SINGAPORE INSTITUTE OF ARBITRATORS

NEWSLETTER

MICA (P) 134/10/2011 **FEBRUARY** 2012 **ISSUE** NO. 1

THE PRESIDENT'S COLUMN

May I wish all our members a (belated) Happy New Year and best wishes, on behalf of myself and the Council, for 2012.

The Institute itself turned 30 last year, an event rightly commemorated at our Annual Dinner in November 2011.

The occasion was graced by Our Guest of Honour Justice VK Rajah, Judge of Appeal, Assoc Prof Ho Peng Kee, Past Presidents of the Institute Johnny Tan, Raymond Chan, and (Senior District Judge) Leslie Chew.

I would like to devote my message in this issue to what SIArb has achieved in the last 30 years.

In that time, the Institute has developed and matured into its unique position in the Singapore arbitration industry as a national arbitral body.

SIArb's Objective

SIArb was formed in 1981 as a national body for those interested in arbitration. Its objective then, as it is now, was to promote, maintain and improve standards of the arbitration profession. We have broadened our focus to embrace other ADR forms such as adjudication.

In addition to training, we also have a keen interest, as a national arbitral body, in the broader arbitration and ADR framework in Singapore.

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ANNOUNCEMENTS UPDATES & UPCOMING EVENTS

1. Seminar on "Issues in Construction Arbitration" By Ms Audrey Perez and Mr Ho Chien Mien on **29 March 2012**.

NEW MEMBERS

The Institute extends a warm welcome to the following new members:

Fellows

1. Tan Chun Hao, Daniel
2. Tan Chau Yee
3. Chiah Kok Khun
4. Jose P Tejada JR
5. Foo Charn Lim
6. Ong Lip Cheng, Peter
7. Satish Madhu Uttamchandani
8. Michael Wong
9. Timothy Edward Elsworth
10. Lu Geok Lan
11. Sapna Jhangiani
12. Ian Jeremy Sutcliffe
13. Surajit Kumar Das
14. Gerald Chien-Yi Kuppusamy
15. Lim Meng Yong
16. Ng Ka Luon, Eddee
17. Kwek Yiu Wing, Kevin

Members

1. Holger Fabian Ganninger
2. Yap Tuck Kong Jimmy
3. Zoe Stollard nee Raxter
4. Mario Joseph Durinic
5. Tin Keng Seng, Eric
6. Magintharan Subramaniam
7. Lee Tim Chee Terence
8. Chia Ern Hui, Dorothy
9. Gan Seng Chee
10. Paul Supramaniam

Associate Members

1. Potter Phuong-Trinh Nyuyen aka Trinh Nguyen
2. Tan Chuin Wei, Dennis
3. Ong Ching Seong, Kevin
4. Mohammed Forrvkh Rahman

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Scheme Arbitrations

We are now the appointing arbitration centre for scheme arbitrations under the Private Education and Estate Agents Acts. These scheme arbitrations provide consumers speedy and affordable avenues to resolve their disputes. We are involved in developing a similar scheme arbitration model for sports arbitration.

Dialogue & Consultation

We are actively engaged with the Ministry of Law as part of its efforts to promote greater dialogue and exchange of ideas within the Singapore arbitration community.

We have submitted detailed and considered feedback on proposed changes to the International Arbitration Act, as part of the public consultation launched by the Ministry in late October last year. We were similarly involved in a further public consultation by the Ministry in December 2011 on proposed amendments to the Legal Professional Act in so far as it related to arbitration elements.

In the Region

Under the leadership of our last 2 Presidents, Raymond Chan and Johnny Chan, the Institute has established an impressive regional footprint. This has included collaboration with other arbitral institutions in Asia through the Regional Arbitration Institutes Forum, as well as training programs in Vietnam and Cambodia.

Our 2009 Vietnam initiative was a collaboration with The Law Society of Singapore and Khattar Wong. We conducted two days of workshops on "International Arbitration Law & Practice" in Ho Chi Minh City, Vietnam for members of the Ho Chi Minh Bar Association.

In 2010, the International Finance Corporation (IFC), an arm of the World Bank Group announced an open competitive tender to design and deliver a tailored arbitration training programme in Cambodia. SIArb successfully led a team consisting of the Institute, the Law Society and SIAC to design and run an arbitration training program in Phnom Penh, Cambodia.

This World Bank funded program saw the Institute lead the training of Cambodia's first group of 50 arbitrators for its National Arbitration Centre, the NAC. The NAC will be the first commercial arbitration body in Cambodia to offer the business community an alternative commercial dispute resolution mechanism. It was a great privilege for the Institute to be involved in the training of their pioneer batch of arbitrators.

