ATTORNEY-
GENERAL'S
CHAMBERS

PROPOSED AMENDMENT TO THE INTERNATIONAL ARBITRATION ACT ON RULES OF ARBITRATION

(Report)

LRRD No. 11/2002

LAW REFORM AND REVISION DIVISION
ATTORNEY-GENERAL'S CHAMBERS
SINGAPORE

2 October, 2002

Report on Proposed Amendment to the International Arbitration Act on Rules of Arbitration

The Law Reform and Revision Division Team for this project comprises:

Mr Charles Lim Aeng Cheng – Principal Senior State Counsel (LRRD)

Assoc Prof Lawrence Boo Geok Seng – Law Reform Consultant

Ms Yvette C Rodrigues – Senior Legal Executive

The following persons have rendered invaluable assistance to the team:

Mr Warren Khoo
Chairman, SIAC

Mr Michael Hwang SC
Allen and Gledhill

Mr Vinodh Coomaraswamy
Shook Lin and Bok

Mr Pang Khang Chau
Deputy Director (Legal Policy), Ministry of Law

Legal Editorial and Publication

Ms Noraini Jantan – Corporate Support Officer
Ms Cindy Soh – Secretarial Support Officer

LAW REFORM AND REVISION DIVISION
ATTORNEY-GENERAL'S CHAMBERS

REPORT ON PROPOSED AMENDMENT TO THE INTERNATIONAL ARBITRATION ACT ON RULES OF ARBITRATION

CONTENTS

Report on Proposed Amendment to the International Arbitration Act on Rules of Arbitration

1. Facts of the Case

1.1 This report examines and proposes amendments to the International Arbitration Act (Cap.143A, 1995 Ed.) ("IAA") arising from *Dermajaya Properties* vs *Premium Properties* (2002) 2 SLR 164. By an agreement dated 4 October 1996 ("the agreement"), the claimant agreed to buy from the respondents 100% of the paid-up capital in President Hotel Sdn Bhd. The agreement provided for disputes to be referred to a sole arbitrator under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"). The agreement further provided that the arbitration be held in Singapore before a single arbitrator appointed by the Regional Arbitration Center at Kuala Lumpur. Disputes arose between the parties and an arbitrator was appointed. The arbitrator made an interim award under which the claimant was to deposit $200,000 as security for the respondents' costs in the arbitration. The claimant appealed to the High Court against the arbitrator's decision. The primary issue was whether the arbitrator had jurisdiction to order security for costs against the claimant.

2. Ruling on the Whole Favourable

2.1 Under section 3 of the IAA, the Model Law, except for Ch VIII thereof, has the force of law in Singapore. Section 5 provides that Part II of the IAA and the Model Law, which is set out in the First Schedule to the IAA, shall not apply to an arbitration which is not an international one. Part II of the IAA provides for the power of the arbitrator to make orders for security for costs under section 12. The UNCITRAL Rules, however, do not enable the arbitrator to order security for costs against the claimant. The pre-amendment section 15 of the IAA, which was applicable here, states that if the parties agreed that the dispute is to be settled or resolved otherwise than in accordance with Part II or the Model Law, Part II and the Model Law shall not apply. The claimant submitted that by adopting the UNCITRAL Rules, which are incompatible with the Model Law, the parties have by implication opted out of the Model Law and Part II of the IAA. According to the claimant, this is sufficient to constitute the agreement of exclusion under section 15 of the IAA. Two other issues were involved in this case: the first one being whether the pre-amendment to section 15 allowed an implied opting out, that is, the choice of a set of rules incompatible with the Model Law meant that the parties had agreed that the arbitration be resolved otherwise than in accordance with the Model Law. The second issue was whether

an opting out of the Model Law or Part II would necessarily mean that both have been excluded.

