SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
MICA (P) 031/11/2006 **DEC** 2006 **ISSUE** NO. 8

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VIEWPOINT

PRESIDENT'S MESSAGE

Below is the speech delivered by the President at the Institute's 25th Anniversary Dinner held on 24 November 2006 at the Four Seasons Hotel.

"Senior Minister of State for Law and Home Affairs, Associate Professor Ho Peng Kee, Justice Judith Prakrash and Justice V.K. Rajah, Fellows and Members of the Institute, Ladies and Gentlemen. It gives me great pleasure to welcome you to our 25th Anniversary Gala Dinner.

Let me also extend a warm welcome to our overseas guests including Mr Kevin Woo President of the Malaysian Institute of Arbitrators, Mr Hiranto, Vice- Chairman of Badan Arbitrase Nasional Indonesia (BANI), Mr Graham Anstee–Brook, Chairman of Western Australia Chapter of the Institute of Arbitrators and Mediators, Australia (IAMA) and Dr Colin Ong, President of the Brunei Arbitration Association, who have all made a special trip to Singapore to join us for this evening's celebration. We are honoured by your presence this evening.

I will share with you our Institute's immediate plans and long-term goals.

Immediate term:

Most of you will know that international arbitration in Singapore is growing at an accelerated pace, helped no doubt by the rapid expansion of trade and commerce between Asia, Europe and the United States and the attendant cross border transactions.

Indeed, Singapore has become increasingly popular as a seat for international commercial arbitrations particularly in disputes involving Chinese and Korean entities.

Our Institute seeks to take advantage of this development. More specifically we intend to assist our members to be appointed as arbitrators for these international arbitrations conducted in Singapore.

We intend to do this by firstly, raising the profile of our members as arbitrators of choice in the international stage. The establishment of our own Panel of Arbitrators, which includes prominent English Queen's Counsel and well known international arbitrators from Australia, India and the United States, is one way to achieve this. The list of all our Panel Members is given prominence in our Institute's recently revamped web site. We intend to further publicise the names in our Panel in our Newsletters and in future events.

You will have heard that in February 2007, our Institute together with the SIAC and the Maritime Lawyers Association of Singapore will co-host the 27th International Congress of Maritime Arbitrators in Singapore. This is a prestigious international maritime arbitrator's conference, which will provide an excellent platform and opportunity for our maritime members to establish international contacts and to publicise their arbitration expertise.

Secondly, our Institute will assist members to be appointed as arbitrators by playing an active role in the nominating process for arbitrators for ICC Arbitrations where the seat

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of arbitration is in Singapore. With the recent changes in the ICC Singapore nomination procedure, our Institute was selected as one of the organisations that may nominate arbitrators for such arbitrations.

Longer term:

In the longer term, the challenge will be to provide opportunities for our junior and less experienced members to be act as arbitrators.

In this regard, we are currently exploring Scheme Arbitrations, i.e. arbitrations on a smaller scale for specific industries such as the travel industry. We are at an exploratory stage, and if the Scheme is implemented, we will be in a position to appoint our members as arbitrators.

Such scheme arbitrations will benefit the specific industry concerned as well as the public as end-users. In this way we will be able to also develop and enlarge our pool of experienced arbitrators.

A Sub-Committee headed by our Immediate Past President, Mr Richard Tan has been formed to study this Scheme in detail and make the necessary recommendations.

Our goal in the long term will be to make our Institute the premier Arbitration Institute in the region and to be recognised for the quality of our Panel Arbitrators in terms of their competence, capability and integrity.

Training:

Our training and education of arbitrators is and will continue to be a major part of our mission. We will continue to conduct our International Entry Course and our Fellowship Course as well as to provide basic or introductory arbitration courses for other industries and professions in Singapore such as the Shipping Industry and the Real Estate Industry.

We will also continue to be involved with the National University of Singapore (NUS) and Kings College London in their Masters of Science (Construction Law and Dispute Resolution) Course and with the NUS in their Graduate Certificate in International Arbitration programme.

International Links:

Internationally, we have in the last three years established links through memoranda of co-operation with four arbitral institutes in the region; namely BANI, the Institute of Arbitrators and Mediators, Australia, the Malaysian Institute of Arbitrators and the Hong Kong Institute of Arbitrators.

In April next year we will be assisting the Malaysian Institute of Arbitrators in their adjudication training course. We are also in the process of exploring mutual recognition of memberships with the New Zealand Institute of Arbitrators. .

In the longer term, we are considering setting up chapters in India and Indonesia as we already have members residing in both these countries.

Thanks:

In conclusion, let me thank Mr Naresh Mahtani, Chairman of the Organising Committee and members of the Organising Committee for successfully organising this Evening's Gala event.

Finally, I would like to thank all of you for your presence this evening to celebrate our 25 years of existence.

All of us who are members of the Institute can be justifiably proud of our Institute's progress and achievements in the past 25 years.

Thank you."

