Legal Business

Memoranda on legal and business issues and concerns for multiple industry and business communities

RAJAH & TANN
advocates & solicitors

Singapore As A Forum For Arbitration

November 2004

Rajah & Tann
4 Battery Road
#26-01 Bank of China Building
Singapore 049908
Tel: 65 6535 3600
Fax: 65 6538 8598
E-mail: eOASIS@rajahtann.com
Website: www.rajahtann.com

Singapore As A Forum For Arbitration

Arbitration as a means of dispute resolution has been growing in popularity internationally. Increasingly seen by international corporations and commercial entities as a valid alternative to being mired in local court systems, an important question for consideration has been the choice of a forum for the conduct of arbitration. Singapore is a regional and financial hub that serves as a gateway between East and West and houses the regional headquarters of many multinational corporations. In addition, it is also a significant arbitration site at it has over the years increased its standing and popularity as an arbitration forum of choice.

The growth of Singapore's reputation and influence in this arena has been immeasurably aided by the establishment of the Singapore International Arbitration Centre ('SIAC') in July 1991 and the enactment by the Singapore legislature of the International Arbitration Act ('IAA') in 1994 incorporating the UNCITRAL Model Law on Commercial Arbitration. This article will take a look at both the SIAC and the IAA, the enforcement of arbitral awards in Singapore, as well as other reasons that have contributed to the establishment of Singapore as a centre for arbitration.

The Growth of the SIAC

The SIAC was set up to promote arbitration as a viable alternative to litigation for the settlement of commercial disputes. As the only arbitral institution in Singapore, it provides a comprehensive range of services and facilities for international and domestic arbitration. These include the provision of support and administrative services such as providing a venue for arbitration hearings and acting as the registry / depository of arbitral pleadings and documents.

The SIAC is also the statutory appointing authority for arbitrators under the International Arbitration Act and maintains a panel of accredited arbitrators of local and international experts from which appointments can be made. The panel includes prolific members of the Singapore bar and former judges of the Supreme Court. Many of the arbitrators on the panel are members of the Singapore Institute of Arbitrators or the Chartered Institute of Arbitrators, London and are professionals in their specialised fields.

The SIAC administers the cases before it under its own Rules of Arbitration (the 'SIAC Rules') but is also able to administer arbitrations under any other rules agreed to by the parties such as the UNCITRAL Arbitration Rules 1976.

To attract arbitrations to be held in Singapore, the SIAC has ensured that the facilities it offers and the fees it charges remain both attractive and competitive in comparison with other major arbitration centres world-wide. It has also put together a comprehensive set of rules governing international arbitrations, with the emphasis always on upholding party autonomy but balanced with a sensible regard for ensuring that arbitrations cannot be hijacked by one party. In addition, the SIAC continually seeks to improve the transparency, efficiency and integrity of the arbitrations it conducts. Hence, it recently implemented a new three-step process for the appointment of arbitrators to be used where the rules provide require the chairman of the SIAC to appoint an arbitrator (for example, where parties cannot agree).

© Rajah & Tann, Knowledge & Risk Management

The growth of Singapore as a centre for arbitration and the success of the SIAC in fulfilling its mission can be seen in the numbers of cases handled by the SIAC. With only two cases at its inception in 1991, that number grew to hit a high-water mark of 89 cases in 2000. A review of the types of cases that are handled by the SIAC indicate that disputants cover a wide range of nationalities both regionally and from all parts of the world, be it Europe, the United States, Australia, China, India or Indonesia.

Favourable Arbitration Laws

The Arbitration Act ('AA') and the International Arbitration Act ('IAA') are the two relevant statutes which govern the conduct of arbitration in Singapore. Broadly speaking, the AA applies to domestic arbitrations, and the IAA applies to international arbitrations.

This distinction is an important one as which act applies will determine the rules by which the arbitration will be conducted (unless the arbitration agreement itself stipulates a set of rules different from that imposed under either Act, in which case, it is the contractually agreed rules that apply). This is because each act applies a different arbitration regime that will govern the arbitration proceedings.

