The Asia-Pacific Arbitration Review

2016

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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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Investment Arbitration in Asia

Jawad Ahmad, **Kelvin Poon** and **Andre Yeap SC**
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Summary

Despite the recent rhetoric and negative publicity surrounding the alleged problems with investment treaty arbitrations, and the political backlash that followed, Asia-Pacific states continue to enter into new treaties that include investor-state dispute settlement provisions (ISDS), and arbitration remains the preferred mechanism for resolving disputes between investors and states.

INVESTMENT TREATY ARBITRATION AND ASIAN GIANTS

In the Asia-Pacific region, some of the notable claims include the trinity of claims being threatened or advanced against India arising from the 2012 Income Tax Amendment Act (ITAA). This piece of legislation levied a hefty retroactive capital gains tax on any overseas merger or acquisition dating back to 1962 in which an underlying asset located in India was transferred.[1] Vodafone Group, Nokia Corp and Cairn Energy have each threatened or commenced investment treaty claims against India for alleged breaches of the BITs between India and the Netherlands, Finland and the UK respectively. Although India is not party to the ICSID Convention, the investors have recourse to bring claims against India under the UNCITRAL Arbitration Rules.

2014 also saw the People's Republic of China facing a second investment arbitration claim brought under ICSID.[2] The claimant, a South Korean firm, Ansung Housing Co Ltd (Ansung), commenced proceedings in respect to a 2006 investment in a development project for a golf country club and condominium in Sheyang-Xian, Jiangsu Province. The claim was brought pursuant to the China–Republic of Korea BIT. In the claim, Ansung has alleged that due to various alleged arbitrary and illegal actions and omissions of the Shenyang-Xian government, Ansung has been deprived of the use and enjoyment of its investment and its investment plans have been frustrated. As a result of these alleged illegal acts and omissions, Ansung claims that it was forced to dispose of its entire investment to a Chinese purchaser at a price significantly lower than the amount Ansung had invested toward the project. Ansung claimed to have suffered losses of more than 100 million renminbi and sought an award of damages.[3]

Interestingly, 2014 also saw at least one PRC investor launching an investment claim against another state. Beijing Urban Construction Investment Development (Beijing Urban) commenced investment arbitration proceedings against Yemen on 3 December 2014. Beijing Urban had signed a US$114 million contract with the Yemeni civil aviation and meteorology authority to build an international airport in Sana'a, with work beginning in 2006. The project was to be completed two years later but suffered substantial delays. The basis on which the claim is being brought is unclear but it is believed that the claim is founded on the China–Yemen BIT signed in 1998.

DEVELOPMENTS ELSEWHERE IN THE REGION

Besides the China and Indian cases, the rest of the region has also seen developments in investment treaty disputes.

In Indonesia, two separate decisions on jurisdiction were issued in a consolidated ICSID case involving the issue of Indonesia's consent to ICSID arbitration under its BITs with Australia and the UK. The two claimants involved are Churchill Mining PLC, a UK company, and its wholly-owned Australian subsidiary, Planet Mining Pty Ltd. The dispute concerned the validity of certain mining licences purportedly obtained by the claimants through a group of local companies as well as the validity of the revocation of these licenses by

the Indonesian authorities. ICSID arbitration proceedings were commenced against the Republic of Indonesia, on the basis that Indonesia had breached various obligations under the UK–Indonesia BIT[4] and the Australia–Indonesia BIT.[5] At the jurisdictional phase of the proceedings, Indonesia objected to each claim on the ground that it had not consented to arbitrate either claim, which the ICSID tribunal rejected.

The ICSID tribunal's dismissal of Indonesia's jurisdictional challenges, which permitted the claimants to proceed with claims for damages that potentially exceed US$1 billion, has generated a great deal of controversy. It came to light in March 2014 that Indonesia commenced a review of its existing treaties that govern foreign direct investment. A statement from the Netherlands embassy in Jakarta on 21 March 2014 announced that Indonesia had decided to terminate the bilateral investment treaty between the two nations from 1 July 2015.[6]

While some have characterised Indonesia's actions as a reaction to the tribunal's decisions in ***Churchill Mining v Indonesia*** and ***Planet Mining v Indonesia***, there is a general reluctance to draw a clear link between the two events. For instance, it has been suggested that the term 'terminate' fails to adequately capture 'the nuanced process that Indonesia is going through to review its BITs by letting the old ones lapse so that new and better ones can be renegotiated'.[7] Specifically, it appears that the state's aim in its review of its BIT commitments was primarily to ensure that there was 'consistency between local and international laws and regulations'.[8]

Elsewhere in the region, the Singapore High Court in ***Government of the Lao People's Democratic Republic v Sanum Investments Ltd*** [2015] SGHC 15 pronounced on the scope as well as justiciability of foreign BITs. This is the first time a Singapore court has undertaken such an exercise. The case concerned a dispute between Laos and Sanum Investments Limited (Sanum), a company incorporated in Macao. Sanum had commenced UNCITRAL arbitration proceedings against Laos for, among others, expropriation under article 8(3) of the PRC–Laos BIT.

In its award on jurisdiction dated 13 December 2013, the tribunal found that the treaty extended to Macao. This led Laos to seek a review by the Singapore High Court under section 10 of the International Arbitration Act of the tribunal's ruling on jurisdiction. Two substantive issues were put before the court: first, whether the PRC–Laos BIT applied to Macao, and second, if it did, whether Sanum's expropriation claims fell outside of the scope of article 8(3) of the BIT. The court ultimately held that the parties to the treaty never intended for it to cover Macao.

The court went further and expressed its views on article 8(3) of the BIT. The crux of the second substantive issue centred on the meaning of the word 'involving' under article 8(3) of the PRC–Laos BIT. Essentially the issue turned on whether the interpretation of article 8(3) allowed for a determination as to whether there was an expropriation or whether it was limited to the determination of the compensation amount only. The judge endorsed the latter interpretation.

It would not be a stretch to say that the decision caused quite a stir. Just weeks after the High Court decision was handed down in Singapore, the government of Peru sought to rely on the Singapore High Court decision to annul an award on jurisdiction issued by the ICSID tribunal in ***Tza Yap Shum v Peru***. Presumably, this was because the Singapore High

Court had expressly referred to and disagreed with the tribunal's decision on the question of jurisdiction.[9] Eventually, the ad hoc committee dismissed Peru's application.[10]

While critics of the Singapore High Court's decision have expressed concerns as to its implications and how it may project Singapore as a less attractive venue both by tribunals and parties themselves, who may choose to seat their arbitrations elsewhere,[11] it does show that the Singapore court is not afraid to take a stand on issues of public international law. This can only bode well for its continued development and growth in the region.

In its decision, the Singapore High Court also commented that it was necessary to understand that communist regimes at that time possessed 'a certain degree of distrust regarding investment or private capital and [...] the decisions of international tribunals on matters over which they have no control'.[12] This context, according to the court, was significant in respect to how article 8(3) of the treaty had to be interpreted.

Some commentators have suggested that 'the distrust communist states may have towards bilateral investment treaties may be seen as being indicative of a growing sentiment that is not peculiar to these states'[13] because these states perceive that the decision-making processes in investment treaty arbitration 'may not adequately account for public policy concerns and may favour the investor over the state'.[14] Such postulations, however, do not appear to be fully reflective of current times. While the scope of disputes that could be subjected to arbitration in treaties with communist regimes may have been restrictive in the 1960s, this is not the case now.

In the last decade, communist regimes in the region – like China, Laos and Vietnam – have entered into treaties that demonstrate a willingness to have all types of disputes (and not exclusively on the question of compensation for expropriation) resolved by investment treaty tribunals.[15] For instance, the China–Japan–Korea trilateral investment agreement (2012)[16] and the China–Canada BIT (2012)[17] utilise broad wording to encompass practically any and all disputes arising from or by reason of the agreement.[18] The India–Laos BIT (2000)[19] and Denmark–Laos BIT (1998)[20] also do not restrict the types of disputes that may ultimately be submitted to arbitration. The same may be said of the recent Vietnam–Morocco BIT (2012), which enabled the submission of any and all legal disputes to arbitration arising directly out of investments under the treaty. These relatively recent treaties involving communist regimes suggests that there is an appetite to have arbitral tribunals resolve a broader class of disputes, which must mean that any concerns that investment treaty arbitration for these states do not 'adequately account for public policy concerns' are tenuous at best.

INTERNATIONAL INVESTMENT AGREEMENTS AND ISDS

The new treaties signed by Asia-Pacific states also indicate that investor–state arbitration remains the preferred mechanism to resolve disputes. The United Nations Conference on Trade and Development (UNCTAD) found that in 2014, 27 international investment agreements (IIA) were concluded (14 BITs and 13 'other IIAs')[21] globally. That is one every other week.[22] 10 of the IIAs signed that year involved at least one state located in the Asia-Pacific region.[23] Of those 10 treaties, six contain an ISDS provision. A full breakdown of the treaties is provided in the table below.

Title	Type of IIA	Date of Signature	Date of entry into force	Text publicly available?	ISDS Provision?
		23/10/2014			

Japan–Kazakhstan BIT (2014)	Bilateral investment treaty		N/A	Yes	Yes
Israel–Myanmar (2014)	Bilateral investment treaty	05/10/2014	N/A	Yes	Yes
Canada–Republic of Korea Free Trade Agreement (2014)	Other investment instrument agreement	22/09/2014	N/A	Yes	Yes
ASEAN–India Services and Investment Agreement (2014)	Other investment instrument agreement	08/09/2014	N/A	No	
Burkina Faso–Singapore BIT (2014)	Bilateral investment treaty	27/08/2014	N/A	No	Yes[24]
Côte d'Ivoire–Singapore BIT (2014)	Bilateral investment treaty	27/08/2014	No	No	Yes[25]
Japan–Mongolia EPA (2014)	Other investment instrument agreement	22/07/2014	N/A	No	
Australia–Japan EPA (2014)	Other investment instrument agreement	08/07/2014	N/A	Yes	No[26]
Malaysia–Turkey FTA (2014)	Other investment instrument agreement	17/04/2014	N/A	Yes	No
Australia–Republic of Korea FTA (2014)	Other investment instrument agreement	08/04/2014	N/A	Yes	Yes

Investors commenced 42 known ISDS cases pursuant to IIAs in 2014 globally.[27] This is lower than the number in 2013, which saw 59 new cases. Of the 42 known ISDS cases commenced in 2014, two claims were commenced against India,[28] one against China[29] and Indonesia[30] each.[31] In 2013, two claims were commenced against India,[32] one against Pakistan[33] and Vietnam[34] each.[35]

Interestingly, in 2014 at least two of the 42 new claims commenced were brought by investors whose home state is located in the Asia-Pacific region – China and Republic of

Korea.[36] There were no publically reported claims filed by investors whose home state is located in the Asia-Pacific region in 2013.

No hard conclusions may be drawn from the above statistics '[a]s most IIAs allow for fully confidential arbitration'[37] and the actual number of cases may be higher.[38] At most, it can be observed that investment treaty arbitration continues to feature in the Asia-Pacific region. The fact that investors from the Republic of Korea and China utilised ISDS in 2014 is a testament of its legitimacy and attraction. It may be the start of several more to come in this region.[39]

THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (TPPA) – LOOKING AHEAD

A hint as to how Asia-Pacific investment treaty arbitration and foreign investment will look in the future may be found in the TPPA. The TPPA is a multilateral free-trade agreement currently being negotiated by an array of economies in the Asia-Pacific region, North America and South America.[40] The TPPA is estimated to potentially account for approximately 39 per cent of the world's GDP.[41] It will impact all aspects of commerce and trade between these regional economies and, once in force, will arguably pave the way for a new generation of legal experts with plentitude of skills. The TPPA has its supporters and critics – from pundits, politicians and interest groups – and has been subject to significant media coverage and controversial leaks. The role ISDS plays in the TPPA in this regard will be significant for businesses and the arbitral community alike.

The receptiveness towards ISDS is not necessarily homogenous across each state party. Australia is currently facing a claim by Philip Morris Asia Limited (a Hong Kong entity acquired by Philip Morris Australia) pursuant to the Hong Kong–Australia BIT under the auspices of the 2010 UNCITRAL Arbitration Rules. The case arose from the enactment of the Tobacco Plain Packaging Act 2011 (Cth) which required all tobacco products to use plain packaging in Australia. Philip Morris maintains that the measure has led to the depreciation of the value of its intellectual property rights.[42] One author believes that the ongoing dispute has placed the future of ISDS for Australia in question.[43]

Irrespective of the reaction towards the ongoing dispute, there is no clear indication that ISDS under the TPPA is off the table insofar as Australia is concerned. In fact, according to the official government website, ISDS still has a role to play.[44]

In the US, Senator Elizabeth Warren wrote a fierce article for ***The Washington Post*** criticising the inclusion of an ISDS provision in the TPPA. She noted that '[a]greeing to ISDS in this enormous new treaty would tilt the playing field in the United States further in favor of big multinational corporations. Worse, it would undermine US sovereignty.'[45] A group of Democrats also submitted an anti-ISDS Bill in the House of Representatives in February 2015 calling for the prohibition of any ISDS provision in any free trade agreement or investment treaty.[46] The incumbent administration, however, has recanted by quelling misconceived notions of ISDS provisions.[47]

Senator Warren's article has led politicians overseas to challenge the inclusion of an ISDS provision in the TPPA. At the time of writing, Mr Fletcher Tabuteau, New Zealand First Spokesperson for Commerce and Trade, introduced the 'Fighting Foreign Corporate Control Bill' which seeks to similarly prohibit the government from signing any treaty that would give 'foreign corporates the right to seek compensation if they believe our [New Zealand] laws affect their business.'[48]

While there is much political rhetoric against the inclusion of an ISDS provision, the legal implications of a potential 'carve-out' for opposing states are less considered. Professor Mark Feldman argues that in the event a state party refuses to assent to the ISDS provision under the TPPA, it could create issues in respect of provisions 'of any joint interpretation mechanisms provision that may be included within [the TPPA]'.[49] This mechanism essentially permits a tribunal to request a joint interpretation by the contracting parties to the treaty of a particular provision which is binding. Should a state party not consent to the ISDS provision then it may 'undermine [...] the proper operation of joint interpretation mechanisms contained within the treaty'.

For instance, it is unclear whether a state party 'would have authority to participate in the joint interpretation of provisions contained within the dispute settlement section of a TPP[A] investment chapter.' It is likely that such authority would be challenged on the ground that the state party in question would be interpreting provisions to which it has not agreed to. Also, it is unclear whether the tribunal would have authority to request for a joint interpretation when that provision has not been agreed by all contracting parties. Professor Feldman recommends that these issues (and others) should be dealt with through careful drafting by the contracting parties in the event one state party refuses to assent to the ISDS provision.

While a draft text is not officially available, a working draft of the 20 January 2015 Investment Chapter for the TPPA has been released[50] (2015 TPPA Draft), which shows that ISDS is included. That said, this is by no means representative of the final version and it remains to be seen whether an ISDS provision will feature in the TPPA and, if so, in what form and shape.

Some notable features of the ISDS provision under the 2015 TPPA Draft are worth highlighting. First, for the moment the 2015 TPPA Draft indicates that ISDS does not apply to Australia.[51] Second, should a disputing party request, the 2015 TPPA Draft requires the arbitral tribunal to transmit its proposed decision or award on liability to the disputing parties for commentary. The parties will have 60 days to provide their comments which the tribunal shall consider and issue its decision or award not later than 45 days after the expiration of the 60 days.[52] Third, the 2015 TPPA Draft leaves open the possibility of the creation of an appellate body to review awards rendered by investor-state dispute settlement tribunals.[53] Fourth, the Draft permits the respondent state to request, within 45 days after the tribunal is constituted, the tribunal to decide any objection (relating to jurisdiction, competence or otherwise) on an expedited basis.[54] Presumably, this is based on article 28(5) of the 2004 US Model BIT which also provides for preliminary objections to be resolved through an expedited procedure. This provision is retained in the most recent 2012 US Model BIT. To avoid a frivolous use of this mechanism, the tribunal may award the winning party reasonable costs and attorney's fees in submitting or opposing the objection.

The 2015 TPPA Draft suggests that as of January 2015 the Contracting Parties (save for Australia) support the inclusion of an ISDS provision under the TPPA. This may very well change, but at the time of writing, there is every expectation that ISDS will be included and play a role in the Asia-Pacific region.

CONCLUSION

The new treaties signed by Asia-Pacific states outlined above and the likely inclusion of an ISDS provision in the TPPA suggest that investor-state arbitration is here to stay. This is compounded by the continued use of investor–state arbitration against Asia-Pacific states

and by claimants from Asia-Pacific states. The TPPA will be instrumental in shaping the next generation of arbitration practitioners and should be closely studied and critiqued.

Notes

1. See sections 9 and 195 of the Income Tax Act (5th Edition 2012) (- http://saarc-sec.org/uploads/document/India%20-%20Income%20Tax%20Act%202012%20%2821%20May%202012%29_20130521053032.pdf).
2. The first investment-treaty arbitration case under ICSID against China was ***Ekran Berhad v People's Republic of China*** (ICSID Case No. ARB/11/15). The case was suspended pursuant to parties' agreement and ultimately discontinued.
3. Luke Eric Peterson, 'China is hit with second ICSID claim, as Korean investor lodges arbitration' 5 November 2014. www.iareporter.com/articles/20141106.
4. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments dated 27 April 1976. The obligations alleged to have been breached were articles 3 (promotion and protection of investment) and 5 (expropriation).
5. Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments dated 17 November 1992. The obligations alleged to have been breached were articles II(ii) (fair and equitable treatment), II(iii) (protection and security), IV (most favoured nation) and V (compensation for loss).
6. Netherlands Embassy in Jakarta, Indonesia. 'Termination Bilateral Investment Treaty' http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html.
7. Michael Ewing-Chow and Junianto James Losari. 'Indonesia should not withdraw from the ICSID', ***The Jakarta Post***, 24 April 2014, www.thejakartapost.com/news/2014/04/24/indonesia-should-not-withdraw-icsid.html.
8. Ben Bland and Shawn Donnan. 'Indonesia to terminate more than 60 bilateral investment treaties', The ***Financial Times***, 26 March 2014, www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz3Ur1ZNIVS.
9. Kyriaki Karadelis. 'Peru fails to annul Chinese treaty award', ***Global Arbitration Review***, 4 March 2015. https://globalarbitrationreview.com/news/article/33600/peru-fails-annul-chinese-treaty-award/.
10. Ibid.
11. Todd Weiler and Tai-Heng Cheng, 'The virtue of judicial restraint: two comments on Laos v Sanum', ***Global Arbitration Review***, 12 March 2015. https://globalarbitrationreview.com/journal/article/33620/.
12. [2015] SGHC 15, at [123].
13.

Mahdev Mohan and Jaya Anil Kumar, 'Bilateral Investment Treaty Interpretation: An "Internationalist Spirit" tempered by Context', ***SLW Commentary***, Issue 3/March 2015. www.singaporelawwatch.sg/slw/component/cck/?task=download&file=attached_document&id=58317.

14. Ibid.

15. Article 15: '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 an 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.'

16. Article 20(1):
'An investor of a Contracting Party may submit to arbitration under this Part a claim that the other Contracting Party has breached an obligation:
(a) Under Articles 2 to 7(2), 9, 10 to 13, 14(4), or 16, if the breach is with respect to investors or covered investments of investors to which sub-paragraph (b) does not apply, or
(b) Under Article 10 or 12 if the breach is with respect to investors of a Contracting Party in financial institutions in the other Contracting Party's territory or covered investments of such investors in financial institutions in the other Contracting Party's territory or covered investments of such investors in financial institutions in the other Contracting Party's territory,
And that the investor or a covered investment of the investor has incurred loss or damage by reason of, or arising out of, that breach'.

17. Wenhua Shan. 'China and International Investment Law', ***Regionalism in International Investment Law***, Ed Leon E Trakman and Nicola W Ranieri, Oxford: Oxford University Press, 2013, p246.

18. Article 9(1) to (3):
'(1) Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
(2) Any such dispute which has not been amicably settled within a period of six months may, if both Parties agree, be submitted:
(a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial, arbitral or administrative bodies; or
(b) to the International conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.
(3) Should the Parties fail to agree on a dispute settlement procedure provided under paragraph (2) of this Article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration. The Arbitration procedure shall be as follows:
(a) If the Contracting Party of the Investor and the other Contracting Party are both parties to the convention on the Settlement of Investment Disputes between States and nationals of other States, 1965 and the investor consents in writing to submit the

dispute to the International Centre for the Settlement of Investment Disputes such a dispute shall be referred to the Centre; or
(b) to an ad hoc arbitral tribunal by either party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976.'

19. Article 9(1) to (2):
'(1) Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party shall, as far as possible, be settled amicably.
(2) If such dispute between an investor of one Contracting Party and the other Contracting Party continues to exist after a period of three months, investor shall be entitled to submit the case either to:
(a) international arbitration of the International Centre for Settlement of Investment Disputes established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965 (ICSID Convention), or
(b) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law.'

20. Article 9: 'a legal dispute under the provisions of this Agreement arising directly out of an investment, between one Contracting party (disputing party) and an investor of the other Contracting Party (disputing investor) [...]'.

21. UNCTAD. 'Recent Trends in IIAs and ISDS', IIA Issue Note, No. 1, 2015, 19 February 2015, http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf. See footnote 2: 'Other IIAs' refers to economic agreements other than BITs that include investment-related provisions (eg, investment chapters in economic partnership agreements (EPAs) and free trade agreements (FTAs), regional economic integration agreements and framework agreements on economic cooperation).

22. Ibid, p1.

23. This includes: Australia, Brunei Darussalam, Japan, Malaysia, New Zealand, Singapore, Vietnam, Myanmar, Samoa, Republic of Korea, India, Bangladesh, Cambodia, China, Hong Kong, Pakistan, Indonesia, Democratic People's Republic of Korea, Lao People's Democratic Republic, Macao, Mongolia, Papa New Guinea, Philippines, Taiwan, Thailand and Timor-Leste.
The 10 IIAs signed from the above lists were the Japan-Kazakhstan BIT, Israel-Myanmar BIT, Canada-Republic of Korea FTA, ASEAN-India Services and Investment Agreement, Burkina Faso-Singapore BIT, Côte d'Ivoire – Singapore BIT, Japan-Mongolia EPA, Australia-Japan EPA, Malaysia-Turkey FTA and Australia-Republic of Korea FTA.
The above research is based on the investmentpolicyhub.unctad.org website, accessed 25 March 2015.

24. While the full text of the BIT is not publicly available, the Singapore Ministry of Trade and Ministry has confirmed in a press release that the BIT "[o]ff[ers] international arbitration as an avenue for … investors to resolve investment disputes."
Singapore Ministry of Trade and Industry, 'Singapore Signs Bilateral Investment Treaty With Burkina Faso And Ivory Coast To Promote Greater Investment Flows'.www.mti.org.sg. N.p., 27 August 2014,-www.mti.gov.sg/NewsRoom/SiteAssets/Pages/Singapore-Signs-Bilateral-In

vestment-Treaty-With-Burkina-Faso-And-Ivory-Coast-To-Promote-Greater-Investment-Flows/SINGAPORE%20SIGNS%20BILATERAL%20INVESTMENT%20TREATY%20WITH%20BURKINA%20FASO%20AND%20IVORY%20COAST.pdf.

25. Ibid.

26. Interestingly, Article 14.19 of the 'Agreement Between Australia and Japan for an Economic Partnership' and accompanying Investment Chapter leaves open the possibility of an ISDS provision being included in the future:
Article 14.19 - Review
1. Unless the Parties otherwise agree, the Parties shall conduct a review of this Chapter with a view to the possible improvement of the investment environment through, for example, the establishment of a mechanism for the settlement of an investment dispute between a Party and an investor of the other Party. Such review shall commence in the fifth year following the date of entry into force of this Agreement or a year on which the Parties otherwise agree, whichever comes first.
2. The Parties shall also conduct such a review if, following the entry into force of this Agreement, 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 or the other party to that agreement, with a view to establishing an equivalent mechanism under this Agreement. The Parties shall commence such review within three months following the date on which that international agreement entered into force and will conduct the review with the aim of concluding it within six months following the same date.
3. At any time after the first year following the entry into force of this Agreement, either Party may request the other Party to agree to commence the review provided for in paragraph 1.

27. UNCTAD (Note 21, above), p5.

28. *Louis Dreyfus Armateurs v India (UNCITRAL)* and *Vodafone International Holdings BV v India (UNCITRAL).*

29. *Ansung Housing Co., Ltd. v People's Republic of China* (ICSID Case No. ARB/14/25).

30. *Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v Republic of Indonesia* (ICSID Case No. ARB/14/15).

31. UNCTAD (Note 21, above), p13-14.

32. D*eutsche Telekom v India* and*Khaitan Holdings Mauritius v India* (UNCITRAL).

33. *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/13/1).

34. *RECOFI v Vietnam* (UNCITRAL).

35. UNCTAD (Note 21, above), p25-26.

36. Ibid, p13. The two known cases are *Bejing Urban Construction Group Co. Ltd. v Republic of Yemen* (ICSID Case No. ARB/14/30) which involves a Chinese investor and *Ansung Housing Co., Ltd. v People's Republic of China* (ICSID Case No. ARB/14/25) which involves a South Korean investor. Two claims were filed by investors whose home state was unknown.

37. UNCTAD (Note 21, above), p5.

38. For a critical study of the recent UNCTAD report see Esme Shirlow's article on 'Looking behind the Statistics for Investment Arbitration'. Kluwer Arbitration Blog. 24 Feb. 2015.http://kluwerarbitrationblog.com/blog/2015/02/24/looking-behind-the-statistics-for-investment-arbitration/.
39. 2015 also saw two new bilateral investment treaties signed between Japan and Ukraine (05/02/2015) and Japan and Uruguay (26/01/2015). Neither have entered into force and both are publicly available. Both have an ISDS provision.
40. Currently including Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam
41. Beth Cubitt. 'Potential Investor-State Dispute Settlement Provisions in Trans-Pacific Partnership Agreement – A Change in Policy for Australia?' Kluwer Arbitration Blog, 14 February 2014, http://kluwerarbitrationblog.com/blog/2014/02/14/potential-investor-state-dispute-settlement-provisions-in-trans-pacific-partnership-agreement-a-change-in-policy-for-australia/.
42. Beth Cubitt. 'Potential Investor-State Dispute Settlement Provisions in Trans-Pacific Partnership Agreement – A Change in Policy for Australia?' Kluwer Arbitration Blog. 14 Feb. 2014.http://kluwerarbitrationblog.com/blog/2014/02/14/potential-investor-state-dispute-settlement-provisions-in-trans-pacific-partnership-agreement-a-change-in-policy-for-australia/.
43. Ibid. 'Whereas the inclusion of ISDS provisions in investment treaties was an uncontroversial political issue in the past, the Philip Morris arbitration and the inevitable conception of the TPPA has created significant debate in Australia and forced a divide between the Labour and Coalition Governments' approach to the issue.'
44. Australian Government – Department of Foreign Affairs and Trade. Trade and investment topics:
    'The Government will consider ISDS provisions in FTAs on a case-by-case basis.
    The Australian Government is opposed to signing up to international agreements that would restrict Australia's capacity to govern in the public interest – including in areas such as public health, the environment or any other area of the economy.' (-www.dfat.gov.au/trade/topics/pages/isds.aspx).
45. Sen. Elizabeth Warren. 'The Trans-Pacific Partnership Clause Everyone Should Oppose'. ***The Washington Post***, 25 February 2015. www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html.
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to take action – on its own, or on the basis of a petition from labor unions or other interested parties – against TPP[A] governments that don't honor their labor commitments. The same is true for enforcing environmental commitments.'- https://www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers.

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50. Trans-Pacific Partnership Agreement (TPP) – Investment chapter – version 20 January 2015. Transnational Dispute Management. www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=13913.
51. Ibid, Note 29.
52. Ibid, section B, article II.22(9).
53. Ibid, section B, article II.22(10): '10. In the event that an appellate mechanism for reviewing awards rendered by investor–state dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article II.28 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article II.23.'
54. Ibid, article II.22(5): 'In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 or any objection that the dispute is not within the tribunal's competence, including an objection that the dispute is not within the tribunal's jurisdiction. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.'

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Innovation in Asia

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Summary

With the Hong Kong International Arbitration Centre (HKIAC) winning GAR's innovation award of 2014,[1] Asia is emerging as a pioneer iof innovation in international arbitration. This chapter examines innovative arbitration practices introduced by various arbitral seats and institutions in Asia and discusses how Asia's forward-thinking mindset has placed it at the forefront of international arbitration best practice.

WHY INNOVATE AND HOW DID IT HAPPEN?

The first question is why does it matter to be innovative? Leading business publication *Entrepreneur* has a direct answer as follows:

> Innovators push the boundaries of the known world. They're change agents who are relentless in making things happen and bringing ideas to execution. In many ways, innovation is key to your success no matter what your business is. The minute you stop innovating is the minute you become mediocre.[2]

In the business world, companies have to be innovative to meet the evolving needs of their clients. Similarly, arbitration practices need to be evolved, with innovative ideas to address any gaps in the business market and any problems faced by commercial parties.

To this end, leading arbitral seats in Asia, such as Hong Kong and Singapore, have been the key driving forces for innovative practices in the region. With world-class legal infrastructures and judicial systems, the government and arbitration community in these jurisdictions have taken innovative steps to further refine their arbitration framework and to push international arbitration practices to a new level.

The background to this is the impressive growth in the number and size of disputes that are being referred to the leading arbitration centres in Asia. Over the past few years, the total number of arbitration cases handled by arbitral institutions in Hong Kong and China together has exceeded that of their Western counterparts.[3] The growth has also attracted leading international arbitral bodies to make arrangements to facilitate their dispute resolution services in Asia. For example, the International Chamber of Commerce (ICC) opened its first overseas secretariat office in Hong Kong in November 2008. More recently the Permanent Court of Arbitration (PCA) entered into a host country agreement with China to provide a legal framework for PCA-administered proceedings in Hong Kong.[4]

The growing caseload in Asia brings more legal talent into the region and fosters a culture of innovation to keep Asia at the leading edge of thinking in international arbitration. This thinking has driven many arbitral seats and bodies in the region to innovate and to customise their arbitration offerings for their users. Leading arbitral institutions in Asia have ignited waves of innovative activity and are the trendsetters in pushing forward arbitration revolutions. Most arbitral institutions in Asia are relatively new and young entrants in arbitration. In many instances, this also means that these institutions are less bureaucratic and can operate at a higher level of efficiency. This enables these institutions to respond swiftly to any need for improvement and can take quick actions to perfect their arbitration systems in a creative manner. As a result, Asia is transitioning from a 'follower', emulating traditional arbitral jurisdictions, to a 'mover' that develops innovative arbitration practices to shape the future of arbitration.[5]

INNOVATIVE ARBITRATION RULES

The last several years have seen innovative procedures introduced by major arbitral institutions in the region with a view to promoting diversity of institutional choices for users of arbitration.

For example, HKIAC has consolidated best arbitration practices into its latest set of rules – 2013 HKIAC Administered Arbitration Rules (HKIAC Rules). Recognised by ***GAR*** as one of the best developments in 2013,[6] the HKIAC Rules create a sophisticated system which offers parties the following innovative tools to enhance cost-effectiveness and efficiency of arbitration.

Choice Of Method To Remunerate Arbitral Tribunal7

HKIAC is the first institution to offer parties a choice to pay the arbitral tribunal based on the amount in dispute or hourly rates. If parties choose the latter, the arbitrator's rate must not exceed a fee cap[8] unless the parties agree or HKIAC determines otherwise. This choice allows the parties to select the most economical way to pay the tribunal. For example, if a party claims a significant amount in a straightforward dispute, the parties can opt for an hourly arrangement to save costs. Equally, if the amount in dispute is small but the dispute involves complex factual and legal issues which would take the tribunal a long time to decide, it would make sense for the parties choose to pay the tribunal based on the sum in dispute. The uniqueness of this mechanism has earned HKIAC a ***GAR*** nomination for best innovation of 2013.[9]

Standard Terms Of Appointment10

All arbitrators appointed under the HKIAC Rules must use the standard terms of appointment (subject to any variations through party agreement or by HKIAC). The uniformity created by these standard terms will lead to a transparent and efficient appointment process. HKIAC is the only institution that has introduced such terms. Parties to arbitrations under other institution rules will have to negotiate specific terms and conditions with their arbitrators – a process that often results in dissatisfaction.

Multi-party And Multi-contract Provisions11

The HKIAC Rules contain comprehensive and far-reaching provisions to maximise the ability of HKIAC and arbitral tribunals to manage complex disputes involving multiple parties or multiple contracts. In this regard, the HKIAC Rules are the first set of rules that offer a complete system to deal with complex arbitrations by joinder, consolidation and single arbitration under multiple contracts in the Asia-Pacific region.[12] The joinder provision allows an existing or additional party to submit a request for joinder at any stage of the arbitration. The consolidation provision empowers HKIAC to consolidate several arbitrations if they involve a common question of law or fact, claims arising out of the same transaction or a series of transactions, and compatible arbitration agreements. An innovative feature is that the HKIAC consolidation provisions cover situations where the parties to each arbitration are different. This is particularly useful for finance, construction, insurance/reinsurance, M&A and supply train disputes where the relevant contracts often involve different parties. Alternatively, under the HKIAC Rules a party may commence a single arbitration under multiple contracts from the outset to avoid seeking consolidation later.

These trend-setting provisions have prompted many other institutions in the region to include similar provisions in their rules. Both the 2014 version of the Japan Commercial Arbitration Association (JCAA) Commercial Arbitration Rules and the 2015 version of the

China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules now include a suite of provisions regarding joinder, consolidation and single arbitration under multiple contracts. CIETAC's Hong Kong Arbitration Center now also offers parties a choice to determine the arbitral tribunal's fees based on either the amount in dispute or hourly rates.

In Kuala Lumpur, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) has developed an innovative set of rules tailored for disputes arising from commercial transactions based on Islamic principles of shariah.[13] Known as the i-Arbitration Rules, the rules are largely based on the UNCITRAL Arbitration Rules with some modifications. The most notable modification is the addition of a provision to refer shariah issues to a shariah advisory council or a shariah expert. This is a useful innovation to meet the specific need of Islamic finance parties and is a helpful contribution to the arbitration options in Asia. The introduction of the i-Arbitration Rules won KLRCA the ***GAR*** innovation award of 2012.

DESIGNATION OF GOVERNING LAW OF THE ARBITRATION AGREEMENT

A revolutionary development in international arbitration last year was the introduction of HKIAC's new model clauses, which for the first time have included a provision to prompt parties to designate an appropriate law to govern their arbitration agreement.[14]

The law of the arbitration agreement generally deals with the formation, existence, scope, validity, interpretation and enforceability of the arbitration agreement. This is to be distinguished from the law of the substantive contract and the law of the seat. The former determines the substantive dispute and the latter governs the procedural conduct of the arbitration. In practice, parties often fail to recognise the importance of the law of the arbitration agreement and do not specify the law in their contracts. This creates uncertainty as to which law will apply to the arbitration agreement, especially where the law of the contract and the law of the seat are not the same.

The uncertainty is manifested by inconsistent court decisions from different jurisdictions as to what law should govern the arbitration clause where there is no express choice. The English courts will engage in a three-stage inquiry to apply the law that has the closest and most real connection with the arbitration agreement, absent an express or implied choice.[15] In ***Sulamérica v Enesa Engenharia***,[16] the English Court of Appeal created a rebuttable presumption that the law of the substantive contract will apply in this situation.

The Hong Kong courts have adopted a similar approach emphasising the need to examine the particular terms of the arbitration agreement and the surrounding circumstances. In ***Klöckner v Advance Technology***,[17] the Hong Kong Court of First Instance (CFI) concluded that the law of the substantive contract was intended to govern the arbitration agreement.

However, a different approach has been taken by the Singapore and Indian courts. In ***FirstLink v GT Payment***,[18] the Singapore High Court held that, by default, the arbitration agreement would be governed by the law of the seat, rejecting the presumption that parties would want the same law to govern their performance of the contract and the resolution of their disputes. Similarly the Indian Supreme Court has held that the law of the seat would apply to an arbitration clause with an unclear choice of governing law.[19]

Given the lack of international consistency, HKIAC updated its model clauses in August 2014 to include a choice-of-law provision. Such a provision can prevent disputes concerning which law should govern the arbitration agreement. Many law firms have now advised their clients to include the suggested provision in their contracts.

The HKIAC model clause is also a useful addition to China or India-related contracts. Since Chinese law does not recognise ad hoc arbitration, parties to China-related transactions can adopt HKIAC's model clause and choose a different law to govern their arbitration agreement. This can avoid any adverse impact of Chinese law that would potentially render the agreement invalid. For India-related contracts, the use of HKIAC's model clauses can avoid the risk of any interference of the Indian courts to determine the law of the arbitration agreement.

This innovative provision of the HKIAC model clauses has received worldwide recognition and has led to HKIAC winning the GAR award for 'innovation by an individual or organisation in 2014'.[20]

USE OF TRIBUNAL SECRETARIES

As international arbitration cases have generally grown more complex, there is a clear demand for tribunal secretaries to manage administrative tasks in arbitration, allowing the arbitral tribunal to focus on deciding the merits of the dispute. The trend is reflected in the results of a 2012 ICCA survey which indicated an overwhelming 95 per cent approval of the use of tribunal secretaries.[21] However there are also concerns of such a secretary going beyond his or her mandate and improperly influencing the tribunal's decisions. The concerns are highlighted in the recent ***Yukos v Russia*** case, where Russia has sought to challenge the award based on, among other things, an allegation that the tribunal secretary played in excessive role in the tribunal's decision-making process.

Two arbitral institutions in Asia have quickly responded to the trend of using tribunal secretaries and the associated concerns by introducing measures to regulate the role of these secretaries.

HKIAC is the first institution to address the use of tribunal secretaries in the Asia-Pacific region. On 1 June 2014, HKIAC issued the Guidelines on the Use of a Secretary to the Arbitral Tribunal (the Guidelines),[22] providing detailed provisions regarding the appointment, removal, remuneration and duties of tribunal secretaries. To address the controversy surrounding the role of tribunal secretaries, the Guidelines define the tasks that can be performed by a secretary in a comprehensive manner while allowing the parties to agree or the tribunal to direct otherwise. The Guidelines have also established a system to determine the fees and expenses of a tribunal secretary. The Guidelines can be used by parties in arbitrations administered by HKIAC under any version of the HKIAC Administered Arbitration Rules or the UNCITRAL Arbitration Rules or any other cases after consultation with HKIAC.

In addition to the Guidelines, HKIAC has also introduced a tribunal secretary service giving tribunals the opportunity to appoint a member of the HKIAC Secretariat as secretary.[23] This service allows the HKIAC Secretariat to save time and costs for parties, to provide useful insights into the HKIAC arbitral procedures, and to assist the tribunal in managing the arbitral process more efficiently. HKIAC has recently provided such service to an emergency arbitrator who was appointed to decide an application for emergency relief arising out of a US$1.9 billion M&A dispute. With the assistance of an HKIAC Secretariat member, the emergency arbitrator rendered an emergency award within just a few days after the hearing. HKIAC is the only institution that has provided a tribunal secretary service in the region. This innovation contributes to HKIAC's winning of the ***GAR*** award for best innovation of 2014.[24]

Eight months after HKIAC introduced the Guidelines, the Singapore International Arbitration Centre (SIAC) issued a brief Practice Note on the Appointment of Administrative

Secretaries (the Practice Note).[25] The Practice Note applies to all secretaries appointed in SIAC-administered cases on or after 2 February 2015. In an effort to control arbitration costs, the Practice Note provides for different methods to remunerate a tribunal secretary for cases below and above S$15 million (approximately US$11 million). For cases where the amount in dispute is below S$15 million, the parties will not bear any fees of a secretary. However, where the amount in dispute is S$15 million or above, the parties may be asked to pay the fee of the secretary. Such fee shall not exceed S$250 (approximately US$180) per hour.[26]

SPECIALIST ARBITRATION SCHEMES

Concomitant with Asia's fast-paced economic and technological developments, arbitration in Asia has evolved as a viable forum for resolving highly specialist and technical disputes. Several arbitration schemes have been created in Asia to deal with technically complex disputes arising in specialist areas such as aviation and payment of land premium.

