

INTERNATIONAL ARBITRATION IN ASIA ON THE RISE: CAUSE & EFFECT

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INTRODUCTION

Within what might seem like a blink of an eye, international arbitration in Asia has exploded and Asia is now firmly established on the arbitral map. Arbitration experts in Asia have held conferences and written papers discussing the reasons for this phenomenon.² These analysts also contemplate the greater implications of the increase in arbitration

¹ The author is grateful to Jacopo Roberti di Sarsina and Carol Wang for their valuable assistance and research on this article.

² See, e.g., International Association of Lawyers (UIA), October 31 – November 4, 2013, *Arbitration in Asia*, 57th Annual Congress, Macau, Macau; Hong Kong International Arbitration Centre (HKIAC), September 23, 2013, *Arbitrating with Asia: Understanding Risk & Resolving Disputes*, Buenos Aires, Argentina.

in Asia and what lies ahead for international arbitration in the region.³ The institutional caseloads in the Asian region evidence strong growth.⁴ For example, the Hong Kong International Arbitration Centre (HKIAC) has seen an increase of 20% from 2012-2013 in the number of cases fully administered by the HKIAC Secretariat, which represents a 97% increase from 2011.⁵ Even institutions without a traditional stronghold in Asia have seen a need to increase their presence in the region.⁶ If they have not already, foreign law firms seem to be queuing to establish some sort of presence in Asia, either physically or through more visits to the region.⁷ Fifteen of the top twenty American law firms listed in the *American Lawyer* “A-List Firms in 2012” have established their Asia offices in Hong Kong.⁸ Most of these firms found Hong Kong’s status as an international financial hub to be the primary lure to set up corporate

³ See, e.g., China Britain Law Institute (CBLI) & China International Arbitration Club (CIAC), June 6, 2013, *Where next for China-related Arbitration?*, Beijing, China; Hong Kong Department of Justice Legal Services Forum, September 16, 2014, *Think Global, Think Hong Kong*, Qingdao, China; International Arbitration Centre of the Austrian Federal Economic Chamber (VIAC) & China International Economic and Trade Arbitration Commission (CIETAC) & HKIAC, March 31, 2012, *New developments in Arbitration in China and Austria*, Vienna, Austria.

⁴ See generally Jawad Ahman & Andre Yeap, *Overviews: Arbitration In Asia*, The Asia-Pacific Arbitration Review 2014, <http://globalarbitrationreview.com/reviews/55/sections/193/chapters/2165/arbitration-asia/>.

⁵ HKIAC, *Case Statistics 2013*, <http://www.hkiac.org/en/hkiac/statistics>. In 2011: the HKIAC had 41 administered arbitration cases, in 2012: 68 administered arbitration cases and in 2013: 81 administered arbitration cases.

⁶ See, e.g., Kanishk Verghese, *Arbitration in Asia: The next generation?*, Asian Legal Business (July 1, 2014), <http://www.legalbusinessonline.com/reports/arbitration-asia-next-generation>. The International Court of Arbitration of the International Chamber of Commerce (ICC) setup its first overseas office in Hong Kong in 2008 and the London Court of International Arbitration (LCIA) launched LCIA India, its first independent subsidiary, in April 2009, which is based in New Delhi. In 2007, the Permanent Court of Arbitration with its seat in The Hague, agreed with the Singapore government to incorporate a virtual hearing centre in Singapore for its cases.

⁷ See John Grimley, *US law firms likely to continue Asia expansion. Why? Because their clients are doing the same*, Asian Law Portal (January 27, 2014), <http://www.asialawportal.com/2014/01/27/us-law-firms-likely-to-continue-asia-expansion-why-because-their-clients-are-doing-the-same/>. The following firms are some of the firms that have recently established a presence in Asia; Loyens & Loeff (2012), Hogan Lovells (2009), Ashurst (2008), Gide Loyrette Nouel (2006), Nabarro (2012), Kobre & Kim (2010).

⁸ See *A-List 2012 Honorees*, American Lawyer (2012), http://www.americanlawyerawards.com/honorees/2012_winners.

practices to support their clients in the region. With the flourish of alternative dispute resolution, law firms with existing Asian offices are bolstering their dispute resolution practices.⁹ Even more indicative of the market growth is that many law firms without Asian presences are now looking to enter the market with a dispute resolution practice rather than a corporate practice.¹⁰

In light of these trends, the rise of international arbitration in Asia and its effects provides many interesting questions. The purpose of this article is to examine the reasons for the rise in international arbitration in Asia, with a focus on East Asia, and to investigate whether international arbitration practice has been influenced by the increased number of arbitrations in Asia, leading to an “Asianisation” of arbitration.

I. WHY IS INTERNATIONAL ARBITRATION ON THE RISE IN ASIA?

The first question – what is the cause of this trend? The short answer – the stars aligned themselves to trigger a burgeoning of the arbitral market in Asia. Over many years, international arbitration in Asia has evolved and matured to become an attractive and reliable dispute resolution mechanism.¹¹ The confidence placed in the process is now common across industries.¹² In recent years, the growing trade among Asian countries and as between Asian companies and non-Asian companies

⁹ See, e.g., Suzi Ring, *Herbert Smith City disputes partner moves to Hong Kong*, LegalWeek (March 3, 2011), <http://www.legalweek.com/legal-week/news/2030093/herbert-smith-city-disputes-partner-moves-hong-kong>; K&L Gates, *K&L Gates Continues Asia Pacific Growth with Addition of Corporate, Litigation, and IP Lawyers in Hong Kong and Seoul Offices*, K&L Gates News (May 30, 2013), <http://www.klgates.com/kl-gates-continues-asia-pacific-growth-with-addition-of-corporate-litigation-and-ip-lawyers-in-hong-kong-and-seoul-offices-05-30-2013/>.

