX and Niko on 16 October 2003 on the terms that Niko and BAPEX would supply the gas and Petrobangla would buy the same. Under the JVA, gas supplies started in November 2004. However, an agreement as to the price of the gas had not been reached with the buyer. Niko requested a price of US$2.75/MCF and the buyer offered US$1.75/MCF.

On 27 December 2006, a GPSA was concluded where the price was fixed at US$1.75/MCF.Both the JVA and the GPSA contained standard arbitration clauses with ICSID provisions. While Petrobangla made a few payments over the years, as of 1 April 2010, it owed Niko and BAPEX US$27.16 million and US$8.55 million respectively.

It is important to mention here that in 2005, two blowouts had occurred in the relevant gas fields being operated by Niko. Subsequent to the blowouts, the Bangladesh Environmental Lawyers' Association (BELA) filed a local case to have the JVA invalidated and for an injunction to be placed on payments to Niko for the said gas. Subsequently, a government committee found Niko responsible for the blowouts and commenced legal action against Niko in the local court seeking compensation. The local court, upon considering BELA's arguments, did not find the JVA to be obtained through a flawed process but issued an interim order restraining payments for the said gas until Niko paid compensation as per the decision of the local court.

Pursuant to several reminders from Niko to Petrobangla over payment for the said gas produced by Niko, Niko served a Notice of Arbitration on Petrobangla on 8 January 2010. Niko decided to refer these two particular disputes for arbitration under the ICSID Convention, registering the 'Compensation Claim' as ICSID Case No. ARB/10/11 and the 'Payment Claim' as ICSID Case No. ARB/10/18. The ICSID Tribunal was constituted and proceedings began on 20 December 2010. During the preliminary procedural stage, it was agreed that the two arbitrations would proceed together and the ICSID Tribunals' decision would be furnished in a single instrument.

Bangladesh objected to the jurisdiction of the ICSID Tribunal over these two claims. It contended, inter alia, that Niko was a facade and not the real claimants in the arbitration,[11]

and that a 'real connection' is required between a corporation and the home state beyond the mere fact of incorporation.[12] With regard to the subject matter of the case, Bangladesh denied that the dispute directly arose out of an investment and argued that neither the sale of gas or potential expenditures related thereto may be considered as an investment. Moreover, it argued that as Niko had committed acts of corruption, it could not benefit from the JVA and GPSA and the arbitration clauses in particular. To support this, they referred to two ICSID awards - the ***Phoenix Action*** award[13] and the ***Hamester*** award[14] - and sought to establish that as the claimants had not referred the dispute to arbitration with clean hands and they had committed bribery, the ICSID Tribunal should not accept jurisdiction over these two claims. Bangladesh argued that ICSID arbitration should only be open to those who make good faith investments, as otherwise the integrity of the ICSID system would be jeopardised and the doctrine of clean hands would be undermined. Bangladesh further argued that the ICSID Tribunal should not have jurisdiction over the Compensation Claim as the blowouts fell outside of the scope of the JVA, especially as the subject matter involved tort, criminal and environmental liabilities beyond the scope of the JVA.

On 19 August 2013, the ICSID Tribunal rendered its Decision on Jurisdiction on a few key points.

First, with regard to Niko's identity and nationality, it concluded that distinct corporate identities possess a legitimate function in mobilising investments and thus Niko did not act illegally in being incorporated abroad. More precisely, as the corporate structure of the company was known to Bangladesh, Niko could be considered as a legitimate claimant, with its nationality apparent from its registration in Barbados.[15]

Second, the ICSID Tribunal further found that though the government of Bangladesh played 'a central role in the elaboration of the project and the negotiations of the two contracts',[16] and that Petrobangla and BAPEX are agencies of the government in the sense of article 25 of the ICSID Convention, they were deemed to have separate legal identities capable of entering into agreements under the laws of Bangladesh.[17] This is most apparent from the terms of the GPSA and JVA, where it was stated that 'the responsibilities and obligations of Petrobangla and the Government [...] has been assign [sic] to BAPEX'. By delegating authority, Bangladesh clearly consented not to participate in the Agreements as a party.[18] In other words, the ICSID Tribunal was not persuaded by Niko's arguments that the acts of Petrobangla and BAPEX could be attributed to Bangladesh. This is a significant departure from the position taken by the ICSID Tribunals in the ***Saipem*** and ***Chevron*** cases, where Petrobangla was considered to be part of the state, despite its separate legal identity, and its actions were attributable to Bangladesh. The distinguishing feature between the aforementioned cases and the instant case was that Bangladesh had not signed any agreement with the investor and has not on its own behalf agreed to ICSID arbitration.[19] The ICSID Tribunal therefore decided not to rely on 'attribution' in considering whether Niko's veil should be lifted, as argued by Bangladesh, or when seeking to hold Bangladesh as being bound to arbitrate, as submitted by Niko.

Third, the ICSID Tribunal considered the requirement for 'designation' by a state and, in particular, whether the designation of authority has to be validly communicated to ICSID through a formal notification. The ICSID Tribunal distinguished the instant proceedings from the ***Cambodia Power*** case,[20] where it was held that 'communication is inherent in the very notion of designation' and that communication has to be the sole preserve of the state itself. However, the ICSID Tribunal took the view that, while designation may be the sole preserve of the state, ad hoc designation - as in the instant proceedings - can be communicated

through means other than a formal notification. Thus, if a state's written approval of an ICSID arbitration agreement, concluded by one of its agencies, is brought to the attention of ICSID with a request for arbitration by an investor, as has been done in the instant case, it may suffice as adequate notification.[21] As the designation was found to be valid and as notification was considered to have taken place, the ICSID Tribunal found BAPEX and Petrobangla to be bound by the arbitration clauses in the Agreements.[22]

Fourth, while the Tribunal conceded that an investment must be a 'coherent unit',[23] they found no justification for distinguishing between 'investments where the entire project is subject to a single instrument and those where different aspects of the project are regulated by separate contracts', as had been argued by the respondents. Thus, the expenditure and the legal instrument through which Niko's investment was implemented in Bangladesh (ie, the GPSA) formed a 'constituent part of the investment operation'.[24] This expenditure also met the ***Salini*** criteria for determining whether an investment had taken place since there was a substantial contribution, a certain duration of operation, a risk undertaken and contribution to Bangladesh's operation through the implementation of the JVA.

Fifth, while considering Bangladesh's arguments regarding Niko's illegal acts of corruption, the ICSID Tribunal noted that Bangladesh did not seek for the JVA or GPSA to be rescinded. In the absence of any clear declaration from Bangladesh invalidating the Agreements, the ICSID Tribunal decided not to consider the Agreements as being void.[25] The ICSID Tribunal concluded that Niko had committed the said acts of corruption sanctioned in the Canadian case but, after scrutinising the evidence, they did not find further evidence of corruption nor did they believe that corruption had influenced the JVA/GPSA.[26] The prohibition of bribery is part of international public policy and arbitrators are not supposed to give effect to contracts in conflict with such policy. However, in the instant case, corruption was not the 'object' of the contract, as it was in ***Mr X, Buenos Aires v Company A***,[27] where bribing Argentinean civil servants was the object of the contract. The ICSID Tribunal reviewed the ***World Duty Free***[28] case and article 50 of the Vienna Convention on the Law ofTreaties regarding the bribery of foreign public officials to find that an agreement may be voided by a state which is subject to corruption. However, the state may choose not to do so in the interest of preserving existing commercial arrangements - as Bangladesh had chosen to do so in the current case. In the absence of any clear declaration from Bangladesh, the ICSID Tribunal decided not to consider the Agreements as being void.[29] Moreover, questions regarding whether an investment was made in good faith reaffirms, rather than derogates from, the need for a tribunal to accept jurisdiction and consider the merits of the dispute.[30] That is why the ICSID Tribunal held that resolving the dispute, instead of avoiding it, preserved the integrity of the system.[31]

Sixth, with regards to the Compensation Claim, the ICSID Tribunal upheld their jurisdiction to determine whether Niko has any liability for the blowouts under the JVA.[32] The scope of the arbitration clause in the JVA referred to the origin of the dispute 'arising in connection with performance/interpretation of the JVA', and the ICSID Tribunal accepted that as Niko had a wide range of obligations under the JVA, disputes 'in connection with the performance of the JVA' had to be construed broadly and may require the ICSID Tribunal to make findings concerning liability on grounds other than the JVA at the merit stage of the proceedings.[33] Similarly, the question of whether BAPEX, as a party to the JVA, owes a duty under the Agreement to cooperate with Niko is evidently a dispute arising in connection with the JVA and thereby gives the ICSID Tribunal jurisdiction to determine that particular question. Furthermore, with respect to jurisdiction ratione personae, the ICSID Tribunal differed from Niko in finding that it does not have jurisdiction over Petrobangla with respect to claims

based on the JVA, as only BAPEX was the signatory to the Agreement and is a separate legal entity.[34] However, under the GPSA, it was apparent that Petrobangla had agreed to arbitrate with Niko over the GPSA disputes. The ICSID Tribunal also agreed with Bangladesh that its jurisdiction is limited to determining the rights and duties of Niko and BAPEX in connection with the performance of the JVA, and did not extend to the state of Bangladesh and private third parties.

Thus, by way of conclusion, the ICSID Tribunal held that they did have jurisdiction over the dispute between Niko and BAPEX under the terms of the JVA over the Compensation Claim as well as over the dispute with Petrobangla over the payment under the GPSA. The ICSID Tribunal found that it did not have jurisdiction over the state of Bangladesh, which was neither a party to the JVA nor the GPSA.

CONCLUSION

The aforementioned cases demonstrate Bangladesh's positive attitude towards engaging with the ICSID process and its growing desire to comply with the spirit of the ICSID Convention. Even in the ***Saipem*** and ***Chevron*** cases, where the Bangladeshi courts interfered with the arbitral process, Bangladesh ultimately participated and accepted the decision on merits delivered by the ICSID Tribunals, even when such decisions may have involved substantial monetary awards against Bangladesh. This growing compliance with the terms of BITs and the ICSID Convention should be encouraging to foreign investors as it is indicative of a more robust investor protection regime in Bangladesh. These developments will be particularly important for those interested in investing in Bangladesh's energy sector, an area with great potential as Bangladesh possesses 10 trillion cubic feet of natural gas reserves.[35]
At the same time, the decisions of the ICSID Tribunals reveal the areas in which Bangladesh can build greater investor confidence. It is hoped that lessons from these cases will help Bangladesh bolster its investment framework, in turn increasing the inward flow of foreign direct investment in Bangladesh.

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Notes

1. ICC Case No. 7934/CK, published in (2000) 18(4) ASA BULL. at 821-829.
2. ***Saipem v Bangladesh***, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures dated 21 March 2007, para. 130.
3. ***Allard v Sweden***, No. 35179/97 (section 4) (bil.), ECHR 2003-VII - (24 June 2003).
4. ***Saipem***, supra note 2, para. 132.
5. ***Saipem v Bangladesh***, ICSID Case No. ARB/05/07, Award dated 30 June 2009, para. 167.
6. ***Saipem***, supra note 5, para 159.
7. ***Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd v People's Republic of Bangladesh***, ICSID Case No. ARB/06/10, Award of 17 May 2010, ICSID Review (2011), pp. 256-294.
8. UNB Dhaka, 'Chevron accepts int'l court ruling' ***The Daily Star***, 20 May 2010 (Available online at: http://archive.thedailystar.net/newDesign/news-details.php?nid=139251) accessed on 14 May 2014.
9.

Lindsey Marchessault, 'Chevron Bangladesh Block Twelve, Ltd and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd v People's Republic of Bangladesh (ICSID Case No. ARB/06/10): Introductory Note' ICSID Review (2011) 26 (1): 256-264, p. 257.

10. Star Report, 'Int'l Court rejects Chevron Claim' ***The Daily Star***, 19 May 2010 (Available online at: http://archive.thedailystar.net/newDesign/news-details.php?nid=139124) accessed on 14 May 2014.
11. ***Niko Resources (Bangladesh) Ltd v People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited (BAPEX) and Bangladesh Oil Gas and Mineral Corporation (Petrobangla)***, ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18, Decision on Jurisdiction dated 19 August 2013, para 173.
12. Ibid, para 198.
13. ***Phoenix Action Ltd v Czech Republic***, ICSID Case No. ARB/06/05, Award dated 15 April 2009.
14. ***Gustav F W Hamester GmbH Co KG v Republic of Ghana***, ICSID Case No. ARB/07/24, Award dated 18 June 2010.
15. ***Niko***, supra note 11, para 182 - 203.
16. Ibid, para 219.
17. Ibid, para 235.
18. Ibid, para 251.
19. Ibid, para 248.
20. ***Cambodia Power Company v Kingdom of Cambodia***, ICSID Case No. ARB/09/18, Decision on Jurisdiction dated 22 March 2011.
21. ***Niko***, supra note 11, para 328.
22. Ibid, para 348.
23. Niko, supra note 11, para 364.
24. Ibid, para 372.
25. Ibid, para 464.
26. Ibid, para 423-429.
27. ***Mr X, Buenos Aires v Company A***, 10 Arbitration International 1994 at 282.
28. ***World Duty Free Company Limited v the Republic of Kenya***, ICSID Case No. ARB/00/7, Award dated 31 August 2006.
29. ***Niko***, supra note 11, para 464.
30. Ibid, paras 470-471.
31. Ibid, para 474.
32. Ibid, para 497.
33. ***Niko***, supra note 11, paras 505-506.
34. Ibid, para 515.
35.

UNCTAD, 'An Investment Guide to Bangladesh' (Available online at: http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=464) accessed on 10 June 2014.

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China

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Summary

CASELOAD OF ARBITRATION INSTITUTIONS IN MAINLAND CHINA
THE IMPROVEMENT OF THE ARBITRATION RULES
THE PRE-REPORTING MECHANISM SPECIALLY TAILORED FOR THE SPLIT OF CIETAC
THE VALIDITY OF A HYBRID ARBITRATION CLAUSE
INVESTMENT TREATIES AND FREE TRADE AGREEMENTS
CONCLUSION

Along with China's steady economic growth and expanding relationship with the outside world, commercial disputes have occurred inevitably as the by-products of economic development. The past year has witnessed an increase in caseload accepted by arbitration institutions in mainland China. China continues its leading role in resolving disputes through arbitration in the Asia-Pacific region.

The promulgation of the Arbitration Rules of China International Economic and Trade Arbitration Commission (CIETAC) in May 2012 (the 2012 CIETAC Rules) has led to a year long internal dispute between CIETAC Beijing Headquarters (CIETAC Beijing) and its former Shanghai and South China Sub-Commissions. Arbitration users at home and abroad have expressed great concern over the uncertainty and risk created by the split. Indeed, there were conflicting judicial decisions by various local courts on the validity of arbitration agreements and the enforcement of arbitral awards so affected. The Supreme People's Court of China (SPC) was called upon to set rules clarifying the allocation of jurisdiction faced by CIETAC Beijing and its former Sub-Commissions for the pre-split and post-split period, and eventually a special pre-reporting mechanism was established to address the issue, though such mechanism still lacks the desired degree of transparency.

However, it appears that the dispute over the split did not prevent CIETAC and its former Sub-Commissions from aligning itself more closely to the internationally accepted standard. CIETAC has embraced a sharp increase in caseload. The CIETAC South China Sub-Commission – now the South China International Economic and Trade Arbitration Commission or Shenzhen Court of International Arbitration (SCIA) – is attempting to establish a legal person governance structure so as to operate as a non-profitable arbitration institution according to standards adopted by major international arbitration institutions in other jurisdictions. CIETAC Shanghai Sub-Commission – now the Shanghai International Economic and Trade Arbitration Commission or Shanghai International Arbitration Center (SHIAC) – has made some essential breakthroughs in liberalising arbitration practice by promulgating its own set of rules of arbitration, including particularly the China (Shanghai) Pilot Free Trade Zone Arbitration Rules.

There are some other new developments as well. This chapter serves to highlight the key developments and newly emerged trends in China over the past year.

CASELOAD OF ARBITRATION INSTITUTIONS IN MAINLAND CHINA

For several years, the overall caseload of all arbitration institutions established in mainland China has been ignored or hardly noticed by foreign arbitration users. This is attributed to the fact that CIETAC has played a dominant role in handling foreign-related arbitration cases, and local arbitration commissions generally received a smaller number of foreign-related cases compared to CIETAC. However, it is worth noting that the situation has changed.

According to statistics published by the Office of Legal Affairs of the State Council, which has long been assigned with the mission to guide China's arbitration work nationwide since the implementation of the Arbitration Law in 1995, there were 219 arbitration commissions (including CIETAC and CMAC) located in major municipalities in Mainland China in 2012 and 96,378 arbitration cases in 2012, with the total amount in dispute being 131.5 billion renminbi.[1] In 2013, the number of arbitration commissions reached 225 and they accepted 104,257 cases with the total amount in dispute being 164.6 billion renminbi.[2]

The arbitration cases handled by China's arbitration commissions were overwhelmingly domestic cases. Foreign-related arbitration cases taken in 2012 and 2013 numbered 1,521 and 1,596 respectively, which make up only 2 per cent of the overall caseload in 2012 and year 2013 respectively. In 2013, there were 55 arbitration commissions accepting foreign-related arbitration cases.[3]

The huge number of arbitration cases accepted by China's arbitration commissions is proof of the fact that arbitration is becoming a popular means of dispute resolution at the choice of commercial businesspersons. Officials from China's administrative and judicial bodies have vowed to adopt a pro-arbitration policy in order to enable arbitration to fully develop as an efficient dispute settlement platform. The ultimate goal is to enhance a fair competition environment, which is necessary for economic growth. For example, the president of the SPC, Zhou Qiang, noted in his keynote speech at the Asia Pacific Regional Arbitration Group Conference in Beijing in June 2013 that arbitration and the court system should complement one another, and that they should be partners, not opponents. He further proclaimed that the two limbs should work together to strengthen domestic and international cooperation, share with one another their dispute resolution experiences, and improve their professional competence so as to provide a stronger effort for the development of international legal order for trade and investment.[4] Indeed, the importance of formulating and maintaining a proper policy favoring arbitration in China can never be underestimated, if one takes into account the existing gap between arbitrations in China and those in other jurisdictions.

As the leading arbitration institution in China, CIETAC created a new record in history by accepting a total of 1,256 arbitration cases in 2013, including 375 foreign-related cases and 881 domestic cases. That represents an 18.5 per cent increase (by 196 cases) from 2012. Among the above, CIETAC Beijing accepted 1,058 cases, a 8.51 per cent increase in the number of cases accepted in 2012, including 322 foreign-related cases (up by 19 cases) and 736 domestic cases (up by 64 cases). The CIETAC Secretariat Shanghai Office (which is distinct from SHIAC) accepted 159 cases (up by 122 cases) including 43 foreign-related cases and 116 domestic cases. The CIETAC Secretariat South China Office (which is distinct from SCIA) accepted 18 cases (up by two cases) including seven foreign-related cases and 11 domestic cases. The CIETAC Southwest Sub-Commission in Chongqing accepted 11 cases, including three foreign-related cases and eight domestic cases. The CIETAC Tianjin Arbitration Center accepted 10 cases, all domestic. No case was accepted by the CIETAC Hong Kong Arbitration Center in 2013. Of all the domestic cases accepted by CIETAC in 2013, over 80 per cent involved foreign investment elements, with one party or both parties being foreign-invested enterprises. The total amount claimed in all cases accepted by CIETAC in 2013 reached 24.4 billion renminbi, representing an increase of 58 per cent, or 8.9 billion renminbi, from 2012. The parties involved came from 56 countries and regions, up by 10 countries or regions from 2012.[5]

The SCIA took 242 and 245 arbitration cases in 2012 and 2013 respectively, and handled 300 mediation cases in 2012 and 400 mediation cases in 2013. SHIAC accepted 505 arbitration cases in 2012, and in 2013 its arbitration caseload dropped to 397. It seems that CIETAC's announcement on the revocation of authorisation[6] has had a substantial impact on the caseload of SHIAC in 2013.

