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International Arbitration in East Asia: From Emulation to Innovation

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INTERNATIONAL ARBITRATION IN EAST ASIA: FROM EMULATION TO INNOVATION

Joongi Kim¹

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INTRODUCTION

As East Asian economies continue their dynamic growth, their importance as a key engine in the global economy continues to expand. With their economic development largely driven by cross-border trade and investment, the prospects of an ever increasing number of disputes become inevitable. Yet, until recently, arbitration was not a natural choice as a means to resolve disputes. Asian parties did not consider it nor did they resort to it. This has dramatically changed over the past decade. The number and size of international commercial arbitration cases involving Asian parties has rapidly increased. Globally, Asian companies are responsible for a significant portion of the growth in international arbitration with the size and number of cases where they

¹ The author would like to thank the participants of the Salient Issues in International Commercial Arbitration Conference held at American University, Washington College of Law on Nov. 7, 2013, Luke Nottage, Tan Ai Leen Tan and the SIAC Secretariat for their helpful comments, Jessun Jackie Park and Yeonmi Jen Kim for their research assistance, and Jiyoung Won and Kayla Byun for providing KCAB statistics. All references to Korea refer to the Republic of Korea. The Democratic People's Republic of Korea, or North Korea, has a minor number of international arbitration cases and is not a member of the New York Convention or the ICSID Convention.

are parties continuing to grow.² Much of this success can be attributed to the ability of Asian countries and their institutions to expeditiously establish a viable international arbitration architecture. The brief span in which this has been achieved is unparalleled.

This article seeks to explore whether East Asia countries can complete a transition from “fast followers” of emulating leading jurisdictions and institutions in the world to join the ranks of “first movers” that lead the development of new arbitration innovation and reforms.³ It first examines how the use of international arbitration practice has expanded in the region. Despite the breadth and diversity of countries, the article focuses on the top five jurisdictions in the region that are responsible for the vast majority of international cases, namely China, Japan, Korea, Hong Kong and Singapore.⁴ It then explores novel issues that are emerging across the region to determine whether signs of a transition can be discerned. The potential for deeper convergence towards a more harmonized standard of arbitration practice is examined in the process. Indications that East Asia no longer trails but instead has reached the forefront of innovation appear to be manifesting. In several instances, at least from a structural or rules standpoint, they appear to be leading major jurisdictions and institutions.

I. International Arbitration in East Asia

As cross-border disputes have become an inescapable part of conducting business in East Asia, resolution through international

² Shahla F. Ali, *Barricades and Checkered Flags: An Empirical Examination of the Perceptions of Roadblocks and Facilitators of Settlement Among Arbitration Practitioners in East Asia and the West*, 19 PAC. RIM L. & POL'Y J. 243, 249 (“[I]n recent years[,] the number of international arbitrations conducted in East Asia has grown steadily.”); Christopher Lau & Christin Horlach, *Commentary: Arbitration in Asia? Yes – But Where?*, 23 SPG INT’L L. PRACTICUM 43 (2010) (“In 2007, Asia was the seat of seventy percent of global reported arbitration cases. . . . ‘[A]rbitration has gained a firm foothold in many jurisdictions in Asia.’”).

³ Marvin Lieberman, & David Montgomery, *First-mover Advantages*, 8 STRATEGIC MGMT. J. 41 (1988).

⁴ This article focuses on countries classified under the region East Asia and the Pacific according to the World Bank, which includes Australia, Cambodia, China (Hong Kong), Chinese Taipei, Indonesia, Japan, Korea, Laos, Mongolia, Myanmar, New Zealand, Philippines, Singapore, Thailand, Vietnam. Where relevant, occasional reference has been made to countries from South Asia such as India, Bangladesh, Pakistan and Sri Lanka.

arbitration has emerged as a leading preference for parties.⁵ The numbers of cases involving East Asian parties has significantly grown across all the major international arbitral institutions such as the International Chamber of Commerce (ICC), International Center for Dispute Resolution (ICDR) and London Court of International Arbitration (LCIA). Even more importantly institutions based within the region such as the China International Economic and Trade Arbitration Commission (CIETAC), Hong Kong International Arbitration Centre (HKIAC), Japan Commercial Arbitration Association (JCAA), Korean Commercial Arbitration Board (KCAB) and Singapore International Arbitration Centre (SIAC) have achieved extraordinary growth. Asian countries established the necessary arbitration infrastructure through the adoption of treaties, laws and rules that allowed for this growth to occur. A wealth of experience has allowed East Asian institutions, companies, public entities and counsel to create a sophisticated international arbitration ecosystem.

1. Asian Parties at the ICC, ICDR and LCIA

At the most widely-used institution in the world, the ICC, 22.7 percent of their new cases in 2012 involved a party from the Asia Pacific region, the second consecutive year it exceeded 20 percent.⁶ Similarly, at the ICDR, 20 percent of their 996 cases in 2012 involved an Asian party.⁷ At the LCIA, only 14.75 percent of their 265 cases in 2012 involved Asian parties, but this represented a substantial increase from 2011 when they were involved in 6.5 percent of the cases.⁸ The ICDR and LCIA unfortunately do not provide more detailed statistics regarding the nationalities of the parties. The ICC, however, offers comprehensive yearly data on the number of claimants and respondents from each

⁵ Lau & Horlach, at 43 (“In 2007, Asia was the seat of seventy percent of global reported arbitration cases. . . . “[A]rbitration has gained a firm foothold in many jurisdictions in Asia.”).

⁶ ICC International Court of Arbitration Bulletin, Vol. 24, No. 1 (2013). In the most recent White & Case / Queen Mary survey, 13 percent of those surveyed were Asian parties. *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, White & Case / Queen Mary. <http://arbitrationpractices.whitecase.com>.

⁷ This represented a slight decline from 23 percent of their cases in 2011. The ICDR International Arbitration Reporter, Sept. 2013. Vol. 4, 7.

⁸ LCIA 2012 Registrar’s Report, 2. http://www.lcia.org/LCIA/Casework_Report.aspx.

country that provides insight into the state of international arbitration in East Asia.⁹

At the ICC, parties from six leading jurisdictions, India, Korea, China, Singapore, Hong Kong and Japan, remain the most active users.¹⁰ The top six jurisdictions lead the way as they represent approximately two-thirds of the total claims involving Asian parties, with the next eleven jurisdictions representing the bulk of the remaining one-thirds. Indian parties have separated themselves as the most frequent users with Korean parties second when China and Hong Kong parties are counted separately, although recently Chinese parties have become more frequent respondents.¹¹ India's growth is impressive considering that most arbitrations are not institutional but are *ad hoc* ones that are statistically difficult to ascertain. Asia's top jurisdictions have consistently shown increased use of the ICC over the past 20 years, particularly within the past five years from 2008 to 2012.¹² For the six major jurisdictions, over the past five years, the number of times they have been respondents has increased by 75 percent and claimants, by almost 40 percent.¹³ Generally, Indian, Korean and Chinese parties have more frequently appeared as respondents, whereas Japanese, Singaporean and Hong Kong parties have been more often claimants. Recently, Chinese and Indian parties have been a respondent almost twice as many times they have been a claimant. Nevertheless, the six major jurisdictions have led the way in actively bringing actions as claimants.¹⁴ Whether as respondents or as claimants, Asian parties have clearly grown accustomed to international arbitration.

⁹ *Statistics*, Int'l Chamber of Commerce, <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics> ("Since its creation in 1923, The ICC International Court of Arbitration has administered more than 19,000 disputes involving parties and arbitrators from some 180 countries and independent territories. . . . Full annual statistical reports are available in the Court's Bulletin and from ICC's Dispute Resolution Library.").

¹⁰ Tables 1 and 2. The Philippines' statistics are skewed due to an anomalous number of cases in in 2004 and 2011, where they were respondents in 50 cases and 36 cases, respectively. Excluding these two years, they averaged less than five cases a year as respondents.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

Table 1. ICC Cases with South/East Asian and Pacific Respondents

Country	5-Year Period Averages				5-Year Period Totals				Total
	1994-97	1998-02	2003-07	2008-12	1994-97	1998-02	2003-07	2008-12	
India	14.0	17.8	24.4	39.2	56	89	122	196	463
Korea	8.3	11.2	18.4	16.0	33	56	92	80	261
China	6.3	7.8	15.6	19.2	25	39	78	96	238
Japan	7.3	8.6	7.8	11.2	29	43	39	56	167
Philippines	4.5	6.8	12.2	10.6	18	34	61	53	166
Singapore	4.8	7.6	6.0	10.0	19	38	30	50	137
Malaysia	5.5	3.4	4.0	9.0	22	17	20	45	104
Thailand	4.3	8.2	5.2	3.8	17	41	26	19	103
Hong Kong	5.8	4.0	2.6	8.4	23	20	13	42	98
Australia	5.0	2.4	6.8	5.0	20	12	34	25	91
Indonesia	3.5	3.6	2.0	8.0	14	18	10	40	82
Chinese Taipei	2.0	4.0	3.6	4.6	8	20	18	23	69
Pakistan	0.8	4.2	3.2	2.8	3	21	16	14	54
Sri Lanka	0.8	1.8	3.8	3.6	3	9	19	18	49
Vietnam	1.3	0.6	1.4	5.4	5	3	7	27	42
Bangladesh	0.8	1.0	0.8	1.6	3	5	4	8	20
New Zealand	0.5	0.8	0.6	0.6	2	4	3	3	12

Source: ICC (1993 data was excluded because it did not distinguish between number of claimants and respondents).