¹⁰ Lawyers Weekly, *Asia's allure*, www.lawyersweekly.com.au, 28/10/2013; Binham C., *UK law firms to continue Asia expansion*, Financial Times, 06/05/2012, www.ft.com; Grimley J., *US law firms likely to continue Asia expansion. Why? Because their clients are doing the same*, Asia Law Portal, 27/01/2014; The Australian, *Practice makes perfect for PwC Asian expansion*, <http://www.theaustralian.com.au>, 04/04/2014.

¹¹ Jawd Ahmad & Andre Yeap, *Arbitration in Asia*, ASIA-PACIFIC ARB. REV. 2014, <http://globalarbitrationreview.com/reviews/55/the-asia-pacific-arbitration-review-2014/>

¹² Allen & Overy, *The Year of the Dragon and continued growth of international arbitration in Asia*, ALLEN & OVERY (JAN. 30, 2012), <http://www.allenoverly.com/publications/en-gb/Pages/The-Year-of-the-Dragon-and-continued-growth-of-international-arbitration-in-Asia.aspx>

coupled with the lack of confidence in the judicial system in Asia has sparked a demand for international arbitration.¹³

A. Strength of the Arbitral Infrastructure in Asia

The core building blocks of any arbitral infrastructure are a sound legislative framework and a pro-arbitration/pro-enforcement judiciary.¹⁴ Upon this foundation rests a neutral and reputable arbitral institution as well as a community supportive of the development of international arbitration.

As the backbone of an arbitral seat, the legislative framework of a given jurisdiction defines the roles of the players involved in the process and structures the fundamental rules of the game. Over the years, Asia-Pacific jurisdictions have proactively adopted the UNCITRAL Model Law on International Arbitration and Conciliation (the ‘UNCITRAL Model Law’). Of the ninety-six jurisdictions that have adopted the 1985 UNCITRAL Model Law, the highest concentration of Model Law Countries can be found in Asia; in addition, eleven of the twenty-one jurisdictions to have adopted the UNCITRAL Model Law, with the 2006 amendments are based in Asia.¹⁵ The relative conformity to one uniform

¹³ See Kent Phillips & Roger Milburn, *Arbitration builds on progress in Asia*, S. CHINA MORNING POST (July 3, 2013, 4:48 AM), <http://www.scmp.com/business/companies/article/1274205/arbitration-builds-progress-asia>; Chris Crowe, *Asia’s arbitration explosion*, INT’L BAR ASS’N, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=C55383E1-519F-4CD9-8822-BE34CC748D2F>; Gary Born & A.F.M. Maniruzzaman, *Resolving Business Disputes by ADR in Asia*, TRANSACTIONAL DISPUTE MGMT (2011), <http://www.transnational-dispute-management.com/article.asp?key=1748>.

¹⁴ See Jan Paulson, *Arbitration-Friendliness: Promise of Principle and Realities of Practice*, 23 ARB. INT’L. 477 (2007); Phillip Capper & Dipen Sabharwal, *Section 69 and the “Interventionism” of English Courts*, KLUWER ARB. BLOG (Sep. 23, 2009), <http://kluwarbitrationblog.com/blog/2009/09/23/section-69-and-the-interventionism-of-english-courts/>; Gary Born, *The impact of Dallah*, KLUWER ARB. BLOG (Feb. 10, 2011), <http://kluwarbitrationblog.com/blog/2011/02/10/the-impact-of-dallah/>; Kate Davies, *In defence of section 69 of the English Arbitration Act*, KLUWER ARB. BLOG (Nov. 1, 2011), <http://kluwarbitrationblog.com/blog/2010/11/01/in-defence-of-section-69-of-the-english-arbitration-act/>; White & Case, 2010 *International Arbitration Survey: Choices in International Arbitration* (2010), http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf.

¹⁵ *Status, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, United Nations Commission on International Trade Law, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

template allows countries that have adopted the UNCITRAL Model Law to benefit from a common body of case law and contribute to the development of transnational arbitration law.¹⁶ The engagement of the judiciary goes along with this development. Whilst there is less regional uniformity on the approach judges take in addressing arbitration matters, the Hong Kong and Singaporean judiciaries are leading examples with several other Asian jurisdictions developing better appreciations of the role that international arbitration plays vis-à-vis the court systems.¹⁷

Arbitral institutions are also an integral part of the arbitral infrastructure. They serve as the administrators of the arbitral process and shape the policies that govern the process.¹⁸ Arbitral institutions often serve as a key resource center for new users to the region. In Asia, there is a growing number of institutions achieving international recognition and, by all counts, they are starting to see the gravity of work shift eastwards.

The arbitration regime in Hong Kong and the practice of the HKIAC provide a good example of the strength of the arbitral infrastructure in Asia and can be illustrated by looking at its legislation, judiciary and flagship institution, the HKIAC.

1. Evolution of a Solid Arbitration Legislative Framework

Arbitration in Hong Kong is not a recent phenomenon. The history of arbitration in Hong Kong is long, making it one of the most established seats in Asia. Hong Kong has officially recognized arbitration as an alternative dispute resolution mechanism dating back to 1855 when the Civil Administration of Justice (Amendment) Ordinance was enacted. Indeed, the very first arbitration ordinance—Ordinance No. 6—was enacted as an interim measure while a legal system was established in the colony. Interestingly, arbitration's predominance in Hong Kong was short lived. As Ordinance No. 6 was not sanctioned by

¹⁶ Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1329 (2003); Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 ARB. INT'L. 1, 60 (2002); Maxi Scherer, *The globalization of international commercial arbitration*, 2 LETTRE DES JURISTES DE SCIENCES PO 64 (2010).

