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THE ADOPTION OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION IN SINGAPORE

This Article examines the provisions of the International Arbitration Act, which introduces the UNCITRAL Model Law on International Commercial Arbitration to Singapore. It considers various issues which arise under the Act and compares its provisions with the existing Arbitration Act.

I. INTRODUCTION

A Bill incorporating the UNCITRAL Model Law on International Commercial Arbitration[1] was introduced in Parliament in Singapore on 25 July, 1994[2] and was passed on 31 October 1994. The decision to adopt the Law was made after a study of the existing law on arbitration by a Sub-Committee of the Law Reform Committee. This Sub-Committee was appointed in 1991 by the then Attorney-General with a view to reforming Singapore's law on commercial arbitration. Chaired by a senior lawyer, it included experienced local lawyers from private practice and from the Attorney-General's Chambers, offshore lawyers, academics and the Chief Executive Officer of the Singapore International Arbitration Centre. It completed its report in August 1993. Its report was accepted by the Law Reform Committee, which made some changes to the Sub-Committee's proposals. The changes were not substantial and the form which the new Act has taken largely reflects the work of the Sub-Committee.

With this enactment, Singapore joins a number of countries which have legislation based on the Model Law.[3] Important questions arising from the

1 UNCITRAL stands for the United Nations Commission on International Trade Law. The Model Law was adopted by the United Nations in General Assembly Resolution 40/72, 40 GAOR Supp No 53 A/40/53, on 11 December 1985.

2 The International Arbitration Bill, Bill No 14/94, read for the first time on 25 July 1994, has been enacted as the International Arbitration Act 1994, Act No 23 of 1994 (hereafter, "the Act"), which received Presidential assent on 25 November 1994. At the time of writing, the Act had not come into effect.

3 To date, the following have adopted the Model Law in one form or another: Australia, Bermuda, Bulgaria, Canada (by the Federal Parliament and by the legislatures of all Provinces and Territories), Cyprus, Egypt, Finland, Hong Kong, Mexico, Nigeria, Peru, the Russian

Act include its effect on existing arbitration statutes, its application and interpretation, and its relation to the existing law governing domestic arbitrations. This article will examine the existing legislation, the general receptiveness of arbitration in Singapore, the effect of the new law and difficulties which may arise or remain with the new law.

II. The Law on Commercial Arbitration Prior to the International Arbitration Act

Prior to the new Act, there were three main statutes dealing with commercial arbitration.[4] The first, which relates to arbitration in Singapore in general, is the Arbitration Act.[5] The other two statutes deal specifically with international arbitrations, and give legislative effect to Singapore's accession to two major Conventions in this area. They are the Arbitration (Foreign Awards) Act and the Arbitration (International Investment Disputes) Act.[6] The Acts cover different subject-matter and serve different purposes. The Arbitration Act (Foreign Awards) Act is the legislative enactment of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.[7] This Act has been repealed by the new legislation, which re-enacts provisions relating to the adoption of that Convention and the Convention itself. The Arbitration (International Investment Disputes) Act, on the other hand, embodies the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of

Federation, Scotland, Tunisia, within the United States: California, Connecticut, Oregon and Texas. I wish to thank Mr Jernej Sekolec, Senior Legal Officer in the Office of Legal Affairs, International Trade Law Branch of UNCITRAL for this list which stands as at 16 November 1994. For a comparison of the reception of the Model Law by various countries, see Ch 4, *International Reaction to the Model Law*, in Isaak I Dore, The UNCITRAL Framework for Arbitration in Contemporary Perspective (1993). See also Robert K Paterson & Bonita J Thompson (eds), *UNCITRAL Arbitration Model in Canada* (1987), which includes not only a discussion of the Canadian position, but also those of the USA, Japan, Hong Kong, Australia, the People's Republic of China and the International Chamber of Commerce.

4 Arbitrations for industrial matters and labour disputes are governed by a separate Act, *viz*, the Industrial Relations Act, Cap 136, Singapore Statutes, 1985 Rev Ed. These are handled by the Industrial Arbitration Court established under that Act. Such arbitrations are not included in the present discussion. Other statutes, such as the State Immunity Act, Cap 313, Singapore Statutes, 1985 Rev Ed also contain provisions relating to arbitration. S 11 of that Act reads:

"11(1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts in Singapore which relate to the arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States."

5 Cap 10, Singapore Statutes, 1985 Rev Ed.

6 Respectively, Cap 10A and Cap 11, Singapore Statutes, 1985 Rev Ed.

7 Hereafter, "the New York Convention".

1965.[8] In becoming a member of both these two Conventions, Singapore has clearly committed herself to the recognition and enforcement of arbitration awards made in fellow member countries. This demonstrates Singapore's support of international arbitration as a means of dispute resolution.[9]

The Arbitration Act, on the other hand, does not distinguish, in its general applicability, between domestic and international arbitrations[10] and deals with a wide range of issues. These include the irrevocability of arbitration agreements, provisions implied in arbitration agreements, power of the courts to stay court proceedings pending arbitration, subpoena of witnesses, power of the courts to remit and set aside awards, and judicial review of arbitration awards. It may therefore apply to international arbitrations which take place in Singapore. A question which immediately arises is what role this Act will play relative to the new International Arbitration Act. This question will be examined later.

It is clear from the foregoing and her relatively swift adoption of the UNCITRAL Model Law that the general attitude in Singapore to international arbitration is one of strong support. Singapore is keen to keep abreast of international developments and to adopt measures which promote international arbitration in commercial disputes. Further proof of this attitude is the establishment of the Singapore International Arbitration Centre in March 1990.[11] The Centre is well equipped to deal with international and domestic arbitrations, mediation and conciliation.[12]

The push to establish Singapore as a major financial and commercial centre makes it imperative for her to have an effective dispute resolution system capable of dealing with commercial disputes fairly, swiftly and affordably. A strong international commercial arbitration infrastructure will

8 Hereafter, "the ICSID Convention". ICSID stands for the International Centre for the Settlement of Investment Disputes, which is the arbitral body set up under the Convention.

9 The rest of this discussion will not focus on the Arbitration (International Investment Disputes) Act, as it applies to investment disputes between State or State entity and foreign investor. The comparison will be made, rather, between the Arbitration Act and the new International Arbitration Act, as they both cover more general commercial disputes.

10 The Arbitration Act does make the distinction in s 30(7) in relation to exclusion agreements. The other requirement for that Act to apply to an arbitration agreement is that there must be a "written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not" – s 2 of the Arbitration Act. This Act now co-exists with the new International Arbitration Act as an alternative regime, applying to arbitrations in Singapore to which the latter does not apply.

11 The Centre began its operations in July 1991. It has its own rules, which are based on the UNCITRAL Arbitration Rules.

12 The Centre is optimistic and foresees claims submitted to it for resolution to reach the S$500 million mark shortly; see "Singapore Making its Mark as Arbitration Centre", The Straits Times,14 November 1994, at 40.

complement the already-speedy judicial system.[13] This infrastructure is now in place, with the enactment of the International Arbitration Act.

Given the support to strengthen the arbitration process existing even prior to the new legislation, the Act is merely the most recent manifestation of the receptiveness of the country to arbitration as a dispute resolution method for international commercial disputes. It introduces a separate regime to govern international commercial arbitrations, leaving the existing Arbitration Act the role of regulating domestic arbitrations.[14] The two regulatory frameworks will therefore co-exist for the time being.