In response to the increasing need for institutional arbitration of aviation disputes in China, in August 2014 the International Air Transport Association (IATA), the China Air Transport Association (CATA) and the Shanghai International Arbitration Center (SHIAC) established the world's first body to provide aviation arbitration services – the Shanghai International Aviation Court of Arbitration (SHIACA).

Aviation disputes are commonly dealt with by ad hoc arbitration under the IATA Rules. This presents an issue for aviation disputes in China, because Chinese law does not recognise ad hoc arbitration and requires the designation of an arbitral institution to administer arbitration disputes. SHIACA was created to fulfil this requirement and to provide an onshore forum for contractual aviation disputes, which cover those in relation to procurement, sales and financial leasing of aircrafts, as well as air transport, insurance, fuel supply and ground service.[27] This is a noteworthy innovation which creates an unprecedented specialist arbitration system supported by a list of aviation arbitrators.[28]

Another novel arbitration scheme in Asia is the Pilot Scheme for Arbitration on Land Premium, announced by the Hong Kong government in 2014. The Scheme provides an arbitration procedure for disputes between the government and land developers in relation to land premium payable for lease modification or land exchange applications. The Scheme has begun to run for an initial period of two years since October 2014 and will be subject to further fine-tuning.[29]

An arbitration under the Scheme can be triggered upon proposal by either the government or the developer after they have failed to agree on the relevant land premium amount. A three-member tribunal comprising an experienced legal professional and two surveyors will be appointed to decide the dispute. HKIAC acts as the appointing authority to appoint arbitrators if there is any failure to appoint by the parties. The developer has to pay 15 per cent of the premium last assessed by the government as security to deter the developer from abandoning the arbitration. To ensure that the assessed value does not become out of date, in straightforward documents-only proceedings, the tribunal is expected to issue an award approximately 10 weeks after it is constituted.[30]

The Scheme is the first of its kind and demonstrates the creative use of arbitration for land premium disputes between a government and private developers.

COMBINATION OF MEDIATION AND ARBITRATION

Med-arb or arb-med (collectively, med-arb) is a dispute resolution mechanism that combines mediation and arbitration into a single process. This practice typically involves the same person acting both as mediator to facilitate settlement and as an arbitrator to render a final and binding award.

Various forms of med-arb have long been practised in Asia, because many Asian jurisdictions have a strong preference for mediation as part of their legal tradition. As a result, many Asian arbitral institutions have incorporated med-arb procedures into their rules.[31] While med-arb is perceived by some as an effective means of dispute resolution, it is not without pitfalls. The common criticism appears to focus on the ability of the arbitral tribunal to perform the dual role of arbitrator and mediator in a fair and impartial manner.

The criticism was manifested in the CFI's decision in ***Gao Haiyan v Keeneye***.[32] In that case, the court was asked to decide an application to refuse enforcement of a mainland Chinese award issued under an arb-med procedure. Reyes J of the CFI had serious reservations regarding the conduct of the arb-med process which took place over dinner at the Xi'an Shangri-La Hotel without the presence of the parties and all members of the arbitral tribunal. The Court of Appeal disagreed and found that the arb-med procedure did not cause sufficient concerns of bias having given due weight to the arb-med practice in China. Although the award was ultimately not refused enforcement in Hong Kong, the case shows that the Hong Kong courts will scrutinise med-arb procedures vigorously.[33]

To address the concerns about med-arb, many arbitral institutions in the region have introduced innovative measures to regulate the practice. The 2015 CIETAC Rules allow CIETAC to mediate with the parties' consent in circumstances where the parties are not comfortable with mediation being conducted by the arbitral tribunal.[34] The China (Shanghai) Pilot Free Trade Zone Arbitration Rules have introduced a pre-tribunal mediation procedure. Under the procedure, the Chairman of SHIAC will appoint a mediator within three days of the parties' request and the mediator will not act as arbitrator in the subsequent proceedings unless the parties agree otherwise.[35] In Singapore, SIAC and the Singapore International Mediation Centre (SIMC) have launched an arb-med-arb procedure, which contemplates the constitution of an arbitral tribunal under the SIAC or UNCITRAL Rules, followed by a mediation under the SIMC Mediation Rules which is to be completed within eight weeks. The tribunal will decide any unresolved dispute or record any settlement in the form of a consent award depending on the outcome of the mediation.[36] A similar procedure also exists under the 2015 Beijing Arbitration Commission (BAC) Arbitration Rules.[37]

FUTURE TRENDS

While Asia's desire to innovate continues, more needs to be done to maintain a consistent pattern of excellence in arbitration practices in the region. For example, uniform application of the UNCITRAL Model Law remains a work in progress in Asia. The divergence between the Hong Kong and Singapore courts in relation to the enforcement of five SIAC awards in ***Astro v Lippo***[38] is a recent example in this regard. The Hong Kong Court of First Instance enforced the awards despite the Singapore Court of Appeal's decision to refuse enforcement. A key area of difference between the two courts was whether a party could raise a jurisdictional objection at the enforcement stage if it failed to do so in the arbitration. The Singapore court found that a party was entitled to object to the tribunal's jurisdiction before an enforcement court under the UNCITRAL Model Law, while the Hong Kong court took issue with a party keeping a jurisdictional objection in reserve to be deployed in the enforcement court depending on the outcome of the arbitration.

Notwithstanding the necessary steps to further improvement in Asian arbitration, many jurisdictions in the region have made continuous efforts to introduce best innovations in policing and enhancing global arbitration standards. Through these innovations, coupled with Asia's growing economic power and industry expertise, the arbitration community in the region is on track to build Asia as an arbitration haven to provide relevant practices and expertise that are unmatched in any other region in the world. These innovative developments suggest a trend among arbitral institutions in Asia to lead the development of international arbitration practice. The result is that, in the words of Australian arbitrator Doug Jones AO, 'Asia as a whole is ahead of the game.'

Notes

1. See HKIAC News Flash 'And the GAR Innovation Award goes to … HKIAC', 27 February 2015. Available online atwww.hkiac.org/en/news/526.
2. See www.entrepreneur.com/innovators/.
3. Michael Moser, ***Arbitration in Asia***, 2nd Edition, JurisNet, LLC, 2013, p xix.
4. See 'PCA enters into Host Country Agreement with China', Available online at: www.pca-cpa.org/shownews.asp?ac=view&pag_id=1261&nws_id=471.
5. See Joongi Kim, 'International Arbitration in East Asia: From Emulation to Innovation', ***The Arbitration Brief*** 4, No. 1 (2014), 1-30.
6. 'Vote now for the GAR Awards 2014', 24 Jan 2014. Available online at https://globalarbitrationreview.com/news/article/32341/vote-gar-awards-2014/.
7. The HKIAC Rules, art 10.
8. At the date of writing, the fee cap is HK$6,500/hour (approximately US$830).
9. GAR, (Note 6, above).
10. The HKIAC Rules, schedules 2 and 3.
11. The HKIAC Rules, articles 27-29.
12. ICC is another leading arbitral institution that has offered a similar breadth of multi-party and contract provisions.
13. The text of the i-Arbitration Rules is available online at- http://klrca.org/rules/i-arbitration/.
14. The HKIAC model clauses are available online at www.hkiac.org/en/arbitration/model-clauses.
15. See eg, ***Sulamérica Cia Nacional De Seguros SA and others v Enesa Engenharia SA*** [2012] EWCA Civ 638.
16. ***Ibid.***
17. ***Klöckner Pentaplast Gmbh & Co Kg v Advance Technology (HK) Company Limited***, 14/07/2011, HCA1526/2010.
18. ***FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others*** [2014] SGHCR 12, 19 June 2014.
19. See eg, ***NTPC v Singer***, AIR 1993 SC 998; ***Enercon India v Enercon GMBH***, Civ. App. 2086/7, 2014.

20. *GAR*, 'GAR Awards 2015 – the winners', 26 February 2015. Available online at https://globalarbitrationreview.com/news/article/33584/gar-awards-2015-winners/.
21. Young ICCA Guide on Arbitral Secretaries, the ICCA Reports No. 1, 2014, p 2.
22. HKIAC, 'Guidelines on the Use of a Secretary to the Arbitral Tribunal', 1 June 2014. Available online at www.hkiac.org/images/stories/arbitration/HKIAC%20Guidelines%20on%20Use%20of%20Secretary%20to%20Arbitral%20Tribunal%20-%20Final.pdf.
23. More details about HKIAC's tribunal secretary service are available online at www.hkiac.org/en/arbitration/tribunal-secretary-service.
24. GAR, (Note 20, above).
25. 'Tribunal secretaries: now SIAC issues guidance', 10 February 2015. Available online at https://globalarbitrationreview.com/news/article/33384/tribunal-secretaries-siac-issues-guidance/.
26. SIAC, 'Practice Note on the Appointment of Administrative Secretaries', PN-01/15, 2 February 2015. Available online at https://globalarbitrationreview.com/cdn/files/gar/articles/SIAC.pdf.
27. SHIAC, 'The First Seminar Held by International Shipping and Air Transport Research Group of SHIAC'. Available online at www.shiac.org/English/EventsDetails.aspx?tid=8&nid=781.
28. SHIAC, 'SHIAC Appoints 71 New Foreign and Domestic Arbitrators'. Available online at www.shiac.org/English/NewsDetails.aspx?tid=7&nid=803.
29. Hong Kong government press release, 'Government announces implementation framework of Pilot Scheme for Arbitration on Land Premium', 24 October 2014. Available online at www.info.gov.hk/gia/general/201410/24/P201410240936.htm.
30. See HKIAC News Flash, 'HKIAC Designated as Appointing Authority in the Pilot Scheme for Arbitration on Land Premium', 13 August 2015. Available online at www.hkiac.org/en/news/2014.
31. See eg, ariclet 47 of the 2015 CIETAC Rules; rules 54 and 55 of the 2014 JCAA Rules; articles 42, 43 and 67 of the 2015 BAC Rules; chapter VI of the 2015 China (Shanghai) Pilot Free Trade Zone Arbitration Rules; the SIAC-SIMC Arb-Med-Arb Protocol.
32. *Gao Haiyan v Keeneye Holdings Ltd* [2011] HKCFI 240, 12 April 2011.
33. See Fei Ning, Joe Liu, 'Mediation meets arbitration – the experience of med-arb in Mainland China and Hong Kong', ***Australian Alternative Dispute Resolution Law Bulletin***, 2014, Vol 1 No 5, pp 97-100.
34. See the 2015 CIETAC Rules, article 47(8).
35. See the 2015 China (Shanghai) Pilot Free Trade Zone Arbitration Rules, article 50.
36. See the SIAC-SIMC Arb-Med-Arb Protocol.
37. See the 2015 BAC Rules, article 43.
38. *Astro Nusantara International B.V. v PT First Media TBK*, HCCT 45/2010, 17 Feb 2015; *PT First Media TBK v Astro Nusantara International B.V. et al*, [2013] SGCA 57, 31 October 2013.

39. *GAR*, 'Is Asia ahead of the game?' 20 Oct 2014. Available online at https://globalarbitrationreview.com/news/article/33083/is-asia-ahead-game.

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Economic Damages

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Summary

ACQUISITION PREMIUMS AND THE PRIVATE BENEFITS OF CONTROL

In 2014 the management and strategies of several large publicly listed firms were the subject of high-profile public debates between activist shareholders and the firms' managers. For example, in September 2014, Starboard Value, a US-based hedge fund, publicly criticised the management of Yahoo! and suggested that it explore a merger with AOL. A month later, Third Point, a US investment fund, stepped up its criticism of Dow Chemical's performance and strategy. In Japan, Sony resisted calls from Third Point to spin off parts of its operations, until Third Point sold its stake in Sony.

These public debates have taken place against a backdrop of increased shareholder activism. In total, *The Economist* estimates that since 2009, 15 per cent of the members of the S&P500 have come under 'attack' from activist shareholders.[1]

The adversarial stance adopted by many activist investors has has caused more attention to be paid to the benefits and value associated with corporate control and how the benefits of that control are split between owners and managers. In modern finance a distinction is drawn between 'ownership' and 'control'. Ownership refers to the proportionate right to a share of the net assets held by a company and the income generated by those assets. Control, on the other hand, refers to the ability to direct the company's operational, strategic and capital allocation decisions.

For many assets, ownership confers control; ownership of a car grants the owner control over how that car is used. However, in corporate contexts the relationship between ownership and control is often less clear.

At one end of the spectrum, a family business might be 100 per cent owned and managed by a single founder or family. In this case the family both owns and controls the company. Such tightly held, family-orientated ownership structures are a common characteristic of Asian corporations. In certain cases, a family might achieve control of a company, or a group of companies, through a complex structure of stock pyramids and cross holdings. They might also enjoy voting rights disproportionate to their rights over the corporation's cash flows.

On the other hand, in the US and Europe, large companies are typically publicly listed and their ownership is dispersed across a large number of shareholders, each of whom may only own a small fraction of the company's equity. The management of these companies is delegated to a team of managers who do not own a significant part of the company's equity and may, or may not, have contracts to align their interests with those of the company's shareholders. Although, as activist hedge funds have shown, it is possible to wield considerable influence over a company's strategy even in the absence of a controlling stake, giving rise to a degree of de facto control over the entity.

Between these two poles lie a diverse range of ownership-control structures. In some cases, a degree of control might also be held by third parties. For example, debt covenants can restrict the set of actions available to the company and its management in respect of, inter alia, the payment of dividends, the assumption of additional debt, or the disposal of major capital items. These covenants transfer some elements of corporate control to debt, rather than equity, investors (or their agents, the management).

A complete taxonomy and discussion of the many ways in which control may be distributed among different classes of investors and stakeholders, who may in certain circumstances

include suppliers or customers, is too vast to cover in this paper. In the interests of simplicity, this paper assumes that the controlling investor holds a majority of the company's equity and voting rights and is able to exercise full control over the actions of the company's management.

THE VALUE OF CONTROL

The value of a commercial asset is a function of the amount, timing and risks of the cash flows that it is expected to generate. In theory, the value of control should be no different – to be valuable, control must allow its beneficiary to: (i) earn additional cash flows; (ii) bring forward the realisation of expected positive cash flows; (iii) push out the realisation of expected negative cash flows; or (iv) reduce the risks associated with the expected cash flows.

In practice, there are many ways in which an investor might realise value from control. These fall into two broad categories. First, control allows the investor to organise the affairs of the company in ways that maximise the value of the company to the benefit of all shareholders. These general benefits of control might arise from steps taken to:

- improve the company's profit margin;
- increase the efficiency with which the company uses its assets;
- reduce the company's debt interest rate;
- optimise the capital structure of the company; or
- reduce the company's tax burden.

Within the DuPont framework, each of these actions would increase the return on the company's equity and, in theory, its share price.[2] In each case, if these strategies are successful they will increase the value of all of the company's equity, benefiting not just the controlling investor, but also any non-controlling investors. As observed in the *Financial Times*:[3]

> Companies that are doing poorly are the ones that tend to get targeted [by activist hedge funds]. A well thought out business plan for a company that has become somewhat entrenched in its thinking can result in all shareholders over time becoming substantially enriched.

However, not all of the benefits of control are necessarily shared, or shared proportionally, across all equity investors.

Control might also allow an investor to generate private benefits, possibly at the expense of non-controlling investors. For example, the controlling investor might set the company's dividend policy to suit its cash flow needs rather than those of other investors. Alternatively, the controlling investor might seek to extract value from the company at the expense of non-controlling investors through 'self-dealing', which might include actions such as:

- withdrawing assets from the company at below market value;
- inducing the company to enter non-arm's-length contracts with parties related to the controlling investor; and
-

restructuring the company's ownership rights to further reduce the influence of, or 'squeeze out', non-controlling investors.

Even if the controlling investor does not engage in self-dealing, it enjoys (implicitly valuable) protection from the potential self-dealing activities of other investors.

The extent to which a controlling investor can use these, or other, strategies to realise value from its control is dependent on the specific characteristics of the controlling investor, the asset and its management team.

The availability of general benefits depends to a large degree on the quality of the company's current operations and incumbent management. If the company in question is already well managed, uses its assets wisely and invests optimally then the additional general benefits that can be generated through control may be relatively small, in the absence of improvements in the efficiency of the company's capital structure.

Alternatively, if the company has poor management, or is failing to keep up with its competitors, a controlling investor may be able to generate additional value by having the company invest in new projects or undertake cost-cutting programmes to improve its margins. In this case, the value of control will be a function of the expected additional cash flows and the ease with which the controlling investor can implement the necessary changes.

The industry in which the target company operates likely affects both general and private benefits of control. It stands to reason that the potential benefits of management change would be greatest in industries where a company's performance is particularly sensitive to the strategic actions of management. Dyck and Zinglaes (2004)[4] found that more competitive, lower margin industries are associated with lower private benefits, because companies operating in those industries are less likely to survive the inefficiencies introduced by self-dealing.

In many jurisdictions non-controlling investors enjoy some statutory protection from self-dealing. For example, in Singapore, shareholders are protected by well specified accounting standards and disclosure requirements that make it easier for the non-controlling investor to verify the income earned by the controlling investors and identify instances of self-dealing. Shareholders can also seek remedies from the courts if they feel that their interests have been unfairly prejudiced by the actions of the company.

Additional protections might also be enshrined in the company's articles of association or shareholders' agreement as super-majority clauses; veto rights or buyout rights.

These protections reduce the controlling investor's ability to generate private gains at the expense of the non-controlling investors, reducing the value of control. Variations in the protections granted to non-controlling investors, and the enforcement of those protections, suggest that the value of control should vary between jurisdictions; lower values of control should, in theory, be observed in jurisdictions that grant non-controlling investors extensive protections, as compared to jurisdictions with fewer protections for non-controlling investors.

Empirical research bears out this prediction. Both Dyck and Zinglaes (2004) and Nenova (2003)[5] found that the premiums paid for control are greatest in countries offering fewer protections to non-controlling investors. Dyck and Zinglaes (2004) also found that the

extraction of private benefits was also curbed by extra-legal factors, such as social norms and the ease with which public opinion is mobilised and expressed.

ESTIMATING THE VALUE OF CONTROL

Despite the importance of control to investors, it is the subject of relatively little empirical investigation. This lack of evidence is, in part, a function of the concealed nature of the benefits conferred by control, particularly the private benefits. A controlling investor will only value the private benefits of control when the extraction of those benefits cannot be frustrated by the non-controlling investor. If the extraction of private benefits can be observed, and demonstrated in court, a non-controlling investor may more easily resist a controlling investor's efforts to appropriate those benefits.[6]

To overcome this difficulty, researchers have attempted to infer the value that investors place on control by observing the prices paid in transactions that confer control, rather than attempting to estimate the value of control directly. Researchers have identified two ways in which the value of control might be inferred from publicly observable data.

The first method focuses on companies with multiples classes of traded shares conferring different voting rights. Shares with voting rights tend to trade at higher prices than shares without voting rights. This price differential reflects the value of a vote. Researchers assume that a shareholder competing for control would be willing to pay the minority holders of voting shares a premium, over the price of a non-voting share, that reflects the value of the private benefits the controlling shareholder expects to earn.[7]

This approach suffers from certain weaknesses. Most significantly, at any given date, relatively few companies are the subject of a contest for control. However, the minority holder of a voting share can only realise the value of the vote when control is contested. Therefore, for those companies not subject to an active contest for control, the price differential between voting and non-voting shares will include, among other things, an assumption about the probability that a contest for control will arise.

In addition, many jurisdictions prohibit multiple share classes, which limits the number of countries that can be subjected to empirical analysis. Even where companies are permitted to issue multiple classes of shares, those that elect to do so generally represent a small minority of listed companies. The self-selected nature of the sample raises the concern that the results of such studies may not be applicable to the wider universe of companies that do not issue multiple classes of shares.

The second method draws on the prices paid in acquisitions of controlling stakes in publicly listed companies. Transaction prices are sourced either from privately negotiated acquisitions of controlling stakes from a single vendor, or from instances of control being acquired through an offer made to all shareholders. The value of control is assumed to be captured by the difference between the transaction price per share and the traded share price before the transaction was announced (the transaction premium).

As a purely hypothetical example, suppose Emptor Ltd acquires a controlling stake in Caveat Plc for US$13 per share (the 'transaction price'). Before the acquisition, the shares of Caveat Plc traded at a US$10 per share (the 'pre-acquisition market price'), and rose to US$12 per share after the transaction (the post-acquisition market price). In this case, it might be assumed that:

-

the total value of control to Emptor Plc was US$3 per share, namely the difference between the transaction price and the pre-acquisition market price;

- Emptor Plc's control of Caveat Plc was expected to generate US$2 per share of general benefits accruing to all shareholders, namely the difference between the post-acquisition market price and the pre-acquisition market price; and
- Emptor Plc expects to be able to extract US$1 per share of private benefits, namely the difference between the transaction price and the post-acquisition market price.

This approach is also not without potential problems. Most fundamentally, it has been suggested that the premiums observed in the acquisitions of controlling stakes are simply due to systematic overpayment or evidence of a winner's curse.[8] Between 1992 and 2006 BCG estimates that 58 per cent of M&A deals destroyed value for the acquirer's shareholders.[9] Implicitly, positive average ex ante control premiums might conceal average ex post control premiums of close to, and perhaps below, zero.

Dyck and Zinglaes (2004) reject this overpayment hypothesis. They argue that if the observed premiums were attributable to overpayment, one would expect the acquirer's share price to fall following the announcement of the acquisition. Since, in those cases where data is available, no statistically significant fall in the acquirer's share price is observed, Dyck and Zinglaes conclude that the premiums paid in acquisitions are not attributable to systematic overpayment.[10]

Even where overpayment is not a significant issue, it is unclear that transaction premiums can be used to arrive at widely applicable estimates of the value of control. The difference between a company's pre-acquisition market price and the transaction price might be driven by a number of things unrelated to the value of control.

In some cases the quoted market price of shares in thinly traded companies, may not reflect the contemporaneous price at which those shares would trade on the market. For example, in many small quoted companies a large percentage of the outstanding shares are held by insiders, who are neither buyers nor sellers in the market. In these cases, shares in the company may trade infrequently on the market.

Since the quoted share price reflects only the price at which the company's shares were last traded, this price may no longer reflect the company's market value. The transaction premium observed in the acquisition of the company might, therefore, include an 'update' to the market price that is not entirely attributable to control.

In addition, many transactions are motivated by factors beyond the target company's cash-generative capacity. PwC's 2014 M&A Integration Survey Report found that in 2013 'access to new brands, technologies or products', 'access to new markets' and 'operational synergies' were each reported as 'very important' strategic goals by over 40 per cent of survey respondents.

These strategic goals may generate significant additional cash flows for the purchaser. However, the value of these cash flows will be heavily dependent on the specific characteristics of the acquirer. For example, following its acquisition of F&N, TCC Assets was expected to realise significant synergies from the sale of F&N's products through the distribution network operated by its subsidiary, ThaiBev. These synergies would not have been available, or at least not to the same extent, to an alternative acquirer.

As a result of perceived synergistic or strategic benefits, the value of the asset to an acquirer may exceed the market price for the asset. An acquirer who is able to derive value from an asset that would not be available to other market purchasers is sometimes referred to as a 'special purchaser' who places a 'special value' on the asset.[11]

This gives rise to a distinction between the 'value' of the asset to the acquirer and the 'price' at which it is willing and able to acquire the asset. Typically, the value of the asset to the acquirer sets an upper limit on the price it is willing to pay for the asset.

The potential vendor may also derive special benefits from ownership of the asset. A transaction will only occur if the value of the asset to the potential acquirer exceeds its value to the owner. The gap between these two values creates a space in which the transaction price can be negotiated. The agreed transaction price will then be a function of the relative bargaining positions of the two parties.

This suggests that the size of an observed transaction premium may be very sensitive to the unique characteristics of the acquirer, and to some extent, the vendor. Care must therefore be taken when applying the results of analysis based on such premiums to valuations in which strategic benefits may, or may not, be present.

More generally, Nath (1990, 1994 and 2011)[12][13][14] has argued that in the majority of cases companies trade at close to their control value and therefore the premiums paid in acquisitions do not reflect the benefits of control. He identifies three main reasons for this:

- first, only 3–4 per cent of publicly traded companies are subject to takeovers in any given year. This is much lower than would be expected if gaining control of public companies enabled the acquirer to realise significant additional value;
- second, the premiums observed in acquisitions are a function of the laws of supply and demand. The presence of an investor seeking to purchase a large number of shares represents an increase in demand for those shares. This results in an increase in the share price, which is unrelated to control. It is, however, unclear why a short-term excess of demand for a share would increase the price of that share above the value of that share over the long term; and
- third, to gain control of a public company, it is necessary to convince the holders of the majority of the company's shares to sell. The price required to convince the majority of the company's shareholders to sell may exceed the traded share price, which represents only the price at which the marginal shareholder would be willing to sell. Again, this effect is unrelated to the value of control.

It remains debatable whether Nath's observations imply that the trading price of a share already includes a premium for control, which should be backed out when valuing a minority stake (as Nath suggests), or whether the applicable control premium is small and therefore the value of a share without control is approximately equal to the value of a share with control (as others have suggested).[15]

A final complication, common to both of the approaches used to estimate the value of control, concerns the related concepts of liquidity and marketability.[16] Individual shares in publicly listed companies are generally assumed to be both liquid and marketable. Listing shares of a company provides a mechanism through which the shares can be easily and quickly traded, as well as access to a large pool of potential purchasers.

Generally speaking, large blocks of shares are assumed to be less marketable than small blocks, since fewer purchasers will be able to afford the larger stake, reducing the pool of potential purchasers. In transactions involving large tranches of shares a discount may be applied to the transaction price, to reflect the reduced marketability of the asset.

While a large stake in a company is able to command a premium for control, it is also subject to a discount for lack of marketability. Therefore, unless these two effects are separated, the analysis based on the transaction prices of large blocks of shares may, in fact, understate the value of control.

However, the relationship between control and marketability is not necessarily so simple. A full account of the potential interactions between control and marketability is beyond the scope of this article. However, as a simple example, a 45 per cent stake in a company might lack both control and marketability, since few investors would be willing to make such a significant investment in a company without the protections conferred by control.

Increasing that stake to 51 per cent would, in most cases, grant the investor control. Since control is a desirable characteristic, the presence of control might make such a stake more attractive to potential purchasers. Thus, in some circumstances, moving from a large, but non-controlling stake in a company to a controlling stake may result in increased marketability as well as increased control.

CONTROL PREMIUMS IN VALUATION

The empirical challenges that arise when seeking to estimate the value of control have not prevented valuation practitioners from applying large control premiums, and discounts for lack of control, to their valuations.

Whether an adjustment for control is applicable depends, in part, on the valuation approach adopted. Two of the most frequently used methods of estimating the value of an asset are income approaches, such as discounted cash flow (DCF) modelling, and market-based approaches, usually based on comparable companies' multiples of (say) profit or sales.

Income approaches to valuation assume that an asset's value today is equal to the value of the cash flows that the asset is expected to generate in future, discounted at a rate that reflects the risks inherent in those cash flows. In a DCF approach, the company's expected cash flows are projected over a discrete period, followed by an assumption of a mature state from which a 'terminal' or 'continuing' valuation is derived.

An advantage of DCF models is that they allow for valuations to be performed using multiple scenarios. Thus, the expected value of changes to the company's capital structure, investment plans, revenue streams or costs can be explicitly included in the analysis.

In many cases the cash-flow projections and discount rates used in DCF models are assumed to represent the optimal use of the company's assets and its ideal capital structure. The DCF value, therefore, includes, at a minimum, many of the general benefits of control. Applying an additional premium predicated on the availability of general benefits from control would double count these benefits.

In cases where DCF analysis is used to value a non-controlling stake in a company, it is common to apply a 'discount for lack of control' to the pro rata value of the non-controlling stake. This discount reflects that the controlling investor may extract private benefits that

reduce the value of the non-controlling investors' stake to a fair market value that is below its pro rata value.

The applicability of a 'discount for lack of control' also depends on the context in which the valuation is performed. It may not, for example, be appropriate to apply a discount for 'lack of control' in cases involving the unlawful expropriation or wrongful taking of an asset.

Mathematically, the applicable discount for lack of control is often assumed to be equal to:

1 – (1/(1 + control premium))

However, this relationship potentially fails to distinguish between general and private benefits of control. Since the discount for lack of control may only be applicable in cases where the controlling investor is able to extract private benefits at the expense of the minority, the above formula may overstate the discount for lack of control if the control premium includes general benefits of control.

In practice, many jurisdictions require mandatory offers to be made for all of a public company's stock once the acquirer's stake exceeds a certain threshold. The presence of these requirements further complicates the analysis of the relationship between control premiums and discounts for lack of control. The acquirer of a large stake in a public company might be unwilling to pay for the perceived private benefits of control, if there is a risk that it will be obliged to purchase all of the company's outstanding shares. This might reduce both the control premium and the minority discount implied by the transaction price.

More generally, since discounts for lack of control reflect, in part, the risk that a controlling investor might seek to extract private gains at the expense of the non-controlling investor, they might be more significant in valuations where there is a controlling investor capable of extracting private benefits, or where it is likely that a single investor will gain control of the company.

A market-based approach relies on the market prices of shares in companies sufficiently comparable to the target. There are two commonly used sources of pricing data:

- the prices at which shares in publicly listed comparable companies are traded on the stock market (trading prices); and
- the prices at which blocks of shares in comparable companies are acquired in publicly announced, arm's length transactions (transaction prices).

Market-based valuations that use trading prices are often assumed to exclude any value of control. Since the ownership of small parcels of shares does not, generally, confer control, it is assumed that valuations performed with reference to the prices of small parcels of shares will also not include the value of control.

However, when applying a control premium to valuations performed using trading prices, care must be taken to ensure that the benefits of control are not double counted. If the comparable companies used to value the target asset are well run, applying an additional premium predicated on some improvement in the target company's efficiency or growth may double count the benefits of control.

CONCLUSION

To date, Asia has seen relatively little public criticism of managers by shareholders. However, there are signs that hedge funds are increasingly interested in the gains that could be made from taking activist positions in Asian corporates. For example, Third Point has recently used its stake in Funuc, the world's largest robotics company, to call for a share buy-back. In February 2015 Singapore saw the launch of a new hedge fund, EVA Capital SP, whose explicit strategy is to take activist positions in small and medium size construction and engineering companies.

These developments suggest that public battles for corporate control may become increasingly common in Asia. As this occurs, the ability to accurately estimate the value that might be gained from control will become increasingly important.

Attempts to estimate the value of control have been hindered by the difficulties of directly observing the value placed on control by investors in situations where the researcher cannot observe those investors' plans or expectations. As noted above, there are legitimate concerns that control premiums estimated with reference to the prices paid in acquisitions may systematically overstate the value of control.

Ideally, to overcome these difficulties, the incremental cash flow and risk reduction benefits associated with control should be projected and valued explicitly, with reference to the specific characteristics of the target asset and its acquirer. Regardless of the valuation approach adopted, care must be taken to ensure that the application of a control premium does not double count these benefits.

Where the benefits of control are not susceptible to direct observation, the applicable control premium is left within the judgement of the valuer. The valuer must therefore decide where the company lies within the range, from companies that could command a significant control premium to those that might command no premium. This assessment should be guided by the characteristics of the company itself.

Notes

1. *The Economist*, 'The new masters of the universe', 9 February 2015.
2. CFA Institute, 2007. Financial Statement Analysis, CFA Program Curriculum (2007) Level 1 (Volume 3) (Volume 3). Edition. CFA Institute; p227.
3. *Financial Times*, 'Shareholder activism: Battle for the boardroom', 23 April 2014.
4. Dyck and Zinglaes (2004): Dyck, Alexander and Zingales Luigi. 'Private Benefits Of Control: An International Comparison', *Journal of Finance*, 2004, v59(2 April), 537-600.
5. Nenova (2003): Nenova, Tatiana, 2003, 'The value of corporate voting rights and control: A cross-country analysis', *Journal of Financial Economics 68*, 325–351.
6. It should be noted that this resistance may be unsuccessful, particularly where courts are reluctant to interfere in decisions taken by a company's management, except in the most extreme cases.
7. See Nenova (2003) and Dyck and Zinglaes (2004) (Noted 5 and 4, above).
8. A winner's curse can occur in auctions where participants have incomplete information concerning the target asset and the other potential acquirers. In such cases, the asset's eventual acquirer cannot be sure that it has not overpaid for the asset, since all the other participants in the auction, by definition, considered the asset to be worth less than the acquirer paid.

9. BCG Perspectives: 'The Brave New World of M&A'.
10. This analysis relies on the assumption that privately owned acquirers are no more susceptible to overpayment than publicly listed acquirers.
11. See, for example, the definitions provided by the International Valuation Standards Council.
12. Nath 1990: Nath, Eric, 1990, 'Control Premiums and Minority Interest Discounts in Private Companies', ***Business Valuation Review*** v9(2), 39-46.
13. Nath 1994: Nath, Eric, 1994, 'A Tale of Two Markets', ***Business Valuation Review*** v13(3), 107-112.
14. Nath 2011: Nath, Eric, 2011, 'Best Practices Regarding Control Premiums: comments regarding the appraisal foundation's proposed white paper on control premiums', ***Journal of Business Valuation***, 2011, v2, 25-30.
15. See Bolotsky (1991) for a discussion of both positions.
16. Although the terms are sometimes used interchangeably, in this article 'liquidity' is defined as the ease and speed with which an asset can be converted in to cash at relatively little cost. Marketability on the other hand refers to the size of the potential pool of acquirers for the asset.
17. In practice, and depending on (inter alia) the profile of the other shareholders, a 45 per cent stake might confer a degree of de facto control, despite the absence of a majority of the company's voting rights.
18. In practice, one might assess whether the comparable companies are well run by comparing their growth rates, margins and other operational efficiency metrics to industry averages.

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Australia

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Summary

Australia has a long-standing tradition of embracing arbitration as a means of alternative dispute resolution. At 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 in Australia was largely confined to disputes in areas such as building and construction. Strong and steady growth of the Australian economy over much of the past two decades and the opening of Asian markets have accelerated a growing trend towards the use of arbitration in other areas, particularly the energy and trade sectors.

Australia continues to develop as an attractive hub for international arbitration. The pro-arbitration approach taken by Australian courts and the dynamic nature of Australia's arbitration legal framework, in particular the International Arbitration Act 1974 (Cth) (IAA), have combined to put Australia at the forefront of international arbitration in the Asia-Pacific region.

ARBITRATION LAW REFORMS IN AUSTRALIA

Australia's international arbitration framework underwent significant changes in 2010. Importantly, amendments to the IAA adopted the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration (Model Law), replacing the 1985 version.

There were a number of other noteworthy amendments to the IAA. In particular, section 21 of the IAA was repealed, which had the effect that parties could no longer contract out of the Model Law. The IAA now includes detailed provisions dealing with confidentiality and consolidation of proceedings, which apply if the parties expressly agree to them.

At the domestic arbitration level, uniform arbitration legislation based on the 2006 Model Law is now in operation in all states and territories of Australia, with the exception of the Australian Capital Territory. This uniform legislation is known as the Commercial Arbitration Acts (CAAs). The CAAs represent a significant step forward in modernising Australia's domestic arbitration legislation, having brought it into alignment with the IAA at the federal level.

The CAAs include confidentiality provisions that apply unless the parties specifically opt out, and allow for an appeal from the arbitration award if certain preconditions are met. Further under the CAAs, the courts must stay court proceedings in the presence of an arbitration agreement, removing the courts' discretion to stay proceedings that was previously available.

Australia has further entrenched the use of ADR processes through the enactment of the Civil Dispute Resolution Act 2011 (Cth). This Act explicitly recognises that litigation should be a last resort in resolving disputes and requires parties to take 'genuine steps', such as mediation or direct negotiations, to resolve a civil dispute before court proceedings can be commenced.

INSTITUTIONAL ARBITRATION IN AUSTRALIA: ACICA

The Australian Centre for International Commercial Arbitration (ACICA) is Australia's premier international arbitration institution. ACICA has published its own set of arbitration rules, known as the ACICA Arbitration Rules 2005 (the ACICA Rules).

In 2011, the ACICA Rules were updated to include provisions relating to emergency arbitrators that enable the appointment of an emergency arbitrator in arbitrations that have

commenced under the ACICA Rules, but in which a tribunal has not yet been appointed. Therefore, by accepting the ACICA Rules, parties also accept 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 the regime in writing.

Also included in the 2011 amendments to the ACICA Rules are new provisions for 'Application for Emergency Interim Measures of Protection'. These 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 that must be made in writing and 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 updates to the ACICA Rules have provided parties in cross-border disputes with a prompt and efficient option for obtaining urgent interlocutory relief before an arbitral tribunal is constituted.

ACICA is planning a wholesale update to the ACICA Rules in 2015. In late 2014, it released a draft of the ACICA Arbitration Rules 2015 that will update the 2005 Rules. Among the proposed changes is the ability for ACICA to consolidate two or more pending arbitrations in certain circumstances and provisions in respect of multi-party arbitrations under which an arbitral tribunal may join additional parties bound by the same arbitration agreement as the existing parties to the arbitration.

ACICA has also published a separate set of Expedited Arbitration Rules (ACICA Expedited Rules), of which the latest version was published in 2011. The ACICA Expedited Rules aim to provide arbitration that is quick, cost effective and fair, considering in particular the amounts in dispute and complexity of issues. These rules operate on an opt-in basis.

AIDC

ACICA is based in Sydney and operates out of the Australian International Disputes Centre (AIDC). The AIDC 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 including 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.

PCERA

In 2014, the Perth Centre for Energy and Resources Arbitration (PCERA) was established as a not-for-profit centre for arbitration and expert determination specialised in administering dispute resolution in the energy and resources sector.

The PCERA is geographically located in Perth, Western Australia, which is a regional hub for Australian and Asian energy and resources projects. The PCERA boasts an institutional framework, the PCERA Arbitration Principles, that is designed to facilitate the efficient

resolution of Energy and Resource Industry disputes. This framework is coupled with a specialised knowledge base drawn from an array of specialised arbitration practitioners. These qualities make the PCERA an attractive option for disputing parties in the energy and resources sector.

PRIMARY SOURCES OF ARBITRATION LAW

Legislative powers in Australia are divided between the Commonwealth of Australia, as the federal entity, and the six states and two territories.

Matters of international arbitration are governed by the IAA, which incorporates 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 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 (eg, those dealing with confidentiality or consolidation of proceedings) that only apply if the parties expressly opt in. The IAA also provides clarity to 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. Australia is also a signatory to the ICSID Convention, the implementation of which is contained in part IV of the IAA.

Domestic arbitration is governed by the relevant CAAs of each state or territory where the arbitration takes place. All states and territories, except the Australian Capital Territory, have passed uniform domestic arbitration legislation adopting the Model Law, ensuring that Australia has a largely consistent domestic and international arbitration legislative framework in line with the international benchmark.

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 requires an 'agreement in writing' to include an arbitral clause in a contract or an arbitration agreement signed by both parties or contained in an exchange of letters, the Model Law is more expansive, covering content recorded in any form. Under the IAA, the term 'agreement in writing' has the same meaning as under the New York Convention. Domestic arbitrations under the CAAs adopt the more expansive definition contained in the Model Law.

In the landmark decision of ***Comandate Marine Corp v Pan Australia Shipping*** [2006] FCAFC 192, the Federal Court of Australia 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 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 approach.

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.

Where multiple claims are brought by one party, but only some of which are capable of settlement by arbitration, 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 to 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).

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 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, and must disclose circumstances likely to give rise to justifiable doubts as to their impartiality or independence. The IAA clarifies that a justifiable doubt exists only where there is a real danger of bias 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 article 10 of the Model Law provides 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 section 11 of the CAAs 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. Pursuant to article 11(5) of the Model Law, any appointment made by ACICA is unreviewable by a court.

Furthermore, the emergency arbitrator provisions in 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.

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, the Model Law and CAAs prescribe that the party must initially submit a challenge to the tribunal, and then may apply to a competent court if the challenge is rejected.

To remove arbitrators because of a perceived lack of independence and impartiality under the IAA and the CAAs, any challenge must demonstrate that there is a 'real danger' that the arbitrator is biased.

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

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' to 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 IAA and CAAs both provide that arbitrators are not liable for negligence in respect of anything done or omitted to be done in their capacity as arbitrators (with the exception of fraud). This exclusion is also reflected in article 44 of the ACICA Rules. There are no known cases where an arbitrator has been sued in Australia.

