



**GLOBALISING YOUR PRACTICE -
OPPORTUNITIES AND CHALLENGES**

Arbitration of International Commercial Disputes

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Introduction

(1) In this presentation we will be discussing (1) whether it is appropriate to impose restrictions on the choice of counsel(legal representation) in international arbitration and the implication of doing so for positioning as a “ Safe Arbitration Seat” .

(2) Using available statistical data in SE Asia regarding international arbitration and discuss what Lawyers and policy makers have done or should be doing to get the “**CAKE SHARED PROPERLY**” as a way to face **Globalization**.

International Arbitration & Legal Representation

- ❑ Limitations on the parties' choice of legal representatives would contradict the basic concept of arbitration as a flexible and self-tailored dispute resolution system.
- ❑ freedom of legal representation is recognized in most national arbitration laws, and by most institutional arbitration rules . Especially in South-Eastern Asia; the arbitration rules of many centers provide for such a freedom:

Article 22 of China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules 2014 : *“A party may be represented by its authorized Chinese and/or foreign representative(s) in handling matters relating to the arbitration. In such a case, a Power of Attorney shall be forwarded to the Arbitration Court by the party or its authorized representative(s)”*

International Arbitration & Legal Representation(Cont...)

- Article 5 of the Chinese European Arbitration Centre (CEAC) arbitration rules 2012: *“Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation **or assistance(...)**”.*
- South Korea: Article 7 of Korean Commercial Arbitration Board rules 2016: *“ A party may be represented by any person of its choice in proceedings under the Rules, subject to such proof of authority as the Arbitral Tribunal may require”*
- **Singapore:** Art. 23 of SIAC rules 2016
- **Australia:** article 8 of ACICA arbitration Rules 2016
- **Thailand:** article 53 of the Thailand arbitration center rules 2015
- **Pakistan:** article 19 of Center for international investment and commercial arbitration (arbitration rules 2016)

International Arbitration & Legal Representation(Cont...)

- ❑ Despite what have been said: laws in a few jurisdictions require that counsel in locally-seated to be locally-qualified to represent in arbitration
- ✓ That is true in Turkey, **Thailand** and was formerly true in Japan and a few other jurisdictions(Gary Born , 2014).
- ✓ **difficulties also in India.** There, the law appears to allow foreign lawyers to appear in arbitration but this is have been challenged to the Supreme Court in Bar Council of India v. A.K. Balaji - SLP (Civil) No. 17150-54/2012. The position of the SC of March 18, 2018 appear to be that foreign lawyers not allowed to appear in arbitration.
(<http://www.advocatekhoj.com/library/judgments/announcement.php?WID=9848>)
- ✓ **In Nigeria:** Nigeria Legal Practitioners Act define a legal Practitioner as only lawyer registered to practice law in Nigeria(**Is that a good way to share the CAKE?**)

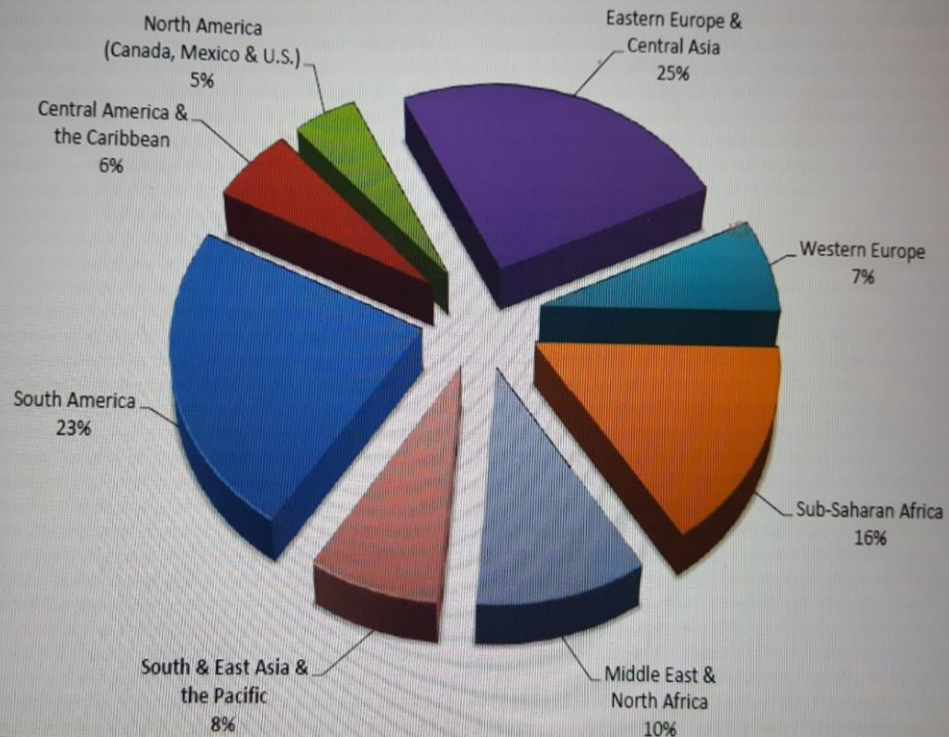
International Arbitration & Legal Representation(Precision)

