



SEOUL: Trends in the Asia-Pacific region

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The ICC International Court of Arbitration's fourth annual Asia-Pacific conference in Seoul explored recent arbitration developments in the region. **Vanina Sucharitkul**, senior associate at Herbert Smith Freehills in Bangkok and a member of the ICC Court for Thailand, reports.



Vanina Sucharitkul

South Korea's rise

For over a decade, South Korea has developed as a promising seat for international arbitration. The 1999 Arbitration Act substantially mirrors the UNCITRAL Model Law. The Ministry of Justice has commissioned a special committee to consider amendments to the act to reflect the 2006 UNCITRAL Model Law. In 2011, the Korean Commercial Arbitration Board (KCAB) overhauled its international rules to bring international arbitration practice in line with other international institutions. Finally, Korean courts have historically supported arbitration with strong records of enforcement and limited intervention.

Kevin Kim, a vice president of the ICC Court and head of international arbitration and litigation at Bae Kim & Lee in Seoul, said South Korea is now an active participant in the arbitration market. After the 1997 Asian Financial Crisis, the use of arbitration clauses in international commercial contracts rose dramatically in cross-border M&A deals. Those trying times helped establish arbitration as the means for dispute resolution among Korean companies. With the increase in outbound investments in the 2010s, there has been more commercial arbitration involving Korean companies and large construction projects in the Middle East, Africa, Latin America and other regions; and treaty arbitrations brought either by Korean investors or against the Korean government. Kim said he expected international arbitration in Seoul to increase as it continues to take steps to brand itself as an attractive seat of arbitration with the launch of the International Dispute Resolution Center (IDRC) in 2013.

Joongi Kim, arbitrator and professor at Yonsei Law School, explained that the Korean government has committed itself to using arbitration to resolve investment disputes, as reflected in its 88 bilateral investment treaties (BITs) and seven free trade agreements (FTAs) in force, as well as its recently concluded FTAs with Australia, Canada and Colombia that await ratification. Kim expressed concern that Korea might be more vulnerable to investor-state arbitration claims arising out of measures taken by regional governments rather than the central government. Overseas, Korean investors are becoming increasingly assertive and for the first time have begun to resort to investment arbitration to settle their disputes.

Bridging the gap: the impact of culture

Singaporean arbitrator **Christopher Lau** SC, alternative member of the ICC Court for Singapore, addressed the importance of bridging the cultural gap in international arbitration through effective communication. He said that this begins with developing awareness for the cultural differences and sensitivities of all involved, including the tribunal, counsel and parties. Patience, firmness and sensitivity will in most cases work better in building rapport than open confrontation. Lau advised counsel to be clear and brief and maintain probity and integrity in their written communications. In terms of evidence, methodical organisation of documents can ensure efficiency in the proceedings. Counsel should ensure that only evidence relevant to the outcome is produced. Finally, counsel should be responsive and reasonable; an extreme position can only result in the loss of credibility and trust of the tribunal.

Simon Chapman, partner at Herbert Smith Freehills in Hong Kong, considered the perspective of foreign counsel working in Asia, and noted that the cultural background of the tribunal members and counsel often had a greater impact on the overall process than the background of the parties themselves. This would typically be less true in settlement discussions, where greater direct party involvement would often bring cultural issues to the fore. Chapman also noted that the dispute resolution process followed would have some impact on this, citing the combined arbitration and mediation ("arb-med") procedures common in mainland China.

Investment arbitration in Asia

The east Asia and Asia-Pacific region is following global trends in investment protection, with 658 BITs and 54 FTAs concluded since the 1990s, said **Claudia Salomon**, global co-chair of international arbitration at Latham & Watkins in New York. Emerging markets are experiencing a shift from being predominantly recipients of foreign investments to becoming capital-exporting countries. The rise in the number of BITs concluded by African and Central and South American countries demonstrates this shift. This trend is also supported by the number of investment arbitration claims brought by east Asian and Pacific investors, she said.