The Beijing Arbitration Commission (BAC) accepted 1,627 arbitration cases in 2013, with a total amount in dispute of 12 billion renminbi. The figure amounts to half the total amount

in dispute in all CIETAC cases. While most of the cases are purely domestic, BAC seized 44 foreign-related arbitration cases, representing 2.7 per cent of its caseload.[7]

Over the past 10 years, Wuhan Arbitration Commission (WHAC) has always accepted the greatest number of arbitration cases in Mainland China. The predominant of arbitration cases are domestic. According to the available statistics, WHAC accepted 77,391 arbitration cases from 1997 to 2011. In 2012, it accepted 10,608 cases; and in 2013, 10,469 cases.[8] Other arbitration commissions that handle large volume of arbitration cases include the Guangzhou Arbitration Commission, the Shanghai Arbitration Commission, the Shenzhen Arbitration Commission, the Xiamen Arbitration Commission, the Qingdao Arbitration Commission, the Harbin Arbitration Commission, the Chengdu Arbitration Commission, the Changsha Arbitration Commission, the Zhengzhou Arbitration Commission and the Xian Arbitration Commission.

THE IMPROVEMENT OF THE ARBITRATION RULES

In the past year, a few leading arbitration commissions have published new sets of rules of arbitration or proposed amendments to existing rules for the public to comment on.

In October 2013, the Beijing Arbitration Commission (BAC) circulated the new Draft BAC Arbitration Rules (the Draft Remedies) for public comments aiming at revising its existing Rules published in 2008. As explained by the BAC, the draft includes a number of improvements to the existing rules, and efforts were made to align the rules with the latest developments of arbitration rules of other renowned arbitration bodies in the world such as the ICC International Court of Arbitration.[9] The proposed major changes include, inter alia, the following:

The Written Agreement Requirement

In line with the revised UNCITRAL Model Law and Arbitration Rules, the BAC attempted to enlarge the scope of arbitration agreement. The draft rules recognise that the writing requirement would be deemed to be fulfilled where, in the exchange of the application for arbitration and the statement of defence, one party asserts the existence of the Arbitration Agreement and the other party does not deny this

A Broader Authority Granted To Arbitral Tribunals

The Draft Rules aim to confer maximum flexibility over procedural matters on arbitral tribunals. In relation to matters not expressly provided for in the Rules, the BAC or the arbitral tribunal shall have the power to conduct the arbitral proceedings in a manner it considers appropriate.

Truncated Tribunal

Following CIETAC's recent move to allow truncated tribunals to issue arbitral awards, the draft proposed to insert a provision to the same effect: if, after the conclusion of the last oral hearing, an arbitrator of a three-member arbitral tribunal is unable to participate in the deliberation and render the award due to his or her demise or removal from the BAC's panel of arbitrators or other reasons, then provided that consents are obtained from both parties and the chairman of BAC, the remaining two arbitrators may continue the arbitral proceedings and render the award.

Stenographers In Oral Hearings

The minutes currently adopted by many Chinese arbitration commissions are only brief summaries of hearings, which may not fully meet parties' needs in disputes of high complexity or highly techincal in nature. In order to provide the parties with a more detailed record and increase the transparency of oral hearings, the Draft Rules added a special provision allowing the use of stenographers. Practitioners may find stenographer reporting very helpful in recording all statements that have been made by the participants of the oral hearing.

Consolidation Of Arbitrations

The consolidation of arbitrations has already become an important stipulation in the arbitration rules of quite a few renowned international arbitration institutions. To catch up with the latest development, the BAC revision draft introduced this approach with detail-oriented provisions. Generally, at the request of a party and where all the parties concerned consent, or where the BAC considers necessary and where all parties concerned consent, the BAC may decide to consolidate two or more pending arbitrations which are governed by the Rules into a single arbitration. Apart from the above, the BAC revision draft also introduced the possibility of consolidating the hearings of two or more arbitration cases with the consent of all parties, provided the members of the arbitral tribunals are the same.

The proposed changes to the existing arbitration rules have reflected the BAC's ambition to play a leading role in the frontier of commercial arbitration in China. Nevertheless the provisions to be introduced are more or less moderate and enterprising within the acceptable framework of China's current arbitration laws.

In contrast, more innovative and constructive improvements of the existing rules of procedure can be found in the China (Shanghai) Pilot Free Trade Zone Arbitration Rules (the 2014 Pilot Rules), which became effective on 1 May 2014.

After splitting from CIETAC in 2012, SHIAC has made several bold and innovative attempts to become one of the most advanced arbitration institutes in China. These include the diligent promulgation and revision of its own arbitration rules since its split from CIETAC and the establishment of the China (Shanghai) Pilot Free Trade Zone Court of Arbitration (the Pilot Court) in October 2013. Commentators noted that the 2014 Pilot Rules have adopted arguably the most advanced international arbitration practices, representing a very positive and innovative development for the arbitration industry in China.[10] In strong support of the 2014 Pilot Rules, the Shanghai mayor hoped that SHIAC and its Pilot Court would accumulate 'replicable and scalable experience' in institutional development, and strive to build Shanghai into an international arbitration center with great influence.[11] A famous judge from the SPC anticipated that the implementation of the 2014 Pilot Rules would provide beneficial experience for the amendment of Chinese Arbitration Law and the reform and innovation of China's commercial arbitration system.[12]

Resembling the provisions to be introduced in the Draft Rules discussed above, the 2014 Pilot Rules of SHIAC contains similar provisions allowing for a broader interpretation of written arbitration agreement, consolidation of arbitrations, truncated tribunal and facilitative measures for conducting arbitration proceedings. Moreover, in the following regimes the 2014 Pilot Rules made bold improvements that can be found nowhere in China's other arbitration rules:

Open Panel Of Arbitrators

SHIAC has an established panel of arbitrators composed of 625 arbitrators, 199 of them from 37 foreign countries and regions. Unlike the approach of 'closed pool' panellists adopted by most Chinese arbitration institutes, the 2014 Pilot Rules took one step towards allowing parties to choose arbitrators from outside the established panel, subject to final confirmation by the commission to guarantee the quality of the selected arbitrators. This liberal approach towards the parties' selection of arbitrators serves to enhance the parties' autonomy over the arbitration process and will certainly encourage the involvement of more sophisticated international arbitration practitioners in China.

Interim Measures And Emergency Tribunal

Under China's current Arbitration Law, the power to issue interim measures for the preservation of property or evidence rests solely with the competent People's Court.[13] The arbitration commissions or tribunals can only transfer the requesting party's application for interim measures to the competent court. In contrast, in recent years the arbitral tribunal tends to order interim measures, particularly in case of emergency.

The 2014 Pilot Rules, however, provides detailed guidance by devoting an entire chapter to the interim measures, including an order permitting one party to perform or an injunction preventing one party from performing certain acts. Article 20 of the 2014 Pilot Rules allows SHIAC to transfer the application for interim measures - in accordance with the relevant laws of the jurisdiction where the interim measure is sought together with these Rules - to the court with competent jurisdiction for a ruling, to the tribunal for a decision, or to the emergency tribunal constituted pursuant to article 21 of these Rules for a decision.

An emergency tribunal may be set up by SHIAC in accordance with the laws of the jurisdiction where the interim measure is sought at the request of one party during the period between the acceptance of a case and the constitution of the arbitral tribunal. The emergency tribunal shall make a ruling on the application for interim measures within 20 days after the formation of the tribunal or within 10 days after security is provided by the applicant. The emergency tribunal shall dissolve on the date when the arbitral tribunal is constituted and shall hand over all materials to the tribunal. Unless otherwise agreed to by the parties, the arbitrator appointed for the emergency tribunal shall not act as an arbitrator in respect of disputes relating to interim measures.[14]

The 2014 Pilot Rules has essentially increased the number of competent bodies that may facilitate the arbitration by issuing interim measures. This includes not only the competent court, but also the emergency tribunal and arbitral tribunal. The 2014 Pilot Rules will be very helpful in territories where the applicable law permits an emergency tribunal or arbitral tribunal to order interim measures. Though the improvement is welcomed, one should not overestimate its application in China because the function of an emergency tribunal or arbitral tribunal in ordering interim measures is not currently allowed under China's Arbitration Law.

Joinder Of Third Parties

For the first time, the 2014 Pilot Rules have opened the door to third parties who wish to join an arbitration.Article 38 of the Rules provides that the claimant and the respondent may by a joint written application request a third party to be joined in an arbitration with the latter's consent. A third party may also apply in writing to become a party in an arbitration with the written consent of both parties. The tribunal shall decide on the joinder of a third party, or, if the tribunal has not been constituted, the Secretariat shall make such decision. The

clarification of the rules on the joinder of third parties will improve the efficiency of arbitration proceedings and help to avoid potential parallel or repetitive proceedings.

Paralleled Mediation

There is a long-standing practice in Chinese arbitration of combining arbitration with mediation (Med-Arb). The typical method of Med-Arb is to conduct mediation by arbitrators who switch roles from mediators to arbitrators and vice versa during the same arbitration proceedings with consent from the parties. The practice has proved effective in resolving disputes quickly and cheaply, yet an increasing concern has been raised with respect to due process and without prejudice issues because the arbitrator may, by way of his role as a mediator, be privy to information that would not otherwise be available to him as an arbitrator. For instance, in *Gao Haiyan and Xie Heping v Keeneye Holdings Ltd*, the Hong Kong Courts have warned against the potential shortcomings of Med-Arb.[15]

To avoid possible challenges to Med-Arb cases, the 2014 Pilot Rules provides parties with one alternative option - they may have a mediation conducted by a mediator who shall not be an arbitrator in the same dispute, parallel to the arbitration proceedings. Article 50 of the Rules stipulates that any party may apply for mediation with the consent of the other party during the period after an arbitration case has been accepted and before the tribunal is constituted. The chairman of the SHIAC shall, within three days after receipt of written consent for mediation, appoint a mediator from the panel of mediators. Mediators are bound by ethical rules and mediation shall not affect the arbitration proceedings. Unless otherwise agreed to by the parties in writing, a mediator shall not act as an arbitrator in the subsequent arbitration proceedings. It is anticipated that this new mechanism will be able to serve the parties well by relieving their doubt as to the possible bias or injustice that may be arise from the traditional Med-Arb process.

Award Ex Aequo Et Bono

The 2014 Pilot Rules allow arbitrators to decide the case ex aequo et bono (ie, in accordance with equitable principles and common good) and not be bound by legal rules. The preconditions to decide ex aequo et bono are that the parties have expressly empowered the arbitrators to do so either in the arbitration agreement or in a written application submitted during the arbitration proceedings, and that such decision would not violate any mandatory provisions of laws or public policies.

Authorised with the power to decide the case ex aequo et bono, the arbitral tribunal may have one more practical tool to reach a fair decision in light of the circumstances of the case.

Strong Judicial Support To The 2014 Pilot Rules

Immediately after the promulgation of the 2014 Pilot Rules by SHIAC, the Shanghai No. 2 Intermediate People's Court, the court designated by the higher court to be in charge of reviewing arbitration cases by SHIAC, issued 'Opinions on Judicial Review and Enforcement of Arbitration Cases Applying the China (Shanghai) Pilot Free Trade Zone Arbitration Rules' (the Opinions)[16] on 4 May 2014.The Opinions provide strong judicial support for the implementation of the 2014 Pilot Rules.

The Opinions have 20 articles altogether.The main aim of the Opinions is to positively and efficiently support arbitration under the 2014 Pilot Rules, being applicable to all types of cases including applications for property preservation, confirming the validity and effect of arbitration agreement, and enforcing, revoking, and setting aside awards. Among others, the

Opinion shows respect for party autonomy, places no restriction on the scope of application of the Rules, recognises the appointment of non-penal arbitrators and awards ex aequo et bono, and establishes a fast-track mechanism for confirming arbitration agreement and enforcement of arbitral awards.The Opinions will greatly facilitate and guarantee the implementation of the 2014 Pilot Rules, and provide parties to arbitration under the 2014 Pilot Rules with tremendous convenience.

THE PRE-REPORTING MECHANISM SPECIALLY TAILORED FOR THE SPLIT OF CIETAC

Those who are familiar with arbitration in China will likely know that there is a special 'pre-reporting mechanism' set up and maintained by the SPC to combat local protectionism in the setting aside and enforcement of arbitral awards. The core concept of the 'pre-reporting mechanism' is to require that local courts report level by level to the SPC if the local courts intend to deny the validity of an arbitration agreement involving foreign elements, refuse the recognition and enforcement of a foreign-related arbitral award; or set aside a foreign-related arbitral award. Only having received a reply from the SPC may the competent local courts render judgment on the issues in dispute.[17] This centralised monitoring mechanism has effectively curbed the motivation for local protectionism and greatly reduced the possibility of conflicting judicial decisions on the same or similar issues.

In September 2013, the SPC decided to employ the 'pre-reporting mechanism' to resolve the problems arising from the split of CIETAC.

Conflicting Judicial Decisions After The Split Of CIETAC

The split of the CIETAC Shanghai Sub-Commission and the CIETAC South China Sub-Commission was triggered by the promulgation and implementation of the 2012 CIETAC Rules, which became effective as of 1 May 2012. Along with the back-and-forth argument with CIETAC Beijing, SHIAC and the SCIA have increased their pace to finalise their independent status by obtaining official support from the local legislative, administrative and judicial authorities.

The movement in affirming the SCIA and SHIAC's status after the split from CIETAC Beijing has steadily proceeded, and it seems that the separation is inevitable and irrevocable. Currently, there is no doubt that the former CIETAC Shanghai Sub-Commission and the former CIETAC South China Sub-Commissions have separated from CIETAC Beijing and that they are now independent arbitration commissions, recognised at least by local authorities. CIETAC is thus split into three independent arbitration commissions:

- CIETAC, with headquarters in Beijing, three remaining Sub-Commissions in Tianjin, Chongqing and Hong Kong, and two offices in Shanghai and Shenzhen respectively;
- SHIAC, with headquarters in Shanghai and a branch called the China (Shanghai) Pilot Free Trade Zone Court of Arbitration in Shanghai; and
- SCIA, with headquarters in Shenzhen.

At the moment, CIETAC accepts all arbitration cases if the parties reach arbitration agreements specifying arbitration by CIETAC or by one of CIETAC's Sub-Commissions (including the Shanghai or Shenzhen Sub-Commission), no matter when the arbitration agreements are concluded, prior to or after the split of CIETAC.

SHIAC and SCIA, however, insist that they are successors of the CIETAC Shanghai and Shenzhen (South China) Sub-Commission respectively. They continue to accept arbitration

cases if the arbitration agreements provide for arbitration by CIETAC Shanghai or Shenzhen (South China) Sub-Commission.

Unsurprisingly, the split of CIETAC has created much uncertainty as to CIETAC arbitration agreements and arbitral awards. Practitioners have regularly advised clients to amend the previously drafted CIETAC arbitration agreements to pinpoint which one of the three arbitration commissions should have jurisdiction over their disputes after split of CIETAC, but it is not realistic for the arbitration users to revise all the arbitration agreements, since the disputing parties do not usually agree with each other.

Because of the confused propaganda and clash of jurisdictions, a number of intermediate court judgments took inconsistent approaches towards the validity of arbitration agreements and the enforceability of awards involving the split of CIETAC.[18]

In south China, where the SCIA is currently located, the Shenzhen Intermediate People's Court delivered two landmark judgments in November 2012 confirming that the SCIA is an independent arbitration commission which, as successor to the CIETAC Shenzhen Sub-Commission (or the CIETAC South China Sub-Commission), may administer arbitration according to the 2005 CIETAC Rules, and an application for setting aside of SCIA arbitral award due to the split of CIETAC was therefore rejected.[19]

In the Shanghai, Zhejiang and Jiangsu area, where SHIAC is currently located, several intermediate people's courts had delivered conflicting judicial decisions.

On 7 May 2013, the Suzhou Intermediate People's Court of Jiangsu Province handed down a ruling ([2013] Su Zhong Shang Zhong Shen Zi No.004)[20] not to enforce an award rendered by SHIAC ([2012] Zhong Guo Mao Zhong Hu Zi No. 452). In the ruling, the Suzhou Intermediate People's Court held that, as SHIAC did not properly inform the parties of the change of the status of the institution and did not give the parties an opportunity to either confirm or reselect the arbitration institution, and that SHIAC had acted against the parties' true intention regarding the selection of the arbitration institution. The Suzhou Intermediate People's Court held that it should not enforce the award as SHIAC had no right to continue to hear and subsequently rule on the case after its 'independence' from CIETAC.

On 22 May 2013, the Ningbo Intermediate People's Court of Zhejiang Province made a similar ruling ([2013] Zhe Yong Zhi Cai Zi No. 1)[21] not to enforce an award rendered by SHIAC ([2013] Hu Mao Zhong Cai Zi No. 047).The reasoning of the court was exactly the same as that of the Suzhou Intermediate People's Court.

On 21 July 2013, thet Taizhou Intermediate People's Court of Zhejiang Province made a ruling ([2013] Zhe Tai Zhi Cai Zi No. 2)[22] rejecting the respondent's motion for refusal of the enforcement of an award made by SHIAC where the arbitration clause provided that 'disputes shall be submitted to Shanghai branch of CIETAC for arbitration in accordance with law'. The Taizhou Intermediate People's Court dismissed the respondent's arguments and upheld the award on the basis that:

- SHIAC was indeed the arbitration institution 'CIETAC Shanghai branch' stipulated in the arbitration clause of the sales contract;
- the award was made in the name of 'CIETAC Shanghai branch' and SHIAC did not go beyond its authority; and
-

the respondent did not raise any objection to the jurisdiction of SHIAC during the arbitration.[23]

It is worth noting that the attitude towards the SHIAC arbitration taken by the Taizhou Intermediate People's Court is inconsistent with that taken by the Suzhou and Ningbo Intermediate People's Courts.The former was for SHIAC arbitration and the latter was against SHIAC arbitration if SHIAC accepted a case according to a pre-split arbitration clause.

However, the shift took place swiftly because of intervention from the High People's Courts in Zhejiang Province and Jiangsu Province. The High People's Court of Zhejiang Province held in the supervision proceedings that the Ningbo Intermediate People's Court erred in its application of law, and made a directive on 17 July 2013 ordering the Ningbo Intermediate People's Court to rectify the previous decision. On 25 July 2013, the Ningbo Intermediate People's Court made a new ruling ([2013] Zhe Yong Zhi Jian Zi No. 1) revoking the previous ruling and ordered the enforcement of the arbitral award rendered by SHIAC. Subsequently, the High People's Court of Jiangsu Province issued a notice ([2013] Su Zhi Jian Zi No. 71) during the case filing supervision proceedings directing the Suzhou Intermediate People's Court to revoke its previous ruling and to re-review the case.[24]

The overruling of the court rulings made by the Suzhou and Ningbo Intermediate People's Courts has ensured that the movement of local courts in the Shanghai, Zhejiang and Jiangsu area is consistent in supporting SHIAC's jurisdiction over arbitration clauses concluded prior to the split of CIETAC.

Yet people still have good reason to worry that the jurisdictional dispute among the CIETAC institutions would affect the enforceability of their arbitral awards in other provinces, municipalities and autonomous regions.[25] The people's courts outside the Shanghai, Zhejiang and Jiangsu area may have some other reasons not to support SHIAC's jurisdiction over pre-split arbitration clauses, as demonstrated by a case adjudicated in the Liaoning Province of north China. In this case, the arbitration clause specified that arbitration should be conducted by the CIETAC Shanghai Sub-Commission. However, the dispute was brought before the Dalian Maritime Court for litigation. The defendant challenged the court's jurisdiction based on the existing arbitration clause. Among other things, the plaintiff argued that since CIETAC has suspended the Shanghai Sub-commission's authorisation to accept or to administer CIETAC arbitrations, the arbitration clause in question had become void. The Dalian Maritime Court and the appellate court, the Liaoning High People's Court, ruled against the plaintiff and held that the arbitration agreement should be valid but the arbitral jurisdiction should be exercised by CIETAC Beijing instead of SHIAC, since CIETAC issued the Management Notice on 1 August 2012, in which CIETAC suspended the Shanghai Sub-commission's authorisation to accept CIETAC arbitration applications. The Dalian Maritime Court ruled that the dispute should be referred to CIETAC Beijing for arbitration and the Liaoning High People's Court upheld the judgment.[26]

Given the fact that the local courts had differed on the post-split SHIAC's or SCIA's jurisdiction under a pre-split CIETAC Sub-Commission arbitration agreement, and to avoid further diversity in adjudicating the same or similar issues, the SPC decided to set up and implement the 'pre-reporting mechanism' specifically tailored for the split of CIETAC.

The Pre-reporting Mechanism

On 4 September 2013, the Supreme People's Court (the SPC) issued the Notice on Certain Issues in Relation to the Correct Handling of Judicial Review of Arbitration Matters (the SPC Notice).

