

**INTERNATIONAL ARBITRATION IN SINGAPORE:
THE VIEW FROM THE BENCH**

Justice Steven Chong

I. Introduction

1. Before sharing with you Singapore's approach towards international arbitration from the perspective of our courts, it will be apt to make three broad interlocking observations to set the discussion in context.

2. First, we live in an increasingly interconnected world. The scale and subject of this conference itself stands as a true reflection of that – it has drawn participants from across the globe and the cause in which we are gathered springs from a tremendous initiative from our hosts to propel economic integration even further forward. Indeed, in a world where globalisation is opening up new tributaries of engagement every day, the staggering reach of the “One Belt, One Road” project promises to create an entire ocean of possibilities and opportunities for the free movement of goods, services and human capital.¹

3. Second, with trade and commerce assuming an increasingly complex transnational dimension, it is imperative that our legal systems likewise mature to meet the needs of businessmen. To give you a sense of this commonplace

¹ The “One Belt, One Road” project promises to develop a “New Silk Road” connecting an estimated 60 countries with a population of 4.4 billion people across Asia, Europe and Africa accounting for 63% of the entire global population, and an aggregate GDP of over USD20 trillion, representing around 30% of global GDP: See the Keynote Speech delivered by Mr Rimsky Yuen SC, JP, Secretary of Justice at the ALB Hong Kong In-House Legal Summit 2015, “Opportunities and Challenges for Lawyers under the Mainland’s ‘Belt and Road Initiative” (at para 8), accessible at <<http://www.doj.gov.hk/eng/public/pdf/2015/sj20150922e.pdf>>.

commercial complexity, a recent survey of senior lawyers and business executives found that 90% of their disputes involved two or more jurisdictions with some cutting across as many as 50!² In this new trading environment, businessmen therefore need more than ever before to be assured of the sanctity of their contracts, the proper enforcement of their rights, and the effective resolution of their disputes. And, naturally, it will be to the legal systems of the jurisdictions in which they transact that they look to for such assurance.³

4. My third observation draws the first two together and refracts them through the prism of Singapore's own thinking. To begin, it is axiomatic that Singapore is a small nation with a small domestic market and so our approach to growth has, perhaps unsurprisingly, been to embrace a globalised world and to maximise our opportunities within it.⁴ But more importantly, Singapore is not just content to be a *passenger* riding the wave of economic integration, we aspire to be an *architect* of a modern transnational legal order that will encourage, sustain and strengthen that integration. In 2013, our Chief Justice, Sundaresh Menon, underlined at the annual LAWASIA conference that it was no longer tenable for countries in this region to work within jurisdictional silos.⁵ He then outlined a blueprint for the greater convergence in Asia of our legal frameworks and substantive laws undergirded by multi-jurisdictional collaboration and a shared sense of belonging to a global community. In keeping with that ambition,

² See Hogan Lovells, "Global Currents: Trends in Complex Cross-Border Disputes" (2014) at p 4, available at <<http://www.hoganlovells.com/globalcurrents/>>.

³ See Sir Tom Bingham, *Lives of the Law: Selected Essays and Speeches (2000–2010)* (Oxford University Press, 2011), especially ch 18 on "The Law as the Handmaid of Commerce" at p 295.

⁴ Singapore welcomed this year the creation of the ASEAN Economic Community which transforms our 10-member bloc into a single market and production base and has also readily committed to the Asian International Infrastructure Bank which will finance the "One Belt, One Road" project.

⁵ See Sundaresh Menon, "Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence" (2013) *Singapore Journal of Legal Studies* 231.

Singapore has since launched several bold initiatives which include the Singapore International Commercial Court and the Asian Business Law Institute.

II. The state of international arbitration in Singapore

5. Singapore's approach to international arbitration is informed by the same international and commercially-minded outlook. We recognise that, as the pre-eminent mode of resolving cross-border commercial disputes, international arbitration plays a vital role in facilitating transnational commerce. We have therefore been fully committed to creating the conditions necessary for it to flourish.
6. And flourish it has. Recently, the Minister for Law spoke of how the Singapore International Arbitration Centre started off with only two cases in the 1990s but handled a record of 271 cases last year.⁶ Singapore has also consistently ranked as the number one seat in Asia for ICC arbitrations,⁷ and our future continues to look bright with the latest edition of the Queen Mary and White & Case survey showing that Singapore is the most improved seat over the last five years, thus enjoying a "strong momentum" going forward.⁸

⁶ See Opening Address by Minister for Law, K Shanmugam, at SIAC Congress 2016 (27 May 2016), accessible at <<https://www.mlaw.gov.sg/content/minlaw/en/news/speeches/opening-address-by-minister-for-law--k-shanmugam--at-siac-congre.html>>.

