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International Arbitration

Singapore – Trends & Developments

Contributed by

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Hale and Dorr

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SINGAPORE

The 'Trends & Developments' sections give an overview of current trends and developments in local legal markets. Leading lawyers analyse particular trends or provide a broader discussion of key developments in the jurisdiction.

Trends and Developments

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Wilmer Cutler Pickering Hale and Dorr international arbitration group has been involved in more than 650 proceedings in recent years. We have successfully represented clients in a number of the largest institutional arbitrations and several of the most significant ad hoc arbitrations to arise in the past decade. We pride ourselves on consistently achieving our clients' objectives through efficient staffing and the use of in-house know-how and precedents.The firm's international arbitration practice is headed by Gary Born, one of the world's preeminent authorities in the field.

Authors

Gary Born is the chair of the International Arbitration Practice Group. Mr. Born is widely regarded as the world's preeminent authority on international commercial arbitration and international litigation. He has been ranked for the past 20 years as one of the world's leading international arbitration practitioners and the leading arbitration practitioner in London. Mr. Born has participated in more than 600 international arbitrations, including four of the largest ICC arbitrations and several of the most significant ad hoc arbitrations in recent history.

Jonathan Lim focuses his practice on international arbitration matters and complex multi-jurisdictional disputes. He has experience with representation of clients in ad hoc and institutional arbitrations (including under the HKIAC, ICC, LCIA, SIAC and UNCITRAL Rules) sited in various jurisdictions, including both common law and civil law jurisdictions in Europe and Asia. Mr. Lim has also advised governments in Africa and Asia on public international law issues and international arbitration law reform. Mr. Lim is also a Visiting Senior Fellow at the National University of Singapore, where he teaches a course on commercial and investment arbitration each year. He publishes and speaks regularly on international arbitration and financial regulation. He has also lectured on international arbitration and financial regulation at the Singapore Management University and the London School of Economics.

Dharshini Prasad is an associate in the Litigation/Controversy Department, and is a member of the International Arbitration Practice Group. Ms. Prasad has advised States, State entities and private sector firms on commercial, investment and international law issues in Asia, the Middle East, Europe and Latin America. Ms. Prasad has also represented clients in institutional and ad hoc arbitrations (under the ICC, SIAC and UNCITRAL arbitration rules) sited in various jurisdictions and across a range of industries, including oil and gas, mining, manufacturing and technology licensing.

Trends and Developments – Singapore

Singapore has continued to develop as a global centre for international arbitration and dispute resolution in recent years, competing with older centres such as London, Paris and Geneva. A comprehensive survey on international arbitration in 2015 reports that Singapore is one of the five most preferred and widely used seats in the world and the most improved seat according to users worldwide. Statistics from the International Chamber of Commerce (ICC) confirm these findings; Singapore is the top choice of seat in Asia for all ICC arbitrations, and the fourth most preferred seat worldwide. In addition, the number of foreign parties that have chosen Singapore as an arbitral seat is on the rise.

Apart from its hallmarks of neutrality and efficiency, the key contributors to Singapore's success as an arbitral venue are:

- The strong pro-arbitration approach of the Singaporean judiciary in upholding arbitration agreements and recognising and enforcing arbitral awards, consistent with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

- The development of the Singapore International Arbitration Centre (SIAC), which provides state-of-the-art rules and infrastructure for the effective and efficient resolution of disputes.
- The high quality of the Singaporean legal services sector, with both international and local counsel based in Singapore engaging in varied and complex international arbitration matters.
- The commitment of the Singaporean government to maintaining robust and modern international arbitration legislation through the International Arbitration Act (Chapter 143A) and the Arbitration (International Investment Disputes) Act (Chapter11).

The past year in particular has seen innovations in institutional arbitration by SIAC, legislative reform projects on third-party funding and developments in investor-state arbitration that will further cement Singapore's prominence as an arbitral venue.