THE ARBITRAL PROCEDURE

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

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. In doing so, the most significant requirement under the Model Law is that the parties are treated with equality and are afforded a reasonable opportunity to present their case. This requirement cannot be derogated from, even by the parties' agreement.

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. Under the Model Law, courts may:

- grant interim measures of protection (article 17J);
- appoint arbitrators where the parties or the two party-appointed arbitrators fail to agree on an arbitrator (articles 11(3) and 11(4));
- decide on a challenge of an arbitrator, if so requested by the challenging party (article 13(3));
- decide, upon request by a party, on the termination of a mandate of an arbitrator (article 14);
- decide on the jurisdiction of the tribunal, where the tribunal has ruled on a plea as a preliminary question and a party has requested the court to make a final determination on its jurisdiction (article 16(3));
- assist in the taking of evidence (article 27); and
- set aside an arbitral award (article 34(2)).

In addition to those functions prescribed in the Model Law, courts have additional powers granted by the IAA, including the power to issues subpoenas, as discussed above.

Domestically, courts also have limited power to intervene under the CAAs. These circumstances include:

- applications by a party to set aside or appeal against an award (sections 34 and 34A);

- 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);
- a challenge to an arbitrator (section 13);
- terminating the mandate of an arbitrator who is unable to perform the arbitrator's functions (section 14);
- reviewing an arbitral tribunal's decision regarding jurisdiction (section 16); and
- making orders in relation to the costs of an arborted arbitration (section 33D).

INTERIM MEASURES

Under the Model Law, the arbitral tribunal is generally free to make any interim orders or grant interim relief as it deems necessary. Further, under the Model Law, courts may order interim measures irrespective of whether the arbitration is seated in that country. Courts also may enforce interim measures issued by a foreign arbitral tribunal (article 17H of the Model Law).

The CAAs contain detailed provisions dealing with interim measures in part 4A, including allowing courts to make interim awards unless the parties expressly intend otherwise and an obligation on courts to enforce interim measures granted in any state or territory, except in limited circumstances.

STAY OF PROCEEDINGS

Provided the arbitration agreement is drafted widely enough, Australian courts will stay proceedings in face of a valid arbitration agreement. Section 8 of the CAAs gives greater primacy to the arbitration agreement. So long as there is an arbitration agreement that 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 so as 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, assuming the subject matter of the dispute is arbitrable. Courts will refuse a stay only if they find the arbitration agreement is null, void, inoperative or incapable of being performed and may impose such conditions as they think fit in ordering a stay.

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 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 reflect 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. There are also statutory provisions in Australia's insurance legislation that render void an arbitration agreement unless it has been concluded after the dispute has arisen.

PARTY REPRESENTATION

There is great flexibility regarding legal representation in international arbitrations under the IAA and domestic arbitrations under the CAAs. In either situation, parties may elect to either represent themselves or choose to be represented by a legal practitioner or any other person. There is no equivalent provision in the Model Law.

CONFIDENTIALITY OF PROCEEDINGS

Australian courts have taken a somewhat controversial approach to confidentiality of arbitral proceedings. In the well-known decision in *Esso Australia Resources v Plowman* (1995) 183 CLR 10, the High Court of Australia held that while arbitral proceedings and hearings are private in the sense that they are not open to the general public, this 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 certain opt-in provisions dealing in detail with the confidentiality of different aspects of arbitral proceedings (sections 23C-G of the IAA). These provisions deal with the circumstances in which confidential information may be disclosed and the process for such disclosure, as well as the circumstances in which courts and tribunals may allow or prohibit disclosure. Since these provisions operate on an opt-in basis, it is advisable to agree to their application in the arbitration agreement to ensure confidentiality is preserved.

EVIDENCE

Evidentiary procedure in Australian arbitrations is largely influenced by the common law system. Arbitrators in international and domestic arbitration proceedings are not bound by the rules of evidence, and may determine the admissibility, relevance, materiality and weight of the evidence with considerable freedom (article 19(2) of the Model Law and section 19(3) of the CAAs).

Although arbitrators enjoy great freedom in the taking of evidence, in practice, arbitrators in international proceedings will often refer to the IBA Rules on the Taking of Evidence (the IBA Rules). The ACICA Rules also recommend the adoption of the IBA Rules in the absence of any express agreement between the parties and the arbitrator.

The situation is slightly different in domestic arbitrations. Despite the liberties conferred by section 19(3) of the CAAs, many arbitrators still conduct arbitrations similarly to court proceedings: namely, witnesses are sworn in, examined and cross-examined. Nevertheless, arbitrators are more and more frequently adopting procedures that suit the particular circumstances of the case and that 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. The Model Law and the CAAs contain similar form requirements that awards must meet (see article 31 of the Model Law and section 31 of the CAAs).

The Model Law and the CAAs do not prescribe time limits for delivery of the award and delays in rendering an award do not result in the termination of the arbitral proceedings. Despite this, a party may apply to a court to terminate an arbitrator's mandate on the basis that the arbitrator is unable to perform his function or fails to act without undue delay (article 14(1) of the Model Law).

Under Article 29 of the Model Law, any decision of the arbitral tribunal must be made by a majority of its members, but the presiding arbitrator may decide procedural questions if authorised by the parties or the arbitral tribunal.

RECOURSE AGAINST AWARD

The only available avenue for recourse against international awards is to set aside the award (article 34(2) of the Model Law). The grounds for setting aside an award mirror those for refusal of enforcement under the New York Convention, and essentially require a violation of due process or a breach of public policy. The term 'public policy' in article 34 of the Model Law is qualified in section 19 of the IAA and requires some kind of fraud, corruption or breach of natural justice in the making of the award. The Model Law does not contemplate any right to appeal for errors of law.

In 2014, the Full Court of the Federal Court of Australia in ***TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*** [2014] FCAFC 83 held that an international arbitral award will not be set aside or denied enforcement under the Model Law for a breach of the rules of natural justice unless real unfairness or real practical injustice in the conduct of the dispute resolution process is demonstrated by reference to established principles of natural justice and procedural fairness. The Full Court also rejected the notion that minor or technical breaches of the rules of natural justice would suffice for the setting aside or non-enforcement of an international arbitral award in Australia.

Further, 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.

Most recently, in ***William Hare UAE LLC v Aircraft Support Industries Pty Ltd*** [2014] NSWSC 1403, the Supreme Court of New South Wales held that where parts of an award are affected by a breach of the rules of natural justice in respect of one aspect of an arbitration, the infected parts of the award can be severed and the balance of the award enforced in accordance with section 8 of the IAA. This decision reflects the strongly pro-enforcement attitude of Australian courts to enforcing arbitral awards.

The same grounds for setting aside an award apply domestically. However, the CAAs also permit an appeal of an award on a question of law in limited circumstances (section 34A). Such an appeal 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 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.

The confinement of challenges under the IAA and CAAs strictly to those grounds set out in the Acts was confirmed recently by the Federal Court in ***Beijing Be Green Import & Export Co Ltd v Elders International Australia Pty Ltd*** [2014] FCA 1375. In that case the applicant was unsuccessful in seeking a stay of the execution of a money judgment of a CIETAC award, pending determination of separate CIETAC arbitral proceedings. The applicant sought a stay on the ground that the award in the latter proceedings would constitute a substantial set-off of the money judgment. The Court held that this ground did not warrant a stay and the respondent was entitled to the fruits of the arbitral process into which the parties had freely entered.

ENFORCEMENT

Often, in practice, the most important 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 nonConvention 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. For awards made within Australia, either article 35 of the Model Law for international arbitration awards, or section 35 of the CAAs for domestic awards, applies.

In 2013, the High Court of Australia in ***TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia & Anor*** [2013] HCA 5 confirmed that the Federal Court has jurisdiction to enforce international arbitral awards and that the powers exercised by an arbitral tribunal are not in contravention of the Australian Constitution.

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 involving Australian parties is expected to increase significantly over the next decade, the level of awareness about the availability of investment protection under investment treaties still needs to be raised.

Australia continues to negotiate bilateral investment treaties (BITs) and free trade agreements (FTAs) actively. 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. Significantly, in 2014, Australia concluded FTAs with China, Japan and Korea,

representing Australia's three largest export markets. Further FTAs are currently under negotiation with 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 (TPP).

Following a brief period of reluctance towards including investor-state dispute settlement (ISDS) provisions in its BITs and FTAs, in recent years Australia has been more willing to incorporate these provisions. The recently concluded FTAs with China and Korea incorporated ISDS provisions including requirements that Australian investors must be treated fairly and equitably, and prohibit discrimination against foreign investments in favour of domestic investments. The FTA with Japan does not include ISDS provisions but it does contain a review clause providing for future consideration of ISDS provisions.

CLAYTON UTZ

Bangladesh

Sameer Sattar
Sattar&Co

Summary

In the past, Bangladeshi courts have come to conflicting decisions in respect of the scope of their powers over arbitration seated outside Bangladesh. The controversy appears to have stemmed from the meaning and application of section 3 of Bangladesh's Arbitration Act 2001 (the AA 2001), which deals with the scope of the Act.[1] In the ***HRC Shipping Ltd***. (-***HRC***)[2] case, the High Court of Bangladesh stayed a domestic suit in favour of arbitration proceedings conducted outside Bangladesh, while in the ***STX Corporation Ltd***. (***STX***)[3] case, the High Court of Bangladesh refused to provide an interim remedy when the arbitration proceedings were seated abroad.

These decisions caused confusion for the international business community, who are primarily the users of the arbitral process, as they were left without an opportunity to successfully invoke the Bangladeshi courts in respect of arbitration conducted outside Bangladesh. The effect of this has been most prominent in relation to interim remedies, where the Bangladeshi courts have been unable to grant any relief to arbitration users, even to protect or support the foreign arbitral process.

The most recent decision of the Bangladesh High Court, the ***Egyptian Fertilizer Trading Limited*** (***Egyptian Fertilizer***)[4] case, seems to follow the approach of the ***STX*** case in not granting interim relief to arbitration seated outside of Bangladesh and reflects a tendency on the part of the Bangladeshi courts to interpret section 3 of the AA 2001 restrictively.

HRC SHIPPING LTD

The ***HRC*** case arose out a dispute in relation to the shipment of goods under a charter agreement. Under the relevant agreement, HRC shipped 53 containers to Sri Lanka from Bangladesh. However, much of the said cargo was dropped into the sea and washed away when the ship was hit by a tsunami, while berthing at its destination port. HRC submitted that the loss was not only due to the tsunami but also due to the negligence of the ship's crew. As a result, HRC claimed compensation and damages through the Bangladeshi courts, by instituting an suit. However, since the charter agreement contained an arbitration clause, the Defendants Nos. 5 and 6 commenced arbitral proceedings in London and applied for the suit to be stayed under section 10 of the AA 2001[5].

The issue before the Bangladeshi High Court in the suit was whether it should stay the local proceedings in favour of the arbitration in London. As a preambular statement, the High Court noted that the AA 2001 was largely based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law) and that the harmonisation and flexibility fostered by the Model Law was also enshrined in the AA 2001.[6]

Bearing in mind that the AA 2001 avowedly sought 'to establish a uniform legal framework for the fair and efficient settlement of disputes'[7] through international commercial arbitration, the court in the ***HRC*** case ruled that section 3(1) had to be interpreted inclusively. It explained as follows:

> It is evident that Section 3(1) provides that 2001 Act would apply where the place of arbitration is in Bangladesh. It does not state that it would not apply where the place of arbitration is not in Bangladesh. Neither does it state that the 2001 Act would 'only' apply if the place of arbitration is Bangladesh.[8]

In contrast, the court noted that the UNCITRAL Model Law, through articles 1(2) and 8, has an exclusive definition as it provides that proceedings will 'only' be stayed if it is in the territory of a state. The High Court interpreted this omission to be an indication that the Bangladesh Parliament did not intend to restrict the application of the AA 2001 only to arbitration proceedings taking place in Bangladesh.

In the ***HRC*** case, the High Court commented on the importance of this interpretation in relation to interim remedies. It held that, if such an interpretation was not given, it would inhibit applications for interim relief in Bangladesh, even if the properties and assets of the parties may be in Bangladesh. This line of reasoning rested upon the Indian decision of ***Olex Focas v Skoda Export***,[9] where it was held that the courts have the power to grant interim relief for arbitration seated abroad as:

> There is always a time-lag between pronouncement of the award and its enforcement. If during that interregnum period, the property/funds in question are not saved, preserved or protected, then in some cases the award itself may become only a paper award or decree.[10]

In relation to arguments against the application to stay the suit, the High Court observed that if such a stay was not possible:

> […]then the provision for enforcement of foreign arbitral award will become redundant as prior to completion of the foreign proceedings, one of the party is free to obtain an order injuncting the foreign arbitration proceedings and as such there would not be any foreign arbitral award to enforce.[11]

In light of the above reasoning, the court in the ***HRC*** case stayed the suit in favour of the arbitration seated outside Bangladesh. It is clear from the reasoning that the court in the ***HRC*** case took a more purposive interpretation of section 3 of the AA 2001, bearing in mind that the AA 2001 was modelled largely on the UNCITRAL Model Law and acknowledging that such an interpretation was necessary in order to make interim remedies available to aggrieved parties arbitrating their disputes outside Bangladesh.

Despite this progressive approach, the court in the ***STX*** case and ***Egyptian Fertilizer*** case came to the exact opposite decision on the very issue of providing interim remedies to parties arbitrating their disputes outside Bangladesh.

STX CORPORATION LTD

The ***STX*** case arose out of a supply contract between STX Corporation Ltd, a foreign company, and Meghna Group of Industries Limited, a company incorporated under the laws of Bangladesh. The contract contained an arbitration agreement under which any dispute in relation to the contract was to be resolved through arbitration in Singapore. Disputes arose under the contract and arbitration was commenced in Singapore.

While the arbitration proceedings were pending, STX filed for an interim order in the Bangladeshi High Court against some of the respondents under section 7A of the AA 2001[12] to restrain those respondents from transferring or selling off their assets, so as to prevent them from escaping from their obligations under the forthcoming arbitral award.

The main issue for the High Court was whether interim remedies could be provided in cases of foreign arbitration, seated outside Bangladesh, under the AA 2001.The High Court began its judgment with a plain reading of section 3 of the AA 2001 and held that the legislature intended for the AA 2001 to apply only when the arbitration proceeding is in Bangladesh. The High Court held:

> From a combined reading of Section 2(ga) [2(c)], 2(ta) [2(k)] and Section 3 of the Act, it is apparent that the intention of the legislature is that the scope of the Act of 2001 is limited within the territory of Bangladesh, except that there is a scope to enforce an award passed in a foreign arbitration, pursuant to Section 3(2) read with Sections 45, 46 and 47 of the said Act of 2001.[13]

In relation to the interpretation of statutes, the court held that the literal construction of a statute is the golden rule of construction and that when words in a statute are clear and unambiguous, they should be construed according to their tenor and meaning, as it most clearly reflects the intention of the legislature. The High Court further explained that, while interim measures for foreign arbitration were provided for in other jurisdictions, until and unless the Parliament enacts such a provision explicitly in a statute, such measures cannot be granted in Bangladesh.

The High Court was persuaded by the authorities cited by the respondents and found that the law as in sections 3(1) and 3(4) of the Act is limited in application as to the arbitration being held in Bangladesh and that the High Court could not refer the parties to arbitration under section 10 of AA 2001, as the proceedings were being conducted outside Bangladesh. The High Court held that since the Appellate Division had categorically ruled on this issue, there was no further scope for this Court to depart from their findings in light of the binding precedent rule enshrined in Article 111 of the Constitution of the People's Republic of Bangladesh.[14] The High Court also considered the ***HRC*** and the ***Bhatia*** cases but showed due deference to the decisions of the Appellate Division.

The narrow construction of the scope of AA 2001 has been adopted in several cases succeeding the ***STX*** case. This is evident in the ***Egyptian Fertilizer*** case, decided on 10 June 2014, and will be a cause for serious concern among the international business community and lawyers that seek remedies from Bangladeshi courts to support the arbitral process conducted abroad.

EGYPTIAN FERTILIZER TRADING LTD

The ***Egyptian Fertilizer*** case arose from a dispute over the performance of a sales contract for fertiliser. The applicant, Egyptian Fertilizer Trading Ltd (Egyptian Fertilizer) is a limited company incorporated under the laws of the United Arab Emirates. On 10 September 2009, it entered into a contract with the respondent, East West Property Development (Private) Ltd (East West), a limited company incorporated under the laws of Bangladesh, for the sale of 35,000 tonnes of granular urea. Under the terms of the contract, East West agreed to confirm a letter of credit in favour of Egyptian Fertilizer five business days before shipment of the fertiliser. In the event of a dispute, the parties agreed to refer the matter for arbitration before the International Court of Arbitration at the International Chamber of Commerce (ICC) in London.

However, after an initial phase of cooperation and after Egyptian Fertilizer booked a large sum of urea, East West began to delay performance of its contractual obligation to open a line of credit. After the deadline for performing the contract passed, Egyptian Fertilizer notified East West of its intention to pursue legal action under the terms of the contract.

Subsequently, on 5 January 2010, Egyptian Fertilizer filed a request for arbitration before the ICC and three days later, the ICC informed East West that such proceedings had been initiated. Immediately thereafter, East West filed a title suit[15] in a district court in Bangladesh praying for the contract to be declared 'illegal, void and having no binding effect' and for a permanent injunction to be placed on Egyptian Fertilizer from pursuing any proceedings. Moreover, pending settlement of the suit, East West applied for an interim injunction restraining the petitioner from pursuing the arbitration abroad. This injunction was granted by the district court on 28 January 2010 and Egyptian Fertilizer's application for the suit to be stayed in favour of arbitration was rejected on 1 June 2010.

Egyptian Fertilizer subsequently petitioned the High Court to provide interim relief, on the basis that sections 7 and 10 of AA 2001 granted the court such power, regardless of the chosen seat of arbitration. They submitted that restrictively interpreting AA 2001 would frustrate the intent of the Bangladeshi legislature and violate the country's international treaty obligations under the UNCITRAL Model Law and the United Nations Conference on International Commercial Arbitration.[16] In particular, it was argued that the legislature intended for the subject matter of the arbitration to be preserved and protected. Furthermore, counsel for Egyptian Fertilizer submitted that the lower court did not have jurisdiction over the dispute as the ICC had assumed jurisdiction before the suit was filed and that the suit itself was vexatious and infringed the arbitration agreement in the contract. Notably, Egyptian Fertilizer prayed that an injunction be passed on East West from pursuing the suit until the completion of the arbitration proceedings and pronouncement of an award.[17]

East West submitted that the High Court did not have jurisdiction over the instant proceedings, in light of the proceedings before the lower courts. They referred to a decision of the Appellate Division of the Supreme Court of Bangladesh, ***Managing Director, Rupali Bank Limited and others v Tafazal Hossain and others***,[18] which established that if a court does not have jurisdiction over a matter, it should not go into the merits of the said matter. East West averred that an application under section 7A of the AA 2001 was not maintainable as the place of arbitration was outside Bangladesh. In its view, the only provisions of AA 2001 that are applicable when arbitral proceedings are seated outside Bangladesh were sections 45, 46 and 47, which concern the recognition and enforcement of foreign arbitral awards. East West also brought to the High Court's attention that an award was delivered by the ICC on 30 June 2012, pursuant to which Egyptian Fertilizer had filed a money decree execution case for the recovery of the value of the fertiliser and sought to attach East West's property to secure the same. East West noted that Egyptian Fertilizer had failed to notify the High Court of these developments. They contended that the application could no longer be maintained as its core purpose of restraining domestic litigation in favour of arbitration had evaporated.[19]

On hearing the parties' submissions, the High Court rejected the application on the basis that it was not maintainable. The High Court had three reasons for arriving at such a decision. Firstly, it held that while exercising its special statutory jurisdiction under section 7A of the AA 2001, the High Court did 'not act as a court of appeal or revision against any order passed by a court or judicial authority in any suit'[20] and in such capacity it did not have

constitutional jurisdiction over the lower court. The High Court averred that the proper course of action in such circumstances would have been to file a revisional application before a superior court against the order or orders of the district court under section 115 of the Code of Civil Procedure 1908 (Bangladesh).[21] The court added that a host of recent arbitration applications had been rejected on the same grounds.[22] Secondly, the court held that pursuant to a literal interpretation of section 3(1) of the AA 2001, applications for interim relief from the High Court under sections 7, 7A and 10 of AA 2001 were not maintainable for arbitration proceedings seated outside Bangladesh. The court interpreted the scope of the Act to extend 'only'[23] to arbitrations seated in Bangladesh. While sections 45 to 47 of the AA 2001 were specifically made applicable under section 3(2), all other sections of the AA 2001 were omitted.[24] Thirdly, the High Court was of the view that following the pronouncement of the arbitration award by the ICC, the substance of the application had fallen away. There was no longer any need for an injunction and further prolongation of the matter was an abuse of process of the High Court.[25]

On the face of the judgment, it is unclear whether counsel for ***Egyptian Fertilizer*** referred to ***HRC*** but it is apparent that the High Court in the instant case was not moved by the same considerations as in the earlier cases. Unlike the ***HRC*** case, the High Court in ***Egyptian Fertilizer*** did not inclusively interpret section 3, in line with legislative intent and the UNCITRAL Model Law. Such an interpretation would have facilitated the dual public policy objectives of encouraging commerce and peacefully resolving disputes. Moreover, it is clear that a literal interpretation of the AA 2001 is also out of line with the intention of the Bangladeshi Parliament, when it specifically amended the AA 2001 in 2004 to incorporate a section on interim relief. The Bangladesh Law Commission, which formulated this amendment stated:

> The arbitral tribunal, (after it is constituted), is empowered to take interim measures during the arbitral proceedings. The absence of a provision to take such measures before constitution of the arbitral tribunal and after making of an arbitral award may provide an unscrupulous party an opportunity to defeat the award that may be made against it [...] We feel that a provision empowering the Court to take interim measures should be included in the [Arbitration Act, 2001] in order to prevent an unscrupulous party's attempt to defeat enforcement of an award.[26]

The High Court remarked that Egyptian Fertilizer should have submitted a revision petition before a competent court against the order or orders of the district court but the anti-arbitration stance demonstrated by the lower court from the commencement of proceedings renders it unlikely that the relief sought would have been available through such an avenue. It is in such circumstances, given the substantial sums involved, that the assistance of the High Court becomes all the more necessary.

Though Egyptian Fertilizer successfully secured an arbitral award in its favour, it now faces an uphill task of having that award recognised and enforced in Bangladesh.

CONCLUSION

The importance of interim remedies cannot be understated. The purpose of such remedies is generally to uphold and support the arbitral process and prevent any steps from being taken by the losing party which may cause irreparable harm to the process by making the enforcement of the award impossible.

While arbitral tribunals can order interim relief, it is an accepted fact that there may be a number of situations where only national courts can effectively address the potential harm to the arbitral process. For example, effective authority may be required from a national court within whose jurisdiction the party against whom the relief is sought is resident. As Lew explains:

> Due to the standing organisation of state courts, and the direct enforceability of court ordered interim measures, they are in general quicker and more effective than measures ordered by tribunals, which in some cases may have to be declared enforceable by state courts.[27]

It is my view that the construction of the AA 2001 in the ***STX*** and ***Egyptian Fertilizer*** cases is regressive in terms of the development of arbitration laws in Bangladesh, as it leaves open the possibility that the innocent party, even after undertaking expensive arbitration proceedings in good faith, is left with little more than a paper award. While such a development is in line with the Indian Supreme Court's decision in ***Bharat Aluminium Co***[28] that Indian courts are unable to interfere or issue any interim orders in respect of arbitration seated outside India, to allow such a result is manifestly against the ethos and spirit of the UNCITRAL Model Law and the New York Convention, to which Bangladesh is a party.

Unfortunately, it now seems that, unless the Bangladeshi Parliament amends the AA 2001 to expressly include a provision that states that the Bangladeshi courts have the power to issue interim remedies in cases of foreign-seated arbitrations, the High Court will not purposively read the Act or exercise their inherent powers to grant such relief. It is feared that this might, in turn, dilute the reputation that Bangladesh is trying to develop as an arbitration friendly jurisdiction. This may not be healthy for a developing country which is actively trying to attract foreign investment and international trade.

In relation to this particular interim remedy issue, it is felt that Bangladesh could take valuable lessons from a developed arbitral jurisdiction like Singapore. In ***Multi-Code Electronics Industries v Toh Chun Toh and Others***,[29] the Singapore High Court took a less restrictive approach on this issue, deciding that it could, under its general statutory power, grant injunctions in support of foreign-seated arbitral proceedings. To avoid future confusion, Singapore's International Arbitration Act (IAA) was amended in line with the revisions made to the Model Law in 2006. As part of the revisions, the original article 17 of the Model Law was replaced by a new chapter on interim measures. This contains a new article 17J, which provides that:

> A court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation to proceedings in court.

The intention of this new provision of the UNCITRAL Model Law was to clarify beyond doubt the powers of a competent court to grant interim measures. In line with this, Singapore's IAA was amended on 1 January 2010 to include a new section 12A on court-ordered measures. The new section 12A(1) drew on article 17J of the Revised Model Law and clarified that the court's powers to grant interim measures are not restricted to Singapore-seated arbitrations.

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Notes

1. Section 3 of the AA 2001 states:
   Scope—(1) This Act shall apply where the place of Arbitration is in Bangladesh; (2) Notwithstanding anything contained in sub-section (1) of this section, the provisions of ss 45, 46 and 47 shall also apply to the arbitration if the place of that arbitration is outside Bangladesh; (3) This Act shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration; (4) Where any arbitration agreement is entered into before or after the commencement of this Act, the provisions thereof shall apply to the arbitration proceedings in Bangladesh relating to the dispute arising out of that agreement.
2. *HRC Shipping Ltd v MV X-Press Manaslu and Others* [unreported]. This case has been recently reported in 1 LCLR [2012], Vol.2, pp.207–22.
3. *STX Corporation Ltd v Meghna Group of Industries Limited and others*, Arbitration Application No.16 of 2009 [unreported]. This case has been recently reported in 1 LCLR [2012] Vol.2, pp.159–178.
4. *Egyptian Fertilizer Trading Limited v. East West Property Development (Private) Limited*, Arbitration Application No. 11 of 2010 [unreported].
5. Section 10 of the AA 2001 states:
   10. Arbitrability of the dispute—(1) Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may, at any time before filing a written statement, apply to the Court before which the proceedings are pending to refer the matter to arbitration. (2) Thereupon, the Court shall, if it is satisfied that an arbitration agreement exists, refer the parties to arbitration and stay the proceedings, unless the Court finds that the arbitration agreement is void, inoperative or is incapable of determination by arbitration.
6. *HRC* judgment, paragraph 28, referring to *M/s Strains Construction Company v Government of Bangladesh represented by Chief Engineer, Roads and Highways Departments* 22 BLD (HCD) 236.
7. *HRC* judgment, para.27.
8. *HRC* judgment, para.32.
9. *Olex Focas Pvt. Ltd v Skoda Export Co. Ltd*. 2000 AIR (Del) 171.
10. *HRC* judgment, paragraph 40.
11. *HRC* judgment, paragraph 46.
12. Section 7A of the AA states:
    7A. Powers of court and High Court Division to make interim orders: (1) Notwithstanding anything contained in Section 7, unless the parties agree otherwise, upon prayer of either parties, before or during continuance of the proceedings or until enforcement of the award under section 44 or 45 in the case of international commercial arbitration the High Court Division and in the case of other arbitrations the court may pass order in the following matters: … (c) To restrain any party to transfer

certain property or pass injunction on transfer of such property which is intended to create impediment on the way of enforcement of award.

13. ***STX*** judgment, paragraph 22.
14. Article 111 states: 'The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.'
15. Title Suit No. 51 of 2010 in the court of Assistant Judge, Second Court, Dhaka
16. ***Egyptian Fertilizer*** case, paragraph 7.
17. Prayer quoted in ***Egyptian Fertilizer*** case, paragraph 3.
18. 44 DLR (AD) 260
19. ***Egyptian Fertilizer*** case, paragraph 8.
20. ***Egyptian Fertilizer*** case, paragraph 4.
21. Section 115 states:
    115(1). The High Court Division may, on the application of any party aggrieved, call for the record of any suit or proceedings, in which a decree or an order has been passed by a Court of District Judge or Additional District Judge, or a decree has been passed by a Court of Joint District Judge, Senior Assistant Judge or Assistant Judge, from which no appeal lies; and if such Court appears to have committed any error of law resulting in an error in such decree or order occasioning failure of justice, the High Court Division may, revise such decree or order and, make such order in the suit or proceedings, as it thinks fit. (2) The Court of District Judge may, on the application of any party aggrieved, call for the record of any suit or proceeding, in which an order has been passed by a Court of Joint District Judge, Senior Assistant Judge or Assistant Judge, from which no appeals lies; and if such Court appears to have committed any error of law resulting in an error in such order occasioning failure of justice, the Court of District Judge may, revise such order and, make such order as it thinks fit [...]
22. *INTRACO (BD) Joint Venture v the Government of the People's Republic of Bangladesh (Arbitration Applications No. 9 & 10 of 2013); Roads and Highways Department v Hanil Engineering Construction Company Limited and another (Arbitration Application No. 4 of 2012); Roads and Highways Department v Najir Basic Joint Venture (Bangladesh) Limited and others (Arbitration Application No. 20 of 2012).*
23. ***Egyptian Fertilizer*** case, paragraph 11.
24. ***Egyptian Fertilizer*** case, paragraph 13.
25. ***Egyptian Fertilizer*** case, paragraph 15.
26. Bangladesh Law Commission, 'Report on the Proposal for Amendment of the Arbitration Act, 2001, for Including a Provision Relating to Interim Measures by Court' (8 January 2003) Available at www.lawcommissionbangladesh.org/reports/55.pdf [Accessed 10 January 2013].
27. J Lew, L Mistelis et al, 'Comparative International Commercial Arbitration', (London: Kluwer Law International, 2003) at paras.23–113
28. *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc*. , Civil Appeal No.7019 of 2005.

29. *Multi-Code Electronics Industries (M) Sdn Bhd and Another v Toh Chun Toh Gordon and Others* [2009] 1 SLR 1000.

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Summary

The dynamic development of arbitration in China over the past year continues to attract much attention from the arbitration community. A lot of changes took place in both rules of law and legal practice. China's leading arbitration institutions, the China International Economic and Trade Arbitration Commission (CIETAC) and Beijing Arbitration Commission (BAC), promulgated their latest arbitration rules in November 2014 and December 2014 respectively, presenting significant amendments to their previous ones. The judicial decisions rendered by intermediate people's courts in Shanghai and Shenzhen stirred up a further round of discussion on jurisdictional questions arising from the split of CIETAC. The revised interpretation on the Civil Procedure Law of the PRC (2012) issued by the Supreme People's Court (SPC) embraces some important judicial explanation on arbitration-related matters. Furthermore, newly published court decisions have clarified some controversial issues, such as whether the Chinese parties may submit their pure domestic dispute for arbitration in a foreign country and whether it is valid for an ICC arbitration clause to designate China as the seat of arbitration.

This chapter highlights the latest development of commercial arbitration and BIT arbitration in China, covering the period from June 2014 to April 2015.

CASELOADS OF CIETAC AND BAC

Despite being entangled in post-split problems, CIETAC made marvellous progress in 2014 to create the highest caseload in history. According to the statistics released on CIETAC's official website,[1] CIETAC accepted a total of 1,610 arbitration cases in 2014, including 387 foreign-related cases and 1,223 domestic cases. The 2014 caseload represents a 28 per cent increase (by 354 cases) from 2013. The total amount of claim of all cases accepted by CIETAC in 2014 reached 37.8 billion renminbi, which represents an increase of 55 per cent or 13.4 billion renminbi from 2013. The parties involved came from 48 countries and regions. In 2014 CIETAC amended its list of arbitrators, and the new list of arbitrators is composed of 1,212 arbitrators from 41 countries. The number of CIETAC arbitrators from foreign countries and Hong Kong and Macao is now 332, corresponding to 27.5 per cent of the total number.

BAC took cognisance of 2,041 cases in 2014, increasing by 25.4 per cent in terms of newly accepted cases compared to that in 2013. Of these, 41 cases are international, corresponding to 2.01 per cent of BAC's total case number. A remarkable record achieved by BAC in 2014 is that none of its arbitral awards were set aside by the competent people's court in Beijing, and only one arbitral award was refused enforcement.[2]

China's overall arbitration case number in 2014 reached 113,660, an increase of 9 per cent compared to 2013. The total amount of the claims is 265.6 billion renminbi.

THE NEW 2015 CIETAC RULES

CIETAC published its new Arbitration Rules in November 2014, which became effective as from 1 January 2015 (the 2015 CIETAC Rules). The 2015 CIETAC Rules are designed to improve the efficiency of CIETAC arbitral proceedings and bring the CIETAC rules further in line with international best practice. Key amendments include provisions dealing with problems after CIETAC's split, multiparty arbitration, joinder of additional parties, consolidation of arbitration, arbitrator's power to order interim protection, emergency arbitrator and special provisions in relation to arbitration administered by CIETAC Hong Kong Arbitration Center. The major changes are summarised as follows:

Provisions Dealing With Post-split Problems

Article 2.6 of the 2015 CIETAC Rules states:

> Where the subcommission/arbitration centre agreed upon by the parties does not exist or its authorisation has been terminated, or where the agreement is ambiguous, the [CIETAC] Arbitration Court shall accept the arbitration application and administer the case. In the event of any dispute, a decision shall be made by CIETAC.

This provision aims to address the confusion and ambiguity that followed the secession of the former Shanghai and Shenzhen subcommissions from CIETAC. Since CIETAC reorganised its two subcommissions in Shenzhen and Shanghai on 31 December 2014, this provision will lead to acceptance of cases by CIETAC's South China Subcommission (located in Shenzhen) or Shanghai Subcommission where an arbitration agreements provides for arbitration by CIETAC Shenzhen (or South China) Subcommission or CIETAC Shanghai Subcommission.

Use Of Single Arbitration Concerning Multiple Contracts

Article 14 of the 2015 CIETAC Rules permits parties to commence a single arbitration concerning disputes arising out of multiple contracts. The claimant may initiate a single arbitration concerning multiple contracts if:

- such contracts consist of a principal contract and its ancillary contracts or such contracts involve the same parties as well as legal relationships of the same nature;
- the disputes arise out of the same transaction or the same series of transactions; and
- the relevant arbitration agreements are identical or compatible.

Joinder Of Additional Parties

Article 18 of the 2015 CIETAC Rules introduces a mechanism for joining additional parties to an ongoing arbitration. It allows third parties to be invited at any stage into the proceedings. A party wishing to add an additional party into the proceedings may file a request with CIETAC if the third party is prima facie bound by the same arbitration agreement on which the arbitral proceedings are founded. CIETAC will make a decision having heard all parties and the party to be joined to the proceedings.

Compulsory Consolidation Of Proceedings

A mechanism for parallel proceedings to be consolidated into a single arbitration on consensus basis was first introduced by the 2012 CIETAC Rules. Article 19 of the 2015 CIETAC Rules further allows a party to have an unprecedented right to request compulsory consolidation of parallel arbitration proceedings even without consent from all the other parties. Under such rule, two or more proceedings can now be compulsorily consolidated by CIETAC at the request of any party if the claims in these arbitrations:

- share the same arbitration agreement;
- are made under multiple arbitration agreements that are identical or compatible and the arbitrations involve the same parties and the legal relationships are of the same nature; or

- are made under multiple arbitration agreements that are identical or compatible, and the multiple contracts involved consist of a principal contract and its ancillary contracts.

Emergency Arbitration

A new emergency arbitration procedure has been introduced into the 2015 CIETAC Rules in line with other major international arbitration institutions such as the ICC, AAA, SCC, SIAC and HKIAC. Article 23 allows parties to appoint and apply to an emergency arbitration for urgent interim relief prior to the establishment of the arbitral tribunal in accordance with the procedures set out in Appendix III of the 2015 CIETAC Rules. The emergency arbitrator's power ceases on formation of the arbitral tribunal, and the existence of emergency proceedings does not preclude a party from applying to any competent court for interim relief concurrently. Since the current Chinese law does not grant an arbitral tribunal with the power to order interim relief measures, the new provisions are understood to apply primarily to arbitration administered by CIETAC Hong Kong Arbitration Center or an arbitration under the auspices of CIETAC with its seat outside mainland China. In Hong Kong or other jurisdictions where an arbitral tribunal's order for interim measures are recognisable and enforceable, the emergency arbitration may come into play.

Special Provisions For CIETAC Hong Kong Arbitration Center

In the 2015 CIETAC Rules, a new chapter has been introduced for arbitration administered by CIETAC Hong Kong Arbitration Center. According to article 74, for the cases administered by CIETAC Hong Kong Arbitration Center, unless otherwise agreed by the parties, the seat of arbitration shall be Hong Kong, the law of the arbitration shall be the Arbitration Ordinance of Hong Kong, and the arbitral award shall be a Hong Kong award. The implication is that CIETAC Hong Kong awards will be recognisable and enforceable in China in accordance with the reciprocal enforcement arrangement that exists between mainland China and the Hong Kong SAR. Article 77 expressly provides that CIETAC Hong Kong arbitral tribunals may order interim relief. Whereas CIETAC Hong Kong Arbitration Center possesses a unique dual status (ie, as a Hong Kong-based entity and as a branch of a China-based arbitration body), it is likely that the Center may well take advantage of it by transferring a party's application for interim measures to a Chinese people's court for determination if there is a demand for interim measures to be taken in mainland China. Article 82 allows CIETAC Hong Kong Arbitration Center to charge administrative and arbitrators' fees separately, according to a fee scale in line with international practice. The improved fee scale should increase the transparency of fees allocation as well as the attractiveness of the CIETAC Hong Kong Arbitration Center to top international arbitrators.

Borrowing from the IBA Rules on the Taking of Evidence in International Arbitration and Chinese principles of evidence in civil litigation, CIETAC drew up and published its Guidelines on Evidence, which became effective on 1 March 2015. These Guidelines are not an integral part of the CIETAC Arbitration Rules. The application of the Guidelines is subject to the consent of the parties in each case. The parties may agree to adopt the Guidelines in whole or in part, or they may agree to vary them. In case of conflict between the Arbitration Rules and the Guidelines that the parties have agreed to adopt in a specific case, the arbitral tribunal shall apply the Guidelines.

THE NEW 2015 BAC RULES

On 4 December 2014, BAC officially released its new Arbitration Rules, which took effect on 1 April 2015 (the 2015 BAC Rules). The revision of its arbitration rules has reflected BAC's fast-growing experience in arbitration as well as its close attention to the developments in international arbitration practice. Important changes or inputs contained in the 2015 BAC Rules include:

- The 2015 BAC Rules announces that BAC is also called Beijing International Arbitration Center (article 1). BAC may determine any place as the seat of arbitration (article 26).
- The arbitral tribunal may, upon authorisation from BAC, make jurisdiction decision by a separate decision, an interlocutory award or final award (article 6).
- Like the 2015 CIETAC Rules, the 2015 BAC Rules allow joinder of additional parties (article 13), consolidation of arbitration (articles 28-29) and emergency arbitration (articles 62-63).
- The parties in multiparty arbitration may file claims against each other, even if the parties are on the same side of claimants or respondents. This may allow all parties to have their disputes resolved by the same arbitral tribunal once and for all (article 14).
- The arbitral tribunal may verify and assess the evidence according to laws, regulations, judicial interpretations and trade usages or other customs of the relevant industry. The arbitral tribunal will examine the evidence comprehensively (article 37).
- Upon a joint request by both parties, or at a request by one party approved by BAC, BAC may appoint one or more stenographers to record the hearing, and the resulting additional costs shall be borne by the parties or the requesting party (article 40).
- The arbitral tribunal may impose sanctions on a party who deliberately delays or obstructs the arbitration proceedings by adjusting the allocation of costs. Furthermore, it adds that the recoverable costs include but not limited to attorneys' fees, costs of preservation measures, travel and accommodation expenses, and notarial fees (article 51).
- The arbitral tribunal may, according to the prior agreement by the parties, or upon the parties' consensus during the arbitral proceedings, render its award ***amiable compositeur*** or ***ex aequo et bono***, but such award shall not violate the mandatory provisions of law and the public interest (article 69).
- For international arbitration, the 2015 BAC Rules provide that the administrative fee charged by BAC and the fees paid to the arbitrators shall be separated and that the parties may decide the method for payment of arbitrators' remuneration. Furthermore, arbitrators' remuneration may be calculated at an hourly rate as agreed between the arbitrators and the parties, or, in absence of agreement, according to the fee schedule formulated by BAC. The capped hourly rate for arbitrators' remuneration may reach 6,000 renminbi (article 61 and Appendix 2).

