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# Introduction



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Arbitral practice in 2011 continued its march towards universal application. The main reason behind the rise and popularity of the alternative dispute resolution process with the ability to transcend national boundaries lies with enforcement efficacy enabled by the New York Convention, parties having autonomy on the procedures and the choice of arbitrator, reduced interference and influences from the government, judiciary and political will of a particular nation and numerous other positive attributes including confidentiality.

The global economy has anchored well in the Asia-Pacific region. It promises to grow strongly in time to come. International arbitration is similarly shifting into this region. Many arbitral institutions are gearing up in anticipation of more disputes and the increased demand for their services. Many are striving to be more successful by promoting their rules and facilities to attract the international trade community. In so doing, they are also actively seeking governmental and judicial support.

The users and arbitral practitioners may be the ones creating the demand and supply, but to sustain and achieve the objectives of a universally accepted, applicable, effective and best practices of arbitration very much relies on the accomplishment of transformation in these arbitral institutions, the business community, the government, judiciary and the political will of each locality.

Over the past 50 years, international arbitration has enjoyed growing popularity with venues like London, Paris, New York and institutions like the International Chamber of Commerce (ICC), London Court of Arbitration (LCIA) and the American Arbitration Association's International Centre for Dispute Resolution (AAA/ICDR). However, with the world economic progression, in order to accommodate a counterpart in the Asian region, there has been a tendency to refer disputes to arbitral institutions located in Asia, namely, the China International Economic and Trade Arbitration Commission (CIETAC), the Beijing Arbitration Commission (BAC), the Singapore International Arbitration Association (SIAC), the Hong Kong International Arbitration Centre (HKIAC), the Korean Commercial Arbitration Board (KCAB), ICC Asia and others. These institutions are now crowded with case references. However, there is still talk of new arbitral institutions, alternative platforms and venues.

The survey conducted in 2010 on international arbitration 'Choices in International Arbitration' by the School of International Arbitration at Queen Mary, University of London (as published by White & Case LLP) reveals a number of interesting points such as:

- choice of seat of arbitration:
  - influenced by 'formal legal infrastructure', the law governing the contract and convenience;
  - London is the most preferred and widely used;
  - London, Paris, New York and Geneva are the seats that were used most frequently by respondents over the past five years; and
  - Singapore has emerged as a regional leader in Asia.

- choice of arbitration institution:
  - corporations look for neutrality and 'internationalism' in their arbitration institutions;
  - there is expectation for institutions to have a strong reputation and widespread recognition;
  - ICC is the most preferred and widely used; and
  - ICC, LCIA and AAA/ICDR are institutions used most frequently in the past five years;
- appointment of arbitrators:
  - corporations want greater transparency about arbitrator availability, skills and experience and, to some extent, greater autonomy in the selection of arbitrators; and
  - 75 per cent of respondents want to be able to assess arbitrators at the end of a dispute. Of these, 76 per cent would like to report to the arbitration institution (if any) and 30 per cent would like to be able to submit publicly available reviews.

The survey further indicates the characteristics of an institution appealing to international arbitration users as follows:

- previous experience of the institution;
- global presence of the institution and ability to administer arbitration worldwide;
- free choice of arbitrator (non-exclusive institutional list);
- strong profile and enjoying broad acceptance among arbitration users;
- ability to review decisions for which the ICC has become appealing;
- effective case management mechanism; an ability to ensure that parties keep to their timetable; in other words, a high level of administration; and
- most important considerations remain the overall costs of the services.

In the Asia Pacific Region, CIETAC, BAC, SIAC, HKIAC, ICC and KCAB have been successful in boosting arbitration. In turn, this has created a sufficient surge for other arbitral institutions in the region to emulate the best practices of each other and create products to meet the growing demand of arbitral users.

The rise of new arbitral institutions and rebranding of existing arbitral institutions is best seen as providing good, complementing alternatives and not competitors. There is room for all with the increasing demand. Arbitral institutions gain mutual benefit in collaborating with one another.

