

IPBA Journal

September 2018

No **91**

NEWS & LEGAL UPDATE



INTER-PACIFIC BAR ASSOCIATION





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The President's Message

Perry Pe
President



Dear Reader,

Our immediate Past President Denis McNamara often reminded me that I was cutting his year as IPBA President short one month by holding the Manila 2018 Conference in March instead of April. Now I wish that I could give him that one month back, as these first six months of my term have been incredibly busy.

In May 2018, while on a business trip in Milan, I took time out to meet with Riccardo Cajola and Chiomenti's Francesco Tedeschi. We discussed our 2019 IPBA Mid-Year Council Meeting to be held in Milan in a year's time. Sara Marchetta (also from Chiomenti) and Riccardo are spearheading this effort. This is the first time for the IPBA to hold an event in Italy, and we are already looking forward to a great weekend.

Also in May 2018, I attended the 8th Annual St Petersburg International Legal Forum (SPILF). Founded in 2011 by the Ministry of Justice of the Russian Federation and the President of the Russian Federation, the SPILF has grown to host over 4,500 delegates from 90 countries with the aim of promoting ideas related to modernising the law in the face of global changes. Our very own President-Elect Francis Xavier was a speaker on arbitration, and in the highlight event where Russian Prime Minister Dimitry Medvedev was the keynote speaker, Francis acted as one of the resource panelists. Aside from Francis, I was also assisted by our At-Large Council member for Europe, Gerhard Wegen. Our goal was to introduce IPBA to the Russian Bar and to increase our Russian membership in the IPBA, and not only to Russian members, but also to lawyers from the Commonwealth of Independent States (CIS).

Results: We got full support from two top Russian law firms: EPAM and ALRUD. We met with Dimitry Afanasiev of EPAM and Vassily Rudomino of ALRUD. From St Petersburg, Francis and Gerhard proceeded to Moscow

to attend an IPBA roadshow organized by Maxim Alexeyev of ALRUD, where Francis, of course, promoted our 2019 IPBA Annual Conference in Singapore.

In June 2018, I went to Heidelberg and then to Mannheim to attend the German Law Day of the German Bar Federation (DAV). The DAV (Deutscher Anwaltverein) is an association of German and German-speaking lawyers that aims to protect and promote the professional and economic interests of the Bar while promoting fairness, education and training, and encourages solidarity. In Heidelberg, there was an international bar leaders symposium organized by the German Bar. All the leading international bar organisations were invited and they all attended, while the IPBA was the only Asia-based bar organization invited. I was assisted by long-time IPBA member and Mannheim resident Axel Reeg, who introduced me to several leading members of the German Bar.

Result: a proposed Memorandum of Agreement to be signed by IPBA with the international law section of the German Bar Federation headed by Dr Jan Curschman. The content of the agreement needs to be reviewed by the Officers and approved by the Council, which we hope to do at our Mid-Year Council Meeting in Thailand this November.

In August 2018, I went to Chicago to attend the American Bar Association (ABA) Annual Conference. The ABA is the voice of the legal profession in the United States, with more than 400,000 members. I attended the International Bar Leaders conference of the ABA's Section of International Law (ABA-SIL), which has around 18,000 membership. Again, the goal was to promote the IPBA, as well as to increase our North American membership. At the same time, I also promoted our upcoming IPBA 2019 Conference in Singapore. I was assisted by McDermott's Michael Chu and by IPBA Past

President Gerry Libby. I met with the Asian-American Lawyers Association, which is the umbrella organisation serving, among others, the Filipino-American Lawyers, Korean-American Lawyers, Indian-American Lawyers and Chinese-American Lawyers groups. Our goal is to increase North American members in the IPBA. I realized that Michael was a former president of this Asian-American lawyers group, and this federation could perhaps be the source of our North American membership in IPBA.

Result: The ABA Section of International Law proposed an MOU with the IPBA, perhaps to be signed this October on the occasion of the ABA-SIL regional event in Seoul. The Chair of the ABA-SIL, Robert Brown, has already appointed Gerry Libby to be the ABA's coordinator for any event which the IPBA and ABA-SIL may jointly hold in the near future.

The Presidents of Law Associations in Asia, or POLA, held their annual meeting in Canberra, Australia in early August. Neil Russ, the Regional Coordinator for Australian and the Southwestern Pacific Islands and IPBA Past President Jim FitzSimons represented the IPBA. Each year, the conference is hosted by the bar association in the host venue country. Although the IPBA is an 'observer' member with no voting rights, as are other international bar associations, attendance at POLA is highly desirable for the IPBA because it allows networking, provides us with a profile alongside 'peer' organisations, and provides IPBA with a significant opportunity to promote the IPBA to under-represented jurisdictions such as Fiji. Neil and Jim also promoted IPBA 2019 Singapore to the delegates, which included IPBA Past President Lalit Bhasin.

In late August to early September 2018, I went to Brussels to attend the Annual Congress of AIJA, the Association Internationale de Jeunes Avocats (International Association of Young Lawyers). There, I attended a special event featuring the leaders from the four main international bar associations: the IBA, UIA, the ABA-SIL, and our IPBA. I was assisted by Rhonda Lundin of the IPBA Secretariat, who spoke at the Pre-Congress Seminar focused on what it takes to be an international lawyer. I was also assisted by IPBA Publications Committee Chair John Wilson, and members Cristine Collantes-Garcia and Patricia Ngochua (who is a Vice-Chair of the Ad Hoc Next Generation Committee). Our goal here was to entice the AIJA lawyers into joining IPBA upon their graduation from AIJA, as the members there 'age out' after 45, and to increase our young lawyer membership for the Next Gen Committee. We offered one lucky recipient free registration to IPBA 2019 Singapore during a raffle for AIJA members. Thanks to our IPBA 2019 Singapore Host Committee for that!

Result: AIJA and IPBA continue to work together on joint programs and inviting speakers from each other's associations to participate in various events (Francis will be speaking at AIJA's 10th Annual Arbitration Conference in Singapore this October for example), and to enhance our Next Gen Committee.

I still have other meetings and events in October, November and December, and into the new year. Watch for all the updates in my next message!

Perry Pe
President





The Secretary-General's Message

Caroline Berube
Secretary-General



I am very proud to be a part of the council of the IPBA—I am more and more impressed, every month, by the energy and time that officers and council members put in to organising more events than ever before and participating in conference calls at any time of their day given the different time zones all our members live and work in—all these efforts underpin the IPBA's position as a top-notch global organisation. Compared to many other organisations, we have very few members in charge of the administration of the IPBA. Rhonda and Yukiko work very hard with us to keep us on track and help all our volunteers to make things happen. We also have a new part-time staff member, Izumi van den Bergh, taking care of the website and social media. Thank you to these amazing ladies and our hard-working council members and officers. You all contribute to make the IPBA a wonderful proactive organisation attractive to new members!

We are back this month on a themed basis for our IPBA Journal! The response has been amazing, thanks to John's initiative! The spotlight in this September issue is on arbitration, as a prelude to the IPBA-THAC Arbitration Day 2018 to be held in Bangkok, Thailand, on 5 and 6 November. This is a very interesting and timely conference, bringing together experts in an area that is gaining ground in legal practice worldwide. We have invited distinguished speakers to discuss some of the most relevant topics and issues in the world of arbitration. We hope that you all can join us to make this event as successful as the previous years.

Prior to our Mid-Year Conference in early November, we have two IPBA events lined up in September. On 20 September, IPBA with our members from the US organised the 'Doing Business with Asia' conference in Los Angeles. The topic is 'Development in Trade, IP, Investment and Dispute Settlement'. We then have 'LatAm Legal Views on Investment, Trade, Compliance and International Dispute Resolution', to be held on 28 September in Santiago, Chile. We hope to see some of you at these events.

Come November, the IPBA will be in Korea and Belgium for its last events of the year. On 7 November, we will be in Seoul, Korea for the IPBA 4th East Asia Regional Forum. We will end the year with our last event in Brussels, Belgium for the IPBA European Regional Conference: International Commercial Courts in Various European Jurisdictions and in Singapore to be held on 22 November.

We have also noted this year that the IPBA is receiving more and more requests from organisations to support their events. This is a very positive development and shows awareness of the IPBA internationally and recognition of the value associated with our organisation. We were asked in August to be on a panel at the AIJA Annual Congress with other international legal organisations to discuss the benefits of each organisation. Rhonda was on the panel and Perry, our President, and other Council members attended the conference the IPBA on the international scene and with the younger legal community.

Please look on the IPBA website for details of eight IPBA-supported events lined up to be held in Japan, India, Germany, Turkey, Singapore and China in the next year.

Finally, the membership renewal period for 2019 begins in November. Please don't forget to renew your membership on time. We expect 2019 to be another exciting year as IPBA comes to Singapore for its 29th Annual Meeting and Conference which will be held from 25 to 27 April 2019. We encourage everyone to take advantage of the Early Bird rate which is valid until 30 November 2018. Please refer to the IPBA website for more information.

I look forward to seeing our officers and council members in Chiang Mai soon, and all of you at the Bangkok conference in November.

Warm regards,

Caroline Berube
Secretary-General



Message to the Reader

John Wilson

Chair – Publications Committee, IPBA



Dear Reader,

Once again, I have the distinct pleasure to welcome you to another issue of the IPBA Journal.

This September issue is the second issue which I have direct responsibility for. Continuing with the thematic approach which I adopted for my 'maiden' issue, (the previous June issue which had a specific focus on taxation in the context of foreign investment in immovable property), in this issue of the Journal we focus our lens on an increasingly important area of international legal practice: arbitration.

We have been fortunate to secure contributions from exceptional authors hailing from Switzerland, China Germany/Japan, Russia, Indonesia and India.

The focus on arbitration for this issue seemed appropriate considering that the IPBA will have an 'Arbitration Day' event, which is scheduled to be held in Bangkok on 5 and 6 November, following the Mid-Year Council Meeting in Chiang Mai.

In this issue, you will find a description of the Arbitration Day event programme and the areas of discussion. I am very grateful to three members of the leadership of the Dispute Resolution and Arbitration Committee for taking the time to provide this description.

In addition, we have been extremely fortunate to have received a contribution of an article authored

by the Honorable Justice Beazley who examines the Convention on Choice of Court Agreements ('the Hague Convention'). In her article, Justice Beazley draws on an interesting debate on the question: 'The Hague Convention—The Game Changer?'. This debate took place at one of the sessions during the most recent Annual Conference of the IPBA in Manila. Justice Beazley examines the key provision in the Hague Convention and provides instructive comparisons of the state of play in regards to accession to and ratification of the Hague Convention as well as comparisons with what happened following the signing of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The first part of this article is published in this issue of the Journal and the second part of the article will be published in the December issue.

The Publications Committee is constantly on the lookout for new high-quality, content-befitting articles for publication in this Journal. As such, we invite you, dear Reader, to submit high-quality articles that you may consider worthy for publication.

I would like to take this opportunity to thank all our contributors who continue to show an interest in the Journal for their contributions.

John Wilson
Chair – Publications Committee, IPBA

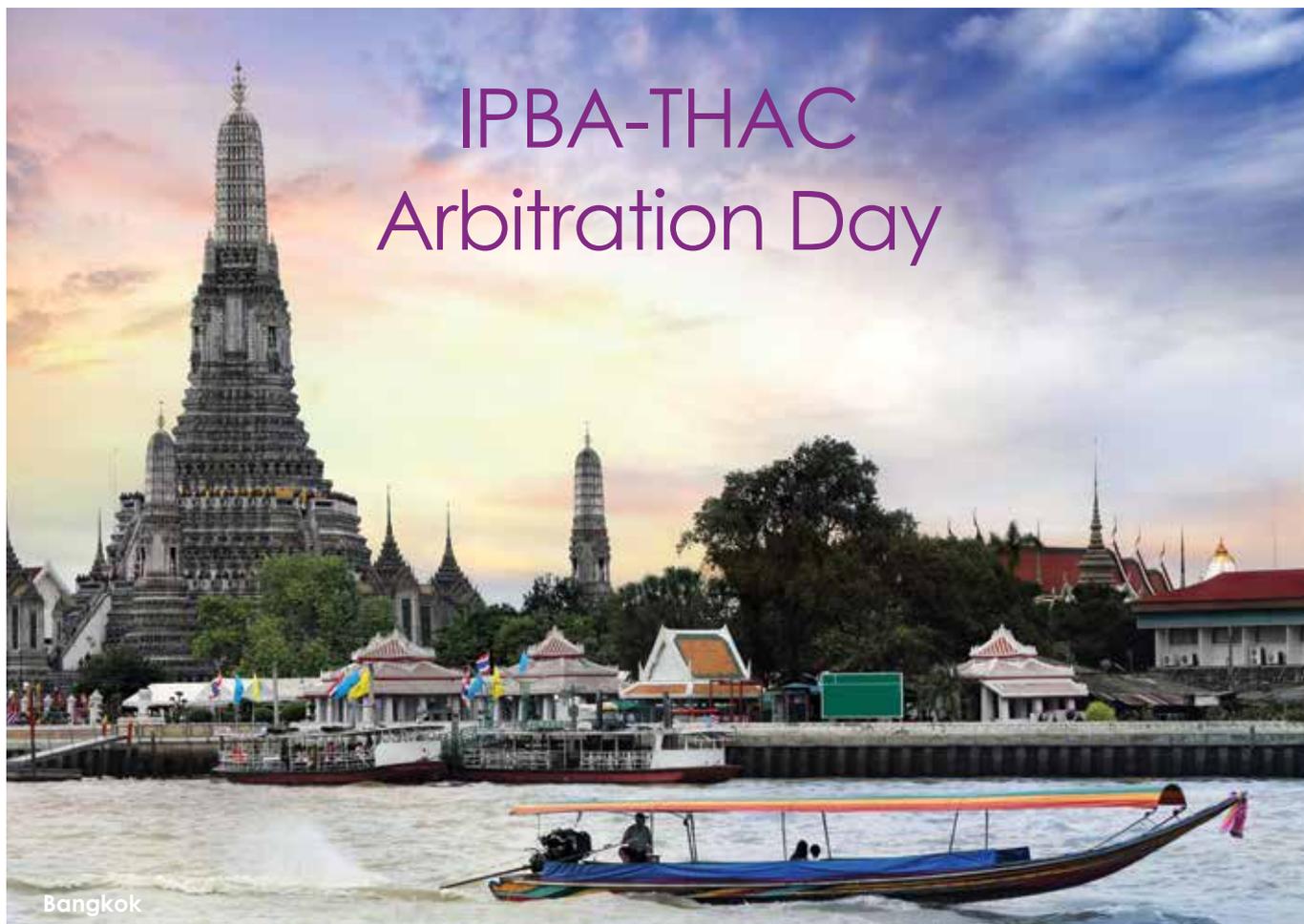
IPBA Upcoming Events

Event	Location	Date
IPBA Annual Meeting and Conferences		
29th Annual Meeting and Conference: Technology, Business & Law - Global Perspectives	Singapore	April 25-27, 2019
30th Annual Meeting and Conference	Shanghai, China	Spring 2020
IPBA Mid-Year Council Meeting & Regional Conferences		
2018 Mid-Year Council Meeting (IPBA Council Members Only)	Chiang Mai, Thailand	November 2-4, 2018
Regional Conference: 4th IPBA Arbitration Day	Bangkok, Thailand	November 5, 2018
Regional Conference: IPBA-THAC Arbitration Day	Bangkok, Thailand	November 6, 2018
IPBA Events		
Doing Business with Asia: Developments in Trade, IP, Investment and Dispute Settlement	Los Angeles, California	September 20, 2018
LatAm Legal Views on Investment, Trade, Compliance & International Dispute Resolution	Santiago, Chile	September 28, 2018
IPBA 4th East Asia Regional Forum	Seoul, Korea	November 7, 2018
IPBA European Regional Conference: International Commercial Courts in Various European Jurisdictions & in Singapore	Brussels, Belgium	November 22, 2018
IPBA Mid-East Regional Forum	Dubai, UAE	January 24, 2019
IFLR/IPBA Asia M&A Forum	Hong Kong	March 6-7, 2019
IPBA 2nd Mekong Regional Forum	Yangon, Myanmar	Spring 2019

IPBA Upcoming Events

Event	Location	Date
IPBA-supported Events		
IFLR's India M&A Forum	Mumbai, India	September 6, 2018
Wolters Kluwer's Japan: 5th Annual International Arbitration, Compliance and Competition Law Summit	Tokyo, Japan	September 6, 2018
Legal Era's 3rd Annual Legal Era Insolvency Summit 2018	Mumbai, India	September 21, 2018
Wolters Kluwer's: Turkey & ME: 5th Annual International Arbitration Summit	TBA	September 27, 2018
Hong Kong Law Society's The ABC to building a Smart belt and Road: Law and Artificial intelligence, Blockchain and Cloud	Hong Kong	September 28, 2018
Wolters Kluwer's South Korea - 7th Annual International Arbitration, Compliance and Competition Law Summit	Seoul, Korea	October 24, 2018
AIJA's 10th Annual Arbitration Conference	Singapore	October 25-27, 2018
ALB's Japan Corporate Compliance Forum	Tokyo, Japan	October 25, 2018
DUXES' 12th China Anti-corruption Compliance Summit 2018	Shanghai, China	October 25-26, 2018
DUXES' Anti-corruption Compliance EMEA Summit 2018	Dubai, UAE	November 14-15, 2018
Wolters Kluwer's China: 4th Annual International Arbitration, Compliance and Competition Law Summit - Beijing	Beijing, China	November 15, 2018
Wolters Kluwer's Indonesia and SE Asia: 6th Annual International Arbitration, Compliance and Competition Law Summit - Beijing	TBA	December 6, 2018
DUXES Anti-corruption Compliance Asia-Pacific Summit 2018	Hong Kong	December 1, 2018

More details can be found on our web site:
<http://www.ipba.org>, or contact the IPBA Secretariat at ipba@ipba.org



The forthcoming IPBA-THAC Arbitration Day on 5 and 6 November 2018 hopes to achieve several objectives. First, the IPBA Dispute Resolution & Arbitration Committee ('DRAC') leadership has listened to the views of its members to consider hosting the Arbitration Day at a new venue that is both vibrant and a promising new arbitration venue. The DRAC leadership is pleased to announce that it has decided to hold the 2018 Arbitration Day in Bangkok, with the support of the Thailand Arbitration Center (THAC), and is also pleased to announce that it has managed to secure a group of speakers who comprise the leading arbitration lawyers and arbitrators from Asia-Pacific, North America and Europe.

The first session on 5 November 2018 will explore recent legislative and case law developments in Asia. The speakers shall explore the latest changes to legislation as well as recent changes to arbitration institution rules within the region. The speakers will also be presenting and analysing recent decisions that have made an

impact on arbitration practices in their own jurisdictions, including China, Hong Kong, Japan, Korea, Singapore and Thailand.

The next session then examines the importance of arbitration on the digital economy and its impact for e-start-up companies in Asia. The speakers—who are leading arbitrators and lawyers from France, Germany, India, Hong Kong, Malaysia, the United Kingdom and the United States—will explain how the explosion of the digital and e-economy throughout Asia will benefit arbitration centres as well as arbitration practitioners. The speakers will deal with the perennial challenges surrounding arbitrations pertaining to e-commerce. They will deal with both the age-old problems involving issues of conflicts of laws and also choice of law where the parties have failed to specify the same in their e-contracts. The speakers from outside Asia will share their experiences on similar issues faced by contracting parties in Europe and North America and how tribunals and counsel have dealt with them.

The first session on day two is an important one in several ways. Previous arbitration conferences have tended to deal with best practices and how established arbitration institutions deal with various matters. Traditionally, emerging arbitration centres from within ASEAN, particularly those with civil law backgrounds, have received less attention. The ASEAN region has a combined GDP exceeding US\$ 2.6 trillion, with the majority from countries with civil law backgrounds. No previous panel session has addressed the issue of how such emerging arbitration centres as BANI, NCAC, THAC and VIAC can improve their game and, in doing so, attract and keep more of their own domestic cases. The Organising Committee considers that the further successful development of arbitration in the ASEAN Region will be of benefit to the global international arbitration market. The Panel will explore what initiatives the emerging institutions (as well as governments) might explore in order to further enhance their attractiveness as centres for arbitration (for example, reducing immigration barriers to arbitration practice).

The second session on day two deals with the interesting topic as to whether established national arbitral institutions in Asia and outside may be subconsciously biased towards the appointment of civil law or common law arbitrators. This is a very important session, which the Organising Committee expects will be of assistance to emerging arbitration centres in positioning themselves to compete with the more established arbitration centres in Asia and further afield. It is remarked in certain quarters that the established global arbitration centres have a tendency to appoint arbitrators from non-Asian (often common law) jurisdictions, while, conversely, the emerging regional arbitration centres look by default to civil law jurisdictions for their appointments.

In examining this issue, the Panel will draw from personal experience in considering the impact tribunal composition has on the strategy involved in conducting an international arbitration, as well as the steps which emerging institutions might seek to take to enhance their reputation and facilitate the fair and just resolution of disputes.

