The Asia-Pacific Arbitration Review

2017

The Asia-Pacific Arbitration Review

2017

Written exclusively by leading arbitrators and legal counsel, this edition covers hot topics and developments in Australia, China, Hong Kong, India, Japan, Korea, Malaysia, Myanmar, Singapore and Vietnam.

GAR Global Arbitration Review

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Summary

PROMOTING COLLABORATION IN ARBITRATION ON A REGIONAL BASIS IN THE CONTEXT OF THE DEVELOPMENT OF INTERNATIONAL ARBITRATION

Global economic integration has also seen moves towards regional economic cooperation. This has posed challenges for commercial arbitration, requiring parties from different countries to proceed towards integrating arbitration concepts and practice. It appears that the UNCITRAL Model Law and the UNCITRAL Arbitration Rules were excellent guides. However, different countries' legal systems, with their associated unique mindsets, significantly affect the development of arbitration in each jurisdiction. Thus, it is necessary for both arbitration institutions and practitioners to communicate and cooperate closely, in order to improve upon the mechanism of arbitration, and to promote a greater sense of affinity and common identity between parties from different countries. In this way, arbitration, as a mode of dispute resolution, will be able to become more widely accepted and adopted within regional business communities.

Since the establishment of the Shanghai International Economic and Trade Arbitration Commission (SHIAC) in 1988, the SHIAC has focused on administering cases and developing international arbitration business. During this period, it has developed a deep understanding of the importance of close communication and cooperation between different arbitration service providers in different countries. The State Council of China released Framework Plan for the China (Shanghai)Pilot Free Trade Zone on 27 September 2013, which emphasised the improvement of the regulatory system and the creation of a sound business environment based on internationalism, legalisation and marketisation. Against this background, the SHIAC established the China (Shanghai) Pilot Free Trade Zone Court of Arbitration, in October of 2013, and then issued the most up-to-date arbitration rules specifically for the Free Trade Zone on 1 May 2014, which introduced in China, for the first time, temporary measures, the emergency tribunal, amiable arbitration and the association of ad hoc arbitration under the UNCITRAL Arbitration Rules with the institution arbitration, improving the third-party joinder and consolidation of arbitration as well as the creation of pre-arbitration mediation rules and a small claims dispute resolution procedure. These efforts laid a solid foundation for the SHIAC to engage in and to promote collaboration in international arbitration.

In 2014, the SHIAC started to intensify its cooperation with domestic and foreign organisations. The SHIAC signed a strategic cooperation agreement with the International Air Transport Association and China Air Transport Association and created the first aviation arbitration court in the world, the Shanghai International Aviation Court of Arbitration, which signified a new development mode for institutional cooperation and drew the attention of enterprises and law firms engaged in aviation-related business.

In 2015, in order to realise the idea of regional arbitration collaboration and business development, the SHIAC started to plan feasible steps for regional arbitration collaborations. Proposed and introduced by the China Law Society, the SHIAC not only launched the commercial arbitration cooperation mechanism between BRICS countries and created communication platforms for dispute resolution bodies from BRICS countries, including Brazil, Russia, India and South Africa, but also initiated the discussion about regional commercial arbitration collaboration between countries in Africa to achieve the goal.

The Model Arbitration Clause reads as follows:

> Any dispute arising from or in connection with this Contract shall be submitted to Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center for arbitration.

ESTABLISHING THE BRICS DISPUTE RESOLUTION CENTER SHANGHAI AND TAKING THE LEAD IN REGIONAL COOPERATION IN ARBITRATION

With the aim of deepening collaboration in the area of arbitration among BRICS, the SHIAC initiated a proposal for the establishment of the BRICS Dispute Resolution Center Shanghai, and an Experts' Committee.

With the initiation and support of the China Law Society, as well as the host organisation of the 2015 BRICS Legal Forum, East China University of Political Science and Law, the BRICS Dispute Resolution Center Shanghai, and its Experts' Committee, were established on 14 October 2015, during the 2015 BRICS Legal Forum. It is one of the first permanent settlement bodies under the mechanism of regional cooperation and the first institution dedicated to commercial dispute settlement among BRICS.

The Experts' Committee consists of 24 experts from BRICS. The main responsibilities of the Experts' Committee are to support and guarantee the smooth operation of the BRICS Dispute Resolution Center Shanghai, to provide advisory opinions for the optimisation of arbitration procedure, and to facilitate the development of arbitration business and the legal system of each BRICS. Recently, several companies and financial institutions from BRICS discussed the feasibility of arbitrating in the BRICS Dispute Resolution Center, and the operation of the new platform.

JOINTLY BUILDING A CHINA–AFRICA JOINT ARBITRATION MECHANISM AND TAKING THE LEAD IN MULTILATERAL INSTITUTIONAL COOPERATION FOR THE DEVELOPMENT OF ARBITRATION BUSINESS

In respect of China and Africa commercial dispute resolution, the SHIAC made a proposal to work closely with South African institutions. With the help of the China Law Society and under full consultation with the Arbitration Foundation of South Africa, the Association of Arbitrators of Africa and Africa ADR, the SHIAC proposed to establish a groundbreaking dispute resolution mode under the China-Africa joint arbitration mechanism. Meanwhile, the Guiding Committee for the China-Africa Joint Arbitration Centre (the Guiding Committee) was also created as the supreme unified decision-making authority.

After three rounds of negotiation within the Guiding Committee, the China-Africa Joint Arbitration Centre Shanghai, and the China-Africa Joint Arbitration Centre Johannesburg, were officially launched on 26 November 2015 in Johannesburg, South Africa. This was announced in conjunction with innovative collaboration modes together with separate arbitration rules, the sharing of arbitrator resources, and a common model arbitration clause. This cooperation mode leaves space for African arbitration institutions and Chinese arbitration bodies of different cities to join this mechanism as well as for new members to create their own arbitration centres.

Early in 2016, some arbitration institutions from African countries have already expressed strong interest in joining the China-Africa joint arbitration mechanism. Meanwhile, the SHIAC communicated more closely with many foreign arbitration institutions by entering bilateral cooperation agreements. Recently, by jointly organising seminars, hosting forums

and sharing best practices with peers overseas, the SHIAC has already built an excellent foundation for regional arbitration cooperation.

The progress made thus far demonstrates the advantages of regionally based arbitration cooperation and resource sharing. The SHIAC fully expects these advantages to become even more pronounced over time. The future of regional arbitration is bright and the SHIAC fully intends to remain in the forefront of this movement in the Asia-Pacific region.

Shanghai International Arbitration Center

Innovation in Asia

Chiann Bao and **Joe Liu**
Hong Kong International Arbitration Centre

Summary

Since the Hong Kong International Arbitration Centre (HKIAC) won GAR's 2014 innovation award,[1] it continues to set the pace for innovation, alongside its peer institutions in Asia. Barriers have been broken over the past year in a number of arbitral seats and institutions in the region, which evidence Asia's position as a beacon for innovation. While this article gives a broadstroke review of the key developments, each Asian jurisdiction has experienced relative improvement, underlining the growing market demand for quality dispute resolution services in the region.

SHANGHAI'S OPEN DOOR POLICY FOR INTERNATIONAL ARBITRATION

In an effort to attract foreign investment to Shanghai, the Shanghai government introduced a policy to welcome international dispute resolution organisations to set up an office in the Shanghai Free Trade Zone. HKIAC became the first international institution to set up an office in the Free Trade Zone in November 2015.[2] Soon after, the International Chamber of Commerce (ICC) and the Singapore International Arbitration Centre (SIAC) announced a similar move at the beginning of 2016.[3]

The significance of such a development cannot be underestimated and was recognised by GAR for best development in 2015. With HKIAC as the first entrant and ICC and SIAC following closely behind, other institutions have also expressed interest in establishing a presence in mainland China, the country with arguably the largest arbitration market in recent years. For example, HKIAC's caseload involving Chinese parties has grown year on year, and HKIAC administers more cases involving Chinese companies than most institutions outside mainland China. With the establishment of an onshore office, these institutions will be able to further cater to the needs of Chinese users.

Additional evidence for Shanghai's liberalisation of its dispute resolution market is found in Siemens International Trading (Shanghai) Co Ltd v Shanghai Golden Landmark Co Ltd.[4] Under PRC law, only disputes with a foreign element may be submitted to foreign arbitration. What constitutes a 'foreign element' has been explained by several Supreme People's Court Interpretations.[5] And, until this case, there was no reported case that delineated what 'other circumstances' might mean. However, the Shanghai No. 1 Intermediate People's Court (the Court) in Siemens recognised and enforced an arbitration award, even though the arbitration involved two PRC entities and was seated in Singapore. While there was no obvious foreign element in this arbitration, the Court found, upon a closer examination that: (1) both parties were wholly foreign-owned entities registered within the Free Trade Zone with foreign sources of capital, foreign ultimate beneficiaries, and management as well as control significantly related to foreign investors; and (2) the performance of the contract has characteristics similar to the international sale of goods. Taking these factors into consideration, the Court held that circumstances existed under which the civil relationship may be determined as a foreign-related one. Accordingly, it upheld the validity of the arbitration agreement and recognised the award.

While it should be emphasised that this is a decision of the Shanghai court, which has no particular precedential value for other Chinese courts, this case represents an important development particularly for foreign investment enterprises in mainland China. It is an opening of a window of opportunity for the Chinese courts to take a more expansive approach in interpreting the 'foreign element' requirement for the purposes of allowing foreign owned or invested companies in mainland China to opt for offshore arbitration.

NEW ARBITRATION LEGISLATION

Two long-awaited pieces of arbitration legislation were passed in the region: Myanmar's Arbitration Law and India's Arbitration and Conciliation (Amendment) Act. For Myanmar, a country that has only recently opened for business after many years of isolation, the accession to the New York Convention in 2013 brought to foreign investors a degree of comfort that recourse could be made available for disputes arising from their investments in Myanmar. The passage of the Arbitration Law by the Burmese parliament gives effect to this momentous development and signifies an acceptance of international norms. The Burmese Arbitration Law (which is currently only in the Burmese language) appears to be largely influenced by the UNCITRAL Model Law. However, there is a distinction carved out between domestic and foreign arbitrations: while the entire piece of legislation applies to domestic arbitrations, only certain provisions apply to foreign arbitrations. Other noteworthy features include express provisions recognising the enforceability of interim measures and the incorporation of grounds of refusing the recognition and enforcement of awards under the New York Convention. Adopting the Singapore International Arbitration Act's position, the Burmese Arbitration Law grants a right of appeal against both positive and negative determinations of jurisdiction by an arbitral tribunal within 30 days of such a ruling (in contrast, Hong Kong grants a right of appeal for positive determinations of jurisdiction only). There are certain idiosyncrasies that may raise cautionary flags, such as the provision regarding the default appointing authority being the Chief Justice, which would be a reference to the Chief Justice of Myanmar for international matters and the local chief justice for domestic matters. Notwithstanding this, the Burmese Arbitration Law, with the UNCITRAL Model Law firmly in its DNA, serves as a key step in the right direction for Myanmar in becoming an arbitration-friendly jurisdiction.

For India, the enactment of the amended arbitration act indicates to foreign investors a willingness to modernise the arbitration regime. The amendments to the Indian Arbitration Act (the Act) introduced certain creative reforms intended to address the criticisms of arbitration and to bring best arbitration practice into the Indian arbitration regime. For example, the Act incorporates the IBA Guidelines on Conflicts of Interest in a wholesale manner. This is intended to apply international practices to ensure the independence and impartiality of arbitrators. In an effort to prevent delay in the arbitral process, the Act requires arbitral tribunals to render awards within 12 months, which can be extended for a period of six months by either the parties or the court.

Some of the recent changes to the Indian arbitration legislation were prompted by several landmark cases over the past few years. For instance, the Act was amended to clarify that parties can obtain interim measures from the Indian courts in both domestic and international arbitrations, effectively negating the BALCO decision which held that parties to an arbitration seated outside of India cannot apply for interim measures from the Indian courts.[6] Additionally, amendments to section 34 of the Act have codified the decision of Shri Lal Mahal Ltd v Progetto Grano SpA,[7] holding that the ground of 'patent illegality' in setting aside an award would not apply to international arbitrations. While the imperfections in the legislation seem glaring according to some commentators, the efforts made to address certain flaws in the system cannot be viewed as anything but laudable and an enthusiastic willingness to bring international best practices to arbitration in India.

Incidentally, what is also noteworthy for India is the long-anticipated home-grown international arbitration centre. This centre, based in Mumbai, is expected to open towards

the end of 2016. This news comes on the heels of the recent closure of the LCIA-India operations in 2015.

RULE REVISION AND INNOVATION

The past 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 – the 2013 HKIAC Administered Arbitration Rules (the HKIAC Rules). Recognised by GAR as one of the best developments in 2013,[8] the HKIAC Rules create a sophisticated system which offers parties a number of innovative tools to enhance cost-effectiveness and efficiency of arbitration. In particular, 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.

Of the innovations incorporated into the HKIAC Rules, the complex arbitration provisions have caught the most attention of other institutions. All subsequent rule revisions by arbitral institutions in Asia have incorporated the same if not similar provisions. 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 include a suite of provisions regarding joinder, consolidation and single arbitration under multiple contracts.

Most recently, the Australian Centre for international Commercial Arbitration (ACICA)'s revised rules, which came into force in January 2016, provide tools to consolidate and join arbitrations as well. In addition, the ACICA's rules incorporate expedited procedures and have followed in the LCIA's footsteps by introducing a provision on the conduct of legal representatives. It is expected that the SIAC's new set of rules, which will be unveiled in May 2016, will also include provisions on joinder, consolidation and single arbitration under multiple contracts. In addition, it is anticipated that the SIAC will soon launch its Investment Arbitration Rules, the first of its kind in Asia.

DEVELOPMENT OF TRIBUNAL SECRETARY BEST PRACTICE

As tribunal secretaries have become more routinely accepted as a player in international arbitration, there is a clear demand for more transparency as to the work and relationship of the tribunal secretaries to the tribunal. Concerns of such a secretary going beyond his or her mandate and improperly influencing the tribunal's decisions are highlighted in the Yukos v Russia case,[9] where Russia successfully challenged the award based on, among other things, an allegation that the tribunal secretary played an excessive role in the tribunal's decision-making process. While this allegation was ultimately deemed moot, the submission of this allegation alone caused much discussion in the arbitration community.

As a result of the increasing need for more visibility on the work of the tribunal secretary, a few institutions have responded to the concerns associated with the existence of a tribunal secretary in an arbitration. In Asia, the HKIAC is the first institution to address the use of tribunal secretaries. On 1 June 2014, the HKIAC issued the Guidelines on the

Use of a Secretary to the Arbitral Tribunal (the Guidelines),[10] 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 the HKIAC under any version of the HKIAC Administered Arbitration Rules or the UNCITRAL Arbitration Rules or any other cases after consultation with the HKIAC.

In addition to the Guidelines, the HKIAC has also introduced a tribunal secretary service giving tribunals the opportunity to appoint a member of the HKIAC Secretariat as secretary.[11] This service allows HKIAC Secretariat members to serve as conflict-free support with an arm's-length relationship with the tribunal. Moreover, tribunal secretaries appointed from the HKIAC Secretariat may have the advantage of having unique and useful insights into HKIAC arbitral procedures. This innovation contributes to the HKIAC's winning of the GAR award for best innovation of 2014.

As of November 2015, the HKIAC launched the world's first tribunal secretary accreditation programme with a view to training a new generation of tribunal secretaries. This programme not only provides a training ground for younger arbitration practitioners but also facilitates the future development of arbitrators who will have had experience serving as tribunal secretaries. The next phase for this tribunal secretary initiative is to establish a roster of those who are experienced tribunal secretaries. These tribunal secretaries will be able to apply to HKIAC's roster which will be made publically available for tribunals in arbitrations under any institutional rules and seated in any jurisdictions.

Following the HKIAC's introduction of its Guidelines, the SIAC issued a brief Practice Note on the Appointment of Administrative Secretaries (the Practice Note).[12] 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. For cases where the amount in dispute is below S$15 million, the parties will not bear any of the secretary's fees. 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 per hour.[13]

BREAKING THE IMPASSE ASSOCIATED WITH THE CIETAC SPLIT

From 2012 to 2015, the split of the CIETAC's Shanghai and Shenzhen sub-commissions – forming the Shanghai International Arbitration Centre (SHIAC) and the Shenzhen Court of International Arbitration (SCIA) respectively – has caused a great deal of uncertainty to Chinese arbitration users. Not only are parties uncertain as to which institution has jurisdiction over cases referring to 'CIETAC Shanghai' or 'CIETAC South China/Shenzhen', but a recalcitrant party may in fact exploit this uncertainty and seek to derail the arbitration procedure by lodging a challenge before the Chinese courts, arguing that the case had not been referred to the proper arbitral institution.

To resolve the dilemma caused by the CIETAC split, the Supreme People's Court (SPC) issued a judicial interpretation on 15 July 2015 clarifying which institution should exercise jurisdiction and under what circumstances: for arbitration agreements concluded before the name change, the former sub-commission would have jurisdiction; otherwise, the CIETAC

would have jurisdiction. The SPC's guidance helps put the controversy between the SHIAC, SCIA and CIETAC to rest.

THIRD-PARTY FUNDING

Other than in Australia, where litigation funding is commonplace, the rest of Asia-Pacific, has not customarily sought third-party funding for arbitration. Indeed, in the common law jurisdictions such as Singapore and Hong Kong, maintenance and champerty have served to prohibit such financial arrangement in litigation. However, enlisting the support of a third-party funder for arbitration may not be in the distant future, at least in Hong Kong. In 2015, in an effort to further entice arbitrations to Hong Kong, the Hong Kong government released a consultation paper examining the possibility of legislating third-party funding for arbitration. While some concerns have been raised such as disclosure requirements and the liability of a third-party funder for cost orders or security for costs, these are not specific to Hong Kong's proposal to legislate the availability of third-party funding for arbitration and seem unlikely to block the progress of this development. Regardless of its outcome, the publication of such a consultation has raised awareness and brought to the forefront of the Asian arbitration community the topic that is firmly integrated in the international arbitration discussion abroad.

FUTURE TRENDS

Asia boasts lively engagement by the governments and the legal community to bolster trade and to formulate dispute resolution platforms for its end users. Commercial arbitration is now the preferred route taken by companies in the region to resolve their cross-border disputes. Investment arbitration is the next frontier which some Asian jurisdictions have already penetrated. With the recent establishment of the Asian Infrastructure Investment Bank, the announcement of the Belt and Road Initiatives and the conclusion of the Trans-Pacific Partnership, the region will inevitably see further development and innovation of dispute resolution mechanisms to cater to the types of disputes such initiatives will inevitably bring.

Endnotes

Hong Kong International Arbitration Centre

Energy Arbitration in China

Huawei Sun and **Danni Wang**
Zhong Lun Law Firm

Summary

The Asia-Pacific region is without a doubt becoming the unrivalled centre of the global energy trade.[1] By the end of 2040, most of the world's oil and gas exports will likely be headed to the region.[2] China is now the world's largest oil importer and second-largest oil consumer. The China National Petroleum Corporation (CNPC) projects the country's dependence on foreign oil will hit a new high of 62 per cent in 2016,[3] and outbound investment in oil and gas in the past few years have reached multibillion dollar levels. There has also been increased activity in shale gas as companies gain more experience and drilling costs decrease. Furthermore, China has the largest generating capacity of renewable energy in the world and is by far the number one investor in clean energy.[4]

The ownership of minerals including oil and gas is vested in the state. The three large national oil companies (NOC) are CNPC, China Petrochemical Corporation (Sinopec) and China National Offshore Oil Corporation (CNOOC). These state-owned enterprises (SOE) have dominated the entire sector from upstream onshore and offshore exploration and production (E&P) and midstream transportation and refinement, to downstream distribution, retail and marketing. Other SOEs such as Sinochem and Yanchang Petroleum continue to expand their presence, and private companies like ENN Group, Bohai Petroleum and Guanghui Energy have emerged and developed, however, their participation remains limited to midstream and downstream activities.

China's energy sector is highly regulated. A rigid licensing regime applies to upstream E&P,[5] and exclusive rights have been given to CNPC and Sinopec for onshore oil E&P, CNOOC for offshore oil E&P and four SOEs for coal-bed methane E&P.[6] Foreign companies seeking to invest in E&P activities in China must partner with one of these SOEs, mainly through production sharing contracts (PSC) and Sino-foreign joint venture agreements (JVA); its participating interests must not exceed 50 per cent.

The midstream and downstream sectors remain dominated by Sinopec and CNPC, although some activities are being opened up to private and foreign investors, such as the construction and operation of gas pipelines and liquefied natural gas (LNG) terminals, crude oil refinement, sales of refined oil and natural gas, and importation of crude oil not subject to the state quota.[7] Nevertheless, private investors face difficulties with market access due to high qualification requirements. Further, the refined oil and natural gas sectors are partially subject to the pricing and supervisory regulations of the National Development and Reform Commission.

DISPUTE RESOLUTION MECHANISM AND GOVERNING LAW

Arbitration is the most popular avenue for resolving international energy disputes and Asian PSC disputes between foreign private investors and host government entities have been referred to arbitration under the ICC, SCC and UNCITRAL rules. The law of the resource country is often mandatorily applied to govern PSCs and joint operation agreements (JOA). English law is often the governing law of international oil and gas contracts, particularly master agreements, share purchase agreements, construction contracts and long-term export agreements.

Sino-foreign PSCs are subject to PRC law. The model Sino-foreign PSCs have long contained a multi-tiered dispute resolution clause which stipulates that (i) parties must first consult for settlement for a fixed period of time; (ii) if the dispute cannot be settled, the parties can agree to CIETAC arbitration; and (iii) failing such agreement, the dispute can be resolved

by a three-member ad hoc tribunal in accordance with the UNCITRAL Rules. Each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the presiding arbitrator; failing which, the presiding arbitrator shall be appointed by the SCC. Despite an increasing tendency for Chinese NOCs to agree to ICC and SIAC arbitration for disputes regarding their overseas investments, the multi-tiered dispute resolution clause remains the default provision for Sino-foreign PSCs. Parties rarely agree on CIETAC arbitration, but may agree on the seat of arbitration during the negotiation process, as this is not specified in the model clause.

Due to restrictions on a foreign company's capacity to distribute oil and gas in China, long-term sale and purchase agreements (SPA) and distribution agreements are often between domestic entities and lack a 'foreign-related element'. China's highest court, the Supreme People's Court (SPC), has long taken the view that a clause for foreign arbitration in a purely domestic contract with no 'foreign-related element' is invalid and unenforceable, based on a narrow interpretation of the components of such an element. Note that foreign invested entities incorporated under Chinese law are considered domestic entities. The court in one recent case considered the source of capital and the special circumstances of performance in the Shanghai Free Trade Zone to support a finding of a 'foreign-related element' in the contract between two domestic entities.[8] As other cases can be easily distinguished, enforcement risks remain for parties who agree on foreign arbitration.

LEGAL ISSUES ARISING FROM ENERGY DISPUTES

Relatively few energy disputes in China-related projects end up in formal arbitration or proceed to a merits hearing. Chinese parties tend to settle to maintain control over high-value disputes and preserve long-term relationships; Chinese culture is also weary of formalistic adversarial systems. Further, the multi-tiered dispute resolution clause encourages negotiation at the earliest stage of a dispute. In contrast to the number of energy disputes handled by international arbitration institutions,[9] major Chinese arbitration institutions such as CIETAC receive much fewer cases, however, statistics are not available. Considering the magnitude of China's investments in and consumption of energy, the proportion of China-related energy cases is low.

Nevertheless, energy activities often involve high-risk and myriad commercial and technical arrangements and many energy contracts cover a long period of time, for example, LNG SPAs usually have 20-year terms. Accordingly, a variety of issues and disputes arise, some of which the remainder of this article will analyse from the perspective of Chinese law and practice, with reference to international practices. Given that many arbitral awards are not publicly available and many issues require a fact-driven inquiry, our analysis is a general one and a particular circumstance in actuality will of course involve other considerations.

CONTRACT INTERPRETATION

Despite the advantages of drafting contracts in clear and unequivocal language, it is often impossible to anticipate the range of circumstances that a clause can and should cover over the entire contract term. The parties may also leave differences on the specificity of a clause unresolved and draft a broad and vague clause so that they can sign and begin to effect the objective of the contract. As a result, contract interpretation is a recurring theme in energy arbitration, the inquiry of which is closely related to the governing law of the contract.

Many energy contracts are governed by English law where the parol evidence rule operates to exclude the admission of extrinsic evidence to vary the terms of a written contract,

and parties are in general strictly held to their bargains. While some exceptions apply, evidence from pre-contractual negotiations and conduct subsequent to making the contract is inadmissible.

By contrast, PRC law affords courts and tribunals more discretion and flexibility to look at the actual performance of the contract, industry practices, evidence from pre-contractual negotiations and other extrinsic evidence to aid interpretation of disputed terms. The overarching principle of good faith may also be applied to favour an interpretation that aligns with notions of fairness to the parties over one that does not. This position has been supported by the SPC.[10] Further, in Zhejiang Zhongcheng v Yuantai Property, the SPC held that when the parties have different interpretations of a term, the trade interpretation or industry practice can be considered.[11]

The PRC General Principles of Civil Law also permit the application of international practice where domestic law or international conventions enacted into PRC law do not contain the relevant provisions.[12] Therefore, internationally accepted cases and principles of lex petrolea may be relevant for PRC courts and tribunals. Since commercial arbitration awards are largely undisclosed, the best way of identifying lex petrolea may be through model contracts for international oil transactions.[13]

ISSUES THAT MAY ARISE DURING PERFORMANCE

A variety of clauses are included to take account of the unpredictable changes that may occur over the life of the contract. Buyers are assumed to take volume risk and sellers are assumed to take price risk and such risk allocation may result in the inclusion of take-or-pay clauses, a formula to calculate prices, as well as clauses to review the price and alleviate hardship. Similarly, stabilisation clauses may be included to protect an investor's contractual bargain against the negative impacts of changes in law.

Take-or-pay Clauses

Take-or-pay clauses, which require the buyer to take delivery of a minimum annual contracted quantity (and pay), or in any event pay a minimum annual amount as the alternative obligation, are very common in SPAs. To provide some flexibility, some contracts allow for amounts not taken in a given year to be offset against successive years ('carry forward') or previous years ('carry back'), or provide the right to resell, with or without cost.[14]

As the seller usually makes a substantial capital investment in a project (sometimes at the request of the buyer), the minimum annual payment resulting from a take-or-pay clause ensures a stable income stream for the life of the contract to underwrite the costs, and is part of the seller's return on investment.

The use of take-or-pay clauses has started to become standard practice in Chinese contracts and has been included in the sample natural gas sale and purchase contract released by the National Energy Administration (NEA). These developments have helped PRC courts and tribunals accept the validity of take-or-pay clauses.

Where the buyer is in default of its obligation to pay, the seller may want to request specific performance to compel payment.[15] It may also be helpful for the seller to show its capacity to deliver upon request. If breach of contract is claimed, a PRC court or tribunal may consider the outstanding amount as liquidated damages and exercise its discretion to award a lesser amount (see 'Compensation and Liquidated Damages' below).

Moreover, the precise obligation of the clause may be affected by whether performance departs from the written obligation. In ICC case 12936 the seller sought a penalty payment from the buyer for failure to take delivery of the agreed quantity. However, the tribunal found that the practice of the parties, through oral agreements, departed from the quantities in the contract.[16] The contract was deemed to be a 'framework agreement fixing certain terms and conditions for sale contracts yet to be made… there was no obligation… to take off certain quantities'.[17] Different governing laws may approach the same situation differently.

A seller should also be careful that any concessions it makes to reduce the buyer's minimum payment for any year is stipulated as a one-off agreement so its right to claim the contractual amount for a subsequent period is not compromised by claims of estoppel.

Price Review

Given the volatility of the energy markets, instead of stipulating one fixed contract price, parties may want to vary the price over the contractual term and will usually include a pricing formula with provisions to review and adjust the price.

The formulas in natural gas contracts in Asia are typically indexed to oil prices and in recent years, oil prices have dropped due to an imbalance of supply and demand. Spot gas prices have also dropped given the advent of cheaper Henry Hub linked shale gas imports entering the region from the United States and the development of international spot market trading in gas, which have given buyers cheaper alternative options. As a result of these changes, contract gas prices linked to earlier oil prices may be higher than current spot gas prices so buyers may be motivated to initiate price review or seek to disconnect the link to oil. In recent years there has been a proliferation of arbitral awards rendered in favour of buyers where rebates were awarded and oil indexation was replaced by a link to gas spot prices.[18]

As part of its gas pricing reforms, China has chosen the Shanghai city-gate gas price as the national benchmark from which it sets the city-gate prices of other provinces.[19] This is not directly linked to but may be affected by international oil prices. The provincial city-gate price is the ceiling for gas prices in domestic contracts and changes in this price may trigger price adjustments.[20]

Contracts governed by Chinese law may contain a broadly drafted clause for price review that only requires good faith efforts to discuss the price adjustment. Rarely will parties link unresolved issues to a dispute resolution clause for arbitration. Parties may also doubt the enforcement of arbitral awards for a revised formula. Thus, most matters are settled without advancing to arbitration, as is the case elsewhere.

Contracts may contain provisions for periodic review, for example every five years, but will often also contain a 'trigger' clause where a party may initiate review any time it proves a 'significant change in circumstances' has occurred. However, it may be difficult to ascertain whether the events in question satisfy this requirement. The tribunal in ICC case 9812 usefully gave some examples: 'devaluation or revaluation of [a currency], a changed competitive situation, a tax on one or several sources of energy, an imposed price control and a changed legal environment with economic effects e.g. new environmental requirements'. Other relevant changes may not affect the value of gas but affect the price, including 'the entry of a powerful and independent competitor in the [Buyer State] market… or a 'governmental price control forcing sellers… not to exceed a certain price'.[21]

When price review is triggered and conducted at arbitration, the tribunal may be requested to revise the pricing formula. Tribunals may have in principle wide discretion and authority to decide the cases before them. However, it may be presented with difficult issues that remain unresolved even after commercially astute parties with expertise in their field have undergone a long period of negotiation. Thus, tribunals usually rely heavily on expert evidence, but they may still find it difficult to come to a decision about the appropriate revision. The tribunal can 'split the baby' or award something else entirely, if parties do not limit the tribunal's authority to do so. As an example, the tribunal in Gas Natural v Atlantic LNG awarded a dual-pricing mechanism that neither party anticipated, nor found satisfactory,[22] however, the petition against the award was denied because the tribunal was held to have the authority to award the dual-pricing system.[23]

Parties should clearly define the scope of the dispute or adjustment put to the tribunal and the tribunal's mandate. To give the parties more control over the process, 'baseball arbitration' is recommended, wherein the tribunal must choose to award one of the parties' final offers. Each party has the incentive to produce the most reasonable final offer. This reduces the time and cost spent on 'long shot' proposals and increases the chance of early and amicable settlement. Being one of two options, the outcome involves less uncertainty and the parties can prepare strategies for their businesses accordingly. The only caveat is that if the tribunal reluctantly accepts a party's proposal and does not support it fully in its reasoning, the award may be challenged.

A Chinese tribunal may be reluctant to revise a complex price formula. It may find expert evidence difficult to understand and likewise lack the expertise to decide on a revision, which only adds to its hesitancy about interfering with the parties' original bargain. Further, a tribunal unconfident with making an award may be weary of the risk of challenge. The tribunal is therefore likely to encourage mediation and help facilitate a settlement. A Chinese tribunal may be inclined to accept a narrow mandate or baseball arbitration if this is clearly included in the parties' arbitration agreement.

Hardship Clauses

Changes in the circumstances may sometimes cause a party 'substantial economic hardship' when it performs a part of the contract and hardship clauses exist to alleviate such harm.

While the foreseeability of a change in circumstances is not necessarily a requirement of price review, hardship clauses are often included to mitigate the effects of extraordinary unforeseeable events. Both clauses may be claimed together. Besides changing the price formula, a greater range of measures can be awarded under a hardship clause so that a 'fairer' balance can be created and the harm alleviated.

The UK Court of Appeal in Superior v British Gas held that 'substantial hardship' does not include difficulties of day-to-day economic variations, but must have a real and weighty impact rather than a mere transient effect.[24] In one case the parties attempted to draft a definition for 'substantial hardship' with objectivity by reference to a quantitative assessment of the effects of hardship.[25]

If adjustment is required to alleviate the hardship, the kind and level of adjustment that should be granted will also be disputed. The expert panel in Superior v British Gas fixed a price to remove substantial hardship for the future and also compensated for past hardship suffered.[26]

Absent the hardship clause, a party will have to rely on the statutory 'change in circumstances' principle under Chinese law. The change must be unforeseeable and not attributable to commercial risk, and is distinguished from force majeure. The principle has narrow scope and courts usually limit it to policy or substantial economic changes such as a sharp price adjustment conducted by the government, economic crisis or substantial inflation.[27] If this requirement is met, the court may grant the modification or termination of a contract upon request, provided that the continuing performance of the contract would be manifestly unfair to one party or frustrate the purpose of the contract.[28]

The SPC has explicitly stated a sharp price change in commodities such as oil generally will not satisfy the change in circumstances requirement as such volatility is the norm and is foreseeable and therefore constitutes a commercial risk the parties must allocate among themselves.[29]

The inclusion of a hardship clause that allows for the adjustment of contractual terms may place a party negatively affected by a change in a better position to negotiate amendments than if the clause is not included.

When negotiating an adjustment under a hardship, take-or-pay or price review clause, parties may make concessions during the process. To preserve their rights under the contract, parties should state that the negotiations are made without prejudice to their future right to rely on the written clauses.

Stabilisation Clauses

Stabilisation clauses are included in the contract to protect an investor against changes in law that adversely affect the commercial viability of a project.

Stabilisation clauses take various forms. For example, 'freezing clauses' prevent the state from applying new laws subsequent to the date of the contract and effectively freeze the applicable laws for the entire term. Common law and some Middle Eastern jurisdictions may consider this an impermissible limit on the legislature's power so enforcement issues may arise. However, some developing nations may approve such clauses to provide assurances of the stability of the investor's original bargain despite changes in government. In the context of investor-state disputes, the dominant view is that a state's agreement to be bound by a stabilisation clause is a valid exercise of state sovereignty, the breach of which will result in compensation to the investor. Recent years have seen a trend of express carve-outs for regulatory changes protecting public health, the environment or human rights.

'Economic equilibrium clauses' allow the state to make regulatory changes as long as the economic benefit for the investor is maintained, otherwise, either the contract may be renegotiated to restore the investor's position or the investor is compensated. Clear and specific compensation mechanisms may be helpful. These clauses are likely to be enforceable in many jurisdictions because they do not fetter state powers but interpretation issues still persist.

Specific to PSCs and JVAs between Chinese NOCs and foreign investors, NOCs are not authorised by the state to agree to a freezing clause so they are less common than economic equilibrium clauses. Despite the lack of Chinese jurisprudence on the latter, we believe they are likely to be valid.

Several issues may arise regarding: the types of law change that can apply, causation of detriment, the required magnitude of change to a party's economic position and the type of remedy a tribunal can grant.

In Duke Energy v Peru, the tribunal found that:

- the 'tax regime' guaranteed to be stabilised included both tax laws and regulations;
- the interpretation and application of those laws and regulations at the time of contract will not be changed to the detriment of the investor; and
- even absent the above, stabilised laws will not be interpreted or applied in a patently unreasonable or arbitrary manner.[30]

Similar questions involving Chinese laws will require an understanding of the Chinese administrative law system.

The analysis of the material change to the investor's economic position may involve a careful examination of the nature of the original bargain between the parties at the time of contract. The party claiming under a stabilisation clause bears the burden of proving that the law change caused a material negative impact on its investment and economic interests. The thresholds for these tests are high.

The aggrieved party should be careful about formulating the relief sought. Even if the stabilisation clause permits renegotiation of contractual terms, enforcement problems may arise. Chinese tribunals would be reluctant to amend the terms of the contract, especially when any amendment of a Sino-foreign PSC has long been subject to the approval of the Ministry of Commerce of the PRC (MOFCOM). The pre-approval requirement has been replaced by a reporting system but in practice, MOFCOM's role of supervising PSCs is essentially the same. The most effective relief would be to request compensation instead of contractual amendment. However, parties rarely set out the method of calculation in their contract and the award for damages may be unpredictable.