⁷ See "Singapore confirms status as Asia's most sought-after dispute resolution hub" (14 June 2016), accessible at <<https://singaporeinternationalarbitration.com/2016/06/14/singapore-confirms-status-as-asias-most-sought-after-dispute-resolution-hub/>>.

⁸ See the results of the survey jointly conducted by Queen Mary, University of London, and White & Case LLP, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration" at p 15, accessible at <<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>>.

7. To be sure, Singapore’s ascent as an arbitration hub is not owed to any single factor. Instead, we have worked hard on a number of different fronts to create a broad-based foundation from which we have diligently built up our capacity and reputation. I have spoken elsewhere of how this “ecosystem” involves a proactive legislature, a deep pool of legal expertise, and world-class infrastructure.⁹ But, today, let me turn to focus on the pivotal role of the judiciary.

III. The role of the courts

8. Singapore’s judicial policy towards arbitration is perhaps best encapsulated in the leading judgment of *Tjong Very Sumito*, where our apex court observed as follows:¹⁰

There was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now well behind us. An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration ... More fundamentally, the need to respect party autonomy ... has been accepted as the cornerstone underlying judicial non-intervention in arbitration. ...

... In short, the role of the court is now to support, and not to displace, the arbitral process.

⁹ See Justice Steven Chong, “Making Waves in Arbitration – The Singapore Experience”, address delivered at the Singapore Chamber of Maritime Arbitration Distinguished Speaker Series 2014, accessible at <<http://www.supremecourt.gov.sg/news/speeches/justice-steven-chong--singapore-chamber-of-maritime-arbitration-distinguished-speaker-series-2014>>.

¹⁰ See *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 (“*Tjong Very Sumito*”) at [28]–[29].

9. Allow me to provide some illustrations of this supportive judicial stance.

(a) Enforcing the arbitration agreement

10. First, the courts in Singapore are particularly mindful of protecting the integrity of arbitration through a rigorous and scrupulous enforcement of parties' agreements to submit their disputes to arbitration.

11. The case of *Tjong Very Sumito* which I have just cited is apposite. The question in that case was whether a “dispute” had arisen within the meaning of an arbitration clause to justify a stay of court proceedings in favour of arbitration. The Court of Appeal took the opportunity to elaborate on Singapore’s policy of minimal curial intervention in arbitration and, consistent with this, held that the word “dispute” should be interpreted broadly. A “dispute” would therefore readily be found to exist unless the defendant had unequivocally admitted that the claim made against him was due and payable but, here, the court further clarified that it would not be astute in searching for an admission except “in all but the clearest of cases”.¹¹ Significantly, the court also stated that it would not delve into the genuineness of a “dispute” since this should properly be left to the arbitral tribunal to assess in accordance with the parties’ contractual bargain.¹² It follows from this that, so far as the Singapore courts are concerned, “it *is* sufficient for a defendant to simply assert that he disputes or

¹¹ See *Tjong Very Sumito* at [69(c)].

¹² See *Tjong Very Sumito* at [69(e)].

denies the claim in order to obtain a stay of proceedings in favour of arbitration”.¹³

12. A more recent example of our ready enforcement of arbitration agreements is another landmark decision of the Court of Appeal in *Tomolugen Holdings* delivered last year.¹⁴ In this case, the court considered the “threshold question” of what standard of review the courts should adopt when hearing an application for a stay under s 6 of our International Arbitration Act (“IAA”), which is substantially based on the UNCITRAL Model Law.
13. The court outlined two possible approaches. On the one hand was the “full merits approach” generally adopted by the English courts which requires the court to actually be satisfied that there exists a valid arbitration clause which covers the dispute at hand before granting a stay; in other words, a stay is granted “if, and only if ... the requirements for the grant of a stay have *in fact* been met”.¹⁵ However, the Court of Appeal in *Tomolugen Holdings* observed that this approach could “significantly hollow” an arbitral tribunal’s *kompetenz-kompetenz* to decide on the existence and scope of its own jurisdiction. This potentially undermines parties’ desire to have their disputes heard by an arbitral tribunal and so, in the final analysis, the court preferred the contrasting “*prima facie* approach”. Under this approach, a stay will be granted so long as the applicant is able to establish on a *prima facie* basis that the conditions for a stay are met.¹⁶

