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Developments in International Arbitration in Singapore in 2009

This article provides a thumbnail sketch of some of the more significant developments in international arbitration in Singapore in 2009.

YANG ING LOONG

CHRISTOPHER TAN

Proposed amendments to the International Arbitration Act

International arbitrations in Singapore are governed by the International Arbitration Act (Cap 143A) (the 'IAA')[1]. On 19 October 2009, the International Arbitration (Amendment) Bill was passed into law by the Singapore Parliament. The amendments came into force on 1 January 2010[2]. The Bill amends the IAA in three ways.

(1) The definition of "arbitration agreement" in s 2 of the IAA is amended by including agreements made by "electronic communications"[3].

(2) The Singapore High Court is empowered by a new s 12A to grant interim orders in aid of international arbitrations, whether the arbitrations are conducted within or outside Singapore.

(i) The background to the amendment is *Swift-Fortune Ltd v Magnifica Marine SA*[4], in which the Singapore Court of Appeal held that a Singapore court had no statutory power under the IAA to grant interim orders or relief to assist arbitrations abroad. Section 12A expressly empowers the High Court to order interim measures in aid of an international arbitration, irrespective of whether the place of arbitration is in Singapore[5]. For example, under s 12A(4), the High Court can make orders in cases of urgency for the purpose of preserving evidence or assets. The term "assets" should be read widely to include intangible asset or choses in action, such as bank accounts, shares and financial instruments[6].

(ii) These powers are, however, only exercisable by the High Court subject to certain conditions, for example, if the arbitral tribunal or arbitral institution has no power to act or is unable temporarily to act effectively[7]. It is noteworthy that:

(a) matters relating to security for costs and discovery/interrogatories are explicitly excluded from these powers[8]; and

(b) any order made by the High Court under s 12A can, in substance, be varied by the arbitral tribunal. Section 12A(7), provides that any order of the High Court made under s 12A will automatically cease to have effect in whole or in part, if the arbitral tribunal makes an order which expressly relates to the whole or part of the order of the High Court.

(3) A new s 19C empowers the Minister of Law to appoint individuals or entities to authenticate and certify awards or arbitration agreements for the purpose of enforcement of an award in a country that is a Contracting State to the New York Convention.

Case law developments (1) – arbitration agreements

Only parties to an arbitration agreement are bound by it

In *Jiang Haiying v Tan Lim Hui*[9], the Singapore High Court confirmed the principle that only parties to an arbitration agreement may participate in it. Among other things, the High Court in that case considered that the expanded doctrine of equitable estoppel was not part of Singapore law[10]. The Court was also of the view that the possibility of having inconsistent rulings in multiple proceedings in court and in arbitration does not outweigh the strict rule that arbitration may only proceed as between the parties that had consented to it[11].

In a different context, the Singapore Court of Appeal (Singapore's highest court), in *PT Jaya Sumpiles Indonesia v Kristie Trading Ltd*[12], confirmed the application of the principle in *Re Kitchin, ex p Young*[13] in Singapore[14]. The principle in *Re Kitchin* is that an arbitration award against a principal debtor is *not* binding on the guarantor and is not evidence against the guarantor in an action by the creditor against the guarantor based on the award. Instead, should the creditor claim against the guarantor, the creditor must prove the guarantor's liability in the same way that it must prove the principal debtor's liability if it were to bring an action against the principal debtor[15].

Hybrid arbitration clause upheld

The Singapore Court of Appeal, in *Insigma Technology Co Ltd v Alstom Technology Limited* [2009] SGCA 24[16], upheld as valid a hybrid arbitration

clause which required all disputes to be resolved "by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce". In other words, an arbitration clause which required the SIAC to apply the ICC Rules was upheld.

The Court of Appeal also made the following observations (among others).

(1) Where parties had evinced a clear intention to settle any dispute by arbitration, effect should be given to such intention, even if certain aspects of the agreement might be ambiguous, inconsistent, incomplete or lacking in certain particulars, so long as the arbitration could be carried out without prejudice to either party's rights and giving effect to such intention did not result in an arbitration that was outside the parties' contemplation. This approach was similar to the principle of 'effective interpretation' in international arbitration law. An arbitration agreement should also not be interpreted restrictively or strictly, as it was not a statute. A commercially logical and sensible construction was to be preferred over another that was commercially illogical. Given the inherently private and consensual nature of arbitration, the principle of party autonomy would be respected and effect would be given to (workable) arbitration arrangements in international arbitration, subject only to public policy considerations to the contrary[17].

