ARBITRATION IN ASIA

SECOND EDITION

Michael J. Moser
Christopher To
General Editors

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 international 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 executives 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 executives 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 piece of work to those who handle international trade and finance.

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

THE EDITORS

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

Christopher To holds qualifications in computing, engineering and law. He is a recognized authority on alternative dispute resolution techniques and has over twenty-five 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 construction, infrastructure projects, 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,

chartered engineer, chartered information technology professional, an accredited mediator and a barrister at law. Dr. 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. He is the general editor of the textbook, "Wolters Kluwer Construction Arbitration in Hong Kong: A Practical Guide," and the author of the leading textbooks "Butterworths Hong Kong Arbitration Law Handbook" and "Wolters Kluwer Mediation in Hong Kong: Law and Practice." Dr. To is currently the Chairperson of the Hong Kong Institute of Directors, Chairperson of the Hong Kong Mediation Council, a division of the Hong Kong International Arbitration Centre and Chairperson of the Construction Dispute Resolution Committee of the Hong Kong Institution of Engineers.

THE CONTRIBUTORS

Bulbul Ahmed, Senior Consultant at DFDL in Bangladesh. He is an advocate qualified to practice law in Bangladesh and is enrolled with the Bangladesh Bar Council. He has significant expertise in banking and finance transactions, corporate and commercial matters, and real property issues. He regularly advises international banks like Citibank, Standard Chartered Bank, and HSBC on financing transactions, including structuring loan and security documentation and perfecting securities. He also advises on regulatory and compliance matters, investment structuring, company incorporations, corporate transactions, and employment issues.

Abdullah Al Afzal, Associate at DFDL in Bangladesh**,** has completed his LL.B (Hons.) from University of London in and LL.M from Eastern University Bangladesh. He is qualified as an Advocate of Supreme Court Bangladesh and is enrolled with the Bangladesh Bar Council.

He has over 15 years of experience in litigation matters involving criminal, civil, company, family disputes, money recovery, constitutional matters, anti-corruption, judicial review, intellectual property, banking and finance, industrial and property.

He routinely advises clients and appears before courts in both contentious and non-contentious proceedings.

Thayananthan Baskaran is a Partner with Baskaran, Kuala Lumpur, and an Associate Member of Crown Office Chambers, London. He is on the panel of several international arbitration centres and has been appointed as arbitrator in a variety of commercial disputes. Mr Baskaran is the author

of *Arbitration in Malaysia: A Commentary on the Malaysian Arbitration Act* (Kluwer Law International forthcoming 2019). He lectures at the Chartered Institute of Arbitrator's Diploma in International Commercial Arbitration. He was the Chair of the Chartered Institute of Arbitrators Malaysia Branch (2017/19) and is a member of the International Chamber of Commerce Commission on Arbitration and ADR. *Global Arbitration Review* has described Mr Baskaran as "incredibly smart, agile and resourceful" and as "the best example of the new wave of Asian practitioners who offer great talent and fresh ideas."

Standré Bezuidenhout is a Partner working at DFDL's office in Vientiane, leading the M&A, and labour practices. He specializes in both local and cross-border merger and acquisition transactions, and has experience in the formation, structuring, and restructuring of business entities in Laos. He is at the forefront of due diligence mandates and drafting transaction documentation for M&A and secured lending transactions and routinely handles corporate, labour, disputes and regulatory and governance advisory matters. He has led the team on recent transactions in the forestry, insurance, logistics, mining and energy sectors. He was admitted as an attorney and notary public in South Africa in 2014. He is recognized as a Recommended Lawyer by Legal 500 (Asia Pacific), a Rising Star Partner by IFLR1000 and in band 2 for General Business Law by Chambers and Partners.

Max Bonnell is a Partner at Henry William Lawyers 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 has been named a leading individual in international arbitration by *Chambers Global*; a leading individual in the *Who's Who of International Commercial Arbitration*, and a leading individual in Dispute Resolution in *Legal 500*. The Australian Disputes Centre has named him as the leading International Dispute Resolution practitioner in Australia. He is an Adjunct Professor of Law at Sydney University, where he teaches International Commercial Arbitration.

Chulalin Bounbouathong is a Junior Legal Advisor and a member of the Lao Bar Association with a strong background in corporate and banking law. Before joining DFDL, she honed her legal expertise over five years with the National Institution of Justice and the Lao Bar Association. She holds a Bachelor of Law from the National University of Laos.