Table 2. ICC Cases with South/East Asian and Pacific Claimants

Country	5-Year Period Averages				5-Year Period Totals				Total
	1994-97	1998-02	2003-07	2008-12	1994-97	1998-02	2003-07	2008-12	
India	11.5	19.8	14	18.4	46	99	70	92	307
Korea	7.0	12.0	9.6	14.2	28	60	48	71	207
Japan	8.5	11.2	11.4	9.0	34	56	57	45	192
Hong Kong	7.0	5.6	6.0	10.4	28	28	30	52	138
Singapore	5.5	5.4	5.6	10.6	22	27	28	53	130
China	2.0	4.6	6.2	10.0	8	23	31	50	115
Australia	4.3	6.2	4.2	5.2	17	31	21	26	95
Thailand	3.5	4.8	2.2	5.8	14	24	11	29	78
Indonesia	2.5	5.2	2.0	4.6	10	26	10	23	69
Malaysia	1.0	3.0	2.6	5.8	4	15	13	29	61
Chinese Taipei	2.0	1.6	2.4	4.2	8	8	12	21	49
Philippines	1.5	3.2	2.4	3.0	6	16	12	15	49
Pakistan	1.5	3.8	1.8	1.8	6	19	9	9	43
Sri Lanka	0.8	1.4	2.6	1.2	3	7	13	6	29
New Zealand	0.3	0.1	4.2	0.4	1	1	21	2	25
Vietnam	0.5	0.6	0.4	2.6	2	3	2	12	18
Bangladesh	0.3	1.2	0.4	1.6	1	6	2	8	17

Source: ICC (1993 data was excluded because it did not distinguish between number of claimants and respondents).

The only exception among the leading jurisdictions has been Japan. Unlike the other major jurisdictions, the total number of cases involving Japanese parties has not significantly increased, and particularly where

they were claimants a notable decline has occurred.¹⁵ This does not appear due to a corresponding increase in cases at other institutions. The international caseload of JCAA, its primary arbitral institution, has remained at less than 20 cases a year in recent years after first exceeding a dozen cases in 2009 and reaching 20 cases in 2010.¹⁶ The number of cases involving Japanese parties at SIAC or KCAB has not been significant either. In 2012, Japanese parties were involved in only four cases at SIAC and five cases at the KCAB.¹⁷ At the same time, the amount of domestic cases at JCAA within Japan has been growing but still remains infrequent at less than 10 cases a year. The general decline could reflect a slowdown of Japanese cross-border transactions, a stronger willingness of Japanese parties to settle disputes, a general preference to resort to court litigation, or a combination of these factors.¹⁸

After the six most active jurisdictions, a second tier of four, the Philippines, Thailand, Malaysia and Indonesia, have emerged as the next group to watch.¹⁹ They have been rapidly amassing experience in ICC arbitration that appears close to reaching critical mass. They consistently have been averaging more than 10 cases per year starting from 2008. In particular, the number of times Indonesian, Malaysian and Thai parties have been claimants or respondents parties has increased by 215 percent, 124 percent and 30 percent, respectively, over the five period from 2008 to 2012 compared with the previous five years. The three countries also have been active users of SIAC, where, in 2012, Thai parties and were involved in 6 cases; Malaysian parties, 14 cases; and, Indonesian parties, 28 cases.²⁰

¹⁵ *Id.*

¹⁶ Table 3. Tatsuya Nakamura & Luke Nottage, *Arbitration in Japan*, in *ARBITRATION IN ASIA 5* (Tom Ginsburg & Shahla Ali eds., 2013); Sydney Law School Research Paper No. 12/39, <http://ssrn.com/abstract=2070447>.

¹⁷ SIAC 2012 Annual Report, 6; KCAB data on file with author.

¹⁸ Much commentary has sought to address the reason for Japan's underrepresentation. Nakamura & Nottage, 5; Michael Allan Richter, *Attitudes and Practices of Japanese Companies with Respect to International Commercial Arbitration: Testing Perceptions with Empirical Evidence*, 5 TDM (2011). <http://www.transnational-dispute-management.com/article.asp?key=1762>. Tony Cole, *Commercial Arbitration in Japan: Contributions to the Debate on "Japanese Non-Litigiousness"*, 40 N.Y.U. J. INT'L L. & POL. 29 (2007).

¹⁹ *Id.* Having been involved in 10 cases a year on average from 1994 to 2012, Australia was excluded from this newly emerging second tier.

²⁰ SIAC 2012 Annual Report, 6; Indonesian parties also participated in 5 cases and Thailand parties 1 case at the KCAB in 2012. KCAB data on file with author.

Overall, at the ICC, six major jurisdictions, India, Korea, China, Hong Kong, Singapore and Japan, have become the dominant users of international arbitration in Asia, with a second tier of four countries, the Philippines, Thailand, Malaysia and Indonesia, quickly gaining ground. Asian parties represent an increasingly significant portion of the cases at the ICDR and LCIA as well. Asian businesses and counsel have been the primary beneficiaries of this increase in activity. Asian arbitrators, however, remain relatively under-represented compared with the quantity of cases in which Asian parties have been involved.²¹

2. Asian Arbitral Institutions

All of the leading Asian jurisdictions have at least one major “national” arbitral institution, with the primary exception being China, which boasts CIETAC and the Beijing Arbitration Commission (BAC), the Shanghai Arbitration Commission and approximately 200 other arbitral institutions.²² In the case of Japan, other than the JCAA, 29 local bar associations have established arbitration centers that primarily deal with domestic cases using med-arb type procedures.²³ Japan also has other institutions such as the Tokyo Maritime Arbitration Commission (TOMAC).²⁴ In Singapore, in addition to SIAC, the Singapore Chamber of Maritime Arbitration (SCMA) was established in 2009.²⁵ KCAB and HKIAC are the only institutions that are based in Korea and Hong Kong, respectively.²⁶

²¹ Luke Nottage & Romesh Weeramantry, *Investment Arbitration in Asia: Five Perspectives on Law and Practice*, 28 *ARB. INTL* 19 (2012); See Richter.

²² For China, this article only focuses on CIETAC’s arbitration rules. In 2012, CIETAC and its sub-commissions in Shanghai and Shenzhen underwent a widely-reported fracture in relations that led to the sub-commissions eventually declaring their independence from the Beijing-based headquarters. Other jurisdictions have been able to avoid such difficulties.

²³ See HIROYUKI TEZUKA & YUTARO KAWABATA, *INT’L BAR ASS’N ARBITRATION COMM., ARBITRATION GUIDE: JAPAN* (2012) (“Arbitration centers established by the local bar associations are frequently used for resolving domestic disputes The Med-Arb process is used in most of the disputes.”).

²⁴ *TOMAC Arbitration and Conciliation*, JAPAN SHIPPING EXCHANGE, <http://www.jseinc.org/en/tomac/index.html>.

²⁵ *About Us*, SINGAPORE CHAMBER OF MARITIME ARBITRATION, <http://www.scma.org.sg/AboutUs.html>.

²⁶ In Hong Kong, the ICC administers cases from Asia-Pacific from its Hong Kong office and in 2012 CIETAC established the CIETAC Hong Kong Arbitration Centre.

After the milestone establishment of Maxwell Chambers in Singapore in July 2009, the top jurisdictions have been vying to enhance their hearing facilities to become the premier venue in the region. HKIAC underwent an extensive expansion and renovation in 2012. In May 2013, Korea established its high-tech Seoul International Dispute Resolution Center (Seoul IDRC). As part of their outbound expansion, many leading institutions have also begun to establish presences in other countries. In April 2013, SIAC launched its first overseas office in Mumbai. In May 2013, SIAC and HKIAC established offices at the Seoul IDRC, marking HKIAC's first overseas venture. CIETAC also notably established a sub-commission in Hong Kong in September 2012.

Asian institutions have been nimbly updating their rules.²⁷ Established in 1985, HKIAC adopted international rules in 2008 with a recent revision that went into effect November 1, 2013.²⁸ Singapore's SIAC amended its rules four times since its first edition in 1991, including in 1997, 2007, 2010, and 2013.²⁹ With a new Court of Arbitration that was established in 2013, SIAC continues its surge to the forefront in terms of institutional innovation and reform. In 2007, Korea promulgated separate international rules that were further revised in 2011 to apply by default for international disputes. CIETAC amended its rules in 2012 as part of a major revision to update its previous rules that were

²⁷ The rules of the major Asian institutions are reviewed in detail in Section III.

²⁸ *Arbitration Rules & Guidelines*, HONG KONG INT'L ARBITRATION CENTER, ("In September 2008, the HKIAC issued the HKIAC Administered Arbitration Rules. . . . modeled on the Swiss Rules.") (last visited Feb. 13, 2014); LOVELLS LLP, INTERNATIONAL ARBITRATION UNDER THE HKIAC ADMINISTERED ARBITRATION RULES, 1 ("The Rules . . . are strongly influenced by the UNCITRAL Rules and the Rules of the Swiss Chamber of Commerce.").

