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A. Legislation and rules

A.1 Legislation

International arbitration in Singapore continues to be governed by the International Arbitration Act (IAA), the Arbitration Act and the Arbitration (International Investment Disputes) Act, to which no legislative amendment was made in 2017.

Notably, the Civil Law (Amendment) Act 2017 was passed by parliament on 10 January 2017 and came into effect on 1 March 2017.³ This Act amended the Civil Law Act to: (1) clarify that the common law torts of champerty and maintenance are abolished in Singapore; and (2) introduce a legal framework for third-party funding for international arbitration and related proceedings in Singapore (discussed in detail in Section C below).

A.2 Institutions, rules and infrastructure

The main arbitral institution in Singapore is the SIAC, which is recognized as one of the top five most-preferred arbitral institutions in the world.⁴

Certain developments have taken place in anticipation of the trend for more international investment arbitrations to be seated in Singapore. On 1 January 2017, the SIAC Investment Arbitration Rules came into

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³ Civil Law (Amendment) Act 2017, No. 2 of 2017.

⁴ 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, by Queen Mary University of London and White & Case LLP.

force.⁵ These Rules were developed for the purpose of offering a specialized set of procedures for the conduct of international investment arbitrations. The Permanent Court of Arbitration has also announced that it will be setting up an office in Singapore by early 2018, which will be its second office outside its headquarters in The Hague, and the first in Asia.⁶

In recognition of Singapore's growing strength as a global hub for international arbitration, the International Court of Arbitration of the ICC plans to set up a case management office in Singapore in the first quarter of 2018.⁷ This is timely given that Singapore has been the leading seat for ICC cases in Asia for the past seven years.⁸

Furthermore, in light of the introduction of third-party funding for international arbitration and related proceedings in Singapore, codes of conduct have been promulgated to supplement the third-party funding legislative framework. These are:

- (a) Practice Note (PN – 01/17) on Arbitrator Conduct in Cases Involving External Funding, issued by the SIAC on 31 March 2017;⁹
- (b) Guidance Note 10.1.1 for lawyers on Third-Party Funding issued by the Law Society of Singapore on 25 April 2017;¹⁰ and

⁵ SIAC Investment Arbitration Rules (1st Edition, 1 January 2017).

⁶ Ministry of Law, *Permanent Court of Arbitration to set up office in Singapore*, 25 July 2017, www.mlaw.gov.sg/content/minlaw/en/news/press-releases/permanent-court-of-arbitration-to-set-up-office-in-singapore-.html.

⁷ Ministry of Law, *Singapore Ministry of Law and International Chamber of Commerce sign MOU to boost arbitration*, 28 June 2017, www.mlaw.gov.sg/content/minlaw/en/news/press-releases/singapore-ministry-of-law-and-international-chamber-of-commerce-.html.

⁸ Ministry of Law, *Singapore Ministry of Law and International Chamber of Commerce sign MOU to boost arbitration*, 28 June 2017, www.mlaw.gov.sg/content/minlaw/en/news/press-releases/singapore-ministry-of-law-and-international-chamber-of-commerce-.html.

⁹ SIAC, Practice Note PN – 01/17 on Arbitrator Conduct in Cases Involving External Fundings, 31 March 2017, www.siac.org.sg/images/stories/articles/rules/Third%20Party%20Funding%20Practice%20Note%2031%20March%202017.pdf.



- (c) SIARB Guidelines for Third-Party Funders issued by the Singapore Institute of Arbitrators on 18 May 2017, along with an Accompanying Note.¹¹

B. Cases

B.1 Court recognizes a one-sided optional arbitration clause as a valid arbitration agreement

In *Wilson Taylor Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd*,¹² the Singapore Court of Appeal agreed with the High Court judge below that an arbitration clause that: (a) entitled only one party (but not the other party) to compel its counterparty to arbitrate a dispute; and (b) made arbitration of a future dispute entirely optional instead of placing parties under an immediate obligation to arbitrate, constituted a valid arbitration agreement.

In this case, the arbitration clause provided that “... *at the election of [the respondent], the dispute may be referred to and personally settled by means of arbitration proceedings...*” The respondent therefore had the right to elect arbitration but it chose to refer the dispute to litigation instead. Since it was the respondent that had the option to elect to arbitrate, the dispute could have fallen within the scope of the arbitration clause only if the respondent so elected. The respondent did not elect to arbitrate. Instead, it clearly chose to refer the dispute to litigation. Therefore, the appellant had no basis to apply to stay the proceedings as the dispute was not a matter that was the subject of the arbitration agreement.