- **Philippine:** Article 13 of the Philippine Dispute Resolution Center *rules of 2015* : “*the parties may be represented by persons of their choice, irrespective of, in particular, **nationality or professional qualification**” .*
- **Mauritius:** In the Mauritius Arbitration Act (section 31) " Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the arbitral proceedings by a law practitioner or other person chosen by him, **who need not to be qualified to practice law in Mauritius or in any other jurisdiction.**“
- **Tested Best Practice without Precision:** case of Rwanda with 25 KIAC International arbitration case out 97 total cases(Parties have been represented by foreign counsels but preferred to work with local counsels since the Seat of arbitration and applicable law to the contract were mainly Rwanda in the 97 cases: Rwandan Law)
 - ✓ **Allowing anybody is important for defining a “safe arbitration seat”**
 - ✓ **Focus much on your Seat in contract (Applicable law) for ended share the “CAKE”**
 - ✓ **Example of two Asian parties applying law of one of the country of North America or European**

Second Objective of the Presentation

(2) Using available statistical data in SE Asia and beyond regarding international arbitration and discuss what Lawyers and policy makers have done or should be doing to get **the “CAKE SHARED PROPERLY”** as a way to face Globalization.

ICSID Statistics 2010-2018 revealed that SE Asian and Pacific registered (8% of the total cases , Western Europe (7%) and North America(5%)



ICSID cases involving
investors with non-SEAP
Nationality
95%

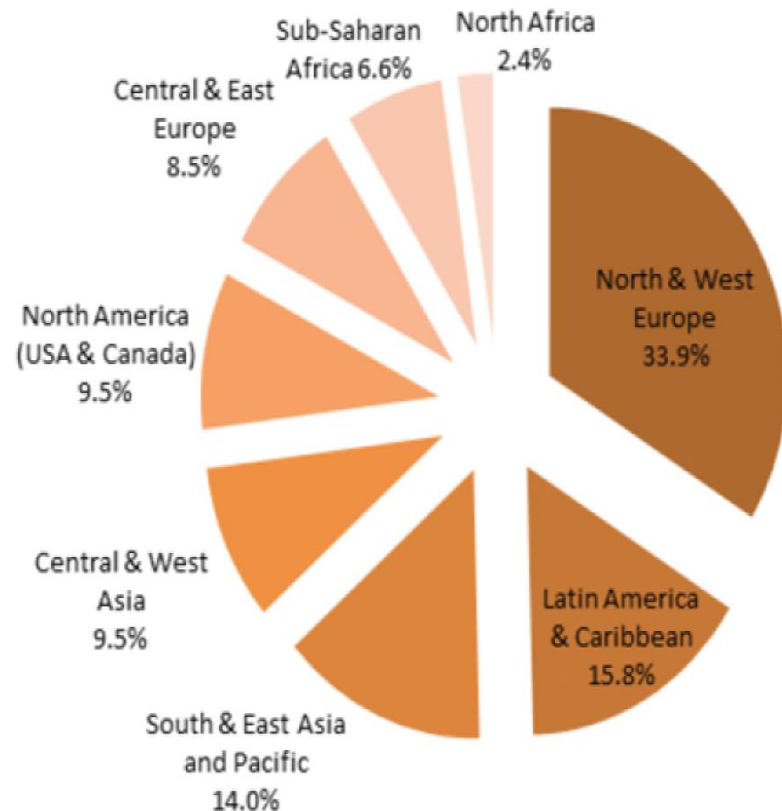
ICSID cases involving
investors with SEAP
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5%

Arbitrators and Conciliators appointed: SE Asian and Pacific (179) , Western Europ(850) and North America(393) ,

In 2017, on the 810 registered cases by the ICC, **14,0%** involved SE Asia and Pacific while **North & West Europe (33.9%)**.

The Nationality of arbitrators appointed from SE Asia and Pacific (**123**) while North & West Europe (**679**)

Origin of arbitrators appointed in ICC case 2017



Region	Year	Men	Women
North America	2016	193 86%	32 14%
	2017	114 82%	25 18%
Latin America & Caribbean	2016	145 88%	19 12%
	2017	165 82%	36 18%
Central & West Asia	2016	46 84%	9 16%
	2017	43 68%	20 32%
South & East Asia and Pacific	2016	109 89%	14 11%
	2017	123 87%	18 13%
North & West Europe	2016	617 86%	103 14%
	2017	679 85%	119 15%
Central & East Europe	2016	64 70%	27 30%
	2017	61 69%	27 31%

Choice of Law in ICC arbitration 2017

In 87% of the disputes referred to ICC Arbitration in 2017, parties included a choice-of-law clause in their contracts. The laws of **England** and **USA** States remained the most frequent choices, followed by **French and Swiss law**.