III. Brief Background of the Model Law

After the coming into being of the New York Convention dealing with recognition and enforcement of arbitration awards, there was a call to look into providing nations with a uniform law governing the process of international commercial arbitration. It is well-documented that the initiative to develop such uniformity came from the Asian-African Legal Consultative Committee ("AAALC").[15] The task of examining the issues and formulating an acceptable Model Law fell to the UNCITRAL, whose Working Group proceeded to tackle the problem. Conscious efforts were made to include, *inter alia*, the AAALC in the process leading up to the formulation of the Model Law. As a culmination of numerous meetings and consultations, the

[13] A recent development in the court system itself is the introduction, by a pilot project in June 1994, of the Court Dispute Resolution scheme in the Subordinate Courts. The scheme, introduced by Subordinate Courts Practice Direction No 2 of 1994, allows judges to settle civil cases in settlement conferences prior to trial. See "New Settlement System Soon for Civil Cases", The Straits Times, 15 August 1994, at 1. A further development, which took effect from 16 November 1994, is the requirement for *all* civil suits to undergo settlement conferences initiated by judges. (The settlement judge will not be the judge who will hear the case if settlement is not reached and the parties proceed to trial.) See The Straits Times, 15 November 1994, at 24. See aso generally, Liew Thiam Leng (District Judge), "Court Dispute Resolution in Singapore", paper presented at the Singapore Academy of Law Lecture on 25 November 1994. In addition, the Rules of the Supreme Court were amended in 1993 to include a procedure allowing a party to a proceeding to make an offer to settle; see Order 22A, inserted by s 278/93. These moves are in line with the aim to ease the burden on the courts as well as to help parties save on court fees which are imposed for hearings.

[14] For a comparison of the areas covered by each, see Appendix.

[15] See the history of the Model Law in HM Holtzmann & JE Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989), Introduction chapter, at 1-17, and generally, for a detailed commentary on each Article. See also Dr I Szasz (*rapporteur*), "Introduction to the Model Law of UNCITRAL on International Commercial Arbitration", at 31-47, in P Sanders (gen ed), UNCITRAL's *Project for a Model Law on International Commercial Arbitration* (1984). See also Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (1990).

Model Law in its present form was ready in 1985. It is therefore not simply the work of developed nations, as developing nations had the opportunity to participate in its creation. Singapore, a member of UNCITRAL since 1970, also participated in the creation of the Model Law.

The Model Law has since been adopted in several jurisdictions. Singapore has based its version of the Model Law on the experience of other Commonwealth States which have adopted it; these include Australia, Hong Kong and New Zealand.[16] As the Model Law aims to inject uniformity into the international commercial arbitration process, its interpretation and application by the various countries adopting it should, hopefully, reflect this. It will be necessary to monitor the progress of cases in these jurisdictions, but this will be possible only with adequate reporting of such cases. Reports will generally be available where the disputes falling under the Model Law either reach the courts for one reason or another, or there is waiver of confidentiality by parties coupled with voluntary submission of information for reporting.[17]

IV. The Model Law in Singapore

The step of incorporating the Model Law as part of Singapore law is one which takes the country further along the road toward becoming an international arbitration centre. The adoption of a regime (albeit with modifications) which has been accepted in several other jurisdictions signals a desire to belong to a community which adopts a uniform, neutral[18] standard for the governing of international arbitrations. Foreign investors in these jurisdictions can now be advised that the international arbitration system in Singapore is patterned after the same model as their own. This familiarity,

[16] The Table of Comparison of provisions of the Act with provisions of other jurisdictions appears at the end of the Bill. Hong Kong adopted the Model Law after a study by the Law Reform Commission; see the *Report on the Adoption of the UNCITRAL Model Law of Arbitration* (1987) by the Sub-Committee set up to look into the matter. The Arbitration (Amendment) (No 2) Ordinance adopting the Model Law came into effect in April 1990. The law was subsequently published as the Arbitration Ordinance, Cap 341, 1990 Reprint.

[17] The Singapore International Arbitration Centre, for instance, requests parties to submit, if they wish, information on arbitrations conducted other than by the Centre for publication in its newsletter. Relatively current information on application of the Model Law around the world can be obtained from the periodic publications of *Case Law on UNCITRAL Texts (CLOUT)* by UNCITRAL.

[18] Some disagree that the Model Law represents a neutral system; see Sornarajah, "The UNCITRAL Model Law; A Third World Viewpoint" (1989) 6 J Int Arb 7. It is noteworthy that Prof Sornarajah appears to have changed his view, as he was a member of the Singapore Sub-Committee, which unanimously recommended acceptance (albeit with modifications) of the Model Law.

it is hoped, will create a greater willingness to have international commercial disputes conducted in Singapore.

As the number of jurisdictions embracing the Model Law increases, more countries will share the experience of operating under the Model Law. There remain, however, problems relating to the actual wording and interpretation of the countries' implementing legislation and the modifications made by each State to the Model Law. This is where absolute uniformity is obviously impossible to achieve. Nonetheless, it is submitted that, whatever the modifications, if they serve merely to enhance rather than to restrict the arbitration process, they will not prevent the creation of a more uniform pattern of overall treatment and regulation of such proceedings in the long run. So long as each implementing State, including Singapore, consciously supports the process by upholding arbitrators' powers granted in the legislation, by giving courts the powers to implement and enforce arbitrators' rulings,orders and awards, and by extending to the parties the autonomy which they wish, the Model Law would have achieved its purpose of providing the common ground rules within which they all operate.

The Act enhances, rather than impedes, the conduct of international arbitrations in Singapore. It augments the arbitrators' powers and the courts' role in giving force to arbitrators' decisions and orders. Save for two surprising provisions,[19] the general tenor of the Act is positive and allows the Model Law in large part to apply unchanged.

It remains to be seen how the Singapore courts will interpret the provisions of the Act. If the use of arbitration is to be promoted, the courts should undoubtedly read the Act in a way to achieve this. Already, the existing Arbitration Act signals an attitude of reduced, if not minimal, interference in the arbitral process by the judiciary. *A fortiori*, in international arbitration, this attitude should be maintained.

Perhaps the adoption of the Model Law by Singapore could also encourage neighbouring countries, particularly those which are fellow members of the Association of Southeast Asian Nations (ASEAN), to consider similar action. In the United Kingdom, the Report by the Departmental Advisory Committee[20] suggested that for States with no developed law and practice in arbitration, the Model Law would be very useful. The Report concluded, however, that the United Kingdom did not fall in that category as it had

[19] These relate to arbitrability, and to appeals from the High Court to the Court of Appeal in relation to challenges of arbitrators' jurisdiction, and will be dealt with later.

[20] The Committee was appointed by the Secretary of State for Trade and Industry under the chairmanship of the Rt Hon Lord Justice Mustill. The Committee dealt with the Model Law in a Consultative Document and a report. The report can be found in "A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law" (1990) Vol 6 No 1 *Arbitration International* 3.

a relatively satisfactory arbitration law. Singapore, despite having an existing Arbitration Act based largely on the English law, has chosen not to follow the example of the United Kingdom. This may interest other countries in considering adoption of the Model Law, even if they have some existing system of regulation of international arbitration.

V. Form of Adoption and Salient Modifications

The Act introduces the Model Law, largely in its original form, into the Singapore system. This brings into play provisions in the Model Law governing important matters not addressed by the existing Arbitration Act. The major changes will be examined later, in a comparison between the new regime and that under the existing Arbitration Act.[21] The more significant of these include issues surrounding the appointment and challenge of arbitrators, jurisdiction, interim orders, conduct of the arbitral proceedings, the law applicable to a dispute, award-making, and recourse against awards. Many of these issues were either not fully dealt with or addressed in the Arbitration Act. Hence, the Model Law clarifies the position on these issues and provides the default statutory position where parties do not agree to the contrary. The Model Law also creates new powers for the arbitral tribunal, thus lending greater force to the arbitral process as a whole. In short, the modifications by the Act aid in the overall task of the Model Law of providing a more comprehensive body of rules for international commercial arbitrations. As will be seen later, the Act additionally introduces useful provisions not found in the Model Law, such as provisions relating to powers of arbitrators and to conciliation.

How does the Act implement the Model Law?