2.2 The Singapore High Court in *Dermajaya* decided that as the parties had chosen Singapore as the seat of arbitration, the curial law of Singapore or the *lex arbitri* applies. The High Court went on to hold that if the curial law of Singapore applies and the arbitration is an international one, then, *prima facie*, the IAA applies. The mere adoption of the rules of an arbitral institution will not be sufficient to constitute an express agreement to exclude the application of the Model Law or Part II of the IAA. The High Court's decision went some way in clarifying the uncertainties caused by the previous decisions of the High Court in *Coop International v Ebel*[1] *and John Holland Pty Ltd v Toyo Engineering Corp*[2]. The High Court also correctly decided that the 2001 amendments to the IAA[3] applied to a pre-amendment situation on the basis that the amendment only clarified, and did not change, the law. The High Court arrived at this conclusion on the basis of the Parliamentary intention as expressed in the Minister of State (Law) (as he then was), Assoc Prof Ho Peng Kee's second reading speech on the International Arbitration (Amendment) Bill 2001 and the phrase "for the avoidance of doubt" used in the amendments. These rulings are favourable to Singapore's standing as an international arbitration centre. The ruling that the 2001 amendments to the IAA did not change the law is welcome as it has restored the legal rights of parties to arbitrations commenced before the amendments came into force.

3. Ruling on Entire Exclusion of Institutional Rules

3.1 However, the High Court went one step further to rule that the application of the Model Law as the curial law will exclude completely an "inconsistent" or "incompatible" set of arbitration rules. This rule has raised practical concerns regarding the application of arbitration rules such as the ICC Rules, the UNCITRAL Rules and the SIAC Rules, etc. These "institutional" rules are commonly used because they are familiar to the international legal community.

---

[1] [1998] 3 SLR 670.

[2] [2001] 2 SLR 262 .

[3] International Arbitration (Amendment) Act 2001 (Act 38/2001). After the amendment to the IAA, s15(1) provides that if the parties have expressly agreed that the Model Law or Pt II of the IAA shall not apply to the arbitration, then both the Model Law and Pt II will not apply to the arbitration. The post amendment section 15(2) provides that "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."

4. Practical Concerns with Ruling

4.1 This ruling was first highlighted in Chan Leng Sun's article, "Developments in Arbitration Law" published in the March 2002 issue[4] of the Singapore Academy of Law Journal. Chan warned drafters of arbitration agreements who intend to supplement the Model Law with provisions from institutional rules to note that it may not be sufficient to merely provide for the application of another set of rules as the entire set may be ousted. Chan suggested that the words "insofar as they are not incompatible with the Model Law or Part II of the IAA" be added to provide for partial incorporation. A Singapore law firm, Allen and Gledhill's online Legal Bulletin[5] also carried an article entitled "Opting out of the Model Law" in its April 2002 issue. The Editor of the Bulletin noted that "the proposition that the choice of the Model Law as the curial law would exclude the application of the UNCITRAL Rules (or following the same logic, any other set of "incompatible" rules), ... is, with respect, flawed". The Editor argued firstly that the court "failed to acknowledge the possibility of co-existence between the UNCITRAL Rules and the Model Law in an arbitration by making an erroneous assumption that IAA/Model Law and the UNCITRAL Rules are mutually incompatible and mutually exclusive". Secondly, that the court has "perhaps failed to appreciate the freedom accorded to the parties by the Model Law to modify its provisions (except very few mandatory provisions)". Thirdly, the Editor argued that even though some of the provisions of the Rules were incompatible, it should have applied the general contractual principle of severance. The Allen and Gledhill Editor also submitted that from a policy perspective the ruling "runs contrary to Singapore's policy to promote itself as a regional arbitration hub".

4.2 The August issue of the international law firm, Clifford Chance's eLegal Bulletin[6] also carried an alert that "for the second time in a year we find ourselves having to advise clients to beware of agreeing to arbitrate in Singapore". The Clifford Chance Bulletin advised that the result of the *Dermajaya* decision is that the chosen institutional rules will be disregarded and the arbitration governed solely by the Singapore IAA. The result is "far more room for disputes and prevarication and a very different kind of arbitration from what the parties intended". The Bulletin suggested that parties consider "whether a different seat which does not have this problem (e.g. Hong Kong or London) would be equally acceptable" and to consider "approaching other parties to see whether they will agree to a change of seat". Another international law firm, Simmons and

[4] Chan Leng Sun, Developments in Arbitration Laws, (2002)14 SacLJ at para 46.
[5] Legal Bulletin, Vol 14 No 4 at www.gledhill.com.sg, posted on 13 May 2002.
[6] Clifford Chance's Bulletin "eLegal". Issue 3, August 2002.