Session three on day two will deal with the topic of interaction between arbitral tribunals and the national courts of emerging and developed arbitration centres. The speakers in this session will address specific difficulties that are encountered by arbitral tribunals when they deal

with challenges brought by parties to the national courts at the seat of arbitration. The purpose of an arbitration agreement is not to completely divest a court of its power to hear and determine certain issues relating to a matter referred to arbitration. The speakers will give their views on how national courts should work within the confines of the New York Convention at both the stage of the arbitration hearing and at the enforcement stage. They will give case examples and share their experiences of how jurisdictions with emerging arbitral centres can deal with national courts and share knowledge with the local judiciary. The speakers will share their ideas on how emerging arbitral centres can try to improve their practices to facilitate the hearing process in the face of challenges made against the tribunal before the local state courts. There will be a discussion on the sort of interim measures that courts should leave to be dealt with by arbitral tribunals.

The last session on day two will be the one of the most interesting sessions of the Conference. It will deal with the issue of how arbitrators from emerging arbitration jurisdictions in Asia can gain a voice in international arbitration. The DRAC leadership fully supports the recent advances made by Women in Arbitration and Arbitral Women in advancing the call for the international arbitration community to be more inclusive. It is also important to look at geographical diversity. While there are now many laudable initiatives in place to ensure that women arbitrators have a voice in the international arbitration community, including the Equal Representation in Arbitration Pledge Initiative, there is no similar initiative in place for both male and female Asian arbitrators and non-Asian arbitrators who reside in emerging arbitration jurisdictions, including those from Indonesia, Myanmar, Philippines, Thailand, Vietnam and other smaller Asian jurisdictions. Bearing in mind the importance of diversity and inclusivity in the appointment of arbitrators, speakers will examine whether major international arbitration centres are sufficiently addressing the need to appoint Asian and Asian-based arbitrators. Speakers may wish to consider a new pledge for both Asian and Asian-based arbitrators which requires consideration to be given to the appointment of at least one Asian or Asian-based arbitrator if the dispute originates in Asia. This may also lead to a similar new pledge initiative specifically for the ASEAN region.

Organising Committee
IPBA-THAC Arbitration Day

Is the Hague Convention on Choice of Court Agreements a Game Changer? (Part One)

The Hague Convention came with several revelations and modifications to the world of law. One of the most prominent being that on the choice of court agreements. Often in the arbitral landscape, the question of enforcement arises. In that regard the Hague Convention holds the potential to be a revolutionary aspect towards that end. Is the Hague Convention on Choice of Court Agreements a game changer?



The Peace Palace, seat of the International Court of Justice, The Hague

Introduction

In the 1970s, the then Chief Justice of the United States recognised that '[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts'.¹ As this statement recognises, it is an 'inevitable incident[t] of international commerce'² that disputes between commercial parties will arise and, as experience teaches us, the efficient resolution of disputes is necessary for the maintenance of strong economic activity. More than 30 years later, the now Chief Justice of the Federal Court of Australia stated that '[a]n ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce'.³ These observations are particularly pertinent in the context of the Asia-Pacific region, which has been characterised as the 'most dynamic economic region in the world'.⁴

Arbitration has long been an accepted mechanism for dispute resolution and, today, is probably the leading dispute resolution mechanism for international commercial and intergovernmental disputes. Until about 40 years ago, arbitration had a national, rather than international, focus, in that it was governed by national laws and subject to review by national courts.⁵ The dramatic expansion of the scope of arbitration and the relaxation of the approach taken by national courts towards arbitration,⁶ which brought about an influx of new arbitration cases, saw the establishment of new arbitration institutions, the introduction of a wide range of regulatory rules (including various institutional rules, guidelines and codes) and the international harmonisation of arbitration laws and practices.⁷ The popularity of international arbitration is reflected in the steady increase of the case loads of leading arbitral institutions, with the number of reported cases increasing between three- and five-fold since the late 1980s.⁸

In more recent times, it has been recognised that juridical adjudication by courts continues to be of relevance in the resolution of international commercial disputes. Indeed, its relevance and importance has been revitalised in recent years.⁹ However, as the statement of Allsop CJ emphasises, adjudication, whether arbitral or judicial, without effective enforcement mechanisms is, effectively, an 'empty shell'. It is therefore unsurprising that questions of enforceability have once again emerged as a vital consideration in the sphere of international commercial dispute resolution.

Against this background, at the 2018 Inter-Pacific Bar Association Annual Meeting and Conference held in Manila, panellists from both common law and civil jurisdictions engaged in a timely debate as to whether the *Convention on Choice of Court Agreements*,¹⁰ commonly referred to as the Hague Convention, is a 'game changer' ('the Manila debate').¹¹ This article reflects on the Manila debate. It addresses the threshold question of what is meant by the term 'game changer', before considering the arguments for and against the view that the Hague Convention is a game changer. It concludes, at its highest, that while the Hague Convention has the potential to be a game changer, it has yet to reach that status. Significant doubts were expressed by the opposing team as to whether that status would ever be reached.

The Hague Convention: Preliminary Observations

The Hague Convention was a product of the Judgments Project, a project undertaken by the Hague Conference on Private International Law ('Hague Conference') concerning the international jurisdiction of courts and the enforcement of foreign judgments. The Convention entered into force on 1 October 2015 and seeks to establish:

... an international regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements.¹²

The Hague Convention contains three key provisions. First, article 5 provides that, as a general rule, the court designated in an exclusive choice of court agreement ('the chosen court') must exercise its jurisdiction to decide a dispute to which the agreement applies.¹³ Second, article 6 provides that, as a general rule, a court that is not the chosen court must suspend or dismiss any proceedings to which an exclusive choice of court agreement applies.¹⁴ Third, article 8 provides that, as a general rule, a judgment rendered by the chosen court must be recognised and enforced in other states parties to the Convention.¹⁵

At present, there are 30 states party to the Convention, namely, the member states of the European Union, Mexico, Singapore and Denmark. In addition, four states

(Montenegro, the People's Republic of China, Ukraine and the United States of America) have signed, but not ratified, the Convention.

The Threshold Question: What Does it Mean to be a 'Game Changer'?

As is the case with any game, it is important to demarcate the playing field. In this case, the playing field is international commercial dispute resolution, the key mechanisms of which need no introduction—they are litigation, arbitration and mediation.

The historically intemperate relationship between arbitration and litigation is well known, and was stated pithily by Lord Campbell in 1856, when he noted that '[s]omehow the courts of law had, in former times, acquired a horror of arbitration'.¹⁶ Today, in most countries, such judicial antipathy towards arbitration has dissipated in favour of an appreciation of its importance to international trade and commerce.¹⁷ Courts now tend to give priority to party autonomy and eschew intervention.¹⁸

While it has been suggested that the Hague Convention may serve as the tool 'by which the judicial empire ... strike[s] back',¹⁹ it was accepted during the Manila debate that it is unlikely that the Convention will lead to the displacement of international arbitration,²⁰ and nor should it. Rather, litigation and arbitration should be seen as mutually supportive structures in the marketplace of international dispute resolution.²¹ In particular, judicial determination is the appropriate forum for the clear and determinate articulation of principles of law and their proper application.²² The rule of law requires that this be so. This is as important for arbitration as it is for litigation. Importantly, such legal principles are increasingly being considered having regard to the jurisprudence of other jurisdictions.

The courts also provide the arbitration process with the necessary supervision and support it requires to maintain its integrity.²³ Where there is 'a gap or a failure in the arbitration mechanism',²⁴ such as where the independence or impartiality of an arbitrator is called into question, judicial intervention is essential.

To the extent that arbitration is often cited as the preferred mode of international commercial dispute resolution, the Hague Convention must transform litigation into a viable and attractive alternative in order to be a 'game changer'. To succeed, the Hague Convention must

whet the appetite of parties to cross-border commercial transactions and lead them to consider litigation from the menu of available dispute resolution mechanisms. Litigation, where it is the most appropriate mechanism, should be selected as willingly and as readily as arbitration is currently.

The New York Convention—Precursor or Stimulus?

Almost 60 years ago, what has been described as the 'most effective instance of international legislation in the entire history of commercial law'²⁵ entered into force: the Convention on the Recognition and Enforcement of Foreign Arbitral Awards²⁶ (or, as it is commonly known, the New York Convention). Central to the Convention are obligations imposed on states parties to recognise agreements to arbitrate²⁷ and to recognise and enforce arbitral awards.²⁸

During the Manila debate, the New York Convention was used as a yardstick by which to measure the success of the Hague Convention and, according to the affirmative team, this was rightly so, as the Hague Convention seeks to do for foreign judgments what the New York Convention has done for arbitral awards. However, the opposing team's criticism of the Hague Convention on such a comparison was stinging. They quoted from the public hearings on the Australian Parliament's Joint Standing Committee on Treaties to make their point. As the Chair said of the Hague Convention, '[i]t seems like it is moving at the speed of an asthmatic ant with a heavy load of shopping'.²⁹

As noted earlier, only 30 states have ratified the Hague Convention thus far: the member states of the European Union, Mexico, Singapore and Denmark. This is in stark contrast to the 157 states that have ratified the New York Convention, rendering an arbitral award a form of global currency. One explanation for this difference may be that the New York Convention requires states to recognise and enforce foreign arbitral awards, which are considered a form of 'private justice' in that they do not emanate from the state and are only very loosely connected to the state of the seat of arbitration, if at all. A compelling rationale for enforcing arbitral awards is that parties have chosen this form of dispute resolution and should therefore be bound by their choice. By way of contrast, the Hague Convention requires a state to recognise and enforce a foreign judgment, which, properly characterised, is an act of the state emanating from a state's judiciary. This gives

the Hague Convention a political dimension, which may render states more reluctant to ratify it.

Looking beyond the numbers, some of the world's largest economies have not yet signed or ratified the Hague Convention. For example, Japan (No 3), India (No 7), Brazil (No 9) and Canada (No 10) have yet to sign the Hague Convention, and the United States of America (No 1) and the People's Republic of China (No 2) have yet to ratify it. This lack of progress does not generate confidence, and without the numbers, the Convention will not be a success.

In particular, having regard to the Asia-Pacific region, only Singapore is a party to the Hague Convention. This reflects concerns expressed by the Australian Attorney-General's Department that Asia is 'chronically underrepresented' at the Hague Conference,³⁰ although that has started to change in recent years.³¹

However, the situation may not be as bleak as it first appears. Comparisons are meaningless if they are not based on the same starting point. The Hague Convention entered into force some 56 years after the New York Convention. Accordingly, a valid comparison between the Conventions requires a consideration of the status of the New York Convention just less than three years after it entered into force—that is, in early 1962. At that time, the Convention only had 21 states parties. These figures bode well for the Hague Convention, which gained 30 states parties in the same period of time.

However, if the assessment is undertaken from when the Hague Convention opened for signature in 2005, as distinct from when the Convention entered into force, it becomes apparent that, during the course of 13 years, only 30 states have signed and ratified the Convention. In comparison, in the first 13 years of the New York Convention's existence, it attracted 38 state parties.

The Hague Convention suffered from an initially slow uptake. Some argued that as the United States proposed the Convention, other states may have been inclined to wait to see if the United States ratified the Convention before taking any action.³² However, the fact that China, a key player in international trade and commerce, signed

the Convention last year demonstrates that there is ongoing momentum. In addition, China's 'Belt and Road' initiative will likely provide added impetus. Montenegro also signed the Convention last year, and other states have signalled their intention to do so. For example, in late 2016, the Joint Standing Committee on Treaties supported Australia's accession to the Hague Convention and recommended that binding treaty action be taken.³³

Although the Hague Convention entered into force just over two years ago, its effects can already be felt among international organisations. For example, the International Swaps and Derivatives Association ('ISDA') has announced that it will update the ISDA Master Agreements to conform to the Convention's requirements—a move declared to be an 'important step'³⁴ by ISDA.

The Promise of Certainty and Finality

At present, choice of court agreements are not always respected under divergent national rules,³⁵ which creates an undesirable level of uncertainty for commercial parties. The question of the enforcement of foreign judgments is no more certain. A recent survey conducted by the Asian Business Law Institute revealed that there is disparity in the enforcement of judgments in the Asia-Pacific region. Some states do not appear to recognise and enforce foreign judgments at all, while others will only do so if there is reciprocity.³⁶

It was not in contention during the Manila debate that articles 5 and 6 of the Hague Convention enhance the value of choice of court agreements and will provide greater certainty and predictability to parties to such agreements.³⁷ Similarly, it was not in contention that article 8 of the Convention enhances the enforceability of foreign judgments, thereby bypassing the need for states to enter into bilateral enforcement agreements.³⁸ Indeed, the 'crowning virtue'³⁹ underlying arbitration's strong foothold in the international commercial dispute resolution landscape is the existence of a 'global web of enforceability'.⁴⁰ In an international arbitration survey conducted earlier this year, 64 percent of respondents indicated that they preferred arbitration to other dispute resolution processes because of the enforceability of arbitral awards.⁴¹ It is true that this web took a long time

Some of the world's largest economies have not yet signed or ratified the Hague Convention

to achieve, as discussed above, and that, similarly, it will be some time before the Hague Convention establishes such a web. However, article 8 provides the underlying framework necessary to achieve this outcome.

It must be recognised, as the opposing team stressed, that enforceability is only one factor that leads parties to choose arbitration over litigation. The other factors are oft cited and include confidentiality, procedural flexibility and the ability to have the arbitrators of one's choice. In the 2018 survey referred to above, 60 percent of respondents indicated that they preferred arbitration because it allowed them to avoid specific legal systems and national courts, 40% referred to the flexibility of arbitration, 39% valued the ability to select arbitrators and 35% were attracted to the confidential and private nature of the process.⁴² The Hague Convention does not and cannot provide anything similar, except to the extent that in some national courts, there are expert judicial officers or panels which enables those courts to provide an adjudication in specialist areas.

However, the affirmative team argued that the absence of these arbitral features in the judicial sphere does not mean that the Hague Convention will not become a game changer. Some disputes are better suited to being resolved in public proceedings governed by formal procedural rules and subject to the coercive powers of a court. For example, a dispute that raises novel legal issues can only be determined authoritatively by a court,⁴³ not only in the particular case, but for the purpose of establishing legal principles for future cases.

By laying down principles of law, the courts provide certainty for future commercial transactions and a principled basis for the resolution of disputes raising the same legal issues. The commercial community generally is thus the beneficiary. Accordingly, the greater the uptake of the Convention, the more effectively courts will be able to serve the commercial community in the resolution of those disputes that are, or which ought to be, brought in the courts.

Further, arbitration is not without its critics, and the arbitration community itself has voiced its discontent with the cost of arbitration and the lack of effective sanctions

during the arbitral process.⁴⁴ An effective alternative can only make arbitration more efficient.

Ultimately, the affirmative team argued that the promise of certainty and finality will encourage cross-border trade and commerce. Entities are more likely to engage in international business with the confidence that their choice of court agreement will govern any dispute and that any resulting judgment will be enforced.⁴⁵ As the former Chief Justice of New South Wales, the Hon JJ Spigelman AC, noted, '[t]he global patchwork quilt of rules and practices for recognition and enforcement of foreign judgments is, by reason of its limited scope, a significant barrier to world trade and investment'.⁴⁶

This deficiency is addressed by the Hague Convention. Articles 5 and 6 work to ensure that unnecessary time and expense are not wasted on determining whether a court that is the chosen court should not exercise jurisdiction, or whether a court that is not the chosen court should suspend or dismiss the proceedings, thereby minimising forum shopping. The "carrot" of enforcement⁴⁷ will also reduce a significant amount of parallel litigation,⁴⁸ and the delay and costs associated with re-litigating issues that have already been determined.

The second part of this article will appear in the December 2018 edition

Notes:

- ¹ *M/S Bremen v Zapata Off-Shore Co*, 407 US 1, 9 (1972) (Burger CJ).
- ² The Hon JJ Spigelman AC, 'International Commercial Litigation: An Asian Perspective' (2007) 35 *Australian Business Law Review* 318, 318.
- ³ *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, 95 [192] (Allsop J).
- ⁴ Spigelman, n 2 above, 318.
- ⁵ Stavros Brekoulakis, 'Introduction: The Evolution and Future of International Arbitration' in Stavros Brekoulakis, Julian DM Lew and Loukas Mistelis (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) 1, 5.
- ⁶ *Ibid* 6.
- ⁷ *Ibid* 5-8.
- ⁸ Gary B Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012) 17.
- ⁹ See, e.g. Justice James Allsop, 'Australia—A Vital Commercial Hub in the Asia Pacific Region: The Importance of and Challenges for Australian Commercial Courts and Arbitral Institutions' [2015] *Federal Judicial Scholarship* 3.
- ¹⁰ Opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015) ('Hague Convention').
- ¹¹ For the proposition: The Hon Justice MJ Beazley AO, President of the

The greater the uptake of the Convention, the more effectively courts will be able to serve the commercial community

New South Wales Court of Appeal; Chan Leng Sun SC, Global Head of Arbitration at Baker McKenzie; and Colin Seow, District Judge and a registrar of the Singapore International Commercial Court. For the opposition: Dr Dorothee Ruckteschler, Partner at CMS Hasche Sigle; Yoshimasa Furuta, Partner and Co-Chair of Dispute Resolution at Anderson Mori & Tomotsune; and Marion Smith QC of 39 Essex Chambers.

¹² Hague Convention, preamble.

¹³ *Ibid*, article 5.

¹⁴ *Ibid*, article 6.

¹⁵ *Ibid*, article 8.

¹⁶ *Russell v Pellegrini* (1856) 6 E & B 1020, 1026 (Lord Campbell).

¹⁷ See e.g. *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45.

¹⁸ Julian DM Lew, Loukas A Mistelis and Stefan M Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 356.

¹⁹ Chief Justice Robert French AC, 'International Commercial Dispute Resolution and the Place of Judicial Power' (2014) 11 *Judicial Review* 349, 363.

²⁰ Richard Garnett, 'The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?' (2009) 5 *Journal of Private International Law* 161, 173. Cf Jeffrey Talpis and Nick Krnjec, 'The Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant That Gave Birth to a Mouse' (2006) *Southwestern Journal of Law and Trade in the Americas* 1, 35.

²¹ Spigelman, n 2 above, 320; Ved P Nanda, 'The Landmark 2005 Hague Convention on Choice of Court Agreements' (2007) 42 *Texas International Law Journal* 773, 787; Sundaresh Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution' (Speech delivered at Dubai International Financial Court Lecture Series 2015, Dubai, 22 January 2015); Allsop, n 9 above, para [16].

²² Robert S Summers, 'The Principles of the Rule of Law' (1999) 74 *Notre Dame Law Review* 1691, 1693–5.

²³ Spigelman, n 2 above, 320; Allsop, n 9 above, para [15]; Michael Hwang, 'Commercial Courts and International Arbitration—Competitors or Partners?' (2015) 31 *Arbitration International* 193, 194.

²⁴ Spigelman, n 2 above, 320.

²⁵ Michael John Mustill, 'Arbitration: History and Background' (1989) 6 *Journal of International Arbitration* 43, 49.

²⁶ Opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) ('New York Convention').

²⁷ *Ibid*, article 2.

²⁸ *Ibid*, article 3.

²⁹ Public Hearing on the Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 10 October 2016, 6 (Stuart Robert MP).

³⁰ *Ibid* 10 (Andrew Walter, Assistant Secretary, Attorney-General's Department).

³¹ The Attorney-General's Department noted that 'Singapore is a relatively new player in the space. Vietnam is a relatively new player in the space. China has been there for a long time and has just become a very active player in a way that it had not previously': Public Hearing on the Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 10 October 2016, 10 (Andrew Walter, Assistant Secretary, Attorney-General's Department).

³² Matthew H Adler and Michele Crimaldi Zarychta, 'The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band' (2006) 27 *Northwestern Journal of International Law & Business* 1, 36.

³³ Joint Standing Committee on Treaties, Parliament of Australia, *Implementation Procedures for Airworthiness—USA; Convention on Choice of Courts—Accession; GATT Schedule of Concessions—Amendment; Radio Regulations—Partial Revision* (Report No 166, November 2016) 23 [3.21].

³⁴ International Swaps and Derivatives Association, *2018 ISDA Choice of Court and Governing Law Guide* (2018) 6.

³⁵ The Hon Chief Justice Marilyn Warren AC and the Hon Justice Clyde Croft, 'An International Commercial Court for Australia—Looking beyond the New York Convention' (Speech delivered at the Commercial CPD Seminar Series, Melbourne, 13 April 2016).

³⁶ Asian Business Law Institute, *Recognition and Enforcement of Foreign Judgments in Asia* (2017).

³⁷ Paul Beaumont, 'Hague Choice of Court Agreements Convention 2005:

Background, Negotiations, Analysis and Current Status' (2009) 5 *Journal of Private International Law* 125, 126; Garnett, n 20 above, 167.

³⁸ In the Australian context, the enforcement of foreign judgments has been described as 'fragmented', as Australia is party to various reciprocal recognition agreements: Michael Douglas, 'A Consideration of Current Issues in Private International Law' (2017) 44 *Australian Bar Review* 338, 350. See e.g. *Foreign Judgments Regulations 1992* (Cth); *Trans-Tasman Proceedings Act 2010* (Cth).

³⁹ Guy S Lipe and Timothy J Tyler, 'The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases' (2010) 33 *Houston Journal of International Law* 1, 5.