A. *Adoption of the Model Law*

Section 3(1) of the Act gives the Model Law (except Chapter VIII)[22] the force of law, subject to the provisions of the Act. The Model Law is set out in its entirety in the First Schedule of the Act. To the extent, therefore, that the Act does not override or modify it, it represents the law. The Act in large part supplements the Model Law. As the Model Law has deliberately omitted addressing various issues, the individual adopting States are left to furnish the rules and details in those areas.

[21] See also Appendix.

[22] Chapter VIII, on Recognition and Enforcement of Awards, has been specifically excluded.

B. *Interpretation*

The Act takes priority over the Model Law in the interpretation of terms. Section 2(2) provides that, for the interpretation of any word and expression occurring in Part II of the Act[23] and the Model Law, the meaning will be that in the Part, whether or not a particular meaning is given to the word or expression by the Model Law.

In a departure from the usual silence of Singapore legislation on *travaux préparatoires*, section 4 allows reference to documents of UNCITRAL and its working group in preparing the Model Law, for the purposes of interpreting it. This provision is a modification of the equivalent provision in Australian legislation[24] and is certainly a welcome inclusion. This is important as the aim of the legislation, as stated in the long title, is "to make provision for the conduct of international commercial arbitrations based on the Model Law...." The background to the Model Law is thus crucial for understanding its provisions and their intent. It will help Singapore courts adopt interpretations of its provisions in a manner best reflecting the aspirations of the international community, as expressed in the Model Law. For reasons which will be apparent later, it would have been useful to have included a provision allowing the reference to the *travaux préparatoires* of the Act itself as well, as that would have put away any doubt as to whether, say, the Sub-Committee's Report can be referred to.

C. *Application*

The Act does not apply to all commercial arbitrations, but only to those falling within its terms, where the parties have not agreed to exclude it. It therefore applies on an "opt-out" basis. It is the default framework of regulation if not excluded. Section 15 allows parties to "opt-out" by agreeing either in the arbitration agreement or any other document in writing that their dispute should not be settled or resolved by the Act or the Model Law. This is an important provision as it allows parties the discretion as to whether their dispute shall be regulated by the law or not.

On the other hand, for purely domestic arbitrations which otherwise would not fall within its terms, parties may choose to have its provisions apply. In these cases, parties are allowed to "opt-in" under section 5(1) and have the Act apply to their arbitration. This arrangement gives maximum flexibility to parties and respects the party autonomy principle.

[23] Part II deals with International Commercial Arbitration and is the primary portion which incorporates, modifies and supplements the Model Law. Part III deals with the incorporation of the New York Convention.

[24] International Arbitration Act 1974 (C'th).

The Act and the Model Law as incorporated by it apply to "international commercial arbitrations".[25] "International" is defined in Article 1(3) as well as in section 5(2) and (3) of the Act.[26] As to the definition of "international" arbitrations to which the Act applies, section 5(2)(a) of the Act modifies the case falling under Article 1(3)(a) of the Model Law, to read:

> at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore.

The Act therefore makes use of a number of factors to determine if an arbitration falls within its scope. These include places of business of the parties at the time of the conclusion of arbitration agreement, place of arbitration determined in the arbitration agreement, place where the substantial part of obligations are to be performed, place of closest connection with the subject-matter of the dispute, whether the parties themselves have agreed that the subject-matter of the arbitration agreement relates to more than one country, and place of habitual residence.

The word "commercial" is not defined in the Act, but appears as a footnote to Article 1 of the Model Law. The footnote indicates that the word should be given "a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not". A number of examples then follow. Presumably, this footnote applies as part of the Act as it is part of the Model Law which has been adopted.[27]

D. *Stay of Court Proceedings*

Section 6 of the Act supplements Article 8 of the Model Law, which sets out the course which a court should take when faced with a proceeding where the parties are subject to an arbitration agreement. The section is supportive of arbitration and allows the court to stay such proceedings.

[25] See Article 1 of the Model Law, First Schedule. "Commercial" is not defined but the footnote therein indicates that it should be given a wide interpretation. This is desirable if arbitration is to encompass a wide variety of matters and disputes.

[26] The definition of an "international" arbitration in s 5(2) differs from that in Art 1(3) only in one respect: while s 5(2)(a) refers to an arbitration in which "*at least one of the parties* to an arbitration agreement, at the time of the conclusion of *the* agreement, *has its place of business in any State other than in Singapore,*" Art 1(3)(a) refers to a case where "the parties to an arbitration agreement have, at the time of the conclusion of *that* agreement, *their places of business in different States.*" (Emphasis added.)

[27] The position is made clearer in the International Commercial Arbitration Act of British Columbia, Canada, SBC 1986, c 14, in which s 1(6) expressly incorporates the list of transactions in the footnote. In both this legislation as well as in the Model Law, the lists are not intended to be exhaustive.

Section 6(2) makes it clear that the court shall stay proceedings unless the arbitration agreement is "null and void, inoperative or incapable of being performed". In addition, section 6(3) empowers the court in such a situation to make interim or supplementary orders for the preservation of property which is the subject of the dispute. Again, these provisions demonstrate the desire of Parliament to promote the arbitration process and to lend it the necessary judicial support.

E. *Number of Arbitrators*

In section 9, the Act modifies the number of arbitrators, where the parties do not themselves determine it, from three under Article 10(2) of the Model Law to one. The position is the same under the Arbitration Act. This reduces the time required to constitute the arbitral tribunal where the parties have made no express stipulation as to number, since each proposed arbitrator would have to be acceptable to all parties. It would also eliminate delay caused by incompatibility of schedules of multiple arbitrators.

F. *Appeals*

Under Article 16(3) of the Model Law, an arbitral tribunal is allowed to rule on a plea against its own jurisdiction, with such a ruling subject to appeal to the relevant court, namely, the High Court in this case. It is expressly stated there that there may be no further appeal from the decision of that court. This position has been modified by the Act. Section 10 surprisingly opens a new avenue of appeal from such a High Court decision on the question of jurisdiction of the arbitral tribunal, to the Court of Appeal. Although the section allows such an appeal only with the leave of the High Court itself (and a refusal to grant leave cannot be appealed from), it is nonetheless a departure from the clear prohibition against appeal from the decision of first instance under Article 16(3) of the Model Law.

The creation of this appeal avenue contrary to the Model Law leads one to query its inclusion. The relevant comment in the Explanatory Statement to the Bill is unhelpful. The Sub-Committee Report gives the reason at paragraph 38 for this further appeal:

> The Committee feels that questions of jurisdiction go to the very basis of the arbitration, and an aggrieved party must be given an opportunity to appeal if he believes he has strong grounds....

However, the Report itself recognises in the same paragraph:

> The Model Law, however, bars further appeals from the decision of the initial Court, to ensure that the appellate process is not abused by parties to frustrate the arbitration agreement.

There are two reasons why the provision is unsatisfactory. First, while appeals to the Court of Appeal are relatively speedily dealt with, this additional appeal process, nonetheless, opens the door to further delay of the arbitration proceedings. No guidelines have been given in the Act as to the cases in which the High Court is to grant leave to appeal. If the criterion of the Sub-Committee, *viz*, where a party is aggrieved and believes he has a strong case, is used, then the leave to appeal must be granted according to the subjective belief and aggravation of the party. In that case, the appeal process is not necessarily safeguarded from abuse. It is therefore submitted that unless very clear guidelines are set for the High Court on the cases in which it is to grant leave of appeal, this section is not satisfactory. It allows parties to prolong matters when they could have been finally disposed of by the High Court at first instance. This provision has no equivalent in the corresponding legislation of British Columbia, Canada, and of Hong Kong. A question relating to a particular tribunal's jurisdiction is not likely to be of general interest, demanding a policy ruling by the Court of Appeal. This provision also demonstrates a lack of confidence in the High Court's ability to deal with such a matter satisfactorily. Whilst it is true that such an appeal will lie only with the leave of the High Court, it is, nonetheless, an inroad into the policy to minimise appeal action in arbitral proceedings.

