

## SINGAPORE ARBITRATION REGIME 2002: THE DOMESTIC AND INTERNATIONAL ARBITRATION DIVIDE\*

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### Introduction

This article explores the origins and development of the statutory regime governing arbitrations in Singapore. It will consider its unified origin, when no distinction was drawn between domestic and international arbitrations and the rationale for the current reliance on such a distinction and the UNCITRAL Model Law. This paper will analyse the structure and operation of this regime as well as some recent High Court and Court of Appeal decisions arising out of ambiguity in the law. It will also consider the ‘*localisation*’ of many of the broad principles outlined in the Model Law to fit in with both key commercial objectives which prompted the adoption of the Model Law as well as some aspects of the common law system in Singapore.

2. The article will also consider (briefly and by way only of an outline) the current situation in Malaysia and the steps underway to revise the existing statutory regime. However as these are matters in a state of flux with no published draft bill available for public comment, it is not possible to analyse the possible changes with any precision.

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## Legislative history

### Arbitration Ordinance 1809 and 1953

3. The origins of Singapore statutory law on arbitration can be traced to the Arbitration Ordinance of 1809<sup>1</sup>, in what was then the British India controlled Straits Settlements, comprising Singapore, Malacca and Penang. The Arbitration Ordinance 1809 stood undisturbed for nearly 150 years until it was replaced by the Arbitration Ordinance in 1953<sup>2</sup>.

4. The Arbitration Ordinance 1953 was renamed the Arbitration Act 1953<sup>3</sup> ('the AA 1953'), on separation from Malaysia in 1965.

### Overview – 1953 to 2002

5. The AA 1953, and its predecessor the Arbitration Ordinance 1953, was based on the United Kingdom's Arbitration Act of 1950 ('the UK AA 1950').

6. Both the AA 1953 and the UK AA 1950 envisaged a relatively high level of judicial intervention, such as the right to:

- (a) revoke the arbitrator's authority or restrain arbitral proceedings on the ground that the arbitrator 'is not or may not be impartial' (s 12(1));
- (b) order that the arbitration agreement cease to have effect where the dispute involved questions of fraud (s 12(2));
- (c) remove an arbitrator for delay in entering on the reference or making the award (s 18(1));
- (d) set aside, confirm, or vary award on appeal on a question of law (s 28).

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<sup>1</sup> Ordinance XIII of 1809.

<sup>2</sup> Act 14 of 1953.

<sup>3</sup> Chapter 10.

7. The AA 1953 drew no distinction between domestic and international arbitration, a divide that was to subsequently become critical. It was the governing statute for all arbitrations in Singapore for over 40 years until 1995, when a major shift took place with the introduction of the International Arbitration Act 1994<sup>4</sup> ('the IAA').

8. The IAA marked a sea change in Singapore's attitude to regulation of arbitration. It was enacted primarily to govern international arbitrations in Singapore and relied on the framework of the UNCITRAL Model Law on International Commercial Arbitration ('the Model Law'). Domestic arbitrations remained regulated by the AA 1953 for a further six years following the introduction of the IAA until March 2002, when the AA 1953 was repealed in favour of the new Arbitration Act 2001 ('AA 2001').

## **Global developments in international Arbitration law**

9. The 1980s saw a growing trend towards party autonomy in arbitration proceedings, particularly in international arbitrations. The high watermark was the UN General Assembly Resolution of 11 December 1985 which adopted the Model Law<sup>5</sup>. The Model Law gained widespread acceptance in many countries including Australia, Canada, Hong Kong, USA and was finally adopted by Singapore<sup>6</sup> in 1994.

### **The UNCITRAL Model Law**

10. The objective of the Model Law, as evident from the language of the General Assembly Resolution<sup>7</sup>, was to establish a model that could be utilised

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<sup>4</sup> Chapter 143A.

<sup>5</sup> General Assembly Resolution 40/71 A40/53 (11 December 1985).

<sup>6</sup> See Column 625 of the Singapore Parliamentary Reports, Vol 63, on the sitting of 31 October 1994.

<sup>7</sup> The General Assembly Resolution recorded the General Assembly's belief that '[the] model law... significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.'

by different member states for the settlement of international commercial disputes.

11. The General Assembly's adoption of the Model Law did not of itself give it force of law in member states – this would require appropriate domestic legislation. The Model Law was therefore no more than a recommended or, as suggested by its title, a model set of laws. Member States were therefore free to adapt or modify the Model Law to suit local conditions and considerations.

### **The Singapore Arbitration Regime strategy**

12. In the 1980s and 1990s, there was a push by the Singapore government to develop Singapore into a centre for legal services in general, and international arbitration in particular. There was some concern that this objective would be hampered by the fact that foreign parties (in particular parties from countries outside the Commonwealth) would be unfamiliar with the AA 1953 and may thus be uncomfortable with selecting Singapore as a venue for international arbitrations.

13. Further, the AA 1953 contemplated a significant amount of judicial intervention from the Singapore Courts<sup>8</sup>. This was out of line with the preference of foreign parties for party autonomy and minimal court intervention.

14. In contrast, competing international arbitration centres in the Asia Pacific such as Hong Kong, Australia and Canada, had adopted the Model Law, which was seen as an internationalised body of law foreign parties were familiar with. The Model Law had the benefit of also focusing on a key component of any effective system of international commercial arbitration – party autonomy, because in such international cases, there is a special need to be free of unfamiliar local standards<sup>9</sup>.

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<sup>8</sup> See Para 6 of this paper.

<sup>9</sup> Section 564, Guide to UNCITRAL Model Law.

## Adoption of the Model Law in Singapore

15. In November 1991, a Sub-Committee of the Law Reform Committee of Singapore (the 'Committee') was appointed, to recommend 'reform or revision of the existing laws relating to commercial arbitrations in the light of international developments in international commercial arbitration'.

16. The Committee recommended the adoption of the Model Law in its 1993 Report<sup>10</sup> on the basis that 'the Model Law reflect[ed] current international developments and represent[ed] an internationally accepted model'<sup>11</sup>. The Committee considered the Mustill Report<sup>12</sup>, a 1988 English study on the UNCITRAL Model Law. The Mustill Report rejected the Model Law, concluding that it did *not* offer a regime superior to that then existing in England<sup>13</sup>.

17. The Committee declined to adopt the Mustill Report, commenting that 'Singapore can ill afford to adopt [the English position]. If Singapore aims to be an international arbitration centre, it must adopt a world view of international arbitration'<sup>14</sup>.

## The International Arbitration Act

18. The Committee's recommendations led to IAA, which was passed in October 1994, and came into effect on 27 January 1995. The Parliamentary Secretary, Ministry of Law, explained the rationale for the adoption of the Model Law in the IAA in Parliament:

'Firstly, the Model Law provides a sound and internationally accepted

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<sup>10</sup> Report of the Sub-Committee on Review of Arbitration Laws, Law Reform Committee, August 1993 ('Sub Committee Report').

<sup>11</sup> Para 3, *ibid*.

<sup>12</sup> The Response of the Departmental Advisory Committee to the UNCITRAL Model Law on International Commercial Arbitration 1988.

<sup>13</sup> Certain aspects of the Model Law were incorporated into the UK Arbitration Act 1996 despite the recommendations in the Mustill Report.

<sup>14</sup> Para 8, Sub-Committee Report.

framework for international commercial arbitrations.