This article will not discuss the differences between the two regimes of arbitration. For the purposes of this article, it is sufficient to note that the regime adopted by the IAA is the UNCITRAL Model Law on Commercial Arbitration (the 'Model Law'), while the AA is modelled after the English Arbitration Act and its regime is generally not as extensive or as comprehensive as that of the IAA. These two regimes have some significant differences which, depending on the issues that arise during any specific arbitration, can be critical to its conduct and result.

Application Of The IAA

The IAA governs international arbitrations, and under the IAA whether any particular arbitration is to be regarded as international will depend on whether it meets any one of the following criteria:

- at least one of the parties to the arbitration agreement has its place of business in a country other than Singapore;
- the place of arbitration, as determined pursuant to the arbitration agreement, is in a country which is neither party's place of business;
- the country in which a substantial part of the obligations of the commercial relationship is to be performed is a country which is neither party's place of business;
- the country in which the subject-matter of the dispute is most closely connected is a country which is neither party's place of business; or
- the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

Unlike the IAA, the AA does not provide any guidelines or rules as to whether it applies to a particular arbitration. It applies to all arbitrations that come under Singapore law, unless that arbitration is one that comes under the ambit of the IAA. In other words, it is, in a sense, the default law applicable to an arbitration that comes under Singapore law. An arbitration in Singapore where the parties both have their place of business in Singapore, and the obligations under the commercial relationship are to be performed in Singapore is the quintessential example of an arbitration coming within the ambit of the AA, and which will thus be subject to its arbitration regime.

© Rajah & Tann, Knowledge & Risk Management

The IAA allows parties to 'opt-out' of the arbitration regime which it provides, by stating that if parties to an arbitration agreement have agreed that any dispute that has arisen or may arise between them is to be settled or resolved otherwise than in accordance with Part II of the IAA or the Model Law, Part II and the Model Law will not apply in relation to the settlement or resolution of the dispute. Conversely, the IAA allows parties in a domestic arbitration to 'opt-in' to the IAA regime by stipulating that the IAA shall apply.

Parties cannot 'opt-out' of the AA as such. However, the arbitration rules stipulated by the AA are regarded as being implied into an arbitration agreement, and where parties expressly provide for their own rules to govern the proceedings of an arbitration, these will apply in place of the implied rules stipulated by the AA.

Overview Of The IAA Regime

The IAA regime is based on the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') which has been adopted by Singapore. The Model Law was drafted to be highly supportive of international arbitrations. Hence, parties choosing arbitration and seeking to settle on a jurisdiction for arbitration will find that the IAA highly helpful for the following reasons:

- The IAA expressly upholds submissions to arbitration, requiring the court to stay court proceedings brought in contravention of such a submission unless very narrow exceptions apply.
- In addition to empowering arbitrators to make a range of interim orders covering matters such as security for costs, the giving of evidence by affidavit and other procedural matters, the IAA also expressly confers powers on the courts to compel parties to abide by these orders or to compel witnesses to appear thus ensuring the arbitrations cannot be held up. In addition, arbitrators are also empowered to take the necessary steps to make an award where one party delays proceedings, thereby ensuring that arbitrations are not hijacked.
- A particularly important consideration of parties in arbitration is the desire to ensure that arbitral awards are not later unwound by a court. A cornerstone of the Model Law, and hence the IAA, are the limited grounds under which a court can refuse to enforce an arbitral award. This policy of the IAA has been consistently upheld by Singapore courts which have frequently made it clear that they will not interfere with arbitral awards without good and clear reasons.

Tax Regime

To enhance the attractiveness of Singapore as a forum for arbitration, its tax laws were recently amended to abolish withholding tax for foreign arbitrators. In addition, while one usually only thinks of the contracting parties when one considers arbitration, in Singapore, the Contracts (Rights of Third Parties) Act – which came into force in 2002 – provides that third parties who are beneficiaries under an agreement which contains an arbitration clause will also be bound by that clause if they seek to exercise their rights.