Her diverse experience includes auditing integrated management systems and training in General Tax Law, Mediation, and Arbitration. Ms. Bounbouathong began her legal career as a Legal Assistant, supporting regulatory research, and later as an Internal Audit and Compliance Assistant. She has also completed internships with private enterprises, the Lao People's Vientiane Capital Court, and a local law firm.

Tien Bui has been with Freshfields Vietnam offices since 2002 and is the first ever Vietnamese lawyer elected to the Freshfields partnership. He is widely recognised as a top-tier corporate and finance lawyer in Vietnam. Mr. Bui has established a reputation among his clients as an effective and commercially minded lawyer who represents the client's best interests. Fluent in both Vietnamese and English. He is also known as an effective communicator with an ability to present complex legal issues to his clients and the counterparties.

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 is a specialist in intellectual property, securities and commodities law and has been active in international 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*, 438 US 478 (1978) and successfully tried a leading IP case which was shown on national television in China, namely *Microsoft vs. Juren*. Mr. Buxbaum has been very active in mining and energy projects and was Honorary Counsel to the Independent Power Producers Forum (IPPF) from 2000 to 2019. He is a well-regarded expert on private international and Asian law, including Mongolian law and Chinese law, who, in addition to being an experienced and highly respected practitioner, has also published extensively in the legal field.

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.

Nishant Choudhary, Partner and Managing Director, at DFDL in Myanmar. His core expertise is practice dispute redressal by assisting several clients in Myanmar, and since 2021 in Cambodia. Accumulating more than 19 years of dispute resolution experience in various capacities, he has advised on some of the most challenging and groundbreaking dispute matters, both conventional and alternative in various sectors throughout the region. Given his in-depth understanding of the dispute redressal landscape in the region, he is responsible for heading regional dispute resolution practice for DFDL. Before relocating to Myanmar, he was a litigation lawyer in India and had worked on some landmark matters.

In addition to the disputes practice, Mr. Choudhary focuses on varied transactional matters in Myanmar and banking and finance matters in Cambodia. In Myanmar, his practice centers on M&A (and general Corporate and Commercial), B&F (including Fintech and Capital Market), Energy and Infrastructure, TMT, Real Estate, Aviation, and Dispute Resolution. In addition to being a frequent speaker at various national and international conferences and seminars across the globe, he has authored several articles and papers published in various journals such as the IBA, Asia-MENA, Lexis Nexis and IFLR. Ranked by most of the leading directories like Chambers and Partners, IFLR and Asia Law, he received the 40 EU-India Business Leader 2019 award at the European Parliament in Brussels. Mr. Choudhary is often quoted for his views on legal matters relating to Myanmar by several Myanmar and international newspapers. He holds a Master of Laws (LL.M.) in Business and Finance Law from the George Washington University Law School, Washington DC.

Md. Shakhawat Chowdhury, Associate at DFDL in Bangladesh, brings over 10 years of experience in litigation and legal advisory, with a focus on corporate and commercial matters, shipping, taxation, anti-corruption, judicial review, intellectual property, banking and finance, industrial and property law, as well as cross-border alternative dispute resolution.

He holds a postgraduate degree with a specialization in international arbitration, environmental and climate change law.

He is an Advocate enrolled with the Bangladesh Bar Council and actively contributes to the publication of local case law reports.

Yancy Cottrill is currently working as an attorney in Williston, North Dakota. He previously worked as an attorney in the Ulaanbaatar office of Anderson & Anderson LLP. He is admitted to the New York Bar and the State Bar Association of North Dakota. He 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, current events in Mongolian arbitration, and investment arbitration in Bosnia & Herzegovina. Mr. Cottrill has legal experience in the post-communist emerging markets working and studying in Russia, Ukraine, Hungary, and Bosnia & Herzegovina. He also served four years as a staff attorney for the Congress of the Federated States of Micronesia.

Bounyasith Daopasith received his Bachelor Law from the National University of Laos and a Master of International Trade and Business from the Nalsar University of Law in Hyderabad, India. He is currently a Legal Adviser with DFDL (Lao) Sole Co. Ltd where he focuses his practice on corporate and commercial law, employment law, real estate, and dispute resolution. As an experienced practitioner having advised on two major proposed listings on the Lao Stock Exchange, he advises on securitization and stock market regulations. Bounyasith Daopasith also has considerable experience in advising on real estate investments in the tourism and retail sectors.

