International Commercial Arbitration
In Asia

ADR - WHY ARBITRATION?

Discontentment with the traditional rigid and adversarial state court system has led to the emergence of other popular methods of alternative dispute resolution (“ADR”) procedures, which include *inter alia* arbitration, negotiation, mediation, conciliation, dispute review boards and expert determination etc.

International commercial arbitration has enjoyed a long history which predates the existence of organized systems of States’ courts. Even though international commercial arbitration as a method of settling disputes has been known and employed by the global commercial community for centuries, there is now an increasing awareness that when parties are desirous of a binding decision — other than by way of litigation — and at the same time wish to have a structured, full and fair legal process, arbitration is the preferred and plausible alternative to litigation.

Although arbitration may not always be cheaper than litigation, it is generally speedier, less formal and a greater degree of privacy and confidentiality can be observed and enjoyed by the parties. Unlike litigation in open court, arbitrators are, as a rule, forbidden to disclose any information whatsoever about arbitral proceedings and/or results to a third party. Unwanted intrusion into the dispute resolution process is generally avoided and unnecessary publicity is much less foreseeable.

As barriers to international trade diminish, global commerce has prospered. Concomitant to this has been the rise in disputes between international parties. In an international dispute, it is common that the parties will have their places of business in different countries. Unwillingness by commercial parties to have matters resolved in the foreign court of the other disputing party, with perhaps unfamiliar law, language and culture, adds to arbitration’s appeal.

As such, arbitral proceedings are usually held in neutral locales, with expert arbiters agreed and appointed by respective parties applying internationally recognized arbitration rules such as the ICC Rules of Arbitration (“ICC Rules”) or the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) as opposed to submission of jurisdiction to national courts of the other disputing party, where aside from the questionable expertise of judges in some less developed countries, there remains the nagging concern about long drawn-out procedural rules which obstruct the speedy resolution of international commercial disputes.

Inherent limitations of domestic courts to hear international commercial disputes are also notoriously well known. Complex issues of jurisdiction, problems of foreign state immunity and concerns over the enforcement of any resulting judgment may all complicate and limit the effectiveness of litigation and hence the enforceability of court judgments as opposed to arbitral awards.
It is thus widely acknowledged and indeed appreciated that the strongest advantage of arbitration in cross-border commercial transactions is that arbitral awards are more readily enforceable than court judgments, pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) which provides for the due international recognition and enforcement of foreign arbitral awards in over 120 countries worldwide, subject to very limited defences set out in the New York Convention (discussed towards the end of this paper).

The aforesaid advantages of arbitration have thus resoundingly propelled arbitration as the “first amongst equals” within the ADR family.

**INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA**

Following the global trend in dispute resolution, arbitration has in recent years been elevated as the preferred method of alternative dispute resolution within the Asia-Pacific region, particularly where international commercial transactions are concerned.

It has been estimated that each year, over 3000 new arbitration cases are heard worldwide, with around 40% of these having direct links to Asia. In particular, Hong Kong and Singapore are widely regarded as leading centres for international commercial arbitration in Asia.

This paper provides a broad, general overview of arbitral proceedings in a wide array of Asian countries (China is intentionally omitted as it will be covered separately in another paper). It briefly reviews the major arbitration institutions in Asia and their significant milestones; the respective international commercial arbitration laws in force within such Asian states; and the recognition and enforcement mechanisms of arbitral awards therein under the New York Convention.

**ARBITRATION INSTITUTIONS IN ASIA**

The International Chamber of Commerce (“ICC”), founded in 1923 and based in Paris, remains the most established and reputable international arbitral institution to date.

Traditionally, most international commercial contracts invariably expressly stipulate for the application of either the ICC Rules or the Model Law to regulate arbitral proceedings emanating thereof.

With the recent proliferation of arbitral institutions in Asia, various Asian countries have in turn introduced national arbitral laws conforming with international arbitration standards by closely emulating either the ICC Rules and/or the Model Law.

