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The International Comparative Legal Guide to:

International Arbitration 2004

A practical insight to cross-border International Arbitration work



Published by Global Legal Group.

Shearman & Sterling LLP contributors of the Singapore Chapter.

Singapore

John Savage



Tan Ai Leen



Shearman & Sterling LLP

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your country?

Under the international arbitration law of Singapore, an arbitration agreement is an agreement in writing referred to in Article 7 of the UNCITRAL Model Law of International Commercial Arbitration (the “Model Law”) and includes an agreement deemed or constituted under Section 2(3) or 2(4) of the International Arbitration Act (Cap. 143A) (the “IAA”) (see Section 2(1) of IAA).

Article 7 of the Model Law defines an arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Article 7(2) of the Model Law provides that the arbitration agreement shall be in writing, and that it is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Section 2(3) of the IAA also provides that, in any arbitral or legal proceedings, where a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances in which the assertion calls for a reply and the assertion is not denied, an effective arbitration agreement will be deemed between the parties to the proceedings.

Section 2(4) of the IAA stipulates that a reference in a bill of lading to a charterparty or some other document containing an arbitration clause shall constitute an arbitration agreement if the reference is such as to make that clause part of the bill of lading.

1.2 What other elements ought to be incorporated in an arbitration agreement?

We suggest that the arbitration agreement specify, at a minimum, the seat of arbitration, the number of arbitrators, the institutional or other rules governing the arbitration, and the language of the arbitration. Various additional elements may be desirable depending on the nature of the transaction at hand.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The Singapore Court will, upon application by a party, stay court proceedings brought in breach of the arbitration agreement unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed (Section 6 of the IAA). In practice, the approach of the Singapore Court has generally been to stay proceedings if these conditions are fulfilled.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration agreements in your country?

The IAA and the Arbitration Act (Cap. 10) (the “AA”) govern the enforcement of arbitration agreements in Singapore.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the law differ?

The AA governs domestic arbitration proceedings and the IAA governs international arbitration proceedings. The legislative regimes applicable to domestic arbitration and international arbitration are kept separate. In general, under the AA, the courts have greater supervision over a domestic arbitration than they would over an international arbitration under the IAA. For example, Section 45 of the AA provides that the Court may, on the application of a party, determine any question of law arising in the course of the proceedings which the Court is satisfied substantially alters the rights of one or more of the parties. Section 49 of the AA allows a party to appeal to the Court on a question of law arising out of an award made in domestic arbitration proceedings.

The focus of this chapter is on Singapore’s international

arbitration regime under the IAA and not on its domestic arbitration regime under the AA.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

Subject to the provisions of the IAA, the Model Law, with the exception of Chapter VIII, has the force of law in Singapore (Section 3(1) of the IAA).

The Model Law has been supplemented and modified by the provisions of the IAA. For example, Article 10(2) of the Model Law provides for the default number of arbitrators to be three. However, Section 9 of the IAA provides that, notwithstanding Article 10(2) of the Model Law, if parties have not determined the number of arbitrators, there shall be a single arbitrator.

Another example is Section 24 of the IAA, which provides that notwithstanding Article 34(1) of the Model Law, the High Court of Singapore may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if the making of the award was induced or affected by fraud or corruption or a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your country? What is the general approach used in determining whether or not a dispute is “arbitrable”?

As a general rule, disputes concerning matters which are “commercial” in nature are arbitrable (see Article 1(1) of the Model Law which sets out a wide description of “commercial”). In addition, Section 11(1) of the IAA provides that any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so. Accordingly, issues such as citizenship, legitimacy of marriage or winding-up of a company may not be arbitrable as it may be contrary to public policy to have such issues determined by arbitration.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

Yes, an arbitrator is permitted to rule on the question of his or her own jurisdiction under Article 16(1) of the Model Law.

3.3 Under what circumstances can a court address the issue of the jurisdiction and competence of the arbitral tribunal?

After the arbitral tribunal has ruled as a preliminary question that it has jurisdiction, any party may request the High Court to decide the matter, within 30 days after having received notice of the arbitral tribunal’s ruling. This is set out in Article 16(3) of the Model Law read with Article 6 of the Model Law and Section 8(1) of the IAA. Article 16(3) of the Model Law provides that the High Court’s decision shall be subject to no appeal. However,

Section 10 of the IAA provides that notwithstanding Article 16(3) of the Model Law, an appeal from a decision of the High Court made under Article 16(3) of the Model Law shall lie to the Court of Appeal, but only with the leave of the High Court.

The court may also address the issue of the jurisdiction of the arbitral tribunal where it has to consider an application for a stay of proceedings brought by one party, see item 1.3 above.