The SPC recognised the increase in disputes over the jurisdiction of CIETAC and its former sub-commissions in the acceptance of arbitration cases. It was against this background that the SPC issued the SPC Notice, offering guidance to the lower courts and providing a unified standard on how to deal with these matters. When asked to review the validity of a CIETAC arbitration agreement, or to hear an application to set aside or not to enforce an arbitral award made by CIETAC, SHIAC or SCIA, the SPC Notice requires the relevant court to report its intended decision to the SPC. Such report shall be made level by level and eventually to the SPC, after the lower court's judicial committee has discussed the case and given its opinion. The courts should not make any rulings until the SPC has given its opinion. This level-by-level reporting system is also called a 'pre-reporting mechanism'.

Commentators pointed out that it is a welcome development for China's highest court to take measures to resolve the potential problems caused by the separation of CIETAC,[27] and that the benefits of the pre-reporting mechanism are manifold. First, it will effectively set up a uniform standard nationwide for judicial review for all courts, and safeguard the predictability of arbitration cases and to the legitimate expectation of the parties. Second, it will prevent local protectionism. Third, it will to a large extend make up for the lack of judicial remedy available to the parties, maintain the authority and stability of arbitration and protect the legitimate rights of bona fide parties.[28]

The disadvantages of the SPC Notice are equally apparent. It is brief and lacks detailed guidelines on all specified questions and issues, including the legal status of the post-split SHIAC and the SCIA, the allocation of jurisdiction between CIETAC Beijing and SHIAC/SCIA prior to or after the split, and the time frame for the lower court's decision to reach the SPC and for the SPC to issue its opinion. It appears that operation of the pre-reporting mechanism lacks adequate transparency to the public. It is not known at this stage whether the SPC will issue further guidance on these points. No case employing the pre-reporting mechanism has been publicised yet. The effect of the implementation of the SPC Notice, which is bound to draw a lot of public attention, is yet to be seen.

THE VALIDITY OF A HYBRID ARBITRATION CLAUSE

In most cases, parties agree that an arbitration institution should administer arbitration cases under their own arbitration rules. Occasionally, a hybrid arbitration clause may provide that an arbitration institution should administer arbitral proceedings in accordance with other rules. Paragraph 3 of article 4 of the 2012 CIETAC Rules allows hybrid arbitration by stipulating that:

> [where] the parties agree to refer their dispute to CIETAC for arbitration but have agreed on a modification of these Rules or have agreed on the application of other arbitration rules, the parties' agreement shall prevail unless such agreement is inoperative or in conflict with a mandatory provision of the law as it applies to the arbitration proceedings. Where the parties have agreed on the application of other arbitration rules, CIETAC shall perform the relevant administrative duties.

In practice, this provision is rarely applied.

A recent case, however, signals that the Chinese courts are willing to confirm that a hybrid arbitration clause is valid and enforceable. Following directions from the Supreme People's Court, the Ningbo Intermediate People's Court gave a ruling on 27 March 2014 holding that CIETAC may administer arbitration proceedings under the UNCITRAL Rules and that the parties' agreement should be recognized and upheld.[29] In that case, Luxembourg company INVISTA Technologies Sàrl (INVISTA)and Chinese company Zhejiang Yisheng Pretrochemical Co Ltd (Yisheng) agreed in a licence agreement that 'arbitration shall take place at CIETAC' in accordance with UNCITRAL Rules. INVISTA initiated the arbitration before CIETAC and Yisheng challenged the validity of the hybrid arbitration clause before the Ningbo Intermediate People's Court by alleging that the parties had only agreed the place of arbitration but failed to designate an arbitration institution and therefore the hybrid arbitration clause was essentially an ad hoc arbitration clause which was invalid for being in violation of the Chinese Arbitration Law. In the ruling, the Ningbo Intermediate People's Court held that the words 'arbitration shall take place at CIETAC' should be interpreted as the parties' agreement to have CIETAC administer arbitration under the UNCITRAL Rules. The agreement is valid and enforceable, and Yisheng's application should be dismissed.

The ruling given by the Ningbo Intermediate People's Court should receive warm welcome since it opens the door to a more liberalised arbitration environment in Mainland China. It also reflects Chinese Courts' increasing support for CIETAC's internationalisation.

INVESTMENT TREATIES AND FREE TRADE AGREEMENTS

China has concluded over 130 BITs and FTAs over the years. Such treaties typically grant foreign investors the right to initiate arbitration for violations of the guaranteed substantive treatments under the BIT by the host state.[30]

In the past year, one important development is the implementation of the China-Japan-Korea trilateral investment treaty.

The China-Japan-Korea Agreement for the Promotion, Facilitation and Protection of Investment is widely believed by economists to be a prelude to the foundation of the free trade agreement (FTA) among the three countries. On 13 May 2012, China, Japan and Korea concluded this trilateral investment agreement which forms the first legal framework among China, Japan and Korea in the regime of economic cooperation. It came into effect on 17 May 2014.

The three nations have previously concluded several bilateral investment treaties, including a 1988 treaty between China and Japan and a 1992 treaty between China and Korea. However, the rights granted in those agreements were more circumscribed. For example, investors can only submit claims to international arbitration in the case of expropriation and only have a claim for quantification of compensation owed under national law (as opposed to international law). Article 15 of the trilateral investment agreement extends the coverage of arbitration to almost all legal obligations. Paragraph 1 of article 15 provides that:

> an investment dispute is a dispute between a Contracting Party and an investor of another Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of the former Contracting

> Party under this Agreement with respect to the investor or its investments in the territory of the former Contracting Party.

For the settlement of investment disputes between a contracting party and an investor of another contracting party, article 15 provides 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 on arbitration in accordance with other arbitration rules.

For the settlement of disputes between contracting parties to the trilateral agreement through arbitration envisaged by article 17, the default mechanism is ad hoc arbitration under the UNCITRAL Rules of Arbitration unless the contracting parties have agreed otherwise. These rules may be modified by the disputing parties or modified by the arbitrators. Interestingly, article 17 allows the third contracting party to participate in the arbitration proceedings by joining either of the disputing parties by delivering a written notice of its intention to participate to the disputing parties and to the arbitral tribunal. Alternatively, article 17 allows the third contracting party that is not participating in the arbitration proceedings to attend all hearings, to make written and oral submissions to the arbitral tribunal and to receive a copy of the written submissions furnished by the disputing parties to the arbitral tribunal.

This agreement has thus deepened the contracting parties' commitments to international arbitration as a means of resolving disputes with foreign investors or among themselves.

CONCLUSION

This past year witnessed much chaos over the split of CIETAC. With the intervention by the SPC and with joint efforts made by local courts, especially through the newly-established pre-reporting mechanism, the uncertainty and risks over the jurisdictional issues, the enforceability of arbitral awards and so on have been significantly reduced. It is believed that the new level-by-level reporting system will effectively minimise the inconsistent practices by local courts, and will gradually clarify the jurisdictional allocation of CIETAC, SHIAC and SCIA in applying the pre-split or after-split arbitration clauses.

More encouragingly, China's arbitration institutions are moving forward to focus on strategic expansion and the improvement of service quality. As quick learners of the generally accepted international standards of the arbitration community, some of them are striving for superiority. Good examples of this are the Shanghai International Economic and Trade Arbitration Commission and the BAC. By promulgating new Rules of Arbitration or soliciting opinions for the amendments of existing Rules, they are making innovative improvements and breakthroughs. In a country like China with a large number of arbitration institutions, a high quality of service should always be the primary goal to be achieved year by year.

The authors would like to thank Ellen Pang for her assistance in this chapter.

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Summary

THE 2013 RULES – A SNAPSHOT
AMENDMENTS TO THE HONG KONG ARBITRATION ORDINANCE
THE PRO-ARBITRATION STANCE OF THE HONG KONG JUDICIARY
CONCLUSION

The second half of 2013 and the first half of 2014 have been an exciting time of change for the arbitration scene in Hong Kong.

On 1 November 2013, the long-awaited amendments to the Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules came into force. The end result – a truly innovative set of Rules – reflects best practice and the most recent trends in international commercial arbitration, including the incorporation of a series of provisions to deal with multi-party arbitrations, as well as the introduction of emergency arbitration procedures.

Earlier, on 19 July 2013, amendments to the Hong Kong Arbitration Ordinance came into force to deal with the enforcement in Hong Kong of emergency interim relief – whether granted in or outside Hong Kong. This was followed by further amendments, which came into force on 16 December 2013, dealing specifically with the enforcement of Macanese arbitration awards in Hong Kong, in order to implement the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the Hong Kong Special Administrative Region and the Macao Special Administrative Region which had been signed on 7 January 2013 (the Hong Kong–Macao Arrangement).

The extent of the legislative amendments and the relative speed with which they were finalised by the Department of Justice, introduced into the Legislative Council (LegCo) in Hong Kong and subsequently brought into force are testimony to the Hong Kong government's firm commitment to the continued development of international commercial arbitration in Hong Kong. Indeed, the government's increasing focus on international arbitration in Hong Kong was emphasised by the Secretary for Justice, Rimsky Yuen, at a seminar in Vietnam on 20 February 2014, at which he commented:

> Capitalising on our robust legal system and legal infrastructure, it is the steadfast policy of the Hong Kong Government, and one of the key priorities of my department (the Department of Justice), to promote Hong Kong as a centre for international legal and dispute resolution services in the Asia Pacific region.
>
> One of our focuses is naturally international arbitration, a mode of dispute resolution which enjoys great popularity amongst the international business community and is gaining more and more momentum in the Asia Pacific region. The reason for this trend is totally understandable. Businessmen normally do not prefer to litigate, still less to litigate in a foreign place and subject to a foreign legal system with which they are not familiar.

At the beginning of 2014, Teresa Cheng SC took over the chair of the HKIAC. Key changes to the HKIAC's organisational structure followed, described by the HKIAC as being 'motivated by the principles of independence and expertise and the needs of the users'. The changes were also in response to the amendments introduced by the 2013 Rules and the increased role to be played by the HKIAC in arbitrations administered under those Rules. An Executive Committee has been established to serve as the principal body directing the activities of the HKIAC, together with three standing committees: the Proceedings Committee, the Appointments Committee, and the Finance and Administration Committee. The three standing committees are already dealing with matters concerning the business operations

of the HKIAC as well as the more specific procedural functions entrusted to the HKIAC under the 2013 Rules and in accordance with its role as appointing authority under the Arbitration Ordinance.

This article discusses the 2013 amendments to the HKIAC's Rules and the Arbitration Ordinance, and highlights recent case authorities that demonstrate the pro-arbitration approach of the Hong Kong judiciary.

THE 2013 RULES – A SNAPSHOT

The 2013 Rules – which will be supplemented by practice notes made available on the HKIAC's website – implement a number of key changes in the following areas:

Scope Of The 2013 Rules (article 1)

The 2013 Rules apply where an arbitration agreement provides for arbitration 'administered by the HKIAC' or words to 'similar effect' (article 1.1). This represents a change from the 2008 Rules, which contained a more restrictive reference to words of the 'same effect'. The change was introduced to address the situation 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.

Article 1.3, which provides that the 2013 Rules came into force on 1 November 2013 and apply, absent contrary agreement, to all arbitrations commenced on or after that date, is subject to article 1.4. Article 1.4 expressly carves out the consolidation (article 28), single arbitration under multiple contracts (article 29) and emergency relief (article 23.1 and schedule 4) provisions of article 1.3, and provides, absent express contrary agreement of the parties, that 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 Rules come into effect, even if the Notice of Arbitration is submitted on or after 1 November 2013. Nonetheless, the parties could agree to opt-in to those provisions in agreements made prior to 1 November 2013.

HKIAC's Power To Determine Whether An Arbitration Should Proceed (article 19.4)

The HKIAC's power under article 19.4 to determine whether an arbitration should proceed is an entirely new provision, introduced as a result of the extensive public consultation process that took place prior to the finalisation of the 2013 Rules.

Where, before the tribunal is constituted, there is a dispute between the parties over the existence, validity or scope of the arbitration agreement, or the competence of the HKIAC to administer the arbitration, the HKIAC has the power to decide whether and to what extent the arbitration should proceed. The test is whether the HKIAC is prima facie satisfied that an arbitration agreement under the 2013 Rules exists. If the HKIAC is so satisfied, the arbitration will proceed, and any disputes over the subsequently appointed tribunal's jurisdiction will be decided by the tribunal itself (pursuant to article 19.1).

Arbitrator Fees And Appointments (articles 9 And 10, Schedules 2 And 3)

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

Pursuant to articles 9 and 10 of the 2013 Rules, the designation of an arbitrator shall be confirmed by the 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.

Where the parties are unable to agree on the method of determining the fees and expenses of the tribunal – and inform the HKIAC of this within 30 days from the respondent's receipt of the Notice of Arbitration – the default position is that the tribunal's fees and expenses will be calculated by reference to hourly rates and schedule 2. So far, this tracks the 2008 Rules.

However, two important changes have been introduced by the 2013 amendments.

The first change is the introduction of an hourly fee cap for arbitrators, currently set at HK$6,500.[2] Higher rates can only be charged by express written agreement of all the parties, or if the HKIAC so determines in 'exceptional circumstances'.[3]

The second change is the introduction of standard arbitrator terms of appointment, which are set out in schedule 2 and schedule 3. The same terms of appointment apply to both schedules, but have been set out in each schedule to aid users and to enable each schedule and fee system to stand alone. As with the fees, the standard terms can only be varied with the agreement of all the parties or by the HKIAC, where the HKIAC considers any changes to be appropriate (article 9.2).

The uniformity created by these two features is aimed at facilitating negotiations around the appointment of arbitrators, and the streamlining of this process and the commencement of the substantive arbitration proceedings. Feedback received to date is encouraging and demonstrates that users have embraced the certainty that prescribed standards and fee caps have introduced.

Multi-party Arbitrations (articles 27, 28 And 29)

Some of the most innovative changes implemented by the 2013 Rules relate to provisions dealing with multi-party situations, being: article 27 (Joinder of Additional Parties), article 28 (Consolidation of Arbitrations) and article 29 (Single Arbitration under Multiple Contracts).

Provisions dealing with multi-party arbitrations are becoming more relevant as a larger number of claims raised are subsets of the same dispute, and involve multiple parties and multiple contracts.

The specific changes are discussed in more detail below.

Joinder

The joinder provisions have been strengthened and expanded. In summary:

- the HKIAC has been given an 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 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. Article 28 gives the HKIAC the power to consolidate two or more arbitrations at a party's request and after consulting with all parties. The factors which the 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 or of 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 the 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] and highly relevant in the modern world of international commercial arbitration. It provides that claims arising out of or in connection with more than one contract may be made in a single arbitration where 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

The 2013 Rules include two important waivers within the multi-party provisions.

The first relates to the appointment of arbitrators and the express waiver by the parties of their right to appoint an arbitrator. This waiver is particularly important and has been included to address the inherent conflict between the effective management of multi-party disputes and the otherwise equal right of parties in arbitration proceedings to appoint arbitrators, brought into sharp focus by the ***Dutco*** case.[5] In the context of joinder, article 27.11 provides, therefore, 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 the HKIAC may revoke the appointment of any arbitrators already designated or confirmed and proceed to appoint a new tribunal. Similarly, in the context of consolidation, Article 28.6 provides that where the HKIAC decides to consolidate two or more arbitrations, the parties thereto shall be deemed to have waived their right to designate an arbitrator, and the 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.

The second waiver is equally important and relates to the enforcement of arbitral awards that arise out of multiparty proceedings. In all cases of joinder (article 27.13), consolidation (article 28.8) or single arbitrations under multiple contracts (article 29.2), the parties expressly waive[6] 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.

Expansion Of Expedited Procedure (article 41)

Consistent with the trend of enabling more arbitration proceedings to be fast-tracked when it would be appropriate to do so, the 2013 Rules have also expanded the application of the expedited procedure. In addition to increasing 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 (approximately US$3.2 million as at May 2014), the expedited procedure will also apply where the parties agree and in cases of exceptional urgency (to be determined by the HKIAC after considering the views of the parties).

The HKIAC's expedited arbitration proceedings have the following features:

- the appointment of a sole arbitrator (unless the arbitration agreement provides for a tribunal of three arbitrators, in which case the HKIAC will invite the parties to agree to refer the case to a sole arbitrator) (article 41.2(a) and (b));
- the ability of the HKIAC to 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 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 the HKIAC transmitted the file to the tribunal. The 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)

The confidentiality provisions have also been clarified and now expressly reflect section 18 of the Arbitration Ordinance.

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

Article 42.5 retains the HKIAC's power to publish awards.[7] Specifically, an award will only be published (whether in full form, summary form or by way of an extract) where a request has been made to the 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 the HKIAC. This is an important function and there was overwhelming support for its retention in the 2013 Rules, but the parties similarly retain the power of veto should they wish to keep the award entirely confidential.

Interim Measures (articles 23 And 24)

The tribunal's power to order interim measures of protection is dealt with under 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.

Article 23.3 of the 2013 Rules, however, expressly allows an interim measure to be given in the form of an order (as well as an award or other form). It also provides that the types of interim measure listed in article 23.3 (a) to (d) – for example measures to maintain or restore the status quo pending determination of the dispute – are given only by way of 'example and without limitation'. This contrasts with article 17 of the UNCITRAL Model Law (which is given effect by section 35 of the Arbitration Ordinance), which contains an exhaustive 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 Rules, reflecting a request from market participants for this power to be included within a separate provision and thus identified clearly.

Emergency Relief Procedures (article 23.1 And Schedule 4)

The 2013 Rules also allow 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 introduction of emergency arbitrator procedures again reflects the most recent trends in international commercial arbitration, and offers 'fast-track' options to parties requiring urgent relief prior to the constitution of the tribunal. Similar procedures can be found in the ICC Rules, SCC Rules, Swiss Rules, the SIAC Rules and, most recently, the Japan Commercial Arbitration Association Rules, which came into force on 1 February 2014.

Paragraph 22 of schedule 4 emphasises that the emergency relief procedures are in no way intended to replace or exclude the role of the courts in providing interim 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[8] that have implemented emergency relief provisions demonstrate that parties are increasingly taking advantage of the ability to invoke the assistance of an emergency arbitrator and 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.

The primary power of the parties to apply for such emergency relief is contained in article 23.1 and the substantive procedure is set out in schedule 4.

Some of the key features of the emergency relief procedure set out in schedule 4 are:

- the application for emergency relief can be filed concurrently with, or following, the filing of the Notice of Arbitration, but prior to the constitution of the tribunal (paragraph 1);
- the applicant must pay the application deposit stipulated by the HKIAC on its website, consisting of the 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, although the 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 the HKIAC determines that it should accept the application, it must seek to appoint an emergency arbitrator within two days after receipt of the application and the 'Application Deposit' (paragraph 5). For these purposes, the HKIAC has established a

separate subset of more experienced arbitrators who have agreed, where appropriate, to act as emergency arbitrators for the HKIAC;

- after appointment of the emergency arbitrator, the 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 the HKIAC transmitted the file to the emergency arbitrator, subject to this period being extended by agreement of the parties or by the 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 the HKIAC in appropriate circumstances, 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.

AMENDMENTS TO THE HONG KONG ARBITRATION ORDINANCE

Enforcement Of Emergency Interim Relief

In conjunction with the drafting of the emergency relief procedures, the 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 LegCo in April 2013 and passed in July 2013. The amendments introduced a new part 3A into the Arbitration Ordinance entitled 'Enforcement of Emergency Relief'. Part 3A came into force on 19 July 2013.

Part 3A comprises two sections: section 22A (Interpretation) and section 22B (Enforcement of emergency relief granted by emergency arbitrator).

Under section 22A, an 'emergency arbitrator' is defined as an 'emergency arbitrator appointed under the arbitration rules (including the arbitration rules of a permanent arbitral institution) agreed to or adopted by the parties to deal with the parties' applications for emergency relief before an arbitral tribunal is constituted'.

Section 22B(1) then permits the enforcement of emergency relief granted by an emergency arbitrator both inside and outside Hong Kong. Enforcement is possible 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 emergency relief is of a nature which could have been granted in Hong Kong. Section 22B(2) (a) – (f) sets out an exhaustive list of interim measures recognised under the Arbitration Ordinance, taken from sections 35, 40 and 56 of the Arbitration Ordinance This proviso 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.