²⁹ Concern has been raised that the frequent updates may lead to confusion as to which version of the rules should apply when the arbitration agreement is ambiguous: the rules in force at the date of the underlying contract, those at the time of the breach or those at the time arbitration is sought. Emmanuel Duncan Chua & Anthony Chea Nicholls, *Singapore: New rules*, *Global Arb. Rev.*, Apr. 4, 2013. The ICC rules stipulate it will be the rules in place at the time of commencement of the arbitration unless the parties have agreed to submit to the rules in effect on the date of the arbitration agreement. ICC Rules, Art. 6.1.

in effect since 2005.³⁰ The amendments placed them closer in line with the practices of other major jurisdictions. JCAA revised its rules in 2008 and promulgated a new edition that took effect as of February 2014. In some countries, changes to institutional rules have sometimes preceded amendments to the arbitration laws. HKIAC's 2008 amendments, for example, preceded the Hong Kong Arbitration Ordinance (CAP 609) in 2011,³¹ and the SIAC's 2010 amendments also preceded the passage of Singapore's International Arbitration Act (SIAA) (Cap 143A) in 2012.³²

In terms of usage, Asian parties and their counterparties have been increasingly opting for local arbitral institutions over traditional institutions such as the ICC, ICDR or LCIA.³³ A significant increase in international cases involving Asian parties across all major Asia-based institutions confirms the advancements in the region. At SIAC, for example, in 2012, out of 235 total cases, Singaporean parties were involved in 32 percent and other Asian parties, 48 percent.³⁴ Similarly, out of 85 international cases brought at the KCAB in 2012, Korean respondents represented 45 percent of the cases and other Asian respondents 33 percent, and Korean claimants brought 55 percent of the cases and other Asian claimants 26 percent.³⁵ Chinese parties have been particularly

³⁰ Anthony Connerty, *The 2012 Revision of the CIETAC Arbitration Rules: A Look at the Most Significant Changes*, 67 DISP. RESOL. J. 72, 74-76 (2012); Jessica Fei et al., *The New CIETAC Arbitration Rules: A Move Towards Internationalisation?*, 17 No. 2 IBA Arb. News 27 (2012); *New CIETAC Arbitration Rules to be Effective on 1 May 2012*, CIETAC, <http://www.cietac.org/index/news/477b3d6f8bcbfa7f001.cms>.

³¹ Ying Deng et al., *Regional and Comparative Law: China*, 46 Int'l Law 517, 533 (2012) ("On June 1, 2011, Hong Kong's new arbitration law, the Arbitration Ordinance Cap. 609 (Ordinance), came into effect.")

³² SIAA, Chapter 143A, available at <http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=CompId%3A71fd09c2-1a82-4073-a792-45170850e5d3;rec=0>.

³³ See Kimberley Chen Nobles, *Emerging Issues and Trends in International Arbitration*, 43 Cal. W. Int'l L.J. 77, 81-82 (2012) ("[T]he WIPO, a relative newcomer to international arbitration, and the more regional arbitration institutions such as the SIAC, the China International Economic and Trade Arbitration Commission (CIETAC), and the Hong Kong International Arbitration Centre (HKIAC), are increasingly used as they institute measures to compete more effectively with the larger arbitration institutions.").

³⁴ SIAC 2012 Annual Report, 6. SIAC's older statistics do not differentiate between domestic and international cases.

³⁵ On file with author.

active at such institutions as CIETAC, BAC, HKIAC and SIAC.³⁶ At SIAC, in 2012, Chinese parties were the most active non-Singaporean users, and, at HKIAC, more than half of their cases involved a mainland Chinese party. The increase in SIAC cases involving Indian parties is also notable. The greater preference for regional institutions confirms their enhanced stature.

Table 3. International Cases at Asian Arbitral Institutions

Institutions	2008	2009	2010	2011	2012
CIETAC (China)	548	560	418	470	331
SIAC (Singapore)	99	160	198	188	235
KCAB (Korea)	47	78	52	77	85
HKIAC (HK)	n/a	29	16	41	68
VIAC (Vietnam)	35	26	26	83	64
BAC (China)	59	72	32	38	26
JCAA (Japan)	12	17	21	17	17

Sources: CIETAC, SIAC, KCAB, HKIAC, VIAC, BAC, JCAA. SIAC data includes both domestic and international cases.

3. UNCITRAL Model Law, New York Convention and ICSID Convention

Across South and East Asia and the Pacific, a broad spectrum of countries in the region have adopted the 1985 version of the UNCITRAL Model Law.³⁷ One eminent arbitration expert has assessed that Asia has

³⁶ See Nobles, at 100 (“Both the HKIAC and the SIAC are considered credible alternatives to European arbitration institutions and have had increasing workloads as parties adopt their arbitration rules in China-related contracts.”).

³⁷ UNCITRAL Model Law on International Commercial Arbitration, 24 I.L.M. 1302 [Model Law]. The 2006 version is hereinafter referred to as the 2006 UNCITRAL Model Law. Japan first established an independent arbitration statute in 2003 that came into effect in 2004 and largely incorporated provisions from the 1985 Model Law. Arbitration Law, No.138 of 2003. <http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf>; Jerry McAllin & Luke Nottage, *Changing the (JCAA) Rules: Improving International Commercial Arbitration in Japan*, 18 J. JAPAN L. 23, 24 (2004). Korea adopted its arbitration law in 1966 and subsequently adopted the Model in 1999.

the highest concentration of countries in the world that have adopted the Model Law.³⁸ After Australia in 1989, Hong Kong adopted the Model Law in 1990, followed by Singapore (1994), Sri Lanka (1995), India (1996), New Zealand (1996) and Korea (1999), Bangladesh (2001), Thailand (2002), Japan (2003), the Philippines (2004), Malaysia (2005) and Cambodia (2006).³⁹ Jurisdictions in the region that have adopted the 2006 UNCITRAL Model Law include New Zealand (2007), Brunei Darussalam (2009), Hong Kong (2010) and Australia (2010).⁴⁰ China, Indonesia, Vietnam and Pakistan, in contrast, are among the more significant countries from the region whose arbitration law is not based upon the Model Law.

With regard to the New York Convention, almost all of the jurisdictions in the region are members, including China (1987), India (1960), Japan (1961), Korea (1973) and Singapore (1986).⁴¹ Other countries include Cambodia (1960), Sri Lanka (1962), Thailand (1960), the Philippines (1967), Australia (1975), Indonesia (1982), Mongolia (1995), New Zealand (1983), Malaysia (1986), Bangladesh (1992), Viet Nam (1995), Lao (1998) and, most recently, Myanmar (2013).⁴² Similarly, the ICSID Convention has entered into force in China (1993),

³⁸ Julian Lew, *Increasing Influence of Asia in International Arbitration*, *ASIAN DISPUTE REV.* 4, 6 (January 2014).

³⁹ Many countries have since revised their arbitration laws. Chinese Taipei's Arbitration Law also follows the UNCITRAL Model Law in many regards. For the current status of Model Law countries, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

⁴⁰ As of May 2014, Korea is in the planning stage of adopting provisions from the 2006 version.

⁴¹ Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T 2517, 330 U.N.T.S. 38. See Bassler, at 103 (“The *sine qua non* of international arbitration as we know it is, of course, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’). Its primary objective is ‘to insulate foreign arbitral awards from national judicial review at the award enforcement state.’”). The Convention applies to Hong Kong through China and while Chinese Taipei is not a signatory it recognizes and enforces foreign awards under basically similar standards through its Arbitration Law. For the current status of countries that have adopted the New York Convention, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

⁴² Non-members from the region include Bhutan, Federated States of Micronesia, Kiribati, Maldives, Nauru, North Korea, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu.

Korea (1967), Japan (1967) and Singapore (1968).⁴³ To expand its mandate beyond commercial arbitration, SIAC's 2013 rules also added provision to permit the administration of investment arbitration cases.⁴⁴ Among jurisdictions actively engaged in commercial arbitration, India, Thailand, Chinese Taipei and Vietnam, have yet to become members of the ICSID Convention.⁴⁵ All of them nevertheless have signed investment treaties that include provisions to use the ICSID's Additional Facility as an optional venue to resolve disputes with investors.⁴⁶ Countries such as Australia, and more recently Indonesia, have recently espoused a more reserved attitude toward investment treaty arbitration.⁴⁷ Overall, the number of cases involving Asian parties in investor-State arbitration

⁴³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [ICSID Convention]. For the current status of countries have adopted the ICSID Convention, see <http://icsid.worldbank.org>.

⁴⁴ SIAC Arbitration Rules [SIAC Rules], Rule 3.1(d).

⁴⁵ Thailand, for example, signed the ICSID Convention in 1985 but has yet to ratify it and Myanmar and Laos also still not members.