Secondly, the general approach of the Model Law will appeal to international businessmen and lawyers, especially those from Continental Europe, China, Indonesia, Japan and Vietnam who may be unfamiliar with English concepts of arbitration. This will work to Singapore's advantage as our businessmen expand overseas.

Thirdly, it will promote Singapore's role as a growing centre for international legal services and international arbitrations ...'<sup>15</sup>

19. As can be seen, the overriding focus was really the expected appeal of the Model Law to 'international businessmen and lawyers .... unfamiliar with English concepts of arbitration'. Parliament was obviously keen to expand Singapore's appeal as a 'centre for international legal services and international arbitrations' beyond the common law world.

### **Two separate statutory regimes – domestic and international**

20. With the enactment of the IAA, two separate statutory regimes were created, one for international and another for domestic arbitrations. While the IAA governed international arbitration, the AA 1953<sup>16</sup> (and its current reincarnation the AA 2001) governed domestic arbitration. This broad division is subject to opt-in/opt-out provisions, discussed later in this paper, which allow some extent of cross over between these two regimes.

21. The primary difference between the two regimes is the extent of judicial supervision. This can be illustrated by a comparative study of the appeal and stay procedures under the IAA and the AA 1953.

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<sup>15</sup> See Column 627 of the Singapore Parliamentary Reports, Vol 63, on the sitting of 31 October 1994.

<sup>16</sup> Subsequent to 1 March 2002 (the date the AA 1953 was repealed and replaced by the Arbitration Act 2001), it would be the AA 2001.

### **Appeal – International Arbitrations**

22. There is no right of appeal under the IAA on the merits of the award itself. Court intervention is confined to setting aside the award in the very limited circumstances set out in Art 34 of the Model Law, (incorporated by s 24 IAA), which include the following situations:

- (a) incapacity of one party;
- (b) invalidity of the arbitration agreement;
- (c) improper notice of the proceedings or inability to present his case;
- (d) the award dealing with a dispute not contemplated by or not falling within the terms of submission to arbitration;
- (e) the composition of the arbitral tribunal or the procedure not being in accordance with the parties' agreement;
- (f) the subject matter of the dispute not being capable of settlement by arbitration under the law of the state; or
- (g) the award being in conflict with the public policy of the state.

23. Rather surprisingly, fraud or breach of the rules of natural justice is not an acceptable ground under the Model Law. This is redressed by s 24 IAA which provides two additional grounds:

- (a) if the making of the award was induced or affected by fraud or corruption;  
or
- (b) where a breach of the rules of natural justice has occurred in connection with the making of the award by which the rights of any party have been prejudiced.

### **Appeal – Domestic Arbitrations**

24. The key difference here is that Court intervention is possible (albeit limited) on the merits of the Award itself, unlike the situation in the case of international arbitration awards. Intervention on the merits is however permissible in only the following situation.

25. The award may be appealed against on a point of law under s 28 of AA 1953. However, such an appeal requires either the consent of the parties or leave of Court<sup>17</sup>. The Court will not grant such leave unless the determination involves a question of law which will substantially affect the rights of one or more parties to the arbitration agreement<sup>18</sup>.

26. In addition to this avenue of appeal, the Court also has broad powers to set aside the award in its entirety where the arbitrator has ‘misconducted himself or the proceeding or the award has been improperly procured’<sup>19</sup>. The broad ground of misconduct has now been replaced in AA 2001 with specific factors<sup>20</sup>.

### **Stay of Court proceedings**

27. The key difference is that a stay is mandatory in the case of international arbitrations, but discretionary for domestic arbitrations. This will be discussed in further detail later in this paper.

### **Definition of ‘international’**

28. It is therefore of some importance to consider what distinguishes an international arbitration from a domestic one. This is dealt with in the IAA<sup>21</sup> which provides that an arbitration will be international if:

- (a) the parties agree in writing that the IAA or the Model Law shall apply;  
or
- (b) at least one of the parties, at the time of conclusion of the arbitration agreement, has its place of business in any state other than Singapore; or
- (c) one of the following is situated outside the State in which the parties

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<sup>17</sup> s 28(3) of Arbitration Act.

<sup>18</sup> s 28(4) of Arbitration Act.

<sup>19</sup> s 17(2) of Arbitration Act

<sup>20</sup> See Para 81 of this paper.

<sup>21</sup> s 5(2).



have their place of residence:

- (i) the place of arbitration;
  - (ii) any place where a substantial part of the obligations is to be performed or with which the subject matter of the dispute is most closely connected; or
- (d) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

29. This definition of ‘international’ differs from that found in Art 1(3) of the Model law. First, the words ‘at least one of’ were inserted before the words ‘an arbitration agreement’ in Art 1(3)(a) of the Model Law. Secondly, the words ‘different states’ in Art 1(3)(a) were substituted with ‘in any States other than Singapore’. The nett effect of this can be seen in the marked up version of Art 1(3) below:

‘(3) An arbitration is international if (a) at least one of the parties to an arbitration agreement ... ~~have~~ has its place of business in ~~different States~~ any State other than Singapore.’

30. This in effect broadens the definition of ‘international’. Consider for example, an arbitration between parties, both of whom have their place of business in the same state (other than Singapore). Under the Model Law, this would not be regarded as an international arbitration since the parties do not have their place of business in different states. However under the IAA, it would be regarded as an international arbitration.

31. This broadens the applicability and appeal of the IAA regime to parties contemplating venues for international arbitration.

### **Opting-out**

32. Section 15 IAA (prior to the recent amendments to be discussed below) provided that:

‘If the parties ... have (whether in the arbitration agreement or in any other document in writing) agreed that any dispute ... between them is to be settled ... otherwise than in accordance with this Part or the Model Law, this part and the Model Law shall not apply ....’

33. This provision allowed parties to an international arbitration to effectively *opt-out* of Part II of the IAA and the Model Law. However it generated some confusion as to how it was to operate, resulting in a subsequent amendment to s 15 (this will be discussed below with the surrounding case law) in November 2001, to clarify the position.

### Opting-in

34. Parties to a domestic arbitration can choose to *opt-in* to the IAA. This requires such parties, under s 5(1) IAA, to agree in writing to the application of either Part II IAA or the Model Law, or both.

35. Following from the opt-in/opt-out provisions of the IAA, the AA 1953 (and subsequently AA 2001) applied to international arbitrations where parties have opted out of the IAA<sup>22</sup>, just as it ceased to apply to domestic arbitrations, where the parties had opted into the IAA regime.

36. In other words, the IAA applied to international arbitrations, unless the parties *opted-out*. It did not apply to domestic arbitrations unless the parties *opted-in*. Where the IAA did not apply as a result of the opting out, the AA 1953 (and subsequently AA 2001) regulated the arbitration. Depending therefore on the opting-out or in by the parties, it is entirely possible for the IAA regime to apply to domestic arbitrations, as it is for the AA to apply to international arbitrations.

37. Parties therefore have total freedom to decide which regime which they

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<sup>22</sup> s 15(1) IAA.

wish to adopt. The only difference is the default regime that applies if no choice is made.

