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Asia Pacific Arbitration Roundup 2019

Welcome to the first edition of our Asia Pacific Arbitration Roundup.

2019 was an eventful and active year for international arbitration. Various notable cases were decided demonstrating a generally consistent pro-arbitration approach across the Asia Pacific region. Governments and arbitration institutions continued to innovate and seek changes to their rules and policies for bigger market shares.

In this new series, we highlight some of the major developments for international arbitration across Asia Pacific in 2019.

We welcome any questions or feedback.

AUSTRALIA
A liberal pro-arbitration approach was affirmed by the High Court in *Rinehart v Hancock Prospecting Pty*, which ruled that disputes about the validity of settlement deeds were disputes "under" those deeds and therefore were subject to the arbitration clause.

In *Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain*, the Federal Court ruled that sovereign immunity does not deprive the court of its subject matter jurisdiction to make procedural orders in enforcement proceedings.

The Western Australia Supreme Court raised the bar for establishing urgency under an "urgent relief" carve out to arbitration agreement in *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation*.

Click here to know more.

CHINA
The first Judgments of the China International Commercial Courts (CICC) were published in September 2019, in which the CICC confirmed its jurisdiction to hear disputes on the validity of arbitration agreements without the need to gain approval from the tiered reporting system applied to the lower courts.

The new “Framework Plan for the New Lingang Area of China (Shanghai) Pilot Free Trade Zone” now allows foreign administered arbitration in Lingang, Shanghai.

The Beijing Arbitration Commission and Beijing International Arbitration Centre released new draft international investment arbitration rules for public comment.

Various decisions and interpretations were issued by the Supreme People’s Court relating to arbitration.

Click here to know more.

HONG KONG
The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region came into force, allowing parties to Hong Kong arbitrations to seek interim measures in Chinese courts.

The principles of anti-suit injunctions were confirmed by the Hong Kong Court, which reaffirmed its robust pro-arbitration approach in *Dickson Valora Group (Holdings) Co Ltd v Fan Ji Qian*, *Giorgio Armani SpA v Elan Cloths Co Ltd*, *AIG Insurance Hong Kong Limited v Lynn McCullough* and *William McCullough* and *GM1 v KC*.

The Court of Appeal ruled on arbitration clauses in winding-up proceedings in light of the controversial ruling in *Lasmos Limited v Southwest Pacific Bauxite (HK) Limited*.

Click here to know more.
JAPAN

A new bill has been introduced to expand the scope for foreign lawyers to conduct international arbitration in Japan.

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NEW ZEALAND
Two amendments were made to the Arbitration Act 1996 to align with recent developments in domestic and international case law and arbitration practice.

In Wai-iti Developments Ltd v General Distributors, the Court favoured the prima facie review test over a ‘full review’ approach when considering whether to grant a stay.

Click here to know more.

SINGAPORE
The Court of Appeal confirmed the principles on deciding the proper law of an arbitration agreement in BNA v BNB and another.

The Court of Appeal considered the preclusive effect of Article 16(3) of the UNCITRAL Model Law in Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd.

SOUTH KOREA
The Supreme Court of Korea reaffirmed the high bar for setting aside arbitral awards in two cases.

The Korean Commercial Arbitration Board (KCAB) continued its outward expansion, officially opening its overseas liaison office in Hanoi, Vietnam.

KCAB prepares to release final video conferencing protocol following the release of the Draft Protocol in late 2018.

Click here to know more.

THAILAND
In April 2019, the National Legislative Assembly amended the Thai Arbitration Act, formally allowing foreign arbitrators and counsel to perform their duties as an arbitrator or a representative of the disputing parties in arbitral proceedings in Thailand.

The Supreme Administrative Court overturned the ruling of the Central Administrative Court in relation to the Arbitration Award in the Hopewell Project Dispute.

Click here to know more.

Regional contacts

Ernest Yang
Partner, Hong Kong
Co-Head of International Arbitration, Asia Pacific
+852 2103 0768
ernest.yang@dlapiper.com

Gitanjali Bajaj
Partner, Sydney
Co-Head of International Arbitration, Asia Pacific
+61 2 9286 8440
gitanjali.bajaj@dlapiper.com
Australia

Major developments and cases in Australia

Gitanjali Bajaj, Corey Steel, Samuel Cho, Erin Gourlay

In this article, we discuss three significant arbitration-related cases decided by Australian courts in 2019 namely, Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13, Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain [2019] FCA 1220 and Duro Felguera Australia Pty Ltd v Samsung C&T Corporation [2019] WASC 90.

Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13

High Court of Australia affirms liberal pro-arbitration approach and the importance of arbitration in confidential disputes

The case concerned a dispute raised by Ms Bianca Rinehart and Mr John Hancock (as beneficiaries of trusts administered by their mother Mrs Gina Rinehart and others) in relation to the trustees’ conduct which was alleged to have diminished the assets of the trusts.

The beneficiaries commenced proceedings in the Federal Court of Australia in relation to the alleged misconduct, and Mrs Rinehart sought to have the proceedings referred to arbitration on the basis that the dispute was the subject of an arbitration agreement pursuant to s 8(1) of the Commercial Arbitration Act 2010 (NSW) (Act). Mrs Rinehart relied upon a number of settlement deeds entered into between the parties (Deeds) which came into existence against the background of public threats of litigation by Mr Hancock about Mrs Rinehart’s wrongdoing. Each of the Deeds contained an arbitral clause providing that any disputes “under” the Deeds were to be resolved in a confidential arbitration.

The beneficiaries asserted that they were not bound by the terms of the Deeds because their assent to them was procured by misconduct on the part of Mrs Rinehart. The primary judge held that disputes about the validity of the Deeds were not disputes “under” the Deeds and therefore were not covered by the arbitral clause. The Full Court and the High Court disagreed with this interpretation.

Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain [2019] FCA 1220

Australian Court confirms that a foreign State’s claim for sovereign immunity does not deprive the Court of its subject matter jurisdiction to make procedural orders in enforcement proceedings

In April 2019, Infrastructure Services Luxembourg S.A.R.L (ISL) sought orders pursuant to s 35(4) of the International Arbitration Act 1974 (Cth) (IAA) for leave to enforce an award of the International Centre for

Settlement of Investment Disputes (ICSID) against Spain. The award was for payment of EUR112m (subsequently reduced to EUR101m) as compensation for Spain’s breach of the Energy Charter Treaty (ECT) by failing to accord fair and equitable treatment to the claimants who had renewable energy investments in Spain.

In May 2019, before any substantive steps were taken in the Federal Court proceedings, Spain filed an application with ICSID for annulment of the award and requested the Secretary-General of ICSID to provisionally stay its enforcement until the application was determined. Spain also separately filed a conditional appearance in the Federal Court for the purpose of asserting immunity from the jurisdiction of the Australian courts in accordance with section 10(7) of the Foreign State Immunities Act 1985 (Cth) (FSIA).

The Secretary-General provisionally stayed enforcement of the award on 23 May 2019.