⁴⁶ Examples include the India-Australia BIT, Thailand-Canada BIT, Chinese Taipei-Costa Rica BIT and Viet Nam-Japan BIT. Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, art. 12, Feb. 26, 1999; Agreement between the Government of Canada and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments, art. XIII, Jan. 17, 1997, art. 11, Mar. 25, 1999; Agreement between the Republic of Costa Rica and the Republic Of China on the Promotion and Reciprocal Protection Of Investment, ; Agreement between Japan and the Socialist Republic of Viet Nam for the Liberalization, Promotion and Protection of Investments, Japan-Viet., art. 14, Nov. 14, 2003.

⁴⁷ Since late 2013, Australia appears to be following a case by case assessment as they have agreed to include arbitration as means for dispute settlement in its recently concluded free trade agreement with Korea but not in the one with Japan. Luke Nottage, *Why no investor-state arbitration in the Australia-Japan FTA?* (Apr. 9, 2014), <http://www.eastasiaforum.org/2014/04/09/why-no-investor-state-arbitration-in-the-australia-japan-fta/>; see also Luke Nottage, *Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis and Regional Implications*, Sydney Law School Research Paper No. 14/39. <http://ssrn.com/abstract=2424987>. Indonesia recently announced that it is withdrawing from bilateral investment treaties that usually call for investor-State arbitration. Ben Bland in Jakarta and Shawn Donnan, *Indonesia to terminate more than 60 bilateral investment treaties*, FIN. TIMES, Mar. 26, 2014.

remain relatively low compared to the amount of international commercial arbitration in the region.⁴⁸

II. From Emulation to Innovation

Asian economies have embraced international arbitration as an accessible and often preferred means to resolve disputes. They have made concerted efforts to create the infrastructure necessary for arbitration to take hold.⁴⁹ From a structural standpoint, this has included not only establishing the necessary legislative framework but also building well-governed arbitral institutions with effective and timely arbitral rules.⁵⁰ Jurisdictions in Asia have been particularly adept at attuning themselves to the needs of Asian users. By primarily focusing on its institutions, this section examines where Asia's leading jurisdictions stand in terms of modern international arbitration practice and how in certain areas they have managed the transition from emulating others to becoming leaders in innovation.

1. Administering Hybrid Agreements

One of the most notable innovations from the region involves arbitral institutions administering cases based upon the rules of other institutions. CIETAC, SIAC and HKIAC especially have overseen cases under so-called hybrid arbitration agreements where parties have designated one arbitral institution but chosen the arbitral rules of another institution. CIETAC's 2012 rules mark the most aggressive position toward hybrid agreements. If the parties submit a dispute to CIETAC but stipulate the application of other arbitration rules, CIETAC rules explicitly provide that they "shall perform the relevant administrative duties."⁵¹ The 2012 rule suggests that it will not be discretionary but rather mandatory for

⁴⁸ Although Asian countries have faced numerous claims as respondents, Asian parties have been overall less involved in investor-State arbitration as claimants. Joongi Kim, *A Pivot to Asia in Investor-State Arbitration: The Coming Emergence of Asian Claimants*, 27 ICSID Rev. 399 (2012); Claudia Salomon & Sandra Friedrich, *Investment arbitration in the East Asia and Pacific region: a statistical analysis*, 8 GLOBAL ARB. REV., Nov. 4, 2013.

⁴⁹ Donald Arnavas & Robert Gaitskell, *Trendsetters: Asia-Pacific Jurisdictions Lead the Way in Dispute Resolution*, 4 Y.B. ARB. & MEDIATION 170, 170 (2013) (discussing "Arbitration Friendly" Asia-Pacific jurisdictions).

⁵⁰ Lau & Horlach, at 43-44 (country-by-country overview).

⁵¹ CIETAC Arbitration Rules [CIETAC Rules], Art. 4.3.

CIETAC to administer a hybrid arbitration agreement.⁵² This applies not only to cases that called for application of UNCITRAL rules but also those of other institutions. CIETAC administers hybrid cases once or twice a year.⁵³

SIAC became one of the first institutions to permit administration of the rules of other institutions as memorialized in the famous *Insignia Technology Co Ltd v Alstom Technology* case.⁵⁴ In 2009, Singapore courts dismissed a challenge to set aside the arbitral award from that case.⁵⁵ Furthermore, in 2013, Singapore courts upheld another similar hybrid arbitration agreement.⁵⁶ With its new Court of Arbitration, consisting of an eminent group of experts, SIAC appears even more capable of administering hybrid arbitrations. SIAC rules, however, do not contain a specific provision such as CIETAC that declares that they can or must administer such cases. Among other institutions in the region, HKIAC has administered a case under CIETAC rules.⁵⁷ HKIAC also does not have a rule specifically covering hybrid cases.

In response to these hybrid agreements, the ICC amended its rules to stipulate they are “the only body authorized to administer arbitrations under the ICC Rules” and thus have the exclusive right to administer

⁵² Connerty, at 74 (“[Article 4(3)] deals with the situation where the parties have agreed on rules other than the CIETAC Rules The parties’ choice prevails.”).

⁵³ Lei Shi, *From the Asian Map: China*, NEWS & VIEWS HK45/HKIAC NEWSLETTER 8 (Dec. 2013).

⁵⁴ *Insignia Technology Co Ltd v Alstom Technology Ltd*. [2009] SGCA 24. See Arnava & Gaitskell, at 174 (“[T]he Singapore Court of Appeals recently affirmed that it was proper for SIAC to assume jurisdiction over a case that required it to apply a hybrid of SIAC and ICC procedural rules, noting that SIAC was quite capable of performing the required functions and that the concept of party autonomy permitted the parties to choose the arbitration rules that would govern their arbitration.”); Christopher Lau & Christin Horlach, *Party Autonomy: The Turning Point?*, 4 DISP. RESOL. INT’L 121, 122 (2010) (“[T]he Singapore Court of Appeal confirmed the validity of a hybrid arbitration clause.”).

⁵⁵ As an epilogue to the case, despite surviving attempts to set aside the award in Singapore, Chinese courts later denied recognition and enforcement of the award because they found that, having been approved by SIAC, the tribunal was not properly constituted under the rules of the ICC. Shi, at 8.

⁵⁶ *HKL Group Co Ltd v Rizq International Holdings Pte Ltd*. [2013] SGHCR 5. Sean Izor, *Insignia Revisited: Singapore High Court Finds Arbitration Clause to be Operable*, Feb. 25, 2013, <http://kluwerarbitrationblog.com/blog/2013/02/25/insigma-revisited-singapore-high-court-finds-arbitration-clause-to-be-operable>.

⁵⁷ Shi, at 8.

their rules.⁵⁸ In addition, they imposed an obligation upon the parties that “[b]y agreeing to arbitration under the [ICC] Rules, the parties have accepted that the arbitration shall be administered by the Court.”⁵⁹ They have not taken any formal action to prevent other institutions from administering ICC rules.⁶⁰ In comparison to the ICC’s stance, a senior CIETAC official recently declared that they follow an open position to hybrid agreements and other institutions administering cases under their rules.⁶¹

JCAA and KCAB rules do not contain explicit provisions allowing for the administration of cases based on the rules of other arbitral institutions. No such hybrid cases have been reported in either jurisdiction. JCAA does have a separate set of rules covering the administration of cases based on the UNCITRAL Arbitration Rules.⁶²

Overall, the administration of hybrid arbitration agreements in Asia remains infrequent. They often are not the intentions of the parties but the result of oversight by contract drafters. Hybrid agreements nevertheless represent a novel situation for Asian institutions that they innovatively incorporated. The consequences of CIETAC’s new mandatory rules shall be worthy of evaluation in the near future.

2. Expedited Procedures

The leading jurisdictions in Asia have taken the lead in adopting provisions concerning expedited procedures. These accelerated procedures meet the demands of Asian parties that desire prompt resolution.

⁵⁸ ICC Rules, Art. 1.2.

⁵⁹ ICC Rules, Art. 6.

⁶⁰ *But see* Meeran Ahn, *The 2012 International Chamber of Commerce Rules of Arbitration: Meeting the Needs of the International Arbitration Community in the 21st Century*, 4 Y.B. ARB. & MEDIATION 370, 371-72 (“[M]aking the ICC Rules ineffective in ad hoc arbitration[,] [t]he Rules and the ICC Court are both strengthened in international arbitration by establishing a firm role for the Court and giving the Court exclusive control over arbitrations conducted under ICC Rules.”).

⁶¹ Shi, at 8.

⁶² Kei Konishi, *Mediation/Arbitration Under Japanese Law*, 42 *les Nouvelles* 337, 339 (2007) (“UNCITRAL Rules may be applied if the parties agreed to apply it (JCAA Rules on Arbitral Procedure under UNCITRAL Rule, Sec.1).”). HKIAC similarly adopted the “Procedures for The Administration of International Arbitration” in 2005 for use when parties want the HKIAC to administer a case under UNCITRAL Rules. U.N. Comm’n on Int’l Trade Law, UNCITRAL Arbitration Rules [UNCITRAL Arbitration Rules], http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

Most notably, the ICC⁶³, ICDR⁶⁴ and LCIA⁶⁵ all have yet to adopt similar procedures. In 2008, JCAA became the first arbitral institution in the region to adopt expedited procedures.⁶⁶ SIAC followed with its own rules in 2010, and HKIAC, CIETAC and KCAB now all have similar procedures albeit with their own variations.

