Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd and Another [2002] SGHC 53

Case Number : OM 600037/2001

Decision Date : 20 March 2002

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Christopher Chuah and Michael Chia (Drew & Napier LLC) for the claimants; Sundaresh Menon and Hilbert Lee (Rajah & Tann) for the respondents

Parties : Dermajaya Properties Sdn Bhd — Premium Properties Sdn Bhd; Another

Arbitration – Conflict of laws – Curial law – Agreement to refer dispute to arbitrator under UNCITRAL Rules – Singapore as place of arbitration – International Arbitration – Whether arbitrator has power to order security for costs – Whether International Arbitration Act applies – Whether amendments to s 15 of International Arbitration Act to clarify or change law – Whether mere adoption of incompatible set of rules sufficient to exclude Model Law or Pt II of International Arbitration Act – Whether incompatible set of rules totally excluded if Model Law applies – Whether Model Law and Pt II to be read and applied together – ss 5, 12, 15 & Pt II, Sch 1 International Arbitration Act (Cap 143A, 1995 Ed)

Arbitration – Arbitral tribunal – Powers – Power of arbitrator to order security for costs – Whether arbitrator exceeding jurisdiction by including arbitrator's fee and Singapore International Arbitration Centre costs in award for security for costs – s 12 International Arbitration Act (Cap 143A, 1995 Ed)

Judgment

GROUNDS OF DECISION

Introduction

1. The Claimant Dermajaya Properties Sdn Bhd is a company incorporated in Brunei.

2. The First Respondent Premium Properties Sdn Bhd and the Second Respondent CFE Holdings (Malaysia) Sdn Bhd are companies incorporated in Malaysia.

3. By an agreement dated 4 October 1996 ('the Agreement') the Claimant agreed to buy from both the Respondents 100% of the paid up capital in another company incorporated in Malaysia, President Hotel Sdn Bhd, for RM297,000,000.

4. Clause 12.15 and 12.16 of the Agreement provides:

'12.15 Arbitration

Any dispute or difference between the parties in connection with this Agreement shall be referred to a sole arbitrator under the Arbitration Rules of the United Nations Commission on International Trade Law -

12.15.1 the arbitration shall be held in Singapore; and

12.15.2 the arbitrator shall be appointed by the parties or, failing agreement, by the Director, for the time being of the Regional Center for Arbitration at Kuala Lumpur.

12.16 Law

This Agreement shall be governed by, and construed in accordance with, the laws of Malaysia.'

5. Disputes arose between the parties subsequently. An action was commenced in the High Court of Malaya in Kuala Lumpur by the Claimant naming both Respondents and President Hotel Sdn Bhd as Defendants. This action was stayed by order of the High Court of Malaya in Kuala Lumpur on 3 September 1997.

6. About three and a half years later, by an agreement dated 9 March 2001, the parties agreed to the appointment of Dato Mahadev Shankar as arbitrator.

7. On 17 August 2001, the Respondents applied for security for costs from the Claimant in the sum of RM500,000. This was reduced during submission to RM470,000.

8. After submissions, the arbitrator made an Interim Award dated 5 November 2001 under which the Claimant was to deposit S$200,000 as security for the Respondents' costs in the arbitration. His decision rested on the applicability of the International Arbitration Act (Cap 143A) ('IAA') and in particular s 12 IAA. This in turn depended on the interpretation of s 15 IAA.

9. The Claimant, being dissatisfied with the decision of the arbitrator, then appealed to the High Court.

10. The appeal came up for hearing before me on 19 February 2002. The primary issue is whether the arbitrator had jurisdiction to order security for costs against the Claimant.

11. It is common ground that:

(a) the Arbitration Rules of the United Nations Commission on International Trade Law ('the UNCITRAL Rules') do not enable the arbitrator to order security for costs against the Claimant.

(b) Section 12 IAA does enable the arbitrator to order security for costs against the Claimant.

(c) The other legislation in Singapore applicable to arbitration is the Arbitration Act (Cap 10) ('AA'). This Act is often described as applying to domestic arbitration. At the material time, the AA does not enable the arbitrator to order security for costs against the Claimant. However, the High Court of Singapore may do so.

12. I would add that it is also common ground that the place, or seat, of the arbitration is Singapore.

Section 15 IAA

13. Section 15 IAA has been amended recently. However it is the pre-amendment s 15 and not the current s 15 which is applicable.

14. The pre-amendment s 15 states:

'15. If the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between

them is to be settled or resolved otherwise than in accordance with this Part or the Model Law, this Part and the Model Law shall not apply in relation to the settlement or resolution of that dispute.'
[Emphasis added.]

15. The IAA is:

'An Act to make provision for the conduct of international commercial arbitrations based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law and conciliation proceedings and to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and for matters connected therewith.'

16. Part II of the IAA is the main part. It comprises ss 2 to 26 of the IAA. Under s 3, the Model Law, with the exception of Chapter VIII thereof, is to have the force of law in Singapore.

17. Under s 5, Part II and the Model Law shall not apply to an arbitration which is not an international arbitration. However, the parties before me agreed that their arbitration is an international arbitration for the purpose of the IAA. Thus, prima facie, Part II and the Model Law apply to the arbitration in question.

18. The Model Law is set out in the First Schedule to the IAA. It covers various matters such as the composition and jurisdiction of the arbitral tribunal and the conduct of arbitral proceedings, the making of the award and termination of proceedings. It also provides for recourse against an award and recognition and enforcement of awards.

