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VIEWPOINT

THE PRESIDENT'S COLUMN



We are nearing the end of the first quarter of 2009, and the financial meltdown I mentioned in the previous issue of the newsletter is affecting all areas of business. The SI Arb has not been spared the far-reaching effects. The Institute faces challenges, both financially and operationally, and must be nimble and agile in the face of these challenging times. We must rise to meet these challenges and continue to pursue our twin objectives of increasing the Institute's membership and elevating professional standards. In this issue, let me share with members some of the challenges that the Institute faces and the Council's plans to deal with them.

Escalating Operational Costs

In July 2008, while the economy was still buoyant, rentals sky-rocketed and as mentioned in the August 2008 issue of the newsletter, the Institute was forced to relocate to a smaller office at the City Hall when our previous landlord raised rental by a whopping 165%. The Council took the decision to give up its hearing room and downsize the office from 985 sq ft to 180 sq ft. Despite the financial meltdown since the last quarter of 2008, we have not yet seen rentals going down to pre-2008 rates. In July 2009, the Institute will again be moving to Maxwell Chambers at Maxwell Road. Although the rent there factors in the weak global economy, it has not reverted to pre-2008 levels.

Rental and staff costs are the main expenditure items of the Institute. Together, they make up 80% of the Institute's operating expenses. With the increase in rental costs, at the next Annual General Meeting, the Council will have to seek members' approval to increase membership fees to cover operating expenses. The Council is aware that the present economic climate may not be the best time for an increase in membership fees, but I trust that members appreciate that membership fees have not been adjusted for the last four years and support the upward revision.

New Premises – Maxwell Chambers

Maxwell Chambers will house local and international arbitral institutes and institutions and provide world-class arbitration hearing facilities. I believe that despite the higher rental, it is in the interest of the Institute to be located there. The synergy gained by having the key arbitral institutes and institutions co-located will increase the vibrancy of Singapore arbitration and add robustness to the growth of the arbitral institutes and institutions based here. Indeed, the built-in high-tech facilities will serve us well when providing arbitration services to members and the public alike.

Compulsory Continuing Professional Development (CPD) For SIArb and SIAC Panels of Arbitrators

The Institute has commenced implementation of the compulsory CPD for its panel arbitrators this year. By now, panel members would have received letters of notification on the implementation guidelines. The support of the Singapore International Arbitration Centre (SIAC) in adopting SIArb's CPD framework for the SIAC Panel of Arbitrators is an affirmation of the SIAC's confidence in the Institute's CPD programme. This is an endorsement of the Institute as a professional body that subscribes to quality training.

Formation of Singapore Chapter of the Chartered Institute of Arbitrators

I congratulate the East Asia Branch of the Chartered Institute of Arbitrators (Hong Kong) for its recent launch of a Chapter in Singapore. I wish the Chapter council success. While its presence will, no doubt, serve to strengthen the arbitration scene in Singapore, I must also acknowledge that it poses competition to the Institute's activities and courses. However, competition is healthy as long as both organisations do not duplicate efforts, adopt a consultative approach and collaborate for the mutual benefit of our members. Indeed, the two councils have met a few times to explore areas of collaboration. I look forward to collaborative efforts between SIArb and CIArb in the organisation of arbitration courses and conferences in future.

Partnership with the Singapore Management University (SMU)

The Institute will be partnering SMU as part of our collaboration with the institutes of higher learning in the pursuit of academic and professional development in the field of alternative dispute resolution. This partnership will be launched in conjunction with the opening of SMU's Dispute Resolution Centre this year. More details of the launch and collaboration will be announced shortly. Following the public announcement of the collaboration, there will be a series of joint talks organised for practitioners, end-users and students alike. Our partnership with SMU epitomises the role of Singapore as a dispute resolution hub in the region as well as internationally.

Fellowship Assessment Course 2009

The Institute will be opening applications for admission to the SIArb Fellowship Assessment Course in May 2009. Under the directorship of Associate Professor Neale Gregson once again, the course is scheduled to be held on 21 August, 22 August and 24 August 2009. Details of the syllabus will be released at a later date. I look forward to our Associate Members and Members embarking on the course as one of their professional development endeavours this year. Successful completion of the course makes one eligible to be admitted as a Fellow, among other admission criteria.

Members' Nite 2009

The Institute will be holding its Members' Nite on 28 May 2009. It will provide an opportunity for members to network, share experiences and foster fellowship. Further details of the event will be announced soon.