Second, if the Sub-Committee's reason is accepted, then there are other questions which may also "go to the very basis of the arbitration", such as issues relating to arbitrability, which are dealt with elsewhere in the Act, and discussed in the next section. Adopting the above reasoning, should not aggrieved parties who believe that they have strong cases in these situations likewise be given an opportunity to appeal? Are questions of arbitrability any less fundamental than those of jurisdiction? Yet the additional appeal process in section 10 does not include the former.

It is noteworthy that in Article 16(1), the Model Law adopts the basic premise that an arbitral tribunal may rule on its own jurisdiction. The fact that the Model Law allows an appeal to the initial Court in Article 16(3) is already a concession to aggrieved parties and an inroad to the *kompetenz-kompetenz* principle in Article 16(1). By introducing a process of appeal to the Court of Appeal, section 10 is taking the process one step further.

Under Article 16(3), an appeal to the initial court (the High Court in this case) is permitted only if the arbitral tribunal had ruled on the jurisdiction

issue as a "preliminary question", rather than in an award on the merits. Section 10 does not change this. However, little comfort can be drawn from this qualification as parties are unlikely to allow a jurisdiction issue to be settled in an award, rather than as a preliminary question.

G. *Arbitrability*

Section 11 is a modification of the position of silence on the matter of arbitrability of disputes under the Model Law. Section 11(1) provides that any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless *the arbitration agreement* is contrary to public policy. The public policy problem has arisen before in other jurisdictions, where disputes submitted to arbitration have involved questions which were argued to be best left to the courts of the country for determination.[28] However, it is submitted that the language of section 11(1) should have been clearer. Rather than referring to the *arbitration agreement* as being contrary to public policy, if what was intended was for the exclusion of unarbitrable *subject-matter*, the section should have referred to that, as was done in the New York Convention, and in the part of the Act embodying it.[29] The language chosen is unfortunate as it appears to create a new ground for challenging arbitration agreements, namely, that they may be contrary to public policy. Unfortunately, the Explanatory Statement found at the end of the Bill does not properly explain the inclusion of this ground. What kind of arbitration agreement, for instance, would be contrary to public policy? The term "public policy" is not defined and, indeed, may not be possible to define, as was recognised by the Sub-Committee in its Report.[30] The most obvious situation would be where it occurs as part of an illegal contract, or a contract which promotes activity which is undesirable under the broad rubric of "public policy". Given the width of the notion of public policy, the provision runs counter to the more

[28] Such issues have arisen in the USA, for instance, in relation to antitrust and securities issues. See, for instance, *Scherk* v *Alberto-Culver* 417 US 506 (1974) and *Mitsubishi Motors Corp* v *Soler Chrysler-Plymouth Inc* 105 S Ct 3346 (1985). The American position is extremely supportive of international commercial arbitration, with the result that the public policy objection is construed very narrowly. This in turn allows a greater number of issues to be found to be arbitrable. See the evolution of American judicial attitude in this respect traced in Ian R Macneil, *American Arbitration Law, Reformation-Nationalization-Internationalization* (1992), especially Chapters 13 and 14.

[29] The relevant provision is found in s 31(4)(b) of the Act. This in turn was derived from Art 36(1)(b)(i) of the New York Convention. Public policy, a separate ground in s 34(1)(b) of the Act and Art 36(1)(b)(ii) of the Convention, relates to the recognition and enforcement of an award, not to the arbitration agreement itself.

[30] See paras 26 to 28 of the Report of the Sub-Committee, dated 31 August 1993.

general policy to promote and support international arbitration agreements. It is therefore submitted that this provision should have been excluded or re-worded to mean situations where the *subject-matter* of the dispute is such that arbitration of it would be contrary to public policy. With the present wording, one can only hope that any court having to interpret the provision will do so restrictively, if the intention behind the legislation is to be realised.

It is interesting to contrast the wording in question to that of the Model Law itself. Article 8 allows a court to stay judicial proceedings pending arbitration, unless the arbitration agreement is "null and void, inoperative or incapable of being performed".[31] No mention is made of public policy as a ground for invalidating the agreement. The Act further provides for public policy to negative the *enforcement* of an award, under Part III of the New York Convention.[32] This means that the public policy ground occurs *twice* in the Act, once in relation to the commencement of proceedings, and again in relation to the enforcement of an award. This is disturbing in view of the potential width of the ground.

H. *Powers of the Arbitral Tribunal*

The Act enhances the powers given to an arbitral tribunal under Article 17 of the Model Law. Section 12 gives arbitrators new powers, as well as some powers which already exist under the Arbitration Act. In particular, section 12(1) allows arbitrators to make orders or give directions to the parties for a variety of purposes, including for security of costs, discovery of documents, interim preservation of property and interim injunctions and "any other interim measure". In conjunction with these powers, any order or direction so made can be enforced by the High Court of a Judge thereof in the same way as if made by an order of court.[33] This vastly increases the powers of the arbitrators. Since section 12(1) does not limit the powers of arbitrators to those of judges, there is a possibility that an arbitrator under the Act may make interim orders which a court may hesitate to make. Furthermore, the arbitrator's power to make "any other interim measure" seems wide enough to include the making of *Mareva* injunctions, worldwide or otherwise, and *Anton Piller* orders. If so, by what mechanism would these orders be enforced? The *Mareva* injunction, which is a useful order where parties are likely to have foreign places of business (to which assets

[31] The same position is found in s 8(2) of the International Commercial Arbitration Act of British Columbia, Canada, SBC 1986, c 14 and Part IIA of the Hong Kong Arbitration Ordinance, Cap 341, 1990 Reprint.

[32] S 31(4)(b).

[33] S 12(5) and (6). Prior to this, under the Arbitration Act, such orders could only be made by the court; see 27(1) and the Second Schedule of that Act.

may be easily transferred), appears to be provided for in section 12(1)(f)). If one has to return to the courts for assistance in enforcement of such orders, as appears to be the case, then the arbitrator's power in relation to these extended devices may not be all that potent, especially if the courts choose to refuse to assist in these somewhat drastic devices. Such assistance would appear to be necessary, in view of the fact that Article 93 of the Constitution vests judicial power only in the Supreme and Subordinate Courts.[34]

Section 12(3) goes on to allow arbitrators to administer oaths and take affirmations, while section 12(4) allows them to adopt inquisitorial processes. Both these provisions are, however, subject to any contrary agreement by the parties. Section 12(4) in particular is interesting as it represents a watershed departure from the conventional adversarial approach which the Singapore legal system is steeped in. It recognises that in international commercial arbitration, it is not necessary to insist that the familiar common law ways must be adhered to. What is paramount is the parties' consensus on the manner of resolving their dispute.

Sections 13 and 14 deal with ordering the appearance of witnesses and the production of any document in arbitration proceedings. Section 13 allows any party to an arbitration agreement to take out a writ of *subpoena ad testificandum*, for the appearance of a witness, and a writ of *subpoena duces tecum,* for the production of documents. The latter writ cannot be used, however, to compel the production of any document which a person could not be compelled to produce at the trial of an action. Section 14 (1) allows the High Court or a Judge thereof to order such writs to issue, to compel the attendance of a witness before an arbitral tribunal, wherever he is in Singapore.