19. However Part II IAA provides for other powers of an arbitral tribunal including, as I have mentioned, the power to make orders for security for costs under s 12.

Claimant's position

20. The Claimant's position is as follows:

(a) The UNCITRAL Rules were published by UNCITRAL in 1976. The Model Law was published in 1985. Although the Agreement is dated 4 October 1996, the parties had adopted the UNCITRAL Rules and not the Model Law.

(b) (i)Although the UNCITRAL Rules and the Model Law were promulgated by the same body, i.e UNCITRAL, they are incompatible.

(ii) For example, where there is to be one arbitrator, and if parties cannot agree to the appointment of the arbitrator and if there is no agreement on the appointing authority, Article 6 of the UNCITRAL Rules provides that either party may request the Secretary-General of the Permanent Court of Arbitration at the Hague to designate an appointing authority.

(iii) However, in a similar situation, Article 11(3)(b) read with Article 6 of the Model Law, provides that each State adopting the Model Law is to designate the appointing authority. In the case of Singapore, the appointing authority is designated under s 8(2) IAA as the Chairman for the time being of the Singapore International Arbitration Centre ('SIAC'), or such other person as the Chief Justice may appoint.

21. I would digress to say that, in the case before me, the Agreement does specifically identify the authority to appoint the arbitrator, if the parties should fail to agree on the arbitrator. However, this is immaterial to the argument before me because my conclusion about s 15 IAA must be the same whether an arbitration agreement does or does not have an express provision on the appointing authority.

22. Coming back to the Claimant's position, Mr Christopher Chuah, for the Claimant, submitted that since the UNCITRAL Rules are incompatible with the Model Law, then both the Model Law and Part II do not apply. The parties have by implication opted out of the Model Law and Part II and this is sufficient for the purpose of s 15 IAA. The word 'agreed' in s 15 includes agreement by implication and is not restricted to an express agreement to the contrary.

23. Mr Chuah also submitted that:

(a) The heading to every pleading referred only to the UNCITRAL Rules.

(b) The Respondents had initially relied solely on Article 15 of the UNCITRAL Rules. 'This shows that the Respondents were not aware of the IAA at that time nor did they intend to rely on the IAA' (para 14 of Claimant's Submission).

(c) The parties had not referred to the IAA in the arbitration provision. 'It was never the intention of the parties to be governed by the IAA and the Model Law' (para 24 of Claimant's Submission).

(d) Malaysia and Brunei have not adopted the Model Law.

24. Mr Chuah referred to two cases. The first was *Coop International Pte Ltd v Ebel SA* [1998] 3 SLR 670, a decision by Chan Seng Onn JC.

25. In that case, the first agreement which incorporated an arbitration provision provided that the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva Switzerland ('the Geneva Rules'), were to apply. It also provided that 'The arbitral tribunal shall have its seat in Geneva'. This agreement was terminated by a termination agreement which did not have an arbitration provision. Subsequently, the parties entered into a third agreement which was in the nature of a settlement agreement. A dispute arose under the third agreement and a question arose whether the arbitration provision in the first agreement applied.

26. Chan JC held that it did not. However he also gave his views, though obiter, on the arbitration provision and s 15 of the IAA in relation to a mandatory stay of court proceedings.

27. As the arbitration provision had provided for arbitration outside Singapore, Chan JC was of the view that s 15 IAA was not applicable and hence it could not and need not be used to oust the application of the Model Law and Part II. Chan JC then rendered his view on the hypothetical situation whereby parties had chosen Singapore as the place of their arbitration but agreed to abide entirely by the Geneva Rules.

28. In his view, the Geneva Rules were incompatible with the Model Law as applied in Singapore and he referred to the Geneva Rules on an appointment of a sole arbitrator as an illustration. He concluded thus:

'143 Article 19 does not help much as the selection of the arbitrator is not simply a rule of

procedure that has to be followed by the arbitral tribunal in conducting proceedings. It is substantive in nature. In this hypothetical case, the parties had selected a procedure which is contrary to the mandatory provision in the IAA and the Model Law.

144 In my opinion, it is not necessary to have an explicit agreement stating that the Model Law or Part II will not apply, as counsel for the respondents had contended. Section 15 itself does not appear to require a clear express term of exclusion. On a plain and literal reading of that section, it can cover both express and implied exclusions. If the intention is to limit s 15 to an express ouster only, Parliament could easily have provided for it.

145 Second, the transition provision in s 26 of the IAA provides that Part II shall not apply to an international arbitration that was commenced before 27 January 1995, the date the IAA came into force. It would appear that the IAA covers international arbitration agreements concluded before the IAA was in force. Parties certainly could not be expected to know that there is a need under s 15 to expressly opt out of the Model Law or Part II. I do not think that Parliament could have intended that these parties should be precluded from opting out and that they should be forced to adopt procedures for arbitration in Singapore that are contrary to what the parties had agreed between themselves. As with international arbitration agreements concluded on or after 27 January 1995, they should also have the same facility to opt out and the only way this can be done is to construe s 15 such that opting out by implication is allowed.

146 By choosing procedures which are alien and contrary to the mandatory provisions in the Model Law or Part II for arbitration *in Singapore*, I think parties would have successfully opted out by implication.

