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COMMERCIAL ARBITRATION IN THE ASEAN REGION

Recent years have brought substantial economic growth and development among the emerging markets of the ASEAN region, particularly in emerging markets like Vietnam, Laos and Cambodia, among others. As in any jurisdiction, this increase in development, along with an increase in cross-border transactions in the region, has driven an increase in commercial disputes, both in terms of quantity and complexity. Foreign investors, when considering whether to enter a new market, should consider the ability to resolve disputes efficiently as a significant factor in their decision whether to carry out investment projects.

Vietnam and Cambodia are two examples of emerging markets of significant interest to foreign investors. Both jurisdictions offer investors a measure of political stability, rising consumer purchasing power, and low-cost, plentiful labor.

Vietnam has had a functioning commercial arbitration body, the Vietnam International Arbitration Centre ("VIAC"), for more than two decades, while Cambodia has recently launched its commercial arbitration body, the National Commercial Arbitration Centre ("NCAC"), and adopted its arbitration rules in July of 2014. The NCAC complements the country's already-successful Arbitration Council, which hears collective labor disputes. For both countries, the availability, or promise, of commercial arbitration is an encouraging factor for foreign investors to consider. In this article, we discuss commercial arbitration in Vietnam and Cambodia as examples of ASEAN emerging market jurisdictions which are making an effort to improve the commercial dispute resolution environment for investors.

Throughout Asia, international commercial arbitration caseloads at major arbitration centers are on the rise. Table 1 shows the yearly caseloads of major commercial arbitration centers in the region.

TABLE 1 – Caseloads of Major International Arbitration Centers in Asia

	1993	*1999*	*2002*	*2003*	*2004*	*2005*	*2006*	*2007*	*2008*	*2009*	*2011*
CIETAC	486	609	684	709	850	979	981	1118	1230	1482	1352
HKIAC	139	257	320	287	280	281	394	448	602	649	624
ICC	352	529	593	580	561	521	593	599	663	817	793
KLRCA	3	10	2	4	3	6	1	2	8	7	N/A
SIAC	15	67	38	35	48	45	65	70	99	150	140

CIETAC: China International Economic and Trade Arbitration Commission
HKIAC: Hong Kong International Arbitration Center
ICC : International Chamber of Commerce
KLRCA : Kuala Lumpur Regional Center for Arbitration
SIAC : Singapore International Arbitration Center

COMPARING COMMERCIAL ARBITRATION TO COURT ACTION

Commercial arbitration is a private dispute resolution mechanism based on an agreement of the disputing parties to have their dispute heard and decided by a private arbitration tribunal. In contrast, court action is typically administered by a state to some extent, is heard by a public institution, is presided over by a judge who is either publicly elected or appointed by government officials, and usually involves public proceedings. Further, court action is often characterized as being inefficient, time-consuming, and susceptible to significant delays resulting from motions practice and rigid procedures and rules governing admissibility of evidence. Commercial arbitration generally involves flexible procedural rules and relaxed rules of evidence intended to expedite the dispute resolution process. Additionally, the parties to commercial arbitration, as well as the arbitrators, are motivated to resolve disputes quickly and with minimal expense.

In most jurisdictions where commercial arbitration is available, an agreement by the parties to the dispute is necessary to have the dispute heard by an arbitration tribunal. Such an agreement may be by formal arbitration agreement, a dispute resolution provision in the contract giving rise to the dispute, or by agreement after a dispute has arisen. Likewise, the parties usually have an option to agree on whether the arbitration will be binding or non-binding. Most arbitrations are binding, meaning that the decision of the arbitration tribunal is final and not subject to appeal on the merits of the decision. In the case of non-binding arbitration, a party could pursue legal action in an appropriate court with respect to the same dispute, independent of the arbitration.

Commercial arbitration cannot be used for disputes other than commercial disputes, which most often consist of claims based on breach of commercial contract terms. Actions such as labor disputes, marital disputes, and criminal matters may not be submitted to commercial arbitration.

Commercial arbitration is typically available in two alternative forms; ad-hoc arbitration and institutional arbitration. Ad-hoc arbitration is established by the disputing parties to resolve a dispute, without the use of an organized institution to administer the proceedings. The parties may choose to adopt a known set of arbitration rules, which govern the arbitration procedures, such as the arbitration rules promulgated by the International Chamber of Commerce ("ICC") or the United Nations Commission on International Trade Law ("UNCITRAL"), or may choose to apply rules of their own making. The parties are free to appoint one or more arbitrators to hear the dispute, determine facts, apply law, and issue a decision. In ad-hoc arbitration, unless the selected arbitration rules require otherwise, the parties enjoy significant latitude in selecting the arbitrator(s). The arbitrators may or may not have specific training related to arbitration, and may instead be selected based on their expertise in a particular area of law or sector of the economy.

