SINGAPORE INSTITUTE OF ARBITRATORS

NEWSLETTER

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COUNCIL – 2009/2010

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VIEWPOINT

THE PRESIDENT'S COLUMN

As we approach the 4th quarter of the year and although there are green shoots to be seen, we are not out of the woods yet, so said the economists. Commercial disputes have been on the rise as we continue to be plagued by the financial gloom. From the perspective of the arbitration community, one positive development of the financial tsunami seems to be a growing awareness of the use of arbitration as an alternative means to resolve commercial disputes.

That said, the Institute will continue its drive to promote arbitration from the standpoint of arbitrators, counsel and end-users. The success of this lies in training and that is something the Institute will conscientiously pursue through its running of courses and seminars, strategic collaborations with institutions and organizations and continual participation in business initiatives to promote a better understanding of arbitration alongside other dispute resolution methods.

Collaboration with the Singapore Mediation Centre (SMC) and the Singapore Infocomm Technology Federation (SiTF)

This leads me to announce our initiative to provide in collaboration with the Singapore Mediation Centre (SMC) a mediation-arbitration framework for members of the Singapore Infocomm Technology Federation (SiTF). We are in the midst of finalizing a Memorandum of Understanding with SMC and SiTF, an ADR scheme which will serve to provide members of SiTF an avenue to resolve disputes quickly and in a cost-effective manner. This initiative is driven by the Scheme Arbitrations Committee. The scheme is customized to the needs of IT professionals. This is one initiative that is introduced to the marketplace in the hope that more industry players will forge strategic alliances with the Institute as they witness and experience the benefits of ADR. At the same time, it provides opportunities for our members to be appointed as arbitrators under this arrangement.

Collaboration with the Singapore Commodity Exchange Limited (SICOM)

Members would also be pleased to know that the Singapore Commodity Exchange Limited (SICOM) had invited the Institute to submit a list of legally qualified arbitrators for admission to SICOM's Panel of Arbitrators for its scheme arbitration for rubber contracts disputes. In this regard, legally qualified professionals of the SIArb Panel of Arbitrators (Primary) with areas of specialization in international trade and maritime law have been invited to submit their names for nomination to SICOM for consideration for admission to SICOM's panel.

Continued from page 1

SIArb Arbitration Bar Committee

At last year's Annual Dinner, his Honour Justice V K Rajah suggested that the Institute consider setting up an Arbitration Bar Committee as a vehicle for formal feedback to the judiciary concerns facing practitioners of arbitration. Taking up the honourable judge's suggestion, the Arbitration Bar Committee has now been formed and I am pleased to announce its launch with the Inaugural Commercial Arbitration Symposium event scheduled for 3 September 2009. This symposium serves as an interactive forum for participants to discuss current issues and developments in the field of commercial arbitration in an informal setting under chairmanship of several experienced arbitrators and practitioners. The topics that will be discussed at the symposium are "The Tribunal – Jurisdiction, Power and Duties", "The Arbitration – Conduct, Practice and Procedures" and "The Courts – Role, Support and Enforcement". We are honoured to have Professor Lawrence Boo, Mr. Philip Jeyaretnam SC, Mr. Christopher Lau SC, Professor Michael Pryles, Mr. Sundaresh Menon SC and Mr. Chelva Rajah SC participating as Co-Chairs at the symposium. I am sure that participants will have a fruitful free-flowing discussion on these issues under the expert guidance of the Co-chairs.

The Regional Arbitral Institutes Forum (RAIF)

I am proud to announce that at the 3rd Regional Arbitral Institutes Forum (RAIF) Conference held in Hong Kong on 16 June 2009, SIArb was unanimously elected to be the permanent secretariat for RAIF. As the permanent secretariat, SIArb will be co-ordinating the activities of RAIF. The annual conference will continue to be rotated among member countries with the conference secretariat from the host country. In this regard, the Malaysian Institute of Arbitrators (MIArb) has been voted to host the 4th RAIF Conference in Malaysia next year. At the same time, the RAIF website will be formally launched at the conference. The website will provide a single gateway portal to all member institutes' websites.

The RAIF serves as an excellent platform to promote arbitration with its common objectives at regional levels. I look forward to seeing positive growth in the grouping as we drive our initiatives for greater co-operation among member institutes.