TERMINATION OF CONTRACT

Disputes over termination often arise. For example, one party to a PSC may contend that if the exploration stage does not yield discoveries of oil or a commercially acceptable result, the contract can be terminated. These disputes often involve a fact-based inquiry into whether the conditions for termination have been met, if any are specified in the contract. As with most other jurisdictions, Chinese law recognises the parties' autonomy to agree on such conditions.[31]

Where the contract is silent or unclear, a party may try to claim the other party breached the contract as grounds for termination, for example, by claiming the other party failed to satisfy the required cash calls for the project. Many factors may lead a party to seek termination, for example, commercial viability issues, geological difficulty, concerns about environmental harm or a change of government. The actual circumstances giving rise to termination may not be covered by the contract, hence the importance of understanding the statutory grounds for effective termination under Chinese law.

The most frequently used grounds for termination in Chinese contracts are renunciatory breach, either shown by words or conduct, or material breach of contract resulting in frustration of the purpose of the contract.[32] Note that there is a high threshold for the latter and in complex and long-term energy contracts, the contract may have multiple purposes

so that failure to achieve one purpose at an earlier stage of the contract might not satisfy this ground. Clear drafting may mitigate the unpredictability of a tribunal's interpretation of the purpose of the contract. In general, parties should clearly set out the conditions and procedure to terminate the contract.

COMPENSATION AND LIQUIDATED DAMAGES

Energy arbitration is characterised by the high values at stake, which in many cases involve claims for hundreds of millions of dollars. Under article 113 of the PRC Contract Law, compensation for breach of contract shall be equal to the actual loss suffered by the conforming party, and may include lost profits, provided that the latter was foreseeable to the party in breach at the time of contract. Where the contract is lawfully terminated, the claimant is entitled to compensation for losses due to early termination. The claimant has the burden of proving actual out-of-pocket costs and losses. For lost profit assessment, objective evidence is generally required, such as a project feasibility report, historical financial records (from which projections may be made), reports on the average profitability of a similar project in similar circumstances and other similar documents. Chinese tribunals are less familiar with the widely accepted discounted cashflow method for assessing lost profits and will often exercise wide discretion in awarding the amount.

Chinese law affords the tribunal discretion to adjust down the liquidated damages claimed so that it does not exceed 130 per cent of the actual loss.[33] To maximise the compensation it can receive, for example under take-or-pay clauses, claimants should provide all relevant documents showing their financial contributions to the project, with a proper deduction of the costs saved from termination of the contract.

CONCLUSION

A contract may not be able to address all the issues that may arise from complex energy activities. Nevertheless, good drafting is crucial because Chinese jurisprudence is not well developed for this sector but Chinese tribunals tend to respect commercial agreements, including clear arrangements for the types of clauses discussed above. Parties are also advised to consider clearly setting out the tribunal's jurisdiction to resolve disputes left over from good faith negotiations.

Endnotes

中倫律師事務所
ZHONG LUN LAW FIRM

23/F South Tower CP Centre, 20 Jin He East Avenue, Chaoyang District, Beijing 100020, China

Tel: +86 10 5957 2288

http://www.zhonglun.com

Economic Damages

Braden Billiet
FTI Consulting

Summary

The value of a business asset is the present value of the cash flows it is expected to generate in the future.[1] All valuation professionals will agree with this statement.

Almost as axiomatic for business valuers in a disputes context was the notion that for a historical valuation, no account should be taken of events occurring after the valuation date.

That is, if a loss arose as a result of a breach of contract on a date in the past, a valuer would assess the effects based on reasonable expectations for the future at the time of breach, ignoring what is known about subsequent events (whether such events would increase or decrease the amount of the assessment).

Recent decisions in the UK courts will cause valuers to reappraise this approach, at least when dealing with lost profits claims under English law.

The emerging approach, as applied in Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory) and recently reaffirmed in Bunge SA v Nidera BV, allows the use of hindsight to the extent that it is seen to give effect to what has been termed an 'accurate' assessment of the loss.

This article summarises the current state of play and highlights some of the considerations this raises for assessments of damages from a valuation perspective.

VALUATION APPROACHES

According to the compensatory principle, the injured party in a breach of contract case is 'so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed'.[2]

An assessment of damages, therefore, requires valuations of the financial positions of the injured party in both a situation in which the contract is performed (the but-for position) and a situation in which it is not performed (the actual position), with the losses being the difference between the two.

Valuations are forward looking. In performing a valuation, a valuer must convert expectations (and assessments of the degree of uncertainty regarding those expectations) into a value at a point in time – the valuation date.

There is no single approach to capitalising future financial returns into a value at a discrete point in time. The two primary approaches for the valuation of income-generating assets are the income approach and the market approach, where such expectations are generally reflected explicitly through the former and implicitly through the latter.

Income bases of valuation rest on the premise that an asset's value is equal to the value of the cash flows that it is expected to generate in future, discounted at a rate that reflects the risks inherent in those cash flows. The most frequently used income approach is discounted cash flow (DCF) analysis.

Market-based valuation approaches are essentially comparative in nature in that the value of the subject asset is inferred from a comparison with the characteristics of similar traded assets, selected based on their growth prospects and risks.

The appropriate approach in any given case may vary, for instance, with the purpose of the valuation, the nature of the asset, and the availability of information.

If a valuer seeks to assess the effect of conduct that has resulted or is expected to result in lower sales being made or higher costs being incurred, for example, as is often the case in breach of contract disputes, an income approach is usually preferred, given its emphasis on performance projections (including projections of sales and costs).

In performing an income-based valuation at a date in the past, the valuer ordinarily uses a projection of future performance, ideally informed by analysis conducted by or for the parties prior to that date (as may have been prepared in the ordinary course of business or for specific purposes such as raising financing). If available, the valuer may also consider contemporaneous third-party research and analysis.

To the extent future events are incorporated they would need to be known or knowable at the valuation date, where the asset's value would reflect both (i) their expected effect if they occurred and (ii) their estimated probability of occurrence.

WHY HINDSIGHT MATTERS

If all awards of compensation were made immediately after the date of injury, hindsight would be irrelevant.

However, as there is always a delay (and sometimes a lengthy one) between the date of injury and the date at which compensation is assessed, new information becomes available which, if taken into account, can have considerable effects on the valuations and resulting assessments of damages.

The potential effect of performing a valuation that takes into account hindsight information as compared to one that reflects the uncertainty that existed at an earlier point in time is perhaps best seen by way of example.

Suppose Company A agrees to purchase, and Company B agrees to sell, the rights to drill for oil over a plot of land for $100,000.

Company B reneges on the deal, refusing to sell the rights, at a time when it is not known how much oil the plot of land contains (or, indeed, whether it contains any at all). Mineral rights over similar plots of land, all thought to have the same chance of containing oil, are available at the same price of $100,000.

If it subsequently turns out that this particular plot of land contained oil worth $10 million, how much should Company A be awarded as compensation for Company B's breach of contract?

One option is to award it the market value of the rights at the date of breach, $100,000. That value reflects the range of outcomes anticipated at the time, including the possibility that the land contained oil worth $10 million and the risk that it contained none.

An alternative is to award it the value of the rights after the discovery of oil (ie, $10 million less the costs of extracting the oil and adjusted for any other costs and benefits of ownership of the rights). That is the value of the oil over which, as it is now known, Company A would have eventually come to hold rights (assuming it did not intend to dispose of them prior to the discovery).

While, to some, the latter may seem a more just outcome in the circumstances, it would, in effect, reward Company A for risks it did not actually bear.

Which of these approaches is correct is a matter of law and would depend upon the court's willingness to allow hindsight evidence.

RECENT RULINGS IN THE UK COURTS

To what extent hindsight may be taken into account in valuations performed for damages assessments, if at all, has long been a matter of legal debate.

Indeed, as Lord Macnaghten asked over 100 years ago of the decision maker's ability to consider the available information in Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co, a case in which the owner of a coal mine was prevented from mining during a period when, with hindsight, it was known that the price of coal rose:[4]

> Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him why should he shut his eyes and grope in the dark?

The UK courts have, in contrast to the approach ultimately taken by Lord Macnaghten in the matter above, generally applied a 'breach date rule',[5] assessing damages as at the date of breach in cases of breach of contract only using information that was known or knowable as at that date.

In that regard, Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory) represented something of a departure.

In July 1998, the Golden Strait Corporation chartered a tanker (Golden Victory) to Nippon Yusen Kubishika Kaisha for a period of seven years. While the earliest date of redelivery of the vessel under the contract was December 2005, the agreement provided both parties a right to cancel if war broke out between any two or more of a number of countries including the US, the UK, and Iraq.

In December 2001, Nippon Yusen Kubishika Kaisha repudiated the contract, and Golden Strait Corporation claimed for damages over the remaining 48 months until the agreed termination date.

In the arbitration to which the matter was referred in the first instance, the arbitrator determined that, while it was not foreseeable at the time of repudiation, the outbreak of the Second Gulf War in March 2003 would have allowed Nippon Yusen Kubishika Kaisha to cancel the agreement, had it still been in force, and, therefore, that it was only liable for damages over a period of 15 months.

The award was appealed and ultimately brought before the House of Lords where it was determined, in a 3-2 decision, that damages should be assessed by considering the course of events as at the date of the assessment, consistent with the decision of the arbitrator.

In particular, the majority in The Golden Victory, while stating that the date of breach was the ordinary starting point for a damages assessment, held that as the agreement included a term that meant the duration of the charter was uncertain, the outbreak of the war must be considered to reach an 'accurate'[6] assessment of the loss.

As it was found that both the contract and the hypothetical replacement that could have been entered as a form of mitigation (assumed to be on the same terms but at the lower

prevailing market price) would have been cancelled, the period over which damages were assessed was truncated to reflect that fact.

In other words, in the view of the House of Lords, a forward-looking estimate of the loss as at the date of breach would have resulted in overcompensation where it was known, with hindsight, that a subsequent event would have reduced the loss.

In this regard, Lord Scott stated:[7]

> The lodestar is that the damages should represent the value of the contractual benefits of which the claimant had been deprived by the breach of contract, no less but also no more.

A dissenting opinion was given on the basis that damages ought to be assessed at the date of the breach without regard for future events unless they were 'inevitable' or 'predestined'.[8] A key concern over the approach of the majority, as was raised by Lord Bingham, was that it 'undermines the quality of certainty which is a traditional strength and major selling point of English commercial law'.[9]

Indeed, this was also noted by the arbitrator in the first instance:[10]

> In essence, it does not seem to me that it can be right that the value of that which the Owners have lost (and which is calculable on the date of breach in the then prevailing circumstances) should thereafter vary according to when a determination is made in proceedings to enforce their rights and in perhaps quite different circumstances.

In addition, Lord Bingham observed that the compensatory principle, while long recognised as the governing principle in contract law:[11]

> [D]oes not… resolve the question whether the injured party's loss is to be assessed as of the date when he suffers the loss, or shortly thereafter, in the light of what is then known, or at a later date when the assessment happens to be made, in the light of such later events as may then be known.

Nevertheless, the majority's view as to what constituted an appropriate assessment of loss in the light of the available information at the date of assessment was incorporated into the compensatory principle. As Lord Scott stated:[12]

> The arguments of the Owners offend the compensatory principle. They are seeking compensation exceeding the value of the contractual benefits of which they were deprived.

This version of the compensatory principle has since been applied in a number of cases in the UK, including Flame SA v Glory Wealth Shipping Pte Ltd (The Glory Wealth) and Bunge SA v Nidera BV.

In The Glory Wealth, a case involving a repudiated freight contract, the court found, by reference to the decision of the House of Lords in The Golden Victory, that it was necessary to consider whether the innocent party, having been affected by a sharp decline in the freight market following the collapse of Lehman Brothers, would have been able to perform its side of the contract had it not been repudiated.[13]

If the owner could not prove that it could finance the agreed voyages, the court held that it would not be entitled to damages that would place it in a better position, at the date of breach, than it would have found itself in had the contract been performed.

Despite the differing views expressed within (as well as external criticism of) the decision in The Golden Victory, the court's approach in that matter was recently reaffirmed by unanimous decision of the UK Supreme Court in Bunge SA v Nidera BV, a case involving a repudiated contract for milling wheat, where (like in The Golden Victory) the party in breach would have subsequently been able to cancel the contract (in this case, as a result of an embargo introduced by Russia).

In addition, the decision in Bunge SA v Nidera BV expressly stated that The Golden Victory interpretation of the compensatory principle applied equally to one-off sale contracts as to instalment contracts (the type of contract at issue in The Golden Victory), and, where the issue of commercial certainty was raised, Lord Sumption stated:[14]

> Commercial certainty is undoubtedly important, although its significance will inevitably vary from one contract to another. But it can rarely be thought to justify an award of substantial damages to someone who has not suffered any.'

VALUATION CONSIDERATIONS

The Golden Victory application of the compensatory principle, and the scope it allows for account to be taken of hindsight, raises a number of issues that both lawyers and valuers will want to consider for damages assessments under English law. These include:

(i) In which cases is hindsight allowable?

(ii) What hindsight information may be used?

(iii) How is hindsight to be incorporated?

IN WHICH CASES IS HINDSIGHT ALLOWABLE?

Notwithstanding the willingness of the courts to take account of subsequent events in the cases discussed above, the 'breach date rule' has not been displaced entirely.

Consider, for example, Ageas v Kwik-Fit (GB) Ltd and AIG Europe Ltd, in which Ageas, as the purchaser of a business, brought a claim against Kwik-Fit (GB) Ltd, the seller, and AIG Europe Ltd, its insurer, on the basis that the business's warranted accounts contained errors in relation to bad debt provisions that resulted in an overstatement of profits and assets and, thus, an overpayment on the part of Ageas.[15]

While it was agreed that the loss was the difference between the value of the asset as warranted and its true value, Ageas calculated its loss to be around double the level of AIG. The primary difference was that Ageas corrected the provision for bad debts at the time of

sale based on historical bad debts prior to the sale and AIG's correction of the provision took account of the actual bad debts after the sale, which were lower than in previous years.

Mr Justice Popplewell, in considering whether the business's actual performance after the sale could be taken into account, accepted the approach in The Golden Victory that:[16]

> In an appropriate case, the valuation can be made with the benefit of hindsight, taking account of what is known of the outcome of the contingency at the time that the assessment falls to be made by the court.

He noted that hindsight was not merely permitted to determine reasonable expectations for the future at a historical date, as in Buckingham v Francis,[17] but could be used to award a level of compensation different from that which would have been expected at the date of breach.[18]

However, Mr Justice Popplewell ultimately determined that it was not necessary to take account of hindsight in the case before him and that doing so would cut across the allocation of risk between the parties.

He reasoned that because the risk or reward of any loss or benefit as might arise from both the way the business was operated and external influences fell to Ageas under the contract (there was no provision for an adjustment of the price after closing), Ageas was entitled to compensation based on an extrapolation of historical bad debts (ie, to retain the benefit of the lower level of bad debts realised under its ownership).

While, on the surface, the approach here (rejecting hindsight to award a higher level of loss than would have been estimated at the time of breach) may appear to be at odds with that in The Golden Victory (in which hindsight was used to award a lower level of compensation than would otherwise have been estimated), this serves to illustrate that a one-size-fits-all approach is not appropriate in contract disputes.

In the case of a breach of warranty, at least insofar as the parties have not contracted to share the risks and rewards after the sale, it appears the purchaser will not be penalised for performance being better than would have been projected at the date of sale (whether due to factors within its control or external influences).

It is unclear how the court would have ruled in Ageas had there been a purchase price adjustment mechanism or if subsequent performance were worse than would have been expected at the date of sale.

In addition, it remains to be seen where the limits of The Golden Victory use of hindsight lie, more generally, in assessing damages in breach of contract cases.

WHAT HINDSIGHT INFORMATION MAY BE USED?

For a historical valuation in which hindsight is not allowed, it may be appropriate to refer to documents produced shortly after the valuation date in order to triangulate the position as at that time.

For cases in which hindsight is deemed permissible, a more comprehensive consideration of what information may be taken into account is required.

By the date of assessment of loss a wide range of information (including that relating to the overall economy, the industry and the company itself) may be available beyond what would have been known or knowable at the date of breach. This includes anticipated events for which the outcome was unknown in addition to events that were not even considered at the date of breach.

Certain of this information is independent of the parties (such as inflation and exchange rates), while other information may be influenced by the actions the parties took, including as a result of the dispute.

It is important to distinguish between the conditions that arose only as a result of the dispute as compared to those that would have arisen in any case in order to determine the relevance to the formulation of the but-for position or the actual position.

Where the court takes into account one type of information, it may not take into account all types of information. In the context of The Golden Victory, for example, the event that was taken into account (the outbreak of the Second Gulf War) was assumed, as discussed above, to affect both positions.

However, as Lord Brown noted, an account of hindsight could also be relevant to an assessment of the profits the owners would have earned given that the agreed rate of hire under the contract was a base rate plus a share of operating profit (as would affect the but-for position) and to the length of time it would take them to enter a replacement contract (as would affect the actual position only).[19]

In Louis Dreyfus Commodities Suisse SA v MT Maritime Management BV (The MTM HONG KONG), the court accepted, by reference to The Golden Victory, that account should be taken of the unexpected difficulties that ship owners experienced in re-letting the ship after repudiation by the charterer.[20]

On that basis, the court determined it was appropriate to lengthen the period over which damages were assessed (including beyond expiry of the original contract). It, therefore, in effect, compensated the injured party for ineffective (but what were held to be not unreasonable) efforts to mitigate the loss in the actual position.

Commentators have suggested this is a step too far, highlighting the problems with a 'bare' application of The Golden Victory compensatory principle that bypasses considerations of causation, mitigation and remoteness.[21]

Given the wide range between taking into account all available (relevant) information, on the one hand, and considering only a single event or type of information, on the other, this is an area where further guidance from the courts would be useful.

HOW IS HINDSIGHT TO BE INCORPORATED?

Assuming hindsight is allowed and the information that it is appropriate to incorporate is identified, there remains a question as to how the calculations are to be performed.

As discussed above, the 'breach date rule' prescribes a date of valuation. If a DCF analysis is performed, the value of lost cash flows would be expressed at the date of breach, with all loss amounts projected to arise after that date being discounted back to it.[22]

In contrast, in performing the valuation at a later date, the final valuation date and cut off for new information must be determined. It may be that the latest valuations are set out in each

side's respective expert reports or a joint report (if any), or the valuations may continue to be updated at the hearing or subsequently.

As more time elapses between the date of breach and the date of assessment, there is increased potential for subsequent events to affect the valuation. This means a valuation that uses hindsight can change considerably depending on when it is assessed.

Then, having used hindsight, one must consider what risks remain in the cash flows. On the basis that the use of hindsight removes the business risks, some valuers have taken the view that past losses need not be discounted and, rather, should be brought forward from the specific dates on which they arose in the past to the date of assessment of compensation at interest rates that reflect only the risk that the other party would not pay them.[23]

If, however, the past cash flows, as informed by hindsight, are merely taken to be the most likely amounts where there still remains risk that they could have been higher or lower, the cash flows may still be discounted back to the date of breach before being brought forward as a lump sum at a pre-award interest rate.

It remains to be seen what approach will be preferred under English law. Depending on the size of the discount rate and horizon over which the losses arise, the results may vary considerably depending on the approach taken.

CONCLUSION

Valuers have generally assessed losses in a disputes context based on reasonable expectations for the future at the time of breach, ignoring what is known about subsequent events.

The Golden Victory application of the compensatory principle, in allowing account to be taken of hindsight to the extent it is seen as necessary to give effect to an accurate assessment of the loss, while controversial, was recently reaffirmed in Bunge SA v Nidera BV.

This, therefore, removes some uncertainty as to where the UK courts stand on the permissibility of hindsight, at least for lost profits claims, but raises further uncertainties in the practical application of such an approach, as highlighted in this chapter.

Given the effect that hindsight information (and the particular way in which that information is implemented) may have on a valuation, these are areas that both lawyers and valuers will want to pay attention to in damages assessments under English law.

A one-size-fits-all approach to the use of hindsight may not be appropriate. In the absence of clear guidance from the courts, recent decisions suggest it is worth bearing in mind the allocation of risk between the parties and the effects of subsequent events in the context of overall considerations of causation, mitigation and remoteness.

Endnotes

200 Aldersgate, Aldersgate Street, London EC1A 4HD, United Kingdom

Tel: +44 20 3727 1000

https://www.fticonsulting.com/

Hong Kong Construction Arbitration

Richard Lyons, **James McKenzie** and **Paul Starr**
King & Wood Mallesons

Summary

Hong Kong remains a pre-eminent and growing international centre of excellence for arbitration generally, and for the resolution of construction disputes in particular.

In this article, we present an overview of Hong Kong as a centre for dispute resolution for construction disputes. We also highlight a number of interesting and important developments and trends. These include recent relevant Hong Kong court judgments, state-of-the-art provisions for emergency arbitration, a consultation in relation to third-party funding of arbitrations, and a consultation in relation to security for payment legislation for the construction industry.

Before turning to the detail, however, it is worth highlighting that both domestic and international arbitration continues to flourish in Hong Kong.

The 2015 International Arbitration Survey published by Queen Mary College University of London, for example, found that Hong Kong was the third most frequently used seat of arbitration worldwide over the preceding five-year period (behind only London and Paris) and that it remained the third most popular choice in 2015.

In addition, the main Hong Kong arbitration institute, the Hong Kong International Arbitration Centre (HKIAC) was recognised as being the third most preferred arbitration institute worldwide, ranked only behind the ICC and LCIA. The HKIAC was further ranked as the most improved arbitration institute worldwide over the previous five-year period.

There is, however, no requirement to use the rules of the HKIAC. Parties in Hong Kong are free to conduct their arbitrations on an ad hoc basis (using, for example, the UNCITRAL Rules) or pursuant to the arbitral rules of any arbitral institution.

A number of key international arbitral bodies have also established offices and presences in Hong Kong in order to serve the Asia Pacific region. These include the ICC and CIETAC. The Permanent Court of Arbitration in The Hague also has a 'host country' agreement with Hong Kong.

The Hong Kong judiciary remains highly supportive of arbitration. The courts have handed down a number of pro-arbitration related judgments over the past year. These have, for example, upheld the constitutionality of provisions in the Arbitration Ordinance, granted anti-suit injunctions to restrain proceedings where there was an arbitration agreement, strengthened the cost penalties for parties opposing stays to arbitration, and stressed the importance of the enforcement of arbitral awards.

The rule of law remains strong and unimpeached in Hong Kong. There has been no deterioration in the Hong Kong system that should deter or trouble parties considering using Hong Kong as their seat of arbitration. This applies equally to non-Chinese parties who are in dispute with Hong Kong or mainland Chinese entities.

Hong Kong arbitration and the Hong Kong courts do not favour local or Chinese parties. There can, however, be a potential advantage for non-Chinese parties in having the seat of arbitration in Hong Kong as there is a dedicated bilateral enforcement regime between Hong and the PRC that makes it easier to enforce a Hong Kong arbitration award in mainland China against Chinese assets.

CONSTRUCTION DISPUTES IN HONG KONG IN OVERVIEW

The Culture Of The Hong Kong Construction Industry

The construction and engineering industries worldwide have a tendency to generate disputes. Hong Kong has been no exception to this. The combination of keen prices and old-fashioned risk allocation (where risk is offloaded on to contractors and consultants) has given rise to an adversarial industry with a 'claims culture'.

Significant innovations and reforms are currently in train in Hong Kong to improve this industry culture, and to manage both disputes and risk in a more efficient and cooperative manner. For example, as we discuss below, the Hong Kong government is systematically introducing the NEC form of contract for public procurement projects. Work is also under way to introduce security for payment legislation, which will contain some form of statutory adjudication procedure for use prior to the completion of a project.

It should be noted, however, that even prior to the more recent developments highlighted above, the Hong Kong construction industry had already become increasingly successful at managing and resolving disputes without having to resort to formal legal proceedings. The majority of disputes are resolved by negotiation, with claims often being used by all parties as bargaining chips when resolving the final account for the project.

The Use Of ADR And Other Techniques To Reduce And Manage Disputes

There has been consistent growth in the use of ADR methods both to avoid disputes crystallising in the first place, and, where disputes have arisen, to resolve them without formal legal proceedings.

Mediation has been used successfully to resolve disputes for at least 20 years in Hong Kong including in relation to major infrastructure projects such as bridges and also the Hong Kong International Airport.

There is a formal requirement for parties to attempt mediation before pursuing proceedings in the Hong Kong courts but there is no such requirement in relation to pursuing arbitral proceedings. It is, however, common for construction contracts to include a multi-tiered dispute resolution mechanism, with mediation as one of the intermediate tiers. The Hong Kong courts will uphold a contractual mediation agreement provided that it is sufficiently clear and specifies details such as the Mediation Rules to be applied, and the identity of an appointing body to nominate the mediator in default of the parties' agreement.

There is increasing use in major projects of either a dispute resolution adviser (DRA) or a dispute resolution board (DRB) in order to try to contain disputes and prevent them from escalating.

The DRB system (which is typically adopted internationally in FIDIC contracts) involves an independent panel that considers disputes that are referred to it during the lifetime of the relevant project. A DRB decision is generally binding on the parties on an interim basis – unless and until it is replaced later on by an arbitration award rendered by a separate arbitral tribunal.

The DRA system (which was developed in Hong Kong in the early 1980s) involves an independent professional being involved with the project from start to finish. The DRA holds regular meetings with the key stakeholders (at least the owner and the main contractor) and discusses issues and problems that are arising. The appointed DRA can advise and cajole the parties but generally cannot make any binding determination in relation to disputes or

issues. A good DRA can therefore help the parties to avoid disputes or find ways to resolve problems before they escalate.

Arbitration Remains The Main Forum For Formal Legal Proceedings For Construction

Arbitration remains the main method of dispute resolution for disputes between owners and main contractors, and also for disputes between main contractors and principal sub-contractors. This is the case for both public sector procurement as well as private sector projects. Arbitration clauses are found in most, if not all, of the Hong Kong standard form contracts commonly in use as well as in the major international standard forms of contracts (such as the FIDIC Rainbow suite) commonly encountered.

Where construction disputes are resolved by the Hong Kong courts they tend to involve disputes at the lower tiers of the construction process (sub-contractors and sub-sub-contractors) where contracts are often less well developed and less sophisticated.

RECENT 'STRUCTURAL' DEVELOPMENTS IN CONSTRUCTION ARBITRATION

As highlighted above, there are a number of important developments and innovations in Hong Kong under way that are intended to benefit the construction industry both domestically and internationally. These developments can be broadly broken down into three main sub-sets:

Developments that aim to make sure that both domestic and international arbitrations held in Hong Kong continue to have the benefit of an international state-of-the-art arbitral regime. These developments include:

- the adoption of a particularly sophisticated and effective regime for emergency arbitrations seated in Hong Kong; and
- the ongoing consultation in relation to permitting third-party funding of arbitrations seated in Hong Kong.
- Developments that aim to help the Hong Kong construction market to manage risks more effectively, and to reduce disputes. These developments include:
- the adoption of the NEC form of contract; and
- the work being done in relation to future security for payment legislation.
- Legislative changes in Hong Kong substantive law that affect the construction industry in Hong Kong. These developments include the entry into effect of:
- the Hong Kong Competition Ordinance; and
- the entry into effect of the Hong Kong Contracts (Rights of Third Parties) Ordinance (which extends contractual rights in some circumstances to third parties that are identified in a contract but are not themselves contracting parties).

We will address each of these briefly in turn.

DEVELOPMENTS TO BENEFIT PARTIES IN ARBITRATIONS

Emergency Arbitrations

The purpose of an emergency arbitration is to enable a party to an arbitration agreement to obtain urgent interim relief in the period before the main arbitral tribunal is constituted – without having to have recourse to national courts.

In essence, a party can, pending the appointment of the main arbitral tribunal, apply for an emergency arbitrator to be appointed solely to deal with its urgent application for interim relief. The emergency arbitrator appointed cannot deal with any substantive issues and cannot sit as a member of the main arbitral tribunal. The emergency arbitrator therefore only has jurisdiction to deal with the relevant urgent application for interim relief. Further, the main tribunal can, once it is constituted, vary or discharge any decision made by the emergency arbitrator.

The system of emergency arbitration has been a welcome addition to the international arbitration tool kit. It has, however, been somewhat weakened in many jurisdictions by problems with the enforceability of decisions rendered by an emergency arbitrator. The problems that have been encountered are that the courts in some jurisdictions have been unable or unwilling to enforce an emergency arbitration decision on the grounds that it does not constitute a 'final and binding' arbitral award.

This problem has been solved in Hong Kong as the Arbitration Ordinance has been amended (by Sections 22A-B) to provide that a decision of an emergency arbitrator in relation to interim relief shall be enforceable by the Hong Kong courts to provide that a decision of an emergency arbitrator in relation to interim relief shall be enforceable by the Hong Kong courts with leave in the same way an order or direction of the court having the same effect does. If leave is granted, the Hong Kong courts can enter a judgment in terms of the emergency relief granted.

Emergency relief granted by an emergency arbitrator can be enforced under this mechanism irrespective of whether it was granted in or outside Hong Kong. Two statutory conditions must, however, be satisfied. The first is that the emergency arbitrator must have been appointed under emergency arbitration rules agreed to or adopted by the parties. The second is that the relief granted must consist of temporary measures (including an injunction) by which the emergency arbitrator orders a party to do one or more of the following:

> (a) maintain or restore the status quo pending the determination of the dispute concerned;
>
> (b) 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;
>
> (c) provide a means of preserving assets out of which a subsequent award made by an arbitral tribunal may be satisfied;
>
> (d) preserve evidence that may be relevant and material to resolving the dispute;
>
> (e) give security in connection with anything to be done under paragraph (a), (b), (c) or (d);
>
> (f) give security for the costs of the arbitration.

This mechanism for the enforcement of emergency arbitration decisions fills a lacuna that exists in many other jurisdictions.

Separate from this legislative development, it is also worth noting that both CIETAC Hong Kong[1] and the HKIAC have introduced emergency arbitration procedures into their arbitration rules.

The HKIAC emergency arbitration procedure (see Schedule 4 of the HIKIAC Rules) provides for an emergency arbitrator to be appointed within two days of a request being made, and for the emergency arbitrator to render his or her decision (including costs) within a further 15 days. Importantly, a party requesting an emergency arbitrator must commence the main arbitration before or at the same time as requesting the emergency appointment.

The details of this HKIAC emergency arbitration procedure are beyond the scope of this brief summary. However, two points are worth highlighting. The first is that the emergency arbitration procedure applies to all arbitrations under the HKIAC Rules irrespective of whether the relevant arbitration agreement pre or post-dates the inclusion of the emergency arbitration procedure in the Rules.[2] The second is that the HKIAC Rules expressly provide that the emergency arbitrator can continue to render a decision on emergency relief even if the main tribunal is constituted part way through the emergency arbitration procedure. This contrasts with the position under certain other sets of rules, where the emergency arbitrator is rendered functus officio as soon as the main tribunal is constituted. The HKIAC approach has significant merit as it prevents time and costs being wasted by allowing the emergency arbitration to be concluded rather than abandoned part way through. The main tribunal, however, will not be bound by the emergency decision and can vary or discharge it.

Consultation Regarding Third-party Funding Of Arbitrations In Hong Kong

The Hong Kong Law Reform commission published a report in October 2015 recommending that legislative changes be enacted to permit third-party funding of arbitrations. This is a welcome development given that the funding costs of the arbitral process impose significant financial burdens on parties.

Hong Kong, as a common law jurisdiction, has a legal infrastructure that imposes restrictions on the extent to which third parties can currently fund legal proceedings. There has, however, over the past decade, been a movement towards some degree of liberalisation of these restrictions.

The Hong Kong Court of Final Appeal in a unanimous decision in Unruh v Seeberger-[3] considered the modern application of the long-standing restrictions on 'champerty and maintenance'. The Court of Final Appeal concluded that the traditional legal policies underlying champerty and maintenance continue to apply but that they must be substantially qualified by other (more modern) considerations. The Court concluded that restrictions on champerty and maintenance still apply in Hong Kong (in order to protect the integrity of the legal process) but had shrunk in application.

Importantly, the application of champerty and maintenance in Hong Kong arbitrations, and therefore the permissibility of third-party funding of arbitrations, was expressly left open by the court in Unruh.

The restrictions on third-party funding potentially deny access to justice in some cases and appear hard to justify in the modern international arbitration and business environments. A wider and more flexible approach to funding and financing would benefit some potential parties.

On the other hand, it is important also to recognise that third-party funding of arbitration does raise serious and legitimate concerns in relation to both ethical conduct, and also the potential implications for the other party to the arbitration. Significant care, therefore, needs to be taken when permitting third-party funding in order to ensure that it is structured in a way that delivers benefits but does not erode ethical standards and confidence in the underlying system of arbitration.

The Hong Kong Law Reform Commission has therefore launched a public consultation exercise to consider, among other things, whether third-party funding should be permitted in arbitration and, if so, whether corresponding ethical and financial standards should be introduced. The consultation also addresses issues such as extra-territorial effect, privilege and adverse costs orders against the funders.

The consultation paper contains not only a useful analysis of the relevant considerations for Hong Kong but also of practices in other jurisdictions (including England and Wales, Australia, France, Germany, the United States, China and Singapore).

The consultation is likely to lead to constructive changes in funding arbitrations, which in turn ought, to an extent, to facilitate greater use of arbitration in some circumstances, and ease the burden on some parties.

DEVELOPMENTS TO BENEFIT THE CONSTRUCTION SECTOR IN HONG KONG

The Introduction Of The NEC Contract

The NEC 3 family of contracts represent a radically different approach to contracting and managing projects from the traditional model adopted in Hong Kong. It is beyond the scope of this article to review the differences in detail but they represent a fundamental shift in the approach to the allocation and management of risk.

As was highlighted above, Hong Kong has traditionally taken an adversarial approach to risk by using contracts in which employers offload risk by allocating it to the main contractor and consultants without reference to who is best able either to manage or bear the risks concerned. This has tended to promote an inefficient procurement regime, and a claims culture.

The NEC 3 contracts, on the other hand, take a much more nuanced and balanced approach to both risk allocation and management. A greater level of risk is accepted by employers than has been the norm in Hong Kong. This does not, however, mean that risk has simply been transferred back to employers from other parties. Instead, risk and reward are shared in a sophisticated manner that seeks to promote its effective management, and that gives incentives to all concerned to deliver the project on time and in budget.

It is also important to note that NEC contracts do not simply represent a 'contractual' shift in approach to risk and reward but also require a radically different approach to construction and project management. The emphasis is on early identification of potential problems and a collegiate approach to management and problem solving. NEC contracts must be managed and administered in a very different way from more traditional contracts. NEC contracts have proved successful in many jurisdictions, although they are not, of course, a panacea for all ills and a great deal depends upon how they are actually implemented in each individual project.

The NEC3 forms involve a three-tiered dispute resolution system. Disputes are first referred to a DRA. The second tier can involve either a voluntary mediation or adjudication and the third tier is arbitration.

The Hong Kong government trialled NEC 3 contracts on a number of projects (including a HK$2 billion community hospital project at Tin Shui Wah). Following the trials, the Hong Kong government has announced that it will use NEC 3 for all contracts tendered and let in 2015/2016. Two other important employers have also been trialling it in Hong Kong – the Hong Kong Jockey Club and China Light & Power.

It should be noted that the use of adjudication in Hong Kong NEC 3 contracts is very much in its infancy and the adjudication provisions have sometimes been deleted. This is because there has not been the legal infrastructure or skilled resources to implement contractual adjudication effectively or on a wide-scale basis. That, however, is starting to change as bodies in Hong Kong have started to introduce a training and qualification regime for adjudicators.

It is not yet clear whether the introduction of NEC contracts will, by itself, jumpstart a significant movement towards adjudication in Hong Kong. On balance, however, it is relatively unlikely to do so as there is currently no tailored legal structure for the enforcement of adjudication decisions in Hong Kong. As a result, the enforcement of adjudication decisions is ultimately a matter of contract. In this sense adjudication can be considered to be akin to agreeing to have a dispute determined by way of 'expert determination'. The courts will generally give effect to these forms of dispute resolution agreements provided that they are properly drafted.

In the absence of security for payment legislation (as to which, see below), it seems likely that the uptake of contractually agreed adjudication will remain low. As such, the dispute resolution mechanisms in NEC contracts are not likely by themselves to have any significant impact upon dispute resolution methods in Hong Kong.

