ARBITRATION IN ASIA

SECOND EDITION

Michael J. Moser
General Editor

JURIS

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FOREWORD

Asia has witnessed dramatic growth in the use of international arbitration in the past two decades. This coincides with an extraordinary increase in international trade, cross-border businesses and investments in the region. Given its well-known benefits such as flexibility, confidentiality and enforceability, arbitration will no doubt continue to grow as the preferred method for the resolution of international commercial disputes.

As the use of arbitration increases, practitioners and business people have to face the problem of selecting an advantageous or at least neutral arbitral seat and/or a set of arbitral rules to suit their contracts during negotiation and drafting. It is not an easy task to keep track of the arbitration laws, institutional rules and arbitral practices which are fast developing and/or changing in most jurisdictions, and Asia is no exception.

Arbitration in Asia is an ideal reference to guide practitioners and business people in the proper selection of a suitable arbitral seat or jurisdiction in Asia. The book includes contributions by the area's leading arbitration practitioners and experts. I am honored and proud to recommend this important work.

Philip L.Y. Yang, BBS
Former President,
Asia Pacific Regional Arbitration Group
Former Chairman,
Hong Kong International Arbitration Centre

THE EDITOR

Michael J. Moser is a leading foreign specialist in Chinese business law. A member of the New York Bar, he has practiced law in China for more than 30 years and has advised on a number of ground-breaking commercial transactions. As a leading expert on the resolution of Chinese-foreign business disputes, he frequently acts as arbitrator in disputes between Asian parties and multinational corporations. He was the first foreign national to be appointed as an arbitrator in China; he is Honorary Chairman of the Hong Kong International Arbitration Centre (HKIAC), Vice President of the Asia Pacific Regional Arbitration Group (APRAG), Co-Chair of the China Arbitration Forum and a former Vice Chair of the IBA Committee on Arbitration. He is also a Court Member of the London Court of International Arbitration, a Board Member of the Arbitration Institute of the Stockholm Chamber of Commerce and a Commission Member of CIETAC.

Prior to his retirement in 2006, Michael Moser was China Managing Partner of Freshfields Bruckhaus Deringer. His extensive publications include the following: *Investor-State Arbitration—Lessons for Asia; Duelling with Dragons: Managing Business Disputes in Today's China; Hong Kong Arbitration: A User's Guide; Arbitration in Asia; Hong Kong and China Arbitration;* and *International Arbitration in the People's Republic of China: Commentary, Cases and Materials*. He is a graduate of the Harvard Law School and holds a Ph.D. from Columbia University. Michael Moser is an arbitrator member of 20 Essex Street Chambers in London and Singapore and is based in Hong Kong.

Contact: mmoser@20essexst.com; arbitrator@michaelmoser.com.
Further details can be found on his web site: www.michaelmoser.com

THE CONTRIBUTORS

Cecil Abraham is a Senior Partner with Zul Rafique & Partners. (Advocates & Solicitors). He obtained his LL.B. Hons. from Queen Mary College, University of London in 1968 and is also a Barrister-At-Law of the Middle Temple. He was admitted as an Advocate & Solicitor of the High Court of Malaya in 1970. He is a Chartered Arbitrator and a Fellow of the Chartered Institute of Arbitrators UK, Malaysian Institute of Arbitrator, Singapore Institute of Arbitrators and the Australian Centre for International Commercial Arbitration Limited. He is also a Fellow of

Queen Mary & Westfield College, University of London. Tan Sri Dato' Cecil Abraham has an extensive arbitration practice and has been frequently appointed as Chairman, Sole Arbitrator and Co-Arbitrator in domestic and international arbitrations conducted under the UNCITRAL, ICC, SIAC, KLRCA and LCIA rules of arbitration. He also appears frequently as Counsel in domestic and international arbitrations. He is Counsel for the Government of Malaysia in an ICSID arbitration. He has been nominated to the ICSID panel by the Government of Malaysia. Tan Sri Dato' Cecil Abraham is a Council Member of the International Council of Commercial Arbitration (ICCA) and the past Vice-President of the Asia-Pacific Regional Arbitration Group (APRAG). He is the Chairman of the Arbitration Committee of ICC Malaysia and an accredited mediator. Tan Sri Dato' Cecil Abraham is also on the Advisory Council of the SIAC and the International Institute for Conflict Prevention & Resolution.

Thida Aye is a former Adviser to Township Court, under the Supreme Court of Myanmar. She is also a former Judge, Civil Township Court, Yangon Division, Union of Myanmar. She is now an Attorney at DFDL in Yangon, Myanmar. She is particularly interested in the law of projects relating to natural resources. Having written extensively about various aspects of the Myanmar legal system, she has recently published, with James Finch, an article on the law of hydropower in Myanmar.