Institutional arbitration, as opposed to ad-hoc arbitration, is a form of arbitration which is more organized, and which is administered by an institution having administrative apparatus and, usually, its own rules of arbitration. The VIAC and the NCAC are examples of arbitration institutions. Other well-established arbitration institutions include the Singapore International Arbitration Centre ("SIAC") and the Hong Kong International Arbitration Centre ("HKIAC"), both of which have become known as reputable, highly-professional dispute resolution forums. Arbitration institutions determine, as incorporated in their own rules, such things as qualifications of arbitrators, number of arbitrators constituting an arbitration tribunal, the arbitration rules to be applied to proceedings, whether the institution will accept disputes arising outside of the jurisdiction where the institution is seated, and other factors. Institutional arbitration offers parties more structure and procedural certainty than ad-hoc arbitration, while still affording the parties significant discretion in determining the parameters of their dispute resolution process.

Under most arbitration rules, the parties, usually through their contractual arrangement, may choose the law to govern their commercial / contractual arrangement. Note that the law, which is the law of a particular political jurisdiction, is for the purpose of determining the legality of the actions of the parties, and for construing the terms of the contract. For example, determining whether one party to a contract breached its obligations under the contract and the consequences of such breach are issues of law. This differs for the arbitration rules, which govern the procedural formalities of the arbitration proceedings.

ADVANTAGES OF ARBITRATION

In many jurisdictions, arbitration is regarded as a more efficient and transparent form of dispute resolution than is court action. While commercial arbitration is focused on resolving disputes arising purely from commercial arrangements, and offers a streamlined approach to resolving disputes, courts are heavily loaded with many different types of disputes, and by law, must afford parties significant opportunities for appeals, reconsideration of judicial decisions, and the like, often referred to as "motions practice." Depending on the litigation strategy of a party, they may engage in motions practice merely to delay the completion of a case or as an effort to frustrate the opposing party.

In contrast, commercial arbitration, being a dispute arising purely from commercial activities, and usually being conducted by an arbitration institution which is motivated to hear and complete arbitrations efficiently, lends itself to the rapid resolution of disputes. To be clear, in commercial arbitration, all parties involved, including disputing parties, the arbitration institution and the arbitrators themselves, share a common goal, which is to resolve commercial disputes efficiently.

As an example of the heavy judicial caseload of courts which contributes the inefficient resolution of disputes, in 2007, the number of cases taken by the Hanoi People's Court was 226 to be handled by only six judges, for an average of 32 cases per judge. On average, each judge took charge of 37 cases that year alone, in addition to the caseloads the judges carried over from prior years. The situation is even more extreme in Ho Chi Minh City where there were about 1,000 cases in 2007 handled by 17 judges for an average of 59 cases per judge. The combination of the public's right to file legal action and the limited resources of the publicly-funded courts creates a significant disparity in the ratio of cases to judges.

Commercial arbitration, which typically is not publicly-funded, but instead is paid for by disputing parties, is itself a commercial activity, with all participants financially motivated to resolve disputes efficiently. Moreover, in the interest of their own commercial development and exposure, arbitration institutions, as well as arbitrators, are motivated to produce results which demonstrate efficiency, fairness, and transparency.

To a large extent, arbitration is a self-litigation process. The parties to a dispute are free to select or appoint their arbitrators, as opposed to court action where a judge is assigned, often on a random rotational basis, with no consideration given to whether the assigned judge has experience and expertise relevant to the dispute. The involved parties may negotiate with each other on arbitration procedures, set the time-schedule for the proceedings, and even reach an agreement on admission of evidence, and whether the arbitration will or will not include hearings.

Commercial arbitration rules usually allow the parties to decide on the language of the arbitration proceedings, regardless of the language native to the jurisdiction where the proceedings are conducted. Courts, on the other hand, usually require that the official version of any documents filed with the court, and the language of any hearings, be that of the native language of that court's jurisdiction, regardless of an agreement by the parties that a contract written in a different language be binding. These are factors of significant concern to foreign parties who find themselves involved in commercial disputes. Further, under most arbitration rules, the parties may select arbitrators of any nationality, such that an arbitration heard in Vietnam could be decided by arbitrators from outside the jurisdiction, thus minimizing or eliminating the perception of "home-towning".

Confidentiality of the proceedings, and of the arbitration decision and award, is another significant consideration. Commercial arbitration proceedings, which by their very nature are proceedings brought in accordance with a private-party agreement, are generally confidential. Such confidentiality can be an important factor to parties who may not wish to have their grievances known to business associates, customers, suppliers, or the press.

ENFORCEMENT OF ARBITRAL AWARDS

In some respects, commercial arbitration decisions are more final and absolute than judicial decisions. Given that parties to commercial arbitration typically agree, prior to commencement of arbitration proceedings, that the arbitration decision is to be final and binding, there is little, if any, opportunity for appeal or reconsideration of an arbitration decision, at least as to the substance of the dispute. In contract, in the context of judicial decisions, except for a final decision by the highest court in a given jurisdiction, rules of civil procedure generally afford parties a number of opportunities, and rights, to appeal or seek reconsideration of decisions. Thus, even after a court has issued a decision, the action may continue for months or years as parties lodge appeals and engage in motions practice.

Despite the relative finality of commercial arbitration decisions in relation to the substance of disputes, given that commercial arbitration is a private, non-judicial proceeding, it lacks enforcement power. Where courts have a state element giving them considerable enforcement power, to include ordering police action, seizure of assets, sale of assets, and the like, commercial arbitration institutions and tribunals have no such power.

