



INSIDE ARBITRATION

PERSPECTIVES ON CROSS-BORDER DISPUTES

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Welcome to the sixth issue of Inside Arbitration

Recent months have seen our global arbitration practice holding events to mark the 60th anniversary of the New York Convention. One of the most important and successful United Nations treaties in the area of international trade law, for many it is viewed as the bedrock on which arbitration has blossomed, and one of the key reasons for the global adoption of international arbitration for resolving cross-border disputes.

Across a number of offices, we have been exploring the Convention's impact, its effectiveness and whether it can continue to stand the test of time. In London, I was delighted to host an event to mark the anniversary, leading a panel of esteemed guests to consider these themes, comprising The Rt Hon. the Lord Neuberger of Abbotsbury, One Essex Court, Former President of the UK Supreme Court; Professor Albert Jan van den Berg, Partner, Hanotiau & van den Berg; Dr. Jörg Weber, Head of Investment Policies Branch, Division on Investment and Enterprise, UNCTAD; and Mimi Lee, Managing Counsel, Chevron. We have also seen the firm lead events across many of our offices, including Sydney and Singapore. I am pleased to provide a window into these insightful discussions in our article "60 years of the New York Convention: a triumph of trans-national legal co-operation, or a product of its time and in need of revision?".

The last few months have also been an exciting time for our practice with the promotion of two of our arbitration practitioners to the partnership, Amal Bouchenaki (in New York) and Helen Tang (in Shanghai). One of our leading practitioners in Hong Kong, May Tai, was also promoted to become Managing Partner of all our Greater China offices. As a practitioner who believes strongly in the drive for diversity across the arbitration community, I am personally and professionally delighted to see these three hugely talented women recognised and to watch their careers continue to grow. Our Spotlight articles in this issue are therefore, rightly, focused on their achievements and interests.

The promotion of existing talent from within the firm has not been our only focus. We have also welcomed Partners Hew Kian Heong and Michelle Li and four new associates to our Greater China disputes practice. Splitting their time between Shanghai and Beijing, Hew and Michelle are highly respected for their leading construction and infrastructure disputes experience. As we start to notice a palpable increase in Belt and Road

disputes, Hew and Michelle are extremely well placed to advise both our Chinese and international clients. In this issue's sector-focused piece, senior associates from our Asian offices share their thoughts on building Infrastructure in Asia Pacific and issues and trends for construction disputes across the region.

In "A view from Seoul", Partner Mike McClure and Professional Support Consultant Briana Young provide insight into another market in the Asia Pacific region, considering how international arbitration is viewed in Korea and how Seoul is endeavouring to join Hong Kong and Singapore as a leading Asian arbitral seat. Partner Alastair Henderson, Senior Associate Daniel Waldek and Associate Reshma Nair also provide insight into regional trends in South East Asia and efforts to adopt international best practice in Malaysia, Thailand and Vietnam.

There has been a relative lull in amendments to the rules of many of the key arbitral institution in the last year. DIS (the German Institute of Arbitration) is a notable exception. Senior Associate Catrice Gayer provides a concise summary of key changes to the rules for anyone considering a DIS arbitration clause or anticipating a DIS arbitration in the near future.

Our last issue looked at the change afoot in investment arbitration. In this issue Partners Peter Leon and Andrew Cannon and Of Counsel Iain Maxwell focus on the rise of resource nationalism, its implications for clients and the potential for recourse via investment arbitration.

I hope this issue of Inside Arbitration provides some useful tips and that you enjoy reading it. Feedback on the content is, as always, welcome and we should be delighted to hear from you to discuss your thoughts on the topics covered.



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60 years of the New York Convention: a triumph of trans-national legal co-operation, or a product of its time and in need of revision?

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards – known as the “New York Convention” – has been described as the most important and successful United Nations treaty in the area of international trade law. Renaud Sorieul, the Secretary of UNCITRAL has called it “the cornerstone of the international arbitration system”.

Despite its significance, the Convention is actually a very unassuming document. It is a mere 5 pages long, made up of 16 Articles, with a surprising directness to the drafting. One questions whether a treaty of this nature would look quite so minimalist if it were to be negotiated today. The global reach of the Convention is impressive. The tally of signatory states now stands at 159 (with Sudan having deposited its instruments of accession on 26th March this year). Herbert Smith Freehills is working with Sierra Leone on its accession, and other states are looking to sign up: the “160th” state is anticipated this year. Out of a total of 195 countries in the world, 80% are contracting states.

On the 60th anniversary of its creation, Paula Hodges QC, Hannah Ambrose and Vanessa Naish consider the impact of the New York Convention contemplating the reasons for its success and the motivation of States in accepting the obligations it imposes: Dr. Jörg Weber of UNCTAD comments on the impact the Convention has on its Contracting States, including on FDI inflows; and Alastair Henderson and Gitta Satryani present the results on a survey on enforcement of arbitral awards in the ASEAN region. We also ask whether the Convention remains fit for purpose in its current form, and, if not, whether revision is a practical possibility.



How did the New York Convention come about and what does it do?

In the 1920s the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 were agreed and entered into by a limited number of states. Both were generally considered inadequate in achieving the enforcement objectives they had been designed for, and an initiative began at the International Chamber of Commerce ("ICC"), to replace them. The ICC issued a draft convention in 1953 and change was pushed forward within the auspices of the United Nations. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by the UN following a diplomatic conference held in May and June 1958 at the United Nations Headquarters in New York, and entered into force on 7 June 1959.

The Convention's principal aim is that foreign and non-domestic arbitral awards should not be discriminated against by courts asked to enforce them. It obliges Contracting States to ensure such awards are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards. A second aim of the Convention is to require courts of Contracting States to uphold valid arbitration agreements and stay court proceedings in respect of matters which the parties have agreed should be resolved by arbitration. In short, by signing up to the Convention, a state agrees that its courts will respect and enforce parties' agreements to arbitrate, and to recognise and enforce any resulting arbitral award in its jurisdiction subject to only very limited grounds for refusal.

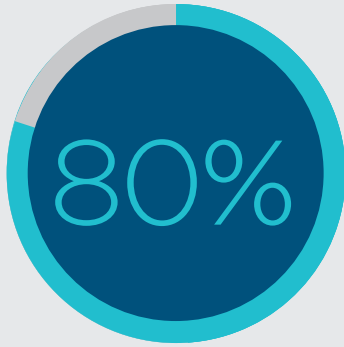
Both limbs of the Convention are critical factors in the growth and popularity of arbitration across the world in the last 60 years. Privacy, the ability to choose an arbitral tribunal and neutrality are also considered valuable aspects of the arbitral process. However, the knowledge that the parties' agreement will be upheld and any resulting award will be enforced across 80% of the countries in the world is fundamental. Without these features, it is doubtful whether arbitration would have become the preferred method of cross-border dispute resolution.

The knowledge that an arbitral award can be enforced by the coercive powers of the courts in countries around the world also encourages voluntary compliance. A well-respected academic study found that 9 out of 10 awards are satisfied without the need for enforcement proceedings.¹

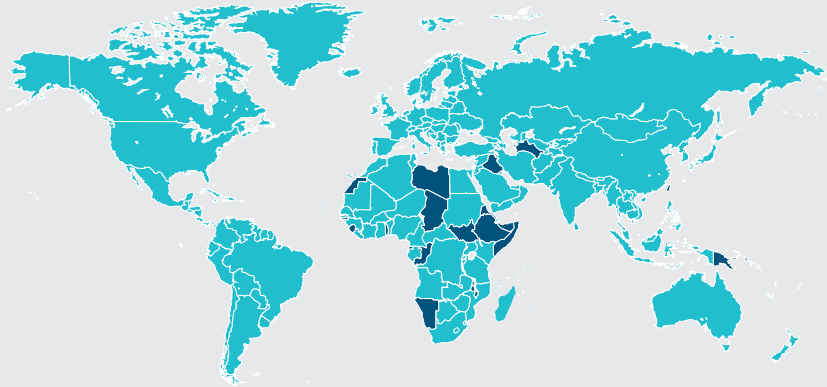
1. Queen Mary University of London School of International Arbitration and PwC Study *International Arbitration: Corporate Attitudes and Practices*, 2008, available at: <http://www.arbitration.qmul.ac.uk/research/2008/index.html>. (the QMUL Study 2008).

The New York Convention in numbers

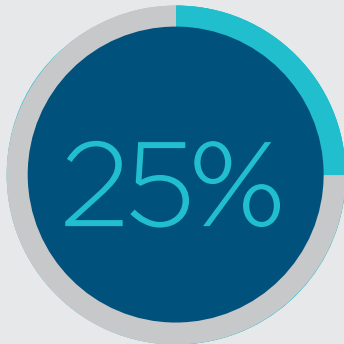
159 Signatory states:



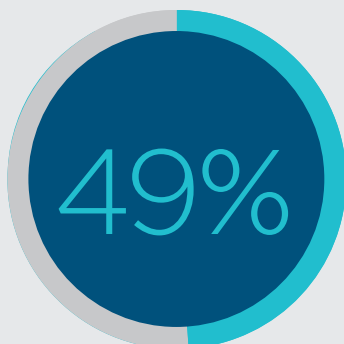
80% of the countries in the world



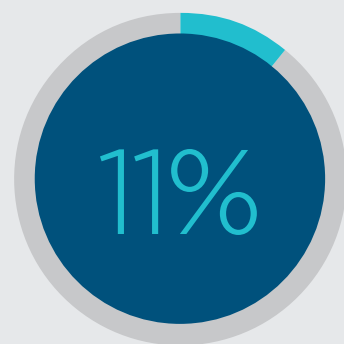
According to the QMUL Study 2008:



25% of arbitrations are settled before the tribunal delivers an award

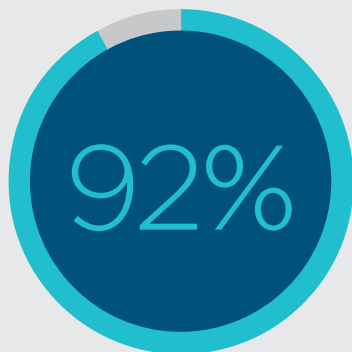


49% of awards are voluntarily complied with



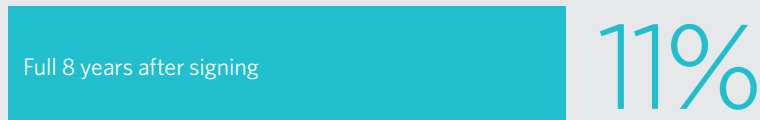
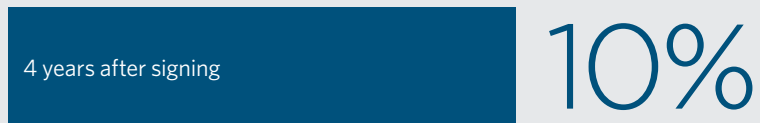
11% go to the stage of recognition and enforcement

The same study recognised that:



"overall, 92% of the arbitration disputes are successfully resolved at some stage through the arbitration proceedings."

New York Convention FDI growth



The New York Convention's contribution to the achievement of Sustainable Development Goals: An Interview with Dr. Jörg Weber, Head of Investment Policies Branch, Division on Investment and Enterprise, UNCTAD



Dr Jörg Weber



The United Nations Conference on Trade and Development ("UNCTAD")'s role is to advise countries on developing frameworks to attract more foreign investment, increase the economic benefit derived from that investment, and help them manage any negative impacts of it.

UNCTAD has estimated that additional annual funding of US\$ 2.5 trillion is required to achieve the Sustainable Development Goals ("SDGs") in developing countries. Increasing the participation of the private sector in SDG financing is a crucial task.

Membership in the New York Convention can be an important prerequisite in this regard, although such membership alone will not solve the issue. There are now about 40 states which are not contracting states, and these are mostly least

developed countries in Africa and the Pacific region.

The Convention can have an impact on the attractiveness of a country for foreign investment and on its further prosperity and growth. International commercial arbitration provides a way in which international parties can agree to enter into complex and highly valuable contractual arrangements, with the certainty that, in the event of a dispute, there will be a predictable process and an internationally enforceable outcome. And it works. Of the approximately 5000 new arbitration matters being commenced each year, 25% of cases are settled before they get to an award, 49% of the awards are voluntarily complied with, and only 11% of those awards even get to the stage of recognition and enforcement.²

And this is down to the New York Convention.

Without the quasi-global framework that it created, we would not see the uptake of arbitration or compliance with its outcome

UNCTAD recently advised Sudan on its growth and development, recommending accession to the Convention as part of its development strategy.³ Sudan became the 159th signatory state this year. So what is the case for countries to ratify or accede to the Convention?

We firstly look at the contribution that the Convention makes towards the sound legal infrastructure of a country. Ratification of the Convention demonstrates that business can be carried out in that jurisdiction with reduced risk and that there is an ability to recover debts in case things go wrong. This can increase a country's attractiveness for foreign investment and promotes economic growth.

