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Calls for convergence across Asia-Pacific

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An International Bar Association event in Sydney today examined the local nuances of arbitrating in Asia-Pacific countries and heard calls for greater convergence of arbitral practice across the region. **Kyriaki Karadelis** reports

The event was co-hosted by the IBA, the Australian Centre for International Commercial Arbitration (ACICA) and the Law Council of Australia – one of several events held as part of Sydney Arbitration Week, which kicked off yesterday with GAR Live.

Chairing the panel, ACICA president **Douglas Jones AO** asked whether arbitration in the Asia-Pacific region had any distinguishing characteristics – to which the resounding answer was "yes".

A need for more convergence

Sunil Abraham, a partner at Zul Rafique & Partners in Kuala Lumpur and senior vice chair of the IBA's Asia-Pacific Regional Forum, surveyed the marked cultural and procedural differences across the region, starting with the parallel common and civil law systems at play in Australia, Hong Kong, Singapore and India versus China and Japan. The colonial histories of many countries has also resulted in differences on a domestic level: Indonesia has a strong Dutch influence while Vietnam's legal system is influenced by France, he explained.

This variety of systems has led to "substantial differences" in respect of the conduct of arbitral proceedings, Abraham noted. The differences manifest themselves in many ways; Indian lawyers tend to bring India's code of civil procedure with them

issuing notices to produce documents as they would in a domestic court case, for example, though this is increasingly less so.

Meanwhile, some arbitral centres are actively trying to distinguish themselves from others: Malaysia aims to become one of the world's leading centres for Islamic finance, so the Kuala Lumpur Regional Centre for Arbitration (KLRCA) has introduced the unique I-rules, which requires arbitrators to refer issues of shariah law to a shariah advisory council.

Abraham also noted how some countries in the Asia-Pacific region have adopted the UNCITRAL Model Law in its entirety, while others have adapted it to ensure compatibility with their domestic legal systems. To that effect, domestic courts approach the enforcement or setting aside of awards very differently in terms of errors of fact or law, or public policy.

He compared the difficulties in enforcement of arbitral awards in India before last year's Balco decision with the Singapore Court of Appeal's recent judgment in the Astro v Lippo case, which construed section 19 of Singapore's International Arbitration Act as being consonant with the Model Law in granting a "choice of remedies" to parties – who may either actively initiate set-aside proceedings or wait until confirmation proceedings are filed to resist enforcement.

Abraham also noted a line of Singapore authorities that have effectively held an award cannot be challenged on the grounds of errors of law, even if the error is egregious (except where there is corruption or fraud). "Some might argue perhaps that the courts have gone too far in making Singapore the absolute haven for an award to be protected," Abraham said.

He pointed out that various "soft laws", such as the IBA rules on the taking of evidence and the guidelines on party representation, can serve to fill the gaps in arbitral practice. While less developed jurisdictions such as Pakistan and Bangladesh have a tendency to resist innovative changes to the arbitral process, the better-known arbitral centres are moving towards harmonisation, he added. One example of this is emergency arbitrator provisions, which SIAC was the first institution in the region to include in its rules, but are now being taken up by institutions such as the KLRCA and HKIAC.

Abraham closed by arguing that more consideration should be given to harmonisation, particularly on how different judiciaries approach enforcement issues. He said that the Asia-Pacific region should perhaps consider setting up a "regional arbitration court" (a variation on the model of the International Commercial Court that Singapore is considering) to hear arbitration-related matters such as enforcement applications.

Views from Korea and Japan

Benjamin Hughes, an independent arbitrator based in Seoul, agreed that the region should aim for greater convergence. He recalled that US common law looked "very peculiar" to him as a young Korean-trained lawyer when he moved to the US to finish his studies.

Hughes noted that there is already a lot of cross-pollination among many of the leading Asia-Pacific arbitral institutions such as ACICA, HKIAC and CIETAC, not to mention the many prominent Western arbitrators sitting in Asia and vice versa. But local peculiarities still exist, and while they may be fun to talk about, "regional surprises" are not much fun for international users of arbitration.

"Parties have certain expectations of predictability and fairness when they bring a dispute to international arbitration," he explained. The aim should not be to create one uniform type of arbitration akin to a "straightjacket", because if all arbitration was identical, the parties would be deprived of choice. "But some convergence to ensure the basic norms of fairness and equal treatment of the parties would be helpful."

Hughes agreed with Abraham that the first place to consider reforms would be in the regional courts where the biggest differences exist. "It is essential for the long-term viability of arbitration in the region and around the world that local courts consistently recognise and enforce arbitral awards."

For example, he noted that while Korea has an "excellent arbitration community and very sophisticated counsel", the Korean courts have recently refused enforcement of awards in two cases on questionable grounds. "Regional differences are inevitable but inconsistent interpretation and application of the New York Convention is not helpful."