⁴⁰ Warren and Croft, n 35 above.

⁴¹ Queen Mary University of London and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) 7.

⁴² *Ibid*.

⁴³ Spigelman, n 2 above, 320.

⁴⁴ See e.g. Queen Mary University of London and White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015).

⁴⁵ Beaumont, n 37 above, 126; Garnett, n 20 above, 168.

⁴⁶ The Hon JJ Spigelman AC, 'The Hague Choice of Court Convention and International Commercial Litigation' (2009) 83 *Australian Law Journal* 386, 386.

⁴⁷ Louise Ellen Teitz, 'Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation' (2004) 10 *Roger Williams University Law Review* 1, 68.

⁴⁸ *Ibid*.



The Hon Justice M J Beazley AO President of the New South Wales Court of Appeal, Australia

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Her Honour was made an Officer in the Order of Australia in the Queen's Birthday Honours List on 12 June 2006 for service to the judiciary and the law, particularly through contributions to professional and ethical standards and to the advancement of women in the legal profession and the community. In May 2008 her Honour was awarded Doctor of Laws honoris causa (Hon LLD) by the University of Sydney. In 2012, she was named as one of the inaugural *Australian Financial Review/Westpac 100 Women of Influence*.

Recent Developments in the Investment Arbitration Landscape – Efficient Protection of European Investments in the Aftermath of the Achmea Ruling

The European investment arbitration landscape has recently been shaken by the judgment of the CJEU in the famous Achmea case, which is highly relevant also for investors from the Asia-Pacific region holding investments in Europe. This article reviews the developments since the release of the Achmea judgment, and explores possible strategies to optimize investment protection in the post-Achmea world.



Introduction

In the midst of the US-initiated trade war, European economies have become more attractive not only for Chinese outbound investments, but also to investors from other major economies such as Japan and Singapore. However, the European investment arbitration landscape has been recently shaken by the—now famous—6 March 2018 judgment of the Court of Justice of the European Union ('CJEU') in the case *Slovak Republic v Achmea B.V.*¹ ('Achmea'), in which the CJEU ruled that the arbitration clause contained in the bilateral investment treaty ('BIT') between the Netherlands and the Slovak Republic was incompatible with European law. Unsurprisingly, this decision has fuelled the EU Commission's crusade against intra-EU BITs: recent developments point towards a termination of their intra-EU BITs by several EU member states ('Member States').

However, the *Achmea* shock waves are not confined to the European borders. Dispute settlement clauses contained in international investment agreements negotiated by the EU itself with third countries may well be affected. The reasoning in *Achmea* may indeed tip the scales against the new Investor Court System ('ICS') promoted by the EU and included in both the EU-Singapore and the EU-Vietnam free trade agreements, which are yet to be signed. In the context of the Comprehensive Economic and Trade Agreement ('CETA') between Canada and the EU, Belgium has submitted to the CJEU in 2017 a request for an opinion on the compatibility of the ICS with the EU Treaties ('Opinion 1/17'). *Achmea* was one of the topics raised during the hearing on Opinion 1/17, which took place on 26 June 2018, and the CJEU's opinion is eagerly awaited.²

While the full meaning and practical impact of *Achmea* are still uncertain and have been debated heatedly among arbitration practitioners over the last few months, investors worldwide are well advised to reassess the structure of their investments in Europe, in order to ensure that they still benefit from the best possible protection. This is also highly relevant for investors from the Asia-Pacific region. Even though investors from third countries are arguably still sufficiently protected under the existing extra-EU BITs, issues may arise where investments have been structured through entities or holding companies located within the EU, as is often the case.

The Achmea Ruling

This matter arose out of a dispute between the Dutch insurance company Achmea B.V. and the Slovak Republic, after the latter had adopted regulations impacting the health insurance market. Achmea B.V. initiated arbitration proceedings under the BIT between the Netherlands and the Slovak Republic ('Netherlands-Slovakia BIT').³ The matter was referred to an *ad hoc* arbitral tribunal seated in Frankfurt which, in 2012, rendered an award ordering Slovakia to pay damages in the principal amount of EUR 22.1 million to Achmea B.V. Slovakia applied to set aside this award before the *Oberlandesgericht Frankfurt am Main* (Higher Regional Court), which dismissed the application. Slovakia subsequently appealed this decision to the German *Bundesgerichtshof* (Federal Court of Justice). In this context, the *Bundesgerichtshof* requested a preliminary ruling from the CJEU on the compatibility of arbitration clauses contained in intra-EU BITs with the Treaty on the Functioning of the European Union ('TFEU').⁴



Disregarding Advocate General Wathelet's outspoken defence of intra-EU investment arbitration⁵, the CJEU ruled that the arbitration clause in Article 8 of the Netherlands-Slovakia BIT was incompatible with EU law. According to the CJEU, Articles 267 and 344 of the TFEU must be interpreted

... as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the [Netherlands-Slovakia] BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.⁶

The CJEU first recalled that the EU Treaties have established a judicial system which intends to ensure consistency and uniformity in the interpretation of EU law.⁷ In particular, the Member States have undertaken under Article 344 of the TFEU not to submit disputes concerning the interpretation or application of the EU Treaties to any method of settlement other than provided for in the Treaties.⁸ The CJEU also noted that the preliminary ruling procedure provided for in Article 267 of the TFEU is a keystone of the judicial system which aims to ensure the uniform interpretation of EU law, and thereby its consistency, full effect and autonomy.⁹ On the basis of these premises, the CJEU applied a three-step analysis in order to determine whether the arbitration clause contained in Article 8 of the Netherlands-Slovakia BIT contradicts these principles.

First, the CJEU examined whether the disputes which the arbitral tribunal under Article 8 of the Netherlands-Slovakia BIT is called to resolve may relate to the interpretation or application of EU law. The CJEU noted that even if the disputes falling under this disposition relate to possible BIT infringements, tribunals seized with such disputes also have to take into account the law in force in the relevant contracting party. As EU law forms part of the law in force in every Member State, it follows that the arbitral tribunal may be called on to interpret or apply EU law.¹⁰

Second, the CJEU analysed whether an arbitral tribunal may be regarded as a court or tribunal of a Member State within the meaning of Article 267 of the TFEU, and came to the conclusion that it is not the case and that

arbitral tribunals are therefore not entitled to apply to the CJEU for preliminary rulings.¹¹

In a third step, the CJEU ascertained whether an arbitral award made by such a tribunal is subject to review by a court of a Member State, ensuring that the questions of EU law can be submitted to the CJEU by means of a reference for preliminary ruling. As the *lex arbitri* (here German law) provided only for limited review of the award, the CJEU came to the conclusion that the Netherlands-Slovakia BIT established a mechanism for settling disputes 'which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law'.¹² On this basis, the CJEU found that Article 8 of the Netherlands-Slovakia BIT had 'an adverse effect on the autonomy of EU law'.¹³

Fortunately, the CJEU made clear that these considerations do not apply to commercial arbitration, finding that arbitration proceedings under BITs are different from commercial arbitration proceedings, as they 'derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts [...] disputes which may concern the application or interpretation of EU law'.¹⁴ This clarification is welcome, even though the reasoning behind the distinction between commercial and investment arbitration fails to convince and has been questioned by legal commentators.

The Post-Achmea World – Areas of Uncertainty and Recent Developments

Achmea was a major earthquake for the international investment arbitration community. The decision has certainly been one of the most profusely commented upon. Even though the CJEU's ruling was not particularly surprising given the pre-existing climate within the EU when it comes to traditional investor-state dispute settlement ('ISDS') mechanisms, the rather short judgment raises numerous questions and concerns.

While some legal commentators argue that the reasoning in *Achmea* might not be transposable to dispute settlement clauses contained in other BITs, as it is specific to the Netherlands-Slovakia BIT, there seems to be a consensus that the CJEU's decision is in fact a death sentence for investment arbitration based on intra-EU BITs. However, what will become—in practice—of pending intra-EU investment arbitration proceedings is still unclear. While arbitral tribunals might defy the



Achmea was a major earthquake for the international investment arbitration community

CJEU's decision and carry through with pending arbitrations, state courts seized with enforcement or setting aside applications will have to seriously consider the implications of the *Achmea* ruling. Indeed, the Svea Court of Appeal (Sweden) has already stayed enforcement of two awards in light of *Achmea*.¹⁵

Another important area of uncertainty is the impact of the *Achmea* ruling on proceedings under the auspices of the International Centre for Settlement of Investment Disputes ('ICSID'). The ICSID Convention obliges its contracting states to enforce ICSID awards 'as if it were a final judgment of a court in that State' (Article 54 of the ICSID Convention). Some commentators argue that the *Achmea* ruling is not compatible with this obligation, and that the CJEU did not intend it to catch ICSID arbitration. However, even though the tribunal in *Achmea* was an *ad hoc* tribunal, the wording of the CJEU's ruling is sufficiently broad to encompass ICSID arbitration, and the rationale seems to apply regardless of the type of arbitration or the institution under the auspices of which such arbitration is conducted.

It is also still unclear whether *Achmea* is intended to apply to arbitration clauses contained in multilateral investment treaties and treaties to which the EU itself is a contracting party, as the ruling is not limited to BITs (unlike the

questions referred by the German *Bundesgerichtshof*), but refers to international agreements.¹⁶ Since the release of *Achmea*, this question has already arisen several times with regard to arbitrations under the Energy Charter Treaty ('ECT'). Spain, which is currently facing a large amount of investment claims under the ECT, took full advantage of the CJEU's decision. On the very same day, it sought to reopen proceedings in the ICSID arbitration brought against it by Masdar Solar & Wind Cooperatief U.A.; however, the tribunal seized with the matter concluded that *Achmea* cannot be applied to multilateral treaties such as the ECT, to which the EU itself is a party, and had therefore no bearing upon the case.¹⁷ However, the Svea Court of Appeal took an opposite view and stayed enforcement of the award in *Novenergia v Spain*, another ECT case.¹⁸ The Swedish court is likely to refer the case to the CJEU, which should bring clarification on whether the reasoning in *Achmea* also applies to the ECT. In the meantime, challenges to jurisdiction by Member States are likely to multiply; it has already been reported that Germany has requested that the *Vattenfall* case¹⁹ (another ECT case under the auspices of ICSID) be dismissed for lack of jurisdiction.

Until the practical consequences of *Achmea* are settled, investors will have to assess whether it makes sense to invest time and money in pending or yet-to-be-initiated

intra-EU investment arbitration proceedings with the risk of the award being unenforceable in the EU. It has been recently reported that Airbus has withdrawn the claim it had filed in December 2017 against Poland under the Netherlands-Poland BIT. Other investors may adopt the same cautious approach and turn to state courts instead of arbitral tribunals.

On the political field, even though the *Achmea* ruling does not have a direct effect on the validity of the numerous intra-EU BITs currently in force (nearly 200), it has clearly given a push to the EU Commission's long-standing war against them. The EU Commission has been urging the Member States to terminate their intra-EU BITs for years. In June 2015, the Commission even initiated infringement proceedings against Austria, the Netherlands, Romania, Slovakia and Sweden, requesting them to terminate their existing intra-EU BITs. Following *Achmea*, the Netherlands, which had not surrendered so far, has indicated that it will seek to terminate its BITs with Slovakia and other Member States. Denmark, and more recently Poland and Romania are seeking to do the same. Italy had already done so previous to the CJEU's ruling. In light of *Achmea*, it seems that other Member States will have no choice but to follow suit or at least seek to revise the dispute settlement mechanisms as provided for under their existing intra-EU BITs.

Either way, *Achmea* has fuelled the EU Commission's efforts to replace the current prevailing ISDS mechanism with a permanent international court. Shortly after the release of *Achmea*, on 20 March 2018, the EU Council adopted directives authorising the EU Commission to negotiate, on behalf of the EU, a convention establishing a multilateral court for the settlement of investment disputes. In the post-*Achmea* area, it seems that the EU is inescapably moving away from investment arbitration to a court system.

Taking Stock of *Achmea* – Possible Restructuring of Investments

In a perfect world, mutual trust and common values between the Member States²⁰ should be sufficient to ensure investment protection within the European Union. However, in the real world, the courts of certain Member States are not seen by investors as reliable or predictable. The ruling in *Achmea* and the surrounding uncertainty since its release in March 2018 might scare certain investors away.

Even though *Achmea* could have, in the long run, adverse impact also on extra-EU BITs, for the time being the consensus is that the CJEU's ruling applies only to intra-EU BITs. In order to benefit from maximal treaty protection, prudent investors may therefore want to consider restructuring their European investments through companies located outside of the EU, in countries which have concluded investment treaties with the countries in which their investments are located. Geographically located in Europe, the obvious candidate is Switzerland, with its wide network of international investment agreements, business friendly environment and excellent economic and trade relations with the EU. Post-Brexit United Kingdom will also be a potential choice, although a more risky one as the exact consequences of Brexit on the investment protection network currently in place and the framework for future trade relations with the EU are still not clearly defined.

However, to be effective, restructuring should be implemented ahead of time in order to avoid possible allegations of bad faith or abuse of process by the respondent Member State in the context of a dispute. Measures to optimise BIT protection have been considered as acceptable by arbitral tribunals in the past, provided however that they were taken *before* the facts leading to a dispute arise and that the nationality requirements under the relevant BIT or investment treaty are met.²¹ For existing disputes, investors which are audacious enough to start arbitration proceedings against an EU Member State on the basis of an intra-EU BIT or of the ECT are well-advised to take all possible measures to ensure that the seat of the arbitration will be located outside of the European Union. This will increase the chances of having the award recognised and enforced, if not in the European Union, at least in third countries. With its well-established arbitration tradition and arbitration-friendly courts, Switzerland will once again be an attractive choice. Parties looking for a seat of arbitration in Asia may turn to Singapore, and the number of investment arbitrations seated in the island-state will certainly increase. Interestingly, the Singapore International Arbitration Centre has in fact recently launched investment arbitration rules, a clear attempt to attract more investment cases in the future.

Conclusion

In light of *Achmea*, the EU Commission's crusade against the traditional investment arbitration system seems unstoppable. The future will tell us whether a

multilateral court system as pushed by the EU will prevail, and whether it will ensure a fairer or more efficient resolution of investment disputes. At this stage, recent developments seem to confirm that *Achmea* signs the death warrant of intra-EU investment arbitration, and the chances that investors will be able to bargain their way out of it by invoking that ICSID arbitration or the ECT are not covered by the CJEU's ruling appear questionable at the least. Savvy investors worldwide should take stock of *Achmea*, assess whether their investments in the European Union are still sufficiently protected and move on to greener pastures. International dispute resolution practitioners surely have an important role to play in ensuring efficient transition in the post-*Achmea* area. One possible measure is to consider restructuring European investments through third countries in order to maximise treaty protection.

Notes

¹ CJEU, Judgment of 6 March 2018, *Slovak Republic v Achmea B.V.*, C-284/16, EU:C:2018:158 ('*Achmea*').

² Gesa Kübek: CETA's Investment Court System and the Autonomy of EU Law: Insights from the Hearing in Opinion 1/17, *VerfBlog*, 2018/7/04, available at <<https://verfassungsblog.de/cetas-investment-court-system-and-the-autonomy-of-eu-law-insights-from-the-hearing-in-opinion-1-17/>>.

³ Or, more precisely, the 'Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic', concluded in 1991, which can be uploaded at <<http://investmentpolicyhub.unctad.org/IIA/treaty/2650>>.

⁴ The exact questions as referred to the CJEU were: '(1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date? If Question 1 is to be answered in the negative: (2) Does Article 267 TFEU preclude the application of such a provision? If Questions 1 and 2 are to be answered in the negative: (3) Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?' (*Achmea* at para [23]).

⁵ Opinion of Advocate General Wathelet delivered on 19 September 2017, *Slovak Republic v Achmea B.V.*, C-284/16, EU:C:2017:699.

⁶ *Achmea* at para [60].

⁷ *Ibid* at para [35].

⁸ *Ibid* at para [32].

⁹ *Ibid* at para [37].

¹⁰ *Ibid* at paras [39]–[42].

¹¹ *Ibid* at paras [43]–[49].

¹² *Ibid* at para [56].

¹³ *Ibid* at para [59].

¹⁴ *Ibid* at para [55].

¹⁵ *Novenergia II–Energy & Environment (SCA), SICAR v The Kingdom of Spain*, SCC Arbitration (2015/063), Award, 15 February 2018 and Decision of the Svea Court of Appeals Suspending the Enforcement of the Award until Further Notice, 16 May 2018, both available at <<https://www.italaw.com/cases/6613>> and *PL Holdings S.à.r.l. v Republic of Poland*, SCC Case No. V 2014/163, Award, 28 June 2017, available at <<https://www.italaw.com/cases/620>>.

¹⁶ *Achmea* at para [60].

¹⁷ *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, at paras [678]–[683].

¹⁸ *Novenergia II–Energy & Environment (SCA), SICAR v The Kingdom of Spain*, SCC Arbitration (2015/063), Award, 15 February 2018 and Decision of the Svea Court of Appeals Suspending the Enforcement of the Award until Further Notice, 16 May 2018, both available at <<https://www.italaw.com/cases/6613>>.

¹⁹ *Vattenfall AB & Ors v Federal Republic of Germany*, ICSID Case No. ARB/12/12.

²⁰ *Achmea* at para [34].

²¹ For an overview of the requirements to take into consideration: Simon Gabriel, *Investment Planning via Switzerland*, *ASA Bulletin*, Volume 31, Issue 1, pp 11–26.



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New Trends in Enforcement of Arbitral Awards in China

China has seen revolutionary changes in recent years in respect to its arbitral landscape. The Supreme People's Court has issued several new judicial interpretations in this regard. The enforcement of arbitral awards in China is approved or denied in Chinese Law dependent on several factors outlined by these interpretations.



Introduction

The 'Belt and Road' initiative is likely to significantly boost outbound investment by Chinese companies and their trading partners in their 'Belt and Road' investments. How to enforce foreign arbitral awards in the People's Republic of China (PRC) will become a particularly important issue.

In 1987, China joined the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'). On 10 April 1987, the Supreme People's Court of China ('Supreme Court') issued the Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China ('the Supreme Law Notice'), describing the issues related to the enforcement of foreign arbitral awards under the New York Convention. On 26 December 2017, the Supreme People's Court promulgated the



Relevant Provisions of the Supreme People's Court on Issues concerning Applications for Verification of Arbitration Cases under Judicial Review (Law [2017] No 21, the 'Provisions on Applications for Verification of Arbitration Cases') and the Provisions of the Supreme People's Court on Several Issues concerning Trying Cases of Arbitration-Related Judicial Review (Law [2017] No 22, the 'Judicial Review Provisions'). The above two provisions are the judicial interpretations of the application of the arbitration law and the judicial review of arbitrations issued by the Supreme People's Court in the form of normative documents since the promulgation of the law, named the Interpretation on the Application of the Arbitration Law of the people's Republic of China (interpretation of Law [2006] No 7, the 'Judicial interpretation of the Arbitration Law') in 2006.

On 23 February 2018, the Supreme People's Court issued three judicial interpretations on implementation

issues. Among them, the Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Cases in the Arbitration of Arbitral Awards by the People's Court ('Rules for the Implementation of the Awards') and the Regulations on Reporting and Verification of Arbitration Judicial Review Cases just issued two months ago, together with the Arbitration Law and its judicial interpretation, jointly set out China's regulatory framework in respect of revoked and unimplemented arbitral awards. As stated by the Supreme People's Court at a press conference, arbitration has become contractual, autonomous, non-governmental and quasi-judicial because of its own characteristics, such as autonomy, flexibility, convenience, and as well, it is final and binding. It has become an important way to resolve disputes. The Supreme People's Court has intensively issued relevant judicial interpretations, which reflects judicial supervision and support for arbitration.

This article selects the substantive and procedural issues related to the recognition and enforcement of arbitral awards in the three provisions, and briefly analyses the new judicial direction reflected in these three new judicial interpretations and regulations.

Compliance with the New York Convention Enforcement Obligations to Create a Quality Rule of Law Environment in the Free-Trade Pilot Area

On 23 September 2005, Shanghai Golden Landmark and Siemens signed a contract for the supply of goods by tender, stipulating that Siemens should ship the equipment to the site by 15 February 2006 and disputes shall be submitted to the Singapore International Arbitration Centre ('SIAC'). The two parties have disputes in the performance of the contract. Shanghai Golden Landmark filed an arbitration at SIAC to terminate the contract and stop paying the purchase price. In the arbitration process, Siemens filed a counterclaim requesting payment of all purchases, interest and compensation for other losses.

In November 2011, SIAC issued a ruling rejecting the arbitration request of Shanghai Golden Landmark and supporting the arbitration counterclaim of Siemens. Shanghai Golden Landmark paid a portion of the amount, and the outstanding payment and interest under the arbitral award were RMB 5,133,872.30. Based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the New York Convention, Siemens has requested the first Intermediate People's Court of Shanghai to recognise and implement the arbitral award made by SIAC. Shanghai Golden Landmark resisted the application, taking the position that the arbitral award should not be recognised and enforced on the grounds that both parties are Chinese legal persons and that the place of performance of the contract is also in China, so the civil relationship involved in the case has no foreign factors. The agreement to submit the dispute to a foreign arbitration agency is null and void and recognition and enforcement of the award would be contrary to China's public policy.

