

CIArb's Asia-Pacific Conference 2011

'DRAFTING ARBITRATION CLAUSES TO MINIMISE COSTS AND DELAYS IN INTERNATIONAL COMMERCIAL ARBITRATION:

AN ASIA-PACIFIC PERSPECTIVE'

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INTRODUCTION

Concerns about growing delays and (especially) costs in International Commercial Arbitration (ICA) have spread from West to East:¹

Advantages of ICA over Cross-Border Litigation ('East' vs 'West')

Response: 'highly relevant' or 'significant' (* Statistically significant at 99% confidence level)	Region of Practice	
	East (Ali study '06)	West (CBU '94)
Forum's neutrality	88 (%)	78 (%)
Forum's expertise	83	76
Results more predictable	36	42
Voluntary compliance*	42	24
Treaties ensure compliance abroad	85	69
Confidential procedure*	76	56
Limited discovery	47	56
No appeal	64	58
Procedure less costly	36	20
Less time consuming*	57	35
More amicable	52	35

¹ Adapted from: Ali, Shahla, 'Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West' (2009) 28(4) *Review of Litigation* 799-844, at p833 (and her *RESOLVING DISPUTES IN THE ASIA PACIFIC REGION*, Routledge, 2010, at <http://www.amazon.com/Resolving-Disputes-Asia-Pacific-Region-International/dp/0415583721>); compare Buhring-Uhle, Christian et al, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS*, Kluwer, 2nd ed 2006.

This is also a major and longer-standing concern about Japanese corporations, for example, which explains why they still do not contest many ICA cases (even at the JCAA) despite increasingly incorporating arbitration clauses in cross-border contracts.² The ICC, which has a growing Asia-Pacific caseload, has produced a useful Report suggesting various means to manage costs and delays.³ Yet the ICC distinguishes itself as a 'high-quality, high-cost' arbitral venue, evidenced eg by the hands-on service provided by its Secretariat and its 'Court of Arbitration'. My presentation therefore proposes measures that are often more radical, and which may be particularly suited for ICA involving Australian and Asian parties.

INNOVATIONS IN DRAFTING ARBITRATION CLAUSES

- i. Chose ad hoc arbitration only for very large cases, now that (regional) arbitration institutions often offer similar Rules, experience and charges.
- ii. Mostly chose a sole arbitrator:
 - a. but get the institution to provide a list with biographical information, eg statistics on past cases arbitrated and underway, sample/redacted awards, other experience, substantive law and sector knowledge as well as procedural law expertise, familiarity with foreign languages and legal/cultures, willingness to charge fixed fees or time charge caps and to accept payment in foreign currencies; or
 - b. allow institution to choose number depending on complexity of eventual dispute (see eg ACICA Arbitration Rules); and/or
 - c. create internal/arbitral appeals mechanism to a different (sole) arbitrator even for serious error of law, but eg only on documents (ie no hearings).
- iii. Agree that each party and the institution will propose (at least) a variety of persons as sole (or presiding) arbitrator:
 - a. not just (ex-)lawyers or ex-judges, but also law professors with relevant experience, and non-jurists unless the dispute overwhelmingly involves legal rather than technical issues;
 - b. including 'next generation' (40s-50s) arbitrators;
 - c. arbitrators willing to waive or diminish any contractual/Rules-based immunities for negligence etc in conducting an arbitration (although this may make them more cautious / slow, depending on the disputes at issue).
- iv. Maximise tribunal powers to order interim measures, including eg ex parte preliminary orders (unless clearly prohibited, as now in Australia).
- v. Limit documentation in arbitral proceedings:

² Kitagawa, Toshimitsu and Nottage, Luke R., 'Globalization of Japanese Corporations and the Development of Corporate Legal Departments: Problems and Prospects', Sydney Law School Research Paper No. 06/46; in RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA, William Alford, ed., Harvard, 2007, at <http://ssrn.com/abstract=837906>

³ Greenberg, Simon, 'ICC Arbitration in Australia' in INTERNATIONAL ARBITRATION IN AUSTRALIA, Luke Nottage and Richard Garnett, eds, Federation Press, 2010, at pp 122-3.

