PROPOSED IAA AMENDMENTS

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BACKGROUND

On 26 June 2019, the Singapore Ministry of Law launched a public consultation, ending on 21 August, with regards to proposals to amend Singapore's International Arbitration Act (Cap. 143A) (the "IAA").

> "Given Singapore's growing popularity as a forum for maritime arbitrations, this article will focus on the effect of this option on the resolution of shipping disputes."

In an effort to enhance the options available to parties arbitrating under the IAA and to make Singapore law arbitration more commercially attractive, the proposals included the following:

- a default nomination procedure for arbitrators in multi-party situations;
- a request for the Tribunal to decide on jurisdiction at the preliminary award stage;
- powers to enforce confidentiality obligations in arbitration; and
- the option to allow appeal to the Singapore High Court on questions of law arising out of an arbitral award.

This option of an additional right of appeal is the most significant procedural development of these proposals. Given Singapore's growing popularity as a forum for maritime arbitrations, this article will focus on the effect of this option on the resolution of shipping disputes.

IN WHAT CIRCUMSTANCES WILL THE IAA APPLY?

The seat of an arbitration usually determines the procedural (or curial) law applicable which, in turn, dictates the nature and extent of the involvement and intervention of the court of jurisdiction in any reference.

If the seat is not expressly identified as Singapore in the arbitration clause, then other factors will be indicative, such as:

- a reference to "Singapore arbitration";
- the application of a specific arbitral institution's Rules, such as the SIAC/ SCMA; or
- absent anything to the contrary, the substantive law provision governing the contract.

Once the seat has been established, unless the parties are both domestic Singapore entities, then it is likely that the IAA will apply to the arbitration.

CAN THE SINGAPORE HIGH COURT INTERVENE IN AN ARBITRAL AWARD UNDER THE IAA?

The IAA gives effect to the provisions of the UNITRAL Model Law on International Commercial Arbitration in Singapore law.

Any arbitral award is final and binding on the parties in accordance with section 19B of the IAA, subject only to an application to the Singapore High Court for setting aside on the grounds of procedural irregularity, fraud, corruption and breach of natural justice: see Article 34 of the Model Law (augmented by Article 24 of the IAA).

Despite this authority, the Singapore courts have shown a reluctance to interfere with the autonomy of a Tribunal and have only exercised this right to set aside an award in exceptional circumstances.

> "There is no provision under the IAA for appeal of an arbitral award to the Singapore High Court on the basis of a mistake in law."

Similarly, there is no provision under the IAA for appeal of an arbitral award to the Singapore High Court on the basis of a mistake in law, as can be found in section 69 of the English Arbitration Act 1996 (the "EAA") or, indeed, section 49 of Singapore's domestic Arbitration Act (Cap. 10) (the "AA").

Currently, parties must expressly opt out of the IAA (by sec. 15(1) thereof) in favour of the AA if they require a greater level of court supervision in the reference.

PROPOSAL FOR AN APPELLATE PROCEDURE ON QUESTIONS OF LAW

Clause 6 of the draft IAA Bill sets out the details of the right of appeal mechanism in respect of errors in law to the Singapore High Court (the "Court").

Under proposed sections 24A (1) and (2), the parties to a Singapore arbitration conducted under the IAA must opt in to the right to appeal in writing and, then, obtain leave of the Court.

The granting of leave of the Court will be narrowly circumscribed with the same restrictive criteria as the AA (likewise derived from sec. 69 of the EAA and the Nema Guidelines), whereby:

- the decision of the arbitral tribunal on the question is obviously wrong; or
- the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and
- it is just and proper in all the circumstances for the Court to determine the question.

The proposed sections 24B to 24D will address the procedure and effects of such an appeal.

HOW PROGRESSIVE IS THIS PROPOSAL?

Challenging arbitral awards on questions of law (rather than on narrow procedural grounds) is generally discouraged in most jurisdictions, as many commercial parties adopt arbitration for dispute resolution to enjoy the benefits of finality, confidentiality and expedition.

"The confidential nature of arbitration has materially hindered the evolution of maritime law, which requires the public scrutiny, analysis and refinement offered by the court."

However, transnational maritime parties are far more accustomed to the right of appeal on a point of law due to the development of dispute resolution in shipping. Indeed, for such entities, finality is far less of a concern than ease of enforceability, avoidance of certain legal systems and flexibility.

Most standard shipping related contracts, such as for sale of a vessel or carriage of goods, expressly provide for arbitration in preference over court adjudication. Further, of those maritime arbitrations, 80% choose England as the seat of arbitration and, in doing so, adopt sec. 69 of the EAA, allowing for appeal on a question of law, unless the parties actively opt out of that right, which is unusual.

Indeed, it can come as a surprise for maritime parties to a Singapore arbitration to find out that, under the current law, they have no right of appeal on a point of law.

It is perhaps then unsurprising that, as a recognised maritime hub and fast developing forum for maritime disputes, Singapore would adapt its statutory arbitration rules to address such concern.

WHAT IS THE RATIONALE FOR THE PROPOSAL?

A more collective concern arising from the absence of any right of appeal on the law is the vital ongoing development of a robust and coherent shipping case law, a point that was raised by Singapore's Chief Justice, Sundaresh Menon, at the 10th anniversary of the SCMA in October 2019.

The confidential nature of arbitration has materially hindered the evolution of maritime law, which requires the public scrutiny, analysis and refinement offered by the court. The inability of a Tribunal to refer to, or be bound by, previous arbitral decisions can lead to unpredictable and conflicting results.

Whilst there have been attempts to circulate redacted decisions of Tribunals, either with parties' consent (SIAC Rule 32.12) or without parties' objection (SMCA Rule 36.9), the right of appeal to the Court remains the better way to improve certainty and to ensure the observation of any legal and commercial developments.

CONCLUSION

There is always a balance to be had between respecting and preserving the autonomy of contracting parties to have their disputes resolved by way of arbitration and allowing for the rectification of mistakes and development of sound law by the courts.

Singapore's adoption of an opt in appellate mechanism, akin to the Hong Kong arbitration ordinances, should address this balance. It would allow parties to proactively consider and weigh the risks of mistakes of law and cost consequences against the benefits of finality, confidentiality and expedition.

The opt in, together with the limited grounds within which an appeal can be brought, should prevent the unwanted spectre of unnecessary judicial interference in, or frivolous and vexatious prolongation of, arbitrations whilst ultimately enhancing the legitimacy and certainty of arbitral awards.

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