¹⁷ Grand Pac. Holdings Ltd. v. Pac. China Holdings Ltd. (in liq) (No 1) [2012] 4 HKLRD 1 (9 May 2012); Lucky-Goldstar Int'l (H.K.) Ltd. v Ng Moo Kee Eng'g Ltd. [1993] 2 HKLR 73. .

¹⁸ Dep't of Justice, The International Arbitration Centre for the Asia Pacific,

London, the Colonial Office prohibited the ordinance five months after its enactment, believing it gave the Governor too much power.¹⁹

As one would expect of any sophisticated jurisdiction, Asian or otherwise, Hong Kong arbitration legislation has strongly evolved and developed since the 1855 Arbitration Ordinance, to reflect important international developments, and incorporating some of the most innovative and progressive changes in the region.

Possibly the two most significant developments in the legislation for international spectators, took place in 1977 and 1990. The first addresses one of the cornerstones of international arbitration, the reciprocal enforcement of arbitral awards through the primary instrument, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the 'New York Convention' or the 'Convention').²⁰ At a time when Hong Kong was still under the British rule, the New York Convention was incorporated into Hong Kong legislation in 1975 as a result of the United Kingdom's accession to the Convention.²¹ The legislation incorporating the Convention took effect in 1977, making arbitral awards rendered in Hong Kong recognizable and enforceable in other Convention territories.²² Upon resumption of sovereignty over Hong Kong on July 1, 1997, the Chinese Government extended the territorial application of the Convention to Hong Kong. As such, today awards rendered in Hong Kong continue to be recognizable and enforceable in Convention territories.²³

¹⁹ Neil Kaplan, *The History and Development of Arbitration in Hong Kong*, 1 Y.B. INT'L FIN. & ECON. L. 203, 205 (1996).

²⁰ United Nations Conference on International Commercial Arbitration, *Convention of the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS (1958), http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

²¹ MICHAEL J. MOSER & TERESA Y.W. CHENG, *HONG KONG ARBITRATION A USER'S GUIDE* (2ND ED. 2008); Kaplan, *supra* note 18.

²² See UNCITRAL, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Oct. 4, 2014).

²³ Arbitral awards made in Mainland China are not enforceable in Hong Kong under the UNCITRAL Convention as the Convention only applies to awards made in a different state. Following Hong Kong's return to Chinese sovereignty, this requirement was no longer satisfied. As a result, in 1999 the Mainland Chinese and Hong Kong governments enacted the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, which permits the reciprocal enforcement of arbitral awards on conditions similar to those in the Convention.

The second development was in 1990 when Hong Kong became the first jurisdiction in Asia to adopt the UNCITRAL Model Law for international arbitrations having their seat in Hong Kong, upholding the founding principle that local courts should support, but not interfere with, the arbitral process. An extension of this development and an important part of the maturation process of the legislative framework in Hong Kong took place when Hong Kong took steps to amend the long-standing arbitration legislation by incorporating the 2006 amendments to the UNCITRAL Model Law and unifying the domestic and international arbitration regimes. In turn, this bolstered its attractiveness as a seat for arbitration, effectively extending the UNCITRAL Model Law to all arbitrations seated in Hong Kong.

The purpose of the reform was fourfold. First, it sought to make the law of arbitration more conducive to arbitration parties both in and outside Hong Kong. Second, reform would enable the Hong Kong business community and arbitration practitioners to operate an arbitration regime that accords with widely accepted international arbitration practices and developments as the Model Law is familiar to practitioners from both civil law and common law jurisdictions.²⁴ Third, it would attract more business parties to choose Hong Kong as the place to conduct arbitral proceedings. Finally, it would promote Hong Kong as a regional center for dispute resolution.²⁵

As a result, arbitration in Hong Kong is currently governed by the Arbitration Ordinance (Cap. 609) (the “New Ordinance” or the “2011 Arbitration Ordinance”) since June 1, 2011.²⁶ The arbitration legislation contains many features one would expect to see in pro-arbitration legislation together with some unique features, which are intended to encourage parties to seat their arbitration in Hong Kong. For example,

²⁴ Surveys show that formal legal infrastructure (understood as the national arbitration law, track record in enforcing agreements to arbitrate and arbitral awards, neutrality and impartiality of legal system) is vital and a top factor taken into account by the parties when choosing the arbitration seat, *see* White&Case, Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, available at http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf.

²⁵ *See, e.g.*, Arbitration, DEPARTMENT OF JUSTICE, THE GOVERNMENT OF HONG KONG SAR (MAY 2013), <http://www.doj.gov.hk/eng/public/arbitration.html>.

