The Asia-Pacific Arbitration Review 2019

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A Global Arbitration Review Special Report

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The Asia-Pacific Arbitration Review 2019

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Overviews

Country chapters

Global Arbitration Review is delighted to publish *The Asia-Pacific Arbitration Review 2019*, 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 European Arbitration Review*, *The Middle Eastern & African Arbitration Review* and *The Arbitration Review of the Americas*, *The Asia-Pacific Arbitration Review* provides an unparalleled annual update – written by the experts – on key developments.

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Energy Arbitration in China

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The Asia-Pacific region is without a doubt becoming the unrivalled centre of the global energy trade.[1] Global demand for energy is expected to climb about 25 per cent by the end of 2040, with a significant contribution from the expanding economies in the Asia Pacific region.[2] China is now the world's largest crude oil importer and it is expected that China's apparent oil demand will continue to rise by 4.6 per cent year on year to hit 600 million metric tonnes (12.05 million barrels per day) in 2018.[3] China's outbound investment in oil and gas in the past few years has reached multibillion-dollar levels. There has also been increased activity in shale gas as companies gain more experience and drilling costs decrease. Furthermore, China has the largest generating capacity of renewable energy in the world and is by far the largest force in global clean energy development.[4]

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

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

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

Dispute resolution mechanism and governing law

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

Sino-foreign PSCs are subject to Chinese law. The model Sino-foreign PSCs have long contained a multi-tiered dispute resolution clause that stipulates that:

- parties must first consult for settlement for a fixed period of time;
- if the dispute cannot be settled, the parties can agree to China International Economic and Trade Arbitration Commission (CIETAC) arbitration; and
- failing such agreement, the dispute can be resolved by a three-member ad hoc tribunal in accordance with the UNCITRAL Rules.

Each party shall appoint one arbitrator and the two arbitrators appointed shall appoint the presiding arbitrator; failing which, the presiding arbitrator shall be appointed by the SCC. Despite an increasing tendency for Chinese NOCs to agree to ICC and Singapore International Arbitration Centre arbitrations for disputes regarding their overseas investments, the multi-tiered dispute resolution clause remains the default provision for Sino-foreign PSCs. Parties rarely agree on CIETAC arbitration, but may agree on the seat of arbitration during the negotiation process, as this is not specified in the model clause.

Owing to restrictions on a foreign company's capacity to distribute oil and gas in China, long-term sale and purchase agreements (SPAs) and distribution agreements are often between domestic entities and lack a 'foreign-related element'. China's highest court, the Supreme People's Court (SPC), has long taken the view that a clause for foreign arbitration in a purely domestic contract with no 'foreign-related element' is invalid and unenforceable, based on a narrow interpretation of the components of such an element. Note that foreign invested entities incorporated under Chinese law are considered domestic entities. In a notice issued by the SPC in 2016, wholly foreign-owned enterprises that are registered within a pilot free trade zone are permitted to submit disputes to arbitration seated outside mainland China, regardless of whether a 'foreign-related element' exists in the case.[8] Encouraging as the notice may be, enforcement risks remain for parties not incorporated in a pilot free trade zone who agree on foreign arbitration.

Legal issues arising from energy disputes

Relatively few energy disputes in China-related projects end up in formal arbitration or proceed to a merits hearing. Chinese

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

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

Contract interpretation

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

Many energy contracts are governed by English law where the parol evidence rule operates to exclude the admission of extrinsic evidence to vary the terms of a written contract, and parties are in general strictly held to their bargains. While some exceptions apply, evidence from pre-contractual negotiations and conduct subsequent to making the contract is inadmissible.

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

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

Issues that may arise during performance

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

Take-or-pay clauses

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

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

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

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

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

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

Price review

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

The formulas in natural gas contracts in Asia are typically indexed to oil prices and in recent years, oil prices have dropped because of an imbalance of supply and demand. Spot gas prices have also dropped given the advent of cheaper Henry Hub linked shale gas imports entering the region from the United States and the development of international spot market trading in gas, which have given buyers cheaper alternative options. As a result of these changes, contract gas prices linked to earlier

oil prices may be higher than current spot gas prices so buyers may be motivated to initiate price review or seek to disconnect the link to oil. In recent years there has been a proliferation of arbitral awards rendered in favour of buyers where rebates were awarded and oil indexation was replaced by a link to gas spot prices.[18]

As part of its gas pricing reforms in the past several years, China has chosen the Shanghai city-gate gas price as the national benchmark from which it sets the city-gate prices for non-residential use of other provinces.[19] This is not directly linked to but may be affected by international oil prices. The provincial city-gate price no longer operates as the ceiling price for private transactions. Instead, the ceiling price has been replaced by a baseline city-gate price for each province,[20] which has been reduced by the Chinese government recently to lower the costs for production.[21] Suppliers and buyers are allowed to negotiate the detailed city-gate price for each transaction ranging from 20 per cent above the baseline city-gate price to any lower price they could agree. Such changes may affect the economic equilibrium of the gas supply contract and trigger price adjustments.

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

Contracts may contain provisions for periodic review, for example every five years, but will often also contain a 'trigger' clause where a party may initiate review any time it proves a 'significant change in circumstances' has occurred. However, it may be difficult to ascertain whether the events in question satisfy this requirement. The tribunal in ICC case 9812 usefully gave some examples: 'devaluation or revaluation of [a currency], a changed competitive situation, a tax on one or several sources of energy, an imposed price control and a changed legal environment with economic effects, eg, new environmental requirements'. Other relevant changes may not affect the value of gas but affect the price, including 'the entry of a powerful and independent competitor in the [Buyer State] market . . .' or a 'governmental price control forcing sellers . . . not to exceed a certain price'.[22]

When price review is triggered and conducted at arbitration, the tribunal may be requested to revise the pricing formula. Tribunals may have in principle wide discretion and authority to decide the cases before them. However, it may be presented with difficult issues that remain unresolved even after commercially astute parties with expertise in their field have undergone a long period of negotiation. Thus, tribunals usually rely heavily on expert evidence, but they may still find it difficult to come to a decision about the appropriate revision. The tribunal can 'split the baby' or award something else entirely, if parties do not limit the tribunal's authority to do so. As an example, the tribunal in *Gas Natural v Atlantic LNG* awarded a dual-pricing mechanism that neither party anticipated, nor found satisfactory,[23] however, the petition against the award was denied because the tribunal was held to have the authority to award the dual-pricing system.[24]

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

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

Hardship clauses

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

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

The UK Court of Appeal in *Superior v British Gas* held that 'substantial hardship' does not include difficulties of day-to-day economic variations, but must have a real and weighty impact rather than a mere transient effect.[25] In one case the parties attempted to draft a definition for 'substantial hardship' with objectivity by reference to a quantitative assessment of the effects of hardship.[26]

If adjustment is required to alleviate the hardship, the kind and level of adjustment that should be granted will also be disputed. The expert panel in *Superior v British Gas* fixed a price to remove substantial hardship for the future and also compensated for past hardship suffered.[27]

Absent the hardship clause, a party will have to rely on the statutory 'change in circumstances' principle under Chinese law. The change must be unforeseeable and not attributable to commercial risk, and is distinguished from force majeure. The principle has narrow scope and courts usually limit it to policy or substantial economic changes such as a sharp price adjustment conducted by the government, economic crisis or substantial inflation.[28] If this requirement is met, the court may grant the modification or termination of a contract upon request, provided that the continuing performance of the contract would be manifestly unfair to one party or frustrate the purpose of the contract.[29]

The SPC has explicitly stated a sharp price change in commodities such as oil generally will not satisfy the change in circumstances requirement as such volatility is the norm and is foreseeable, and therefore constitutes a commercial risk the parties must allocate among themselves.[30]

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

When negotiating an adjustment under a hardship, take-or-pay or price review clause, parties may make concessions during

the process. To preserve their rights under the contract, parties should state that the negotiations are made without prejudice to their future right to rely on the written clauses.

Stabilisation clauses

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

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

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

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

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

In *Duke Energy v Peru*, the tribunal found that:

- the 'tax regime' guaranteed to be stabilised included both tax laws and regulations;
- the interpretation and application of those laws and regulations at the time of contract will not be changed to the detriment of the investor; and
- even absent the above, stabilised laws will not be interpreted or applied in a patently unreasonable or arbitrary manner.[31]

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

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

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

Termination of contract

Disputes over termination often arise. For example, one party to a PSC may contend that if the exploration stage does not yield discoveries of oil or a commercially acceptable result, the contract can be terminated. These disputes often involve a fact-based inquiry into whether the conditions for termination have been met, if any are specified in the contract. As with most other jurisdictions, Chinese law recognises the parties' autonomy to agree on such conditions.[32]

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

The most frequently used grounds for termination in Chinese contracts are renunciatory breach, either shown by words or conduct, or material breach of contract resulting in frustration of the purpose of the contract.[33] Note that there is a high threshold for the latter and in complex and long-term energy contracts, the contract may have multiple purposes so that failure to achieve one purpose at an earlier stage of the contract might not satisfy this ground. Clear drafting may mitigate the unpredictability of a tribunal's interpretation of the purpose of the contract. In general, parties should clearly set out the conditions and procedure to terminate the contract.

Compensation and liquidated damages

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

Chinese law affords the tribunal discretion to adjust down the liquidated damages claimed so that it does not exceed 130 per cent of the actual loss.[34] To maximise the compensation it can receive, for example under take-or-pay clauses, claimants should provide all relevant documents showing their financial

contributions to the project, with a proper deduction of the costs saved from termination of the contract.

Disputes involving clean energy projects

Renewable energy investment projects are time and cost consuming. Further, the development of the projects is highly dependent upon the policies implemented by the host states. For the purpose of fulfilling their ambitions in the renewable energy consumption targets, many countries have implemented various support schemes and measures to promote foreign investment in renewable energy sector. Examples include feed-in tariffs and green certificate scheme implemented in some EU countries. Following a boom of foreign investment, however, there has been a wave among the host states to reduce the incentives in an effort to alleviate the national financial burden caused by subsidies paid over the years. Instead of directly decreasing the subsidies, these countries imposed a variety of fees or taxes on renewable energy projects which do not apply to other sections. These unfavourable regulatory changes have prompted foreign investors to initiate a number of investment treaty arbitration proceedings against the host states, alleging the latter's violations of fair and equitable treatment and expropriation of the investor's investment under relevant investment treaties. This is particularly the case with solar energy projects invested in Spain, Czech Republic, Bulgaria, etc. Considering the complexities and difficulties in proving the host states' violations of obligations under an investment treaty, Chinese investors tend to resort to political risk insurances, which usually provide for less demanding requirements for obtaining compensation. Nevertheless, this may give rise to a new subrogation issue if the political risk insurer would like to seek remedy from the host state in the investment arbitration proceedings after settling the investor's claim. This is caused by the different standards set by the relevant investment treaty and insurance policy on the events triggering the investor's right for claim. In addition, such standards are subject to interpretation under different legal regime, with international law applying to investment treaty and very often Chinese law applying to the insurance policy. It remains to be seen whether and to what extent such discrepancy would affect the terms of future insurance policies and political risk insurance market.

At the domestic level, we have seen new types of disputes arising out of clean energy projects invested into China. Such projects often involve transfer of advanced technology and trading of Certified Emission Reductions (CERs) under the Clean Development Mechanism (CDM). As these projects are usually introduced or supported by local governments, the construction of projects and performance of investment contracts are potential areas to give rise to commercial and investment treaty arbitration.

Conclusion

A contract may not be able to address all the issues that may arise from complex energy activities. Nevertheless, good drafting is crucial because Chinese jurisprudence is not well developed for this sector but Chinese tribunals tend to respect commercial agreements, including clear arrangements for the types of clauses discussed above. Parties are also advised to consider clearly setting out the tribunal's jurisdiction to resolve disputes left over from good faith negotiations. Due to fast growth of renewable energy investments, this has become a new area for disputes with recurring issues related to the incentive measures implemented by the host state.

Notes

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17 Ibid.

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20 The Circular of the National Development and Reform Commission on Reducing the City-Gate Benchmark Prices of National Gas Used

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21 The Circular of the National Development and Reform Commission on Reducing the City-Gate Benchmark Prices of Natural Gas Used for Non-residential Purposes (2017).

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24 Ibid.

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27 See footnote 23.

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32 Article 93 of the PRC Contract Law (1999).

33 Article 94 of the PRC Contract Law (1999).

34 Article 29 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Contract Law of the People's Republic of China (II)(2009).

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Enforcement of Arbitral Awards in the Asia-Pacific

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Arbitration in Asia continues to be on the rise. In 2017, the Singapore International Arbitration Centre (SIAC) received a record-breaking 452 new cases from parties across 58 jurisdictions, which marked a 32 per cent increase from 2016.[1] In Hong Kong, a total of 460 new cases were filed at the Hong Kong International Arbitration Centre (HKIAC).[2] This continued rise may be explained by a number of factors including growth in the region, the relatively low costs of conducting an arbitration in the Asia-Pacific (as opposed to, for instance, in America or Europe),[3] and the proliferation (and continued development and advancement) of arbitral institutions in Asia.[4]

One further factor – which perhaps explains the popularity of arbitration (as compared to litigation) in general – is the relative ease with which arbitral awards (as compared to court judgments) may be enforced worldwide.[5] But is this really the case? Have countries in Asia generally tended toward being arbitration-friendly or arbitration-averse? We consider recent developments in a few jurisdictions – Singapore, India and Australia – to examine if convergence toward or divergence from a uniformed approach in the enforcement of international arbitral awards has been the order of the day.

The Model Law

The Model Law was designed to 'assist states in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration'[6] in a bid to achieve uniformity of the law of arbitral procedures across jurisdictions.[7] Of particular importance for the purposes of this article, the Model Law provides states with guidelines on the enforcement of arbitral awards. This is found in articles 35 and 36 of the Model Law, which provide:

> *Chapter VIII. Recognition and Enforcement of Awards*
> *Article 35. Recognition and enforcement*
> *(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.*
> *(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.*
>
> *Article 36. Grounds for refusing recognition or enforcement*
> *(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:*
> *(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:*
> *(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*
> *(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
> *(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*
> *(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*
> *(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or*
> *(b) if the court finds that:*
> *(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or*
> *(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.*
> *(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.*

Legislation based on the Model Law has been adopted in 74 states, with two Asian states – Korea and Myanmar[8] – coming on board as recently as 2016. Even though there remain countries in the region – such as Indonesia – that have yet to adopt the Model Law, even these countries typically nevertheless enact domestic legislation that broadly tracks the Model Law provisions in relation to enforcement.[9]

Singapore

Singapore is a Model Law country that has enacted local legislation (the International Arbitration Act (IAA) and the Arbitration Act) that gives effect to the Model Law (with seeming exceptions that are discussed below). Two developments in the field of enforcement bear mention.

The first is the decision by the Court of Appeal of *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v*

Astro Nusantara International BV and others and another appeal [2014] 1 SLR 372. Although this decision was made some years ago (on 31 October 2013), its significance cannot be overstated. In short, the Court of Appeal upheld the notion of 'choice of remedies' – which means broadly that a party would not be precluded from resisting enforcement of an arbitral award (in Singapore) by dint of its having failed to apply to set aside the award at its seat. Although this seems a rather trite proposition in Singapore now, it was not at the time, not least given the legislative framework in the country (in particular, the IAA).

A party seeking to resist enforcement of a foreign award in 2013 would have been confronted principally with two provisions of the IAA.

- First, section 19 of the IAA, which provides: 'An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award'.
- Second, section 3(1) of the IAA, which provides: 'Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore'. Chapter VIII houses articles 35 and 36, which are cited above, and effectively provides for the mechanism to resist enforcement.

In this light, and at the risk of oversimplifying, it was perhaps understandable that the High Court came to the conclusion that '[r]efusal of recognition and enforcement cannot be divorced from setting aside – a domestic international award is either recognised and not set aside, or it is not recognised and is set aside' (*Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* [2013] 1 SLR 636 at [82]).

The Court of Appeal disagreed. After engaging in a thorough analysis not just of the history of section 19 of the IAA but also the Model Law, it came to the conclusion that a 'choice of remedies' was 'not just a facet of the Model Law enforcement regime; it [was] the heart of its entire design' (at [65]); and the choice of remedies notion was indeed incorporated in section 19 of the IAA, purposively interpreted (at [99]).

Since the decision in *Astro*, and from this we glean the second broad development, Singapore courts have faced a number of arbitration-related applications (typically setting aside or resisting enforcement).[10] The general approach has been one of deference (in line with the Model Law), and attempting to give effect as far as possible to the parties' agreement to arbitrate.[11]

One example of this is the High Court decision of *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768. There, the High Court was faced with an application to set aside an arbitral award on the basis of, among other things, the tribunal having arrived at the award in breach of natural justice. Having 'found there to be substance in [the applicant's] submissions', the High Court asked counsel for the respondent if 'he wished to invite [the court] to exercise [its] power under Art 34(4) of the UNCITRAL Model Law . . . to suspend [the] setting aside proceedings for a period of time in order to give the tribunal an opportunity to resume the arbitral proceedings and take action to eliminate the grounds advanced by [the applicant]'.[12] Counsel for the respondent did indeed extend such an invitation to the court. The High Court then suspended the setting-aside proceedings for six months and remitted the award to the tribunal for it to 'consider whether it was necessary or desirable, and if so to what extent, to receive further evidence or submissions on three specific issues'.[13] The foregoing is an example of the High Court trying to give effect to the parties' agreement to arbitrate as far as possible because instead of proceeding directly to address the setting-aside application, it instead alerted parties to the option of remission (and thereafter indeed remitted the matter, which could conceivably have resulted in the award having been 'corrected'). As it transpired, the remission was found to have been in vain as, among other things, the tribunal effectively considered it was neither necessary nor desirable for it to receive further evidence or submissions on the issues identified by the court.[14] The High Court went on to consider the application on the merits and found in favour of the applicant, setting aside the award.[15]

More recently, the High Court granted a permanent injunction restraining a party from re-litigating, in a foreign court, matters which have been fully resolved in a final award issued pursuant to an arbitration seated in Singapore. In granting the injunction, the High Court in *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 carefully considered whether such an injunction was governed by the Model Law because 'if a matter is governed by the Model Law, the court's intervention is restricted to the extent provided for in the Model Law and nothing else'. In the event, the High Court concluded that article 5 of the Model Law did not prevent the court from issuing a permanent anti-suit injunction as the grant of a permanent injunction or other remedy is not a matter governed by the Model Law.[16] In arriving at its decision, the High Court expressly upheld the finality and sanctity of an arbitral award. It considered that where proceedings are commenced in relation to claims already fully resolved by arbitration, such proceedings are in substance an attack on the award and would be a breach of the party's obligation not to set aside or otherwise attack any issued award other than though the mechanisms provided for in the seat of arbitration, which could justify the grant of a permanent anti-suit injunction.[17]

In short, the Singapore courts have steered a course in line with the Model Law[18] – upholding the principle of double control yet intervening in a principled manner (again in line with the Model Law regime) in exercising their supervisory jurisdiction.

Australia

In a recent decision by the Supreme Court of Victoria, *Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd* [2017] VSC 97, the court provided guidance on what was a final award, and whether an arbitrator was functus officio. Although the court's determination was in relation to the Commercial Arbitration Act 2011 (CAA) (ie, a 'domestic statute in the State of Victoria'),[19] the Supreme Court itself noted that 'it should be interpreted in conformity with international norms with respect to the Model Law, "so far as practicable"' (at [10]). In this regard, the Supreme Court's analysis would be relevant to the other states in Australia and other Model Law jurisdictions in general.[20]

The parties in this case were embroiled in two sets of proceedings, as outlined below.

In the first set of proceedings, Blanalko alleged Lysaght breached a design and construction contract. This led to court proceedings beginning in 2012, which culminated in a settlement deed. Through the settlement, part of the dispute was resolved and the remaining part was directed to arbitration. In the arbitration, the arbitrator delivered an interim award on 15 June 2016, which resolved most of the dispute, and invited parties to make submissions on, among other things, costs. A further award, which was named a 'final award', was delivered on 9 August 2016. In this, the arbitrator found that he had the jurisdiction to consider the matter

of costs of the court proceedings but did not go on to decide the issue because he did not have the requisite information. Neither party thereafter requested an additional award under section 33(5) of the CAA, which is substantially similar to article 33(3) of the Model Law: 'Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award'. Blanalko thereafter applied to court for an order that Lysaght pay its costs of the court proceedings that commenced in 2012. Lysaght applied to stay Blanalko's application on the basis it should be arbitrated (ie, pursuant to section 8 of the CAA, which is substantially similar to article 8 of the Model Law).

In the second set of proceedings, Blanalko filed an application to set aside the arbitral award on the basis that the arbitrator had no power to determine the question of costs the way that he did (which was, in Blanalko's submission, tantamount to 'permitting the parties to make application to the Supreme Court for it to determine the question').[21] This was brought pursuant to section 34(2)(a)(iii) of the CAA, in other words, that 'the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside'.

The court dismissed the setting aside application[22] and found that the 'final award', despite its label, was not in fact a final award.[23] This was because it 'did not decide all issues put to the arbitrator within the arbitrator's mandate and did not involve an order or direction that might be characterised as an invalid delegation of power to a third party'.[24]

The court also gleaned from the UNCITRAL Secretarial Notes that a party is not constrained by the 30-day time limit in section 33(5) of the CAA (and in general article 33 of the Model Law) to seek a further award where, as was the case in this instance, the arbitrator made 'a conscious decision not to deal with an issue'.[25] Necessarily, the court found that the arbitrator's mandate in respect of costs of the court proceedings commenced in 2012 remained.[26]

What is noteworthy about the judgment for the purposes of this article is twofold. First, the court emphasised from the outset the need to interpret the CAA in line with the Model Law (at [10]). Second, the court thereafter conducted a rigorous analysis relying not only on local authorities but court decisions from neighbouring Model Law jurisdictions (including New Zealand[27] and Singapore)[28] as well as the UNCITRAL Analytical Commentary[29] and the Model Law drafting history.[30] Both signal steps toward convergence.

More directly, on the topic of enforcement, the Victorian Court of Appeal in *Gutnick and another v Indian Farmers Fertiliser Cooperative Ltd and another* [2016] VSCA 5 upheld an arbitration award,[31] dismissing an application to resist enforcement on the basis of public policy.

There, the arbitral award declared certain agreements involving the sale of shares to be rescinded, and ordered the return of the purchase price with interest and costs.[32] By then, the shares had already been transferred pursuant to the agreements but no provision was made in the award for the return of the shares. The applicants argued the award should not be enforced in Australia because enforcement would be contrary to public policy. This was based on section 8(7)(b) of the International Arbitration Act 1974 (Cth),[33] which is materially similar to article 36(1)(b)(ii) of the Model Law.[34]

The crux of the applicants' 'public policy' argument was as follows:

- the award permits 'double recovery' as the award allows the respondents to have their money back and keep the shares (which had already been transferred pursuant to the agreements); and
- double recovery was contrary to public policy (and that therefore enforcement of the award should not be allowed).[35]

The court ruled that there was no risk of double recovery in that case, thereby dismissing the appeal. The pertinent portions of the judgment are as follows:

> *29. It needs to be recalled that the applicants are contending that the award should not be enforced because it would fundamentally offend principles of justice and morality. We accept the contention of the respondents that the effect [the orders in the award], was that both [agreements] were set aside ab initio and that the parties were restored to the positions that they were in before the agreements were entered into. As the applicants themselves conceded, the effect of the order that the agreements 'are rescinded' was to revest equitable title in the shares in the applicants. We also accept the contention of the respondents that for the applicants to have made good the proposition that enforcement of the award would be contrary to public policy, they would have had to have established that the primary declaration of rescission would or should not have been made under the domestic law of Australia or England without express consequential orders providing for the revesting of the shares.*
>
> *30. When the tribunal made its award declaring that the agreements had been rescinded, it did not declare that the respondents were entitled to retain ownership of the shares; nor did it say anything that implied such an entitlement. It is plain from the award that the respondents' case was a conventional claim for rescission involving the return of what was purchased with a refund of the purchase price. The arbitral tribunal accepted those claims and made an award and order accordingly. As the judge put it, 'the declaration of rescission in the award necessarily entails the avoidance of the transactions from the beginning and the restoration of the parties to their previous positions'. With respect, we agree. Far from being contrary to public policy, we consider that the award conforms with the public policy of Australia.*

In short, the court's approach was consistent with the notion of minimal curial intervention[36] (particularly in the arena of resisting enforcement on the basis of public policy) – marked clearly in the portion quoted above (*Gutnick* at [29]) by the court's acknowledgement of the high threshold the applicants needed to meet. Incidentally, this strict approach to considering 'public policy' based applications to resist enforcement – or to set aside – has been adhered to by the Singapore courts as well.[37]

In line with this approach of being a pro-arbitration jurisdiction, 2017 also saw the Federal Court of Australia in *Lahoud v Democratic Republic of Congo* [2017] FCA 982 enforcing two investment arbitration awards for the first time.

India

In the previous edition of the *Asia-Pacific Arbitration Review*,[38] we referred to India's amendment, in December 2015, to its domestic

arbitration legislation (the Arbitration and Conciliation Act 1996) as manifesting India's ambition to be a pro-arbitration jurisdiction.

Despite the coming into force of the Arbitration & Conciliation Amendment Act 2015 (the Amendment Act), there has been some confusion in relation to whether its provisions would apply to arbitration proceedings commenced before the Amendment Act came into force. Specifically, issues have arisen as to whether the Amendment Act governs applications relating to arbitration proceedings that were commenced before the Amendment Act came into force for:

- interim measures to support such arbitrations that were seated outside of India; and
- petitions filed under section 34 of the 1996 Act to set aside awards emanating from arbitration proceedings, and whether a stay on enforcement would be granted automatically once such a petition is filed.

These issues have arisen largely because of the way section 26 of the Amendment Act is framed. It states:

> *Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.*

While the Bombay High Court had ruled that the Amendment Act would apply to proceedings in court filed after the Amendment Act came into force,[39] there were decisions in other high courts of India going in the opposite direction,[40] which added to the confusion.

A recent judgment of the Indian Supreme Court in Board of Control for Cricket in *India v Kochi Cricket Pvt Ltd* (Appeal (Civil), 2879-2880 of 2018) issued on 15 March 2018 (the *BCCI* case) may have finally put these issues to rest even though it remains to be seen whether this decision will be uniformly applied across the Indian Courts. Eschewing a literal interpretation that would do violence to what the Supreme Court recognised to be the legislature's intention behind the passing of the Amendment Act (ie, to make India an arbitration-friendly jurisdiction), the Supreme Court held that arbitration-related applications filed in court after the coming into force of the Amendment Act will be governed by its provisions even if the underlying arbitration proceedings were commenced before the Amendment Act came into force. The Supreme Court arrived at such a conclusion by reading the last phrase in section 26 ('this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act') to mean that the Amendment Act shall apply to any court proceedings 'in relation to arbitral proceedings' commenced on or after the commencement of the act. Thus, even if the underlying arbitration proceedings had commenced prior to the Arbitration Act, the act will apply so long as the application to the Indian court was made after the Amendment Act came into force.[41]

In light of the *BCCI* case, it would appear that the Indian Courts will have power to entertain applications for interim measures in support of foreign arbitral proceedings commenced prior to the coming into force of the Amendment Act if the court proceeding were filed post the Amendment Act coming into force. While a proviso to section 2 of the Amendment Act states that applications for interim measures will apply even where the arbitration was seated outside India, the confusion surrounding the proper interpretation of section 26 of the Amendment Act had meant that some applications for interim measures in aid of foreign arbitrations commenced before the Amendment Act came into force were refused on the basis that the Amendment Act did not govern such applications.

The second main amendment to the Arbitration and Conciliation Act 1996, perhaps more directly relevant to the theme of this chapter, was the provision relating to enforcement of awards. The key amendment in the Amendment Act was the addition of a provision, section 36(2) and 36(3) which stipulates that an application to set aside an award would not automatically stay any application to enforce the same. This was a departure from the original act which provided for such stays being automatically granted upon a petition to set aside the award being filed. Rather, under the Amendment Act, whether a stay would be granted would be a matter for the court's discretion, and may be subject to 'conditions as it may deem fit'. This, it has been noted, could curb or control the undue delays faced by successful parties attempting to enforce their awards.

For the reasons given earlier, there has been some uncertainty as to whether these new provisions would apply to awards issued in respect of arbitral proceedings commenced before the Amendment Act came into force. The *BCCI* case seems to have clarified that these new provisions would apply even to awards issued pursuant to arbitral proceedings commenced before the Amendment Act came into force. In arriving to its decision, the Supreme Court expressed concern that it would be inherently unfair for enforcement proceedings to be stayed automatically simply on the basis that an application had been made under section 34 to set aside an award.[42]

With the *BCCI* case, it would appear that the Indian courts have taken a further step in bringing its court procedures in line with the legislative's objective of making arbitration an efficient and predictable method of dispute resolution in India.[43]

Conclusion

From the foregoing, the trend in Asia toward convergence based on the countries surveyed continues unabated. That said, parties (and parties' counsel) may still face practical challenges in enforcement, whether as a function of needing to familiarise themselves with the nuances (convergence not being complete) of a foreign jurisdiction (where enforcement is being considered) or being dissuaded as a matter of perception.[44] It is apparent (or perhaps it has always been) that the endgame of arbitration is recourse to the courts whether through applications for setting aside or resisting enforcement. And although courts can go far in ensuring these processes are not abused (as the courts above have), as the continuing saga of *Yukos* epitomises,[45] efforts at convergence will often be challenged by divergent interests.

Notes

1 See www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics/69-siac-news.

2 See www.hkiac.org/about-us/statistics.

3 See, for example, www.legalbusinessonline.com/reports/arbitration-asia-next-generation.

4 See www.jonesday.com/files/Publication/d5d0b710-b68a-4254-9abf-c97d9209fd40/Presentation/PublicationAttachment/d14c7619-75be-4258-b7f9-cde1c6d98a10/Intl%20Com%20Arb%20in%20Asia.pdf.

5 It remains to be seen if the reception of the Hague Convention on Choice of Court Agreements around the world – which would

typically entail lowering the bar to recognition and enforcement of foreign judgments – would make court judgments more attractive. In the Singapore context, the convention was ratified in June 2016: see www.mlaw.gov.sg/content/minlaw/en/news/press-releases/singapore-ratifies-hague-convention-on-choice-of-court-agreement.html.

6 See www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

7 See paragraph 2 of Resolutions adopted by the General Assembly at the 112th plenary meeting, 11 December 1985.

8 We discussed Myanmar's new arbitration act in our previous chapter: http://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2017/1036984/arbitration-in-asia.

9 In the case of Indonesia, see generally: http://globalarbitrationreview.com/chapter/1036908/indonesia.

10 See, eg, *AKN* [2015] 3 SLR 488, *JVL Agro Industries Ltd* [2016] 4 SLR 768, *AUF v AUG* [2016] 1 SLR 859, *Prometheus Marine Pte Ltd* [2017] SGHC 36.

11 See *AKN* [2015] 3 SLR 488 at [37]-[39], crucially (at [37]): 'A critical foundational principle in arbitration is that the parties choose their adjudicators. Central to this is the notion of party autonomy. Just as the parties enjoy many of the benefits of party autonomy, so too must they accept the consequences of the choices they have made. The courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases'; *Prometheus Marine Pte Ltd* [2017] SGHC 36 at [60]: 'In my view, a formulaic and pedantic approach to construction of the issues should be eschewed in favour of a holistic assessment of the true issues before the Arbitrator'; and at [86]: 'A high threshold must be crossed for the court to set aside an Award for breach of the rules of natural justice'.

12 See *JVL Agro Industries Ltd* [2016] 4 SLR 768 at [127].

13 See *JVL Agro Industries Ltd* [2016] 4 SLR 768 at [1] and [126].

14 See *JVL Agro Industries Ltd* [2016] 4 SLR 768 at [138].

15 See, in particular, *JVL Agro Industries Ltd* [2016] 4 SLR 768 at [140].

16 See *Hilton Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [44] and [46].

17 See *Hilton Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [55].

18 On a separate note, see http://kluwerarbitrationblog.com/2016/12/07/uncertainty-of-enforcement-of-emergency-awards-in-india/, where it was noted the 'legislative and judicial trend worldwide is to bring municipal arbitration laws to recognize and enforce emergency awards', and the position in Singapore was cited as an example.

19 *Blanalko* at [10].

20 This point was similarly made in http://hsfnotes.com/arbitration/2017/03/16/australian-court-provides-guidance-on-art-333-of-the-model-law-the-doctrine-of-functus-officio-and-when-a-final-award-is-not-final/.

21 *Blanalko* at [45].

22 For the court's detailed reasoning, see in particular [47]-[50].

23 *Blanalko* at [66].

24 *Blanalko* at [66].

25 *Blanalko* at [25].

26 *Blanalko* at [66].

27 *Blanalko* at [22].

28 *Blanalko* at [35], [51], [53] and [58].

29 *Blanalko* at [31].

30 *Blanalko* at [32].

31 The arbitration was seated in Singapore; English law applied (*Gutnick* at [6]).

32 Full orders set out in Gutnick at [7].

33 Section 8(7)(b) provides: 'In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that … to enforce the award would be contrary to public policy'. For a general introduction to the International Arbitration Act 1974 (Cth) (and section 8 in particular), see www.lexology.com/library/detail.aspx?g=58063fca-b0fe-4c05-9080-12be459d4806.

34 In fact, the similarity – and the relationship between the International Arbitration Act 1974 (Cth) and the Model Law – was highlighted at footnote 2 of *Gutnick* (and further at [17]).

35 See *Gutnick* at [3].

36 For a similar analysis on this point, see www.twobirds.com/en/news/articles/2017/australia/enforcement-of-foreign-arbitral-awards-in-australia.

37 See *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 at [75]-[76]; *AJU v AJT* [2011] 4 SLR 739 at [38]; *BLB and another v BLC and others* [2013] 4 SLR 1169 at [100] (the point was undisturbed on appeal – *BLC and others v BLB and another* [2014] 4 SLR 79 at [50]).

38 See http://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2017/1036984/arbitration-in-asia.

39 BCCI Vs. M/s Rendezvous Sports World and (ii) BCCI Vs. Kochi Cricket Private Ltd. (Justice Smt. R.P. SondurBaldota).

40 Ministry of Defence, Govt. of India Vs. Cenrex SP Z.O.O. & Ors, (Justice Mr. Valmiki Mehta.

41 *BCCI* case [para 23,25].

42 *BCCI* case [para 39,40]

43 Following the publication of the *BCCI* case, the report of the Srikrishna Commission was published. This report has now led to the Arbitration Amendment Bill of 2018, the Commercial Courts Bill of 2018 and the Delhi Arbitration Centre Bill 2018. At the time of writing, these bills are yet to be passed into law.

44 See generally www.ft.com/content/b08965b4-c675-11e6-8f29-9445cac8966f.

45 See generally http://kluwerarbitrationblog.com/2016/05/13/theus50-billion-yukos-award-overturned-enforcement-becomes-agame-of-russian-roulette/.

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Rajah & Tann Singapore is one of the largest full-service law firms in Singapore and South East Asia. Over the years, the firm has been at the leading edge of law in Asia, having worked on many of the biggest and highest-profile cases in the region. The firm has a vast pool of talented and well-regarded lawyers dedicated to delivering the very highest standards of service across all the firm's practice areas.

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International Arbitration Developments During the Second Decade of the Pacific Century

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The 21st century has aptly been described as the 'Pacific Century' (or the Asia-Pacific century). This is certainly evident in relation to international trade developments and foreign direct investment (FDI) inflows. Key trade agreements were executed and entered into force during the first two decades of this century, including the Trans-Pacific Partnership Agreement that was signed on 4 February 2016 (the TPP) by the original 12 contracting states and bilateral free trade agreements such as the US-Korea Free Trade Agreement that was signed on 30 June 2007 and entered into force on 15 March 2012. In addition, the 2014 World Investment Report of the United Nations Conference on Trade and Development indicated that Asia continues to be the world's top recipient of FDI, accounting for approximately 30 per cent of FDI inflows globally.[1] Finally, three major Asian economies, China, South Korea and Japan, signed a trilateral investment agreement on 13 May 2012, which entered into force on 17 May 2014. In the coming decades of this century, many anticipate that the strengthening economies of the Asia-Pacific will increasingly turn from being recipients to being sources of investment and capital.

As with the flow of FDI, the litmus test of the Pacific century in respect of international arbitration will be whether the region can not only absorb, attract and adopt, but also proliferate, promote and produce ideas, talent and innovation. As we near the end of the second decade of this century, it is an opportune time for this chapter to take stock and highlight some noteworthy developments in the area of international arbitration in the Asia-Pacific region that would reaffirm the notion that this is the Pacific century.

The first set of developments relate to efforts taken by Asian-Pacific jurisdictions seeking to align themselves with international best practices in international arbitration, in particular giving effect to their adoption of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The second set of developments relate to the promotion of diversity, which is both part of a larger, global movement, but also an area where Asian-Pacific arbitration communities are beginning to proactively partake in an exchange of ideas and explore new initiatives. Finally, the third set of developments relate to the positioning various institutions and jurisdictions are undertaking in connection with China's Belt and Road Initiative (BRI), which is perhaps the most striking example of innovation emanating from the region to the rest of the world.