Simmons also highlighted the decision in their online International Arbitration Bulletin[7]. The article entitled "Rules of Law" found comfort in that part of the *Dermajaya* decision[8] which followed the spirit of the amended section 15(2) of the IAA and declined to follow the *John Holland* decision. The article, however, expressed the view that:

> "Slightly worrying, however, is the fact that the court went on to hold that, since the legislation applied, the UNCITRAL rules would not be applied without an express further agreement of the parties". Such reasoning puts into doubt the effectiveness in a Singapore arbitration of a standard arbitration clause nominating UNCITRAL rules or institutional rules, such as the ICC or LCIA arbitration rules. Until rogue decisions of this kind are overruled or clarified by legislation, parties choosing Singapore or Brisbane[9] as a seat of arbitration should seek specific advice on the wording of their arbitration clauses to ensure that the terms will be effective."

4.3 We understand from local practitioners that several other international law firms have either issued similar advisories to their clients or were making enquiries on the status of the *Dermajaya* decision. There is a real risk that arbitral institutions such as the ICC (International Chambers of Commerce) are also concerned that their institutional rules may be excluded in their entirety in an arbitration held in Singapore. The fact that the UNCITRAL Rules, which were designed to be compatible with the UNCITRAL Model Law, were held to be incompatible with the IAA and the Model Law would give rise to legitimate concerns that other institutional rules would *a fortiori* be held to be incompatible.

5. Analysis of *Dermajaya* Case

5.1 The concerns expressed by practitioners in the international arbitration community merits a closer analysis of the two statements arguably made obiter dicta by the High Court in *Dermajaya Properties* vs *Premium Properties*[10]. The first statement is that the application of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") will exclude completely an

---

[7] May 2002 Issue No 6, at www.simmons-simmons.com/arbitration/int_arbitration_may02_1.pdf.
[8] Simmons and Simmons reported that the court in *Dermajaya* followed the spirit of section 15(2) (even though it post-dated the arbitration) and held that a choice of the UNCITRAL rules did not amount to an implied opt-out of the Model Law and Part 2 of the International Arbitration Act. The firm said that that part of the decision is comforting.
[9] The reference to Brisbane is due to an Australian State decision, *Eisenwerk v Australia Granites Ltd, Supreme Court of Queensland, July 2, 1999*, which was followed in the *John Holland* case to the effect that the adoption of institutional rules ousted the UNCITRAL Model Law.
[10] *[2002] 2 SLR 164.*

inconsistent or incompatible set of arbitration rules (see para 69 reproduced below):

> "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."

5.2 The second statement is that the UNCITRAL arbitration rules are incompatible with the Model Law (see para 87 reproduced below). A corollary to this statement is the statement that the parties can agree after the commencement of the arbitration to agree on rules to fill in the vacuum on an ad hoc basis:

> "87. In summary, I hold that the Model Law and Pt 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."

6. Proposed IAA (Amendment) Bill 2002

6.1 In the light of the fact that there was no appeal from the *Dermajaya* decision, it is proposed that a draft International Arbitration (Amendment) Bill 2002[11] be enacted to address the concerns arising from the *Dermajaya* ruling. It is also proposed that the opportunity be taken to resolve any lingering doubts over the relationship between the *lex arbitri* (Model Law/IAA) and the contractual rules that may have been created by the decisions of the Singapore High Court in *Coop International* vs *Ebel*[12] *and John Holland Pty Ltd v Toyo Engineering Corp*[13]. The very helpful and valuable suggestions made by Mr Warren Khoo, Mr Lawrence Boo, Mr Vinodh Coomaraswamy and Mr Pang Khang Chau were incorporated in the drafting process.

