GAR Global Arbitration Review

The rise of arbitration in the Asia-Pacific

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27 May 2022

In summary

Arbitral hubs and institutions in Asia have reached new heights in terms of their growth and popularity, achieving stellar global rankings and an ever-growing number of case filings. Arbitration's popularity in Asia has been augmented by the generally pro-arbitration stance taken by the countries in the region. This chapter examines recent developments in Singapore and other parts of Asia, tracking the continued growth and overall maturation of Asia's arbitration scene.

Discussion points

- The growing profile of the arbitral seats and institutions in Asia
- Steps taken by arbitral institutions to enhance and update their rules to compete with other international arbitral institutions
- Pro-arbitration stance of jurisdictions across the region, including support for the arbitral process and the enforcement of arbitral awards

Referenced in this article

- *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* ([2021] SGCA 9)
- *CAJ and another v CAI and another appeal* ([2021] SGCA 102)
- *CKG v CKH* ([2021] SGHC(I) 5)
- *CNX v CNY* ([2022] SGHC 53)
- *National Oilwell Varco Norway AS (formerly known as Hydralift AS) v Keppel FELS Ltd (formerly known as Far East Levingston Shipbuilding Ltd)* ([2022] SGCA 24)
- *Phoenixfin Pte Ltd and others v Convexity Ltd* ([2022] SGCA 17)
- *The 'Navios Koyo'* ([2021] SGCA 99)
- *Westbridge Ventures II Investment Holdings v Anupam Mittal* ([2021] SGHC 244)

Arbitral hubs and institutions in Asia have reached new heights in terms of their growth and popularity. In the 2021 Queen Mary University of London and White & Case International Arbitration Survey (the QMUL Survey),[1] Singapore and Hong Kong ranked first and third respectively as the most popular arbitral seats in the world. This marks a first for Singapore, and it shares its position with London – a global powerhouse in the field. Singapore was also named the most preferred seat in the Asia-Pacific, and, along with Hong Kong, ranked in the top-five most preferred seats in all regions.

According to the QMUL Survey, three out of the five most preferred arbitral institutions in the world are located in Asia, namely: the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC) and the China International Economic and Trade Arbitration Commission (CIETAC), which ranked second, third and fifth respectively. The survey highlighted a noticeable growth in the percentage of respondents selecting SIAC and the HKIAC, with SIAC ranking as the most preferred institution in the Asia-Pacific. This also marks CIETAC's debut in the list of the top-five most preferred arbitral institutions in the world.

The steady growth of Asia's arbitration scene reflects the increased willingness of Asian and other international parties to resolve their disputes within the region. It also demonstrates the distinction of the region's seats and institutions, and their strong reputation across the globe. The pro-arbitration stance taken by the jurisdictions in the region has greatly enhanced the standing of arbitration in the region and beyond, creating a healthy ecosystem that continues to thrive.

UNCITRAL Model Law

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law) was designed to assist states in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. This is to achieve uniformity of the laws of arbitral procedures across jurisdictions. The Model Law provides guidelines, found in articles 34, 35 and 36, on the setting aside and enforcement of arbitral awards.

Legislation based on the Model Law has been adopted in 74 states, with two Asian states – Korea and Myanmar – adopting the law as recently as 2016. Although there are countries in the region (eg, Indonesia) that have yet to adopt the Model Law, these countries nevertheless typically enact domestic legislation that broadly tracks the Model Law's provisions in relation to enforcement.

Singapore

Singapore is a Model Law country that has enacted local legislation – the International Arbitration Act (IAA) – that gives effect to the Model Law. The principle of minimising judicial interference, and a pro-arbitration philosophy, strongly influence the Singaporean judicial approach in applying the IAA.

Time limits and fraud

A recent example is *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* ([2021] SGCA 9) (*Bloomberry*), where the Singapore Court of Appeal examined the relationship between article 34(3) of the Model Law and section 24 of the IAA. In *Bloomberry,* the plaintiffs applied to set aside a partial award rendered in a Singapore-seated arbitration governed by the UNCITRAL Arbitration Rules 2010. The partial award on liability was issued on 20 September 2016. In the application to set aside the award, the plaintiffs referred to evidence of fraud or corruption, which they claimed was not discoverable until months after the partial award had been rendered. The plaintiffs' position was that the fraud allegations amounted to procedural fraud, constituting a ground for setting aside and a bar to the enforcement of the partial award. The application to set aside the award had been commenced out of time after the three-month time limit in article 34(3) of the Model Law. The permissible time limit to set aside the order granting leave to enforce the partial award in Singapore had also expired.