Major arbitral institutions in Asia include the following:

a. Mongolian International Court of Arbitration (“MICA”);

b. Japan Commercial Arbitration Association (“JCAA”);

c. China International Economic and Trade Arbitration Commission (“CIETAC”);

d. Hong Kong International Arbitration Centre (“HKIAC”);

e. Korean Commercial Arbitration Board (“KCAB”);

f. Philippine Dispute Resolution Centre (“PDRC”);

g. Thai Arbitration Institute (“TAI”);

h. Singapore International Arbitration Centre (“SIAC”);

i. Kuala Lumpur Regional Arbitration Centre for Arbitration (“KLRCA”);

j. Badan Arbitrasi Nasional Indonesia (“BANI”) in Indonesia;

k. Australian Centre for International Commercial Arbitration – although Australia is not strictly considered an Asian country, given its sociogeographical proximity to the region, key aspects of arbitral proceedings in Australia are also discussed.

International commercial arbitration can be conducted on the basis of *ad hoc* rules agreed for each particular arbitration. However, the drafting of such one-off particularized rules represents a potentially lengthy and troublesome preliminary to the settlement of a dispute which necessarily falls for completion at a time when relations between the parties are likely to be already strained.

It is hence clearly preferable to have predetermined rules to which the parties can swiftly and easily resort. Many institutions in countries throughout the world, including the major Asian arbitration institutions above, have thus drafted clear, user-friendly sets of institutional rules for the conduct of international commercial arbitrations, in the desire of attracting lucrative arbitration business to their centres which would trigger a positive spin-off effect in their respective economies.
The presence of such formal arbitral institutions in a country is a clear indication of the growing desire by disputing parties in a dispute to proceed via structured, institutionalized arbitration proceedings as opposed to ad hoc arbitration or court litigation proceedings.

Structured, institutionalized arbitration proceedings increasingly play a very prominent role in Asia because of the support (financial and otherwise) they receive from their respective local governments. Many such arbitral institutions in Asia tend to be government-affiliated bodies such as trade or commercial associations/organizations, whose primary aim is to provide cost-effective and efficient dispute settlement mechanisms for commercial parties.

Whilst there are undisputed, obvious advantages of having arbitral institutions sanctioned by the local government, the close proximity of the relationship between the arbitral institution and the government does invoke issues relating to the perception of fairness and impartiality within the arbitral process.

Restriction of the freedom of parties to freely select arbitrators of their choice is an instance where many Asian arbitral institutions reflect their localized character. In a number of Asian jurisdictions, parties to an arbitration administered by local bodies must strictly select arbitrators only from an approved list, with no recourse to unaccredited foreigners serving as arbitrators. The archaic requirement of the use of local language in arbitral proceedings is another instance.

**Comparative National Arbitration Legislations**

Within Asia, there is a wide discernible variation in the national arbitration legislations that govern international commercial arbitration.

At one end of the spectrum are Singapore, Hong Kong Australia, and India, which have each adopted the Model Law. In contrast, Malaysia, Thailand, Taiwan and Indonesia have each in turn promulgated their own arbitration laws without adopting the Model Law.

**Singapore**

Singapore is one of the most progressive and dynamic countries in Asia in terms of implementing arbitration laws that conform to international standards. The Singapore International Arbitration Centre (“SIAC”) was incorporated in 1990 and commenced operations in 1991. Since then, the SIAC has handled approximately 700 arbitrations.

The SIAC primarily bases its arbitration rules on the Model Law and the rules of the London Court of International Arbitration. In the early 1990s, a subcommittee of the law reform committee was set up to consider amendments to Singapore’s Arbitration Act which had been first enacted in 1953. Adopting the final recommendations of the law reform committee, the International Arbitration Act (Chapter 143A, 2002 Ed) (“IAA”) was enacted on 31 October 1994 and came into force on 27 January 1995. The IAA re-enacts the New York Convention and repeats substantively most of the provisions of the Convention.

The IAA adopts the Model Law for international arbitrations, whilst the amended Arbitration Act (Chapter 10, 2002 Ed) regulates domestic arbitrations instead. The new Arbitration Act, which was enacted in October 2001 and came into force on 17 October 2001, has been substantially amended.

The operation of the IAA and the domestic Arbitration Act allow parties to arbitrations to opt in or out of either regime. Apart from implementing the Model Law, the IAA introduced several additional provisions aimed at facilitating the conduct of international commercial arbitrations in Singapore. These include provisions for the confidentiality of court proceedings in connection with arbitrations; conciliation proceedings prior to arbitration; immunity of arbitrators; invoking the assistance of the court to enforce interim orders and directions; and allowance for taxation of arbitration costs by the Registrar of the SIAC.