At the JCAA, by the year after its adoption, 16% of its administered cases were expedited. The JCAA requires that cases that do not exceed JPY 20 million (approximately US\$204,000) must use the expedited procedure unless the parties choose otherwise.⁶⁷ The JCAA's 2014 rules now allow the parties to use the expedited procedures if both parties agree even if their claim exceeds the JPY 20 million threshold (approximately US\$204,000).⁶⁸ JCAA uniquely provides more detailed rules for calculating the monetary threshold and specifies that "interest, rent, damage, penalty, expense, or cost that is incidental to the principal claim" shall not be included in the calculation.⁶⁹ JCAA does not obligate a documents-only proceeding but instead stipulates that the tribunal must consist of a sole arbitrator who should conduct a one-day

⁶³ Peter J.W. Sherwin & Douglas C. Rennie, *Interim Relief Under International Arbitration Rules And Guidelines: A Comparative Analysis*, 20 AM. REV. INT'L ARB. 317, 357 (Table: Summary of Interim Measures Available Under the Rules).

⁶⁴ Sherwin & Rennie, at 341 ("The ICDR Rules also lack explicit procedures for the expedited formation of a tribunal. Indeed, the Rules do not provide for expedited proceedings."). Examples of other arbitral institutions with expedited procedures include the Swiss Rules of International Arbitration (Section V), the Arbitration Institute of the Stockholm Chamber of Commerce (Rules for Expedited Arbitrations) and World Intellectual Property Organization (Expedited Arbitration Rules).

⁶⁵ *Id.* at 345 ("The LCIA Rules do not contain a separate set of expedited procedures; however, they do provide the tribunal with the power to modify any time limits in the Rules."). LCIA rules also do allow expedited formation of a tribunal. LCIA Rules, Art. 9.

⁶⁶ Notably, the Australian Centre for International Commercial Arbitration (ACICA) adopted separate expedited rules in August 2010. Jonathan DeBoos et al., *ACICA's Expedited Arbitration Rules of 2008*, in INTERNATIONAL ARBITRATION IN AUSTRALIA 103-121 (Richard Garnett & Luke Nottage eds., 2010).

⁶⁷ JCAA Rules, Rule 75.2.

⁶⁸ JCAA Rules, Rule 75.2. Concerning the previous rules see Sherwin & Rennie, at 350 ("The Rules do not provide a procedure, however, for a party to request the expedited formation of the tribunal.").

⁶⁹ JCAA Rules, Rule 75.3.

hearing that can be extended by one additional day “if unavoidable.”⁷⁰ Tribunals have three months to finalize their award.⁷¹

SIAC’s rules set a maximum threshold for claims of S\$ 5 million (approximately US\$ 4 million).⁷² The high threshold for the size of claims allows more cases to qualify for the procedures by default. SIAC in practice follows a flexible approach and permits the procedures where “exceptional urgency” can be demonstrated or by mutual agreement.⁷³ The default procedure requires that tribunals hold a hearing to examine witnesses, experts and arguments.⁷⁴ The tribunal should consist of a sole arbitrator, unless the SIAC President determines otherwise, who should render the award within six months.⁷⁵ As of the end of 2013, SIAC has received 115 applications for the expedited procedures.⁷⁶

As of November 2013, HKIAC substantially increased the threshold for expedited procedures to HK\$25 million (approximately US\$ 3.2 million).⁷⁷ This represents a nearly 13-fold rise from the previous threshold from 2010 and most likely stemmed from its competition with SIAC. HKIAC also permits the use of expedited procedures upon a showing of “exceptional urgency” or by mutual agreement.⁷⁸ HKIAC similarly gives a tribunal, consisting of a sole arbitrator unless the arbitration agreement calls for three arbitrators, six months to reach an award.⁷⁹ In contrast with SIAC, however, the default procedure calls for the tribunal to decide based upon documentary evidence only, unless it decides it more appropriate to hold a hearing.⁸⁰

The other jurisdictions have followed the JCAA approach and established lower thresholds, making the claims smaller, but at the same time require tribunals to render faster awards. CIETAC’s new 2012 rules make it easier for parties to apply for what is termed “summary procedures”.⁸¹

⁷⁰ JCAA Rules, Rules 79.1 & 80.

⁷¹ JCAA Rules, Rule 81.1.

⁷² SIAC Rules, Rule 5.1.

⁷³ SIAC Rules, Rule 5.1.

⁷⁴ SIAC Rules, Rule 5.2.c.

⁷⁵ SIAC Rules, Rule 5.2.b & d. The Registrar can also shorten the deadlines. SIAC Rules, Rule 5.2.a.

⁷⁶ SIAC 2013 Annual Report, 11;

⁷⁷ HKIAC Administered Arbitration Rules 2013 [HKIAC Rules], Art. 41.1(a).

⁷⁸ HKIAC Rules, Art. 41.1(c).

⁷⁹ HKIAC Rules, Art. 41.2(a) & (f).

⁸⁰ HKIAC Rules, Art. 41.2(e).

⁸¹ CIETAC Rules, Ch. IV.

Parties can now submit disputes under the procedures if they do not exceed RMB 2 million (approximately US\$ 328,000).⁸² Previously, the threshold was RMB 500,000 (approximately US\$ 82,000).⁸³ Unless the parties agree otherwise or the tribunal deems necessary, the new rules also stipulate that the threshold for qualifying for the procedures will not be affected if an amendment to a claim or a counterclaim might add to the overall amount in dispute.⁸⁴ The rules do not provide that the procedures can be adopted by one party's demonstration of urgency but do allow them where the amount claimed has not been specified or is unclear, taking into consideration such relevant factors as the complexity of the case.⁸⁵ CIETAC permits the tribunal to examine the case "in the manner it considers appropriate" and does not mandate whether it must be an oral hearing or documents only proceeding and does not explicitly allow the parties to decide.⁸⁶ A sole arbitrator, unless the parties prefer three, must render the award within three months, a faster timetable than SIAC or HKIAC, although the CIETAC Secretary General may grant an extension.⁸⁷

For the KCAB, the monetary threshold for expedited procedures is KRW 200 million (approximately US\$ 190,000) and is mandatory for claims that do not exceed it.⁸⁸ Parties may adopt the procedures based on mutual consent but they cannot be employed based upon a single party's showing of "exceptional urgency" as in the case of SIAC and HKIAC. The default procedure provides for a determination based upon documentary evidence only like the HKIAC unless the parties or the tribunal decide otherwise.⁸⁹ If a hearing is deemed necessary only one should be held unless the tribunal considers more are required.⁹⁰ As with other institutions such as JCAA and CIETAC that have lower

⁸² CIETAC Rules, Art. 54.1.

⁸³ Sherwin & Rennie, at 355 ("The Summary Procedure automatically applies if "the amount in dispute does not exceed 500,000 yuan" or if the parties otherwise agree.").

⁸⁴ CIETAC Rules, Art. 61.

⁸⁵ CIETAC Rules, Art. 54.2.

⁸⁶ CIETAC Rules, Art. 58.

⁸⁷ CIETAC Rules, Arts. 56 & 60(2).

⁸⁸ KCAB International Arbitration Rules [KCAB Rules], Art. 38.1.

⁸⁹ KCAB Rules, Art. 42.1.

⁹⁰ KCAB Rules, Art. 41.1.

thresholds, a tribunal composed of a single arbitrator chosen by the KCAB Secretariat has three months to render an award.⁹¹

The accelerated procedures provide Asian parties with an innovative avenue by which to seek more expeditious resolution of disputes that many traditional institutions have yet to offer. With tight deadlines and simplified but flexible proceedings under the administration of able arbitrators, the expedited procedures have proved to be popular among users of Asian institutions.

3. Emergency Arbitrators

Another innovation of choice among many leading institutions around the world has been the adoption of emergency arbitrators to handle issues before the constitution of the tribunal or relevant court. SIAC, HKIAC and JCAA all have adopted provisions allowing for the appointment of emergency arbitrators. They permit the appointment as a default option unless the parties opt-out. SIAC, HKIAC and JCAA emergency arbitrator provisions have nuanced differences when compared with the ICC and ICDR. CIETAC, KCAB and LCIA do not yet have any provisions on emergency arbitrators but LCIA's recently proposed new rules permit them.⁹²

In 1990, the ICC launched its "Pre-Arbitral Referee Procedure" that served as a precursor to modern emergency arbitrators.⁹³ As an opt-in procedure, however, it required prior agreement of the parties and was not that frequently used.⁹⁴ Effective 2010, SIAC became the first jurisdiction in the region to allow for appointment of emergency arbitrators

⁹¹ KCAB Rules, Arts. 40 & 43.1. Cf. Alexander Wiker, *An Arbitration Body for the International Seoul: KCAB's New Rules*, 4 Y.B. ARB. & MEDIATION 198, 201 (2012) ("If the dispute is under 200 million won and the arbitration agreement calls for three arbitrators, the Secretariat may "encourage" the parties to agree to refer the case to a sole arbitrator.").

⁹² The February 18, 2014 draft version of new LCIA rules provide for emergency arbitrators in Article 9B. <http://www.lcia.org/media/download.aspx?MediaId=336>.