To overcome the time limit, the plaintiffs sought to argue that first, the three-month time limit stipulated in article 34(3) of the Model Law ought to be extendable in cases of fraud, and especially in cases where the fraud is discovered only after the expiry of the time limit. In this regard, the plaintiffs argued that the phrase 'may not' in article 34(3) should be construed as importing a discretion to extend time.[2] Second, the plaintiffs also argued that even if the time limit in article 34(3) was absolute, section 24 of the IAA comprises a separate regime for setting aside, and is not subject to the time limit prescribed in article 34(3). This is because section 24 does not set out a time limit and instead provides two additional grounds for setting aside '[n]otwithstanding Article 34(1) of the Model Law'.[3]

The Singapore Court of Appeal disagreed. First, in relation to the time limit in article 34(3) of the Model Law, the Court of Appeal affirmed prior decisions made by the Singapore courts, holding that the clear terms of article 34(3), along with the material relating to the discussions among the drafters of the Model Law, show that there was to be no extension of the time limit even in cases of fraud.[4] Second, the Court of Appeal agreed with the finding of the judge below that the three-month time limit also applies to section 24 of the IAA.[5] In particular, the phrase 'notwithstanding Article 34(1) of the Model Law' did not introduce a distinct remedy unconstrained by the limitations in article 34 – rather, it simply introduced new grounds for setting aside (apart from those set out in article 34) to which the article 34 time limit would similarly apply. [6] Parties seeking to set aside an arbitral award must be mindful of this and ensure that any challenges to a Singapore arbitration award are brought promptly and within three months.

Arbitrability and the applicable law

In the Singapore High Court case of *Westbridge Ventures II Investment Holdings v Anupam Mittal* [2021] SGHC 244 (*Westbridge*), the Court had to answer a previously unanswered question: in determining the issue of subject matter arbitrability at the pre-award stage, would the law of the seat or the law of the arbitration agreement apply?

Westbridge concerned a dispute between the shareholders of a company incorporated in India. The arbitration agreement between the shareholders was governed by Indian law, while Singapore was designated the seat of arbitration. The defendant in *Westbridge* commenced court proceedings against the plaintiff in Mumbai, India, alleging shareholder minority oppression and mismanagement. In response, the plaintiff sought an anti-suit injunction in the Singapore courts against the Mumbai proceedings, relying primarily on the arbitration agreement between the parties.

The defendant opposed the injunction on the basis that, under Indian law, disputes relating to minority oppression and mismanagement are non-arbitrable, and it is Indian law (ie, the law of the arbitration agreement) that would apply to determine the arbitrability of the dispute. The plaintiff, on the other hand, argued that the applicable law should be Singapore law, as it is the law of the seat. Unlike India, it is well established that in Singapore, minority oppression disputes are arbitrable.

The Court held that the law of the seat (Singapore law) would apply. In coming to this decision, the Court reasoned that 'subject matter arbitrability, when raised at the pre-award stage before the seat court, is essentially an issue of jurisdiction'.[7] Therefore, where the seat court is asked to consider an arbitral tribunal's subject matter jurisdiction on grounds of arbitrability, whether pre-award under section 6(2) or section 10(3) of the IAA, or post-award under article 34(2)(b) of the Model Law, the court should apply Singapore law as the law of the seat to determine that question.[8] Further, the Court in *Westbridge* opined that applying the law of the seat at the pre-award stage would be consistent with 'Singapore's public policy to promote or favour international arbitration',[9] as it would be 'neither necessary nor desirable for [the Singapore Courts] to give effect to foreign non-arbitrability rules'.[10]

Setting aside awards

Under Singapore law, the scope for judicial intervention in arbitration proceedings is narrowly circumscribed. As observed in the Singapore Court of Appeal case of *CAJ and another v CAI and another appeal* ([2021] SGCA 102) (*CAJ*), over the past 20 years, only approximately 20 per cent of applications to set aside arbitral awards have been allowed,[11] attesting to the Singapore courts' commitment to the principle of minimal curial intervention.

However, in exceptional cases, the Singapore courts have exercised their power to set aside arbitral awards. One such case is *CAJ*, where the Singapore Court of Appeal partially set aside an arbitral award on the basis that the tribunal had decided on an issue that was only raised by a party at the very last moment – without giving the counterparty an adequate opportunity to respond.