As in Hong Kong, party autonomy within the arbitral process has been greatly increased with court interference drastically reduced. Furthermore, issues of costs and time have all been extensively reviewed in the process of reforming and promoting Singapore as the arbitration venue of choice.

According to ICC statistics, in 2002 86% of venues of arbitration for cases were chosen by the parties. Of those, Singapore was the chosen venue for 14 arbitrations, Hong Kong held six, while Australia, the Philippines and Chinese Taipei each heard one apiece.

Whist the ICC is just one international arbitration organisation amongst many and it would be foolhardy to presumptively take these figures as representative of the total cross-section of Asian arbitrations, Singapore’s fledgling dominance in the international commercial arbitration scene is highly significant and perhaps an indication that its strong initiatives in promoting arbitration are paying off handsomely.
**Hong Kong**

The leading Asia arbitration centre is undoubtedly Hong Kong. The Hong Kong Arbitration Centre was established in 1985.

The primary legislation governing arbitration in Hong Kong is the Arbitration Ordinance, Chapter 341. The Arbitration Ordinance governs both domestic and international arbitrations. Pursuant to the Arbitration Ordinance, Hong Kong adopted the Model Law in 1990 and also the New York Convention to govern international arbitrations.

The Arbitration Ordinance has gone through numerous amendments and in 2000 via the Arbitration (Amendment) Ordinance 2000 implemented legislation for the Arrangement between Mainland China and the Hong Kong SAR on the Mutual Enforcement of Arbitral Awards. The said amendments also further clarified the procedure for enforcement of arbitral awards, orders, and directions, made either in or outside of Hong Kong.

The Arbitration Ordinance was the last legislative legacy of the erstwhile colonial government. With the benefits of maximum party autonomy, an open legal system, expert legal practitioners and a free economy, Hong Kong continues to exert immense arbitration appeal within Asia.

**Australia**

The Australian Centre for International Commercial Arbitration was established in 1985 with the aim of facilitating international arbitration in Australia, particularly in Sydney.

In Australia, at the federal level, the International Arbitration Act 1974 implements the Model Law and New York Convention for international arbitrations. Parties are permitted to exclude this law and in doing so will become subject to the Commercial Arbitration Act of the State or territory where the international commercial arbitration is held.

**India**

The Arbitration and Conciliation Act of 1996 (“ACA”) was introduced in India to consolidate the laws relating to domestic as well as international commercial arbitration. With its enactment, the Indian Arbitration Act 1940 — a legacy of colonial British was wholly repealed.

The ACA adopted the Model Law for international arbitrations, with a few variations. It also adopted the UNCITRAL Arbitration Rules 1976, the UNCITRAL Conciliation Rules 1980, and the provisions of the New York Convention as regards recognition and enforcement of foreign arbitral awards.

**ALTERNATIVE APPROACHES**

**Malaysia**

In Malaysia, arbitration is regulated by the Arbitration Act 1952. This Act deals with both domestic and international arbitrations. In 1980, the Act was amended to include a new section 34 which, *inter alia*, established a special and separate legal regime for international arbitrations conducted before the Kuala Lumpur Regional Centre for Arbitration.

As a result of the 1980 amendments, international arbitrations conducted under the auspices of the Kuala Lumpur Regional Centre for Arbitration are now excluded from the jurisdiction of the Arbitration Act of 1952 and completely outside the scope of the court’s powers of intervention and supervision.

**Indonesia**

Arbitration matters in Indonesia were, until recently, governed by the provisions contained in the 19th century Dutch colonial civil law rules and the Indonesian Civil Code. In 1999, Indonesia passed the Law on Arbitration and Alternative Dispute Resolution to replace this outdated Law.

A significant development sought to be brought about by this new law is reduced court interference in the arbitral process.

**Thailand**

In Thailand, arbitration has been long recognized in both the Civil Procedure Code 1934 (sections 210 to 220) and in Thailand’s 1987 Arbitration Act as a legitimate means of dispute resolution.

The business community and the government have recognized the importance of providing effective means of

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1 Hong Kong has been consistently rated the world’s freest economy seven years running by the *Fraser Institute* in Canada.
commercial dispute resolution within Thailand and continue to develop and supplement its existing institutions and laws to create an environment increasingly amenable to arbitration. Hence, increasingly many disputes in Thailand are being arbitrated in lieu of litigation.