In closing, I reiterate that the Institute shall stay committed to our cause of providing quality arbitration training and education. As we approach the new work year, I express my heartfelt appreciation for your on-going contributions and support. I look forward to working with you in meeting the challenges I have outlined above in the 2009/2010 work year.

Johnny Tan Cheng Hye PBM
President

SIARB INTERNATIONAL ENTRY COURSE - 28 & 29 NOVEMBER AND 6 DECEMBER 2008

MR. RICHARD TAN, COURSE DIRECTOR



The Institute held an entry course on arbitration at the Marina Mandarin on 28-29 November 2008. The course took on a different format from previous courses as it offered candidates, for the first time, the option of taking either the entire course and a written examination (for those wishing to qualify to become a



Member) or attending only one or more of separate modules (for those who were intending just to learn more about different aspects of arbitration). The four modules offered were "An Introduction to Arbitration", "Commencement of the Arbitration and the Establishment of the Tribunal", "The Arbitration Procedure" and "The Award" which included lectures and tutorials. A 2-hour written examination followed a week later. A total of 17 participants took part in this course and all of them opted to take all 4 modules and the examination.



The Course Director for the course was Associate Professor (adjunct) Richard Tan, and the other lecturers and tutors were Mr Johnny Tan, Mr Chan Leng Sun, Mr Naresh Mahtani and Mr Andrew Chan.

The Institute was also grateful to have as observers and to help in the tutorials, Mr Muthu Arusu, Dr Chris Vickery, Mr M P Rai, Mr Dinesh Dhillon and Mr Ganesh Chandru.

There had earlier been discussions by the Council on whether the Institute should continue to conduct examinations as part of the route to admission to the Institute as a Member. It was decided that standards should be kept at a high level and the process of evaluation though a written examination would help ensure that that objective was achieved. Those holding the title of "Member" would have the satisfaction of knowing that they had not been accorded that title lightly.

The Institute was both honoured and fortunate to have Sir Vivian Ramsey, High Court judge and Chief Judge of the UK Technology and Construction Court appear as a "surprise" guest lecturer. Justice Ramsey spoke on the topic "The Role



of the Courts in Supporting Arbitration". Justice Ramsey happened to be in Hong Kong to give a keynote address at a seminar the day before the course started and agreed to come to Singapore to give an impromptu talk at the invitation of the course director, Richard Tan, before heading back home to London. We were all very thrilled and privileged to have Justice Ramsey give, notwithstanding the brief notice, an inspiring and comprehensive lecture on this important aspect of arbitration. With his characteristic willingness to share his vast knowledge of the law with others, he also took part in the last tutorial of the day. He later commented that he enjoyed the session and thought that the participants were a lively group who asked many intelligent and probing questions.

WHEN IS A SEAT NOT A SEAT

BRAES OF DOUNE WIND FARM (SCOTLAND) LIMITED V ALFRED MCALPINE BUSINESS SERVICES LIMITED [2008] EWHC 426 (TCC)

AUTHOR: MARGARET JOAN LING, ASSOCIATE WITH ALLEN & GLEDHILL LLP, INTERNATIONAL ARBITRATION PRACTICE GROUP

Determining the seat of arbitration is important as it determines the procedural law applicable to the arbitration. A party who has designated a particular country as the seat of arbitration will expect that country to administer, control or decide what control there is to be over the arbitration. In addition, the seat potentially affects the law of the arbitration agreement as well as the proper law of the substantive contract.

In a case by the English Technology and Construction Court, *Braes of Doune Wind Farm (Scotland) Limited v Alfred McAlpine Business Services Limited* [2008] EWHC 426 (TCC) ("*Braes*"), it was held that the seat of arbitration was the country whose system of law the parties had designated as the procedural law governing the arbitration, notwithstanding that the parties had designated another seat in their contract.

Case Summary

The dispute in *Braes* arose out of an Engineering, Procurement and Construction Contract (the "*EPC Contract*") dated 4 November 2005. Although an arbitration award had already been given in respect of the dispute, the Claimant sought leave to appeal against the award. However, the Respondent argued that the English Court did not have jurisdiction to entertain such an appeal and asked for leave to enforce the same.

