

Benchmark Litigation Asia Market Trends Report 2024

The key drivers and challenges of Asia's thriving disputes market

This report highlights the growth of cross-border disputes, trending sectors and arbitration issues through survey data analysis and interviews with litigators from around the region.

Executive summary

Technology and globalisation have catalysed a significant transformation in modern businesses. As Asia proves its substantial roles in the global economy, disputes have become an inevitable facet of modern businesses, particularly amid the recent geopolitical crises that drive companies around the world to reconfigure their supply chains.

Benchmark Litigation Asia gathered input from more than 1000 individuals across the region during its annual research cycle. The respondents predominantly consisted of private practice and in-house lawyers. One noteworthy discovery was the significant level of growth and the changing landscape of disputes in Asian markets.

Disputes with cross-border elements become more common, presenting opportunities for law firms to handle international cases with complex cross-border matters. Corporate crimes and investigations, technology, fintech, and data protection and privacy have been the hottest topics in the past 12 months.

The advancements in technology have brought about an increase in trade secrets and patent litigations. As e-commerce and digitalisation continue to change international trade, data has also become more important than ever. Legal professionals play a central role in assisting businesses in dealing with privacy protection, and compliance issues, as well as expanding into overseas territories. Law firms specialising in these areas have the opportunity to carve out niche markets.

Amid the growing complexity and volume of legal disputes, the surge of litigation cases has become a pressing concern, and courts are struggling to keep pace. From our interviews with legal professionals across the region, a unanimous consensus emerged regarding the increasing embrace of alternative dispute resolutions.

This report will delve further into how lawyers navigate the intricacy of solving cross-border disputes through alternative dispute resolutions, from the latest market developments and choosing the seat of arbitration to an exploration of the pressing issues surrounding award enforceability.

Continuing uptick in disputes

Benchmark Litigation conducted a survey and interviews with legal practitioners and their clients for its annual rankings and awards research. The survey, which took place between September and December 2023, included optional questions and garnered responses from hundreds of in-house counsel at various companies and private practice lawyers around the region.

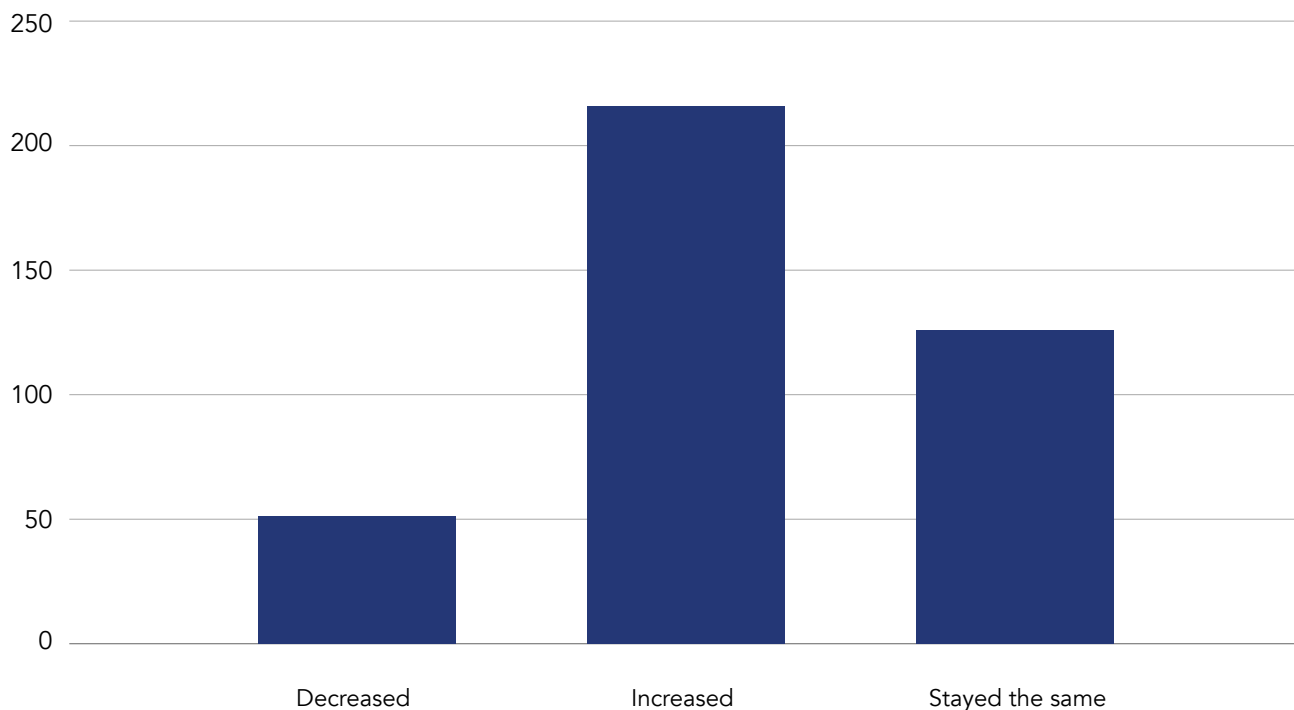
The survey revealed trends and a significant level of growth in the dispute resolution market in Asia, with more than half of respondents declaring an increased volume of disputes in the past 12 months. Only around 13 percent of respondents claimed otherwise, while 32 percent said there was a stable volume. Economics, regulatory issues, and politics were the key drivers. More than half also expressed that the nature of the disputes had changed.