Conclusion

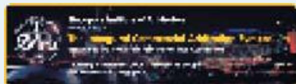
Going forward, I am happy to announce that after the 28th Annual General Meeting held on 31 July 2009, the new council for 2009/2010 are:

President	: Mr. Johnny Tan Cheng Hye
Vice President	: Mr. Mohan Pillay
Hon. Secretary	: Mr. Yang Yung Chong
Hon. Treasurer	: Mr. Chan Leng Sun
Imm. Past President	: Mr. Raymond Chan
Council Members	: Mr. Andrew Chan Chee Yin
	: Mr. Edwin Lee Peng Khoon
	: Ms. Audrey Perez
	: Mr. Govind Asokan
	: Dr. Chris Vickery
	: Mr. Anil Changaroth
	: Mr. Mark Errington (co-opted)

To the outgoing council members, I thank you for your contributions and hope that you will continue to support the institute. To the newly elected council members, I look forward to working with you. To all members of the institute, I thank you for your continued support and look forward to serving you better.

Johnny Tan Cheng Hye PBM
President

The Inaugural Commercial Arbitration Symposium – Thursday, 3 September 2009



The Singapore Institute of Arbitrators is proud to present "The Inaugural Commercial Arbitration Symposium" on Thursday, 3rd September 2009 from 9.00 a.m. to 2.00 p.m. at Marina Mandarin, Singapore.

Organised by the SIArb Arbitration Bar Committee which was formed in November 2008 to represent the interests and concerns of Institute members engaged as counsel in arbitrations, or arbitration related proceedings before the Courts, this Inaugural Symposium provides a distinctive and interactive forum for participants to discuss current issues and developments in the field of commercial arbitration. There are no set speakers or speeches. Participants will be invited to submit topics for discussion in advance of the Symposium. The topics will be grouped into themes and allocated to one of the three working sessions, at which participants will be invited to introduce their topic. The topic is then presented for discussion, under the expert chairmanship of the Co-Chairs. The objective is to generate a free-flowing discussion of current issues in commercial arbitration practice guided by the Co-Chairs.

There are limited places available for this Symposium so as to maintain the efficiency of the format, and preserve the quality of the discussion. We are honoured to present our line-up of Co-Chairs for the 3 working sessions, as follows:

1. Session 1 – Mr. Chelva Rajah SC and Mr. Christopher Lau SC
2. Session 2 – Professor Lawrence Boo and Mr. Philip Jeyaretnam SC
3. Session 3 – Professor Michael Pryles and Mr. Sundaresh Menon SC

For any enquiries on registration, please contact the Symposium Secretariat at Tel: +65 63296496 or Email: siarb@intellitrain.biz. Members are strongly encouraged to participate in this enriching event.

Announcements

UPDATES & UPCOMING EVENTS

1. "Issues Concerning Costs In Construction Arbitrations" by Mr. Naresh Mahtani on 28 July 2009.
2. Annual General Meeting by SIArb on 31 July 2009.
3. Fellowship Assessment Course by SIArb on 14 August, 21 August, 22 August and 24 August 2009.
4. "The Inaugural Commercial Arbitration Symposium" by SIArb Arbitration Bar on 3 September 2009.
5. "Ten Questions Not To Ask In Cross Examination In Contractual Disputes" by Mr. Michael Hwang, S.C. on 10 September 2009.
6. "Multi-Contract Arbitrations" by Mr Alastair Henderson on 8 October 2009.
7. Annual Dinner by SIArb on 21 October 2009.
8. International Entry Course by SIArb on 23 October, 24 October and 31 October 2009.

New members

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

FELLOWS

1. Adrienne Kouwenhoven
2. Anne Goh
3. Ben Giaretta
4. Capt Julian CP Brown
5. Chen Guang Feng
6. Chong Yee Leong
7. Gombrii Karl-Johan
8. Lee Chye Kim
9. Madusoodanan J Pillai
10. Michael Tselentis Q.C., S.C.
11. Ng Yuen
12. Rasa Inpakumar Kanagaratnam
13. Stuart Isaacs, QC
14. Teng Sor Hoong Iris

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2. Lee Wei Yuen Arvin

JUSTICE DENIED? THE RULE ON EXHAUSTION OF LOCAL REMEDIES AND ICSID ARBITRATIONS

By Vikram Nair, Associate with Norton Rose (Asia) LLP

1. The story of foreign individuals and entities suffering at the hands of host states is probably as old as civilization. In Tudor England, when King Henry VIII fell out with the Pope and the Roman Catholic Church, he proceeded to seize much of the Church's land and property in his territory. In the 20th Century, following revolutions in Cuba and Iran, US investments in these countries faced much publicized expropriation and destruction.
2. Under customary international law, a foreign investor who suffered mistreatment at the hands of a host state would first be expected to seek all remedies available within the host state before seeking diplomatic protection from his own state if his grievance remains unresolved.
3. This rule, known as the rule on exhaustion of local remedies is captured in Article 44(b) of the International Law Commission's Articles of State Responsibility:-

