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# To 2027 and Beyond: A Survey of Arbitration in the 'Asian Century'
# by K. Davies

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# To 2027 and Beyond: A Survey of Arbitration in the 'Asian Century'

***Kate Davies, Wilmer Cutler Pickering Hale and Dorr LLP****

*It was in 2001 that Goldman Sachs made the first of its predictions for the inclusion in global policy-making of Brazil, Russia, India and China (the so-called BRIC economies), based on their growing importance and contribution to the global economy. Over the course of the last decade, Goldman Sachs' focus has turned to economies predicted to follow the BRICs; the "Next Eleven", which include from South/East Asia Indonesia, South Korea, the Philippines and Vietnam. By 2027, China is expected to take over from the US as the world's economic super-power. In 2011, with the emerging economies of the world rebounding from the global financial downturn of 2008/2009 leaving the West in growing crisis, those predictions continue to resonate, in particular for South/East Asia.*

*The rapid growth of the world's emerging economies has led to an inevitable increase in international disputes involving parties from those same countries, including those in South/East Asia. Two jurisdictions have emerged in recent years to dominate the scene for arbitration in the region; Singapore and Hong Kong. It is trite to say their success stems from an overall stable investment environment. However, as other jurisdictions in the region take steps to mirror their success, this article seeks to frame both the current status and future of arbitration in South/East Asia within the wider context of the region's growing economic strength. It does so by reference to a number of external sources of data compiled by leading institutions.*

*The first part of this article considers some of the characteristics that have given Singapore and Hong Kong their status as global financial and business centres. It also considers how they have fashioned themselves as stable and neutral venues for arbitration and what their futures might hold in this regard. The second part of this article then considers data tracking the growth of and predictions for South/East Asia's "Next Eleven" economies outside the BRICs as well as a newly published report purporting to assess the efficacy of the overall framework for arbitration in each of those countries. It also looks at recent developments in the field of arbitration in each jurisdiction. It may not be possible to predict the likely success of these developments; but this article concludes with a review of what the data reveals about the future for this region, both economically and in the field of arbitration, and looks for possible lessons learned and future trends.*

It is no understatement to say that we face a new world order in the global economy. From the World and Asian Development Banks to the International Monetary Fund, the United Nations Conference on Trade and Development (UNCTAD) and some of the world's leading economic think-tanks, all speak of "*Asia's large and rising systemic importance*".[1] While

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Alive to cultural, linguistic and political diversity in the region and disparities in geographic classifications, this article refers to the countries reviewed herein as coming from the 'South/East Asia' region. This is a less than geographically robust use of the term which arises because of the different classifications for this region.

inflation and contamination from the world's advanced economies remain key threats,[2] South/East Asia's two BRIC economies, India and China,[3] have led the region to an impressively rapid and sustained recovery from the global financial crisis of 2008/2009.[4] As talk in the West today continues to focus on the risks of sovereign debt crises, further quantitative easing and the increasing likelihood of further recession (or indeed, depression), South/East Asian economies are the envy of the world; even today, they dominate the global economy.[5] Indeed, the shift in global emphasis from the economies of the West to those of the world's emerging countries, including in South/East Asia, has recently been described by one U.K. Minister as nothing short of a "*revolution*".[6]

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However, the World Bank definition for "East Asia and the Pacific" broadly coincides with the ICC's classification for "South and East Asia & the Pacific" and includes all the countries surveyed in this article (Singapore, Hong Kong SAR, Indonesia, South Korea, the Philippines, Vietnam).

[1] International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks* p. 84 (September 2011); Asian Development Bank, *Outlook 2011: South-South Economic Links* in chapter *Asia in the Uneven Global Recovery* , p. 3 (2011) ("The world has come out of its deepest downturn since the Great Depression, in a recovery marked by an interesting bifurcation: the developing world has made a rapid return to its pre-crisis growth path while major industrial countries continue to struggle."); World Bank, *Global Development Horizons 2011, Multipolarity: The New Global Economy,* p. xi (2011) ("The world economy is in the midst of a transformative change. The most visible outcome of this transformation is the rise of a number of dynamic emerging-market countries to the helm of the global economy. It is likely that, by 2025, emerging economies – such as Brazil, China, India, Indonesia, and the Russian Federation – will be major contributors to global growth, alongside the advanced economies."); Asian Development Bank, *Asia 2050: Realizing the Asian Century* (2011); UNCTAD, *World Investment Report 2011: Non-Equity of International Production and Development* (2011); International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks* p. 84 (September 2011) ("Asia's track record during the crisis and the recovery has been enviable").

[2] *See e.g.,* Asian Development Bank, *Outlook 2011: South-South Economic Links* in chapter *Asia in the Uneven Global Recovery*, p. 3 (2011) ("Developing Asia will continue to spearhead the global recovery. Private demand is sustaining growth even as monetary and fiscal policies are normalized. The region's growth in 2011 will remain vigorous, albeit somewhat slower than in 2010. *Inflation pressures are building, however, and overheating is an emerging threat in some economies*."); International Monetary Fund, *Global Financial Stability Report: Grappling with Crisis Legacies,* p. x (September 2011) ("emerging markets face the risk of sharp reversals prompted by weaker global growth, sudden capital outflows, or a rise in funding costs that could weaken domestic banks … [e]merging market policymakers need to guard against overheating …"); International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks* p. 85 (September 2011) ("the recent volatility in U.S. and euro area financial markets rippled through many Asian equity markets, which if sustained could affect the region's future economic prospects"); International Monetary Fund, *Regional Economic Outlook: Asia and Pacific: Managing the Next Phase of Growth,* pp. x and 8 to 15 (April 2011) ("pockets of overheating across the region pose new risks to the outlook").

[3] The 'BRIC economies' of Brazil, Russia, China and India as a phrase first adopted, and were first identified as countries that should, because of their economic strength (whether by GDP or PPP), be included in global policy-making, by Goldman Sachs' Jim O'Neill in 2001. *See* Goldman Sachs Global Economic Paper No. 66, *Building Better Global Economic BRICs,* (30 November 2001).

[4] *See e.g.,* Goldman Sachs Global Economics, BRICs Monthly No. 09/05 *BRICs Lead the Global Recovery,* (29 May 2009); International Monetary Fund, *Global Financial Stability Report: Grappling with Crisis Legacies,* p. x (September 2011) ("[e]merging market economies are at a more advanced phase in the credit cycle. Brighter growth prospects and stronger fundamentals, combined with low interest rates in advanced economies, have been attracting capital inflows."); International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks* p. 72 (September 2011) ("Asia activity is still robust …"); International Monetary Fund, *Regional Economic Outlook: Asia and Pacific: Managing the Next Phase of Growth,* pp. 1 and 4 (April 2011) ("[In 2011 and 2012] China and India are expected to lead the rest of the region").

[5] *See e.g.,* International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks* p. 84 (September 2011) ("Asia's track record during the crisis and the recovery has been enviable") and p. 85 ("[g]rowth is projected to decelerate but remain strong and self-sustained …"); Asian Development Bank, *Asia 2050: Realizing the Asian Century* Preface (2011) ("The rapid rise of Asia over the past 4-5 decades has been one of the most successful stories of economic development in recent times. Today, as Asia leads the world out of recession, the global economy's center of gravity is once again shifting toward the region. The transformation underway has the potential to generate per capita income levels in Asia similar to those found in Europe today. By the middle of this century, Asia could account for half of global output, trade, and investment, while also enjoying widespread affluence.")

[6] During a speech given at Chatham House. *See also* International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks* p. 88 (September 2011) (speaking of "Asia's large and rising systemic importance").

A few simple facts easily support this epithet. The G-8 – formerly dominated by nations from North America and Europe[7] – has effectively been replaced by the G-20,[8] which today counts among its most powerful members China, India, Indonesia and the Republic of Korea (South Korea).[9] China has taken over as the world's second largest economy (behind the United States) followed by Japan and India.[10] South/East Asian issuers led the world's capital raising markets in 2010, with Malaysia recording the largest ever IPO for South/East Asia.[11] Hong Kong was the leading global stock exchange for funds raised through IPOs in 2010, with two of the biggest IPO listings in history.[12] South Korea had the highest GNI per capita of any country outside of the G-6 with a population of over 50 million in 2010.[13] Singapore was the fastest growing economy in 2010.[14] Finally, two South/East Asian countries top the IFC/World Bank's index of the most attractive places in the world to do business in 2011 (the "Doing Business Index");[15] in order of ranking, Singapore and Hong Kong.

Tracking South/East Asia's impressive economic growth have been its continued efforts to encourage outside investment. One of the central pillars in creating a stable investment environment is provision for robust, efficient *and predictable* resolution of disputes when they arise (as they undoubtedly do wherever there is trade, commerce, inward investment and the development of infrastructure).[16] Given the (perceived and actual) issues with resolving disputes through local courts in many jurisdictions and the need as well as the desire for a more flexible, neutral and international form of dispute resolution, arbitration has emerged in recent years as the dispute resolution mechanism of choice for many corporations, a number of which are reported to take a strict approach to their preference for arbitration over state court litigation.[17] This is as true for Asia as it is for the rest of the world.[18]

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[7] In April 1973, Finance Ministers from the US, Germany and France (George P. Schultz, Helmut Schmidt and Valerie Giscard d'Estaing) met to discuss the international monetary crisis of the 1970s following the collapse of the Bretton Woods system laying the foundation for the G-5 (the US, Germany, France, the UK and Japan). The G-5 was replaced by the G-7 (which added Canada and Italy) in 1986 to 1987 following the Louvre Accord of February 1987. The G-7 became the G-8 when Russia joined talks at the 1994 Naples Summit in 1997.

[8] The G-20 members are: Argentina, Australia, Brazil, Canada, *China*, EU, France, Germany, *India*, *Indonesia*, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, *South Korea*, Turkey, UK, USA.

[9] It is understood that no formal statement of the replacement of the G-8 has yet been made although informal statements have been reported by leading press associations. *See for example* BBC News, *Obama hails "Tough Regulations"* (26 September 2009) ("Speaking at the end of a two-day G20 summit, Mr Obama also outlined plans to give emerging economies a greater say in the global economy. The G20 will effectively replace the G8 group of developed economies.").

[10] Bloomberg News, *China Overtakes Japan as World's Second-Biggest Economy* (16 August 2010); Goldman Sachs Global Economics, BRICs Monthly No. 11/06, *The BRICs Remain in the Fast Lane,* p. 1 (24 June 2011).

[11] *See* Ernst & Young Report, *Global IPO trends 2011*, pp. 5 and 6 (2011).

[12] *See* Ernst & Young Report, *Global IPO trends 2011*, pp. 5, 6 and 9 (2011). These were the listing of Agricultural Bank of China Ltd, raising US$ 22.1 billion and AIA Group Ltd raising US$ 20.5 billion.

[13] *See* World Bank Data, *GDP per capita (current US$)*, available at http://data.worldbank.org. The GNI Per Capita Atlas Method US$ is defined by the World Bank as "the gross national income, converted to U.S. dollars using the World Bank Atlas method, divided by the midyear population. GNI is the sum of value added by all resident producers plus any product taxes (less subsidies) not included in the valuation of output plus net receipts of primary income (compensation of employees and property income) from abroad."

[14] *See* Asian Development Bank*, Outlook 2011: South-South Economic Links* in chapter *Singapore*, p. 206; International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks* p. 85 (September 2011). *See also* Bloomberg News, *Singapore Raises 2011 Inflation Forecast* (17 February 2011).

[15] IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, p. 4 (2011) ("World Bank Doing Business 2011") . For further discussion of this Index, see below.

[16] In this regard, the World Bank has recently noted that: "Complex commercial contracts require reliable and flexible dispute resolution mechanisms, and companies often prefer to have alternatives to court litigation. Investors favor environments where they have flexibility in deciding on arbitration proceedings and where outcomes are more secure and easily enforceable. Thus a stable and predictable arbitration regime, as part of the broader legal framework, is another factor that can affect conditions for F[oreign] D[irect] I[vestment]." *See* World Bank, *Investing Across Borders 2010*, pp. 3, 54-55 (2010).

[17] *See* in this regard, Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration* (2010); UNCTAD, *World Investment Report 2011: Non-Equity of International*

Alive to this trend and the need for predictability, countries around the world have taken ever more sophisticated steps to promote the use of arbitration in their jurisdiction. In Asia, in particular, Hong Kong and Singapore have emerged not just as leading centres for the business that is fuelling so much of Asia's economic growth, but also (and consequently) as leading centres for the resolution of disputes – in particular, through arbitration.

Part A of this article seeks to frame the success of Hong Kong and Singapore as leading venues for arbitration within the wider context of their importance as global centres for business and finance. Much is often said about this but often in fairly loose terms. This article seeks to provide specific reference and data points to understand the key characteristics that have defined their success. In this regard, reference is made to a range of independent sources of data, including from the World Bank, the Asian Development Bank (ADB) the International Monetary Fund (IMF), the International Finance Corporation (IFC), the Economist Intelligence Unit, the U.S. State Department, Transparency International and the World Economic Forum (WEF).[19] Acknowledging the limitations and inherent inaccuracies in any one data set, every effort has been made to cross refer data points across these and other sources to ensure fair representation of the available facts and figures.[20]

Throughout the discussion and in addition to underlying economic data, reference is also made to three key sources:

a. the "2010 Corruption Perceptions Index," which measures the degree to which public sector corruption is perceived to exist in 178 countries around the world. The report is based on "*different assessments and business opinion surveys carried out by independent and reputable institutions. It captures information about the administrative and political aspects of corruption. Broadly speaking, the surveys and assessments used to compile the index include questions relating to bribery of public officials, kickbacks in public procurement, embezzlement of public funds and questions that probe the strength and effectiveness of public sector anti-corruption efforts*.";[21]

b. the "2011 Global Competitiveness Index," which measures the micro- and macro-economic foundations for the national "*competitiveness*" of the economies of

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*Production and Development*, p. 169 (2011); World Bank, *Investing Across Borders 2010*, p. 55 (2010) ("international arbitration is often the preferred method for resolving disputes". The same report also notes that "[f]rom a country's perspective, not only does an arbitration regime assist in attracting FDI, but it eases the strain on local courts—which are often congested and have huge case backlogs—by providing an alternative method of dispute resolution that can have fewer and more flexible procedural rules than litigation.").

[18] *See* Greenberg, Kee and Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* ¶1.129 (2011) ("The Asia-Pacific international arbitration climate has changed dramatically in the last 20-30 years. The region is now a major user of international arbitration, with at least 500 international arbitrations taking place here each year.").

[19] Asian Development Bank*, Outlook 2011: South-South Economic Links*; International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks* (September 2011); International Monetary Fund, *Regional Economic Outlook: Asia and Pacific: Managing the Next Phase of Growth* (April 2011); sources of data available from the World Bank, as well as World Bank regional and country Economic Quarterly Reports (all available on the World Bank website); IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs* ("Doing Business Index"); World Economic Forum, *Global Competitiveness Index Report 2011-2012* ("2011 Global Competitiveness Index"); Transparency International, *Corruption Perceptions Index 2010* ("2010 Corruption Perceptions Index"); U.S. State Department, *Investment Climate Statements* (2011); Economist Intelligence Unit, Country Analyses (2011) (available at www.eiu.com).

[20] Individual data for countries is not easily accessible, let alone in a single place. The sources used here are relied upon as being the most widely used collective sources of independent, economic data. In many instances, reference has been made to other, external sources of data for the purposes of verification, not all of which have been quoted here in the interests of space.

[21] 2010 Corruption Perceptions Index, p. 5.

142 countries by reference to 12 individual "*pillars*".[22] The WEF defines "*competitiveness*" as the "*set of institutions, policies, and factors that determine the level of productivity of a country. The level of productivity, in turn, sets the level of prosperity that can be earned by an economy. The productivity level also determines the rates of return obtained by investments in an economy, which in turn are the fundamental drivers of its growth rates*.";[23]

c. finally, the Doing Business Index (defined above) which benchmarks and quantifies the regulations that "*enhance business activity and measures how business regulations and institutions affect economic outcomes*" and broadly speaking captures the regulatory and fiscal stability, efficiency and accessibility of 183 countries as places to do business.[24] The economies of those 183 countries are ranked on the basis of nine areas of regulation: starting a business, dealing with construction permits, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts (discussed below) and closing a business.[25]

For the purposes of comparison, occasional reference is also made to the "Business Environment" rankings of the Economist Intelligence Unit and the "Global Financial Centres Index", which similarly rank the overall attractiveness of the world's financial centres by reference to survey responses and independent benchmarking.[26]

Having defined both Hong Kong and Singapore as leading business and financial centres, Part A goes on to consider their status as leading arbitral venues, looking in particular at their court systems and arbitration framework (meaning not just their arbitration laws, but institutional, governmental and court support, their enforcement record as well as the profile and knowledge of the local legal community).[27] Again, the article seeks to provide some

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[22] 2011 Global Competitiveness Index. Reference is also made in this paper to the Global Competitiveness Index Report 2010-2011 (the "2010 Global Competitiveness Index"). The 12 pillars used in the Global Competitiveness Index are: institutions, infrastructure, macroeconomic environment, health and primary education, higher education and training, goods market efficiency, labour market efficiency, technological readiness, market size, business sophistication and ,innovation. *See* 2011 Global Competitiveness Index, pp. 4-8.

[23] The World Economic Forum defines "*competitiveness*" as the "*set of institutions, policies, and factors that determine the level of productivity of a country. The level of productivity, in turn, sets the level of prosperity that can be earned by an economy. The productivity level also determines the rates of return obtained by investments in an economy, which in turn are the fundamental drivers of its growth rates*." *See* 2011 Global Competitiveness Index, p. 4.

[24] *See* IFC/World Bank, *Business 2011: Making a Difference for Entrepreneurs*, p. v. The "fundamental premise of *Doing Business* is that economic activity requires good rules - rules that establish and clarify property rights and reduce the cost of resolving disputes; rules that increase the predictability of economic interactions and provide contractual partners with certainty and protection against abuse. The objective is regulations designed to be efficient, accessible to all and simple in their implementation. Doing Business gives higher scores in some areas for stronger property rights and investor protections, such as stricter disclosure requirements in related-party transactions. … Its aim is simply to supply business leaders and policy makers with a fact base for informing policy making and to provide open data for research on how business regulations and institutions affect such economic outcomes as productivity, investment, informality, corruption, unemployment and poverty."

[25] *See* IFC/World Bank, *Business 2011: Making a Difference for Entrepreneurs*, p. v.

[26] *See* Z/Yen Group, *Global Financial Centre's Index 10* (September 2011); Economist Intelligence Unit, *Business Environment Rankings* (2011) (available on subscription). The Global Financial Centre's Index ranks the world's financial centres by reference to survey data collected from 1,887 respondents and external indices (including the indices referred to in this article), rather than benchmarked data based on a country's regulatory environment.

[27] According to the Queen Mary Arbitration Survey, the most important factor for corporates choosing where to arbitrate their disputes is the "formal legal infrastructure". *See* Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, p. 17 (2010) ("The most important factor is the 'formal legal infrastructure' at the seat (62%), which includes the national arbitration law and also the track record in enforcing agreements to arbitrate and arbitral awards in that jurisdiction and its neutrality and impartiality.").

context for the success of Hong Kong and Singapore by looking at the development of both jurisdictions and at some recent data purporting to assess court and arbitral efficiency. In particular, reference is made to the Doing Business Index which benchmarks, as discussed above, the efficiency of the courts of individual countries. This is done by reference to the time, cost and procedural complexity of resolving disputes through the courts (measuring the number of days and procedures it takes to resolve a contractual dispute and the associated cost as a percentage of the judgment value).[28]

Reference is also made to a recently published World Bank report, *Investing Across Borders*.[29] The report was a pilot initiative for 2010, purporting to assess the regulation environment for foreign direct investment (FDI) of 87 countries, including all those reviewed in this article (with the exception of Hong Kong). The results are based on data collected from a survey of 2,350 "experts" in 87 economies in relation to four key areas: investment (the ease with which foreign companies may invest and own equity in local companies in certain sectors); starting a business (the degree to which the regulation for starting up a foreign and domestic company is equal); access to industrial land (equal treatment of foreign and domestic investors in the development, transfer, mortgage etc. of land); and arbitrating commercial disputes.[30]

In this latter regard, *Investing Across Borders* purports to provide data points based on the survey results for the overall regime for arbitration in each of the 87 jurisdictions.[31] For each country, the study assesses the responses given to the survey and scores, accordingly, the '*strength of the [arbitration] law*' (scoring highly if it is a Model Law and New York Convention country);[32] the '*ease of [arbitration] processes*' (these are the process provided for in the law as opposed to institutional processes meaning that a high score for the 'arbitration law' usually translates into a high score for 'arbitration processes';[33] and, finally, the '*extent of judicial assistance [for arbitration]*'.[34] The study assesses and quantifies these measures by reference to two case studies (one domestic, the other international) and provides an average for each country for the amount of time it takes to enforce a foreign (and domestic) arbitral award through the courts, assuming there is no appeal.[35]

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[28] *See* IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs* p. 70 (which explains that "*Doing Business* measures the time, cost and procedural complexity of resolving domestic businesses. The dispute involves the breach of a sales contract worth twice the income per capita of the economy. The case study assumes that the court hears an expert on the quality of the goods in dispute. This distinguishes the case from simple debt enforcement."). *See also* World Bank, *Investing Across Borders 2010* which includes an "Arbitrating Commercial Disputes indicator [to] assess the strength of legal frameworks for alternative dispute resolution, rules for arbitration, and the extent to which the judiciary supports and facilitates arbitration. The indicators compare national regimes for domestic and international arbitration for local and foreign companies."

[29] *See* World Bank, *Investing Across Borders* 2010.

[30] *See* World Bank, *Investing Across Borders* 2010, p. 8.

[31] *See* World Bank, *Investing Across Borders* 2010 which includes an "Arbitrating Commercial Disputes indicator [to] assess the strength of legal frameworks for alternative dispute resolution, rules for arbitration, and the extent to which the judiciary supports and facilitates arbitration. The indicators compare national regimes for domestic and international arbitration for local and foreign companies." A description of the methodology used can be found in Chapter 6 of the report. *See* World Bank, *Investing Across Borders* 2010 at Chapter 5.

[32] *See* World Bank, *Investing Across Borders* 2010, p. 55. This index "*analyzes the strength of countries' legal frameworks for alternative dispute resolution, as well as the countries' adherence to the main international conventions related to international arbitration*."

[33] *See* World Bank, *Investing Across Borders* 2010, p. 55. This index "*assesses the ease of the arbitration process, and whether there are restrictions or other obstacles that the disputing parties face in seeking a resolution to their dispute*."

[34] *See* World Bank, *Investing Across Borders* 2010, p. 55.

[35] *See* World Bank, *Investing Across Borders* 2010, p. 55. This index "*measures the interaction between domestic courts and arbitral tribunals, including the courts' willingness to assist during the arbitration process and their effectiveness in enforcing arbitration awards*." A summary of each country's performance (compared with Hong Kong, Singapore the BRICs, the US and UK) is included at Appendix II.

*Investing Across Borders* has significant limitations (in particular as a tool for measuring arbitral efficiency), notwithstanding its attempts at objectivity. This arises mainly out of the fact that the data is based on survey results only. The survey respondents for each country are limited in number, particularly for some of the jurisdictions where arbitration is lesser known and may not themselves be independent or reflective of actual practice. In particular, while some of the top ranking countries based on these measures are broadly in line with expectations (with England scoring highest, followed shortly by Singapore and France),[36] there are significant anomalies; the report's analysts are aware of this and are seeking to address its limitations in the 2012 version of the report.[37] Nevertheless, when put in context and recognising the limitations, the report provides some useful points of departure for discussion.[38]

Having framed the success of Hong Kong and Singapore as arbitral seats in this wider, socio-economic context, this article goes on to consider in Part B the wider South/East Asia region by reference to the same sources of data. Given the growing importance of this region as a whole (as discussed in this article), the second part of this article provides a survey of recent trends in South/East Asia's new, emerging countries outside Hong Kong and Singapore (which are already leading business, finance and arbitral venues) and beyond India and China (which are established BRIC economies)[39] where arbitration appears to be taking hold; namely, the so-called "*Next Eleven*" or "*N-11*" economies of Indonesia, South Korea, the Philippines and Vietnam.[40] Also included in this survey is the non- N-11 economy of Malaysia due to recent developments in its framework for arbitration and its growing importance as a financial centre. A summary of the data captured in this article is provided in Appendices I and II.

