CONTEMPORARY INTERNATIONAL ARBITRATION IN ASIA: A STOCK TAKE

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Over the past decades, the world community has witnessed an increasing number of cross-border transactions, especially investments in the Asian region; along with a concomitant rise in cross border business disputes. Parties to these transactions favour international commercial arbitration for the resolution of disputes. There is little doubt that the choice of arbitral seat is influenced inter alia by the arbitral infrastructure and the involvement of judiciary in the place of arbitration. Asian countries have responded to these demands through effective development of their infrastructure for arbitration, coupled with significant efforts to update their arbitration laws. Following this surge in international commercial arbitration, there have also been several developments in the conflict of laws jurisprudence in legal systems like, Singapore, Hong Kong, Malaysia, Dubai and India.

I. Importance of International Commercial Arbitration in Asia

The International business community all across the globe has accepted international commercial arbitration[1] as an effective mechanism for resolving its commercial disputes. Unwillingness of parties to have matters resolved in the national court of the other disputing party, with perhaps unfamiliar law, language and culture, is treated as one of the major reasons for this preference. The history of arbitration as an informal mechanism of dispute settlement in the Asian continent can be traced back to ancient times.[2] The political and economic conditions that existed in various countries in the continent created major stumbling blocks for the growth of commerce and trade until the beginning of

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[1] The terms 'International Arbitration' and 'International Commercial Arbitration' are used interchangeably in this paper.

[2] *See* SIMON GREENBERG et al., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE, (2011). For example, Arbitration in China can be traced back to about 2100 – 1600 BC.

the 20th century. The region has also manifested hostility towards trans-national arbitration for the resolution of commercial disputes. Asian presence in the international arbitration scene was felt, for the first time ever, in the very first arbitration administered by the International Chamber of Commerce.[3] Many nations in the region gained a significant economic momentum after the Second World War and witnessed an impressive record of growth in the last few decades. For instance, Japan emerged as an economic superpower after World War II; while China and India survived the global financial recession, and continue to be the fastest growing economies, forming part of the BRIC countries[4]. In addition, more than half of the Next 11[5] countries, which could greatly impact the global economy in the near future, are located in the Asia-pacific region. The trade liberalisation policies of the Asian economies have helped the increasing number of international commercial transactions.

This unprecedented growth of the Asian countries, especially after the financial crisis, resulted in a surge in trade and investments in the region. One of the inevitable consequences of these commercial activities was, of course, the growth of cross border disputes involving multinational corporations and even sovereign states. The Asian international business community has shown no reluctance in embracing International Arbitration as a viable dispute resolution mechanism, as its counterparts in the western world did from the beginning of the 20th century. Thus it can be said with little doubt that International Arbitration has emerged as the most preferred mechanism for resolving trade and investment disputes in 21st century Asia. The positive changes in the arbitration landscape of the Asia-Pacific are evident from the significant number of countries that have ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[6] so far.[7] The latest addition is Myanmar, which consented to be bound by the Convention on 16th

[3] *Id.* at 34 (Authors note that, when the ICC Court administered its first case in 1923, the claimant was Thai).

[4] In 2001, Goldman Sachs created and coined the term 'BRIC' to identify the world's fastest growing economies Brazil, Russia, India & China.

[5] In 2005, Goldman Sachs identified the Next 11 (N-11) largest populations after BRIC, which (combined with economic and political conditions) could greatly impact the global economy. The N-11 countries include Bangladesh, Egypt, Indonesia, Iran, Korea, Mexico, Nigeria, Pakistan, Philippines, Turkey and Vietnam; *See Beyond the BRICS: A look at the Next-11 (Apr. 2007)*, GoldmanSachs.com, http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/brics-book/brics-chap-13.pdf (last visited Apr. 8, 2014)

[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

[7] Excluding a few countries like, North Korea, Taiwan, Bhutan, Maldives, Iraq, etc. most of the Asian countries are parties to the New York Convention.

April 2013.[8] As an inducement for foreign investments in the country, many legislatures have updated their national arbitration laws in line with the UNCITRAL Model Law.[9] These legislative changes,[10] reflecting the best practices in international arbitration, have increased the receptiveness of a new arbitration culture in Asia. Apart from legislative reforms, the development of an international arbitration infrastructure as well as pro-arbitration judgments from various courts in the region has made Asia an arbitration hotspot of the present times.