Hong Kong–Macao Arrangement

Amendments to the Arbitration Ordinance in 2013 also included the addition of a new Division 4 of Part 10 (Enforcement of Macao Awards) which came into force on 16 December 2013 in order to implement the Hong Kong–Macao Arrangement.

The Hong Kong–Macao Arrangement has been eagerly awaited and facilitates the enforcement of Macao arbitral awards in Hong Kong, and vice versa, on terms more or less the same as the similar Arrangement between Hong Kong and the Mainland, which in turn was premised on the New York Convention 1958.

The limited grounds to refuse enforcement of a Macao award are set in new section 98D of the Arbitration Ordinance and replicate[10] the grounds for refusing to enforce:

- Hong Kong and non-Convention awards (see section 86);
- Convention awards (see section 89); and
- Mainland awards (see section 95).

THE PRO-ARBITRATION STANCE OF THE HONG KONG JUDICIARY

Pacific China Holdings Ltd (in Liquidation) V Grand Pacific Holdings Ltd [2013] HKEC 248

In the Hong Kong chapter of *The Asia-Pacific Arbitration Review 2012*, the author discussed the controversial first instance decision of ***Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd*** (2011) HKLRD 611, in which Saunders J[11] set aside an ICC award under (as was then) article 34[12] of the UNCITRAL Model Law. Grand Pacific Holdings Ltd appealed to the Court of Appeal. At the time of writing the 2013 edition of *The Asia-Pacific Arbitration Review*, the Court of Appeal's decision had not yet been handed down. A decision was handed down on 9 May 2012, when the Court of Appeal unanimously overturned the first instance decision, to much applause from the local arbitration community. In particular, the Court of Appeal stressed the high threshold – namely, that any breaches of article 34 (2) must be of a 'serious' or 'egregious' nature – which a party must meet in order to succeed in having an award set aside on grounds of due process.

On 19 February 2013, the Hong Kong Court of Final Appeal refused leave to appeal against the Court of Appeal's judgment and dismissed Pacific China Holdings Ltd's application, thereby endorsing the Court of Appeal's ruling on this issue.

Then, on 16 August 2013, the Appeal Committee of the Court of Final Appeal rejected an second application by Pacific China Holdings Ltd for leave to appeal against the Court of Appeal separate decision on costs given on 23 July 2012. In that costs decision, the Court of Appeal had cited with approval case law to the effect that where a party applies unsuccessfully to set aside an award, it should expect – in the absence of special circumstances – to pay costs on a higher basis than normal (ie, the indemnity basis).

Po Fat Construction Company Limited V The Incorporated Owners Of Kin Sang Estate HCCT 23 Of 2013

In this case, in her Reasons for Decision dated 6 November 2013, Chan J[13] dismissed the applications of Po Fat Construction Limited (inter alia) for leave to appeal on questions of law and to set aside a domestic arbitral award made against it. Citing the Court of Appeal's threshold discussed in the ***Pacific Holdings*** case, Chan J held that she did not agree that the conduct of the arbitrator was 'so serious or egregious [...] as to justify the Award being set aside.'[14]

Chan J also found[15] that the authorities[16] were clear that even had there been a serious procedural irregularity or error undermining the due process of the arbitration, the court still would not exercise its discretion to set aside an arbitral award where it is not satisfied that the outcome of the dispute would have been affected thereby, or where the court is satisfied that the tribunal could not have reached a different conclusion.

Finally, on the question of costs, Chan J followed the Court of Appeal in the ***Pacific China*** case and held that this was an 'appropriate and obvious' case for Po Fat Construction Limited to pay the costs of the incorporated owners of Kin Sang Estate on an indemnity basis, with certificate for two counsel.

X Chartering V Y HCCT 20 Of 2013

Similarly, in the case of ***X Chartering v Y***, in her decision dated 3 March 2014, Chan J dismissed Y's application to set aside an Order granting leave to X Chartering to enforce two London arbitration awards as judgments of the Hong Kong court. Again, in giving her decision, Chan J referred to the clear principles governing applications to resist enforcement of awards as cited by the Court of Appeal in the ***Pacific China*** case.

In particular, Chan J confirmed that the court is concerned with the process of the arbitral proceedings and not the substantive merits of the dispute or the correctness of the award, and that any conduct complained of must be so serious or egregious that one could say a party had been denied due process.

Further, on the question of public policy, Chan J confirmed that the court adopts a narrow approach. She referred with approval to the 2009 case of ***A v R (Arbitration: Enforcement)*** [2009] 3 HKLRD 389 where Reyes J observed:

> If the public policy ground is to be raised, there must be something more, that is, a substantial injustice arising out of an award which is so shocking to the court's conscience as to render enforcement repugnant.[17]

On the facts before her, Hon Chan J was satisfied that Y had had a reasonable opportunity to present its case, that due process had not been denied, and that there was no breach of public policy. Moreover, she confirmed the court's residual discretion to enforce an award in any event, and held that she would anyway have exercised this discretion in favour of enforcement. Y's application was dismissed, and an order was made for Y to pay X Chartering's costs on an indemnity basis.

Guo Shun Kai V Wing Shing Chemical Co Ltd HCCT 35 Of 2012

In the case of ***Guo Shun Kai v Wing Shing Chemical Co Ltd***, G Lam J dismissed (inter alia) Wing Shing's application to set aside an order granting leave to enforce a CIETAC award against Wing Shing and ordered Wing Shing to pay Guo Shun Kai's costs on an indemnity basis.

G Lam J held that the mere fact that Wing Shing had applied to the Shenzhen Intermediate People's Court for the dismissal or setting aside of the award did not mean that the award had been 'suspended by a competent authority of the Mainland or under the law of the Mainland' for the purposes of section 95(2)(f)(ii) of the Arbitration Ordinance.

Shanghai Fusheng Soya-Food Co Ltd V Pulmuone Holdings Co Ltd [2014] HKEC 825

In the case of ***Shanghai Fusheng Soya-Food Co Ltd v Pulmuone Holdings Co Ltd***, Chan J again dismissed Shanghai Fusheng's application to set aside an ICC Hong Kong arbitral award on the ground that the award was in conflict with the public policy of Hong Kong. Referring to the cases of ***Hebei Import***, ***Grand Pacific Holdings***, and ***A v R (Arbitration: Enforcement)***, Chan emphasised again the narrow construction given to the term 'contrary to public policy' and the fact that the court is concerned only with the structural integrity of the arbitration proceedings, and not the substantive merits of the dispute or the correctness or otherwise of the award.

In this case, which related to disputes arising out of a joint venture between the parties, the applicant argued that the ICC tribunal had failed or refused to take note of a Shanghai court judgment given in respect of proceedings commenced by the respondent on behalf of the joint venture company against the applicant. The applicant argued that the Shanghai court judgment had decided the same issues that had been canvassed before the arbitral tribunal and, therefore, bound the parties. The applicant claimed that the award was contrary to Hong Kong public policy because there should be finality in the resolution of disputes and re-litigation on the same issues should be prevented.

Chan J disagreed. She held that there was 'nothing shocking to the court's conscience, nothing offensive to [Hong Kong] notions of justice and morality, to permit the Respondent to enforce the Award.'

In particular, Chan J found that the applicant had participated in both the court and the arbitration proceedings, and had been given the opportunity to make relevant submissions in the arbitration to the tribunal, and had in fact done so. The tribunal had decided that the issues raised in the Shanghai proceedings had no relevance to or effect on the arbitral award. As a result, Hon Chan J held that there had been no serious breach which undermined due process, that the applicants had had a fair opportunity to present their case on all the issues raised in the arbitration, and that she could find no injustice as a result of the existence or effect of the Shanghai court judgment. She dismissed the application to set-aside and ordered the applicant to pay the respondent's costs on an indemnity basis.

These recent rulings confirm the Hong Kong judiciary's long-standing support for arbitration, and reluctance to interfere with the arbitral process. In addition, they serve as a warning to parties that meritless and frivolous challenges to arbitration awards are likely to be penalised in costs.

CONCLUSION

As demonstrated by the recent developments highlighted in this chapter, Hong Kong is a significant player in the international arbitration arena. It has a long and well-established track record as an arbitration venue, not only for China-related arbitrations – for which it has for a long time been the seat of first choice – but also for disputes involving parties from all over the world.

The HKIAC's 2013 'best practice' Rules and the latest amendments to the Hong Kong Arbitration Ordinance – unmatched in any jurisdiction in terms of the enforcement regime implemented for emergency relief – further enhance Hong Kong's reputation, and demonstrate the Hong Kong government's commitment to supporting international commercial arbitration in Hong Kong.

This, coupled with the strong support of a robust judiciary, means that Hong Kong is well-placed to secure a lion's share of international arbitration work going forward.

Notes

1. Members of the Executive Committee are: Teresa Cheng GBS SC JP (Chair of HKIAC); Lord Goldsmith QC (Newly Appointed Vice Chair of HKIAC); John Budge (Newly Appointed Vice Chair of HKIAC); Matthew Gearing QC; Justin D'Agostino and Kathryn Sanger.
2. Approximately US$840 or £560 as at July 2013. 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.
3. Paragraph 9.5, schedule 2.
4. Article 29 is similar to article 9 of the 2012 ICC Rules.
5. *Siemens AG and BKMI Industrienlagen GmbH v Dutco Consortium Construction Company Ltd*.
6. To the extent such waiver can validly be made.
7. See article 38.3 of the 2008 HKIAC Rules.
8. In its 2013 Annual Report, SIAC reported that it had received, and accepted, 19 applications for emergency arbitration relief in 2013. This took the total of emergency relief applications accepted by SIAC since the emergency relief procedures were first introduced in July 2010 to 30. Informal reports confirm that as at May 2014, that number had increased to 36.
9. The emergency arbitrators designated as such by HKIAC are all on HKIAC's Panel of Arbitrators, and are identified by an asterisk '*' against their names.
10.

Note:
(i) subject to (ii) below, the grounds for refusing to enforce an award differ only in sections 86(1)(f)(ii) (Hong Kong and non- Convention awards), 89(2)(f)(ii) (Convention Awards), 95(2)(f)(ii) (mainland awards) and 98D(2)(f)(ii) (Macao awards). Sections 86(1)(f) and 89(2)(f) follow the fifth ground of refusal of recognition and enforcement under article V of the New York Convention, being where the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. Sections 95(2)(f) and 98D(2)(f) following the respective arrangements with the mainland and Macao, and refer only to the situation where the award has been set aside or suspended by a competent authority, or under the law, of the mainland or Macao, as the case may be;
(ii) Section 95 of the arbitration Ordinance dealing with the grounds for refusal to enforce a Mainland award does not contain the equivalents of sub-sections 86 (4) and (5), section 89 (5) and (6) and section 98D (5) and (6). These sub-sections each provide that:
• if an application for setting aside or suspending the relevant award has been made to a competent authority the enforcement court may, if it thinks fit, adjourn the enforcement proceedings and may, on the application of the party seeking to enforce the award, order the respondent to provide security; and
• any decision or order of the award in this regard is not subject to appeal.

11. The judge then specialising in arbitration matters.
12. Now section 81 of the Arbitration Ordinance, which gives effect to article 34 of the UNCITRAL Model Law.
13. The current judge specialising in arbitration matters.
14. Reasons for Decision, para. 28.
15. Ibid, para. 29.
16. *Citing Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd* [2011] 1 HKLRD 707 and *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in Liquidation) (No. 1)* 4 HKLRD 1.
17. Para. 23 of Reyes J's judgment.

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Summary

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PROCEDURE FOR ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

In 1981, Indonesia ratified the 1958 New York Convention (the 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,[1] Indonesia will apply the New York Convention to arbitral awards made only in the territory of other contracting states. In other words, foreign arbitral awards can only be enforced in Indonesia if the country deciding on the award is also a contracting state to the New York Convention.[2]

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, that are considered commercial under Indonesian law.

Besides, Indonesia ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) in 1968.[3] According to article 3 (1) of Law No. 5 of 1968 concerning ratification 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.

To further encourage foreign investment from major investor countries, Indonesia has also signed a considerable number of bilateral investment treaties (BITs) with many countries. At the time of writing, Indonesia has signed BITs with 67 countries including Australia, China, France, India, Italy, Malaysia, the Netherlands, Thailand, South Korea, the United Kingdom, Germany, Singapore and Russia.[4] To provide the legal certainty sought by investors, the treaties specifically provide arbitration as the preferred method of dispute settlement.

To promote further economic cooperation between and among member states of the Association of Southeast Asian Nations (ASEAN), Indonesia ratified the ASEAN Comprehensive Investment Agreement (ACIA)[5] through Presidential Regulation No. 49 of 2011. The ACIA was signed by Indonesia and other ASEAN members on 26 February 2009. One of the most important features of the ACIA is its investor–state dispute settlement mechanisms and the promotion of alternative dispute resolution methods. ASEAN investors can resolve disputes by using domestic courts and tribunals, through international arbitration (including ICSID) and by means of alternative dispute methods, such as mediation, conciliation, consultation and negotiation.

THE INDONESIAN ARBITRATION LAW

Realising the value of arbitration in both international and domestic commercial relations, on 12 August 1999, the Indonesian government enacted and promulgated Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (Arbitration Law),[6] as the first national arbitration law in Indonesia. Pursuant to its closing provision, the Arbitration Law replaces articles 615–651 of the Dutch Code of Civil Procedure, which had been applicable in Indonesia since the Dutch colonisation of Indonesia.

The Indonesian Arbitration Law provides for rules of ad hoc arbitral proceedings and procedures for the recognition and enforcement of international and national arbitral awards in Indonesia.

It should be noted that Indonesia is not a UNCITRAL Model Law country because the Indonesian Arbitration Law did not take the UNCITRAL Model Law on International Commercial Arbitration into account.

THE USE OF ARBITRATION IN INDONESIA

While arbitration has long-established roots in Indonesia, it only began to receive significant attention in the late 1970s when Indonesian businesspeople started to actively take part in international trade and the government started to promote it. Arbitration is now widely accepted in Indonesia although there is significant room for it to be used more as a dispute resolution mechanism.

Agreeing to have disputes resolved by arbitration has long been the only solution for many 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 generally of the view that bringing a claim relating to an international business transaction before an Indonesian court is an unattractive option. Indonesian judges may not be familiar with sophisticated business transactions, especially those with an international dimension. The foreign party cannot be represented by lawyers of its own nationality, but must instead use the services of local lawyers. Further, all documents and evidence in cases before an Indonesian court must be in the Indonesian language, requiring translation and interpretation by an official translator or interpreter before being accepted by the court. Moreover, Indonesia is not party to an international treaty for the enforcement of foreign judgments.

In practice, and perhaps due to their limited knowledge of and experience in arbitration, Indonesian parties usually choose institutional arbitration over ad hoc arbitration in their arbitration agreements. There remains the misunderstanding 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 engaged in promoting arbitration. Of these, the Indonesian National Board of Arbitration (BANI) is the oldest 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.

Other arbitration institutions in Indonesia include the Indonesian Shariah Arbitration Board and the Indonesian Capital Market Arbitration Board (BAPMI). The former was established by the Indonesian Council of Ulemas (religious scholars) and handles various disputes, including commercial and financial disputes, based on shariah principles. BAPMI focuses on resolving disputes related 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, 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 having already occurred, the parties may decide for arbitration by a separate submission agreement.[7] It is specifically required that both parties sign the agreement.[8] In the event the parties desire to submit their

dispute to arbitration after it arises, their submission agreement must be made in the form of a notarial deed if any of the parties cannot sign for themselves.[9]

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 they are accompanied by 'a record of receipt of correspondence between 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 arbitration clause is considered an agreement independent from the contract containing it. Therefore, the invalidity of the main contract does not necessarily mean the invalidity of the arbitral clause.

In Indonesia, the parties have the freedom to choose ad hoc or institutional arbitration (either domestic or international). Additionally, there is no prohibition on parties choosing foreign law as the applicable substantive law, and there is no requirement that the chosen law has some connection to the parties or to the dispute.

Further, 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 their rights waived 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 courts have no jurisdiction over a dispute that is subject to an arbitration agreement. Article 11 (2) of the 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. One of these circumstances is to appoint an arbitrator only if the parties cannot reach an agreement on this.

THE JUDICIAL APPROACH TOWARDS ENFORCEMENT AND CHALLENGES AGAINST INTERNATIONAL ARBITRAL AWARDS

Like arbitration law and practice in many other jurisdictions,[10] judicial intervention can also occur after the final award has been rendered. Such interventions are possible at two levels:

- at the level of enforcement of the arbitral award when a party is seeking an 'exequatur' of the arbitral award; and
- at the level of taking a motion for annulment of the award.

Theoretically speaking, the results of arbitral proceedings 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. There is no provision in arbitration law

allowing a party to appeal to the court on a jurisdictional issue or any question of law arising out of an arbitral award.[11]

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 an application to annul an award may only be made within 30 days from the date the award was registered at the court.

It is also important to note that while the Arbitration Law provides the court the option of refusing to enforce an international arbitral award, it does not specify the grounds on which such refusal can be made.[12] Unlike the Model Law,[13] the Arbitration Law also does not regulate a stay procedure in connection with the enforcement of an arbitration award.

It is also worth highlighting that the Arbitration Law provides for very limited grounds[14] for annulment of arbitral awards. 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 suggests: 'Chapter VII regulates the annulment of an arbitral award. This is possible for several reasons, among others: [the subsections of Article 70 are cited]'. The limitative nature of this provision is an area of considerable debate among legal practitioners.

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, '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 an arbitral award rendered within Indonesia the status of international arbitral award. However, in ***PT Lirik Petroleum v PT Pertamina EP***, Indonesia's Supreme Court (Decision No. 904K/PDT.SUS/2009) regarded an arbitral award rendered by the International Chamber of Commerce (ICC) in Jakarta as an international award. Despite the fact that the seat of the arbitration was in Jakarta, the Supreme Court in this case considered the subject of the dispute between the parties to be an international contract and the ICC to be an international arbitral institution.

Although there is a slightly different treatment of national and international awards in respect of the enforcement of arbitral awards, the enforcement procedures for both national and international arbitral awards must begin with registration. 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.[15] Unless the Republic of Indonesia is a party to the arbitrated dispute, the Arbitration Law vests in the District Court of Central Jakarta's jurisdiction to issue the exequatur to enforce foreign arbitral awards in Indonesia.

The general rule in an application for the enforcement of an arbitral award is that the court may not review the reasoning for the award. In practice, however, the chair of the court will only issue an exequatur if he or she is satisfied that both the nature of the dispute and the underlying arbitration agreement are valid under Indonesian law and not contrary to good morals and public policy.[16]

The Arbitration Law provides that only disputes in the commercial sector and concerning rights that are fully controlled by the parties can be resolved through arbitration.[17] Consequently, if parties are not permitted to dispose their rights by compromise pursuant to applicable laws and regulations, they cannot arbitrate them.[18]

- The Arbitration Law[19] suggests that the Indonesian courts will grant an application for the enforcement of an international arbitral award unless:
- the award was rendered in a state that is not bound by a bilateral or multilateral convention or treaty with recognition and enforcement of foreign arbitral awards and to which Indonesia is party;[20]
- the legal relationship on which the award was based cannot be considered as commercial under Indonesian law; or
- the recognition or enforcement of the award would be contrary to public policy.[21]

After issuance of the exequatur, 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).

Notes

1. 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'.
2. There are many 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 an 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.
3. 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.
4. In line with Indonesia's strengthened economic and trading status, the Indonesian government is currently undertaking a serious review of all of its BITs with a view to re-negotiating their terms and conditions once they expire.
5. In addition to the ACIA, Indonesia is a signatory of ASEAN free trade agreements with Australia, New Zealand China, Japan, Korea and India. Indonesia has also expressed an interest in joining the Trans-Pacific Partnership Agreement.
6. 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.

7. See article 4 (2) of the Indonesian Arbitration Law.
8. See article 9 (1) of the Indonesian Arbitration Law.
9. See article 9 (1) of the Indonesian Arbitration Law.
10. 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, p129
11. 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.
12. 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).
13. 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'.
14. 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.
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:
    • 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;
• the legal relationship on which the award was based cannot be considered as commercial under Indonesian law; or
• 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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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, the then-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 preparatory works 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 (the IBA Rules) become increasingly widely known.

New Zealand has a local arbitration institution, the New Zealand Dispute Resolution Centre, which offers a variety of arbitration rules. The most popular international institutional rules are those of the International Chamber of Commerce and the Singapore International Arbitration Centre.