As businesses are increasingly becoming globalised, Pathorn Towongchuen, senior partner at TTT+Partners in Bangkok, observed that disputes with cross-border elements are becoming more common in Thailand. This presents an opportunity for law firms with expertise in handling international disputes to attract clients seeking assistance for complex cross-border matters.

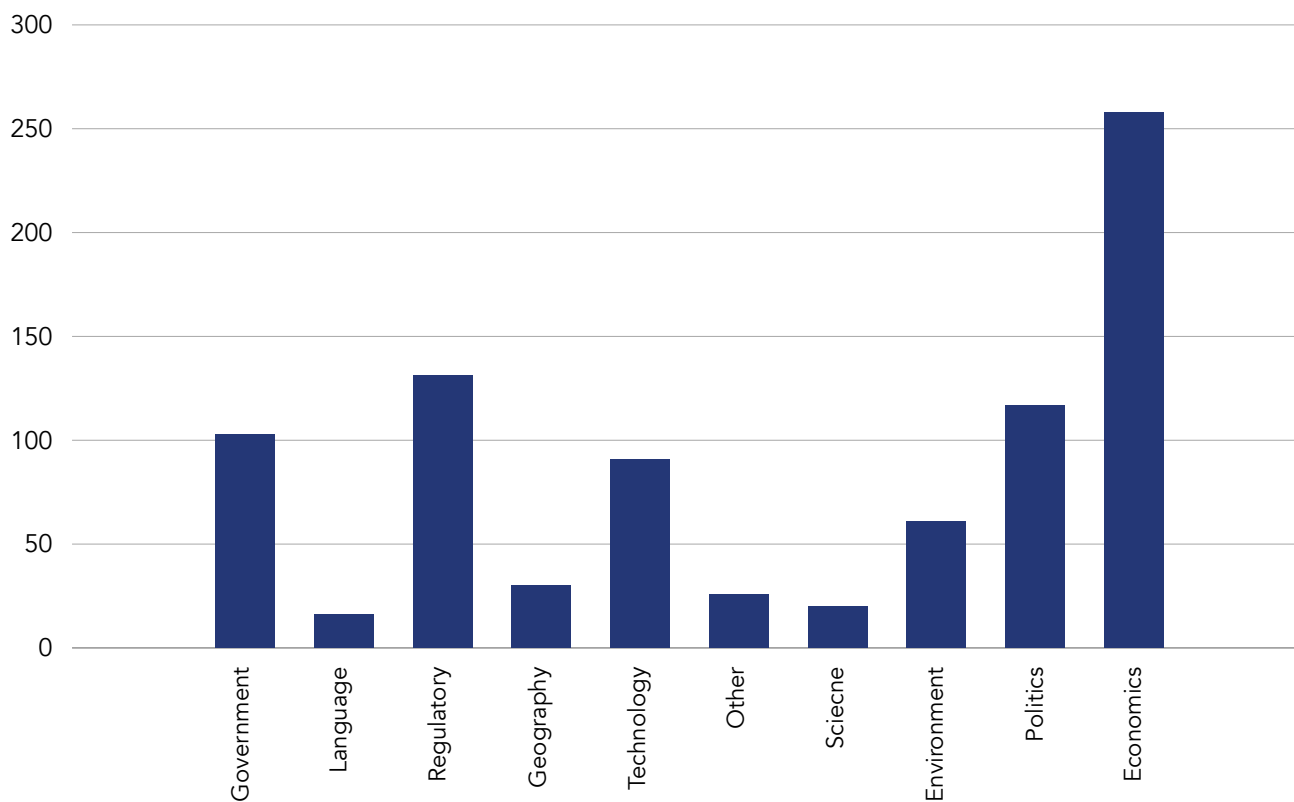
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On the other side, he also sees an economic slowdown as the Thai government and the central bank slowly cease their pandemic reliefs for

