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Uniquely Singapore: The Development Of An International Arbitration Hub

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Commentary

Uniquely Singapore: The Development Of An International Arbitration Hub

By
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Introduction

In the 2007 House of Lords case of *West Tankers v RAS Riunione Adriatica di Sicurta SpA*, the Honourable Lord Hoffman stated in his judgment that Singapore stands as one of the world's "leading centres of arbitration."¹ That his Lordship should pick Singapore for special mention alongside traditional arbitration hubs such as New York and the Bahamas is recognition that Singapore has, in recent years, developed into an important centre for the arbitration of disputes in Asia and from beyond.

Indeed, Singapore has shown to be a favourite place of arbitration for many multinational corporations with operations in Asia. Singapore was the most frequently selected city in Asia and the 6th most frequently selected city in the world² for ICC administered arbitrations.³ Additionally, Singaporean arbitrators were also given a big nod from parties to arbitration as Singaporean arbitrators were also the most frequently appointed amongst all Asian countries.⁴ Singapore law was also the most frequent choice, of all Asian national laws, as the applicable law by parties in their contracts.⁵

The upward trend in arbitrations in Singapore is also reflected in the growth of the Singapore

International Arbitration Centre ("SIAC"). The number of international commercial arbitration cases in Singapore administered by the SIAC alone increased by almost one and a half times between 2000 to 2006.⁶

This article attempts to identify the factors which have contributed to Singapore's recent success in attracting international arbitrations to its shores and will highlight recent developments in the Singapore jurisprudence on arbitration.

Forthcoming Developments

With Asian economies prospering in recent years, there is a palpable trend of Singapore developing from its previous role as a gateway for investments from the Western Hemisphere to Asia, to one where Singapore acts as a conduit for investments moving westwards as well. In the long-term, the Singapore Government's plan is an ambitious one to transform itself into one of the world's top cosmopolitan cities with ultra-wealthy residents from all over the globe. Recent plans include the government's decision to allow Sands and Genting International to build two integrated casino Resorts (scheduled to be ready by 2010)⁷ and announcement on 11 May 2007 that Singapore will stage the first Formula One Grand Prix street race to be held at night in Sep/Oct 2008.⁸ Singapore is undergoing a radical transformation into the "Monaco of the East."

In that context, serious efforts are underway to ensure that essential services are conveniently available to

investors by developing Singapore's professional services industry, with high-end international arbitration being one of such services identified by the Government. To further increase Singapore's attractiveness as a place for arbitration, several other developments are in the pipeline:

Tax Incentives

Since 2004, foreign arbitrators have been exempted from tax on any income derived from arbitration work done in Singapore.

In its Budget for 2007, the Singapore Government announced a new tax incentive to boost international arbitration activities in Singapore. The Budget was also used to announce plans to develop Singapore as a centre for "high-trust services" ranging from legal services to financial services. In the legal sector the government aims to leverage on Singapore's already existing strengths of efficiency, reliability and neutrality and position Singapore as "a trusted centre for high-end arbitration work." Under the new tax incentive, law firms will be granted a 50 percent tax exemption on qualifying incremental income derived from international arbitration work. At present, it is expected that the incentive will be available from 1 July 2007 to 30 June 2012.⁹

International Centre For Dispute Resolution® ("ICDR") To Open Singapore Office

The American Arbitration Association® ("AAA") and the SIAC announced a joint venture to establish a dispute resolution centre to be situated in Singapore. The new centre, to be called the International Centre for Dispute Resolution – Singapore, will be ICDR's fourth global office¹⁰ and will enhance Singapore's standing as a premier centre for international commercial arbitration.

The ICDR – Singapore will be jointly developed by the AAA and the SIAC and will provide:

- comprehensive rules for the conduct of arbitration and mediation;
- training and the appointment of arbitrators to the panel of arbitrators of ICDR-Singapore; and
- case administration services.

Construction Of A Dedicated Arbitration Complex

The construction of an integrated arbitration complex that will house both state-of-the-art hearing facilities and the offices of international arbitration institutions is underfoot and the complex is expected to be up and running by late 2008. The arbitration complex aims to provide specialised facilities and services catered to high-end international arbitration work and is targeted at being seen as the premiere international arbitration venue in the region, for both ad-hoc and institutional arbitration cases.¹¹

The key features of the complex will include custom-designed hearing room layouts suited for arbitration work, provision of caucus rooms for short breakout sessions and working rooms for legal teams to prepare their cases, world-class telecommunications and teleconferencing equipment, secure document storage facilities, 24-hour operating hours for users that need to work overnight, rest and refreshment areas, concierge services for foreign users of hearing rooms, and co-located international arbitral institutions to provide one-stop arbitration services.

The SIAC, AAA and ICC have already been confirmed to occupy the new complex and it is anticipated that other international arbitration institutions will soon follow.

Singapore's Inate Competitive Advantages

While the efforts of the Singaporean arbitration practitioners and the Singapore government's initiatives deserve to be lauded, Singapore is also blessed with several natural growth factors which ought not to be overlooked.

Convenient Geographical Location In Asia

Since her days as a centre for entrepôt trade until the mid-20th century, Singapore has exploited her excellent geographical location — in the centre of South-east Asia, and lying in the mid-point of the major trade routes in Asia between India and China.