⁹³ <http://www.iccwbo.org/products-and-services/arbitration-and-adr/pre-arbitral-referee/rules-for-a-pre-arbitral-referee-procedure/>.

⁹⁴ Art. 2. Emmanuel Gaillard & Philippe Pinsolle, *The ICC Pre-Arbitral Referee: First Practical Experiences*, 20 ARB. INT'L 13 (2004).

unless the parties have provided otherwise.⁹⁵ SIAC's adoption notably preceded the ICC's 2012 rules change to a similar effect. The SIAC procedures largely followed the ICDR's rules, the first institution to establish the opt-out method and the term "emergency arbitrator" in 2006.⁹⁶ SIAC has become the leading jurisdiction in the region in terms of experience with the emergency arbitrators, having handled 30 cases as of the end of 2013.⁹⁷ The success can be attributed to the efficient manner in which cases have been processed. SIAC emergency arbitrators needed on average 2.5 days to issue the first interim order after the request for emergency relief and only on average 8.5 days to render an award on interim relief after the first interim order.

Effective November 1, 2013, HKIAC became the next major jurisdiction to adopt provisions for emergency arbitrators.⁹⁸ HKIAC's emergency arbitrator provisions generally followed the ICC Rules.⁹⁹ Three months later, as of February 1, 2014, JCAA adopted a new version of its rules that included provisions regarding emergency arbitrators.¹⁰⁰ Overall, SIAC, HKIAC and JCAA rules contain notable differences from each other and also when compared to the ICC and ICDR.

First, in terms of what type of determinations an emergency arbitrator can render, HKIAC grants the widest discretion and provides that the

⁹⁵ SIAC Rules, Schedule 1. See Marianne Roth & Claudia Reith, *A Continuing Trend Towards Emergency Rules*, 16 VJ 223, 228 (2012) ("[T]he Singapore International Arbitration Centre (SIAC) also decided to offer an emergency procedure in the fourth edition of the SIAC Rules, which entered in force on 1 July 2010."). SIAC contains a separate rule on emergency relief. SIAC Rules, Rule 26.2.

⁹⁶ ICDR Rules, Art. 37. Roth & Reith, at 229 ("All in all the emergency mechanism provided by the SIAC is modelled closely on the emergency measure provisions of Article 37 ICDR Rules."). See Erin Collins, *Pre-Tribunal Emergency Relief in International Commercial Arbitration*, 10 LOY. U. CHI. INT'L L. REV. 105, 112 (2012) ("[The SIAC's rules] are very similar to the ICDR emergency relief rules."). Other institutions that contain rules for emergency arbitrators include the Netherlands Arbitration Institute (NAI), the Swiss Chambers' Arbitration Institute (SCAI), the Stockholm Chamber of Commerce (SCC) and the International Centre for Dispute Resolution (ICDR).

⁹⁷ SIAC 2013 Annual Report, 11.

⁹⁸ HKIAC Rules, Schedule 4. HKIAC also has separate provisions concerning emergency relief. HKIAC Rules, Art. 23.

⁹⁹ ICC Rules, Art. 29 & App. V.

¹⁰⁰ JCAA Rules, Arts. 70~74; Regulations for Arbitrator's Remuneration, Art. 9. JCAA also has provisions concerning interim measures. JCAA Rules, Arts. 66~69.

emergency arbitration can make a “decision, order or award.”¹⁰¹ SIAC and ICDR allow the emergency arbitrator to grant an interim order or award, whereas JCAA and ICC only allow orders.¹⁰² An award could of course benefit from the application of the New York Convention. Unlike other institutions, HKIAC also obligates the emergency arbitrator to “make every reasonable effort” to ensure that the decision, order or award made is “valid.”¹⁰³

Second, HKIAC and JCAA generally grant more generous time-lines like the ICC when compared with SIAC or ICDR. HKIAC, JCAA and ICC seek to appoint an emergency arbitrator within two days of receipt of an application instead of one day as in the case of SIAC and ICDR.¹⁰⁴ HKIAC and ICC permit a challenge against an emergency arbitrator within three days.¹⁰⁵ JCAA requires it be made within two days and SIAC and the ICDR only allow one day.¹⁰⁶ In terms of the proceedings, HKIAC and ICC allow them to be conducted in such a manner as the emergency arbitrator “considers appropriate” taking into account the “urgency” of the situation and giving each party a “reasonable opportunity” to be heard.¹⁰⁷ SIAC, ICDR and JCAA stipulate that the emergency arbitrator must establish a schedule; SIAC and ICDR require it within two days of appointment and JCAA, immediately.¹⁰⁸ Overall, HKIAC, JCAA and ICC require the emergency arbitrator to reach a conclusion within 15 days from transmission of the file, with the HKIAC and JCAA allowing extensions by party agreement and the ICC

¹⁰¹ HKIAC Rules, Schedule 4.12 (the HKIAC rules define an emergency arbitrator’s decision, order or award as an “Emergency Decision”) & Schedule 4.16.

¹⁰² SIAC Rules, Schedule 1.6; ICDR Rules, Art. 37.5; JCAA Rules, Rule 70.1 & Rule 66.1 (“Interim Measures are...’orders”); ICC Rules, Art. 29.2 & App. V, Art. 6.

¹⁰³ HKIAC Rules, Schedule 4.24.

¹⁰⁴ HKIAC Rules, Schedule 4.5 (“after receipt of both the Application and Application Deposit”); JCAA Rules, Rule 71.4; SIAC Rules, Schedule 1.2; ICDR, Art. 37.3. The ICC provides a more ambiguous “as short a time as possible” deadline and that it will normally be within two days. ICC Rules, App. V, Art. 2.1.

¹⁰⁵ HKIAC Rules, Schedule 4.8; ICC Rules, App. V, Art. 3.1.

¹⁰⁶ JCAA Rules, Rule 71.6; SIAC Rules, Schedule 1.3. ICDR also requires they must be made within one day. ICDR Rules, Art. 37.3.

¹⁰⁷ HKIAC Rules, Schedule 4.11; ICC Rules, Art. 5.2.

¹⁰⁸ SIAC Rules, Schedule 1.5. The ICC again provides a more ambiguous “as short a time as possible” deadline and that it will normally be within two days. ICC Rules, App. V, Art. 5.1. ICDR similarly requires the schedule “as soon as possible” but within two days. ICDR Rules, Art. 37.4.

requiring approval of the President of the ICC Court.¹⁰⁹ SIAC and ICDR do not stipulate a deadline for the order or award.

Third, HKIAC maintains the strictest requirement for parties to demonstrate that they notified the other party of the application for an emergency arbitrator. The HKIAC requires that the application actually “have been or are being served” on the other party.¹¹⁰ SIAC follows the ICDR approach and will permit the party to submit at certification that the other parties have been notified or an “explanation of the steps taken in good faith” to notify the other party.¹¹¹ JCAA adopts the ICC approach and will notify the other party themselves instead of requiring the applicant to do so.¹¹²

Fourth, HKIAC also takes into account the unusual contingency where an emergency arbitrator has been appointed but did not have the opportunity to act as one, such as when the case has been settled or withdrawn. All major institutions provide that, once appointed, an emergency arbitrator cannot serve as an arbitrator in a subsequent case, although SIAC, HKIAC, JCAA and ICDR rules permit it if the parties’ consent.¹¹³ In theory, HKIAC allows an emergency arbitrator who was appointed but did not act as one to later act as an arbitrator in an arbitration relating to the dispute even without mutual consent of the parties.¹¹⁴

Fifth, SIAC and HKIAC both require that an application for an emergency arbitrator be filed concurrently or following a request for arbitration.¹¹⁵ This forces the party seeking the emergency arbitrator to expedite the process of formally filing a request for arbitration. JCAA follows the ICDR and ICC approach that allows the application for an emergency arbitrator to be filed even before the request for arbitration.¹¹⁶ As with the ICC, the JCAA instead does require that the request

¹⁰⁹ HKIAC Rules, Schedule 4.12; JCAA Rules, Rule 72.4 (two weeks from appointment); ICC Rules, Art. 6.4.

¹¹⁰ HKIAC Rules, Schedule 4.2(i).

¹¹¹ SIAC Rules, Schedule 1.1; ICDR Rules, Art. 37.2.

¹¹² JCAA Rules, Rule 70.6 and Rule 16; ICC Rules, App. V, Art. 1.5.

¹¹³ SIAC Rules, Schedule 1.4; HKIAC Rules, Schedule 4.21; JCAA Rules, Rule 72.8; ICC Rules, App. V, Art. 2.6; ICDR Rule, Art. 37.6.

¹¹⁴ HKIAC Rules, Schedule 4.21.

¹¹⁵ SIAC Rules, Schedule 1.1; HKIAC Rules, Schedule 4.1.