Alignment: developments on the legislative front

In considering developments in the Asia-Pacific region, it is important to look at the work of the United Nations Commission on International Trade Law (UNCITRAL), especially as 2018 marked the 60th anniversary of the New York Convention. Since its inception UNCITRAL has worked to further its mandate of progressing the harmonisation and modernisation of international trade law by preparing and promoting the use of legislative and non-legislative instruments in several key aspects of commercial law, including international arbitration.

Two UNCITRAL instruments significant to international arbitration are the UNCITRAL Model Law on International Commercial Arbitration (the UNCITRAL Model Law) and the New York Convention. Jurisdictions seek to adopt these instruments in an effort to bring themselves in line with best practices in international arbitration. Notably, Hong Kong became the first jurisdiction in Asia to incorporate the 1985 UNCITRAL Model Law in its domestic legislation, only a few years after the instrument was released. Since then, several other jurisdictions in Asia have adopted the UNCITRAL Model Law, including, among others, Singapore in 1994, Sri Lanka in 1995 and South Korea in 1999. In 2012, UNCITRAL launched its Regional Centre for Asia and the Pacific in order to strengthen its mandate in the Asia-Pacific region.

More recently, Myanmar and Fiji both enacted new arbitration legislation. Myanmar's Parliament passed its new Arbitration Law (Union Law No. 5/2016) on 5 January 2016 and Fiji's legislature passed the International Arbitration Act 2017 on 15 September 2017 (the 2017 Act). These long-awaited legislative developments have brought these jurisdictions in line with international arbitration best practices by both aligning them with the UNCITRAL Model Law and giving effect to the New York Convention in each state. Myanmar's reforms have been covered extensively including in earlier editions of this publication,[2] in particular since they are coming at the same time the state has made significant strides to attract foreign investment with the introduction of new investment laws, rules and procedures, which are meant to bolster investor confidence and the ease of doing business in Myanmar, as well as increase efficiency.

Fiji's enactment of the 2017 Act has not only been lauded as a step in the right direction for the state, as it incorporates best practices from other leading pro-arbitration jurisdictions in the Asia-Pacific region, but it might be a catalyst for others among the Pacific Island states to make similar reforms. The 2017 Act applies only to international arbitrations while the 1965 Arbitration Act in Fiji will continue to apply to domestic arbitrations.

According to the 2017 Act, 'international arbitrations' are where:

- at the time the arbitration agreement was entered into, one of the parties was based outside of Fiji;
- Fiji is not the seat of the arbitration;
- the place in which a substantial part of the obligations of the commercial relationship are required to be performed is not Fiji; or
- there is a locale that has a closer connection to the subject-matter of the dispute that is not Fiji.

Among the number of advisers involved in assisting the government of Fiji with its reforms, it is noteworthy that international

and regional organisations such as UNCITRAL and the Asian Development Bank were involved. Aspects of best practices found in many pro-arbitration jurisdictions that were adopted in the 2017 Act, include, among other things, provisions ensuring the confidentiality of arbitration proceedings (subject only to limited exceptions), provisions giving parties autonomy in their selection of representation in arbitrations, as well as provisions concerning the recognition of the enforceability of decisions by emergency arbitrators.

As part of its efforts to progress harmonisation across jurisdictions, UNCITRAL initiated work nearly a decade ago on the preparation of a guide with the objective of promoting the uniform and effective interpretation and application of the New York Convention with a view to minimising the risk that the practice and application by the 159 contracting states might diverge from the spirit of the Convention. UNCITRAL was assisted by two prominent members of the international arbitration community, Professor Emmanuel Gaillard, the head of the international arbitration practice at Shearman & Sterling LLP, and Professor George Bermann, the director for the Center for International Commercial and Investment Arbitration at Columbia Law School. The UNCITRAL Secretariat Guide on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the Guide) was presented to UNCITRAL in 2016. The Guide was developed using a 'bottom up' approach, whereby case law across a combination of 15 common and civil law jurisdictions was compared and analysed. An online platform was also launched at the same time, the aim of which is to supplement the Guide by making available case law implementing the New York Convention from these 15 jurisdictions, as well as others (www.newyorkconvention1958.org), including from jurisdictions in the Asia-Pacific region, such as China, Hong Kong and Singapore. Several members of the arbitration community from around the world, including courts, academic institutions, law firms, arbitral institutions and organisations have contributed to this initiative, including, among others, the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC) and the Cairo Regional Centre for International Commercial Arbitration. The Hong Kong International Arbitration Centre (HKIAC) became an official contributor in January 2018. On 5 April 2018, the platform reached a significant milestone with more than 2,000 decisions from 58 jurisdictions now publicly accessible online.

Coinciding with the 60th anniversary of the New York Convention, a series of seminars have been launched in the past two years in an effort to promote the Convention, as well as the Guide, and encourage the broader international arbitration community to participate in the dialogue regarding the interpretation and application of the Convention. Such seminars have already taken place in the Asia-Pacific region: in Beijing at the premises of the China International Economic and Trade Arbitration Commission on 15 November 2017,[3] and in Hong Kong at HKIAC on 12 February 2018.[4]

In parallel to these seminars on the New York Convention, UNCITRAL has been organising judicial summits in the Asia-Pacific region. The primary objective of these summits has been to enhance international trade and development by way of capacity-building for judiciaries, focusing on the interpretation and application of UNCITRAL and other international instruments. The second judicial summit took place in Hong Kong in October 2017 during the Hong Kong Arbitration Week.

In addition to welcomed reforms in Myanmar and Fiji, pro-arbitration jurisdictions have also enacted enhancements to their domestic legislation. In 2017, the first of these has been the much-watched passage of third-party funding (TPF) legislation in both Singapore and Hong Kong. Singapore's framework for TPF abolishes the common law torts of maintenance and champerty; and qualified that TPF in relation to international arbitration and related court or mediation proceedings is neither contrary to public policy nor unlawful. That legislation came into force in March 2017.

Similar amendments to Hong Kong's Arbitration Ordinance are expected to enter into force later in 2018. Their practical effect mirrors that of the reforms in Singapore, ie, abolishing tortious doctrines in favour of allowing funding by third parties; so long as they do not have a legitimate interest in the proceedings, which would include representation of any party to the dispute. In this context, Hong Kong's reforms are broader than that of Singapore's as the meaning of third-party funder extends beyond professional funding outfits. Analogous reforms have also been made to Hong Kong's Mediation Ordinance. In addition to the legislative reforms, a provisional TPF code of practice – covering matters including conflicts, degree of funder control and grounds for terminating a TPF agreement – is expected to be drawn up within three years of these amendments taking effect. The TPF amendments to the legislative frameworks in Singapore and Hong Kong should broaden the dispute resolution options available to parties in both jurisdictions.

As reported by *GAR* in September 2017, HKIAC has initiated a rules revision process in respect of its 2013 Administered Arbitration Rules, which is looking to introduce, among other things, a new provision on the disclosure of TPF and amend the confidentiality provisions to allow for the disclosure of information of the third-party funder.[5] This proposed amendment is aimed at giving regard to the recent TPF reforms in Hong Kong's laws.

Hong Kong has also introduced legislation in 2017 that clarifies in its Arbitration Ordinance (Cap. 609) that all disputes relating to intellectual property rights are arbitrable in Hong Kong and that it is not contrary to public policy to enforce awards rendered in relation to intellectual property rights in the jurisdiction. The legislation has broadly defined intellectual property rights so as to cover intellectual property rights wherever they may subsist, by whatever name called, whether registrable or registered, as well as new types of intellectual property rights which may be recognised in the future.

The legislative reform removes the legal uncertainty that some jurisdictions continue to face as to whether intellectual property disputes, especially those that concern the validity of intellectual property rights registered with or granted by intellectual property authorities can be resolved by arbitration between private parties. The development has been praised as removing another obstacle to parties seeking to conduct intellectual property arbitrations in Hong Kong.

Exchange: developments on the gender diversity front

While the international system of arbitration and dispute resolution is underpinned by black letter law, its success and effectiveness depend greatly on the intangible, in particular human capital. Communities worldwide are realising the importance of inclusivity when attracting capable and diverse talent. Whereas the legislative developments throughout Asia-Pacific discussed above are best characterised as an alignment with existent international practices, the promotion of gender diversity is an equally topical issue all around the world – even in jurisdictions which are normally considered as market leaders on other fronts. To that

end, in the Pacific Century, the arbitration communities of the Asia-Pacific should be cognisant of their responsibility to improve diversity along a number of different fronts; while acknowledging that gender inclusivity is an area of the broader diversity challenge in which the region can contribute and shape future best practices.

As such, Asian-Pacific arbitration communities cannot simply look to their counterparts in other jurisdictions for established models of diversity or inclusiveness. Rather, this is an area where the region can both observe evolving practices and engage in the exchange of ideas through initiatives of their own.

A promising trend towards greater inclusivity is the diversity that can be seen at the helm of several major arbitral institutions not only in the region, but also across the world. Jackie van Haersolte-van Hof is director general at the London Court of International Arbitration (LCIA), Annette Magnusson is secretary general at the SCC, Sarah Grimmer is secretary-general at HKIAC, Deborah Hart is executive director at the Arbitrators' and Mediators' Institute of New Zealand, and Meg Kinnear is secretary-general at the International Centre for Settlement of Investment Disputes, just to name a few. Women also rank highly on the governing bodies of various arbitral institutions including Judith Gill QC, the first female president of the LCIA Court and Teresa Cheng SC, former chairperson of HKIAC and the current secretary for justice of Hong Kong.

Conscious of the fact that women remain under-represented in international arbitral tribunals, the international arbitration community has taken on efforts of finding ways to address this. One such initiative is the Equal Representation in Arbitration Pledge (the Pledge), which numerous law firms, arbitral institutions and international organisations have signed, including HKIAC. In this context, HKIAC has shown since signing the Pledge a marked improvement in the number of female arbitrators it has appointed – nearly 17 per cent in 2017, up from 6.7 per cent in 2016. HKIAC is also working to enhance gender diversity on its Panel and List of Arbitrators by increasing the presence of female arbitrators from just under 10 per cent in 2016 to 17 per cent in 2017. Such efforts to increase the visibility of women in the field of international arbitration are expected to continue.

Empowering female leadership also expands the scope of innovation in the Asia-Pacific region by giving women a platform to implement initiatives that target wider communities than just those of arbitral institutions. Dr Ling Yang, deputy secretary-general of HKIAC, for example is behind the Women in Arbitration (WIA) initiative, which was launched on International Women's Day on 8 March 2018.[6] WIA aims to promote the success of female practitioners in international arbitration and related practice areas in China. WIA provides a forum for its members to discuss, network and develop the next generation of leading female practitioners. Notably, what prompted the creation of the WIA initiative was the lack of groups dedicated to the interests of female practitioners in the Chinese arbitration community.

Diversity is of course not only important in arbitration communities, but also in the judicial systems that underpin their work. In this context, the arbitration list of Hong Kong's Court of First Instance is overseen by a well-known female jurist in the form of the Hon Madam Justice Mimmie Chan. Recently, in March 2018, Hong Kong's highest judicial body, the Court of Final Appeal, announced the appointment of Baroness Brenda Hale and Chief Justice Beverley McLachlin as non-permanent judges (NPJs).[7] The system of NPJs was introduced in 1997 as part of an effort to promote the exchange of ideas and judicial practices between Hong Kong and other common law jurisdictions after the handover. This development is a positive sign that Hong Kong's judiciary is becoming more diverse, while also remaining robust and independent under the 'one country, two systems' framework; and comes soon after the Special Administrate Region marked the 20th anniversary of the handover in 2017.

The appointments of Baroness Hale and Chief Justice McLachlin serve as an inspiring example for the Asia-Pacific to become a regional epicentre for the flow of ideas tackling social issues that transcend borders. Being historical 'firsts' in the United Kingdom and Canada respectively (ie, the first female heads of their native jurisdictions' highest courts) they will now go on to become the first female NPJs in Hong Kong. Moreover, Baroness Hale's jurisprudence has also been well received and referred to by judges in Hong Kong when considering matters concerning issues such as discrimination against same-sex couples. The Hong Kong judiciary's overall openness to the exchange and implementation of progressive ideas with other common law counterparts serves as an important reminder to the arbitration community in the Asia-Pacific. Rather than an accomplished end goal, the progress made to date is better seen as part of a larger, conscious effort towards greater inclusivity that will surely continue to develop into the next decade on multiple spectra.

Innovation: developments along the Belt and Road

As China's BRI continues to enhance global supply chains across over 65 economies, analysts predict it will deliver trade revenue totalling US$2.5 trillion by 2025. The Asia-Pacific's arbitral institutions are aware of the opportunities that lay in the sophisticated agreements that will be negotiated as part of BRI investments across the world. The BRI was covered extensively last year in the 2018 edition of the *GAR Asia-Pacific Arbitration Review*.[8] That said, this initiative is an ever more dynamic phenomenon that is likely to occupy the minds of practitioners and pages of publications for the coming years, if not decades.

In early 2018, China announced the establishment of international commercial courts to handle BRI disputes.[9] These are also referred to as the so-called One Belt One Road (OBOR) Courts. At the time of writing, this Chinese innovation is very much in a nascent stage and not much is known as to the details of the undertaking. It appears that initially, three OBOR Courts will be established in Beijing, Xian and Shenzhen, which will fall in practice under the supervision of the Supreme People's Court.[10] Each OBOR Court will hear BRI disputes based on the locality in which they arose: with the Xian court hearing Silk Road Economic Belt matters,[11] the Shenzhen court hearing Maritime Silk Road matters[12] and the Beijing court discharging 'functions similar to a "headquarter"'.[13]

While the concept of OBOR Courts presents new competition to existing, established players in the region, institutions are also proactively innovating to cater to BRI disputes. In March 2018, the International Court of Arbitration of the International Chamber of Commerce (ICC) launched a 'Belt and Road Initiative Commission', which will aim to 'drive the development of ICC's existing dispute resolution procedures and infrastructure to support Belt and Road disputes'.[14] In April 2018, HKIAC launched a host of dedicated BRI services, including expertise, outreach and a knowledge database. In particular, HKIAC's knowledge database, which is updated on a regular basis, archives publications and reports relevant to the BRI and provides information on the practical application of the law to assist parties to BRI agreements. The initiative by HKIAC is complemented by a Belt and Road advisory committee: composed of experts from a variety of BRI

affiliated industries (eg, finance, construction, insurance) who will ensure HKIAC's services remain relevant to the diverse array of stakeholders who are engaged in BRI-related projects.

Conclusion: there is still work to be done

As the second decade of the Pacific Century draws to a close, some might argue that there have been setbacks that stood in the way of progress. The Trump administration's original decision to withdraw from the inaugural version of the TPP and the United States' imposition of tariffs on Chinese goods – ostensibly in the name of protecting intellectual property rights – come to mind. Nevertheless, international arbitration in the Asia-Pacific region is on a largely positive trajectory. Several jurisdictions have adopted UNCITRAL-based legislation and collaborated with international bodies to develop frameworks that lay the foundations for effective arbitration and the enforcement of awards. The pro-arbitration jurisdictions of Hong Kong and Singapore have implemented reforms that now allow TPF in international arbitration proceedings. Hong Kong has also clarified its stance on intellectual property arbitrations. Communities in the region are participating in the enlightened international movement towards greater diversity. The BRI will create new opportunities for both established, and perhaps even new arbitral institutions in the region.

With all of this considered, many challenges lie ahead as we ask ourselves what to hope for in the coming decades of the Pacific Century. We still need more States to accede to the New York Convention, especially in Belt and Road economies. We need to further promote the adoption of the UNCITRAL Model Law. We need to start thinking about a broader spectrum of inclusivity, whilst maintaining the progress made so far. We need to remain acutely aware of the innovation emanating from the region and spot the opportunities that arise therein. We need to think of ways to lessen the conspicuous gaps that exist between the region's sophisticated arbitral jurisdictions and the newcomers. Reassuringly, the developments discussed in this chapter are testament to the fact that the international arbitration community in Asia-Pacific has scope and power to contribute to positive change whether independently or in cooperation with states and law makers.

Notes

1 UNCTAD Press Release, 24 June 2014, available at http://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=181.

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13 Y S Zhao, *Global Times*, 'China to create Belt & Road courts: report', available at www.globaltimes.cn/content/1086598.shtml.

14 ICC, 'ICC Court launches Belt and Road Initiative Commission', available at https://iccwbo.org/media-wall/news-speeches/icc-court-launches-belt-road-initiative-commission/.

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Investment Treaty Arbitration in the Asia-Pacific

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Introduction

Despite lingering discontent in certain regions of Asia with investor-state dispute settlement (ISDS), Asian countries are playing an increasingly significant role in the development of ISDS law and policy. This is in part due to Asia's rising global economic prominence, with foreign direct investment (FDI) flows into and out of Asia hitting historic highs. As China, Japan and the broader Asia-Pacific region emerge as major sources of outbound FDI in particular, Asian countries have a growing interest in protecting the rights of their nationals who invest in other countries.

Rather than rejecting ISDS or investment protections wholesale, countries in Asia are exploring ways to address what they perceive as problems with the current investment treaty regime and ISDS mechanisms. Some of these efforts have resulted in a shift in emphasis from traditional bilateral investment treaties (BITs) to multilateral agreements with investment chapters, which contain or propose (to the extent they are still being negotiated) their own specific provisions on ISDS. In addition, private arbitral institutions in Asia are innovating by adopting new arbitration rules specially geared towards investor-state arbitration.

China's One Belt One Road initiative, the signing of landmark trade deals such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the legalisation of third-party funding (TPF) in Hong Kong and Singapore all make it likely that the need for ISDS in the Asia-Pacific region will only grow. As a result, Asian countries can be expected to continue to experiment with new ideas in an attempt to make ISDS work for them, contributing to the development of investment treaty law and practice throughout the world.

This article provides a brief overview of the current state of ISDS in Asia, and is structured as follows:

- the first section summarises the historical development of investment treaty arbitration in Asia;
- the second section describes the multilateral treaties being concluded or negotiated by Asian countries;
- section three highlights some of the new ideas explored in those treaties and elsewhere; and
- section four provides an overview of developments in China and India, as well as a few other notable developments on a national level.

Historical background

Over the past few decades, global FDI has experienced exponential growth. In the Asia-Pacific region in particular, FDI has been hugely important for economic development. For example, India has seen its annual FDI inflows increase from less than US$1 billion in the early 1990s to nearly US$45 billion by 2016.[1] During this period, it has become one of the fastest-growing economies in the world.[2]

In a bid to attract FDI, countries in Asia sought to modernise their laws and policies governing foreign investment, notably by embracing BITs. BITs were intended to encourage cross-border investment by extending various protections to foreign investments, such as promises of non-discrimination and fair and equitable treatment, as well as by granting foreign investors the right to bring their claims directly against host states through access to ISDS mechanisms.[3]

BITs thus proliferated in Asia over the past half-century. Although there were fewer than 30 BITs in the 1970s, this figure had nearly doubled by the 1980s.[4] BIT activity then exploded in the 1990s and 2000s, with 21 East Asian and Pacific countries signing 369 BITs in the 1990s and a further 234 BITs in the 2000s.[5] This boom mirrored growth in the number of BITs concluded worldwide.[6]

After 2010, however, the number of new BITs being signed fell dramatically.[7] This may be explained in part as a reaction to investment treaty claims being brought against countries in the Asia-Pacific region, generating a backlash against ISDS. For example, in response to an increase in investor claims between 2004 and 2014, Indonesia announced a plan to terminate its BITs and renegotiate new ones that would limit its exposure to claims.[8] Similarly, and as discussed in further detail below, India issued termination notices to more than 80 per cent of its BIT counterparties in the aftermath of the *White Industries* case, the first publicly known investment treaty ruling against India, and also adopted a narrower Model BIT.[9] Australia also denounced ISDS and sought to exclude it in all future investment treaties when it faced its first investment treaty case as a respondent state in *Philip Morris*,[10] although it has softened its position since and would now consider ISDS provisions 'on a case-by-case basis in light of the national interest.'[11]

In the past few decades, many countries in Asia have also emerged as significant exporters of capital. China and Japan, for example, are two of the world's largest capital exporters, with FDI outflows in 2016 exceeding US$183 billion and US$145 billion, respectively.[12] As their outbound FDI increases, countries in Asia would increasingly rely on investment treaties not just as a means of attracting FDI, but also as a means of protecting the overseas investments of their nationals.

Consequently, despite criticisms of ISDS and a move away from traditional BITs, countries in Asia have been actively negotiating multilateral treaties and free trade agreements (FTAs) with ISDS provisions. As Professors Peinhardt and Wellhausen note, such multilateral treaties constitute an 'overlapping channel[] of access to ISDS,' allowing states to 'act on domestic dissatisfaction with ISDS' – for example, by terminating BITs – 'without eschewing ISDS altogether.'[13] This alternative route has generated renewed enthusiasm for multilateral treaties and FTAs across Asia as a vehicle for attracting FDI and protecting investments abroad.

Multilateral treaties

A number of multilateral treaties that contain investment chapters and provisions on ISDS have been signed or are in the process

of being negotiated by Asian states, reflecting active investment diplomacy in the region. Such agreements include preferential trade agreements, FTAs, economic partnership agreements and economic integration agreements with provisions for the promotion and protection of foreign investments through substantive and procedural safeguards.

Key to the recent initiatives is the Association of Southeast Asian Nations (ASEAN), a regional intergovernmental organisation comprising Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. In addition to concluding the 2009 ASEAN Comprehensive Investment Agreement (ACIA) among its 10 members,[14] ASEAN is currently a contracting party to 13 international investment agreements. The latest investment agreements were signed in 2017 with Hong Kong[15] and in 2014 with India.[16] ASEAN has also concluded regional investment treaties with China,[17] Australia and New Zealand,[18] Korea[19] and Japan.[20]

ASEAN is also in the process of negotiating a free trade agreement with the European Union (EU). At the 16th consultations between ASEAN Economic Ministers (AEM) and the EU Trade Commissioner in March 2018, officials pledged to speed up their efforts to negotiate FTAs, both at the bilateral level and at the region-to-region level.[21] Negotiations are also ongoing with Canada.[22]

Another important development in treaty negotiations in Asia is the Regional Comprehensive Economic Partnership (RCEP), for which negotiations were officially launched in 2012. RCEP covers trade in goods and services, investment, intellectual property, and competition policy. Its aim is to create a 'modern, comprehensive, high-quality and mutually beneficial economic partnership agreement among the ASEAN member states and ASEAN's FTA partners'.[23] RCEP is being negotiated by 16 Asia-Pacific countries[24] with the aim of being finalised in November 2018.[25]

RCEP's final language on ISDS has yet to be revealed. It is also not clear what types of investments would be protected by RCEP and whether RCEP's scope would differ from those of existing agreements.[26] Nonetheless, the latest media statement from the Fourth RCEP Intersessional Ministerial Meeting in March 2018 announced that there was a 'growing convergence among [RCEP Participating Countries] on the outstanding issues on investment.'[27]

The increasing importance of the Asia-Pacific region in investment trade talks is evinced by Japan's role in spearheading the negotiations of the CPTPP after the United States withdrew from the TPP in January 2017.[28] Japan persuaded Canada to stay in the agreement and in November 2017, Japan announced the main breakthroughs in negotiations. The Japanese prime minister, Shinzo Abe, has also expressed hope for the revival of the original 12-nation TPP trade deal with the US.[29]

In the meantime, the CPTPP was signed on 8 March 2018 between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.[30] Despite certain provisions being suspended – notably the definitions of 'investment agreement' and 'investment authorisation'[31] – the CPTPP remains largely unchanged from the TPP in relation to ISDS, and importantly, preserves the option of investment treaty arbitration for violations of the investment protection standards contained in the agreement. Notably, however, additional side letters entered into in parallel with the CPTPP by New Zealand with Brunei, Malaysia, Peru, Vietnam and Australia specifically exclude ISDS entirely or allow ISDS only if the relevant state agrees.[32] In a joint declaration, Canada, Chile and New Zealand have also stated their intent 'to work together on matters relating to the evolving practice' of ISDS, 'including as part of the ongoing review and implementation' of the CPTPP.[33]

It remains to be seen what economic and legal effects these multilateral agreements will have, and how they will interact with BITs in the Asia-Pacific region. While the aim of these agreements is to liberalise trade between signatory states, different approaches have been adopted with regard to investor protections and there has been some reluctance wholeheartedly to adopt ISDS mechanisms. New Zealand's side agreements entered into in parallel with the signing of the CPTPP are particularly reminiscent of Australia's previously stated intent to reject ISDS in new investment treaties.

Regional developments

The proliferation of trade deals and negotiations described above promises a greater global impact for Asian states. Notably, recent developments in Asia have showcased the region as a marketplace for new ideas and experiments in the field of international investment law.

One type of provision that has gained traction in Asia is the use of binding statements and interpretation. In response to criticism that investment tribunals do not interpret international investment agreements (IIAs) in accordance with what the contracting states had in mind when they entered into those agreements, Asian states have concluded agreements with procedures for contracting states to issue joint interpretations of treaty provisions. For example, the ACIA contains a provision whereby the tribunal or a disputing party can request a joint interpretation of any provision of the ACIA at issue in a dispute.[34] Only if the member states cannot agree on a joint interpretation within 60 days would the tribunal be entitled to decide the issue; otherwise, any joint interpretation is binding on the tribunal.[35] A materially identical provision on joint interpretation features in the ASEAN-Australia-New Zealand FTA,[36] and a provision to the same effect is included in the ASEAN-India FTA.[37] The Canada-China BIT also provides that parties 'may take any action as they may jointly decide'[38] and in the event that the respondent state invokes a specific exception to the treaty as a defence, the contracting parties are to consult each other to determine whether such defence is valid.[39]

The China-Australia FTA (ChAFTA) goes one step further with an additional provision that enables parties to control the application of the treaty.[40] Under the ChAFTA, if an investor challenges a regulatory measure, the respondent state is entitled to issue a 'public welfare notice' explaining the basis for its position.[41] This would suspend the arbitration proceedings and trigger a 90-day consultation period with the non-disputing state.[42] If an agreement cannot be reached within that timeframe, the matter would be decided by the investment tribunal.

Another development in the field of investment treaty law that is receiving some attention in Asia consists of appellate mechanisms. Historically, decisions in investment treaty arbitrations are final and subject only to very limited grounds of review.[43] This has led to criticisms concerning the lack of corrective mechanisms if tribunals are seen as having made 'wrong' decisions.[44] Asian IIAs that contemplate the creation of an appellate mechanism include the Singapore-US FTA,[45] India's new Model BIT and the ChAFTA. The Singapore-US FTA states that the 'Parties shall strive to reach an agreement that would have [an appellate body that may be established by a separate multilateral agreement in force as between the parties] review awards' rendered under the US-Singapore FTA.[46] Similarly, the Indian Model BIT encourages the parties to 'establish an institutional mechanism to develop an appellate body or similar mechanism to review awards rendered by

tribunals [under the BIT].'[47] Under the ChAFTA, the states have an obligation 'to commence negotiations with a view to establishing an appellate mechanism to review awards' within three years after it enters into force.[48]

The appeal mechanism provision has more teeth in the recently negotiated EU-Singapore Investment Protection Agreement and EU-Vietnam FTA, as these agreements effectively establish a permanent Appeal Tribunal to hear appeals from the awards issued by the permanent investment tribunal (also established by the agreements and further discussed below).[49] The grounds for appeal are:

- error in the interpretation or application of the applicable law;
- manifest error in the appreciation of the facts, including the appreciation of the relevant domestic law; and
- the grounds provided in article 52 of the ICSID Convention.[50]

The EU-Singapore Investment Protection Agreement and EU-Vietnam FTA also provide a novel provision for a permanent investment tribunal.[51] The tribunal will comprise six members under the EU-Singapore Investment Protection Agreement and nine under the EU-Vietnam FTA – one-third from the EU, one-third from Singapore or Vietnam (as the case may be) and one-third from third countries – and the tribunal will hear cases in divisions of three members, chaired by the national from a third country. The members will be paid a retainer fee 'to ensure their availability',[52] and such retainer fee may be permanently transformed into a regular salary,[53] in which case the members will serve full-time on the tribunal and cannot accept other engagements.

National developments

China

China's One Belt One Road or Belt and Road (OBOR) initiative has generated substantial commentary and analysis since its launch in 2013. It is a development strategy that seeks to enhance land-based (the belt) and sea-based (the road) connectivity between China and major markets in Europe, Asia and the Middle East through massive investments in infrastructure development. OBOR has become a centrepiece of China's foreign policy and is part of Chinese president Xi Jinping's ambitious plan to deepen economic ties with the world and reshape international trade.[54] So far, 72 countries are participating in the initiative, and the list continues to grow.[55]

Despite the enormous financial resources China has pledged for the OBOR initiative, it is not yet clear how much investment protection will be available to OBOR investors.[56] This is an important issue for OBOR investors because infrastructure projects present heightened investment risks. These projects are characterised by complex structures and arrangements, and they involve payments of large sums of money over an extended period of time, often in countries that are politically or economically unstable. As implementation of the OBOR initiative unfolds, it is likely that investment disputes relating to it will also arise.

China is currently party to 109 BITs that are in force (the largest number in Asia and second in the world only to Germany), and 19 treaties with investment provisions that are in force.[57] China has investment agreements with the majority of the OBOR countries.[58]

Many Chinese BITs adopt a broad definition of 'investment'.[59] Thus, although the outcome of individual cases will depend on the specific facts and legal instruments involved, as a theoretical matter, the employment of such a broad definition suggests that the infrastructure investments contemplated by the OBOR initiative would generally be covered.[60]

In addition, as a general matter, in many cases Chinese BITs would also likely protect the Chinese state-owned enterprises (SOEs) that can be expected to lead OBOR investments.[61] The more recent Chinese BITs expressly include SOEs within the definition of 'investor', while older Chinese BITs do not on their face exclude SOEs.[62] The argument that Chinese SOEs would be protected even by the older Chinese BITs because they define 'investor' broadly enough to encompass SOEs, will certainly be made in future disputes.

In *Beijing Urban Construction Group v Yemen*, Chinese SOE Beijing Urban Construction Group Co Ltd (BUCG) was allowed to bring its claims of expropriation against Yemen under the 2002 Yemen-China BIT. That case concerned a US$100 million contract to construct part of the terminal at Sana'a International Airport in Yemen.[63] Yemen did not challenge BUCG's standing as an 'investor' under the BIT, although it raised the objection that BUCG, as an SOE, did not qualify as a 'national of another Contracting State' under article 25 of the ICSID Convention.[64] The tribunal rejected Yemen's objection, concluding that BUCG was not acting as an agent of the Chinese government or fulfilling Chinese governmental functions in Yemen.[65]

In terms of the substantive investment protections in Chinese investment agreements, most Chinese BITs with countries participating in the OBOR initiative include provisions for fair and equitable treatment (FET).[66] All Chinese BITs with OBOR countries also prohibit expropriation or nationalisation of investments unless the taking is for the public interest, is non-discriminatory and in accordance with the law, and is accompanied by compensation.[67] Most of these BITs also protect against indirect expropriation with phrases such as measures 'having an effect equivalent to' or 'tantamount to' expropriation.[68]

Finally, on the issue of access to ISDS, China's BITs have undergone an evolution over time. The BITs may be grouped into three different generations.[69] The first generation of Chinese BITs, concluded between 1982 and 1989, either do not permit ISDS or limit its availability to disputes concerning the amount of compensation for expropriation.[70] The second generation, from 1990 to 1997, also restrict access to ISDS but contain references to ICSID arbitration, particularly in those BITs concluded after China acceded to the ICSID Convention in 1993.[71] The third generation, comprising BITs concluded after 1997, generally contain comprehensive ISDS provisions granting access to international arbitration for all investor-state disputes.[72] Accordingly, the availability of ISDS would depend on which BIT applies.

The jurisdictional restrictions found in the older Chinese BITs have been invoked against Chinese investors, sometimes successfully. For example, in *China Heilongjiang v Mongolia*,[73] the tribunal dismissed for lack of jurisdiction three Chinese investors' claims against Mongolia.[74] Mongolia had cancelled a licence for the claimants to operate in the Tumurtei iron ore mine and the claimants sought to have the licence reinstated.[75] The claims were brought under the 1991 China-Mongolia BIT, which provided that disputes 'involving the amount of compensation for expropriation' may be submitted to arbitration.[76] Although the award is not public, reports indicate that the tribunal had concluded that the BIT's dispute settlement clause restricted its jurisdiction only to disputes over the amount of compensation for expropriation, not the legality of an expropriation.[77]

China Heilongjiang stands in contrast to three other cases brought by investors under Chinese BITs, namely *Tza Yap Shum v Peru*,[78] *Sanum Investments v Laos*,[79] and *Beijing Urban Construction Group v Yemen*.[80] In *Tza Yap Shum* and *Sanum Investments*, the

tribunals interpreted the language 'involving the amount of compensation for expropriation' in the dispute settlement clause of the respective BITs[81] broadly to mean not only the calculation of the amount owed, but also other issues inherent in an expropriation, such as whether the expropriation had been carried out in compliance with the applicable BIT's requirements.[82] The tribunal in Beijing Urban Construction Group also adopted a broad interpretation of similar language in the China-Yemen BIT's dispute settlement clause.[83] The relevant treaty language in the China-Peru BIT and the China-Laos BIT is identical to that of the China-Mongolia BIT interpreted in China Heilongjiang. Although it is unknown why the China Heilongjiang tribunal chose to diverge from the approach taken by the earlier tribunals, China Heilongjiang is the most recent decision of the four cases on this issue and demonstrates the real risk that a Chinese investor may face substantial jurisdictional challenges in attempting to submit its claims against a foreign state to arbitration.

A temporal objection to jurisdiction was also invoked successfully against Chinese investors in *Ping An Life Insurance v Belgium*.[84] In that case, the claimants alleged that Belgium had expropriated their 2007 investment in a banking and insurance group and sought to arbitrate the dispute in ICSID under the 1986 and 2009 BITs between China and the Belgian-Luxembourg Economic Union (BLEU). The 1986 BIT's dispute settlement clause does not contemplate ICSID arbitration as such and also restricts arbitration to disputes that '[arose] from an amount of compensation for expropriation, nationalisation or other similar measures'.[85] By contrast, the 2009 BIT grants access to ICSID arbitration for all legal disputes between an investor of one state and the other state.[86] Because the dispute crystallised before the 2009 BIT entered into force, the claimants sought to rely on the substantive obligations contained in the 1986 BIT as well as the procedural remedy of the 2009 BIT. The tribunal dismissed the case for lack of temporal jurisdiction, concluding that 'the more extensive remedies under the 2009 BIT' were not available to 'pre-existing disputes that had been notified under the 1986 BIT but not yet subject to arbitral or judicial process'.[87] This case also highlights the risk that restrictive dispute settlement provisions in China's older BITs may be used against Chinese investors seeking to protect their OBOR investments, in the absence of any broader investment protections that may be negotiated as OBOR moves forward.

Various Chinese arbitral institutions also have begun to offer themselves as alternative fora for the resolution of OBOR-related investment disputes. Effective 1 October 2017, China International Economic and Trade Arbitration Commission (CIETAC), a leading arbitration institution in China, launched special international investment arbitration rules with the resolution of OBOR-related claims in mind.[88] In conjunction with the launch of these new rules, CIETAC established an Investment Dispute Resolution Center in Beijing to hear such disputes.[89] The rules also authorise CIETAC's Hong Kong Arbitration Centre to administer such arbitrations.[90] In a similar vein, the Shenzhen Court of International Arbitration (SCIA) updated its arbitration rules in 2016 to provide that it would accept and administer investor-state arbitrations under the UNCITRAL Arbitration Rules.[91]

As the discussion above may suggest, China could possibly do more as OBOR unfolds to develop a comprehensive and uniform approach to investment protection, and particularly access to investor-state arbitration. One interesting development on this front, in addition to the developments with regard to rules and institutions noted above, is that China has announced plans to establish international courts in China to resolve OBOR-related investment and commercial disputes.[92] It is unclear, however, whether and to what extent these courts would have jurisdiction over another sovereign state and thus provide a viable alternative forum for Chinese investors to pursue investor-state claims.