The English Arbitration Act 1996 provided that it only applied if the seat of the arbitration was in England and Wales or Northern Ireland. In addition, the material terms of the EPC Contract provided that:

"1.4.1. The Contract shall be governed by and construed in accordance with the laws of England and Wales and, subject to Clause 20.2 [Dispute Resolution], the Parties agree that the courts of England and Wales have exclusive jurisdiction to settle any dispute arising out of or in connection with the Contract.

20.2.2. (a) ...any dispute or difference between the Parties to this Agreement arising out of or in connection with this Agreement shall be referred to arbitration.

(b) Any reference to arbitration shall be to a single arbitrator...and conducted in accordance with the Construction Industry Model Arbitration Rules February 1998 Edition, subject to this Clause (*Arbitration Procedure*)...

(c) **This arbitration agreement is subject to English Law and the seat of the arbitration shall be Glasgow, Scotland.** Any such reference to arbitration shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act 1996 or any statutory re-enactment."

(emphasis added)

In deciding that England was the seat of arbitration, the Court opined that it had to consider "*what in substance, the parties agreed was the law of the country which would juridically control the arbitration*". According to the court, the following terms in the EPC Contract militated in favour of England being the country which the parties agreed

would control the arbitration:

- (1) Clause 1.4.1 provided that the English and Welsh court had the exclusive jurisdiction to settle disputes arising out of the contract subject to arbitration under Clause 20.2.2.(a).
- (2) Clause 1.4.1 expressly referred to the English Arbitration Act 1996 which permits and requires the English Courts to entertain applications for leave to appeal against arbitral awards.
- (3) Clause 20.2.2 stated that the arbitration agreement is subject to English law and that "*any such reference to arbitration [is]...deemed a reference to arbitration within the meaning of the Arbitration Act 1996...*"

Akenhead J. also noted that the parties appeared to agree that the Scottish courts had no real control or interest in the arbitral proceedings and this suggested that the parties could not have intended that the arbitration be conducted as an "*delocalized arbitration*".

Comments

The Court in *Braes* looked at the agreement as a whole to determine which system of law the parties intended would supervise the arbitration. Consequently, merely stipulating Glasgow, Scotland as "seat" of the arbitration was insufficient to give the Scottish courts supervisory jurisdiction. The Court was of the view that the parties' express agreement that the "seat" of arbitration was to be Glasgow, Scotland "*must relate to the place in which the parties agreed that the hearings should take place*". The reference to the English Arbitration Act in the EPC Contract affirms that the Court had taken the right approach as it would be odd to expect the Scottish court to apply the English Arbitration Act.

There are indications that the Singapore courts may adopt the approach in *Braes*. In *PT Garuda Indonesia v Birgen Air* [2003] 1 SLR 393, the court had to determine the seat of arbitration. The relevant clauses in the lease agreement between the parties provided that:

"Clause 16.8: Governing Law
This Agreement shall in all respects be governed by, and construed in accordance with, the laws of the Republic of Indonesia, including all matters of construction, validity and performance.

Clause 16.9: Arbitration
In the event that a commercial controversy or claim ... such controversy or claim shall be settled by arbitration held before a board of three qualified arbitrators. The parties agree that such arbitration shall be held in Jakarta, Indonesia and conducted in the English language in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce."

In addition, the terms of reference of the arbitration which the parties had agreed upon provided that the "*place of arbitration*" was Indonesia and that the "*arbitral Tribunal and the Parties may convene at any other location if necessary*".

The parties subsequently agreed that the arbitration

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proceedings were to be conducted in Singapore. Based on this change in venue, the Claimant argued that the seat of arbitration was Singapore. As was the case in Braes, the Singapore Court of Appeal rejected the Claimant's argument based on the terms of the lease agreement:

"35 We were unable to accept Garuda's contention that just because the parties eventually agreed with the arbitrators' suggestion that the hearing be held in Singapore, there was in consequence such an agreement to alter the place of arbitration from Jakarta to Singapore. What was changed was the 'venue of hearing'. This comes out clearly from the language of the correspondence.

36 In our opinion, Garuda's argument failed to give effect to the provisions of art 20(2) of the Model Law which expressly authorise the tribunal to meet at any place, other than the agreed place of arbitration, to hear witnesses and the parties. The opening words of art 20(2), 'notwithstanding the provisions of paragraph (1) of this Article', clearly mean that such a hearing by the tribunal at a different location from that of the place of arbitration does not alter what was the agreed place of arbitration. Indeed, the tribunal confirmed the hearing to be in Singapore even before receiving any indication from Garuda: see Dr Croft's letter of 21 May 1999.