This article does not attempt to provide comprehensive coverage of the court and legal system of each country (nor the culture behind those systems); nor does it cover in depth the provision for arbitration in each or case law developments in all areas. These are covered elsewhere far more comprehensively than space here will allow.[41] Its purpose is to frame the

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[36] This is consistent with a number of other studies which reach broadly the same conclusions. *See* for example, the Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, p. 19 (2010), which concludes that London is the most popular seat for arbitration in the world.

[37] The most serious anomaly is Senegal which ranks second behind England in terms of its scores for arbitration, a ranking that is unexplained when other factors, such as Senegal's Corruption Perceptions Index and Doing Business Index rankings, are taken into account. For example, the World Bank reports that it takes on average 780 days to enforce a debt through the local courts; one of the worst enforcement records in the world. *See* IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, p. 191. It is hard to reconcile this with Senegal's score of 98.8 for "*extent of judicial assistance [for arbitration]* in *Investing Across Borders. See* World Bank, *Investing Across Borders* 2010, p. 147. *See also* the U.S. Department of State, *Investment Climate Statement for Senegal* (2011) ("the existing framework is cumbersome and slow. Few judges or lawyers are conversant in commercial laws. Court cases are expensive and rarely resolved expeditiously. Decisions can be inconsistent, arbitrary, and non-transparent."). The author has spoken with the team responsible for the arbitration section of *Investing Across Borders* who agree that the result is anomalous and point to the extremely small sample set of survey respondents available for Senegal; something which *Investing Across Borders* is seeking to address by including additional survey respondents. Further improvements to the data results could also be made by cross-referencing the results to some external sources of data, such as those referred to in this article. I am grateful to the *Investing Across Borders* team for their time and cooperation in discussing the data.

[38] It is to be noted that *Investing Across Borders* does not contain the overall rankings for arbitration discussed in this article. The rankings referred to are based on the author's own analysis of the data contained in the report for each of the 87 jurisdictions for their efficiency in arbitration. The overall ranking for each of the countries reviewed in this paper together with other, control countries, is included at Appendix II.

[39] A review of these jurisdictions is beyond the scope of the present article whose purpose is to look at the development of more fringe economies and jurisdictions.

[40] *See* Part B below for the meaning of "Next Eleven" and a discussion of why these jurisdictions have been chosen.

[41] For a more detailed discussion of the legal cultural identity of each of the countries reviewed here, *see e.g.,* M. Pyrles & V. Taylor, *The Cultures of Dispute Resolution in Asia* in M. Pryles (ed.), *Dispute Resolution in Asia*

success of the region's leading arbitral venues within the wider context of their importance as business and financial centres and use this to discuss developments in the region's emerging economies.

### *A. The Rise of Hong Kong and Singapore As Leading Centres for Arbitration*

Singapore and Hong Kong have emerged in recent years as two of the most important centres for global finance and business. This is demonstrated by their top-ranking status in the Doing Business Index and supported by a wealth of independent data and analysis.

#### 1. Hong Kong and Singapore: Asia's Leading Tigers

##### a) Hong Kong

With a population of around seven million, Hong Kong is one of the most densely populated cities in the world.[42] It is consistently ranked as one of the leading world centres for business and finance. Indeed, the Global Financial Centres Index ranks Hong Kong as one of the top three centres for finance and business, together with New York and London.[43] According to the same Index, the three cities together control around 70 percent of the world's equity trading.[44] The Global Competitiveness Index also ranks Hong Kong's financial market as the second best in the world, after Singapore.[45] Hong Kong's status as a leading financial centre is also supported by data from the Economist Intelligence Unit.[46]

In addition, Hong Kong's stock exchange was the world's biggest centre for capital raising through IPOs in 2010.[47] In 2010, Hong Kong raised US$ 57.9 billion in equity through 87 IPOS (or HK$ 449.5 billion), representing roughly 20 percent of the total value of capital raised on the global markets;[48] this compares with the New York Stock Exchange which raised US$34.7 billion through 82 IPOs and the London Main List which raised just US$ 8.9 billion through 18 IPOs.[49]

Hong Kong's growth in 2010 was more modest than Singapore's, but at 6.8 percent was in line with the region and far out-paced the economies of the West.[50] The mainstay of Hong

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(2006); G. Kim, *East Asian Cultural Influences* in M. Moser ed., *Arbitration in Asia* (update 2010). For a country by country discussion of their court, legal and arbitration system, *see e.g.,* M. Pryles (ed.), *Dispute Resolution in Asia* (2006); P. McConnaughay & T. Ginsburg (eds), *International Commercial Arbitration in Asia,* (2006); J. Carter (ed.), *The International Arbitration Review* (2010) (Chapters on China, Hong Kong, India, Japan, Korea, Malaysia, Singapore). For a discussion of the enforcement environment, *see e.g.,* Hwang & Tat, *Recognition and Enforcement of Arbitral Awards* in M. Pryles & M. Moser (eds), *Asian Leading Arbitrators Guide to Arbitration,* p. 407 (2007). *See* further some of the journal articles and papers referred to below.

[42] Economist Intelligence Unit, *Country Analysis: Fact Sheet* (October 2011).

[43] *See* Z/Yen Group, *Global Financial Centre's Index 10* (September 2011).

[44] *See* Z/Yen, *Global Financial Centres Index* 10, p. 10 (September 2011); Economist Intelligence Unit, *Country Analysis: Business Environment* (July 2011). *See also* Economist Intelligence Unit, *Country Analysis: Business Environment* (July 2011).

[45] *See* 2011 Global Competitiveness Index, p. 28. *See also* Economist Intelligence Unit, *Country Analysis: Business Environment* (July 2011).

[46] *See* Economist Intelligence Unit, *Country Analysis: Business Environment* (July 2011).

[47] *See* Asian Development Bank, *Outlook 2011: South-South Economic Links* at p. 126; Ernst & Young Report, *Global IPO trends 2011*, at pp. 4-5 (2011).

[48] *See* Ernst & Young Report, *Global IPO trends 2011*, at pp. 4-5 (2011).

[49] *See* Ernst & Young Report, *Global IPO trends 2011*, at pp. 5, 20 (2011). One of the reasons for the dramatic fall in IPO fundraising on London's main market is that most available capital was invested through secondary issues due to the financial crisis. In other words, companies already listed have been looking for additional equity capital leaving limited funds available for new entrants to the market.

[50] *See* Asian Development Bank, *Outlook 2011: South-South Economic Links,* p. 125; International Monetary Fund, *Regional Economic Outlook: Asia and Pacific: Managing the Next Phase of Growth,* p. 4 (April 2011);

Kong's economy is of course its financial, professional and trade services sector.[51] Hong Kong's economy is also boosted by strong private consumption and some exports (largely consumer goods), mainly to China.[52]

While Hong Kong was ranked as only the eleventh most competitive economy in the world,[53] it has – according to the Global Competitiveness Index - the best infrastructure in the world (ahead of Germany and Singapore) and a competitive goods and labour market. Like Singapore, it is exposed to general inflationary pressures and a bubble in its property market.[54] It is also reported to be less competitive than Singapore in its standard of and participation in education and, consequently, in innovation.[55] It also has some perception problems arising out of questions about its political and judicial independence from Mainland China (discussed below).

b) Singapore

With a population of around five million, Singapore ranks alongside Hong Kong as one of the most densely populated countries (city states) in the world.[56] Despite its diminutive size, however, Singapore recorded unprecedented economic growth in 2010; it was the world's fastest growing economy with GDP growth at a "*scorching pace*" of 14.5 percent (although this is widely reported as exceptional and is expected to slow).[57]

Underscoring this success, Singapore is consistently ranked across a variety of external indices as the most attractive place in the world to do business. For example, it is currently ranked as the most neutral place in the world to do business according to the 2010 Corruption Perceptions Index.[58] It has also this year overtaken Sweden and the US as the second most competitive economy in the world behind Switzerland by reference to the latest Global Competitiveness Index.[59] The city state's institutions are ranked in the same Index as the best in the world both in terms of transparency and government efficiency,[60] boasting world-class infrastructure (ranking third behind Hong Kong and Germany) with a strong focus on education.[61] Singapore has the most developed financial market in the world and also ranks first and second respectively as having the most competitive goods and labour markets.[62] The Economist Intelligence Unit also ranks Singapore as being "*the most attractive location for*

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International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks* p. 85 (September 2011). This was a marked recovery from a contraction of 2.7 percent in 2009.

[51] *See* Asian Development Bank, *Outlook 2011: South-South Economic Links,* p. 125.

[52] *See* Economist Intelligence Unit, *Hong Kong Country Analysis: Fact Sheet* (October 2011).

[53] *See* 2011 Global Competitiveness Index, p. 15.

[54] *See* Asian Development Bank, *Outlook 2011: South-South Economic Links* in chapter *Hong Kong,* pp. 126-127.

[55] *See* 2011 Global Competitiveness Index, p. 28. Hong Kong's higher education system ranked 14th in the world and it ranks 43rd in its availability of scientists and engineers. This compares with Singapore's 8th place, behind Switzerland and Sweden, which top the rankings for innovation.

[56] World Bank Data; Economist Intelligence Unit, *Country Analysis: Fact Sheet* (September 2011).

[57] *See* Asian Development Bank, *Outlook 2011: South-South Economic Links* in chapter *Singapore,* p. 206 and 208 ("the economy is forecast to grow by 5.5 percent in 2011"); International Monetary Fund, *Regional Economic Outlook: Asia and Pacific: Managing the Next Phase of Growth,* p. 4 (April 2011); International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks* p. 85 (September 2011) (which shows comparable expected growth of 5.3 percent for 2011); Economist Intelligence Unit, *Country Analysis: Fact Sheet* (September 2011). *See also* Bloomberg News, *Singapore Raises 2011 Inflation Forecast* (17 February 2011).

[58] Together with New Zealand and Denmark. *See* 2010 Corruptions Perception Index. For comparison, the UK ranked 20, the US, 22 and China, 78.

[59] *See* 2010 Global Competitiveness Index, p. 14.

[60] *See also* its top ranking in the Corruptions Perception Index 2010.

[61] 2011 Global Competitiveness Index, p. 12.

[62] 2011 Global Competitiveness Index, p. 12.

*business in the world in 2011-15*."[63] The same source reports that "*the political environment in Singapore is expected to remain highly stable, with its level of political effectiveness unmatched by any other country in the world*."[64]

A major component of Singapore's economic strength lies in its financial and business services industry,[65] which accounted for at least 70 percent of total employment and generated nearly all new jobs in 2010.[66] Despite its strength in services, the biggest contributor to the city's growth was in fact its manufacturing industry (mainly chemicals, mineral fuels, electrical components and pharmaceutical products).[67]

Singapore is also exposed to general inflationary pressures and a growing property bubble (which the government is seeking to address); it is also, as discussed below, more exposed than some economies in the region to contagion from the recession in the West.

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Perhaps not surprisingly given this stellar economic performance and overall institutional strength, both Hong Kong and Singapore are also increasingly popular as destinations of choice for parties choosing to arbitrate their disputes. In fact, such has been their recent success that it is now legitimate to speak of their importance as a situs for arbitration not just regionally, in Asia, but globally.[68]

2. Hong Kong and Singapore: Asia's Leading Arbitral Venues

The rise in popularity and success of these two key jurisdictions in the global arbitration market is undoubtedly a reflection of their status as stable, neutral and increasingly important global financial and business centres. Indeed, it is precisely because of their world-class institutions and infrastructure (including, importantly, their legal systems) that both cities have achieved such dominant positions as a situs for arbitration.

In this regard, both cities have developed their status as leading arbitral venues through sustained government-investment in arbitration;[69] effective global marketing and promotion;[70]

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[63] Economist Intelligence Unit, *Country Analysis: Business Environment* (September 2011).
[64] Economist Intelligence Unit, *Country Analysis: Business Environment* (September 2011).
[65] *See also* Lee Kuan Yew, *Hard Truths to Keep Singapore Going* p. 139 (2010).
[66] *See* Asian Development Bank, *Outlook 2011: South-South Economic Links*, p. 207.
[67] *See* Asian Development Bank, *Outlook 2011: South-South Economic Links*, p. 206; Economist Intelligence Unit, *Country Analysis: Fact Sheet* (September 2011)..
[68] *See* Greenberg, Kee and Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* ¶1.130 (2011).
[69] Following Singapore's worst recession since its Independence (in 1965), in 1985 the Singapore government established a high level Economic Committee, which recommended the establishment of an international arbitration centre as part of a programme to speed up the resolution of commercial disputes and develop Singapore as a centre for legal services. *See* Cheng, *The Developmental Life Cycle of International Arbitration Legislation — Singapore IAA Case Study*, 7(1) Asian Int.'l Arb. Journal 2 (2011). The government has not stopped in its furtherance of Singapore as a hub for arbitration since. As noted in recent press, the Singaporean government "engages the arbitration community on an ongoing basis and amendments to the International Arbitration Act are made constantly to improve the process of international arbitration, demonstrating a commitment to the development of the country's legislative framework to suit the needs of the international business community". *See* The Business Times, *Singapore: The Future Global Arbitration Hub For Asia* (28 October 2009). In April 2008, the Singapore government also announced tax incentives for firms carrying out international arbitration work with hearings in Singapore and work pass exemptions for those entering Singapore for arbitration and mediation services. *See* Ministry of Law, *CAA* (9 April 2008) (available at www.siac.org).
[70] Singapore, in particular, has made extensive efforts in the last 10 years to promote its services, including through link-ups with some of the world's leading arbitration institutions (the AAA, PCA, ICC and ICDR). *See* Cheng, *The Developmental Life Cycle of International Arbitration Legislation — Singapore IAA Case Study*,

a knowledgeable and supportive court system;[71] effective national arbitration institutions with modern and progressive rules;[72] state of the art facilities for arbitration;[73] an experienced, sophisticated and increasingly international arbitration community;[74] and, a modern framework legislation.[75] Not surprisingly, *Investing Across Borders* cites many of these as key characteristics across countries reported to have strong investment environments.[76]

a) Hong Kong's Arbitration Framework

Hong Kong has been less frequently active in its legislative amendments than Singapore (discussed below) but currently boasts the newest arbitration law in the world (effective as of 1 June 2011).[77] Unlike Singapore, Hong Kong now no longer retains a dual system for 'domestic' and 'international' arbitrations (although, as in Singapore, certain domestic 'opt-

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7(1) Asian Int.'l Arb. Journal 3 (2011).

[71] The pro-arbitration stance of the Singaporean courts, in particular, is well documented. In a recent article, one leading Singapore practitioner and arbitrator noted the "near-Herculean task" of setting aside an arbitral award in Singapore, such is the courts' reluctance to interfere in the arbitral process. *See* Hwang & Tan, *New Developments in Arbitration in Singapore,* 6(2) Asian Int.'l Arb. Journal 213 (2009). *See also* Howell, *Developments in International Commercial Arbitration in Asia*, 8 (2007) (referring to specialist judges who deal with international arbitration issues); Speech by Law Minister K Shanmugam during the *Committee of Supply Debate 2011*, 9 March 2011 (available at: http://www.mlaw.gov.sg) ("we have a highly regarded, strong and independent judiciary. Our legal system is free of corruption, and is based on Common Law. International best practices are adopted and investors as well as lawyers who advise them can easily understand our system, and work within it"); Cheng, *The Developmental Life Cycle of International Arbitration Legislation — Singapore IAA Case Study*, 7(1) Asian Int.'l Arb. Journal 11-12 (2011). ("the Singapore courts have been very supportive in bringing to bear the legislative intent behind arbitration legislation and have shown consistent emphasis on party autonomy and support of the finality of the arbitral award."); Decision of the Singapore High Court, *Tjong Very Sumito & Ors v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732; [2009] SGCA 41 at p. 28 per VK Rajah JA ("There was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now well behind us. ***An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with***. More fundamentally, the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration. In essence, a court ought to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends the law.").

[72] Discussed further below.

[73] As noted below, Singapore's Maxwell Chambers opened its doors in January 2010 and the HKIAC has recently announced plans to expand its space in Hong Kong's Two Exchange Square.

[74] *See* Cheng, *The Developmental Life Cycle of International Arbitration Legislation — Singapore IAA Case Study*, 7(1) Asian Int.'l Arb. Journal 11-12 (2011).

[75] *See* R. Morgan, *Abandoning Colonial Arbitration Laws in Southeast Asia – II Background and Commentary* 15(7) Mealey's International Arbitration Law Report 44 (2000) ("Being visibly a model law jurisdiction … is critically important from the standpoint of attracting international arbitration business to an arbitration centre. This was a clear motivation to Hong Kong and Singapore"); Hwang & Lee, *Survey of South East Asian Nations on the Application of the New York Convention,* 25(6) Journal Int.'l Arb. 873 (2008) ("one prominent factor that has encouraged the rise of the use of arbitration has been the formal adoption of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") in various South East Asian jurisdictions in recent years."); Hwang & Tat, *Recognition and Enforcement of Arbitral Awards* in Pryles & Moser (eds), *Asian Leading Arbitrators Guide to Arbitration,* 407 (2007); Greenberg, Kee and Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* ¶1.33 (2011) ("The widespread adoption of the Model Law was an essential ingredient for the growth of arbitration in this region"). In a recent speech, the Singaporean Minister for Justice stated that: "In terms of the legislative framework, my Ministry updated the International Arbitration Act two years ago. We continue to monitor legislative and other developments in other jurisdictions, and seek feedback from practitioners and users of Singapore's arbitration services on a regular and systematic basis. We have given our commitment to update our laws to reflect best practices, and we have moved fast – and will continue to move fast – when the need arises." *See* Speech by Law Minister K Shanmugam at the Committee of Supply Debate in Parliament, ¶21, 9 March 2011, available at www.mlaw.gov.sg.

[76] World Bank, *Investing Across Borders 2010,* p. 12.

[77] Hong Kong's Arbitration Ordinance (Ord. No. 7 of 2010).

ins' are retained).[78] Further changes include adoption of the more expansive provision for interim measures seen in the 2006 revision of the UNCITRAL Model Law;[79] codification of the obligation of confidentiality;[80] provision for greater use of alternative dispute resolution (in particular, so-called "med-arb")[81]; and provision with regard to the enforcement of awards (in particular, those rendered in Mainland China).[82]

The Doing Business Index considers Hong Kong's courts to be the second most efficient in the world (behind those of Luxembourg); it takes on average just 150 days at a cost of 25 percent of the value of the debt to enforce a contract through the courts in Hong Kong.[83] In addition, while *Investing Across Borders* does not include data on Hong Kong's efficiency in relation to the enforcement of arbitral awards or its arbitral regime in general,[84] data available on the HKIAC website shows that of the 191 cases in which enforcement of (foreign and domestic) awards was sought between 2001 and 2010, 26 were opposed and only four were set aside.[85]

b) Singapore's Arbitration Framework

The legislature in Singapore has been extremely alert to potential issues affecting the development of arbitration arising out of problematic judicial decisions. Singapore introduced its International Arbitration Act in 1995 ( "IAA"), incorporating the UNCITRAL Model Law (with minor modifications)[86] and the New York Convention;[87] there is a separate regime for domestic arbitration.[88] The IAA contains a mechanism whereby parties can opt-out of the international (Model Law) regime,[89] the legislative purpose of which was to allow those who desired a "*greater degree of judicial intervention*" to opt-in to the domestic regime for arbitration.[90] However, on 14 March 2001, the High Court of Singapore rendered a controversial decision setting aside an award on the basis that adoption of the ICC Rules was an implied opting-out of the Model law regime.[91] The legislature responded with a change to section 15 of the IAA on 1 November 2001[92] making clear that any opt-out must be express

[78] Hong Kong's Arbitration Ordinance (Ord. No. 7 of 2010), Part 11 and Section 5.
[79] Hong Kong's Arbitration Ordinance (Ord. No. 7 of 2010), Part 6.
[80] Hong Kong's Arbitration Ordinance (Ord. No. 7 of 2010), Section 18.
[81] Hong Kong's Arbitration Ordinance (Ord. No. 7 of 2010), Sections 32 and 33.
[82] Hong Kong's Arbitration Ordinance (Ord. No. 7 of 2010), Division 3 of Part 10.
[83] IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs,* p. 168.
[84] This is likely due to the fact that Hong Kong is not a 'country' and therefore does not fall within the World Bank's parameters for *Investing Across Borders*.
[85] *See* HKIAC website. It is not clear whether the figures reported refer to orders to set aside or refusal of enforcement. It is also not clear how many of the awards referred to here were domestic as opposed to international.
[86] The International Arbitration Act (Cap 143A, 2002 Rev Ed) came into force on 27 January 1995 and was amended in 2001, 2002, 2005 and 2009. *See* International Arbitration Act 1994 (Cap. 23); International Arbitration (Amendment) Act 2001 (No. 38 of 2001); International Arbitration (Amendment) Act 2002 (No. 28 of 2002); Statutes (Miscellaneous Amendments) (No. 2) Act 2005 (No. 42 of 2005); International Arbitration (Amendment) Act 2009 (No. 29 of 2009). The IAA expressly adopts the 1985 Model Law (as a Schedule), but modifies it in respect of, in particular: the manner of appointing the third arbitrator (where there are three arbitrators) (Section 9A, IAA); power to order interim measures (Section 12, IAA); court assistance in taking evidence (Sections 13 to 14, IAA); confidentiality of proceedings (Sections 22 to 23, IAA); grounds for setting aside an award (Section 24, IAA); and immunity from suit of arbitrators (Section 25, IAA) and appointing authorities/arbitral institutions (Section 25A, IAA).
[87] Part III, IAA. Singapore acceded to the New York Convention in 1986.
[88] Arbitration Act (Cap. 10, 2002 Rev Ed).
[89] Section 15, IAA.
[90] Cheng, *The Developmental Life Cycle of International Arbitration Legislation — Singapore IAA Case Study*, 7(1) Asian Int'l Arb. Journal 12 (2011).
[91] Decision of the Singapore High Court, *John Holland v. Toyo Engineering Corp. (Japan)* [2001] 2 SLR 262.
[92] *See* International Arbitration (Amendment) Act 2001 (No. 38 of 2001), Section 12, which amended section 15 to the IAA. In particular, Section 15(2) provides: "For the avoidance of doubt, a provision in an arbitration agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to exclude the

(and not implied).[93] Further uncertainty arising out of case law developments on this same subject in 2002[94] were addressed in an additional change to the law that same year.[95] This flexible and impressively rapid approach to addressing problems as they arise demonstrates the singular commitment of the government and legal community to the development of Singapore as an international hub for arbitration.

Most recently in January 2010, Singapore introduced further revisions to its framework arbitration legislation in the continued drive to position itself as a global centre for dispute resolution.[96] The most important change was again brought about by unfortunate case law developments;[97] section 12A of the IAA now confirms that the Singapore court does indeed have the power to grant interim relief in aid of foreign-seated international arbitrations.[98] Other changes introduced by the 2010 amendment include new provisions in relation to authentication to assist overseas enforcement of awards made in Singapore,[99] and clarification that the definition of "*arbitration agreement*" includes agreements made by "*electronic communications*".[100]

Data recently compiled by the IFC/World Bank supports the view that Singapore is an increasingly important centre for arbitration.[101] According to this data, Singapore has one of the most effective court systems in the world, taking on average 150 days to resolve a

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application of the Model Law or this Part to the arbitration concerned". *See also* Cheng, *The Developmental Life Cycle of International Arbitration Legislation — Singapore IAA Case Study*, 7(1) Asian Int'l Arb. Journal 14 (2011).

[93] Section 15(1), IAA.

[94] *See* Decision of the Singapore High Court, *Dermajaya Properties v Premium Properties* [2002] 2 SLR 164 (*obiter* comment by Woo Bih Li . that if parties adopt a set of arbitration rules which contain procedures different from those contemplated by the Model Law, then those arbitration rules would be regarded as incompatible with the Model Law and would therefore be entirely excluded.)

