New York State Bar Association International Section Seasonal Meeting
Seoul, Korea, April 23-24, 2018.

Panel Outline (June Yeum, Clyde & Co)

1. **PT First Media TBK v Astro Nusantara International BV (Singapore Court of Appeal, 2013)**
   - Considers the question of **whether the enforcing court can dis-apply the NYC grounds (for refusing enforcement) if the unsuccessful party failed to exercise its remedies to set aside the award at the seat.**

   - Singapore international arbitration law adopts the "choice of remedies" thinking – an unsuccessful party can choose to actively challenge an award at the seat (by filing a setting aside application), or to wait passively and challenge at a later juncture by refusing enforcement.

   - Hong Kong arbitration law is less clear, and suggests that the right to exercise choice of remedies must be exercised in good faith. If the unsuccessful party delays in setting aside the award in bad faith, the grounds for refusing enforcement could be dis-applied.

2. **BCY v BCZ (Singapore High Court, 2016)**
   - **What is the law governing an arbitration agreement in the absence of an express choice of law?**

   - The NYC provides a ground for refusing enforcement if the agreement is invalid under the applicable law. This is increasingly an issue given that commercial contracts do not often express the law governing an arbitration agreement.

   - Should the implied choice of law be the law of the substantive contract, or, as the language of the NYC suggests, the law of the seat? *BCY v BCZ* [2016] SGHC 249 suggests that the substantive governing law governs the arbitration agreement.

   - *Firstlink Investments v GT Payment* suggests that neutrality is paramount when parties are in dispute, and suggests that the law of the seat applies.

3. **Applicability of accepted IA standards in Asia**
   - **Most** jurisdictions in Asia are party to NYC: Singapore, Malaysia, Indonesia, India, China, Philippines, Thailand, Japan

   - **Latest** jurisdiction to join: Myanmar (2013)

   - Notable non-NYC jurisdiction: Taiwan

   - While most jurisdictions in Asia are NYC signatories, they differ in extent to which they comport with NYC standards and other accepted IA standards (e.g. Model Law):

     (a) Singapore (faithfully applies Model Law and NYC)

- International Arbitration Act grounds for setting aside and resisting enforcement are no more and no less than Model Law and NYC respectively.

- Courts faithfully apply these grounds and rarely set aside awards.

(b) India (law partly based on Model Law)

- India's Arbitration and Conciliation Act ("IACA") has two parts. Part I deals with Indian-seated arbitration. Part II deals with enforcement of foreign awards.

- Part I is based on Model Law 1985 to some extent. Key differences between Part I and Model Law:

Area of difference	**Model Law 1985**	**IACA**
Arbitration agreement and substantive claim before court	**Art 8(1):** "A **court** before which an action is brought in a matter which is the subject of an arbitration agreement **shall**, if a party so requests not later than when submitting his first statement on the substance of the dispute, **refer the parties to arbitration** unless it finds that the **agreement is null and void, inoperative or incapable of being performed**."	**Section 8(1):** "A **judicial authority**, before which an action is brought in a matter which is the subject of an arbitration agreement **shall**, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, **refer the parties to arbitration** unless it finds that ***prima facie* no valid arbitration agreement exists."**
Failure or impossibility to act	Article 14 • Arbitrator can be removed by the appointing authority if he is unable or fails to perform his functions • Decision of appointing authority is **not subject to appeal**	Section 14 • Arbitrator's mandate terminates if he is unable or fails to perform his functions • Decision to remove arbitrator can be appealed to the court
Setting aside of award	Article 34 - Award can be set aside for, among others, being in	Section 34 - Public policy defined as fraud/ corruption; "contravention with

	conflict with public policy	the **fundamental policy of Indian law**"; "conflict with the most basic **notions of morality or justice**". - For arbitrations that involve only Indian parties, award can be set aside for "**patent illegality** appearing on the face of the award"

(c) Indonesia (non-Model Law)

- Indonesia's arbitration laws are contained in Law No 30 of 1999 dated 12 Aug 1999 ("Indo Arbitration Law").

- Indonesia's arbitration law has its own grounds for setting aside award: award being based on forged documents, opposing party concealing important documents and award being obtained through fraud.

- Default language of arbitration is Indonesian.

- Default procedure: documents-only arbitration, unless parties agree otherwise.

4. Some peculiarities of IA practice in Asia

Interim relief

- **Singapore**

  - Court-ordered interim relief (freezing of assets; interim injunctions) available but generally only prior to constitution of tribunal.

  - After tribunal is constituted, parties are expected to seek interim relief from tribunal first.

  - Security for costs is only available from the arbitral tribunal.

  - Interim relief ordered by emergency arbitrator is enforceable.

- **Indonesia**:

  - No court-ordered interim relief as court not allowed to interfere at all once dispute is referred to arbitration: Article 3, 11, Indo Arbitration Law.

- Arbitral tribunal is permitted to grant interim relief, including attachment orders or sale of perishable goods, but there is no means to enforce such orders if they are not complied with.

- **India**

  - Court-ordered interim relief (e.g. preservation or custody of subject matter; securing the amount in dispute; injunction) available, even for foreign-seated arbitrations.

  - However, once arbitral tribunal has been constituted, the court shall not entertain interim relief application unless circumstances exist which "may not render [tribunal-ordered relief] efficacious".

  - Any tribunal-ordered interim relief can be directly enforced:

    Interim relief orders by the tribunal "shall be deemed to be an order of the Court for all purposes and shall be enforceable… in the same manner as if it were an order of the Court."