The extent to which NEC contracts impact upon the number and type of construction disputes reaching arbitration is likely instead to depend, in large measure, on how effective those involved with individual projects are. If, the project participants implement NEC contracts effectively, it should reduce the number of disputes but one of the biggest risks for those involved in an NEC 3 project is an assumption that they can carry on with a 'business as normal' approach.

Forthcoming Security For Payment Legislation

The Hong Kong government is committed to introducing security for payment legislation for the construction industry in the reasonably foreseeable future. As a part of the preparation for this, government has recently undertaken a public consultation exercise on the basis of a suggested outline scheme.

The primary objective of the proposed legislation is to make sure that cash starts to flow properly down the supply chain during a project, and is not held onto by those towards the top of the chain. Typically, employers tend to be, at best, slow to pay main contractors throughout the project, and main contractors, as a result, tend then to hold onto their cash and to be very slow in paying their sub-contractors, and so on. In general terms, the lower down the supply chain a contractor is, the greater the cash flow problems experienced.

The outline scheme proposed by government for the consultation exercise last year suggested a compulsory statutory scheme for both public and private sector procurement (although small value private sector contracts would be exempt).

The key ingredients of the suggested scheme included compulsory provisions that:

- require interim payments to be made within 60 days and final payments within 120 days;
- provide a right for parties to suspend work if they are not paid;
- prohibit 'pay when paid' provisions; and
- introduce a statutory adjudication scheme for disputes prior to completion of the project that concern payment, value of works, or extensions of time, under which the adjudicator's decision would be binding unless challenged in an arbitration after completion of the works.

The results of the public consultation are not yet known but it is anticipated that draft legislation will be prepared and enacted by government.

Until the scope and details of the final proposed scheme are known, it is difficult to assess what impact the security for payment scheme will have on dispute resolution within the construction industry.

The experience in some other jurisdictions, however, is that statutory adjudication can reduce significantly the volume of disputes that proceed to arbitration post completion of the works. This has been particularly the case in jurisdictions such and England and Wales where the security for payment legislation is widely drafted and strictly enforced by the courts.

It is therefore possible that Hong Kong may ultimately see a reduction in construction arbitration in a few years' time, once security for payment legislation has been implemented. At this stage, however, no draft Ordinance has yet been tabled.

GENERAL DEVELOPMENTS THAT IMPACT THE HONG KONG CONSTRUCTION INDUSTRY

The Hong Kong Competition Ordinance

The Hong Kong Competition Ordinance has now come into force and will have a significant impact on business in the construction industry.

The Hong Kong Competition Commission has identified four types of arrangements that it considers to be serious examples of anti-competitive behaviour:

- fixing prices with competitors;
- restricting output of goods or service with competitors;
- sharing markets, territories or customer with competitors; and
- rigging bids with competitors.

It should be stressed, however, that these are highlighted examples only, and that the Ordinance outlaws anti-competitive conduct in a wider manner.

Participants in the construction industry will need to pay particular attention to pre-bid and tendering arrangements.

Special care will also need to be given where (as is common in Hong Kong for many legitimate reasons) two or more separate contractors wish to bid for a project on a cooperative joint venture basis. Joint ventures of this type are less likely to fall foul of the Competition Ordnance if the parties can demonstrate that a joint venture is needed either because the individual companies would not be able to undertake the project by themselves or because of the scale and nature of the project itself.

Third Parties Contract Ordinance

The Contracts (Rights of Third Parties) Ordinance came into effect on 1 January 2016. It impacts upon the common law doctrine of privity of contract.

In outline, the Ordinance creates a statutory right for a third party, who is not a party to the contract but is adequately identified in the contract by name or description or class, to enforce obligations in the contract provided that the contract contains either (i) an express term to that effect, or (ii) a term that purports to confer a benefit on the third party unless the contracting parties, on a proper construction, did not intend for the third party to have the right to enforce.

The Ordinance also gives a third party, who has an enforceable third-party obligation, the right to bring arbitration proceedings where the relevant contract contains an arbitration agreement. The resulting arbitration award will be enforceable in Hong Kong but may not necessarily be enforceable internationally (where enforcement may be restricted to parties who are signatories to the arbitration agreement).

The Ordinance does not, however, apply either to contracts entered into prior to January this year or to contracts that include a provision opting out of the Ordinance. It is therefore doubtful whether this legislation will have much effect, as it is likely that construction employers will simply 'opt out' to avoid claims being brought against them by, for example, sub-contractors.

RECENT HONG KONG JUDGMENTS RELATED TO CONSTRUCTION ARBITRATION

The Enforcement Of Arbitration Awards And Arbitration Agreements

In KB v S,[4] the court outlined the approach adopted in Hong Kong towards enforcement of arbitration awards and arbitration agreements by reference to 10 principles:

- The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.
- Under the Arbitration Ordinance (the Ordinance), the court should interfere in the arbitration of the dispute only as expressly provided for in the Ordinance.
- Subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how their dispute should be resolved.
- Enforcement of arbitral awards should be 'almost a matter of administrative procedure' and the courts should be 'as mechanistic as possible'.
- The courts are prepared to enforce awards except where complaints of substance can be made good. The party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way.
-

In dealing with applications to set aside an arbitral award, or to refuse enforcement of an award, whether on the ground of not having been given notice of the arbitral proceedings, inability to present one's case, or that the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, the court is concerned with the structural integrity of the arbitration proceedings. In this regard, the conduct complained of 'must be serious, even egregious', before the court would find that there was an error sufficiently serious so as to have undermined due process.

- In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction.
- Failure to make prompt objection to the tribunal or the supervisory court may constitute estoppel or want of bona fides.
- Even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground.
- ...parties to the arbitration have a duty of good faith, or to act bona fide.

Indemnity Costs Ordered Against Unsuccessful Parties In Attacks On Arbitrations

The usual practice of the Hong Kong courts is now to award costs on an indemnity basis (in effect requiring the loser to pay a higher percentage of the winner's costs) where a party unsuccessfully resists enforcement of an arbitration award (see KB v S above) or a stay to arbitration (see, Bluegold Investment Holdings Ltd v Kwan Chun Fun Calvin).[5]

Constitutional Challenge To The Ordinance Rejected

The court in Wing Bo Building Construction Company Limited v Discreet Limited[6] has recently rejected a constitutional challenge to the provisions in the Ordinance that prevent appeals from arbitration awards. The plaintiff in that case argued that section 20(8) of the Ordinance (which adopts article 8 of the UNCITRAL Model Law) was incompatible with the Basic Law, Hong Kong's constitutional document. The court rejected the argument and upheld the constitutionality of section 20(8). This decision comes just three months after the Court of Appeal rejected a similar constitutional challenge to Section 81(4), China International Fund Limited v Dennis Lau & Ng Chun Man Architects & Engineers (HK) Limited v Secretary for Justice,[7] and affirms that Hong Kong's arbitration regime is constitutionally sound.

Grant Of An Anti-suit Injunction By Hong Kong Courts

Section 45(2) of the Ordinance gives the Hong Kong courts the power to grant an interim measure in relation to any arbitral proceedings that have been commenced either in or outside Hong Kong.

In Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi,[8] the Hong Kong courts granted an anti-suit injunction to restrain a party from pursuing Turkish court proceedings in breach of an arbitration clause.

CONCLUSION

Hong Kong remains a major and world class centre for both arbitration generally, and construction arbitration in particular. The legal infrastructure for arbitration and also for the construction industry remains robust and investment in it is continuing. Whatever the

wider political issues, rule of law remains intact and both the courts and arbitrators remain independent, impartial and neutral.

The emphasis of recent developments affecting arbitration in Hong Kong has been on: further reinforcing the integrity of arbitration system (by stressing the enforceability of both arbitration agreements and awards); and ensuring that the arbitral system remains at the cutting edge (by, for example, introducing enforcement of emergency arbitration decisions, and a public consultation on permitting third-party funding of arbitrations).

In terms of construction disputes, arbitration remains the primary system for dispute resolution and that is unlikely to change in the next couple of years. Recent developments are primarily aimed at: changing the approach to risk allocation and management (through, for example, the introduction of the NEC 3 contract); and dispute avoidance or reduction techniques (such as the future introduction of security for payment legislation). These developments will hopefully lead to fewer and more contained construction disputes in the future. It will, however, take time to see if this eventuates.

Overall, one can expect to see the current trends continuing over the foreseeable future.

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Endnotes

KING&WOOD MALLESONS

18th Floor, East Tower, World Financial Center, 1 Dongsanhuan Zhonglu Chaoyang District
Beijing 100020, China

Tel: +86 10 5878 5588

http://www.kwm.com

Arbitration in Asia

Karam Hiroo Advani, **Kelvin Poon**, **Daryl Larry Sim** and **Andre Yeap SC**
Rajah & Tann Singapore

Summary

In recent years, there has been a concerted effort by jurisdictions in Asia to introduce and refine their arbitration frameworks. Not only have many court judgments continued to approach international commercial arbitration in a harmonised manner but some jurisdictions have also overhauled their arbitration laws to be more in keeping with international standards. For example:

- Myanmar, pursuant to its obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), enacted the Arbitration Act on 5 January 2016; and
- India updated its arbitration framework by enacting the Arbitration and Conciliation (Amendment) Ordinance 2015.

Below we will look at the recent changes to the Myanmar and Indian arbitration laws and briefly comment on their impact. In addition, we will analyse various court judgments across the region and comment on the general willingness to approach international commercial arbitration in a harmonised manner.

MYANMAR'S NEW ARBITRATION ACT

Myanmar became a signatory to the New York Convention in April 2013 and this was generally seen as one of many welcome steps towards encouraging investment into the country. Since that time, the Myanmar government released a draft Arbitration Bill in 2014 which more or less mirrored the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). However, the draft Arbitration Bill was subjected to further reviews by the Myanmar parliament which effectively delayed its enactment into domestic law. Nevertheless, after various changes were made to the original draft Arbitration Bill, the Myanmar parliament enacted the Arbitration Act on 5 January 2016.

Through its enactment, the AA replaced the antiquated Arbitration Act 1944 and the Arbitration (Protocol and Convention) Act 1937 (in relation to foreign awards). The AA aims to provide the overarching framework for all arbitrations concerning Myanmar and therefore governs both domestic and international arbitration as well as the recognition and enforcement of awards (both foreign and domestic).

Like the previous draft Arbitration Bill 2014, the AA is primarily based on the Model Law. Accordingly, among other things, the AA: requires an arbitration agreement to be 'in writing';[1] recognises the doctrine of severability of an arbitration agreement;[2] provides that the arbitral tribunal may rule on its own jurisdiction;[3] permits the arbitral tribunal to make interim orders;[4] and permits, in certain instances, for the court to assist with the taking of evidence.[5]

Nevertheless, there are still some slight differences between the AA and the Model Law. For example, the default number of arbitrators is one[6] (three under the Model Law); and, unless otherwise agreed by the parties, the arbitral tribunal shall specify the party entitled to costs, the party who shall pay the costs, the amount of costs or the method of determining costs and the manner in which costs shall be paid.[7]

In line with arbitration frameworks in other Asian jurisdictions, the AA provides flexibility to parties when determining the procedural framework of the arbitration. Nevertheless, the AA does impose a few mandatory provisions which are primarily aimed at maintaining the integrity of the arbitration. Accordingly, the AA requires disclosure by arbitrators of any

circumstances likely to give rise to justifiable doubts as to his impartiality or independence[8] and all parties shall be treated with equality and provided a full opportunity to present his case.[9]

Consistent with the approach in other Model Law jurisdictions, the AA provides for different levels of court supervision depending on the nature of the arbitration. For international arbitrations seated overseas, the Myanmar courts may hear appeals on: a lower court's decision not to refer parties to arbitration; whether a court ordered interim order (arising from the arbitration) should be granted; and whether the foreign award should be enforced in Myanmar.[10]

For domestic arbitrations, in addition to the above, the Myanmar courts may also hear appeals on, among other things, any legal issue arising out of the arbitral award[11] and on the arbitral tribunal's decision on its jurisdiction.[12]

The AA recognises foreign awards rendered in other New York Convention jurisdictions[13] and, provided such foreign award is enforced in Myanmar, it is deemed to be a decree of the Myanmar courts. In order to enforce a foreign award, the party must provide:

- the original award (or copy), duly authenticated in the manner required by the law of the country in which it was made;
- the original arbitration agreement (or a duly certified copy); and
- such evidence as may be necessary to prove that the award is a foreign award.[14]

A foreign award may only be refused to be enforced in Myanmar pursuant to one of the following grounds:

- The parties to agreement are under some incapacity under the law applicable to them.
- The arbitration agreement is not valid under the law to which the parties have subjected to it or failing any indication thereon under the law of Myanmar.
- The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case.
- The arbitral award is made by the arbitral tribunal without following the rules of the arbitration or the arbitral award is made in breach of the rules of the arbitration or the award contains decisions on matters that are not relevant to the arbitration. However, if the part of the award not within the scope of the arbitration can be separated from the rest of the award, the court may set aside only part of the award that is not relevant.
- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.
- The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
- The subject matter of the dispute is not capable of settlement by arbitration under the law of the Republic of the Union of Myanmar.
- The enforcement of the award would be contrary to the national interests of Myanmar.

While the enactment of the AA is a welcome step, bringing Myanmar's arbitration framework in step with other New York Convention jurisdictions, it remains to be seen how the Myanmar court will interpret the AA. No doubt, especially in the context of enforcing foreign awards, investors will be eager to see whether the Myanmar courts will adopt a more passive approach (akin to Singapore and Hong Kong) or whether they will adopt a more interventionist approach.

INDIA'S RECENT AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT

On 23 October 2015, the Indian parliament enacted the much awaited Arbitration and Conciliation (Amendment) Ordinance 2015 (the Amendment Ordinance), which amended the Arbitration and Conciliation Act 1996 (ACA). Among other things, the Amendment Ordinance effectively reversed a string of Indian case law and in doing so, brought India's arbitration framework in line with international standards. Some of these changes will be discussed below.

The Amendment Ordinance expands the definition of an arbitration agreement to include communications through electronic means.[15] On the other hand, the definition of an 'international commercial arbitration' was narrowed. Previously, if one of the parties was 'a company or an association or a body of individuals whose central management and control is exercised in any country other than India'[16] the arbitration would be considered an 'international arbitration'.[17] However, the Amendment Ordinance amended this definition such that this no longer applies to companies and only pertains to associations and bodies of individuals. Accordingly, if a party is a company and is managed or controlled offshore, this would not, in and of itself, lead to the arbitration being classified as an 'international arbitration'.

In addition, the Amendment Ordinance provides that provisions relating to interim measures and assistance from the court in taking evidence shall apply even to arbitrations not seated in India, unless expressly excluded by the parties.[18] This amendment possibly sought to reverse previous Indian judgments which may have confined the scope of the court's powers to Indian seated arbitrations.

The Amendment Ordinance also expands on the provisions concerning the appointment of and grounds for challenging an arbitrator.[19] While the general principle that an arbitrator should be independent and impartial remains, the Amendment Ordinance provides a list of 34 scenarios that may give rise to a justifiable doubt as to the independence and impartiality of an arbitrator.[20] In addition, the Amendment Ordinance also provides a list of 19 instances where a person must not be appointed as an arbitrator, notwithstanding any agreement made by the parties prior to the dispute. For example, a person must not act as an arbitrator if such person was an employee, consultant, adviser or has had any other past or present business relationship with a party. This falls into line with the IBA guidelines and should be viewed as a major step forward.

While the ACA provides that an award may be refused to be enforced if it is in conflict with the public policy of India,[21] the Amendment Ordinance has now inserted 'Explanation 1' into the ACA, which has the effect of confining the application of a conflict of public policy to three grounds. More specifically, Explanation 1 relevantly provides that:

> For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-
>
> (i) the making of the award was induced or affected by fraud or corruption…; or
>
> (ii) it is in contravention with the fundamental policy of Indian law; or
>
> (iii) it is in conflict with the most basic notions of morality or justice.[22]

Moreover, the Amendment Ordinance makes it clear that in determining whether any of these three circumstances are met, the court shall not look into the merits of the dispute.[23] In addition, for domestic arbitrations, the award may be set aside if, on the face of the award, it is patently illegal (not being an erroneous application of the law or by re-appreciation of evidence).

Notwithstanding the general acceptance of most of amendments in the Amendment Ordinance, it is not bereft of controversy. Specifically, the Amendment Ordinance provides that arbitrations must be completed within 12 months from the date the arbitral tribunal enters upon the reference (ie, the date all arbitrators have received notice of appointment), extendable for a further six months by agreement of the parties.[24] If an award is not made within such time, the mandate of the arbitrator shall terminate unless the Indian court has extended the period of time to render an award. While the length of an international arbitration is highly dependent on the peculiarities of the matter, it is not uncommon for international arbitrations to require more than 12–18 months from the appointment of arbitrators to the rendering of an award. It therefore remains to be seen how this new amendment will play out in practice. More importantly, it will be interesting to see whether parties resolving their disputes through arbitration in India will view this requirement as a positive attempt to spur prompt resolutions of disputes or as a burden, necessitating numerous court applications for an extension of time.

In addition to the above, ambiguities and unresolved issues still remain. These include:

- whether the number of times an arbitrator has appeared in arbitration proceedings before the same party may be a ground of challenging the appointment of such arbitrator;
- an emergency arbitration scheme has not been implemented;
- the absence of a distinction between the 'seat' and 'venue' of an arbitration;
- despite recommendations in the Indian Law Commission Report, the Amendment Ordinance did not amend the ACA to expressly state that issues of fraud are arbitrable – thereby leaving the issue of arbitrability of fraud open to the Indian courts; and
- despite recommendations in the Indian Law Commission Report, no time limits were imposed on Indian courts when deciding challenges to the enforcement of foreign arbitral awards.

CONTINUING HARMONISATION OF INTERNATIONAL ARBITRATION IN ASIA

From Australia to Singapore to Hong Kong, jurisdictions in Asia continue to harmonise their approach to international commercial arbitration. This continuing development is

encouraging for the growth of international commercial arbitration and provides an element of certainty for parties doing business across Asia.

We now look at a few court decisions from Australia, Malaysia, New Zealand, Singapore and Hong Kong and how these jurisdictions continue to adopt an international approach to arbitration.

Australia

Robotunits Pty Ltd v Mennel[25] is an insightful case in which the Victorian Supreme Court expressly reaffirmed the principle of 'international harmony' in international commercial arbitration. This case concerned a 'pathological' arbitration agreement which referred to a non-existent set of arbitration rules. In determining whether the court proceedings should be stayed and the dispute referred to arbitration (notwithstanding the pathological arbitration agreement), the Victorian Supreme Court cited with approval the Federal Court Decision of TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd:[26]

> [I]t is not only appropriate, but essential, to pay due regard to the reasoned decisions of other countries where their laws are either based on, or take their content from, international conventions or instruments such as the New York Convention and the Model Law. It is of the first importance to attempt to create or maintain, as far as the language employed by parliament in the ... [Act] permits, a degree of international harmony and concordance of approach to international commercial arbitration. This is especially so by reference to the reasoned judgments of common law countries in the region, such as Singapore, Hong Kong and New Zealand.[27]

The court then referred to the Singapore Court of Appeal's decision in AKN v ALC[28] which relevantly affirmed the policy of 'minimal curial intervention' in arbitration. Ultimately, the court, applying the policy of minimal curial intervention, ordered a stay of the court proceedings and referred the elements of the dispute caught by the arbitration agreement to be referred to arbitration. With regard to the relevant seat and rules of the arbitration, the court ordered parties to come to an agreement on these matters within 28 days, failing which a party could apply to the court for a decision.

Malaysia

The case of The Government of India v Cairn Energy India Pty Ltd & Ors[29] concerned, among other things, the ambit of 'public policy' in determining whether the court should resist enforcement of an arbitral award on public policy grounds. The Malaysian court, after referring to a string of international judgments in New Zealand, Singapore and Hong Kong, specifically cited the Singapore Court of Appeal decision in PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA[30] that affirmed a narrow approach:

> In discussing the term 'public policy', it was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice.

After examining the approach in other jurisdictions, the Malaysian court concluded that the 'same concepts of public policy prevail [in Malaysia]'.

New Zealand

Kyburn Investments Limited v Beca Corporate Holdings Limited[31] concerned whether an arbitral award should be set aside on the grounds of a breach of natural justice. In this case, the appellant argued that there was a breach of natural justice as the arbitrator had inspected the premises in the presence of only the respondent.

As the New Zealand Court of Appeal agreed that the arbitrator had breached of the rules of natural justice, it went on to address the question of 'whether there is an onus on a party complaining of a breach of natural justice to make out that its consequences are sufficiently material to warrant setting aside an award'.[32]

After analysing the case law in other jurisdictions (including Australia and Hong Kong), the New Zealand Court of Appeal held that:

> Cases in jurisdictions applying the Model Law do not support the existence of an onus. Instead the materiality of the breach and possible effect on the outcome are treated as relevant factors.[33]

The New Zealand Court of Appeal ultimately followed this approach and found that, 'while the arbitrator's breach of the rules of natural justice was significant, the risk that something was said by [the respondent during the inspection] to the arbitrator did not…. have any material effect on the outcome of the rent review arbitration.'[34] In support of its conclusion that the inspection had no material effect, the New Zealand Court of Appeal provided the following bases:

- the award correctly recorded the well-established legal principles the arbitrator intended to follow;
- the award was principally based on the arbitrator's evaluation of the expert valuation evidence;
- the award made no reference to the inspection in question or any information provided by the respondent during the inspection;
- the award contained an accurate physical description of the premises; and
- the award contained no error and was otherwise an unexceptional rent review award.

Hong Kong

The Hong Kong case of S Co v B Co[35] concerned the setting aside of an arbitral award on the grounds that, among other things, the tribunal did not have jurisdiction. Prior to being able to determine this point, the Hong Kong High Court needed to determine the standard of review for a jurisdictional challenge, specifically whether the review could be heard de novo (ie, a fresh review of the case). In deciding this point, the court reviewed commentaries and case law from other New York Convention countries including Singapore, Canada and the United Kingdom. In particular, the court cited, with approval,[36] the following passage from the Singapore case of PT Tugu Pratama Indonesia v Magma Nusantara Ltd:[37]

> Accordingly, the court makes an independent determination on the issue of jurisdiction and is not constrained in any way by the findings or the reasoning

> of the tribunal. In the same way, parties are not limited to rehearsing before the court the contentions put before the tribunal but are entitled to put forward new arguments on the issue and the court is entitled to consider these.[38]

Ultimately, the Hong Court High Court ruled that it was permitted to hear the plaintiff's jurisdictional challenge de novo, including on points not previously raised before the tribunal.

Singapore

Firstlink Investments Corp Ltd v GT Payment Pte Ltd and others[39] concerned a dispute over the payment of money into an online payment account. The plaintiff commenced proceedings in the Singapore High Court and the defendant argued that the court proceedings should be stayed and referred to arbitration pursuant to an arbitration agreement between the plaintiff and defendant. In response, the plaintiff argued that the arbitration agreement was invalid on the grounds that it was null and void, inoperative or incapable of being performed.

In order to decide whether to stay proceedings, the Singapore High Court had to determine the applicable standard in determining the validity of an international arbitration agreement. Ultimately, the court reaffirmed the prevailing policy that an applicant for a stay of court proceedings only needed to show, on a prima facie basis, that an arbitration agreement existed. In coming to this conclusion, the Singapore High Court referred to a number of common law and Model Law jurisdictions, including Hong Kong, all of which supported a 'pro-arbitration' approach. Given the low threshold requirements needed to show an existence of an arbitration agreement, the Singapore High Court ordered a stay of proceedings and referred the dispute to arbitration.

Another important case was the Singapore Court of Appeal's judgment in AKN and another v ALC and other and other appeals (AKN).[40] AKN concerned the consequences arising from the partial setting aside of an arbitral award,[41] including whether the original tribunal retained jurisdiction to make a fresh determination or award in respect of the matters that had been set aside.

Firstly, the Singapore Court of Appeal held that under the Singapore International Arbitration Act (IAA) the power to remit an award back to the original tribunal operates as an alternative to setting aside an award. As such, if a court decides to set aside an award, the court will not have the power to then remit matters arising from the award (which had been set aside) back to the original tribunal.

Secondly, once a tribunal has rendered its award, it generally has no further mandate or jurisdiction. However, the tribunal may be conferred fresh or further jurisdiction but only pursuant to an order of the court. In coming to this conclusion, the Singapore Court of Appeal referred to the following extract from the Australian case of Mark Blake Builders Pty Ltd v Davis:[42]

> Thus in the end the extent of the arbitrator's jurisdiction turns upon the Court's order – to what extent was the arbitrator's jurisdiction expressly or impliedly revived? … Depending on the terms of the order, it may be necessary to look to the court's reasons in order to decide the extent of revival … But the arbitrator does not have jurisdiction going beyond what is necessary to give effect to the order of the court.

In the present case, as the award had been partially set aside, the Singapore Court of Appeal did not have the power, and therefore could not make an order, to remit the matters set aside back to the original tribunal (see the first point above).

Thirdly, where a matter arising from an award has been set aside, a party may commence fresh proceedings before a new tribunal for such matter, subject to the principle of res judicata.[43] In the present case, as the tribunal had rejected the appellant's case for loss of profits, the appellant could not start fresh proceedings on the issue of damages. However, as the tribunal did not consider the appellant's 'lost land' claim, the appellant was permitted, if it wished, to commence fresh proceedings under a new tribunal for its lost land claim.

CONCLUSION

The recent updates to Myanmar and India's arbitration laws and the continued push by jurisdictions in Asia to harmonise their approach to international arbitration will no doubt increase the attractiveness of arbitration in Asia. With the continued growth of arbitration in Asia, it is envisaged that the Asia-Pacific jurisdictions will continue to play a leading role in the growth and harmonisation of arbitration law and practice.

Endnotes

RAJAH & TANN
Singapore

https://www.rajahtannasia.com/

China

Ning Fei and **Shengchang Wang**
Beijing Hui Zhong Law Firm

Summary

In the past year, the economic downturn has not necessarily led to a decreased use of arbitration in China. On the contrary, the number of arbitration cases and amounts in dispute soared to a new record. In response to the demand for arbitration services, China's arbitration institutions worked quickly towards institutionalising their respective networks by expanding branches or establishing cooperative relationships with their counterparts. For example, in 2015, the China International Economic and Trade Arbitration Commission (CIETAC) set up three sub-commissions in the Zhejiang, Hubei and Fujian provinces, and two arbitration centres in the Guangdong pilot and Tianjin free trade zones. The Shanghai International Economic and Trade Arbitration Commission (SHIAC) entered into a cooperation agreement with the Arbitration Foundation of Southern Africa, the Association of Arbitrators Southern Africa and Africa ADR, and in November 2015 they set up the China-Africa Joint Arbitration Centre Shanghai (CAJAC Shanghai) and the China-Africa Joint Arbitration Centre Johannesburg (CAJAC Johannesburg). In October 2015, SHIAC also launched the BRICS Dispute Resolution Centre Shanghai, the first institution dedicated to business, trade and investment dispute settlement in BRICS countries. The South China International Economic and Trade Arbitration Commission (SCIA) reinforced its Arbitration Center in the Guangdong Pilot free trade zone, and commenced a substantial revision of its arbitration rules aimed at bringing SCIA arbitration closer to the universally accepted standard.

Foreign arbitration institutions are now allowed to enter the Shanghai Pilot Free Trade Zone to set up representative offices. Comfortingly, the Supreme People's Court (SPC) finally settled the long-pending dispute over jurisdictional issues arising from the split of CIETAC. Progress has also been made by the Chinese arbitration institutions and courts of law to better serve or aid arbitration.

CASELOADS OF CHINESE ARBITRATION INSTITUTIONS

In March 2016, the Law Office of the State Council released arbitration statistics for 2015.[1] The statistics shows that the total number of new arbitration cases accepted by 244 arbitration commissions in Mainland China in 2015 reached 136,924, an increase of 20 per cent compared with 2014, and the disputed amount totalled 411 billion renminbi, representing a sharp rise of 55 per cent compared with 2014.

In 2015, CIETAC hit its highest caseload record. According to the statistics released on CIETAC's official website,[2] CIETAC accepted 1,968 arbitration cases in 2015, including 437 foreign-related cases and 1,531 domestic cases. The 2015 caseload represents a 22 per cent increase (by 358 cases) from 2014. The total amount claimed in all cases accepted by CIETAC in 2015 reached 42.5 billion renminbi, which represents an increase of 12.5 per cent from 2014. The parties involved came from 57 countries and regions. In 2015, CIETAC administrated arbitration primarily under its own rules, but there were 16 arbitration cases under the auspice of other rules, including UNCITRAL Rules. The number of international cases where both parties came from outside mainland China is 40.

The Beijing Arbitration Commission (BAC) took cognisance of 2,944 cases in 2015, an increase by 44.2 per cent in terms of newly accepted cases compared to 2014. Of the 2,944 cases, 52 cases are international, corresponding to 1.77 per cent of BAC's total case number. The total amount claimed in all cases accepted by the BAC in 2015 reached 41.11 billion renminbi, which represents a remarkable increase by 157.9 per cent from 2014. In 2015, the BAC concluded 2,425 cases: 1,373 by award, 349 by successful conciliation and 700 by

withdrawal. The BAC maintained a good record where none of its arbitral awards were set aside by the competent people's court in Beijing, and only three arbitral awards were refused enforcement in the whole of 2015.

The statistics demonstrate that mainland China is still a rising and appealing venue for arbitration users doing business in China.

CIETAC GUIDELINES ON EVIDENCE TAKING IN ARBITRATION

In order to assist the parties, their counsels and arbitral tribunals in dealing with issues of evidence in arbitration proceedings, CIETAC adopts its Guidelines on Evidence (the Guidelines) in accordance with the Arbitration Law, the CIETAC Arbitration Rules, CIETAC's arbitration practice, and with appropriate reference to the IBA Rules on the Taking of Evidence in International Arbitration, as well as those of the Chinese principles of evidence in civil litigation that are suitable for use in arbitration. The Guidelines, passed by the CIETAC chairmen's meeting on 26 September 2014, came into effect on 1 March 2015.

The CIETAC Guidelines are not deemed an integral part of the CIETAC Arbitration Rules. 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 CIETAC Arbitration Rules and the Guidelines that the parties have agreed to adopt in a specific case, the tribunal shall apply the Guidelines. Parties may also agree that the tribunal and the parties will use these Guidelines for reference, and not in any binding capacity.

In general, the CIETAC Guidelines resemble the IBA Rules on the Taking of Evidence in International Arbitration in many respects. Both contain detailed provisions on the burden of proof, submission, the taking and exchange of evidence, and the examination and assessment of evidence, but the CIETAC Guidelines has its own salient features.

On Assumption Of The Burden Of Proof

The CIETAC Guidelines provide that each party shall bear the burden of proving the facts that it alleges. Specifically, the Guidelines set out a clear borderline under the following circumstances:

- Where there is a dispute over the fact of the formation or the coming into force of a contract, the party alleging the same shall bear the burden of proof; the party alleging the modification, rescission, termination or cancellation of a contract shall bear the burden of proving the facts giving rise to the change in the contractual relationship.
- Where there is a dispute over the fact of the performance of a contract, the party with the obligation of performance shall bear the burden of proof.
- The party claiming damages or other relief and the party rejecting such claims shall each bear the burden of proving the facts supporting their own claim. The party alleging that the amount of liquidated damages as provided for in the contract is lower or higher than the actual loss suffered shall bear the burden of proving its claim.

On The Production Of Documents

Traditionally, the arbitral tribunals of mainland China are reluctant to order the production of documents. However, the CIETAC Guidelines now expressly provide that a party may request that the tribunal order the other party to produce a specific document or a narrow and specific

category of documents. The requesting party shall state the reasons for its request, identify in sufficient detail the requested documents, and explain the relevance and materiality of the requested documents. The tribunal shall invite the other party to comment on the request to produce. Where the other party does not object to the request to produce, the relevant documents shall be produced in accordance with the request to produce. Where the other party objects, the tribunal shall decide whether or not to grant the request to produce.

Compared with the IBA Rules, the CIETAC Guidelines on production of document are relatively conservative. There is no broad scope of discovery as usually allowed in litigation in the common law jurisdiction, and the Chinese-style production must be specific and narrow. The tribunal retains discretionary power over whether to grant the request to produce or not. For instance, the tribunal may dismiss a request to produce for considerations of procedural economy, fairness or equality of the parties.

On Expert Opinions

The CIETAC Guidelines permit a party to submit an expert opinion on specific issues to support its claims. The tribunal may appoint one or more experts on its own initiative. Historically, Chinese tribunals take a liberal approach to accepting expert opinions, seldom asking the party-appointed expert to appear at hearing. Under the CIETAC Guidelines, the situation has been significantly changed.

A number of rules are formulated to regulate the conduct of an expert witness:

- A witness or an expert shall, in principle, appear in person at the hearing or by way of videoconferencing, and be questioned by the party who calls him or her (ie, direct examination) and by the opposing party (ie, cross-examination).
- The examination process shall be controlled by the tribunal, which shall ensure that each party has an opportunity to question the witness or the expert, and may limit the time for direct examination or cross-examination. The tribunal may decide that the expert's written opinion serves as an answer to the direct examination and proceed to cross-examination directly.
- The tribunal, after consultation with the parties, may arrange expert-conferencing or witness-conferencing.
- The tribunal may limit any questions raised by a party, or inform an expert that he or she is not required to respond to a specific question. The tribunal may put questions to an expert at any time.

The Guidelines are a mixture of civil law approach and common law approach; they are deemed useful tools and options for those concerned with evidence-taking in international arbitration in China.

THE SPC REPLY ON JURISDICTIONAL ISSUES AFTER THE SPLIT OF CIETAC

As noted previously, the unexpected split of CIETAC that took place in 2012 created a great deal of uncertainty with regard to jurisdictional allocation and determination. For over three years, CIETAC could not reach consensus with its former sub-commissions, SHIAC and SCIA, to offer the outside world a certain, practical and transparent solution package to calm the chaos on jurisdiction issues. The deadlock was eventually broken by the SPC.[3]

On 15 July 2015, the SPC issued a Notice of Reply to Questions raised by the Shanghai Municipal Higher People's Court et al relating to Judicial Review of Arbitral Awards involving the China International Economic and Trade Arbitration Commission and Its Former Sub-commissions (the SPC Reply). The SPC Reply became effective on 17 July 2015 and all lower people's courts should abide by it in their trial activities. In essence, it has four key points confirming the judicial position that the lower courts must take regarding the validity of arbitration agreements and potential challenges to arbitral awards in setting aside or enforcement proceedings.

First, the SPC Reply clarifies the principles of jurisdictional allocation among CIETAC, SHIAC and SCIA as follows:

- If an arbitration agreement referring to the 'CIETAC Shanghai Sub-Commission' or the 'South China Sub-Commission' was concluded before the former CIETAC sub-commissions renamed themselves as a result of the CIETAC split, then the newly formed SHIAC or SCIA will have jurisdiction over those disputes. The relevant dates of name change for SHIAC and SCIA are 8 April 2013 and 22 October 2012 respectively. If a party subsequently applies to court to invalidate the arbitration agreement, set aside the arbitral award or resist the enforcement of the arbitral award on the ground that SHIAC or SCIA has no jurisdiction, such application will not be supported.
- If the parties have entered into an arbitration agreement referring to the 'CIETAC Shanghai Sub-Commission' or the 'South China Sub-Commission' on the date of or after the name change, but before 17 July 2015, CIETAC will have jurisdiction over any disputes. However, if the claimant submits the disputes to SHIAC or the SCIA and the respondent does not raise any objection, the courts should not support a party's later application to set aside or resist enforcement of an arbitral award on the ground that the SCIA or SHIAC had no jurisdiction.
- If the parties have entered into an arbitration agreement referring to the 'CIETAC Shanghai Sub-Commission' or the 'South China Sub-Commission' on or after 17 July 2015, CIETAC will have jurisdiction over any disputes.

Second, the SPC Reply sets out exceptional rules that deviate from article 13.2 of the SPC Interpretation on Relevant Issues in Application of the Arbitration Law. Under the SPC Reply, even after CIETAC, SHIAC or the SCIA has confirmed the validity of the arbitration agreement and made a decision on jurisdiction in relation to the jurisdiction issue caused by CIETAC's split, a respondent may still apply to the court to determine the validity of the arbitration agreement provided it does so before the first arbitral hearing. In such cases, the court should accept the respondent's application and make a civil ruling.