Thayananthan Baskaran is a Partner in Zul Rafique & Partners, Kuala Lumpur. He read law at King's College, London, was called to the Bar of England & Wales by Gray's Inn and was admitted as an Advocate & Solicitor of the High Court of Malaya in 2000. Mr. Baskaran regularly appears as Counsel in arbitrations to resolve disputes arising from building and engineering contracts. He has appeared as Counsel in domestic and international arbitrations governed by the ICC, the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the Malaysian Institute of Architects and the UNCITRAL rules as well as in several ad-hoc arbitrations. He is on the panel of arbitrators of the KLRCA and on the database of arbitrators and mediators of the LCIA. He is a Member of the Chartered Institute of Arbitrators and a member of the ICC Malaysia Arbitration Committee.

Alex Baykitch is a Partner at King & Wood Mallesons in Sydney, Australia where his practices focuses on litigation & dispute resolution and international arbitration. He has over 20 years' experience in the area of

cross border litigation and international arbitration. Alex Baykitch is consistently listed as a leading individual in legal directories, for his expertise in cross border litigation and international arbitration, and sits as sole and party-appointed arbitrator as well as chairman of arbitral tribunals conducted under the ICC, LCIA, KLRCA, and UNCITRAL Rules. Mr. Baykitch is a Member of the Australian government's Delegation to UNCITRAL's Working Group on Arbitration. He is also an Australian Delegate to the ICC Arbitration Commission and served on the Commission's Task Force on the New York Convention. Until recently, he was the Vice-President of the Australian Centre for International Commercial Arbitration (ACICA). He is a fellow of ACICA and also a Member of the arbitration panels of the ICC International Court of Arbitration, Singapore International Arbitration Centre, China Maritime Arbitration Commission, the Korean Commercial Arbitration Board and ACICA. He has presented at numerous conferences and written on various topics in relation to international arbitration and is a co-author for the Australian chapter of World Arbitration Reporter.

Max Bonnell is a Partner at King & Wood Mallesons in Sydney, Australia, where he specializes in commercial litigation and international arbitration. His work involves all forms of dispute resolution and spans a variety of fields including resources, telecommunications, contractual disputes, trade practices, banking, professional negligence, and Corporations Act disputes. He is experienced in mediation and arbitration as well as litigation in each of the major Australian jurisdictions. Much of his recent work has involved disputes concerning complex technological problems. Max Bonnell is a Fellow of the Chartered Institute of Arbitrators and a Fellow of the Australian Centre for International Commercial Arbitration. He has published and lectured extensively in the field of international arbitration. He regularly appears as an advocate before international tribunals. He was named a leading individual in international arbitration by *Chambers Global* 2012; a leading individual in the 2012 *Who's Who of International Commercial Arbitration*, and a leading individual in Dispute Resolution in *Legal 500* 2012. He is an Adjunct Professor of Law at Sydney University, where he teaches International Commercial Arbitration.

David C. Buxbaum is the Senior Counsel at Anderson & Anderson LLP. He has been active in China since 1972 and Mongolia since 1992. He was the first American lawyer invited to China to represent American business interests in 1972, after President Nixon's historic

visit. Mr. Buxbaum has been active in litigation and arbitration. He has served as counsel in numerous arbitration proceedings in Hong Kong, Sweden, Singapore, China, the United States of America, and Mongolia. He represented the successful respondents before the United States Supreme Court in the landmark case of *Butz v Economou* and successfully handled a leading IP case in China, namely *Microsoft vs. Juren*. Mr. Buxbaum has been very active in mining and energy projects and is Honorary Counsel to the Independent Power Producers Forum (IPPF) since 2000. He is a well-regarded expert on private international and Asian law, including Mongolian law, who, in addition to being an experienced and highly respected practitioner, has also published extensively in the field.

Andrew Chan is a Partner in Litigation & Dispute Resolution at Allen & Gledhill LLP. He is a specialist in dispute resolution (especially arbitration), trusts, and insolvency. In arbitration, he has acted as Counsel, Arbitrator and Expert on Singapore law. He is a Fellow of the Singapore Institute of Arbitrators (as well as being on its panel of tutors), a Fellow of the Chartered Institute of Arbitrators and a Director of the Singapore incorporated American Arbitration Association-ICDR Ltd. Mr. Chan is on several arbitration panels. He is an author and editor of several legal texts and has written over seventy articles covering many areas of the law and has contributed to various publications.

Lasonexay Chanthavong received his Bachelor of Laws (LL.B.) from the National University of Laos and Master of Laws (LL.M.) from Yokohama National University, Japan. He is a member of the Lao Bar Association and has worked for DFDL as a Senior Legal and Tax Adviser since 2003. Prior to this he was a consultant in the Tax and Legal Service Division of KPMG's Lao PDR, Vientiane Office. He speaks Lao, English and Thai.

