# Kluwer Arbitration Blog

## 2021 in Review: Southeast Asia

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In 2021, Southeast Asia saw institutional progress, arbitration-related court decisions, and investment treaty developments. All in all, it was an eventful and, at times, surprising year for the region in terms of arbitration developments.

**Institutional progress**

Some Southeast Asian arbitral institutions revamped and revised their arbitration rules as part of their strategic institutional development.

The Asian International Arbitration Centre ("AIAC") published its Arbitration Rules 2021 (the "AIAC Rules 2021"), which took effect on 1 August 2021. A summary of the changes may be found here. One significant change is the amalgamation of the UNCITRAL Arbitration Rules (as revised in 2013) into the AIAC Rules 2021, making the latter more holistic and user-friendly. Other changes include the introduction of a summary determination procedure similar to the early dismissal procedure found in the rules of other international arbitral institutions. Also worth noting are the refined provisions on the joinder and consolidation procedures, multi-party appointment procedure, fast track arbitration procedure (which is now self-contained), and awards.

The AIAC also released the new i-Arbitration Rules 2021 on 1 November 2021. These rules contain provisions that specifically cater to and align with Shariah principles including, among others, a framework for the appointment of Shariah experts by the arbitral tribunal, revisions to the reference mechanism to any relevant Shariah Council, clarifications on the imposition of Ta'widh and Gharamah, as well as Shariah compliant costs and expenses of an arbitrator. In other aspects, the provisions of the i-Arbitration Rules 2021 are largely similar to those of the AIAC Rules 2021.

Elsewhere, amendments to the Thai Arbitration Institute Arbitration Rules came into effect on 1 October 2021. Among other changes, the amended rules allow for expedited proceedings and also remove the previous rules on class action proceedings.

The Singapore International Arbitration Centre ("SIAC") also conducted a revision process for the SIAC Arbitration Rules in 2020 and indicated plans to release the revised SIAC Arbitration Rules in the third quarter of 2021. These revisions remain highly anticipated.

Apart from updated arbitration rules, there were other notable institutional developments in 2021.

The SIAC promoted its new office in New York and shared its commitment to be part of the arbitration community in the Americas and work with arbitration stakeholders on capacity building and training, developing best practices, new reforms and policy initiatives, and fine-tuning case management.

Also, our blog contributors considered sector-specific developments in the maritime hub of Singapore and elsewhere in Asia. The Singapore Chamber of Maritime Arbitration ("SCMA"), which adopts a self-administered model of institutional arbitration similar to that of the London Maritime Arbitrators Association, recently completed the process of updating the SCMA Arbitration Rules, the fourth edition of which took effect on 1 January 2022.

**Court decisions**

As our blog contributor discussed in this post, the Vietnam Council of Justices of the Supreme People's Court adopted Precedent no. 42/2021/AL to protect consumers in Vietnam against mandatory arbitration. This bound Vietnamese courts from 15 April 2021. The Vietnamese courts have decided in prior cases that consumers may refuse to arbitrate under an SIAC arbitration clause and have the right to request that a Vietnamese court hears their case.

Singapore saw some landmark cases where arbitral awards were successfully set aside – a rare occurrence in the city's arbitration-friendly landscape:

1. In *CBS v CBP* [2021] SGCA 4, discussed by our blog contributors here and here, the Singapore court set aside an arbitral award as the arbitrator's decision not to allow a hearing for oral witness evidence, in the absence of clear powers to do so, amounted to a breach of natural justice.
2. In *CBX v CBZ* [2021] SGCA(I) 3, discussed by our blog contributor here, the court found that the tribunal exceeded its jurisdiction by deciding certain claims that fell outside the scope of the parties' submission to arbitration, and failing to give the parties sufficient opportunity to present their case on those issues.
3. In *CAJ v CAI* [2021] SGCA 102, the court found that the tribunal's decision to allow an extension of time to the appellants, despite the issue of an extension of time not being raised in the parties' pleadings and the respondent not having been given a reasonable opportunity to engage with that issue (including by leading further evidence, testing the appellants' evidence and tendering further legal submissions), was in excess of its jurisdiction and in breach of natural justice.

In other Singapore court-related developments covered by the blog:

1. The Singapore High Court issued a supplementary judgment on the quantum of costs from a set aside proceeding, finding that the defendants were not permitted to argue for a higher quantum of costs by seeking to switch the basis of the costs ordered from standard to indemnity basis (see *BTN v BTP* [2021] SGHC 38). Our blog contributor explored the differing approaches to this issue in Singapore and Hong Kong.
2. The Singapore High Court held that where proceedings are a nullity due to the involvement of a non-existent entity, they cannot lead to any award capable of being set aside (see *National Oilwell Varco Norway AS (formerly known as Hydralift AS) v Keppel FELS Ltd (formerly known*

*as Far East Levingston Shipbuilding Ltd)* [2021] SGHC 124). Our blog contributor discussed this case and the interesting questions tackled by the court.

In addition, some important Malaysia-specific developments caught the attention of our blog's contributors:

1. Anti-arbitration injunctions: In recent years, the Malaysian Courts have had the opportunity to consider anti-arbitration injunctions, in the context of both Malaysia-seated arbitrations and foreign-seated arbitrations involving Malaysian parties. In *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1 and *MISC Berhad v Cockett Marine Oil (Asia) Pte Ltd* [2021] MLJU 563, for example, the Malaysian Courts appeared to have adopted a light touch approach by relying on the general test for interlocutory injunctions, as opposed to the stricter test applicable to anti-arbitration injunctions in other common law jurisdictions.
2. Confidentiality in arbitration-related court proceedings: The Malaysian Courts have also had the opportunity to consider the confidentiality obligations prescribed by the Malaysian Arbitration Act 2005. The Malaysian Courts have been consistent in upholding confidentiality, preserving the confidentiality of the arbitral proceedings and what transpired during those proceedings, even in enforcement or setting aside proceedings.

**Developments in investment treaty arbitration**

The Singapore International Dispute Resolution Academy published analysis from its International Dispute Resolution Survey: 2020 Final Report and launched the 2021 SIDRA Survey, which called for responses from lawyers, legal advisers, in-house counsel, and corporate executives who have experience in international commercial disputes and investor-state disputes resolution. SIDRA concluded that (i) hybrid mechanisms are the third most popular dispute resolution method in 2016-2018, (ii) the most important factor for users in the selection of a hybrid mechanism over stand-alone arbitration is the preservation of a business relationship and (iii) users are not satisfied with the cost and speed of arbitration, and the efficiency of arbitrators and arbitral institutions.

Separately, the Indonesia-Singapore bilateral investment treaty entered into force on 9 March 2021, paving the way for new procedural rights for investors.

On 1 January 2022, the RCEP also came into force for Australia, Brunei Darussalam, Cambodia, China, Japan, Lao PDR, New Zealand, Singapore, Thailand and Vietnam, paving the way for the creation of the world's largest free trade area. For the remaining signatory States, the RCEP Agreement will enter into force 60 days after the deposit of their respective instrument of ratification, acceptance, or approval to the Secretary-General of ASEAN as the Depositary of the RCEP Agreement.

As Article 10.18 of the RCEP sets out a process for the member States to enter into discussions regarding investor-state dispute settlement in the next two years, whether and how investor-state arbitration will be applied under the RCEP will be a space to watch.

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