In the modern times, Singapore has continued to be a focal point for trade and commerce in the region, not least due to its status as a sophisticated and super-efficient regional and international airhub linking

Singapore to 180 cities in more than 50 countries.¹² Indeed, all the major cities in Asia are within 7 hours air travel of Singapore. This makes Singapore an ideal meeting place in Asia for parties from different parts of the world.

Good Understanding Of Major Cultures

Stemming from Singapore's colonial days, most of the population of multi-racial Singapore are descendents of immigrants from China, India and the Malay archipelago. Due to this, Singaporeans understand the commercial mindset of companies from different parts of Asia and the shared heritage with Singapore provides an unimitable comfort level to many Asian companies looking for a neutral venue to conduct any dispute resolution.

This is complemented by Singapore's reputation for neutrality and lack of corruption as a whole. Singapore has consistently been ranked as one of the most corruption-free countries in the world.¹³

Supportive Legal System

Singapore's legislature is supportive of the government's aim to make Singapore an international arbitration hub and has been proactive in enacting laws which bring Singapore's arbitration laws in line with internationally accepted practices.

Supportive Pro-Arbitration Judiciary

Appointment Of Specialist Arbitration Judges

There has been a conscious effort by the Singapore court system to promote the use of arbitration and other forms of alternative dispute resolution, as well as to aid in the efforts to promote Singapore as an ideal forum for international arbitration. In a move that signified how important arbitration has become in Singapore, three High Court judges were specially appointed to oversee the development of Singapore's case law jurisprudence in the field of arbitration. All three hear High Court applications arising from arbitration proceedings made under the AA and the IAA.

On 3 April 2003, the Honourable Chief Justice of Singapore Justice Yong Pung How (as he then was), appointed a High Court judge, the Honourable Justice Judith Prakash, to preside over all arbitration matters brought before the High Court, including ap-

peals against arbitral awards and all applications arising from arbitration proceedings over which the High Court has jurisdiction. The press release issued by the Supreme Court states that the judiciary "encourages the use of the arbitration process in the resolution of disputes in suitable cases."¹⁴ It goes on to specifically state that the judiciary recognises that "to enhance Singapore's stature as an international commercial dispute resolution centre, the institutional infrastructure must be complemented with judges of the highest caliber and integrity who are competent to adjudicate complex cases which come before the courts."

In November 2004, the Chief Justice Yong Pung How appointed two more judges to hear arbitration matters brought before the High Court. In that press release, it was stated that the appointments "will create a group of judges in the High Court with depth of expertise and experience, to preside over arbitration matters. . . . This will allow the High Court to hear an increased volume of arbitration matters expeditiously, and support Singapore's efforts in becoming the location of choice for commercial arbitration in the Asia-Pacific region."¹⁵

Singapore Courts' Pro-Arbitration Attitude In Its Jurisprudence

The body of Singapore jurisprudence on arbitration shows the supportive stance which the Singapore courts have taken to promote Singapore as an international arbitration hub.

For instance, in the 1998 Singapore High Court case of *Coop International Pte Ltd v Ebel SA*¹⁶ which dealt with a question on whether the parties were entitled to opt out of the operation of Singapore's International Arbitration Act by virtue of section 15 of that statute, it was stated:

"Section 15 therefore only applies if parties had chosen to arbitrate in Singapore because the parties will be subject to the Model Law procedures unless they take advantage of s. 15 to opt entirely out of the Model Law and Part II of the IAA. This may well be part of the Government's policy to encourage the growth of arbitration in Singapore by not unnecessarily constraining the parties to any fixed set of procedures be it in the

form of the Model Law or otherwise."
(emphasis added)

The same concern in promoting Singapore as an arbitration hub was also evident in the 1995 case of *Star-Trans Far East Pte Ltd v Norske-Tech Ltd*¹⁷ during which a party had objected to the appointment of a foreign arbitrator on the basis that the costs of such an appointment would be higher. The Singapore High Court rejected this argument and stated:

"Singapore being an international arbitration centre, the courts should not discourage international arbitration with the participation of international arbitrators. Such arbitrations are not uncommon or illegal in Singapore." (emphasis added)

Initiative Of The Singapore Judiciary

It is also worth noting that the Singapore judiciary has shown its initiative in developing interesting issues surrounding international arbitration law and its practice in a manner which is conducive to arbitration.

An example of this initiative can be seen in the recent case, *Otech Pakistan Pvt Ltd v Clough Engineering Ltd & Anor*¹⁸ where the Singapore Court of Appeal examined the applicability of the doctrine of champerty to arbitration proceedings. While this issue has been debated in courts around the world, it had not been previously considered by Singapore courts and the Singapore Court of Appeal took this opportunity to expound its views on the issue. Champerty exists where one party agrees to aid another to bring a claim on the basis that the person who gives the aid shall receive a share of what may be recovered in the action. A champertous contract offends public policy because of its tendency to pervert the course of justice and is, therefore, unenforceable.

The High Court of Hong Kong had held the view that it is not appropriate to extend the prohibition against champerty, which is a principle of the public justice system, to the private consensual system of arbitration.¹⁹ Similarly, the English Court of Appeal had also observed that the condemnation of champerty had been limited to the context of civil litigation and extending it to private arbitration would involve a

radical new step.²⁰ The House of Lords did not disagree with this view.²¹

The Singapore Court of Appeal, however, took a different view and agreed with the observations of Scott VC in *Bevan Ashford v Geoff Yeandle (Contractors) Ltd*.²² The Court of Appeal stated that the policy considerations on which the doctrine is based (the interests of justice and of the litigants) are as important in arbitration as they are in litigation, and the natural inference would be that champerty is as applicable in the one as it is in the other.