The Court of Appeal’s confirmation that one-sided optional arbitration clauses are enforceable is good news for commercial parties, especially those engaged in finance transactions where such clauses

¹⁰ The Law Society of Singapore, Guidance Note 10.1.1 on Third-Party Funding, 25 April 2017, www.lawsociety.org.sg/Portals/0/ForLawyers/GuidanceOnProfessionalAndPracticeIssues/PDF/Council_GN_Third_Party_Funding.pdf.

¹¹ SIARB Guidelines for Third-Party Funders, 18 May 2017, www.siarb.org.sg/images/SIARB-TPF-Guidelines-2017_final18-May-2017.pdf.

¹² [2017] 2 SLR 362.

are commonly found. It ensures flexibility and certainty, and respects the parties' freedom to contract and resolve disputes. Furthermore, where it is clear that a party is entitled to, and has elected to, litigate rather than arbitrate, the Court has made clear that it will respect that decision.

B.2 Court clarifies extent of its holding that statutory minority oppression claims are arbitrable

In *L Capital Jones Ltd v. Maniach Pte Ltd*,¹³ the Singapore Court of Appeal clarified its decision in *Tomolugen Holdings Ltd v. Silica Investors Ltd*,¹⁴ where it held that statutory minority oppression claims are arbitrable. The Court of Appeal explained that its decision in *Tomolugen* was focused on whether there was anything intrinsic to all statutory minority oppression claims which raised public policy considerations against arbitration, and it held that no such considerations exist. The Court of Appeal went on to clarify that while statutory minority oppression claims generally did not raise public policy considerations against arbitration, the Court left open the possibility that the facts of particular statutory minority oppression claims might do so. Therefore, while a statutory minority oppression claim is arbitrable *per se*, there may be instances where other features of the dispute raise public policy considerations that would make such a claim non-arbitrable.

B.3 Court dismisses stay application on basis of failure to participate in mediation in good faith under a med-arb clause

In *Heartronics Corporation v. EPI Life Pte Ltd*,¹⁵ the Singapore High Court held that the failure to participate in mediation in good faith under a med-arb clause constitutes a repudiatory breach of the arbitration agreement between the parties, which, if accepted by the innocent party, renders the arbitration agreement inoperative within the meaning of Section 6(2) of the IAA.

¹³ [2017] 1 SLR 312.

¹⁴ [2016] 1 SLR 373.

¹⁵ [2017] SGHCR 17



In this case, the med-arb clause adopted the SMC-SIAC med-arb procedure jointly promulgated by the Singapore Mediation Centre and the SIAC. The Court rejected the defendant's submission that the obligations to mediate and arbitrate contained within the SMC-SIAC med-arb procedure could be severed or viewed as two distinct agreements. The Court held that the correct approach was to view the med-arb clause as a unitary dispute resolution mechanism, the entirety of which must therefore be considered to be the "arbitration agreement" for the purposes of a stay application under the IAA.

In this case, the Court highlighted that the defendant failed to make payment of the necessary fees to the SMC, which prevented the mediation from proceeding. The defendant also continually sought to postpone the commencement of the mediation. The Court held that such conduct was evidence of the defendant's failure to participate in mediation in good faith, thus committing a repudiatory breach of the med-arb clause, and such repudiatory breach was subsequently accepted by the plaintiff.

B.4 Court sets aside investor-state award

In *Kingdom of Lesotho v. Swissbrough Diamond Mines (Pty) Ltd*,¹⁶ the Singapore High Court set aside an investor-state award on the basis that the tribunal exceeded its jurisdiction. The application before the High Court was the first in which a party requested the Singapore courts to set aside an investor-state award on the merits. This judgment demonstrates the willingness and competence of the Singapore courts to deal with issues concerning public international law and investment arbitration.

B.5 Error in governing law is no bar to enforcement of award

In *Quanzhou Sanhong Trading Limited Liability Co Ltd v. ADM Asia-Pacific Trading Pte Ltd*,¹⁷ the Singapore High Court held that it would not set aside a foreign arbitral award even if the arbitral tribunal made

¹⁶ [2017] SGHC 195.

¹⁷ [2017] SGHC 199.

an error as to the governing law of the contract. In this case, the defendant argued that if the arbitral tribunal made an error as to the governing law of the contract, it would exceed its jurisdiction because it would have disregarded the parties' express agreement as to the governing law. The Court held that the defendant's submission could not be justified as a matter of principle, and explained that an arbitral tribunal does not exceed its jurisdiction just because it comes to a wrong conclusion on an issue that was within the scope of the submission to arbitration, including an issue as to governing law. The Court found that the defendant was in substance arguing an appeal against the tribunal's decision on governing law, and such appeals are not allowed under the IAA.