Finally, although not specifically related to OBOR, it is perhaps interesting to note when considering China's experience with ISDS that there have been only three known arbitrations involving China as a host state,[93] and the only one that has proceeded to judgment was recently dismissed in a rarely used summary proceeding under ICSID Arbitration Rule 41(5). In *Ansung Housing v China*, Ansung, a Korean property developer, commenced ICSID arbitration against China under the 2007 China-Korea BIT alleging violations of an agreement to build a luxury golf course project in China. The tribunal held that Ansung's claim was time-barred under the China-Korea BIT, which provides that an investor could not submit a claim to international arbitration 'if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage'.[94] Ansung had filed its request for arbitration in October 2014, more than three years after the date on which it first acquired knowledge of loss or damage in 'late summer or early autumn 2011'.[95] The tribunal also decided that Ansung could not save its time-barred claim through the most favoured nation (MFN) clause of the BIT,[96] because that clause did not apply to the scope of a state's consent to arbitrate with investors, including temporal limitation periods.[97]

India

Alongside China, India is one of the fastest growing economies in the world.[98] The United Nations Conference on Trade and Development (UNCTAD) reported in 2017 that it was the third most attractive destination for FDI, after China and the United States.[99] India's investment policy from the 1990s called for the use of BITs to attract foreign investors. Between 1994 – when it signed its first BIT, with the UK – and 2011, India signed an average of four to five BITs per year, granting broad investment protections to foreign investors.[100]

India's stance on investment treaties underwent a dramatic reversal in 2011, when for the first time India was found to have violated BIT obligations, in the *White Industries* case.[101] Before *White Industries*, only nine reported BIT cases had been brought against India, and they all had settled.[102] *White Industries* concerned prolonged judicial delays that left the claimant unable to enforce an arbitral award against an Indian state-owned mining company. Although the tribunal found that the delays did not constitute a denial of justice, it applied an 'effective means' standard from another Indian BIT through the MFN clause of the Australia-India BIT.[103] The tribunal held that India had failed to provide White Industries with an effective means of asserting claims and enforcing rights, and it ordered India to pay the amounts due under the award plus interest, as well as most of the claimant's costs.[104]

At least 14 investment treaty cases against India followed *White Industries*,[105] challenging the legality of India's actions ranging from the assessment of retrospective taxes,[106] to the cancellation of spectrum licenses[107] and telecom licences,[108] to criminal investigations of bribery allegations.[109] All of these cases remain pending, and India has reportedly already been found in breach of its investment treaty obligations in at least two of the cases: *Deutsche Telekom* and *CC/Devas*.[110]

White Industries and subsequent cases prompted a reevaluation of India's investment treaty programme: India adopted a new

policy of terminating its existing BITs and published a new, narrower Model BIT.[111] In July 2016, India sent BIT termination notices to as many as 57 countries.[112] With regard to some 25 BITs that India could not terminate unilaterally because their initial terms had not expired, India requested to enter into joint interpretative statements with the other countries to prevent expansive interpretations by tribunals.[113] The first Joint Interpretative Note was signed with Bangladesh in July 2017.[114]

The new Model BIT was approved by the Indian Cabinet in December 2015 and introduced significant changes to India's investment regime. The scope of protected investors and investments has been narrowed, specifically excluding portfolio assets and intangible rights[115] and requiring protected investors to have 'substantial business activities' in the home state where they are incorporated.[116]

The Model BIT also does not apply to tax disputes[117] – a provision clearly intended to foreclose the possibility of future claims like the ones brought by Vodafone, Cairn Energy and Vedanta Resources. It also contains a general exceptions provision reserving India's right to implement and enforce regulatory measures in the public interest, for example to protect public morals or to conserve the environment.[118] Additionally, the Model BIT specifically excludes from the scope of the expropriation clause state measures that are 'designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment.'[119]

Other notable changes are the deletion of the FET and MFN clauses, which featured in most of India's existing BITs,[120] and the addition of conditions precedent before ISDS becomes available to a foreign investor. For example, investors must first exhaust all available local remedies, and there are strict limitation periods for submitting claims to arbitration.[121]

Since India adopted the Model BIT, it has successfully concluded a BIT with Cambodia which reportedly adopts almost all of the Model BIT's text.[122] India is also negotiating a BIT with Brazil that reportedly replaces ISDS with other alternative dispute resolution mechanisms such as an ombudsman, state-state arbitration and 'dispute prevention procedures.'[123]

India has maintained its scepticism of ISDS; in July 2017, a High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India issued a report suggesting that India should consider 'shift[ing] away entirely from investor-state dispute resolution', or including appellate mechanisms in BITs if India decides to maintain ISDS.[124]

Although India's efforts to protect its national interests are commendable, they arguably fail to give sufficient consideration to India's interests as a home state. India's annual outward FDI has increased from less than US$100 million in the early 1990s to over US$5 billion by 2016, although the numbers have steadily declined from a peak of US$21 billion since the 2008 financial crisis.[125] Indian investors have also commenced five arbitrations against other states, the latest filed in September 2017 against Bosnia and Herzegovina.[126] Accordingly, India's investment treaty policy should be calibrated to balance its right to regulate with the need to protect the overseas investments of its nationals.

Other developments

Beyond China and India, there has also been plenty of activity in other Asian countries concerning ISDS, both in terms of defending investor-state claims and undertaking new initiatives to develop ISDS in the region.

Arbitrations to watch

In the past six years, South Korea has been on the receiving end of three investor-state disputes, two of which are still ongoing.[127] The *Lone Star* case, in particular, has received substantial media attention and generated hostility towards ISDS in South Korea.[128] This case involves a protracted and acrimonious dispute between South Korea and US private equity firm Lone Star Funds over the latter's investment in Korea Exchange Bank (KEB) and the taxation of Lone Star's investment gains. Lone Star acquired a majority stake in KEB in 2003, at a time when KEB was reportedly in dire financial straits. Korean law prohibited the sale of a majority stake in a Korean bank to Lone Star unless that bank was in financial distress. As the economy rebounded, the value of KEB shot up and the Korean government began to scrutinise the acquisition based on suspicions that KEB might not actually have been in financial distress at the time of the acquisition. A governmental agency subsequently announced that Lone Star's acquisition of KEB was illegal and financial regulators blocked Lone Star's attempts to sell KEB between 2005 and 2011. Lone Star eventually sold its majority stake in KEB in 2012. The Korean government also imposed 85 billion won in taxes on Lone Star in respect of the sale of all its investments in South Korea.

Lone Star commenced ICSID arbitration in 2012 under the 1974 Korea-BLEU BIT, demanding over US$4.6 billion in damages allegedly caused by South Korea's actions, which allegedly delayed the KEB sale process and depressed the sale price, and subjected Lone Star's investment gains to unjustified taxation. A hearing on jurisdiction took place in January 2016 and a hearing on the merits followed in June 2016.[129] The award is yet to be rendered, but given the amount of public attention to this dispute in South Korea, whatever the outcome, it is expected to have a significant influence on the country's approach to foreign investment going forward. Already, ostensibly due to the Lone Star dispute, South Korea has adopted a policy of including a denial of benefits clause in all of its BITs, in order to exclude so-called 'mailbox companies' from the scope of investment protections, whereas only one Korean BIT had such a clause before Lone Star commenced arbitration.[130]

Indonesia has also been in the news as the respondent state in a number of investor-state arbitrations. While it has generally prevailed in the cases brought against it – UNCTAD reports that cases against Indonesia were either decided in its favour, or discontinued, or settled[131] – it is worth noting that the latest two investor-state arbitrations commenced against Indonesia in recent years involved investors of other Asian countries: India[132] and Singapore.[133] As Asian countries continue to strengthen their economic ties with one another, it is likely that such arbitrations between investors of one Asian country and another Asian country will become more common.

ISDS initiatives

Alongside regional trade agreements and the concurrent development of ISDS, there have been important initiatives in the region, in Singapore and Hong Kong.

First, the Investment Arbitration Rules of the Singapore International Arbitration Centre (SIAC IA Rules) came into force in January 2017, becoming the first set of investment arbitration rules to be promulgated by a private arbitral institution.[134] Commentators have highlighted that the SIAC IA Rules 'actively address some of the main points of criticism which have been raised against investment arbitration in recent years, in particular, with respect to the transparency of proceedings and

the participation of non-disputing stakeholders'.[135] These rules showcase Singapore's continued dedication to becoming a hub for international dispute resolution.

Second, in 2017, both Singapore and Hong Kong legalised third-party funding (TPF) in international arbitrations seated in those jurisdictions,[136] following the meteoric rise in demand for TPF in international arbitration.[137] The increased availability of TPF may well encourage both prospective claimants and respondent states to arbitrate investor-state claims in Singapore or Hong Kong, as TPF may ease the financial burden of prosecuting or defending against those claims. This could increase the number of investment treaty arbitrations in Asia, although the impact of TPF in Hong Kong and Singapore on the volume of such arbitrations remains to be seen.

Conclusion

It remains to be seen whether and to what extent the new investment protection standards and approaches to ISDS that Asian countries are adopting or proposing are here to stay, as they have not yet been tested. The trend certainly seems to be that ISDS will at least persist in one form or another in Asia, and perhaps grow. As Asian economies continue to expand, their approach towards and use of ISDS will surely be closely watched, with one possible outcome being that at least some of their continued experimentation with new ideas could lead to improvements to the current international investment regime.

Notes

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2 See section four.

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5 Id.

6 See Claudia T Salomon & Sandra Friedrich, 'Investment Arbitration in East Asia and the Pacific', 16 *J World Inv & Trade* 800, 807–808 (2015).

7 See id at 808 & Chart B.1.

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9 See Prabhash Ranjan & Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction', 38 Nw *J Int'l L & Bus*. 1, 16-18 (2017).

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11 Austl. Gov't Dep't of Foreign Affairs & Trade, Investor-State Dispute Settlement, http://dfat.gov.au/trade/investment/Documents/isds-faqs.pdf (last visited 12 April 2018).

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13 Clint Peinhardt & Rachel L Wellhausen, 'Withdrawing From Investment Treaties but Protecting Investment', 7 *Glob. Pol'y* 571, 572 (2016).

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15 Agreement on Investment Among the Governments of the Hong Kong Special Administrative Region of the People's Republic of China and the Member States of the Association of Southeast Asian Nations, 12 November 2017 (scheduled to enter into force by 1 January 2019).

16 Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the Republic of India, 12 November 2014 [hereinafter 'ASEAN-India Investment Agreement']. Article 30 stipulates that the Agreement entered into force on 1 July 2015 for any party that notified the other parties in writing that it has completed its internal requirements.

17 Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the People's Republic of China and the Association of Southeast Asian Nations, 15 August 2009 (entered into force 1 January 2010).

18 Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, 27 February 2009 (entered into force 10 January 2010) [hereinafter 'AANZFTA'].

19 Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, 2 June 2009 (entered into force 1 September 2009).

20 Agreement on Comprehensive Economic Partnership Among Japan and Member States of the Association of Southeast Nations, Mar. 28, 2008 (entered into force 1 December 2008).

21 The Sixteenth AEM-EU Trade Commissioner Consultations, Joint Media Statement (2 March 2018), http://asean.org/storage/2018/03/16-AEM-EU-TC-JMS-final.2-00000002.pdf.

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34 ACIA, supra n. 14, art. 40(2).
35 Id. art. 40(3).
36 AANZFTA, supra n. 18, ch. 11, art. 27(2).
37 ASEAN-India Investment Agreement, supra n. 16, art. 20(19)-(20).
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39 Id. art. 20(2).
40 Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China, Austl.-China, June 17, 2015 (entered into force 20 December 2015) [hereinafter 'ChAFTA'].
41 Id. art. 9.11(5).
42 Id. art. 9.11(6).
43 Under Article 52 of the ICSID Convention, the grounds for annulment are limited to the following: improper constitution of the tribunal; manifest excess of powers; corruption; serious departure from a fundamental rule of procedure; and failure to state reasons. Under Article V of the New York Convention, the grounds are: incapacity of one of the parties to the arbitration agreement; invalidity of the arbitration agreement; the losing party was not given proper notice of the arbitral appointment or of the arbitration proceedings or was otherwise unable to present its case; matters decided exceed the scope of the submission to arbitration; and improper constitution of the tribunal or conduct of the arbitral proceedings.
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50 EU-Singapore IPA, supra, art. 3.19; EU-Vietnam FTA, supra, ch. 8, sec. 3, subsec. 5, art. 28.
51 EU-Singapore IPA, supra n. 49, art. 3.9; EU-Vietnam FTA, supra n. 49, ch. 8, sec. 3, subsec. 4, art. 12.
52 EU-Singapore IPA, supra n. 49, art. 3.9(12); EU-Vietnam FTA, supra n. 49, ch. 8, sec. 3, subsec. 4, art. 12(14).
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83 *BUCG v Yemen* Decision on Jurisdiction, supra n. 63, paragraphs 87, 109. See Agreement on the Encouragement and Reciprocal Protection of Investments Between the Government of the People's Republic of China and the Government of the Republic of Yemen, China-Yemen, art. 10.2, 16 February 1998 (entered into force10 April 2002) (providing that the Contracting States consented to arbitrate disputes 'relating to the amount of compensation for expropriation').

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Debevoise & Plimpton LLP has successfully represented clients in Asia-related arbitrations for decades. The firm's arbitration practice in Asia reflects Debevoise's global strength in the area. It is one of very few law firms in the world to combine sophisticated international arbitration, general commercial dispute resolution and public international law capacity in four major international arbitration centres: New York, London, Hong Kong and Paris.

The Asia team has a strong track record advising on the most complex international disputes for leading multinationals, international organisations, sovereigns and non-governmental organisations.

Clients benefit from a team of internationally renowned arbitration lawyers. The firm has a deep bench of partners, counsel and associates who focus on arbitration in the region. The senior members of the team are also heavily involved in shaping the arbitration environment in Asia, taking leadership roles on bodies such as the Hong Kong International Arbitration Centre and the Singapore International Commercial Court Committee.

The team's long track record of work on arbitration in Asia, coupled with a deep level of involvement in the region's arbitration community, is incredibly powerful. It gives the team the experience and perspective needed to advise clients on their most critical arbitrations.

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Oil and Gas Arbitration in the Asia-Pacific Region

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Introduction

The increased use of arbitration by parties in the Asia-Pacific region[1] has been a consistent trend over the past decade, and shows no sign of declining. For example, the Singapore International Arbitration Centre (SIAC) recently announced that it administered an all-time record number of 452 new cases in 2017, up 32 per cent from 343 new cases in 2016 and a 67 per cent increase from the 271 new cases filed in 2015.[2] The Chinese International Economic and Trade Arbitration Commission (CIETAC) also administered its all-time high of 2,298 new domestic and foreign-related cases in 2017, up from only 981 cases in 2006.[3] The Hong Kong International Arbitration Centre (HKIAC) had a total of 460 new cases filed in 2016;[4] of these new cases, 262 were arbitrations, 15 were mediations and 183 were domain name disputes.[5]

The importance of the oil and gas sector to the Asia-Pacific economies cannot be understated.[6] It is therefore unsurprising that oil and gas arbitrations have continue to increase in both prominence and frequency.

Disputes arising out of the oil and gas sector, which is often characterised by large, complex and capital-intensive ventures involving participants from multiple jurisdictions, are particularly suitable for international arbitration. Indeed, in a survey by the Queen Mary University of London, 56 per cent of energy industry respondents preferred arbitration as a choice of resolving cross border disputes, and 78 per cent of energy industry respondents strongly agree or agree that arbitration is well suited to the energy industry.[7]

The Asia-Pacific region's share of global energy consumption is expected to rise to 49 per cent – or almost half of global consumption – by 2040.[8] These dramatic increases in commercial and economic activity in the oil and gas sector portend an even greater role for international arbitration in the Asia-Pacific region.

The types of interests that may give rise to arbitration in the oil and gas sector are diverse, and vary within the region. Japan, South Korea, China (including Taiwan) and India accounted for 69 per cent of global liquefied natural gas (LNG) net imports in 2016, with Japan alone accounting for 32 per cent of global net imports.[9] Australia, Malaysia, India and Indonesia, along with China, are the largest oil and gas producers in the Asia-Pacific region.[10] Jurisdictions such as Timor Leste, Vietnam and the Philippines have significant amounts of unexplored oil and gas resources that are more recently being commercialised.

Although it is difficult to generalise about the varied contracts, practices and legal frameworks pertaining to oil and gas across the Asia-Pacific region, a few emerging trends can be identified. This article examines these trends and considers possible future directions for oil and gas arbitrations in the region.

Current trends

Enhancing the appeal of international arbitration

Several jurisdictions in the Asia-Pacific region have taken steps to make themselves more attractive to arbitration generally and oil and gas arbitration in particular. These have taken the form of institutional developments and legislative changes.

Institutional developments

Australia has introduced innovations specific to the oil and gas sector. In November 2014, the Perth Centre for Energy and Resources Arbitration (PCERA) was launched. As a specialised energy and resources arbitral institution with a dedicated panel of expert arbitrators, PCERA is the first of its kind in the Asia-Pacific region.[11] In August 2017, PCERA published the PCERA Arbitration Rules 2017, which are based expressly on a modified version of the UNCITRAL Arbitration Rules.

Many institutions in the region have made changes that are designed to improve arbitration generally, but which will also, have a positive effect on oil and gas arbitrations. For example, the SIAC most recently revised its rules in 2016. A number of amendments will enhance the utility and attractiveness of the SIAC Rules to the oil and gas sector, including:

- the early dismissal of claims and defences procedure;
- provisions regarding joinder of additional parties and consolidation of multiple arbitrations; and
- further refinements to the existing emergency arbitrator and expedited arbitration procedures.[12]

Given that oil and gas disputes often involve multiple contracts and multiple parties, joining relevant parties or consolidating the dispute in a single arbitral forum will result in a more efficient resolution of the dispute, if it is fair and appropriate to do so. Disputing parties will also benefit from the enhancements made by the SIAC to its emergency arbitrator mechanism, which allows parties to obtain expedited interim relief before the constitution of the tribunal within 14 days,[13] and to the expedited procedure, which allows parties to obtain an award within six months of the constitution of the tribunal.[14]

The SIAC has also released its first set of investment arbitration rules (SIAC IA Rules), which came into effect on 1 January 2017.[15] The SIAC IA Rules were developed with a view towards issues 'unique to international investment arbitration'.[16] Some of the key provisions under the SIAC IA Rules include:

- a default list procedure for the appointment of the sole or presiding arbitrator;
- an opt-in mechanism for the appointment of an emergency arbitrator;
- a procedure for early dismissal of claims and defences;
- provisions for submissions by non-disputing parties; and

- provisions to enable the tribunal to order the disclosure of third-party funding arrangements and to take such arrangements into account when apportioning costs.[17]

More recently, the SIAC proposed an innovative cross-institution consolidation protocol,[18] which is designed to facilitate the consolidation of international commercial disputes across multiple institutions. Such consolidation is currently not possible under the leading institutional arbitration rules. The SIAC has prepared a memorandum discussing the protocol for cross-institution consolidation,[19] and is in the process of engaging with other arbitral institutions and the arbitration community on the protocol.

There is a degree of convergence among the rules of the leading centres in the Asia-Pacific region. The HKIAC revised its rules in 2013, and the latest version of the HKIAC Rules also include comprehensive provisions dealing with multiple contracts, joinder and consolidation, emergency interim relief and expedited procedures.[20] CIETAC also revised its rules in 2015, and the revised rules also have provisions on multiple contracts, joinder and consolidation, and emergency interim relief and expedited procedures.[21] In addition, on 1 October 2017, CIETAC has also released the International Investment Arbitration Rules (CIETAC IA Rules), the first set of investment arbitration rules promulgated by a Chinese arbitration institution.[22]

In April 2016, India set up the Mumbai Centre for International Arbitration (MCIA), its first home-grown international arbitration centre.[23] The MCIA Rules, like the other leading rules in the region, have provisions dealing with multiple contracts, joinder and consolidation, emergency interim relief and expedited procedures.

Legislative changes

Singapore and Hong Kong have periodically made refinements to their legal frameworks for arbitration to ensure that they remain ahead of latest developments in the field. Most recently, in 2017, both Singapore and Hong Kong took legislative steps to permit third party funding. Singapore introduced amendments to the Civil Law Act with effect from 1 March 2017 that abolished the common law torts of champerty and maintenance, and also provided that third party funding is not contrary to public policy or illegal when it is provided by qualifying funders in prescribed dispute resolution proceedings, details of which are set out in the Civil Law (Third Party Funding) Regulations 2017 (Regulations).[24]

In June 2017, Hong Kong passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 to permit third-party funding. Unlike Singapore, Hong Kong does not mandate third-party funders to adhere to particular regulations. Hong Kong also adopted a broader definition of 'third-party funder' that is not limited to professional funders and includes any 'person who is a party to a funding agreement . . . and who does not have an interest recognised by the law in the arbitration other than under the funding agreement'.[25] This would include lawyers and law firms (save for lawyers and law firms acting for a party in the arbitral proceedings).

These changes will provide additional options to arbitration users in the oil and gas sector in terms of funding their claims (although users should be aware that public policy issues may still arise if third party funding is prohibited in a jurisdiction where enforcement may be sought).

In 2015, Australia also made changes to its arbitration legislation that will have positive consequences for energy arbitrations. Notably, the amended International Arbitration Act now provides that arbitrations seated in Australia are presumptively confidential, subject to a number of limited exceptions, namely consent, third-party rights, enforcement of awards, public interest and natural justice.[26] Confidentiality can be very important for the oil and gas industry, especially as highly valuable and proprietary information may be at stake, particularly in upstream exploration and appraisal ventures.

India has made significant strides to improve its reputation as a venue for arbitration, including revisions to its legal framework for arbitration through the 2015 Indian Arbitration and Conciliation (Amendment) Act which came into force on 23 October 2015.[27] The key reforms made by the new act include:

- that the provisions on court-ordered interim relief and court assistance in the taking of evidence would, subject to contrary agreement, apply to arbitrations seated outside India – a lacuna left by the much-criticised *Balco* decision;[28]
- strict time limits for an arbitral tribunal seated in India to render a final award;[29] and
- limitations on the scope of 'public policy' as a ground for refusing enforcement of awards.[30]

Many of these changes are in line with modern arbitration practice (although some, such as the time limits, have been criticised) and, along with the introduction of the MCIA, will give India greater prominence as a potential seat for arbitration.

China is also continually improving its arbitration legal framework. Under Chinese law, before a lower court refuses recognition or enforcement of a foreign-related or foreign arbitration award, such decision has to be reported to the Supreme People's Court (SPC).[31] In 2017, the SPC released two judicial interpretations on arbitration (the Interpretations).[32] The Interpretations extend the SPC reporting system to domestic arbitral awards, permit parties to participate in the decision-making of the reviewing court and clarify the approach the SPC will take with respect to the law governing the arbitration agreement (which will not necessarily be the law governing the underlying contract).[33]

Arbitrations involving states or state-linked parties

Oil and gas resources often take on a strategic, security or geopolitical significance for a state. The state is the resource-owner under the law for most countries in the region.[34] Producing states are thus key players in the oil and gas industry, and may take on a commercial interest in a particular oil and gas venture or contract, or exercise certain regulatory and control functions that affect a particular venture or contract. States can participate in a venture or contract in one or more of a variety of ways:

- they may participate through an oil and gas ministry or some type of government agency;
- they may participate through a national oil and gas company; or
- they may regulate through hydrocarbon laws, regulations or policies.[35]

Oil and gas arbitrations therefore frequently involve states or state-linked parties. These can include commercial arbitrations arising out of various contracts between private parties and states or state-linked parties, and also arbitrations under investment treaties.

Commercial arbitrations

States or their national oil companies are typically parties to upstream agreements granting private oil and gas companies the rights to certain oil and gas interests. These may take the form of a concession agreement, a licence agreement, a production sharing agreement or a service agreement. They may also take the form of a hybrid agreement that combines elements of the different types of granting agreements. In general, since the 1970s, the oil and gas industry has shifted from concession agreements, under which the state granted title over the resource to private companies, to production sharing agreements or service agreements, under which the state retains ownership over the resources but grants a private company the right to participate as an investor or a producer.[36]

Under a production sharing agreement, which is the most commonly encountered type of granting agreement, the investor takes on exploration and other risks in the venture, but has an entitlement to recover costs and share in the production as profit, once operations become commercial. Indonesia, in fact, introduced production sharing agreements in the 1960s.[37] Production sharing agreements are now found across the Asia-Pacific region, including in Bangladesh, China, India, Malaysia, Myanmar, Philippines, Sri Lanka and Vietnam.[38]

Disputes that may arise under production sharing agreements include disputes regarding:

- the recovery of costs and accounting procedure under the agreement;
- the extent and nature of rights granted under the contract;
- non-payment of invoices or royalties;
- prices or price adjustments; and
- delays, disruptions or force majeure.

The nature and complexity of such disputes varies, and depend on factors such as the scale and complexity of the project, the parties involved and the political environment.

A large proportion of oil and gas arbitrations in the region have arisen out of production-sharing and other granting agreements – India has reportedly been involved in arbitrations relating to 22 out of its 310 production sharing agreements in the last 15 years.[39] Some arbitrations are illustrative of the range of issues that might be encountered. In November 2011, Reliance Industries filed a notice of arbitration against India regarding a dispute arising out of the cost recovery provisions its production sharing agreement over the KG-DG offshore gas block in the Bay of Bengal, which it operates in a joint venture with the Indian government, BP and Niko Resources, a Canadian company.[40] Reliance Industries then filed another claim together with BP and Niko Resources in 2014 under the same agreement relating to the Indian government's delay in implementing a price hike for natural gas.[41] This claim was later withdrawn.[42] In November 2016, Reliance Industries began yet another arbitration under the same agreement after India imposed a US$1.55 billion fine on Reliance Industries and its partners for extracting certain gas that had migrated to the KG-D6 block from adjacent blocks owned by the Oil and Natural Gas Company (ONGC).[43]

Many oil and gas arbitrations in the region or involving parties from the region arise out of joint venture agreements as well. In June 2016, Sinopec, China's state-owned energy company, filed a US$5.5 billion claim against Repsol in Singapore over an investment in an ailing North Sea oil joint venture.[44] In March 2017, PetroChina and five other Chinese state-owned oil companies submitted to arbitration under the AAA Rules a dispute over oil and gas fields in Chad against Carlton, a Texas energy investments company.[45] This reflects a marked shift away from the reluctance that Chinese state-owned companies have sometimes had in the past to invoke formal dispute resolution procedures. In May 2017, MedocEnergi, an Indonesian oil company, won a US$24 million UNCITRAL award in a dispute with Singaporean and Australian partners arising out of a joint venture to operate the Jeruk oil field off the coast of East Java.[46]

Investment treaty arbitrations

A significant number of oil and gas disputes in the Asia-Pacific region have also been submitted to arbitration under various investment treaties. Such treaties frequently provide for commitments by host states to certain standards of conduct with respect to the treatment of foreign investments, and for the states' consent that breaches of such standards may be submitted to arbitration. Countries in Asia are party to more than 1,200 bilateral investment treaties (BITs) or investment agreements, many of which provide for the arbitration of investment disputes.[47]

A number of multilateral treaties that cover the region, including the 2009 ASEAN Comprehensive Investment Agreement (ACIA) and the Trans-Pacific Partnership (TPP), also provide for arbitration. The status and effect of the TPP is unclear in light of the current US administration's withdrawal by executive order in January 2017; however, talks are reportedly under way between the other TPP signatories, China, and South Korea to revive the deal in a different form.[48] Based on public statements by its foreign minister, China appears open to exploring the TPP, alongside other multilateral treaties that it is seeking to negotiate with trade partners in the Asia-Pacific, including the Regional Comprehensive Economic Partnership (RCEP) and the Free Trade Area of the Asia-Pacific (FTAAP).[49]

A substantial number of investment treaty arbitrations involving states in the Asia-Pacific region have related to oil and gas disputes. A large proportion of International Centre for Settlement of Investment Disputes (ICSID) arbitrations involving parties from the region have been related to the oil and gas sector. As of October 2016, out of the 46 ICSID cases involving a state from the South and East Asia and the Pacific, 45 per cent concerned the oil, gas and mining sector.[50] A significant number of non-ICSID investment treaty arbitrations also relate to the oil and gas sector.

Given the complexity and variety of the security and political environments in which many oil and gas ventures operate, a wide range of different issues can give rise to investment treaty arbitration. For example, expropriation claims of various descriptions – whether framed as lawful or unlawful, direct or indirect – are not uncommon in the oil and gas sector. In 2016, a UNCITRAL tribunal dismissed two treaty claims brought by Progas Holdings, a Mauritian entity and its British-Iraqi shareholder against Pakistan for alleged expropriation of an LPG terminal in Port Qasim, Karachi.[51] The awards are being challenged before the English court for an application to set aside filed by the investors.[52]

Retroactive taxation claims and other regulatory actions by governments also frequently give rise to investment treaty disputes. In March 2015, Cairn Energy, a Scottish oil company, initiated UNCITRAL arbitration against India under the UK-India bilateral investment treaty, alleging that India's demands for US$1.6 billion in retroactive taxes against its Indian subsidiary, as well as India's restrictions preventing Cairn from selling its remaining 10 per cent stake in its subsidiary, are in breach of the treaty.[53] In May 2015, Hanocal Holding and IPIC International, Dutch subsidiaries of the International Petroleum Investment Company (IPIC), initiated ICSID arbitration for retroactive tax levied on

the sale of a controlling stake in Hyundai Oilbank, which is a Korean petroleum and refining company.[54] More recently, in July 2016, Royal Dutch Shell initiated ICSID arbitration against the Philippines for US$1.1 billion in retroactive tax bills levied by the Philippines auditing commission on the gas produced from the Philippines' first natural gas field in Malampaya.[55] Samsung filed an ICSID claim against Oman, under the Oman-Korean bilateral investment treaty, in relation to a bidding process held by the state to find a contractor to undertake improvements to the Sohar refinery in northern Oman in 2015. The case has settled earlier in 2018.[56]

Investment treaty arbitration has also been subject to criticism in recent years, and the response of some states in the region has been to terminate or seek to renegotiate its bilateral investment treaties. As at March 2017, India notified 58 countries, including 22 EU countries, of its intention to terminate its BITs.[57] India has announced that it intends to replace those treaties by negotiating a new set of treaties based on the new Indian Model BIT, which it published in 2015.[58] It has been reported earlier this year that the new model treaty, in particular the arbitration clause requiring investors to resolve the dispute in Indian courts for at least five years before going for arbitration, has not been well received.[59]

Indonesia also announced at the end of 2014 that it would formally phase out its 67 BITs, and has proceeded to terminate a number of such treaties in accordance with that announcement.[60] There have been indications that Indonesia plans to negotiate new treaties on different terms, although reports are not conclusive. For treaties that have been terminated or are about to be terminated, investments made prior to the expiry of the treaties should continue to enjoy protection under 'survival' or 'sunset' clauses for up to 15 years.[61] Indeed, in August 2016, Oleovest, a Singapore-based subsidiary of an Australian renewable energy company, initiated ICSID arbitration against Indonesia under the Singapore-Indonesia bilateral investment treaty with respect to a palm oil oleochemical project in Sumatra. The treaty had lapsed in June 2016, but the relevant treaty contains a survival clause protecting existing investments for 10 years after June 2016.[62]

Future directions

Price movements and volatility

Price movements in oil and gas markets are a key driver of change in the industry. They are also a driver of disputes. Parties to energy-related contracts that were formed and negotiated in a different price environment may find themselves or their counterparts tied to agreements that are no longer as profitable as had been anticipated. Further exploration, appraisal or development of existing oil and gas assets may proceed on a slower and more conservative timescale. Parties may seek to get out of, or revise, a bad bargain. All of this can give rise to disputes – indeed, the recent low price environment has reportedly given rise to a number of disputes arising out of unpaid invoices or cost overruns, or the suspension, renegotiation or cancellation of oil exploration and drilling obligations.[63]

Price movements will continue to be volatile and difficult to predict. Future upward movements in oil and gas prices, or regional divergences in prices creating arbitrage opportunities, will very likely fuel an increase in disputes. Indeed, a study done by Chatham House shows a correlation between the oil and gas price level and the number of arbitrations – in other words, the highest incidence of arbitrations took place during the oil and commodity price boom from 2002–2008.[64]

Because gas is often sold in large volumes under 20-to-35-year long-term gas supply and purchase agreements, price movements and volatility often lead to very large and complex gas pricing disputes. In particular, many such contracts include a price review or price adjustment clause, which permits parties to revise the price formulae under their contract if a certain set of contractually defined criteria are satisfied.[65]

In Europe, various factors and developments have contributed to a proliferation of gas price arbitrations in the last decade involving disputes over the applicability and mechanics of such price review clauses. Commentators attribute this increase to the development of competitive natural gas markets and liquid gas hubs in some parts of Europe, leading to a mismatch between spot prices for gas and the prices paid under long-term gas supply contracts that predate those developments, which tend to be linked to oil and alternative fuels.[66] Another driver of the increase in such disputes has been the oversupply of natural gas due to the development of shale gas in the US and China, and increased LNG imports from the Middle East and North Africa, which has led to a further divergence in the price-setting mechanisms in the oil and gas markets.[67]

Perhaps surprisingly, such gas price arbitrations have not been as common in the Asia-Pacific region – even though regional developments, including the dramatic spike in demand for LNG after the Fukushima nuclear power plant incident, have contributed to the increase in gas pricing disputes in Europe.[68] One commentator's review of public LNG disputes found that, out of 72 LNG disputes observed globally since 2010, there have been no reports of arbitrations brought by a Japanese, Chinese or Korean LNG buyer (even though Japan, China and South Korea together account for more than half of global LNG imports).[69]

Recently, in February 2018, Korea Gas Corporation, a South Korean state-owned entity, brought a gas price review arbitration against the Australia's North West Shelf joint venture under supply contract that ended in 2016.[70] It remains to be seen whether this is an isolated example or the first of a series of gas price review claims akin to the spate of such claims that has recently been seen in Europe.

Not much information is publicly available on the price revision mechanisms in gas or LNG supply and purchase agreements. However, commentators point to anecdotal evidence that long-term contracts in the Asia-Pacific region are traditionally set on the basis of Japan Customs-cleared Crude (JCC) prices and contain vague price review clauses that do not always provide for price revision through arbitration.[71] There are also suggestions that Asian market participants prefer to negotiate rather than arbitrate price adjustment issues.[72]

However, more recent reports suggest that regional participants are now more seriously considering drafting or relying on gas price review mechanisms in their long-term contracts, in part because of a growing divergence between sellers' and buyers' positions. This will increasingly be the case as the JCC prices compete with the development of emerging gas trading markets in Singapore and Shanghai,[73] which may develop in the future into gas hubs and a reference point for gas pricing. The European experience with liberalisation of gas markets and the emergence of gas hubs, and its impact on market behaviour and gas price reviews, suggests that gas price arbitrations will be a potential growth area for the future in the Asia-Pacific region.[74]

One important difference with Europe, however, is that the Asia-Pacific is not a single market, and does not have a coordinating political, legal or regulatory mechanism like the European Commission that can establish standards across-the-board for third-party access to infrastructure or to regulate anticompetitive

contracting behaviour.[75] This means that the development of a regional gas hub may take a longer time than it did in Europe.

Other LNG disputes

The Asia-Pacific region has been referred to as the 'backbone' of the global LNG market,[76] and it alone accounts for over two-thirds of the global LNG growth.[77] In 2016, 53.6 per cent of global supply of LNG went to Asia,[78] and as mentioned above, Japan, South Korea, and China are the world's top three LNG importers.[79] As noted by one commentator, the 'largest global trade flow route continues to be Intra-Pacific trade, a trend which is poised to continue as that basin posted the largest gains in both supply and demand by region.'[80] In the future, some commentators have predicted that, as result of increasing demand from Australia, India, Indonesia and Malaysia, the demand for LNG in the region is expected to be double or more by 2030.[81]

Besides the gas price review issues referred to above, there are other issues specific to LNG ventures and contracts that can give rise to disputes. In particular, unlike pipeline gas, LNG can be transported and delivered to destinations other than those specified in the parties' contract, and can also be re-exported after it is delivered. This creates opportunities for market participants to create additional value by sending LNG cargoes to a destination that has a higher price, which can give rise to disputes. For example, disputes have arisen out of destination restrictions or diversion provisions in LNG contracts, including whether a seller is entitled to refuse a diversion proposal, or whether and how profits on diverted cargoes are to be shared.[82]

As noted above, there is very little public information on LNG-related arbitrations involving parties from the Asia-Pacific region, and the anecdotal evidence suggests that parties have so far tended to avoid litigating or arbitrating disputes under such contracts. However, as LNG markets continue to mature in the Asia-Pacific, and with trading volumes continue to increase, it is likely that more of such disputes will arise in the future.

Another area to watch is LNG-related construction disputes. Australia currently has almost A$200 billion of LNG-related construction projects underway, which is part of a plan for Australia to overtake Qatar as the world's biggest LNG exporter by 2018.[83] However, the rush to build up Australia's LNG industry has also led to cost overruns of almost US$50 billion at multiple facilities operated by major oil and gas companies.[84] Along with other factors, this has predictably led to a number of LNG-related construction disputes being submitted to arbitration. For example, in September 2016, Chevron initiated UNCITRAL arbitration in Perth against CPB Contractors, an Australian construction company, and Saipem, its Italian counterpart, regarding a disputed request for US$1.5 billion in extra costs for constructing a jetty for the LNG project.[85]

State-to-state arbitration disputes

As energy and resource security becomes an increasing concern for states in the Asia-Pacific region – which is likely given volatile energy prices and the reliance of China, Japan and South Korea on oil and gas imports[86] – there may also be more state-to-state arbitrations that are related to the oil and gas sector.

State-to-state disputes can arise out of oil and gas resources that straddle contested state boundaries. For example, in 2009 the Permanent Court of Arbitration (PCA) in The Hague administered an UNCITRAL arbitration between the Sudan People's Liberation Movement/Army and the government of Sudan regarding the contested borders of the Abyei region, which is located within the Muglad Basin and contains a number of oil and gas subsurface resources.[87] Similar disputes have arisen regarding land boundaries in the Asia-Pacific, most notably in the Kashmir region where Pakistan, India and China have all put forward competing claims,[88] although such claims have not been submitted to arbitration.

Similar disputes can also arise out of oil and gas resources that straddle maritime boundaries or exclusive economic zones. In July 2016, a five-member PCA tribunal constituted under the 1982 UN Convention on the Law of the Sea (UNCLOS) rejected territorial claims by China in the South China Sea, with respect to the status of the Scarborough Shoal, Itu Aba and certain features in the Spratly Islands.[89] China has however consistently rejected the legitimacy of the PCA award, on the basis that territorial questions are not subject to UNCLOS,[90] and rather than comply with the award, China has instead stepped up its construction activities and presence in the South China sea.[91] This goes to show how delicate and politically sensitive these boundary issues can be – and illustrates some of the limitations of the arbitration process in resolving such disputes.