²⁶ Arbitration Ordinance, Hong Kong Laws CAP 609 (June 2011), available at <http://www.hkiac.org/en/arbitration/arbitration-ordinance> [hereinafter Arbitration Ordinance].

as confidentiality in arbitration proceedings is paramount, the New Ordinance establishes that court proceedings relating to arbitration are in general to be heard in closed court.²⁷ The court may also order a person to attend proceedings before an arbitral tribunal, to give evidence or to produce documents or other evidence.²⁸ Additionally, discovery during the arbitral process can be flexible and narrow as the matter is left to the discretion of the arbitral tribunal.²⁹

An interesting feature of the New Ordinanceone that has been retained and enhanced from the old regimeis the “med-arb” provision whereby a member of the arbitral tribunal assumes the role of mediator in the course of the proceedings in an effort to facilitate settlement.³⁰ Another element carried over from the previous ordinance worth noting is that arbitral tribunals are expressly empowered to grant interim measures including the preservation of assets and evidence,³¹ and the Hong Kong courts may also grant interim measures in proceedings commenced inside or outside Hong Kong.³² Increasingly, arbitral institutions are providing parties with the possibility to apply to the institution for interim relief before the tribunal has been appointed using the emergency arbitrator provisions.³³ One of the most recent amendments to the arbitration legislation facilitates this process by providing for any emergency relief granted by an emergency arbitrator, whether granted in or outside Hong Kong, to be enforceable in the same manner as an order or direction of the Court that has the same effect.³⁴ This change was prompted by the recent revisions to the HKIAC Rules, which are explained in further detail below. In response to the HKIAC’s request for this legislative amendment, the Hong Kong government worked closely with the HKIAC to draft appropriate legislation to provide for the enforceability of emergency arbitrator decisions in and outside of

²⁷ Arbitration Ordinance §16. .

²⁸ *Id.* at §55(2).

²⁹ *Id.* at §56

³⁰ *See e.g. id.* at §33.

³¹ *Id.* at §35 (2)(c-d)

³² *Id.* at §45 (2)

³³ *See generally* ICC Rules of Arbitration, Article 29 and Appendix 5 (2012); Singapore International Arbitration Centre, Schedule 1 (2013); The SCC Rules; the Arbitration Rules and the Rules for Expedited Arbitrations, Appendix II (2010); London Court of International Arbitration, Article 9B (effective as of October 1, 2014).

³⁴ Arbitration Ordinance §22B.

Hong Kong. Such swift and well-thought out amendment reflects the Hong Kong government's support towards the development of arbitration in Hong Kong.³⁵

This new legislation, which is clearer, more user-friendly, and more flexible than the previous Arbitration Ordinance, certainly evidences the strength of Asia's arbitral offering and ability to respond to market demand.

2. Role of the Judiciary

The attitude courts hold in relation to arbitration is also paramount to the strength and reliability of any arbitral infrastructure. The Hong Kong judiciary has long been a beacon in the region, upholding the rule of law and representing a truly independent judiciary free of any influence.³⁶ In fact, Hong Kong is ranked Number 4 among the 148 countries on the index of judicial independence in the "The Global Competitiveness Report 2013-2014" published by the World Economic Forum ("Forum"), right after New Zealand, Finland, and Ireland.³⁷ This ranking is based on the Executive Opinion Survey conducted by the Forum where the individuals being surveyed scored on a scale of 1 to 7 in their responses to the question "in your country, to what extent is the judiciary independent from the influences of members of government, citizens or firms?" That the Court of Final Appeal, the highest court in Hong Kong, comprises non-permanent judges which hail from other common law jurisdictions, specifically, the United Kingdom and

³⁵ A booklet published by the Commerce, Industry and Technology Bureau of the Government of the Hong Kong Special Administrative Region Professional Services Development Assistance Scheme, available at http://www.psdas.gov.hk/content/doc/2003-2-02/HKIAC_Booklet%20-%202003-2-02.pdf; but see Legal Week, *HK government called to boost funding to promote arbitration*, October 23, 2013, <http://www.legalweek.com/legal-week/news/2302410/calls-for-government-to-boost-funding-to-promote-hong-kong-arbitration>.

³⁶ Teresa Y.W. Cheng, Michael J. Moser, *Hong Kong Arbitration: a User's Guide* 17 (2d ed. 2008).

³⁷ World Economic Forum, *The Global Competitiveness Report 2013-2014*, available at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf.

Australia, only further evidences the independence of Hong Kong's judiciary.³⁸

In addition to this excellent reputation, Hong Kong courts have maintained a pro-arbitration stance in their supervisory role. For example, Hong Kong judges have followed the UK case law of broad construction of arbitration clauses.³⁹ Hong Kong courts have also taken a pro-enforcement stance.⁴⁰ The ability of the Hong Kong judiciary to produce reasoned and sound decisions which have influenced the development of substantive international arbitration law has commanded international recognition and respect.

Three recent cases demonstrate the Hong Kong court's approach to arbitration.

*a. Lin Ming v. Chen Shu Quan*⁴¹

In this case, the Hong Kong Court of First Instance granted a stay of court proceedings in favour of an HKIAC arbitration and refused to grant an anti-arbitration injunction in parallel proceedings.

The dispute concerned the alleged failure by a food processing group owned by Mr Lin Ming to comply with a put option contained in a share purchase agreement with the Sequedge Group. An HKIAC arbitration was commenced in September 2011 by the Sequedge companies while Mr Lin filed a claim in the Hong Kong courts against the Sequedge companies and 26 other defendants in November 2011. Mr Lin then applied for an anti-arbitration injunction on 29 November 2011, while the Sequedge companies brought a mirror application for a stay of the court proceedings in favour of arbitration on 19 December 2011.

Article 8(1) of the UNCITRAL Model Law, given effect by Section 20 of the 2011 Arbitration Ordinance, provides that a court before which an action is brought in a matter, which is the subject of an arbitration

³⁸ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Article 82, *available at* http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf ("The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal").

³⁹ *See e.g. Paquito Lima Buton v. Rainbow Joy Shipping Ltd Inc.*, [2008] 4 H.K.C. 14, 55.

⁴⁰ *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)*, [2012] 4 H.K.L.R.D. 1

⁴¹ H.C.A. 1900/201.

agreement, must refer the parties to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed. The Court considered that since a good *prima facie* case had been established that a valid arbitration agreement existed between Sequedge and Lin, it was bound to grant the stay application in favor of the HKIAC arbitration.