(2) Parties to an arbitration in Singapore were free to adopt the arbitration rules of their choice to govern their arbitration. Their choice of arbitration rules would be respected by Singapore law and be given the fullest effect possible. Where there was a conflict between the arbitration rules and the IAA or the Model Law, the rules would prevail unless the conflict was with a mandatory provision of the IAA or the Model Law. Section 15A of the IAA also implicitly recognised the industry practice that an arbitration institution might play different roles in a particular arbitration, depending on the parties. The role of the SIAC in the present case was precisely that of an administrator of the arbitration proceedings to be conducted under the ICC Rules. A hybrid form of arbitration was a matter of agreement between the parties and was wholly consistent with Singapore's policy considerations[18].

"Where parties had evinced a clear intention to settle any dispute by arbitration, effect should be given to such intention, even if certain aspects of the agreement might be ambiguous, inconsistent, incomplete or lacking in certain particulars, so long as the arbitration could be carried out without prejudice to either party's rights and giving effect to such intention did not result in an arbitration that was outside the parties' contemplation."

'No dispute' argument rejected

Arbitration clauses commonly provide that "all disputes" arising out of the parties' contract will be referred to arbitration. A party sometimes seeks to avoid arbitration by arguing that there is 'no dispute' between the parties, and therefore the arbitration clause does not apply.

The Court of Appeal in *Tjong Very Sumito v Antig Investments Pte Ltd*[19] decisively rejected a similar argument on the facts of that case. The Court set out a number of principles in relation to how it would analyse a 'no dispute' argument, which included the following[20]:

(1) The Singapore courts would interpret the word 'dispute' broadly and (consistent with the prevailing philosophy of judicial non-intervention) readily find that a dispute exists unless the defendant has unequivocally admitted that the claim is due and payable.

(2) The Court would not consider the merits of a denial/defence or the genuineness of a dispute. This should be left to the arbitrator to assess, in accordance with the parties' contractual bargain to arbitrate.

(3) Silence by itself (even in the face of repeated claims) is insufficient to constitute an admission of a claim[21].

(4) If a defendant makes an unequivocal admission on liability but not on quantum, there is still a dispute referable to arbitration[22].

The Court of Appeal also underscored Singapore's "unequivocal judicial policy of facilitating and promoting arbitration", and emphasized that the Court's role is to support, and not to displace, the arbitral process[23].

The Court of Appeal's reasoning was applied in two subsequent Singapore High Court decisions, *Jiangsu Hantong Ship Heavy Industry Co Ltd v Sevan Pte Ltd*[24] and *Jiangsu Hantong Ship Heavy Industry Co Ltd v Sevan Holding I Pte Ltd*[25]. In both cases, the High Court rejected the appellant's argument that there was no dispute between the parties, stayed the court proceedings and referred the matter to arbitration. In both cases, the opposing party did not expressly challenge the appellant's demand for payment and had asked for more time to settle the amounts invoiced by the appellants. In the High

Court's view, however, this did not (on the facts in both cases) amount to an admission by the opposite party of the appellant's claims.

> "The Singapore courts would interpret the word 'dispute' broadly and (consistent with the prevailing philosophy of judicial non-intervention) readily find that a dispute exists unless the defendant has unequivocally admitted that the claim is due and payable."

Court clarifies meaning of "for the time being in force"

It is not uncommon for arbitration agreements to provide that the rules of a specified arbitral institution "for the time being in force" will be applied to the arbitration. An issue that arose in *Car & Cars Pte Ltd v Volkswagen AG*[26] was whether that phrase referred to the relevant rules at the time the contract was concluded, or whether it referred to the rules in force at the time the arbitration commenced.

The Singapore High Court held that, as a matter of construction, the phrase "for the time being in force" must refer to rules in force at the time of the commencement of the arbitration. If parties had intended to refer to the rules existing at the time of the conclusion of the contract, they could have easily identified the specific rules by name[27]. On the facts in that case, the Court found that the parties had "expressly chosen to enter into four separate agreements with significantly different dispute resolution clauses, each worded differently"[28], and took the view that in such contractual arrangements it was inevitable that there would be a risk of multiplicity of proceedings[29].