Taiwan
Taiwan has also taken important steps in recent years to reform its arbitration system, enacting new legislation in 1998 to replace the old laws of 1961. In 1994, a committee was established under the supervision of the Judicial Department to consider amendments to the Commercial Arbitration Act of 1961.

While a significant group of academics, commercial lawyers and the business community favoured adoption of the Model Law so as to boost Taiwan’s ambitions to become a regional business centre, their efforts ultimately failed. The result of the committee’s deliberations was a compromise agreement to make selective amendments to the existing legislation. The resulting new Arbitration Act came into force in December 1998.

Although the Taiwan Arbitration Act 1998 did not adopt the UNCITRAL Model Law, it does nevertheless incorporate a number of the Model Law’s key features. In particular, it provides for a broader scope of application for commercial arbitration and less intervention by the courts. It permits arbitrators to determine the applicable law in an arbitration proceeding, and to grant interim measures; and it adopts the principles of severability of the arbitration clause and of party autonomy. There are, however, a number of provisions which appear regressive. One of these relates to the ability of foreigners to sit as arbitrators in Taiwan. Other issues pertain to the due recognition and enforcement of foreign arbitral awards.

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN ASIA

Most jurisdictions in Asia have already acceded to the New York Convention of 1958.

The New York Convention essentially obliges convention countries to enforce awards made in another signatory state. Recognition and enforcement of foreign arbitral awards between signatory states is strictly mandated and refusal to enforce is allowed only in very limited situations as set out in Article V thereof.

Foreign arbitral awards sought to be enforced under the New York Convention must be arbitral awards that have not been set aside or suspended. An atypical example of the grounds justifying such a refusal of enforcement is that the foreign arbitral award “has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made” (Article V(I)(e) of the New York Convention).

The scheme of the New York Convention is to allow a successful party under an arbitral award to seek enforcement in any of the Convention countries where the assets of the debtor may be found. It does not limit the number of countries in which the party may seek such enforcement as long as the debt remains unsatisfied. As such, it is theoretically possible for an award to be allowed enforcement in one jurisdiction and refused in another or vice versa. In practical terms, when an award is refused enforcement in one jurisdiction, the burden gets heavier when enforcement is later sought in another jurisdiction as the latter would naturally seek to avoid inconsistency in rulings.

Despite the rapid ascension and ratification of the New York Convention by most Asian states, the intended implementation mechanisms for the recognition and enforcement of foreign arbitral awards under the New York Convention are still left wanting in some Asian jurisdictions as shall be discussed hereinbelow.

Singapore
There are two regimes for the recognition and enforcement of arbitral awards under the International Arbitration Act in Singapore. One is for arbitral awards made pursuant to an international arbitration conducted in Singapore, and the other for foreign arbitral awards made in the territory of a Convention country under the New York Convention.

The first regime is governed by section 19 of the International Arbitration Act.

The second regime is governed by Part III of the International Arbitration Act. Section 31 sets out the

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grounds on which a Singapore court may properly refuse to set aside an award made in the territory of a Convention state under the New York Convention. The grounds are essentially those set out in Article V of the New York Convention, which are similar to those under Article 34 of the Model Law.

The decision of the Singapore High Court in re An Arbitration between Hainan Machinery Import and Export Corp and Donald & McArthy Pte Ltd, [1996] 1 SLR 34, dealing with recognition and enforcement of foreign arbitral awards under the New York Convention, is highly indicative of the laudable, positive attitude of the Singapore courts in upholding the spirit of the New York Convention by very stringently reviewing the limited exceptions within Article V of the New York Convention for which recognition and enforcement of foreign arbitral awards may be denied for cause (emphasis added).

In Hainan, four substantive grounds were relied upon to challenge enforcement of a foreign arbitration award made in China pursuant to the CIETAC Rules.

First, reliance was placed on section 31(2)(e) of the International Arbitration Act (which is similar to Article V(1)(d) of the New York Convention). The argument was rejected inter alia on the basis that the defendants did not put forward any evidence that CIETAC's Arbitration Rules were so breached. Further, the defendants had ample opportunity to attend the hearing, but failed to attend. The defendants therefore had very little right to criticize the manner in which the arbitration had been conducted.

