12th
Edition

2018-2019

The Baker McKenzie **International Arbitration Yearbook**

Singapore

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Nandakumar Ponniya[1] and Michelle Lee[2]

A. Legislation and rules

A.1 Legislation

International arbitration in Singapore continues to be governed by the International Arbitration Act (IAA), the Arbitration Act and the Arbitration (International Investment Disputes) Act, to which no legislative amendment was made in 2018.

Notably, on 1 November 2018, the Supreme Court of Judicature (Amendment) Act 2018 (the Act) enhanced the jurisdiction of the Singapore International Commercial Court (SICC) to hear international commercial arbitration-related court proceedings. The Act clarifies that the SICC is empowered to hear matters relating to the enforcement or setting aside of arbitral awards that would normally be referred to the High Court for resolution under the IAA.[3]

A.2 Institutions, rules and infrastructure

The main arbitral institution in Singapore is SIAC, which is recognized as one of the top three most preferred arbitral institutions in the world and the top institution in Asia.[4]

[1] Nandakumar Ponniya is a partner in Baker McKenzie's Singapore office. He is seasoned in international arbitration with a focus on building, infrastructure and construction law. He regularly advises on infrastructure projects such as rail systems, oil and gas facilities, and utilities plants, as well as commercial and residential developments across the Asia Pacific region.
[2] Michelle Lee is a senior associate in Baker McKenzie's Singapore office. Michelle obtained her LL.M from Columbia University where she was named a James Kent Scholar.
[3] Supreme Court of Judicature (Amendment) Act 2018, No. 1 of 2018.
[4] 2018 International Arbitration Survey by Queen Mary University of London and White & Case.

On 19 December 2017, SIAC announced its proposal for cross-institution co-operation of international arbitral proceedings. It proposed that a protocol is adopted by arbitral institutions allowing the cross-institution consolidation of arbitration proceedings that are subject to different institutional arbitration rules. Currently, the consolidation provisions adopted by various arbitral institutions do not allow for consolidation of arbitrations that are subject to different institutional rules. SIAC developed a proposed consolidation protocol[5] for leading arbitral institutions to adopt and incorporate into their own arbitration rules, and utilize for the administration of consolidated arbitrations.[6]

To assist with this initiative, on 12 October 2018, SIAC entered into a Memorandum of Understanding (MOU) with CIETAC. Under the MOU, SIAC and CIETAC will set up a joint working group to discuss SIAC's proposed cross-institution consolidation protocol. The institutions will also work together to promote international arbitration as a preferred method of dispute resolution for resolving international disputes and organize conferences, seminars and workshops as methods to promote international arbitration in Singapore and China.[7]

In recognition of Singapore's growing strength as a global hub for international arbitration, the Permanent Court of Arbitration (PCA) opened an office in Singapore in January 2018.[8] The International Court of Arbitration (ICA) of the ICC also opened a case management

[5] SIAC, "Memorandum regarding proposal on cross-institution consolidation protocol," http://siac.org.sg/images/stories/press_release/2017/Memorandum%20on%20Cross-Institutional%20Consolidation%20(with%20%20annexes).pdf

[6] SIAC, "Proposal on Cross-Institution Consolidation Protocol," 19 December 2017, http://siac.org.sg/69-siac-news/551-proposal-on-cross-institution-consolidation-protocol

[7] SIAC, "SIAC Signs Memorandum of Understanding with the China International Economic and Trade Arbitration Commission," 12 October 2018, http://www.siac.org.sg/69-siac-news/584-siac-signs-memorandum-of-understanding-with-the-china-international-economic-and-trade-arbitration-commission

[8] Permanent Court of Arbitration, Singapore Office, January 2018, https://pca-cpa.org/en/about/structure/singapore-office/

office in Singapore on 23 April 2018.[9] The opening of the PCA office and the ICA case management office in Singapore will allow the PCA and ICA to handle cases in real time, assist the promotion of Singapore as a venue for international arbitration, and better serve the dispute resolution needs of users in Singapore and the wider Asia region.

B. Cases

B.1 Court of Appeal decides that it is strongly arguable that the commencement of court proceedings *per se* is a *prima facie* repudiation of the arbitration agreement

In *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed),*[10] the Singapore Court of Appeal held that it is strongly arguable that the commencement of court proceedings *per se* is a *prima facie* repudiation of the arbitration agreement, notwithstanding that there are a number of foreign authorities that have expressed the contrary view.

The Court of Appeal reasoned that parties who enter into a contract containing an arbitration agreement can reasonably expect that disputes arising out of the underlying contract would be resolved by arbitration. Thus, where court proceedings are commenced without an accompanying explanation or qualification and the relief sought in the court proceedings would resolve the dispute on the merits, the defending party in the court proceedings is entitled to take the view that the plaintiff no longer intends to abide by the arbitration agreement. Nevertheless, the Court of Appeal noted that it would still be open to the plaintiff to displace this *prima facie* conclusion by furnishing an explanation for the commencement of court proceedings to show objectively that it had no repudiatory intent to breach the arbitration agreement.