The Otech case is an example of how the Singapore courts are willing to address contentious legal issues with the ultimate aim of rendering arbitration proceedings clear, concise and accessible to both domestic and international arbitrations.

Unobtrusive Curial Assistance

Perhaps the most significant facet of how the courts have aided in Singapore's development as an international arbitration hub is the courts' policy of rendering assistance (for instance, in the granting of interim orders, and the enforcement of arbitration awards) in a unobtrusive way which recognizes that arbitration is a legitimate choice for parties to resolve their disputes without the court's interference.

This is tied closely with the policy considerations underpinning Singapore's international arbitration law regime, and they will be examined together.

Favourable Arbitration Regime

International vs Non-International Arbitration

Singapore's arbitration regime is based on a dichotomy between international arbitration and non-international arbitration (the latter is also loosely referred to as "domestic arbitration"). International arbitration is governed by the International Arbitration Act ("IAA"), while non-international arbitration is governed by the Arbitration Act ("AA").

Section 5 of the IAA states that Part II (which, in general, deals with the conduct of the arbitration) of the IAA and the Model Law shall not apply to an arbitration which is not an international arbitration. Conversely, section 3 of the AA states that the AA will apply only to arbitrations in Singapore and to which

Part II of the IAA do not apply. Loosely put, the AA applies to all arbitrations governed by Singapore law while the IAA applies to all *international* arbitrations governed by Singapore law.

Thus, the question of whether the IAA or the AA applies to an arbitration rests on the whether the arbitration is considered an international arbitration. As defined in the IAA, an arbitration is international if:

- (1) one of the parties to the arbitration agreement, at the time of the conclusion of the arbitration agreement, had its place of business or was habitually resident outside Singapore (if the party had more than one place of business, the place of business is deemed to be that which has the closest relationship to the arbitration agreement); or
- (2) the place of arbitration determined in, or pursuant to, the arbitration agreement is outside Singapore; or
- (3) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected is outside Singapore; or
- (4) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

Giving primacy to the principle of party autonomy in arbitration, parties to what would otherwise be an international arbitration under the IAA, are also permitted to choose not to apply the IAA.²³ Conversely, parties to a domestic arbitration can “opt in” to the IAA regime by agreeing in writing that Part II of the IAA and the Model Law applies to the arbitration.²⁴

Beyond the question of its applicability, the AA is outside of the scope of this article. Instead, broad brushstrokes will be used to paint a picture of Singapore's international arbitration regime.

The IAA And The UNCITRAL Model Law

The IAA, and the distinction between international arbitrations and domestic arbitrations, were introduced because it was thought that a greater freedom

from curial intervention would be desirable for arbitrations of an international character while a closer involvement by the courts in domestic arbitration is desirable.²⁵

The provisions of the IAA adopt and give force to the UNCITRAL Model Law on International Commercial Arbitration (“**Model Law**”) and the the Convention for the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“**New York Convention**”), subject to some variations.

Enforcement Of Arbitration Agreements

Section 6(2) of the IAA and Article 8 of the Model Law mandates that the courts have to stay any court proceedings or refer any such proceedings to arbitration, if the dispute in the court proceedings is the subject of a valid arbitration agreement. The only exceptions to the mandatory stay or reference, are if the arbitration agreement is “null and void, inoperative or incapable of being performed.”²⁶

The Singapore courts have taken a clear pro-arbitration attitude by holding that a dispute exists for the purpose of arbitration so long as a claim is not admitted.²⁷ In other words, the courts will not refuse a stay of proceedings pursuant to the IAA even it appears that there is no arguable or triable issue. The courts' refusal to deal with the question of the merits of the dispute is consistent with the principle that the parties should be held to their choice of bringing their dispute to arbitration — the question of the merits should be for the arbitrator, and not the courts, to decide.

Arbitral Competence

In Singapore, any dispute can be put before an arbitrator unless it is “contrary to public policy to do so.”²⁸ The scope of “public policy” is not defined in the IAA. However, it is expressly provided that the fact that any written law confers jurisdiction on any subject matter on any court of law but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.²⁹ It is generally accepted that issues which may have public interest elements such as, citizenship or legitimacy of marriage, validity of registration of trade marks or patents, bankruptcies or issues relating to anti-trust legislation, may not be arbitrable.³⁰

If the subject matter of the arbitration agreement is contrary to public policy, the matter is not arbitrable and any award made may be set aside. The issue of arbitrability may also be brought before the court to resist an application for the stay of judicial proceedings in favour of arbitration, or before the arbitral tribunal as a ground to challenge its arbitral jurisdiction.

Arbitration Procedure And The Arbitral Tribunal

To enable the proper functioning of international arbitrations, sections 12 and 13 of the IAA set out for the powers of the arbitral tribunal in relation to the orders and directions it may make. These powers are in addition and without prejudice to those enumerated in the Model Law. Section 12 provides the tribunal with the power to, amongst others, order discovery of documents and interrogatories, to make a direction or an order for the taking of evidence by affidavit, and make orders to ensure the preservation and interim custody of any evidence for the purposes of the proceedings.

