

ICCA

INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

International Arbitration The Coming of a New Age?

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GENERAL EDITOR
ALBERT JAN VAN DEN BERG

with the assistance of the
Permanent Court of Arbitration
Peace Palace, The Hague



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Preface

This seventeenth volume in the ICCA Congress Series contains the proceedings of the XXI International Arbitration Congress organized in Singapore, 10-13 June 2012. It was the largest ICCA Congress ever, with over 1,000 participants, and we are grateful to the Host Organization, the Singapore International Arbitration Centre (SIAC), for their flawless organization and warm hospitality.

The work of the Congress opened with a Joint Plenary Session, during which Sundaresh Menon – then the Attorney General of Singapore and currently its Chief Justice – delivered a thought-provoking Keynote Address on the present Golden Age of arbitration and its potential weaknesses. Six Breakout Sessions “B” then focused on the practical aspects of the arbitration proceedings, from the agreement to arbitrate and the commencement of proceedings (with an introduction to i- and e-arbitration) to the evidence-collecting phase, the tribunal’s decision and the issue of legal and arbitration costs. Six Breakout Sessions “C” examined the interaction between legal orders and national courts and arbitration; the need for and role of ethical codes; the balance between investment protection and “policy space”; the future of ICSID; and the role of technological tools in arbitration. The Closing Joint Plenary Session featured a unique event: a debate among eleven senior judges from the five continents who addressed specific issues arising in the application of the 1958 New York Convention from their different perspectives.

The Sessions were in two formats: panels with one or two moderators and panelists in two formats: Panels with a Reporter with Commentators who were asked to provide written papers, and Roundtables. Participants in the Roundtables were not required to prepare publishable papers in preparation for their session. In addition, we are fortunate to be able to include, in one case, a Summary of the discussion at the Roundtable on Oral Evidence, accompanied by Notes from the Moderator, Johnny Veeder. Video recordings of every session are available online on the ICCA website at <www.arbitration-icca.org>.

Many people contributed to making the Singapore Congress a success. A word of thanks goes in particular to the Plenary and Breakout Session moderators:

Joint Plenary Opening Session

Sundaresh Menon and Michael Pryles

Breakout Session B

- B1: James Castello and Domitille Baizeau;
- B2: Martin Hunter and Jim Morrison;
- B3: Teresa Cheng and Adrian Lai;
- B4: Audley Sheppard and Chester Brown;
- B5: Siegfried Helsing and John Townsend;
- B6: Constantine Partasides and Andrew Riccio

Breakout Session C

- C1: Emmanuel Gaillard;
- C2: Gabrielle Kaufmann-Kohler and Eva Kalnina;
- C3: Bernard Hanotiau and Xiaomao Min;

- C4: Kap-You Kim and John Bang;
- C5: Brigitte Stern and Emmanuelle Cabrol;
- C6: William Slate and Philippe Pinsolle

and Johnny Veeder, my co-moderator for the *Joint Plenary Closing Session*.

I also wish to thank the Singapore Congress Organizing Committee: Michael Pryles, chair; Rachel Foxton; Minn Naing Oo; Fathi Fadzil; Natalie Chen and Vivian Sim.

On behalf of ICCA I would once again like to thank the Secretary General of the Permanent Court of Arbitration, Mr. Hugo Sieblesz, for hosting the staff of ICCA Publications at its headquarters in the Peace Palace in The Hague, as well as the staff of the PCA for their administrative and technical support. I would further like to thank the editorial staff of ICCA Publications for the tireless and dedicated efforts in preparing this volume for publication.

The next ICCA Congress will be held in Miami on 6-9 April 2014. Information on the Congress is posted on the ICCA website <www.arbitration-icca.org> and the Miami 2014 Organizing Committee website <www.iccamiami2014.org>.

Albert Jan van den Berg
August 2013

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Joint Plenary Session A

International Arbitration: The Coming of a New Age for Asia (and Elsewhere)

Opening Address by Minister for Law K. Shanmugam

President of the ICCA, Professor Jan Paulsson, Attorney-General, Mr Sundaresh Menon SC, Chairman of the SIAC, Professor Michael Pryles, distinguished guests, ladies and gentlemen, a very good morning to all of you.

We, Singapore, are indeed honoured to host this twenty-first International Council for Commercial Arbitration (ICCA) Conference. This meeting is returning to Asia after eight years. In these last eight years, much has changed in the Asian arbitration scene. In that context, I will share with you three points. First, the economic developments underpinning these changes. Second, how Singapore is positioning itself in the arbitration and legal sector in this context. Third, what the new age, possibly the golden age for arbitration in Asia, might require. But do not be alarmed, I will be quite brief.

First, there is much hype and cliché about India and China, but economic growth in those countries is real, and it still has a considerable way to go. That growth, which is occurring within three to five hours of Singapore, will underpin the growth of this entire region. Second, not a lot of people recognize this, but ASEAN as an entity, the 10 countries of ASEAN, with a combined population of 608 million people, has an economy of US\$ 1.8 trillion, which actually makes it Asia's third largest economy, ahead of India, and which is growing strongly and is poised for further growth. Among the projects ASEAN is seeking to undertake in the next few years, is of course improving connectivity, which means a lot more roads, rail roads, ports, airports, infrastructural connectivity between different countries. We already see a lot of interest from construction companies looking at these projects, often with the support of governments. The area also has growth at six to six and one half percent, which is significant given that it is taking place against the backdrop of a severe economic crisis in the world. We will undoubtedly be affected if it goes down south to the rest of the world, but the long-term trend is settled and upwards. And ASEAN is really at that stage where it is ready to take off. In that context of economic growth, India, China, ASEAN, arbitration has to be, is the only way in which most parties can settle their disputes, given the different complexities and different legal systems and practices in this region.