Third, the SPC Reply affirms that the previously decided cases should maintain the status quo by stipulating that the people's court shall not uphold the application for setting aside or refusal of enforcement of an arbitral award on the ground that CIETAC, SHIAC or the SCIA should not have taken the case in relation to CIETAC's split. This rule is to mitigate a waste of arbitration and litigation resources merely attributed to the split of CIETAC.

Finally, the SPC Reply delimitates the principles where CIETAC, SHIAC and the SCIA have accepted the same dispute under the same arbitration agreement before the SPC Reply took into effect. When it occurs, any party concerned may apply to the people's court to confirm the validity of the arbitration agreement before the first hearing of the arbitral tribunal, and

the people's court shall hear the case and make a ruling accordingly, otherwise the arbitration body that first accepted the case shall have jurisdiction over the case.

The SPC Reply has provided long-awaited and much-needed clarity on issues arising from the split of CIETAC. It provides the business community with a higher degree of certainty and transparency. It gives a final say to the jurisdiction disputes among CIETAC, SHIAC and the SCIA, by a clear cut depending on the date of the conclusion of the arbitration agreement. It also offers CIETAC, SHIAC and the SCIA the peace of mind to pursue future plans without being held back by endless quarrels over jurisdiction. Hopefully the principles of delimiting jurisdiction of CIETAC, SHIAC and the SCIA in the SPC Reply will be equally acceptable to judges in other jurisdictions if the relevant arbitral awards are sought for recognition and enforcement outside mainland China.

JUDICIAL DECISION RECONSIDERING THE FOREIGN-RELATED ELEMENT

The Chinese law distinguishes foreign-related arbitration from purely domestic arbitration. There are bifurcated treatments towards foreign-related arbitration and domestic arbitration in many aspects. The concept of 'foreign-related' is not defined by the Civil Procedure Law or the Arbitration Law, but rather by the Interpretation of the Supreme People's Court on Several Issues Concerning the Law Applicable to Foreign-Related Civil Relation (2012), according to which an arbitration is 'foreign-related' if any of the following conditions is met:

- either party or both parties are foreign citizens, foreign legal persons or other organisations or stateless persons;
- the habitual residence of either party or both parties is located outside the territory of China;
- the subject matter is located outside the territory of China;
- the legal fact that leads to establishment, change or termination of civil relationship happens outside the territory of China; or
- other circumstances under which the civil relationship may be determined as a foreign-related one.

Except for the arbitration which contains those elements as outlined above, in all other circumstances an arbitration should be categorised as a domestic one. In this regard, an arbitration between two sino-foreign joint ventures will normally be deemed as domestic arbitration because a sino-foreign joint venture incorporated in China is a Chinese legal entity.

The Chinese law provides no basis for allowing two PRC legal persons to choose a foreign arbitration institution or engage in ad hoc arbitration outside the territory of the PRC. In several cases, the Chinese courts have ruled to deny the validity of the arbitration agreement reached by two Chinese legal persons who agreed arbitration of domestic disputes without any foreign-related element outside mainland China. For example, in the cases Jiangsu Aerospace Wanyuan Wind Power Co, Ltd v LM Wind Power (Tianjin) Co,[4] Liupanshui Hengding Development Co, Ltd v Zhang Hongxing[5] and Beijing Chaolaixinsheng Sports and Leisure Co Ltd v Beijing Suowangzhixin Investment Consulting Co Ltd,[6] the Chinese courts have ruled to deny enforcement of the relevant arbitral awards to which both parties are Chinese entities without any other foreign-related elements involved.

It is therefore intriguing to explore whether there are indeed 'any other circumstance under which the civil relationship may be determined as a foreign-related one' if the parties to

arbitration are Chinese entities. In November 2015, a landmark case in this regard emerged in Shanghai attracting much attention in arbitration community.

In Siemens International Trading (Shanghai) Co, Ltd v Shanghai Golden Landmark Co, Ltd,[7] the Shanghai No. 1 Intermediate People's Court (SNIPC) decided to recognise and enforce an arbitration award made by an arbitral tribunal under the rules of Singapore International Arbitration Center (SIAC), even though the arbitration took place in Singapore between two PRC-incorporated companies.

In this case, the SNIPC found that both of the two parties to the SIAC arbitration are Chinese legal persons that were incorporated within the Shanghai Pilot Free Trade Zone and wholly controlled by foreign companies. Normally, the dispute between two Chinese legal persons is not allowed to be arbitrated outside mainland China. However, after further examination, the court ascertained that it was satisfied that the underlying contract in dispute had a foreign-related element, since the goods were transported from a location outside the territory of China and delivered within China after clearance of custom formalities, so the transaction could be deemed as the international sale of goods. The court ruled that the contract in dispute was foreign-related, the arbitration agreement was valid and the SIAC arbitral award should be recognised and enforced pursuant to the 1958 New York Convention. The Court further contended that the defendant initiating the SIAC arbitration and seeking for non-enforcement of the arbitral award in favour of plaintiff's counterclaim breached the principle of estoppel, bona fide, fairness and reasonableness.

Practitioners and commentators welcomed this ruling.[8] It is noted that the SNIPC took a liberal approach and pro-arbitration policy to interpret the concept of foreign-related element when 'any other circumstances' occur. In this case, the movement of goods in dispute across territory borders is deemed a foreign-related element even though the contracting parties are Chinese entities. The rationale and presumption behind this case are widely applauded as a sign of further progress made by the Chinese judicial organs in support of international commercial arbitration.

ENTRY OF FOREIGN ARBITRATION INSTITUTIONS INTO MAINLAND CHINA

A milestone achievement made in the past year is that three eminent and leading international arbitration bodies entered Shanghai and established their respective representative offices in the Shanghai Pilot Free Trade Zone.

On 20 November 2015, the Hong Kong International Arbitration Center (HKIAC) set up its Shanghai office in the China (Shanghai) Pilot Free Trade Zone, which has been designated by the state council as an area to 'support the introduction of internationally renowned commercial dispute resolution institutions'. The launch of the HKIAC's Shanghai office marks the beginning of a new chapter of arbitration in mainland China, since it is the first time an offshore arbitration institution has set up a formal presence on the mainland. According to the HKIAC, this is an important milestone that represents a major stride made by the HKIAC to promote international arbitration services on the mainland. Operating through its Shanghai office, the HKIAC seeks closer cooperation with local arbitration commissions to promote international arbitration best practice on the mainland by providing professional training to mainland Chinese arbitrators and practitioners, as well as by facilitating the development of an overall pro-arbitration policy across China. Where necessary, the Shanghai office will extend the HKIAC's world-class services to support its hearings on the mainland and provide such other appropriate services as may be permitted under Chinese law.[9]

On 2 March 2016, SIAC commemorated the official launch of its Shanghai office. According to SIAC, the Shanghai office will serve as a platform for SIAC to promote and develop international arbitration in China together with its partners and friends in the Chinese arbitration community.[10]

On 3 March 2016, the International Chamber of Commerce (ICC) unveiled the ICC Shanghai Office. The ICC is the first non-Asian headquartered dispute resolution institution to establish an office in mainland China, following receipt of an official licence from the State Administration of Industry and Commerce (SAIC) permitting the opening of a new ICC representative office in the Shanghai Free Trade Zone. According to the ICC, the opening of its second regional office in Asia represents another milestone for court expansion in Asia and will facilitate its ambitions to further leverage the growth in demand for its services not only from arbitration users in China but across the entire region. By establishing a presence in Shanghai, the ICC hopes to build on its ties with the Chinese authorities and stand ready to adapt to dispute resolution developments in China.[11]

No doubt the opening of the representative offices of HKIAC, SIAC and the ICC in Shanghai is a historical event. The foremost importance of their inauguration marks a breakthrough for foreign arbitration institutions to be able to establish a lawful presence in mainland China, though it is still uncertain whether these institutions may be allowed to administer arbitration proceedings and fix mainland China as the place of arbitration. It is reasonable to expect that they will conduct training, assist in hearings and deepen cooperative ties with their counterparts in China at the preliminary stage, before moving on to accept and administer cases once the Chinese law gives a clear-cut green light to them. A recent positive result is that the judicial decisions approved by the Supreme People's Court recognise the validity of an arbitration agreement where the parties have agreed arbitration by foreign arbitration institution in China. In Longlide Packaging Co Ltd v BP Agnati SRL[12] and Ningbo Beilun Licheng Lubricating Oil Co Ltd v Famowanchi Corporation,[13] the Chinese courts hold the arbitration agreements that subject relevant disputes to ICC arbitration in Shanghai and Beijing.

Logically, the permission of entry into China and the upholding of the ICC arbitration agreement that designates China as the place of arbitration are bound to move toward a final goal that the Chinese court will sooner or later recognise and enforce the arbitral awards rendered by foreign arbitration institutions in China. The only issue left is that there is no unambiguous provision in the Arbitration Law or Civil Procedure Law to facilitate or directly support the enforcement of arbitral awards as such. Since China has made 'reciprocal reservation' to the 1958 New York Convention and the Chinese courts only recognise and enforce arbitral awards made outside the territory of China in accordance with the Convention, the notion of 'non-domestic award' is not very helpful for the enforcement. To promulgate supplemental laws or rules that admit the enforcement of arbitral award made by foreign arbitration institutions in China will become very much desirable.

Endnotes

Beijing Hui Zhong Law Firm

India

Vaishnavi Chillakuru and **Naresh Thacker**
Economic Laws Practice

Summary

The Indian arbitration scene underwent a complete makeover in 2015 with the enactment of the Arbitration and Conciliation (Amendment) Act 2015 (the Amendment Act), which brought sweeping changes to the Arbitration and Conciliation Act 1996 (the Act). This has long been in the offing, and scholars and practitioners alike hope that it is enough to breathe fresh life into an otherwise faltering alternative dispute resolution mechanism. While the promulgation of the Act in 1996 helped to make arbitration the default choice for adjudication of commercial disputes, over the last two decades, the process of arbitration has started to resemble traditional court proceedings in India. Inordinate delays, high costs, excessive interference by courts and misinterpretation of some of the provisions, resulted in a growing sense of exasperation among users of the process.

An amendment to the Act to remedy some of these issues had been on the cards for quite some time. After two aborted attempts – one in 2001 and the other in 2010 – the law was finally amended by the promulgation of the Arbitration & Conciliation (Amendment) Ordinance 2015 (the Ordinance), which was subsequently replaced by the Amendment Act.

The Amendment Act incorporates most proposals set out in the 246th Law Commission Report released in 2014 (Law Commission Report), but also introduces some unique provisions not hitherto seen in any leading arbitration statute. Some of these provisions contain extraordinary measures to remedy certain particular issues pertaining to ad hoc domestic arbitrations, such as delay in proceedings and high costs. The Amendment Act also incorporates other changes with far-reaching consequences – some effecting a significant departure from the existing law, some clarifying certain controversies, and others simply confirming the law as declared through interpretations received from courts over time.

This article analyses some key provisions of the amended Act that are likely to significantly impact the conduct of arbitral proceedings. We briefly consider the extent to which the recommendations of the Law Commission Report have been incorporated into the Amendment Act, the probable reason for the amendment, and the likely effect on arbitral proceedings.

HIGH COURTS NOW EXCLUSIVE FORUM FOR RELIEF IN INTERNATIONAL COMMERCIAL ARBITRATIONS

Under the Act as it stood prior to the amendment, 'court' was defined to mean the principal civil court of original jurisdiction in a district, for both domestic and international commercial arbitrations.[1] Only under limited circumstances, as in case of exercise of its ordinary original civil jurisdiction over the subject matter, could the High Court deal with a matter under the Act. The result was that in most cases international parties had to approach lower courts in remote parts of India to obtain the necessary reliefs.

The ramifications for an international party were that it had to deal with an unfamiliar legal system, language barriers, clogged court dockets, different interpretation by different courts at the same level and last but not the least unfamiliarity of lower courts with arbitration law. Bearing these issues in mind, the Law Commission Report recommended that in cases of international commercial arbitration, references to 'court' ought to mean the high court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the questions forming the subject-matter of the arbitration, or a high court having jurisdiction to hear appeals from decrees of courts subordinate to that high court, with respect to subject matter of arbitration. Accordingly, the Amendment Act adopted the new definition of 'court' with

respect to international commercial arbitration.[2] The effect of this amendment is that, in all international commercial arbitrations seated in India, high courts will be the exclusive forum for reliefs under the Act. One obvious drawback of this change, which is being overlooked in all quarters, is that this move will in all likelihood further increase the pendency levels at the High Court.

EXPANDED SCOPE OF JUDICIAL AUTHORITY'S POWER TO REFER PARTIES TO ARBITRATION

The Act, pre-amendment, provided that a judicial authority before which an action is brought in a matter which is also the subject matter of an arbitration agreement, shall refer the parties to arbitration if a party applies for the same not later than submitting his first statement on the substance of the dispute.[3] This provision has been fairly successful even in the pre-amendment period, and has generally received a pro-arbitration treatment from courts. Nonetheless three amendments have been brought about to this provision.

The first, and possibly the most controversial issue even in more mature jurisdictions, statutorily allows not only parties to an arbitration agreement, but any person claiming through or under the party, to seek reference of the dispute to arbitration.[4] This opens doors for roping in non-signatories to arbitration in arbitrations seated in India. Under the un-amended law the Supreme Court while considering the provisions of section 45 of the Act,[5] which applies to international commercial arbitration, allowed joinder of non-signatories to an arbitration agreement under limited circumstances. However, the same could not be applied to domestic arbitrations[6] inasmuch as the provision relating thereto was differently worded. The Amendment Act now removes this dichotomy so that non-signatories may be referred to arbitration by courts even in domestic arbitrations.

The second, and the more ambiguous, amendment mandates that reference to arbitration by the judicial authority has to be made notwithstanding any judgment, decree or order of the Supreme Court or any court.[7] While the amendment is vaguely worded, it seems to be an attempt to address decisions of courts on arbitrability of various issues such as fraud, severability of issues etc.[8] Only time will tell if the courts will interpret this exclusion to be sufficient to negate the varying principles outlined in these decisions. The conclusions reached by the courts in these decisions on arbitrability are based on reasoning unique to each case. Therefore, exclusion that has now been introduced through the Amendment Act may not be sufficient to negate the law laid down in these decisions.

Lastly, the Amendment Act requires the judicial authority, before making the reference to consider prima facie whether there exists a valid arbitration agreement.[9] The law as it stood made it mandatory for a judicial authority to refer the parties to arbitration and the scope of any review was extremely limited.

INTERIM MEASURES: GREATER POWERS VESTED IN THE ARBITRAL TRIBUNAL

The Act provides parties with two avenues for obtaining interim relief – through the court[10] and through the arbitral tribunal.[11] Perhaps the biggest drawback of the interim protection regime under the pre-amended Act was that the provisions were heavily loaded in favour of approaching the courts rather than the tribunal. At the outset, the parties could agree to divest the tribunal of the power of granting interim reliefs. Further, the powers of the arbitral tribunal to grant interim relief were limited to the subject matter of the dispute; the tribunal was not vested with the wide discretionary powers of the court. Most crucially, there were no provisions enabling enforcement of an order granting interim reliefs by the tribunal.

The Amendment Act, following the recommendations in the Law Commission Report, has aligned the powers of the tribunal to grant interim relief with that of the court. Thus, the tribunal's power to pass interim orders shall now mirror that of the courts. Also, an order of the tribunal granting interim relief shall be deemed to be an order of the court and shall be enforceable under the Code of Civil Procedure 1908, in the same manner as if it were an order of the court. Moreover under the amended Act once the arbitral tribunal has been constituted, the court shall not entertain an application for interim relief, unless the court finds the remedy afforded by the tribunal inefficacious.[12] This amendment is an affirmation of what some courts had already been following in practice.

Furthermore the amendment seeks to plug a loophole in the Act, whereby a party, having obtained interim relief from the court prior to the commencement of arbitration proceeding, would thereafter drag its feet on initiating proceedings. The Amendment Act has addressed this issue by making it mandatory for a party to commence arbitral proceedings within 90 days from the date of an order granting interim relief, or within such further time as the court may determine. This change in law, though borrowed from the Law Commission Report, does not fully reflect its recommendations, inasmuch as it has omitted an important condition, namely that the interim order shall lapse if the arbitral proceedings are not initiated within the statutorily mandated period. In doing so, the Amendment Act has taken the teeth out of this clause, although it is likely that courts will nevertheless interpret the provision such that non-adherence will amount to vacation of the interim protection.

A significant aspect that has not been considered by both the Amendment Act and the Law Commission Report is the development of provisions with respect to emergency arbitrators in many institutional rules. In the recent amendment to the Singapore law, the definition of 'arbitrator' was amended to provide for this. It would have been helpful if the Amendment Act had provided that interim measures by emergency arbitrators will also be enforceable in the same manner as orders of the tribunal. This will now have to await interpretation by the courts, and it is likely that courts will recognise emergency arbitrators' orders in the same manner.

APPOINTMENT OF ARBITRATORS AND GROUNDS FOR CHALLENGE

The provision for appointment of an arbitrator by the court has undergone significant changes following the Amendment Act. Many of the changes that have been effected are a consequence of the propositions of law laid down by the Supreme Court in SBP & Co v Patel Engineering Ltd,[13] and have largely conformed to the recommendations in the Law Commission Report.

The pivotal issue under consideration in Patel Engineering was whether the role of the Chief Justice while appointing an arbitrator was administrative or judicial. Ultimately, on analysis, the Court held that the Chief Justice performed a judicial function. Recently, the issue arose once again when the Supreme Court held that since the Chief Justice is not a 'court', a decision under section 11 is not a decision of the court and hence, will not have any precedential value.[14] The Amendment Act has now finally laid this issue to rest by replacing 'Chief Justice' with Supreme Court or High Court.

An unfortunate outcome of Patel Engineering was that the Court interpreted section 11 in such a way as to confer wide powers on the Chief Justice in deciding the existence and validity of the arbitration agreement. The Court held that the Chief Justice enjoyed the power to decide on 'his own jurisdiction, to entertain the request, the existence of a valid arbitration

agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators' and such decision was final. This resulted in excessive interference by courts in subsequent cases, infringing upon the arbitrator's right under the Act to decide on his own jurisdiction and the scope of the arbitration agreement.[15] The Amendment Act has sought to rein this in by providing that the Supreme Court or High Court shall limit its examination only to the existence of the arbitration agreement. However, the Law Commission's recommendation clarifying that the final decision on jurisdiction ought to be left to the tribunal was not included in the amendments.

Further, Patel Engineering held that the Chief Justice can delegate his or her power of appointment of arbitrators only to another judge of that court. The Amendment Act now clearly provides that the Supreme Court or the High Court may designate any other person or institution as the appointing authority, and further clarifies that such a designation will not be deemed a delegation of judicial power. This paves the way for courts to designate institutions or expert bodies as the appointing authority in appropriate cases.

An aspect on which Patel Engineering stands reaffirmed is with regard to appeal against a decision under section 11. It was held in Patel Engineering that no appeal shall lie against such a decision except under article 136 of the Constitution. This has now received statutory recognition under the Amendment Act.

The Amendment Act has also introduced two crucial provisions with the intention to address the issue of delay.

First, it requires the Supreme Court or the High Court, as the case may be, to endeavour to dispose of the application for appointment of arbitrator within 60 days from the date of service of notice on the other party.[16]

Second, before appointing an arbitrator, the Supreme Court or the High Court shall seek a disclosure in writing from the prospective arbitrator of circumstances, inter alia, which are likely to affect his or her ability to devote sufficient time to the arbitration, and, in particular, his or her ability to complete the arbitration in 12 months. This provision will help to ensure appointment of arbitrators with sufficient time to expeditiously deal with arbitral proceedings.

What is most interesting is the introduction of a provision requiring the High Court to formulate rules for the purpose of determination of the fee of arbitrators in ad hoc arbitrations. This provision is the first of its kind to be legislatively introduced, and will lead to a fixed fee schedule being imposed. In other jurisdictions such matters are normally left to parties or institutions. While the reason for introduction of such a provision is not hard to fathom in light of the high costs involved in domestic arbitrations, it severely obstructs party autonomy, a hallmark of this form of dispute resolution. Also, it has the potential of impairing the quality of arbitral proceedings.

The Act also now requires a prospective arbitrator to disclose in writing the existence of any past or present relationship with either of the parties or the subject matter of the dispute, which is likely to give rise to justifiable doubts as to his independence and impartiality. The Amendment Act also introduces two schedules – one sets out the grounds that shall serve as a guide in determining whether circumstances exists which give rise to justifiable doubts as to the independence or impartiality of an arbitrator,[17] while the other sets out the grounds which would make a prospective arbitrator ineligible for appointment.[18] These amendments have been made in accordance with the International Bar Association Guidelines on Conflicts

of Interest in International Arbitration (the IBA Guidelines). India was one of the first countries to adopt the guidelines by the IBA and incorporate them into its domestic law.

The 1996 Act had the same provision concerning independence and impartiality as the Model Law. Despite this, the practice of appointing an ex-employee of one of the parties to the proceedings as an arbitrator was rampant, especially in contracts with public sector undertakings. The only restriction which the Supreme Court put on this was that the said employee ought not to be involved in the contract in question.[19] The schedule under the new amendment now provides this as a ground for disqualification from appointment.

Although the amendments with regard to independence and impartiality of arbitrators are extremely positive, one aspect that has not received attention is that of the right of unilateral appointment – something which has become a menace in Indian contracts with unequal bargaining powers. In most advanced jurisdictions, such unilateral right of appointment is considered against public policy and not enforced. No such bar exists under Indian law, and the Amendment Act has also failed to address this.

SPEEDY DISPUTE RESOLUTION

One of the most contentious provisions brought about by the Amendment Act is that of the introduction of a time limit before which the arbitral award has to be rendered in case of all arbitrations seated in India.[20] Intriguingly, this provision was never recommended by the Law Commission. The provision sets out that the award shall be made within 12 months, extendable for a period of six months if the parties so agree, from the date the arbitral tribunal enters upon the reference. Further, the amendment Act seeks to reward the tribunal with additional fees, as per the agreement of the parties, where the award is rendered within a period of six months from the date the arbitral tribunal enters upon the reference.

If the award is not rendered within the prescribed time period of 12 months, or within the mutually extended period of up to six months, the arbitration proceedings stand terminated unless the period is extended by the court, on an application by either party prior to or after the expiry of the period so specified. However, the courts are to allow the extension only for sufficient cause, and on such terms and conditions as may be imposed by the court. It also provides that an extension application shall be disposed of by the court as expeditiously as possible, and that it shall endeavour to dispose of the matter within a period of 60 days from the date of service of notice on the opposite party. The court may also impose actual or exemplary costs on any of the parties.

It is not difficult to understand why the lawmakers were of the opinion that such a provision ought to be introduced; it is not uncommon for ad hoc arbitrations in India to take more than four to five years to conclude. Unlike international practice, hearings are held in a diffused manner over long periods of time. No time limits either for cross-examination or for arguments are prescribed, and lawyers often misuse the discretion. Many of these issues in ad hoc arbitrations in India originate from the traditional approach to trials in Indian courts. For instance, recording of evidence is neither time bound nor is it conducted on a day-to-day basis in Indian courts. Therefore, although this provision may be peculiar to Indian arbitration law, perhaps an out of ordinary problem requires an extraordinary solution. Having said that, the 12-month deadline seems overambitious and impractical. A more practical deadline would be 24 months, with six months' extension on parties' agreement.

Another factor to consider is the institutional delay in Indian courts, which is often beyond the control of the courts and the judges given the sheer number of cases on their docket.

A solution that entails lining up before the court to determine future action is a problem in itself. One solution could be to allow the arbitration to continue during the pendency of an extension application, instead of an automatic cessation of the tribunal's mandate.

Perhaps the most surprising amendment under this provision is the discretion vested in the court to order a reduction of fees of the arbitrator, if the court finds that proceedings have been delayed for reasons attributable to the arbitral tribunal. The court, while deciding an application for extension of time, can even substitute one or all of the arbitrators. These provisions have come under severe criticism, and for good reason. There is nothing within the amended law that indicates whether the arbitrator would be heard before any penalty is levied upon him for the delay. Even if the arbitrator is given an opportunity to put forth his or her case, it would not bode well for the spirit of the arbitral process to have arbitrators participate in proceedings before the court to fix responsibility for the delay. Further, the likelihood of imposition of penalties by courts has the potential of destroying the equilibrium between them and the arbitral tribunals. In the modern view on arbitration, the equation between the two should be that of partners towards a common goal of providing efficient and effective redressal of commercial disputes. This provision puts the courts and tribunals in an adversarial position, which may not be conducive to the development of a healthy participatory role.

The Amendment Act has also inserted a new provision providing for a fast-track procedure for arbitration.[21] Under this provision, parties to an arbitration agreement may, before or at the time of the appointment of arbitral tribunal, agree in writing to have their dispute resolved by a fast-track procedure. If parties do opt for a fast-track procedure, the dispute shall be decided on the basis of written pleadings, documents and submissions filed by the parties without any oral hearings. An oral hearing may be held only on a request made by all the parties or if it is considered necessary by the arbitral tribunal to clarify certain issues. If an oral hearing is held, the arbitral tribunal may dispense with any technical formalities and adopt such procedure as deemed appropriate for expeditious disposal of the case. The section also provides that an award is to be made within six months from the date the arbitral tribunal enters upon the reference, failing which the consequences under section 29A would follow. The effect of this amendment is that parties can now choose a fast-track procedure even if they do not wish to subject their arbitration to any institutional rules.

COSTS

The Amendment Act has introduced a whole new regime for awarding costs in arbitrations,[22] which is in accordance with the recommendations in the Law Commission Report. The section vests the arbitral tribunal with the discretion to determine whether costs are to be paid, the amount of such costs, and when such costs are to be paid. The term 'costs' has also been defined to include fee and expenses of arbitrators, courts and witnesses, legal fee and expenses, administrative fee of the institution, and any other expenses incurred in connection with the arbitral or court proceedings and the arbitral award.

The section also sets out certain circumstances, such as conduct of parties, which shall be considered by the court or tribunal when determining the costs.[23] This provision is essential in the Indian context, and is in line with the rules of leading arbitration institutions. Such a provision will ensure efficient conduct of the proceedings by disincentivising inequitable or mala fide conduct on the part of either of the parties.

Crucially, the said section has incorporated the 'cost follows event' principle – the unsuccessful party shall be ordered to pay the costs of the successful party. If the court or tribunal seeks to make a different order, the reasons for the same have to be recorded in writing. This is a welcome and necessary addition considering the fact that traditionally Indian courts are not known to grant actual costs to parties. By virtue of this amendment, courts and arbitral tribunals will have a clear guide for exercising their discretion in awarding costs, which is completely different from traditional principles under Indian procedural law.

The Amendment Act has also amended the default rate of interest – it has been changed from 18 per cent to 2 per cent higher than the current rate of interest prevalent on the date of award. The unamended provision was often criticised as being penal and without reference to commercial realities. The Amendment Act has, therefore, incorporated the changes suggested in the Law Commission Report in this regard.

CHALLENGE AND ENFORCEMENT OF AN ARBITRAL AWARD

Extensive changes to the provision for challenge of an arbitral award[24] have been introduced through the Amendment Act, which are in accordance with the recommendations of the Law Commission Report. The explanation provided in the relevant provisions under the Act defining 'public policy', has now been replaced with a new explanation which brings the legislation in line with judicial precedents. The explanation now states that an award would be in conflict with public policy if the award:

- was induced or affected by fraud or corruption or in violation of section 75 (confidentiality) or section 81 (admissibility of evidence of conciliation proceedings in other proceedings);
- is in contravention with the fundamental policy of Indian law; or
- is in conflict with the most basic notions of morality and justice.[25]

A second explanation has also been added to the same sub-section clarifying that no review on merits can be undertaken by a court for determining whether the award is in contravention with the fundamental policy of India.[26] This explanation was probably added as a way to rein in the expansive definition accorded to the term 'fundamental policy of India' by the Supreme Court in ONGC v Western Geco.[27]

Further, a new subsection has been added to provide that an award in an arbitration exclusively between Indian parties can be set aside if it is vitiated by patent illegality appearing on the face of the award. However, it has been clarified that an award shall not be set aside merely on the ground of erroneous application of the law or by re-appreciation of evidence.[28] Patent illegality as a ground for violation of public policy was first introduced by the ONGC v Saw Pipes case.[29] The scope of that interpretation had been restricted by subsequent decisions of the courts. However, the amendment has completely done away with that interpretation in case of awards rendered in international commercial arbitrations, thereby reverting to the interpretation in Renusagar case.[30] This is a welcome move, as it assures foreign parties of a more hands-off approach from the courts towards challenge of arbitration awards.

The Amendment Act has also added a provision stating that challenge petitions are to be concluded within one year and if courts lower than a High Court are likely to take longer, they will need to seek extension from the High Court.[31] While it is unlikely that this deadline will be strictly adhered to in light of the large pendency of cases in Indian courts, such provision

will give courts the basis to enforce tight deadlines. In light of the current scenario where challenge petitions often languish in courts for three or four years, this provision would afford some relief to litigants.

Another important amendment warrants that an application filed in court for setting aside the arbitral award would not by itself operate as a stay on enforcement of the award.[32] A party would be required to file a separate application before the court for stay of the enforcement, and the court may grant a stay subject to such conditions as it deems fit.[33] This is a departure from the earlier provision which provided for an automatic stay of enforcement once an application for setting aside the award was filed. Further, the courts earlier did not have the discretion to impose any conditions, such as depositing part of the arbitral sum, prior to deciding an application for challenge of an arbitral award.[34] The Amendment Act now specifically empowers the court to grant a stay of the operation of an award on such conditions as it deems fit, including a direction for deposit.

APPLICABILITY OF THE AMENDMENT ACT

A glaring omission in the Ordinance Act was that it did not provide for a date from which the changes would become effective (ie, whether the same was to be applied prospectively or otherwise). Fortunately, the Amendment Act clearly stipulates that, unless otherwise agreed by the parties, it would be applicable only to those arbitral proceedings that were commenced after the Amendment Act came into effect.[35] It further provides that any action taken under the Act as amended by the Ordinance shall be deemed to have been taken under the corresponding provisions of the Act, as amended by the Amendment Act.

An issue that has now arisen with regard to the applicability of the Amendment Act is whether it is prospectively applicable even to post-arbitration proceedings, such as proceedings for setting aside of the arbitral award.

When deciding an application for setting aside of the arbitral award, the Calcutta High Court held that the provisions of the Act as amended by the Amendment Act would be inapplicable as the Amendment Act stipulates that it is applicable only to those proceedings that were commenced after the enactment of the Amendment Act.[36] However, the Madras High Court gave a contrary view, and on an interpretation of section 26 of the Amendment Act, held that the amendments would be applicable to all post-arbitration proceedings, including court proceedings.[37] It will be interesting to follow the path the judicial interpretation would take in this regard.

CONCLUSION

The purpose behind the Amendment Act was multifold – to align the statute with judicial precedents, to clarify certain provisions that had received unintended interpretations by the courts, and to address issues that were specific to Indian arbitrations. While the provisions enacted to conform to judicial precedents are straightforward, the greater challenge lay in fine tuning the Act to ensure that it was capable of overcoming issues that commonly arise in arbitrations in India.

Two of the most common problems that domestic arbitrations are afflicted with are delay in proceedings and high costs. It is therefore unsurprising to find that the Amendment Act has introduced several changes in a bid to tackle these two issues. In order to address the problem of delay, proceedings now have to be concluded within a maximum period of 18 months, a fast track procedure has been introduced, and time limits for courts deciding

applications under various sections have been imposed. To curb the problem of high costs in arbitrations, the Amendment Act has introduced a provision allowing High Courts to formulate a fixed fee schedule for arbitrator's fee, and has set out guidelines for arbitrators and the courts to follow when imposing costs on parties. Further, the time limit that has now been put in place for concluding the proceedings would itself ensure that the costs are comparatively low, as the number of hearings would be automatically limited to a large extent.

Mere change in law, without effective implementation will ensure that it fails in achieving its stated objectives. While the attempts made by the legislature are laudable, for the law to be truly effective, there needs to be a paradigm shift in approach to arbitration by all stakeholders to the process, ie, parties, lawyers, arbitrators and the courts. One of the core objectives of arbitration as a mechanism of dispute resolution is to allow parties to adjudicate disputes privately, so as to unburden the courts. This needs to be recognised and acted upon by the different stakeholders in order to truly reap the rewards of the new amendments. Parties filing frivolous applications before courts, or opposing a reference to arbitration solely with a view to drag on litigation, courts giving parties the leeway to carry out such proceedings, arbitrators failing to impose strict timelines on parties during the proceedings are some of the issues that contribute to the larger problem. Unless the Amendment Act is accompanied by a shift in attitude towards the conduct of arbitral proceedings, it may fail to have the desired impact.

Endnotes

Economic Laws Practice

Hong Kong

Kathryn Sanger, **Yvonne Shek** and **Thomas Walsh**
Clifford Chance LLP

Summary

In 2015, the international arbitration community voted Hong Kong to be the most preferred arbitration seat in Asia.[1] This comes as little surprise, as Hong Kong continues to be a leader in adopting best practices in international arbitration, and the Hong Kong International Arbitration Centre (HKIAC) has not rested in its quest for continued innovation and excellence.

The single most newsworthy event of 2015 was the HKIAC's opening of an office in Shanghai. In doing so, the HKIAC was the first offshore arbitral institution to set up an on-the-ground office in mainland China, and it reflected the HKIAC's experience and reputation as the go-to venue for parties with disputes relating to the PRC. The International Chamber of Commerce (ICC)[2] and the Singapore International Arbitration Centre (SIAC)[3] have since followed suit and in 2016 also set up representative offices in mainland China.

Otherwise, it was a year of steady progress in Hong Kong, with a number of pro-arbitration judgments by the courts, the beginning of opening the doors to third-party funding, and further initiatives by the HKIAC. The China International Economic and Trade Arbitration Commission's (CIETAC) Hong Kong Arbitration Centre (HKAC) also began to accept and administer cases.

Queen Mary's International Arbitration Survey recognises Hong Kong

The continued progress by Hong Kong as an internationally recognised seat for arbitration, and the HKIAC as a leading arbitral institution, was expressly recognised in 2015 by the sixth iteration of Queen Mary University of London's International Arbitration Survey (October 2015).[4] The survey judged the HKIAC to be the most preferred arbitral institution outside of Europe and the third best arbitral institution worldwide. It also found the HKIAC to be the world's most improved institution over the past five years. Participants said their choice of institution was based on an assessment of the quality of its administration, neutrality and level of 'internationalism'.

Such recognition is well-deserved, and clearly reflects the growing momentum, reputation and strength of international arbitration in Hong Kong.

FUNDING IS (PROBABLY) COMING

One of the most interesting – and arguably controversial – developments in international arbitration has been the growth of third-party funding.

Third-party funding is where a third party to the arbitration finances all or part of one of the parties' arbitration costs. The funder will then, normally, receive an agreed percentage of the proceeds of the award or a success fee. If the claim is unsuccessful, the funder's investment is lost. Third-party funding developed in Australia but is now a common feature of international arbitration in numerous jurisdictions including England and Wales, various European jurisdictions and the United States.

Third-party funding is, however, still relatively rare in Asia, and particularly so in common law countries such as Hong Kong (and Singapore), with their traditional and strict doctrines of champerty and maintenance that (subject to limited exceptions) prohibit the funding of litigation.

In respect of arbitration, the position in Hong Kong as to whether third-party funding of international arbitration is permitted is unfortunately unclear. In 1994, a decision of the Hong

Kong High Court[5] found that the law of champerty did not extend to international arbitration. However, more recently in 2006, the Court of Final Appeal, in Unruh v Seeberger,[6] expressly left open the question of whether the doctrines of champerty and maintenance applied to international arbitration.

Given Hong Kong's position as one of the major centres of international arbitration, and the increasing likelihood that a party to an arbitration taking place in Hong Kong would want to consider whether it should – and could – seek third-party funding in relation to its participation in such an arbitration, it became clear that Hong Kong needed to consider this in more detail, not only to preserve and promote Hong Kong's competitiveness as an arbitration centre, but also to increase the availability and use of arbitration services more generally. Accordingly, in June 2013, the Chief Justice and Secretary for Justice of Hong Kong asked the Law Reform Commission to review the issue of third-party funding.