Interlocutory Assistance In Arbitration By Singapore Courts

A party to the international arbitration who seeks an order under section 12 of the IAA may also choose to apply to the High Court, instead of the arbitral tribunal, as that party deems expedient. Section 12(7) of the IAA provides that the High Court shall have the same power of making orders in respect of any of the matters set out in section 12(1), discussed briefly above, as it has for the purpose of and in relation to an action or matter in the court.

Section 12(5) of the IAA stipulates that an arbitral tribunal may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in the High Court. This includes the award of interest. Section 12(6) then provides that all orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the High Court, be enforceable in the same manner as if they were orders made by a court and, where leave is so given, judgment may be entered in terms of the order or direction.

There is contention in Singapore as to whether this section empowers Singapore courts to make orders in relation to international arbitrations taking place

outside of Singapore. Section 3(1) of the IAA provides that "Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore." It can be argued that Singapore courts, therefore, have the ability to assist in foreign arbitrations being conducted outside of Singapore. However, the purpose of the IAA and the wording and placement of section 12 in the IAA can be seen to be at odds with this point of view. This interesting issue has been considered by the Singapore Court of Appeal in the case discussed below, which is included here to demonstrate the continuing evolution of Singapore's approach to international arbitration.

Swift-Fortune Ltd v Magnifica Marine S.A.³¹

The recent decision in *Swift-Fortune Ltd v Magnifica Marine S.A.* addresses important issues relating to the power of a Singapore court to grant *Mareva* interlocutory relief to assist international arbitrations taking place outside Singapore.

The case concerned an appeal against a decision of the Singapore High Court which set aside a *Mareva* injunction restraining Magnifica Marine SA, a Panamanian company, from disposing of its assets in Singapore pending arbitration proceedings in the United Kingdom. The dispute arose in connection with the sale of a vessel by Magnifica to Swift-Fortune, a Liberian company, whereby the latter claimed substantial losses of up to US\$2.5 million arising from delay in the delivery of the vessel.

When the matter was before the High Court, the court ruled that it had no power to issue the injunction sought.

Swift-Fortune argued that section 12(7) of the IAA applies to all international arbitrations whether conducted in or outside Singapore. This argument is based on reading section 12(7) in conjunction with section 5(2) of the IAA which provides a broad spectrum of what arbitration would be treated as international, with no qualification as regards the seat of arbitration or the law applicable to the arbitration. Magnifica stressed that the purpose of the IAA is to promote international arbitration in Singapore and section 12(7) should be read with this purpose in mind.

The Court of Appeal agreed with the decision of the High Court that section 12(7) of the IAA is not

intended to apply to foreign arbitrations but only to international arbitrations which have Singapore as the seat of arbitration. Therefore section 12(7) does not allow the court to grant interim measures, including *Mareva* injunctions, to assist foreign arbitrations. The Court of Appeal considered arguments relating to the legislative purpose of the IAA, the placement of section 12(7) in the IAA, the doctrine of extraterritoriality, and the possibility of over-reaching. In regard to these arguments, the Court of Appeal stated:

- (a) the IAA is intended to encourage and assist the proper functioning of international arbitrations in Singapore, not anywhere else;
- (b) section 12(7) is placed in section 12 which deals only with the powers of arbitral tribunals conducting arbitrations in Singapore. The court agreed with the High Court in believing that it is unlikely that Parliament intended section 12(7) to apply to foreign arbitrations, when at the same time it has not conferred on the court the power to grant *Mareva* injunctions in aid of foreign court proceedings;
- (c) section 12(7) is not expressed to apply extraterritorially; and
- (d) allowing Swift-Fortune's broad theory could lead to interference with the rights of parties and intrusion into powers of foreign arbitral tribunals.

Challenge To Arbitration Awards

An award is defined in both the IAA and the AA as "a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any orders or directions made under section 12."³²

The question of whether a negative rule by an arbitral tribunal would constitute an "award" was considered in the following case which recently came before the Singapore Court of Appeal.

**PT Asuransi Jasa Indonesia (Persero) v
Dexia Bank SA**³³ (The 'PT Asuransi Case')

The Appellant was the guarantor of a series of US dollar notes held by the Respondent (the "BI Notes"). In

February 2000, the Appellant sought to approve at a meeting a scheme to release their payment obligations under the BI Notes by replacing them with a new series of notes by another company.

The Respondent commenced an arbitration in March 2001 (the "First Arbitration") against the Claimant and obtained an award against the Appellant (the "First Award"). The issues determined in the First Arbitration include, *inter alia*, whether the Appellant owed any obligation under the BI Notes to make payment to the Respondent and whether the obligations under the BI Notes were restructured in February 2000.

The Appellant did not appear in the First Arbitration, but instead sought to call another meeting of BI Notes holders in June 2001 to ratify the February 2000 resolutions. The First Tribunal was not aware of this June 2001 ratification meeting until it received a copy of a notarized document containing the minutes of the ratification meeting in August 2001. In October 2001, the First Tribunal subsequently issued the First Award holding, *inter alia*, that the BI notes had not been restructured in 2000.

The Appellant commenced the Second Arbitration in January 2002 to seek a declaration that the June 2001 meeting and the restructuring scheme were valid and binding on all BI Notes holders, including the Respondent. However, the Second Tribunal issued a decision which it titled an "Award" finding that it had no jurisdiction to determine the substantive issues (the "Second Award").

The Appellant's applied to the Singapore High Court to set aside the Second Award on the basis, *inter alia*, that the Second Tribunal's findings contradicted the findings of the First Tribunal and were therefore illegal and contrary to public policy. The High Court dismissed the application.

