

THE INTERNATIONAL ARBITRATION ACT OF SINGAPORE

The laws governing private commercial arbitration in Singapore are divided into domestic and international regimes. There is a third regime that deals with investment disputes, namely the Arbitration (International Investment Disputes) Act which gives effect to the United Nations Convention on the Settlement of Disputes between States and Nationals of Other States.

I. Background

The international regime is governed by the International Arbitration Act (“IAA”), which was enacted in 1994 and amended in 2001. The IAA gives the force of law to the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”), with some modifications. It also gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“the New York Convention”).¹

Singapore adopted the Model Law in 1994 because it was an internationally accepted model. Singapore believed that it must adopt a world view of international arbitration if it were to be an international arbitration centre.² It discerned an international trend to reduce the extent of curial intervention in arbitration proceedings.

The domestic arbitration regime comes under the Arbitration Act (“AA”). It was completely revised in 2002 to harmonise the laws relating to domestic arbitration to those governing international arbitration. Nonetheless, Singapore decided to keep the two

¹ An older statute, the Arbitration (Foreign Awards) Act, giving effect to the New York Convention is replaced and subsumed within the IAA.

² Sub-Committee on Review of Arbitration Laws, 1993, p. 2, para. 8.

regimes separate so that the courts could continue to exercise a greater degree of supervision over domestic arbitrations.³

Every arbitration in Singapore must now be governed by either the AA or the IAA. The IAA applies to international arbitrations and defines it in terms comparable (but not identical) to the Model Law.⁴ The AA operates as the default regime whenever an arbitration in Singapore falls outside the reach of the IAA.⁵ The AA will also apply where parties to an international arbitration which is otherwise subject to the IAA opt out of the IAA.

A major difference between the AA and the IAA is the right of appeal from an arbitral award. There is no right of appeal under the IAA but the AA permits an appeal on a question of law, with the leave of the court. Section 49(5) AA incorporates *The Nema*⁶ guidelines which have been followed in Singapore.⁷ In a nutshell, the decision of the arbitral tribunal on the point of law must be obviously wrong, unless it is a question of general public importance in which case the Court must be satisfied that the tribunal's decision is at least open to serious doubt. Under the IAA, the challenges to an award are in the form of an application to set it aside, or to resist enforcement of the award. These are discussed below

II. The International Arbitration Act

The IAA may be seen as a statute incorporating two international Conventions: the Model Law and the New York Convention. The IAA consists of three parts. Part I is just the title provision. Part II is the substantive part on the proceedings of international arbitration. The Model Law, with modifications, is made part of Singapore law, save for

³ Review of Arbitration Laws, Law Reform and Revision Division, Attorney-General's Chambers, LRRD No. 3/2001, p. vii.

⁴ Section 5 IAA; cf. Article 1(3) & (4) Model Law.

⁵ Section 3 AA.

⁶ *Pioneer Shipping v BTP Tioxide Ltd (The Nema)* [1982] AC 724.

⁷ See, e.g. *Hyundai Engineering v Sembawang Kimtrans* [2001] 1 SLR 739; *Permasteelisa Pacific Holdings Ltd v Hyundai Engineering and Construction Co Ltd* [2005] 2 SLR 270.

Chapter VIII. Chapter VIII of the Model Law deals with recognition and enforcement of awards. This chapter is not adopted because Part III of the IAA adopts the New York Convention on the enforcement of foreign awards.⁸

Due to some details of the Model Law that have been modified in the IAA, care must be taken to read the Model Law with Part II of the IAA.

Some amendments to the IAA in 2001 are similar to the provisions introduced in the AA. As with the AA, the Limitation Act is expressly made applicable to arbitrations as it applies to court proceedings (but, unlike the AA, the IAA does not give the court power to extend the time fixed by an arbitration agreement to commence an arbitration).

Application of the IAA

The IAA applies automatically if the arbitration is international as defined in section 5(2), namely if:

- (a) at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) 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; or
- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

⁸ A Singapore award may be enforced in the same manner as a judgment of the court: section 19 IAA.

It will also apply if the parties so agree in writing.⁹ Conversely, the parties may agree to opt out of the IAA even if the arbitration is international in character. Section 15 was amended in 2001 to clarify that the mere adoption of institutional rules by parties would not oust the application of the Model Law. Section 15A adds that rules of arbitration adopted by the parties shall apply to the extent that such rules are not inconsistent with the mandatory provisions of the Model Law or the IAA.

Enforcing the arbitration agreement

The IAA follows the stricter Model Law test for staying of legal proceedings in respect of matters covered by the arbitration agreement, unless the arbitration agreement is null and void, inoperative or incapable of being performed. There are slight differences in the wording. For example, a party who has failed to satisfy the conditions under section 6 IAA for a stay (i.e. before filing pleadings or taking a step in the proceedings) cannot seek a stay under Article 8. Section 7 sets out the court's powers in relation to security obtained for court proceedings, where the proceedings are stayed for arbitration. In the context of an admiralty action, it expressly empowers the court to order that the property arrested be retained as security for the satisfaction of any arbitral award, or that stay of the action be conditional on provision of equivalent security.