On 19 October 2015, the appointed subcommittee of the Hong Kong Law Reform Commission issued a consultation paper on third-party funding for arbitrations in Hong Kong. The subcommittee presented its preliminary views by way of four primary recommendations, and initiated a public consultation process to seek views and comments on whether reform is indeed needed and, if so, what kind of reform is appropriate. The subcommittee's four 'recommendations' are as follows:

- The Arbitration Ordinance should be amended to allow third-party funding for arbitration in Hong Kong under Hong Kong law.
- Ethical and financial standards for third-party funders providing third-party funding to parties to arbitrations taking place in Hong Kong should be developed.
- The Commission invited submissions as to the nature, provenance and content of such ethical and financial standards, and how they should be enforced.
- The Commission invited further submissions as to whether, and on what basis, a third-party funder should be directly liable for adverse costs orders, or orders to provide security for costs.

The consultation period ended in January 2016, and the subcommittee's more detailed recommendations are expected to follow later this year. The recommendations have been received positively by the Hong Kong community, including the HKIAC, which set up a specialist HKIAC Task Force on Third Party Funding to provide a formal response on its behalf. The HKIAC has also committed itself to taking the lead in considering whether related changes are required to locally applicable arbitral rules or other guidelines.

It is likely, therefore, that 2016 will see interesting discussions on the nature of legislative and other amendments required to deal with third-party funding for international arbitration. Of particular interest will be the discussions on the extent to which the existence of third-party funding (including the identity of the third-party funder) should be disclosed to the tribunal and the other party or parties to the arbitration.

THE HKIAC CONTINUES TO REINFORCE ITS LEADING POSITION

A number of new initiatives from the HKIAC were seen in 2015, as it continued to live up to its reputation as one of the world's most innovative arbitral institutions.[7]

New Shanghai Office

As mentioned above, the major development in 2015 was the HKIAC's opening of an office in mainland China on 19 November 2015, making the HKIAC the first offshore arbitral institution to open an office in mainland China.

Having gained approval from the mainland authorities, the HKIAC opened its office in the Shanghai Pilot Free Trade Zone, or FTZ. The FTZ was established to offer favourable foreign investment conditions and has been designated by the State Counsel as an area that would 'support the introduction of internationally renowned commercial dispute resolution institutions'.[8] The office is headed by the HKIAC's deputy secretary-general, Liu Jing, and represents the institution's second foreign office (HKIAC established a presence in Seoul in 2013).

The HKIAC is recognised for having long-standing and extensive expertise in administering China-related cases and working with Chinese parties. The opening of its Shanghai office is intended to help the HKIAC provide its services to mainland Chinese users. While case management services will initially continue to be conducted from Hong Kong, the Shanghai office could extend the HKIAC's services to support hearings held in mainland China. As the ability of foreign arbitral institutions to administer mainland-seated arbitrations under PRC law remains unclear, the HKIAC has suggested that parties seek legal advice before requesting administrative services from the HKIAC for mainland-seated arbitrations.[9]

The HKIAC's Shanghai office will also allow for closer cooperation between the HKIAC and its mainland counterparts to develop further the international arbitration scene and promote international best practices in mainland China. HKIAC chairperson, Teresa Cheng SC, intends that the new office will provide 'a unique platform to connect Chinese companies and lawyers with world-class arbitration practice'.[10] Hong Kong's Secretary for Justice, Rimsky Yuen SC, has also confirmed the Hong Kong government's strong support for arbitration and the ground-breaking initiative by the HKIAC, stating that the new Shanghai office creates a 'triple win' situation for the HKIAC, for Shanghai enterprises, and for Hong Kong and mainland China.[11]

With the opening of its new office in mainland China, the HKIAC has paved the way for other arbitral institutions to follow. As noted, the ICC and SIAC quickly followed suit and have already opened representative offices in mainland China. This development also reflects once again that Hong Kong, in part because of its geographical and cultural proximity to China, remains the premier arbitration hub outside of Europe.

Training For Tribunal Secretaries

Another important initiative by the HKIAC was the introduction of its tribunal secretary training programme in November 2015.[12] This came on the back of its introduction in June 2014 of a tribunal secretarial service for HKIAC-administered and ad hoc arbitrations that allows arbitral tribunals to appoint a member of the HKIAC secretariat as its secretary.

Tribunal secretaries have long been used by arbitration tribunals to assist with administrative tasks and to enable the tribunal to focus their efforts on the merits of the dispute. As arbitrations have been more complex and unwieldy, so the use of tribunal secretaries has increased. However, there has always been a concern that the tribunal secretary can exceed their mandate and, in effect, act as a 'fourth arbitrator'. These long-standing concerns have been made explicit most recently in the Yukos v Russia[13] dispute, in which Russia sought to challenge the arbitral tribunal's award based on, among other things, an allegation that the arbitrators did not fulfil their mandate personally because the tribunal secretary played a

significant role in analysing the evidence and legal arguments, in the tribunal's deliberations, and in the drafting of the award.[14]

To grapple with these concerns, the HKIAC has introduced what it termed as the 'world's first tribunal secretary accreditation programme'. This programme consists of a one-and-a-half day workshop with both a written and an oral exam, the intent being to give participants the skills needed to act as a tribunal secretary, while also ensuring that they act within their mandate. Workshops have now been run in Hong Kong, Beijing and London, and have proved very popular.

Notably, at the recent joint ArbitralWomen and CIArb's International Women's Conference held at UNESCO House in Paris in March 2016, keynote speaker Hilary Heilbron QC proposed a roster of pro bono arbitral tribunal secretaries as a way for aspiring practitioners – both women and men – to gain more experience and make more contacts to help them on their own individual paths to sitting as arbitrators. The HKIAC's own initiative comes, therefore, at an opportune time.

Ratings System For Arbitrations

Given the proliferation of arbitral institutions, it is critical for institutions to be able to track users' thoughts on their services so they can continue to improve. The Queen Mary International Arbitration Survey also noted that users wanted greater transparency regarding arbitrator availability and performance: 75 per cent of respondents wanted to assess arbitrators at the end of a dispute and 76 per cent wanted to be able to report to the arbitral institution.

To that end, the HKIAC has launched a system to enable users to evaluate both the institution and the arbitrators.[15]

A party is now able to rate the HKIAC's services and facilities on a scale of one to five. And they will also be able to rate a number of qualifications of the tribunal and individual arbitrators such as preparation, familiarity with the applicable laws and rules, the ability to facilitate a fair, neutral and effective process, and case management, communication and decision-making skills.

Practice Note On Consolidation Of Arbitrations

On 1 January 2016, the HKIAC introduced a new Practice Note on Consolidation of Arbitrations, applicable to all requests for consolidation submitted under article 28 of the HKIAC Administered Arbitration Rules (the HKIAC Rules) on or after that date. The Practice Note provides helpful practical guidance on the matters to be set out in any request for consolidation and response to a request.

Users of the HKIAC Rules will already be aware that articles 27, 28 and 29 of the HKIAC Rules provide for joinder of additional parties to existing arbitrations, consolidation of arbitrations, and the commencement of a single arbitration under multiple contracts. These provisions, which were introduced in 2013, not only assist in simplifying the drafting of arbitration clauses (which refer disputes to the HKIAC), but are also in line with the reality of modern day commercial disputes, which more often than not involve complex transactions and multiple parties and contracts. At the same time as introducing the new Practice Note, the HKIAC has also released flowcharts to demonstrate the practical operation of the consolidation and joinder procedures.

The Practice Note on Consolidation of Arbitrations, as with the underlying provisions, has been well received by practitioners and end users of the HKIAC Rules.[16]

CIETAC HONG KONG

CIETAC established its HKAC in September 2012 and has, since then, offered logistical support to cases administered by other CIETAC entities.

However, it was only in 2015 that the HKAC started to accept and administer cases following the 2015 edition of CIETAC's rules coming into force. The HKAC accepted five cases in 2015 and, going forward, it will be an interesting further option for users of international arbitration in Asia.[17]

KEY CASES IN 2015–2016

Decisions handed down by the Hong Kong courts in the past year have continued to reflect the judiciary's strong pro-arbitration stance and robust approach to the enforcement of arbitral awards in Hong Kong. In KB v S & Others,[18] the court in particular laid down '10 commandments'[19] for the enforcement of arbitral awards.[20] The Court of First Instance also granted the first reported antisuit injunction to restrain foreign court proceedings in favour of Hong Kong arbitration.[21] In China International Fund Ltd v Dennis Lau & Ng Chun Man Architects & Engineers (HK) Ltd,[22] the Court of Appeal dismissed a challenge against the constitutionality of section 81(4) of the Arbitration Ordinance relating to appeals against decisions on applications to set aside awards.

KB V S & Others [2015] HKCU 2271

In KB v S & Others, Justice Mimmie Chan[23] considered an application by S and others to set aside an Order of the Hong Kong court granting leave for KB to enforce two Hong Kong arbitral awards. The application of S and others was dismissed and struck out, on the basis that it had been made out of time without proper reason, S and others had not stated precise grounds for the application, and in any event Justice Chan found that the application was without merit. The court ordered indemnity costs against S and others.

In the judgment, Justice Chan summarised – in a list of '10 commandments' – the Hong Kong courts' pro-enforcement approach towards the enforcement of arbitral awards:

1. The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.
2. […] the court should interfere in the arbitration of the dispute only as expressly provided for in the [Arbitration] Ordinance.
3. Subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how their dispute should be resolved.
4. Enforcement of arbitral awards should be 'almost a matter of administrative procedure' and the courts should be 'as mechanistic as possible' (Re PetroChina International (Hong Kong) Corp Ltd [2011] 4 HKLRD 604).
5. The courts are prepared to enforce awards except where complaints of substance can be made good. The party opposing enforcement has to

show a real risk of prejudice and that its rights are shown to have been violated in a material way (Grand Pacific Holdings Ltd v Pacific China Holdings Ltd [2012] 4 HKLRD 1 (CA)).

6. In dealing with applications to set aside an arbitral award, or to refuse enforcement of an award… the court is concerned with the structural integrity of the arbitration proceedings. In this regard, the conduct complained of 'must be serious, even egregious', before the court would find that there was an error sufficiently serious so as to have undermined due process (Grand Pacific Holdings Ltd v Pacific China Holdings Ltd [2012] 4 HKLRD 1 (CA)).
7. In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction (Xiamen Xingjingdi Group Ltd v Eton Properties Limited [2009] 4 HKLRD 353 (CA)).
8. Failure to make prompt objection to the Tribunal or the supervisory court may constitute estoppel or want of bona fide (Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111).
9. Even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground (Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111, 136A-B).
10. The Court of Final Appeal clearly recognized in Hebei Import & Export Corp v Polytek Engineering Co Ltd that parties to the arbitration have a duty of good faith, or to act bona fide (p 120I and p 137B of the judgment).[24]

These '10 commandments' have been held to apply equally to applications to set aside an arbitral award.[25]

Ever Judger Holding Co Ltd V Kroman Cellik Sanayii Anonim Sirketi [2015] 3 HKC 246

In this case, Justice Godfrey Lam granted an antisuit injunction to restrain Turkish court proceedings in favour of arbitration in Hong Kong.

A dispute arose under a charterparty between Ever Judger and Kroman that provided for any disputes to be referred to arbitration in Hong Kong. In January 2015, Kroman commenced court proceedings in Turkey, while Ever Judger commenced arbitration proceedings in Hong Kong. Ever Judger obtained an ex parte antisuit injunction from the Hong Kong court to restrain the Turkish court proceedings. On 2 March, Ever Judger filed its defence in the Turkish court proceedings together with its objection to jurisdiction. On the same day, Ever Judger applied inter partes to the Hong Kong court for the antisuit injunction to be continued.

The issue before the court was whether there were strong reasons not to grant the injunction, notwithstanding the arbitration clause. On this, Justice Lam held that it is clear that the Hong Kong courts should grant an antisuit injunction to restrain foreign proceedings brought in breach of an agreement for arbitration in Hong Kong, where there has been no delay and

the foreign proceedings are not too far advanced, unless there are strong reasons to the contrary that would warrant not holding the parties to their contract.[26] In respect of the arguments raised by Kroman in opposing the injunction, Justice Lam held that the court would not refuse an injunction simply because there was a risk of parallel proceedings and inconsistent decisions. Also, the 'inconvenience' of this case having two sets of proceedings (one between Ever Judger and Kroman, and the other related proceedings in Turkey between Kroman and its insurer) was a result of the different contracts the parties had entered into, and was not a reason to refuse the injunction.[27]

In respect of Kroman's argument that the Turkish court should be left to decide whether to decline jurisdiction before the Hong Kong court determines whether the injunction should continue, Justice Lam held that the granting of the injunction does not equate to an assertion that the Hong Kong court or arbitral tribunal is a superior or better forum. It seeks only to uphold the parties' arbitration agreement. Also, in this case, Ever Judger was obliged to file its defence under the Turkish court rules, and for that reason had to file its challenge against jurisdiction, as otherwise it would be taken to have submitted to the jurisdiction of the Turkish court.[28]

As for any alleged delay, Justice Lam held that the breach of the arbitration clause occurred when Kroman commenced the Turkish court proceedings in early January 2015. Thereafter, Ever Judger acted quickly in requesting Kroman to withdraw the court proceedings, and applying to the Hong Kong court for an injunction.[29]

On that basis, the court granted Ever Judger's application to continue the antisuit injunction, and ordered costs against Kroman.

Bluegold Investment Holdings Ltd V Kwan Chun Fun Calvin [2016] HKEC 523

In the events leading up to this case, Bluegold, Kwan and another company entered into a series of agreements relating to the issuance of convertible notes by the other company to Bluegold, which were guaranteed by Kwan. The subscription agreement, notes and note conditions contained the same clause providing for Hong Kong arbitration, whereas the guarantee between Bluegold and Kwan provided that Kwan 'irrevocably submits to the non-exclusive jurisdiction of the Hong Kong courts'.[30] Bluegold commenced court proceedings under the guarantee, and Kwan applied to stay the action in favour of arbitration under section 20 of the Arbitration Ordinance.

The main issue in dispute was whether the claim brought by Bluegold was 'in a matter which is the subject of an arbitration agreement' under section 20 of the Arbitration Agreement. If so, Justice Mimmie Chan held, it was mandatory for the court to order a stay of the proceedings. Justice Chan further held that, 'unless the point is clear, the Court should not decide the matter but should refer the parties to arbitration, for the Tribunal to determine its own jurisdiction.'[31]

Justice Chan found that the events that gave rise to the alleged breach of the guarantee obligation were matters arising from the subscription agreement and the notes, which contain an arbitration clause binding Bluegold, Kwan and the company.

Further, having regard to the series of agreements and the context of the transaction, Justice Chan found that it was not clear and obvious from the guarantee that Bluegold and Kwan had provided for a method of dispute resolution that was 'clearly contrary to the intention expressed in the arbitration clause in the Subscription Agreement'.[32] Justice Chan held that

it is arguable that Kwan's submission to the non-exclusive jurisdiction of the Hong Kong courts under the guarantee operated in parallel with the arbitration agreement in the other contracts. She referred to the English case of AXA Re v Ace Global Markets Ltd,[33] which held that a clause providing for disputes arising from an agreement to be referred to the jurisdiction of the English courts, 'operates in parallel with the arbitration provisions of the agreement, by fixing the supervisory court of the arbitration'. In this case, however, it was not necessary for Justice Chan to consider whether Kwan's submission to the court's jurisdiction under the guarantee was a submission to the supervisory jurisdiction of the court only. Rather, she held that Bluegold's court action could be said to be brought 'in a matter which is the subject of an arbitration agreement' and, pursuant to section 20 of the Arbitration Ordinance, must be stayed.

Kwan's stay application was granted together with costs on an indemnity basis.

Top Gains Minerals Macao Commercial Offshore Ltd V TL Resources Pte Ltd [2015] HKCU 2793

In this case, TL Resources sought to set aside a Mareva injunction that Top Gains had obtained from the Hong Kong court in support of proposed arbitration proceedings in Singapore.

Top Gains' initial application to the Singapore court for a Mareva injunction had been refused, on the basis that there was no fraudulent, unconscionable or dishonest conduct by TL Resources that showed a real risk of dissipation of assets. Top Gains subsequently applied to the Hong Kong court for an injunction, on the basis of there being new evidence of TL Resources' improper conduct that demonstrated a real risk of dissipation of assets. The Hong Kong court agreed and granted a Mareva injunction against TL Resources (the Injunction). Top Gains applied again to the Singapore court for an injunction, but the application was again refused. TL Resources then applied to the Hong Kong court to set aside the Injunction granted in Hong Kong.

Justice Chan dismissed TL Resources' application and ordered costs in favour of Top Gains.

In relation to TL Resources' argument that, in applying for the Injunction, Top Gains had misled the Hong Kong court by failing to disclose the Singapore court's reasons for dismissing its initial injunction application, Justice Chan held that any non-disclosure in this respect would not be material since 'the Court in Hong Kong is bound to exercise its own independent discretion in deciding whether there is a real risk of dissipation of assets, as a matter of Hong Kong law'.[34] Further, in exercising its jurisdiction to provide assistance to a foreign court seized of the substantive proceedings, the Hong Kong courts 'must respect the view and the approach of the foreign court, and should be cautious and slow to take a different view', but '[t]hat is not to say that it cannot take a different view'.[35] On the facts, Justice Chan found that Top Gains had not failed to disclose material information or misled the Hong Kong court. Among other things, Top Gains had referred the Hong Kong court to the Singapore court's decision and exhibited a hearing report as well as the Singapore judge's notes of evidence.

Justice Chan also held that, in determining an application for a Mareva injunction in aid of foreign arbitration, the court would consider whether there was a good arguable case that the foreign proceedings (or arbitration) are capable of giving rise to a judgment (or award) that may be enforced in Hong Kong.[36] In this case, the sales agreement between the parties contained a 'hybrid' arbitration clause, providing for disputes to be 'referred to Singapore International Arbitration Centre (SIAC) for arbitration in accordance with the Rules

of Conciliation and Arbitration of the International Chamber of Commerce' and Top Gains commenced ICC arbitration proceedings in Singapore. TL Resources argued that the ICC did not have jurisdiction in this case and so the injunction should not have been granted. Justice Chan declined, however, to rule on the jurisdictional issue, and held that, although Top Gains had seemingly departed from the arbitration clause by commencing ICC rather than SIAC arbitration, 'this is a question of or challenge to the jurisdiction of the arbitral tribunal, which should be determined by the tribunal itself'.[37] Justice Chan further found that an ICC award issued in this case might nonetheless be recognised and enforceable in Hong Kong.

On the significant question of whether there was a real risk of dissipation of assets, Justice Chan found that TL Resources' conduct in this case demonstrated sufficiently 'low commercial morality'[38] to infer a real risk of dissipation and that its explanations for avoiding contractual obligations were 'somewhat incredible'.[39] After failing to deliver goods to Top Gains under the sales agreement, TL Resources allegedly sought to pass on its losses to Top Gains by either terminating the sales agreement or procuring an increase in the contract price. TL Resources then sold the goods it had contracted to sell to Top Gains to a new buyer (although TL Resources argued that this was not done for profit and that it was unable to purchase goods from its supplier as a result of the rising market). Justice Chan also noted TL Resources' belated reliance on the unmeritorious defence of force majeure.

Justice Chan found that there was sufficient evidence, from TL Resources' dealings and conduct in the case, to conclude that there was a real risk that TL Resources would dishonour its obligations under any judgment and that Top Gains might have difficulty enforcing any judgment, in the absence of the Injunction. Accordingly, Justice Chan dismissed TL Resources' application to set aside the injunction and ordered costs in favour of Top Gains.

China International Fund Ltd V Dennis Lau & Ng Chun Man Architects & Engineers (HK) Ltd [2015] HKCU 1854

In this landmark case, the Court of Appeal considered, and confirmed, the constitutionality of section 81(4) of the Arbitration Ordinance, which provides that leave from the Court of First Instance is required for any appeal from a decision of that court under section 81(1) relating to applications to set aside an award.

After China International's application to set aside a Hong Kong award was dismissed by the Court of First Instance, and its application for leave to appeal was also dismissed by the same judge, China International sought leave to appeal from the Court of Appeal. Having regard to section 81(4) of the Arbitration Ordinance, Dennis Lau & Ng Chun Man argued that the Court of Appeal does not have jurisdiction to grant leave. China International argued that the provision is unconstitutional, in that it disproportionately restricts the power of final adjudication of the Court of Final Appeal under article 82 of Hong Kong's Basic Law. In view of the constitutional challenge, the Secretary for Justice also decided to participate in this action.

The Court of Appeal followed the principles laid down by the Court of Final Appeal in A Solicitor v Law Society[40] for determining the proportionality of a provision that restricts the power of final adjudication, namely whether the restriction or limitation pursues a legitimate aim, is rationally connected with that legitimate aim, and is no more than is necessary to accomplish that legitimate aim.[41] It was not disputed that section 81(4) is connected to the legitimate aim of promoting speed, finality and reduction of costs in arbitration and

respecting parties' autonomy in choosing their own dispute resolution process – the only issue in dispute was whether the provision is more than necessary to accomplish that aim.

Having considered the parties' submissions and the applicable law, the Court of Appeal found as follows:

- Notwithstanding the finality of section 81(4), the Court of Appeal has residual jurisdiction to intervene in 'the extreme situation where the refusal of leave by the lower court cannot be properly regarded as a 'judicial' decision'.[42]
- The application of section 81(4) is not absolute in that parties to an arbitration agreement are free to opt for Schedule 2 of the Arbitration Ordinance (the so-called domestic arbitration provisions), which generally provides for greater involvement from the Court of Appeal, to apply. Parties who wish to retain the option of seeking leave to appeal from the Court of Appeal can stipulate in their arbitration agreement that section 4 of Schedule 2 applies.[43]
- The English Court of Appeal has held that the provision under the English Arbitration Act 1966 similar to section 81(4) of the Arbitration Ordinance satisfied the proportionality test.[44] Indeed, 'the limit in the number of permissible court challenges is an integral part of the package for which parties, in the free exercise of their autonomy, opt when they contract out of the ordinary process of litigation and refer their disputes to arbitration'.[45] There is nothing remiss in allowing first instance judges to decide whether to grant leave to appeal against their own decisions, indeed it is 'proportionate that the judge who knows about the case… should be entrusted with the decision whether there is a reasonable prospect of success'.[46]
- In considering the 'no more than is necessary' element, it needs to be borne in mind that there is always 'the possibility of a reasonable range of options'.[47] Having regard to the above factors, the Court of Appeal found that section 81(4) of the Arbitration Ordinance does not fall outside the range of reasonable options, and it is irrelevant that the Model Law does not mandate this particular restriction or that other jurisdictions might adopt different approaches.

Accordingly, the Court of Appeal dismissed the constitutional challenge and ordered indemnity costs against China International.

This decision was followed in Wing Bo Building Construction Co Ltd v Discreet Ltd,[48] where the Court of First Instance upheld the constitutionality of section 20(8) of the Arbitration Ordinance, which provides that decisions of that court to stay proceedings in favour of arbitration are not subject to appeal.

Dana Shipping And Trading SA V Sino Channel Asia Ltd [2016] HKCFI 440

In this case, Justice Chan considered whether an arbitral award should be enforced in Hong Kong, pending determination of an application to set aside the award before the court at the seat of arbitration.

In November 2015, Dana obtained leave to enforce an LCIA arbitration award (the Award) in Hong Kong (the Enforcement Order). Sino applied to set aside the Enforcement Order, while Dana applied for security from Sino for the Award amount under section 89(5) of the Arbitration Ordinance. Prior to the hearing of these applications, Sino applied to the English court to set aside the Award. The application was made six months late, and on the basis that

Sino was not given proper notice of the arbitration proceedings or appointment of arbitrator, and was thus unable to present its case in the arbitration. Before the Hong Kong court, Sino argued that its own application to set aside the Enforcement Order and Dana's application for security should both be adjourned, pending the conclusion of Sino's set aside application in England.

Justice Chan considered the two applicable tests: firstly, 'the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court… If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security'; and secondly, 'the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult… if enforcement is delayed'.[49]

In relation to the first issue, Justice Chan found that Sino's set aside application before the English court was not strong, and it certainly could not be said that the award was 'manifestly invalid'.[50] Among other things, the notices of arbitration and appointment of arbitrator had been served on an entity that had regularly dealt on behalf of Sino with Dana, and to whom Sino had 'lent' its name. There had been no explanation for the delay in Sino's set aside application, and no expert evidence had been adduced as to the likelihood of Sino being granted leave by the English court to make its application out of time.

In relation to the second issue, in light of the lack of financial information surrounding Sino, and Sino's practice of lending its name to another entity to transact on its behalf, Justice Chan found that there was a real risk of dissipation of assets. Justice Chan also noted that Sino appeared to be engaging merely in delay tactics.[51]

Accordingly, Justice Chan ordered that Sino's application to set aside the Enforcement Order be adjourned for a limited period of three months only, and on the condition that Sino pay 60 per cent of the award amount as security into court. Costs of the two applications before the Hong Kong court were again awarded to Dana on an indemnity basis.

CONCLUSION

The past year has seen continued innovation and world-leading initiatives by the HKIAC, the beginnings of potentially highly significant reforms to the rules on third-party funding aimed at supporting and promoting arbitration in the jurisdiction, and further case law reflecting the Hong Kong judiciary's robust pro-arbitration approach. These developments reflect, and reinforce, the international arbitration community's recognition of Hong Kong as the most popular arbitration seat in Asia.

Endnotes

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Summary

The year 2015 witnessed numerous developments in trade relations between Vietnam and foreign partners. In particular, after a decade of preparation, Vietnam has finally become the 84th member state of the Convention on Contract for International Sale of Goods (CISG)[1] which will bring sale contracts between Vietnamese and foreign parties closer to international standards. Furthermore, on 4 February 2016, Vietnam, along with other 11 member countries, signed the Trans-Pacific Partnership (TPP), a high-standard free trade agreement which covers approximately 30 per cent of the global GDP.[2] Besides, on 2 December 2015, Vietnam and the EU finally declared the completion of negotiation of the EU-Vietnam Free Trade Agreement (EVFTA).[3] This treaty marks an important achievement of the 25-year bilateral ties between Vietnam and the EU and is regarded as the beginning of a strategic partnership with unlimited potential between the two partners. By joining these two remarkable treaties, Vietnam has actually adopted the two contentious models of Investor-State Dispute Settlement (ISDS) (ie, the traditional investment arbitration promoted by the United States in the TPP and a brand new system of investment court initiated by the European Commission in the EVFTA).

Apart from the accession to these international treaties, new national legislation was promulgated in 2015 which is believed to create significant changes to the substantive as well as procedural legal matters in Vietnam. Such legislation, both international and domestic, will definitely bring interesting changes to arbitration practices in Vietnam. This article aims at introducing an overview on the changes in the legal framework as a result of the promulgation of new legislation in Vietnam and their potential impacts regarding arbitration and ADR.

AN OVERVIEW OF ARBITRATION IN VIETNAM IN 2015

In September 2015, the Ministry of Justice of Vietnam (MOJ) issued the Report on four years of Implementation of Law on Commercial Arbitration, which was announced in the Conference on the same topic.[4] According to the report of the MOJ, as of 31 July 2015, arbitration centres in Vietnam have handled 879 cases and issued 586 arbitral awards. In addition, the state enforcement agencies received 325 applications for enforcement of arbitral award with the requested enforcement value of nearly US$6.88 million and 592 billion dong. Among them, 180 awards were successfully enforced, which accounted for 60 per cent of the applications.

According to the latest information announced by the MOJ, there are now 15 arbitration centres in Vietnam among which Vietnam International Arbitration Center (VIAC) is considered the most prominent. 2015 bore witness to great achievements of the VIAC with a number of impressive figures. In 2015, the VIAC set a new record of 146 new case filings, recognising an 18 per cent increase from 124 new cases filed in 2014.[5] Among them, 37.1 per cent of the new cases involve foreign elements with a number of them requiring the application of foreign laws and appointment of foreign arbitrators.[6]

Also, the VIAC has just accredited 10 foreign arbitrators to its panel, which increases the number of foreign arbitrators of VIAC to 27 including Professor Gary Born, President of the Singapore International Arbitration Center.

Additionally, the VIAC initiated the revision of its Arbitration Rules to be in line with the Resolution No. 01/2014/NQ-NDTP – Guiding the Implementation of Certain Provisions of the Law on Commercial Arbitration (Resolution No. 01). Remarkably, the procedure for

consolidation of the disputes and the expedited procedure have been incorporated into the drafts of the new Rules.

Not only has Vietnam domestic arbitration undergone rapid development in 2015, but foreign arbitration involving Vietnamese parties has also realised significant improvement. Especially, according to the 2015 Annual Report of the Singapore International Arbitration Center (SIAC),[7] 2015 saw a significant increase in the number of cases involving Vietnamese parties, which makes Vietnam sixth in the top-10 nationalities (excluding Singapore) of parties that submitted their disputes to arbitration at SIAC in 2015 with 29 cases. In addition, Vietnam National Oil and Gas Group (PetroVietnam), a Vietnamese state-owned enterprise, won a US$100 million tax-related dispute in an arbitration conducted under the Arbitration Rules of the International Chamber of Commerce (ICC).[8] These figures indicate a new age when Vietnamese parties are no longer against arbitration in foreign institutions.

New Legislation Governing The Recognition And Enforcement Of Foreign Arbitral Awards

In the latest meeting session in November 2015 the National Assembly of Vietnam approved a number of pieces of new legislation, including the 2015 Civil Procedure Code.[9]

Arbitration laws of Vietnam, though using the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 as a baseline, contain a number of local adaptions. One of the most notable deviations is the separation of the recognition and enforcement of foreign arbitral awards from the 2010 Law on Commercial Arbitration (LCA). Instead, this issue is governed by the Civil Procedure Code (CPC). The 2015 CPC, which comes into force on 1 July 2016, dedicating a chapter to the procedure for recognition and enforcement of foreign arbitral awards. This chapter is considered closer to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Award (the New York Convention) and is expected to significantly improve the poor record of recognition and enforcement of foreign arbitral awards in Vietnam.[10] Positive amendments to this chapter shall be briefly introduced below.

Replacing The Legal Term 'arbitral Decision' With 'arbitral Award' To Be In Line With LCA

The LCA makes clear distinction between 'arbitral decision' and 'arbitral award'. Nevertheless, in the old CPC, the term 'arbitral decision' is used in lieu of 'arbitral award' which causes confusion for practitioners as well as foreign investors. Therefore, in order to get rid of that complexity, the new CPC replaces the term 'arbitral decision' with 'arbitral award' to be in line with the definition in the LCA as well as the New York Convention. It should be noted that under the definition of 'arbitral award', only full and final arbitral awards that were not set aside by the court of the seat of arbitration shall be recognised and enforced in Vietnam and, accordingly, interim awards do not fall within the regime of recognition and enforcement of arbitral awards in Vietnam.

The Competent Authority Handling The Recognition And Enforcement Request

Pursuant to the old CPC, the award creditors have no choice but to submit their application to the MOJ. The dossier is then examined by the MOJ before being passed to the competent court. This process is usually time-consuming and causes delay to the resolution of the application. Therefore, to shorten the proceeding, the new CPC now provides that the award creditors can file their request directly to the competent court unless the mutual legal assistance treaties to which Vietnam is a member explicitly require the submission of the request to the MOJ.[11]

Time Bar For Application For Recognition And Enforcement Of Foreign Arbitral Award In Vietnam

The old CPC is silent on the matter of time limitation for application for recognition and enforcement of foreign arbitral award in Vietnam. Nevertheless, it is shown by precedent that the Court arbitrarily applied the time bar of one year, which is applicable for general civil cases, to this particular procedure [***Cargill v Dong Quang*** (2014), Decision No. 01/2014/QDST-KDTM of the People's Court of Long An province, which is upheld by Decision No. 08/2015/QDST-KDTM of the Appellate Court of the Supreme People's Court in Ho Chi Minh City]. The new CPC has cured this situation by clearly stating a limitation of three years for the application for recognition and enforcement of foreign arbitral award.[12] This time bar shall start as from the date the foreign arbitral award taking effect.

BURDEN OF PROOF

One of the drawbacks of the recognition and enforcement of foreign arbitral award in Vietnam is that heavy burden of proof is usually wrongly placed against the award creditors instead of award debtors due to the silence of the old CPC on this issue. The local court often requests the award creditors to provide bunches of documents to prove a number of issues such as the legal capacity to enter into the contract and the arbitration agreement of each contracting party, validity of the arbitration agreement or the legality of the service of arbitral notices.[13] Understanding that problem, the new CPC, in compliance with article V.1 of the New York Convention, clearly stipulates that the burden of proof shall be borne by the award debtors.[14] This amendment is expected to make a change in the attitude of the local award debtors who often refused to participate in the arbitral proceedings only to later claim against the recognition and enforcement of the arbitral award in Vietnam.

PROOF OF FOREIGN LAW

The old CPC does not provide any provision on how contents of foreign law would be pleaded before the Vietnamese courts. Hence, the local judges usually use their subjective understanding and analogical application of Vietnamese law to interpret and apply foreign laws. To fill in such blank, the new CPC has supplemented a new provision on the application of foreign law in which it stipulates the obligation to provide the contents of foreign law by the litigants.[15] Notably, the law also implicitly provides an open door for the reference of foreign lawyers' affidavit by allowing the provision of foreign law by an individual, organisation or authority specialised in foreign laws.

Judicial Review Of The Appellate Decisions On Recognition Or Non-recognition Of Foreign Arbitral Awards

The appellate decisions on recognition or non-recognition of foreign arbitral awards of the High Court (previously known as the Appellate Court) used to be final and binding without any higher level of review. Nevertheless, due to the bad record of non-recognition cases, the new CPC now allows the review of the decisions by the Supreme People's Court under cassation or re-opening procedure.[16] Thus, it is supposed that the number of foreign arbitral awards to be refused of recognition and enforcement in Vietnam for wrongful application of the law or misinterpretation of facts would decrease under the strict supervision of the Supreme People's Court.

These amendments are expected to bring the law governing the procedure for recognition and enforcement of foreign arbitral awards in Vietnam closer to the international standards.

Though it may take time to see any actual improvement, it is reasonable to believe in a brighter future for the number of recognised foreign arbitral awards in Vietnam. Nevertheless, 'contrary to fundamental principles of Vietnamese laws' is still listed as a ground for refusal of recognition and enforcement of foreign arbitral award in Vietnam, instead of 'public policy'. The concept of 'fundamental principles of Vietnamese laws' remains a long-standing problem, not only of the recognition and enforcement of foreign arbitral awards, but also of the annulment of domestic arbitral awards. It is hoped that detailed definition or guidance on this term shall be issued in the near future.

RECOURSE AGAINST DOMESTIC ARBITRAL AWARDS

According to the report of VIAC, 2015 recognises the highest number of applications for annulment of the arbitral awards with 13 applications. Nevertheless, until the end of 2015, there had yet to be any domestic award set aside by the local court.

Similar to the situation of recognition and enforcement of arbitral award in Vietnam, 'contrary to fundamental principles of Vietnamese laws' is still the most typical ground for the losing parties to challenge the arbitral award. For instance, an award debtor submitted that the arbitral award did not uphold the agreement of parties on acceptance of work, payment and other regulations of Law on Construction could make up a violation of fundamental principles of Vietnamese laws (***Life Style Vietnam Joint Stock Company v Tien Phong Construction and Trade Co., Ltd*** (2015) Decision No. 1161/2015/QD-PQTT dated 23 October 2015 of the People's Court of Ho Chi Minh city). This argument was rejected by the trial panel because it led to a revisit of the merit of the dispute which is not allowed by article 71(4) of the LCA. In another case, the losing party argued that miscalculation of the time bar and failure to clarify on the time of conclusion of the contract and delivery of the goods also resulted in a violation of fundamental principles of Vietnamese laws (***Minh Sang Technical Co., Ltd v Multron System PTE. Ltd*** (2015) Decision No. 1172/2015/QD-PQTT dated 26 October 2015 of the People's Court of Ho Chi Minh city). The trial panel in this case only considered the submission on time bar but still upheld the decision of the arbitral tribunal because the allegation of the award debtor was groundless. Other issues related to the conclusion of the contract and the delivery of the goods are regarded as the substantive matters which had been resolved by the arbitral tribunal and hence not reviewed by the trial panel.

Other grounds raised by the award debtors for challenge against the arbitral award are: the arbitral proceedings are inconsistent with the provisions of laws,[17] violation of the confidentiality of arbitration and not ensure of the impartiality, objectivity and independence of the arbitrators.[18] None of these grounds is justified and all of them are disregarded by the trial panel.

