SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
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VIEWPOINT

PRESIDENT'S MESSAGE

At the 24th Annual General Meeting of the Institute on 15 July 2005 held at the Hilton Hotel, I am honoured to be re-appointed as the President of the Institute for a second term. I wish to thank the members who presented themselves for election at the Annual General Meeting.

I am pleased to announce the new Council Members for the year 2005/2006 as follows:

Mr Raymond Chan	President
Mr Goh Phai Cheng, SC	Vice President
Mr Johnny Tan Cheng Hye	Honorary Secretary
Mr Yang Yung Chong	Honorary Treasurer
Mr Richard Tan	Immediate Past President
Mr Govindarajalu Asokan	Council Member
Dr Philip Chan	Council Member
Capt Lee Fook Choon	Council Member
Mr Michael Hwang, SC	Council Member
Mdm Meef Moh	Council Member
Dr Lock Kai Sang	Council Member

I am especially pleased to welcome Mr Michael Hwang, SC and Dr Lock Kai Sang as new Council Members. Mr Michael Hwang, SC is an active and prominent member of the local and international arbitration circles and needs no introduction. Dr Lock Kai Sang was the former President of the Institution of Engineers Singapore and had recently qualified as a Fellow of our Institute. He brings with him much experience as a professional engineer and has been appointed to chair the Institute's Activities Committee. We also welcome back our former Honorary Secretary, Mr YC Yang as the newly elected Honorary Treasurer of the Institute.

Together with the new Council, I would like to take this opportunity to thank the outgoing Council Members and in particular to our former Honorary Treasurer, Mr Basil Vareldzis for their services and contributions to the Institute.

Workplan 2005/2006

The current Locally Based Enterprise Advancement Programme (LEAP) will be soon be ending. Moving forward, the Institute will continue to build and expand on the momentum achieved in the past two years.

I would like to share some of the highlights in the Workplan for this Council year. Over the past two years, our membership has been growing steadily with a significant increase of new Fellows. The Institute will be constituting a Panel of Arbitrators comprising of mainly Fellows of the Institute. I hope that members appointed to this Panel will also share their experience by becoming pupil masters to the less experienced members in the spirit of continuing education and fellowship among members.

As part of our continuing efforts to establish new links and ties with our overseas counterparts, we are exploring establishing overseas chapters as an avenue to expand the Institute's international presence.

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Insurance Arbitration Group

The new Council has approved an arbitration committee for insurance to address the growing interest in arbitration in the insurance market. The new Committee is chaired by Mr Govindarajalu Asokan. For members keen to serve on the various Committees, I invite you to register your interest with the respective Chairpersons of the Committees so that they may contact you to join as a member of their Committees. (A list of the Committees can be found on our website: www.siarb.org.sg)

Asian International Arbitration Journal (AIA Journal)

I am delighted to announce that the inaugural issue of the AIA Journal is out. The AIA Journal is a joint effort between the Institute and the Singapore International Arbitration Centre together with the publisher Kluwer Law International. This bi-yearly international journal will have a high quality collection of scholarly articles, notes on arbitral awards, new legislation and book reviews with a special focus on Asia. In view of the rising numbers of arbitration cases from the arbitration centers in the region, this journal promises to deliver to its readers greater insight and a deeper understanding on the arbitral practices in Asia.

Recent Courses - International Entry Course and Pupilage Course

The Institute conducted another International Entry Course jointly with the Chartered Institute of Arbitrators in August at the Hilton Hotel. The Course attracted 60 candidates from diverse backgrounds. The Co-Course Directors were Mr Richard Tan and Mr Philip Yang with the other lecturers comprising of Associate Professor Lawrence Boo, Mr Michael Hwang SC, Mr Robin Peard and myself.

Mr Philip Yang also conducted the one-day Pupilage Course - Documents Only Arbitration during his recent trip here in August. We are indeed grateful to all the tutors especially Mr Philip Yang and Mr Robin Peard for their commitment and support of the Institute's courses.

Graduate Certificate in International Arbitration

Some 27 candidates successfully completed the 2nd intake of the Graduate Certificate of International Arbitration conducted by the Faculty of Law of the National University of Singapore. This particular 5-month intensive programme for advanced training in arbitration is highly rated for its content and syllabus. It is also widely noted for its stringent admission criteria, as there are usually an overwhelming number of applications.

Under a MOU signed between the Chartered Institute of Arbitrators, the National University of Singapore and the Institute, successful candidates subject to the provisions of the Constitution are eligible to join the Institute as Fellows. I would like to congratulate the following successful candidates and invite them to join the Institute as Fellows:

C.B Chidambara Raj, Chan Chee Yin Andrew, Chan Ket Teck, Michael Chia Hock Chye, Dang Hop Xuan, Dhingra Jag Mohan, Issac Tito Shane, Kailash Chandra Gupta, Khoo Sze Boon, James Leow Ban Hua, Lim Han Cheong, Gloria Lim May Ern, Michael Moey Chin Woon, Mun Hon Pheng. Muralidharan Pillai, Poh Leong Sim, Rabi Ahmad, Rai Mahendra Prasad, Selvaraj Muthusamy, Johnny Tan Cheng Hye, Luke Tan Loke Yong, Tay Sun Kuie, Iris Teng Sor Hoong, Townrow Ian Hugh Alan, Tyebally Abedeen Abdulkader, Yvonne Yee Fong Kong, Yogarajah Indrayogan. (names are not in any particular order)

I look forward to your strong support in the activities and events of the Institute in the coming year.