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);
- 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. Care is required in drafting written arbitration agreements in New Zealand. A recent Supreme Court decision, ***Carr & Anor v Gallaway Cook Allan*** [2014] NZSC 75, has held that an arbitration clause which provides for invalid recourse against an arbitral award (in that case, an appeal on a question of fact) is not a valid arbitration agreement.

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 that 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 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, an appeal against that decision had been argued before the Supreme Court, but judgment was still awaited.

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 that 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 preparatory works 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 Supreme Court has recently, in *Carr & Anor v Gallaway Cook Allan* [2014] NZSC 75, set aside an arbitral award where the arbitration clause had provided for an invalid form of recourse against any resulting award; in that case, an appeal on a question of fact. The main lesson from this case is that arbitration agreements in New Zealand must be carefully drafted.

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, 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.

Notes

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

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Summary

THE HISTORY OF ARBITRATION IN INDIA
OVERVIEW OF THE ACT
MINIMAL JUDICIAL INTERVENTION
CONDUCT OF THE ARBITRAL PROCEEDINGS
RECENT TRENDS IN ARBITRATION IN INDIA

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.

THE HISTORY OF ARBITRATION IN INDIA

The existence of arbitration law in India can be traced back to the 18th century. The firHst attempt at codifying the arbitration law was made during the British rule by enacting the Bengal Regulation in 1772 (the Regulation), applicable only to the Presidency Towns. As per 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 and included disputes in relation to land, rent and revenue.

In 1859, 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 again in 1882; however, the provisions relating to arbitration remained unchanged. The arbitration provisions therein provided for the 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, 1889 (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. Thereafter, a new Code of Civil Procedure was enacted in 1908 (the Code), which contained the provisions relating to arbitration in schedule II. Considering the drawbacks in the existing provisions, a need for consolidation and amendment of the law and its codification in a separate enactment was sensed. This resulted in the enactment of the Indian Arbitration Act, 1940 (the 1940 Act), which repealed schedule II of the Code.[1]

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

Somewhat contrary to principles of arbitration, 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 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). Its primary object 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 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 provides for, inter alia:

- 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 an interim measure of protection, including for injunction or for any appointment of receiver, for example;
- appointing 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 The Courts And The Arbitral Tribunals

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

Under the Act, unlike the predecessor 1940 Act, the arbitral tribunal is empowered by section 17 to make orders in relation to interim measures 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 before and after 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 the 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, a predetermined individual can be 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 a 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 has been 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

Parties are free to agree on the procedure to be followed by the arbitral tribunal. If the parties do not agree to the procedure, the procedure will be 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 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 a maximum of 30 days on evidence of sufficient cause. Subject to a 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, once 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 and a consequence of which most of the existing judicial decisions are not in tune with the spirit of the Act. Initially, the conduct of the judiciary was not 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 the 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 judgment in ***ONGC v Saw Pipes***[6] 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***,[7] 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 onshore and offshore.

However, more recently, steps have been taken by the Supreme Court to make India an arbitration friendly jurisdiction. In ***Lal Mahal v Progetto Grano Spa***[8] the Supreme Court overruled its decision in ***Phulchand Exports v OOO Patriot***[9] where it held that the concept of 'public policy' in relation to challenging a domestic or an international award would be same. In ***Lal Mahal***, the Supreme Court held that section 48 (conditions for enforcement of foreign awards) of the Act does not give an opportunity to have a 'second look' at the foreign award at the award enforcement stage and that the scope of inquiry under section 48 does not permit review of the foreign award on merits.

In recent years, the Supreme Court – in ***Dozco India P Ltd v Doosan Infracore Co Ltd***,[10] ***Videocon Industries v Union of India***[11] and ***Yograj Infrastructure Limited v Ssang Yong Engineering and Construction Company Limited***[12] – 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 that can be considered arbitration-friendly. The foremost step towards this approach has been the prospective overruling of the ***Bhatia International*** judgment.

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***,[13] wherein the Supreme Court, overruling those 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 Code 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 towards clearing past ambiguity in the judicial pronouncements preceding it.

The Delhi High Court in ***NNR Global Logistics (Shanghai) Co Ltd v Aargus Global Logistics Pvt Ltd and Ors***[14] 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 the 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 Industries v ONGC***,[15] 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***,[16] while dealing with severability of arbitration clause, made it 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***,[17] 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***,[18] 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 the enforcement of a foreign award was taken by the Supreme Court in ***Fuerst Day Lawson v Jindal Exports***,[19] 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***[20] 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 ***HLS Asia Ltd v Geopetrol International Inc & Ors***,[21] 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.

The Bombay High Court, in its decision in ***Sahyadri Earthmovers v L&T Finance Ltd***,[22] 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.

In the recent decision of ***Swastik Gases v Indian Oil Corporation Ltd***,[23] the Supreme Court analysed whether, in exclusive jurisdiction clauses, the omission of expressions such as 'only', 'alone', 'exclusive' and 'exclusive jurisdiction' could still be construed to oust the jurisdiction of all courts except the one mentioned, in case of an application made under

section 11(appointment of arbitrators) of the Act. The Court held that while providing for jurisdiction clause in the agreement, omission of words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' is not decisive and does not make any material difference. The Court held that the intention of the parties as to jurisdiction of dispute resolution was material.

The Bombay High Court recently held in ***Mulheim Pipecoatings v Welspun Fintrade***[24] that an arbitration agreement would survive even if the agreement (containing the arbitration clause) was superseded by a subsequent agreement. However, this position has been slightly modified by the Supreme Court's decision in ***M/S Young Achievers v IMS Learning Resources Pvt Ltd***[25] where the Court held that an arbitration clause in an agreement cannot survive if the agreement containing arbitration clause has been superseded.

The ***Supreme Court in Enercon v Enercon GmBH***,[26] while determining whether an arbitration clause is unworkable or incapable of being performed, held that the court ought to adopt the attitude of a reasonable business person, having business common sense as well as being equipped with the knowledge that may be peculiar to the business venture. It further held that the arbitration clause cannot be construed with a purely legalistic mindset, as if one is construing a provision in a statute. Moreover, if the seat of arbitration is in India, Indian Courts would have exclusive supervisory jurisdiction. Foreign courts would not therefore be able to exercise concurrent jurisdiction. Furhermore, the Supreme Court in the above case also held that an arbitration agreement cannot be avoided on the basis that there is no concluded contract between the parties. A reference to arbitration can only be avoided (in the context of international commercial arbitration) if the arbitration agreement is 'null and void, inoperative or incapable of being performed'.

Arbitrability of fraud has also been revisited with the Supreme Court. The Supreme Court in ***Swiss Timing Ltd v Organising Committee, Commonwealth Games 2010***[27] held that arbitration proceedings can commence even if allegations of fraud have been made in domestic arbitrations. This is indicative of the pro-arbitration stance being adopted by the Apex Court.

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

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 government departments and 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 to expand its increasing visibility in India. Over the past 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*,[28] 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. Currently, an appeal from the Madras High Court's judgment is pending before the Supreme Court.

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.

Formation Of A New Forum

The Indian Arbitration Forum (IAF) is an initiative of leading practitioners and law firms of India with the objective of promoting institutional arbitration as an effective dispute resolution method and promoting India as a venue for international arbitration. The IAF will be launched in Mumbai on 29 August 2014.

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Notes

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. [2005 (8) SCC 618].
8. 2013 (3) ARBLR 1 (SC).
9. (2011) 10 SCC 300.
10. (2011) 6 SCC 179.
11. (2011) 6 SCC 161.
12. [2011] 14 (ADDL) SCR 301.
13. Civil Appeal No. 7019 of 2005.
14. 2012 VIIIAD (Delhi)125.
15. 2010(11) SCC 296.
16. 2010(112)BOMLR2258.
17. 2011(1)ARBLR244(Delhi).
18. [2010] All ER (D) 21.
19. (2011) 8 SCC 333.
20. 2012 (9) SCALE 595.
21. 2013IAD(Delhi)149.
22. 2011 (4) Mh.L.J. 200.
23. (2013) 9 SCC 32.
24. 2014(2)ABR196.
25. 2013(5)ALLMR931.
26. [2012] EWHC 689.
27. Arbitration Petition No. 34 of 2013.
28. ((2012) 35 KLR 290 (Mad)).

Juris Corp

Malaysia

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SO WHY MALAYSIA?

Malaysia's continuing efforts to promote its international arbitration credentials have been widely recognised and applauded. In this update of the chapter on the jurisdiction, we continue to chart its progress through enhancements made to the legislative, regulatory and institutional frameworks.

RECENT INITIATIVES

A number of factors promoting Malaysia's attractiveness as a hub for international arbitration have been in place for some time.

As a signatory to the 1958 New York Convention (the New York Convention), arbitral awards made in Malaysia may be enforced in countries that are similarly signatories to the New York Convention. This ease of enforceability between signatories to the New York Convention is reciprocal, which significantly contributes to the high regard held for arbitral awards made in Malaysia.

Another major factor lies in the fact that arbitration costs in Malaysia, in terms of fees relating to the proceedings, as well as logistical costs such as those of accommodation and transport, are also comparatively lower when measured against the costs of other major arbitration hubs in the region.

Nonetheless, these factors would not, on their own, have successfully propelled Malaysia into the arbitration spotlight without the driving force that is the Kuala Lumpur Regional Centre for Arbitration (KLRCA). The KLRCA has been embarking on a number of initiatives to position itself as a leading venue for arbitration. For instance, the KLRCA i-Arbitration and Fast Track Arbitration Rules were implemented in the past two years to complement the KLRCA Arbitration Rules in further encouraging arbitrations.

Recently, the KLRCA hosted the KLRCA International Arbitration Conference 2014, themed 'Reflecting the Past, Building the Future', from 19 to 21 June 2014. The conference brought together eminent arbitration experts from across the globe to deliberate on the foundations of arbitration, examine the current state of the practice and develop a road map for the future.

In terms of physical infrastructure, refurbishment works have been undertaken to improve the KLRCA's premises and facilities. As noted on its web page, these improvements, once completed, are part of the KLRCA's roadmap towards establishing state-of-the-art facilities to better the KLRCA's services, and to promote its use and attractiveness.[1]

These are but a few examples of how the KLRCA has been taking active steps to position itself as a leading arbitral institution in the region. Together with the requisite government and judicial support, the country is hopeful that arbitration in Malaysia will grow in prominence in this region.

AN OVERVIEW OF ARBITRATION IN MALAYSIA

Prior to the Malaysian Arbitration Act 2005 (the 2005 Act), which came into force on 15 March 2006, arbitration in Malaysia was governed by the Arbitration Act 1952 (the 1952 Act) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985.

The time when proceedings are commenced would determine the question of which arbitration act applies. For arbitral proceedings commenced before 15 March 2006, the 1952 Act would apply. The 2005 Act applies to any arbitral proceedings commenced thereafter.[2]

As with all new legislation, the implementation of the 2005 Act saw some initial teething difficulties and uncertainty which have since been addressed by the Arbitration (Amendment) Act 2011 (the 2011 Amendment Act).

Last year, we discussed the difficulties that arose in the application of the 1952 Act, as well as the differences between the 1952 Act and the 2005 Act. In summary, we highlighted that a key difference between the 1952 Act and the 2005 Act lies in the distinction between domestic and international arbitrations, and how this distinction affects the applicability of various sections of the 2005 Act.

To recapitulate, the 2005 Act is divided into four parts:

- part I (sections 1 to 5) addresses preliminary matters such as key definitions, the commencement of arbitral proceedings, and the arbitrability of the subject matter in dispute;
- part II (sections 6 to 39), the essence of the 2005 Act, covers the material 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, the enforcement of arbitral awards, and the available recourse in respect of such awards;
- part III (sections 40 to 46) deals chiefly with judicial control over arbitral proceedings, such as the determination of preliminary points of law by the courts, the extension of time for commencing arbitral proceedings, and the making of arbitral awards; and
- part IV (sections 47 to 51) covers miscellaneous issues such as the liability of the arbitrators and the immunity of arbitral institutions.

In terms of the distinction between domestic arbitrations and international arbitrations, section 2 (found in part I) of the 2005 Act provides that 'international arbitration' means an arbitration where:

- one of the parties has its place of business outside Malaysia;
- the seat of arbitration is outside Malaysia;
- the substantial part of the commercial obligations are to be performed outside Malaysia;
- the subject matter of the dispute is most closely connected to a state outside Malaysia; or
- the parties have agreed that the subject matter of the arbitration agreement relates to more than one state.

Under the same section 2 of the 2005 Act, 'domestic arbitration' refers to any arbitration which is not an international arbitration.

In a domestic arbitration, part III of the 2005 Act applies by default unless the parties to the arbitral proceedings take steps to 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 by allowing any party to the arbitral proceedings to refer to it any question of law arising out of an arbitral award,[3] and allowing

the court to extend the time imposed for the commencement of arbitral proceedings[4] or the delivery of an arbitral award.[5]

The distinction between domestic and international arbitrations also determines the applicability of section 12(2) (found in part II) of the 2005 Act. Section 12(2) provides that in the event that the 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.

In relation to domestic arbitrations, section 30 of the 2005 Act provides that 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.

Lastly, the distinction between domestic arbitrations and international arbitrations also affects the recognisability and enforceability of the arbitral award as an arbitral award made pursuant to an international arbitration in Malaysia would not fall within the ambit of sections 38 and 39 of the 2005 Act. This is because section 38 of the 2005 Act is silent on whether it applies to awards of international arbitrations in Malaysia, whereas it expressly states that on an application in writing, a domestic arbitration award or an arbitration award from a foreign state may be enforced by the High Court as a judgment thereof.

ARBITRAL TRIBUNALS

Jurisdiction

Both the 1952 Act and the 2005 Act allow the expression of party autonomy in relation to the appointment of arbitrator or establishment of the arbitral tribunal. In this regard, the parties may expressly agree on the number of arbitrators to decide the case.[6] In cases where the parties cannot reach an agreement, the 2005 Act provides that a sole arbitrator would be appointed for domestic arbitrations, while three arbitrators would be appointed for international arbitrations.

The default procedures for the appointment of arbitrators are provided for under section 13 of the 2005 Act. Parties are however free to determine the procedures that are to be adopted with regard to the appointment of arbitrators, which will typically be governed by the rules earlier agreed upon to govern the conduct of the arbitration. In the event that the parties are unable to come to an agreement on the appointment of arbitrators or come to a stall by failing to make the necessary appointments, either party may apply to the director of the KLRCA to appoint the arbitrators.[7] In the event that the director similarly fails to appoint the arbitrators, either party may then apply to the High Court for assistance in the appointments.[8] Naturally, arbitrators are expected to disclose circumstances that may result in a conflict of interests, and this is expressly stated in section 14 of the 2005 Act.

As a recent development, the KLRCA Arbitration Rules were amended in 2013 to allow for the appointment of an emergency arbitrator who would be empowered to grant emergency interim relief prior to the constitution of the arbitral tribunal. Schedule 2 of the KLRCA Arbitration Rules sets out the manner of appointment, powers and time limits on the interim relief provided by the emergency arbitrator.

Regardless of the manner in which the arbitrator, the arbitral tribunal and the emergency arbitrator is appointed, the importance of the doctrine of ***Kompetenz-Kompetenz*** remains and is expressly recognised by section 18 of the 2005 Act, which grants the arbitral tribunal the power to rule on its own jurisdiction. Despite the foregoing, parties still retain the option to appeal to the final decision of the High Court against the arbitral tribunal's ruling on its own jurisdiction. However, the courts have given considerable recognition to the importance of the doctrine and have taken on a strong pro-arbitration stance in several recent cases.[9] In ***Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor***,[10] the High Court said of the extent to which the doctrine of ***Kompetenz-Kompetenz*** is applicable in Malaysia:-[11]

> Parliament has clearly given the arbitral tribunal much wider jurisdiction and powers. And, such powers would extend to cases even when its own jurisdiction or competence or scope of its authority, or the existence or validity of the arbitration agreement is challenged [...] Most noteworthy is that even where its own jurisdiction or competence or its scope of authority is challenged, it may rule on such plea either as a preliminary question or in an award on the merits.

Evolving Roles Of Arbitrators

The decision in ***Sundra Rajoo v Mohamed Abd Majed and Persatuan Penapis Minyak Sawit Malaysia (Poram)***[12] highlights the changing role of an arbitrator, in demonstrating that challenges could be submitted by an arbitrator against a fellow arbitrator in the same case. In this case, the applicant brought an action against the first respondent (who was appointed by Virgoz Oil as one of three arbitrators) in the proceedings involving Virgoz Oil and Fats Pte Ltd within Poram (an arbitral institution) at the High Court in Kuala Lumpur. The basis of the applicant's action was that the first respondent had previously been nominated and appointed as the representative for Virgoz Oil and Fats Pte Ltd. Presumably, the applicant felt that this would hinder the proceedings as a result of conflict of interests and requested in the present case that the first respondent to disclose all previous appointments of the first respondent by Virgoz Oil and Fats Pte Ltd. Eventually, the High Court decided to recognise the locus standi of the applicant and ordered the first respondent to make the disclosures within seven days or be removed and disqualified.[13]

This novel request to the High Court raises questions on when challenges can be made and, significantly, by whom. Conventionally, only the parties to the arbitration possessed the right to submit challenges and it is uncommon to think of the arbitrator as a party to the same arbitration. In this case, the High Court recognised the locus standi of the applicant by overcoming the hurdle in section 2 of the 2005 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',[14] 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'.-[15] Evidently, the court was scrupulous to interpret section 2 in accordance with English dicta so that it could permit the applicant 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 Haji 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.[16]

The 'natural justice' justification is not without criticism. As one commentator believes, relying on such justification may be slightly far-fetched, although it is also suggested that it may be relied on as a check and balance to ensure impartiality.[17] In this sense, the 'natural justice' justification matches rather closely the General Standard 7, section (c) IBA Guidelines on Conflicts of Interest in International Arbitration, where it states that an arbitrator is under a duty to make reasonable inquiries to investigate potential conflicts of interests. 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.

Corruption: a strong response

On 23 June 2013, the KLRCA demonstrated its support for greater transparency in arbitral proceedings by signing the Corporate Integrity Pledge (CIP) along with 40 other multinational corporations, committing to impartial tribunal proceedings and combating corruption in the arbitration field.[18]

On 25 June 2013, Yusof Holmes Abdullah, a UK arbitrator in the KLRCA, was charged with bribery in the Penang Malaysian Sessions Court. Abdullah was accused of soliciting US$2 million from the director of a local company, JMR Construction, to rule in its favour in arbitration proceedings against a Chinese-owned dredging company, Syarikat Nanjing Changjiang Waterway Engineering Bureau.[19] This was the first time an arbitrator had been charged with corruption in Malaysia.[20] 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. However, the KLRCA's pledge to stamp out corruption, along with its swift removal of Abdullah from its panel, is assurance that the KLRCA is serious about its status as a dependable forum for arbitration.

ARBITRAL AWARDS

Section 2(1) of the 2005 Act defines an arbitral award as a decision of the arbitral tribunal on the substance of the dispute, including 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.

Sections 37 to 39 (found in part II) of the 2005 Act deal with the recognition and enforcement of, and also challenges against, an arbitral award. Section 37 sets out the exhaustive grounds for setting aside an arbitral award in the High Court. These include cases where the arbitration agreement was not valid or the dispute did not fall within such agreement;[21] when the dispute is not capable of being settled by arbitration by Malaysian Law or if it is contrary to public policy; or if there was fraud or corruption or other breaches of natural justice.

It should 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. However, section 42 of the 2005 Act allows the court to set aside an arbitral award to which a question of law has been referred for its determination.

Section 38 of the 2005 Act deals with the procedure for recognition and enforcement of arbitral awards, whereas section 39 sets out the grounds for refusal of recognition and enforcement. These grounds are essentially similar to the grounds listed in article V of the New York Convention.

Of interest would be the courts' consideration of circumstances, which would contravene public policy or natural justice. The courts have applied a narrow interpretation to both concepts. In the recent case of ***Open Type Joint Stock Co Efirnoye (EFKO) v Alfa Trading Ltd***,[22] the court had the opportunity to consider these grounds when there were two arbitral awards (one from Russia and the other from Ukraine) rendered for disputes arising from the same contract. The plaintiff wished to enforce the Russian award, whereas the defendant argued it would be contrary to public policy to enforce contradictory awards, as well as a breach of natural justice as the two tribunals had 'ignored all propriety and established practice and determined the same issue, effectively twice'.[23] Both arguments were rejected by the High Court, which stated that to fall within the public policy ground, the defendant would have to show that enforcement would be 'wholly offensive to the ordinary, reasonable and fully informed members of the public'.[24] Thus, a party wishing to invoke the public policy exception has to overcome a high threshold:[25]

> The thread running through the authorities is that the extent to which the enforcement of the foreign judgment is contrary to public policy must be of a high order to establish a defence. A number of the cases involved questions of moral and ethical policy, fairness of procedure, and illegality of a fundamental nature.

