



Asia's arbitration explosion

As Asia begins to dominate the global economy, major arbitral venues are competing for the increasing disputes.

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'Dispute resolution is big business. It's a simple economic truth,' says Jern-Fei Ng of London's Essex Court Chambers. Over coffee at the Renaissance Chancery Court Hotel in London, Ng is praising the newly launched Maxwell Chambers, a swanky 21st century centre for alternative dispute resolution (ADR) in Singapore.

Though a member of one of London's premier barristers' chambers, Ng is used to seeking work in more exotic parts of the world. A Malaysian by birth, he and some 40 of his Essex Court colleagues have taken office space in Maxwell Chambers. It's yet another example of the English Bar taking its expertise overseas.

The trend is partially explained by the reduction in court proceedings in the United Kingdom following the much-heralded Woolf Reforms, but also the rise in arbitration cases, most notably in Asia.

As cross-border transactions within Asia Pacific intensify, and trade between East and West heightens, the consequential wave of disputes is becoming increasingly evident. Major cities within the region are eagerly flaunting their arbitration credentials, no better illustrated than by the launch of Maxwell Chambers in Singapore in January.

Singapore is now challenging Hong Kong SAR as the principle international arbitration location in Asia Pacific, but it is not the only jurisdiction to thrust itself onto the global arbitration map. Seoul, Sydney and Kuala Lumpur are just three other examples of locations where the authorities are keenly attempting to draw in lucrative arbitration cases. But even with such high hopes, history is not necessarily on their side. The global arbitration map is littered with ambitious new international arbitral centres that never managed to develop a sustainable business.

The success of the China International Economic and Trade Arbitration Commission (CIETAC), the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC), which is now located within Maxwell Chambers, overshadow the rest of Asia's arbitral venues.

Arbitration has become big business in Asia, as court judgments are not enforceable across borders to the same extent as in Europe for instance. Aside from common law jurisdictions such as India, Malaysia and Hong Kong SAR, litigation is considerably less prevalent than in the United States. But with business clashes on the rise, arbitration has sated the desire for an acceptable form of dispute resolution.

London Clifford Chance partner Denis Brock, the firm's former Asia Head of Dispute Resolution says: 'Arbitration is the way ahead in Asia, because it's transnational and most deals in Asia are cross-border. With the New York Convention, arbitration trumps all.' As most major Asian states are signed up to the New York Convention, this means arbitral awards are enforceable in multiple jurisdictions.

Key growth

The statistics already illustrate astounding growth in arbitration cases. In 2009, the SIAC dealt with 160 cases, a 60 per cent increase on the previous year. Ng says: 'The SIAC has had an explosion of cases in the last year alone.' This race for distinction ties in with the glitzy launch of Maxwell Chambers in Singapore in January. Sold as a 'centre for international dispute resolution'

it is one of the boldest attempts by a jurisdiction to become a global leader in ADR, principally arbitration.

Maxwell Chambers was originally the Customs House from the 1940s onwards, and became known as the 'White House'. According to Maxwell Chambers' Chief Executive Wong Sheng Kwai, it has now been rebuilt to house

'top international arbitral institutions' and 'best-of-class hearing facilities' under one roof.

The Singapore Government is clearly behind it; the launch party was attended by the Minister for Law, K Shanmugam, and Senior Minister, S Jayakumar. Maxwell Chambers is leased from the Singapore Land Authority and was established through seed money from the Singapore Government. Wong says the intention is that ownership will transfer to the private sector in due course.

Essex Court's Ng comments: 'Singapore realises that if it is to continue to develop as a major centre of commerce and finance, it needs to have a world class legal infrastructure in place.'

He is not wrong about arbitration and its ever-increasing role in international disputes. The majority shareholders in Yukos are currently engaged in a US\$100 billion claim against the Russian Federation in the Permanent Court of Arbitration in The Hague. This is believed to be the world's largest ever arbitration and Legal Business indicates that the legal advisers are billing

some US\$10 million annually in a case that has run for over five years. Big arbitration cases are not unusual. Last year, French Media conglomerate Vivendi was awarded US\$2.43 billion by the London Court of International Arbitration (LCIA) in a case against Poland's Elektrim.

While Asia may not necessarily have the biggest cases, the pace of growth is outstripping Europe and North America, evidenced by SIAC's huge 60 per cent growth in its number of cases in 2009.