Kabir Duggal is an attorney in Arnold and Porter's New York office focusing on international arbitration and public international law matters, serving both as arbitrator and mediator. He is recognized as a "Chartered Arbitrator" (the highest ranking for arbitrators) by both the Chartered Institute of Arbitrators and the Asian Institute of Alternative Dispute Resolution. He also frequently serves as an expert on international arbitration and public international law matters. Dr. Duggal is also a Lecturer-in-Law at Columbia Law School, an adjunct Professor at Fordham Law School, and a Course Director and a Faculty Member for the Columbia Law School-Chartered Institute of Arbitrators Comprehensive Course on International Arbitration. He also acts as a Consultant for the United Nations Office of the High Representative for Least Developed Countries (UN-OHRLLS) on the creation of a novel "Investment Support Program." Dr. Duggal works closely with the U.S. Department of Commerce's Commercial Law Development Program

(CLDP) as an expert and has undertaken capacity-building workshops in Georgia, Kosovo, Bosnia & Herzegovina. He has also conducted training and capacity-building sessions for several Governments including Colombia, Saudi Arabia, Myanmar, India, Philippines among others on public international law and dispute resolution matters. He also serves on the Federal Republic of Somalia's New York Convention Task Force as well as the WTO Negotiating Team (International Board). Dr. Duggal has published over 60 articles and has spoken at over 300 arbitration events all over the world. He is a passionate advocate for diversity, equity, and inclusion issues and frequently writes and speaks on these issues. Dr. Duggal is the Co-Founder of REAL (Racial Equality for Arbitration Lawyers), a non-profit seeking to create greater representation in international arbitration. He is a graduate of the University of Mumbai, University of Oxford (DHL-Times of India Scholar), NYU School of Law (Hauser Global Scholar), Leiden Law School (2019 CEPANI Academic Prize), and is currently pursuing an SJD Degree from Harvard Law School. Dr. Duggal is admitted to practice law in New York, District of Columbia, England & Wales (as a Barrister), and in India.

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 Associate 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 widely 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).

Kyaw Kyaw Han is a legal adviser in DFDL Myanmar and is based in Yangon. His practice focuses on aviation, compliance due diligence, corporate law, and land title due diligence. He holds an LL. B from Dagon University, Myanmar, a Diploma of Business Law from Yangon

University, Myanmar, and a Diploma of Human Resource Management IQN (UK), along with a Diploma of Corporate & Business Law from the City of Oxford College (UK). He is currently a higher-grade pleader and is licensed to practice in subordinate courts, such as district and township courts. He is also an accredited arbitrator/mediator with the Myanmar International Arbitration Centre (MIAC) and an associate member of the Myanmar Arbitration Centre (MAC) established by the Union of Myanmar Federal Chambers of Commerce (UMFCCI). In addition, he is a certified representative for Trademark, Patent, and Industrial Design registration.

Emadul Hasan, Trainee at DFDL in Bangladesh, obtained his LL.B. and LL.M. degrees from the University of Barishal in 2022 and 2023, respectively. He worked as an apprentice lawyer for six months at the Dhaka Judge Court, where he was involved in various matters relating to civil, criminal, company, and tax law.

He has acquired experience in handling litigations, dispute resolution, company matters, and regulatory compliance at DFDL. He is currently engaged in several ongoing arbitration proceedings, litigation matters, and corporate advisory work.

In addition to advising and assisting with company incorporations, licensing, and employment-related issues, he is involved in conducting land vetting and legal due diligence.

Rupert Haw is a past Country Managing Director and a consultant of DFDL's Lao PDR practice. He has outstanding experience in telecommunications, corporate finance and M&As in Southeast 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.

