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The Baker McKenzie **International Arbitration Yearbook**

Singapore

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A. Legislation and rules

A.1 Legislation

Singapore is one of the world's most popular seats for arbitration.[3] This can be attributed to a confluence of factors: infrastructure, the use of English as the *lingua franca*, transparency, the rule of law and a respected judiciary. Over the last 10 years, Singapore has also proactively initiated legislative measures to promote the efficacy of the arbitral process.

The International Arbitration Act (IAA) provides the legislative framework that governs the conduct of international arbitrations in Singapore. On 1 January 2010, three key changes were made to the then-existing arbitration regime to:

(i) Clarify that courts may grant interim orders in aid of foreign arbitrations.

(ii) Expand the definition of an arbitration agreement to include "electronic communications."

(iii) Permit the Minister of Law to designate entities to administer the non-mandatory process of authenticating awards, providing parties with an avenue to authenticate awards for the purpose of overseas enforcement under the New York Convention.

On 1 June 2012, further amendments were made to the IAA to:

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[3] 2015 Queen Mary University of London International Arbitration Survey: Improvements and Innovations in International Arbitration.

(i) Clarify that: (a) awards and orders given by emergency arbitrators; and (b) certain orders and directions of interim measures made by arbitral tribunals in arbitrations outside Singapore are enforceable by the High Court.

(ii) Permit an appeal to the High Court and the Court of Appeal on a tribunal's ruling that it does not have jurisdiction.

(iii) Expand an arbitral tribunal's powers to award interest.

(iv) Expand the definition of "arbitration agreement" by providing that the requirement that it "shall be in writing" is met if "its content is recorded in any form," however the arbitration agreement was concluded.

The Civil Law (Amendment) Act, passed in January 2017, provides a framework for third-party funding in certain categories of proceedings. This will give businesses an additional financing option for international commercial arbitration and bring Singapore's system in line with other major arbitration centers around the world, such as London, Paris and Geneva, where third-party funding is becoming a common feature in commercial disputes.

A further key development relates to the establishment of the Singapore International Mediation Centre (SIMC) in November 2014 and the Singapore International Commercial Court (SICC) in January 2015. These new institutions complement the existing arbitration industry in Singapore, with the aim of offering users a selection of efficient and dependable dispute resolution platforms. In 2014, the SIMC collaborated with the Singapore International Arbitration Centre (SIAC) to offer an "arbitration-mediation-arbitration" service that combines the efficiency of mediation and the certainty and enforceability of an arbitral award. The SIAC-SIMC Arb-Med-Arb Protocol provides for a three-stage process, involving: (i) the initiation of arbitration proceedings before the SIAC; (ii) a stay of the arbitration for the case to be submitted to mediation at the SIMC; and (iii) the reference of the matter back to arbitration to either resume

arbitration or, where mediation is successful, to request the tribunal to record the parties' settlement in the form of an enforceable consent award.

A.2 Institutions, rules and infrastructure

Singapore allows for both institutional and *ad hoc* arbitration. Institutional arbitrations offer certain advantages — an established set of rules for parties to abide by, administrative assistance from the institution concerned, and panels of accredited arbitrators.

The main arbitration institution in Singapore is the SIAC, which has become a major arbitration institution globally, enjoying steady and continual growth in the number of cases that it handles. Apart from the SIAC, there are also specialized arbitration institutions for specific industry sectors, the most prominent of which is the Singapore Chamber of Maritime Arbitration (SCMA).

A.2.1 The SIAC Rules

SIAC arbitrations are governed by the SIAC Rules, which were first promulgated in 2007.

On 1 August 2016, the sixth edition of the SIAC Rules ("SIAC Rules 2016") came into effect. Some of the key highlights of the SIAC Rules 2016 include: new provisions on consolidation, multiple contracts and joinder of additional parties to facilitate the cost-effective and efficient resolution of disputes, the introduction of an innovative procedure for the early dismissal of claims and defenses, and the delocalization of the seat of arbitration.