¹¹⁶ JCAA Rules, Rule 70.7. The ICC does require that an application cannot come after transmission of the file to the arbitral tribunal. ICC Rules, Art. 29 & App. V, Art. 2.2.

for arbitration be subsequently filed within ten days.¹¹⁷ The request for arbitration could be delayed during this time. JCAA also contains a unique provision that allows the application to be filed for the contingency “when any arbitrator has ceased to perform his or her duties.”¹¹⁸

Finally, Singapore and Hong Kong have adopted legislation to buttress their emergency arbitrator regimes. In the case of Singapore, the 2012 amendments to the SIAA provide that an emergency arbitrator’s award or order are enforceable within Singapore and like an arbitral tribunal receive the same status as if made by a court.¹¹⁹ New provisions in the Hong Kong Arbitration Ordinance similarly provide that an emergency arbitrator’s relief is enforceable in the same manner as a court order or direction.¹²⁰ Japan’s Arbitration Act has not been yet amended to stipulate the enforceability of an emergency arbitrator’s decision in the fashion of Singapore or Hong Kong.

Combined with the expedited procedures, SIAC’s lead followed by HKIAC’s and JCAA’s variations demonstrates how these institutions have been able to respond to the demands in international practice.¹²¹ SIAC in particular has successfully met the needs of parties for expeditious action through its efficient operation of emergency arbitrators and has developed a market niche that has led to a significant number of cases.

¹¹⁷ JCAA Rules, Rule 70.7; ICC Rules, App. V, Art. 1.6.

¹¹⁸ JCAA Rules, Rule 70.1.

¹¹⁹ SIAA, Arts. 2(1) & 12(6). Jason Fry, *The Emergency Arbitrator: Flawed Fashion or Sensible Solution?*, 7 DISP. RESOL. INT’L 179, 194 (2013) (“[T]he Singapore International Arbitration Act has sought to deal with the issues that arise in relation to the enforceability of the decision. It provides that ‘all orders or directions made or given by an arbitral tribunal [which, as stated above, includes the emergency arbitrator] in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court and, where leave is so given, judgment may be entered in terms of the order or direction.’”).

¹²⁰ Hong Kong Arbitration Ordinance, Sec. 22B.

¹²¹ See Samuel W. Cooper et al., *Current Topics in International Arbitration*, 65 ADVOC. (Texas) 10, 10 (“[A]fter the adoption of [emergency arbitrator] rules in 2012, the ICC touted them in a press release entitled New rules attract international arbitration cases.’ It likely is not a coincidence that in 2013, the Hong Kong International Arbitration Centre (“HKIAC”) established its own process for the appointment of emergency arbitrators . . .”).

4. Determining the Seat of Arbitration

The major Asian institutions have specific rules on where the place of arbitration should be and who should determine when the parties have not specified it.¹²² Whereas some institutions like the ICC and ICDR believe the institution should determine the place, others believe that the tribunal should fix it or that a default choice should be provided, excluding the initial role of either the institution or tribunal.¹²³ Most institutions in Asia provide more certainty regarding the seat and follow the later method by designating a specific city, which is usually the capital where their headquarters is located.¹²⁴ They also offer less “intervention” by the institution and grant more deference to the tribunal most likely chosen by the parties. Unlike the ICC and LCIA, only the ICDR allows a tribunal to later change the place after the institution’s initial determination.¹²⁵

SIAC, HKIAC and KCAB all provide that, absent the parties’ agreement, the default choice of the seat shall be Singapore, Hong Kong and Seoul, respectively.¹²⁶ At the same time, they also provide that the tribunal “having regard to the circumstances of the case” may decide that another seat is “more appropriate.”¹²⁷ The “having regard to the

¹²² Like the ICC and ICDR, CIETAC, JCAA and KCAB use the term “place” whereas, like the LCIA, HKIAC and SIAC uses the term “seat”. ICC Rules, Art. 18; ICDR Rules, Art. 13; CIETAC Rules, Art.7; JCAA Rules, Rule 38; KCAB Rules, Art. 18; LCIA Rules, Art. 16; HKIAC Rules, Art. 14; SIAC Rules, Rule 18. In the case of arbitration laws, Hong Kong, Japan, Korea and Singapore follow the Model Law and UNCITRAL Arbitration Rules and use “place”. Hong Kong Arbitration Ordinance, Sec. 48; Japan Arbitration Law, Art. 28; Korea Arbitration Act, Art. 21; SIAA, Art. 5; Model Law, Art. 20; UNCITRAL Arbitration Rules, Art. 18.

¹²³ The ICC provides that the Court fixes the place. ICC Rules, Art. 18. The ICDR Rules provide that the administrator initially determines the place. ICDR Rules, Art. 13.1.

¹²⁴ At the LCIA, the default seat is London unless the LCIA Court determines another seat is more appropriate. LCIA Rules, Art. 16.1.

¹²⁵ ICDR Rules, Art. 13.1.

¹²⁶ SIAC Rules, Rule 18.1; HKIAC Rules, Art. 14.1. KCAB Rules, Art. 18.1; Korea’s Article 21 of the Arbitration Act follows Article 20(1) of the Model Law.

¹²⁷ SIAC Rules, Rule 18.1 (“having regard to all the circumstances of the case”); HKIAC Rules, Art. 14.1 (“having regard to the circumstances of the case”); KCAB Rules, Art. 18.1 (“in view of the all the circumstances of the case”). *See Nobles*, at 95 (“These rules empower tribunals to initiate hearings to determine the seat of arbitration when the parties do not agree, and the production of evidence on the tribunals’ initiative. These new rules serve to expedite resolution of the case.”).

circumstances” language originates from the UNCITRAL Model Law and the UNCITRAL Arbitration Rules, but all three institutions further default to a specific city within their jurisdiction as the seat and add the “more appropriate” requirement.¹²⁸

CIETAC’s 2012 rules stipulate that if the parties have not decided the place or “their agreement is ambiguous” the place will be Beijing or one of the four cities where CIETAC has sub-commissions.¹²⁹ The new CIETAC rules also provide that “having regard to the circumstances of the case,” a location other than one of the default choices may be selected.¹³⁰ In the past, determination of the place was limited to the default cities where CIETAC had offices. It remains to be seen how often a different location and whether one outside of China will be chosen. Another significant point that differs with SIAC and KCAB is that CIETAC, and not the tribunal, has the authority to make this choice.

JCAA also designates certain cities as the default choice for the seat but they follow unique approach and do not allow the tribunal or institution to decide differently. JCAA rules state that the default place will be the city of the JCAA office where the request was submitted, which could be Tokyo, Osaka, Nagoya, Kobe or Yokohama.¹³¹ They do not permit the tribunal or institution to choose another location. In some regards, this further respects party autonomy and offers parties greater predictability instead of leaving the choice to the discretion of the institution or tribunal.

Where the parties have not agreed and have not designated a particular institution or institution’s rules, most countries have arbitration laws that follow the Model Law standards that do not provide a default location and permit the tribunal to determine the seat of arbitration.¹³² Following the Model Law, in Japan, Korea, Hong Kong and Singapore, the tribunal shall determine the place “having regard to the circum-

¹²⁸ SIAC Rules, Rule 18.1; Model Law, Art. 20(1); UNCITRAL Arbitration Rules, Art. 18.1.

¹²⁹ CIETAC Rules, Art. 7.2.

¹³⁰ CIETAC Rules, Art. 7.2. China’s Arbitration Law does not contain a provision regarding the determination of the place of arbitration. Arbitration Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 1994, effective Sept. 1, 1995), (China) (English translation provided by the National People’s Congress, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm).

¹³¹ JCAA Rules, Rule 36.1.

¹³² Model Law, Art. 20; Japan Arbitration Law, Art. 28; Korea Arbitration Act, Art. 21; Hong Kong Arbitration Ordinance, Sec. 48; SIAA, Art. 12(1).

stances of the case.”¹³³ The tribunal should also consider the “convenience of the parties.”¹³⁴ The only non-Model Law country, China, holds that ad hoc arbitration agreements that do not specify an institution are invalid unless the parties conclude a subsequent agreement that includes one.¹³⁵

5. Confidentiality and Transparency

Another distinguishing feature for Asian institutions and jurisdictions concerns the duty of confidentiality and transparency of awards.¹³⁶ Asian institutions have generally adopted more explicit provision regarding the duty of confidentiality. Their views differ, however, regarding the publication of arbitral awards, with some institutions adopting a more permissive stance and others being more restrictive.

All institutions in the region specify that the parties and arbitrators must not disclose information regarding the proceedings and the award. In contrast, the ICC rules only mention that such an obligation applies to its Court members and everyone who participates in the Court’s work.¹³⁷ In ICC cases, tribunals can make orders concerning confidentiality upon the request of the party but an explicit duty does not exist to the parties, tribunal or others.¹³⁸ The ICDR imposes an obligation of confidentiality on the tribunal and administrators but again not directly on the parties.¹³⁹ The LCIA requires parties to keep confidential all awards, all materials produced for the proceeding and all documents produced by the parties,

¹³³ Model Law 2(1); Japan Arbitration Law, Art. 28(2); Korea Arbitration Act, Art. 21; Hong Kong Arbitration Ordinance, Sec. 48; SIAA, Art. 20(1).

¹³⁴ Model Law 2(2); Japan Arbitration Law, Art. 28(2); Korea Arbitration Act, Art. 21; Hong Kong Arbitration Ordinance, Sec. 48; SIAA, Art. 20(1).

¹³⁵ China Arbitration Law, Art. 18. Jingzhou Tao, *Salient Issues in Arbitration in China*, 27 AM.U.INT’L L. REV. 807, 812 (2012).