Yours sincerely

Raymond Chan
President, SIArb

Farewell to the Institute's Executive Director - Teresa Ee

The Institute bids a fond farewell to its Executive Director, Teresa Ee. Teresa will be leaving the Institute on 31 October 2005 after more than one and a half years of dedicated service. Teresa joined the Institute as its Executive Director on 19 January 2004. An architect by training with a second degree in law, and a postgraduate degree in construction law and arbitration from King's College London, Teresa is a familiar face to many of our members at our various talks and seminars. Assisted by Jenny, Teresa has quietly but efficiently taken care all the administrative functions of the Institute. Teresa leaves us with these words, "I count my blessing to meet many of you in the course of my work. My most rewarding moments come from seeing your active interest and participation in the Institute's events as a growing community." We will miss Teresa's presence and contributions. Teresa plans to take a short break before continuing to pursue her interest in arbitration. We wish her all the best in her career and hope that she will continue to support the Institute, as a Fellow of the Institute.

ARBITRATION LAW AND LEGISLATION IN SINGAPORE

– *Impact on the Grain and Feed Trade Association (GAFTA) Forms and Rules*

By Govindarajalu Asokan, Partner, Rodyk & Davidson

INTRODUCTION

(A) ARBITRATION

(i) Definition And Features

1. Arbitration is often defined as a process by which 2 or more persons submit a dispute or difference to one or more impartial persons (the arbitral tribunal) for a binding decision (the arbitration award) instead of a competent court of jurisdiction.

2. Four essential features usually govern an arbitration, including an international commercial arbitration:

   (a) Arbitration agreement

   (b) Choice of arbitrators

   (c) Arbitration award

   (d) Enforcement of the award

(ii) Arbitration Agreement

3. Confining to paragraph 2(a) above, it should be noted that the arbitration agreement may be contained in the main contract as the "arbitration clause", alternatively, it may appear as "submission to arbitrate". An arbitration agreement is one that normally requires the parties to submit any dispute or difference to arbitration.

4. Unless there is an agreement to arbitrate, there can be no valid arbitration. It is often required to be in writing as otherwise the subsequent enforceability of the arbitration award may be challenged on the basis that there was no arbitration agreement in the first place. It should be noted that, by the arbitration agreement, the parties relinquish their right to resort to their own courts of law - a fundamental right of citizens of all civilised countries. Accordingly, written evidence of the arbitration agreement must exist for the purpose of practicality.

5. Examples of written arbitration agreements can be found in the several Contracts of the Grain And Feed Trade Association (GAFTA):

S/N	CONTRACT NO	TYPE	ARBITRATION AGREEMENT IN CLAUSE
(1)	1	General Feedingstuffs	26
(2)	21	Intra-Asia Feedingstuffs	26
(3)	1	GAFTA CHARTER PARTY TERMS	26

6. The arbitration agreement in the "GAFTA CHARTER PARTY TERMS - Parts 1, 2, 3", in serial no. 3 above provides that:

   (a) The Charter Party be construed in accordance with the Laws of England.

   (b) The applicable addition of the Arbitration Rules Form 127 of the GAFTA shall form part of the Charter Party;

   (c) The parties to the Charter Party are deemed to be cognisant of such Form 127 of the GAFTA;

   (d) Such Form 127 of the GAFTA shall be used for the conduct of the arbitration to which any dispute "arising out of or under this Charter Party or any bill of lading issued thereunder" shall be referred.

7. The arbitration agreement in each of the Contracts itemised above in paragraph 5 is, to some extent

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similar (although not identical), to that in the said Form 127 by providing in part (a) thereof, that:

(a) The applicable edition of the GAFTA Arbitration Rules, No. 125 shall form part of "this Contract".

(b) The parties thereto are deemed to be cognisant of such Rules, No. 125.

(c) Such Rules, No. 125 shall be used for the conduct of the arbitration to which any dispute "arising out of or under this contract" shall be referred.

8. Part (b) of the said arbitration agreement prohibits litigation in respect of any such dispute until dealt with by the said arbitration or, if applicable, by an appeal-board. The prohibition against litigation binds both parties or anyone claiming under either of them. It therefore follows that the said part (b) is in the nature of a "*Scott v Avery*" clause, which can be generally described as a provision in an arbitration agreement making an award a condition precedent to any litigation, subsequent to an arbitration.

(iii) Types of Arbitrations

9. An arbitration conducted independently of an arbitral institution like the Singapore International Arbitration Centre ("SIAC"), is called an ad-hoc arbitration. An ad-hoc arbitration is normally not governed by institutional rules. Arbitrations administered by arbitral institutions like the SIAC are called institutional or administered arbitrations. Arbitrations administered by specialised trade bodies also fall into this category.