In July 2019, in order to comply with the ICSID provisional stay, ISL requested a temporary stay of its own enforcement application in the Federal Court. In an unusual twist, Spain opposed ISL’s stay application, contending that the ICSID provisional stay did not impact the Federal Court’s ability to determine its claim for foreign immunity. Spain submitted on the papers (as it subsequently did not attend the hearing) that the application to stay the enforcement proceedings was an impermissible attempt to implead a foreign State in circumstances where a conditional appearance had been filed by that State raising the immunity issue, which was listed for hearing.
The Federal Court first dealt with the perceived conflict in the ICSID Convention between the operation of an automatic provisional stay of enforcement under Art 52(5) and Australia’s obligation as a contracting State to recognise and enforce an arbitral award under Article 54(1). The Court resolved the tension by finding that the enforcement obligations under Article 54(1) are subject to the provisions of Art 52(4), with the result that the automatic provisional stay of enforcement also suspended Australia’s enforcement obligations under Art 54(1).

The Court ordered the enforcement proceedings to be stayed until further order, holding that the stay order pending determination of the immunity issue would not implead Spain in anyway. The Court reached this conclusion by applying its “subject matter jurisdiction” to determine procedural issues such as the stay application, which is distinct from the question of jurisdiction over a foreign State.

_Duro Felguera Australia Pty Ltd v Samsung C&T Corporation [2019] WASC 90_

The bar has been raised for establishing urgency under an “urgent relief” carve out to arbitration agreement.

_Duro Felguera (DF) _brought an interlocutory application to reinstate security converted by Samsung C&T Corporation’s (Samsung) comprising a performance bond provided by DF under a subcontract to perform some works for the Roy Hill iron ore project. The parties’ dispute in relation to the underlying subcontract under which the bond was given and called upon had already proceeded to arbitration.

Samsung sought an order under s 7(2) of the International Arbitration Act 1974 (Cth) that the court proceedings be stayed and the matter be referred to arbitration. DF argued that the proceedings should not be stayed because its claims for urgent declaratory relief were outside the scope of the arbitration agreement and, further, the matters for determination in the court proceedings were not matters capable of settlement by arbitration.

The contract contained a carve out for summary relief, in the following terms:

> “Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under the Subcontract or to seek injunctive or urgent declaratory relief.”

The question for the Court was whether or not DF’s application for declaratory relief seeking re-instatement of the bond fell within the terms of the carve out and therefore were outside the scope of the arbitration agreement. The Court held that DF’s claims for declaratory relief were not urgent.

First, there was no risk of the money being paid to or used by Samsung, or otherwise put beyond the reach of DF, as the money was being held in the trust account of Samsung’s solicitors who had confirmed that Samsung would only deal with the funds if the matter was finally determined or settled. Secondly, there was no evidence that DF would suffer any prejudice by not receiving the money, if it was entitled to it, until a court judgment or arbitral award was issued, other than the usual prejudice which a party suffers from a delay in receiving money to which it is entitled. Thirdly, the declaratory relief sought by DF was not urgent in the sense of requiring immediate attention.

The Court also considered whether DF’s claim that Samsung had breached its undertaking not to call on the performance bond over a certain amount could be resolved by arbitration. The Court agreed with DF that whether or not Samsung had breached its undertaking was not a dispute falling within the arbitration agreement. However, the Court concluded that the substantive claims of the proceeding were subject to the arbitration agreement and the non-arbitral claim was an ancillary claim. In the exercise of its discretion to control its own proceedings, the Court stayed the whole of the court proceedings pending the outcome of the arbitration.
China

Major developments and cases in China

Ernest Yang, Xiaoshan Chen, Queenie Chan

In this article, we summarise some of the major arbitration-related developments and cases decided in 2019 in China.

Foreign administered arbitration allowed in Lingang, Shanghai

On 27 July 2019, the State Council of the People’s Republic of China issued the “Framework Plan for the New Lingang Area of China (Shanghai) Pilot Free Trade Zone”. According to Article 4 of the Framework Plan, “well-known” overseas arbitral and dispute resolution institutions will be allowed to establish business divisions in the Lingang Free Trade Zone in Shanghai to conduct arbitration with respect to civil and commercial disputes arising in international commerce, maritime, investment and other fields and to support and safeguard applications for interim measures applications made before and during arbitrations.

Before the Framework Plan, there were no express laws allowing or prohibiting foreign arbitration institutions to administer arbitrations in China. However, Article 10 of the PRC Arbitration Law requires that arbitration commissions must be registered with the judicial administrative department of a Chinese province, autonomous region or municipality directly under the Central Government.

Although in 2013, the Supreme People’s Court had upheld the validity of an arbitration agreement providing for ICC arbitration in Shanghai in the case of Longlide Packaging Printing Co Ltd v BP Agnati S.r.l., given the non-binding nature of the ruling, there is still considerable uncertainty on the validity of an arbitration clause providing for a China – seated arbitration to be administered by a foreign arbitration institution.

On 8 November 2019, the Shanghai Municipal Bureau of Justice announced the “Administrative Measures for Business Offices Established by Foreign Arbitration Institutions in Lingang Area of China (Shanghai) Pilot Free Trade Zone” detailing requirements for the establishment and registration of business offices in Lingang, Shanghai for foreign arbitration institutions. The Administrative Measures came into force on 1 January 2020.

First Judgments published by the China International Commercial Courts

In June 2018, the Supreme People’s Court of China launched the China International Commercial Courts (CICC) for dealing with commercial disputes arising from projects along the Belt and Road Initiatives.

The CICC published its first three judgments in September 2019.

The first three judgments involve the same transaction concerning the sale and purchase of the shares of a BVI company, Newpower Enterprise Inc., a worldwide distributor of electronic components and finished goods. The purchaser and the seller had engaged in extensive negotiations of the asset purchase agreement and the debt settlement agreement for the transaction. The agreements provided that disputes shall be submitted to arbitration administered by the Shenzhen Court of International Arbitration. The seller
alleged that the purchaser had refused to complete the approval procedures for foreign investments and foreign exchange and therefore issued a notice to the purchaser to terminate the transaction and no agreement was signed between the parties.

The purchaser subsequently commenced arbitration against the seller in the Shenzhen Court of International Arbitration and the seller applied to the Intermediate People’s Court of Shenzhen for a confirmation that there was no valid arbitration agreement between the parties.

According to the Provisions of the Supreme People’s Court on Several Issues Concerning Deciding Cases of Arbitration-Related Judicial Review, the Intermediate People’s Court was required to report and request approval from the Higher People’s Court within the jurisdiction when it is to determine the invalidity of an arbitration agreement of foreign-related or Hong Kong, Macau or Taiwan-related arbitration cases. The relevant higher people’s court shall in turn report and request approval from the Supreme People’s Court.

However, the CICC confirms its jurisdiction to hear disputes on the validity of arbitration agreements in these cases directly and to avoid the delay caused by the tiered reporting system involving the lower courts.

In its judgments, CICC found that the parties had in fact consented to the agreement to arbitrate even though the underlying contracts had never been signed. The CICC further confirmed that an arbitration agreement is severable and its existence and validity shall be considered separately from the underlying contract.

It is worth noting that the two judges on the collegial panel also “listened carefully and paid close attention to the lawyers’ arguments citing international law, foreign laws and case precedents as well as the reference materials in English that they submitted”.

The approach taken by the CICC in these judgments is a welcomed development in support of arbitrations especially for sino-foreign disputes on international/belt and road projects, and provided a more efficient platform to resolve disputes on the validity of arbitration agreements.
Beijing Arbitration Commission/Beijing International Arbitration Centre arbitration rules

In February 2019, the Beijing Arbitration Commission/Beijing International Arbitration Centre published its draft international investment arbitration rules (IIA Rules) for public comment.