The statistics for year 2010 represent the resulting shifts in international arbitration towards this region and certainly the numbers continue to increase in both the established and emerging arbitration institutions. Number of international cases administered by Arbitral Institution:

	AAA	CIETAC	ICC	JCAA	KCAB	LCIA	SIAC	HKIAC	VIAC	APEC
2010	888	418	793	26	52	237	140	175	37	N/A

### Institutional transformation

As one of the emerging institutions in the region, at the beginning of the year 2010, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) underwent revitalisation and a re-branding exercise, made possible by the strong support of Asian-African Legal Consultative Organisation and the Malaysian government.

KLRCA adopted with some modifications, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2010 on 15 August 2010, and, on the same date, the UNCITRAL Rules were officially ratified for implementation, replacing the rules of 1976. This has been the most notable move by the KLRCA to make available the most current, universally accepted best practices to appeal to the international arbitral user.

The revitalisation process began from an internal reorganisation and streamlining of the Centre's structure, the strengthening of its capacity and further expansion of the panel of arbitrators. The Centre embarked aggressively on activities to raise awareness and visibility of the institution and what it has to offer, thereafter entering into strategic partnerships and collaborations with international arbitral organisations and corporate bodies, and engaging with and reaching out to the international arbitral user through numerous programmes.

Recently, in July 2011, the KLRCA successfully hosted the Asia Pacific Regional Arbitration Group Conference (APRAG) intended to position Malaysia as a preferred venue for alternative dispute resolution and further assumed the presidency of the APRAG for the next two years.

The success of Maxwell Chambers in Singapore denotes a new trend that appeals to the international arbitration users. The concept of an arbitration hub with modern purpose-built hearing facilities and the ability to house, in one location, all the related Alternative Dispute Resolution (ADR) providers in the region emphasises that an institution has to go beyond just providing specified rules, administration and basic facilities. The chamber's concept has been adopted by Australia in a recognition of the trend, with the set-up of the Australian International Disputes Centre in Sydney in the latter part of 2010.

KLRCA embraced the idea and is scheduled to move to its new premises by early 2013. The plans are for a five-storey building behind an art deco façade, situated close to Kuala Lumpur's colonial-era railway station and cricket ground. The building will house the secretariat of the KLRCA as well as 23 hearing rooms, support and office facilities for users, a business centre, breakout rooms, an arbitrator's lounge and an auditorium.

Other interesting initiatives taken by the institutions in the region in the recent year include:

- CIETAC's Online Arbitration Rules (Online Arbitration Rules) focuses on e-business disputes and the entire arbitration process being conducted by online communication methods, supplemented by traditional communication methods. In order to resolve disputes efficiently, besides the standard procedure, the Online Arbitration Rules contain summary and expedited procedures. Currently CIETAC is also revising its Arbitration Rules 2005. Revised rules, aimed at granting more party autonomy, are expected to take effect in 2011; and
- SIAC's fourth edition arbitration rules, which came into effect on 1 July 2010. The amendments primarily aim to improve the efficiency and speed of arbitration proceedings with two key features, namely:
  - a mechanism for emergency interim relief prior to the formation of an arbitral tribunal through appointment by the SIAC Chairman of an emergency arbitrator with the power to order or award any interim relief deemed necessary; and

