Kluwer Arbitration Blog

Arbitration in Asia at full gallop

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In the past, arbitration laws and arbitral institutions in Asia have often been seen as less well developed when compared to their Western counterparts. However, just as Asia's economies have grown at a rapid pace, catching up to (or surpassing) those of Europe and the United States, so has Asia's focus on arbitration. Realising the worth of international arbitration, governments in Asia have invested in their arbitral industries – their law, institutions and facilities – attracting some of the highest value disputes in the world and increasing volumes. Expect nothing less in the new year of the horse.

In just the last 12 months, Asia has seen its two largest arbitral institutions – the Hong Kong International Arbitration Centre ("HKIAC") and the Singapore International Arbitration Centre ("SIAC") – adopt new rules and new governance structures. Such changes correspond with recent updates to arbitration laws adopted in Hong Kong and Singapore. And the courts in both jurisdiction hand down (at the highest levels) judgments that understand and support the arbitral process whilst retaining and balancing their functions as supervisory or enforcement courts. In China, courts have shown leadership in arbitration by intervening in and offering guidance on the recent split at the China International Economic and Trade Arbitration Commission ("CIETAC") and the Beijing Arbitration Commission ("BAC") is currently undergoing the process of updating its rules. And there are important developments elsewhere in the region – South Korea has established the Seoul International Dispute Resolution Centre ("SIDRC"), and the Kuala Lumpur Regional Centre for Arbitration ("KLRCA") in Malaysia adopted new rules and is scheduled to move into new premises in 2014 – to name but a few.

All of these changes occurring in such a short period indicate that, as with global economic trends, Asia is determined to cement its place at the top table of international arbitration.

Singapore

A decade ago, Singapore was not widely considered a key player on the international arbitration stage. Today, backed by SIAC, the establishment of Maxwell Chambers, and a judiciary and government strongly supportive of arbitration, Singapore is a leading centre for arbitration not only in Asia, but in the world.

SIAC introduced new rules in 2010, then swiftly updated them in 2013. SIAC also expanded its operations by opening an office in Mumbai (similar to the LCIA), with plans to open further offices in Seoul and the Gulf. Singapore has also updated its International Arbitration Act by implementing the International Arbitration (Amendment) Act, which came into force in June 2012.

Singapore's judiciary has been key in promoting the city-state's arbitration attractiveness. The

courts have consistently delivered judgments which confirm Singapore's anti-interventionist attitude, such as TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd [2013] SGHC 186 and BLB and another v. BLC and another [2013] SGHC 196.

However, perhaps most indicative of Singapore's rise is the degree of attention it is receiving globally. A prime example is the Singapore court case of Astro v. Lippo (PT First Media TBK v. Astro Nusantara International BV & others [2013] SGCA 57). This case dealt with a party's ability to challenge the enforcement of an arbitral award on the grounds of lack of jurisdiction where that party had not previously taken steps available to it to challenge the award on the same grounds, as well as circumstances pursuant to which non-signatories to an arbitration agreement can be joined into existing arbitral proceedings. Beyond the content of the judgment, the amount of coverage it received and its impact on arbitration globally signify how much the international arbitration community is paying attention to judgments coming out of Asia. The case was even compared to the highly influential UK case of Dallah v. Pakistan, and was the subject of a "Breaking News" bulletin in "Global Arbitration Review", as well as coverage on this blog.

Hong Kong

Despite Singapore's rise, many still consider Hong Kong the leading arbitral venue in Asia, with the two cities vying for prominence in the region. Regardless of parties' individual preferences, it is clear that Hong Kong has also been at the forefront of modernising arbitration law in order to ensure that parties who choose to arbitrate there can take advantage of the latest developments; indeed Hong Kong's 2011 Arbitration Ordinance is widely regarded as one of the most modern and up to date in the world – with amendments being made at the end of 2013, including to ensure that awards and orders of emergency arbitrators are enforceable in Hong Kong, whether or not the seat of arbitration is in Hong Kong. Commentators have pointed to the swift passing of these amendments as evidence of the Hong Kong government's desire to support the arbitral process and to move quickly when change is needed.

These amendments were followed (and, to a certain extent, prompted) by updated administered arbitration rules issued by the HKIAC, which came into force on 1 November 2013. The new HKIAC Rules address all of the most topical issues in international arbitration, including joinder of additional parties, consolidation of claims and emergency arbitration. The HKIAC Rules are now regularly used to resolve some of the most complex disputes coming out of Asia, in particular mainland China, and the features adopted in the new rules give parties the best chance to ensure that such disputes are resolved efficiently.

Not only has the HKIAC recently expanded its premises in Hong Kong, but it is also expanding its global presence. In May 2013, HKIAC opened a branch office in Seoul.

Recognising Hong Kong's position as a centre of Asian arbitration, a number of other bodies, including ICC, CIArb and CIETAC, have recently set up shop there as well, as have arbitration practitioners keen to exploit Hong Kong's status and proximity to the mainland China market.