When considering whether to grant the anti-arbitration injunction, the relevant legislation was Section 12 of the Arbitration Ordinance, adopting Article 5 of the Model Law, which provides that “*In matters governed by this Law, no Court shall intervene except where so provided in this Law*” and Section 21L of the High Court Ordinance confers on the courts a general jurisdiction to grant injunctive relief. The court did hold that it retained discretion to restrain arbitration cases, as part of its general jurisdiction to grant injunctive relief, but noted that such jurisdiction must be exercised “*very sparingly and with great caution*”.

The Hong Kong courts interpreted the potentially conflicting legislation in favor of arbitration by taking a restrained approach by refusing to grant anti-arbitration injunctions.

b. Grand Pacific Holdings v. Pacific China Holdings⁴²

In this case, the Hong Kong Court of Appeal held that an award could be set aside on procedural grounds only if the violation was “*sufficiently serious or egregious so that one could say a party has been denied due process*”⁴³, refusing to set aside an ICC arbitration award made in Hong Kong.

The ICC arbitration seated in Hong Kong began in 2006. The tribunal rendered an award in August 2009 ordering the claimant, Grand Pacific Holdings Ltd (GPH), to pay the respondent, Pacific China Holdings Ltd (PCH) a sum in excess of US\$55 million together with interest. PCH then applied to set aside the award in Hong Kong, relying on Article 34(2)(a)(ii) and (iv) of the UNCITRAL Model Law, claiming that it was unable to present its case and that the arbitral procedure was not in accordance with the agreement of the parties.

After reviewing commentaries on Articles 18 and 34 of the UNCITRAL Model Law, the Court of Appeal stated, as quoted above, that in order to set aside an award, the misconduct “*must be sufficiently serious or egregious so that one could that a party has been denied*

⁴² [2012] 4 H.K.L.R.D. 1.

⁴³ *Id.*

due process.”⁴⁴ Furthermore, the court stated that a party who has had a reasonable opportunity to present its case would “rarely be able to establish that he has been denied due process.”⁴⁵ However, the court agreed with the lower court’s consideration that “if the violation had no effect on the outcome of the arbitration that is a good basis for exercising one’s discretion against setting aside”⁴⁶. With this set out as guidance, the Court concluded that the conduct was not sufficiently serious or egregious.

On 19 February, 2013, the Court of Final Appeal refused leave to appeal against the judgment of the Hong Kong Court of Appeal, underlining once again what has been deemed “*the jurisdiction’s arbitration-friendly credentials and the reluctance of its courts to interfere with the arbitral process and the awards.*”⁴⁷

*c. Gao Haiyan v. Keeneye Holdings Ltd.*⁴⁸

In this case, a Hong Kong Court of Appeal decision in 2011 overturned the lower court’s order refusing to enforce a PRC arbitral award on the ground of public policy on the basis of alleged bias arising from the way a ‘med-arb’ process was conducted.

The award made in Mainland China was the result of an arbitration that took place between Gao and Keeneye at the Xian Arbitration Commission. After the first hearing, the parties agreed to arb-med, whereby the arbitrators then proceeded to carry out a mediation process, a procedure commonly applied in Mainland China. Neither party accepted the mediation settlement and the arbitration continued to a final award against Keeneye.

Keeneye appealed the decision at the Xian Intermediate Court on the basis of bias. The court did not find any bias and held that the arb-med process had been conducted in accordance with the applicable rules. Gao obtained leave to enforce the award in Hong Kong. Keeneye then challenged enforcement of the award in Hong Kong. The Hong Kong

⁴⁴ *Id.* at paragraph 94.

⁴⁵ *Id.* at paragraph 105.

⁴⁶ *Id.* at paragraph 102.

⁴⁷ Justin D’Agostino and Herbert Smith Freehills, *Hong Kong Court of Final Appeal refuses leave to appeal in the Grand Pacific v. Pacific China case*, Kluwer Arbitration Blog, February 20, 2013, <http://kluwerarbitrationblog.com/blog/2013/02/20/hong-kong-court-of-final-appeal-refuses-leave-to-appeal-in-the-grand-pacific-v-pacific-china-case/>.

⁴⁸ [2012] 1 H.K.L.R.D. 627 (C.A.C.V. 79/2011)

Court of Appeal allowed the enforcement of the award, reversing a decision of the Court of First Instance to refuse enforcement on the grounds of public policy. It reasoned that simply because the procedure adopted would give rise to a fear of bias if carried out in Hong Kong, it did not necessarily amount to a breach of public policy. If the procedure was acceptable practice in the jurisdiction in which it took place, it would not be in breach of public policy in Hong Kong unless it was so serious as to be contrary to fundamental conceptions of morality and justice.

The judgment emphasizes that the Hong Kong courts will not readily refuse to enforce arbitral awards, whether rendered in China or elsewhere and will interpret the public policy ground for refusal of enforcement narrowly. The Court of Appeal also indicated that, in determining whether or not to deny enforcement of an award, weight may be accorded to any decision of the courts of the seat as to whether or not to set aside the award.

It is clear from the above decisions that the Hong Kong courts perform as any of the courts of the traditionally most established seats would. The reliability of the court system which supports the arbitral process is yet another reason why arbitrations have migrated east.