### **Modifications and clarifications to the Model Law in the IAA**

38. This section will discuss some of the more important modifications Singapore has made to the Model Law.

*(a) Appointment of arbitrators (Art 10 Model Law)*

39. Article 10 Model Law allows the parties total freedom to determine the number of arbitrators, with a default of three arbitrators. Section 9 IAA has modified this, with a default of one arbitrator. This is a more economical option for parties, with maximum flexibility to agree any increase beyond this minimum.

*(b) Stay of proceedings (Art 8 Model Law)*

40. The IAA goes further in this area than the Model Law in two respects. It details when and by whom stay applications may be made; secondly, it allows the Court to attach conditions to any stay it grants.

41. Interestingly enough the word ‘stay’ does not even appear in Art 8. The Court is merely required to ‘refer the parties to arbitration’. The assumption that this implies a stay is made tenuous by Art 8(2) which contemplates arbitration commencing (and even an award being made) while ‘the issue is pending before the Court’. This could explain the opening words s 6 of the IAA provision, which provides for a mandatory stay ‘[n]otwithstanding Art 8 of the Model Law’ unless the Court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed<sup>23</sup>.

42. Section 6(1) IAA provides a detailed framework for the operation of

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<sup>23</sup> Art 8 Model Law.

principles outlined in broad terms in Art 8 of the Model Law<sup>24</sup>, and stipulates a mandatory stay in the case of an international arbitration.

43. Sections 6(2) and 6(3) IAA empower the court to also impose conditions for the grant of stay, in particular interim or supplementary orders for any property which is the subject of the dispute for the explicit purpose of ‘preserving the rights of parties’.

(c) *Powers of the arbitral tribunal (Chapter V, Model Law)*

44. Section 12(1) IAA expressly grants the arbitral tribunal powers which, by and large, are not explicitly available under the Model Law, including powers to make orders in respect of:

- (a) security for costs;
- (b) discovery of documents and interrogatories;
- (c) giving evidence by affidavit;
- (d) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute (this is available under Art. 17 Model Law);
- (e) securing the amount in dispute;
- (f) ensuring that any award made is not rendered ineffectual by a party dissipating his assets; and
- (g) an interim injunction or any other interim measure.

45. Once again, the draftsman has sought to localise by express reference, matters only referred to in broad terms by the Model Law or not at all. For example the powers for discovery, interrogatories and affidavit evidence reflect procedure in the Singapore Courts. Under the Model Law, such rules of

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<sup>24</sup> It provides for a mandatory stay and clarifies that the application for a stay may be made:

- (a) by any party to the action who is also a party to the arbitration agreement; and
- (b) if the matter in dispute in the action is the subject of an arbitration agreement; and
- (c) after entering an appearance to the action but before delivering any pleadings or taking any steps in the proceedings [thereby localising the Model Law reference to ‘not later than when first submitting his first statement on the substance of the dispute’ under Art 8(1)].

procedure would be left under Art 19 to the parties to agree, failing which the Tribunal could proceed '[to] conduct the arbitration in such manner as it considers appropriate'.

46. All orders or directions made by an arbitral tribunal are, with leave of Court, enforceable in the same manner as if they were Court orders and judgment may be entered in terms of the order or direction<sup>25</sup>. This provides a significant level of compulsion (within the jurisdiction) and again underlines the supporting role of the judicial system. The Model Law does not deal with any judicial assisted method of compulsion for interim orders of this sort.

*(d) Arbitral jurisdiction – Art 16, Model Law*

47. Article 16 Model Law empowers the arbitral tribunal to rule on its own jurisdiction, including objections with respect to the existence or validity of the arbitration agreement. There is a single final appeal to the High Court under Art 16(3). This puts to rest the controversy surrounding the jurisdiction of the arbitrator to determine its own jurisdiction<sup>26</sup>.

48. The IAA has modified this by allowing a further appeal from the High Court to the Court of Appeal under Art 16(3), with leave of the High Court<sup>27</sup> however. Issues of jurisdiction are critical, going as they do to the very heart of the arbitration process. The supplemented appeal review process under the IAA acknowledges this.

*(e) Inquisitorial philosophy*

49. The Model Law does not prescribe any particular procedure for the conduct of arbitrations, common law or civil. The thrust of Chapter V on 'Conduct of Arbitral Proceedings' is instead to devolve this to the parties (see Art 19(1)), or the arbitration tribunal in default (see Art 19(2)).

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<sup>25</sup> s 12(5) IAA.

<sup>26</sup> See for eg, *International Handbook on Commercial Arbitration*, Vol 1 (ICCA) 'England' (1988).

<sup>27</sup> s 10 IAA. However, no appeal will be allowed from an order refusing such leave.

50. Section 12(3) IAA allows an arbitral tribunal, unless the parties to an arbitration agreement have agreed to the contrary, the power to adopt inquisitorial processes if it deems fit.

51. Despite being a common law jurisdiction, permitting the tribunal the flexibility to adopt a civil law approach, allows Singapore to remain an attractive venue to parties from continental Europe. This was an area which Parliament specifically wished to attract for international arbitration, as seen during the reading of the IAA Bill<sup>28</sup>.

(f) *Subpoena*

52. The Model Law does not stipulate the nature or level of the assistance expected from the domestic judicial system in the taking of evidence<sup>29</sup>. The IAA fleshes this out in a manner which effectively replicates in the arbitration, the position one finds in Singapore Court proceedings.

53. Section 13(1) IAA allows a party to take out a subpoena ad testificandum (which compels a witness to attend the hearing to give evidence) or a subpoena duces tecum (which compels a witness to attend, give evidence and produce specified documents). However, there is no compulsion to produce documents which would be precluded from production at a trial<sup>30</sup>, thus preserving the position of privileged and confidential information common in the English and Singapore legal systems.

54. Section 14(1) IAA permits the application for such subpoenas to be made to the High Court. Further, under s 14(2), the High Court may also issue an order under s 27 of the Prisons Act to bring up a prisoner for examination before the arbitral tribunal.

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<sup>28</sup> See Para 18 of this paper.

<sup>29</sup> There is only a broad reference in Art 27 to ‘the arbitral tribunal ... request[ing] from a competent court of this state assistance in taking evidence’. The Court ‘..may [then] execute the request within its competence and according to its rules on taking evidence’.

<sup>30</sup> s 13(4) IAA.

(g) *Arbitral immunity*

55. This issue is not addressed in the Model Law. The common law recognizes a certain degree of immunity for arbitrators because of their quasi-judicial capacity<sup>31</sup>.

56. Nevertheless, legislation would assure arbitrators that they would not be exposed to liability should they commit any mistakes in the course of an arbitration. Section 25 IAA helps achieve this by providing that an arbitrator shall not be liable for:

- (a) negligence in respect of anything done or omitted to be done in the capacity of the arbitrator; and
- (b) any mistake of law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award.

(g) *Recourse against an arbitral award – Art 34 Model Law*

57. Under the IAA and the Model Law, the only recourse against an award is to have it set aside by the High Court. There is no right of appeal on the merits.

58. Article 34(2) Model Law (which is incorporated in its entirety by s 24 IAA) provides for the setting aside of an arbitral award in limited circumstances which have been discussed earlier<sup>32</sup>. The two additional grounds of fraud/corruption and breach of natural justice is a further instance of the ‘*localisation*’ of the Model Law.

