State Practice of Asian Countries in International Law

Singapore

Elisabeth Liang and Jaclyn L. Neo***

ARBITRATION – PUBLIC POLICY AND ISSUE ESTOPPEL IN SETTING-ASIDE PROCEEDINGS – INTERNATIONAL COMMERCIAL ARBITRATION

The Singapore High Court in *BAZ v BBA and others and other matters* [2018] SGHC 275 set aside an ICC award as against the parties which were minors, as it violated Singapore's most basic notion of justice to find them liable for fraudulent misrepresentation for an amount exceeding S\$720 million. It clarified that it was this determination that went against the principle of protecting the interests of minors in commercial transactions, which was part of the public policy in Singapore, rather than the failure to appoint a litigation representative for the minor parties in the arbitration.

The High Court also held that the doctrine of issue estoppel, though not expressly provided for in the New York Convention or Model Law, may be applied as part of the residual domestic law applicable in setting-aside or enforcement proceedings. In particular, where the setting-aside application is based on grounds attracting *de novo* review by the seat court, and is not concerned with arbitrability or public policy, the seat court would be slow to recognise the determination of a foreign enforcement court as giving rise to issue estoppel. The determination of the seat court should be given primacy.

However, the extended doctrine of *res judicata* would not apply – setting-aside or enforcement proceedings are a review of the outcome of the arbitration proceedings, and unlike the multiple sets of litigation proceedings envisaged in the extended doctrine of *res judicata*, unconcerned with the merits of the dispute.

* Associate, WongPartnership LLP.

** Associate Professor, National University of Singapore Faculty of Law, and Director of the Centre for Asian Legal Studies, National University of Singapore.

**ARBITRATION – ENFORCEMENT OF ARBITRAL AWARD
PENDING CHALLENGE AT THE SEAT – INTERNATIONAL
COMMERCIAL ARBITRATION**

Skaugen, the applicant in *Man Diesel Turbo SE v IM Skaugen Marine Services Pte Ltd* [2018] SGHC 132, sought to adjourn enforcement of the arbitral award on grounds that its setting-aside application in the seat court had “good prospects”, the length of delay would not be substantial, and Man Diesel would not suffer prejudice resulting from the adjournment. The Singapore High Court refused this and chose to uphold the *ex parte* order granting leave for immediate enforcement of the award, noting that Skaugen had only filed its setting-aside application in the seat court after Man Diesel had commenced enforcement proceedings in Singapore. The SGHC found it contradictory that Skaugen had in fact started new arbitration proceedings against Man Diesel predicated on the validity of the arbitral award, whilst later attempting to set aside the same award in the seat court for invalidity.

Further, a delay of one to two years before the setting-aside application would be disposed of would be too long and prejudicial to Man Diesel.

**ARBITRATION – REVIEW OF JURISDICTION OF ARBITRAL
TRIBUNAL IN THE SINGAPORE COURTS – INTERNATIONAL
COMMERCIAL ARBITRATION**

The Court of Appeal in *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)* [2018] SGCA 63 held that the commencement of litigation proceedings in breach of an arbitration agreement was indicative of the claimant’s intention to repudiate the arbitration agreement. In *dicta*, it considered it “strongly arguable” that the mere commencement of litigation proceedings was itself a *prima facie* repudiation of the arbitration agreement, especially where the commencement of litigation proceedings is not explained nor qualified in scope.

Where the defendant to these litigation proceedings then engages the court’s jurisdiction on the merits – in this case, by applying for summary judgment in its favour or to strike out the action – it will be deemed to have submitted to the court’s jurisdiction and thus accepted the claimant’s repudiation of the arbitration agreement. Accordingly, the arbitral tribunal would not have jurisdiction to hear the dispute.

**ARBITRATION – REVIEW OF JURISDICTION OF ARBITRAL
TRIBUNAL IN THE SINGAPORE COURTS – INTERNATIONAL
COMMERCIAL ARBITRATION**

In *Sinolanka Hotels & Spa (Private) Limited v Interna Contract SpA* [2018] SGHC 157, the Singapore High Court confirmed that parties cannot apply for the curial review of an arbitral tribunal's jurisdiction under either Section 10(3) of the International Arbitration Act or Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration if the tribunal had decided the issue of jurisdiction in the final award (or in an award which also deals with the merits of the dispute), and not as a preliminary question. The statutory language in this regard is clear that the courts have no power to determine the arbitral tribunal's jurisdiction at such stage.