147 What then is the legal regime to govern that arbitration in Singapore after the parties had by implication opted out? Having regard to s 5(4), I am of the view that if Part II is no longer applicable, then the legal regime reverts to the Arbitration Act (Cap 10) (AA). The definition of arbitration agreement in s 2 of the AA is extremely wide and would cover all arbitration agreements, whether domestic or international in nature. When Part II and the Model Law in the IAA applies, the AA is not applicable. So when Part II and the Model Law are inapplicable, the AA must apply. I cannot envisage a lacuna here.

148 I do not think I should go further to deal with the question how the arbitration is going to be conducted having regard to the fact that the Geneva Rules are not exactly in line with many of the provisions in the AA. It may well be easier if the parties, after realising the complexities, simply agree to go to Geneva to arbitrate rather than have it done in Singapore if they still want to follow the Geneva Rules. But the point remains that they can arbitrate in Singapore using procedures other than the Model Law.'

29. In summary, where the place of international arbitration is Singapore, Chan JC's view was that the adoption of rules incompatible with the Model Law or Part II would mean that the parties had opted out under s 15. Furthermore, his decision indicated that once there is an opting out of either the Model Law or Part II, both are excluded. Lastly, he decided that if the Model Law and Part II do not apply, then the AA applies.

30. The appeal against Chan JC's decision was dismissed but it was not suggested by either side that the dismissal of the appeal had any bearing on the pre-amendment s 15 IAA.

31. The second case referred to by Mr Chuah was *John Holland Pty Ltd (fka John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262, a decision by

Choo Han Teck JC.

32. In that case, the parties had expressly agreed to refer disputes to arbitration for settlement under the rules of Conciliation and Arbitration of the International Chamber of Commerce ('the ICC Rules'). According to para 1 of Choo JC's judgment, the arbitration clause stipulated that the arbitration was to be held in Singapore according to the laws of Singapore. However the hearing actually took place in Vancouver although the final submissions were conducted in Singapore. A preliminary question arose as to whether Part II and the Model Law of the IAA applied.

33. Choo JC said:

> '9 It will be helpful to begin by considering some general principles, and perhaps, take into account the philosophies of the domestic and international arbitration that both counsel believe have a material bearing on the way the statutory provisions are to be interpreted. It is obvious from the Singapore Hansard reports, which both counsel referred to, that the IAA was enacted to provide expediency and flexibility to parties who wish to conduct an international arbitration in Singapore or have Singapore law apply. Thus, s 15 permits the parties to exclude Pt II or the Model Law (or both) by agreement. It is also common ground that there are material differences between the ICC Rules and the Model Law. But in spite of these differences, the two sets of rules purport to perform the same function, which is, to provide the procedural structure for the arbitration. In any form of dispute resolution, the function of the procedural structure is to facilitate the resolution process by freeing the parties to concentrate on the real and substantive issues of fact and law. If one shares this view, then it becomes plain that the adoption of two different codes only serves as a distraction and will dissipate the energy and time of the protagonists in unnecessary clarification of conflicting rules.
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> 10 Mr Hwang and Mr Wong used the term 'implied opting out' as a convenient way of expressing whether the adoption of the ICC Rules had that effect on the Model Law. That is one way of looking at it, but on my part, I am not comfortable with the term 'implied opting out' in the context of s 15. In my judgment, s 15 requires the parties to be clear in selecting another set of rules if they do not wish the Model Law to apply by default. I think that it may not be the correct approach to argue that there was an implied opting out (as Mr Hwang did), or that the entire circumstances and facts must be scrutinized to see whether an opting-out may be implied (as Mr Wong suggested). I should add that Mr Wong wishes me to take into account the fact that counsel for JHPL actually made submissions on two occasions (one in the final submissions here in Singapore) in reliance on the provisions of the Model Law. Thus, he said that the reliance militates against any implicit opting-out. …. However, the circumstances reveal a different picture to me altogether. By agreeing to have the arbitration conducted in accordance with the ICC Rules, the parties have thereby, in my view, agreed that the Model Law will not apply, or in the words of s 15, 'that the arbitration be settled or resolved otherwise than in accordance with the Model Law'. If they should subsequently at the proceeding itself, by consent or without objection, rely on the Model Law (or any other set of rules) at the arbitration they will be regarded as having agreed to do so on an ad hoc basis. That arrangement will end when either party wishes to revert to the chosen rules; and any dispute as to whether they would be permitted to do so will be determined by the arbitrator. The arbitrator is perfectly entitled to determine whether any issue of estoppel arises and whether there is a need to revert to the contractually chosen rules in writing. Therefore, in this case, the ICC Rules remain the governing rules to the exclusion of the Model Law. There are two ancillary points which I ought to deal with. The first concerns the question whether Pt II of the IAA must be applied in tandem with the Model Law such that both are excluded whenever the parties have excluded either of them. The second concerns the question whether the AA applies, as the default legislation as it were,

whenever the IAA has been excluded.