38 ... Garuda seemed to have placed great emphasis on the fact that the hearing of the arbitration

was held entirely in Singapore and nowhere else. But an arbitration proceeding does not comprise only of the oral hearing and the submission. It encompasses an entire process, commencing from the appointment of the arbitrator or arbitrators to the rendering of the final award.

39 While both Amazonica and Union Bank of India (supra) did not involve the Model Law, and could be distinguished on that basis, the real differentiating feature there lies in the fact that in both those cases the relevant clauses were far from clear. We have alluded to that before. **But in the instant case, the lease agreement was abundantly clear: the lease agreement was to be governed by Indonesian law and the place of arbitration was Jakarta, which must also mean that the arbitration proceedings were subject to Indonesian law.**"

(emphasis added)

Conclusion

In the premises, the designation of a particular law in the arbitration clause may determine the seat of the arbitration notwithstanding an apparently express provision to the contrary in the agreement. In order to ensure that an express designation of a place as the seat of an arbitration is given effect to, it may be prudent that parties not refer to procedural law which is different from the expressly agreed seat.

ANNOUNCEMENTS

UPDATES & UPCOMING EVENTS

1. **"Stay In Favour of Arbitration: The Malaysian Perspective – Then And Now"**
by Mr. Lam Ko Luen and
"Natural Justice: A Natural Concern For The Arbitrator – Some Guidelines From A Recent Singapore Court Of Appeal Decision" by Dr. Philip Chan followed by **MOU Signing Ceremony** between SI Arb and MI Arb on 23 March 2009.
2. **"Impact Of Insolvency On Arbitration"**
by Mr. Andrew Chan on 29 April 2009.
3. **"Issues Concerning Costs In Construction"**
by Mr. Naresh Mahtani on 23 July 2009.
4. **"SI Arb Members' Nite"**
on 28 May 2009.
5. **"Third (3rd) Regional Arbitral Institutes Forum Conference"**
by Hong Kong Institute of Arbitrators on 16 June 2009.
6. **"SI Arb Fellowship Assessment Course"**
by Assoc. Prof. Neale Gregson on 21, 22 and 24 August 2009.

NEW MEMBERS

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

Fellows

1. Denash Gopal
2. Dr Dominic Henley Katter
3. Dr Ong Geok Quee
4. Eduardo R Cenza
5. Stuart Isaacs, QC
6. Lim Chee Huat Jacob
7. Lim Kim Cheong
8. Marcus Gordon
9. Ng Cho Huat
10. Por Hock Sing Michael
11. Sim Edmund Walter Kwantze

Members

12. Tan Tyginn
13. Teng Sor Hoong Iris
14. Teo Tiong Gee Keith
1. Capt Jone J Abotnes
2. Gary Nigel Howells
3. Henny Mardiani
4. Kandavellu Kangatharan
5. Liew Thiam Leng
6. Marco Stefanoni

7. Teh Yoong Chii Brian
8. Then Choon Huat
9. Vincent Woon
10. Wee Keat Meng Jimmie

Associate Members

1. Morris Dempster
2. Nicholas John Watts
3. Yeo Oon Chye

“P & I CLUBS AND MARITIME ARBITRATION
IN SINGAPORE”

ON 2ND DECEMBER 2008

SPEAKERS: MS. SHEILA LIM AND MR. CHRISTOPHER HALL



.....
**“PROTECTION OF FOREIGN INVESTMENTS: THE KEY
ISSUES IN INVESTOR – STATE ARBITRATION”**

ON 21ST JANUARY 2009

SPEAKER: MR. J. CHRISTOPHER THOMAS, QC



RECENT DEVELOPMENTS IN ARBITRATION CASE LAW

BY DR. PHILIP CHAN CHUEN FYE

Recent developments in arbitration case law

Introduction

In this issue, eight cases touching on various matters are examined. All are from the High Court with two of them being decided at the Assistant Registrar's level and the others at the Honourable Judges level. One case involved the Arbitration Act (AA) while the others involved the International Arbitration Act (IAA) as the applicable law.

Arbitration Act

***Acclaim Insurance Brokers Pte Ltd v Navigator Investment Services Ltd* [2009] SGHC 12 [Choo Han Teck J]**

There were two matters before the High Court. The first matter concerned the Defendant's application to apply for an amendment to its application for a stay of proceedings under OS No 130 of 2008. The second matter was an appeal against the Assistant Registrar's decision to dismiss the Defendant's application for the stay itself.