4 Selection of Arbitral Tribunal

4.1 Are there any limits to the parties’ autonomy to select arbitrators?

No.

4.2 If the parties’ chosen method for selecting arbitrators fails, is there a default procedure?

Yes. If the parties’ chosen method for selecting arbitrators fails, any party may request the Chairman of the Singapore International Arbitration Centre (the “SIAC”) to take the necessary measures to appoint the arbitrators (see Article 11(4) of the Model Law read with Section 8(2) of the IAA).

4.3 Can a court intervene in the selection of arbitrators? If so, how?

If a challenge of an arbitrator under any challenge procedure agreed upon by the parties or under the challenge procedure in Article 13(2) of the Model Law is not successful, the challenging party may request the High Court to decide on the challenge within thirty days after having received notice of the tribunal’s decision rejecting the challenge. This is set out in Article 13(3) of the Model Law read with Section 8(1) of the IAA.

4.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence (see Article 12(2) of the Model Law).

5 Procedural Rules

5.1 Are there laws or rules governing the procedure of arbitration in your country? If so, do those laws or rules apply to all arbitral proceeding sited in your country?

The provisions governing the conduct of international commercial arbitration in Singapore are set out in Part II of the IAA. Part II of the IAA (and the Model Law, as modified or supplemented by the IAA) applies to all international arbitrations sited in Singapore. Under Section 5(2) of the IAA, an international arbitration is one which:

- 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
- the place of arbitration if determined in, or pursuant to, the arbitration agreement is situated outside the State in which the parties have their places of business; or

- any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected is situated outside the State in which the parties have their places of business; or
- the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

If a party has more than one place of business, the place of business shall be that which has the closest relationship to the arbitration agreement (see Section 5(3)(a) of the IAA). If a party does not have a place of business, a reference to his place of business shall be construed as a reference to his habitual residence (see Section 5(3)(b) of the IAA).

Parties to an arbitration have the choice of opting in or opting out of Part II of the IAA and the Model Law. Part II of the IAA and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration (see Section 5(1) of the IAA). This is the “opt-in” provision.

If the parties to an arbitration agreement have expressly agreed either that the Model Law or Part II of the IAA shall not apply to the arbitration or that the AA shall apply to the arbitration, then both Part II of the IAA and the Model Law shall not apply to that arbitration but the AA or the repealed AA (if applicable) shall apply to that arbitration (see Section 15(1) of the IAA). This is the “opt-out” provision.

A provision in an arbitration agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to exclude the application of the Model Law or Part II to the arbitration concerned (see Section 15(2) of the IAA).

5.2 In arbitration proceedings conducted in your country, are there any particular procedural steps that are required by law?

Subject to the provisions of the Model Law, the parties are free to agree on the procedure to be followed by the tribunal in conducting the proceedings (see Article 19 of the Model Law). Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements (see Article 23(1) of the Model Law). All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. In addition, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties (see Article 24(3) of the Model Law).

There are other mandatory provisions of the Model Law on procedural issues from which parties cannot derogate. These include Article 18 (parties shall be treated with equality and each party shall be given a full opportunity of presenting his case), Article 31 (form and contents of award), Article 32 (termination of proceedings) and Article 34 (application for setting aside as exclusive recourse against arbitral award) read with Section 24 of

the IAA (which sets out additional grounds for the setting aside of an award).

5.3 Are there any rules that govern the conduct of an arbitration hearing?

Yes. Unless parties agree otherwise, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by one party (see Article 24(1) of the Model Law).

The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents (see Article 24(2) of the Model Law).

Where the applicable law is Singapore law, the person appearing in the arbitration proceedings must do so jointly with a Singapore lawyer (see Section 35 of the Legal Profession Act (Cap. 161)).

5.4 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Yes. The High Court has the same power as the arbitral tribunal to deal with certain procedural issues arising during an international arbitration, such as security for costs, discovery of documents and interrogatories and interim injunctions or any other interim measures (see Section 12(1) read with Section 12(7) of the IAA and see the list of the arbitral tribunal’s powers at item 6.1 below).

The High Court has the power to compel a witness to attend before an arbitral tribunal, give evidence and produce specified documents wherever he or she may be within Singapore. The High Court may also issue an order to bring up a prisoner in Singapore for examination before an arbitral tribunal (see Section 14 of the IAA).

6 Preliminary Relief and Interim Measures

6.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

An arbitrator is permitted to make orders or give directions for:

- security for costs;
- discovery of documents and interrogatories;
- giving of evidence by affidavit;
- the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;
- 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;
- the preservation and interim custody of any evidence for the purposes of the proceedings;
- securing the amount in dispute;
- 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
- an interim injunction or any other interim measure

(see Section 12(1) of the IAA).