Though there is no new regulation governing the annulment of domestic arbitral award promulgated in 2015, it seems that the guidance of the Supreme People's Court in Resolution No. 01 has been generating a positive effect. These above decisions also reflect the open mind of the local judges with regard to the challenge of domestic arbitral awards in particular and arbitration issues in general.

NEW DAWN OF MEDIATION IN VIETNAM

Though in recent years mediation has been recognised as a method of alternative dispute resolution beside arbitration, there has never been any legislation specifically regulating commercial mediation. The Decree on Commercial Mediation, which is now under the final review of the government and is expected to be passed in the middle of 2016, is the

first legislation governing the commercial mediation in Vietnam. The Decree is inspired by the UNCITRAL Model Law on International Commercial Conciliation with several local modifications. Furthermore, the promising future of Mediation in Vietnam is also facilitated by Chapter 33 of the new CPC on recognition of results of out-of-court mediation. This section will concentrate on introducing highlights of the new framework governing mediation in Vietnam.

QUALIFICATION OF MEDIATORS

According to the Decree on Commercial Mediation, in order to be a mediator in Vietnam, a person must meet specific qualifications that are quite similar to the qualifications of arbitrators set out by the LCA. Notably, there is no explicit restriction on the nationality of the mediator except for the requirement for registration with the Department of Justice in case of ad hoc mediator. That means foreign mediators are free to register and be named in the list of mediators of a mediation centre in Vietnam.

Forms Of Mediation And Procedure For Conducting Mediation

The Decree on Commercial Mediation promotes both institutional mediation and ad hoc mediation. A mediation centre can be newly established or an arbitration centre registering to conduct mediation service. Furthermore, the Decree also encourages foreign mediation institutions to open their branches or representative offices in Vietnam.

Recognition Of Mediated Settlement Agreement

One of the matters contributing to the success of the mediation is the ability of enforcement of the settlement agreement resulted from mediation. For this purpose, firstly the mediated settlement agreement will have binding effect between parties in accordance with the civil law. Furthermore, both the Decree on Commercial Mediation and the new CPC allow one or both parties to request the court for recognition of the mediated settlement agreement. After being recognised, the mediated settlement agreement shall take immediate effect without being reviewed under appellate procedure and be enforced as court judgment in compliance with the 2008 Law on Enforcement of Civil Judgment amended in 2014.[19] These regulations are in line with the international trend reflecting the proposed Convention on Recognition of Mediated Settlement Agreement, a convention with similar effect to the New York Convention, which is now a main topic in the working agenda of the Working Group II of the UNCITRAL.[20]

Regardless of minor deficiencies, these regulations are expected to create a sound legal framework for the solid development of mediation in Vietnam.

ISDS Regimes Under New FTAs Of Vietnam

Vietnam is now member of 11 FTAs and is taking part in the negotiation process of five others.[21] Among them, the regional Trans-Pacific Partnership (TPP) and the Europe–Vietnam FTA (EVFTA) are attracting special attention from investors as well as legal practitioners not only from Vietnam but also from countries all over the world. Though having not signed the Washington Convention on Settlement of Investment Disputes between States and Nationals of Other States (ICSID), Vietnam was involved in seven investment arbitration cases with foreign investors conducted in compliance with UNCITRAL Arbitration Rules, of which Vietnam successfully settled one case, won two cases and is still in the process of resolving four remaining ones.[22]

As ISDS provisions are always the ones with most controversies, this section shall be dedicated to give an overview of the ISDS mechanism under the two modern FTAs that have recently been concluded by Vietnam.

TPP With The Traditional Investment Arbitration Model

The ISDS in the TPP is inspired by the 2012 Model Bilateral Investment Treaties (BIT) of the United States with a number of reformations in order to increase the safeguard and transparency of arbitral proceeding but still maintains the 'loosely institutionalized system of one-off arbitration'.[23]

Procedure Of Dispute Resolution

Influenced by the traditional investment arbitration, investor–state disputes under the TPP shall be resolved by an arbitral tribunal comprises of three arbitrators appointed by the disputing parties unless otherwise agreed by the parties. Under the TPP, the claimant also has a choice of procedural rules, namely the ICSID Convention, ICSID Additional Facilities, UNCITRAL Arbitration Rules or other rules as agreed by both the claimant and the respondent. It should be noted that almost all members of the TPP are members of ICSID while Vietnam has not shown a clear intention to accede to this convention.

Enforcement Of The Award

The arbitral tribunal shall render the arbitral award that has binding effect upon disputing parties if it is not subject to revision or annulment under the ICSID Convention, ICSID Additional Facilities or UNCITRAL Arbitration Rules. There is no appeal mechanism under the TPP. Enforcement of the award shall be provided by the national law of the member states and may be sought through the ICSID Convention or New York Convention.[24]

Transparency

One of the innovations of the ISDS under the TPP is the policy of transparency. Accordingly, all the arbitral documents including, inter alia, the notice of intent, notice of arbitration, pleading, memorials, minutes of transcript of hearings, orders, awards and decisions of the arbitral tribunal shall be made available to the public subject to a limited number of exceptions as may be raised by the respondent. Furthermore, the hearing shall also be open to the public.[25] The TPP also requires the member states to provide guidance on the code of conduct as well as guidance on the conflicts of interest for arbitrators serving on ISDS tribunals.[26] Being familiar with the confidentiality of investment arbitration conducted under the old UNCITRAL Arbitration Rules, it is high time for Vietnam to get used to the transparency policy under the ISDS mechanism of the TPP and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which are incorporated in the new UNCITRAL Arbitration Rules that took effect on 1 April 2014.

In general, ISDS provisions under the TPP is regarding as having 'address the deficiencies and limitations of ISDS provisions in earlier investment treaties'[27] and balancing the rights of the investors with the sovereignty of the host country.

NEW MECHANISM OF ISDS UNDER THE EVFTA

Being regarded as 'one of the most ambitious and comprehensive FTAs to date',[28] the EVFTA applies a new mechanism of ISDS which was proposed by the European Commission. Particularly, it is announced by the European Commission that the ISDS in section 3, Chapter 8 on trade in services, investment and e-commerce of the EVFTA includes key provisions

of the new investment court system for EU trade and investment negotiations which the European Commission is also proposing in the negotiation of the Transatlantic Trade and Investment Partnership (TTIP) with the United States.[29] Accordingly, the disputes between an investor and Vietnam or the EU or a member state of the EU shall be resolved by a two-tier tribunal system in which the decision of the tribunal will be subject to appeal by the appellate tribunal. Furthermore, the procedure of dispute resolution as well as the enforcement of the award is also noteworthy.

INVESTOR–STATE DISPUTE SETTLEMENT BODIES

Instead of traditional arbitration, investment disputes under the EVFTA shall be resolved by standing tribunal operating similarly to a permanent court or the Dispute Settlement Body (DSB) of the WTO. Pursuant to article 12(2) of section 3, Chapter 8 of the EVFTA, the tribunal shall comprise nine standing members, three of them shall be nationals of a member state of the EU, three shall be nationals of Vietnam and three shall be nationals of third countries. The members of the tribunal must be qualified for judicial office in their countries or jurists of recognised competence. Public international law expertise is a compulsory requirement and experience of international trade and investment law and dispute resolution is desirable.[30]

Meanwhile the appellate tribunal will consist of six appointees, two of them nationals of Vietnam, two nationals of a member state of the EU and two nationals of third countries.[32] They are also required to meet the same qualifications as the members of the tribunal and must be appointed to the highest judicial office in their respective countries.[31]

THE PROCEDURE OF DISPUTE RESOLUTION

Similar to the TPP, a claim shall only be considered by the tribunal if it meets all the pre-conditions for the settlement of a dispute such as amicable settlement, consultations and submission of notice of intent to submit a claim. The claimant can choose to apply either the ICSID Convention; the ICSID Additional Facilities; or the UNCITRAL Arbitration Rules; or any other rules on agreement of the disputing parties with clear intention made in their statement of claim.[32]

The tribunal hearing a specific case shall be a division of three members from the nine members of the tribunal, one national of a member state of the EU, one a national of Vietnam and chaired by a member who is a national of a third country.[33] The division of the tribunal shall decide a dispute upon consensus basis. In case, consensus cannot be reached, the majority method shall be used.[34] The decision made by the division of the tribunal shall be regarded as a provisional award and shall be subject to appeal.

Either disputing party may appeal against the provisional award for one of the grounds set out in article 28(1) of section 3, Chapter 8 of the EVFTA. The appellate proceedings shall be conducted similarly to the first instance by the division of three members from the appellate tribunal. The award of the appellate tribunal shall be final and binding upon the disputing parties.

The dispute resolution proceedings shall be assisted by the Secretariat of ICSID or the Permanent Court of Arbitration, which will be decided during legal scrubbing before the finalisation of the text of the EVFTA.

ENFORCEMENT OF THE AWARDS

A provisional award issued by the tribunal that is not appealed by any disputing party within 90 days of its issuance and final award of the appellate tribunal shall be binding upon parties and not subject to any appeal, review and annulment of other remedy. Unlike the arbitral award rendered by the arbitral tribunal under the ISDS regime of TPP, the final awards under the EVFTA shall be recognised by the member states of the EVFTA within its territory as a final judgment of the local court.[35] Nevertheless, in the first five years after the entry into force of the FTA, the awards, of which Vietnam is a respondent,[36] must be recognised and enforced in Vietnam pursuant to the New York Convention.

Apart from these significances, the ISDS mechanism under the EVFTA also focuses on the transparency as well as the independence and impartiality of the members of the tribunal or appellate tribunal with the incorporation of UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration as referred to in article 20 of section 3 and a Code of Conduct of Members of the Tribunal, Members of the Appellate Tribunal and Mediators attached in Annex II of Chapter 8. Furthermore, there is also a designated mediation procedure mechanism for resolution of investor–state disputes applicable for voluntary mediation between disputing parties.

It is anticipated that the ISDS mechanism under the EVFTA shall be a challenge to Vietnam as the investment disputes will increase along with the growth of trade values. Additionally, it is the first time this new two-tier system is applied and may be supportive evidence for the EU in the negotiation of ISDS provisions in the TTIP.

CONCLUSION

It is said that opportunities are always accompanied by challenges and Vietnam, for ratification of the new generation FTAs, should be ready to cope with the threat of the increase in number of investment arbitration cases. However, the government of Vietnam seems to be concentrating more on trade deals than paying due attention to the ISDS regime. Particularly, Decision No. 04/2014/QD-TTg on Promulgation of Regulation on Coordination in Resolution of International Investment Disputes of the Prime Minister of Vietnam dated 14 January 2014 is regarded as a first positive move to basically prepare to participate in the resolution of investment disputes. Accordingly, the MOJ will be the pioneer assisting the government to coordinate with other national agencies and also act as legal representative agency of the Vietnamese government in the settlement of international investment disputes.

Furthermore, with the amendments of a number of important legislation, Vietnam is showing a positive and friendly attitude toward both arbitration and mediation, being the dispute resolution methods outside the court. This movement is believed to make great contribution to the development of ADR in Vietnam and brings the framework governing arbitration and mediation of Vietnam coming closer to the international standards.

Since these pieces of legislation, both domestic and international, still have not been tested it will be interesting to see what the future may bring and how Vietnam will complete its framework to welcome the opportunities and face the challenges.

Endnotes

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Singapore

Chou Sean Yu and **Alvin Yeo SC**
WongPartnership LLP

Summary

Despite concerns that the growth of international arbitration in Singapore may have hit a plateau, statistics from the Singapore International Arbitration Centre (SIAC) and the Singapore courts show that there was a steady rise in new cases in Singapore in 2015.

In 2015, the SIAC recorded its highest ever number of administered cases and highest ever sum in dispute since commencing operations in 1991. There was also a relatively larger number of international arbitration cases that came before the Singapore courts and that is a positive indication of the continued increased activity in international arbitrations seated in Singapore.

CONTINUED GROWTH OF INTERNATIONAL ARBITRATION IN SINGAPORE

The 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration undertaken by the Queen Mary University of London and White Case LLP found Singapore to have been the most improved seat over the past five years.

In 2015, the SIAC received 271 new cases from parties from 55 jurisdictions; a 22 per cent increase from the 222 cases filed in 2014. Of these new cases, a record number of 244 cases were administered at the SIAC. Another new record set in 2015 was the total sum in dispute, amounting to S$6.23 billion. The SIAC reported a total of 116 awards having been issued in 2015.

In August 2015, the SIAC commenced the review of its 2013 Arbitration Rules. A public consultation on the draft revised Rules was undertaken in early 2016. The revision takes into account recent developments in international arbitration practice and procedure, and is aimed at better serving the needs of businesses, financial institutions and governments that use the SIAC. The draft Rules include new proposed joinder, intervention and consolidation provisions, revisions to the SIAC's emergency arbitrator and expedited procedures, and new provisions requiring tribunals to commit to a schedule for the closing of proceedings and subsequent delivery of draft awards. The SIAC will launch its new SIAC Arbitration Rules 2016 at the biennial SIAC Congress to be held in Singapore on 27 May 2016.

The SIAC also sought public feedback in February 2016 on its draft Investment Arbitration Rules 2016, a comprehensive set of specialised rules for the administration of investment arbitrations by the SIAC. The draft Investment Arbitration Rules aim to provide an alternative, bespoke set of procedures to the SIAC Arbitration Rules. They are intended to address issues that have been the focus of much discussion within the international investment arbitration community including, provisions on early dismissal of claims, confidentiality, submissions by non-disputing parties and disclosure of third-party funding arrangements.

In September 2015, the SIAC released a revised SIAC model clause that harmonises the previous SIAC model clause with the SIAC model clause for contracts with Chinese parties, providing a single user-friendly model clause for contracting parties. The revised model clause offers parties flexibility in selecting the seat of arbitration, while providing certainty in designating the SIAC as the arbitral institution to administer their disputes.

DEVELOPMENT OF SINGAPORE'S TRIPARTITE DISPUTE RESOLUTION MECHANISMS

In our last report, we reported on the establishment of the Singapore International Mediation Centre (SIMC) and the Singapore International Commercial Court (SICC).

In 2015 there were five new cases at the SIMC, three of which were arb-med-arb cases jointly administered with the SIAC. All the cases that proceeded to mediation at the SIMC were successfully settled.

The SICC heard its first case in 2015 which involved claims of over S$800 million and concerned Indonesian, Australian and Singapore business interests. The case was heard before a panel of three judges comprising a Singapore High Court judge, an English judge and a Hong Kong judge.

CASE LAW

- We report on the following judgments that were released between March 2015 and February 2016:
- In Coal & Oil Co LLC v GHCL Ltd [2015] SGHC 65, the High Court held that the failure of the arbitral tribunal to declare the proceedings closed before issuing the award did not constitute a breach of duty on the part of the tribunal and did not warrant the award being set aside.
- In PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30 the Court of Appeal, reaffirming the principle of temporary finality in construction contracts, held that a binding, non-final decision of the Dispute Adjudication Board (DAB) under a contract incorporating the 'Conditions of Contract for Construction: For Building and Engineering Works Designed by the Employer' published by the FIDIC (the Red Book) was capable of being enforced by a partial award in arbitration proceedings pending final adjudication of the merits of the DAB's decision.
- The High Court affirmed in Malini Ventura v Knight Capital Pte Ltd & Ors [2015] SGHC 225 that if an arbitration agreement was shown to exist on a prima facie basis, the issue regarding the existence of the arbitration agreement would have to be determined by the arbitral tribunal.
- In Cassa di Risparmio di Parma e Piacenza spA v Rals International Pte Ltd [2015] SGHC 264, the High Court had to determine whether a plaintiff suing on a promissory note was obliged to arbitrate because it was also an assignee of a related contract containing an arbitration agreement with the defendant.
- The Court of Appeal considered in Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals [2015] SGCA 57 the arbitrability of minority oppression actions.
- In AMZ v AXX [2015] SGHC 283 the High Court held that parties, in an application to set aside an award, could not put forward an alternative case on the merits and were bound by the case submitted by them in the arbitration proceedings.
- In AYH v AYI and another [2015] SGHC 300 the High Court held that the failure of a party to make full use of the opportunities afforded to him including by raising arguments against issues which arose during the pendency of the proceedings, would not amount to a breach of natural justice justifying the setting aside of an award.
- In AKN and another v ALC and others and other appeals [2015] SGCA 63, the Court of Appeal considered whether under the Singapore International Arbitration Act (IAA) and the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) it had the power to remit matters back to the tribunal that passed the award for reconsideration, when the award has been set aside.

- The High Court considered in Five Ocean Corporation v Cingler Ship Pte Ltd (PT Commodities & Energy Resources, intervener) [2015] SGHC 311 its powers to order interim measures preserving assets outside Singapore in aid of international arbitrations.

THE TRIBUNAL IS NOT UNDER AN OBLIGATION TO DECLARE PROCEEDINGS CLOSED BEFORE RELEASING ITS AWARD

In Coal & Oil Co LLC v GHCL Ltd [2015] SGHC 65, a dispute arose concerning an agreement for the supply of coal and which was heard pursuant to the 2007 SIAC Rules.

The legal issue involved the interpretation of rule 27.1 of the 2007 SIAC Rules, which provides that the 'Tribunal shall submit the draft award to the Registrar within 45 days from the date on which the Tribunal declares the proceedings closed'. The plaintiff argued that the tribunal had breached its duty under rule 27.1 by failing to declare the arbitral proceedings closed before releasing its award and sought to have it set aside.

The Court held that rule 27.1 only conferred a power, but did not impose an obligation, on the tribunal to declare the arbitral proceedings closed. This was because:

- under the 2010 and 2013 SIAC Rules, the tribunal could only declare the proceedings closed once it had consulted with the parties and formed a view that the parties had no further evidence or submissions to present. To accept the plaintiff's construction would mean that the 2007 SIAC Rules were even stricter than its successor rules since it would impose an unqualified obligation to issue a declaration of closure without the duty to first consult the parties and be subjectively satisfied that parties had no further evidence or submissions to present;
- the declaration of closure was a 'case-management tool' and not a condition precedent for the release of an award; and
- the declaration of closure was not critical and did not add anything substantive to the arbitration process. The Court was of the view that to construe Rule 27.1 in any other manner would not be commercially sensible as the drafters of the SIAC Rules were mindful of the need to avoid impeding the arbitration process with pointless formalities.

The Court therefore held that there was no breach of duty when the tribunal elected not to issue a declaration of closure of the proceedings before releasing its award.

CONFIRMATION THAT A DECISION OF A DAB UNDER THE RED BOOK CAN BE ENFORCED BY A PARTIAL AWARD

In PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30, PT Perusahaan Gas Negara (Persero) TBK (PGN) engaged CRW Joint Operation (Indonesia) (CRW) to, inter alia, design and pre-commission a gas pipeline. Disputes between the parties were referred to and adjudicated by the DAB.

PGN disputed one of the decisions of the DAB requiring it to pay CRW US$17,298,834.57 (adjudicated sum). PGN did not comply with the DAB decision and issued its notice of dissatisfaction (NOD) in terms of clause 20.4 of the Red Book against the DAB decision.

CRW commenced arbitration proceedings in 2009 seeking a declaration that PGN had an immediate obligation to pay CRW and an order for prompt payment. Although PGN did not

file any counterclaim, it disputed its liability to make payment, having issued a NOD, and requested the tribunal to review the merits of the DAB's decision. The tribunal issued an award requiring PGN to give prompt effect to the DAB decision despite having issued a NOD. The award was set aside by the Court of Appeal, inter alia, on the ground that the tribunal had exceeded its jurisdiction by not considering the PGN's challenge to the merits of the DAB decision. We reported on this decision in our report in the 2012 Review.

Thereafter, CRW commenced a second arbitration in 2011 seeking a final determination that PGN was liable to pay the adjudicated sum and pending a final determination, a partial or interim award requiring PGN to pay the adjudicated sum. By an interim award dated 22 May 2013 (interim award) a majority of the tribunal held that PGN was bound to comply with the DAB decision and directed PGN to pay the adjudicated sum.

Dismissing PGN's application to have the interim award set aside, the Court of Appeal held:

- A party's distinct contractual obligation to comply promptly with a DAB decision, whether final and binding or merely binding but non-final, is capable of being directly enforced by arbitration without the issue of non-compliance being first referred to the DAB or parties attempting amicable settlement, as provided in clause 20 of the Red Book.
- A tribunal would be entitled to make a final determination on the issue of prompt compliance alone if that is all it has been asked to rule on.
- Where both the dispute of non-compliance with a binding but non-final DAB decision as well as the dispute over the merits of that DAB decision are put before the same tribunal, the tribunal may:
- make an interim or partial award which finally disposes of the issue of prompt compliance with the DAB decision;
- proceed to consider the merits of the DAB decision, which is a separate and conceptually distinct matter; and
- subsequently make a final determination of the underlying dispute between the parties.

The Court drew a distinction between partial, interim and provisional awards and held that only provisional awards are prohibited by section 19B of the IAA. The Court held that an award enforcing the DAB's decision was not provisional in respect of the issue it determined (ie, PGN's obligation to comply with the DAB decision); and section 19B of the IAA rendered the interim award final and binding qua that particular issue. The Court of Appeal's judgment was one of the runner-ups in the GAR Awards 2016 for 'the most important decision' category.

WHERE AN ARBITRATION AGREEMENT PRIMA FACIE EXISTS, IT IS FOR A TRIBUNAL TO DECIDE ON THE EXISTENCE OF AN ARBITRATION AGREEMENT

Malini Ventura v Knight Capital Pte Ltd & Ors [2015] SGHC 225 involved an application by the plaintiff for an interim injunction staying SIAC arbitration proceedings. Disputes arose out of a personal guarantee (guarantee) pursuant to which the plaintiff guaranteed a loan granted by the defendants to a Singapore company (borrower). The guarantee contained a SIAC arbitration clause.

The borrower defaulted on the loan and the defendants demanded that the plaintiff repay the loan under the guarantee. The plaintiff refused and the defendants commenced arbitration. The plaintiff contended that her signature on the guarantee was forged and thus, there was no arbitration agreement. The plaintiff asked the tribunal to stay the proceedings on the basis that no valid arbitration agreement existed. The tribunal indicated that it wished to proceed with the arbitration, over the plaintiff's objections and request for a stay, and ruled that it would decide the jurisdictional objection in a final award together with the merits of the dispute.

The plaintiff then filed an application to the High Court submitting that pursuant to section 6(1) of the IAA, until a challenge to the existence of an arbitration agreement was resolved by the court, there could be no arbitration agreement. The plaintiff contended that it was for the court to decide whether there was an arbitration agreement or not.

The High Court dismissed the plaintiff's application and held that the issue of whether there was a valid arbitration agreement was to be determined by the tribunal. The Court affirmed the principle of Kompetenz-Kompetenz holding that pursuant to section 6 of the IAA, article 16 of the Model Law and rule 25.2 of the SIAC Rules, the tribunal had the authority to rule on its own jurisdiction and decide on the existence of an arbitration agreement. The Court held that, so long as the defendant satisfied the Court on a prima facie basis that an arbitration agreement existed, the issue would be referred to the tribunal for determination.

A PARTY IS NOT BOUND BY AN ARBITRATION AGREEMENT IN A RELATED CONTRACT IF ITS CLAIMS DO NOT FALL WITHIN THE TERMS OF THE ARBITRATION AGREEMENT

In Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd [2015] SGHC 264, the arbitration agreement was contained in a contract for the sale of goods (supply agreement), between the seller, Oltremare SRL (Oltremare) and the buyer, Rals International Pte Ltd (Rals), which was the defendant in the court proceedings.

Pursuant to the supply agreement, Rals provided eight promissory notes in favour of Oltremare as deferred payment for the goods. Oltremare negotiated these promissory notes to its bank, the plaintiff, Cassa di Risparmio di Parma e Piacenza SpA (Cariparma). Oltremare had also previously assigned its contractual right to payment under the supply agreement to Cariparma under a discount arrangement. When the promissory notes were subsequently dishonoured, Cariparma sued Rals in court.

Rals claimed that Cariparma was bound by the arbitration agreement in the supply agreement as assignee and sought a stay of the court proceedings under section 6 of the IAA.

The High Court held that an assignment of a contract carried with it both the benefit and the burden of the arbitration agreement. The Court considered the principle of conditional benefit and noted that an instrument may be framed so that it conferred only a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed or certain burdens assumed. Such restrictions or qualifications were an intrinsic part of the right, the assignee takes the right as it stands and cannot pick out the good and reject the bad. In such cases, it is not only the original obligor who is bound by the burden, but his successors in title are also unable to take the right without assuming the burden.

Accordingly, the Court found that the right to receive the purchase price under the supply agreement, which had been transmitted by assignment to Cariparma, carried with it

the burden of the arbitration agreement contained in article 9 of the supply agreement. Cariparma was therefore bound to arbitrate all disputes that fell within the scope of the arbitration agreement.

The Court held that, in applying section 6(1) of the IAA to the terms of article 9 of the supply agreement, it was bound to stay the proceedings if the subject matter of the action could be said to 'arise in connection with' the supply agreement. However, Cariparma had not framed its claim on its right as assignee to receive the purchase price under the supply agreement from Rals. Instead, Cariparma's claim was deliberately confined to the eight promissory notes and on that basis Cariparma argued that the subject matter of the action did not 'arise in connection with' the supply agreement.

The Court therefore dismissed the application for a stay, holding that it was highly unlikely that Rals and Cariparma intended to bring claims related to the notes under the arbitration agreement. The rights and obligations arising under the contract were separate and independent from the statutory contract represented by the notes. Further, the parties had confined their arguments to those under the Bills of Exchange Act and had not made any arguments that prompted an inquiry into the performance obligations under the underlying contract. Rals has been given leave to appeal against the High Court decision.

STATUTORY MINORITY SHAREHOLDER'S OPPRESSION CLAIMS ARE ARBITRABLE

In Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals [2015] SGCA 57, the plaintiff (Silica) was a minority shareholder in the eighth defendant, having purchased its shares from the second defendant pursuant to a share sale agreement containing an arbitration agreement. Silica subsequently commenced court proceedings for minority shareholder's oppression claims under section 216 of the Singapore Companies Act.

One of the majority shareholders applied for a stay of the proceedings under section 6(1) of the IAA, in favour of arbitration. The application was dismissed by the High Court on the basis that the minority oppression claim was not arbitrable as the tribunal would not possess the broad remedial powers vested with the Court under the relevant provisions in the Companies Act.

The Court of Appeal overturned the High Court's decision. In considering arbitrability, the Court of Appeal held that where there is a valid arbitration agreement covering the subject matter of the dispute, there will be a presumption that the subject matter is arbitrable. This presumption can only be rebutted by showing that parliament had intended to preclude a particular type of dispute from arbitration or that it would be contrary to public policy to resolve that type of dispute by arbitration.

The Court held that a dispute over minority oppression or unfairly prejudicial conduct was arbitrable as section 216 of the Companies Act was not introduced to protect or further any public interest. Further, rejecting the High Court's reasoning of remedial inadequacy, the Court held that overlapping court and arbitral proceedings arising from the incomplete coverage of the arbitration clause to the dispute, does not in itself justify refusal of a stay under section 6 of the IAA. There was nothing to preclude the underlying dispute from being resolved by arbitration with parties remaining free to subsequently apply to the courts to grant such relief that were beyond an arbitrator's powers.

The Court held that a distinction should be drawn between a minority oppression claim under section 216 of the Companies Act and those involving the liquidation of an insolvent

company or avoidance claims arising out of insolvency, which were non-arbitrable, and observed that there was nothing in section 216 that suggested a preclusion of arbitration.

The Court of Appeal stayed the court proceedings qua the issue that fell within the scope of the arbitration agreement. The Court further held that if Silica commences arbitration, all other issues would be stayed as a matter of case management. Notably, the Court ordered that the stay would be conditional upon the arbitration being administered expeditiously.

PARTIES CANNOT PUT FORWARD AN ALTERNATIVE CASE ON THE MERITS IN PROCEEDINGS FOR SETTING ASIDE AN AWARD

In AMZ v AXX [2015] SGHC 283, AMZ, the seller of crude oil, commenced arbitration proceedings against AXX, the buyer, for breach of contract. AMZ claimed that AXX committed three breaches of contract including failure to take delivery of the crude oil. AMZ alleged that by reason of the cumulative effect of the three breaches, AXX was in repudiatory breach of contract.

The tribunal held that AXX was not in repudiatory breach as two alleged acts did not amount to a breach of contract and the third breach did not constitute a repudiatory breach of the contract. As AMZ had failed to claim for damages for each individual breach, the tribunal dismissed AMZ's claim in its entirety.

AMZ applied to have the award set aside, inter alia, on the ground that the tribunal breached the rules of natural justice as AMZ was unable to present its case in the arbitration and the tribunal failed to accord equality of treatment to it in the arbitration.

The High Court dismissed AMZ's application, finding that there were no procedural defects and no breach of natural justice. The Court noted that, even if there were procedural defects, they caused no prejudice to AMZ because they touched on findings that were not necessary for the tribunal's ultimate decision. The Court observed that since AMZ did not put forward an alternative case before the tribunal that it would be entitled to damages for even a single breach of contract, which did not amount to a repudiatory breach; it could not put forward an alternative case on the merits in proceedings for setting aside and was bound by the case submitted in the arbitration proceedings. This decision is currently under appeal.

FAILURE OF PARTIES TO TAKE THE OPPORTUNITY TO SUBMIT ON ISSUES OF LAW AND FACT WHICH AROSE DURING THE ARBITRATION DOES NOT AMOUNT TO A BREACH OF NATURAL JUSTICE

The High Court dismissed a challenge to set aside an arbitration award in AYH v AYI and another [2015] SGHC 300. AYH was a former director of AYI and had been involved in the operations of an Indonesian mining company which AYI indirectly owned. When AYH stepped down from his posts, AYH and AYI entered into a settlement deed under which AYH was to make payments for previously impugned transactions on certain dates (the settlement deed).

AYH defaulted on the payments. AYI commenced arbitration seeking specific performance. The tribunal found in favour of AYI and ordered specific performance by AYH. AYH applied to set aside the award on the ground that the dispute was beyond the scope of the arbitration and that there was a breach of natural justice pursuant to articles 34(2)(a)(iii) and 34(2)(a)(ii) of the Model Law.

A key issue was whether the settlement deed was capable of performance. AYH claimed that the settlement deed was void for common mistake as the liabilities covered under it were

owed to the Indonesian mining company and not to AYI. AYH asserted that the settlement deed did not settle all of the claims, because payments made under it could not release his liability to the Indonesian mining company, which was not bound by the settlement deed. AYI subsequently entered into an additional agreement with the Indonesian mining company (the additional agreement), which referred to the settlement deed and stated that cash or assets received from AYH by AYI would be passed to the Indonesian mining company, which would release its claims against AYH.

The additional agreement was entered into less than a week before the arbitration hearing, and only after the agreed list of issues had already been settled and submitted to the tribunal. During the course of the hearing before the tribunal, AYI referred to the additional agreement. AYH did not object to the production of the additional agreement at the hearing although he did not admit its validity or legal effect.

Before the High Court, AYH argued that any dispute with respect to the additional agreement was outside the proper scope of the arbitration because, inter alia, the additional agreement had not been included in the agreed list of issues and the effect of the additional agreement was never placed before the tribunal as an issue to be determined during the hearing. Accordingly, AYH claimed that the tribunal did not have jurisdiction to make findings with respect to the additional agreement or make the award it did.

The High Court found that the additional agreement had been properly put forward before the tribunal even though it had not been included in the agreed list of issues or mentioned in the pleadings. More significantly, the Court found that the tribunal had not made a substantive finding regarding the additional agreement. The Court held that the fact that the additional agreement was submitted when the arbitration was substantially under way did not preclude its admission in the proceedings since the existence of the additional agreement had already been made known to AYH, who was aware of AYI's intention to rely upon it during the arbitration. AYH was therefore not prejudiced or deprived of the opportunity to make submissions to the tribunal on the additional agreement.

THE COURT HAS NO POWER TO REFER A MATTER BACK TO THE TRIBUNAL IF AN AWARD HAS BEEN SET ASIDE

In our chapter in the previous edition, we reported on the decision of the Court of Appeal in AKN & Anor v ALC & Ors [2015] SGCA 18, where the setting aside of part of an award by the High Court was affirmed. The Court of Appeal subsequently had to consider issues of costs and consequential orders arising from that decision in AKN and another v ALC and others and other appeals [2015] SGCA 63. Specifically, the Court considered whether it could remit any matter that was the subject of an award that had been set aside (in whole or in part) to the same tribunal that made the award.

It was common ground before the Court that the only express provision permitting a court to remit an award to the original tribunal is found in article 34(4) of the Model Law. The Court went on to hold that article 34(4) confers only a limited power and does not empower the court to remit any matter after setting aside an award. The Court further held that article 34(4) is a curative provision available in limited circumstances where the court considers it appropriate to suspend the setting aside proceedings and remit the matter to the tribunal in order to obviate a defect which may result in the award being set aside. This decision makes it clear that the only recourse that may be available to a party after an arbitral award has been set aside, is to commence fresh arbitration proceedings.

THE COURT CAN MAKE AN ORDER FOR INTERIM RELIEF OVER FOREIGN ASSETS IN SUPPORT OF INTERNATIONAL ARBITRAITON

Finally, Five Ocean Corporation v Cingler Ship Pte Ltd (PT Commodities & Energy Resources, intervener) [2015] SGHC 311 involved a consideration of the court's powers to order interim measures in aid of arbitration under section 12A of the IAA.

The case involved the shipment of a cargo of coal from Indonesia to India. A dispute arose when the defendant failed to pay the freight due after the release of the bill of lading. The charter party between the plaintiff and the defendant contained a lien clause and an arbitration clause referring disputes to arbitration in Singapore. Both the owner of the vessel and the plaintiff subsequently gave notice of lien and exercise of the lien to the defendant and intervener. The plaintiff issued a notice of arbitration to the defendant, who did not respond or appoint an arbitrator. The plaintiff then applied to the High Court for an order for sale so as to preserve the value of the cargo, which had shown visible signs of heating damage.

The High Court examined its powers to grant the order for the sale of the cargo under section 12A(4) of the IAA. A preliminary question was whether the court had the power to preserve assets situated outside Singapore. Although noting that the main legislative intention behind the enactment of section 12A was to give a court power over assets and evidence situated in Singapore, the Court held that the provision was wide enough to confer the court with the power to preserve assets outside Singapore provided the seat of the arbitration is Singapore and the court has in personam jurisdiction over the parties to the local proceedings. The Court also noted that since at the time of the hearing the cargo was situated in international waters, the grant of the sale order would not interfere with the jurisdiction of any other court.

Having found that it had jurisdiction and power to grant an order of sale, the Court proceeded to find that a plaintiff's right to detain possession of the cargo until it received payment of the freight was an 'an asset' within the meaning of section 12A(4) of the IAA and capable of being preserved through an order for sale. Further, the right to detain possession could effectively be preserved through an order for sale because the right to detain possession was transferred to a right to the proceeds of the sale, which could be held in court in Singapore until further orders by the tribunal. Finally, the Court held that the order for sale was urgent and necessary, inter alia, as the cargo was overheating and there was some risk that the coal may self-ignite and the arbitral tribunal had not yet been constituted.

12 Marina Boulevard Level 28, Marina Bay Financial Centre Tower 3, 018982, Singapore

https://www.wongpartnership.com/

Japan

Yoshimi Ohara
Nagashima Ohno & Tsunematsu

Summary

WHAT HAPPENED TO TOKYO/JAPAN AS A SEAT OF INTERNATIONAL ARBITRATION?

The 2015 International Arbitration Survey carried out by Queen Mary University of London in partnership with White & Case (2015 Survey) has disappointed arbitration practitioners in Japan.[1] Five years ago when Queen Mary University of London and White & Case published the 2010 International Arbitration Survey (2010 Survey), Tokyo was ranked fourth among the preferred seats of arbitration.[2] However, in 2015 Tokyo/Japan disappeared from the list of most preferred seats of arbitration.

2010 International Arbitration Survey

Choice Of Seat Of Arbitration Chart 15

1	London	30%
2	Geneva	9%
3	Paris	7%
4	Tokyo	7%
5	Singapore	7%
6	New York	6%
7	Others	34%

2015 International Arbitration Survey

Choice Of Seat Of Arbitration Chart 8

1	London	47%
2	Paris	38%
3	Hong Kong	30%
4	Singapore	24%
5	Geneva	17%
6	New York	12%
7	Stockholm	11%

What happened to Tokyo/Japan over the past five years as a seat of international arbitration? The 2015 survey revealed that the following are the top three decisive factors for the respondents to the 2015 Survey in selecting their preferred seat:

(i) reputation and recognition of the seat;

(ii) law governing the substance of the dispute; and

(iii) particularities of contract in dispute.