As for the argument on natural justice, it was rejected because the court found that both parties had an equal opportunity to be heard.[26]

SETTING ASIDE ARBITRAL AWARDS

Parties who are dissatisfied with the arbitral awards rendered against them have the option of setting aside the awards under the 1952 Act or the 2005 Act. As there remains no appeal procedure against arbitral awards, provisions relating to setting aside under the 1952 Act and the 2005 Act are applicable and the cases applying these provisions are instructive.

Under The 1952 Act

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. Setting aside of arbitral awards, however, is a bleak recourse as the courts are increasingly less inclined to upset the finality of arbitral awards.

In ***The Government of India v Cairn Energy India Pty Ltd & Anor***,[27] a case dealing with the 1952 Act, the Federal Court held that, where a specific question was referred to arbitration for consideration, the arbitral tribunal's decision on it should be respected, in that no judicial interference was possible on the basis that the tribunal's decision upon the question of law

had been an erroneous one.[28] The exception to this non-interference rule is 'if the matter is a general reference, interference may be possible "if and when any error appears on the face of the award"'.[29] The Federal Court further held that a question of construction of an agreement was a question of law,[30] and if the question was the sole issue that parties had referred for arbitration, the court would generally not set aside the findings of the arbitrator unless the award was tainted with illegality.[31] The extent to which the Federal Court leaned towards a pro-arbitration stance can be seen from the court's judgment when it said:[32]

> if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesar's judgment.

It is also worth noting that the 1952 Act expressly excludes the court's jurisdiction in dealing with certain arbitrations. Such was the case in ***Asia Control Systems Impac (M) Sdn Bhd v PNE PCB Bhd and another appeal***,[33] where the Court of Appeal dismissed the appellant's appeal to set aside the arbitral award pursuant to section 34 of the 1952 Act. Section 34 excluded the application of the 1952 Act or other written law to any arbitration held under the United Nations Commission on International Trade Law Arbitration Rules 1976 (the UNCITRAL Arbitration Rules) and the KLRCA Arbitration Rules. Following an analysis of the relevant judgments, the Court held that:

> the preponderance of authorities reveals a consistent pattern under s 34(1) ie the Act or other written law shall not apply to an arbitration held under, as in the instant-appeal, the UNCITRAL Arbitration and the Rules of the KLRCA. This exclusionary principle is predominant and prevails, particularly where s 34(1) begins with the words 'Notwithstanding anything contrary in this Act or any other written law.'

Under The 2005 Act

The position under the 2005 Act is consistent with that under the 1952 Act. In ***Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd***,[34] Haji Hamid Sultan bin Abu Backer JC of the High Court held that the 2005 Act 'makes it compulsory for the courts to respect the decision of the arbitrators' and that 'real proof is required to be shown before the court can meddle with the award.' In ***SDA Architects v Metro Millennium Sdn Bhd***,[35] the Court of Appeal, following the case of ***Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd***, said that 'the Scheme of AA 2005 is to almost prohibit the intervention of court relating to Arbitration Award unless the Act specifically gives jurisdiction and power to intervene'.[36]
In ***The Government of India v Cairn Energy India Pty Ltd & Ors***,[37] the High Court favoured the view that only where the court is satisfied that there is evidence certain of the matters alleged under section 37 of the 2005 Act, will the court exercise its discretion to intervene for the purposes of setting aside the arbitral award.

In ***Tan Kau Tiah v Tetuan Teh Kim Teh, Salina & Co & Anor***,[38] the Court of Appeal similarly adopted a pro-arbitration stance. The first respondent had given written undertakings to release the documents of title to the appellant pursuant to a decision by an arbitrator or the

court or both. After the arbitrator had rendered an arbitral award in favour of the appellant, the first respondent refused to hand over the documents and, instead, 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 as 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. Abdul Malik Ishak JCA, delivering the decision of the Court of Appeal, ordered the immediate return of the documents of title, as the arbitral award was final and binding, irrespective of whether or not there was any pending application to have the order set aside. Accordingly, 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.[39] Further, as the first respondent had, in his affidavit, employed the disjunctive word 'or' in regard to what had to be complied with (namely, that the first respondent would 'comply with the directions in the arbitration award or a court order'), and the dispute between the parties ended with an arbitral award, the first respondent must by its own admission comply with it.

The finality of an arbitral award was similarly observed in ***Ngo Chew Hong Oils & Fats (M) Sdn Bhd v Karya Rumpun Sdn Bhd***[40] where a mere filing of an affidavit to oppose registration, instead of making an application, is deemed insufficient to set aside an arbitral award.

ENFORCEMENT OF ARBITRAL AWARDS

The Effect Of The CREFAA Act41

Although the Convention on the Recognition and Enforcement of Foreign Arbitral Award (CREFAA) Act was repealed by the 2005 Act, it remains relevant as being a pre-cursor to the now-amended section 38(1) of the 2005 Act.

Prior to the amendment of section 38(1) of the 2005 Act, it was held by the Court of Appeal in ***Sri Lanka Cricket v World Sports Nimbus Pte Ltd***[42] that a declaration in the form of a gazette notification by His Majesty Yang di-Pertuan Agong was a prerequisite to the enforcement of an arbitral award by a party to the New York Convention. However, in late 2009, the Federal Court, in ***Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd***[43] reversed the decision of the Court of Appeal:

> 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.[44]

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. In ***Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd***-, the Federal 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. The Federal

Court's holding effectively extended the ambit of the word 'may' and exemplified the court's pro-arbitration stance by construing the test in a manner that lowers the required threshold. This direction in making the recourse to foreign arbitrations more accessible in Malaysia came, not unexpectedly, as a welcome gesture.

Pursuant to the amendment to section 38(1) of the 2005 Act, upon 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 this, the 2005 Act was silent in this respect. However, with regard to arbitral awards from a foreign state, section 38(1) read with section 38(4) of the 2005 Act specifies that only arbitral awards from countries that are party to the New York Convention are recognised. Thus, it appears that arbitral awards from countries which are not signatories to the New York Convention would not be recognised and cannot be enforced under the 2005 Act.

The Courts' Assistance

Given the trend in various other jurisdictions, Malaysian courts have similarly moved towards providing wider support for arbitration.

Under the 1952 Act, all arbitrations under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the ICSID Convention), the UNCITRAL Arbitration Rules or the KLRCA Arbitration Rules were governed by section 34 of the 1952 Act. Arbitrations governed by this section were not subject to judicial intervention, except for the purpose of enforcement of arbitral awards.[45] This was considered problematic, as ouster of judicial assistance could wane and undermine the efficacy of arbitral proceedings. Furthermore, the enforcement of domestic arbitral awards applying either the UNCITRAL Arbitration Rules or KLRCA Arbitration Rules was not without its difficulties, as section 34 of the 1952 Act stated that such arbitral awards, though domestic, would not be enforced in the same manner as a judgment.[46] As the ICSID Convention or the New York Convention only applied to arbitral awards made with a foreign element, enforcement under those instruments was not available to such domestic arbitral awards either.

These difficulties have since been eradicated by the coming into force of the 2005 Act. Indeed, the 2005 Act has gone beyond resolving these issues and has extended the reach of the court in certain situations. This is evident in the court's role with respect to 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.

Both the 1952 Act and the 2005 Act allow for judicial intervention in specific instances, such as the staying of proceedings,[47] granting of interim measures of protection such as security for costs and interrogatories,[48] and the enforcement of arbitral awards.[49] In terms of recent changes, section 11 of the 2005 Act was amended in 2011 to clarify that the court may also order the preservation of property 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.

There have also been cases considering whether the courts may use their inherent powers to make orders outside of the specified instances, pursuant to order 92, rule 4 of the Rules of High Court. In 2011, however, section 8 of the 2005 Act was amended to read '[n]o court shall intervene in matters governed by this Act, except where so provided in this Act'; a change from '[u]nless otherwise provided, no court shall intervene in any of the matters governed

by this Act'. The explanatory note for this change in the Arbitration (Amendment) Bill 2010 was to limit court intervention to situations specifically covered by the principal Act and to discourage the use of inherent powers.

It remains to be seen whether the change will affect the usage of inherent powers by the judiciary. In the case of ***Plaza Rakyat Sdn Bhd v Datuk Bandar Kuala Lumpur***,[50] the court held that injunctions do not amount to court intervention and serve to preserve the subject matter referred to arbitration. In ***SDA Architects v Metro Millennium Sdn Bhd***,[51] the Court of Appeal also recently held that section 8, read with section 44 of the 2005 Act, prohibited the court from intervening with regard to the arbitral tribunal's apportionment of costs in an arbitration. In another case, ***Twin Advance (M) Sdn Bhd v Polar Electro Europe BV***,[52] the plaintiff tried to argue that the court had inherent jurisdiction to set aside a Singapore-made award. This was rejected by the High Court, which stated that the effect of section 8 of the 2005 Act excluded its inherent powers to modify the substantive provisions of the 2005 Act:[53]

> I am of the view that our s 8 of the AA 2005 which is akin to article 5 of the Model Law as adopted by the AA 2005 should similarly be interpreted in line with the Model Law that the court should exclude its general or residual powers or its inherent jurisdiction to indirectly vary the substantive provisions of AA 2005 which does not categorically provide or intend so.

These recent decisions suggest that there is indeed a growing tendency and increasing harmonisation of Malaysia's arbitration laws with the non-interventionist approach under the Model Law. Undoubtedly, the court's assistance to facilitate the effective and efficient conduct of arbitral proceedings is indispensable, although a careful balance must be struck to ensure arbitrations are not stifled by an excessively interventionist judiciary. It is hopeful that the continuation of this trend would allay concerns on the same.

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.[54]

The courts have continued a pro-arbitration stance by interpreting this provision narrowly;[55] as stated by Azahar Mohamed J of the High Court in ***AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd***:[56]

> the provisions of s 10 make it mandatory for the court before which the proceeding is brought in respect of a matter which is the subject of an arbitration agreement to make an order for stay of proceedings and refer the parties to arbitration. The word 'shall' that appears in s 10 imposes a mandatory obligation to stay the proceedings and refer the parties to arbitration in respect of matter which is the subject of an arbitration agreement.

Even if there is some doubt as to the validity of the arbitration agreement, the court would lean towards granting a stay for the arbitral tribunal to determine its jurisdiction, in line with the doctrine of ***Kompetenz-Kompetenz*** as discussed earlier.[57]

That said, parties who wish to arbitrate should still be watchful not to take a step in court proceedings.[58] In ***Lau King Kieng v AXA Affin General Insurance Bhd***,[59] the defendants had requested an extension of time from the plaintiff. The High Court considered the defendants' request to be an intimation of the defendants' intention to deliver a statement of defence, which would constitute a step in the proceedings. As such, Stephen Chung JC held that the defendants, by requesting from the plaintiff extension of time for them to file their defence, had in fact abandoned their right to arbitration.[60]

THE KLRCA

The KLRCA was established in 1978 under the auspices of the Asian-African Legal Consultative Organisation (AALCO),[61] to provide a forum for the settlement of trade, commerce and investment disputes within the Asia-Pacific region. It was the first of its kind in the region.[62]

While the KLRCA has the support of the Malaysian government, it is a non-profit organisation and is neither a government branch nor agency. It is the policy of both the 1952 Act and the 2005 Act that the KLRCA should operate as an independent arbitral institution for domestic and international arbitrations.

About half of the arbitrations conducted under the auspices of 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.[63] Recognising this demographic, the KLRCA now also functions as the adjudication authority to provide adjudication of construction cases. On 15 April 2014, the Malaysian Construction Industry Payment and Adjudication Act (CIPAA), first passed in June 2012, came into effect.[64] Section 32 of the CIPAA empowers the KLRCA to be the adjudication authority responsible for, among others:

- setting competency standards and criteria of an adjudicator;
- determining the standard terms of appointment of an adjudicator and fees for the services of an adjudicator;
- being the administrative support for the conduct of adjudication under the CIPAA; and
- fulfilling any functions as may be required for the efficient conduct of adjudication under the CIPAA.[65]

The KLRCA Arbitration Rules 2013

In 2013, the KLRCA revised the KLRCA Arbitration Rules,[66] which came into force on 24 October 2013. The new rules apply automatically to all KLRCA arbitrations commenced after 24 October 2013, unless otherwise agreed by the parties.[67]

Of the many changes made to the KLRCA Arbitration Rules,[68] five significant amendments bear highlighting. The first is the introduction of a set of provisions for the appointment of an emergency arbitrator who would have the power to grant emergency interim relief prior to the constitution of the tribunal.[69] The appointment procedure of an emergency arbitrator under schedule 2 covers, among others, the time in which the emergency arbitrator is to act,

the time within which an award or order should be made by the emergency arbitrator, and the maximum period or periods of time within which such order or award will be binding. This revision serves to 'provide an option for parties to apply where they require urgent interim relief, increasing party autonomy, providing certainty and minimising judicial intervention'.[70]

Second, rule 11(8)(a) now empowers the tribunal to award interest both before and after the award. In this regard, rule 11(8)(a) provides that the arbitral tribunal may 'award interest on any sum of money ordered to be paid by the award on the whole or any part of the period between the date on which the cause of action arose and to the date of realisation of the award'.

Third, for the purposes of 'strengthen[ing] confidentiality requirements in order to enhance the privacy of any proceedings',[71] rule 15(1) now provides that:

> [the] arbitral tribunal, the parties, all experts, all witnesses and the KLRCA shall keep confidential all matters relating to the arbitral proceedings including any award except where disclosure is necessary for purposes of implementation and enforcement or to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to challenge an award in bona fide legal proceedings before a state court or other judicial authority.

The ambit of rule 15(1) is wide in that 'matters related to the proceedings' encompass pleadings, evidence and other material in the arbitration proceedings, all documents produced by another party, and the award.[72]

Fourth, rule 13(5) now provides for the director of the KLRCA to fix separate deposits on costs for claims and counterclaims. When the director of the KLRCA has fixed separate advance preliminary deposits on costs, each of the parties shall pay the advance preliminary deposit corresponding to its claims.

The fifth amendment is reflected in the revised schedule of fees and administrative costs. The purpose of the fees and costs revision is to make KLRCA arbitrations 'more attractive, suitable and competitive... maintaining a 20% cost advantage with respect to other institutions'.[73]

Although these revisions are not unique to the KLRCA Arbitration Rules, they evidence the KLRCA's efforts in enhancing and streamlining the KLRCA Arbitration Rules to be on par with its international counterparts.

The KLRCA Fast Track Rules 2013

In 2010, the KLRCA launched the KLRCA Fast Track Rules for parties who wish to arbitrate speedily with minimal costs. The KLRCA Fast Track Rules have undergone two revisions, with the most recent revision in 2013.

There have been several changes to the timelines for arbitration commencing under the KLRCA Fast Track Rules. In this regard, the timelines in rule 4 on appointment of arbitral tribunal and in rule 6 have been shortened to provide greater expediency. Rule 11(4) has also been amended to reduce the duration for completion of substantive oral hearings from 40 days to 30 days. As regards fees and administrative costs, rule 19(1) empowers the director of the KLRCA to fix the arbitral tribunal's fees in accordance with the Schedule of Fees. Rule 19(5) also empowers the director of the KLRCA to determine the appropriate value for a claim

or counterclaim in consultation with the arbitral tribunal and the parties for the purpose of computing the arbitrator's fees and the administrative costs. Finally, rules 21 and 22 of the old KLRCA Fast Track Rules have been removed to give finality to an arbitral award.

The KLRCA I-Arbitration Rules 2013

Since the inception of the KLRCA i-Arbitration Rules in September 2012, the KLRCA remains the only institution to offer resolution of disputes based on shariah principles.

Under the revised rule 11, whenever the arbitral tribunal has to form an opinion on a point related to shariah principles or decide on a dispute arising from the shariah aspect of the contract, the arbitral tribunal may refer the matter to the relevant Shariah Advisory Council or shariah expert for its ruling.

Another slight modification, compared with the conventional KLRCA rules, refers to the cost of reference. The new rule 13 now 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 under Rule 11'.

The KLRCA's efforts in revolutionising arbitration by integrating shariah-based laws in its rules are commendable. These efforts would certainly give the KLRCA headway in Islamic arbitration, prompting other Islamic jurisdictions to perhaps adopt similar models within their regions.

Spurring The KLRCA's Continued Growth

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.[74] Its recent efforts, however, have seen the KLRCA continue to steadily elevate its international position.

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.[75] Foreign lawyers are allowed to represent and appear in arbitral proceedings, and there is a large panel of experienced domestic and international arbitrators from diverse fields of expertise. On 24 September 2013, the Legal Profession Act was amended to introduce a new section 37A to allow both foreign lawyers and foreign arbitrators to enter into Malaysia to participate in arbitration proceedings without being subject to immigration approval and to the restriction of 60-day entrance limit. This amendment is intended to facilitate arbitration proceedings in Malaysia.

SO WHY MALAYSIA?

The rise of international arbitration in Asia may undoubtedly be observed in Hong Kong and Singapore, with both countries exhibiting themselves as impressive arbitration hubs at the forefront of pro-arbitration regimes. Not to be overlooked, Malaysia has been striving to narrow the gap between itself and Singapore and Hong Kong, to be Asia-Pacific's arbitral forum of choice.

In a similar vein to 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,[76] which streamlined the procedures (eg, through the shortening of time limits, referring disputes to a sole arbitrator, and holding proceedings on the basis of documentary evidence) 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).

In addition, notable features of the 2005 Act are comparable to the newest Arbitration Ordinance of Hong Kong (the Hong Kong Arbitration Ordinance). This includes provisions that 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 legislation, the 2005 Act has helped to bring Malaysia closer in line to the approach taken by Hong Kong, in unifying its domestic and international regimes. In contrast, Singapore still maintains separate legislation for domestic arbitrations (which are governed by the Arbitration Act) and international arbitrations (which are governed by the International Arbitration Act). The move in unifying and harmonising the laws of arbitration in Malaysia is intended to usher in a more accessible arbitral regime.

As discussed above, the courts have also been taking a strong pro-arbitration stance and have readily enforced arbitration agreements as well as awards. Furthermore, legislative changes have made it easier to seek the court's assistance in obtaining interim protection such as security for costs, which increases the pragmatic feasibility of arbitration as well.

Notes

1. http://klrca.org.my/facilities/klrca-new-building/ (accessed 17 June 2014).
2. Section 51(2) of the 2005 Act. While there was initially some controversy on the application of the Acts, see: ***Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd*** [2008] 7 MLJ 757; followed in ***Hiap-Taih Welding & Construction Sdn Bhd v Bousted Pelita Tinjar Sdn Bhd (formerly known as Loagan Benut Plantations Sdn Bhd)*** [2008] 8 MLJ 471. Cf. ***Majlis Ugama Islam Dan Adat Resam Melayu Pahang v Far East Holdings Bhd & Anor*** [2007] 10 CLJ 318; ***Total Safe Sdn Bhd v Tenaga Nasional Bhd & TNB Generation Sdn Bhd*** [2009] 1 LNS 420, this was resolved by the 2011 amendment to the Bahasa Malaysia text.
3. Section 42 Arbitration Act 2005.
4. Section 45 Arbitration Act 2005.
5. Section 46 Arbitration Act 2005.
6. Section 12 Arbitration Act 2005.
7. Section 13(4), (5), (6) Arbitration Act 2005.
8. Section 13(7) Arbitration Act 2005.
9. See ***Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor*** [2008] 1 MLJ 233, ***Chut Nyak Isham bin Nyak Ariff v Malaysian Technology Development Corp Sdn Bhd & Ors*** [2009] 9 CLJ 32, ***TNB Fuel Services Sdn Bhd v China National Coal Group Corp*** [2013] 1 LNS 288
10. [2008] 1 MLJ 233.
11. Ibid, per Vincent Ng J paragraph [13].
12. D-24NCC(ARB)-13 OF 2010.
13. Derived from Tibor Várady's 'On Shifting Players and Roles in the Process of Challenging Arbitrators: A Comment on Sundra Rajoo v Mohammed Abd Majed and Persuatan Penapis Minyak Swait Malaysia (Poram)'. ***The Practice of Arbitration:***

Essays in Honour of Hans Van Houtte. Edited by Patrick Wautelet, Thalia Kruger, and Govert Coppens (Oxford: Hart Publishing, 2012). pp.37–44.