Steven Smith, partner at Jones Day in San Francisco, analysed outward direct investment (ODI) flows from Japan, South Korea and China, which have continued to increase since 2006, and those states' investment protection coverage. Few known investment claims have been brought by claimants from these states, he observed. ODI flows from northeast Asia have historically been relatively small (with the exclusion of Japanese ODI) and the more recent ODI flows from these countries have been concentrated in relatively low-risk jurisdictions. As northeast Asia increases its ODI flows toward emerging markets with elevated risk, however, investment treaty arbitration may become more common in future, he predicted.

Alexis Mourre, partner at Castaldi Mourre & Partners in Paris and vice president of the ICC Court, addressed the Court's experience in administering investor-state arbitrations and arbitrations involving a state or a state entity. Mourre said there had been a steady growth in the number of treaty-based arbitrations administered under the ICC rules, which allow the parties to adapt to the particular needs of

the dispute. The parties can agree an appropriate level of transparency, including communications by the Court of the reasons for its decisions on objections to the confirmation of arbitrators, non-confirmation of arbitrators and challenges and replacement of arbitrators. Further, nothing in the ICC rules prevents the parties from agreeing that the award, proceedings or submissions be made public. Alternatively, while arbitrations under the ICC rules are not confidential per se, the parties can agree to keep confidential the existence of the arbitration, the arbitral proceedings, the submissions made by the parties, and the decisions made by the tribunal.

Regional overview

In Asia, international arbitration has firmly established roots in Hong Kong and Singapore. However, other leading economies have stepped up the development of their legal landscape to encourage international arbitration in their jurisdiction, speakers explained.

Andrew Pullen, partner at Allen & Overy in Singapore, provided an update of the legal landscape in Asia. He first discussed the rise in emergency arbitrator applications and the enforcement of their decisions in the region. Under the Singapore International Arbitration Act, an emergency arbitrator is deemed an "arbitral tribunal" and the decision can be enforced by the High Court as an order or award. The Hong Kong Arbitration Ordinance contains specific provisions for enforcing emergency arbitrator relief granted in or outside Hong Kong. Other jurisdictions, however, do not contain similar express provisions. Emergency arbitrator decisions are likely to be treated in the same way as interim relief orders made by the main tribunal. Pullen also addressed India's pro-arbitration trend in its recent judicial decisions and Myanmar's accession to the New York Convention in 2013.

Alvin Yeo SC of Wong Partnership in Singapore addressed amendments to the city-state's International Arbitration Act, pursuant to the International Arbitration (Amendment) Bill passed in 2012. The amendments include relaxation of the definition of "arbitration agreement" to include agreements concluded orally or by conduct or by any other means; expansion of the term "arbitral tribunal" to include emergency arbitrators appointed in accordance with the rules of arbitration agreed by the parties; provisions that any interim orders granted by an emergency arbitrator will be enforceable by the Singapore High Court; and the possibility for appeal of a negative jurisdictional ruling.

Canada recently ratified the ICSID Convention, effective on 1 December 2013, observed Craig Chiasson, counsel at Borden Ladner Gervais in Vancouver. The delay in the ratification of the convention can be attributed to Canada's federalist constitutional framework, which requires provincial implementing legislation. As for judicial support for arbitration, the court has shown strong support for the New York Convention and "broad deference and respect" to tribunals.

In the United States, New York and Florida are leading the way in promoting international arbitration, said Cedric Chao, co-head of international arbitration at DLA Piper in San Francisco. New York now has its own international arbitration hearing centre, while the New York judiciary has assigned a single judge to hear all international arbitration matters that come before that state's court of first

instance. In Miami, a circuit court has also created a [specialised division](#) to hear international commercial arbitration cases.

Chao attributed the success of these two US states, in part, to a legal regime that authorises foreign lawyers to appear in arbitrations. California's development as a seat of arbitration has previously been hindered by the ambiguity in foreign lawyers' rights to appear. To promote international arbitration in the state, a bill is pending with the California Senate that would expressly permit any person (even non-lawyers) to appear or assist in an arbitration seated in California. Another development from the US is the issuance of the [New Optional Appellate Rules](#) by the American Arbitration Association (AAA), which allow parties to appeal arbitral awards to an internal appellate tribunal. The new rules only apply where all the parties have agreed to their use, either in their arbitration clause or in a post-dispute agreement. The appeal must be based on an "error of law that is material and prejudicial" or "determinations of fact that are clearly erroneous." Chao said this may show that the US is still not fully accustomed to arbitration, particularly in sectors such as technology.