The arbitrator does not require the assistance of the court to award such preliminary or interim relief. However, judgment may be entered in terms of such orders or directions made or given by an arbitral tribunal, by leave of the High Court. The judgment will then be enforceable in the same manner as if it was an order made by a court (see Section 12(6) of the IAA).

6.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The High Court is entitled to grant preliminary or interim relief in proceedings subject to arbitration (see items 5.4 and 6.1 above). A party's request to the High Court for interim relief does not affect the jurisdiction of the arbitral tribunal (see Article 9 of the Model Law).

6.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The national courts are generally reluctant to intervene in cases where the arbitrators are able to hear the application brought before the Court. The national courts are likely to be more willing to hear the application if there is urgency and the arbitral tribunal has not been constituted or the arbitration has not commenced.

7 Evidentiary Matters

7.1 What rules of evidence (if any) apply to arbitral proceedings in your country?

There are no specific rules of evidence which apply to arbitral proceedings. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence (see Article 19(2) of the Model Law).

7.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

There are no limits to the scope of an arbitrator's authority with respect to ordering the disclosure of documents and other disclosure or discovery.

7.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

The Court has the same power as the Tribunal to order the discovery of documents. See items 5.4 and 6.1 above.

7.4 What is the general practice for disclosure/discovery in international arbitration proceedings?

In practice, the scope of discovery in arbitral proceedings with their seat in Singapore is less extensive than discovery in court proceedings.

7.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

The arbitral tribunal has the power to make orders to any party for the giving of evidence by affidavit (see Section 12(1)(c) of the IAA). The Court has the same power as the arbitral tribunal (see Section 12(1)(c) read with Section 12(7) of the IAA).

Unless parties agree otherwise, the arbitral tribunal also has the power to administer oaths to or take the affirmations of the parties and witnesses (see Section 12(2) of the IAA), to adopt if it thinks fit inquisitorial processes (see Section 12(3) of the IAA), to appoint one or more experts to report to it on specific issues to be determined by the tribunal and require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his or her inspection (see Article 26(1) of the Model Law). If a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his or her written or oral report, participate in a hearing where the parties have the opportunity to put questions to him or her and to present expert witnesses in order to testify on the points at issue (see Article 26(2) of the Model Law).

In addition, see items 5.4 and 7.1 above.

8 Making an Award

8.1 What, if any, are the legal requirements of an arbitral award?

With respect to international arbitrations, the award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30 of the Model Law. The award shall state its date and the place of arbitration as determined in accordance with Article 20(1) of the Model Law. After the award is made, a copy signed by the arbitrators shall be delivered to each party (see Article 31 of the Model Law).

9 Appeal of an Award

9.1 On what bases, if any, are parties entitled to appeal an arbitral award?

An arbitral award made in an international arbitration under the IAA cannot be appealed. The only recourse against such an award is an application for setting aside (see Article 34(1) of the Model Law).

10 Enforcement of an Award

10.1 Has your country signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? What is the relevant national legislation?

Singapore has signed and ratified the New York Convention with the reservation that Singapore will apply the New York Convention only to the recognition and

enforcement of awards made in the territory of another Contracting State. The relevant national legislation is Part III of the IAA.

10.2 What is the approach of the national courts in your country towards the enforcement of arbitration awards in practice?

The national courts will enforce arbitration awards in accordance with the New York Convention and the IAA.

11 Confidentiality

11.1 Are arbitral proceedings sited in your country confidential? What, if any, law governs confidentiality?

Arbitral proceedings in Singapore are confidential. The IAA does not expressly provide that arbitral proceedings are confidential. Sections 22 and 23 of the IAA extend confidentiality to court proceedings under the IAA which arise out of the arbitration, on the application of any party to the proceedings.

11.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

In view of the confidential nature of arbitral proceedings, it is unlikely that information disclosed in arbitral proceedings can be referred to and/or relied on in subsequent proceedings.

11.3 In what circumstances, if any, are proceedings not protected by confidentiality?

If there are court proceedings which arise out of an international arbitration, a party wishing to protect the confidentiality of the proceedings may apply to the Court for the court proceedings to be heard otherwise than in open court. If not, the confidentiality of the court proceedings may not be protected (see Section 22 of the IAA).

12 Damages/interests/costs

12.1 Are there limits on the types of damages that are available in arbitration (E.g., punitive damages)?

Singapore's law of international arbitration imposes no specific limits on the types of damages available in arbitration with a seat in Singapore. However, an arbitral award may be set aside by the High Court if the High Court finds that the award is in conflict with the public policy of Singapore (see Article 34(2) of the Model Law, read with Section 8(1) of the IAA). Damages awarded should therefore not be contrary to the public policy of Singapore.