(i) *Enforcement of foreign awards – Arts 35 & 36*

59. Chapter VIII of the Model Law (comprising Arts 35 and 36) deals with the recognition and enforcement of awards. It takes an inclusionary approach allowing enforcement of awards, under Art 35(1) ‘irrespective of the country in which it was made’. Article 36 then lists out limited exceptions for refusing

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<sup>31</sup> See *Sutcliffe v Thackrah* [1974] AC 727.

<sup>32</sup> See Para 22.

enforcement, with the burden being on the party against whom the enforcement is sought.

60. Such an approach is inconsistent with the scheme of the UN Convention for the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'). The New York Convention allows signatories to stipulate that only arbitral awards made in another convention country will be recognised and enforced; ie there is an element of reciprocity. The Model Law draws no such distinction.

61. Singapore has been a party to the New York Convention since 1986, requiring reciprocity for enforcement. Instead of taking the difficult (and quite untidy) approach of amending Chapter VIII of the Model Law to fit within the New York Convention model, the IAA simply excluded Chapter VIII Model Law altogether under s 3(1) IAA. In its place the IAA re-enacts in Part III the provisions of the Arbitration (Foreign Awards) Act which gives effect to New York Convention.

(j) *Confidentiality of court proceedings arising from arbitrations (s 22 and s 23 IAA)*

62. The IAA recognises that parties to an international arbitration are usually concerned about the privacy of their proceedings, and may wish to keep any proceedings in court confidential. It effects this by extending the confidential nature of arbitration proceeding through to any related court proceedings arising under the IAA.

63. Section 23 IAA imposes strict limitations on<sup>33</sup> what information may be published about such proceedings. This restriction however applies only to proceedings not heard in open court<sup>34</sup>, ie once the matter is in open Court, the Court is unable to impose any of these restrictions. The IAA fortunately offers a simple solution to this seeming mirage of confidentiality, by allowing any one

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<sup>33</sup> s 23(2), (3) & (4).

<sup>34</sup> s 23(1) IAA.



party to the proceedings to compel the court hearing 'to be heard otherwise than in open Court'<sup>35</sup>.

64. The Model Law does not seek to impose any restrictions of this nature.

### **Party Autonomy and Reduction of Judicial Intervention**

65. The underlying tenet of the IAA is regard for party autonomy. One basis for achieving this is the reduction of judicial intervention. The IAA does this by excluding all court intervention, save as provided under the IAA. This is best illustrated by Art 5 Model Law which provides that:

'In matters governed by this Law, no court shall intervene except where so provided in this Law.'

66. Article 5 applies through s 3(1) IAA which provides that, with the exception of Chapter VIII and subject to the IAA, the Model Law 'shall have the force of law in Singapore'. The powers of the Singapore High Court to intervene in arbitration proceedings are thus limited to those set out in the IAA and the Model Law.

67. Under the Model Law (as modified by the IAA), judicial intervention is limited to for only the following circumstances:

- (a) Challenge of arbitral jurisdiction<sup>36</sup>;
- (b) Challenge of the arbitral tribunal on grounds of partiality or lack of independence<sup>37</sup>;
- (c) Setting aside an award<sup>38</sup>.

68. However there remains a need for judicial assistance to avoid injustice

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<sup>35</sup> s 23(1) IAA.

<sup>36</sup> See Art 16(3) as amended by s 10 IAA.

<sup>37</sup> See Art 12.

<sup>38</sup> See Art 34 Model Law and s 24 IAA.

and to support party autonomy. Hence the Court's power to remedy abuses such as fraud, corruption and non-observance of the rules of natural justice is preserved. Court assistance in the course of proceedings is also made available via use of its coercive powers of enforcement.

## **The Arbitration Act 2001 ('AA 2001') and amendments to the IAA**

69. The IAA introduced an entirely new international arbitration regime but left the domestic arbitration regime largely untouched.

70. This was to change in 2001 with the passing of AA 2001 which came into force in March 2002. AA 2001 replaced the existing arbitration regime under the AA 1953 in its entirety.

71. At the same amendments were also made to the IAA, coming into effect on 1 November 2001. However this was more by way of supplementing an existing scheme, the broad framework for which had already been established by the IAA in 1995, rather than the wholesale replacement of an existing regime which is what the AA 2001 did.

### **Continued dual regime approach**

72. These changes did not in any way effect the cardinal principle of maintaining a dual regime approach to arbitration law. In fact it probably reinforced it.

73. Part II of the IAA and the Model Law continued to apply to international arbitrations where the parties had not opted out under s 15(1) IAA, or domestic arbitrations where the parties choose to opt in to the IAA regime. The AA 2001 applied to any domestic arbitration (where parties had not opted in to the IAA) or to international arbitrations (where they had chosen to opt in to the AA).

## **Objectives of the amendments**

74. The Minister of State for Law, in his speech on the reading of the Arbitration Bill 2001 in Parliament, explained that when the IAA was first enacted in 1995, it was decided that the migration to the UNCITRAL Model Law be conducted in phases, with the first phase involving only international arbitration<sup>39</sup>. As the Model Law has been well received by Singapore arbitrators and practitioners, the next step was to align the domestic law with the Model Law and to narrow the differences between the two regimes; hence the repeal of the AA 1953 and the enactment of the AA 2001. This explains why the realignment of domestic arbitration laws with the Model Law took place more than six years after the enactment of the IAA in 1995.

## **Important provisions of the AA 2001**

75. The AA 2001 draws inspiration not only from the Model Law, but also useful provisions of the 1996 UK Arbitration Act. Some of the more important provisions in the AA 2001 which diverge from the IAA are considered below.

76. The new AA 2001 is substantially different from its predecessor Act, the AA 1953. A comparative analysis between these two Acts merits a separate discussion and this cannot be achieved here with any thoroughness, without unduly burdening this article. The focus below will be on difference between AA 2001 and the IAA.

### *(a) Stay of proceedings*

77. Section 6 substantially retains the AA 1953 position under which a court could stay court proceedings commenced in breach of an arbitration agreement.

78. The grant of such a stay remains discretionary unlike the position under the IAA where stay is mandatory. This is a key difference between the two regimes.

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<sup>39</sup> See Column 2214 of the Singapore Parliamentary Reports, Vol 73, on the sitting of 5 October 2001.

79. AA 2001, under s 6(3) provides similar powers, to that available under s 6(2) IAA, for conditions to be imposed for the grant of stay.

*(b) Removal of arbitrator*

80. The broad category of ‘misconduct’ is no longer a ground for removal of an arbitrator as it previously was under s 17(1) of the AA 1953.

81. Section 16(1) AA 2001 now provides specific grounds under which a party may request the Court to remove an arbitrator, including where:

- (a) the arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so; or
- (b) the arbitrator refuses or fails to properly conduct the proceedings or to use reasonable despatch to proceed with the reference and making the award, and this causes ‘substantial injustice’.

82. Section 16(2) AA 2001 further provides that the Court will not exercise its power or removal unless parties have exhausted any available recourse to any institution or person vested by the parties with power to remove an arbitrator.

The arbitrator is entitled to appear at the removal hearing and be heard before the court makes any order<sup>40</sup> and there is no appeal against any order by the court<sup>41</sup>.

83. There is an equivalent section in the IAA and the Model Law, by way of Article 14 Model Law, which is in general less explicit terms. Section 16 AA 2001 is adapted from s 24 of the UK AA 1996.

