RECENT REGIONAL DEVELOPMENTS IN SOUTH EAST ASIA

27 July 2018 | Global
Legal Briefings

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.

First published in Inside Arbitration, Issue 6

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 ("**SIArb**") Working Group launching the SIArb 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 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 SIArb'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 SIArb'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 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 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 ("**HKIAC**"), 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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If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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