Yours sincerely

Raymond Chan
President

ANNOUNCEMENTS

• NEW MEMBERS •

The Institute extends a warm welcome to the following new members:

Fellows

1 Peter Megens
2 Ho Chien Mien
3 Koh Juay Kherng (transfer)

Members

1 Ken Fernandes
2 Yoga Vyjanthimala
3 Lee Mun Kong Lawrence

• UPCOMING EVENTS •

1. "Injunctions In Aid Of Foreign Arbitration" by Phillip Capper and Chan Leng Sun on **12 January 2007**
2. ICMA XVI Conference on **26 February to 2 March 2007**
3. "Beyond Known Space – ADR in the Fourth Dimension" by Hew R Dundas on **27 Feb 2007**
4. "Enforcement of Arbitration Agreements and Awards - Recent Developments" by Chan Leng Sun and Dinesh Dhillon on **2 April 2007**
5. "Construction Adjudication Course" jointly organized by SIArb, MIArb, PAM, IEM in Kuala Lumpur on **27 April 2007**

SENIOR MINISTER OF STATE FOR LAW AND HOME AFFAIRS, ASSOCIATE PROFESSOR HO PENG KEE'S SPEECH AT THE 25TH ANNIVERSARY OF THE SINGAPORE INSTITUTE OF ARBITRATORS, ON 24 NOVEMBER 2005

"I am happy to join you to celebrate this happy occasion of your 25th Anniversary. I extend my heartfelt congratulations to the Council and members of the Singapore Institute of Arbitrators (SIArb) on this significant milestone your Institute's history. SIArb had humble beginnings in 1981 with just 25 members. Today you boast a membership strength of 625, counting amongst them several prominent arbitration practitioners, both Singaporeans and non-Singaporeans. In your ranks are several Queen's Counsel, Senior Counsel, senior lawyers and industry experts in the field of construction, shipping, commerce, insurance and information technology. Indeed, before I entered politics in 1991 as a University Don, I too was active in SIArb.

The Institute has made good progress since 1981. At its launch, one of its main objectives was to promote, encourage and facilitate the settlement of disputes through arbitration. The Institute then emphasised the education and training of arbitrators. In 1994, the Institute made the Entry Course Examination a prerequisite for admission to membership in an effort to improve the quality and calibre of its members.

Today, the Institute's Fellowship has become the standard for admission to the SIAC's Panel of Arbitrators. I note that training and education remain very much the primary focus of the Institute, which should be the case. I commend the Council and all the past Councils for bringing the Institute and the practice of arbitration to the level it is today.

Singapore is now considered a leading arbitration centre in the region. SIArb has played a part in this achievement. One contribution it has made is by linking up with arbitral institutes in Malaysia, Indonesia, Australia, and Hong Kong, as well as with the National University of Singapore (NUS) and the Chartered Institute of Arbitrators through separate Memoranda of Cooperation. I had witnessed one such MOU signed by the Institute and BANI from Indonesia last year. I understand that representatives from some of these countries and their guests are here amongst us this evening and I welcome you all to Singapore. I urge SIArb to continue to foster closer relationship and co-operation with your counterpart organizations and press on with your effort to build stronger ties with other arbitral institutes in the region. This is certainly one key area where SIArb can add value to our overall efforts.

I also note that that the Institute has expanded its training and education programmes beyond Singapore. In this regard, I understanding that sometime in 2007, the Institute will be organizing a Regional Conference jointly with its MOU partners, the Malaysian Institute of Arbitrators, the Hong Kong Institute of Arbitrators and the Institute of Arbitrators and Mediators, Australia. SIArb will also be co-hosting the ICMA XVI Conference in Feb/ Mar 2007. These are important efforts from the private sector as we relentlessly pursue our goal of enhancing Singapore's position as an arbitration hub.

All this has been made possible by the dedication of past and present Council Members, with the support of the arbitration community and the many volunteers who had contributed to the development of the arbitration profession. I note that the Institute has now established its own Panel of Arbitrators with its own set of Arbitration Rules and Code of Conduct. I urge those on the panel to continue to uphold the highest standard of professionalism.

Much of this has been made possible through a 2-year grant from the Economic Development Board (EDB) under its Locally Based Enterprise Advancement Programme (LEAP) to SIArb to develop an Arbitration Capability Enhancement programme (ACE). The aims of ACE include, conducting programmes to enhance arbitration capabilities, providing continual professional development and professional training programmes, hosting international and local conferences, forging strategic alliances with international arbitration bodies as well as provide the use of arbitration services by the Institute's Panel of Arbitrators. Although this 2-year monetary grant expired sometime in October 2005, I am happy to note that EDB remains a keen supporter of SIArb and is currently in discussions with SIArb to collaborate in and support even more activities in the future.

Further, the Ministry of Law is developing an integrated dispute resolution complex which will be located at Maxwell Road, to be operational by the end of 2008. We aim to bring in prominent international arbitral institutions to this complex, to add to its synergy and buzz. In this regard, I believe SIArb can also play a role, being a key institution in our local arbitration scene. Co-locating in the complex will also help raise the Institute's profile, both locally and overseas.

In conclusion, I once again congratulate the Institute on its 25th Anniversary and commend its efforts promoting arbitration and providing training to strengthen arbitration in Singapore and the region. I am confident that with the dedication of the present and future Councils it will continue to grow from strength to strength. Thank you and have a wonderful evening."