Yancy Cottrill is an attorney in the Ulaanbaatar office of Anderson & Anderson LLP. He is admitted to New York Bar, graduated from Central European University in Budapest with an LL.M in International Business Law, and earned his Juris Doctorate from the David A Clarke School of Law at the University of the District of Columbia. He has published articles on the applicability of UCC Article 6 in the emerging markets of post-communist countries, mining capital markets in Mongolia, and human rights abuses. Mr. Cottrill has legal experience in the post-communist emerging markets working and studying in Russia and

Hungary before joining Anderson & Anderson LLP. He served as a Peace Corp volunteer in Ukraine before attending law school. Additionally, he has traveled extensively in the post-communist countries of Eastern Europe.

James Finch was raised in the United States and Asia, educated in the United States and served in the U.S. foreign service, where he was posted to various locations in Latin America. Early in his law career he practiced in Tehran, New York, and Santo Domingo. Later he returned to Asia, first to practice in Vietnam, then as the Resident Partner of Myanmar Thanlwin Legal Services, Ltd. in Myanmar, now DFDL, where he has lived for over fifteen years. His practice encompasses financial transactions, infrastructure projects, mining, oil and gas, and a wide variety of other civil and commercial matters.

Gu Weixia was born and grew up in Shanghai. She obtained her LLB from East China University of Political Science and Law, and MCL and SJD degrees from the University of Hong Kong. She is an Assistant Professor at the Faculty of Law, University of Hong Kong. Dr. Gu is an Articles Editor of the Hong Kong Law Journal, and also serves as the Deputy Director of the Center for Chinese Law at the University of Hong Kong. Prior to joining academia, she was the youngest recipient in Hong Kong of the U. S. Dept. of State's prestigious Fulbright Award and was selected as an Honorary Young Fellow of the New York University School of Law. Dr. Gu has been consulted on the revision of the arbitration rules in China, such as those of CIETAC, and the more locally-based Shanghai and Shenzhen Arbitration Commissions. She has published various articles on arbitration development in China as well as on the Chinese judiciary in leading publications in English, among them, *Asian Courts in Context* (Cambridge University Press, 2014), and is the author of the book, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues* (Sweet & Maxwell, 2012).

Rupert Haw is the Country Managing Director of DFDL's Lao PDR practice. He has outstanding experience in telecommunications, corporate finance and M&As in South East Asia and has strong credentials in regulatory and operational risk management in emerging markets. Mr. Haw also has sound experience in dispute resolution and has represented numerous firms in contentious proceedings in both the superior and lower courts. He also has a strong interest in private commercial arbitration.

Mr. Haw was admitted as an attorney of the High Court of South Africa in 1997 and holds a B. Proc. (University of Natal, South Africa). Previously, he was a Senior Manager of Big4 Forensic and Dispute Services department where he was responsible for managing a number of major investigations into fraud and corruption for the private sector and law enforcement agencies in both Africa and the United States.

Alastair Henderson is Head of Herbert Smith Freehills's arbitration practice in Southeast Asia. He graduated in law from Oxford University in 1986, qualified as a Lawyer in London in 1990 and moved to Asia in 1993. He has lived and worked with Herbert Smith Freehills in Hong Kong and Bangkok but is now based in Singapore from where he conducts arbitrations and other commercial disputes in all countries of the region. Mr. Henderson is internationally recognised as one of Asia's foremost practitioners in this field. A wide-ranging case load includes energy disputes, construction and infrastructure disputes, domestic and international trade claims, investment claims and general commercial and financial cases.

Hoang Thi Thanh Thuy is a Vietnamese Lawyer who obtained a Bachelor of Law degree from the Ho Chi Minh City Law University in 2003. She has experience in, among other areas, arbitration, and other corporate issues.

Michael Hwang, S.C. practises as a Barrister and International Arbitrator based in Singapore. He is or has been: a Vice Chairman of the ICC International Court of Arbitration, a Member of the Governing Board of the International Council for Commercial Arbitration, a Court Member of the London Court of International Arbitration, a Trustee of the Dubai International Arbitration Centre and a Council Member of the International l Council of Arbitration for Sports. He has served as a United Nations Compensation Commissioner, a Judicial Commissioner of the Supreme Court of Singapore and the President of the Law Society of Singapore. He is currently the Chief Justice of the Dubai International Financial Centre. He is on the panel of many arbitration centres, and is involved both in international commercial arbitration as well as public international arbitration. He has also served as Singapore's Non-Resident Ambassador to Switzerland.

