The Asia-Pacific Arbitration Review

2011

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Global Arbitration Review is delighted to publish *The Asia-Pacific Arbitration Review 2011*, one of a series of special reports that deliver business-focused intelligence and analysis designed to help general counsel, arbitrators and private practitioners to avoid the pitfalls and seize the opportunities of international arbitration. Like its sister reports *The Arbitration Review of the Americas* and *The European and Middle Eastern Arbitration Review*, *The Asia-Pacific Arbitration Review* provides an unparalleled annual update - written by the experts - on key developments.

In preparing this report, Global Arbitration Review has worked exclusively with leading arbitrators and legal counsel. It is their wealth of experience and knowledge - enabling them not only to explain law and policy, but also to put theory into context - which makes the report of particular value to those conducting international business in the Asia-Pacific region today.

Global Arbitration Review would like to thank our contributors, specialists in arbitration across the Asia-Pacific region, who have made it possible to publish this timely regional report.

Although every effort has been made to provide insight into the current state of domestic and international arbitration across the Asia-Pacific region, international arbitration is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought.

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Commercial arbitration in the Asia-Pacific region is flourishing. The last year has seen phenomenal growth in the number of disputes initiated, as well as in the monetary sums in dispute, in both domestic and international arbitration. Looking critically at the year in review, the impact of the global financial crisis predominates. Indeed, it is more probable than not that we have only seen the tip of the iceberg in terms of the disputes that will inevitably surface. However, it must necessarily be the case that clients and practitioners operating in the region were satisfied at the time of entering into commercial contracts - for the most part, well before this economic climate arose or was anticipated - that dispute resolution by arbitration was fair, efficient, and enforceable. What we see now are the very positive results of a variety of steps taken to promote and encourage confidence in arbitration, which necessarily relies on mutual confidence and consent as its basis.

The surge in arbitration can be partially attributed to developing and industrialising populations in the region, and the consequent increase in business opportunities and ensuing disputes. Nevertheless, the positive impact that established arbitral jurisdictions in the Asia-Pacific region, particularly Singapore and Hong Kong, have had cannot be understated. These factors have fostered a positive view of the desirability of resolving disputes by commercial arbitration, beyond the international imperative of using arbitration to secure international enforceability under the New York Convention. Arbitration is not, however, without its critics. There is, at least, an ever-developing interest internationally in conciliation and mediation, which follows very dramatic growth in the use of these processes domestically. Nonetheless, if the current crop of arbitration cases is handled adroitly and expertly, with efficient procedures and minimum delay and expense, arbitration will serve its clients well, and it can be expected that the number of disputes referred to arbitration in the future will continue to increase substantially.

Success in this respect is, of course, not only dependent on arbitrators and arbitration practitioners. The whole process must be well supported by arbitral institutions and, importantly, the courts. All concerned must play their part in maintaining the quality of arbitral processes and outcomes, and in reducing delay and expense. Courts, whether they be supervising or enforcing, must understand and support arbitration in all these respects. This is particularly important in an atmosphere of concern, internationally and domestically, at the incidence of delay and expense. This is demonstrated by the inclusion of new provisions in the 2010 revision of the UNCITRAL Arbitration Rules, which expressly provide that arbitral tribunals must avoid 'unnecessary delay and expense' (article 17.1), and a new provision granting a supervisory function to the designated appointing authority over the 'Fees and expenses of arbitrators' (article 41).

In this introduction, I briefly explore the statistics evidencing and, at least in part, explaining the basis of this recent growth, as well as the significant efforts of individuals and organisations, public and private, to encourage and develop arbitration. These include efforts

by the judiciary to create and promote the services of specialist lists and judges, significant legislative changes, and development of new rules, services and education programmes by arbitral institutes and centres. Modernisation and reform of this kind has occurred in Australia, Hong Kong and Singapore, for example. Arbitrators, arbitration practitioners, arbitral institutes, governments and courts involved or interested in arbitration should, whilst there is momentum, utilise the opportunity to bolster and reinforce both domestic and international arbitral regimes. Arbitration users should also play their part.

Books such as The Asia-Pacific Arbitration Review prompt and encourage us to reflect upon the state of the broader arbitral landscape. This allows us valuable insight into the longer-term trends and developments across the region that are too easily overlooked in the day-to-day bustle of an individual's arbitral practice and jurisdiction-specific concerns. Careful analysis and extrapolation of these comparative trends also allows us to make, with equal measures of trepidation and confidence, predictions about the future shape of arbitration globally. The picture now emerging seems clear: the future of arbitration, as with world economic growth, is Asia.

Statistics

The statistics referred to below provide a brief summary of what is canvassed in greater detail in this year's Asia-Pacific Arbitration Review.1 Overall, the data show the increased incidence of arbitral cases in both established and developing arbitral jurisdictions.

Hong Kong

The Hong Kong International Arbitration Centre (HKIAC) handled 649 dispute cases. Of these, 429 were arbitration related: 309 international arbitrations and 120 domestic arbitrations. Twenty-nine cases were fully administered by the HKIAC in accordance with its rules, up from 12 in 2008.

China

In mainland China, the China International Economic and Trade Arbitration Commission (CIETAC) had 1,482 cases, a 16 per cent increase from the previous year. Of these, 560 were international in nature, a slight increase on the previous year.

The Beijing Arbitration Commission (BAC) had 1,830 cases, a decrease from 2057 in the previous year, which, according to its annual report, was mainly due to the decline in the number of group proceedings instituted. The BAC's international caseload increased by over 50 per cent, from the previous year, to 72. However, 25 of these cases faced problems: ten awards were revoked by courts; eight cases re-arbitrated; and seven were not enforced by a court. Although this was a small minority of the total cases heard, the problems encountered in 2009 were the highest ever recorded for the BAC.

Korea

The Korean Commercial Arbitration Board (KCAB) registered 318 cases in 2009, representing a 21 per cent increase compared with 2008. Seventy-eight international cases were registered - a 66 per cent increase on the previous year.

SIAC

The Singapore International Arbitration Centre (SIAC) handled 160 new cases in 2009, representing a 60 per cent increase on the previous year, and almost doubling the average rate of growth in new cases over the last five years. SIAC administered cases grew to 114, an extraordinary 60 per cent increase on the previous year.

Legislation

There has been significant legislative activity in the region. Perhaps most prominently, the governments of Australia, Singapore and Hong Kong, independently reviewed their respective arbitration legislation. These efforts were aimed at updating, modernising and clarifying existing arbitration law and practice, as well as promoting the individual jurisdiction as an attractive seat for future arbitrations.

Updating and modernisation

As a result of its review, Australia chose to adopt the majority of the 2006 amendments to the United Nations Commission on International Trade Law (UNCITRAL) Model Law (Model Law), bringing it into line with Singapore and Hong Kong. All three jurisdictions now have provisions largely consistent with the 2006 Model Law, including provisions for designating a prescribed appointing authority and governing the grant of interim measures. However, all jurisdictions have opted out of article 17B of the Model Law, which allows an arbitral tribunal to grant ex parte interim orders.

The recent legislative reviews and legislative changes in all three jurisdictions have not only clarified the substantive arbitral law to make arbitration more efficient and attractive, but have also sought to overcome some problems in relation to arbitral practice and perceptions with respect to the substantive and procedural law applicable. The revised International Arbitration Act in both Australia and Singapore came into effect on 6 July 2010 and 1 January 2010, respectively. It is envisaged that Hong Kong will also bring its revised legislation into effect by the end of November 2010.

Moving towards a unitary arbitral regime

All Australian states and territories agreed to adopt the Model Law to govern domestic arbitrations. When this change is enacted throughout the country, commercial arbitration in Australia will be governed by a unitary regime, pursuant to the provisions and intent of the Model Law. This will substantially assist in building expertise, knowledge and skills under the Model Law and arbitration generally, in and among Australian practitioners and the judiciary. In a similar vein, the Hong Kong Arbitration Bill of 2009, expected to be enacted and to commence in November 2010, also provides for a unitary regime, removing the distinction between domestic and international arbitrations. Singapore, however, continues to maintain a distinction between domestic and international arbitrations, the former operating under the Arbitration Act (chapter 10), and the latter under Singapore's International Arbitration Act (chapter 143A). Nonetheless, Singapore's domestic Arbitration Act relies heavily on Model Law provisions, and thus the provisions of the domestic Act are largely similar to those of the international Act.

The standard of arbitral reasons: Gordian Runoff

On 1 April 2010 the New South Wales Court of Appeal handed down a decision in Gordian Runoff v Westport Insurance Corporation & Ors [2010] NSWCA 57. This decision set aside the first instance judgment delivered on 23 April 2009. The case was decided pursuant to the Commercial Arbitration Act 1984 (NSW), which has since been superseded by the Commercial Arbitration Act 2010 (NSW). The court held that the trial judge had erred by finding both a 'manifest error' and 'strong evidence of an error of law' pursuant to the 1984 Act, holding instead that that there was no obvious or prima facie case that the arbitrators were wrong on a question of law. The court overturned the trial judge's decision in relation to the standard of reasoning required to the extent that he had followed the Victorian Court of Appeal decision in Oil Basins v BHP Billiton [2007] VSCA 255. The court found the decision of the Victorian Court of Appeal, insofar as it held that arbitrators should provide the same level of reasoning as that expected of a judge, was 'plainly wrong'.

On 3 September 2010 the High Court of Australia granted leave to appeal from the decision of the New South Wales Court of Appeal in Gordian Runoff v Westport Insurance Corporation & Ors [2010] NSWCA 57. This will allow the High Court to rule determinatively on the extent of reasoning that an arbitrator must engage in to avoid a challenge on a point of law pursuant to the provisions of the domestic Commercial Arbitration Act. The appeal is expected to be heard early in 2011, and will finally reconcile the position between the appellate courts and across Australia. Given that the provision for reasoning is broadly consistent in both the 1984 and 2010 Act, this decision will be of importance under Australia's new unitary arbitral regime, which is to be enacted in all other Australian states and territories. In the meantime, the Victorian Supreme Court, in Thoroughvision Pty Ltd v Sky Channel Pty Ltd [2010] VSC 139, has taken a narrow view of the extent of the principle established with respect to arbitrator's reasons in the Oil Basins case.

Enforcement and the validity of foreign arbitral awards

On 9 April 2010, the Singapore High Court in Denmark Skibstekniske Konsulenter A/S I Likvidation (DSK) v Ultrapolis 3000 Investments Ltd [2010] SGHC 108 considered the validity of a foreign arbitral award in enforcement proceedings. The plaintiff, DSK, applied for leave to enforce an arbitral award, which the defendant resisted. The defendant argued that enforcement should be refused as DSK could not satisfy the evidentiary provisions of the act, which require the production of an arbitration agreement under which the award purports to have been made (section 30(1)(b)). The defendant also argued, pursuant to section 31(2)(b) of the IAA (which is modelled on article V(1)(a) of the New York Convention), that the arbitration agreement was not valid under the law applicable to it. The court dismissed both arguments. It found that at the evidentiary stage, as the grounds for refusing enforcement are contained in other provisions, the court engages only in a formalistic or mechanistic examination, and does not delve into the substance of the award. As a result, DSK had produced a sufficient copy of the arbitration agreement, based on the decision in Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd [2006] 3 SLR(R) 174. In relation to the validity argument, the court found that the agreement was valid under the law it was subject to. Consequently, leave to enforce the award was granted.

In Strandore Invest A/S & ors v Soh Kim Wat [2010] SGHC 151, the plaintiffs sought leave to enforce a foreign award. The defendant requested a stay on enforcement, pending the resolution of a suit earlier filed challenging the arbitration award. The court was satisfied that the formal requirements of the Singapore International Arbitration Act were made out, but expressed some doubt about the mechanistic process the court had earlier endorsed in Aloe Vera and DSK, noting that this approach was not consistent with the English Court of Appeal decision in Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2009] EWCA Civ 755 (Dallah) (which was upheld on appeal in [2010] UKSC 46). It was noted by the court that sometimes 'bad' arbitration awards were handed down, and it thus may not always be appropriate to only undertake a formalistic examination of the documents. Aloe Vera and DSK still represent the law as it currently stands in Singapore. However, DSK has been appealed to the Court of Appeal, which might possibly vary the approach adopted by the Singapore courts.

Australian Commercial Disputes Centre

Early August 2010 saw the opening of the equivalent Australian facility to Maxwell Chambers in Singapore, the Australian International Disputes Centre, based in Sydney. Funded by the Australian and New South Wales governments and Australian Centre for International Commercial Arbitration (ACICA), it offers modern purpose-built hearing facilities akin to its

counterpart in Singapore, and also houses leading ADR providers in Australia - including ACICA, the Australian Branch of the Chartered Institute of Arbitrators and Australian Commercial Disputes Centre (ACDC). It is envisaged that other Australian states will also follow suit, acting in conjunction through a 'grid' of coordinated centres throughout Australia to offer services to domestic and international clients alike.

Australian ACICA Judicial Liaison Committee on cooperation in arbitration

The ACICA Judicial Liaison Committee was established in late October 2010. This committee is chaired by a former chief justice of the High Court of Australia, the Hon Murray Gleeson AC. The committee includes the judges hearing arbitration-related cases from the Supreme Courts and the Federal Court of Australia, as well as representatives from ACICA. It aims to promote uniformity in the rules and procedures relating to arbitration in Australia - particularly concerning the enforcement of arbitration agreements and awards, as well as the appointment of arbitrators, and the provision of interim measures or other assistance in support of arbitration.

Specialist arbitration lists

In January 2010, the Supreme Court of Victoria created a specialist arbitration list, which I manage. The arbitration list hears all arbitration-related cases, both domestic and international, and provides a 24-hour service for urgent applications. In August 2010, Bombay's High Court also announced the creation of a court dedicated to arbitration-related applications. In China, a similar practice has arisen where a lower court decision not to enforce an award is, in practice, automatically referred to a higher court to review, and if not enforced it must, consequently, be reviewed by the Supreme People's Court. All of these efforts are aimed at ensuring that specialisation in the resolution of arbitral disputes leads to consistent and predictable outcomes in line with global arbitration jurisprudence and international conventions and obligations.

Arbitration Rules

UNCITRAL Rules

UNCITRAL published a 2010 version of its Arbitration Rules, replacing the rules of 1976. The 2010 Rules involve largely procedural amendments to clarify and update the original rules in light of the developments in both arbitral best practice and technology in the intervening period. This is most clearly seen in the recognition and regulation of joinder and multi-party disputes, the 'future-proofing' of the provisions relating to service and communication, and the myriad of procedural amendments to enhance arbitral efficiency.

The 2010 Rules offer a greater degree of 'institutionalisation', which is controversial given that the UNCITRAL Rules are intended to apply to ad hoc arbitrations not governed by an arbitral institution. This is seen in the greater role of appointing authorities, increased disclosure requirements for arbitrators, and the immunity of arbitrators and appointing authorities from liability. This increasing codification will no doubt assist in overcoming the most egregious procedural breaches and tactical delays. However, it may be that the increased regulation provided for in the revised rules may be seen as conflicting with parties' reasons for choosing to employ ad hoc arbitration: simplicity, flexibility and untrammelled party autonomy (this freedom, paradoxically, giving rise to the very problems the revised rules seek to solve). Overall, the revised rules do strike a careful balance between innovation and stability and should serve the international community well - both the private sector and governments, the latter through the use of the revised rules for bilateral investment treaty arbitration (BIT). It is likely that some of the changes made in the revised UNCITRAL Rules will be replicated in the rule sets of arbitral institutes and centres in the region.

SIAC Rules

SIAC published the fourth edition of its rules, effective from 1 July 2010, replacing the previous edition of its rules, published in 2007. The revisions include: a new 'expedited procedure' for cases below a certain value, or where there is exceptional urgency; the transfer of certain powers from the registrar to the arbitral tribunal, including, for example, the power to determine the arbitral seat where the parties cannot agree; and a new 'emergency arbitrator' procedure, to assist parties requiring urgent relief before the constitution of an arbitral tribunal.

LCIA India Rules

On 17 April 2010, the LCIA India Rules commenced operation. The provisions of these rules are of particular significance, given the increasing reliance on arbitration as a dispute resolution mechanism in India. The rules aim to assist in creating a viable local alternative dispute resolution mechanism, by attempting to overcome perceived unwarranted interference in the arbitral process by the judiciary. As a result, LCIA India did not select New Delhi as the default seat in its Model Arbitration Clause. The seat was intentionally omitted; under the LCIA India Rules, parties agreeing to arbitrate must always make a conscious choice of seat location. It is envisaged the seat will, more often than not, be outside India (with some hearings possibly being heard in India where desired) to minimise the scope for unwarranted judicial involvement with arbitrations and arbitral awards. Whether this approach will have the desired effect, particularly when consequential enforcement proceedings need to be taken in the Indian courts, remains to be seen. Nevertheless these developments must be seen as innovative and desirable, particularly having regard to the very significant size and importance of the Indian economy and India as a trading nation.

Conclusion

Attracting arbitral custom is often framed as a zero-sum game: whatever one jurisdiction gains in terms of caseload is thought of as coming at the expense of others. However, recent growth across the region has acted both to reinforce the leading role of arbitral stalwarts, as well as assisting in the development and growth of smaller institutes and arbitral jurisdictions. It thus appears that a jurisdiction's self-interest may coincide with the mutual interest of other jurisdictions, which are traditionally seen as competitors. That is to say, arbitration in the region is best served by emphasising the mutually beneficial aspect of supportive regional arbitral jurisdictions: every jurisdiction in the region benefits from a demonstrated understanding of the particularities and nuances of the international arbitral regime, and a strong regional enforcement environment. This supportive environment has been reinforced by the positive and proactive measures implemented by governments in the region, as well as the encouraging moves by the judiciary and arbitral bodies. Much of what occurs in the next few years, particularly the way in which current arbitral disputes are handled, will influence the next generation of arbitration in the region. To a large extent this will depend on which jurisdictions are in practice, and perceived to be, supportive of arbitration. This is not to suggest an overzealous deference to arbitration is necessitated. In the long run, the jurisdictions that stand to offer most will be those that offer support for arbitration, within the framework of a certain, consistent and predictable enforcement environment, with close adherence to the rule of law.