12.2 What, if any, interest is available?

Where an award directs a sum to be paid, that sum shall, unless the award otherwise directs, carry interest as from

the date of the award and at the same rate as a judgment debt (see Section 20 of the IAA). Judgment debts in Singapore carry interest at the rate of 6% per annum (see Order 42, Rule 12 of the Rules of Court).

12.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

As a general rule, the successful party will be entitled to recover its fees and costs from the losing party. Any costs directed by an award to be paid shall, unless the award otherwise directs, be taxable by the Registrar of the SIAC (see Section 21(1) of the IAA). Unless the fees of the arbitral tribunal have been fixed by a written agreement or the agreement has provided for determination of the fees by a person or an institution agreed to by the parties, any party to the arbitration may require that such fees be taxed by the Registrar of the SIAC (see Section 21(2) of the IAA). Most procedural rules of arbitration will stipulate the method of assessing such fees and/or costs.

13 General

13.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in your country? Are certain disputes commonly being referred to arbitration?

Singapore's suitability as a seat of arbitration is being enhanced by the stated policy of the Government of Singapore to promote Singapore as a hub for international arbitration in Asia. In our experience, parties are increasingly providing for Singapore as the situs of international arbitration as it is seen as a stable and neutral venue, with developed arbitration laws and fair and efficient courts. The Singapore International Arbitration Centre is enjoying increasing success, although we also frequently see Singapore-situs arbitration subject to the rules of the ICC, LCIA and UNCITRAL. Construction and shipping disputes are probably the disputes most commonly referred to arbitration in Singapore.

13.2 Are there any other noteworthy current issues affecting the use of arbitration in your country?

In the last two years, Singapore's international arbitration laws have come under some scrutiny, largely due to the two cases of *John Holland Pty Ltd (fka John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* (2001) 2 SLR 262 and *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd & Anor* (2002) 2 SLR 164. These cases were interpreted as causing uncertainty over the effect of the procedural arbitration rules chosen by the parties. Amendments were made to the IAA (Sections 15 and 15A) to deal with the uncertainty. One remaining issue is the requirement that where the issue in dispute involves Singapore law, the person appearing in the arbitration proceedings must do so jointly with a Singapore lawyer.

**John Savage**

Shearman & Sterling LLP
6 Battery Road
#25-03
Singapore 049909

Tel: +65 6230 3800
Fax: +65 6230 3899
Email: jsavage@shearman.com
WWW: www.shearman.com

Mr Savage is a partner of Shearman & Sterling LLP, based in the firm's Singapore office. He is a member of the firm's international arbitration group, and leads the firm's international arbitration practice in Asia. Mr Savage has represented governments and corporations in over fifty international arbitrations, both institutional and ad hoc, conducted in the English and French languages. These arbitrations have had a variety of applicable laws, venues and subject-matters. Mr Savage's practice focuses on construction and international investment arbitrations. Mr Savage has also been appointed as an arbitrator.

Mr Savage is the co-editor of "Fouchard Gaillard Goldman on International Commercial Arbitration" (Kluwer, 1999), one of the world's leading treatises in the field. He qualified as a solicitor in England and Wales and an avocat in France.

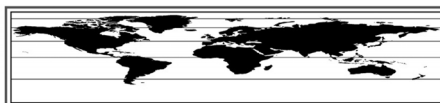
Mr Savage is listed as a leading individual in international arbitration in the Asia Pacific Legal 500, 2003. He is also the recipient of an award for arbitration from the Legal Who's Who Singapore 2003.

**Tan Ai Leen**

Shearman & Sterling LLP
6 Battery Road
#25-03
Singapore 049909

Tel: +65 6230 3800
Fax: +65 6230 3899
Email: aileen.tan@shearman.com
WWW: www.shearman.com

Ms Tan is an associate in Shearman & Sterling LLP's Singapore office, and is a member of the firm's international arbitration practice. She has represented multinational clients in arbitration and litigation matters, with a focus on construction disputes. She qualified as a Singapore advocate and solicitor in May 1998 and is now an English solicitor.

SHEARMAN & STERLING LLP

Shearman & Sterling LLP is an international law firm with a market-leading international arbitration practice. In Asia, we have a dedicated team of international arbitration specialists working out of our Singapore office. For more information about our international arbitration capabilities in Asia, and how we can help you resolve your international arbitration disputes, please contact:

John Savage
(t): +65 6230 3800
(f): +65 6230 3899
jsavage@shearman.com
www.shearman.com