After reporting to the Supreme People's Court and receiving a reply, the first Intermediate People's Court of Shanghai concluded that, in accordance with the provisions of the New York Convention, the arbitration award involved should be recognised and enforced. Looking at the actual situation of the subject and



performance characteristics involved in the contract of this case, according to the fifth provisions of Article 1 of the Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I), it can be concluded that the contractual relationship is a foreign-related civil legal relationship. The specific reasons are as follows.

First, although Siemens and Shanghai Golden Landmark are both Chinese legal persons, their registered places are all within the Shanghai Free Trade Zone and their nature is wholly foreign-owned and are closely related to their foreign investors. Second, the characteristics of the performance of the contract in this case has foreign factors. The equipment involved in the case was first transported from outside China to the free trade experimental area for bonded supervision, and then, according to the need for the performance of the contract, timely customs clearance and customs clearance procedures were carried out, and transferred from the region to the outside. At this point, the import procedures have been completed, so the transfer of the subject matter of the contract also has certain characteristics of an international goods sale.

The arbitration clause in the case is valid. And the content of the arbitral award does not conflict with China's public policy, so the recognition and enforcement of the arbitral award is not contrary to



The Pilot Free Trade Zone is the basic platform, important node and strategic support for China to promote the 'Belt and Road' construction

Chinese public policy. At the same time, the ruling also pointed out that Shanghai Golden Landmark actually participated in the entire arbitration proceedings, argued that the arbitration clause is valid, and partially fulfilled the obligations established in the award after the award was made. In this case it claims to reject the application for recognition and enforcement of the arbitration award involved in the case on the grounds that the arbitration clause is invalid does not conform to the generally accepted legal principles of estoppel, good faith, fairness and reasonableness, so its claim should not be claimed.

The Pilot Free Trade Zone ('FATZ') is the basic platform, important node and strategic support for China to promote the 'Belt and Road' construction. Connecting international practices, supporting the development of free trade pilot zones, improving international arbitration and other non-litigation dispute resolution mechanisms will help strengthen the international credibility and influence of the rule of law in China. The ruling of this case is based on the reform of the investment and trade facilitation in the Pilot Free Trade Zone. In the case of contract disputes between wholly foreign-owned enterprises in the Pilot Free Trade Zone, the identification of foreign-related factors is emphasised, and it confirmed that the arbitration clause is valid and clarified that 'anti-expression is prohibited'. This ruling fulfils the New York Convention concept of 'favourable to the implementation of the ruling' and reflects China's basic

position of abiding by international treaty obligations. At the same time, the case promoted the breakthrough reform of enterprises in the Pilot Free Trade Zone to choose overseas arbitration. The judicial experience in this case can be replicated and be promoted as a successful example of alternative dispute resolution involving businesses in the Pilot Free Trade Zone.

In January 2017, the Supreme People's Court issued the Opinions of the Supreme People's Court on Providing Judicial Guarantee for the Building of Pilot Free Trade Zones, stipulating that if the foreign-funded enterprises registered in the Pilot Free Trade Zone have agreed to submit commercial disputes to extraterritorial arbitration, the relevant arbitration agreement shall not be invalidated only on the grounds that the dispute does not have foreign-related factors. It also stipulates that if one or both parties are foreign-invested enterprises registered in the Pilot Free Trade Zone, and agree to submit the commercial dispute to extraterritorial arbitration, the People's Court shall not support the claim if one party submits the dispute to an extraterritorial arbitration and claims that the arbitration agreement is invalid after the relevant award has been made; or the other party does not object to the validity of the arbitration agreement in the arbitration proceedings and claims that the arbitration agreement is invalid on the grounds that the arbitration agreement is invalid after the relevant award has been made. This helps to build a more stable and predictable 'Belt and Road' legal environment for doing business.

Create a System for Outsiders Applying for Not Executing the Arbitral Award

Articles 9 and 18 of the Several Provisions of the Higher People's Court of Guangdong Province on Handling Cases about a Petition for Not Enforcing an Arbitral Award (for Trial Implementation) refer to the system for a third party to apply for refusal to execute an arbitral award.

The Zhuhai Intermediate People's Court of Guangdong Province initiated the system for the applicant to apply for refusal to execute the arbitral award and clarified the following relief procedures: if the outsider files an enforcement objection during the enforcement of the case, if the Executive Board has examined the case and determined that the arbitral award may be wrong, the objection will be submitted to the Judicial Committee for discussion; if the Judicial Committee considers that

the ruling violates the public interest and it is necessary to initiate the examination mechanism, the filing court shall decide to file the case, and the fourth court shall be responsible for the examination; if the fourth court considers that the arbitration award is wrong after examination, it shall not enforce the arbitral award.

The basis for the establishment of the system is Article 237, paragraph 3 of The Civil Procedure Law of the People's Republic of China: 'if the people's court determines that the enforcement of the award is contrary to the public interest, it shall not enforce it.' The standard of non-enforcement has been made clear in the procedure law.

In the No 203 case, the Jiangsu Higher People's Court also similarly applied the third paragraph of Article 58 of the Arbitration Law of the People's Republic of China and the second paragraph of Article 237 of the Civil Procedure Law. It stipulates that the arbitral award shall be judicially examined *ex officio* and that the ruling shall not be deemed to be effective if it violates the public interest.

The application for non-enforcement by third party persons rather than the parties involved is an innovative provision made by the Supreme People's Court to prevent false arbitration. However, there are certain drawbacks. First, the Arbitration Law and Civil Procedure Law stipulate that the person who applies for revocation and non-enforcement can only be the parties. The above regulations conflict with the current law of the country. Second, the provision does not limit the scope of the applicant outsider who has the right to apply for non-enforcement. The provisions on the conditions for the non-existing application of the case are too principled and broad, which may cause abuse of rights by persons unrelated to the arbitration case, delay the enforcement of procedures, result in a decline in the efficiency of judicial and arbitration and affect the credibility of the court and arbitration. Finally, according to the theory of *res judicata*, the *res judicata* has relativity. Even if there is an effective judging document, it does not affect the possibility for a third party to sue separately and defend its own rights and interests in accordance with the provisions of the substantive law, not necessarily by negating the validity of an effective judicial judgment. In addition,

from the practical experience of civil litigation, the effect of the third party's revocation is not satisfactory.

It is undeniable that in practice there is a situation in which the interests of the outsiders in the case are damaged by false arbitration cases, and this phenomenon really needs judicial supervision by the courts to protect the interested parties. China's criminal law also provides corresponding provisions for false litigation and arbitration. After the above-mentioned judicial interpretation is made, it is also necessary to strengthen the understanding of the relevant theories such as *res judicata*, follow up and improve the supporting system and further clarify the identification and corresponding conditions of the subject identity who applies for not executing the arbitral award. Whether the system can effectively combat false arbitration is still left to the test of time.

If the People's Court determines that the enforcement of the award is contrary to the public interest, it shall not enforce it

Uniform Review Criteria for Non-Enforceable Cases

The Provision on the Enforcement of the Awards is more detailed than the Interpretation of the Arbitration Law and other relevant provisions in respect of the statutory reasons for non-enforcement of the arbitral award. We believe that although both non-enforcement and revocation are judicial reviews of arbitral awards and the two systems have the same ground, the emphasis should be different. The revocation of an arbitral award is a review of the arbitral award and the impartiality of the arbitral proceedings. The court may conduct a comprehensive review or a formal review. However, the non-enforcement of the arbitral award is to deal with the enforcement objection of the person seeking enforcement, whose purpose is to avoid the enforcement error and should be more inclined to safeguard the enforcement procedure, so the examination should be limited to the 'mild' formal review.

In any case, the judicial authority that revokes the arbitral award is the people's court where the arbitral institution is located and the judicial organ that does not enforce the arbitral award may be the people's court in any place in the country. Detailed regulations are of great benefit to the harmonisation of standards for non-enforcement cases.

Among them, some articles are in line with the internationally accepted philosophy. For example, Article 14, paragraph 3, provides for a dissent system:

Where the applicable arbitration procedure or arbitration rules are specially prompted, the parties know or should know that the statutory arbitration proceedings or the chosen arbitration rules have not been complied with, if the parties still participate in or continue to participate in the arbitration proceedings and have not raised any objection, the people's court shall not support the application for not enforcing the arbitral award on the grounds of violating the legal procedure after the award has been made.

There was no such provision in the Provisions for the Enforcement of the Award (Consultation Paper). When soliciting opinions, an organisation proposed that abandoning objections is not only a common practice of international commercial arbitration, but also a requirement of the principle of good faith, which can promote the parties to exercise their procedural rights in a timely manner. This opinion was accepted in the final judicial interpretation.

The Supreme People's Court emphasised in the press conference that there is a precondition for the waiver of the objection, that is, 'the situation that requires violation of the procedural rules must be specifically prompted with the parties.' The arbitral tribunal is required to ask the parties whether there is any objection to the arbitral proceedings that have already taken place at the end of the trial.

Connection of Revocation and Non-Enforcement

According to the provisions of the Arbitration Law, China has applied for the revocation and non-enforcement of domestic arbitral awards, adopting a two-track parallel system of these two remedies, and the legal reasons for the two are basically the same. The parallel system in practice leads to the abuse of judicial procedure by the applicant to hinder the enforcement and repeated review results in the waste of judicial resources and other adverse consequences.

On 4 May 2017, the Intermediate People's Court of Yanbian Korean Autonomous Prefecture of Jilin Province applied for a case in which an application

for not enforcing the arbitral award is made after the application for revoking the arbitral award is rejected. On 26 August 2015, the Yanbian Arbitration Commission accepted the construction contract dispute between the Hengsheng Company and the Hongfeng Company. On 4 January 2017, the Yanbian Arbitration Commission made a (2015) Yan Zhongzi No 1055 ruling on the construction contract dispute between Hengsheng and Hongfeng. The Hongfeng Company was not satisfied with the result and it applied to the Yanbian Intermediate People's Court to revoke the above ruling. On 20 March 2017, the Yanbian Intermediate People's Court (Civil Trial 2nd Chamber) made a (2017) Ji 24 Min Te No 4 civil ruling and rejected the application of the Hongfeng Company. Later, in the enforcement of the procedure, the Hongfeng Company requested not to enforce the Yanbian Arbitration Commission (2015) Yan Zhongzi No 1055 ruling on the grounds that:

The arbitral tribunal's judgment deprived the parties of their right to appeal. The arbitral tribunal did not serve the notice of the court in accordance with the law. Due to objective reasons, it was unable to participate in the trial and the arbitral tribunal did not support its request to have an extension of the trial. The arbitral tribunal did not give a statutory defense period for the arbitration request for the change, which was a procedural violation.

After review by the Yanbian Intermediate People's Court, the arbitral tribunal that made the legal document in force in this case did not serve the notice of the court in accordance with the relevant provisions. The request of the legal representative of Hongfeng Company for extension of the trial was not allowed for legitimate reasons. The Hongfeng Company did not participate in the court normally; it was not allowed to conduct cross-examination and certification of the evidence in court and it lost the right to defend the evidence and reached a level that would substantially affect the fairness of the arbitration. The Hongfeng Company's reasons for not enforcing the arbitration award were established, which were supported by the Court.

The relationship between revocation and non-enforcement of arbitral award, and if the parties have the right to apply for not enforcing the arbitral award after the application for revoking the arbitral award is rejected, and in addition, when the court that accepts the application for revocation is inconsistent with the

execution court, how to deal with the completely different conclusions of the two courts' determinations in regard to revocation/non-enforcement, are always difficult points in practice. The Enforcement Regulations attempt to clarify the convergence of the two procedures in order to simplify the process of judicial review of arbitration. In the Articles 10 and 20, the rules are as follows:

- If both applications exist in one case, revocation shall be reviewed first. If the party seeking enforcement withdraws the application for revoking the arbitral award, it shall be deemed to have withdrawn the application for non-enforcement at the same time.
- Non-enforcement should follow the one-off application principle, except for new evidence. The reason for the application for non-enforcement shall not be the same as the one be rejected in the former application for non-enforcement.

The above provisions embody the Supreme People's Court's efforts to eliminate conflicts or duplication of the two procedures on the basis of the existing two-track system, which objectively helps the parties and the outsiders to have more relief opportunities. But in the long run, the unification of judicial review of arbitration still requires reform at the legislative level.

In addition, there are several aspects of the Executive Regulations that are worth mentioning:

1. clarify the scope of the arbitration mediation as non-enforcement (Article 1);
2. clearly clarify the handling of unclear implementation content (Articles 3 to 5); and
3. defining the finality of the ruling and its exceptions (Articles 22 and 5).

Expanding the Scope of the System of Application for Verification Concerning Arbitration Cases

For civil litigation cases involving the validity of an arbitration agreement outside the arbitration judicial review case, if the case is not appealed to the first-instance civil ruling, the application for the review system shall also apply. Different from arbitration judicial review cases, civil litigation cases accepted by some courts also

involve determination of the validity of the arbitration agreement. If the people's court is dissatisfied with the ruling of dissent, dismissal and jurisdictional objection, due to the effectiveness of the arbitration agreement, the parties may appeal in accordance with the law.

Article 7 of the Provisions on Applications for Verification of Arbitration Cases also clearly stipulates that different types of appeal systems should be applied in accordance with foreign-related and non-foreign-related cases. However, the regulation does not make clear that the non-foreign (Hong Kong, Macao and Taiwan) cases need to apply the 'party cross-provincial administrative region' and 'social public interest' exceptions in accordance with Article 3 of it. However, we believe that non-foreign civil litigation cases should in principle be subject to the 'three-tier court' reporting system in which exceptions are applied in accordance with Article 3.

The Provisions on Applications for Verification of Arbitration Cases stipulates the reporting and verifying system for both foreign and non-foreign arbitration judicial review cases to the higher or Supreme People's Court, and a unified standard for the discretion of arbitration judicial review cases, which has played a positive role in respecting the parties' will to arbitrate, avoiding the arbitration agreement or award being denied at will, maintaining the finality and authority of arbitration at home and abroad.

Clearly Stipulates the Principle of Confirmation of Foreign-Related Factors in the Judicial Review of Arbitration Cases

In the past, many judicial interpretations, in regard to the determination of foreign arbitration judicial review cases in the Civil Procedure Law adopted the standard of whether the arbitration institution is a foreign arbitration institution or not. However, in fact, whether the arbitration institution is foreign-related is not necessarily an inevitable guarantee for the case.

In reply No 2 of the Supreme Court (2012) there was a case in which the parties entered into an arbitration clause in the Trade Agreement, stipulating that the disputes may be submitted to the International Chamber of Commerce for arbitration in Beijing. The Supreme People's Court believed that both parties to the 'Trade Agreement' were Chinese legal persons, the subject matter was in China and the agreement was also

concluded and implemented in China. There was no component of foreign-related civil relations and the agreement did not belong to foreign-related contracts. Since the jurisdiction of arbitration is a power conferred by law, and the law of our country does not stipulate that the parties may submit disputes not involving foreign factors to an overseas arbitration institution or temporarily arbitrate outside China, therefore, there is no legal basis for the two parties in this case to submit the dispute to the International Chamber of Commerce for arbitration. This case should not be a foreign-related case.

In the Judicial Review Provision, it is made clear that where the arbitration agreement or arbitral award has the circumstances specified in Article 1 of the Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I) it shall be the foreign-related arbitration agreement or the foreign-related arbitration award. That is to say, according to the subject, object, legal fact, subject matter and other aspects of the relevant civil legal relationship, there are foreign factors to determine whether the civil legal relationship is foreign. In addition, in accordance with the relevant legal principles of civil litigation, Judicial Review Provisions stipulate that applications for confirmation of the validity of arbitration agreements involving the Hong Kong Special Administrative Region, the Macao Special Administrative Region, the Taiwan Region, applications for enforcement or revocation of a case involving an arbitral award of the Hong Kong Special Administrative Region, the Macao Special Administrative Region, and the Taiwan Region by an arbitration institution in China, shall be reviewed in accordance with the provisions applicable to judicial review cases involving foreign-related arbitration.

Three-level Principle for Confirming the Application of the Law on the Validity of Foreign-related Arbitration Agreements

The principles for the application of the law for the confirmation of the validity of foreign-related arbitration agreements in Article 16 of the 2006 Judicial interpretation of the Arbitration Law are three-levelled principles: (1) the law stipulated by the parties; (2) the law of the place of arbitration; and (3) the law of the courts (*lex fori*), and Article 18 of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships, which was implemented in 2011,



Whether the arbitration institution is foreign-related is not necessarily an inevitable guarantee for the case

supplements that if the parties have not agreed on the law applicable, they may apply the law of the place of arbitration or the law of the place where the arbitration institution is located. The Judicial Review Provisions further confirm and supplement some issues on the basis of adhering to the above-mentioned three-level law application principles, as discussed below:

- a. It is necessary to choose the applicable law of arbitration agreement clearly: if the parties agree to choose the law applicable to confirm the validity of the arbitration agreement concerning foreign affairs, they should make a clear expression of intention. The law applicable to the contract only cannot be regarded as the law applicable to the confirmation of the validity of the arbitration clause in the contract.
- b. The law of the place where the arbitration institution is effective or of the place of arbitration is preferred: if the parties have not chosen the applicable law, and if the applicable law of the place where the arbitration institution is located and the law of the applicable place of arbitration make different determinations of the validity of the arbitration agreement, the People's Court shall apply the law that confirms the validity of the arbitration agreement.
- c. The arbitration institution or place of arbitration may be determined by the arbitration rules. If the arbitration institution or place of arbitration is not

agreed upon in the arbitration agreement, but the arbitration institution or place of arbitration may be determined according to the arbitration rules agreed upon in the arbitration agreement, then the arbitration institution or place of arbitration determined according to the rules shall be regarded as an arbitration institution or place of arbitration as stipulated in Article 18 of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships.

Law Applicable to the Review of the Effect of an Arbitration Agreement on a Foreign Award under the New York Convention

When a People's Court applies the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to examine a case in which a party applies for recognition and enforcement of a foreign arbitral award, and the respondent raises a plea on the grounds that the arbitration agreement is invalid, the People's Court shall, in accordance with the provisions of paragraph 1(a) of Article 5 of the Convention, determine the law applicable to the confirmation of the validity of the arbitration agreement, that is, determine the capacity of the parties to act according to the law applicable to the parties to the award, and then determine the validity of the arbitration agreement; or determine the validity of the arbitration agreement based on the law chosen by the parties.

If the parties have no choice, the validity of the arbitration agreement shall be determined in accordance with the law of the country making the award (arbitration place). Unlike the applicable legal provisions confirming the validity of an arbitration agreement, the applicable law under the Convention does not include *lex fori*. Since a foreign award has been made, it of course is rendered in a certain place.

On this point, a relatively instructive case is Hyundai Glovis Company's applying to the Ningbo Intermediate People's Court of Zhejiang Province for recognition and enforcement of the SIAC 004 Arbitration Award in 2015. On 13 July 2012, Hyundai Glovis and Zhejiang Qiying Energy Chemical Company signed a 'sales and purchase agreement', stipulating that Qiying Energy Chemical will

purchase about 55,916 metric tons of bulk Indonesian thermal coal (mixed) from Hyundai Glovis at a unit price of US\$57 per metric ton, and the port of unloading shall be Ningde. The time when the ship arrives at the anchorage port of discharge shall not be later than 16 July 2012. Any disputes between the parties relating to the agreement shall be finally settled by the three arbitrators appointed in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules'), and the place of arbitration shall be Singapore. After the above agreement was signed, Hyundai Glovis fulfilled all obligations and delivered 55,922 metric tons of coal to the port of discharge on 14 July 2012. Qiying Energy Chemical unloaded and received all of the above coal, but later, Qiying Energy Chemical did not pay the full amount of the contract. After repeated calls by Hyundai Glovis, Qiying Energy Chemical still owed US\$146,755.30.

If the parties have no choice, the validity of the arbitration agreement shall be determined in accordance with the law of the country making the award

According to the arbitration clause in the Sale and Purchase Agreement, Hyundai Glovis filed an arbitration application with SIAC on 23 January 2014. SIAC accepted the case and according to the SIAC Rules duly performed the service, notice and other obligations to Qiying Energy Chemical at the address and mailbox agreed upon in the Sale and Purchase Agreement. Qiying Energy Chemical had not raised any objection or participated in the arbitration as required. On 18 September 2015, Hyundai Glovis applied to the Ningbo Intermediate People's Court of Zhejiang Province for recognition and enforcement of SIAC 2015 arbitral award.

The Court found that the case was a party applying for recognition of a foreign arbitral award. Since the arbitral award in this case was made by SIAC in Singapore, and both China and Singapore are members of the New York Convention, the relevant provisions of the Civil Procedure Law of the People's Republic of China and the New York Convention should be applied for review. The Court found that the 004 arbitral award submitted by Hyundai Glovis and the Agreement for Sale and purchase had been notarised and certified in the form in accordance with the provisions of Article 4 of the New York Convention and the court examined whether Qiying Energy Chemical had received appropriate notice of the appointment of arbitrators and the conduct of

arbitration proceedings; whether the arbitration clause agreed by the parties was invalid; whether the arbitration proceedings and the composition of the arbitral tribunal were in violation of the agreement of the parties and the SIAC Rules. After this examination, the Court found that Award 004 did not contain the relevant circumstances under Article 5 of the New York Convention which would cause non-recognition or non-enforcement, nor did it violate the terms of the reservations made by China when it acceded to the Convention. Thus, the award should be recognised and enforced.