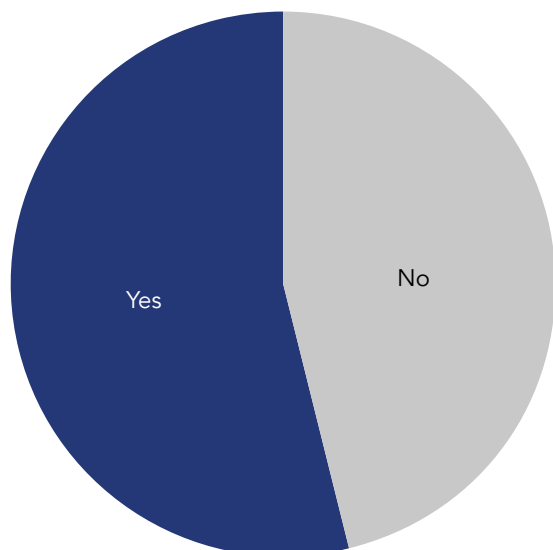
Q: In terms of volume, have disputes increased, decreased or stayed the same in your jurisdiction over the past 12 months compared to the previous year?



Q: What are the key drivers influencing your answer to the previous question?



Q: Do you find the nature of disputes in your jurisdiction changing?



private sectors. Some public companies such as property developer More Return and electrical components manufacturer Stark are suffering financial crises, which could spell panic among investors.

“Several investors are not confident in investment in the Thai stock market and many bond issuers are not able to roll the bond or find the new financing sources to recover their debt,” said Towongchuen. “This will be a trend for the default of several bond issuers from now and this cycle will impact the rest of business in Thailand, especially public companies. Several more rehabilitations and debt recoveries will occur.”

Sun Zhiqian, a partner at Guantao Law Firm in Beijing, had a similar view on bankruptcy and debt-related issues due to the economic recessions currently going on in mainland China. “There will be brutal fights for law firms and legal professionals in order to compete in a shrinking market,” said Sun.

In Indonesia, Andreas Hartono, a Jakarta-based senior partner at ASNP Law Office, is optimistic about a growing number of cross-border disputes. An important factor to consider was that the country had just wrapped up its general election to choose a new president and senate members. Shifts in political stability and investment could happen if the new administration holds a different vision and policies from the incumbent.

“Obviously, this is a challenging period but there is positive momentum for us. Especially as the world develops, and becomes more competitive, and now there is a more widespread commitment towards environmental sustainability,” he said.

In terms of the most active areas for dispute resolution, Hartono pointed out the suspension of debt payment or *penundaan kewajiban pembayaran utang* (PKPU). One of the reasons is, apart from its simple process, the required time frame to install a PKPU status over the debtor is relatively short compared with the arbitration or litigation process.

“Some creditors now prefer to initiate a PKPU petition against the debtor rather than initiating an arbitration or litigation at the civil court,” explained Hartono.

The energy sector has been also quite busy with disputes mainly influenced by geopolitical tensions in the past couple of years that have caused delays in delivery and sudden rises in fossil fuel prices. On the other hand, carbon credits have gained popularity in Indonesia due to their attractive rewards associated with managing carbon emissions and producing carbon credits.

“However, this growing business opportunity has yet to be sufficiently addressed and regulated by the Indonesian government, potentially creating loopholes and, conversely, risks of disputes among industry players,” Hartono added.

Emerging sectors and practice areas

In terms of practice areas and industry sectors, the survey also found that corporate crimes and investigations had sparked the most significant disputes in the past 12 years. Other growing sectors and practice areas are technology, fintech, and data protection and privacy.

To keep up with the ever-changing landscapes in the legal industry, respondents expressed many strategies could be taken, with the top responses including deploying legaltech or artificial intelligence solutions, enhancing internal training, investing in marketing and business development investment, and adding headcount via recruitment. However, most of the respondents (56%) expressed that they did not believe regulatory developments would impact their business.