The Assistance of the National Court in International Commercial Arbitrations – International Arbitration Act (Cap. 143A)

- By Mr Leslie Chew SC

Introduction

As arbitration becomes the principal means of resolving transnational commercial disputes the relevance and indeed the need to rely on national law appears questionable. It is now well-recognized that so far as parties to international commercial arbitrations are concerned, the less national law impinges on their dispute the happier they would be.

There are of course good reasons for this desire to avoid national law. In the first place, parties to an international commercial arbitration will invariably hail from different legal jurisdictions and frequently from very different legal systems (Civil Law vs Common Law jurisdictions). Secondly, the parties' choice of arbitration as the mode to resolve their disputes is itself premised on the belief that they should rely on a more neutral tribunal (as they perceive it) than a national court, which may reside in the jurisdiction of one of the parties. Thirdly and not unimportantly, by definition if reliance were to be placed on the national law of one of the parties, there will always be a perception of possible bias.

The question now arises whether there is any role for national law at all in international commercial arbitrations.

Any consideration of international commercial arbitration with its myriad possibilities and often complex legal nuances will quickly reveal that at some point national law becomes necessary. The most immediate and apparent consequence is when the time comes to enforce an award made by an international arbitral tribunal. However, a closer examination will also reveal that even during its life, an international commercial arbitration prior to issue of an award by the tribunal, the national courts do have a role to play. In some instances, as will be discussed below, this role will be crucial. Indeed, it would be impossible to have any meaningful international commercial arbitration divorced from national law.

The Relationship between International Commercial Arbitrations and National Law

While increasingly both parties and arbitrators alike prefer to operate in a kind of a special chamber as far as possible avoiding national law or national court rules, nevertheless, it is equally obvious that international commercial arbitrations cannot avoid entirely the incidence or influence of national law.

In the first place, clearly an arbitration cannot take place totally without reference to *terra firma* – the venue of the arbitration will in most cases have an influence if not a direct bearing upon the procedural and other administrative aspects of the arbitration, international though it may be.

Secondly, arbitrators do not have power over individuals or institutions that do not submit themselves to the jurisdiction of the tribunal. Thus while the parties to the arbitration themselves have consensually submitted to the jurisdiction of the arbitral tribunal, others unrelated to the parties have not. By contrast, everyone and every institution or organization is necessarily subject to some national law or other. This submission to the jurisdiction of a particular national law by an individual or organization is but an incidence of reality. A person living in a particular country whether he is a national or not will automatically be subject to the laws of that country simply by being present in its territory and consequently the national law of that country will apply to that person. The national court's jurisdiction arises *ipso facto* without the need for a "consensual submission" to the law of the land.

Thus, while international commercial arbitrations may exist and operate quite independently and almost entirely outside the purview of national law, national law tied to the venue of the arbitration will always be somewhere in the background.

Indeed, properly speaking national law provides the contextual framework in which all international commercial arbitrations take place. Unless there is law to permit international commercial arbitrations in a particular territory or jurisdiction in the first place, there is at least doubt as to whether such an arbitration would be sustainable.

International commercial arbitrations can only thrive if its awards – the outcome of the case between the parties – can be enforced. Enforcement of an arbitral award necessarily requires the enforcing party to go to some 'national body' within the territory in which the enforcing party desires to enforce the arbitral award. Since the arbitral tribunal issuing the award is not a national body, there is no immediate obligation for any territory to enforce or indeed recognize the arbitral award itself. It is not a judgment of any national territory's courts or tribunals. The immediate implication is that arbitral awards, certainly those made by international arbitral tribunals, require national law to recognize it and to enforce it.

Seen in the light of this discussion of national law, it becomes obvious that the assistance of national law available to international commercial arbitrations is at least helpful if not necessary. In some cases, it will prove crucial. To that end, it is intended in this paper to examine four areas in which the assistance of the national court in Singapore is at least important if not crucial.

The International Arbitration Act of Singapore

Singapore has a dual regime applying to arbitrations. It has both a law governing domestic arbitrations and another that specifically governs international commercial arbitrations. The law governing international commercial arbitrations is known as the International Arbitration Act (Cap. 143A) ("IAA").

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The IAA concerns itself only with international commercial arbitrations and does not apply to domestic arbitrations in Singapore. Domestic arbitrations with no international element are governed by another act, the Arbitration Act (Cap. 10). However, even domestic parties may consensually subject themselves to the provisions of the IAA.

For parties to an international commercial arbitration whose seat of arbitration is Singapore, however, the IAA is the legal framework.

Thus, section 5(1) of the IAA states,

> *"This Part 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".*

Section 5(2) of the IAA goes on to define when an arbitration is an international one.

(See section 5(2) of the IAA. See also the commentary on this section in *"Singapore Arbitration Handbook"*, Leslie K H Chew, LexisNexis Butterworths, (2003) at pp. 94 – 96 and the cases referred to).

The structure and form of the IAA is based on the Model Law of the United Nations Commission on International Trade Law (UNCITRAL). The provisions in the IAA are cast in terms that adhere to the principles and approach of the UNCITRAL Model Law.

Enforcement of an International Commercial Arbitration Agreement – Power to stay Court Proceedings

The starting point of any reference to the arbitration of a commercial dispute is the arbitration agreement itself.

Unless parties have either prior to or subsequently upon the occurrence of a dispute, subscribed to an arbitration agreement, there will not be a legal basis for an arbitration to settle the dispute between the parties.