Daniel Kalderimis is a partner at Chapman Tripp and leads the firm's international arbitration practice, focused on the Asia-Pacific region. He is admitted in New Zealand, New York and England and Wales (where he is a

solicitor-advocate for civil matters). Mr. Kalderimis is New Zealand's representative to the ICC Commission and national correspondent to the United Nations for the New York Convention and UNCITRAL Model Law. He regularly acts as counsel in international arbitrations, and acted on the first bilateral investment treaty arbitration held in New Zealand. Mr. Kalderimis also regularly appears as a barrister and solicitor in significant commercial litigation before New Zealand courts, and has experience as an ICC arbitrator. He is author of a guide to the ICSID Convention and Arbitration Rules; the New Zealand chapters for guides produced by the International Bar Association, Global Arbitration Review and World Arbitration Reporter; and is a contributing author to New Zealand's leading arbitration textbook. He graduated first in his year at Victoria University of Wellington (LLB Hons: first class, BA), and studied at Columbia Law School (LLM), where he received the Fulbright-Buddle Findlay Award and was an associate-in-law. He previously worked in London as a senior associate in Freshfields Bruckhaus Deringer's international arbitration group. Daniel Kalderimis is an adjunct lecturer at Victoria University of Wellington and a member of the LCIA, International Bar Association, International Law Association, American Society of International Law and Arbitrators' and Mediators' Institute of New Zealand.

Kap-You (Kevin) Kim is the Founder and Head of Bae, Kim & Lee LLC's International Arbitration & Litigation Practice Group, Asia's most active and experienced international arbitration team, now consisting of 16 full-time arbitration practitioners from multiple jurisdictions. In addition to serving as the first Secretary General of the ICCA to be appointed out of Asia, Kevin is a Court Member at the ICC Court and the LCIA Court – the first to be appointed from East Asia – a Board Member of the AAA, a member of the Panel of Arbitrators of ICSID, and an Editorial Board Member of Global Arbitration Review. He is also a senior advisor and arbitrator of the Korea Commercial Arbitration Board (KCAB), a Vice President of the Korean Council for International Arbitration (KOCIA) and a Vice Chair of the International Arbitration Committee of ICC Korea. Kevin has also served as Chair of the International Committee of the Korean Bar Association and Vice Chair of the IBA Arbitration Committee. He has acted as Counsel or Arbitrator in over 180 commercial arbitral proceedings in Asia, Europe and the United States, and has extensive experience practicing under the rules of all major international arbitral institutions, particularly in the fields of construction, distributorship, post-M&A, intellectual property and information technology. He received his legal education at Seoul

National University Law School (LL.B.) and Harvard Law School (LL.M.), and is author or editor of numerous publications on international arbitration. In 2011, Kevin led his team, as general editor, in the production of the first book-length treatise on arbitration in Korea: ARBITRATION LAW OF KOREA: PRACTICE AND PROCEDURE (Juris Publishing, 2011). Kevin is a member of the Korean and Seoul Bar Associations, and is also admitted to practice in New York. He speaks Korean (native), English (fluent) and Japanese (conversational).

Milton Lawson graduated from the University of Lancaster in the UK, where he obtained a Masters Degree in Philosophy. Mr. Lawson is the Managing Lawyer of Freshfields Bruckhaus Deringer's Ho Chi Minh City office and is one of the longest serving foreign lawyers working in Vietnam. Mr. Lawson was trained as a litigation lawyer in a major London litigation practice and has experience in a wide range of commercial litigation and arbitration matters. He is one of the few lawyers in Vietnam to have a wide experience and specialization in litigation, having advised on over 30 disputes, in the Vietnamese courts as well as arbitration in the Vietnamese International Arbitration Centre. Mr. Lawson also advised both Vietnamese and foreign parties that were involved in numerous contentious matters.

BoHao(Steven) Li is a litigation and dispute resolution law clerk based in the Wellington office of Chapman Tripp. He advises clients predominately in the energy, insurance, banking and financial services industries. He is also a member of Chapman Tripp's China Desk team. He will be admitted as a barrister and solicitor of the High Court of New Zealand in December 2014. Mr. Li graduated with LLB (Hons) from the Victoria University of Wellington and participated in the 20th Willem c Vis Moot in Vienna. He is currently coaching the 2015 Chinese University of Hong Kong Vis Moot team.

Nigel N.T. Li and **Angela Y. Lin** are Partners in the international law firm Lee & Li, Taipei, Taiwan.

Karen Mills has practiced in Indonesia for more than 30 years and is one of the Founders of the KarimSyah Law Firm in Jakarta. Ms. Mills is a Chartered Arbitrator, Fellow of the Chartered Institute of Arbitrators ("CIArb") and of the Singapore and Hong Kong Institutes, and Founder and Co-chair of the Indonesian Chapter of CIArb. Ms. Mills is on the panel of arbitrators of most arbitral institutions in the region, including

those of China, Malaysia, Singapore, Hong Kong, Korea, New Zealand and the Philippines, as well as Indonesia; She also serves as a Domain Name Panelist under ADNDRC, Hong Kong, Beijing and Seoul. Ms. Mills sits on the First Appointing Authority of the Chinese-European Arbitration Centre, the Executive Board of ArbitralWomen and the Editorial Board of the Journal of World Energy Law and Business, among others, and is Co-Chair of the IBA Mediation Committee Section on investor-state Mediation. She sits as arbitrator throughout Asia and the Pacific, as well as in the US, and has acted as lead counsel for the Indonesian Government in several Investor-State arbitrations. A graduate of New York University School of Law and a Member of the New York bar, Ms. Mills commenced her legal career with Haight, Gardner Poor & Havens specialising in maritime and aviation financing. Her primary fields of expertise include banking, financing and restructuring, oil, gas, mining and energy matters, insurance, hospitality, information technology and general cross-border transactions. An approved Tutor for all levels of CIArb training, she teaches, speaks and writes extensively on arbitration and other matters around the world, and has published over 130 papers in international professional books and journals.