“Disputes are becoming of an increasingly cross-border nature,” said Eugene Thuraisingam, the name partner of his own firm in Singapore. “Various regulatory developments, including crackdowns on money laundering, have also resulted in spillovers into dispute resolution and white-collar crime work.”

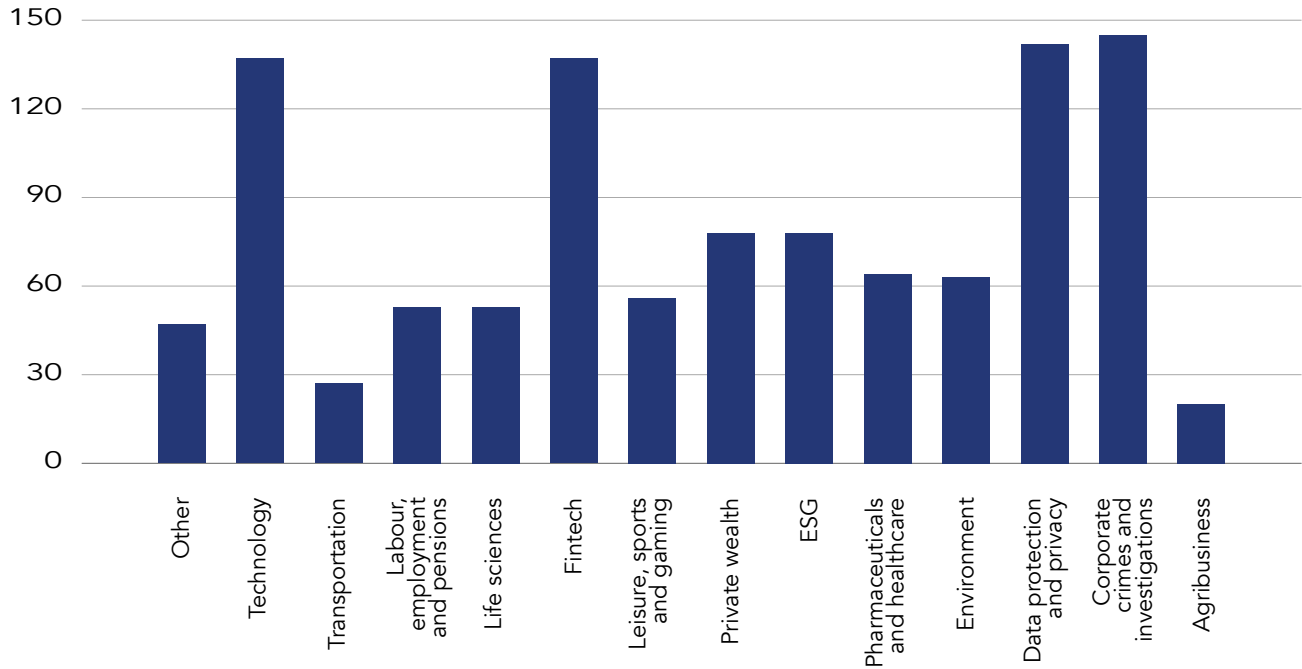
James Jiang, managing partner at Topcom China Law Offices in Shanghai, noted that along with the significant advancement in technology, China has also witnessed a growth in trade secrets and patent litigations. The government continuously increases its investment in technology and provides enterprises with multiple policies and initiatives to create a favourable environment for innovation and business.