The draft IIA Rules introduce a number of innovative aspects aiming to improve and distinguish from existing investment arbitration rules and practices.

For instance, the draft IIA Rules expressly allow appeal against arbitral awards and specified a set of specialized rules for appeal proceedings. The grounds of appeal include:

1. errors in the interpretation and/or application of rules of law;
2. manifest or material error in the appreciation of facts; or
3. the arbitral tribunal lacks jurisdiction or exceeds its power.

To improve efficiency and costs of arbitration, the draft IIA Rules require tribunals to render arbitral awards within 24 months after the constitution of the tribunal and also provides an indicative timetable with suggested timeline and rules for expedited procedures.

Considering the public interest involved in investment disputes, the draft IIA Rules also provide for compulsory publication of certain arbitration documents such as the notice of arbitration, jurisdictional decisions and the award but also gives parties the autonomy to decide the extent to which the UNCITRAL Transparency Rules should apply to the arbitration.

Separately, the Beijing Arbitration Commission also updated its arbitration rules and fee schedule which took effect from 1 September 2019.

Various decisions and interpretations issued by the Supreme People’s Court

In 2019, the Supreme People's Court issued various decisions and interpretations which have significant impact on arbitrations in China. These include:

• The "Provisions (III) of the Supreme People's Court on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China" issued on 27 March 2019 which expressly provides for the right of the administrator in a bankruptcy case to apply to set aside an arbitral award.

• The "Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Agreement Cases" issued on 27 November 2019 which clarified and confirmed that arbitration agreements in administrative agreements shall be null and void.

• On 14 November 2019, the Supreme People's Court issued the “Minutes of the National Courts' Civil and Commercial Trial Work Conference” and confirmed, among other things, that an arbitration agreement reached between the insured and a third party is binding on an insurer exercising its right of subrogation.

Interim measures from PRC Court available for Hong Kong arbitration

On 1 October 2019, the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the Arrangement) came into force. This major development provides a means for parties to an arbitration seated in Hong Kong to seek interim measures from the Mainland Chinese courts. The Arrangement also provides a means for parties to an arbitration seated in the Mainland China to seek interim measures from the courts in Hong Kong.

For further details, please follow this link.
Hong Kong

Major developments and cases in Hong Kong

Ernest Yang, Queenie Chan

In this article, we summarize some of the major arbitration-related developments and cases decided in 2019 in Hong Kong.

Interim measures from PRC Court available for Hong Kong arbitration

On 1 October 2019, the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the Arrangement) came into force. This major development provides a means for parties to an arbitration seated in Hong Kong to seek interim measures from the Mainland Chinese courts.

Under the Arrangement, parties to arbitrations that fulfil the following two criteria will be able to apply to the PRC courts for interim measures in aid of their arbitrations:

• the arbitration is seated in Hong Kong; and
• the arbitration is administered by one of the institutions that fulfil the qualifications set out under the Arrangement.

The following six institutions have been designated as qualifying institutions:

• Hong Kong International Arbitration Centre;
• China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre;
• International Court of Arbitration of the International Chamber of Commerce - Asia Office;
• Hong Kong Maritime Arbitration Group;
• South China International Arbitration Centre (HK); and
• eBRAM International Online Dispute Resolution Centre.

Parties can apply for (i) asset preservation order; (ii) evidence preservation order; and/or (iii) conduct preservation order either before the arbitration has commenced or during the course of the arbitration.

As a condition for granting the interim measure, the PRC courts may require the applicant to provide security.

Applications for interim measures in aid of arbitrations seated in Hong Kong may be made regardless of whether the arbitration commenced before or after the Arrangement came into force.

The interim measure may be sought before the arbitration is commenced, but the PRC court will discharge the interim measure if the applicant cannot show that a qualifying institution is administering the arbitration within 30 days of the grant of the interim measure.

One unique feature is that the Arrangement provides that, if the interim measure is sought during an arbitration, application for interim measures are to be submitted to the appropriate mainland Chinese court (i.e. the Intermediate People’s Court where the assets, evidence or the respondent is located) through the institution administering the arbitration. However, the Supreme People’s Court has issued a memorandum recognizing that such a procedure would not be conducive to the urgent nature of interim measures applications. Hence, parties to Hong Kong seated arbitration should be allowed to file their applications directly to the mainland Chinese court and let the mainland Chinese court confirm the authenticity of the application with the relevant institution.

As of December 2019, the HKIAC had received eleven applications and at least four of the applications for preservation of assets have already been granted.

Anti-suit injunctions

In 2019, we have seen a handful of applications made to the Hong Kong Court for anti-suit injunctions based on breaches of arbitration clauses.

In Dickson Valora Group (Holdings) Co Ltd v Fan Ji Qian [2019] HKCFI 482, an anti-suit injunction was granted to restrain proceedings commenced in the Shenzhen Qianhai Cooperation Zone People’s Court. In this case, the Hong Kong Court granted the injunction even though the Qianhai Court had rejected an earlier jurisdictional challenge. The Court further noted that it will not recognize and enforce a foreign judgment made
in breach of a dispute resolution agreement pursuant to section 3 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46).

In *Giorgio Armani SpA v Elan Clothes Co Ltd* [2019] HKCFI 530; [2019] HKCFI 2983, an anti-suit injunction was granted to restrain proceedings commenced in Shandong, China. In this case, it was held that the scope of an arbitration agreement which was expressed to be made by “a party and its affiliates” can cover any disputes arising from the agreement which involves the party’s affiliates even if the affiliates concerned had not signed the agreement. The Court has further confirmed its jurisdiction to grant anti-suit injunction even if the arbitration tribunal is still deciding on applications to join the parties in arbitration.

In *AIG Insurance Hong Kong Limited v Lynn McCullough and William McCullough* [2019] HKCFI 1649, an anti-suit injunction was granted to restrain proceedings commenced in the US District Court for the Southern District of Florida, Miami Division. It was held that if a foreign proceeding was in substance a claim to enforce a party’s obligations under a contract, the party to the contract had the right to prevent a claim pursued against it pursued otherwise than by the contractually agreed mode no matter whether the enforcing party is a party to the arbitration agreement in the contract or not.

In *GM1 v KC* [2019] HKCFI 2793, an anti-suit injunction was granted to restrain proceedings commenced in Suzhou, China. In this case, it was held that the fact that (i) the foreign court may insist on its own jurisdiction; (ii) it may not be possible to discontinue or withdraw the foreign proceedings after it has been accepted; and (iii) the arbitration clause is subject to disputes were not grounds to refuse an anti-suit injunction.

These cases all reaffirmed the robust pro-arbitration approach adopted by the Hong Kong Court and the principle that for cases between parties to an arbitration agreement, an anti-suit injunction will ordinarily be granted to restrain a party from suing in a non-contractual forum unless there are strong reasons to the contrary.

**Arbitration clauses in winding-up proceedings**


In *Lasmos*, previous authorities were substantially departed from and it was held that, save for exceptional cases, a creditor’s winding-up petition should “generally be dismissed” where three requirements are met:

1. if a company disputes the debt relied on by the petitioner;
2. the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and
3. the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process and files an affirmation according to the winding up rules.