3. The Contribution of the Arbitral Institution

The growth of transparent, efficient and international arbitral institutions in the region has also contributed significantly to the strength of the arbitral infrastructure in Asia. Parties are more likely to seat their arbitration in a place where they are comfortable that their administered proceedings will be handled impartially, professionally, efficiently and cost effectively by a reputable institution.⁴⁹ Arguably, there is a preference for regional expertise when dealing with Asian parties, and the regional institutions in Asia have risen to the challenge of providing local knowledge within an independent multinational framework. The HKIAC certainly has been on the regional stage for some time but has met the pressing market needs over recent times offering users of

⁴⁹ The White & Case and Queen Mary University of London 2010 International Arbitration survey shows that neutrality, reputation/recognition and arbitral rules are the top three factors taken into account by the parties when choosing the arbitral institution. See White&Case and Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, available at http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf.

arbitration from across the globe a viable option as the subsequent paragraphs demonstrate.

As an arbitral jurisdiction that originally served an industry more accustomed to an ad hoc process with some institutional support – the construction industry – for many years, the HKIAC did not have a set of its own rules. In 1995 construction disputes represented 54% of the total number of cases that came to the HKIAC, maritime disputes represented 22% of the total cases, while commercial disputes represented only 13%.⁵⁰

With the popularity of the UNCITRAL Arbitration Rules, HKIAC formulated a set of Procedures for the Administration of Arbitrations under the UNCITRAL Arbitration Rules in 2005 (“Procedures”). These Procedures proved to be an attractive alternative to purely ad hoc arbitration without institutional support.

Then, in 2008, the HKIAC went one step further. As a result of the burgeoning Chinese companies in commercial trade, the HKIAC established its own institutional rules (the “2008 Rules”). Keeping in mind Hong Kong’s roots as a traditionally ad hoc seat and also with the desire to give parties an option that is distinct from the other arbitral jurisdictions in the region, the HKIAC adopted a set of rules that were based on the UNCITRAL Arbitration Rules. These rules were promoted to be “light touch” in approach – meaning, primarily, that arbitral awards are not scrutinized.

Furthermore, in light of the growing discontent with costs associated with arbitration, the institution wanted to give parties the choice of how to pay its arbitrators – by hourly rates or by a schedule of fees. This can be a tough decision for the parties as it has been anecdotally evidenced that the larger disputes (in value) might be more economically handled if the arbitrators are paid by the hour. The explanation to this seems to be that the larger disputes do not necessarily require more work from an effective arbitrator than the smaller disputes.

Given the success of this specific process and the increasing number of multi-party and multi-contract disputes the HKIAC has seen over the past five years, the HKIAC began a revision process of the 2008 Rules in late 2011. Despite the fact that the 2008 Rules were working well overall, the increasingly complex, multi-party and multi-contract cases being submitted to the HKIAC and developments across institutions

⁵⁰ In 1995, there were 41 maritime disputes, 101 construction disputes, and 24 commercial disputes.

globally together with feedback received from users prompted the review.

The 2013 Rules came into force on 1 November 2013 and have retained the “light-touch” approach found in the 2008 Rules, whilst improving the HKIAC’s ability to supervise and manage proceedings efficiently. The goal was to ensure that HKIAC met its changing users’ needs and maintained international best practice. This goal has been achieved and, in addition, the 2013 Rules introduce some innovative ‘state of the art’ features, which given the feedback to date, further strengthen the arbitral framework, attracting more arbitrations and hence adding to the rise of international arbitrations in the region.

The 2013 Rules retain the system which allows parties to choose to pay arbitrators an hourly rate or according to a schedule of fees.⁵¹ However under the 2013 Rules, if parties choose the hourly rate option, the rate is capped at \$6,500 (US\$838), unless they agree otherwise. This mechanism allows parties to better control costs and at the same time provides a more transparent system. Standard terms of appointment for arbitrators have also been introduced to streamline the appointment process and to avoid any awkward conversations between parties and tribunals.

Many institutions now also include emergency arbitrator provisions in their rules.⁵² The HKIAC introduced an emergency arbitrator provision despite the Hong Kong courts being some of the most efficient when it comes to applications for interim relief in arbitral proceedings, for those arbitrations where parties do not have the luxury of efficient courts that are well versed in matters of arbitration.

A party may apply for such emergency prior to the constitution of the arbitral tribunal. Usually, the HKIAC will proceed to the appointment of the emergency arbitrator within two days after receipt of the application and the emergency arbitrator will render his or her decision within 15 days of receipt of the case file.⁵³

Some of the most innovative features introduced by the 2013 Rules are the provisions regulating the joinder of additional parties,⁵⁴

⁵¹ HKIAC Rules Article 33 (2013).

⁵² See e.g. ICC Rules Article 29 and Appendix 5 (2012); SIAC Rules Schedule 1 (2013); SCC Rules Appendix II (2010); LCIA Article 9B (2014).

⁵³ HKIAC Rules Schedule 4, paragraph 5 (2013).

⁵⁴ *Id.* at art. 27.

consolidation of arbitrations,⁵⁵ and single arbitration under multiple contracts.⁵⁶ These changes are specifically designed to address the growing complexity of commercial disputes involving multiple party and multiple contract arbitrations, which represent about a third of the cases submitted to the HKIAC.

B. The Increased Demand for Arbitration in Asia

The other primary factor contributing to the rise in international arbitration matters in Asia is the demand for arbitration in the region. There are two clear reasons as to why Asian parties are increasingly seeking to resolve commercial disputes through arbitration:

1. Increase in Trade with Asia

In recent years, trade with Asian countries globally has increased. According to the statistics provided by the United States Census Bureau, as of November 2013, three Asian jurisdictions featured in the top 10 countries with which the U.S. trades⁵⁷:

- **China** being the second largest trading partner (U.S. trade in goods with China reached US\$511.8 billion);
- **Japan** being the fourth largest trading partner (U.S. trade in goods with Japan reached US\$187.1 billion); and
- **South Korea** being the sixth largest trading partner (U.S. trade in goods with South Korea reached US\$95.1 billion).