On appeal, the Appellant relied on the Supreme Court of India case of *Oil & Natural Gas Corporation Ltd v SAW Pipes Ltd*³⁴ where it was held that an arbitral award which was inconsistent with the provisions of the Indian Arbitration and Conciliation Act and therefore wrong in law, was "patently illegal" and liable to be set aside on the ground that it was in conflict with the public policy of India.

The Singapore Court of Appeal dismissed the appeal and made the following observations:

- (1) The legislative intent of the Indian Arbitration and Conciliation Act is not reflected in the IAA which, in contrast, gives primacy to the autonomy of arbitral proceedings and limits court intervention to only the prescribed situations.
- (2) The legislative policy under the IAA is to minimize curial intervention in international arbitrations.
- (3) Errors of law or fact in an arbitral decision, *per se*, are final and binding on the parties and may not be appealed against or set aside by a court except in the limited situations prescribed in the IAA and the Model Law. Such errors may be set aside only if they are outside the scope of submission to arbitration.
- (4) The general consensus of judicial and expert opinion is that public policy under the IAA encompasses a narrow scope. Errors of law or fact, *per se*, do not engage the public policy of Singapore.

In reaching its decision, the Singapore Court of Appeal also considered whether a negative ruling on jurisdiction was an “award” under the IAA and could therefore be set aside. On this, the Court of Appeal held that the definition of “award” in section 2 of the IAA clearly contemplates a decision on the *substance* of the dispute, which does not include a negative determination on jurisdiction. Only in the case where an arbitral tribunal has ruled on its jurisdiction as a preliminary question can the aggrieved party appeal to the court against the decision. Since the Second Tribunal had not decided on the substantive issues in dispute but only on the preliminary question of jurisdiction, the Second Award was not an “award” capable of being set aside under the IAA.

Finality Of Arbitral Awards And Enforcement

A pillar of the IAA regime is ensuring the enforceability of arbitration awards made under the IAA. Parties would not submit their disputes to arbitration in Singapore if they thought that the arbitral award could be easily set aside or overturned.

Section 19 of the IAA provides that, with the leave of court, an award may be enforced as a judgment or an order of the court, and where such leave is given, judgment may be entered in terms of the award.

The IAA thus also provides that an award made by the arbitral tribunal is final and binding on the parties and may be relied upon by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.³⁵ Additionally, once the award has been signed and delivered in accordance with Article 31 of the Model Law, the arbitral tribunal is not permitted to vary, amend, correct, review, add to or revoke the award.³⁶

An award made under the IAA may only be refused enforcement in Singapore if the limited grounds for setting aside the award exist. The setting aside of an international arbitration award is discussed in the following section.

Setting Aside An Award

The only recourse against an award available to parties whose arbitration is conducted in accordance with the IAA is to seek to set it aside. Appeals on merit to a court concerning an arbitration award are allowed only under the domestic Arbitration Act, and even then, only in limited circumstances.³⁷

Article 34 of the Model Law provides that an award may be set aside on limited grounds which are set out in Article 34(2). It should be noted, however, that section 24 of the IAA provides that, notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if the making of the award was induced or affected by fraud or corruption or a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced. These grounds are exhaustive and the court hearing an application to set aside an award under the IAA has no power to investigate the merits of the dispute or to review any decision of law or fact made by the tribunal.

Natural Justice In Arbitration Proceedings

The issue of natural justice and how arbitrations ought to be conducted was recently considered by the Singapore Court of Appeal.³⁸ In its decision, the

Court of Appeal also considered how the concept of natural justice would interact with the concept of parties' autonomy in arbitration.

**Soh Beng Tee & Co Pte Ltd v Fairmount
Development Pte Ltd**

In the *Soh Beng Tee* case, the appellant ("SBT") was engaged as the main contractor by the respondent ("Fairmount") for the construction of a condominium. A dispute arose over a delay in the construction. In the resulting arbitration, the main issues were (i) whether Fairmount had rightfully terminated SBT's employment as contractor under the contract, (ii) if not, whether Fairmount had rightfully terminated SBT's employment because SBT was in repudiatory breach of its obligation to complete the project with diligence and due expedition, and (iii) whether Fairmount could counterclaim for liquidated damages under the SIA Conditions for SBT's delay in completing the project by the contractually stipulated time.

(Judgment in Section B. Document #05-070525-109Z.)

The arbitrator in that case held that the Termination Certificate that had been issued was invalid and that as a result the arguments moved onto whether SBT had proceeded with due diligence and expedition. On this issue, the arbitrator considered the evidence and stated in his award that the architect had caused delay and had thus prevented SBT from completing the construction by the original contract date, and *the time for the performance of the project was at large*.

Fairmount applied to the Singapore High Court to set aside the arbitration award on the grounds that (i) the issue of whether time was at large as a result of the architect's acts was not contemplated by and did not fall within the terms of the submission to arbitration (ii) a breach of the rules of natural justice had occurred because Fairmount had been deprived of an opportunity to submit on the issue as to time at large.

Section 48(1)(a)(vii) of the AA (which is identical to section 24(b) of the IAA) provides that an arbitration award may be set aside if it is proven that:

". . . a breach of the rules of natural justice occurred in connection with the

making of the award by which the rights of any party have been prejudiced. . . ."