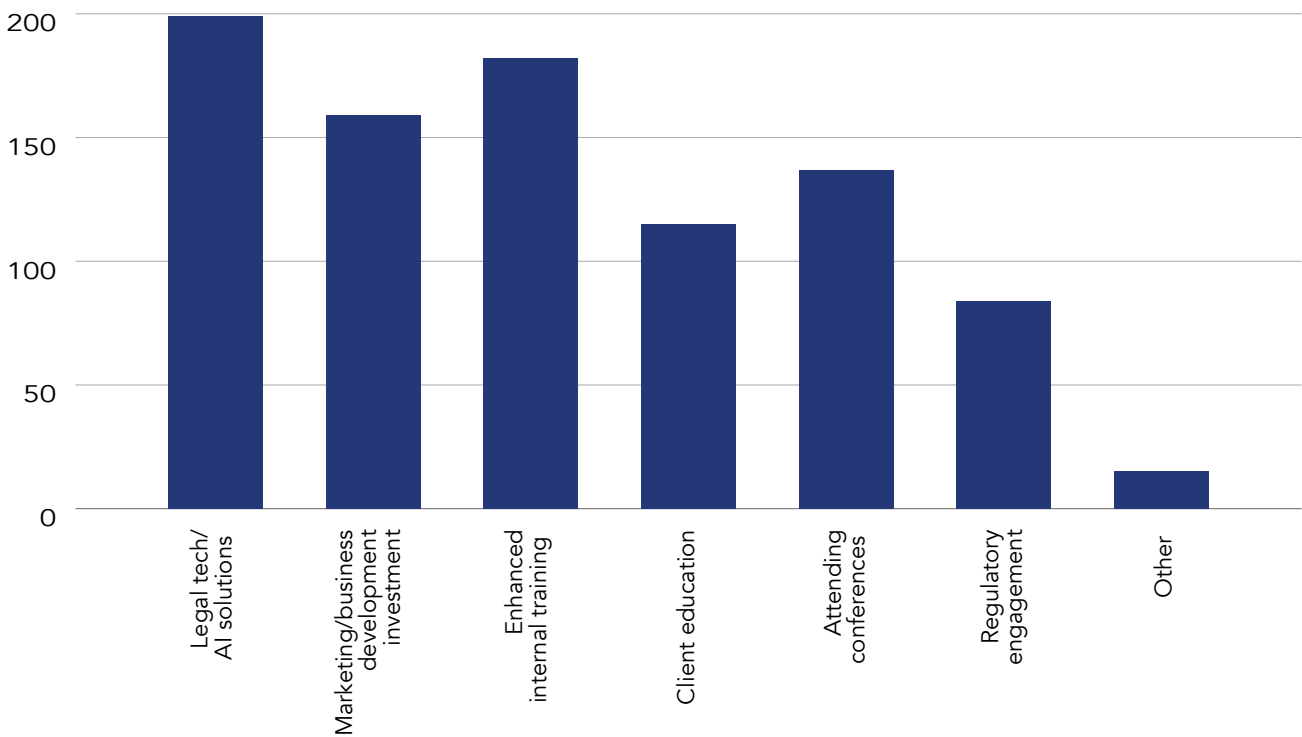
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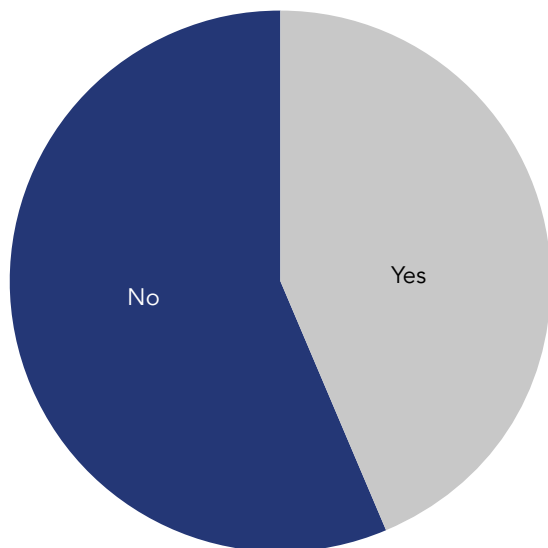
Q: What new sectors or practice areas do you see disputes in your jurisdiction developing in?



Q: What are your firm's plans to respond to the changes/challenges of an evolving dispute landscape?



Q: Are there key regulatory developments that will impact your business?



“An increase in friction between enterprises over intellectual property (IP) infringement also comes along,” said Jiang. “The government and judicial institutions have been intensifying enforcement efforts concerning IP rights.”

Notably, the cost of IP infringement has been elevated through several high-compensation cases, such as the Vanillin trade secret case with an award of CNY159 million compensation (US\$2 million) in 2021. Enterprises have realised the importance of protecting IP rights and have actively taken measures to safeguard their technological innovations and trade secrets.

As China’s economic growth has shifted from reliance on foreign investment to self-driven innovation and expansion into overseas markets, it is inevitable for companies to deal with overseas challenges. Many non-practicing entities have initiated standard essential patent litigations against Chinese enterprises.

Other anticipated trends, Jiang said, are outbound investment and data compliance. With the establishment of the National Data Bureau in October 2023 and large Chinese internet platforms actively expanding into overseas markets, disputes and compliance obligations related to data rights will become the blue ocean of legal business.

“Lawyer’s opinions will play a crucial role, especially in privacy protection compliance issues, such as providing advice on how Chinese enterprises can

comply with the EU’s General Data Protection Regulation standards when expanding into European markets,” Jiang said.