Overall, the changes introduced into BAC's new Rules are bold and significant compared to the 2008 BAC Rules and may serve better to conduct fair, efficient and less expensive arbitration.

COMPREHENSIVE JUDICIAL INTERPRETATION ON CIVIL PROCEDURAL LAW

On 30 January 2015, the SPC promulgated its Judicial Interpretation of the Civil Procedure Law (the Interpretation), which came into effect on 4 February 2015. The Interpretation contains 23 chapters and 552 articles in total. Being the most comprehensive judicial interpretation in SPC's history, it is a substantive update of the SPC's previous interpretation on Civil Procedure Law in 1992 and aims to implement the 2012 Civil Procedure Law.

There are at least 17 articles that are directly related to arbitration in the Interpretation, touching on topics such as court jurisdiction, validity of arbitration agreement, interim measures, enforcement, ad hoc arbitration and foreign arbitral award. They include:

- The court ordering interim protection measures has jurisdiction over claim for losses therefrom if the party requesting interim protection measures fails to initiate arbitration or the request is proved to be wrong (article 27).
- If the court accepting a case is challenged on the basis that there is a valid arbitration agreement, the court should strike out the action if: (i) the arbitration institution or another court has already upheld the validity of the arbitration agreement; (ii) the parties have not challenged the validity of the arbitration agreement before the first hearing in the arbitration; or (iii) the court itself reaches a decision that the arbitration agreement is valid (article 216).
- An arbitral award may be partly denied enforcement if the party against whom the enforcement is sought can prove that there exists any of the irregularities enumerated by law as to that part (article 477).
- The ruling of the court refusing enforcement of an arbitral award is not subject to challenge before or review by the higher level court.
- As regards the dispute that has been arbitrated, the parties can either enter into a new arbitration agreement to arbitrate their dispute again or submit their dispute to the court (article 478).
- Where a foreign-related arbitration institution in China transfers a party's application for asset protection measures, the court grants an order only upon security provided by the applicant. Where the court orders evidence preservation, it has discretion to exempt the applicant from providing security, if the court considers such security unnecessary (article 542).
- In order to enforce a foreign arbitral award, the applicant must first apply to have the award recognised by the court. Only after the court rules to recognise the award can it then grant enforcement. If the applicant only applies to recognise the award but not to enforce it, the court would only rule on its recognition but not to enforce it (article 546).
- Recognition and enforcement by the Chinese court of an arbitral award made by an ad hoc tribunal outside the territory of the PRC can be sought according to a treaty to which China accedes or on the basis of reciprocity (article 545).

The Interpretation has extensively enlarged the provisions on taking of evidence, running from article 90 to article 124. Among other things, the Interpretation allows the court to order production of evidence, ask the witnesses to warrant that they will tell the truth, and treat the statement made by a party-appointed expert as that party's statement. As arbitral tribunals seated in China usually make reference to judicial interpretation when conducting arbitration

proceedings, it is expected that the Interpretation will have significant impact on arbitration practice in China.

The SPC gives its Interpretation basically within the current framework of arbitration legislation without addressing some hotly debated issues such as whether ad hoc arbitration may be allowed in mainland China and whether an arbitral tribunal may order interim measures. At this stage, ad hoc arbitration may not be conducted in mainland China and only a court of law may order interim protection measurea.

JUDICIAL DECISIONS ON JURISDICTIONAL ISSUES AFTER THE SPLIT OF CIETAC

To cope with disputes brought with by the breaking away of the Shanghai International Economic and Trade Arbitration Commission (SHIAC) and the South China International Economic and Trade Arbitration Commission (SCIA) from CIETAC, the SPC issued its Notice on Certain Issues in Relation to the Correct Handling of Judicial Review of Arbitration Matters (the SPC Notice)[4] on 4 September 2013. The SPC Notice set up a level-by-level pre-reporting mechanism for local courts to harmonise judicial review practice in dealing with jurisdictional issues and judicial review over arbitral award in relation to split of CIETAC. Uncertainty and confusion continued, however, as for more than one year after the SPC Notice was published, no judicial decision was unveiled to the public. Therefore, outsiders had no way to know what tests the SPC would use to instruct the local courts to determine and resolve the relevant problems.

On 31 December 2014, CIETAC announced that it had reconstituted its Shanghai and South China subcommissions. In combination with CIETAC's announcement to terminate its authorisation of SHIAC and SCIA on 31 December 2012, it seems that SHIAC and SCIA would have no jurisdiction over disputes where the parties had agreed to have their disputes administered by CIETAC's Shanghai Subcommission or CIETAC's Shenzhen (South China) Subcommission. But with publication of a number of court decisions, this presumption becomes unsustainable and it turns out to be the contrary, at least for those arbitration clauses concluded prior to the split of CIETAC.

Also on 31 December 2014, the Shanghai No. 2 Intermediate People's Court ruled in the case ***Ni Laibao and Liu Donglian v Soudal Investment Limited***[5] that SHIAC, instead of CIETAC, had jurisdiction over a dispute arising from a 2010 contract where the parties had agreed to arbitrate before the 'China International Economic and Trade Arbitration Commission Shanghai Subcommission'. In the civil ruling, the court held that SHIAC's former name was CIETAC Shanghai Subcommission and it was established in 1988 through formal procedures and legitimately registered with the Bureau of Justice of the Shanghai Municipality. Upholding that SHIAC had jurisdiction deriving from the arbitration clause at issue, the court stated that:

> The arbitration commission designated by said arbitration clause, ie, 'CIETAC Shanghai Subcommission' (which has now changed its name to SHIAC), is an arbitration commission duly established by law and is competent to accept cases and make awards according to the parties' arbitration agreement. Therefore, the arbitration clause in this case is a valid arbitration clause. The dispute between the parties in this case shall be administered by SHIAC as expressly agreed in the arbitration clause.

In addition to the above case, SHIAC reported on its website a series of 12 civil rulings by Shanghai No. 2 Intermediate People's Court on the same or similar issues, handed down on 8 and 9 January 2015, confirming that the Shanghai court has now adopted a consistent approach to dispose of a number of pending cases that concern the question of CIETAC/SHIAC jurisdiction.[6]

Joining in chorus with SHIAC, SCIA also posted on its official website a judicial decision in the case ***Shandong Fuyu Lanshi Tires Co, Ltd v Shenzhen Nianfu Enterprise Development Co, Ltd***[7] by the Shenzhen Intermediate People's Court confirming that SCIA had jurisdiction where the parties agreed to refer arbitration to 'CIETAC South China Subcommission'. In another case ***Walmart (Anhui) Commercial Retail Limited v Huangshan Tianyinfudi Property Development Company***[8] the Shenzhen Intermediate People's Court ruled that 'CIETAC South China Subcommission' stipulated in an arbitration clause of a property leasing agreement concluded in February 2011 should be construed as SCIA, which is a lawful arbitration institution. Notably, the validity of the same arbitration clause was also filed for examination by the Beijing No. 2 Intermediate People's Court, which delivered a civil ruling[9] declaring that it lacked jurisdiction over the dispute and referring it to the Shenzhen Intermediate People's Court for a final adjudication.

According to the SPC Notice on level-by-level report, these decisions must have been reached with consent from the SPC. So some experienced practitioners conclude that the SPC's position is now also clear: under clauses designating 'CIETAC Shanghai/South China Subcommission', the competent institution should be the now independent and renamed SCIA and SHIAC, not the CIETAC Shanghai/South China subcommissions as reorganised in December 2014.[10]

Nevertheless, it is still uncertain which institution has jurisdiction over the case if an arbitration agreement referring the dispute to CIETAC Shanghai Subcommission or CIETAC South China Subcommission was concluded after 31 August 2012 (when SHIAC and SCIA jointly announced breaking away from CIETAC), or even after 31 December 2014 (when CIETAC announced reconstruction of its Shanghai and South China subcommissions), since all the judicial decisions mentioned above only touched on those arbitration clauses entered into prior to 1 May 2012 (when CIETAC issued the 2012 CIETAC Rules). Further judicial guidelines to clarify the situation in this regard are desirable.

JUDICIAL DECISION BANNING DOMESTIC DISPUTES BEING ARBITRATED OUTSIDE CHINA

The question as to whether two Chinese parties may agree and submit their dispute for arbitration seated outside mainland China has been examined and adjudicated in two previous civil cases. In the case ***Jiangsu Aerospace Wanyuan Wind Power Co, Ltd v LM Wind Power (Tianjin) Co***, the SPC replied to Jiangsu Province High People's Court[11] that the sales agreement concluded in 2005 between two Chinese parties involves no foreign-related elements because: the parties to the sales agreement are both Chinese legal persons; the subject matter in dispute is located in China; and the conclusion and performance of the sales agreement is in China. The SPC concluded that the arbitration agreement contained in the sales agreement is invalid because the Chinese laws have failed to specify that the Chinese parties may submit their purely domestic dispute for arbitration, either institutional or ad hoc, outside China, and therefore, it is groundless for the parties to have arbitration in a country other than China. Similar views were expressed by the SPC in the case ***Liupanshui Hengding Development Co, Ltd v Zhang Hongxing***.[12]

In a case reported in July 2014, the ***Beijing Chaolaixinsheng Sports and Leisure Co Ltd v Beijing Suowangzhixin Investment Consulting Co Ltd***, this issue was discussed again in the judicial decision given by the Beijing No. 2 Intermediate People's Court. In its civil ruling, the Court reiterated that two Chinese parties are banned from having their domestic dispute arbitrated outside mainland China. This case involved a contract to operate a golf course in Beijing concluded between a Chinese company and a wholly foreign-owned enterprise that was registered in Beijing and owned by a Korean citizen. The arbitration clause provided for arbitration at the Korean Commercial Arbitration Board (KCAB) in Seoul, which rendered an arbitral award on 29 May 2013. In enforcement proceedings the Beijing No. 2 Intermediate People's Court, following a reply from the SPC according to the level-by-level report mechanism, gave a civil ruling[13] on 20 January 2014 to deny recognition and enforcement of the KCAB arbitral award. The reasoning held by the SPC is that there were no foreign elements in the contract, given that the subject matter was located in China, the contract was concluded and performed in China and the wholly foreign-owned enterprise had the status of a Chinese enterprise. The SPC went on to hold that PRC law did not authorise the parties to refer domestic disputes not involving a foreign element to foreign arbitration and that the arbitration clause was invalid. According to article V(1)(a) (invalid arbitration agreement) and article V(2)(b) (public policy) of the 1958 New York Convention, enforcement of the KCAB arbitral award should be denied.

The ***Chaolaixinsheng*** case set off alarm bells that the Chinese judicial authority is far from open-minded as to the possibility of letting domestic disputes go to foreign jurisdictions for arbitration, even though one or both parties to arbitration are wholly foreign-owned companies incorporated in China. To mitigate risks exposed to recognition and enforcement, it is wise to have purely domestic disputes arbitrated by Chinese arbitration institutions.

OPENING DOOR TO ICC ARBITRATION IN CHINA

In the case ***Longlide Packaging Co Ltd v BP Agnati SRL***, the report of which was published by the SPC in April 2014, for the first time the SPC confirmed by a reply to Anhui Province High Court[14] the validity of an ICC arbitration clause by which the parties agreed to have arbitration administered by the ICC Court of Arbitration according to its arbitration rules with the seat of arbitration in Shanghai, China.

In the arbitration clause, the parties agreed that:

> Any dispute arising out of or in connection with this contract should be submitted to the International Court of Arbitration of the International Chamber of Commerce and be subject to the final award rendered by one or multiple arbitrators appointed by the Rules of the Court of Arbitration. Jurisdiction place should be Shanghai China and the arbitration should be conducted in English.

The SPC held that the arbitration clause complied with the requirements under article 16 of the PRC Arbitration Law that it contained the consensus of arbitration, the matters of arbitration and the appointed arbitration institution. Therefore it is a valid arbitration agreement.

The ***Longlide*** decision represents an amazing breakthrough, for it has clarified the long-standing doubt over whether parties may agree arbitration by foreign arbitration institutions in mainland China. According to the SPC, the validity of an arbitration agreement

as such shall be upheld, since the ICC Court could be deemed as an arbitration institution under article 16 of the PRC Law, which had been previously misunderstood as providing that the terminology 'arbitration commission' in that clause should not include an foreign arbitration body that are not registered under in China.

Commentators contend that in this case the SPC has sent a positive signal that a foreign arbitration institution may be permitted to administer arbitration seated in China, however, they also pointed out that the ***Longlide*** decision does not answer what is arguably the more significant question as to how such an award can be enforced in China.[15] Indeed, in a recent decision rendered by Hong Kong Court of First Instance in the case ***Z v A***, the Hong Kong Court took the view that there is a risk that an ICC award made in mainland China may not be enforceable in mainland China despite of existence of the ***Longlide*** decision.[16] If in the future the award made in the ***Longlide*** case were enforced by a Chinese court, it would appear that a green light is truly granted for foreign arbitration institutions to provide arbitration services in the PRC.

NEW DEVELOPMENT IN INVESTMENT TREATY ARBITRATION

In 2014, two more BIT cases involving China were filed at ICSID.

On 4 November 2014, Ansung Housing Co, a Seoul-based developer, filed its claim against China at ICSID, seeking relief concerning a property development project. The claim is based on the 2007 bilateral investment treaty between China and Korea, as opposed to the 2014 tripartite investment agreement between China, Japan and Korea, which also allows for disputes to be resolved through ICSID arbitration. The case was registered as ***Ansung Housing Co, Ltd v People's Republic of China*** (ICSID Case No. ARB/14/25).

On 3 December 2014, a Chinese investor initiated an ICSID arbitration against Yemen for resolving dispute arising from construction of an airport terminal. The case was registered as ***Beijing Urban Construction Group Co Ltd v Republic of Yemen*** (ICSID Case No. ARB/14/30).

There should be more BIT arbitrations in the future, either filed by Chinese investors or initiated by foreign investors, given the fact that China has signed over 130 BITs.

Notes

1. CIETAC's 2014 Work Report and 2015 Work Plan at www.cietac.org/AboutUs.
2. BAC's Arbitration Work Report 2014 at www.bjac.org.cn/page/gybh/2014zj.html#rd.
3. The context of CIETAC Guidelines on Evidence may be found at- www.cietac.org/index.cms
4. Fa (2013) No.194 issued by the Supreme People's Court.
5. (2012) Hu Er Zhong Min Ren (Zhong Xie) Zi No.5 Civil Ruling given by the Shanghai No. 2 Intermediate People's Court.
6. See www.shiac.org/ResourcesDetail.aspx?tid=39&aid=853&zt=3.
7. (2013)Shen Zhong Fa Shewai Zhong Zi No. 133 Civil Ruling given by Shenzhen Intermediate People's Court on 6 January 2015.
8. (2014) Shen Zhong Fa Shewai Zhong Zi No.191 Civil Ruling given by Shenzhen Intermediate People's Court on 21 January 2015.
9. (2014) Er Zhong Min Te Zi No. 07708 Civil Ruling given by Beijing No. 2 Intermediate People's Court on 13 February 2015.

10. Jessica Fei, Justin D'Agostino, Brenda Horrigan, May Tai, Simon Chapman, ***Shanghai Court ruling confirms SHIAC's jurisdiction over arbitrations referred to "CIETAC Shanghai sub-commission"***, at http://hsfnotes.com/arbitration.
11. (2012) Min Si Ta Zi No. 2 Reply given by the Supreme People's Court on 31 August 2012.
12. The case was reported at the SPC's publication,***the Guidelines for Accepting Cases***, edited by Case Acceptance Division of the SPC, Vol. 1 (2011).
13. (2013) Er Zhong Min Te Zi No. 10670 Civil Ruling given by Beijing No. 2 Intermediate People's Court. The context of the Ruling was recited in (2014) San Zhong Min Zhong Zi No. 09403 Civil Ruling given by Beijing No. 3 Intermediate People's Court. It can be visited at www.bjcourt.gov.cn/cpws/paperView.htm?id=100039499405.
14. (2013) Min Si Ta Zi No. 13 Reply given by the Supreme People's Court on 25 March 2013.
15. John Choong, Lucy Reed and Nicholas Lingard, Looking into 2015: China Arbitration, at www.freshfields.com/en/knowledge/Looking_to_2015__China_Arbitration/?LangId=2057.
16. *Z v A* [2015] HKEC 289.

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Summary

HONG KONG IN THE SPOTLIGHT – THE RULE OF LAW AND INTERNATIONAL ARBITRATION

Since the second half of 2014, Hong Kong has been in the international spotlight with the 'umbrella movement', symbolising the region's fight for democracy and making global headlines. This has brought into focus, not just for those in the legal profession but for the community at large, the issue of the rule of law in Hong Kong. Associated questions have been raised as to what the future holds for Hong Kong and what will become of its status as a premier international arbitration and disputes resolution venue. Upon closer examination, it is clear that, politics aside, Hong Kong's legal system has emerged triumphant from the global scrutiny.

The rule of law has long been an established cornerstone of Hong Kong's legal system. But what does it actually mean? In a speech given to celebrate the 25th anniversary of the Hong Kong International Arbitration Centre (HKIAC) on 4 December 2014, the Right Honourable Lord Hoffman expressed that the rule of law, in the context of international arbitration, means having a system of legal rules at the seat of the arbitration which is fair and efficient and which people can understand and having a judiciary that is independent and competent to lend support to the arbitration.[1] Yet events in the past year have called into question the ongoing independence of Hong Kong's judiciary and its ability to uphold the rule of law in its true sense.

On 27 June 2014, members of the judiciary, Hong Kong Law Society and the Hong Kong Bar Association participated in a silent march in response to the 'white paper' released by Beijing, which interpreted the 'one country, two systems' model in Hong Kong's Basic Law as requiring all administrators, including judges, to be patriotic and to love the country.[2] Many perceived Beijing's stance as jeopardising judicial independence, one of the core values of Hong Kong's legal systems and a fundamental tenet of the rule of law.

Thereafter, from late September 2014 onwards, hundreds of thousands of students and other protestors, dubbed the 'umbrella movement', occupied main parts of Central and other major roads in Hong Kong to stage a peaceful protest. Whilst the campaign was sparked by Beijing's decision to vet all Chief Executive candidates for the 2017 elections, the movement generally championed the themes of democracy, safeguarding of Hong Kong's freedoms and independence, and the upholding of the rule of law. The 'umbrella movement' continued well into mid-December 2014 – it did not affect or dampen spirits during Hong Kong Arbitration Week held in October 2014, but rather gave cause for dynamic discussions.

The protests and outspoken dialogue that have taken place in Hong Kong in the past year are clear evidence of the operation of the rule of law in Hong Kong, not a sign of its deterioration. Hong Kong has a long-established common law system and, in developing the same, evidently draws on the experiences of other jurisdictions including the United Kingdom, Australia, Canada and Singapore.

The Court of Final Appeal in Hong Kong also continues to maintain an extensive and impressive list of esteemed foreign judges, each of whom sit alongside two permanent Hong Kong judges to form a robust and truly impartial bench. The independence of Hong Kong's judiciary, its pro-arbitration stance, the force of the rule of law in the jurisdiction, and Hong Kong's sustained position as a preferred seat of arbitration in the Asia-Pacific region, have been invariably confirmed in recent months by, among others, the Honourable

Andrew Li (former Chief Justice of the High Court of Hong Kong), the Honourable Mr Justice Geoffrey Ma (current Chief Justice of the High Court of Hong Kong), the Right Honourable Lord Neuberger (non-permanent member of the Hong Kong Court of Final Appeal), the Right Honourable Lord Hoffman (international arbitrator and non-permanent member of the Hong Kong Court of Final Appeal), and Mr Neil Kaplan QC (international arbitrator and former chair of the HKIAC).[3] As Lord Neuberger stated in a speech made in Hong Kong on 26 August 2014, '[i]f I felt that the independence of the judiciary in Hong Kong was being undermined then I would either have to speak out or I would have to resign as a judge', but there is simply 'no present problem' with the rule of law in Hong Kong.[4]

Indeed, in concluding his speech given at the HKIAC on 4 December 2014, 'Lord Hoffmann went on to broach what he called the unfortunate and uninformed perception that because it is a part of China, Hong Kong does not count as an independent jurisdiction and is unsuitable as a seat of arbitration. Anyone who makes an effort to educate themselves will find that perception to be misconceived, he said.'[5]

It seems clear then that Hong Kong has an independent judiciary which is openly supportive of arbitration (discussed further below), as well as a legal community united in ensuring that any misconception as to Hong Kong's rule of law remains no more than a myth.

GAR AWARD RECOGNISES HKIAC INNOVATION – NEW MODEL ARBITRATION CLAUSE AND TRIBUNAL SECRETARIAL SERVICE

The HKIAC remains at the cutting edge of the international arbitration scene. This has been recognised at the Global Arbitration Review Awards Ceremony held in Washington, DC, on 25 February 2015, where the HKIAC received the award for 'innovation by an individual or organisation in 2014'. This award reflects, in particular, two innovative developments introduced by the HKIAC in the past year.

- In August 2014, the HKIAC became the first major international arbitral institution to introduce into its model arbitration clause an express governing law provision. Given the varying case law in Hong Kong, England, India and Singapore in recent years over the question of which governing law should apply to an arbitration agreement in the absence of an express provision,[6] this has been a welcome move among arbitrators and practitioners in the Asia-Pacific region, and will no doubt continue to be adopted widely.
- Earlier, in June 2014 the HKIAC rolled out its tribunal secretarial service for HKIAC-administered and ad hoc arbitrations, allowing an arbitral tribunal to appoint a member of the HKIAC Secretariat as its secretary. The service was introduced together with a set of Guidelines on the Use of a Secretary to the Arbitral Tribunal, which detail the appointment, challenge, duties and remuneration of tribunal secretaries. The value of tribunal secretaries is increasingly recognised in international commercial arbitration for further enhancing arbitral tribunals' efficiencies and reducing overall costs for parties, thus reflecting another addition to the HKIAC's range of world-class capabilities.

Updates To Procedures And Practice Note

In continuing the commitment to meet the needs of and deliver efficient and effective arbitral processes to its users, the HKIAC has introduced a number of updates to its procedures and practice notes in the past year. In October 2014, the HKIAC introduced a new Practice

Note on the Challenge of an Arbitrator, providing a unitary system to govern challenges to arbitrators in arbitrations administered by the HKIAC under the 2008 and 2013 HKIAC Administered Arbitration Rules, the 1975 and 2010 UNCITRAL Arbitration Rules, and any other arbitration rules issued by HKIAC which designate HKIAC to decide challenges to arbitrators. The Practice Note sets out a streamlined procedure for filing and deciding any challenges to arbitrators. For the HKIAC, this system also serves to provide feedback on the quality of the arbitrators, thereby helping to ensure that excellence is maintained.

The HKIAC Procedures for the Administration of Arbitration under the UNCITRAL Rules (the 2015 Procedures) also came into effect on 1 January 2015. In the Asia-Pacific region, the HKIAC has the longest history of and experience in administering arbitrations under the UNCITRAL Arbitration Rules. The 2015 Procedures supersede the HKIAC's previous procedures for the administration of UNCITRAL arbitrations, and apply to all arbitrations commenced on or after 1 January 2015 pursuant to an arbitration agreement or investment treaty which provides for the 2015 Procedures to apply or provides for arbitration administered by the HKIAC under the UNCITRAL Arbitration Rules. The updates incorporated in the 2015 Procedures bring them into conformity with all versions of the UNCITRAL Arbitration Rules.

HKIAC Administered Arbitration Rules

In the Hong Kong chapter of *The Asia-Pacific Arbitration Review 2014*, the author discussed extensively the new provisions introduced in the HKIAC's Administered Arbitration Rules which came into effect in November 2013 (the 2013 Rules). This innovative new set of rules, which reflect best practices and the most recent trends in international commercial arbitration, include updates to the scope of the rules, arbitrator fees and appointments, procedures for joinder of parties and consolidation of proceedings, the expedited procedure, confidentiality, and interim measures, and introduction of the emergency relief procedures.[7] The 2013 Rules continue to be well received and have been widely adopted in international commercial arbitrations.

BOLSTERING CIETAC HONG KONG – THE 2015 CIETAC ARBITRATION RULES

Many will recall that the China International Economic and Trade Arbitration Commission (CIETAC) launched the CIETAC Hong Kong Arbitration Center (CIETAC Hong Kong), the only CIETAC office to be established outside of mainland China, in 2012. Since then, CIETAC has introduced a new set of arbitration rules, which came into effect on 1 January 2015 (the 2015 CIETAC Rules). Apart from changes which reflect recent trends in international arbitration practice,[8] such as the inclusion of provisions on emergency arbitrators and joinder and consolidation, the 2015 CIETAC Rules are significant as they introduce special provisions which are applicable only to CIETAC Hong Kong arbitrations.

In particular, Fee Schedule III now contains a separate fee schedule for CIETAC Hong Kong arbitrations. This is significant because CIETAC arbitrators are generally paid less than their counterparts in other international arbitration institutions. The new fee schedule significantly improves the fee scale and rates for arbitrators sitting in CIETAC Hong Kong arbitrations, which in turn should result in a greater pool of leading international arbitrators being available for CIETAC Hong Kong arbitrations.

Further, pursuant to chapter VI of the 2015 CIETAC Rules, for any arbitration administered by CIETAC Hong Kong:

- unless otherwise agreed, the seat of arbitration will be deemed to be Hong Kong, the arbitration procedure will be governed by Hong Kong law, and any award rendered will be considered a Hong Kong award;
- parties are entitled to nominate arbitrators who are not on CIETAC's panel of arbitrators, without obtaining consent from the other party; and
- the arbitral tribunal is expressly permitted to grant any appropriate interim relief, subject to the parties' agreement otherwise (this is broader than the tribunal's power in CIETAC arbitrations seated in mainland China).[9]

Although it is premature to assess the practical impact of the 2015 CIETAC Rules, they do render CIETAC Hong Kong a competitive option for users who wish to adopt a framework that is familiar and amenable to mainland Chinese parties but which also incorporate international arbitration standards. In any event, the 2015 CIETAC Rules will reinforce, or perhaps reflect, Hong Kong's unique position as a truly international dispute resolution centre.

AMENDMENTS TO THE HONG KONG ARBITRATION ORDINANCE

In line with its firm commitment to the continued development of international commercial arbitration in Hong Kong, the government continues to constantly receive comments on and to update the Arbitration Ordinance (Chapter 609 of the Laws of Hong Kong). In response to concerns raised by the arbitration community, the Hong Kong government has introduced, for the second time in two years, amendments to the Arbitration Ordinance. The Arbitration (Amendment) Bill 2015, which was gazetted on 23 January 2015, removes legal uncertainties relating to the opt-in mechanisms for domestic arbitration set out in schedule 2 of the Ordinance. The proposed amendments also update the list of parties to the New York Convention, with the addition of Bhutan, Burundi, the Democratic Republic of the Congo, Guyana and the British Virgin Islands (by extension from the United Kingdom).

PRO-ARBITRATION STANCE OF THE HONG KONG JUDICIARY

Judgments handed down by the Hong Kong courts in the past year not only continue to reflect the region's robust judiciary and its firm pro-arbitration stance, but also highlight Hong Kong as the prime go-to jurisdiction in the Asia-Pacific region for international commercial arbitration.

Significantly, in the landmark case of *Astro Nusantara & Ors v PT Ayunda Prima Mitra & Ors*[10], the Court of First Instance in Hong Kong was called upon to consider a decision of the Singapore Court of Appeal which found that substantial parts of Singapore arbitral awards were unenforceable in Singapore. In stark contrast, the Hong Kong Court ultimately found that the Singapore awards were enforceable in Hong Kong. The case is discussed in greater detail below.

Astro Nusantara & Ors V PT Ayunda Prima Mitra & Ors [2015] HKCU 432*

In this case, five Singapore arbitral awards (the SIAC Awards) had been issued in favour of Astro, who then applied to the courts of Singapore and Hong Kong respectively to enforce the awards. Orders had been granted in Hong Kong in 2010 for Astro to enforce the SIAC Awards in Hong Kong (the 2010 Orders). In Singapore, PT First Media challenged the enforcement proceedings, and in 2013 the Singapore Court handed down its judgment refusing to enforce

substantial parts of the SIAC Awards on the basis that the arbitral tribunal had acted outside of its jurisdiction.

PT First Media applied to the Hong Kong courts seeking an extension of time to apply to set aside the 2010 Orders, and seeking to set aside the 2010 Orders on the basis that the same application before the Singapore Court of Appeal had been unfavourable to Astro. Accordingly, the Court of First Instance in Hong Kong was required to rule on the enforceability of the SIAC Awards in Hong Kong, the effect of the Singapore Court of Appeal decision on the enforceability of the SIAC Awards in Hong Kong, and whether the 2010 Orders should be set aside.

In dismissing PT First Media's application, Chow J held that the Court has a discretion to decline to refuse enforcement of an arbitral award (under section 44(2) of the old Arbitration Ordinance (Cap 341), which was applicable) in circumstances where there has been a breach of the good faith, or bona fide, principle by the award debtor. The Hong Kong Court found that PT First Media had acted in breach of the good faith or bona fide principle, and thus was not permitted to rely on the Arbitration Ordinance to resist enforcement of the SIAC Awards.

Justice Chow held that the principle of good faith was 'wide enough to cover situations recognised under our domestic law as giving rise to an estoppel or waiver',[11] and that in this case, PT First Media was fully aware of its right to challenge the SIAC's ruling on jurisdiction before the Singapore Court pursuant to article 16(3) of the Model Law at a much earlier stage of the arbitral process, but chose not to do so. Justice Chow was critical of PT First Media keeping the jurisdictional invalidity point (which was the key reason the Singapore Court of Appeal found the SIAC Awards to be substantially unenforceable) in reserve, to be deployed in the enforcement court only when it suited its interests to do so.

While recognising that there is 'no general obligation on the part of an award debtor to exhaust his remedies in the supervisory court' before resisting enforcement in the enforcement court,[12] in all the circumstances of the present case (including PT First Media's conduct during the arbitration), Chow J concluded that permitting PT First Media to resist enforcement of the SIAC Awards in Hong Kong would be contrary to the principle of good faith.[13] Justice Chow also noted that, notwithstanding that the Singapore Court of Appeal had refused to enforce substantial parts of the SIAC Awards in Singapore, the SIAC Awards had not been set aside in Singapore and so remain 'still valid and create legally binding obligations'[14] in Hong Kong. This position would not change as a result of any Singaporean Court decision to refuse enforcement of a substantial part of the SIAC Awards.

Chow J noted obiter that, if he was wrong in his substantive conclusion, he has residual discretion to permit enforcement of an award even if the award debtor is able to establish grounds for the refusal of enforcement. Justice Chow nonetheless conceded that such discretion is very narrow and, in this case, if he had not come to the conclusion he had, subject to the application of the good faith principle, he would not be prepared to exercise the residual discretion to permit enforcement of the SIAC Awards in Hong Kong given the Singapore Court of Appeal's finding that the SIAC Awards had been rendered by the arbitration tribunal without jurisdiction to do so.

In relation to PT First Media's time extension application, Chow J dismissed this also. Justice Chow held that, even if there was merit to PT First Media's setting aside application, he would still have refused the time extension application because a delay of 14 months was very significant, particularly in the context of resisting enforcement of a New York Convention

award. Also, in this case, the delay was the result of a deliberate and calculated decision by PT First Media not to take action in Hong Kong.

Justice Chow dismissed PT First Media's extension of time and setting aside applications with costs.

T V TS [2014] 4 HKLRD 772

This case concerns a dispute over the jurisdiction of an arbitrator pursuant to the arbitration clauses in two separate agreements. The agreements contained similar arbitration clauses, which provided for 'any dispute' and 'any and all disputes' to be referred to arbitration. Arbitral proceedings were conducted and an award was granted, however the arbitrator failed to consider part of the dispute between the parties. The applicant (T) further argued that the arbitration clauses had become inoperative by virtue of performance, and commenced court proceedings to recover its claim. The respondent (TS) sought to stay the court proceedings in favour of arbitration.

Justice Mimmie Chan upheld the say. She found that, despite having failed to consider part of the dispute, the arbitrator had the requisite jurisdiction, thus the remaining part of the dispute should be referred back to the arbitral tribunal or a new arbitral tribunal for arbitration. Further, it was held that the language in the arbitration clauses was sufficiently wide to encompass multiple disputes and did not become inoperative simply as a result of failure to consider a part of the dispute.

This case reflects the Hong Kong courts' sharp criticism against attempts to 'reopen' through court proceedings issues which have already been dealt with in arbitration. Justice Chan noted in particular Reyes J's observation in ***A v R (Arbitration: Enforcement)*** [2009] 3 HKLRD 389 that:

> Abortive and unmeritorious attempts to challenge or to frustrate enforcement of or compliance with a valid award should not be encouraged. Where a party unsuccessfully resists enforcement, or seeks to set aside an award, or as in this case, seeks unsuccessfully to reopen through court proceedings an issue dealt with in arbitration, instead of reverting to the arbitral tribunal or making a new submission to arbitration in accordance with an acknowledged and agreed arbitration clause, it should pay the incidental costs on an indemnity basis, unless special circumstances exist. The fact that it may have an arguable case would not constitute special circumstances.

Accordingly, Chan J stayed the court proceedings in favour of arbitration upon the respondent's application, and ordered that the applicant pay costs on an indemnity basis.

Z V A & Ors [2015] HKCU 375

The applicant applied to the Court of First Instance to resist enforcement of an arbitration award and to set aside the award under section 34 of the Arbitration Ordinance and article 16 of the Model Law, on the basis that the location of the arbitration was incorrectly decided and as such there was no jurisdiction. In this case, the parties only agreed that the governing law of the agreement would be the 'Laws of the People's Republic of China' and that the ICC Arbitration Rules would apply. The arbitral tribunal decided that the arbitration would take

place in Hong Kong and that the procedural laws applicable to the arbitration would be Hong Kong law.

The application to set aside the arbitral award was rejected, on the basis that article 14(1) of the ICC Rules provides that the place of the arbitration is to be fixed by the ICC Court unless agreed upon by the parties. Justice Mimmie Chan emphasised that '[r]ational and reasonable businessmen would not have intended by their agreement to refer their dispute to arbitration by an institution, or in a place, which would render the arbitral award unenforceable'.[16] Especially given the vague terms in the agreement and the fact that there is a risk that an award in mainland China may not be enforceable in mainland China, Chan J held that the arbitral award was given within jurisdiction. Again, she ordered that costs be paid by the failed applicant on an indemnity basis.

VK Holdings (HK) Ltd V Panasonic Eco Solutions (Hong Kong) Co Ltd [2015] HKCU 50

This is another case where the jurisdiction of the arbitrator was disputed pursuant to section 34 of the Arbitration Ordinance. The dispute involved a sale and purchase contract for certain products, and a dispute arose as to whether the contract provided for the arbitration of disputes involving sale and purchase of other products not specifically mentioned in the contract. In upholding the well-known principle that an arbitrator has only such jurisdiction as the contracting parties have agreed to give him under the contract, Justice Mimmie Chan noted that '[e]ach arbitration clause must be construed in the context of the contract as a whole, and the meaning of a particular formula may be broader or narrower depending on the nature of the transaction'.[17] Given the wide language used in the contract and bearing in mind that the other products were very similar to the products specified in the contract, she found that the dispute was so closely linked and related to their relationship and the contract that it could not reasonably be said that any disputes relating to the other products would not be included in the contract. As such, Chan J held that the arbitrator had jurisdiction over the dispute. Costs were to be paid by the failed applicant on an indemnity basis.

Hong Kong Golden Source Ltd V New Elegant Investment Ltd [2014] HKCU 2251

This is a case concerning enforcement of a CIETAC arbitral award. The underlying arbitral proceedings related to a commercial dispute over the transfer of shareholdings in a company. Before the Hong Kong court, the applicant sought to resist enforcement of the mainland award on public policy grounds, specifically the prevention of criminal, fraudulent, corrupt or other unconscionable behaviour.

Justice Chow reiterated that it is the legislature's intent for mainland awards to be 'readily enforceable in Hong Kong and refusal to enforce should be an exception rather than the rule'.[18] He noted that the discretion the court has to refuse enforcement is a residuary one, and the required threshold to resist enforcement is a very high one. Where enforcement is resisted on the ground that it would be contrary to public policy, it should be borne in mind that Hong Kong public policy itself leans towards the enforcement of foreign arbitral awards. As such, 'contrary to public policy' should be given a narrow construction, and it must be shown that there is a 'substantial injustice arising out of an award which is so shocking to the court's conscience as to render enforcement repugnant'[19] before the Hong Kong courts would consider non-enforcement of a foreign arbitral award.

Justice Chow found that the public policy grounds were insufficient to refuse the enforcement of the mainland arbitral award. Costs were to be paid by the failed applicant on an indemnity basis.

Arima Photovoltaic & Optical Corp V Flextronics Computing Sales And Marketing (L) Ltd [2014] 5 HKLRD K1

The applicant in this case sought to set aside an international arbitral award on the basis that the arbitral tribunal's award did not constitute a reasoned award. It was claimed that this resulted in breaches of article 34(2)(a)(iii) and (iv), and 34(2)(b)(ii) of the Model Law, entitling the court to set aside the arbitral award. The application was refused at first instance and, on appeal, was again refused by the Court of Appeal on the basis that sufficient reason was given, noting that the burden is on the plaintiff to 'establish that the award rendered by the tribunal was one that was not reasoned'.[20] Costs were to be paid by the failed applicant on an indemnity basis.

S Co V B Co [2014] 6 HKC 421

In this case, the applicant challenged an arbitral award under article 34(2) of the Model Law, on the basis that the arbitral tribunal acted outside of its jurisdiction under article 16(3) of the Model Law and that the award should not be enforced as it is in conflict with the public policy of Hong Kong.

Justice Mimmie Chan held that in deciding whether the tribunal acted within jurisdiction, the court should conduct an independent review and not be bound or restricted by the tribunal's preliminary decision on its own jurisdiction, namely, the court should not be in a worse position than the arbitrator in determining the challenge (as per ***Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*** [2011] 1 AC 763). She further stressed the need for a party to act promptly in relation to any allegation of non-compliance or breach of the procedural rules or of natural justice, as a party's failure to raise such a point before the court of supervisory jurisdiction may amount to an estoppel or lack of good faith, thereby precluding him from raising the same before the court of enforcement.[21] In relation to public policy, Chan J emphasised the narrow approach in determining whether an award would be contrary to public policy and noted that the arbitral award in this case came nowhere near the standard required.

Justice Chan found that the tribunal had acted within jurisdiction, dismissed the application to resist enforcement and ordered costs against the applicant on an indemnity basis.

CONCLUSION

As demonstrated by the recent developments highlighted in this chapter, Hong Kong continues to be a significant player in the international arbitration arena. The 'umbrella movement' and the dialogue generated both onshore and abroad by the fight for democracy and independence under the 'one country, two systems' model has provided an opportune spotlight for Hong Kong to stand proud, and to showcase both the independence of its highly-regarded judiciary and the strength of the rule of law in Hong Kong.

The firm commitment of the government, the courts, eminent judges, the international arbitral institutions with a key presence in Hong Kong (the HKIAC, ICC and CIETAC), and the arbitration community at large in supporting Hong Kong as a premier international arbitration venue, is further evident in the variety of developments that have taken place recently – from the updated and innovative HKIAC rules, new procedures and guidelines issued by the HKIAC and CIETAC; to the ongoing updates to the Arbitration Ordinance; and, most notably, the recent landmark decision of the Hong Kong Court of First Instance to enforce SIAC

arbitral awards notwithstanding an earlier decision by its Singaporean counterpart refusing to enforce those same awards.

In summary, although Hong Kong has been measured by the international arbitration community and the world at large over the course of the past year, it has stood up well to the scrutiny and, importantly, not been found wanting.

Notes

* Please note that in the printed edition of this chapter, the applicant, PT First Media, was erroneously named PT Ayunda. The authors apologise for the oversight and for any confusion caused.