Enforcement of an arbitration decision requires a separate legal action, whether the arbitration proceedings were conducted locally or in a foreign jurisdiction. Such enforcement often involves an intricate marrying of international arbitration procedures, local or foreign law applied to the resolution of the dispute, and local laws and regulations governing the enforcement of the foreign arbitration decision. While the specific procedures vary from jurisdiction to jurisdiction, in general the prevailing party in arbitration will file a request with the court, seeking issuance of an order to enforce the arbitration award. While the non-prevailing party generally cannot challenge the arbitration decision as to the substance of the dispute, they do have the right to oppose the arbitration decision or award on various other grounds, such as an assertion that the arbitration decision or the underlying arbitration agreement is unlawful or contrary to public policy, that the party did not receive proper notice of arbitration, or that the award was given in relation to disputes or matters falling outside the scope of the arbitration agreement.

In the context of foreign arbitration decisions specifically, most countries, 149 to be exact, are signatories to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "NY Convention"). Table 2 shows the regions of the world where the NY Convention is in force. In Southeast Asia, member states of the NY Convention include Vietnam, Cambodia, Thailand, Laos, and Myanmar, among others. Generally, states which are signatories to the NY Convention are obligated to provide mechanisms for enforcement of foreign arbitration decisions. In member jurisdictions, enforcing a foreign arbitration decision is much more feasible than enforcing a foreign court judgment, which requires a specific bilateral treaty between the jurisdiction where the court judgment was issued and the jurisdiction where enforcement is sought. Adopting the NY Convention has proven to be much more attractive than negotiating bilateral treaties for enforcement of court judgments. While much work remains to be done to streamline the enforcement process, as members of the NY Convention are currently at various stages of actual implementation of its provisions, the general acceptance and relative uniformity of the provisions of the NY Convention offer reason for optimism.

TABLE 2 – Signatories to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards

COMMERCIAL ARBITRATION IN LOCAL JURISDICTIONS

While international institutions like the SIAC and HKIAC have established themselves as pillars of efficient and professional commercial dispute resolution, there is reason for optimism on a more local level as well. Here, we discuss two examples; Vietnam and Cambodia.

In Vietnam, the VIAC was founded on April 28, 1993, pursuant to Decision No.204/TTg of the Prime Minister. With about 150 arbitrators, consisting of both local and foreign scholars having extensive knowledge in a wide range of professional expertise, the VIAC has become somewhat of a competitor to other arbitration centers in the region such as the SIAC and the HKIAC, at least for commercial disputes arising in Vietnam. To date, there have been about 1,000 cases heard and resolved by the VIAC.[1]

In its first year, the VIAC received six cases. This figure increased quickly to reach 25 cases in 1996, 32 cases in 2004, 58 cases in 2008, and 83 cases in 2011.[2] In 2010, the VIAC had 123 arbitrators, of which six were foreigners while 117 were distinguished legal scholars of Vietnam.[3] Currently, the number of arbitrators of the VIAC is about 150 having extensive experience and expertise in nearly all areas of commercial disputes, including foreign trade, maritime, banking and finance, construction, manufacturing, intellectual property and more.

In its continuing endeavor to improve its framework for commercial arbitration activities, Vietnam has upgraded the Commercial Ordinance of 2003 to harmonize it with the Law on Commercial Arbitration of 2010. Having more than two decades of experience and development, the VIAC offers great promise to act in accordance with international practices, ensuring its operation in an effective manner, and attracting foreign direct investment into Vietnam.

[1] See more at http://www.viac.org.vn/vi-VN/Home/thong-ke-92.aspx
[2] Supra Note 1
[3] Supra Note 1

In Cambodia, the NCAC has been established and is poised to begin accepting disputes. The NCAC is the product of Cambodia's Law on Commercial Arbitration, which was enacted in 2006 and the related Sub-Decree on the Organization and Functioning of a National Arbitration Center, passed in 2009 (the "Sub-Decree"). Initial funding and assistance for the NCAC was provided by the Asian Development Bank and the International Finance Corporation, a member of the World Bank Group. Cambodia also enacted a new Code of Civil Procedures in 2007, which includes key provisions on execution of arbitration decisions, both foreign and local, as well as provisions allowing for courts to issue decisions for interim relief (injunctive relief) in the context of matters subject to arbitration proceedings.

Just as the VIAC has done for Vietnam, the successful operation of a commercial arbitration center in Cambodia will contribute greatly to providing a measure of confidence to foreign investors that, should commercial disputes arise in the context of their investment project, a fair and efficient mechanism will be available to resolve such matters.

The ASEAN region is continuing its rapid economic development, and the continued increased availability of reliable institutions of commercial dispute resolution is key to the long-term continuation and success of that economic development. With well-established international institutions like the SIAC and the HKIAC offering commercial dispute resolution services in the region, coupled with more localized arbitration by institutions like the VIAC and the upcoming NCAC, foreign investors are finding themselves in an increasingly-favorable environment for developing projects and engaging in business transactions.