Notes

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All references are to 2009 figures, unless otherwise indicated.

About the author

Justice Croft practised extensively in property and commercial law and was an arbitrator and mediator in property, construction and commercial disputes, domestically and internationally. He was an Institute of Arbitrators and Mediators (IAMA) grade 1 arbitrator (the highest grading), a member of the IAMA Australian and international panel of commercial arbitrators, a member of the Australian Centre for International Commercial Arbitration (ACICA), the Singapore International Arbitration Centre (SIAC) and the Asia Pacific Regional Arbitration Group (APRAG) panels of international arbitrators; and has represented APRAG at the United Nations Commission on International Trade Law (UNCITRAL) International Arbitration Working Group Sessions from 2005 until 2010. Justice Croft is presently a member of the Hague Conference on Private International Law Working Group on Choice of Law in International Contracts.

Justice Croft is also a life fellow of IAMA, a life fellow of ACICA and a judicial fellow of AMINZ. He was a fellow of the Chartered Institute of Arbitrators and a member of the London Court of International Arbitration (LCIA). He was the IAMA national president (1997-2000) and was an IAMA national councillor and IAMA vice president until his appointment. Justice Croft was the treasurer, a director and a fellow of ACICA. He was an accredited mediator under the Australian National Mediator Accreditation System (and a Victorian Bar and IAMA accredited mediator) and a sessional member, Victorian Civil and Administrative Tribunal. He is the author, or co-author, of leading texts in the property, equity, leasing, securities and commercial law fields and of numerous articles and conference papers on commercial arbitration (domestic and international) and property and commercial law subjects. Justice Croft is an adjunct professor of law, Deakin University, Melbourne. He was appointed senior counsel in 2000 and holds BEc, LLB and LLM degrees from Monash University, Melbourne, and a PhD from the University of Cambridge.

Justice Croft is now a judge of the Commercial Court in the Victorian Supreme Court and also the judge in charge of its Commercial Arbitration List, domestic and international.

Supreme Court of Victoria

Light at the End of the Tunnel or the Light of an Oncoming Train?

Ajay Thomas

London Court of International Arbitration (India)

In the previous edition of this publication, I provided an overview of the state of the law and practice of arbitration in India and the need for reforms. In this edition, I attempt to give an update on latest developments, with special emphasis on the reforms that are currently under way.

The economic miracle

2010 has been a year in which the strength of the Indian economy has forcefully reasserted itself, having expanded by 8.8 per cent in the last reported quarter, with analysts predicting that its growth rate could overtake China's by 2013, if not before.1 It is also predicted that, in the next decade, the Indian economy could treble in size from the current US$1.4 trillion.

By way of illustration, Bloomberg has reported that car sales in India grew by 30 per cent in 2010, causing car manufacturers to introduce waiting lists for the first time in almost a decade.2

These statistics and predictions paint a picture of an optimistic nation, reflected in Indian's topping the latest world consumer confidence index.3

Besides being a major investment destination, there has also been a visible trend of greater participation by Indian corporates in the global economy. The past couple of years have been witness to a small but significant number of Indian companies acquiring businesses overseas. Mahindra & Mahindra's recent agreement to buy Korea's Ssanyong Motors and telecoms giant Bharti-Airtel's acquisition of the African operations of Zain Telecom are just two cases in point.

The road to legal sector reform

Given the staggering 34 million cases pending in the various courts in India, and the not-too-happy ADR scene, the case for reform in the Indian legal sector has never been clearer or more urgent.

'It is my dream that India should emerge as a hub of international arbitration',4 said the former law minister of India, Dr HR Bhardwaj. His successor, Dr Veerappa Moily, building on his predecessor's dreams, has initiated a slew of judicial reforms, and has set an ambitious timeline of five years to transform the Indian legal scene.

The Commercial Courts Amendment Bill, 2009, has been introduced in parliament to create special divisions in high courts to deal exclusively with commercial disputes above a certain

threshold value. The Bill has been passed by the lower house of parliament (Lok Sabha) and is pending in the upper house of parliament (Rajya Sabha). In June 2010, the government introduced the National Litigation Policy, 2010, which aims, inter alia, to reduce government litigation in courts and the average time for cases from 15 years to three years.

On the arbitration front, in a strong vote of confidence in institutional arbitration, the Delhi High Court established the Delhi High Court Arbitration Centre (DAC) in late 2009, with a view to promoting the use of institutional arbitration, and to easing the huge backlog of cases. Hot on the heels of the launch of the DAC, the Chartered Institute of Arbitrators (CIArb) set up its Indian branch, and it is hoped that CIArb, through its training programmes, will enhance in the local arbitration scene global arbitration best practices, and will help to create a larger pool of locally available arbitrators.

In April 2010, the Ministry of Law released a Consultation Paper on the proposed amendments to the Indian Arbitration and Conciliation Act (the Act), which has, by and large, elicited positive reactions from the business and legal communities. Listed below are some of the major changes proposed.

Proposed amendments

In a step that would nullify the decisions of the Supreme Court in Venture Global Engineering v Satyam Computer Services Ltd,[5] and other similar decisions, which had ruled that part I of the Act, which was intended to apply essentially to domestic arbitrations, would also apply to arbitrations seated outside India, the consultation paper proposes to restrict the applicability of the provisions of part 1 to arbitrations seated in India, except for the provisions relating to interim relief (section 9) and assistance of the courts in taking evidence (section 27), which would also be applicable to international arbitrations.

In the Saw Pipes case,[6] the Supreme Court had held that if an award is contrary to the substantive provisions of the law, or the provisions of the Act, or against the terms of the contract, it would be patently illegal and liable to be set aside under section 34 of the Act. Addressing these points, it is proposed that the Act be amended to include a provision where an arbitral tribunal is obliged to (the word used is 'shall') take into account the terms of the contract and trade usages applicable to the transaction.

The Act currently provides for an automatic stay on the enforcement of an arbitration award on the mere filing of an application challenging an award under section 34. It is proposed to make an arbitration award immediately executable on the expiry of the limitation period to challenge it, unless a stay order has been passed by the court.

It is also proposed to introduce more comprehensive disclosure standards for arbitrators.

As a part of the public consultative process, LCIA India joined hands with the government and with the International Centre for Alternative Dispute Resolution (ICADR) to organise a conference in Mumbai in August 2010, to discuss the proposed amendments. The conference was one in a series held in various Indian cities.

It is hoped that a draft amendment Bill, incorporating the feedback and ideas raised during the consultative process will be introduced in the upcoming session of parliament.

The launch of the LCIA India Arbitration Rules In April 2010, at a conference held in Mumbai, LCIA India launched its Arbitration Rules. These Rules are to a large extent based on the LCIA's own tried and tested rules, but with changes incorporated to reflect the interface with the Indian Act, the practice of arbitration in India and the various judicial decisions of the

Supreme Court of India. The Rules came into force from 17 April 2010, and are accessible on the LCIA India website (www.lcia-india.org).

The philosophical keystone to the Rules is article 14, which places corresponding duties on parties and tribunals to ensure proceedings are conducted fairly, efficiently and expeditiously.

The Rules include a number of new provisions aimed at expediting proceedings, which provisions may provide a prototype for future rules to be published by the LCIA. These new provisions include an express requirement that all prospective arbitrators confirm their ability to devote sufficient time to ensure the expeditious conduct of the arbitration. Further, article 28.4(b), a new provision, provides that the tribunal may take into account the conduct and cooperation, or non-cooperation, of the parties during the arbitration when determining the allocation of costs.

Article 10 of the Rules gives the power to the LCIA Court to revoke an arbitrator's appointment if the arbitrator 'does not conduct or participate in the arbitration proceedings with reasonable diligence, avoiding unnecessary delay or expense'.

The LCIA India Rules, although directed at parties doing business in and through India, are an international set of rules, which are suitable for operation under any system of law, regardless of the seat or venue of the arbitration.

Unlike the LCIA Rules, which provide for London as a default seat, the LCIA India Rules do not provide for a default seat. In the absence of parties' agreement, the seat would be determined by the LCIA Court, taking into account, inter alia, the parties' proposals in this regard.

LCIA India has also produced a set of 'Notes for Arbitrators' (also available on its website), to provide guidance to arbitrators conducting arbitrations under its Rules, on issues relating to independence, impartiality, confidentiality and the management of time and costs.

LCIA India is pleased to be administering its first arbitrations already.

Pro-arbitration approach of the Indian judiciary

The Indian judiciary has been, by and large, supportive of arbitration, notwithstanding the occasional aberrant decision. Four cases decided in 2010 are of special note, namely Bhushan Steel Ltd v Singapore International Arbitration Centre & Anr;[7] Sumitomo Heavy Industries v Oil & Natural Gas Commission of India;[8] Dozco India P Ltd v Doosan Infracore Co Ltd;[9] Denel (Proprietary Limited) v Bharat Electronics Ltd.[10]

In Bhushan Steel, the arbitration clause contained in a series of contracts for the supply of coated steel coils, made reference to disputes being referred to arbitration in Singapore, as per international law. Upon a dispute arising, the second defendant, a Danish company, initiated arbitration proceedings at the Singapore International Arbitration Centre (SIAC). The plaintiff, Bushan Steel, then filed a suit in the Delhi High Court seeking, inter alia, a declaration that the arbitration clause in the contract was vague and indeterminate, and hence void and incapable of being enforced; and asked that the court issue a permanent injunction restraining SIAC from continuing the arbitration proceedings.

The Danish company, in response, filed an application for the rejection of the application on grounds that the court had no jurisdiction to hear the application under the Code of Civil Procedure (CPC) and under section 5 of the Indian Arbitration Act. The Delhi High Court held that the law applicable to the arbitration was Singaporean law and, given that the

clause clearly provided for Singapore as the seat of arbitration, the parties had excluded the provisions of the Act.

The Sumitomo Heavy Industries case saw the Supreme Court, in a well reasoned declaration of the law, holding that, if the conclusion of the arbitrator is based on a possible view of the matter, the court should not be expected to interfere with the award. It held that an arbitrator 'is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the arbitrator has to be accepted as final and binding'. It further went on to rule that a court, while considering a challenge to an arbitral award, 'does not sit in appeal over the findings and decision of the arbitrator'.

In the recent case of Dozco India, the Supreme Court refused to intervene in a dispute where the arbitration clause made a specific reference to arbitration under Korean law, with a seat of arbitration in Seoul. It held that the designation of a foreign seat and an express choice of a foreign governing law, amounted to a clear agreement to exclude the operation of part 1 of the Indian Arbitration Act.

In the Denel case, the Supreme Court refused to interfere with an arbitration agreement, on the ground that the parties had entered into it with full knowledge and understanding of what they were agreeing. This case also saw the court sounding a note of caution to public sector undertakings (PSUs), albeit through its obiter dicta finding, advising PSUs to change their practice of nominating their own senior employees as arbitrators.

Light at the end of the tunnel or the light of an oncoming train?

Having lived and worked in Singapore for a few years, prior to taking up my position at LCIA India, I have had the privilege of seeing how Singapore has managed to turn around its legal sector to emerge as a legal services hub for Asia, especially in the field of arbitration. It will, however, require a Himalayan effort and dogged determination, backed by strong political will, to turn into a living reality, the hope and expectation of successive Indian ministers of law that India may itself become a global arbitration hub.

However, for the first time in decades, there is an air of expectancy in arbitration circles in India; and, for the first time, the proposed reforms are backed by solid political will, and, if one looks beyond the many contradictions and challenges of India, one cannot but reach an optimistic assessment of the future.

Light at the end of the tunnel, for sure!

Notes

1
See 'India's surprising economic miracle', The Economist, (2 October 2010), p9.

2See Kartik Goyal 'India's Economy Grows Most Since 2007, Adding Pressure on Rates', 31 August 2010, available at http://www.bloomberg.com/news/2010-08-31/india-s-economy-expands-8-8-fastest-since-2007-adding-pressure-on (accessed on 15 November 2010).

3Nielsen Global Consumer Confidence Index (July-September 2010 quarter).

4HR Bhardwaj, Address at the launch of LCIA India, New Delhi, 18 April 2010, available at www.lcia-india.org (accessed on 15 November 2010).

5(2002) 4 SCC 105.

6Oil & Natural Gas Corpn Ltd v Saw Pipes, (2003) 5 SCC 705.

7IA No 11355/2009 in CS (OS) No1392/2009.

82010(3) Arb. LR 151(SC).

9MANU/SC/0812/2010.

10JT2010(5)SC344; 2010 (6) SCC 394.

About the author

As registrar with the London Court of International Arbitration (India), Ajay heads its Delhi-based secretariat.

He holds a Masters in Law (LLM) from the National University of Singapore, where he read International Commercial Arbitration, and Admiralty and Maritime Law. On being called to the Bar, he practised mainly at the Bombay High Court, as a counsel at a leading maritime law chamber. Prior to joining LCIA India, Ajay was counsel and head of the South Asia desk of an arbitral institution based in Singapore.

Ajay is a member of the Singapore Institute of Arbitrators, the Maritime Law Association of Australia and New Zealand, the Australasian Forum for International Arbitration, Singapore Corporate Counsels Association and the Asian Society of International Law. He is also the India correspondent to the Global Sales Law Handbook, a comprehensive work on international sales law encompassing all legal systems.

Ajay can be reached at at@lcia-india.org.

London Court of International Arbitration (India)

The Rise of Arbitral Institutes in Asia

Chong Yee Leong and **Qin Zhiqian**

Rajah & Tann Singapore

The grand opening of the Maxwell Chambers on 21 January 2010 has caused a stir in the regional and international legal and arbitration scene and once again put the spotlight on the rise of arbitration in Asia. The rise of arbitration in Asia is one of the biggest contributing factors to the growth of arbitral institutions across Asia. The rise of arbitral institutions in Asia is two-fold: First, there has been a significant increase in international and domestic arbitration cases submitted to Asian Arbitration Institutes as evidenced in the table below. In 1985 the China International Economic and Trade Arbitration Commission (CIETAC) handled 37 cases. In 2009, CIETAC handled 560 cases. A similar trend can be seen in Singapore International Arbitration Centre (SIAC) where in 2000, it handled a mere 37 cases. By 2009, SIAC handled 114 international arbitration cases.

Second, there has been a proliferation of arbitration institutions across Asia. One will be hard pressed to find an Asian country without an arbitration institution or an Asian country not in the process of setting up an arbitration institution. This paper will study the factors that have led to the rise of arbitral institutions in Asia and conduct a review on some of the more successful arbitral institutions in Asia, namely, China International Economic and Trade Arbitration Commission (CIETAC), Hong Kong International Arbitration Centre (HKIAC) and Singapore International Arbitration Centre (SIAC).

Why are Asian arbitration institutions gaining prominence?

Factors that account for this phenomenon can broadly be categorised into three categories: First, the rise of arbitration in Asia; second, the growing preference for institutional arbitration over self-administered or ad hoc arbitration; and third, in some Asian countries there is no clear legal basis for the conduct of ad hoc proceedings.

Selected statistics of arbitral institutions1

Number of international cases administered by arbitral institutions										
Arbitr-al instit-ution	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
CIETAC (China)	543	562	468	422	461	427	442	429	548	560
SIAC (Singap-ore)	37	39	34	23	39	29	47	55	71	114

BAC (China)	11	20	19	33	30	53	53	37	59	72
JCAA (Japan)	8	16	8	14	15	9	11	15	12	17
KCAB (South Korea)	40	65	47	38	46	53	47	59	47	#
KLRCA (Malaysia)	20	3	3	5	3	7	1	2	8	#
PDRC (Philippines)	0	1	2	0	0	0	1	1	0	#
VIAC (Vietnam)	23	16	19	16	32	22	23	21	#	#
HKIAC* (Hong Kong)	298	307	320	287	280	281	394	448	602	649

- Unavailable statistics.
* - HKIAC does not distinguish between cases administered by them and those that they only provide physical services for.

Rise of arbitration in Asia

The direct consequence of the rise of arbitration in Asia is that more disputes have been submitted to Arbitral Institutes in Asia. In summary, the rise of arbitration in Asia can be attributed to the following reasons:

- Arbitration is generally more expedient, less formal and a greater degree of privacy and confidentiality can be observed and enjoyed by the parties.
- The growth of Asian economies and their increased participation in global commerce has led to a rise in international commercial disputes and a concomitant growing acceptance of arbitration as a form of dispute resolution. With the increasing integration of global markets, the demand accelerates for neutral dispute resolution forums that are international in scope yet responsive to diverse users and cultures.
- Inherent limitations of domestic courts to hear disputes of a complex and industry-specific nature.
- Perceived and actual corruption in the local courts (some Asian courts) also compels foreign investors to insist on settling disputes via arbitration.
- Culturally, Asians are generally less inclined towards litigation as compared to the Americans and Europeans.
- Arbitral awards are more readily enforceable than court judgements, pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which provides for international recognition and enforcement of foreign

arbitral awards in over 120 countries worldwide, subject to very limited defences set out in the New York Convention.

The above-mentioned reasons are some of the factors accounting for the rise of arbitration in Asia. The rise of arbitration in Asia can only mean that arbitral institutions will have increasing number of cases to administer.