Michael Hwang, S.C. currently practises as an international arbitrator and mediator based in Singapore. He sits as arbitrator in domestic and

international disputes, including investment treaty disputes and sports arbitrations, under a wide variety of arbitral rules. He was the Chief Justice of the Dubai International Financial Centre Courts from 2010 to 2018 (having served as Deputy Chief Justice since 2005). His other past appointments include: Vice Chairman of the ICC International Court of Arbitration, Vice President of the International Council for Commercial Arbitration, member of the Permanent Court of Arbitration, Court Member of the London Court of International Arbitration, panel member on the International Centre for Settlement of Investment Disputes Panel, and Trustee of the Dubai International Arbitration Centre. He has also served as a United Nations Compensation Commissioner, Vice-Chair of the International Bar Association's Arbitration Committee, as well as Council Member of International Council of Arbitration for Sport. He has been Singapore's Non-Resident Ambassador to Switzerland and Argentina, a Judicial Commissioner (fixed-term High Court Judge) of the Supreme Court of Singapore, and President of the Law Society of Singapore. He was educated at undergraduate and postgraduate levels at Oxford University and has been conferred an Honorary LLD by the University of Sydney.

Karan Joseph is a Partner in the Dispute Resolution practice at Shardul Amarchand Mangaldas & Co. In addition to a robust arbitration practice, he regularly advises on matters relating to Constitutional Law, Commercial Law, Technology and Media Disputes. He appears frequently before the High Court of Karnataka, in addition to appearing before Courts, statutory Tribunals, quasi-judicial authorities and Arbitral Tribunals across jurisdictions. An alumnus of Columbia Law School (LL.M.), he is a Registered Foreign Lawyer with the Singapore International Commercial Court and was recently recognised by the Indian Business Law Journal as one of India's Future Legal Leaders – 2023. He contributes frequently to national and international publications on Arbitration, developments in domestic law, and speaks regularly at seminars and conferences in India and abroad, on invitation. As part of his active *pro bono* practice, he represents several minor victims of sexual assault in proceedings seeking the termination of their pregnancies. He is an Adjunct Faculty at the National School of Journalism and Public Discourse, where he teaches a post graduate course on Law and Media. He is also the Managing Trustee of the General K.S. Thimayya Memorial Trust, that hosts India's premium annual lecture series.

Rizki Karim is a partner of KarimSyah Law Firm. His primary interest lies in dispute resolution, both in litigation and arbitration. He has been actively

involved in arbitrations before many different arbitral institutions, such as SIAC, ICC, AAA-ICDR, BANI, BAKTI, BAPMI, and LAPS-SJK. On the litigation side, he has handled a variety of cases, ranging from complex commercial litigation, criminal investigation, as well as tax litigation.

He obtained his law degree from Universitas Gadjah Mada. Prior to joining KarimSyah, he had experiences as trainees in prominent law firms in Singapore. In his spare time, He frequently coaches mooting teams from universities across Indonesia, specifically for arbitration-focused competitions such as the Vis Moot. He also has co-founded the Indonesia Young Arbitration Community.

Rizvi Abdullah Khan, Junior Associate at DFDL in Bangladesh, completed his LL.B. (Hons.) from the University of London in 2022 and has been enrolled as an Advocate with the Bangladesh Bar Council since 2024. With over two years of legal experience in Bangladesh, he has developed a strong foundation in corporate and commercial law, with a particular focus on company matters, regulatory compliance, and transactional work.

At DFDL, he is actively involved in advising both domestic and international clients on a wide range of matters, including infrastructure and power projects, mergers and acquisitions, employment law, project financing, and regulatory compliance. His work encompasses drafting and negotiating complex transaction documents, conducting legal due diligence, and providing strategic advice on structuring and implementing cross-border transactions. He is currently involved in multiple sell-side and buy-side due diligence exercises, as well as various financing transactions.

Mealy Khieu is a Senior Partner of Sok Siphana & Associates. Ms. Khieu covers IP, commercial arbitration, commercial mediation, and corporate concerns. She is the founding member of the National Commercial Arbitration Center (NCAC) and was elected as the first Executive Board member. In March 2019, she was elected as Vice President of NCAC. She holds a dual Master, University Libre de Brussels (ULB) and from Royal University of Law and Economics in collaboration with University of Montreal, University of Geneva and French Cooperation Center, Phnom Penh. She holds a Bachelor of Law, National Institute of Management and Royal University of Law and Economics, Phnom Penh and is the registered lawyer with the Bar Association of the Kingdom of Cambodia. She is also an authorized Trademark Agent recognized by the Ministry of Commerce of Cambodia. She is a registered mediator with NCAC and is recognized as a commercial mediator by the CEDR.

