

Interim Measures in Aid of Foreign Arbitrations

The recent amendments to the International Arbitration Act

A 2007 Report by the International Chamber of Commerce – International Court of Arbitration (ICC-ICA) ranked Singapore as the leading city in Asia for ICC Arbitrations and alongside Paris, London, Geneva and Zurich, as one of the most popular venues for ICC Arbitrations in the world. Singapore's evolution into the pre eminent arbitration venue in Asia received a further boost recently with the launch of Maxwell Chambers as an integrated one-stop arbitration centre providing world-class hearing facilities with state of the art services.

However, achieving excellence as a prime arbitration venue for international arbitrations may well not be enough. Singapore must also be seen as an active participant on the world stage in promoting the effective administration of international arbitrations, wherever these arbitrations are conducted. In recognition of this, the Singapore Parliament passed the International Arbitration Amendment Act (the "Amendment Act") in October 2009. The Amendment Act, which came into force on 1 January 2010, introduced new provisions to the International Arbitration Act ("IAA"). This article looks at Section 12A of the IAA which was introduced by way of the recent amendments to extend the Court's powers to grant interim relief to parties engaged in international arbitrations conducted outside Singapore.

The primary objective of Section 12A of the IAA was to rectify the discrepancy that existed in the earlier version of the IAA which was exposed in the wake of the rulings in *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR (R) 323, *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 and the decision of the Singapore Court of Appeal in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629.

Under the earlier version of the IAA, Section 12 (7) provided the Court with the same powers in an International Arbitration as the Court had in relation to a litigation action or matter before the Court. Section 12(1)(a) to (i) specifies the interim measures which the Court may grant in aid of arbitrations as follows:

(a) The power to order that a party to the arbitration provide security for costs of the arbitration;

(b) The power to order a party to the arbitration to provide discovery of documents or answer interrogatories under oath;

(c) The power to order or direct that the evidence to be adduced at the arbitration be in the form of an affidavit;

(d) The power to order the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute in the arbitration;

(e) The power to order that samples to be taken of, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute in the arbitration;

(f) The power to order the preservation and interim custody of any evidence for the purposes of the proceedings in the arbitration;

(g) The power to order that the amount in dispute in the arbitration be secured;

(h) The power to grant Mareva Injunctions (commonly known as freezing Orders) to ensure that any award made in the arbitration is not rendered ineffectual by the dissipation or disposal of assets by a party to the arbitration; and

(i) The power to grant any other interim injunction or any other interim measure in aid of the arbitration.

The original version of the IAA was based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law ("Model Law") that came into effect in 1985. Under Article 17 of the 1985 version of the Model Law, arbitral tribunals were provided with wide powers to grant interim measures in aid of arbitration. The general policy that existed in 1985 was that the powers of the local courts to intervene or interfere in arbitral proceedings should be excluded save only where the Model law permitted such intervention. Article 9 of the 1985 version of the Model Law enabled parties to an arbitration to apply to the local courts

and for the courts to grant interim measures in aid of the arbitration. But, given the policy of minimalist intervention by the courts, there was a lack of clarity as to the extent of the courts' power or jurisdiction to grant such interim measures.

The 1985 version of the Model Law was revised by UNCITRAL in 2006. The 2006 revisions introduced a new Chapter IV A on preliminary orders and interim measures. This Chapter contained detailed provisions on the powers of an arbitral tribunal. More significantly, it contained specific provisions governing the local courts' powers to order interim measures in aid of an arbitration. Article 17J of the revised Model Law now states that "a court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation to proceedings in court". Clearly, one of the objectives of the 2006 revision was to clarify and extend the local courts' powers to aid foreign arbitrations.

The question in Singapore was whether Section 12(7) read together with Section 12(1)(a) to (i) empowered the Singapore courts to grant interim measures in aid of a foreign arbitration, that is to say, where the arbitration is not conducted in Singapore but in some other foreign venue. This issue came up for determination before the Singapore Court of Appeal in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629.