In *CAJ,* the respondent (claimant) had, in the arbitration proceedings, sought liquidated damages from the appellant for a delay in construction of a polycrystalline silicon plant. After an eight-day oral hearing, the appellant (defendant) had raised a previously unargued defence in their written closing submissions. Despite objections from the respondent, the tribunal allowed the defence, substantially reducing the damages payable from the appellant to the respondent.

The respondent subsequently applied to the Singapore courts to set aside the tribunal's decision to allow the defence, while maintaining the rest of the award. In allowing the application, the Singapore Court of Appeal held that the tribunal had exceeded its jurisdiction by ruling on the defence in spite of the fact that the impugned defence did not feature anywhere except in the appellants' written closing submissions.[12] The Court held that it should have thus been 'plain and obvious' to the tribunal that, until then, the respondent had no prior notice that it had to deal with the said defence, and the defence could not possibly have fallen within the scope of the parties' submission to arbitration.[13]

The Court also held that there was a breach of natural justice, as the respondent had not been given a fair and reasonable opportunity to respond to the impugned defence. While the appellant had raised some facts and evidence in relation to the defence during the arbitration, given that the defence was not in issue in any meaningful way during the arbitration, the respondent still could not be considered to have had reasonable notice that it was necessary to engage with the said facts and evidence.[14] This materially prejudiced the respondent's rights, because if the respondent had been given the opportunity to lead further evidence, test the appellants' evidence and tender further legal submissions, this could have reasonably made a difference to the tribunal's determination.[15]

The case of *Phoenixfin Pte Ltd and others v Convexity Ltd* [2022] SGCA 17 (*Phoenixfin*) involved an arbitrator who had, earlier on in the arbitration, dismissed the defendant's application to amend its pleadings to introduce a new issue. However, during an oral reply hearing following the evidential hearing, the arbitrator unilaterally considered that the said issue was to be determined as part of the arbitration, and set a further hearing on the matter. The plaintiff maintained that as the issue was unpleaded, it was not part of the issues to be determined by the arbitrator, and refused to produce its witnesses at the further hearing. The arbitrator subsequently dismissed the plaintiff's claim on the basis of its findings on that issue.

In its judgment, the Singapore Court of Appeal held that while pleadings in arbitration proceedings are not determinative in the same way they might be in court litigation,[16] they are important for factual issues, or for issues that are a mix of fact and law.[17] This is because for such issues, a party needs to be able to question the evidence produced in support of the issue, as well as have the chance to itself introduce relevant rebuttal evidence. To do this, it is imperative that there be clarity and precision regarding what issue is being raised and what evidence will be relied on to support it – pleadings, in such situations, would assume a more significant role in determining whether a party has been afforded natural justice during the arbitration proceedings.[18]

Accordingly, in *Phoenixfin*, the Court of Appeal held that the arbitrator was not entitled to make a finding on the issue in question, which was a matter of mixed fact and law. This was because the issue was unpleaded, and no evidence had been led by the defendants on it. The plaintiff did not have an opportunity to adequately respond to the defendant's case, because no case had ever been established.[19]

It is thus clear from the above cases that the Singapore courts are sensitive and alive to the question of whether the parties in an arbitration have been afforded their right to a fair hearing, and will not hesitate to intervene in cases where that right has been denied. Where possible, however, the Singapore courts have continued to take a pro-arbitration approach by remitting the issue back to the arbitral tribunal for it to eliminate the grounds for setting aside. A recent example of this is *CKG v CKH* ([2021] SGHC(I) 5) (*CKG*), where the Singapore International Commercial Court dealt with an application to set aside an arbitral award on the basis of the tribunal having failed to consider issues submitted to it for determination *infra petita* under article 34(2)(a)(iii) of the Model Law. In his judgment, Jeremy Lionel Cooke IJ agreed with the applicant that the tribunal had failed to deal with live issues between the parties, which could have affected the applicant's liability or the quantum of damages. In the circumstances, Cooke IJ agreed that setting aside would be the prima facie remedy.[20]

However, as observed by Cooke IJ, article 34(4) of the Model Law, the Court when asked to set aside an award may, where appropriate and so requested by a party, suspend the setting-aside proceedings for a period of time to give the tribunal an opportunity to take such action as would eliminate the grounds for setting aside.[21] In this regard, Cooke IJ was of the view that the main question was whether the original tribunal could approach the matter, which it failed to decide, in a balanced and open-minded way.[22]