Before *Lasmos*, the debtor had to show that the petitioning debt was bona fide disputed on substantial grounds to dismiss an insolvency petition. The effect of this new approach is that the company is entitled to have the petition dismissed where there is an arbitration clause as long as the three requirements are met.

In both *But Ka Chon* and *Sit Kwong Lam*, the Court of Appeal did not find it appropriate to decide whether the *Lasmos* approach is correct because the debtor had not taken any steps to commence arbitration and the third requirement under the *Lasmos* approach was therefore not met. In *Sit Kwong Lam*, the Court also found that the arbitration agreement had not been incorporated in the contract in dispute.

However, the Court of Appeal expressed reservations on the *Lasmos* approach in both judgments:
In But Ka Chon, the Court observed that:

1. The jurisdiction of the court to order a stay is founded on the discretion of the court and therefore it is questionable whether a firm rule to exercise the discretion in one way would be right and consistent with the legislative intent.

2. The Eastern Caribbean Court of Appeal had already declined to adopt the same approach followed in Lasmos and it is doubtful whether it is sufficient to show only that the debt was not admitted instead of a bona fide dispute on substantial ground.

In Sit Kwong Lam, to prevent opportunistic attempts to invoke the Lasmos approach in the future, the Court emphasized that it was not necessary to commence arbitration for the Court to dismiss of stay a winding-up petition – all that was required of the debtor was that they had taken the steps required under the arbitration clause to commence the process of arbitration. However, the genuine intention to arbitrate must be demonstrated in a filed affirmation.

Third party funding
On 1 February 2019, the key provisions (save for those related to third party funding of mediation) of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 permitting third party funding in arbitration in Hong Kong came into full operation.
Japan

**Major developments and cases in Japan**

Takahiro Nonaka, Yuya Aoki, Queenie Chan

In this article, we discuss some of the major arbitration-related developments in 2019 in Japan.

**New JCAA arbitration rules**

On 1 January 2019, the Japan Commercial Arbitration Association (JCAA) amended its Administrative Rules and Commercial Rules and introduced a new set of Interactive Rules.

The Administrative Rules are designed to provide the “minimum essentials” to allow the UNCITRAL Arbitration Rules to be administered effectively by the JCAA. The most significant update concerns the remuneration of arbitrators which is raised to USD500 - USD1,500, putting the rates comparable to other institutions in the region.

The changes to the commercial arbitration rules include:

- **Prescribing requirements to investigate potential conflict of interests** – Arbitrators must conduct a reasonable investigation into anything that might affect their impartiality and independence.

- **Detailed rules on Tribunal Secretary** – Arbitrators cannot delegate decision-making to tribunal secretaries and can only appoint tribunal secretaries if the parties consent.

- **Rejection of Party’s Untimely Submission of Statement or Evidence** – The arbitral tribunal may reject a party’s submission of additional statements or evidence if such submission is untimely.

- **No dissenting opinions** may be disclosed to avoid potential challenges and additional costs.

- **Increased scope for expedited procedure** – The expedited procedure will now be available to cover dispute worth up to JPY50m. The procedure will in principle be conducted based on the documents and the arbitrators must aim to issue an award within three months of appointment in an expedited arbitration.

- **Revising the arbitrator and administrative fees** – The remuneration for arbitrators will be fixed at an hourly rate of JPY50,000 which is subject to a cap depending on the value of dispute and reduction of hourly rates after a period of time spent on the case. The administrative fees are revised to JPY500,000 - JPY25m, depending on the value of the dispute.

The new Interactive Rules hence advocate a new structure under which the arbitral tribunal is obliged to communicate to the parties its temporary views regarding the case. The arbitral tribunal will be obliged to present twice during the course of proceedings.

- **The tribunal is required to provide a document summarizing the parties’ positions on the factual and legal grounds of the claim and defences and the factual and legal issues that the arbitral tribunal tentatively ascertains arising from the positions.**

- **Before making a decision on whether a hearing is necessary, the tribunal must also set out the factual and legal issues it considers important, its preliminary views and any other important matters and again allow for parties to comment.**

A fixed system of arbitrator’s remuneration as opposed to fees based on hourly rates is also adopted.

**Government adopted bill to expand scope for foreign lawyers to conduct international arbitration in Japan**

On 18 October 2019, the Japanese cabinet adopted a bill to amend the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Foreign Lawyers Act). As of February 2020, the amendment is still under discussion in the Japanese parliament.
The amendments expand the scope for foreign lawyers to conduct international arbitration in Japan. Currently, a registered foreign lawyer in Japan is only allowed to represent a party in international arbitration which is seated in Japan if all or part of the parties are persons who have an address or a principal or head office in a foreign jurisdiction. As such, a foreign lawyer may not be able to act in an arbitration even if the parties are Japanese subsidiaries of foreign entities. The amendments now expressly allow foreign lawyers to represent Japanese subsidiaries where 50 per cent of the voting shares or equity interest are owned by foreign entities.

Furthermore, in line with the Japanese government’s recent initiative to boost international arbitration in Japan, an amendment to the existing laws relaxing the registration requirement for foreign lawyers and allowing foreign lawyers to set up joint corporation with local partners is also under discussion in the Japanese parliament.
New Zealand

Major developments and cases in New Zealand

Iain Thain, In Sook Scorgie, Katherine Nordmeyer

In this article, we discuss some of the major arbitration-related developments in 2019 in New Zealand.

Arbitration Amendment Act 2019

New Zealand’s Arbitration Act 1996 (Act) was enacted to encourage the use of arbitration and promote consistency between international arbitral regimes, through the adoption of the UNCITRAL Model Law. Recent developments in domestic and international case law and arbitration practice prompted reforms to the Act in 2019, including two that affect New Zealand’s international arbitration regime.

First, article 16(4) was added to Schedule 1 of the Act, which applies to international arbitrations seated in New Zealand. This provides that if a party fails to pursue a challenge to an arbitral tribunal’s jurisdiction within a timely manner, it waives its rights to later object to that tribunal’s ruling as to its jurisdiction. This amendment was intended to prevent the adoption of the Singapore Court of Appeal decision in Astro v Lippo. In that case, the unsuccessful party to an arbitral award successfully challenged the award for lack of jurisdiction, although it had not earlier sought a court ruling on jurisdiction. This reform is notable as a departure from overseas jurisprudence and a restriction on the choice of remedies doctrine.

The second change was prompted by Carr v Gallaway Cook Allan. This was a Supreme Court decision where the arbitration agreement allowed for appeals of fact. Appeals on questions of law are permitted by Schedule 2 of the Act (additional rules that for an international arbitration apply only by agreement), but appeals of fact are prohibited. The majority of the Court set aside the award. However, the reasoning of the minority highlighted a discrepancy in the Act. Where a tribunal departed from agreed procedure to avoid infringing Schedule 1, that award could not be set aside based only on the departure. But where the departure was to avoid infringing Schedule 2, the award could be set aside. Following the amendment, awards cannot be set aside based on the tribunal’s departure from agreed procedure, where this was only to meet the requirements of the Act (including both Schedules where applicable).