Given these factors, the author considers that two phenomena might have primarily contributed to the change of the survey result over the past five years: first, the recent severe

competition among the arbitration seats, particularly in Asia, resulted in two winners in the region – Hong Kong and Singapore, which has made the rest in the region less compelling (ie, item (i)). Second, the surge of outbound investment by Japanese companies due to the continued low growth rate of the economy in Japan might have made Tokyo/Japan less pertinent to disputes under contracts in terms of governing law (ie, item (ii)) as well as making Tokyo/Japan less important as a centre of business contemplated under the contracts (ie, (iii)).

What should Tokyo/Japan do to revive and further boost its position as a preferred seat of arbitration? The Japanese Arbitration Act is consistent with the 1985 UNCITRAL Model Law, and the Japan Commercial Arbitration Association (JCAA) introduced up-to-date arbitration rules in 2014 incorporating then state-of-the-art arbitration rules, including emergency arbitrators. Arbitration practice in Japan meets the global standard, and Japanese courts have been very much arbitration friendly, diligently enforcing arbitration awards and dismissing challenges to arbitration awards, taking a consistent position that errors in the finding facts and application of law do not constitute grounds to refuse enforcement of or set aside an arbitration award. The only exception to this clean record is the Tokyo High Court decision in 2013[3] in which the court set aside an arbitration award based on breach of procedural public policy because the tribunal treated the disputed issues as undisputed and failed to find the facts. The mishandled facts were likely to have been dispositive as such facts would have been found to be in favour of the respondent by the tribunal, and the claimant claims granted by the tribunal may have been in violation of the Antimonopoly Act of Japan. Accordingly, the 2013 Tokyo High Court decision may well be regarded as not having deviated from the principles of the UNCITRAL Model Law, and the Japanese courts remain arbitration friendly. Last, but not least, the Japanese legal market has been open in the sense that foreign practitioners are free to come to Japan to serve as arbitrators or arbitration counsel in arbitration proceedings in Japan regardless of the governing law of the disputed contracts.

The Japanese Federation of Bar Associations and the Japan Association of Arbitrators each launched a project group in 2015 with the purpose of promoting Japan as a preferred seat of arbitration and are now attempting to seek endorsement from the business community and the government. The project is still in its inception, and the author hopes to report the progress of such project in the next edition of the GAR Asia-Pacific Arbitration Review. In the meantime, any constructive suggestions from users or those who wish to use Japan as a seat of arbitration would be very much appreciated. After all, multiple attractive options for seats only benefit users as arbitration is such a global engagement.

KEY JAPANESE COURT DECISIONS ISSUED IN 2015

The author introduces below two key Japanese court decisions issued in relation to arbitration: first, the court dismissed a challenge to an arbitral award based on the presiding arbitrator's failure to disclose; and second, the court narrowly construed an arbitration agreement of a time charter to exclude disputes involving interpretation of the Corporate Reorganisation Act. These court decisions are important because for the first time among the scant published Japanese court decisions in arbitration they dealt with hot topics: a challenge based on an arbitrator's failure to disclose; and an insolvency and arbitration agreement, both of which are widely debated in the global arbitration community.

Challenge To An Arbitral Award Based On Arbitrator's Failure To Disclose – Dismissed

Court Decision – Osaka District Court, 17 March 2015[4]

Facts

In a JCAA arbitration seated in Osaka, the presiding arbitrator was a partner of a law firm in Singapore, and a lawyer who joined the same law firm in its San Francisco office as a partner after about 18 months from the commencement of arbitration had represented and continued to represent a sister company of the claimant in a CRT antitrust class action in California (Class Action). The presiding arbitrator failed to disclose such fact. Before he was appointed, the presiding arbitrator submitted a statement of independence (SOI) to the JCAA with a reservation that, according to his firm's policy, lawyers of his firm in the future would be able to give advice or represent a client in a matter unrelated to the arbitration but having a conflict of interests with a party or parties to the arbitration or their affiliates; lawyers of his firm in the future would be able to give advice or represent a party or parties to the arbitration or their affiliates in a matter unrelated to the arbitration; an arbitrator would not be able to be involved in any of these matters or receive any information on any of these matters; the arbitrator considers that such matters if any will not affect his independence and impartiality as an arbitrator. The two party arbitrators appointed the presiding arbitrator in spite of the reservation. The respondent challenged the arbitration award based on, among other things, the composition of the arbitral tribunal and the arbitration procedure being in violation of Japanese law and public policy[5] due to the presiding arbitrator's failure to disclose circumstances likely to give rise to justifiable doubts as to his impartiality and independence.

Ruling

The court dismissed the challenge to the award for two reasons: no ground for a challenge to the presiding arbitrator was met and any flaw caused by breach of duty to disclose was minor. First, in terms of the ground for a challenge to the presiding arbitrator, the court found that such circumstances do not give rise to justifiable doubts, and there was no suggestion that such circumstances affected the outcome of the arbitration[6] because:

- there was no indication that an exchange of information on the class action was made between the presiding arbitrator and the partner in the San Francisco office;
- the two cases are unrelated and the parties are different; and
- the presiding arbitrator was not involved in the class action or exposed to information concerning the class action.

Second, in terms of breach of duty to disclose, any flaw caused thereby was minor because of the reservation made in the SOI. The respondent could have anticipated that circumstances like the one in this case might happen, yet the respondent did not object to the reservation.

Analysis

While the court in a different jurisdiction could have reached the same conclusion under the same fact pattern, the court analysis significantly fell short compared to international arbitration practice. Essentially, the court in denying the circumstances that give rise to justifiable doubts, relied on the presiding arbitrator's lack of knowledge of his new colleague's representation in the class action and the unrelated nature of the two cases, namely, the arbitration and class action and the party to the class action was a sister company of the party and not the party itself. However, under the IBA Guidelines on Conflicts of Interest in

International Arbitration (the IBA Guidelines), which is widely referred to by prospective and appointed arbitrators, arbitration institutions and the courts in various jurisdictions, if the arbitrator's firm is currently rendering services to an affiliate of one of the parties, will fall within the Orange List, which warrants disclosure of such circumstances even when such relationship with an affiliate of a party does not create a significant commercial relationship for the law firm and without involving the arbitrator.[7] If the arbitrator's law firm did regularly advise an affiliate of a party and the firm derives significant financial income from such affiliate, then the facts fall within the Non-Waivable Red List.[8] Representing a company in a US antitrust class action could incur substantial legal fees. However, the court in this case did not investigate whether the presiding arbitrator's law firm regularly advised a party's affiliate or whether the firm derived significant financial income from such affiliate to the party. The court appeared to have heavily relied on the fact that the presiding arbitrator was not aware of his colleague's services. However, the Japanese Arbitration Act, consistent with the UNCITRAL Model Law, imposes on an arbitrator a continuous duty to disclose any and all circumstances likely to give rise to justifiable doubts as to his or her impartiality and independence. Although neither the law nor rules clearly spell it out in Japan, it is considered to be the natural conclusion that an arbitrator, as well as a party, is required to conduct a reasonable investigation to identify whether there are any circumstances that are likely to give rise to justifiable doubts.[9]

What is worse in this case is that the law firm seems to have been aware of the fact that a new partner represented a sister company of a party to the arbitration, over which another partner is presiding as an arbitrator, and elected not to share such information with the presiding arbitrator by using the so-called advance waiver to avoid a conflict. It was that law firm's policy according to the court decision. The law firm might have thought this advance waiver was a more sanitised version of a conventional advance wavier because an arbitrator would not know during the arbitration the circumstances that are likely to give rise to justifiable doubts so as not to jeopardise his impartiality and independence. The court in this case endorsed the law firm's policy by reasoning that the presiding arbitrator was not aware of his colleague's services, and the respondent, who challenged the award, did not object to the advance waiver. The court rushed to its conclusion without even examining, among other things, whether it was a waivable conflict, whether a duty to disclose/duty to investigate was waivable, the scope of waiver (if waivable), and the timing of the respondent becoming aware of these circumstances. The challenging party does not appear to have made these arguments, and therefore the court may not have been aware of numerous insightful discussions in the wider arbitration community and varying practices in other jurisdictions over an arbitrator's impartiality, independence and duty of disclosure and advance wavier. It would be a pity if, in fact, the court was unable to benefit from those resources, especially the IBA Guidelines. The 2014 IBA Guidelines exhibit a clear direction on this issue (ie, advance waiver does not discharge an arbitrator's ongoing duty of disclosure).[10] Depending on the facts to be explored further in this case, the court could have come to a different conclusion, or at least could have examined and analysed the issues differently, if it had received such input.[11] Accordingly, it is too early to conclude that the Japanese court will find the advance waiver enforceable even under the same fact pattern.

INSOLVENCY AND ARBITRATION – DISPUTES OVER THE INTERPRETATION OF JAPANESE INSOLVENCY LAW ARE OUTSIDE THE SCOPE OF AN ARBITRATION AGREEMENT

Court Decision – Tokyo District Court, 28 January 2015[12]

Facts

In a case where a charterer went through corporate reorganisation proceedings in Japan, an owner sued the trustee of the charterer in the Tokyo District Court seeking, among other things, declaratory judgment that the charterer's freight should be qualified as a common benefit claim as opposed to a reorganisation claim. The trustee, on the other hand, sought dismissal of the lawsuit due to an arbitration agreement in a time charter. The time charter in the dispute was based on the one authorised by the New York Produce Exchange, 1946 version.[13] Paragraph 17 provides that 'should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men'. The charterer and the owner modified this paragraph 17 to have London as the seat of arbitration. The High Court of Justice in the UK issued an order recognising the Japanese reorganisation proceedings as foreign main proceedings and staying any individual proceedings concerning the charterer's assets, including arbitration.

Ruling

The court dismissed the trustee's claim ruling that the arbitration agreement in paragraph 17 is reasonably construed not to cover disputes such as whether or not the charterer's freight should be qualified as a common benefit claim as opposed to a reorganisation claim under the Japanese reorganisation act. To come to that conclusion, the court first found UK law to be the governing law of the arbitration agreement in paragraph 17, given that the time charter was governed by UK law and the seat of arbitration was London. The court, while recognising that UK law interprets a contract as it is written, construed the parties' intention in entering into the arbitration agreement to exclude differences primarily relating to the interpretation of Japanese reorganisation law reasoning that:

- the parties agreed to arbitrate in London under UK law because maritime court precedents and maritime experts are abundantly available in the UK;
- an arbitrator in London who is a 'commercial man' and neither a scholar nor a former judge, may not properly construe complicated legal issues under the Japanese reorganisation act, which is at the centre of the disputes in this suit; and
- UK law itself allows arbitration against a bankrupt debtor only under special circumstances, such as upon the permission of the court.

Analysis

The issue of whether or not a trustee is bound by an arbitration agreement of a debtor has been the subject of heated debate among scholars in Japan. The prevailing view is that an arbitration agreement, being severable from the underlying contract, is not automatically terminated even when a trustee has terminated the underlying agreement based on its right to terminate executory contracts. At the same time, given the dual roles and character of a trustee, namely acting as a successor to a debtor and coordinating the interests of all the interested parties in insolvency proceedings, whether a trustee is bound by an arbitration agreement depends on the nature of each dispute. For instance, when a trustee exercises its rights on behalf of creditors, such as the right of avoidance, a trustee is considered not to be subject to an arbitration agreement. No court decision on this issue was published

until the above court decision.[14] As a matter of practice, the courts in many jurisdictions are generally supportive of a trustee, and it is creditors who tend to insist on honouring an arbitration agreement. On this point, this case was unique in that it was the trustee who disputed the jurisdiction of the court based on an arbitration agreement. It is quite possible that this trustee might have attempted to compel the creditor to give up its claims due to legal costs and the burden associated with London arbitration, which might have affected the outcome of the court decision. It is worth noting that the Japanese court rejected the trustee's argument that, based on the severability of an arbitration agreement, a trustee may not terminate an arbitration agreement by terminating the underlying agreement under the corporate reorganisation act. On the other hand, the court narrowly construed the scope of disputes covered by the arbitration agreement to exclude the particular disputes primarily over the interpretation of the Japanese reorganisation act based on a reasonable interpretation of the parties' intentions. A critic commented that the parties to the arbitration agreement would not have contemplated a situation of insolvency at the time of executing the time charter and to conclude that they would have is hindsight interpretation of the arbitration agreement, with which the author concurs.[15] That said, it was helpful that the Japanese court confirmed that it does not take the position that a trustee is not bound by an arbitration agreement or that a trustee may terminate an arbitration agreement if the underlying contract is executory. A lesson to be learned from this case is that when the two Japanese parties choose a foreign seat of arbitration and foreign governing law (eg, London arbitration or UK governing law in maritime contracts or commodity contracts), due to the abundance of case law and expertise available at the seat and under the governing law, it would be prudent to tailor the language of an arbitration agreement so that the two Japanese parties do not need to argue complicated Japanese legal issues through translation when those are the only primary issues, so as to avoid a situation where important points are lost in the translation.

CONCLUSION – GOING FORWARD

The 2015 Survey is indeed insightful and even instructive as to what Japan should do to improve its position as a seat of international arbitration within the highly competitive arbitration community. The top-two important elements in choosing a preferred seat were neutrality and impartiality of the local legal system and national arbitration law.[16] When legal issues arise in connection with arbitration proceedings, it is the local law that resolves the issues and streamlines the proceedings. The Japanese court has a good track record of supporting arbitration. However, there is much room to improve so as to convince the global arbitration community that the Japanese court does support arbitration by offering clear guidance and direction to heavily debated issues in the global arbitration community rather than focusing on resolving particular issues in each case. The author hopes to report the progress of court decisions in the area of arbitration in subsequent editions of the GAR Asia-Pacific Arbitration Review.

Endnotes

NAGASHIMA OHNO & TSUNEMATSU
長島・大野・常松 法律事務所

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan

Tel: +81 3 6889 7000

http://www.noandt.com

Malaysia

Jovn Choi Fuh Mann, **Andre Yeap SC** and **Avinash Pradhan**
Rajah & Tann Singapore

Summary

Arbitration is a well-established method of dispute resolution in Malaysia. It is set to grow in popularity with the increasing volume of cross-border trade and investment, especially with the advent of the ASEAN Economic Community (AEC). This is because of its many advantages, such as speed, confidentiality, the ability to provide a neutral forum to resolve disputes (especially between parties of different nationalities) as well as according parties with the autonomy to nominate arbitrators and to design the arbitration procedure. This article seeks to provide an overview of the arbitration landscape in Malaysia. The first section of this article will introduce the main aspects of arbitration, with references to some of the salient features of Malaysia's arbitration laws as well as to the relevant case law, while the second section will introduce the developments in Malaysia's arbitration scene in recent years, notably the growing prominence of the Kuala Lumpur Regional Centre for Arbitration (KLRCA).

MAIN ASPECTS OF ARBITRATION AND ARBITRATION LAWS OF MALAYSIA

The primary source of law in relation to both international and domestic arbitration in Malaysia is the Arbitration Act 2005 as amended by the Arbitration (Amendment) Act 2011 (the Act). The Act is modelled after the UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006. It also incorporates important articles from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), to which Malaysia is a signatory. As Malaysia is a common law jurisdiction, the Act is further supplemented by case law that interprets the provisions of the Act.

Arbitration Agreement

An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes, actual or potential, between them in respect of a defined legal relationship (eg, a contractual relationship).[1] Since arbitration is consensual, the arbitration agreement is fundamental in evidencing the parties' consent to arbitrate their disputes. An arbitration agreement may take the form of an arbitration clause contained in a contract.[2] Alternatively, a reference to an arbitration clause in a separate document also constitutes an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.[3]

This latter provision was first interpreted by the High Court of Kota Kinabalu in CTI Group Inc v International Bulk Carrier SPA (CTI Group).[4] There, the defendant sought to set aside an order for the recognition and enforcement of an arbitral award on the grounds that, inter alia, it did not sign the Share Transfer Agreement (STA) that contained an arbitration clause, and therefore should not be compelled to arbitrate the dispute. However, the defendant had signed a number of annexures that made clear reference to the STA. Thus, the question before the High Court was whether the arbitration clause in the STA was incorporated by reference to the annexures and should, accordingly, bind the defendant.

The High Court of Kota Kinabalu cited the Federal Court case of Ajwa for Food Industries Co (MIGOP) Egypt v Pacific Inter-Link Sdn Bhd.[5] In that case, the contract referred to a standard set of terms and conditions that contained an arbitration clause. However, no specific reference was made to the arbitration clause, nor were the standard terms and conditions attached to the contract. The Federal Court held as follows:

> We are of the view that the mere fact the arbitration clause is not referred to in the contract and that there is a mere reference to standard conditions which was neither accepted nor signed, is not sufficient to exclude the existence of the valid arbitration clause. There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required.[6]

Adopting the Federal Court's reasoning, the High Court of Kota Kinabalu in CTI Group held that the arbitration clause in the STA bound the defendant because it was incorporated by reference into the annexures. Further, the annexures were integral to the STA, which meant that the defendant could not have been unaware of the STA and the arbitration clause.

The matter subsequently proceeded to the Court of Appeal of Putrajaya, which allowed the appeal and set aside the registration of the arbitral award. It pointed out that the defendant was not a signatory to the agreement in any manner or had any form of nexus as provided for in sections 9(1) to (5) of the Act, and consequently the arbitration agreement could not be registered as such, pursuant to section 38 of the Act.[7] It remains to be seen how this issue will be considered in subsequent decisions given that the Court of Appeal's pronouncement does not accord with the Federal Court's decision in Ajwa for Food Industries Co (MIGOP) Egypt v Pacific Inter-Link Sdn Bhd, which held that a mere reference to a document containing an arbitration clause was sufficient to constitute an arbitration agreement – even if the document was not signed and even if the arbitration clause was not specifically referred to.

Stay Of Proceedings

Where parties have agreed to resolve their disputes by arbitration, the Malaysian courts generally will not, subject to certain conditions, lend aid to a party who, in breach of the arbitration agreement, commences a suit in court by hearing the suit. Rather, the courts are inclined to stay such court proceedings and direct the parties to arbitrate the dispute. This is reflected in section 10(1) of the Act, which provides as follows:

> A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

The relevant legal principles in relation to section 10(1) of the Act have been helpfully laid down by the High Court of Kuala Lumpur in the case of ZAQ Construction Sdn Bhd v Putrajaya Holdings Sdn Bhd.[8] These principles may be summarised as follows:

- As the language in section 10(1) of the Act is couched in mandatory terms with the use of the word 'shall', the court is obliged to stay court proceedings and refer the parties to arbitration where the terms of section 10(1) of the Act are met.[9]
- The only exception to the above is where the court finds the agreement to be 'null and void, inoperative or incapable of being performed'.[10] These constraints must relate to the arbitration agreement itself, and not the underlying contract or subject matter.[11]

They may also relate to circumstances where it is legally or practically impossible to make valid references to arbitration pursuant to the arbitration clause.[12]

- The court will only stay proceedings that are brought in respect of a matter that is the subject of an arbitration agreement.[13] This is a three-step inquiry:[14]
- What is the nature of the plaintiff's claim?
- What is the ambit of the arbitration agreement?
- Does the plaintiff's claim fall within the ambit of the arbitration agreement?
- Only where the plaintiff's claim falls within the ambit of the arbitration agreement is the court then obliged to stay the court proceedings and refer the parties to arbitration.
- For the court to order a stay, there must be a dispute to refer to arbitration.[15] However, the court is not required to evaluate, let alone determine, the merits of the plaintiff's claims or the defendant's defences when deciding whether to grant a stay.[16]
- The party seeking a stay of court proceedings must not have taken such a step in the proceedings as to disentitle it to the order of stay. A step in the proceedings is a definitive, conscious and deliberate step taken in respect of participating in the court proceedings.[17]
- Arbitration agreements should be construed broadly so as to give effect to the contractual choice of the parties as opposed to defeating their agreement. Such an approach accords with the philosophy of minimal court intervention in matters that parties had agreed to submit to arbitration.[18]

Appointment Of Arbitrators

The Act gives the parties freedom to agree on a procedure for appointing arbitrators.[19] In the absence of such an agreement, the Act provides for certain default procedures. Thus, if the parties fail to agree on the appointment of arbitrators, any party may apply to the Director of the KLRCA for such appointment.[20] If the Director in turn fails to appoint the arbitrators, any party may then apply to the High Court to seek its assistance to do so.[21] In appointing the arbitrators, the Director or the High Court shall have due regard to several factors, such as any qualifications required of the arbitrator by the parties' agreement.[22]

To what extent and on what basis can a party challenge the appointment of arbitrators by the Director? This question was considered by the Court of Appeal of Malaysia at Kuching, Sarawak in the case of Sebiro Holdings Sdn Bhd v Bhag Singh.[23] Before the High Court, the appellant sought but failed to terminate the appointment of the respondent as arbitrator on the grounds that he lacked geographical knowledge of Sarawak, which was the place of performance of the underlying contract. In dismissing its appeal, the Court of Appeal noted that 'the power exercised by the Director of the KLRCA under subsections 13(4) and (5) of [the Act] is an administrative power' and therefore '[his function] is not a judicial function where he has to afford the right to be heard to the parties before an arbitrator(s) is appointed'.[24] Following from this, it was held that:[25]

> the Court cannot interpose and interdict the appointment of an arbitrator whom the parties have agreed to be appointed by the named appointing authority under the terms of the Contract, except in cases where it is proved that there are circumstances which give rise to justifiable doubt as

> the [arbitrator's] impartiality or independence or that the [arbitrator] did not possess the qualification agreed to by the parties.

On the facts, since there was no pre-agreement between the parties as to the arbitrator's qualification, the arbitrator could not be disqualified on the grounds argued by the appellant.

Reference On Questions Of Law

As mentioned earlier, one of the fundamental tenets of the modern arbitration regime is minimal curial interference. Indeed, the Act states that '[n]o court shall intervene in matters governed by this Act, except where so provided in this Act'.[26] Therefore, there are limited avenues through which an arbitral award may be challenged before the courts in Malaysia. One of them is for the aggrieved party to apply to the High Court to set aside an arbitral award on certain exhaustive grounds laid down in section 37 of the Act. The other avenue is for that party to refer a question of law to the High Court in accordance with section 42 of the Act, which is the subject of consideration in Awangku Dewa Bin Pgn Momin v Superintendent of Lands and Surveys, Limbang Division, decided by the Court of Appeal of Malaysia sitting at Kuching, Sarawak,[27] and in Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd,[28] decided by the Court of Appeal of Putrajaya.

The first case concerned disputes over native customary rights over certain parcels of land located in Kuala Lawas, Sarawak. Dissatisfied with the arbitrator's award in favour of the respondent, the appellants sought to refer eight questions of law to the High Court of Sabah and Sarawak. The High Court refused to set aside the award on the grounds that '[t]here was no error on the face of the award and there was no reason to intervene on the questions of law or to set aside the award'.[29] The Court of Appeal agreed with the result, but disapproved of the High Court's treatment of the proceedings 'as if it is an 'appeal' against the decision of the arbitrator'.[30] Citing the Court of Appeal's decision in Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd, it cautioned that 'the High Court in exercising its statutory jurisdiction under [the Act] does not enjoy appellate jurisdiction'.[31] The Court of Appeal then proceeded to lay down the following guidance:[32]

> A High Court in dealing with a 42 reference must summarily dismiss the application, without even attempting to answer the 'question of law' posed to the court, if the question is, in the first place, not properly and intelligibly framed; or where it is clear to the court that there is a disguised attempt by the applicant to appeal against the decision of the arbitral tribunal.

On the facts, the Court of Appeal concluded that 'the eight 'questions of law' referred to by the High Court were not genuine questions of law, but rather an attempt to appeal against the decision of the arbitrator'[33] and thus dismissed the appeal.

Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd concerned an arbitral award that contained decisions on matters that were not brought up by the parties and where the parties were not given the opportunity to address those matters. In the arbitral proceedings, even though the arbitral tribunal had found that the counterclaiming defendant had failed to adduce evidence on the quantum of loss that it had suffered, the arbitral tribunal proceeded to summarily fix an inflation rate of 20 per cent on the balance of the contract price in arriving at a 'reasonable' award of damages for the counterclaim.[34]

The Court of Appeal dismissed an appeal brought against the decision of the High Court varying the award. The Court of Appeal agreed with the High Court that, in depriving the plaintiff of an opportunity to address the arbitral tribunal on the rate of inflation, a complaint under section 42 was made out.[35] The Court of Appeal also agreed with the trial judge that the issue referred (ie, 'whether an Arbitral Tribunal can impose a percentage based on inflation rate to represent the cost of work done without a plea on that point and no invitation for submissions on the same being called for from parties through their counsel') was indeed a question of law within the meaning of section 42 of the Act.[36]

In coming to its decision, the Court of Appeal emphasised that the jurisdiction under section 42 'is not a provision as to appeals but a reference on a question of law', and helpfully set down the approach to be taken in considering an application under section 42:

- The court must first ask the hypothetical question (taking the complaint of the applicant at its highest) of whether the purported question of law raised will substantially affect the rights of the parties arising out of the award. If not, the application must be dismissed in limine.[37]
- The applicant must also make out a case that it has suffered 'patent injustice', as a threshold requirement in order for the court to consider the application on its merits.-[38]
- If the applicant is successful in making out a case of 'patent injustice', only then would the court deal with the application on the merits.
- The Court of Appeal expressly eschewed an approach that allowed for reopening of the facts, and, while highlighting that a common sense approach ought to be taken, specifically pointed out that the question of law must arise out of the award, and that the applicant 'must demonstrate the question of law looking at the award and not any other extraneous material'.[39]
- The Court of Appeal also made clear that even if there had been an error on a question of law, the court ought first to consider whether the case was a fit and proper one for remission to the Tribunal. If it was, the case ought to be remitted; as pointed out by the Court of Appeal, '...[t]his is a safe guard guaranteed in section 42 itself to sustain party autonomy... where the court takes the view that the arbitrator has fallen into error and/or what often under the previous regime is referred to as a technical misconduct.'[40] The Court of Appeal made clear that setting aside or varying the award would only be appropriate if the case was not a fit and proper one for remission.

Setting Aside

Section 37 of the Act sets out the grounds under which the High Court may set aside an arbitral award. It states that the party making the application is to provide proof that:

- a party to the arbitration agreement was under any incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;
- he or she was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present that party's case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

- the award contains decisions on matters beyond the scope of the submission to arbitration; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act.

It also provides that the High Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia or the award is in conflict with the public policy of Malaysia.

Two points should be noted where setting aside of an award is concerned. First, the High Court can only intervene on matters specifically set out in section 37 of the Act.[41] This is because section 8 of the Act limits the scope of intervention by the High Court to such extent as is provided in the Act. It follows that the High Court cannot invoke its inherent powers to set aside an arbitral award.[42] Second, it is clear from the use of the word 'may' rather than the word 'shall' in section 37(1) of the Act that the High Court is vested with the discretion to intervene subject to any specific requirements of the Act.[43] For example, the party making the application must provide proof, that is, he must prove to the court the matters complained of on a balance of probabilities.[44]

Three of the setting-aside grounds listed above were considered by the High Court of Kuala Lumpur in Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd.[45] The parties entered into a joint venture agreement (JVA) to undertake a mixed housing and commercial development project on a piece of land in Johor. Several disputes arose between the parties, which were resolved by arbitration in the plaintiff's favour. The plaintiff then sought to enforce the award, while the defendant sought to set it aside.

The defendant argued that the award contained decisions on matters beyond the scope of submission to the arbitration (section 37(1)(a)(v) of the Act) and not falling within the terms of the submission to the arbitration (section 37(1)(a)(iv) of the Act). The High Court disagreed, citing the following proposition from Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd:[46] 'It is trite that the arbitrator has a general jurisdiction to deal with all matters relating to the dispute and this will cover incidental matters.'[47] This comports with the 'more expansive and extensive definition of an 'arbitration agreement' under [the Act]' which 'justifies such a practical approach in promoting arbitration as a one-stop centre to resolve any and every dispute arising out of or under an agreement'.[48] The High Court's reasoning is reminiscent of the oft-cited passage in the House of Lords decision of Fiona Trust and Holding Corp v Privalov:[49]

> [T]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

The defendant also argued that the award was against the public policy of Malaysia (section 37(1)(b)(ii) of the Act) because the plaintiff's attempt to delay or derail the housing development project would not be in the public interest. In rejecting this argument, the High Court distinguished between the adjudication by the arbitrator on the parties' rights under the JVA, which was not contrary to public policy, and the subject matter of the arbitration, which may engage issues of public policy.[50] The High Court also adopted the test of public policy laid down in the Singapore High Court decision of AJU v AJT:

> Thus, in order for AJT to succeed in setting aside the award on the ground that upholding the award would be in conflict with the public policy of Singapore, it has to establish, first, that the tribunal decided erroneously on the issue of illegality of the concluding agreement. Next, it has to show that the error was of such a nature that enforcement of the award would 'shock the conscience,' be 'clearly injurious to the public good' or would contravene 'fundamental notions and principles of justice'.[51]

On the facts, the High Court opined that it could not be said that arbitral proceedings, which may delay the completion of the housing development project, were contrary to public policy per se. Also, in adopting the test of public policy enunciated in AJU v AJT, the High Court seemed to be of the view that the present award was not of such a nature that would 'shock the conscience', be 'clearly injurious to the public good' or would 'contravene fundamental notions and principles of justice'. Therefore, the defendant's attempt to set aside the arbitral award on the grounds of public policy failed.

DEVELOPMENTS OF ARBITRATION IN MALAYSIA

Kuala Lumpur Regional Centre For Arbitration (KLRCA)

The KLRCA was set up in 1978 by the Asian-African Legal Consultative Organisation (AALCO) to provide a neutral venue in the Asia-Pacific region for the arbitration of disputes in relation to trade, commerce and investment. Today, it hosts and administers domestic and international commercial arbitrations, and offers other dispute resolution processes, such as adjudication and mediation. The KLRCA has its own institutional arbitration rules, which are modelled after the UNCITRAL Rules of Arbitration. In addition, it has developed new procedural rules to cater for the various needs and demands of the international business community.

For example, in 2012, the KLRCA pioneered a set of procedural rules known as the 'i-Arbitration Rules'. These rules are shariah compliant and suitable for arbitration of disputes that arise out of an agreement premised on the principles of shariah.[52] Arbitral awards decided in accordance with the i-Arbitration Rules will be enforceable in the signatory countries to the New York Convention. One of the innovative provisions of the i-Arbitration Rules is Rule 11, which provides for a procedure for reference to the Shariah Advisory Council or a shariah expert whenever the arbitral tribunal has to form an opinion on a point related to shariah principles, and decide on a dispute arising from the shariah aspect of the contract. The arbitral tribunal may refer the matter to the relevant Council or shariah expert for its ruling.

The applicable law at the place of business will determine which Shariah Advisory Council is relevant. In Malaysia, for example, Islamic banking is regulated by the Central Bank of Malaysia, whereas the Islamic capital market is regulated by the Securities Commission.

Therefore, in an Islamic banking matter or capital market matter, the 'relevant council' means the Shariah Advisory Council under the Central Bank of Malaysia or the Securities Commission, respectively.[53]

Another set of procedural rules designed by the KLRCA is the 'Fast Track Arbitration Rules'. These rules are targeted at parties that wish to obtain an award expeditiously with minimal costs. To this end, various controls are put in place. For example, the Fast Track Arbitration Rules state that the arbitral tribunal shall publish the final award no later than 90 days (documents-only arbitration)[54] or 160 days (arbitration with a substantive oral hearing)[55] from the commencement of the arbitration. In contrast, arbitrations proceeding under the usual KLRCA Arbitration Rules are estimated to be completed in about a year or more. As for the costs and expenses of arbitration, under the Fast Track Arbitration Rules, the maximum amount that either party shall be entitled to recover is capped at 30 per cent (documents-only arbitration) and 50 per cent (arbitration with a substantive oral hearing) of the total amount of claim and counterclaim (if any).[56]

The KLRCA has also been very active in promoting arbitration through tie-ups with other organisations. For example:

- It was engaged in advanced talks with the Permanent Court of Arbitration (PCA) to make the KLRCA an alternative venue for PCA cases.[57]
- It signed an agreement with the International Council of Arbitration for Sports (ICAS) to be the alternative hearing centre for sports arbitration.[58]
- In mid-2015, the KLRCA set up a new Investment Treaty Arbitration and International Law Department that was headed by an experienced practitioner.[59]
- It has entered into an agreement with the Chartered Institute of Arbitrators (CIArb) with a view to exploring areas of co-operation in the provision of arbitration services to international and domestic parties.[60]
- It has entered into a Memorandum of Understanding with the Asian Football Confederation (AFC) to enhance the collaboration and exchange between the two organisations and to promote sporting dispute resolution.[61]
- It has also signed a Memorandum of Understanding with the Securities Industry Dispute Resolution Centre (SIDREC) to further the common aim of promoting the use of alternative dispute resolution in relation to capital market products and services disputes in Malaysia and the region.[62]
- In March 2016, it organised the inaugural KLRCA International Investment Arbitration Conference (KIIAC 2016) in collaboration with the Institute of Malaysian and International Studies (IKMAS). In the conference, various issues concerning international investment arbitration were addressed by the speakers, with a particular focus on the Asia-Pacific region, given the recent signing of the Trans-Pacific Partnership Agreement (TPP).[63]

It is apparent from this flurry of activities that the KLRCA is keen to establish itself as a hearing venue for the resolution of both international and domestic disputes, including international investment disputes between investors and the host government.

OTHER DEVELOPMENTS IN MALAYSIA

There are three reasons why the developments in Malaysia's arbitration landscape appear promising.

First, the KLRCA has grown from strength to strength over the years. Despite facing intense competition from regional heavyweights such as the Hong Kong International Arbitration Centre (HKIAC) and Singapore International Arbitration Centre (SIAC), the KLRCA has become more prominent and continues to attract an increased caseload year on year. This is attributable to KLRCA's constant improving of its services to meet the demands and needs of the global business community, and active efforts in collaborating with other organisations, both within and outside of Malaysia, which helps to boost its visibility.

Second, a critical decision was made about a decade ago to repeal the outmoded Arbitration Act 1952, which was based on the English Arbitration Act 1950, and to enact the present Act. This was a significant move because it brought the arbitral regime in Malaysia in line with modern arbitral practice. After a few teething years, the Arbitration (Amendment) Act 2011 was introduced to further improve the Act. This series of improvements was discussed in some detail in last year's article. There were also improvements to other legislation, such as the amendments to the Legal Profession Act, which came into force about two years ago and liberalised the legal sector in Malaysia. Foreign law firms and foreign lawyers are now permitted to appear in arbitral proceedings in Malaysia. Furthermore, the absence of a requirement to pay withholding tax on arbitrator's fees earned is welcome news to foreign arbitrators.

Last but not least, the Malaysian courts have been supportive of the arbitration regime in Malaysia. As Datuk Professor Sundra Rajoo, director of the KLRCA, puts it: 'The courts have been enforcing awards and more importantly, supporting awards. They give interim measures and they also support arbitral awards and applications from arbitrations that are seated outside Malaysia.'[64] This encompassing attitude of the courts in not striking down arbitral awards readily further strengthens Malaysia's role and position in the international arbitration community.

In sum, the confluence of the three factors above – a strong arbitral institution, laws favourable to arbitration and a judiciary supportive of the arbitration regime – contribute to the success of arbitration in Malaysia today.

Endnotes

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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 the 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 2016 (the ACICA Rules). The first edition of the ACICA Rules was published in 2005, but ACICA has issued multiple revisions since then.

The 2016 edition of the rules came into force on 1 January 2016 and has introduced significant amendments to address perceived shortcomings in international arbitration practice. One of the major objectives of the changes has been to reduce the rising time and cost of international arbitrations. ACICA has sought to achieve this objective through the introduction of an 'Overriding Objective' to conduct proceedings with fairness and efficiency in proportion to the value and complexity of a given dispute (article 3). In addition, the 2016 rules require arbitrators to adopt certain case management practices including conferencing and measures to encourage settlement by the parties (article 21.3). ACICA has also sought to facilitate effective consolidation and joinder through the new article 14, and to protect arbitrators in the discharge of their functions through a robust immunity encapsulated in article 49.