In the first matter, namely the application to amend OS 130 of 2008, to change the applicable law from the AA to the IAA, the learned Judge dismissed the said application on the following grounds at paragraph 3:

- The arbitration concerned parties in Singapore, on matters governed by Singapore law, and Singapore was the forum of the arbitration;
- There was nothing to indicate why this matter comes under the International Arbitration Act, which applies when, *inter alia*, both parties consent to having their arbitration under it;
- The Defendant commenced the arbitration ostensibly under the Arbitration Act and had taken an inordinately long time to claim that it was an international arbitration - a point that could have been made but was not made before either Assistant Registrars in previous hearings; and
- The onus was a very high one on the Defendant in these circumstances to show that this was an international arbitration. In view of the paucity of evidence and argument, the learned Judge did not allow the amendment sought and dismissed the application accordingly.

In the second matter, namely the application which was an appeal, the learned Judge dismissed the appeal on the following grounds at paragraph 5:

- In a multi-faceted action such as that which the Plaintiff was involved in, parts of which they had no choice and parts of which they might have, the discretion lay with the Court in deciding whether this application for a stay of proceedings ought to be allowed; and
- Furthermore, the commencement of the arbitration proceedings in this case was initiated, on what seemed to the learned Judge to be dubious grounds, only after the Plaintiff sought discovery against the Defendant in a separate application.

International Arbitration Act

Section 6 – stay of court proceedings

(a) by defendants

***PT Tri-M.G. Intra Asia Airlines v Norse Air Charter Limited* [2009] SGHC 13 [Darius Chan AR]**

The application before the Court was for a stay of court proceedings based on section 6 of the IAA. In particular, the Assistant Registrar had to determine whether a stay should be granted when there is both an arbitration clause as well as a jurisdiction clause, both of which are reproduced below for ease of reference:

15 ARBITRATION

All disputes under this Agreement shall be submitted for resolution by arbitration pursuant to the Rules of conciliation and Arbitration of the International Chamber of Commerce in effect as of the date any dispute arose.

22 GOVERNING LAW AND JURISDICTION

22.1 This Agreement shall be governed and construed in accordance with the laws of The Republic of Singapore.

22.2 Each of the parties to this Agreement agrees for the exclusive benefit of the others (sic) that the courts of The Republic of Singapore shall have jurisdiction to hear and determine any suit, action or proceedings and to settle any disputes which may arise out of or in connection with any Governing Document (respectively "Proceedings" and "Disputes") and, for such purposes irrevocably submits to the jurisdiction of such courts.

[emphasis added]

The learned Assistant Registrar held at paragraph 67 that there was a valid arbitration agreement as set out in clause 15 and that clause 22.2 refers to the supervisory jurisdiction of the Singapore Courts over the arbitration. It was noted earlier at paragraph 47 that "*such a construction would best give effect to the expressed intentions of the parties in the context of an international commercial contract.*"

The other issue that the learned Assistant Registrar had to deal with was whether a dispute existed. It was held at paragraph 64 that there was no admission of liability and that there was denial of liability. Hence, a dispute existed. Accordingly, the stay application was granted. In arriving at this answer the Court was assisted by the following guidelines at paragraphs 57 and 58:

- The court is not to consider whether there is in fact a dispute or whether there is a genuine dispute. This means that the quality of the defence is not a matter for the courts: see Robert Merkin and Louis Flannery, *Arbitration Act 1996* (Informa Law, 2008) at 40 ("*Merkin and Flannery*");
- A dispute will exist unless there has been a clear and unequivocal admission not only of liability but also quantum: see *Louis Dreyfus v. Bonarich*

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International (Group) Limited [1997] 3 HKC 597; *Tai Hing Cotton Mill Limited v. Glencore Grain Rotterdam BV* [1996] 1 HKC 363 at 375A-B;

- In the absence of admissions as to both these aspects, a mere denial of liability or of quantum claimed, even in circumstances where no defence exists, will be sufficient to find a dispute for the purposes of section 6 of the IAA (and Article 8, UNCITRAL Model Law);
- The court does not involve itself in evaluating the merits of the claim;
- That there must be an admission as to both liability and quantum before a dispute ceases to be a dispute has also been recognised in *Glencore Grain Ltd v Agros Trading Co* [1999] 2 Lloyd's Rep 410: see Merkin and Flannery at 41. Joseph QC summarises it pithily [11.16]: "unless a claim has been admitted in full, a dispute will exist."