*(c) Powers of arbitral tribunal*

84. The arbitral tribunal’s powers under the AA 2001 has been extended to include powers (previously only exercisable by the Court under s 27(1) AA

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<sup>40</sup> s 16(5) AA 2001.

<sup>41</sup> s 16(6) AA 2001.

1953) to order<sup>42</sup>:

- (a) security for costs;
- (b) discovery of documents or interrogatories;
- (c) giving of evidence by affidavit;
- (d) a party or witness to be examined on oath or affirmation, and may for that purpose administer any necessary oath or take the necessary affirmation;
- (e) the preservation of and interim custody of any evidence of the purposes of the proceedings;
- (f) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject matter of the dispute; and
- (g) the preservation, interim custody or sale of any property which is or forms part of the subject matter of the dispute.

86. However, the arbitral tribunal's powers do not go as far as those in s 12(1) IAA. In particular, s 28(2) AA 2001 does not allow the court to make an order:

- (a) securing the amount in dispute;
- (b) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
- (c) an interim injunction by any other interim measure.

87. As in the case of the IAA<sup>43</sup>, parties can apply to the court under s 28(4) AA 2001 for enforcement of orders or directions made or given by a tribunal and if leave is given, judgment may be entered in terms of the order or direction.

(d) *Effect of an award*

88. Section 44(1) AA 2001 provides that an award made by the arbitral tribunal shall be final and binding on the parties and on any person claiming

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<sup>42</sup> See s 28(2) AA 2001.

<sup>43</sup> See s 12(5) IAA.

through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction. This essentially restates the existing law on the doctrine of res judicata.

89. Section 44(2) AA 2001 further provides that an arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award unless:

- (a) There is an error in computation, any clerical or typographical error, or other error of a similar nature; or
- (b) It is pursuant to a request for the interpretation or clarification of the award or part of the award.

90. However, an arbitrator can make an additional award on claims presented in the arbitral proceedings but omitted from the award<sup>44</sup>.

*(e) Appeals against awards*

91. Under AA 2001, a party to arbitration proceedings may appeal to the Court on a question of law arising out of an award made in the proceedings either with the agreement of all the other parties or with leave of court.

92. The conditions to be satisfied before leave to appeal will be granted is stated in s 49(5), namely that:

- (a) the determination of the question will substantially affect the rights of one or more of the parties;
- (b) the question is one which the arbitral tribunal was asked to determine;
- (c) on the basis of the findings of fact in the award
- (i) the decision of the arbitral tribunal on the question is obviously wrong;
- or
- (ii) the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and

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<sup>44</sup> S 43(4) AA 2001.

- [This represents in essence the principles enunciated in *The Nema*<sup>45</sup>.]
- (d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.
93. There is no avenue for such appeal under the IAA and the Model Law.

### **The IAA amendments 2001**

94. The 2001 amendments to the IAA included the following important revisions:
- (a) amendments to s 15 IAA on opting out;
  - (b) enactment of a new s 19B IAA concerning the arbitral tribunal's powers to revisit or reverse an award that has been made;
  - (c) change in the definition of 'award'.

### **The amendment to s 15 of the IAA**

95. The material sections of pre-amendment s 15 IAA read:

'If the parties to an arbitration agreement have ..... agreed that any dispute ..... between them *is to be settled or resolved otherwise than in accordance with this Part or the Model Law*, this part and the Model Law shall not apply in relation to the settlement or resolution of that dispute.' (Emphasis added)

96. A trio of Singapore High Court decisions arose from the uncertainties of the language in s 15 IAA, focusing in particular on the following issues:
- (a) whether the opting out of Part II of the IAA and/or the Model Law had to

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<sup>45</sup> *B.T.P. Tioxide Ltd v Pioneer Shipping Ltd and Armada Marine SA* ('The Nema') [1981] 2 Lloyd's L Rep 239 (HL).

be express or could be implied; and

- (b) if the parties have in fact opted out, can parties opt out of either Part II of the IAA or the Model Law without opting out of the other?

97. These three judicial decisions, *Coop International v Ebel SA*<sup>46</sup>, *John Holland Pty Ltd v Toyo Engineering Corp (Japan)*<sup>47</sup> and *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd and Anor*<sup>48</sup>, are considered below.

(a) *Coop International v Ebel SA*

98. Insofar as is relevant to this article, the High Court in *Coop* had to consider whether an arbitration clause providing for arbitration in Singapore under the Rules of Arbitration of the Chamber of Commerce & industry of Geneva constituted an opting of out Part II of the IAA or the Model Law. This issue arose in the context of an application for a stay. The question of whether the IAA or AA applied was relevant because the IAA requires a mandatory stay<sup>49</sup>, while a stay is discretionary under AA 1953.

99. *Coop International*, arguing against any stay, submitted that the IAA did not require parties to expressly exclude Part II of the IAA or the Model Law. If parties chose procedures for arbitration alien to that prescribed by Part II or the Model Law, they must have agreed to its exclusion. *Ebel*, who was seeking a stay, argued that the mere choice of a different set of rules was insufficient to exclude Part II or the Model Law unless parties had clearly and expressly excluded Part II or the Model Law.

100. Chan Seng Onn JC sitting in the High Court held<sup>50</sup> that ‘... it is not necessary to have an explicit agreement stating that the Model Law or Part II will not apply ... Section 15 itself does not appear to require a clear express term of exclusion. On a plain and literal reading of that section, it can cover

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<sup>46</sup> [1998] 3 SLR 670.

<sup>47</sup> [2001] 2 SLR 262.

<sup>48</sup> [2002] 2 SLR 164.

<sup>49</sup> Unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

<sup>50</sup> *Ibid*, at p 703D.



*both express and implied exclusions.* If the intention is to limit s 15 to an express ouster only, Parliament could easily have provided for it ...' (Emphasis added).

101. This view is consistent with the language of s 15 as it then stood – s 15 referred to the parties '[having] agreed' without specifying an express agreement. Chan JC further held that when parties have selected a set of rules incompatible with the Model Law, they have thereby implicitly opted out of both the IAA & the Model Law.

(b) *John Holland Pty Ltd v Toyo Engineering Corp (Japan)*

102. This case arose from an application by John Holland to set aside an arbitration award in favour of Toyo Engineering. The arbitration was held pursuant to an arbitration clause providing for arbitration in Singapore according to Singapore law. A preliminary issue arose as to whether the Model Law but *not* Part II IAA was excluded, given the parties' express agreement to arbitrate under the ICC rules, it being common ground that there were material differences between the Model Law and the ICC Rules. The preliminary issue was relevant to determine the set of procedural and substantive rules applicable to setting aside the arbitration award.

103. John Holland submitted that the setting aside provisions in the AA 1953 should apply as parties had implicitly opted out of Part II IAA and the Model Law with the express selection of the ICC Rules. Toyo argued that the setting aside rules in Part II IAA should apply notwithstanding the express selection of the ICC Rules to govern the arbitration. Once again, as in *Coop*, attention turned to s 15 IAA.

104. Choo Han Teck JC held that s 15 IAA required parties to be clear in selecting another set of rules if they did not wish the Model Law to apply by default. By agreeing to have the arbitration conducted in accordance with the ICC Rules, the parties had thereby implicitly agreed that the Model Law would not apply. In short, Choo JC was of the view that the adoption of another set of institutional rules, without more, was sufficient to opt out of the Model Law.