I. *Conciliation*

Under the Act, conciliation is recognised as a useful companion dispute resolution process to arbitration.[35] A procedure which did not exist under the Arbitration Act, namely, the appointment of a conciliator where the agreement calls for it, is provided for in section 16(1). In such a situation, where the parties do not select the conciliator, the section allows the Chairman of the Singapore International Arbitration Centre to make the appointment. Section 16(3) further allows such a conciliator to subsequently act as arbitrator if the conciliation does not produce a settlement. Section 16(4) provides a provisional time-frame of 4 months, within which the conciliation is to

[34] The Constitution of the Republic of Singapore, 1992 Reprint.
[35] These provisions are derived from the Hong Kong Arbitration Ordinance (Cap 341).

be completed. This time-frame is subject ot the agreement of the parties. This is useful as it ensures that a conciliation is not allowed to drag on indeterminately.

Section 17 elaborates on the role and powers of a conciliator. First, an arbitrator or umpire[36] chosen by the parties can instead act as conciliator if all parties to the arbitral proceedings consent in writing and none has withdrawn their consent. Second, section 17(2) makes it clear that such a conciliator may communicate with the parties to the arbitration either collectively and separately, and "shall treat information obtained by him from a party to the arbitral proceedings as confidential, unless that party otherwise agrees or unless sub-section (3) applies".

Sub-section (3) is somewhat controversial. It derives from the Hong Kong legislation adopting the Model Law, and reads:

> (3) Where confidential information is obtained by an arbitrator or umpire from a party to the arbitral proceedings during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire *shall* before resuming the arbitral proceedings disclose to all other parties to the arbitral proceedings as much of that information as he considers *material* to the arbitral proceedings.[37]

This provision gives the arbitrator-conciliator a duty and a discretion as to the information obtained in the course of conciliation which he may disclose in the ensuing arbitral proceedings. Presumably, this provision aims to allow each party fair warning as to what matters the other party may raise, and to avoid the springing of surprise arguments or even bargaining tactics. One argument against this duty is that if parties enter into conciliation proceedings knowing that the arbitrator-conciliator could subsequently reveal important information to the other side in arbitration proceedings should there be no settlement, parties would not be willing to make the frank disclosure they might otherwise make. This, in turn, could hold up the settlement process as parties are unwilling to help the conciliator get to the truth of the matter, or to their true bargaining positions. It also places the conciliator-turned-arbitrator in a rather difficult position, having to decide which of the information he has received is "material". If the arbitrator reveals too much or reveals inadequately, the parties may later seek to discredit his or her award on the basis of bias. It remains to be seen how this provision will in fact affect arbitration proceedings.

[36] The term "umpire", which also appears in the Arbitration Act, is not defined.
[37] Emphasis added.

J. *Settlement in Award*

Section 18 makes it possible to enforce awards which record parties' terms of settlement like judgments and orders, and for judgment to be entered in the terms of the award, subject to the High Court or a Judge thereof granting leave to do so. This is useful as the recording of settlements in the form of awards allows such arrangements to have binding effect, as well as the benefits of the enforcement provisions in Part II of the Act. The Arbitration Act does not provide for such a course, but presumably, there is nothing to stop the parties from having the award embody their settlement if they agree.

K. *Setting Aside Awards*

Section 24 of the Act provides for grounds on which the High Court may set aside an award. The two grounds thereunder are where the making of the award was induced or affected by fraud or corruption, and where a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced. These are in addition to the grounds found in Art 34 of the Model Law, which largely mirror those for refusal of recognition and enforcement of an award under Article V of the New York Convention. The limitation of grounds to these make it more difficult for arbitration awards to be set aside.

L. *Arbitrator Immunity*

Section 25 is an important new provision under Singapore law. It gives arbitrators acting under the Act immunity from negligence for acts and omissions done in the capacity of arbitrator, and from any mistake in law, fact or procedure made in the course of arbitral proceedings and the making of awards. This is important as it gives arbitrators the protection accorded to members of the Bench. It highlights the quasi-judicial function of the arbitrator rather than his status as a mutually agreeable decision-maker whose powers derive from the parties' agreement.

The Arbitration Act, which will now apply primarily to non-international arbitrations, is silent on this matter. It requires one to look to the common law for assistance, and although the law generally treats arbitrators like judges in terms of immunity, there is some doubt.[38] This doubt unfortunately remains for arbitrators who act under the Arbitration Act.

[38] This ambiguity in the law is discussed in JDM Lew, "Immunity of Arbitrators under English Law", Ch 4, in JDM Lew (ed), *The Immunity of Arbitrators* (1990). The book also usefully

M. *Enforcement of Awards*

Section 19 allows an award made under the Act to be "enforced in the same manner as a judgment or order." This is done with the leave of the High Court or a Judge thereof, and a judgment may be entered in terms of the award. This is an important provision as it gives the party in whose favour the award is made, access to court machinery for enforcing judgments, such as garnishee and execution proceedings.

This provision differs in purpose from Part III, which provides for the application of the New York Convention. Whilst section 19 provides for local enforcement of awards made in Singapore under the Act, the provisions of Part III provides for the local enforcement of arbitral awards made in a country which is a member of the New York Convention other than Singapore.

N. *Miscellaneous Provisions*

Section 20 allows interest to run from the date of an award unless the award directs otherwise. The applicable rate is that for a judgment debt, *viz*, 8% per annum.[39]

Section 21 provides for the taxation of costs to be paid under an award and of the fees of the arbitral tribunal (unless those fees have been fixed earlier).

Section 22 provides for the hearing of proceedings under the Act in open court. Section 23, however, protects the parties' right to confidentiality by allowing the court to restrict publication of the proceedings in proceedings heard otherwise than in open court.

Section 26 contains provisions pertaining to transitional matters. Sub-section (1) states that the Act does not apply to an international arbitration commenced before the date of the commencement of the Act, unless the parties otherwise agree. Again, this provision gives parties involved in arbitration prior to the Act the choice of whether to have its provisions govern their proceedings. Under sub-section (2), if they choose not to have the Act govern, the law in force prior to the Act would apply. For clarity, section 26(4) states at which point arbitral proceedings are to be taken as having commenced.

examines the positions under the laws of Argentina, Australia, Austria, France, Germany, Japan, the Netherlands, Norway, Spain, Sweden, Switzerland and the USA, as well as in relation to the standard form contracts of various international bodies.

[39] This rate applies unless otherwise agreed by the parties: Order 42 Rule 12 of the Rules of the Supreme Court, GN S 274/70, 1990 Ed.

O. *The Model Law Provisions Which Apply Unamended*

Apart from the foregoing modifications by the Act, the Model Law provisions apply in their original form. These cover a wide variety of issues, from commencement of proceedings to award-making. The provisions give much more detail to the arbitral process than does the Arbitration Act. A comparison and contrast of the issues covered by the Arbitration Act and the Act is included in the Appendix. Some of the salient provisions will be highlighted here.

Article 5 limits the role of the courts in relation to arbitrations under the Model Law. The Article provides:

> In matters governed by this Law, no court shall intervene except where so provided in this Law.

This Article must be read subject to the provisions in the Act which permit court action. In this respect, the Act does not give the courts a large role either, except in enforcing arbitration agreements (section 6), enforcing arbitrators' orders (sections 12(5), (6) and 14),[40] and enforcing awards (section 19).

Article 7 explains the meaning of "arbitration agreement" to include both an arbitration clause and an agreement separate from the main agreement. Article 7(2) specifies that an arbitration agreement must be in writing, and proceeds to give useful examples of when this is satisfied. For instance, an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement would suffice. This is not specified in the Arbitration Act.

Article 12(1) deals with an ethical issue faced by arbitrators: the duty of disclosure of "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence". Rather than leave this matter to the individual arbitrator, the Article forces the arbitrator to confront any

[40] The International Arbitration Act of British Columbia, Canada, SBC 1986, c 14, has an additional provision to safeguard against judicial interference with arbitral orders. S 5(b) provides:
"No arbitral proceedings of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal shall be questioned, reviewed or restrained by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided in this Act."
See Cecil OD Branson, QC, "Some Essentials Provided by the British Columbia International Commercial Arbitration Centre", conference paper presented at *Dispute Resolution across the Continents*, Society for Professionals in Dispute Resolution 22nd Annual Conference, Dallas, Texas, USA, 22-29 October 1994.

such circumstances and to disclose them. Failure to do so may lead to challenge by the parties under the procedure in Article 13. In contrast, under the Arbitration Act, these details of procedure are not spelt out.