**ARBITRATION – REVIEW OF JURISDICTION OF ARBITRAL
TRIBUNAL IN THE SINGAPORE COURTS – INTERNATIONAL
COMMERCIAL ARBITRATION**

In *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78, the Singapore High Court held that where jurisdiction had been decided as a preliminary question, a failure to challenge it within 30 days (pursuant to Section 10(3) of the International Arbitration Act and Article 16(3) of the UNCITRAL Model Law) had a preclusive effect on subsequent setting-aside proceedings at the seat. This would apply even if the challenging party had not participated in the arbitration, and especially, would amount to an abuse of process where the challenging party had deliberately allowed the arbitration to proceed and only raised a jurisdictional challenge at the seat court in blatant disregard of the 30-day time limit. However, the challenging party would not lose its passive remedy of resisting enforcement whether in another jurisdiction or at the seat.

**DISPUTE RESOLUTION – MEMORANDUM OF GUIDANCE –
SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF
CHINA**

China and Singapore signed the Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme

Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases on 31 August 2018. It applies to both international and non-international cases of which recognition and enforcement of judgments requiring a natural or legal person to pay a fixed or ascertainable sum of money to another natural or legal person in commercial cases is sought in the other party's courts, including judgments issued by the Singapore International Commercial Court.

This Memorandum is significant as there was no pre-existing treaty for reciprocal enforcement of judgments between both countries. *Kolmar Group AG v Jiangsu Textile Industry (Group) Import & Export Co Ltd* (2016) Su 01 Xie Wai Ren No 3 was the first case in which a Chinese court enforced a judgment in Singapore, but it is not a binding precedent. The Memorandum now sets out various procedural and substantive conditions for the enforcement of Singapore judgments in China. Most importantly, it stipulates that Chinese courts will not review the merits of a Singapore judgment. A Singapore judgment may only be challenged on limited procedural and jurisdictional grounds, or as contrary to public policy. The Memorandum sets out the same conditions for the enforcement of Chinese judgments in Singapore courts.

TREATY – RATIFICATION OF TREATIES

Singapore ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) on 19 July 2018 and the agreement entered into force on 30 December 2018. The CPTPP is a regional free trade agreement between eleven countries which represent 14% of the global economy. It is also Singapore's first preferential trade agreement that involves Canada and Mexico. Notably, the CPTPP provides for investor-State dispute resolution under the ICSID Convention Arbitration and Additional Facility Rules or UNCITRAL Arbitration Rules (including the UNCITRAL Transparency Rules) if an investment dispute has not been resolved after six months of consultations and negotiations, and includes a Code of Conduct for arbitrators.

TREATY – FREE TRADE AGREEMENT – SINGAPORE AND SRI LANKA

Sri Lanka and Singapore signed the Sri Lanka-Singapore Free Trade Agreement on 23 January 2018. The agreement has been ratified and entered into force on 1 May 2018. The Free Trade Agreement is Sri Lanka's first modern

and comprehensive free trade agreement and provides Singapore companies with another avenue to venture into the larger South Asia market. It is also Sri Lanka's first treaty commitment on government procurement, and lists the Singapore International Arbitration Centre as an institution under which investor-State disputes can be brought, promoting Singapore as an arbitration hub.

**TREATY – BILATERAL INVESTMENT TREATY – SINGAPORE
AND KENYA**

Singapore and Kenya signed the Singapore-Kenya Bilateral Investment Treaty and an Agreement for the Avoidance of Double Taxation on 12 June 2018. The Bilateral Investment Treaty grants investors protection such as Most-Favoured-Nation treatment, fair and equitable treatment, and protection from illegal expropriation. The Agreement for the Avoidance of Double Taxation stipulates the taxing rights of both jurisdictions on all forms of income flows arising from cross-border business activities and minimizes the double taxation of such income.