   "The responsibility of a State may not be invoked if:

   …

   (b) the claim is one to which and rule of exhaustion of local remedies applies and any available and effective local remedy has not been exercised."
4. An important exception to this principle has since been developed in the last century in various multilateral and bilateral investment treaties ("MIT"s and "BIT"s respectively). For example, in relation to disputes between investors and the host nation the Singapore-Indonesia BIT provides:

   "2. In the event that such a dispute cannot be settled within six months, either party to the dispute may, in accordance with the laws and regulations of the Contracting Party in whose territory the investment was made, submit the dispute to the competent court of that Contracting Party.

   3. If any dispute cannot be settled as specified in paragraph 1 of this Article within six months, it may be submitted to an ad hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedures specified in paragraph 2 of this Article."[1]

   (Emphasis in bold ours)
5. Many MITs and BITs have similar provisions that permit investors to commence action directly against host states in the event of a dispute that amounts to a breach of the treaty.[2]
6. On its face, this provision not only creates an exception to the customary rule on exhaustion of local remedies, but in fact provides investors with a 'fork in the road', requiring them to choose between pursuing local remedies or international arbitration against the host state. The implication is that an investor that chooses to submit the dispute to a local court of the host state would not be able to subsequently submit the dispute for arbitration against the host state.
7. However, there is one important ICSID decision that suggests the rule may be more complex, especially if the organ that commits the wrongful act is a court of the host state. In this situation, the investor may be required to exhaust the judicial process in the host state before commencing international arbitration, notwithstanding a 'fork in the road' provision in the relevant BIT or MIT.

The Loewen Decision[3]

8. The story began in Mississippi. The Loewen Group Inc ("Loewen") was a Canadian operator of funeral parlours founded by Mr Raymond Loewen. It entered into various agreements with companies owned by Mr Jeremiah O'Keefe ("O'Keefe") and his son, who were operators of funeral parlours in Mississippi. These contracts included three contracts which Loewen eventually breached which were valued at about US$ 980,000, and involved the exchange of two funeral homes said to be worth US$2.5 million for a Loewen insurance company worth around US$ 4 million.
9. O'Keefe sued Loewen in the Mississippi court and won an award of $500 million, including $75 million for emotional distress and $400 million in punitive damages. The verdict was the outcome of a 7 week trial, in which, according to Loewen, the trial judge repeatedly allowed O'Keefe's attorney's to make extensive and highly prejudicial references to[4]:-
   (a) Loewen's foreign nationality which was contrasted to O'Keefe's Mississippi roots;
   (b) Race-based distinctions between O'Keefe and Loewen;
   (c) Class based distinctions between Loewen (which O'Keefe's counsel portrayed as large wealthy corporations) and O'Keefe (who was portrayed as running family owned businesses); and
   (d) After permitting these references, the trial judge refused to give an instruction to the jury stating clearly that nationality-based, racial and class-based discrimination was impermissible.
10. Loewen sought to appeal the $500 million verdict and judgement (arising from a contractual dispute that, by O'Keefe's admission, could not have exceeded US$ 4 million) but were required by Mississippi law to post a bond worth 125% of the judgment or US$ 625 million in order to stay the execution of the decision.
11. The bond could have been dispensed with for good cause, but the Mississippi Supreme Court, on appeal, refused to dispense with the requirement for the bond to be posted within 7 days, failing which it would face immediate execution of judgment.
12. On 29 January 1996, faced with the threat of execution against their assets the next day, Loewen, under what it described as extreme duress, entered into a settlement with O'Keefe for US$ 175 million.[5]
13. The North-Atlantic Free Trade Agreement ("NAFTA"), a MIT between Canada, the USA and Mexico, was in force at the time. Loewen commenced an ICSID arbitration and alleged breaches of NAFTA Articles 1102, 1105 and 1110. It alleged a failure by the USA to, inter alia, provide investors of another party with treatment in accordance with international law, including the fair and equitable treatment and full protection and security.[6]
14. The case was heard before a distinguished tribunal. The Chair was Sir Anthony Mason (former Chief Justice of Australia) and the members were Lord Mustill (former

Continued on page 5

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Lord of Appeal in Ordinary in England) and Judge Abner J Mikva (former Chief Judge of United States Court of Appeals for the District of Columbia Circuit).