Growing preference for institutional arbitration over ad hoc arbitration

In an institutional arbitration, the arbitration agreement designates an arbitral institution to administer the arbitration. Should a dispute arise, the parties will submit their dispute to the stipulated institution that will intervene and administer the arbitral process as provided by the rules of that institution. An ad hoc arbitration is not administered by any institution as the arbitration agreement does not specify an arbitral institution. The parties have to determine all aspects of the arbitration like the selection and manner of appointment of the arbitral tribunal, applicable law, procedure for conducting the arbitration and administrative support without assistance from or recourse to an arbitral institution. Ideally, if the parties cooperate and facilitate the arbitration, ad hoc arbitration can be more flexible, cheaper and faster than an administered arbitration. It is a popular choice because the parties do not have to pay administrative fees to the arbitral institutions, which can be hefty and deemed as an unnecessary expenditure. However, practically speaking, it is precisely the fact that parties to an arbitration tend to be at odds with one another and are in an acrimonious relationship that means they have to resort to arbitration to resolve their dispute. It may be unrealistic to expect parties to cooperate and to meet eye to eye when negotiating the rules and agreeing on arbitral procedures. Furthermore, parties may lack the expertise and knowledge to set up the arrangements to conduct an ad hoc arbitration. There may be severe consequences should misinformed decisions be made pertaining to the procedures, which may hamper the arbitration proceedings or even render the arbitral award null and void.

One of the main complaints of institutional arbitration is that disputants have to bear administration fees to the arbitral institution which tend to be hefty and deemed as an unnecessary cost incurred. However, it stands to reason that in most cases, it is well worth the money to pay the arbitral institutes to administer the arbitration on behalf of the parties. More and more commercial parties turn to institutional arbitration over ad hoc arbitration because of the many advantages of institutional arbitration possess. The learned Sundra Rajoo cited eight reasons in support of institutional arbitration.[2]

Reputation

A perceived advantage of institutional arbitration is the reputation and prestige of the institution. It is widely perceived that an arbitral award issued under the name of a well known institution is helpful in terms of enforcement.

Arbitration rules

Parties who agree to submit any dispute to arbitration in accordance with the rules of a named institution effectively incorporates that institution's rules into their arbitration agreement. Parties will have a tried and tested set of arbitral rules that provide for the various factual situations which may arise in arbitration available to them.

Administration

Arbitral Institutions provide trained staff to administer the arbitration. The arbitral institution's staff will ensure that the important milestones of arbitration are met. For instance, to ensure that the arbitral tribunal is appointed, that advance payments are made in respect of the fees

and expenses of the arbitrators, that time limits are kept in mind and that the arbitration is run as smoothly as possible.

Supervision

Certain arbitral institutions like the ICC and SIAC scrutinise an award before it is published to the parties, thus ensuring that the reasoning and content of the award deals with all claims and counterclaims made by the parties and that the principles of due process have been adhered to throughout the course of the proceedings.

Quality of the arbitral panel

International arbitration institutions usually benefit from vast databases of arbitrators in order to assist parties in appointing appropriate arbitrators for the resolution of their dispute. The institutions have panels of experienced arbitrators specialising in various specialised areas and can appoint a suitable arbitrator well versed in the particular field wherein the dispute lies.

Remuneration of the arbitral tribunal

An important advantage of institutional arbitration is that it avoids the discomfort of the parties and the arbitral tribunal having to discuss, agree and fix the arbitral tribunal's remuneration. Most institutions have a mechanism for determining the scale of remuneration and collecting from the parties the money from which the arbitral tribunal will be paid without directly involving the arbitrators. This means that the arbitral tribunal is able to maintain a certain level of material detachment. This has the very definite advantage of allowing the arbitral tribunal to focus solely on the substance of the case rather than discuss with the parties a matter that is personal to them.

Speed

In an institutional arbitration, there will be timelines for the exchange of the parties' pleadings, the main hearing and the publication of the final award in place. These timelines will guide the tribunal and the parties to resolve the dispute expeditiously.

Default procedures

Some institutional arbitration rules expressly provide for the continuation of arbitration proceedings to prevent the proceedings from stopping short in its tracks, even where one of the parties defaults during the course of the arbitration. Some commentators have also argued that there is a cultural preference for institutional arbitration in Asia because of a preference for administered arbitration as opposed to ad hoc proceedings. In Japan, for example, ad hoc arbitrations are reported to be quite rare, with Japanese parties preferring the more structured arrangements of arbitration before the JCCA.3 Parties who prefer a proper degree of supervision will opt for institutional arbitration.

No legal basis for ad hoc arbitration

In some Asian countries, there lies no legal basis for the existence of ad hoc arbitration. For instance, in China, there is no clear legal basis for the conduct of ad hoc arbitration. The 1995 PRC Arbitration Law requires that all arbitrations be carried out under the auspices of a government-sanctioned arbitration commission. Although perhaps not as extreme as in China, doubts also surround the enforceability and practicality of executing ad hoc arbitration agreements in some other Asian jurisdictions.

China - China International Economic and Trade Arbitration Commission (CIETAC)

The most important arbitral institute in China dealing with foreign-related arbitration is CIETAC. CIETAC was first established in 2 April 1956. Over the years, statistics have shown a clear upward trend in the number of arbitration cases that CIETAC handles per year.

This can be attributed to the increased economic openness of China and its accession to the WTO. This has created unprecedented opportunities for trade and investment in China and with Chinese parties. In practice, most Chinese parties prefer arbitration in China to arbitration in a foreign venue. This is due to a variety of factors. First, Chinese enterprises have been and remain relatively inexperienced with arbitration outside China. Hence, there is a general reluctance among many Chinese companies to agree to arbitration outside China in contract negotiations. Second, standard form printed contracts drafted by China's main state trading firms, on the basis of which most of the country's international commodity trade is conducted, almost always provide for arbitration in China.4

By and large, Chinese entities also prefer alternative dispute resolution like arbitration and mediation over litigation in court when it comes to resolving conflicts. This preference has its roots in the early Confucian thinking whereby the great sage said, 'In hearing cases I may do as well as the rest. The main objective, however, is to prevent litigation.' This preference is reflected in CIETAC, where CIETAC uses a 'unique combination of arbitration with conciliation.'

Another reason that accounts for the growing popularity of CIETAC is that arbitration at CIETAC is relatively cheaper as compared to its western counterparts. A Chinese arbitrator remarked, 'Arbitrators must be organised and must consider how they can cut costs and must have a sense of social responsibility to the parties.' A western attorney in China noted, 'If you look at the costs of using the ICC and compare it with the costs of using CIETAC, there is a massive difference.'5

Pursuant to the PRC Arbitration Law (1995), CIETAC permits foreign lawyers to represent their clients in arbitration proceedings. This practice, coupled with the inclusion of foreign specialists on the panel of arbitrators and allowing foreign and international law to be the governing law of disputes submitted to CIETAC, shows that CIETAC is constantly exposed to international norms and also reflects its willingness to follow international legal norms where specific provisions of Chinese laws are either unavailable or unclear.6

All these factors have contributed to the growing success of CIETAC, making it the busiest arbitral institution in Asia.

Hong Kong - Hong Kong International Arbitration Centre (HKIAC)

The leading arbitral institute in Hong Kong is undoubtedly the HKIAC, which was established in 1985. When HKIAC opened its doors in 1985, it handled a meager nine cases. In 2009, it was reported that it handled 649 arbitration cases (both domestic and international). HKIAC is widely considered to be the premier destination for cases involving blue-chip clients. There are many factors that have contributed to the meteoric success of HKIAC.

First, Hong Kong has one of the most progressive legal regimes for arbitration in the world, a well equipped and professionally administered international arbitration centre, a vibrant arbitration community with knowledgeable and experienced arbitrators and a prime location at the crossroads of trade and commerce in the Asia-Pacific region.

Hong Kong's proximity to China and the economic integration of the two economies under the Closer Economic Partnership Agreement, concluded in 2003, have made Hong Kong an ideal venue for arbitration of commercial disputes with international elements. HKIAC has become a popular venue for PRC-foreign party arbitration because of the potential resistance from the foreign party in having its dispute heard in China. Hence, HKIAC becomes a logical and convenient choice for these foreign parties. Furthermore, HKIAC provides for

an administered arbitration, which addresses the requirement under the PRC Arbitration Law 1995 that all arbitration must be administered and not ad hoc.

Another reason that explains why HKIAC is gaining in popularity is because HKIAC offers a variety of approaches to resolving disputes, including negotiation, conciliation, mediation and arbitration. Parties to arbitration may select domestic rules that provide that a conciliator may later act as an arbitrator if conciliation proves to be unsuccessful.[7]

Singapore - Singapore International Arbitration Centre (SIAC)

SIAC was incorporated in 1990 and commenced operation in 1991. Over the years, the SIAC has seen a steady increase in the number of arbitration cases that it handles. While CIETAC may be the busiest arbitration venue in Asia by volume of cases and HKIAC is widely considered to be the leading arbitration centre in Asia, attracting mainly blue-chip clients, many practitioners already recognise that disputes are increasingly gravitating towards Singapore.

Maxwell Chambers, which houses many international arbitration institutions from around the world, including the SIAC, provides state-of-the-art hearing facilities and support services. As Professor S Jayakumar put it aptly at the grand opening of Maxwell Chambers on 21 January 2010, 'We will be deluding ourselves if we believe that excellent physical facilities and infrastructure alone will ensure success in making Singapore an international arbitration hub.' The success of an arbitral institute depends on other intangible and yet more important factors and it is with these intangibles that SIAC has become increasingly successful over the years.

First, Singapore has a robust legal system and a judiciary that is understanding and supportive of arbitration. Singapore is constantly re-examining her legal regime on arbitrations to ensure that Singapore is arbitration friendly and stay competitive. In recent years, Singapore has enacted legislative changes to liberalise and update the legal regime for arbitration. These includes freedom for foreign lawyers and arbitrators to practise arbitration in Singapore and clarifying the powers of the courts with regard to the granting of interim measures in support of foreign arbitrations, and also to introduce a framework for authenticating arbitration awards.

Second, Singapore has a well developed business infrastructure and good connectivity by air to countries all over the world. In the earlier part of 2010, the Australian government announced that it too wanted to be a prime location for resolving disputes involving Asian parties and that it would finance the creation of a modern arbitration centre in Sydney. Despite the lower legal and accommodation costs in Sydney compared to Singapore and Australia's perceived neutrality, some commentators are still sceptical on whether a Sydney-based arbitration institution aimed at resolving disputes involving Asian parties will take off. Clifford Chance London partner Denis Brock says: 'You generally need to choose an arbitration centre that is the most convenient. You need to ask yourself where the witnesses are and where it's easiest to deal with the case. You can spend thousands of pounds just moving documents and people around.'[8] Hence, Sydney's geographical remoteness from Asia may work against its intention to become a prime location for resolving disputes involving Asian parties. This accentuates the importance of location and the comparative advantage that Singapore enjoys in terms of geographical location over other countries.

Third, Singapore has a strong pool of lawyers who are skilled in arbitration work, as well as international arbitrators of international repute.

Fourth, Singapore's reputation for neutrality and being perceived as being less corrupt than other countries in the world is another factor that is contributing to the growth of SIAC. In the 2009 Corruption Perception Index,9 Singapore is ranked third out of 180 nations in the rankings as being the third least corrupt nation in the world. Singapore's reputation for neutrality, for instance, not having administrative nexus to China or other nations makes it more attractive than HKIAC, the other arbitration powerhouse in Asia. Parties seem to feel more comfortable having their disputes resolved in Singapore, especially when the counterparty is Chinese.

Conclusion

Annop Singh, director of the IMF's Asia and Pacific Department, says that, based on expected trends, within five years, Asia's economy will be about 50 per cent larger than it is today and be comparable in size to the economies of the United States and Europe.10 The continued growth of Asian economies and the increased participation in global commerce will lead to the continued rise of arbitration in Asia. The rise of arbitration in Asia is good news for arbitral institutes across Asia because this means more business for them. In order to fully exploit the economic benefits of this phenomenon, arbitral institutes have to constantly upgrade their facilities and, more importantly, the country wherein the arbitral institute lies must have a robust legal system and a judiciary that is understanding and pro-arbitration. This would require the collaborative efforts of the arbitral institutes, the judiciary and the government.

Notes

1
All statistics published here have been obtained from the respective institutions named.

2Sundra Rajoo 'Institutional and Adhoc Arbitrations: Advantages and Disadvantages.'

3Michael J Moser Arbitration in Asia 2nd Edition at page xiv.

4Michael J Moser Arbitration in Asia 2nd Edition at page CHI-5.

5 -
www.allbusiness.com/legal/labor-employment-law-alternative-dispute-resolution/12384454-1.html.

6www.lexology.com/library/detail.aspx?g=01b107cb-83b5-4107-8a66-f3c6636ba6ee.

7'Conciliation' and 'mediation' are?two terms that are frequently used interchangeably.

8Chris Crowe, 'Singapore pushes for share of Asia's rising arbitration cases.'

9www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table.

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Hong Kong

Kathryn Sanger
Clifford Chance LLP

Summary

2010 marks the 25th anniversary of the founding of the Hong Kong International Arbitration Centre (HKIAC). To celebrate this occasion, the HKIAC hosted a series of events in Hong Kong during November 2010, including the HKIAC 25th Anniversary Conference, held on 18 and 19 November 2010.

The past 25 years has seen Hong Kong become an increasingly arbitration popular venue for the resolution of international disputes. Indeed, in 2009, the HKIAC handled 649 dispute cases: 429 arbitration cases, 140 domain name cases, 159 mediations and 18 adjudications. Of the 429 arbitration cases, 309 (or 72 per cent) were international in nature.

In his speech at the Ceremonial Opening of the Legal Year 2010, the secretary for justice, Mr Wong Yan Lung, SC, confirmed that the expansion of Hong Kong's capacity as an international arbitration centre 'continues to be a prime policy objective'. Citing the high number of cases being handled by the HKIAC, the Secretary for Justice endorsed Hong Kong as being well-placed to serve as a regional hub for international arbitration.

The substantial number of cases being handled by the HKIAC reflect a number of factors, not least the highly respected arbitration regime in Hong Kong, as well as the attitude of the local courts, which are very supportive of the arbitration process.

In the context of the latter, recent case authorities highlight the approach taken by the Hong Kong courts and the attitude adopted towards international arbitration, as well as the continued application of the common law system in Hong Kong following the return of Hong Kong to the PRC on 1 July 1997, (after which Hong Kong became a special administrative region (SAR) of the PRC).

Recent case authorities

FG Hemisphere Associates LLC v Democratic Republic of Congo & Ors [2010] 2 HKC 487

The recent Court of Appeal decision in the case involving the Democratic Republic of the Congo (DRC), which was handed down in February 2010, considers the current position in Hong Kong (following the handover in 1997) regarding the doctrine of sovereign immunity. This case is particularly important in the context of the enforcement of arbitration awards, as well as court judgments, in Hong Kong against foreign states.

The facts of the DRC case are as follows: in the 1980s, a Yugoslav company, Energoinvest, entered into contracts to construct a hydroelectric facility and high-tension electric transmission lines in the DRC. In connection with these contracts, DRC entered into certain credit agreements with Energoinvest under which the DRC was financed by Energoinvest for a substantial percentage of the cost of the works. These credit agreements incorporated the International Chamber of Commerce (ICC) arbitration clauses.

The DRC defaulted on its repayment obligations and, in April 2003, arbitral awards were made in France and Switzerland against the DRC.

FG Hemisphere Associates LLC (FGH) acquired the benefit of the ICC awards and sought to enforce them against the DRC in Hong Kong. FGH obtained an ex parte order allowing it to enforce the ICC awards as a judgment of the Hong Kong court. The order joined as defendants a number of Hong Kong limited companies within a consortium of Chinese enterprises, to be restrained from paying US$104 million out of a sum of about US$221 million, which were monies payable to the DRC as entry fees under a cooperation agreement and a joint venture agreement between the DRC and the Hong Kong defendants.

The DRC applied to set aside the order, claiming immunity from jurisdiction and from the process of execution. Reyes J (the judge currently in charge of the specialist Hong Kong construction and arbitration list) set aside both the leave and the injunctions.1

FGH appealed. The appeal addressed the questions of whether, inter alia, the law of Hong Kong required application of the doctrine of absolute immunity from jurisdiction and execution, as opposed to the restrictive doctrine; and whether by agreeing to refer a dispute to arbitration in a New York Convention country, to be conducted according to the ICC Rules, a foreign state that was not a party to the New York Convention waived such state immunity from jurisdiction and execution to which it was otherwise entitled.

Sovereign Immunity

In the context of sovereign immunity, there are two schools of thought on the ambit of sovereign immunity in public international law, whether in respect of immunity from jurisdiction (first stage) or immunity from execution (second stage):

- 'absolute immunity': under this approach, the domestic courts of one state would not normally have jurisdiction to adjudicate upon matters in which another state is named as defendant. This is subject only to the exception where the state waives immunity before a given tribunal of another state; and
- 'restrictive immunity': under the restrictive immunity approach, and in the context of immunity from jurisdiction, states do not enjoy immunity from suit where they are engaged in transactions of a purely commercial nature. In the context of immunity from execution, the test is the use to which the assets are to be put (as opposed to the nature of the underlying transaction). If those assets are to be used for a commercial purpose they will not be immune from the process of execution. By contrast, if the assets are for a sovereign or public purpose, they will be immune from the process of execution.

Before Hong Kong's handover back to the PRC in July 1997, Hong Kong followed the restrictive approach2 adopted in the United Kingdom (UK). The law on sovereign immunity was governed by the UK State Immunity Act 1978 (SIA), as extended to Hong Kong by the State Immunity (Overseas Territories) Order 1979.

However, upon the PRC's resumption of the exercise of sovereignty on 1 July 1997, the SIA ceased to have effect in Hong Kong.