Second, in that context, how have we, Singapore, been positioning ourselves? We have always tapped on natural advantages, which are the neutrality of Singapore; the judiciary which is highly regarded and recognized; the logistics, the ease of communications, of getting in and out; safety. But a few years ago, we stepped back, and we said how can we look at this in the context of growth and actually make Singapore an even better arbitration centre. We said that we would do everything that is necessary to make the eco-system first-rate for arbitration.

To start off, of course, there is the willpower of the government, the desire to make a change and create the right legislative framework. So, we took the approach of consulting the industry, putting in whatever changes which were necessary, and in Singapore, if we come across a problem, if the industry says this needs to be changed, we can change it legislatively within a matter of six to seven months, and we have done it several times. Our Courts are extremely supportive and are pro-arbitration. But, as I

shared this yesterday with a smaller group, if we see a decision, and we have seen a couple that we feel that are not the most arbitration-friendly, not welcomed by the industry, we got on it and we legislatively changed it. And over a period of time, there is a framework, a system where both the Courts and the legislature work together. We don't try to be thought leaders, because we don't believe that we are at that stage in the arbitration sector, but we take the best practices around the world and we say we will incorporate from here. We consult very closely, regularly, with the industry both within Singapore and outside Singapore.

The second factor of the eco-system is that you need a first-rate arbitration centre, like the Singapore International Arbitration Centre (SIAC) in Singapore. We looked at it and we said four years ago that we will internationalize the board; if you want to be an international sector, you have to have a board that reflects it. So one of my first tasks upon becoming Minister was to talk to Professor Pryles, persuade him to come and chair SIAC. And our board today has people from all over the world, while Singaporeans are distinctly the minority. For international arbitration, you need that approach.

Third, we made sure that lawyers from anywhere in the world can practise in Singapore in the arbitration sector, and parties are free to appoint who they like, and conducting arbitrations in Singapore will be easy, financially painless from the tax management perspective, and very open.

Next, getting the right infrastructure in place. I think some of you have seen Maxwell Chambers; for the others, I invite you to visit the place. Yesterday during my dialogue, some ideas came up as to how we can make it even better, and we will do it.

These are but some of the changes that we put in place. In tandem with this, as you heard the Prime Minister yesterday, we will also be opening up our legal services sector. As a result of the changes, from 2007 to 2011, the foreign law practices in Singapore have doubled from about 60 to about 120. The number of foreign lawyers in Singapore has also almost doubled from about 630 to 1,030. My Ministry will soon be considering applications for the second round of opening up – issuance of Qualifying Foreign Law Practice licences to foreign law firms to practise Singapore law.

The results from SIAC have been reasonably good. From 2007 to 2011, the number of international arbitration cases has basically doubled, using SIAC as a proxy, although of course there are many more arbitrations that take place outside of SIAC. This year particularly, in the first quarter, we have 118 cases compared to 59 last year for the same period. The value of the claims is even more impressive. In the first quarter alone, the value of the claims has exceeded the value of all the claims last year. So, the fact that people have been writing in SIAC and Singapore into their contracts for a period of years is now beginning to show. And all of that against a backdrop of difficult economic conditions.

We intend to go further, particularly in the context of excellence in arbitration. We have talked to one of the universities to ask them to become a world class centre of excellence, and we will be setting up an arbitration academy. Singapore intends to position itself not just as a common law arbitration centre, or a centre of arbitration for common law jurisdictions, but really as a centre which is the midst of a number of countries, plenty of which have a civil law system, for those lawyers to also come here and get training. If you come to Singapore, you get a one-stop experience of the entire region. We intend to be a centre of excellence. We have talked to a number of serious

international practitioners, some of you are here, because we don't believe that we can do this ourselves.

Then, about the new age. Asia is growing, but it is very raw growth, and people's confidence in the system of arbitration, in the results, varies. What are the expectations of neutrality, how often will the party which appoints an arbitrator expect an arbitrator ruling in his favour? These are legitimate questions to ask in the Asian context. And there is the degree to which parties truly expect neutrality and independence, in a dispute resolution mechanism which is also an economic activity for the judge. I think ICCA and others, including ourselves, have to do a lot of work in this area, to have the right expectations, create the right intellectual framework, and to professionalize the area, and to make clear the rules of conduct and practice, surrounding issues like conflicts, neutrality, confidentiality. To take neutrality for example, from a recent situation that I know of. Everyone understands neutrality, but how you put it in practice, the degree to which an arbitrator appointed by a party can be communicating with that party without breaching his duty of neutrality, can attract controversy in practice. Some think that this is perfectly alright. The Attorney-General will share with you later the degree to which these dissenting judgments are delivered by arbitrators in favour of the party who appointed them. I think it's a telling statistic.

So, while it is an exciting new area, I think we need to get the fundamentals right as we move ahead. With that, let me conclude my speech by asking about the symbolism of this conference being held in a casino. I suppose what we really want is the opposite: that going to an arbitration must not be like taking part in a lottery, and it should not depend on who you have appointed, and the further lottery of who the chairman is going to be. The more it appeals to the merits of the situation, and the less to the vagaries of the appointing mechanism, the better it is.

Thank you. I hope all of you have a good conference.