B. Cases

B.1 Asymmetric arbitration clause held to be valid and enforceable

In *Dyna-Jet Pte Ltd. v. Wilson Taylor Asia Pacific Pte Ltd.* ("*Dyna-Jet*"),[4] parties entered into a contract that gave the plaintiff the right to

[4] [2016] SGHC 238.

elect to refer its disputes to litigation or arbitration (ie, an asymmetrical optional arbitration agreement). A dispute arose and the plaintiff decided to bring an action in court. The defendant then applied for an order to stay the plaintiff's action in favor of arbitration.

The High Court found that the asymmetrical optional arbitration agreement was valid and enforceable. It dismissed the stay application, as the plaintiff had effectively relinquished its right to refer this particular dispute to arbitration when it elected not to arbitrate.

B.2 Parties must comply with agreed preconditions for arbitration

In *International Research Corp. PLC v. Lufthansa Systems Asia Pacific Pte Ltd. and another,*[5] the Court of Appeal held that where parties had clearly contracted for a specific set of dispute resolution procedures as preconditions for arbitration, those preconditions had to be strictly complied with.

The dispute resolution clause in the case provided that parties had to convene certain meetings to try and resolve any disputes prior to the commencement of arbitration proceedings. It set out in mandatory fashion and with specificity the parties' respective personnel who were required to meet as part of a series of steps that were to precede the commencement of arbitration. While some meetings took place, it was not clear what was discussed at the meetings and not all personnel designated in the clause attended the meetings. The Court of Appeal held that the preconditions had not been substantially complied with and consequently, the tribunal did not have jurisdiction over the dispute.

B.3 Lack of jurisdiction as grounds for resisting enforcement

Under the Model Law, a party has three routes to object to the tribunal's jurisdiction: (i) challenging the tribunal's preliminary ruling on jurisdiction by appeal to the court under Article 16(3); (ii) seeking

[5] [2013] SGCA 55.

to set aside the award under Article 34 for lack of jurisdiction; and/or (iii) resisting the grant of leave to enforce the award on the grounds of lack of jurisdiction based on Section 19 of the IAA read with Article 36. Article 36 does not apply in Singapore because the IAA excludes the import of Articles 35 and 36, but similar grounds for resisting enforcement (albeit of a foreign award) are found in the New York Convention.

In *PT First Media TBK v. Astro Nusantara International BV and others,*[6] the Court of Appeal held that a party may invoke lack of jurisdiction as a ground to challenge enforcement even where it had not availed itself of earlier remedies. The Court of Appeal examined the Model Law's *travaux préparatoires*, which revealed that it was drafted with a view to giving parties a choice between "active" and "passive" remedies against awards. "Active" remedies are those initiated by the party itself to attack an award, such as the curial review procedure in Article 16(3) of the Model Law or the setting-aside procedure in Article 34. In contrast, the "passive" remedy of resisting enforcement — raised as a defense if the opposing party acts to enforce the award — is found in Article 36 of the Model Law. Although Article 36 does not apply in Singapore, the Court of Appeal held that a Singapore court has discretion to refuse enforcement and recognition of awards made in Singapore on the same grounds as those found in Article 36. In this case, although PT First Media TBK (part of the Indonesian Lippo group) had not appealed the tribunal's preliminary ruling that it had jurisdiction under Article 16(3) or applied to set aside the final award under Article 34 of the Model Law, it was not precluded from raising the jurisdiction point in resisting enforcement of the award.

On a separate issue, the Court of Appeal found that the tribunal had wrongly joined third parties related to the Astro group to the arbitration, as PT First Media TBK did not consent to the joinder. The award was set aside to the extent that it related to claims of the third

[6] [2013] SGCA 57.

parties.[7] As seen in the Hong Kong chapter of this *Yearbook*, however, enforcement of the award was upheld in Hong Kong because the respondent failed to challenge enforcement within time.