14. ***Companie Européenne de Céreales SA v Tradax Export SA*** (1986) QB (Comm Ct) 301.
15. ***K/S Norjarl A/S v Hyunday Heavy Industries Co Ltd*** [1992] Q.B. 863 at 885.
16. D-24NCC(ARB)-13 OF 2010 at paragraph [8].
17. T Várady, 'On Shifting Players and Roles in Process of Challenging Arbitrators'. ***The Practice of Arbitration: Essays in Honour of Hans van Houtte***. Edited by Patrick Wautelet, Thalia Kruger, and Govert Coppens (Oxford: Hart Publishing, 2012). p.43.
18. 'KLRCA declares war on corruption Arbitration centre collaborates with MACC, Pemandu and Bar Council', ***The Star Online*** – Press Release 23 Jun 2013, www.thestar.com.my/News/Nation/2013/06/23/KLRCA-declares-war-on-corruption.aspx (accessed 13 June 2014).
19. Sebastian Perry, 'UK arbitrator charged with bribery in Malaysia'.***Global Arbitration Review***, 28 June 2013, www.globalarbitrationreview.com/news/article/31692/ (accessed 13 June 2014).
20. 'Bribery probe began late last year, says MACC'. ***The Star Online***, 27 June 2013, www.thestar.com.my/News/Nation/2013/06/27/Bribery-probe-began-late-last-year-says-MACC.aspx (accessed 9 July 2013).
21. 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.
22. [2012] 1 MLJ 685.
23. Ibid, at paragraph [38].
24. Ibid, at paragraph [39].
25. Ibid, at paragraph [40].
26. Ibid, at paragraph [38].
27. [2011] 6 MLJ 441.
28. Ibid, at paragraph [30].
29. Ibid, at paragraph [30].
30. Ibid, at paragraph [36].
31. Ibid, at paragraph [36].
32. Ibid, at paragraph [53].
33. [2010] 4 MLJ 332.
34. [2010] 5 CLJ 83.
35. [2014] MLJU 28.
36. Ibid, at paragraph 10(a).
37. [2014] 9 MLJ 149.
38. [2010] 4 CLJ 914.
39. On further appeal on a separate question, the Federal Court set aside the Court of Appeal's decision, albeit on a separate question and separate basis. See ***Tetuan Teh***

Kim Teh, Salina & Co (Satu Firma) v Tan Kau Tiah @ Tan Ching Hai & Anor [2013] MLJU 500. Importantly, the Federal Court, while eventually setting aside the Court of Appeal's ruling, did not disagree with the Court of Appeal's holding that an arbitral award is final and binding.

40. [2009] 1 LNS 1321.
41. Also known as the New York Convention.
42. [2006] 3 MLJ 117. This decision was reaffirmed by the Court of Appeal in ***Alami Vegetable Oil Products Sdn Bhd v Lombard Commodities Ltd*** [2009] 3 MLJ 289.
43. [2010] 2 MLJ 23.
44. Ibid, at paragraph [21]. .
45. Section 34(1) Arbitration Act 1952
46. Section 27 Arbitration Act 1952.
47. Section 6 Arbitration Act 1952 and Section 10 Arbitration Act 2005.
48. Section 13 Arbitration Act 1952 and Section 11 Arbitration Act 2005.
49. Section 27 Arbitration Act 1952 and Section 38 Arbitration Act 2005.
50. [2012] 7 MLJ 36, at paragraph [45].
51. [2014] MLJU 28 at paragraph [10].
52. [2013]7 MLJ 811 at paragraph [39].
53. Ibid, at paragraph [39].
54. In the 2011 Amendments, section 10(1) was amended to remove the ground to resist a stay of proceedings if 'there is in fact no dispute between the parties'. Sections 10(4) and 11(3) were also added to clarify that a stay of proceedings may be ordered even if the seat of arbitration is not in Malaysia.
55. See ***Chut Nyak Hisham Nyak Ariff v Malaysian Technology Development Corporation Sdn Bhd*** [2009] 9 CLJ 32; ***Renault Sa v Inokom Corporation Sdn Bhd & Anor and Other Applications*** [2010] 5 CLJ 32; ***Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd*** [2010] 7 CLJ 785; and ***AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd*** [2011] 8 MLJ 792.
56. [2011] 8 MLJ 792 at paragraph [4].
57. See, eg, ***TNB Fuel Services Sdn Bhd v China National Coal Group Corp*** [2013] 4 MLJ 857.
58. ***Winsin Enterprise Sdn Bhd v Oxford Talent (M) Bhd*** [2010] 3 CLJ 634.
59. [2014] 8 MLJ 883.
60. Ibid, at paragraphs [34] to [35].
61. 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. See 'Member States', AALCO, www.aalco.int/scripts/view-posting.asp?recordid=3 (accessed 13 June 2014).
62. 'About KLRCA', Kuala Lumpur Regional Centre for Arbitration, http://klrca.org.my/about/ (accessed 13 June 2014).

63. Datuk Sundra Rajoo's Speech at the launch of KLRCA's Revised Rules 2013: http://klrca.org.my/speeches/datuk-sundra-rajoos-speech-at-the-launch-of-klrcas-revised-rules-2013/ (accessed 2 May 2014).
64. KLRCA, http://klrca.org.my/rules/adjudication/#PartV-AdjudicationAuthority (accessed 18 June 2014).
65. Ibid.
66. Newsletter of Kuala Lumpur Regional Centre for Arbitration, Jul–Sept 2013: www.klrca.org. my/userfiles/File/KLRCA_Newsletter_JulSept_2013_Web.pdf (at 2 May 2014), at p. 7.
67. Rule 1(2) of the 2013 KLRCA Arbitration Rules.
68. Other revisions not covered herein are: rule 6(1) making Malaysia the seat of arbitration in default of agreement; rule 4 refining the KLRCA Director's role in the appointment of arbitrators; rule 8 introducing consolidation of proceedings and concurrent hearings; and rule 12(9) allowing for the arbitral tribunal to apportion fees and costs relative to the parties' claim and counterclaim.
69. Rule 7(2) read with schedule 2 of the 2013 KLRCA Arbitration Rules.
70. KLRCA, http://klrca.org.my/wp-content/uploads/2013/11/2013Q3newsletter4.pdf at page 7.
71. Ibid, at page 9.
72. Rule 15(2) of the KLRCA Arbitration Rules.
73. KLRCA, http://klrca.org.my/wp-content/uploads/2013/11/2013Q3newsletter4.pdf-, page 10.
74. Risen Jayaseelan, 'New Life for Arbitration', ***The Star Online,*** 1 January 2011, www.thestar.com.my/story.aspx?sec=prodit&file=%2f2011%2f1%2f1%2fbusiness%2f7719437 (accessed 13 March 2012) .
75. Ibid.
76. Rule 5 of the Arbitration Rules of the Singapore International Arbitration Centre, 2013 Edition.

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Australia has a long-standing tradition of embracing arbitration as a means of alternative dispute resolution. While on a domestic level this is reflected by court-annexed and compulsory arbitration prescribed for certain disputes, arbitration has become equally common in international disputes. Traditionally, arbitration was largely confined to areas such as building and construction. However, the strong and steady growth of the Australian economy over the past two decades and the opening of the Asian markets in the mid-1990s have further advanced the use of arbitration in other areas, particularly the energy and trade sectors.

Arbitration in Australia has experienced significant growth in recent years. This can be attributed to the growing familiarity on behalf of legal practitioners and their clients of the importance and advantages of international arbitration. While the increasing use of arbitration, in conjunction with other forms of ADR, have 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 internationally and domestically have helped to develop Australia as an attractive hub for international arbitration and put Australia at the forefront of international arbitration practice. Amendments to the International Arbitration Act 1974 (Cth) (IAA) and the introduction of the new Commercial Arbitration Acts (the CAAs) represents a new dawn for arbitration in Australia. Coupled with the pro-arbitration approach taken by Australian courts, Australia is well positioned to keep pace with international standards, user expectations and ready to grasp growing opportunities that arbitration has to offer.

ARBITRATION LAW REFORMS IN AUSTRALIA

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

The Amendment Act introduced a number of significant changes to the IAA. Foremost, 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 a result, 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 to 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 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 and as a result the domestic arbitration legislation of the states and territories, the largely uniform CAAs, 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 (ie, 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 group of over 60 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 and which has translated into greater cost and time savings. At the time of publishing, the progress of the CAAs through the Australian States and Territories is as follows:

- Passed and in operation:
    - New South Wales - Commercial Arbitration Act 2010 (NSW);
    - Victoria - Commercial Arbitration Act 2011 (VIC;
    - South Australia - Commercial Arbitration Act 2011 (SA);
    - Northern Territory - Commercial Arbitration (National Uniform Legislation) Act 2011 (NT);
    - Tasmania - Commercial Arbitration (Consequential Amendments) Act 2011 (TAS);
    - Queensland - Commercial Arbitration Act 2013 (QLD); and
    - Western Australia - Commercial Arbitration Act 2012 (WA).
- No action:
    - Australian Capital Territory - yet to introduce a Bill into parliament.

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 pre-conditions 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 further revised its Expedited Arbitration Rules (ACICA Expedited Rules), which were first published in late 2008. The ACICA Expedited Rules aim to 'provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved' (article 3.1 of the ACICA Expedited Rules). Further, ACICA has adopted an opt-in approach for these rules, requiring parties to explicitly select them (rather than the ACICA Rules) in their arbitration agreement.

In 2011, ACICA 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 accept not only arbitration according to the ACICA Rules, but also to be bound by the emergency rules and any decision of an emergency arbitrator. The power of the emergency arbitrator applies to all arbitrations conducted under the ACICA Rules unless the parties expressly opt-out of it in writing.

Also included in the latest 2011 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 established a streamlined process through which a party can apply to have an arbitrator appointed to a dispute seated in Australia. A board comprising representatives of the attorney general, the chief justices of the High Court and Federal Court 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

In 2010, 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 ADIC also provides all the necessary business support services, including case management and trust account administration provided by skilled and professional staff.

In April 2007, AMTAC was officially launched by ACICA. With approximately 12 per cent of world trade by volume either coming into or going out of Australia by sea, Australia is in a position to take a leading role in domestic and international maritime law arbitration. AMTAC is committed to using the ACICA Expedited Arbitration Rules for maritime proceedings conducted under its auspices. The facilitative role of AMTAC complements and is complemented by the role of the Australian courts in providing sure, reliable and impartial means to resolve disputes that arise in international trade.

PRIMARY SOURCES OF ARBITRATION LAW

Legislative powers in Australia are divided between the Commonwealth of Australia, as the federal entity, and 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 CAAs of each state or territory where the arbitration takes place. Following

amendments made in 1984 and 1993, the arbitration acts of the states and territories are largely uniform and were commonly referred to as 'the Uniform Acts'. With all states and territories except the Australian Capital Territory 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 a reference to the previous domestic arbitration regime, which is still in operation only in the Australian Capital Territory (and is yet to introduce a CAA Bill into parliament). This is to be contrasted with the newly enacted uniform CAAs in all other states and territories.

ARBITRATION AGREEMENTS

For international arbitrations in Australia, 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 (eg, ***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 allow parties to approach the court to obtain subpoenas, to require a person to attend for examination before the arbitrator, or to produce documents to the arbitrator. These powers remain, but a party now requires approval of the arbitral tribunal before approaching the court.

THE ARBITRAL TRIBUNAL

Appointment And Qualification Of Arbitrators

Australian laws impose no special requirements with regard to the arbitrator's professional 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 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 the parties be treated with equality, and be afforded a reasonable opportunity of presenting its case. This cannot be derogated from by the parties' agreement and applies to domestic arbitrations as well as to international arbitrations.

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

operating on an opt-out basis. For domestic arbitration, the relevant legislation is the CAAs, with the exception of Australian Capital Territory, which is still governed by the Uniform Acts.

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

As regards 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. Further, the parties may ask the court to order interim measures in relation to arbitration proceedings. The CAAs make clear that it is not incompatible with an arbitration agreement for a party to request an interim measure of protection from a court.

STAY OF PROCEEDINGS

Provided the arbitration agreement is drafted widely enough, Australian courts will stay proceedings in face of a valid arbitration agreement. For domestic arbitrations in the Australian Capital Territory which operate under the Uniform Acts, section 53(2) provides that a stay application must be made before the party has delivered pleadings or taken any other steps in the proceedings, other than the filing of an appearance, unless it is with the leave of the court. In contrast, section 8 of the CAAs gives greater primacy to the arbitration agreement. So long as there is an arbitration agreement which is not null or void, inoperative or incapable of being performed, the court must refer the parties to arbitration. There is no scope for the court to exercise discretion not to enforce an arbitration agreement.

For international arbitrations, Australian courts support the autonomy of international arbitration and will stay court proceedings in the presence of a valid arbitration agreement broad enough to cover the dispute, if the subject matter of the dispute is arbitrable (section 7(2) of the IAA). Applications for stay are limited to those types of arbitration agreements listed in section 7(1) of the IAA. The primary purpose of this section is to ensure that a stay of proceedings is not granted under the New York Convention for purely domestic arbitrations. Pursuant to section 7(5) of the IAA, courts will refuse a stay only if they find the arbitration agreement is null, void, inoperative or incapable of being performed. The courts may impose such conditions as they think fit in respect of the order to stay court proceedings.

Similarly, article 8 of the Model Law mandates a stay of proceedings where there is a valid arbitration agreement. A party must request the stay before making its first substantive submissions. Although the issue of the relationship between article 8 of the Model Law and section 7 of the IAA has not been definitively settled by the courts, the prevailing opinion among arbitration practitioners is that a party can make a stay application under either of the two provisions (this also seems to be the position of the Federal Court in ***Shanghai Foreign Trade Corporation v Sigma Metallurgical Company*** (1996) 133 FLR 417).

The IAA is expressly subject to section 11 of the Carriage of Goods By Sea Act 1991 (Cth), which renders void an arbitration agreement contained in a bill of lading or similar document relating to the international carriage of goods to and from Australia, unless the designated seat of the arbitration is in Australia. Furthermore, there are statutory provisions in Australia's insurance legislation (section 43 of the Insurance Contracts Act 1984 (Cth) and section 19 of the Insurance Act 1902 (NSW)) that render void an arbitration agreement unless it has been concluded after the dispute has arisen. A decision by the New South Wales Supreme Court clarified that this limitation applies to both insurance and reinsurance contracts (-***HIH Casualty & General Insurance Limited (in liquidation) v Wallace*** (2006) NSWSC 1150). A similar provision is also contained in section 7C of the Home Building Act 1989 (NSW).

PARTY REPRESENTATION

There are much greater flexibilities with regard to legal representation in international arbitrations than there are in domestic arbitrations. Under section 29(2) of the IAA, a party may either represent itself or choose to be represented by a duly qualified legal practitioner from any legal jurisdiction or, in fact, by any other person it chooses.

For domestic arbitrations in the Australian Capital Territory, 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 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, 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 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). 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 requires a violation of due process or a breach of public policy. The term 'public policy' in article 34 of the Model Law is qualified in section 19 of the IAA and requires some kind of fraud, corruption or breach of natural justice in the making of the award. The Model Law does not contemplate any right to appeal for errors of law.

The Uniform Acts allows for broader means to challenge an award. An appeal to the Supreme Court is possible on any question of law (section 38(2) 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 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 (the 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 seven free trade agreements (FTAs), with a further eight 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, which came into effect in 2010. Recently, Australia also signed an FTA with Korea in April 2014 and an economic partnership agreement (EPA) with Japan in July 2014, which will enter into force when domestic processes have been completed. Further FTAs are currently under negotiation with China, India, Indonesia, and the Gulf Cooperation Council, in addition to the Pacific Agreement on Closer Economic Relations 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.

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Summary

CONTINUED GROWTH OF INTERNATIONAL ARBITRATION IN SINGAPORE
CASE LAW

There have been a number of developments in Singapore since our last report.

In his keynote speech at the inaugural SIAC Congress 2014 on 6 June 2014, Kasiviswanathan Shanmugam, Singapore's minister for foreign affairs and minister for law, observed that there had been an increased preference for arbitration as a means of dispute resolution in the region over the years and commented that there was room for further growth driven by continued economic development in Asia. He noted that Singapore was now the third-most preferred seat of arbitration worldwide and the Singapore International Arbitration Centre (SIAC), the fourth most preferred arbitral institution worldwide.[1] He pointed out that the success of the arbitration sector in Singapore was due to several factors, including Singapore's strong legal framework, arbitration-friendly policies and regulation, proximity and connectivity to the rest of the world and the growth of the SIAC into a first-rate arbitration centre. He promised that the Singapore government will continue to support the growth and development of arbitration in Singapore.

Minister Shanmugam said that building on the success in arbitration, Singapore was looking to develop complementary infrastructure and services in international commercial litigation and mediation. These initiatives were first mooted in January 2013 by Chief Justice Sundaresh Menon. A committee co-chaired by Justice VK Rajah (now the attorney general of Singapore) and senior minister of state, Indranee Rajah, and comprising of Singapore lawyers and prominent international counsel, including the Honourable James Jacob Spigelman, AC QC; former chief justice of the Supreme Court of New South Wales, Lord Peter Goldsmith QC PC; former attorney general of England and Wales and professor, Jan Paulsson, was set up. In November 2013, the committee delivered its report and recommended the creation of the Singapore International Commercial Court (SICC) as a division of the Singapore Supreme Court. The Singapore government has since announced that the SICC will be formed.

Several international arbitration matters were heard before the Singapore Court of Appeal and High Court in the period from July 2013 to June 2014 and we report on the following below in further detail:

- in*International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd & Anor* [2013] SGCA 55, the Court of Appeal held that a third party was not bound by an arbitration clause contained in a related contract between two other parties;
- the High Court set out guidance on what would constitute a breach of natural justice by an arbitral tribunal in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186;
- in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2013] SGCA 57, the Court of Appeal held that it was still open to an award debtor to resist enforcement of an international arbitration award or a jurisdictional ruling made in Singapore when it failed to apply to have the decision set aside within the time limits prescribed by the Model Law;
- the High Court considered whether a minority oppression claim under section 216 of the Singapore Companies Act could be arbitrated in *Silica Investors Limited v Tomolugen Holdings Limited* [2014] SGHC 101;
- the High Court was asked in *The Lao People's Democratic Republic v Sanum Investments Ltd & Anor* [2013] SGHC 183 to issue subpoenas compelling the

production of documents relating to an audit in order to assist in international investment arbitrations seated in Singapore;

- in *R1 International Pte Ltd v Lonstroff AG* [2014] SGHC 69, the High Court opined that the court has power to grant a permanent anti-suit injunction in relation to arbitration proceedings.

CONTINUED GROWTH OF INTERNATIONAL ARBITRATION IN SINGAPORE

The year 2013 saw a new record year for SIAC. New case filings increased by a further 10 per cent from 235 in 2012 to 259 received in 2013, reinforcing SIAC's position as one of the fastest-growing arbitral institutions in the world.[2] Of the new cases filed with SIAC in 2013, 86 per cent were international in nature and 48 per cent had no connection with Singapore. SIAC received cases from parties from 50 jurisdictions, with the highest number of filings being generated by Indian parties who have been one of the strongest contributors of cases to SIAC over the past four years. In order to interact more closely and share information on a regular basis with current and potential users in this important jurisdiction, 2013 also saw SIAC open its first overseas liaison office in Mumbai, India. This was followed by the opening of a second liaison office at the new International Dispute Resolution Centre in Seoul, South Korea.

New initiatives implemented at the SIAC included the establishment of a new panel of arbitrators for intellectual property disputes, the introduction of a new schedule of fees and amendments to the practice notes on case administration to provide for, amongst other things, the Registrar to be able to consult the SIAC Court of Arbitration on issues arising during scrutiny of draft arbitral awards.

There was some debate which evolved as to whether the proposed SICC will be a threat to the success of the SIAC. As noted by Minister Shanmugam in his address at the SIAC Congress 2014, the SICC will simply be another option for businesses to consider when resolving disputes, as part of a complete suite of dispute resolution offerings to parties. He said that the SICC would appeal to parties who would have non-arbitrable disputes and would like the availability of an appeal. While not all the details concerning the SICC have been finalised, the key elements of the SICC include:

- the setting up of a panel of judges for the SICC comprising not only judges from the Singapore judiciary, but specialist judges from around the world;
- as the SICC is intended to be a forum for international disputes, it has the ability to apply foreign law in determining disputes; and
- parties before the SICC will be entitled to engage international counsel (subject to registration requirements) to conduct the advocacy at hearings and not just Singapore lawyers.