¹³⁶ For an in-depth discussion on the duty of confidentiality, see generally Gu Weixia, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?*, 15 AM. REV. INT’L ARB. 607 (2004); Alexis C. Brown, *Presumption Meets Reality: An Exploration Of The Confidentiality Obligation In International Commercial Arbitration*, 16 AM. U. INT’L L. REV. 969 (2001).

¹³⁷ ICC Rules, App. 1, Art. 6 & App. II, Art. 1.

¹³⁸ ICC Rules, Art. 22.3. The ICC website suggests that parties should sign a confidentiality agreement if they are concerned. <http://www.iccwbo.org/FAQs/Frequently-asked-questions-on-ICC-Arbitration/#Q4>.

¹³⁹ ICDR Rules, Art. 34.

but they do not include other aspects of the proceedings.¹⁴⁰ The deliberations of the tribunal are likewise “confidential to its members” but the scope of what qualifies as deliberations is unclear.¹⁴¹ Arbitrators do not have an explicit duty.

Asian institutions impose more express obligations on those involved in arbitrations under their rules. SIAC imposes a specific duty of confidentiality on both the parties and arbitrators.¹⁴² KCAB, HKIAC, JCAA and CIETAC rules provide an even wider range of persons subject to the obligation of confidentiality. According to the KCAB rules, for example, the duty applies not only to parties, arbitrators and the secretariat but also to the parties’ representatives and assistants.¹⁴³ HKIAC does not include party representatives and assistants but instead includes emergency arbitrators, experts, witnesses and the secretary of the tribunal and HKIAC itself.¹⁴⁴ JCAA’s new rules also stipulate that the JCAA staff, parties, arbitrators, counsel and assistants and “other persons involved in the arbitral proceedings” must keep the proceedings confidential unless required by law or in court proceedings or “based on any other justifiable grounds.”¹⁴⁵ CIETAC includes the representatives, witnesses, interpreters, experts consulted by the tribunal, appraisers appointed by the tribunal and also have a catchall “all other relevant persons” category.¹⁴⁶ Whether experts or appraisers appointed or consulted by the parties will fall under the “all other relevant persons” category

¹⁴⁰ A caveat exists when a party has a legal duty, must “protect or pursue a legal right” or seeks to “enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.” LCIA Rules, Art. 30.1. For a brief comparison between ICC and LCIA confidentiality rules, see Scott D. Marrs & Joseph W. Hance III, *Arbitration Confidentiality: What You Thought You Knew Could Hurt You*, 77 TEX. B.J. 152, 154 (2014).

¹⁴¹ Deliberations also may be disclosed “save and to the extent that disclosure of an arbitrator’s refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12 and 26.” LCIA Rules, Art. 30.2.

¹⁴² SIAC Rules, Rule 35.1.

¹⁴³ KCAB Rules, Art. 52(2). See Benjamin Hughes & Seungmin Lee, 17 No. 1 IBA ARB. NEWS 43, 44-45 (Apr. 2012) (comparing Korea’s Domestic Rules and International Rules on confidentiality).

¹⁴⁴ HKIAC Rules, Art.42.2.

¹⁴⁵ JCAA Rules, Rule 38.2. Japanese arbitration law does not require that arbitral proceedings be kept confidential.

¹⁴⁶ CIETAC Rules, Art. 36.2. See Comparison of Asian Arbitration Rules, table (“Art. 36 provides for confidentiality in relation to “any substantive or procedural matters relating to the case.”).

remains unclear. The scope and specificity of the duty of confidentiality in Asian arbitral institutions ranks among the most comprehensive in the world.

In terms of arbitration laws, Hong Kong and Singapore contain special provisions regarding confidentiality whereas most other jurisdictions' statutes follow the Model Law. Hong Kong's Arbitration Ordinance notably includes strict confidentiality requirements regarding the arbitral proceedings and awards.¹⁴⁷ The obligation is imposed on parties with certain exceptions such as when mandated by law but does not explicitly apply to arbitrators or others involved in the proceedings such as witnesses or experts. Furthermore, Hong Kong law also extends confidentiality to the courts such that court hearings concerning arbitration by default are confidential as well.¹⁴⁸ Singapore law does not contain a statutory obligation providing for the confidentiality of arbitration but where an international arbitration faces court review the SIAA permits a party to request for the session to be closed.¹⁴⁹

Singapore has adopted an innovative view concerning the transparency of awards. Under its new 2013 rules, SIAC may publish awards with the names of the parties and "other identifying information" redacted.¹⁵⁰ The applicable rules do not specify if party consent must be obtained or if the parties can object to the publication. This transparency serves to enhance the credibility of SIAC awards and help to build a body of arbitration jurisprudence. The ICDR and LCIA also allow publication of awards under stricter circumstances. The ICDR specifically requires party consent for an award to become public but it does not state whether this applies to redacted awards as well.¹⁵¹ The LCIA goes one step further and requires consent from both the parties and the

¹⁴⁷ Hong Kong Arbitration Ordinance, Sec. 18. Apparently, most of the provisions derived from New Zealand's Arbitration Act.

¹⁴⁸ Hong Kong Arbitration Ordinance, Sec. 16; Kun Fan, *The New Arbitration Ordinance In Hong Kong*, 29 J. INT'L ARB. 715 (2012)

¹⁴⁹ SIAA, Sec. 22 & 23.

¹⁵⁰ SINGAPORE ARBITRAL AWARDS 2012 (LexisNexis 2012); SIAC Rules, Rule 28.10. The Netherlands have been publishing redacted awards since 1919. Pieter Sanders, *QUO VADIS ARBITRATION?: SIXTY YEARS OF ARBITRATION PRACTICE* (Kluwer 1999), 14. In line with the recent push for greater transparency, in July 2013, UNCITRAL adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration that went into effect April 2014.

¹⁵¹ ICDR Rules, Art. 27.4.

tribunal for an award to be disclosed.¹⁵² ICC awards have been published in anonymous form since 1974. Although in practice party consent is probably obtained, it is not explicitly required like other institutions.

In contrast, as a default, HKIAC will not publish unless it receives a request to do.¹⁵³ Upon receiving a request, HKIAC will delete all references to the parties but will not publish the redacted awards if a party objects.¹⁵⁴ HKIAC has therefore taken a more protective stance toward respecting the privacy of parties relative to enhancing the transparency of awards. The CIETAC, KCAB, and JCAA's rules do not explicitly provide for the possibility of publishing redacted awards.¹⁵⁵ In practice, KCAB does publish redacted awards on a selective basis.

CONCLUSIONS

Asian economies account for an ever-growing proportion of international trade, investment and economic activity in the world. In conjunction with their remarkable growth, Asian parties have become major players in international arbitration, active in all the major arbitral institutions of the world. While the increase in cases can be partially attributed to the after effects of the 2008 Global Financial Crisis, the growth could also be considered as a natural result of their expanding economic activity through cross-border deals and the widespread adoption of arbitration as a means to resolve disputes that arise therefrom.

The significant increase in the number cases at Asian institutions and involving Asian parties around the world demonstrates the depth and breadth of the practice of arbitration for those in the region. Traditional seats such as Paris, London and New York and traditional institutions such as the ICC, ICDR and LCIA no longer represent the automatic choice for Asian parties. Affordability, familiarity, and accessibility coupled with efficiency and competency have played a pivotal role in this development. Leading Asian jurisdictions have established a comprehensive arbitration architecture consisting of effective laws, rules,

¹⁵² LCIA Rules, Art. 30.3.

¹⁵³ See HKIAC Rules, Art. 42.5; Comparison of Asian Arbitration Rules, table ("Awards made in the arbitration are confidential, except to the extent that a disclosure may be required of a party by a legal or regulatory duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority. (Art. 42.3)").

¹⁵⁴ HKIAC Rules, Art. 42.5(c).

¹⁵⁵ McAllin & Nottage, *supra* note 36, at 33.

institutions, courts, counsel, arbitrators, academies and universities. From a structural standpoint, they have begun to provide many innovative reforms at the forefront of arbitration practice. In the next phase, we will likely see more examples of them taking the lead in advancing international arbitral practice as they continue their efforts to meet the demands of users.¹⁵⁶

¹⁵⁶ For concerns about the future of international arbitration raised by an Asian specialist see Sundaresh Menon, *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*, ICCA Congress 2012 (June 10, 2012). http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf, at 1-5. Another bold initiative by Singapore is the plan to establish an “International Commercial Court” potentially modelled after the Dubai International Financial Centre (DIFC) Courts where based upon party consent judicial review would be provide to international commercial disputes by a professional judiciary composed of international jurists. Enforcement in foreign jurisdictions remains an issue with one option under consideration is to qualify the court decisions as “foreign arbitral awards” to obtain the benefits of the New York Convention. K Shanmugam, *International Dispute Resolution: The Singapore Perspective in an Evolving Landscape*, Oct. 29, 2013, <http://www.mlaw.gov.sg/news/speeches/keynote-speech-by-Minister-at-LAWASIA-conference-2013.html>; Michelle Quan, *Law Minister unveils two big initiatives: International commercial mediation centre and Singapore International Commercial Court*, BUSINESS TIMES, Oct. 30, 2013.