Further follow-up training is scheduled in 2012 and 2013 which will include an advanced Award Writing course.

These initiatives will, I hope, open opportunities for the Institute to further expand its work in the region generally, especially the Mekong Delta area.

Closer to home, we are working with the Malaysian Institute of Arbitrators to share our experience in statutory adjudication, with the introduction of a similar scheme in Malaysia expected shortly.

So we have come a long way since 25 members got together in 1981 to establish the Institute.

Moving Forward

Looking ahead, the Institute is committed to broadening its reach and appeal, given its unique position as a national arbitral body.

a. We will reach out to the needs and interests of specialist segments of the arbitration community such as infrastructure & construction, IT & technology, and shipping, offshore & marine. The Special Focus Committee has been set up to explore this.

b. We aim to broaden our appeal by delivering greater value to our members through networking forums, professional development programs, and exploring the prospect of an annual or bi-annual national arbitration conference.

c. Finally, we will work hard to expand the regional footprint established over the last few years through Past Presidents Johnny Tan & Raymond Chan by seeking out more opportunities regionally for training, membership and collaboration.

I will update you on these initiatives as the year progresses.

Mohan R Pillay
President

Case Law Development

By Dr. Philip Chan

Introduction

A decision of the Court of Appeal in Motor Image Enterprises Pte Ltd v SCDA Architects Pte Ltd is examined in this edition. This case should be of interest to arbitration lawyers as it touches on an important aspect of appeal against an arbitrator's award on a question of law pursuant to s 49 of the Arbitration Act (Cap 10, 2002 Rev. Ed) ["AA"].

This case also highlights the important difference in the level of review of questions of law that will be carried out, on the one hand, by a court dealing with an application for leave to appeal on this basis, and on the other hand, by the court that hears the appeal itself. The case is also instructive as regards the nature of the jurisdiction exercised by the court seized with an application for leave to appeal.

***Motor Image Enterprises Pte Ltd v SCDA Architects Pte Ltd* [2011] SGCA 58 [Chan Sek Keong CJ, Andrew Phang Boon Leong JA and V K Rajah JA]**

The appeal arose from a decision of the High Court[1] dismissing an appeal against a domestic arbitration award. The High Court Judge had held that it was not appropriate for her to make a ruling on a question of law for which she had earlier granted leave to appeal under s 49(5) of the AA. The Judge had also held that the question of law had not properly arisen as it had not been premised on the facts that the arbitrator had found.

Relevant facts

The underlying arbitration had arisen from a contract for the design of premises for Motor Image. The project had been abandoned, and SCDA had successfully claimed in the arbitration for fees. Motor Image appealed.

A series of applications was made before the matter reached the Court of Appeal, as follows:

(a) Firstly, Motor Image sought leave from the High Court to appeal a question of law in the Award. This application was granted, but with the questions to be determined having been modified by the Judge.

(b) SCDA then filed an application under s 49(7) of the AA for leave to appeal the Judge's decision above. This application was made on the ground that leave should not have been granted, because the modified question of law failed to state correctly the factual basis of the arbitrator's award. The Judge dismissed the application.

(c) Following this, the appeal in (a) above was heard by the High Court. The appeal was dismissed on the basis that the modified question of law was "not appropriate because it was premised on facts that were not found by the arbitrator, and ignored his factual findings." [19]

(d) Motor Image then issued a further Summons under s 49(11) of the AA, to appeal to the Court of Appeal. This Summons raised two new questions of law. Leave to appeal was granted in respect of the first question; leave for the second question was refused.

Issues

The main issue identified by the Court of Appeal is, "whether the High Court, having determined under s 49(5) of the AA that a question of law has arisen …. which the arbitral tribunal was asked to determine ("Finding") and having granted leave to appeal, had the power, on hearing the appeal … to review and overturn the Finding on the basis that the question of law does not in fact arise out of the award." [24]

There was a related issue which arose for consideration by the Court of Appeal. The issue is whether when leave to appeal is granted, this right of appeal could be revoked without a review of the merits of the case.

The Court of Appeal accepted on behalf of the appellants that ordinarily a right of appeal cannot be revoked, even where the right has accrued by reason of leave having been given. The court referred to this as the "Moore principle" (Moore, Nettlefold & Co v The Singer Manufacturing Co [1904] 1 KB 820 at 823).

