BEYOND THE

Steven Finizio and Kate Davies of WilmerHale examine the Asian jurisdictions that are looking to compete with China, Hong Kong and Singapore as seats of arbitration

Much of the discussion of dispute resolution in Asia focuses on the complexities of arbitration relating to China, or the successful marketing of Singapore and Hong Kong as arbitration jurisdictions. But Asia includes not only these leading economic powers but other major business centres and a number of the fastest growing economies in the world, and has made an impressively rapid recovery from the global financial crisis. For that reason, any discussion of international arbitration in Asia needs to look beyond these countries.

There are a number of increasingly popular seats of arbitration and arbitration institutions in Asia. Asian businesses are becoming increasingly sophisticated in their dispute resolution choices – and less culturally constrained from aggressively pursuing the options available to them or using their leverage to demand that disputes be resolved close to home. Even for disputes related to China, options are less frequently limited to a choice between a European seat (e.g. Stockholm) or a CIETAC arbitration in Beijing; other Asian jurisdictions (particularly Singapore and Hong Kong) are being considered by both foreign and Chinese parties.

While companies engaged in international transactions usually prefer to resolve disputes through international arbitration, negotiating a dispute resolution agreement in an international agreement is not simply a matter of which party has leverage, but it requires an understanding of the range of available options and their consequences. Among other things, a party needs to be aware of the consequences of choosing a particular place of arbitration and of different arbitration rules and institutions, as well as whether a transaction is considered foreign or local (as is often the case, for example, with transactions in China). It is also important to consider the ability to enforce an arbitral award in the other party's home jurisdiction, as well as other places where it may have assets.

With that in mind, we discuss below some recent developments in a number of significant Asian jurisdictions beyond

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China. In some of these jurisdictions, serious issues remain about inefficiency and corruption in local courts. This means that while arbitration may be a more attractive alternative to litigation, enforcement of arbitration agreements and awards remains risky, even where new and modern arbitration legislation has been adopted (foreign companies doing business in Asia also need to be aware of bilateral and multilateral investment treaties which may provide additional protections for their business activities in Asia).

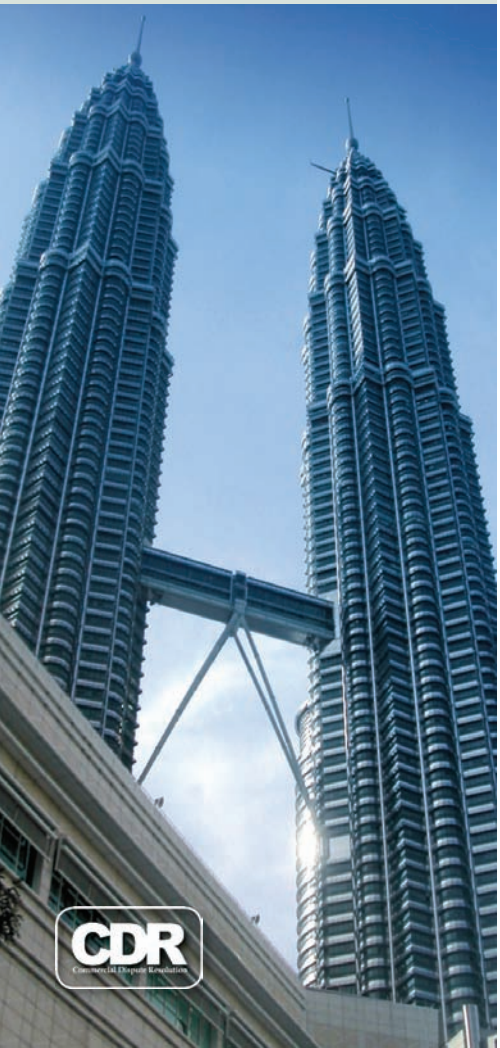
Hong Kong and Singapore are now well established as leading jurisdictions for international arbitration. Both boast supportive courts and experienced local arbitration institutions with modern rules. Both are also popular jurisdictions for arbitrations under the rules of other leading international arbitration institutions (e.g., the ICC, AAA/ICDR and LCIA), with good hearing facilities and experienced and international legal communities. Both are frequently agreed upon as places to arbitrate disputes relating to China, and they are taking steps, with government support, to keep their pre-eminent positions in the region.