(B) ARBITRATION RULES

10. The SIAC Rules 1997 is an example of administered or institutional rules just as is the SIAC Domestic Arbitration Rules. The UNCITRAL Rules of Arbitration (adopted by UNCITRAL in 1976) is an example of non-administered or non-institutional rules. Institutional rules include the GAFTA for commodity trade and contract of carriage disputes, notably GAFTA Forms 125 (commodity trade) and 127 (contract of carriage).

II LAW & LEGISLATION

(A) State Initiatives

(i) Singapore

(a) International Convention for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).

11. It was ratified on 14 October 1968 by Singapore although it was in force internationally since 14 October 1966. The ICSID establishes an International Centre for the Settlement of Disputes in Washington DC.

(b) United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention 1958)

12. The New York Convention 1958 was concluded on 10 June 1958 at New York. Singapore became a party to the said convention on 21 August 1986 although it was *in force* internationally since 7 June 1959. The New York Convention requires the Singapore courts to recognise and enforce foreign arbitration agreements and foreign arbitration awards.

(c) Bilateral trade and Investment Agreements

13. Singapore has entered into bilateral trade and investment agreements with some countries including China and India. They do provide for disputes to be resolved by way of arbitration.

(d) United Nations Model Law on International Commercial Arbitration (Model Law)

14. The United Nations established the United Nations Commission on International Trade Law ("UNCITRAL") in 1966 for the harmonisation of international trade law. Its work includes the

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making of rules for the formation of contracts as well as for the international sale of goods. Its best contribution is the Model Law on International Commercial Arbitration, which it adopted on 21 June 1985.

15. The Model Law is the product of an intensive study into the several arbitrations laws applied everywhere in the world. It is a model intended to achieve greater worldwide uniformity of the laws governing international commercial arbitration.

16. According to the Model Law, the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Singapore adopted the Model Law when enacting the International Arbitration Act, Cap. 143A on 31 October 1994.

(ii) U.K.

17. Like Singapore, the U.K. is a party to the ICSID. It ratified the ICSID on 19 December 1966. Similarly, the U.K. is a party to the New York Convention 1958. It ratified the said convention on 24 September 1975. But, strictly speaking, England has not adopted the Model Law, although the English Arbitration Act 1996 reflects its format and provisions.

(B) Parliamentary Initiatives

(i) Arbitration Act (2002 Edn), Cap. 10

18. Enacted in October 2001 the Arbitration Act, Cap. 10 came into force on 17 October 2001. It resembles many of the provisions of the International Arbitration Act, Cap. 143A, which is based on the UNCITRAL Model Law, as aforesaid. However, under the new Arbitration Act, an arbitrator does not have the power to issue a mareva or other injunction, available to him under the International Arbitration Act, Cap. 143A. However, it allows a party to appeal to the High Court against an award, although in limited circumstances. Under the new Arbitration Act, Cap. 10, like the International Arbitration Act, Cap. 143A, an award may be set aside by the High Court on grounds of, for example, incapacity of a party to the arbitration agreement, invalidity of the arbitration agreement and lack of proper notice of the arbitration proceedings. In domestic arbitrations, where the parties had agreed to submit their dispute(s) to the SIAC, the SIAC Domestic Arbitration Rules will apply along with the new Arbitration Act, Cap. 10, of which the latest version is the 2002 edition.

19. By section 3 of the Arbitration Act (2002 Edn), Cap. 10A, the said Act only applies to an arbitration where the place of arbitration is Singapore and such arbitration is a domestic arbitration, not covered by Part II of the International Arbitration Act, Cap. 143A.

(ii) International Arbitration Act, Cap. 143A

20. The International Arbitration Act, Cap. 143A came into force on 27 January 1995 after having been enacted on 31 October 1994. It adopts the UNCITRAL Model Law, and appears as Scheduled 1 thereto. It only applies to an international arbitration - not a domestic arbitration that is governed by the new Arbitration Act (2002 Edn), Cap. 10. However, parties can freely agree to "opt-in" to the International Arbitration Act, Cap. 143A.

21. Section 5 in Part II of the International Arbitration Act, Cap. 143A states:

"(1) 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.

(2) Notwithstanding Article 1(3) of the Model Law, an arbitration is international if -

(a) 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

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(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) 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; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(3) For the purposes of subsection (2) -

(a) 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;

(b) 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.

(4) Notwithstanding any provision to the contrary in the Arbitration Act (Cap. 10), that Act shall not apply to any arbitration to which this Part applies."

22. Consider, for example, the case of a buyer, having his place of business in Singapore, who bought feedingstuffs in bags/bulk on CIF terms from a seller, having his place of business in India, for delivery in Singapore and had, as required, signed GAFTA No. 21, say on 1 April 2005, with a dispute or difference thereon having arisen between them thereafter. GAFTA Arbitration Rules, No. 125 will be triggered under the arbitration agreement in clause 26 of GAFTA No. 21 and the arbitration hearing (oral) can be held in Singapore under Rule 1:3 if so agreed by the parties:

"1:3 Any oral hearing fixed in an arbitration shall take place at the registered offices of The Grain and Feed Trade Association (GAFTA), London, or (but without prejudice to Rules 1:1 and 1:2 above), elsewhere if agreed by the parties in writing."