Kap-You (Kevin) Kim is a senior founding partner of Peter & Kim and heads the firm's Seoul office. Previously, he was a senior partner at Bae, Kim & Lee LLC, where he worked for over three decades in various roles, including as the co-founder and head of the International Arbitration Practice and the head of the Domestic and International Disputes Group. Mr. Kim has acted as counsel, presiding arbitrator, co-arbitrator, and sole arbitrator in close to 300 international arbitrations under all the major institutional rules. His practice involves representing both states and corporations in international disputes across various fora and arising from a wide range of industries. He is a Vice President of the ICC Court, Advisory Board Member of the International Council for Commercial Arbitration (ICCA), Council Member of the American Arbitration Association, and Chairman of the Korean Commercial Arbitration Board's (KCAB) International Arbitration Committee. He also holds a number of other prominent positions, including that of a member of the Panel of Arbitrators at ICSID, and an editorial board member of the *Global Arbitration Review*. He served as the Secretary-General of the ICCA from 2010 to 2014, a court member in the LCIA Court from 2007 to 2012, and the Vice-Chair of the IBA Arbitration Committee from 2008 to 2010.

Mr. Kim is a graduate of the Seoul National University College of Law (LLB, LLM) and Harvard Law School (LLM). He is a member of the Korean and Seoul Bar Association and is also admitted to practice law in the state of New York. He has authored a number of publications on international law, international arbitration among other areas. He is conversant in Korean (native), English (fluent), and Japanese (conversational).

Anna Kirk is a commercial arbitrator, adjudicator and barrister, specialising in international arbitration and public international law. Dr. Kirk is New Zealand's member on the ICC International Court of Arbitration (2021–24) and sits on the Council of the Arbitrators' and Mediators' Institute of New Zealand. She is a Fellow of the Chartered Institute of Arbitrators. Dr. Kirk has been working in arbitration for over 15 years as counsel, arbitrator and tribunal secretary. She has significant experience in arbitrations under the ICC, UNCITRAL, ICSID, LCIA and SIAC Rules. Dr. Kirk practised in London before returning to New Zealand in 2011 to work with Sir David Williams KC.

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

Lauren Lindsay is a barrister and arbitrator based in the Asia-Pacific region. She acts as counsel in all forms of dispute resolution, including commercial litigation and arbitration, investment treaty disputes and in mediations. Ms. Lindsay also accepts appointments as arbitrator. She is dual-qualified in law and science, with particular expertise in disputes arising in the life sciences, insurance, ICT and renewables sectors. Ms. Lindsay is admitted to practice in New Zealand and England & Wales. She is ranked as a commercial litigator in Chambers & Partners, Legal 500 and Who's Who Legal. She is a Fellow of CIArb, ACICA and AMINZ. Ms. Lindsay is a bilingual French and English speaker. Prior to returning to the independent bar in 2019, she spent over seven years with a global law firm's international arbitration group in London.

Nicholas Lingard is a partner at Freshfields Bruckhaus Deringer in Singapore and the head of their International Arbitration group for Asia-Pacific. He is an experienced international arbitration counsel and advocate and leads one of the most active treaty arbitration practices in Asia, representing both investors and states, in high-profile, politically complex cases around Asia and the world. Mr. Lingard represents clients in commercial disputes across a variety of industries, under all the major arbitral rules, including ICC, SIAC, UNCITRAL, HKIAC, AAA and NAI, and under all major systems of law. He provides public international law advice to sovereign and private clients, and accepts occasional appointments as arbitrator.

Mr. Lingard is recognised as a leading international arbitration practitioner by all the major directories. He is ranked in Band 1 for international arbitration in Singapore by Chambers & Partners and as a Band 1 "Leading Individual" for arbitration in Singapore by Legal 500.

A former law clerk to the Chief Justice of Australia, he was educated at the University of Queensland, where he received University Medals in law and Japanese, and Harvard Law School, where he was a Frank Knox Memorial Fellow. He is admitted to practise in New York and New South Wales, Australia. Mr. Lingard speaks English and Japanese and was appointed to the Singapore International Arbitration Centre Users Council in September 2015. He is a Registered Foreign Lawyer entitled to appear before the Singapore International Commercial Court.

