

Asia/Pacific

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This article highlights selected developments during 2010 in Australia, Japan, the Philippines, South Korea, Thailand, Timor Leste, and Vietnam.

I. Australia

A. INTERNATIONAL ARBITRATION LAW

Australia amended its International Arbitration Act¹ to incorporate provisions from the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration and its 2006 amendments (“Model Law”). Additional provisions complement the Model Law to protect arbitration from undue court interference and recalcitrant respondents. The amended statute relaxes the test to determine whether an

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1. See *generally* INTERNATIONAL ARBITRATION IN AUSTRALIA (Luke Nottage & Richard Garnett eds., 2010) (for an extensive commentary on the International Arbitration Act).

arbitration agreement is valid² and increases the difficulty of successfully challenging an arbitration award on public policy grounds.³

Several new provisions will also help bring about the efficient and private resolution of a dispute. Recognizing the importance of party autonomy, parties can opt in or out of these provisions.⁴ Default provisions create a duty of confidentiality,⁵ enable the tribunal to deal effectively with undue delay,⁶ and allow the ordering of payment of costs⁷ and interest.⁸

The reforms to the act signify the Australian government's increasing interest in and support of international arbitration. The federal government and the New South Wales ("NSW") State Government also recently invested in the Australian International Disputes Centre opened by the Attorney General in Sydney. The federal government has also appointed the Australian Centre for International Commercial Arbitration as the sole appointing authority under the International Arbitration Act.

B. DOMESTIC ARBITRATION LAWS

New South Wales was the first Australian state to proclaim the *Commercial Arbitration Act 2010* ("CAA").⁹ The Australian states and territories developed the CAA with two principle aims. First, it is hoped that the states and territories will adopt a uniform statute to resolve the inconsistent domestic arbitration laws currently in force. The second aim is more fundamental to arbitration. Business was reluctant to use arbitration to resolve disputes due to inadequate laws that have encouraged inefficiency and have not prevented court interferences.

The CAA contains provisions that mandate efficiency,¹⁰ delineate the court's role, and give the tribunal powers to sanction delays¹¹ and issue enforceable interim measures.¹² Information disclosed in the arbitration will be protected as confidential.¹³ The right to appeal an award will exist only where parties expressly agree to that right,¹⁴ and the grounds upon which a court may refuse enforcement of an award have been narrowed.¹⁵ These substantial reforms should re-invigorate interest in domestic arbitration in Australia as a useful means to resolve disputes privately and efficiently.

2. *International Arbitration Act 1974* (Cth) §§ 3(4), 3(5) (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/iaa1974276/.

3. *Id.* § 8(7A).

4. *Id.* § 22.

5. *Id.* § 23C.

6. *Id.* §§ 23B, 23H.

7. *Id.* § 23K.

8. *Id.* § 26.

9. See generally DOUG JONES, *COMMERCIAL ARBITRATION IN AUSTRALIA* 1st ed. (2011) (for an extensive commentary on commercial arbitration in Australia).

10. *Commercial Arbitration Act 2010* (NSW) § 24B (Austl.), available at http://www.austlii.edu.au/au/legis/nsw/consol_act/caa2010219/.

11. *Id.* § 25.

12. *Id.* §§ 17, 17A.

13. *Id.* § 27E.

14. *Id.* § 34A.

15. *Id.* §§ 35, 36.

C. SETTING FORTH REASONS IN ARBITRATION AWARDS

2010 also saw several judgments that were encouraging to arbitration practitioners. In 2006, the Victorian Court of Appeal stated in the *Oil Basins* case¹⁶ that a tribunal's reasons for its decisions reached in an award should be of the same standard required of judges, and where that standard was not met, the award should be set aside. This much-maligned decision created a negative impression of arbitration and traduced Australia's reputation as an arbitration-friendly location. Decisions from three different courts have truncated the operation of the *Oil Basins* principle.

In May 2010, in the *Thoroughvision* case,¹⁷ an award was challenged in the Supreme Court of Victoria, because it lacked adequate reasons. Justice Croft, who was bound by the *Oil Basins* decision, found that there was no manifest error of law and the reasons in the award were sufficient. Justice Croft discussed the requirement of proportionality discussed in *Oil Basins* and found that an arbitration concerning a simple dispute would not require reasons as detailed as those required in a substantial, complex, and lengthy arbitration.¹⁸ As the *Thoroughvision* arbitration merely concerned the proper construction of a memorandum of understanding, he found that the award need not have been as extensive as what was required in the *Oil Basins* decision.

In April 2010, in the *Gordian Runoff* case,¹⁹ the New South Wales Court of Appeal rejected *Oil Basins*, finding no basis to require arbitral awards to be reasoned to the standards of common law judges. This decision has since been appealed to the High Court of Australia, where a judgment is expected in 2011.