A further reform proposal is of interest because it was not enacted. This was a proposed presumption of confidentiality for court proceedings concerning arbitration. This suggestion demonstrates that New Zealand is looking to overseas jurisdictions such as Singapore and Hong Kong in attempts to meet the market for international arbitrations. However, it was considered that the drawbacks of restricting open justice would not be outweighed by the benefits of attracting more international arbitrations. Given the policy interests, it is unlikely that this issue will be revisited soon. Instead, parties concerned about confidentiality may need to agree to exclude rights of appeal to the Court or agree to appeal only in a further arbitral setting.

Issues of Jurisdiction: Case update on the ‘Prima Facie’ review test

An arbitral tribunal (including one convened in respect of an international arbitration) may rule on its own jurisdiction pursuant to New Zealand’s Arbitration Act 1996 (Act). Although the court retains the power to determine whether a claim is covered by an arbitration clause in proceedings before it, article 8, Schedule 1, of the Act provides jurisdiction for a court to grant a stay of those proceedings.

However, the appropriate approach to be taken by a court when determining whether to grant such a stay has been of some debate. New Zealand courts have historically adopted the ‘full review’ approach, ruling on jurisdiction challenges to arbitration agreements in detail. However, the recent trend favours the ‘prima facie review’ approach, where to grant a stay the court need only determine that there is a prima facie case that the arbitration clause applies. Recent cases suggest that the debate is closing off, with courts favouring the facilitation of party autonomy and limited court intervention.

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1 PT First Media TBK v Astro Nusantara International BV [2013] SGCA 57.
2 Carr v Gallaway Cook Allan (2014) NZSC 75.
3 For example, AMINZ provides a confidential Arbitration Appeals Tribunal as an alternative to High Court proceedings.
4 Article 16, Schedule 1.
In Wai-iti Developments Limited v General Distributors Limited,\(^6\) the Court was asked to follow Canadian precedent in Dell Computers Corp v Union des Consommateurs\(^7\) to undertake a full review in circumstances where the challenge to the arbitrator’s jurisdiction was based solely on a question of law or, for questions of mixed fact and law, the questions of fact require only superficial consideration of the documentary evidence in the record. However, the Court declined to conduct a full review.

The Court was reluctant to depart from the trend favouring ‘prima facie review’, noting that the arbitration clause provided for disputes to be resolved by two arbitrators or their umpire, not by one judge. Although the Court also considered that it was not clear that the questions arising in this case were solely questions of law,\(^8\) reference was made to the importance of party autonomy under the Act, even where issues of contractual interpretation may raise questions of law.

\(^6\) [2019] NZHC 1656.
\(^7\) [2007] 2 SCR 801.
\(^8\) We note that on the facts it appeared open to the Court to find otherwise.
Major developments and cases in Singapore

Matthew Shaw

In this article, we discuss three notable arbitration-related cases decided in Singapore, namely, BNA v BNB and another [2019] SGCA 84; Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd [2019] 2 SLR 131; and Sun Travels & Tours Pvt Ltd v Hilton Manage (Maldives) Pvt Ltd [2019] 1 SLR 732.

BNA v BNB and another [2019] SGCA 84

This case considered the proper law of an arbitration agreement.

A dispute arose between the appellant (BNA), a PRC company, the first respondent (BNB), a Korean company, and the second respondent (BNC), a PRC company, in connection with a so-called Takeout Agreement for the sale of industrial gasses. Under the Takeout Agreement, BNA was buyer, BNB was seller, and BNC had assumed BNB's obligations. The Takeout Agreement was stated to be: “governed by the laws of the People's Republic of China”. It also provided that all disputes “shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai…”.

BNB and BNC commenced arbitration against BNA, following which the SIAC appointed a three-member tribunal. BNA disputed jurisdiction, contending that the law of the arbitration agreement was PRC law (not Singapore law), the seat of arbitration was Shanghai (not Singapore), and that, as the dispute was a domestic PRC matter, the SIAC, as foreign arbitral institution, was prohibited from administering the arbitration. Contrary to BNA's contentions, the tribunal decided by majority that it did have jurisdiction, that Singapore was the seat of arbitration, and that Singapore law was the proper law of the arbitration agreement (notwithstanding that PRC law governed the Takeout Agreement).

BNA applied to the Singapore High Court under s 10(3) of the International Arbitration Act seeking a declaration that the tribunal lacked jurisdiction. The High Court applied the three-stage framework for determining the proper law of an arbitration agreement set out in in BCY v BCZ [2017] 3 SLR 357 (BCY v BCZ), which involves, first, consideration of the parties' express choice of law in relation to the arbitration agreement (if any), secondly, their implied choice, which usually will be taken to be the same law as governs the rest of the contract unless there are countervailing considerations, and thirdly, if there is no implied choice, a “closest connection” test will be applied. This three-stage test is in line with the English decision in Sulamerica Cia Nacional de Seguros S.A. v Enesa Engenharia S.A. [2012] EWCA Civ 638 (Sulamerica).

The High Court found that the parties had not expressly chosen a law to govern the arbitration agreement, but they had chosen Singapore as the seat of arbitration by virtue of their choice of the SIAC (which provided in Rule 18.1 of its 2013 Rules for Singapore to be the seat absent the parties' choice). This choice of Singapore as the seat displaced what otherwise would be taken as the parties' implied choice that PRC law would govern the arbitration agreement. The tribunal therefore had jurisdiction. BNA appealed.

First, applying Sulamerica and endorsing it at the Court of Appeal level for the first time, the Court of Appeal found that the parties had not made an express choice of law governing the arbitration agreement, as choosing the law that governs the contract does not amount to such a choice. The choice of PRC law to govern the Takeout Agreement therefore was not decisive. As to the parties' implied choice of law governing the arbitration agreement, the Court of Appeal found that, in accordance with the presumption in the second limb of Sulamerica, this was the same as the proper law of the contract, i.e., PRC law.

Secondly, the words “arbitration in Shanghai” in the Takeout Agreement should be given their natural and ordinary meaning, which was to identify Shanghai as the seat of arbitration – not only the venue or physical location (as the High Court had found). Accordingly, if there is only one geographical indicator in an arbitration agreement, this should be read as relating to the parties' choice of seat. The Court of Appeal went on to find that the fact that the arbitration agreement might be invalid under PRC law if Shanghai was the seat was not a reason to depart from the natural meaning of the words “in Shanghai”.

Thirdly, and significantly, the Court of Appeal found that the invalidity of the arbitration agreement under PRC law was not a reason to avoid concluding
that PRC law was impliedly the proper law of the arbitration agreement – at least where (as here) there was no evidence that the parties had considered the invalidating effect of PRC law. This is a departure from the approach in Sulamerica, in which the parties are unlikely to be deemed impliedly to have chosen a system of law under which the arbitration agreement would be invalid.

Finally, on the matter of invalidity, the Court of Appeal noted that the parties' manifest intention to arbitrate (reflected in the Takeout Agreement) "is not to be given effect at all costs". It considered that the parties had not only chosen to arbitrate – but to do so in a certain way, in a certain place, and under the administration of a certain institution. If the result of a proper construction of their agreement is the conclusion that it would be unworkable then the parties must live with that consequence.

Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd [2019] 2 SLR 131
This case considered the scope of the preclusive effect of Article 16(3) of the UNCITRAL Model Law.