This question was eventually answered in the affirmative.[23] A few reasons were raised for this. First, Cooke IJ was persuaded by the distinction of the tribunal, stating that he considered 'that this Tribunal should be capable of recognising its omission',[24] and would be capable of approaching the issues it had missed in an open-minded manner, instead of simply affirming its original decision. Second, Cooke IJ also found that setting aside the award would create more difficulties, in that a differently constituted tribunal would have to essentially re-hear the entire matter – instead of simply deciding on the discrete issues that had inadvertently been left out by the original tribunal.[25] In the round, given that the original tribunal was able to do justice between the parties, Cooke IJ considered that it was sufficient to suspend the setting-aside proceedings and remit the award to the original tribunal to eliminate the grounds for setting aside.

Stay of proceedings

A further case of particular interest to emerge from the Singapore courts in the past year was the Court of Appeal's decision in *The 'Navios Koyo'* ([2021] SGCA 99) (*Navios Koyo*). In that case, the Singapore Court of Appeal set out the circumstances under which it would exercise its discretion under section 6(2) of the IAA to impose conditions on a stay of proceedings in favour of arbitration. In that case, the condition that the applicant sought to impose was a waiver of an accrued defence of time bar.

After surveying the relevant jurisprudence on the matter, the Court of Appeal was of the view that the exercise of its discretion to impose a condition depended on the true nature of the condition sought, in the context of the relevant circumstances.[26] In this regard, the condition that the applicant sought to impose (ie, the waiver of the defence of time bar) was markedly different from the usual administrative conditions, such as imposing a timeline to commence arbitration. Such conditions were essentially orders consequential upon the stay order, and sought to give effect to the arbitration agreement. They did not purport to decide any substantive issue, which was rightly reserved to the arbitration. By contrast, the question of whether a party is entitled to rely on a time bar is typically an issue that rightly should be determined in the arbitration. The nature of the condition sought in the present case was thus significant.[27]

That said, the Court clarified that it would not go so far as to suggest that all conditions sought that do not solely facilitate or give effect to the arbitration agreement are necessarily impermissible, and reference will be had to all of the surrounding facts and circumstances. However, conditions that do not merely facilitate or seek to give effect to the arbitration agreement will be subject to a heightened level of scrutiny, and the threshold for such conditions to be granted may be said to be considerably higher than that applicable for essentially administrative conditions.[28]

The Court emphasised that the exercise of its direction would largely entail a consideration of whether the party seeking the stay is able to put forward a proper justification for the imposition of the condition.[29] In determining whether such justification is established, the Court would have regard to (1) the reasons for the conditions being sought, and whether those reasons could have been obviated by the applicant's own conduct; (2) whether the need for any of the conditions was contributed to or caused by the conduct of the respondent; and (3) the substantive effect on the parties of any condition that the court may impose.[30]

The first two considerations focus on the respective conduct of each party, and this should be assessed as a matter of sound commercial practice.[31] A party seeking a condition would not be allowed to do so if the reasons for the condition being sought arise entirely from its own conduct, and the other party did nothing to cause or contribute to the need for the stay or the imposition of the condition.[32] The third consideration looks at the substance of the condition sought. In this regard, the Court was of the view that being asked to deprive a party of a substantive and accrued defence that ought properly to be determined at the arbitration (ie, a time bar) was a very strong factor against the imposition of the condition.[33] Ultimately, applying the above considerations to the facts of the case, the Court decided that it had no legal basis to impose the condition because, inter alia, the applicant had known from the outset that there was an arbitration clause that would govern the dispute. Despite this, the applicant had sat on its hands for almost a year, taking a risk that it could be inferred to have elected to accept.[34]

Enforcement

In terms of enforcement, recent jurisprudence has continued to demonstrate the Singapore courts' commitment to facilitating the enforcement of arbitral awards whenever possible. In *National Oilwell Varco Norway AS (formerly known as Hydralift AS) v Keppel FELS Ltd (formerly known as Far East Levingston Shipbuilding Ltd)* ([2022] SGCA 24) (*NOV*), the Singapore Court of Appeal dealt with a novel issue concerning a purported 'misnomer'. Under section 19 of the IAA, the Singapore courts are empowered to enforce an award 'in the same manner as a judgment or an order to the same effect' and to enter a judgment against the debtor only 'in terms of the award'. The process that is entailed in this regard has been described as 'mechanical' in nature, in that in enforcing an award, the Court may only do so on terms that implement the award, and the award can only be enforced against a losing party in the arbitration.[35]