Another tech powerhouse, India, is experiencing a similar trend. Emerging sectors such as technology, IP, and international trade are generating novel legal issues and disputes. Shally Bhasin, New Delhi-based partner at Shardul Amarchand Mangaldas & Co, noted that law firms specialising in these areas have the opportunity to carve out niche markets and attract clients seeking specialised expertise.

With India’s expanding economy and increasing commercial activities, Bhasin observed that the demand for dispute resolution services is on the rise. “The legal market in India is highly competitive, with both domestic and international law firms vying for clients,” said Bhasin. “This competition requires firms to differentiate themselves by offering innovative services, demonstrating industry expertise, and providing cost-effective solutions.”

On the other hand, rapid changes in laws and regulations, coupled with complex regulatory requirements, posed challenges for legal professionals in staying abreast of legal developments and advising clients accordingly. Moreover, recruiting and retaining top legal talent is a challenge faced by many law firms. “With increasing demand for specialised expertise, firms need to invest in training and development programs to nurture skilled professionals and stay competitive in the market.”

Litigation backlogs

From the interviews with legal professionals around the region, if there is one thing that all agree on, it is the rising adoption of alternative dispute resolution methods. Amid the growing complexity and volume of legal disputes, courts are struggling to keep pace, and it has become apparent that handling the surge of litigation cases has become a pressing concern.

Such an issue is especially conspicuous in India. “The bureaucratic machinery is heavily burdened due to the significant volume of government litigation, comprising around 46% of court cases,” said Bhasin. “Litigation slows down decision-making within government bodies, leading to administrative delays.”

Furthermore, Bhasin explained, an expansive interpretation of “state” in Article 12 of the Constitution of India includes various entities like public sector undertakings and cooperative societies, making government litigation more complex. This broad interpretation has led to the explosion of writ petitions at the high courts. According to the Indian Economic Survey 2017-2018, data from six high courts show that over a million writ petitions are pending, making up 50-60% of the backlog in the judicial system.

“It is no secret that Indian courts are plagued with an inordinate number of pending cases, a concern that is further exacerbated by the incessant delays that arise in the disposal of such cases,” said Bhasin. “Further, owing to the procedural rigamaroles, speedy justice has always been a distant reality. It is in this light that approaches under the umbrella of hybrid dispute resolution gain traction.”



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Hybrid dispute resolution and pre-litigation mediation often take the forms of Med-Arb and Arb-Med-Arb. These mechanisms help bypass lengthy processes at the court litigation route, assisting disputing parties in having a more proactive involvement and greater transparency in dialogue.

In China, a similar problem persists, with litigations usually taking years to reach the final verdicts. “Alternative dispute resolution may only take less than six months to resolve the cases,” said Sun of Guantao Law Firm. “It also costs far less money on attorney fees and legal costs and probably less than one-fifth.”

Jiang of Topcom China Law Offices agreed, citing no significant increase in the number of judges and clerks of courts in China while cases are continuously piling up. According to the 2024 working report of the Supreme People’s Court of China, since 2013, the total number of cases concluded by courts nationwide has risen at an average annual rate of 13%, an increase of 2.4 times in the past decade, and the average number of cases handled per judge has risen from 187 in 2017 to 357 in 2023.

“The judges are handling huge caseloads. Therefore, it is inevitable for alternative dispute resolution to become the primary dispute resolution method in China,” said Jiang. “Alternative dispute resolutions are usually more affordable and cost-efficient. Parties do not need to pay court fees if they adopt these methods such as mediation, conciliation, and negotiation. This is especially true for small claims.”

Jonathan Yuen, Rajah & Tann Singapore’s head of commercial litigation and employment disputes practices, sees an increased use of alternative dispute resolution across all industries and sectors in the island city-state. The reason for this, apart from the 2019 Singapore Mediation Convention, is Singapore’s Rules of Court 2021, which imposes an obligation on parties to consider alternative dispute resolution before commencing and during court proceedings.

The greater use of tiered dispute resolution clauses in contracts requires parties’ senior management to first negotiate or mediate their dispute in good faith and to proceed to litigation or arbitration only if the matter remains unresolved. “When a dispute arises, and when emotions may understandably run higher, these tiered dispute resolution clauses prevent parties from rushing to court or arbitration as a point of first resort,” said Yuen.