Pt II and the Model Law as one

11 In the *Coop* case (supra), the judge assumed that when the parties have selected a set of rules other than the Model Law, they have thereby implicitly opted out not only of the Model Law but the IAA as well. The issue whether the two are conjoined did not appear to have been argued before the court in that case. The court's assumption elicited the following commentary by the editors of *Halsbury's Laws of Singapore*. They say at p 18 of vol 2 ([20.012] note 14):

> Often contractual rules of arbitration are confused with the applicable law of the arbitration (*lex arbitri*). While parties may adopt certain rules of arbitration, the law of the arbitration is normally determined by the law of the situs or the seat of the arbitration. For this reason, rules of international arbitral institutions do not normally specify the applicable law of arbitration (*lex arbitri*). Many arbitrations in Singapore are conducted in accordance with institutional rules of arbitration such as the International Chamber of Commerce (ICC) and the UNCITRAL Rules. Whether or not the law of the arbitration is the Arbitration Act or the International Arbitration Act should be decided upon the factors set out in the International Arbitration Act s 5(2). In *Coop International Pte Ltd v Ebel SA* [1998] 3 SLR 670, Chan Seng Onn JC said at 142 - 146, in relation to a hypothetical situation where if the parties had chosen Singapore as the place of arbitration and adopted the Rules of the Chamber of Commerce and Industry of Geneva, then the parties would have successfully opted out of the International Arbitration Act by implication. He illustrated his view with the example that under the Geneva Rules, the arbitrators are to be appointed by the Chamber of Commerce and Industry of Geneva, whereas under the International Arbitration Act, the Chairman of the Singapore International Arbitration Centre is the appointing authority. It is submitted that the court's view on this point is erroneous and the illustration inappropriate. Choice of institutional rules of arbitration has been confused with the application of *lex arbitri*.

12 The express wording of s 15 permits the parties to exclude either Pt II or the Model Law (or both). That is the principal right that the IAA confers on them. It will not stand to reason to interpret the word 'and' (in '… this Part and the Model Law shall not apply …') in the second part of s 15 literally because that would have castrated what was intended to be a potent right of choice, without so much as the intervention of a semi-colon. If, for example, the parties had elected to apply Pt II but not the Model Law, it cannot follow that consequently, both - Pt II and the Model Law - become inapplicable. In my view, one must naturally read the words 'as the case may be' in ellipsis before the words 'shall not apply'. In arriving at this conclusion, I gathered support from the wording of s 5 of the IAA which has a reversed image of s 15. Section 5 allows parties to a domestic arbitration to adopt Pt II of the IAA or the Model Law. When one looks at the wording of s 5, it will at once be clear that the legislature could not have intended the domestic AA to be substituted by the IAA if the parties had chosen the Model Law without choosing Pt II. Section 5 reads:

> This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration.

> The words 'as the case may be' should similarly be incorporated after 'this Part or the Model Law'. It will also be seen that all the provisions of Pt II are capable of application on their own without the Model Law. Section 5(4) emphasizes the point. 'Notwithstanding anything to the contrary in the Arbitration Act, that Act shall not apply to any arbitration to which this Part applies.' The omission of 'the Model Law' provides the emphasis.
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> 13 I would state an obvious point at the risk of appearing tautologous, but I think that it is important to do so in this case. The point is this. When parties select Pt II of the IAA, without specifying the Model Law as well, the Model Law is naturally included because it is part of Pt II, as it is by means of the First Schedule to the IAA. However, the converse is not so. When parties select the Model Law without specifying Pt II of the IAA, the latter does not apply. When the beast is slain, its tail is slain; when its tail is slain, the beast is not.
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> 14 Thus, the only issue in the case before me, was whether the ICC Rules fall into the same genus as the Model Law. It may not be disputed that the ICC Rules are different from legislative provisions such as Pt II of the IAA, but ought we to hold that the Model Law being part of a statute be similarly regarded? In the present context I think not. The Model Law was created as an optional set of rules to be utilised like any other set of contractual rules such as the ICC Rules. It follows, therefore, that the parties had elected to apply the ICC Rules in place of the Model Law, thereby excluding the Model Law only. The election did not include Pt II of the IAA. It may be helpful if I issue the reminder that parties ought to express their intention without ambiguity. Parliament enacted the IAA to govern international arbitration, but confers upon the parties the liberty of choice. When the parties make their election, they must remember that by excluding the IAA they may have invoked the AA by default (if the choice of law clause specifies Singapore law, as in this case). There is no reason why the AA cannot apply to an international arbitration, but parties ought to be sure and clear as to what they want when making a s 15 election.
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> 15 The approach I had taken in coming to this finding is based on the principle that statutory provisions must be read plainly, and interpreted strictly and faithfully; but when parties have, by sheer ingenuity or fortuity, created a set of circumstances not envisaged by the draftsman, then the court ought to apply the law with sufficient latitude to give effect as closely as possible to the agreement of the parties. This is especially so in matters concerning international arbitration in which the attractiveness of resolving commercial disputes between international parties according to the manner and law of their choice, by arbitrators of their choice, and unfettered by domestic rules (designed in part, to cater to domestic needs) are some of the factors that have led to the ascendancy of international arbitration in recent times.'

34. Accordingly, Choo JC was also of the view that the choice of a set of rules incompatible with the Model Law meant that the parties had agreed that the arbitration be settled or resolved otherwise than in accordance with the Model Law. I will refer to this as 'an implied opting out' although Choo JC was not comfortable with that term.

35. However, Choo JC held that even though the Model Law was excluded, Part II was not. He then went on to deal with s 24 of the IAA which was relevant in the case before him but irrelevant to the case before me. Apparently, there was no appeal against his decision.

36. Mr Chuah relied on both *Coop* and *John Holland* for the proposition that a selection of an incompatible set of rules like the UNCITRAL Rules is sufficient to constitute the agreement of exclusion under s 15 IAA.