**TREATY – BILATERAL INVESTMENT TREATY AND AIR SERVICES
AGREEMENT – SINGAPORE AND RWANDA**

Singapore and Rwanda signed the Rwanda-Singapore Bilateral Investment Treaty and Air Services Agreement on 15 June 2018. The Bilateral Investment Treaty grants investors protection such as Most-Favoured-Nation treatment, fair and equitable treatment, and protection from illegal expropriation. It is complemented by the Air Services Agreement, which will enhance connectivity, enabling wider economic benefits through increased investment, tourism and trade between the countries.

**TREATY – BILATERAL INVESTMENT TREATY – SINGAPORE
AND INDONESIA**

Singapore and Indonesia signed an Agreement on the Promotion and Protection of Investments, also known as the Bilateral Investment Treaty, on 11 October 2018. This replaced the previous Bilateral Investment Treaty which expired on 20 June 2016. The Bilateral Investment Treaty will complement

the ASEAN Comprehensive Investment Agreement to promote greater investment flows between both countries, by providing investor protection such as Most-Favoured-Nation treatment, National Treatment, fair and equitable treatment and full protection and security based on customary international law, and protection from illegal expropriation.

TREATY – FREE TRADE AGREEMENT – SINGAPORE AND THE EUROPEAN UNION

The European Union (EU) and Singapore signed the EU-Singapore Free Trade Agreement (EUSFTA) and EU-Singapore Investment Protection Agreement (EUSIPA) on 19 October 2018. The agreements will be sent to the European Parliament for approval before the EUSFTA can be ratified and entered into force. The EUSIPA must be ratified by both the EU and its individual member states and will additionally be sent to the regional and national parliaments of the EU member states for approval before it enters into force. This is expected to take around two to three years after signing.

Key benefits of the EUSFTA include tariff elimination, reduced non-tariff barriers, greater market access for service providers, professionals and investors, enhanced government procurement opportunities, and enhanced intellectual property rights.

The EUSIPA will replace the twelve existing bilateral investment treaties between Singapore and various EU member states. It notably clarifies investment protection standards and obligations, prescribes shorter timelines for consultations between parties and for the tribunal to issue an award, and adopts similar requirements to the UNCITRAL Transparency Rules. It also establishes a new standing international and fully independent dispute resolution system, comprising a First Instance Tribunal and an Appeals Tribunal with permanent members. The latter will hear challenges to tribunal members in-house. These features, as the European Commission has announced, are indicative of the EU's new approach to investment protection and its enforcement mechanisms.

TREATY – FREE TRADE AGREEMENT UPGRADE PROTOCOL – SINGAPORE AND THE PEOPLE'S REPUBLIC OF CHINA

Singapore and China signed the China-Singapore Free Trade Agreement Upgrade Protocol on 12 November 2018. It will enter into force upon ratification.

The upgraded Free Trade Agreement enhances market access for goods, improves Singapore companies' access into China's legal, maritime and construction services sectors and Chinese companies' access into Singapore's air transport, courier, environment and financial services sectors. It also enhances investment protection for Singapore investors in China, surpasses existing commitments in the World Trade Organisation Trade Facilitation Agreement in Release of Goods, Advance Rulings and Express Shipments, and introduces new chapters on Trade Remedies, Economic Cooperation, Competition, Environment, E-commerce and Manpower.

TREATY – BILATERAL INVESTMENT TREATY – SINGAPORE AND KAZAKHSTAN

Singapore and Kazakhstan signed the Singapore-Kazakhstan Bilateral Investment Treaty on 21 November 2018. Kazakhstan is Singapore's most significant economic partner among the five Central Asian states and also part of the Eurasian Economic Union, which Singapore is in the process of negotiating a Free Trade Agreement with. The signing of the Bilateral Investment Treaty will serve as a good foundation to the ongoing negotiations. The Treaty also provides for an investor's submission of a claim to arbitration under the ICSID Convention Arbitration and Additional Facility Rules or UNCITRAL Arbitration Rules (including the UNCITRAL Transparency Rules) if an investment dispute has not been resolved after six months of consultations and negotiations.