B.4 Setting aside awards for breach of natural justice

B.4.1 *LW Infrastructure Pte Ltd. v. Lim Chin San Contractors Pte Ltd. (LW Infrastructure)*[8]

In *LW Infrastructure*, the Court of Appeal set aside an additional award worth approximately SGD 274,000 (approximately USD 194,000) in pre-award interest against LW Infrastructure Pte Ltd. (LW) on the basis that there had been a breach of natural justice. The test for setting aside an award for breach of natural justice was elucidated to be whether any materials not placed before the arbitrator "could reasonably have made a difference; rather than whether it would have necessarily done so." Hence, the Tribunal's failure to hear further submissions on whether an additional award was to be issued, *inter alia*, was found to be a breach of natural justice that resulted in real prejudice to LW.

Although this arbitration was governed by the Arbitration Act (the AA), this decision is equally applicable to arbitrations governed by the IAA because the court relied on the legislative intention that the two acts should be "broadly consistent." This case illustrates that Singapore courts can and will supervise the integrity of the arbitration process, while not interfering in the process by substituting their views on the merits over those of the arbitrator.

[7] This was based on the SIAC Rules 2007. The 2016 SIAC Rules clarify the provisions for joinder, but consent of all is still needed except where all concerned are parties to the arbitration agreement.
[8] [2012] SGCA 57.

B.4.2 *AKN and another v. ALC and others and other appeals (AKN v. ALC)*[9]

In *AKN v. ALC*, the Court of Appeal set out three requirements that relate to the rule of natural justice. First, the inference that an arbitrator failed to consider an important pleaded issue must be clear and virtually inescapable. Second, there must be a causal nexus between the breach of natural justice and the arbitral award. Finally, the breach must have prejudiced the aggrieved party's rights. In contrast, the inference that an arbitrator wholly missed important pleaded issues should not be drawn where the arbitrator has simply misunderstood the aggrieved party's case, has been mistaken as to the law, or has chosen not to deal with a point pleaded because they thought it was unnecessary or wrong.

B.5 Court will not uphold injunctions requiring unacceptable supervision

In *Maldives Airports Co. Ltd. and another v. GMR Malé International Airport Pte Ltd*.[10] ("*Maldives Airports*"), the Court of Appeal held that courts would not ordinarily grant injunctions requiring parties to continue working together once it was shown that there had been a serious breakdown of mutual trust and confidence. It would also not usually grant an injunction that would require an unacceptable degree of supervision. The Court of Appeal therefore discharged an injunction prohibiting the appellant from interfering with the respondent's operation of an airport under a concession agreement.

The decision in *Maldives Airports* further clarified the law in relation to the grant of interim measures, confirming that: (i) Section 12A of the IAA allows the court to grant an Anton Piller or Mareva or any other order necessary for the preservation of evidence and assets, the term "assets" being confined to such contractual rights as lend themselves to being preserved; and (ii) the standards for the grant of

[9] [2015] SGCA 18.
[10] [2013] SGCA 16.

interim measures in an arbitration are no different from the standards applied to civil court cases.

B.6 Review of investment arbitration awards by the Singapore court

In *Sanum Investments Ltd. v. Government of the Lao People's Democratic Republic* ("*Sanum v. Laos*"),[11] an arbitration was brought by an investor in Macau against the government of Laos on the basis of the PRC-Laos Bilateral Investment Treaty (the BIT). The issue was whether the BIT applied to Macau, and whether the investor's claims fell within the dispute resolution clause set out in the BIT, thereby giving the tribunal jurisdiction to hear the dispute.

The Court of Appeal determined that the interpretation and applicability of the BIT were justiciable before Singapore courts, and no special deference was warranted in the investor-state arbitration content. The Court of Appeal also held that the BIT applied to Macau. The moving treaty frontier rule, as reflected in Article 15 of the Vienna Convention on Succession of States in respect of Treaties and Article 29 of the Vienna Convention on the Law of Treaties, presumptively provided for the automatic extension of a treaty to a new territory as and when it became part of that state. Further, the dispute resolution clause was interpreted to be broad enough to permit arbitration in respect of the investor's claims.

