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Singapore's Amendment to Its International Arbitration Act Pledges Its Leadership in the Asia-Pacific Region

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Singapore has emerged as one of the leading international arbitration centers not only in Asia but also in the world. To keep this title, the Singapore Ministry of Law ("Ministry of Law") played a major role by keeping track on international and commercial legislative developments, and, adapting and framing innovative legislations to promote international arbitration.

Recent amendment by the Ministry of Law in September 2020 of the International Arbitration Act ("IAA") pledged to enhance Singapore's status as an arbitration hub in Asia and improve the legal regime for international arbitration. The recent amendment was proposed for the first time in 2019 at Singapore government's public consultations. Inputs were taken from businesses, arbitrators, professional bodies, academic and practitioners in both local and offshore law practices, academics and international dispute resolution institutions. Only two of the four propositions pertaining to 'Default Mode of Appointment of Arbitrators in Multi-Party Situations' and 'Recognise that an arbitral tribunal and the High Court have powers to enforce obligations of confidentiality in an arbitration' are adopted by the Ministry of Law and the other two pertaining to 'Arbitrator(s) Decide on Jurisdiction at the Preliminary Stage if Requested by All Parties' and 'Provision for Parties to Opt-In to an Appellate Procedure on Questions of Law' are still under consideration. The amendment clearly demonstrates Singapore's intention to secure the position of top international arbitration seat in the competitive arbitration world. Furthermore, these reforms also indicate Singapore's accomplishments in adapting to arbitration legislations and institutional rules.

Key features of the amendment

1. Default Mode of Appointment of Arbitrators in Multi-Party Situations

The International Arbitration (Amendment) Bill first proposes to amend Section 9A and insertion of Section 9B of the IAA. A default mode for appointment of arbitrators in multi-party situations is mentioned in Section 9B. To apply this provision, the agreement of parties must not specify any appointment procedure in a situation where there are more than two parties to a dispute. The new amendment also puts forward Section 9B with the default procedure for the appointment of a three-member tribunal as well as for the appointment of the presiding arbitrator in case of multi-party situations.

The new amendment brings Singapore's IAA in line with the current procedures set out in leading arbitral institutions, such as Article 12(8) of ICC, Article 8.1 of LCIA, Article 8.2(c) of HKIAC. These institutions, more or less, state that the appointing authority will have the power to select all the three arbitrators where the parties, i.e. respondents or claimants, fail to select a co-arbitrator among themselves. This practice has been adopted by most arbitral institutions e.g. the ICC and DIAC did so under the influence of the famous Dutco Case.

The introduction of the default procedure in multi-party situations cures the deficiency in the IAA and shows Singapore's steadfastness in adapting to recent trends and best practices of international arbitration. However the effect of this amendment would be restricted because it requires the parties not to adopt institution rules containing their own default multi-party nomination procedures.

2. Recognition of the powers of arbitral tribunal and the High Court to enforce confidentiality obligations

The presence of an express provision under the IAA on confidentiality obligations in arbitral proceedings and/or of the award would strengthen the legal framework and parties' ability to enforce such obligations. Presently, the parties only had an implied default duty under the law of Singapore to keep the arbitration confidential on the parties in respect to all Singapore seated arbitrations under common law principles. Inserting Section 12(1)(j) to the IAA would not result in autonomous imposition of confidentiality obligation. Rather, it authorizes the arbitral tribunal to enforce confidentiality obligations. Section 12(1)(j) explicitly recognized the power of arbitral tribunal and provided them with confidence while responding to breaches of confidentiality obligations. Furthermore, court-ordered interim measures provisions are also amended. Section 12A(2) is amended to empower both the arbitral tribunal and the High Court to make orders for enforcing confidentiality obligations when parties agree to such obligations in writing by virtue of arbitration agreement and/or applicable law and procedural rules.

This amendment aims to provide the arbitral tribunals with confidence to react to any violation of confidentiality appropriately by strengthening parties' ability to enforce existing obligations rather than codifying confidentiality obligations. By way of comparison, Section 17 of Cap. 9 Hong Kong Arbitration Ordinance ("HKAO") adopts a different approach by imposing express confidentiality obligations on parties in Hong Kong seated arbitrations. Nevertheless, the express power to enforce confidentiality obligations by way of an order is absent in the HKAO. The Ministry of Law's approach towards this part of the amendment could have been better if they would have further extended the scope by codifying further confidentiality obligations. As of now, the approach adopted by the HKAO fares better as Hong Kong Courts often recognise arbitral awards in which injunctions are used to prevent confidentiality.

Further areas where the IAA needs to be amended

Two propositions are still being considered by the Ministry of Law. These propositions are: Requirement That Arbitrator(s) Decide on Jurisdiction at the Preliminary Stage if Requested by All Parties ("first proposition"); and Provision for Parties to Opt-In to an Appellate Procedure on Questions of Law ("second proposition").

Currently, Section 10(2) of the IAA which regulates power of the arbitral tribunal's power to rule on jurisdictional issues on the basis of parties' requests appears to be underestimated. The first proposition seeks to amend this section to give due regard to parties' requests for the arbitral tribunal to decide on jurisdictional issues at preliminary stage of the arbitral proceedings. This proposition has the potential to encourage party autonomy and rapidly resolve jurisdictional issues. At the same time, it also encourages time and cost efficiencies of the arbitral proceedings. On the other hand, a downfall attached to this proposition is that it prioritizes party autonomy over the arbitral tribunal's discretion over case management and sometimes the tribunal are in better position to determine the timing of such proceeding rather than the parties.

The second proposition seeks to permit parties to approach the appellate body in Singapore, i.e. Singapore High Court, to decide on questions of law that arises out of the final award. The proposition states the requirement of leave of court, which under Section 24A, would only be granted if there is a question of "general public importance and the decision of the arbitral tribunal is at least open to serious doubt," or if the decision is "obviously wrong." The latter is limited to truly egregious errors and described as 'a major intellectual aberration' by Justice Akenhead. Similarly, other arbitration laws such as the English Arbitration Act 1996 and the New Zealand Arbitration Act also provide for a limited right of appeal on a point of law arising out of an arbitral award. It is worth noting that a few arbitral institutions such as the AAA and the ICDR also adopted new appellate rules in 2013 which allow appeal in matters relating to errors of law and clearly erroneous fact. The bright side of the second proposition is that it reduces the risk of mistakes in the application of law. Parties with preference for minimum curial intervention would welcome this proposition as this limits the ground for annulling an award. However, to some extent, the proposition might erode the quick and efficient resolution of the disputes in arbitration. Though the consequences are limited as the parties are required to opt-in to the appellate procedure.

Conclusion

This amendment by the Ministry of Law reflects the fast pace of innovation, and shows Singapore's adaptability in an increasingly competitive arbitration world. It further demonstrates Singapore's capacity to enhance the framework of arbitration and reiterates the Singapore's intention to strengthen the efficiency of arbitrations seated in Singapore with the likely consequence that it will remain the leading arbitral seat in the region.

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