The first question was "whether Motor Image's right of appeal was abrogated by the Judge revisiting the basis on which she had granted leave to appeal, and declining to decide the [modified question of law] that was before her." [31] As regards this question, the Court of Appeal took the view that there was a threshold issue to be considered first, namely whether there was a valid appeal in the first place. This threshold issue itself begged the question of whether the judge had any jurisdiction to grant the leave to appeal.

[1] Motor Image Enterprises Pte Ltd v SCDA Architects Pte Ltd [2011] 1 SLR 497.

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The second question was "…whether the Moore principle, which was established for court actions, would be applicable to arbitrations where issues of jurisdictional facts are relevant as they are the basis on which leave may be granted to appeal against an arbitrator's award." [31] This second question would only be applicable if the judge did in fact and in law abrogate the right to appeal granted earlier.

The Court of Appeal's finding

The Court of Appeal noted that:

"If the Judge had no jurisdiction to grant leave to appeal under s 49(5) of the AA with respect to the [modified question of law], then there would be no vested right of appeal to abrogate. Under s 49(5) of the AA, leave to appeal shall be given only if the Court is satisfied that the question is one which the arbitral tribunal was asked to determine. The Judge was satisfied that this requirement was met when she gave leave, but, in our view, she was mistaken as to that jurisdictional fact. At the Appeal Stage, she realised that the arbitrator was not asked to determine the [modified question of law]. Similarly, at the Leave Stage, she was satisfied that on the basis of the finding of facts in the award, the decision of the arbitral tribunal on the question was obviously wrong, or that the question was one of general public importance and the decision of the arbitral tribunal was at least open to serious doubt. It is implicit in this jurisdictional fact that the question of law for which leave is granted must be premised on the same facts on which the arbitrator made his award. The Judge only appreciated at the Appeal Stage that this was not the case. In other words, she had earlier mistakenly given leave to appeal a question of law which the arbitrator did not decide on the facts found by him in the arbitration." [36]

The Court of Appeal further held:

"In our view, if the [modified question of law] was not the question which the arbitrator was asked to determine, then it was a question on which no appeal could have been brought under s 49(5) of the AA, and the Judge had no jurisdiction to grant leave to appeal on such a question on the basis that it was an appealable question … It follows from this conclusion that the Judge, in refusing to determine the [modified question of law], did not abrogate any right of appeal vested in Motor Image because no such right could have been properly vested in it by reason of the Judge's earlier jurisdictional error." [37]

The Court of Appeal therefore concluded that:

"...the High Court has no jurisdiction under s 49(5) of the AA to give leave to appeal against an arbitrator's award on the basis of facts which were not found by the arbitrator and which did not form the basis of his award. Otherwise, this would allow the High Court to arrogate to itself the jurisdiction to decide on the correctness or legality of an arbitrator's award on a factual premise different from that on which the award was made. We are unable to accept that this is what is contemplated by s 49(5) of the AA." [39]

Following the above conclusion the court noted that it was not necessary for it to decide whether the Moore principle was applicable to the High Court's decision. The appeal was dismissed by the Court of Appeal.

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Arbitration of tax issues

By Sundareswara Sharma*

Introduction

The suitability of arbitration as an avenue to resolve tax issues[1] may not be a popular topic for discussion. However, this can arise in relation to tax issues between private parties, between States and between a State and a private party. This article seeks to provide a brief introduction to this area with a focus on the first of these three types of relationships and also discusses a relevant court decision.

Private disputes

The duties and obligations of parties to a contract can relate to tax obligations if these are framed as part of the terms of the contract. Theoretically, the question whether a dispute on tax obligations is capable of settlement by arbitration, could arise at various stages of proceedings. One party may take objection to a private arbitrator or arbitration tribunal hearing and deciding a tax obligation as this could involve third party interests such as the tax authorities, or may be objectionable on grounds of public policy. In the realm of international arbitration, it may be argued at the enforcement stage that a foreign award ought not to be enforced as tax issues between the parties are not capable of settlement by arbitration or enforcing awards that result from the disputes arising out of tax issues would be contrary to public policy.[2] Instead of waiting till an award is made and challenging it in the enforcement court, an objection could also be launched at a much earlier stage in court proceedings where an interlocutory application may be made for such proceedings to be stayed pending arbitration.