- a framework for an expedited arbitration procedure that is only applicable if the amount in dispute does not exceed S\$5 million, if all parties agree or in cases of exceptional urgency;
- The Australian Centre for International Commercial Arbitration (ACICA) has also updated its arbitration rules on 1 August 2011 to include provisions on emergency arbitration that is designed to be an effective alternative to seeking pre-arbitration emergency relief in court, prior to and after the commencement of arbitration, but before the constitution of the arbitral tribunal;
- LCIA India, the first independent subsidiary of the LCIA, also adopted new arbitration rules in April 2010. The LCIA India rules are intended to adapt the general LCIA Arbitration rules for Indian conditions with three key features, namely:
  - a provision addressing Indian case law: article 32(6) expressly excludes certain provisions of Part I of the Indian Arbitration and Conciliation Act 1996, which is directed at domestic arbitration and contains extensive court supervisory powers when the place of arbitration is outside India. This provision is in response to the Indian Supreme Court decision in *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105, which held that, unless excluded by the parties, Part I would apply even to arbitrations taking place outside India;
  - tailored costs provisions: the rules include a costs regime that provides for a capped hourly rate for arbitrators (rather than the Indian practice in some ad hoc arbitrations of arbitrators charging expensive daily sitting fees, plus additional costs for drafting the award and other duties); and
  - to shorten applicable time limits: the rules provide that an award must be issued within six months (reasons may be given in summary form) and technical amendments, such as the shortened time period from 21 to 14 days to nominate an arbitrator, as well as the removal of the requirement for a Memorandum of Issues that aims to speed up and de-clutter the conduct of proceedings.

### Legislative transformation; judicial receptivity

Following the survey on international arbitration mentioned earlier, 62 per cent of the respondents opined that formal legal infrastructure or statutory framework was the most decisive factor in choosing a place of arbitration. In the spirit of encouraging international commercial arbitration, there have been a number of arbitration legislative changes in this region recorded from the years 2009 to 2011. Such changes have been based on UNCITRAL Model Law 2006. In some jurisdictions, the change is aimed at creating a unitary arbitration framework, namely, removal of differentiation between international and domestic arbitration.

#### Malaysia

As part of its strategy to increase prominence as a seat of international arbitration, the Malaysian Government introduced an amendment to the Arbitration Act 2005. The Arbitration (Amendment) Act 2011 has come into operation, effective from 1 July 2011. The amendments are designed to reassure parties in international arbitrations seated outside Malaysia of the court's limited powers of intervention, the availability of interim measures for maritime arbitrations and the likelihood of enforcement of arbitral awards by the courts.

### Australia

In Australia, recent amendments to the International Arbitration Act 1974 (IAA) were passed on the 17 June 2010, resulting in a more uniform and efficient framework for international arbitration practices that are based on international standards. The different states and territories in Australia agreed to adopt uniform national laws on domestic arbitration based on the UNCITRAL Model Law. There are now limited grounds for Australian courts to refuse enforcement of an award. The changes to Australian IAA and the adoption of a new model law for domestic arbitration means that Australia will have a harmonised system for both domestic and international arbitration.

Recent Supreme Court decisions in New South Wales and Queensland have largely reversed the common law position that any reference to state arbitration acts operate as an exclusion of the model law. The decisions suggest that courts accept the need for supportive, noninterventionist jurisdiction if international arbitration is to be effectively administered. The shift in judicial reasoning is important as it provides greater certainty that the model law will be given full effect in judicial proceedings.

### Singapore

On 1 January 2010, Singapore's International Arbitration Act (IAA) was amended with the coming into force of the International Arbitration (Amendment) Act 2009. The mainspring for the amendment act was changes made to the UNCITRAL Model Law in 2006. Singapore's IAA is based on the 1985 UNCITRAL Model Law and the recent amendments reflect some of the changes made in the 2006 UNCITRAL Model Law to 'refine' the IAA and ensure that Singapore's laws remain consistent with modern international standards.

One of the key changes to the IAA is a new Section 12A that empowers the Singapore High Court to order interim measures for arbitrations seated outside Singapore. This is a welcome change in support of foreign arbitrations.