23. Assuming the parties so agree and the arbitration is indeed orally heard in Singapore, it does not follow that Part II of the International Arbitration Act, Cap. 143A is triggered, including sections 5 and 15 (see paragraph 44 below) thereof. For, the hearing in Singapore will be without prejudice to the said Rules 1:1 and 1:2, which provide as follows:

"1:1 The provisions of the Arbitration Act 1996, and of any statutory amendment, modification or re-enactment thereof for the time being in force, shall apply to every arbitration and/or appeal under these Rules save insofar as such provisions are expressly modified by, or are inconsistent with, these Rules.

1:2 The juridical seat of the arbitration shall be, and is hereby designated pursuant to section 4 of the Arbitration Act 1996 as, England."

24. From the aforequoted Rules 1:2 and 1:3 it will be readily noted that the place of arbitration is England; only the venue of the hearing is Singapore. It, thus, follows that the hearing held in Singapore was for the convenience of the parties. Accordingly, the decision of Singapore Court of Appeal in *PT Garuda Indonesia v Bingen Air* [2002] 1 SLR 393/399 becomes relevant:

"24. Thus the place of arbitration does not change merely because the tribunal holds its hearing at a different place or places. It only changes where the parties so agree. The significance of the place of arbitration lies in the fact that for legal reasons the arbitration is to be regarded as situated in that state or territory. It identifies a state or territory whose laws will govern the arbitral process. The following passage of Kerr LJ in *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116 ('the *Amazonica* case'), while it did

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not relate to the Model Law, is nevertheless germane (at p 120):

> [T]he English concept of 'seat of arbitration' is the same as 'place of arbitration' under the Model Law.

25. While the agreement to change the place of arbitration may be implied, it must be clear. This is in the interest of certainty. By choosing the 'place of arbitration' the parties would have also thereby decided on the law which is to govern the arbitration proceedings."

25. The Court of Appeal in paragraph 43 of the said decision also said as follows:

"Before we conclude, we should mention that counsel for the respondent submitted that the judge below had perhaps gone a little too far when he stated in his judgment (at ¶94) that:

> As the place of arbitration is not Singapore, neither art 34 of the Model Law nor, for that matter, Pt II of the Act, will apply.....

As counsel for the appellant had not submitted on this aspect and as this point did not really concern the case, and in the absence of full arguments from both counsel, we are not inclined to offer any views on it." ("Emphasis added").

26. The judgment (unreported: 11 September 2001) of the High Court goes too far. The Model Law has the force of law in Singapore by virtue of section 3(1) of the International Arbitration Act, Cap. 143A in Part II thereof:

> "Subject to this Act, the Model Law..... shall have the force of law".

27. Article 1(2) of the Model Law does state that its provisions apply only where the seat of arbitration is Singapore. To this extent the High Court is correct. But Articles 8 and 9, in particular, of the Model Law, are exempted from this restriction.

28. Article 8 of the Model Law provides for stay of court proceedings in favour of arbitration in circumstances, which have been modified by sections 6 and 7 of the International Arbitration Act, Cap. 143A. Article 9 states that a party can apply to court for an "interim measure of protection" and the court can grant such a measure. Stay of admiralty in *rem* proceedings in the High Court are, therefore, governed by sections 6 and 7 of the International Arbitration Act, Cap. 143A even where the seat of arbitration is not Singapore.

29. As for the Indian seller, in the above example, he can rely on Article 9 of the Model Law and apply to Court, particularly the High Court, for a mareva injunction, provided there are grounds therefore, restraining the Singapore buyer from dissipating his assets. The Court's jurisdiction for this pre-trial remedy is to be found in the Supreme Court of Judicature Act, Cap 322, First Schedule at item 5:

> "Power before or after any proceeings are commenced to provide for -
> (a) .....
> (b) .....
> (c) the preservation of assets for the satisfaction of any judgment which has been or may be made".

30. The dissatisfied Singapore buyer can then apply to the said Court to discharge the mareva injunction on the basis that the proceedings are subject to arbitration and not litigation. In such an event, the said court can stay the court proceedings under section 6 of the International Arbitration Act, Cap. 143A, discussed above, on condition that the mareva injunction shall remain in force pending the conversion of the arbitration award into a judgment of the said Court. The condition can be imposed by the said court under section 6(2) of the International Arbitration Act, Cap. 134A :

> "The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit,

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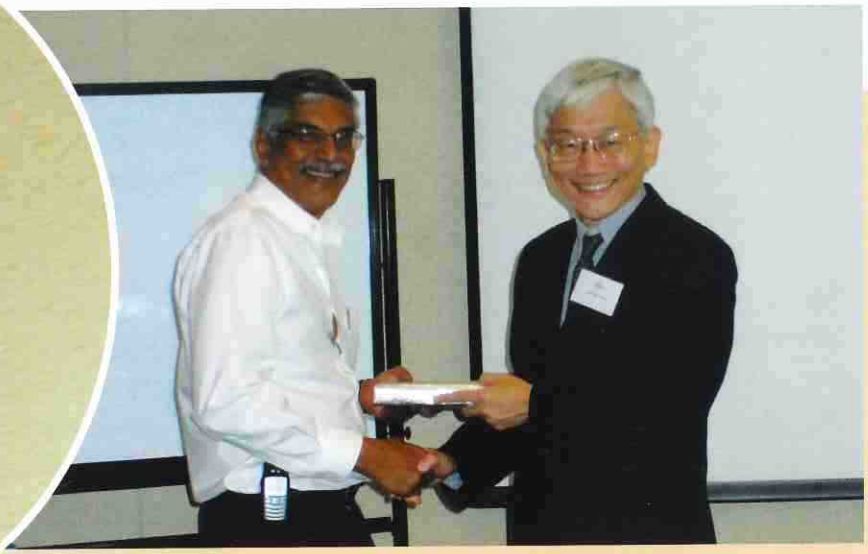
Pupillage Training: Documents Arbitration By Philip Yong 19 August 2005