At the practical level, such an objection received judicial attention in *AED Oil Limited v Puffin FPSO Limited (No. 2)*[3] from the Australian courts in regard to an oil exploration project which involved a Singapore-incorporated party, AED Services Pte Ltd (AED Services). The original parties to a charter contract were AED Oil Limited (AED Oil), a company incorporated in Australia, and Puffin FPSO Limited (Puffin) which was incorporated in Malta. The rights and obligations of AED Oil were later novated to AED Services, its related company. The terms of the charter contract required AED Services to indemnify Puffin for its tax liabilities arising from the oil exploration project; and in return, Puffin was obliged to comply with Australian and Maltese taxation laws to minimize its tax liabilities. The parties agreed that AED Services would manage Puffin's tax responsibilities, including the preparation and filing of tax returns. AED Oil guaranteed the obligations of AED Services, being its ultimate holding company, including the tax obligations. The contract limited Puffin's ability to take any action on a tax claim without prior written approval from AED Services, and Puffin risked losing its right to indemnity if it did so.

The AED entities and Puffin disagreed on how Puffin's assets were to be depreciated, on the effective life of the assets and hence the amount of tax payable. Following from this, Puffin refused to sign the tax returns as prepared by AED and authorize them to be lodged with the Australian Tax Office (ATO) on the basis that the draft returns were not "true and correct" as far as it (Puffin) was concerned.

In the ensuing proceedings against Puffin, AED Oil sought and was granted an injunction restraining Puffin from taking any steps to enforce a registered fixed charge in Puffin's favour. The charge secured the obligations of AED Oil as guarantor of performance by AED Services of its obligations under the charter contract. The proceedings commenced after Puffin demanded from the AED entities amounts alleged to be Puffin's income tax and goods and services tax (GST) liabilities. Further, AED Services claimed that Puffin had breached the charter contract by refusing to sign the tax returns prepared by AED Services and to authorize their lodgment. AED Services also claimed that the amounts demanded by Puffin fell outside the definition of "tax claim" in the charter contract, and as such AED Services was not obliged to indemnify Puffin for the amounts. As observed by the court, the relevant clause on tax claims was designed to ensure that payments were made to Puffin net of any amount of tax that AED Services was required to deduct from payments or which Puffin might be obliged to pay. The parties intended that Puffin would receive the full amount of its invoices and other entitlements and that any tax liabilities incurred as a consequence of the payments would be borne ultimately by AED Services.

Puffin replied to these claims by alleging that AED Services had unreasonably withheld its consent to Puffin registering for GST with the ATO, lodging business activity statements, paying GST it owed and filing income tax returns, and that AED Services was liable to indemnify Puffin over its tax liabilities. The AED entities applied to court for stay of these counterclaims and relied on an arbitration clause in the charter contract.

Arguing against the stay application, Puffin contended, among other things, that the stay should be refused as, among other things, a dispute about its statutory obligation to register for GST, file income tax returns and eventually pay these taxes was not a "matter that is capable of settlement by arbitration". Puffin also contended that its counterclaims came within a clause of the charter contract that expressly permitted a party to seek urgent interlocutory relief from the court where, in that party's reasonable opinion, that action was necessary to protect its rights.

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The court found the counterclaims to be sufficiently urgent to fall within the clause in the charter contract and that the entire dispute should be determined by the court and dismissed the stay application. Interestingly, the court also commented that although a determination by the ATO may bear upon the contractual issues and the reasonableness of the positions taken by the parties, the dispute was essentially contractual and was therefore "capable of settlement by arbitration". The court held Puffin could commence court proceedings for all claims except those for declarations about AED Services' withholding of consent to Puffin filing its income tax returns.

On appeal[4], the Court of Appeal carefully examined the evidence by Puffin in its counterclaims and disagreed these claims were urgent enough to be determined by the court. It found Puffin had received tax advice more than 2 years before and delayed making legal claims on its Australian income tax and GST liabilities and delayed on acting upon legal advice that it request AED Services to consent to Puffin seeking an extension of time for lodgement of its tax returns. The Court of Appeal allowed the stay of court proceedings so that the dispute could be referred to arbitration, thus recognizing that the tax issues being part of a contractual dispute were capable of being resolved by arbitration. Such a court decision would not bind the tax authority.

Other tax issues suitable for arbitration between private parties may be found in commercial agreements dealing with mergers and acquisitions on accrued tax liabilities, clauses in agreements on allocation of tax credits, recovery of GST, and liabilities for incorrect accounting and tax computations.