Strengthening Institutional Arbitration

The year 2016 marked the 25th anniversary of SIAC. Having grown robustly since its inception, SIAC's caseload today includes disputes from around the world, with parties coming from Australia, Asia, Africa, Europe and the Americas. Roughly 84% of the new cases filed with SIAC in the past year have an international element, with 42% having no connection to Singapore at all. The total value of disputes handled by SIAC reached a record SGD6.23 billion (about USD4.41 billion) in 2015. Figures for 2016 are expected to show significant improvement, continuing a growth trend that is unparalleled in both the region and elsewhere.

True to its mandate of promoting cost- and time-efficient dispute resolution, SIAC's 2016 Costs and Duration Study shows that its arbitrations last an average 13.8 months, while tribunal fees average SGD97,518 (about USD69,000) and administrative fees SGD12,211 (About USD8,650). These figures put SIAC in a more favourable position than other global arbitration institutions such as the London Court of International Arbitration in terms of cost- and time-efficiency.

Another milestone in 2016 was the release of the sixth edition of the SIAC Rules. The 2016 SIAC Rules are the product of an extensive consultative process with comments from more than 500 SIAC users from jurisdictions in Asia, Europe, the Middle East, Africa and North America and reflect current international best practice, including a number of market-leading innovations. Key features of the new 2016 rules include:

- A new procedure for the early dismissal of claims and defences – the first of its kind among major institutional rules for commercial arbitration – to promote the early resolution of disputes;
- New provisions to deal with multi-party and multi-contract arbitrations, in particular comprehensive provisions addressing the joinder of additional parties, consolidation of multiple arbitrations and commencement of disputes arising in connection with multiple contracts;
- Refinements to increase the efficiency of SIAC's popular emergency arbitrator provisions, including changes that ensure SIAC appoints an emergency arbitrator within one day of a request by a party for such an appointment and that the emergency arbitrator issue its order or award within 14 days of being appointed;
- Amendments to the expedited arbitration procedures that increase the threshold value of disputes that can be subject to expedited arbitration from SGD5 million to SGD6 million (about USD3.54 million to USD4.25 million) and empower the tribunal to conduct a documents-only arbitration to enhance efficiency; and
- The removal of Singapore as the default seat of SIAC arbitration (except for emergency arbitration proceedings), reflecting SIAC's increasingly multinational and diverse user base. There is no longer a default seat under the rules. In the absence of agreement between the parties the Tribunal will determine the seat.

The 2016 SIAC Rules provide a more efficient and flexible set of arbitral procedures that are well-suited to deal with disputes of all sizes and complexities. They also reflect the increasingly multinational and multiparty character of the disputes administered by SIAC, and ensure that SIAC better meets the needs of its users.

Third Party Funding Reforms

The Singapore government has been quick to respond to the needs of parties and changing trends in international arbitration, and willing to make material changes to its legislation if necessary. For instance, between 2010 and 2012 a series of amendments to the International Arbitration Act ensured that the Singapore courts have the power to grant interim relief in aid of foreign arbitrations, review negative rulings on jurisdiction by arbitral tribunals, and enforce awards by emergency arbitrators. Consistent with this proactive and supportive approach to international arbitration, in July 2016 the Singapore government launched a public consultation to review the role of third-party funding in international arbitration and mediation and ancillary court proceedings. The public consultation period on the proposed legislation ended on 29 July 2016, and the resulting proposed legislation was passed on 10 January 2016, and came into force on 1 March 2017.

Third-party funding is an increasingly common feature of both international commercial and investment arbitrations. Other leading arbitral venues such as London, Paris and

Geneva permit and regulate such arrangements. However, historically, third-party funding arrangements have been considered contrary to public policy and illegal in many jurisdictions, including Singapore. Litigants may also have claims in tort against third-party funders to recover special damages resulting from any third-party funding agreement, based on the common law torts of champerty and maintenance.

The Civil Law (Amendment) Act 2017 amends the Civil Law Act (Chapter 43) and abolishes the common law torts of champerty and maintenance in Singapore. In the context of international arbitration and mediation and related court proceedings, the amendment also clarifies that third-party funding agreements are no longer considered contrary to public policy or illegal. It also establishes a basic legal framework for permitting and regulating third-party funding, and amends the Legal Profession Act to permit legal practitioners to assist their clients in matters pertaining to third-party funding contracts, from the initial stage of referrals, to negotiating, advising, and drafting the contract, and to act behalf of those clients in the event any dispute arises out of the third party funding.