[95] The International Arbitration (Amendment) Act 2002 introduced section 15A to the IAA, which provides that: "It is hereby declared for the avoidance of doubt that a provision of rules of arbitration agreed to or adopted by the parties, whether before or after the commencement of the arbitration, shall apply and be given effect to the extent that such provision is not inconsistent with a provision of the Model Law or this Part from which the parties cannot derogate."

[96] The International Arbitration (Amendment) Act 2009 (No. 29 of 2009) was passed by Parliament on 9 October 2009 and became effective on 1 January 2010.

[97] Decision of the Singapore Court of Appeal, *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR (R) 323 (decision of Prakash J. who interpreted section 12(7) IAA as applying to international arbitrations seated in Singapore only); *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 (Ang J., who took the opposite view, on the basis that "(a) Section 12(7) gives effect to Art 9 of the Model Law which preserves the right of the parties to the court's jurisdiction to grant interim measures in support of arbitration proceedings; (b) The first qualifier is wide enough to include international arbitrations conducted in Singapore and abroad, "*with the qualification that the curial support for arbitral proceedings abroad is confined to court-ordered interim measures* "; and (c) Order 69A r 4(1) also supports this interpretation."); Decision of the Singapore Court of Appeal*, Swift-Fortune Ltd v Magnifica Marine SA*[2007] 1 SLR 629 (Chan Sek Keong CJ delivering judgment of Court of Appeal, confirming first instance decision of Prakash J.).

[98] Section 12A, IAA.

[99] Section 19C, IAA. Under section 19C, the Minister for Law is empowered to designate entities to authenticate, on a non-mandatory basis, 'made in Singapore' arbitration awards. Until this change, there was no public body in Singapore that could authenticate such awards. This had caused difficulties for some parties in enforcing their Singapore arbitration award overseas because some foreign courts require that the awards be duly authenticated before allowing the awards to be enforced. The authentication by designated entities is not the sole means of authentication.

[100] Section 2(1), IAA ("'arbitration agreement' means an agreement in writing referred to in Article 7 of the Model Law and includes (a) an agreement made by electronic communications if the information contained therein is accessible so as to be useable for subsequent reference …"). Note that this extended definition of 'arbitration agreement' does not apply to Part III IAA (enforcement of foreign arbitral awards under the New York Convention) because "electronic communications" is not recognised by the definition in the New York Convention.

[101] *See* IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*; World Bank, *Investing Across Borders 2010* (2010). *See* summary of this data in Appendix II.

contractual dispute at 26 percent of the value of the judgment debt.[102] Other sources describe the "*high standards of openness and transparency*" in Singapore's court system.[103] In addition, according to *Investing Across Borders*, Singapore has the second most effective, supportive and efficient overall arbitration regime in the world, behind the U.K..[104]

In addition to a strong legal system with courts very supportive of arbitration,[105] it takes a reported average of just 7 weeks to enforce a foreign arbitral award in the courts of Singapore (assuming there is no appeal).[106] That Singapore's courts are supportive of arbitration is also evident from an independent review of its enforcement record. In 2011, out of 4 proceedings before the Singapore High Court to set aside an international arbitration award, only two proceedings resulted in an international arbitral award being set aside successfully.[107] These are the only two instances since 2001, one of which is pending appeal, which have resulted in a successful set aside of an international arbitral award; there have been no refusals of enforcement of an international arbitral award between 2001 to date.[108]

### c) Hong Kong and Singapore's Arbitration Institutions: Innovation and Modernisation

The national institutions in Singapore and Hong Kong have also been extremely active in their continued drive to position themselves internationally. In this regard:

- The Singapore International Arbitration Centre (SIAC) is one of the many institutions around the world substantially to have revised its rules in 2010, introducing emergency arbitrator and expedited procedures for the more efficient resolution of disputes[109] and new provisions in relation to multi-party appointment of arbitrators[110] and confidentiality.[111]

- Having adopted its new "Administered Rules" for international arbitration (based on the UNCITRAL Rules) on 1 September 2008, the Hong Kong International

[102] *See* World Bank: *Doing Business 2011: Making a Difference for Entrepreneurs,* p. 192. Singapore's court system ranks 13th according to the Doing Business Index.
[103] *See* U.S. Department of State, *2011 Investment Climate Statement for Singapore* (2011).
[104] *See* Appendix II. This ranking ignores the anomalous result for Senegal, for reasons discussed above.
[105] *See* World Bank, *Investing Across Borders 2010* p. 150 (2010).
[106] World Bank, *Investing Across Borders 2010* p. 150 (2010). Singapore scored 92.4 for its "strength of law", 81.8 for its "ease of process" and 93.5 for its "extent of judicial assistance" in the same report. *See further below* and Appendix II.
[107] *See* Decision of the Singapore High Court, *Kempinski Hotels SA v PT Prima International Development* [2011] SGHC 171 (which resulted in three related awards, two on merits and one on costs, being set aside by the Singapore High Court. The basis for set aside for each was the same; that the Tribunal had made a decision on an issue not formally pleaded by the Respondent and was consequently a decision beyond the scope of the matters submitted to the Tribunal. This case is now the subject of appeal, due to be heard on 16 January 2012.). *See also* Decision of the Singapore Court of Appeal, *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33 (where the underlying contract was based on the standard provisions in the 1999 FIDIC Conditions of Contract. One of the parties commenced an arbitration to review the decision of a Dispute Adjudication Board (DAB) constituted under those Conditions which had awarded a sum of money to the Claimant. The Tribunal issued a final award confirming the obligation of the Respondent immediately to pay that sum of money to the Claimant and declining to review the merits of the Board's decision (on the basis that no such review was permitted). The Singapore Court of Appeal found the failure to review the merits of the DAB decision by the Tribunal to be a contravention of the FIDIC Conditions of Contract and consequently that the Tribunal had acted in excess of their jurisdiction. The Court also found that rules of natural justice had been breached because the losing party before the Board had been denied a chance to produce evidence and defend its position before the Tribunal.
[108] These figures are based on independent research conducted for the author by her colleague, Darius Chan. They refer to reported case law only.
[109] SIAC Rules, Rule 5 and Schedule 1 (4th ed., 1 July 2010).
[110] SIAC Rules, Rule 9 (4th ed., 1 July 2010).
[111] The new SIAC rules became effective in July 2010.

Arbitration Centre (HKIAC) has also recently announced (government-backed) plans to expand its offices in Two Exchange Square to provide more modern, state-of-the art hearing and office facilities. This expansion is in line with the government's commitment to promoting Hong Kong as a leading arbitration centre in Asia Pacific.[112]

In addition, January 2010 saw the grand opening of Singapore's new, bespoke arbitration facility, Maxwell Chambers. In addition to 14 rooms providing world class hearing facilities, it is also now home to a number of leading arbitration names and institutions (including barristers chambers from London, the ICC, the ICDR and of course SIAC). In 2010, 120 arbitration cases were heard at Maxwell Chambers, compared with 46 cases after it first opened.[113]

d) Hong Kong and Singapore: Statistical Support for their Status as Leading Arbitral Venues

The changes seen in the last year to the rules and legislation of these (and other leading) jurisdictions are in part driven by concerns expressed by some users in relation to arbitrator bias/experience and the time and cost of arbitral proceedings.[114] In many cases and in particular in Asia, they also reflect that hallmark of growth and prosperity; a desire to innovate. For example, SIAC has been one of the first institutions (together with the SCC) to introduce and report on its new emergency arbitrator procedure; discussions with SIAC case managers show that the procedure has been used in at least four cases with positive outcomes in each case (although key questions remain about the ultimate enforceability of such measures).

Whatever the motive, no-one can ignore the increasing popularity and therefore importance of these key jurisdictions - as recent statistics show.

- In the 2010 Queen Mary International Arbitration Survey, Singapore was listed as the third most popular choice of seat for international arbitration (the most popular in Asia), behind London and Geneva (and jointly with Paris and Tokyo).[115] SIAC

[112] At the HKIAC's silver anniversary conference in November 2010, the Chief Executive Officer of the Hong Kong Special Administrative Region (SAR), Hon. Donald Tsang, kicked off the event with a welcome speech. He and other Hong Kong government officials who spoke, including Hon. Justice Robert Tang, Court of Final Appeal Judiciary, a member of HKIAC's Council, encouraged using Hong Kong as a forum for international arbitration, and assured attendees of its commitment to independence, the rule of law, and enforceability of awards issued there.

[113] *See* Cheng, *The Developmental Life Cycle of International Arbitration Legislation — Singapore IAA Case Study*, 7(1) Asian Int'l Arb. Journal 4 citing Speech by Law Minister K Shanmugam at the Committee of Supply Debate in Parliament, 9 March 2011, available at http://www.mlaw.gov.sg.

[114] The last year has seen amended the rules of the Stockholm Chamber of Commerce (adopted January 2010), UNCITRAL (effective July 2010) ACICA (effective September 2010), and the ICC (adopted July 2011). In addition, 2012 will see the introduction of new, revised CIETAC rules addressing changes to the rules on the place and language of the arbitration, appointment of arbitrators, consolidation and interim measures. The International Bar Association has also updated its influential Rules on the Taking of Evidence in International Arbitration (adopted in May 2010). Jurisdictions that have updated their arbitration legislation include Scotland (in force from 7 June 2010), Ireland (in force from 8 June 2010.), France (in force from 1 May 2011), Australia (in force from 6 July 2010), Cambodia (in force from 6 March 2006 and updated by sub-decree in 2010) and Vietnam (in force from 1 January 2011). In addition, Malaysia is in the process of updating its arbitration law, last updated in 2005. Some of these developments are discussed further below.

[115] *See* Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, p. 19 (2010). *See also* the overall ranking of the World Bank, *Investing Across Borders 2010* report at Appendix II.

was listed as the fourth most popular institution to administer an arbitration, behind (in order of ranking) the ICC, the LCIA and the AAA/ICDR.[116]

- In 2009, the ICC administered 1,491 ongoing arbitrations with over 2,000 parties. Of those, 14% (411) involved parties from South/South East Asia, the second highest group behind North and Western Europe (41%) and ahead of North America (9%) and Latin America and the Caribbean (11%). The growth in the number of parties from South and East Asia and the Pacific saw increases recorded for all major nationalities in the region. India (52 parties) was the most frequently represented country, followed by China (49 parties), then South Korea (31 parties), Singapore (27 parties), Japan (26 parties) and Malaysia (22 parties). Singapore was the most popular seat in Asia and overall, the fifth most popular seat for arbitration, with 38 ICC sited arbitrations, behind Paris (113 arbitrations), London (73 arbitrations), Geneva (62 arbitrations), Zurich (50 arbitrations) and ahead of New York (17 arbitrations) and Hong Kong (9 arbitrations).[117] 2010 statistics for the ICC were not available at the time of writing.

- In 2009, SIAC recorded 160 new cases, a 60 percent increase in its case load from the previous year.[118] Of these, nearly 20 percent related to India in one way or another (the highest total for any one country outside Singapore). In 2010, the number of cases increased again to 198, of which 140 were international. The cases filed in 2010 involved parties from over 45 jurisdictions. While Asia dominates those countries represented (Singapore (107), India (36), Hong Kong (26), Indonesia (22), Vietnam (15), Mainland China (14), Korea and Malaysia (both 12) and Japan (11)) follow as the countries with the most representations. The major non-Asian countries include significant entries for the US (13) followed by the UAE (10) and Bermuda and the BVIs (both 7).[119]

- The HKIAC handled 291 arbitration matters in 2010, of which 175 were international.[120] The most frequently represented countries in these international cases were, in order, Mainland China (91), the BVIs (48),[121] Korea (15), USA (11), India (10).[122]

These figures and survey results support the view that Hong Kong and Singapore are not just well positioned regionally; putting aside challenges they face (discussed further below), they have to date earned their place as world-leading business and arbitration centres.[123]

### *B. The Growing Importance of Asia: Beyond Hong Kong and Singapore*

The importance of Asia as a global business, financial and dispute resolution centre should not be defined by reference to Hong Kong and Singapore alone, however. Nor should the region's two BRIC economies (India and China) overshadow the growing importance of

[116] *See* Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, p. 19 (2010).
[117] ICC 2009 Statistical Report.
[118] SIAC Annual Report (2009).
[119] SIAC Annual Report (2010).
[120] HKIAC Case Statistics 2010, available at www.hkiac.org. More detailed statistics are not available.
[121] Of course, parties from the BVIs may not actually reside there so this figure is misleading; but it does confirm Hong Kong's importance as a financial centre.
[122] The author is grateful to the HKIAC for providing these statistics.
[123] Compare the HKIAC and SIAC case loads with that of the LCIA, for example, which had 246 disputes referred for arbitration 2010. *See* LCIA, Director General's Report 2010, at p. 1.

other economies in South/East Asia. If, as many predict, China replaces the United States as the global super-power by 2027,[124] the significance and importance of *all* Asian economies are ignored at our peril as the effects of China's (and India's) increasing global super-power status ripple outwards.[125]

Current talk of a new economic world order may be dominated by the BRICs, and in particular China. However, many of the less well-known South/East Asian countries have also shown their own, impressive economic growth and development. In addition, these economies are gaining in prominence and importance as companies and investors increasingly look beyond China, which is rapidly losing its low-cost advantage.[126] Thus, while Singapore and Hong Kong may have topped the Doing Business Index, South Korea was the next most easy jurisdiction in South/East Asia in which to do business and ranked an impressive 16th in the world (ahead of Germany, France and Switzerland).[127] Further according to the Doing Business Index, emerging economies such as Indonesia, Malaysia and Vietnam took the lead in reforming their regulatory infrastructure to encourage foreign investment and new business growth in 2010.[128] Finally, following on from its now-infamous predictions about the BRIC economies, Goldman Sachs now talks of the rising importance in global policy-making of the "Next Eleven" or "N-11" economies, identified as the countries that "*could potentially have a BRIC-like impact in rivalling the G7*".[129] From South/East Asia, the N-11 includes Indonesia, South Korea, Vietnam and the Philippines.[130]

These same countries are also alive to the need to attract outside investment and increasingly cognisant of the required stability that entails. In this regard, both the Philippines[131] and Vietnam[132] have both upgraded their framework legislation for the resolution of disputes through international arbitration in the last year to bring it more in line with international

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[124] Goldman Sachs former chief economist, Jim O'Neill, in his famous BRIC assessment, originally predicted that China would overtake the U.S. by 2040. *S*ee Goldman Sachs Global Economic Paper No. 99, *Dreaming With BRICs: The Path to 2050,* p. 3 (1 October 2003); Goldman Sachs Global Economic Paper No. 134, *How solid are the BRICs?,* (1 December 2005); Goldman Sachs Global Economic Paper No. 153, *The N-11: More Than an Acronym* p. 9 (28 March 2007). However, the projections changed in 2008, when China was predicted to overtake the US by 2027. *See* Goldman Sachs Global Economic Paper No. 192, *The Long-Term Outlook for the BRICs and N-11 Post Crisis* p. 1 (4 December 2009) ("our projection from 2008 that China could become as big as the US by 2027—and therefore the BRICs collectively as large as the G7 by 2032—now looks more, rather than less, likely as a result of the crisis"). There are of course detractors to this view.

[125] Even now, the rising cost of labour in China and India is forcing many foreign companies to look elsewhere in Asia for business expansion and opportunities. *See* in particular comments below on Vietnam.

[126] *See e.g.,* KPMG Publication, *Product Sourcing in Asia Pacific: New Locations, Extended Value Chains* (2011); UNCTAD, *World Investment Report 2011: Non-Equity of International Production and Development,* p. 46 (2011) ("China continues to experience rising wages and production costs, so the widespread off-shoring of low-cost manufacturing to that country has been slowing down …") and at p. 47 ("the competitiveness of South-East Asian countries in low-cost production will be strengthened …"). This compares with the position over the last decade, where China has been at the centre of the world's export market. *See* International Monetary Fund, *Regional Economic Outlook: Asia and Pacific: Managing the Next Phase of Growth,* p. 47 (April 2011) ("Over the last decade, Asia economies have become part of a greater supply network, increasingly centred on China" and at p. 48 ("Asian economies increasingly have formed a supply network, with China taking the role of an assembly hub for final goods exports, notably consumer goods.").

[127] IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs,* at p. 4.

[128] IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, at p. 161.

[129] Goldman Sachs Global Economic Paper No. 134, *How Solid are the BRICS?,* (1 December 2005); Goldman Sachs Global Economic Paper No. 153, *The N-11: More Than An Acronym* p. 1 (28 March 2007).

[130] *See* Goldman Sachs Global Economic Paper No. 134, *How Solid are the BRICS?,* (1 December 2005); Goldman Sachs Global Economic Paper No. 153, *The N-11: More Than An Acronym* pp. 9-10 (28 March 2007); Goldman Sachs Global Economic Paper No. 192, *The Long Term Outlook for the BRICs and N-11 Post Crisis* (4 December 2009). The other N-11 economies are: Mexico, Turkey, Iran, Nigeria, Egypt, Pakistan, Bangladesh as well as South Korea, Indonesia, the Philippines and Vietnam.

[131] *See* Implementing Rules and Regulations (IRR) of Republic Act No. 9285 which came into effect on 21 December 2009 (available at http://adrresources.com).

[132] In Force From 1 January 2011.

standards (and Malaysia is in the process of doing so).[133] There have also been recent initiatives in many South/East Asian jurisdictions for promoting their own, national arbitral institutions (including, outside the N-11, in Cambodia, where the National Arbitration Center was the first arbitral institution to be opened in the country; opened with the support of the IFC and World and Asian Development Banks).[134]

In addition, there are (some might say, legitimate) questions regarding the future of Hong Kong as a stable and neutral environment both as a general matter and for the resolution of disputes through arbitration; in particular concerning its independence from Mainland China. The perception of this issue should not be understated and is not limited to talk in arbitration circles. For example, the Economist Intelligence Unit notes that the "*ongoing dispute about the process of transition to full democracy will continue to drag down scores for political stability - Hong Kong's weakest rating category by far*."[135] In the context of arbitration, anecdotal reports suggest that some international parties feel more comfortable choosing Singapore as a venue for arbitration over Hong Kong where the counter-party is Chinese.

Those sentiments may have been heightened by the 8 June 2011 decision of the Hong Kong Court of Final Appeal (CFA) in *Democratic Republic of the Congo v FG Hemisphere Associates LLC* (the "*Congo* case") and subsequent confirmation by the Chinese government, in relation to the status of sovereign immunity in Hong Kong.[136] A full discussion of this case is beyond the scope of this text. However, the main issue in the *Congo* case was whether the application by Mainland China of the doctrine of absolute immunity (as distinct from the common law doctrine of restrictive sovereign immunity practiced in Hong Kong at the time of the handover of the territory from Britain to China in 1997) could be reconciled with the Basic Law of Hong Kong.[137] The Basic Law guarantees the autonomy of the Hong Kong judiciary and legal system for a minimum of 50 years from the handover, subject to specified limitations.[138] Importantly, Article 13 of the Basic Law preserves control over foreign affairs

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[133] *See* further below. Cambodia has also recently updated its arbitration legislation. *See* The Commercial Arbitration Law Of The Kingdom Of Cambodia, dated 6 March 2006 (updated 2010).

[134] As discussed further in this article, the Vietnam International Arbitration Center (VIAC) has recently renewed its promotion activities with a joint conference with the SIAC in June 2011; Korea recently hosted the International Bar Association annual conference in March 2011 and the Korea Commercial Arbitration Board (KCAB) is set to introduce revisions to its rules in September 2011; the KLRC in Malaysia has recently signed an MOU with the 90,000 member strong Associated Chinese Chambers of Commerce and Industry of Malaysia in a bid to promote its services. In July 2010, Cambodia established the National Arbitration Center (NAC) with the backing of the IFC and the World and Asian Development Banks, which recognise that "*as the Cambodian economy grows and there are more commercial transactions, a streamlined dispute resolution mechanism gives the private sector more comfort to engage in business transactions*." *See See IFC Helps Establish Cambodia's First National Arbitration Center to Resolve Commercial Disputes* (available at: http://www.ifc.org/ifcext/eastasia.nsf/Content/SelectedPRCambodia?OpenDocument&UNID=BF9525619E3044238525760E004D7137). Clearly driving this plan is the desire, as noted above, to create a stable investment environment. *See* the statement of IFC Head of Advisory Services in Mekong in *IFC Helps Establish Cambodia's First National Arbitration Center to Resolve Commercial Disputes*. According to reports of recent statements by government ministers, the NAC is due to open by the end of 2011. *See* http://cambodianlaw.wordpress.com/2010/07/06/commercial-arbitration-by-2011/. In this regard, the Cambodian government recently launched a campaign to attract 50 to 60 Cambodian and foreign individuals to "*be the first arbitrators of NAC*". *See* http://www.adb.org/Documents/Others/P34389-CAM-NAC-Announcemet.pdf.

[135] Economist Intelligence Unit, *Country Analysis: Business Environment* (July 2011).

[136] Decision of the Hong Kong Court of Final Appeal, *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC* (Final appeal Nos 5, 6 and 7 of 2010 (Civil) (8 June 2011).

[137] The doctrine of restrictive immunity recognises that states cannot be liable for acts made in a sovereign capacity (*acta jure imperii*) but allows a limited exception for acts of a private law or commercial character (*acta jure gestionis*). No such exception applies under the doctrine of absolute immunity.

[138] Decision of the Hong Kong Court of Final Appeal, *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC* (Final appeal Nos 5, 6 and 7 of 2010 (Civil) ¶35 (8 June 2011).

relating to Hong Kong to the Central People's Government[139] and Article 19 excludes from the jurisdiction of the courts of Hong Kong "*acts of state such as … foreign affairs*".[140]

During the course of the proceedings, the Office of the Commissioner of the Ministry of Foreign Affairs of China (OCMFA) in Hong Kong wrote a total of three letters to the Hong Kong courts,[141] setting out the "*consistent and principled position of China*", which was that "*a state and its property shall, in foreign courts, enjoy absolute immunity*" and that China "*has never applied the so-called principle … of 'restrictive immunity*'."[142] The OCMFA confirmed that the position of China "*applies to [Hong Kong]*".[143] The majority of the CFA decided (on a provisional basis) that since China applies a doctrine of absolute sovereign immunity, so must Hong Kong to avoid "*a divergent state immunity policy [between Hong Kong and China] embarrass[ing] and prejudic[ing] the State in its conduct of foreign affairs*."[144] Bohkary J. dissented from the majority view.[145] The matter was then referred, at the request of the CFA, to the Standing Committee of China's National People's Congress which voted unanimously in favour of a resolution confirming the CFA's decision in August 2011.[146] The Committee clarified that under the Basic Law, sovereign immunity is a foreign policy issue to be decided by the Chinese government.

The decision raises obvious concerns relating to any post-enforcement strategy involving state-held assets in Hong Kong, but those apply irrespective of the seat of arbitration (since the doctrine relates to the situs of state-held assets, not of the arbitration). One view is, therefore, that the impact of this decision on the choice of Hong Kong as a seat should be negligible. Further, other recent decisions of the Hong Kong court continue to demonstrate its generally pro-arbitration stance.[147]

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[139] The Basic Law, Art. 13 ("The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region. The Ministry of Foreign Affairs of the People's Republic of China shall establish an office in Hong Kong to deal with foreign affairs. The Central People's Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law.")

[140] The Basic Law, Art. 19 ("The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication. The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained. The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. …").

[141] The three letters were dated 20 November 2008 (to the High Court), 21 May 2009 (to the Court of Appeal) and 25 August 2010 (to the CFA). *See* Decision of the Hong Kong Court of Final Appeal, *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC* (Final appeal Nos 5, 6 and 7 of 2010 (Civil) ¶¶44, 46, 47 (8 June 2011).

[142] *See* Letter dated 20 November 2008, cited in Decision of the Hong Kong Court of Final Appeal, *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC* (Final appeal Nos 5, 6 and 7 of 2010 (Civil) ¶44 (8 June 2011). This position was stated, notwithstanding the fact that China had signed the UN Convention on Immunities of States and Their Property 2004 which adopts the doctrine of *restrictive* state immunity. China explained this apparent inconsistency in its second letter by reference to the fact that as it had signed, but not yet ratified, the Convention, it was not bound by the Convention. *See* Decision of the Hong Kong Court of Final Appeal, *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC* (Final appeal Nos 5, 6 and 7 of 2010 (Civil) ¶46 (8 June 2011).

