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HARRY ELIAS

Year In Review,
Year Looking Forward:
International Arbitration Developments in Singapore and Beyond

Year in Review: 2018

Summary Award Procedure

Summary award procedures have become increasingly popular as a means of countering manifestly unmeritorious claims or defences. There has been a ready uptake of the procedure by major commercial arbitral centres around the globe. Under the SIAC Rules 2016, a binding arbitral award may be obtained in as short a time as 2 months under its early determination procedure. This means significant time and cost savings for parties. Under this procedure, the Tribunal must give reasons for its summary award/order. Most recently, the HKIAC has also started offering this procedure in its HKIAC Rules 2018. We can expect the frequency of summary award applications to increase in the coming years.

Due to its complexity, there are various tactics that a defendant can adopt to disrupt the summary award procedure. There are also steps that parties may take to enhance the international enforceability of a summary award. We recommend that parties obtain specialist advice to strategically navigate the summary award procedure. Click here to read more about the summary award procedure

Singapore takes the lead in efficient enforcement of awards

The developments in Singapore's arbitration laws demonstrate the Singapore courts' and arbitral centres' pro-arbitration and pro-enforcement stance. In 2018, the Singapore High Court ordered the immediate enforcement of an arbitral award notwithstanding ongoing setting aside proceedings at the seat. From this decision, it is clear that the Singapore courts are inclined to swiftly enforce arbitral awards, which is consistent with the principles of international comity and finality of awards.

In another decision, the Singapore High Court demonstrated that it would be strict in construing the timelines in the Model Law and International Arbitration Act ("**IAA**"). A party who has applied out of the time prescribed under the Model Law and IAA will lose its right to set aside a preliminary ruling on jurisdiction. This prevents delay tactics and promotes finality and certainty in the arbitral process. However, tactically, this party may still rely on its passive remedy of resisting enforcement, whether in another jurisdiction or in Singapore.

Arbitration in Asia is on the rise

2018 saw many significant arbitral developments in Asia.

Singapore: The developments in Singapore's legal landscape in 2018 signaled a renewed commitment towards a strong pro-arbitration stance adopted by the Singapore courts and arbitral institutions. The courts have shown a renewed dedication to the swift enforcement of arbitral awards rendered. Offerings by the SIAC also make it easier for parties to obtain an enforceable award in a shorter time. The Singapore High Court has also clarified that the admissibility of pre-contractual negotiations is a procedural issue to be determined by the arbitral tribunal.

Hong Kong: The new HKIAC Administered Arbitration Rules 2018 ("**HKIAC Rules 2018**") came into force on 1 November 2018. Parties bringing arbitrations before the HKIAC after this date may benefit from the new innovations found in the HKIAC Rules 2018. Click here to find out more about the new innovations to the HKIAC Rules 2018. The Hong Kong Government has also recently published a code of practice for third party funding of arbitration ("**Code of Practice**"). The Code of Practice sets out the practices and standards that third party funders would be expected to comply with in carrying on activities in connection with third party funding in Hong Kong. The Code of Practice will come fully into force on 1 February 2019.

Malaysia: In February 2018, the KLRCA was renamed the Asian International Arbitration Centre ("**AIAC**"). The rebranding is the latest move by Malaysia to differentiate itself as a dispute resolution centre in the region.

The Malaysian Government also recently introduced the Arbitration (Amendment) (No. 2) Act 2018 ("**Amendment Act 2018**"). The Amendment Act 2018 came into force on 8 May 2018, heralding a new era of arbitration in Malaysia. The Amendment Act 2018 introduces long-awaited changes to Malaysia's Arbitration Act 2005, including express provisions ensuring confidentiality of arbitration and arbitration-related court proceedings. The renaming of the KLRCA and the Amendment Act 2018 signal Malaysia's commitment to further enhancing its profile as an arbitration-friendly jurisdiction.