The application or influence of national law on the arbitration agreement between the parties in an international commercial dispute then becomes, very crucial. The impact of national law will obviously determine whether and how such an agreement may be carried out. As previously stated, although an arbitration may be international it nevertheless, takes place in a venue that has its own national law. This national law must, simply by reason of the fact that it is the law of the land or territory where the arbitral seat is, have effect or influence upon the arbitration itself.

The first and most important issue that arises in the context of national law is whether or not an arbitration agreement will be recognized and enforced by a national court to the detriment of its own supervisory powers over the resolution of disputes that is taking place within its legal jurisdiction.

The incidence of the impact of national law on an arbitration agreement is clearly seen when the seat of the international commercial arbitration is in the national territory of one of the parties. Let us consider an international commercial arbitration having its arbitral seat in Singapore. Assume further that the parties to the dispute and to the international commercial arbitration are a Singapore company and a US company.

In such a case there are good reasons for the Singapore company to try to stay the arbitration proceedings and move the dispute to the national courts of Singapore for resolution.

The advantages to the Singapore company to have its dispute with the US company resolved by the national courts of Singapore are several:

- From the point of view of costs, it is quite apparent that there will be saving of costs if the dispute were to be adjudicated by a national court – these are state resources which are made available at subsidized cost as a public service. By comparison a three-man tribunal presiding over a complex commercial arbitration, as an international commercial arbitration is likely to be, is often expensive simply by nature of its scale.

- The familiarity of local advisors to national laws and procedures, provide the Singapore party a significant advantage over the US company.

- The psychological advantage, whether perceived or real to the Singapore company is quite significant. In international sports, for example, home ground advantage is never underestimated.

The above-mentioned are some of the reasons why a Singapore company in our example would want to try to stay arbitral proceedings in favour of a court action even though it may have previously agreed to arbitration.

Clearly, then the most immediate impact of national law on an international commercial arbitration is whether the national law governing such arbitrations supports or negates international commercial arbitration agreements.

In our Singapore example, if the US company refers a dispute between the parties to arbitration under an arbitration agreement, the Singapore company could arguably take pre-emptive action by instituting court action in a Singapore court ignoring the reference to arbitration. If that happens, the US company will then have to consider what it does with the dispute.

Two immediate concerns arise for the US company. Firstly it would loathe having to go to a national court – a process it obviously tried to avoid by subscribing to an arbitration agreement in the first place. Secondly, even if necessary, the US company will have to consider the implications of submitting to the jurisdiction of a Singapore court. These are crucial questions to a commercial entity involved in a dispute.

Happily for the US company, Singapore's IAA is well able to assist and deal with the situation. Section 6 of the IAA clearly provides the US company the ability to apply to the court in Singapore to stay the proceedings in favour of the arbitration.

More importantly, the IAA obliges the court in such an application by the US company, to stay the court proceedings in favour of the

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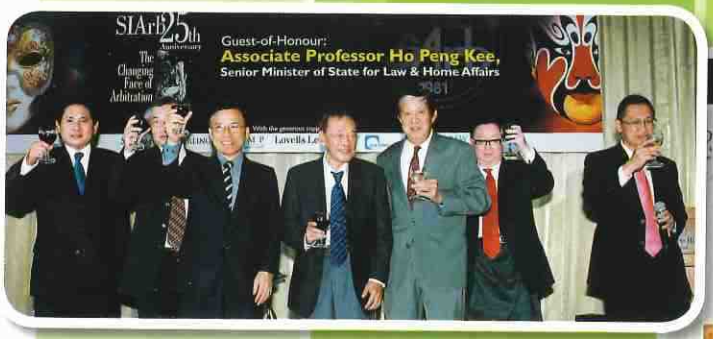

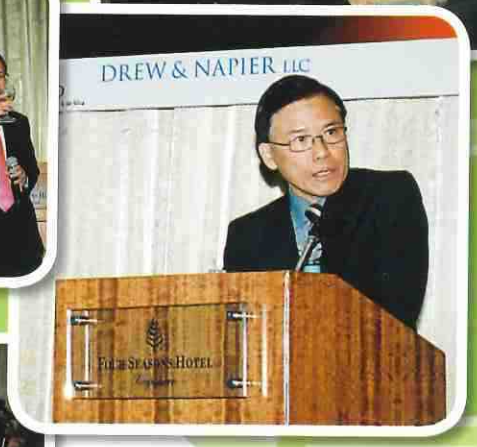

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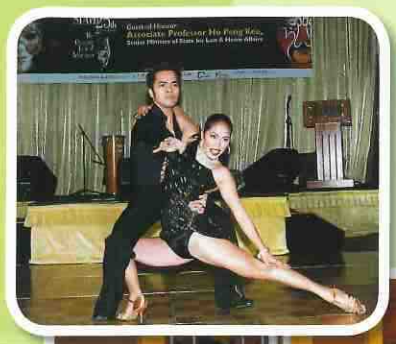