15. The tribunal found there were serious breaches of due process against Loewen by the State of Mississippi and criticized in detail the conduct of the trial[7] and also found that the award of damages of $500 million was excessive and grossly disproportionate to any harm that O'Keefe may have suffered[8]. The Tribunal's evaluation of the trial was:

    "By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due."[9]

16. However, the tribunal nonetheless dismissed Loewen's claim because, inter alia, Loewen could not argue that it was denied justice because it had not exhausted all available local remedies, namely, an appeal for civil review before the Supreme Court[10].

17. This was notwithstanding Article 1121(1)(b) of NAFTA, which appeared to be a 'fork in the road' provision that provided, in relation to any claim of a breach of Article 1110 of NAFTA:

    "the investor and the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116".[11]

    (Emphasis in bold ours)

18. Loewen argued that his provision required it to give up its claims before local tribunals and courts if it wished to pursue international arbitration and it therefore could not be expected to exhaust local remedies.

19. The tribunal did not explore the full meaning or implication of this 'fork in the road' provision, but instead dismissed it as follows:

    "Although the precise purpose of NAFTA Article 1121 is not altogether clear, it requires a waiver of domestic proceedings as a condition of making a claim to a NAFTA tribunal. Professor Greenwood and Sir Robert Jennings agree that Article 1121 is "not about the local remedies rule.""

20. The tribunal appeared to have been primarily persuaded by an ingenious argument by counsel for the US that in the case where the internationally wrongful act was committed by the judiciary, it would be wrong to hold that a state had violated international law until the judicial process had been exhausted.[12]

21. The duty imposed on a state is to provide a fair and equitable system of justice and a state cannot be said to have breached his duty at an international level unless the decision in question was a decision of a court of last resort. An aberrant decision by an official lower in the hierarchy which is capable of being reconsidered, does not itself amount to a breach of international law.[13]

22. The tribunal appeared to agree with the argument that there were two distinct rules that required the exhaustion of local remedies. First, there was a substantive requirement of finality, meaning that the decision in question must be a final one before state responsibility is triggered. Second, there was a procedural requirement under international law that required local remedies to be exhausted before a state may exercise local remedies.[14]

23. Applying this, the tribunal was of the view that the US was not internationally responsible for a breach of international law by the Mississippi Court because it was not a decision of a final court:-

    "...It would be very strange indeed if sub silentio the international rule [on exhaustion of local remedies] were to be swept away. And it would be very strange if a State were to be confronted with liability for breach of international law committed by it magistrate or low-ranking judicial officer when domestic avenues of appeal are not pursued, let alone exhausted. If Article 1121 were to have that effect, it would encourage resort to NAFTA tribunals rather than resort to the appellate courts and review processes of the Host Sate, an outcome which would seem surprising, having regard to the sophisticated legal systems of the NAFTA parties. Such an outcome would have the effect of making a State potentially liable for NAFTA violations when domestic appeal or review, if pursued, might have avoided liability on the part of the State."[15]

24. The result of this decision was that Loewen's claim was dismissed, notwithstanding the tribunal's view that it had suffered a denial of justice by the Mississippi Court, because it had failed to exhaust local remedies.

Implications of the Loewen Decision

25. The Loewen decision creates serious practical difficulties for potential claimants.

26. The distinction it drew between the procedural requirement to exhaust local remedies and the substantive requirement for finality of a decision before international responsibility is a broad one and it is an open question as to whether it is only confined to judicial decisions.

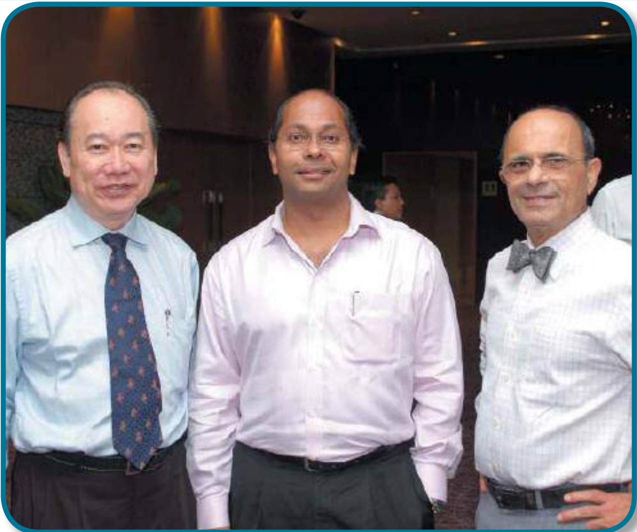
27. For example, if a local land authority seizes a foreign investor's factory but the legislation in question provides that an appeal is available to the local court, would the investor be required to go before the local court before the decision can be said to be a final decision of the State?