7. Drafting Approach

7.1 The drafting approach adopted was to refrain from tinkering with the existing section 15 of the IAA except for the substitution of the

[11] A copy of the draft Bill is reproduced at Annex A.
[12] [1998] 3 SLR 670.
[13] [2001] 2 SLR 262 .

phrase "rules of an arbitral institution" with the phrase "rules of arbitration" for consistency of usage. This is because section 15 deals with how one determines the law of the arbitration.[14] Accordingly, clause 3 of the Bill introduces a new section 15A on "Application of Rules of Arbitration". The purpose of the new section 15A is to govern the relationship between the *lex arbitri* (Model Law/IAA) on the one hand and the contractual rules (rules chosen by the parties) on the other hand, and to decide which should prevail and to what extent. As the Allen and Gledhill Bulletin argues, the Singapore High Court has failed to acknowledge the possibility of co-existence between the UNCITRAL Rules and the Model Law in an arbitration by making an erroneous assumption that IAA/Model Law and the UNCITRAL Rules are mutually incompatible and mutually exclusive. Accordingly, the new section 15A begins with the restatement in subsection (1) for the avoidance of doubt[15]. Section 15A(1) states that a provision of rules of arbitration agreed to or adopted by the parties shall apply and be given effect to the extent that such provision is not inconsistent with a provision of the Model Law or Part II of the IAA from which the parties cannot derogate. It does not matter if the rules are adopted before or after the commencement of the arbitration. It is necessary to clarify this point as the statement of the High Court in paragraph 87 of the judgment may be construed to mean that there is somehow a difference in application between institutional rules agreed upon before the commencement of the arbitration and those rules adopted after the commencement. What the Court probably meant was that the parties were not precluded from agreeing on specific provisions of the rules which are not incompatible on an ad hoc basis to fill any vacuum in the Model Law and Part II. In the words of the learned Judicial Commissioner of the High Court in *Dermajaya*:

> "... 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."

[14] Section 15 of the IAA has been the central source of the contention in the *Coop International, John Holland* and *Dermajaya* cases. Section 15 was recently amended in 2001 by the International Arbitration (Amendment) Act 2001 to resolve the uncertainty in the wake of the *Coop International* and *John Holland* cases. The legislative intent behind section 15 was given full effect by the High Court in the *Dermajaya* case and no substantive amendment is therefore required to section 15.

[15] The expression "for the avoidance of doubt" was chosen to indicate that the clause is intended to clarify rather than change the law and will accordingly apply to a pre-amendment situation. This was the interpretation given in the *Dermajaya* decision for the phrase "for the avoidance doubt" in section 15(2), an interpretation which we respectfully adopt in drafting the present amendments.

8. Meaning of "inconsistent" or "incompatible"

8.1 The use of the term "inconsistent" raises the logical issue of what is meant by the word "inconsistent". In *Dermajaya*, it was suggested that the fact that there are differences between the provisions in the institutional rules and the provisions of the IAA or the Model Law is in itself an incompatibility or inconsistency. Although the line of authority – *Coop International, John Holland* and *Dermajaya* - employs the word "incompatible" rather than "inconsistent", it is submitted that they are substantially the same. The High Court in *Dermajaya* cited the example of section 8(2) of the IAA (under Part II) as an incompatibility because it 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 functions under Article 11(3) and (4) of the Model Law (see para 73 of the judgment reproduced below).

> "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, section 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 functions under Article 11(3) and (4) of the Model Law'. If the Model Law is excluded, would section 8(2) IAA apply or not?
>
> 74. If section 8(2) IAA still applies, the incompatibility regarding the appointing authority would still be present. However, if section 8(2) IAA does not apply, then which other provisions of Part II of the IAA also do not apply?"

8.2 With the greatest respect, this line of reasoning is flawed because it fails to take into account that Article 11(2) of the Model Law states clearly that the parties are free to agree on a procedure for appointment of arbitrators. Article 11(3) and (4) are default provisions that take effect only in the absence of contrary arrangement by the parties or where the appointment procedure fails. In fact, it is clear on a true construction of Article 11(4)(c) that the agreed procedure may include appointment by a third party or institution.