Also in April, in the *Northbuild* case, Justice Martin of the Queensland Supreme Court determined that an arbitral award did not contain adequate reasons.²⁰ But the principal reason for His Honour's decision was that the award made broad findings and contained contradictions and not because the reasons were not of a judicial standard. On that point, His Honour affirmed that arbitrators should not be held to the same standards as judges when providing reasons for their awards.²¹ The *Northbuild* and *Gordian Runoff* cases mark a positive development in Australian arbitration law insofar as they usefully distinguish between an arbitral award and a judgment. But what is required in Victoria is less clear. What is a complex arbitration? When will an arbitrator have to provide reasons of the same standard as a judge's reasons? The High Court granted leave to appeal the *Gordian Runoff*. It is hoped that the appeal, expected some time in 2011, should resolve what standard of reasoning is required in arbitral awards.

16. BHP Billiton Ltd. v. Oil Basins Ltd. [2006] VSC 402 (Unreported, Sup. Ct. of Victoria, 1 Nov. 2006) (Austl.) (considering sub-section 29(1) of the *Commercial Arbitration Act 1984* (Vic) that requires an arbitrator to include in an award reason for the decision reached).

17. *Thoroughvision Pty. Ltd. v. Sky Channel Pty Ltd.* [2010] VSC 139, [9]-[11] (Unreported, Judge Croft, Sup. Ct. of Victoria, 22 Apr. 2010) [9]-[11] (Austl.).

18. *Id.* at [54]-[58].

19. *Gordian Runoff v. Westport Ins. Co.* [2010] NSWCA 57, [199]-[222] (Austl.).

20. *Northbuild Construction Pty Ltd. v. Discovery Beach Project Pty Ltd.* [2010] QSC 94, [37] (Austl.).

21. *Id.* at [40] (referring to *Cypressvale Pty Ltd v. Retail Shop Leases Tribunal* [1996] 2 Qd. R. 462 per McPherson and Davies JJA at [485]).

II. Japan

A. DEVELOPMENTS IN CYBER LAW

Under Japan's constitution, Article 21,²² freedom of speech is guaranteed. An interesting case which could have implications for future freedom of speech in Internet cases was handed down by Japan's Supreme Court in March 2010.²³ The plaintiff in the original case, a ramen-shop restaurant chain, asked for damages from the defendant who posted disparaging remarks and opinions about the chain in late 2002 on a blog site the defendant operated. The plaintiff filed charges for libel and the defendant was indicted in 2004. The Tokyo District Court found the defendant not guilty, arguing in part that an individual who posts comments on a website should not be held to the same standard for libel that a journalist would but that a "looser" standard should apply to individuals. On appeal, the Tokyo High Court overturned and the defendant eventually appealed to the Supreme Court, which then ruled in favor of the plaintiff. The Court rejected the "looser" standard for an individual posting on the Internet and held that such an individual must be held to the same standard of libel that other media outlets are. A blogger must post information that he or she believes is factually correct when it is posted. In this case, the Court said that the postings were one-sided and that due to the nature of the Internet many viewers can view such a posting instantly even though the posting might not contain accurate information and that a libeled party would not have time to respond to the charges in the Internet post, if indeed they were even aware of the postings. This case seems to suggest that Internet postings must be held to the same standards as other forms of media and that remedies for libel are available from at least the owners or operators of an Internet website in Japan.

B. ORGAN TRANSPLANTS²⁴

On July 24, 2010, the revised Law on Organ Transplantation took full effect.²⁵ Before the revisions, written consent of the donor was needed before organs could be donated. Beginning January 1, 2010, the revisions allow for organ transplants from brain-dead patients if the person's family grants permission for the transplant, even if the patient never made clear an intention to donate organs should that person ever be pronounced brain dead. The revisions also allowed for the donation of organs by donors under the age of fifteen.

22. Nihonkoku Kenpo [KENPO] [CONSTITUTION], art. 21, para. 3 (Japan) available at <http://www.solon.org/Constitutions/Japan/English/english-Constitution.html>.

23. Daisuke Nakai, *Internet Posts Held to Libel Standards*, ASAHI.COM Mar. 18, 2010, <http://www.asahi.com/english/TKY201003170253.html>.

24. Zouki-no ishoku-ni kansuru houritsu [The Law Concerning Organ Transplantations], Law No. 104 of 1997, art. 1 (Japan).

25. *Id.*

A. INVESTMENT REGULATIONS

On December 4, 2009, then President Macapagal-Arroyo signed into law the pre-need Code of the Philippines³² (the “Code”). The Implementing Rules and Regulations (“IRR”) of the Code were adopted by the Insurance Commission on March 8, 2010. The Code and the IRR seek to regulate the operations of pre-need companies³³ with the ultimate objective of protecting plan holders from the financial failure of and misreporting by pre-need companies.