***Tjong Very Sumito and Others v Antig Investments Pte Ltd* [2008] SGHC 202 [Choo Han Teck J]**

The matter before the Court was an appeal against the Assistant Registrar's decision to dismiss the Defendant's application for a stay of court proceedings under section 6 of the IAA. The court allowed the appeal and held at paragraph 8 that, "(i) a dispute referable to the [main contract] exists; and (ii) a positive assertion had been made by the defendant challenging the plaintiffs' claim (albeit after the commencement of court proceedings)."

In essence, the Court held at paragraph 6 that a dispute in a contract that is supplementary to the main contract in which the Defendant is invoking the arbitration clause as the ground for asking a stay of court proceedings would satisfy the requirement that a stay is granted when there is a dispute referable to arbitration under the main contract.

Further, the Court held at paragraph 7 that only "a positive assertion by the defendant that he is disputing the claim would suffice for the purposes of s6(2) of the IAA." Indeed, the Court added, "this would be so even if it can be easily demonstrated that the defendant was wrong."

***The "Duden"* [2008] SGHC 149 [Andrew Ang J]**

The matter before the Court was an appeal against the Assistant Registrar's decision to impose a particular condition on an order for the stay of proceedings. The appeal was dismissed. The Court held at paragraph 11 that its power to impose conditions when granting a stay is derived from section 6(2) of the IAA. This might be contrasted with the UK's Arbitration Act 1996 which obliged the Court to grant a stay without condition. Further, the Court emphasised at paragraph 12 that the discretion to impose conditions upon a stay of court proceedings in favour of arbitration is an unfettered one.

Nevertheless, the Court set out some guidelines on the exercise of the discretion at paragraphs 14 to 16:

- Discretionary power must, of course, be exercised judiciously. The corollary to a wide discretionary power is the great caution with which it should be exercised;
- Courts generally should be slow to interfere in the arbitration process. In recent years, courts have moved from strong uncertainty as to the arbitration process resulting in extensive judicial interference or the non-enforcement of arbitration agreements to a position in favour of arbitration, *i.e.* deferring to party autonomy and avoiding intervention where

possible (Julian DM Lew QC *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at p 356; and

- Nevertheless, the Court should not be reluctant to intervene by exercising its statutory power to impose conditions where the justice of the case calls for it.

(b) by plaintiffs

***Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd* [2008] SGHC 229 [Nathaniel Khng AR]**

In this rather unusual case, there is an application by the Plaintiff for a stay of court proceeding in respect of the counterclaim by the defendant which was granted. The issues before the Assistant Registrar included whether there is a valid arbitration clause and whether the applicable law is the IAA. The arbitration clause, clause 40.1 of the sub-contract between the parties, is reproduced below for ease of reference.

"In the event of any dispute or difference between the [Plaintiff] and the [Defendant], whether arising during the execution or after the completion or abandonment of the Sub-Contract Works or after the termination of the employment of the [Defendant] under the Sub-Contract (whether by breach or in any other manner), with regards [sic] to any matter or thing of whatsoever nature arising out of the Sub-Contract or in connection therewith, then either Party shall give to the other notice in writing of such dispute or difference and such dispute or difference shall be finally resolved by arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this Clause. The tribunal shall consist of one (1) arbitrator whose appointment as arbitrator shall be agreed by the Parties in writing, or failing such agreement as may be appointed on the request of either Party by the Chairman of the Singapore International Arbitration Centre and in either case, the award of such arbitrator shall be final and binding on the Parties. The arbitration proceedings shall be in the English language. Provided Always [sic] that the [Plaintiff] shall have the sole discretion to commence proceedings in the courts of Singapore and/or any other jurisdiction if the [Plaintiff] deems fit."

On the issue as to whether clause 40.1 is a valid arbitration clause, the Court at paragraphs 48 to 53 held as follows:

- It would appear that cl 40.1 can be constructed as setting out a dual dispute resolution regime;
- It is clear from cl 40.1 that both parties are obligated to have their disputes arbitrated;
- However, the Plaintiff has an option to commence court proceedings;
- Obviously, if the Plaintiff chooses to commence court proceedings for certain matters, the Plaintiff cannot subsequently do a *volte-face* and have the same matters arbitrated;
- Once a claim had been sent for arbitration, the Defendant would be entitled to raise all defences that it possessed, including the defence of set-off. Similarly, it should be the case that once a claim is submitted for litigation, a Defendant is entitled

- to raise all defences, including the defence of set-off; and
- If a counterclaim is not a set-off (and hence, not a defence), it does not follow that the Plaintiff, by choosing to commence court proceedings, has waived its right to have a claim raised as a counterclaim arbitrated.