Clearly Stipulate that the People's Courts Shall Implement the Awards of Mainland Arbitration Institutions by Applying Different Provisions of the Civil Procedure Law in Accordance with the Non-Foreign Rulings and Foreign-Related Rulings and No Longer Based on Whether the Arbitration Institution is Domestic or Foreign

Article 17 of the Judicial Review Provisions adjusts the scope of application of Article 274 of the Civil Procedure Law and clearly stipulates that the People's Courts shall examine the application for the enforcement of not only the arbitral awards made by foreign-related arbitration institutions, but also foreign-related arbitration awards made by the arbitration institutions in China in accordance to Article 274 of the Civil Procedure Law.

This regulation has been adapted to the development trend of arbitration institutions in China. At present, domestic arbitration institutions, including the China International Economic and Trade Arbitration Commission and the China Maritime Arbitration Commission, which were first established in the China Council for the Promotion of International Trade, have not stipulated that they only accept foreign-related or domestic cases. There is no distinction between the scope of coverage of the arbitration institutions and there is no separate division of domestic arbitration institutions or foreign arbitration institutions now. Article 17 of the Judicial Review Provisions harmonises the differences between foreign-related arbitration in the various legal provisions of the Arbitration Law and is easy to implement in practice.

Reaffirm the Right to Appeal

Article 20 of Judicial Review Provisions stipulates that the ruling made by the People's Court in the arbitration judicial review case shall have legal effect once it is served, except for the ones on dismissal of the case,

rejection of the application and jurisdiction objection. Where a party applies for reconsideration, appeals or applies for retrial, the People's Court shall not accept it, unless otherwise provided by law and judicial interpretation. This provision fully complies with Article 154 of the Civil Procedure Law on civil rulings.

Conclusion

The Supreme People's Court issued three judicial interpretations in just a few short months, which greatly encouraged the arbitration community. Twenty years ago, the Arbitration Law was promulgated and since the Interpretations on Arbitration-Related Judicial Review Cases was issued in 2006, a lot of changes have been made in the regulations and provisions regarding arbitration. There were two amendments to the Civil Procedure Law in 2007 and 2012 and Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China in 2005.

The procedures and standards for judicial review of arbitration have been constantly changing. The Supreme Law now makes three consecutive new judicial interpretations and regulations to meet the needs of the increasingly developing domestic and foreign situation of arbitration, by making regulations and innovative adjustments to some new circumstances. It provides important new legal guidelines for arbitration centres on the handling of domestic arbitration and related cases. Those interpretations and provisions are worth studying further.



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Arbitration in Russia after the Reform: First Results and Future Developments

During 2013-2017, the Russian arbitration landscape went through a larger-scale legislative and regulatory reform. What are the main features of the regime under the new law and how does it affect arbitration in Russia? What is its impact for the regions of the Far East of Russia, the closest to the Asia Pacific region?



Arbitration in Russia after the Reform: First Introduction

Disputes unavoidably (and regrettably!) take place in business relationships. Once a dispute arises, both parties wish to resolve it confidentially and efficiently in order to reduce losses and continue development of their business.

Arbitration as an alternative to state courts in commercial dispute resolution has been popular for the past half century in numerous countries, especially as it is based on trust. The main advantages of resolving disputes by arbitration are flexibility (the disputing parties have freedom to choose the specialisation of arbitrators and determine independently the form of dispute resolution procedures) and confidentiality (hearings are closed and private).

Russian business used to have several options for dispute resolution, but due to its underdeveloped status, domestic

arbitration in Russia could hardly be considered as a reliable and fair alternative to state courts. Hundreds of arbitral institutions were created by commercial organisations that used them for various illegal schemes or as 'pocket' arbitral institutions. As a result, the reputation of arbitration as an effective and impartial dispute resolution method in Russia became tainted.

In order to cure this situation and create decent legal grounds for the development and promotion of arbitration in the country, in 2013 the Russian Government started large-scale arbitration reform ('the Reform') resulting in the adoption of two new Federal laws that came into force on 1 September 2016. Since 1 November 2017, a 'new era' of arbitration in Russia began—the transitional period of the reform expired and the activities of most of the bad-faith arbitral institutions were terminated.

New Russian Arbitration Legislation

Historically, Russia has been a country with two laws governing arbitration: one law for international commercial arbitration and another for domestic arbitration. Following the Reform, both laws became compliant with the UNCITRAL Model Law, with the main difference being that the Federal Law 'On Arbitration (Arbitral Proceedings) in the Russian Federation' ('Law on Arbitration') covers both the procedure for domestic arbitration and the rules and requirements for the establishment and further activities of arbitral institutions. Each arbitral institution can adopt rules for both domestic and international arbitration.

The Reform pursued the goal of creating world-class arbitral institutions, as well as restoring confidence in arbitration for the business community and state courts. It was designed to provide Russian and foreign businesses investing in Russia with a solid and reliable alternative to the state courts. It also focused on such issues as the arbitrability of disputes, including corporate disputes, and on enhancing several other important aspects and features of arbitration, to make Russia more attractive as a place for resolving disputes.

The Law on Arbitration Provides for the Procedure of Establishment and Functioning of Permanent Arbitral Institutions as well as Specific Requirements for Such Institutions

In accordance with the Law on Arbitration, permanent arbitral institutions can be established exclusively by a



non-profit organisation as a 'subdivision' (department) thereof. A permanent arbitral institution must obtain an authorisation to administer arbitration in Russia from the Russian government. The application to receive such an authorisation is subject to approval by the Council on Development of Arbitration in Russia at the Ministry of Justice that comprises 50 leading Russian law practitioners, academics and representatives of the business community.

The legislative requirements intend to ensure the transparency of the activities of permanent arbitral institutions. A non-profit organisation at which an institution is established must publish information about its founders and members of its governing bodies on its website. A permanent arbitral institution is also required to release its recommended list of arbitrators, arbitration rules and information about its structure on its website.

An Exhaustive List of Non-Arbitrable Disputes was Established

In accordance with the amendments to the Code of Commercial (Arbitrazh) Procedure, parties cannot resolve by arbitration the following categories of disputes:

- insolvency disputes;
- non-arbitrable corporate disputes;
- disputes arising out of administrative and other public-law relationships;
- disputes related to the establishment of legal facts;
- disputes arising out of class actions;
- disputes falling within the exclusive jurisdiction of the Court of Intellectual Property Rights;
- disputes arising out of privatisation of state or municipal property;
- disputes arising out of state and municipal contracts.

All other types of disputes, that are not included in this list, are arbitrable.

New Laws Provide List of Arbitrable Corporate Disputes and Conditions for the Resolution of Such Disputes in Arbitration

New arbitration legislation distinguishes between three types of corporate disputes: arbitrable, 'conditionally' arbitrable and non-arbitrable disputes. Importantly, none of the corporate disputes can be resolved within ad hoc arbitration.

Most corporate disputes are 'conditionally' arbitrable, that is, the parties can resolve them in arbitration only upon a condition—if administrated by a permanent arbitral institution that adopted special rules on the arbitration of corporate disputes. The aim of this rule is to protect the rights and legal interests of shareholders.

Arbitration of M&A disputes arising out of share purchase agreements in regard to the shares of Russian companies do not require special arbitration rules and can be resolved under standard arbitration rules. However, foreign arbitral institutions that wish to administer such disputes need to receive authorisation from the Russian government. The only criterion that a foreign arbitral institution must meet is that it enjoys a worldwide reputation. This requirement was designed to prevent 'offshorisation' of bad-faith Russian arbitral institutions that have not received an authorisation to administer arbitration in Russia after 1 November 2017.

New Laws Stipulate the Procedure for the Assistance to and Supervision of Arbitral Tribunals by Competent Courts

The parties can request a competent court to assist with the following procedural issues prior to rendering an arbitral award:

- appointment of an arbitrator, if he/she cannot be appointed in accordance with the appointment procedure under the arbitration rules or by the agreement of the parties;
- termination of the mandate of an arbitrator, if he/she is not able to perform his/her functions or if he/she denies self-recusal in case of failure to perform his/her functions;
- deciding on the jurisdiction of the arbitral tribunal, in case of the parties disagreement with a positive jurisdictional finding by the arbitral tribunal.



A permanent arbitral institution must obtain an authorisation to administer arbitration in Russia from the Russian government

This regime was introduced to eliminate deadlock situations and to decide on key issues that can become the grounds for the annulment of an arbitral award. However, the parties to the arbitration administered by a permanent arbitral institution ('PAI') can waive the right to apply to state courts on the above issues by entering into an express agreement that shall be a part of the arbitration agreement.

Notably, these amendments have already increased the interest in arbitration among Russian businesses that are interested in resolving disputes in a professional and efficient manner in accordance with globally-acknowledged standards and create a solid basis for the future development of arbitration in Russia.

The Brand-New Arbitral Institution

In an effort to dispose of hundreds of 'pocket' or bad faith arbitral institutions, the impartiality of which was highly questionable, the new law introduces strict requirements and rigorous procedures for obtaining authorisation, so that only truly professional and independent PAIs can administer arbitration in Russia.

As of July 2018, there are only four Russian PAIs: the Russian Arbitration Center at the Russian Institute of Modern Arbitration (RAC at RIMA), the International

Commercial Arbitration Court ('ICAC'), the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation ('MAC') and the Arbitration Center at the Russian Union of Industrialists and Entrepreneurs ('RSPP'). Traditionally, ICAC was the leading institution administering international arbitration in the USSR and Russia with more than 80 years of history.

Now both RAC at RIMA and ICAC have extensive lists of international arbitrators and the capacity to administer international arbitration in accordance with modern arbitration rules which contains features such as multiple claims, multi-party arbitration, consolidation of arbitrations etc. Both of these institutions also have special arbitration rules to administer corporate disputes that require such rules as mentioned above.

Regional Development and Innovative Legislation

Notwithstanding the relatively small number of organisations authorised to administer arbitration under the new arbitration law in Russia, it is fair to suggest that these organisations, established by reputable founders of the non-profit organization (in our case Federal Bar of Attorneys of Russia, Saint Petersburg International Legal Forum and others) are capable of meeting the needs of the business community to resolve domestic and

international disputes coming from Russian and foreign parties. These major arbitral institutions are actively opening regional divisions and specialised divisions for particular types of disputes. For example, the RAC at RIMA has launched a Far Eastern Department with the main office in Vladivostok and additional offices in Kamchatka and Sakhalin island. The Chamber of Commerce and Industry traditionally has its specialised Maritime Arbitration Commission for maritime disputes.

With the launch of the regional divisions, arbitration has become more accessible and convenient for regional business and for neighbouring countries. For example, the Far Eastern Division of the RAC at RIMA translated its Arbitration Rules into English and Japanese, is currently working on a translation into Chinese and has developed a specialised database of arbitrators including both Russian arbitrators and arbitrators from the Asia Pacific region (Japan, China, South Korea, Hong Kong, etc.).

To increase the attractiveness of the Far East of Russia for investors from the Asia Pacific region, the Russian Government is steadily making efforts to develop the region and introduce an innovative regulation in different spheres. For example, in August 2017, a special visa regime was introduced allowing for the receipt of an electronic visa to enter Russia for eight days through Vladivostok Sea Port and Vladivostok Airport.

On 6 August 2018, a new set of laws, including the Federal Law 'On Special Administrative Districts in the Territory of Kaliningrad Region and Primorsky Krai', introduced a special economic zone in the territory of the island Russky in Vladivostok. The law provides for special economic regimes for residents of the Special Administrative Region ('SAR'). It also provides for the arbitrability of disputes arising out of contracts that are concluded between the management company of the SAR and each resident of the SAR. The new legislation also envisages the possibility for the parties to such contracts and any other contracts concluded with the participation of the residents of the SAR to agree on expedited *ex parte* procedures for enforcement of the arbitral awards in the relevant Russian state courts. The same regime is provided for in the territory of the island Oktyabrsky in Kaliningrad—the

most Western region of Russia, where the RAC at RIMA has launched its Western Division.

Rebuilding Trust and Promoting Arbitration

The goal to increase the attractiveness of arbitration in Russia holds the promise of a great deal of work in the future for the entire Russian arbitration community. In order to reach this goal, Russian arbitral institutions will have to be active in the development and promotion of arbitration among legal practitioners and improve knowledge and skills of the Russian lawyers in the field of arbitration.

The year 2018
marked the relaunch
of one of the most
successful arbitration
conferences—
Russian Arbitration
Day

There are a number of events and training that are being held now in Russia in order to promote arbitration. First of all, one of the largest international legal events—Saint Petersburg International Legal Forum ('SPILF') always dedicates attention to arbitration issues and includes several panels and satellite events on alternative dispute resolution ('ADR'). During

SPILF 2018, the President-Elect of the IPBA, Francis Xavier SC, took part in the plenary session together with the Russian Prime Minister Dmitry Medvedev and spoke on new challenges for the legal profession in the era of digitalisation.

The year 2018 marked the relaunch of one of the most successful arbitration conferences—Russian Arbitration Day. Its format is unique in a sense that the speakers go through a thorough selection process by reputable moderators of the Conference. The Conference also includes two to three special guest star speakers from foreign jurisdictions. As commented Prof Anton Asoskov of Lomonosov Moscow State University and member of the Board of the ICAC:

Every year Russian Arbitration Day attracts more and more talented speakers. It's a unique platform for specialists in the sphere of international arbitration who may present the results of their studies as an article in the final digest or as a speech at the Conference. Unlike other Conferences we choose speakers not for the readiness to pay sponsorship fees, but for the quality of their works.

As arbitration is constantly developing, in order keep abreast of new trends, arbitrators and staff of an arbitral

institution must necessarily be well trained and enhance their skills and knowledge. Therefore, the RAC at RIMA, together with the Chartered Institute of Arbitrators ('CI Arb'), now regularly hold training for arbitration practitioners in Moscow. The President-Elect of the IPBA, Francis Xavier SC, an arbitrator of the Singapore branch of the CI Arb, takes part in these training sessions as one of the course tutors.

Young Perspective and Moot Court Community Support

It has already become a worldwide tradition to launch groups of young practitioners under the auspices of the leading international arbitral institutions—the experience of the Young ICCA, YAF ICC, YAS, YIAG demonstrates its importance and significance for forming a new generation of professionals in arbitration and ADR.

In 2017, under the auspices of the RAC at RIMA, a new professional platform for young specialists was launched—Young Institute of Modern Arbitration ('YIMA')—which aims to create a unified professional community of young Russian professionals in arbitration and ADR and welcomes all active young lawyers interested in arbitration.

Another important aspect of popularising arbitration among the young generation of lawyers is the support of the moot community. The RAC at RIMA regularly hosts pre-moots of international competitions and organises domestic moot courts, as well as supports Russian teams for international moot courts. In 2018, for the first time in the 25-year Vis Moot history, a Russian team sponsored by the RAC at RIMA became the winner of this prestigious arbitration competition—hats off to the Higher School of Economics.

Among the current plans of the Russian Arbitration Center in this regard is the idea to hold in December 2018 the second annual V.P. Mozolin Corporate Arbitration Moot Court Competition. Last year, the moot court was extremely popular among students from all over the country—122 teams from more than 20 law schools have registered for the moot court and more than 60 arbitrators, specialising in corporate law and arbitration, evaluated the team's oral presentations.

Following the Asian Dragons

Improvement of arbitration as a means of alternative dispute resolution is an ongoing process in the Russian Federation. One of the original purposes of the Reform

was to bring arbitral practices in line with the international standards common for such arbitral seats as Stockholm, Paris, London, Singapore and Hong Kong. It can surely only be beneficial to observe and learn from the experiences of other countries which successfully align their businesses' dispute resolution needs with the dispute resolution options available.

Cooperation with the international arbitral centres is among the main priorities of the RIMA: it has entered into cooperation agreements with the Singapore International Arbitration Centre ('SIAC'), Hong Kong International Arbitration Centre ('HKIAC') and the Japan Association of Arbitrators ('JAA'). This cooperation has already led to several joint events on arbitration-related topics and exchange visits. For instance, Russian and Japanese practitioners regularly meet at various conferences in Japan and in Russia and inform each other about developments in the field of arbitration in both jurisdictions.



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Andrey Gorlenko is one of the leading arbitration and litigation practitioners in Russia. For more than 10 years Andrey has been practicing law as an Attorney at Law and Partner in one of the oldest Russian law firms and subsequently joined Debevoise & Plimpton (Moscow office). His practical experience included complex commercial and corporate disputes, both in Russia and foreign jurisdictions. In 2013–2015, Andrey was a member of the working group in charge of the arbitration reform in Russia.

Russian Arbitration Center at RIMA is the new arbitration initiative steered by the Federal Bar of Attorneys of Russia and the Saint-Petersburg International Legal Forum (SPILF). It is aimed at the establishment and development of a modern, independent and reputable arbitration venue in Russia both for domestic and international disputes. In April 2017, Russian Arbitration Center at RIMA received official authorization from the Government of Russia to administer disputes as a permanent arbitration institution. More information can be found at: www.centerarbitr.ru

The New DIS Arbitration Rules 2018: Germany's Offer of an Attractive Arbitration Alternative for Asian Parties

Despite Germany's economic importance, Asian practitioners might have overlooked Germany's attractive offer as a seat of international commercial arbitration. On March 2018, the German Institution of Arbitration (DIS) launched its new rules providing for time- and cost-efficient arbitration; Germany as a seat of arbitration and the new DIS Arbitration Rules should now be even more practical options for Asian practitioners.



European Central Bank building, Frankfurt

Introduction

In international arbitration, there is now global competition for the 'best' arbitration rules and the best place of arbitration.¹ While in recent years much emphasis has been placed on a significantly increased prominence for arbitration offers made by Asian states,² 'the old world' still has noteworthy arbitration offers. Alongside the European 'superpowers' in arbitration, such as Switzerland, England and France, there is, for example, an often overlooked offer by Germany.

Germany has been one of the most important economic partners in Asian countries and the German economy has been doing well recently. For example, when it comes to Japan, Japanese companies have more offices in Germany than anywhere else in Europe.³ Japanese companies doing business in Europe regard Germany as the most prominent market⁴, and many Japanese companies that already have offices in Germany are considering expanding their business activities within Germany.⁵

In addition, due to Brexit⁶ many Asian companies are considering turning their German branches into their regional headquarters⁷ or relocating their regional headquarters from the United Kingdom to Germany.⁸ In particular, many financial institutions have decided to relocate their European regional headquarters from London to Frankfurt.⁹

Despite Germany's economic importance, as a seat of arbitration in Europe, Germany might not have been as popular for Asian legal practitioners as Switzerland, London, or Paris. However, Germany is indeed an attractive place for international commercial arbitration.

Germany hosts various arbitration institutions, of which the German Institution of Arbitration ('DIS') is the most prominent.¹⁰ The DIS has revised its rules and the new DIS Rules 2018 (the '2018 DIS Rules') entered into force on 1 March 2018. This marks the first reform of the DIS Rules in 20 years.

In this article, the authors, a German and a Japanese arbitration practitioner, will discuss how Germany is an attractive place for international commercial arbitration as well as the new features of the DIS 2018 Rules.

Germany as an Arbitration-Friendly Place

First, the authors would like to introduce some basic

characteristics illustrating Germany's arbitration friendliness:

Arbitration Legal Framework

Germany is a signatory to the New York Convention and it relied on the UNCITRAL Model Law when it reformed the German arbitration law, that is, the tenth book of the German Code of Civil Procedure.¹¹ The UNCITRAL Model Law is also adopted by most Asian countries when they enact national arbitration laws.¹² Thus, the German arbitration law is easily understandable for Asian practitioners.¹³

Arbitration friendliness of State Courts

German state courts are considered to have an 'arbitration-friendly' attitude. When German courts intervene, they respect the parties' choice. The role of state courts is limited during arbitral proceedings, in line with the approach of the UNCITRAL Model Law.¹⁴

Also, judicial proceedings for enforcing or setting aside arbitral awards in German state courts are speedy. The proceedings start with the Higher Regional Court and an appeal to the Supreme Court is only available if there are important legal issues at issue. Proceedings for setting aside awards in German state courts usually take three months to one year.¹⁵ Since Frankfurt is the most popular arbitration seat, the Frankfurt Higher Regional Court has a particular chamber that specialises in judicial proceedings relating to arbitration cases.

Also, generally speaking, the costs of judicial proceedings in Germany, including lawyer's fees, are not very high.¹⁶ For example, these costs are considerably cheaper than in England in particular.

Civil Law Jurisdiction—Familiar to Practitioners from Civil Law Jurisdictions in Asia

Germany is a civil law jurisdiction and German laws contain one of the most important bases for the laws of civil law jurisdictions in Asia, such as Japan, South Korea, mainland China and Taiwan. Although the laws of these countries were also influenced by common law jurisdictions, especially by US laws,¹⁷ the judicial system and legal concepts of German laws are still very understandable for practitioners from civil law jurisdictions.

Convenience of Location and Hearing Facilities

With regard to infrastructure, Germany offers convenient

locations and facilities for conducting arbitral proceedings.