Disputes could also arise out of agreements to share revenue between States. One example is the dispute between Australia and Timor Leste regarding a controversial Certain Maritime Arrangements in the Timor Sea (CMATS) treaty that sets out a method for dividing revenue from the very large and potentially lucrative Greater Sunrise oil and gas reserve.[92] CMATS split revenues on a 50-50 basis and imposed a 50-year moratorium on Timor Leste pursuing maritime boundary negotiations or claims. Timor Leste sought to terminate the CMATS.[93]

In September 2016, a five-member commission at the PCA found that it had jurisdiction to hear a compulsory conciliation proceeding under UNCLOS Annex V involving Australia and Timor Leste, which would require Australia to negotiate with Timor Leste regarding a permanent maritime boundary (Australia had expressly excluded disputes relating to sea boundary delimitation from compulsory arbitration and judicial settlement in 2002).[94]

After negotiations, Timor Leste and Australia reached an agreement on 30 August 2017 in Copenhagen on the 'central elements' of a permanent maritime boundary in the Timor Sea – ending a maritime boundary dispute affecting the fate of an estimated US$40 billion in oil and gas reserves. The agreement also addresses the legal status of the Greater Sunrise gas field located in the disputed waters and the establishment of a 'special regime' for the development of the field and the sharing of revenues.[95] The treaty was signed on 6 March 2018.[96]

The UNCLOS Annex 5 conciliation proceedings were the first of their kind. It remains to be seen how such procedures will be employed in future state-to-state disputes.

Notes

1 The exact periphery of what constitutes the 'Asia-Pacific region' is difficult to define with precision, and depends in part on context. For example, the Asia-Pacific Economic Cooperation (APEC) forum includes Canada, Chile, Russia, Mexico, Peru and the US. For the purposes of this article, these countries are not treated as falling within the 'Asia-Pacific region.'

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3 CIETAC, Statistics, available at http://cietac.org/index.php?m=Page&a=index&id=24.

4 At the time of publication of this article, HKIAC has not yet released its 2017 statistics.

5 HKIAC, Statistics, available at http://www.hkiac.org/about-us/statistics.

6 Based on 2016 data, Asia-Pacific, as a region, is the biggest consumer of oil. Asia-Pacific's oil consumption represented 34.8 per cent of the global consumption. The region's oil consumption growth is also the highest at 3.3 per cent. Asia-Pacific consumes over one fifth (20.4 per cent) of the world's natural gas. On the production side, Asia-Pacific's natural gas production growth rate in 2016 (2.9 per cent) was only second to the Middle East. See BP, Statistical Review of World Energy June 2017, available at https://www.bp.com/content/dam/bp/en/corporate/pdf/energy-economics/statistical-review-2017/bp-statistical-review-of-world-energy-2017-full-report.pdf, at pp 15, 26, 27.

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16 2017 SIAC IA Rules, available at, www.siac.org.sg/our-rules/rules/siac-ia-rules-2017.

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Wilmer Cutler Pickering Hale and Dorr LLP offers one of the world's premier international arbitration and dispute resolution practices. The multinational team – consisting of over 70 lawyers, trained and qualified in a wide range of common and civil law jurisdictions – has extensive experience with arbitration administered by all of the major international arbitration institutions, including the International Chamber of Commerce, London Court of International Arbitration, International Centre for Settlement of Investment Disputes, UNCITRAL, American Arbitration Association/International Centre for Dispute Resolution, Singapore International Arbitration Centre, Hong Kong International Arbitration Centre, Stockholm Chamber of Commerce and others, as well as more specialised forms of institutional arbitration and ad hoc arbitrations. In recent years, the practice has handled more than 650 proceedings, in numerous arbitral seats, and governed by the laws of more than 70 different legal systems. In addition to representing clients as counsel, many of the firm's international arbitration lawyers regularly sit as arbitrators. The practice has particular experience in a number of specialised substantive areas, including: disputes involving states; energy; financial services; joint venture, services and franchise disputes; insurance; mergers and acquisitions; construction and engineering; intellectual property; telecommunications; and employment.

Shanghai International Aviation Court of Arbitration: Take-Off in Aviation Arbitration

Shanghai International Arbitration Center

In June, 2014, supported by the International Air Transport Association (IATA) and the China Air Transport Association (CATA), the Shanghai International Arbitration Center (SHIAC) established the Shanghai International Aviation Court of Arbitration (SIACA).

As one of SHIAC's affiliations which provides international aviation arbitration services, SIACA accepts various disputes in which the disputing parties, subject matter or the legal facts lead to the establishment, change or termination of civil and commercial relationships connected to the aviation industry, including but not limited to manufacturing, sale and other transactions of aircrafts and aircraft components, air transportation, airport services, supply of aviation fuel and materials, aviation intermediary services, aviation finance and aviation facilities. Therefore, SIACA steps into the circle of professional international arbitration courts.

SIACA entered the Shanghai Hongqiao Linkong Business Park bordering the Shanghai Hongqiao International Airport in 2017, and acquired a 600 square metre facility for arbitration, including two hearing rooms, one reception room, one deliberation room, one consulting room and several office rooms.

Diversified routes for aviation dispute resolution

Connect IATA Arbitration Rules and offer ad hoc arbitration service

In accordance with article 16 of the Arbitration Law of China, an effective arbitration clause shall contain agreement on the arbitration institution, which renders the conclusion that institutional arbitration, rather than ad hoc arbitration awards rendered in mainland China that are judicially recognised by China's courts. However, it seems that changes have taken place with the release of the Opinions of the Supreme People's Court on Providing Judicial Guarantee for the Building of Pilot Free Trade Zones on 9 January 2017. It stipulates that if two enterprises registered in China's pilot free trade zones (FTZs) agree that relevant disputes shall be submitted to arbitration at a particular place in mainland China, according to particular arbitration rules, and by particular personnel, the effectiveness of such agreement shall be upheld.

Furthermore, the courts in China have recognised the arbitration awards rendered by Chinese arbitration institutions applying the UNCITRAL Arbitration Rules. For example, the Shanghai No. 2 Intermediate People's Court affirmed, in *Nantong Si Jian Construction Group Co Ltd v Exxon Mobil* [Shanghai Er Zhong Yuan (2013) Hu Er Zhong Min Ren (Zhong Xie) Zi No. 1], that the aforementioned kind of arbitration awards shall be effective and recognised.

The above conditions constitute the foundation for the connection between the SHIAC arbitration rules and IATA arbitration rules which are of ad hoc nature. Based on the latest judicial practice and thoughts on arbitration, SHIAC uses its Ad Hoc Arbitration Service Guidance to implement ad hoc arbitration rules like the IATA arbitration rules. Therefore, SHIAC is capable to provide hearing room and facilities, to appoint arbitrators, and to administrate the procedures due to the authorisation of the disputing parties or the tribunal in the cases applying the IATA arbitration rules.

Enact aviation arbitration rules and accept aviation disputes

To provide professional and individualised arbitration service to aviation industry participants, SHIAC has commenced the draft of SIACA Arbitration Rules. For this purpose, SHIAC has gathered over 40 aviation dispute resolution experts to organise multiple rounds of seminars to discuss the rules. To cater to the aviation industry's features, the aviation arbitration rules shall contain mechanisms of pre-arbitration mediation, stipulations about a specialised panel of aviation dispute arbitrators and the results of the consultation report from the experts committee. This ensures more flexibility and professionalisation of the procedure.

Draft model aviation commercial contracts

The enormous increase scale of the aircrafts lease and financial lease business in China causes various potential risks and disputes. Challenging factors are the vagueness of terms, defects of the processes and the imbalance of rights and obligations in the contracts. Thus, based on the international practices and customs, and conditions of the aircraft lease market in China, SHIAC drafted the Model Contract of Aircrafts Lease (exposure draft) to offer hints to the users to reduce risks and allocate contractual rights and obligations. The model contract further recommends submitting the disputes under the contract to SIACA.

Gather aviation experts and educate young practitioners

SIACA has organised various events to gather aviation legal and business experts and educate young practitioners.

To provide support and guidance to SIACA, SHIAC established the Experts Committee (Committee) on Shanghai International Aviation Arbitration by the joint initiation of IATA, CATA and SHIAC. The Committee has 23 members from world-famous airlines, aviation manufacturer corporations, airports, aviation fuel corporations and aircraft financial lease companies. The committee will provide policy-making suggestions to the marketing and improvement of aviation arbitration. It will further offer advice in individual arbitration cases, and it will recommend and appraise evaluation institutions or experts.

Expand panel of aviation dispute arbitrators

In November 2014, for the operation of aviation arbitration under SIACA, SHIAC recruited 71 experts all over the world with both legal and aviation business background. So as to optimise the management structure, and the segmenting of domestic aviation industry, SHIAC will focus on aviation arbitration and recruit more experts, inter alia, from the fields of general aviation,

unmanned aerial vehicle, internet plus aviation, construction and operation of aviation facilities, and aviation environmental-protection, for its 2018–2021 term panel. SHIAC will also establish a specialised panel of aviation dispute arbitrators to facilitate the user's in selection of the optimal arbitrators in aviation disputes.

Training of international aviation legal practitioners

In January 2018, SIACA organised the China Round of Ninth International Air Law Moot Court (Moot Court). The Moot Court was proposed and established by the International Civil Aviation Organization (ICAO), organised by the Sarin Memorial Legal Aid Foundation from India and the International Institute of Air and Space Law of Leiden University in the Netherlands. It is the sole air law moot court competition around the world and of significant influence in air transport field. The Moot Court's purpose is to encourage more law students to study international air law. This competition focused on the case involving the collision between a unmanned aerial vehicle and a civil airplane, and inspired a thorough discussion on air law and aviation dispute resolution among the students. SHIAC will keep tracing and studying the legal issues in the moot court case to prepare for future real disputes.

The aviation arbitration of SHIAC has just taken off, yet has a long way to fly. Despite of the current limited number of cases, SHIAC's exploration to aviation arbitration will be beneficial and significant. SHIAC will also offer fair, impartial and efficient dispute resolution services, escort the aviation industry and provide a stage to protect the rights and interests of the users.

Timeline for the Shanghai International Arbitration Centre

Date	Event
June 2014	SHIAC established SIACA
28 July 2014	SHIAC visited ICAO and IATA in Montreal, Canada
28 August 2014	IATA, CATA and SHIAC concluded the strategic cooperation agreement Inauguration of SIACA Establishment and first Conference of the Experts Committee
13 November 2014	SHIAC recruited 71 aviation legal experts into its panel
25 February 2015	SHIAC attended the 2015 IATA Legal Symposium in Seoul, Korea
23 November 2015	SHIAC attended the 2015 ICAO World Aviation Forum, and visited ICAO and IATA in Montreal, Canada
29 January 2016	SHIAC attended the 2015 CATA Legal Committee Annual Conference
10 May 2016	SHIAC organized the 2016 Shanghai International Aviation Legal Forum
1 May 2017	SIACA started to use the premises in Hongqiao Linkong Business Park
25 May 2017	ECUPL, IIASL of the Leiden University and SHIAC organized the 2017 Shanghai International Aviation Legal Forum
16 August 2017	Ms Liu Fang, Secretary-General of ICAO visited SIACA
8 November 2017	SHIAC attended the Asia-Pacific Regional Seminar on the Cape Town Convention and its Aircraft Protocol and Cross-Border Transferability of Aircraft, and visited IATA Singapore office in Singapore
17 November 2017	SHIAC attended the OBOR Civil Aviation Legal Practice and Innovation Forum & 2017 Air Law Society Annual Conference
25 January 2018	SHIAC hosted China Round of Ninth International Air Law Moot Court
27 February 2018	SHIAC attended the 2018 IATA Legal Symposium in Bangkok, Thailand

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Established in 1988, the Shanghai International Economic and Trade Arbitration Commission (SHIAC) (also Shanghai International Arbitration Center, previously the China International Economic and Trade Arbitration Commission Shanghai Commission) has been providing independent, impartial, effective and professional arbitration services for commercial disputes from its inception.

In October 2013, SHIAC founded the China (Shanghai) Pilot Free Trade Zone Court of Arbitration and enacted the China (Shanghai) Pilot Free Trade Zone Arbitration Rules in line with international practice. In August 2014, SHIAC established the first aviation arbitration platform in the world: the Shanghai International Aviation Court of Arbitration, providing a significant approach for settling international aviation disputes. In October 2015, SHIAC established the first dispute resolution platform for the BRICS countries: the BRICS Dispute Resolution Center Shanghai, offering dispute resolution mechanisms for settling cross-border disputes among the BRICS countries. In November 2015, SHIAC set up the first dispute resolution platform for disputes arising between Chinese and African countries: the China-Africa Joint Arbitration Centre Shanghai, providing the business entities of China and Africa with convenient dispute resolution services.

SHIAC is dedicated to actively giving full play to the important role of arbitration among diversified dispute resolution methods and keeps devoting itself to building Shanghai to be the arbitration center in the Asia-Pacific region and the world as a whole.

Australia

Doug Jones, Frank Bannon, Dale Brackin, Steve O'Reilly and Clive Luck
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Australia has a long-standing tradition of embracing arbitration as a means of alternative dispute resolution (ADR). At a domestic level this is reflected by court-annexed and compulsory arbitration prescribed for certain disputes. Arbitration has become equally common in international disputes. Traditionally, arbitration in Australia was largely confined to disputes in areas such as building and construction. Strong and steady growth of the Australian economy over much of the past two decades and the opening of Asian markets have accelerated a growing trend towards the use of arbitration in other areas, particularly the energy and trade sectors.

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

Arbitration law reforms in Australia

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

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

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

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

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

Institutional arbitration in Australia: Australian Centre for International Commercial Arbitration (ACICA)

ACICA is Australia's premier international arbitration institution. It has published its own set of arbitration rules, known as the ACICA Arbitration Rules 2016 (the ACICA Rules). The first edition of the ACICA Rules was published in 2005, but ACICA has issued multiple revisions since then.

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

An earlier round of important amendments was made in 2011. The ACICA Rules were updated to include provisions relating to emergency arbitrators that enable the appointment of an emergency arbitrator in arbitrations that have commenced under the ACICA Rules, but in which a tribunal has not yet been appointed. Therefore, by accepting the ACICA Rules, parties also accept to be bound by the emergency rules and any decision of an emergency arbitrator. The power of the emergency arbitrator applies to all arbitrations conducted under the ACICA Rules, unless the parties expressly opt out of the regime in writing.

Also included in the 2011 amendments to the ACICA Rules were provisions for 'Application for Emergency Interim Measures of Protection'. These provide that the emergency arbitrator may grant any interim measures of protection on an emergency basis that he or she deems necessary and on such terms as he or she deems appropriate. Such emergency interim measures may take the form of an award or of an order that must be made in writing and must contain the date when it was made and reasons for the decision. These emergency procedures generally follow the same approach as the ACICA Rules on interim measures and will not prejudice a party's right to apply to any competent court for interim measures.

These updates to the ACICA Rules have provided parties in cross-border disputes with a prompt and efficient option for obtaining urgent interlocutory relief before an arbitral tribunal is constituted.

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

Rules aim to provide arbitration that is quick, cost effective and fair, considering in particular the amounts in dispute and complexity of issues. These rules operate on an opt-in basis.

Most recently, ACICA has launched and published its Tribunal Secretary Panel and Guidelines in recognition of the prevalent use of tribunal secretaries in commercial arbitration, and the significant value they often bring to the administration of the arbitration. Panel appointments last three years and applicants must have completed the Chartered Institute of Arbitrators (CIArb) Tribunal Secretaries Course (or equivalent), and demonstrate involvement in at least one arbitration, or have a minimum six months' experience as a tribunal secretary. A list of panel members is published on the ACICA website and tribunals are encouraged to make their own arrangement with the tribunal secretary in relation to appointments. The Guidelines came into effect on 1 January 2017 and apply to tribunal secretaries involved in an ACICA-administered arbitration. The object of the Guidelines is 'to encourage transparency with respect to the appointment, duties and remuneration of tribunal secretaries'. Importantly, the tribunal secretary's duties are contained in paragraphs 10–13 and are effectively limited to administrative assistance. Paragraph 12 prohibits the performance of any decision-making functions.

Australian Disputes Centre (ADC)

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

The ADC houses leading ADR providers, which, in addition to ACICA, include CIArb Australia and the Australian Maritime and Transport Arbitration Commission.

The ADC is available for ACICA, the Permanent Court of Arbitration, the International Chamber of Commerce, the International Centre for Dispute Resolution, the London Court of International Arbitration, the China International Economic and Trade Arbitration Commission, the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre, the American Arbitration Association and any other arbitrations, mediations or other processes. In addition to state-of-the-art hearing facilities, the ADC also provides all the necessary business support services, including case management and trust account administration provided by skilled and professional staff.

Other institutions: Perth Centre for Energy and Resources Arbitration (PCERA) and Melbourne Commercial Arbitration and Mediation Hub (MCAMH)

In 2014, the PCERA was established as a not-for-profit centre for arbitration and expert determination specialised in administering dispute resolution in the energy and resources sector.

The PCERA is geographically located in Perth, Western Australia, which is a regional hub for Australian and Asian energy and resources projects. The PCERA boasts an institutional framework, the PCERA Arbitration Principles, which is designed to facilitate the efficient resolution of energy and resource industry disputes. This framework is coupled with a specialised knowledge base drawn from an array of specialised arbitration practitioners. These qualities make the PCERA an attractive option for disputing parties in the energy and resources sector.

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

Primary sources of arbitration law

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

Matters of international arbitration are governed by the IAA, which incorporates the Model Law. The Model Law provides for a flexible and arbitration-friendly legislative environment, granting parties ample freedom to tailor the procedure to their individual needs.

The IAA supplements the Model Law in several respects. Division 3, for example, contains provisions on the parties' right to obtain subpoenas, requiring a person to produce certain documents or to attend examination before the arbitral tribunal. While these provisions apply unless the parties expressly opt out, there are other provisions (those dealing with the consolidation of proceedings) that only apply if the parties expressly opt in. The IAA also provides clarity to the meaning of the term 'public policy' for the purpose of articles 34 and 36 of the Model Law.

Part II of the IAA implements Australia's obligations as a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Australia acceded to the New York Convention without reservation. Australia is also a signatory to the ICSID Convention, the implementation of which is contained in part IV of the IAA.

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

Arbitration agreements

For international arbitrations in Australia, the Model Law and the New York Convention require the arbitration agreement to be in writing. While article II(2) of the New York Convention requires an 'agreement in writing' to include an arbitral clause in a contract or an arbitration agreement signed by both parties or contained in an exchange of letters, the Model Law is more expansive, covering content recorded in any form. Under the IAA, the term 'agreement in writing' has the same meaning as under the New York Convention. Domestic arbitrations under the CAAs adopt the more expansive definition contained in the Model Law.

In the landmark decision of *Comandate Marine Corp v Pan Australia Shipping* [2006] FCAFC 192, the Federal Court of Australia confirmed its position that an arbitration clause contained in an exchange of signed letters is sufficient to fulfil the written requirement. However, as the Federal Court pointed out in its decision in *Seeley International Pty Ltd v Electra Air Conditioning BV* [2008] FCA 29, ambiguous drafting may still lead to unwanted results. In that case, the arbitration clause included a paragraph providing that nothing in the arbitration clause would prevent a party from 'seeking injunctive or declaratory relief in the case of a material breach or threatened breach' of the agreement. The Federal Court interpreted that paragraph to mean that the parties intended to preserve their right to seek injunctive or declaratory relief before a court. The court was

assisted in its interpretation by the fact that the agreement also included a jurisdiction clause.

Under Australian law, arbitration agreements are not required to be mutual. They may confer a right to commence arbitration to one party only (see *PMT Partners v Australian National Parks & Wildlife Service* [1995] HCA 36). Some standard form contracts, particularly in the construction industry and the banking and finance sector, still make use of this approach.

Arbitrability

Australian courts have taken a broad view on the scope of commercial disputes that are capable of settlement by arbitration (ie, arbitrable). In the landmark case of *Rinehart v Welker* [2012] NSWCA 95, Bathurst CJ clarified that 'it is only in extremely limited circumstances that a dispute which the parties have agreed to refer to arbitration will be held to be non-arbitrable' (at [167]). After a detailed synthesis of the Australian authorities, his Honour held that disputes that are arbitrable may include claims involving fiduciary breach, fraud, serious misconduct, claims for the removal of a trustee and certain statutory claims for breach of the Competition and Consumer Act 2010 (Cth) (such as claims under section 18 in respect of misleading and deceptive conduct) and contraventions of the Corporations Act 2010 (Cth), notwithstanding that such claims may entail the grant of statutory remedies by the arbitral tribunal.

However, the arbitrability of commercial disputes is not without its limits. For example, there is a recognised principle that arbitrators cannot award relief that affects the public at large. Competition, bankruptcy and insolvency disputes are generally (although not invariably) non-arbitrable. Intellectual property disputes affecting rights in rem, such as the status of patents and trademark, are similarly non-arbitrable (*Larkden Pty Limited v Lloyd Energy Systems Pty Limited* [2011] NSWSC 268).

Where multiple claims are brought by one party, but only some of which are capable of settlement by arbitration, the courts have approached this issue by staying court proceedings only for those claims it considers capable of settlement by arbitration (see *Hi-Fert v Kiukiang Maritime Carriers* (1998) 159 ALR 142).

Third parties

There are very limited circumstances in which a third party who is not privy to the arbitration agreement may be a party to the arbitral proceedings. One situation in which this can occur is in relation to a parent company where a subsidiary is bound by an arbitration agreement, though this exception is yet to be finally settled by Australian courts. There is, however, authority suggesting that a third party can be bound by an arbitration agreement in the case of fraud or where a company structure is used to mask the real purpose of a parent company (see *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449).

Under the revised IAA, courts now have the power to issue subpoenas for the purpose of arbitral proceedings, requiring a third party to produce to the arbitral tribunal particular documents or to attend for examination before the arbitral tribunal (section 23(3) of the IAA).

Similarly, under the CAAs, a party may obtain a court order compelling a person to produce documents under section 27A.

However, a 2017 decision of the Federal Court of Australia is worth note in this context. In *Samsung C&T Corporation, in the matter of Samsung C&T Corporation* [2017] FCA 1169, the Federal Court declined to grant the request of a party to a Singaporean-seated arbitration for a subpoena of documents located in Australia pursuant to section 23 of the IAA. The decision has created some ambiguity as to whether Australian courts have power to issue subpoenas in aid of foreign-seated arbitrations (as opposed to only Australian-seated arbitrations). It has been suggested by some commentators that the decision does not accord with the intent and purpose of the IAA and Model Law, and that it is therefore likely to be revisited in the future.

The arbitral tribunal

Appointment and qualification of arbitrators

Australian laws impose no special requirements with regard to the arbitrator's professional qualifications, nationality or residence. However, arbitrators must be impartial and independent, and must disclose circumstances likely to give rise to justifiable doubts as to their impartiality or independence. The IAA clarifies that a justifiable doubt exists only where there is a real danger of bias of the arbitrator in conducting the arbitration.

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

Where the parties have not agreed upon an appointment procedure or where their appointment procedure fails, parties are able to seek the appointment of arbitrators for international arbitrations from ACICA. Pursuant to article 11(5) of the Model Law, any appointment made by ACICA is unreviewable by a court.

Furthermore, the emergency arbitrator provisions in the ACICA Rules enable the appointment of an emergency arbitrator in arbitrations commenced under the ACICA Rules but before the case is referred to an arbitral tribunal. The emergency procedure calls for ACICA to use its best endeavours to appoint the emergency arbitrator within one business day of its receipt of an application for emergency relief.

Arbitration law in Australia does not prescribe a special procedure for the appointment of arbitrators in multiparty disputes. If multiparty disputes are likely to arise under a contract, it is advisable to agree on a set of arbitration rules containing particular provisions for the appointment of arbitrators under those circumstances, such as those found under article 13 of the ACICA Rules.

Challenge of arbitrators

For arbitrations under the IAA and the CAAs, a party can challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence. The parties are free to agree on a procedure for challenging arbitrators. Failing such agreement, the Model Law and CAAs prescribe that the party must initially submit a challenge to the tribunal, and then may apply to a competent court if the challenge is rejected.

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

Power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary

The CAAs contain provisions under section 27D to facilitate med-arb, a process whereby an arbitrator may act as a mediator or conciliator or other 'non-arbitral intermediary' to resolve the dispute.

Med-arb may occur if the arbitration agreement provides for it or the parties have consented to it. Under the CAAs, an arbitrator who has acted as a mediator in mediation proceedings that have been terminated may not conduct subsequent arbitration proceedings in relation to the dispute unless all parties to the arbitration consent in writing.

Liability of arbitrators

The IAA and CAAs both provide that arbitrators are not liable for negligence in respect of anything done or omitted to be done in their capacity as arbitrators (with the exception of fraud). This exclusion is also reflected in article 49 of the ACICA Rules. There are no known cases where an arbitrator has been sued in Australia.

The arbitral procedure

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

Parties are generally free to tailor the arbitration procedure to their particular needs, provided they comply with fundamental principles of due process and natural justice. In doing so, the most significant requirement under the Model Law is that the parties are treated with equality and are afforded a reasonable opportunity to present their case. This requirement cannot be derogated from, even by the parties' agreement.

Court involvement

Australian courts have a strong history of supporting the autonomy of arbitral proceedings. Courts will generally interfere only if specifically requested to do so by a party or the tribunal, and only where the applicable law allows them to do so.

The courts' powers under the Model Law, and therefore under the IAA, are very restricted. Under the Model Law, courts may:

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

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

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

- applications by a party to set aside or appeal against an award (sections 34 and 34A);
- where there is a failure to agree on the appointment of an arbitrator, the court may appoint an arbitrator at the request of a party (section 11);
- a challenge to an arbitrator (section 13);
- terminating the mandate of an arbitrator who is unable to perform the arbitrator's functions (section 14);
- reviewing an arbitral tribunal's decision regarding jurisdiction (section 16); and
- making orders in relation to the costs of an aborted arbitration (section 33D).

Interim measures

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

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

Stay of proceedings

Provided the arbitration agreement is drafted widely enough, Australian courts will stay proceedings in face of a valid arbitration agreement. Section 8 of the CAAs gives greater primacy to the arbitration agreement. So long as there is an arbitration agreement that is not null or void, inoperative or incapable of being performed, the court must refer the parties to arbitration. There is no scope for the court to exercise discretion so as not to enforce an arbitration agreement.

For international arbitrations, Australian courts support the autonomy of international arbitration and will stay court proceedings in the presence of a valid arbitration agreement broad enough to cover the dispute, assuming the subject matter of the dispute is arbitrable. Courts will refuse a stay only if they find the arbitration agreement is null, void, inoperative or incapable of being performed and may impose such conditions as they think fit in ordering a stay.

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

The IAA is expressly subject to section 11 of the Carriage of Goods By Sea Act 1991 (Cth), which renders void an arbitration agreement contained in a bill of lading or similar document relating to the international carriage of goods to and from Australia, unless the designated seat of the arbitration is in Australia. There are also statutory provisions in Australia's insurance legislation that render void an arbitration agreement unless it has been concluded after the dispute has arisen.

Party representation

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

Confidentiality of proceedings

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

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

The 2015 amendments to the IAA effectively displaced the well-known decision in *Esso Australia Resources v Plowman* (1995) 183 CLR 10, in which the High Court of Australia held that while arbitral proceedings and hearings are private in the sense that they are not open to the general public, this does not mean that all documents voluntarily produced by a party during the proceedings are confidential.

Evidence

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

Although arbitrators enjoy great freedom in the taking of evidence, in practice, arbitrators in international proceedings will often refer to the IBA Rules on the Taking of Evidence (the IBA Rules). The ACICA Rules also recommend the adoption of the IBA Rules in the absence of any express agreement between the parties and the arbitrator (article 31.2).

The situation is slightly different in domestic arbitrations. Despite the liberties conferred by section 19(3) of the CAAs, many arbitrators still conduct arbitrations similarly to court proceedings: namely, witnesses are sworn in, examined and cross-examined. Nevertheless, arbitrators are more and more frequently adopting procedures that suit the particular circumstances of the case and that allow for more efficient proceedings.

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

Form of the award

The proceedings are formally ended with the issuing of a final award. The Model Law and the CAAs contain similar form requirements that awards must meet (see article 31 of the Model Law and section 31 of the CAAs).

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

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

Recourse against award

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

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

Further, the Federal Court's decision in *Uganda Telecom Pty Ltd v Hi Tech Telecom Pty Ltd* [2011] FCA 131 reinforced the finality of arbitral awards and Australia's pro-enforcement policy by holding that there is no general discretion to refuse enforcement; and the public policy ground for refusing enforcement under the IAA should be interpreted narrowly and should not give rise to any sort of residual discretion.

In *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403, the Supreme Court of New South Wales held that where parts of an award are affected by a breach of the rules of natural justice in respect of one aspect of an arbitration, the infected parts of the award can be severed and the balance of the award enforced in accordance with section 8 of the IAA. The decision was subsequently affirmed by the Court of Appeal (see [2015] NSWCA 229). This case reflects the strongly pro-enforcement attitude of Australian courts to enforcing arbitral awards.

The same grounds for setting aside an award apply domestically. However, the CAAs also permit an appeal of an award on a question of law in limited circumstances (section 34A). Such an appeal is only possible with the leave of the court or if the parties agree to the appeal before the end of the appeal period. Further, the court must be satisfied that the following requirements are satisfied:

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

The confinement of challenges under the IAA and CAAs strictly to those grounds set out in the Acts was confirmed

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

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

Enforcement

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

Section 8 of the IAA implements Australia's obligations under article V of the New York Convention and provides for foreign awards to be enforced in the courts of a state or territory as if the award had been made in that state or territory and in accordance with the laws of that state or territory. For awards made within Australia, either article 35 of the Model Law for international arbitration awards, or section 35 of the CAAs for domestic awards, applies.

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

Investor-state arbitration

From an Australian perspective, the opening of foreign markets, especially in Asia, is also increasing the significance of the protection of foreign direct investment under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the ICSID Convention). While the number of investment arbitrations involving Australian parties is expected to increase significantly over the next decade, the level of awareness about the availability of investment protection under investment treaties still needs to be raised.

Australia continues to negotiate bilateral investment treaties (BITs) and free trade agreements (FTAs) actively. Australia has entered into FTAs with New Zealand, Chile, the United States, Malaysia, Singapore and Thailand, and is a party to the ASEAN–Australia–New Zealand FTA. Significantly, Australia was one of 12 nations to sign the Trans-Pacific Partnership (TPP) on 4 February 2016, following over seven years of negotiations. However, at the time of writing, it appears that the TPP is unlikely to enter force following the withdrawal of the United States in January 2017. In March 2018 the 11 signatories to the TPP other than the United States signed an alternative agreement known as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The CPTPP is a free trade agreement involving 11 countries in the Pacific region, namely Australia, New Zealand, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore and Vietnam. Although the CPTPP has yet to enter into force, notably it does contain investor-state arbitration provisions. Earlier in 2014, Australia concluded FTAs with China, Japan and Korea, representing Australia's three largest export markets. Further FTAs are currently under negotiation with India, Indonesia, and the Gulf Cooperation Council, in addition to the Pacific Agreement on Closer Economic Relations Plus and the Regional Comprehensive Economic Partnership.

Following a brief period of reluctance towards including investor-state dispute settlement (ISDS) provisions in its BITs and FTAs, in recent years Australia has been more willing to incorporate these provisions. Chapter 9 of the TPP establishes robust investment protections and detailed dispute settlement procedures that allow for arbitration in the event of a breach of the protections. FTAs with China and Korea also incorporated ISDS provisions including requirements that Australian investors must be treated fairly and equitably, and prohibit discrimination against foreign investments in favour of domestic investments. The FTA with Japan does not include ISDS provisions but it does contain a review clause providing for future consideration of ISDS provisions.

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Professor Doug Jones AO is a leading independent international commercial and investor/state arbitrator.

The arbitrations in which he has been involved include infrastructure, energy, commodities, intellectual property, commercial and joint venture, and investor-state disputes spanning over 30 jurisdictions around the world.

Doug is an arbitrator member at Arbitration Place in Toronto and a door tenant at Atkin Chambers in London, and has an office in Sydney, Australia.

Prior to his full-time practice as an arbitrator Doug had 40 years' experience as an international transactional and disputes projects lawyer.

Doug is acknowledged as a leading arbitrator and is highly ranked in a number of leading publications. Most recently, in 2017, *Chambers Asia-Pacific* recognised Doug as 'without question the leading Asia-Pacific-based arbitrator for construction disputes', and he maintained his Band One ranking in the International arbitration category.

Doug has published and presented extensively, and holds professorial appointments at Queen Mary College, University of London; and Melbourne University Law School.

Doug is an Officer of the Order of Australia, and one of only four Companions of the Chartered Institute of Arbitrators.

Frank Bannon is a leading partner in the construction, major projects and international arbitration groups whose expertise covers a range of areas, including construction, engineering and mining, major projects, international arbitration, dispute resolution and litigation.

Frank has acted in a broad range of disputes both locally and internationally, and is experienced in all forms of dispute resolution including litigation, arbitration, expert determination and mediation (both in advising at the contract drafting stage and at the dispute stage). He has acted in a number of high-profile international arbitrations concerning major infrastructure projects under most of the major international institutional rules, including UNCITRAL, the International Chamber of Commerce, the Singapore International Arbitration Centre and the Kuala Lumpur Regional Centre for Arbitration.

Frank is consistently recognised and acknowledged for his expertise in leading legal directories. He has been voted by peers as one of Australia's best lawyers in construction/infrastructure (2008–2018), is classified as 'Pre-eminent' in *Doyle's Guide – Leading Construction & Infrastructure Litigation Lawyers* (New South Wales 2018) and is listed in construction – Australia in *Chambers Asia-Pacific 2018*.

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Clayton Utz was founded in 1833 and today is one of the largest and most successful commercial law firms in Australia. We have 169 partners and over 1,600 employees based in six offices around the country (Sydney, Melbourne, Brisbane, Canberra, Darwin and Perth).

Our clients include Australia's and the world's largest corporations and financial institutions as well as federal and state government agencies. We also maintain strong links with legal firms across the globe through membership of the Lex Mundi and Pacific Rim Advisory Council (PRAC) networks.

Clayton Utz is a full-service firm with 14 national practice groups (NPG): banking and financial services; competition; commercial litigation; corporate, M&A and capital markets; employment and workplace relations; energy and resources; environment and planning; insurance advisory and claims; intellectual property and technology; major projects; public sector; real estate; restructuring and insolvency; and taxation. Our NPG structure allows us to focus on the needs of individual sectors of commerce and industry by supporting them with precise and specialised areas of legal practice. We have been a key player in many of Australia's largest and most complex projects, with clients including federal and state government departments and many of Australia's top 100 companies.

The international arbitration group at Clayton Utz is one of the leading practices in the Asia-Pacific region. The team is known for its world-class practitioners. Doug Jones is well known throughout the international arbitration community and has advised and represented clients in major international transactions, projects and disputes throughout the world under all of the major arbitration rules and regimes.

Clayton Utz is committed to the development and study of international arbitration and international dispute resolution in Australia and the Asia-Pacific region. Clayton Utz, supported by the University of Sydney, holds an annual International Arbitration Lecture, with previous presenters including Sally Harpole, Toby Landau QC, Lord Mustill, Fali Nariman, Rusty Park, Arthur Marriott QC, Karl-Heinz Böckstiegel, Gabrielle Kaufmann-Kohler, Jean-Claude Najar, Essam Al Tamimi, David Rivkin, Chief Justice James Allsop AO and most recently Michael Hwang SC and, most recently, the Honourable Sir Bernard Eder.

Dale Brackin
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Practising widely in building and construction law for more than 30 years, Dale has also developed particular expertise in the resolution of commercial disputes on construction and engineering projects through litigation, arbitration and alternative dispute resolution techniques throughout Australia and in various international jurisdictions.

He has conducted numerous arbitration proceedings, including domestic arbitrations in various states and territories of Australia as well as international arbitrations, both ad hoc and institutional (including under the ICC Rules, the UNCITRAL rules and the EDF Rules).

Dale has been widely recognised for his expertise. He was voted by peers as one of Australia's Best Lawyers in construction/infrastructure and litigation (2008–2018), he was recognised by *Chambers Asia Pacific* as leading in the Construction field (2013–2018) and was listed in *Doyle's Guide* for 2018 as 'Pre-eminent' in Queensland for construction.

Steve O'Reilly
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Steve O'Reilly is a senior partner in the construction, major projects and international arbitration groups. Steve has extensive experience in a wide range of construction, engineering, mining and energy, and resources projects. He has been involved in some of the largest construction disputes in Australia, South East Asia, the United States and the United Kingdom.

Steve's practice lends itself to major arbitration work commonly involving international arbitration through the International Chamber of Commerce or UNCITRAL rules or through bespoke contracts for large infrastructure, and energy and resources projects with domestic arbitration agreements but evoking international arbitration style procedures.

Steve has been voted by peers as one of Australia's best lawyers in construction/infrastructure (2008–2018).

Clive Luck
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Hong Kong

Sanjna Pramod
CMS Hong Kong

Introduction

The Belt and Road Initiative (BRI) was first announced by President Xi of the People's Republic of China (PRC) in late 2013 and aims to connect Asia, Europe and Africa along five main routes.[1] With the spurt of commercial and investment activities, the BRI sets the scene for the further development and popularity of international arbitration in Asia.