Among the salient features of the Code and the IRR are the following: (a) transfer of regulatory powers from the Securities and Exchange Commission to the Insurance Commission (“Commission”);³⁴ (b) minimum capitalization of P100 million for pre-need companies incorporated after the Code took effect;³⁵ (c) the Commission’s power to prescribe qualifications and to disqualify directors of pre-need companies who are found to be “unfit”;³⁶ (d) restrictions on investments of directors and officers of pre-need companies;³⁷ (e) mandatory establishment of a trust fund per pre-need plan category to ensure the delivery of the guaranteed benefits and services provided under a pre-need plan contract;³⁸ (f) required monthly deposits to the trust fund;³⁹ (g) limitations on investments of trust funds (i.e., the Code specifies what investments are allowed, *e.g.*, fixed income instruments, equities, real estate);⁴⁰ (h) mechanisms to ensure prompt delivery of benefits to the plan holders when their plans mature (*e.g.*, interest for late payment and recovery of investment in case of insolvency);⁴¹ (i) disclosures to the Commission (*e.g.*, annual pre-need reserve valuation report)⁴² or by publication (*e.g.*, synopsis of annual financial statements);⁴³ and (j) civil and criminal sanctions for violations of the Code include fines ranging from P10P10 thousand (US\$225, approximately) to P5P5 million (US\$113,000, approximately), and

32. See generally An Act Establishing the Pre-Need Code of the Philippines, Rep. Act No. 9829 (Dec. 3, 2009) (Phil.), available at http://www.lawphil.net/statutes/repacts/ra2009/ra_9829_2009.html.

33. “Pre-need company” refers to any corporation registered with the Insurance Commission and authorized or licensed to sell or offer to sell pre-need plans, and also refers to schools, memorial chapels, banks, nonbanks, financial institutions and other entities which have also been authorized to sell or offer to sell pre-need plans. *Id.* § 4(c). “Pre-need plans” are contracts, agreements, deeds or plans for the benefit of the plan holders which provide for the performance of future service/s, payment of monetary considerations or delivery of other benefits at the time of actual need or agreed maturity date, as specified therein, in exchange for cash or installment amounts with or without interest or insurance coverage and includes life, pension, education, interment and other plans, instruments, contracts or deeds as may in the future be determined by the Insurance Commission. *Id.* § 4(b).

34. *Id.* § 5.

35. *Id.* § 9.

36. *Id.* § 11. The Insurance Commission has promulgated rules regarding persons who are “unfit.”

37. No director or officer of any pre-need company, nor any relative within the fourth degree of consanguinity or affinity, shall have an investment in excess of five million pesos in any corporation or business undertaking, in which the pre-need company’s trust fund has an investment in or a financial interest with. *Id.* § 13.

38. *Id.* § 13.

39. *Id.* § 31.

40. *Id.* § 34.

41. *Id.* §§ 26-27.

42. *Id.* § 41.

43. *Id.* § 44.

imprisonment ranging from one year to fourteen years, or both, at the discretion of the court.⁴⁴

B. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES

On April 29, 2010, the Philippine Supreme Court approved the Rules of Procedure for Environmental Cases (“Rules”).⁴⁵ Following a mandate under the Philippine Constitution that the state “protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature,”⁴⁶ the Rules seek to streamline implementation of various pieces of Philippine environmental laws⁴⁷ by providing special procedural rules that can “sufficiently address the procedural concerns that are peculiar to environmental cases.”⁴⁸ The Rules provide various remedial measures, including Environmental Protection Orders (“EPOs”), “issued by the court directing or enjoining any person or government agency to perform or desist from performing an act in order to protect, preserve, or rehabilitate the environment;”⁴⁹ protection against strategic lawsuits against public participation (“SLAPP”) lawsuits;⁵⁰ writs of *Kalikasan*,

Remed[ies] available to a natural or juridical person, entity authorized by law, people’s organization, non-governmental organization, or any public interest group accredited by or registered with any government agency, on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of a public or official or employee, or private

44. *Id.* §§ 53-54.

45. Rules of Procedure for Environmental Cases, Administrative Matter No. 09-6-8-SC (S.C., Apr. 29, 2010) (Phil.), available at http://sc.judiciary.gov.ph/Environmental_Annotation.pdf.