The growth and importance of Asia as a global financial and business centre does not end with China, Hong Kong and Singapore – nor does the growth in the use of international arbitration in Asia. ICC statistics show that nearly 15% of the parties in ICC arbitration are from South and Southeast Asia, which is greater than from North America. In addition to parties from China (and India), this includes a large number of parties from South Korea, Singapore, Japan and Malaysia. Recent LCIA statistics tell a similar story, with more than 10% of the parties from Asia Pacific.

These numbers reflect the economic strength and natural resources in many parts of Asia. They also reflect the willingness of Asian parties not only to agree to arbitration clauses in contracts, but to actually engage in disputes. Moreover, many Asian jurisdictions have recognised the need for legal stability and predictability to attract outside investors. Many Asian jurisdictions have adopted the UNCITRAL Model Law as the basis for their arbitration legislation. In the last year, for example, Cambodia and Vietnam both have revised their arbitration legislation to be more in line with international standards. Other developments in key Asian jurisdictions are discussed below, with a special emphasis on South Korea, which is emerging as a particularly important jurisdiction.

Indonesia In some critical ways, Indonesia remains outside of recent Asian trends, despite its extensive natural resources and the importance to its economy of foreign investment and trade. Indonesia is one of the few major Asian jurisdictions not to adopt the UNCITRAL Model Law and the Indonesian courts have a reputation for interfering with arbitration proceedings and for refusing to enforce foreign awards against Indonesian parties, particularly with regard to state-owned entities. Nonetheless, arbitration usually remains a more attractive option than litigation against Indonesian parties, and local lawyers suggest that the Indonesian courts are becoming more receptive to enforcing foreign awards.

Malaysia Malaysia updated its Arbitration Act in 2005 and is in the process of revising it again. The revised Act, which is expected to be finalised during 2011, will give the courts power to ▶



grant provisional measures in support of foreign arbitration proceedings and will bring the grounds for enforcing and challenging foreign awards more closely into line with the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The Malaysian government also has announced plans to build a dedicated arbitration hearing centre in Kuala Lumpur.

The Kuala Lumpur Regional Centre for Arbitration (KLRCA), which has faced a number of criticisms in recent years, has appointed a new director and is working to rebuild its reputation. It has updated its rules, which now incorporate the 2010 UNCITRAL Arbitration Rules, and include revised procedures for the replacement of arbitrators, reviewing arbitrators' costs, and interim measures.

Philippines

The Philippines took strides to modernise its arbitration legislation in 2004, when it adopted the UNCITRAL Model Law and implemented the New York Convention. However, the actual application of these laws, particularly with regard to enforcement of foreign arbitral awards, has been inconsistent. The Supreme Court adopted new ADR Rules in 2009 to promote arbitration, which include simplified and expedited procedures for enforcing foreign awards.

Republic of Korea

South Korea is one of the world's fastest growing economies as well as a member of the G20, and its strong manufacturing, shipping and construction industries mean that Korean parties are increasingly active in international disputes and that South Korea is pushing its way into a discussion of the major arbitration jurisdictions in Asia.

South Korea has a progressive international arbitration law and a sophisticated, robust and efficient court system. Korean law firms include experienced international arbitration lawyers, with an increasing number of foreign practitioners, and a number of international law firms are poised to open offices in Seoul. Korean parties are increasingly involved in international proceedings, as reflected by ICC statistics, and, while official statistics are not available, anecdotal reports suggest that there has been a significant rise in the number of arbitrations at the Korean Commercial Arbitration Board (KCAB).