Consideration: The choice of law (Lex Arbitri) determine the appointment and the counsel to involve(Dispute resolution clause)

MEETING THE CHALLENGES

Some barriers to Arbitrate in developing countries cited in literature (Action Need)

- ❑ Interference of Courts
- ❑ Corruption
- Limited trained professionals(issue of capacity building)
- Poor legal/regulatory frameworks
- Lack of data on Enforcement in many developing countries?
- What else? Political instability, visa issue? Airline?

There is always excuses of not arbitrating in developing countries.

We need to admit some of the weaknesses and work hard to improve but players need to fight the negative perceptions.

Meeting The Challenges for developing countries(Cont...) Time of Enforcement of awards

- Sample data for Arbitrating Commercial Disputes in Sub- Saharan Africa in 2011 shown ***that the time to enforce an arbitration award in Africa varies from a year in Ethiopia(375), Tanzania(425), and Ghana(436), , the same survey of 2011 indicated that Srilanka(720), Pakistan(806), Philippines(948),***

The average dispute resolution time of ICSID case since 1 July 2003 is 3.2 years or 1,171 days (GAR Journal vol. 4, Issue No 5)

This have an impact on the Seat determination by parties and Sharing the cake in the future may require making your seat "Safe"(a clear enforcement regime)

CHANGES HAPPENED

Herbert Smith Freehills conducted a survey on the enforcement of arbitration awards in the ASEAN region(2018)

- **Singapore (Enforce in 6 months, Herbert Smith Freehills 2018),**
- among the ASEAN countries, 91.02% of the participants consider **the Singapore** courts to be highly or very effective in enforcing international arbitral awards, This is followed by **Malaysia** where close to 69% of the participants consider the courts to be effective generally in enforcing international arbitral awards.
- The courts' approach to enforcement of arbitral awards in the other South East Asian countries is still not as developed as in Singapore, but they have steadily improved over the years, especially in **Thailand**, and **Philippines** where courts have been increasingly effective in recognising arbitral award
- **Rwanda in Central Africa (6 months, users perception survey 2015)**

Recent Experience of Rwanda(as Safe seat)

- Kigali International Arbitration Centre(KIAC) registered 96 cases in 5 years(25 Int'l case)
- 3-6 months (enforcement of award vary between 3 to 6 months)
- None of the 48 KIAC is yet be set aside by the Rwandan court
- Chief Justice rules of 2012 giving priority of arbitration case over other matter. It doesn't follow the normal role/Registry
- The New civil code procedure of April 2018 and the provision on court intervention
- **Art: 21: Grounds for refusal of registration of a claim by the court Registrar**
- Files a claim without demonstrating that he/she has used amicable settlement or arbitration specified in the contract;

Dealing with the influence of negative perception

- WB Doing Business report which ranked 186 economies of the world
- Global Competitive Index,
- Global States of Mind Surveys
- Business baseline profitability index

Some of the developing countries(in South Eastern Asia for example) have better ranking than developed countries in the above index & Survey

What lawyers and their jurisdictions can do to appear on the map of Int'l arbitration(share the cake).

- Driving/Positioning your respective countries as an Arbitration safe Seat(**legal representation, 1958 New York Convention, Model law, Supportive Courts, Clear Enforcement Regime, visa policy, safety etc..**).
- Testing Arbitral Institutions in South Eastern Asia(some of them have been tested)
- Start with Contract Negotiation & drafting (Seat-Applicable Law, Avoid Pathological Clauses). For purpose of sharing the cake when Dispute arises.**
- Learn more than one International languages (for young people)

Ended: Be aware that: Arbitration is not only a legal concept or a form of justice but an industry which includes many attractive factors such as **tourism, Hotels facilities, zero tolerance to corruption, Entry facilities(visa), safety, internet facility, transport etc....**

Example: PRADA Report in France (2011).

Case of Egypt

Eg2: 2012 Ministerial Instruction on Contract drafting , negotiation of Dispute resolution clause(Rwanda) with model arbitration clause compulsory to Government contract.

Conclusion

- The Economic expansion at the ASEAN continent where according to OECD, ASEAN's real GDP is growing at 5.1% need to think and rethink the Arbitration dispute resolution mechanisms especially for **future equitable share of the Cake in this globalized world.**
- Finally, the lesson from some developing countries including SE Asia which tested their arbitrators and arbitral centers is encouraging. Additionally, what we also learned is that change is possible, it is happening, and the mission of the legal practitioners gathered here is **to contribute to make it happen more quickly than in the past. FOR THE CAKE TO BE SHARED PROPERLY**

Conclusion (Cont...)

The Analogy of SE Asia captains during Turbulences



- Turbulences are directing to land out of West Eastern Asia such as Paris, London or Zurich etc.. since during turbulence it is allowed to land any where (you pay the landing cost).
- Despite the Turbulences, without fear the captain and his Assistant pushed and landed safely in Bangkok or Philippines

Those captains who can make it are:

West Eastern Asian's Lawyers and their policy makers (Attorney General/Ministry of Justice) right from the beginning of the Contract negotiation and drafting to make sure that when dispute arises the **CAKE WILL BE SHARED EQUALLY.**



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THANK YOU