Frankfurt, the country's centre and arguably the European Union's future financial centre, is one of the most popular places to conduct arbitral proceedings.¹⁸ The reason is that Frankfurt can be conveniently accessed from all over the world—it is centrally located in Europe and it has an international hub airport.

With regard to the hearing facilities in Frankfurt, the DIS and the Frankfurt Chamber of Industry and Commerce jointly founded the Frankfurt International Arbitration Centre ('FIAC') in 2005. The FIAC is located in the city of Frankfurt and offers rooms and practical support for the conduct of oral hearings in arbitral proceedings. The services may be used not only in all national and international arbitral proceedings, such as DIS, ICC and ICSID, but are also available for other alternative dispute resolution proceedings.¹⁹

In addition to these hearing facilities, parties can, of course, also choose hotels or conference rooms that are easily available in every major German city, such as Frankfurt, Hamburg, Munich, Stuttgart, Dusseldorf and Berlin. Generally, the costs of such hearing facilities in Germany are cheaper than those of other major arbitration seats in Europe, such as London, Paris, Geneva and Zurich. The DIS assists the parties in their search for hearing facilities in Germany. Recently the DIS commenced a project to promote Berlin as a venue for resolving legal disputes. For this purpose, the DIS has compiled a shortlist of organisations in Berlin that provide hearing facilities, as well as ancillary facilities that parties may require for their arbitrations. This information is intended for parties, lawyers, arbitral institutions and any other interested persons who may consider choosing Berlin irrespective of whether the arbitration case is administered by the DIS.

Characteristics of German Arbitrators

The authors would also like to point out some common characteristics of German arbitrators in general. German arbitrators generally think like a judge.²⁰ It has been said that German arbitrators tend to avoid the unnecessary taking of evidence and limit the issues on which evidence is to be taken.²¹ This may be because German arbitrators put emphasis on '*Tatbestandsvoraussetzungen*' (that is, factual requirements of certain legal effects) and the burden of

proof, which might be similar to the thinking of civil-law-based legal practitioners'.²² Also, like witness hearings in German court proceedings, which are usually very brief and conducted by judges,²³ German arbitrators prefer not to hold unnecessarily lengthy witness hearings. These characteristics of German arbitrators lead to efficient proceedings.

Moreover, compared to the approach of common law arbitrators, German arbitrators are rather proactive in encouraging settlement between the parties, which might sound familiar to practitioners from civil law jurisdictions.

The 2018 DIS Rules

DIS as a Leading Arbitration Institution in Germany

The DIS was founded in 1992 and published its previous rules in 1998 in accordance with the revision of the German arbitration law in the same year.²⁴ It does not require that the place of arbitration be Germany, so the DIS Rules can also be used for arbitral proceedings outside Germany, including Asian countries.²⁵ The DIS adopted some supplementary rules after the launch of its 1998 Rules, such as the Rules for Expedited Proceedings.²⁶

The number of foreign parties using the DIS has been increasing and sometimes the DIS even administers arbitral proceedings that do not involve any German parties—in 2017 it had 11 cases without German parties.

The 2018 DIS Revisions

In its first reform in 20 years, which entered into force on 1 March 2018, the DIS completely revised its arbitration rules. The 2018 DIS Rules are focused on providing innovations that address the efficiency of the proceedings, cost effectiveness, multi-contract and multi-party arbitrations and the transparency of proceedings.

Most of the amendments are basically in line with recent trends in the amendment of arbitration rules in other major arbitration institutions, such as the ICC, the LCIA, the SIAC and the JCAA. However, some unique aspects can be found in the 2018 DIS Rules; for example, the arbitral tribunal is to encourage amicable settlement of the dispute at each stage of the arbitration, which is in line with the practices of German arbitrators as stated above. Moreover, the role of the dispute manager is unique to the DIS, which may help parties select the best method to resolve disputes.

Compared to the approach of common law arbitrators, German arbitrators are rather proactive in encouraging settlement between the parties

As to the costs, generally speaking, DIS arbitration is cheaper than ICC arbitration. The key features of the 2018 DIS Rules are as follows:

(1) Efficiency of the Proceedings²⁷

The main emphasis of the 2018 DIS Rules is to enhance the efficiency of the proceedings. To achieve this goal the Rules provide the following:

- Shorter time periods for the constitution of the arbitral tribunal: 21 days to nominate the respondent's party-appointed arbitrator and 21 days to nominate the President (*Articles 7.1 and 12.2*) (1998 rules: 30 days).
- Flexible time period at the discretion of the DIS for the nomination of a sole arbitrator by the parties (*Article 11*) (1998 DIS Rules: strict 30-day time limit).
- Earlier submission of the Answer: within 45 days, with a possible extension of 30 days on request, following the respondent's receipt of the Request (*Article 7.2*) (1998 DIS Rules: within a time limit to be determined by the Arbitral Tribunal, once constituted). This is meant to ensure that the Answer is provided shortly after the arbitral tribunal has been constituted.
- A case management conference is to take place in principle within 21 days after the constitution of the arbitral tribunal. At the case management conference, the arbitral tribunal and the parties must discuss the procedural rules, the procedural timetable as well as measures to increase the procedural efficiency of the proceedings (*Article 27*) (1998 DIS Rules: no mandatory case management

conference, the practice among DIS arbitral tribunals differed widely).

- Two annexes deal specifically with measures for increasing procedural efficiency and with expedited proceedings, which the arbitral tribunal is to discuss with the parties at the case management conference. This includes limiting the length and number of submissions, limiting the duration of the oral hearing, dividing the proceedings into individual stages, or having the arbitral tribunal provide a preliminary assessment on the facts and on the law. If expedited proceedings are used, each party can make two submissions and the final award is to be rendered, in principle, within six months of the case management conference.
- In order to ensure the efficient conduct of the arbitration, cost sanctions are possible: when making decisions on costs, the arbitral tribunal can take into account the extent to which the parties have conducted the arbitration efficiently (*Article 33.3*). When fixing the fees of the arbitrators if the arbitration is terminated prior to the rendering of a final award, the DIS can take into account the diligence and efficiency of the arbitrators (*Article 34.4*).
- The arbitral tribunal is to send the final award to the DIS within three months after the last hearing or the last authorised submission. The DIS may sanction delay by reducing the fees of the arbitrators depending on the amount of time taken to issue the final award (*Article 37*).

(2) Cost Effectiveness

The second main focus of the 2018 DIS Rules is the reduction of costs. To achieve this goal, the 2018 DIS Rules provide for the following mechanisms to help parties resolve their dispute as early in the proceedings as possible:

- The arbitral tribunal is to engage in active case management unless any party objects. It must seek to encourage an amicable settlement of the dispute or of individual disputed issues at every stage of the arbitration and to discuss with the parties at the case management conference possible alternative methods of dispute resolution, such as mediation (*Articles 26²⁸ and 27.4*).²⁹ These provisions are in line with the practice of German arbitrators and the 1998 DIS Rules,³⁰ which actively encourage settlement

during the arbitral proceedings. This approach is more flexible than the so-called 'Arb-Med-Arb'. Arbitrators who make use of these provisions will normally develop flexible solutions tailored to the parties' will and the particularities of the case.

- The parties can request the DIS to appoint a dispute manager to advise and assist the parties in selecting the dispute resolution mechanism best suited for resolving their dispute (*Article 2.2*). This role is unique to the DIS.
- If the parties choose an alternative method of dispute resolution, such as mediation, adjudication or expert determination, a settlement made or decision reached can be recorded by the arbitral tribunal in the form of an award, to facilitate enforcement abroad (*Article 41.2*).
- If the parties have not provided for the number of arbitrators in their arbitration agreement, each party can submit a request to the DIS that the arbitral tribunal be comprised of a sole arbitrator. As a default rule, if no such request is submitted or the request is denied, the arbitral tribunal will be comprised of three arbitrators (*Article 10*).

(3) Multi-Contract and Multi-Party Arbitrations

Whereas the 1998 DIS Rules provided only basic rules for multi-contract and multi-party arbitrations, the 2018 Rules now provide detailed input:

- Article 17 deals with multi-contract arbitrations and provides that claims arising out of more than one contract can be dealt with in one arbitration, provided that all parties have agreed. If there is more than one arbitration agreement, the arbitration agreements need to be compatible. Disputes on whether the parties have agreed or the arbitration agreements are compatible are decided by the arbitral tribunal.
- Article 18 deals with multi-party arbitrations and provides that claims between more than two parties can be arbitrated in one arbitration, if there is an arbitration agreement that obliges all of the parties to have their claims decided in a single arbitration, or if all of the parties have so agreed in a different manner. Disputes on this question are decided by the arbitral tribunal.

- If a multi-party situation arises after an arbitration has been initiated, several arbitrations can be consolidated if all parties agree (*Article 8.1*) and additional parties can be joined up to the appointment of any arbitrator (*Article 19.1*).
- Regarding the constitution of the arbitral tribunal in multi-party arbitrations, if the parties fail to jointly nominate an arbitrator, the appointing committee has discretion to decide whether it will appoint arbitrators for both sides, or will appoint the arbitrator nominated by the opposing side, as well as appoint the arbitrator for the parties who have not jointly nominated an arbitrator (*Article 20.3*).

(4) Transparency of Proceedings

Various administrative functions will now be managed by the DIS instead of the arbitral tribunal. These include:

- The administration of the deposits for the fees and expenses of the arbitral tribunal (*Article 34* and following)).
- Decisions on challenges to arbitrators or the removal of arbitrators (*Articles 15.4* and *16.2*).
- The review of the determination of the amount in dispute by the arbitral tribunal (*Article 36.3*).
- Within the DIS, there will be an appointing authority as well as an 'Arbitration Council' made up of 15 individuals who will be tasked with matters such as decisions on the number of arbitrators, challenges to arbitrators and arbitrators' fees.

Conclusion

The 2018 DIS Rules provide innovative suggestions to improve the efficiency and cost effectiveness of dispute resolution. Considering the cost-effectiveness and efficiency of the Rules, and reliable and helpful operation by the DIS staff, DIS arbitration is now a practical option for Asian practitioners; it can be used not only by Asian companies' subsidiaries operating in or near Germany, but also by ordinary companies, possibly in combination with their home jurisdiction, as a place of arbitration and/or its national law. Thus, DIS arbitration and Germany as a place of arbitration offer an attractive and time- and cost-efficient alternative to other popular places for arbitration. Admittedly, some places of arbitration are more glamorous, such as London or Paris, but at the end

of the day, users of arbitration should favour a procedure that offers a fair and transparent decision in a time- and cost-efficient manner. Germany and DIS arbitration are up to this challenge.

It will be exciting to see how these suggestions are taken up in practice and how DIS arbitration is used by Asian practitioners.

Notes

¹ Stephan Wilske, 'The Global Competition for the 'Best' Place of Arbitration for International Arbitrations—A More or Less Biased Review of the Usual Suspects and Recent Newcomers', *Contemporary Asia Arbitration Journal* Vol 1, 21-66 with many references (May 2008).

² Stephan Wilske, 'Significant Differences in International Arbitration in the 'East' and the 'West': Myth, Reality, or Lost in Globalization?' in: *A Liber Amicorum in Honour of Professor Herbert Han-Pao Ma*, 543, 549-551 (2016).

³ It is ranked fourth among the world, after China, the United States and India, in 2016. See *Statistics of the Ministry of Foreign Affairs of Japan about Numbers of Japanese Citizens Living Abroad* (2017 Detailed Version), 68 (2017).

⁴ Japan External Trade Organization ('JETRO'), *Survey of the Activities of Japanese Companies Operating in Europe in 2017*, 4, 32, 4 December 2017

⁵ JETRO, *ibid* at 28.

⁶ With regard to the effects of Brexit on Asian businesses and dispute resolution, see Stephan Wilske, Lars Markert & Robert Stendel, 'BREXIT, Trump and Other Political Earthquakes: What are the Effects on Asian Businesses and Dispute Resolution?', *Korean Arbitration Review*, 8th Issue, 8 (2017).

⁷ With regard to Japan, see JETRO, n 4 above, at 28 and 31.

⁸ With regard to Japan, see JETRO, *ibid*, at 40.

⁹ Jennifer Rankin, 'Banks and Companies Plan Expansion in Frankfurt After Brexit', 21 July 2017, *The Guardian*, available at <https://www.theguardian.com/business/2017/jul/21/banks-and-companies-plan-expansion-in-frankfurt-after-brexit> (last visited 12 April 2018).

¹⁰ Stephan Wilske & Lars Markert, 'Arbitration Law and Practice in Germany—An Appealing Choice for International Commercial and Investment Dispute Resolution in the Heart of Europe', *Romanian Arbitration Journal*, Vol 14 No 2, 18, 23 (2010).

¹¹ Wilske & Markert, *ibid*, 25-26.

¹² See UNCITRAL, *Status map of UNCITRAL Model Law on International Commercial Arbitration* (1985).

¹³ With regard to a comparison between Japanese arbitration law and German arbitration law, see Lars Markert & Aiko Hosokawa, 'An Introduction to International Arbitration—A Comparative Perspective', (1)-(2), *JCA Journal*, Vol 65 No 1, 13 (2018), Vol 65 No 2, 23 (2018).

¹⁴ Wilske & Markert, n 10 above, 24-25.

¹⁵ Wilske & Markert, n 10 above, 25.

¹⁶ E.g. to enforce an arbitral award of 100,000 EUR, German court fees will be approximately 1,700 EUR and the lawyer's fees approximately 3,000 EURO for each party, although the costs incurred in enforcing awards depend on the amount in dispute according to the costs schedules for court fees and for lawyer's fees. These fees are to be paid by the losing party. Stephan Wilske & Claudia Krapfl, 'Germany', in *Getting the Deal Through—Arbitration 2018*, 114, 119 (Gerhard Wegen & Stephan Wilske eds., 2018).

¹⁷ E.g. with regard to Japan, see Markert & Hosokawa, n13 above, Vol 65 No 2, at 24-25.

¹⁸ According to the DIS statistics in 2016 (<http://www.disarb.org/upload/statistics/DIS%20Statistics%202016.pdf>), Frankfurt and Hamburg are the two most popular places (23 cases in each city).

¹⁹ See the DIS website: <http://www.disarb.org/en/0/content/fiac-id44>.

²⁰ Thinking of the style of German arbitrators, a German arbitrator, Prof Franz-Joerg Semler, suggested using a method developed by state

courts as an approach to case management. See Franz-Joerg Semler, 'Enhancing Efficiency in Arbitral Proceedings: A Dialectical Approach to Case Management', *International Bar Association Arbitration News Letter*, April 2012 Issue, 49 (2012).

²¹ *Ibid* at 50.

²² E.g. classification of *Tatbestand*, which has been a basis of Japanese civil procedure practice, is based on a theory proposed by Professor Rosenberg in Germany. See Hidetoshi Yasui, 'Die Grundlage der Offenlegungspflicht der Parteien im Verhandlungsablauf', *Doushishahougaku*, Vol 62 No 6, 309, 317 (2011). Also, see the 'dialectical approach' proposed by Prof. Franz-Joerg Semler, n 20 above.

²³ As to the characteristics of witness hearings in German state courts, see Markert & Hosokawa, n 13 above, *JCA Journal* Vol 65 No 2, at 25.

²⁴ Wilske & Markert, n 10 above, at 26.

²⁵ *Ibid* at 27.

²⁶ *Ibid* at 27-28.

²⁷ The following part is originally based on Stephan Wilske & Claudia Krapfl, 'New DIS Rules Come Into Force on 1 March 2018', *Thomson Reuters Practical Law*, 24 Jan 2018.

²⁸ Article 26 (Encouraging Amicable Settlements): 'Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues.'

²⁹ Article 27.4 stipulates that during the case management conference, the arbitral tribunal shall specifically discuss the following with the parties: '... (iii) the possibility of using mediation or any other method of amicable dispute resolution to seek the amicable settlement of the dispute or of individual disputed issues.'

³⁰ Section 32.1 of the 1998 DIS Rules stipulated as follows: 'At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute.'



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Indonesia: Enforceability of Awards of Legal Costs in International Arbitration under Indonesian Law

In international arbitration, it is not uncommon to see a situation where the losing party is ordered to pay the legal costs of the prevailing party. It is therefore important to know whether in a jurisdiction where the recognition and enforcement of an arbitral award is sought, awards of legal costs are recognized by the local courts and can be enforced.



Introduction

In international arbitration, it is not uncommon to see a situation where the losing party is ordered to pay the legal costs of the prevailing party (the 'costs follow the event' principle). Given that the quantum of legal costs borne by each party in an international arbitration case can be quite significant, it is therefore important to know whether in a jurisdiction where the recognition and enforcement of an arbitral award is sought, awards of legal costs are recognised by the local courts and can be enforced, and if local rules do not permit such awards, whether the existence of an order for legal costs in a foreign award will have any effect on the enforceability of the arbitral award itself in the intended jurisdiction. This article will discuss the enforceability of awards of legal costs in Indonesia, including the relevant provisions and precedents.

Awards of Legal Costs under Indonesian Law

The Indonesian Arbitration Law is silent on the issue of which party should bear legal costs in arbitrations and in regard to the issue of whether or not the reimbursement of legal costs of the prevailing party by the losing party is permitted. The law only provides that 'Arbitration fees are charged to the losing party'.¹ According to the Arbitration Law, arbitration fees include (1) arbitrators' honorarium; (2) travel expenses and other expenditure incurred by the arbitrator(s); (3) costs of the summons as well as travel expenses incurred for presenting witnesses and expert witnesses needed in the examination of the dispute; and (4) administrative costs.²

In the absence of provisions on awards of legal costs in the Arbitration Law, a natural avenue of inquiry into what the position is would be to look at the Civil Procedural Law, which could be argued to be the default position on the issue. In this regard, it should be noted that the Arbitration Law does make several specific references to some provisions of the Civil Procedural Law. For example, Article 69 para (3) of the Arbitration Law stipulates that the procedure for the enforcement of arbitral awards must follow the procedure set out in the Civil Procedural Law.

Article 181 of the Civil Procedural Law stipulates that the 'party against whom a decision is given will be ordered to bear the court costs' (this is essentially akin to Article 77 para (1) of the Arbitration Law). Moreover, Article 379 of the Law provides that 'Orders for court costs shall not include fees and reimbursement payable to lawyers, advocates, and attorneys, but are instead to be borne by the parties who are assisted or represented by those lawyers, advocates, and attorneys.' This provision has

been repeatedly reinforced by the Indonesian Supreme Court, including in *Minister of Foreign Affairs et al v Bebas Daeng [1973]*, where the Supreme Court judges rejected a claim for legal costs reimbursement on the basis that there are no provisions in the Civil Procedural Law requiring a litigant to be represented by or seek legal assistance from a lawyer and hence, any lawyer's fees cannot be recouped from the opposing party.³

A similar position was taken by the West Jakarta District Court in *Qatar Airways Q.C.S.C v Leo Mualdy Christoeffel [2016]*, where the court ruled that hiring a lawyer is an 'option' (as opposed to an 'obligation') and hence anyone who chooses to do so must bear the lawyer's fees and such costs cannot be reimbursed from the opposing party.

By comparison, the Indonesian National Board of Arbitration ('BANI') Rules take a less strict approach in addressing the issue of legal costs. Article 38 of the BANI Rules provides that:

Except in extraordinary circumstances, legal costs of each party shall be borne by the party engaging such legal services and will not normally be charged against the other party. Yet, if the Tribunal determines that a claim is frivolous or that one party has caused innumerable difficulties or delays in the progress of the arbitral proceedings, legal costs can be charged to the party causing such difficulties.

In other words, the BANI Rules provide for certain circumstances where a party (who may not necessarily be the losing party) is ordered to bear the legal costs of the other party. Having said this, it remains to be seen how Indonesian courts would perceive and respond to any request for the enforcement of local awards of legal costs, especially because no arbitral awards (either local or foreign awards) can be enforced in Indonesia if they are in contravention of Indonesian public order. While there is no precise or clear definition of 'public order', one may reasonably argue that a violation of any provision of the Civil Procedural Law (such as Article 379 as mentioned above) amounts to a violation of Indonesian public order.

Enforceability of Foreign Awards of Legal Costs

Indonesia is a member of the New York Convention, which was ratified through Presidential Decree No 34 of 1981. As a follow-up to the ratification, the Supreme Court issued Regulation No 1 of 1990 on Enforcement of

International Arbitration Awards. In 1999, the Indonesian government enacted the Arbitration Law. The contents of the Supreme Court Regulation are, to a large extent, akin to the provisions of the Arbitration Law concerning the enforcement of foreign arbitral awards. Indonesian arbitration regime is governed under these sets of rules.

The Arbitration Law employs the term 'international arbitration awards' to describe arbitral awards rendered by an arbitration institution or individual arbitrator outside the jurisdiction of Indonesia (foreign seat arbitration).⁴ Based on the Arbitration Law, there are two main steps to enforce foreign arbitral awards in Indonesia, that is, the registration of awards and the submission of an application for an *exequatur* (order for enforcement) at the Central Jakarta District Court, being the court that has jurisdiction over matters with respect to the recognition and enforcement of international arbitration awards.⁵ Article 66 of the Arbitration Law provides that a foreign arbitral award will only be recognised and may be enforced in Indonesia if it:

1. is rendered by an arbitrator or arbitration panel in a country which is bound to Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of international arbitration awards;
2. falls within the ambit of commercial law under Indonesian law (the 'commerciality' principle);
3. does not conflict with Indonesian public order;
4. is confirmed to be enforceable by the Chairman of the Central Jakarta District Court (or by the Supreme Court if Indonesia is a party to the dispute) via the issuance of an *exequatur*.