Article 16 is an extremely significant provision as it encompasses two important principles in arbitration law, namely, the arbitrator's power to decide his own jurisdiction (often called the "competence-competence" principle, after the principle of *kompetenz-kompetenz*), and the doctrine of separability. The latter doctrine allows a separation of the arbitration agreement from the other terms of the main contract. It serves to insulate the arbitration agreement from any defect in the main contract and to allow it to be upheld, notwithstanding any such defect. This insulation, in turn, preserves the power of the arbitral tribunal to rule on its own jurisdiction even if the main agreement is defective in some way. Article 16(3) further allows the tribunal to rule on a plea that it has no jurisdiction, which ruling can be appealed against in court (the High Court, in the Singapore context). Unfortunately, this appeal can be taken one step further under the Act because of an extension of the appeal process in section 10 to the Court of Appeal.

Articles 18 to 27 deal with the conduct of proceedings and the general rules applicable to them. These very practical provisions do not appear in the Arbitration Act. Article 18 ensures the equal treatment of parties and Article 19 allows party choice as to the procedural rules which will govern the proceedings. Articles 23 to 24 relate to statements of claim and defence, and hearings and written proceedings. Article 26 allows the tribunal to appoint an expert or experts if it considers this to be necessary, unless the parties agree otherwise. This will obviously assist the tribunal in reaching a decision, but since it is likely to add to the costs of the proceedings and the expert may be unfamiliar to the parties, their consent, or at least lack of agreement to the contrary, is needed.

Article 28 breaks new ground in a number of ways. First, it expressly states the principles for choice of law applicable to the dispute. Priority is given in Article 28(1) to the choice made by the parties. Failing such a choice being made, the tribunal is directed by Article 28(2) to decide on the applicable law according to the conflict of laws rules "which it considers applicable". Having decided the applicable law, the tribunal is directed under Article 28(4) to "decide in accordance with the terms of the contract" and to "take into account the usages of the trade applicable to the transaction". Article 28(3), an innovation under Singapore law, allows a tribunal to decide *ex aequo et bono*, or as *amiable compositeur.* These are concepts which are not familiar to a lawyer trained in the common law. They are, however, commonly applied in international arbitrations and in the civil law jurisdictions. The Sub-Committee Report recognised this

unfamiliarity of common lawyers with these concepts, and recommended their adoption, albeit with limitations.[41] It is submitted that this Article is useful, as it allows parties greater flexibility in resolving their dispute, by permitting their arbitral tribunal to depart from strict legal principles.

Article 31 provides for the form and contents of an award. Of particular interest is Article 31(2), which requires that the reasons on which the award is based be given, unless the parties agree otherwise. This will ensure that awards made under the Act will generally be well-reasoned, since the statement of reasons opens the award to attack if the reasons are found to render the award invalid.

Article 34, another important provision, deals with recourse against awards. This Article has to be read in conjunction with section 24, which gives two further grounds for setting aside awards. As mentioned, the grounds in Article 34(2) largely reflect those in Article V of the New York Convention, save for the ground in Article V(1)(e) as to the lack of finality of an award. The next part will examine the role of the provisions adopting this Convention, in relation to the rest of the Act.

VI. The New York Convention

Part III of the Act re-enacts, with some changes, the provisions of the Arbitration (Foreign Awards) Act, which is repealed in Part IV. This re-enactment as part of the Act is to combine the earlier provisions of the Act with the recognition and enforcement framework for international arbitration awards under the New York Convention. At the same time, Chapter VIII of the Model Law on similar subject-matter is excluded by section 3(1). The Act therefore presents a neat package which covers the conduct of international arbitrations from start of proceedings to enforcement of an award.

Before the relationship between the Act and the New York Convention is examined, what are the main changes made in Part III from the now-repealed Arbitration (Foreign Awards) Act?[42]

The definition of an "agreement in writing" has been amended in the Act by the inclusion in section 27(1) of agreements in an exchange of telefacsimile messages. This is merely a reflection of the frequency of use of this means of communication in the business world.

Section 4 of the repealed Act, relating to enforcement of arbitration agreements under the Convention and stay of court proceedings for the purpose of such enforcement, has been omitted in Part III of the Act. These

[41] See Pt P of the Report. Whether these limitations can be referred to is not expressly addressed in the Act. See, *supra*, the point made under "B *Interpretation*" under Pt V of this Article.

[42] Hereafter, "the repealed Act".

matters are now dealt with under sections 6 and 11, and by the Model Law provisions. It is noteworthy that section 4 of the repealed Act did not contain any ground of objection to enforcement of an arbitration agreement based on public policy.

The crux of Part III is the enforcement in Singapore of arbitration awards made in New York Convention countries. The provision giving force to this objective is now found in section 29(1) of the Act, which allows such awards to be enforced "in the same manner as an award of an arbitrator made in Singapore is enforceable under section 19". Section 29(2) further provides that foreign awards enforceable under sub-section (1) shall be recognised for all purposes as binding upon the parties between whom it was made and can further be relied on, in legal proceedings in Singapore, by way of defence, set-off or otherwise. This preserves the position under the repealed Act.

The grounds for refusal to enforce an award remain the same under section 31 in the Act as those under section 7 of the repealed Act.

Whereas section 8(1) of the repealed Act provided that a Ministerial order declaring which States are Convention countries was conclusive evidence of the fact, section 32(1) of the Act has omitted the word "conclusive".

Section 33 of the Act preserves the position of a party seeking to enforce an award under Part III notwithstanding the registrability of a foreign award under the Reciprocal Enforcement of Commonwealth Judgments Act.[43] The section also corrects the inconsistent terminology in the equivalent provision under the repealed Act, (*viz*, section 9) where reference was made to a "Convention award" instead of a "foreign award".

For proceedings begun under the repealed Act, section 36(2) of the Act provides for continuation as if they has been commenced under the Act.

Finally, section 35 confers power on the Rules Committee (established under the Supreme Court of Judicature Act) to make rules to regulate the practice and procedure of a court in respect of any matter under the Act.

What role, then, do the provisions in Part III of the Act relating to New York Convention awards made other than in Singapore, have in relation to the rest of the Act? The repeal of the previous Act with re-enactment in Part III was not necessary for the adoption of the Model Law. All that its inclusion in the Act achieves is to place all Singapore provisions relating to international commercial arbitration (apart from those arising from investment disputes) in one statute. The amendments mentioned above could simply have been made to the repealed Act *de hors* the Model Law. In reality, Part II deals with international commercial arbitration awards *made in Singapore in accordance with the Act,* whereas Part III deals with inter-

[43] Cap 265, Singapore Statutes, 1985 Rev Ed.

national arbitration awards *made in a New York Convention country other than Singapore*. Enforcement and grounds for refusing enforcement of the former type of award, therefore, are governed not by Part III, but by section 19 in Part I. By excluding Chapter VIII on enforcement in the Model Law, the Act has reduced the provisions governing enforcement of awards under Part II to section 19 and, indirectly, section 24. Section 24 of the Act, read with Article 34, however, only deals with *grounds for setting aside awards*, not for refusal of enforcement. This means that for international arbitration awards made in Singapore under Part II, there is a serious lacuna in relation to the grounds for refusal of enforcement, and that if courts refuse to enforce such awards, they must set them aside under section 24. This oversight has arisen, presumably, from the mistaken assumption that Part III would also cover enforcement of Part II awards. According to the Explanatory Statement to the Bill, "Chapter VIII is not adopted in order to avoid any inconsistency with Part III of the Bill which *also* deals with the recognition and enforcement of foreign awards."[44] As it stands, the silence of Part II on the grounds for refusal to enforce an award thereunder means that there are no such grounds under Singapore law. It is not inconceivable that there may arise circumstances which justify a refusal of enforcement, without calling for a setting aside of the award under section 24. The legislation is therefore really incomplete without setting out the grounds for refusal of enforcement in such circumstances. It is a regrettable position[45] and it is hoped that either the provisions in Chapter VIII of the Model Law will be made applicable, or the grounds in section 31 of Part III will be made applicable to Part I awards. Either option would be acceptable by international standards, since the grounds in both are largely similar, save for that in relation to lack of finality of an award found in section 31 but not in Chapter VIII.