1. Olga Boltenko, 'Hong Kong: Lord Hoffman's rule of law musings', 10 December 2014, ***Global Arbitration Review***, Volume 10 – Issue 1.
2. The full text of the 'white paper', titled 'The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region', was released by the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the Hong Kong SAR on 10 June 2014. It is available online at:- www.fmcoprc.gov.hk/eng/xwdt/gsxw/t1164057.htm.
3. This issue is discussed in detail in the article by Alison Ross, 'The umbrella cause', ***Global Arbitration Review,*** 10 November 2014, . See also the article in Note 1, above.
4. Clare Baldwin, 'Foreign judge in Hong Kong defends city's legal independence', Reuters, 26 August 2014. Also see Note 3, above.
5. See Note 1, above.
6. See, for example, ***Klöckner Pentaplast Gmbh & Co Kg v Advance Technology*** (H.K.) Company Limited HCA1526/2010, where the Court of First Instance in Hong Kong discusses the issue; ***Sulamérica Cia Nacional De Seguros SA and others v Enesa Engenharia SA*** [2012] EWCA Civ 638, which sets down the English position; and ***FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others*** [2014] SGHCR 12, which sets out the approach in Singapore.
7. For a detailed explanation of the 2013 Rules and the new provisions introduced therein, refer to the Hong Kong chapter of ***The Asia-Pacific Arbitration Review 2014***.
8. For example, Appendix III of the 2015 CIETAC Rules set out emergency arbitrator provisions, and multi-party and multi-contract arbitrations is dealt with in articles 14, 18 and 19.
9. Chapter VI of the 2015 CIETAC Rules applies only to CIETAC Hong Kong arbitrations. See, for example, articles 74, 76 and 77.1.
10. [2015] HKCU 432.
11. Per Chow J at paragraph 81 of the decision.
12. Ibid, paragraph 82.
13. Ibid, detailed discussion of relevant case law on public policy and principles of good faith from paragraph 66 onwards.
14. Ibid, paragraph 129.
15. Per Reyes J, at paragraph 28 of the decision.

16. Per Chan J, at paragraph 47 of the decision.
17. Per Chan J, at paragraph 24 of the decision.
18. Per Chan J, at paragraph 28 of the decision.
19. Per Chan J, at paragraph 28 of the decision.
20. Per Barma JA, at paragraph 7 of the decision.
21. At paragraph 76 of the decision, following ***Hebei Import & Export Corp v Polytek Engineering Co Ltd*** [1999] 2 HKC 205 and ***Gao Haiyan v Keeneye Holdings Ltd*** [2012] 1 HKC 335.

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India

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Summary

India adopted the UNCITRAL Model Law on International Commercial Arbitration, 1985 (Model Law) through the Arbitration and Conciliation Act, 1996 (1996 Act). The Indian legislature decided to have one statute governing domestic and international arbitration, enforcement of foreign awards, and conciliation. Other than the modifications necessary to adapt to this wider scope, the 1996 Act virtually imported the Model Law text with minor amendments. It was widely believed that this would ensure India's entry into the international arbitration arena with a position of strength, coinciding with the economic reforms that were first initiated in 1991. However, as years rolled by, hope turned to despair.

Over the years, interpretation of certain provisions of the 1996 Act led to strange results, often prolonging the time parties spent in court. The general perception that awards will be considered final and not reviewed on merits was soon dispelled, at least in the case of domestic arbitration involving all Indian parties.[1] As if this was not enough, India's reputation in the international arbitration community suffered a severe setback when the Supreme Court of India allowed a foreign award to be challenged in Indian courts under the 1996 Act.[2] India received a lot of flak in the international sphere and the general sentiment among foreign investors was a distrust of the dispute redressal mechanism under the 1996 Act.

However, the story of the 1996 Act, which remains a work in progress, has started to look more positive. The Supreme Court of India in the last five years has, slowly but surely, taken a clear stand in favour of arbitration. Through a number of decisions, the apex court has given effect to the policy intent of the 1996 Act of minimal court intervention. It has also reviewed and overruled some of its earlier decisions which had failed to take into account some of the axiomatic principles governing the concept of international arbitration. With the apex court at the wheels, and with able support from various High Courts, the 1996 Act is finally on course to achieve its original intent.

This chapter reviews some critical recent developments, including the 246th Report of the Law Commission of India (the LC Report), which has suggested significant amendments to the 1996 Act to further refine the robust pro-arbitration atmosphere which has been under construction for sometime now. If news reports are to be believed, the finished product will be revealed this year as the Indian government has promised to table the Bill for amendment at the earliest opportunity.

DEATH BLOW TO CHALLENGE OF FOREIGN AWARDS

If one was to identify the most damaging event derailing India's attempt to build a pro-arbitration environment, the Supreme Court's decision in ***Venture Global*** would be the clear choice. Over the years, international jurisprudence on arbitration developed to ensure that only the court of the seat of arbitration should have the jurisdiction to review and set aside an award. Therefore, foreign awards were considered to be beyond the reach of any court. ***Venture Global*** unsettled this position under Indian law, causing great uncertainty in the minds of foreign parties dealing with Indian businesses, as the threat of a potential challenge of a foreign award in India could not be ruled out despite a clear choice of foreign seat.

It did not take long for Indian courts to realise that probably ***Venture Global*** had overreached. Today, it is easier to find precedents of various Indian courts that distinguish ***Venture Global*** than those that have actually applied it. Through various decisions the apex court had virtually diluted the effect of the ratio in ***Venture Global***.[3] However, it remained a precedent to

deal with in every case, and an excuse that allowed a recalcitrant party to file an application challenging a foreign award.

In September 2012, a five-judge constitutional bench of the Supreme Court in ***Bharat Aluminium v Kaiser Aluminium*** overruled ***Venture Global***.[4] The apex court for the first time recognised that seat was the centre of gravity for international arbitration and held that Indian courts would have no jurisdiction over any arbitration seated outside India. However, in light of earlier precedents which held sway for about 10 years, the overruling was made prospective – such that, the law as interpreted and declared in ***Bharat Aluminium*** would apply only to arbitration agreements entered after the date of the decision, namely 6 September 2012.

The Supreme Court explained that since parties ought to have acted on reliance of the law as declared by ***Bhatia International*** and ***Venture Global***, to do complete justice, it ought to be allowed to apply to agreements entered prior to the date of the constitutional bench's decision.

While ***Bharat Aluminium*** definitely was a watershed in establishing a pro-arbitration legal regime in India, the decision has brought in one negative corollary – no assistance of an Indian court can be sought in any foreign-seated arbitration. Therefore, Indian courts currently have no jurisdiction to grant interim relief or assist in collecting evidence in India under the 1996 Act.

The prospective overruling was seen as disappointing as it allowed a decision that the court recognised to be flawed to continue to exist as a precedent. However, it seems that disappointment was to be short-lived.

Even prior to the ***Bharat Aluminium*** decision, various decisions of the Supreme Court had considered and distinguished ***Venture Global*** – such that challenging a foreign award in India continued to prove very difficult. However, a foot in the door remained. Two recent decisions of the apex court – in May 2014 and March 2015 – seem to have finally shut the door on any such attempts.

In ***Reliance Industries v Union of India***,[5] the apex court clarified that though ***Venture Global*** was overruled prospectively, the position of law as it stood prior to ***Bharat Aluminium*** would not allow Indian courts to interfere with foreign awards. The court remarked that it was too late in the day for anyone to contend that seat of arbitration did not amount to an exclusive jurisdiction clause. The court also dismissed attempts to justify Indian courts' jurisdiction by reference to mandatory fiscal and other laws that applied to the issue in dispute by clarifying that grounds of challenge cannot be a consideration in deciding whether Indian courts have jurisdiction to entertain the challenge.

In ***Harmony Innovation Shipping Ltd v Gupta Coal India Ltd***,[6] the Supreme Court – while disagreeing with the High Court's reliance on ***Bharat Aluminium*** to deny jurisdiction of Indian courts in a pre-September 2012 agreement – reached the same conclusion by applying the principles laid down in decisions prior to ***Bharat Aluminium*** and in ***Reliance Industries***. The court effectively held that once it was determined that London was the seat of arbitration, it was clear that parties impliedly excluded application of part I of the 1996 Act leading to the conclusion that Indian courts would have no jurisdiction.

If there was any doubt about the intent of Indian courts, ***Reliance Industries*** and***Harmony Shipping*** have dispelled them. It can now be confidently asserted that whether a foreign

award is rendered before or after the prospective overruling of ***Venture Global***, Indian courts will refuse to entertain any applications challenging it.

ALLEGATIONS OF FRAUD ARBITRABLE

Across jurisdictions, the power of arbitrators to deal with certain types of dispute or with certain kinds of allegation or doubt as to their power to grant certain remedies has been debated with differing outcomes. Both the Model Law and the New York Convention provide grounds to challenge or oppose enforcement of awards if it be found that the subject matter of dispute is not capable of settlement by arbitration. One of the most controversial of these in both EU and the US has been matters concerning competition law.

In India as well, many such issues have arisen in the working of the 1996 Act. Some of the most controversial, or problematic, have been decisions relating to the arbitrator's power to grant specific performance or to adjudicate allegations of fraud (in civil disputes).

It had been contended in many cases that the grant of specific performance is a discretionary remedy and the power to exercise such discretion lies exclusively with civil courts, and therefore arbitrators have no power to grant such relief. Divergent opinions were held by different High Courts, which were set to rest by the Supreme Court by confirming that such power was available to arbitrators.[7]

While that controversy was resolved, another one arose when the Supreme Court held that disputes involving serious allegations of fraud were not capable of adjudication by arbitration.[8] It is not difficult to see why this would be a serious predicament. Allegations of fraud either in formation of contract or in the manner of performance is not uncommon in commercial disputes – the species of disputes that arbitration is most suited to. To carve out an exception on the basis of what allegations or contentions are taken up by parties sounds fundamentally flawed and is an invitation to allege fraud for anyone wishing to avoid an arbitration agreement. This is precisely what eventually happened, with courts having to deal with arguments of this nature more frequently. Courts reacted by distinguishing the *Radhakrishnan* decision on varying grounds to salvage parties' agreement to arbitrate. However, this had its limits, and certain arbitration agreements were defeated. Eventually, the apex court, in a case relating to a foreign seated arbitration, held that allegations of fraud do not render a dispute non-arbitrable – distinguishing *Radhakrishnan* simply by reference to the fact that it related to a domestic arbitration and without commenting on it any further.[9] This left arbitration agreements seated in India susceptible to attack on the ground that the dispute involved adjudication of allegations of fraud. A few months later, another Supreme Court bench went on to hold that *Radhakrishnan* was per incuriam certain earlier decisions of the apex court and was therefore not good law.[10] There remains some issue concerning the precedential value of *Swiss Timing*, as a single-judge bench has held a division bench decision to be per incuriam.[11]

In the changes suggested by the Law Commission in the LC Report, it prefers to deal with the problem head-on by recommending addition of a sub-section to section 16 which will categorically provide that arbitral tribunal shall have the power to adjudicate a dispute notwithstanding 'serious questions of law, complicated questions of fact or allegations of fraud, corruption etc' being involved – borrowing directly from the language used by the Supreme Court in *Radhakrishnan*.

TWO GEMS FROM THE LAW COMMISSION

The LC Report, which has led to a draft amendment ready to be tabled in Indian parliament, has been the most noteworthy development in arbitral jurisprudence in India. Since the text of the draft amendment has not yet been made available, it is not clear what recommendations of the LC Report have been accepted and which have been rejected or paused. Reports suggest, however, that the Indian government has accepted most of the recommendations of the LC Report and the draft amendment will essentially reflect the draft prepared by the Law Commission.

Among the many changes, most of which are bound to have positive impact on the arbitration scenario in India, we assess below in some detail two issues we consider will have maximum practical impact on parties that deal with the process.

Ensuring Independence And Impartiality

The provisions relating to independence and impartiality of arbitrators are an axiomatic requirement for a successful regime of arbitration in any jurisdiction. Since the determination of arbitrators in the form of their award are without appeal and are supported by the force of state action (through enforcement), it is incumbent for the state to provide for adequate checks and balances to review the decision-making process. As a part of that right, legislations around the world provide that arbitrators must be independent and impartial.

One of the basic tenets of natural justice is that no man must be a judge in his own case. By extension of this principle, it is essential that arbitrators should not in any manner be related to parties or counsel of parties such that it gives rise to justifiable doubts as to their independence or impartiality. Such requirements are invariably also contained in all leading institutional rules.

Another facet of this same requirement is that there must be equality in appointment rights between parties. In other words, a unilateral right to appoint the arbitral tribunal with one of the parties to the dispute is prima facie contrary to the idea of a fair dispute resolution process. This right had been held to be important enough to set aside an award on grounds of public policy in France, a jurisdiction where setting aside of an arbitration award is a rarity. In the famous ***Dutco*** case, the French court held that equality of parties in the appointment of arbitrators is a matter of public policy that can only be waived after the dispute had arisen.[12]

Germany statutorily provides for such situation.[13] It stipulates that if an arbitration agreement grants preponderant rights to one party with regard to the composition of the arbitral tribunal which places the other party at a disadvantage, that other party may (within two weeks from becoming aware of appointment of an arbitral tribunal) request the court to make the appointment in deviation from the agreed procedure.

In India, however, courts have given primacy to the binding nature of an agreed arbitration clause and refused to interfere with either agreed named arbitrator who are employees of one of the parties or procedure which gives one of the parties the unilateral right to appoint the arbitral tribunal.[14] This practice started with government agencies and public sector units providing such clauses in their tenders or contracts, leaving no flexibility for any negotiation.

The LC Report rightly observes that '[t]he balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory'. It has, therefore, suggested some definitive changes to put an end to the practice of appointing employee arbitrators or arbitrators otherwise having a close link to the parties. It is also

encouraging to see that the LC Report has put to good use the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines). The recommendations seek to remedy the problem of neutrality of arbitrators as follows:

- Every potential arbitrator is mandated to make a disclosure in the prescribed form inter alia disclosing existence of any relationship with either party or with the subject matter of dispute which is likely to give justifiable doubts as to his independence and impartiality. As a guide to the same, a Fourth Schedule to the 1996 Act is proposed which is an adaptation from the Orange List of the IBA Guidelines.
- A Fifth Schedule to the 1996 Act is proposed, which is an adaptation of the Red List of the IBA Guidelines and it is provided that any person whose relationship with parties, counsel, or subject matter falls in any category listed therein – such person would be ineligible to be appointed as an arbitrator notwithstanding a prior agreement to the contrary. However, parties are free to waive application of this provision subsequent to the disputes having arisen.
- If an arbitrator is appointed despite his ineligibility under the Fifth Schedule, he can be substituted by an application to the appropriate court under section 14 of the 1996 Act.

In our view, this does take care of the neutrality issue adequately and is bound to put to end the practice of appointing related arbitrators, in particular by state entities in India. There might be some concerns about possible abuse or delay insofar as it creates another opportunity for moving the court under section 14 of the 1996 Act. In the bargain between fairness and speed, this seems to be an acceptable compromise.

While the Commission has laudably addressed the concerns regarding neutrality of arbitrators, it stopped short of completing this circle by also addressing the problem of unilateral right of appointment with one of the parties.

On the surface, it may seem that once the problem of neutrality is addressed, the problem of unilateral appointments is solved indirectly – as even if a party has the sole right to appoint the arbitrator, it cannot appoint an individual who is biased. This is not the case if one reviews the practical issues surrounding the problem. It is not difficult for parties who are able to negotiate such unilateral rights in their favour to find individuals who appear neutral on any objective evaluation but are patronised by such parties to ensure a favourable tribunal. Given that this practice has been prevalent in India for some time, examples of such cases are numerous. Shockingly, even in employment contracts, many corporations today provide for such arbitration clauses.

Given that arbitration leads to a binding award not subject to appeal, it is imperative that equality in rights of appointment are guarded by legislation and made non-waivable prior to disputes. Allowing the stronger party to unilaterally set up a tribunal for rendering a binding decision on any dispute is ex facie unjust and unconscionable. In our view, therefore, an amendment must be proposed in section 11 on the lines of the German statute to provide that if an arbitration agreement grants preponderant rights to one party with regard to the composition of the arbitral tribunal which places the other party at a disadvantage, that other party may (within 30 days from becoming aware of appointment of an arbitral tribunal or invocation of arbitration agreement between parties) request the court to make the appointment in deviation from the agreed procedure. It could also be provided that parties are free to agree otherwise after disputes have arisen between them.

Costs-follow-the-event Regime

In India, traditionally, granting costs of litigation has been left to the discretion of the courts – with little assistance or guidance statutorily. The practice that developed was that either courts seldom granted costs or when they did, it would be nominal or in any case without any reference to actual costs incurred by the parties. Probably the reason such practice developed over the years was that courts considered costs to be a penalty for bringing a certain action. This can be deciphered from the cases where courts have traditionally allowed costs (albeit nominal), where most often cost orders are combined with negative remarks on the conduct of the party directed to pay.

The existing framework under the 1996 Act for awarding costs gives wide discretion to the arbitration tribunal under section 31(8). It also clarifies that costs includes arbitrators' costs, witnesses' costs, legal fees and any other expenses incurred in respect of the arbitration proceeding and arbitral award. Despite this, a robust regime has not yet developed in India for awarding actual costs of arbitration to the succeeding party, something common in most advanced jurisdictions. Most critical reason for this is that the traditional approach towards costs of litigation has rubbed off to some extent on arbitration in India as well.

While it has been held that courts would not interfere with award of costs unless it is shown that such award is 'palpably incorrect', as it is within the discretion of the arbitral tribunal,[15] the Supreme Court has also observed that under section 31(8), what is awardable is not actual expenditure but reasonable costs.[16]

In the interaction of Indian users of the arbitration process with the international arbitration practices, one of the striking differences observed is the practice of awarding actual costs and its effect on how parties behave. The 'cost follows the event' regime applied invariably by international arbitration tribunals, on the one hand, gives the aggrieved party in a dispute the confidence to incur costs and, on the other, persuades a recalcitrant respondent to reconsider dilatory tactics. Very often, parties find it easier to reach a settlement and avoid not only incurring costs for pursuing the dispute but also being saddled with the other party's costs.

Additionally, ability to award actual costs also strengthens arbitrators to partly award interim costs for any wasteful expenditure that may be caused due to unnecessary adjournments or extensions sought by either party. This acts as a strong deterrent against any party seeking to delay the proceedings.

Fortunately, the Commission has taken note of the benefits of the 'cost follows event' regime. It also has recognised that despite the current regime under section 31(8) of the 1996 Act not in any manner prohibiting arbitrators from adopting this principle, given the traditionally restrained approach of courts in granting costs, something more was needed to encourage awarding of actual costs by Indian arbitrators more frequently than presently being done.

To give more teeth to the provisions on costs, the Commission has recommended that section 31(8) be modified to simply provide that unless otherwise agreed between parties, the arbitral tribunal shall fix the costs of the arbitration. It then recommends the insertion of section 6A providing a regime for costs. Together, the modified provisions would create the following framework for awarding costs:

- The regime for costs under the 1996 Act will apply both to the arbitration proceeding itself and any related court proceeding that might be initiated. Therefore, courts will

also follow this regime in awarding costs for all proceedings brought before it under provisions of the 1996 Act, notwithstanding anything contained in the Code of Civil Procedure, 1908 (CPC).

- Courts and arbitral tribunals are granted the discretion to decide not only the amount but also the time when costs are to be paid, therefore specifically enabling interim order on costs even prior to conclusion of proceedings.
- As a rule, the unsuccessful party should be asked to bear the costs of the successful party unless a different order is made for reasons to be recorded in writing.
- As guidance, circumstances to consider while granting costs are also provided for – which includes conduct of parties and any reasonable settlement offers that might have been made.
- It categorically allows interests on costs from or until a certain date.

The effects of these provisions are far greater than they seem at first blush:

- Freeing the courts from the shackles of the CPC to order costs under this regime will ensure that parties are more careful and less trigger-happy in seeking intervention of courts even in the limited circumstances provided for under the 1996 Act. For example, often recalcitrant respondents simply hold back on nominating an arbitrator or agreeing to a sole arbitrator to delay initiation of proceedings. If courts under this provision grant actual costs, taking into account such conduct, the delay caused, add interest and order immediate payment – such strategy is bound to prove costlier than the benefits it might grant.
- Giving overriding effect to the new cost regime will make it easier for courts and arbitral tribunals to disregard the earlier precedents on rationale for awarding or denying costs and make the transition away from the traditional approach towards the transnational standard much smoother.
- The cost-follows-the-event rule will persuade parties to consider the merits of the dispute before deciding to take an unreasonable position simply to delay the inevitable.
- Specific mention of reasonable settlement offers among relevant circumstances to consider while awarding or ordering costs will see the culture of 'without prejudice save as to costs' offers being exchanged and seriously considered between parties – something that is common in many sophisticated arbitration jurisdictions. This will also inevitably lead to more settlements, saving costs, time, and often relationships between parties.

A robust regime on costs, as recommended by the Commission, would not merely compensate the party found to be on the right side of law on a case to case basis, but crucially, will shape the behaviour of stakeholders in the process of arbitration significantly and for the better.

CONCLUSION

For the last few years, arbitration jurisprudence in India has evolved faster than any other branch of the law. This has, until now, been led by decisions of the Supreme Court of India. However, there is a limit to what can be achieved through judicial interpretation. The time

is ripe for this evolution to be consolidated through appropriate legislation. At the time of writing this, it seems inevitable that 2015 will finally see the first amendment to the 1996 Act.

The 1996 Act, by any fair analysis, has been a giant step in arbitral jurisprudence in India. After all, the 1996 Act was hardly an innovation – being a very slightly modified adaptation of the Model Law text. It is almost unanimously accepted that the Model Law has been an unprecedented success when compared to any other recommendation in the field of international legislative guidance. Probably, this was the reason why the Indian draftsmen had hardly tinkered with the Model Law text, and where they did, experience has shown it was not prudent.

One is reminded of Lord Bingham's advice in an introduction to the 1996 English Arbitration Act, '[T]he success of the Act will depend on these tools being skillfully used to fashion the product for which they were designed. This means, above all, that they should be knowledgably used, with an understanding of their origin, and of why they were designed as they were.'[17] Most, if not all, problems that were faced in the working of the 1996 Act over the last 18 years were creation of disjunctive interpretation by courts or abuse of the arbitral process by its users – litigants and lawyers alike. Courts in India, at least in the early part of this 18-year period, often approached the 1996 Act with scorn and the process of arbitration with distrust. Many of these have been, over a period of time, corrected through the process of judicial reconsideration.

Any suggestion that either the jurisprudence of arbitration or the acceptance of the process has not since 1996 grown in leaps and bounds in India is too pessimistic a view, disconnected from reality. The perception of India as an arbitration unfriendly jurisdiction has suffered huge setbacks in recent years – for which the Supreme Court of India and many other High Courts must be congratulated. With purposive interpretation, careful appreciation of legislative history and policy intent, readiness to refer to transnational standards, and a trusting attitude towards arbitration as a mechanism of dispute resolution – the apex court has in the last few years given effect to the aspirations of the draftsmen of the 1996 Act and the expectations of the users.

While the LC Report has done a commendable job of dealing with some of the most important problems faced in the conduct of arbitration in India, we believe it has taken an unkind view in judging the 1996 Act as a total failure. This has, probably, led it to suggest a bit too many changes to the text of the 1996 Act.

Amending legislation, except when the job is to adapt it to a change in policy, must remain an exercise in restraint. In that sense, legislative amendments must remain a Ptolemisation and not a Copernican revolution.[18] Particularly under the common law system, legislation has a life of its own – it evolves through judicial expositions over time.

Any tinkering with the language of a piece of legislation, however insignificant it might appear to the draftsmen, can unsettle years of guidance available by way of precedent – leading, more often than not, to unintended consequences, or at the minimum, to an avoidable period of uncertainty. Therefore, amendments to the 1996 Act should be limited to correction of problems faced and well identified or to fill gaps between the legislation and the new developments in the international arbitration arena. Any amendment that seeks to modify provisions that have not until now caused any significant problems and have otherwise attained settled interpretations, will invariably have the collateral effect of creating doubt in

the minds of the users. Judging from that perspective, many recommendations in the LC Report deserved to be reconsidered and ideally to be rolled back – even though they are well intended. However, we will need to wait to see whether this has been accounted for in the final draft that the Indian government intends to table in the parliament.

In the final analysis, India is set to start a new chapter in its arbitration jurisprudence, which we believe ties in well with its declared intent of creating a favourable investment environment and improving the ease of doing business.

Notes

1. See *Oil & Natural Gas Corporation v Saw Pipes* (2003) 5 SCC 705.
2. *Venture Global Engineering v Satyam Computer Services Ltd* (2008) 4 SCC 190.
3. See, eg, *Dozco India Pvt Ltd v Doosan Infracore Co Ltd* (2011) 6 SCC 179; *Videocon Industries v Union of India* (2011) 6 SCC 161; *Yograj Infrastructure Ltd v Ssangyong Engineering and Construction Co Ltd* (2011) 9 SCC 735.
4. (2012) 9 SCC 552.
5. *Reliance Industries Ltd v Union of India* (2014) 7 SCC 603.
6. 2015 SCC Online SC 190.
7. *Olympus Superstructures Pvt Ltd v Meena Vijay Khetan* (1999) 5 SCC 651.
8. *N Radhakrishnan v Maestro Engineers* (2010) 1 SCC 72
9. *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte Ltd* (2014) 11 SCC 639.
10. *Swiss Timing v Organizing Committee, Commonwealth Games* (2014) 6 SCC 677.
11. Subsequently, in *Avitel Post Studioz Ltd v HSBC Pl Holdings (Mauritius) Ltd* (2014) SCC Online 929, the Bombay High Court noted that it was bound by Swiss Timing and not Radhakrishnan.
12. Decision of the French Court of Cassation in *Siemens AG and BKMI Industrienlagen GmbH v Dutco Construction Company* (Dubai) (7 January 1992 – XV Yearbook Com. Arb. (1992) 124 et seq.) (arose out of a multiparty arbitration under ICC Rules. As per the then existing rules, both respondents (Siemens and BKMI) were asked to appoint one arbitrator between themselves, whereas Dutco got to appoint the other arbitrator independently. Respondents objected but under threat that ICC would in default appoint the arbitrator, agreed while reserving rights to challenge the appointment procedure. Post-Dutco, almost all institutional rules were amended to provide for a more fair and voluntary system of appointment of arbitrators in multiparty arbitration).
13. Section 1034(2) German Code of Civil Procedure.
14. See, eg, *Indian Oil Corporation Limited v Raja Transport* (P) Ltd (2009) 8 SCC 520.
15. *Vidyawati Construction Company v Union of India* (2009) 17 SCC 403.
16. *Sanjeev Kumar Jain v Raghubir Saran Charitable Trust* (2012) 1 SCC 455.
17. See The Rt. Hon The Lord Bingham of Cornhill, Lord Chief Justice of England, Foreword to Bruce Harris, Rowan Planetrose, & Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (1st edn., Blackwell Science, 1996.

18. See Slavoj Zizek, ***The Sublime Object of Ideology***, at xi (Verso, 2008) (Zizek calls change or supplement of a discipline within its current framework as a process of Ptolemisation, inspired by Ptolemy's earth-centered astrology; and a process that seeks to change the basic framework itself is referred to as Copernican revolution).

Economic Laws Practice

Indonesia

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Summary

INTERNATIONAL CONVENTIONS AND TREATIES

In 1981, Indonesia ratified the 1958 New York Convention (the New York Convention) by Presidential Decree No. 34 of 1981. Since then, Indonesia effectively 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 (Rv), which had been applicable in Indonesia since the Dutch colonisation of Indonesia.

The Indonesian Arbitration Law did not take the UNCITRAL Model Law on International Commercial Arbitration into account. The Arbitration Law applies to all arbitrations held within the territory of the Republic of Indonesia, provided the parties have not agreed that a

specific foreign law or arbitration rules shall apply. There is no statutory distinction between national arbitration and international arbitration with regard to the nationality of the parties or the location of their project. The only effective differences between a national arbitration, one held in Indonesia, and an international one, held outside of Indonesia, is the procedure for enforcement of the award.

THE USE OF ARBITRATION IN INDONESIA

Despite the rising popularity of arbitration, there is an emerging sentiment within the legal and business community in Indonesia that arbitration is more complicated, more time-consuming and more expensive than court litigation. Many Indonesian business and legal people also express concern about the lack of court support for enforcement of the arbitral award and the possibility of annulment of the arbitral agreement or awards by the court. That is why, in domestic transactions, many Indonesian companies tend not to choose arbitration as the exclusive forum for resolving disputes covered by their contracts.

The attitude is different when it comes to international commercial contracts. Agreeing to have disputes resolved by arbitration has long been the only solution to avoid court proceedings in Indonesia or other jurisdictions. Foreign parties are generally of the view that bringing a claim relating to an international business transaction before an Indonesian court is an unwise 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.

If the use of arbitration is unavoidable, Indonesian parties usually choose institutional arbitration over ad hoc arbitration in their arbitration agreements. In Indonesia, there is still a mistaken perception among the general public that arbitration must be under the administration of an institution. Many people mistakenly understand that an arbitration seated in Indonesia cannot be an ad hoc arbitration.

Since the late 1990s, Indonesia has experienced a steady increase in arbitration cases, although the popularity or arbitration has moved up and down. The rise in popularity of arbitration after the enactment of the Arbitration Law has motivated the establishment of several new arbitral institutions in Indonesia to compete with or supplement the longest existing Indonesian National Board of Arbitration (BANI). The major ones 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.

Along with the increase of public awareness of non-institutional mediation and ad hoc arbitration, there is a growing number of independent mediation and arbitration practices in Indonesia. To foster the level of skills and professionalism of Indonesian mediators and arbitrators, Indonesia has seen the establishment of several mediation and arbitration

training institutes, such as the Indonesian Arbitrators Institute and the Indonesian Academy of Independent Mediators and Arbitrators.

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 Arbitration Law acknowledges the notion of severability of the arbitration agreement from the rest of the contract. From the perspective of the 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 (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 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, in the case of ad hoc arbitration.

In a recent judgment in the case between PT Citra Televisi Pendidikan Indonesia and PT Berkah Karya Bersama (Decision No. 533/Pdt.G/2014/PN.Jkt.Sel), the District Court of South Jakarta refused to hear an application to recuse an arbitrator in arbitral proceeding

held under the BANI rules. The District Court was of the view that it had no jurisdiction to deal with the application. The judgment confirms the position of the Arbitration Law, namely where parties have agreed that a dispute should be referred to an arbitral institution for resolution, the rules of the institution should fully govern the conduct of the arbitration, including procedures for the appointment and recusal of arbitrators. Intervention of the courts is only to support the arbitration.

JUDICIAL APPROACH TO ENFORCEMENT AND CHALLENGES OF INTERNATIONAL AWARDS

Like arbitration law and practice in many other jurisdictions,[10] judicial intervention can 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 Arbitration Law provides very limited grounds for the court to undertake judicial control over arbitral awards. There is no provision in the 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] In practice, the judges' interpretation and application of 'public policy' thus becomes so criticial as it would determine whether an exequatur can be granted or not.

It is also worth highlighting that the Arbitration Law provides for very limited grounds[13] and very strict procedure for annulment of arbitral awards. In practice, however, the application of these provisions often raises issues. While there is no clear definition of public policy, the concept of public policy can be relied on by the Indonesian courts to nullify an arbitration award or to refuse enforcement.

Unlike the UNCITRAL Model Law,[14] the Arbitration Law does not regulate a stay procedure in connection with the enforcement of an arbitral award. In practice, the commencement of an annulment action is often used by the losing party as a tempting dilatory avenue of an adverse arbitral award. As an application for annulment could effectively stay or frustrate the enforcement of the award, the award creditor upon receipt of a favourable award against an Indonesian party should immediately engage an Indonesian counsel who have experience in handling international arbitration enforcement cases and able to process things speedily in the courts.

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 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.

To register an international award, in addition to the power of attorney from the arbitrator, which must have been legalised by the Indonesian embassy, the applicant would be required to furnish: (i) a certification from the Indonesian embassy or other diplomatic representation in the seat of the arbitration to the effect that both the country and Indonesia are parties to the New York Convention; (ii) the original or an authenticated copy of the international award plus its official Indonesian translation (by an Indonesian sworn translator); and (iii) the original or an authenticated copy of the underlying contract (which is the basis for the award) plus its official Indonesian translation (by an Indonesian sworn translator). Therefore in practice registration of an international award generally takes much longer than a domestic award.

Moreover, under the Indonesian Arbitration Law, an international arbitral award can only be enforced after the chairman of the District Court of Central Jakarta 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 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] 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:

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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 moveables or immoveables, 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 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.
14. 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'.
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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Summary

ON THE VERGE OF THE TPP DEAL

It was more than half a century ago when Germany introduced a policy to use international investment agreements (IIAs) to facilitate foreign investment by German companies and entered into the first bilateral investment treaty (BIT) with Pakistan. Following the German initiative, the International Centre for Settlement of Investment Disputes (ICSID), an institution that offers a forum to resolve disputes between investors and host states, was founded. Since then the use of IIAs to promote foreign investment has become increasingly widespread, not only among developed countries but also developing countries. Consequently, as of 2014 there are more than 3,000 IIAs around the globe.

Originally, IIAs were mainly promoted by European countries and the US, which is represented by the fact that the top 10 most frequent home states of investors filing investment treaty claims (as of the end of 2014) are either European states or the US (with one exception being Turkey). IIAs are no longer the privilege of European countries and the US and they have become important tools for Asian countries such as China and Korea in making their investors competitive in overseas markets. Now, both China and Korea enjoy more than 100 bilateral investment treaties (BITs) respectively. In terms of the number of BITs and free trade agreements (FTAs), Japan has been far behind with only 21 BITs and 14 FTAs in effect. However, in the last few years, the Abe administration has been striving to increase the number of FTAs and BITs to support foreign investment by Japanese companies, particularly in emerging markets. The aim is to stimulate Japan's economy by tapping into such emerging markets. The result of such efforts is shown below.

Japanese BITs that have come into force since 2014	
Mozambique	29 August 2014
Myanmar	7 August 2014
China and Korea	17 May 2014
Iraq	25 February 2014
Kuwait	24 January 2014
Papua New Guinea	17 January 2014
Japanese FTAs that have come into force since 2014	
Australia	15 January 2015
Japanese BITs executed since 2014	
Ukraine	5 February 2015
Uruguay	26 January 2015

Kazakhstan	23 October 2014
Japanese FTAs executed since 2014	
Mongolia EPA	February 2015

One of the most ambitious attempts of the Abe administration is to conclude within this year the Trans-Pacific Partnership Agreement (TPP), which, once concluded, will cover countries accounting for more than one-third of the world's GDP. Top Japanese and US trade officials plan to meet during the week of 20 April 2015 aiming to resolve major trade issues including those relating to the automobile and agricultural sectors.

INVESTOR-STATE DISPUTE SETTLEMENT PROVISION

The TPP negotiations have generated debate in Japan over the investor-state dispute settlement provision (ISDS), the provision that enables investors of another contracting state to initiate arbitration against a contracting state to resolve investment disputes as defined in BITs and FTAs.

But for the ISDS, even if BITs or FTAs are in force, investors have no choice but to rely on their own government's discretion in exercising diplomatic protection against the host state for its violation of the investors' protection afforded under BITs/FTAs. On the other hand, the biggest merit of the ISDS is to enable investors to fairly resolve disputes with host states at their own initiative both from a substantive and procedural law perspective. From a substantive law perspective, agreements between investors and host states are often governed by the law of the host state. An investor would not be able to enjoy proper recourse in court litigation or commercial arbitration where national law applies of the host state even if such law itself violated the BIT. However, in investment treaty arbitration under BITs/FTAs, in principle international law, such as BITs/FTAs, is the applicable law. As such, in the investment treaty arbitration under BITs/FTAs, unlike in court litigation or commercial arbitration, investors can obtain proper recourse if the conduct of the host state was in violation of such international law, even when that conduct is in compliance with the national law of the host state.

From a procedural law perspective, if the contract between investors and the host state provides for either the host state's national court or commercial arbitration within the host state to resolve a dispute, then either the local civil procedural code or arbitration act would apply to such proceedings. Therefore, there is a possibility that the judiciary of the host state may improperly intervene in any such judicial or arbitration proceedings for the benefit of the host state. Investment treaty arbitration has incorporated a number of mechanisms to minimise the intervention of host states or third-party state national courts.

Japan's Ministry of Economy, Trade and Industry (METI) has been promoting economic partnership agreements (EPAs) and BITs, including ISDS provisions, if necessary, to facilitate investment in foreign countries, particularly in emerging markets, by Japanese investors. METI has this year announced the publication of 'frequently asked questions' with respect to EPAs/BITs and investment treaty arbitration to help Japanese investors understand FTAs/BITs and the benefits that FTAs/BITs and ISDS can offer Japanese corporates investing overseas.

ISDS UNDER ATTACK

Japan has consistently incorporated ISDS into its BITs/FTAs, except for BITs/FTAs with the Philippines and Australia.[2] However, for the first time, ISDS has come under attack in Japan, over recent years in particular in the context of ongoing TPP negotiations. Concerns have been raised not only by non-profit organisations but also by politicians of both the ruling party and opposition parties, as well as the Japanese Federation of Bar Associations and some local bar associations.[3] Thanks to the TPP, awareness of and interest in investment treaty protections and arbitration have dramatically increased over the last few years; however, most of the criticism appears to be based on misconceptions of the ISDS and investment treaty arbitration framework. The following are some of the criticisms made in Japan against ISDS.

Restrictions On Judicial Power

ISDS restricts judicial power because it allows large (and often Western) multinationals to file claims against Japan outside the Japanese judiciary system.

Restrictions On State Powers

ISDS also restricts Japan's executive and legislative powers because the language of BITs, which sets the standard of protection for investors, is so ambiguous and general it creates a 'chilling' effect on government bodies causing such bodies to refrain from introducing new laws or regulations or modifying existing laws and regulations, including those the aim of which is to promote public health, security and environmental protection. Because treaties supersede national law, ISDS could hinder Japan's democracy.

Scrutiny Of Arbitrators

In investment treaty arbitration, arbitrators are chosen by the parties, are not scrutinised and are immune from liability. Some arbitrators represent major companies and yet sit as arbitrators in certain situations, reflecting a potential bias in favour of investors. This concern is an extension of a belief in some Japanese circles that arbitrators in commercial arbitration cannot really be neutral as they sometimes adjudicate cases involving companies they presently or have previously represented as counsel.

No Appeal

Arbitration awards are not subject to appeal, and there have been many inconsistent arbitration awards.

Confidentiality Of Arbitration Proceedings

Arbitration proceedings are confidential and such proceedings are not well equipped to resolve disputes involving a state's public interest and public policy.

No Need For ISDS In Developed Countries

ISDS is not necessary when developed countries, such as Japan, are the respondent state as Japan has a modern and independent court and arbitration system which could effectively adjudicate investment disputes.

ISDS For Benefit Of US Investors

In general, investment treaties afford protections to foreign investors that are not available to domestic investors. In particular, the TPP will create an investment environment that favours the United States and United States investors at the expense of Japan's public interest.

DEFENDING ISDS

Some of the criticism is based on a lack of understanding, while other parts of the criticism may promote a healthy discussion about further improving investment treaty arbitration. Let us look at how we can respond to those questions one by one.

Restrictions On Judicial Power

Arbitration does not restrict Japan's judicial power; arbitration supplements such power. Resolving international disputes by way of arbitration is not necessarily unique to investment disputes. Arbitration has and continues to be widely utilised by the private sector to resolve commercial disputes, particularly those with foreign counterparties. More generally, arbitration has been widely used as well by states to resolve not only commercial disputes with the private sector but also state-to-state disputes with other states at institutions such as the International Court of Justice or the Permanent Court of Arbitration. Some state-to-state disputes are resolved at other fora, such as the WTO. When those proceedings are not considered to restrict the judicial power of states, how can investment treaty arbitration be said to restrict the judicial power of the state?

Restrictions On State Powers

No Restriction

In Japan, once a state ratifies a treaty and it comes into force, the treaty supersedes Japan's domestic law to the extent that Japan is obligated to enact law and regulations to implement its obligations under the treaty. This is an inherent feature of all treaties in most countries; it is not unique to investment treaties. In Japan, treaties are not considered to be a restriction on executive or legislative powers because it is the executive branch that negotiates treaties and it is the legislative branch that ratifies the treaties to make them effective.