As mentioned earlier, there is no precise or clear definition of 'public order' or the matters which are deemed to be contrary to public order. The Arbitration Law is silent on the meaning of 'public order'. Article 4 para (2) of the Supreme Court Regulation broadly describes public order as 'the fundamental principles of the Indonesian legal system and social system in Indonesia'. In other words, public order is an open-ended concept. Having said this, it is fair to say that

'fundamental principles of the Indonesian legal system' can be found in various pieces of Indonesian legislation, such as the Civil Procedural Law.

In *Harjani Prem Ramchand v Merrill Lynch International Bank Limited* [2009], the Central Jakarta District Court rejected a claim concerning the reimbursement for legal costs as ordered by the Singapore Court under Singapore law. Two reasons were given by the Central Jakarta District Court for the rejection: first, the order was issued by the Singapore court and, second, the matter was not recognised under the Indonesian legal system. In arriving at the second reason, the Central Jakarta District Court referred to the Supreme Court decision in *Minister of Foreign Affairs et al v Bebas Daeng* [1973]. While the first reason may not be relevant as far as this article is concerned—since, unlike foreign arbitral awards, foreign court orders or decisions are, generally, not enforceable in Indonesia—the second reason given by the court reinforces the inadmissibility of a claim or order for legal costs reimbursement in Indonesia. Given this court decision as well as other authorities mentioned earlier, including

Article 379 of the Civil Procedural Law, the enforcement of foreign awards of legal costs in Indonesia tends to be problematic.

The Potential Pitfall of Including an Order for Legal Costs in a Foreign Award to be Enforced in Indonesia

In *Astro Nusantara International BV et al ('Astro') v PT Ayunda Prima Mitra et al ('Ayunda')* [2010 and 2012], the Supreme Court upheld the Chairman of the Central Jakarta District Court's refusal to recognise and enforce a Singapore International Arbitration Centre ('SIAC') award, essentially because the award contained an anti-suit injunction.

The dispute between Astro and Ayunda originally concerned a failed joint venture under a Subscription and Shareholders Agreement ('SSA'). Pursuant to the arbitration clause in the SSA, Astro commenced arbitration against Ayunda under the SIAC Rules. However, prior to such event, Ayunda filed a case against Astro at the South Jakarta District Court. During the arbitral proceedings Ayunda raised a jurisdictional objection contesting the Tribunal's jurisdiction. The

Indonesian courts do have the basis to not recognise and enforce foreign awards that orders the legal costs of one party to be paid by the other party

Tribunal then issued an award dismissing Ayunda's jurisdictional challenge and granted an anti-suit injunction prohibiting Ayunda from continuing its court proceedings against Astro in Indonesia given that the subject matter of the dispute fell within the arbitration clause set out in the SSA. The anti-suit injunction also prohibited Ayunda from taking any further legal action so far as the SSA was concerned, unless it was brought before arbitration under the SSA. The Indonesian Supreme Court was of the view that the anti-suit injunction violated Indonesian public order as such order limited one's right to initiate a claim before Indonesian courts. As a result, the Supreme Court decided to refuse to recognise and enforce not only the anti-suit injunction, but also the other orders and relief set out in the award.

It was unfortunate that in that case the Supreme Court did not consider Article V(1)(c) of the New York Convention which essentially allows partial enforcement,⁶ especially because there is still an unresolved debate among scholars on this topic. Indonesian leading scholars are divided into different opinions on whether a partial enforcement of a foreign award is permitted and can be done. Article V(1)(c) of the New York Convention provides as follows:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, *that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;*
(Emphasis added)

On balance, there is always a possibility that the enforcement of a foreign award with an order for legal costs reimbursement will end up in the entire award becoming unenforceable as it is deemed to violate Indonesian public order vis-à-vis the Civil Procedural Law, which disallows reimbursement for legal costs from the opposing party.

Conclusion

In view of the foregoing discussion, it appears that Indonesian courts do have the basis to not recognise and enforce foreign awards that orders the legal costs of one party to be paid by the other party. In fact, the issue does not stop there. In *Astro v Ayunda*, the Supreme Court decided to refuse to enforce the entire SIAC award on the basis that one of the orders set out therein was deemed to be in contravention of Indonesian public order. Thus, despite the controversy surrounding the Supreme Court decision in *Astro v Ayunda*, parties in international arbitration need to be very cautious about seeking an order for legal costs if they intend to enforce their case in Indonesia as Indonesian courts may not only refuse to recognise and enforce the order for legal costs, but also the entire arbitral award.

Notes

¹ Arbitration Law, Art 77, para (1).

² Ibid, Art 76, para (2); Art 49, para (2).

³ Supreme Court decisions do not formally bind lower courts because, like other civil law countries, Indonesia does not follow the rule of binding precedent. Yet, practically speaking, Supreme Court decisions are persuasive authorities. It is not difficult to find a situation where a lower court will follow Supreme Court decisions.

⁴ In *Pertamina EP et al v PT Lirik Petroleum [2009]*, the Supreme Court considered an award as a foreign award since the award was rendered under the International Chamber of Commerce ("ICC") Rules, although the place of arbitration was Jakarta. The issue of whether an arbitral award is a local or foreign award becomes essential because there is a provision in the Arbitration Law requiring local arbitral awards to be registered at the relevant court within 30 days after they are rendered, failing which the award will be unenforceable.

⁵ Arbitration Law, Art 65.

⁶ As discussed earlier, although Indonesia does not follow the rule of binding precedent, Supreme Court decisions are persuasive authorities and considered as one of the sources of law under the Indonesian legal system.



Turangga Harlin Partner, MacalloHarlin Advocates

Turangga Harlin of MacalloHarlin Advocates, Indonesia, has extensive experience in commercial disputes. He has advised clients on a variety of disputes encompassing areas such as distributorship, shareholders, joint ventures, banking and finance and construction disputes. He has represented clients in cross-border disputes involving several jurisdictions, as well as complex civil cases, such as multi-party litigation and citizen lawsuit cases. He has also represented clients in various state administrative proceedings, including those concerning licencing disputes. As a dispute lawyer, Mr Harlin has assisted and represented clients in proceedings before domestic and international arbitration institutions, including the Indonesian National Board of Arbitration (BANI) and the Singapore International Arbitration Centre (SIAC).

India Moves to Amend Arbitration Law

The proposed amendments to India's arbitration law sets up an independent arbitration council that grades and accredits arbitral institutions, creates a repository of awards, relieves courts from the burden of appointing arbitrators, assures confidentiality of proceedings and clarifies on the applicability of the 2015 amendments to ongoing disputes. Given India's overburdened court system, these amendments could not have come any sooner.

Introduction

For any international investor, or Indian businessman for that matter, engaging with India's court system can be a frustratingly agonising experience, akin to slow torture, as cases take ages to move through the clogged judicial process. Arbitration, which was initially bandied about as the *panacea*, soon became a prisoner of the very system that it was supposed to fix. This led to a serious credibility crisis as far as the Indian alternative dispute resolution mechanism was concerned and contracting parties started moving dispute resolution venues out of India for all major contracts.

With international arbitration deserting the country and domestic arbitration increasingly becoming unaffordable, slow and unreliable, something had to be done quickly to bring a semblance of credibility to the Indian commercial dispute resolution superstructure. The efficacy (or the lack of it) of India's contract enforcement apparatus resulted in an abysmal score for the country in the World Bank ranking of global nations on contract enforcement. As the first major step towards fixing this systemic malady, the arbitration law was amended through the Arbitration and Conciliation (Amendment) Act, 2015 ('2015 Amendment'), which sought to reduce the pendency of cases in the courts, facilitate speedy enforcement of contracts as well as recovery of monetary claims, restore credibility to the process through transparent rules and thereby showcase India as an investor-friendly country.

Moving rather quickly to fix the *lacunae* noticed by courts in the 2015 Amendment, the government of India has sought to introduce the Arbitration & Conciliation (Amendment) Bill, 2018 ('2018 Bill'). It will now be placed



for consideration before the Indian Parliament. The 2018 Bill makes an ambitious attempt at making India a preferred arbitration destination.

Key Features of the 2018 Bill

Arbitration Council of India

The 2018 Bill provides for the creation of an independent Arbitration Council of India ('ACI') that will grade arbitral institutions, accredit them by laying down norms and be tasked with the establishment and maintenance of uniform professional standards for arbitration and other alternative dispute resolution methods. The ACI will also maintain an electronic depository of all arbitral awards. It will facilitate the speedy appointment of arbitrators through arbitral institutions designated by the Supreme Court or the High Courts, without having any requirement to approach the courts for this purpose.

Confidentiality and Immunity

Arbitral institutions shall maintain confidentiality of all arbitral proceedings other than the award. Further, the arbitrator shall be protected against legal proceedings for actions or omissions done in good faith in the course of arbitration proceedings.

Timelines for International Arbitration

International arbitration is now sought to be excluded from the rigours of a strict timeline that the 2015 Amendment mandated. The time limit for rendering the award in domestic arbitrations shall be 12 months from the completion of pleadings.

Appointment of Arbitrators Without Court Intervention

Parties will now be allowed to approach arbitral institutions designated by the Supreme Court of India or the High Courts for appointment of arbitrators without involving the courts. This is a significant step towards promoting institutional arbitration and reducing the heavy burden on courts that are currently saddled with such appointment applications.

Applicability

Unless parties agree otherwise, the 2015 Amendment will not apply to: (1) arbitral proceedings that have commenced prior to the commencement of the 2015 Amendment; (2) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the 2015 Amendment.

The Supreme Court had earlier ruled in Board of Control for Cricket in India v Kochi Cricket Pvt Ltd and others that the 2015 Amendment will apply to applications that are pending in various courts challenging arbitral awards but were filed before the commencement of the 2015 Amendment. The Bill of 2018 seeks to put this controversy at rest.

What is Missing?

Some of the criticism of the Bill of 2018 revolves around its failure to define the scope of the ACI's powers and the relaxation on the 12 month deadline for completion of the domestic arbitral process (the 12-month clock will now start from the completion of pleadings and not from date of arbitration reference). Much to the chagrin of the arbitration community, the Bill of 2018 is silent on the establishment of specialist arbitration benches in various courts as also in embracing a uniform set of rules for recording of evidence that is benchmarked on international standards.

Conclusion

The proposed amendments are premised on the transparent and hassle-free appointment of arbitrators and curtailment of judicial intervention, thereby contributing to speedy resolution of disputes in line with international best practices. The Bill of 2018 is definitely a welcome step and deserves appreciation.



Ramesh K. Vaidyanathan
Founding and Managing Partner,
Advaya Legal

Ramesh Vaidyanathan is the Managing Partner of Advaya Legal, a full service law firm based out of Mumbai. He is a general corporate lawyer with varied experience across diverse sectors. Before founding Advaya, Ramesh had the opportunity to be in private practice as the partner of a large law firm and the General Counsel of a large Indian infrastructure company. Apart from general corporate and commercial advisory work, a good part of his work involves projects, infrastructure and aviation.

Ramesh is active in legal fora at the national and international level and speaks regularly at various conferences. Ramesh teaches Indian law course modules at the Michigan State University (MSU) in the US and has also rendered a visiting lecture at the Seikei Law School in Tokyo. He is also the founder director of Advaya Charitable Foundation that works in the area of education of underprivileged children including legal education.

IPBA New Members June – August 2018

We are pleased to introduce our new IPBA members who joined our association from June 2018 – August 2018. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

Canada , Matthew Weaver <i>Blake, Cassels & Graydon, LLP</i>	Panama , Juan Alexis Lopez Navarro <i>Lopez, Lopez & Associates</i>
China , Jian (Scott) Li <i>Jin Mao Partners</i>	Philippines , Michelle Carisse Balois <i>Feria Tantoco Daos</i>
Hong Kong , Richard Grasby <i>Charles Russell Speechlys LLP</i>	Russia , Alevtina Kamelkova <i>Ivanyan and Partners</i>
Hong Kong , Jeremy Lightfoot <i>Campbells</i>	Singapore , Jonathan Howes <i>Pinsent Masons MPillay LLP</i>
India , Gaurav Dani <i>IndusLaw</i>	Singapore , Swee Yen Koh <i>WongPartnership LLP</i>
India , Ramesh Vaidyanathan <i>Advaya Legal</i>	Singapore , Nathaniel Rowe <i>King & Spalding LLP</i>
Indonesia , Prihandana Suko Prasetyo Adi <i>AKSET Law</i>	Thailand , Kodchaporn Susanhakanok <i>Diamondlaw Co., Ltd.</i>
Indonesia , Yohanes Brilianto Hadi <i>AKSET Law</i>	United Kingdom , Jane Davies Evans <i>3 Verulam Buildings</i>
Indonesia , Mohamad Kadri <i>AKSET Law</i>	United Kingdom , Kushal Gandhi <i>CMS Cameron McKenna Nabarro Olswang LLP</i>
Indonesia , Thalia Priscilla <i>AKSET Law</i>	United Kingdom , Caroline Marshall <i>Pinsent Masons LLP</i>
Indonesia , Alfa Dewi Setiawati <i>AKSET Law</i>	Uruguay , Alfredo Taullard <i>Hughes & Hughes</i>
Korea , Min Young Sung <i>Yulchon LLC</i>	USA , Mark Ito <i>Schlack Ito, a Limited Liability Law Company</i>
Kuwait , Areej Hamadah <i>The Office of lawyer Areej Abdel Rahman Hamada</i>	Vietnam , Hieu Dang <i>Vision & Associates</i>

There was a mistake in the recently distributed IPBA Membership Directory, April 1, 2017 through March 31, 2018. Please note the following correction:

Jurisdiction: Argentina
Catriel Agustin Marques ⇄ Marqués
info@marques-law.com.ar ⇄ cam@marqueslaw.com.ar

We humbly apologize for this error!

Members' Note

John Wilson, Sri Lanka

In February this year, several of the existing Sri Lankan membership of the Chartered Institute of Arbitrators (CI Arb) met in Sri Lanka with Mr. Anthony Abrahams, Director General of CI Arb. Mr. Abrahams was supported at this meeting by none other than our very own IPBA President – Francis Xavier!

At that meeting, it was decided to constitute a steering committee in connection with the incorporation of a CI Arb entity in Sri Lanka. I was requested to act as the Honorary Secretary of the Steering Committee and I am pleased to report here that considerable progress has been made.

The Constitution of the local entity has now been finalized, an exhaustive review of the standard format for CI Arb having being carried out by myself and members of the team at my law firm, for compliance with Sri Lankan law.

A resolution having been passed by the Board of Trustees of CI Arb resolving to approve the establishment of a CI Arb "branch" in Sri Lanka, steps will be taken in the near future to incorporate the CI Arb entity in Sri Lanka.

It is considered that, in the context of a considerable expansion in construction activity in Sri Lanka, (which is projected to continue and increase in the future having regard to the major development initiatives and investments such as the Megapolis project of the Government of Sri Lanka and the Port City project), there will be an increasing amount of ADR work in Sri Lanka; and so, the establishment of CI Arb in Sri Lanka is a welcome development.

CI Arb through its training programmes will contribute to furthering alternate dispute resolution in Sri Lanka and provide ADR education and training to professionals from many professions including lawyers, quantity surveyors project managers and civil engineers.

Publications Committee Guidelines for Publication of Articles in the IPBA Journal

We are pleased to accept articles on interesting legal topics and new legal developments that are happening in your jurisdiction. From time to time, issues of the Journal will be themed. Please send: (1) your article to both **John Wilson** at advice@srilankalaw.com and **Priti Suri** at p.suri@psalegal.com; (2) a lead paragraph of approximately 50 or 60 words, giving a brief introduction to, or an overview of the article's main theme; (3) a photo with the following specifications (File Format: JPG or TIFF, Resolution: 300dpi and Dimensions: 4cm(w) x 5cm(h)); and (4) your biography of approximately 30 to 50 words.

The requirements for publication of an article in the *IPBA Journal* are as follows:

1. The article has not been previously published in any journal or publication;
2. The article is of good quality both in terms of technical input and topical interest for IPBA members;
3. The article is not written to publicise the expertise, specialization, or network offices of the writer or the firm at which the writer is based;
4. The article is concise (2500 to 3000 words) and, in any event, does not exceed 3000 words; and
5. The article must be written in English (with British English spelling), and the author must ensure that it meets international business standards.
6. The article is written by an IPBA member. Co-authors must also be IPBA members.
7. Contributors must agree to and abide by the copyright guidelines of the IPBA.

Discover Some of Our New Officers and Council Members



John Birch

Co-Chair, Insolvency Committee

What was your motivation to become a lawyer?

In my youth, I always enjoyed having a great 'debate' with my parents and friends, whose political views differed from mine, and whom I wanted to 'set straight'. I became a strong advocate for my beliefs (even if they were unpopular), which led me naturally to my current role as an insolvency litigator.

What are the most memorable experiences you have had thus far as a lawyer?

My most memorable experiences are those when I successfully defied conventional wisdom and won an unwinnable case. This first happened to me as a junior associate when, as a favour to a corporate client, I undertook an appeal from a decision dismissing a citizenship application of one of its employees who was a long-time Canadian resident. When I started the case, I knew nothing about immigration law and had no preconceived notion about how to win the appeal, but I firmly believed that my client was right, devised some creative arguments that real immigration lawyers might have dismissed as hopelessly ill-informed and naive, and

somehow managed to win the appeal, thereby allowing my client to live the rest of her life in Canada with her family. In my later years of practice, my most memorable experiences have been meeting new people at home and abroad. The IPBA has been a key part of that endeavour. From my years of involvement in the IPBA, I firmly believe that what unites us is far stronger than what divides us. It is always great to gain knowledge about a new language, culture, or country.

What are your interests and/or hobbies?

My two teenage daughters and their year-round sports keep me very busy. On my own time, I love to cycle, ski, or (when tired) simply read the newspaper in my back yard.

Share with us something that IPBA members would be surprised to know about you.

Before becoming a lawyer, I held numerous unglamorous jobs to generate income to pay my tuition. These include delivering political campaign flyers, moving goods in a warehouse and doing shipping and receiving, working as a mailman and selling beer in a store at Toronto's most dangerous intersection. All of these activities took place in the era before 'resume building' became the fashionable way to try to land a job. But I think that my menial work taught me the most important lesson of all ... stay in school!

Do you have any special messages for IPBA members?

We are all very lucky to be members of an organisation where true friendships can be nurtured and sustained.



Jiang Junlu

At-Large Council Member, China

What was your motivation to become a lawyer?

I did not intend to become a lawyer when I first started my career as a journalist focusing on the labour area. Employment and labour law at that time in China was totally different to what it is now. However, the career as a labour journalist got me interested in the life and opportunities of a legal practitioner and I, foreseeing the potential of employment and labour law practice, started my own firm with some friends.

What are the most memorable experiences you have had thus far as a lawyer?

Compliance is a big area of our operation, and every year our team helps many multinationals improve their compliance in China. There is no 'most memorable' experience that I can think of. Instead, it is the 'always-can-do' attitude of my team that I cherish the most, and I believe this is also what my clients always count on.

What are your interests/hobbies?

I really enjoy reading whenever I have time, not necessarily lengthy books, but also short interesting

articles and newspapers. This allows me to quickly know what other people are thinking and what is happening in the world.

Share with us something that IPBA members would be surprised to know about you.

I really enjoy travelling and getting to see different landscapes. Sometimes I even go camping.

Do you have any special messages for IPBA members?

It is very nice to meet everyone and if you need anything please feel free to give me a shout. Thanks!



What was your motivation to become a lawyer?

When I was a high school student, I felt angry about various social contradictions, although, compared with today, Japan was relatively richer and the disparity in wealth was narrower. At that time, I had little inclination to work for any profit-making organisation. I believed that if I became a lawyer I could work for the advancement of human rights and social justice without worrying much about my income. However, I do not think this is applicable to current Japanese lawyers.

What are the most memorable experiences you have had thus far as a lawyer?

I have been enjoying being involved in new business on a daily basis, such as M&A, joint ventures, licensing and distributorships between Japanese companies and foreign companies. But there are two experiences which I will not forget.

The first one is that my client had recently lost at the trial of first instance in a dispute regarding the construction of a huge plant, and we started representing the client from the appeal, during which a substantial settlement was obtained and the client collected more than 15 billion Japanese Yen. Although I have experience working as a member of a legal team in large cases, such as labour

disputes, shareholders derivative actions and product liability suits, this was my first time as lead counsel of a legal team consisting of seven attorneys and I worked hard to manage the team and to coordinate the case and all involved to the satisfaction of the people in charge.

The second experience was when I, as a lead counsel, applied to the court for civil rehabilitation proceedings on behalf of a Japanese listed company with a Singapore branch and Malaysian subsidiaries. Because neither Singapore nor Malaysia recognised Japanese insolvency proceedings, we concluded out-of-court settlements with the courts' permission. We tried to look for a sponsor but we couldn't find one so we managed to have an independent rehabilitation plan to be approved by all the creditors, including the foreign creditors. When the rehabilitation plan was successfully completed, I was glad to have overcome such obstacles.