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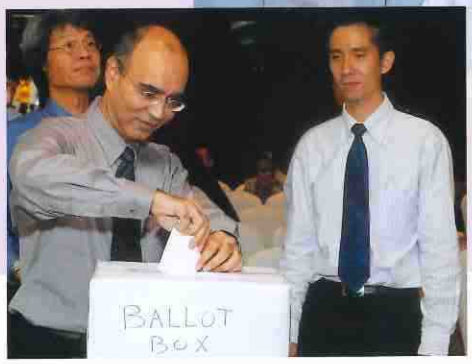

Arbitration in China
By Ang Yong Tong and Peter Chow
12 September 2005

:neral Meeting
2005

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staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed."

(iii) Arbitration (Foreign Awards) Act, Cap. 10A (repealed)

31. The Arbitration (Foreign Awards) Act, Cap. 10A dealt with the enforcement of foreign awards under the New York Convention 1958. It was repealed by the International Arbitration Act, Cap. 143A, which re-enacted the New York Convention 1958 as Schedule 2 and is dealt with further in Part III.

(iv) Reciprocal Enforcement of Commonwealth Judgments Act, Cap. 264 (RECJA)

32. The primary purpose of the RECJA is to facilitate the reciprocal enforcement of judgments and awards in Singapore and the United Kingdom. Under section 2(1) of the RECJA the word, "judgment" as used in the Act includes an enforceable award in proceedings on an arbitration.

33. Under the RECJA, the High Court has the power to enforce an award converted, by another recognised Commonwealth court, into a judgment or order.

(v) Reciprocal Enforcement of Foreign Judgments Act, Cap. 265 (REFJA)

34. The REFJA came into force on 26 March 1959 to make provision for:

(a) The enforcement in Singapore of judgments and awards given in foreign countries which offered reciprocal treatment to judgments given in Singapore;

(b) Facilitating the enforcement in foreign countries of judgments given in Singapore; and

(c) Matters connected therewith.

35. The REFJA, it should be noted, does not specifically include an arbitration award in the definition of "judgment". If such award were converted into a judgment in the jurisdiction with which Singapore has reciprocity, in this respect, presumably such judgment would be enforceable under the REFJA. However, the REFJA is hardly relevant, even today.

(vi) Arbitration (International Investment Disputes) Act, Cap. 11.

36. The ICSID was given statutory force by the Arbitration (International Investment Disputes) Act, Cap. 11. It came into force on 11 September 1968, about a month before the ICSID was ratified by Singapore on 14 October 1968. Section 7 specifically states that the Arbitration Act, Cap. 10 [the latest version whereof is the 2002 Edn.,] has no application. The exclusion of the International Arbitration Act, Cap. 143A, is not specified, at least as at to-date.

(vii) Evidence Act, Cap.97

37. It should be noted that, under section 2(1) of the Evidence Act, Parts I, II and III shall not apply to proceedings before an arbitrator, leaving only Part IV dealing with banker's books.

(viii) Limitation Act, Cap. 163

38. Section 3 of the Limitation Act, Cap. 163 provides, inter alia, that it shall not apply to any arbitration to which the Government is a party. Section 8A of the International Arbitration Act, Cap. 143 and section 11 of the Arbitration Act (2002 Edn), Cap. 11 provide that the Limitation Act, Cap. 163 shall apply to arbitration proceedings as it applies to litigation. The same provisions provide, in subsection (3) of each thereof, that a *Scott v Avery* clause shall be ignored for the purpose of ascertaining the date of accrual of a cause of action.

(viii) Rules of Court (ROC) made pursuant to the Supreme Court of Judicature Act, Cap. 322

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39. Order 67 of the ROC, referred to earlier, deals with the registration and other procedure for the reciprocal enforcement of judgments under the RECJA and REFJA.

40. Order 69 of the ROC largely deals with applications, appeals and enforcement of a domestic arbitration award, governed by the Arbitration Act, (2002 Edn), Cap. 10.

41. Order 69A of the ROC deals with matters concerning international arbitration in Singapore under the International Arbitration Act, Cap. 143A, including enforcement of a foreign award.

III ROLE OF ARBITRATION RULES

(A) GENERAL

42. It will be recalled that in institutional/administered arbitrations, rules of arbitration play a part, just as the UNCITRAL Rules do in non-institutional/ administered arbitrations.