Singapore recognizes the doctrine of separability of the arbitration agreement. Separability means that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Therefore, if the contract is null and void, it does not mean that the arbitration clause is necessarily invalid as a matter of law.¹⁰

The tribunal

⁹ Section 2(1) IAA on the definition of an arbitration agreement is being amended to expressly allow an agreement made by electronic communications.

¹⁰ *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR 278.

The default number of arbitrators is one, notwithstanding Article 11(3) of the Model Law, which provides for three.¹¹

The IAA, in giving the force of law to Article 16(3) of the Model Law, incorporates the doctrine of *kompetenz-kompetenz*. *Kompetenz-kompetenz* refers to the power of the tribunal to rule on its own jurisdiction. The tribunal's decision is still subject to review by the court, but safeguards are installed to prevent undue disruptions to an arbitration. A party intending to raise a jurisdictional objection must do so no later than the submission of the statement of defence. If the tribunal rules that it has jurisdiction, the aggrieved party has 30 days to apply to the court to decide the matter. In a slight modification of Article 16(3) of the Model Law, the IAA provides that an appeal against the High Court's decision on the jurisdiction issue shall lie to the Court of Appeal, but only with the leave of the High Court. There is currently no right to appeal against a tribunal's ruling that it has no jurisdiction.¹²

The tribunal has powers to make what are commonly known as interlocutory orders, e.g. on security for costs, discovery and interim preservation of property. This facilitates the smooth flow of the arbitration, so that interlocutory procedural matters are swiftly dealt with in the same forum. The tribunal's powers under section 12 IAA are enlarged to include powers to order samples to be taken and evidence to be preserved. The tribunal under the IAA has power to order interim injunctions, which the domestic tribunal does not have. All orders and directions made by a tribunal seated in Singapore may, by leave of the High Court, be made enforceable as if they are orders of the court.¹³

It has been held that section 12(7) IAA which empowers the court to grant interim relief in aid of arbitration applies only to arbitration seated in Singapore.¹⁴ Section 12(7) IAA

¹¹ Section 10 IAA.

¹² *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597.

¹³ Section 12(6) IAA.

¹⁴ *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 692; cf. *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854. The question whether the court has power under another statutory provision, i.e. section 4(10) Civil Law Act remains controversial: *Multi-Code Electronics v Toh*

will soon be replaced by a new section 12A that will expressly empower the Court to grant interim relief (except for security for costs and discovery which will be the exclusive province of the tribunal) irrespective of where the arbitration is seated. There are numerous conditions imposed to ensure that the court does not freely intervene in matters that should be reserved for the tribunal.

The tribunal has certain default powers conferred by Article 25 of the Model Law. If the claimant fails to file his statement of claim, the arbitral tribunal shall terminate the proceedings. Termination does not prevent a party from commencing fresh arbitration proceedings.¹⁵ On the other hand, if the respondent does not file his statement of defence, the tribunal has to continue the proceedings. If either party does not appear at the hearing or produce documentary evidence, the tribunal may proceed and make an award on the evidence before it. Unlike the AA which gives the tribunal such power, the IAA does not confer on the tribunal the power to dismiss a claim for inordinate and inexcusable delay on the part of the claimant.¹⁶

An arbitrator enjoys immunity from liability for negligence or any mistake in law or fact in the conduct of the arbitration.¹⁷

The award

An award is defined “a decision on the substance of the dispute and includes any interim, interlocutory or partial award”.¹⁸ Interlocutory or procedural orders made by the tribunal under section 12 would not be considered an award. Section 19A of the IAA provides that the arbitral tribunal may make more than one award at different points in time during the arbitration proceedings on different aspects of the matter. Section 19B states that,

Chun Toh [2009] 1 SLR 1000 Chan J held in the affirmative, declining to follow Tay J’s decision in *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR 856.

¹⁵ On the other hand, it is open to question whether a defaulting claimant is in repudiatory breach of the arbitration agreement. This provision is to be contrasted with section 41 of the English Arbitration Act 1996, which permits an award dismissing the claim.

¹⁶ Section 29(3) AA.

¹⁷ Section 25 IAA.

¹⁸ Section 2(1) IAA.

except as provided in Articles 33 (correction or interpretation) and 34(4) (setting aside) of the Model Law, the tribunal shall not vary, amend or revoke its award. The tribunal is *functus officio* with respect to the substantive matters decided in an award.