8.3 The other way in which the *Dermajaya* judgment suggests that institutional rules may be considered to be "inconsistent" is the absence of a particular provision in the institutional rules where such a provision is found in the IAA or the Model Law. In other words, that silence in the chosen rules versus an express provision in the

Model Law or the IAA amounts to "incompatibility". This can be implied from the fact that the High Court found the UNCITRAL Rules to be incompatible because they do not enable the arbitrator to order security for costs against the claimants whereas section 12 of the IAA does so enable (see paragraph 11 of the judgment reproduced below). The precise reason why the High Court found incompatibility is not expressly stated in the judgment.

> "11. It is common ground that:
>
> (1) 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.
>
> (2) section 12 IAA does enable the arbitrator to order security for costs against the claimant.
>
> (3) 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."

8.4 It is respectfully submitted that the absence of a complementary power or provision in the Rules cannot be a ground for inconsistency. Moreover, certain matters such as jurisdiction and enforcement of arbitral awards dealt with in the *lex arbitri* or the curial law cannot be effectively dealt with in mere contractual rules such as the ICC or the UNCITRAL Rules which do not enjoy the status of the force of law. Neither can provisions which govern the relationship between the arbitral tribunal and the domestic Courts.

8.5 It is therefore of some importance that the proposed legislative amendment clarify the precise meaning of "inconsistent". The Bill therefore introduces new subsections (2) to (6) to the new section 15A which will apply for the purposes of determining whether a provision of rules of arbitration is inconsistent with the Model Law or Part II of the IAA. Some of the concepts were borrowed from section 4(2) and (3) of the UK Arbitration Act 1996[16]. These subsections are without prejudice to the general restatement in

[16] Chapter 23 of 1996. Section 4(2) of the UK Act states that "The other provisions of this Part (the non-mandatory provisions) allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement". Section 4(3) goes on to explain that "the parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided".

section 15A(1). A provision of rules of arbitration is not inconsistent with the Model Law or Part II merely because it provides for a matter covered by any provision of the Model Law or Part II. Conversely, a set of rules of arbitration are not inconsistent with the Model Law or Part II merely because the set of rules is silent on a matter covered by any provision of the Model Law or Part II.

8.6 A provision of rules of arbitration is also not "inconsistent" merely because it provides for a matter which is also covered by a provision of the Model Law or Part II which allows the parties to make their own arrangements by agreement but which applies in the absence of such agreement. The parties may make such arrangements by agreeing to the application or adoption of rules of arbitration or by providing any other means by which a matter may be decided.

8.7 It also appears from the reasoning in the *Coop International*, *John Holland* and *Dermajaya* line of authority that the institutional rules e.g. ICC Rules, UNCITRAL Rules and Geneva Rules are treated as alternative choice of "laws" and equated to the status of law rather than mere contractual rules. Although the High Court in *Dermajaya* chose not to follow the earlier decisions on the ground that choosing Singapore as the seat of arbitration meant that the curial law of Singapore applied, the High Court nevertheless followed the reasoning that there should not be two incompatible sets of rules. As Mr Warren Khoo so succinctly expressed it:

> ..."the first thing that it (the proposed legislation) should do is to dispel the general notion that runs through the *Dermajaya* judgment that there is somehow some fundamental or general incompatibility between the rules agreed by the parties (in that case the UNCITRAL Arbitration Rules) and the provisions of the Model Law. The word "incompatible" is used so often in the judgment that it acquires the status of an *a priori* premise on which all the essential arguments are anchored. This is quite wrong."

8.8 It is submitted that this misconception that the IAA and the Model Law and the institutional rules cannot co-exist and are mutually exclusive is the root cause of the finding that institutional rules are incompatible with the Model Law or the IAA. It is therefore equally important to clarify that the Model Law allows the parties the freedom to make their own arrangements by agreeing to the application or adoption of institutional rules or providing any other means by which a matter may be decided. They may do so for example by providing for appointment of the arbitrators by the Geneva Chamber of Commerce and Industry.

9. Meaning of "rules of arbitration"

9.1 Finally we considered the meaning of "rules of arbitration". Although section 15(2) currently refers to "rules of an arbitral institution", the rules in question in the *Dermajaya* case were the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules. As UNCITRAL is an organ of the United Nations and certainly not an arbitral institution, it was thought necessary to introduce a wider concept of "rules of arbitration". In the new section 15A(7), "rules of arbitration" is defined for the purposes of sections 15 and 15A to mean the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation including UNCITRAL. This will cover arbitration rules adopted or recommended by trade associations or professional bodies.