The appellant in *NOV* sought to enforce an award that was issued not in its name but in the name of a company that no longer existed: A/S Hydralift (Hydralift). Following two mergers as part of a corporate restructuring exercise, the appellant, a Norwegian company, assumed all the assets, rights, obligations and liabilities of Hydralift.[36] When the respondent commenced an arbitration against Hydralift, the appellant appeared, defended the claim and succeeded in its counterclaim in the arbitration. The appellant did all this purporting to be Hydralift and it never disclosed the fact that the mergers had occurred or that Hydralift no longer existed.[37]

In the proceedings, the respondent had argued that because the award was rendered in favour of Hyrdralift, a different entity that had ceased to exist even before the commencement of the arbitration, the appellant should not be permitted to enforce the award. The court below agreed with the respondent, holding that the tribunal intended to and did issue the award in favour of Hydralift and not the appellant. Applying section 19 of the IAA and applying the mechanical approach to enforcement, the court would not be enforcing the award in the same manner as a judgment to the same effect if it were to allow the enforcement application.[38] Further, the court below found that the use of Hydralift was not a mere misnomer because both parties had objectively intended to use Hydralift's name to refer only to Hydralift and not to the appellant. Thus, the arbitration and the award were a nullity from the outset. In any event, a misnomer could only be corrected by taking the appropriate steps in the arbitration and this had not been done.[39]

The Court of Appeal in *NOV* disagreed, holding that the judge had erred in not appreciating that the effect of the mergers under Norwegian law is that the appellant is, for all intents and purposes, the same legal entity as Hydralift.[40] Therefore, though Hydralift ceased to exist as a separate entity thereafter, its legal personality continued to survive and was subsumed in that of the appellant,[41] and the situation was that of a true misnomer. In the Court of Appeal's view, the power to enforce an arbitral award in a misnomer situation would not be inconsistent with the mechanical approach to enforcement,[42] opining that the Singapore courts generally endeavour 'to facilitate the enforcement of arbitral awards' and an 'unduly rigid approach towards enforcement would be antithetical to this aim'.[43] True 'slips' and changes of name can thus be accommodated within the mechanical approach to enforcement.

State immunity

As the arbitration scene in Singapore continues to mature, an increasing number of high-profile investor-state disputes have also been adjudicated in the country. In March 2022, there was a novel ruling on the applicability of section 14(2) of the State Immunity Act 1979 to a leave order under section 29 of the IAA to enforce an arbitral award in Singapore against a foreign state. The question in *CNX v CNY* ([2022] SGHC 53) (*CNX*) was as follows: where an award creditor is granted such leave to enforce an arbitral award in Singapore against a foreign state, how much time does the foreign state have, following service of the leave order on it, to take the steps necessary to challenge the order?[44] Specifically, would section 14(2) of the State Immunity Act 1979, which provides that any 'time for entering an appearance (whether prescribed by Rules of Court or otherwise) shall begin to run 2 months after the date on which the writ or document is so received', apply to an application to set aside a leave order?

In *CNX*, the plaintiff had obtained a leave order, which stated that the defendant state could apply to set aside the order 'within 21 days' after service of the order. The defendant state argued that once the leave order was served on the defendant in accordance with section 14(1) of the State Immunity Act 1979, section 14(2) of the same would then apply to govern the time that the defendant had to apply to set aside the leave order.[45] The plaintiff, on the other hand, took the position that section 14(2) would not apply to an application to set aside the leave order, because, inter alia, a state would not require as much time to react to enforcement proceedings as compared to fresh claims against it, since it would be aware of the disputes and arbitral proceedings giving rise to the arbitral award, particularly in instances where the state had actively and fully participated in the underlying arbitration.[46]

The Singapore High Court disagreed with the plaintiff, holding that a purposive interpretation of section 14(1) of the State Immunity Act 1979 shows that it does indeed apply to the time a defendant state had to set aside a leave order. In this regard, apart from the plain words of the statute, the Court was also of the view that while the enforcement of an arbitral award may not take a respondent state by surprise, different considerations would come into play when a state is faced with the potential enforcement of the award in a particular jurisdiction, as compared to the considerations at play in the underlying arbitral

proceedings. The Court firmly disagreed that the defendant should be deprived of its entitlement to the additional time allowed under section 14(2) simply because it had participated in the arbitration.[47] In the circumstances, the Court held that where a leave order is served on a state, and the leave order provides for a time limit for the state to challenge the enforcement of the order, the said time limit would only begin to run two months after the date of service of the order.[48]