37. He also relied on *Coop* for the proposition that once an incompatible set of rules is adopted, then both the Model Law and Part II do not apply. On this point, he submitted that *John Holland* was incorrectly decided because the Model Law and Part II are inextricably intertwined.

38. After these two cases, the IAA was amended. In particular, the old s 15 was repealed and substituted. The current s 15 states:

> '15. (1) If the parties to an arbitration agreement (whether made before or after the date of commencement of the International Arbitration (Amendment) Act 2001) have expressly agreed either -
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> (a) that the Model Law or this Part shall not apply to the arbitration; or
> (b) that the Arbitration Act 2001 or the repealed Arbitration Act (Cap.10) shall apply to the arbitration,
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> then, both the Model Law and this Part shall not apply to that arbitration but the Arbitration Act 2001 or the repealed Arbitration Act (if applicable) shall apply to that arbitration.
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> (2) For the avoidance of doubt, a provision in an arbitration agreement referring to or adopting any rules of an arbitral institution shall not of itself be sufficient to exclude the application of the Model Law or this Part to the arbitration concerned.'
> [Emphasis added.]

39. Counsel for the parties agreed that the current s 15 IAA is clear in that the mere adoption of any set of arbitration rules will not exclude the application of the Model Law. Furthermore, it is also clear under the current s 15 IAA that if the parties have expressly agreed that the Model Law or Part II shall not apply to an arbitration, then both the Model law and Part II shall not apply. Having said that, it seems to me that the current s 15(2) IAA, should read, '… shall not of itself be sufficient to exclude the application of the Model Law and this Part to the arbitration concerned'.

40. 1 November 2001 is the date of commencement of all the recent amendments to the IAA. However, the transition provision states that the amending Act shall not apply to arbitration proceedings commenced before the date of commencement of the amending Act. The arbitration before me was commenced before the date of commencement of the amending Act.

41. The question is whether the current s 15 IAA effects a change to s 15 prior to the amendment or merely re-affirms what was already the intention behind and the meaning of the pre-amendment s 15. It was not disputed that I could have regard to Parliamentary Reports on any relevant Bill to assist me. Indeed this is provided in s 9A of the Interpretation Act (Cap 1).

42. When the Bill in respect of the IAA was read in 1994, Associate Professor Ho Peng Kee (the then Parliamentary Secretary to the Minister for Law) said, on 31 October 1994:

> 'The Bill will mainly implement the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration on an "opt-out" basis ….'

43. Subsequently, on 5 October 2001, Assoc. Prof. Ho Peng Kee, who had then become the Minister of State for Law, said, in respect of the amending Act:

> ' Sir, this Bill is related to the Bill which was just passed [i.e the Bill to amend the Arbitration Act]. This Bill makes consequential and related amendments to the International Arbitration Act

to ensure its consistency with the Arbitration Bill which we have just moved earlier. Another objective is to clarify certain provisions in the International Arbitration Act. This Bill is another product of the work of the Attorney-General's Chambers' Law Reform and Revision Division. Indeed, consultation on this Bill was done jointly with those that took place on the Arbitration Bill.

Sir, this Bill effects the following changes in order to harmonise it with the proposed Arbitration Act:

First, the stay of proceedings provisions will be streamlined. I think I have mentioned this already just now. Because under the existing International Arbitration Act, all stay of proceeding applications must be filed in the High Court, regardless of whether the action was originally commenced in the Subordinate Courts or the High Court. This Bill will remove this inconvenience because now the parties need not submit the matter for determination by the High Court.

Second, the Bill amends the International Arbitration Act to allow the Court on its own motion to discontinue certain stayed actions if at least two years have elapsed since the order of stay has been made. As I have explained just now, this amendment follows from that in the first Bill, because two years is a long enough time for the action to proceed if the parties have so intended and, in any case, even if discontinued, they can take up an action to restart it.

Thirdly, the Bill provides limited immunity to the default appointing authority and arbitral institutions. This states that arbitral institutions are not liable for anything done or omitted in respect of the discharge of their functions in appointing or nominating arbitrators unless there is shown to have been bad faith involved in the act or omission. The provision also clarifies that the appointing authority or arbitral institution is not liable for the acts of the arbitrator appointed or nominated by it.

Sir, apart from the foregoing, two main amendments are made to provide clarifications, so that there will be greater certainty as to the operation of the International Arbitration Act. Firstly, clause 14 provides clarification on the finality of an interim award. Under UK arbitration law and our domestic Arbitration Act, an interim award, once given, is binding and cannot be reviewed by the arbitrator. The Model Law says nothing about the finality of an interim award but practitioners have long assumed that the position is the same as well. The Attorney-General, the Chairman of the SIAC and leading arbitrators, including members of the Singapore Institute of Arbitrators, have recommended that legislation be passed to clarify this position to avoid uncertainty in the law. Thus, clause 14 of the Bill amends the Act to state clearly that the position in Singapore for international arbitrations is that interim awards are final and binding.

Second, clause 12 of the Bill amends section 15 of the International Arbitration Act to clarify its scope. Section 15 was intended to allow parties who desire a greater degree of judicial intervention to opt out of the Model Law regime into the domestic Arbitration Act as the applicable law of arbitration. In its existing form it has created some uncertainty in the industry and requires clarification. The first question to be resolved is whether parties to an arbitration agreement should be regarded as having opted out of the Model Law if the arbitration agreement contains a reference to the use of institutional arbitration rules, eg, ICC rules, without more. A new section 15(2) is therefore added to clarify that a reference in an arbitration agreement to any institutional arbitration rules would not, by itself, be regarded as an agreement to opt out of the Model Law.