Tatsuya Nakamura obtained his B.E. in 1980 at the University of Osaka Prefecture, LL.B. in 1993 at the Keio University in Tokyo and LL.M. in 1996 at the University of Tsukuba in Tokyo. He is Professor of Law at Kokushikan University in Tokyo and General Manager at JCAA.

Fali S. Nariman is a Senior Advocate of the Supreme Court of India; President Emeritus of the Bar Association of India, Honorary President of the ICCA (International Council of Commercial Arbitration); and Vice-Chairman of the ICC International Court of Arbitration in Paris from 1989 till December 2005.

Custodio O. Parlade is the former Managing Partner of the Benitez Parlade Africa Herrera Parlade & Panga in Makati City, former Chair of the Committee on Arbitration of the Philippine Chamber of Commerce and Industry, Founding Member and former Vice Chairman of the International Chamber of Commerce (Philippines), Inc. and Co-founder and first President of the Philippine Dispute Resolution Center, Inc. He has served as Chairman or Member of arbitration panels in international commercial arbitration, including ICC arbitration. He has written articles on arbitration for domestic and foreign journals. He helped draft the Implementing Rules and Regulations of the ADR Act. He was Vice

Chairman of the Supreme Court Subcommittee that drafted the Special Rules of Court for ADR. He has written books on arbitration in the Philippines and has contributed a chapter on arbitration in the Philippines in "Arbitration in Asia" published by Butterworths and its updated version published by Juris Publishing. He is a Member of the International Court of Arbitration of the International Chamber of Commerce. He is a Lecturer on arbitration in various Mandatory Continuing Legal Education [MCLE] programs conducted by the University of the Philippines and other established institutions regularly and by the Ateneo de Manila University occasionally.

Ramesh Selvaraj is a Partner in the Litigation and Dispute Resolution department of Allen & Gledhill LLP. He has experience in a wide range of commercial disputes and has a keen interest in international arbitration. He is a Fellow of the Singapore Institute of Arbitrators as well as an accredited mediator with the Singapore Mediation Centre.

Billie Jean Slott is Of Counsel to the firm of Sciaroni and Associates, located in Phnom Penh, Cambodia. Her areas of practice are litigation, arbitration, and exploration and mining. She was appointed by the Minister of Commerce to serve as a Commissioner on the Selection and Inception Commission of the National Arbitration Center, Cambodia. She was Lead Onshore Counsel for the Royal Government of Cambodia and Electricité du Cambodge in relation to a multi-million dollar international ICSID arbitration conducted at The Hague. She is a Founding Member of the Cambodian Association of Mining and Exploration Companies and a Member of the California bar. She has been practicing law in Southeast Asia for over ten years.

Surapol Srangsomwong is a litigation and arbitration specialist with over 30 years of experience in dispute resolution. He is acknowledged locally and internationally as one of Thailand's leading lawyers in this field, and is recognised for his extensive experience in contentious labour and employment matters. He handles commercial disputes in the Thai courts and arbitration for local and international clients. He also has a substantial practice advising in relation to complex and often high-profile criminal and regulatory investigations. Mr. Srangsomwong worked with Baker & McKenzie in Bangkok before leaving to establish Siam Premier International Law Office, where he served as Managing Partner and Head of litigation. He is now a Managing Partner in Herbert Smith Freehills's

Bangkok office, where he heads the firm's Thai litigation and arbitration practice on behalf of well-known Thai and international clients.

David W. Su is the Director of Intellectual Property Division at Taiwan Semiconductor Manufacturing Company, Ltd.

Yasuhei Taniguchi obtained LL.B., 1957, Kyoto University, LL.M., 1963, University of California, Berkeley, J.S.D., 1964, Cornell University, was Professor of Law at Kyoto Univ. till 1998; Teikyo Univ. till 2000; Tokyo Keizai Univ. till 2006 and Senshu University Law School in Tokyo till 2009. He was President of Japan Arbitrators Association till 2013; Council Member of ICCA 1990-2011 (now Advisory Member); Council Member of ICC Institute of World Business Law till 2006, Member of the Appellate Body of the WTO (2000-2007, Chairman 2004-2005). He is a Fellow of the Chartered Institute of Arbitrators, and currently serves as Chairman of the Special Advisory Committee of JCAA, Chairman of Investment Transactions Overseeing Committee of the Bank of Japan. Mr. Taniguchi is Of Counsel to the law firm Matsuo & Kosugi in Tokyo.