Ng recognises that arbitration is a vital form of dispute resolution for international cases, but believes Asia is going to experience more growth than other parts of the world. He believes that keen arbitration practitioners must look to new markets. 'There is a business opportunity in trying to link up with prospective clients by taking my business to them,' he says.

Robert Pé, Orrick's Asia Head of Litigation

also believes that Singapore is primed to be a prominent player in the global arbitration scene. 'The level of commitment the Singapore Government has put into arbitration will definitely bear fruit. Like Hong Kong SAR, a lot of people do feel very comfortable with using Singapore,' he says. Pé believes that Singapore's apparent neutrality

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is very appealing to Asian business clients. In this sense, he suggests that Hong Kong suffers because of its ties to mainland China, even though it is a separate common law jurisdiction. 'Korean clients seem to feel more comfortable with Singapore than Hong Kong, particularly when the counterparty is Chinese,' he indicates.

New players

Yet with arbitration becoming an essential part of the dispute resolution fabric in Asia, numerous other legal centres have attempted to give themselves an alluring makeover.

Sydney is one of the latest to do so. Though outside of Asia, it clearly has its eye on the mounting wave of disputes emerging from the continent. Earlier this year, the Australian Government said that it would fund the establishment of a new arbitration centre in Sydney.

Sydney has many appealing attributes. Australia has a mature legal profession and

system, and a large rank of highly qualified dispute resolution practitioners. But can Sydney plant itself in the higher echelons of global arbitration centres? Damian Sturzaker, a dispute resolution partner at Sydney-based Marque Lawyers says: 'Whilst I would like to say that business people make sophisticated decisions about the arbitration venue, often it boils down to choosing a venue that is not seen as favouring one side rather than the other. For Asian disputes, this could be Australia or New Zealand.' Mr Sturzaker indicates that legal costs and hotel costs would typically be significantly less than in Hong Kong SAR and Singapore for instance. He adds: 'We have a non-interventionist style of court process and a stable government [even with the recent deposal of prime minister Kevin Rudd]. In terms of a physical location, it's a nice place to come.'

Although Australia is close to Asia as a time zone – Sydney is currently just two hours ahead of Singapore – it is not close in proximity. It takes some 12 hours to fly from Beijing to Sydney and over seven hours to fly from Singapore to Sydney. Being geographically remote is not in its favour. Clifford Chance's Denis Brock says: 'You generally need

to choose an arbitration centre that is the most convenient. You need to ask yourself where the witnesses are and where it's easiest to deal with the case. You can spend thousands of pounds just moving documents and people around.'

Robert Pé, US firm Orrick's Asia Head of Litigation says that Sydney's geographical location is going to count against it: 'You could just as easily fly to London or Paris, although then you have the disadvantage of the time difference. Geographical proximity to the dispute is useful, particularly when you consider witnesses. On the other hand, Sydney does have a lot of high quality lawyers and their charge-out rates are reasonable.'

Even so, Sydney is not the only legal centre to push its arbitration status. The Korean Commercial Arbitration Board (KCAB) is hopeful of claiming an increasing flow of international arbitration cases, having principally heard cases involving Korean parties up until now. John Rhie, a new partner at Seoul-based Kim & Chang says: 'They have changed the KCAB rules to include separate

international arbitration rules. The KCAB has refurbished its building and the hearing rooms are as modern as any of the arbitration centres I have seen.' Mr Rhie joined Kim & Chang from the London office of McDermott Will & Emery earlier this year. He cites the massive growth in Korean-related arbitration and the efforts of the state to become a major international player in this segment, as the main reason for his move. It's safe to say that Korea has form in this area. In 2008, 30 Korean entities were involved in newly registered ICC cases, compared to 31 from India and 20 from the PRC, according to Global Arbitration Review.

In Southeast Asia, Malaysia is also pushing its international arbitration credentials, after a sticky period during which its judiciary was beset with a series of controversies. This damaged

the jurisdiction's international arbitration standing, according to Lim Chee Wee, a partner at leading local firm Skrine. Malaysia, in fact, established the Kuala Lumpur Regional Centre for Arbitration (KLRC) way back in 1978 and now wishes to rebuild its once exalted reputation. 'The Malaysian Bar is now fully supportive of the KLRC and

confident in the present director,' he says. Lim indicates that the current Chief Justice's efforts to clear the backlog of cases working through the courts and for cases to be disposed of more expeditiously and be more arbitration-friendly has made an enormous difference. Malaysia has a talented pool of arbitrators, and charge-out rates are considerably less than in Hong Kong SAR and Singapore.