Prior to this change, the High Court had interpreted the power conferred by the IAA as excluding the making of interim orders to assist foreign arbitrations. In the case of *NCC International AB v Alliance Concrete Singapore Pte Ltd* (2008) 2 SLR 565, the Singapore Court of Appeal held that Singapore courts would generally play a more interventionist role in granting interim injunctions in domestic arbitration as compared to international arbitration because the domestic arbitration conferred the power to grant interim injunctions solely on the court, whereas the IAA conferred the same power on both the court and the arbitral tribunal. The Court of Appeal made it clear that where the court had concurrent jurisdiction with the arbitral tribunal, it would only intervene to support arbitration where matters were very urgent or where the court's coercive powers of enforcement were required.

Now, the High Court may grant interim orders and relief including discovery of documents and freezing of assets in foreign arbitrations in line with 2006 Model Law.

### Hong Kong

In Hong Kong SAR, a new Arbitration Ordinance 2010 (Chapter 609) came into effect on 1 June 2011. Very much like the previous legislation but limited to the international regime, it has adhered to the spirit of the UNCITRAL Model Law. The previous Arbitration Ordinance created a dual system that imposed different rules for 'international' and 'domestic' arbitration. While the 'international' arbitration law followed the UNCITRAL Model Law, the 'domestic' regime was derived from long-standing UK law.

The new Ordinance emphasises the arbitrator's primacy and is directed at ensuring the quick and efficient resolution of disputes.

The arbitral tribunal has absolute power to deal with all matters that might arise before and during the proceedings which includes the authority to rule on any question of law or procedure and to make binding orders to enforce its decisions without judicial interference.

The new Ordinance is not substantially different from the previous regime but it does significantly alter the potential for judicial review of arbitral proceedings. Under the existing rules for domestic arbitration, the court could make a variety of preliminary orders in relation to domestic arbitration and review any determination of law made by an arbitral tribunal. However, unless the parties expressly agree otherwise, the new Ordinance does not allow judicial review of questions of fact or law that arise during arbitration.

As a consequence, an award can only be set aside under the proposed system in the limited circumstances of it having been made under an invalid agreement or if it was contrary to the terms of an agreement or the prevailing public policy. The only other notable functions that courts (specifically the Court of First Instance of the High Court of Hong Kong) will be able to perform, include hearing challenges to a tribunal's jurisdiction, making interim orders before proceedings have commenced and assisting the tribunal with gathering evidence.

The new Ordinance also introduces many of the current features of domestic arbitration 'opt-in' provisions so that parties can continue to utilise them. These 'opt-in' provisions will automatically apply to any arbitration clauses that currently refer to 'domestic' arbitration. This allows those parties more familiar with the domestic regime to continue using these rules. Similarly, it enables all parties (whether local or foreign) to take advantage of the forms of judicial review currently applicable to domestic arbitration.

### China

In the past there had been considerable uncertainty with regard to the enforcement of arbitral awards rendered by foreign arbitration institutions with their seats in China. However, a landmark decision by the Ningbo Intermediate Court, enforced in 2009, provides a positive indication of courts beginning to recognise awards rendered in ICC proceedings seated in Mainland China.

A clear regulation allowing international institutions such as the ICC to administer arbitrations within mainland China would give the parties greater choice and lead to healthy competition between various institutions. Further, this flexibility could also be extended to allow ad hoc arbitration, which for the time being is not permitted in China.

### India

The Government of India's Ministry of Law and Justice has issued a consultation paper on the proposed amendments to the Indian Arbitration and Conciliation Act (IACA) 1996 (IACA), such as the need to amend the Section 2(2) to ensure that Part 1 applies only to arbitrations in India, while there is continued applicability of Section 9 and 27 to international commercial arbitration where the place of arbitration is not in India.

There is another important proposed amendment to section 34 dealing with the term 'public policy' of India wherein, currently, the courts may set aside foreign awards that violate Indian statutory provisions and also that are contrary to public policy. This is to negate the effect of the decision in *Oil & Natural Gas Corporation Ltd (ONGC) v Saw Pipes Ltd* (2003), where the Supreme Court held that the term 'public policy' be given a wide interpretation.