- a. Adopt (or at least require consideration of) IBA Rules on Evidence-Taking (revised 2010);
- b. Possibly even stricter at least re certain defined/agreed issues, eg
 - i. 'no discovery' (ACICA Expedited Rules);
 - ii. joint expert witness reports (or at least conclaves / 'hot-tubs'), otherwise require tribunal (not party) appointment if one party requests expert evidence;
 - iii. no or only one or 'exceptional' oral hearings (and then by telephone conference, unless parties want internet-based video-conferencing).
- vi. Applicable substantive law:
 - a. Consider a simpler, tailored, neutral set of norms like the UNIDROIT Principles of International Commercial Contracts (at least to supplement the application of a specified national contract law governing the underlying dispute).
 - b. Especially after or during dispute, require tribunal to give the parties the opportunity to specify that some narrowly defined issues should be decided based on general fairness (et aequo et bono) rather than any system of law, or only with 'summary reasons' or 'without any reasons'.
- vii. Require (or require tribunal to consider) partial awards eg re:
 - a. Applicable law(s);
 - b. Quantum of compensation (even first!) vs liability;
 - c. Interpretation of limitation of liability clauses.
- viii. Authorise tribunal (in writing) to facilitate settlement during proceedings (Arb-Med):
 - a. Only in open session; unless
 - b. by further written agreement (possibly only after getting further legal advice), parties allow ex parte meetings (caucusing) – eg with parties from China or Japan⁴ (much less likely: those from HK, Singapore, Europe – where caucusing uncommon).
- ix. Set strict but realistic time limits for award (from date tribunal constituted).
- x. Party costs:
 - a. Consider adopting 'American rule' (also found eg in Japanese law) where party costs born by each side (even if win) – deters claims.
 - b. If instead parties maintain the 'English rule' (more common now in ICA), require arbitrators to award:
 - i. only 'reasonable' costs of winning party's lawyers based on itemised bills;
 - ii. including in-house counsel costs (typically cheaper than outside counsel) – this will focus the parties' minds on (minimising) the real costs of arbitration.
 - c. Negotiate with outside lawyers to stage and cap at least parts of their legal work – including eg significant incentive for settlement.

⁴ See http://blogs.usyd.edu.au/japaneselaw/2009/07/arbmed_and_new_international_c_1.html and Nottage/Garnett in *ibid*, pp 179-84.

- xi. Opt-in (if necessary) to allow 'compound interest' awards; specify rate(s).
- xii. Incorporate strict confidentiality requirements (as under ACICA Arbitration Rules⁵), so the tribunal can 'get on with the job' without being overly concerned about public scrutiny of findings.
- xiii. Specify overarching general principles for conduct of the arbitration: eg that '(i) arbitration is an *efficient*, impartial, enforceable and *timely* method by which to resolve commercial disputes; and (ii) awards are intended to provide *certainty and finality*'.⁶

CONCLUSION

In determining the seat of the arbitration, apart from usual considerations such as geographical convenience and critical mass in arbitration caseload, parties and their legal advisors should determine whether the *lex arbitri* promotes or at least allows these and other measures to minimise costs and delays in ICA.⁷

⁵ Cf also Michael Hwang SC's 'Model Procedural Order on Confidentiality', via <http://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=383>.

⁶ International Arbitration Act (Cth), as amended 2010, s39(2)(b); see also the ACICA Expedited Arbitration Rules.

⁷ See generally eg Greenberg, Simon et al, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE, CUP, 2011; Garnett, Richard and Nottage, Luke R., 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?' (September 14, 2010) Asian International Arbitration Journal, Forthcoming; Sydney Law School Research Paper No. 10/88, at <http://ssrn.com/abstract=1676604>.