¹³ See *Tjong Very Sumito* at [49], emphasis in original.

¹⁴ See *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 (“*Tomolugen Holdings*”).

¹⁵ See *Tomolugen Holdings* at [30] and [48], emphasis added in italics.

¹⁶ See *Tomolugen Holdings* at [29], [63] and [67].

(b) Supervising arbitration proceedings

14. A second area which showcases Singapore’s supportive judicial posture towards arbitration is in the context of applications to set aside arbitral awards. Very often, these applications are grounded in complaints of breach of natural justice. But as I had the occasion to observe in one such case that came before me recently, many such applications fail because they have creatively sought to expand the defined boundaries of what constitutes a breach of natural justice, and the courts have been equally strict in enforcing those boundaries.¹⁷ In this connection, the Singapore courts have repeatedly stated that it is “not a stage where a dissatisfied party can have a second bite of the cherry”.¹⁸ If we were any less robust, arbitration would be turned into “the first step on a tiresome ladder of appeals” and, without exaggerating, it would be ruined.¹⁹
15. A good illustration of this robust approach is another decision handed down last year by the Court of Appeal – *AKN v ALC*.²⁰ In that case, the Court of Appeal partially reinstated an arbitral award that had been set aside in its entirety by the High Court on grounds of breach of natural justice. In so doing, the Court of Appeal emphasised the need to be careful in distinguishing between an arbitral tribunal’s absolute failure to even consider an argument, which is a breach of natural justice, and its decision no matter how uninformed and mistaken to reject an argument, which is not.²¹ While it might be tempting to conflate the two and give in to an impulse to do what was “correct” in every case, the Court

¹⁷ See *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154 at [2] and the cases cited therein at [3].

¹⁸ See *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [65(b)] and [98].

¹⁹ See *Tjong Very Sumito* at [29].

²⁰ See *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 (“*AKN v ALC*”).

²¹ See *AKN v ALC* at [46].

of Appeal noted that judicial interference in the latter scenario would actually defeat party autonomy which is a critical feature of arbitration. The court explained this in the following terms:²²

A critical foundational principle in arbitration is that the parties choose their adjudicators. Central to this is the notion of party autonomy. Just as the parties enjoy many of the benefits of party autonomy, so too must they accept the consequences of the choices they have made. The courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases. ...

16. I pause at this juncture to make clear that a supportive judiciary does not equate to one which seeks to uphold arbitral awards *in all circumstances*. Acting blindly in this way is in fact a disservice to arbitration because, then, arbitration would truly become “a law unto itself”, rendering meaningless parties’ careful choice of the arbitral seat and, with it, the *lex arbitri* that governs their arbitrations.²³ At the end of the day, the courts have a fundamental supervisory role over arbitral tribunals and parties expect and demand that this be discharged thoughtfully so that, while the arbitration process is not unduly interfered with, tribunals are also not given free rein to conduct proceedings as they wish. Singapore’s courts are fully cognisant of this and we have therefore intervened *in appropriate circumstances*.²⁴ This has included situations where a

²² See *AKN v ALC* at [37].

²³ See the address by Lord Mance at the 30th Annual Lecture organised by The School of International Arbitration and Freshfields Bruckhaus Deringer, “Arbitration – a Law unto itself?”, accessible at <<https://www.supremecourt.uk/docs/speech-151104.pdf>>.