B.7 Court clarifies that minority oppression claims are arbitrable

In *Tomolugen Holdings Limited and another v. Silica Investors Limited*[12] ("*Tomolugen*"), the Singapore Court of Appeal clarified that minority oppression claims are generally arbitrable. Such claims involve shareholders of a company and the reference to arbitration is not against public policy as they do not involve a public interest element.

[11] [2016] SGCA 57.
[12] [2015] SGCA 57.

The Court of Appeal also clarified that the fact that there are jurisdictional limitations on an arbitral tribunal's ability to grant certain relief (such as an order for the winding up of the company) will not in itself render the subject matter of a dispute non-arbitrable. Procedural complexities will also not render the dispute non-arbitrable.

In the more recent case of *L Capital Jones Ltd. and another v. Maniach Pte Ltd.,*[13] the Court of Appeal took the same view and affirmed the holding in *Tomolugen*.

B.8 Arbitral tribunal's power to rule on its own jurisdiction

Arbitral tribunals have the power to rule on their own jurisdiction, consistent with the widely recognized principle of *kompetenz-kompetenz*. This, however, is subject to the court's power to rule on challenges to the tribunal's jurisdiction. Typically, challenges may be brought at different stages of the arbitration proceedings: (i) at the start of the arbitration, where a stay of court action is sought in favor of arbitration; (ii) during the arbitration, where an appeal is brought to the court on a ruling by the tribunal on its jurisdiction; and/or (iii) after the arbitration, where an application is taken out to set aside or enforce an arbitral award.

Recent cases have clarified the standard of review that courts would adopt in deciding on jurisdictional challenges, particularly where challenges are made at the start of the arbitration in the context of stay proceedings. In *Sim Chay Hoon v. NTUC Income Insurance Co-operative Ltd.,*[14] the Court of Appeal, in deciding a stay application, explained that the court should generally undertake a restrained view of the facts and circumstances before it, in order to determine whether it appeared on a *prima facie* basis that there was an arbitration clause and an arbitrable dispute. If the appellants were dissatisfied with the tribunal's initial decision, they could seek recourse under Section 48

[13] [2017] SGCA 03.
[14] [2016] 2 SLR 871.

of the Arbitration Act to set aside the award. At that later stage, the courts will conduct a more in depth review (a "*de novo review*") and make an independent determination, unrestricted by the findings or reasoning of the tribunal.[15]

C. Trends and observations

The Singapore government's commitment to develop Singapore as an arbitration and dispute resolution hub is evident in the multitude of swift reforms and developments in legislation as well as high-profile judicial pronouncements. Of particular significance are the developments with respect to third-party funding and recent cases on investment arbitration.

C.1 Third-party funding

The Civil Law (Amendment) Act[16] was passed on 10 January 2017 to allow third-party funding in Singapore for certain categories of legal proceedings, including international arbitration proceedings. The amendments also introduced safeguards to prevent abuse of the new rules, for instance: (i) only professionals whose primary business is funding claims will be allowed; and (ii) lawyers will be barred from receiving referral fees or having an ownership interest in these fund providers. This will allow international businesses to use the funding tools available to them in other centers and promote Singapore's growth as a leading venue for international arbitration.

C.2 Investment arbitration

Singapore is beginning to hear more investment arbitration cases. This is illustrated by the recent cases of *Sanum v. Laos* and *Maldives Airports v. GMR Malé* discussed above.

In addition, the SIAC launched its Investment Arbitration Rules 2017 (the "IA Rules") on 1 January 2017. The IA Rules are tailored to

[15] *PT Tugu Pratama Indonesia v. Magma Nusantara Ltd.* [2003] 4 SLR(R) 257.
[16] Second Reading of the Civil Law (Amendment) Bill (parliamentary report not released yet).

issues unique to investment arbitration and draw on best practices from bodies such as the Permanent Court of Arbitration, the International Centre for Settlement of Investment Disputes and the United Nations Commission on International Trade Law. Given the increasing confidence in Asian seats of arbitration, particularly Singapore and Hong Kong, and the constant improvement to their arbitration infrastructure, we can expect to see more investment arbitration cases being heard in Asia in the near future.