Arbitration is becoming increasingly Asian

There are four main drivers of the process

By Dr. Nicolas Wiegand and Dr. Tom Christopher Pröstler, LL.M. (Sydney)

Introduction

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The vast majority of international contracts provide that disputes arising out of or in connection to them are to be resolved by arbitration instead of litigation. This is because arbitration offers a number of decisive advantages over litigation when it comes to international transactions.

To name just a few, firstly, international arbitration forgoes any national bias or home-team-advantage associated with litigation. Secondly, arbitration is more flexible, among other things allowing the parties to choose procedural rules, arbitrators and an administering arbitral institution. Thirdly, and most importantly, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) guarantees that international arbitral awards are generally recognised and enforced all across the world. A similarly far-reaching agreement allowing the enforcement of state court judgments does not exist.

The old times...

Traditionally, the geographical centres of international arbitration were located in Europe and North America. The widely used and accepted international arbitral institutions, like the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) or the International Centre for Dispute Resolution of the American Arbitration Association (ICDR), are located there. Further, cities like Paris, London, Zurich, Geneva, Frankfurt, Vienna or Washington were regularly chosen as seats of arbitrations, and still are.

...are changing

Over the past two decades, however, Asian options have increasingly added more choice to this mix. Today, Asia has firmly established its place in international arbitration, both with a number of high-profile arbitral institutions such as the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC), or the China International Economic and Trade Arbitration Commission (CIETAC), and with seats of arbitrations in cities like Hong Kong or Singapore.

In fact, despite having already established its place in international arbitration, Asia is still building and expanding its presence. The main drivers of this process are the growing economic strength and geopolitical importance of Asia as well as the ever-increasing legal sophistication and infrastructure within the region. Asia’s progressive development leads to growing numbers of international arbitrations involving Asian parties, while at the same time providing these...
parties with inherently stronger bargaining powers. This means that western parties are less often in a position to impose their own preferred arbitration clause, including western arbitral institutions or seats. At the same time, Asia’s growing legal sophistication and infrastructure gives western parties less reason to insist on such institutions or seats.

All across Asia, new arbitral institutions, such as the HKIAC and SIAC, have been created and existing institutions, like CIETAC or KCAB, have been modernised.

The following case numbers give a snapshot of new international arbitration cases registered in 2013 (or in 2012, when more recent figures were not available) with some of the most prominent arbitral institutions in Asia, Europe and North America. These numbers demonstrate that while the major Asian arbitral institutions have been on the market for much shorter than most European and North American institutions, they have an annual new caseload equivalent to or even exceeding some of their most prominent western counterparts.

**Arbitration in Asia: The caseload speaks for itself**

The HKIAC, established in 1985, registered 195 new international arbitration cases in 2013, while the SIAC, established in 1992, registered 223 such cases. Mainland China’s most traditional arbitral institution, the CIETAC, founded in 1956, recorded 311 new international cases (for 2012) and its Korean pendant, the Korean Commercial Arbitration Board (KCAB, established in 1966), registered 77 such cases. In Europe, the LCIA, dating back to 1883, had a total of 290 new cases, including a number of purely domestic cases. The SCC, established in 1917, had 86 new international cases and the German Institute of Arbitration (DIS), with its roots dating back to 1920, recorded 30 (2012). The ICDR, as the traditional North American institution dating back to 1923, had a total of 1165 new international cases. Finally, the ICC, as the most international arbitral institution and established in 1923, registered 767 new international arbitration cases. Notably, this number includes cases filed with the ICC’s main office in Paris and its branch office in New York, but in particular also a substantial number of new cases filed at the ICC’s Asia office in Hong Kong.

Now, while it is easy to understand why Asian parties should welcome the trend to more international arbitration in Asia, it is less obvious why western parties should also welcome it. However, there are multiple reasons for this.

The traditionally high-frequented arbitral institutions in Europe and North America are selected for their professional and efficient case administration and support services, as well as for their modern, precise and exhaustive arbitration rules. Similarly, the cities in Europe and North America regularly chosen as seats of arbitrations offer high-quality infrastructure such as good international and local transportation, as well as hotels and conferencing facilities. More importantly, these seats provide first class legal background for international arbitration with up-to-date, well balanced national arbitration laws supplemented by generally arbitration friendly and highly specialized independent state courts that, particularly at seats such as Hong Kong, are famous for ensuring the effective conduct and integrity of arbitral proceedings.

Moreover, all across Asia, new arbitral institutions such as the HKIAC and SIAC, have been created and existing institutions, like CIETAC or KCAB, have been modernized. These institutions today provide services at the same level and quality as European and North American institutions. In addition, the ICC established an Asia office in Hong Kong in 2008 to administer its Asian related
arbitration cases. Further, the arbitration rules of Asian institutions are being updated on a very regular basis (and in fact more frequently than the rules of established European arbitration institutions) and are of the same quality as their western counterparts, if not better. In some aspects, they have taken the lead on international innovation.

