Commercial Arbitration in the ASEAN Region Poised to Increase Confidence in Foreign Investment

By Alex Larkin

ASEAN, the Association of Southeast Asian Nations, has been progressing toward achieving its heightened goal of an integrated ASEAN Economic Community (AEC). A significant part of this effort has been an increased focus on commercial arbitration as a means of resolving commercial disputes. This continuing development, as an alternative to the disparate judicial systems among ASEAN member states, brings with it a measure of increasing confidence that foreign investors in these states can avail themselves of certain investment protections.

Of the ten ASEAN member states, several consistently rank poorly in annual surveys related to civil justice and enforcement of contracts in local judicial systems. The World Justice Project (WJP) Rule of Law Index 2015, which surveyed 102 countries, ranked ASEAN members Indonesia at 83, Myanmar at 94, Vietnam at 76, and Cambodia dead last at 102 for civil justice according to such factors as freedom from corruption, accessibility and affordability of the civil justice system, and enforcement of judicial decisions. Likewise, the World Bank Group's Doing Business 2016 Report, which surveyed 189 economies, ranked Myanmar at 187 out of 189 economies, Cambodia at 174, Indonesia at 170, and the Philippines at 140 according to their ability to enforce contracts, with a focus on the efficiency of commercial court systems as measured by the procedures and time and costs to resolve commercial disputes.

In light of the domestic judicial environments, investors contemplating projects in ASEAN member states should consider whether their investments, in particular commercial contracts, can be effectively protected and enforced. Commercial arbitration is poised to increase that confidence in foreign investments in the region.

The ASEAN Comprehensive Investment Agreement

Of particular interest in the context of commercial disputes under the AEC has been the adoption of the ASEAN Comprehensive Investment Agreement (ACIA) by ASEAN member states. The ACIA includes commercial dispute resolution provisions that call for arbitration and resemble those found in many bilateral investment treaties. The provisions provide investors from ASEAN member states with investment projects in other ASEAN member states the option to seek resolution of commercial disputes against the host member state by way of commercial arbitration. Under the ACIA, ASEAN member states are obligated to ensure certain protections for covered investments, including those summarized in Table 1.

Under Article 4(a) of the ACIA, a covered investment is an investment made by an investor of one member state in the territory of another member state that has been admitted to the laws, regulations, and national policies of the member state where the investment was made and, where applicable, has been specifically approved in writing by the competent authority. Covered investments include every kind of asset owned or controlled by an investor, including, but not limited to, movable and immovable property, shares, stocks, intellectual property rights, and claims of money, among others.

The ACIA benefits apply to investors from member states, including both natural and legal persons, and extend protection to investors from outside ASEAN who set up a juridical entity in any ASEAN member state. The entity, however, cannot be merely a shell company established solely for the purpose of providing an investment vehicle and taking advantage of the ACIA investor protections.

Under Article 33 of the ACIA, where an investor with a covered investment has been deprived of any of the protections to which it is entitled by an ASEAN member state, such an investor has the right, after attempting to resolve the matter by consultation and negotiation, to submit a claim against the member state to the courts of the member state or to arbitration. For investors seeking to resolve disputes by arbitration, the ACIA permits a number of different options for arbitration venue, including:

- Kuala Lumpur Regional Centre for Arbitration (KLRCA) in Malaysia;
- International Centre for Settlement of Investment Disputes (ICSID); or
- other arbitration institutions agreed to by the parties, which may include the Singapore International Arbitration Centre, the Hong Kong International

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- Arbitration Centre, and the Vietnam International Arbitration Center, among others.

Once the arbitration tribunal has issued a final arbitration award, the host ASEAN member state must provide for enforcement of the award. Additionally, under Article 41 of ACIA, the award can be enforced in any country worldwide that is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

A Look at Arbitration in Selected ASEAN Member States

Aside from the ACIA, the ASEAN member states are in different stages of enacting and enabling local arbitration rules and arbitration institutions and legislation to enable judicial recognition and enforcement of arbitral awards. Leading in these areas are Singapore and Malaysia, both of which feature well-established and highly reputable international arbitration institutions—the Singapore International Arbitration Centre and the Kuala Lumpur Regional Centre for Arbitration, respectively. The following discusses the status of commercial arbitration in a number of developing ASEAN member states.