As is the case with other FDI determinants, measuring the Convention's impact on FDI growth is a challenging task, and not without controversy. At the same time, a study by A Myburgh and J Paniagua published in 2016⁴ looked econometrically at the connection between signing the Convention and inward FDI and concluded that the impact was "positive and significant". The study considers UNCTAD data on net FDI inflows for a balanced panel of those countries that joined the NY Convention in the period from 1975 to 2003, the study concluded that FDI is higher in the years after joining the NY Convention. In the four years prior to signing the NY Convention, growth in average FDI inflows is just over 2%. The growth is 10% for the four years after joining the NY Convention and 11 percent for the full eight years after joining the NY Convention.

This accords with an earlier study of Daniel Berkowitz from 2004 which indicated that ratification of the New York Convention leads to increased trade flows.⁵ Acceding to the Convention may also result in reduced interest rates for the signatory state, lightening the pressure on the domestic legal system thanks to the reduced number of complex commercial cases to be litigated in courts, and improvement in the World Bank's Doing Business ranking.

At the same time, it is important to contextualise the findings of econometric studies. Econometric studies can help, but they also have limitations. For example, counterfactuals (ie investments and business relationships that take place without coverage by the New York Convention) suggest that legal instruments' influence on economic matters are limited and that other determinants, in particular the economic ones, are more important.

At the practical level, ratification of the Convention means that investors become less sensitive to weaknesses in a country's domestic institutions once that country has ratified the Convention. Accession to the Convention can also boost local

2. QMUL Study 2008. Even though the report dates from 2008, subsequent years have not revealed any major changes.

3. See the 2015 Investment Policy Review of the country, at: <https://tinyurl.com/ybuym5d>

4. "Does International Commercial Arbitration promote Foreign Direct Investment?", A Myburgh and J Paniagua, The Journal of Law and Economics 59(3):597-627 August 2016

5. Daniel Berkowitz, Johannes Moenius & Katharina Pistor, Legal Institutions and International Trade Flows, 26 Mich. J. Int'l L. 163 (2004). <https://tinyurl.com/yb63hyxd>

arbitration capacity and often spurs (or is part of) domestic legal reform in the area of arbitration.

Countries considering ratification do raise a number of concerns

There is considerable disquiet around loss of sovereignty - that a country's courts are bound to respond in a particular way to party agreement, even where that agreement results in the resolution of disputes relating to that country's natural resources outside its jurisdiction. There are also financial implications involved, as the costs of international arbitration are typically significantly higher than the costs of litigation in courts. Further, a country considering accession will need to introduce implementing legislation and may need to train its judiciary as well as its legal practitioners.

For some countries, the cost-benefit analysis of this may be challenging, particularly when the economic benefits of ratification do not manifest themselves overnight. In relation to treaty-based investor-state disputes, UNCTAD has concluded that the system of "private" arbitration is not an optimal solution. UNCTAD has therefore been promoting the reform of this system as part of reform of international investment agreements more generally. Although statistically treaty-based disputes account for only an estimated 1-1.5 per cent of all international arbitrations, they have given rise to serious concerns, including due to serious financial implications for States. While discussions on establishing a multilateral investment court are currently under way, they will not affect the Convention's key role in ensuring effectiveness of arbitration between private parties.

Fundamentally, the Convention supports multilateralism and contributes to it by creating a business environment in which people can trust each other. This is not to be assumed in the current global environment when multilateralism is under threat. I see this 60th anniversary as an

opportunity to celebrate what has been achieved and focus on the importance of global cooperation. Global trade and investment will be a major factor in the achievement of the UN's Sustainable Development Goals, not least the eradication of extreme poverty by 2030. The Convention's role in that should not be forgotten.



Is the Convention ripe for revision?

The Convention's impact is impressive, as is its current global coverage. The work of UNCTAD aims to achieve global participation. However, whilst the Convention is upheld as the "cornerstone" of arbitration, there have been challenges. Some argue that it should be revised in order to remain relevant and suitable for the years to come.

One such advocate for change is renowned arbitrator, Albert Jan van den Berg. Professor van den Berg raised the prospect of a revision of the Convention in his keynote address at the ICCA Conference in Dublin in 2008 on the Convention's 50th anniversary. He subsequently issued a draft revised text, now widely known as the "Miami Draft" to highlight the purported inadequacies of the existing text and the ways in which it could be improved.

More recently, at an event organised by Herbert Smith Freehills in London to recognise the Convention's 60th Anniversary, Professor van den Berg highlighted growing concerns about the future of the Convention, noting that the rate of successful enforcement is in decline as domestic courts become more sceptical of the work product of arbitrators and, in effect, more anti-arbitration. He also cautioned against the courts' increasingly "liberal" attitudes towards the text, which has resulted on occasion in the interpretation and the application of the text beyond recognition of the text itself.

The Miami Draft proposes fundamental changes to the Convention. For example, Article 1 of the Convention (Field of Application) states that the Convention applies to awards made in the territory of a state other than the state in which enforcement is sought. The test is purely territorial, and, according to Professor van den Berg, is incomplete because the Convention does not apply in the territory of state where award is made. The interpretation by domestic courts of the grounds for refusing enforcement can also be criticised, including with regard to the scope of interpretation of Article V(2)(b) (the "public policy exception"). Further, concern has been expressed (by Professor van den Berg and many others) regarding the permissive interpretation which has been placed by some domestic courts on the word "may" in Article V(1). Such an interpretation introduces a discretion on the enforcing court as to whether to refuse recognition and enforcement on the grounds listed in Article V. A further example of judicial analysis said to justify amendments to the Convention concerns interpretation of Article V(1)(e), most recently by the US and Dutch courts. Against the plain meaning of the text, Article V(1)(e) (which concerns an award which has not yet become binding on the parties, or has been set aside or suspended by the courts of the seat), has been interpreted to mean that a judgment setting aside an award must be capable of being recognised in the courts of the country where enforcement is sought before the set aside will be considered valid. In so doing, these courts have relied on their own domestic approach to enforcement. The divergent approaches to the recognition and enforcement of awards which have been set aside (well known examples include the *Dallah* and *Hilmarton* cases), undermine arbitration's promise of finality and predictability. Other questions arise around the lack of consistency on the process for enforcement globally.

Herbert Smith Freehills is proud to have been supporting Sierra Leone on a pro bono basis in its possible accession to the New York Convention.

The enforcement of arbitral awards: An ASEAN case study



To mark the 60th anniversary of the New York Convention, the South East Asian International Arbitration practice of Herbert Smith Freehills conducted a survey on the enforcement of arbitration awards in the ASEAN region to understand how the enforcement regime has operated in practice in the ASEAN region, and how effective it is thought to be. The key findings and conclusions from the survey were shared and discussed at an event held in Singapore on 12 June 2018 to celebrate the 60th anniversary of the Convention that was jointly hosted by the Singapore Management University, the Singapore International Dispute Resolution Academy and Herbert Smith Freehills.

Participants from various sectors and jurisdictions contributed to the survey and shared their perspectives and experience regarding the enforcement regime of international arbitral awards in the 10 ASEAN member states. A fuller analysis of the survey results will be made available to the public in the near future. In the meantime, we share some of the key findings of the survey in this article.

Effectiveness of South East Asian courts in enforcing international arbitral awards

Unsurprisingly, among the ASEAN countries, 91.02% of the participants consider the Singapore courts to be highly or very effective in enforcing international arbitral awards, and almost all the participants responded that they would be very likely to recommend enforcement in Singapore. Singapore has developed into a leading arbitration hub over the years and its courts have been very supportive of arbitration, as evident from the multiple instances where they have upheld the finality of arbitral awards. This is followed by Malaysia where close to 69% of the participants consider the courts to be effective generally in enforcing international arbitral awards.

The courts' approach to enforcement of arbitral awards in the other South East Asian countries is still not as developed as in Singapore, but they have steadily improved over the years, especially in Thailand, and Philippines where courts have been increasingly effective in recognising

arbitral awards. The survey results reveal that a majority of the participants consider the Indonesian and Vietnamese courts to be the least effective (relative to jurisdictions such as Singapore or Malaysia), while there is limited knowledge regarding enforcement of arbitral awards in Brunei, Cambodia, Laos and Myanmar. This may reflect the fact that there are not many cases of enforcement in these jurisdictions, especially in Myanmar which ratified the New York Convention only in the last few years.

Efficiency in enforcement proceedings

The survey also show improvements in the efficiency of enforcement proceedings in South East Asian courts in recent years. As reflected in the survey, enforcement proceedings (including all appeals) usually take between one to two years on average in the ASEAN region. Singapore enforcement proceedings, unsurprisingly, take the least amount of time, especially with the availability of an expedited procedure where enforcement usually takes less than six months. It is also heartening to know from the participants that enforcement in the courts of other major South East Asian jurisdictions such as Malaysia and The Philippines take less than 12 months: more than 69% of the participants responded that enforcement takes between six and 12 months in Malaysia, while more than 53% responded the same in relation to The Philippines.

As regards appeals against enforcement decisions of the courts of first instance, even jurisdictions which are seen to be pro-arbitration are not immune to high rates of appeals. More than 85% of the participants consider appeal to be highly or very likely against decisions which seek to enforce international arbitral awards. Similarly high rates are found in respect of Indonesia, Malaysia, and The Philippines.

Limited grounds of refusal to enforce

In theory, the grounds on which national courts may refuse recognition and enforcement of arbitral awards are very limited and courts should generally enforce arbitral awards. Additionally, a court which

is asked to enforce an arbitration award should not re-examine the merits of the underlying dispute. However, the language used in Article V leaves room for interpretation and gives the domestic courts discretion when interpreting these grounds (most famously the ground of public policy). This has resulted in varied interpretation by domestic courts, and the effectiveness of the enforcement regime under the convention has had mixed results across jurisdictions. This is true for the South East Asian jurisdictions as well, as reflected in the results of the survey.

However, it was only with respect to Singapore that a large majority of the participants (81.63%) felt that the courts did not re-examine the merits. While 51.43% of the participants felt that Malaysian courts also steered away from a re-examination of the merits, participants felt that, in practice, the courts of the other ASEAN countries did sometimes expand the grounds in the New York Convention in order to re-examine the merits.

Conclusions to be drawn from the ASEAN Enforcement Study

Undoubtedly, there has been an increase in foreign investment and international transactions in the South East Asian region in the last decade. As such, the number and complexity of international commercial arbitrations in the South East Asian region have also increased. As reflected by the survey, courts in different ASEAN jurisdictions have interpreted and applied the New York Convention differently, resulting in varying degrees of effectiveness when it comes to enforcing international arbitral awards. Nonetheless participants of the survey remain optimistic about the prospect of improvements in the efficiency and the effectiveness of enforcement of international arbitral awards in the South East Asian jurisdictions. As judges and lawmakers become more familiar with international commercial arbitration through training, cross-border exchange of information, and capacity building conducted by various organisations including UNCITRAL, there will be better consistency and uniformity in the application of the New York Convention for enforcement of international arbitral awards across the region.

What next for the Convention?

Whatever weight one assigns to the criticisms that can be made of the Convention, they do not appear likely to bring about change. Even minor clarificatory revision to the Convention text is highly unlikely as it would require the unanimous agreement of all parties to the Convention. Generating the political will across 159 states to support such change may pose an insurmountable hurdle. Comparisons can be drawn with the ICSID Convention where current efforts to refresh the ICSID process look set to occur through revisions of the ICSID Rules (requiring a still difficult 2/3rd majority) rather than through amending the ICSID Convention itself, which would require unanimity.

Suggestions have also been made that any revisions could be brought about by the addition of an "annex" which can be adopted by signatory states. Yet this raises the spectre of a "two tier" Convention with different states applying different rules and interpretations, with two different sets of jurisprudence running in parallel. By maintaining a single text, jurisprudence remains relevant to all contracting states and is likely to have persuasive value to all, bringing about greater alignment than in a two tier system.

While the Convention might benefit from a refresh to reflect global arbitration practice, clarify uncertainties and to bring about greater consistency in interpretation, few States will, at present, be willing to expend political capital, time and resource on the revision of a treaty which has been shown to be extraordinarily effective. Whilst it is an international law instrument, the Convention becomes operative at national level through the actions of domestic courts. Efforts may therefore be better expended by bodies such as ICCA, UNCITRAL and UNCTAD in focusing on the education and training of state's judiciary and the dissemination of guidance (such as the UNCITRAL Secretariat Guide on the Convention) and interpretive instruments (such as the Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention, adopted by UNCITRAL in

2006). Easy access to jurisprudence through online sources will also remain helpful (such as the Case Law on UNCITRAL Texts ("**CLOUT**") collection, as well as the accumulation of authorities on www.newyorkconvention1958.org).

Whilst the discussion about improving the Convention will continue, the obligations it creates between states undoubtedly establish valuable advantages for private parties on a domestic level. No parallel instrument exists in terms of the global reciprocal enforcement of court judgments – states have been slow to adopt the Hague Convention on Choice of Court Agreements 2005. As a practical matter therefore commercial parties continue to regard the Convention as a key tool in reducing enforcement risk in cross-border transactions.