Case law developments (2) – challenges to arbitration awards

Court proceedings to set aside an award – alleged fraud and perjury in arbitration

Swiss Singapore Overseas Enterprise Pte Ltd v Exim Rajathi India Pvt Ltd[30] concerned an unsuccessful attempt to set aside an international arbitration award on grounds of fraud. The alleged fraud concerned allegations that the successful claimant in an SIAC arbitration had falsified testimony at the arbitration relating to the amount of cargo it had sold to a third party in mitigation of damages and had suppressed documents in order to perpetuate the falsehood. It was argued that the alleged fraud induced the arbitrator to make an award in favor of the claimant in the sum of US$1,201,609.20, when the actual loss suffered by the claimant was in fact less. The respondent to the arbitration applied to set aside the award under section 24(a) of the IAA and article 34(1)(b)(ii) of the Model Law on the basis that it was induced by fraud.

The Singapore High Court summarized the law on when perjury and/or the suppression of evidence would amount to fraud, which would justify the setting aside of an award[31]:

"(a) if the fraud alleged was in the shape of perjury, the applicant must prove that its new evidence could not have been discovered or produced, despite reasonable diligence, during the arbitration proceedings;

(b) the newly discovered evidence must be decisive in that it would have prompted the arbitrator to have ruled in favor of the applicant instead of the other party;

(c) if the fraud was in the shape of non-disclosure of a material document, the document must be so material that earlier discovery would have prompted the arbitrator to rule in favor of the applicant; and

(d) negligence or error in judgment in failing to discover a crucial document would not be sufficient to justify a setting aside of the award and for that purpose, the non-disclosure must have been deliberate and aimed at deceiving the arbitrator."

On the facts, the Court concluded that the alleged fraud, which related to a change in circumstances pertaining to a contract between the claimant and a third party and which was not disclosed to the arbitrator was (as a matter of law) *legally irrelevant* to the assessment of damages in that case. The Court therefore upheld the arbitration award.

The judge noted, however, that had it been demonstrated that the arbitrator would have awarded a different amount of damages if the change in circumstances been disclosed to him, there would be a "strong argument to assert that the award was procured by the suppression of documents and facts"[32].

> "… [T]he Court's role is to support, and not to displace, the arbitral process."

It is noteworthy that the Court was of the view[33] that proving fraud or unconscionable conduct alone is not sufficient to set aside an arbitration award. In order to obtain relief, the complainant must show that the reprehensible conduct or fraud had caused substantial injustice, in that the same procured or substantially impacted the making of the award. This sets a high threshold to clear, in so far as allegations of perjury and/or suppression of evidence in arbitration hearings are concerned. It is probably in only very clear and very serious cases of perjury or suppression of evidence, which go to the root of the key issues determined by a tribunal, that one can prove a causal link between the perjury and/or suppression of evidence and the 'procurement' of or 'substantial

impact' on the making of the award.

Court proceedings to set aside an award – alleged breach of the rules of natural justice

The Singapore High Court decision in *Sobati General Trading LLC v PT Multistrada Arahsarana*[34] concerned an unsuccessful attempt to set aside an ICC award[35] on the ground of breach of the rules of natural justice.

> "[It is probably in only very clear and very serious cases of perjury or suppression of evidence, which go to the root of the key issues determined by a tribunal, that one can prove a causal link between the perjury and/or suppression of evidence and the 'procurement' of or 'substantial impact' on the making of the award."

In that case, the Court upheld the award and decided that the arbitral tribunal was entitled to come to a conclusion regarding the termination of a distributorship agreement that was a 'middle ground' between the positions taken by the claimant and the respondent in the arbitration. The Court found that there was evidence supporting the tribunal's decision in relation to the 'middle ground', although the 'middle ground' was not pleaded by the parties initially or referred to in the Terms of Reference in the arbitration, and that the evidence was available to both parties at an early stage[36].

Court proceedings to set aside an award – security for costs

Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd [2009] SGHC 112[37] concerned the plaintiff's application to the Singapore High Court under section 24 of the IAA to set aside an arbitral award made by the SIAC. The defendant applied to court for the plaintiff to pay security for costs before the plaintiff could proceed with the court application.