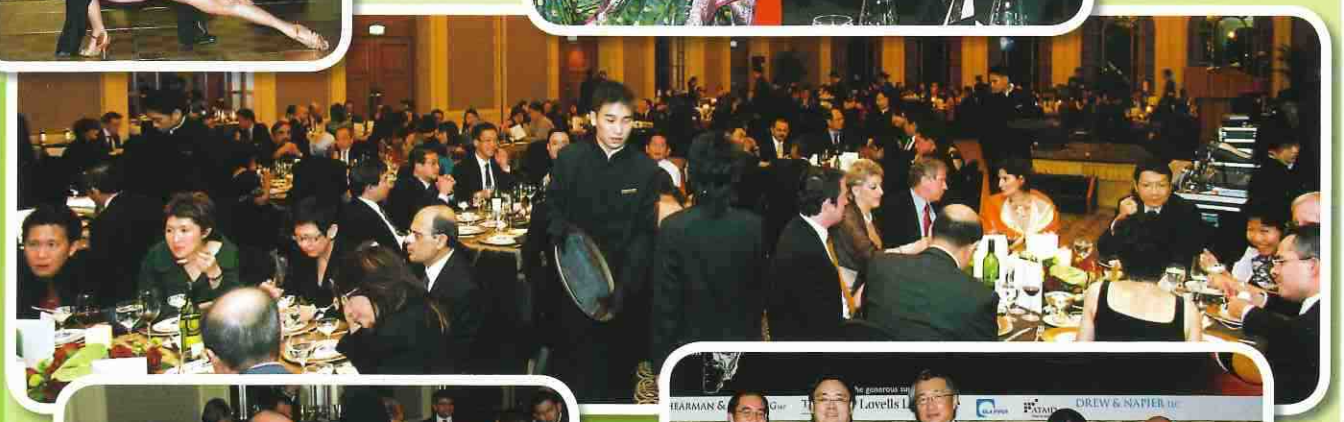

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arbitration. In other words, the stay is a mandatory one subject to a specific proviso in the Act itself - see Section 6(2) of the IAA.

As has been mentioned in an application for a stay of the legal proceedings before a court in Singapore by the US company, the court is mandatorily required to stay the proceedings in favour of the arbitration "...unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed". In *Mitsui Engineering & Shipbuilding Co Ltd v PSA Corp & Anor* [2003] 1 SLR 446, 448 it was conceded by the appellants that section 6(2) was to be interpreted as requiring a mandatory stay. Though, it was not argued otherwise, the Court accepted that a stay was mandatory. The same judge, Justice Woo Bih Li, expressly referred to this mandatory stay in the case of *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR 646. Indeed, this stay is mandatory even where as in that case there is a doubt as to whether or not there was a dispute.

A reading of section 6(2) of the IAA in particular the phrase set out above will immediately raise the spectre of a loophole to get away from the mandatory stay. Put simply, the question arises as to when the Singapore court will deem an arbitration agreement "null and void, inoperative or incapable of being performed"?

In Singapore however there is good reason to be assured that the ambit of this limiting condition, "null and void, inoperative or not capable of being performed" in section 6(2) will be a narrow one – see generally the discussion on section 6 of the IAA in *"Singapore Arbitration Handbook"*, Leslie K H Chew, LexisNexis, (2003) at pp. 96 – 98. More importantly, the Singapore High Court has ruled that a breach of an agreement containing the arbitration clause and its termination, will not render the arbitration clause "inoperative" – *Mancon (BVI) Investment Holding Co. Ltd. v Heng Holdings SEA (Pte) Ltd*, [2000] 3 SLR 220 at paragraphs 28-30.

Of importance also is the Hong Kong case of *Lucky-Goldstar (HK) Limited v Ng Mook Kee Engineering* [1993] 2 HKLR 73. From the case, it is evident that a clear intention to arbitrate is sufficient to stave off an attempt to stay the arbitration proceedings. Even where the arbitration clause refers to non-existent rules of arbitration or fails to specify the arbitral situs, this will not prevent the mandatory stay. The equivalent provision in the Hong Kong Ordinance is section 6 (cross-referencing to Article 8 of the Model Law), which is in *pari materia* Singapore's section 6 of the IAA.

Perhaps of greater assurance to the US company and to others is the fact that both Singapore and Hong Kong are territories that hold themselves out as hubs for international commercial arbitrations. A Singapore court considering an application by the US company to stay the proceedings in favour of the arbitration must itself be mindful of its approach and attitude to the enforcement of international commercial arbitration agreements. As this writer has observed, Singapore must out of necessity come out in support of international arbitration in view of its aspiration to be an international hub for commercial arbitration - see the comments made by Justice Judith Prakash in the Singapore case of *Re An Arbitration between Hainan Import & Export Corp and Donald & McCarthy Pte Ltd* [1996] 1 SLR 34, in respect of Singapore's position on international commercial arbitrations.

In summary, it is submitted that the effect of Section 6(2) of the IAA and the only correct approach of the Singapore court in our hypothetical case would be to grant the US company a mandatory stay of court action in favour of its reference to international arbitration.

Compelling the Attendance of Witnesses

In any arbitration hearing, it is always possible that a witness may be reluctant to appear before the arbitral tribunal or that a party other than the parties to the arbitration itself may decline to produce documents necessary to the arbitration.