The question that the Court of Appeal had to determine was whether the law in Hong Kong on the question of sovereign immunity had changed following the handover: whether the law in Hong Kong required the application of the restrictive approach (in accordance with common law principles) or the absolute approach (as applied under PRC law).

The Court of Appeal held, by a majority,3 that following the handover the doctrine of restrictive immunity continued to apply in Hong Kong, as it did before the handover in 1997. The Court of Appeal's finding was premised on the following:

- as from 1 July 1997, the law of Hong Kong in relation to state immunity from suit and from execution could only properly be determined by reference to common law principles, on the basis that the Hong Kong courts, from 1 July 1997, were to continue to apply the common law in the absence of statute;4
-

customary international law had developed from the principle of absolute immunity to that of restrictive immunity, and that this international law had been absorbed into the common law under the doctrine of incorporation (and which had not changed);

- there was no local legislation enacted to replace the SIA as extended to Hong Kong to alter the common law position; and
- no national law applied in Hong Kong that gave effect in Hong Kong to the PRC's stance on sovereign immunity.

This finding of the Court of Appeal has provided welcome and helpful clarification of the approach to sovereign immunity adopted in Hong Kong after the handover. The ruling is particularly significant in light of the PRC's consistent and unequivocal opposition to the restrictive doctrine, and adherence to the absolute approach to sovereign immunity.

Evidence of the PRC's longstanding adherence to the doctrine of absolute immunity was presented to the Court of Appeal in the form of two letters issued by the Office of the Commissioner of the Ministry of Foreign Affairs of the PRC in the Hong Kong SAR.

In considering the PRC's stance on the doctrine of sovereign immunity, the Court of Appeal held that:

- in the realm of law with which the Court of Appeal was in this case concerned, there was nothing new, whether in Hong Kong or elsewhere, in the practice of presentation to the courts of such communication by the executive branch of the government;
- the two Ministry letters before the Court were directed at the applicable theory rather than at a specific claim for immunity;
- nonetheless, the Court must still have close regard to the PRC's attitude to the doctrines of absolute and specific immunity;[5]
- no prejudice[6] would, however, be caused to the PRC's sovereignty by the Hong Kong courts adhering to the common law incorporation of the customary international principle of restrictive immunity;
- the Ministry letters did not suggest that absolute immunity should be applied in the Hong Kong courts, which were enjoined to apply the common law in the absence of statute. Further, in practice the success of the application before the Court did not constitute or threaten an infringement of the sovereignty of the PRC; andM
- it was not unreasonable to suppose that were it intended that the Hong Kong courts should apply the Central People's Government's preferred theory of sovereign immunity, that intention would be given effect by legislation, which had not happened.

Waiver Of Right To Claim Immunity From Jurisdiction And From Execution

The Court of Appeal also considered whether the DRC had waived the right to claim immunity from jurisdiction and from execution. The Court of Appeal considered whether, on the facts of this case, the waiver must be express and 'in the face of the Court' or whether it might be implied by submission of the foreign state to an ICC arbitration.

The Court of Appeal held the following:

- as the SIA no longer applied in Hong Kong, Hong Kong had reverted to the common law position which required express waiver;

- in this respect, waiver by a state could be given in two ways: (i) either by express consent given after a particular dispute had already arisen (the waiver 'in the face of the court'),7 or (ii) by consent given in advance in an international treaty8 between the foreign state and the forum state;9
- as such, waiver had to have taken place at the time the court was asked to exercise jurisdiction and 'could not be constituted by, or inferred from, a prior contract to submit to the jurisdiction of the court or to arbitration.';10 and
- moreover, at common law, a waiver of immunity in respect of jurisdiction does not in itself imply a waiver of immunity from execution: a separate waiver is required.

Finding

Applying the above, the Court of Appeal found, inter alia, that:

- the DRC had not waived immunity from execution (noting that the DRC is not a party to the New York Convention);
- leave should be given to FGH to enforce the arbitral awards; and
- the DRC would not be immune from execution in respect of such of the entry fees as might be due to the DRC and were not intended to be used for sovereign purposes.

Appeal To The Hong Kong Court Of Final Appeal

- The finding of the Court of Appeal in this case will provide comfort to parties who were concerned that Hong Kong would not be judicially independent from the PRC post Hong Kong's handover to the PRC in 1997. Thus, practitioners keenly await the outcome of the appeal to the Court of Final Appeal (following leave to appeal granted by the Court of Appeal), set down for 21 March 2011.

In determining whether leave to appeal should be granted, the Court of Appeal held that there were questions involved in the appeal which by reason of their great general or public importance ought to be submitted to the Court of Final Appeal for decision. The Court of Appeal held that the questions for determination were:

- Were the Hong Kong courts precluded by reason of the Basic Law from determining whether a foreign state was entitled to immunity from suit and execution?
- After the resumption of the exercise of sovereignty by the PRC on 1 July 1997, did the law of Hong Kong incorporate the restrictive doctrine of state immunity?
- If the law of Hong Kong incorporated the restrictive doctrine of state immunity, what was the scope of the commercial exception to which that doctrine gave effect?
- When a state voluntarily submitted to arbitration pursuant to the Rules of Arbitration of the ICC in force on 1 January 1988, did it thereby waive such state immunity as it otherwise enjoyed from proceedings for the recognition and execution of the resulting award?

A V R [2010] 3 HKC 67

The case of A v R relates to enforcement of an arbitration award in Hong Kong under the New York Convention.

Prior to 1 July 1997, Hong Kong was a member of the New York Convention by virtue of the United Kingdom's accession on its behalf. After the handover, the PRC extended its own membership of the New York Convention to Hong Kong.11 The limited grounds for refusing enforcement of a New York Convention award are set out in article V of the New York Convention, which in turn have been enacted in Hong Kong (formerly via section 44 of the Arbitration Ordinance and now via section 89 of the new Arbitration Ordinance (Ordinance No. 17 of 2010)).12

One ground for refusing the recognition or enforcement of a New York Convention award is where to do so would be contrary to the public policy of Hong Kong.13 A leading Hong Kong case on the application and meaning of public policy is Hebei Import & Export Corp v Polytek Engineering Co Ltd.14 In this case, the Court of Final Appeal held that being contrary to public policy meant 'contrary to the fundamental conceptions of morality and justice of Hong Kong' and should be narrowly construed and applied.15

The question of whether an award is contrary to public policy was further considered in the case of A v R. The applicant, which was a Danish company, had obtained an award in Denmark against the respondent, a Hong Kong company. The award granted damages of US$3 million against the respondent in favour of the applicant, arising out of breach of a commission agreement between the parties. Shortly before the substantive arbitration hearing in Denmark, the respondent dismissed its lawyers, and also failed to appear at the hearing. Nonetheless, when the time came for enforcement of the award in Hong Kong, the respondent company argued, inter alia, that the damages were not payable on the basis that they amounted in essence to a penalty, and sought an order refusing enforcement of the award as contrary to public policy.

Reyes J dismissed the respondent's application, finding as follows:

> Public policy was often invoked by a losing party in an attempt to manipulate an enforcing court into re-opening matters which had been (or ought to have been) determined in an arbitration. The public policy ground was thereby raised to frustrate or delay the winning party from enjoying the fruits of a victory. The court must be vigilant that the public policy objection was not abused in order to obtain for the losing party a second chance at arguing a case. To allow that to happen would be to undermine the efficacy of the parties' agreement to pursue arbitration. That by itself would not be conducive to the public good. Public policy itself leaned towards the enforcement of foreign arbitral awards as a matter of comity. The parties agreed to resolve their disputes by arbitration, rather than through the court. They should be held to what they had agreed and be obliged to comply with an arbitration award. By choosing arbitration, the parties must be deemed to have undertaken the risk that an arbitrator might get matters wrong in his decision. An error (whether of law or fact did not matter here) by an arbitrator in an award could not by itself counterbalance the public policy bias towards enforcement. If the public policy ground was to be raised, there must be something more, that was, a substantial injustice arising out of an award which was so shocking to the court's conscience as to render enforcement repugnant.

In addition, as a further deterrent to applicants seeking to bring potentially unmeritorious challenges against the enforcement of arbitration awards in Hong Kong, Reyes J held that, in the absence of special circumstances, when an award was unsuccessfully challenged, the court 'would henceforth normally consider awarding costs against a losing party on an indemnity basis.'

Reyes J's comments on costs were made in light of the implementation of the recent Civil Justice Reform (CJR) in Hong Kong on 2 April 2009 and in support of one of the CJR's underlying objectives, being the duty of the parties to assist the court in the just, cost-effective and efficient resolution of disputes. Reyes J held that to award costs on the conventional party-and-party basis would encourage parties to bring unmeritorious challenges to an award, which in turn would not be conducive to the CJR and its underlying objectives.

The findings and comments of Reyes J show the robust stance that the Hong Kong courts will take in respect of last-ditch attempts to resist the enforcement of arbitration awards in Hong Kong.

Xiamen Xinjingdi Group Ltd v Eton Properties Ltd & Anor [2008] 6 HKC 287 This case concerned enforcement of a CIETAC (Beijing) award in Hong Kong. The respondents applied to the Hong Kong court to set aside ex parte leave given to the applicant to enforce the CIETAC award in Hong Kong. As in the case of A v R, the respondents sought to argue that to enforce the award would be contrary to the public policy of Hong Kong. The respondents argued, inter alia, that it was now impossible to perform the part of the arbitral award imposing non-monetary obligations.

Again, Reyes J was quick to dismiss the respondents' application to set aside, holding that:

> The court's role in an application for enforcement of a Mainland arbitral award under s2GG of the Arbitration Ordinance (Cap 341) was essentially that of an overseer. The court would ensure that the arbitration was conducted fairly and in lending the means at the court's disposal, make the award effective.

Reyes J went on to say that the Hong Kong court should not 'second-guess' the award, and that the role of the Hong Kong courts should be as 'mechanistic' as possible.

Conclusion

The cases discussed above highlight the supportive role played by the Hong Kong courts in aid of the arbitration process. As such, they should serve to reassure arbitration practitioners and their clients who may be sceptical of Hong Kong's stance, and position in relation to the PRC, following the handover in 1997. In addition, the decisions illustrate that Hong Kong is an attractive and arbitration-friendly venue for international arbitration.

Notes

1
Reyes J declined to determine whether Hong Kong adopted the restrictive or the absolute approach to sovereign immunity post-handover in 1997. Reyes J considered that on the facts before him, the relevant transaction was not of a commercial nature, nor had there been any waiver by the DRC of the right to invoke state immunity. As such, the transaction did not fall within the exception to sovereign immunity recognised by the restrictive approach and it was unnecessary for Reyes J to express any settled view on the validity of each of the two doctrine theories advanced before him.

2This approach is one that has developed over the course of the 20th century. In the first half of the 20th century, at common law the absolute school of thinking was dominant. The rule of sovereign immunity from sui derives from the maxim of public international law par inparem non habet imperium (equals do not have authority over one another).

3Yeung JA dissenting.

4Article 8 of the Basic Law of the Hong Kong SAR.

5This duty was emphasised by article 13 of the Hong Kong Basic Law, which provided that the PRC Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong SAR.

6The Court of Appeal held that, in theory, it was absolute immunity (not restrictive immunity) that took away from the sovereignty of a nation as its courts were not able to exercise their jurisdiction even over disputes within their territorial limits.

7A state would, for example, expressly waive immunity to jurisdiction by participating in arbitration proceedings.

8An example of such an international treaty is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), which would be relevant in the context of a waiver of immunity from execution (as opposed to jurisdiction).

9It follows, therefore, that under Hong Kong law express consent cannot be given in advance in a private agreement between the foreign state and a private party.

10Paragraph 166 of the Court of Appeal judgment.

11The PRC acceded to the New York Convention on 22 January 1987.

12In last year's chapter on Hong Kong, I reported that the arbitration regime in Hong Kong was undergoing reform. The old Arbitration Ordinance provided for two distinct regimes: the domestic regime; and the international regime, based on the UNCITRAL Model Law on International Commercial Arbitration. The new Arbitration Ordinance (No. 17 of 2010) became law on 12 November 2010. In essence, the new Ordinance removes the distinction between domestic and international arbitrations and establishes a single arbitration regime in Hong Kong based on the Model Law.

13Note that the grounds for refusing recognition or enforcement of a non-New York Convention award are set out in article 36 of the Model Law and are the same as the grounds set out in section 44 of the Ordinance.

14[1999] 1 HKLRD 665 (CFA).

15The Court of Final Appeal also confirmed that a failure to raise the issue of contrary to public policy in proceedings to set aside an award would not preclude a party from resisting enforcement of the same award on that ground in another jurisdiction, on the basis that each jurisdiction has its own public policy.

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Australia has a long-standing tradition of embracing arbitration as a means of alternative dispute resolution. While on a domestic level this is reflected by court-annexed and compulsory arbitration prescribed for certain disputes, arbitration has become equally common in international disputes. Traditionally, arbitration was largely confined to areas such as building and construction. However, the strong and steady growth of the Australian economy over the past decade and the opening of the Asian markets in the mid-1990s have further advanced the use of arbitration in other areas, particularly the energy and trade sectors. From an Australian perspective, the opening of foreign markets - especially in Asia - is also increasing the significance of the protection of foreign direct investment under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention). While the number of investment arbitrations with Australian participation is expected to increase significantly over the next decade, the level of awareness about the different options of investment protection available under investment treaties still needs to be raised.

Australia is a party to 21 bilateral investment treaties (BITs), 20 of which were in force as at 1 November 2009. Most of the BITs designate ICSID arbitration for the resolution of disputes arising under these treaties. Australia has further entered into free-trade agreements (FTAs) with New Zealand, Singapore, Thailand, the United States and Chile, and is a party to the recently signed ASEAN-Australia-New Zealand FTA. Further FTAs are currently under negotiation with China, Malaysia, Japan, Korea and the Gulf Cooperation Council (GCC), in addition to the Pacific Agreement on Closer Economic Relations (PACER) Plus and the Trans-Pacific Partnership (TPP) Agreement.

Some of Australia's FTAs contain investment protection provisions similar to those commonly found in BITs. For example, section B of chapter 10 of the Australia-Chile FTA contains detailed provisions on investor-state dispute settlement. Where a dispute between a party and an investor is not resolved by negotiations and consultations, the investor may refer the investment dispute to arbitration under the ICSID Convention, proceedings under the ICSID Additional Facilitations Rules, arbitration under the UNCITRAL Arbitration Rules or arbitration under any other arbitration rules. The procedures and remedies available are significantly broader than those included in the existing BIT between Australia and Chile.

The Australia-Chile FTA is the most comprehensive outcome in trade negotiations since the Closer Economic Relations Trade Agreement with New Zealand in 1983, and will liberalise trade and investment between Australia and Chile.

Arbitration Law reforms in Australia

In July 2010 the International Arbitration Amendment Act 2010 (Amendment Act) introduced some major amendments to Australia's international arbitration legislation. The intention behind the revision of the International Arbitration Act 1974 (Cth) (IAA) was to ensure that

the act remains at the forefront of international arbitration practice and to develop Australia as an attractive hub for international arbitration.

The Arbitration Amendment Act 2010 introduces a number of significant changes to the IAA. Foremost, the 2006 version of the UNCITRAL Model Law now replaces the 1985 version as the applicable law under the IAA. As such, the provisions on the enforcement of interim measures to which parties could previously opt-in under the IAA became obsolete and therefore have been repealed. The enforcement of interim measures is now covered by article 17H to of the Model Law.

There have been a number of other noteworthy amendments to the IAA. For example, the repeal of the former section 21 IAA, which allowed the parties to agree to resolve their dispute 'other than in accordance with the Model Law'. Under the revised IAA such contracting-out of the Model Law is no longer possible. The primary reason for this was to create certainty and consistency in the application of Australian arbitration law and to avoid any further confusion which resulted from the infamous decision by the Queensland Court of Appeal in Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH v Australian Granites Ltd [2001] 1 Qd R 461 (Eisenwerk). Eisenwerk is authority for the position - under the old IAA - that where the parties select (in that particular case) the ICC Arbitration Rules, they have contracted out of the Model Law and as a result the domestic arbitration legislation of the states and territories, the largely uniform Commercial Arbitration Acts, would apply.

Other relevant changes to the IAA include the inclusion of additional provisions, most of which operate on an opt-out basis. For example, unless the parties agree to opt out, the parties apply to the courts to issue a subpoena with regard to the production of documents and the examination of witnesses.

Nevertheless, there are few provisions which only apply if the parties have expressly agreed to apply those provisions, for example the long awaited provisions on confidentiality and disclosure of information in connection with arbitration proceedings (section 23C&D IAA).

Reforms are also taking place on a domestic arbitration level. In early 2010 the Standing Committee of Attorneys-General agreed to introduce uniform arbitration legislation in all states and territories, which is to be based on the 2006 UNCITRAL Model Law. This is a significant step forward in modernising Australia's domestic arbitration legislation and to bring domestic arbitration legislation closer to that at the federal level (ie, the IAA). So far only New South Wales has introduced a new Commercial Arbitration Act that incorporates the 2006 Model Law. Unlike the IAA, the Commercial Arbitration Act 2010 (NSW) includes confidentiality provisions, which apply unless the parties specifically opt-out. In contrast to the IAA, the Commercial Arbitration Act (NSW) allows for an appeal from the arbitration award if certain pre-conditions are met.

Another significant change to the new act is that the exercising of the courts' power to stay court proceedings in the existence of an arbitration agreement is now compulsory - under the old Act it was in the courts' discretion to stay proceedings, which was a cause of many problems.