46. CONST. (1987), art. II, § 16 (Phil.).

47. *E.g.*, An Act Providing for a Comprehensive Water Quality Management and for Other Purposes, Rep. Act No. 9275 (Mar. 22, 2004) (Phil.), available at http://www.lawphil.net/statutes/repacts/ra2004/ra_9275_2004.html; An Act Providing for the Conservation and Protection of Wildlife Resources and Their Habitats, Appropriating Funds Therefore and for Other Purposes, Rep. Act No. 9147 (July 30, 2001) (Phil.), available at <http://www.pcte.gov.ph/initiatv/RepA9147.htm>; An Act Providing for an Ecological Solid Waste Management Program, Creating the Necessary Institutional Mechanisms and Incentives, Declaring Certain Acts Prohibited and Providing Penalties, Appropriating Funds Therefore, and for Other Purposes, Rep. Act No. 9003 (July 24, 2000) (Phil.), available at <http://emb.gov.ph/laws/solid%20waste%20management/ra9003.pdf>; An Act Providing for a Comprehensive Air Pollution Control Policy and for Other Purposes, Rep. Act No. 8749 (June 23, 1999) (Phil.), available at http://www.lawphil.net/statutes/repacts/ra1999/ra_8749_1999.html; An Act Providing for the Development, Management and Conservation of the Fisheries and Aquatic Resources, Integrating All Laws Pertinent Thereto, and for Other Purposes, Rep. Act No. 8550 (Feb. 25, 1998) (Phil.), available at http://www.lawphil.net/statutes/repacts/ra1998/ra_8550_1998.html; An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous People, Creating a National Commission of Indigenous People, Establishing Implementing Mechanism, Appropriating Funds Therefore, and for Other Purposes, Rep. Act No. 8371 (July 28, 1997) (Phil.), available at <http://www.sipo.gov.cn/sipo2008/ztl/ywzt/yczyhctzsbh/zlk/gglt/200804/P020080411465576165364.pdf>; An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation, Rep. Act No. 7942 (Mar. 3, 1995) (Phil.), available at <http://www.psdn.org.ph/chmbio/ra7942.html>; An Act to Control Toxic Substances and Hazardous and Nuclear Wastes, Providing Penalties for Violations Thereof, and for Other Purposes, Rep. Act No. 6969 (1990) (Phil.), available at <http://www.emb.gov.ph/laws/toxic%20substances%20and%20hazardous%20wastes/ra6969.PDF>, among others.

48. Annotation to the Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC (2010) (Phil.).

49. Rules of Procedure for Environmental Cases, RR. 1, § 4(d).

50. *Id.* RR. 6, § 1.

individual or entity, involving environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces;⁵¹

continuing mandamus, which are writs issued by a court in an environmental case directing any agency or instrumentality of the government or officer thereof to perform an act or series of acts decreed by final judgment which shall remain effective until judgment is fully satisfied;⁵² and consent decrees.⁵³

C. INTERNATIONAL HUMANITARIAN LAW

On December 11, 2009, the Philippine Act on Crimes against International Humanitarian Law, Genocide and Other Crimes Against Humanity ("Act") was signed into law.⁵⁴ The Act defines war crimes, genocide, and other crimes against humanity and imposes penalties for the commission of such crimes.⁵⁵

The Act includes the following salient provisions: (a) subject to exceptions, official capacity is not a ground for exemption from criminal responsibility or reduction of sentence;⁵⁶ (b) culpability of superiors for crimes committed by subordinates under his/her effective command and control under defined circumstances;⁵⁷ (c) non-prescription of crimes penalized under the Act;⁵⁸ (d) measures to protect victims and witnesses;⁵⁹ and (e) universal jurisdiction over persons, whether military or civilian, suspected or accused of a crime penalized under the Act regardless of where the crime was committed.⁶⁰

IV. South Korea

A. CAPITAL MARKET REGULATORY DEVELOPMENT: IMPLEMENTATION OF OVER-THE COUNTER DERIVATIVES REVIEW PROCESS

On June 13, 2010, a review process for over-the-counter derivatives ("OTC Derivatives") was implemented by Korea Financial Investment Association ("KFIA"), promulgated under the Financial Investment Services and Capital Markets Act of Korea, as amended ("FISCMA"). The OTC Derivatives Review Committee established by KFIA, reviews derivatives to be offered by financial investment companies.⁶¹ Derivatives are sub-

51. *Id.* R. 7, § 1.

52. *Id.* RR. 8, §§ 1, 7.

53. *Id.* R. 3, § 5.

54. An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes, Rep. Act No. 9851 (Dec. 11, 2009) (Phil.), available at http://www.lawphil.net/statutes/repacts/ra2009/ra_9851_2009.html.

55. *Id.* §§ 4-6.

56. *Id.* § 9.

57. *Id.* § 10.

58. *Id.* § 11.

59. *Id.* § 13.

60. *Id.* § 17.

61. *Implementation of Over-the-Counter Derivatives Review Process*, FIN. NEWSL. (Yulchon Att'ys at Law, S. Korea), Mar. 3, 2010, at 1, available at http://www.yulchon.com/mail/201003/finance/yulchon_finance_newsletter_201003.pdf.

ject to the Committee's review if they are new derivatives (i.e. OTC derivatives not previously offered or sold in Korea's financial market or to general investors (*e.g.*, non-institutional investors) before June 13, 2010), credit derivatives, derivatives that derive their value from natural, environmental, or financial risks, except risks involving financial investment products, foreign exchange, or commodities (the "Condition Derivatives") and any other derivatives to be offered to general investors.⁶²

For credit derivatives and the Condition Derivatives, the Committee focuses its review on availability of underlying asset prices, including the availability of periodic and continuous price information, the independence of third-party pricing agents, objectivity, and the reasonableness of valuation methodologies.⁶³ For derivatives to be offered to general investors, the Committee reviews, in addition to the foregoing subject matters, the correlation between derivatives and their corresponding leverage, the appropriateness of the terms of derivative transactions, and the sufficiency of the disclosure of the derivatives.⁶⁴