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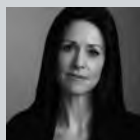
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Spotlight article: Amal Bouchenaki

One of the global arbitration practice's newest partners discusses her route into arbitration, via the complexities of derivatives and project finance, the synergies between her LatAm and MENA practices, and her experience of single-handedly releasing a ship seized off the coast of Mauritania.

You have an incredibly interesting background, having studied or worked in Paris, Edinburgh, the Hague, California and New York. How did this come about?

I started with a very math-oriented academic background but was interested in languages. I have a diverse background – none of my grandparents share the same cultural background, and nor do their parents! As a result, it was only natural for me to see the world as a web of connections and to be drawn to different languages and cultures. So I looked for a subject that could accommodate my taste for maths and my humanities interests – it seemed like law would suit. I looked for a course which would allow me to develop an academic study of law in more than one jurisdiction but also to work on my languages. My strongest language was French and my English, Spanish and Arabic were already well-developed, so I went to Université Paris XI Sceaux which offered a tough course with ISIT (a translation school) that would push me to further develop my English and Spanish skills as well as studying different legal systems.

"As it turned out, the programme offered me an opportunity to study both English and Scottish law in Edinburgh"

I was really enthused. The Scottish law element offered a good bridge between the

common law system and the civil law system I had already studied in Paris. And I loved living in Scotland – the welcoming people and the beautiful Highlands which I explored at every opportunity. I will say that I found the accent challenging at first and I started thinking that perhaps my English was not as good as I thought it was and of course I got used to the accent in the end and I enjoy understanding so well now. It reminds me of how enriching an experience Scotland was for me.

And then you headed to the Hague?

Yes, that's right, to the Hague Academy of International Law. In the course of my studies, I became particularly curious about private international law. Then, as I considered cases in the context of my studies, I was particularly drawn to those which involved states and state entities and increasingly exposed to and interested in public international law cases. Learning about both private and public international law (this was something I would end up returning to) was enlightening, and the Program at the Hague was a lot of fun!

When you went into practice, you joined a French litigation boutique. What was your motivation?

I had it in my head that I should really develop my practical abilities in one jurisdiction first - France. As it turned out, the private international law work was steered towards me due to my languages (particularly the Spanish and Arabic) and my academic background. For example, matters involving recognition and

enforcement and foreign proceedings. International work – whether it was private or public international law – fell to me. I remember when I was really junior, everyone departed for their annual summer vacations, leaving me alone with assurances that "nothing ever happens in August". The very next day, as I sat in the deserted office, I got a call about the seizure of a client's vessel full of perishable goods off the coast of Mauritania. I guess I was the right person to deal with it – it was a Spanish contract and the court order was in Arabic – unfortunately I had zero months' practical experience! It was a true baptism by fire. To this day, it is one of my most terrifying professional experiences, but it is also a reminder for me of the value of keeping my calm and working through issues no matter how desperate a situation appears to be!

You also spent time doing complex transactional work, including at Deutsche Bank. How did that come about?

I am and have always been annoyingly curious about everything. So when I came out of university, I made very conscious professional choices to give me exposure to the areas that seemed the most mysterious to me. Finance was one of them. After a while at the boutique, I took on a traineeship at Deutsche Bank as a support lawyer for the derivatives trading desk. The work was largely focussed on the legal aspects of non-vanilla transactions. It was complex and enjoyable and I took the transactional knowledge I had gained into the arbitration practice at Coudert Brothers, working under arbitrator Laurie Craig. I enjoyed the work



and quickly realised that it was the job for me for the long run. I felt too young to specialise at that time. Working with Laurie Craig is so humbling. He brought so much depth and background, he made me realise that before I dived into the resolution of cross-jurisdictional business disputes, I should know first hand what I was dealing with. My former boss at Deutsche Bank suggested that I follow him to Linklaters in Paris to work in the structured and project finance teams. This really paid off – negotiating these complex transactions added the layer of understanding I wanted in order to be involved in disputes about them.

What prompted the move back to contentious work?

I moved to California for personal reasons and had to adapt to my circumstances. I qualified in California and also spent some time helping friends in Silicon Valley who were setting up start-ups. This was a very enriching time too. I was forced to contemplate the interaction of new technologies with existing legal frameworks.

However, fortuitously Laurie Craig, who had joined a Californian firm in Paris, suggested that I work with him again. I went back into private practice with him. I stayed in California doing arbitration work until the cases became really too big. The work in Paris was great but having spent time in California, I remained extremely interested in the Americas and disputes in the region, particularly given my Spanish language skills. So in 2010 I moved to New York to do more LatAm work. Of course, the first case I got was an Arabic-language arbitration in

Egypt! Over the years, I have continued to do work centred on the Americas but have also deepened my knowledge of the MENA region.

How do you marry your LatAm and MENA specialisms?

In a sophisticated market such as the Americas, experience of these two regions is really complementary and I don't regard them as separate areas of practice. Both regions include emerging markets and disputes in both regularly include the interaction between civil law procedure and common law governed undertakings I find. The fundamental skills involved in managing these aspects to be related, so I can draw on experiences in Latin America in work related to MENA and vice versa. Asian clients are investing all over too. It is seldom the case that all aspects of a matter are related to one jurisdiction. As a lawyer, I need to see disputes from the perspective of clients – it helps clients that the person who represents them can think in a transversal way. I have also found it useful to clients to be able to draw from experiences and conduct by counterparts and states in various developing economies. It bolsters the strategic thinking for cross-jurisdictional disputes arising out of emerging or underdeveloped economies.

How did you build your treaty arbitration practice?

The treaty arbitration piece came along even though I started my career in private law disputes. Many of the transactions and disputes involved states and state entities,

so gaining expertise in public international law, including treaty arbitration, was inevitable. Some issues of course are very particular to investment treaty arbitration and call for a specialism. So over the years, I learned, and I continue to learn to recognise the specificities and the common themes between commercial and investment treaty arbitrations. The investors are investing in both a governmental system and a particular venture. You always need to understand the commercial and business implications of the investment – from both the point of view of the state and the investor. The best way to understand those mechanics is to understand commercial transactions and commercial disputes more generally, but without losing sight of the specific universe of public international law concepts that govern the conduct of a host state and its relation to a private entity. So I feel I'm fortunate to do commercial arbitration work as well as investor-state arbitration. I think it adds value and makes my professional life exciting too!

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Spotlight article: Helen Tang

Helen was recruited via the firm's PRC Scholarship programme, which targets outstanding native Mandarin speakers. On 1 May 2018, she became the latest PRC Scholar to be promoted to the partnership, and the first within the firm's Disputes practice. We asked about her experience of partnership so far, working in an all-female team, and her views on China's arbitration landscape.

How does the firm's PRC scholarship programme work? What benefits do you think it gave you?

The programme was established to expand the firm's offering to Chinese clients, by recruiting students from Chinese universities and sending them to study common law in the UK and Hong Kong. I first heard about it from Lucy Yao, a former PRC Scholar who is now the head of our Alternative Legal Services team in China. She was a year before me in university, and she won the firm's PRC scholarship to study for an LLM in London and then work in Hong Kong. When I heard that, I told myself that was an opportunity that I should pursue after I graduated. A year later, I applied for - and was offered - the PRC scholarship. Subsequently, the firm decided to change the scholarship to involve one year of study for a graduate diploma in law in the UK, one year of study for a professional certificate in law in Hong Kong, and a two-year training contract, culminating in qualification as a Hong Kong solicitor. While that would mean a much longer commitment, I did not hesitate for a second before saying yes to the scholarship.

In my view, the programme benefits the scholars, the firm, and our clients. PRC scholars are well placed to understand Chinese clients, both linguistically and culturally. We have also benefited from first-class common law education and training in a top international firm, so we can help our clients understand and make

the most of the dispute resolution process. In international arbitration for Chinese clients, it is especially important for lawyers to truly understand the clients' cases and needs, and to help bridge any cultural gap between Chinese clients and the arbitration process, which can be rather foreign to most Chinese clients. In fact, it is often the cultural gap between Chinese and non-Chinese parties that leads to the dispute in the first place. It is our job to help our Chinese clients understand the process of international arbitration, in order to get them prepared for the process and do the right things to build up their credibility before international tribunals.

What attracted you to Disputes work?

I spent the first year of my training contract working on IPO projects in the corporate team, and just assumed that was where I would qualify. At that stage, I thought my litigation seat would be just a formality. But three weeks after starting there, I realised I loved everything about disputes work. What struck me was that the lawyers, together with clients, have strategic control of disputes cases, whereas the banks had been in the driving seat for all the IPO work I had done.

"I also enjoyed the chance to apply the law to the client's problems and come up with solutions"

I found the work both intellectually inspiring and challenging. Overall, I felt a greater sense of responsibility as a Disputes lawyer, and a bigger sense of achievement as a result. So I decided to build my career in the Disputes team. Fortunately, there was an opening in Shanghai; I moved on qualification in 2009, and - apart from a year in London - have been here ever since.

It was the year I spent in London that really solidified my attraction to international arbitration. In London, the cases were truly international; you could find yourself working on a dispute governed by Italian law, with a Paris seat and a Russian client, for example. That sense of the work being completely international made me really fall in love with arbitration.

Another inspiration was a conversation I had, early on, with Justin D'Agostino (now the firm's Global Head of Disputes), during which he revealed that he had never lost a case. He explained that if he thinks a case can be won, he will do his utmost to win it for the client. If not, he will do his best to encourage the parties to settle, rather than trying to run an unfavourable case. This really brought home to me that the job of a Disputes lawyer is to do what is best for the client, whatever that looks like. It is not about winning for winning's sake.



You are a partner in an international law firm. How does your Chinese background help in your work?

Towards the end of my London secondment, a large, China-based IT company came in for a meeting. The client had just lost the merits stage of an LCIA arbitration, and was looking to instruct new lawyers for the quantum phase. Paula Hodges QC (now our Global Head of Arbitration) took me to the meeting. While the meeting was conducted in English, I noticed the client's delight and comfort when they found out that I could speak Chinese and that I knew their company well. Subsequently, when I read the hearing transcript of the earlier merits hearing, I realised that the client had a good case, but it had not been run the right way. It was clear that the lawyers (another international firm) had mismanaged the whole arbitration, largely because they did not fully understand the Chinese client's case and the client did not fully trust its lawyers. Because of this, the client had presented a certain version of events to the lawyers, who had no choice but to run the case based on the information they had been given. There also seemed to have been little communication with the client's witnesses to prepare them for cross examination.

Working with Paula and others, we went on to secure an excellent settlement just before the quantum hearing was due to begin. Because I spoke the language and understood its culture, the client quickly felt understood, and that enabled it to trust us.

My role in "filling the gap" between the Chinese client and its international lawyers, and helping to position us as a trusted adviser, really inspired me. Since then, I have tried to do the same with all my clients, whether Chinese or multinational. It is all about winning their trust, so they feel comfortable telling us the whole story and we can work together to run the case in their best interests.

Until the recent arrival of partner Hew Kian Heong, our Shanghai arbitration team was entirely female. Does it make a difference working in an all-female environment?

I have been lucky to work with great female leaders in Shanghai, including partners May Tai, Brenda Horrigan and Liz Poulos, and senior consultant Sarah Munro. They are all exceptional lawyers, with superb attention to detail, and they have each taught me a lot. They are also very caring, and excellent communicators. We have also long had a very efficient, smart and caring team of female associates in Shanghai, who support each other and share a lot of joy with each other. Our work is challenging, and can be stressful, but if you have a good team to help you tackle those challenges, it makes the process more enjoyable and the work day easier.

"I really admire my colleagues, at all levels, for being so hard-working and having true passion for the job. It is this, together with their strong sense of responsibility, that really hold the team together"

All of these skills also help us in our client-facing work. Disputes work is rarely enjoyable for the client; there is generally a lot at stake, and disputes cause clients headache and anxiety. If their lawyers can really communicate with them, it helps them to feel they are in good hands and able to trust us completely with all the facts of the dispute. Our aim is for each client to understand that we are fully on its side, as its trusted adviser. Without disrespect to my male colleagues, I suspect women sometimes have the edge on this skill.

How would you describe the arbitration landscape in mainland China?

China has made huge strides in the last ten years; Chinese courts and practitioners are increasingly supportive of arbitration. Last year alone, the Supreme People's Court issued four separate "Judicial Interpretations" on arbitration-related issues, all of which support enforcement of arbitral awards and encourage consistent decision-making. For example, the SPC has adopted a pro-validation approach to

judicial review of arbitration clauses. If the clause does not expressly state its governing law, it will be deemed governed by either the law of the seat, or the law of the relevant arbitral institution, whichever gives effect to the clause. The SPC also extended the "reporting system" (which requires Chinese courts to refer to the superior courts before refusing enforcement of an arbitral award) from just foreign-related arbitral awards (where usually at least one of the parties is foreign) to domestic arbitrations (without the participation of a foreign party) as well. We have also seen a number of international arbitration centres, including the ICC and the HKIAC, set up representative offices in the Shanghai Free Trade Zone.

