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International ADR developments

Arbitration in Asia

Damian Sturzaker

As Asian economies make an impressive recovery from the Asian financial crisis, and the Australian and Asian currencies remain weak against the US dollar, there has been a surge in exports across the region. Furthermore, the increased economic openness of China and its prospective accession to the WTO have created unprecedented opportunities for trade and investment in the world's most populous country. In light of these developments, economic interest and investment in the Asian region has increased.

With the increased economic interaction between Asia and the West, as well as within Asia itself, has come potential for cross-border disputes to arise. Increasingly, businesses are at risk of being sued in foreign jurisdictions where their commercial rights and obligations become subject to unfamiliar laws and procedural processes. Avoiding this situation requires careful thought and attention to the way in which a company conducts its commercial transactions. One of the most effective ways to avoid being sued in a foreign jurisdiction is to ensure that all commercial contracts that the business enters into contain a comprehensive and effective arbitration clause.

Why arbitration?

Few parties to international contracts cherish the idea of suing or being sued in a foreign country, where differences and uncertainty in the law, language, and legal and business culture could present decisive disadvantages. Arbitration, however, provides the advantages of a relatively inexpensive and expeditious dispute resolution process in a neutral locale with proceedings conducted according to familiar and well established arbitration law. Arbitration offers the added flexibility of allowing parties to choose the arbitration tribunal, the arbitrators, and in some cases the arbitration rules and law.

These benefits have led to an increased number of foreign companies that

undertake business in Asia including arbitration agreements in their contracts. With these developments there has been a concomitant increase in the number of Asian arbitration centres and in the adoption of modernised arbitration laws among Asian countries. As such, arbitration now has a greater level of acceptance and greater enforceability across the Asian region than ever before.

Legal advice

For companies seeking to rely on arbitration clauses when doing business in Asia, it is important to have a good understanding of how the arbitral process operates. The most important considerations are the integrity of the arbitral process, and the enforceability of the arbitration award. The table opposite provides a list of issues for consideration when incorporating an arbitration clause into a commercial agreement.

International arbitration across Asia

This summary is designed to provide companies with a basic understanding of the various Asian arbitral bodies which may hear a dispute brought under an arbitration clause, and the enforceability of any decision made by that arbitral body.

Hong Kong

Arbitral institutions and arbitration law

Hong Kong is one of the leading arbitration centres in Asia. This is largely due to Hong Kong's sophisticated *Arbitration Ordinance* which includes the United Nations Commission on International Trade Law (UNCITRAL) Model Law as an attached schedule, and Hong Kong's experienced International Arbitration Centre (HKIAC) which has heard more than 1600 disputes since its establishment in 1985. The HKIAC conducts arbitrations principally under the UNCITRAL Arbitration Rules and maintains a panel of approved arbitrators. ➤

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Enforcement

➤ By virtue of Britain's, and later China's, ratification of the New York Convention in 1977 on Hong Kong's behalf, Convention awards made in other contracting States can be enforced in Hong Kong, subject only to the limited grounds of refusal in art 5 of the Convention. It should be noted that since the handover, the Convention no longer applies to the enforcement in Hong Kong of awards made in China. Instead, the reciprocal recognition and enforcement of arbitration awards is provided for in the *Arbitration (Amendment) Ordinance 2000*, which came into effect on 24 January 2000 and reflects the spirit of the New York Convention.

People's Republic of China

Arbitral institutions and arbitration law

The China International Economic and Trade Arbitration Commission (CIETAC), was established in 1956 under the auspices of the China Council for the Promotion of International Trade to handle disputes arising from international or foreign related economic or trade transactions. CIETAC has its headquarters in Beijing, with subcommissions in Shenzhen and Shanghai and has become the busiest arbitration institution in the world. In 1999 CIETAC accepted 660 new cases and resolved 706 cases. CIETAC maintains a panel of Chinese and foreign arbitrators, from which the parties are required to make their selection, and has its own procedural rules. As recently as September 2000, CIETAC amended its arbitration rules, extending the body's jurisdiction to include the arbitration of domestic disputes.