Within Asia, trade is also booming. According to the China-ASEAN Business Council Chinese Secretariat, trade between China and the ASEAN reached a record high of US\$400.9 billion in 2012.⁵⁸ The ASEAN-China Center estimates that ASEAN is likely to become China's biggest trading partner in the next two to three years.

⁵⁵ *Id.* at art. 28.

⁵⁶ *Id.* at art. 29.

⁵⁷ United States Census Bureau, "Top Trading Partners – November 2013," <http://www.census.gov/foreign-trade/statistics/highlights/top/top1311yr.html>.

⁵⁸ Xu Ningning, *Industrial cooperation offers way to expand trade with Asean*, Asia News Network, November 1, 2013, <http://www.asianewsnet.net/Industrial-cooperation-offers-way-to-expand-trade—41320.html>.

2. Arbitration: the Most Reliable Method of Dispute Resolution in the Region

While there has been some improvement in the traditionally troubled courts, companies are still generally reluctant to rely on the courts in the majority of the countries in the region.⁵⁹ In addition, there is no convention, treaty or other arrangement for the recognition and enforcement of foreign court judgments within the region. As a result, arbitration is seen as the only real method of effective dispute resolution.⁶⁰

II. Has International Arbitration Practice Been Influenced by the Rise of International Arbitration in Asia?

All of the factors mentioned above contribute to the rise in arbitration in Asia but the next question is, so what does this mean? What is the effect of such a rise? Is there an “Asianisation” of international arbitration? That is, are there any cultural factors which affect the state of play in international arbitration generally?

The Asianisation of international arbitration has been a popular topic in recent years.⁶¹ The reason for this, is partly the attention that the region has received as a result of its economic growth. And, the experiences of the practitioners seem to suggest that there are certainly cultural factors to be aware of so as to prevent any faux pas during the course of the arbitration.⁶²

⁵⁹ Ram Marshu, *Justice Delayed is Justice Denied: India's 30 Million Case Judicial Backlog* (Dec. 25, 2013), *The Diplomat*, <http://thediplomat.com/2013/12/justice-delayed-is-justice-denied-indias-30-million-case-judicial-backlog/>.

⁶⁰ QUEEN MARY, UNIV. OF LONDON, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 5-22 (PriceWaterHouse Coopers, 2006), available at <http://www.arbitration.qmul.ac.uk/docs/123295.pdf>; QUEEN MARY, UNIV. OF LONDON, CORPORATE CHOICES IN INTERNATIONAL ARBITRATION INDUSTRY PERSPECTIVES 1-8 (PriceWaterHouseCoopers, 2013), available at <http://www.arbitration.qmul.ac.uk/docs/123282.pdf>.

⁶¹ Mayer Brown JSM, *Asia's Arbitration Centres—Hong Kong, China and Singapore* 1 (Sept. 14, 2011), available at <http://www.mayerbrown.com/publications/Asias-Arbitration-Centres—Hong-Kong-China-and-Singapore-09-14-2011/>; David P. Fidler, *The Asian Century: Implications For International Law* 5, 9 S.Y.B.I.L. 19, 26, 29-35(2005).

⁶² Karen Mills, *The Importance of Reognising Cultural Differnces in International Dispute Resolution*, in ASIAN LEADING ARBITRATOR'S GUIDE TO INTERNATIONAL ARBITRATION 55 (Michael Pryles & Michael Moser eds., JurisNet, LLC, 2007).

The keynote address given by Julian DM Lew QC entitled ‘Increasing Influence of Asia in International Arbitration’ at the inaugural Hong Kong Arbitration Week in 2012⁶³ put forward that international arbitration had been led by Europe and the West, noting that the established institutions and the most often selected seats are those in Europe. However, the increase in economic power of Asian parties has meant that such parties more often have stronger bargaining power and may now be in a position to do business on the best terms including with respect to selecting their preferred applicable law and the venue for arbitration.⁶⁴ According to Lew, “the activities of business, and economic and industrial development, have and will continue to influence and bring about changes to the way in which and where international arbitration is conducted around the world” and that this “may increasingly be the case in Asia.”⁶⁵ If where arbitrations are being conducted is an indication of the Asianisation of international arbitration, then this may very well be the beginning of such a phenomenon, given the significant increase in arbitrations seated in Asian jurisdictions over the last decade, as mentioned at the beginning of this paper.

The idea of an asianisation—or, more generally, a culturalisation—of arbitration, however, is not wholly accepted. In an address given by Mr. Jan Paulsson at the Chartered Institute of Arbitrators’ (CI Arb) Alexander Lecture entitled ‘*Universal Arbitration—what we gain, what we lose*’ in November 2012 he described the concept of “universal arbitration” as being something “*we may think of as being descriptive, sociological, the convergence of the way disputes are resolved so that disputants, advocates and arbitrators of any nationality can be found everywhere doing the same thing in the same way with an ever decreasing number of linguistic barriers. English is dominant, Spanish is in the ascendant, Mandarin, German and Arabic are holding their own in particular contexts, French has plummeted in a few decades—but that’s about it. A hundred other languages are irrelevant and if one of them is yours and you want to participate, you must retool.*”⁶⁶ Paulsson further

⁶³ Julian DM Lew QC, Professor, Increasing Influence of Asia in International Arbitration, Inaugural ICC HK/HK45 Keynote Address delivered during Hong Kong Arbitration Week (Oct. 15, 2012), in *ASIAN DISPUTE REVIEW*, Jan. 2014, at 1, 2.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ CI Arb News, , Leading Arbitration Expert, *Universal arbitration the way forward*, Chartered Institute of Arbitrators (Dec. 6, 2012), <http://www.ciarb.org/news/ciarb-news/universal-arbitration-the-way-forward.php>.

argues that “overcoming the clash of cultures as well as the ability to bring arbitrators from all over the world together is what is gained from universal arbitration.”⁶⁷ Furthermore, he asserts “potential parties in international commerce want the same thing: a desire that justice is swift, fair and at no cost to the deserving party.”⁶⁸ This is a powerful argument against the Asianisation of arbitration.