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In Thailand, Towongchuen of TTT+Partners notes that litigation can be time consuming due to various factors such as procedural delays and the schedule of each court, with one to one-and-a-half years until the first court issues the judgment. Since 2020, the amended Civil Code Procedure made it possible to opt for mediation without filing new lawsuits to courts.

This will help to save time if they can finish this session by avoiding going to court. However, Towongchuen observed that there weren’t many successful negotiation sessions for dispute resolution in Thailand due to the lack of expert middlemen that could help complete the session.

Additionally, the Thai Arbitration Institute and Thailand Arbitration Centre have been promoting arbitration by focusing on cost-effectiveness, time efficiency, confidentiality, and expert arbitrators in unique areas. These local seats are preferable among small and medium businesses, rather than going overseas to solve cross-border disputes.

“The key considerations that Thai lawyers take into account when selecting a seat for cross-border arbitration are neutrality, cost efficiency, and how time-consuming it is,” he said. “For the past decade, the most preferred seat for Thai lawyers now is the Singapore International Arbitration Centre (SIAC).”

Choosing arbitration seats

For those who intend to solve cross-border disputes through arbitration, there are many factors to consider when it comes to choosing a seat. From experience, Hartono of ASNP Law Office, highlights that the key considerations are the award’s enforceability, the neutrality, costs and efficiency of the seat, and the local courts’ attitude towards the proceedings and awards.

A seat that facilitates the recognition and enforcement of awards, possibly through international conventions like the New York Convention, is highly favourable. The reputation of the selected seat for neutrality and impartiality is also vital to ensure a fair and unbiased process. Normally, disputing parties seek a balance between cost-effectiveness and efficiency, as the overall



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– Jerald Foo, Rajah & Tann

spending such as arbitrator fees, administrative expenses, and whatnot, are significant considerations.

“Based on our observations, the SIAC lately has gained prominence as a leading institution for the arbitration process involving Indonesian parties and other jurisdictions,” said Hartono. “The Asian International Arbitration Centre in Kuala Lumpur is also getting more popular among parties with Indonesian interests.”

Bhasin of Shardul Amarchand Mangaldas & Co admits that the dilemma in choosing the seat often surfaces during international commercial arbitrations. While there is no straitjacket formula to solve this, she hints at certain factors that come into play.

The pace of arbitral procedures and the timing of when the award is made can be very crucial. If parties wish to settle disputes quickly, it would make sense to opt for a seat that ensures that an award has to be passed within the shortest span of days.

Another important factor is whether the arbitral awards can be challenged and the level of scrutiny that the courts of the respective jurisdictions have in setting aside or intervening in the awards. Some parties also value the confidentiality of the proceedings on top of other considerations.

“In recent times, Singapore has emerged and asserted its presence in the international arbitration domain,” said Bhasin. “Its success is owed due to the fast-paced procedures and the fact that the award has to be provided to the parties in a short duration as compared to the time frames prescribed in other jurisdictions ... Singapore’s closer proximity than other known jurisdictions also makes it a preferred choice for Indian parties.”

Jerald Foo, a partner at Rajah & Tann Singapore, observes a huge demand from Malaysia, Hong Kong and Japan recently to resolve their cross-border disputes in the city-state. A strong judiciary and a deep pool of legal counsel, according to Foo, are the reasons. Parties can expect their disputes to be handled well and efficiently, regardless of the governing law and subject matter.

Along with burgeoning international law firms establishing their presence, collaboration with local Singaporean firms allows the latter to continue

to service its existing clients while expanding out or entering into other jurisdictions to serve a wider spectrum of clientele.

“Clients can be better served by cross-border collaboration,” said Foo. “For instance, if a dispute concerns a contract governed by Malaysian law with the matter to be resolved via Singapore-seated arbitration, a network allows the law firm to assemble a team with members adept in Malaysian law and other members who are familiar with Singapore’s arbitral procedure.”

Minh Dang, a Singapore-based partner at Vietnamese law firm YKVN, observes that the distinction between international and local firms in the Lion City is getting vague nowadays. International firms have focused on building up regional hubs, while big firms from Japan, Korea, China, and Singapore have also developed their own regional networks to service their clients.

“Singapore is now also the third global financial centre. A lot of private equity and venture capital players have relocated their regional hubs here,” said Minh. “If you’re not the best of the best in general, you should have a niche in which the international arbitration community recognises that you’re the best of the best in that niche.”