(B) SINGAPORE

43. Such rules of arbitration cannot prevail over the mandatory provisions of the Arbitration Act (2002 Edn), Cap. 10 and International Arbitration Act, Cap. 143A. They are to exist in harmony with the applicable legislation. They must be applied by the arbitral tribunal if they are not at variance to the mandatory provisions of the applicable legislation. In other words they override non-mandatory provisions of the legislation like the Arbitration Act (2002 Edn), Cap. 10 and the International Arbitration Act, Cap. 143A. Examples of non-mandatory provisions are those containing words like "in the absence of agreement", "unless parties otherwise agree" and "subject to agreement to the contrary", found in the Arbitration Act (2002 Edn), Cap. 10 and the International Arbitration Act, Cap. 143A. Mandatory provisions are those sections in applicable legislation containing words like "notwithstanding anything to the contrary" and "notwithstanding any term in an arbitration agreement". Again, where there is an overlap between the rules of arbitration and the non-mandatory provisions of an applicable legislation, such rules are still applicable in the conduct of the arbitration. Likewise, where the applicable legislation is silent on a matter specifically covered by the rules of arbitration, the latter are, once again, applicable provided they are consistent with the mandatory provisions of the applicable statute. Section 15A in Part II of the International Arbitration Act, Cap 143A is consistent with the above.

44. Finally, it should be noted that under section 15 of the International Arbitration Act, Cap. 143A, Part II thereof or the Model Law itself cannot be excluded merely by a provision in an arbitration agreement in which the parties have agreed to any rules of arbitration.

(C) GAFTA

45. Looking at rule 1.1 of the GAFTA Arbitration Rules No. 125, once again, it will be seen, that it provides for such rules to override the provisions of the English Arbitration Act 1996 if such provisions are "expressly modified by, or are inconsistent with, these Rules", meaning GAFTA Arbitration Rules No. 125. However, such Rules cannot override the mandatory provisions of the English Arbitration Act 1996 as set out in Schedule 1 thereto.

IV CONCLUSION

46. The above is a broad overview of the law and legislation on arbitration in Singapore. An attempt has been made to deal with the role, if any, of Singapore arbitration law and legislation as regards GAFTA Forms 125 and 127. On a more important note, it remains to be seen how another Court of Appeal will react to the High Court judgment in *PT Garuda v Birgen Air* (unreported: 11September 2001) raised in paragraph 25 hereof.

Legal Developments Affecting Arbitration

by Dr Philip Chan Chuen Fye

In this issue, two cases are featured. Both cases were decided pursuant to the Arbitration Act 2001. The first case involved a stay of court proceeding application and the second case concerns an application to remove the arbitrator. What is interesting is that in deciding the first case, the Court of Appeal relied on cases, which interpreted the old Arbitration Act while we are told by the High Court in the second case that there is a new standard to be aware of in an application to remove an arbitrator. The second case should be of particular interest to those who act as arbitrators and users of arbitration including lawyers required to advise whether the arbitrator should be removed. It is recommended that the full case report be read in the light of the new and more demanding test required to be satisfied before the arbitrator is removed.

The first case - Stay of court proceeding application

Multiplex Constructions Pty Ltd v Sintal Enterprise Pte Ltd [2005] SGCA 10 [2005] 2 SLR 530 [Court of Appeal Chao Hick Tin JA and Judith Prakash J] - The Court of Appeal's decision allowed the appeal in part and set aside the decision below.

This case involved an application to stay the court proceeding under the Arbitration Act (Cap 10, 2002 Rev Ed) under section 6 which is reproduced below.

"Stay of legal proceedings

Section 6.

(1) Where any party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

(2) The court to which an application has been made in accordance with subsection (1) may, if the court is satisfied that -

(a) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and

(b) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration,

make an order, upon such terms as the court thinks fit, staying the proceedings so far as the proceedings relate to that matter."

The main point that has to be determined by the court is whether there is a dispute between the parties that should be stayed in favour of arbitration. The following relevant principles stated in the judgment are set out below. For the names of the cases from which the principles have been derived, please read the full case report.

- "It is well established that if the court finds that there is no dispute between the parties, then generally there will be no sufficient reason to stay court proceedings as there will be nothing to refer to arbitration." [see paragraph 5];
- "...if a claim is indisputable then a court has jurisdiction to hear the matter instead of referring it to arbitration..." [see paragraph 6];
- a court should use "a holistic and common sense approach towards determining the existence of a dispute..." [see paragraph 6];
- "...except in a very clear case, in a situation where there was an arbitration clause, full scale argument should not be permitted since the parties had agreed on their chosen tribunal and the defendant would be entitled, *prima facie*, to have the dispute decided by that tribunal in the first instance. This court concluded ...that it was the party resisting the stay of proceedings who had the burden of showing that the other party had no defence to the claim;" [see paragraph 6];
- "...if there appears to be a conflict between two provisions of a contract and such conflict cannot be settled without delving deeply into the contract, then the resolution of the question of construction that is raised by the conflict is a dispute which should go to arbitration." [see paragraph 19]

The second case - Application to remove the arbitrator

Yee Hong Pte Ltd v Powen Electrical Engineering Pte Ltd [2005] SGHC 114 [2005] 3 SLR 512 [Belinda Ang J]

This case involved an application to remove an arbitrator under the Arbitration Act (Cap 10, 2002 Rev Ed) under section 16(1)(b). It was noted by the learned judge at paragraph 4 that:

- "The Arbitration Act of 2001 which came into operation on 1 March 2002 provides for a set of new domestic laws which are in line with the UNCITRAL Model Law and at the same time it adopted some features of the UK Arbitration Act 1996 (c23)."
- "Previously, under the former legislation, an arbitrator may be removed for misconduct either of himself or of the proceedings or for delay in proceeding with the reference and

Continued on page 13

Continued from page 12

making the award. The new Act avoids the label "misconduct"..."