Finally, the growing economic strength and legal sophistication of Asian countries has drawn virtually all major international law firms to the region and promoted the international expertise of Asian firms. The infrastructure for arbitration is often immaculate. For anyone who has arrived at one of Asia’s main airports, travelled on its major cities’ subway systems or stayed in one of its countless high-class hotels knows that Asian cities easily match if not surpass European and North American metropolises.

It follows that the traditional reasons for choosing arbitral institutions and seats in western countries have lost their merit. Today, first-class arbitral institutions, seats and law firms can be found not only in Europe and in North America, but also in Asia. For the users of international arbitration, independently of whether they come from the west or the east, this is good news, as it allows them a greater choice and flexibility when selecting the optimal arbitration arrangement to suit their transactions.

Convergence of civil and common law in arbitration practice in Asia

Nevertheless, some distinctive features of arbitration in Asia remain. Maybe the most intriguing of these is that the two central, most developed arbitration hubs of the region, Hong Kong and Singapore, are both common law jurisdictions, while the surrounding powerhouses of the Asian economy, like Mainland China, South Korea or Japan, are civil law jurisdictions. The same is true for the most important rising economies in South East Asia. This leads to the unusual consequence that many lawyers providing arbitral services to the Asian market from Hong Kong and Singapore have a common law background, while the parties to the dispute come from civil law countries. In the worst case, this may lead to considerable frictions and misunderstandings between lawyers and clients (and possibly the tribunal) and a discrepancy between what the parties expect and what they get from arbitration.

In the old arbitration hubs of Europe, and to a lesser degree in those of North America, similar collisions between civil and common law have resulted in major arbitral law firms hiring a diverse mixture of lawyers from different legal backgrounds in order to optimally meet their clients’ and the specific case’s needs. This process has also begun in Asia, with the more common law dominated firms in Hong Kong and Singapore starting to integrate more civil law educated lawyers in their ranks. For the same reason, CMS’ arbitration group decided to service Hong Kong, and from here Asia as whole, with a team educated both in civil and common law, but with a focus on the former in particular with a view to the enormous market of Mainland China, a civil law country, on the doorsteps of Hong Kong. Thereby, CMS not only distinguishes itself from other firms and adds to the diversity of the Hong Kong legal market, but is in particular also able to provide tailored advice for both Asian and European civil law clients on arbitration in Asia.

Consequences

What does this expanded flexibility in choosing arbitral institutions, seats and firms mean for the users of international arbitration? Predominantly, it means that if used strategically, parties may profit from agreeing on arbitration seated in Asia or under administration of an Asian institution or both.

First, the proposition of an Asian arbitral institution or seat may be used as bargaining tool in contract negotiations. For instance, agreeing on a (specific) Asian institution or seat can be traded for a specific substantive law or commercial benefit.

Further, agreeing on an Asian institution or seat may be of advantage in terms of the acceptance of the dispute resolution procedure itself as well as any resulting award. If the administrating institution or arbitral seat is in Asia, Asian parties may be more willing to abandon litigation in favor of arbitration in the first place or to participate benevolently in arbitral proceedings once a dispute has arisen. Also, Asian arbitral institutions will often have a better understanding of Asian culture, realities and legal systems, giving them an advantage over most European or North American institutions when it comes to administering Asia related cases. Such an awareness in handling cases may again increase the acceptance of arbitration proceedings with Asian parties. Additionally, the higher acceptance of arbitration by Asian parties may even extend to the award itself, not only promoting an effective and fast dispute resolution process, but potentially the voluntary compliance with an award.
However, even if an award is not voluntarily complied with and enforcement becomes necessary, an Asian arbitral institution or seat may be of benefit. While in major Asian commercial and legal centers like Hong Kong, Singapore, South Korea or Japan arbitral awards will generally be enforced with the same reliability as in most European or North American countries, this might already be different in some parts of Mainland China. Here, an arbitral award issued under the administration of a Chinese arbitral institution, including such based in Hong Kong, or issued at a Chinese seat, can enhance the perspectives of an award’s effective enforcement. The same can be true of other Asian countries.

Finally, it is important to note that in selecting the optimal arbitration arrangement to suit a transaction, parties can generally choose an Asian institution but with a European or North American seat and vice versa. However, this is not the case where the seat of arbitration is in Mainland China, as the Chinese arbitration law still generally prohibits non-mainland Chinese institutions to administer arbitrations seated within its borders.

Conclusion

To sum up, the fact that arbitration is becoming more Asian has expanded the possibilities for choosing arbitral institutions and seats that can both be agreed in view of the specific needs in any given transaction. As such, it offers more flexibility to users of international arbitration, allowing them to profit from additional bargaining options and from the increased regional acceptance of arbitration as such, arbitral proceedings and resulting awards.

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