[143] Decision of the Hong Kong Court of Final Appeal, *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC* (Final appeal Nos 5, 6 and 7 of 2010 (Civil) ¶47 (8 June 2011).

[144] Decision of the Hong Kong Court of Final Appeal, *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC* (Final appeal Nos 5, 6 and 7 of 2010 (Civil) ¶269 (8 June 2011).

[145] Decision of the Hong Kong Court of Final Appeal, *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC* (Final appeal Nos 5, 6 and 7 of 2010 (Civil) ¶¶130-142 (8 June 2011).

[146] Decision of the Standing Committee of the National People's Congress, 26 August 2011.

[147] *See for example* Decision of the Hong Kong Court of First Instance, *Klöckner Pentaplast Gmbh & Co Kg v Advance Technology (H.K.) Company Limited*, 14/07/2011, HCA1526/2010 (2010).

However, the *Congo* case may not be dismissed so easily; rightly or wrongly, it typifies and may fuel the concerns regarding the independence of the Hong Kong judiciary from Mainland China.[148] Putting aside the majority position of the CFA on the issue of waiver of state immunity[149] and the scope of the specified limitations in the Basic Law (referred to above),[150] the interference of the OCMFA in the case at each stage of the proceedings and the decision of the majority creates certain perceptions. It certainly seems to have been uppermost in the mind of Bohkary J. in opening his dissenting judgment for the CFA:

> "It has always been known that the day would come when the Court has to give a decision on judicial independence. That day has come. Judicial independence is not to be found in what the courts merely say. It is to be found in what the courts actually do. In other words, it is to be found in what the courts decide."[151]

Singapore may not suffer from such perception issues. It is also a notoriously pro-arbitration jurisdiction, as the discussion above demonstrates. But even Singapore faces questions over its seemingly stable long-term future. Singapore as a city state is governed by one party (the PAP) that has ruled uninterrupted since 1959. By all reports, it is an effective government, recognised for its transparency and long-term policy focus, as clearly demonstrated in the findings referred to above. However, there is always the possibility that the ruling party might change and with it Singapore's policies and coveted Asian Tiger status. In addition, Singapore's economic success is heavily services driven and as such, relies on the outside world (including, importantly, the West which is also one of Singapore's major export markets).[152] Singapore is therefore more vulnerable to the global financial crisis that continues to engulf the US, the UK and the Eurozone.[153] Indeed, some leading economists and academics have described Singapore's economy as "*here today, gone tomorrow*".[154] This contrasts to many other South/East Asian countries whose economies are self-reliant (be that from natural resources as in Indonesia, labour as in Vietnam or technology as in South Korea).

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In light of all these legal and economic developments and as discussed above, the second part of this article provides a survey of some recent trends in the key, emerging N-11 South/East Asian jurisdictions of Indonesia, South Korea, the Philippines and Vietnam (as well as the non-N-11 Malaysia).

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[148] As one leading practitioner in the region has noted, "*[r]ightly or wrongly, the perception would likely be that Hong Kong is a less neutral seat than Singapore for disputes with politically connected PRC entities. This decision could reinforce such views*." *See* Bloomberg News, *Singapore Gains as Hong Kong Follows China Rule on Immunity*, 31 August 2011.

[149] A proper discussion of the issue of waiver is beyond the scope of the present text. For a summary of the position on waiver in this context in Singapore, *see* Chan, *Sovereign Immunity in the Enforcement of Awards Against States Transnational Notes*, NYU Transnational Center for Transnational Litigation & Commercial Law, (2011) (discussing the Singapore State Immunity Act 1979 (Ch. 313), Section 11 ("Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts in Singapore which relate to the arbitration.")).

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[151] Decision of the Hong Kong Court of Final Appeal, *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC* (Final appeal nos 5, 6 and 7 of 2010 (Civil) ¶1 (8 June 2011). It is to be noted that Bokhary J. has not been shy in confronting the government of the PRC during his years on the bench in Hong Kong and is due to retire shortly.

[152] The same is also true of Hong Kong although it arguably has greater exposure to China than Singapore does which may shield it more from any further recession or crisis in the West.

[153] Lee Kuan Yew, *Hard Truths To Keep Singapore Going* p. 139 (2011).

[154] Lee Kuan Yew, *Hard Truths To Keep Singapore Going* p. 140 (2011).

## 1. Indonesia

### a) Indonesia's Economy: Leading Asia's Rise?

Indonesia is one of the world's top 20 largest economies and the second largest of the economies reviewed here (behind South Korea).[155] With a population of around 240 million, it is also the fourth most populous country in the world (behind China, India and the U.S.).[156] Given its enormous wealth in natural resources,[157] it is no surprise that it ranks as one of the most important of the N-11 economies.[158] Indeed, some analysts believe that Indonesia should be re-classified as a BRIC, or BRIICK,[159] economy.[160]

In this regard, Indonesia is predicted to be one of six major emerging economies contributing more than half of all global growth by 2025,[161] and to overtake the UK economy by 2050.[162] It is also one of the ADB's very recently identified "Asia-7" economies, which are those economies predicted to "*lead Asia's rise*" in what is referred to as the coming "*Asian Century*".[163] The Indonesian government has adopted these predictions for its own, with the publication in 2010 of its *Master Plan for the Acceleration and Expansion of Indonesia's Economic Development 2011-2025*. The *Master Plan* aims to move Indonesia into one of the largest global economies by 2025.[164] Reflecting its growing economic status, Indonesia is also playing an increasingly important role on the international stage with its membership of the G-20 and chairmanship of ASEAN.[165]

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[155] World Bank Data, *GDP per capita (Total US$)*.
[156] *See* World Bank Data, *Indicators: Population (Total)* (Downloaded 5 September 2011); Economist Intelligence Unit, *Country Analysis: Fact Sheet* (September 2011).
[157] In 2010, Indonesia's major exports were made up of mineral products (16.4 percent), liquefied natural gas (8.7 percent) and crude petroleum and products (6.6 percent). Its major export markets are Japan, China, the US and Singapore. *See* Economist Intelligence Unit, *Country Analysis: Fact Sheet* (September 2011).
[158] *See* Goldman Sachs Global Economic Paper No. 134, *How Solid are the BRICS?,* (1 December 2005); Goldman Sachs Global Economic Paper No. 153, *The N-11: More Than An Acronym* pp. 9-10 (28 March 2007); Goldman Sachs Global Economic Paper No. 192, *The Long Term Outlook for the BRICs and N-11 Post Crisis* (4 December 2009).
[159] Brazil, Russia, India, Indonesia, China and South Korea. *See* World Bank, *Global Development Horizons 2011, Multipolarity: The New Global Economy* (2011).
[160] Goldman Sachs Global Economic Paper No. 192, *The Long Term Outlook for the BRICs and N-11 Post Crisis* p.16 (4 December 2009). *See also* 2011 Global Competitiveness Index, p. 23. Indeed, in its original prediction for the BRIC economies, Goldman Sachs identified Indonesia as one of the most important "emerging economies" outside of the BRICs. *See* Goldman Sachs Global Economic Paper No. 66, *Building Better BRICs,* p.4 (30 November 2001). *See also* World Bank, *Global Development Horizons 2011, Multipolarity: The New Global Economy* (2011) in particular at p. xi ("The world economy is in the midst of a transformative change. The most visible outcomes of this transformation is the rise of a number of dynamic emerging-market countries to the helm of the global economy. It is likely that, by 2025, emerging economies – such as Brazil, China, India, Indonesia, and the Russian Federation – will be major contributors to global growth, alongside the advanced economies.").
[161] *See* World Bank, *Global Development Horizons 2011, Multipolarity: The New Global Economy* p. 3 (2011) ("By 2025, six major emerging economies—Brazil, China, India, Indonesia, the Republic of Korea, and the Russian Federation— will collectively account for more than half of all global growth. Several of these economies will collectively account for more than half of the global growth rate. This new global economy, in which the centers of growth are distributed across both developed and emerging economies, is what GDH 2011 envisions as a multipolar world.").
[162] *See* Goldman Sachs Global Economic Paper No. 153, *The N-11: More Than An Acronym* pp. 9-10 (28 March 2007).
[163] Asian Development Bank, *Asia 2050: Realising the Asia Century,* p. 2 (2011). *See also* Economist Intelligence Unit, *Country Analysis: Economy – Long Term Outlook* (September 2011) ("Indonesia has the potential to maintain a rapid rate of economic expansion … 2011-30").
[164] World Bank, *Indonesia Economic Quarterly: Current Challenges, Future Potential*, p. ix (28 June 2011).
[165] The Association of South East Asian Nations.

Indonesia was one of a few South/East Asian economies barely to have noticed the global financial crisis,[166] with steady and sustained GDP growth of around 6 percent in 2007, 2008 and 2010 (with only a minor contraction to 4.6 percent in 2009).[167] This impressive economic performance has been fuelled by strong private consumption, buoyant investment and strong export demand[168] and is matched by a doubling in foreign direct investment in Indonesia in 2010, to US$ 12.7 billion.[169] In addition, Indonesia has a strong hold on its budget deficit and public debt accounting for its improved overall credit rating in 2010.[170] As with so many Asian countries, inflation remains a key issue.[171]

Traditionally seen as a country with a poor investment environment, the Indonesian government has recently described the importance of its foreign investment as necessary "*not mainly due to the lack of budget, but more to improve efficiency, expertise and quality of services*."[172] Interestingly, the government's own spending on infrastructure as a share of GDP has fallen dramatically since the 1990s (and is well below that of the faster growing Asian economies).[173] However, with this growing foreign investment, Indonesia has made strides in recent years to improve its infrastructure for business. This is a fact recognised by the World Bank, which listed Indonesia as one of the top 10 jurisdictions that has made the most improvement in its efforts to encourage growth in business and investment.[174] To this end, it ranks an impressive 46th in the Global Competitiveness Index[175] (although it still only ranks 121st in the Doing Business Index and 110th in the Corruption Perceptions Index).[176]

b) Indonesia's Court System: Uncertain and Unpredictable

Indonesia is undoubtedly an important jurisdiction in terms of foreign investment and trade relations.[177] However, the prospect of resolving any dispute arising out of contracts in the

[166] *See* Goldman Sachs Global Economic Paper No. 192, *The Long Term Outlook for the BRICs and N-11 Post Crisis,* p. 6 (4 December 2009) (describing Indonesia as having "displayed remarkable resilience during the global financial crisis").
[167] Asian Development Bank, *Outlook 2011: South-South Economic Links* in chapter *Indonesia* at p. 185; International Monetary Fund, *Regional Economic Outlook: Asia and Pacific: Managing the Next Phase of Growth,* p. 4 (April 2011); International Monetary Fund, *World Economic Outlook, Slowing Growth, Rising Risks* p. 85 (September 2011); Economist Intelligence Unit, *Country Analysis: Fact Sheet* (September 2011). *See also* 2010 Global Competitiveness Index, p. 29 ("Indonesia managed to maintain a relatively healthy macroeconomic environment throughout the crisis … While most other countries saw their budget deficits surge, Indonesia kept its deficit under control.").
[168] Asian Development Bank, *Outlook 2011: South-South Economic Links* in chapter *Indonesia* at p. 185.
[169] Asian Development Bank, *Outlook 2011: South-South Economic Links* in chapter *Indonesia* at p. 186.
[170] *See* Asian Development Bank, *Outlook 2011: South-South Economic Links* in chapter *Indonesia* at p. 187; 2011 Global Competitiveness Index, p. 30.
[171] Asian Development Bank, *Outlook 2011: South-South Economic Links* in chapter *Indonesia* at p. 186; Goldman Sachs Global Economic Paper No. 192, *The Long Term Outlook for the BRICs and N-11 Post Crisis* p. 16 (4 December 2009); 2011 Global Competitiveness Index, p. 30; Economist Intelligence Unit, *Country Analysis: Fact Sheet* (September 2011).
[172] Norton Rose Publication, *Indonesia Inward Investment: An industry survey* p. 13 (September 2010), p. 13.
[173] According to the Asian Development Bank, it has fallen by 50 percent. *See* Asian Development Bank, *Outlook 2011: South-South Economic Links* in chapter *Indonesia* at p. 189. The 2010 Global Competitiveness Index also notes with "particular concern the quality of Indonesia's infrastructure". *See* 2010 Global Competitiveness Index, p. 29.
[174] IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, at p. 16. Nevertheless, the World Bank has recently noted that "The poor quality of infrastructure is one of the biggest obstacles to firms operating in Indonesia." *See* World Bank Country Report, Indonesia (28 June 2011).
[175] 2011 Global Competitiveness Index, p. 15 (although this is a drop from its 2010 ranking of 37. *See* 2010 Global Competitiveness Index, p. 22.
[176] *See* IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, p. 4; 2010 Corruption Perceptions Index, p. 3.
[177] Broadly speaking, Indonesia is a civil law country influenced by its days as a Dutch colony. However, customary law, such as Shariah law, also plays an important role (reflected by the existence of a specialist arbitral institution in this area). Indonesia's legal system is founded in its national cultural ideal for consensus (or *Pancasila*). *See* M. Pryles & V. Taylor, *The Cultures of Dispute Resolution in Asia* in Pryles (ed.), *Dispute*

local courts in Indonesia is reported to be very poor. According to the *Doing Business* estimate, it takes, on average, 570 days at a cost of 123 percent of the value of the judgment debt to resolve a commercial dispute in the Indonesian courts; one of the worst court environments in the world and the worst of the Asian jurisdictions reviewed here.[178] The *Doing Business* estimate is in line with other reported data and commentary; for example, one author refers to the "*inordinate amount of time it can take to reach a final and binding decision through the judicial system*."[179]

Perhaps in seeking to address at least some of these issues, the Supreme Court has recently taken steps to try to alleviate the strain on court caseloads by adoption of a system for court-annexed mediation.[180] However, there remains a widely held view that the court system in Indonesia is "*uncertain and unpredictable*",[181] and lacks transparency and independence.[182] Indeed, the Global Competitiveness Index concludes that "*corruption and bribery remain pervasive and are singled out by business executives as the most problematic factor for doing business in the country*."[183]

c) Indonesia's Arbitration Framework: Signs of Improvement?

In addition to the problems with its local court system, Indonesia is one of the few remaining Asian jurisdictions yet to adopt a framework legislation for arbitration based on the Model Law.[184] The governing legislation is Law No. 30/1999 (accompanied by a non-binding "Elucidation") which was adopted in response to calls for the "*fundamental reform of the country's arbitration laws*".[185] While the Law does incorporate some of the core principles of the Model Law (including limited court intervention and finality of awards),[186] there are also some significant departures.[187] These include the fact that parties are required to attempt to

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*Resolution in Asia* p. 4 (2006); K. Mills, *Indonesia* in Pryles (ed.), *Dispute Resolution in Asia* p. 166 (2006).
[178] IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, at pp. 75 and 161.
[179] K. Mills, *National Report for Indonesia* (2006) in J. Paulsson (ed), *International Handbook on Commercial Arbitration* p.1 (1984, update 2006 Supplement No. 47; update 2011 Supplement No. 63.
[180] K. Mills, *National Report for Indonesia* (2006) in J. Paulsson (ed), *International Handbook on Commercial Arbitration* pp. 1 and 29 (1984, update 2006 Supplement No. 47; update 2011 Supplement No. 63.
[181] K. Mills, *National Report for Indonesia* (2006) in J. Paulsson (ed), *International Handbook on Commercial Arbitration* p. 1 (1984, update 2006 Supplement No. 47; update 2011 Supplement No. 63).
[182] *See e.g.,* G. Goodpaster, *Reflections on Corruption in Indonesia* in Lindsey and Dick, *Corruption in Asia* p. 96 (2001) ("The corruption of so many actors in the legal system means that it cannot serve as a proper tool of governance nor as a just means of dispute resolution."); H. Dick, *Corruption and Good Governance: The New Frontier of Social Engineering* in T. Lindsey and H. Dick, *Corruption in Asia* p. 71 (2001) ("Since [President Soeharto's] downfall in May 1998, corruption has never been out of the headlines of a newly unfettered media"); R. Bose, N. Yap and A. Jaliwala, *Enforcement of International Arbitration Awards in Asia - Paying Lip Service to the New York Convention*, ICMA XVI Congress Papers, 477, 482 (Singapore 2007); Economist Intelligence Unit, *Indonesia Country Analysis Indonesia: Regulatory/Market Assessment* (September 2011) ("[n]early two years after a 2009 presidential election landslide victory for Susilo Bambang Yudhoyono, reforms … have still failed to materialise as corruption scandals within the judiciary, police and government again threatened his credibility and reputation for clean government.").
[183] 2011 Global Competitiveness Index, p. 30.
[184] *See* Indonesian Law No. 30/1999 Concerning Arbitration and Alternative Dispute Resolution dated 12 August 1999. *See also* N. Rubins, *The Enforcement and Annulment of International Arbitration Awards in Indonesia*, 20(2) Am. U. Int'l L. Rev. 359, 367 (2005). One academic has also remarked upon:"[Indonesia's] fail[ure] either to build upon or to modernise … the colonial legal system bequeathed to [it] or to adopt a more acceptable modern alternative." *See* R. Morgan, *Abandoning Colonial Arbitration Laws in Southeast Asia II: Background and Commentary* 15(7) Mealey's Int'l Arb. Report 41 (July 2000).
[185] N. Rubins, *The Enforcement and Annulment of International Arbitration Awards in Indonesia*, 20(2) Am. U. Int'l L. Rev. 359, 369 (2005).
[186] *See* Indonesian Law No. 30/1999, Arts 3, 11 and 17(2).
[187] For a more complete discussion of the Law, *see* K. Mills, *National Report for Indonesia* (2006) in J. Paulsson (ed), *International Handbook on Commercial Arbitration* (1984, update 2006 Supplement No. 47; update 2011 Supplement No. 63; K. Mills, *Indonesia* in M. Pryles (ed.), *Dispute Resolution in Asia* p. 166 (2006).

settle their dispute amicably (in line with Indonesia's state ideology, *Pancasila*).[188] Further, the arbitral tribunal is under an obligation to encourage amicable settlement between the parties following receipt of the Response.[189] In addition, all arbitrations with their seat in Indonesia and irrespective of the nationality of the parties, place of performance or governing law are characterised as "domestic".[190] This is of particular importance when it comes to the procedure and venue for enforcement; domestic awards must be registered with the District Court "*having jurisdiction over the respondent*"[191] within 30 days of the award being rendered.[192] Failure to do so will render the award unenforceable (no such time limit applies to foreign awards).[193]

In addition, courts are not *required* to refer disputes to arbitration where there is an agreement to arbitrate; the Law states only that they do not have jurisdiction to hear them[194] (Indonesia has an unfortunate record in assuming jurisdiction over disputes subject to arbitration agreements);[195] arbitrators must be over the age of 35 years and have at least 15 years of experience and "*active mastery*" in their field;[196] there is no express recognition of the *competence-competence* principle (which means that disputes regarding the arbitrators' jurisdiction often end up in the Indonesian courts);[197] the default language is Indonesian (although this may be altered by agreement);[198] the dispute will be decided on documents only unless the parties agree otherwise or the tribunal deems a "verbal hearing" necessary;[199] and the grounds for annulment in Article 70 are more limited than in the Model Law (broadly speaking public policy and fraud, including where false documents have been used in the arbitration, where false evidence has been given and where important evidence has been concealed).[200] However, it is far from clear that these grounds for annulment are exhaustive.[201] Indonesia's arbitration law can thus be described as a hybrid, containing only

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[188] *See* Indonesian Law No. 30/1999, Art. 6. For a discussion of the underlying legal culture in Indonesia, *see* K. Mills, *National Report for Indonesia* (2006) in J. Paulsson (ed), *International Handbook on Commercial Arbitration* p. 61 (1984, update 2006 Supplement No. 47; update 2011 Supplement No. 63); K. Mills, *Indonesia* in Pryles (ed.), *Dispute Resolution in Asia* p. 166 (2006); N. Rubins, *The Enforcement and Annulment of International Arbitration Awards in Indonesia*, 20(2) Am. U. Int'l L. Rev. 359, 362 (2005).

[189] *See* Indonesian Law No. 30/1999, Art. 45 ("the arbitrator or arbitration tribunal shall first endeavour to encourage an amicable settlement between the disputing parties."). *See also* K. Mills, *Indonesia* in Pryles (ed.), *Dispute Resolution in Asia* p. 166 (2006). This is also a requirement under the arbitral rules of BANI, the main arbitral institution in Indonesia.

[190] "International" arbitrations for the purposes of Indonesian Law No. 30/1999 are those whose seat is outside of Indonesia.

[191] *See* Indonesian Law No. 30/1999, Art. 1(4).

[192] *See* Indonesian Law No. 30/1999, Art. 59(1).

[193] *See* Indonesian Law No. 30/1999, Art. 59(4).

[194] *See* Indonesian Law No. 30/1999, Arts 3 and 11 (Article 3 provides that "The District Court shall have no jurisdiction to try disputes between parties bound by an arbitration agreement." Article 11 provides that "the existence of a written arbitration agreement shall eliminate the right of the parties to seek resolution of the dispute or difference of opinion … through the District Court"). It is suggested that the relationship between these two provisions is unclear, although some authors argue that the qualified Article 11 controls the unqualified Article 3. *See* S. Pompe & M. van Waes, *Arbitration in Indonesia* in P. McConnaughay & T. Ginsburg (eds), *International Commercial Arbitration in Asia,* p. 101, fn. 15 (2006).

[195] *See* M. Hwang & Y. Tat, *Recognition and Enforcement of Arbitral Awards* in M. Pryles & M. Moser (eds), *Asian Leading Arbitrators Guide to Arbitration*, p. 407, 424-425, 426 (2007) (referring to the *Bankers Trust* cases). For the opposite view, *see* K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March 2003, p. 9 (updated 2005) ("In most cases known to have come before the Indonesian courts, such courts have upheld this principle and have declined jurisdiction.").

[196] *See* Indonesian Law No. 30/1999, Art. 12.

[197] *See* N. Rubins, *The Enforcement and Annulment of International Arbitration Awards in Indonesia,* 20(2) Am. U. Int'l L. Rev., 359, 367 (2005).

[198] *See* Indonesian Law No. 30/1999, Art. 28.

[199] *See* Indonesian Law No. 30/1999, Art. 36.

[200] *See* Indonesian Law No. 30/1999, Art. 66.

[201] *See* N. Rubins, *The Enforcement and Annulment of International Arbitration Awards in Indonesia* 20(2) Am.

some internationally recognizable norms. In this regard, *Investing Across Borders* arguably gives more credence to its law than is deserved (given its non-Model Law status), with a score of 95.4 for its "*strength of [arbitration] laws*" and 81.8 for "*ease of [arbitration] process*".[202]

As with many South/East Asian jurisdictions, the real test of Indonesia's Law No. 30/1999 has been its implementation by the courts, both in relation to court support for arbitration and enforcement.[203] For example, until 1990, foreign arbitral awards could not be enforced in Indonesia. While Indonesia has been a signatory to the New York Convention since 1982, the enabling law (Presidential Decree No. 34/1981) did not set out a procedure for enforcement.[204] Pending such a mechanism and despite the express terms of the New York Convention requiring equal treatment between domestic and foreign arbitral awards,[205] the Supreme Court determined that foreign arbitral awards could not be enforced in Indonesia despite its accession to the New York Convention.[206] It was not until the Supreme Court Regulation No. 1/1990 (the "1990 Regulation") that Indonesia adopted a procedure for the enforcement of a foreign award.[207] This is now reflected in (and, arguably, superseded by)

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U. Int'l L. Rev., 359, 371 (2005) (referring to *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Co.,* No. 86/PDT.G/2002/PN.JKT.PST).

[202] *See* World Bank, *Investing Across Borders 2010*, p. 117.

