Kluwer Arbitration Blog

Singapore's International Arbitration Act 2012 vs Hong Kong's Arbitration Ordinance 2011

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Following a previous round of amendments in 2009 that came into effect on 1 January 2010, the Singapore Ministry of Law published further proposed amendments to Singapore's International Arbitration Act ("the IAA") on 8 March 2012. The proposals took into account views garnered from a public consultation process. There are four key proposals in this round of amendments summarized below. This note also briefly compares the proposals against Hong Kong's Arbitration Ordinance ("the AO") that came into force on 1 June 2011.

I. The Writing Requirement

As a result of amendments in 2009, an arbitration agreement under the IAA currently includes "an agreement made by electronic communications if the information contained therein is accessible so as to be useable for subsequent reference". In this round of amendments, the Singapore Ministry of Law has followed Hong Kong's example (section 19 of the AO) in adopting Option 1 of the 2006 amendments to the Model Law, such that an arbitration agreement is in writing "if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means."

II. Negative jurisdictional rulings

As Singapore case law currently stands, if a tribunal decides as a preliminary question that it has no jurisdiction, the aggrieved party has no recourse to judicial review (*PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597). A Law Reform Committee Report of January 2011 by the Singapore Academy of Law ("the Report") recommended an amendment to allow review of negative jurisdictional rulings. The authors observed that appeals from negative jurisdictional rulings are currently allowed in Belgium, England, France, India, Italy, New Zealand, Sweden, Switzerland and the United States. The Ministry of Law has accepted that recommendation, and also grants the court power to make costs orders against any party.

One of the objections raised against this proposal was the risk that an arbitral award by a tribunal that had previously ruled that it had no jurisdiction may be challenged on jurisdictional grounds under Article V(1) of the New York Convention when

enforcement is sought abroad. The Report's response was that this is a risk for the appellant to consider when appealing a negative jurisdictional ruling, given its knowledge of the laws of the jurisdictions in which it may seek to enforce an award. Another response can now be made to the objection at least under English law: in light of *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, the jurisdiction of a tribunal at the enforcement stage is subject to *de novo* review anyway.

Notably, Hong Kong passed section 34 of the AO on 10 November 2010 expressly providing that "[a] ruling of the arbitral tribunal that it does not have jurisdiction to decide a dispute is not subject to appeal", and that in that case, the court must, if it has jurisdiction, decide that dispute. This would be one of the key significant differences between the Singapore and Hong Kong worthy of note by practitioners if and when the Singapore Ministry of Law's proposal is passed into law.

III. Tribunal's power to award interest

The IAA currently does not define clearly the scope of a tribunal's power to award post-award interest and interest on costs. The proposal allows a tribunal to award simple or compound interest at a rate and rest which the tribunal considers appropriate on monies claimed in the arbitration, as well as costs orders. The Singapore Ministry of Law stated that this proposal was based on section 79 of the AO.

IV. Emergency Arbitrator Procedure

The proposal amends the definitions of an "arbitral tribunal" and an "arbitral award" to clarify the status of orders made by emergency arbitrators. The policy intention is to accord emergency arbitrators the same standing as any other arbitral tribunal and to ensure that orders of emergency arbitrators are equally enforceable. Any appeal to the courts on a jurisdictional ruling, including one made by an emergency arbitrator, shall not operate as a stay of proceedings. This is to prevent the purpose of the emergency arbitrator procedure from being defeated. This proposal is in support of the SIAC's emergency arbitrator procedure introduced in July 2010, but is not limited to emergency arbitrators appointed under the SIAC Rules. There is no corresponding provision in the AO.

V. Other Differences

It is also interesting to note various areas that the Singapore Ministry of Law has sought public views on but not made part of the present round of proposals. These include waiver of the right to set aside awards and whether third party funding would be appropriate in the context of international arbitration. It demonstrates the Ministry's awareness to cutting edge issues and an unstinting commitment to consider and adopt international best practices.

Another area which the Singapore Ministry of Law sought public views on but where no proposals were made related to the 2006 amendments to the Model Law on interim and preliminary orders. Whilst both Singapore and Hong Kong enumerates a list of

interim orders that a tribunal has the power to grant under section 12 of the IAA and section 56 of the AO respectively, Singapore does not expressly permit *ex parte* interim measures, preliminary orders or the conditions for the granting of such measures, all of which the 2006 Model Law does. Hong Kong has adopted the 2006 Model Law position in Part 6 of its AO. Section 53(3) of the AO also empowers the tribunal to make peremptory orders for compliance within a specified time, but not the IAA. These are significant differences also worthy of note by the practitioner.

The latest rounds of proposals also do not abolish the separation between domestic arbitration and international arbitration – Singapore maintains an Arbitration Act for the former which permits a greater degree of curial supervision. Nonetheless the present proposals are also introduced to the Arbitration Act by way of mirror proposals *mutatis mutandis*. This approach differs from the AO. The AO unifies the international and domestic arbitration regime in Hong Kong so that they both follow the Model Law, but still allows parties to use rules governing domestic arbitration by expressly providing for this in their arbitration agreements.

Section 18 of the AO also contains an express duty of confidentiality in respect of arbitration proceedings and awards, subject to a number of exceptions. Hong Kong is one of a comparatively small number of jurisdictions to have expressly legislated a duty of confidentiality. In this round of proposed amendments, Singapore has not followed suit; under the common law, a duty of confidentiality would be implied under the arbitration agreement.

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