Here it is quite clear that while the arbitral tribunal has the power to order a witness to be produced or a party to produce documents, it has little if any power to compel a non-party to appear before the arbitral tribunal or to compel his production of documents. That is the natural consequence of a consensual process as opposed to the overarching powers of the national court over any individual or party.

It is therefore in such instances that the national court, if it is properly invested with the necessary powers can assist the arbitral process. In the case of Singapore, the IAA contains express provisions fulfilling this purpose.

Sections 13 and 14 of the IAA empower both the High Court as well as the lower Courts (the Subordinate Courts) with the power to order a witness to appear before an arbitration tribunal and to compel the production of documents.

The process of compelling the attendance of a witness or production of documents is at the instance of a party to the arbitration. Accordingly, the party, which seeks to invoke the assistance of the national court in these matters, must apply to that court.

As has been pointed out, the ability or power to summon witnesses both to attend and to produce documents before an arbitral tribunal is a necessary adjunct to the whole process of the arbitration itself – see *"Singapore Arbitration Handbook"*, Leslie K H Chew, LexixNexis Butterworths, (2003) p. 106.

Here too it can be seen that the IAA of Singapore can be of great assistance to the international arbitral process.

Enforcement of Orders and Directions

In the course of an arbitration the arbitral tribunal may be called upon and may make various orders and directions requiring the parties or a party to undertake certain obligations or to carry out certain directions as ordered by it.

It is easy to see that the sanctity of such orders and directions and the integrity of the arbitral process itself will come under attack if there are no supportive powers to see to its compliance by relevant parties. Thus, legislative support in the form of national law can be crucial for the effectiveness or otherwise of such orders and directions. The legislative support in national law must be seen particularly in the context of the powers of the arbitral tribunal itself for the powers of an arbitral tribunal is meaningless if they are not enforced or capable of meaningful

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enforcement. Enforcement would mean the enforcement through national courts.

Returning to our earlier example of the Singapore and US companies, suppose in the dispute an interlocutory application is made for an order to preserve certain properties to prevent any subsequent arbitral award from being nugatory. One can see in the case of perishable goods for example, how critical this power could be. As an example, assume that in our hypothetical case, the subject matter of the dispute are goods which were transported in reefer containers and pending the arbitration, these goods need to be stored in properly refrigerated warehouses or some other storage facility. Assume further that in our hypothetical case, the arbitral tribunal has on application granted an order in favour of the US company, directing the Singapore company to take steps to preserve certain perishable goods in its custody in Singapore.

Clearly, if the Singapore company fails to comply with the order or direction of the arbitral tribunal, the tribunal or the US company must do something. The arbitral tribunal having made its order is in a difficult position. Apart from making some further interim order such as a stay of the arbitration pending the Singapore company's compliance with its order for preservation of property, there is, it is submitted little it can do. This power to stay the arbitral proceedings may or may not be available as an express power. Does the arbitral tribunal have the power to stay arbitral proceedings pending the Singapore company's compliance of its orders? In Singapore the IAA is silent.

Happily, under the IAA, section 12 provides the arbitral tribunal with the power to order interim preservation of property as well as the means to enforce such orders – see section 12(6) which provides that the orders and directions of an arbitral tribunal are enforceable with the leave of the court as if they were orders made by the court.

By providing a means by which parties may apply to court to enforce directions made by an arbitral tribunal the IAA makes it more likely that such orders or directions will be complied with. This is both sensible and more effective. By the leave of the High Court in Singapore property forming the subject matter of the arbitration within the borders of Singapore can be protected thereby facilitating and preserving the integrity of the arbitral process.

Enforcement of Awards

Arbitral awards are the outcome of the dispute resolution process to which the parties have subscribed namely international commercial arbitration. These awards being non-court awards must be recognized for enforcement otherwise there would be no point to arbitration at all.

The *raison d'etre* of all arbitration therefore is the issuance of an enforceable arbitral award. Thus whether and how an arbitral award is enforceable under the national law of a territory is being sought is very important.

In the case of the IAA, an arbitral award made in Singapore is by section 19 enforceable with the leave of the High Court or a judge thereof as if it were an order of the Court.

Arguably, of greater importance is the enforcement of an arbitral award issued by an international commercial arbitral tribunal outside Singapore i.e. an arbitral award that is not a Singapore award.

In international commercial arbitrations the ultimate aim of a party to the process is to obtain an arbitral award in its favour that it can enforce against the other party in some territory where that other party has assets. It is therefore critical that the territory where enforcement of a foreign arbitral award is sought possesses laws that enable such enforcement. The enforcement process involves two stages. The first stage requires a foreign award to be recognized before it can be enforced. The second stage involves the enforcement of the arbitral award itself and the grounds which would prevent it from being enforced if there be any such grounds.

Under the IAA, foreign arbitral awards are recognized for enforcement by virtue of section 29 thereof.

Section 29 in fact recognizes and treats foreign arbitral awards for enforcement purposes in the same way as local arbitral awards in Singapore under section 19 of the IAA. Alternatively, it may be enforced by an action on the award in court. For the procedure under the Rules of Court in Singapore, see generally Order 69A. See also the commentary at p.124 of the Singapore Arbitration Handbook, Leslie K H Chew, LexisNexis Butterworths (2003). Section 30 of the IAA sets out the formalities required in applying for leave in the High Court in Singapore to enforce a foreign arbitral award.