TREATY – UNITED NATIONS CONVENTION ON INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION

The United Nations General Assembly adopted the Convention on International Settlement Agreements Resulting from Mediation on 20 December 2018. It shall be open for signature by all States in Singapore, on 7 August 2019. The Convention is the first UN treaty to be named after Singapore and will be known as the "Singapore Convention on Mediation".

Playing a similar role as the New York Convention does for arbitration, the Convention is the first multilateral treaty to provide for the cross-border enforcement of mediated settlement agreements, and will give businesses greater certainty that their mediated settlement agreements can be relied upon in cross-border commercial dispute resolution. Singapore's role in the

negotiations, drafting of the treaty, and as the host of the treaty signing serve to consolidate its position as a leading international dispute resolution centre.

**TREATY – MULTILATERAL CONVENTION TO IMPLEMENT TAX
TREATY RELATED MEASURES TO PREVENT BASE EROSION AND
PROFIT SHIFTING**

Singapore deposited the Instrument of Ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting on 21 December 2018. The Convention was signed by Singapore on 7 June 2017 and will enter into force for Singapore on 1 April 2019. The key benefits include minimum standards for preventing treaty abuse such as the adoption of the Principal Purpose Test, minimum standards for enhancing dispute resolution with assistance from the Inland Revenue Authority of Singapore, and mandatory binding arbitration provisions to provide certainty and specified timeframes for parties in treaty-related disputes.

**HUMAN RIGHTS – SUBMISSION OF FIRST REPORT ON
INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL
FORMS OF RACIAL DISCRIMINATION TO COMMITTEE ON THE
ELIMINATION OF RACIAL DISCRIMINATION**

Singapore submitted its first report to the United Nations Committee on the Elimination of Racial Discrimination on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on 24 December 2018. Singapore signed the ICERD in October 2015 and ratified it in November 2017. The Committee has not yet provided its concluding observations on Singapore's Report.

The Report emphasises Singapore's commitment to racial harmony, anchored on the principles of the secular state, multi-racialism and meritocracy. Singapore highlighted three pillars on which the Government's approach to building social cohesion was anchored: (i) legislation that safeguards racial and religious harmony; (ii) policies that foster social integration; and (iii) programmes that mobilise the community to build mutual respect and understanding, and to work together for the common good. Specific measures include the Presidential Council for Minority Rights which acts as a safeguard against the implementation of discriminatory laws; the Group

Representation Constituency to ensure Parliament's multi-racial composition; the Ethnic Integration Policy to ensure a balanced ethnic mix across public housing estates and to prevent the formation of racial enclaves; five ethnic-based Self-Help Groups to assist low-income persons and families; and Community Programmes in place to foster social cohesion.

**INTERNATIONAL ECONOMIC LAW – REVIEW OF
INVESTOR-STATE AWARDS IN THE SINGAPORE COURTS –
INVESTMENT TREATY LAW**

Swissborough Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho [2018] SGCA 81 is Swissborough's appeal against the Singapore High Court's decision to set aside a partial final award on jurisdiction and merits by a Permanent Court of Arbitration tribunal on grounds that the PCA Tribunal lacked jurisdiction over the parties' dispute.

The Court of Appeal dismissed the appeal, finding that the SGHC did have jurisdiction to hear the setting-aside application pursuant to Article 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration (*i.e.*, an award dealing with a dispute not contemplated by or not falling within the terms of the submission to arbitration), even if the Kingdom had been contesting the very existence of the PCA Tribunal's jurisdiction to hear the claims submitted to it. In *dicta*, the Court of Appeal further stated that even if it had no jurisdiction to hear the setting-aside application on Article 34(2)(a)(iii) grounds, it would have allowed the Kingdom to amend the grounds for setting-aside in its originating summons to Article 34(2)(a)(i) (*i.e.*, the arbitration agreement was invalid) – highlighting, once again, the Singapore courts' extremely pro-arbitration approach.

This decision also affirmed the Singapore courts' willingness to engage in extensive treaty interpretation, with the Court of Appeal reviewing, in its appellate position, the SGHC's *de novo* analysis of the PCA Tribunal's jurisdiction.