IS THERE AN 'ASIAN' STYLE OF DISPUTE RESOLUTION?

Dispute Resolution in Asia edited by Michael Pryles (The Hague: Kluwer Law International, 1997) pages i–xx, 1–324. Price US$136.00 (hardcover). ISBN 90 411 0484 4.

The editor, Michael Pryles, and co-author, Veronica Taylor, concede that it is tempting to think there is an 'Asian' way to negotiate commercial agreements according to Asian values.[1] However, the rationale for this collection of papers is that the time has come to move beyond cultural stereotyping about commercial dispute resolution in Asia and to seek accurate data. It is the 'forensic' nature of this collection of papers on dispute resolution in 10 Asian countries (Australia, the People's Republic of China, Japan, Malaysia, the Philippines, Singapore, Taiwan, Thailand, Vietnam and the Special Administrative Region of Hong Kong) that makes it a significant contribution to the literature on commercial legal practice in the region.

One can readily agree with Pryles and Taylor in their introductory chapter that the search for an Asian approach to dispute resolution is 'probably a futile exercise',[2] because Asia itself is an artificial construct and because no system, international, regional or local, is static. Asian nations today are undergoing a highly dynamic, if fragmented, process of legal change. Cultural attitudes to the role of law in society are changing in Asian nations. In addition, a process of standardisation of commercial legal practice and documentation is now discernible. Legal retraining of government legal officers from nations in transition to a market economy is underway. Indeed, the Faculty of Law at The University of Melbourne is currently training lawyers from Mongolia, Vietnam and Indonesia to improve their knowledge of modern commercial legal skills and substantive law.

An oft-repeated concept of law in Asia is that commercial disputes are usually resolved through consensus-based processes. While this may be true, Pryles and Taylor show that use of the International Chamber of Commerce for arbitration has grown from 3.1 per cent of parties from South and South East Asia in 1983 to 11.5 per cent in 1995.[3] The introductory chapter usefully provides a factual basis for analysis of the willingness of parties from Asia to use international arbitration by setting out details of case settlements from the China International Economic and Trade Arbitration Commission, Hong Kong International Arbitration Centre, Australian Centre for International Commercial Arbitration, Japan Shipping Exchange, Japan Commercial Arbitration Association, the Kuala Lumpur

[1] Veronica Taylor and Michael Pryles, 'The Cultures of Dispute Resolution in Asia' in Michael Pryles (ed), *Dispute Resolution in Asia* (1997) 1.

[2] Ibid 18.

[3] Ibid 19.

Regional Centre for Arbitration and the Singapore International Arbitration Centre.[4]

It is precise research of this kind that prompts the observation that generalisations about law in Asian countries will not be an adequate basis for corporate decision-making in the 21st century. Pryles and Taylor argue that lawyers and their clients need to have a more precise 'analytical toolkit' for undertaking commercial transactions in Asia and for planning for the possibility of legal disputes.[5] In practice, a client will seek legal advice when considering, for example, where to establish a joint venture enterprise in Asia, on tax, corporate and security laws, labour costs, environmental regulations, the foreign investment regime, dispute resolution and enforcement of foreign judicial and arbitral awards. The authors note the paradox that with globalisation of commercial transactions it has become necessary to study local cultures and laws. The more local laws and practices are understood, the clearer it becomes that each nation is significantly different from its neighbour.

Each of the chapters in this collection deals with the same legal topics: jurisdiction of the courts, exclusion of jurisdiction on grounds such as sovereign immunity, choice of law, conservation and procedural questions, mediation, recognition and enforcement of foreign judgments, arbitration and procedures and enforcement of arbitration agreements and awards. The law on dispute resolution is arranged along 'lines of inquiry' for doing business in specific jurisdictions in Asia. The orderly presentation of these laws renders the collection easily accessible to practitioners unfamiliar with the laws of Asia and facilitates comparative analysis of the law, making the task of advising on the most appropriate jurisdiction for dispute resolution or enforcement of foreign judicial and arbitral awards relatively straightforward.

Moser, in his chapter on the People's Republic of China, describes the rise in the number of disputes between Chinese business entities and foreign companies following the rapid growth of investment and foreign trade in China.[6] As it is projected that, by the year 2020, China will have the largest economy in the world,[7] its civil procedure laws will need to be further developed. Moser sets out the basic framework for civil litigation in China adopted in 1991, making the important point that Chinese courts have exclusive jurisdiction in litigation relating to certain foreign transactions.[8]

Critical to many international commercial transactions is the restriction of immunity for sovereign entities engaged in commercial activities. While Moser touches on diplomatic and consular immunities, no mention is made of the capacity of Chinese trading entities to avoid obligations through their quasi-sovereign status. As China has long maintained its adherence to the

[4] Ibid 20.
[5] Ibid 20–3.
[6] Michael Moser, 'People's Republic of China' in Michael Pryles (ed), *Dispute Resolution in Asia* (1997) 73.
[7] Taylor and Pryles, 'The Cultures of Dispute Resolution in Asia', above n 1, 19.
[8] Moser, above n 6, 74.

traditional doctrine of absolute sovereign immunity, this issue needs clarification. Other contributors, such as Suvanpanich in his chapter on Thailand, appreciate the risk of sovereign immunity for investors,[9] but there appears to be little law on the issue in the Asian region.