'Chilling' Effect

It is true that the standard of protection afforded in investment treaties, such as 'fair and equitable treatment' or 'full protection and security', are somewhat vague. However, this issue is not unique to investment treaties but is seen in other treaties as well (and indeed in Japanese domestic law itself). This is an issue of substantive law, namely how to draft a clear standard of protection in investment treaties; and not an issue of ISDS, a procedural law that enables investors to use arbitration when a state violates the standard of protection. In addition, there have been substantial efforts to clarify the standard of protection afforded in investment treaties, and in the near future the standard of protection may look quite different from those found in traditional treaties.

Public Purposes

In relation to the concerns raised in Japan that investment treaties may restrict the enactment of new law or regulations or the modification of existing laws and regulations aiming to protect public health or the environment, arbitration awards have been actually taking into account state powers to serve public purposes, such as the protection of public health and the environment. Some criticise certain arbitration awards such as ***Metalclad v Mexico***,[4] ***SD Myers v Canada***,[5] ***Tecmed v Mexico***,[6] but most of those criticisms are based

on a misconception of the facts and the rulings in the cases. It is not that the tribunals in those cases found measures to protect public health and the environment in violation of investment treaties. But in the ***Metalclad*** case, there were inconsistencies as to the authority to grant permit in waste management businesses among the state government, local government and municipality resulting in substantial damages being sustained by the investors, which were found to be in breach of the fair and equitable treatment (FET) requirement; in the ***SD Myers*** case, the Canadian government itself questioned the legitimacy of the PCB exportation ban from an environmental perspective; and in the Tecmed case, again the Mexican government requested the relocation of the waste site based on a local protest campaign against the waste site and refused to renew the licence of a waste management business without providing the investor an alternative waste site which the government was required to provide.

Scrutiny Of Arbitrators:

Independence And Impartiality

Arbitration systems are carefully set up to ensure the impartiality and independence of arbitrators to ensure the fairness and integrity of arbitration systems. Arbitration rules require arbitrators to be independent and impartial throughout the arbitration proceeding. Any justifiable doubt as to the impartiality and independence of arbitrators would be grounds to disqualify or challenge an arbitrator. If justifiable doubt as to the impartiality and independence of an arbitrator is later found after the issuance of the award, such award could be challenged or annulled.

IBA Guidelines And Double-hat Issue

The IBA guidelines on conflict of interests in international arbitration (revised as of 2014) have been a useful reference for arbitrators, parties and institutions to determine the necessary scope of disclosure or disqualification or challenge of arbitrators. With respect to the 'double-hat' issue (ie, the arbitrator is concurrently acting as counsel on a related legal issue for unrelated matters), while conflicts of interest commonly arise from the relationships between arbitrators and the subject matter of the disputes, including parties or party counsel, the IBA Guidelines suggest that there are circumstances that call for disclosure by arbitrators should similar legal issues be dealt with in two separate proceedings in which the arbitrator concurrently acts as counsel even if the subject matter, parties and party counsel are unrelated as between those two cases.

Party Autonomy

Unlike for judges, there is no particular system to screen arbitrators except for their impartiality and independence. Party autonomy is a fundamental element of arbitration. In arbitration, each party familiar with the dispute must be able to locate the best arbitrators, and by the same token, it would be best to leave any challenge of arbitrators to the opposing party because the opposing party would be best equipped to consider whether the arbitrators should be challenged. As such, the fact that there is no particular system to screen arbitrators in advance of appointment, unlike for judges, does not undermine the fairness of the system. Rather, leaving such screening primarily to the parties increases the efficiency and fairness of the arbitration system.

No Appeal

No Appeal Is Not A Bad Thing

The lack of appeal of arbitration awards is one of the great advantages of arbitration as it guarantees quicker and more efficient dispute resolution. Even now, investment arbitration generally takes longer than regular commercial arbitration. For instance, ICSID arbitration, which does not allow appeals, typically takes more than three years before the arbitration concludes, and such lengthy proceedings have been much criticised. If an appeal were to be allowed, the whole process would take even longer and an arbitration system with appeals would not serve the goal to resolve investment disputes efficiently.

Basic Scrutiny

While there is no appeal, awards may be challenged in accordance with either the ICSID Convention or the arbitration act of the seat of arbitration. When there are serious procedural irregularities, awards are successfully challenged.

Who Will Fix Inconsistencies Between Awards?

There are indeed arbitration awards that differ on certain issues, such as the interpretation of the definition of 'investment' or an umbrella clause, or issue of whether or not dispute resolution provisions of other BITs/FTAs may be imported by using a most-favoured nation clause of the applicable BITs/FTAs. Some propose the establishment of an appeal system as a way to resolve inconsistencies. However, significant challenges would need to be overcome if an appeal system was to be introduced. Who will sit as the arbitrators in the appeal? Unless the same or similar members on the appeal body are appointed by the institutions, the appeal body will not properly function to resolve inconsistencies among arbitration awards. On the other hand, if members of the appeal body are to be appointed by the institutions, the very act of appointing the appeal body members will mean that the institutions themselves will be participating in the creation of international investment case law. This goes far beyond the role of the institutions, which is the administration of the procedural framework for investment arbitration. In any event, having appeal body members selected by the institutions entirely undermines the party autonomy of the arbitration system. I hope inconsistencies among arbitration awards will be resolved in the long run by way of accumulation of arbitration awards and tribunals paying due respect to past arbitration awards.

Consistency of awards would be enhanced by limiting the pool of arbitrators in investment treaty cases. However, limiting the pool of arbitrators would produce some serious consequences. Even now, with some exceptions, most arbitrators are European, US or Canadian practitioners. There are quite a few states that must feel underrepresented in terms of region, culture and the development stage of their states within the investment arbitration regime. A truly international regime, however, requires a more diverse and globally representative group of arbitrators. Increasing the number of arbitrators from different regions such as Asian nations may actually increase inconsistency between awards, at least in the short term. However, that is a price which may be worth paying. This is because a more diverse pool of arbitrators with their shared expertise and broader perspectives should actually achieve a more balanced development of investment case law as well as investment arbitration procedure and over the longer term inconsistencies between awards should be resolved as well.

Confidentiality Of Arbitration Proceedings

In response to a call for transparency in investment treaty arbitration, the situation has substantially improved. While the ICSID Convention has empowered the secretary general to disclose certain arbitration information to the public without the individual consent of the parties, ICSID has been working hard with parties to persuade them to consent to publish arbitration awards as well as arbitration proceedings. UNCITRAL has now introduced new rules for transparency. Once the transparency rules apply, subject to certain confidentiality exceptions (article 7), hearings are made public, and written statements, transcripts of hearings, decisions, orders and awards of tribunals, among others, are made public.[7] Recent Japanese IIAs provide that the respondent state may publish the arbitration awards. As such, where transparency is concerned, ISDS itself may address such concerns.

No Need For ISDS In Developed Countries

Some argue that investment disputes may be resolved in the court of the host state so long as the host state is a developed country and its judiciary functions properly. This proposition is not tenable. First, arbitration is a dispute resolution mechanism that involves the least amount of intervention from the sovereign and therefore is best suited to resolve disputes between the state and foreign investors. It is said that even in developed countries such as the US and Germany, states rarely lose in their own national courts. Second, the court system varies from country to country, and investors will be forced to fight in those different court systems, which is too cumbersome. Thirdly, the arbitration system is a dispute resolution mechanism balancing different legal backgrounds, such as common law systems and civil law systems, whereas the court system adopts either the common law system or the civil law system. Investment treaty case law would be best developed by the accumulation of arbitration awards rather than court decisions on investment law in different court systems in different languages.

ISDS For US Investors

Indeed, it appears that this is the real reason for the underlying opposition against the TPP and ISDS. For BITs/FTAs that do not involve the US, none of the above issues appear to have been raised, and Japan's Diet has unanimously approved the ratification of the BITs and FTAs. There is a fear of litigious US investors initiating numerous arbitrations against Japan and impeding Japan's ability to introduce laws and regulations that serve public purposes. In fact, US investors are by far the most frequent users of investment treaty arbitration, and the high cost and lengthy duration of arbitration, particularly investment arbitration, is said to be at least partially caused by the judicialisation or the so-called Americanisation of the arbitration system, ie, importing aggressive US-style litigation tactics into the arbitration system. Those concerns are understandable given the records of home countries of investors: US investors filed investment treaty claims in approximately 130 cases (total as of the end of 2014) and are by far the most frequent user of the ISDS system. However, insisting that the national courts should be utilised to resolve investment treaty disputes would not be persuasive unless the national court system were well suited to resolve such investment treaty disputes. Rather, instead of insisting on abolishing the current investment treaties and investment arbitration system that has contributed tremendously to the establishment of international investment case law, what we should focus on is improving the current arbitration system to address those legitimate and fair concerns.

CONCLUSION

Some of the criticisms against investment treaties and ISDS have some merit, particularly those surrounding the tendency of US investors to frequently use investment arbitration. Other concerns, however, are derived from misconceptions of the current system and case law and are compounded by the sometimes emotional broader political debate in Japan about the merits of Japan participating in the TPP. For the legitimate concerns, arbitration practitioners like us are responsible for considering how to improve the system. For the unfounded criticisms, again, arbitration practitioners like us are equally responsible for educating those who are unfamiliar with the current system rather than simply denouncing their lack of knowledge.

Notes

1. http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=929&Sitemap_x0020_Taxonomy=UNCTAD Home;#6;#Investment and Enterprise;#607;#International Investment Agreements (IIA).
2. In published arbitration awards Japan has never been a respondant state, and there is only one published arbitration case in which an affiliate of a Japanese investor brought an investment treaty case against a member state. ***Saluka Investments BV v The Czech Republic***, Partial Award, UNCITRAL, 17 March 2006.
3. Politicians' criticisms against ISDS in the Diet are summarised in 'Myth and Reality of Investment Treaty Arbitration observed in the Diet deliberations' by Prof Shotaro Hamamoto, Horitsu Jiho (2015).
4. ***Metalclad Corporation v The United Mexican States***, ICSID Case No. ARB(AF)/97/1.
5. ***SD Myers, Inc v Government of Canada***, UNCITRAL, Partial Award, 13 November 2000.
6. ***Técnicas Medioambientales Tecmed, SA v The United Mexican States***, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.
7. www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

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Summary

As the international arbitration community has been witnessing profound changes in the last few years, Korea has kept pace by reinforcing its own international arbitration infrastructure, especially its facilities and equipment, and by updating its rules and procedures to bring them in line with international standards. Specifically, Korea recently opened the Seoul International Dispute Resolution Centre, a venue equipped with cutting-edge technology for arbitration hearings, and is in the process of amending the Arbitration Act of Korea (Arbitration Act) as well as the International Arbitration Rules of the Korean Commercial Arbitration Board (KCAB) as part of its efforts for infrastructure improvement. Moreover, Korea continues to be recognised as a pro-enforcement jurisdiction in approving and enforcing arbitral awards where the Korean court's refusal to enforce arbitral awards are rare exceptions. This arbitration-friendly stance is well demonstrated in recent court decisions.

This article will introduce the recent international arbitration trends in Korea by highlighting some of the key provisions in the currently proposed amendment to the Arbitration Act and the KCAB International Arbitration Rules and by discussing some of the notable decisions of the lower courts related to international arbitration.

PROPOSED AMENDMENT TO THE KOREAN ARBITRATION ACT

From 2012, there were discussions regarding the need to amend the Arbitration Act to harmonise it with international standards. A special committee was commissioned by the Ministry of Justice to provide specific recommendations on the amendments, culminating in the final draft of the amendments for which a public hearing was held in November of 2014. The proposed amendment is intended to reflect the pro-arbitration stance that has emerged in the international community since Korea's last amendment to its law in 1999. Of the many amendments that were proposed and are currently being discussed, a few provisions warrant particular attention. In particular, it is noteworthy that the proposed amendment aims to reflect the 2006 UNCITRAL Model Law on International Commercial Arbitration provision relating to the power of the arbitral tribunal to order interim relief, enabling the arbitral tribunal to issue a wide array of interim measures enforceable by court decisions. Additionally, such amendment is designed to simplify the enforcement process of arbitral awards by permitting the court to render a decision to enforce the award in the form of an order rather than in the form of a judgment.[1]

Interim Measures

An interim measure is not a new concept in international arbitration in Korea. Article 18 of the current Arbitration Act contains a provision that stipulates the arbitral tribunal's authority to grant interim measures. However, the existing article 18 has certain issues: first, it only states that the interim measure shall be given in the form of an 'order' instead of an award, and does not clarify whether such order is enforceable in accordance to the provisions regarding the recognition and enforcement of awards. Second, it limits the subject matter of the interim measure to a certain extent. Therefore, the proposed amendment removes the limitation that any interim measure shall be in the form of an order, and widens the scope of the subject matter of the interim measures.[2] The main details of the proposed amendment related to interim measures are as follows:

- A more detailed provision on the scope of the arbitral tribunal's power to order interim relief – a provision which allows the tribunal to order a party to:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets from which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.
- Any party seeking compulsory enforcement based on the interim measure issued by the arbitral tribunal may request the court for an order granting compulsory execution.
- There will be grounds for refusing recognition or enforcement if:

- any of the grounds for revocation of arbitral awards set out in article 36(2) of the Arbitration Act are present;
- at the request of the party against whom it is invoked, the court is satisfied that the arbitral tribunal's decision regarding the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with, or the interim measure has been terminated or suspended by the arbitral tribunal or by the court;
- the court finds that the interim measure is incompatible with the powers conferred upon it unless it decides to reformulate the interim measure to the extent necessary to adapt it to its own powers for the purposes of enforcing that interim measure and without modifying its substance;

Any determination made by the court on any grounds for refusal of recognition or enforcement of the interim measure shall be effective only for the purposes of the application to recognise and enforce the interim measure; the court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Simplification Of Enforcement Procedures

Another proposed amendment simplifies the procedure for enforcing arbitral awards in Korea. The current Arbitration Act requires the judgment of a court for enforcement of arbitral awards. The proposed amendment changes the enforcement requirement from a judgment of a court to a court order. That is, the amendment newly adds provisions dealing with the following matters:

- a court receiving an application for enforcement of an arbitral award may render its decision in the form of an order, not a judgment;
- a court must set a date for a hearing, or a date for examination on which both parties may attend, and notify the parties thereof;
- as a fundamental matter a court must state the reasons for its decision on enforcement of arbitral awards;
- while a party may immediately appeal the court's decision on enforcement of arbitral awards, such appeal shall not have the effect of staying the enforcement; and
- after the court's decision on enforcement of arbitral awards is made final, a lawsuit for revocation of arbitral awards shall not be permitted.

Court's Cooperation With Examination Of Evidence

Article 28 of the current Arbitration Act provides the arbitral tribunal a helpful process in which it can request a court to conduct examination of evidence. The proposed amendment to the Arbitration Act strengthens this process by guaranteeing the right of arbitrators or parties to participate in the court's examination of evidence, and further enables the arbitral tribunal to request practical cooperation from the courts. The proposed amendment further provides that when cooperating with the arbitral tribunal in examination of evidence a court may compel a witness to appear before the arbitral tribunal or compel a person to produce certain documents to the arbitral tribunal.

Other Matters

In addition to the provisions discussed above, there are other noteworthy proposed amendments to the Arbitration Act.

Form Of Arbitration Agreement

While the proposed amendment takes the approach of the 2006 Model Law, which relaxes the requirement that an arbitration agreement must be 'in writing', the proposed amendment, rather than abandoning the 'in writing' requirement, adopts the approach of requiring that arbitration agreement be recorded in any form.

Appointment Of Arbitrators

In situations where a party is not responding to request for appointment of an arbitrator, the proposed amendment provides that the arbitrator be appointed by the court or an arbitration institution designated by the court.

Decision On The Arbitral Tribunal's Authority

The current Arbitration Act stipulates that, when a question arises regarding the arbitral tribunal's authority (or to what extent the tribunal has authority) to decide on certain matters in relation to the arbitral proceedings, a party may seek a court decision to determine the existence (or the extent) of such authority, provided that the party raised an objection in the arbitral proceedings and that the arbitral tribunal has made a decision that it has authority. The proposed amendment makes it clear that the party may seek a court decision where the arbitral tribunal has made a decision that it does not have authority also.

Arbitration Cost And Delay Penalty (interest)

The proposed amendment adds provisions stating that unless the parties agree otherwise, the arbitral tribunal may determine the apportionment of arbitration costs after a thorough review of the facts of the case; and in cases where the arbitral tribunal grants an arbitral award it also has the authority to order payment of delay penalty.

PROPOSED AMENDMENT TO THE KCAB INTERNATIONAL ARBITRATION RULES

The key provisions of the proposed amendment to the KCAB International Arbitration Rules (KCAB Rules and the Proposed KCAB Rules) concern (i) instituting an emergency arbitrator system, (ii) the procedure for joining a party in a multiple-party dispute and (iii) the process of confirmation by the Secretariat of the KCAB (the Secretariat) concerning arbitrator appointment.

Emergency Arbitrator

The Proposed KCAB Rules introduce an emergency arbitrator system under article 28(3) and Schedule 3. Such amendment provides parties with timely interim relief prior to the constitution of the arbitral tribunal, while reducing the party's burden of additionally filing a motion for conservatory measures in foreign courts, thus ensuring the parties' rights and bringing the KCAB Rules in line with the rules of other major international arbitration institutions.[5] The amendment further provides that when the Proposed KCAB Rules are approved, the emergency arbitrator provision will be available in all current and future KCAB international arbitrations, regardless of whether the arbitration agreement was entered before or after the implementation of the Proposed KCAB Rules.

The details of emergency arbitrators are as follows:

- Under the Proposed KCAB Rules, a party may file a written motion to the Secretariat for interim (emergency) relief to be enforced by an emergency arbitrator, concurrently with or after the filing of arbitration proceedings.[6]
- If a written application for an emergency measure meets the requirements under the KCAB Rules and the Secretariat deems that appointment of an emergency arbitrator to be appropriate, the Secretariat shall use its efforts to appoint one emergency arbitrator within two business days from its receipt of such written application for an emergency measure.
- A party may file an opposition motion challenging the appointment of an emergency arbitrator within two business days from the day on which such party receives the notice of appointment or from the day on which such party becomes aware of that the fairness or independence of the appointed emergency arbitrator is in question, whichever is later, and in which case the Secretariat shall make a decision on such motion.
- The emergency arbitrator shall have fifteen days from his or her appointment to decide whether an emergency measure is deemed appropriate and necessary. The time limit shall not be extended unless there is an agreement between all the relevant parties or in case of extraordinary circumstances, and the Secretariat has approved the extension.
- An emergency arbitrator shall not serve as an arbitrator for the relevant dispute unless all relevant parties agree in writing.

Joinder

The Proposed KCAB Rules introduce a procedure for joining a party to resolve disputes among multiple parties at one time. This amendment is designed to promote judicial economy and to prevent any conflicting awards being issued by different arbitral tribunals for parties involved in related disputes. In particular, the Proposed KCAB Rules state that a third party may be joined in a case if (i) a party files a motion for joining a third party; such third party agrees to the joinder in writing (and that any and all claims against such third party arise from the same arbitration agreement which is among the existing parties); and (ii) the arbitral tribunal is satisfied that the motion is valid (even over the objection of the other party). The amendment further states that, even when a party is joined after the formation of the arbitral tribunal, the joinder shall not affect the composition of the arbitral tribunal, and that the arbitral tribunal may not approve the joinder if it is likely to cause undue delay, even if the above-mentioned requirements for joinder has been satisfied.

Confirmation By The Secretariat Concerning Arbitrator Appointment

The Proposed KCAB Rules contain a provision whereby the appointment of an arbitrator becomes effective only on the confirmation by the Secretariat. This entitles the Secretariat to review, at its own discretion, the fairness or independence of the arbitrator or arbitrators appointed by the parties or examine the parties' complaint related to such appointments. This confirmation process will result in the parties or arbitrators to make appointments more cautiously, and enables the Secretariat to exclude inappropriate arbitrators at an earlier stage, which will in turn contribute to the efficiency of the arbitration proceedings.

RECENT NOTABLE COURT DECISIONS

As mentioned above, Korea is generally known as a pro-enforcement jurisdiction in enforcing international arbitral awards, and, for rarely refusing the enforcement of arbitral awards. This arbitration-friendly stance is also demonstrated in recent court decisions.

In practice, a party receiving an unfavourable arbitral award typically files a suit seeking to set aside or, obtain the non-recognition or non-enforcement of, such arbitral award, mainly arguing that the arbitral agreement between the parties is invalid or that the subject of the award is beyond the scope of the relevant arbitration agreement, or the recognition and enforcement of the arbitral award contradicts public policy.

However, Korean courts generally tend to reject the argument that an arbitration agreement between the parties is invalid. Korean courts also seldom recognise the argument that a dispute over an arbitral award is beyond the scope of the arbitration agreement because courts generally interpret the scope as broadly as possible. Moreover, Korean courts rarely accept a party's argument that the recognition and enforcement of the arbitral award contradicts public policy, based on the Supreme Court's ruling that such provision must be narrowly interpreted in consideration of the balance between maintaining domestic welfare and providing for stability in international transactions based on the following premises: (i) the purpose for refusing the recognition and enforcement of foreign arbitral awards is to prevent fundamental morals and social order of a country in which the arbitral award is being enforced from being harmed; and (ii) the Korean court may refuse to recognise and enforce a foreign arbitral award to the extent that the result from the recognition of such foreign arbitral award actually contradicts public policy (see Supreme Court Decision 93Da53054 dated 14 February 1995).

Among the court decisions made in the past two years (2013 and 2014), the following are notable:

Claim For The Examination And Confirmation Of The Arbitral Tribunal's Authority To Decide On The Language Of The Arbitral Proceedings

This case arose from a KCAB arbitration between a US company, Company A, and a Korean company, Company B, where the presiding arbitrator recommended the use of both English and Korean due to the parties' inability to agree on the language for arbitration (the Recommendation for Agreement). Company B objected and argued that the language must be in Korean, after which the arbitral tribunal decided that both Korean and English would be used in this arbitral proceeding (the Language Decision). Company B filed a suit seeking the examination and confirmation of the authority of the arbitral tribunal based on Articles 17(3), 17(5) and 17(6) of the Arbitration Act for the Language Decision.

The District Court ruled that, though the Language Decision was rendered by the arbitral tribunal after the objection was raised by Company B, this was not an exercise of the arbitral tribunal's authority to rule on the 'preliminary question' regarding the authority of the arbitral tribunal pursuant to article 17(5). As such, it ruled that a suit for examination and confirmation was inappropriate. However, on appeal, the Appellate Court held that the suit for examination and confirmation was appropriate. The Appellate Court reasoned that the Recommendation for Agreement corresponded to the matter alleged to be beyond the scope of the arbitral tribunal's authority that came into question during the arbitral proceedings according to article 17(3) of the Arbitration Act, and that the Language Decision subsequent to Company B's objection falls under the scope of a ruling as a preliminary question under article 17(5).

This decision now permits a party in an arbitration that suspects that the arbitral tribunal has exceeded its authority to immediately object to a decision, and, if the arbitral tribunal makes a ruling as a preliminary question, the objecting party can immediately seek examination and confirmation from the court pursuant to article 17 of the Arbitration Act. In other words, disputes relating to the authority of the arbitral tribunal can be dealt with by the courts in the early stage of the arbitration to ensure a smoother arbitration process.

Clarification Of Arbitral Award

Company C and Company D entered into an agreement whereby Company D was to supply certain goods to Company C (the Supply Agreement). Company C filed for arbitration seeking damages, etc, against Company D, and, in response, Company D filed a counter-claim against Company C demanding the performance of obligations set forth in clause 14.2 of the Supply Agreement. The relevant arbitral tribunal dismissed Company C's claim and upheld Company D's claim, and issued the following ruling: '*Company C shall perform its obligations set forth in clause 14.2'.*

Company D filed a suit seeking a decision of enforcement of the relevant arbitral award.

The District Court issued the following ruling:

> Paragraph (3) in the arbitral award fails to meet the requirements as a compulsory execution certificate, since it does not directly specify the type, details and scope of benefits to be realised by compulsory execution. Furthermore, even when a decision of enforcement is issued by a court, as a practical matter, it is impossible to implement the compulsory execution procedures according to the above Paragraph (3) of the relevant arbitral award and, therefore, there are no legal interests for Company D to seek for a decision of enforcement of the relevant arbitral award.

As such, the Court ruled that it was inappropriate for Company D to file a suit to seek the decision of enforcement.Subsequently, the court of appeals overruled the lower court's decision and permitted the enforcement of the relevant arbitral award for the following reasons: (i) a decision of enforcement not only grants enforceability to such arbitral award, but serves as a mechanism preventing the other party from arguing any reasons for to set aside such arbitral award; and (ii) even if such arbitral award is unenforceable, a party to such arbitral award must comply with such arbitral award, once the validity is confirmed by the court's decision of recognition and enforcement. Thus, even when the arbitral

award is unenforceable, there are judicial benefits for seeking a decision of enforcement. Furthermore, the court of appeals permitted the compulsory execution in such case since a decision of enforcement with reference to this arbitral award is not in contravention of public policy in Korea and there was no other reason for refusing to enforce such arbitral award under the Arbitration Act. Thereafter, the case has come to a conclusion due to Company D's withdrawal of its petition during the Supreme Court proceedings.

As such, Korean courts respect the purport of arbitral awards and deem that there are judicial benefits, even when the obligations set forth in an arbitral award are somewhat ambiguous.
Endnotes

1. In Korea, when rendering a decision in the form of a judgment, the court is required to abide by certain and strict procedures, whereas when rendering a decision in the form of an order, the court has the discretion for more flexible procedures.
2. These provisions referenced article 17 of the UNCITRAL Model Law on International Commercial Arbitration (As adopted by the United Nations Commission on International Trade law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006 (Model Law)).
3. The grounds for revocation of arbitral awards under the Arbitration Act are almost identical to those set forth in Article 34 of the Model Law.
4. The KCAB is also preparing a draft of the KCAB Code of Ethics for Arbitrators together with its amendment to the KCAB Rules.
5. It is widely known that if a party files a motion for an interim measure with a court prior to the constitution of the arbitral tribunal, Korean courts generally issue interim measures to the extent that any rights to be protected by such interim measures have been demonstrated by the requesting party, even when the merits are subject to arbitration proceedings.
6. Any party filing a motion for an emergency measure must pay in advance a management cost of 3 million won and an emergency arbitrator fee of 15 million won (the amount may be subsequently reduced in certain cases) when submitting its motion for such emergency measure. In case of non-prepayment, the Secretariat deems such motion to have not been filed.
7. Korean Arbitration Act, Article 17 (Determination of Arbitral Tribunal's Authority over Arbitration Proceedings):
   (3) Any objections on the arbitral tribunal's scope of authority shall be raised as soon as the matter alleged to be beyond the scope of its authority comes into question during the arbitral proceedings.
   (5) The arbitral tribunal may rule on the objection under Paragraphs (2) or (3) above either as a separate order to the objection (or the 'preliminary question' regarding the authority of the arbitral tribunal, 'preliminary question'), or within the merits of the arbitral award.
   (6) If the arbitral tribunal rules as a separate order to the preliminary question that it has authority under Paragraph (5) above, any party who is dissatisfied with that ruling may request, within thirty (30) days after it has received notice thereof, the court to examine the authority of the arbitral tribunal.
   (8) No appeal shall be filed against the decision on the examination of the authority which is rendered by a court following a request therefor under Paragraph (6) above.

8. The Appellate Court nevertheless dismissed Company B's appeal, ruling that Article 17(8) of the Arbitration Act indicates that no appeal can be filed against the court's decision on the examination over authority following the motion set forth in Article 17(6) of the same Act.

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Malaysia

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Summary

In recent years, Malaysia has made great strides in cultivating a positive domestic environment for arbitration, bolstered by three broad areas of change.

The first is legislative reform. The Malaysian Arbitration Act (the 2005 Act), which came into force on 15 March 2006, repealed the Arbitration Act 1952 (the 1952 Act) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (the CREFAA Act). The 2005 Act was subsequently complemented by the Arbitration (Amendment) Act 2011 (the 2011 Amendment Act) which removed various teething issues of ambiguities associated with the 2005 Act. More recently, from 3 June 2014, as a result of amendments to the Legal Profession Act, non-Malaysian qualified lawyers may appear in arbitral proceedings in the jurisdiction, as either counsel or arbitrator. As a result, Malaysia now enjoys a statutory framework which is generally in line with modern principles of international arbitration practice.

The second is an increasing judicial receptiveness and familiarity with the arbitration process. While lower courts have occasionally reverted to a more parochial approach towards arbitration, recent decisions by the Court of Appeal reveal the judiciary's strong commitment to the principle of minimal curial intervention, in line with the modern statutory framework.

The third is the revitalisation of the Kuala Lumpur Centre for Arbitration (KLRCA). Under the leadership of its new management, the KLRCA has implemented a slew of innovative initiatives that are potentially game-changing, including the first-of-its-kind KLRCA i-Arbitration Rules in 2013. The KLRCA offers administrative fees significantly lower than that of its competitors in the region and newly refurbished physical premises incorporating state-of-the-art video conferencing technology.

While the impact of these developments has yet to be fully evaluated, there are early indications of resurgence in Malaysia's profile as a venue of international arbitration. In this update, the authors discuss general principles of Malaysian law on international arbitration alongside recent developments relating to arbitration practice in the jurisdiction.

AN OVERVIEW OF ARBITRATION IN MALAYSIA

Prior to the 2005 Act, which came into force on 15 March 2006, arbitration in Malaysia was governed by the 1952 Act and the CREFAA Act.

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. 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 2011 Amendment Act.

In previous years, 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.

The 2005 Act is divided into four parts:

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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,[2] and allowing the court to extend the time imposed for the commencement of arbitral proceedings[3] or the delivery of an arbitral award.[4]

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.

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. As a signatory to the 1958 New York Convention (the New York Convention), arbitral awards made in Malaysia may be enforced in other New York Convention countries. 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.

Lastly, conducting arbitration proceedings in Malaysia is also said to be significantly cheaper when measured against other major arbitration jurisdictions in the region, due to the lower costs of the KLRCA and the more modest logistical costs of accommodation and transport.

ARBITRAL TRIBUNALS

Appointment

Both the 1952 Act and the 2005 Act allow party autonomy in relation to the appointment of arbitrator or establishment of the arbitral tribunal. In this regard, the parties may agree on the number of arbitrators to decide the case.[5] 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. In the event that the parties are unable to agree on the appointment of arbitrators, either party may apply to the director of the KLRCA to appoint the arbitrators.[6] 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.[7] Arbitrators are expected to disclose circumstances that may result in a conflict of interest, as provided in section 14 of the 2005 Act.

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.

Jurisdiction

Regardless of the process by which the tribunal is appointed, the importance of the doctrine of ***Kompetenz-Kompetenz*** remains and is expressly recognised by section 18 of the 2005 Act. This grants the arbitral tribunal power to rule on its own jurisdiction, and is recognised as an integral component of modern arbitration. Nevertheless, parties retain the option of appealing the tribunal's decision on jurisdiction to the High Court. The Malaysian courts have long recognised the importance of ***Kompetenz-Kompetenz***.[8] In ***Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor***,[9] the High Court said of the extent to which the doctrine of ***Kompetenz-Kompetenz*** is applicable in Malaysia:[10]

> 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

Last year, we discussed the decision in *Sundra Rajoo v Mohamed Abd Majed and Persatuan Penapis Minyak Sawit Malaysia (Poram)*,[11] which highlights the potentially evolving role of an arbitrator, that is, in demonstrating that appointment challenges may be submitted by an arbitrator against a fellow arbitrator sitting on the same tribunal. In this case, the High Court recognised the locus standi of the applicant and ordered the first respondent to make certain disclosures within seven days or be removed and disqualified.[12]

This novel application to the High Court raised questions on when challenges can be made and, significantly, by whom. Conventionally, only the parties to the arbitration (as opposed to the arbitrators) possess the right to submit challenges. 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. The High Court relied on 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',[13] and second Browne-Wilkinson V-C in ***Norjarl v Hyundai***, where 'on appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral agreement'.[14]

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 field of arbitration.[15]

On 25 June 2013, Yusof Holmes Abdullah, a chartered arbitrator of British nationality, 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.[16] This was the first time an arbitrator had been charged with corruption in Malaysia.[17] The KLRCA promptly removed Abdullah from its list of arbitrators upon the revelation of these allegations. The government's and KLRCA's swift response emphasises the administration's determination to protect 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. However, 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. Section 42 of the 2005 Act, on the other hand, 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.

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, whichever is relevant and applicable.

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 difficult as the courts are increasingly accepting of the finality of arbitral awards.

In *The Government of India v Cairn Energy India Pty Ltd & Anor*,[18] 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.[19] 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".[20] The Federal Court further held that a question of construction of an agreement was a question of law,[21] 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.[22] The extent to which the Federal Court leaned towards a pro-arbitration stance can be seen from the court's judgment when it said:[23]

> 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*,[24] 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 broadly consistent with that under the 1952 Act. In ***Tan Kau Tiah v Tetuan Teh Kim Teh, Salina & Co & Anor***,[25] 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.[26] 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.

In ***SDA Architects v Metro Millennium Sdn Bhd***,[27] the respondent had filed an originating summons to the High Court seeking direction as to whether the appellant should have been awarded the full costs of the arbitration when it was only partially successful. The High Court had allowed the respondent's application. However, the Court of Appeal, following the case of ***Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd***,[28] 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'.[29] The Court of Appeal concluded that there was no ground to support the respondent's contention and dismissed the appeal, thereby leaving the arbitral award unchanged.

In ***The Government of India v Cairn Energy India Pty Ltd & Ors***,[30] 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 relation to section 38, the Malaysian courts, in adopting a pro-arbitration stance, have applied a narrow interpretation to the twin concepts of public policy and natural justice. In the case of ***Open Type Joint Stock Co Efirnoye (EFKO) v Alfa Trading Ltd***,[31] the court had the opportunity to consider these grounds when there were two arbitral awards (one from Russia and the other from Ukraine) rendered over two 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'.[32] 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'.[33] Thus, a party wishing to invoke the public policy exception has to overcome a high threshold:[34]

> 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 within the relevant arbitration proceeding.[35]

ENFORCEMENT OF ARBITRAL AWARDS

The effect of the CREFAA Act[36]

Although the CREFAA Act was repealed by the 2005 Act, it remains relevant as being a precursor to the now-amended section 38(1) of the 2005 Act.

Prior to the amendment of section 38(1) of the 2005 Act, a declaration in the form of a gazette notification by His Majesty Yang di-Pertuan Agong was held to be a prerequisite to the enforcement of an arbitral award by a party to the New York Convention.[37] However, in late 2009, the Federal Court, in ***Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd***[38] 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.[39]

Prior to the reversal of its decision, 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.

In addition, pursuant to the now-amended 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.

Interim Relief And Enforcement

Both the 1952 Act and the 2005 Act allow for judicial intervention in specific instances, such as the staying of proceedings,[40] granting of interim measures of protection such as security for costs and interrogatories,[41] and the enforcement of arbitral awards.[42] In 2011, section 11 of the 2005 Act was amended 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, pursuant to order 92, rule 4 of the Rules of High Court, use their inherent powers to make orders outside of the circumstances specified. 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 indiscriminate expansion of the court's inherent powers

This restriction on the court's powers can be seen in ***SDA Architects v Metro Millennium Sdn Bhd***,[43] where the Court of Appeal 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***,[44] 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:[45]

> 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.

The judiciary's commitment to facilitating enforcement of arbitral awards is exemplified in the recent Court of Appeal decision of ***Agrovenus LLP v Pacific Inter-Link Sdn Bhd and another appeal***.[46] In this case, the award debtor sought to resist enforcement of the award

on the allegation that the tribunal had no jurisdiction to hear the dispute between the parties by relying on various sub-sections of section 39 of the 2005 Act. The opposing party argued that as the award debtor had not raised any objection to the tribunal's jurisdiction throughout the arbitration proceedings, the award debtor was now estopped from raising such objections to the court. The court of first instance relied on the English decision of *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs, Government of Pakistan*,[47] holding that it had the ability to evaluate the tribunal's jurisdiction despite the jurisdictional issue having not been raised at an earlier time.

The Court of Appeal, however, overturned the High Court's decision, holding that the award debtor was effectively estopped from challenging the tribunal's jurisdiction after the award had already been rendered. In doing so, the Court of Appeal cited ***Rustall Trading Ltd v Gill & Duffus SA***,[48] that:

> a party to an arbitration must act promptly if he considered that there were grounds on which he could challenge the effectiveness of the proceedings; if he failed to do so and continued to take party in the proceedings, he would be precluded from making a challenge at a later date.

These recent decisions suggest that there is indeed an increasing harmonisation of Malaysia's arbitration laws with the non-interventionist approach under the Model Law, under the supervision of the Malaysian courts, and in particular the Court of Appeal.

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.[49]

The courts have continued a pro-arbitration stance by interpreting this provision narrowly;[50] as stated by Azahar Mohamed J of the High Court in ***AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd***:[51]

> 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.[52] In ***TNB Fuel Services Sdn Bhd v China National Coal Group Corp*** [2013] 4 MLJ 857, the Court of Appeal ordered a stay of court proceedings in favour of arbitration proceedings pursuant to section 10 of the 2005 Act. The Court of Appeal noted that a court is no longer required to delve into the facts of the dispute when considering an application for stay, so long

as the arbitration agreement is not null and void or impossible of performance. This is in accordance with the doctrine of *Kompetenz-Kompetenz* which provides that the tribunal is able to determine its own jurisdiction.

In *KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd*,[53] the plaintiff had commenced a court action against the defendant in respect of payment for various palm oil products. The defendant sought an application to stay the proceedings under section 10 of the Arbitration Act 2005. The plaintiff in turn argued that section 10 could not apply on the basis that there was allegedly no 'dispute', and that it was evident that the defendant was liable to the plaintiff in this regard. The High Court held that under section 10, as amended by the 2011 Amendment Act, it was no longer possible for parties to argue that there was no 'dispute' between the parties as a means of escaping an arbitration agreement in favour of court proceedings. The court further provided that the relevant question was whether the matter before the court is encompassed by the arbitration agreement.

Nevertheless, parties wishing to enforce arbitration agreements should still be watchful not to take a step in court proceedings.[54] In *Lau King Kieng v AXA Affin General Insurance Bhd*-[55], 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.[56]

THE KLRCA

The KLRCA was established in 1978 under the auspices of the Asian-African Legal Consultative Organisation (AALCO),[57] 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.[58] While the KLRCA has the support of the Malaysian government, it is a non-profit organisation and is neither a government branch nor agency.

Despite being the first arbitral institution to be established in the region, up until recently, the KLRCA's caseload was trailing far behind newer arbitral centres in Singapore, Hong Kong and Australia.[59] Its recent efforts, however, has resulted in a resurgence in KLRCA's regional and global profile. 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.[60] Under its present management, the ambitions of the KLRCA have taken on an increasingly international flavour. According to Datuk Sundra Rajoo, director of the KLRCA, negotiations with the Permanent Court of Arbitration (PCA) are ongoing, which could see the KLRCA become an alternative venue for PCA cases. Additionally, the KLRCA has also inked a deal with the International Council of Arbitration for Sports, making the KLRCA an alternative hearing centre for international sports disputes. The KLRCA is now aiming for a caseload of 300 cases by 2016.

Currently, 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.[61] 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.[62] 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.[63]

The KLRCA Arbitration Rules

In 2013, the KLRCA revised the KLRCA Arbitration Rules,[64] 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.[65]

Of the many changes made to the KLRCA Arbitration Rules,[66] 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.[67] 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'.[68]

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',[69] 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.[70]

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'.[71]

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

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

Since the inception of the KLRCA i-Arbitration Rules in September 2012, the KLRCA remains the only institution in the region to offer resolution of disputes based on shariah principles. Under 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. Rule 13 of the KLRCA i-Arbitration Rules is now modified from the KLRCA Rules, providing 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 integrating shariah-based laws in its rules are an innovative method to fulfil the specialised needs of parties in the region. It should be observed that common law courts are traditionally resistant to classifying shariah principles as an applicable system of law. In the English Court of Appeal case of ***Shamil Bank of Bahrain v Beximoco Pharmaceuticals Ltd & Ord***,[72] the court referred to shariah principles as 'not simply principles of law but principles which apply to other aspects of life and behaviour'. The parties' own expert witnesses also observed some degree of uncertainty in relation to banking jurisprudence under shariah law. Ultimately, the English Court of Appeal refused to adjudicate the matter under shariah law.