The KFIA notifies the result of its review, including its recommendation, to a financial investment company requesting the review. Subsequently, the company must notify KFIA of its compliance with KFIA's recommendation within five business days of receipt of such recommendation.⁶⁵ If the company fails to comply with KFIA's recommendation, it must disclose in prospectuses of its investment products that it does not comply with KFIA's recommendation.⁶⁶

B. GOVERNMENT TO INTRODUCE A BILL FOR POISON PILL

In the wake of the Asian financial crisis in 1997, the Korean government abandoned numerous protective mechanisms against foreign shareholdings to induce foreign investment and to enhance corporate governance (*e.g.*, mandatory tender offers, requirement to publicly notify acquisition of shares, requirement of board consent for the acquisition of shares by a foreigner in excess of ten percent). Back then, there had been virtually no hostile takeovers, and the concept of poison pills was very foreign. But, as the barriers fell, hostile takeover attempts seemed to be flooding in, thanks to headline-making hostile bids, such as Sovereign Asset Management's attempt to takeover SK Co., Ltd. in 2003 and Carl Icahn's and Steel Partners' infamous bid on KT&G in 2006. The Korean business community became increasingly concerned about the absence of sufficient defense mechanisms in case of unsolicited bids to takeover and called on the government to act. Eventually, the Ministry of Justice ("MOJ") submitted a bill to allow poison pills on March 10, 2010.⁶⁷ The bill is currently pending before the National Assembly. Korean poison pills have the following distinctive features:

1. *Procedural Requirements:*

A special resolution of the shareholders meeting and an affirmative vote of at least two-thirds of the total number of directors are required for a company to adopt poison pills.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Bill no. 1807842, available at <http://likms.assembly.go.kr>.

Further, the articles of incorporation of the company must stipulate the terms of the poison pills, such as the type and the maximum number of new shares acquirable upon exercise of the rights, or any difference of treatment among shareholders.

2. *Substantive Requirements:*

The bill also provides that the company may introduce poison pills if it is necessary to maintain or enhance the corporate value and shareholders' benefits. Although no interpretive materials are available yet, the MOJ described the following as examples of such necessary circumstances: (i) an unfriendly suitor acquires a large block of shares and then demands that the target repurchase its shares at a substantial premium (green mail); (ii) leveraged buyout of the target using its assets as security ("LBO"); and (iii) the acquirer sells a large chunk of assets of the target to repay the debt used to finance the takeover (bust-up).

In sum, the submission of the bill by MOJ to introduce poison pills defenses reflects the current situation of market for corporate control in Korea. With the economic downturn, Korean conglomerates had increasingly been pressuring the government to legalize defensive tactics to thwart hostile takeover bids. The bill is the fruit of such pressures. Although MOJ tried to make the Korean poison pills more stringent than those of other countries, it is debatable as to whether the current version is sufficiently adapted to the Korean market. The National Assembly will examine the bill in the future, so the shape of the Korean poison pills will soon be set.

C. RETIRED JUDGES AND PROSECUTORS

In October 2010, the Special Committee on Judicial Reform in Congress agreed to enact a bill requiring retired judges and prosecutors who start private practices to recuse themselves from criminal cases filed in districts where they served. This restriction is limited to the first year of their private practice.

In the South Korean legal system, there is a deeply rooted custom called Jeon-gwan ye-u. It refers to an informal arrangement that retired judges and public prosecutors receive favorable treatment from their incumbent former colleagues regardless of the merits of the case. It has been described as one of the most serious problems undermining public trust in the Korean judicial system.

The Special Committee on Judicial Reform designed the bill to root out this custom by restricting the cases that retired judges and prosecutors can accept in their private practices. The bill prohibits retired judges and prosecutors from taking cases filed in the districts where they served in their last year. Given that the bill includes districts wherein they served less than a year, this bill imposes a stronger restriction than before. Strong opposition from the legal community, arguing the bill deprives their freedom of choice of occupation was heard, yet the Committee found that restoring public trust and establishing a fair judicial system was more important.

This restriction is effective for one year after the initiation of private practices. In deciding how long the restriction should be imposed, the Committee took into account the court's previous decision. In 1989, the Constitutional Court of Korea invalidated a provision banning retired judges and prosecutors from starting private practice for two years in

the districts where they had served. The Court found the ban unreasonably excessive. To circumvent unconstitutionality, the Committee limited the restriction to one year.

The restriction is limited to criminal cases only. Records show that the potential for preferential treatment was felt the most in criminal cases, and the Committee denied expanding the restriction to all cases. Nevertheless, strong arguments were made that it is necessary to restrict both criminal and civil cases in order to correct the deeper systematic wrong.