An earlier round of important amendments was made 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 were 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 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.

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 has also published a separate set of Expedited Arbitration Rules (ACICA Expedited Rules), of which the latest version was published in 2016. 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.

ADC

ACICA is based in Sydney and operates out of the Australian Disputes Centre (ADC). The ADC is an independent non-profit organisation and serves as 'one-stop' ADR shop, offering a full range of dispute resolution services including mediation and international arbitration.

The ADC houses leading ADR providers, which, in addition to ACICA, include the Chartered Institute of Arbitrators (CIArb) Australia and the Australian Maritime and Transport Arbitration Commission (AMTAC).

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

OTHER INSTITUTIONS: PCERA AND MCAMH

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.

A further institutional addition to the Australian arbitration scene in 2014 was the Melbourne Commercial Arbitration and Mediation Hub (MCAMH). Arbitrations at MCAMH benefit from the same neutrality, judicial support and leading regulatory framework as offered by other Australian arbitral institutions.

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 (those dealing with the 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) (formerly known as the Trade Practices Act 1974 (Cth) (TPA)), which is Australia's principal 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 (now section 18 of the Australian Consumer Law) 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 anticompetitive 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 that 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 particular documents for, or 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 13 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 49 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 courwt 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 aborted 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 the 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

Arbitrations seated in Australia now enjoy confidentiality by default (section 23C), subject to a limited number of narrow exceptions, such as where the parties expressly agree otherwise (sections 23D-23G).

The current position reflects recent amendments to the IAA effected by the Civil Law and Justice Legislation Amendment Act 2015. Prior to this enactment, confidentiality under the IAA only applied on an opt-in basis, with the onus on the parties to agree expressly (in their arbitration agreement or otherwise) to hold arbitration proceedings confidentially. Failure to do so could lead to the unsavoury outcome where an arbitration was not confidential, despite a party having at all times intended to resolve the commercial dispute on a confidential basis.

The 2015 amendments to the IAA effectively displaced the well-known decision in Esso Australia Resources v Plowman (1995) 183 CLR 10, in which 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.

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 (article 31.2).

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.

More 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. The decision was subsequently affirmed by the Court of Appeal (see [2015] NSWCA 229). This case 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 sure 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 that 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 those 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.

The increasing incidence of emergency arbitration has led to more attention being paid to the issue of enforceability in the context of awards rendered by emergency arbitrators. The Victorian Court of Appeal enforced an emergency arbitrator's award in Sauber Motorsport AG v Giedo Van Der Garde BV And Others [2015] VSCA 37.

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, Australia was one of 12 nations to sign the Trans-Pacific Partnership (TPP) on 4 February 2016, following over seven years of negotiations. Earlier 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 and the Regional Comprehensive Economic Partnership.

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. Chapter 9 of the TPP establishes robust investment protections and detailed dispute settlement procedures that allow for arbitration in the event of a breach of the protections. FTAs with China and Korea also incorporated ISDS provisions, including requirements that Australian investors be treated fairly and equitably, and that 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

Myanmar

Christopher Chuah and **Goh Wanjing**
WongPartnership LLP

Summary

In the 2016 edition of The Asia-Pacific Arbitration Review, the Myanmar chapter explored the country's arbitration landscape by looking at the key provisions in the Arbitration Act 1944 and considering potential developments in view of the draft Arbitration Bill, as well as the Myanmar Investment Law.

The draft Arbitration Bill has since passed into law. On January 2016, Myanmar's parliament enacted the long-anticipated Arbitration Law 2016 following its accession to the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 (New York Convention) in 2013. The Arbitration Act 1944 was concomitantly repealed.[1] Unlike the Arbitration Act 1944, which was based on the Indian Arbitration Act 1940, the Arbitration Law 2016 largely tracks the UNCITRAL Model Law 1985 (Model Law), bringing Myanmar's antiquated arbitration laws in line with international norms and best practices. Awards rendered in arbitrations seated in any of the other 155 signatories to the New York Convention can now be enforced in Myanmar and vice versa.

This chapter[2] analyses the Arbitration Law 2016 and highlights the key differences between it and the Arbitration Act 1944, with a view to the Model Law as well as the Singapore International Arbitration Act (SIAA)[3] (which also largely incorporates the Model Law). Generally, since the Arbitration Law 2016 is based on the Model Law which seeks to promote arbitration as an independent dispute resolution mechanism, it takes a more pro-arbitration and less interventionist stance compared to its predecessor.

KEY HIGHLIGHTS IN THE ARBITRATION LAW 2016

Domestic And International Arbitration

While the Arbitration Act 1944 only contemplated domestic arbitration, the Arbitration Law 2016 covers both domestic and international arbitration.

Under the Arbitration Law 2016, an arbitration is international if:

- the place of arbitration determined in, or pursuant to, the arbitration agreement is situated outside the country in which the parties to the agreement have their place of business;
- a place where any substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected is situated outside the country in which the parties to the agreement have their place of business; or
- the parties to the arbitration agreement have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.[4]

If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement. If a party does not have a place of business, reference is to be made to his habitual residence.[5] These provisions mirror the Model Law[6] and the SIAA.[7]

Additionally, the Arbitration Law 2016 provides that an arbitration is also international if any party to the arbitration agreement has, at the time of the conclusion of the agreement, its place of business in any country other than Myanmar.[8] This mirrors the SIAA, which uses Singapore as the reference point.[9] However, the equivalent provision in the Model Law is slightly different as it does not use a single country as a reference point, but provides that an

arbitration is considered international if the parties to the arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states.[10]

Arbitration Agreement

The Arbitration Act 1944 and the Arbitration Law 2016 both require an arbitration agreement to be in writing.[11]

Unlike the Arbitration Act 1944, the new Arbitration Law 2016 explicitly clarifies the writing requirement. An arbitration agreement is deemed to be in writing if it is:

- signed by the parties;
- made by electronic communication such that the information contained therein is accessible so as to be usable for subsequent reference; or
- if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another.[12]

As for the first criterion, it is self-evident that an arbitration agreement is in writing if it is signed by the parties. The latter two criteria are based on option 1, article 7 of the UNCITRAL Model Law 2006 (Model Law 2006),[13] but the criteria as set out in the Model Law are even wider. It additionally provides that an arbitration agreement is deemed to be in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. Also, a reference to any document containing an arbitration clause constitutes an arbitration agreement in writing if the reference is such as to make that clause part of the contract.[14] However, the Arbitration Law 2016 has not adopted these two provisions.

The SIAA wholly adopts the above-mentioned Model Law 2006 position[15] and further includes that a reference in a bill of lading to a charterparty or other document containing an arbitration clause shall constitute an arbitration agreement in writing if the reference is such as to make that clause part of the bill of lading.[16]

Separability And Kompetenz-kompetenz

The separability doctrine provides that the arbitration agreement is distinct from its underlying contract. Hence, the nullity or discharge of the underlying contract does not ipso jure invalidate the arbitration agreement. Kompetenz-kompetenz picks up where separability ends. It allows the tribunal to rule on its own jurisdiction, including any objections over the existence or validity of the arbitration agreement.

Though the Arbitration Act 1944 was silent on separability, arbitration clauses have been accepted as separate from their underlying agreements.[17] But the Arbitration Act 1944 expressly rejected kompetenz-kompetenz, mandating that parties challenging the existence or validity of an arbitration agreement had to apply to court to decide the matter.[18] In contrast, separability and kompetenz-kompetenz are explicitly enshrined in the Arbitration Law 2016,[19] the Model Law[20] and the SIAA.[21]

Under the Arbitration Law 2016, where the tribunal rules that it has or does not have jurisdiction, a party may appeal to the court within 30 days of receipt of the decision.-[22] Similarly, under the SIAA, a party may appeal against a tribunal's positive or negative determination on jurisdiction within 30 days of receipt of notice of that ruling.[23] By contrast, under the Model Law, only a positive determination of jurisdiction is appealable.[24] A

tribunal's negative ruling on jurisdiction is intended to be final and binding on that issue as regards the parties and is thus not susceptible to appeal.[25]

Stay Of Court Proceedings

Under the Arbitration Act 1944, where a party to an arbitration agreement commences legal proceedings against any other party to that arbitration agreement, a court may, on the application of any party to the legal proceedings, stay the proceedings if it is satisfied that there is not sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration.[26] The court therefore has discretion not to refer the matter to arbitration. This is similar to the position under the Singapore Arbitration Act (SAA),[27] which applies to domestic and not international arbitrations and under which Singapore courts are conferred with a larger degree of supervisory powers.

By contrast, the Arbitration Law 2016 is less interventionist. Where a party refers a matter which is the subject of an arbitration agreement to the court, the court must refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative, or incapable of being performed.[28] This is consistent with the Model Law[29] and the SIAA.[30]

The Arbitral Tribunal

Constituting The Tribunal

The Arbitration Act 1944 allows parties to agree on the number of arbitrators. There will be a sole arbitrator in the absence of any agreement.[31] Where the arbitration agreement provides for an even number of arbitrators, the arbitrators shall appoint an umpire no later than one month from the latest date of their respective appointments.[32] Where the arbitration agreement provides for three arbitrators – one to be appointed by each party and the third to be appointed by the two appointed arbitrators – the agreement shall have effect as if it provided for the appointment of an umpire and not for a third arbitrator.[33]

Under the Arbitration Law 2016, parties are still free to determine the number of arbitrators but it cannot be an even number.[34] In the absence of any agreement, a sole arbitrator will be appointed.[35] This is similar to the SIAA[36] but different from the Model Law, which provides that the default number of arbitrators is three.[37] Parties are free to agree on the appointment procedure, but where a party fails to act in accordance with the agreed procedure, the default appointing authority is the chief justice or any individual or entity designated by the chief justice.[38] In an arbitration with three arbitrators, each party shall appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator who 'shall act as the presiding arbitrator'.[39] Unlike the role played by the umpire in the Arbitration Act 1944, the 'presiding arbitrator' under the new law will also be involved in the rendering of the award and will not assume an active role only if the two arbitrators cannot agree.

Impartiality And Independence Of The Tribunal

The Arbitration Act 1944 was silent as to the impartiality and independence of arbitrators. This requirement was instead found in case law.[40] The Arbitration Law 2016 now expressly requires potential arbitrators and arbitrators from the time of appointment and throughout the arbitral proceedings to disclose in writing any circumstances likely to give rise to justifiable doubts as to their impartiality or independence.[41] This is identical to the Model Law[42] and SIAA[43] positions.

Challenging The Appointment Of Arbitrators

Under the Arbitration Act 1944, the court may remove an arbitrator if he fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award, or if the arbitrator has misconducted himself or the proceedings.[44]

In contrast, under the Arbitration Law 2016, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess the qualifications agreed to by the parties.[45] These grounds are exhaustive under the Model Law[46] and SIAA,[47] but on a literal interpretation of the relevant provisions under the Arbitration Law 2016, they appear not to be exhaustive, and an arbitrator may possibly be challenged on other grounds other than those stated in section 14(c) of the Arbitration Law 2016. However, it may be argued that a more constructive interpretation or approach should be taken and that those grounds should be read exhaustively.

Tribunal-ordered Interim Measures

The only provision in the Arbitration Act 1944 which explicitly addressed tribunal-ordered interim measures is section 13(e), which empowered the tribunal to administer interrogatories. Though the proviso to section 41(b) of the Arbitration Act 1944 provided that the court's power to make the orders listed in the Second Schedule did not prejudice any power that may be vested in an arbitrator to make the same orders, the Arbitration Act 1944 did not expressly confer upon the tribunal those Second Schedule powers. Whether a tribunal could exercise the Second Schedule powers thus likely depended on the arbitration agreement.

The Arbitration Law 2016 expands the list of tribunal-ordered interim measures. The tribunal is expressly empowered to order:

- security for costs;
- discovery of documents and interrogatories;
- giving of evidence by affidavit;
- preservation, interim custody or sale of any property under dispute;
- samples to be taken from, or any observation to be made of or experiment conducted upon, any property under dispute;
- preservation or interim custody of any evidence;
- provision of security for the amount under dispute; and
- issuance of temporary injunction or other interim measures.[48]

Tribunal-ordered interim measures, whether or not Myanmar is the arbitral seat, may be enforced by the court as if they were the court's orders and directives.[49] Where the arbitral seat is outside Myanmar, the applicant must additionally prove that the interim measure is of the same type as an interim measure made in Myanmar for the court to enforce the interim measure.[50]

Article 17 of the Model Law empowers a tribunal to grant interim measures unless otherwise agreed by the parties, but does not provide a list of such measures. The SIAA does have a list of tribunal-ordered interim measures that mirror the Arbitration Law 2016, but the former has an extra tribunal-ordered interim measure – the power to ensure that any award which may

be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party.[51]

Court-ordered Interim Measures

The Arbitration Law 2016 also provides for court-ordered interim measures and may make orders for:

- obtaining testimonies;
- preservation of any evidence;
- issuance of orders concerning property connected to any dispute under or arising from arbitration;
- inspection, making of photographic records, preservation or taking into custody of any property under dispute;
- samples to be take from, or any observation to be made of or experiment conducted upon any property under dispute;
- permitting the entry into any premises owned by or under the control of any party involved in the arbitration in order to carry out the said matters;
- disposal of any significant property under arbitration; and
- issuance of a temporary injunction or appointment of a receiver.[52]

Article 17J of the Model Law 2006 provides that even though courts have the same power of issuing interim measures in respect of arbitration proceedings, they must exercise the power 'in consideration of the specific features of international arbitration'. The SIAA is even more explicit that court-ordered interim measures should defer to tribunal-ordered interim measures. If the case is not one of urgency, the court can order interim measures only if the application was made with the tribunal's permission or the agreement in writing of the other parties.[53] Furthermore, the court can order interim measures only if or to the extent that the tribunal has no power or is unable for the time being to act effectively.[54] This is similarly reflected in the Arbitration Law 2016, where court-ordered interim measures are only applicable in certain circumstances and would take a backseat to the tribunal's authority.

Applicable Law

The Arbitration Law 2016 differentiates between domestic and international arbitration solely for the purpose of determining the applicable law to the dispute.

Under the Arbitration Law 2016, for domestic arbitration where Myanmar is the arbitral seat, the applicable law is Myanmar law, ostensibly regardless of the intention of the parties.[55]

However for international arbitration where Myanmar is the arbitral seat, the tribunal should apply the law chosen by the parties.[56] This is consistent with the position under the Arbitration Act 1944. Even though the Arbitration Act 1944 was silent as to the determination of the applicable law, Myanmar courts have accepted that party autonomy is paramount and the applicable law should be determined in accordance with the parties' intentions.[57] Under the Arbitration Law 2016, if the parties fail to choose the applicable law, the tribunal may apply the law which it considers applicable.[58] This is the voie directe approach, which allows the tribunal to directly apply a particular law or rules of law.

The Model Law and the SIAA also provide that the tribunal decide the dispute in accordance with the law chosen by the parties.[59] However, where parties fail to choose the applicable law, the Model Law and the SIAA adopt the more complex voie indirecte approach. The tribunal will first determine the applicable conflict of laws rules because applying them to discern the applicable law.[60]

Under the Arbitration Law 2016, Model Law and the SIAA, the tribunal can also decide the matter ex aequo et bono if expressly authorised by the parties.[61]

Setting Aside

Under the Arbitration Act 1944, a setting aside application had to be made within 30 days of the date of service of the notice of filing the award.[62] The setting aside grounds were:

- that the arbitrator or umpire misconducted himself or the proceedings;
- that the award was made after the issue of a court order superseding the arbitration or after arbitration proceedings had become invalid under section 35; or
- that the award was improperly procured or otherwise invalid.[63]

Under the Arbitration Law 2016, a setting aside application can now be made within three months from the date on which the applicant had received the award, or if a request had been made for the correction or interpretation of an award, or for an additional award, from the date that request had been disposed of by the tribunal.[64] The setting aside grounds are:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the prevailing law of Myanmar;
- the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the Arbitration Law 2016, unless the agreement was in conflict with a non-derogable provision of the Arbitration Law 2016;
- the subject matter of the dispute is not capable of settlement by arbitration under prevailing law; or
- the award is in conflict with the national interests of Myanmar.[65]

Under the Arbitration Act 1944, courts had a wide discretion in deciding whether to set aside an award, especially under the general catch-all ground that the award 'was improperly procured or [...] otherwise invalid'. Now, the setting aside grounds under the Arbitration Law 2016 generally mirror those under the Model Law,[66] for which there are numerous authorities that these grounds should be construed narrowly given the pro-enforcement Model Law regime.[67] The SIAA also adopts the Model Law setting aside grounds but

supplements them with two others – namely, when the making of the award was induced or affected by fraud or corruption or if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.[68]

It should also be noted that section 41a(7) of the Arbitration Law 2016 uses the term 'national interest' while the equivalent provisions in the Model Law and the SIAA use 'public policy' instead. It is unclear how the Myanmar courts will construe 'national interest'.

It appears that for domestic awards, the objecting party cannot simply resist enforcement passively. Section 7 of the Arbitration Law 2016 provides that no court shall intervene in matters governed by the Arbitration Law 2016 except where so provided and no provision allows for passive resistance of enforcement of a domestic award. An objecting party must thus apply for setting aside within a three-month time frame, failing which the objecting party cannot resist enforcement.

Appeals

In addition to setting aside, the Arbitration Law 2016 allows a party to, with notice to the other parties, apply to court for a ruling on an issue of law arising from a domestic award.[69] The court shall allow the appeal if the tribunal's ruling on the issue materially prejudices the rights of one or both parties and if the award made by the tribunal is completely wrong.[70] However, where the parties have agreed in writing to disallow appeal or that the stating of grounds in the award is unnecessary, no appeal shall be allowed.[71] This is a completely novel provision that has no genesis in the Arbitration Act 1944. Neither is there an equivalent under the Model Law or the SIAA.

As regards applying to court for a ruling on an issue of law, a parallel may be drawn to the SAA which, unlike the SIAA, allows for appeals on questions of law arising out of an award.[72] Singapore adopts a dual regime for domestic and international arbitrations. Courts are vested with more supervisory powers for domestic arbitrations under the SAA,[73] and the avenue for appeal on questions of law is one such example. However, appeals on questions of law in Singapore is confined to domestic arbitrations under the SAA, while appeals on issues of law in Myanmar ostensibly extends even to awards made pursuant to international arbitrations as long as the seat of arbitration is Myanmar.

Enforcement Of Foreign Awards

The Arbitration Act 1944 was completely silent on the enforcement of foreign awards. Enforcement of foreign awards used to be solely governed by the Arbitration (Protocol and Convention) Act 1937, which gave effect to Myanmar's treaty obligations under the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (Geneva Convention).

Pursuant to Myanmar's accession to the New York Convention, the Arbitration Law 2016 duly provides for enforcement of foreign awards. Under the new law, the enforcing party must produce to the court the original award or a duly authenticated copy, the original arbitration agreement or an authorised copy, and evidence to prove that the award is a foreign award.[74] The latter requirement is not found in the New York Convention, the Model Law or the SIAA, and it is unclear what evidence is necessary to satisfy this requirement. Where the award or arbitration agreement is in a foreign language, the enforcing party must also produce a duly certified translation into English.[75]

Myanmar courts may refuse to enforce a foreign award on the following grounds under the Arbitration Law 2016:

- a party to the arbitration agreement in pursuance of which the award was made was, under the law applicable to it, under some incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it, or in the absence of any such indication, under the law of the country where the award was made;
- the respondent was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings;
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or contains a decision on the matter beyond the scope of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing which, not in accordance with the law of the country where the arbitration took place;
- the award has not yet become binding on the parties to the arbitral award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made;
- the subject-matter of the difference between the parties is not capable of settlement by arbitration under the law of Myanmar; or
- enforcement of the award would be contrary to the national interest of Myanmar.[76]

These grounds generally correspond to article V(1) and (2) of the New York Convention, article 36(1) of the Model Law and section 31(2) to (4) of the SIAA, but there are two differences:

- Article V(1)(c) of the New York Convention, article 36(1)(a)(iii) of the Model Law and section 31(3) of the SIAA contain a proviso that for the fourth ground above, where the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced. However, this proviso is not enacted in the Arbitration Law 2016.
- Section 46c(2) of the Arbitration Law 2016 uses the term 'national interest' while the equivalent provisions in the New York Convention, Model Law and SIAA use 'public policy' instead. It is unclear if 'national interest' will be equated to 'public policy' and if so, whether the narrower conception of 'international public policy' will be preferred over the broader conception of domestic public policy. Since the Arbitration Law 2016 is as yet only officially available in the Myanmar language, these questions remain open.

The Way Forward

It is heartening that the new Arbitration Law 2016 brings Myanmar's arbitration laws in line with international norms and best practices. However, this alone is insufficient. Much still depends on the attitude of Myanmar courts towards the interpretation and the application

of the new legislation, especially in relation to the enforcement of foreign arbitral awards in Myanmar.

For example, as mentioned above, Myanmar courts can refuse to enforce a foreign arbitral ground under the Arbitration Law 2016 on the ground that it would be contrary to Myanmar's 'national interest'. If 'national interest' is given too broad an interpretation, this would obstruct the enforcement of foreign arbitral awards in Myanmar, which is contrary to the objective of the New York Convention. Judges must thus be trained on the proper procedures and philosophy behind the enforcement of foreign awards. The development of a pro-arbitration spirit is imperative, even when state-linked parties are involved, for arbitration to flourish as an independent and effective dispute resolution mechanism in Myanmar.

In addition, an arbitration-friendly culture and infrastructure must also be promoted. In last year's chapter, we referred to the dispute between Fraser and Neave Limited (F&N) and Myanmar Economic Holdings Limited (MEHL), which was arbitrated under Myanmar law in Singapore. The arbitrators had ruled in favour of MEHL, declaring that MEHL was entitled to buy out F&N's stake in Myanmar Brewery. This dispute has now finally been resolved, with F&N agreeing to complete the sale at US$560 million.[77] That MEHL, a government entity, was the successful party may provide the necessary reassurance to Myanmar's political and business class that arbitration is a neutral mechanism that does not disadvantage Myanmar parties.

It is notable that other forms of alternative dispute resolution are gradually being accepted in Myanmar. Officials from the Singapore International Mediation Centre recently visited Myanmar to promote the Centre's services and mediation as a dispute resolution mechanism.[78]

As for arbitration infrastructure, it is encouraging that the Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI) has announced plans to set up arbitration centres to deal with economic disputes across the country. These arbitration centres aim to mediate general disputes including economic affairs, and the first arbitration centre will be established at UMFCCI headquarters in Lanmadow Township, Yangon. To assist in this process, experts from SIAC have conducted training and workshops in Myanmar.[79] Myanmar delegations have also organised study visits to Singapore, which involved discussions with SIAC representatives.[80] These initiatives should help Myanmar attain, in time to come, the critical mass of trained lawyers, arbitrators, judges, as well as knowledgable businesspeople and companies necessary for a functioning arbitration ecosystem.

The enactment of the Arbitration Law 2016 is a significant but nascent step towards a more modern, vibrant and efficacious arbitration ecosystem in Myanmar.

Endnotes

12 Marina Boulevard Level 28, Marina Bay Financial Centre Tower 3, 018982, Singapore

https://www.wongpartnership.com/

Korea

Sam Kim, **Jun Sang Lee** and **Young Shin Um**
Yoon & Yang LLC

Summary

Korea's continued efforts to promote international arbitration as an alternative form of dispute resolution have been evident to practitioners both at home and abroad. The result of such efforts has been an ever-increasing number of Korean parties involved in international arbitrations, as well as a growth in the number of international arbitrations administered under the International Arbitration Rules of the Korean Commercial Arbitration Board (KCAB). These changes reflect the growing consensus among Korean companies that arbitration is more expedient, more cost-efficient and less risky than litigation in a foreign jurisdiction. In addition, with the opening of the Seoul International Dispute Resolution Center (SIDRC) in 2013, Korea signalled its intention to position itself as a new regional hub, with plans to attract both Korean and non-Korean parties to select Seoul as the seat of their arbitrations.

Keeping in line with its reputation for being an arbitration-friendly and enforcement-friendly country, Korea has had several notable developments in the past two years. First, a proposed amendment to the Arbitration Act of Korea has been submitted to the National Assembly for ratification. Second, the International Arbitration Rules of the KCAB has been revised, and will come into effect on 1 June 2016. Lastly, Korean courts continue to demonstrate their positive attitude toward arbitration through recent decisions dealing with various aspects of arbitration. This article addresses each of these developments in more detail.

PROPOSED AMENDMENTS TO THE ARBITRATION ACT OF KOREA

Since the Arbitration Act was adopted in 1966, a number of amendments have been made in order to promote international trade and international commercial arbitration by adopting international arbitration standards, minimising domestic court interference and facilitating enforcement of arbitral awards. Following the new UNCITRAL Model Law of 2006, which introduced the power of the arbitral tribunal to order interim measure, enforceable interim measures, and other pro-arbitration changes, the Ministry of Justice undertook working level discussions for revisions starting in 2014 and submitted final draft of partial amendments to the Arbitration Act (the Amendment) to the National Assembly on 8 October 2015. While it awaits ratification by the National Assembly, a few key amendments are summarised below.

Scope Of Disputes

Current

Article 1 of the Arbitration Act is understood to limit the scope of disputes to 'dispute in private laws', which in Korea is generally understood to encompass only disputes involving property.[1]

Proposed

The Amendment expanded the scope to include 'any property dispute or non-property dispute which may be resolved by the parties' reconciliation' as disputes that can be arbitrated.

Effect

This will expand the scope of arbitrable disputes under the Arbitration Act to include disputes involving intellectual rights and antitrust. Although they are generally classified as non-property disputes, they are considered suitable for arbitration as they tend to trigger confidentiality issues where the parties are reluctant to disclose information to the public, which is generally required in litigation.

Acceptable Forms Of Arbitration Agreement

Current

An arbitration agreement must be 'in writing' and can be in the form of a separate agreement or in the form of an arbitration clause in a contract.

Proposed

It is proposed that, like the UNCITRAL Model Law, any record should be considered to have the effect of a 'valid arbitration agreement in writing' if it shows the parties' arbitration agreement, regardless of its form or method.

Effect

An expansion of the scope of acceptable forms of an arbitration agreement is expected to decrease the number of arbitral awards that are deemed unenforceable by the Korean courts for failure to satisfy the 'in writing' requirement.

Appointment Of An Arbitrator

Current

While the parties are free to agree on the procedure for appointing an arbitrator, if an arbitrator cannot be appointed by the prescribed procedure, the current Arbitration Act empowers only the court to appoint an arbitrator.[2]

Proposed

The Amendment allows the arbitral institution, as well as the court, to appoint an arbitrator if the parties fail to reach an agreement.

Effect

The arbitral institution is considered to be equipped with a more specialised knowledge of the dispute, as well as the arbitrators, and thus would be able to appoint an appropriate arbitrator for the case expeditiously.

Interim Measures

Current

Although article 18 of the current Arbitration Act provides interim measures in the form of an interim order, there continues to be debate on whether such 'order' is enforceable in the Korean courts under the current laws. As a result, after obtaining an interim order from the arbitral tribunal, a party seeking to enforce such interim measures often files a separate proceeding in the court, seeking the court's interim measure rather than trying to enforce the already-obtained arbitral tribunal's interim order.

Proposed

The Amendment provides that an interim measure issued by an arbitral tribunal shall be recognised as binding, and shall be enforced upon application to the competent court. Where recognition or enforcement of an interim measure is sought, the court may, if it considers proper, order the requesting party to provide appropriate security, or where such decision is necessary, protect the rights of third parties. In addition, the party that obtained enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

Effect

After the revision of the UNCITRAL Model Law in 2006, various countries, including Hong Kong, Austria, Germany, France and Switzerland, facilitated enforcement procedures for interim measures issued by arbitral tribunals. By following the international trend, the Amendment is expected to act for the convenience of the parties and further improve the efficacy of arbitral proceedings.

Enforcement: Filing Requirements

Current

To request enforcement of an arbitral award, the party must submit a duly authenticated original award or duly certified copy of the award, and the original arbitration agreement or a duly certified copy of the agreement with the complaint for the enforcement judgment. In addition, if either the award or the arbitration agreement is in a foreign language, a 'duly certified Korean translation' must be included.[3]

Proposed

The Amendment simplified the requirement to a 'copy of the award' as opposed to a 'duly certified copy of the award', and a 'Korean translation of the award' as opposed to a 'duly authenticated Korean translation'. The Amendment eliminated the requirement for an 'original arbitration agreement or duly certified copy thereof'.[4]

Effect

This relaxed requirement for filing is expected to make the enforcement proceeding much more cost and time efficient.

Enforcement: Request For An Order

Current

A party seeking to enforce an arbitral award in Korea is required to go through the litigation process of filing a complaint, making submissions, attending oral hearings and obtaining a judgment from the court.

Proposed

A party can request that the court issue an order in favour of enforcement of an arbitral award.

Effect

Based on the Civil Procedure Act of Korea, obtaining an order, as opposed to a judgment, from the court is generally more cost and time efficient, as courts have several procedural discretions for issuing an order, including the decision of whether or not to hold a hearing.

NEWLY AMENDED KCAB INTERNATIONAL ARBITRATION RULES

In 2014, the KCAB unveiled proposed changes to its then-current International Arbitration Rules (the International Rules) to address the needs of foreign parties in international arbitration in Korea and to reflect the recent trends in the field of international arbitration. The KCAB's proposed changes to the International Rules were widely welcomed by practitioners, given the increasing number of arbitrations being administered under its International Rules, especially in relation to the high number of construction arbitrations in 2015. These proposed

changes were eventually approved, and the new International Arbitration Rules (the New International Rules) will come into full effect on 1 June 2016.[5]

Of the many changes to the new International Rules, the following are worth special note and discussion.

Emergency Arbitrator

One of the most notable changes in the New International Rules is the adoption of the 'emergency arbitrator' provision. With the advent of the system by the American Arbitration Association (AAA) in 2006, various institutions, including the Singapore International Arbitration Centre (SIAC) in 2010, the International Chamber of Commerce (ICC) in 2012, the Hong Kong International Arbitration Centre (HKIAC) in 2013, and the London Court of International Arbitration (LCIA) in 2014, have been introducing emergency arbitrator provisions to their rules. This wide adoption has been a result of the fact that an emergency arbitrator provides more effective protection of the parties' rights during arbitration proceedings, and the KCAB's inclusion of the emergency arbitrator provision in the New International Rules has already received wide support among practitioners. A brief overview of the newly added provision is as follows:

- A party in urgent need of interim measures prior to the constitution of the arbitral tribunal may apply for such relief pursuant to the procedures set forth in the appendix of the New International Rules.
- Any party seeking conservatory and interim measures may apply in writing to the secretariat for interim measures by an emergency arbitrator, with the following required information:
  - details of the measure sought;
  - a reference to the arbitration agreement;
  - contact information of the parties; and
  - specific facts supporting the necessity of the emergency measures.
- The secretariat shall appoint a competent emergency arbitrator, and the emergency arbitrator may order, modify, suspend or terminate emergency measures he or she finds necessary. Parties are bound by the ordered emergency measure ordered by the emergency arbitrators, and the ordered emergency measures shall be deemed as interim measures ordered by the arbitral tribunal once constituted.

Joinder Of Additional Parties

The KCAB also added a provision allowing the joinder of additional parties to the arbitration if the arbitral tribunal approves and all parties, including the additional party, agree in writing to be joined, or the additional party is a party to the same arbitration agreement and the additional party agrees in writing to be joined. However, the arbitral tribunal may refuse the joinder on reasonable grounds, such as a delay in arbitral proceedings.

Single Arbitration Under Multiple Contracts And Consolidation Of Arbitrations

The New International Rules provide a way for parties involved in disputes arising out of multiple contracts to deal with their disputes in a single arbitration proceeding administered by the KCAB. If the arbitration agreements contained in the contracts at issue are considered identical and they all specify arbitration under the KCAB, and most importantly, if it is

sufficient to conclude that the contracts are intended to form one unified and indivisible or continuous transaction, the secretariat can allow for the submission of a single request for arbitration for all claims arising out of multiple contracts. Moreover, the New International Rules added a provision that allows consolidation of arbitrations in certain instances. Consolidation is only possible with the request of a party, prior to the appointment of an arbitrator in the other arbitration, and approval from the tribunal after consulting with the parties and considering the relevant factors.

Confirmation Of Appointed Arbitrators

The KCAB's special attention to ensuring impartiality and independence of an arbitrator is evident in the New International Rules, as reflected in amendments dealing with the arbitrator selection process. Under the previous International Rules, an arbitrator selected by a party (or selected by arbitrators) automatically became a member of the tribunal without any confirmation process. The revision, however, now states that the appointment of an arbitrator would only be valid upon confirmation of the appointment by the secretariat. Even in cases where parties include an explicit statement in the arbitration agreement granting the power to appoint an arbitrator to a party or to each party, it will be assumed that the parties intended to follow the confirmation process of the KCAB. If during the confirmation process the secretariat determines that the arbitrator is clearly inappropriate, the secretariat can reject the appointment after providing opportunity for the appointing party and the appointed arbitrator to submit their opinions.

Statement Of Impartiality And Independence

To further ensure arbitrators' impartiality and independence, the New International Rules include an amendment to the provision dealing with arbitrators submitting statements of impartiality and independence. Under the previous International Rules, only an arbitrator who believed that there were circumstances likely to raise justifiable doubts as to his or her impartiality or independence was required to submit the statement. However, the amendment now requires that all arbitrators accepting appointment must submit an acceptance form and statement.

Electronic Submission

The amendment also grants the electronic submission of pleadings and written communications. Previously, such submissions were required to be in hard copy form, with a copy for each party, arbitrator and the secretariat, and in certain cases the hard copies would be sent to the secretariat for distribution to the parties. However, the New International Rules added the option of providing submissions and written communications through electronic means, such as email and fax.

Other notable changes in the New International Rules include:

- an amendment to the maximum dispute amount for expedited proceedings from 200 million won to 500 million won;
- the addition of a provision that grants the secretariat or the arbitrator the ability to require a party to submit a translation of a submission, if the arbitral language has not yet been decided; and
-

a new requirement that once a respondent has filed an answer, the claimant can withdraw all or part of its request for arbitration only with the consent of the respondent.

RECENT COURT DECISIONS

As the Korean legal system bases its foundation on the civil law system, court decisions in Korea do not have binding stare decisis effect. Nevertheless, Korean courts do give considerable weight to prior decisions, and decisions from the Supreme Court of Korea are considered to have de facto stare decisis effect as the lower courts tend to maintain consistency with the Supreme Court's decisions. In this regard, it is undisputable that the 'pro-arbitration' approach shown in court decisions has long contributed to forming an arbitration-friendly judicial basis in Korea.

Arbitration Agreements

Along with the introduction of amendments to the Arbitration Act to expand the scope of valid arbitration agreement, the Supreme Court in 2015 reaffirmed the judiciary's strong position of widely accepting parties' intent to resolve dispute by arbitration.[6] In case No. 2013da74868, the Supreme Court ruled that a dispute arising out of a Commitment Letter (the Letter) in which one party promised to return the dividend it received in the case of a triggering event, was subject to arbitration despite the fact that the Letter did not contain an arbitration clause. The Supreme Court reasoned that the two parties had executed a shareholders' agreement that contained an arbitration clause, and the original distribution of the dividend was in accordance with the shareholders' agreement. It went on to explain that the Letter should be deemed to be a follow-up agreement to the shareholders' agreement, that the dispute arising out of the Letter is considered to be a dispute arising out of or in connection with the application of the shareholders' agreement, and as such the arbitration clause of the shareholders' agreement would apply. The Supreme Court took the position that there could be discrepancies in the results if disputes relating to the distribution of dividends are subject to arbitration, whereas disputes relating to return of dividends are not.[7]

Future Outlook

There is little doubt that Korea is invested in promoting arbitration as an alternative means of dispute resolution. These recent developments serve as assurance that Korea has the system in place to be the next regional hub of international arbitration in the Asia-Pacific. In the coming year there will continue to be developments, especially in light of the Ministry of Justice's recently submitted draft of the 'Act Related to the Promotion of Arbitration Industry' to the National Assembly. If passed, the proposed act will have a great impact on Korea's ability to attract more international arbitration cases to Korea, educate and train arbitration specialists, and establish a solid foundation for the arbitration industry in Korea.

Endnotes

Yoon & Yang LLC