The Court was of the view that the fact that the plaintiff, a company incorporated in China, was outside Singapore (and hence considered a foreign plaintiff in the Singapore courts) was of little weight in relation to the security for costs application. In other words, in the context of applications to the courts to set aside an international arbitration award, a plaintiff should not be penalised for being ordinarily resident out of Singapore[38].

On the facts of the case, however, the Court ordered the plaintiff to pay the defendant security for costs before the former could proceed with the court application. There was evidence that the plaintiff had a propensity to resist paying costs orders made against it[39]. The Court also considered that any Singapore court order for costs against the plaintiff (which would be made if the plaintiff's application to set aside the award was ultimately unsuccessful) would not be easy for the defendant to enforce in China[40].

Case law developments (3) – miscellaneous

Pre-action discovery/pre-action interrogatories

In *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd*[41], the Singapore Court of Appeal dealt with the question of how the courts would treat an application for pre-action discovery and/or pre-action interrogatories, when the application involved both parties and non-parties to an arbitration agreement. In that case, pre-action discovery and interrogatories were sought not only against a party with whom the applicant had an arbitration agreement, but also against third parties with whom the applicant had no such agreement. On the facts, the Court of Appeal granted the pre-action discovery and pre-action interrogatories sought.

The Court of Appeal noted that where parties and the issues in dispute between them are the same in both the potential arbitration and the court proceedings, the court should be extremely reluctant to grant pre-action discovery or pre-action interrogatories.

Where, however, there are separate court actions involving third parties, the precise facts and circumstances will be of crucial importance to the court's determination whether to grant the application. While the Singapore courts constantly bear in mind the need to facilitate and promote arbitration, the Court will balance this to ensure that court procedures (which are aimed at achieving both procedural as well as substantive justice) are not undermined[42].

The Court of Appeal also took the view that there were very persuasive arguments why the Singapore courts do not have power to grant *pre-arbitral* discovery[43].

> "While the Singapore courts constantly bear in mind the need to facilitate and promote arbitration, the Court will balance this to ensure that court procedures (which are aimed at achieving both procedural as well as substantive justice) are not undermined."

Arbitrator cannot terminate own appointment

In *Hong Kiat Construction Pte Ltd v Ngiam Benjamin* [2009] SGHC 158, the Singapore High Court stated that there is a difference between an

arbitrator purporting to terminate his own appointment and the termination of the arbitration itself. In other words, the termination of an arbitrator's appointment does not necessarily terminate the arbitration itself.

The Court also took the view that, on the facts, the arbitrator could not have unilaterally terminated his own appointment in the absence of consent from the parties[44].

Institutional developments

Singapore International Arbitration Centre

The Singapore International Arbitration Centre (SIAC)[45] is an independent, not-for-profit organization that was established in 1991 to meet the demands of the international business community for a neutral, efficient and reliable dispute resolution institution in a fast-developing Asia.

A new Board of Directors of the SIAC was appointed on 1 March 2009. The Board, which comprises leading arbitrators and arbitration counsel, includes Professor Michael Pryles (Chairman), Mr Sundaresh Menon (Deputy Chairman), Mr Cavinder Bull, Mr Pierre Yves-Gunter, Mr David W Rivkin, Mr John Savage, Ms Judith Gill QC, Ms Pallavi S Shroff and Mr Byung-Chol Yoon.

On 13 October 2009, the SIAC appointed an international council of advisors, comprising eminent leaders of the international arbitration community.

Since June 2009, the SIAC Rules Committee has been undertaking a full review of the SIAC 2007 Rules, and has invited views from the public.

Maxwell Chambers

Maxwell Chambers in Singapore[46] is said to be the world's first integrated dispute resolution complex, housing both best-of-class hearing facilities as well as headquarters and regional offices of several top international ADR institutions. Maxwell Chambers has 14 fully-equipped hearing rooms, 12 preparation rooms and a full suite of supporting services, such as recording transcription, catering, concierge and secretarial services. The facilities at Maxwell Chambers were opened for reservation from late July/early August 2009.