The trial judge held that the issue as to time at large was not beyond the scope of submission, but held that the award should be set aside because there had been a breach of natural justice. On appeal, the setting aside was overturned. The Court of Appeal surveyed the case law on the law relating to natural justice in arbitration proceedings and made the following observations:

- Generally, parties to arbitration have a right to be heard effectively on every issue that may be relevant to the resolution of a dispute. The overriding concern is fairness and the rule of thumb is that the parties must be treated equally and allowed reasonable opportunities to present their cases and to respond.
- An arbitrator should not base his decision on matters not submitted or argued before him.
- However, it would also be unfair to the successful party if it were deprived the fruits of its labour as a result of a dissatisfied party raising technical challenges after the award.
- This concept of fairness justifies a policy of minimal curial intervention. There is a need to recognize the autonomy of the arbitral process by encouraging finality. Having opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risk of having only a very limited right of recourse to the courts.
- The balance between ensuring the integrity of the arbitral process and ensuring the rules of natural justice are complied with is preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award under the AA and the IAA. There must be a real basis for alleging that the arbitrator had conducted the arbitration irrationally or capriciously.
- The parties will almost invariably propose opposite solutions to resolve a dispute. The arbitrator is perfectly entitled to embrace a middle path so long as it is based on evidence that is

before him. He is not expected to consult the parties on his thinking process before finalizing his award unless it involves a dramatic departure from what has been presented before him.

- An award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied. It is not the function of the court to assiduously comb an arbitral award microscopically to determine if there was any fault in the arbitration process.

Enforcement Of Foreign Arbitration Awards In Singapore

Enforcement of foreign arbitrations can be sought via two routes — the New York Convention and, if the award is made in a Commonwealth jurisdiction that has reciprocal arrangements for the enforcement of judgments.

New York Convention

Singapore is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Singapore acceded to the Convention on 21 August 1986 and re-enacted most of the Convention's provisions in Part III of the IAA. By acceding to the Convention, Singapore is bound to recognise awards made in any other country which is a signatory to the Convention.

The IAA gives effect to the New York Convention in mirroring provisions dealing with issues such as the mandatory stay of court proceedings,³⁹ the recognition of the binding effect of New York Convention awards,⁴⁰ and the grounds to challenge enforcement.⁴¹

An award may be enforced in Singapore either by action or in the same manner as judgment or order to the same effect, with the leave of the High Court.⁴² An award which is enforceable in this manner is to be recognised as binding for all purposes upon the persons between whom it was made and may accordingly be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore.⁴³

It is noteworthy that under Singapore's Limitation Act, applications for leave to enforce a foreign award

made in a New York Convention country must be made within six years of the award being made.⁴⁴

A court hearing the application for enforcement of a foreign award cannot review the case on the merits. It may, however, refuse to grant enforcement of the award in Singapore if the grounds set out in section 31(2) of the IAA, which are identical to those in Article V of the New York Convention, are proven.⁴⁵

The Singapore courts' attitude toward the enforcement of foreign arbitrations is to apply the limited grounds for refusing enforcement restrictively. This point can poignantly be seen in the case of *Re An Arbitration Between Hainan Machinery Import and Export Corporation and Donald & McCarthy Pte Ltd*,⁴⁶ where the defendants, a Singapore company, sought to set aside an order to enforce an arbitral award made in China on several grounds, including that the enforcement of the award would be contrary to public policy. In upholding the enforcement of the award, the High Court of Singapore addressed the issue of public policy by stating that:

“there was no allegation of fraud or illegality and enforcement would therefore not be injurious to the public good. **As a nation that aspired to be an international arbitration centre, Singapore must recognise foreign awards if it expected its own awards to be recognised abroad. . . .**” (emphasis added)

Aloe Vera Case

The Singapore High Court also recently expounded upon the requirements for enforcement of foreign arbitral awards under the New York Convention. The case of *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd & Anor*⁴⁷ is instructive on the issues involving the enforcement of a foreign arbitral award against an alleged non-party to the arbitration agreement.

In this case, the plaintiff, an American company, entered into an exclusive distributorship agreement (“Agreement”) with the first defendant, a Singapore-incorporated company. The second defendant, Steven Chiew, signed the Agreement on behalf of the first defendant but the former was not expressly stated to be a contracting party. The agreement was governed by the law of Arizona, USA and provided for disputes to be

arbitrated in Arizona. Once arbitration commenced in Arizona upon the termination of the agreement, Chiew took the position that he was not a party to the agreement and had not agreed to arbitration or to the law of Arizona applying to him personally. The US arbitrator, however, made a preliminary order that he had jurisdiction over Chiew because Chiew was properly a party to the arbitration under the definition provided in the agreement. Thereafter, Chiew took no part in the proceedings.

In the final award, the US arbitrator made a finding that Chiew was at all material times the president, a director and shareholder of the first defendant. He further found that the first defendant was the *alter ego* of Chiew and all its acts and obligations were the acts and obligations of Chiew.

The plaintiff obtained leave from the Singapore High Court to enforce the final award against the defendants. Chiew applied to set aside the award by contending that the plaintiff had not established that there was an arbitration agreement between the parties. Alternatively, Chiew argued that he met the requirements for one or more of the grounds set out in section 31(2) of the IAA, which provided the bases for refusing to enforce a foreign arbitration award. The assistant registrar dismissed Chiew's application and Chiew appealed.