Karen Mills practiced in Indonesia for over 40 years and was one of the Founders of the KarimSyah Law Firm in Jakarta. She was a Chartered Arbitrator, Fellow of the Chartered Institute of Arbitrators ("CIArb") and of the Singapore and Hong Kong Institutes, and Founder and former Co-

chair of the Indonesian Chapter of CIArb and member of the Main Committee of the East Asia Branch of CIArb. She was 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 served as a Domain Name Panelist under ADNDRC, Hong Kong, Beijing and Seoul. Ms. Mills sat on the Investor-State Mediation Taskforce, the First Appointing Authority of the Chinese-European Arbitration Centre, the Advisory Council of ArbitralWomen, the Board of Directors of the Vis East Moot Competition, and the Editorial Board of the Journal of World Energy Law and Business, among others. She sat as arbitrator throughout Asia and the Pacific, as well as in the US, and successfully served 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 included investor-state disputes, 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, and coach and arbitrator of the Vis East and other Moot competitions, she taught, spoke and wrote extensively on arbitration and other matters around the world, and published well over 150 papers in international professional books and journals.

Samiha Mobin Binta, Trainee at DFDL in Bangladesh, obtained her (LL.B.) degree from the University of London in 2023. She was called to the Bar of England and Wales in 2024, after completing the bar training course at University of the West of England, United Kingdom.

She has acquired experience in dealing with company matters, regulatory compliance, and dispute resolution. At DFDL, she is engaged in drafting share transfer agreements, and provides advisory support on various matters including arbitration, employment, license and permits-related issues.

She is also involved in conducting due diligence in relation to company incorporations, mergers, and acquisitions.

Cristina A. Montes is a lawyer who was admitted to the practice of law in the Philippines in 2007. She is a partner at the Hildawa & Montes Law Offices and is a member of the Philippine Dispute Resolution Center, Inc. (PDRCI). She is also currently a professional lecturer at the San Beda

Graduate School of Law and the University of Asia and the Pacific Institute of Law. Previously, she was a law clerk for then-Associate Justice Conchita Carpio-Morales of the Philippine Supreme Court (2005-2009), a research assistant at the University of the Philippines Law Center Institute of International Legal Studies (1998-2001), and a Legislative Staff Officer at the House of Representatives Committee on Economic Affairs (1997). She obtained her A.B. from the University of Asia and the Pacific in 1997, her Ll.B. at the University of the Philippines in 2005, and her *Master en Derecho de la Globalización e Integración Social* from the Universidad de Navarra in Pamplona, Spain. In 2022, she obtained her Doctor of Juridical Science degree from the San Beda University Graduaate School of Law.

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

Kristy Newby has 20 years' experience practicing as a solicitor in the Lao PDR, Vietnam and Australia, 15 years being based in SE Asia. In both Laos and Vietnam, Ms. Newby has advised private and public companies, financial institutions and investors on corporate and commercial matters, with a focus on mergers and acquisitions and foreign direct investment. She also leads teams on the development and financing of energy projects, advising sponsors and lenders on a number of cross-border power projects. Additionally, she has substantial experience advising potential investors and existing operators in the mining sector in Lao PDR.

Ms. Newby is recognized in Laos as a "Leading Individual" in Legal 500 (Asia Pacific), an "Elite Practitioner" and Female Lawyer of the Year, Lao PDR in AsiaLaw Profiles, a "Band 1 Practitioner" in Chambers Asia Pacific and "Highly Regarded" by IFLR1000.

Shahwar Nizam is a Partner and the Managing Director of DFDL Bangladesh. With over 25 years of experience, he is widely recognized as one of Dhaka's leading lawyers in the corporate and finance sectors.

He has advised major local and international clients across Bangladesh, Singapore, and the UK on a broad range of matters, including banking and finance, projects, mergers and acquisitions, and general corporate issues. His practice also encompasses significant experience in international arbitration and litigation.

Mr. Nizam has developed deep industry knowledge in energy, infrastructure, finance, telecom, technology, retail, and distribution. He

actively promotes investment opportunities in Bangladesh, particularly in the energy, infrastructure, and technology sectors, and has played a pivotal role in guiding foreign investors through their market entry and establishment in the country.

He is qualified to practice in both England & Wales and Bangladesh, and holds law degrees from Sheffield University and the University of London. He is also a member of the Dhaka Bar Association.