Arbitration in China is governed by the *Arbitration Law* which came into force on 1 September 1995. The legislation provides unified law on the administration of domestic and international arbitration. An important feature of the *Arbitration Law* is that it discourages ad hoc arbitration, requiring parties to specify a recognised arbitration institution in their arbitration agreement. Although parties are not permitted to specify alternative rules, Chinese parties are not prevented from agreeing to arbitrate outside China.

Enforcement

Article 269 of China's *Civil Procedure Law* requires a party seeking the enforcement of a foreign related domestic award to apply to the Intermediate People's Court in the province where the relevant assets are situated. The court cannot, however, review the substantive merits of the case. In relation to foreign awards, China has acceded to the New York Convention, though its record of enforcement has been unpredictable.

Taiwan

Arbitral institutions and arbitration law

Although Taiwan has not adopted the UNCITRAL Model Law, Taiwan's *Arbitration Law* enacted on 24 June 1998 reflects a number of its key principles. Importantly, the legislation allows significant autonomy to the parties. They are able to choose the place, procedure, language and law of the arbitration. At present, the Commercial Arbitration Association is the only non-governmental organisation dealing with international commercial disputes in Taiwan.

Enforcement

Although Taiwan is not party to the New York Convention, the grounds for refusing the

enforcement of foreign awards are nevertheless similarly limited.

Singapore

Arbitral institutions and arbitration law

After Hong Kong, Singapore is the most established arbitration centre in Asia. The Singapore International Arbitration Centre (SIAC) was established in 1991 under the auspices of the Economic Development Board and the Trade Development Board. Since 3 August 1999 SIAC has operated as an independent institution under the auspices of the Singapore Academy of Law. SIAC arbitration rules are based on the UNCITRAL Rules and influenced by the *London Court of International Arbitration Rules*. SIAC also maintains panels of international and domestically accredited arbitrators.

International arbitration in Singapore is governed by the *International Arbitration Act* which came into effect on 27 January 1995 and which substantially adopts the UNCITRAL Model Law. A dual regime for international and domestic arbitration now exists in Singapore, the latter still governed by the 1953 *Arbitration Act*.

Enforcement

As the New York Convention has ➤

Incorporating an arbitration clause: issues for consideration
Select an arbitral site other than the country of the opposing party (if possible).
Confirm that an award made in the selected jurisdiction will be enforceable under the New York Convention.
Check if it is possible to appeal to the courts on points of law arising during the arbitration or after an award is made. Is it possible to exclude appeals (for example, under the 1996 UK <i>Arbitration Act</i>)?
Ascertain the grounds for setting aside awards (for example, Swiss law's option to exclude all grounds of appeal).
Determine whether the courts are empowered to order provisional remedies prior to and/or during arbitration and to enforce orders made by the arbitrators.
Check the position on joinder of non-signatories to arbitration.
The ability to transfer funds quickly and easily.
What is the law on consolidation of arbitrations?
Check the law on the power of the courts and arbitrators to rule on arbitrators' jurisdiction.
Check the availability of pre-hearing discovery.
Are there any nationality or other restrictions on counsel and arbitrators?
Logistical considerations. Parties should bear in mind the following when choosing which country (and city) should host the arbitration: <ul style="list-style-type: none"> • the availability of venues in which the arbitration may be held and of support facilities (facsimile, IT facilities, etc.); • good transport links; • expert assistance, both legal and technical/commercial; and • the availability of qualified arbitrators locally.



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➤ been incorporated into Singapore's *International Arbitration Act*, Convention awards can be enforced in Singapore, subject only to the reciprocity reservations and the standards exceptions in art 5.