"All in all, there are numerous signals that China's top court is actively opening up the country's arbitration landscape, and increasing support for the process"

What challenges remain?

The SPC's efforts are encouraging, and widely welcomed by the international arbitration community. However, China does not have the long history of international arbitration that countries like France and the UK have; it still has work to do before it fully catches up with the world's leading seats. There are still some constraints in China's Arbitration Law, eg that arbitral tribunals sitting in China cannot order interim relief but must rely on the local courts to do so. It is also impossible to enforce a foreign order for interim relief in mainland China. However, China is moving rapidly in the right direction, and I am confident it will continue to make progress.

What advice would you give other Chinese nationals considering a career in an international firm?

Chinese clients are an increasingly important source of business for firms like Herbert Smith Freehills and its peers. Chinese nationals have the advantage of understanding Chinese clients, both culturally and linguistically. However, while it is vital to understand your client and win his or her trust, that by itself is not enough. The key skill for Disputes lawyers is presenting your client's case to a court or tribunal, in a concise and convincing way. Good English communication skills are equally, if not more, important; you must be able to speak fluently, and draft clearly and persuasively. For those of us without English as a first language, this can present a real challenge, and we have to work extra hard to master these skills. This is something that we need to work on constantly and continuously, in order to improve.

Passion for the job is also vital. I come from the generation of China's single child policy. Our parents have expected us to fulfil every one of their dreams - we haven't had siblings to share the load. As well as having successful careers in a profession, we have been expected to marry, to take care of our parents, to spend time with family and relatives, and to produce grandchildren (preferably more than one!).

Chinese lawyers beginning their careers now do not need to tick every one of these boxes. This is particularly true of the women. I see people now with different passions, both for their careers and something else which balances it. There is no "one size fits all" for this generation in terms of their jobs; they have many more options than my generation. As a result, young Chinese should choose a legal career only if they have a real passion for the law; and are willing to commit to it. That is the only way to succeed.

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Recent regional developments in South East Asia

The last 20 years have witnessed Singapore's meteoric rise to become one of the most popular arbitral seats globally. As the results of our recent survey on enforcement of arbitral awards in ASEAN states demonstrate (see page 7), Singapore also leads the pack for effective and efficient enforcement of arbitration awards in the ASEAN region by some distance. Lesser developed markets such as Myanmar and Laos fall at the other end of the spectrum. The experience and perception of enforcement in Indonesia and Thailand falls somewhere in the middle, with continuing uncertainty being noted.

Against the backdrop of that market perception, we have nevertheless seen a number of encouraging changes in the South East Asian arbitration landscape over the last year or so. These suggest an observable regional effort to meet international expectations better through improving education and infrastructure to support arbitration, with a trend in states expanding their arbitral institutions and revising institutional rules, guidelines and domestic laws to bring them in line with (and in some cases, promote) international standards. In this article, we provide an update of these recent changes.

Singapore

Top of the rankings

In the latest Queen Mary University of London International Arbitration Survey, the Singapore International Arbitration Centre ("**SIAC**") was ranked the most preferred arbitral institution in Asia, and third out of

the top five arbitral institutions in the world. Singapore was similarly ranked the most preferred seat of arbitration in Asia, and third most preferred seat in the world, immediately after London and Paris. Singapore's continued strong showing in this prestigious survey, among others, is a testament to its position as a worldwide leader of international arbitration.

Singapore's rise to becoming a leading international arbitration hub has taken less than 20 years. The SIAC was only established in 1991 and Singapore adopted the UNCITRAL Model Law 1994. However, since these early developments, Singapore has established a strong track record, not just as a global arbitration hub, but, increasingly, as an international centre for the promotion of all forms of dispute resolution, including litigation and mediation. Singapore's success is the result of several factors. These include strong government and institutional support for

implementing laws and regulations that adopt and promote international best practice, as well as the physical infrastructure to support the arbitration and broader dispute resolution landscape. These steps, combined with a judiciary which has implemented the government's clear policy of respect for the arbitration process and the enforcement of arbitral awards, have catapulted Singapore to its pole position today.

Leading by example: ethics in arbitration

Singapore is also leading by example on a global front, with members of the Singapore Institute of Arbitrators ("**SI Arb**") Working Group launching the SI Arb Guidelines on Party-Representative Ethics in April 2018 to address concerns on the ethical conduct of both legal and non-legal representatives in international arbitration.

Unlike traditional means of domestic dispute resolution where parties and their counsel are governed by domestic bar associations and ethical codes for their conduct in proceedings, international arbitration has not had the benefit or security of a universally-applicable code for ethics. The explosive growth in new entrants to international arbitration, even within South East Asia, has arguably had an impact on ethical standards in practice, with conduct of proceedings routinely challenged by conflicting legal systems and ethical norms, particularly in matters such as document production and witness preparation. Take for example a scenario in which Hong Kong qualified lawyers represent Indonesian claimants against an Indian defendant represented by American lawyers in a Singapore seated SIAC arbitration. Several or a combination of professional rules may apply, potentially with different rules for each participant. This risks the introduction of an uneven playing field for participants depending on

The explosive growth in new entrants to international arbitration, even within South East Asia, has arguably had an impact on ethical standards in practice...

their choice of legal counsel and seat, ultimately affecting the fairness and integrity of international arbitration.

Some institutions have made efforts to combat this: for example, the London Court of International Arbitration's Rules now contain an annex detailing guidelines on the conduct of parties' legal representatives, providing tribunals with a range of enforcement powers to ensure compliance with the same. Similarly, in 2013, the International Bar Association ("IBA")

released its Guidelines on Party Representation in order to give parties the option to adopt a uniform standard code of conduct to govern legal representatives in international arbitration, although the international response to these guidelines have been mixed.

However, there has, to date, been no concerted effort to develop similar ethical guidelines within South East Asia, and the IBA's international guidelines have yet to achieve broad recognition in this region. The SI Arb's consultation and launch of ethical guidelines¹ will broadly address issues that come up in conflict situations such as ex-parte communications with other represented parties and the continuing obligation on counsel not to perpetrate false evidence.

While the guidelines do not specifically address issues of witness preparation or discovery, as the Honourable Chief Justice Sundaresh Menon noted at his keynote



address to the 2018 SIAC Congress, these guidelines, "will provide a useful starting point for a deeper conversation on counsel ethics in Singapore seated arbitrations", and following that, some form of transnational consensus on what constitutes ethical conduct in the ASEAN region, as well as the broader international community. On any view, the SI Arb's initiative is likely to be a helpful contribution for developing and supporting international arbitration in the region and globally, and further demonstrates how Singapore is taking a leading role in forging the future of international arbitration.

Malaysia

Rebranding of the KLRCA

Malaysia has relatively recently begun to emerge as a regional dispute resolution hub. The Kuala Lumpur Regional Centre for Arbitration ("**KLRCA**") had only administered 22 cases from its incorporation in 1978 to 2010, but this number rose to 932 by the end of 2017, with a 100% increase in arbitration cases in 2017 alone.

In line with these developments, in February 2018, the KLRCA was renamed the Asian International Arbitration Centre ("**AIAC**"). The rebranding is the latest move by Malaysia to establish itself as a leading and independent centre for dispute resolution services. This change to the institution's name is important to note for those drafting arbitration agreements. Reference should be made to the correct institution and rules to avoid any confusion in the event of future disputes.

Amendment to institutional rules

Following the rebranding of the KLRCA to AIAC, the centre has revised its rules, issuing the AIAC Rules 2018. The amendments bring the AIAC Rules into line with international best practice in a number of areas. The key changes include provisions to: (i) permit joinder of third parties and the consolidation of multiple arbitrations; (ii) implement the technical scrutiny of awards to improve quality and

reduce opportunities for set aside proceedings; and (iii) introduce a more simplified fee structure to provide greater cost certainty to end-users.

Amendment to domestic laws

Malaysia's efforts to establish itself as a potential seat of arbitration in the ASEAN region can also be seen in its recent amendment of its Arbitration Act. Changes were introduced in May 2018 to bring its legal framework more closely into line with the UNCITRAL Model Law.

Key changes include the overhaul of provisions on interim measures. Arbitral tribunals can now grant interim measures

Importantly, the statutory right of appeal of an arbitral award to appeal questions of law decided in an arbitral decision has now been removed

which would have otherwise only been available from the Malaysian courts. The Act now also provides greater clarity on the recognition and enforcement of interim measures ordered by an arbitral tribunal.

The Act also aligns its provisions on interest with global standards. Arbitral tribunals seated in Malaysia are now empowered to award simple or compound interest at a rate considered appropriate by the arbitral tribunal, both on sums awarded by the arbitral tribunal and on costs.

Importantly, the statutory right of appeal of an arbitral award to appeal questions of law decided in an arbitral decision has now been removed. The only recourse against a Malaysia seated arbitral award is a setting-aside action on the familiar narrow grounds of the Model Law.

Thailand

In Thailand the domestic practices of the Thai courts have been influential in terms of the procedure adopted for arbitrations run on an ad hoc basis or under the rules of the government funded Thai Arbitration Institute ("**TAI**"). However, the Thailand Arbitration Centre ("**THAC**"), which was established in 2015, has sought to challenge this status quo, introducing institutional rules more aligned with international standards and actively promoting its rules and (impressive) facilities to international businesses. The TAI responded to this challenge by issuing its own updated arbitration rules in 2017.

As with the new AIAC rules, the new 2017 TAI Rules are designed to promote efficiency, speed, transparency and fairness in proceedings, and address some of the practical problems encountered under the older 2003 TAI Rules. These changes include: (i) stipulating a sole arbitrator as the default position where the parties have not agreed the number of arbitrators; (ii) confirmation that an arbitral tribunal has the power to grant interim measures; (iii) a requirement for tribunals to establish a timetable for the proceedings within 30 days of the arbitral tribunal being constituted; (iv) arrangements for electronic filing of documents; and (v) a power to consolidate multiple sets of arbitration proceedings.

These recent developments suggest there is scope for positive change in the domestic Thai arbitration landscape. The adoption of international best practices helps to equip arbitration institutions with the tools to provide a more sophisticated and uniform experience. However, significant challenges remain.

The underlying legislative framework supporting arbitrations seated in Thailand still presents practical problems for international users. For example, Thailand has not implemented the UNCITRAL Model Law, foreign arbitrators are required to obtain a work permit to sit as an arbitrator

1. Available at https://www.siarb.org.sg/images/SIARB_Party-Rep-Ethics_Guidelines_Apr18.pdf

within Thailand, and parties can only appoint foreign counsel to represent them in arbitration proceedings under limited circumstances. While there have been suggestions to amend the legislative framework and, for example, to remove these restrictions for international cases, the applicable arbitration law remains unchanged. In addition, for Thailand to become a more attractive seat for international arbitrations, further legislative and policy changes would be required, such as supporting arbitrations taking place in Thailand and further strengthening Thai court procedures for the recognition and enforcement of arbitral awards.

Vietnam

In common with Malaysia and Thailand, Vietnam has also seen its main domestic arbitration institute, the Vietnam International Arbitration Centre ("**VIAC**"), recently refresh its rules. The rules indicate Vietnam's strong desire to have its primary domestic arbitration compete with alternative regional options.

The VIAC issued new rules in 2017 which also mark a shift towards international best practice. The 2017 VIAC rules include new provisions to allow parties to bring claims either (i) relating to more than one contract in a single Request for Arbitration, irrespective of whether the claims are made under one or more arbitration agreement, or (ii) agreeing to consolidate two or more pending VIAC arbitrations into a single arbitration. At this stage, it is unclear how these rules will be applied by VIAC in practice, not least because the relevant rules are brief when compared to the rules of other institutions, such as the Hong Kong International Arbitration Centre ("**HKCIAC**"), SIAC and ICC.

The new VIAC rules also include a new fast track procedure which allows proceedings to be heard by a sole arbitrator in an expedited manner. While there is no time limit specified (unlike other institutional rules – such as SIAC or ICC rules – which have a six month limit), the new VIAC rules do provide that, unless the parties agree otherwise, a tribunal has discretion to decide a case on a documents-only basis and

without an oral hearing, requests to produce documents or the examination of witnesses.

Indonesia

The most significant challenge for the Indonesian arbitration market arises from the controversial creation of a new arbitration centre.

Historically, the main domestic arbitration institute in Indonesia was the Badan Arbitrase Nasional Indonesia ("**BANI**"). In 2016, however, a new arbitration institute was established by former BANI arbitrator Anita Kolopaking, called BANI Pembaharuan ("**BANI-P**").

Reminiscent of similar issues encountered in China following the CIETAC split, BANI and BANI-P have been litigating in the Indonesian court system to determine which entity is legitimately entitled to refer to itself as "BANI". Meanwhile, arbitrating and contracting parties have been left not knowing which institution should be administering their disputes.

In 2016, BANI submitted a claim to the State Administrative Court, arguing that the establishment and registration of BANI-P with the Ministry of Law and Human Rights should be revoked. By mid-2017, the State Administrative Court had found in favour of BANI, however, this decision was subsequently revoked by the State Administrative High Court on the ground that the Administrative Court never had jurisdiction over the matter.