[203] *See e.g.,* M. Hwang & S. Lee, *Survey of South East Asian Nations on the Application of the New York Convention* 25(6) Journal Int'l Arb. 873, 876 (2008) ("… curial interference has occurred in spite of ostensible support of arbitration and express support in legislation. While the right phrases have been used and repeated, the actual judicial practice has sometimes demonstrated overreach and an approach that can be said to be more visceral than cerebral. Part of it can be attributed to overcoming residual historical distrust of arbitration. The other part may be attributed to a misplaced sense of judicial parochialism and perhaps unfamiliarity with the arbitration process. However, on the whole, we do see a growing trend towards pro-arbitration sentiments and practices pursuant to the increasing enactment of arbitration legislation adopting the Model Law, coupled with reduced hostility to, and growing judicial acceptance of, arbitration as an alternative dispute resolution method."); R. Bose, N. Yap and A. Jaliwala, *Enforcement of International Arbitration Awards in Asia - Paying Lip Service to the New York Convention*, ICMA XVI Congress Papers, 477, 478 (Singapore 2007) ("the reality is that enforcement of arbitration awards remains problematic in many countries in the world including several Asian jurisdictions. Corruption, local protectionism, faulty regulation, ignorance and systemic inefficiency make enforcement proceedings difficult, time-consuming and, sometimes, impossible.").

[204] The Presidential Decree No. 34 of 1981 was published in the State Gazette (Berita Negara) of 1981, as No. 40 of 5 August 1981, referred to in K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March 2003, p. 1 (updated 2005).

[205] Article III New York Convention provides that every contracting state must recognise and enforce awards rendered in other contracting states without imposing substantially more onerous conditions than are imposed upon recognition or enforcement of domestic awards. Pursuant to Article 59(3) of Law No. 30/1999, a domestic arbitral award may be enforced on delivery of the original award and arbitration agreement only.

[206] *See* Decision of the Indonesian Supreme Court, *Navigation Maritime Bulgare v. P.T. Nizwar* 11 Y.B. Com. Arb. 508, 509 (1986). *See also* N. Rubins, *The Enforcement and Annulment of International Arbitration Awards in Indonesia* 20(2) Am. U. Int'l L. Rev., 359, 367 (2005); K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March, 2003, p. 2 (updated 2005) (suggesting that the "confusion [arising out of Presidential Decree No. 34] was understandable" since "registration and application for enforcement of domestic-rendered awards was to be made in the District Court (*Pengadilan Negeri*) in the district in which the award is rendered, [and] the members of the Supreme Court could not agree as to which court one would apply for enforcement of a foreign-rendered award, there being no District Court in which to register, nor which would have had jurisdiction to grant enforcement of, an award rendered outside of the jurisdiction of any domestic court. Some judges therefore believed that application should be made directly to the Supreme Court; others that the awards should be "self-executing"; and still others that a single District Court should be designated to take jurisdiction over New York Convention enforcement applications." *See also* N. Rubins, *The Enforcement and Annulment of International Arbitration Awards in Indonesia* 20(2) Am. U. Int'l L. Rev., 359, 367 (2005); Supreme Court Decision of 20 August 1984 No 294 K/Pdt. 1983 referred to in ICC Bulletin, Special Supplement, *International Arbitration in the Asia/Pacific Region* Vol. 2(1) 29 (1991).

[207] *See* Supreme Court Regulation No. 1 of 1990 reprinted in J. Paulsson ed., *International Handbook On Commercial Arbitration*, Supp. 13 (1992). Supreme Court Regulation No. 1 of 1990 specified that the District Court of Central Jakarta was the designated venue to which application for enforcement should

the Law No. 30/1999.[208] Following the adoption of promulgating regulations, however, the Supreme Court nullified the first ever enforcement order issued under the 1990 Regulation (in the infamous *E.D.F. Man* case).[209]

Despite this, some reports suggest that the introduction of Law No. 30/1999 has resulted in overall improvements and greater expedition, in particular in relation to enforcement of foreign awards. In mid-February 2005, a leading practitioner and author in the region reported that five out of the nine international awards whose recognition had been sought in Indonesia since adoption of Law No. 30/1999 were granted *exequatur* "*quite promptly*".[210] The other four cases were granted cassation (appeal) to the Supreme Court.[211] Similarly, *Investing Across Borders* reports that it takes around 22 weeks to enforce an arbitration award rendered in Indonesia or in a foreign country.[212] That Indonesia's enforcement record may be improving is a view that has been expressed to the author by local practitioners in the region recently; it is also reflected in other anecdotal reports.[213]

However, *promptness* in enforcing an award is not necessarily the same as having a robust, overall arbitration environment. In this regard, Indonesia has had a poor track record, in

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be made, addressing the confusion that had previously arisen in the Supreme Court. *See* K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March, 2003, p. 2 (updated 2005); N. Rubins, *The Enforcement and Annulment of International Arbitration Awards in Indonesia* 20(2) Am. U. Int'l L. Rev., 359, 367 (2005); S. Pompe & M. van Waes, *Arbitration in Indonesia* in P. McConnaughay & T. Ginsburg (eds), *International Commercial Arbitration in Asia,* p. 119 (2006).

[208] *See* K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March, 2003, at p. 2 (updated 2005) ("Although the New Law does not also specifically rescind the provisions of Supreme Court Regulation 1 of 1990, a law is superior to a regulation in the legal hierarchy and thus to the extent that the two are inconsistent the provisions of the New Law will prevail."). It is also to be noted that not only must enforcement of a foreign award comply with the requirements of the New York Convention (in Article IV(1)), it must also be accompanied by documentation from an Indonesian diplomatic representative in the jurisdiction in which the award was made. *See* Indonesian Law No. 30/1999, Art. 67. The statement must confirm a diplomatic relationship of that country with Indonesia and the country's New York Convention status.

[209] *See* Decision of the Supreme Court, *E.D. F. Man (Sugar) Ltd v Yani Haryanto*, Case No. 1205K/Pdr/1990 (14 December 1991) referred to in K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March, 2003, p. 12 (updated 2005); R. Bose, N. Yap and A. Jaliwala, *Enforcement of International Arbitration Awards in Asia - Paying Lip Service to the New York Convention*, ICMA XVI Congress Papers 477, 488 (Singapore 2007) ("Law No 30 has greatly improved the enforcement of international arbitration awards").

[210] *See* K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March, 2003, p. 8 (updated 2005).

[211] *See* K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March, 2003, p. 8 (updated 2005).

[212] World Bank, *Investing Across Borders 2010*, p. 117 (2010). This is broadly consistent with informal survey reports from other sources. *See* K. Mills, Enforcement *of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration*, presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March, 2003, p. 5 (updated 2005) ("Although no time limit for issuance of exequatur on international awards is expressed in the New Law, in the past applications to most District Courts for execution of domestic awards has normally engendered not more than six months, despite the absence of a time limit.")

[213] R. Bose, N. Yap and A. Jaliwala, *Enforcement of International Arbitration Awards in Asia - Paying Lip Service to the New York Convention*, ICMA XVI Congress Papers, 477, 488 (Singapore 2007) ("anecdotal evidence suggests that the District Court has, on some occasions, granted *execatur* for international arbitration awards in under a month of the application as compared to six months for domestic awards. … [and] most arbitration awards registered with the Indonesian courts have been enforced"); M. Hwang & Y. Tat, *Recognition and Enforcement of Arbitral Awards* in M. Pryles & M. Moser (eds), *Asian Leading Arbitrators Guide to Arbitration,* 407, 416 (2007) ("it must be noted that the courts have acted very promptly in the enforcement of foreign awards, in some cases issuing exequatur within less than a month of request.").

particular in relation to court interference. One author argues that it is the "*wide publicity*" given to a "*few aberrant cases*" which has created and "*subsequently made worse Indonesia's unfortunate international reputation with regards to arbitration*."[214] A review of these "*aberrant cases*" (decided both before and after adoption of the new law in 1999) reveals that at least some of the decisions were "*tenable*" given the then state of the law.[215] The same author also argues that the famous *Pertamina* cases – involving multiple anti-arbitration injunctions and annulments issued by the Indonesian courts - have been "*widely misunderstood*".[216] Yet no-one has challenged in substantive terms the overwhelming majority view, which refers to the *Pertamina* cases as "*highly controversial*"[217] and "*emblematic of the continuing problems in enforcing arbitral agreements and awards*" in Indonesia.[218] Commentators have also expressed underlying concerns about "*undue influence*",[219] "*irregular[ity]*"[220] and report on "*misconceived*" decisions that "*violate both the language and purposes of the [New York] Convention*",[221] and continue to bring "*further embarrassment to Indonesia's reputation in the world of arbitration*".[222] These majority

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[214] *See* K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March, 2003, p. 10 (updated 2005).

[215] *See* the *ED & F Man (Sugar) Ltd vs. Yani Haryanto* case and the decision of the Supreme Court relating to the award on the original contract (decided before adoption of the Indonesian Law No. 30 1999 but after adoption of the Supreme Court Regulation No. 1 of 1990) referred to in K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March, 2003, p. 12 (updated 2005). This case concerned a contract for the import of sugar, authority for which was required by the Government Logistics Bureau. Authorisation was not obtained and the contract was declared by the court to be null and void *ab initio* because it was in violation of law and public policy; as a result, the arbitration agreement was also null and void. This, Mills suggests, was consistent with the then state of the law in Indonesia. However, as noted above, this decision was rendered before adoption of the new Law No. 30 1999 which now provides in Article 10(5) that the "*cancellation of the main contract*" will not render the arbitration agreement "*null or void*". Whether or not the same decision would be reached under the new Law, therefore, remains to be seen. *See also* in this regard Greenberg, Kee and Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* ¶9.190 (2011).

[216] *See* K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March, 2003, p. 13 (updated 2005) ("[The Pertamina cases] are probably the most widely misunderstood of all of Indonesia's notorious cases, primarily because of the plethora of press reports prepared and widely disseminated by the Claimants in the original arbitral references (First Defendants in these court applications) and by their various counsel and expert witnesses, with no counterbalancing coverage having been afforded the Indonesian parties or truly independent scholars.").

[217] M. Hwang & Y. Tat, *Recognition and Enforcement of Arbitral Awards* in M. Pryles & M. Moser (eds), *Asian Leading Arbitrators Guide to Arbitration,* p. 407, 428 (2007).

[218] N. Rubins, *The Enforcement and Annulment of International Arbitration Awards in Indonesia* 20(2) Am. U. Int'l L. Rev., 359, 362 (2005).

[219] *See* K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March, 2003, pp. 12 (updated 2005) (referring to *E.D. & F. Man (Sugar) Ltd vs. Yani Haryanto* case and the decision of the Supreme Court relating to the award on the settlement agreement (decided before adoption of the Law No. 30 1999 but after adoption of the Supreme Court Regulation No. 1 of 1990)).

[220] *See* K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March, 2003, pp. 12-13 (updated 2005) (referring to the Decision of the District Court of Central Jakarta May 1997 in *Panin International Credit vs. P.T. Gemawidia Statindo Komputor*).

[221] G. Born, *International Commercial Arbitration*, p. 2413 (2009) (referring to decisions in which the courts in Indonesia have purported to annul foreign awards on the basis that the parties' underlying contract was governed by Indonesian law in Decision of the District Court of Central Jakarta, dated 27 August 2002, *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara v. Karaha Bodas Co.,* No. 86/PDT.G/2002/PN.JKT.PST. These annulment decisions were denied effect by courts outside Indonesia. *See, e.g.*, Decision of the Hong Kong Court of First Instance, *KarahaBodas Co.*, 364 F.3d at 288; *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, XXVIII Y.B. Comm. Arb. 752 (2003)).

[222] *See* K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of

views are broadly reflected in *Investing Across Borders*, which shows that the extent of judicial support for arbitration in Indonesia remains extremely poor (41.3); only the Philippines records a lower score of the countries reviewed here.[223] Certainly, the steps taken by the Indonesian courts and the proliferation of anti-arbitration injunctions issued in the *Pertamina* cases, and other cases in which the Indonesia courts have assumed improper jurisdiction in disputes subject to an arbitration agreement, raise concerns beyond Indonesia's apparently improved recent enforcement record.[224]

### 2. Republic of Korea (South Korea)

#### a) South Korea's Economy: An 'Innovation Powerhouse'

With a population of around 50 million, South Korea is one of world's most successful newly industrialised economies.[225] Its shift from agriculture to industry began in the 1960s and by the early 1990s, it had become one of the largest economies in the world.[226] Today, it has one of the most sophisticated and powerful information technology industries, described as one of the "*world's innovation powerhouses*".[227] Samsung is the success story of South Korea, accounting for around a fifth of the country's GDP and with a market capitalisation roughly equal to that of Sony, Panasonic and Toshiba put together.[228]

South Korea's economy was hit hard by the financial crisis,[229] but has recovered well with GDP of around 6 percent in 2010.[230] This strong recovery has been fuelled largely by robust investment and surging exports, mainly in the technology sector (in particular, to China but

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the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March, 2003, p. 28 (updated 2005).

[223] *See* Appendix II.

[224] For the Indonesian courts' improper assumption of jurisdiction, *see* reports of the Decision of the District Court of South Jakarta (1999) in the *Roche* case (on the basis that only "technical business" disputes" could be subject to arbitration; all "legal" disputes had to be referred to the court) referred to in S. Pompe & M. van Waes, *Arbitration in Indonesia* in P. McConnaughay & T. Ginsburg (eds), *International Commercial Arbitration in Asia,* pp. 123-124 (2006); the *Bankers Trust* cases (*Bankers Trust Company & Bankers Trust International vs. PT. Jakarta International Hotels and Development* Decision of the District Court of South Jakarta (Pengadilan Negeri Jakarta Selatan) No. 454/Pdt.G/1999/PN.Jak.Sel, 30 May, 2000) and *Bankers Trust Company & Bankers Trust International v PT Mayora Indah*) referred to in K. Mills, *Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration* paper presented at The Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators in Kuala Lumpur on 1 March, 2003, pp. 28-33 (updated 2005); S. Pompe & M. van Waes, *Arbitration in Indonesia* in P. McConnaughay & T. Ginsburg (eds), *International Commercial Arbitration in Asia,* p. 125 (2006).; M. Hwang & Y. Tat, *Recognition and Enforcement of Arbitral Awards* in M. Pryles & M. Moser (eds), *Asian Leading Arbitrators Guide to Arbitration,* 407, 426 (2007). *See also* D. Howell, *Developments in International Commercial Arbitration in Asia*, 8 (2007) ("There has been more than one case in which an Indonesian party has been able to frustrate enforcement of a Convention award by commencing court proceedings on the claim").

[225] *See* World Bank Data; Economist Intelligence Unit, *Indonesia Country Analysis: Fact Sheet* (September 2011).

[226] *See e.g.,* World Bank, *Country Brief for the Republic of Korea* (updated May 2010).

[227] The 2010 Global Competitiveness Index, p. 28. *See also* Goldman Sachs Global Economic Paper No. 153, *The N-11: More Than an Acronym* p. 12 (28 March 2007); Asian Development Bank, *Outlook 2011: South-South Economic Links* in chapter *Republic of Korea* at p. 128; 2011 Global Competitiveness Index, p. 29 ("the high quality of education …combined with the high degree of technological readiness are among the building blocks of [South Korea's] remarkable capacity for innovation."). Electrical machinery and appliances are South Korea's biggest export item, making up 15.1 percent of all goods exported. *See* Economist Intelligence Unit, *Country Analysis: Fact Sheet* (September 2011).

[228] In 2010, Samsung had a market capitalisation of around USD 130 billion compared to a combined market capitalisation of Panasonic (c. USD 39.4 billion), Sony (c. USD 35 billion) and Toshiba (c. USD 14 billion), together c. USD 88.4 billion.

[229] International Monetary Fund, *Country Report No. 11/247 for Republic of Korea* p. 8 (August 2011).

[230] Asian Development Bank, *Outlook 2011: South-South Economic Links* in chapter *Republic of Korea* at p. 128; International Monetary Fund, *Regional Economic Outlook: Asia and Pacific, Managing the Next Phase of Growth,* p. 4 (April 2011); International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks* p. 85 (September 2011).

also to Japan and the US).[231] Despite its economic strength, however, recent reports reveal that South Korea still suffers from institutional weaknesses, in particular in relation to the inefficiency of (and lack of trust in) its government, the rigidity of its labour laws, underdeveloped financial markets, the lack of regulatory transparency and falling levels of foreign direct investment.[232] These were all matters Lee Myung-bak promised in his presidential campaign in 2007, but has failed, to address; his agenda has necessarily shifted to deal with the global financial crisis.

Together with Indonesia, South Korea is another of the six major emerging economies predicted to contribute more than half of all global growth by 2025.[233] South Korea is another of the N-11 economies predicted to overtake the U.K. in terms of income-per-capita by 2050[234] and is one of the ADB's "Asia-7" economies.[235] Perhaps not surprisingly, South Korea ranked 24th in the Global Competitiveness Index (reporting "*outstanding infrastructure and [a] stable macroeconomic environment*"),[236] 16th in the Doing Business Index (two places ahead of Japan)[237] and joint 39th in the Corruption Perceptions Index.[238]

b) South Korea's Court System: Efficient but Inaccessible

Unlike the majority of the jurisdictions reviewed in this Part B, South Korea is reported to have a robust and efficient court system (although its institutions as a whole are seen by the Global Competitiveness Index as a weakness).[239] According to the IFC/World Bank estimate, it takes, on average, 230 days at a cost of just 10 percent of the value of a debt to enforce a commercial contract in the South Korean courts; one of the top five enforcement environments in the world (behind Hong Kong but ahead of Singapore).[240]

However, South Korea's court system is still largely impenetrable to the outside world. There is, as yet and to the best of the author's knowledge, no system for making South Korea's court judgments publicly available, let alone available in English (or other languages).

c) South Korea's Arbitration Framework: the 'Singapore of North East Asia'?

The Law Minister of South Korea has recently announced his goal that South Korea should become the "*Singapore of North East Asia*" for arbitration.[241] Certainly, South Korea has a modern international arbitration law which adopts the 1996 UNCITRAL Model Law almost

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[231] Asian Development Bank, *Outlook 2011: South-South Economic Links* in chapter *Republic of Korea* at p. 128.
[232] *See* 2010 Global Competitiveness Index, p. 28; IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, at p. 132; U.S. State Department, *Investment Climate Statement – South Korea* (2011).
[233] *See* World Bank, *Global Development Horizons 2011, Multipolarity: The New Global Economy* p. 3 (May 2011) ("By 2025, six major emerging economies—Brazil, China, India, Indonesia, the Republic of Korea, and the Russian Federation— will collectively account for more than half of all global growth. Several of these economies will collectively account for more than half of the global growth rate.").
[234] Goldman Sachs Global Economic Paper No. 153, *The N-11: More Than an Acronym*, p. 10 (28 March 2007).
[235] Asian Development Bank, *Asia 2050: Realising the Asian Century* p. 2 (2011).
[236] *See* 2011 Global Competitiveness Index, p. 15 and p. 29. This compares with a ranking of 22 in the 2010 Global Competitiveness Index.
[237] *See* IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, p. 4.
[238] *See* IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, p. 4; 2010 Corruption Perceptions Index, p. 3.
[239] *See* 2011 Global Competitiveness Index, p. 29.
[240] IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, pp. 75 and 161.
[241] *See* Speech by Law Minister K Shanmugam at the Committee of Supply Debate in Parliament, ¶21, 9 March 2011, available at www.mlaw.gov.sg.

in its entirety and the New York Convention.[242] South Korea's judiciary are knowledgeable and supportive of arbitration, scoring highly across all three indicators for arbitration according to *Investing Across Borders*.[243]

South Korea also has an increasingly sophisticated and international arbitration community, with a number of local law firms having dedicated teams of arbitration specialists qualified in multiple jurisdictions.[244] As one leading international arbitration practitioner has noted:

> "Many legal communities have, over the recent decades, sought to enhance their engagement with international commercial arbitration, and the quality of their participation in the process. No country has seen faster development in less time than Korea. It is a testament to the farsightedness and determination of its remarkably dynamic legal community, which has been transformed in the course of a single generation."[245]

Based on the limited case law reports available and on anecdotal evidence, the South Korean courts appear to exhibit a sophisticated approach to arbitration in line with international standards, in particular in relation to enforcement.[246] This is supported by the *Investing Across Borders* data which shows that it takes, on average, 23 weeks to enforce a foreign award in South Korea.[247] However, the *Investing Across Borders* data is based on there being no appeal. In this regard, it should be noted that in practice, where enforcement proceedings *are* the subject of an appeal in South Korea, reports suggest the process can be protracted and expensive, sometimes taking as long as two to three years.[248]

In February 2011 and shortly before the IBA International Arbitration Day came to South Korea, the IBA announced that it was to open its first regional office for the Asia region – in

[242] Arbitration Act No. 6083 of Korea, 31 December 1999 (substantially amending the Act as originally enacted on 16 March 1966).
[243] World Bank, *Investing Across Borders 2010,* p. 122. South Korea scored 94.9, 81.9, and 70.2 across the three indicators.
[244] The large law firms in South Korea specialising in international arbitration are investing huge sums of money in educating their lawyers, many of whom spend significant amounts of time as part of their legal training.
[245] J. Paulsson, Co-head of Freshfields Bruckhaus Deringer's International Arbitration and Public International Law groups, commenting on a forthcoming publication on Kim & Bang, *Arbitration Law of Korea: Practice and Procedure* (Juris, 2011).
[246] *See e.g.,* Decision of the Supreme Court of South Korea dated14 February 1995*, Adviso NV v. Korea Overseas Constr. Corp.,* XXI Y.B. Comm. Arb. 612, 615 (1996) ("The basic tenet of [Article V(2)(b)] is to protect the fundamental moral beliefs and social order of the country where recognition and enforcement of the award is sought from being harmed by such recognition and enforcement. As due regard should be paid to the stability of international commercial order, as well as domestic concerns, this provision should be interpreted narrowly. When foreign legal rules applied in an arbitral award are in violation of mandatory provisions of Korean law, such a violation does not necessarily constitute a reason for refusal. Only when the concrete outcome of recognizing such an award is contrary to the good morality and other social order of Korea, will its recognition and enforcement be refused."); B. Kim & B. Hughes, *South Korea: receptive to foreign arbitration awards?* in Asian Counsel, *Special Report: Dispute Resolution,* p. 26 (2010); B. Kim & B. Hughes, *Korea* in J. Carter (ed.), *The International Arbitration Review 2010,* p. 170 (2010) ([One of the two] … most important developments in arbitration in Korea in 2009 have been … an important Supreme Court case that reinforces the strong presumption in the Korean courts in favour of the recognition and enforcement of foreign arbitral awards" referring to the Decision of the Korean Supreme Court, *Woodchips, Inc. v. Donghae Pulp Co. Ltd*, December No. 2006Da20290,28 May 2009).
[247] World Bank, *Investing Across Borders 2010,* p. 122.
[248] B. Kim & B. Hughes, *South Korea: receptive to foreign arbitration awards?* in Asian Counsel, *Special Report: Dispute Resolution,* p. 27 (2010); B. Kim & B. Hughes, *PLC Arbitration Handbook 2011-2012, South Korea,* (2011).

Seoul.[249] In addition, the Korean Commercial Arbitration Board (KCAB) opened new, state-of-the art hearing facilities in 2010.[250]

While official statistics are not available, anecdotal reports suggest a recent explosion in the number of arbitrations at the KCAB.[251] According to one report, the number of international cases at the KCAB increased by almost two-thirds between 2008 and 2009.[252] Perhaps in response to this and to demonstrate its willingness and ability to respond to perceived problems with its framework, the KCAB has recently published revisions to its 2007 International Rules for Arbitration. The revisions were approved by the Supreme Court of Korea on 29 June 2011 and will come into effect on 1 September 2011. Interestingly, the 2011 Rules include a new Chapter providing for an expedited procedure which applies by default for cases involving claims not exceeding 2 million Korean won or by agreement of the parties;[253] this appears to have been transposed across from the (domestic) KCAB Arbitration Rules.[254] This new procedure as it applies to the International Rules appears to have received little attention. The more widely reported change is that the International Rules will now apply as the default for international arbitration cases.[255] This is in contrast to the 2007 revision of the Rules, under which the domestic rules applied by default unless the international rules were expressly specified by the parties.[256] To date and to the best of the author's knowledge, however, only one case has been filed under the KCAB's International Rules, a case which was subsequently settled and withdrawn.[257]

Despite the promulgation of these new rules, the KCAB still has not fully engaged with the importance of raising its international profile (although the hosting of the IBA day in March 2011 was a start). As a result, while the international arbitration community as a whole in South Korea is becoming more and more sophisticated, the KCAB does not yet compete with SIAC or HKIAC.