Secondly, the defendants relied on section 31(2)(d) of the International Arbitration Act (which is similar to Article V(1)(c) of the New York Convention). The defendants argued that the plaintiffs had waived and/or repudiated their right to arbitrate when they threatened that they would seek “legal recourse”, the plaintiffs meant the institution of a lawsuit. This bare assertion was clearly insufficient.

Thirdly, an issue arose under section 31 (4) (a) of the International Arbitration Act. The contention raised was that the arbitral award did not specify the applicable law and it was necessary that the dispute be determined in accordance with its applicable law. The defendants argued that, since there was no express choice of law, it was necessary for the parties to agree on the applicable law or for the arbitration tribunal to decide on it, and they had failed to do so. The court rejected this argument on the basis of the principle that, in the absence of any express choice of law, the law of the nominated place of arbitration would normally be regarded as the implied choice of law of the parties. This was PRC law, and there was little evidence to suggest that the tribunal decided the dispute under any law other than PRC law.

Finally, the ground of public policy was raised. In particular, it was sought to be argued that the award should not be enforced, as it did not decide the real matter in dispute between the parties. The court rejected the argument, taking a very strict and narrow view as to what constituted sufficient grounds of public policy to effectively challenge a foreign arbitral award.

It is humbly submitted that the Singapore court in Hainan has upheld the spirit and ethos of the New York Convention by carefully reviewing all arguments for the refusal of enforcement of a foreign arbitration award made in China pursuant to the CIETAC Rules which is highly commendable.

Hong Kong

After July 1997, China extended its membership in the New York Convention to Hong Kong. Accordingly, the New York Convention continues to apply in Hong Kong and with the exception of certain awards made in China (discussed further below), arbitral awards obtained in another contracting state to the New York Convention are enforceable directly in Hong Kong.

The position is slightly different in the case of enforcing an award made in China in Hong Kong and vice versa. Prior to 1 July 1997, Hong Kong was a member of the New York Convention by virtue of the UK’s accession on its behalf. China acceded to the New York Convention in 1987. Before 1 July 1997, therefore, awards made in Hong Kong were enforceable in China under the New York Conven-
tion and awards made in China were enforceable in Hong Kong under the New York Convention.

Following 1 July 1997, China extended its membership in the New York Convention to Hong Kong, but it did not establish clear guidelines for the enforcement of awards between the PRC and the new Hong Kong Special Administrative Region (“HKSAR”).

On 21 June 1999, following a few years of delay, the Supreme People’s Court Vice President Shen Deyong and HKSAR Secretary for Justice Elsie Leung signed a Memorandum of Understanding on the Arrangement between the Mainland and the Hong Kong SAR on the Mutual Enforcement of Arbitral Awards (the “Arrangement”). Implementing legislation for the Arrangement was enacted in Hong Kong on 6 January 2000 in the Arbitration (Amendment) Ordinance 2000. The PRC Supreme People’s Court issued a notice to implement the Arrangement on 24 January 2000. The Arrangement came into effect on 1 February 2000.

Under the Arrangement, an arbitral award made on the Mainland may be enforced by the High Court of the HKSAR and an arbitral award made in Hong Kong may be enforced on the Mainland by an Intermediate People’s Court on terms basically the same as those which would apply if an application for enforcement were made under the New York Convention.

Finally, similar to the enforcement procedure under the Convention, an application may also be made under section 2GG to seek leave of the Hong Kong courts to enforce a non-Convention award.

Following the decision in *Ng Fung Hong Ltd v ABC* [1998] 1 HKC 213 in which it was held that a CIETAC award could not be enforced in Hong Kong under section 2GG, there was some doubt as to whether section 2GG applied to arbitrations where the place of arbitration was outside Hong Kong.

However, on 23 June 2000, the Arbitration (Amendment) (No. 2) Ordinance 2000 came into effect to amend section 2GG of the Ordinance as follows:-

a. by renumbering it as section 2GG(1); and
b. by adding:-
   i. Notwithstanding anything in this Ordinance, this Section applies to an award, order and direction made or given whether in or outside Hong Kong;

Accordingly, section 2GG(1) clarifies that the summary procedure for enforcement of awards, orders and directions under section 2GG of the Ordinance applies to awards, orders and directions made either in or outside Hong Kong.

The Hong Kong courts are generally regarded as having an excellent record in recognizing and enforcing foreign arbitral awards in accordance with the New York Convention.