The Singapore High Court stated that the term "arbitration agreement" as used in section 19 of the IAA had to be understood together with section 2 of the IAA which defines an arbitration agreement as that referred to in the Model Law. The Model Law provides that an agreement is in writing if, *inter alia*, it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement.

In determining the issue of whether there was a valid and binding arbitration agreement, the High Court was asked to consider the case US Court of Appeals for the Second Circuit case of *Sarhank Group v Oracle Corporation*.⁴⁸ In the *Sarhank* case, the US Court of Appeals overturned a decision by the District Court to enforce an arbitration award made in Egypt. The dispute was between an Egyptian corporation Sarhank, and Oracle Systems, Inc ("Systems"). The contract was governed by Egyptian law. Sarhank com-

menced arbitration against both Systems and Oracle Corporation ("Oracle"). The arbitrators found that the arbitration agreement was binding upon Oracle under Egyptian law because Oracle was a partner of Systems in the relation with Sarhank.

The US Court of Appeals decided that American federal arbitration law governed the issue of whether there was a valid and binding arbitration agreement. It held that "an American non-signatory [could] not be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on *American contract law or American agency law.*" (emphasis added)

Justice Prakash, having considered counsel's arguments and the published criticism⁴⁹ of the Court of Appeals' reasoning in the *Sarhank* case, decided to depart from the Court of Appeals' decision. She stated:

"The approach taken by the [Court of Appeals for the Second Circuit] was antithetical to that enshrined in the Convention. It demonstrated an insular attitude to the decision of foreign tribunals involving American nationals without regard to the fact that the American parties had chosen to do business in a foreign jurisdiction and to make their agreements subject to foreign law and foreign arbitration. It runs counter to international comity and is an attitude that, if followed widely in the US, would adversely affect the enforcement of US arbitration awards abroad since the Convention implements a system that enjoins mutuality and reciprocity so that there is a danger of non-US jurisdictions refusing to enforce US awards when their own awards are not recognised in the US."

The High Court endorsed the view that one must take a pragmatic approach towards the definitions in the New York Convention and the IAA in order to give effect to arbitral awards granted outside Singapore. Where the award was made by a foreign arbitral tribunal and where the law governing the arbitration was not Singapore law, the applicable part of the IAA is Part III. Section 27 is entitled "Foreign Awards."

“Foreign awards” are defined as arbitral awards made in pursuance of an arbitration agreement in the territory of a country other than Singapore which is a party to the Convention. The court went on to say that section 19 of the IAA generally applies only to arbitration proceedings with their seats in Singapore and which are “international arbitrations” within the meaning of that term in section 5 of the IAA.

The High Court, in dismissing Chiew’s appeal, also stated that the enforcement process is a mechanistic one which does not require judicial investigation by the court of the jurisdiction in which enforcement is sought. The mechanistic nature of the enforcement process is also supported by section 31(1) of the IAA, which states that enforcement may be refused in the cases specified in section 31(2) and 31(4) of the IAA but not otherwise. The language of the Act indicates that such grounds are meant to be exhaustive and that the court has no residual discretion to refuse enforcement if one of the grounds is not established.

In this judgment, the Singapore court endorsed a pragmatic approach to the enforcement of foreign arbitral awards. In doing so, it emphasized the different roles played by the supervisory and enforcement courts in the arbitration process and examined the extent of the Singapore court’s jurisdiction to enforce foreign arbitral awards.⁵⁰

Commonwealth Reciprocity

An arbitral award made in the United Kingdom or in other Commonwealth jurisdictions may also be enforced under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) (“RECJA”). The RECJA defines the term “judgment” as including an arbitration award if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.⁵¹

However, with the extensive ratification of the New York Convention, enforcement under the RECJA, which has a more complicated procedure and more onerous standards than the New York Convention, has become less useful. One example of this is that the time limited for the registration of an arbitration award under the RECJA is 12 months⁵² as compared to the 6 year limitation period for enforcement under the New York Convention.

Furthermore, the RECJA also required that it must be “just and convenient” for the award to be enforced in Singapore before the court will allow enforcement.⁵³ Section 3(2) of the Act places limitations on this discretion by listing occurrences where the court shall not allow the registration of a judgment (such as where the original court acted without jurisdiction). An illustration of the court exercising its discretion in this regard can be found in the case of *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (also known as Yugoimport-SDPR)*.⁵⁴

Conclusion

It can be seen from the above that Singapore has the strong and proper fundamentals necessary to be a reliable jurisdiction in which international arbitrations can take place. The international arbitration regime is in line with international practice in various jurisdictions and the Singapore courts are willing to assist in arbitral procedures where necessary while eschewing from any interference which would violate the parties’ agreement that the dispute is to be resolved through arbitration rather than through the courts.

However, the legal regime can be easily emulated. This goes some way to explaining the effort put into the various developments in terms of developing Singapore’s arbitration infrastructure highlighted in this article. Singapore’s ability to deliver the best service and the most comfortable environment for parties to resolve their disputes may ultimately be what sets Singapore apart as the preferred international arbitration centre in Asia.