There is generally no right of appeal against a final award of the arbitrator, although the court may set aside an award on grounds of fraud or breach of natural justice, apart from the grounds provided in Article 34 of the Model Law.¹⁹ Examples under Article 34 are where the applicant was under some incapacity, the arbitration agreement was invalid, the applicant was unable to present his case, the tribunal acted outside its jurisdiction or contrary to agreed arbitral procedure, the subject matter was not arbitrable or the award was contrary to public policy. Article 34 provides that any application to set aside an award must be made within three months from receipt of that award.²⁰

III. Enforcing an award

Enforcing a Singapore award

A Singapore award can be enforced like an order or judgment of the court, by application to the Court, whether it is made under the AA or the IAA.²¹ An award is deemed to be made at the place of arbitration.²²

For the purpose of enforcement of an award, whether under the IAA, or the AA, leave must be applied from the High Court. An application may be made *ex parte* and must be supported by an affidavit –

- (a) exhibiting the arbitration agreement and the original award or, in either case, a copy thereof;

¹⁹ Section 24 IAA.

²⁰ It has been held that the Court has no power to extend the time for setting aside an award under Article 34 Model Law: *ABC Co v XYZ Co Ltd* [2003] 3 SLR 546.

²¹ Section 19 IAA; section 46(1) AA.

²² Article 31(3) Model Law; section 38, ss. (3) and (4) AA.

- (b) stating the name and the usual or last known place of residence or business of the applicant (“the creditor) and the person against whom it is sought to enforce the award (“the debtor”); and
- (c) stating either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.²³

An order granting leave must be drawn up by the creditor and served on the debtor personally or by sending a copy to his usual or last known place of residence or business or in such other manner as the Court may direct.²⁴

Service of an order for enforcement of an award out of jurisdiction is not subject to the same requirements as service of an originating process out of Singapore, which requires leave of the Court and must meet certain conditions before leave is granted.²⁵ Service of the order for enforcement does not require leave of the Court, but it must comply with the methods for service of originating process stipulated under the Rules of Court.²⁶

The award is not enforceable immediately once the order is granted. The debtor has time to apply to set it aside. If the order served in Singapore, the debtor has 14 days after service to apply to set it aside. If the order is to be served out of jurisdiction, the period allowed is fixed by the Court at the time the order is made. The award cannot be enforced until this period of time has expired, or if there is an application to set aside the order, until the application is finally disposed of.²⁷

The usual options for enforcement are available if the award is not challenged or set aside. Common examples are writs of seizure and sale and garnishee proceedings.

²³ Order 69, rule 14(1) Rules of Court for AA awards; Order 69A, rule 6(1) Rules of Court for IAA awards.

²⁴ Order 69, rule 14(2); Order 69A, rule 6(2).

²⁵ Order 11, rules 1 and 2.

²⁶ Order 69, rule 14(3); Order 69A, rule 6(3); see Order 11, Rules 3, 4 and 6 for the provisions regarding the methods of service out of jurisdiction that apply to service of an enforcement order.

²⁷ Order 69, rule 14(4); Order 69A, rule 6(4).

Enforcing a foreign award

Through Part III of the IAA, Singapore subscribes to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. This means that an award made in a Convention country other than Singapore can be enforced in Singapore in the same manner as a judgment of a Singapore court.²⁸

The procedure to register the foreign award and obtain a judgment to make it enforceable is quite similar to that for enforcing a Singapore award. Under section 30 IAA, the claimant must produce to the Court:-

- (a) the duly authenticated original award or a duly certified copy thereof;
- (b) the original arbitration agreement or a duly certified copy;
- (c) certified English translation for foreign language award.

An application to enforce a foreign award is made *ex parte* to a Judge in Chambers or the Registrar.²⁹ It must be supported by an affidavit exhibiting the above documents. In addition, the affidavit must state:-

- (a) the name and usual or last known place of business of the applicant/creditor and the defendant/debtor; and
- (b) that the award has not been complied with or the extent to which it has not been complied with.

After the order is obtained and drawn up, it may be served within jurisdiction on the defendant personally or by sending a copy at its last known address, or outside

²⁸ Section 29 IAA, giving effect to Art III New York Convention.

²⁹ Order 69A, rule 6 Rules of Court.

jurisdiction without leave (following the usual requirements for such service). The defendant has 14 days after service of the order to apply to set aside the order (or in the case of service out of jurisdiction, such time as the Court may direct). The award shall not be enforced until after the expiration of this period.

The grounds for challenging enforcement of a foreign award are set out in section 31 IAA, which reflects Article V of the New York Convention. These are comparable to the grounds for setting aside an award.

Apart from the enforcement mechanism based on the New York Convention, the IAA allows a party to seek enforcement of a foreign award by any other means, such as those available under legislation on the reciprocal enforcement of judgments.³⁰

CHAN Leng Sun

September 2009

ANG & PARTNERS

³⁰ Section 33 IAA.