Simultaneously, civil proceedings in the District Court were commenced by BANI-P on separate grounds, in particular that it is the successor of BANI and therefore should inherit all arbitration agreements that simply provide for "BANI" arbitrations. By August 2017, the District Court had ruled in favour of BANI-P.

The confusion did not end here. In September 2017, in yet further proceedings, the Jakarta Commercial Court found in favour of BANI and declared BANI to be the rightful owner of the trademark over the brand "BANI". Shortly after, in November 2017, BANI issued a statement saying that the decision had become final and binding,



because no appeal had been filed by BANI-P, therefore making the original BANI the only rightful party to use the name "BANI" and "Badan Arbitrase Nasional Indonesia".

However, significant confusion remains in practice which is regrettable and unhelpful to end-users. Parties with arbitration agreements that refer to BANI face problems given the uncertainty around which institution will be responsible for administering their arbitrations. This uncertainty gives rise to a risk of challenges to the validity of their arbitration agreements, additional delays in case management, and yet further risk of awards issued by BANI administered tribunals from being challenged upon enforcement. These risks are real. We are seeing contracting parties using the existence of the two competing institutions as a strategic tactic in disputes: this has become a live issue and deliberate disruptive tactic in several current cases.

A cautious approach should therefore be adopted:

- for arbitration agreements concluded before the establishment of BANI-P, it is prudent for the time being, to construe this as reference to the original BANI.
- for arbitration agreements concluded after the establishment of BANI-P, consider the parties' knowledge and intentions at the time the contract was executed. For example, additional wording may need to be agreed before commencing arbitration with either institution in order to insulate any award issued from potential enforcement



challenges premised on the dispute between the two institutions.

- for new arbitration agreements, consider – where possible – the use of alternative rules and institutions – such as SIAC and ICC – so as to avoid the uncertainties. Where parties are contemplating the use of domestic industry-specific institutions, specialist legal advice should be sought.

Conclusion

Most of these recent changes have been implemented with a clear goal of raising practices and standards to be more aligned with international best practices and the desire to reduce the time and costs of, and therefore encourage the use of, arbitration in the region. The changes also point to increased support and respect for arbitration as a dispute resolution mechanism by states in the region, with reduced interference in the arbitral process and greater powers for the tribunals.

While the adoption of more modern arbitration rules on their own is a positive development, it remains clear that the strongest arbitration hubs benefit from a combination of institutional leadership, which allows for infrastructural coherence, coupled with an invested, "hands off" government keen to promote the substantial foreign direct investment that a leading dispute resolution hub supports. Once a seat's legal framework matures in quality, factors relating to convenience of access and use become most relevant. For example, the availability of experienced locally based arbitrators and the use of modern arbitration

rules that facilitate expedited proceedings, have both been found to underlie the increased success of a seat. Investment in up to date physical infrastructure, such as dedicated hearing centres, is also an important factor.

In addition to these changes, there have been initiatives in many parts of the region to increase judicial awareness of arbitration and its proper and legitimate place in the dispute resolution architecture. Many of these reforms have been based on established international models; among them, for example, draft arbitration law reforms based on the UNCITRAL Model Law, and training programs for arbitrators and judges to conduct arbitration proceedings under the auspices of international associations such as the Chartered Institute of Arbitrations. Accordingly, with judicial understanding and acceptance of arbitration improving in many parts of the region, recognition and enforcement of arbitration agreements and awards has been on an upward trend (though not yet exemplary!).

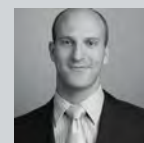
These changes, while incremental, are all welcome attempts to bring the region's arbitration landscape into line with international standards and, in turn, promote economic activity. However, challenges remain with domestic arbitration and the enforcement of foreign awards in parts of the region. This is particularly so where institutions are inexperienced and state courts do not adopt uniform standards for effectively and consistently enforcing existing arbitration laws. Care should always

be taken when negotiating arbitration agreements for South East Asia related contracts. While a choice of Singapore as a seat and international rules such as those of the ICC and SIAC will protect end-users from many of the problems elsewhere in the region, it is not always possible (or permissible) to agree to that, and this will not eliminate the enforcement risks. Extra care and specialist advice, should therefore be taken when negotiating arbitration agreements with other seats and rules in the South East Asia region.

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Spotlight article: May Tai

May Tai is a Malaysian national who has spent her career in Herbert Smith Freehills' international arbitration practice, working on many of our largest, most complex cases. Since last year, she has also been the Managing Partner of our Greater China offices. We asked her to tell us about her globetrotting career with the firm, and how it has shaped her as a lawyer.

You are truly the product of an international law firm, having worked in no less than five of the firm's offices. What perspectives have you gained from that experience?

I went to university in the UK, and started as a trainee in the London office. During my training contract, I spent six months in Tokyo, then returned to qualify in London. I was seconded to Singapore for two years as an associate, going back to London for another two years before moving to the Shanghai office, where I was promoted to partner. I moved to Beijing in 2010 and spent four years in that office before relocating to Hong Kong in 2014. So far, I have no plans to move again – but you never know!

Working in so many different offices has made me realise, above all, that there is no one "right" way to deliver legal services or be a trusted adviser to a client. Our approach has to be guided by the client's legal and cultural background, as well as its business culture. There isn't even a "one size fits all" approach throughout Asia; it's a huge territory with numerous different languages, cultural attitudes and norms. Though I have noticed that you can bond with almost anyone in Asia about food! It's the equivalent of talking about the weather in England...

Clients routinely tell us that it is important their lawyers understand both the Asian norms and the Western, common law aspects of the international arbitration process. This is particularly true of Chinese state-owned enterprises, which have distinctive cultures and processes. To service these clients, it is vital that you understand and appreciate the cultural differences.

Are there still opportunities for lawyers to travel around as you did? Would you recommend it?

I think it's "horses for courses", to coin an English expression. It has been a great experience for me to spend time in so many of the firm's offices, but it isn't for everyone. So much depends on your personal circumstances, your career preferences, and whether you can achieve a work-life balance that suits you.

"The important thing is that the firm still offers the opportunity to travel and work in different parts of the world to those lawyers who want it"

The firm really benefits from this internal movement, and so do the individual lawyers. Of course, it's not possible for every lawyer in the firm to do it; you have to be in the right place at the right time, and be open to saying yes when the opportunity arises.

You are a Mandarin speaker, and have been based in China for 10 years. How have the needs of Chinese clients changed during that time?

To do well in any process, you need to understand the rules of the game. Although there is a long history of arbitration in China, Chinese domestic arbitration is very different from international arbitration in seats like Paris, London or Singapore. Any Chinese party who expects to find arbitration practiced in the same way in Paris or Singapore as they would find in China, will quickly find it is mistaken and unlikely to do well. The same is true of multinationals who end up in CIETAC arbitration on the mainland.

Chinese clients' expectations have changed over the years, as they have had more exposure to the international process and realised that it is different to the process they were traditionally used to. Once they have come to this conclusion, and if they are well advised, they can of course play the game as well as anyone. In fact, some of the

distinctive features of Chinese companies can be an advantage in international arbitration, like the fact that people generally stay in one company for a very long time. I'm working on a large case now, where my client is a Chinese state-owned enterprise. It has submitted statements from 14 witnesses, all of whom were employed by the client when the events in dispute happened several years ago. All 14 still work there. This makes it significantly easier for the client to obtain their evidence and paint a complete picture of the events that led to the dispute. In my experience, this is almost unheard of in any multinational or other Western company.

Chinese clients are increasingly sophisticated, and understand that they may have to work harder than their opponents because they are unfamiliar with international arbitral process. But they are willing to do that work, and more and more Chinese parties are prevailing as a result.

Equally, we as lawyers have become more accustomed to working with Chinese clients, and adapting our own working styles to accommodate theirs. Whereas, for example, a senior in-house lawyer at a Western company can sign off on a submission within a day or two, it could take three weeks for a Chinese client to get all the approvals its internal process requires. Neither system is right or wrong, they are simply different. As an international lawyer, it is my job to understand and accommodate that.

You are known as a champion of diversity in the firm. Why is this important to you?

When I was a junior lawyer, the people who promoted and encouraged me recognised the importance of diversity. It would be remiss of me not to do as much as, if not more than, my mentors did for me.

More broadly, the firm's business requires genuine diversity.

"It would be impossible for any international business to operate today without diverse teams that reflect both its existing pool of clients, and the clients it is targeting"

When I come across an opponent who is representing an Asian client without at least some lawyers who speak the client's language and understand the client's business culture, I know that that is not going to be an easy cooperation. I know that a lot of time will be spent trying to understand one another and avoid miscommunication and misunderstandings. We can avoid this by fielding diverse teams.

What are clients looking for in terms of diversity, and why?

Our job is about communicating; with clients, with opponents, and with tribunals. That requires diverse teams with a mixture of backgrounds and language skills, as well as genuine cultural sensitivity. Often, I am representing a Chinese client in a dispute with a non-Chinese counterparty and a tribunal of mixed nationalities. As well as advocacy before the tribunal, I find myself advocating to the client, to persuade it to approach an unfamiliar process in a way that will increase its chances of success, but may initially be uncomfortable. Because I have lived and worked in both Asia and the West, I can understand the different mind-sets and cultures. Speaking Mandarin, Cantonese and English helps too; it is much easier to communicate with anyone if you can let them speak to you in their mother tongue. I want my client or witness to feel at ease and relaxed when they speak to me.

Clients increasingly understand the advantages of diversity, not least because they rely on them in their own businesses. I do some work for hotel management companies and one of them has a standard engagement letter that requires diversity from its law firms, on grounds that the nature of its business requires it to field diverse teams. I expect to see many more like this in years to come.

The landscape has changed a lot since I started my career, particularly as regards gender diversity. 66% of our China arbitration partners, and 35% of the entire Mainland China partnership, are now female. This year, Herbert Smith Freehills promoted 18 partners worldwide; 14 are women.

We are making progress in other areas of diversity too.

"We have worked hard to promote LGBTI+ diversity, and have been recognised for our success"

The firm's promotions process increasingly favours lawyers with the linguistic and cultural backgrounds that clients in this region require. For example, 75% of our newly-promoted Senior Associates in our Asian offices are of ethnically Asian backgrounds. We also recognise that we need lawyers with Chinese language skills and backgrounds outside Asia, and are working hard to recruit and retain the right people.

All of these efforts have resulted in a much more ethnically diverse body of lawyers across the firm, which is clearly a strength. Our Greater China arbitration team is a perfect example: besides me, we have one Singaporean partner, one Hong Kong partner, three mainland Chinese partners, and three from the UK, all of whom are long-term Asia residents.

A firm that can build – and maintain – that kind of diverse talent has really hit the jackpot. We believe our clients agree, and feel the benefits.

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Upheaval and uncertainty in
mineral regulation in parts of
Africa: **Resurgence of resource
nationalism highlights the
importance of investment
treaty protections**



The last few months have seen significant changes to mining regulations in various African states, giving rise to a concern that a regional trend of resource nationalism may be (re-) emerging. In this context it is important for companies associated with the mining sector to be aware of the protection international investment treaties may provide against the impact of resource nationalism on their assets, and how to maximise that protection before risks materialise. Peter Leon, Partner and Africa Co-Chair in Johannesburg, Andrew Cannon, Partner and Iain Maxwell, Of Counsel, both in London, consider some of the developments, before discussing how companies can use investment treaties to protect themselves against the risks they pose.



Recent developments in Tanzania, the Democratic Republic of Congo (“DRC”), Zambia and South Africa

Tanzania

Recent changes to Tanzania’s mineral law regime are at one extreme of the developing trend. In July 2017, Tanzania enacted drastic amendments to the 2010 Mining Act, as well as two new laws asserting the Government’s “permanent sovereignty” over its natural resources (not only minerals but oil and gas as well) (see [here](#) for more details). Among other changes, the Government:

- empowered itself to renegotiate terms in mining contracts which Parliament considers “unconscionable”. “Unconscionable” terms are defined to include those providing for foreign laws or dispute resolution mechanisms;
- immediately banned the exportation of unprocessed minerals;
- raised royalty rates; and
- increased Government shareholding rights, including a minimum sixteen per cent non-dilutable free-carried interest in any mining company operating under a mining licence or a special mining licence. The Government is entitled to increase this interest to an extent equivalent to the total tax expenditure incurred by the Government in favour of the mining company (up to a maximum of fifty per cent); and
- prohibited investors from resorting to international dispute resolution mechanisms, prescribing that natural resource related disputes “shall not be a subject of proceedings before any foreign court or tribunal” and shall only be adjudicated by Tanzanian judicial and statutory bodies.

In January 2018, Tanzania published a set of new regulations under the amended Mining Act. The most onerous of these are the “Local Content” regulations, which came into force on 10 April 2018, requiring mining companies:

- to have at least five per cent ownership by an “indigenous Tanzanian company” to be eligible for the grant of new mining licences;
- to meet substantially increased quotas for local recruitment, training and procurement of local goods and services; and
- to conduct business through Tanzanian banks and only use the services of Tanzanian financial institutions, insurance brokers and legal practitioners.