US and Hong Kong approaches to enforcement

Is there a significant divergence between Hong Kong and US law regarding enforcement of international arbitration awards and is it relevant that Hong Kong is a Model Law jurisdiction whereas the US is not? A panel discussion reviewed the latest US and Hong Kong decisions and policy issues relating to sovereign immunity, competence-competence, crown immunity, the US doctrine of "manifest disregard of the law", the approach of supervisory courts, judicial review of arbitral decisions, and the power of the tribunal to manage cases. The discussion was moderated by Luis O'Naghten, who was at the time still a partner at Akerman Senterfitt, though he has since [moved](#) to Baker & McKenzie in Miami.

Peter Chow, partner and Asia head of international dispute resolution at what is now Squire Patton Boggs, spoke of the Hong Kong case of *Democratic Republic of the Congo v FG Hemisphere Associates*, where the Court of Final Appeal determined that, following the handover of Hong Kong to China in 1997, sovereign immunity is absolute in Hong Kong. This is in contrast to the doctrine of restrictive immunity adopted in many other jurisdictions. Chow commented that there were misconceptions that as a result of this case, Hong Kong's attractiveness as a leading seat was reduced compared to that of Singapore. He observed that the case concerned the enforcement of an award regardless of the seat of arbitration. On the contrary, he said, the case confirmed the view that sovereign immunity would not prevent an arbitral tribunal seated in Hong Kong from assuming jurisdiction. Therefore it did not adversely impact the choice of Hong Kong as a seat. He also referred to the pro-arbitration stance taken by the Hong Kong courts in enforcing awards from mainland China and other countries.

Kim Rooney, independent arbitrator and barrister in Hong Kong, discussed common misconceptions as to the operation of the crown immunity doctrine in Hong Kong's law (which concerns whether a domestic government or its organs are subject to the jurisdiction of its courts) and its relationship to the doctrine of sovereign immunity, following the 1997 handover. She referred to effect of the "one country, two systems" doctrine constitutionally preserving Hong Kong's

common law system until 2047. Rooney explained that the Hong Kong government is not generally immune in Hong Kong proceedings. She discussed the position of Chinese state-owned enterprises structured as independent enterprises with legal personality engaging in commercial activities, commenting that these are not entitled to invoke sovereign immunity in Hong Kong; nor should they be eligible to successfully invoke crown immunity. Rooney also discussed the broad scope of an arbitral tribunal's power to manage cases in Hong Kong both as a Model Law jurisdiction and as held by Hong Kong courts, and the limited scope of the supervisory court's power to review a Hong Kong seated tribunal's exercise of its powers.

Lawrence Schaner, partner and co-chair of the international arbitration practice of Jenner & Block, confirmed the US courts' willingness to enforce arbitral awards that have been annulled at the seat. He then discussed whether the doctrine of "manifest disregard" is a threat to enforcement in the US, canvassing various US judgments and concluding that it is not. He also discussed the extent to which parties can contract out of judicial review of an award, reviewing the US Supreme Court's 2008 decision in *Hall St Associates v Mattel* and the Ninth Circuit's 2013 decision *In re Wal-Mart Wage and Hour Employment Practices Litig.*

The conference closed with its traditional panel of in-house counsel discussing the state of international arbitration in Asia and North America. With economic growth progressing in both regions, they said there would be more business transactions and, inevitably, more disputes.

Andrea Carlevaris, secretary general of the ICC Court, said that Seoul's "dynamic commercial environment and its vast and sophisticated legal community" made it a perfect venue for the conference. He thanked the speakers and audience for their contributions.

The ICC's fourth annual Asia-Pacific conference was entitled "International Arbitration – A Regional Journey" and took place from 19 to 21 May.