Vietnam founded the Vietnam International Arbitration Center (VIAC, www.viac.vn) in 1993, which has seven locations. In its first year in operation, the VIAC received six cases, and, to date, has heard about 1,000 cases, with 146 cases submitted in 2015. The arbitrators of the VIAC currently number about 150 and have extensive experience and expertise in many areas of commercial disputes, including foreign trade, maritime, banking and finance, construction, manufacturing, intellectual property, and more. Vietnam upgraded the country's Commercial Ordinance of 2003 to bring it in line with the Law on Commercial Arbitration of 2010. Having more than 20 years' of operating experience, the VIAC has a generally positive reputation and provides investors with a viable alternative to court action.

In Cambodia, the National Commercial Arbitration Centre (NCAC, www.ncac.org.kh), the country's sole commercial arbitration institution, officially launched in 2013. At its first annual general meeting in July 2014, it adopted the NCAC's arbitration rules and internal rules, marking a significant step towards full operation of the commercial dispute resolution body. The NCAC is the product of Cambodia's Law on Commercial Arbitration, enacted in 2006, and the related Sub-Decree on the Organization and Functioning of a National Arbitration Centre, passed in 2009. Cambodia also enacted a new Code of Civil Procedure in 2007, which includes key provisions on execution of arbitration decisions, both foreign and local, as well as provisions allowing courts to issue decisions for interim relief in the context of matters subject to arbitration proceedings. The NCAC, at the end of 2016, had received three cases, with one case being dropped and the other two yet to complete proceedings and arbitral awards. *See Arbitration Inching Forward*, Phnom Penh Post, Dec. 19, 2016, *available at* http://www.phnompenhpost.com/business/arbitration-inching-forward. While the NCAC is a new, yet-to-be-proven institution, it offers significant promise as an alternative dispute resolution body for Cambodia.

As with most arbitration rules, the arbitration rules of the NCAC (NCAC Rules) are flexible and allow disputing parties significant control over the arbitration proceedings. For example, the parties may determine the law to be applied to the substance of the dispute (Article 17) and may select the language of the proceedings (Article 18). The NCAC Rules allow parties to be represented by any person of their choice (Article 3) and prohibit *ex parte* communications between a party and an arbitrator, meaning communication between one party and an arbitrator without including the other party or simultaneously providing the same communication to the other party (Article 4.5).

Regarding arbitrators, the parties to a dispute may determine the number of arbitrators (Article 9) and may select the arbitrators, so long as the arbitrators meet qualification criteria set out by the NCAC (Article 10). While the details of the qualifications to act as an arbitrator are set forth in the internal rules of the NCAC, rather than in the NCAC Rules, generally parties may appoint an arbitrator who is registered with the NCAC or any person who has served as, or is registered as, a commercial arbitrator of any local or international commercial arbitration institution. The spirit of the NCAC Rules is in keeping with the desire to appoint arbitrators who have experience and expertise in the specific commercial area associated with the subject matter of the dispute. The aim, under the NCAC Rules, is to permit the parties to a dispute to appoint arbitrators who are well suited to resolve the dispute fairly and efficiently, in part based on the arbitrators' familiarity with the type of commercial activity underlying the dispute.

In January of 2016, Myanmar adopted its Arbitration Law (the "Arbitration Law"), which supersedes the country's seldom used Arbitration Act of 1944. The Arbitration Law is intended to bring Myanmar into compliance with its obligations as a party to the New York Convention. The Arbitration Law appears to be modeled after the UNCITRAL Model Law on International Commercial Arbitration of 1985. The Arbitration Law requires the courts of Myanmar to recognize and enforce arbitral awards, so long as none of the non-enforcement justifications under the New York Convention, discussed below, are present. To date, this author is not aware of any arbitration proceedings having been initiated under the Arbitration Law, nor aware of any arbitration institution in Myanmar.

Enforcing Foreign Arbitral Awards

One key advantage of arbitration, as compared to court action, in many jurisdictions, is the ability to enforce arbitral awards across borders. While arbitration proceedings are possible in the less-developed ASEAN states like Myanmar

Articles 5 and 6	Member states must treat investors and investments from other member states no less favorably than domestic investors and investments (Article 5) from any other Member state or non-member state (Article 6)	**Article 12**	Member states must accord to investors, concerning their entitled investments that suffer loss due to armed conflict, civil strife, or emergency and, non-discriminatory treatment with respect to restitution and compensation
Article 8	No requirement to appoint senior management of a particular nationality	**Article 13**	Capital, profits, dividends, and other transfers related to entitled investments can be freely moved into and out of each member state
Article 11	Member states must provide fair and equitable treatment to investors	**Article 14**	Covered investment cannot be expropriated or nationalized without fair compensation and due process