Rather than clarifying the new regime introduced in 2017, the 2018 regulations exacerbate the uncertainty and concerns around impossibility of compliance. In a more recent development, in June 2018 the Tanzanian Government announced further tightening of controls on the industry, including a requirement that large-scale mining licences will only be issued after Cabinet approval. Moreover, the Government has also stated that it will no longer sign new mineral development agreements, which guarantee a stable tax and regulatory regime for existing mining companies. A number of foreign-owned mining companies currently benefit from such clauses.

Articles discussing the legislative and regulatory reforms in Tanzania in more detail can be found [here](#) and [here](#).

The DRC

In the DRC, the 2002 Mining Code has been significantly revised, with effect from 28 March 2018. Among other things, the revised Code:

- increases the royalty rates on most minerals;
- introduces a ten per cent royalty on minerals which are designated “strategic substances”;
- removes the stabilisation guarantees previously stipulated, which exempted licence holders from complying with changes to the fiscal and customs regime for 10 years; and
- increases the State free carry non-dilutable equity stake from 5% to 10%.



The DRC Government and international mining companies have been engaged in negotiations to manage these changes. However, it was reported in June 2018 that despite ongoing discussions between mining companies and the DRC Government with a view to amending the Code, regulations have been signed to implement the Code into law without any concessions to industry.

The DRC Government has also indicated its intention to renegotiate existing mining contracts in the coming year, and the state-owned mining company Gécamines has even threatened to institute arbitration proceedings against companies that refuse to participate in the process. For more detail see our recent brief [here](#).

Zambia

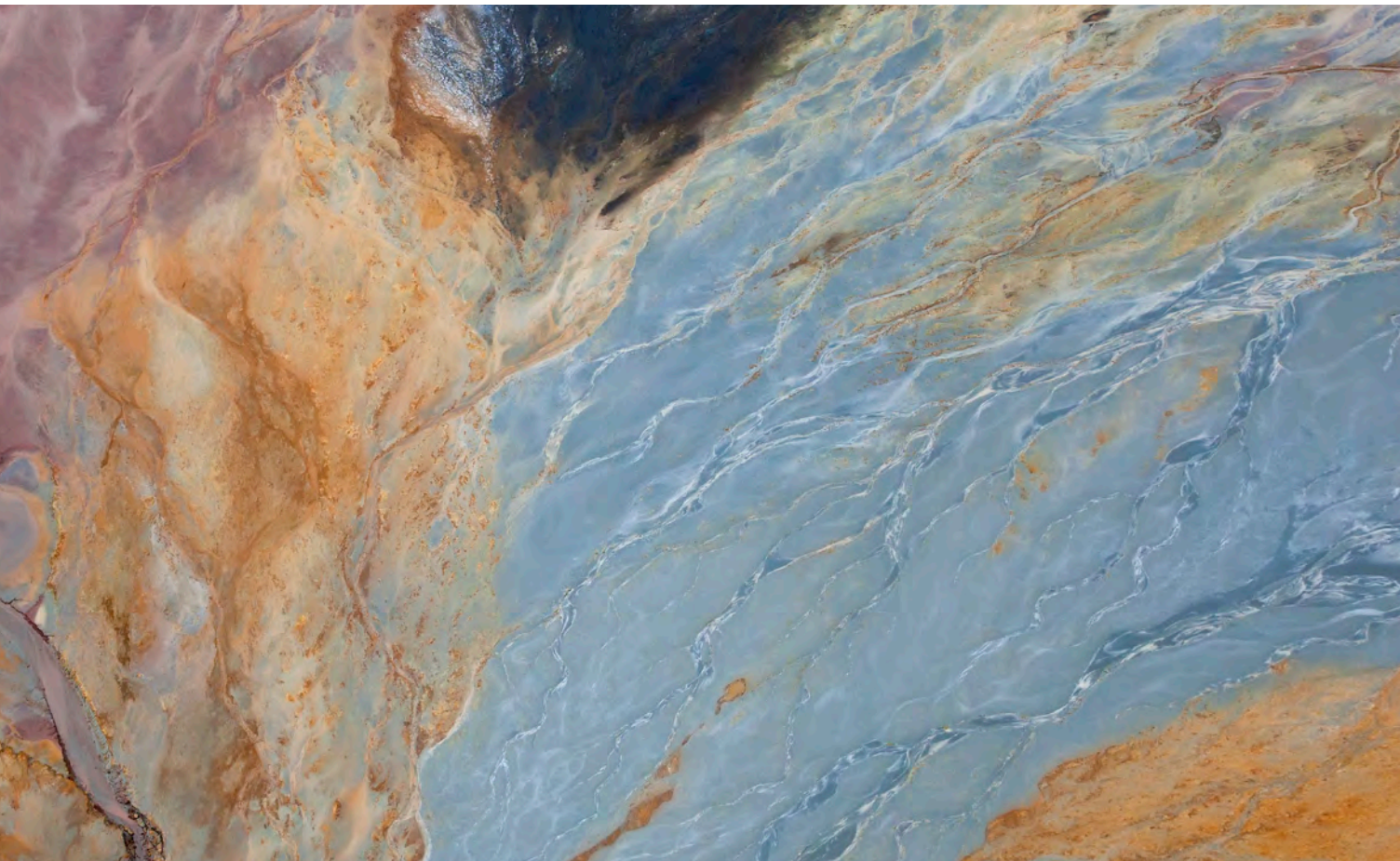
In March 2018, Zambia reportedly imposed a US\$8 billion tax demand on Canadian mining company First Quantum relating to duties on mining equipment imported between 2012 and 2017, US\$7.8 billion of which is made up of penalties and interest. The Zambian Revenue Authority has also indicated it has initiated detailed compliance audits of all mining companies.

South Africa

Finally, the situation in South Africa remains in a state of flux, where the High Court recently ruled that the Mining Charter (a Government document setting black economic empowerment ("**BEE**") targets) does not create binding obligations. The

Government has lodged an appeal against the decision, which will likely only be heard towards the end of this year (and a further appeal could take another year to finalise). As a result, mining companies still do not know which targets they are required to meet in respect of ownership, management and the procurement of local goods and services, or what the legal consequences of non-compliance might be.

Whilst the new draft Mining Charter published for public consultation on 15 June 2018 has been received by many as an improvement on the previous draft, there is nonetheless some cause for concern for both existing miners and those considering new mining operations in the country. For example, recognition of historical





achievement of BEE targets has now been included but there are still uncertainties as to requirements when Black investors sell their BEE interest. Moreover, those who obtain new mining rights will have to meet an increased 30% BEE requirement (from 26%) within five years but also absorb the burden of a 10% free-carried interest to be given to qualifying employees and local communities. In addition, holders of existing rights will have to top up their BEE shareholding within five years. At the same time, the draft Mining Charter substantially increases quotas for the procurement of goods and services from BEE entities as well as BEE representation at all company levels. (Further analysis of Mining Charter III is available [here](#) and [here](#) and Peter Leon's interview on Classic FM discussing the Mining Charter III is available [here](#)).

Far-reaching amendments to South Africa's 2002 Mineral and Petroleum Resources Development Act remain unresolved after more than five years. Drafted in 2012, introduced into Parliament in 2013, and hastily passed in 2014, the amendments would have the effect of (among other things):

- elevating the contested Mining Charter to the status of binding law, and giving the Minister of Mineral Resources the power to amend or repeal it "as and when the need arises" (thus obviating the current litigation);
- requiring Ministerial consent for the transfer of any interest in an unlisted company, as well as a controlling interest in a listed company; and
- giving the Minister of Mineral Resources effectively unlimited powers to "designate" any mineral or mineral product to be offered to local beneficiaries at discounted prices (in quantities, qualities and timelines prescribed by the Minister), failing which they may not be exported without the Minister's prior written approval.

Although the President referred these amendments back to Parliament in 2015, citing concerns over its constitutionality, the Government has not withdrawn them, and they thus continue to weigh on investor confidence as Parliament persists with a slow, stunted and heavily-criticised process of reconsideration.

The importance of rights enshrined in international treaties

The recent developments in these states, and elsewhere, highlight the importance of rights enshrined in international treaties, which are protected from the vagaries of local politics. Investment treaties provide a stable framework of protections upon which investors can rely even when there is upheaval in local laws and regulations.

Through such treaties and by planning ahead, investors can enhance the security of their investments and their negotiating leverage with the host state. Such leverage can help to protect and preserve the smooth operation of an asset – and help to provide an avenue for recourse against the host state in the event arbitrary and/or discriminatory state acts do nevertheless occur.

How do treaty protections arise?

Investment protection treaties – whether bilateral ("**BITs**"), regional or multilateral – typically provide a range of substantive protections to companies or nationals from one State party to the treaty (the Home State) who have an investment in another State party to the treaty (the Host State). Equally important, such treaties typically also include the right for a protected investor to bring international arbitration proceedings against the Host State to enforce those rights.

What types of protections can be available?

Whilst each treaty is different, there are a number of fundamental substantive protections or guarantees which are typically included in such treaties. Most treaties include a prohibition on expropriation without compensation, whether directly or indirectly through a series of governmental acts which encroach on an investment and result in it being deprived of value. An example is the successful unlawful expropriation claim brought by *Rusoro Mining v Venezuela* with respect to the nationalisation of its investment constituting mining concessions and contracts to explore and produce gold. Many treaties also include prohibitions on discrimination, guarantees of national and most-favoured-nation treatment (where the investor is guaranteed treatment in the Host State as favourable as that provided to nationals of the Host State and nationals of any third state) and the guarantee of fair and equitable treatment (or "**FET**").

FET clauses provide particularly versatile protection and have been interpreted as precluding a denial of justice by the courts of the host state; protecting an investor's legitimate expectations; and requiring fairness in administrative decision-making. While not all regulatory changes will amount to an expropriation or a breach of the FET guarantee, where the state's exercise of its regulatory power involves procedural unfairness or lack of due process, bad faith, discrimination or a failure to protect an investor's legitimate expectations as to how it will be treated, an FET claim under an available treaty (if there is one) may be possible. For example, Crystallex International Corporation recently brought a claim against Venezuela for breach of the FET guarantee based on its failure to secure a required environmental permit several years into a gold mining project.



An investment treaty may also contain a guarantee of full protection and security for the investment. Such a standard has been interpreted by some tribunals as offering a guarantee that extends beyond physical protection of an investment to the security of the regulatory environment in which the investment is made. By way of example, in a claim by Copper Mesa Mining against Ecuador, the tribunal found that the guarantee of full protection and security had been breached by Ecuador through its flawed reaction to an anti-mining blockade of one of Copper Mesa's mines.

How can investors ensure the availability of such protections?

As already alluded to, investment treaties only protect investments made by nationals or companies of the Home State in the Host State. Therefore, in order for an investor to benefit from investment treaty protection, there must be such a treaty in place between the Home State and the Host State.

Where there is not a treaty in place between the Home State and the Host State that incorporates broad substantive protections and the right to enforce those protections through international arbitration, it may be possible, at the outset of a transaction (or at latest before a dispute arises), to structure the investment via a subsidiary or other entity in a country which does benefit from such a treaty. Treaty protection should therefore be a significant consideration at the early stages of a project. It is sensible to consider structuring for investment protection at the same time as reflecting on the most tax efficient investment structure, and also to keep the options under review throughout the life of an investment, as the treaty protections available may change over time.

What is the process for effectively enforcing treaty rights?

Many investment treaties allow the investor to elect to arbitrate disputes between it and the host state before an independent ad hoc international arbitration tribunal. Mining companies have taken advantage of this right in order to avoid having to bring a claim against the host state before that host state's domestic courts. Access to international arbitration also reduces the need for the investor to leverage any political influence it has with its own government to try to resolve the dispute through diplomatic channels.

Mining companies may also benefit from domestic law protections or guarantees governing the legal treatment of investments made in the territory and, of course, should include robust contractual protections where possible. However, neither the existence of possible avenues of redress under domestic law nor contractual risk management can completely insulate a foreign investment from the exercise of state powers. Investment treaties can therefore provide a valuable risk-mitigation tool for those establishing mining operations abroad.

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A view from Seoul: How is arbitration viewed in Korea and how is it changing?

Over the past four decades, South Korea has experienced unprecedented growth, transitioning from a modest economy in the 1960s, to the world's 11th-largest economy and 6th-largest exporter today. As the number of Korean cross-border deals has increased, so has the number of cross-border disputes involving Korean parties. Recognising this, Herbert Smith Freehills opened its doors in Seoul in 2013 – one of the first international law firms to do so – with a team of both transactional and disputes specialists. Mike McClure, Head of Seoul Disputes, and Briana Young, Professional Support Consultant, tell us more about the disputes landscape in South Korea, and Seoul's continuing efforts to join Hong Kong and Singapore as a top Asian seat.