Legislation

On the legislative front, the Singapore Parliament has passed the Legal Profession (Amendment) Act 2022 (the Act), which will permit lawyers and their clients to enter into conditional fee agreements (CFAs) for certain types of contentious proceedings. CFAs have traditionally been disallowed in Singapore due to concerns about champerty and conflicts of interest between lawyers and their clients. However, following positive feedback during a public consultation in August 2019,[49] CFAs will now be allowed for, inter alia, domestic and international arbitrations.[50]

The Act defines a CFA as an agreement between lawyers and their clients relating to the whole or any part of the remuneration and costs in respect of contentious proceedings, to be payable only in circumstances specified in the agreement[51] (eg, the success of the client's claim). A CFA may provide for an 'uplift fee', which is a fee that is payable in specified circumstances that is higher than the costs that would otherwise be payable if there was no CFA.[52] However, the CFA must not provide for the remuneration or costs to be payable as a percentage or proportion of the amount of damages or other amounts awarded to the client in the proceedings – in other words, agreements where the lawyer is paid fees based on a percentage of the financial benefit awarded in a claim are still prohibited in Singapore.

With the introduction of CFAs for arbitrations, Singapore joins international dispute resolution hubs, such as London, New York and Geneva, that have long allowed such outcome-related fee structures. This is a welcome development that cements Singapore's position as the pre-eminent arbitration destination in Asia.

Developments in Asia and ASEAN

There have also been developments across the arbitration landscape in Asia.

China

China seems set to lift its long-standing prohibition on ad hoc arbitrations. On 30 July 2021, the Ministry of Justice of the People's Republic of China issued, for public consultation, the Arbitration Law of the People's Republic of China (Amended Version) (Draft for Comments) (the Draft Arbitration Law),[53] which sets out a basic framework of rules for ad hoc arbitrations. At present, the Draft Arbitration Law limits ad hoc arbitrations to disputes that have 'foreign-related elements', which has been defined to mean disputes where:

- at least one party concerned is a foreign citizen, legal person or organisation in a foreign jurisdiction;
- the habitual residence of at least one party to the arbitration is outside the territory of China;
- the subject matter is outside the territory of China; or
- the legal facts that establish, change or eliminate the civil relations between the parties took place outside the territory of China.

For the purpose of determining whether a dispute has a foreign element, Hong Kong, Macau and Taiwan, which are politically considered part of China, shall be treated as a foreign territory. The proposed introduction of ad hoc arbitration in China is likely to have a significant impact on the growth of the Chinese arbitration scene, and is good news for arbitration practitioners and those looking to arbitrate in China.

Cambodia

Arbitral institutions in the region have also revamped their rules to better address the needs of commercial parties. On 28 March 2021, the National Commercial Arbitration Centre of Cambodia (NCAC) introduced new arbitration rules (the 2021 NCAC Rules) that incorporate a number of significant amendments, including a new expedited procedure and provisions for the appointment of an emergency arbitrator.[54]

The expedited procedure, provided for under article 9 of the 2021 NCAC Rules is a costs-saving procedure for disputes involving small claims. Parties may file an application to implement the expedited procedure under three circumstances:

- if the sum of the dispute does not exceed the amount of US$3 million representing the aggregate value of the claim, counterclaim and any set-off defence;
- if the parties so agree; or
- in cases of exceptional urgency.

If the application is approved, the General Secretariat of NCAC (the General Secretariat) may shorten the time limit for the proceedings, and the final award shall be made within 270 calendar days of the date when the tribunal is constituted.

Further, a party that wishes to obtain emergency interim measures may file an application with the General Secretariat for such measures to be issued by an emergency arbitrator. The costs of the application will have to be borne by the applicant, and include application fees, emergency arbitrator fees and expenses for the proceedings. Within three days of receipt of the application and the applicant's payment of the application fees, the Appointment and Proceeding Committee will appoint an emergency arbitrator. The emergency arbitrator is to issue an interim order or award within 15 days of the date of his or her appointment, unless the General Secretariat extends the timeline in exceptional circumstances.

