Proposed Amendments to International Arbitration Act to Strengthen Legal Framework

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Introduction

Singapore has risen to become one of the leading centres for international arbitration worldwide, with the Singapore International Arbitration Centre ("**SIAC**") ranked as the most preferred arbitration institution in Asia and the third most preferred arbitration institution in the world. In 2019, SIAC reported new records with 479 new case filings worth a total of S$10.91 billion, a nearly 15% increase in dispute value from the previous year. Its global appeal is marked by the international nature of 87% of the new cases, with arbitrating parties from 59 jurisdictions. Moreover, Singapore remains the most preferred seat in Asia for International Chamber of Commerce ("**ICC**") arbitrations per the ICC Dispute Resolution: 2019 Statistics report.

To maintain Singapore's competitive edge, the Ministry of Law ("**MinLaw**") tracks changes in international best practices and consults on how Singapore's legal framework can be improved. Such a consultation was held in June to August 2019 regarding four proposals put forward by MinLaw to amend Singapore's International Arbitration Act ("**IAA**") (which governs international commercial arbitration proceedings in Singapore) as well as other third-party proposals also contained therein. These four MinLaw proposals were to:

1. Introduce a default mode of appointment of arbitrators in multi-party situations;
2. Recognise that an arbitral tribunal and the Singapore High Court have powers to enforce confidentiality obligations in an arbitration;
3. Allow parties to, by agreement, request the arbitrator/s to decide on jurisdiction at the preliminary stage; and

4. Allow a party to the arbitral proceedings to appeal to the High Court on a question of law arising out of an award made in the proceedings, provided parties have agreed to opt in to this mechanism.

The first two of these proposals were adopted in the International Arbitration (Amendment) Bill ("**Bill**"), which was passed on 5 October 2020, and we examine them below. It should be noted that while the latter two proposals have not been adopted in the Bill, they continue to be studied by MinLaw.

Default Mode of Appointment of Arbitrators in Multi-Party Situations

Currently, IAA only addresses the process for default appointment of a three-member arbitral tribunal for arbitrations with only one claimant and one respondent in section 9A, in which (a) each party appoints one arbitrator, and (b) the two parties then appoint a third arbitrator by agreement within 30 days after a request is made by either party. One detail noted is that the Bill will amend section 9A(2) to clarify and confirm the existing legal position that the 30-day timeline excludes the day of the receipt of request itself.

Due to the growing trend of arbitrations involving more than two parties – particularly in the areas of joint ventures, infrastructure projects, oil and gas development, and merger and acquisition disputes – the need to provide a similar procedure for multi-party arbitrations has grown likewise. The Bill introduces a new section 9B, which sets out the default mode of appointment in multi-party arbitrations with three arbitrators to be appointed. A brief outline of the procedure is set out below:

1. All claimants must jointly appoint one arbitrator and notify the respondents of it on the same date that the request to refer the dispute to arbitration ("**Request**") is made.

2. Within 30 days after the Request is received by all respondents, they must jointly appoint a second arbitrator and inform the claimants.

3. Within 60 days after the Request is received, the third arbitrator will be appointed by agreement of the first two arbitrators (and not by the parties, unlike section 9A), and will be the presiding arbitrator.

    a. If agreement cannot be reached, any party may request the appointing authority to appoint the third arbitrator, who will be the presiding arbitrator.

4. Should either the claimants or respondents be unable to appoint their arbitrator (or fail to notify the other parties by the specified deadline), the appointing authority must appoint all three arbitrators if any party so requests.

    a. Under those circumstances, the appointing authority is able to reappoint or revoke the appointment of any arbitrator already appointed, and may designate one of the three arbitrators to be the presiding arbitrator, having regard to all relevant circumstances.

It should be noted that this procedure is provided as a *default* mode of appointment. Similar to the existing section 9A mechanism, parties can opt out upon agreement under Article 11(2) of the UNCITRAL Model Law on International Commercial Arbitration as set out in the First Schedule of the IAA.

Through introducing a clear process and fixed timelines, the new default mode of appointment serves to avoid delays caused by an inability by parties to agree on the appointment of the tribunal. It will apply to arbitrations that are commenced on or after the Bill passes into law and comes into effect, although parties to ongoing arbitrations may opt in if (a) no arbitrator has been appointed yet and (b) they agree in writing to do so.

Recognition of Powers to Enforce Confidentiality Obligations

Confidentiality is one of the key advantages of arbitration over litigation. At present, the parties and arbitral tribunal already have a common law duty of confidentiality not to disclose confidential information obtained in the course of proceedings, or use them for any purpose other than the dispute. The Bill does not codify these obligations of confidentiality or impose them where they did not previously exist, but will strengthen the arbitral tribunal and the High Court's ability to *enforce* them.

This is achieved through the explicit recognition of the powers of the arbitral tribunal under the new section 12(1)(*j*) to make orders and give directions to the parties to enforce confidentiality obligations arising from three sources:

1. A written agreement between the parties, whether in the arbitration agreement or any other document;
2. Any written law or rule of law, including at common law; or
3. Under the rules of arbitration (including those of an institution or organisation) agreed to or adopted by the parties.

The same powers are granted to the High Court or a Judge thereof ("**High Court**") under section 12A(2). However, subsections (3), (6), and (7) place limits on these powers to make such orders ("**Court Orders**") by providing that:

1. the High Court may refuse to make Court Orders if the prospective or actual place of arbitration is not Singapore, and this makes such orders inappropriate;
2. Court Orders may be made only if (and to the extent that) the arbitral tribunal has no power to do so, whether temporarily or otherwise; and
3. a Court Order will cease to have effect if the arbitral tribunal makes an order expressly relating to the whole or part of the Court Orders.

In practice, this suggests that the arbitral tribunal (rather than the High Court) will have the final say on questions of confidentiality.

Concluding Remarks

While the Bill has not yet come into force, it represents a welcome improvement to the legal framework for arbitration in Singapore by preventing delays in appointing an arbitral tribunal and reassuring parties that confidentiality obligations can be enforced. With the increasing number of multi-party arbitrations and the anticipated increase in the demand for dispute resolution brought about by the COVID-19 pandemic, it is imperative that Singapore continues to maintain and enhance its attractiveness as a venue for international arbitrations.

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