In addition to the extremely limited access to its court judgments, there has also to date been very limited commentary on international arbitration in South Korea. This is surprising given the increasingly international profile of the legal community. The forthcoming publication by one of South Korea's leading arbitration practices on the subject will therefore be a welcome addition to international understanding of this increasingly important jurisdiction.[258]

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[249] *See* IBA Net, *IBA announces opening of Asia office in Seoul, South Korea* (28 February 2011).
[250] *See* B. Kim & B. Hughes, *Korea* in J. Carter (ed.), *The International Arbitration Review 2010,* pp. 174 (2010).
[251] *See* B. Kim & B. Hughes, *Korea* in J. Carter (ed.), *The International Arbitration Review 2010,* pp. 170 (2010) ("The two most important developments in arbitration in Korea in 2009 have been an explosive growth in the number of international arbitrations administered by the KCAB …").
[252] *See* B. Kim & B. Hughes, *Korea* in J. Carter (ed.), *The International Arbitration Review 2010,* p. 173 (2010).
[253] Korean Commercial Arbitration Board International Arbitration International Rules for Arbitration 2011 ("KCAB International Rules for Arbitration 2011"), Arts 38 to 44. The new expedited procedure will be heard on the basis of documents only, unless the parties agree otherwise.
[254] *See* KCAB International Rules for Arbitration 2011, Arts 57-61.
[255] *See* KCAB International Rules for Arbitration 2011, Art 3(1)(b). An 'international' arbitration case is one where one of the parties to the arbitration has its "place of business" outside of South Korea, or where the "place of arbitration" is outside Korea. *See* KCAB International Rules for Arbitration 2011, Art. 2(d).
[256] *See* KCAB International Rules for Arbitration 2007, Art 3(1).
[257] *See* B. Kim & B. Hughes, *Korea* in J. Carter (ed.), *The International Arbitration Review 2010,* pp. 174 (2010).
[258] *Bae Kim & Lee LLC* is about to publish the first ever treatise on International Arbitration in Korea in the English language. *See* K. Kim and J. Bang (eds), *Arbitration Law of Korea: Practice and Procedure* (due for publication in November 2011).

3. Malaysia

a) Malaysia's Economy: Avoiding the 'Middle Income Trap'

Malaysia has a population of around 28 million, making it the smallest of the countries reviewed in this Part B.[259] In the last three decades, Malaysia has transformed itself, now boasting world-class infrastructure, a strong services sector and a major export industry (largely machinery and transport equipment).[260] While it is not one of the "N-11" economies, Malaysia is one of the ADB's "Asia-7" economies.[261] This is in part a recognition of the sophistication of Malaysia's financial market, which is one of the best in the world, coming third to that of Singapore and Hong Kong according to the Global Competitiveness Index.[262] In this regard and as noted above, Malaysia recorded the largest ever IPO for the Southeast Asia region with its US$ 4.2 billion offering of Petronas Chemicals.[263]

While Malaysia's was one of the Asian economies more affected by the global recession - with a contraction of 1.7 percent in 2009 - 2010 marked the beginning of an impressive recovery (with growth of around 7.2 percent).[264] This was driven largely by its strong services sector,[265] good domestic demand and exports of goods, in particular to Singapore, China, Japan and Thailand.[266] Malaysia also took the lead in 2010 in improving its infrastructure to ease start-up for small and medium sized companies.[267]

As part of continuing efforts to boost the economy, the government introduced a structural reform program in 2010 to enable Malaysia to break free of the "*middle-income trap*" and reach "*high-income country status*" by 2020.[268] As evidence of the success of this measure and of its overall strength, Malaysia ranked 21st in the Global Competitiveness Index,[269] 21st in the Doing Business Index (ahead of Germany, France and Switzerland)[270] and joint 56th in the Corruption Perceptions Index.[271]

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[259] World Bank Data; Economist Intelligence Unit, *South Korea Country Analysis: Fact Sheet* (September 2011).
[260] *See* Economist Intelligence Unit, *Malaysia Country Analysis, Fact Sheet* (September 2011).
[261] Asian Development Bank, *Asia 2050: Realising the Asia Century* p. 2 (2011).
[262] *See* 2011 Global Competitiveness Index, pp. 20-21. *See also* World Bank: *Doing Business Report 2011* at p. 47 (Malaysia ranks fourth behind New Zealand, Singapore and Hong Kong in its protection of investors.); Economist Intelligence Unit, *Malaysia Country Report, Business Environment* (September 2011) (ranking Malaysia's business environment 6th).
[263] *See* Ernst & Young Report, *Global IPO trends 2011*, p. 5 (2011).
[264] *See* Asian Development Bank, *Outlook 2011: South-South Economic Links* at p. 194; International Monetary Fund, *Regional Economic Outlook: Asia and Pacific: Managing the Next Phase of Growth*, p. 4 (April 2011); International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks* p. 85 (September 2011).
[265] Services account for around 57 percent of GDP. *See* Asian Development Bank, *Outlook 2011: South-South Economic Links* in chapter *Republic of Korea* at p. 194.
[266] Asian Development Bank, *Outlook 2011: South-South Economic Links* at p. 194-195; The 2011 Global Competitiveness Index, p. 28. Malaysia's main exports are electronic goods (around 40%) and palm oil and petroleum products (around 25%). *See* Asian Development Bank, *Outlook 2011: South-South Economic Links* at p. 195.
[267] *See* IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, p. 3.
[268] *See* Asian Development Bank, *Outlook 2011: South-South Economic Links* p. 195; Economist Intelligence Unit, *Malaysia Country Analysis: Regulatory/Market Assessment* (May 2011) (the "New Economic Model, Tenth Malaysia Plan and Economic Transformation Programme"). *See also* Asian Development Bank, *Asia 2050: Realizing the Asian Century* (2011), in particular at p. 9 (the "middle income trap" refers to countries "stagnating and not growing to advanced country status … they have short periods of growth followed by periods of stagnation or even decline or are stuck at low growth rates").
[269] 2011 Global Competitiveness Index, p. 15.
[270] *See* IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, p. 4.
[271] *See* 2010 Corruption Perceptions Index, p. 3.

b) Malaysia's Court System: Combating Inefficiency

According to the IFC/World Bank estimate, it takes, on average, 585 days at a cost of just 27.5 percent of the value of a debt to enforce a commercial contract in the Malay courts.[272] This suggests that Malaysia still has some problems with efficiency in its court system (although its institutions overall score reasonably well, according to the Global Competitiveness Index).[273] This view finds support elsewhere, as the most recent investment report prepared by the U.S. State Department shows:

> "the domestic legal system is accessible but generally requires any non-Malaysian citizen to make a large deposit before pursuing a case in the Malaysian courts (i.e., $100,000), and can be slow, bureaucratic, and is regarded by some observers as politically influenced. … The U.S. Embassy is aware of an ongoing case where … it took 44 months and 26 hearings before the Malaysian court took action to address the merits of his case."[274]

Malaysia is seeking to address this problem. It has been observed that top-ranking economies tend to hold their public servants accountable through performance-based systems.[275] In this regard, Australia,[276] Singapore[277] and the U.S.[278] have all used measures to assess the efficiency and robustness of their judges and court systems since the late 1990s.[279] Malaysia took similar steps to address its poor record in court efficiency and transparency in 2009, with the introduction of a system to performance-test its judges.[280] According to the limited data available, case disposal rates are reported to be improving in Malaysia's courts.[281]

c) Malaysia's Arbitration Framework: Addressing Institutional Reform

Until 2005, arbitration in Malaysia was governed by the Arbitration Act 1952 which was based on the extremely outdated 1950 Arbitration Act of England & Wales. Malaysia repealed the 1952 Act in its entirety and replaced it with the Arbitration Act 2005, which

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[272] IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, pp. 75 and 161
[273] *See* 2011 Global Competitiveness Index, p. 19.
[274] U.S. Department of State, *2011 Investment Climate Statement - Malaysia* (2011).
[275] *See* IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, p. 5.
[276] The Australian courts are required to follow a government-wide performance data collection and reporting process. In addition, the Productivity Commission produces an annual Report on Government Services that compares court performances across Australia. Report available at www.pc.gov.au. *See* Chapter 7.
[277] The Subordinate Courts of Singapore, Justice Scorecard. The program was developed in 1999 and re-certified in 2002 and again in 2006. The Justice Scorecard is an adaptation of the balanced scorecard technique. This technique was developed at the Harvard Business School for business organisations. The Subordinate Courts of Singapore were the first judicial and public institution to adapt and use such a balanced scorecard technique. *See Case Study: The Subordinate Courts of Singapore* (Report prepared by the Subordinate Courts of Singapore, available at www.subcourts.gov.sg); R. Kaplan & D. Norton, *Strategy-Focused Organisation* (2001); J. Creelman and N. Makhijani, *Mastering Business in Asia – Succeeding with the Balanced Scorecard* (2005).
[278] The United States Bureau of Justice Administration and National Center for State Courts have collaborated on a Trial Court Performance Standards project, which focuses on indicators to assess trial court 'outputs' in five areas: access to justice, timeliness, fairness, independence and accountability and public confidence. Available at www.ncsconline.org.
[279] All three countries are members of the International Consortium for Court Excellence. Similar systems also exist across some European jurisdictions. The World Bank also advocates that "more and better performance indicators are desperately needed in the legal reform field." *See* World Bank, *Law and Justice Institutions, Justice Reform* available at http://web.worldbank.org.
[280] *See* IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, p. 5.
[281] *See* IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, p. 5.

adopts, with some modifications,[282] the UNCITRAL Model Law.[283] The Act adopts a near uniform law for domestic and international arbitrations,[284] although there are provisions that apply to domestic arbitrations that do not apply to international arbitrations, unless the parties so agree (as in Singapore).[285] The strength of Malaysia's arbitration laws and the general supportiveness of its courts for arbitration is recognised by the survey data in *Investing Across Borders*.[286]

The Malaysian government appears to recognise the importance of maintaining a truly *international* framework for arbitration. A Bill to amend the 2005 Act received Royal Assent on 23 May 2011 and was published in the Gazette on 2 June 2011.[287] The Act, as amended, will: make clear that courts should exercise their supervisory powers where the Act expressly so provides but should not intervene in reliance on their inherent jurisdiction only;[288] give the court powers in relation to admiralty proceedings;[289] give the court new powers to grant a stay of proceedings[290] and interim measures[291] in aid of foreign seated arbitrations; clarify the law to be applied in any of the grounds for enforcing and challenging awards;[292] and raise the threshold for acceptance by the courts of references on questions of law.[293]

More important than the changes themselves, however, will be effective implementation of the new law by the courts. In terms of enforcement, *Investing Across Borders* estimates that it takes 24 weeks to enforce an arbitration award in Malaysia.[294] However, Malaysia has suffered from its own share of aberrant decisions on enforcement.[295] In 2006, the Court of Appeal (overturning the decision of the lower court) determined in the *Nimbus* case that a foreign award could only be enforced in Malaysia if it had first been entered into the Gazette; since the award in that case had not, the Court of Appeal refused its enforcement.[296] The

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[282] In particular, Part III, which contains provisions that apply to domestic arbitration (and only to international arbitration if the parties so agree in writing) and Part IV (which contains provisions relating to liability of arbitrators, immunity of arbitral institutions, bankruptcy, mode of application and repeal and savings).
[283] The Malaysia Arbitration Act 2005 (Act 646) came into force on 15 March 2006.
[284] For example, the default number of arbitrators for domestic arbitration is one, three for international arbitration. *See also* the provisions in Part III of the Act which apply to domestic arbitrations.
[285] Parts I, II and IV of the Act apply to domestic arbitration, as does Part III, unless the parties agree otherwise in writing. Parts I, II and IV of the Act apply to international arbitration where the seat is in Malaysia; Part II does not apply unless the parties agree otherwise. *See* Arbitration Act 2005, Article 3. Part III contains provisions granting the courts powers to determine preliminary points of law and to hear appeals on points of law, none of which are contained in the Model Law.
[286] *See* World Bank, *Investing Across Borders 2010,* p. 128 (2010).
[287] *See* Arbitration (Amendment) Act 2011 (Act A1395).
[288] *See* Arbitration (Amendment) Act 2011, Articles 3 (amending Section 8 of the 2005 Act) ("No court shall intervene in matters governed by this Act, except where so provided in this Act" replaces "unless otherwise provided, no court shall intervene in any of the matters governed by this Act"). The courts have relied on the original wording both in refusing to intervene where they should exercise their supervisory jurisdiction and intervening where they should not by reference to their "inherent jurisdiction".
[289] *See* Arbitration (Amendment) Act 2011, Article 4(b) (inserting Section 10(2A) of the 2005 Act).
[290] *See* Arbitration (Amendment) Act 2011, Article 4(a) (amending Section 10(1) of the 2005 Act).
[291] *See* Arbitration (Amendment) Act 2011, Article 5 (amending Section 11(3) of the 2005 Act).
[292] *See* Arbitration (Amendment) Act 2011, Article 8 (amending Section 39 of the 2005 Act to make clear that the law to be applied is the "laws of the State where the award was made").
[293] *See* Arbitration (Amendment) Act 2011, Article 9 (inserting Section 42(1A) of the 2005 Act to make clear that any reference on a question of law will be dismissed unless "the question of law substantially affects the rights of one or more of the parties.").
[294] World Bank, *Investing Across Borders 2010,* p. 128 (2010).
[295] *See* M. Hwang & S. Lee, *Survey of South East Asian Nations on the Application of the New York Convention* 25(6) J. Int'l Arb., 873, 882 (2008) (who refer to Malaysia's "*hiccup[s]*").
[296] *See* Decision of the Malaysian Court of Appeal, *Sri Lanka Cricket v. World Sport Nimbus Pte. Ltd* [2006] Part 6, Case 3 CAM ¶12 (Decision of 14 March 2006). *See also* Decision of the Malaysian Court of Appeal, *Jan de Nul NV v Inai Kiara Sdn Bhd* (2006) MYCA 36 (in which the Court of Appeal determined that "any dispute arising out of or in connection with the Agreement" was not sufficiently wide to cover claims in tort – again, a decision under the 1985 Act, now repealed). For a fuller discussion of this case, *see e.g.,* M. Hwang & Y. Tat, *Recognition and Enforcement of Arbitral Awards* in M. Pryles & M. Moser (eds), *Asian Leading*

1985 Act pursuant to which that case was decided has since been repealed by the 2005 Act,[297] which now incorporates the main provisions of the New York Convention and contains no requirement for gazetting.[298] However, some commentators remain of the view that recalcitrant parties may still seek to rely on *Nimbus* in seeking to resist enforcement.[299] This case aside, the courts of Malaysia do not share many of the transparency and other institutional drawbacks of neighbouring countries in the region and take a comparatively sophisticated and 'international' view of arbitration, both in relation to general interpretation of the law and to enforcement of awards.[300]

The main arbitral institution in Malaysia is the Kuala Lumpur Regional Centre for Arbitration (KLRCA) which was established in 1978. While up-to-date statistics are not available, the KLRCA receives around 20 new references to arbitration each year (although most of these are domestic).[301] The KLRCA has often been criticised for its inefficiency and lacks the profile of its neighbouring Singapore. The recent appointment of a new Director is designed to address this.[302] The Director has described the KLRCA's failure to achieve a foothold as a seat for arbitration as "*straightforward: the KLRCA was slow to realise the importance of marketing itself as an international centre*."[303] In light of this, the new Director has recently expanded the management team at the KLRCA,[304] increased the numbers of arbitrators[305] and engaged in various promotion activities designed to raise the KLRCA's profile in the region.[306]

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*Arbitrators Guide to Arbitration,* 407, 420 (2007).

[297] Arbitration Act 2005, Section 51 (repealing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320)).

[298] Arbitration Act 2005, Sections 38 to 39.

[299] M. Hwang & S. Lee, *Survey of South East Asian Nations on the Application of the New York Convention* J. Int'l Arb.. 25(6), 873, 882 (2008). *See also* D. Howell, *Developments in International Commercial Arbitration in Asia*, 5 (2007).

[300] On Malaysia's approach to appeals from awards on questions of law (under section 42 of the Malaysia Arbitration Act 2005), *see for example* Decision of the Malaysian High Court, *Majlis Amanah Rakyat v. Kausar Corporation Sdn. Bhd.* [2009] 1 LNS 1766, p. 34 in relation to case R3(2)-24-64-2008 ("it will be unwise for any Malaysian Court to conclude in favour of an extended jurisdiction under section 42 of our Arbitration Act 2005, even for domestic Arbitral Awards" adopting a "strict approach" to appeals on questions of law). For a recent example of the court's approach to enforcement, *see* Decision of the Malaysian High Court, *Taman Bandar Baru Masai Sdn. Bhd. v. Dindings Corporations Sdn. Bhd.* [2010] 5 CLJ 83, 102 (plaintiff submitted that the final award dealt with a dispute not contemplated by or not falling within the terms of submission to arbitration and the final award was therefore in conflict with the public policy of Malaysia and that arbitrator had breached rules of natural justice; court rejected this argument on the basis that "procedural skirmishes before the arbitrator cannot be allowed to prevail in the pretext of natural justice or public policy consideration when in essence the matters complained of falls within the jurisdiction of the arbitrator."; court also dismissed plaintiff's application for what it termed the "prolixity" of its submissions); Decision of the Malaysian High Court, *Majlis Amanah Rakyat v. Kausar Corporation Sdn. Bhd.* [2009] 1 LNS 1766, p. 66 in relation to case R3(1)-24-60-2008 ("the Malaysian Courts cannot … ignore the above comparative jurisprudence in the interests of maintaining comity of nations and a uniform approach to the model law … to the concept of "public policy" in relation to foreign awards. … the Defendant would need to proceed further to establish the conflict with the public policy of Malaysia in the narrow sense of something offending basic notions of morality and justice or something clearly injurious to the public good in Malaysia" which leads to a "substantial miscarriage of justice").

[301] *See* Global Arbitration Review, *Can Kuala Lumpur catch up?* (22 February 2011) (Interview with Sundra Rajoo). *See also* M. Pyrles & V. Taylor, *The Cultures of Dispute Resolution in Asia* in M. Pryles (ed.), *Dispute Resolution in Asia* p. 25 (2006).

[302] Sundra Rajoo was appointed Director of the KLRCA on 1 March 2010.

[303] *See* Global Arbitration Review, *Can Kuala Lumpur catch up?* (22 February 2011) (interview with Sundra Rajoo).

[304] Before Rajoo's directorship, the team at the KLRCA consisted of just four members; it now has 23.

[305] The list of arbitrators at the KLRCA has increased from around 200 to around 556. The majority of those are international (only 171 are domestic). *See* the List of Arbitrators on the KLRCA website.

[306] The KLRCA has recently signed an MOU with the 90,000 member strong Associated Chinese Chambers of Commerce and Industry of Malaysia in a bid to promote its services. *See* Global Arbitration Review, *Can Kuala Lumpur catch up?* (22 February 2011) (interview with Sundra Rajoo).

The KLRCA is also the first international arbitration centre to have adopted the new 2010 UNCITRAL Arbitration Rules (which include revised procedures for the replacement of an arbitrator, a review mechanism regarding the costs of the arbitrators and new, more detailed provisions regarding the grant and availability of interim measures). It also introduced a new set of fast track rules in 2010 which have so far been used in a handful of domestic cases only.[307] In addition to its main rules for arbitration, the KLRCA also administers arbitrations for the Islamic Banking community, in recognition of Malaysia's growing Islamic banking sector.[308]

4. The Philippines

a) The Philippines' Economy: Stable and Resilient?

With a population of just over 90 million, the Philippines is the world's twelfth most populous country.[309] Its major export market is made up of electronic goods (which go predominantly to China, the US, Singapore and Japan) but it also has strong mineral wealth.[310] It is also widely known for its workforce, 25 percent of which is reported to work overseas.[311] It is another of the N-11 economies which demonstrated "*remarkable resilience*" during the global financial crisis whose performance has "*positively surprised*" leading commentators and analysts.[312] In this regard, its GDP growth for 2010 was at 7.3 percent (compared with 1.1 percent in 2009), driven mainly by strong growth in industry (over services) and a recovery in exports.[313] Unlike many of the Asian economies, inflation in the Philippines remains relatively low and stable, despite the strong economic rebound from the financial crisis.[314]

However, the Philippines suffers high rates of unemployment; coupled with poor infrastructure and policy stability, investor confidence is reported to be low.[315] Despite this, the Philippines recorded one of the biggest improvements in the Global Competitiveness Index, rising from 85th (in 2010) to 75th in 2011[316] although it still ranks a poor 148th in the Doing Business Index and 134th in the Corruption Perceptions Index.[317]

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[307] *See* Global Arbitration Review, *Can Kuala Lumpur catch up?* (22 February 2011) (interview with Sundra Rajoo).
[308] *See* Rules for Arbitration (Islamic Banking and Financial Services) 2007.
[309] World Bank Data; Economist Intelligence Unit, *Philippines Country Analysis: Fact Sheet* (September 2011).
[310] World Bank, *Country Overview for the Philippines*; Economist Intelligence Unit, *Philippines Country Analysis: Fact Sheet* (September 2011).
[311] World Bank, *Country Overview for the Philippines.*
[312] Goldman Sachs Global Economic Paper No. 192, *The Long-Term Outlook for the BRICs and N-11 Post Crisis,* p. 6 (4 December 2009). *See also* Goldman Sachs Global Economic Paper No. 134, *How Solid are the BRICS?,* (1 December 2005); Goldman Sachs Global Economic Paper No. 153, *The N-11: More Than an Acronym,* pp. 9-10 (28 March 2007).
[313] Asian Development Bank, *Outlook 2011: South-South Economic Links,* pp. 201-202; International Monetary Fund, *Regional Economic Outlook: Asia and Pacific, Managing the Next Phase of Growth,* p. 4 (April 2011); International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks,* p. 85 (September 2011).
[314] Asian Development Bank, *Outlook 2011: South-South Economic Links,* p. 202.
[315] Asian Development Bank, *Outlook 2011: South-South Economic Links,* p. 205.
[316] 2011 Global Competitiveness Index, p. 15. However, this is a significant improvement on 2010, when the Philippines ranked 85. *See* 2010 Global Competitiveness Index, p. 15.
[317] *See* World Bank Report, *Doing Business 2011: Making a Difference for Entrepreneurs,,* p. 4; 2010 Corruption Perceptions Index, p. 3; 2011 Global Competitiveness Index, p. 31.

b) The Philippines' Court System: Efficiency and Transparency Concerns

Resolving disputes through the courts in the Philippines may not cost as much in some jurisdictions but it will take a prohibitively long time; the World Bank estimates that it takes on average *842* days to enforce a contract at a cost of 26 percent of the value of the debt.[318] This data finds support in other sources, which report the "*inefficiency*" and "*uncertainty*" of the judicial system as a disincentive for foreign investors.[319] In addition, the quality of the country's institutions (including its court system) is assessed as "*poor*" with problems of "*corruption … [being] particularly acute*".[320] This is also reflected in the Philippines' Corruption Perceptions Index score of just 2.4, the worst of the countries reviewed here.[321] Practitioners based in the Philippines echo these views.[322]

c) The Philippines' Arbitration Framework: New Rules to Overcome Judicial Confusion

Perhaps because of this inefficiency and due to the aversion of most Filipinos to adversarial encounters, most disputes are resolved through negotiation.[323] However, arbitration does have a foothold.