Institutional arbitration in Australia: ACICA

The Australian Centre for International Commercial Arbitration (ACICA) is Australia's premier international arbitration institution. Following the successful launch of the new arbitration rules of the Australian Centre for International Commercial Arbitration (ACICA) in 2005,

ACICA has recently revised its Expedited Arbitration Rules, which were first published in late 2008.

In April 2007, the Australian Maritime and Transport Arbitration Commission (AMTAC) was officially launched by ACICA. With approximately 12 per cent of world trade by volume either coming into or going out of Australia by sea, this will pave the way for Australia to take a leading role in domestic and international maritime law arbitration. AMTAC is committed to using the ACICA Expedited Arbitration Rules for maritime proceedings conducted under its auspices.

The Commonwealth attorney general has announced that ACICA will be the default appointing authority for arbitrators under the IAA.

Most recently, ACICA entered into a cooperation agreement with the Australian International Disputes Centre (AIDC), from which it operates at a new venue in Sydney. The AIDC was established in 2010 with the assistance of the Australian government and the government of the State of New South Wales. The centre houses leading ADR providers which, in addition to ACICA, include the Chartered Institute of Arbitrators Australia, AMTAC and the Australian Commercial Disputes Centre (ACDC). The AIDC provides state-of-the-art hearing facilities which are equipped with audio-visual conferencing equipment.

Primary sources of arbitration law

Legislative powers in Australia are divided between the Commonwealth of Australia, as the federal entity, and six states. Furthermore, there are two federal territories with their own legislatures.

Matters of international arbitration are governed by the IAA which, as mentioned above, has recently undergone a revision. Section 16 of the IAA adopts the 2006 version of the UNCITRAL Model Law. Since the revision it is no longer possible for parties to opt out of the application of the Model Law. Section 21 of the IAA now provides that '[i]f the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration'. The Model Law provides for a flexible and arbitration-friendly legislative environment, granting parties ample freedom to tailor the procedure to their individual needs. The adoption of the Model Law does of course also provide users with a high degree of familiarity and certainty as to the operation of those provisions, making it an attractive choice.

The IAA supplements the Model Law in several respects. Division 3, for example, contains provision on the parties' right to obtain subpoenas requiring a person to produce certain documents or to attend examination before the arbitral tribunal. While these provisions apply unless the parties expressly opt out, there are other provisions such as those dealing with confidentiality or consolidation of proceddings which only apply if the parties expressly opt-in. Another helpful provision is section 19, which clarifies the meaning of the term 'public policy' for the purpose of articles 34 and 36 of the Model Law.

Part II contains the implementation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Australia has acceded to the New York Convention without reservation and it extends to all external territories.

Australia is also a signatory to ICSID, the implementation of which is contained in part IV of the IAA.

Domestic arbitration has traditionally been a matter of state law and is governed by the relevant Commercial Arbitration Act (CAA) of each state or territory where the arbitration takes place. Following amendments made in 1984 and 1993, the CAAs of the states and territories are largely uniform. As mentioned above, the CAAs are currently undergoing significant reforms. As the first state to enact new legislation, the New South Wales government has passed the Commercial Arbitration Act 2010 (NSW) which came into force on 1 October 2010. The Act is based on and supplements the 2006 Model Law and applies to domestic commercial arbitrations constituted by an arbitration agreement.

In the following paragraphs, any reference to 'CAA' is therefore a reference to the CAAs of all states and territories except New South Wales.

Arbitration agreements

Form requirements

For international arbitrations in Australia, both the Model Law and the New York Convention require the arbitration agreement to be in writing. While article II(2) of the New York Convention states that an 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement signed by both parties or contained in an exchange of letters or telegrams, the Model Law is more expansive in its definition, and states that '[a]n arbitration agreement is 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'. Under the IAA, the term 'agreement in writing' has the same meaning as under the New York Convention.

In the landmark decision of Comandate Marine Corp v Pan Australia Shipping [2006] FCAFC 192, the Federal Court confirmed its position that an arbitration clause contained in an exchange of signed letters is sufficient to fulfil the written requirement. Furthermore, the court found that a liberal and flexible approach should be taken in interpreting the scope of an arbitration agreement. In this case, the words 'all disputes arising out of this contract' were held to be wide enough to encompass claims under the Trade Practices Act for misleading and deceptive conduct that arose in relation to the formation of the contract. The judgment preceded the decision by the UK House of Lords in Fiona Trust & Holding Corp v Privalov [2007] UKHL 40, which confirmed the more liberal approach with regard to interpreting the scope of an arbitration agreement.

However, as the Federal Court of Australia pointed out in its decision in Seeley International Pty Ltd v Electra Air Conditioning BV [2008] FCA 29, ambiguous drafting may still lead to unwanted results. In that case, the arbitration clause included a paragraph providing that nothing in the arbitration clause would prevent a party from 'seeking injunctive or declaratory relief in the case of a material breach or threatened breach' of the agreement. The Federal Court interpreted that paragraph to mean that the parties intended to preserve their right to seek injunctive or declaratory relief before a court. The court was assisted in its interpretation by the fact that the agreement also included a jurisdiction clause.

Domestic arbitrations under the CAA (other than in New South Wales, where the arbitration law has been revised to implement the Model Law) also requires an arbitration agreement to be in writing, although there is no requirement for the agreement to be signed. There is generally no distinction between submission of an existing dispute to arbitration and an arbitration clause referring future disputes to arbitration. However, the distinction is important in the context of statutory provisions, such as those relating to insurance contracts. These will be discussed below.

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.

Severability of the arbitration agreement

Australian courts acknowledge the notion of severability of the arbitration agreement from the rest of the contract. There is authority from the High Court of Australia in relation to domestic arbitrations suggesting that the notion of severability does not apply in circumstances where there is a dispute concerning the initial existence of the underlying contract or the arbitration agreement itself (see Codelfa Construction v State Rail Authority (NSW) (1982) 149 CLR 337). However, this issue has been resolved at least in New South Wales. In Ferris v Plaister (1994) 34 NSWLR 474, it was held that the arbitrator may determine that the relevant contract was void ab initio, as long as there was a general consensus. However, an arbitrator may not possess jurisdiction to determine a claim that no arbitration agreement has in fact been concluded. In those circumstances, the arbitrator will usually adjourn the arbitration proceedings pending the court's determination of the issue.

In contrast, for international arbitrations article 16(1) of the Model Law expressly provides that the tribunal may also consider objections as to the existence of the arbitration agreement.

Stay of proceedings

Provided the arbitration agreement is drafted widely enough, Australian courts will stay proceedings in face of a valid arbitration agreement. For domestic arbitrations which operate under the old CAAs, section 53(2) of the CAA provides that a stay application must be made before the party has delivered pleadings or taken any other steps in the proceedings, other than the filing of an appearance, unless it is with the leave of the court. For international arbitrations, section 7(2) of the IAA incorporates Australia's obligations under the New York Convention and provides for a stay of court proceedings if they involve the determination of a matter capable of settlement by arbitration. Applications for stay are limited to those types of arbitration agreements listed in section 7(1) of the IAA. The primary purpose of this section is to ensure that a stay of proceedings is not granted under the New York Convention for purely domestic arbitrations.

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

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

Casualty & General Insurance Limited (in liquidation) v Wallace (2006) NSWSC 1150). A similar provision is also contained in section 7C of the Home Building Act 1989 (NSW).

Arbitrability

The issue of which disputes are arbitrable has not yet been fully resolved. Particularly in relation to competition, bankruptcy and insolvency matters (with regard to the latter, see Tanning Research Laboratories v O'Brien (1990) 64 ALJR 211, as reported in Yearbook of Commercial Arbitration XV (1991), pp521-529), courts have occasionally refused to stay proceedings - without expressly holding that these matters are inherently not arbitrable. Instead, most court decisions have considered whether the scope of the arbitration agreement is broad enough to cover such a dispute (see, for example, ACD Tridon Inc v Tridon Australia [2002] NSWSC 896) in respect of claims arising under the Corporations Act 2001.

Considerations such as these commonly arise in relation to the Trade Practices Act 1974 (Cth), Australia's competition and consumer protection legislation. In IBM Australia v National Distribution Services (1991) 22 NSWLR 466, the New South Wales Court of Appeal held that certain consumer protection matters under the Trade Practices Act 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 Trade Practices Act 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 Trade Practices Act (anti-competitive behaviour) are more appropriately dealt with by the court, irrespective of the scope of the arbitration agreement. These decisions show that courts may be reluctant to allow the arbitrability of competition matters and may seek to preserve the courts' jurisdiction to hear matters that have a public dimension.

An increasingly common issue that courts face arises when multiple claims are brought by one party, only some of which are capable of settlement. So far the courts have approached this issue by staying court proceedings only for those claims it considers capable of settlement by arbitration (see Hi-Fert and Tanning Research Laboratories).

Third parties

There are very limited circumstances in which a third party who is not privy to the arbitration agreement may be a party in the arbitral proceedings. One situation in which this can occur is in relation to a parent company where a subsidiary is bound by an arbitration agreement, though this exception is yet to be finally settled by Australian courts. There is, however, authority suggesting that a third party can be bound by an arbitration agreement in the case of fraud or where a company structure is used to mask the real purpose of a parent company. However, under the revised IAA courts now have the power to issue subpoenas, for the purpose of arbitral proceedings, requiring a third party to produce to the arbitral tribunal particular documents or to attend for examination before the arbitral tribunal.

The arbitral tribunal

Appointment and qualification of arbitrators

Australian laws impose no special requirements with regard to the arbitrator's professional qualification, nationality or residence. However, arbitrators must be impartial and independent. Article 12 of the Model Law requires arbitrators to disclose any circumstances

likely to give rise to justifiable doubts as to their impartiality or independence. This duty continues throughout the arbitration. The revised IAA (article 18A) supplements the justifiable doubt test required by article 12(1)&(2) Model Law by stating that a justifiable doubt as to the arbitrator's impartiality or independence only exists if 'there is a real danger of bias on part of' the arbitrator.

Where the parties fail to agree on the number of arbitrators to be appointed, section 6 of the CAA provides for a single arbitrator, and article 10 of the Model Law for a three-member tribunal, to be appointed. The appointment process for arbitrators will generally be provided in the institutional arbitration rules, or within the arbitration agreement itself. For all other circumstances, article 11 of the Model Law and section 8 of the CAA prescribe a procedure for the appointment of arbitrators.

It should be noted that the arbitration law in Australia does not prescribe a special procedure for the appointment of arbitrators in multiparty disputes. If multiparty disputes are likely to arise under a contract, it is advisable to agree on a set of arbitration rules containing particular provisions for the appointment of arbitrators under those circumstances, such as the ACICA arbitration rules (article 11). The federal attorney general recently announced that it plans to appoint ACICA as a statutory appointing authority under the IAA.

Challenge of arbitrators

For arbitrations under the Model Law, a party can challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence. This standard has also been applied in domestic arbitrations (Gascor v Ellicott [1997] 1 VR 332).

The parties are free to agree on a procedure for challenging arbitrators. Failing such agreement, article 13(2) of the Model Law prescribes the procedure. Initially the party must submit a challenge to the tribunal, but may then apply to a competent court if the challenge has been rejected (article 13(3) of the Model Law).

For domestic arbitrations the courts have exclusive jurisdiction to remove arbitrators. Pursuant to section 44 of the CAA, any party can make an application to the court to remove an arbitrator or umpire where it is satisfied that: there has been misconduct by the arbitrator; undue influence has been exercised in relation to the arbitrator; or an arbitrator is unsuitable or incompetent to deal with the particular dispute. Also, its involvement in the appointment of an arbitrator does not bar a party from later alleging the arbitrator's lack of impartiality, incompetence or unsuitability for the position (CAA, section 45).

Liability of arbitrators

Both the CAA, at section 51, and the IAA, at section 28, provide that arbitrators are not liable for negligence in respect of anything done or omitted to be done in their capacity as arbitrators. But they remain liable for fraud. This is also reflected in article 44 of the ACICA arbitration rules. There are no known cases where an arbitrator has been sued in Australia. In addition, an entity that appoints, or fails or refuses to appoint, a person as an arbitrator is also not liable in relation to the appointment if it acted in good faith (section 28(2) IAA).

Procedure

Under Australian law, parties are generally free to tailor the arbitration procedure to their particular needs, as long as they comply with fundamental principles of due process and natural justice such as equal treatment of the parties, the right of a party to present its case

and the giving of proper notice of hearings. This applies to domestic arbitrations as well as to international arbitrations.

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 are very restricted. However, courts may:

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

In addition to those functions prescribed in the Model Law, courts have additional powers a specified under the IAA. These include, for example, the power to issues subpoenas pursuant to section 23 IAA and which has been dealt with in detail above.

With regard to domestic arbitration, courts have some additional powers. In particular, courts have discretion to stay proceedings (CAA, section 53), as well as power to review an award for errors of law (CAA, section 38) and to issue subpoenas (CAA, section 17) upon application by a party.

Party representation

There are much greater flexibilities with regard to legal representation in international arbitrations than there are in domestic arbitrations. Under section 29(2) of the IAA, a party may either represent itself or choose to be represented by a duly-qualified legal practitioner from any legal jurisdiction or, in fact, by any other person it chooses. This applies to all international arbitrations irrespective of whether or not the Model Law applies (in case the parties choose to opt out). For domestic arbitrations, the requirements are more restrictive. Section 20(1) of the CAA sets out a comprehensive list of circumstances and requirements under which a party may be represented in arbitral proceedings. While the provision is broad enough to also allow representation by a foreign legal practitioner in certain circumstances, representation by a non-legal practitioner is very limited.

Confidentiality of proceedings

In the past Australian courts have taken a somewhat controversial approach to confidentiality of arbitral proceedings. In the well-known decision in Esso Australia Resources v Plowman (1995) 183 CLR 10, the High Court of Australia held that while arbitral proceedings and hearings are private in the sense that they are not open to the general public, that does not mean that all documents voluntarily produced by a party during the

proceedings are confidential. In other words, confidentiality is not inherent in the fact that the parties have agreed to arbitrate. However, the court noted that it is open to the parties to agree that documents are to be kept confidential.

The new IAA now includes provisions dealing in detail with the confidentiality of different aspects of the arbitration proceedings (sections 23C-G IAA). In particular, the provisions deal with circumstances in which confidential information ma be disclosed and the process for such disclosure, as well as the power of the courts and the tribunal to allow or prohibit disclosure under certain circumstances. As these provisions only apply if the parties have expressly agreed to their application, it is advisable to agree to their application in the arbitration agreement if confidentiality is to be preserved.

Evidence

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

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 ACICA arbitration rules also suggest the adoption of the IBA Rules in the absence of any express agreement between the parties and the arbitrator.

The situation is slightly different with regard to domestic arbitrations. Despite the liberties conferred by section 19(3) of the CAA, many arbitrators still conduct arbitrations in a manner not dissimilar to court proceedings: namely, witnesses are sworn in, examined and cross-examined. Nevertheless, there has been some development lately, and more arbitrators are adopting procedures that suit the particular circumstances of the case and allow for more efficient proceedings.

For arbitrations under the Model Law, article 27 allows an arbitrator to seek the court's assistance in the taking of evidence. In such case, a court will usually apply its own rules for the taking of evidence.

Interim measures

With regard to arbitrations under the Model Law, the arbitral tribunal is generally free to make any interim orders or grant interim relief as it deems necessary in respect of the subject matter of the dispute. Article 9 states that it is not incompatible with the arbitration agreement for a party to request, before or during arbitral proceedings, interim measures from a court and for a court to grant such measures. Since the 2006 Model Law has been incorporated into the IAA the position with respect to the courts' power to grant interim measures in support of foreign arbitration has been clarified. Article 17J Model Law now states that a court has the power to order interim measures 'irrespective of whether [the seat] is in the territory of this State'.

Courts now also have the power to enforce interim measures issued by an arbitral tribunal (article 17H Model Law).

Under the CAA, the arbitrator has freedom to conduct the arbitration as he or she sees fit. In particular, section 23 allows the arbitrator to make interim awards unless the parties' intention to the contrary is expressed in the arbitration agreement. Furthermore, section 47

confers on the court the same powers to make interlocutory orders for arbitral proceedings as it has with regard to court proceedings.

Form of the award

The proceedings are formally ended with the issuing of a final award. Neither the Model Law nor the CAA prescribes time limits for delivery of the award. However, there are certain form requirements that awards have to meet. According to article 31 of the Model Law, an award must be in writing and signed by at least a majority of the arbitrators. It must contain reasons, state the date and place of the arbitration and be delivered to all parties to the proceedings. This date will be relevant for determining the period in which a party may seek recourse against the award.

The form requirements for domestic awards are similar. The award needs to be in writing, signed and contain reasons (CAA, section 29). Although there is no express requirement for the award to state the date and place of the arbitration, it is recommended to do so. The parties may also choose for the award to be delivered orally, with a subsequent written statement of reasons and terms by the arbitrator (CAA, section 29(2)). With regard to the content of the award, there are currently no restrictions as to the remedies available to an arbitrator. Whether the award of exemplary or punitive damages is admissible, however, is yet to be tested in Australia. There are no statutory time limits, in either domestic or international proceedings, for the making of an award. Where the arbitration agreement itself contains a time limit to this effect, a court would have the power to extend the time limit with regards to domestic proceedings (CAA, section 48(1)). The effect of such a time limit in Model Law proceedings is not settled. Under article 32 of the Model Law, delays in rendering an award do not result in the termination of the arbitral proceedings. Instead, one option is for a party to apply to a court to determine that the arbitrator loses his mandate under article 14(1) of the Model Law, on the basis that he is 'unable to perform his function or for any other reason fails to act without undue delay'.

Under article 29 of the Model Law, any decision of the arbitral tribunal shall be made by a majority of its members. In contrast, the CAA provides that the decision of a presiding arbitrator shall prevail if no majority can be reached (CAA, section 15). The Model Law allows a similar power of the presiding arbitrator, though only with regard to procedural matters (article 29 of the Model Law).