Tax treaty disputes

International organizations such as the ICC[5] and the OECD[6] are promoting arbitration as an avenue to resolve issues in double taxation by States. Tax disputes, e.g. on transfer pricing, between States[7] who are parties to a double taxation agreement ("DTA") may be resolved through international arbitration where provision has been made in the DTA for resolution by such means. Many States have entered into bilateral agreements for the avoidance of double taxation and prevention of fiscal evasion (tax treaties)[8] in relation to income tax. The prime objective of such international agreements is to provide relief from double taxation. Tax treaties modeled upon the OECD Model Tax Convention on Income and Capital[9] contain provisions for dispute resolution under Article 25 titled Mutual Agreement Procedure ("MAP"). Briefly, a person (taxpayer) who considers he has been taxed by both States who are parties to the DTA may present his case to the competent authority of the State of which he is a resident, within 3 years from the first notification of such taxation. There must be actual taxation upon the person not merely some expectation or concern that taxation will occur. Examples of actual taxation are payment of tax, assessment of tax and notification from tax authorities that tax will be imposed on a certain element of income. The competent authority of his State would then endeavour to resolve the case on its own, and if it is unable to do so, it is to resolve the case by mutual agreement with the competent authority of the other State, to avoid double taxation.

Over the years, the MAP framework for dispute resolution has been attracting much attention, especially recently. A new paragraph 5 to Article 25 is being considered at and promulgated by the OECD, to provide for unresolved issues to be settled by arbitration. This avenue would be available in the situation where the competent authorities are unable to reach an agreement to resolve the case by mutual agreement within 2 years from the presentation of the case to the competent authority of the other State. The case is to be submitted to arbitration, in such circumstances, upon the request of the taxpayer. However, the case cannot be submitted to arbitration if the unresolved issues in question have already been decided by a court or administrative tribunal in either State. The arbitration decision is binding on both States unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision. The arbitration decision is to be implemented notwithstanding any time limits in the domestic laws of the States.

Considerable latitude is given to the competent authorities of the two States to a DTA to settle, by mutual agreement, the mode of application of the new paragraph. A State may disallow the application of the new paragraph on the grounds of national law, policy or administrative considerations. States are also provided the option to include the new paragraph only in treaties with certain other States. The appropriateness of arbitration, both as a general remedy and as a specific solution, is hence left to the discretion of each State.

States currently advocating the use of arbitration as an avenue to resolve disputes in international taxation include the United States and Canada in North America, and certain European States such as Austria, Belgium and Germany. States in Asia generally have yet to embrace the arbitration route in resolving issues in international double taxation under the DTAs between them. An interesting exception is Singapore, in its DTA with Mexico. Under Article 25 of this DTA, there is a different paragraph 5 for the tax dispute to be submitted for arbitration if both competent authorities and the taxpayer agree. This is provided the taxpayer also agrees to be bound by the decision of the arbitration board. The decision is also binding on both States in respect of that case.

Investment treaty disputes

Tax disputes between a State and a private party can be seen in bilateral investment treaties (BITs) between a host State and a foreign investor, particularly where the investor alleges tax has been imposed by the host State in an arbitrary or discriminatory manner. Such issues may call into question the legality of the tax itself and are on a different plane from the two earlier types of relationships. The challenge may arise from the way

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in which a State amends its legislation on investment protection for a foreign investor to impose a tax measure if the manner of amendment offends international principles of due process or domestic legal principles defeating the legitimate expectations of the investor about continuation of the existing tax treatment[10].

Awards of international arbitral tribunals interpreting BITs which analyse in what circumstances tax measures taken by a host State amount to expropriation, whether directly or indirectly, provide another useful resource on the incidence and development of arbitration of tax issues. Standards of protection provided by BITs against tax measures vary depending on the regimes used. For example, US BITs have a regime under which taxation is regarded as tantamount to expropriation, so that if a tax is contrary to an express investment guarantee given to the foreign investor by the host State, an arbitral tribunal could find the tax measure to be expropriatory. The US Restatement of Foreign Relations sets out 4 basic situations on when a tax measure may amount to an expropriatory act or contravene international law. These are: confiscatory tax measures, tax measures that prevent or unreasonably interfere with the use or enjoyment of property, discriminatory tax measures, and taxes designed to force an alien (foreigner) to abandon property or sell it at a distressed price. Apart from expropriation, the tax measures taken may also be contrary to other standards of protection such as "fair and equitable treatment" and "national treatment" in tax-related investment disputes.

Conclusion

This short survey on the incidence and use of arbitration as an avenue for resolution of tax disputes in three types of relationships between parties may provide some food for thought in the evolution of tax arbitration.

Sundareswara Sharma

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* Sundareswara Sharma is a partner at ATMD Bird & Bird LLP specialising in taxation and dispute resolution including arbitration. The views expressed in this article are solely those of the author, do not constitute legal advice and do not represent the views of ATMD Bird & Bird LLP or its clients.