**Malaysia**

Enforcement of domestic arbitral awards is pursuant to the provisions of section 27 of the Act, or by way of summary enforcement.

Foreign awards can also be enforced by way of summary enforcement or by the New York Convention, which was enacted in Malaysia in 1985. Recognition and enforcement of foreign arbitral awards can be taken pursuant to the provisions of the New York Convention.

The party seeking to enforce a New York Convention award must produce the duly authenticated original award or a duly certified copy of it and the original arbitration agreement or a duly certified copy of it.

Under section 4 of the New York Convention, if the award is in a language other than the national language or English language, a translation is required of it in the national language or in English, certified by an official or sworn translator or by a diplomatic or consular agent.

By virtue of section 3 of the New York Convention, a New York Convention award can be enforced in Malaysia by way of registration in a manner similar to section 27 of the Act. This is a common method of registering foreign arbitral awards provided the award falls within the definition of the New York Convention.

In the event the foreign award is made in a country which is not signatory to the New York Convention, then the manner to register and enforce the award in Malaysia would be by way of a fresh action for breach of the terms of the award – *Para Shipping Ltd v MPC Holding Sdn Bhd* (1984) CLJ 248.

An interesting point to note is that this case was filed before the New York Convention Act was enacted. In the circumstances, it is logical that such a procedure would likewise be available for instances where the award originates from a country which is not a signatory to the New York Convention.

**Thailand**

The same procedures apply to enforcement of arbitral awards whether they are foreign or local. The enforcement
of almost all foreign arbitral awards is usually within the jurisdiction of the Thai Civil Court.

A party wishing to enforce a foreign arbitral award must file a claim to enforce the arbitral award within one year from the date that a copy of the award was delivered to the party concerned.

The party applying for the recognition and enforcement of the foreign arbitral award must also produce the following documents with appropriate Thai translations:

a. original copy of the award or a certified copy thereof;

b. original copy of the arbitration agreement (or, simply, the clause in a contract which contains the agreement to arbitrate) or a certified copy thereof; and

c. a translation into Thai of the award and of the arbitration agreement.

The translations must be certified by a sworn translator, an officer of the Ministry of Foreign Affairs, a diplomatic delegate, or a Thai Consul.

Indonesia

Indonesia is signatory to the New York Convention. All applications for permission to enforce a New York Convention award in Indonesia must be made to the Chief Judge of the Central Jakarta District Court. The court cannot look at the merits of the award at the enforcement stage.

No appeal lies from an order for execution of the award. However, appeal lies to the Supreme Court against a refusal by the Chief Judge to enforce the award.

As discussed in section 4.2.2 above, it was only recently that Indonesia passed its arbitration law. There is therefore not much case law on enforcement under the new regime. However, under the old regime of arbitration, the Indonesian Code of Civil Procedure (“RV”) provided that, except for general average awards, judgments of foreign courts could not be enforced in Indonesia. Based on this provision, it had long been assumed that the same applied to foreign-rendered arbitration awards and that these could not be enforced there.

In 1981, Indonesia ratified the 1958 New York Convention; yet, for the 10-year period following such ratification, the Indonesia courts were still reluctant to grant enforcement of foreign arbitral awards against Indonesian parties due to lack of promulgating regulations.

However, in 1990, the Supreme Court promulgated Regulation No. 1 which set out the necessary implementing regulations for enforcement of arbitral awards rendered in a country which, together with Indonesia, is party to an international convention regarding implementation of foreign arbitral awards and designating the District Court of Central Jakarta as the venue to which application for enforcement thereof, through an order of *exequatur*, was to be made.

The Chairman of that court was then required to transmit the *exequatur* request file to the Supreme Court within 14 days of receipt, attaching (i) the original award, or a certified copy thereof, together with an official translation thereof; (ii) the original or a certified copy of the agreement forming the basis of the award, together with an original or a certified copy of the agreement forming the basis of the award, together with an official translation thereof; and (iii) a statement from the Indonesian diplomatic mission in the jurisdiction in which the award was rendered to the effect that such country has diplomatic relations with Indonesia and that Indonesia and such country are contracting states to an international convention regarding implementation of foreign arbitral awards.