The second question to resolve is which legal regime will apply in the event that parties to

an international arbitration conducted in Singapore opt out of the Model Law. For the avoidance of doubt, section 15 is amended to state that Singapore's domestic arbitration law under the Arbitration Act would apply to the arbitration if parties expressly choose to opt out of the International Arbitration Act or the Model Law.'
[Emphasis added.]

44. On the first issue i.e whether the pre-amendment s 15 allowed an implied opting out, Mr Chuah submitted that the plain reading of the pre-amendment s 15 clearly allowed an implied opting out. Therefore, he submitted, the amendment to s 15 was to change the law.

45. However, as regards the second issue i.e whether an opting out of the Model Law or Part II would necessarily mean that both have been excluded, he submitted that the amendment to s 15 did not change the law as it was the law, as enunciated in *Coop*, that the opting out of one would exclude both.

Respondents' position

46. Mr Sundaresh Menon appeared for both the Respondents. His primary position was that as regards the first issue, both *Coop* and *John Holland* were incorrectly decided. In other words, there can be no implied opting out.

47. Mr Menon stressed that the parties had chosen Singapore as the place of arbitration. Accordingly, the question was whether the IAA or the AA applies. The parties cannot choose to opt out of both the IAA and the AA as the place of arbitration is Singapore. He submitted that the parties did not intend for the AA to apply as this was an international arbitration.

48. Mr Menon relied on the speech of Assoc. Prof. Ho regarding the amendments to s 15. He submitted that Assoc. Prof. Ho had stressed that they were to clarify the position whereas in respect of amendments to some other provisions, Assoc. Prof. Ho had said that they were changes. He submitted that Mr Chuah was picking and choosing when Mr Chuah submitted that, as regards the first issue, the amendments to s 15 constituted a change to the law but, as regards the second issue, the amendments to s 15 merely reflected what was already the law.

49. Mr Menon submitted that if I did not agree with his primary submission, then his alternative position would be that although there could be an implied opting out of the Model Law, an implied opting out of the Model Law would not mean that the parties had opted out of Part II as well. This related to the second issue for which he submitted that Choo JC's decision was to be preferred to that of Chan JC's.

50. On the second issue, Mr Menon submitted that there is a distinction between the curial law and the rules governing the conduct of arbitration proceedings. For example, ss 2 to 8, 10, 19 and 20 and 24 IAA relate to the curial law. Aspects like the avenue for an appeal to a court of law, if any, would come under the curial law but would not be covered under rules on the conduct of arbitration proceedings like the UNCITRAL Rules or the ICC Rules.

51. Accordingly, while the Model Law would not apply under his alternative submission, the other provisions of the IAA would still apply. As the enabling provision for security for costs, s 12, is not part of the Model Law but the IAA, the arbitrator would still have jurisdiction to make an award for security for costs to be provided.

My decision

52. It seems to me that in *Coop* and *John Holland*, both Chan JC and Choo JC were of the view that there should not be two incompatible sets of rules applying to the conduct of the arbitration. As parties had expressly chosen a set of rules incompatible with the Model Law, that would mean that the parties had opted out of the Model Law.

53. While I agree that there should not be two incompatible sets of rules applying to the conduct of an arbitration, I am of the view that attention should be focussed first on whether the parties have chosen Singapore as the place of arbitration.

54. If Singapore is the place of arbitration, the curial law of Singapore applies. As the speech by Assoc. Prof. Ho on 5 October 2001 shows, the question then is whether the IAA or the AA applies. The question of opting out was to allow parties to opt out of the IAA into the AA and not to opt out of the IAA into a set of rules of an arbitral institution governing the conduct of the arbitration. I would add that the curial law, or the lex arbitri as it is sometimes called, is not necessarily restricted to a set of procedural rules governing the conduct of the arbitration.

55. For example, Redfern and Hunter on Law and Practice of International Commercial Arbitration 3rd Edition, p 83 states:

> '**(d) The lex arbitri - a procedural law?**
>
> It is sometimes said that the *lex arbitri* is a law of procedure. It is true that the *lex arbitri may* deal with procedural matters - such as the constitution of the arbitral tribunal where there is no relevant contractual provision - but the authors suggest that the *lex arbitri* is much more than a purely procedural law. It may stipulate, for instance, that a given type of dispute - over patent rights, for instance, or (as in some Arab states) over a local agency agreement - is not capable of settlement by arbitration under the local law. It is suggested that this is a matter of substance rather than of procedure. Or again by way of example, an award may be set aside on the basis that it is contrary to the public policy of the *lex arbitri*; once more, this would seem to be a matter of substantive law rather than of procedure.'

56. I would also refer to the comments in Halsbury's Laws of Singapore Vol 2 p 18 footnote 14, most of which were cited by Choo JC in para 11 of his judgment.

57. If the curial law of Singapore applies and the arbitration is an international one, then, prima facie, the IAA applies. Since the IAA incorporates the Model Law, the Model Law has also effectively been chosen by the parties, even though they might have been unaware of it. Ignorance of the law is no excuse. The question is whether the Model Law and Part II IAA have been excluded under s 15.

58. I accept the point that the Respondents were not aware of the IAA at the time the Agreement was executed. The Claimant was also not aware.