The BRI provides unprecedented opportunities for the dispute resolution landscape in Hong Kong, with Hong Kong being ideally placed to become the preferred venue for arbitration between the PRC entities involved in BRI opportunities and parties hailing from the 72 countries participating in the BRI.[2] The proximity to China that may have previously led to uncertainty about the judicial system in Hong Kong now has the potential to help, with the BRI offering Hong Kong a historic opportunity to leverage its status as a modern financial hub combining efficient infrastructure, well-regulated markets and Western-styled legal institutions with a deep understanding of Chinese culture and business practices.[3]

Ms Carrie Lam, chief executive of Hong Kong Special Administrative Region, on 12 June 2016 showcased Hong Kong as a leading intermediary between mainland China and the rest of the world. To support this statement, she quoted certain principal considerations. Hong Kong's status as an international financial centre and the world's largest offshore renminbi business centre has the capital, products and expertise to meet the growing demand for financial services along the BRI. Ms Lam sang the praises of the Hong Kong professionals in the legal and arbitration sector as ideal service providers for dispute resolution between BRI enterprises.[4]

Mainland Chinese authorities also pay credence to Hong Kong's significant role in the BRI. On 18 May 2016, Mr Zhang Dejiang, member of the Standing Committee of the National People's Congress, in his keynote speech at the inaugural Belt and Road Summit, expressed clear support for Hong Kong's role in the BRI. He observed that Hong Kong sits at the busiest international sea route and boasts a developed port economy and is an important gateway in China's expansion. He further stated that Hong Kong and mainland China have developed all-round, wide-ranging and high-level exchange cooperation, and that Hong Kong should seize new opportunities arising from the BRI.[5]

President Xi Jinping's BRI as mainland China's flagship project entails ambitious global infrastructure projects and has gained momentum since 2013.[6] Many of the countries involved in the BRI have unstable geopolitical climates that can give rise to increased potential for legal disputes. Some examples of BRI disputes could be late or non-payment of equipment suppliers, abandonment of projects because of political turmoil or companies not strictly following contracts.[7]

Thus, Hong Kong's strategic location, business environment and legal expertise, jettisoned by the support of the Hong Kong and mainland Chinese governments, paves the way for a significant role in the BRI in more ways than one.

This article discusses the key features that place Hong Kong as the most viable seat for resolution of disputes arising from the BRI.

Hong Kong as a neutral seat

Over the years, legal practitioners, arbitral institutions,[8] the judiciary and members of the government have consistently worked together to clear the air around the PRC's 'influence' over Hong Kong.[9] Any concern that Hong Kong is subject to 'undue political influence' from the PRC is unfounded. Hong Kong has a robust, independent legal system, a strong legal profession, independent judiciary, user-friendly arbitration legislation, effective enforcement of both domestic and foreign awards, and the availability of a diverse pool of international arbitrators as well as the presence of world class arbitration institutions.[10]

The Basic Law[11] effectively serves as Hong Kong's constitution within China and implements the idea that Hong Kong and China will function as 'One Country, Two Systems'. Hong Kong retains its autonomous common law framework including an independent judiciary to exercise the power of final adjudication.[12] Further, the Basic Law expressly states that the national laws of the PRC shall not be applied to Hong Kong.[13]

Clear, certain and accessible arbitration law

In June 2011, a new Arbitration Ordinance[14] (Arbitration Ordinance) came into effect which reformed the arbitration law of Hong Kong by unifying the legislative regimes for domestic and international arbitrations on the basis of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL Model Law).[15]

The Arbitration Ordinance is self-contained and comprehensively regulates all issues relevant to both domestic and international arbitration. In recent years, the Legislative Council of Hong Kong has made several amendments to the Arbitration Ordinance in order to address current issues arising in the context of arbitration and arbitrability in Hong Kong. The amendments continue to ensure that Hong Kong's arbitration laws are modern and up-to-date, which enhance its status as a preferred seat of arbitration.

The most notable amendments made in the Arbitration Ordinance include the express permission for third-party funding in arbitration and the jurisdiction to hear intellectual property rights (IPR) disputes. These amendments are discussed in further detail below.

Enforceability of interim measures

As stated above, the BRI necessarily involves several Chinese state-owned enterprises (SOEs)[16] as the driving force behind many BRI projects along the old Silk Road and maritime trade routes. With the Chinese parties in BRI projects likely to be

the party with the better bargaining power in contractual negotiations, many may prefer dispute resolution clauses with a seat in China.

Generally speaking, in the context of arbitral proceedings, the option of seeking interim relief from the arbitral tribunal is often preferred. However, the Arbitration Law of the People's Republic of China does not enable a party to seek interim relief from an arbitral tribunal but only from a competent court.[17] By way of contrast, Hong Kong is well-placed to arbitrate BRI disputes in this respect because, as is typical of arbitration-friendly jurisdictions, the courts in Hong Kong are empowered to recognise and enforce interim measures ordered by an arbitration tribunal seated in or outside Hong Kong.[18]

An interim measure is defined as a 'temporary measure whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided'.[19] The arbitral tribunal is equipped with the power to order a party to:[20]

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

In addition, section 21M of the High Court Ordinance[21] empowers the court to grant interim relief in aid of proceedings seated outside Hong Kong without requiring that the relief must be incidental to substantive proceedings commenced in Hong Kong.[22]

Recognition of emergency relief

The legislature has backed Hong Kong's efforts to strengthen its position to become a global seat for international arbitration. A significant provision in the Arbitration Ordinance permits all emergency relief granted by an emergency arbitrator, either granted in or out of Hong Kong, to be enforced in the same manner as an order or direction of the Hong Kong courts, with leave of the High Court.[23]

The court may refuse leave to enforce emergency relief granted outside Hong Kong unless the party seeking to enforce it can demonstrate that the relief being sought is a 'temporary measure' (including, for example, an injunction) with the aim of doing one or more of the following:[24]

- maintain or restore the status quo pending the determination of the dispute concerned;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award made by an arbitral tribunal may be satisfied;
- preserve evidence that may be relevant and material to resolving the dispute;
- give security in connection with anything to be done under the measures stated above; or
- give security for the costs of the arbitration.

The Hong Kong International Arbitration Centre (HKIAC) is also reacting to the trend of arbitral institutions in other arbitration-friendly jurisdictions of including emergency arbitrator provisions in the institutional rules. The HKIAC is currently consulting on amendments to its Administered Arbitration Rules and has released a second draft of the proposed new Administered Arbitration Rules.[25] The proposed rules allow an applicant to file an application for the appointment of an emergency arbitrator prior to the submission of a Notice of Arbitration, provided that such notice is submitted to the HKIAC within seven days of receipt of the application, unless the emergency arbitrator extends such term.[26]

The emergency arbitration mechanism, assuming it is implemented, will provide a useful tool for parties engaged in BRI projects which desire rapid enforceable solutions prior to final arbitral resolution. The key benefit of appointing an emergency arbitrator over seeking relief from the main tribunal, once constituted, is, of course, urgency and the ability to maintain the status quo for the duration of the main arbitral proceedings.

Minimal court intervention

The underlying policy of the Arbitration Ordinance is to respect party autonomy and restrict the court's interference in the course of the arbitration.[27] In this spirit, the judiciary maintains a policy of minimal intervention and routinely supports the arbitral regime by upholding its independence and finality, particularly in respect of recourse against awards (discussed further below).

The primary objective of the courts in Hong Kong, in the context of arbitration, is to facilitate the arbitral process and assist in enforcement of arbitral awards.[28] The courts may intervene only in circumstances as expressly provided for in the Arbitration Ordinance.[29]

Enforcement is a matter of administrative procedure and Hong Kong courts strive to be as mechanistic as possible.[30] In considering whether or not to refuse enforcement of an award, the court does not look into the merits or at the underlying transaction.[31]

Recourse against awards

An arbitral award can be challenged under the Arbitration Ordinance only on limited grounds. The ability to appeal an arbitral award depends on whether the parties have, or deemed to have, opted in to certain opt-in provisions in Schedule 2 of the Arbitration Ordinance, which otherwise do not apply.

The types of challenge available under the Arbitration Ordinance are the following.

Setting aside an award under section 81 of the Arbitration Ordinance

The setting aside procedure under the Arbitration Ordinance under section 81, read together with section 5, applies only to awards given by tribunals seated in Hong Kong. Section 81 is mandatory and cannot be contracted out of by the parties. The exhaustive grounds for setting aside are set out in section 81(1) and are analogous to article 34(2) of the UNCITRAL Model Law.

Challenging an award on grounds of serious irregularity[32]

The provisions in relation to challenging an award under Schedule 2, section 4 and appealing an award under Schedule 2, section 5 are not mandatory but are opt-in provisions. Schedule 2 contains the provisions previously applicable to domestic arbitrations before the Arbitration Ordinance was revised in 2011 and the separate regimes for domestic and international arbitrations abolished. Until recently, it was sufficient for parties to refer to their arbitration as a 'domestic arbitration' in order to trigger the application of Schedule 2. However, for arbitration agreements signed from 1

June 2017, it is no longer sufficient for parties to an arbitration agreement to refer to a 'domestic arbitration'; rather, parties should expressly opt in to the entirety of Schedule 2 or state that they wish specific provisions of Schedule 2 to apply in their arbitration.

Schedule 2, section 4(2) of the Arbitration Ordinance, sets out the categories of serious irregularity in respect of which challenges may be brought. It is not sufficient for an applicant to establish that a serious irregularity has occurred. In addition, the applicant must show that the irregularity caused or will cause substantial injustice.[33]

The Court of Appeal in Grand Pacific Holdings Ltd v Pacific China Holdings Ltd[34] set a high threshold and held that in dealing with an application to set aside an award, only a sufficiently serious error, which undermined due process, could be considered. Even so, the court may still refuse to set aside the award if the court was satisfied that the arbitral tribunal could have reached a different conclusion. Some breaches might be so egregious that an award would be set aside although the result could not be different.[35]

Appealing an award on question of law[36]

Schedule 2, section 5 read together with Schedule 2, section 6(1), provides that an appeal under Schedule 2, section 5 can only be brought with the agreement of the parties or with leave of the court.

As per Schedule 2, section 6(4) of the Arbitration Ordinance, leave to appeal will only be granted if the court is satisfied that:

- the decision of the question will substantially affect the rights of one or more of the parties;
- the question is one which the arbitral tribunal was requested to decide; or
- on the basis of findings in the award, the decision of the arbitral tribunal on the question is obviously wrong or the question is one of general importance and the question is at least open to serious doubt.

The court in *A & Others v Housing Authority*[37] set the test for leave to appeal against an arbitral award. Under section 6(4) of Schedule 2 to the Ordinance, leave to appeal is to be granted only if the court is satisfied that, on the basis of the findings of fact in the award, the decision of the arbitral tribunal on the question is 'obviously wrong' or the question is one of 'general importance' and the decision of the arbitral tribunal is 'at least open to serious doubt'.[38] In either case, Justice Chan remarked that 'whether the appropriate test to be applied is "obviously wrong", or "open to serious doubt", the threshold is high'.[39]

Recognition and enforcement of awards

One of the greatest advantages of arbitration is the enforceability of awards. BRI disputes will almost certainly involve Chinese parties, in which the ability to enforce awards in mainland China and against Chinese assets will be an important consideration. Arbitral awards rendered in Hong Kong are enforceable in more than 150 jurisdictions under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[40] and in mainland China under the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region.[41] The Secretary for Justice of Hong Kong regards this extensive network as 'one of the important reasons why many parties choose to conduct arbitration in Hong Kong'.[42]

The Hong Kong judiciary prides itself with a remarkable track record of enforcing arbitral awards. As per the statistics published by the HKIAC, the courts have not refused enforcement of an arbitral award from 2010–2017.[43] These statistics are telling of the determined and consistent pro-arbitration approach of the courts in Hong Kong.

Recognition of third-party funding

On 14 June 2017, Hong Kong approved third-party funding (TPF) of arbitrations seated in Hong Kong by adopting the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Third Party Funding Ordinance).[44]

Scope

The Third Party Funding Ordinance amends the Arbitration Ordinance[45] and the Mediation Ordinance,[46] to permit TPF for arbitration, mediation and related proceedings. The Third Party Funding Ordinance unequivocally provides that third-party funding of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty.[47] This is the case both for proceedings in Hong Kong and for work done in Hong Kong in pursuance of arbitrations or mediations outside the territory.

Definitions

A 'third-party funder' may provide 'arbitration funding' to a 'funded party' under a 'funding agreement' in return for a financial benefit if the arbitration is successful within the meaning of the funding agreement.[48] Arbitration funding can be in the form of money or any other financial assistance in relation to any costs of the arbitration.[49] The funding agreement must be in writing and includes only those made on or after the Third Party Funding Ordinance comes into effect.[50]

The definition of a third-party funder is not limited to only professional funders but extends to 'any person who is a party to a funding agreement and who does not have an interest recognised by law in the arbitration other than under the funding agreement'.[51] Given the definition of third-party funders, lawyers may establish funding practices, however lawyers and law firms that act for any party in relation to the arbitration may not fund those proceedings.[52] This is reflective of Hong Kong's stance against lawyers accepting contingency fees.[53]

Disclosure obligations

The funded party must give written notice to the arbitration body and each party to the arbitration of:

- the fact that there is a funding agreement;
- the name of the funder; and
- the end of the funding agreement (other than because the arbitration has ended).[54]

Code of practice

A Code of Practice (Code) may be issued by an 'authorised body' appointed by the Secretary of Justice to set out the practices and standards with which third-party funders are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration.[55] The Arbitration Ordinance, save for providing that the Code will be issued, does not specify exactly what these standards and practices will be.

A draft Code circulated to the Legislative Council[56] provides some insight as to what may be contained in the Code. A third party will be subject to duties to maintain capital adequacy requirements to pay all debts when they are due and payable and cover aggregate funding liabilities under all of their funding agreements

for a minimum period of thirty six months.[57] They also must maintain access to a minimum of HK$20 million of capital.[58]

In addition, the draft Code includes provisions for instances where there is non-compliance by a subsidiary or an associated entity of a third-party funder, a dispute resolution mechanism or an associated entity of a third party funder, a dispute resolution mechanism for disputes on the funding agreement, a complaints procedure and a requirement for an annual return.[59]

The Code will not be a part of the legislation and so a failure to comply with the Code will not attract any legal consequences.[60]

Thus, TPF provisions are welcomed as an encouragement for parties who may have a strong case but lack the requisite funding in commencing an arbitration. TPF creates opportunities to boost Hong Kong's role as a financing and dispute resolution hub for BRI projects.

Arbitrability of IPR disputes in Hong Kong

IPRs play a crucial role in the implementation of the BRI initiative. Trademark and branding activities may be the foundation for entities that plan to expand their businesses to BRI counties.[61] Patent regime and innovation are the primary drivers of technology transfers between China and BRI countries.[62]

The 'Visions and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road', jointly issued by the National Development and Reform Commission, the Ministry of Foreign Affairs and the Ministry of Commerce of the PRC, aims to foster the development of a number of technologies and industries such as cross-border electronic commerce, maritime engineering technologies, environmental protection industries and energies industries.[63] All these industries would need extensive investment in IPR acquisition, licensing, protection and enforcement. Given that the BRI covers a wide range of jurisdictions, IPR disputes can be expected in cross-border transactions and investments.

Arbitration is increasingly being used to resolve disputes involving IPR especially when involving parties from different jurisdictions. Court litigation for IPR disputes often result in multiple proceedings under different laws, with the risk of conflicting results. On the other hand, arbitration of IPR disputes has the attraction of offering a single proceeding under the law determined by the parties, coupled with an arbitral procedure and nationality of the arbitrator, or arbitrators, which is perceived as neutral from the perspective of the parties.

The enforcement of the Arbitration (Amendment) Ordinance in 2017 has paved the way for a clear stance on the arbitrability of IPR disputes, thereby establishing Hong Kong as the prime venue for arbitrating BRI IPR disputes.[64]

Scope

In Hong Kong, parties resort to arbitration to resolve any type of dispute over any IPR, irrespective of whether such IPR is protected by registration and whether it is registered or subsists in Hong Kong or any other jurisdiction.[65] Examples of IPR include patents, know-how, trademarks, copyright as well as IPRs that are registered or subsist in Hong Kong or in other jurisdictions such as utility models or other types of 'petty patents', supplementary protection certificates, database rights, etc, as well as new types of IPRs which may emerge in the future.[66]

Limitations of Enforcement

Parties can save significant time and costs by choosing arbitration to resolve IPR disputes. Rather than initiating multiple proceedings in multiple courts, pursuant to the IPR amendments to the Arbitration Ordinance, all IPR disputes arising in multiple jurisdictions could be resolved in arbitration seated in Hong Kong.

As stated above, parties can enforce the awards rendered in Hong Kong in any of the 150 signatory states to the New York Convention and in mainland China and the Macao Special Administrative Region.[67] However, whether an arbitral award is enforceable in a particular jurisdiction depends above all on the law of that jurisdiction. For instance, enforcement of an arbitral award which concerns the validity of a registered IPR may be refused in certain jurisdictions such as, in respect of patent infringement, China, where state authorities and courts are vested with sole competence to determine the validity of the IPR.[68]

Specialist arbitrators

Given the nuances of the field, the HKIAC has introduced a Panel of Arbitrators from various jurisdictions with extensive experience and strong expertise in intellectual property disputes.[69]

The arbitrability of IPR disputes in Hong Kong cements Hong Kong's status as a leading venue for the arbitration of IPR disputes.

Institutions in Hong Kong

Hong Kong has received international and national recognition for its arbitral sophistication. Hong Kong's home-grown arbitral institution, the HKIAC, has unrivalled experience and was recently ranked as the fourth most-preferred arbitration institution worldwide.[70] The HKIAC is designated the appointing body under the Arbitration Ordinance to appoint arbitrators and to determine the number of arbitrators where the parties to a dispute are unable to agree.[71]

Hong Kong was also selected by the Paris-based International Chamber of Commerce (ICC) to be the location for its first Asian branch. The China International Economic and Trade Arbitration Commission and the China Maritime Arbitration Commission also opened their first arbitration centres outside mainland China in Hong Kong.

The HKIAC announced its 'Belt and Road Programme' in early April 2018.[72] The programme seeks to place the HKIAC in a prime position among other arbitral institutions for BRI disputes and includes a Belt and Road Advisory Committee and an online resource platform.[73] The online resource platform contains publications, reports related to BRI, news and information on dispute resolution alternatives for BRI activities.[74] The HKIAC was also a supporting organisation for the recent Belt & Road Summit and has hosted several other events on the same subject matter.[75]

Other arbitral institutions are also reacting to the BRI. The ICC Court established a commission focusing on dispute resolution relating to the BRI in early March 2018.[76] The commission will develop the existing ICC dispute resolution procedures and the ICC infrastructure to tailor them for BRI disputes.[77] Some of the aims of the commission include raising awareness of the ICC as an arbitral institution, maximising its international coverage, engaging with corporations and governments in all the BRI countries and conducting conduct events throughout the BRI region with the ultimate goal of establishing ICC as a competent institution in resolving BRI disputes.[78]

Investor–state arbitration in Hong Kong

Several agreements have been made with a view of facilitating investor–state arbitration in Hong Kong. A Host Country Agreement between Hong Kong and the Permanent Court of Arbitration (PCA) was signed on 4 January 2015 which took effect

immediately. The aim of the Host Country Agreement is to facilitate the PCA's conduct, provision of facilities and services of arbitral proceedings in Hong Kong. In addition to the Host Country Agreements, the PCA has entered into a cooperation agreement with the HKIAC.[79]

The Host Country Agreement allows the PCA to offer full benefits of its services at the HKIAC. The dispute resolution administered by the PCA includes arbitration, mediation, conciliation and fact-finding commissions of inquiry.

In addition to arrangements like the Host Country Agreement, the HKIAC offers free hearing space to parties in cases involving a state eligible for the Organisation for Economic Co-operation and Development (OECD) Development Assistance Committee.[80] This measure is particularly relevant for investor–state arbitrations arising from the BRI.

The HKIAC and the Institute of Modern Arbitration of the Russian Federation (IMA) also signed a Cooperation Agreement on the 6 March 2018. The goal of the Cooperation Agreement is to promote investor–state arbitration and alternative dispute resolutions methods in Russia and Hong Kong.[81]

As reported by *Global Arbitration Review* on 8 August 2018,[82] the HKIAC is set to administer a treaty claim filed by an American citizen against South Korea. This would be the second investment treaty case in which the HKIAC has been requested to provide administrative support.

The HKIAC Secretary General Sarah Grimmer was quoted as saying:

> *Several members of HKIAC's secretariat have significant experience in investment treaty arbitration, making HKIAC an excellent administrative choice for such disputes.*[83]

Hong Kong and the HKIAC continue to strengthen their respective positions in becoming a preeminent arbitral seat and institution, not only for commercial arbitration but also for investor–state arbitration.

Conclusion

The London Centenary Principles (London Principles)[84] postulate key factors that are necessary for an effective, efficient and safe seat for the conduct of international arbitration. Some of the principles are:

- a clear and effective law,
- an independent judiciary,
- legal expertise,
- functional facilities and
- the ready recognition and enforcement of foreign arbitration agreements, orders and awards made at the seat in other countries.

Parties engaged in BRI projects would find that Hong Kong scores highly on all the London Principles and rivals long-established seats of London, Paris and Geneva. Reflecting the importance of Hong Kong as an arbitral seat and as stated above, the International Arbitration Survey produced by the Queen Mary University of London, finds Hong Kong to be the fourth most-preferred seat worldwide.[85]

The former Secretary for Justice of Hong Kong Special Administrative Region, Mr Rimsky Yuen noted that:

> *proper legal risk management is crucial for any Belt and Road project, and Hong Kong, with its modern legal infrastructure and expertise in dispute resolution, is an ideal neutral venue for resolving Belt and Road disputes.*[86]

Arbitration in Hong Kong has come of age with the amendments introducing TPF and arbitrability of IPR. Modern arbitration laws and the pro-arbitration approach of the judiciary coupled with world-class facilities and highly qualified lawyers make Hong Kong the ideal venue for the arbitration of disputes arising from the BRI.

Notes

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India

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Introduction

The Arbitration and Conciliation Act 1996 (Arbitration Act) ushered in a new era for arbitration law in India. It adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (Model Law) to align Indian arbitration practice with internationally acceptable standards and practices. The Arbitration Act held sway for nearly two decades. While it had its drawbacks, with the aid of cautious and purposive judicial interpretation, the Arbitration Act was able to meet practical exigencies. Nevertheless, given the limitations associated with law evolved through judicial interpretation, there was a pressing need to fill the gaps and, wherever necessary, to clarify the law on arbitration through legislative intervention. In such circumstances, the Arbitration and Conciliation (Amendment) Act 2015 (Amendment Act) was introduced to fill the lacunae and clarify ambiguities in the Arbitration Act. While the Arbitration Act continues to govern the law of arbitration in India, it does so in an amended form.

Efficacy, expediency and economy were the watchwords for the Amendment Act, which sought, among other things, to address the problems of enforcing awards in India, time consuming arbitral and court-related proceedings, and consequently, the ever burgeoning costs associated with such proceedings. The problems associated with Indian arbitration caused India great embarrassment in the global arbitration community.

With unbridled support of the Indian judiciary, the Amendment Act (now in its third year) has, slowly but surely, projected India as an arbitration-friendly jurisdiction. In the first half of the present chapter, we review the critical developments on the law of arbitration in India, which are primarily a consequence of the Amendment Act; in the second half of this chapter we briefly discuss the emerging issues and the way forward for the law of arbitration in India.

Upholding independence and impartiality of arbitrators

For an unbiased decision, it is but obvious that no man should be a judge in his own cause. While the foregoing is a recognised principle of natural justice and followed in India, nonetheless, the practice of appointing ex-employees as arbitrators has for long been prevalent in India. When this practice was brought to the attention of courts, they frowned upon it as such practice cast justifiable doubts about a tribunal's ability to adjudicate impartially. To ensure that awards rendered an unbiased view of the dispute, the Amendment Act inserted schedule 5 and schedule 7 in the Arbitration Act; these schedules incorporate International Bar Association Guidelines relating to independence and impartiality of arbitrators in the Arbitration Act.

These newly inserted standards for independence and impartiality of arbitrators have been zealously upheld by the Indian judiciary. To eliminate bias, the Supreme Court expanded the scope of schedule 5 to the amended Arbitration Act (which disallows a party's employee to act as an arbitrator) by holding that if the person named as an arbitrator was ineligible to act as an arbitrator (in this case by reason of his being a managing director of the party), then such a person would also be ineligible for nominating another arbitrator.[1] On another occasion, to ensure constitution of fair and unbiased tribunal, the court went to great lengths to note that '. . . panel should be broad based . . . engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background . . . as it is not necessary that all disputes that arise, would be of technical nature . . .'.[2] On yet another occasion the court noted that an arbitrator, who was in contravention of clauses 22 and 24 of schedule 5 to the amended Arbitration Act, would be de jure disqualified under section 14(1)(a) from continuing with his mandate and therefore, the court terminated his mandate. All these instances clearly reflect the judiciary's painstaking efforts to ensure appointment of impartial arbitrators.

Interim relief

Prior to the Amendment Act, litigants were unsure about efficacy of interim relief obtained from a tribunal because the tribunals' powers to grant interim reliefs were restricted in scope and its enforcement shrouded in ambiguity. To ensure that interim relief granted by a tribunal was an efficacious remedy, the Amendment Act aligned the tribunals' powers to with that of the courts and made interim relief granted by tribunal enforceable as an order of the court under the provisions of the Code of Civil Procedure, 1908 (the Code).

Further, while courts have repeatedly upheld the additional powers of interim relief conferred by the Amendment Act on the tribunals,[3] the Bombay High Court on one occasion noted a practical limitation to such powers – that the power of a tribunal to appoint a receiver was limited to appointment of a private receiver as opposed to the court receiver.[4]

Following the Amendment Act coming into effect, the Supreme Court extended its pro-arbitration to issues which had arisen in relation to arbitrations prior to the Amendment Act. This is exemplified by the Supreme Court's decision in *Alka Chandewar*,[5] wherein the court enforced the interim directions passed by the tribunal, noting that party's failure to comply with tribunal's interim order amounted to a contempt of tribunal's order. This view encourages parties to arbitrations initiated prior to the Amendment Act, ie, 23 October 2015, to approach tribunals for interim relief being rest assured that such interim orders are enforceable.

In order to balance the requirement of minimal intervention of court in arbitration with easy accessibility to courts for efficacious remedies, section 9 (3) of the amended Arbitration Act dissuades courts from entertaining application for interim relief after tribunals have been constituted unless, it finds that circumstances exist in which interim relief granted by tribunal may

be inefficacious. Explaining the fine balance, the Calcutta High Court[6] clarified that under section 9(3) the court's power is not automatically barred by constitution of an arbitral tribunal and that the court may grant relief if it finds that the relief given by the tribunal will be inefficacious. However, the High Court noted that in the event the tribunal assumes powers in circumstances under sections 33[7] and 34,[8] an application for interim relief will have to be made to the tribunal (provided such relief will be efficacious).

To put to rest the controversy created by the decisions of the Supreme Court in *Bhatia International*[9] and *BALCO*,[10] the Amendment Act introduced provisions under which parties to an international commercial arbitration seated outside India are allowed to approach courts in India for interim reliefs. This amendment, has far-reaching consequence as it allows foreign parties or foreign award holders to secure their interests pending grant or enforcement of an award. The usefulness of the amendment is illustrated by a recent decision of the Bombay High Court wherein the High Court secured sums due under a foreign award which was pending enforcement. In relation to proviso to section 2(2) of the amended Arbitration Act, the High Court noted that recourse to Indian courts for interim measures in relation to a foreign seated arbitration is a transitory provision, pending enforcement of the foreign award.[11] The Bombay High Court's recent ruling, that an application for interim relief in relation to a foreign award can be made to a court which enjoys jurisdiction over the assets of the judgment debtor,[12] spares users the unnecessary dilemma of deciding which court to approach, ie, a court which enjoys jurisdiction over subject matter of arbitration or a court which enjoys jurisdiction over subject matter of the award.

Restricting grounds for challenge to an award

To reduce judicial intervention with an award, whether granted in a domestic or a foreign seated arbitration, extensive amendments pertaining to a challenge against an award were introduced in the Arbitration Act. The amendments in this context are a welcome change.

The Indian judiciary has strictly implemented the amended provisions, refusing applications seeking to stall enforcement of awards for the mere asking. Repeatedly, the courts have clarified that in proceedings wherein an award is challenged, the courts do not sit in appeal over it, thereby limiting courts' interference with an award.

When called upon to decide the validity of two-tiered arbitration in context of the Arbitration Act, the Supreme Court upheld parties' autonomy to provide for a two-tiered arbitration.[13] In the instant case the validity of appellate arbitration was challenged on the grounds, inter alia, that two-tiered arbitration was not in accordance with the Arbitration Act and was against public policy. Rejecting the foregoing grounds, the Supreme Court noted that in providing for two-tiered arbitration, the parties had not by-passed any provision of the Arbitration Act. The court further noted that the argument that appeal is a creature of statute will not apply in the present case as there is a distinction between a statutory appeal to a court and an appeal to a non-statutory body agreed between the parties.

Enforcement of awards

Prior to the Amendment Act, initiation of challenge proceedings automatically led to stay on execution of a domestic award. Such a practice was hitherto used to disrupt the execution of an award for an award holder. By expressly prohibiting such automatic stay on execution proceeding, the amendments provided the much-needed relief to an award holder who can now proceed to execute an award, unless the execution proceeding is expressly stayed.

Clarifying and expediting the process for execution of an award, the Supreme Court ruled that an award may be executed directly by the court having territorial jurisdiction over the award-debtor's assets.[14] Thus, the court did away with ubiquitous practice of requesting transfer of execution proceedings initiated before a court enjoying supervisory jurisdiction over the arbitration to another court. This decision not only clarifies the procedure for execution but puts to rest the continuous debate about whether execution proceedings had to be first initiated before a court having jurisdiction over the arbitration proceedings and then transferred to the court where the assets of the judgment debtor were located, or whether the execution proceedings could be directly initiated before the court which enjoys jurisdiction over the assets of the judgment-debtor.

Further, be it a domestic award or a foreign award, the Supreme Court has refused to expand the scope of its review in the context of enforcement proceedings. The Supreme Court in relation to domestic awards has reiterated that an arbitral award is given the status of a decree of a civil court and should be enforced in accordance with the Code; that an executing court can only execute the decree and cannot hold any factual inquiry that can have the effect of nullifying the decree itself.[15] In relation to enforcement of foreign awards, it has been reiterated that grounds for resisting enforcement of foreign award in India are narrow. When called upon to determine the question of enforceability of an award in light of the provisions of Foreign Exchange Management Act 1999 (FEMA) the Delhi High Court noted that 'the width of the public policy defence to resist enforcement of a foreign award, is extremely narrow. And the same cannot be equated to offending any particular provision or a statute.'[16] On another occasion, similar contentions in relation to FEMA – that the foreign award contravened the provisions of FEMA, were raised before the Delhi High Court which refused to intervene with the ruling of the arbitral tribunal. The court held that the tribunal's interpretation of the agreement was consistent with the parties' intentions and was not opposed to Indian law.[17]

Place of arbitration

International arbitration practice has primarily been seat-centric. Having adopted the Model Law, India too followed the seat centric principles in arbitration. The Supreme Court in *BALCO*[18] recognised that the seat was the centre for international arbitration and held that Indian courts would have no jurisdiction over any arbitration seated outside India. This has been reiterated by the courts time and again, with the Bombay High Court even imposing costs of 500,000 rupees on the party which sought to challenge an award (granted in an arbitration seated in New York) before the court.[19] The Bombay High Court reiterated that Part 1 of the Arbitration Act did not apply to arbitrations seated outside India.

Recently, the Supreme Court clarified the importance of seat in the context of domestic arbitrations; it held that the seat of arbitration was akin to an exclusive jurisdiction clause[20] and as a consequence, a choice of an Indian city as the seat or place of arbitration would confer exclusive jurisdiction on the courts of such city. Thus, an application challenging the award will lie to courts of the city named as the seat of arbitration.

What constitutes an arbitration agreement

Of late, there have been various decisions clarifying the law on arbitration agreement. The Supreme Court has clarified and

reiterated that for reading an arbitration clause in another document as a part of the contract between parties, there must exist in the contract a conscious acceptance of the arbitration clause in the other document. Finding such an intention to exist and paying heed to the developing nature of commercial law, the Supreme Court on one occasion held that a general reference in a contract to a standard form of contract of one party was sufficient to incorporate the arbitration clause contained in such standard form of contract.[21]

Minimal intervention of courts

Having adopted the Model Law, the Arbitration Act provided for minimal intervention by courts in arbitral proceedings. To bolster the existing provisions, the Amendment Act in addition to limiting courts' role in granting interim reliefs and interfering with awards, also restricts courts' role in an application for appointment of arbitrators. The Supreme Court, while deciding an application for appointment of an arbitrator under the amended Arbitration Act, recognised such restrictions introduced as section 11(6A)[22] in the amended Arbitration Act.[23]

However, in a recent ruling, in view of a full and final settlement existing between the parties, the Supreme Court while deciding an application for appointment of an arbitrator, refused to refer the matter to arbitration on the grounds that for a reference to arbitration a dispute needed to exist.

Other than the immediate foregoing instance, the Indian judiciary has taken great care in restraining itself from intervening in the arbitral process. This is illustrated from a recent decision of the Delhi High Court where the court recognised an arbitral tribunal's power to pierce the corporate veil.[24]

Emerging issues

Although, the Amendment Act with support of the Indian judiciary has made great strides in clarifying and aligning, the law of arbitration in India with international arbitral standards and practices, there remain grey areas of law which have escaped the attention of or remain unaddressed by both, the legislature and the judiciary.

Indian parties foreign seat

A question which has repeatedly reared its head, is whether two Indian parties can choose a foreign seat for an arbitration. While deciding this question in the context of the erstwhile Arbitration Act 1940,[25] the Supreme Court held that two Indian parties were free to opt for a foreign-seated arbitration. However, the position of law under the Arbitration Act, with the amended provisions, remains unclear.

While deciding an application for appointment of an arbitrator, the Supreme Court on one occasion held that under the Arbitration Act, it was not open for two parties to derogate from Indian law by opting for a foreign-seated arbitration.[26] Yet again, this case is not definitive, as the court via official corrigendum clarified that '. . . any findings or observations made hereinbefore were only for the purpose of determining the jurisdiction of this Court as envisaged under section 11 of the 1996 Act and not for any other purpose.'

Though the Bombay High Court[27] expressed its view that such a proposition could be considered as opposed to public policy of India, the Madhya Pradesh High Court, following the Supreme Court's decision under the erstwhile Arbitration Act 1940, took a view contrary to the view taken by the Bombay High Court.[28] While the decision of the Madhya Pradesh High Court was appealed to the Supreme Court, this particular question remained unaddressed.

Unilateral appointments of arbitrators

The Amendment Act provides grounds which raise justifiable doubts and render a party's nominee ineligible to act as an arbitrator. Nonetheless, it fails to put an end to the practice of unilateral appointment of arbitrators by a party to an arbitration agreement. A recent decision,[29] wherein the Delhi High Court allowed a contractually agreed appointing authority who was one of the party's representative to unilaterally appoint an arbitrator, brings to light that a prevalence of the practice of unilateral appointment may stall the legislature's efforts to achieve cent percent appointments of impartial and independent arbitrators.

Failure to recognise emergency arbitrators

Emergency arbitrators are commonly provided in rules of almost all international arbitral institutes, eg, the Singapore International Arbitration Centre, the International Chamber of Commerce, and domestic arbitral institutes, eg, the Mumbai Centre for International Arbitration. Given the lengths to which the legislature and the judiciary have gone to ensure that interim measures in arbitrations are meaningful, it is difficult to understand why opportunity to recognise emergency arbitrators has been missed. This failure is especially baffling given that the legislature has adopted a proactive approach towards institutional arbitration.

While courts have, in relation to foreign-seated arbitrations, granted interim reliefs under the Arbitration Act in *Raffles Design*[30] and *Avitel*,[31] the courts to date have ruled that a suit has to be filed for seeking enforcement of such awards rendered by emergency arbitrator.[32] Given the ambiguity in law about the status of relief granted by an emergency arbitrator and the procedure to enforce the same, parties ought to be careful in agreeing to arbitral rules which do not provide an opt-out mechanism from the provisions relating to emergency arbitrators.

Further amendments to the Arbitration Act: Arbitration and Conciliation (Amendment) Bill 2018

A high-level committee under the chairmanship of Honourable Justice B N Srikrishna, Supreme Court of India, was constituted by the Central Government to review the state of Indian arbitration pursuant to the Amendment Act. The said committee submitted its report on 30 July 2017. On the basis of the suggestions in the report, the Arbitration and Conciliation (Amendment) Bill 2018 (Amendment Bill) was issued. The Amendment Bill has been approved by the Union Cabinet, but awaits the approval of both the houses of the Parliament. Among the various changes suggested, the Amendment Bill lays emphasis on institutional arbitration vis-à-vis ad hoc arbitration, and seeks to address practical difficulties faced in the applicability and implementation of the Amendment Act. While the text of the Amendment Bill is not available, if press reports are to be believed, the Amendment Bill intends to bring further clarity to the law of arbitration in India.

Impetus to institutional arbitrations

Great efforts have been made by both the judiciary and the legislature to encourage institutional arbitration for settlement of disputes.