Malaysia

In Malaysia, the Asian International Arbitration Centre (AIAC) introduced new rules (the 2021 AIAC Rules), which took effect on 1 August 2021.[55] Similar to the 2021 NCAC Rules, the 2021 AIAC Rules provide for a new fast-track procedure in three situations: (1) where the amount of the dispute does not exceed US$500,000 for an international arbitration or less than 2 million ringgit for domestic arbitration parties; (2) where parties so agree; or (3) where there is exceptional urgency. An arbitration under the fast-track procedure must be determined by a sole arbitrator (unless otherwise agreed to by the parties) and must proceed as a documents-only arbitration. Shorter and stricter timelines are prescribed under the fast-track procedure, and such timelines will supercede any prescribed in the arbitration agreement. The 2021 AIAC Rules have also been consolidated with the UNCITRAL Arbitration Rules 2013, removing the need to read the two sets of arbitration rules conjunctively. This consolidation aligns the rules of the AIAC with international standards, ensuring greater efficiency and a more user-friendly structure.

India

Finally, in India, the 2021 amendments to the Indian Arbitration and Conciliation Act 1996 (ACA) have caused some apprehension among arbitration practitioners.[56] On 10 March 2021, the Indian Parliament passed the Arbitration and Conciliation (Amendment) Act,[57] which, among other things, empowers the Indian courts to 'stay the [enforcement of an] award unconditionally' where the court is prima facie satisfied that the arbitration agreement or underlying contract or the making of the award was induced or effected by fraud or corruption. There is understandable concern that this amendment may increase the risk of defendants making unmeritorious claims of fraud and dragging their cases into court, undermining India's arbitration regime.

The Project Director, NH No. 45E and 220, NHAI v M. Hakeem & Anr (SLP (C) No. 13020/2020) (*Project*) concerned the Indian courts' power to modify arbitral awards. For context, before *Project,* several setting-aside applications before the Indian courts had resulted in a modification or a concession to the losing side in the arbitration. In regard to this phenomena, the Indian Supreme Court in *Project* clarified that while the ACA does not provide Indian courts with the power to modify arbitral awards, the Supreme Court may make modifications to an award pursuant to its constitutional power to do 'complete justice' under article 142 of the Constitution of India. Although this ruling is welcome in that it specifies the precise source of the Indian courts' discretion, the dismissal of the ACA is cold comfort in the face of the Supreme Court's confirmation of its broad discretionary power under the Constitution of India.

That said, the Indian courts have generally taken a decidedly pro-arbitration approach in recent judgments. In *PASL Wind Solutions Private Limited v GE Power Conversion* (Civil Appeal No. 1647 of 2021) (*PASL*), the Indian Supreme Court ruled that there was nothing in the ACA precluding Indian parties from arbitrating in a foreign seat. The case involved two Indian parties that had agreed to arbitrate a dispute in Zurich. In the arbitration, all the plaintiff's claims were dismissed and the defendant was awarded the costs of the arbitration along with interest thereon (the Award).

The defendant applied for enforcement of the Award as a foreign award under Part II of the ACA. In challenging the Award, the plaintiff argued, inter alia, that first, the Award should be treated as a domestic award because the dispute involved two Indian parties; and second, that the designation of a foreign seat was contrary to Indian public policy, as that would essentially allow parties to contract out of Indian law where it would otherwise apply. Accordingly, the defendant argued that the arbitration and the resultant Award should be declared impermissible.[58]

The Indian Supreme Court rejected both arguments. First, the Court held that based on a proper reading of the applicable law, the mere fact that both parties to the arbitration were Indian entities would not make an award given in a foreign-seated arbitration a domestic award. Such an award would be considered a foreign award enforceable by the Indian courts.[59] Second, the Court held that the designation of a foreign seat for arbitration is not contrary to Indian public policy, as 'there is no clear and undeniable harm caused to the public in permitting two Indian nationals to avail of a challenge procedure of a foreign county [sic] when, after a foreign award passes muster under that procedure, its enforcement can be resisted in India'.[60] In concluding that Indian parties may choose a foreign seat of arbitration, the Court also stressed the importance of freedom of contract and party autonomy, opining that the latter is 'the brooding and guiding spirit of arbitration'.[61]

Finally, in ***Amazon.com*** *NV Investment Holdings Inc v Future Retail Ltd* (Civil Appeal Nos. 4492–4493 of 2021) (*Amazon*), the Indian Supreme Court held that an India-seated award rendered by an emergency arbitral tribunal appointed by the SIAC is enforceable. The Court was of the view that the term 'arbitral tribunal' in section 17 of the ACA (which provides for the enforcement of awards by tribunals seated in India) includes an emergency arbitrator, and thus any awards by such an arbitrator could be deemed an order of the Indian courts and enforceable as such.