10. Alternative Approaches – the Mandatory Provisions List Approach

10.1 Serious consideration was given to whether we should adopt the approach in section 4 of the UK Arbitration Act 1996[17] in setting out the mandatory provisions in the Schedule to the Act. Section 15(1) of the UK Act provides that the mandatory provisions shall have effect notwithstanding any agreement to the contrary. As one arbitration practitioner[18] noted, the advantage of a schedule or list approach is that it will avoid uncertainty and satellite litigation over what qualifies as a "provision from which the parties cannot derogate". The difficulty presented was how to distinguish between the "mandatory" and "non-mandatory" provisions of Part II of the IAA and the Model Law. Reproduced at **Annex B** is a table of the mandatory provisions under the UK Arbitration Act 1996 and their possible equivalents under the IAA and the Model Law.[19]

10.2 The disadvantage is that it requires careful thought to work through the ramifications of making certain provisions mandatory. The danger is that in tinkering with the Act to correct *Dermajaya*, we may introduce unintended effects by incorporating a schedule of mandatory provisions. On balance, the view prevailed that we should not adopt the list or schedule approach. Whilst it is true that it is fairly clear from the Act and the Model Law which are the non-mandatory provisions as they make express reference to the parties' contrary agreement, the same cannot be said of the mandatory

[17] Section 4(1) of the UK Act states that "The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary".
[18] Vinodh Coomaraswamy.
[19] We acknowledge the assistance of Mr Lawrence Boo and Mr Vinodh Coomaraswamy in the preparation to this table

provisions. There is a grey area in respect of provisions where there is no express language making reference to the parties' contrary agreement but which may not have been intended to be mandatory. An example cited by the practitioner is section 12(1), which sets out the powers of the tribunal to make interim orders, and makes no reference to the parties' contrary intention. Is this section intended to be mandatory or non-mandatory? And if it is mandatory, in what sense is it mandatory? Is it mandatory in the sense that the parties cannot derogate from it, or is it mandatory in the sense that the parties cannot supplement it?

10.3 For the above reasons, it was decided that it would be better to leave this to be decided on a case by case basis rather than making an *a priori* classification.

11. Alternative Approaches – the Interpretation Guidelines Approach

11.1 Mr Warren Khoo, Chairman of the Singapore International Arbitration Centre argued that "it seems that the difficulties which the *Dermajaya* case and its predecessors *Coop International* and *John Holland* fell into were difficulties concerning the proper interpretation and application of the provisions of the Model Law and the rules which the parties had adopted". That being the case, Mr Khoo argued that what is needed in the legislative amendment are guidelines on the matter of construction. Mr Khoo further suggested that though it is an unusual subject for legislation, it is not impossible. He cited in support of his proposal the example of section 9A[20] of the Interpretation Act and article 7[21] of the Vienna Convention on Contracts in the International Sale of Goods.

11.2 Mr Khoo proposed a draft amendment which starts with the general proposition as discussed above in relation to section 15A(1). Mr Khoo proposed that the legislation would go on and state further that the rules agreed by the parties and the provisions of the Model Law as modified by Part II of the IAA should be read as far as possible as

[20] Interpretation Act (Cap 1), Section 9A- "(1) In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object."

[21] The United Nations Convention on Contracts for the International Sale of Goods adopted at Vienna, Austria, on 10th April 1980 has the force of law in Singapore by virtue of the Sale of Goods (United Nations Convention) Act (Cap283A). Article 7 expressly provides that: "7-(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. 7-(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

complementing each other, rather than as being opposed to each other. Then, consistent with giving pre-eminence to party autonomy, the proposed legislation would go on and say that where there is any inconsistency, the rules agreed by the parties should take precedence over any provision to the contrary in the Model Law (as modified by Pat II of the IAA) except such provisions from which the parties cannot by law derogate.