The Philippines took strides to modernise its infrastructure for the resolution of international disputes through arbitration in April 2004, with the adoption of the Republic Act 9285 (ADR Act). Domestic arbitrations continue to be governed by separate legislation.[324] The ADR Act adopts the Model Law.[325] In addition, Executive Order No. 1008 (otherwise known as the Construction Industry Arbitration Law of 1985) governs arbitration of construction disputes in the Philippines.[326] The modernisation of the international arbitration law is recognised by *Investing Across Borders*, with the Philippines scoring 95.4 and 82.8 for its "*strength of [arbitration] laws*" and "*ease of [arbitration] process*".[327] However, commentary and case law reveals that the courts do not always adhere to international standards in its application.[328]

Further, while the New York Convention is "*expressly recognized*" by the Supreme Court of the Philippines,[329] the country has a poor enforcement record largely due to the extremely

[318] World Bank Report, *Doing Business 2011: Making a Difference for Entrepreneurs*,, p.187.
[319] *See* U.S. Department of State, *2011 Investment Climate Statement - The Philippines* (2011).
[320] 2011 Global Competitiveness Index, p. 31. *See also* U.S. Department of State, *2011 Investment Climate Statement – The Philippines* (2011).
[321] 2010 Corruption Perceptions Index, p. 3.
[322] *See* P. Lazatin, *The Philippines* in M. Pryles (ed.), *Dispute Resolution in Asia*, p. 307 (2006) (referring to the "costly and slow process of litigation and clogged court dockets").
[323] *See* P. Lazatin, *The Philippines* in M. Pryles (ed.), *Dispute Resolution in Asia*, p. 307 (2006).
[324] Arbitration Law 1953, as amended by Chapter 5 of the ADR Act (as defined below).
[325] The Republic Act No. 9285, or Alternative Dispute Resolution Act (ADR Act), came into force in the Philippines on 2 April 2004 and adopted the UNCITRAL Model Law and replaced the Arbitration Law 1953. The Philippines was in fact one of the original signatories to the New York Convention. The New York Convention came into force in the Philippines on 4 October 1967. This followed the established practice of the Supreme Court of the Philippines which had confirmed that a foreign arbitral award should be enforced in the Philippines as early as 1926. *See* Decision of the Supreme Court of the Philippines, *Robinson, Fleming & Co v Cruz Tan Chong Say*, GR No 24904 (25 March 1926) cited in P. Prodigalidad, *Recognition and Enforcement of Foreign Arbitral Awards in the Philippines: Challenges after the 2009 Special ADR Rules*, 6(2) Asian Int'l Arb. Journal 101, 102 (2010).
[326] The Construction Industry Arbitration Commission (CIAC) was also created under this law and it has exclusive jurisdiction over construction disputes which are subject to an arbitration agreement. *See* the Construction Industry Arbitration Law of 1985 (Executive Order No. 1008).
[327] *See* World Bank, *Investing Across Borders 2010*, p. 141.
[328] *See* Greenberg, Kee and Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* ¶1.152 (2011).
[329] *See* P. Lazatin, *The Philippines* in M. Pryles (ed.), *Dispute Resolution in Asia* p. 352 (2006) (referring to

protracted enforcement process through the national courts (mirroring the data above). In this regard, the Philippines scored just 33.7 for its "*judicial assistance [for arbitration]*", the worst score of the countries reviewed here.[330] Furthermore, *Investing Across Borders* reports that it takes on average 126 weeks to enforce an international arbitration award rendered in the Philippines (again, this assumes no appeal).[331] These figures are dwarfed by one case in which it is reported that an arbitral award remained unenforced for over a decade.[332]

The reason for this poor enforcement record is down not just to inefficiency of the courts; it is compounded by legislative and jurisprudential "*vagaries*".[333] For example, while the ADR Act finally implemented the Philippines' obligations pursuant to the New York Convention (which came into force on 4 October 1967),[334] it did so inconclusively. In particular, Article 45 of the ADR Act left the grounds for opposing recognition and enforcement by a party to a "*foreign arbitration proceeding*" to be determined by "*procedural rules **to be** promulgated by the Supreme Court*".[335] The rules were not forthcoming and this left the courts unclear on what procedures to apply and lawyers forced to equate foreign arbitral awards with foreign judgments.[336] This was unfortunate, given that "*[f]oreign judgments have limited binding effect in the Philippines*."[337] This is so for two main reasons. First, a foreign judgment may be reversed or set aside by the courts "*by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud or clear mistake of law or fact*".[338] Secondly, a foreign judgment *in personam* is not conclusive, but only "*presumptive evidence*" of an existing right.[339] This has led to some unfortunate decisions in which the Supreme Court has looked into the substance of foreign awards and refused their recognition and enforcement on grounds that clearly exceed the narrow limits of the New York Convention.[340]

In seeking to address this, the Supreme Court of the Philippines adopted a new set of ADR rules in 2009, whose purpose is to "*encourage and promote the use of ADR, particularly arbitration and mediation, as an important means to achieve speedy and efficient resolution of disputes, impartial justice, curb a litigious culture and to de-clog court dockets*".[341] Importantly, the new rules make clear that the grounds for refusing to recognise and enforce an award are limited to those laid down in the New York Convention. This is certainly a

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*National Union Fire Insurance Company of Pitts burg v. Stolz-Nielsen Philippines Inc. GR No. 87958, 26 April 1990*).

[330] *See* World Bank, *Investing Across Borders 2010*, pp. 13 and 141 (2010).

[331] *See* World Bank, *Investing Across Borders 2010*, pp. 13 and 141 (2010).

[332] *See* P. Prodigalidad, *Recognition and Enforcement of Foreign Arbitral Awards in the Philippines: Challenges after the 2009 Special ADR Rules*, 6(2) Asian Int'l Arb. Journal 101, 103 (2010).

[333] P. Prodigalidad, *Recognition and Enforcement of Foreign Arbitral Awards in the Philippines: Challenges after the 2009 Special ADR Rules*, 6(2) Asian Int'l Arb. Journal 101, 107 (2010).

[334] The Philippines was one of the very early adopters of the Convention.

[335] ADR Act, Art. 45 (emphasis added).

[336] P. Prodigalidad, *Recognition and Enforcement of Foreign Arbitral Awards in the Philippines: Challenges after the 2009 Special ADR Rules*, 6(2) Asian Int'l Arb. Journal 101, 108 (2010).

[337] P. Prodigalidad, *Recognition and Enforcement of Foreign Arbitral Awards in the Philippines: Challenges after the 2009 Special ADR Rules*, 6(2) Asian Int'l Arb. Journal 101, 108 (2010).

[338] *See* Rules of the Supreme Court of the Philippines, Rule 39, Section 48 ("Effect of foreign judgments or final orders").

[339] *See* Rules of the Supreme Court of the Philippines, Rule 39, Section 48(b) ("In case of a judgment or final order against a person, the judgment or final order is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title.").

[340] P. Prodigalidad, *Recognition and Enforcement of Foreign Arbitral Awards in the Philippines: Challenges after the 2009 Special ADR Rules*, 6(2) Asian Int'l Arb. Journal 101, 109 (2010) (referring to the 1970 Decision of the Supreme Court in *Soorajmull Nagarmull v Binalbagan-Isabela Sugar Co Inc.* GR No L-22470 (28 May 1970), 33 SCRA 46 (award confirmed by court in India refused enforcement in the Philippines on the basis that according to the contract law of the Philippines, the award contained a clear mistake of law).

[341] P. Prodigalidad, *Recognition and Enforcement of Foreign Arbitral Awards in the Philippines: Challenges after the 2009 Special ADR Rules*, 6(2) Asian Int'l Arb. Journal 101, 114 (2010).

welcome step. However, to date there has been little reported data or discussion against which to judge the success or otherwise of the new ADR rules.

Currently, there are several organisations and centres dealing with ADR methods in the Philippines.[342] The largest and most well known is the Philippine Dispute Resolution Centre, Inc. (PDRCI), which was established by the Philippine Chamber of Commerce and Industry and is a member of APRAG.[343] It was created in 1976 to encourage the use of ADR for settlement of domestic and international disputes in the Philippines.[344] Following support from the World Intellectual Property Organisation, the PDRCI has also recently launched a joint initiative with the Philippine Intellectual Property Office (IPOPHL) - the IPOPHL-PDRCI – for the resolution of intellectual property related disputes by arbitration.[345] The Office for ADR, an agency attached to the Department of Justice, is also currently being formed to promote the use of ADR in the private and public sector. Finally, the Philippines became the 111th member of the Permanent Court of Arbitration on 12 September 2010.

### 5. The Socialist Republic of Vietnam

#### a) Vietnam's Economy: South/East Asia's 'Destination of Choice'?

With a population of around 87 million, Vietnam is the world's thirteenth most populous country (behind the Philippines).[346] Vietnam has been one of the fastest growing economies in South/East Asia since the introduction of the government's Đổi mới policy in 1986 (opening up the economy to foreign investors for the first time).[347] Prior to the global financial crisis, the United Nations commented on Vietnam's "*impressive process of transformation from an isolated, poor and collectivized agriculture-based economy into a booming nation with a dynamic and diversified private sector co-existing with a large public sector, fully integrated into the world economy. … [where] poverty has been reduced at one of the fastest rates in history.*"[348] The same report highlights both the importance of foreign direct investment as an historic driver for Vietnam's economic growth and the growth potential for the future.[349]

Echoing this, Vietnam has been described more recently as "*rapidly becoming the destination of choice*" in South/East Asia for foreign investors, in particular for Japanese companies.[350] The same source reports a Japan Bank for International Co-operation (JBIC) survey of Japanese companies with overseas operations, which found that Vietnam beats China and India as the most promising source of cheap labour.[351] This is consistent with similar reports

[342] *See for example* the Philippine Clearing House Corporation, which provides that member banks cannot invoke the jurisdiction of a trial court without prior recourse to the Arbitration Committee.
[343] The Asia Pacific Regional Arbitration Group.
[344] In 1976, it was called the Committee on Arbitration.
[345] *See* PDRCI Press Release, *IPO Launches IP Arbitration With PDRCI* (20 June 2011).
[346] World Bank Data.
[347] Đổi mới means renovation or renewal and refers to the government's political and economic renewal plan. For a discussion of the background to and implementation of this policy, *see* Investment Policy Review, *Vietnam*, Chapter I (2008, UNCTAD).
[348] UNCTAD, *Investment Policy Review, Vietnam*, p. 1 (2008).
[349] UNCTAD, *Investment Policy Review, Vietnam*, pp. 8-9 (2008). It is to be noted that this report as issued prior to the global financial crisis. For more recent reports on the status of Vietnam, see further below.
[350] Financial Times, *Japanese groups home in on Vietnam* (26 July 2010). For a general commentary on the importance of Vietnam and its potential for foreign direct investment, *see* UNCTAD, *Investment Policy Review, Vietnam*, (2008).
[351] Financial Times, *Japanese groups home in on Vietnam* (26 July 2010).

elsewhere.[352] Indeed, manufacturing is reported to be the primary driver of foreign direct investment in Vietnam (mainly of textiles).[353]

As one of Goldman Sachs' predicted N-11 economies, Vietnam had managed growth comparable to China, Russia and India by 2007,[354] earning it "Best in Class" status among the N-11.[355] At the same time, its economy was predicted to take over some of the G7 by 2050.[356] Today, Vietnam has been hard hit by the global financial crisis and is showing some worrying economic trends.[357] In particular, its overall infrastructure and institutions are weak.[358] Yet Vietnam remains an extremely important economy; it reported GDP growth of 6.8 percent in 2010 (driven mainly by a strong services sector and a growth in manufacturing, infrastructure development and general construction)[359] and is expected to continue its overall recovery.[360] In this regard, Vietnam ranked 65th in the Global Competitiveness Index[361] and 78th in the Doing Business Index (one place ahead of China). As discussed below, however,

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[352] *See* KPMG Publication, *Product Sourcing in Asia Pacific: New Locations, Extended Value Chains,* (15 September 2011); UNCTAD, *Investment Policy Review, Vietnam*, p. 8 (2008) ("Viet Nam is increasingly establishing itself as a platform for the production of manufactured goods for the global economy. It is increasingly seen as one of the alternatives to China, with similarly low labour costs, reasonably efficient and competitive infrastructure services and an increasingly welcoming environment.").

[353] UNCTAD, *Investment Policy Review, Vietnam*, p. 5 (2008); Economist Intelligence Unit, *Vietnam Country Analysis: Fact Sheet* (September 2011) (15.6 percent of Vietnam's exports consist of textiles and another 7.1 percent of footwear. The two other main export items are crude oil and fisheries products (both 6.9 percent)). In 2006, Intel established its state-of-the-art semiconductor assembly and test facility in the Saigon Hi-Tech Park in Ho Chi Minh City. This is believed to be the largest of Intel's facility network in the world. *See* UNCTAD, *Investment Policy Review, Vietnam*, p. 11 (2008).

[354] *See also* Goldman Sachs Global Economic Paper No. 153, *The N-11: More Than an Acronym,* p. 3 (28 March 2007). The same paper predicts that Vietnam is a "*plausible candidate[--] for the kinds of sustained, structural high-growth path exemplified by China and India*." *See* Goldman Sachs Global Economic Paper No. 153, *The N-11: More Than an Acronym,* p. 14 (28 March 2007).

[355] The "Best in Class" epithet refers to the Goldman Sachs Growth Environment Score (GES). *See* Goldman Sachs Global Economic Paper No. 153, *The N-11: More Than an Acronym,* p. 4 (28 March 2007). *See also* Asian Development Bank, *Asia 2050: Realizing the Asian Century* p. 4 (2011) ("More Asian countries need to emulate Japan, Singapore and Republic of Korea and come closer to, or preferably become, the global best practice").

[356] Goldman Sachs Global Economic Paper No. 153, *The N-11: More Than an Acronym,* p. 10 (28 March 2007).

[357] Goldman Sachs Global Economic Paper No. 192, *The Long Term Outlook for the BRICs and N-11 Post Crisis,* p. 16, 17 (4 December 2009) ("Vietnam saw the largest decline in its [GES] score. The deterioration in macroeconomic stability pulled down its GES this year, mainly as a result of much higher inflation."); World Bank, *Taking Stock: An Update on Vietnam's Recent Economic Developments,* p.11 (June 2011) ("[t]he decline in private domestic investment does not bode well for Vietnam … [and] [t]he declining trend in committed foreign direct investment is also worrisome"); 2011 Global Competitiveness Index, p. 30 ("Vietnam's competitiveness assessment declines [in 2011] … and only a significant improvement in macroeconomic environment … limits its fall in the rankings. Despites this … some macroeconomic challenges remain."); International Monetary Fund, *Regional Economic Outlook: Asia and Pacific, Managing the Next Phase of Growth,* pp. 10 -11 (April 2011) ("the expansionary policies adopted during the crisis have raised macroeconomic risks … the outlook for 2011 depends critically on whether the new policy package will succeed in restoring policy credibility as well as domestic and foreign investor confidence"); International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks* p. 87 (September 2011) ("the real cost of capital is at historical lows because of elevated inflation [in Vietnam], and inflation expectations are inching up.").

[358] *See* 2011 Global Competitiveness Index, p. 31.

[359] Asian Development Bank, *Outlook 2011: South-South Economic Links,* p. 215; International Monetary Fund, *Regional Economic Outlook: Asia and Pacific, Managing the Next Phase of Growth,* p. 4 (April 2011); International Monetary Fund, *World Economic Outlook: Slowing Growth, Rising Risks,* p. 85 (September 2011).

[360] Goldman Sachs Global Economic Paper No. 192, *The Long-Term Outlook for the BRICs and N-11 Post Crisis,* pp. 8, 9, 13, 18 (4 December 2009); World Bank Report, *Taking Stock: An Update on Vietnam's Recent Economic Developments* (June 2011); International Monetary Fund, *Regional Economic Outlook: Asia and Pacific, Managing the Next Phase of Growth,* pp. 10-11 (April 2011) ("if sound macroeconomic policies are implemented, the outlook for 2011 is broadly favourable").

[361] 2011 Global Competitiveness Index, p. 15.

Vietnam still has much to do to improve transparency across its institutions (it ranked joint 116th in the Corruption Perceptions Index).[362]

### b) Vietnam's Court System: Efficiency and Transparency Concerns

The prospect of resolving any dispute arising out of associated trade or other commercial dealings locally in Vietnam is reported to be quite good; the IFC/World Bank estimates that it takes, on average, 295 days at a cost of only 28.5 percent of the value of a debt to enforce a commercial contract in the Vietnam courts; one of the better performing of the jurisdictions reviewed in this article.[363] However, this data should be viewed with caution. Vietnam's courts still have "*endemic*"[364] problems with independence and transparency (despite a requirement that they have "*good ethical qualities*" and be "*incorrupt and honest*"),[365] which might help explain this statistic.[366] Indeed, between 1996 and 2000 two members of Vietnam's Supreme Court staff were indicted on criminal charges for corruption.[367] Further independent studies reveal that "*users claim they have to pay court officials, including judges, to determine cases in their favour*".[368] These findings are supported by Vietnam's Corruption Perceptions Index score of just 2.7 out of 10, the second worst of the countries reviewed here (behind the Philippines). To add to this, Vietnam has traditionally had a reputation for a somewhat chaotic legal system,[369] a problem compounded by a proliferation of legislation following many years of reform.

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[362] *See* World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs,* p. 4; 2010 Corruption Perceptions Index, p. 3.
[363] IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, at p. 204.
[364] P. Nicholson, *The Vietnamese Courts and Corruption* in T. Lindsey and H. Dick (eds.), *Corruption in Asia,* p. 201 (2001)
[365] Article 2, Circular, 01 of the Law on the Organization of People's Courts referred to in in P. Nicholson and N. Quang, *The Vietnamese Judiciary: The Politics of Appointment and Promotion*, 14(1) Pacific Rim Law and Policy Journal 1, 11 (Jan. 2005).
[366] As noted above, Vietnam ranked 116 in the 2010 Corruption Perceptions Index. *See also* 2011 Global Competitiveness Index, p. 31 ("corruption is considered frequent and pervasive"); UNCTAD, *Investment Policy Review, Vietnam* p. 74 (2008) ("Viet Nam continues to suffer from widespread corruption at various levels of Government and from low confidence in the fairness of the judicial system. Investors frequently report that various forms of petty corruption are commonly required to 'ease processes'"); Economist Intelligence Unit, *Vietnam Country Analysis: Business Environment* (September 2011) (Vietnam "continue[s] to be undermined by corruption, an inefficient bureaucracy and an unfair legal system"); P. Nicholson, *Vietnamese Court Reform: Constancy and Change in the Contemporary Period*, draft paper presented at a Conference in Victoria, Canada (27-29 March 2003) (this paper cites many examples of corruption in the judiciary); P. Nicholson & N. H. Quang (2005), *The Vietnamese Judiciary: The Politics of Appointment and Promotion*, 14(1) Pacific Rim Law and Policy Journal, 1-34 ("any assertion that Vietnamese judges are independent from Party-State influence is false"); P. Nicholson & K. Truong *Drugs Prosecutions in Vietnam: The Modern Propaganda Trial*, 34 Monash University Law Review, 430-456 (2008); R. Bose, N. Yap and A. Jaliwala, *Enforcement of International Arbitration Awards in Asia - Paying Lip Service to the New York Convention*, ICMA XVI Congress Papers, 477, 489 (Singapore 2007) ("[r]ampant corruption, lack of transparency and a cumbersome procedure are still problems").
[367] P. Nicholson, *The Vietnamese Courts and Corruption* in T. Lindsey and H. Dick (eds), *Corruption in Asia,* p. 201 (2001).
[368] P. Nicholson, *The Vietnamese Courts and Corruption* in T. Lindsey and H. Dick (eds), *Corruption in Asia,* p. 202 (2001). *See also* R. Bose, N. Yap and A. Jaliwala, *Enforcement of International Arbitration Awards in Asia - Paying Lip Service to the New York Convention*, ICMA XVI Congress Papers, 477, 483 (Singapore 2007) ("the perception is that the courts in Vietnam are not entirely independent of political influence which gives rise to the potential for partisan decisions.").
[369] *See e.g.*, P. Nicholson & N. Quang, *The Vietnamese Judiciary: The Politics of Appointment and Promotion*, 14(1) Pacific Rim Law and Policy Journal, p. 3 (2005) ("the role of law in Vietnam today is unclear: … the Vietnamese legal system, like its economy, is in transition and uncertainties about its new form and orientation remain"); C. McKinley *Inside Indochina: In Vietnam, Laws are Made To Be Broken*, A Dow Jones Newswires Column, 29 October 2002 ("the country's legal infrastructure has grown at such a fast rate and with so little coordination that nobody, not even the Ministry of Justice, knows exactly what laws are out there. Hardly surprising then that enforcement is erratic."); M. Polkinghorne and Le C. Dinh, *Vietnam* in M. Pryles (ed.),

However, the reforms of recent years have been a step in the right direction (a result in part of Vietnam seeking accession to the WTO).[370] In 2002, the Vietnam Communist party (VCP), the National Assembly and various other state institutions published a "*Legal Needs Assessment*" which laid out plans for a fundamental overhaul of Vietnam's legal and court system focussing on transparency and the building of a business-friendly legal environment.[371] As a result, the last 10 years have seen reform not only of Vietnam's court system[372] but of its Competition Law (in 2004),[373] Company Law (in 2005),[374] Commercial Law (in 2005)[375] and the enactment of a new Civil Proceedings Code in 2005.[376] Perhaps in recognition of the success of these reforms, Vietnam was one of the World Bank's top 10 countries with the most improved business environment in 2010.[377]

c) Vietnam's Arbitration Framework: Legislative Reform

Vietnam adopted arbitration as an official mechanism for resolving disputes arising from "*commercial activities*"[378] with the introduction of the Ordinance on Commercial Arbitration in 2003 ("2003 Ordinance").[379] Prior to that time, domestic arbitration awards were unenforceable in Vietnam.[380] Based on the 2003 Ordinance, *Investing Across Borders* assessed Vietnam's strength of its arbitration law and ease of process for arbitration at 84.9 and 61.8, respectively.[381]

However, perhaps in recognition of its increasingly competitive economic status, Vietnam has now replaced the 2003 Ordinance and introduced an entirely new arbitration law, which came into effect on 1 January 2011 ("Arbitration Law").[382] The Arbitration Law does not

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*Dispute Resolution in Asia*, pp. 449-450 (2006).

[370] *See* M. Pyrles & V. Taylor, *The Cultures of Dispute Resolution in Asia* in M. Pryles (ed.), *Dispute Resolution in Asia*, p. 9 (2006). *See also* UNCTAD, *Investment Policy Review, Vietnam*, pp. 1 and 74 (2008) ("The Government has stepped up its efforts to tackle high-level corruption and to improve the quality of the court system. Viet Nam adopted the first Law on Anti-Corruption in 2005, which strengthened the provisions of the 1998 Ordinance on Anti-Corruption. One of the key aspects of the law is to require not only government officials to declare their assets, but also those of their close relatives. The law also establishes a National Anti-Corruption Steering Committee to coordinate the fight against corruption, which remains under the responsibility of a number of agencies, including the Government Inspectorate, the State Audit and the People's Procurary."). For a general overview of the reforms and suggestions for further reform to encourage outside investment, *see* UNCTAD, *Investment Policy Review, Vietnam*, Chapter II (2008). Vietnam became the WTO's 150th member on 11 January 2007.

[371] The Vietnam Communist Party (VCP) finalised a policy paper, *Resolution of the Political Bureau on Forthcoming Principal Judiciary Tasks* ('Resolution 8') in January 2002. This was followed by: *Law on the Organisation of People's Courts* dated 19 April 2002; *Ordinance on Judges and People's Assessors of the People's Courts* dated 11 October 2002; and Resolution 131/2002/NQ- UBTVQH11 of the Standing Committee of the National Assembly, dated 4 October 2002, On Judges, People's Assessors and Prosecutors (Resolution 131).

[372] Law on Organisation of the People's Court in Vietnam dated 2 April 2002.

[373] Competition Law of Vietnam, effective 1 July 2005.

[374] Enterprise Law of Vietnam No. 60-2005-QH11 (2005).

[375] Commercial Law of Vietnam No. 36-2005-QH11 (31 December 2005).

[376] The Vietnamese Civil Proceedings Code was passed by the National Assembly on 15 June 2004 and took effect on 1 January 2005.

[377] Vietnam ranked with Kazakhstan, Rwanda, Peru, Cape Verde, Tajikistan, Zambia, Hungary, Grenada and Brunei Darussalam. *See* IFC/World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, p. 5.