The appellant (RALL) and the respondent (AGMS) were both Sri Lankan companies that provided maritime security services. They entered into a Master Agreement that contained an arbitration agreement for disputes to be resolved in Singapore under the Rules of the SIAC. AGMS commenced arbitration against RALL in April 2015 accusing it of failing to comply with the terms of the Master Agreement. RALL did not respond to AGMS’s notice of arbitration or nominate an arbitrator. The tribunal was constituted without RALL’s involvement.
In August 2015, RALL wrote to the SIAC stating that the dispute included matters beyond the scope of submission to arbitration and that the arbitration was in conflict with Sri Lankan public policy. Later in November 2015, RALL informed the SIAC that the parties had reached a settlement and there was no need for the arbitration to proceed. The settlement was contained in a memorandum of understanding (MOU). AGMS disagreed with this and urged that the arbitration should continue. The tribunal held a preliminary meeting and decided (by majority) to issue an order that the arbitration should proceed. RALL chose not to attend this meeting and continued not to participate in the arbitration. The tribunal then heard the rest of the case and issued an award in favour of AGMS. RALL applied to the Singapore High Court to set aside the award on the grounds that the tribunal lacked jurisdiction and that the arbitration was contrary to Sri Lankan public policy. The High Court dismissed the application and RALL appealed.

The Court of Appeal found on the facts that Article 16(3) of the UNCITRAL Model Law and s 10(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (IAA) were engaged. These provisions stated that if a tribunal ruled on a preliminary question of its own jurisdiction, such a ruling could be appealed to the Singapore High Court within 30 days. RALL had objected to the tribunal’s jurisdiction in its two items of correspondence to the SIAC. There did not need to be a formal objection or plea by a party for Article 16(2) of the Model Law and s 10(3) of the IAA to be engaged. The tribunal’s interim order was a preliminary ruling on jurisdiction and thus was appealable.

The Court of Appeal also found that RALL’s refusal to participate in the arbitration on jurisdictional grounds did not deprive it of its rights to object to jurisdiction later. (Writing letters to SIAC seeking or providing information was not considered to amount to “participating in the arbitration”.) The law did not compel the RALL to take part in the arbitration or defend its position – and RALL was under no obligation to do so. Neither Article 16(3) nor s 10(3) could be interpreted to prevent a respondent who chose not to participate on jurisdictional grounds from raising that jurisdictional objection in an application to set aside the award at a later point.
In August 2015 the tribunal issued a final award ordering Sun not in breach of the HMA. Sun then stopped participating. Sun's misrepresentation claim and finding that Hilton was then in breach of the HMA. The tribunal issued a partial award in May 2015 dismissing Hilton's counter-allegations. Sun counter-alleged that Hilton had made fraudulent misrepresentations as to the hotel's likely future financial performance, which induced Sun to enter into the HMA. Sun sought damages for its lost opportunity to profit under the HMA. Hilton commenced arbitration in Singapore against Sun under an arbitration clause in the HMA seeking Sun to pay damages to Hilton. In December 2015, Hilton sought to enforce the award in the Maldivian courts. There were certain procedural errors made at the outset of the enforcement process but eventually Hilton obtained judgment in its favour from the Enforcement Division. This was then appealed by Sun.

Before the appeal was heard, Sun commenced litigation against Hilton in the Maldivian courts making the same allegations of fraudulent misrepresentation as it had made earlier in the arbitration. The Maldivian Civil Court delivered judgment in favour of Sun in March 2017 (March Judgment). Hilton continued to attempt to enforce the awards against Sun in the Maldivian Courts. However, Sun later relied on the March Judgment in the Enforcement Division to resist these efforts, and the Enforcement Division issued a ruling on June 2017 refusing enforcement of the arbitral awards (June Judgment). Hilton meanwhile appealed the March Judgment.

In July 2017 Hilton filed an application against Sun in the Singapore High Court seeking: (a) a permanent anti-suit injunction to restrain Sun from commencing and/or proceeding with any action against Hilton in the Maldives; (b) a declaration that the awards were final, valid and binding on the parties; and (c) a declaration that Sun's claim in the Maldivian litigation was in breach of the arbitration agreement in the HMA. The Singapore High Court made the order and declarations sought. Sun appealed.

The Court of Appeal confirmed that, in cases involving an arbitration agreement, or an exclusive jurisdiction clause, it would normally be sufficient to show that a party had breached such an agreement for an anti-suit injunction to be issued. (There would be no need to prove the extent of the prejudice suffered or to satisfy other typically injunction-related criteria.) However, an anti-suit injunction was still an equitable remedy, not available as of right, and it was critical for such relief to be sought promptly and before the foreign proceedings were too advanced. This need for promptness has its roots in considerations of comity, which involves respect for the operation of different legal systems and the avoidance of the wastage of judicial time and resources that would be involved in abandoning proceedings at a late stage. To seek an anti-suit injunction only after the foreign proceedings have become well-advanced is a waste of the foreign court's resources. Nor is it satisfactory for an applicant who has raised jurisdictional

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**Sun Travels & Tours Pvt Ltd v Hilton Manage (Maldives) Pvt Ltd [2019] 1 SLR 732**

In this case, the Court of Appeal held that delay may forfeit the availability of anti-suit and anti-enforcement injunctions.

The appellant (Sun) was a resort operator that owned a hotel in the Maldives. It entered into a hotel management agreement (the HMA) with the respondent (Hilton). Sun later became dissatisfied with Hilton's performance and terminated the HMA. Hilton accepted the termination on the basis that it was a wrongful repudiation of the HMA.

Hilton commenced arbitration in Singapore against Sun under an arbitration clause in the HMA seeking damages for its lost opportunity to profit under the HMA. Sun counter-claimed that Hilton had made fraudulent misrepresentations as to the hotel's likely future financial performance, which induced Sun to enter into the HMA. The tribunal issued a partial award in May 2015 dismissing Sun's misrepresentation claim and finding that Hilton was not in breach of the HMA. Sun then stopped participating. In August 2015 the tribunal issued a final award ordering Sun to pay damages to Hilton.

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Article 16(3) of the Model Law and s 10(3) of the IAA may have preclusive effect where a respondent fails in its preliminary jurisdictional objection before the tribunal, declines to appeal the tribunal's ruling to the Singapore High Court and instead continues to participate in the arbitration. In that scenario, the respondent would have contributed to the wasted costs and it would be justified to preclude the respondent from bringing an application to set aside for lack of jurisdiction (when it could have done so much earlier under the 30-day time limit for appeals in Article 16(3) of the Model Law and s 10(3) of the IAA). Importantly, however, in this case, the Court of Appeal found that the respondent's actions in refusing to participate did not contribute to any wastage of costs; indeed, it was the claimant that persisted with the arbitration in such circumstances that must take the risk of wasted costs.

On the specific matter of the MOU, the Court of Appeal set aside the award because it contained “decisions on matters beyond the scope of the submission to arbitration” within the meaning of Article 32(2)(a)(iii) of the Model Law. The Court of Appeal found that the MOU was effective and operative immediately upon its execution, that it resolved the parties' disputes, and that, accordingly, there no longer was a dispute for AGMS to refer to arbitration.