As we reach this conclusion, it would be particularly useful to take note of the addendum to the Budget speech by Professor S Jayakumar, the Deputy Prime Minister and the Minister for Law, who stated that:

“International arbitration in particular presents enormous potential for growth. Given our reputation and strengths, Singapore can be a location of choice for the conduct of international arbitration work, especially for the Asian region. [The Ministry of Law] will work with other agencies to achieve this goal. We will set up an international dispute resolution complex, encourage major international arbitration institutions to

be based here, and work with local and foreign institutions and law firms to attract more international arbitration work to Singapore.”⁵⁵

Endnotes

1. *West Tankers v RAS Riunione Adriatica di Sicurta SpA and others* [2007] UKHL 4 (H.L.), per Lord Hoffman.
2. **The top 10 most frequently selected cities were, in descending order:** Paris, Geneva, London, Zurich, New York, Singapore, Madrid, Mexico City, Vienna.
3. **According to the most recent statistics available from the ICC as of the time of writing of this article — 2005 Statistical Report, ICC International Court of Arbitration Bulletin Vol 17/No. 1 (2006)**
4. *Ibid.*
5. *Ibid.*
6. **Singapore International Arbitration Centre, online:** <<http://www.siac.org.sg/facts-statistics.htm>> (accessed on 14 May 2007).
7. **Ministry of Trade and Industry, online:** <<http://app.mti.gov.sg/default.asp?id=585>> (accessed on 14 May 2007).
8. **Wilfred Yeo “F1 comes to Singapore”** *The Straits Times* (12 May 2007). The article quotes the Minister of State for Trade and Industry S. Iswaran as saying: “Singapore is a leading business centre, and our aim is to be a vibrant global city that is abuzz with high-quality entertainment and events. A world-class event like an F1 race, with more than 500 million (television) viewers worldwide, will take us closer to this objective.’
9. **Ministry of Law, online:** http://notesapp.internet.gov.sg/___48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-6YF7C6?OpenDocument (accessed on 14 May 2007).
10. **Joining other ICDR centres in New York, Dublin and Mexico City.**
11. **Ministry of Law, News Release, (November 2006), online:** <http://notesapp.internet.gov.sg/___48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-6U86A2?OpenDocument> (accessed on 14 May 2007).
12. **Singapore Changi Airport, online:** <http://www.changiairport.com/changi/en/airport_guide/?__locale=en> (accessed on 14 May 2007).
13. **Corrupt Practices Investigation Bureau, online:** <<http://app.cpib.gov.sg/newcpib/user/default.aspx?pgID=152>> (accessed on 14 May 2007).
14. **Supreme Court, online:** <<http://app.supremecourt.gov.sg/default.aspx?pgid=425&printFriendly=true>> (accessed on 14 May 2007).
15. **Supreme Court, online:** <<http://app.supremecourt.gov.sg/default.aspx?pgid=407&printFriendly=true>> (accessed on 14 May 2007).
16. [1998] 3 SLR 670.
17. [1995] 3 SLR 631.
18. [2006] SGCA 46.
19. *Cannonway Consultants Limited v Kenworth Engineering Ltd* [1997] ADRLJ 95.
20. *Giles v Thompson* [1993] 3 All ER 321.
21. *Giles v Thompson* [1994] 1 AC 142.
22. [1999] Ch 239.
23. **Section 15 IAA.**
24. **Section 5(1) IAA.**
25. **Law Reform Committee Report of the Sub-Committee on Review of Arbitration Laws 31 August 1993 at paragraphs 12 and 13.**
26. **Section 6(2) of the IAA and Article 8 of the Model Law.**

27. *The Dai Yun Shan* [1992] 2 SLR 508. See also *Coop International Pte Ltd v Ebel SA* [1998] 3 SLR 670.
28. Section 11(1) IAA.
29. Section 11(2) IAA.
30. Halsbury's Laws of Singapore Vol 2 2003 Reissue at para 20.002.
31. [2006] SGCA 42.
32. Section 2(1) IAA, section 2(1) AA.
33. [2007] 1 SLR 597.
34. AIR 2003 SC 2629.
35. Section 19B(1) IAA.
36. Section 19B(2) IAA.
37. Section 49 AA.
38. *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28.
39. Section 7 IAA, Article 8(1) Model Law, Article II.3 New York Convention.
40. Sections 19B and 29(2) IAA, Article 25 Model Law, Article III New York Convention.
41. Section 31 IAA, Article 36 Model Law, Article V New York Convention.
42. Section 29(1) IAA.
43. Section 29(2) IAA.
44. Section 6(1)(c) Limitation Act (Cap 163).
45. Section 31(2) IAA.
46. [1996] 1 SLR 34; [1995] SGHC 232.
47. [2006] SGHC 78, See also "Singapore court rejects party's non-signatory claims", award upheld" **Mealey's International Arbitration Report**, vol 21, No 6, June 2006, p 19.
48. 404 F 3d 657 (2nd Cir, 2005). See *Yearbook Comm Arb'n XXVIII* (2003) p1043 for the decision of the first instance.
49. See "Looking for Law in All the Wrong Places: The Second Circuit's Decision in *Sarhank Group v Oracle Corporation*" Barry H Garfinkel and David Herhily, *Mealey's International Arbitration Report* vol 20, No 6, June 2005, p 18.
50. Timothy Cooke, "Enforcement of Foreign Arbitral Awards in Singapore," *Law Gazette* Feb 2007 (3).
51. Section 2(1) RECJA.
52. Section 3 RECJA.
53. Section 3(1) RECJA.
54. [2006] SGHC 210.
55. Ministry of Law, New Release, online: <http://notesapp.internet.gov.sg/_48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-6VDETR?OpenDocument> (accessed on 14 May 2007). ■

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