



EVERSHEDS
HARRY ELIAS

International Arbitration
Year in Review 2019



International Arbitration Year in Review 2019

Dear Valued Clients,

Eversheds Harry Elias is pleased to bring you its annual International Arbitration Year in Review, focusing on Singapore and regional developments in international arbitration. We began this initiative last year with the objective of keeping our clients and stakeholders up to date, so that you are able to make informed critical decisions in your day-to-day business.

In this Year in Review, we compile legal developments that had a significant impact in international arbitration in Singapore, as well as some of our practice group's initiatives throughout the year. Please feel free to reach out to any of us if you would like further information and if you would like to be included in our mailing list for legal updates.

On behalf of the team, we want to thank each of you for being part of our journey in 2019, and we look forward to supporting you in your success in 2020.



Francis Goh

Head, International Arbitration
Eversheds Harry Elias

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Notable Developments

Signing of the Singapore Mediation Convention

On 7 August 2019, 46 states signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Mediation Convention) at an official signing ceremony in Singapore. The signatories included the world's two largest economies, the United States and China, and three of the four largest economies in Asia, China, India and South Korea.

The Singapore Mediation Convention is meant to facilitate the enforcement of mediated international commercial settlement agreements, in a manner similar to how the New York Convention facilitates the recognition and enforcement of international arbitration awards.

The ability to enforce a mediated settlement agreement internationally will encourage parties to come to the mediation table in order to resolve their disputes. In addition, the Convention will signal the recognition of mediation as a meaningful means of resolving cross-border commercial disputes, promoting the use of mediation as a mode of dispute resolution. Further information is available [here](#).

Developments in EU-Singapore Trade Relations

In February 2019, the European Parliament approved the European Union-Singapore Free Trade Agreement (EUSFTA) and the European Union-Singapore Investment Protection Agreement (EUSIPA). The EUSFTA is the first FTA between the European Union and an ASEAN country. Singapore and the EU launched negotiations of the EUSFTA in 2009, and the investment protection elements thereof later became the EUSIPA.

On 21 November 2019, the EUSFTA entered into force. The EUSIPA is currently undergoing ratification, which is expected to take two years. Once it comes into force, the EUSIPA will be a binding international treaty concluded between the EU and Singapore. It is primarily aimed at promoting investments between the EU and Singapore.

The EUSIPA offers legal protection to Singaporeans and Singapore companies investing in the EU and vice versa, ensuring that the respective Governments will treat each other's investors equally and fairly. Critically, the EUSIPA also establishes a Tribunal to which aggrieved investors can bring their claims.

For further information, our team has prepared a primer on the EUSIPA. This primer is available [here](#).

Notable Developments

Proposed Amendments to the Singapore International Arbitration Act

On 26 June 2019, the Singapore Ministry of Law launched a public consultation on proposals to amend the Singapore International Arbitration Act (IAA). The contemplated changes include amendments to the IAA to:

- provide for the default appointment of arbitrators in multi-party situations;
- allow parties to, by mutual agreement, request the arbitrator(s) to decide on jurisdiction at the preliminary award stage;
- provide an arbitral tribunal and the Courts with powers to support the enforcement obligations of confidentiality in an arbitration; and
- allow a party to arbitral proceedings to appeal to the Singapore High Court on a question of law arising out of an award made in the proceedings, provided parties have agreed to opt in to this mechanism.

The Ministry also sought views on the following proposals:

- whether parties should have the option to limit or waive by agreement, the annulment grounds set forth in Section 24(b) of the IAA and Article 34(2)(a), but not to the annulment grounds in section 24(a) and Article 34(2)(b); and
- whether legislative amendments should be introduced to empower the court to make an order providing for costs of the arbitration following a successful application under section 24 of the IAA or article 34(2) of the Model Law to set aside an award, whether wholly or in part.

The above proposed reforms are intended to address issues faced by parties in arbitration. As arbitration becomes an increasingly prevalent and established form of dispute resolution mechanism, more attention has been placed on seeking to address specific issues. Of particular concern are situations where (1) a party challenges the tribunal's jurisdiction, fails in the tribunal's preliminary determination but succeeds after appealing the tribunal's decision to the Court; and (2) a party applies to the Court to set aside a tribunal's award and succeeds. In such situations, the tribunal lacks jurisdiction to make the relevant costs awards. At the same time, the Courts are also either unable to or uncertain how to make such costs awards. The result is that successful parties often struggle or fail to recover costs that they would ordinarily be entitled to.

Upon reviewing the public's responses, the Ministry is slated to finalise the draft International Arbitration Act Bill. The Bill is expected to strengthen Singapore's international arbitration framework to support the needs of commercial users, and hopefully reveal solutions to the long-standing costs conundrum. Further information is available [here](#).