While Singapore’s shine getting brighter, another Asia financial hub, Hong Kong, has also developed its unique selling point. Jiang of Topcom China Law Offices points out the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region, or the RRE Arrangement, which came into effect on 29 January 2024.

“In the past, applying for enforcement of judgments from mainland China in Hong Kong has been laborious on the ground that the judgments of the mainland courts are not final due to the existence of trial supervision procedures,” said Jiang. “This has led to parallel proceedings in Hong Kong and mainland China, resulting in a huge waste of judicial resources.”

The implementation of the RRE Arrangement is expected to reduce the above-mentioned re-litigations. Civil and commercial judgments in force in mainland China can be recognised and enforced in Hong Kong, and vice

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versa. The RRE Arrangement also includes IP disputes and punitive damages awards within the scope of mutual recognition, which is expected to support technological and innovation development.

Policy barriers

While alternative dispute resolutions are gaining traction for solving cross-border disputes, especially arbitration, there are lingering concerns about award enforceability. The New York Convention allows the courts of a contracting state to refuse to recognise and enforce an arbitration award if they believe that doing so would go against their public policy. This means that if enforcing the foreign award would violate the state’s principles of justice or the legal system, the courts can choose not to enforce it.

“The key challenge in the enforcement of arbitral awards in Thailand is whether the arbitral awards are found to be contrary to Thai public policy,” said Towongchuen of TTT+Partners. “Enforcement of foreign arbitral awards in Thailand can be challenging due to the requirements for recognition under the Thai Arbitration Act”

Therefore, efforts can be made to provide a clearer and more precise definition of what constitutes public policy. This could involve legislative reforms or judicial interpretations aimed at providing more guidance to courts and parties involved in arbitration proceedings.

A similar concern was also expressed by Hartono of ASNP Law Office. Despite Indonesia’s membership in the New York Convention, there exist varying views and interpretations among Indonesian judges regarding the public policy requirements for enforcing a foreign arbitral award. This is the reason why the Supreme Court recently issued Supreme Court Regulation No. 3 in 2023, which stipulated a definition or interpretation of a public policy.

“With this new definition of public policy, anyone trying to challenge the enforceability of foreign arbitral awards in Indonesia needs to prove that such awards would impact Indonesia’s legal, economic, and socio-cultural systems,” said Hartono.

While public policy is meant to safeguard the genuine rights and interests of the parties, Bhasin of Shardul Amarchand Mangaldas & Co sees that it could also be used for stalling the award enforcement. “Simply by citing a contravention of any Indian law, parties could attempt to drag out the enforcement proceedings,” said Bhasin. “However, the Supreme Court of

India, in *Renusagar Power v General Electric*, held that a violation of the law cannot instantly cause the public policy factor to come into play since it can be a tool that might be misused.”

Bhasin pointed out that the enforcement of foreign awards is much simpler in theory than in practice as the process is riddled with cross-border legal frameworks and differing interpretations of international treaties. The process becomes even more challenging in courts when Indian authorities claim sovereign immunity to resist unfavourable foreign arbitral awards.

“The examples surrounding public policy, jurisdiction-related issues, and other attempts by parties to forcefully exhibit that the award is perverse or bad in law showcase that there exists a myriad of challenges when it comes to the enforcement of foreign awards,” says Bhasin. “However, at the same time, the recent trend of the courts in India has been towards accepting foreign awards as it is and encouraging the enforcement of the same.”

Conclusion

Dispute markets in Asia have been growing along with the dynamics of cross-border trades, investments, and geopolitical tensions. These changes have far-reaching consequences, making the role of legal professionals more crucial than ever to foster cooperation and adherence to international rules.

This report unveiled that there is significant growth in the disputes space that is being propelled by a vibrant corporate crimes and investigations sector, followed by an uptick in contentious technology, fintech, and data protection matters. However, as this rapid growth is not being accompanied by the courts’ resources, fertile ground is being sown for alternative dispute resolution.

Arbitration has been the most popular alternative due to its relatively fast results, cost-efficiency, and confidentiality. Although, many are concerned about award enforceability in local jurisdictions. As the industry evolves, legal professionals on the ground believe that clearer guidance to courts and parties involved in arbitration proceedings would ease this issue.

Finally, to keep up with the ever-changing landscapes of the legal industry, firms are increasingly deploying legaltech and artificial intelligence solutions. They are also continuing to invest in human resources through training and hiring processes. These strategies aim to leverage technology, improve skills, expand market reach, and strengthen the workforce to stay ahead in an increasingly competitive market.