China

China is a New York Convention jurisdiction, with a long history of arbitration and alternative dispute resolution, and (despite challenges in the lower courts in China) a strong record of enforcing foreign arbitral awards. However, it has recently faced some difficulties in relation to arbitration, mainly stemming from the recent internal split at CIETAC. On 1 August 2012, not long after publishing an improved and updated set of rules, CIETAC suspended the authorisation of its Shanghai and South China (Shenzhen) sub-commissions to accept and administer arbitrations. Since then, the Shanghai and South China sub-commissions have introduced new rules and established themselves as independent commissions, re-named Shanghai International Economic and Trade Arbitration Commission (or the Shanghai International Arbitration Centre) and the

Shenzhen Court of International Arbitration, respectively. This has, unfortunately, led to a period of uncertainty. Following this split, the Chinese courts have had to grapple with how to deal with CIETAC arbitration agreements which reference the former sub-commissions. Various court cases have been filed in China in relation to this issue, many challenging the validity of arbitration agreements or awards rendered pursuant to arbitration agreements that reference these sub-commissions.

In response, on 4 September 2013 the Supreme People's Court of China ("SPC"), China's highest court, issued a Notice on Certain Issues Relating to Correct Handling of Judicial Review of Arbitration Matters, pursuant to which any lower court that hears a case relating to the CIETAC split must report to the higher courts, including ultimately to the SPC, before rendering a decision. This Notice demonstrates that the SPC is offering guidance to the lower courts and aims to ensure that the courts apply a unified standard in addressing this issue.

Interestingly, China adopts a similar approach in relation to foreign-related arbitration agreements and foreign or foreign-related arbitral awards. In China, a lower court must report to the competent higher people's court if it seeks to nullify a foreign-related arbitration agreement, to set aside a foreign-related arbitral award, or to refuse enforcement of a foreign or foreign-related arbitral award. Again, this is a welcome sign of China's commitment to ensure quality and consistency in arbitration-related judgments.

In addition to CIETAC, other Chinese arbitral institutions are working hard to promote themselves and to ensure that their rules reflect modern, international standards. Most notable is the BAC. The BAC seeks to recognise global standards in relation to international arbitrations (which may differ from the approach taken in relation to domestic arbitrations in China). Chapter 8 of the BAC Rules contains special provisions in relation to international commercial cases, such as provisions relating to the appointment of arbitrators, the med-arb procedure, and arbitral awards. Further, in an effort to stay current, the BAC has amended its Rules seven times since its first set of Rules was established in 1995, the latest amendment being in 2008. A further revised draft of its Rules (which would replace the 2008 Rules) has recently been published for comments.

And there's more

There are many other jurisdictions in Asia which seek to increase the use of arbitration and to ensure that modern, international standards are upheld. One clear sign of this is the sheer number of regional arbitral institutions, including the Indonesian National Board of Arbitration (Badan Arbitrase Nasional Indonesia), the Vietnam International Arbitration Centre, and the Japan Commercial Arbitration Association.

The KLRCA in Malaysia has recently adopted new arbitral rules, which came into force on 24 October 2013. KLRCA will move into new, modern facilities in 2014. In addition, the Malaysian government has recently passed laws which allow foreign law firms to advise clients in Malaysia on arbitration cases on a "fly-in/fly-out" basis and to open local bases in Malaysia (either as Qualified Foreign Law Firms or through joint ventures with local firms).

Korean parties are significant users of arbitration, so it is no wonder that Seoul is promoting itself as a future leader in the arbitration field in Asia. The Seoul International Dispute Resolution Centre (SIDRC) was established in May 2013 and institutions such as the ICC, SIAC, HKIAC, the American Arbitration Association/International Centre for Dispute Resolution and the LCIA have already taken up residence at the SIDRC. Moreover, the Korean Commercial Arbitration Board is making great strides to challenge the dominance of the more established institutions.

Even jurisdictions that were previously seen as shunning arbitration and its developments are now beginning to embrace it. Thailand, for example, has faced criticism relating to problems with foreign arbitrators, restrictions on foreign counsel, and delays and difficulties in enforcing awards

in the Thai courts. However, in recent months, judgments coming out of the Thai courts in relation to the enforcement of arbitral awards suggest an increasingly supportive attitude towards arbitration. Myanmar, which only a couple of years ago was effectively segregated from the international arbitration community, deposited an instrument of accession with the Secretary-General of the United Nations, consenting to be bound by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") on 16 April 2013. The New York Convention came into force in Myanmar on 15 July 2013 (although domestic legislation has yet to be amended and adopted to provide a framework for the enforcement of foreign arbitral awards).

There may be more hurdles to jump for arbitration in Asia in the year of the horse, but in recent years, Asian jurisdictions have worked hard to ensure that their arbitration regimes are on a par with their Western counterparts. Asian arbitral institutions have come very far very quickly; and these efforts look likely to be rewarded, as parties increasingly seat even their largest and most important arbitrations in Asia and adopt the rules of regional institutions.

In international arbitration, as in world affairs more generally, Asia's sun continues to rise.

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