

## **CHOICE OF LAW IN THE ASIA PACIFIC REGION – CHOOSE WELL!**

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The Asia Pacific region is a dynamic region to do business in. Its economic growth significantly surpasses growth in Western countries, and countries in the region continue to attract a substantial amount of investment from outside the region.

It is well known that there are a number of pitfalls to doing business in some of the countries in the region but corporations with international activities or international ambitions simply cannot avoid the region. Care needs to be taken and very little should be taken for granted.

### **Know the Legal System**

The countries in the region inevitably have their own legal systems, few of which are based on the British or Commonwealth system. Hong Kong and Singapore are the two “countries” that largely rely upon the British legal system although they have also enacted their own statutory provisions and developed their own legal interpretations.

Other countries in the region have legal systems that are quite distinct from the British or American system.

### **Choice of Law**

Where parties to a contract are from countries that have similar legal systems, such as Australia and the United States, the choice of law is important – for a number of reasons – but often not critical, given a substantial similarity in many legal principles. However, where one party to a contract is from a country that has a legal system that is significantly different to the system of the other party to the contract, any choice of law provision in a contract is of considerable importance.

Choice of law clauses and clauses regulating jurisdictional issues are often given little attention, if for no other reason than that they inevitably appear at the end of a contract, and after the clauses that are considered to be of greater commercial importance. However, for the above reasons, they really need, with international transactions, to be given a greater focus.

Historically, many countries in the Asia Pacific region have not had a judicial or quasi-judicial approach to disputes. Traditionally, many disputes have been resolved as a result of conciliation rather than confrontation. Often that conciliation was achieved with the intervention of an “elder statesman” (traditionally, very rarely was there an intervention by an “elder stateswoman”). Resolving disputes in that way has traditionally been considered to be “the Asian way”.

Traditionally, the “Asian way” has helped countries in the region achieve significant growth. However, today’s globalisation tends to make that approach of conciliation less attractive and less successful, particularly when Asian corporations are doing business, and subsequently have a dispute, with a corporation that is not accustomed to the same approach.

Accordingly, many countries in the region now appreciate that they must have a more legalistic and judicial or quasi-judicial mechanism in place for the settlement of trade disputes. The existence of such a mechanism also acts as an encouragement to foreign investors, who feel buoyed by the existence of a system that, at least in principle, allows them to have a fair hearing on any matters in dispute.

The Association of South East Asian Nations (“ASEAN”) started to fully appreciate the need for such a system as a result of the growth in the economies of many of its members. The culmination of its efforts to introduce an appropriate mechanism led to the introduction, in 1996, of the Protocol on Dispute Settlement Mechanism.

Accordingly, there is a mechanism existing throughout the region although its practical implementation in some countries is still far from straight forward.

Many corporations doing business in the Asia-Pacific region prefer to have a choice of law clause that provides for any disputes to be determined in Australia. This is often the case if one of the contracting parties has some form of association with Australia.

Many corporations prefer that course because of the open and established legal system, apparently exempt from any form of corruption that exists in Australia. Many corporations also prefer that course if there is to be an arbitration clause in a contract.

Australia has a long-standing tradition of engaging in arbitration as a means of alternative dispute resolution.

In 2005, the Australian Centre for International Commercial Arbitration (“ACICA”) received a substantial boost in its promotion, assisted greatly by the introduction of new arbitration rules. Those rules are largely based on international arbitration rules but have been amended to provide for a number of positive additions. The availability of arbitration in Australia and clear cut rules governing such arbitrations appear to be well received in the region.

As a general rule, Australian Courts will stay any Court proceedings that may be issued where there is an effective arbitration clause in existence.

In addition, Free Trade Agreements (“FTAs”) also tend to bring with them dispute resolution provisions. Australia has a number of FTAs including with the United States and other FTAs are being negotiated with China, Japan, Malaysia and other member nations of ASEAN.

To summarise, choice of law clauses coupled with arbitration clauses are increasingly important in the Asia Pacific region, given the different legal systems that exist, given the increasing volume of trade, given FTAs, other dispute provisions set out by the World Trade Organisation (“WTO”) and the General Agreement on Tariffs and Trade (“GATT”) and given the commercial need to try and identify a simplified but clear mechanism for resolving any disputes.

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