Table 1: ACIA – ASEAN Member State Obligations for Covered Investments

and Cambodia, as discussed above, parties often prefer to have commercial disputes, arising out of or in relation to investments and commercial activities in such jurisdictions, resolved by arbitration institutions in more developed jurisdictions, such as Singapore, Hong Kong, and Malaysia, followed by enforcement of the arbitration award back in the jurisdiction where the dispute arose. Such cross-border enforcement is made possible by treaty, specifically the New York Convention, as well as enabling legislation in the jurisdiction of enforcement.

Every ASEAN member state, as well as 148 other states, is a party to the New York Convention, thus providing the ability to enforce foreign arbitral awards in each member state, although not all of the member states have adopted enabling legislation providing clear procedures for seeking judicial recognition and enforcement of awards.

Given that arbitrators and arbitration institutions generally do not have enforcement power, it is necessary to present an arbitration award to a court of competent jurisdiction and seek a court order to recognize and enforce the award. Once such a court order has been obtained, enforcement is possible just as in the case of a court judgment following a civil trial. Importantly, when a court considers a request for an order to recognize and enforce an arbitral award, such consideration by a court is not an appeal of the arbitral award. The court will not review or reconsider the evidence or the legal arguments presented during arbitration proceedings, nor the reasoning of the arbitral tribunal in reaching its decision and preparing its award. Rather, the court will only consider issues related to notice, jurisdiction, scope of proceedings, and certain procedural aspects of the arbitration proceedings.

The grounds for a court to decline to issue an order to recognize and enforce a foreign arbitral award under the New York Convention are limited to the following:

1. The arbitration agreement is not valid under the law governing the underlying agreement;
2. Notice of arbitration is not properly served;
3. The award is given in relation to disputes or matters falling outside the scope of the arbitration agreement;
4. The composition of the arbitration tribunal is not in accordance with the arbitration agreement or the laws of the country where the arbitration is held;
5. The award is not final and binding under the laws of the country in which the award was given;
6. The subject matter of the arbitral proceedings is not capable of being settled by arbitration; or
7. Recognition or enforcement of the award would be contrary to public policy.

While enforcement of foreign arbitral awards is legally possible in all ASEAN member states, certain of the less-developed members have very few, if any, instances of successful enforcement. The author is not aware of any successful foreign arbitral award enforcements in Myanmar or the Lao PDR, and the courts of Cambodia, to date, have granted one request for enforcement. In March 2014, the Supreme Court of Cambodia confirmed the decision of the Cambodian Court of Appeal, which ruled in favor of recognition and enforcement of an arbitral award issued by the Korean Commercial Arbitration Board (KCAB) of Seoul, Republic of Korea.

The award issued by the KCAB resolved a commercial dispute among multiple Korean parties, who entered into contractual agreements in relation to the financing and development of a large-scale commercial and residential project in Phnom Penh, Cambodia. In May 2012, in accordance with Article 353 of the Code of Civil Procedure of Cambodia and Articles 6 and 7 of the Law on Approval and Implementation of the New York Convention, the prevailing party in the KCAB arbitration proceedings sought enforcement of the KCAB's award in Cambodia by filing a motion to the Court of Appeal of Cambodia. The Court of Appeal issued its decision, in favor of recognizing and enforcing the award, in April 2013. A non-prevailing party subsequently filed an appeal to the Supreme Court of Cambodia to seek reversal of the Court of Appeal's decision. Ultimately, that motion was rejected by the Supreme Court on grounds that the appeal to the Supreme Court was not timely, resulting in the prior Court of Appeal decision being a final judgment in favor of recognition and enforcement, a result that provides encouragement as to enforceability of foreign arbitration provisions in commercial contracts.

Reason for Optimism

The continuing efforts by ASEAN member states to develop commercial arbitration institutions and enact corresponding enabling legislation, in line with the New York Convention,

demonstrates a determined and concerted effort in that region of the world, to provide efficient and effective means of commercial dispute resolution, which is encouraging for foreign investors looking to enter ASEAN markets or expand existing operations in those markets, while ensuring protection of their investments. Much work remains to be done to accomplish the goals of the AEC and to ensure transparency of proceedings and enforceability of arbitration awards throughout much of the region. The recent and current trends, however, are very promising. ◆