In order to regulate the quality of third-party funding services provided, the Civil Law (Third Party Funding) Regulations 2017 only permits such arrangements with entities whose principal business is to fund dispute resolution proceedings, while also mandating that such entities have a paid-up share capital or managed assets of not less than SGD5 million (about USD3.54 million) or the equivalent amount in foreign currency. The Regulations further specify that third-party funding is limited only to arbitrations and arbitration-related litigation.

Furthermore, concurrent amendments to the Legal Profession (Professional Conduct) Rules 2015 require legal counsel to disclose, as soon as practicable, the existence of a third-party funding agreement and the identity and address of the third-party funder to the court or tribunal and to all other parties in those proceedings.

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Resolving Investment Disputes
Various events since 2015 also signal Singapore's growing importance as a hub for the resolution of investment disputes.

In May 2015, a tribunal of the International Centre for Settlement of Investment Disputes (ICSID) in *Papua New Guinea Sustainable Development Program Ltd v Papua New Guinea* granted Papua New Guinea's (PNG) early dismissal application on jurisdictional grounds under Rule 41(5) of the ICSID Rules. The tribunal found that PNG did not provide "consent in writing" to arbitrate disputes under Article 25 of the ICSID Convention through its domestic legislation (the Investment Promotion Act). The dispute, which related to PNG's alleged expropriation of the investor's shareholding in PNG's largest tax-paying mining company, has also given rise to separate proceedings before the Singapore courts over the management of the investor's assets worth US$1.5 billion. PNG was represented by a Singaporean firm in the ICSID proceedings, the first time that a Singapore practice has acted for a party in an ICSID dispute. The proceedings were conducted in Maxwell Chambers, an integrated dispute resolution complex in Singapore's business district which houses the world's top international alternative dispute resolution institutions, including the SIAC, and provides state-of-the-art hearing facilities and support services.

In 2010, ICSID and Maxwell Chambers had entered into a memorandum of understanding for the conduct of ICSID proceedings in Singapore, reflecting Singapore's growth as an arbitral venue for investment disputes.

In February 2016, SIAC released a draft of its new Investment Arbitration Rules for public consultation, which came into force of 1 January 2017. SIAC is the first arbitral institution to cater separately for commercial and investment disputes. The rules contain many provisions that aim to address prevalent concerns of inefficiency in investment arbitration, and aim to marry SIAC's efficient procedures with an appreciation of the legitimate interests of the investors and States who are potential users of the new rules. In line with recent developments on transparency in international investment arbitration, the rules also contain provisions on the role of non-disputing parties and the disclosure of third-party funding arrangements.

In September 2016, the Singapore Court of Appeal released its much-awaited judgment in *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57. In a carefully reasoned decision, a five-judge bench of the Court of Appeal reversed a decision of the Singapore High Court, which had previously vacated a jurisdictional award by an UNCITRAL tribunal seated in Singapore. The Court of Appeal upheld the award, finding that the tribunal had jurisdiction to hear certain claims by a Macanese inves-

tor under the 1993 Bilateral Investment Treaty between the People's Republic of China (the PRC) and the Lao People's Democratic Republic (Laos) (the PRC-Laos BIT). The court found jurisdiction, applying a *de novo* standard of review, on the basis that the PRC-Laos BIT applied to the Macau Special Administrative Region (Macau), so the Macanese investor was an "investor" under Article 1(2)(b) of the BIT, and the investor's claims fell within the dispute resolution clause in Article 8(3) of the BIT.

September 2016 also saw the Singapore High Court grant rights of admission to an English barrister to represent the Government of Lesotho in an application to set aside an UNCITRAL jurisdictional award in *Swissborough Diamond Mines Ltd, et al v Government of Lesotho*. This reflects a progressive approach to the admission of foreign counsel before Singapore courts, particularly where expertise in public international law or investor-state arbitration is required. This will undoubtedly add to Singapore's attractiveness as an international arbitration hub for disputes from all over the world.