India, too, is making some headway in developing its own arbitration culture. It has reformed its arbitration regime and limited the scope for judicial intervention. As part of its emergence on the arbitration stage, the London Court of International Arbitration (LCIA) established its first independent subsidiary in April 2009, in the Indian capital New Delhi.

Cultural drivers

Arbitration is clearly gaining traction quickly in Asia. In 2004, the Hong Kong International Arbitration Center (HKIAC) handled just 280

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cases. By 2009, this had leapt to 649 disputes.

In fact, Asia has experienced much greater growth in arbitration than Europe, which has effective transnational treaties to enforce court judgments. Clifford Chance's Denis Brock says: 'Arbitration is not prevalent for intra-European disputes, because there are sophisticated transnational treaties to enforce court judgments.' Frances Van Eupen, counsel at Allen & Overy in Hong Kong SAR says that Asia is the key area for growth in arbitration: 'Banks in the region are contracting with emerging market counterparties and those contracts often provide for disputes to be referred to arbitration. A key reason for choosing arbitration when dealing with emerging markets is because enforcement under the New York Convention crosses jurisdictional boundaries. In Europe there are reciprocal arrangements for the enforcement of judgments, so banking disputes are more often referred to the courts rather than arbitration.'

'There are parallels with Russia going back ten years.'

Paul Mitchard QC

Skadden Arps Slate Meagher & Flom

Orrick's Robert Pé says that his practice has been transformed since returning to Hong Kong SAR in 2003. At that point, arbitration accounted for only a small proportion of his day-to-day practice, but now accounts for 70 to 80 per cent of his work. The startling growth in investment into China circa 2000, as the nation moved towards World Trade Organisation (WTO) accession, saw many contracts using arbitration as the preferred dispute resolution clause.

Skadden's Paul Mitchard QC transferred to Hong Kong SAR from London in 2009, as the firm recognised the growth of arbitration in the region. Mr Mitchard is not short of experience when spotting global trends and he is convinced that arbitration has its place in Asia. 'There are parallels with Russia going back ten years. There was great scepticism about arbitration there and there was no tradition. They just weren't used to trusting someone to adjudicate the case fairly,' he says. 'As international firms moved into the Russian market they managed to convince clients to use LCIA clauses. I see that sort of progression here. The clients are learning that it is a process they are able to trust.'

Trust is clearly the current theme, with even China International Economic and Trade Arbitration Commission (CIETAC) earning the confidence of both domestic and foreign parties. China has introduced a reporting-up process by which local courts are not allowed to review or set-aside arbitral awards without referring the case up to the next level, with the ultimate stage being the Supreme People's Court. It can be a long and laborious process, but it has discouraged random interference from China's judiciary. Pé says: 'In my view CIETAC has put in a lot of effort to respond to criticism, particularly from the foreign investment community. There are still some unfortunate stories from time to time. The scale fees are pretty low and so some foreign arbitrators have negotiated with the party appointing them to agree fees outside the scale. Some observers view this as a bit questionable.'

Even so, CIETAC's imperious position within the global arbitration environment is unquestionable. In 2009, it handled an enormous 1,482 arbitration cases, the highest volume of disputes by any international arbitral institution. This is clearly explained by China's giant economy and its ever-increasing role in global trade. Ik Wei Chong, a Shanghai partner at Clyde & Co, says that there is less evident political interference than there used to be and that the Supreme People's Court only refused 12 foreign arbitral awards in 2008 and not on the grounds of public policy. Mr Wong says that the world's eagerness to do business with China has ensured CIETAC's case volume will remain untouchable, partially because Chinese companies are in such a strong bargaining position. 'It's just a reflection of China becoming a dominant player on the international stage,' he says. When it comes to contracts, the dispute resolution element is affectionately known as the 'midnight clause', the last technicality before closing the transaction and Wong says that foreign parties are more focused in achieving value for money and are willing to forgo their first choice of arbitral venue.

CIETAC's caseload is likely to increase on the same stunning trajectory, but its caseload is entirely made up of disputes involving Chinese parties. In this regard, the HKIAC and SIAC are a band apart, and the latter has been given a considerable boost by the launch of Maxwell Chambers. International arbitration is big business and Asia is at the heart of it. Only time will tell if other arbitral venues can challenge the pre-eminence of Hong Kong SAR and Singapore. ☒

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