Notable Developments

Arbitrability of IP Disputes in Singapore

On 11 March 2019, the Singapore Ministry of Law launched a public consultation to seek feedback on a draft Intellectual Property (IP) (Dispute Resolution) Bill. Among others, the Bill will provide greater clarity and certainty that IP disputes can be arbitrated in Singapore, and that the arbitral award has an effect only on the parties to the arbitration and not on the world at large. This aims to facilitate the use of arbitration in IP disputes, and strengthen Singapore's position as a choice venue for the arbitration of international IP disputes.

Opening of Maxwell Chambers Suites

On 8 August 2019, Singapore opened Maxwell Chambers Suites, an extension of Maxwell Chambers. Maxwell Chambers is the world's first integrated dispute resolution complex, housing both best-in-class hearing facilities and top international dispute resolution institutions. It is expected that Maxwell Chambers Suites will house at least 11 international institutions and 20 disputes chambers and practices from 11 countries.

Third Party Funding in Hong Kong follows Singapore

On 1 February 2019, the Hong Kong Code of Practice for Third Party Funding of Arbitration came into effect. The Code set out the practices and standards with which third party funders are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration.

This development follows Singapore's liberalisation of the market for third party funders in 2017, when it amended the Civil Law Act. Thus, in Singapore, third party funding is allowed for any civil, mediation, conciliation, arbitration or insolvency proceedings.

Hong Kong and China Agreement on Interim Measures for HK-seated Arbitrations

On 1 October 2019, the landmark arrangement between the Hong Kong Government and China's Supreme People's Court on interim measures in aid of arbitrations entered into force. This arrangement allows the courts of each jurisdiction to award interim measures in support of arbitrations seated in the other's territory. This is significant for international parties who wish to resolve China-related disputes in Hong Kong while preserving their ability to obtain interim relief in China.

Singapore Legal Updates

Case Management Stays in Arbitration

The Singapore Court of Appeal case of *Rex International Holding Ltd and another v Gulf Hibiscus Ltd* [2019] SGCA 56 clarified the circumstances under which a case management stay can be granted.

In this case, the SGCA found that the appellants were wrongly granted a stay of proceedings brought against them by the respondents. The stay of proceedings was granted on case management grounds - in particular, that there was a dispute resolution clause providing for arbitration, found in a shareholders' agreement that had been entered into between the Respondent and a third party.

The SGCA clarified that case management concerns only arise where there are imminent or existing separate legal proceedings, giving rise to a real risk of overlapping issues. The court, in deciding whether to grant a case management stay, would need to consider the nature and extent of the overlaps between the separate legal proceedings. Pertinently, a case management stay would only be required where the proper ventilation of the issues in the court proceedings depended on the resolution of the related putative arbitration, which has overlapping issues.

Timely Use of Anti-Enforcement Injunctions in International Arbitration

The Court of Appeal's decision in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] SGCA 10 reminds parties that it is important to seek the seat court's assistance as soon as it learns of its counterparty's breach of the arbitration agreement.

As a general rule, injunctive relief must be sought at the earliest opportunity. As regards anti-suit injunctions, when a party first becomes aware that their counterparty intends to or has commenced concurrent litigation proceedings, that party should seek legal advice and representation so that any applications for injunction can be made promptly.

If a party waits too long, the supervisory court may be unable to assist it in granting an anti-suit injunction, save in exceptional situations. This is because an anti-suit injunction has the effect of jeopardizing the foreign court judgment or order and any other related enforcement procedures.

An anti-enforcement injunction will not ordinarily be the fall-back option if a party is late in applying for the anti-suit injunction. The anti-enforcement injunction has the draconian effect of unravelling a foreign judgment, something that the seat court would usually be reluctant to do. What a party would be left with may be mere declaratory reliefs. The recognition of these declaratory reliefs remains within the discretion of the enforcement court. Further information is available [here](#).

Singapore Legal Updates

Challenges to Arbitral Tribunal Rulings

In the case of *BTN and another v BTP and another* [2019] SGHC 212, the Singapore High Court cautioned against using clever methods to disguise a *de novo* challenge on the substantive decision by the tribunal by alleging breaches of natural justice or a ruling on negative jurisdiction.

In this case, the plaintiff commenced proceedings arguing that, *inter alia*, the partial award by the arbitral tribunal was a negative jurisdiction ruling because of the tribunal's alleged abdication of its jurisdiction to the Malaysian Industrial Court and, in the alternative, was a breach of natural justice. The High Court upheld the partial award, finding that it was neither a ruling of negative jurisdiction nor a breach of natural justice.

In coming to its decision, the High Court was careful not to allow parties who have opted to have their disputes resolved by arbitration to have a second chance to canvass the merits of their case before the courts just because they are unhappy with the results of the arbitration. The Singapore Court's reluctance to interfere with the decision of the arbitral tribunal is welcome as it gives greater force and recognition to arbitral awards and decisions.