The Maharashtra state government implemented the 'Institutional Arbitration Policy' for the state of Maharashtra wherein it suggested that dispute resolution mechanism in all existing government or public sector undertakings contracts and agreements (where value exceeds 50 million rupees) be amended to

provide for reference of disputes to 'Indian Arbitration Institutes'.[33] The Government of Maharashtra recognised and approved the Mumbai Centre for International Arbitration (MCIA), a domestic arbitration institute of repute, as an arbitration institute.[34] Now, the Union Cabinet through the Amendment Bill seeks to provide impetus to institutional arbitrations, inter alia, by:

- establishing an independent body to grade arbitral institution and accredit arbitrators; and
- facilitating appointment of arbitrators through designated arbitral institutions by the Supreme Court or High Courts, without having any requirement to approach the courts in this regard, etc.

The foregoing efforts have been bolstered by the judiciary – the Supreme Court on a previous occasion (for the very first time) directed the MCIA to appoint an arbitrator in an international commercial dispute. Therefore, the court delegated its power of appointment of arbitrator to an 'institution designated by such Court'. Further, various High Courts have keenly promoted institutional arbitrations. This is exemplified by the establishment of the Delhi International Arbitration Centre under the aegis of the Delhi High Court and by the recent announcement of the Punjab and Haryana High Court to launch an International Arbitration Centre in Gurugram, Haryana.

Retrospective or prospective applicability of the Amendment Act

A question that has arisen since the enforcement of the Amendment Act is whether arbitration-related proceedings that were initiated prior to the Amendment Act but were pending at the time of its coming into effect, ie, on 23 October 2015, are regulated by the provisions of the Amendment Act. The ambiguity about applicability of the Amendment Act to proceedings pending when the Amendment Act was brought in force, arose primarily due to the terminology of section 26 of the Amendment Act which reads '. . . but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act'.

The rulings of various High Courts on this issue were in conflict. Consequently, appeals were filed before the Supreme Court to decide the issue. The Supreme Court has finally decided the issue.[35] The court noted that it was clear from the language of section 26 that the amended provisions were prospectively applicable to arbitral proceedings and court proceedings in relation thereto. Further, determining the applicability of the amended section 36 to existing proceedings, the court held that 'section 36, as substituted, would apply even to pending section 34 applications on the date of commencement of the Amendment Act.'

Interestingly, the Amendment Bill which was approved prior to the Supreme Court's decision takes a contrary view; section 87 of the Amendment Bill provides that the Amendment Act will not apply to court proceedings arising out of or in relation to arbitral proceedings which commenced prior to Amendment Act and the same is irrespective of when such court proceedings commenced, ie, whether prior to or after the Amendment Act.

In the said circumstances, in its ruling the Supreme Court has drawn the legislature's attention to section 87 of the Amendment Bill. It remains to be seen whether the Amendment Bill will be aligned with the Supreme Court's ruling.

Conclusion

The Amendment Act brought the much-awaited and much-needed overhaul to the Arbitration Act. The apprehensions about the efficacy and expediency of arbitrations in India is a matter of the past; both the said words are the cornerstones for the amended Arbitration Act.

Viewed fairly, the Amendment Act is a colossal step which allows India its rightful place amongst leaders of the global arbitration community. While its implementation continues to face hiccups, the Amendment Act has done a commendable job in filling in the gaps between the law in India and the developments in the international arbitral community.

Being a jurisdiction which follows the doctrine of stare decisis, judicial interpretation has vastly contributed to the development of Indian law and jurisprudence. Therefore, the role of the Indian judiciary in ensuring India moves ahead as an arbitration friendly jurisdiction cannot go unnoticed. In the regime prior to the Amendment Act, the Indian judiciary played a crucial role in pinpointing and providing the required clarity to the inadequacies in law. In the regime after the Amendment Act (which sought to address the inadequacies in law) the Indian judiciary by adopting both, the spirit and the letter of the Amendment Act, fervently continues implementing the objectives and the letter of the Indian arbitration law.

While we note that the law of arbitration in India is still work in progress, the state of arbitration in India has unquestionably turned over a new leaf.

Notes

1 *TRF Ltd v Energo Engineering Projects Ltd*, 2017 (8) SCC 377.

2 *Voestalpine Schienen GmbH v Delhi Metro Rail Corporation*, 2017 (4) SCC 665.

3 *NTPC Ltd v Jindal ITF Ltd & Ors*, 2017 SCC OnLine Del 11219; *Delhi State Industrial & Infrastructure v PNC Delhi Industrial Infra Pvt Ltd*, ARB. A. (COMM.) 17/2017, Delhi High Court; *Lanco Infrastructure Ltd v Hindustan Construction Co Ltd*, 2016 SCC OnLine Del 5365; *Enercon GmbH & Ors v Yogesh Mehra & Ors*, 2017 SCC OnLine Bom 1744.

4 *Shakti International Pvt Ltd v Excel Metal Processors Pvt Ltd*, 2017 SCC OnLine Bom 321.

5 *Alka Chandewar v Shamshul Ishrar Khan*, 2017 SCC OnLine SC 758.

6 *Bishnu Kumar Yadav v ML Soni & Sons & Ors*, AIR 2016 Cal 47.

7 33. Correction and interpretation of award; additional award.

(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

...

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

...

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award."

8 34. Application for setting aside arbitral award:

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award ...

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

9 *Bhatia International v Bulk Trading SA*, (2002) 4 SCC 105.
10 *Bharat Aluminum Co v Kaiser Aluminum Technical Services Inc*, (2012) 9 SCC 552.
11 *Aircon Beibars FZE v Heligo Charters Pvt Ltd*, 2017 SCC Online Bom 631.
12 *Trammo DMCC (formerly Known as Transammonia DMCC) v Nagarjuna Fertilizers & Chemicals Ltd*, 2017 SCC OnLine Bom 8676.
13 *Centrotrade Minerals and Metals Inc v Hindustan Copper Ltd*, (2017) 2 SCC 228.
14 *Sundaram Finance Limited v Abdul Samad*, 2018 SCC OnLine SC 121.
15 *Punjab State Civil Supplies Corporation Ltd v Atwal Rice and General Mills*, (2017) 8 SCC 116.
16 *Cruz City 1 Mauritius Holdings v Unitech Ltd*, 2017 SCC OnLine Del 7810.
17 *NTT Docomo Inc v Tata Sons Ltd*, 2017 SCC OnLine Del 8078.
18 Supra at note 10.
19 *Katra Holdings Ltd v Corsair Investments LLC & Ors*, (2017) SCC OnLine Bom 8480.
20 *Indus Mobile Distribution Pvt Ltd v Datawind Innovations Pvt Ltd & Ors*, AIR 2017 SC 2105.
21 *Inox Wind Ltd v Thermocables Ltd*, (2018) 2 SCC 519.
22 Section 11 (6A): 'The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.' Arbitration and Conciliation Act, 1996 : Section 11 - Appointment of arbitrators.
23 *M/s Duro Felguera SA v M/s Gangavaram Port Ltd*, (2017) 9 SCC 729.
24 *GMR Energy Limited v Doosan Power Systems India Pvt Ltd*, 2017 SCC Online Del 11625.
25 *Atlas Export Industries v Kotak & Company*, (1999) 7 SCC 61.
26 *TDM Infrastructure Pvt Ltd v UE Development India Pvt Ltd*, (2008) 14 SCC 271.
27 *Addhar Mercantile Pvt Ltd v Shree Jagdamba Agrico Exports Pvt Ltd*, 2015 SCC OnLine Bom 7752.
28 *Sasan Power Ltd v North America Coal Corporation India Pvt Ltd*, 2015 SCC OnLine MP 7417.
29 *DK Gupta & Anr v Renu Munjal*, 2017 SCC OnLine Del 12385.
30 *Raffles Design International India Pvt Ltd v Educomp Professional Education Ltd*, 2016 SCC OnLine Del 5521.
31 *Avitel Post Studios Ltd v HSBC PI Holdings (Mauritius) Ltd*, 2014 SCC OnLine Bom 929.
32 Supra at note 30.
33 Government Resolution No. Misc. – 2016/C. No.20/D-19, 13 October 2016.
34 Government Resolution No. ARB/C.No.01/2017/D-19, 28 February 2017 read with Government Resolution No. Misc-2016/C.No.20/D-19, 01 December 2016 and Government Resolution, 4 March 2017.
35 *Board of Control for Cricket in India v Kochi Cricket Pvt Ltd and Ors*, 15 March 2018, Civil Appeal Nos. 2789-2880 of 2018 (arising out of SLP (C) Nos. 19545-19546 of 2016).

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Naresh has successfully represented clients in matters pertaining to economic offences before diverse tribunals and courts in India. He is also actively involved in the field of alternate modes of dispute resolution and has managed a number of International Chamber of Commerce, London Court of International Arbitration (LCIA), Singapore International Arbitration Centre, UNCITRAL, Swiss Rules and ad hoc arbitrations. He has been part of mediation and conciliatory proceedings at the clients' behest and has brought them to fruition.

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Economic Laws Practice (ELP) is a leading full-service Indian law firm established in 2001 by eminent lawyers from diverse fields. The firm brings to the table a unique combination of professionals comprising lawyers, chartered accountants, financial planners, economists and company secretaries; enabling us to offer services with a seamless cross-practice experience and top-of-the-line expertise to our clients.

ELP has a unique position among law firms in India for offering comprehensive services across the entire spectrum of transactional, advisory, litigation, regulatory and tax matters. Our areas of expertise include banking and finance; competition law and policy; corporate and commercial; hospitality; infrastructure; international trade and customs; litigation and dispute resolution; private equity and venture capital; securities laws and capital markets; tax; and telecommunications, media and technology.

With six offices across India (Mumbai, New Delhi, Pune, Ahmedabad, Bangalore and Chennai), ELP has a team of over 180 qualified professionals with acumen in diverse practice areas. We work closely with leading global law firms in the UK, the US, the Middle East and the Asia-Pacific region. This gives us the ability to provide a pan-India and global service offering to our clients.

Our commitment is to develop and nurture long-term relationships with our clients by providing the most optimal solutions in a practical, qualitative and cost-efficient manner. Our in-depth expertise, immediate availability, geographic reach, transparent approach and the involvement of our partners in all assignments has made us the firm of choice for our clients.

ELP's market-leading litigation and dispute resolution practice is built on the strength of a team that is not only at the cutting edge of legal knowledge and research skills, but has also mastered the art of advocacy. Each team member is acknowledged to consistently deliver results. The team prides itself on diversity and depth of experience and represents clients across fora and practice areas from inquiry and investigation stages right up to the Supreme Court of India, playing a dual role of solicitor and counsel, which sets us apart from other practices in India.

ELP is recognised internationally as a thought leader in India for arbitration. We have represented clients in proceedings before various institutions – such as the International Chamber of Commerce, the London Court of International Arbitration (LCIA), LCIA India, the Singapore International Arbitration Centre, the London Maritime Arbitrators Association and the Grain and Feed Trade Association, the Kuala Lumpur Regional Centre for Arbitration – and in ad hoc proceedings around the world, with the amount in disputes ranging from a few million to billions of dollars. Our approach to commercial disputes has ensured the most effective representation of our clients as often these disputes require industry-specific know-how. ELP offers its expertise in various sectors such as energy, construction, international trade, government contracts, admiralty, insurance and product liability. We also take pride in offering cost-effective services to our clients in less sizeable disputes by efficient staffing. The firm has been recognised as one of the top specialist arbitration firms in the world by *GAR 100* (ninth and tenth edition) and as Dispute Resolution Law Firm of the Year in *India Business Law Journal*'s Indian Law Firm Awards 2015. ELP's dispute resolution practice has also been ranked in the Top Tier by *The Legal 500 Asia-Pacific* 2016–2018.

Japan

Yoshimi Ohara
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The Japan International Dispute Resolution Centre

On 28 February, the Japan International Dispute Resolution Centre (JIDRC), a body whose purpose is to operate a hearing facility in Japan, was established. Being organised with five individuals, it made a humble start with a big dream of serving as a catalyst to attract more arbitration to Japan and eventually to become a hub of arbitration in Asia. While Japan enacted an Arbitration Act consistent with the UNCITRAL Model law on 1 March 2004 – even before Hong Kong (2010), Korea (2016) and Malaysia (2005), which have enjoyed caseloads[1] far outnumbering that of Japan – and the Japanese courts have a good track record of being deferential to the decisions of arbitral tribunals (with a few exceptions that I introduced in the 2018 edition of the *GAR Asia Pacific Arbitration Review*, which was overruled by the Supreme Court that I will highlight later in this article), the Japan Commercial Arbitration Association (JCAA), the most prominent arbitration institution in Japan, has suffered from a consistently low caseload: around 20 per year for the past 10 years. This trend is consistent with the International Chamber of Commerce (ICC) statistics showing not more than five arbitration cases seated in Japan every year for the past 10 years. The number of arbitration cases involving Japanese parties, however, has been gradually increasing. The Singapore International Arbitration Centre (SIAC), which enjoyed yet another record high caseload in 2017, revealed that the number of Japanese parties doubled from 13[2] to 27[3] in 2017 and that the total disputed amount involving Japanese parties in 2017 was close to US$1 billion. While the dispute-averse tradition in Japan remains unchanged and a conciliatory approach to disputes when they arise still permeates, Japanese companies have become less hesitant to engage in arbitration in cross-border disputes, owing to higher demand for accountability in their corporate governance.

Then why is the number of arbitrations seated in Japan still so small? Among the key factors that contribute to popular arbitration seats,[4] a factor that is conspicuously missing in Japan is a hearing facility. Maxwell Chambers in Singapore, the hearing facility at the Hong Kong International Arbitration Centre in Hong Kong (HKIAC), the Seoul International Dispute Resolution Centre (SIDRC) in Seoul and Bangunan Sulaiman housing the Asian International Arbitration Centre (AIAC) in Kuala Lumpur have been playing a key role in each jurisdiction not only in offering hearing venues but also in housing offices of local as well as international arbitration institutions, and most importantly serving as a source of intelligence for arbitration in the region by offering conferences and trainings, and a space for arbitration practitioners to gather. The Japan International Dispute Resolution Centre was created to serve as a catalyst for promoting Japan as the seat of arbitration.

Japan's basic economic policy: promote international arbitration in Japan

The JIDRC, although small, has full support from the government and its ruling party. The Liberal Democratic Party issued 'The Cornerstones of Diplomacy based on the Japanese Judicial system'[5] in June 2017, placing the highest priority on the establishment of Asia's number one arbitration center in Japan under the leadership of Ms Yoko Kamikawa, the incumbent minister of Justice. The Abe administration, in line with its ruling party's policy, adopted the 'Basic Policy on Economic and Fiscal Management and Reform in 2017'[6] (Basic Policy) in June 2017. Although reference to international arbitration is very brief and lacks clarity, the Japanese government's official recognition of the importance of international arbitration for the first time, and its expression of its commitment to capacity building in international arbitration in Japan, marks an important step. In fact, the inception of the JIDRC can be traced back to 1999, when the international arbitration council, formed by the public and private sectors, issued a proposal to establish a new arbitration centre in Japan, well before the official launch of Maxwell Chambers in 2010. The proposal has two prongs: modernisation of the Arbitration Act and the establishment of an arbitration hearing facility in Japan. The first prong of the proposal was realised in 2004 when an arbitration act consistent with the UNCITRAL Model Law was enacted; however, there was no follow-through on the second prong until the JIDRC was belatedly established in 2018.

Kansai area (Osaka and Kyoto) galvanised

The JIDRC will open its first hearing facility in Nakanoshima in Osaka in May 2018. Osaka was historically a centre of business in Japan, with a number of rivers and canals; and Nakanoshima (which literally means 'central island'), a sandbar along the Yodo River, is the centre of Osaka, where the city hall, a convention centre, concert hall, library, museums, a beautiful park and the Kansai-HQ of many Japanese companies are located. But why Osaka instead of Tokyo? It was a matter of coincidence and luck. Since some of the Ministry of Justice's office space in Nakanoshima will become vacant in May 2018, the ministry offered this office space together with an international conference facility on the same floor for use as a hearing venue. Because it was originally built as an international conference facility, it is equipped with microphones, a booth for interpreters and other facilities to be utilised for arbitration hearings, although it might be too grand for a small case.

Coincidentally, 2017 was the year the Kansai area attracted the most attention in international dispute resolution in Japan.[7] The Japan Association of Arbitrators (JAA) entered into a memorandum of understanding with Doshisha University[8] (in Kyoto and founded more than 140 years ago by Jo Niijima, a graduate of Phillips Academy and Amherst College) to establish the Japan

International Mediation Centre – Kyoto, on the main campus of Doshisha University, adjacent to the north side of the Kyoto Imperial Palace. Japan has a long tradition of amicable settlement of disputes. The Japan International Mediation Centre – Kyoto hopes to facilitate efficient and effective amicable settlement by offering both institutional mediation and ad hoc mediation. It has been working closely with the Singapore International Mediation Centre in selecting a panel of international mediators and offering training to mediator candidates.[9] The Japan International Mediation Centre is now finalising its panel of mediators, rules and its fee schedule, all of which is currently under the review of the Cabinet Office in accordance with the Public Interest Corporation Act[10] and should be ready to be publicised soon.

Tokyo hearing facility yet 'under construction'

What about a hearing facility in Tokyo? A hearing facility in Tokyo is still under discussion by the committee organised by the Cabinet Secretariat in response to the Basic Policy adopted by the Abe administration (the Committee). The Committee, chaired by the assistant cabinet secretary, consists of the Cabinet Secretariat, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Economy Trade and Industry, the Japan Sports Agency, and the Ministry of Land, Infrastructure, Transport and Tourism, forming strategies to promote international arbitration in Japan. The Japan Federation of Bar Associations, the Japan Association of Arbitrators, the Supreme Court, Tokyo Metropolitan Government, Osaka Prefectural Government, the JCAA, and the Japan Shipping Exchange Inc – which primarily administers maritime arbitration in Japan – also participate in this committee as observers. The Committee is expected to issue an interim report sometime in April 2018. Unlike the Osaka facility which is readily available, the Tokyo facility needs to be newly built and hence requires a budget, and it will take time before a plan is realised. Details of the Tokyo hearing facility are yet to be seen. Some say that it is likely to be located in an area close to the 2020 Olympics venue on the waterfront, since one of the driving forces behind this Basic Policy is to offer services in Tokyo to resolve sports-related disputes during the 2020 Olympics.

Tokyo is an arbitration-friendly seat[11]

The Tokyo District Court, which has jurisdiction to hear matters related to arbitration seated in Tokyo, has a particularly good track record as an arbitration-friendly court. The Tokyo District Court heard, from the enactment of the Arbitration Act consistent with the UNCITRAL Model Law on 1 March 2004 until 31 December 2016, approximately 50 per cent of all cases involving arbitration handled by all Japanese courts as a first instance court. The statistics for the Tokyo District Court decisions in relation to arbitration demonstrate that the Tokyo District Court enforced, and dismissed challenges, to virtually every arbitral award presented before it since the enactment of the Arbitration Act on 1 March 2004. The arbitration-friendly Tokyo District Court together with a state-of-the-art hearing facility in Tokyo will without doubt boost Tokyo as a seat for international arbitration.

Building soft infrastructure

A hearing facility alone is not enough to promote international arbitration in Japan. The Queen Mary University survey in 2015 reveals that the top four factors that make a seat attractive to users are:

- neutrality and impartiality of the local legal system;
- national arbitration law;
- track record of enforcing arbitration agreements and arbitral awards; and
- availability of quality arbitrators familiar with the seat.

The Committee has been working on building not only hard infrastructure such as hearing facilities but also soft infrastructure, and is currently reviewing the Arbitration Act, the law concerning the practicing of foreign lawyers in Japan, arbitration-related court practice and arbitration institutions and arbitration training programmes currently available in Japan, to see how they can be improved. International arbitration institutions such as the ICC or institutions for arbitrators such as the Chartered Institute of Arbitrators and the Singapore Institute of Arbitrators will play an active role in offering arbitration training programmes that meet international standards.

Supreme Court decision: advance waiver and consequence of failure to disclose a potential conflict

In the 2017 and 2018 editions of the *Asia-Pacific Arbitration Review*, the author highlighted decisions of the Osaka District Court[12] and Osaka High Court[13] in which the losing party challenged an arbitral award on the basis of the presiding arbitrator's failure to disclose a Potential Conflict of interest in a JCAA case seated in Osaka. The Osaka District Court dismissed the challenge, finding the failure to disclose to be a minor breach of arbitral proceedings; while the Osaka High Court reversed, and upheld the challenge, finding the failure to disclose to be a fundamental breach of due process. The Supreme Court[14] has now overruled the Osaka High Court decision and has remanded the case to the Osaka High Court.

Facts

The JCAA arbitration involves disputes arising out of a sales contract (contract) entered into in October 2002 between Sanyo affiliates (Japanese and Singapore entities) and Prem Warehouse LLC (US) (Purchaser).[15] The contract was assumed by Sanyo and another affiliate of Sanyo which later became a wholly owned subsidiary of Panasonic in April 2011. In June 2011, Sanyo filed a request for arbitration against the purchaser and its affiliate seeking declaratory relief that Sanyo and its affiliate did not breach the contract. An arbitrator from the Singapore office of King & Spalding (K&S) was appointed as chair arbitrator on 20 September 2011. The chair arbitrator submitted a statement (advance waiver) to JCAA on 20 September 2011 declaring that:

- K&S lawyers might advise and represent their clients in the future in a matter unrelated to this arbitration in which their clients' interests were in conflict with those of a party to this arbitration or its affiliates; and
- K&S lawyers might advise and represent a party to this arbitration or its affiliates in the future in a matter unrelated to this arbitration.

The tribunal issued an award on 11 August 2014. The presiding arbitrator failed to disclose the fact that a K&S lawyer who was found to have been with K&S San Francisco office on 20 February 2013 at the latest represented Sanyo's sister company, Panasonic Corporation of North America in a litigation pending at the United States District Court for the Northern District of California (the potential conflict). The purchaser moved to challenge the arbitral award on the ground that the presiding

arbitrator failed to disclose circumstances likely to give rise to justifiable doubts as to impartiality and independence of the presiding arbitrator.

Ruling

The Supreme Court reversed the Osaka High Court decision and remanded to the Osaka High Court. The Supreme Court concurred with the Osaka High Court decision in that the advance waiver did not constitute disclosure of circumstances likely to give rise to justifiable doubts as to impartiality and independence of the presiding arbitrator, because circumstances to be disclosed by an arbitrator must be concrete enough to allow a party to challenge an arbitrator in an appropriate manner, and disclosure of a potential conflict of interest in an abstract manner, as being made by the presiding arbitrator in the instant case, did not discharge an arbitrator's obligation under the Japanese Arbitration Act to continuously disclose circumstances likely to give rise to justifiable doubts as to impartiality and independence of the presiding arbitrator during the arbitration proceedings. On the other hand, the Supreme Court disagreed with the Osaka High Court's finding that the arbitrator breached its disclosure obligation because K&S could have discovered the Potential Conflict without any difficulty. The Supreme Court found that it was not clear from the record of this case whether the arbitrator or K&S was aware of the potential conflict and whether K&S could have discovered the potential conflict in the ordinary course of business. As a result, the Supreme Court held that the Osaka High Court erred in its finding of a breach of the presiding arbitrator's disclosure obligation without finding the above facts that would affect the outcome of the case, and remanded the case to the Osaka High Court to try those facts.

Analysis

While the conclusion of the Supreme Court decision in reversing the Osaka High Court decision relieved many arbitration practitioners in Japan, the Supreme Court decision still left a number of questions unanswered. As an initial matter, the question arises of which standard the Supreme Court applied in finding an arbitrator's obligation to disclose the potential conflict:

- the IBA Guidelines on Conflict of Interests of Arbitrators in International Arbitration (the IBA Guidelines);
- the domestic code of conduct for Japanese bar members adopted by the Japan Federation of Bar Associations; or
- a sui generis obligation upon arbitrators.

The second question is whether the Supreme Court has taken a position that a breach of an arbitrator's disclosure obligation, if found, automatically leads to annulment of an arbitral award due to a breach of due process. If the answer to the second question is no, under what circumstances will the Supreme Court find that a breach of an arbitrator's disclosure obligation entails the annulment of an arbitral award? Another question is whether such a conflict as leads to the disqualification of an arbitrator only annuls an arbitral award, and, if so, whether the Supreme Court found that the potential conflict disqualified the arbitrator and under what standard. If the Supreme Court has taken a position that a breach of an arbitrator's obligation to disclose alone annuls an arbitral award, how does the Supreme Court reconcile that with the approach taken by the IBA Guidelines that a failure to disclose does not automatically disqualify an arbitrator?[16]

It is possible that the Supreme Court took the position that a breach of the presiding arbitrator's disclosure obligation, if found, was sufficient to annul this arbitral award, because the Supreme Court appears to consider that such facts as support a breach of the presiding arbitrator's disclosure obligation[17] could affect the outcome of this case, which implies the Supreme Court takes the view that whether a breach is found is dispositive of the challenge to the arbitral award.

It can only be hoped that in the subsequent court proceedings the above questions will be answered and the Japanese court will clarify its standard as regards an arbitrator's disclosure obligation and the consequence of a failure to disclose in the context of a challenge to an arbitral award.

The fact that one major Japanese electronics company, Sanyo, was acquired by Panasonic, another major Japanese electronics company, is common knowledge in Japan. However, this may not be a case for an arbitrator and law firms primarily practising outside Japan, and accordingly it makes sense to overrule the Osaka High Court decision, which assumed, without any supporting facts, that K&S could have discovered the potential conflict without any difficulty.

At the same time, arbitration practitioners should recognise that demand for reasonable investigation and disclosure of potential conflicts on the part of prospective and appointed arbitrators has been heightened in light of the integrity of arbitration proceedings.

GAR on 29 March 2018 revealed yet another court decision that set aside an award based on an arbitrator's failure to disclose a Potential Conflict. According to the *GAR*, the Paris Court of

Number of cases relating to arbitration handled by the Tokyo District Court between 1 March 2004 and 31 December 2016[18]

Categories of applications	Conclusion						Pending	Total
	Granted	Dismissed on the merits	Dismissed not on the merits (without prejudice)	Settlement	Withdrawal	Other		
Service of process by the court[19]	2				1			3
Designation of the number of arbitrators[20]								0
Appointment of arbitrators[21]	3		1					4
Challenge to arbitrators[22]								0
Dismissal of arbitrators[23]								0
Challenge to arbitral tribunal's jurisdiction[24]	1	1	3		2			7

Appeal annulled an award dismissing claims worth US$150 million that the Middle Eastern branch of Audi Volkswagen won against its Qatari vehicle distributor Saad Buzwair Automotive Co (SBA) on the ground that one of the tribunal members failed to disclose work that was carried out by his law firm for Porsche, a Volkswagen Group company, during the course of arbitration, creating reasonable doubt as to his independence and impartiality.[25] The French Court, in finding reasonable doubt as to this arbitrator's independence and impartiality, appears to have taken into account not only the arbitrator's firm's disclosure of their work for Porsche in their list of top five cases in *JUVE*, the German directory, but also the arbitrator's failure to disclose at the time of his appointment another matter that his firm worked on for another Volkswagen Group company, despite such fact having been published in an earlier edition of *JUVE*. The arbitrator appears to have admitted such matterafter he was questioned by SBA in reference to the firm's statement in JUVE regarding the matter. This suggests an arbitrator's failure to disclose potential conflicts has consequences particularly when coupled with other factors.

Conclusion

The author has been working with the Committee to help form effective strategies to build soft and hard infrastructure for international arbitration in Japan. While public support is pivotal to turbo-boosting international arbitration in Japan, it inevitably involves political complications. Among various initiatives to promote arbitration in Japan, the author hopes that the judiciary will take a more active role in promoting international arbitration in Japan by way of publicising their arbitration-friendly track record to the international arbitration community and clarifying their rules and standards applicable to arbitration-related cases, to provide greater reassurance as to potential uses of Japan as a seat of arbitration. The author hopes to provide a further update on the situation in Japan in the next edition.

Notes

1 www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.
2 http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_AR_2016_24pp_WEBversion_edited.pdf.
3 http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf.
4 www.arbitration.qmul.ac.uk/research/2015/.
5 https://jimin.ncss.nifty.com/pdf/news/policy/135089_1.pdf (available only in Japanese).
6 http://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/2017/2017_basicpolicies_en.pdf (a provisional English translation).
7 www.doshisha.ac.jp/en/news/2017/1205/news-detail-962.html.
8 www.doshisha.ac.jp/en/index.html.
9 https://www.gov.sg/~/sgpcmedia/media_releases/minlaw/press_release/P-20171201-2/attachment/SIMC-JAA%20MOU%20-%20Press%20Release.pdf.
10 JAA is a public interest corporation.
11 This section is based on the article 'Survey on Arbitration related cases Handed by the Tokyo District Court' authored by Hidenobu Nagasue, the former senior court clerk in the Civil Division of the Tokyo District Court. *JCA Journal*, July 2017 (Japanese) p 11.
12 Osaka District Court Decision, 17 March 2015, 2014(arb) No. 3 2270 Hanrei Jiho 74.
13 Osaka High Court Decision, 28 June 2016, 2015 (ra) No. 547, 1431 Hanrei Times 108.
14 Supreme Court Decision, the third petty bench, 2016 (leave) No. 43. http://www.courts.go.jp/app/files/hanrei_jp/306/087306_hanrei.pdf (Japanese).
15 The Purchaser appeared to have changed its name according to the Osaka District Court decision.
16 The Explanation to General Standard 3 of the IBA Guidelines provides that under comment 5 of the Practical Application of the General Standards, a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue (https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).
17 The Supreme Court remanded the Osaka High Court to try whether the presiding arbitrator or K&S was aware of the Potential Conflict and if not whether K&S could have noticed the Potential Conflict in the ordinary course of business.
18 Infra. Mr Nagasue cautioned that those figures are approximate and do not include the number of cases pending at the High Court.
19 Article 12 of Arbitration Act.
20 Article 16 of Arbitration Act.
21 Article 17 of Arbitration Act.
22 Article 19 of Arbitration Act.
23 Article 20 of Arbitration Act.
24 Article 23 of Arbitration Act.
25 https://globalarbitrationreview.com/article/1167354/audivolkswagen- award-set-aside-in-paris (Subscription required).

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Ms Ohara is currently serving as a vice president of ICC Court and a board member of Swiss Arbitration Association and Japan Association of Arbitrators. She was newly appointed as a governing board member of the International Congress and Convention Association as of 1 April 2018. She previously served as a court member of the London Court of International Arbitration (LCIA) (2010–2015) and a vice president of LCIA (2013–2015). She is a frequent speaker and author on the subject of international arbitration. She teaches international arbitration on the Keio University Law School LLM programme (2014–present).

She received her LLB from the University of Tokyo and her LLM from Harvard Law School. She is admitted to practise law in Japan and New York.

Malaysia

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Malaysian arbitration law is underpinned by the Malaysian Arbitration Act 2005 (the 2005 Act). The 2005 Act, which came into force on 15 March 2006, repealed the Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985. The 2005 Act provides a legislative framework in support of international arbitration in line with generally recognised principles of international arbitration law. Initial teething problems arising from the language of the Act were addressed by the Arbitration (Amendment) Act 2011 (the 2011 Amendment Act).

The jurisprudence of the Malaysian courts has developed accordingly, demonstrating a firm commitment to minimising curial intervention. Moreover, the Malaysian courts readily draw on case law from other pro-arbitration jurisdictions, thereby demonstrating a transnational approach and sensitivity to the development of local law on the subject.

Complementing these developments is the Kuala Lumpur Regional Centre for Arbitration, newly rebranded as the Asian International Arbitration Centre (AIAC). The Kuala Lumpur Regional Centre for Arbitration was set up in 1978 by the Asian-African Legal Consultative Organization to provide a neutral venue in the Asia-Pacific region for the arbitration of disputes in relation to trade, commerce and investment. Today, it hosts and administers domestic and international commercial arbitrations, and offers other dispute resolution processes, such as adjudication and mediation. The centre is housed in purpose-oriented premises that contain all the trappings expected of a modern venue for international arbitration. In a similar vein, the AIAC's rules are comparable to those of other major arbitration institutions. The main set of rules – the AIAC Arbitration Rules – incorporates the UNCITRAL Arbitration Rules (as revised in 2010). The AIAC has a separate set of rules for expedited arbitrations (termed the Fast Track Arbitration Rules) as well as a set of rules that are specifically designed for the arbitration of disputes arising from commercial transactions premised on Islamic principles (the AIAC i-Arbitration Rules). A central feature of the AIAC i-Arbitration Rules is that they incorporate a reference procedure to a shariah advisory council or shariah expert whenever the arbitral tribunal has to form an opinion on a point related to shariah principles.

The 2005 Act

The primary source of law in relation to both international and domestic arbitration in Malaysia is the 2005 Act, as amended by the 2011 Amendment Act. The 2005 Act is modelled on the UNCITRAL Model Law on International Commercial Arbitration 1985 (the Model Law), with amendments as adopted in 2006. It also incorporates important articles from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 to which Malaysia is a signatory. As Malaysia is a common law jurisdiction, the 2005 Act is further supplemented by case law that interprets and applies its provisions. In this regard, the 2005 Act vests the power of judicial intervention in the High Court, which is itself defined under section 2 of the 2005 Act to encompass both the High Court of Malaya and the High Court in Sabah and Sarawak.[1]

Section 8 of the 2005 Act provides the foundation of the approach now taken by Malaysian law and the Malaysian courts to arbitration. It provides that '[n]o court shall intervene in matters governed by this Act, except where so provided in this Act'; thus espousing the Model Law philosophy of providing within the statute itself for all instances of potential court intervention in matters regulated by the statute.[2]

The 2005 Act distinguishes between international and domestic arbitration, with the more 'interventionist' sections of the 2005 Act applying only to domestic arbitrations. International arbitration is defined, in general accordance with the Model Law provisions, as an arbitration where:

- one of the parties has its place of business outside Malaysia;
- the seat of arbitration is outside Malaysia;
- the substantial part of the commercial obligations are to be performed outside Malaysia;
- the subject matter of the dispute is most closely connected to a state outside Malaysia; or
- the parties have agreed that the subject matter of the arbitration agreement relates to more than one state.[3]

Parties to a domestic arbitration are free to opt in to the non-interventionist regime. Likewise, parties to an international arbitration may opt in to the interventionist regime.

Party autonomy features strongly in the 2005 Act. Under the 2005 Act, parties are at liberty to make their own decisions on the seat of the arbitration,[4] the substantive law applicable to the dispute,[5] the number of arbitrators[6] and the procedure for their appointment,[7] the time for challenge of an arbitrator, and, subject to the provisions of the 2005 Act, the procedure to be followed by the arbitral tribunal in conducting the proceedings. Section 30(1) of the 2005 Act provides for the arbitral tribunal in an international arbitration to decide the dispute in accordance with the law as agreed upon by the parties as applicable to the substance of the dispute. In the event that parties to an international arbitration fail to agree on the applicable substantive laws, the arbitral tribunal shall apply the law determined by the conflict of laws rules.[8]

However, one deficiency in the 2005 Act recently identified by the Federal Court is the lack of a power to award interest for the pre-award period. In *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals*,[9] the Federal Court held at [187] that under section 33(6) of the 2005 Act, an arbitrator can only award post-award interest, and not pre-award interest, unless specifically provided for in the arbitration agreement. The restriction in section 33(6) of the 2005 Act has been interpreted strictly, as in *Kejuruteraan Bintai Kindenko Sdn Bhd v Serdang Baru Properties Sdn Bhd and another originating summons*,[10]

where the High Court held that even though the claims and counterclaims of the respective parties had dealt with the issue of pre-award interest, the effect of section 33(6) of the 2005 Act was to preclude the issue of pre-award interest being submitted to arbitration.

However, the High Court recognised that the saving provision in section 39(3) operated to preserve the rest of the award:[11]

> *The part that is affected and infected with respect to the pre-award interest can be clearly and clinically severed or excised from the part of the Award that is intact, which integrity has not been compromised or contaminated in any way by the pre-award interest element.*

The arbitration agreement and the jurisdiction of the tribunal

Malaysia takes a broad approach to the construction of arbitration agreements. The Fiona Trust single-forum presumption – that 'rational businessmen are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal'[12]– represents the law in Malaysia.[13]

The doctrine of *kompetenz-kompetenz* is also recognised in Malaysia. Section 18(1) of the 2005 Act provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.[14] The doctrine has been applied by the courts in the cases of *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor*,[15] *Chut Nyak Isham bin Nyak Ariff v Malaysian Technology Development Corp Sdn Bhd & Ors*,[16] and *TNB Fuel Services Sdn Bhd v China National Coal Group Corp*.[17] Malaysian law also recognises the principle of separability; namely that the arbitration agreement is separate from the main contract in which it may be contained.[18] An arbitration agreement therefore will not be invalidated because of, for example, an illegality invalidating the main contract.[19]

Section 10 of the 2005 Act allows a party to apply to the High Court for a stay of legal proceedings if the subject matter of the dispute is subject to an arbitration agreement. Section 10 of the 2005 Act makes it mandatory for the High Court to grant a stay unless the arbitration agreement is null and void, inoperative or incapable of being performed. Moreover, the Malaysian courts recognise the principle that it is for the arbitrators to first decide on questions of jurisdiction, and not the courts. In *Press Metal Sarawak v Etiqa Takaful Bhd*,[20] the Federal Court specifically approved the following pronouncement of the *Canadian Supreme Court in Dell Computer Corporation v Union des Consommateurs*: [21]

> *In a case involving an arbitration agreement, any challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator in accordance with the competence-competence principle, which has been incorporated into art. 943 CCP. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception, which is authorized by art. 940.1 CCP, is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record. Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding.*

The Federal Court also specifically approved the following propositions, taken from the Singapore cases of *Dalian Hua Liang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd*[22] and *Tjong Very Sumito v Antig Investments*:[23]

> *…if it was at least arguable that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered.*
>
> *…if the arbitration agreement provides for arbitration of 'disputes' or 'difference' or 'controversies', then the subject matter of the proceedings in question would fall outside the terms of the arbitration agreement if (a) there was no 'disputes' or 'difference' or 'controversy' as the case may be; or (b) where the alleged dispute is unrelated to the contract which contains the arbitration agreement.*

In the recent case of *Asiagroup Sdn Bhd v PFCE Timur Sdn Bhd*,[24] the High Court (at [24]) recognised the statutory power and jurisdiction of arbitrators to rule on their own jurisdiction, and affirmed the principle that even if the court had doubts concerning the existence of the arbitration agreement within a contract, it should lean in favour of granting a stay so that the dispute may be referred to arbitration in order to let the arbitrators first decide whether they had jurisdiction to arbitrate the dispute.