VII. Other Issues

Whilst the Act has introduced a useful framework for the conduct of international commercial arbitrations, the procedural rules which parties are left to choose are also important to the fair, speedy and economical resolution of the dispute. If either the UNCITRAL Arbitration Rules or the Arbitration Rules of the Singapore International Arbitration Centre are

[44] Emphasis added. This shows that the drafters thought that Pt II of the Act also relates to the recognition and enforcement of foreign awards, which is clearly not the case.

[45] The same position is found under the Hong Kong Arbitration Ordinance, Cap 341, 1990 Reprint, since Chapter VIII of the Model Law is likewise omitted. Contrast the position in British Columbia, Canada, where, despite the existence of the Foreign Arbitral Awards Act, SBC 1985, Cap 74, which adopts the New York Convention, the International Arbitration Act contains the equivalent provisions of Ch VIII of the Model Law in s 36.

adopted, the functioning of the tribunal under the Act should not be impeded as these Rules are compatible with the Model Law. If parties choose procedural rules which deviate from the Act, then surely the Act must prevail.

Although the Act supplements the Model Law in many ways, it remains silent on some important matters. The first of these is that of consolidation of arbitration proceedings. The Sub-Committee deliberated over this and chose to recommend the present position.[46] Although this may avoid complications arising from consolidating arbitrations from different jurisdictions, it does not assist the position in cases where consolidation may be desirable, such as where there is a series of parties involved in separate but related disputes. A common instance of this would be in a construction project involving contractor and several sub-contractors. In the Hong Kong Arbitration Ordinance,[47] section 6B(1) provides that a Court may order consolidation if it appears:

> (a) that some common question of law or fact arises in both or all of [the arbitration proceedings], or
>
> (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or
>
> (c) that for some other reason it desirable to make an order under this section....

Minimising court interference in the arbitral process is obviously important, but a multiplicity of related arbitrations is equally undesirable. Where legitimate court action such as that above may be useful, the Act should not have been silent, or left the matter ambiguous.

The Act has also not addressed an important issue relating to the summary judgment procedure, or what is more commonly known as "Order 14" judgments.[48] A court may be faced with a pending arbitration and an application by one of the parties for summary judgment. In such a situation, which should take priority? An application for summary judgment differs from the commencement of court proceedings (which should be stayed in favour of arbitration) in that the summary judgment procedure deals with cases in which there is clearly no defence to the claim. If it is made out, there is no dispute for arbitration. Logically, then, in such a case, the summary judgment application should be heard first. Arguably, doing so will dispose of a claim to which there is genuinely no defence; it will also not unduly

[46] See Pt L of the Report.
[47] *Supra*, note 45.
[48] Order 14 of the Rules of the Supreme Court, GN S 274/70, 1990 Ed.

delay arbitration proceedings as such applications are heard relatively swiftly.[49] The position of the Sub-Committee, however, was that:

> where foreign parties agree to arbitrate in Singapore, they should be assured that their consent must not be construed as a submission to the jurisdiction of the Singapore courts. To allow one party to insist on proceeding to the Singapore court for the purpose of determining the issue summarily would be totally inconsistent with the agreement to arbitrate in Singapore....

This view is understandable as summary judgment is a judicial procedure, whereas parties to an arbitration have agreed to settle their disputes outside the judicial system. It remains to be seen which view the local courts will adopt when faced with such an application.

Article 28 of the Model Law admirably allows the parties to decide on the law which will govern their dispute. In international arbitrations, it is not uncommon to encounter a choice directed at a non-national system, such as "general principles of international law" or *lex mercatoria.* If Article 28 is read widely, such choices would be acceptable and the arbitral tribunal would be obliged to do its best to apply what it understands to be such law. Since the Act does not state whether such non-national systems would be acceptable, it remains to be seen how acceptable such a choice would be under it. If it treats such choices as being unacceptable, then the tribunal would have to resort to the next step in Article 28, namely, to determine the applicable laws by looking at conflict of laws principles as if no choice had been made.

The Act does not deal with questions of ethical conduct of arbitrators, except in a few instances. Article 12 of the Model Law, which applies under the Act, relates to the duty of an arbitrator to disclose any circumstances which may give rise to doubts as to his impartiality or independence. Section 17 of the Act requires the arbitrator, who has first acted in an unsuccessful conciliation, to make disclosure of so much of confidential information which he had obtained during the conciliation which he considers to be material, to all parties before resumption of arbitration proceedings. As for other ethical issues, it remains for the Singapore International Arbitration Centre or other institution of arbitrators to bring into existence some code of conduct or of ethics, such as the American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes, the International Bar Association Code of Ethics for International Arbitrators and the Chartered

[49] This appears to be the position in Hong Kong. See Kaplan, Spruce & Cheng, *Hong Kong and China Arbitration Cases and Materials* (1994), Ch 1.

Institute of Arbitrators Guidelines of Good Practice for Arbitrators.

Finally, if Singapore is to succeed as a major international arbitration centre, the issue of appearance of foreign lawyers in such arbitrations conducted in Singapore must surely deserve further consideration. With the adverse publicity of the by-now infamous *Turner* case[50] still etched in many foreign lawyers' minds, one might ask whether the resultant amendments to the Legal Profession Act[51] are really sufficient and satisfactory. Although section 34A of that Act now allows a foreign lawyer to act in arbitrations where the applicable law is other than Singapore law, and where the applicable law is Singapore law provided they do so with a local lawyer, foreign lawyers may well advise their clients to choose another forum, where such limitations do not exist, for arbitration.[52] The latter requirement of having the foreign lawyer appear with a Singapore counterpart presumably addresses the need for accurate application of Singapore law. One might argue, however, that if all parties to the arbitration are satisfied not to have any Singapore lawyer present, this should be allowed. A foreign lawyer in such a case would presumably be briefed by a Singapore lawyer before he or she appears before the arbitral tribunal. The question is whether it is really necessary to have the Singapore lawyer *appear* jointly in the arbitration.

VIII. Conclusion

The International Arbitration Act is a welcome development in the evolution of Singapore's law on commercial arbitration. It brings into the Singapore legal system a framework of regulation for international arbitrations in the form of a modified version of the UNCITRAL Model Law on International Commercial Arbitration. The standards and procedure in the Model Law are born of painstaking work by members of various nations and represent

[50] *Turner (East Asia) Pte Ltd* v *Builders Federal (Hong Kong) Ltd* [1988] 2 MLJ 280.

[51] Cap 161, Singapore Statutes, 1994 Rev Ed.

[52] The position differs, for instance, in Hong Kong, where foreign legal representation is allowed; section 2F of the Arbitration Ordinance, Cap 341, 1990 Reprint, states:

> "*Representation and preparation work*
>
> For the avoidance of doubt, it is hereby declared that ss 44, 45 and 47 of the Legal Practitioners Ordinance (Cap 159) do not apply to:-
>
> (a) arbitration proceedings;
>
> (b) the giving of advice and the preparation of documents for the purpose of arbitration proceedings;
>
> (c) any other thing done in relation to arbitration proceedings except where it is done in connection with court proceedings arising out of an arbitration agreement or arising in the course of, or resulting from, arbitration proceedings."