Enforcement of Arbitration Award Refused due to Wrong Seat of Arbitration

In *ST Group Co Ltd and others v Sanum Investments Limited and another* [2019] SGCA 65, the Singapore Court of Appeal refused to enforce an SIAC arbitration award of over USD 200 million, on the ground that the selection of the seat of arbitration was incorrect. This is a serious blow to the prevailing party in this case, who had been involved in multiple proceedings over the same dispute since 2012, and a cautionary tale for other parties in pending or anticipated proceedings.

The SGCA held that once an arbitration is wrongly seated, in the absence of waiver of the wrong seat, any award that ensues should not be recognised and enforced by other jurisdictions because such award had not been obtained in accordance with the parties' arbitration agreement.

Further, it is not necessary for a party resisting enforcement of an award arising out of a wrongly seated arbitration to demonstrate actual prejudice arising from the wrong seat. It is sufficient that had the arbitration been correctly seated a different supervisory court would have been available to the parties, had court recourse been necessary, both in relation to issues arising in the course of the proceedings and to issues arising in relation to the final award.

Further information is available [here](#).

Singapore Legal Updates

The Law of the Arbitration Agreement

In *BNA v BNB* [2019] SGHC 142, the Singapore High Court was tasked to resolve uncertainties in the arbitration clause, which contained the phrase “arbitration in Shanghai”. The High Court observed that in most cases, the law of the arbitration agreement, if unspecified, is likely to be the same as the law of the underlying agreement.

However, the SGHC took a different approach in light of the facts of this case. While the underlying agreement was governed by PRC law, the High Court found that the arbitration agreement was governed by Singapore law. If PRC law were the proper law of the arbitration agreement, the arbitration may be rendered invalid under PRC law. This is in line with the Singapore court’s pro-arbitration policies.

In ascertaining the proper law of the arbitration agreement, the High Court reiterated the doctrine of separability. An arbitration agreement is separate and independent from the underlying contract. Therefore, the proper law of the underlying contract need not be the same as the proper law of the arbitration agreement. Further information is available [here](#).

Non-Participating Respondents May Apply to Subsequently Set Aside an Award

The recent case of *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited* [2019] SGCA 33, laid down authoritatively the rule in relation to a non-participating respondent in an international arbitration who objects to the Tribunal’s jurisdiction.

The Singapore Court of Appeal held that a non-participating respondent may apply to set aside an award on jurisdictional grounds. This is so even if it had not made a prior appeal of the Tribunal’s jurisdictional ruling under Article 16(3) of the UNCITRAL Model Law. In coming to its decision, the SGCA considered that a respondent who stays away from the arbitration proceedings cannot be said to have contributed to a wastage of costs (that would otherwise have been prevented by a timely application under Article 16(3)).

Following this case, a respondent has the prerogative to decline participation in an arbitration if it believes that a final award will not be ordered against it or that there are sufficient grounds to resist enforcement of the award. This is especially so where there is no arbitration agreement or where arbitration proceedings are in some way contrary to parties’ agreement, as alleged here. However, this may be a risky course of action to pursue. If the respondent is mistaken in its belief, the arbitration which proceeds without its participation will end in an enforceable award against it and no challenge to jurisdiction that it may thereafter file will be successful. Further information is available [here](#).

Eversheds Harry Elias International Arbitration Practice Group Updates

February 2019 Partner **Rodman Bundy** and Of Counsel **Alvin Yap** lectured at the Singapore International Arbitration Academy. The team held a cocktail reception for the attendees at the end of the course.

Partner **Shaun Leong** was a speaker at the conference Derivatives Disputes: Litigating and Arbitrating the ISDA Master Agreements. A quick cheat-sheet for Corporate Counsel to the 2018 ISDA Arbitration Guide is available [here](#).

April 2019 The team held a workshop for the Singapore Corporate Counsel Association on Belt and Road Transactions: Managing the Process for Maximum Benefits. Partner and Head of International Arbitration **Francis Goh**, Partner **Rodman Bundy**, Partner **Shaun Leong**, Of Counsel **Alvin Yap** and Foreign Legal Associate **Janice Lee** spoke about the emerging trends and developments and key aspects to watch out for when involved in a Belt & Road transaction. The team also discussed dispute prevention and project management techniques in Belt and Road projects.

May 2019 Partner **Shaun Leong** was a speaker at Echelon Asia Summit, on the interplay between artificial intelligence and the law, a technology event involving over 15,000 tech ecosystem players, start-ups, investors, and corporates from more than 30 countries. An e-briefing on emerging trends in technology disputes and how to effectively manage risks is available [here](#).