This is in line with Chan JC's ruling in *Coop*, which recognised implied opting-out.

105. Choo JC went further to hold that the express wording of s 15 allowed the parties to *exclude* either Part II IAA or the Model Law (or both). The parties' application of the ICC Rules in place of the Model Law, only excluded the Model Law but *not* Part II IAA. This ruling differs from *Coop* where Chan JC held that once the parties opted out of *either* Part II of the IAA or the Model Law, *both* Part II and the Model Law ceased to apply.

106. Several months after Choo JC's decision, Parliament passed the International Arbitration (Amendment) Bill 2001 on 5 October 2001 which, *inter alia*, amended s 15 IAA. This has since been enacted into the International Arbitration (Amendment) Act 2001 which came into force on 1 November 2001. *John Holland* and *Coop* must now be considered in light of the amended s 15 IAA.

### **The amendments to s 15 of the IAA**

107. In his speech at the reading of the International Arbitration (Amendment) Bill 2001, the Minister of State for Law commented that:

'... clause 12 of the Bill amends s 15 of the International Arbitration Act to clarify its scope. Section 15 was intended to allow parties who desire a greater degree of judicial intervention to opt out of the Model Law regime into the domestic Arbitration Act as the applicable law of arbitration. In its existing form, it has created some uncertainty in the industry and requires clarification. The first question to be resolved is whether parties to an arbitration agreement should be regarded as having opted out of the Model law if the arbitration agreement contains a reference to the use of institutional arbitration rule, eg ICC rules, without more. A new s 15(2) is therefore added to clarify that a reference in an arbitration agreement to any institutional arbitration rules would not by itself,

*be regarded as an agreement to opt out of the Model Law.* The second question to resolve is which legal regime will apply in the event that parties to an international arbitration conducted in Singapore opt out of the Model Law. For the avoidance of doubt, s 15 is amended to state that Singapore domestic arbitration law under the Arbitration Act would apply to the arbitration if parties expressly choose to opt out of the International Arbitration Act *or the Model law ...*' (Emphasis added)

108. The material amendments to s 15 IAA can be seen from the marked up extract:

~~'(1) If the parties to an arbitration agreement ... have agreed that any dispute...between them is to be...resolved otherwise than in accordance with this Part or the Model Law, this Part and the Model Law shall not apply... have expressly agreed either –~~

- (a) that the Model Law or this Part shall not apply to the arbitration; or
- (b) that the Arbitration Act 2001 or the repealed Arbitration Act (Cap. 10) shall apply to the arbitration.

then, both the Model Law and this Part shall not apply to that arbitration but the Arbitration Act 2001 or the repealed Arbitration Act (if applicable) shall apply to that arbitration.

(2) For the avoidance of doubt, a provision in an arbitration agreement referring to or adopting any rules of an arbitral institution shall not of itself be sufficient to exclude the application of the Model Law or this Part to the arbitration concerned.'

(marked up to show amendments)

109. The effect of this amendment is two fold:

- (a) Express agreement is now needed to opt out of the Part II IAA or the Model Law. It cannot be implied from the mere adoption of institutional

rules (such as the ICC Rules in *John Holland*). Such adoption will therefore *not* by itself be sufficient to exclude the application of Part II of the IAA and Model Law. This in effect reverses *Coop* and *John Holland* on this point;

- (b) An exclusion of *either* the Model Law or Part II of the IAA will exclude the application of *both*, and the AA will apply instead. This reverses the ruling in *John Holland* in respect of the finding that parties may exclude the Model Law without excluding Part II of the IAA.

110. However, the amended s 15 IAA remained unclear on the extent of applicability of institutional rules adopted by the parties where there is no express exclusion of either the Model Law or Part II of the IAA. Two issues arise in such a situation:

- (a) Will the Model Law apply to the exclusion of the parties' choice of institutional rules? Or
- (b) Will the Model Law apply together with the parties' choice of institution rules and if so, which set of rules will prevail in the event of conflict?

111. These issues were discussed in *Dermajaya Properties v Premium Properties*<sup>51</sup>:

(a) *Facts*

112. Dermajaya and Premium were parties to an arbitration commenced prior to the coming into force of the 2001 International Arbitration (Amendment) Act, which amended s 15<sup>52</sup>.

113. Parties agreed that the UNCITRAL Rules would apply to the arbitration.

114. The issue was whether Part II of the IAA and the Model Law applied given the parties express agreement on the UNCITRAL Rules. This issue was relevant as the arbitrator has power to grant security for costs under the Part II

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<sup>51</sup> *Supra*.

<sup>52</sup> s 17(2) International Arbitration (Amendment) Act 2001.

of the IAA, but not under the UNCITRAL Rules and the AA 1953.

115. Dermajaya submitted that by adopting the UNCITRAL Rules, which were incompatible with the Model Law, the parties had by implication opted out of the Model Law and Part II IAA and that this is sufficient to constitute the agreement of exclusion under s 15 IAA. This was the same argument used by John Holland in respect of the adoption of the ICC rules in *John Holland*. Counsel for Dermajaya cited *John Holland* in support (together with *Coop*), and argued that the UNCITRAL Rules would thus apply with no power therefore for the arbitrator to grant security for costs.

116. Premium submitted that there could be no implied opting out under s 15 IAA and that *John Holland* and *Coop* were incorrectly decided. Premium relied on the Minister of State for Law's speech in Parliament in respect of the 2001 amendments to s 15 IAA (reproduced in material part above); in particular the Minister's comments that the amendments were for clarification purposes. Hence, Part II of the IAA would apply and the arbitrator had the power to make an order for security for costs.

117. Woo Bih Li JC held that the Minister of State for Law had made it clear when introducing the amendments, that the amendments to s 15 IAA were to clarify Parliament's intention behind the original s 15 and not to change it. Woo JC therefore held that the mere adoption of UNCITRAL rules did not constitute an express opting out of Part II of the IAA or the Model Law. This contradicts *John Holland* and *Coop*, on this point.

118. Woo JC then considered the position of the Model Law in the face of the parties' express choice of an incompatible set of rules, the issue being whether the incompatible set of rules was totally excluded or was it excluded only in so far as it was not inconsistent with the Model Law. His view was that the incompatible set of rules would be completely excluded.

## **IAA Amendments 2002**

119. Woo JC's views in *Dermajaya* led to a further amendment of the IAA by

way of the International Arbitration (Amendment) Bill 2002. The object of the 2002 IAA amendment was to clarify that arbitration rules agreed upon by parties will be given effect to the fullest extent possible under Singapore law.

120. The bill, which had its first reading on 27 August 2002, was prompted by concerns expressed by various law firms about Woo JC's comments in *Dermajaya*.

121. In its press release dated 24 August 2002, the Ministry of Law said that 'the Bill will clarify that parties have full liberty to agree on their own arbitration rules, and that their choice of arbitration rules will be fully respected under Singapore law. This approach will reflect the true intention of the parties and reaffirm the principle of party autonomy in international arbitration.'

122. The Bill introduces a new s 15A to the International Arbitration Act, to clarify the application and effect of rules of arbitration agreed to or adopted by the parties. Under s 15A arbitration rules agreed by the parties, will be given effect to the extent that they are not inconsistent with 'mandatory provisions' of the IAA.