59. The thrust of Mr Chuah's submission was that as the parties were not aware of the IAA at the material time, they could not have intended for the IAA to apply. However, I am of the view that the IAA applies because the parties had agreed that Singapore is the seat of arbitration and not because the parties had expressly adopted the IAA.

60. Given that the seat of arbitration is Singapore, it seems to me that the correct approach is not

to consider whether the parties intended to include the IAA but whether they intended to exclude the IAA and hence the Model Law and Part II. Accordingly, the fact that the parties were not aware of the IAA at the material time militates against, rather than supports, the Claimant's position.

61. I agree with the observation in para 38 of the arbitrator's Reasons for the Dismissal of the Claimant's Application for a Stay of Execution on his order on security for costs. He said:

> '38. In this case I find that at all material times and until the parties entered into their submissions before me as to whether I had the power to order security, the issue of whether the IAA applied did not cross their minds at all. One cannot opt-out of a statute which is not in one's consciousness anymore than one can elect not to jump over a hurdle which is not in the line of one's vision.'

62. I should mention that often parties do not appreciate the consequences of choosing a state as the place of arbitration. Also, the venue of the hearing of the arbitration is often taken to be synonymous with the place of the arbitration. Indeed this may well have been the situation before me but there is no dispute that Singapore is the place of arbitration.

63. In *Naviera Amazonica Peruana S.A. v Compania Internacional De Seguros Del Peru* [1988] 1 Lloyd's Rep 116 (the *Peruvian Insurance* case), Kerr LJ said at p 120 and 121:

> 'Finally, as I mentioned at the outset, it seems clear that the submissions advanced below confused the legal "seat" etc of an arbitration with the geographically convenient place or places for holding hearings. This distinction is nowadays a common feature of international arbitrations and is helpfully explained in Redfern and Hunter at p.69 in the following passage under the heading "The Place for Arbitration":
>
> > The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings or even hearings in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses… . It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country for instance, for the purpose of taking evidence …. In such circumstances each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.'
>
> [Emphasis added.]

A similar passage is found in p 86 and 87 of the 3rd Edition, 1999, of Redfern and Hunter.

64. Accordingly, parties and their professional advisers would have to be familiar with the concept of the place of arbitration and the consequence of choosing a state as the place of arbitration. As

the curial law of any state may change from time to time, they would also have to be familiar with the curial law of the place of arbitration at the time the agreement to arbitrate is entered into as well as at the time when arbitration is contemplated and when it commences.

65. I would also add two other points. First, if parties do not wish the IAA or the AA to apply, then they should not choose Singapore as the place of arbitration although they may have Singapore as the venue of the hearing. Secondly, the governing law of the substantive dispute is a different concept from the place of arbitration and the curial law.

66. The fact that the parties before me have chosen another set of rules to govern the arbitration proceedings does not in itself negate their choice of Singapore as the place of arbitration. Furthermore, it is more probable than not that they were also unaware of the AA and/or in any event did not intend the AA to apply to their international arbitration.

67. As for the amendments to s 15, it is my view that Assoc. Prof. Ho had made it clear that the amendments thereto were to clarify Parliament's intention behind the original s 15 and not to change it. This is reinforced by the following phrase, 'For the avoidance of doubt' in the current s 15(2) IAA.

68. Accordingly, as regards the first issue, I am of the view that the requirement for parties to agree to exclude the Model Law or Part II was and is a requirement for an express opting out in that the mere adoption of the rules of an arbitral institution would not be sufficient to constitute such an exclusion.

69. The question then is, if the Model Law applies, does this mean that the other incompatible set of rules is totally excluded or is it excluded only in so far as it is not inconsistent with the Model Law? From what I have said above, my view is that the other set of rules is completely excluded. Likewise, if the other set of rules applies, then the Model Law is completely excluded.

70. I would add that in *Coop*, Chan JC decided that the Model Law and the IAA would not have applied because of incompatibility with the Geneva rules but held that the AA would then apply in place of the IAA, to avoid a lacuna. However if the then AA (before the current amendments to the AA) had applied, it too would have at least one provision incompatible with that of the Geneva Rules i.e s 8(2) of the then AA provides that it is the High Court (as the court is defined under s 2) who may appoint an arbitrator whereas the Geneva Rules provide for the Chamber of Commerce and Industry of Geneva to be the appointing authority. Therefore, that incompatibility would still not have been resolved by the exclusion of the Model Law and the IAA. Indeed, Chan JC recognised in para 148 of his judgment that 'the Geneva Rules are not exactly in line with many of the provisions in the AA'.

71. As an aside, I would mention that the AA has also been amended recently with a new AA coming into force on 1 March 2002. The new AA also has its own set of provisions governing the conduct of an arbitration. For example, s 28(2) thereof gives the arbitrator power to make an order for security for costs.

72. As for the second issue, Mr Menon's argument that there is a distinction between the curial law and the rules governing the conduct of arbitration proceedings is neither here nor there. The question is whether Parliament intended for both the Model Law and Part II to be read and applied together under the pre-amendment s 15 IAA.

73. Although Choo JC decided that Part II would still apply even if the Model Law did not, Choo JC's decision on the second issue would give rise to further questions. For example, s 8(2) IAA (which is under Part II) stipulates that the Chairman of the SIAC, or such other person as the Chief Justice may

appoint, 'shall be taken to have been specified as the authority competent to perform the function under Article 11(3) and (4) of the Model Law'. If the Model Law is excluded, would s 8(2) IAA apply or not?