The SICC is expected to be up and running early next year, along with a new Singapore International Mediation Centre, which will provide international commercial mediation services.

CASE LAW

Third Party To Contract Not Bound By Arbitration Agreement In Related Contract Between Two Other Parties

We reported in last year's chapter the High Court's decision in ***International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd & Anor*** [2012] SGHC 226 that parties had intended an arbitration agreement to be binding on a third party. The Court of Appeal reviewed this decision in ***International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd & Anor*** [2013] SGCA 55.

The appellant (IRCP) and the second respondent (Datamat), were respondents in an arbitration instituted by the first respondent (Lufthansa), pertaining to disputes arising under an agreement between only Lufthansa and Datamat (the cooperation agreement). Under the cooperation agreement, Lufthansa was to supply a system that would be utilised by Datamat to fulfil another contract with a third party, Thai Airways (TA). IRCP was another of Datamat's subcontractors for its contract with TA. Subsequently, Datamat ran into financial difficulties and was unable to meet its payment obligations to Lufthansa. To resolve the situation, the three parties entered into two supplemental agreements pursuant to which IRCP would, inter alia, provide certain financial guarantees and pay monies (received by Datamat from TA) to Lufthansa for services rendered under the cooperation agreement. Clause 37.2 and 37.3 of the cooperation agreement contained a multi-tiered dispute resolution mechanism (the Dispute Resolution Mechanism) which included arbitration in Singapore.

Lufthansa terminated both agreements and commenced arbitration proceedings against IRCP and Datamat for non-payment of outstanding sums. IRCP objected to the tribunal's jurisdiction on the grounds that it was not a party to the arbitration agreement contained in the cooperation agreement; and even if it was a party to the arbitration agreement, Lufthansa had not fulfilled the conditions precedent for the commencement of any arbitration. The tribunal dismissed IRCP's arguments and ruled that it had jurisdiction. IRCP applied to the High Court pursuant to article 16(3) of the UNCITRAL Model Law (Model Law) and section 10 of the IAA, but was unsuccessful in setting aside the jurisdiction ruling.

The Court of Appeal allowed IRCP's appeal and held that the tribunal did not have jurisdiction over IRCP and its dispute with Lufthansa. The Court of Appeal held that IRCP was not bound by the arbitration clause in the cooperation agreement when it entered into the supplemental agreements. While the cooperation agreement had to be read with the supplemental agreements to understand IRCP's obligations, IRCP undertook no obligation under the cooperation agreement. IRCP's only substantive obligation under the Supplemental Agreement was to act as a payment agent for Datamat; the primary rights and obligations under the cooperation agreement between Datamat and Lufthansa remained unaffected and intact. The first Supplemental Agreement expressly stated that Lufthansa and Datamat agreed that IRCP had no other obligations than those provided for therein, which meant that the obligation to arbitrate in clause 37.3 of the cooperation agreement had been excluded.

The Court of Appeal further decided that, by agreeing to such an arrangement, IRCP would not have expected to be involved in an arbitration concerning disputes as to the substantive obligations in the cooperation agreement. There was also no presumption that parties had intended for any dispute arising out of both agreements to be decided by the same tribunal. First, not all parties to the dispute were also parties to the arbitration clause in clause 37.3 of the cooperation agreement; and second, there would not be a situation where issues arising between IRCP and Lufthansa would be common to those which might arise between Lufthansa and Datamat.

Finally, the Court of Appeal noted that the language and form of the arbitration clause pointed against the incorporation of the dispute resolution mechanism into the supplemental agreements. The preconditions for arbitration in clause 37.2 were specific and did not contemplate the IRCP's participation; its workability would be questionable if incorporated into the supplemental agreements.

What Constitutes A Breach Of Natural Justice By An Arbitral Tribunal?

In *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186, the plaintiff (TMM) and the defendant (PRM) were parties to two memoranda of agreements (MoA) for the purchase of vessels. TMM had rejected delivery of the vessels, claiming that they were not physically ready for delivery as required by the MoA. TMM claimed that this amounted to a repudiation of the MoA by PRM and commenced arbitration. PRM counterclaimed, alleging that TMM had itself repudiated the MoA by failing to accept delivery of the vessels.

The arbitrator found that there had been no repudiatory breach by PRM. Accordingly, TMM was held to have repudiated the MoA by rejecting delivery. TMM applied to set aside the award under section 24(b) of the IAA and article 34(2)(a)(iii) of the Model Law on grounds that the arbitrator had breached the rules of natural justice and had dealt with a dispute outside of the scope of submission to arbitration.

The High Court recognised as a general principle that while it must invariably look at the evidence on the record to determine the merits of the challenge brought against an arbitral award, it did not follow that the court would always sift through the entire record of the arbitral proceedings with a fine-tooth comb. A court should not nitpick the award but should read it in a reasonable and commercial way, expecting that there will be no substantial fault to be found with it.

The High Court held that an arbitral tribunal was required to ensure that the essential issues were dealt with, but need not deal with each point made by a party. It further held that arbitral tribunals must be given fair latitude in determining what was essential or otherwise, and could take the view that the dispute before it may be disposed of without further consideration of certain issues. In this regard, natural justice required an arbitral tribunal to demonstrate that it had at least attempted to comprehend the parties' arguments on essential issues. The explicability of a decision was only one factor that went towards proving that it failed to do so, and the central inquiry was whether the award reflected the fact that the arbitral tribunal had applied its mind to the critical issues and arguments.

An arbitral tribunal is generally bound to give reasons for its decision, but such duty was of a lower standard than that applicable to court decisions. Arbitrators are usually not required to give an explanation of each step taken in evaluating the evidence or their reasons for attaching more weight to some evidence than to other evidence. The key question is 'whether the contents of the arbitral award taken as a whole inform the parties of the bases on which the arbitral tribunal reached its decision on the material or essential issues'. The High Court noted that the arbitrator's preference of a particular piece of evidence is 'strictly irrelevant' as it does not exercise appellate jurisdiction over the tribunal in setting aside proceedings under the IAA. In the present case, it was held that the arbitrator had met the minimum standard for giving reasons and explanations expected of an arbitral tribunal.

Finally, the High Court made it clear that it will not allow dissatisfaction with the merits of an arbitrator's decision to be turned into an allegation of bias, and curial recourse against an

award should not be abused as an opportunity to invite the court to judge the full merits and conduct of the arbitration.

Doctrine Of 'choice Of Active And Passive Remedies' At Heart Of The Design Of The Model Law

PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV [2013] SGCA 57 was an appeal to the Court of Appeal arising from the High Court decision in *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2012] SGHC 212 (which we had covered in our report last year).

Two parties, the Astro Group and the Lippo Group, had been involved in a joint venture that had failed. This failure gave rise to a dispute between the parties that resulted in arbitration proceedings in Singapore. The proceedings were commenced pursuant to the arbitration clause in the parties' agreement governing the joint venture (JVA). Of the eight respondents, only the first to the fifth respondents had been parties to the JVA. The sixth to eighth respondents were not parties to the JVA but had been involved in the provision of services envisaged under it. Rather than having separate civil litigation proceedings, the respondents asked the arbitral tribunal to declare that the sixth to eighth respondents be joined as parties to the arbitration, and to further decide on the claims of the sixth to eighth respondents. The tribunal issued an award (the joinder award) finding that it did have the power to join the sixth to eighth respondents to the arbitration proceedings and that such joinder was desirable and necessary in the interests of justice. Under the IAA and article 16(3) of the Model Law, the appellant could have appealed against the joinder award. However, it chose not to and instead proceeded to defend the case in the arbitration albeit reserving its rights on the jurisdiction of the tribunal.

The respondents sought to enforce the joinder award (along with other awards issued in its favour) in Singapore and obtained leave to do so. The appellant challenged the enforcement of the awards, invoking the Tribunal's lack of jurisdiction as a ground to resist enforcement. The core question was whether the appellant was entitled to raise a jurisdictional objection (relating to the joinder of the sixth to eighth respondents to the arbitration) when Astro sought to enforce the arbitration awards in Singapore (long after the time stipulated for any setting-aside applications under the Model Law), or whether it was too late for it to do so.

At first instance, the High Court held that, as section 3(1) of the IAA expressly excludes article 36 of the Model Law which sets out the grounds for resisting enforcement of an award, it was not open to an award debtor to resist enforcement of an international arbitration award or a jurisdictional ruling made in Singapore. The award debtor could only apply to have the decision set aside within the time limits prescribed by the Model Law. Accordingly, the appellant's challenge with respect to jurisdiction ought to have been raised at the earlier stage and that at the enforcement stage no such challenge with respect to jurisdiction was available.

The Court of Appeal overturned the High Court's decision, which held that the Tribunal's orders that purport to apply as between the appellant and the sixth to eighth respondents suffer from a deficit in jurisdiction and are therefore not enforceable in Singapore.

The Court of Appeal found that the doctrine of the 'choice of remedies' was at the heart of the entire design of the Model Law. Pursuant to this doctrine, a party to an international arbitration in Singapore against which a preliminary ruling or an award is rendered is able to:

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actively challenge a tribunal's preliminary ruling on jurisdiction or to apply for an award to be set aside under article 16(3) and 34 of the Model Law respectively; or

- elect the 'passive remedy' of resisting enforcement of an award at a later stage pursuant to section 19 of the IAA on any of the grounds under article 36 of the Model Law.

The Court of Appeal was of the view that the express exclusion of article 36 of the Model Law by section 3(1) of the IAA was not sufficiently indicative of legislative intention to deprive an award debtor of the benefit of the 'passive' remedies enjoyed under the English law and the Model Law. The Court of Appeal arrived at this view after an extensive analysis of, among others:

- the preparatory works of the Model Law;
- English arbitration law;
- the application of the Model law in other jurisdictions;
- the reports of the law reform committee tasked with the introduction of the IAA and the relevant Singapore parliamentary debates; and
- various academic commentaries.

The Court of Appeal found that the Singapore courts' power to enforce an award under section 19 of the IAA had to be read consistently with the philosophy of the Model Law and, given the fundamental importance of the 'choice of remedies' doctrine, any exclusion of the doctrine would need to have been made explicitly.

The Tribunal's ruling on joinder of the sixth to eighth respondents was made pursuant to Rule 24(b) of the SIAC Rules (2007 Edition), which provides that the tribunal has the power to 'allow other parties to be joined in the arbitration with their express consent, and to make a single final award determining all disputes among the parties to the arbitration'. The Court of Appeal overturned the Tribunal's ruling on joinder and held that any third party proposed to be joined under SIAC Rules (2007 Edition) must be a party to the arbitration agreement. In that regard, the Court of Appeal noted that, by contrast, Rule 24(b) of the SIAC Rules (2010 and 2013 Edition) gives the tribunal the power to

> upon the application of a party, allow one or more third parties to be joined in the arbitration, provided that such person is a party to the arbitration agreement, with the written consent of such third party, and thereafter make a single final award or separate awards in respect of all parties.

Finally, the Court also rejected the respondents' arguments that the appellant's continued participation in the arbitration proceedings amounted to a waiver of its right to object to the Tribunal's jurisdiction. The Court observed that the party asserting the waiver must:

> meet a high threshold of demonstrating that the adversely affected party's conduct is only consistent with waiver and that the purported waiver had been communicated in clear and unequivocal terms.

The Court of Appeal therefore allowed the appeal and refused the enforcement of the arbitral award insofar as it concerned the sixth to eight respondents.

Arbitrability Of Intra-corporate Disputes

The High Court examined the issue of the arbitrability of intra-corporate disputes in ***Silica Investors Limited v Tomolugen Holdings Limited and Others*** [2014] SGHC 101. The issue before the court was whether a minority oppression claim under s 216 of the Companies Act (CA) could be arbitrated.

The plaintiff (Silica) was the minority shareholder of the 8th defendant company (Auzminerals). The majority and controlling shareholder of Auzminerals was the first defendant (Tomolugen), which held approximately 55 per cent of the shares. Silica became a shareholder of Auzminerals when it purchased its shares from the second defendant (Lionsgate) under a share sale agreement and a supplemental agreement. Clause 12.3 of the share sale agreement provided for disputes between Silica and Lionsgate to be referred to arbitration at the SIAC.

Silica commenced a suit pursuant to section 216 of the CA alleging minority oppression by several of the defendants and seeking, among others, an order that Auzminerals be wound up pursuant to section 216(2)(f) of the Companies Act. Lionsgate applied for a stay of the court proceedings on the basis of the arbitration agreement.

The issues before the High Court were, among others, whether Silica's claim fell within the scope of the arbitration clause; and if so, whether Silica's claim for relief against minority oppression is arbitrable. Having found that Silica's claim fell within the scope of the arbitration clause, the High Court proceeded to consider whether the claim was arbitrable. The High Court referred to section 12(5) of the IAA, which provides that the 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', and noted that section 12(5) cannot be construed as conferring upon arbitral tribunals the power to grant all statute-based remedies or reliefs available to the High Court. An arbitral tribunal clearly cannot exercise the coercive powers of the courts or make awards in rem or bind third parties to the arbitration agreement.

It was held that some statutory claims andremedies were solely within the purview of the courts (eg, winding-up, granting a judgment in rem in admiralty matters, avoidance claims, bankruptcy and matrimonial matters, and criminal prosecutions). However, this did not mean that such a claim was automatically rendered non-arbitrable. Instead, it was observed that such claim might well straddle the line between arbitrability and non-arbitrability depending on the facts of the case, the manner in which the claim was framed, and the remedy or relief sought.

The High Court took the view that whether a minority oppression action under section 216 of the Companies Act was arbitrable would depend on all the facts and circumstances of the case. Generally, minority oppression claims are non-arbitrable except in cases where the court was satisfied that all the relevant parties (including third parties whose interests may be affected) are parties to the arbitration, and the remedy or relief sought was one that only affected the parties to the arbitration.

In the present case, the High Court held that Silica's minority oppression claim was non-arbitrable because there were relevant parties, including other shareholders, who were

not parties to the arbitration. Further, Silica had asked for remedies that the arbitral tribunal had no power to grant, including an order for winding up.

Subpoenas Issued To Compel Production Of Documents In Aid Of Arbitration

In *The Lao People's Democratic Republic v Sanum Investments Ltd & Anor* [2013] SGHC 183, the High Court was asked to issue subpoenas compelling the production of documents relating to an audit in order to assist in international investment arbitrations seated in Singapore.

The subpoena applications were filed in connection with:

- an International Centre for Settlement of Investment Dispute arbitration seated in Singapore between Lao Holdings NV (Lao Holdings) and Laos; and
- an arbitration under the UNCITRAL Arbitration Rules seated in Singapore between Sanum Investments Ltd (Sanum Investments) and Laos.

Both concerned claims brought by Lao Holdings and Sanum Investments as investors (Foreign Investors) against Laos for alleged infractions of the investment treaties in relation to their casino and other gaming investments in Laos, one of which concerned the Savan Vegas project (Savan Vegas). A dispute arose between the Foreign Investors and the local partners to the investments (ST) in 2011. ST sought to obtain access to all financial and operational documents relating to Savan Vegas but was refused by the Foreign Investors. A government audit of Savan Vegas was ordered and carried out by officials from the Laotian Ministry of Finance, local tax officials and designated members of an accounting firm. The Foreign Investors alleged that the audit was improper because, among others, the accountants had no relevant experience and were thus unqualified to carry out the audit, and that the audit had been driven by an improper purpose.

An audit report was produced on 20 July 2012. The Foreign Investors alleged that, as a result of the audit, the Laotian central government began issuing demands for payments of various tax debts amounting to approximately US$23.8 million. The Foreign Investors and Laos all agreed that the documents relating to the accountants' participation in the audit were relevant and material to the arbitration proceedings, and agreed to make a joint request that the accounting firm provide various itemised documents or classes of documents. However, the accounting firm refused to release the documents and subpoena applications were accordingly filed.

Section 13 of the IAA read with order 69A rule 7 of the Rules of Court confers upon the Singapore courts the power to issue subpoenas to compel persons within Singapore to testify or to produce documents to an arbitral tribunal.

The requirements for the issuance of a subpoena to produce documents are stringent: what is sought must be relevant, material and necessary for the fair disposal of the matter. The High Court noted that, for the purposes of the arbitrations, the contemporaneous records of work done by the accounting firm during the audit would be relevant in revealing the state of affairs of Savan Vegas at the time of the inspection. The emails, notes, memoranda and work papers sought from the accounting firm would also shed light on the circumstances of its appointment and the audit, given that propriety of the audit was in issue.

The High Court accepted that the proprietary and confidential nature of an accountant's working papers imposed on the court a duty to be utterly scrupulous in ensuring that it

was satisfied as to the relevance of the documents. However, issues of confidentiality and privacy were simply relevant factors that the court would consider when deciding whether to order production in cases such as the present. On the facts, the High Court was satisfied that the documents sought were of such high relevance and materiality to the issues raised in the arbitrations that the interests of justice outweighed the potential invasion into the confidentiality and privacy of a third party.

The High Court disagreed with the accounting firm's argument that the subpoenas sought were framed too widely and considered that the application was sufficiently precise for one to know what documents were expected of him to produce. The High Court was also satisfied that this was not an application for third party discovery in aid of arbitration (which it did not have the power to order) disguised as a subpoena to produce documents. As a result, it held that the subpoena applications were proper but ordered that the wording of the subpoenas be amended by deleting the words 'including' or 'any and all' to narrow down the language of the application.

Power Of Court To Grant Permanent Anti-suit Injunction In Arbitration Proceedings

In *R1 International Pte Ltd v Lonstroff AG* [2014] SGHC 69, the plaintiff (R1 International) and defendant (Lonstroff) were both business entities who dealt with each other on a number of transactions under which the plaintiff sold, and the defendant bought, consignments of rubber. A dispute arose from one of the orders and Lonstroff commenced proceedings in the courts of Switzerland. R1 International then commenced proceedings in Singapore to obtain an anti-suit injunction preventing Lonstroff from continuing the Swiss proceedings in breach of the Singapore Commodity Exchange (SICOM) arbitration clause. An interim injunction to this effect was made which Lonstroff then applied to discharge. R1 International applied for the anti-suit injunction to be made permanent.

The first question before the High Court was whether the applicable contract between the parties in fact contained an arbitration clause. The High Court held that the arbitration clause had not been incorporated into the contract and, accordingly, there was no basis to grant a permanent anti-suit injunction, or sustain the interim injunction as sought by R1 International.

Although the High Court's finding above disposed of the matter, it went on to consider the issue dealt with extensively by parties (ie, whether it had the power to grant a permanent anti-suit injunction).

The High Court concluded that it did have the power to grant a permanent anti-suit injunction in aid of domestic international arbitrations (ie, international arbitrations with their seat in Singapore). However, it did not express any concluded opinion on whether it had the power to issue permanent anti-suit injunctions in aid of foreign international arbitrations (ie, international arbitrations with their seat outside Singapore).

The High Court held that the power to grant permanent anti-suit injunctions in aid of domestic international arbitrations was derived under section 4(10) of the Civil Law Act (CLA). This is the power that the court exercises when it grants a permanent anti-suit injunction in aid of local court proceedings and the High Court saw no reason why this power could not be exercised to make permanent anti-suit injunctions in aid of domestic international arbitration proceedings.

As to whether the Court could grant a permanent anti-suit injunction in aid of a foreign international arbitration, the High Court expressed no concluded opinion. The High Court

observed that section 12A(2) read with section 12(1)(i) of the IAA gave it the power to grant interim injunctions, even in aid of foreign international arbitration proceedings, and it would be logical and consistent to hold that the court had power under the more wide-ranging law in section 4(10) of the CLA to issue permanent anti-suit injunctions in such cases. However, the High Court noted that Singapore courts should not be an international busybody and that it was only when strong reasons were present that the courts would intervene with a permanent anti-suit injunction in support of foreign international arbitrations (eg, in a situation where the arbitration forum did not provide for effective interim measures in support of arbitration).

Notes

1. Minister K Shanmugam's Keynote Address at the Inaugural SIAC Congress 2014 on 6 June 2014.
2. SIAC Annual Report 2013.

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