Paris Arbitration Week Recap: Recent Developments and Key Arbitration Trends in Asia

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On 10 July 2020, a panel of arbitration practitioners discussed the topic of "Recent Developments and Key Arbitration Trends in Asia" as part of the 2020 Paris Arbitration Week. The panel discussion covered the distinctive features of and the latest developments in five different jurisdictions: Singapore, China, Hong Kong, South Korea and India. Hosted by the Singapore International Arbitration Centre's YSIAC group, the panel was moderated by Ms Marina Zenkova (Member, YSIAC Committee; Senior Associate, White & Case (Moscow)), and the speakers were Mr Manish Aggarwal (Partner, Three Crowns LLP), Ms Edwina Kwan (Partner, King & Wood Mallesons), Ms SeungMin Lee (Partner, Peter & Kim), Mr Daryl Chew (Member, YSIAC Committee; Partner, Shearman & Sterling) and Ms Ong Pei Ching (Partner, TSMP Law Corporation.

Asia has become one of the world's most important arbitration regions, with Singapore being the third-most preferred arbitration seat after London and Paris, and SIAC being the third most-preferred arbitration institution after ICC and LCIA. Singapore continues to offer users secure, stable and sustainable solutions even amidst COVID-19, while new opportunities for foreign arbitrations open up in China and Hong Kong particularly in the Pilot Free Trade Zones. In South Korea, users of arbitration are paving the way forward for IP disputes which are uniquely dense in

the market, while India continues to showcase innovation through its arbitral rules.

Singapore continues to be a secure, stable and sustainable hub for dispute resolution

Singapore continues to be a popular seat due to its three distinctive features: security, stability and sustainability. These characteristics were demonstrated by Singapore's effortless transition into the "new norm" of online hearings in the current COVID-19 climate. Despite the severe disruptions created by movement restrictions and social distancing rules, the courts and arbitral institutes turned seamlessly towards various forms of online and other hearing arrangements, minimising the interruption to ongoing cases.

In addition to these characteristics, the Singapore courts and government take a proactive stance that supports arbitration. For example, recent case law demonstrates the robust approach taken by the Singapore courts to enforce the obligation to arbitrate by the firm adoption of the "*prima facie*" threshold that some jurisdictions have departed from.[fn]AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company) [2020] SGCA 33; Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd [2020] SGHC 20.[/fn]

The Ministry of Law and the Law Reform Committee of the Singapore Academy of Law also actively consider reforms to arbitration law. A noteworthy proposal under consideration is to introduce to the International Arbitration Act (IAA) an "opt in" mechanism that would allow parties to appeal to the High Court on a question of law arising out of an award made in the proceedings. If this proposal is accepted, it will be interesting to see how it operates in practice. It is not clear the extent to which commercial users would agree to opt in; although the option of inviting the court's intervention may afford parties greater autonomy, it may also protract the proceedings.

Another proposal is to amend the IAA to give parties the option to waive or limit the grounds to set aside an arbitral award under Article 34(2) Model Law and section 24(b) IAA, on the condition that the agreement is reached after the award is rendered.

In addition, the Ministry is also considering amendments that would give the

Singapore courts the power to order costs in certain situations, such as when an arbitral award is successfully set aside. This would plug a lacuna in the existing legal framework, since tribunals cannot render new costs awards once the award is set aside.

New opportunities for foreign arbitration open up in China and Hong Kong

The arbitration scene in China and Hong Kong is marked by efficiency, speed, and the endorsement of hybrid ADR approaches such as med-arb and conciliation-arb. Market trends tend to be heavily shaped by the China's Belt & Road Initiative (BRI). Equally shaping the scene is the China's more recent vision for the Greater Bay Area (GBA), an economic corridor connecting the delta of the Pearl River including Hong Kong SAR, Macao SAR and the nine most developed cities (including the megacities of Guangzhou and Shenzhen) in the adjacent Guangdong Province. The nine different arbitration institutions in the GBA are discussing how to make dispute resolution user-friendly and facilitate more cross-border investments in those regions. At the same time, there is discussion on how to reconcile the different laws (Chinese law, Hong Kong law which is based on common law, and Macau law which is based on Portuguese law), and different currencies.