V. Thailand

Thailand is the last remaining country in the ASEAN⁶⁸ group that has not implemented third generation ("3G") telecommunication services.⁶⁹ Thailand has been trying to launch a 3G network for almost five years, but due to its unstable political climate and lingering questions in connection with the authority of the National Telecommunications Commission ("NTC") to issue 3G licenses, a 3G network has not materialized. The NTC was created under the 1997 Constitution⁷⁰ and the Frequency Allocation Act B.E. 2543 (2000).⁷¹ The questions surrounding the authority of the NTC arise because the most recent constitution,⁷² adopted in 2007, requires a new independent regulatory body, the National Broadcasting and Telecommunication Commission ("NBTC"), to be created to regulate the radio and television broadcasting industry and the fixed line and mobile phone industry.

In late August 2010, after years of delay, the NTC announced that an auction for 3G licenses would take place. The excitement surrounding the announcement was short lived, despite the fact that three bidders (local privately-owned mobile operators) had placed almost US\$125 million on deposit to participate in the auction process.⁷³

Two state-owned companies, the Communications Authority of Thailand ("CAT") and the Telecommunications Organization of Thailand ("TOT"), act as not only the licensing authorities in the 2G spectrum, but also as competitors to privately owned operators.⁷⁴ CAT and TOT petitioned the Administrative Court and requested an injunction to suspend the auction of 3G licenses.

They argued that their interests would be damaged because 3G users would not have to pay for use of the 2G network thus all fees paid by users would be going to the privately

68. The Association of Southeast Asian Nations (ASEAN) consists of ten member states, namely: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar (aka Burma), Philippines, Singapore, Thailand, and Vietnam. *Member Countries*, ASS'N OF S.E. ASIAN NATIONS, www.aseansec.org/74.htm (last visited Feb. 14, 2011).

69. Borris Sullivan, *Thailand's 3G Auction Confirmed for September*, THAILAND BUS. NEWS, Aug. 2, 2010, <http://thailand-business-news.com/news/top-stories/19380-thailands-3g-auction-confirmed-for-september>.

70. CONST. OF THE KINGDOM OF THAILAND 1997, ch. III, § 40, available at <http://www.asianlii.org/th/legis/const/1997/1.html#S040>.

71. Section 6 and 46 of the Frequency Allocation Act B.E. 2543 (2000).

72. CONST. OF THE KINGDOM OF THAILAND 2007, ch. III, pt. 7, § 47, available at <http://www.asianlii.org/th/legis/const/2007/1.html>.

73. Thanyarat Dokson, *Thailand's Bid for High-Speed Internet Stalled*, WASH. TIMES, Sept. 23, 2010, <http://www.washingtontimes.com/news/2010/sep/23/thailands-bid-for-high-speed-internet-stalled/>.

74. Tim Johnston, *Thailand: Tangled State Interests Hold 3G Auction Hostage*, FIN. TIMES BLOG (Sept. 16, 2010, 10:26 AM), <http://blogs.ft.com/beyond-brics/2010/09/16/thailand-tangled-state-interests-hold-3g-auction-hostage/>.

owned mobile operators who were granted a 3G license. The crux of the argument is that under section 47 of the 2007 Constitution the NTC does not have the authority to allow 3G licenses to be put up for auction. The NTC argued that a 3G network is in the best interest of the country as the performance of state agencies and other service providers would be affected if they do not have access to the most up-to-date technology.

The Administrative Court agreed with CAT and TOT and ordered an injunction that the NTC did not have any authority to allow the 3G licenses to be put up for auction.⁷⁵ The order is temporary and may ultimately be removed after further consideration of the issues.

The next step is for the Administrative Court to consider whether the NTC has authority to allow 3G licenses to be put up for auction. But, a review by the Administrative Court could become moot if Parliament authorizes the NBTC to oversee the telecommunications industry. In early November 2010, the Thai Senate passed a national frequency allocation bill, the first step in establishing the NBTC.⁷⁶ Under the new bill, members of NBTC must be appointed within 180 days from when the bill comes into force upon its publication in the Royal Gazette.

VI. Timor Leste

In 2010, the Democratic Republic of Timor-Leste continued its task of reviewing the country's legislation by replacing statutes from the pre-independence period and by passing new legislation on issues not yet regulated.

A. BANKING AND FINANCE

By means of Resolution No. 28/2010 of 26 May 2010, the Government approved the Business Plan for the incorporation of the Timor-Leste Development Bank ("BNTL"). BNTL will be majority held by the state with a participating interest of fifty-one percent. The remaining forty-nine percent will be held by national and foreign private investors. BNTL will focus initially on financing large and medium-sized enterprises and may also later engage in asset management activities. For this purpose, BNTL will use a small portion of the amounts in the country's petroleum fund to acquire participating interests in national, regional, and global enterprises.

B. CRIMINAL LAW

2010 was an important year for international cooperation on criminal matters. National Parliament Resolution No. 5/2010, of February 10, 2010, ratified the Convention on Transfer of Convicted People between Member States of the Community of Portuguese-speaking Countries ("CPLP"). This convention is aimed at allowing convicts that are nationals of member-states to serve their prison sentences in their respective country of origin, whenever they have been convicted in another member-state.