Korea on the rise

Driving Korea's growth are the nation's chaebols, the family-owned conglomerates, including Samsung, Hyundai Group, LG Corporation, SK Group and Lotte Group, that are some of the largest and fastest growing companies in the world. The expansion and diversification of these companies has seen cross-border investment and trade increase exponentially in South Korea. The use of arbitration has increased in turn, with international arbitration emerging as the dispute resolution mechanism of choice for Korean companies in pursuit of international export markets.

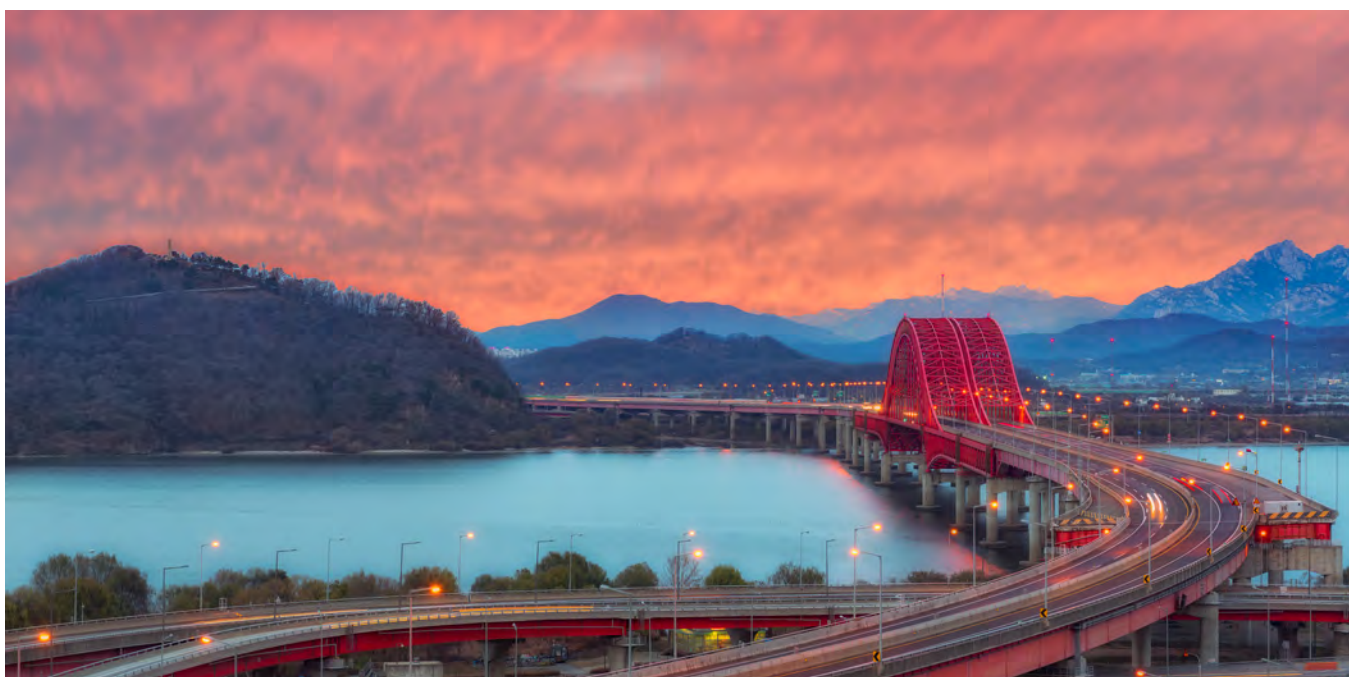
Today, South Korean companies are among the world's biggest users of international arbitration. In 2017, South Korea ranked 6th in the list of nationalities of parties participating in Hong Kong International Arbitration Centre ("**HKIAC**") arbitration and 9th in the top foreign users of Singapore International Arbitration Centre ("**SIAC**") arbitration. In 2016, South Korean parties were involved in 82 new International Chamber of Commerce

("ICC") arbitration cases. "Our Korean clients have long been aware of the advantages associated with using arbitration to facilitate deals, with the top draws being the finality and enforceability of arbitral awards, the private and confidential nature of proceedings and the ability to use arbitration as a negotiation tool when dealing with potential disputes" states Mike McClure, Partner and Herbert Smith Freehills' Head of Disputes in Seoul.

Today, South Korean companies are among the world's biggest users of international arbitration

South Korea's legal system is also pro-arbitration. Enacted in 1966, the South Korean Arbitration Act substantially incorporates the 1985 UNCITRAL Model Law on International Commercial Arbitration, including the latest

amendments adopted in 2006. The Arbitration Act also incorporates the New York Convention on the recognition and enforcement of awards, to the extent the award was made by another contracting state and relates to a commercial dispute as defined by Korean law. Korea is also a party to the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**") as well as a number of bilateral investment promotion and protection agreements that assure enforcement of arbitral awards relating to investor-state disputes. Further, the Korean Commercial Arbitration Board ("**KCAB**"), South Korea's sole arbitral institution, has signed over 50 arbitration agreements (24) and cooperation agreements (27) worldwide, including with major arbitral institutions such as SIAC, HKIAC, ICC and the American Arbitration Association.



Liberalisation and development of the arbitration industry

Despite South Korea's strong legal framework and active interest in international arbitration, the majority of arbitrations involving South Korean parties are currently seated outside the country. However, the South Korean government has shown a commitment, particularly over the last five years, to building an arbitral framework to replicate – and eventually rival – that of the major global seats. "Although Seoul has not had the international profile of other key arbitral seats in the region such as Singapore or Hong Kong, we expect this will shift in the short to medium term, due to the government's drive to liberalise the legal market and mandate to develop arbitration as a key industry" notes Mike.

The latest bid to promote Seoul as a hub for international arbitration started with the launch of the Seoul International Dispute Resolution Centre in 2013 and culminated in a series of government mandates concerning South Korea's arbitration industry and related amendments to its Arbitration Act and KCAB arbitration rules in 2016. The legal basis for the promotion of arbitration in South Korea is set out in the Arbitration Industry Promotion Act. Enacted on 27 December 2016, the Act provides a legislative framework for the promotion of Korean arbitration by mandating the development of infrastructure such as dispute resolution facilities and key arbitral institutions (Seoul IDRC is home not only to the KCAB, but to the Korean offices of international institutions including the ICC, LCIA, ICDR, SIAC and HKIAC) and industry professionals. In order to achieve this, the legislation provides the Korean Ministry of Justice with authority to establish and implement a basic plan for promoting the arbitration industry every five years.

In line with this goal, in September 2016, South Korea amended the Arbitration Act further to reflect the Model Law regime. The key amendments included expanding the scope of arbitrable disputes to include non-monetary disputes (such as intellectual property disputes) and modifying the interim measures regime to

allow enforcement by Korean courts. Other key amendments included expanding the tribunal's ability to gather evidence with the assistance of Korean courts and simplifying the procedure for enforcement of arbitral awards. As a result, Korean courts can now assist by ordering witnesses to appear before the tribunal or to submit relevant documents. Further, recognising and enforcing arbitral awards now only requires a court order, rather than a court judgment (which requires an oral hearing), significantly reducing the time and cost associated with the process. These amendments evidence the government's push to increase cooperation between Korean courts and tribunals, and to build on the already pro-arbitration, non-interventionist stance of the Korean judiciary.

When it comes to challenging the major arbitral institutions in the future, what will set Korea apart from the likes of Singapore and Hong Kong is that it is a civil law jurisdiction

Finally, 2016 also saw the KCAB amend both its domestic and international Arbitration Rules, and issue a new Code of Ethics for Arbitrators – all with a view to enhancing reliability, increasing efficiency, and expediting tribunal processes. "Korea has shown complete dedication to developing its arbitral framework and we are starting to see the results reflected in the expansion of the KCAB's case load" says Mike, who has accepted two KCAB appointments to act as arbitrator in the first quarter of 2018. In 2016, the KCAB handled 381 arbitrations, reporting an increase in arbitrations with more than KRW 100 billion (approx. US\$ 86.1 million) in dispute, and a 124% increase in total amounts in dispute. The KCAB has also reported an increase in the average claim per case to KRW 4.9 billion (approx. US\$ 4.2 million).

In 2017, the KCAB expanded to open offices in Shanghai and Los Angeles and held promotional workshops, forums and seminars both at home and abroad. Among these was the Seoul Arbitration Festival, an annual event focusing on the development of arbitration in the Asia Pacific region, which last year played host to more than 900 attendees.

While it remains to be seen whether Seoul will become a new hub for international arbitration, Mike is optimistic: "The latest suite of amendments has seen Seoul develop as a real alternative to the more established seats in the region. Although the transition is in its early stages, Korea is well placed to service the needs of global parties and it is only a matter of time before it will do so on broader scale. When it comes to challenging the major arbitral institutions in the future, what will set Korea apart from the likes of Singapore and Hong Kong is that it is a civil law jurisdiction. The KCAB is the currently the only arbitral institution in the Asia Pacific region vying for international arbitration which is governed by a civil law system – this is a key market differentiator for Seoul which may attract parties with a civil law preference. More importantly, as the perceived difficulties with Korean arbitration continue to fall away, we can expect to see Korean parties to insist more and more on arbitrations seated at home. It is certainly an exciting time for arbitration in Korea, and we are looking forward to continuing to be involved as the industry develops." Mike concludes.

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Key features of the new DIS rules 2018

- The new rules came into force on 1 March 2018
- Drafted concurrently in English and German
- "Civil law" procedural basis, but reflect developments in international arbitration practice since last revision in 1998



Promotion of Early Settlement

Not a new feature, but a key part of the DIS approach.

- Unless a party objects, the arbitral tribunal should encourage an amicable settlement between the parties at every stage of the arbitration (Article 26).
- During the case management conference, the arbitral tribunal must address whether it can give a preliminary legal and factual assessment of the case (Article 27.4(i) and annex 3). A common feature in German civil law proceedings, aimed at streamlining proceedings, shortening submissions and enhancing settlement negotiations between the parties. If they don't object, parties waive their right to invoke doubts regarding the arbitral tribunal's impartiality or independence.



New DIS body "the Arbitration Council" has power to make decisions. Some of these decisions have been previously taken by an arbitral tribunal under 1998 DIS Rules

These include:

- Challenges to arbitrators (Article 15.4): Under the previous DIS Rules 1998 the decision on the challenge of an arbitrator was made by the arbitral tribunal itself and not by the DIS. The aim is to reduce the risk that an unsuccessful party will appeal the challenge decision to the state courts.
- Removal of an arbitrator from office where the Arbitration Council considers that the arbitrator is not fulfilling its duties or will not be fulfilling its duties in the future (Article 16.2).
- Uniquely, the new DIS rules allow for the arbitral tribunal to determine the amount in dispute as they are closest to the matter in dispute, but this can also be referred to the Arbitration Council for modification or confirmation. However, the final decision on arbitrators' fees where arbitration terminated prior to award (Article 34.4) and after an award, based on amount in dispute and the time taken to issue the award (Article 37) rests with the Arbitration Council.



Administration of arbitrators' fees

The DIS will now request and administer the deposits for the arbitrators' fees payable by the parties. Under the DIS Rules 1998 the arbitral tribunal had to request and administer the deposits. This was heavily criticised by many arbitrators.



Review of awards

The DIS will now review an award with regard to form (Article 37.3), but not in terms of content.



Changes related to Efficiency and Expedition of proceedings

A number of timescales have been shortened and greater case management obligations imposed:

- Respondent has to nominate its arbitrator within 21 days (instead of 30 days under the DIS Rules 1998) after receipt of the request for arbitration (Article 7.1 (i))
- Deadline for the co-arbitrators to nominate the president was shortened from 30 days to 21 days (Article 12.2).
- Respondent has to file the answer to the request for arbitration within 45 days after receipt of the request (Article 7.2). The DIS Rules 1998 did not stipulate any deadline for a respondent at all and was up to the Tribunal to determine. Delay in the formation of the Tribunal then led to delays in the filing of the answer.
- A case management conference should ideally take place within 21 days after the constitution of the arbitral tribunal (Article 27.2). Article 27.4 obliges the arbitral tribunal, parties and in-house counsel to address and discuss the adoption of measures (listed in annexes 3 and 4 of the DIS Rules 2018) aimed at procedural efficiency. They are also obliged to discuss whether they wish to opt in to the application of the rules of expedited proceedings (annex 4) during the case management conference. Further, they have to discuss whether to empower the arbitral tribunal to give a preliminary assessment of the case and propose a settlement.



Multi-party, multi-contract and joinder of additional parties

The DIS Rules 2018 contain new and multi-faceted provisions for multi-party proceedings, multi-contract proceedings and the joinder of additional parties (Articles 8 and 17-19).