The last year has seen a number of decisions regarding the incorporation of arbitration agreements by reference. Malaysian law recognises the principle of incorporation by reference:[25]

> *According to section 9(5) of [the 2005 Act], an arbitration agreement may come into existence by reference. . . the agreement itself need not have an arbitration clause in it as long as the agreement refers to an arbitration clause in another document and the agreement is in writing and the reference incorporates the said clause into the agreement. . .*
>
> *. . . There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required.*

In *TH Heavy Engineering Bhd v Daba Holdings (M) Sdn Bhd* (formerly known as Dugwoo (M) Sdn Bhd),[26] after an examination of the existing jurisprudence, the High Court synthesised the general principles. First, while case law is relevant, the determination of whether an arbitration agreement has been incorporated via reference is a matter of construction and turns on the facts of each particular case. Second, while no specific forms or words need be used to incorporate an arbitration agreement into a contract, and the document to be incorporated need not be signed by the parties, there must on the other hand be evidence of a clear intention to submit to arbitration. Third, where the document containing the arbitration agreement is specifically identified in the contract, either directly or indirectly, that is generally sufficient and the document need not be specifically attached to the contract. On the other hand, where a document is only referred to in general, broad and unspecific terms, attaching it to the contract would be prudent, as its absence might point to an absence of evidence of the parties' intent to arbitrate.

The decision in *Thien Seng Chan Sdn Bhd v Teguh Wiramas Sdn Bhd & Anor*[27] affirms that the document containing the arbitration

clause need not be signed by the parties in order for it to be incorporated into the contract. The High Court also clarified how arbitration agreements are to be construed when a contract contains multi-tiered dispute resolution clauses. Firstly, where a contract only expressly mentions mediation as a method of dispute resolution, but incorporates an arbitration agreement indirectly by reference to another document, the court will uphold the arbitration agreement:[28]

> *It is only too obvious that much as parties may want to first try to resolve their disputes through mediation, there may be times when resolution through mediation fail. Whilst hoping for the best, one must be prepared for the worst. The [incorporated arbitration agreement] takes over where mediation is terminated.*

Secondly, where a contract provides that the parties agree to submit to the jurisdiction of the courts for the purpose of any action or proceedings arising out of the contract, this cannot be taken to preclude the operation of the arbitration agreement within or incorporated into the same contract:[29]

> *The Court must proceed on the basis that the parties did not intend to contradict themselves in the same document expressing their contractual obligations and intentions. . .*
>
> *. . . There is thus no conflict in the 2 clauses but a complementarity leading to a convergence of interest and purpose where the aid of the Court shall be called upon if necessary for matters pending arbitration for example in cases of injunctive reliefs and even for matters after arbitration as in an enforcement of the award.*

One notable exception to the court's power to grant a stay of proceedings under the 2005 Act is where a winding up petition has been presented against a respondent. In *NFC Labuan Shipleasing I Ltd v Semua Chemical Shipping Sdn Bhd*,[30] the High Court found that:

- a winding-up petition is not a substantive claim that is contemplated by section 10 of the 2005 Act, but a statutory right that may be invoked and exercised at any time in accordance with the law on winding-up, and cannot be modified or diluted by section 10; and
- a winding-up petition is not a claim for payment, but a sui generis proceeding with different reliefs and end results from a civil proceeding subject to arbitration, and is therefore not susceptible to a stay pending arbitration.

The seat of arbitration

In *The Government of India v Petrocon India Limited*,[31] the Federal Court was faced with a question regarding the identification of the seat of arbitration in circumstances where the law applicable to the container contract was Indian law; but where the contract specified the 'venue' of the arbitration as Kuala Lumpur, while at the same time expressly providing that the 'arbitration agreement' was to be 'governed by' the 'laws of England'. The Court of Appeal had concluded that the juridical seat was London, because English law was chosen as the law of the arbitration.

The Federal Court disagreed and held that '. . . the seat of arbitration will determine the curial law that will govern the arbitration proceeding', and drew on English case law to come to the conclusion that '. . . there is a strong presumption that the place of arbitration named in the agreement will constitute the juridical seat.'[32]

The Federal Court expressly recognised that there was a distinction between the seat of arbitration for the purposes of identifying the curial law, and the physical or geographical place where the arbitration was held, considering that '[i]n the case of place of arbitration it can be shifted from place to place without affecting the legal seat of the arbitration'. The Court, however, held that the word 'venue' in the clause meant the juridical seat, reasoning that if it had merely been a reference to the geographical or physical seat, it would not have been necessary to have it inserted in the agreement; and that in any event the word 'venue' and 'seat' are often used interchangeably. Ultimately, however, the Federal Court did not overturn the decision of the Court of Appeal, as it accepted the argument of the respondent that, on the facts of the case, the parties had subsequently expressly agreed to change the seat of the arbitration to London.

The appointment of arbitrators

Sections 12 to 17 of the 2005 Act governs the appointment of arbitrators. The distinction between domestic and international arbitrations also determines the applicability of section 12(2) of the 2005 Act (found in Part II). Section 12(2) of the 2005 Act provides that in the event that the parties to the arbitral proceedings fail to determine the number of arbitrators, the arbitral tribunal shall consist of three arbitrators in the case of an international arbitration and a single arbitrator in the case of a domestic arbitration.

The default procedures for the appointment of arbitrators are provided for under section 13 of the 2005 Act. Parties are, however, free to determine the procedures that are to be adopted with regard to the appointment of arbitrators. Arbitrators are expected to disclose circumstances that may result in a conflict of interest, as provided in section 14 of the 2005 Act.

In the event that the parties are unable to agree on the appointment of arbitrators, either party may apply to the director of the AIAC to appoint the arbitrators. In the event that the director similarly fails to appoint the arbitrators, either party may then apply to the High Court for assistance in the appointments.

In the case of *Sebiro Holdings Sdn Bhd v Bhag Singh*,[33] the Court of Appeal was confronted with the question of whether the KLRCA director's appointment of an arbitrator was susceptible to challenge. Before the High Court, the appellant had sought, but failed to terminate, the appointment of the respondent as arbitrator on the grounds that he lacked geographical knowledge of Sarawak, which was the place of performance of the underlying contract. In dismissing its appeal, the Court of Appeal noted that 'the power exercised by the Director of the KLRCA under subsections 13(4) and (5) of [the 2005 Act] is an administrative power' and therefore '[his function] is not a judicial function where he has to afford the right to be heard to the parties before an arbitrator(s) is appointed'.[34] Following this, it was held that:[35]

> *The Court cannot interpose and interdict the appointment of an arbitrator whom the parties have agreed to be appointed by the named appointing authority under the terms of the Contract, except in cases where it is proved that there are circumstances which give rise to justifiable doubt as the [arbitrator's] impartiality or independence or that the [arbitrator] did not possess the qualification agreed to by the parties.*

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

Representation of parties at arbitration in East Malaysia

In *Samsuri bin Baharuddin & Ors v Mohamed Azahari bin Matiasin and another appeal*,[36] the Federal Court held that the effect of section 8(1) of the Advocates Ordinance 1953, read with section 2(1)(a) and (b) of that statute, was to prohibit foreign lawyers, who do not have the right to practise law in Sabah, from representing parties to arbitration proceedings in Sabah.

Interim relief

The scheme of the 2005 Act permits both the arbitrator and the courts to grant interim relief. Thus, section 19 of the 2005 Act permits arbitral tribunals to grant orders that include security for costs and discovery of documents. On the other hand, section 11 of the 2005 Act expressly confers powers on the High Court to make interim orders in respect of the matters set out in section 11(1)(a)–(h) of the 2005 Act, which include an order to prevent the dissipation of assets pending the outcome of the arbitration proceedings. Section 11(3) of the 2005 Act expressly provides that such powers extend to international arbitrations where the seat of arbitration is not in Malaysia.

The scope of the court's powers under section 11 of the 2005 Act was recently considered in *Telekom Malaysia Bhd v Obnet Sdn Bhd*[37] where the plaintiff sought discovery of confidential documents during the course of arbitration, but was refused by the arbitrator. The plaintiff then applied to the court for discovery of those documents under section 11 of the 2005 Act, which was resisted by the respondent on the grounds that:

- the court was bound by the arbitrator's finding of fact that discovery ought not to be allowed as grave injustice would be caused to the respondent;
- section 11 of the 2005 Act only provided for interim measures, and discovery was a permanent measure as the document could not be undisclosed once it was disclosed; and
- the court should not interfere with the arbitrator's procedure.

Firstly, the court took the view that the proper test that the arbitrator should have applied was whether the document was necessary for the fair disposal of the case. The obligation of confidentiality was a mere consideration, and would not be necessarily determinative of the application. Thus, the court was not bound by the supposed finding of fact of the arbitrator. Secondly, the court held that even though section 11 of the 2005 Act refers to interim measures, some of the specific orders that the court is empowered to make are not interim in nature. On a proper construction of the section, therefore, the legislature must have intended that the court should be empowered to make such orders whether or not their effect would be interim in nature or otherwise. Thirdly, the court agreed with the general position in law that an arbitrator is master of his own procedure, but emphasised that there were exceptions to this general principle, one of which was section 11 of the 2005 Act. Thus, the High Court dismissed the respondent's arguments and ordered discovery.

The case of *Telekom Malaysia Bhd v Obnet Sdn Bhd* is notable as it highlights the distinct nature of Malaysian law with respect to interim measures. The case is founded on the fact that section 11 of the 2005 Act contemplates the concurrent jurisdiction of the arbitral tribunal and the High Court with respect to certain interim measures. That the 2005 Act provides for such concurrent jurisdiction is uncontroversial – indeed, as regards certain specific types of interim measure, it is clear from the 2005 Act that the High Court's powers are in fact more extensive than that of the Tribunal. However, the significance of *Telekom Malaysia* lies in the fact that the High Court seems to have considered that the statutory framework permitted the Court to reconsider an issue that had already been the subject of a determination by the Tribunal acting within its powers. It remains to be seen whether *Telekom Malaysia* will be endorsed by the higher courts.

Awards

Section 2(1) of the 2005 Act defines an award as a decision of the arbitral tribunal on the substance of the dispute and this includes any final, interim or partial award and any award on costs or interest. Section 36(1) of the 2005 Act further provides that all awards are final and binding. Pursuant to section 33 of the 2005 Act, an award should state the reasons upon which the award is based unless the parties have otherwise agreed or the award is on agreed terms. Section 35 of the 2005 Act allows the tribunal to correct any clerical error, accidental slip or omission in an award; it also permits the tribunal to give an interpretation of a specific point or part of the award upon request by a party.

Sections 38 and 39 of the 2005 Act address the recognition and enforcement of awards. While section 38 of the 2005 Act sets out the procedure for recognising and enforcing awards, section 39 of the 2005 Act sets out the grounds on which the recognition or enforcement of an award will be refused.

The grounds for setting aside an award, and for refusing recognition or enforcement, are drawn from article V of the New York Convention – a party seeking to set aside or seeking to resist recognition or enforcement must show that:

- a party to the arbitration agreement was under an incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the state in which the award was made;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- the award contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties (unless such agreement was in conflict with a provision of the 2005 Act from which the parties cannot derogate), or, failing such agreement, was not in accordance with the 2005 Act; or
- the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

An award may also be set aside or have its recognition or enforcement refused where the award is in conflict with the public policy of Malaysia; or on the ground that the subject matter of the dispute is not arbitrable under Malaysian law. In this regard, section 4(1) of the 2005 Act expressly provides that 'any dispute that the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy.'

Various cases illustrate that the prevailing judicial philosophy is to take an extremely restrictive approach to permitting setting aside applications. In *Ajwa for Food Industries Co (Migop), Egypt v Pacific Inter-link Sdn Bhd & another appeal*, the Court of Appeal explained that 'the court should be slow in interfering with an arbitral award. The court should be restrained from interference unless it is a case of patent injustice which the law permits in clear

terms to intervene.'[38] As regards the meaning of the term 'public policy' in this context, the courts have also been clear that the ground is extremely narrow and to be read restrictively. As stated by *Lee Swee Seng J in Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd*,[39] '[a]n error of law or fact does not engage the public policy of Malaysia. . .'.[40] In this regard, it is clear that the Malaysian courts do not equate public policy in this context with a wide conception of the public interest; rather, the courts have applied the following test:[41]

> *Although the concept of public policy of the State is not defined in the Act or the model law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would 'shock the conscience' . . ., or is 'clearly injurious to the public good or . . . wholly offensive to the ordinary reasonable and fully informed member of the public' . . . or where it violates the forum's most basic notion of morality and justice. . . . This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law.*[42]

A recent case in point is *Sime Darby Property Berhad v Garden Bay Sdn Bhd*.[43] The High Court was faced with an application to set aside an arbitral award. The dispute concerned a landscaping and turfing project. The claimant in the arbitration was the contractor for the project, while the respondent was the employer. The tribunal had found the claimant to be liable for rectification works instructed by the contract administrator, but then held that the parties had, by conduct, accepted the retention sum as a mode to allocate funds for rectification works and sought to limit the amount recoverable by the employer to that amount retained. This, however, was not the position taken by either party.

The court set aside the award and held that '. . .if the Arbitrator had wanted to rely on her knowledge of what she understood to be the usual practice in construction contracts, then she should inform the parties about it and invite them to challenge such an understanding of usual practice.'[44] The court, however, pointed out that this was not done, and that the Arbitrator had thus decided an 'issue not at play and not pleaded and in that pejorative sense, an "invented issue" and thus was in breach of natural justice in not allowing the parties to be heard on this new issue.'[45] Of significance is the High Court's view as to the test to be applied where there had been a breach of natural justice. The High Court considered that '[a]ny breach of natural justice not in the manner of a technical or inconsequential breach would be sufficient for the court to intervene under section 37(1)(b)(ii) read with section 37(2)(b) application to set aside.'[46]

However, the Court of Appeal (in *Garden Bay Sdn Bhd v Sime Darby Property Bhd*)[47] subsequently allowed an appeal against the High Court's decision. The Court of Appeal placed emphasis on section 37(6) of the 2005 Act, which provides the High Court with the power to '. . .adjourn the proceedings . . . to allow the arbitral tribunal an opportunity to resume the arbitral proceedings.' The Court of Appeal considered that the effect of this subsection, read in light of the other provisions of the 2005 Act, entailed that it was incumbent on a party applying to set aside an award to simultaneously move the court under section 37(6) of the 2005 Act. In other words, as a general rule, a party making an application to set aside an award must move the court to consider whether the award can be saved by a reference to the tribunal under section 37(6) of the 2005 Act:

> *. . .it is not the court's function to set aside the award under section 37 . . . without giving an opportunity to the arbitral tribunal to deliver an enforceable award. Any parties who make an application under section 37 or section 42 without seeking appropriate direction pursuant to section 37(6), must be seen to be an abuse of process of court and must be dismissed. . .*

The failure of the applicant to apply for a reference to the tribunal under section 37(6) of the 2005 Act was, in the view of the Court of Appeal, fatal to its case.

The decision is remarkable. It is founded in a robust conception of the statutory philosophy of judicial non-interference and the unique nature of the Malaysian statutory framework, and, as far as the authors can tell, has no parallel in UK, Hong Kong or Singapore jurisprudence. While jurisdictions such as Singapore recognise the power of the court hearing a setting aside application to suspend setting aside proceedings in order for the tribunal to be given the opportunity to eliminate the grounds advanced in support of the application (see, for example, *JVL Agro Industries v Agritrade International Pte Ltd*[48]), it has never been suggested that it is mandatory for the applicant to move the court for such a suspension. Parties seeking to set aside an arbitral award under the Act ought know to be very cautious in making an application to set aside, without a simultaneous application for the court to direct the tribunal to cure the matter giving rise to the complaint; indeed, the Court of Appeal went so far as to suggest that a failure to couple a setting-aside application with a section 37(6) application could constitute an abuse of process. It remains to be seen whether the decision will be endorsed by the Federal Court.

In *Intraline Resources Sdn Bhd v Exxonmobil Exploration and Production Malaysia Inc*,[49] the High Court commented that the mechanism of section 37 of the 2005 Act was not to be abused by applicants, and reiterated that the threshold for judicial intervention under section 37 of the 2005 Act was high:[50]

> *. . .In order to uphold and respect party autonomy the Courts can only intervene in limited circumstances as defined in the statute, focusing on a fair process and on the right of the parties to the arbitration to a decision that is within the true ambit of their consent to have their dispute arbitrated, and plainly do not extend to the realm of vindicating the merits or correctness of the decisions of the arbitral tribunal. Courts cannot entertain setting aside applications which are in truth a manifestation of the desire of the regretful losing party in arbitration to be given another opportunity to argue the merits of its case.*

It is also clear that the courts take a pragmatic approach to such applications, and will not be strung up by technicalities. This is clearly illustrated by the decision in *Tridant Engineering (M) Sdn Bhd v Ssangyong Engineering and Construction Co Ltd*.[51]

This was an appeal against a High Court decision to the effect that an award contained a decision on matters beyond the scope of the submission to arbitration. The respondent was the main contractor for a development in Johor. The appellant was a nominated subcontractor, who entered into two contracts with the respondent contractor, one for the installation of electrical services, and the other for extra-low voltage installation works. The dispute in the arbitration concerned a claim by the appellant for sums said to be due and owing. The respondent's position was that it was entitled to refuse payment on the basis of a 'pay when paid' clause in the contracts; and that in any event the appellant's claim was time-barred. The appellant's position was that a reasonable time to pay had lapsed and hence the respondent was liable to pay; as

regards the limitation issue, the appellant's position was that time only started to run from the date reasonable steps had been taken by the respondent to be paid by the employer.

The arbitrator decided that the respondent's liability to pay was not contingent on the receipt of the sum from the employer. On the limitation issue, the arbitrator decided that there had been an acknowledgment of debt in a proof of debt filed with an insolvent entity who had an interest in the project, and that this resulted in a postponement of the limitation period pursuant to sections 26 and 27 of the Limitation Act 1953 (the Limitation Act).

The High Court decided that this latter aspect of the arbitrator's decision fell outside the scope of the reference to arbitration. It is noteworthy, in this regard, that the appellant had not placed any reliance on sections 26 and 27 of the Limitation Act in its pleadings.

The Court of Appeal reversed the decision of the High Court and noted that, although the relevant sections of the Limitation Act were not pleaded, the arbitrator had invited full submissions on the issue; moreover, there was no evidence that the respondent had protested against the arbitrator's introduction of the issue of postponement of the limitation period. Similarly, the respondent had not sought to introduce any further evidence.

The Court of Appeal considered, in this context, that the failure to plead was not fatal to the respondent's claims. There had been no breach of the rules of natural justice. Moreover, the Court of Appeal took an extremely pragmatic approach to the question of whether the issue had been sufficiently engaged on the pleadings:

> *[32] . . .even though sections 26 and 27 of the Limitation Act 1953 were not formally pleaded, the pleadings as they stood were adequate to put the Respondent on notice the issue of postponement of the limitation period. It was undisputed that the defence of the Respondent in the alternative was that the Appellant's claim was time barred by virtue of the Limitation Act and once that issue of limitation was put on the table so to speak, the Appellant was fully entitled to avail of any means to rebut the defence of limitation.*

The Court of Appeal in this context endorsed the following proposition, drawn from the Singapore decision in *PT Prima International Development v Kempinski Hotels SA*:[52]

> *. . .any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded.*

The Federal Court has recently clarified in *CTI Group Inc v International Bulk Carriers SPA*[53] that a party seeking to set aside an order made under section 38 of the 2005 Act cannot apply to set it aside under that section on the ground that there is no arbitration agreement in existence between the parties. An application for setting aside must be taken out under section 39 of the 2005, and a party seeking to do so can only rely on the grounds set out in section 39 of the 2005, and no other grounds.

Section 42(4) of the 2005 Act, which applies only to domestic arbitration unless the parties agree otherwise, provides a further avenue through which an award can be set aside. Upon the reference of a question of law arising out of an award to the High Court for its determination, the High Court has the power to, inter alia, set aside the award in whole or in part. However, in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals*,[54] the Federal Court interpreted the scope of this power in a restrictive manner, holding that the proper test for judicial intervention is whether there is a question of law arising out of the award that substantially affects the rights of one or more of the parties. The court also dismissed other tests for illegality that had been cited by counsel, holding that section 42 of the 2005 Act must be read as it stands, and previous jurisprudence relating to the setting aside of awards, such as the case law developed around the repealed Arbitration Act 1952, cannot be applied to section 42 of the 2005 Act:[55]

> *An award might or might not be perverse, unconscionable, unreasonable, and the like. But it only matters whether there is a question of law arising out of the award that substantially affects the rights of one or more of the parties. Under s 42, that is the only ground for the court to intervene. Perverse, unconscionable, unreasonable, and the like are not tests for the setting aside of an award.*

Section 37(4) of the 2005 Act provides, inter alia, that an application for setting aside of an award may not be made after 90 days from the date that the award was issued. As was recently established in *Triumph City Development Sdn Bhd v Kerajaan Negeri Selangor Darul Ehsan*,[56] this is a strict limit, and the court does not have an inherent jurisdiction to set aside an award even if an application is made out of time:[57]

> *. . .If the parties are allowed to go to court to challenge arbitration awards even if it is made out of time, then there is no point for the parties to have undergone arbitration process . . . It defeats the very purpose of having arbitration as the chosen mode of dispute resolution contractually agreed to by the parties. This is the reason why the court should be strict in entertaining this kind of application.*

Conclusion

Malaysia continues its growth as a centre for arbitration. The 2005 Act provides a coherent modern legislative framework in line with international norms and best practices. As it stands, Malaysia has all the components in place to take off as a centre for international arbitration. Recent decisions of the country's domestic courts underscore the fact that the Malaysian judiciary is now distinctly pro-arbitration – as Datuk Professor Sundra Rajoo, director of the AIAC, has stated: '[t]he courts have been enforcing awards and more importantly, supporting awards. They give interim measures and they also support arbitral awards and applications from arbitrations that are seated outside Malaysia.'[58]

Given the current arbitral landscape and the progressive and innovative approach taken by the AIAC in promoting Malaysia as a cost-efficient centre for dispute resolution, the country is poised to tap into the significant growth of international arbitration in the Association of Southeast Asian Nations and Asia-Pacific region. The right foundations are in place, and the future remains bright.

Notes

1 Section 2 of the 2005 Act.
2 Paragraph 17 of the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration.
3 Section 2 of the 2005 Act.
4 Section 22(1) of the 2005 Act.
5 Section 30(2) of the 2005 Act.
6 Section 12(1) of the 2005 Act.
7 Section 13(2) of the 2005 Act.

8 Section 30(4) of the 2005 Act.
9 [2018] 1 MLJ 1.
10 [2017] MLJU 1332.
11 Ibid, at [42].
12 *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2007] 4 All ER 951, at 957.
13 *Press Metal Sarawak v Etiqa Takaful Bhd* [2016] MLJU 404, *KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd* [2013] 1 CLJ 993. See also *PLB-KH Bina Sdn Bhd v Hunza Trading Sdn Bhd* [2014] 1 LNS 1074.
14 Section 18 of the 2005 Act also provides for the procedures and time limits for raising objections to the arbitral tribunal's jurisdiction. It also provides for appeal to court (which shall have the final say) in regard to the arbitral tribunal's ruling on its jurisdiction.
15 [2008] 1 MLJ 233.
16 [2009] 9 CLJ 32.
17 [2013] 1 LNS 288.
18 *Government of India v Petrocon India Limited* [2016] MLJU 233.
19 *Arul Balasingam v Ampang Puteri Specialist Hospital Sdn Bhd* (formerly known as Puteri Specialist Hospital Sdn Bhd) [2012] 6 MLJ 104 at 110I-111A.
20 [2016] MLJU 404.
21 [2007] SCJ No. 34.
22 [2005] 4 SLR 646.
23 [2009] 4 SLR 732.
24 [2017] MLJU 515.
25 *Cooperative Rabobank UA (Singapore Branch) v Misc Bhd & Anor* [2017] MLJU 2076, at [14]-[19].
26 [2018] 7 MLJ 1.
27 [2017] MLJU 1117.
28 Ibid, at [44].
29 Ibid, at [59] - [61].
30 [2017] MLJU 900.
31 [2016] MLJU 233.
32 Ibid, at [35].
33 [2015] 4 CLJ 409.
34 Ibid, at [17].
35 Ibid, at [21].
36 [2017] 2 MLJ 141.
37 [2017] MLJU 1484.
38 [2013] 2 CLJ 395, at [13].
39 [2016] MLJU 354.
40 Ibid, at [44].
41 *Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd* [2012] 5 MLJ 809.
42 Taken from *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, at [59] (internal citations omitted).
43 [2017] MLJU 145.
44 Ibid, at [42].
45 Ibid, at [39].
46 Ibid, at [25].
47 [2017] MLJU 1998.
48 [2016] 4 SLR 768
49 [2017] MLJU 1299.
50 Ibid, at [90].
51 [2016] MLJU 5.
52 [2012] SGCA 35.
53 [2017] 5 MLJ 314.
54 [2018] 1 MLJ 1, at [66].
55 Ibid, at [118].
56 [2017] MLJU 1518.
57 Ibid, at [4]-[5].
58 www.legalbusinessonline.com/reports/arbitration-asia-next-generation.

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Rajah & Tann Singapore is one of the largest full-service law firms in Singapore and South East Asia. Over the years, the firm has been at the leading edge of law in Asia, having worked on many of the biggest and highest-profile cases in the region. The firm has a vast pool of talented and well-regarded lawyers dedicated to delivering the very highest standards of service across all the firm's practice areas.

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Public Policy under Indonesian Arbitration Law

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Introduction

One of the problems with the request for the enforcement of foreign arbitration awards is the rejection of the request by the national courts on the ground that the award violates public policy.[1] This problem also occurs in Indonesia. This issue appeared for the first time in 1979 when the Supreme Court rejected the request for execution of the London arbitration award in *ED & F Man (sugar) Ltd v Haryanto*. The Supreme Court argued the London arbitration award was in violation of the public policy of Indonesia.

The Indonesian Supreme Court was of the opinion that the purchase of sugar agreement made between the parties, namely ED & F Man (Sugar) Ltd, a London-based sugar company and Mr Haryanto, an Indonesian businessman, was not valid under Indonesian law. The Supreme Court argued the only institution that had the authority to export and import sugar was the government-owned logistic body, namely Badan Usaha Logistik. Therefore, the Supreme Court further argued the sugar transaction made by Mr Haryanto was a violation of Indonesian law. This, according to the Supreme Court, was a violation of public policy.

The ground of public policy for the annulment of foreign arbitration award is recognised under the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. Article V paragraph 2 (b) of the New York Convention provides that 'recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.'[2]

The main difficulty with the issue of the set-aside or the annulment of foreign arbitral awards on the basis of violation of public policy is that there is no clear meaning under the Indonesian arbitration laws. The laws are silent about the meaning or definition of it.[3]

Since the Supreme Court's decision in the *ED & F Man (sugar) Ltd v Haryanto*, various laws on arbitration have been promulgated. The main problem with these laws is that they do not give satisfactorily the meaning of public policy. This issue has also became interesting, as the government in 1999 promulgated Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. The same question is whether this law provides a better formula concerning the meaning of public policy.

Besides discussing the statutory laws above, this article will also outline the opinions of Indonesian scholars specialising in arbitration. Their opinions about public policy with regard to the arbitration awards will help to understand public policy as a term. The scholars included are Professor Sudargo Gautama and Professor Priyatna Abdurrasyid. My short opinion will also be added to this part.

The decisions of the courts concerning arbitration and public policy will also be specifically mentioned in this article. There are two controversial but interesting cases, which will be discussed. These are:

- *Bankers Trust v PT Mayora Indah TbK* (2000);
- *The Astro Nusantara Bv et al v PT Ayunda Primamitra* (2010).

In general, this article tries to see what development has taken place in relation to the application of public policy. Particular attention will be given to the position of the Indonesian court when faced with the request for the execution of foreign arbitral.[4]

Public policy under Indonesian Arbitration Law

Indonesian laws in general contains the term public policy in it. The term public policy, for example, is found in Law No. 9 of 2004 concerning the Administrative Court. According to this law, public policy is 'the interest of the nations and state and/or the interest of the people and/or the interest of the development in accordance with the existing regulations.'[5] As seen from this definition, the term public policy under this law is exceedingly broad. Public policy is connected not only with the interest of the state or nation but also with the people and (national) development. No laws explain what the interests of the state or nation is. However, when it comes to the issue of the interests of the state and development, the issue of state's assets or money may be classified as falling within that meaning.

An important legislation promulgated in the same year with Law No. 9 of 2004 is Law No 1 of 2004 concerning the State's Assets. This Law strongly gives a signal of warning to the public (and might include foreign courts or foreign arbitration) about the status of the state (Indonesian government) assets. Article 50 of this Law states that no body may confiscate state's assets including state's money.

The other laws contained the term public policy may also be found in Law No 48 of 2009 concerning the power of judiciary;[6] and Law No. 5 of 1999 concerning the Prohibition of Monopoly and Unfair Competition.[7] All of these laws provide a very broad definition with regard to the meaning of public policy.

The Indonesian statutory laws on arbitration include:

- Government Regulation No. 34 of 1981 concerning the Ratification of the New York Convention of 1958;
- Supreme Court Regulation No. 1 of 1990 concerning the Methods for the Execution of the Foreign Arbitral Awards; and
- Law No. 30 of 1999 concerning the Arbitration and Alternative Dispute Resolution.

Government Regulation No. 34 of 1981 concerning the Ratification of New York Convention 1958

The first consideration that the Indonesian court argued, as shown below, in applying the public policy consideration is the fact that Indonesia is a member of the New York Convention of 1958 on

the Recognition and Enforcement of Foreign Arbitral Awards. The Indonesian legislation that embodies the ratification of the Convention is Presidential Regulation No. 34 of 1981.

The Presidential Regulation however has only two paragraphs. These two paragraphs contain a confirmation that Indonesia ratified the New York Convention. The first paragraph affirmed that the text of the New York Convention was attached to the Presidential Regulation. The Regulation also set the date of the entry of force of the Presidential Regulation, namely the date of the promulgation of the Presidential Regulation, which was 5 August 1981.

The problem with this presidential regulation is that it does not, for example, provide a translation of the text of the New York Convention into Indonesian.[8] It does not mention either which court is given the authority to deal with requests for the enforcement of foreign arbitral awards in Indonesia. It is also silent about the application of public policy as embodied in article V of the New York Convention.

An important and interesting case with regard to the lack of the detailed provisions implementing the New York Convention was the *PT Nizwar v Navigation Maritime Bulgare*.[9] The Indonesian Supreme Court refused to give execution to the request for the enforcement of London Arbitration Award. The Supreme Court argued that the court could not enforce the award mainly because there was no implementing legislation (of the Government Regulation No. 34 of 1991), which gave the power to the Court of Jakarta to enforce the foreign arbitration award (in Indonesia).

On the basis of these developments, the Indonesian Supreme Court launched an initiative to issue legislation accommodating the problems faced in the two cases above, namely Supreme Regulation No. 1 of 1990 concerning the Methods of Implementing and Executing the Foreign Arbitration Awards.

Supreme Court Regulation No. 1 of 1990 concerning the Methods of Implementing and Executing the Foreign Arbitration Awards

Supreme Court Regulation No. 1 of 1990 answers three problems in relation to the regulation of foreign arbitral awards as embodied in Government Regulation No. 34 of 1981. Firstly, it gives power to the Central Jakarta Court to handle the request and execution of foreign arbitration awards.[10]

Secondly, it lays down the requirement for the grant of execution. Among others it requires that the foreign arbitration awards may only be enforced in Indonesia if they are not in violation of public policy of the Republic of Indonesia.

The third problem is the definition of 'public policy' in Indonesia. Article 4 of the Supreme Court Regulation says that the public order (policy) is the violation of the principles of the whole legal system and society in Indonesia.[11] This definition is more restrictive than the definition provided in Law No. 9 of 2004. Nevertheless, this definition does not solve the problem. This definition is purportedly to be confined to the law, but still it may cover all the systems of law (and society) in Indonesia. It does not state which specific laws would fall within the meaning of public policy. Therefore, the attempt of the Supreme Regulation to define the meaning of public policy is still far from the expectation. The meaning of public policy is still broad.

Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution

The government promulgated Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (the Law) in August 1999. The law replaced the old Dutch-private procedural law on arbitration as embodied in articles 615–651.[12]

Law No. 30 of 1999 regulates both domestic and international arbitration and their awards. The requirement of public policy is contained in article 66. This article states that international arbitration awards will only be recognised and enforced within the jurisdiction of the Republic of Indonesia if they fulfil the following requirements:

i the international arbitration award must have been rendered by an arbitrator or arbitration tribunal in a country which, together with the Republic of Indonesia, is a party to a bilateral or multilateral treaty on the recognition and enforcement of international arbitration awards;

ii international arbitration awards, as contemplated in item (i), are limited to awards which, under the provisions of Indonesian law, fall within the scope of commercial law;

iii international arbitration awards, as contemplated in item (i), may only be enforced in Indonesia if they do not violate public order;

iv the international arbitration awards may be executed in Indonesia after obtaining execution from the head of the Central District Court of Jakarta; and

v when one of the parties involved in the international arbitration is the State of the Republic of Indonesia, the international arbitration may only be enforced if it has obtained execution from the Supreme Court, in which the power will be delivered to the head of the Central District Court of Jakarta.

The explanatory notes of article 66 of Law No. 30 of 1999 does not offer any explanation on what the terms public policy means. The lack of the definition would imply that the broad definition mentioned under Supreme Regulation No. 1 of 1990 still applies. This would also mean that the term could be still extensively interpreted.

The opinions of scholars

Professor Sudargo Gautama

The scholar who tried to define the term 'public policy' for the first time was Sudargo Gautama, a professor of private international law. He explained the term 'public policy', or the principle of public order, in the following statements: 'public policy or open bare orde is merely a reserve principle which is only to be invoked exceptionally'.

He said the application of these terms ought to be strictly limited and be applied cautiously. This term was only an exception. He opined, if this term was used without any limitation to set aside the application of the foreign law, it would mean private international law would fail to develop and would only uphold the supremacy of the national law to foreign law. This condition could alienate Indonesia from the international community.[13] He further noted that the public policy should be an 'escape clause' and should be confined to be used as a 'shield not a sword'.[14]

What Professor Gautama meant to intent is quite clear. He did not try to provide the meaning to the term public policy. He merely wanted to argue that this term should be applied cautiously and this would mean that the term should not be applied easily.

Professor Priyatna Abdurrasyid

The other scholar who tried to explain the meaning of public policy was Professor Priyatna Abdurrasyid. He was the chair of the BANI Arbitration Centre of Indonesia. In his leading book on arbitration (in Indonesia) titled *Arbitration and Alternative Dispute*

Resolution, Abdurrasyid did not try to give the meaning of public policy. He only stated that there needed a further study about public policy.[15] Secondly, Abdurrasyid merely quoted the meaning of public policy as contained in the Supreme Court Regulation No. 1 of 1990.[16]

Abdurrasyid admitted article V (2)(b) of New York Convention is the most important provision for a domestic court to set aside the foreign arbitral awards when they are violating the public policy of a state.[17]

Although admitting the importance of public policy ground, Abdurrasyid was of the opinion that the existence of this ground did not mean that it was a mandatory for a court to set aside the award. He opined that public policy might be used to set aside the award.[18] The words 'might be used' emphasises that public policy grounds should not be freely, or at all the times, used by the court to set aside the foreign arbitral awards. It was on the hand of the court whether it would use it or refused to use it to set aside the foreign arbitral awards.

My personal opinion about public policy under Indonesian arbitration law is that since the term is not really clear and subject to broad interpretation depending upon the National Court to interpret it, I share with the opinion of Professor Gautama, that the term must be used carefully. The term cannot be used easily to set aside the foreign arbitration awards. The basis for this position are the following.

Firstly, public policy should be used cautiously mainly because all states must respect the application of due process of law in other countries. This position is of importance, and must be taken into consideration mainly because the existence of different meanings of public policy in every legal system should be appreciated. This fact should be considered carefully, in order to prevent the misuse of this institution (public policy). At the end of the day, the free use of this institution would endanger the existence and the future of international arbitration.