SIArb Party Representative Guidelines

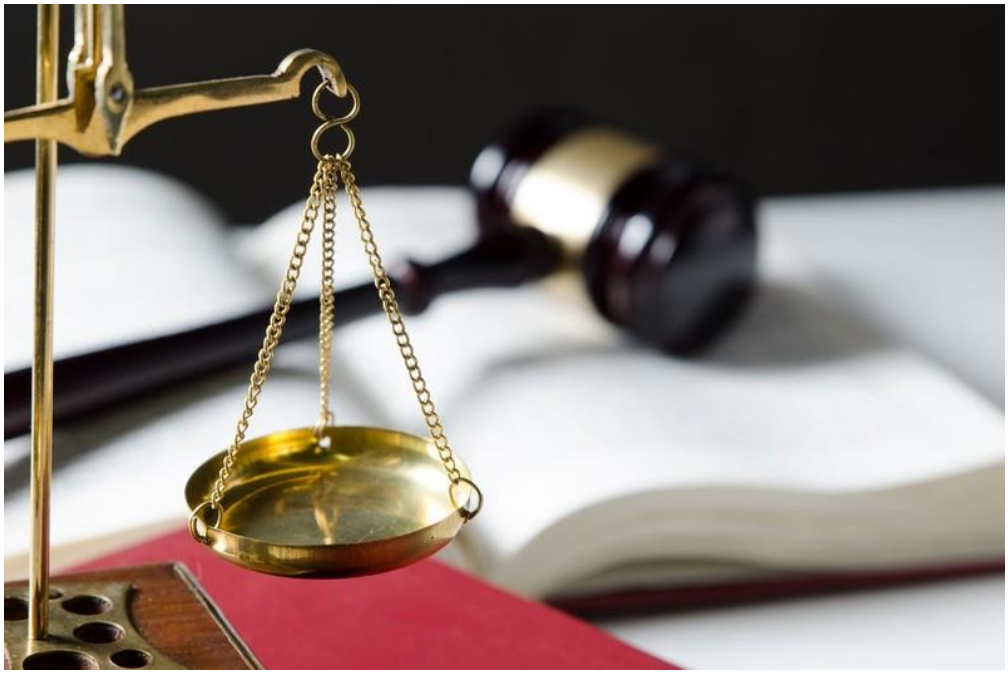
Earlier this year, the SIArb Guidelines on Party Representative Ethics 2018 ("**SIArb Guidelines 2018**") were published. The SIArb Guidelines 2018 aim to enhance uniformity in the interpretation of professional ethics and values so as to avoid unnecessary delay, misunderstandings, and expense. With the SIArb Guidelines 2018, parties can be assured of the fair and just conduct of arbitrations seated in Singapore. Parties can also engage with each other on the same page regarding ethical conduct in international arbitration.

3 Core Principles in the SIArb Guidelines 2018:

- A party representative should respect the integrity of international proceedings, including the independence of the tribunal/arbitrators
- A party representative should act honestly and with integrity in all of his or her dealings with the tribunal and parties involved in the arbitration proceedings
- A party representative should treat the tribunal and other parties with respect and act with the highest degree of professionalism

Up till the SIArb Guidelines 2018, there had been no concerted effort to develop ethical guidelines on party-representatives' conduct within Southeast Asia. The SIArb Guidelines 2018 now join the ranks of the LCIA Rules and the IBA Guidelines in providing a framework for parties to clarify their expectations of ethical conduct in international arbitration.

Our Head of International Arbitration, Mr Francis Goh, is the Honorary Secretary of the SIArb.



Repudiatory breach of arbitration agreement

Following the Singapore Court of Appeal case of *Marty Limited v Hualon Corporation (Malaysia) Sdn Bhd (Receiver and Manager Appointed)* [2018] SGCA 63, it is now recognised that an arbitration agreement can be repudiated. This gives the innocent party the right to accept the breach and bring the agreement to an end.

In finding repudiatory intent, the courts will consider whether the breaching party has an explanation for commencing litigation other than its rejection of the arbitration agreement. The Court of Appeal has observed that the commencement of court proceedings may in itself constitute a *prima facie* repudiation of the arbitration agreement. However, the courts will be slow to infer repudiatory intent if the breaching party can provide a satisfactory explanation for its commencement of court proceedings.

A party who wishes to make a tactical application can consider taking these steps to preserve its right to refer the dispute to arbitration:

- Provide explanations for its commencement of litigation
- Restrict its claim in court to ensure the remedy or award sought does not overlap with that sought in arbitration
- Expressly refer to its right to bring separate court proceedings in its claim

It remains an open question whether the Singapore courts would order damages to be awarded to the innocent party for a repudiatory breach of the arbitration agreement. Such an approach has been adopted by an ICC Tribunal where the party who commenced proceedings before a Greek court was ordered to pay damages. The Hong Kong Court of First Instance has similarly considered that a wrongful repudiation of arbitration agreement would entitle the innocent party to damages.

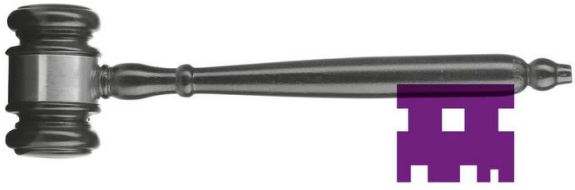
Procedural irregularities may not taint an arbitral award

The recent case of *Sanum Investments Limited v ST Group Co. Ltd and others* [2018] SGHC 141 offers successful parties the assurance that the threshold for resisting enforcement of an award is high. Even when there are multiple procedural irregularities, an award can be enforced as long as there is no prejudice caused to the losing party.