  - Emergency arbitrator ("EA")

    - Indian courts will not enforce EA award per se but may take the EA's decision into account when deciding whether to grant Court-ordered interim relief

    - *See*, Raffles Design International India Private Limited v Educomp Professional Education Limited (Delhi High Court refused to enforce an EA award and the court would have to re-consider the merits of the interim relief application).

    - *See*, Avitel Post Studioz Ltd v HSBC Pi Holdings (Mauritius Ltd) (Bombay High Court granted an interim mandatory injunction being cognizant of the petitioner's success before the EA).

5. Tactical considerations in India-related arbitrations

- Indian parties quite commonly resort to interlocutory motions before the Indian courts even after the dispute is referred to arbitration.

- The objective is to have a second (or third!) bite at the cherry in the event they cannot prevail in the arbitration.

- If the Indian court reaches a different conclusion from the tribunal, the losing party in the arbitration can prejudice any potential enforcement in India
- Example: a party can seek injunction from Indian court enjoining Singapore-seated arbitration for purported lack of jurisdiction. Even though the Tribunal has yet issued its decision on jurisdiction. *See*, GMR Energy Limited vs Doosan Power Systems India (Delhi High Court, 2017)

- To counter such tactics, one must carefully consider pre-empting such tactical play by for e.g., seeking anti-suit injunction from the tribunal or court of the seat.

Prepared by:

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June is a senior equity partner in the Singapore and New York offices of Clyde & Co, specializing in cross-border disputes. She has extensive experience representing clients in international commercial arbitration and represents blue-chip Asian and multinational companies in large-scale cross-border disputes and international arbitrations.

June has been consistently recognized as one of her field's top practitioners. She has been singled out by Legal 500 Asia Pacific 2018 for her "outstanding quality of work and commitment to clients" and is recognized as a recommended lawyer in the Singapore International Arbitration category. June has also been described as "one of a handful of go-to individuals in the field" (Chambers Asia Pacific 2016), "an exceptional advocate" (Chambers Global 2015), and "a standout practitioner and fierce negotiator" (Chambers Asia Pacific 2015). Chambers Asia Pacific ranked her in Band 1 for Dispute Resolution-Arbitration category in South Korea (2015).

June is an arbitrator/panellist appointed by the SIAC, ICDR/AAA, Indonesia BANI Arbitration Center, KCAB, and WIPO. June has also served as arbitrator in the SIAC arbitration matters.

June has extensive experience in cases involving equipment defect and non-payment in project disputes. Among her many wins, she successfully represented an Asian contractor in arbitration over installation of power equipment; won an arbitration claim on behalf of a US electronics company over warranty and defect issues; obtained an early favorable settlement in favor of a multinational consortium in relation to delay and disruption damages, and has handled a USD 102 million claim on behalf of a multinational contractor relating to a power plant project in India.

Shaun Leong

Senior Associate, Singapore

Upon graduating with First Class Honours, Shaun served as a judge of the Supreme Court of Singapore for five years, where he heard and decided applications in a wide range of complex commercial cases.

Shaun published seminal judgments on international arbitration law. The decisions include *Firstlink Investments v GT Payment* on the applicable law governing an arbitration agreement, and *Titan Unity*, endorsed by the Singapore Court of Appeal, on the threshold to determine the existence of a valid arbitration agreement.

As a practitioner, Shaun was substantially engaged in all aspects of legal and strategic work on a mass tort product liability case arising out of South Korea; including work on mass civil claims filed by victims, mediation, settlement and compensation, forensic investigations work in cooperation with Korean authorities, criminal defence work in relation to charged individuals, and strategic / legal advice re communications with media and political stakeholders.

Shaun represented one of the world's largest Japanese car manufacturers in a Japan Commercial Arbitration Association arbitration on a contractual termination dispute, where a Middle Eastern claimant alleged failure to assist with fulfilling licensing requirements, and alleged breach of warranties.

In 2017, Shaun successfully represented a global energy client in an SIAC Emergency Arbitration in obtaining emergency relief to protect and preserve the client's assets in a multi-million dollar commodities dispute.

Shaun is a contributing author to two leading texts, first the Singapore International Arbitration Law and Practice (2nd Ed), and second the Singapore Civil Procedure ("The White Book"), in charge of the chapters relating to international arbitration, Singapore arbitration and the SICC.

Gerald Leong

Associate, Singapore

After obtaining his Bachelor of Laws (with First Class honours) from the National University of Singapore, and his Master of Laws from Boston University in the US, Gerald was admitted to the Singapore Bar. As an Associate in Clasis LLC (Clyde & Co's associated Singapore firm), Gerald has full rights of audience before the Singapore Courts.

Gerald frequently represents prominent Korean-headquartered multinational corporations across various sectors, such as construction, trading, commodities, marine, technology and consumer electronics.

He is well versed in complex arbitration-related issues, such as multi-party/ multi-contract disputes, jurisdictional challenges, alter ego claims, ancillary relief, choice of law, and curial intervention. Having attended the SIAC Academy in 2017, Gerald is also familiar with some of the latest innovations in SIAC arbitral procedure, such as joinder, consolidation, expedited procedure and early dismissal of claims.

Gerald represented a Korean-headquartered contractor in an SIAC arbitration (with ancillary court proceedings in New York and India) against the employer arising out of a power plant project in India. The disputed issues included allegations of defects and enforceability of a corporate guarantee.

Gerald also represented a prominent Korean-headquartered contractor in arbitration against a Thai bank in relation to the enforcement of performance bonds.

In addition, Gerald has advised on a number of construction-related matters, including the viability of delay claims and termination risks.