75. Supreme Administrative Court, 23 Sept. 2010 Order No. 786/2553 (Thai.).

76. Mongkol Banqprapa, *Frequency Allocation Bill Receives Senate Nod*, BANGKOK POST, Nov. 16, 2010, <http://www.bangkokpost.com/business/telecom/206554/frequency-allocation-bill-receives-senate-nod>.

One of the most important statutes approved during 2010 was Law no. 7/2010, of 7 July, on domestic violence. This law acknowledges that families have, first and foremost, a special duty to protect and defend groups that are particularly vulnerable, such as women, children, elderly, and disabled persons, against all forms of violence, exploitation, discrimination, abandonment, oppression, sexual abuse, and other forms of ill-treatment.

C. IMMIGRATION

In March 2010, Timor-Leste approved new rules for tourism and transit visas. Previously, any foreign national could request a tourism visa or a transit visa on arrival in the country. Decree-Law No. 5/2010, of March 16, 2010, approved new procedures for the issuance of tourism and transit visas on arrival in the country, restricting the issuance of some visas. As of the effective date of the new rules, only travelers from authorized countries will be allowed to request visas on arrival at the entry point into the country. All other foreigners wishing to enter the national territory shall obtain a visa prior to entering the country.

After approval of the new rules, the immigration authorities have adopted a stricter stance on foreigners that are not in compliance with immigration requirements, notably those that are working in the country without a valid work visa.

D. MEDIA & ENTERTAINMENT

By means of Decree No. 3/2010, of June 16, 2010, the government approved rules aimed at regulating the exercise of advertising activities by the state-owned company Rádio e Televisão de Timor-Leste, E.P. This decree sets forth, *inter alia*, the concepts of advertisement and advertising activities, the applicable restrictions, and the rules on duration of advertising and its insertion in or between programs.

E. STATE ADMINISTRATION

In April, the National Parliament approved Law No. 2/2010, on the state's National Security policy. The law establishes and regulates the "Integrated System of National Security," which combines the state's activities respecting national defense, internal security, and civil protection. On the same date, the National Parliament also enacted Law No. 4/2010, of April 21st, aimed at establishing and governing internal security. The purpose of this statute is to safeguard and ensure the safety of the population, reinforcing the need to stabilize the country.

Decree-Law No. 1/2010, of February 18th, on procurement decentralization rules regarding acquisition of goods and services by the State introduced important changes to the public procurement procedures. The new measures cover, amongst other sectors, the acquisition of goods and services by the state with respect to construction works.

2010 also marked the country's adherence to the CPLP, by means of National Parliament Resolution no. 14/2010, of 16 June 2010. The CPLP comprises the following countries: Angola, Mozambique, Brazil, Portugal, Cape Verde, São Tomé e Príncipe, Guinea-Bissau, and Timor-Leste. CPLP's main objectives are: (i) political and diplomatic cooperation among the member states with respect of international affairs; (ii) cooperation in all areas, including education, health, science and technology, defense, agriculture, public

administration, telecommunications, justice, public security, culture, sports and media; and (iii) the implementation of projects aimed at promoting and spreading the Portuguese language, namely through the International Portuguese Language Institute.

VII. Vietnam

A. COMMERCIAL ARBITRATION IN VIETNAM

Vietnam has become an attractive destination for foreign investors, but confidence in the country's legal system to resolve commercial disputes remains low. Reasons include the lack of an independent judiciary, the lack of published court decisions, and a tendency to criminalize civil disputes, among others. As such, arbitration is a preferred alternative to litigation. Likely with an eye towards foreign investors, in June 2010 the Vietnamese government issued the Law on Commercial Arbitration ("Arbitration Law").⁷⁷ The Arbitration Law replaces and improves upon 2003's Ordinance on Commercial Arbitration ("2003 Ordinance").⁷⁸ This article discusses key aspects of the Arbitration Law that are important to foreign investors and their lawyers.

1. *Application*

The Arbitration Law applies only to commercial matters. At least one of the parties to a dispute must be engaged in commercial activities.⁷⁹ The term "commercial activities," however, is undefined, allowing for a broad application of the law. The 2003 Ordinance, in contrast, limited the scope of "commercial activities" to specific conduct.⁸⁰ The Arbitration Law applies to both Vietnamese and foreign parties (referred to as "foreign elements").

2. *Language and Location*

The Arbitration Law states that the language used in arbitration proceedings involving a foreign element, including an enterprise with foreign invested capital (*e.g.*, a joint venture enterprise), depends on the parties' prior agreement.⁸¹ If no agreement exists, the arbitration tribunal ("Tribunal") decides the language.⁸² This change is an important difference from the 2003 Ordinance, where the default language was Vietnamese, even when a foreign party was involved.⁸³

The Arbitration Law allows the parties to choose the proceeding's location via prior agreement.⁸⁴ If the location has not been agreed upon, the Tribunal decides where the

77. *Pháp Luật Về Trọng Tài Thương Mại* [Law on Commercial Arbitration], No. 54/2010/QH12 (June 17, 2010) (Viet.) [hereinafter *Arbitration Law*].