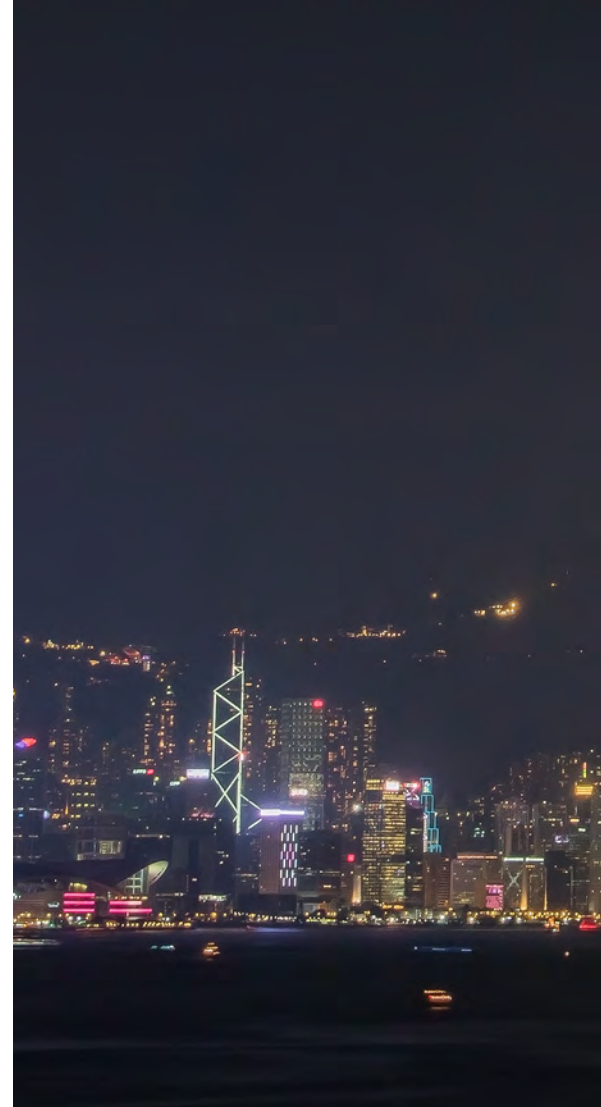
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Building infrastructure in Asia Pacific: Issues and trends in construction disputes across the region

In recent years, infrastructure investment has been a key driver of economic development for countries in Asia Pacific. Whilst some countries focus on accelerating development of their domestic infrastructure (such as Australia and the ASEAN countries), others are funding and exporting resources to facilitate such investment (such as China). The different economic policies of countries, coupled with the legal, political, cultural and social complexities in Asia Pacific, mean that different parts of the region are characterised by their own set of issues and trends in construction disputes. In this article, we take a look at some of the key issues and trends in construction disputes involving Australia, the ASEAN region and China.



Australia

The Australian construction industry is a mature and developed sector of the Australian economy. Research published by the Australian Bureau of Statistics (ABS) in 2017 recorded the construction sector as the second largest industry in the Australian economy, with an annual economic contribution of approximately A\$128.7 billion.¹

It is also a highly competitive sector of the Australian economy. The level of competition has continued to grow as international contractors have in recent years entered the Australian market. This has been driven by an increasingly global perspective to the EPC contractor market.

The highly competitive construction industry has resulted in Australian companies operating in this sector being well respected internationally, given the technical expertise and knowledge they have developed with respect to the delivery

of large construction projects, across a variety of sub-sectors, including mining, energy, oil and gas, transport and other public infrastructure. Like the rest of the world, the scale and complexity of such projects in Australia continues to grow, while technological improvements have increasingly greater impacts on the delivery of these projects.

The Australia construction industry is subject to extensive laws and regulations. This includes various security of payment laws across the Australian states and territories which provide an expedited adjudication process for the interim resolution of payment disputes under construction contracts. The 'West Coast' model legislation that applies in Western Australia and the Northern Territory allows adjudication claims to be made up or down the contractual chain though in practice, the adjudication process tends to be used predominantly by contractors and subcontractors to enforce the payment of

progress claims made in respect of construction work performed under a construction contract and to maintain cash flow down the contracting chain.

In Australia, both State and Federal governments have acknowledged the need to improve security of payment for EPC contractors and subcontractors. Several reviews and inquiries in recent years have identified security of payment as an issue in the Australian construction industry. The lack of consistent security of payment laws across Australia jurisdictions has been identified as an ongoing issue. Most recently, in May 2018, the Australian Federal government released a final report concerning the Review of Security of

The Australia construction industry is subject to extensive laws and regulations

1. ABS (2017), Australian National Accounts: National Income, Expenditure and Product, December Quarter 2017, ABS Cat. No. 5206.0, Table 37



Payment Laws in Australia, undertaken by Mr John Murray AM. The report includes over 80 recommendations to improve consistency in security of payment legislation and enhance protections to ensure contractors get paid on time for work they have done, regardless of which state or territory they operate in.

Key amongst these is the recommendation to make security of payment laws nationally consistent with what is commonly known as the East Coast model, which is modelled on the New South Wales security of payment legislation. Following the release of this report, the Australian Federal government intends to consult with industry to consider the report's recommendations and explore ways to improve the protections in the construction industry.

National courts remain a popular mechanism for the resolution of construction disputes. Nevertheless, international arbitration has become an

increasingly common forum for the final resolution of large construction projects in Australia where international contractors have played a significant role in the delivery of the project. Australian developers and contractors operating outside of Australia are also increasingly turning to international arbitration as the favoured forum for construction disputes.

ASEAN

While Australia is a single, but federal, jurisdiction, the ASEAN region in comparison encompasses 10 independent jurisdictions: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Each of these have different and varied cultural, economic, political and legal landscapes. Together, ASEAN is the seventh largest trading block in the world. One constant theme across the entire region is the continuing need and appetite for infrastructure investment. That investment has vastly outstripped GDP growth across

ASEAN during the last decade, and future infrastructure investment requirements are estimated by the Asia Development Bank to be in excess of US\$2,759 billion.² This reflects the increasing demand for power, transportation, water and sanitary systems in ASEAN countries.

Governments, state agencies, and international developers and contractors have been at the forefront of providing this infrastructure through traditional direct forms of procurement and, increasingly, public-private partnerships. The resulting mix of international parties, each with their own cultures and systems, operating across such a broad and varied region often gives rise to significant challenges and divergent interests. Ultimately, this gives rise to disputes.

In our experience, it is increasingly common on major projects within ASEAN that complex disputes arise which are not easily and swiftly resolved. This is particularly the case on projects where governments and

2. Meeting Asia's Infrastructure Needs, ADB, 2017

state entities are involved. At the heart of many of these disputes lies a fundamental divergence between the state's desire to procure state-of-the-art infrastructure and a lack of adequate funding.

Consequently, major projects can be conceptualised and then approved without necessarily ensuring adequate certainty on the scope of the project, with poor or incomplete contractual and technical documentation, and without detailed budget development that allows for full contingencies. In practice, this leads to project participants having differing expectations as to how the project will be delivered. It is therefore common to see significant and complex arguments about variations (given scope and documentation issues) and pricing (as insufficient budget is allotted to cover the contingency).

A further issue which flows from this, is state actors' ability to exert control over project participants to delay payment, including by issuing, applying or interpreting laws or regulations in a manner which impacts cash flow. This is less of an issue in Singapore and Malaysia, due to the availability of security of payment legislation (as in Australia and the UK). However, we see problems in countries such as Indonesia and Vietnam, where public procurement regulations and contractual payment mechanics can be applied in a manner which prevents or significantly delays payment processes, thereby negatively impacting contractor cash flow. These issues are also compounded by the potential for political change and uncertainty, which can bring with it reviews, delays and potential termination of projects; again giving rise to claims and disputes.

While it is often preferable for these complex disputes to be resolved through negotiations and mediation to achieve a settlement, in our experience that is not always possible in some countries in the region. One reason for this is that some laws which aim to prevent public corruption and state losses can be applied broadly (and be perceived to apply broadly) so as to discourage representatives of states, or state owned entities, from agreeing to any

deal which can be perceived as costing the state more than what was originally agreed. For example, if a fixed lump sum contract for US\$100m was agreed, and a dispute arose over a variation which would cost US\$15 million, even a settlement for US\$10million could be perceived as causing the state to incur a loss, despite the settlement being in the state's interest to avoid the inherent litigation risk of a formal dispute. It is therefore common that disputes which one might expect to be settled, are instead escalated to formal dispute resolution.

In our experience, most complex projects in the region require disputes to be finally resolved by arbitration, preferably in a neutral seat (although, as explained below,

In our experience, most complex projects in the region require disputes to be finally resolved by arbitration, preferably in a neutral seat...

some countries require construction disputes to be resolved by domestic arbitration). In addition to arbitration, it is increasingly common to find that parties are able to use statutory or contractual processes to solve problems early on in projects. For example, both Singapore and Malaysia have security of payment legislation which provides for payment claims to be adjudicated swiftly during the course of a project. In other countries, such as Indonesia and Vietnam, FIDIC forms of contract have been used for some major projects allowing parties to use dispute avoidance boards (DABs) to resolve problems on a timely basis (although, in practice, DABs are not widely used in the ASEAN region). While the statutory security of payment regimes have largely been effective, it remains to be seen how effective DABs have been in practice. This is due to issues of practical enforceability, which ultimately require the commencement of arbitration. On the

whole, therefore, it is common that disputes on major projects in ASEAN eventually end up in arbitration.

China

In parallel with the infrastructure development in the ASEAN region and Australia, China's construction industry has undergone significant transformation in recent years. Since the announcement of the Belt and Road Initiative in 2013, Chinese contractors have undertaken and invested in a vast number of infrastructure projects overseas. According to the China International Contractors Association, in 2017 alone Chinese contractors concluded 7,217 construction contracts along the Belt and Road and 13,267 construction contracts globally. The nature, size and geographical coverage of these projects, coupled with the broader implications of the Belt and Road Initiative, present Chinese contractors with a unique set of legal challenges.

Whilst many of the issues that Chinese contractors encounter are those commonly encountered in construction and infrastructure projects (such as changes to work scope, delay to completion or defects in works), Chinese contractors also experience – perhaps more often than their counterparts in developed countries – problems during project execution that are not strictly related to the construction works, but are the product of the political, legal or economic environment of the host country.

Many countries in which Chinese contractors operate can be characterised by relatively high political risks, weak rule of law and/or poor governance. As a consequence, projects in these places are more likely than those in developed jurisdictions to be affected by events such as change to host government (whether through election or political coup), discriminatory or arbitrary acts of local authorities, civil unrest or armed conflicts. This can cause the contractor to incur substantial costs and losses and bring even the largest projects to a standstill.

Whilst it is possible for contractors to mitigate these risks at the outset through contractual risk allocation and/or political



risk insurances, not all costs and losses can be anticipated and covered. In those circumstances, it will be necessary for contractors to recover their losses under the contract. For instance, we have advised on claims flowing from prolonged suspension or termination of a project due to the impact of decisions by national and regional governments, as well as insurgency in the host state.

In practice, assessing the contractual implications of a claim event may not always be at the forefront of a contractor's mind. It is easy for contractors to focus on minimising the time and cost impact of an event to the project, only to realise later that their claims are time barred or otherwise prejudiced. To address this problem, it is advisable for contractors to involve experienced counsel as soon as they become aware of a potential claim event, to assist in identifying, substantiating and managing potential claims and, where appropriate, in commencing legal proceedings to protect and pursue these claims.

In line with our experience in the ASEAN region, there is a general trend amongst Chinese contractors to resolve disputes arising out of complex projects by way of arbitration outside the host state. Here, Chinese contractors generally prefer to have a right to commence arbitration if a dispute cannot be amicably settled or mediated, rather than going through a multi-tiered dispute resolution mechanism (such as those provided in FIDIC standard forms of contract) that requires the dispute to be

referred to a dispute adjudication board before the parties can commence arbitration.

Whilst contracting parties are generally free to choose how they wish to resolve disputes under the contract, this is not possible where local laws and regulations require disputes to be resolved by arbitration in the host state. For instance, Indonesian law requires all contracts with subcontractors that provide services to holders of Production Sharing Contracts to provide for domestic arbitration. Meanwhile, Philippines law confers upon the Construction Industry Arbitration Commission original and exclusive jurisdiction over all domestic construction disputes.

Domestic arbitration may not be in the best interest of foreign contractors. In less sophisticated jurisdictions (where many Chinese contractors operate), there is a risk that local proceedings could involve procedural delays, lack of procedural fairness, inexperienced arbitral tribunals and/or potential for influence by the employer (particularly if it is a state-owned entity). In this regard, there is value in contractors engaging international counsel to work with, or manage, local counsel. International counsel can help minimise litigation risks and assess the prospects of challenging the jurisdiction of any domestic arbitral tribunal, to secure a more suitable (and neutral) forum in which to resolve the dispute.

Conclusion

As infrastructure investment in Asia Pacific continues to grow, complex construction disputes will be inevitable. Many of the risks

in construction projects can be managed through proper project due diligence, appropriate structuring (for example, to ensure protection through available investment treaties) and negotiating contractual protections where possible (such as stabilisation or change-in-law provisions). Above all, parties should try to agree to arbitrate disputes in a neutral seat and under the auspices of an internationally recognised arbitration institution (such as SIAC, HKIAC or ICC) in order to provide themselves with the best framework for resolving cross-border, international construction disputes on a balanced legal, linguistic, technical and cultural playing field for all stakeholders.

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