Maxwell Chambers houses, or will house, a number of renowned arbitral institutions[47], including:

- the International Court of Arbitration of the International Chamber of Commerce (ICC)
- the International Centre for Dispute Resolution Singapore (ICDRS)
- the Permanent Court of Arbitration (PCA)
- the Singapore International Arbitration Centre (SIAC)[48]
- the Singapore Institute of Arbitrators (SIArb)
- the Singapore Chamber of Maritime Arbitration

The official opening of Maxwell Chambers took place on 21 January 2009, to coincide with the inaugural Singapore International Arbitration Forum (SIAF)[49]. The SIAF is hosted by Maxwell Chambers, and co-organized by the SIAC.

Yang Ing Loong & Christopher Tan,
Sidley Austin LLP, Singapore

1 2002 Revised Edition. Domestic arbitrations in Singapore are governed by the Arbitration Act (Cap 10).
2 See the International Arbitration (Amendment) Act (Commencement) Notification 2009 (11 December 2009).
3 It is noteworthy that while this amendment clarifies that an arbitration agreement can be made by electronic communications, *no* corresponding amendment is made under Part III of the IAA, which relates to the recognition and enforcement of foreign awards in countries that are the Contracting States to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. See the Explanatory Statement to the Bill (Bill No 20/2009) and the parliamentary speech by the Minister of Law, Mr K Shanmugam, on 19 October 2009.
4 [2007] 1 SLR 629.
5 See Explanatory Statement to the Bill (Bill No 20/2009). The new s 12A is in line with the new art 17J of the UNCITRAL Model Law on International Commercial Arbitration, which was added by UNCITRAL in 2006.
6 See the parliamentary speech of the Minister of Law, Mr K Shanmugam, on 19 October 2009.
7 Section 12A(6).
8 Section 12A(2).
9 [2009] 3 SLR 13.
10 Paragraph 28 of the Court's judgment.
11 *Ibid*, para 61.
12 [2009] 3 SLR 689.
13 (1881) 17 Ch D 668 (Court of Appeal, England & Wales).
14 Paragraphs 39 – 49 of the judgment.
15 The application of this principle can cause difficulties in certain cases. If, for example, the main contract between a creditor and the principal debtor contains an arbitration clause, but the contract of guarantee between the same creditor and the guarantor does not, it may not be possible to join the guarantor to the arbitration between the creditor and the principal debtor. The creditor would have to commence separate proceedings against the guarantor and the guarantor would be bound by any arbitration award as between the creditor and the principal debtor.
16 [2009] 3 SLR 936.
17 See also paras 31–34 of the judgment.
18 *Ibid*, paras 41-43.
19 [2009] SGCA 41.
20 Paragraph 69(a) – (h) of the judgment.
21 *Ibid*, para 61.
22 *Ibid*, para 64.
23 *Ibid*, paras 28–32.
24 [2009] SGHC 285.
25 [2009] SGHC 288.
26 [2009] SGHC 233.
27 Paragraph 25 of the judgment.
28 *Ibid*, para 50.
29 *Ibid*, para 49. It is therefore important to ensure that arbitration clauses in distinct but related contracts properly reflect the parties' intention to have all disputes under those contracts referred to a single forum for dispute resolution, if that is indeed their intention.
30 [2009] SGHC 231.
31 Paragraph 30 of the judgment.
32 *Ibid*, para 65.
33 *Ibid*, para 29.
34 [2009] SGHC 245.
35 The ICC arbitration was held in Singapore.
36 The Court found that it was the claimant who chose not to deal with the legal effect of that evidence: see para 25 of the judgment.
37 [2009] 3 SLR 1017.
38 Paragraph 13 of the judgment.
39 *Ibid*, para 16. Among other things, the plaintiff did not honour the two costs awards made against it in the arbitration.
40 See paragraph 19 of the judgment.
41 [2009] SGCA 45.
42 Paragraph 67 of the judgment.
43 *Ibid*, para 64.
44 See paragraph 4 of judgment.
45 http://www.siac.org.sg.
46 http://www.maxwell-chambers.com.
47 Addendum to President's Address in Parliament on 18 May 2009 – Supplementary Information on the Ministry of Law's Addendum dated 21 May 2009.
48 The SIAC moved into Maxwell Chambers on 11 August 2009.
49 http://www.siaf.sg/index.html.