Japan

Arbitral institutions and arbitration law

The main international commercial arbitration institution in Japan is the Japan Commercial Arbitration Association (JCAA). As the only permanent commercial arbitral institution in the country, JCAA contributes to the resolution of disputes arising from international and domestic business transactions. Although the JCAA has its own rules, parties are free to adopt the UNCITRAL Rules. Parties are also free to choose their own arbitrators.

Japan has not adopted the UNCITRAL Model Law and there remains no specific international arbitration law in Japan, though draft legislation is being considered by the Japanese Parliament. Currently, both domestic and international arbitration is governed by Pt VIII of the *Code of Civil Procedure* based on the old German Code of 1890. The law, however, remains very general and parties have considerable flexibility in choosing the procedures and substantive law to govern the arbitration.

Enforcement

Japan acceded to the New York Convention in 1961 and foreign awards are thus enforceable, subject only to the reciprocity reservations in art 1(3) of the Convention and the standard grounds of refusal laid out in art 5. An award made in Japan has the same effect as a binding judgment. To date, there has been no case where a Japanese court of law did not approve of and enforce a foreign arbitral award.

Republic of Korea

Arbitral institutions and arbitration law

Founded in 1966, the Korean Commercial Arbitration Board (KCAB) is the only officially recognised arbitration and mediation body in the Republic of Korea and has jurisdiction over both domestic and foreign disputes. Parties have significant autonomy when arbitrating at the KCAB and are free to

choose ad hoc procedures or the rules of any recognised international arbitral organisation, such as the UNCITRAL Rules or those of the KCAB itself. The KCAB maintains a panel of Korean and foreign arbitrators that include respected professionals drawn from the international bar and the international business community as well as international jurists and academics. Arbitration in Korea is governed by the *Arbitration Act* which came into force in December 1999 and substantially adopts the UNCITRAL Model Law.

Enforcement

Korea acceded to the New York Convention on 9 May 1973, subject only to the commercial and reciprocity reservations and the standard exceptions laid out in art 5. Foreign arbitral awards are therefore readily enforceable in Korea. Domestic awards of the KCAB have the same status as judgments and are also easily enforceable.

Malaysia

Arbitral institutions and arbitration law

There is a dual system of international arbitration in Malaysia: those that come under the *Malaysian Arbitration Act 1952*, and those conducted under the rules of the Kuala Lumpur Regional Centre of Arbitration (KLRC). The KLRC was established in 1978 and has become the principal organisation responsible for international commercial arbitrations in Malaysia. The KLRC rules are based on UNCITRAL Rules, with certain modifications, and allow for significant autonomy to parties in relation to arbitration procedure and the appointment of arbitrators.

Enforcement

Awards made in Malaysia are enforceable in the same manner as judgments. Malaysia is party to the New York Convention and foreign awards are thus enforceable, subject only to the exceptions under art 5. Importantly, Malaysian courts have the power to intervene in international arbitrations governed by the *Arbitration Act*, but not those held under the KLRC rules.

Thailand

Arbitral institutions and arbitration law

Domestic and international arbitration ➤



➤ in Thailand are both governed by the *Arbitration Act 1987* with differences arising only in respect of enforcement of domestic and foreign awards. Thailand is currently considering a draft *Arbitration Act* that would substantially adopt the UNCITRAL Model law. At present, the only official arbitration organisation in Thailand is the Arbitration Institute, established under Thailand's Ministry of Justice. The Institute has its own procedural rules, though parties have the autonomy to choose different procedures should they wish.

Enforcement

As a party to the New York Convention, foreign awards obtained in Convention countries will generally be enforceable in Thailand. However, arbitration awards obtained within Thailand are subject to review by the Thai courts. The courts also have the power to review foreign awards, though the scope of this review power is essentially limited to grounds outlined in the New York Convention.