Recourse against award and enforcement

Appeal and setting-aside proceedings

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

The CAA allows for broader means to attack an award. An appeal to the Supreme Court is possible on any question of law (section 38(2)) with either the consent of all parties or where the court grants special leave (section 38(4)). (Section 38 is worded slightly differently in the Northern Territory and Tasmania.) However, the Supreme Court will not grant leave unless it considers the determination of the question of law concerned to substantially affect the

rights of one or more parties to the arbitration agreement. Furthermore, the court must be satisfied that there is a manifest error of law on the face of the award or strong evidence exists that the arbitrator made an error of law and that the determination of that question may add substantially to the certainty of commercial law (CAA, section 38(5)). Guidance as to how a court might interpret these provisions can be taken from Giles v GRS Constructions (2002) 81 SASR 575 and Pioneer Shipping v BTP Tioxide [1982] AC 724, though in some regards the latter case has been criticised in more recent decisions.

In the recent decision in Oil Basins Ltd v BHP Billiton Ltd [2007] VSCA 255, the Victorian Court of Appeal set aside an arbitral award because the arbitrators provided inadequate reasons in the award, which did not meet the judicial standard. The decision represented a significant departure from previous authority in respect of domestic arbitration and led to a discussion about uniform legislation under the UNCITRAL Model Law for both domestic and international arbitration.

All the aforementioned rights to appeal may be excluded by the parties by way of an exclusion agreement (CAA, section 40, subject to the limitations set out in CAA, section 41). Further recourse is available under CAA, section 42, in the form of setting aside the award on the grounds that the arbitrator misconducted the proceedings or the award has been improperly procured.

With regard to New South Wales and the revised Commercial Arbitration Act 2010 (NSW), although the act is based on the 2006 Model Law, section 34A allows an appeal of the award under limited circumstances. An appeal on a question of law is only possible with the leave of the court or if the parties agree to the appeal before the end of the appeal period. Further, the court must be satisfied that all of the following requirements are satisfied:

- the determination of the question will substantially affect the rights of one or more of the parties;
- the question is one which the arbitral tribunal was asked to determine;
- the decision of the tribunal on the question is obviously wrong (or is one of general public importance); and
- despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

Enforcement

Often, the most crucial moment for a party that has obtained an award is the enforcement stage. Australia has acceded to the New York Convention without reservation, though it should be noted that the IAA creates a quasi-reservation in that it requires a party seeking enforcement of an award made in a non-convention country to be domiciled in, or to be an ordinary resident of, a convention country. So far no cases have been reported where this requirement was tested against the somewhat broader obligations under the New York Convention, and given the ever-increasing number of convention countries, the likelihood that this requirement will become of practical relevance is decreasing.

Section 8 of the IAA implements Australia's obligations under article V of the New York Convention and provides for foreign awards to be enforced in the courts of a state or territory as if the award had been made in that state or territory and in accordance with the laws of that state or territory. However, section 8 of the IAA only applies to awards made

outside Australia. For awards made within Australia, either article 25 of the Model Law for international arbitration awards, or section 33 of the CAA for domestic awards, applies.

CLAYTON UTZ

South Korea

Benjamin Hughes and **Beomsu Kim**

Shin & Kim

Korean companies have enthusiastically embraced arbitration as the most favored method for resolving international and cross-border commercial disputes. For example, the most recent statistics available from the ICC show that Korean parties were involved as claimants or respondents in 30 ICC arbitrations in 2008, second only to India (31) in Asia and well ahead of China (20), Hong Kong (18) and Japan (13). Korean parties have also been increasingly active in arbitrations under the rules of the Singapore International Arbitration Centre and other regional arbitral institutions. Notably, the Korean Commercial Arbitration Board (KCAB) has seen explosive growth in the number of international arbitrations administered under its rules in Korea, with an increase of almost two thirds from 2008 to 2009. The trend of increasing utilisation of arbitration for the resolution of international commercial disputes by Korean parties is expected to continue, as Korean companies continue to expand and to develop commercial relationships with companies all over the world, spanning numerous legal jurisdictions, languages and cultures.

In addition, as Korean companies gain more leverage in their contract negotiations, we can expect to see more and more arbitrations seated in Korea, governed by Korean law, and under the rules of the KCAB. This article will serve as an introduction to the law and procedures of international arbitrations conducted in Korea and under the international rules of the KCAB, as well as the recognition and enforcement of foreign arbitral awards in the Korea.

The Korean Arbitration Act

First promulgated in 1966, the Korean Arbitration Act (the Arbitration Act or the Act) was completely overhauled in 1999 to substantially adopt the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). The Arbitration Act applies to all arbitrations seated in Korea, but also contains a few provisions that apply to international arbitrations regardless of the seat of the arbitration. These provisions are generally intended to promote and support international arbitrations both in Korea and in other jurisdictions. Article 9 of the Act provides that a Korean court shall dismiss an action where the respondent can show that the dispute is subject to an arbitration agreement in Korea or abroad. Article 10 allows a party in an arbitration in Korea or elsewhere to seek interim relief pending the outcome of the arbitration in the Korean courts. In addition to these provisions, articles 37 and 39 address the recognition and enforcement of foreign arbitral awards, which will be discussed in more detail below.

The 1999 revisions to the Arbitration Act did not adopt the Model Law in its entirety, and a few important differences between the Act and the Model Law should be pointed out. While the Model Law confers final jurisdiction upon the arbitral tribunal to determine its own jurisdiction, for example, article 17 of the Arbitration Act allows a party challenging jurisdiction to appeal the tribunal's determination that it has jurisdiction to a competent court for a final ruling. In addition, unlike the Model Law, article 27 of the Arbitration Act allows a party to challenge the tribunal's appointment of an expert, first to the tribunal but with a right

of appeal to the court. Notably, the act omits the provision at article 34(4) of the Model Law which provides that a court may, where appropriate and so requested by a party, suspend its proceedings in an action challenging an arbitral award to give the tribunal an opportunity to resume the arbitral proceedings or take other action which in the tribunal's opinion may eliminate the grounds for setting aside the award. Finally, article 32 of the act requires that the original signed award be deposited with the court of competence, while the Model Law contains no such requirement. Certain differences with respect to the legal effect of the arbitral award and the procedures for enforcing or setting aside the award will be discussed in more detail below.

The Korean Commercial Arbitration Board

Established in 1970 by what is now the Ministry of Commerce, Industry and Energy, the KCAB is the only officially recognised arbitral institution in Korea. The KCAB currently handles approximately 200 cases annually, most of which are domestic arbitrations.

The Arbitration Rules of the KCAB (the KCAB Rules) have been revised several times, most recently in 2004. The KCAB Rules are the default rules for all arbitrations under the KCAB, regardless of whether the underlying disputes are between domestic Korean parties or of an international nature. However, in January 2007, the KCAB implemented a separate set of Rules of International Arbitration (the International Rules).

The International Rules were promulgated in order to encourage foreign parties to arbitrate disputes in Korea under the auspices of the KCAB, and are modeled closely on the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce (the ICC Rules). However, to date there has been only one arbitration filed under the International Rules of the KCAB. This anomaly is due to a lack of awareness of the existence of the International Rules among foreign users of the KCAB, and confusion as to whether the International Rules automatically apply to arbitrations involving a foreign party.

Article 3 of the International Rules states that the International Rules shall apply where the parties have agreed in writing to refer their disputes to international arbitration 'under the KCAB International Arbitration Rules'. Thus, the International Rules do not automatically apply to arbitrations involving a foreign party, but must be specifically designated in the arbitration agreement or by agreement of the parties. Otherwise, a reference to arbitration under the rules of the KCAB will be deemed to refer to the original KCAB Rules. The distinction is important because the two sets of rules have significant differences. To cite just one example, the default language of the arbitration under the KCAB Rules is Korean.

The International Rules of the KCAB

As the International Rules of the KCAB were introduced in 2007 but are not well known to potential users of KCAB arbitration, this article will focus on the International Rules. As noted above, the International Rules will not be unfamiliar to anyone acquainted with the ICC Rules, on which they were clearly modeled. Nevertheless, there are some important differences which should be noted. For example, the International Rules do not provide for a terms of reference (TOR) or similar document as provided for in the ICC Rules. As such, there is no bar to raising new claims after the TOR or similar procedural hearing. A party may amend or supplement its claim, counterclaim and defences at any time during the arbitral proceedings, unless the tribunal considers it inappropriate because of delay or prejudice to the other party. In addition, while the ICC Rules provide that any counterclaims shall be filed with the answer, the International Rules provide that counterclaims may be filed at a later stage in the arbitral proceedings if the tribunal determines that the delay was justified under the circumstances.

These procedural differences may affect the duration and cost of the proceedings. Some of the other more significant differences are described below.

Appointment, challenge and replacement of arbitrators

Like the ICC Rules, where the parties have not specified a number, the default number of arbitrators under the International Rules is one. However, under the ICC Rules, the ICC Court may sua sponte decide, in light of the circumstances, to appoint three arbitrators (article 8(2)). Under the International Rules, the secretariat of the KCAB will appoint a sole arbitrator unless a party petitions the secretariat to appoint three. The secretariat must then weigh factors such as the size and complexity of the dispute, determine whether three arbitrators should be appointed, and notify the parties of its decision (article 11). In addition, where the arbitration agreement calls for each party to nominate an arbitrator, the International Rules provide that a respondent who fails to submit an answer or to otherwise nominate an arbitrator within the time permitted by the secretariat is deemed to have irrevocably waived the right to nominate an arbitrator (articles 9(6) and 12(2)).

The processes for challenging and replacing arbitrators under the International Rules are closely modelled on the ICC Rules. However, under the International Rules the parties are given less time (15 days as opposed to 30 days) to raise a challenge (article 13). The International Rules also add a provision that, where an arbitrator is challenged, he or she may simply withdraw as an arbitrator (with or without agreement between the parties), and that such a withdrawal does not imply acceptance of the validity of the grounds for the challenge. With respect to the replacement of an arbitrator who has been removed or withdrawn, the International Rules provide that the replacement arbitrator must be chosen by the same method applicable to the appointment of the arbitrator he or she is replacing (article 14(3)), whereas the ICC Rules allow the ICC Court the discretion as to whether to follow such procedures (article 12(3)).

Jurisdiction of the arbitral tribunal

Article 19 of the International Rules explicitly provides that the arbitral tribunal shall have the authority to rule on objections to its jurisdiction, and the existence or validity of the contract of which the arbitration agreement is a part. Like the ICC Rules, the International Rules provide that a determination by the tribunal that the underlying contract is null and void does not render the arbitration clause invalid. Despite these provisions of the International Rules, however, it should be recalled that the Arbitration Act applies to all arbitrations which take place in Korea, and that article 17 of the Act allows a party challenging jurisdiction to appeal the arbitral tribunal's decision that it has jurisdiction to the courts for a final ruling. Thus, while the tribunal will have the first opportunity to rule on its own jurisdiction, it is the courts which may have the final say.

Evidence and experts

The International Rules are more detailed and forceful than the ICC Rules with respect to the production of evidence. Typical of parties from civil law jurisdictions, Korean parties traditionally have been somewhat reluctant to produce documents voluntarily and other evidence unfavourable to them in litigation and arbitration. The International Rules are drafted to address this issue in order to ensure a level playing field with respect to the production of evidence. Article 22 of the International Rules explicitly empowers the tribunal, unless the parties have otherwise agreed in writing, to order the parties to produce documents and other evidence, and to make a property or site under its control available to the tribunal, the other party or any expert appointed by the tribunal. The tribunal is also

specifically empowered to determine the admissibility, relevance, materiality and weight of any evidence.

Under article 20(4) of the ICC Rules, the tribunal may appoint an expert after consultation with the parties. Article 23 of the International Rules confers the same power, but the tribunal is not required to consult with the parties. As noted above, however, the parties have the right under the Arbitration Act to challenge the tribunal's appointment of an expert in the Korean court of competence, so as a practical matter the tribunal should consult with the parties and ensure that the expert is free of conflicts or perceived prejudices. The tribunal is empowered to require the parties to cooperate with the expert by providing relevant information and evidence, and the parties may examine and comment on the expert's report and the evidence relied upon by the expert in drafting it.

Confidentiality

Unlike the ICC Rules, article 45 of the International Rules explicitly provides that the arbitral proceedings, and the records thereof, shall be confidential. Except by consent of the parties, or where required in court proceedings or applicable law, neither the parties nor the tribunal (or the KCAB) may disclose any facts related to the arbitration learned through the arbitration proceedings.

Additional award

Unlike the ICC Rules, the International Rules contain a provision at article 37 permitting a party to petition the tribunal, within 30 days of receipt of the arbitral award, for an 'additional award' as to claims presented in the arbitral proceedings but not addressed in the award. If the tribunal agrees to hear the request, it must render any such additional award within 60 days of receipt of the request. This provision is separate from the provisions regarding the correction and interpretation of the award, which mirror the ICC Rules, and is meant to avoid challenges to the arbitral award by a party alleging that the tribunal has failed to deal with a claim raised in the arbitration. If no request is made under article 37, Korean courts will normally deem a challenge on this basis to have been waived.

Costs

Like the ICC, the KCAB bases administrative costs and arbitrators' fees upon the amount of the claims to be decided in the arbitration. KCAB arbitrations cost significantly less than ICC arbitrations, however, as both the administrative fee scale and the arbitrators' pay are lower.

The payment of advance costs can be a thorny issue, especially where there is a respondent with no counterclaims and no interest in participating in the arbitration. The ICC Rules provide that where one party refuses to pay its share of the advance costs, the other party pay this amount in order to ensure that the arbitration proceeds (article 30(3)). The International Rules go a step further, providing at article 39(5) that a party who is forced to pay the whole of the advance on costs may request the tribunal to order the other party to pay its share in the form of an enforceable interim, interlocutory or partial award.

There is quite a difference between the ICC Rules and the International Rules with respect to the allocation of costs by the tribunal at the end of the arbitration. The ICC rules consider 'costs' to include all of the administrative expenses, fees and expenses of the arbitrators (and experts appointed by the tribunal) as well as the reasonable legal and other costs incurred by the parties for the arbitration. These costs are allocated at the discretion of the tribunal. The International Rules, on the other hand, distinguish between the arbitration costs (such administrative expenses, fees and expenses of the arbitrators and experts) and the costs incurred by the parties (such as legal fees and expenses for experts and witnesses, etc).

Article 40 of the International Rules provides that administrative arbitration costs shall, in principle, be borne by the losing party, subject to the discretion of the tribunal. Article 41, on the other hand, provides that the legal costs and expenses incurred by each party shall be borne by such party, again subject to the discretion of the tribunal. The parties are free to agree otherwise, of course, so it is advisable to consider this issue when drafting the arbitration clause if the International Rules will apply.

Recognition and enforcement of arbitral awards

Domestic arbitral awards

Article 35 of the Arbitration Act states that an arbitral award rendered in Korea shall have the same effect on the parties as the final and conclusive judgment of the court. It should be noted, however, that article 36 of the act provides procedures for a party wishing to apply to the court of competence to set aside an arbitral award rendered in Korea. The grounds for setting aside a domestic award in Korea are similar to the grounds for declining to recognise or enforce a foreign arbitral award, discussed below. No application to set aside an award may be made after three months from the date on which a party received a duly authenticated copy of the award, nor may any such action be entertained after a conclusive judgment of recognition or enforcement of the award has been rendered by a Korean court. There is no corresponding provision under Korean law permitting a party to apply for the setting aside of a foreign arbitral award, as article 36 of the act does not apply to foreign awards.

Foreign arbitral awards

Article 37 of the Arbitration Act sets forth only two procedural requirements for the recognition and enforcement of a foreign arbitral award. First, a party seeking enforcement must submit the original, or a duly authenticated copy of, the award and the agreement to arbitrate. If these are not in Korean, duly certified translations must also be submitted. These straightforward procedural requirements are consistent with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), to which Korea is a signatory, and Korean courts have shown themselves to be extremely friendly to foreign arbitral awards. However, it should be noted that enforcement proceedings are full adversarial court litigations which are subject to multiple appeals, so enforcement against a recalcitrant party can become a time-consuming and expensive undertaking. As noted above, as there is no procedure for setting aside a foreign arbitral award in Korea, a party wishing to resist enforcement of a foreign arbitral award will simply refuse to comply with the award and force the other party to bring an enforcement action pursuant to article 37 of the act.

Article 39 of the Arbitration Act provides that the recognition or enforcement of a foreign arbitral award which is subject to the New York Convention shall be governed by that convention, while foreign arbitral awards which are not subject to the convention shall be governed by the same procedures applicable to the recognition and enforcement of foreign court judgments. As a practical matter, however, the vast majority of foreign arbitral awards for which recognition and enforcement is sought will be subject to the New York Convention. In addition, there is little practical difference these days between the grounds for enforcement of awards subject to the New York Convention and the grounds for enforcement of foreign court judgments under Korean law.

Article V of the New York Convention sets forth the very limited grounds which may permit the refusal of recognition and enforcement of an arbitral award. Among these, the most commonly tested in Korea has been that the recognition or enforcement of the award would

be contrary to the public policy of Korea (section V(2)(b) of the convention), although other grounds have also been raised. Korean courts have proven very friendly to foreign arbitral awards, taking a very narrow view of the exceptional circumstances which are required to successfully resist recognition and enforcement on any of the grounds provided under article V of the convention. The Korean Supreme Court has repeatedly held that a violation of 'public policy' giving rise to a refusal to enforce a foreign arbitral award under section V(2)(b) of the New York Convention should be restrictively interpreted in light of the need for certainty and stability in international commercial transactions, and that the 'public policy exception' to the enforcement of arbitral awards was intended to protect only Korea's most fundamental moral beliefs and social order.