The IAA of course includes provisions, which set out the circumstances under which a foreign arbitral award may be refused enforcement. These events that justify the Court in Singapore refusing enforcement are extremely important as a party in whose favour an arbitral award has been made must know how it may be attacked at the enforcement stage.

Since the structure and form of Singapore's arbitration legislation – the IAA – is based on the UNCITRAL Model Law, it is not surprising that the grounds founding the bases to refuse enforcement of an arbitral award are those of the Model Law.

Section 31 of the IAA therefore sets out in almost identical terms the same provisions set out in Article 36 of the Model Law.

The grounds set out in Section 31 of the IAA are quite self-evident and uncontroversial as they may be said to generally reflect the notions of justice and fairplay.

Perhaps of concern to foreign parties seeking to enforce a foreign arbitral award in Singapore, as in any territory having the UNCITRAL regime is the additional grounds permitting a Court in Singapore to refuse the enforcement of the foreign arbitral award. These are to be found in section 31(4)(a) and (b) of the IAA:

> *"In any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court may refuse to enforce the award if it finds that –*
>
> *(a) the subject-matter of the difference between the parties to the award is not capable of settlement by arbitration under the law of Singapore; or*

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(b) enforcement of the award would be contrary to the public policy of Singapore.

Of the two additional grounds referred to above, again sub-section (4)(a) is less controversial and generally capable of simple application. All nations will reserve to themselves matters within the law which should logically only be dealt with by national courts. Some examples of matters, which are generally considered to be not arbitrable, would include matters pertaining to Succession law, land law and family law.

The more important and perhaps crucial of the two additional grounds so far as foreign arbitral awards are concerned would be the ground which would permit a Court in Singapore for example, refusing enforcement on the ground of public policy. The scope for refusing enforcement on this ground can be of concern to foreign parties who seek to enforce an arbitral award in Singapore.

Public policy, as a ground allowing a national court to refuse enforcement of an arbitral award is in itself not controversial and quite necessary having regard to differences in both cultural and socio-economic circumstances existing in different countries. It is only right that when it comes to enforcement of a foreign arbitral award that local conditions and policies are considered. The concern however, is the ambit of such a ground and the manner in which a country should apply it.

For a while, there was only one case dealing (and even then dealt peripherally only) with the issue of "public policy". In the one case a party sought to ask the High Court in Singapore to refuse enforcement of an arbitral award made in China on the ground that it would be contrary to the public policy of Singapore. In *Re Hainan Import and Export Machinery Corp v Donald & McCarthy Pte Ltd* [1996] 1 SLR 34, the Plaintiffs had obtained an arbitral award in China in their favour and had sought to enforce it in Singapore. Upon obtaining leave to enforce the Plaintiffs served the orders of court on the Defendants in Singapore. The Defendants responded by asking the Court to, among other things, refuse enforcement of the award on the ground that the arbitration had not decided the real issue between the parties and that to enforce the Chinese award in those circumstances would be contrary to the public policy of Singapore. The High Court in Singapore rightly held that the objection to the enforcement was not valid or sustainable. Justice Prakash in the case, said that "There was no allegation of illegality or fraud and enforcement would therefore not be injurious to public good ...the principle of comity of nations requires that the award of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist." (See p.46 B – C of case).

It would appear from this case, therefore that the notions of public policy capable to found a ground to refuse enforcement of a foreign arbitral award in Singapore must entail "exceptional circumstances" which would involve "illegality or fraud" both of which are well-known and universal notions that offend public morality.

Indeed, it is quite clear that the general understanding of arbitration practitioners in Singapore is that the "public policy" within the meaning of section 31(4)(b) of IAA ought to be interpreted in a narrow way. Thus, it has been said that,

> *"However, the term "public policy", when used in the context of determining if an act or omission constitutes a violation of public policy, is to be construed narrowly, such as an act which offends the "most basic notions of morality and justice"*
>
> – *Singapore Academy of Law Annual Review of Singapore Cases 2005 at p. 61.*

In two recent decisions Justice Prakash of the Singapore High Court re-affirmed the "narrow interpretation" of the public policy ground for refusing enforcement of an arbitral award under section 31(4)(b) of the IAA that she first addressed in *Re An Arbitration Between Hainan Machinery Import and Export Corporation and Donald & McCarthy Pte Ltd* [1996] 1 SLR 34, [95]. The cases are in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] 1SLR 196 at [29] and *Aloe Vera of American Inc. v Asianic Food (S) Pte Ltd* [2006] 3 SLR 174.

It is submitted that it is quite safe to expect that a court in Singapore when considering and applying section 31(4)(b) of the IAA will take a narrow view of public policy so that the refusal to enforce a foreign arbitral award will not be so easily invoked. There are good reasons to take this view. Firstly, Singapore's self avowed intention to set itself up as a hub for international commercial arbitrations would necessarily favour recognition rather than the refusal to recognize foreign arbitral awards for enforcement in Singapore. Secondly, On the theory of reciprocity, Singapore is unlikely to want to allow other nations the opportunity on a reciprocal basis to deny enforcement of its arbitral awards under the New York Convention regime.