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The Court of Appeal confirmed that, in cases involving an arbitration agreement, or an exclusive jurisdiction clause, it would normally be sufficient to show that a party had breached such an agreement for an anti-suit injunction to be issued. (There would be no need to prove the extent of the prejudice suffered or to satisfy other typically injunction-related criteria.) However, an anti-suit injunction was still an equitable remedy, not available as of right, and it was critical for such relief to be sought promptly and before the foreign proceedings were too advanced. This need for promptness has its roots in considerations of comity, which involves respect for the operation of different legal systems and the avoidance of the wastage of judicial time and resources that would be involved in abandoning proceedings at a late stage. To seek an anti-suit injunction only after the foreign proceedings have become well-advanced is a waste of the foreign court's resources. Nor is it satisfactory for an applicant who has raised jurisdictional
objections in the foreign court to wait for their outcome in the foreign court before seeking anti-suit relief; indeed, to do so is even more offensive to notions of comity. Matters should be pursued in the foreign court and the Singapore courts at the same time.

The Court of Appeal stated that anti-enforcement injunctions – i.e., injunctions that order a party not to rely or act upon a foreign judgment in its favour – should be an exceptional form of relief. Such injunctions tend to interfere with the foreign court process, and have the effect of nullifying the foreign court judgment and stripping it of any consequences, thereby denying the right of the foreign court the prerogative to decide whether its own judgment should be recognized or enforced. Accordingly, where an anti-enforcement injunction is sought, it is insufficient merely to show that a party has breached an arbitration agreement or exclusive jurisdiction clause. There must be exceptional circumstances. These include where the foreign judgment has been procured by fraud and where the applicant has no knowledge that the judgment was being sought until after the judgment was rendered.

In summary, Hilton should have sought injunctive relief from the Singapore High Court much earlier. Its failure to do so allowed the Maldivian proceedings to reach an advanced stage such that considerations of comity and equity weighed against granting the anti-enforcement order sought. However, the Singapore Court of Appeal decided that it would make the two directions that Hilton had sought as it considered these may be of some use in the Maldivian proceedings.

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South Korea

Major developments and cases in South Korea

Daniel Lee, Seungmin Lee of Shin & Kim

In this article, we summarise some of the major arbitration-related developments in 2019 and notable recent cases decided by the Supreme Court of Korea.

Supreme Court of Korea reaffirms high bar for setting aside awards

Korea is known to be a strongly pro-arbitration jurisdiction and two recent cases have again reaffirmed this status. In the cases, the Supreme Court reaffirmed that there is a high bar for setting aside an arbitral award on grounds of the violation of "public policy and good morals" of the Republic of Korea. In doing so, the Supreme Court reiterated that a violation or misapplication of Korean law, even if mandatory, will not automatically meet this bar.

In a Supreme Court judgment dated 29 November 2018 (Case No. 2016Da18753), a Korean company entered into a license agreement with a Dutch company for utilization of certain patents and trademarks belonging to the Dutch company. In the arbitral award, the tribunal found that the registration of the patent rights in dispute (Patent Rights) under the Korean company's title was in violation of the license agreement and thus the tribunal ordered all of the rights and interests in relation to the Patent Rights to be transferred to the Dutch company and also imposed a measure requiring the Korean company to pay an indirect coercion indemnity amount in case of a failure to effect such transfer.

The Korean company challenged the award on the basis that the indirect coercion measure was against the public policy of Korea, arguing that, under Korean law, the obligation to transfer certain rights to another entity is viewed as an obligation requiring "an expression of intent." For this type of obligation, Article 263(1) of the Civil Execution Act sets forth a method of compulsory execution and, therefore, a separate, indirect coercion indemnity is not an appropriate measure with respect to a transfer of patent rights.

However, the Supreme Court found that enforcement of a foreign arbitral award in Korea requires an enforcement judgment, which takes a considerable amount of time. In these circumstances, the Supreme Court observed that, when interpreting the grounds upon which to refuse the enforcement of an arbitral award under the New York Convention, it is unreasonable to apply the strict Korean procedural rules – i.e., to disallow indirect coercion indemnity when it comes to the enforcement of an obligation requiring "an expression of intent."

The Supreme Court thus concluded that the part of the arbitral award that ordered payment of an indirect coercion indemnity amount cannot be deemed to run against the public order and good morals of the Republic of Korea that refusal to enforce the award would be justified. Thus, the Supreme Court enforced the award in full, meaning that the Korean party would have to pay the indirect coercion payment.

Another court decision dealing with a set aside request based on public policy grounds was the Supreme Court judgment dated 13 December 2018 (Case No. 2018Da34387). In that case, the Supreme Court found that, unlike in a Korean civil litigation proceeding, where the principle of disposition non ultera petita (meaning "not beyond the request" in Latin) is applied strictly, the Supreme Court found that in an arbitration, there is leeway for a more flexible and reasonable approach. Here, the Court referred to the previous Article 52(1) of the KCAB domestic rules, which stated that "[t]he Tribunal may order in the award the specific performance of a contract, grant equitable and reasonable damages or other relief which falls within the scope of the arbitration agreement of the parties."

The claimant had sought an order for monetary compensation, and the arbitral award did not order such compensation to be paid but rather declared that the respondent had the obligation to pay monetary compensation. Based on the previous Article 52(1) of the KCAB domestic rules, the Supreme Court ruled that although the relief sought by the claimant was different from that awarded in the operative part of the arbitral award, this was not in violation of the principle of disposition non ultera petita under Korean law and was not in violation of public policy and good morals, and thus the award was not rendered unenforceable pursuant to Article 36(2), sub 2(b) of the Korean Arbitration Act.

It is worth noting that the previous Article 52(1) of the KCAB domestic rules no longer exists in either the new domestic or international KCAB rules.
However, parties are advised to be cautious in overly relying on this Supreme Court judgment as Korean courts normally will not accept an arbitral award containing an operative part that exceeds the scope of the relief requested or offers materially different relief from that requested. This was an exceptional case where the operative part was not something substantially different from what the claimant had sought and the court thus found that there was room for interpretation of the claimant’s request for relief.

**K CAB continues outward expansion**

On 17 December 2019, Korean Commercial Arbitration Board (KCAB) officially opened its overseas liaison office in Hanoi, Vietnam following approval of Vietnam’s Ministry of Justice. KCAB is the first foreign arbitral institution approved to open an overseas office in Vietnam. According to KCAB, the overseas office will promote KCAB’s services as well as arbitration and alternative dispute resolution in Vietnam.

In the past two decades, Korea and Vietnam have experienced skyrocketing growth in trade and investment, and, since 2014, the Republic of Korea has been the top source of foreign direct investment in Vietnam. Vietnam and South Korea signed the Vietnam-Korea Free Trade Agreement in 2015. It is estimated that around 7,000 Korean firms are operating in Vietnam, employing more than 700,000 workers and contributing 30 per cent of Vietnam’s total export value.

At the opening ceremony, Prof. Hi-Taek Shin, Chairman of KCAB International (the international arbitration-focused arm of KCAB), said, “We are honoured to be the first international arbitral institution to open an office in Vietnam and we look forward to promoting international arbitration and ADR as part of KCAB’s services. We look forward to the continued development of our economic and cultural ties to Vietnam through this Overseas Office.”

The liaison office is the third of its kind to open, following KCAB’s offices in Los Angeles, USA and Shanghai, China in 2017.