[1] Tax issues may relate to income tax, goods and services tax (or value-added tax), stamp duties or other fiscal measures, or a combination of them.

[2] Section 31(4)(b), International Arbitration Act (IAA); Article 34(2)(b) UNCITRAL Model Law on International Commercial Arbitration (Model Law).

[3] [2009] VSC 534.

[4] AED Oil Ltd v Puffin FPSO Ltd (2010) 265 ALR 415.

[5] International Chamber of Commerce.

[6] Organisation for Economic Co-operation and Development.

[7] Although it is a common taxpayer that bears the burden of double taxation by both States, as the States through their competent authorities engage each other in the interests of their national revenues, such disputes are regarded as being between the States themselves.

[8] Singapore currently has 69 comprehensive double taxation agreements, 7 limited tax treaties and 10 signed treaties which are awaiting ratification.

[9] www.oecd.org.

[10] The fact situations in the well-known Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) and Yukos cases make for intriguing reading on this point.

Construction, a view from the front

By Audrey Perez*

Introduction

It is commonly said that construction disputes are complex. It is often difficult to categorize the various aspects of construction apart from generally classifying them as infrastructure, housing, commercial and leisure development.

When it comes to construction disputes the most common reference remains the Contract. In building and construction law in Singapore, like most other common law jurisdictions, the contracts between the project team parties remains the centre of gravity of disputes. Tort Law also has a significant impact on the rights and liabilities of the parties. Legislation is in place to govern both the substantive rights of the parties in terms of payment as well as a statutory dispute resolution process to support the right to timely payment.

The Singapore construction sector has within only 45 years of construction history become the leader in construction technologies as well as in various contemporary policies such as sustainability, safety management, quality management systems and environmental laws and practices. In some areas of construction, Singapore even excels and is well ahead of any other nation daring to set in place pragmatic yet effective standards and regulations. For instance, Singapore is the only place worldwide where management certifications are statutory!

Uniquely, the thorough and complete control of the quality of the execution of the works is regulated. The latter is as well scrutinized by a statutory board with a progressive minimum benchmark enforced nationwide: the Construction Quality Assessment set in place back in the mid-90s, the CONQUASS.

In modern and practical aspects, Singapore is way ahead in Building Information Modeling (BIM) or three dimensional designs which are likely to become statutory in Singapore in less than a year. In short, the construction sector in Singapore is consistently dynamic. For the past decade innovation is on everyone's mind challenging each and every stakeholder with a sole goal: drive the industry up to excellence.

Innovative technologies, globalization of procurement, the increase of speed and size of constructions, as well as the development of Design and Build projects and more recently Design, Build and Operate projects, similar to Public Private Partnerships are the challenges of the future for the Singapore Construction Sector.

It is therefore always surprising and hard to accept, for a construction professional that while there are no projects that are similar and while the industry is evolving and adapting healthily to modern technologies, contracts governing projects of any significance still come in a standard form.

Such contracts have a basic structure that is similar to those used internationally, substantially disconnected from the facts and challenges of a given construction.

Worse, when a dispute arises, the contract remains the key reference when the matter is brought to the Courts or before an Arbitral Tribunal. Contract documents, terms, indemnities and warranties, contract models and standard forms, pricing and claim practices, successful claims, redress for breach of contract, variations arising from ground conditions, valuation of variation claims, payments and certifications, time-related claims and computation of time-related claims, performance bonds, claims arising from termination and matters following termination, claims under negligence, and the latest developments in construction case law are resolutely common topics in construction litigation yet still restrictive and remote from the actual genuine risks, whether technical or logistical.

Demystifying Construction Contracts

The "traditional" method of contracting in construction can be summarized as follows: the owner or developer of an intended project first engages someone to administer the contract. For a building project, he is usually the architect. The other professionals such as the quantity surveyor, the structural engineer, and the mechanical and electrical engineer are then appointed. Contracts are entered into between the employer and these consultants.

A standard form for the contract with the architect is the Singapore Institute of Architects (SIA) Conditions of Appointment which also contains the Scale of Professional Charges. A similar form issued by the Association of Civil Engineers, Singapore (ACES) is also available for the appointment of engineers.

The architect (or engineer) prepares a design. The architect and/or other consultants prepare the drawings, the specifications, the bills of quantities and other documentation that would constitute the contract documents. A compilation of such documents will enable contractors to submit competitive tenders for the construction of the works. The successful contractor is then awarded the contract. In this system, the contractor is not involved in the design at any stage.