Supportive Legal System

Availability Of Competent Legal Profession

Essential to international arbitration is the availability of lawyers who are able to handle the demands of the complexities of international commercial transactions. To that end, Singapore is also an

© Rajah & Tann, Knowledge & Risk Management

advantageous jurisdiction as it has a strong body of competent arbitration professionals who have handled international arbitrations not only in Singapore but in other jurisdictions. Many Singapore law firms have lawyers who have expertise in international arbitration acting not only as counsel but as arbitrators as well. Such is the strength of the profession in this area that international legal ranking journals have cited various Singapore lawyers and law firms, such as Rajah & Tann, as experts in the area of international arbitration.

In addition to being able to call on the expertise of Singapore lawyers, parties seeking counsel to act for them in international arbitrations can now also use their international law firm of choice. In line with its aim of making Singapore an international arbitration hub, the Singapore government recently amended the Legal Profession Act in 2004. Prior to its amendment, foreign lawyers were prohibited from acting in arbitrations in Singapore subject to two exceptions set out in section 35 of the Legal Profession Act:

- They were permitted to act in arbitrations where the dispute was governed by a foreign law. Hence, for example if the parties' contact provided for arbitration and stipulated that the governing law of the contract was English law, then if the matter were arbitrated in Singapore, a foreign lawyer could act in the proceedings.
- If the dispute was governed by Singapore law, they could act in the arbitral proceedings provided that they appeared jointly with a Singapore lawyer.

The amendment of the Legal Profession Act repealed section 35 and replaced it with a new section. Under the new section 35, the market has been opened to foreign lawyers. They may act in any arbitration proceeding in Singapore, regardless of whether they are governed by Singapore or a foreign law. This will include the giving of advice, preparation of documents and providing any other assistance with respect to the arbitration proceedings.

The sole area with respect to arbitrations where a foreign lawyer may not act is to appear in a Singapore court in a matter relating to the arbitration proceedings. So, for example, if a party to an arbitration proceeding wishes to go to court to seek a declaration from the court as to the proper scope of the jurisdiction of the arbitration agreement, he will need to appoint Singapore lawyers. Similarly, if the parties wish to launch an appeal on the arbitral award to the Singapore courts under the relevant provisions of the International Arbitration Act or the Arbitration Act, Singapore lawyers will be required. This is line with the principle that only lawyers called to the Singapore bar may appear in proceedings before our courts.

This amendment brings Singapore in line with a number of other jurisdictions world-wide, including Australia, and the United Kingdom.

Supportive Judiciary

The Singapore judiciary has expressly declared that it encourages the use of the arbitration process in the resolution of disputes. The pro-arbitration stance of the Supreme Court of Singapore can also be seen in its various decisions including a recent Singapore High Court ruling which upheld the confidentiality of arbitration proceedings and eschewed developments in other countries which have rejected the notion that parties to arbitration proceedings are subject to an obligation of confidentiality. The judiciary's support of Singapore's is further evinced by the appointment, in 2003, of a specialist judge to preside over all arbitration matters brought before the High Court.

© Rajah & Tann, Knowledge & Risk Management

Enforcement Of Local Awards In Singapore

Awards made in Singapore, either in respect of a domestic or international arbitration are binding and enforceable. In order to enforce an arbitration award made in Singapore by way of execution proceedings, the following steps must be taken:

- An ex parte application must be made to the High Court for leave to enforce the award.
- The order must be served on the opposing party (the 'debtor') who has 14 days to make an application to set aside the order of court.
- If an application to set aside the order is made by the debtor, the award shall not be enforced until the application is heard and finally disposed of.