Given this foundation, Seoul is positioned to at least talk about rivalling Singapore and Hong Kong as a leading Asian arbitration seat over the next decade. South Korea offers a number of distinctions which may allow it to flourish – unlike Singapore and Hong Kong, but like most of Asia and Europe, it is a civil law jurisdiction. South Korea's civil code is based on that of Japan (which is borrowed from Germany), but its corporate, investment, financial and commercial laws are heavily influenced by Anglo-American law, and this mix may add to its appeal.

Seoul's location, some distance from Singapore and Hong Kong, may also give it regional appeal, particularly because its nearest potential competitor, Tokyo, has not been very active as an arbitration seat and arbitration remains less embraced by the Japanese business community.

There remain hurdles, however, before Seoul can be considered a real rival to Singapore and Hong Kong. Hong Kong and Singapore have made considerable marketing and promotion efforts, while South Korea has just begun that process, foe example with Seoul's hosting of the International Bar Association's Arbitration Day earlier this year.

KCAB is not as experienced or accessible as HKIAC or SIAC, although it is making efforts to change – it opened new facilities in 2010 and its 2007 International Rules for Arbitration are under revision (including clarifying that they apply by default to arbitrations with an international element) and it has hired non-Korean executives.

At the same time, it needs to take additional steps for greater accessibility. For example, KCAB could improve its website, with information as to its composition, access to relevant Korean laws in English and other languages, and news and articles on recent developments in arbitration, and statistics. Another

factor will be the accessibility and transparency of South Korea's court system. South Korea's courts have a growing reputation for supporting arbitration and enforcing arbitration agreements and awards. However, South Korea does not fully benefit from this yet because court judgments are not publicly available in Korean, let alone in other languages.

These issues can be addressed and there are already moves in the right direction, including the planned publication of the first treatise in English on arbitration in Korea. Seoul's arbitration community is experienced, increasingly international and ambitious and appears now to be working together to promote Korea. Korean universities are focused on educating new lawyers on international arbitration, and there will soon be an influx of foreign law firms. All of this suggests that Seoul's status as an arbitration jurisdiction could rise significantly in the next few years.

Taiwan (Republic of China)

Taiwan is distinctive in that it is not a Contracting State to the New York Convention or a member of the United Nations. Nonetheless, Taiwan's arbitration law is based on the UNCITRAL Model Law (with some aspects taken from other jurisdictions) and its provisions on enforcement of foreign arbitral awards follow the requirements of the New York Convention, while including special rules for enforcement of awards from China and Hong Kong. Taiwan's courts have a reputation for enforcing arbitration agreement and awards.

Thailand While Thailand's arbitration law has been based on the UNCITRAL Model Law since 2002, there is little indication that arbitration has yet achieved widespread acceptance (there are few available statistics about international arbitration in Thailand and the most recent ICC findings show only five arbitrations involving Thai parties). In addition, the Thai government in 2009 extended its 2004 restriction on the use of arbitration arising from administrative contracts involving the government or government entities to include all such contracts (unless exempted).

Vietnam Vietnam is attracting significant foreign investment due to its cheap labour and relative political stability and is also becoming a "destination" in the region. According to the Vietnam International Arbitration Centre (VIAC), new cases have increased to approximately 60 a year since 2008, with the most frequent parties from Singapore, South Korea, Hong Kong and the US.

In January this year, Vietnam's new arbitration law, based on the UNCITRAL Model Law, came into effect, which should have a positive influence on proceedings there – and help the ongoing process of educating the Vietnamese legal community with regard to international arbitration. However, serious issues remain about how local courts will implement the law.

The story of international arbitration in Asia beyond the major jurisdictions is not just one of economic success. Hong Kong and Singapore are established as leading regional arbitration seats. Seoul may do so in the next decade and, even if not, it will still be a growing force. There are also increasing numbers of experienced and international specialist practitioners and arbitrators in major Asian jurisdictions. Thus, as Asian jurisdictions and arbitration institutions have flourished in recent years while embracing current model approaches, the next decade may see Asian participants increasingly introducing their own concepts of best practices and influencing procedures in other parts of the world. ■

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