²⁴ Similar observations have been made by Singapore’s appellate judges elsewhere. See, for example, Chief Justice Sundaresh Menon’s address at the ASEAN Law Association Malaysia & Kuala Lumpur Regional Centre for Arbitration Talk & Dinner 2013, “Judicial Attitudes towards Arbitration and Mediation in Singapore” (at paras

tribunal has wholly failed to consider a party's submissions leading to a genuine breach of natural justice,²⁵ where a tribunal has acted in excess of its powers by rendering a final award though a dispute was not within the scope of the arbitration agreement,²⁶ and where a tribunal has made an award purporting to bind non-parties to the arbitration agreement.²⁷

(c) Identifying gaps in the law

17. There is one final, and perhaps less obvious, angle from which we may appreciate the Singapore court's support for international arbitration. This concerns certain decisions of ours which may, at first blush, appear out of kilter with our general philosophy towards arbitration but, on closer inspection, reveal themselves to be "pivotal in the on-going reformation of the arbitration framework in Singapore".²⁸

18. For example, in 2002, the High Court in *Dermajaya Properties* observed that it was an open question as to how the parties' choice of arbitral rules was to be treated where these were incompatible with the IAA.²⁹ The court then ventured to suggest in *obiter dicta* that, in these circumstances, the parties' choice of

30–32), accessible at <<http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/judicial-attitudes-to-arbitration-and-mediation-in-singapore.pdf>>; see also Judge of Appeal Justice Andrew Phang's address at the China-ASEAN Justice Forum 2014, "Alternative Dispute Resolution and Regional Prosperity – A View from Singapore" (at para 5), accessible at <<http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/china-asean-justice-forum---adr-and-regional-prosperity-%28final%29-11092014-%28phang-ja%29-highlighted.pdf>>.

²⁵ See *Front Row Investments Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80; revisited by the Singapore Court of Appeal in *AKN v AKC* at [40]–[47].

²⁶ See *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] 4 SLR 672.

²⁷ See *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372.

²⁸ See Chief Justice Sundaresh Menon's Patron's Address at the Chartered Institute of Arbitrators London Centenary Conference delivered in July 2015 (at para 20), accessible at <<http://www.supremecourt.gov.sg/news/speeches/chief-justice-sundaresh-menon--patron-s-address-at-the-chartered-institute-of-arbitrators-london-centenary-conference>>.

²⁹ See *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd and another* [2002] 1 SLR(R) 492.

rules would be “completely excluded”. This naturally created some disquiet as it seemed to detract from the autonomy of parties to choose their own arbitral rules.³⁰ However, the legislature moved quickly to enact s 15A of the IAA which clarifies that the parties’ choice of arbitral rules would prevail even in the event of incompatibility, unless that incompatibility was with a mandatory provision of the IAA.

19. Another prime example is the case of *Swift-Fortune* where the Court of Appeal considered two conflicting High Court authorities and, with some reluctance, came down on the side of the one which found that Singapore courts did *not* have the power under the IAA to grant interim relief in aid of *foreign* arbitrations.³¹ This was again greeted with dismay by many in the arbitration community as it appeared to reflect an insular approach towards international arbitration.³² But crucially, the more important legacy of *Swift-Fortune* is that it led to legislative changes which ultimately conferred on the court the power it found it did not have.³³

IV. Conclusion

20. Through these examples, I hope that I have demonstrated to you how Singapore’s courts have fostered a judicial attitude that is both respectful of and supportive towards international arbitration. And to circle back to where I began, this perspective is critical to our larger aspiration of being at the vanguard of forging an environment that is suited to the shifting commercial

³⁰ See Charles Lim, “The Developmental Life Cycle of International Arbitration Legislation – Singapore IAA Case Study” (2011) 7(1) Asian International Arbitration Journal 1 at pp 15–16.

³¹ See *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629.

³² See, for example, Lawrence Boo, “Arbitration Law” (2006) 7 SAL Annual Review 51 at para 3.24

³³ Section 12A of the International Arbitration Act was enacted as a consequence of *Swift-Fortune*.

needs of the 21st century. In this, I think Singapore finds herself in good company as it was none other than Lord Mustill who once wrote in a similar context that “the courts must be partners, not superiors or antagonists” of arbitration, for arbitration is after all “a process which is vital to commerce at home or abroad”.³⁴

Thank you.

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³⁴ Cited in David AR Williams, “Defining the Role of the Court in Modern International Commercial Arbitration” (2014) 10(2) Asian International Arbitration Journal 137.