On the other issue as to whether a mere reference to the Arbitration Rules of the SIAC would make the IAA applicable when the arbitration is in essence a domestic arbitration, it was held by the Court at paragraph 45 that the applicable law is indeed the IAA.

Stay of arbitration proceedings

***Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] SGHC 1 [Judith Prakash J]**

The application before the Court was by the Plaintiff for a stay of arbitration proceedings commenced by the Defendant and for an order that all disputes be settled by arbitration in Thailand in accordance with the Arbitration Institute of the Ministry of Justice, Thailand. The Plaintiff failed in their application.

The Court held at paragraph 20 that the Plaintiffs were estopped from asserting that the proper dispute resolution procedure is not arbitration in Singapore under the Rules of Arbitration of ICC as commenced by the Defendant based on clause 19 of the agreement between the Plaintiff and the Defendant, but that arbitration should be commenced in accordance with clause 20 which was referred to in the agreement. However, the defendants were not given a copy of clause 20. The Court had earlier established that (paragraphs 8 to 22):

The Plaintiff's conduct, taken as a whole, constituted a representation that the operative mechanism for dispute resolution was arbitration in Singapore under the Rules of Arbitration of the ICC. In particular, the Plaintiff's letter dated 26 December 2007 constituted a written representation to the same effect. The Plaintiff had not only failed to provide the Defendant with the General Conditions (which contained clause 20, but it had also provided the Defendant with an invalid version of the General Conditions (containing clause 19). Thus, though the Plaintiff had a continuing duty to correct the Defendant's erroneous view as to the applicable dispute resolution mechanism, it failed to do so for more than four years. The Plaintiff's own letter instructed the Defendant to resolve the dispute in relation to the Project by reference to arbitration in Singapore under the Rules of Arbitration of the ICC!

For an estoppel by representation to arise, it must be demonstrated that a party was encouraged to act to his detriment by the representation such that it would be unconscionable for the party making the representation to insist upon his strict legal rights (see *Keppel Tatlee Bank Ltd v Teck Koon Investment Pte Ltd* [2000] 2 SLR 366 at [22]). The element of reliance requires that the representation cause the relevant conduct (see *Spencer Bower* at 90). The Defendant requested arbitration from the ICC International Court of Arbitration in accordance with the dispute resolution mechanism specified both in clause 19 as well as the Plaintiff's letter. Up to the time of hearing, the Defendant had paid an aggregate of US\$30,000 to the ICC as advance for costs for the said arbitration. The Defendant was therefore liable to suffer detriment (monetary loss and time wasted) if the Plaintiff was allowed to back away from its representation. Further, time and expense would also

be wasted if the defendant was required to institute arbitration proceedings in Thailand instead.

Interpretation of arbitration clause

***NCC International AB v Land Transport Authority of Singapore* [2008] SGHC 186 [Tay Yong Kwang J]**

The application before the Court was for several declarations concerning the conduct of the arbitration. The first issue required the court to determine from the arbitration clause 71.4 whether parties had agreed to the appointment of one arbitrator. The second issue required the Court to determine whether pursuant to the incorporation of Rule 5.1 of the SIAC Rules, it was within the power of the Registrar of the SIAC to appoint a tribunal of three members as provided by the said arbitration clause even if the parties had [subsequently?] agreed to the appointment of one arbitrator. Clause 71.4 is reproduced below for ease of reference.

"In the event that mediation is unsuccessful, the dispute or difference between the parties shall be referred to an Arbitrator to be agreed upon between the parties, or failing agreement, to be nominated on the application of either party by the Chairman of the Singapore International Arbitration Centre (SIAC) and any such reference shall be a submission on arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force which rules are deemed to be incorporated by reference to this clause."

It is not in dispute that the relevant SIAC Rules in force at the time of commencement of the arbitration proceedings were the 3rd Edition of the said Rules dated 1 July 2007.