The High Court found that the Tribunal had wrongly concluded that the seat of arbitration was Singapore when it should have been Macau. Further, instead of a single arbitrator, the Tribunal was wrongly composed of three arbitrators.

Nevertheless, the High Court concluded that notwithstanding these procedural irregularities, the SIAC award should be enforced. This is because under Article 36(1) of the Model Law, the enforcement court has residual discretion to allow enforcement of the award, even where a ground for refusing enforcement under that provision has been made out. In other words, the enforcement court may enforce an award despite multiple procedural irregularities in the appropriate case. In this case, the High Court allowed enforcement of the award because it found that there was no evidence of prejudice caused to the losing party.

The Singapore courts' pro-arbitration attitude is welcome because it gives greater force to arbitral awards.



PCA and ICC set up offices in Singapore

In January 2018, the Permanent Court of Arbitration ("**PCA**") opened its office in Singapore. This is the PCA's first Asian office and second office outside of its headquarters in The Hague. The PCA routinely administers State-to-State and investor-State disputes. The Singapore PCA office will serve as a base to support a steady flow of such investment disputes into Singapore. With this new office, Singapore is well-placed to host arbitration proceedings administered by the PCA, especially for disputes in Asia.

In April 2018, the ICC set up a new case management office in Singapore. This is the ICC's fourth overseas case management office in addition to existing overseas offices in Hong Kong, New York and Sao Paulo. Having established a physical presence in Singapore, the ICC can now administer cases more efficiently for disputing parties in Asia. This reaffirms Singapore's position as a leading dispute resolution hub in the region and ICC's top arbitration seat in Asia.

Singapore Court of Appeal allowed application to set aside an investor-State award

The Singapore Court of Appeal in *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2018] SGCA 81 upheld a High Court decision to set aside an investor-State award. This marks the first time the Singapore courts allowed an application to set aside an investor-State arbitration award on the merits.

In this case, the investors commenced claims against the Kingdom of Lesotho for unlawful expropriation of their investments. These claims were brought before the Southern African Development Community ("**SADC**") Tribunal, but it was shut down before the proceedings were concluded. The investors then brought a claim before the PCA on the basis that Lesotho contributed to the shuttering of the SADC Tribunal. The PCA Tribunal found in favour of the investors and directed Lesotho to constitute a new tribunal to hear the investors' expropriation claims. Lesotho then applied to the Singapore courts, as the supervisory court, to set aside the PCA Tribunal Award.

The Court of Appeal held that the PCA Tribunal had no jurisdiction to hear the investors' claim relating to the shuttering of the SADC Tribunal. Among other findings, the Court of Appeal held that the arbitration agreement in question only covered disputes concerning an obligation of Lesotho in relation to the investments. It found that Lesotho did not have an obligation to guarantee that the pending claims before the SADC would be heard. Accordingly, the Court of Appeal held that the shuttering dispute did not fall within the scope of the arbitration agreement.

This case is illustrative of Singapore's growing popularity as a seat for investor-State arbitrations and the kind of complex and novel issues of international law that the Singapore courts will have to decide.



Year Looking Forward: 2019

Belt and Road Initiative disputes

International commercial litigation appears to be gaining traction in China. The Chinese authorities have set up three international courts in Xi'an, Shenzhen and Beijing to hear disputes of an international nature.

These international courts have the endorsement of the Chinese authorities as independent and transparent institutions. However, foreign parties who have commercial dealings with Chinese parties may prefer to adjudicate their disputes in a neutral location. It remains to be seen whether these Chinese international courts will be conferred exclusive jurisdiction to hear such disputes in cross-border contracts. This is likely to depend on the relative bargaining power of parties to the contract.

Even if the Chinese and international parties agree to confer exclusive jurisdiction on a neutral court, it is unlikely that the Chinese court will intervene and claim jurisdiction over such proceedings. Parties can be reassured by the fact that China is a signatory to the Hague Convention on Choice of Court Agreements. Upon China's ratification (which is expected to happen in due course), China will be under a legal obligation to respect parties' agreement to confer exclusive jurisdiction on a neutral court to hear their dispute.

Third party funding

In 2017, the Singapore Parliament took the first step towards liberalising the market for third party funding by amending the Civil Law Act. Currently, third party funding is allowed for any civil, mediation, conciliation, arbitration or insolvency proceedings in Singapore.

This is a welcome move for disputing parties. Parties are no longer precluded from bringing a genuine claim due to the high cost barriers. Even if there are no financial constraints, third party funding is something worth considering in order to balance cash flow and manage risks.