Parties engaged in disputes over shariah-based transactions may be compelled to seek adjudication fora offering recognition of such principles, which would lead to a greater degree

of certainty and assurance of due process for the parties. With the promulgation of the KLRCA i-Arbitration Rules, the KLRCA's enjoys a distinct competitive advantage in this regard.

OUTLOOK AND CONCLUSIONS

Malaysia continues its rapid ascension as a regional centre for international arbitration. The 2005 Act, alongside the 2011 Amendment Act, provides a coherent legislative framework. The liberalisation of the legal market via amendments of the Legal Profession Act ensures the attractiveness of Malaysia as a venue for resolving cross-border disputes. With its unique initiatives, the KLRCA is also poised to capture a significant market in the region. In light of the judiciary's increasing receptiveness and familiarity with international arbitration practice, Malaysia now enjoys the necessary infrastructure to serve as a cost-efficient centre for effective dispute resolution in the region. With continuing support from the government, the courts and the bold stewardship of the KLRCA, arbitration in Malaysia is set to grow from strength to strength.

Notes

1. 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.
2. Section 42 Arbitration Act 2005.
3. Section 45 Arbitration Act 2005.
4. Section 46 Arbitration Act 2005.
5. Section 12 Arbitration Act 2005.
6. Section 13(4), (5), (6) Arbitration Act 2005.
7. Section 13(7) Arbitration Act 2005.
8. 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.
9. [2008] 1 MLJ 233.
10. Ibid, per Vincent Ng J paragraph [13].
11. D-24NCC(ARB)-13 OF 2010.
12. 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). pp37–44.
13. ***Companie Européenne de Céreales SA v Tradax Export SA*** (1986) QB (Comm Ct) 301.
14. ***K/S Norjarl A/S v Hyunday Heavy Industries Co Ltd*** [1992] Q.B. 863 at 885.

15. 'KLRCA declares war on corruption' – Invest KL, www.investkl.gov.my/v1/News-@-KLRCA_declares_war_on_corruption.aspx (accessed 22 April 2015).
16. 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).
17. '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 22 April 2013).
18. [2011] 6 MLJ 441.
19. Ibid, at paragraph [30].
20. Ibid, at paragraph [30].
21. Ibid, at paragraph [36].
22. Ibid, at paragraph [36].
23. Ibid, at paragraph [53].
24. [2010] 4 MLJ 332.
25. [2010] 4 CLJ 914.
26. 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.
27. [2014] MLJU 28.
28. [2010] 5 CLJ 83.
29. Ibid, at paragraph 10(a).
30. [2014] 9 MLJ 149.
31. [2012] 1 MLJ 685.
32. Ibid, at paragraph [38].
33. Ibid, at paragraph [39].
34. Ibid, at paragraph [40].
35. Ibid, at paragraph [38].
36. Also known as the New York Convention.
37. [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.
38. [2010] 2 MLJ 23.
39. Ibid, at paragraph [21].
40. Section 6 Arbitration Act 1952 and Section 10 Arbitration Act 2005.

41. Section 13 Arbitration Act 1952 and Section 11 Arbitration Act 2005.
42. Section 27 Arbitration Act 1952 and Section 38 Arbitration Act 2005.
43. [2014] MLJU 28 at paragraph [10].
44. [2013]7 MLJ 811 at paragraph [39].
45. Ibid, at paragraph [39].
46. [2014] 3 MLJ 648.
47. [2009] EWCA 755.
48. [2000] 1 Lloyd's Rep 14.
49. 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.
50. 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.
51. [2011] 8 MLJ 792 at paragraph [4].
52. See, eg, ***TNB Fuel Services Sdn Bhd v China National Coal Group Corp*** [2013] 4 MLJ 857.
53. [2012] MLJU 1218.
54. ***Winsin Enterprise Sdn Bhd v Oxford Talent (M) Bhd*** [2010] 3 CLJ 634.
55. [2014] 8 MLJ 883.
56. Ibid, at paragraphs [34] to [35].
57. 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).
58. 'About KLRCA', Kuala Lumpur Regional Centre for Arbitration, http://klrca.org.my/about/ (accessed 13 June 2014).
59. 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 22 April 2015).
60. Ibid.
61. 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).
62. KLRCA,http://klrca.org.my/rules/adjudication/#PartV-AdjudicationAuthority (accessed 18 June 2014).
63. Ibid.

64. 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 p7.
65. Rule 1(2) of the 2013 KLRCA Arbitration Rules.
66. 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.
67. Rule 7(2) read with schedule 2 of the 2013 KLRCA Arbitration Rules.
68. KLRCA, http://klrca.org.my/wp-content/uploads/2013/11/2013Q3newsletter4.pdf at p7.
69. Ibid, at p9.
70. Rule 15(2) of the KLRCA Arbitration Rules.
71. KLRCA, http://klrca.org.my/wp-content/uploads/2013/11/2013Q3newsletter4.pdf, page 10.
72. [2004] EWCA Civ 19.

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Summary

With the implementation of market-oriented reforms and foreign investment pouring into Myanmar over the past few years, reform of the arbitration regime and legislation was inevitable and necessary.

Over the last two years, Myanmar has acceded to the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 and issued a draft Arbitration Bill based on the UNCITRAL Model Law. Further, the latest draft Investment Law specifically provides that when a dispute arises between the Union Government of Myanmar or a government entity and a foreign investor, it can be referred to arbitration. These are the developments in Myanmar, bringing it closer to international investment and arbitration standards.

ARBITRATION ACT 1944

As the starting point, we will look at the key features of the arbitration law currently applicable in Myanmar.

The Myanmar legal system is largely common law-based and the current law of arbitration is the Arbitration Act 1944 (Arbitration Act), which mirrors the Indian Arbitration Act, 1940. The Arbitration Act applies to domestic arbitrations, which includes arbitrations entered into between Myanmar companies as well as those involving one or more foreign parties. The Arbitration Act also applies to statutory arbitration.

Reference to arbitration can be made in three ways:

- arbitration without the intervention of a court;
- arbitration with the intervention of court where there is no suit pending;
- arbitration in suits.

Arbitration Agreement

An arbitration agreement is a written agreement to submit present or future differences to arbitration, whether or not an arbitrator is named therein.[1]

There is no special form of agreement prescribed in the Arbitration Act and it may include terms as agreed between the parties. Unless otherwise provided for in the arbitration agreement, the following terms will apply to the arbitration:[2]

- the reference will be to a sole arbitrator;
- if the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire within one month of their appointment;
- the award must be made within four months of the reference to the arbitrators;
- if the award is not made within four months, the matter will be referred to an umpire who must make an award within a further two months;
- the parties to the arbitration will submit to examination under oath or affirmation and produce all requested documents within their possession or power;
- the award will be final and binding on the parties;
- the cost of the arbitration will be at the discretion of the arbitrators.

Arbitrability Of Dispute

The Arbitration Act does not specify which kinds of disputes are arbitrable. In general, any matter in respect of which a civil suit can be filed in court can be referred to arbitration. However, some matters are exclusively within the jurisdiction of a court. For example, the adjudication of a person as an insolvent under the Insolvency Act, the winding up of a company under the Myanmar Companies Act and the appointment of a guardian for a minor under the Guardian and Wards Act cannot be the subject matter of reference to arbitration.[3]

For certain contracts, there are also restrictions on the parties' ability to choose the governing law and forum for dispute resolution. For example, the Myanmar Export and Import Rules and Regulations require trade disputes under sales contracts with foreign companies to be arbitrated in Myanmar under the Arbitration Act, with no option for dispute resolution outside Myanmar.

Substantive Law

The Arbitration Act is silent on the governing law. However, the Myanmar courts have accepted one of the principles of English private international law, which is that the intention of the parties must first be determined before deciding which law is applicable to their dispute.[4] In theory then, parties are free to select the substantive law. However, there appears to be no precedent or case law to date which explains how such choice of foreign law would be applied by the arbitral tribunal or the Myanmar courts.

Where a case involves a foreign element, in the absence of expressed choice by the parties, the substantive law would be determined in accordance with Myanmar law. If there is no enactment in force on the issue at hand, the decision must be according to justice, equity and good conscience.[5]

Procedural Law

If the arbitration is seated in Myanmar, Myanmar law will be the procedural law for the arbitration.[6]

The procedural laws will govern the following:[7]

- the constitution of the arbitral tribunal;
- removal of an arbitrator;
- powers of arbitrators;
- powers of the court;
- the arbitration proceedings and hearing;
- duration of the arbitration proceedings;
- limitation; and
- grounds for setting aside an award.

Constituting The Tribunal

In Myanmar, there is no official list of arbitrators and there are no restrictions or requirements as to who can be appointed by parties as an arbitrator. Lawyers, judges and government officials have been appointed as arbitrators in previous cases, but their ability to handle

complex commercial disputes is questionable due to the lack of awareness and experience in arbitration practice.

Parties are at liberty to decide on the number of arbitrators and to each appoint their own arbitrators.[8] If parties wish to challenge an arbitrator, they may apply to the court and the court may remove the arbitrator[9] and appoint persons to fill the vacancies.[10]

Powers Of The Arbitral Tribunal

Unless a contrary intention is expressed in the arbitration agreement, the arbitrator or umpire has the power under the Arbitration Act to:[11]

- obtain the opinion of the court on any point or, if necessary on the whole subject of the award;
- correct any clerical mistakes or errors arising from any accidental slip or omission in an award;
- administer interrogatories and oaths to all parties appearing in the arbitration;
- make interim awards and grant interim measures; and
- award costs.

The Role Of The Court

The court retains a wide supervisory role under the Arbitration Act and an arbitration agreement that ousts the jurisdiction of the court is deemed to be invalid. The expansive powers of the court are a key area in which the Arbitration Act differs widely from international arbitration laws and rules.

The Act empowers the court to exercise various powers once the tribunal is constituted, such powers including (although without prejudice to any power that may be vested in the arbitrator in respect of these matters):[12]

- the preservation, interim custody or sale of any goods which are the subject matter of the reference;
- securing the amount in difference in the reference;
- the detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein;
- authorising persons to enter on or into any land or building in the possession of any party to the reference for the aforesaid purposes;
- authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
- interim injunctions or the appointment of a receiver;
- the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.[13]

Apart from the above, the court also has jurisdiction in the following areas:

- revocation of the authority of an arbitrator;[14]
-

appointment of arbitrators or umpire if the parties cannot agree on the appointment;[15]

- appointment of arbitrators or umpire to replace the original persons if they had failed to act;[16]
- remove arbitrators or umpires who have failed to use all reasonable dispatch in proceeding with the reference and making an award or have misconducted themselves or the proceedings;[17]
- order the arbitration agreement to cease to have effect if all the arbitrators or umpire are removed for failure to act or misconduct;[18]
- answer questions of law if requested to do so by the arbitrators or the umpire;[19]
- remit an award back to the arbitrators; the award will become void if the award is remitted and the arbitrators or umpire fail to reconsider and submit their decision within the time fixed;[20] and
- set aside an award.[21]

In relation to misconduct, the following would be sufficient to warrant the revocation of an arbitrator's authority:[22]

- the arbitrator had failed to act impartially or has an interest or bias in the result of the proceedings;
- the arbitrator had breached the principles of natural justice by, for example, failing to give one of the parties to the arbitration the opportunity to be heard before the arbitrator;
- the arbitrator had mishandled the arbitration such that it is likely to amount to some substantial miscarriage of justice.

The court may also stay legal proceedings where there is an arbitration agreement. However, the relevant party must file the stay application before filing a written statement or taking any other steps in the legal proceedings. If the court is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, the court may make an order staying the proceedings.

The Award

The arbitral tribunal can make final and interim awards.[23] There are no prescribed requirements for constituting an award, except that the award must be signed by the arbitrators and the parties informed of it by written notice.[24] Unless a different intention is expressed in the arbitration agreement, a final award must be made within four months of entering on the reference or after having been called on by notice in writing from any party to the arbitration agreement. The court may also allow an extended period for the arbitrators to make the award.[25]

The arbitral tribunal has the power to correct in an award any clerical mistake or error arising from any accidental slip or omission.[26] Either party also may request the arbitrators or the umpire to submit the award to a competent court.[27] The court will then check whether the award should be modified or corrected,[28] remitted to the arbitrators or umpire for reconsideration[29] or set aside.[30]

If the court finds no fault with the arbitral award, it pronounces the judgment according to the award and a decree is issued.[31] Such court decree has the same effect and can be enforced like an ordinary decree from the court.

Setting Aside

An application to set aside must be made to court[32] within 30 days of the date of the service of the notice filing the award.[33]

The grounds for setting aside an award are:[34]

- the arbitrators or the umpire misconducted themselves or the proceedings;
- the award was made either after the issue of an order by the court superseding the arbitration or after arbitration have become invalid under section 35;
- the award was improperly procured or is otherwise invalid.

As the courts appear to have wide discretion in deciding whether to set aside an arbitral award, this raises the likelihood that an award may be set aside (at the request of the losing party), resulting in a re-litigation of the entire matter.

If the court refuses to set aside an award, the award may be challenged in an appeal.[35]

Enforcement Of Award

For awards made in Myanmar, the arbitrators must, at the request of any party to the arbitration agreement, file the award together with depositions and documents at a court. Such application must be filed within 90 days of the date of service of the notice of the making of an award.[36]

If the court sees no cause to remit or set aside the award, the court shall, after the time for making an application to set aside has expired or such application has been dismissed, proceed to pronounce judgment according to the award.[37] A decree shall follow and can be executed as any other decree in a civil court.

Accordingly, there appears to be no procedure for a party to resist enforcement of the award. If they are not satisfied with the award, their recourse would be in applying to set aside the award. If they fail to do so, the court may not refuse to recognise and enforce an award accordingly.

As to foreign awards, prior to acceding to the New York Convention on Recognition and Enforcement of Foreign Awards 1958 (New York Convention), Myanmar was party to the Geneva Convention on the Execution of Foreign Arbitral Awards (1927) (Geneva Convention). However, there were obstacles present in the Geneva Convention such as the limited number of signatories and those which had reciprocal arrangements with Myanmar, as well as a convoluted enforcement process. In any event, there appears to be no reported cases of enforcement of foreign awards in Myanmar, which would have to be enforced in compliance with the Arbitration (Protocol and Conventions Act) 1939 (Protocol and Conventions Act).

As Myanmar is now party to the New York Convention, the application of the Geneva Convention is not material.

While there have been developments in Myanmar's future enforcement of foreign awards, which will be discussed below, there remains a lot of work to be done in a wholly untested area.

Agreements And Treaties

Myanmar is an ASEAN member state and has acceded to the ASEAN Comprehensive Investment Agreement 2009, which provides investor protections as well as a dispute resolution mechanism, including referral to foreign arbitration, for commercial activities in certain economic sectors (eg, manufacturing and agriculture).

There are also several bilateral investment treaties in effect (eg, with China, India and Japan). For example, the settlement of disputes clause in the Myanmar–China BIT provides that any legal dispute between an investor of one contracting party and the other contracting party shall first be settled amicably through negotiations. If the dispute cannot be settled within six months, the dispute must be submitted at the request of either party to the International Centre for Settlement of Investment Disputes (ICSID) (under the Convention of the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) or an ad hoc tribunal.[38]

Accordingly, there are agreements which provide for the comfort of neutral arbitration of investor-state disputes, should Myanmar and an investor from another contracting country need to resolve certain issues.

PREVAILING ATTITUDES

As seen above, the Arbitration Act is in need of an overhaul and the enforcement of foreign awards is still untested. In Myanmar, dispute resolution is handled mainly in the courts and local users have very little experience or inclination toward arbitration. The local party would generally prefer dispute resolution in Myanmar as they have little knowledge of arbitration procedures and costs of the same, whether domestically or abroad. Without the entry of foreign investors, arbitration would not be the preferred choice.

Further, the institutional infrastructure for arbitration is weak – there are no domestic or international arbitration centres in Myanmar or procedural rules in place. As a result, international institutional arbitration outside of Myanmar is more popular than arbitrating in Myanmar itself. In this regard, the UNCITRAL Arbitration Rules, SIAC Rules and ICC rules are popular choices for international arbitrations.

There is, however, a process in which commercial and financial disputes can be resolved at the Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI). The UMFCCI has a duty to conciliate disputes between its members and between its members and other individuals and organisations. However, there is no written procedure of conciliation. A subcommittee is formed to conciliate for a specific dispute and to call experts and see their opinions if required. Some parties in local disputes seek the help of the committee to reach a settlement before they proceed to court, however this does not occur with international disputes. The findings of the subcommittee with the approval of the Central Executive Committee are pronounced and the parties who do not comply with the findings are blacklisted.[39] This conciliation procedure, however, does not appear to be in line with international practices.

THE WAVES OF CHANGE

However, in the last few years, Myanmar has seen a number of changes which will shape the trajectory of arbitration here in time to come.

The New York Convention

Myanmar formally acceded to the New York Convention on 16 April 2013, with the Convention entering into force in Myanmar on 15 July 2013. This accession has been years in the making, and reaching this milestone is an important piece in Myanmar's legal and investment framework.

The New York Convention currently has 154 signatories,[40] and requires the contracting states to give effect to arbitration agreements and recognise and enforce arbitration awards from other states. By signing on to the New York Convention, the Geneva Convention will cease to have effect between the contracting states on their becoming bound and to the extent that they become bound, by the New York Convention.[41] This would eradicate issues with the process of enforcement present in the Geneva Convention, wherein the enforcing party must first obtain recognition of the award from the courts in the country of origin before making an application for enforcement in the jurisdiction where enforcement is to follow.

The New York Convention supports ready enforceability of awards from other contracting states without re-litigation in the courts, and offers a supportive environment for the arbitration process in Myanmar.

However, the domestic legislation for the enforcement of foreign awards has not been passed and enforcement therefore remains theoretical. A draft Arbitration Bill has since been published, of which we will consider the key points, but as long as this Bill is not passed, there remains no domestic procedure to enforce a foreign arbitral award.

Draft Arbitration Bill 2014

On 25 May 2014, the Myanmar Parliament published a draft of the new Arbitration Bill, which, when passed into law, will supersede the Arbitration Act and Protocol and Convention Act. The Arbitration Bill had been widely anticipated and sets the domestic tone and framework for arbitration on Myanmar, as well as the enforcement of foreign arbitral awards pursuant to Myanmar's accession to the New York Convention.

The Arbitration Bill is based on the UNCITRAL Model Law (Model Law), with the first part applying to arbitration in Myanmar and the second to the enforcement of a foreign award in Myanmar. For example, the provisions relating to the definition of an arbitration agreement,[42] the procedure of appointing arbitrator(s)[43] and the grounds for setting aside an award[44] are mirrored in the Arbitration Bill and the Model Law.

However, there are differences between the Arbitration Bill and Model Law. First, while parties are free to decide on the substantive law in an 'international commercial arbitration ', the Arbitration Bill provides that arbitrations seated in Myanmar must adopt Myanmar law as the substantive law if those arbitrations do not fall within this definition.[45] This creates uncertainty as to what can be defined as an international commercial dispute, such that parties are allowed to adopt any foreign law as substantive law under this provision.

Next, in relation to the jurisdiction of the arbitral tribunal, article 16 of the Model Law allows parties who object to an order that the tribunal has jurisdiction to request for the court to decide on the matter. In the Arbitration Bill, if the arbitral tribunal rules that it has jurisdiction, it may continue the arbitration proceedings and make an award, with the disputant's only recourse being to apply to set aside this award under section 34.[46] This presents a more onerous process in objecting to the jurisdiction of the tribunal, and much will depend on how the Myanmar courts would apply the provisions under section 34.

For the enforcement of awards, instead of following article 36 of the Model Law, the Arbitration Bill provides that awards made in Myanmar will be enforced when the period for setting aside the award has elapsed or the application to set aside the award had been dismissed. This would indicate that parties objecting to an award must seek to set the award aside, failing which, the court may not refuse to enforce the award and it is not open to the objecting party to resist enforcement.

According to the Arbitration Bill, foreign arbitral awards can be enforced if they are the result of a commercial dispute and were made at a place covered by international conventions connected to Myanmar and as notified in the State Gazette by the President.[47] If the Myanmar court is satisfied with the award, it has to enforce it as if it were a decree of a Myanmar court.[48]

There will be details to be ironed out, but in the meantime we can be heartened to know that this Bill brings Myanmar's legislation much closer to international arbitration standards and legislation.

For one, the Arbitration Bill states there shall be no court intervention in arbitrations except as provided for under the Bill. This is in contrast with the Arbitration Act, where the court has wide powers in arbitration proceedings. Limiting the court's jurisdiction will help to establish arbitration as a parallel and independent dispute resolution option in Myanmar. The Myanmar court now will play a supporting role in the arbitration proceedings instead of an intervening one.

Draft Myanmar Investment Law 2015

After the issuance of the Arbitration Bill, a draft Myanmar Investment Law was released on 24 February 2015 (MIL). The MIL consolidates the Foreign Investment Law 2012 (FIL) and the Myanmar Citizens Investment Law 2013, and aims to provide a transparent, equitable and non-discriminatory legal framework for both domestic and foreign investors.[49] The consolidation is also meant to ensure consistency with best practices in the ASEAN region and a sign of Myanmar's commitment to the establishment of the ASEAN Economic Community.[50]

Foreign investors should be well acquainted with the FIL – this is the piece of legislation they have relied on and wrangled with in making their investments into Myanmar. In relation to dispute resolution, the FIL provides that if any dispute arises in respect of the investment, that parties shall comply with the dispute resolution mechanism as stipulated in the relevant agreement.[51] Theoretically then, the parties can provide for foreign arbitration, both substantively and procedurally. In practice, when it comes to contracts with the government or state-owned enterprises, the substantive law would still be Myanmar law.

In the MIL, at section 21, the language in relation to the dispute resolution mechanism has shifted, and is set out below:

(1) In the event of any dispute between the Union Government or any Government Entity and an Investor in relation to the Investor's Investment where the Investor has incurred loss or damage by reasons of an alleged breach of any rights conferred by this Law with respect to the Investment of that Investor, the Investor shall have access to a dispute settlement mechanism, either domestic court or tribunal or arbitration or other procedures, under the existing laws of the Union or the relevant laws which will be enacted in due course.

(2) In the event of any dispute referred to in sub-section (1) above is between the Union Government or any Government Entity and a Foreign Investor, the disputing Foreign Investor may submit a claim referred to in sub-section (1) above to:

a) Domestic courts or administrative tribunals; or
b) Arbitration under relevant Myanmar law; or
c) Arbitration under the Rules of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules; or
d) Arbitration under the International Convention on the Settlement of Investment Disputes (ICSID) between States and Investors
Provided that resort to any arbitration rules or fora under sub-section (2) shall exclude resort to the other.
(3) In any case arising from sub-section (1) above, the Union Government and the Government Entities are assumed to have given express advanced consent to court proceedings, arbitration or any other dispute settlement procedures.
(…)
(5) In the event of any award made by a foreign arbitral tribunal, such award shall be recognized and enforceable in the Union according to international law, including the New York Convention on the Recognition of Foreign Arbitral Awards 1958.

Why is this significant? First, it is now specifically stipulated that investors (both foreign and domestic) have access to arbitration as a dispute resolution mechanism as against the government and government entities. Second, for foreign investors, reference may be made to foreign arbitral rules or under international conventions, such as the UNCITRAL Arbitration Rules and arbitration under the ICSID Convention.

Third, it would appear that there is no absolute interpretation of sovereign immunity and the government will not avail itself of that defence – the government has given express advanced consent to both court proceedings and arbitration in the event of such a dispute under the MIL. Finally, an award by a foreign arbitral tribunal shall be recognised and enforceable in the Union, including those made under the New York Convention.

The language of section 21 of the MIL is promissory, a movement from a nebulous reference to dispute resolution mechanisms in the FIL to the government's pledge to submit disputes under the MIL to arbitration. There is also a reinforcement of Myanmar's commitment to the New York Convention, insofar as it is 'guaranteed' that disputes under the MIL and arbitrated abroad can be enforced in this jurisdiction. This will bring comfort to foreign investors, specifically those that are engaged in projects with the government, that in the event of a dispute, they now have (explicitly provided) access to foreign arbitration in a neutral jurisdiction.

Myanmar is currently not a member of ICSID. However, as it appears to be open to referring disputes to arbitration under the ICSID Convention (as evinced in the Myanmar–China BIT and MIL), there may be plans to sign on to the ICSID Convention in the future.

While this is a draft piece of legislation and will be further reviewed, it still marks a positive mindset in encouraging foreign investment and assuaging foreign investors. This is in line with other core investor guarantees given in the MIL, such as protection against nationalisation and expropriation[52] as well as regulatory transparency and the right to due process for investors.[53]

FRASER AND NEAVE CASE

Prior to the issuing of the MIL, there was a legal dispute between Fraser and Neave Limited (F&N) and Myanmar Economic Holdings Limited (MEHL) (a government entity) which was arbitrated under Myanmar law in Singapore.

Myanmar Brewery Limited was set up in 1995 by MEHL with Heineken through the latter's Asian arm, Asia Pacific Breweries Ltd (APB). APB transferred its 55 per cent stake to F&N in

1997. In 2012, F&N was bought over by Thai Beverage Public Company Limited (ThaiBev). MEHL commenced arbitration proceedings in November 2013, wherein they argued that ThaiBev's buyout of F&N constituted a change in ownership and therefore violated the joint venture terms between MEHL and F&N, which gave the partners the first right of refusal to purchase each others' shares before they are offered to a third party.[54]

The arbitral tribunal (made up of two Singapore arbitrators)[55] ruled in favour of MEHL and held they were entitled to buy out F&N's stake in Myanmar Brewery as they were in default of the joint venture terms. This case was touted as a test for Myanmar's legal framework and foreign investment environment, and it was commented by MEHL's deputy managing director, Myint Aung, that 'the conduct of this arbitration shows [their] commitment to the rule of law and that [they] will always adhere to due process.'[56]

Based on this earlier case, it would appear that the government will submit to foreign arbitration – a good start – although we are currently unable to tell if such award will be enforced in Myanmar if the tribunal had ruled in favour of F&N. The entrenchment of such reference to arbitration in the MIL is perhaps a crystallisation of, and assurance that, the government will continue their openness toward foreign arbitration.

WHERE DOES MYANMAR GO FROM HERE?

In the last few years, Myanmar has taken constructive steps in overhauling their arbitration regime and reinforcing their commitment to investors and enforcement of foreign awards. However, it will be some time yet before Myanmar reaches a modern arbitration standard.

Myanmar will first need to develop its institutional infrastructure. The passing of the Arbitration Bill and implementing regulations as well as the establishment of a Myanmar Arbitration Centre (which is in the making) are certainly steps in the right direction and are necessary to establish a strong foundation of a modern regime.

In tandem with the setting up of strong legal framework, there is also the need to raise awareness and educate as to the benefits of arbitration practice in Myanmar. As a noted arbitrator has commented, it would be more relevant to talk about judicial ignorance of arbitration than judicial attitudes toward it.[57] The judges, the lawyers, the students, the companies – there is an entire spectrum of users that need to be made aware and brought up to speed on the advantages of arbitration and how it works.

Foreign delegations and arbitrators have visited Myanmar to promote awareness of arbitration services via seminars and workshops. This should continue, particularly as Myanmar is opening up to the idea of foreign arbitration and understanding the relevance of international arbitration in the light of attracting foreign investment. The development of a pro-arbitration and robust judiciary will also be necessary for supporting the arbitration ecosystem; such as the implementation of provisions on enforcing and setting aside of awards.

The road is long, but Myanmar has taken the first stride.

Notes

1. Section 2(a), Arbitration Act.
2. Section 3 and First Schedule, Arbitration Act.
3. Thida Aye and James Finch, ***Asia Arbitration Handbook 2011*** (Oxford University Press), chapter 17, para 17.40.

4. See *China Siam Line by their local Agents Chip Hwat v Nay Yi Yi Stores* [1954] (HC) BLR 270; *V Ramaswamy Iyengar and others v SVKV Velayudhan Chettiar and One* [1952] BLR 25.
5. Thida Aye and James Finch (Note 3, above), para 17.23 and Section 13 of the Burma Laws Act 1898.
6. Thida Aye and James Finch (Note 3, above), Arbitration Act.
7. Supra n3, para 17.23(iii).
8. The procedure for appointment is generally set out at sections 8, 9 and 10 of the Arbitration Act.
9. Section 11(1) and (2), Arbitration Act.
10. Section 12, Arbitration Act.
11. Section 13 , 27, 41 and First Schedule, Arbitration Act.
12. Section 42(b), Arbitration Act.
13. Second Schedule, Arbitration Act.
14. Section 5, Arbitration Act.
15. Section 8, Arbitration Act.
16. Section 11, Arbitration Act.
17. Section 11, Arbitration Act.
18. Section 12(2)(b), Arbitration Act.
19. Section 13(b), Arbitration Act.
20. Section 16, Arbitration Act.
21. Section 30.
22. See *Burma Indo-Ceylon Rice Corporation Ltd v. The State Agricultural Marketing Board* (1958) BLR (HC) 68, *Aishabhaihaji Tahir Mohamed v. Mohamed Yacoob Yunus Jamal* (1960) BLR (HC) 452.
23. Section 27, Arbitration Act.
24. Section 14, Arbitration Act.
25. First Schedule, para 3, Arbitration Act.
26. Section 38, Arbitration Act.
27. Section 14(2), Arbitration Act.
28. Section 15, Arbitration Act.
29. Section 16, Arbitration Act.
30. Section 30, Arbitration Act.
31. Section 17, Arbitration Act.
32. Section 33, Arbitration Act.
33. Section 158, Limitation Act.
34. Section 30, Arbitration Act.

35. Section 39(1)(vi), Arbitration Act.
36. Article 178, First Schedule, Limitation Act.
37. Section 17, Arbitration Act.
38. Article 9, Agreement between the Government of the People's Republic of China and The Government of the Union of Myanmar on the Promotion and Protection of Investments.
39. Thida Aye and James Finch (Note 3, above), para 17.45(b).
40. UNCITRAL,'Status – Convention on the Recognition and Enforcement Foreign Arbitral Awards (New York, 1958)', www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.
41. New York Convention on the Recognition and Enforcement of Awards 1958, Article VII No. 2.
42. Section 7, Arbitration Bill 2014.
43. Generally, chapter 4 of the Arbitration Bill.
44. Section 34, Arbitration Bill.
45. Section 28(a), Arbitration Bill.
46. Section 16(e) and (f), Arbitration Bill.
47. Section 46, Arbitration Bill.
48. Section 51, Arbitration Bill.
49. Draft Myanmar Investment Law 2015 (Myanmar Investment Law), p3.
50. Ibid.
51. Section 43(b), Foreign Investment Law 2012.
52. Section 15, Myanmar Investment Law.
53. Section 11, Myanmar Investment Law.
54. Tim McLaughlin, 'Military firm wins arbitration battle with Fraser & Neave', *The Myanmar Times*-, www.mmtimes.com/index.php/national-news/12137-military-firm-wins-arbitration-battle-with-fraser-neave.html.
55. Shen Rujun and Rachel Armstrong, 'Updated 2-Military-linked Myanmar spat with Singapore's F&N', *Reuters*, www.reuters.com/article/2014/10/31/mehl-fn-myanmarbrewery-idUSL4N0SQ5XZ20141031.
56. Ibid.
57. Interview by Jane Crinnion, 'Arbitration in emerging markets – Myanmar', Lexis Nexis, 8 October 2014.

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Nepal

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Summary

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, p1346, 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/NeKaPa 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

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 (the Act) 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 on the Recognition and Enforcement of Foreign Arbitral Awards, 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 (the Centre), which offers a variety of arbitration rules. In October 2014, the Centre released a new set of international 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); and
- court recognition and enforcement of arbitral awards (article 36, schedule 1).

COMMENCING ARBITRATION

Arbitration Agreements

Article 7 of Schedule 1, which closely follows the Model Law, provides that an arbitration agreement may be made orally or in writing. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement. There are no known examples in New Zealand case law of any oral arbitration agreement having been proved where its existence was disputed by the parties. 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, [2014] NZLR 792, 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) of the Act, 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 an 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 each 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 decided that a stay may be refused where summary judgment can properly be granted.

However, the unanimous decision of the Supreme Court in ***Zurich Australian Insurance Ltd v Cognition Education Ltd*** [2014] NZSC 188 has since overturned that approach. The Supreme Court found that a matter can properly be described as a dispute within the meaning of article 8(1) even if it is capable of resolution through the summary judgment process; the words 'not in fact any dispute' referred only to circumstances where the dispute raised was not bona fide.

The Supreme Court's decision in Zurich deliberately interpreted the Act in light of New Zealand's international obligations under the New York Convention and the approach taken by the Model Law.

New Zealand courts have a residual discretion to grant a stay even where article 8(1) is not engaged. In ***Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd*** [2014] NZHC 1681 the High Court held that it has a discretionary power to stay proceedings 'in rare and compelling circumstances where the costs, convenience and the interests of justice [...] weigh in favour of a stay' (at [39]). In that case, article 8 did not apply because the defendant was not a party to the arbitration (it was, however, the parent company of respondents in the arbitration); but the court nevertheless exercised its discretion to grant a stay pending the outcome of the arbitration. In November 2014, the Court of Appeal upheld the High Court's decision, confirming the court's residual discretion to grant a stay in appropriate circumstances (see ***Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd*** [2014] NZCA 536).

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. Moreover, where an application is made to court for interim measures in support of arbitration proceedings, the relevant test remains that provided by articles 9 and 17B. In *Safe Kids in Daily Supervision Ltd v McNeill HC* Auckland CIV-2010-404-1696, 14 April 2010 at [18] the Court stated: 'The Court will consider the granting of interim measures on the basis that they should complement and facilitate the arbitration, and in [the] same way and with the same limitations as an arbitral tribunal carrying out such an exercise'.

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), relating to whether a sum directed to be paid in an award shall carry interest; and
- article 32(2), relating to 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, 24(2) and 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 the 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. In all of these circumstances, 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 (Schedule 2 of the Judicature Act 1908).

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 or 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 (or, if a request for a correction, interpretation or additional award was made under article 33 of Schedule 1, of the date that request was disposed of). 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 interrelationship between articles 33 and 34(3) was recently considered by the Court of Appeal in ***Todd Petroleum Mining Company Ltd v Shell (Petroleum Mining) Company Ltd*** [2014] NZCA 507, at [36]-[37]. The Court of Appeal, allowing the appeal, held that once an article 33(3) request is made, the three-month period set by article 34(3) for application to the High Court for leave to appeal runs from the date on which the request is 'disposed of' by the arbitral tribunal. It rejected the argument that there was a qualitative requirement that the request under article 33(3) be a 'proper' request.

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 proceedings 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), which lays down eight non-exhaustive factors that should be considered when deciding whether to grant leave, such as the strength of the challenge or the nature of the point of law sought to be raised.

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.

A recent High Court decision in ***Shell (Petroleum Mining) Company Ltd v Vector Gas Contractors Ltd*** [2014] NZHC 31, at [39]-[40] considered whether, on appeal of a question of law, the Court could make factual findings which had not been made by the arbitral tribunal. The Court held that it does not have the ability to make further findings of fact where the arbitral tribunal has not done so.

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 (HC)).

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 annual report of the Singapore International Arbitration Centre (SIAC) 2014 described the past year as 'a year of innovation for SIAC'. Indeed, the past 12 months bore witness to a number of exciting developments in international arbitration not just at SIAC but for Singapore as a whole. The Singapore International Mediation Centre (SIMC) was launched on 5 November 2014, followed by the Singapore International Commercial Court (SICC) on 5 January 2015. In the words of Mr K Shanmugam, Minister for Foreign Affairs and Law, at the inaugural SIAC Congress 2014 on 6 June 2014, the SIMC and the SICC, together with SIAC will provide a 'complete suite of dispute resolution offerings to parties, especially those with cross-border disputes.'

CONTINUED GROWTH OF INTERNATIONAL ARBITRATION AND DISPUTE-RESOLUTION PRODUCTS

Singapore's Tripartite Dispute-resolution Mechanisms

The SIMC offers world-class international commercial mediation services targeted at the needs of parties in cross-border commercial disputes. It hosts an experienced panel of over 65 eminent mediators from 14 jurisdictions worldwide. Among other things, the SIMC will offer professional appointing authority and case management services under the SIMC Mediation Rules.

Mediation at the SIMC will have the benefit of enforceability as settlement agreements may be recorded as consent awards under the Arb-Med-Arb Protocol between SIAC and the SIMC, an innovative process where a dispute is first referred to arbitration before mediation is attempted. If parties are able to settle their dispute through mediation, their mediated settlement may be recorded as a consent award enforceable under the New York Convention. If parties are unable to settle their dispute through mediation, they may resume the arbitration proceedings.

On the other hand, the SICC offers foreign parties access to a neutral international court forum in Asia and in which 11 eminent international jurists have been appointed as 'international judges'. The SICC will complement mediation at SIMC and arbitration at SIAC – it will involve an adjudicative court process managed by the Singapore High Court. The SICC will be able to handle non-arbitrable matters, and will also permit parties access to an appeal process. Parties before the SICC may be represented by a foreign lawyer registered under the relevant statutory provisions. The SICC is not bound to apply any rule of evidence under Singapore law, and parties may apply for other or foreign rules of evidence to govern proceedings. Additionally, the SICC may, on the application of a party, order that any question of foreign law be determined on the basis of oral or written submissions, or both, instead of formal proof.

The SICC has the jurisdiction to hear a claim if: it is of an international and commercial nature; (the parties have submitted to the SICC's jurisdiction pursuant to a written jurisdiction agreement; and the parties do not seek any relief in the form of, or connected with, a prerogative order. The SICC may at its discretion also hear cases that are transferred from the High Court.

SICC judgments are enforced in the same manner as judgments of other superior courts, namely via registration in countries or territories scheduled under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) and the Reciprocal Enforcement

of Foreign Judgments Act (Cap 265), or by commencing an action on the judgment against the judgment debtor in common law jurisdictions.

The SIMC and the SICC complements what SIAC offers – with international commercial arbitration, litigation and mediation services now collectively in place, Singapore seeks to offer the full suite of dispute resolution services to commercial users to address their commercial needs.

SIAC 2014 Case Profiles: An Overview

In 2014, for the first time in three years, SIAC saw a slight decline in the number of new cases received, from 259 received in 2013 to 222 in 2014. Nonetheless, SIAC continues to maintain its position as one of the leading and fastest-growing arbitral institutions in the world, having consistently received over 220 new cases each year since 2012.

SIAC currently handles some of the largest and most complex arbitrations in the world. The total sum in dispute for new cases filed in SIAC in 2014 amounted to S$5.04 billion. The highest claim amount for 2014 was S$2.40 billion, while the average value of a SIAC dispute in 2014 was S$23.65 million (similar to the average sum in dispute in 2013). Excluding the respective cases with the highest claim amounts for each year, the average sum in dispute for 2014 was S$12.42 million, roughly a 20 per cent increase from the average sum in dispute for 2013. A diverse range of claims was filed at SIAC in 2014, arising from key sectors such as commercial (27 per cent), trade (25 per cent), shipping and maritime (14 per cent), corporate (13 per cent), construction and engineering (12 per cent), and the rest (9 per cent) made up by insurance, mining, energy, IP and IT, financial services, and aviation. As in previous years, trade and commercial disputes were the key areas in relation to which disputes have been filed at SIAC.

In 90 per cent of new cases filed at SIAC in 2014, the parties had included a choice of law clause in the contract that gave rise to the dispute and the laws of 19 different jurisdictions were the express governing laws of the underlying contract. Top choices of governing law in these contracts include Singapore law (49 per cent), English law (25 per cent) and Indian law (4 per cent).

Of the new cases filed with SIAC in 2014, 81 per cent were international. The highest number of filings in 2014 was generated by parties from China, closely followed by parties from the United States and India. 2014 saw a significant increase in the number of cases involving parties from the United States, which rose in the rankings to become the second largest foreign user of SIAC arbitration.