As to recent developments, from 1 January 2020 foreign (non-Chinese) arbitral institutions have been permitted to set up branches in the Shanghai Pilot Free Trade Zones (Pilot FTZs).[fn]Measures for the Administration of Overseas Arbitration Institutions' Establishment of Business Departments in the China (Shanghai) Pilot Free Trade Zone Lin-Gang Special Areas effective from 1 January 2020.[/fn] On the one hand, this now signals an opening up of the Chinese arbitration market but it is clear that China is cautious not to fully open up. Foreign arbitral institutions are only entitled to lawfully administer civil and commercial arbitral disputes that have a "foreign-related element".[fn]Measures for the Administration of Overseas Arbitration Institutions' Establishment of Business Departments in the China (Shanghai) Pilot Free Trade Zone Lin-Gang Special Areas effective from 1 January 2020, Article 14.[/fn]

The Shenzhen Municipal Government has updated the rules for arbitration proceedings administered by the Shenzhen Court of International Arbitration

(SCIA).[fn]Provisions on the Administration of Shenzhen Court of International Arbitration effective from 1 June 2019.[/fn] The rules now allow parties to conduct hybrid arbitrations where parties can select a set of arbitration rules while engage in another arbitration institution as the appointing agency for arbitrators.[fn]Provisions on the Administration of Shenzhen Court of International Arbitration effective from 1 June 2019, Article 17.[/fn]

Most recently on 18 June 2020, Shenzhen and Singapore signed a series of memoranda of understanding (MOUs) for the Singapore-China (Shenzhen) Smart City Initiative (SCI).[fn]Singapore-China (Shenzhen) Smart City Initiative (SCI).[/fn] International awards by SIAC or SCIA will have similar standing as those awarded by each other, meaning a SIAC award can be converted into a SCIA award, and thus enforceable in China as a domestic award. This important development will increase the predictability of enforcement outcomes in China. We expect to see more of these procedural developments over the course of the year.

South Korea's users pave the way forward for IP arbitration

Perhaps one of the only jurisdictions where arbitration practitioners will spend a solid amount of their time on IP disputes, is South Korea. The arbitration market is moving in sync with the increasing popularity of Korean cultural content such as online and offline games which accounted for 69.2% of the country's total content exports in the first half of 2019, as well as animation, knowledge and information services, and no doubt, Korean music. Statistics show that the value of the South Korean cultural content was worth 64 billion USD in 2019.

IP disputes are particularly dense in the region. Since last year, many arbitral awards were rendered concerning infringement of intellectual property rights of Korean IP owners, and these were administered by different arbitral institutions such as KCAB, SIAC and ICC. Users of arbitration, who are predominantly IP owners, are thus paving the way forward as they challenge the Korean arbitration community with issues of arbitrability, validity of IP rights, estoppel and parallel proceedings. There are also discussions underway to address IP issues through legislative amendments to the Korean Arbitration Act. It will be interesting to watch the South Korean market develop into a specialised hub for IP disputes.

Procedural innovations continue in India

In India, all three wings of the Indian state – the legislature, executive and judiciary – have been making significant efforts to develop India into an arbitration-friendly jurisdiction.

For example, insofar as enforcement of awards is concerned, following certain amendments to the Indian Arbitration and Conciliation Act 1996 and certain judicial pronouncements, there is no longer an automatic stay on enforcement if a domestic award is challenged before the courts. Similarly, for foreign awards, the Indian courts are taking a proactive approach to enforcement, which is reflected in the vast majority of foreign awards having been enforced in the last five years (albeit with some delays).

There have also been a string of procedural innovations designed to make the arbitral process expeditious and more cost-effective. For instance, following certain amendments made in 2015 and 2019, the Indian Arbitration Act now requires a tribunal in purely domestic arbitrations to render an award within 12 months from the completion of pleadings, which in turn must be completed within six months of the notification of constitution of the tribunal. In case of international commercial arbitration seated in India, this time limit is not mandatory. The parties can agree to extend the statutory 12-month period to 18 months. However, if the award is not rendered within the original 12-month period or the extended 18-month period (in case of an extension), the tribunal's mandate will terminate, unless it is extended by courts on application.

Broadly speaking, the perception within the arbitration community and users remains that the recent measures to improve the Indian arbitration landscape are well-intended; however, they could have been better executed. In particular, uncertainty over a long period regarding the prospective or retrospective effect of the amendments made in 2015 and 2019, and the prevailing lack of clarity regarding some other important aspects (such as ability of foreign lawyers to participate in India-seated arbitrations), have adversely affected India's emergence as an arbitral hub.

More coverage from Paris Arbitration Week is available here.