[9] Ministry of Law, "ICC Court Case Management Team begins operations in Singapore," 23 April 2018, https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/icc-court-case-management-team-begins-operations-in-singapore.html
[10] [2018] SGCA 63.

In this case, the respondent explained that it had commenced court proceedings in the British Virgin Islands ("BVI Action") as it did not have actual knowledge of the arbitration agreement. The Court of Appeal did not accept the respondent's explanation as it was not substantiated by affidavit evidence or on the facts of the case. Further, the respondent's alleged ignorance of the arbitration agreement was not communicated to the appellant. Thus, there would have been no basis for a reasonable person in the appellant's position to conclude that the respondent did not intend to abandon its right to arbitrate.

Further, by applying for summary judgment in the BVI Action, the Court of Appeal found that the appellant had accepted the respondent's repudiation of the arbitration agreement, which brought the arbitration agreement to an end. As such, the Court of Appeal found that the arbitral tribunal lacked jurisdiction over the arbitration and upheld the appellant's challenge to the tribunal's jurisdiction.

B.2 High Court decides that there is no choice of active remedies for a party challenging a tribunal's ruling on jurisdiction

In *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited,*[11] the Singapore High Court held that where a tribunal had ruled on its own jurisdiction as a preliminary question, the party wishing to challenge the tribunal's jurisdiction had to bring that issue to the supervisory court within 30 days of notice of the tribunal's ruling, pursuant to article 16(3) of the UNCITRAL Model Law (article 16(3)), read with section 10(3) of the IAA. The failure to do so would preclude such party from raising the same jurisdictional objection in setting aside proceedings pursuant to article 34(2)(a)(iii) of the UNCITRAL Model Law (article 34(2)(a)(iii)).

On the other hand, such a party is not precluded from raising the same jurisdictional challenge when it exercises its passive remedy of resisting enforcement of the award. In other words, under Singapore

[11] [2018] SGHC 78.

law, while a party who wishes to challenge the tribunal's decision on its own jurisdiction has a choice of selecting between the active remedy under article 16(3) and the passive remedy of resisting enforcement, such a party does not have a choice of selecting between the active remedy under article 16(3) and the active remedy of setting aside the award under article 34(2)(a)(iii).

This is the first time that the Singapore High Court had the opportunity to decide on this significant issue - it is significant because a party may unwittingly lose its right to challenge jurisdiction given the permissive language in article 16(3).[12] While the decision is being appealed to the Singapore Court of Appeal, it nevertheless presents an interesting development in Singapore's arbitration jurisprudence and serves to caution parties in arbitration to adhere to the 30-day period in article 16(3) if applicable. The Singapore High Court also opined that it would be an abuse of process to allow a party such as the plaintiff in this case, who raised a jurisdictional challenge but chose not to participate in most part of the arbitration, to wait to challenge the tribunal's jurisdiction in a setting aside application, in blatant disregard of article 16(3).

B.3 High Court refuses to adjourn enforcement proceedings pending a setting aside application at the seat of arbitration

In *Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd,*[13] the Singapore High Court refused to adjourn enforcement proceedings pending the determination of an application to set aside the award at the seat of arbitration, i.e., Denmark. The Court held that the decision of whether to grant such an adjournment is a matter of discretion for the enforcing court. In exercising its discretion, the court would adopt

[12] This issue has previously been considered and discussed by the co-author in a separate publication titled Michelle Lee, "Choice of Active Remedies Under the UNCITRAL Model Law - When "May" Means May," (2017) 28(1) The American Review of International Arbitration 159.
[13] [2018] SGHC 132.

a multifactorial approach, rather than a bright line test, and come down on the side of an outcome that is the most just or least unjust.

In applying a multifactorial approach, the court held that the applicant for adjournment must at least show that he is demonstrably pursuing a meritorious application at the seat court. This is to allow the enforcing court to satisfy itself that the setting aside application was made in good faith and is not devoid of a properly arguable basis. This would guard against attempts at delaying the enforcement of a binding award, as the court noted the perennial tension between the notion of the finality of a foreign arbitral award and the remedies available to an award debtor (i.e., to set aside the award and resist enforcement of the award).

The court further clarified that at this stage of inquiry, the enforcing court would not engage in a detailed assessment of the facts or legal arguments of the setting aside proceedings. However, if the setting aside application is lacking in merits, there would be little or no tangible prejudice to the award debtor if its application for adjournment is refused.

In this case, the court found that the setting aside application before the Danish Courts lacked merit and those proceedings could take several years. Further, the setting aside application was filed in Denmark only after the award creditor had filed enforcement proceedings in Singapore, even though the award debtor had also earlier commenced separate arbitration proceedings which were premised on the validity of the award. This suggested that the setting aside proceedings were only commenced to derail the enforcement proceedings. The Court, therefore, refused to grant an adjournment of the enforcement proceedings.