It is important to mention, however, that while the award in *Amazon* was issued by a tribunal appointed by the SIAC, the arbitration itself was seated in India. Therefore, it still remains to be seen whether awards rendered in foreign-seated emergency arbitration proceedings may be enforced in India. Nevertheless, this clear pronouncement of the law will aid in ensuring the protection of arbitral processes, and is likely to strengthen the position of arbitration in India as the dispute resolution mechanism of choice.

Conclusion

The trend in Asia is one that generally continues to converge in favour of arbitration. Alongside the growing number of arbitrations in the region, governments and courts alike have taken a firmly pro-arbitration approach, paving the way for increased adoption of arbitration as a means of dispute resolution. Arbitration institutions across Asia have also refined their rules to better cater to commercial parties. While there have been some issues along the way, these are likely to be growing pains, and it is hoped that the arbitration scene will continue growing from strength to strength in the years to come.

The authors would like to express their thanks to Natalee Ho for her assistance in the preparation of this article.

Footnotes

[1] **https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf**.

[2] *Bloomberry* at [32].

[3] *Bloomberry* at [32].

[4] *Bloomberry* at [81] and [89].

[5] *Bloomberry* at [91].

[6] *Bloomberry* at [95].

[7] *Westbridge* at [23(a)].

[8] *Westbridge* at [42].

[9] *Westbridge* at [54].

[10] *Westbridge* at [54].

[11] *CAJ* at [2].

[12] *CAJ* at [52].

[13] *CAJ* at [52].

[14] *CAJ* at [54].

[15] *CAJ* at [54].

[16] *Phoenixfin* at [50].

[17] *Phoenixfin* at [52].

[18] *Phoenixfin* at [52].

[19] *Phoenixfin* at [64].

[20] *CKG* at [61].

[21] *CKG* at [65].

[22] *CKG* at [67].

[23] *CKG* at [69].

[24] *CKG* at [69].

[25] *CKG* at [70].

[26] *Navios Koyo* at [26].

[27] *Navios Koyo* at [27].

[28] *Navios Koyo* at [29].

[29] *Navios Koyo* at [30].

[30] *Navios Koyo* at [30].

[31] *Navios Koyo* at [31].

[32] *Navios Koyo* at [31].

[33] *Navios Koyo* at [32].

[34] *Navios Koyo* at [34].

[35] *NOV* at [2].

[36] *NOV* at [3].

[37] *NOV* at [3].

[38] *NOV* at [17(a)].

[39] *NOV* at [17(b)].

[40] *NOV* at [6].

[41] *NOV* at [53].

[42] *NOV* at [76].

[43] *NOV* at [95].

[44] *CNX* at [1].

[45] *CNX* at [12].

[46] *CNX* at [31].

[47] *CNX* at [31].

[48] *CNX* at [52].

[49] https://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-conditional-fee-agreements-in-singapore.

[50] https://www.mlaw.gov.sg/news/parliamentary-speeches/2022-01-12-second-reading-speech-by-second-minister-for-law-edwin-tong-on-legal-profession-amendment-bill.

[51] Section 115A of the Act defines a 'conditional fee agreement' as 'an agreement relating to the whole or any part of the remuneration and costs in respect of contentious proceedings (whether relating to proceedings in Singapore or any state or territory outside Singapore) conducted by a solicitor, a foreign lawyer or a law practice entity, which provides for the remuneration and costs or any part of them to be payable only in specified circumstances, and may provide for an uplift fee.'

[52] Section 115A of the Act defines an 'uplift fee' as 'the remuneration or costs which the agreement provides are payable in specified circumstances which are higher than the remuneration or costs that would otherwise be payable if there were no conditional fee agreement'.

[53] https://arbitrationasia.rajahtannasia.com/draft-law-potentially-lifts-prohibition-on-ad-hoc-arbitrations-in-china/.

[54] https://arbitrationasia.rajahtannasia.com/expedited-procedure-emergency-arbitrators-new-ncac-rules-2021/.

[55] https://arbitrationasia.rajahtannasia.com/what-you-need-to-know-about-the-aiac-arbitration-rules-2021/.

[56] http://arbitrationblog.kluwerarbitration.com/2021/05/23/indias-arbitration-and-conciliation-amendment-act-2021-a-wolf-in-sheeps-clothing/.

[57] https://egazette.nic.in/WriteReadData/2021/225832.pdf.

[58] *PASL* at [4.1].

[59] *PASL* at [12]-[13].

[60] *PASL* at [59].

[61] *PASL* at [60].

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