After carefully reviewing the various statutory provisions governing the Court's jurisdiction and Article 9 of the Model Law, the Court of Appeal ruled that Section 12(7) of the IAA did not apply to international arbitrations conducted outside Singapore. The Court further ruled that Article 9 of the Model Law did not confer jurisdiction on the courts to grant the interim measures set out Section 12(1)(a) to (i) in aid of foreign arbitrations and that Article 9 has "no bearing on the meaning and effect" of section 12(7) of the IAA. In a nutshell, the Singapore courts did not have the power to grant interim relief with respect to foreign arbitrations.

The Court of Appeal's ruling in *Swift-Fortune* revealed a striking disparity between the progressive approach adopted by UNCITRAL in the 2006 revision to the Model Law and the more limited approach of the Singapore courts in aiding foreign arbitrations. In recognition of the need to adopt a more consistent approach, the new Sections 12A(1) and (2) were introduced to remedy the situation. The original Section 12(7) has been deleted and the newly introduced Sections 12A(1) and (2) empower the Singapore courts to grant some of the interim measures set out under Section 12(1)(a) to (i) of the IAA in aid of international arbitrations which are conducted outside Singapore.

It must be noted that the new amendments do not represent an importation of the 2006 revisions to the Model Law into Singapore law. When it comes to foreign arbitrations, the Singapore courts still do not have the power to make orders in relation to certain interim measures set out under Section 12(1)(a) to (i). These relate to the power to order security of costs, discovery of documents or the administration of interrogatories. This limitation recognizes the central role of the arbitral tribunal as the master of its own procedure and that procedural issues such as discovery of documents, the administration of interrogatories and security of costs should rightfully be left to the arbitral tribunal and to the agreement of the parties.

Under the new Section 12A(4) of the IAA, where the case "is one of urgency," the Singapore court, acting on the application of a party to the foreign arbitration or a proposed party to such an arbitration, may grant interim relief for the purpose of preserving evidence or assets." Under Section 12A(5), if the case "is not of urgency," the Singapore court may grant such an interim relief only if the applicant (who is a party to the foreign arbitration) has obtained the permission of the foreign arbitral tribunal or the agreement in writing of the other party towards the making of the application for interim relief. In the latter case, the applicant is required to give notice of the application to the other party who has the right of attendance before the court at the hearing of the application.

In both cases however, Section 12A(3) and (6) provides that, the Singapore court may refuse to make an order if the fact that the place of arbitration is outside Singapore or likely to be outside Singapore makes it inappropriate to make such order and/or if the arbitral tribunal, and any other institution has the power and is able "to act effectively" on such applications. The Court may refuse to make an order in cases where the applicant is unable to show that the other party has substantial assets in Singapore or is unable to show any link between the foreign arbitration and Singapore.

Lastly, under the new Section 12A(7) of the IAA, the interim measure ordered by the Singapore court shall cease to have effect in whole or in part (as the case may be) if the arbitral tribunal, or any such arbitral institution having power to act in relation to the subject-matter of the order, makes an order which expressly relates to the whole or part of the order made by the Singapore court. This provision again recognizes the central role played by the foreign arbitral tribunal in regulating its own proceedings and the need for the courts to be careful in usurping the functions of the foreign arbitral tribunal.

The new Section 12A of the IAA strongly mirrors provisions in the UK Arbitration Act 1996. It is,

therefore, anticipated that English case law under the UK Arbitration Act will be instructive in understanding how the Singapore courts may interpret their powers and jurisdiction under the new Section 12A in the near future.

In conclusion, the new amendments seek to augment the Singapore courts' powers but with the appropriate restrictions on the exercise of these new powers. This demonstrates a desire to strike a fine balance between extending the courts' powers in assisting parties to a foreign arbitration without compromising the general policy of minimalist intervention by the courts in arbitral proceedings. The amendments are truly progressive in their scope and nature and will, no doubt, boost the city state's continuing efforts to promote Singapore as a leading venue for international arbitration.

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