C. Funding in international arbitration

C.1 Scope of third-party funding in Singapore

2017 saw the landmark introduction of third-party funding for international arbitration in Singapore. Amendments were made to the Civil Law Act to abolish the common law torts of champerty and maintenance.¹⁸ It provides that third-party funding contracts are not contrary to public policy or illegal in international arbitration and related proceedings in court or mediation.¹⁹ This includes applications for stay of court proceedings in respect of matters which are the subject of arbitration agreements, as well as for the enforcement of arbitral awards.

Currently, third-party funding is only permissible in international arbitration and related proceedings in court or mediation. Domestic arbitrations are not included in the third-party funding framework at this time, although the Singapore government has indicated that it may be extended to other categories of dispute resolution proceedings after a period of assessment.²⁰

¹⁸ Section 5A(1) of the Civil Law Act.

¹⁹ Section 5B(2) of the Civil Law Act, read with Section 3 of the Civil Law (Third-Party Funding) Regulations 2017.

²⁰ Second reading speech by Senior Minister of State for Law, Indranee Rajah SC on the Civil Amendment Bill, 2016.



C.2 Qualifying third-party funders

Section 4(1) of the Civil Law (Third-Party Funding) Regulations 2017 prescribes the qualifications for a third-party funder in Singapore, which are as follows:

- (a) the third-party funder carries on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which the third-party funder is not a party; and
- (b) the third-party funder has a paid-up share capital of not less than SGD 5 million or the equivalent amount in foreign currency, or not less than SGD 5 million or the equivalent amount in foreign currency in managed assets.

There is currently no registration requirement. As long as a third-party funder satisfies the requirements under Section 4(1) of the Civil Law (Third-Party Funding) Regulations 2017, it qualifies as a third-party funder under Singapore's third-party funding regime.

C.3 Disclosures

Lawyers are required under Section 49A(1) of the Legal Profession (Professional Conduct) Rules 2016 to disclose to the court or tribunal, and to every other party to those proceedings:

- (a) the existence of any third-party funding contract related to the costs of those proceedings; and
- (b) the identity and address of any third-party funder involved in funding the costs of those proceedings.

Such disclosures must be made at the date of commencement of proceedings, or as soon as practicable after the third-party funding contract is entered into on or after the date of commencement of the dispute resolution proceedings.

Also, while lawyers can introduce or refer third-party funders to their clients, they must not, directly or indirectly, hold any share nor other ownership interest in the third-party funder.²¹ Lawyers also must not receive any commission, fee or share of proceeds from the third-party funder.²²

With respect to institutional rules, Rule 24(1) of the SIAC Investment Arbitration Rules empowers the tribunal to order the disclosure of the existence of a party's third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability.

C.4 Codes of Conduct

C.4.1 SIAC's Practice Note on Arbitrator Conduct in Cases Involving External Funding

As a supplement to an arbitrator's obligations under the SIAC Rules, SIAC's Practice Note states that an arbitrator must disclose any relationship with a third-party funder and that the tribunal must inform the parties of their continuing obligation to inform the tribunal and SIAC of the involvement of a third-party funder in the arbitration proceedings.

With respect to costs, the Practice Note clearly states that the involvement of a third-party funder alone shall not be taken as an indication of the financial status of a party. However, the tribunal may take into account the existence of a third-party funder in apportioning the costs of the arbitration.

C.4.2 Law Society of Singapore's Guidance Note for lawyers on Third-Party Funding

This Guidance Note by the Law Society of Singapore sets out best practices for lawyers and is intended as a guide only. Notably, it states

²¹ Section 49B(1)(a) of the Legal Profession (Professional Conduct) Rules 2016.

²² Section 49B(2) of the Legal Profession (Professional Conduct) Rules 2016.



that lawyers owe ethical duties to their clients and not to the third-party funder. It also provides helpful guidance on issues relating to the negotiation and drafting of the funding agreement.

C.4.3 SIARB Guidelines for Third-Party Funders

These Guidelines seek to promote best practices among third-party funders, by laying down expectations of transparency and accountability between the third-party funder and the funded party, as well as to encourage third-party funders to display high ethical standards towards funded parties so as to uphold the integrity of international arbitration practice in Singapore. Some examples include provisions requiring third-party funders to observe the confidentiality and/or privileged nature of all information and documents relating to the dispute, as well as to recognize that the funded party's lawyers owe professional ethical duties and duties of loyalty and confidentiality to the funded party. As with the Guidance Note by the Law Society of Singapore, it also provides helpful guidance on issues relating to the negotiation and drafting of the funding agreement.