78. *Pháp Lệnh Trọng Tài Thương Mại* [Ordinance on Commercial Arbitration], No.08/2003/L/CTN (Mar. 10, 2003) (Viet.) [hereinafter 2003 Ordinance].

79. *Arbitration Law* art. 2.2.

80. 2003 Ordinance art. 2.3.

81. *Arbitration Law* art. 10.2.

82. *Id.*

83. 2003 Ordinance art. 49.7.

84. *Arbitration Law* art. 11.1.

proceeding will take place.⁸⁵ The Tribunal bases its determination on what is convenient for inter-Tribunal consultation, taking witness statements, interviewing experts, and examining evidence.⁸⁶ The proceeding may be held inside or outside of Vietnam.⁸⁷

3. *Applicable law*

Similar to language and location, when a foreign element is involved, the law applied in the arbitration depends on the parties' prior agreement. If the law has not been agreed to, the Tribunal decides based on what is "most appropriate."⁸⁸ International customs may also be applied if the law chosen by the parties or the Tribunal does not contain provisions relevant to the dispute.⁸⁹ The Arbitration Law's choice of law provisions mark an improvement over the 2003 Ordinance, where foreign law could only be applied if it did not contradict the "fundamental principles" of Vietnamese law.⁹⁰

4. *Arbitrators*

The Arbitration Law requires arbitrators to meet certain minimum qualifications. The qualifications include having legal capacity under Vietnamese law, a university degree, and at least five years of work experience in the discipline studied.⁹¹ A person can still qualify even if the university and work requirements are not met so long as he or she has "highly specialized qualifications and considerable practical experience."⁹²

Importantly, nationality is not a qualification for an arbitrator. This is a key difference from the 2003 Ordinance, which required arbitrators to be Vietnamese citizens.⁹³ Thus, under the Arbitration Law, foreign (or Vietnamese) parties can choose foreign arbitrators. Furthermore, allowing foreigners to sit as arbitrators helps facilitate the establishment of foreign arbitration organizations in Vietnam.

5. *Interim Relief*

Another improvement by the Arbitration Law over the 2003 Ordinance is allowing the Tribunal to grant interim relief. The law defines interim relief as, *inter alia*, maintaining the status quo of assets in dispute, requiring interim payment between the parties, and prohibiting asset right transfers.⁹⁴ The authority to grant interim relief was absent in the 2003 Ordinance. The inclusion of interim relief in the new Arbitration Law helps bring Vietnamese law in line with international standards.⁹⁵

85. *Id.*

86. *Id.* art. 11.2.

87. *Id.*

88. *Id.* art. 14.2.

89. *Id.* art. 14.3.

90. 2003 Ordinance art. 7.2.

91. *Arbitration Law* art. 20.1(a), (b).

92. *Id.* art. 20.1(c).

93. 2003 Ordinance art. 12.1.

94. *Arbitration Law* art. 49.2.

95. See Arbitration Rules, G.G.A. Res. 31/98, art. 26. UNCITRAL, 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (Dec. 15, 1976), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>; *Rules of Arbitration*, INT'L CHAMBER OF COMMERCE, art. 23 (Jan. 1, 1998), available at http://www.icc.wbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

6. *Awards*

The Arbitration Law requires the Tribunal to issue the arbitral award by a majority vote.⁹⁶ If a majority decision cannot be reached, the Tribunal's chairman decides the outcome.⁹⁷ After the Tribunal's decision, a party may petition a Vietnamese court to set aside the award. The Arbitration Law provides grounds for setting aside the award, including a void arbitration agreement, lack of jurisdiction by the Tribunal, forged evidence, a corrupt arbitrator, or a result that is contrary to "fundamental principles of the law of Vietnam."⁹⁸ Although this last basis is certainly ambiguous, it is an improvement over the 2003 Ordinance, which permitted an award to be set aside if it was contrary to Vietnam's "public interest."⁹⁹ Thus, the Arbitration Law slightly narrows the scope for which an award may be set aside. If the award is not carried out voluntarily by the award-debtor, the award-creditor may seek enforcement via a civil judgment.¹⁰⁰

7. *Foreign Arbitration Organizations*

Consistent with Vietnam's opening of its markets, the Arbitration Law allows, for the first time, foreign arbitration organizations to operate in the country. The main requirement is that the foreign arbitration organization be legally established and operating in a foreign country.¹⁰¹ The law allows foreign arbitration organizations to establish either a branch or representative office in Vietnam.¹⁰² Branches may conduct actual arbitration activities, including appointing arbitrators and hearing cases.¹⁰³ Representative offices cannot conduct arbitrations and are limited to advertising, market surveys, and other promotional activities.¹⁰⁴

96. *Arbitration Law* art. 60.1.

97. *Id.* art. 60.2.

98. *Id.* art. 68.2.

99. 2003 Ordinance art. 54.6.

100. *Arbitration Law* art. 66.1.

101. *Id.* art. 73.

102. *Id.* art. 74.

103. *Id.* art. 76.

104. *Id.* art. 78.