With the broad legal framework in place, it remains to be seen how third party funders will interact with disputing parties. Third party funders have a vested interest in the outcome of the dispute. One major concern that disputing parties may have is whether the third party funder will have control, or even greater control, over the conduct of the matter. Another question that arises is whether there should be greater regulation on the disclosure of the source of funding to safeguard against abuse.

Eversheds Harry Elias LLP has cultivated a network of third party funders that we can put you in touch with. With the recent amendments to our Legal Profession Act, we are also able to advise and act for you in relation to the third party funding contract.

SICC as the supervisory court for arbitration

In early 2018, the Singapore Parliament amended the Supreme Court of Judicature Act. The amendments seek to clarify the jurisdiction of the Singapore International Commercial Court ("**SICC**"). It is now clear that the SICC has the same jurisdiction as the Singapore High Court to hear any proceedings related to international commercial arbitration. Our Of Counsel, Mr Shaun Leong, is a contributing author to the 2019 edition of Singapore Civil Procedure. Shaun is in charge of the chapters relating to arbitration, international arbitration and the SICC.

Going forward in 2019, we anticipate that the SICC will hear more arbitration-related applications, including stay of court proceedings, grant of interim relief, enforcement, refusal of enforcement and setting aside applications. This is a welcome development for international parties because they can take advantage of the procedural features of the SICC. This includes the option to have the application heard in camera to keep the entire matter confidential. Parties can also tap into the specialised knowledge and expertise of SICC's international panel of judges.

Eversheds Harry Elias LLP has full rights of audience before all levels of Singapore courts. We are therefore well-placed to provide parties with seamless representation in arbitration and court-related applications in Singapore.

Cost-efficient way of conducting cross-institution arbitrations

At present, arbitral institutions have rules on consolidation and joinder of parties to ensure that related disputes are efficiently and consistently dealt with. However, these rules can only be invoked if the disputes are contained within the same arbitral institutions. What happens when related disputes are referred to different arbitral institutions?

To address this, SIAC has proposed a cross-institution consolidation protocol.

Whether to consolidate: The first option is for each arbitral institution to incorporate a consolidation protocol (which will, among others, specify the timing and criteria of consolidation) into their own rules. There will also be a joint committee comprising members of the different institutions who will decide on the consolidation. The second option is to choose a single institution to decide on cross-institution consolidation under its own rules. The current sentiment is that the first option is preferable, even though the second option may seem more efficient.

How to administer consolidated proceedings: When it comes to the actual conduct of the arbitration, there are again two options on the table. The first option is for the various institutions to agree to new rules that will be applicable to the consolidated proceedings and for such proceedings to be jointly administered by the various institutions involved. The second and more preferable option is for one institution to administer the proceedings under its own rules. This is more efficient.

Cross-institution consolidation is a cost-effective way for parties to resolve related disputes that have been referred to different arbitral institutions. However, this is all premised on the arbitral institutions' willingness to co-operate with each other to serve the disputing parties' needs. Currently, SIAC is in talks with CIETAC on SIAC's proposed cross-institution consolidation protocol. With more institutions coming on board, disputing parties can harness the synergy of such cross-institution collaboration to make the process of dispute resolution more efficient.

Accommodating common law and civil law traditions in international arbitration

From our experience, it is not uncommon for civil law parties to approach arbitration with some degree of hesitation. There seems to be an impression amongst civil law parties that arbitration is heavily influenced by common law concepts and thus, they may be placed at a disadvantage during the arbitration proceedings. However, civil law parties can be assured that they would not be in a weaker position in Singapore-seated arbitrations. This is because under the IAA, a tribunal can adopt inquisitorial processes in its conduct of an arbitration. This is something that parties from civil law jurisdictions are familiar with, where the judge typically adopts a more active role in the fact-finding process.

There have also been some recent developments in relation to rules on the taking of evidence. Most parties are familiar with the 2010 International Bar Association Rules on Taking of Evidence in International Arbitration (the "**IBA Rules 2010**"). It has been said that the IBA Rules are heavily influenced by common law practices.

In late 2018, the Inquisitorial Rules on the Taking of Evidence in International Arbitration (the "**Prague Rules 2018**") were launched. The Prague Rules 2018 mirror the civil law tradition where the tribunal plays a more active role in the conduct of proceedings. One example is in relation to the number of witnesses. Under the IBA Rules 2010, parties have full autonomy to decide the number of witnesses they wish to call. This is so even if some of these witnesses are not entirely relevant to the dispute. The Prague Rules 2018 leave this decision to the tribunal to make after the tribunal hears from each party on their position.

It has been eight years since the IBA Rules 2010 were updated to reflect new developments and best practices in international arbitration. Now is certainly an opportune time for the introduction of another set of rules that are more aligned with the civil law tradition. Only time will tell how the Prague Rules 2018 will fare in comparison to its common law-inspired cousin.

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