Shinji Ogawa acts as case manager of the Japan Commercial Arbitration Association (JCAA). He has managed over 100 international and domestic arbitration cases.

Toontip Palakawong is an associate in the litigation and arbitration practice group at Weerawong C&P. His areas of expertise include contractual dispute, criminal, arbitration, labour, real estate, airline, IT, intellectual property. His expertise in labour extends to the advisory work which enables clients to restructure their organization efficiently as well as investigation of alleged wrongdoings. Toontip Palakawong also has experience in rehabilitation and insolvency. He is a Thai Barrister-at-Law and obtained an LL.B. degree from Thammasat University and an LL.M. degree from the London School of Economics and Political Science, UK.

Custodio O. Parlade was admitted to the practice of law in the Philippines in 1960. He was a Trustee of the Philippine Institute of Construction Arbitrators and Mediators, Inc., and the Chairman of its Committee Revising Construction Industry Arbitration Commission (CIAC) Rules of Procedure. He was also a regular lecturer on domestic and international commercial arbitration in the Mandatory Continuing Legal Education (MCLE) seminars for the University of the Philippines Institute of Judicial Administration, Arellano University, Ateneo de Manila University, the Integrated Bar of the Philippines, and other MCLE providers. He was included in the *Who's Who* List of International Arbitrators as one of three (3) arbitrators from the Philippines in 2008 and then in the Global Arbitration Review 2016. He was an accredited arbitrator of the CIAC. Outside of the CIAC he arbitrated several cases under the rules of the International Chamber of Commerce (ICC), and under the rules of the PDRCI. Until 2014, he was the representative of ICC Philippines to the ICC International Court of Arbitration. He was included in the list of arbitrators of the BANI Arbitration Center (Indonesia), the Singapore International Arbitration Centre, and the Kuala Lumpur Regional Arbitration Center. He authored several publications on arbitration.

Linna Seangly is an associate of Sok Siphana & Associates. She advises foreign and domestic investors on Cambodian commercial and construction arbitration cases and assists her supervisors in litigation-related proceedings. Ms. Seangly has extensive experience in conducting legal research and analysis, and in drafting relevant submissions in arbitration proceedings before the National Commercial Arbitration Centre of Cambodia (NCAC). She holds a dual degree in English Based Bachelor of Law and International Relations from the Royal University of Law and Economics. She was ranked among the top 5 students in her class and was selected to defend her thesis for the International Relations degree. She was a runner-up candidate in the Jessup Mock Moot Court Competition hosted by the Royal University of Law and Economics. She advanced to the semi-final round in the Commercial Arbitration Moot Competition organized by the National Commercial Arbitration Centre. She was also selected to represent her school in the Tun Suffian Moot Court Competition in Malaysia. She has successfully completed her Commercial Arbitration Skills Training Course organized by the National Commercial Arbitration Centre and is on her way to becoming a qualified registered arbitrator in Cambodia.

Ramesh Selvaraj is a Partner in the Litigation and Dispute Resolution department of Allen & Gledhill LLP and is the Co-Deputy Head of the Firm's International Arbitration Practice. 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. He is also presently the Co-Chair of the Young Singapore International Arbitration Centre Committee formed under the auspices of the Singapore International Arbitration Centre.

Phatsawat Siwawej, a Partner in the Litigation and Arbitration Practice Group at Weerawong C&P, the former Bangkok office of White & Case, in Thailand, he specializes in all aspects of commercial dispute resolution, including alternative dispute resolution (ADR). A Member of The Chartered Institute of Arbitrators (MCIArb), he has amassed a wealth of experience in advising both local and international clients on an array of litigation and arbitration disputes, emerging as an effective litigator in numerous high-profile cases. His proficiency encompasses diverse areas of Thai law such as construction, class action lawsuits, project development, joint ventures, hospitality and real estate, intellectual property, employment, and other commercial disputes. He is entrusted to handle the strategic cases of several

leading Thai conglomerates. Mr. Siwawej is also a guest lecturer at top-tier national law schools. He has authored articles on arbitration in Thailand in several leading international legal publications, and has been recognized by the Asia Super 50 Disputes Lawyers edition of Asian Legal Business, The Legal 500 as a Rising Star, and Benchmark Litigation as a Future Star and Top 40 Under 40 in Litigation. He holds an LL.M. from the prestigious London School of Economics and Political Science in the UK.