For any project of significant value organized as per the traditional method, the contract arrangements between the parties are mostly based on a standard form contract. Apart from the most popular form of contract which is the SIA standard form, other forms include the Royal Institute of British Architects' (RIBA) or the Joint Contracts Tribunal (JCT) standard forms or their derivatives.

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The public sector has its own set of standard form and for the traditional system the Public Sector Standard Conditions of Contract for Construction Works (PSSCOC) is adopted.

In recent years, design and build contracts are gaining popularity. Under this arrangement, the contractor agrees to accept all responsibility for the structure he constructs including obligations relating to design on top of his usual obligations for the work done.

The Public Sector Standard Conditions of Contract for Design and Build for the public sector was issued in 2001 (PSSCC). This was soon followed in the same year by the Real Estate Developers' Association, Singapore (REDAS) Design and Build Conditions of Contract.

Employers would typically rely on these local standard forms or adapt non-local forms (this may include the FIDIC Design and Build Conditions of Contract (commonly known as the 'Orange Book') and the Articles of Agreement and Conditions of Building Contract with Contractor's Design, issued by the JCT. A variant of this is what is now commonly described as Engineering Procurement & Construction (EPC) contracts. Such contracts are often used in construction of petrochemical and pharmaceutical facilities and would involve the main contractor in the design of the facilities as well as the procurement of the equipment and machinery to be used.

It is rare, except for very small projects, that all the terms and conditions of a construction contract be contained in a single document. The contract usually contains standard forms together with drawings, specifications, bills of quantities and often exchanges of correspondence, and quotations. It is not uncommon that when disputes arise, correspondence following the award (of the contract) and signing of the contract document form part of the contract.

Once the contract is signed, the works start: Design, Engineering, calculations, submissions, and Construction methods studies, logistics, procurement, equipment, scheduling, execution of the works including, for instance foundations, rafts and transfer slabs, underground works, superstructure, building enclosure, mechanical, electrical and architectural trades.

In fact construction is a blend of exact sciences based on calculations and engineering, state of the art execution as well as a large part the management of people. An average size construction project in Singapore involves about 500 persons for two years. Large projects involve few thousands for about three to four years. There is a daunting quantity of preparatory and follow-up work to be done in addition by all the project team members, from the most junior to the most senior staff involved in order to bring a project to its success. In a nutshell, a construction project encompasses procurement, planning, design, design coordination, physical execution and site coordination, control systems, completion works and related coordination, and a post completion management system.

A huge part of construction practice is its related risks management with systems developed through the construction and post completion phases. Another key feature of Construction projects are regular meetings at various levels and for various scopes that are nothing less then "mini-dispute boards" hearing sessions. At these meetings issues are described, exchanges of information is done – including communicating on each party's liabilities and interests – in order to allow some designated persons to make decisions in order to move forward.

The majority of construction projects are successfully completed without having related disputes settled in litigation or in arbitration. Behind a successful project, there is always an experienced and reasonable project team able to control various disputes and issues met in the lifetime of a project.

Therefore, it is not uneasy to agree that disputes brought to the Courts or before an Arbitral Tribunal often result from a major breakdown in communication between parties or a continuous lack of the same. Often, in construction disputes, it takes one party to take it personally for a matter to spiral out of control and to start a saga holding a party in ransom. Unreasonableness, lack of common sense and foresight are other sources of disputes.

It is therefore very common to hear in construction practice that the contract is a necessary document in order to keep a trace of the initial agreement. Once executed, the document is filed and locked in a cabinet in order to allow the project team to proceed with the actual work! In this vein, Quantity Surveyors and/or Contracts Managers are rather employed within a project team in a very restrictive scope, to assist parties into keeping in view the original agreement, providing regularly objective and independent assessments and advising on some related variations accordingly. Their essential role is facilitating some information regarding some aspects of the actual construction (costs, delays, variations among others) versus the initial agreed framework of the Contract, for some decisions to be taken by the project team to move forward and prevent disputes.

Given the above, it's not controversial to affirm that Construction and Construction Law are practically disconnected. The stakes and languages spoken in each one are different and often unrelated. It is therefore

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neither Construction nor its related disputes that are complex but rather fitting construction disputes into Construction Law, with actual causes of dispute often untold that render construction disputes complex. There is resolutely a daunting gap between Construction processes: its challenges and facts; and Construction Contracts: their structure, substance and language.

Demystifying defects

"In the construction industry, it is accepted that there are likely to be minor defects found in a newly completed building and that is why construction contracts generally provide for a defects maintenance period during which the contractor can touch up the works." – as observed by Justice Judith Prakash in ***Yap Boon Keng Sonny v Pacific Prince Private Ltd and another*** [2008] SGHC 161 at paragraph 134.