Enforcement Of Foreign Arbitral Awards In Singapore

Awards From New York Convention Countries

Singapore acceded to the New York Convention of 1958 (the 'Convention') on 21 August 1986 and subsequently re-enacted most of its provisions in Part III of the IAA. By acceding to this Convention, Singapore is bound to recognise awards made in any other country which is a signatory to the Convention.

Such foreign awards may be enforced by way of a separate action or in the same manner as an award of an arbitrator made in Singapore. Under section 29(2) of the IAA, parties may also rely on such an award as a defence, set-off or otherwise in any legal proceedings in Singapore.

In order to enforce a foreign award made in any of the Convention countries, the following steps must be taken:

- An application must be made to the High Court for leave. Section 6 of the Limitation Act states that this application must be made within six years after the award was made.
- An affidavit must be filed to exhibit the arbitration agreement and the duly authenticated original award or a copy thereof. If the award is not in English, a certified translation of it in English must be provided as well. Additionally, the affidavit must state the name and usual or last known place of abode or business of the applicant and the person against whom enforcement is sought.
- The court hearing the application for enforcement of the foreign award cannot review the case on its merits and can only refuse to grant leave to enforce the award on the grounds stated in section 31(2) and 31(4) of the IAA.
- The court hearing the application will grant leave on an ex parte basis only in urgent cases, in which event the order must be served on the debtor forthwith.

For parties seeking to arbitrate in Singapore, it may be of comfort to know that if the counterparty is from a Convention country, any award obtained in Singapore against the counterparty should conversely be enforceable in its country.

Commonwealth Awards

Singapore is a member of the Commonwealth of Nations and, under the Reciprocal Enforcement of Commonwealth Judgments Act (the 'RECJA'), recognises judgments made in the United Kingdom, as well as jurisdictions that are part of the Commonwealth and with which Singapore has reciprocal

© Rajah & Tann, Knowledge & Risk Management

arrangements for the recognition and enforcement of judgments. The RECJA lists the countries with which such arrangements exist, and of the 54 countries that are members of the Commonwealth, nine have been listed.

An arbitration award from each of these countries is, generally speaking, enforceable in Singapore under the RECJA, as it defines a 'judgment' for its purposes as including an award in proceedings on an arbitration. However, the RECJA does stipulate that this is provided the award has become enforceable in that country in the same manner as a judgment given its courts.

It bears noting that a party wishing to enforce an award under the RECJA has a more onerous procedure to adhere to as compared to the Convention. For instance, the registration of the judgment to aid enforcement must be done within 12 months as compared to the six-year limitation under the Convention. Furthermore, the court hearing the application to register the award will allow registration of the award only where it is just and convenient to do so. This involves an exercise of discretion on the part of the court.

From a practical point of view, as a result of the extensive ratification of the Convention, the procedure relating to enforcement of judgments under the RECJA has become less important. The RECJA, however, would still be relevant for non-Convention countries such as Pakistan.

Conclusion

Arbitration, as a method of dispute resolution, is increasingly gaining favour, and for parties seeking a jurisdiction in which to conduct arbitration in Asia, Singapore affords many advantages, not least of which is the comprehensive legal framework with regards to arbitration, based on internationally accepted practice.

Rajah & Tann is one of the largest law firms in Singapore, with a representative office in Shanghai. It is a full service firm and given its alliances, is able to tap into resources in a number of countries.

Rajah & Tann is firmly committed to the provision of high quality legal services. It places strong emphasis on promptness, accessibility and reliability in dealings with clients. At the same time, the firm strives towards a practical yet creative approach in dealing with business and commercial problems.

The information contained in this newsletter is correct to the best of our knowledge and belief at the time of writing. The contents of the above intended to provide a general guide to the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as the information above may not necessarily suit your specific business and operational requirements. It is also to your advantage to seek specific legal advice for your specific situation. In this regard, you may call the lawyer you normally deal with in Rajah & Tann or e-mail the Knowledge & Risk Management Group at eOASIS@rajahtann.com.

© Rajah & Tann Knowledge & Risk Management. All rights reserved.