Most recently, the Supreme Court reaffirmed in 2009 that a foreign arbitral award rendered in a jurisdiction which is a signatory to the New York Convention shall be recognised as having the same res judicata effect as a domestic Korean court judgment, unless there are grounds under the New York Convention to refuse recognition and enforcement (Korean Supreme Court Dec. No. 2006Da20290, 28 May 2009). In the same decision, the Supreme Court reaffirmed the very high bar for refusal to recognise and enforce foreign arbitral awards based upon the public policy exception in Korea.

Conclusion

Several factors seem to have converged to ensure that the utilization of international arbitration will continue to grow in Korea. Korean companies are already sophisticated and enthusiastic users of international arbitration. As their leverage and influence on the global stage increases, Korea will inevitably become the seat of an increasing number of international arbitrations, whether under the auspices of the KCAB or other international arbitral institutions. As described above, Korea has a progressive Arbitration Act modelled on the UNCITRAL Model Law, and courts which are extremely friendly to arbitration. The promulgation of the International Rules by the KCAB has also improved the environment for international arbitration in Korea. While these rules have to date been under-utilised, we expect to see more arbitrations under the International Rules as awareness grows among potential users of KCAB arbitration.

In preparation for the expected rise in international arbitrations in Korea, in 2010 the KCAB unveiled a new state-of-the-art hearing room for international arbitrations. Korean law firms are increasing the size and expertise of their international arbitration teams by hiring both Korean and foreign licensed attorneys with experience in various jurisdictions and fluency in English and other languages. It seems safe to say that the trend in favour of international arbitration for the resolution of international commercial disputes by Korean parties will continue well into the future.

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Malaysia

Chong Yee Leong

Kamilah & Chong (associate office of Rajah & Tann LLP)

Last year, we discussed the general position of the law applicable to arbitrations in Malaysia. We had highlighted that all arbitrations commenced in Malaysia on or after 15 March 2006 are governed by the Arbitration Act 2005 (2005 Act) and that it repealed the statute which previously governed arbitrations in Malaysia, the Arbitration Act 1952 (1952 Act) and also repealed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (CREFAA Act). As mentioned before, the 1952 Act is not altogether irrelevant now as it is still applicable to arbitrations commenced before 15 March 2006.

In this article, we discuss several of the recent cases decided in the Malaysian courts which clarified certain positions of law relating to arbitration which were previously ambiguous or was never considered before by the courts. We also discuss the adoption of the revised UNCITRAL Arbitration Rules by the Kuala Lumpur Regional Arbitration Centre (KLRAC) and the significant revisions made by UNCITRAL.

Stay of proceedings in court

The issue of whether the court retains any discretion to not grant a stay of proceedings in the courts in favour of arbitration when the subject matter of dispute is subject to an arbitration agreement had been considered several times before. In this regard, it is pertinent to note that there is a clear difference in the provisions relating to the power of the High Court to stay legal proceedings in the 2005 Act when compared with similar provisions in the 1952 Act.

Section 10 of the 2005 Act allows a party to apply to the High Court for a stay of legal proceedings if the subject matter of the dispute is subject of an arbitration agreement. Section 10 (1) of the 2005 Act reads 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 (a) that the agreement is null and void, inoperative or incapable of being performed; or (b) that there is in fact no dispute between the parties with regard to the matters to be referred.

This is unlike section 6 of the 1952 Act, which provides as follows:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no 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, may make an order staying the proceedings.

The difference between section 10 of the 2005 Act and section 6 of the 1952 Act is that while the former makes it mandatory for the High Court to grant a stay, the latter allows the court to use its discretion to grant a stay or otherwise.

Another difference between the provisions is that section 10 of the 2005 Act provides only two instances in which the court does not need to grant a stay; firstly, if the arbitration agreement is null and void, inoperative or incapable of being performed and secondly, if there exist in fact no dispute between the parties in regard to the matters to be referred. Such conditions are not stated in section 6 of the 1952 Act and this allows the court broad discretion by stating that a stay need not be granted if the court is satisfied that there is no sufficient reason why the matter should not be referred to arbitration. However, both sections have a common provision that a stay will not be granted if the applicant has taken part in the proceedings.

When the 2005 Act initially came into force, it was argued that the courts, in a manner similar to the express provision in the 1952 Act and also by way of the inherent jurisdiction of the court, retains its discretion on the issue of granting a stay of proceedings. However, over the years, the courts have clearly established that section 10 of the 2005 Act mandates that a stay be granted if the subject matter of the dispute is subject of an arbitration agreement. Recently, in the case of Chut Nyak Hisham Nyak Ariff v Malaysian Technology Development Corporation Sdn Bhd,[1] the court took the occasion to restate the desire of the legislature to reform the law relating to arbitration and to give primacy to arbitration proceedings over court proceedings in circumstances where parties have agreed to resolve their disputes by arbitration. The High Court stated that in such circumstances, the court has to grant a stay of proceedings regardless of whether the arbitration is international or domestic in nature and that it would be rare for a court not to grant a stay under the 2005 Act. It is also pertinent to note that the High Court was also of the view that notwithstanding that the agreement between parties to which the matter relates was signed in 2005, the applicable statute is the 2005 Act as the notice to arbitrate was only issued in 2008 (after 15 March 2006).

Similarly, the position taken by the second highest court in the country, the Court of Appeal in the case of Renault Sa v Inokom Corporation Sdn Bhd & Anor And Other Applications[2] was no different. The Court of Appeal held that a stay is mandatory under section 10 of the 2005 Act. The court further observed that unlike the 1952 Act which provides the High Court powers to hear disputes on questions of fraud relating to the arbitration agreement (section 25), the 2005 Act deems the same to be within the competent jurisdiction of the arbitrator and is not to be treated any different than other matters.

The court in the case of Winsin Enterprise Sdn Bhd v Oxford Talent (M) Bhd[3] noted that under the 1952 Act, it has the discretion to grant a stay of court proceedings if certain conditions are met, one of which being that the applicant has demonstrated that he is ready and willing to arbitrate the dispute, while there is no such requirement under the 2005 Act. The court held that in both the 1952 Act and 2005 Act, a stay will only be granted if the parting seeking to stay the proceedings has not taken part in the proceedings. In this case, the Court held that the defendant, by requesting and obtaining an extension of time to file its defence, had taken a step in the proceedings and therefore had deprived itself of the right to stay proceedings.

In Gadang Engineering (M) Sdn Bhd v Bluwater Developments Berhad,4 the High Court, having both an application for stay and summary judgment before it, held that the it has no discretion under the 2005 Act but to grant a stay unless section 10(1)(a) or (b) applied. The plaintiff in this case argued that section 10(1)(b) applies, to which the court observed that the application of section 10(1)(b) should be shown in the answer opposing the stay application and not by a separate summary judgment application.

Arbitral awards

Both the 1952 Act and 2005 Act are silent in regard to appeal procedures against an award. However, both acts have provisions relating to setting aside an award. Section 24 (2) of the 1952 Act states as follows:

> Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

Similarly, section 37 of the 2005 Act provides the various grounds for High Court to set aside an award.

Recently, the Court of Appeal in the case of Cairn Energy India Pty Ltd v The Government of India5 held that, under the 1952 Act, an arbitration award is ordinarily final and conclusive unless a contrary intention is provided for in the arbitration agreement. The Court of Appeal also noted that accordingly, the civil courts do not have appellate jurisdiction over the arbitrator's decision if it has been fairly reached. The Court of Appeal, however, also stated that in limited and exceptional circumstances, the court may still set aside an award if there was an error of law on the face of the award. This is based on common law principles. Jeffery Tan JCA stated:

> The remedy of 'error of law on the face of the award' was not provided in the Arbitration Act 1952. But Malaysian law was not and is not limited to the Arbitration Act alone. 'courts in Malaysia have regularly considered arbitration applications on the basis that error of law on the face of the award is available for consideration under our law.6

The Court of Appeal was of the view that a question of construction is a question of law and if the question of construction itself is the very thing that had been referred to the arbitrator for determination, the court would not set aside the findings of the arbitrator only because the court itself would have come to a different conclusion. Further, the Court of Appeal also stated that an erroneous decision of an arbitrator on a specific question of construction does not in itself make it a bad award capable of being set aside. However, where a tribunal has had to determine a question of law that became material to its decision in the dispute that was referred to it - and that question of law was determined erroneously - then curial interference is possible on the ground that there has been an error of law on the face of the award. As observed by the Court of Appeal, the grounds for setting aside an award under the 2005 Act are very limited and, additionally, section 8 of the 2005 Act provides that no court shall intervene in any matters governed by the 2005 Act except as provided. Therefore, it is unlikely that the decision of Cairns Energy India would be of any relevance under the 2005 Act.

A similar position that the Malaysian courts would be unlikely to set aside or refuse recognition of an arbitration award is seen in the recent case of Taman Bandar Baru Masai

Sdn Bhd v Dindings Corporations Sdn Bhd.7 In this case, the High Court considered both an application to set aside an award (the plaintiff's application) as well as an application to register an award for purposes of enforcement (the defendant's application). The court observed that the plaintiff, in relying on sections 37 or 42 as the basis of its application, had failed to properly identify and state which subsection is applicable and as a result, the court held that the plaintiff's application should be dismissed for prolixity especially since the 2005 Act does not allow the courts to intervene in matters that do not strictly fall within any of the sub-sections of section 37. Further, the plaintiff's general arguments that the arbitrator had breached rules of natural justice also could not be accepted by the court in view of the failure to set out the prejudice suffered and the proof thereof. In regard to the defendant's application, the court was of the opinion that there is not much merit in the plaintiff's arguments (that the final award does not deal with the dispute contemplated by the parties) to oppose the said application on the basis that the arbitrator has general jurisdiction to deal with all matters relating to the dispute. The court also stated that the 2005 Act makes it compulsory for courts to respect the decision of the arbitrator and that real proof is required before the courts would meddle with an award.

Another relevant case in relation to enforcement and recognition of an award is the case of Hiap-Taih Welding & Construction Sdn Bhd v Boustead Pelita Tinjar Sdn Bhd (formerly known as Loagan Bunut Plantations Sdn Bhd).8 The High Court in this case had to decide on the appropriate statute to be used for making an application for the recognition and enforcement of an award if the arbitration was commenced under the 1952 Act. The defendant argued that since the award was being registered after 15 March 2006, the application for enforcement should be made under the 2005 Act. The High Court considered the Indian case of Thyssen Stahlunion Gmbh v Steel Authority of India,9 which dealt with a similar point and held that to enforce an award under the 1952 Act (under which the arbitration proceedings were commenced) is an accrued right and that legislature did not intend to take away a vested right by introduction of the 2005 Act; therefore the application was indeed made under the appropriate statute.

Similarly in the recent case of Ngo Chew Hong Oils & Fats (M) Sdn Bhd v Karya Rumpun Sdn Bhd,10 the court observed that in almost all cases, failure to make an application to set aside an award is fatal to a defendant resisting a recognition or enforcement application and that merely filing an affidavit to oppose registration is insufficient. Therefore, it is advisable that a party seeking to oppose the registration of an award also make an application to set aside the award.

CREFAA Act

Enforcement of awards pursuant to arbitration agreements under the New York Convention or arbitrations held outside Malaysia in states which were party to the New York Convention are governed by the CREFAA Act. This statute allows the courts in Malaysia to give effect to private agreements to arbitrate and to recognise and enforce arbitration awards made in other contracting states.

In the case of Sri Lanka Cricket v World Sports Nimbus Pte Ltd,11 the Court of Appeal held that a gazette notification by His Majesty Yang Di-pertuan Agong was a pre-requisite before enforcement of an award from a state is allowed under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 notwithstanding that the state was indeed a signatory to the New York Convention. This decision was reaffirmed once again by the Court of Appeal in the case of Alami Vegetable Oil Products Sdn Bhd v Lombard

Commodities Ltd.12 However, late in 2009, the Federal Court had reversed the decision of the Court of Appeal in the latter case13 and held that gazette notification is evidentiary in nature and not a pre-condition for purposes of enforcing an award from a state which is a signatory to the New York Convention.

It should be noted that there are no similar provisions in the 2005 Act pertaining to the gazette notification by his majesty (as in the repealed CREFAA Act) and thus this issue does not arise for the recognition and enforcement of an award under the 2005 Act. It is certainly arguable that these cases are not applicable to a party seeking recognition and enforcement of an award from a foreign state that is a signatory to the New York Convention under the Act.

Adoption of the revised UNCITRAL Arbitration Rules by the KLRCA The development of arbitration law over the year also most recently saw the adoption of the recently revised UNCITRAL Arbitration Rules by the KLRCA on 15 August 2010, the first arbitration centre in the world to do so. The United Nations Commission on International Trade Law (UNCITRAL) had decided in 2006 that the UNCITRAL Arbitration Rules should be revised to meet the changes in arbitral practice that has occurred over the past 30 years since they were first adopted in 1976. The revised UNCITRAL Arbitration Rules were adopted by UNCITRAL on 25 June 2010 and were effective as of 15 August 2010. With KLRCA adopting the revised UNCITRAL Arbitration Rules, all changes made therein are relevant to and effects arbitrations held in the KLRCA.

The revised UNCITRAL Arbitration Rules saw more provisions being added to the rules with the aim of filling the gaps that became apparent over the years. UNCITRAL states that 'the revision is aimed at enhancing the efficiency of arbitration under the rules and does not alter the original structure of the text, its spirit or drafting style'.

Revision of article 2 shows the rules taking into account modern technology in regard to notice of arbitrations and other communications as well as conduct of the hearing. Where previously, the rules required that notices to be physically delivered, the revision of the rules allows for notices and other communications to be 'transmitted by any means of communications that provides or allows for a record of its transmission'. A point to note is that when communications are conducted via e-mail or facsimile, a designated or authorised address must be used. The revision of the UNCITRAL Arbitration Rules also includes the addition of article 28(4) which provides that witnesses may 'be examined through means of telecommunication that do not require their physical presence at the hearing' with the example of teleconference being stated.

Article 6 has been revised to reduce the time a party needs to wait before making a request to the secretary general of the Permanent Court of Arbitration at The Hague (PCA) in regard to disputes relating to the appointment of an appointing authority from 60 to 30 days. Additionally, it is also now expressly stated that the PCA may be requested by the parties to act as an appointing authority. The default position in regard to the appointment of three arbitrators in the event parties fail to agree to a sole arbitrator has been retained. However, the appointing authority may appoint a sole arbitrator if either of the parties does not appoint a second arbitrator or a party makes such a request and the circumstances are that it is more appropriate to use a single arbitrator.

Among the significant additions in the revised UNCITRAL Arbitration Rules relating to the conduct of arbitrators is that it is now provided that the tribunal 'shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient

process for resolving the parties' dispute' (article 17(1)) and that the tribunal shall as soon as practicable establish a provisional timetable of the arbitration (article 17(2)). There are also now additional provisions dealing with the issue of arbitrator's conflict of interest whereby model statements of independence pursuant to a new article 11 are annexed to the revised rules. Also in regard to arbitrators' conduct, article 16 provides a clause excluding the liability of the tribunal (and also that of the appointing authority) save for intentional wrongdoing. This would most certainly guarantee that the arbitrators can proceed with the arbitration without fear of any negative repercussions from the parties.

Excessive tribunal remuneration would also not be possible now that the revised UNCITRAL Arbitration Rules states that the fees shall be reasonable in amount (article 41). The rules also require that the arbitral tribunal inform the parties of how it proposes to determine its fees soon after the tribunal is constituted and also how the fees and expenses have been fixed. The parties may refer the proposal or the determination of the fees of the tribunal for review to the appointing authority.

Notes

1 [2009] 9 CLJ 32.

2 [2010] 5 CLJ 32.

3 [2010] 3 CLJ 634.

4 [2010] 6 CLJ 277.

5 [2010] 2 CLJ 420.

6 Supra page 440.

7 [2010] 5 CLJ 83.

8 [2008] 8 MLJ 471.

9 AIR 1999 SC 3923.

10 [2009] 1 LNS 1321.

11 [2006] 3 MLJ 117.

12 [2009] 3 MLJ 289.

13 [2010] 1 CLJ 137.

Kamilah & Chong (associate office of Rajah & Tann LLP)

Singapore

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

Introduction

The past year has, once again, seen significant developments in international arbitration in Singapore, with steps taken by the Singapore government and the Singapore International Arbitration Centre (SIAC) to buttress Singapore's profile as a major international arbitration centre.

Changes to the legislation on international arbitration that were passed by the Singapore Parliament in 2009 have come into force in January 2010. One of the key provisions was the introduction of a new section 12A to the International Arbitration Act (IAA), which empowers Singaporean courts to make interim orders in aid of an arbitration seated outside Singapore.[1]

The SIAC saw a jump in the number of cases administered - as at 31 December 2009, the SIAC had recorded a total of 160 new arbitrations (out of an active caseload of 300 cases); a marked increase from the 99 new arbitrations recorded in 2008. The types of cases being administered has also diversified with more international arbitrations; a total of 114 international arbitrations were administered by the SIAC in 2009 (compared to 77 in 2008).

This trend is set to grow with the official opening of Maxwell Chambers, the new integrated dispute resolution complex, on 21 January 2010 (following a soft launch in July 2009). Maxwell Chambers is designed to be a hub for arbitration in Singapore, and hosts state-of-the-art hearing facilities as well as numerous international arbitration institutions, including SIAC, the International Court of Arbitration of the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), the Permanent Court of Arbitration (PCA) and the World Intellectual Property Organization (WIPO), among others. Singapore also hosted the first Singapore International Arbitration Forum in January 2010 to mark the official opening of Maxwell Chambers.