Eversheds Harry Elias was named 'Top Tier Firm' in the 2019 edition of Benchmark Litigation Asia-Pacific. The firm was ranked in, among others, International Arbitration. Partner **Rodman Bundy** was ranked as Dispute Resolution Star.

Partner **Shaun Leong** appointed on the Panel of Advisers and as a Legal Expert of Legal Nodes. Legal Nodes is a global technology and innovative platform that assists start-ups and corporates to define their legal needs and project manage their legal issues, wherever they may be from worldwide.

Eversheds Harry Elias International Arbitration Practice Group Updates

June 2019 Partner **Shaun Leong** was a Keynote Speaker at Pharma Gorilla, a global conference with focus on pharma, life sciences and biotech. Shaun gave a speech entitled "Crisis management in the pharmaceutical and life sciences sector - what you need to do in the first 72 hours of a crisis" where he shared views on how to put in place an effective risk management system to quickly mitigate risks from escalating beyond control within the early stage of a crisis.

Partner **Shaun Leong** was also a speaker at Litigation Gorilla, a global tech law conference, speaking on managing cross border disputes. Shaun chaired the session, "Arbitrating and Litigating Cross-Border Technology Disputes - Key Aspects that Corporate Counsel should know".

July 2019 Partner and Head of International Arbitration **Francis Goh** was interviewed by the Singapore Academy of Law on the topic of Alternative Dispute Resolution. The interview was published as an article titled "It's ADR's Time to Shine" on 18 July 2019.

August 2019 Partner and Head of International Arbitration **Francis Goh** spoke at the conference entitled The Big Deal: Managing Disputes in Asia, organised by the Singapore Academy of Law, the Law Society of Singapore, and the Singapore Corporate Counsel Association. Francis participated in the session titled Keeping the Bargain: ADR Protocols and Mechanisms to Facilitate the Post-signing Implementation of a Deal.

Partner and Head of International Arbitration **Francis Goh** spoke at the seminar The Evolution of Mediation in Asia, organised by Sage Mediation.

Partner and Head of International Arbitration **Francis Goh** hosted the MANE Forum, organised by the Singapore International Dispute Resolution Academy, the Singapore International Mediation Centre, the Singapore International Mediation Institute, and the Singapore Mediation Centre.

Foreign Legal Associate **Janice Lee** spoke at the Asian Society of International Law Biennial Conference held in Manila, Philippines on environmental protections and investment law.

September 2019 Partner and Head of International Arbitration **Francis Goh**, Partner **Shaun Leong**, and Head of Cybersecurity and Data Protection **KK Lim** spoke at the Legal 500 Asia Pacific Disputes Summit. The team spoke on technology disputes.

Partner **Shaun Leong** was a Panel Speaker at the International Arbitration Symposium held at KCAB International in Seoul, South Korea. The Symposium complemented a series of events during the International Bar Association Conference.

Eversheds Harry Elias International Arbitration Practice Group Updates

Partner **Shaun Leong** spoke at the Tech Law Fest. Tech Law Fest is Singapore's largest conference on technology law and legal technology. Shaun spoke on legal technology and innovation.

October 2019 Partner and Head of International Arbitration **Francis Goh** was featured in the special documentary on "Deal & Dispute Management for Asian Businesses", produced by the Singapore Academy of Law in collaboration with Channel NewsAsia.

Partner **Shaun Leong** was a contributing author to Chitty on Contracts, Hong Kong Specific Contracts (6th Edition). Shaun contributed by writing on, amongst others, the impact of the Singapore Mediation Convention.

November 2019 Partner and Head of International Arbitration **Francis Goh** was invited to be Specialist Mediator of the Singapore International Mediation Centre.

Partner **Rodman Bundy** spoke at the Energy Charter Treaty Forum 2019 on the panel Emerging Fields for Inter-State Arbitration, Mediation, and Conciliation of Energy & Natural Resources Disputes.

Partner **Shaun Leong** was appointed by the Bangalore Board of Governance to be an Arbitrator on the Panel of the Bangalore International Mediation, Arbitration and Conciliation Centre.

Of Counsel **Alvin Yap** presented his article on the Application of Mandatory Rules by Arbitral Tribunals under Singapore Law during the inaugural launch of the Singapore Arbitration Journal. Foreign Legal Associate **Janice Lee** was also appointed as an Assistant Editor of the Singapore Arbitration Journal.

Of Counsel **Alvin Yap** spoke at the 7th Annual International Arbitration Summit in Jakarta on Document Production in International Arbitration.

December 2019 Partner **Shaun Leong** and Foreign Legal Associate **Janice Lee** were appointed to the Arbitrator Panel of the Beihai Asia International Arbitration Centre (BAIAC).

Eversheds Harry Elias and Partner **Rodman Bundy** are ranked in Chambers & Partners Asia Pacific 2020 for Dispute Resolution: Arbitration.

Your Team



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