Danyel Thomson is a Senior Legal Adviser with DFDL and a member of the Bar Associations of New Jersey and North Carolina in the United States. She holds a Juris Doctor from the University of North Carolina at Chapel Hill School of Law. She practiced litigation in the United States before joining DFDL's Laos office in 2007. Her practice areas cover investment regulatory compliance, investment and project coordination, contracts, and labor issues with experience in an array of sectors including mining, commercial banking, and hotels. Danyel Thomson has also worked closely with stakeholders on various projects for diplomatic missions and non-government organizations.

Christopher To holds qualifications in computing, engineering and law. He is a recognized authority on alternative dispute resolution techniques and has over twenty years of extensive experience in arbitration and alternative dispute resolution ("ADR") including adjudication and mediation. He has acted as arbitrator, mediator and adjudicator in a variety of international business disputes ranging from insurance, finance, aircraft maintenance, mining and energy transactions, investment, information technology, intellectual property, technology licensing, manufacturing of integrated circuit technology, and mergers and acquisitions and was previously the Secretary-General of the Hong

Kong International Arbitration Centre. He is a chartered arbitrator and an accredited mediator of a number of leading ADR bodies. Professor To currently teaches at leading universities on the subjects of Alternative Dispute Resolution, International Construction Law, International Arbitration, Commercial Contracts and Mediation and has written extensively on the subject and is the author of the leading textbook on arbitration in Hong Kong "*Butterworths Hong Kong Arbitration Law Handbook.*" Dr. To is currently the Chairman of the Chartered Institute of Arbitrators (East Asia Branch).

INTRODUCTION

Michael J. Moser

Recent years have seen a dramatic shift in worldwide patterns of trade and investment. As a result, today's Asia plays an important role in the world economy. Concomitant with these changes, a large number of the disputes which today arise in connection with international trade and business relate to Asian transactions and involve ever larger numbers of Asian parties. In this new environment, arbitration has come to play an increasingly important role.

GROWTH

Arbitration is clearly on the rise in Asia today. Whereas ten years ago Asian arbitration institutions would have received scant mention in a list of the "top ten" busiest international arbitration bodies, the picture today is quite different. In 1985 the China International Economic and Trade Arbitration Commission ("CIETAC") handled 37 cases. Twenty-six years later (2012) the number of cases topped 1,060. In 1985 the number of cases referred to the Hong Kong International Arbitration Centre ("HKIAC") was 9. Today, the number is approaching 293.

Over the past twenty years the number of cases handled by arbitration institutions in Mainland China and Hong Kong together has outstripped that of the International Chamber of Commerce in Paris, the London Court of International Arbitration, the Stockholm Chamber of Commerce and other well-known Western arbitration institutions.

Similar dramatic growth in the acceptance of arbitration in Asia is reflected in ICC statistics. Whereas Asian parties figured in only 3% of ICC cases in 1983, the percentage has increased dramatically since. By the end of 2010, 425 cases were filed with the ICC in which one or more parties were from the Asian region. The increase in the number of cases in recent years involving parties from China, India, Japan, Korea and Singapore is especially noteworthy. In May 2008 the ICC announced the opening of its first overseas secretariat, in Hong Kong.

ARBITRATION INSTITUTIONS

Hand in hand with growth in the volume of cases and increased acceptance of arbitration throughout the region has been the proliferation of arbitration institutions in Asia. From the Mongolian International Court of Arbitration ("MICA") to the Japan Commercial Arbitration Association ("JCAA") to the China International Economic and Trade

Arbitration Commission ("CIETAC"), the Hong Kong International Arbitration Centre ("HKIAC"), the Korean Commercial Arbitration Board ("KCAB"), the Philippine Dispute Resolution Centre ("PDRC"), the Thai Arbitration Institute ("TAI"), the Singapore International Arbitration Centre ("SIAC") and the Regional Center for Arbitration at Kuala Lumpur ("RCAKL") to the Bandan Arbitrase Nasional Indonesia ("BANI") in Indonesia and a number of other similar centres throughout the region, Asian proponents of arbitration have in recent years been engaged in a serious exercise of institution building.

In 2004 the Asia Pacific Regional Arbitration Group ("APRAG") was established as an umbrella organization for Asia-based institutions. Its membership now includes 41 arbitration institutions, centres and other organizations.

As the large number of arbitration bodies in the region shows, institutional arbitration plays a very prominent role in Asia. Why this is so can be attributed to a variety of factors. Some have argued that the predominance of institutional arbitration reflects a preference of many Asian disputants for administered arbitrations as opposed to ad hoc proceedings. In Japan, for example, ad hoc arbitrations are reported to be quite rare, with Japanese parties preferring the more structured arrangements of arbitration before the JCAA.