To help come to a common understanding on norms of fairness in international arbitration, Hughes suggested that more Asia-based arbitration practitioners and parties should play a proactive role in setting standards through international organisations such as the IBA. For example, Asian parties may have a lot to say on Western regional peculiarities, such as US-style discovery and the UK practice of strictly prohibiting the preparation of witnesses. Hughes finished his talk by emphasising that convergence must not mean "Westernisation".

Yoshimi Ohara, a partner at Nagashimi Ohno &Tsunematsu in Tokyo, also talked of a "serious divide" in Asia, where the same legal terms can be used very differently in different jurisdictions, so that that it has become necessary to put a consensus in writing. Like Abraham and Hughes, she noted that arbitration practices gain a local flavour influenced by local court practice. Harmonisation could help lower the entrance barriers to new users of arbitration, she said.

Ohara argued that the IBA had a role to play by getting involved in local communities to increase the size and efficiency of their arbitration practices. The first step for the IBA should be to share the fundamental values of arbitration with these local communities; that court intervention should be limited; that arbitrators should be given authority to manage the procedural aspects of the case; and that due process and the right to be heard should not be undermined. All of these values must be shared while respecting local nuances in certain circumstances, she added.

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The Chinese experience

Another speaker, **Ariel Ye**, head of dispute resolution at King & Wood Mallesons in Beijing, talked through some of the characteristics of domestic arbitration in China – such as the standard adoption of combined mediation and arbitration (or "med-arb") procedures – which make it "very different" from arbitration in Hong Kong or Singapore. Arbitrators in China are generally expected to initiate mediation after the first hearing and act as the mediator as well. As a result, the process has a more inquisitorial style, she said. Around 7,000 cases are resolved in this way in China every year.

Ye said she understood the concerns of Western parties about arbitrators wearing a second hat as mediator, which might give rise to fears that private conversations between the arbitrator and the parties could lead to unfairness if one party discloses information not available to the other. But she argued that the role mediation plays in China usually helps an arbitrator understand how the parties want to resolve their dispute, after which he or she can provide an opinion as to whether the case needs to go to arbitration at all.

Finally, Ye noted that arbitration practitioners in Chinese law firms have fairly little understanding of international arbitration, owing to the small number of international arbitrations that take place on the mainland. This is despite the fact that 80 per cent of international contracts signed by Chinese parties have arbitration clauses, and that the number of international arbitrations taking place in China has doubled since the year 2000. The lack of knowledge of the subject perhaps explains why 90 per cent of Chinese companies arbitrating overseas lose their cases – in which they are respondents 90 per cent of the time.

Ye explained that this poor track record of success is in part because Chinese parties will hand the case over to international counsel with whom they have communication problems. She said that experience shows that Chinese companies are much more willing to participate in cases at SIAC and the HKIAC when the language of the proceeding is Chinese.

Med-arb: the elephant in the room

Jones observed that med-arb was "the elephant in the room". "Do we ignore a system that has worked in one of the major economies of our region," he asked?

Hughes said he felt "extreme discomfort" at the thought of a mediator returning to act as arbitrator. The process is fine for Chinese domestic arbitration where it is great when it works - but the are questions to be asked. "Why it did work? Was it decided prematurely? Were the parties coerced?"

A delegate from Auckland noted that a common approach is to send mediated settlements to arbitration to pick up enforceable awards. He explained that he had recently attended a mediation conference in Paris, however, where nobody dared suggest that the mediator should ever be the arbitrator.

From the audience, **Michael E Schneider** of Lalive in Geneva observed that China is not the only country where arbitrators take on a conciliatory role. In Germany and Switzerland, it is common for arbitrators to take up the role of conciliator at the start of the case. He argued that cultural sensitivity to local practices might be more important than harmonisation in that respect.

Another attendee, **John Beechey**, chairman of the ICC Court of Arbitration, mentioned a working group in Singapore appointed by Chief Justice **Sundaresh Menon** and the ministry of law to examine ways to develop international commercial mediation in the city-state. The group submitted a report last week, recommending the creation of an independent professional body to accredit mediators, provide a mediators' list when required, and address issues of confidentiality and enforcement. Beechey wondered whether the group had consulted with Chinese practitioners on their domestic med-arb model.

Earlier in the day, the Chief Justice of the Federal Court of Australia, **James Allsop AO**, gave a keynote speech arguing that it was important to identify a "pliable regional arbitral coherence and legal culture".

Allsop said that the health of the region overall depends on the health of its dispute resolution centres, which should support each other in the development of shared assumptions as to how dispute resolution should work and how cases should be run.

Sydney Arbitration Week continues on 6 December with the inaugural meeting of the IBA's Asia-Pacific Arbitration Group.

Jones also announced that the Arbitration Week format will be repeated in Sydney in 2014.

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