123. Thus sub-section (2) of the new s 15A provides that arbitration rules agreed to or adopted by the parties shall apply and be given effect to the extent that such provision is not inconsistent with a provision of the Model law or Part II IAA from which the parties cannot derogate. Specific rules provide non-exhaustive guidance on how to determine if a particular provision of arbitration rules is inconsistent with the Model Law or Part II.

124. These rules provide that rules agreed by the parties will not be inconsistent with the Model Law or Part II merely because:

- (a) they provide for matters on which the Model Law and Part II is silent (subsection (3));
- (b) they are silent on matters covered by any provision of the Model Law or Part II (subsection (4));
- (c) they provide for matters which are covered by a provision of the Model Law or Part II which allows the parties to make their own arrangements

by agreement but which applies in the absence of such agreements (subsection (5)), and such arrangements may be made by agreeing to arbitration rules or by providing any other means by which a matter may be decided (subsection (6)).

125. With specific reference to *Dermajaya*, the Law Ministry commented that under the proposed bill, the UNCITRAL Rules and the IAA would not be regarded as incompatible. Instead, they would be read together. Thus, for e.g. the UNCITRAL Rules are silent on the question of security for costs, while the IAA makes express provision for it. Giving both the Rules and the IAA their full effect, the arbitrator would have power to grant security for costs.

### **The amendment to s 19 of the IAA**

126. The 2001 amendments to the IAA included an amendment to s 19 of the IAA. This involved an additional s 19B, arising from the Singapore Court of Appeal's decision in *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley* ('*Jeffrey Tang*')<sup>53</sup>.

127. *Jeffrey Tang* involved the general question of arbitral tribunal's power under the IAA and the Model Law to revisit or reverse an award the tribunal had previously made.

#### *(a) Facts*

128. As part of its final award ('the January award'), the arbitrator dismissed the Respondent, Jeffrey Tang's counterclaim against the Claimant, Stanley Tan. This award was stated to be 'final save as to costs'. Some three weeks after this award, the arbitrator heard an application by *Jeffrey Tang* to reverse the January award and allow his counterclaim. Counsel for Stanley Tan objected to the arbitrator revisiting his decision, arguing that the arbitrator had completed and terminated the hearing by making a final award and was *functus officio*.

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<sup>53</sup> [2001] 1 SLR 624 High Court, [2001] 3 SLR 237 Court of Appeal.

129. The arbitrator however proceeded to make another award ('the March award') which reversed the January award on the counterclaim, and allowed *Jeffrey Tang's* counterclaim with interest. The arbitrator was of the view that he could reconsider the January award as

'... in the case of judgments pronounced by the courts, the Judge has the power to re-consider his verdict so long as the judgment has not been entered or perfected ... Unfortunately, the position is less clear in an international arbitration award where the arbitrator desires to re-consider the matter. There are no direct authorities on the point. If an error is made, there are no express provisions whereby the decision could be rectified in a court of law. Great injustice would be caused in such a case. It is inconceivable that the law or public policy would permit such a situation ... I am therefore of the view that an arbitrator can re-consider the award not only on terms of Art 33(1) of the Model Law but under the general powers given to him to determine the rules and procedure of the tribunal which would include the power to re-consider an award before enforcement if the arbitrator so decide. If [he has] good reasons to re-consider the matter, [he] should be allowed to do it. Otherwise, an injustice would be perpetuated ...'<sup>54</sup>.

130. Stanley Tang applied to the High Court to have the March award set aside.

(b) *The High Court*

131. Selvam, J disagreed with the arbitrator and held that the March award was made outside the arbitrator's mandate. It was consequently a nullity and set aside.

132. Selvam, J held that the doctrine of finality and *functus officio* was expressed in Art 32 of the Model Law and there was nothing in the Model Law which authorised the arbitrator to recall or reconsider his award after he had

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<sup>54</sup> At p 240, *ibid*.



made the final award. His mandate was thereby terminated.

133. The learned Judge was of the view that the absence of any reference in the Model Law to the arbitrator recalling, reconsidering and reversing any decision contained in an award was deliberate and was founded on the principle of finality and public policy to bring an early end to commercial disputes.

(c) *The Court of Appeal*

134. The Court of Appeal disagreed with Selvam, J. They allowed Jeffrey Tang's appeal on the basis that no 'final award' had been issued by the arbitrator and the arbitrator was therefore not *functus officio*.

135. After reviewing various documents of UNCITRAL and its Working Group relating to the preparation of the Model Law<sup>55</sup> and various academic texts, the Court of Appeal ruled that a 'final award' must be the one that completes everything that the arbitral tribunal is expected to decide, including the question of costs. Until such a final award is given, the arbitral tribunal's mandate continues, and it is not *functus officio*.

136. The Court of Appeal considered that the arbitrator's description of the January award as 'final ...' was not conclusive as the claim on costs had yet to be adjudicated. As the arbitrator's mandate had not yet been terminated, he was entitled to reconsider his decision and if he thought fit, as he did here, to reverse himself.

137. In summary, the Court of Appeal's conclusion was that an arbitrator can reconsider and change an award that is not 'final', in the sense that not all the issues the tribunal is expected to decide has been decided (including cost issues).

138. However, Parliament has since amended the IAA by adding a new s 19B, the effect of which is to overrule this aspect of the Court of Appeal's decision in *Jeffrey Tang*.

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<sup>55</sup> The court is entitled to do so under s 4(1) of the IAA.

## The new s 19B of the IAA

139. The new s 19B of the IAA provides:

‘(1) An award made by the arbitral tribunal pursuant to an arbitration agreement shall be *final and binding* on the parties and on any persons claiming through or under them...

(2) Except as provided in Arts 44 and 34(4) of the Model Law, upon an award being made, including an award made in accordance with s 19A, *the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award.*’ (Emphasis added)

140. The new s 19B suggests that any award (whether ‘final’ or otherwise) made by an arbitral tribunal is final and binding on the parties to the arbitration and the tribunal cannot vary, amend, correct, review, add to or revoke the award.

141. However, it would appear that the Court of Appeal’s decision in respect of the definition of a final award remains good law.

142. The Minister of State for Law, at the second reading of the International Arbitration (Amendment) Bill 2001, commented that s 14 of the International Arbitration (Amendment) Act (which inserts the new s 19B) ‘... provides *clarification* on the finality of an interim award. Under UK arbitration law and our domestic Arbitration Act, an interim award, once given, is binding and cannot be reviewed by the arbitrator. The Model Law says nothing about the finality of an interim award but practitioners have long assumed that the position is the same as well... Thus, clause 14... amends the Act to state clearly that the position in Singapore for international arbitrations is that interim awards are final and binding’. (Emphasis ours)

143. The Minister’s speech suggests that the new s 19B (like the amendments to s 15) is a clarification of the law prior to 1 November 2001; ie there is no change to the law. It is important to note that in *Dermajaya Woo JC* referred to the same speech by the Minister and accepted (in the context of s 15 IAA) that

the amendments were a clarification and not a change in the law. Woo JC then applied the post 1 November 2001 law to an arbitration commenced prior to that date.

144. Parliament's intention may have been to include interim awards as being final and binding, but that is not conclusively put beyond doubt by the new s 19B. However when read with the revised definition of 'award' which was part of the 2001 amendments to the IAA, it appears to have achieved this object.

