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Keeping in step with worldwide arbitral norms – recent developments in Singapore

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I. INTRODUCTION

1. Almost exclusively in the last decade, the character of dispute resolution has evolved from one confined mainly to the Courts to one where arbitration is common place for large, multi-national commercial disputes. The necessarily quick pace of the development of Singapore's legal infrastructure in reaction to demands for improved avenues of dispute resolution has led to Singapore being the third most preferred arbitration seat in the world, behind London and Geneva.

2. Singapore is renowned for not shying away from advancing its legal landscape in order to keep pace with the world's best practices in dispute resolution. Recently, its Parliament passed the International Arbitration (Amendment) Act 2012 and the Foreign Limitation Periods Act 2012 to clarify and fortify Singapore's existing legal infrastructure on issues such as the powers of an emergency arbitrator (itself a relatively new development) and the application of foreign limitation periods to claims governed by foreign law.

3. The Singapore International Arbitration Centre ("**SIAC**") is one of the most preferred arbitral institutions in the world, has also recently announced the release of its revised model arbitration clause on 1 September 2015 (the "**Revised Model Clause**"). This is welcome as a model of the simplification of a crucial clause, the arbitration clause.

4. The highlights of these changes are summarised below.

II. RECENT AMENDMENTS TO SINGAPORE'S ARBITRATION FRAMEWORK

5. Singapore recently refined its international arbitration regime in at least five areas:

   a. The requirement for arbitration agreements be in writing;

   b. Whether to confer the Singapore Courts the power the power to review negative jurisdictional rulings;

   c. The Tribunal's power to award interest;

   d. The status of the emergency arbitration and associated procedures; and

e. Whether the foreign limitation laws are to be applied to issues governed by foreign law.

6. The first four areas were amended pursuant to the International Arbitration (Amendment) Act 2012, and the last area amended pursuant to the Foreign Limitation Periods Act 2012.

7. Each of these amendments seeks to clarify various areas of arbitration law and to reduce the obstacles faced by parties who had intended to arbitrate their disputes.

8. The new definition of what constitutes an arbitration agreement provides that it is an agreement that is concluded orally, or by conduct, or through any other means, if its content is recorded in any form. Previously, agreements had to be "*in writing*" for it to be an arbitration agreement under Section 2 of the International Arbitration Act ("**IAA**"). The amendment broadens the definition of an arbitration, thus enlarging the forms in which an agreement to arbitrate may be found. Even records made by one party would suffice; such a record need not be confirmed by both parties. The new definition accords more with commercial reality in which even high value contracts could be concluded orally. Legislatively, the question was whether the possibility of disputes arising over whether there is an arbitration agreement from unilateral records should preclude the law from recognizing agreements from such records, and the answer must balance both competing needs of certainty as opposed to flexibility. As such, a unilateral record of an arbitration agreement is possible, and the Courts are left to decide on the sufficiency of the record in evidencing the arbitration agreement on the facts of each case.

9. Recourse against <u>negative</u> jurisdictional rulings by an arbitral tribunal (i.e., when the tribunal holds it does not have jurisdiction to determine a dispute) is now possible. Previously, the IAA followed the Model Law (which has the force of law in Singapore) in not providing any recourse against negative jurisdictional rulings, even though appeals

were allowed in respect of tribunals' positive rulings on jurisdiction (i.e., rulings by the tribunal that it had jurisdiction to hear the dispute). The amendment was made as it was thought that it would be inconsistent to deny a judicial review of negative jurisdictional rulings when judicial review for positive rulings was permitted, and that the absence of recourse against negative jurisdictional rulings might defeat the parties' intention to arbitrate. Accordingly, an appeal against a tribunal's jurisdictional ruling (whether positive or negative) is now possible.

10. A further amendment clarified that tribunals have full discretion to award interest. Subject to the arbitral agreement, the tribunal will be able to award simple or compound interest, on sums claimed or costs awarded in the arbitration, from such a date, at such rate and with such rest as it seems fit.

11. The definition of an "arbitral tribunal" has also been expanded to include emergency arbitrators who provide urgent interim relief to parties before the arbitral tribunal is constituted. This makes clear the legislative support for emergency arbitrators who are now able to exercise the entire suite of powers available to the tribunal under the IAA and whose awards are enforceable in Singapore's courts in the same way as awards by other tribunals.

12. Last but not least, notwithstanding that the issue has not yet arisen in the Singapore Courts, Parliament has taken the proactive step to clarify the applicability of foreign limitation laws. The amendment makes it clear that where a dispute is governed by a foreign law, the issue of time bar is to be governed by that foreign law (subject to where this would conflict with Singapore's public policy). Following the amendment, there is no need to determine the previously vexed question of whether the issue of limitation was procedural or substantive. This is in line with the amendments to the law in UK in 1985. Like the litigants who have used the UK as the arbitral seat, the litigants using Singapore as their arbitral seat will reap the benefits from this statutory clarification of the law.

III. THE NEW SIAC MODEL CLAUSE

13. The Revised Model Clause provides a single, user-friendly model clause for the convenience of contracting parties who choose to have their disputes referred to arbitration with the SIAC. It harmonises the previous version of the SIAC Model Clause with the SIAC Model Clause for Contracts with PRC Parties. The SIAC Expedited Procedure Model Clause has similarly been updated in line with the Revised Model Clause.

14. The revision is welcome as it offers a single model clause that can be used when parties intend for disputes to be administered by the SIAC, whilst clearly offering the parties flexibility in selecting the seat of arbitration.

15. It is important however, for parties to note the significance of the choice of the seat of arbitration, since the Courts at the seat of arbitration exercises supervisory jurisdiction over the arbitration. This supervision is chiefly in two areas – first, the Courts of the seat of the arbitration determine whether an award can be set aside; second, the Courts of the seat of the arbitration also provide interim relief in aid of the arbitration where necessary. Commercial parties must be aware of the options in drafting their arbitration agreements so as to avail themselves to these legal tools, thereby managing business risks.

IV. CONCLUSION

16. It remains to be seen what further improvements to Singapore's dispute resolution framework the future will bring. Already, the Ministry of Law has asked for feedback on potential issues such as whether parties should be allowed to waive a right to set aside

arbitration awards thus bringing finality to disputes, and whether third party funding would be appropriate in the context of international arbitration.

17. In the midst of these developments, the clear message is that Singapore will continue to keep its arbitration regime in line with, if not at the forefront of, arbitral norms around the world.

About Rodyk & Davidson LLP and the Author:

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