It was alleged by the applicant who was the respondent in the arbitration and the main contractor that:

- the arbitrator made a peremptory order without affording parties the opportunity to be heard. The order had ordered the applicant to exchange its affidavits-in-chief on or before 14 January 2005 failing which the arbitrator would proceed to hear the substantive issues without regard to the said affidavit.
- That the arbitrator had acted in excess of his powers in making the said peremptory order.

This case required the court to interpret section 16(1)(b) which is reproduced below.

"Failure or impossibility to act

Section 16

(1) A party may request the Court to remove an arbitrator -
(a) who is physically or mentally incapable of conducting the proceedings or where there are justifiable doubts as to his capacity to do so; or
(b) who has refused or failed -
(i) to properly conduct the proceedings; or
(ii) to use all reasonable dispatch in conducting the proceedings or making an award,
and where substantial injustice has been or will be caused to that party."

The principles concerning the removal of the arbitrator was declared by the learned judge as follows:

- the use of s16(1)(b) should be confined to exceptional circumstances only since the *re* is a reference to "substantial" injustice as a requirement to grant the application [see paragraph 7];
- in the investigation into whether an arbitrator should be removed, there are two parts, namely, first, there must be a failure to conduct the proceedings properly and second, this failure must have caused substantial injustice [see paragraph 6];
- the "failure to conduct the proceedings properly" covers a multitude of manifestations and situations.
"Mustill & Boyd in *Commercial Arbitration 2001 Companion Volume to the Second Edition* (Butterworths, 2001) at 291 commented that the expression could cover failure to comply with the general duty of the tribunal under s33 of the UK Arbitration Act 1996 (which is similar in part to our s22), the tribunal exceeding its powers, and failure of the tribunal to conduct the proceedings in accordance with the procedure agreed to by the parties. The refusal or failure to conduct the proceedings must be established by evidence: see *Russell on Arbitration* (Sweet & Maxwell, 22nd Ed, 2003) at para 7-081." [see paragraph 5]
- "Actual or cogent evidence of injustice of a substantive nature as the case may be has to be shown before the court will intervene. The test of "substantial injustice" is a high one for any applicant to surmount." [see paragraph 6]

Having considered the facts, the learned judge concluded that:

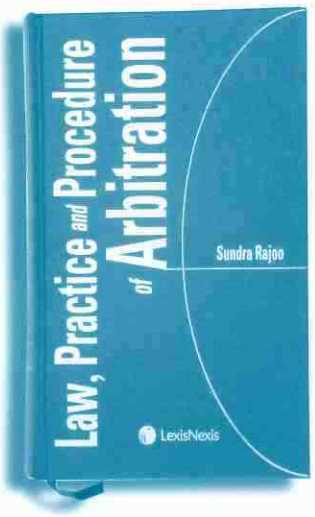
- "There was, in my judgment, nothing in Yee Hong's allegations that was said to manifest, or could be described as amounting to, improper conduct of the proceedings." [see paragraph 44]
- "Even if I reached a contrary position and concluded that the arbitrator had conducted the proceedings improperly as alleged, the fact is that Yee Hong had not shown that substantial injustice had been or would be caused to Yee Hong, and that is fatal to the application under s 16(1)(b) of the Act." [see paragraph 45] "Loss of confidence in an arbitrator's ability to come to a fair and balanced conclusion is itself not capable of being substantial injustice." [see paragraph 48]

In the judgment, it is worth noting that there are several points on the law relating to the removal of an arbitrator, which have changed since the new arbitration legislation has been put into operation.

- "Previously, as long as the court was satisfied that from the conduct of the arbitrator a reasonable person would think that he had displayed real likelihood of not being able to act judicially, that was enough to remove him for misconduct. That is no longer the case. The test now is different." [see paragraph 48]
- "...an arbitrator has a wide discretion in reaching his decision as to what the duty of acting fairly demands in the circumstances of a given case." [see paragraph 26];
- "On the issue of the arbitrator exceeding his power to grant peremptory order, Mr Edwin Lee said that the power to grant an order was not provided in the Act unlike the position under the UK Arbitration Act 1996. I agreed with him on this point." [see paragraph 32]

Book Review: Law, Practice and Procedure of Arbitration

by Sundra Rajoo
(Published by Lexis Nexis)



Written from the perspective of Malaysian Law, this textbook on arbitration by Mr. Sundra Rajoo is a welcome addition to the growing number of local arbitration textbooks. The author is a well-known Malaysian arbitrator with expertise in the fields of construction and architecture. He holds professional degrees in Architecture, Town Planning and Law with postgraduate qualifications in Construction Law and Arbitration.