### **The amendment to the definition of 'award'**

145. Award is now defined 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 direction made under s 12 ...'<sup>56</sup>. (Emphasis added)

146. The upshot of this is the January award in *Jeffrey Tang* would, even if it was not a final award because costs were outstanding, fall within the definition of award under the IAA. Consequently the new s 19B(2) would prevent the arbitrator in *Jeffrey Tang* from issuing the equivalent of the March award.

## **Developments in Malaysia**

### **The Arbitration Act 1952 ('1952')**

147. In Malaysia, arbitration is regulated by the arbitration Act of 1952 ('AA 1952'), based like Singapore's AA 1953, on the UK AA 1950.

148. As with Singapore's statutory regime prior to the introduction of the

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<sup>56</sup> s 2(1) IAA.

IAA 1994, the AA 1952 is a single statutory instrument governing both international and domestic arbitrations.

### **Non-application of the AA1952 from certain arbitrations**

149. The AA 1952 has not seen any substantial revisions since its enactment, save for a major change in 1980 introduced by way of exclusion provisions in s 34. These provisions state that the following categories of arbitration will *not* be subject to AA 1952.

- (a) Arbitration conducted under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 ('the Convention')<sup>57</sup>; or
- (b) Arbitrations conducted under the UNCITRAL Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration in Kuala Lumpur<sup>58</sup>.

150. It has been suggested that the object of the amendment was to encourage the development of the Kuala Lumpur Regional Centre for Arbitration by removing such arbitrations from the supervisory jurisdiction of the Malaysian Courts<sup>59</sup>, and thus make it far more attractive to non-Malaysian potential litigants. Consistent with this, there is some evidence that this amendment was seen as drawing a distinction between international and domestic arbitrations. This certainly appears to be the basis of the following extract from the Rules of the Kuala Lumpur Regional Centre for Arbitration:

'Amendment to the Malaysian Arbitration Act 1952 – s 34

This Section provides that international arbitrations conducted under the Rules of the Centre are excluded from the supervision of the Malaysian Courts which will not intervene in those

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<sup>57</sup> s 34(a) AA1952.

<sup>58</sup> s 34(b) AA1952.

<sup>59</sup> 'Update on Changes and Developments in Arbitration Law in Malaysia' by WSW Davidson, a paper delivered at the Symposium on Arbitration held in Singapore in November 2000.

arbitrations. *This exemption does not apply to domestic arbitrations whether or not conducted under the Centre's Rules or to international arbitrations not conducted under the Rules of the Centre. This is a unique provision not found in other jurisdiction (Introduction Section, Rules of the Centre.*' (Emphasis added)

151. This analysis was supported in *Syarikat Yean Tat (M) Sdn Bhd v Ahli Bina Pamong Sari Sdn Bhd* [1996] 5 MLJ 469 where the court made a distinction between an international arbitration and one involving two local parties even though parties arbitrated under the Rules of the Regional Centre. As the parties were locals, the court held that it would thus be wrong to refer to s 34 of the Act.

152. However, a literal reading of s 34(b) suggests that domestic arbitrations are also excluded from the application of the AA 1952 so long as they are conducted under the UNCITRAL Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration in Kuala Lumpur.

153. This interpretation was favoured by the Malaysian Court of Appeal in *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors* [1997] 4 MLJ 280. The Court of Appeal held that arbitrations under the Convention or the UNCITRAL Rules and the Rules of the Centre were excluded from the AA 1952. It made no difference whether it was an international or domestic arbitration. The Court of Appeal also commented that the Introduction Section of the Regional Centre (set out above), was not consonant with the wording of s 34(1).

154. The post *Sarawak Shell* version of the Rules of the Regional Centre<sup>60</sup> now states that:

“ ...

The Amendment to Malaysian Arbitration Act 1952 in 1980 includes a new s 34 which provides that any arbitration conducted under the Rules of the Centre is excluded from the supervision or

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<sup>60</sup> Extracted from the Regional Centre's webpage as at 28 July 2002.

intervention of the Malaysian Courts.

Section 34 includes domestic arbitration as well as international arbitration.

In the case of *Sarawak Shell Bhd case* [1998] the Appellate Court decided that s 34 includes any arbitration, whether domestic or international.

The status of the Centre as an independent arbitral institution for both domestic and international arbitration is a clear policy of the Arbitration Act 1952. The decided cases of *Klockner Industries* [1990] 3 MLJ 183; *Soilchem Sdn Bhd case* [1993] 3 MLJ 68; and *Sarawak Shell Bhd case* [1998] 2 MLJ 20 state as such, and no other interpretation to s 34 should be given contrary to the decision of the courts.

In this connection the Centre has revised its Arbitration Rules of 1998 as follows:

“This Section provides that any arbitration conducted under the Rules of the Centre is excluded from the supervision of the Malaysian Courts, which will not intervene in such arbitration. This is a unique provision not found in other jurisdictions.

The amendment is necessary to make the paragraph in conformity with the decision of the court in s 34.”(Arbitration Rules of Regional Centre for Arbitration Kuala Lumpur Revised August 2001)

...”

155. There has some criticism within Malaysia<sup>61</sup> of

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<sup>61</sup> See WSW Davidson, footnote 59.

- (a) the fact that there exists no distinction in the regime applicable to domestic, as opposed to international arbitrations; and
- (b) the lack of governmental urgency in replacing the AA 1952 with more progressive legislation.

156. The Chairman of the CIArb, Malaysia Branch recently observed that:

‘Legislation on arbitration in Malaysia has seen little change from 1952. While much of the world has progressed with arbitral law reform, we have not kept apace. This has to a certain extent been a disadvantage as parties have sought to arbitrate in neighbouring countries. Much of the concern has been directed at the case stated procedure currently available under the 1952 Arbitration Act. The [CIArb Malaysia] Branch is of the view that legislation under the UNCITRAL Model law could profitably be adopted for use in Malaysia, a view also expressed by eminent experts during the Video Conference organised by the Branch in September, 2000.’<sup>62</sup>

157. The Malaysian Bar Council has however taken steps to revise the legislation with the circulation of a new draft arbitration act. Particulars of this are not yet available for public comment.

158. However a consensus has now been reported<sup>63</sup> which favours:

- (a) a two act regime, separately regulating domestic and international arbitrations, with a opt in/opt out scheme; and
- (b) the adoption of the Model Law.

## Conclusion

159. Much of the change in the Singapore statutory regime governing

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<sup>62</sup> ‘Chairman’s Thoughts’, CIArb Malaysia Branch Newsletter, Vol 2, April 2002.

<sup>63</sup> WSW Davidson, see footnote 59.

arbitrations has been driven by commercial considerations reflected in the Singapore Government's objective of making Singapore a centre for international arbitration. This can be seen in the manner in which matters dealt with broadly under the Model Law have found expression in quite specific terms in the IAA. More often than not, the fleshing out in this manner has been to consolidate the party autonomy and independence of international arbitrations.

160. The speed with which amendments have been made to the IAA to deal with doubt and uncertainties arising from recent decisions once again testifies to the overriding objective of maintaining an attractive arbitration regime and environment. It seeks to give the greatest possible regard to respecting the parties decisions in international arbitrations, by upholding rather than frustrating their choices. What also runs through the entire approach to the IAA is the clear desire to maintain as broad as possible a level of applicability and appeal to practitioners and users in both the common and civil law world.

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