The contributors confirm the widespread view that mediation and negotiation are the cornerstones of Asian systems of dispute resolution. Moser describes the prominent role played by mediation in traditional and contemporary China,[10] as do Polkinghorne and Ngoc Bich Nguyen in relation to Vietnam.[11] Li and Fan set out Taiwan's three dispute resolution mechanisms of litigation, arbitration and mediation, noting that, in this essentially civil law system, mediation is encouraged as the practical means for settling disputes. Similarly, Lazatin, contributing the Philippines chapter, argues:

> Perhaps owing to the Filipino's non-litigious nature and his consequent aversion to adversarial encounters, further aggravated by the costly and slow process of litigation, most disputes in the Philippines are resolved through negotiation.[12]

Suvanpanich also stresses that, despite dramatic changes in Thai society, mediation remains the prevalent means of dispute resolution, reflecting 'the value of a pure and merciful mind influenced by Buddhism, the characteristic of Thai people concerning compromise and respect for elders, and the influence of the social hierarchy.'[13]

As mediation is seen as a private, informal method of resolving disputes, it is not surprising that there is no Thai law or statute dealing with it exclusively. It is possible, however, under the *Civil Procedure Code* (Thailand) for a civil court to try to bring about settlement by attempting to mediate the dispute at any stage of the judicial proceeding.

Iwasaki, in his chapter on Japan, also sets out the dispute resolution procedures under Japan's *Code of Civil Procedure 1996*, but concludes that the 'most effective and practical means of alternative dispute resolution in Japan' is through conciliation or compromise before the court.[14] Difficulties experienced in translating a conciliation or compromise into a judgment or award for enforcement in a foreign jurisdiction were met in 1997 by the Japan Shipping Exchange Inc, which has amended its rules to enable the conversion to be made.

The importance of mediation and negotiation of disputes in Asian countries warrants further research. Commentators agree that these informal means of resolution are relatively effective in practice, though few studies are available to explain how this has been proved to be so, or whether they provide a lasting

[9] Thawatchai Suvanpanich, 'Thailand' in Michael Pryles (ed), *Dispute Resolution in Asia* (1997) 261.

[10] Moser, above n 6, 79–82.

[11] Michael Polkinghorne and Ngoc Bich Nguyen, 'Vietnam' in Michael Pryles (ed), *Dispute Resolution in Asia* (1997) 293, 296–9.

[12] Victor Lazatin, 'The Philippines' in Michael Pryles (ed), *Dispute Resolution in Asia* (1997) 175.

[13] Suvanpanich, above n 9, 271.

[14] Kazuo Iwasaki, 'Japan' in Michael Pryles (ed), *Dispute Resolution in Asia* (1997) 135.

solution and what their impacts are on development of the 'rule of law' in Asian legal systems.

While the situation is common in Asian countries generally, the laws in Vietnam in particular are changing so rapidly that any description of specific laws is likely to be soon outdated. The Vietnam chapter sets out the respective jurisdictions of the Economic Arbitration Centre and the Vietnam International Arbitration Centre, including fees and procedures. These details will change, but they provide a helpful guide for foreign and local investors as to the arbitration procedures available to them. The distinction between economic and civil contracts, which is fundamental to determining whether the Economic or Civil Court has jurisdiction, is far from clear and is also subject to change in the *Commercial Law 1997* (Vietnam). Polkinghorne and Ngoc Bich Nguyen recognise that Vietnam has attempted to develop a system of dispute resolution where very little existed a decade ago. It remains disturbing for foreign investors that any form of enforcement under Vietnamese laws is uncertain and may be unlikely to occur in practice.

Also uncertain is the implementation of the *Basic Law* in Hong Kong which, along with Malaysia, Singapore and Australia, has a common law tradition within the Asian region. The *Basic Law* was drafted to ensure that the judicial system practised in Hong Kong would be maintained under China, though some changes are thought to be inevitable. The Privy Council, for example, has been replaced by the newly created Court of Final Appeal and there will, of course, be an increase in the use of the Chinese language. Moser sets out the law of dispute resolution as it was in January 1997, though with notations on expected changes. The United Kingdom's *State Immunity Act 1978* did not, for example, apply to Hong Kong after 1 July 1997. Sovereign immunity will be part of the 'localisation' of United Kingdom legislation and was not finalised at the date of publication. The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[15] applies in Hong Kong only through ratification by China. The result is that, while awards rendered outside China and Hong Kong can be enforced in Hong Kong, the Convention will not apply to enforcement inside China of awards rendered in Hong Kong. These, and many other aspects of dispute resolution in Hong Kong, remain to be clarified.