In line with the growth in international arbitrations in Singapore, a number of interesting issues were considered and determined by the Singaporean courts. The Singaporean courts continue to expound a minimalist intervention policy in support of arbitration.

Changes to the SIAC Rules

The SIAC has introduced a number of changes in the 4th Edition of the Arbitration Rules of the SIAC (SIAC Rules 2010), which came into effect on 1 July 2010. Many of these changes have been targeted at streamlining existing procedures and facilitating speedier arbitrations. Some of the key changes are discussed below.

Expedited procedure

One of the more significant changes introduced in the SIAC Rules 2010 is the provision for an expedited procedure available prior to the full constitution of the tribunal. A party can apply for the arbitration to be conducted under the expedited procedure if any of the following conditions are met:

-

the amount in dispute does not exceed S$5 million (being the aggregate amount of the claim, counterclaim and any set-off defence;

- where the parties so agree; or
- in cases of exceptional urgency.

If the chairman of the SIAC determines that the expedited procedure should apply, then:

- the registrar may shorten any time limits under the SIAC Rules;
- the case will be referred to a sole arbitrator (unless the chairman of the SIAC determines otherwise);
- the arbitrator will nevertheless hold hearings to take evidence and hear arguments unless the parties agree that the dispute will be decided on the basis of documentary evidence only;
- the award must be made within six months from the date of constitution of the tribunal (unless the registrar extends the time limits, and only in exceptional circumstances); and
- the arbitrator need only state in summary form the reasons upon which the award is based, but parties may agree that no reasons need to be given.

Emergency interim relief

In line with the newly introduced expedited procedure, the SIAC Rules 2010 also permit parties to apply for emergency interim relief prior to the constitution of the tribunal. If the chairman accepts the application, an emergency arbitrator will be appointed by the chairman within one business day after receipt of the application with payment of the required fee. The tribunal, once constituted, may reconsider, modify or vacate the interim award or order made by the emergency arbitrator, and is not bound by the reasons given by the emergency arbitrator. Rule 26.3 of the SIAC Rules 2010 expressly provides that a request for interim relief made to a judicial authority prior to the constitution of the tribunal, or in exceptional circumstances thereafter, is not incompatible with the Rules.

Objections to the jurisdiction of the tribunal

Rule 25.1 of the SIAC Rules 2010 provides that if a party objects to the existence, validity or scope of the arbitration agreement or to the jurisdiction of the SIAC over a claim before the tribunal is appointed, a committee of the board of the SIAC shall decide, without prejudice to the admissibility or merits of the claim, if it is prima facie satisfied that an arbitration agreement under the Rules may exist. If the committee is not so satisfied, the arbitral proceedings shall be terminated.

Multi-party appointment of arbitrators

The SIAC Rules 2010 prescribe a new procedure for the nomination of arbitrators where there are more than two parties in the arbitration proceedings. Rule 9 provides that where one arbitrator is to be appointed, all parties are to agree on an arbitrator. If no joint nomination is made within 28 days of the filing of the notice of arbitration or within the period agreed by the parties, the chairman of the SIAC shall appoint the arbitrator. Where three arbitrators are to be appointed, the claimants shall jointly nominate one arbitrator and the respondents shall jointly nominate one arbitrator. If no such joint nominations are made within 28 days of the filing of the notice of arbitration or within the period agreed by the parties, the chairman

of the SIAC shall appoint all three arbitrators. The chairman will also designate one of them to act as the presiding arbitrator.

Confidentiality

The previous SIAC Rules did not contain any provisions for sanctions if a party breaches the obligation to keep the arbitration proceedings and the award confidential. Rule 35.4 of the SIAC Rules 2010 provides that the tribunal has the power to take appropriate measures, including issuing an order or award for sanctions or costs, if a party breaches the confidentiality rule.

Judicial decisions of note

The Singaporean courts considered a number of important issues in arbitration law in 2010; the cases of Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) v Larsen Oil and Gas Pte Ltd [2010] SGHC 186 (Petroprod), Denmark Skibstekniske Konsulenter A/SI Likvidation v Ultrapolis 3000 Investments Ltd [2010] SGHC 108 (Denmark Skibstekniske), Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd [2010] 3 SLR 1 (Sui Southern), AJT v AJU [2010] SGHC 201 (AJT) and Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp [2010] 2 SLR 821 (Transocean Offshore) deserve special mention.

Arbitrability of insolvency issues

In Petroprod, the High Court of Singapore for the first time considered the issue of arbitrability of claims under insolvency laws; an issue that has been known to give rise to some delicate questions. As noted in Redfern and Hunter on International Arbitration, 5th ed. (Oxford: Oxford University Press, 2009) at [2.128] (cited at [11] of Petroprod):

> Issues of arbitrability arise in respect of insolvency law due to the conflict between the private nature of arbitration and the public policy driven collective procedures provided for under national insolvency laws. Courts and tribunals in various countries have sought to identify where the boundary of arbitrability should lie, and which insolvency issues are only suitable for resolution by a court. In this regard a distinction can be made between 'core' or 'pure' insolvency issues which are inherently non-arbitrable (for example, matters relating to the adjudication of the insolvency itself or the verification of creditors' claims), and the remaining circumstances of other cases involving the insolvency of one of the parties to a commercial arbitration agreement. The precise location of this dividing line varies between countries, and will depend in part on national insolvency laws.

In Petroprod, the plaintiff (a Cayman Islands company) entered into a management agreement with the defendant, clause 18 of which provided that: '[d]isputes which cannot be resolved amicably shall be resolved by arbitration in Singapore in accordance with the provisions of the Singapore Arbitration Act Chapter 10'. Subsequently, the plaintiff was placed in official liquidation by the Grand Court of the Cayman Islands and compulsory liquidation by the High Court of Singapore.

The plaintiff then commenced action to avoid several transactions involving payments to the defendant pursuant to the management agreement, on the basis that those payments constituted unfair preferences or transactions at an undervalue pursuant to sections 98 and 99 of the Bankruptcy Act read with section 329(1) of the Companies Act and that they were made with the intent to defraud under section 73B of the Conveyancing and Law of Property Act (CLPA).

Unsurprisingly, the defendant applied to stay the action in favour of arbitration, pursuant to section 6 of the Arbitration Act. The plaintiff, in response, contended that the stay application should be dismissed as the issues that required determination in the claim were not arbitrable. The High Court noted that the concept of arbitrability is explicitly recognised in section 11(1) of the International Arbitration Act, which provides that any dispute that the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so. While the Arbitration Act did not contain a similar provision, the High Court nonetheless rightly considered that the arbitrability of the claims ought to be taken into account when determining whether to exercise the discretion to stay proceedings under section 6 of the Arbitration Act.

Against that backdrop, the High Court of Singapore examined the policy behind the avoidance provisions in the Bankruptcy Act and the Companies Act. The Court held that those provisions were enacted for the benefit of the general body of creditors in an insolvency, which policy would be compromised if the enforcement of the avoidance provisions were subject to private arrangements (such as arbitration agreements) between the company and the wrongfully advantaged creditor or transferee. The Court accordingly held that the claims were not arbitrable.

As regards the claims under the CLPA, while the Court held that it was arguable whether the issue under the CLPA should in fact be resolved through arbitration pursuant to the contract between the parties, it would be preferable for all claims to be considered in the same forum as there was likely to be a substantial overlap of factual issues. Accordingly, the application for a stay of proceedings was dismissed.

Conflicting arbitration clauses

Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp [2010] 2 SLR 821 is a useful reminder on the importance of providing for consistent dispute resolution clauses in transactions involving multiple related contracts (unless the parties have consciously and deliberately provided for differing dispute resolution mechanisms).

In this case, the parties had entered into two related contracts, one of which (the drilling contract) provided the resolution of any disputes 'arising out of or in relation to or in connection with [the drilling contract] by arbitration under the LCIA Rules'. The other contract (the escrow agreement), in contrast, provided for the non-exclusive jurisdiction of the Singaporean courts in respect of 'any legal action or proceedings that may be brought at any time relating in any way to this [escrow agreement]'. Proceedings were commenced claiming damages for breach of the escrow agreement, but the plaintiff had, on the back of the breach of the escrow agreement, terminated the drilling contract. The defendant then successfully obtained a stay of the proceedings from an assistant registrar, in reliance on the arbitration clause in the drilling contract.

On appeal, the High Court of Singapore set aside the order for stay, and found that the defendant's application for stay was nothing more than a tactic to delay the progress of the suit. In arriving at this decision, the Court held:

> [26] In addition, I was of the view that where different but related agreements contained overlapping and inconsistent dispute resolution clauses, the nature of the claim and the particular agreement out of which the claim arose ought to be considered. Where a claim arose out of or was more closely connected with one agreement than the other, the claim ought to be subject to the dispute

> resolution regime contained in the former agreement, even if the latter was, on a literal reading, wide enough to cover the claim []

Citing the English decision in UBS AG v HSH Nordbank AG [2009] 2 Lloyd's Rep 272, the High Court considered that when parties must be presumed to intentionally chosen numerous jurisdiction clauses that may overlap, and not to intend that similar claims should be the subject of inconsistent jurisdiction clauses. Accordingly, parties will be taken to have intended that a dispute that fell within both sets of agreements should be governed by the jurisdiction clause in the contract that was closer to the claim.

Enforcement of arbitration awards

In Denmark Skibstekniske, the plaintiff had applied for leave under section 29 of the IAA to enforce a final award made by the Danish Arbitration Institute against the defendant in relation to disputes arising from a new agreement for the design of a 'mega yacht'. The defendant resisted enforcement on various grounds, including an assertion that the plaintiff could not produce the original arbitration agreement or a certified copy thereof as required under section 30(1)(b) of the IAA.

Specifically, the defendant contended that there was no arbitration agreement in writing, as the arbitration clause was contained in the standard conditions to the original agreement between the parties. The parties then executed the new agreement; however, the defendant in executing the new agreement did not sign the standard conditions. On that basis, the defendant contended that the application for enforcement, which exhibited the new agreement, did not contain an arbitration agreement.

The Court granted the plaintiff's application for leave to enforce the award and held that the real issue was whether the standard conditions formed part of the new agreement. This needed to be considered in two contexts: the first stage of enforcement under section 30(1)(b) of the IAA; and the second stage being the refusal of enforcement under section 31(2) of the IAA.

In relation to the first stage, the Court applied Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd [2006] 3 SLR (R) 174, which held that the examination that the court must make of the documents is a formalistic one and not a substantive one. Applying that approach to the present case, the Court found that the plaintiff had satisfied section 30(1)(b) of the IAA by producing a copy of the new agreement and a certified copy of the standard conditions: for the purposes of section 30(1)(b), all the applicant needed to produce was the arbitration agreement under which the award 'purports to have been made'.

In any event, in considering the second stage under section 31(2)(b) of the IAA, the Court held that to succeed, the defendant must show that the arbitration agreement was not valid under the law to which the parties had subjected it (in this case, Danish law). Both parties provided expert evidence on this issue, and the court preferred the evidence from the plaintiff's expert to the effect that the arbitration clause in the standard conditions would have been incorporated into the new agreement by reference under Danish law. The Court accordingly found in favour of the plaintiff and granted the order for enforcement of the arbitration award.

Some doubt, however, has been cast on the mechanistic or formalistic approach taken in Aloe Vera and Denmark Skibstekniske by the Court in Strandore. Commenting obiter, the Court expressed some reservations on the consistency of the mechanistic approach in

light of several recent cases from the English courts, including the English Court of Appeal decision in Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2009] EWCA Civ 755. In Dallah Estate, the Court of Appeal ruled that proceedings under section 103(2) of the English Arbitration Act 1996, the equivalent of section 31(2) of the IAA, should take the form of a full rehearing of the relevant issues and not merely a review of the tribunal's decision.

As matters stand, the approach in relation to the first stage of enforcement remains mechanistic, as set out in Aloe Vera and Denmark Skibstekniske. It will be interesting to see which approach is adopted by the Court of Appeal should it be asked to decide on this issue in the future.

Setting aside arbitral awards

In Sui Southern and AJT, the High Court had to tackle applications to set aside arbitral awards made under the International Arbitration Act (IAA) that, in line with the UNCITRAL Model Law, provide for very limited grounds on which a setting aside of an arbitral awards is permissible.

In Sui Southern, the plaintiff sought an order that an award be set aside on the basis that the award dealt with matters outside the scope of the arbitration reference and was 'perverse, manifestly unreasonable and irrational'. The High Court firmly rejected the application; the Court considered that the award did not exceed the scope of the reference and an irrational decision would not deprive the tribunal of the jurisdiction it had to make that decision.

On the purported 'perversity and irrationality' of the award, the High Court unequivocally rejected the suggestion that a court could apply its power of judicial review to decisions of an arbitral tribunal; the Court considered that there was simply no appropriate analogy between administrative decisions (to which judicial review applies) and arbitral decisions (to which judicial review does not apply). The Court made clear that parties would be held to their agreement to arbitrate and the consequences thereon, unless one of the grounds for setting aside as provided for in article 34 of the Model Law (which has the force of law under the IAA) was made out.

In addition, the High Court rejected the plaintiff's contention that a perverse or manifestly unreasonable award could be set aside on the ground of public policy. The High Court instead made clear that:

- it is incumbent on a party seeking to challenge an award to identify the public policy that the award allegedly breaches and to show which part of the award conflicts with that public policy; and
- the plaintiff had to cross a very high threshold and demonstrate egregious circumstances, such as corruption, bribery or fraud, that would violate the most basic notions of morality and justice.[2]

In contrast, the decision in AJT was the first reported judgment in Singapore where an arbitration award was successfully set aside under article 34(2)(b)(ii) of the Model Law (ie, in conflict with the public policy of Singapore).

The plaintiff in AJT was a British Virgin Islands company and the defendant a public company incorporated under the laws of Thailand. Disputes arose between the parties under an agreement, pursuant to which the plaintiff commenced arbitration proceedings. After the commencement of arbitration, the defendant lodged a complaint to the Thai police against

the sole director and shareholder of the plaintiff. Investigations were commenced by the Thai police, leading to criminal charges for fraud and forgery.

In the interim, the parties negotiated a settlement of their disputes and entered into a settlement agreement that provided for each party to terminate and withdraw all actions (including the arbitration) on the 'closing date', which was in turn defined to mean the date evidence was received of the withdrawal, discontinuation or termination of the Thai criminal proceedings.

After the concluding agreement was signed, the defendant withdrew its complaint to the police. The Thai police subsequently issued orders for the cessation of the Thai criminal proceedings, and payment of the settlement sum was accordingly made to the plaintiff pursuant to the terms of the settlement agreement. However, the plaintiff refused to terminate the arbitration proceedings. The defendant then formally applied to the arbitral tribunal to terminate the arbitration on the grounds that the parties had reached full and final settlement of their claims.

The plaintiff asserted that the settlement agreement was illegal and unenforceable as it amounted to an agreement to stifle a prosecution. The parties agreed to have this issue resolved by the same tribunal that had been constituted to hear the original arbitration proceedings. The tribunal ruled that the settlement agreement was not illegal and directed that the arbitration be terminated.

The plaintiff subsequently applied to the High Court of Singapore to set aside the award on the basis that it was contrary to public policy.

The High Court recognised that there was a balancing act to be done in weighing the 'need to uphold the public interest in ensuring the finality of arbitral awards' against the need for the Court to 'safeguard the countervailing public interest in ensuring that its processes are not abused by litigants'. The Court reiterated the high threshold required for a setting aside of an arbitration award, and affirmed that the Court was exercising its supervisory jurisdiction in considering the legality of the concluding agreement. Notwithstanding that, the Court considered that 'in an appropriate case, the Court, in exercising its supervisory jurisdiction, may examine the facts of the case and decide the issue of illegality'.

Applying those principles, the Court held that the settlement agreement conflicted with public policy, as it was an agreement to stifle prosecution. The Court took the view that the tribunal's decision that the concluding agreement was not illegal was based on the literal terms of the agreement and the tribunal erroneously failed to concern itself with the relevant surrounding circumstances to ascertain the true object, purpose and intentions of the parties.

On the face of it, the decision suggests that a court exercising supervisory jurisdiction is permitted to delve into an in depth re- examination of the issue of illegality even when that precise issue was in fact specifically resolved in favour of one party by the tribunal. This appears to be a significant expansion of the public policy ground for setting aside international arbitration awards; the Singaporean courts have traditionally taken the view that public policy in this respect encompasses a narrow scope. The decision is presently under appeal; it remains to be seen to what extent the Singaporean Court of Appeal will endorse such an approach.

Conclusion

Singapore has continued to go from strength to strength as a leading centre for international arbitration centre and will continue do so. As noted by Singapore's minister for law, Mr K Shanmugam, in his speech at the inaugural Singapore International Arbitration Forum:

> Singapore has seen considerable growth as a venue of choice for international arbitration [] We will remain focused and constantly re-examine our legal regime to ensure that we stay arbitration friendly. The presence in Singapore of so many eminent arbitration thinkers and practitioners [] helps to catalyse this process. It is through open discussion and creative exchange that the arbitration sector can continue to upgrade and improve.

Notes

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Prior to the enactment of section 12A, Singapore's courts did not have the power to grant interim relief to assist an arbitration with a foreign situs. The extension of such powers under section 12A, however, does not include the power to make orders for discovery, interrogatories and security for costs, as these are procedural matters within the arbitral tribunal's purview.

2In Swiss Singapore Overseas Enterprise Pte Ltd v Exim Rajathi Pte Ltd [2010] 1 SLR 573, the High Court of Singapore accepted in principle that an award procured by fraud (in this case, suppressed evidence) could be set aside as being contrary to public policy, although the Court declined to set aside the award on the facts of the case.

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

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