Vietnam

Arbitral institutions and arbitration law

Vietnam's legal system is undergoing rapid development, making information susceptible to change. At present, Vietnam has no law dealing specifically with arbitration. However, the *Foreign Investment Law* does allow for certain disputes to be referred to 'a Vietnamese economic arbitration organisation, or any other arbitration organisation'.

The Vietnam International Arbitration Centre (VIAC) was established in 1993 and replaces the much maligned State Economic Arbitration Board (SEAB) as the only arbitral organisation in Vietnam. Formally attached to the Vietnam Chamber of Commerce, the VIAC has jurisdiction over both domestic and international economic disputes. At present, parties must select arbitrators from an approved panel, all members of which are Vietnamese nationals. Although ad hoc arbitration is possible, it is not recommended because of the relative inexperience of the arbitrators and their lack of confidence to adjudicate pursuant to rules with which they are not familiar. UNCITRAL Arbitration Rules are acceptable, however, and should be preferred to either VIAC's own or ad hoc procedures.

Enforcement

Vietnam ratified the New York Convention in 1995, though subject to its interpretation by Vietnamese Courts or competent bodies in accordance with the Constitution and law of Vietnam. Enforcement of a locally made award in Vietnam requires application to the Economic Court which may review the merits of the award, thus introducing an element of uncertainty in the enforcement procedure. Ironically, therefore, it appears easier to enforce foreign arbitral awards in Vietnam, than those of VIAC because of the lack of law to regulate the enforcement of VIAC's decisions. This is likely to change in the future with the ongoing development of Vietnam's legal system.

Indonesia

Arbitral institutions and arbitration law

BANI (Badan Arbitrasi Nasional Indonesia) is Indonesia's primary arbitration institution and was established in 1977 under the auspices of the Indonesian Chamber of Commerce. Although the BANI arbitration rules do not distinguish between domestic and international cases, foreign parties are able to designate ad hoc arbitration which enables them to choose their own procedures. At least one arbitrator must be appointed from the BANI approved panel. The basis of arbitration in Indonesia is the old Dutch *Code of Civil Procedure*. With the enactment on 12 August 1999 of Indonesia's *Law on Arbitration and Conciliation*, several of these provisions have been revoked and replaced in an attempt to unify and strengthen the institution of arbitration in Indonesia.

Enforcement

Although Indonesia ratified the New York Convention in 1981, it was not until 1990 that the Supreme Court passed regulations for the enforcement of foreign arbitral awards. Under these regulations, parties seeking enforcement must register the award with the District Court of Jakarta. In practice, however, foreign parties have experienced considerable difficulty in enforcing foreign awards. This is because enforcement will only proceed in respect of disputes arising from legal relationships which are

considered 'commercial' under Indonesian law and can be denied for spurious 'public policy' reasons. Although arbitral awards made domestically by BANI also need to be approved by the District Court, this process appears less fraught with uncertainty.

India

Arbitral institutions and arbitration law

Arbitration law in India underwent substantial change in 1996 with the enactment of the *Arbitration and Conciliation Act*. This Act, which covers both domestic arbitration and international commercial arbitration, consolidates Indian arbitration law and minimises the role of the courts in the arbitration process. The Act is modelled on the UNCITRAL Model Law.

The Indian Council of Arbitration (ICA) is India's primary arbitration institution. Established in 1965, the ICA not only acts as an administration centre for a wide range of domestic and international arbitrations, it also trains lawyers and arbitrators and serves as a research centre. It has its own rules of arbitration and panel of arbitrators.

Enforcement

Although India has been a party to the New York Convention since 1958, it has only been since the enactment of the new laws in 1996 that parties have been able to enforce awards under the Convention with relative ease.

Conclusions

Arbitration is providing businesses undertaking projects, deals and transactions within the Asian regions with more commercial certainty than ever before. Arbitration clauses are an effective method of protecting your business's commercial rights and obligations from the risks of being subjected to the vagaries of unfamiliar laws and procedural processes inherent in legal disputes in a foreign jurisdiction. ●

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