Apart from cultural factors, there are in many Asian jurisdictions also good legal reasons why ad hoc arbitration should be avoided. In China, for example, there is no clear legal basis for the conduct of ad hoc proceedings. The 1995 PRC Arbitration Law requires that all arbitrations be carried out under the auspices of a government-sanctioned arbitration commission. Although perhaps not as extreme as in China, doubts also surround the enforceability and practicality of executing ad hoc arbitration agreements in some other Asian jurisdictions.

LEGISLATION

Another theme that emerges from a review of arbitration in Asia is the increasing uniformity of local legislation, as growing numbers of Asian jurisdictions amend outdated laws and adopt the principles established by the UNCITRAL Model Law.

In Australia, where arbitration is well established, a comprehensive legal framework governing arbitration has been in place for some time. At the national or federal level, the International Arbitration Act (1974) ("IAA") implements, *inter alia*, the UNCITRAL Model Law on International Commercial Arbitration. The IAA was amended in 2010 to increase the effectiveness, efficiency and affordability of international

commercial arbitration. Each of Australia's mainland states and territories has separately enacted uniform legislation governing domestic arbitrations in the form of the Commercial Arbitration Act ("CAA"). Under the relevant CAAs, parties in international arbitrations are allowed to "opt out" of the Model Law and choose application of the CAA if they wish.

Hong Kong, which has long been a pioneer in the area, adopted the UNCITRAL Model Law in 1990 to govern both international and domestic arbitrations. As a result a complete revamp of the Hong Kong Arbitration Ordinance to establish a single Model Law regime for both international and domestic cases took place in 2010.

Singapore has also shown itself to be a progressive force in the region. In 1995 Singapore enacted the International Arbitration Act. The IAA adopts the UNCITRAL Model Law for international arbitrations, while domestic arbitrations continue to be governed by the earlier Arbitration Act.

As a result of the legislation introduced in Australia, Hong Kong and Singapore, these jurisdictions today offer some of the most up-to-date and progressive arbitration legislation in the world. Other jurisdictions that have recently adopted the UNCITRAL Model Law or amended local legislation to incorporate key elements of the Model Law include Japan (2004), Korea (1999), Malaysia (2006), the Philippines (2004), India (1996) and Thailand (2002). At the same time, other Asian jurisdictions (such as Taiwan), while not adopting the Model Law, have adopted amendments to local laws aimed at establishing "arbitration-friendly" legislation.

One major arbitration player that has lagged behind in reforming its arbitration legislation is China. The PRC enacted its first Arbitration Law in 1994. The law provides for a bifurcated arbitration system consisting of a domestic regime and an international regime. While China considered, but ultimately decided against, adoption of the UNCITRAL Model Law, a number of its key principles are nonetheless reflected in the final legislation.

As discussed earlier, a distinctive feature of arbitration in China is the requirement that all proceedings be conducted by a designated arbitration institution. The Arbitration Law provides for the establishment of both domestic arbitration commissions and international or foreign-related commissions. Whereas the law itself appears to contemplate a strict demarcation of jurisdiction between the two types of commissions, with domestic commissions dealing exclusively with domestic matters and international commissions dealing with international cases, this distinction has in recent years become blurred. In particular, as a result of a State Council decision in 1996, domestic tribunals may now hear

international cases and international tribunals established under CIETAC may, since 2000, hear both domestic as well as international disputes.

Although China's Arbitration Law has made an important contribution by unifying the previously scattered legislative enactments governing arbitrations in China, it also leaves many questions unanswered. As discussed previously, the Arbitration Law fails to clearly answer the question as to whether ad hoc arbitrations are permissible in China. This has caused particular concern. In addition, by providing that all arbitrations in China be conducted under the auspices of "arbitration commissions" established pursuant to the law, the PRC Arbitration Law casts doubt on whether foreign institutions such as the ICC may legally administer arbitrations inside China.

In the case of *Züblin International GmbH v. Wuxi Woke General Engineering Rubber Co., Ltd*, the Supreme People's Court held that recognition and enforcement of an ICC arbitral award with its seat in Shanghai should be refused enforcement given that there was "no explicit designation of an arbitration institution" but merely reference to the "ICC Rules."

However in another case *Duferco SA v. Ningbo Arts and Crafts Import and Export Co.*, the Ningbo Intermediate People's Court enforced an ICC award with its seat in Beijing, on the grounds that the judgment debtor was procedurally barred from arguing that the arbitration agreement was void because the judgment debtor failed to raise the objection at the arbitral hearing.

With such contrary interpretations some believe that enforcement of foreign arbitral awards with its designated seat inside China remains a concern when it comes to enforceability.