28. If the Claimant decides to pursue the local remedies in the court, then would the Claimant be open to attack in a subsequent arbitrations where the BITs have 'fork in the road provisions'[16] that it had chosen to pursue its remedies in local courts and the option for international arbitration is no longer available?

29. Essentially, the foreign investor faces a 'Catch 22' situation. If it pursues local remedies, its claim in international arbitration may be dismissed on grounds that it elected local remedies over international arbitration in the 'fork in the road'. On the other hand, if it fails to pursue local remedies, its claim may be dismissed because it would be wrong to treat the decision of whatever authority it is appealing against as a final decision.

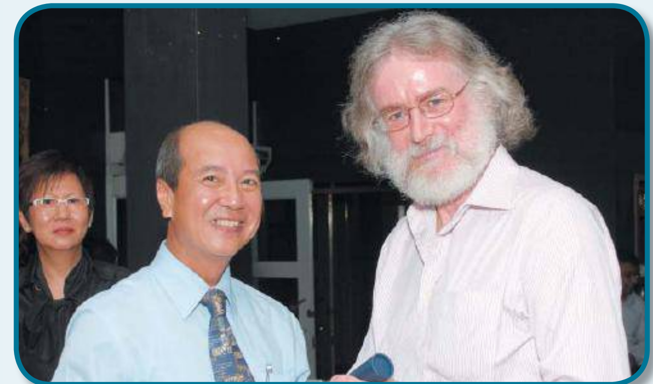
[1]Article IX of Singapore-Indonesia BIT • [2]This would also not have been permissible under customary international law as private individuals (including corporate persons) have no 'personality' under international law and would have to rely on their own states to take up their actions by exercise of diplomatic protection • [3]Loewen Group Inc v United States of America (2003) ICSID Case No. ARB (AF)/98/3 ("The Loewen Decision") • [4]Para 4 of the Loewen Decision • [5]Para 7 of the Loewen Decision • [6]Paras 124 to 141 of the Loewen Decision • [7]Paras 54 to 103 of the Loewen Decision • [8]Paras 104 to 114 of the Loewen Decision • [9]Para 119 of the Loewen Decision • [10]Para 217 of the Loewen Decision • [11]Para 145 of the Loewen Decision • [12]Paras 142 to 164 of the Loewen Decision • [13]Para 153 of the Loewen Decision • [14]Para 143 of the Loewen Decision • [15]Para 162 of the Loewen Decision • [16]See, for example Article IX (2) of Singapore-Indonesia BIT

"Impact Of Insolvency On Arbitration"
on 13 May 2009



"Members' Nite"

on 28 May 2009



The 3rd Regional Arbitral Institutes Forum (RAIF) Conference Successfully Held on 16 June 2009 in Hong Kong

The Regional Arbitral Institutes Forum (RAIF) had successfully held the 3rd RAIF Conference in Hong Kong on 16 June 2009 at the JW Marriott Hotel, with the Hong Kong Institute of Arbitrators (HKIArb) being the hosting institute.

Following the successes in the 1st and 2nd RAIF Conferences in Singapore and Brunei, this year's Conference was extensively patronized by the RAIF members and also key arbitration bodies in the Region. It had definitely provided a unique platform for the participants to update and keep abreast of ADR development and challenges among the Region.

The Conference began with the Opening Remarks by Mr Russell Coleman SC, President of the HKIArb. It was then followed by the Keynote Address presented by the Honourable Mr Justice Reyes from the High Court of Hong Kong. The remarkable Luncheon Guest-of-Honour Speech delivered by Mr Wong Yan Lung SC JP, Secretary for Justice of Hong Kong, addressing the role and importance of ADR development in Hong Kong and the Region as well as the conditions for a jurisdiction to develop as a desirable place of arbitration was another highlight of the event. The views from the distinguished speakers and international delegates on the panel sessions, such as "Regional Arbitration Updates – Perspectives from Users and Practitioners", "Court Intervention in International Arbitration – A Country Report", "International Arbitration after the Financial Tsunami – Problems & Prospects", etc.. had definitely provided ample and fruitful thoughts for all the participants. SIArb Vice President, Mr. Mohan Pillay delivered a paper on "Judicial Approaches to Interim Measures – Trends & Development". Both Mr. Pillay and Mr. Johnny Tan (President) represented the Singapore Institute of Arbitrators at the Conference.

