Switching Arbitral Seats: Musical Chairs in the Asia-Pacific

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Singapore and Hong Kong are now considered to be amongst the top arbitration seats in the world, rivalling the long-established seats of London, Paris and Geneva. Perpetuating their dominance in the region, parties to contracts in the Asia-Pacific often choose either of these seats by default with no consideration of alternatives. This is underpinned, to an extent, by the perception that only Hong Kong and Singapore are able to provide certain benefits to parties to an arbitration. However this is not always the case. Australia, Korea and Malaysia are examples of alternative seats in the region which, in the following key aspects, are competitive with Hong Kong and Singapore.

1. Ample choice of legal counsel

Parties do not need to choose Hong Kong or Singapore as the seat to have ample choice of legal counsel. Australia, like Hong Kong and Singapore, has seen a proliferation of international law firms in the last decade, leaving parties with an abundance of options to engage counsel.

In our experience, parties engaging in transactions with Malaysian government-linked entities are likely to see such entities pushing to use the Kuala Lumpur Regional Centre for Arbitration (KLRCA) and to adopt Malaysian law. This may have assisted the development of the expertise of the local legal market. For example, a large local firm acted for MISC Berhad in its successful USD$254.45m claim against Shell in a KLRCA arbitration this year. In addition, in recent times, the Malaysian government has looked to develop the strength of Kuala Lumpur as an arbitral seat, with a number of foreign law firms recently being allowed to open offices, including Trowers & Hamlins opening in 2015 and Herbert Smith Freehills in 2017. In addition, *Malaysia's Legal Profession Act 1976*, has been amended so that from June 2014, non-Malaysian qualified lawyers and foreign arbitrators have been able to appear in Malaysia-seated arbitral proceedings.

Local firms are also well experienced in Korea, benefitting from the increased case load of the Korean Commercial Arbitration Board (KCAB) in recent times. Whilst the "Big Five" Korean law firms dominate the legal market, there has been an increase in boutiques and new firms being established. Further, similar to Malaysia, Korea's legal market has been liberalised to foreign entrants, with Herbert Smith Freehills being one of the first foreign law firms to receive approval from the Korean Ministry of Justice to open an office in Seoul and now having one of the largest arbitration practices of any of the international law firms on the ground in Korea.

Even if a party appointed counsel from outside of any of these locations, this should not be a weighty

consideration, as the cost of flying counsel to the seat for a substantive hearing is likely to be a fraction of the overall cost of an arbitration. Indeed, both Korea and Malaysia are transport hubs in Asia, with world class international airports, flight networks covering most major cities in the world and relatively few visa restrictions on temporary visitors, meaning that bringing lawyers, arbitrators, witnesses and experts into the country from all over the world is now relatively straightforward.

2. Contemporary arbitration framework – legislation and rules

Each of Australia, Korea and Malaysia has contemporary frameworks governing international arbitrations, whether rules or governing legislation.

The main institution in Australia, the Australian Centre for International Arbitration (ACICA) amended its procedural rules last year to include new provisions to keep in step with developments in Hong Kong and Singapore, and ensure that ACICA's rules continue to reflect contemporary best practice. Similarly, the federal government has introduced a bill to parliament that would amend the *International Arbitration Act 1974* (Cth), which governs all international arbitration proceedings in Australia. The amendments aim to both address uncertainties in Australia's arbitration landscape and keep Australia in line with leading arbitral jurisdictions (for more information on the bill see here).

The KCAB recently revised its procedural rules, like ACICA, to ensure KCAB keeps pace with innovations being implemented around the world. In addition, the Korean government also updated the legislation that governs international arbitrations in Korea.

Malaysia introduced new arbitration legislation in 2005, which it further amended in 2011, to align many aspects of its legislative framework with the UNCITRAL Model Law. The result, coupled with the removal of restrictions on foreign arbitrators and lawyers participating in arbitral proceedings seated in Malaysia in 2014, has been a noticeable increase in KLRCA's annual case load. This went from 10-20 cases annually for the years prior to 2010, to 62 cases registered with KLRCA in 2016 (see Thompson Reuters Practical Law, "Arbitration procedures and practice in Malaysia: overview" by Rabindra S Nathan, and KLRCA 2016 Annual Report, page 16). This ensures a more experienced secretariat, and the choice to appoint any arbitrator the parties choose, but with institution fees around 20% cheaper than HKIAC or SIAC. KLRCA also released revised rules in May 2017.

3. Ability to handle complex disputes

The ability of an institution to handle multi-party and multi-contract disputes is important. Each of ACICA, KCAB and KLRCA has mechanisms to deal with consolidation and joinder.

Alternative seats preferable in appropriate circumstances

The above considerations demonstrate that, at least in some key aspects, Australia, Korea and Malaysia are competitive with Hong Kong and Singapore. Further to this, in the appropriate circumstances, those seats may even be a preferable choice. In our view, there are at least three scenarios in which this may arise.

Location of client, witnesses and documents

First, a significant portion of the work in an arbitration is not carried out at the seat but usually where the client, its witnesses and documents are located. The efficiencies, both in terms of costs and timing, of choosing a seat where these are located, are significant.

A recent example is the ongoing AUD$1.9b dispute between Chevron, CPB Contractors and Saipem

over the construction of a jetty for a liquefied natural gas project in Western Australia. As reported by GAR, Chevron commenced the arbitration against CPB Contractors and Saipem SA under a clause that provides for ad hoc arbitration under UNCITRAL rules seated in Perth, Australia. Given that the client, most of the witnesses, documents and, assuming local law governs the contract, Australian counsel are likely to be located in Australia, there were obvious practical advantages, cost savings and efficiencies to the parties in selecting Perth rather than Hong Kong or Singapore.

Neutral seat

Secondly, if either party is from Hong Kong or Singapore, it may be a negotiation sticking point as to whether the choice of seat should be in Hong Kong or Singapore. Rather than maintaining its position on the choice of seat at the risk of losing leverage on other issues, Australia, Korea or Malaysia may be a neutral solution for the contracting party. For example, a service provider from Singapore and a principal from Hong Kong may resist an arbitration seated in Singapore or Hong Kong, but may consider Australia, Korea or Malaysia a neutral seat.

Expertise in particular disputes

Thirdly, certain institutions and practitioners in a seat may offer expertise relevant to the disputes that may arise under a contract. For example, the KLRCA has particular expertise in administering sharia law disputes, which is part of a broader goal to establish Malaysia as an Islamic finance hub. As part of its repertoire of procedural rules, it has rules that are sharia law compliant and suitable for the arbitration of disputes arising from agreements based on sharia law – being the 'i-Arbitration Rules'.

Similarly, Australia has a specialist arbitration centre in Perth – the Perth Centre for Energy & Resources Arbitration (PCERA). PCERA was launched in November 2014 and aims to capitalise on Western Australian's expertise in the energy and resources sectors.

In Korea, there is considerable knowledge in the arbitration community that has developed as a result of Korean clients being involved in international projects for many years. There are many lawyers in Korea, for example, specialised in EPC construction contracts, the renewable energy sector, computer gaming and consumer projects – all sectors that are booming in Asia and that, in time, no doubt will lead to disputes which will most likely be resolved by arbitration.

Conclusion

For good reason, Hong Kong and Singapore have cemented themselves as premier regional and global arbitral seats. The Asia-Pacific is, however, a large region with a booming arbitral market. For the reasons discussed above, Australia, Korea and Malaysia have demonstrated that they are viable arbitral seats, which should be given serious consideration by parties who may arbitrate in the region. In the right circumstances, and for the right parties, those seats might be preferred over their more established neighbours.