Cases involving parties from Australia, Malaysia and the UK also increased in 2014, with Malaysia and the UK sharing a joint fifth ranking. The other parties in the top 10 list of foreign users were Hong Kong, South Korea, Indonesia and Thailand. SIAC received cases from parties from 58 jurisdictions in 2014. SIAC users came from a wider range of jurisdictions in 2014 than in 2013, and included parties from Mongolia and Papua New Guinea.

Use Of Expedited Procedure And Emergency Arbitrators

In 2014, SIAC received and accepted 12 applications to appoint an emergency arbitrator. SIAC also received 44 requests for the expedited procedure, of which SIAC accepted 23 requests. As at 31 December 2014, SIAC had received a total of 159 applications for the expedited procedure (and accepted 107 requests) since the introduction of these provisions in the SIAC Rules in July 2010.

SIAC Developments And Initiatives In The Last 12 Months

SIAC has undergone a change in leadership in recent months with the appointment of a new president and several new members of the SIAC Court of Arbitration. With effect from 1 April 2015, Mr Gary Born was appointed the new president of the SIAC Court of Arbitration, taking over from Dr Michael Pryles, the founding president.

Among the initiatives undertaken by SIAC in 2014 was the filming and production of an innovative SIAC Arbitration Training Video, a teaching and business development tool that demonstrates an international commercial arbitration and depicts SIAC's workings. SIAC has also rejuvenated its Young SIAC membership (for younger lawyers aged below 40) by rebranding the group as YSIAC and forming a new committee to implement initiatives.

The year 2014 also saw the emergence of a new trend, with four investor-state disputes being referred to SIAC. The SIAC Rules 2013 specifically provide that a party may commence an arbitration in relation to disputes arising out of a legal instrument such as an investment treaty. SIAC was also requested to act as the appointing authority in an investment dispute conducted under the UNCITRAL Arbitration Rules 2010.

In a letter dated 1 April 2015, Mr Gary Born, on the commencement of his term as the new president of the Court of Arbitration of SIAC, noted that one of the key objectives going forward is to enhance SIAC's position as one of the world's truly global international arbitration institutions. While SIAC has a dominant regional position in Asian international arbitration, it would seek to enhance its position as a global institution by ensuring users from all parts of the world regard it as the preferred choice for international dispute resolution.

CASE LAW DEVELOPMENTS

There have been several significant developments in this area since our last report as well as a large number of international arbitration matters before the Singapore Court of Appeal and High Court in the period from July 2014 to March 2015. We report on a selection of the cases in further detail below:

- In ***R1 International Pte Ltd v Lonstroff AG*** [2015] 1 SLR 521 the Court of Appeal granted a permanent anti-suit injunction in aid of international arbitration proceedings seated in Singapore.
- In ***BLC & Ors v BLB & Anor*** [2014] 4 SLR 79, the Court of Appeal reiterated that courts may only interfere if there was a denial of natural justice (as opposed to a mere error of law or fact); and a party's failure to resort to any available remedy under article 33(3) of the UNCITRAL Model Law (the Model Law) might have an impact on whether the courts will exercise its discretion to set aside an award under article 34 of the Model Law.
- In ***AKN v ALC*** [2015] SGCA 18, the Court of Appeal took the opportunity to reiterate the policy of minimal curial intervention and cautioned that the court must not engage with an appeal on the legal merits of an arbitral award.
- In ***PT Central Investindo v Franciscus Wongso & Ors & Anor Matter*** [2014] 4 SLR 978, the High Court noted that the arbitrator's removal for impartiality would not automatically render any award made prior to such removal a nullity.
- In ***Government of the Lao People's Democratic Republic v Sanum Investments Ltd*** [2015] SGHC 15, the High Court interpreted the scope of a bilateral investment treaty

in an appeal against an investment tribunal's jurisdiction ruling and considered the applicable standard of review to a tribunal's ruling on jurisdiction in the context of an investment arbitration.

- In *AQZ v ARA* [2015] SGHC 49, the High Court considered a challenge to a SIAC award rendered issued by a sole arbitrator pursuant to SIAC's expedited procedure, despite parties' express agreement for a three-member tribunal.

Court Of Appeal Grants Permanent Anti-suit Injunction In Aid Of International Arbitration Proceedings Seated In Singapore

We reported in last year's chapter the High Court's decision in ***R1 International Pte Ltd v Lonstroff AG*** [2014] 3 SLR 166, where the High Court opined (obiter) that the Singapore courts had the power to grant a permanent anti-suit injunction in aid of international arbitration proceedings seated in Singapore. However, on the facts of the case, the High Court held that there was in fact no arbitration agreement between the parties and the defendant (Lonstroff) was therefore entitled to commence proceedings in the Swiss court.

The plaintiff/appellant (R1) and Lonstroff dealt with each other on a number of transactions under which R1 sold, and Lonstroff bought, consignments of rubber. A dispute arose from one of the orders and Lonstroff commenced proceedings in the courts of Switzerland. R1 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. Lonstroff resisted R1's application on the basis that the terms of each transaction were exhaustively captured in e-mail confirmations sent by Lonstroff, which did not contain any arbitration agreement. The High Court dismissed R1's application.

The Court of Appeal reversed the decision below in ***R1 International Pte Ltd v Lonstroff AG*** [2015] 1 SLR 521, having found that R1's terms had in fact been incorporated such that there was a submission to arbitration. In so doing, the Court of Appeal had regard to inter alia the standard industry practice for parties to contract on the basis of standardised terms and the parties' conduct throughout the course of the transactions. Even though silence by one party would not by itself constitute acceptance of the terms sent by the other, the failure to object might, in some circumstances, constitute assent to the incorporation of the other party's terms, including a term to submit to arbitration. The Court of Appeal also granted R1's application for the anti-suit injunction on the basis that there was a valid and binding arbitration agreement between the parties.

Court Interference Only If There Was A Denial Of Natural Justice And The Potential Impact Of A Failure To Seek Remedy From A Tribunal Under Article 33(3) Of The Model Law

In ***BLC & Ors v BLB & Anor*** [2014] 4 SLR 79, the Court of Appeal reversed the decision of the High Court to set aside part of an arbitration award on the ground of a breach of natural justice.

Following an unsuccessful joint venture between two groups of companies, the appellants commenced arbitration proceedings against the respondents. In response, the respondents launched their counterclaims. The arbitrator proceeded to issue an award in favour of the appellants in respect of some of their claims, but completely dismissed the respondent's counterclaims.

The respondents applied to set aside the entire award on the basis that (inter alia) the arbitrator had not addressed his mind to one of their counterclaims. This failure to deal with an essential issue in dispute gave rise to an alleged breach of natural justice.

The High Court agreed that the arbitrator had failed to deal with the counterclaim. Such failure could have made a material difference in the award and therefore a denial of natural justice had occurred. The High Court remitted the issue of the counterclaim to a new tribunal to be constituted. The High Court also noted this would have been the type of case that article 33(3) of the Model Law (which permits parties to request within a specified time period the arbitrator to make an additional award as to claims presented in the proceedings but omitted from the award) would have been intended to provide redress for.

The High Court's decision was overturned by the Court of Appeal, which found that the arbitrator did in fact address his mind to the counterclaim and did in fact render a decision in respect thereof. As such, it found that there had been no breach of natural justice.

The Court of Appeal took the opportunity to stress that there will be minimal curial intervention in arbitral proceedings. In considering whether an arbitrator has addressed his or her mind to an issue, the court should be wary of its natural inclination to be drawn to the various arguments in relation to the substantive merits of the underlying dispute between the parties which are beyond its remit. There is no right of recourse to the courts where an arbitrator has simply made an error of law or fact.

The Court of Appeal also made several noteworthy observations on articles 33(3) and 34(4) of the Model Law. It held that it would be consistent with the principle of minimal curial intervention to require that parties first seek relief from the tribunal before resorting to court proceedings. While a party was not obliged to invoke article 33(3) before applying to court under article 34, such party took the risk that the court would not exercise its discretion to set aside any part of the award or invoke the powers of remission under article 34(4). It was also cautioned that the applicant's reasons for failing to resort to article 33(3) (where applicable) might impact upon whether the court would exercise its discretion to set aside an award under article 34.

As regards article 34(4), which essentially allows the court to remit the matter instead of setting aside an arbitral award, the Court of Appeal noted that the clear language of the provision required that the remission be to the original tribunal that had heard the matter.

Court Of Appeal Reiterates The Law On Setting Aside Arbitral Awards For Breaches Of Natural Justice

In ***AKN v ALC*** [2015] SGCA 18, the plaintiffs (the liquidator and secured creditors of a corporation undergoing liquidation) had entered into an agreement with the defendant purchasers in relation to the corporation's production plant and related assets. A dispute subsequently arose when the assets became encumbered with a statutory lien for tax liabilities. The defendant purchasers commenced arbitration proceedings and obtained an award in their favour. The plaintiffs then applied to set aside the award.

High Court

The High Court decision is reported at ***AKM v AKN*** [2014] 4 SLR 245. The High Court set aside the award having found that there were one or more breaches of natural justice and that the tribunal had exceeded its jurisdiction.

The High Court was of the view that the tribunal had misunderstood the plaintiffs' case and inexplicably failed to engage with a number of the plaintiffs' submissions and evidence. The High Court also opined that the tribunal had exceeded its jurisdiction by departing significantly from the parties' submissions in deciding on issues that fell beyond the scope of reference to the arbitration. In particular, the tribunal had erroneously recharacterised the defendant's claim as a loss of opportunity despite not having heard, or invited, submissions on such claim.

Court Of Appeal

The Court of Appeal reviewed this decision in ***AKN v ALC*** [2015] SGCA 18 and allowed the appeals in part, having found that the High Court had erred in various aspects by engaging with the merits of the underlying dispute.

The Court of Appeal took the opportunity to restate the 'proper relationship between arbitral tribunals and the courts'. In the light of the court's limited role in arbitral proceedings, it must not engage with an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration.

When examining a challenge for breach of natural justice, the court must assess the real nature of the complaint and only an arbitral tribunal's failure to even consider an argument amounts to a breach of natural justice. A decision to reject an argument (whether implicitly or otherwise, whether rightly or wrongly, and whether or not as a result of its failure to comprehend the argument and so to appreciate its merits) is but an error of law.

The Court of Appeal emphasised that if the first hurdle of establishing a breach of natural justice is crossed, then the remaining issues arise, namely, whether there was a causal nexus between the breach and the arbitral award, and whether the breach prejudiced the aggrieved party's rights.

The Court of Appeal also observed that, generally the courts should not engage with the merits of the dispute when dealing with an application to set aside arbitral awards. However, an exception arises when the courts are confronted with arguments relating to the jurisdiction of the tribunal in which it undertakes a de novo hearing.

High Court Dismisses Application To Remove Arbitrator For Alleged Apparent Bias

PT Central Investindo v Franciscus Wongso & Ors [2014] 4 SLR 978 involved an application to remove an arbitrator for apparent bias and also addressed the unusual circumstances where a sole arbitrator renders a final award before the determination of an application to remove him.

The plaintiff's complaints that the arbitrator was affected by apparent bias arose from certain directions given by the arbitrator. After the plaintiff's notice of challenge against the arbitrator was dismissed by the SIAC chairman, the plaintiff applied to the High Court to remove the arbitrator pursuant to article 12(2) of the Model Law. The arbitrator rendered his award in favour of the defendants pending the determination of the removal proceedings. The plaintiff sought a consequential order to set aside the award as of right in the event that it succeeded in its application to remove the arbitrator, and also took out a separate application to set aside the award on the basis that the arbitrator was affected by apparent basis.

The High Court dismissed the plaintiff's applications. With regards to apparent bias, the test was whether a reasonable and fair-minded person with knowledge of all the relevant facts would entertain a reasonable suspicion that the circumstances surrounding the proceedings could result in the arbitration being affected by apparent bias. The Court found that plaintiff's complaints could not support a finding that the arbitrator was affected by apparent bias, and that the directions complained of fell within the case management powers of the tribunal and accordingly were within the discretion of the arbitrator.

The High Court also rejected the plaintiff's contention that the award should be set aside. Under article 13(3) of the Model Law, the arbitrator could render an award pending determination of an application for his removal, and had done so by setting out extensive reasons for making a finding contrary to the plaintiff's evidence. An error of law or finding in fact in an arbitral award (if any) did not constitute a ground for setting aside the award under the International Arbitration Act (Cap 143A) (IAA).

In this regard, the High Court observed, obiter, that articles 12 and 13 of the Model Law were silent as to the effect of an order to remove an arbitrator made after an award was rendered. Article 34(2) of the Model Law did not list a successful challenge against an arbitrator under article 13 as a ground for setting aside an award. Nonetheless, even though a successful applicant might not obtain a consequential order upon a court order to remove an arbitrator, it could nevertheless set aside the award by relying on the court order as proof of either ground of setting aside under article 34(2)(iv) (namely procedural irregularity) or 34(2)(b)(ii) (namely conflict of public policy) of the Model Law.

High Court Adopts De Novo Approach In Reviewing Jurisdictional Ruling By Arbitral Tribunal And Overturns Decision That A Bilateral Investment Treaty Between PRC And Laos Applied To Macao

In *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15, the High Court was tasked with reviewing an arbitral tribunal's ruling on jurisdiction. In so doing, the Court had first to consider whether the PRC-Laos BIT applied to Macao.

By way of background, the PRC resumed sovereignty over Macao in 1999. The relevant PRC-Laos BIT had been signed earlier in 1993, but was silent on its application to Macao. The defendant (Sanum) was incorporated under the laws of Macao and, in 2007, Sanum began investing in the gaming and hospitality industry of Laos. Disputes subsequently arose and Sanum commenced arbitral proceedings in 2012 against the government of Laos, in accordance with the dispute resolution article (article 8(3)) of the PRC-Laos BIT. The government of Laos challenged the arbitral tribunal's jurisdiction on the basis that the PRC-Laos BIT did not apply to Macao, but the tribunal held that it had jurisdiction to arbitrate the dispute.

The government of Laos appealed to the High Court pursuant to section 10 of the IAA for a review of the tribunal's ruling over jurisdiction. It also sought to admit fresh evidence in the form of two letters that were only obtained after the arbitral tribunal had issued its positive jurisdictional ruling. The first letter was from the Laotian Ministry of Foreign Affairs declaring Laos's position that the PRC-Laos BIT did not apply to Macao and seeking the views of the PRC government. The second letter was the reply from the PRC Embassy in Laos, affirming Laos's view that the PRC-Laos BIT did not extend to Macao 'unless both China and Laos make separate arrangements in the future'.

There were two issues before the High Court, namely whether the PRC-Laos BIT applied to Macao; and, if it did apply, whether Sanum's expropriation claims fell outside the scope of article 8(3) of the PRC-Laos BIT which provides that disputes 'involving the amount of compensation for expropriation' could be submitted to arbitration.

The High Court dealt first with the preliminary issue of whether the two letters should be admitted. The court decided to admit them, having exercised its discretion with reference to the conditions of the ***Ladd v Marshall*** test. The court held that the two letters were crucial in determining whether the PRC-Laos BIT applied to Macao.

The High Court rejected Sanum's contention that the standard of review under section 10 IAA is a limited one of deference and respect for the tribunal in investor-state arbitrations which may concern issues of public international law, and which decision involved the interpretation of an investment treaty by arbitrators who were experts in international law. The court found that there was no basis to distinguish between investor–state and commercial arbitration, and adopted the de novo approach laid down in its earlier decision in ***PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal*** [2014] 1 SLR 372.

Taking into account the two letters, the High Court's view of the Hong Kong experience, the WTO Trade Report as well as the PRC-Portugal Joint Declaration, the court decided that the exception to the moving treaty frontier rule was established, and that the PRC-Laos BIT did not apply to Macao. The court went on to opine that, contrary to the decision of the international tribunal in ***Tza Yap Shum v Peru***, Case No. ARB/07/06 (ICSID 19 June 2009), under article 8(3) of the PRC-Laos BIT, the tribunal did not possess subject-matter jurisdiction over Sanum's expropriation claims.

This decision is presently the subject of an application for leave to appeal to the Court of Appeal.

High Court Upholds Award Made Under SIAC Expedited Procedure Despite Parties' Express Agreement For A Three-panel Tribunal

In ***AQZ v ARA*** [2015] SGHC 49, the High Court was faced, for the first time, with a challenge to an award made under the expedited procedure of the 2010 SIAC Rules, and upheld the award rendered by the sole arbitrator even though the parties had expressly provided that all disputes were to be resolved by a panel of three arbitrators.

A dispute had arisen between parties over the sale and purchase of Indonesian non-coking coal and the defendant buyer commenced SIAC proceedings for the plaintiff seller's failure to deliver. Clause 16 of the relevant arbitration agreement provided for arbitration 'in accordance with the rules of conciliation and arbitration of the Singapore International Arbitration Centre (SIAC) by three arbitrators'.

The defendant applied for the arbitration to be conducted under the Expedited Procedure pursuant to rule 5 of the SIAC Rules 2010. The plaintiff resisted and challenged the existence of an arbitration agreement and the suitability of the expedited procedure.

The application for expedited procedure was allowed and the arbitration proceeded with the appointment of a sole arbitrator on 8 July 2013, with the plaintiff reserving all its rights accordingly.

After the award was issued in favour of the defendant, the plaintiff applied to set it aside under article 34(2)(a)(iv) of the Model Law on the basis that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, and that the arbitrator lacked requisite jurisdiction. The plaintiff argued that the rules in force at the time of the parties' contract were the SIAC Rules 2007 (which had no expedited procedure), and therefore the conduct of the arbitration under the expedited procedure under the SIAC Rules 2010 was not in accordance with the parties' agreement.

The High Court rejected the plaintiff's application and applied the well-established presumption that references to rules in an arbitration clause are to be construed as references to such rules as may be applicable at the date of the commencement of arbitration, and not at the date of the contract, so long as those rules contain mainly procedural provisions. Furthermore, in contrast to the ICC Rules, the SIAC Rules 2010 did not expressly provide that the expedited procedure was not applicable to arbitration agreements which had been entered into prior to the SIAC Rules 2010 coming into force. As there was nothing on the facts to displace this presumption, the SIAC Rules 2010 were incorporated by reference.

Adopting 'a commercially sensible approach', the High Court held that the SIAC Rules 2010 provide the president with the discretion to appoint a sole arbitrator. The court found that this discretion had been exercised properly and accordingly the incorporated reference to an expedited procedure could and did override the parties' agreement to have three arbitrators.

The High Court also observed that, even if plaintiff were successful in its claim that the arbitration should have been conducted before three arbitrators, the plaintiff did not discharge its burden of explaining the materiality or the seriousness of the breach. While prejudice is not a legal requirement for an award to be set aside pursuant to article 34(2)(a)(iv), it is a relevant factor that the supervisory court considers in deciding whether to exercise its discretion to set aside the award for the breach in question.

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Vietnam

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Summary

Although arbitration first appeared in Vietnam in the 1960s in the forms of the State Economic Arbitration System (SEAS), the Foreign Trade Arbitration Committee (FTAC) and the Maritime Arbitration Committee (MAC), it was not until 1986 that arbitration activities in Vietnam began to actually flourish, owing to an all-round renovation policy named Doi Moi.

This policy was promulgated with top priority given to economic reforms to create a multi-sector economy, attracting greater foreign investment and broadening the export market. As a result, Vietnam has signed 50 bilateral investment treaties (BITs)[1] and eight regional and bilateral free trade agreements (FTAs).[2] The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) was acceded to on 12 September 1995, with entry into force on 11 December 1995. With these significant changes, awareness of arbitration in Vietnam has increased and arbitration has gradually become a favoured mechanism for dispute settlement in transactions between Vietnamese parties and their international partners. According to the Preliminary Report on the Three Years of Implementation of the LCA of the Vietnamese Ministry of Justice (MOJ), from 2011 to 2013 the number of disputes resolved by arbitration increased sharply. The Vietnamese government also encourages the development of arbitration as an alternative dispute resolution mechanism by making efforts to synchronise laws on arbitration with a pro-arbitration regime. Conferences, seminars and training courses sponsored by both Vietnamese government agencies and non-government institutions have been organised to improve the understanding of and provide necessary skills to local judges, arbitrators and Vietnamese enterprises.

ARBITRATION LAW IN VIETNAM

The first legislation on arbitration in Vietnam was the Ordinance on Commercial Arbitration[3] (OCA) dated 25 February 2003. However, to foster arbitration activity and encourage a pro-arbitration approach in Vietnam, the Law on Commercial Arbitration[4] (LCA) was passed by the National Assembly of Vietnam on 17 June 2010 and came into effect on 1 January 2011, replacing the OCA.[5]

The LCA was designed in line with the 2006 UNCITRAL Model Law on International Commercial Arbitration (Model Law). However, owing to local circumstances, there are certain differences, inter alia:

- Article 2 of the LCA states that disputes arising from commercial activities are arbitrable whereas nowhere in the LCA does it clarify the meaning of the term 'commercial activities'. This term is defined in the 2005 Commercial Law of Vietnam as encompassing all activities of profit-making purposes, including, inter alia, sale or purchase of goods, provision of services, investment and commercial promotion. However, it is unclear as to whether tort claims are arbitrable or whether profit-making purposes bear the same meaning as the commercial nature mentioned in the UNCITRAL Model Law.[6]
- The LCA sets out certain mandatory qualifications for arbitrators to ensure that disputes will be settled by reliable tribunals.[7]
- The LCA also supports arb-med procedures by permitting arbitration tribunals, at the request of parties, to assist them in reaching an amicable resolution of their dispute.[8]
- To be enforced in Vietnam, ad-hoc arbitration awards are required to be registered with national courts.[9]

- One ground for vacating arbitral awards under the LCA is 'fundamental principles of Vietnamese law' instead of 'public policy' as provided in the UNCITRAL Model Law. The interpretation of this term is a complicated issue in Vietnam.

In addition, there are by-laws issued to guide the implementation of the LCA, namely Decree No. 63/2011/ND-CP dated 28 July 2011 and Resolution 01/2014/NQ-HDTP dated 20 March 2014 of the Council of Judges of the Supreme People's Court of Vietnam (Resolution 01/2014).[10] In particular, Resolution 01/2014 is designed to ensure the effectiveness of arbitral proceedings and to illuminate matters not expressly covered by the LCA, for example, the role of national courts over foreign arbitrations seated in Vietnam, consolidation of ongoing arbitration proceedings, the legal consequence of waiving the right to object and other provisions increasing the enforceability of arbitration agreements.

In Vietnam, the recognition and enforcement of foreign arbitral awards is regulated by Chapter XXIX-Part VI of Civil Procedure Code No. 24/2004/QH11 as amended in 2011 (CPC). Recently, the Supreme People's Court of Vietnam issued a Practice Note 246/ TANDTC-KT dated 25 July 2014 (Practice Note 246), giving internal guidance on the resolution of applications for recognition and enforcement of foreign arbitral awards in Vietnam. This Practice Note shows the pro-arbitration approach taken by the Supreme People's Court of Vietnam by clarifying the burden of proof of parties, the applicable law for examining the due conduct of arbitral proceedings, and the capacity of parties signing the arbitration agreement, and by explaining the exceptions to recognition and enforcement of foreign arbitral awards. Notably, the CPC is now undergoing review and amendment. This includes changes that are expected to be a significant step towards bringing the arbitration regime more closely into line with the New York Convention.

Both domestic and recognised foreign arbitral awards will be enforced in accordance with the Law on Enforcement of Civil Judgments No. 26/2008/QH12 (LECJ), which was passed by the National Assembly of Vietnam on 14 November 2008 and took effect on 1 July 2009.

ARBITRATION INSTITUTIONS IN VIETNAM

At this time, there are 11 arbitration centres in Vietnam with a total of 325 registered arbitrators.[11] Among them, the most prominent institution is the Vietnam International Arbitration Centre (VIAC) at the Vietnam Chamber of Commerce and Industry (VCCI), with 149 reputable arbitrators, including 17 foreign arbitrators.[12] The VIAC has internal guidance for arbitrators on the time and cost-effective conduct and management of arbitral proceedings. Remarkably, in 2014, the time it took to render a VIAC arbitral award ranged from 81 to 251 days.

In 2014 the VIAC achieved a great deal. The VIAC resolved 124 cases, with over 51 per cent of total disputes involving foreign elements and 20 per cent of total cases requiring the application of foreign law. That figure may partly represent the growth of arbitration activities in Vietnam.

ENFORCEABILITY OF ARBITRATION AGREEMENT

An arbitration agreement will be enforceable under Vietnamese law if it demonstrates the implicit or explicit mutual consent of parties and is 'in writing',[13] regardless of whether the arbitration agreement is made before or after the time of the dispute[14] (***Tan Hoa v Valency Trading*** (2011), Decision 1190/2011/KDTM-QD of People's Court of Ho Chi Minh City).

Before the LCA came into force, the position had been that regardless of the existence of a valid arbitration agreement, when one party initiated court proceedings, but the other party failed to object to the competence of the court, it might form a new choice of court clause, replacing the arbitration agreement. However, the Vietnamese Court dismissed this allegation and upheld the decision favouring jurisdiction of the arbitral tribunal (***Kuo Chi Sheng v Truong Sanh*** (2009), Decision 1475/2009/KDTM-QD of the People's Court of Ho Chi Minh City). This decision, in hindsight, is consistent with the provision of article 16(2)(dd) of the LCA and the recent guidance of the Supreme People's Court in Resolution 01/2014, which limits the court to consider only the existence and the operability of arbitration agreements. The current stance is also entirely consistent with article II of the New York Convention regarding the guarantee of enforceability of an arbitration agreement. Resolution 01/2014 further supports arbitral proceedings by stating that even if the court finds that the dispute is not within the competence of the arbitral tribunal, the court shall stay the court proceedings in favour of the arbitration if the case has already been handled by an arbitral tribunal.[15] In another case, the court decided that 'internal corporate regulations are not binding on a third party' when an award debtor claimed that its signatory lacked the capacity to sign the arbitration agreement due to restrictions provided in the internal charter/resolution of the company (***Thuy Loc v Shiseido*** (2013) Decision 526/2013/KDTM-QD of the People's Court of Ho Chi Minh City).

THE SUPPORTING ROLE OF VIETNAMESE COURTS IN ARBITRATION

Articles 46, 47 and 48 of the LCA permit the arbitration tribunal, on its own initiative or at the request of one or both parties, to collect evidence and summon witnesses. The court shall, at the request of the tribunal or a party, exercise its supporting role in collecting evidence and summoning reluctant witnesses as set out in articles 46(5) and 46(6) of the LCA and article 11(3) of Resolution 01/2014, provided that previous attempts to collect evidence were unsuccessful and that the absence of said witness(es) would obstruct the dispute settlement.

Moreover, article 49(2) of the LCA gives the arbitral tribunal the power to order six types of interim relief at the request of one party, including:

- prohibition of any change in the status quo of the assets in dispute;
- prohibition of acts by, or ordering one or more specific acts to be taken by a party in dispute, aimed at preventing conduct adverse to the process of the arbitration proceedings;
- attachment of the assets in dispute;
- requirement of preservation, storage, sale or disposal of any of the assets of one or all parties in dispute;
- requirement of interim payment of money as between the parties; and
- prohibition of transfer of property rights of the assets in dispute.

However, to avoid application of the same interim relief by both the arbitral tribunal and court, the court shall refuse the application of a party if that party has requested the arbitral tribunal to apply the same interim measure, and vice versa, unless the interim measure requested by that party is beyond the competence of the arbitral tribunal.[16] Further, under article 50 of the LCA, parties shall bear the burden of proof of the necessity for such interim relief in the

dispute settlement. On that basis, the arbitral tribunal and the court are free to determine whether to grant the requested measure.

Although under the CPC the court has the authority to order 13 kinds of interim relief,[17] including those available to tribunals under the LCA as well as a number of exclusive ones,-[18] Resolution 01/2014 mistakenly limits the court's power so that it is equal to the arbitral tribunal's (ie, the court can only order the same kind of interim reliefs provided in article 49(2) of the LCA). It should be noted that interim relief may only be ordered by the court after the filing of a statement of claim in arbitration.

RECOURSE AGAINST ARBITRAL AWARDS

The grounds for recourse against arbitral awards are stated in article 68 of the LCA and are consistent with article 34 of the Model Law except for two main differences. The first is article 68(2)(dd) of the LCA regarding forged evidence affecting the issuance of the arbitral award and the arbitrator accepting money from one party, which was actually adopted from Chinese arbitration law. Secondly, as mentioned above, the LCA refers to the term 'fundamental principles' instead of 'public policy' as grounds for setting aside arbitral awards. When invoking the grounds under article 68(2), the parties who challenge the arbitral award shall bear the onus of proof, except for the situation in article 68(2)(dd) involving the 'fundamental principles of Vietnamese law', which shall be the responsibility of the court. However, in some previous cases the Vietnamese court used this vague term to revisit the merits of the dispute[19] (***Hong Phat v China Policy Limited*** (2013) People's Court of Ho Chi Minh City; ***Toepfer v Sao Mai*** (2011), The Appellate Court – Supreme People's Court in Hanoi).

To clarify this point, Resolution 01/2014 of the Supreme People's Court requires the competent court to consider the two following questions:[20] (i) whether the principle that is purported to be breached is one of the 'basic principles on conduct, of which effects are most overriding in respect of the development and implementation of Vietnamese legal system'; and (ii) whether an arbitral award 'violates the interests of the government, and the legitimate rights and interests of third party(ies)'. If the arbitral award does not satisfy both questions the court will not set aside that award, on the basis of violation of fundamental principles of Vietnamese laws.

Although the new definition rectifies the incorrect understanding of some Vietnamese courts that all provisions of law could be 'fundamental principles', it is not comprehensive enough, since there are still a number of 'fundamental principles' that can be found in other laws. Additionally, the connection between the rights and interests of third parties and 'fundamental principles of Vietnamese law' is still debatable. It is, however, undeniable that with this new guidance the Vietnamese court will be more prudent when considering whether to vacate an arbitral award on this ground.

Notably, the decision of the competent court on recourse against arbitral awards is final and is not subject to appeal or cassation as stipulated in article 71 of the LCA.

Regardless of these problems, according to the report of the VIAC published at a conference on the annulment of arbitral awards on 20 January 2015, from 2003 to 2014, only 46 out of 679 arbitral awards were challenged (6.7 per cent) and, of those, only 19 were set aside. This demonstrates the favourable attitude of the local courts toward arbitration as well as the high enforceability of Vietnamese arbitral awards. The recent notable case between Vinalines (Vietnam), one of the largest state-owned corporations, and SK E&C, a Korean construction contractor, affirms this statement (***Vinalines v SK E&C*** (2014), Decision

No. 09/2014/QD-PQTT of the People's Court of Hanoi). In this particular case, Vinalines challenged the VIAC award in favour of SK E&C, ordering Vinalines to pay SK E&C the amount of around US$3 million. Vinalines requested that the arbitral award be set aside on several grounds, including the violation of fundamental principles of Vietnamese law, forged evidence and ultra petita claims. Vinalines also called for the intervention of the Ministry of Transportation, the Prime Minister and even the Supreme People's Court for reconsideration of the arbitral award. However, the Court of Hanoi City finally dismissed these arguments and decided to uphold the arbitral award because Vinalines failed to prove their allegations and the court will not review the substantive matters decided by the arbitral tribunal.

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Pursuant to the reservations that Vietnam made when ratifying the New York Convention, foreign arbitral awards are enforceable in Vietnam only when:

- they are awards made in the territory of another contracting state;
- they involve differences arising out of legal relationships, whether contractual or not, that are considered as 'commercial' under the national law of Vietnam; and
- with regard to awards satisfying the above condition of 'commercial' nature but made in the territory of non-contracting states, Vietnam will apply the Convention only to the extent to which those states grant reciprocal treatment.

The exceptions for recognition and enforcement of foreign arbitral awards in Vietnam set out in article 370 of the CPC are consistent with article V of the New York Convention. The only difference is the breach of 'fundamental principles' instead of 'public policy' as an exception to recognition and enforcement of foreign arbitral awards. It is arguable that the explanation of 'fundamental principles of Vietnamese law' in Resolution 01/2014, as mentioned above, is also applied to this ground.

Foreign arbitral awards are defined under the LCA and CPC as awards rendered in a foreign arbitration, either inside or outside the territory of Vietnam, to resolve a dispute as agreed by parties.[21] Accordingly, a foreign arbitral award in Vietnam is considered a 'non-domestic arbitral award' under Article I of the New York Convention; however, Vietnam does not have any specific provision for non-domestic arbitration. As a result, there may be a situation where Vietnam is the place of arbitration but the arbitration is conducted under a foreign arbitration institution rules(for example ICC Rules or SIAC Rules). In such a case, the arbitral proceedings shall, in light of article 5(5) of the Resolution 01/2014, be conducted in accordance with the LCA and recognition of this award will be considered under the provision of the CPC for a foreign arbitral award.

In theory, there is no specific time limit for a party to submit an application for the recognition and enforcement of foreign awards in Vietnam. However, a precedent shows that the court may apply a limit of one year to this kind of matter in the CPC (***Cargill v Dong Quang*** (2014), Decision No. 01/2014/QDST-KDTM of the People's Court of Long An province). Therefore, until further guidance on the time limit is issued, the award creditor is highly recommended to seek recognition and enforcement within one year of the award's issuance.

Further, there is no provision on how contents of foreign law should be pleaded before Vietnamese courts. Consequently, in practice, some local judges, based on their subjective understanding, choose to consider matters governed by foreign law in light of analogical application of Vietnamese law, especially in the matters of the legal capacity of the

contracting parties, the validity of the arbitration agreement and the fundamental principles of Vietnamese laws (***Strategic Think Tank LLC and 260 Architects v Sudico*** (2014), Decision No. 07/2014/QDST_KDTM of the People's Court of Hanoi). The burden of proof was also wrongly imposed on the award creditor (***Ecom v Hatexco*** (2013), Decision 08/2013/VKDTM of the People's Court of Hanoi). Some courts even applied the provision of service of notice in court proceedings to judge that the service of arbitral documents of the tribunal was improper and hence, refused the recognition of foreign arbitral awards (***Ecom v Dong Quang*** (2013), Decision No. 01/2013/QDST-KDTM of the People's Court of Long An).

In any case, the decision on the application of recognition and enforcement of a foreign arbitral award rendered by the first instance court is subject to appeal by the involved parties and objections by the People's Prosecutors.[22]

The misunderstandings of local courts may be the main reason why the percentage of foreign arbitral awards recognised and enforced in Vietnam is still low. According to the latest report of the Supreme People's Court at a conference held by the Ministry of Justice of Vietnam, from 2005 to 2014, 24 out of a total of 52 applications for recognition and enforcement were dismissed – 46 per cent of all foreign awards were refused to be enforced in Vietnam.[23] It is expected that the correct guidance of the People's Supreme Court in Practice Note 246 will lead to an increase in foreign arbitral awards becoming both recognised and enforced in Vietnam. It is, however, still advisable that international users appoint local bailiffs or lawyers to serve arbitral notices on Vietnamese counterparties as an extra method, especially in ex-parte proceedings, to avoid the most popular grounds for refusal of recognition and enforcement of potential awards at the later enforcement stage.

POTENTIAL MARKET FOR FOREIGN PRACTITIONERS AND FOREIGN ARBITRATION INSTITUTIONS

The LCA opens up a potential market for foreign arbitration institutions, foreign arbitrators and foreign lawyers.

In accordance with Chapter 12 of the LCA, both branches and the representative offices of foreign arbitration institutions shall be permitted to operate in Vietnam. Although at present no branch or representative office of a foreign arbitration institution has been established in Vietnam, this provision has paved the way for a stronger Vietnamese arbitration market in the future.

As mentioned above, there are currently 17 foreign arbitrators registered in Vietnam. Pursuant to the statistic of the VIAC, the number of disputes has foreign elements accounted for 51 per cent of total disputes at VIAC.[24] Foreign arbitrators and experts are welcome to register under the list of arbitrators of Vietnamese arbitration institutions to meet the high demand of parties in international commercial disputes. Additionally, parties are free to appoint any foreign arbitrator who is not registered to resolve their disputes regardless of whether or not Vietnamese law is applicable.

More crucially, unlike court proceedings, foreign lawyers do not need to be qualified or admitted to the national Bar as Vietnamese lawyers to act in arbitrations in Vietnam. With the increase in disputes applying foreign laws, involvement of foreign lawyers will become essential in arbitral proceedings in Vietnam.

A BRIGHT FUTURE FOR ADR IN VIETNAM

In conclusion, we would like to highlight that Vietnamese law is in the process of review and amendment which we believe will lead to a brighter future of alternative dispute resolution mechanisms in Vietnam in general, as well as commercial mediation and arbitration in particular. This legislative activity comes hot on the heels of a major revision of the Civil Code, the CPC and the birth of the first legislation on commercial mediation.

To improve arbitration activities, the amendments being addressed are inter alia: providing clear definitions of domestic and foreign arbitral awards in light of international arbitration practice and the New York Convention, applying interim reliefs in support of foreign arbitration, guiding the application of foreign law in settlement of dispute and removing some grounds for annulment of arbitral awards to be consistent with the UNCITRAL Model Law. In addition, the new CPC is drafted to be precisely in line with New York Convention to promote the success rate of foreign arbitral awards being recognised and enforced in Vietnam, as well as enhancing the investment environment of Vietnam.

Given the increasing interest in multi-tier dispute resolution processes, new legislation is being designed to recognise the mediated settlement agreement and encourage the use of med-arb and arb-med-arb.

Notes

1. According to the UNCTAD website: http://unctad.org/Sections/dite_pcbb/docs/bits_vietnam.pdf.
2. Source: http://aric.adb.org/fta-country, site accessed on 11 April 201.
3. No. 08/2003/PL UBTVQH11
4. No. 54-2010-QH12
5. Dzungsrt & Associates LLC, ***Getting the Deal through – Arbitration 2015***,Vietnam chapter, published by Law Business Research Ltd, p. 482.
6. See article 2 LCA and article 3(1) Commercial Act No. 36/2005-QH11.
7. See article 20 LCA; this follows the approach adopted in several other Asian/SE Asian jurisdictions.
8. See article 38 LCA.
9. See article 62 LCA.
10. Dzungsrt & Associates LLC (Note 5, above), p482.
11. According to the latest statistics provided by the Ministry of Justice on 10 April 2015.
12. Source: www.viac.org.vn/en-US/Home/arbitration.aspx, see also the MOJ's list of registered arbitrators (available in Vietnamese only): www.moj.gov.vn/bttp/News/Documents/th%C3%A1ng%208.2013/danh%20sach%20trong%20tai%20vien.doc, site accessed on 11 April 2015.
13. See article 16(1) LCA.
14. See article 16.2(dd) LCA.
15. See article 2.2 Resolution 01/2014.
16. See article 102 of CPC Provisional emergency measures:
    1 Assigning minors to individuals or organisations to look after, nurture, take care of and educate them.

2 Forcing the prior performance of part of the alimony obligation.
3 Forcing the prior performance of part of the obligation to compensate for damage to individuals whose lives and/or health have been infringed upon.
4 Forcing the employers to advance wages, remunerations or compensations, allowances for labor accidents or occupational diseases incurred by employees.
5 Suspending the execution of decisions on dismissing employees.
6 Distaining the disputed properties.
7 Prohibiting the transfer of property right over the disputed properties.
8 Prohibiting the change of the current conditions of disputed properties.
9 Permitting the harvesting, sale of subsidiary food crops or other products, commodities.
10 Freezing accounts at banks or other credit institutions, State treasury; freezing properties at places of their deposit.
11 Freezing properties of the obligor.
12 Prohibiting involved parties from performing, or forcing them to perform certain acts.
13 Other provisional emergency measures provided for by law.

17. Dzungsrt & Associates LLC (Note 5, above), p486.
18. Ibid, p488.
19. See article 14.2(dd) Resolution 01/2014.
20. See article 343, para.4 & article 346(2) CPC.
21. See article 345 & article 372 CPC.
22. Available at the official website of the Ministry of Justice in Vietnamese at: www.moj.gov.vn/ct/tintuc/Pages/hoat-dong-cua-Bo-Tu-Phap.aspx?ItemID=6638 , site accessed on 11 April 2015
23. Published in the official website of VIAC. Only available in Vietnamese: http://viac.vn/Uploads/ngoctb/Bao%20cao%20to%20tung%202013%20post%20len%20Veb%20(Dt1).pdf, site accessed on 11 April 2015.

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