Once the order of *exequatur* was granted, the same was to be sent back down to the Chairman of the District Court of Central Jakarta for implementation. If execution was to be effected in a different jurisdiction, the Central Jakarta court was to transfer the order to the most suitable District Court for implementation.

India

The Arbitration and Conciliation Act 1996 provides that an arbitral award is enforced as a court decree, by an application made to the appropriate court. The Code of Civil Procedure 1908 provides the manner in which a court decree is executed. Where an application for execution is made more than two years after the date of the award, leave must be obtained from the executing court, whereupon the court must issue a notice to the person against whom execution is applied for requiring him to show cause why the decree should not be executed against him.

Where no application is made to set aside the arbitral award under the 1996 Act, within the period prescribed, or such application having been made, has been refused, enforcement of the award as a court decree cannot be resisted on any ground. This is provided for by section 34(1) read with section 34(3).

Difficulties have also been experienced in India in implementing the New York Convention. In several decisions, the Supreme Court of India held that Indian courts
were competent to hear appeals and set aside awards rendered outside India on the ground that the arbitration was governed by Indian law. But the enactment of the Model Law in India has greatly improved the present situation.

**Australia**

The International Arbitration Act provides two sets of provisions for the recognition and enforcement of foreign arbitral awards.

Part II gives effect to the New York Convention and Chapter VIII of the Model Law (Schedule 2 of the International Arbitration Act) provides for the recognition and enforcement of awards. Part II is confined to the recognition and enforcement of “foreign awards”.

This is defined in section 3(1) to mean an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies. There is no requirement that the award be rendered in a contracting State. However, section 8(4) of the International Arbitration Act imposes an important restriction. It confines the operation of the Act to:-

a. awards made in Convention countries; and
b. awards made in other countries provided that the applicant for recognition and enforcement is domiciled or ordinarily resident in Australia or in a Convention country.

Chapter VIII of the Model Law provides for the recognition and enforcement of arbitral awards. It is not confined to a foreign arbitral award but simply applies to “an arbitral award, irrespective of the country in which it was made”. Thus it could apply to enforcement of any arbitral award made in Australia.

The limitation on Chapter VIII is found in the scope of the Model Law itself, set out in article 1. Article 1(3) of the Model Law states that it applies to international commercial arbitrations. Sometimes a final award will be enforceable under Part II of the International Arbitration Act and under the Model Law. In this case, section 20 of the International Arbitration Act provides that recognition and enforcement must be sought under Part II of the International Arbitration Act and hence, the Model Law will not apply. This is not of great significance as the rules in both sets of provisions are largely similar.

**CONCLUDING REMARKS**

From the brief survey of international commercial arbitration Asia herein above, a number of themes clearly emerge.

Firstly, there is no doubt that international commercial arbitration has already gained a steadfast foothold in many Asian jurisdictions and that the Asian business community widely considers arbitration as an excellent method of resolving its commercial disputes. It is expected that this trend will continue in the decades ahead.

Secondly, Asian arbitration institutions are playing an increasingly important role in dispute settlement. Across Asia, competition for international commercial arbitration is gaining momentum and Asian arbitration centers, notably Hong Kong and Singapore, have all gone out of their way to adopt world standards to support the arbitration process. With Singapore and Hong Kong strongly entrenched at the top, and Australia and China eagerly keen to have their share, all arbitration centres in Asia have their intrinsic positive and negative attributes. Even if there is unstated acknowledgement of competition between Asia’s regional arbitration centres, it is now clear that Asia collectively has what it takes to attract international commercial arbitration cases from anywhere else in the world.

Finally, a comparative review of recent trends in arbitration legislation reform throughout Asia epitomizes the salutary effects of the ambitious mission and work of the ICC and UNCITRAL respectively in promoting the harmonization of international arbitration law and the practice within Asia. However, as we can observe from the implementation of the New York Convention in various Asia case studies herein above, embracing international arbitration rules and principles and attempting to uniformly enforce them in very diverse sociopolitical and cultural surroundings present significant challenges. Clearly, much more work needs to be done.

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Asia will undoubtedly face many challenges in the coming decades as it sets to build upon its progress realized to date. Surmounting these challenges shall require continuous efforts and the exchange of experiences and views amongst industry players, arbitration practitioners, legal scholars and government officials. It is hoped that review of the materials contained in this symposium paper shall provide but a modest contribution to this imperative task.

FURTHER INFORMATION

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