74. If s 8(2) IAA still applies, the incompatibility regarding the appointing authority would still be present. However, if s 8(2) IAA does not apply, then which other provisions of Part II of the IAA also do not apply?

75. For convenience, I set out the pre-amendment s 15 again. It reads:

> '15. If the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled or resolved otherwise than in accordance with this Part or the Model Law, this Part and the Model Law shall not apply in relation to the settlement or resolution of that dispute.'
> [Emphasis added.]

76. I note the use of the conjunction 'or' initially between Part II and the Model Law and then the use of the conjunction 'and'. In my view the use of 'and' was deliberate as the draftsman could have easily used 'or' again if that was the intention. The use of 'and' was therefore not an oversight.

77. I would respectfully add that I do not think that reading into s 15 the words 'as the case may be' in ellipsis before the words 'shall not apply', as suggested by Choo JC, will work. To illustrate with the additional words inserted, the clause would then read,

> '… this Part and the Model Law, as the case may be, shall not apply in relation to the settlement or resolution of that dispute.'

78. As Choo JC also relied on s 5(1) IAA to reach his conclusion, I set out s 5(1) IAA:

> '5(1) This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration.'

79. Choo JC was of the view that under s 5(1), parties were allowed to adopt Part II or the Model Law. I do not disagree that parties to a domestic arbitration agreement can choose whether to adopt Part II or the Model Law provided this is expressed clearly and the necessary qualifications are made to avoid ambiguity. However, I do not think that it is correct to say that this was the meaning or intention under s 5(1). I am of the view that if parties to a domestic arbitration agree that Part II or the Model Law applies, without more, then, under s 5(1) IAA, both Part II and the Model Law will apply.

80. With respect, a similar incorporation of the words 'as the case may be' after 'this Part of the Model Law' in s 5(1) will not advance Choo JC's view that choosing Part II or the Model Law will mean that only Part II or the Model Law will apply. To illustrate, the provision would then read:

> '5(1) This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law, as the case may be, shall apply to that arbitration.'

81. To put the question in another way, if parties in a domestic arbitration agree in writing that

Part II or the Model Law shall apply, what will apply? The answer, it seems to me, is found in the first part of s 5(1) IAA i.e 'This Part and the Model Law' [emphasis added]. I agree with Choo JC that s 5(1) is the reverse of s 15 IAA but not in the manner stated by him.

82. Choo JC also relied on s 5(4) IAA which he said emphasizes his point. Section 5(4) IAA states:

> '(4) Notwithstanding anything to the contrary in the Arbitration Act, that Act shall not apply to any arbitration to which this Part applies.'
>
> He was of the view that the omission of 'the Model Law' provides the emphasis.

83. With respect, I do not think s 5(4) helps. As Choo JC recognised in the next paragraph of his judgment, i.e para 13 thereof, a reference to Part II, without specifying the Model Law, naturally includes the Model Law which is part of Part II. Accordingly, it is not necessary for s 5(4) IAA to expressly state that the Arbitration Act shall not apply to an arbitration to which this Part 'and the Model Law' applies.

84. It is my view that Parliament's intention and preference was and is that, where Singapore is the place of arbitration and the arbitration is an international one, both the Model Law and Part II should be read and be applied together. Even if the arbitration were a domestic one and the parties agree that the Model Law or Part II is to apply, then both the Model Law and Part II should be read and be applied together.

85. In addition, as I have said, it is my view that Assoc. Prof. Ho had made it clear that the amendments to s 15 were to clarify and not to change the law.

86. Accordingly, as regards the second issue in respect of s 15, if the Model Law or Part II is expressly excluded, both will not apply. This was and is the position under s 15.

87. In summary, I hold that the Model Law and Part II apply to the arbitration in question. The inclusion of the UNCITRAL rules in the Agreement does not oust their application. The UNCITRAL rules do not apply but it is open to the parties to now agree that such rules will apply to fill any vacuum in the Model Law and Part II or to apply such rules on an ad hoc basis.

Secondary issue

88. A number of secondary issues were also raised by the Claimant but eventually Mr Chuah pursued only one.

89. The sum of RM500,000 initially claimed as security for costs comprised the following items:

(a)	Arbitrator's fee	RM 100,000
(b)	Legal fees	RM 300,000
(c)	SIAC costs	RM 50,000
(d)	administrative costs (hotel, transport, subsistence)	RM 50,000

During submissions, the amount for SIAC costs was reduced to RM20,000. As I have mentioned, the arbitrator made an award for security to be provided in the sum of S$200,000.

90. Mr Chuah submitted that even if the arbitrator had jurisdiction to make an award for security

for costs, he had exceeded his jurisdiction under s 12(1)(a) IAA when his award for security for costs included the arbitrator's fee and SIAC costs. Accordingly the quantum awarded should be reduced. On the other hand, Mr Menon submitted that s 12(1)(a) IAA was wide and unlimited.

91. Section 12(1)(a) IAA states:

> '12. (1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for -
>
> (a) security for costs; …'

92. I do not see why this provision should be read in the restrictive manner suggested by Mr Chuah.

93. In the circumstances, the appeal is dismissed with costs to be paid by the Claimant to both the Respondents.

Sgd:

WOO BIH LI
JUDICIAL COMMISSIONER