11.3 After discussions with some practitioners, it was decided that given the limited time due to the urgency of the proposed amendments, we should adopt a narrower approach which will hopefully send a positive signal to international lawyers that the legislature has specifically addressed concerns raised by the *Dermajaya* case. A broader approach, though appropriate in the long term, may cause more difficulties than it hopes to resolve if time does not permit more careful and thorough analysis. For example, one practitioner expressed the view that the concept of "complementary" regimes may reinforce the misconception as explained above that the arbitration rules are on the same plane as the *lex arbitri.* Another unintended effect caused by the "complementary" concept may be that it may create doubt as to whether the mandatory provisions of the Model Law will prevail over the contractual rules although Mr Khoo proposed to deal with this in a related provision. Yet another consideration was whether the interpretative approach or the mandatory list approach (as exemplified in section 4 of the UK Arbitration Act 1996) is the superior approach.

11.4 Having regard to the above it was thought that on balance it is preferable to adopt the narrower and more direct approach but with refinements adopted from the draft amendment provided by Mr Khoo.

12. Summary of Recommendations

12.1 In summary, it is recommended that a new section 15A be introduced to the International Arbitration Act to clarify, for the avoidance of doubt, the application and effect of rules of arbitration agreed to or adopted by the parties.

12.2 It is recommended that the new section 15A(1) restates, for the avoidance of doubt, that a provision of rules of arbitration agreed to or adopted by the parties shall apply and be given effect to the extent that such provision is not inconsistent with a provision of the UNCITRAL Model Law on International Commercial Arbitration and Part II of the International Arbitration Act ("Part II") from which the parties cannot derogate.

12.3 It is further recommended that the new subsections (3) to (6) provide non-exhaustive guidance on whether a provision of rules of arbitration is inconsistent with the Model Law or Part II.

Annex A

International Arbitration (Amendment) Bill

Bill No. /2002.

Read the first time on 2002.

A BILL

intituled

An Act to amend the International Arbitration Act (Chapter 143A of the 1995 Revised Edition).

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement

1. This Act may be cited as the International Arbitration (Amendment) Act 2002 and shall come into operation on such date as the Minister may, by notification in the *Gazette*, appoint.

Amendment of section 15

2. Section 15(2) of the International Arbitration Act is amended by deleting the words "rules of an arbitral institution" in the 2nd and 3rd lines and substituting the words "rules of arbitration".

New section 15A

3. The International Arbitration Act is amended by inserting, immediately after section 15, the following section:

"Application of rules of arbitration

15A.—(1) It is hereby declared for the avoidance of doubt that a provision of rules of arbitration agreed to or adopted by the parties, whether before or after the commencement of the arbitration, shall apply and be given effect to the extent that such provision is not inconsistent with a provision of the Model Law or this Part from which the parties cannot derogate.

(2) Without prejudice to subsection (1), subsections (3) to (6) shall apply for the purposes of determining whether a provision of rules of arbitration is inconsistent with the Model Law or this Part.

(3) A provision of rules of arbitration is not inconsistent with the Model Law or this Part merely because it provides for a matter on which the Model Law and this Part is silent.

(4) Rules of arbitration are not inconsistent with the Model Law or this Part merely because the rules are silent on a matter covered by any provision of the Model Law or this Part.

(5) A provision of rules of arbitration is not inconsistent with the Model Law or this Part merely because it provides for a matter which is covered by a provision of the Model Law or this Part which allows the parties to make their own arrangements by agreement but which applies in the absence of such agreement.

(6) The parties may make the arrangements referred to in subsection (5) by agreeing to the application or adoption of rules of arbitration or by providing any other means by which a matter may be decided.

(7) In this section and section 15, "rules of arbitration" means the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation.".

EXPLANATORY STATEMENT

This Bill seeks to amend the International Arbitration Act (Cap.143A).

Clause 1 relates to the short title and commencement.

Clause 2 amends section 15(2) to replace the term "rules of an arbitral institution" with the expression "rules of arbitration" for consistency with the new definition of "rules of arbitration" introduced in the new section 15A(7).

Clause 3 introduces a new section 15A which clarifies, for the avoidance of doubt, the application and effect of rules of arbitration agreed to or adopted by the parties.