Secondly, the recognised principle of acquired rights under private international law. This principle suggests that what has been recognised as valid under national law where the arbitration (awards) takes place, must also be recognised in other states.

Thirdly, arbitration has been a universal mechanism for the settlement of commercial disputes acknowledged by states in the world. The universal character of arbitration requires that it is a universal mechanism and therefore should be universally recognised by states in the world. This universal character is found in its substantive provisions as well as formal provisions for arbitration.[19]

Fourth, to day we have an internationally recognised convention on the recognition and enforcement of foreign arbitral awards, namely the New York Convention of 1958. This convention lays down the obligation upon its members to recognise the arbitration agreement or clause and the arbitral awards made in the territory of the member states.[20] The convention recognises the principle of public policy that requires its more than 150 member states to observe it.[21]

Case laws: public policy and foreign arbitration awards in Indonesia

No comprehensive data concerning the number of foreign arbitral awards registered with the Central District Jakarta Court requesting for their execution in Indonesia has been recently reported. However, in the survey made in 2010, the number of foreign arbitration awards registered with Central Jakarta Court was about 29 cases (per year).[22] Case laws on the application of the principle of public policy to the foreign arbitration awards so far are very few. There are only two cases, which related to the application of public policy in Indonesia. They included:

- *Bankers Trust v PT Mayora Indah Tbk* (2000); and
- *Astro Nusantara Bv et al v PT Ayunda Primamitra* (2010).

Bankers Trust v PT Mayora Indah (2000)[23]

Facts of the case

The claimant, Bankers Trust, is a company based in London. The respondent, PT Mayora Indah Tbk, is an Indonesian company. The dispute between the parties arose out of the International Swaps and Derivatives Association (ISDA) Master Agreement signed in 1995. When the financial crisis hit Indonesia in 1998, the respondents failed to fulfil their obligations under the agreements.

The respondent brought the dispute to the South District Court of Jakarta requesting for the annulment of the ISDA agreements. The respondent argued that the agreement was in violation of the public policy. The claimant opined that the swaps and derivatives transaction were transactions violating public policy in Indonesia.

The claimant on the other hand submitted the dispute to the arbitration at the London Court of International Arbitration (LCIA). The Jakarta district court was in favour of the respondent while the LCIA was in favour of the claimant. The arbitration award was registered with the Central District Jakarta Court for execution. While at the same time, the claimant appealed the decision of the South Jakarta Court to the Supreme Court.

Faced with the fact that the dispute was being appealed and being examined by the Supreme Court, the Central District Court of Jakarta refused to enforce the arbitration award.

The claimant appealed the decision of the Central District Court to the Supreme Court. The claimant argued that, firstly, the Central District Jakarta Court had not exercised its power in accordance with the Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. The claimant argued, based on the Law No. 30 of 1999, the authority of the District Court in examining the application for the execution of the arbitration award, was an administrative measure. The court may only look at the formality of the application. The court, however, is not authorised to examine and value the substantive aspect of the arbitration award.[24]

Secondly, the claimant argued that the Central District Court of Jakarta had made a serious error in examining the three documents required by the law. The required documents were the authentic copy of the arbitration award, the authentic copy of the arbitration agreement and the note from the Indonesian embassy where the arbitration award was made declaring that the country where the arbitration award was made, was also a party to the international agreement on the recognition and enforcement of foreign arbitral awards.[25]

The claimant thirdly argued that the Central District Court had made a serious fault in exercising its function by taking into account the application of a party to refuse the application of arbitration award. The claimant argued the application of execution of an arbitration award was an ex parte proceeding, not a two-party proceeding.[26]

Fourth, the claimant argued that the Central District Court had made a serious fault in accepting and enjoining the two applications, one from the claimant and one from the respondent, to become one application.[27]

Finally, the claimant argued that the Central District Court had made a serious fault in examining the 'substance' of the international arbitration award.[28]

The decision of the court

The Supreme Court (the Court) dismissed the objections or the arguments of the claimant. The Supreme Court held that the Central District Jakarta Court had not applied the law wrongly. There is however no arguments made by Court to support its position on this point.

The Court also held that the dispute between the parties was in fact still in the process of examination at the South District Court of Jakarta. Therefore, the Court was of the opinion that the application for execution should not be submitted until the case heard at the South District Court of Jakarta gave its final and binding decision.

The Court, on the other hand, agreed with the argument of the claimant that the Central District Court of Jakarta had only an authority to examine the formal measure of the arbitration award. The Court however opined that, based on article 66(c) of Law No. 30 of 1999, the Central District Court of Jakarta had also an authority to examine whether the substance of the application for execution of the foreign arbitration award did not violate public policy, including legal order in Indonesia.[29]

On the basis of these considerations, the Court held that the application of execution of the London arbitration award was a violation of law.[30]

Astro Nusantara Bv et al v PT Ayunda Primamitra (2010)[31]

Facts of the case

The dispute between the parties arose due to the unsuccessful joint venture agreement. The two parties had signed an agreement called the Subscription and Shareholders Agreement (SSA). The SSA contained the agreement of the two parties to provide direct-to-home multi-channel digital satellite pay television, radio and interactive multimedia services in Indonesia.

The failure of the agreement led the claimant to bring this dispute to the Singapore International Arbitration Centre (SIAC) in accordance with article 17.4 of the SSA. When the dispute was heard at the SIAC, the respondent brought the dispute to the District Court of South Jakarta.

The arbitrators were in favour of the claimant and issued an order, among others, for the respondent to stop the court proceedings at the South District Court of Jakarta. The arbitrators reiterated that the clause 17.6 of the SSA forbid the parties to submit their dispute to the national court.

The claimant shortly submitted the copy of the arbitration award to the Central Jakarta Court requesting the execution of the award.

When the registration of the SIAC arbitration award filed with the Central Jakarta Court, the respondent filed a petition to the Central Jakarta Court requesting that the court reject the application for the execution on the basis of, among others, the violation of public policy.

In its decision, the Central District Court was in favour of the respondent. The court stated that the award of the SIAC arbitration was non-executable due to the violation of public policy in Indonesia.

The claimant appealed to the Supreme Court.

One of the legal problems arising out of the facts of the case is whether the grounds for the rejection of the execution of the arbitration award was strong.

The claimant argued that the request of the respondent to reject the execution of the arbitration award was not valid under Indonesian arbitration law. The claimant argued that the issue of the execution of the award was merely between the party requesting for execution and the court that will give its execution order to the losing party to fulfill the order in the award. Therefore, the claimant argued that the Central District Court should not take into account the request of the third party (the respondent)

Furthermore, the claimant argued against the decision of the Central District Court that the SIAC arbitration was non-executable due to the violation of public policy in Indonesia. The argument of the claimant was based on the opinion of Professor Sudargo Gautama concerning the meaning of public policy.[32] In particular, the claimant argued that there was no violation of the principles and the basis of the legal sysem and national interests of the national.[33]

The claimant also questioned whether the intervention of the process of the court in Indonesia is considered as the form of the violation of public policy.[34]

The claimant also argued that the subject matter of the dispute was in the realm of the commercial matters (commercial disputes), since the dispute brought to the arbitration was related to the violation of an agreement. Furthermore, the claimant argued that the SSA contained the provision where prohibited the parties to take legal action in court.[35]

The opinion of the courts

The Central Jakarta Court issued the decision on 28 October 2010 which argued, firstly, that the request of the claimant was not granted; and, secondly, that the execution for the arbitration award of the SIAC No. 062 of 2008 9ARB 062/08/JL could not be granted. The Supreme Court rejected the request of the claimant.[36]

The Supreme Court recognised that article 66 of Arbitration Law does not regulate that the third parties might submit the request for the rejection of the provision of the execuation. The Supreme Court, however, was of the opinion that, from the procedural law aspect, and based on the principle of 'point d'interet, point d'action', which gives the right to the interested parties with the award, the third or interested parties have the right to submit exception to the execution which may impair their interest.[37]

On the substantive provision, the Supreme Court was in favour of the decision of the Central District. The Supreme Court argued that the order of the arbitration award to stop the process of the proceedings in the Indonesian court was a violation of the principle of sovereignty. The court argued that no other foreign power may intervene the legal process of the court in Indonesia.[38] The Supreme Court also argued that the subject matter of the dispute was not within the meaning of the commercial dispute but within the procedural law matter.[39]

Closing remarks

The Indonesian laws and the opinions of scholars above does not give any direction as to what public policy means.

However, the two decisions of the Supreme Court seem to give a little light. First of all, the decisions of the Supreme Court on the two cases above appear to have weakened the integrity of international arbitration.

The decisions of the Supreme Court on the two cases above at least have given us a picture concerning the position of the Supreme Court with regard to the application of the request for the execution of arbitration award in Indonesia.

Secondly, the decision of the Supreme Court has overlooked the recognised principle of acquired rights under private international law. As mentioned above, this principle argues that what has been recognised as valid under the national law where the

arbitration takes place, this recognition must also be acknowledged in other countries.

Thirdly, since arbitration has been a universal mechanism recognised by states in the world, the universal character of arbitration requires that it is a universal mechanism and therefore should be universally recognised by states in the world, including the awards made from the arbitration. The court should first of all, recognise the arbitration award as a final and binding.

Fourth, since Indonesia (and UK) are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, the court should take into consideration the provisions of this convention when drafting its decision. The most important provision of this convention is article III, which reads:

> *Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.*

Despite the criticisms above, the two decisions of the Supreme Court had a single similarity. The main reason for the court's argument in applying the public policy consideration, was because the application for execution was not granted because there was a district court that was still hearing and examining the case of the two parties.

The two cases above at least gave us a somewhat apparent picture on the meaning of public policy under Indonesian arbitration law. This includes the intervention of ongoing proceedings of the domestic court. The intervention may be in the form of an order in the arbitration award, to the parties or to the court in Indonesia to stop the proceedings.

Notes

1 Cf, Redfern and Hunter's observation. They opined '. . .in fact that different States have different concept of their own public policy means that there is a risk that one State may set aside an award that other States would regard as valid.' (Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, Oxford: Oxford UP, 2009, p 615).

2 For discussion on article 5 para 2 (b) of the Convention, see: Albert Jan van den Berg, The New York Convention of 1958, The Netherlands: Kluwer, 1981.

3 Cf, Jan Paulsson has rightly stated that 'it is important to consider not only how judges should uphold national public policy without undermining international arbitration, but also the responsibility that international arbitrators have for taking respectful account of it.' (Italics added) (Jan Paulsson, *The Idea of Arbitration*, Oxford: Oxford UP, 2013, p 200).

4 Prof Abdurrasyid had made an interesting observation concerning the refusal for the recogntion and enforcement the grounds that See for example, Redfern and Hunter's observation. They opined '. . .in fact that different States have different concept of their own public policy means that there is a risk that one State may set aside an award that other States would regard as valid.' (Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, Oxford: Oxford UP, 2009, p 615).

5 Explanatory to article 49 of the law. article 49 says that the Administrative Court shall not have the power to adjudicate and decide the disputes concerning the decisions made by the authorities where the decisions are made in the interest of public policy based on the applicable laws.

6 Explanatory to article 16 of law No. 48 of 2009 provides that the public interest concerns with the interest of the society in general.

7 For example found in article 1(b) of Law No. 5 of 1999 explains that the unfair competition may include an unfair competition which harms 'the society in general'.

8 The translation into Indonesian language of the text of the convention or international agreements is later a mandatory according to article 31 of Law No. 24 of 2009 concerning Flag, Language and State's Coat of Arms and National Anthem.

9 Supreme Court Decision No. MA: No. 2944 K/Pdt/1983.

10 Article 1 of the Supreme Court Regulation No. 1 of 1990.

11 Article 4 of the Supreme Court No. 1 of 1990 reads (in Indonesian): '. . .bertentangan dengan sendi-sendi dari seluruh system hukum dan masyarakat di Indonesia.'

12 Articles 615 to 651 Rv did not contain the provisions on public policy as the grounds for the annulment of (foreign) arbitration awards. This suggested that Rv on arbitration seemed to regulate the domestic arbitration. The Rv on arbitration was divided into five parts. Part 1 regulated the appointment of arbitrators (articles 615-623); part 2 was the provisions on arbitration proceedings (articles 624 – 630); part 3 regulated the arbitration awards (articles 631-640); part 4 was on the efforts or measures against the arbitration award (Articles 641–647); and part 5 contained the provisions concerning the end of arbitrators' duty (articles 648-651).

13 Prof Sudargo Gautama's opinion of public policy is discussed in: Tineke Louise Tuegeh Longdong, Asas Ketertiban Umum dan Konvensi New York 1958, PT. Citra Adtya Bhakti, Bandung, 1998, p 24.

14 Sudargo Gautama, Ibid, Cf, Redfern and Hunter op cit, p 615. (Redern and Hunter argued that '. . .many states are increasingly taking a restrictive approach to the application of public policy').

15 Priyatna Abdurrasyid, Arbitrase dan Alternative Penyelesaian Sengketa (APS) (Translation: *Arbitration and Alternative Dispute Resolution*), 2nd Rev Ed, Jakarta: Fikahati, 2nd Rev Ed., 2011, p 23.

16 Priyatna Abdurrasyid, Ibid.

17 Ibid.

18 Ibid.

19 These substantive and formal provisions universally accepted are embodied in the UNCITRAL Arbitration Rules of 1976 as well as in the UNCITRAL Model Law on International Commercial Arbitration of 1985. Also importance is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, below.

20 Article III of the Convention.

21 Article V:2 (e) of the Convention.

22 Mutiara Hikmah, *Pelaksanaan Putusan Arbitrase Internasional Di Indonesia Berdasarkan Undang-Undang Arbitrase* ('The Application of International Arbitration awards in Indonesia based on the Law on Arbitration'), PhD thesis, Universitas Pelita Harapan, 2010, p 256.

23 The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000. Some authors have discussed this case, among others, Karen Mills, Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration, Paper, February, 2003, revised February, 2005; Mutiara Hikmah, Loc.cit.

24 The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000, page 6.

25 The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000, page 7.

26 The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000, page 8.

27 The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000, page 8.

28 The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000, page 10.
29 The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000, page 11.
30 The Decision of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000, page. 12. (Note that the decision of the Court used the term 'violation of law or the Law' (bertentangan dengan hukum dan atau Undang-Undang). The Court did not use the term 'public policy.' Although not specifically used the term, one may see that the considerations of the Court in its arguments, mentioned above had previously used the term public policy.
31 The Supreme Court Decision No. 01 K/Pdt.Sus/2010. Some authors have discussed this case, among others, Karen Mills, Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration, Paper, February, 2003, revised February, 2005; Michelle Ayu Chinta Kristy and Zhengzheng Jing, 'Public Policy Violation under New York Convention,' MIMBAR HUKUM, Vol. 25:1, February 2013; also found in: http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15029-astro-nusantara-international-bv-and-others-v-pt-ayunda-prima-mitra-and-others-2012-sghc-212.
32 The Supreme Court Decision No. 01 K/Pdt.Sus/2010, Paragraphs 32–34.
33 The Supreme Court Decision No. 01 K/Pdt.Sus/2010, page 22 (Paragraph 34).
34 The Supreme Court Decision No. 01 K/Pdt.Sus/2010 , Paragraphs 35 and 36.
35 The Supreme Court Decision No. 01 K/Pdt.Sus/2010Paragraphs 35 and 36.
36 The Supreme Court Decision No. 01 K/Pdt.Sus/2010, page 37.
37 The Supreme Court Decision No. 01 K/Pdt.Sus/2010, page 36.
38 The Supreme Court Decision No. 01 K/Pdt.Sus/2010, page 36.
39 The Supreme Court Decision No. 01 K/Pdt.Sus/2010, page 37.

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Singapore

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Introduction

In Singapore, 2017 was yet another significant year for international arbitration.

The Singapore International Arbitration Centre (the SIAC) reported a record number of new case filings (452) from 58 jurisdictions and cases administered (421); involving a total sum in dispute of about US$4.07 billion. The number of new case filings represented a 32 per cent increase from the 343 new cases filed in 2016 and a 67 per cent increase from the 271 new cases filed in 2015.

Third-party funding for international arbitrations and related proceedings

On 1 March 2017, the Civil Law (Amendment) Act 2017 came into force, introducing, among other things, a framework to permit third-party funding for Singapore-seated international arbitrations and related proceedings.

Third-party funders are subject to the criteria and other requirements set out in the Civil Law (Third-Party Funding) Regulations 2017 (primarily, the funder must carry on the principal business of funding dispute resolution proceedings, and have a paid-up share capital or managed assets of not less than S$5 million).

Legislative amendments were also introduced to permit Singapore-qualified practitioners to introduce or refer a third-party funder to clients, so long as the practitioner does not receive any financial benefit from such referral. Legal practitioners will be required to disclose to the court or tribunal and every party to the proceedings the existence of any third-party funding.

This puts Singapore on par with other jurisdictions that have permitted third-party funding. The first Singapore arbitration financed through third-party funding was reported in July 2017, and numerous third-party funders have set up operations in Singapore.

SIAC Proposal on Cross-Institution Consolidation Protocol

In December 2017, the SIAC announced its proposal on cross-institution cooperation for the consolidation of international arbitral proceedings. The proposal is set out in letters sent to other international arbitral institutions with a memorandum outlining a protocol, the adoption of which by arbitral institutions would permit the cross-institution consolidation of arbitral proceedings, subject to different institutional arbitration rules.

Singapore International Commercial Court to hear arbitration-related cases

Legislative amendments were also introduced in January 2018 to clarify that the SICC has the same jurisdiction as the Singapore High Court to hear matters under the Singapore International Arbitration Act (IAA). This is aimed at enhancing Singapore's attractiveness as an arbitration seat, as the SICC includes international judges who hear disputes governed by foreign law. It has nevertheless also been clarified that only Singapore qualified lawyers may appear before the SICC for IAA-related matters; as the IAA is Singapore legislation and hence, Singapore (not international) law.

Case law

We summarise below some of the significant judgments released since our last report (from March 2017 to February 2018).

- In *BLY v BLZ and another* [2017] 4 SLR 410, the High Court clarified the test to be applied in determining whether a stay of arbitration proceedings should be granted pending the court's determination of a challenge to the tribunal's ruling on its jurisdiction.
- In *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362, the Court of Appeal upheld the validity of an asymmetric arbitration agreement which gave only one party the right to elect whether to refer disputes to arbitration.
- In *Josias Van Zyl and others v Kingdom of Lesotho* [2017] SGHC 104, the High Court held that the State Immunity Act (Cap 313, 2014 Rev Ed) applies to the service of an order granting leave to enforce an arbitral award.
- In *BMO v BMP* [2017] SGHC 127, the High Court held that an arbitration agreement remained binding and operative, even though the respondent had previously referred the dispute to litigation in court (which court proceedings were subsequently abandoned in favour of arbitration).
- In *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd* and another matter [2017] SGHC 193, the High Court set aside an arbitral award in part on the grounds that the tribunal had acted in excess of its jurisdiction and breached agreed procedure and the rules of natural justice.
- In *Gulf Hibiscus Ltd v Rex International Holding Ltd and another* [2017] SGHC 210, the High Court exercised its inherent case management jurisdiction to conditionally stay court proceedings in favour of arbitration, even though the applicant was not a party to the arbitration agreement.
- In *Quanzhou Sanhong Trading Limited Liability Co Ltd v ADM Asia-Pacific Trading Pte Ltd* [2017] SGHC 199, the High Court found that the tribunal would not have exceeded its jurisdiction even if it had made an error as to the governing law of the contract.
- In *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd and others* [2017] SGHC 195, the High Court set aside in its entirety an investor-state arbitral award for dealing with a dispute not contemplated by and not falling within the terms of the submission to arbitration.
- In *BNX v BOE and another matter* [2017] SGHC 289, the High Court made clear that the rule against hearsay evidence as contained in section 62 of the Evidence Act (Cap 97, 1997 Rev Ed) (the Evidence Act) did apply to arbitration proceedings.

'Special circumstances' required for stay arbitration proceedings pending curial review of a tribunal's ruling on jurisdiction

In *BLY v BLZ and another* [2017] 4 SLR 410, the High Court dismissed an application under section 10(9)(a) of the IAA to stay an ICC arbitration, pending determination of an application made under section 10(3) of the IAA to review the tribunal's ruling on jurisdiction. The stay application was filed as the tribunal had issued a document production order, and the plaintiff did not want to produce the documents ordered.

Section 10(3) of the IAA, read with article 16(3) of the Model Law, allows parties to appeal to the High Court against a tribunal's ruling on its jurisdiction. However, section 10(9) of the IAA provides that an application to the court pursuant to section 10 of the IAA or article 16(3) of the Model Law does not operate as a stay of the arbitral proceedings, or of the execution of any award or order made in the arbitral proceedings, unless the court orders otherwise.

The High Court noted the paucity of legal authorities setting out the appropriate test to be applied for stay of arbitrations under section 10(9) of the IAA, but ultimately took the view that a stay ought to be granted only where there are 'special circumstances' to do so given the particular facts of the case. The High Court held that this would accord with the default position under article 16(3) of the Model Law, which expressly gives the tribunal the discretion to continue with the arbitral proceedings while the court review is pending, as one of the measures to balance between the countervailing considerations of allowing curial review of a tribunal's ruling on jurisdiction and the need to guard against the abuse of such recourse as a dilatory tactic.

Whilst acknowledging that, ultimately, the determination of each application would depend on the unique facts and circumstances in that case, the High Court identified the following non-exhaustive guidelines to determine what might or might not constitute 'special circumstances':

- 'Special circumstances' can include the conduct of the other party the tribunal in arbitration, which must be sufficiently grave to justify the court's exercise of its discretion to stay the arbitration;
- the possibility of wasted time and costs (if the court ultimately determines that the tribunal had no jurisdiction) would not constitute 'special circumstances'. Implicit in the default position under article 16(3) Model Law (permitting the tribunal to continue with the arbitration) is the recognition that an award on the merits could be rendered before the court's review of the tribunal's finding on jurisdiction is finally determined;
- in the same vein, inconvenience and uncertainty associated with the need to set aside the award or resist the enforcement of the award does not constitute 'special circumstances'; and
- the strength of the objection to the tribunal's jurisdiction would not, in and of itself, be a reason to stay arbitration proceedings.

Asymmetric arbitration agreement held to be valid and enforceable

In *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362, the Court of Appeal upheld the validity of an asymmetric arbitration agreement.

The contract between the appellant and the respondent contained a dispute resolution clause which provided that disputes 'may' be referred to arbitration, at the election of the respondent; the appellant had no corresponding right.

When a dispute arose under the contract, the respondent chose to commence Singapore court proceedings against the appellant. The appellant applied for a stay of the court proceedings under section 6 of the IAA.

The Court of Appeal held that for the purpose of determining the existence of a valid arbitration agreement, it did not matter that the clause entitled only the respondent to compel its counterparty to arbitrate a dispute (ie, that the 'lack of mutuality' was immaterial), nor did it matter that the clause made arbitration of a future dispute entirely optional (because the dispute 'may', not 'shall', be referred to arbitration) instead of mandating parties to arbitrate (ie, that 'optionality' was immaterial). In so doing, the Court of Appeal recognised the weight of modern Commonwealth authority which supports the proposition that neither feature (ie, lack of mutuality and optionality) prevented the court from finding that there was a valid arbitration agreement.

In any event, since the respondent had chosen to refer the dispute to litigation by commencing the Singapore court proceedings, the Court of Appeal held that the dispute did not fall within the scope of the arbitration agreement, and dismissed the stay application.

State Immunity Act applies to service of order granting leave to enforce arbitral award

Josias Van Zyl and others v Kingdom of Lesotho [2017] 4 SLR 849 was concerned with the issue of service of a leave order on a foreign state.

The plaintiffs had applied for and obtained an order granting leave to enforce an arbitral award obtained against the Kingdom of Lesotho. The plaintiffs made several attempts to serve the order through various methods on the foreign state, which were unsuccessful. In the circumstances, the plaintiffs sought leave to effect substituted service on the foreign state's Singapore solicitors.

The High Court dismissed the plaintiffs' application for substituted service on the foreign state's Singapore solicitors.

The High Court took the view that the leave order fell within section 14(1) of the State Immunity Act which requires all documents for instituting proceedings against a state to be transmitted through the Ministry of Foreign Affairs to the ministry of foreign affairs of that state, and that there was no basis for distinguishing between adjudicative and enforcement proceedings, or between originating and non-originating processes.

The High Court therefore held that the leave order had to be served through diplomatic channels via the Ministry of Foreign Affairs.

Arbitration agreement operative despite earlier litigation

In *BMO v BMP* [2017] SGHC 127, the High Court held that an arbitration agreement remained binding and operative, even though the respondent had previously referred the dispute to litigation in court (which court proceedings were subsequently abandoned in favour of arbitration).

Prior to commencing the arbitration, the respondent (through its receivers) sued the applicant in the British Virgin Islands (BVI) courts. At some stage during the BVI litigation, the respondent gave notice of its intention to terminate the BVI litigation in order to move to arbitration instead. According to the respondent's receivers, they only became aware of the applicable arbitration agreement after having commenced the BVI litigation.

In the arbitration, the tribunal issued a preliminary award, finding that it had jurisdiction over the dispute. The applicant

then applied under section 10(3) of the IAA to challenge the tribunal's decision on jurisdiction, contending that the arbitration agreement was inoperative as the respondent had, by commencing the BVI litigation, waived and repudiated the agreement to arbitrate.

The Court dismissed the application, finding that the following.

- The defendant had not waived its right to arbitrate by commencing the BVI court proceedings. Whether the matter had previously been referred to litigation is not in and of itself sufficient to indicate a waived, election or waiver by election.
- Significantly, the party who initially breached the agreement to arbitrate is now reasserting the right to compel the counterparty to arbitrate. The correct focus is on the conduct of the applicant, since the inconsistent rights (affirmation or termination after the breach) resides with the innocent party, which was the applicant in this case. It is therefore incorrect to say that the respondent had waived the right to arbitrate by commencing the BVI litigation.
- The act of issuing the BVI litigation does not per se constitute a repudiatory breach of the agreement to arbitrate. As the receivers had explained that the BVI litigation was commenced because they were not aware of the arbitration agreement, the applicant failed to establish that the commencement of the BVI litigation was consistent with an intention on the part of the respondent to renounce its obligation to arbitrate. On the contrary, the respondent's conduct subsequent to the commencement of the BVI litigation was consistent with an intention to arbitrate.

Arbitral award partially set aside on grounds that tribunal had acted in excess of jurisdiction and breached agreed procedure and rules of natural justice

In *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2017] SGHC 193, the High Court set aside, in part, both an arbitral award and the order for enforcement of the award on the grounds that the tribunal had acted in excess of its jurisdiction and breached agreed procedure and the rules of natural justice.

In the arbitration, the notice of arbitration, pleadings, submissions and the parties' 'Agreed List of Issues' (ALOI) did not raise any issue concerning an allegation of breach by the plaintiff of a certain clause of the contract (the Clause). However, the tribunal eventually found in the merits award that the plaintiff breached the Clause and made certain consequential findings. The plaintiff applied to the High Court to set aside those parts of the award.

The High Court took the view that the tribunal had, by making its findings on the plaintiff's breach of the Clause:

- exceeded its jurisdiction by addressing matters beyond the scope of submission to arbitration, and that those findings were unrelated to and not reasonably required for the determination of the issues set out in the ALOI. The High Court also found that there was no further requirement for the plaintiff to show that it had suffered 'real or actual prejudice' where the tribunal had exceeded its jurisdiction;
- breached the agreed procedure when it departed from the ALOI, as it was clearly envisaged that the dispute would be decided within the framework of the ALOI; and
- breached the fair hearing rule because the plaintiff was denied a full opportunity to present its case on the issue of a breach of the Clause. In the High Court's opinion, this breach was clearly connected to the making of the award, as the tribunal's findings on the Clause formed the basis on which the impugned findings in the award were made. The High Court was satisfied that the plaintiff had suffered real or actual prejudice as it could not be said that the tribunal could not reasonably have arrived at a different result.

The High Court declined to remit those parts of the award to the tribunal under article 34(4) of the Model Law, finding that it was not appropriate to do so where the tribunal had exceeded its jurisdiction by deciding on an issue that had not been submitted for its determination (as opposed to the case where the tribunal had failed to make a determination on an issue that had been submitted to it).

Court proceedings stayed in favour of arbitration although applicant not party to arbitration agreement

In *Gulf Hibiscus Ltd v Rex International Holding Ltd and another* [2017] SGHC 210, the High Court exercised its inherent case management jurisdiction to stay (albeit conditionally) court proceedings in favour of arbitration, even though the party applying for the stay was not a party to the arbitration agreement.

The plaintiff was one of three shareholders in a company. The company and its three shareholders entered into a shareholders' agreement which contained an arbitration clause.

The defendants were the ultimate and intermediate holding companies of one of the other shareholders. They were not parties to the shareholders' agreement.

The plaintiff commenced court proceedings in Singapore against the defendants, alleging, among other things, unlawful and lawful means conspiracy in relation to the company's subsidiaries, unjust enrichment and wrongful interference in the company's affairs.

The defendants applied to have the Singapore court proceedings stayed on the basis of the arbitration clause in the shareholders' agreement.

The High Court granted a conditional stay of the Singapore court proceedings, holding that a stay can be granted even if the applicant is not a party to the arbitration agreement. The absence of an arbitration agreement between the parties to the court proceedings is irrelevant because the court's power to order a case management stay does not arise from an arbitration agreement, but is instead predicated on the court's wider need to control and manage proceedings between parties for the fair and efficient administration of justice.

Taking into account the three principles identified by the *Court of Appeal in Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373, the High Court considered that the key issue before it was whether the Singapore court proceedings were so connected with the shareholders' agreement that a stay should be granted; in other words, whether the dispute was within the scope of the arbitration clause. On the particular facts, the High Court concluded that it was, as the arbitration clause was very broad and not restricted to disputes concerning the parties to the shareholders' agreement. Indeed, the shareholders' agreement itself dealt with matters such as the control exerted by the company's shareholders over the company's subsidiaries.

After considering each of the plaintiff's claims, the High Court found that the ends of justice would be better served by upholding the arbitration agreement to which the plaintiff was a party and eliminating the procedural complexities that accompany parallel proceedings. It therefore granted a conditional stay of the Singapore court proceedings.

Tribunal found to not have exceeded jurisdiction even if it had come to an erroneous decision as to the governing law of the contract

In *Quanzhou Sanhong Trading Limited Liability Co Ltd v ADM Asia-Pacific Trading Pte Ltd* [2017] SGHC 199, the High Court found that the tribunal would not have exceeded its jurisdiction even if it had come to a wrong decision on the law governing the contract in question.

Following an arbitration in Beijing under the auspices of the China International Economic and Trade Arbitration Commission Arbitration Rules, the plaintiff obtained an award in its favour. The plaintiff subsequently applied for an obtained an order for leave to enforce the award against the defendant in Singapore.

The defendant applied to the High Court to set aside the order for enforcement on the grounds that the award contained a decision on a matter beyond the scope of the submission to arbitration (section 31(2)(d) of the IAA) and that enforcing the award would be contrary to the public policy of Singapore (section 31(4)(b) of the IAA). The defendant argued that an error by an arbitral tribunal on the governing law would cause it to exceed its jurisdiction because it would have disregarded the parties' express agreement as to the governing law.

The High Court rejected the defendant's contention, finding that there was no reason why an issue as to governing law should be treated differently from other issues submitted to arbitration, citing *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] 4 SLR 1057; if an issue is properly within the scope of submission to arbitration, it cannot be taken outside the scope of submission simply because the tribunal came to a wrong, or even manifestly wrong, conclusion.

It pointed out that the defendant was, in substance, arguing an appeal against the tribunal's decision on the governing law of the contract, and that this did not engage section 31(2)(d) of the IAA.

In light of the High Court's finding that the tribunal had not exceeded its jurisdiction, the defendant's alternative case that enforcement of the award would be contrary to the public policy of Singapore because the tribunal had exceeded its jurisdiction also failed.

In the circumstances, the High Court refused the application to set aside the order for enforcement.

Investor-state arbitral award set aside for dealing with dispute not contemplated by and not falling within terms of submission to arbitration

In *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd and others* [2017] SGHC 195, the High Court, in the exercise of its power under article 34(2)(a)(iii) of the Model Law, set aside in its entirety an investor-state arbitral award for dealing with a dispute not contemplated by and not falling within the terms of the submission to arbitration.

The application before the High Court was the first in which a party requested the Singapore courts to set aside an investor-state arbitral award on the merits. This decision is now the subject of a pending appeal to the Court of Appeal.

The defendants in the setting-aside application were investors who alleged that their investments (ie, mining leases) in the Kingdom of Lesotho (the Kingdom) had been unlawfully expropriated by the Kingdom (the Expropriation Dispute). The investors had sought relief from the Southern African Development Community (SADC) tribunal. However, the SADC tribunal was shut down before the Expropriation Dispute was resolved. The Kingdom was among the parties which had approved the resolutions that led to the dissolution of the SADC tribunal.

The investors then brought a claim before an investment treaty tribunal administered by the Permanent Court of Arbitration (the PCA) that the Kingdom had breached its obligations under the SADC Treaty and Annex 1 of the SADC Protocol on Finance and Investment (Annex 1) by participating in the shutting down of the SADC tribunal.

The PCA tribunal found in favour of the investors and issued an award directing, among other things, that the parties constitute a new tribunal to hear the expropriation claim.

The Kingdom sought to have the award set aside on the basis that the PCA tribunal lacked jurisdiction or that the award exceeded the scope of the submission to arbitration.

A significant portion of the High Court's decision to grant the Kingdom's application turned on the court's interpretation of article 28(1) of Annex 1 (article 28(1)), which provided for disputes 'between an investor and a state party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies' to be submitted to international arbitration.

Applying a de novo standard of review, the High Court found that:

- the true dispute before the tribunal was the dispute over the termination without recourse of the pending SADC claim arising from the shuttering of the SADC tribunal (the 'Shuttering Dispute'). The High Court found that the Shuttering Dispute was distinct and separate from the Expropriation Dispute as the two disputes did not involve the same legal conflict;
- as the dispute for the purposes of article 28(1) was the Shuttering Dispute, the High Court found that the corresponding investment for the purposes of article 28(1) was the right to refer the Expropriation Dispute to the SADC tribunal rather than the mining leases themselves. The High Court disagreed with the PCA tribunal's finding that this right to refer disputes to the SADC tribunal was an 'investment' within the meaning of article 28(1). The High Court further held that the Shuttering Dispute did not concern any obligation of the Kingdom 'in relation to' the investors' purported investment;
- the investors had failed to exhaust local remedies as required by article 28(1). The High Court held that the investors should have pursued a local remedy described as an 'Aquilian action' which could give rise to compensation for pure economic loss caused by the Kingdom's participation in the shuttering of the SADC tribunal. The investors' failure to do so meant that they had not exhausted local remedies. The High Court also found that the investors had not discharged their burden to show that the 'Aquilian action' was unavailable or did not suit the facts of the present case. Nor had the investors adduced evidence to show that this remedy was ineffective, or that they would not have succeeded in an 'Aquilian action' before the Kingdom's courts; and
- in any event, Swissbourgh and the fifth to ninth defendants were not 'investors' for the purposes of article 28(1). In light of the context, object and purpose of Annex 1, the High Court also rejected the investors' submission that the term 'investors' in article 28(1) extended to domestic investors.

Rule against hearsay evidence as contained in Section 62 of the Evidence Act held not to apply in arbitration

In *BNX v BOE and another matter* [2017] SGHC 289, the plaintiff sought to set aside an arbitral award under section 48 of the

Singapore Arbitration Act (Cap 10, 2002 Rev Ed) on a number of grounds (that the tribunal allegedly exceeded its jurisdiction; that there was an alleged breach of the rules of natural justice; that the award was contrary to public policy). In particular, the plaintiff contended that the tribunal breached the rules of natural justice by admitting and giving weight to hearsay evidence, and as the tribunal violated 'basic notions of justice' in admitting and relying on hearsay evidence, the award was contrary to public policy.

The High Court held that the hearsay rule does not apply in arbitration. It observed that what is commonly referred to as the hearsay rule in Singapore is the requirement in section 62 of the Evidence Act that oral evidence in all cases must be direct evidence, ie, evidence from a witness who is able to say from his own personal knowledge that the factual content of his evidence is true.

However, Part II of the Evidence Act, including the hearsay rule in section 62, does not apply to proceedings before an arbitrator (as prescribed in section 2(1) of the Evidence Act). The High Court also noted that there is an 'almost insurmountable argument' to be made that in all arbitrations seated in Singapore, the tribunal is empowered to receive all relevant evidence, with the concerns which underlie the exclusionary rules at common law going only to weight and not to admissibility. That principle of free admissibility would be subject only to the parties' agreement and to principles of public policy, which includes the rules of natural justice.

The High Court also rejected the contention that admitting and relying on hearsay evidence amounts to a breach of public policy; there is nothing in the public policy of Singapore which requires a tribunal to exclude hearsay evidence. Further, Parliament has specifically legislated that Singapore's domestic rules of evidence (which are in any event not public policy) shall not apply to arbitral proceedings.

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WongPartnership is a market leader in Singapore for the provision of high-quality legal services. Our profile extends beyond the shores of Singapore, with a particular focus on the Asia-Pacific region, and we presently have over 300 lawyers, with offices in Singapore, Beijing, Shanghai and Yangon, as well as in Abu Dhabi, Dubai, Jakarta, Kuala Lumpur and Manila, through member firms of WPG, a regional law network.

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