Billie Jean Slott is currently an Assistant Professor of Law at American University of Phnom Penh and Director of Student Affairs. Formerly she was the Administrative Director of the Proasia Legal Solutions Office of Counsel to the firm of Sciaroni and Associates, located in Phnom Penh. Her areas of practice are litigation, arbitration, oil and gas, 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 and is an advisor to the NCAC. 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 twelve years.

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

Suphamit Watnoppakhun, an Associate in the litigation and arbitration practice group at Weerawong C&P, the former Bangkok office of White & Case, has distinguished himself in the field of arbitration. Graduating with an LL.B. (First Class Honors) from Chulalongkorn University and attaining professional licenses as a Lawyer and Notarial Services Attorney from the Lawyers Council under the Royal Patronage, both in 2021, Mr. Watnoppkhun has extensive experience representing clients in arbitral cases at premier institutions like the Thai Arbitration Institute (TAI) and the Thailand Arbitration Center (THAC), as well as handling the subsequent arbitration-related court proceedings. His expertise spans commercial law, domestic and international arbitration, and criminal law, allowing him to successfully represent clients from diverse industries in complex dispute resolution matters. He also serves as a trusted advisor to major Chinese clients across a broad spectrum of industries, skillfully combining his deep legal knowledge with hands-on commercial insights to deliver exceptional results.

INTRODUCTION

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 and mediation have come to play an increasingly important role.

GROWTH

Arbitration is clearly on the rise in Asia today. Whereas thirty 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. Thirty-eight years later (2023) the number of cases topped 5237. (See http://www.cietac.org/index.php?m=Page&a=index&id=40&l=en). In 1985 the number of cases referred to the Hong Kong International Arbitration Centre ("HKIAC") was 9. In 2023, the number was 500 (of those cases, 281 were arbitrations, 10 were mediations and 209 were domain name disputes). 75.1% of all arbitration cases submitted to HKIAC in 2018 were international in nature, i.e. at least one party was not from Hong Kong (89.7% of the administered arbitrations filed in 2023 were international cases). 37.7% of all arbitration cases submitted to HKIAC in 2023 involved no Hong Kong parties and 9.6% involved no Asian parties. [See http://www.hkiac.org/about-us/statistics].

Over the past thirty 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.

ARBITRATION INSTITUTIONS

Hand in hand with the 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 Center("THAC"), the Singapore International Arbitration Centre ("SIAC") and the Asian International Arbitration Centre (AIAC) in Malaysia 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 49 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.

Hong Kong has also become a pioneer with the 2019 signing of the "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region" which has made Hong Kong the only jurisdiction to have interim measures arrangement with Mainland courts for interim relief in arbitrations.

Furthermore, on 22 June 2022, the Supreme People's Court of the People's Republic of China (the "SPC") made a decision that the HKIAC is the first arbitral institution outside the Mainland to be included in the "One-Stop" Platform for Diversified International Commercial Dispute Resolution (the "One-Stop Platform") of the China International Commercial Court ("CICC"). This is expected to improve the efficiency, transparency, and predictability of outcomes in the HKIAC-based arbitrations.

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 with some minor modifications (*section 3(1), IAA*), while domestic arbitrations continue to be governed by the earlier Arbitration Act (AA). However, following its revision in 2001, the AA has similarly adopted many provisions from the UNCITRAL Model Arbitration Law, with adjustments to give the Singapore courts a greater degree of supervision over domestic arbitrations.

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 (2003), Republic of Korea (2016), Malaysia (2005), Mongolia (2017), Myanmar (2016), the Philippines (2004), India (1996), South Africa (2017), Fiji (2017), Manitoba (2017) 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. However, with the growth of China's trade, some say that China is eager to show to the world that it respects the essence of freedom of contract so that a healthy development of international trade could flourish for the benefit of all.

In saying this, 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, Taiwan and Thailand, 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. Hong Kong (2013) and Singapore (2017) have now enacted standalone legislation for mediation to cater to the expanding reach of mediation within the community.

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 http://www.newyorkconvention.org/countries.) 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, nevertheless as countries develop further and knowledge becomes widely accepted, improvements are bound to occur for the benefit of all.

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 loose-leaf 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.

Christopher To
Michael J. Moser