This appears to be the first time the Singapore Courts had the opportunity to decide on whether to adjourn enforcement proceedings pending a setting aside application at the seat. This decision shows that the Singapore Courts would strike a balance between: (i) ensuring the finality of foreign arbitral awards and that the seat court's

jurisdiction to decide on the setting aside application is not encroached upon; and (ii) preventing parties from adopting delay tactics.

B.4 High Court grants a permanent anti-suit injunction to restrain a party from relying on a foreign court judgment obtained in breach of an arbitration agreement

In *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd,*[14] the Singapore High Court held that it has the power to grant a permanent anti-suit injunction to restrain a party from instituting or continuing with foreign court proceedings in breach of an arbitration agreement. Although the Singapore courts had previously granted permanent anti-suit injunctions in aid of arbitration, this decision is noteworthy as it clarified: (i) the source of the court's power to grant such injunctions and the effect of article 5 of the UNCITRAL Model Law (article 5) on such power; and (ii) the negative obligations arising from an arbitration agreement.

Regarding the court's power to grant a permanent anti-suit injunction in aid of arbitration, the court held that it had such a power based on the court's general power to give equitable relief under section 18(2) of the Supreme Court of Judicature Act (SCJA), read with paragraph 14 of the First Schedule to the SCJA. Further, the court considered article 5 and held that it did not prevent a court from issuing a permanent anti-suit injunction as the grant of such a remedy is not a matter governed by the UNCITRAL Model Law. This is especially so where arbitration proceedings have concluded, as there would be no concern over excessive judicial interference into ongoing arbitral proceedings.

The court also clarified that there are at least two implied negative obligations arising from an arbitration agreement. The first is a negative obligation not to commence court proceedings in relation to disputes that the parties had agreed to submit to arbitration. Such an obligation exists even where arbitration proceedings are not ongoing

[14] [2018] SGHC 56.

or even commenced. The second is a negative obligation not to set aside or otherwise attack an arbitral award in jurisdictions other than the seat of arbitration.

In this case, after arbitral awards were made in favor of the plaintiff, the defendant (being the losing party in the arbitration) successfully obtained a judgment from the Maldivian High Court in an action that it had commenced in relation to the same issues raised and argued in the arbitration. The plaintiff appealed against the Maldivian High Court judgment and the appeal was pending before the Maldivian appellate court at the time of the hearing.

The Singapore High Court found that the defendant's pursuit of the Maldivian action was squarely a breach of its negative obligation not to challenge the award other than through setting aside proceedings at the seat (i.e., Singapore). However, the court also took into account the plaintiff's delay of nine months in applying for the permanent anti-suit injunction and found that the Maldivian action was already too far advanced to warrant an anti-suit injunction to restrain the defendant from involvement in those proceedings. As such, the court granted the plaintiff a limited permanent anti-suit injunction to restrain it from taking any steps in reliance on the judgment of the Maldivian High Court.

B.5 High Court allows enforcement of arbitral award despite findings of procedural irregularities

In *Sanum Investments Limited v ST Group Co, Ltd,*[15] the Singapore High Court allowed the enforcement of a SIAC award despite having found that it was based on an incorrect seat of arbitration and an incorrect composition of the tribunal.

In this case, the court found that the correct seat of arbitration was Macau and not Singapore and that the appointment of a three-member tribunal was incorrect. These procedural irregularities allowed the

[15] [2018] SGHC 141.

defendants to apply to the court to resist enforcement of the award pursuant to article 36(1)(a)(iv) of the UNCITRAL Model Law.

However, the court was of the view that article 36(1) of the UNCITRAL Model Law gave the Court a residual discretion to enforce the award notwithstanding that one of the grounds for resisting enforcement had been satisfied, given the permissive language in article 36(1), i.e., enforcement "may be refused … " The court held that where prejudice has not been shown, the court ought to exercise its residual discretion to enforce the award. As the defendants had not produced any evidence of prejudice arising out of the procedural irregularities in the award, they had not discharged their burden of demonstrating the seriousness of the breach.

Further, in response to the defendant's contention that there is no need to show prejudice in respect of an incorrect seat, the court acknowledged that while the parties' chosen seat is an important aspect of an arbitration, choice of seat is less critical in an application to resist enforcement, as opposed to an application to set aside the award. This is because enforcement can be brought in any jurisdiction whereas only the seat court can set aside an award. Therefore, the mere assertion of an incorrectly seated arbitration is not enough. There must be evidence of how the law of the incorrect seat would impact the arbitral procedure that was adopted by the tribunal.

This decision is instructive as it shows the Singapore Court's willingness to enforce an award notwithstanding that it is based on an arbitration that is inconsistent with the parties' arbitration agreement, so long as there is no material prejudice suffered by the award debtor.