[378] While "*commercial activity*" is not defined in the Arbitration Law itself, it is defined elsewhere as "activity for profit-making purposes comprising the purchase and sale of goods, provision of services, investment, commercial enhancement, and other activities for profit-making purposes." *See* Commercial Law No. 36-2005-QH11 of the Socialist Republic of Vietnam, dated 31 December 2005.

[379] Ordinance on Commercial Arbitration, No. 08/2003/PL-UBTVQH of Vietnam which came into effect on 1 July 2003.

[380] R. Garnett and K. Nguyen, *Enforcement of Arbitration Awards in Vietnam,* 2(2) Asian Int'l Arb. Journal , 137, 147 (2006).

[381] *See* World Bank, *Investing Across Borders 2010*, p. 166.

[382] The Vietnam National Assembly passed the Law on Commercial Arbitration No. 54-2010-QH12 on 17 June 2010.

adopt the Model Law but notable changes include: the removal of the requirement that arbitrators be Vietnamese nationals (although they are still required to have certain knowledge, education and experience);[383] the power for tribunals to grant interim relief;[384] and for arbitrations with a foreign element, the default language is no longer Vietnamese.[385]

Despite Vietnam's New York Convention country-status,[386] enforcement remains an issue both in terms of delay and interpretation of the law. Vietnam has been a New York Convention country since 1995; the New York Convention is incorporated into Vietnamese law by the 2005 Code of Civil Procedure ("CCP"), which replaced the 1995 Ordinance on Recognition and Enforcement of Foreign Arbitral Awards ("1995 Ordinance").[387] Generally speaking, the procedure for enforcement in Vietnam has been open to potential misuse and political interference.[388]

More specifically, under the 1995 Ordinance, there were some unfortunate case law developments arising out of a very narrow reading of "*commercial activities*" and a departure from the language used in Article V(2) of the Convention as a ground for refusal to enforce or recognise foreign arbitral awards;[389] the 1995 Ordinance referred instead to an award being "*contrary to the basic principles of the laws of Vietnam*".[390] Contrary to the very narrow definition given to the public policy language in the New York Convention, this provision of the Vietnamese Ordinance is more obviously domestic in its scope; and unfortunately, this is the way it has been interpreted by the courts in Vietnam. In this regard, the Vietnamese Court of Appeal has held that the failure to possess a foreign construction contractor's licence under Vietnamese regulations would have been sufficient ground to refuse enforcement of an award, notwithstanding that the underlying contract was governed by the law of Queensland, Australia.[391] In other words, a mere violation of Vietnamese law would constitute a ground for refusal to enforce a foreign arbitral award and irrespective of the parties' choice of law.[392]

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[383] *See* Article 20, Arbitration Law ("A person with all the following qualifications may act as an arbitrator: (a) Having full civil legal capacity as prescribed in the Civil Code; (b) Having a university qualification and at least five years' work experience in the discipline which he or she studied; (c) In special cases an expert with highly specialized qualifications and considerable practical experience may still be selected to act as an arbitrator notwithstanding he/she fails to satisfy the requirements prescribed in sub-clause (b) above."). In addition, Article 20(3) Arbitration Law provides that: "An arbitration centre may stipulate higher qualifications than those prescribed in clause 1 of this article as applicable to arbitrators in its institution."

[384] Arbitration Law of Vietnam, Articles 48 to 53.

[385] Arbitration Law of Vietnam, Article 10(2).

[386] Vietnam made two reservations on its accession to the New York Convention: reciprocity and commerciality.

[387] *See* R. Garnett and K. Nguyen, *Enforcement of Arbitration Awards in Vietnam,* 2(2) Asian Int'l Arb. Journal 137, 149 (2006).

[388] *See* R. Bose, N. Yap and A. Jaliwala, *Enforcement of International Arbitration Awards in Asia - Paying Lip Service to the New York Convention*, ICMA XVI Congress Papers, 477, 483 (Singapore 2007) ("The procurator, who exercise surveillance powers over the court, has the right to object to the court's decisions. The power to object is wide, vaguely defined and subject to potential misuse."). *See also* U.S. Department of State, *Investment Climate Statement - Vietnam* (2011) ("Parallel to the court systems is the People's Procuracy, which is responsible for supervising the operation of judicial authorities. The People's Procuracy can protest a judgment or ask for a review of a case.").

[389] *See* R. Garnett and K. Nguyen, *Enforcement of Arbitration Awards in Vietnam,* 2(2) Asian Int'l Arb. Journal 137, 141, 143 (2006) (referring to the decision of the Vietnam Court of Appeal in *Tyco Services Singapore Pty Ltd v Leighton Contracts (VN) Ltd* Judgment No. 02/PTDS, 21 January 2003); R. Bose, N. Yap and A. Jaliwala, *Enforcement of International Arbitration Awards in Asia - Paying Lip Service to the New York Convention*, ICMA XVI Congress Papers, 477, 480 (Singapore 2007).

[390] Article 16(9), 1995 Ordinance referred to in R. Garnett and K. Nguyen, *Enforcement of Arbitration Awards in Vietnam,* 2(2) Asian Int'l Arb. Journal 137, 143 (2006).

[391] *See* R. Garnett and K. Nguyen, *Enforcement of Arbitration Awards in Vietnam,* 2(2) Asian Int'l Arb. Journal 137, 141, 143 (2006) (referring to the Decision of the Vietnam Court of Appeal, *Tyco Services Singapore Pty Ltd v Leighton Contracts (VN) Ltd* Judgment No. 02/PTDS, 21 January 2003); Greenberg, Kee and Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* ¶9.190 (2011). The award was actually refused enforcement on other grounds, namely that the underlying contractual relations were not

The decision of the Court of Appeal and the language used in Vietnam's arbitration legislation is obviously out of kilter with international standards. Unfortunately, the new Arbitration Law maintains very similar language to the 1995 Ordinance, such that an arbitral award may still be set aside if it is contrary to the "*fundamental principles of the law of Vietnam*".[393] While the word "*fundamental*" may be an improvement on "*basic*", the decision of the Court of Appeal does not augur well for the application of Vietnam's new law by the courts.

Thus, while it takes, on average, just 17 weeks to enforce a foreign award in Vietnam according to the World Bank, the same comment about Indonesia applies equally here; promptness does not necessarily translate into efficiency, transparency and robustness. In addition, practical experience of enforcement in Vietnam reveals a system that is "*protracted*", with some foreign awards taking "*more than a year*" to enforce.[394] This is supported by the fact that Vietnam's courts scored just 57.2 for their "*extent of judicial assistance [for arbitration]*" a figure that in any event must be seen in light of Vietnam's Corruption Perceptions rating.[395] Vietnam therefore faces significant hurdles; improving transparency and independence, clarifying aspects of its arbitration laws and increasing efficiency, among others. Whether Vietnam comes more into line with international standards for arbitration will also depend on how the new Law is interpreted and given effect by the judiciary.

The Vietnam International Arbitration Centre (VIAC) is the most well-known of the Vietnam arbitral institutions and it is the only one that is independent from the state.[396] Following the introduction of the Arbitration Law, VIAC's list of 120 arbitrators now includes six foreign arbitrators.[397] According to its website, VIAC has seen a significant rise in the numbers of arbitrations it handles, increasing from an annual average of around 15 to 20 between 1994 and 2005 to around 60 from 2008 onwards. The most frequently represented parties in those arbitrations come from Singapore, South Korea, Hong Kong and the US. The introduction of the new Arbitration Law should be a welcome first step in the right direction to those users. However, given Vietnam's growing importance, it was a regrettable opportunity missed for full adoption of the Model Law.

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"commercial" in nature. R. Garnett and K. Nguyen, *Enforcement of Arbitration Awards in Vietnam,* 2(2) Asian Int'l Arb. Journal 137, 141-143 (2006).

[392] It seems the court in this case did not even consider the governing law and thereby ignored principles of Vietnam's conflicts of law rules. However, it is doubtful where observing these rules would have enabled the court to recognise a foreign choice of law since foreign law may only be applied where it is not contrary to the "*basic principles of Vietnamese law*". *See* R. Garnett and K. Nguyen, *Enforcement of Arbitration Awards in Vietnam,* 2(2) Asian Int'l Arb. Journal 137, 146 (2006).

[393] *See* Article 68(2)(dd), Arbitration Law.

[394] For reports of the delays experienced in enforcing awards in Vietnam, *see* R. Bose, N. Yap and A. Jaliwala, *Enforcement of International Arbitration Awards in Asia - Paying Lip Service to the New York Convention*, ICMA XVI Congress Papers, 477, 481 (Singapore 2007).

[395] *See* World Bank, *Investing Across Borders 2010,* p. 166. As with Vietnam's court performance above, this data must be seen further in the context of Vietnam's Corruptions Perception Index rating.

[396] There are also other arbitration institutions in Vietnam, including the Pacific International Arbitration Centre and Commercial Arbitration Centre, both located in Ho Chi Minh City; and the Commercial Arbitration Centre, Can Tho Commercial Arbitration Centre, Vien Dong Arbitration Centre, the Asia Arbitration Centre and Vietnam International, all based in Hanoi. VIAC has made recent efforts to increase and improve its international profile; for example by hosting joint conferences in Hanoi with the SIAC in 2011 and by adding a limited number of foreign arbitrators to its list.

[397] Abdul Nasir (French/Vietnamese), Albert Fanceskinj (French/Vietnamese), Tony Foster (US-US dual national based in Vietnam), Sesto E. Vecchi (admitted in New York, practising in Vietnam), Vinodh Coomaraswamy SC (Singapore) and Professor Yasunobu Sato (Japan).

### *C. To 2027 And Beyond: Arbitration In The New World Order?*

There is no question that the effects of the global recession in 2008/2009 were felt around the world, including in South/East Asia. But it is clear that the world's emerging economies have recovered from that crisis where the economies of the West have not, with the BRIC, N-11 and other countries in South/East Asia behind much of what is driving today's global economy.

As the financial situation in the West once again reaches crisis point, the key question is whether the recovery seen in South/East Asia is sustainable. Will China really lead the world economy by 2027? Will the BRICs and N-11 truly dominate the policy of the G-20 in years (whether they want to is a separate question)? Will Singapore and Hong Kong survive any further recession in the West? These questions are relevant not just in economic terms; they will also help shape predictions for the future of arbitration in Asia.

There is of course no certainty in what the future holds, as recent market activity shows and as the ADB highlights in its prophetically titled and recently published paper, "*Asia 2050: Realizing the Asian Century*."[398] The fact that so much of Asia's (indeed, the world's) economic strength pivots on the success of China means that any failure in China could have serious repercussions for the rest of the region (and the world).[399] Furthermore, the extremely precarious state of the economies of the West is of global concern (particularly for those countries most exposed to them) and as a result, sustaining the high-level growth seen in recent years will not be easy, in particular as North American and Europe become more inward looking.[400] In addition to economic challenges, social disparity and inequality in income and prosperity is increasing across the region and presents a major social and political risk.[401] As the discussion in this article reveals, eradicating corruption and developing the quality and credibility of institutions also presents a significant challenge; referred to as the region's "*Achilles heel*".[402]

Linked to this and perhaps most critical to "*Asia's march towards prosperity*" is its ability to engage with national, regional and global governance (in all its forms, including in relation to climate change, conflict prevention and allocation of resources).[403] As the ADB has recently noted:

> "The region will need to delicately "manage" its rapidly rising role as a major player in global governance in a non-assertive

[398] The report "challenges the growing perception that Asia's rapid rise in the global economy is inevitable, as if the region is on "autopilot." The report highlights significant risks that could lead to economic, social and even political instability and, in turn, derail economic development and growth." *See* Asian Development Bank, *Asia 2050: Realizing the Asian Century* p. xv (2011).
[399] Indeed, the World Economic Forum notes that "with Chinese growth currently fuelling a significant proportion of the world's economic activity. A Chinese slowdown might also precipitate social instability domestically, leading to political instability that could threaten the entire region." *See* Global Risks Index 2011, p. 72. China's current economic strength has diminished fears that an economic slowdown in China presents a significant global risk. *See* Global Risks Index 2011, p. 72 (noting that "The robustness of the Chinese economy since the global financial crisis means a slowing Chinese economy was this year perceived to be one of the least likely of the 37 global risks, a significant change from previous years.").
[400] Asian Development, *Asia 2050: Realizing the Asian Century* pp. xv and 33 (2011).
[401] Asian Development, *Asia 2050: Realizing the Asian Century* p. 33 (2011).
[402] Asian Development, *Asia 2050: Realizing the Asian Century* p. 36 (2011).
[403] Asian Development, *Asia 2050: Realizing the Asian Century* p. 6 (2011).

> and constructive way. As an emerging global leader, Asia should act as - and be seen as - a responsible global citizen."[404]

These risks cannot be ignored and should not be underestimated. But even today, the view remains that the world's major emerging countries, in particular those in South/East Asia, will dominate the global economy. In this regard, Goldman Sachs had this to say of its predictions regarding the BRIC and N-11 economies, following the 2008/2009 global financial crisis:

> "Given the challenges that the BRICs and N-11 economies and markets have faced over the past two years, has their potential to grow further and spread their dominance in a number of areas - including global demand for resources and spending patterns - changed? Has our original 2050 'dream' passed the test provided by this difficult environment? … ***Our assessment is that not only is our story still intact—if anything, it has become even stronger***."[405]

Of course, banks and economists often get it wrong. But *if* these and other predictions for the future strength and power of the BRICs and N-11 do prove to be accurate, then it is safe to assume that the recent growth in arbitration seen in South/East Asia will continue. The emerging N-11 and other economies reviewed here are clearly alive to this with the adoption of new legislation and other key developments concerning their arbitration framework in a bid to improve their overall investment environment. However, it is also clear from the success of Singapore and Hong Kong that it takes much more than adoption of the Model Law to attract parties seeking to arbitrate their disputes (although this is an extremely important milestone).

One of the jurisdictions reviewed here amply demonstrates this point. South Korea stands apart as the only one of the N-11 jurisdictions that today really has the overall legal infrastructure necessary to achieve the sort of success seen in Hong Kong and Singapore. Unlike the other N-11 economies reviewed here, South Korea does not have "*endemic*" problems with transparency and independence. It has a very advanced economy (driven by its highly advanced innovation and technology sector) and also has a sophisticated, effective and supportive court system with an increasingly knowledgeable and international legal community. It can be no coincidence, therefore, that the IBA chose Seoul as the location for its first regional office in Asia.

Certainly, South Korea faces hurdles if it is to achieve its goal of becoming the "*Singapore of North East Asia*". As both Hong Kong and Singapore show, government support and transparency are critical in creating a stable and neutral environment for arbitration and the inefficiency of (and lack of trust in) its government is still a cause for concern for South Korea. The arbitration community in South Korea has also, until recently, not fully engaged

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[404] Asian Development, *Asia 2050: Realizing the Asian Century* p. 7 (2011). For an interesting discussion of Asia's reluctance to engage with global policy, *see* A. Acharya, *Can Asia Lead?* in International Affairs, 87(4), 852 (July 2011).

[405] Goldman Sachs Global Economic Paper No. 192, *The Long Term Outlook for the BRICs and N-11 Post Crisis,* p. 13 (4 December 2009). *See also* Goldman Sachs Global Economics, BRICs Monthly No. 10/03, *Is this the BRICs Decade,* (20 May 2010 ("The last decade saw the BRICs make their mark on the global economic landscape. Over the past 10 years they have contributed over a third of world GDP growth and grown from one-sixth of the world economy to almost a quarter (in PPP terms). Looking forward to the coming decade, we expect this trend to continue ***and become even more pronounced***.").

with the importance of global self-promotion and marketing and the KCAB still lacks the experience and profile of HKIAC or SIAC. In addition and as both Hong Kong and Singapore show, the transparency of both the law and the system for applying that law are key factors in attracting foreign parties to and making more accessible any jurisdiction, in particular where language is an issue.

But South Korea has at least two distinguishing features. First and perhaps most importantly, is South Korea's legal system. At least part of the success of Hong Kong and Singapore must be down to their status as common law jurisdictions, given the traditional influence of the common law in so much of the world's trade and the close correlation of both these jurisdictions with that system (particularly that of England). However, a number of the jurisdictions reviewed here (and others in the region) have civil law systems. The doctrinal foundation for all the basic laws of South Korea (such as the Constitution and the civil and criminal codes) is the civil system. What is perhaps less well-known is the fact that South Korean law also has a strong Anglo-American influence. In particular, South Korea's private sector laws such as it corporate, investment, financial and commercial laws, would be more familiar to U.S. and English trained lawyers than they would be to those with a civilian background. Secondly, South Korean lawyers and arbitrators may have a (perceived) cultural edge on their European civil law counterparts in disputes involving 'Asian' parties. Indeed, there is an emerging trend in SIAC arbitrations, particularly those involving Indonesian parties, in which many of South Korea's most prominent arbitration lawyers are increasingly sitting as arbitrators. This hybrid system of law (and cultural affinity) *could* help to position South Korea alongside Singapore and Hong Kong as the next important venue for arbitration in the region.

Malaysia is not an N-11 economy but has a growing profile as a financial centre. It also has some of the makings of a potentially stable situs for arbitration although it is not yet at the same stage of development as South Korea. It has a Model Law framework legislation and broadly international standards for enforcement (with some exceptions) but it still suffers from inefficiencies in its court system. It has also not yet managed to achieve a real profile for arbitration, even regionally, something which the new director of the KLRCA recognises. It may take more than an increased global marketing strategy, but with its newly revised, international arbitration law and judges subject to performance-testing, Malaysia may yet develop as another important situs for arbitration in the region.

For the remainder of the emerging economies reviewed here, proper development of the formal legal infrastructure will be critical in ensuring their paths to a stable investment environment and if they are to have futures not just as countries generating users of arbitration but as arbitral seats. The data and commentary above reveal that while Indonesia, the Philippines, and Vietnam are all burgeoning economies many of whom broadly adhere to international norms in their arbitration legislation, they still lack the institutional strength and political stability that are so important to creating a stable enforcement environment and obtaining a foothold as a seat for arbitration.

In this regard, all four countries lack proper and carefully balanced judicial support for arbitration in line with international standards. This is so both in terms of transparency and in terms of implementation of the law (during the arbitral process and at the enforcement stage). The success of Vietnam's new Arbitration Law depends ultimately on how it is interpreted and given effect by the judiciary; the parochial views of public policy discussed above are untenable if Vietnam's new law is to succeed. This is also Indonesia's main problem; despite its lack of a Model Law framework, Indonesia's arbitration legislation is broadly in line with

international standards and it has an improving enforcement record. Yet, the data and commentary also show that Indonesia's record for judicial support (particularly during arbitration proceedings) remains poor. Similarly, the court support for arbitration in the Philippines was the worst of all the countries reviewed here, in particular in relation to delay. Transparency and corruption in the courts of all four countries are also a major concern (and it is in this light that some of the reported efficiencies in court systems of these countries must be viewed).

Implementation of new, international-standard arbitration legislation is certainly an important step in creating a stable investment environment. But it is not, on its own, enough; if they are to live up to their promise as future economies in the new world order, the key for Indonesia, the Philippines and Vietnam will be to ensure effective and consistent application of their arbitration laws. This will require major improvements in transparency and independence and investment in education of the judiciary (and, where necessary, the local legal communities).

Without a proper understanding of international standards applicable to the arbitration process as whole, parochialism and mistrust of arbitration will continue to prevail in the emerging economies of the South/East Asia region; and without bottom-up, structural reform, investment in new arbitration laws, arbitral institutions and further regulations to clarify existing laws will be meaningless. But that is not to say we should ignore these jurisdictions; far from it.

**APPENDIX I**
**Socio-Economic Status**

| ***Average Ranking Across All Three Indices*** | **Countries**[406] | **Population**[407] | **GDP Growth 2010** | **"Next Eleven"/BRIC Economy** | **Corruption Perception Index (Score)**[408] | **Global Competitiveness Index 2011**[409] | **Doing Business Index**[410] |
|---|---|---|---|---|---|---|---|
| ***1*** | **Singapore** | **5,076,700** | **14.5%** | **Neither** | **1 (9.3)** | **2** | **1** |
| ***9*** | **Hong Kong** | **7,067,800** | **6.8%** | **Neither** | **13 (8.4)** | **11** | **2** |
| *11* | *United Kingdom** | *62,218,761* | *1.3* | *Neither* | *20 (7.6)* | *10* | *4* |
| *11* | *United States** | *309,050,816* | *2.9* | *Neither* | *22 (7.1)* | *5* | *5* |
| *14* | *Japan** | *127,450,459* | *5.1* | *Neither* | *17 (7.8)* | *9* | *18* |
| ***26*** | **South Korea** | **48,875,000** | **6.2** | **N-11** | **39 (5.4)** | **24** | **16** |
| ***33*** | **Malaysia** | **28,401,017** | **7.2** | **Neither** | **56 (4.4)** | **21** | **21** |
| *61* | *China** | *1,338,299,512* | *10.3* | *BRIC* | *78 (3.5)* | *26* | *79* |
| *83* | *Brazil** | *194,946,470* | *7.5* | *BRIC* | *69 (3.7)* | *53* | *127* |
| ***86*** | **Vietnam** | **86,936,464** | **6.8** | **N-11** | **116 (2.7)** | **65** | **78** |
| *92* | *India** | *1,170,938,000* | *9.7* | *BRIC* | *87 (3.3)* | *56* | *134* |
| ***92*** | **Indonesia** | **239,870,937** | **6.1** | **N-11** | **110 (2.8)** | **46** | **121** |
| ***119*** | **The Philippines** | **93,260,798** | **7.6** | **N-11** | **134 (2.4)** | **75** | **148** |

*included for comparison

[406] This is based on the average of three major indices used for economic performance in this article and listed in the table here.
[407] World Bank Data, 2010.
[408] Based on a review of a total of 178 countries. A score of 10 indicates "very clean" a score of zero represents "highly corrupt".
[409] Based on a review of a total of 139 countries.
[410] Based on a review of a total of 183 countries.

**APPENDIX II**
**Overall Strength of Framework for Arbitration**

| | | World Bank, *Doing Business 2011* | World Bank, *Investing Across Borders 2010* | | | | |
|---|---|---|---|---|---|---|---|
| **Overall Ranking in *Investing Across Borders*[411]** | **Countries** | **Ease of Enforcing Contracts Through Local Courts: Rank** | **(1) Strength of Laws** | **(2) Ease of Process** | **(3) Extent of Judicial Assistance** | **No. of Weeks to Enforce a Foreign Award** | ***Average Score Across All Three Indices*** |
| *1* | *United Kingdom** | *23* | *99.9* | *87.5* | *94.5* | *6* | *94* |
| **3** | **Singapore** | **13** | **94.9** | **81.8** | **93.5** | **7** | ***91*** |
| **15** | **South Korea** | **5** | **94.9** | **81.9** | **70.2** | **23** | ***82.3*** |
| **17** | **Malaysia** | **59** | **94.9** | **81.8** | **66.7** | **24** | ***81.13*** |
| *21* | *United States** | *8* | *85* | *81.8* | *75.3* | *18* | *80.7* |
| *23* | *Japan** | *19* | *95.4* | *77.7* | *65.9* | *21* | *79.6* |
| *34* | *China** | *15* | *94.9* | *76.1* | *60.2* | *31* | *77.1* |
| **45** | **Indonesia** | **154** | **95.4** | **81.8** | **41.3** | **22** | ***72.83*** |
| **49** | **The Philippines** | **118** | **95.4** | **87** | **33.7** | **126** | ***72.03*** |
| *51* | *India** | *182*[412] | *88.5* | *67.6* | *53.4* | *43* | *69.83* |
| **60** | **Vietnam** | **31** | **84.9** | **61.8** | **57.2** | **17** | ***67.96*** |
| *74* | *Brazil** | *98* | *84.9* | *45.7* | *57.2* | *52* | *62.6* |
| | **Hong Kong** | **2** | **No data** | **No data** | **No data** | **No data** | |

*included for comparison

[411] This overall ranking is based on compilation of the data contained in *Investing Across Borders* by the author since the report contains no independent ranking among the 87 jurisdictions reviewed.
[412] It takes on average 1,420 days at a cost of 39.6 percent of the value of the debt to enforce a contract through the courts in India. *See* World Bank, *Doing Business 2011*, p. 169.