Section 15A(1) restate for the avoidance of doubt that a provision of rules of arbitration agreed to or adopted by the parties shall apply and be given effect to the extent that such provision is not inconsistent with a provision of the UNCITRAL Model Law on International Commercial Arbitration and Part II of the Act ("Part II") from which the parties cannot derogate. It does not matter if the rules are adopted before or after the commencement of the arbitration.

Section 15A(2) provides that the new subsections (3) to (6) provide non-exhaustive guidance on whether a provision of rules of arbitration is inconsistent with the Model Law or Part II.

Section 15A(3) provides that a provision of rules of arbitration is not inconsistent with the Model Law or Part II merely because it provides for a matter on which the Model Law and Part II is silent.

Conversely, section 15A(4) provides that rules of arbitration are not inconsistent with the Model Law or Part II merely because the rules are silent on a matter covered by any provision of the Model Law or Part II.

Section 15A(5) also provides that a provision of rules of arbitration is not considered inconsistent merely because it provides for a matter which is covered by a provision of the Model Law or Part II which allows the parties to make their own arrangements by agreement but which applies in the absence of such agreement.

Section 15A(6) provides that the parties may make arrangements by agreeing to the application or adoption of rules of arbitration or by providing any other means by which a matter may be decided.

EXPENDITURE OF PUBLIC MONEY

This Bill will not involve the Government in any extra financial expenditure.

COMPARATIVE TABLE OF MANDATORY PROVISIONS UNDER UK ARBITRATION ACT 1996 AND EQUIVALENT PROVISIONS UNDER IAA/MODEL LAW

SUBJECT-MATTER	ARBITRATION ACT 1996 (UK)	SINGAPORE	
		International Arbitration Act	Model Law
Stay of proceedings	Section 9	Section 6	Article 8
Reference of interpleader issue to arbitration	Section 10	Section 11A	No equivalent
Retention of security where Admiralty proceedings stayed	Section 11	Section 7	No equivalent
Power of court to extend time limit for beginning arbitral proceedings	Section 12	Section 8A(2)	
Application of Limitation Acts	Section 13	Section 8A(1)	No equivalent
Power of court to remove arbitrator	Section 24	No equivalent	Article 13(3)
Effect of death of arbitrator	Section 26(1)	No equivalent	Article 14(1)[1]
Liability of parties for fees and expenses of arbitrators	Section 28	No equivalent	
Immunity of arbitrator	Section 29	Section 25	No equivalent
Objection to substantive jurisdiction of tribunal	Section 31		Article 16(2)
Determination by Court of preliminary point of jurisdiction	Section 32	Section 10[2]	Article 16(3)
General duty of tribunal	Section 33	No equivalent	Article 18, Article 24(2), Article 24(3)
Items to be treated as expense of arbitrators	Section 37(2)	No equivalent	
General duty of parties	Section 40	No equivalent	
Securing the attendance of witnesses	Section 43	Section 13	Article 27
Power to withhold award in case of non-payment	Section 56	No equivalent	
Effectiveness of agreement for payment of costs in any event	Section 60	No equivalent	
Enforcement of award	Section 66	Section 19	No equivalent
Challenging the award: substantive jurisdiction	Section 67[3]	No equivalent	Article 34
Challenging the award: serious irregularity	Section 68[4]	Section 24	

[1] This is the closest equivalent to section 26(1) of the UK Act.
[2] Appeal to Court of Appeal with leave of High Court on issue of jurisdiction.
[3] So far as relating to this section.

SUBJECT-MATTER	ARBITRATION ACT 1996 (UK)	SINGAPORE	
		International Arbitration Act	Model Law
Supplementary provisions		No equivalent	
Effect of Order of Court	Section 71[6]	No equivalent	
Saving for right of person who takes no part in proceedings	Section 72	No equivalent	
Loss of right to object	Section 73	No equivalent	Article 4
Immunity of arbitral institution	Section 74	Section 25A	No equivalent
Charge to secure payment of solicitors' costs	Section 75	No equivalent	

[4] So far as relating to this section.
[5] So far as relating to this section.
[6] So far as relating to this section.