Concluding Remarks

While it is true that international commercial arbitrations operate under the aegis of a regime different from that of disputes governed by national law and under the purview of national courts, nevertheless, commercial arbitrations do not operate in a vacuum but must have as its context geographical territory. This in turn leads to the inevitable interplay of the arbitral process and the national law which is applicable at the seat of arbitration as well as where the arbitral award is ultimately to be enforced.

In the context of this paper, it is hoped that what has been demonstrated is the fact that national courts and domestic law can, not only assist in the process of international commercial arbitrations but also are often indispensable. Thus, where the integrity of the arbitration process needs to be preserved, a national court where adequate legislation exists, can stay legal actions instituted in the national court in violation of the arbitration agreement. Other supportive measures, which a national court can provide, include the compelling of witnesses to give evidence before an international arbitration within its jurisdiction as well as directing a party to comply with arbitral orders and directions. Finally, effective arbitration laws in a state requires the machinery necessary for the recognition for enforcement of foreign arbitral awards to be effectively set up.

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25TH ANNIVERSARY GALA DINNER
24 NOVEMBER 2006

The 25th Anniversary Gala Dinner was a wonderful gathering of pioneers, leaders and members of the Singapore Institute of Arbitrators, as well as honoured guests and friends of the Institute in Singapore and the region.

The Institute started 25 years ago with 25 founding members and it was indeed an auspicious synchronicity that we happened to have 25 tables at this well supported event.

The event was graced by our Guest-of-Honour, Associate Professor Ho Peng Kee, Senior Minister of State for Law and Home Affairs, Justices Judith Prakash and V.K. Rajah, as well as visiting heads and representative of arbitration institutes in Malaysia, Indonesia, Brunei, Western Australia and the United Kingdom.

Also present were former council members, including five former Presidents of the Institute (including Kenneth Gin, Albert Myint-Soe, Raymond Kuah, Leslie Chew SC and Richard Tan) who, as part of the evening's celebrations, joined President Raymond Chan in a celebratory toast to the Institute.

Associate Professor Ho congratulated the Institute and acknowledged the part it played in the development and progress of arbitration in Singapore and the region. [The full text of his speech is at page 3 of this Newsletter]. In his message, amongst other things, the President paid tribute to the forefathers of the Institute and thanked members for their support and participation in the Institute's activities and training programmes. The President also welcomed the new Members, new Fellows and members of the newly formed Panel of Arbitrators of the Institute.

Guests were treated not only to an exquisite 5-course continental dinner, but also to a video history of the Institute, as well as dances from the East and the West and musical performances featuring both eastern and western influences – all as part of the evening's theme of "East-meets-West" in the "Changing Face of Arbitration". As part of the evening's proceedings, our charming and articulate Master-of-Ceremonies, Mr Chia Chor Leong, conducted an inter-table Arbitration Quiz, which was ultimately won by the table from M/s Allen & Gledhill, after a tie-breaker. All in all, it was a colourful and happy evening of warmth, fellowship and fun for the arbitration community in Singapore.

INTERNATIONAL ENTRY COURSE (IEC)

The International Entry Course (IEC), a course jointly organized by the Singapore Institute of Arbitrators and the Chartered Institute of Arbitrators, was conducted on 30th September, 1st October and 7th October 2006 at the Regent Hotel, Singapore. The Course consisted of 2 days of lectures and tutorials, including video clips of a preliminary meeting and a hearing, and a 3-hour written examination thereafter.

The Course Directors, Adj Assoc Prof Richard Tan and Mr Philip Yang, together with Mr Raymond Chan, Dr Philip Chan, Adj Assoc Prof Neale Gregson, Mr Michael Hwang, SC, Mr Leslie Chew, SC and Ms Teresa Cheng, SC, were tutors to 32 candidates who signed up for the course. The course attracted candidates from Singapore and overseas. It was encouraging that many of the candidates were from a variety of different backgrounds and included accountants, engineers, architects, real estate professionals, IT professionals, maritime professionals as well as, of course, lawyers. The interest shown in the course was testimony to the increasing awareness and interest in arbitration in Singapore, which aims to be a world-class arbitration hub.

The course was intensive as usual, covering subjects like arbitration agreements, appointment of arbitrators, powers and jurisdiction of arbitrators, preliminary meetings, interlocutory applications, costs, interest and awards, within a relatively short time. Both domestic and international arbitration were also covered. Students found the course stimulating and in addition to covering the essentials of arbitration practice and procedure, the course also provided a useful platform for the exchange of information on current trends in international arbitration. It was also a good opportunity for interaction and networking amongst candidates across different disciplines.

The hard work will pay off as successful candidates will qualify for admission as a Member of the Singapore Institute of Arbitrators and Associate Member of the UK Chartered Institute of Arbitrators, subject to certain other relevant criteria being satisfied. The results will be announced in the next edition of the newsletter.

A big "THANK YOU" to all those who contributed to the success of the event!

PUBLISHER

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B1-11 UIC Building 5 Shenton Way Singapore 068808.
Tel : 6323 1276 Fax : 6323 1477

Printed by Ngai Heng Book Binder Pte Ltd.

The SIArb Newsletter is a quarterly publication of the Singapore Institute of Arbitrators. Distribution is restricted to members and those organisations and institutions of higher learning associated with the Institute.