Kluwer Arbitration Blog

2022 Year in Review: Southeast Asia

Deborah Loh (Assistant Editor for Southeast Asia) (Clifford Chance Asia) and Irene Mira (Assistant Editor for Southeast Asia) · Wednesday, January 11th, 2023

The year 2022 seems to have passed in a flash, but not without bringing some exciting developments for the arbitration scene in Southeast Asia. From the Southeast Asia editorial team, here are some of the past year's highlights.

Developments in the law and jurisprudence

Contributors to the Kluwer Arbitration Blog critically analysed the Singapore courts' approach to (a) determining which issues fall within the scope of an arbitration, in situations where the impugned issue does not arise from the pleadings; and (b) determining whether subject matter arbitrability is an issue of jurisdiction or admissibility, which has significant implications given that a tribunal's decision on jurisdiction would be subject to de novo review by the courts, while a decision on admissibility would not be.

Across the causeway, 2022 also saw prominent members of Malaysia's arbitration scene discuss important issues as part of the Asia ADR Week 2022. Our contributors covered a key panel discussion on Malaysia's status as a "pro-arbitration" jurisdiction that included a debate on some of the 2018 amendments to the Malaysia Arbitration Act 2005 (the "Act"). One interesting topic of debate was the deletion of Section 42 of the Act (which provided that a party may refer to the High Court any question of law arising out of an award). Diametric views were expressed – that, on the one hand, the amendment is laudable for promoting finality of arbitral awards and, on the other hand, it removed a safeguard that domestic arbitrations would have benefitted from.

Also in 2022, the Malaysia High Court granted an interim injunction against a non-party to an arbitration agreement and the arbitration, clarifying that the High Court has the power to do so under Section 19J of the Act, which grants the High Court the power to order interim measures.[1)]

The tribunal in the widely-publicised dispute of *Kingsgate Consolidated Ltd v. The Kingdom of Thailand* postponed its decision on account of the parties' ongoing negotiations. In this PCA-administered dispute launched in 2017, the claimant alleges among others that the Government of Thailand indirectly expropriated its investment in the Chatree gold mine through measures taken in 2016. At the time of publication, no reported decision has been rendered.

In the Philippines, the Securities and Exchange Commission ("**SEC**") issued guidelines that will

allow corporations to resolve intra-corporate disputes through arbitration instead of court proceedings. The arbitration agreement in such cases may be contained in a company's articles of incorporation or bylaws, or in a separate agreement. One noteworthy point is that under these guidelines, the SEC may appoint the arbitrator if the parties fail to do so. Further, the arbitrators must be accredited by the Office for Alternative Dispute Resolution under the Department of Justice or the SEC, or by organizations accredited by any of the two.

Significant institutional developments

Concerning Indochina institutional developments, it was good tidings all around!

In a notable institutional development for Vietnam, the PCA opened a representative office in Hanoi in November 2022, officially establishing its second home in Asia after its Singapore office and its fifth office outside the Netherlands. The Hanoi office aims to facilitate meetings and hearings in light of the PCA's growing caseload involving Asian parties as well as to forge capacity building for the country's benefit. It bears mention that Vietnam has prescribed the PCA as an administering institution in several investor-state arbitrations in which Vietnam is named as the respondent. The opening of the PCA's office in Vietnam is not just timely but also strategic. It will be interesting to see the kinds of institutional activities and the future caseload helmed by the new office.

Meanwhile, the National Commercial Arbitration Centre ("**NCAC**") in Cambodia reportedly had an emergency arbitrator issue the first interim award under the auspices of NCAC in February 2022. This news is a positive sign for the further development of international arbitration in Cambodia. Based out of Phnom Penh, the NCAC was established in 2006 pursuant to the Law on Commercial Arbitration promulgated by the Royal Decree No. NS/RKM/0506/010 dated 5 May 2006 and has administered a total of 52 cases from 2015 to 2020.

Further, in Thailand, a new specialised arbitration institution, the Thailand Court of Arbitration for Sport ("**TCAS**"), was set up in early October 2022. This project was initiated by the Thailand Arbitration Center in cooperation with the Sports Authority of Thailand, to provide services for the settlement of sports-related disputes through arbitration and mediation handled by arbitrators and mediators with expertise in both domestic and international sports disputes. The TCAS also has specific procedural rules adapted to the needs of the sports world. The TCAS may administer disputes directly or indirectly linked to sport, including commercial disputes related to sponsorship agreements, media rights, employment issues, and regulations of transfers, as well as more sport-specific disputes such as those involving doping, cheating and accidents on the field.

Enforcement of arbitral awards

One might say that an arbitral award is akin to the final act of a play before the curtains close. This final act (or pre-final act in the form of an emergency arbitral award) will reveal whether the end result is satisfactory or not for the audience (i.e. the clients and their representatives). In 2022, the Blog featured two noteworthy posts involving the enforcement of arbitral awards in Southeast Asian jurisdictions, prompting contemplation as to whether the 'final act' (i.e. arbitral award) can be said to have ended on a positive note that supports enforcement.

In the first post, our contributor discussed the success of the emergency arbitrator regime and how it has been impacted by legislation on the enforcement of foreign emergency arbitral awards. The post explains that a recent Singapore High Court decision answered in the affirmative the question of whether foreign emergency arbitration awards are enforceable in Singapore. The post also notes the pro-arbitration stance taken by the Supreme Court of India in recognising the validity of an SIAC emergency arbitrator award, even though the Indian Arbitration Act (1996) does not have express provisions in favour of emergency arbitral awards.

In the other post, our contributor highlighted how Singapore's Reciprocal Enforcement of Commonwealth Judgments Act 1921 provides certain advantages to shrewd award creditors in the enforcement of arbitral awards but also questioned whether a parallel arbitration enforcement regime ought to exist, as it arguably undermines New York Convention provisions aimed at safeguarding the procedural integrity of the issuance of arbitral awards.

Developments in funding alternatives

Another development that caught the eye of our contributors in 2022 was Singapore's new regime for conditional fee agreements. Our contributors evaluated the new regime, including by drawing comparisons to Hong Kong's regime, and also analysed whether costs orders made by arbitral tribunals should consider the impact of alternative fee arrangements.

Looking forward

Now that almost all travel restrictions have been lifted, we anticipate ever greater discourse and collaboration among the arbitration community in 2023 and more inroads being made into the development of arbitration across Southeast Asia.

References

?1 *Padda Gurtaj Singh and others v. Axiata Group Berhad and others* [2022] MLJU 526.

This entry was posted on Wednesday, January 11th, 2023 at 8:33 am and is filed under 2022 in Review, Admissibility, Alternative fee arrangements, Arbitration Institutions and Rules, Cambodia, Enforcement, Jurisdiction, Malaysia, Philippines, Singapore, Thailand, Vietnam
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.