However, there may be a “happy” compromise to views that might support or reject the notion of the Asianisation of arbitration. In fact, many of the factors associated with Asianisation can be found in the library of articles or books on doing business in China.⁶⁹ It is true that understanding the types of factors that arise in the formation and the course of a relationship with a Chinese party or an Asian party can give context to the relationship between the disputants. For example, Asian societies tend to be hierarchical so when negotiating a deal, one should make sure that is dealing with the person at the top of the chain.⁷⁰ It is probably fair to say that those who have engaged in dispute resolution with an Asian party would agree that the same consideration is true. Or the extent to which finality of contract is understood and practiced in China, which can lead to disputes over what might be seemingly obvious breaches of contract in Western eyes. It is no surprise that culture can affect the conduct of parties in a business setting and understanding the cultural factors that can influence how people behave in business settings can affect how a case is presented in arbitration. But, it is not readily apparent as to how these factors would affect the international arbitration process as such.

If one were to note a particular procedural feature of dispute resolution common in Asia, which could be incorporated into the international arbitration process it might be the practice of ‘med-arb’ as referred to

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ PRICEWATERHOUSECOOPERS, *DOING BUSINESS AND INVESTING IN CHINA 21-24* (2013), available at http://download.pwc.com/ie/pubs/2013_doing_business_and_investing_in_china.pdf; *Ease of Doing Business in China*. World Bank Group (2014), <http://www.doingbusiness.org/data/exploreconomies/china> ; ERNST & YOUNG, *DOING BUSINESS IN CHINA* (2003), available at https://www2.eycom.ch/publications/items/china/doing_business_200510/en.pdf.

⁷⁰ *Business etiquette in China*, The Canadian Trade Commissioner Service (Sept. 9, 2014), <http://www.tradecommissioner.gc.ca/eng/document.jsp?did=107932&cid=512&oid=962>; *Doing Business in China*, Kwintessential Ltd., <http://www.kwintessential.co.uk/etiquette/doing-business-china.html>.

earlier in this paper. It is particularly popular in Mainland China, and up to 30% of the cases handled by the China International Economic and Trade Arbitration Commission (CIETAC) are resolved by this method each year.⁷¹ If in years to come, it became common to see such a process in international arbitrations, this may well indicate how Asian practices are ‘Asianising’ arbitration. However, such a development remains to be seen. In addition, given the relative unease of common law practitioners it may not be a development, which will ever be widely accepted.⁷²

It is also important not to forget that Asia represents a vast and diverse region, for example the distance from New Delhi to Seoul is 2,915 miles, forty-eight countries make up the continent in which over 3,500 languages are spoken and the world’s major religions are represented on a large scale, even the countries that comprise Asia can vary according to the context being discussed. This can mean that what may be considered to be culturally unacceptable to Japanese or Korean parties may well be wholly usual to an Indian or Malaysian party in the course of an arbitration. As such, if arbitration has become or has the potential to become ‘Asianised’ we may well need to be clear on exactly which part of Asia might have ‘Asianised’ arbitration.

CONCLUSION

So, while the rise in arbitration in Asia may not influence the state of play of international arbitration at the moment, it is still worthy to note this trend and, in particular a detailed aspect of this trend—or at least the trends we are seeing specifically vis-a-vis China. And that is that, with the rise in arbitration comes the rise in confidence of the Asian players in the international arena. The HKIAC caseload suggests that Chinese companies are increasingly engaging in international arbitration as

⁷¹ HERBERT SMITH, JAPAN DISPUTE AVOIDANCE NEWSLETTER, NEWSLETTER NO. 113, MED-ARB – AN ALTERNATIVE DISPUTE RESOLUTION PRACTICE (Feb. 2012), available at <http://www.herbertsmithfreehills.com/-/media/HS/T29021246%202.pdf>.

⁷² Christian Borris, *Common Law and Civil Law: Fundamental Differences and their Impact on Arbitration*, in 60 (2) *Journal of the Chartered Inst. of Arb.* 73, 82 (1994); Lucy Reed and Jonathan Sutcliffe, *The ‘Americanization’ of International Arbitration*, 16 MEALEY’S INT’L ARB, REPORT 37, 42 (2001); Julian D.M. Lew and Lawrence Shore, *International Commercial Arbitration: Harmonizing Cultural Differences*, in *AAA Handbook on International Arbitration and ADR 3* (Thomas Carbonneau & Jeanette Jaeggi eds., JurisNet, LLC, 2006).

claimant. How this will affect the way in which disputes are resolved is not yet clear. In the meantime, however, the forecast indicates that the profile of the players will begin to change and there may be more Asian players in the game.⁷³ And, to the extent that counsel and arbitrators are familiar with certain cultural nuances associated with doing business in Asia, this will inevitably result in a swifter means to resolving disputes with Asian parties. What is certain is that the increased cross border trade and Asian parties being able to drive a much harder bargain than previously coupled with the strength and reliability of the arbitral infrastructure in Asia mean international arbitration will continue to rise in the region.

⁷³ *Op cit.* 9.