II. Proliferation of arbitral institutions

The debate on the advantages of institutional arbitration over ad hoc arbitration is still a live topic of discussion in the realm of international arbitration law. However, there is little doubt that the presence of well-developed arbitral institutions will give parties a better option for structured arbitration. In the recent past, a number of globally well-known arbitral institutions have established their offices in various cities in Asia including the Singapore International Arbitration Centre set up in Mumbai last year. Traditionally, western institutions like the International Chamber of Commerce, the London Court of International Arbitration, the American Arbitration Association, etc. have dominated the field and almost all the international commercial contracts contained an arbitration clause favouring these institutional rules, but proliferation of indigenous institutions in the region has revolutionised the whole scenario. One of the reasons for this evolution is governmental interest and support involved in importing arbitration services to the respective countries. Many of the Asian institutions are in fact state sponsored bodies, whose aim is to provide cost effective dispute resolution through state-of-the-art facilities. This contest for 'invisible exports' of the arbitration industry has helped the Asian economy in a tremendous way. As a sign of this, significant numbers of arbitral institutions have sprung up across the region. Many of these institutions attract extra ordinary support from the international trading community and have emerged as competitors of the traditional institutions in Europe and America.

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[8] *See Accession Myanmar to New York Convention,* NEW YORK ARBITRATION CONVENTION (Apr. 29, 2013), http://www.newyorkconvention.org/news/accession-myanmar-to-new-york-convention.

[9] Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985) [hereinafter UNCITRAL Model Law].

[10] The major arbitral systems like Singapore, Australia, Hong Kong, Malaysia, Thailand, and India follow the UNCITRAL Model Law whereas, countries like China and Indonesia have updated their arbitration legislations without adopting the UNCITRAL Model Law.

In the past few years, many Asian arbitral institutions have really come of age, in terms of their case load. In particular, the Singapore International Arbitration Centre (SIAC) registered a record number of cases in 2013 and the average monetary value involved in disputes increased significantly, which helped the centre cement its position as the world's fastest growing international arbitral institution. Similarly, the Hong Kong International Arbitration Centre (HKIAC), one of the busiest institutions, also has an ever growing number of dispute resolution matters, including international arbitration. It is noteworthy that the acceptance of Hong Kong as an international arbitration venue has mirrored the evolution of China as an economic power. Malaysia is also an important jurisdiction for the arbitration community with its leading institution Kuala Lumpur Regional Centre for Arbitration (KLRCA) having a significant international presence. Similarly, the Japanese Commercial Arbitration Association, the Korean Commercial Arbitration Board and the China International Economic and Trade Arbitration Commission, representative institutions for international commercial arbitration respectively in Japan, South Korea and China, add to the prominence of institutional arbitration in Asia.

Another notable development is the trend in liberalising the legal services sector in the region. Many legal systems have removed the barriers to foreign law firms allowing leading law firms from United States and Europe to establish their offices in these jurisdictions. Not surprisingly, jurisdictions that have opened their markets to the import of legal services have, eventually, become favourable arbitration destinations. Here, it is worth mentioning that, though India has not yet opened its legal market, the 2010 decision of the Madras High Court was aimed at removing these barriers in the context of international arbitration.

III. Pro-arbitration judiciary

All the major Asian economies are now capable of emulating their western counterparts, having updated their national legislations and established world class arbitration centres. However, the credibility of an arbitral regime depends more on the attitude of the national courts. Essential to this attitude is the determination to support arbitrations happening in the 'locality' and a better understanding of international arbitration law. A number of Asian courts have demonstrated this in the past few years by showing reluctance to set aside an award or refuse the enforcement of foreign awards. The manner in which courts respond to these matters have resulted in the different legal systems getting either a 'hostile' or 'friendly' stamp towards arbitration.

As a matter of illustration the Indian Supreme Court has recently overruled its earlier infamous decisions in order to turn arbitration-friendly. In the case of Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc. , the court

clarified that Indian state courts cannot supervise arbitration taking place abroad. Recently the Supreme Court, in Enercon (India) Ltd. & Ors. v. Enercon GmBH & Anr , held that the courts would strive to make the arbitration agreement workable provided the intent to arbitrate is evident from the contract. Similarly, the Singapore High Court upheld the validity of a pathological arbitration clause to make it operable. In another decision, the Singapore court of appeal confirmed the legal position that Singapore courts will not interfere with the decision of the arbitral tribunal. No doubt, the court decisions are in line with the modern standards of international arbitration and it has made Asian cities more attractive as a venue for international arbitration. In many ways, Hong Kong and Singapore have now emerged as two of the leading venues for international arbitration, alongside traditional locations such as London, New York, Paris and Geneva. Due to the positive developments, as mentioned in the above paragraphs, global corporations are ready to 'place' their arbitrations in various Asian cities. As a consequence, the judiciaries of these countries have concentrated on addressing issues at the gateway of arbitration including the enforcement of arbitration clauses as well as matters post arbitral decision making that involves challenges to the awards and its enforcement.