In establishing its jurisdiction over the matter, the Court held at paragraph 34 that it does have the necessary jurisdiction:

"...it is not disputed that Rule 35.2 of the SIAC Rules does not oust the court's jurisdiction to construe an agreement between the parties. As Rule 5.1 has been incorporated into the contract, it is open to both parties to seek the court's construction of Rule 5.1 as one of the terms of the contract."

The Court then held at paragraph 35 that the parties had indeed agreed to the reliance on one arbitrator. The Court relied on the following:

- The words "an Arbitrator" in clause 71.4 are no different from "a single/sole arbitrator" or "one arbitrator";
- If the parties had meant "a tribunal," with the number of arbitrators remaining to be agreed, they would have simply stated so;
- The context in which the words appear certainly does not require that the singular embrace the plural; and
- Tay J found no ambiguity in the said words and that therefore there was no question of applying the *contra proferentum* rule against the Defendant as the drafter of the contract.

As regards the effect of Rule 5.1, the Court then held at paragraph 43 that, "Rule 5.1 has no application where the parties have agreed on the number of arbitrators." The learned Judge proceeded to set out the reasons for his decision (paragraphs 44 and 45):

□ It was not “within the parties’ contemplation that their agreement in clause 71.4 on a sole arbitrator would be subject to the power of the Registrar of the SIAC to direct otherwise.” This was because, “When [the contract] was made between the parties, Rule 6 of the 1997 SIAC Rules was in force and, as mentioned earlier, there was no need to even refer to it at that time as it was not applicable to the parties who had already agreed on one arbitrator in the event of a dispute. Rule 5.1, as the successor rule to the said Rule 6, if read in the way the plaintiff has contended, would not merely have provided the procedure for the arbitration. It would alter quite fundamentally the parties’ agreement on the arbitral tribunal.”

The agreement of the parties to incorporate the SIAC Rules, even though stated to be those for the time being in force, does not permit those rules to override the express term of the arbitration clause (on a sole arbitrator) except as expressly assented to, and, in the Court’s view, clause 71.4 did not show that the parties had agreed to allow the SIAC Rules to take precedence over their agreement. Reading clause 71.4 and Rule 5.1 together (the latter in the manner interpreted by the Plaintiff) in a commercially sensible way, the Court held that clause 71.4 took precedence over and overrode Rule 5.1.

Confidentiality

International Coal Pte Ltd v Kristle Trading Ltd and Another and Another Suit [2008] SGHC 182 [Lai Siu Chiu J]

There were several issues brought before the court. However, only the issue of confidentiality is dealt with here. For ease of reference, the applicable Rule 34.6 of the Rules of Arbitration of SIAC 1997 is reproduced below.

“The parties and the Tribunal shall at all times treat all matters relating to the proceedings (including the existence of the proceedings) and the Award as confidential. A party or any arbitrator shall not, without the prior written consent of the other party or the parties as the case may be, disclose to a third party any such matter except:

(a) for the purpose of making an application to any competent court;

(b) for the purpose of making an application to the courts of any State to enforce the Award;

(c) pursuant to the order of a court of competent jurisdiction;

(d) in compliance with the provisions of the laws of any State which is binding on the party making the disclosure; or

(e) in compliance with the request or requirement of any regulatory body or other authority which, if not binding, nonetheless would be observed customarily by the party making the disclosure.”

It was held by the Court at paragraphs 82 and 83 that, “As a matter of law, an obligation of confidentiality is to be implied in arbitration proceedings due to the private nature of such proceedings” but, “it is the exceptions to the duty of confidentiality both under common law and under the Confidentiality Rule that give rise to controversy.”

The following principles were also relied on by the court (paragraphs 84, 85 and 102):

- There should be no generalisations of what the duty of confidentiality encompassed as each case should be evaluated in the context of its circumstances;
- A distinction has to be drawn between different types of confidentiality attaching to different types of documents;
- Arbitration awards were also to be treated differently from the materials used or disclosed in the course of arbitration proceedings;

Once the award was registered as a Singapore judgment, it entered the realm of the public domain and no privacy can attach to enforcement proceedings attendant on the judgment. Coupled with the fact that the award is now a judgment, any confidentiality that attached to the arbitration and/or the award had been removed by the Plaintiffs’ own action in instituting these proceedings and making the arbitration and the award a matter of public record. The Plaintiff chose to sue in Singapore and they must live with the publicity, if any, attendant on law suits in Singapore.

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