Rather more predictable than the laws of Hong Kong are those of Malaysia and Singapore. Lim explains the Malaysian federal constitutional structure and court system and describes the procedures under the *Arbitration Act 1952* (Malaysia), modelled on the *Arbitration Act 1950* (UK),[16] and the mechanisms for recognition and enforcement of foreign awards. Lawrence Boo, who is the principal mediator/arbitrator of the Singapore International Arbitration Centre, and Lei Theng, contribute the chapter on Singapore. Singapore aspires to be the regional centre for finance and commerce and, as part of its strategy, has developed procedures for speedy alternate resolution of civil and commercial disputes.

[15] Opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).
[16] 14 Geo 6, c 27.

Picking up the themes introduced by Pryles and Taylor, Boo and Lei Theng describe the 'alternative dispute resolution movement' in Singapore as having its roots in the country's unique culture and history. Mediation has long been used by the Chinese clan associations and within the Malay, Indian and Christian communities. The enthusiasm with which mediation has been adopted in Singapore is thought to reflect the 'traditional Asian inscrutability, where it is taboo to wash one's dirty linen in public.'[17] The comment remains a consistent explanation for an Asian trend towards the mediation of disputes, although Western commentators might make such a point at their peril. However, as this trend is occurring worldwide, it may not be satisfactorily explained in cultural terms.

A recent and possibly unique example of dispute resolution under Singapore's laws is the *Maintenance of Parents Act 1996* (Singapore), which was promulgated to 'make provision for the maintenance of parents by their children'.[18] The aim is to ensure that adult children care for their parents where they might otherwise be remiss in their filial duties. In the event of a dispute, the Act provides for mediation of, for example, maintenance orders.

The authors of the Singapore chapter are to be congratulated for including a section on academic training and research, for this is fundamental if the legal profession is to gain the skills required for effective alternative dispute resolution. The University of Singapore now offers a multidisciplinary negotiation and conflict resolution course on the Harvard Negotiation Workshops model, which provides students with the social, communication and mediation skills needed to enhance Singapore's efforts to provide high quality dispute resolution for the region.

Pryles provides a scholarly and clear description of dispute resolution in Australia, setting out the federal constitutional structure and the Rules of Court for each State.[19] He considers the enforceability of mediation agreements and whether the curial law of an arbitration is the law of the place where the arbitration is held. Australian law on jurisdictional issues is based largely on English decisions, and the Anglo-Australian courts take similar approaches to issues such as a stay of action on the ground of *forum non conveniens* and foreign court clauses. The common law tradition in these and other Asian nations, such as Malaysia and Singapore, provides a useful jurisprudential link in the region for the judicial resolution of disputes along broadly similar lines. Pryles sets out the procedures for recognition and enforcement of foreign judgments and arbitral awards under legislation and at common law. As the *Foreign Judgments Act 1991* (Cth) applies only where a regulation extends it to nominated countries,[20] this chapter is particularly helpful in listing those jurisdictions which have been the subject of regulation.

[17] Lawrence Boo and Lei Theng, 'Singapore' in Michael Pryles (ed), *Dispute Resolution in Asia* (1997) 240.
[18] Ibid 246.
[19] Michael Pryles, 'Australia' in Michael Pryles (ed), *Dispute Resolution in Asia* (1997) 25, 25–7.
[20] *Foreign Judgments Act 1991* (Cth) s 5.

While Australian law is relatively transparent and predictable, the recognition and enforcement of foreign judgments and arbitral awards remains highly uncertain in many Asian jurisdictions. Thailand, for example, has no treaty obligations for the reciprocal enforcement of foreign judgments and no legislation on the subject. As Suvanpanich points out, the single Supreme Court decision, to the effect that it will enforce a final determination of a foreign court of competent jurisdiction, is not a precedent under the Thai civil law system.[21]

It is curious that Indonesia is not included in this survey of Asian laws. This is unlikely to be an oversight and may be explained by the difficulty of adapting the civil and *adat* (customary) laws and practices of this country into the structured format adopted for the book.

While Pryles and Taylor pose stimulating questions in the introductory chapter, it is a pity that no attempt is made in concluding remarks either to analyse and compare the laws and procedures that have been assembled in the country chapters or to draw any conclusions from them. It is observed, for example, that legal infrastructures have not proved to be a precursor to development and prosperity.[22] The recent Asian crisis appears to challenge this assertion. So too does the oft-repeated plea, particularly by nations such as Vietnam and Indonesia, that to encourage foreign investment, legal institutions need reform, legal procedures need to be made transparent and subject to the 'rule of law' and the judiciary trained in modern commercial laws. It remains for further research to determine not only how the formal dispute resolution system purports to work in Asian jurisdictions, but also how it works in practice. Each chapter is a valuable source of information which will form a basis for such analytical and comparative work in the future.

Dispute Resolution in Asia leads the way in setting out the laws of Asian countries in a precise and systematically organised manner. It will be valuable both to practitioners for its clear presentation of the law and to academics and students in their efforts to unpack the stereotypes and to discern if there is an 'Asian way' or, more likely, 'Asian ways' of dispute resolution.

GILLIAN TRIGGS*

[21] Suvanpanich, above n 9, 274.

[22] Taylor and Pryles, above n 1, 10.

* LLB (Melb), LLM (SMU), PhD (Melb); Professorial Fellow, Associate Dean, Undergraduate Studies, Law School, The University of Melbourne.