Nevertheless foreign arbitral awards including those from Hong Kong, Macau and Taiwan obtained through "ad hoc" proceedings are generally recognised and enforceable at the People's Republic of China Courts.

ARBITRATION PROCEDURES AND ASIAN LEGAL CULTURES

While globalization has tended to promote the harmonization of arbitration practice and procedure in Asia and elsewhere, it is important to keep in mind that legal culture continues to exert a strong influence on dispute settlement processes. This is clearly the case in Asia, where tradition runs deep.

One example concerns the approach towards the use of mediation (or conciliation) in arbitration proceedings. The traditional view in the West

has been that mediation and arbitration are distinct proceedings and should be kept separate. In particular, common law-trained lawyers are uncomfortable with the notion that a mediator in possession of confidential information gained in the course of a mediation could subsequently act as arbitrator if the mediation failed. In Asia, by contrast, where "friendly negotiations" and mediation have long been the preferred mechanism for resolving disputes, the combination of mediation and arbitration in the same proceeding is frequently encountered. The practice is especially common in institutional arbitrations in China, Japan, Korea and Taiwan, jurisdictions strongly influenced by Confucian ideals. Indeed, many cases dealt with by these arbitral bodies are settled by mediation conducted in the course of the arbitral proceedings, rather than by an award on the merits.

The traditional practice of combining arbitration and mediation has received growing official sanction in arbitration legislation and procedural rules of various jurisdictions. In China, for example, no bar exists to an arbitrator acting as mediator in the same proceedings, and settlements reached through conciliation in the course of arbitral proceedings may be enforced as arbitral awards.

Hong Kong and Singapore also allow the practice of "combining mediation and arbitration." However, under the arbitration legislation in both jurisdictions, an arbitrator may only act as mediator in a dispute in which he has been appointed arbitrator so long as both parties consent in writing and so long as no party withdraws his consent. In Hong Kong, an arbitrator acting as mediator is required to keep all information obtained by him confidential, but if the mediation fails the arbitrator must disclose to all other parties as much information as he considers is material to the arbitration proceedings.

Legal culture is also evident in the approach toward arbitral decision making found in some Asian jurisdictions. Although arbitrators worldwide have often been accused of making decisions by "splitting the difference," the tendency toward equity-based compromise decisions is most pronounced in Asia. In Indonesia, for example, the Badan Arbitrasi Nasional Indonesia ("BANI") arbitrators are said to "frequently lean towards basing their awards on the principle of *ex aequo et bono*, and not always strictly upon the letter of the law." CIETAC's rules direct arbitrators to base their awards in compliance with the "principle of fairness and reasonableness" as well as the facts and the law. Similar examples could be cited from the practice of tribunals in Japan, Taiwan, Vietnam and elsewhere in the region.

ENFORCEMENT

Finally, a word should be said about enforcement. Most jurisdictions in the Asia-Pacific region have acceded to the New York Convention of 1958. (See Table 1.) Widespread acceptance of the principles contained in the Convention is deserving of applause. Unfortunately, however, there appears to be less uniformity throughout the region with respect to the implementation of the Convention.

TABLE 1

MEMBERSHIP OF THE NEW YORK CONVENTION

STATE	Ratification/Accession	Reservations
Australia	1975	-
Bangladesh	1992	-
Brunei	1996	R
Cambodia	1960	-
Hong Kong SAR	(1997 via PRC)	R
India	1960	C/R
Indonesia	1981	C/R
Japan	1961	R
Laos	1998	-
Malaysia	1985	-
Mongolia	1994	C/R
Myanmar	-	-
New Zealand	1983	R
People's Republic of China	1987	C/R
Philippines	1967	C/R
Singapore	1986	R
South Korea	1995	C/R
Sri Lanka	1962	-
Taiwan	-	-
Thailand	1959	-
Vietnam	1995	C/R

C = Commercial Reservation
R = Reciprocity Reservation

China's own track record with respect to the enforcement of foreign arbitral awards has been mixed. Whereas China itself has been a major beneficiary of the New York Convention, with many of CIETAC's awards being granted recognition and enforcement in courts worldwide, foreign arbitral awards have been greeted less warmly by the People's Courts in China.

Enforcement of foreign arbitral awards has also proved problematical in a number of other jurisdictions throughout the region, including Indonesia, Thailand and Vietnam.

CONCLUSION

There is no doubt that arbitration has gained a firm foothold in many jurisdictions in Asia, and is digging down strong roots in others.

Today more and more Asian parties are questioning the benefits of the traditional paths to London, Paris, Stockholm and Zurich and are seeking to resolve disputes closer to home.

The materials in this looseleaf volume provide a practical reference guide and resource tool for the law and practice of international commercial arbitration in Asia. Please note, however, that this volume is not intended to be a substitute for obtaining legal advice.

I would like to thank each of the country and jurisdiction authors for their enthusiasm for the project and for their contributions.

Michael J. Moser