See Kaplan, Spruce and Cheng, *supra*, note 49, Ch 10, "Legal representation in Asia", for a summary of the positions in some Asian jurisdictions.

a world standard on the conduct of international arbitrations. Together with the supplementary provisions of the Act, the Model Law provisions introduce a separate body of law from that applicable to purely domestic arbitrations. This is in line with the policy to give, to the parties, in international commercial arbitrations maximum flexibility and autonomy; to arbitrators, maximum leeway and assistance in disposing of disputes fairly and swiftly, with minimum resort to the courts; and to courts, powers to assist, rather than to impede, the arbitral process. The Act is therefore an improvement over the previous position under the Arbitration Act, which will now be applied primarily to non-international arbitrations.

The Act leaves some questions unanswered, as well as, raises some new ones. With respect to the former, the Act may have to be amended once it has been in use for some time, after which the potholes would have become much clearer. As for the latter, they can be circumvented if courts faced with proceedings under the Act choose to construe it in a manner which is supportive of the international arbitral process. In due course, however, the advantages of the Act, which outweigh its problems, will, hopefully, be evident. For a start, if the existence of the Act could encourage more international arbitrations to be conducted in Singapore, then one of the primary objectives of the Act would already have been achieved. In the meantime, the experiences of other jurisdictions with their versions of the Model Law will have to be monitored closely to draw useful lessons.[53]

HSU LOCKNIE*

[53] The case abstracts from *Case Law on UNCITRAL Texts (CLOUT)*, *supra*, note 17, are a useful source of such developments. So far, a number of cases on the Model Law from Hong Kong and Canada have been reported in *CLOUT*. Many of these relate to applications for stay of proceedings in relation to Article 8 of the Model Law.

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APPENDIX: COMPARATIVE TABLE OF TOPICS COVERED BY NEW ACT AND ARBITRATION ACT

INTERNATIONAL ARBITRATION ACT (Sections refer to those in the Act; Articles refer to those of the Model Law)	ARBITRATION ACT (CAP 10)
1 Applies to international arbitrations unless parties opt out, and to non-international arbitrations if parties opt in (ss 5 and 15); definition of "international arbitrations" given separate definition in Part III (New York Convention) for enforcement of foreign awards	1 Applies to domestic and international arbitrations; definition of "domestic arbitration" given only for purposes of exclusion agreements under s 30
2 Reference to *travaux préparatoires* allowed for interpretation (s 4)	2 Not applicable
3 Requirement that arbitration agreement be in writing, with examples given (s 2(1) and Art 7)	3 Requirement that arbitration agreement be in writing (s 2)
4 Receipt of written communications (Art 3)	4 Silent
5 Waiver of right to object (Art 4)	5 Silent
6 Court intervention: ss 6-8, 10, 12, 14, 18, 19-24, 31 and Arts 5, 8-9, 11(3)-(5), 16(3), 27, 34 Appeals from High Court to Court of Appeals (s 10): limited avenue of appeal	6 Court intervention: ss 7-8, 9(2), 11-12, 15, 16, 17-19, 21-32 S 28 Judicial review of awards: when appeals from arbitrator's decision to court S 29 Determination of preliminary question by court Ss 30-31 Exclusion agreements excluding appeals to Court of Appeal
7 Court to enforce arbitration agreement (ss 6, 11 and Art 8) unless arbitration is null and void or inoperative or incapable of being performed, or arbitration agreement if contrary to public policy	7 S 7: Court to enforce unless as set out in s 7(2) Arbitration agreement irrevocable unless parties agree to contrary (s 3) No grounds stated for refusal to enforce agreement

INTERNATIONAL ARBITRATION ACT (Sections refer to those in the Act; Articles refer to those of the Model Law)	ARBITRATION ACT (CAP 10)
8 Number of arbitrators where parties do not state to be one (s 9)	8 Same: First Schedule, para 1
9 Appointment of arbitrators (Art 11)	9 Appointment by parties: First Schedule, paras 1-2, and power of court to appoint (ss 8-9, 19)
10 Challenge of arbitrator (Arts 12-13)	10 Ss 12, 18-19
11 Failure/impossibility to act and substitution (Arts 14-15)	11 S 8
12 Public policy against arbitration agreement and arbitrability	12 Absent
13 Power of tribunal to make interim orders (s 12 and Art 17) Power of court to make interim and other orders (ss 6(3), 7 and 12(6))	13 Power of court to make interim orders (s 32 and Second Schedule)
14 Oaths, witnesses and production of documents (ss 13, 14 and Art 27)	14 Ss 13-14, 26
15 Jurisdiction of tribunal including *Kompetenz-kompetenz* (Art 16)	15 Silent
16 Principles for conduct of arbitral proceedings (Arts 18-27): (a) Equal Treatment of parties (b) Rules of procedure (c) Place of arbitration (d) Commencement of arbitral proceedings (e) Language(s) of the arbitration (f) Statements of claim and defence (g) Hearings and written proceedings (h) Default of party (i) Appointment of expert by tribunal (j) Court assistance in taking evidence (s 14 as well)	16 Generally, First Schedule Silent Silent Silent S 37 Silent Silent Silent First Schedule, para 4-5 Silent S 14
17 Conciliation before arbitration if agreed (ss 16-17)	17 Silent

INTERNATIONAL ARBITRATION ACT (Sections refer to those in the Act; Articles refer to those of the Model Law)	ARBITRATION ACT (CAP 10)
18 Award-making/termination of proceedings (a) Applicable law (Art 28) 28(1): law chosen by parties 28(2): conflict of law rules 28(3): *ex aequo et bono* and *amiable compositeur* if agreed 28(4): terms of contract and trade usages applicable (b) Decision-making by panel (c) Settlement and record in award (s 18 and Art 30) (d) Form and contents of award (Art 31) (e) Termination of proceedings (Art 32) (f) Correction and interpretation of award, additional award (Art 33) Relief which can be granted: section 12(4) Silent	18 S 15 and First Schedule, para 6 Silent S 10 Silent Silent Silent Silent Silent Court can enlarge time for making award: s 15
19 Enforcement of awards (s 19 for Part II awards, and Part III for foreign awards); procedure not set out.	19 S 20: Enforcement as if High Court judgment. Procedure for registration and enforcement of awards set out in Order 69, Rules 6 and 7, Rules of the Supreme Court, 1990 Ed, Subsidiary legislation 274/70.
20 Interest on awards (s 20)	20 S 33
21 Taxation and costs (s 21)	21 S 34-36 and First Schedule, para 7
22 Whether court proceedings to be in open court (s 23)	22 Silent
23 Power of Court to set aside award (s 24 and Art 34)	23 Power of Court to set aside award (s 17)
24 Immunity of arbitrators	24 Absent
25 Opt-in/opt-out choice (ss 5(1) and 15)	25 Parties' contrary intention provided for in some sections, *eg,* ss 3 and 6

INTERNATIONAL ARBITRATION ACT (Sections refer to those in the Act; Articles refer to those of the Model Law)	ARBITRATION ACT (CAP 10)
26 Silent	26 Death or bankruptcy of party (ss 4-5)
27 Absent	27 Appointment of umpire (s 11 and First Schedule, paras 2-3)
28 Not expressly stated	28 Award to be final and binding (First Schedule, para 6)
29 Absent	29 Arbitrators may order specific performance (First Schedule, para 8) in cases other than those relating to land
30 Not expressly stated but s 2(1) definition of "award" includes "any interim, interlocutory or partial award"	30 Arbitrators may make interim awards (First Schedule, para 9)
31 Absent	31 Procedure for court to refer case to special referee (ss 21-25)
32 Absent	32 Powers of court (s 27 and Second Schedule)
33 Absent	33 Court may order charge over property (s 38)