What are your interests and/or hobbies?

I love to watch football, by which I mean 'soccer'. I was hopeful that Japan's national team would do well in the recent World Cup.

Share with us something that IPBA members would be surprised to know about you.

I look young, but I just passed a big age milestone (or perhaps my current picture does reflect my age).

Do you have any special messages for IPBA members?

The number of members and delegates seem to be increasing, which is good. Nevertheless, I hope that members become more acquainted with one another—through getting to know fellow members, membership becomes more mutually beneficial.



Olivia Kung

Co-Chair, Women's Business Law Committee

What was your motivation to become a lawyer?

When I was five years old, one afternoon my father came home with a big bag and asked me to stand in front of a mirror. I stood in front of the mirror excitedly thinking there would be some sort of surprise. Instead of any exciting toys or cuddly animals, which I expected, he took a court dress out of the bag. He put the court dress on me and asked me whether I liked the look. I saw my reflection in the mirror and despite the fact that the court dress was a lot bigger than me, I liked it. My father explained to me that was a lawyer's uniform and if I wanted to wear that when I became an adult, I would need to become a lawyer. I said yes. At five years of age, I decided to become a lawyer and the decision was made purely on 'the look'. During my teenage years, I did internships in different law firms. I realised that apart from 'the look', legal work itself was in fact exciting, intellectually challenging and mentally rewarding. At 17 years old, I decided for the second time

that I wanted to become a lawyer. This time the decision was made not based on 'the look', but on the substance of the occupation. I chose to study law at university and the rest is history.

What are the most memorable experiences you have had thus far as a lawyer?

Starting my law firm, Wellington Legal.

What are your interests and/or hobbies?

I enjoy yoga and jogging at night. I also enjoy music, art and culture. In particular, I love musicals and shows.

Share with us something that IPBA members would be surprised to know about you.

I don't think anything about me would surprise those who already know me. I prefer to do things in an unconventional way and I like to explore new and creative ideas. Having said that, if I had to answer the question, no IPBA members would have known that I used to be very short sighted before (thanks to the invention called LASIK) and was a librarian for years at school.

Do you have any special messages for IPBA members?

IPBA is much more than just a network of lawyers from different jurisdictions. It's about friendships, memories we build together and explore ways we can do to improve the association as a whole.



Dr Simone Nadelhofer

Chair, Anti-Corruption and the Rule of Law Committee

What was your motivation to become a lawyer?

As a disputes and white-collar crime lawyer, I'm driven by the ambition to serve clients in extraordinary life circumstances.

What are the most memorable experiences you have had thus far as a lawyer?

There have been many. To name a recent example, I have been coordinating an internal investigation into bribery in an Asian country for a large Swiss retail

company, which led to significant improvements in the client's compliance system.

What are your interests and/or hobbies?

First and foremost, spending time with my husband and children. I also like travelling and participating in endurance sports. I am also a fan of contemporary Indian literature.

Share with us something that IPBA members would be surprised to know about you.

I have spent several months working as an international lawyer in a local law firm in Delhi, India.

Do you have any special messages for IPBA members?

The IPBA is the right choice for legal practitioners from all over the world. The Association is a benchmark for professionalism, a source of 'ahead-of-time' know-how and an excellent networking platform.



Henry Si

Jurisdictional Council Member,
China

What was your motivation to become a lawyer?

A feeling of freedom compared with other jobs available in the country at that time.

What are the most memorable experiences you have had thus far as a lawyer?

Watching a sunrise in Beijing from a meeting room window after a whole night of negotiations.

What are your interests and/or hobbies?

Chinese history and art.

Share with us something that IPBA members would be surprised to know about you.

I used to perform a traditional Chinese cross-talk show (相声) at my firm's new year party, teasing the firm, the profession and ourselves as lawyers, and it gained me some fans.

Do you have any special messages for IPBA members?

The IPBA is a great, great party to make friends in the legal profession; it is good for work, good for life.



Jeffrey Snyder

Jurisdictional Council Member, USA

What was your motivation to become a lawyer?

Growing up in different countries—in the United States (and Mexico, the Philippines, Ethiopia and others)—I learned from my father, who was with USAID, that the law plays an important role in economic development and trade. I discovered that international trade law was a way that I could contribute to this goal.

What are the most memorable experiences you have had thus far as a lawyer?

I enjoy working with companies to resolve issues presented in international trade law. Learning about business and how to help business succeed and trade

continue, can be very rewarding. I have had the privilege of working with companies in many different countries and I never tire of learning about new technology, culture and international business.

What are your interests and/or hobbies?

I enjoy volunteering in support of ending homelessness; I help run a hypothermia prevention shelter each year. I also enjoy hikes (I was able to climb Mt Fuji in 1995) with my wife and family travel. I am on a life-long quest to learn more about Italian red wines and I enjoy Japanese literature (in English translation—in retirement I may start my language study!) and literature from all over.

Share with us something that IPBA members would be surprised to know about you.

I graduated from the American Community School in Addis Ababa, Ethiopia in 1975 (there were 12 of us in the senior class).

Do you have any special messages for IPBA members?

The IPBA needs you so that we can remain strong and provide support for future generations of lawyers in the region. Give of your time and attend, attend, attend.



Inter-Pacific Bar Association Scholarship Programme

The Inter-Pacific Bar Association (IPBA) is pleased to announce that it is now accepting applications for the IPBA Scholarship Programme to enable practicing lawyers to attend the IPBA's 29th Annual General Meeting and Conference to be held in Singapore, April 25-27, 2019.

What is the Inter-Pacific Bar Association?

The Inter-Pacific Bar Association is an international association of business and commercial lawyers with a focus on the Asia-Pacific region. Members are either Asia-Pacific residents or have a strong interest in this part of the world. The IPBA was founded in April 1991 at an organising conference held in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then, it has grown to become the pre-eminent organisation in respect of law and business within Asia with a membership of over 1300 lawyers from 65 jurisdictions around the world. IPBA members include a large number of lawyers practising in the Asia-Pacific region and throughout the world that have a cross-border practice involving the Asia-Pacific region.

What is the Inter-Pacific Bar Association Annual Meeting and Conference?

One of the highlights of the year for the IPBA is its annual conference, which has become the 'must attend event' for international lawyers practicing in the Asia-Pacific region. In addition to plenary sessions of interest to all lawyers, sessions are presented by the IPBA's 23 specialist committees and one Ad Hoc committee. The IPBA Annual Meeting and Conference provides an opportunity for lawyers to meet colleagues from around the world and to share the latest developments in cross-border practice and professional development in the Asia-Pacific region. Previous annual conferences have been held in Tokyo, Sydney, Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali, Beijing, Los Angeles and Kyoto.

What is the IPBA Scholarship Programme?

The IPBA Scholarship Programme was originally established in honour of the memory of M.S. Lin of Taipei, who was one of the founders and a Past President of the IPBA. Today it operates to bring to the IPBA Annual Meeting and Conference lawyers who would not otherwise be able to attend and who would both contribute to, and benefit from, attending. The Scholarship Programme is also intended to endorse the IPBA's mission to develop the law and its practice in the Asia-Pacific region. Currently, the scholarships are principally funded by The Japan Fund, established and supported by lawyers in Japan to honour IPBA's accomplishments since its founding; the Host Committee of the Annual Meeting and Conference in Vancouver, Canada, 2014; and a generous donation by the family of M.S. Lin.

During the conference, the Scholars will enjoy the opportunity to meet key members of the legal community of the Asia-Pacific region through a series of unique and prestigious receptions, lectures, workshops, and social events. Each selected Scholar will be responsible to attend the Conference in its entirety, and to provide a report of his/her experience to the IPBA after the conference. The program aims to provide the Scholars with substantial tools and cross-border knowledge to assist them in building their careers in their home country. Following the conference, the Scholars will enjoy three years of IPBA membership and will be invited to join a dedicated social networking forum to remain in contact with each other while developing a network with other past and future Scholars.

Who is eligible to be an IPBA Scholar?

There are two categories of lawyers who are eligible to become an IPBA Scholar:

1. Lawyers from Developing Countries
To be eligible, the applicants must:
 - a. be a citizen of and be admitted to practice in Laos, Cambodia, Myanmar, Mongolia, Bangladesh or the Pacific Islands;
 - b. be fluent in both written and spoken English (the conference language); and
 - c. currently maintain a cross-border practice or desire to become engaged in cross border practice.
2. Young Lawyers
To be eligible, the applicants must:
 - a. be under 35 years of age at the time of application and have less than seven years of post-qualification experience;
 - b. be fluent in both written and spoken English (given this is the conference language);
 - c. have taken an active role in the legal profession in their respective countries;
 - d. currently maintain a cross-border practice or desire to become engaged in cross border practice; and
 - e. have published an article in a reputable journal on a topic related to the work of one of our committees or have provided some other objective evidence of committed involvement in the profession.

Preference will be given to applicants who would be otherwise unable to attend the conference because of personal or family financial circumstances and/or because they are working for a small firm without a budget to allow them to attend.

Former Scholars will only be considered under extraordinary circumstances.

How to apply to become an IPBA Scholar

To apply for an IPBA Scholarship, please obtain an application form and return it to the IPBA Secretariat in Tokyo no later than **October 31, 2018**. Application forms are available either through the IPBA website (ipba.org) or by contacting the IPBA Secretariat in Tokyo (ipbascholarships@ipba.org).

Please forward applications to:
The IPBA Secretariat
E-mail: ipbascholarships@ipba.org

What happens once a candidate is selected?

The following procedure will apply after selection:

1. IPBA will notify each successful applicant that he or she has been awarded an IPBA Scholarship. The notification will be provided at least two months prior to the start of the IPBA Annual Conference. Unsuccessful candidates will also be notified.
2. Airfare will be agreed upon, reimbursed or paid for by, and accommodation will be arranged and paid for by the IPBA Secretariat after consultation with the successful applicants.
3. A liaison appointed by the IPBA will introduce each Scholar to the IPBA and help the Scholar obtain the utmost benefit from the IPBA Annual Conference.
4. Each selected scholar will be responsible to attend all of the Conference, to make a very brief presentation at the Conference on a designated topic and to provide a report of his/her experience to the IPBA after the Conference. (Subject to later decision by the IPBA.)



An Invitation to Join the Inter-Pacific Bar Association

The Inter-Pacific Bar Association (IPBA) is an international association of business and commercial lawyers who reside or have an interest in the Asian and Pacific region. The IPBA has its roots in the region, having been established in April 1991 at an organising conference in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then it has grown to over 1400 members from 65 jurisdictions, and it is now the pre-eminent organisation in the region for business and commercial lawyers.

The growth of the IPBA has been spurred by the tremendous growth of the Asian economies. As companies throughout the region become part of the global economy they require additional assistance from lawyers in their home country and from lawyers throughout the region. One goal of the IPBA is to help lawyers stay abreast of developments that affect their clients. Another is to provide an opportunity for business and commercial lawyers throughout the region to network with other lawyers of similar interests and fields of practice.

Supported by major bar associations, law societies and other organisations throughout Asia and the Pacific, the IPBA is playing a significant role in fostering ties among members of the legal profession with an interest in the region.

IPBA Activities

The breadth of the IPBA's activities is demonstrated by the number of specialist committees: 23. Each committee focuses on different aspects of business law, indicating the scope of expertise and experience among our membership as well as the variety of topics at our seminars and conferences. All IPBA members are welcome to join up to three committees, with the chance to become a committee leader and have a hand in driving the programmes put on by the IPBA.

The highlight of the year is our Annual Meeting and Conference, a four-day event held each spring. Past conferences have been held at least once, sometimes twice, in Tokyo, Osaka, Sydney, Taipei, Singapore, San Francisco, Los Angeles, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali, and Beijing. Conferences in recent years have attracted over 1,000 delegates and accompanying guests. In addition to the Annual Conference, the IPBA holds in various jurisdictions seminars and conferences on issues such as Arbitration, Dispute Resolution, M&A, and Cross-Border Investment. Check the IPBA web site (ipba@ipba.org) for the latest information on events in your area.

IPBA members also receive our quarterly IPBA Journal, with the opportunity to write articles for publication. In addition, access to the online and annual printed Membership Directory ensures that you can search for and stay connected with other IPBA members throughout the world.

APEC

APEC and the IPBA are joining forces in a collaborative effort to enhance the development of international trade and investments through more open and efficient legal services and cross-border practices in the Asia-Pacific Region. Joint programmes, introduction of conference speakers, and IPBA member lawyer contact information promoted to APEC are just some of the planned mutual benefits.

Membership

Membership in the Association is open to all qualified lawyers who are in good standing and who live in, or who are interested in, the Asia-Pacific region.

- | | |
|--|---------|
| • Standard Membership | ¥23,000 |
| • Three-Year Term Membership | ¥63,000 |
| • Corporate Counsel | ¥11,800 |
| • Young Lawyers (35 years old and under) | ¥6000 |

Annual dues cover the period of one calendar year starting from January 1 and ending on December 31. Those who join the Association before 31 August will be registered as a member for the current year. Those who join the Association after 1 September will be registered as a member for the rest of the current year and for the following year.

Membership renewals will be accepted until 31 March.

Selection of membership category is entirely up to each individual. If the membership category is not specified in the registration form, standard annual dues will be charged by the Secretariat.

There will be no refund of dues for cancellation of all membership categories during the effective term, nor will other persons be allowed to take over the membership for the remaining period.

Corporate Associate

Any corporation may become a Corporate Associate of the IPBA by submitting an application form accompanied by payment of the annual subscription of (¥50,000) for the current year.

The name of the Corporate Associate shall be listed in the membership directory.

A Corporate Associate may designate one employee ('Associate Member'), who may take part in any Annual Conference, committee or other programmes with the same rights and privileges as a Member, except that the Associate Member has no voting rights at Annual or Special Meetings, and may not assume the position of Council Member or Chairperson of a Committee.

A Corporate Associate may have any number of its employees attend any activities of the Association at the member rates.

- Annual Dues for Corporate Associates ¥50,000

Payment of Dues

The following restrictions shall apply to payments. Your cooperation is appreciated in meeting the following conditions.

1. Payment by credit card and bank wire transfer are accepted.
2. Please make sure that related bank charges are paid by the remitter, in addition to the dues.

IPBA Secretariat

Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: 81-3-5786-6796 Fax: 81-3-5786-6778 E-Mail: ipba@ipba.org Website: ipba.org

See overleaf for membership
registration form





IPBA SECRETARIAT

Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: +81-3-5786-6796 Fax: +81-3-5786-6778 Email: ipba@ipba.org Website: www.ipba.org

IPBA MEMBERSHIP REGISTRATION FORM

MEMBERSHIP CATEGORY AND ANNUAL DUES:

- Standard Membership ¥23,000
- Three-Year Term Membership ¥63,000
- Corporate Counsel ¥11,800
- Young Lawyers (35 years old and under) ¥6,000

Name: _____ Last Name _____ First Name / Middle Name _____

Date of Birth: year _____ month _____ date _____ Gender: _____ M / F

Firm Name: _____

Jurisdiction: _____

Correspondence Address: _____

Telephone: _____ Facsimile: _____

Email: _____

CHOICE OF COMMITTEES (PLEASE CHOOSE UP TO THREE):

- | | |
|--|--|
| <input type="checkbox"/> Anti-Corruption and the Rule of Law | <input type="checkbox"/> Insurance |
| <input type="checkbox"/> APEC | <input type="checkbox"/> Intellectual Property |
| <input type="checkbox"/> Aviation Law | <input type="checkbox"/> International Construction Projects |
| <input type="checkbox"/> Banking, Finance and Securities | <input type="checkbox"/> International Trade |
| <input type="checkbox"/> Competition Law | <input type="checkbox"/> Legal Development and Training |
| <input type="checkbox"/> Corporate Counsel | <input type="checkbox"/> Legal Practice |
| <input type="checkbox"/> Cross-Border Investment | <input type="checkbox"/> Maritime Law |
| <input type="checkbox"/> Dispute Resolution and Arbitration | <input type="checkbox"/> Scholarship |
| <input type="checkbox"/> Employment and Immigration Law | <input type="checkbox"/> Tax Law |
| <input type="checkbox"/> Energy and Natural Resources | <input type="checkbox"/> Technology, Media & Telecommunications |
| <input type="checkbox"/> Environmental Law | <input type="checkbox"/> Women Business Lawyers |
| <input type="checkbox"/> Insolvency | <input type="checkbox"/> NEW! Ad Hoc Next Generation (40 and under) |

I AGREE TO SHOWING MY CONTACT INFORMATION TO INTERESTED PARTIES THROUGH THE APEC WEB SITE. YES NO
METHOD OF PAYMENT (PLEASE READ EACH NOTE CAREFULLY AND CHOOSE ONE OF THE FOLLOWING METHODS):

- Credit Card
 - VISA MasterCard AMEX (Verification Code: _____)
 - Card Number: _____ Expiration Date: _____

- Bank Wire Transfer – Bank charges of any kind should be paid by the sender.
 - to DBS Bank Limited, MBFC Branch (SWIFT Code: DBSSGSG)
 - Bank Address: 12 Marina Boulevard, DBS Asia Central, Marina Bay Financial Centre Tower 3, Singapore 018982
 - Account Number: 0003-027922-01-0 Account Name: INTER-PACIFIC BAR ASSOCIATION
 - Account Holder Address: 10 Collyer Quay #27-00 Ocean Financial Centre, Singapore 049315

Signature: _____ Date: _____

PLEASE RETURN THIS FORM TO:

The IPBA Secretariat, Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: +81-3-5786-6796 Fax: +81-3-5786-6778 Email: ipba@ipba.org

Put IPBA in your Business Calendar



----- EVENTS -----

➤ **The World at Your Doorstep**

IPBA Australian-New Zealand Regional Forum
19 July 2018
College of Law, Sydney Level 16, St James Centre, 111 Elizabeth Street
Sydney NSW 2000
For inquiries please email:
Michael Butler: Michael.Butler@finlaysons.com.au
Roger Saxton: roger.saxton@connorco.com.au

➤ **IPBA 2nd Indochina Regional Forum**

24 August 2018
Rangoon, Myanmar
For inquiries please email:
Le Net: net.le@lntpartners.com
Shigehiko Ishimoto: shigehiko.ishimoto@mhmjapan.com

➤ **Doing Business with Asia: Developments in Trade, IP, Investment and Dispute Settlement**

20 September 2018
Los Angeles, California (Crowell & Moring, LLP's office)
For inquiries please email:
Jeffrey Snyder: JSnyder@crowell.com
Corey Norton: cnorton@tradepacificlaw.com

➤ **LatAm Legal Views on Investment, Trade, Compliance & International Dispute Resolution**

28 September 2018
Santiago, Chile
For inquiries please email:
Rafael Vergara: rvergara@carey.cl

➤ **4th IPBA Arbitration Day**

5 November 2018
Bangkok, Thailand
For inquiries please email:
Robert Rhoda: Robert.Rhoda@twobirds.com
Hiroyuki Tezuka: h_tezuka@jurists.co.jp
Colin Ong: dco@onglegal.com
Punjabom Kosolkitiwong: punjabom@dejjudom.com

➤ **IPBA 4th East Asia Regional Forum**

7 November 2018
Seoul, Korea
For inquiries please email:
Jihn U Rhi: jurhi@rhilaw.com
YJ Chang: yjc@leeko.com

➤ **IPBA European Regional Conference International Commercial Courts in Various European Jurisdictions & in Singapore**

22 November 2018
Brussels, Belgium (Stibbe's office)
For inquiries please email:
Jeffrey Holt: jeffreyholt@yahoo.com
Sebastian Kühl: Kuehl@hdh.net
Jan Peeters: Jan.Peeters@Stibbe.com
Bart Kasteleijn: bart.kasteleijn@wintertaling.nl

➤ **IPBA Mid-East Regional Forum**

24 January 2019
Dubai
For inquiries please email:
Ali Al Hashimi: ali.alhashimi@globaladvocates.net
Richard Briggs: r.briggs@hadefpartners.com

➤ **Asia M&A Forum 2019**

28 February to 1 March 2019
For inquiries please email:
Myles Seto: myles.seto@deacons.com.hk
Wilson Chu: wchu@mwe.com

➤ **Global Challenges, Local Solutions & Singapore Being an International Hub**

IPBA 29th Annual Meeting and Conference in Singapore 2019
24 - 28 April 2019
Singapore
Please visit the IPBA 2019 booth at Level 3, Foyer Area of Grand Ballroom
Shangri-la The Fort

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Emma German

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Stan Entertainment
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Proudly collaborating with the Inter-Pacific Bar Association (IPBA) on the Master of Laws (Applied Law) in ASEAN+6 Legal Practice programme.

The College of Law offers the following LLM programmes:

- Master of Laws (Applied Law) in Malaysian Legal Practice
- IPBA Master of Laws (Applied Law) in ASEAN+6 Legal Practice
- Master of Laws (Applied Law) in 12 Australian practice areas
- Master of Laws (Applied Law) in Common Law Practice (New Zealand)

Next intake
commencing on
19 November 2018

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