In the structure of his book, the author sets out the issues commonly faced in arbitration proceedings and considers their practical implications. The layout of the topics using "Divisions" divided into Chapters and further subdivided into Subtopics makes reference by the busy practitioner to subjects of interest an easy task.

The chronological development of the arbitral process in the layout of the book assists the beginner with the creation of a comprehensive map of arbitration law in general and Malaysian law in particular. The inclusion in the book of many checklists showing the more important points of concern in effect guides the novice in avoiding the common pitfalls in the practice and procedure of arbitration.

The author discusses arbitration case law and statutes from many common law jurisdictions including Singapore and Australia. The author also discusses and clarifies the scope and procedure of the domestic arbitration regime in Malaysia. The author explores the international arbitration regime and refers to a wide range of arbitral rules from different jurisdictions. The author has managed in his book to convey arbitration as a dispute resolution regime with practical implications beyond geographical boundaries

In essence, the book is a comprehensive and detailed work that lays the fundamental groundwork for entrants in the law and practice of arbitration. At the same time, it is substantial enough to be a source of reference for the busy arbitration practitioner. Mr. Rajoo has provided arbitration practitioners with a meticulous and comprehensive guide to the law, practice and procedure of arbitration.

Reviewed by Raymond Chan

Announcements

• NEW MEMBERS •

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

Fellows

1 Dr Colin Ong Yee Cheng
2 Christopher Redfearn
3 Christopher Wing To
4 Dr Andreas Respondek (Transfer)
5 Chong Pick Eng
6 Rubin Mohideen M P Haja
7 Chan Seng Onn, SG, SC
8 Ramayah Vangat
9 Prof. Jeffrey Dan Pinsler
10 Jeyaretnam Philip Anthony, SC
11 Michael Moey Chin Woon
12 Dr Philip Pillai
13 Poh Leong Sim (Transfer)
14 Tan Johnny Cheng Hye (Transfer)
15 Sajjad Akhtar
16 Tan Loke Yong Luke
17 Chia Michael Hock Chye
18 Mun Hon Pheng
19 Lim Han Cheong
20 C B Chidambara Raj
21 Mahendra Prasad Rai
22 Dr Tay Sun Kuie
23 Ian Hugh Alan Townrow
24 K. Muralidharan Pillai
25 Chan Ket Teck (Transfer)
26 Muthusamy Selvaraj
27 Sundaresh Menon
28 Tyebally Abedeen
29 Alan Thambiayah
30 Leow Ban Hua, James (Transfer)
31 Tan Siew Bin Eugene (Transfer)
32 Anthony James Phillips

Members

1 Teng Sor Hoong Iris
2 Khoo Sze Boon
3 Dang Hop Xuan
4 Leon Le Lyn

Associates Member

1 Tan Wooi Teong

• UPCOMING EVENTS •

- "Understanding the Chinese Legal Process and its Perspective on International Trade and Shipping Law" by Judge Xin Hai & Jin Yu Lai (jointly conducted with STET) on Monday **3 October 2005**
- Members' Night in **October/ November 2005**
- WIPO Workshop on **10 & 11 November 2005**

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24TH ANNUAL GENERAL MEETING
15 JULY 2005

The Institute held its 24th Annual General Meeting on 15 July 2005 at The Hilton Hotel. The Meeting was attended by 32 members.

The Institute's President, Mr Raymond Chan, called the Meeting to order. Mr Chan briefed the Meeting on the Annual and Financial Reports and thanked the members present for their continued support.

Seated (L - R):
Johnny Tan C. H., Goh Phai Cheng, SC, Raymond Chan, Yang Yung Chong
Standing (L - R):
Richard Tan, Michael Hwang, SC, Meef Moh, Philip Chan, Lock Kai Sang
Not in the photo: Govindarajalu Asokan, Lee Fook Choon

The next item on the agenda was the election for the posts of President, Hon. Treasurer and 3 Council Members. As Mr Chan was seeking re-election for a second term of office as President, he handed the chair to the Vice-President, Mr Goh Phai Cheng, SC. Mr Ganesh Chandru was appointed returning officer. Mr Jamshid K Medora and Mr Randoph Khoo were the scrutineers.

Mr Raymond Chan and Mr Yang Yung Chong were returned unopposed for the posts of President and Hon. Treasurer respectively. The posts for Council Members were contested by Mr Michael Hwang, SC, Ms Vivian Ang Hui Ming, Dr Lock Kai Sang, Mdm Meef Moh, Ms Monica Neo and Mr Tan Siah Yong. The candidates were invited to give a brief introduction about themselves, their visions for the Institute and their contributions if elected. After the ballots were counted, Mr Michael Hwang, SC, Mdm Meef Moh and Dr Lock Kai Sang were duly elected into the Council.

The Elected President, then gave a short address presenting his plans for the coming year. The Meeting ended with a vote of thanks to all present.

HEARING ROOM FOR HIRE

Please DO consider the Institute if you are looking for a hearing venue. The Institute offers competitive members' rates of S$200 per day/S$100 per half-day inclusive of two breakout rooms and free flow of refreshments. We welcome all enquiries. Please give us a call at 6323-1276 or email us at siarb@siarb.org.sg. You may also log-on to our website at www.siarb.org.sg for more details.

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