In the meantime, it is more important than ever for parties, wishing to minimise intervention by Indian courts, to carefully draft their arbitration clauses, and specifically exclude the applicability of Part 1 of the IACA.

## Vietnam

In June 2010 the Vietnamese National Assembly passed the Arbitration Law 2010, which came into effect on 1 January 2011 and replaced the former Ordinance on Commercial Arbitration 2003. By virtue of article 14 (1) of the Arbitration Law 2010, the law of Vietnam is applicable to disputes without a foreign element. Any national laws selected by the parties shall be applicable 'for disputes with a foreign element'. Unlike article 7(2) of the previous Ordinance, tribunals are now able to apply foreign laws chosen by the parties without having to first consider whether it contravenes the fundamental principles of Vietnamese law.

However, if the law of Vietnam or the law chosen by the parties does not contain specific provisions relevant to the matters in dispute, then the arbitration tribunal may apply international customs in order to resolve the dispute if such application or the consequences thereof are not contrary to the fundamental principles of the law of Vietnam.

As one of very few countries, Vietnam still has restrictions as to the requirements for arbitrators constituting the arbitration tribunal. The new act, however, provides exceptional instances where any local or foreign person meeting certain qualifications may act as an arbitrator.

As to the enforceability of foreign arbitral awards, Vietnam's court decisions in the recent past have indicated some development from the previous rather anti-arbitration attitude towards pro-enforcement of foreign arbitral awards.

## Conclusion

The year 2011, records yet another year of vast positive changes in international arbitration, both in terms of experiences and initiatives undertaken by arbitral institutions, legislative bodies and judiciaries of various jurisdictions in the Asia-Pacific Region.

With global economic expansion in this part of the world, there are a lot of opportunities and room for improvement in arbitration practice. Besides having the best practices in place, costs and time control are still two of the most important considerations and concerns of arbitral users.

How each institution and legal framework work around these concerns would be a useful guide and reference and these calls for greater cooperation between institutions in the form of sharing of experiences and integration of services that inevitably will lead to the creation of a larger pool of arbitral users across the world.

## About the author

Sundra Rajoo is the Director of the Kuala Lumpur Regional Centre for Arbitration (KLRCA). He was also recently appointed the president of the Asia Pacific Regional Arbitration Grouping (APRAG), which is a federation of over 30 arbitral institutions in the Asia Pacific region.

Sundra is a chartered arbitrator and an advocate and solicitor of the High Court of Malaya (non-practising), and earlier practised as an Architect and Town Planner. He has been appointed as chairman, co-arbitrator of three-man panels and sole arbitrator in international and domestic arbitrations.

He serves on the panel of numerous international arbitral institutions and organisations and is also a Fellow of the Chartered Institute of Arbitrators, Malaysian Institute of Arbitrators, Singapore Institute of Arbitrators and Indian Council of Arbitration.

Sundra is also the author of several books on arbitration and contract law, including, *Law, Practice and Procedure of Arbitration* (2003); *The Malaysian Standard Form of Building Contract (The PAM 1998 Form)* (1999); and the Arbitration title for *Halsbury's Laws of Malaysia* (2002). He was also the co-author of *Arbitration Act 2005 – UNCITRAL Model Law as Applied in Malaysia* (2007) and *The PAM 2006 Form* (2010).



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The Kuala Lumpur Regional Centre for Arbitration (KLRCA) is a non-profit, non-governmental international arbitral institution that was established in 1978 under the auspices of the Asian-African Legal Consultative Organisation (AALCO). It was the first centre of its kind to be established by AALCO in Asia.

The Centre provides institutional support for domestic and international arbitration proceedings in Asia as well as mediation, conciliation and domain name dispute services. It also offers arbitration for Islamic banking and financial services, as well as Alternative Dispute Resolution-related training. While it is fully funded by the Government of Malaysia under a host country agreement with AALCO, the Centre has been accorded independent and certain privileges and immunities for the purposes of executing its functions as an international organisation.



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