Very little space is reserved to deal with construction defects, in contracts. Most of the time, only liabilities vis-à-vis defects for certain trades are barely dealt with in several paragraphs. Often liabilities on defects are unilateral, as described in warranties, indemnities and performance bonds and hardly take into account building ageing and related maintenance defects which are commonly known to originate from materials, workmanship or from the design. The latter includes the knowledge and experience required for specifying the right material engineered to be handled, applied, installed and maintained in the right manner given the particular purpose and environment of a given construction.

Defects are considered minor when they do not affect the structural or architectural integrity of a given project nor jeopardize its appearance, regardless of the stage at which they appear. There are defects that affect the use of the premises, some others the level of comfort and enjoyment of the building users. Some defects would make a place unsightly while others are inherent to any construction whether they are perceived as unsightly or not. The latter are related to a key factor in engineering considerations called *durability*. Architects and engineers do – but not often enough it seems – include durability in their considerations.

Some defects appear during construction, others after completion and finally latent defects could appear many years or decades after completion! Some defects appear but are not noticeable or not an issue to the layman. Conversely, other defects become a nuisance and an obsession to the premises user while these are not specifically defects per-se but rather natural aging signs of a given construction. Therefore, defects are often related to the end user's perception, expectations and feed back, regardless of whether they are technical defects or not and likewise, their perception will vary depending on the context and country where constructions are looked at.

There are certain cases where defects are dangerous, particularly when they affect the structure of a building or facades finishes, yet regrettably, it takes years before the matter is attended to when a legal battle becomes the priority to the parties involved. In this vein, objectivity and common sense are often lost when the question "who is liable and how to make the other pay for it" becomes more important than the matter of "what has caused the defect and how to attend to it". In such instances, even some defects experts lose a sense of perspective and reality, as well as their duty to be objective, in the midst of debates on liability.

Conclusion

Perhaps continuing professional education incorporating construction and construction law for all Construction related stakeholders is a good step to take in order to reducing the gap between construction and construction law and subsequently reduce construction disputes. Having construction trained and experienced persons from the construction industry sit as arbitrators would be another step in the right direction.

Finally, promoting transparent tender negotiations where parties respect and discuss each party's scope, rights and interests fairly may lead to more realistic, balanced and healthy contract documents, allowing parties, over time, to refer to the contract as a useful guideline and not a threat, providing mechanisms agreed by all to be followed in order to face inevitable and variable yet foreseeable risks during a construction project and other inevitable changes that may be met over time.

Audrey PEREZ

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Seminar On "Iliegality And Public Policy Considerations In The Challenge Of Arbitral Awards"








Date	Event	Speakers
31 January 2012	Illegality and Public Policy Considerations in the Challenge of Arbitral Awards	Mr Michael Hwang SC Mr Chan Leng Sun SC

Courts everywhere have to find a balance between respecting the finality of an arbitral award and upholding the public policy of the land. This balance is all the more delicate when illegality is alleged. Case law has not yielded a consistent approach. English judges, in particular, are not unanimous in their treatment of challenges to arbitral awards on an alleged underlying illegality. The Singapore Court of Appeal considered the judicial debate in AJT v AJU [2011] 4 SLR 739 and took a stand on this issue. SIArb and the Singapore Academy of law jointly organized a Seminar on 'Illegality and Public Policy Considerations in the Challenge of Arbitral Awards' to brain storm these issues.

Mr Michael Hwang SC spoke on breach of confidentiality of arbitration awards in disclosing illegality while Mr Chan Leng Sun SC discussed the context and conclusions of the Court of Appeal's decision in AJT v AJU. The Q&A session was very interesting with contributions from delegates from Singapore and abroad.

This Seminar was held in conjunction with the Book Launch of *Singapore Law on Arbitral Awards* authored by Mr Chan Leng Sun SC. Guest-of-Honour for the Book Launch was the **Honourable Attorney-General Mr Sundaresh Menon SC**.

SIARB 30th Anniversary Dinner

Date	Event
16 NOVEMBER 2011	SIARB 30th Anniversary Dinner

Publisher

Singapore Institute Of Arbitrators
32 Maxwell Road #02-07, Maxwell Chambers, Singapore 069115
Tel: (65) 6372 3931 / 32 Fax: (65) 6327 1938

Printed by Ngai Heng Book Binder Pte Ltd.

The SIArb Newsletter is a quarterly publication of the Singapore Institute of Arbitrators. Distribution is restricted to members and those organisations and institutions of higher learning associated with the Institute.