In addition to the establishment of the new Vietnam overseas office, KCAB has also been actively developing partnerships with peer institutions. In particular, in 2019, KCAB signed agreements with The Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs (MOU), Abu Dhabi Global Market Arbitration Centre (MOU), Hong Kong International Arbitration Centre (Cooperation Agreement), and Singapore International Mediation Centre (MOU).

**Active inaugural year for KCAB NEXT**

Established in November 2018 with support from KCAB International, KCAB NEXT is a professional organization for younger practitioners (most of whom are based in Seoul, Korea) to network, learn and collaborate. In the inaugural year of KCAB NEXT, at least seven events were organized or supported by KCAB NEXT, including joint seminars with YSIAC (the young group of the Singapore International Arbitration Centre), HK45 (the young group for the Hong Kong International Arbitration Centre) and DIS40 (the young group of the German Arbitration Institute).

**KCAB prepares to release final video conferencing protocol**

In late 2018, KCAB International unveiled its Draft Protocol on Video Conferencing in International Arbitration (Draft Protocol). The Draft Protocol is intended to provide guidance to practitioners for planning, testing and implementing video conferences in international arbitration. The Draft Protocol consists of provisions on, among other things, technical requirements and backup plans, notification of who will be participating or observing, the venue for witness examination and how to manage documents to be used during witness examination.

According to KCAB, work on the final version of the protocol has continued since the unveiling of the Draft Protocol, and the final version will be released at some point in 2020.

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Thailand

Major developments and cases in Thailand

Don Rojanapenkul, Ekasit Suttawat
In this article, we summarise some of the major arbitration-related developments and cases decided in 2019 in Thailand.

Amendment to the Thai Arbitration Act

In April 2019, the National Legislative Assembly issued the Arbitration Act (No. 2) B.E. 2562 (2019) (the Amendment), amending the Thai Arbitration Act B.E. 2545 (2002).

Under the Amendment, foreign arbitrators and counsel will now be formally permitted to perform their duties as an arbitrator or a representative of the disputing parties in arbitral proceedings in Thailand.

The Amendment also simplifies the process of acquiring a work permit for foreign arbitrators and counsel wishing to act in arbitrations subject to the rules of the Thai Arbitration Institute (TAI) or the Thailand Arbitration Centre (THAC), but also arbitrations conducted under the rules of other international institutions, as long as arbitration hearings are administrated by either the THAC or TAI.

The simplified work permit procedure will now require the foreign counsel or arbitrator to request a certificate from the relevant "government agency or organisation established by law" (i.e. THAC or TAI), specifying the name of the issuer, the arbitration case number, the name and passport number of the foreign arbitrator or representative and the approximate duration of the arbitration proceedings.

Once in possession of such certificate, the foreign counsel or arbitrator will be able to file the certificate to obtain a work permit, allowing him or her to stay in Thailand for the period specified in the certificate (subject to other specific immigration laws) and perform their duties in the arbitration. In addition, the foreign national will be permitted to start performing their arbitral duties whilst receipt of their work permit is pending.

The Amendment represents progress in Thailand's plans to become a regional arbitration hub, as previously foreign arbitrators were required to complete rigorous work permit applications, which acted as a barrier to arbitrators accepting appointments in Thailand.

The previous restrictions provided parties that had instructed Thai domestic counsel with a disruptive and delaying tactic, removing opposing parties' ability to instruct foreign counsel or appoint a foreign arbitrator.

The Amendment follows the introduction of new Smart Visas for foreign nationals working in the Alternative Dispute Resolution sector in 2018. Whilst the Smart Visa process has not yet been used for an arbitration in Thailand, it is representative of Thailand's ambitions to open up to the world of arbitration.

Confirmation of arbitral award in the Hopewell project dispute

On 22 April 2019, Supreme Administrative Court gave its judgment, which overturned the ruling of the Central Administrative Court that had annulled the enforcement of a TAI award of 11.8bn baht (USD370.14m) in favour of Hopewell (Thailand) Limited (a subsidiary of Hong Kong based Hopewell Holdings).

The dispute subject to the arbitration concerned the termination of construction of the Bangkok Elevated Road and Train System (BERTS), for which Hopewell had been instructed by the State Railway of Thailand (SRT) and the Ministry of Transport. When the project was terminated by the Thai Government amidst the Asian Financial Crisis in 1997, Hopewell estimated that it had spent around USD600m on the project.

The award of the TAI tribunal was challenged by SRT at the Central Administrative Court, on the basis that the tribunal had exceeded its authority in making the award and that the award was against public policy due to the relevant prescription period.

The Central Administrative Court decided that the arbitral tribunal did not have jurisdiction to decide the dispute, as Hopewell had filed for arbitration after the expiry of the limitation period in the arbitration agreement. The Central Administrative Court ruled...
that the relevant prescription period was five years, provided for certain state contracts by the Act on the Establishment of Administrative Courts and Administrative Court Procedure 2542 (1999).

The Supreme Administrative Court, overturning the lower court’s decision, dismissed the cases of each party, adjudging that the matter was not a dispute that could be classified as administrative, and ruling that the arbitral award granted on 8 November 2008 be confirmed.
Key contacts

Australia

Gitanjali Bajaj  
Partner, Sydney  
+61 2 9286 8440  
gitanjali.bajaj@dlapiper.com

Richard Edwards  
Partner, Perth  
+61 8 6467 6244  
richard.edwards@dlapiper.com

Gowri Kangeson  
Partner, Melbourne  
+61 3 9274 5428  
gowri.kangeson@dlapiper.com

Liam Prescott  
Partner, Brisbane  
+61 7 3246 4169  
liam.prescott@dlapiper.com

Corey Steel  
Partner, Perth  
+61 8 6467 6234  
corey.steel@dlapiper.com

China/Hong Kong

Harris Chan  
Partner, Hong Kong  
+852 2103 0763  
harris.chan@dlapiper.com

Kevin Chan  
Partner, Hong Kong  
+852 2103 0823  
kevin.chan@dlapiper.com

Xiaoshan Chen  
Of Counsel, Shanghai  
+86 21 3852 2030  
xiaoshan.chen@dlapiper.com

Leo Cheng  
Partner, Hong Kong  
+852 2103 0681  
leo.cheng@dlapiper.com

Satpal Gobindpuri  
Partner, Hong Kong  
+852 2103 0836  
satpal.gobindpuri@dlapiper.com

May Ng  
Partner, Hong Kong  
+852 2103 0853  
may.ng@dlapiper.com

Ernest Yang  
Partner, Hong Kong  
+852 2103 0768  
ernest.yang@dlapiper.com
Japan

Takahiro Nonaka
Partner, Tokyo
+81 3 4550 2825
takahiro.nonaka@dlapiper.com

New Zealand

Iain Thain
Partner, Auckland
+64 9 300 3818
iain.thain@dlapiper.com

Singapore

John Goulios
Partner, Singapore
+65 6512 9517
john.goulios@dlapiper.com

Matthew C. Shaw
Counsel, Singapore
+65 6512 6062
matthew.c.shaw@dlapiper.com

South Korea

Daniel Lee
Partner, Korea
+82 2 6270 8899
daniel.lee@dlapiper.com

Thailand

Peter Shelford
Partner
+66 2 686 8500
peter.shelford@dlapiper.com

Don Rojanapenkul
Partner
+66 2 686 8558
don.rojanapenkul@dlapiper.com