The Conference ended with the fantastic Conference Dinner. Apart from being a good time for networking, it had also left the participants, especially those non-locals, an exceptional memory with the amazing Face Changing Performance which is a renowned and ancient Chinese opera.

Looking forward, the Malaysia Institute of Arbitrators (MIArb) was announced at the Conference Dinner to be the next hosting institute of the 4th RAIF Conference in Malaysia. All RAIF members look forward to next year's Conference which will surely be another successful one.

Recent Developments in Arbitration Case Law

By Dr. Philip Chan Chuen Fye

In this paper, three cases are examined with one from the Court of Appeal while two are from the High Court. The case from the Court of Appeal, Insigma, is important to Singapore's position as an arbitration hub as the decision appears to allow the use of one arbitral institute's arbitration rules by another even though the rules had prescribed not such procedures but the involvement of prescribed entities that are unique to the particular arbitral institution's structure. The reason why it is said that "the decision appears to allow" is because in the words of the Court of Appeal, the crucial issues not argued out are whether:

> (a) in international arbitration, parties must opt either for an institutional arbitration (where the rules of that institution apply) or a non-institutional arbitration (where the parties make their own rules or, in the absence of such rules, the arbitrators make their own rules); or
> (b) it is inherent in the nature of arbitration that one institution (such as the SIAC or the ICC) may not administer an arbitration applying the rules of another institution. [see paragraph 35]

Another case which could boost the image of Singapore as an arbitration hub is the case from the High Court, Lanco Industries. In this case, the court decided to apply the Court Rules to an application for security of costs with regards to a foreign plaintiff involved in an application that was in support of an arbitration differently from what the court would have done in a non-arbitration related case.

The other case examined in this issue is the case of Merrill Lynch Pierce from the High Court. This case is instructive in that it covers the situation where the court rarely holds that there is no dispute between the parties because of the evidence showing the admission of liability. The court had also to decide whether a mere refusal to make payment in a contract could constitute a dispute.

Case #1 – Insigma Technology Co Ltd v Alstom Technology Ltd [2009] SGCA 24 [Andrew Phang Boon Leong JA, Chan Sek Keong CJ, V K Rajah JA]

This case involved an appeal against the decision of the High Court which dismissed the application by Insigma to set aside the award of the arbitral tribunal on the grounds, inter alia, that the arbitration agreement between the parties was inoperative for uncertainty. According to the Court of Appeal at paragraph 1, it involved, "the novel and important legal issue of whether an arbitration agreement may validly provide for one arbitral institution to administer an arbitration under the rules of another arbitral institution". Only this point will be examined here.

The arbitration agreement found in Art 18(c) of the Licence Agreement entered into between the parties is now reproduced below for ease of reference.

> Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English …

Essentially, SIAC is required to administer the arbitration as though it has the structure of the ICC which the SIAC was prepared to do by agreeing as set out below.

> For this purpose, we propose that the following persons undertake the respective roles under the ICC Rules:
> SIAC Secretariat = ICC Secretariat
> SIAC Registrar = ICC Secretary-General
> SIAC Board of Directors = ICC Court

The Court of Appeal affirmed the decision of the High Court setting out the points in which the Court of Appeal is in agreement with.

> (a) The parties had not bargained for an ICC institutional arbitration but for a hybrid ad hoc arbitration to be administered by the SIAC, applying the ICC Rules only and not the SIAC Rules.
> (b) In principle, so long as no significant inconsistency arose, there was no problem with parties agreeing to an arbitration agreement providing for one arbitral institution to administer an ad hoc arbitration under the procedural rules of another arbitral institution.
> (c) The substitution by the SIAC of the various actors (ie, the ICC Secretariat, the ICC Secretary General and the ICC Court) designated under the ICC Rules with the appropriate corresponding actors in the SIAC to perform their respective functions was within the degree of flexibility allowed by the ICC Rules which respected party autonomy. Party autonomy also meant that the parties were free to decide the conduct of the arbitration and the constitution of the arbitral tribunal and such freedom was an inherent feature of arbitration, especially ad hoc arbitration.
> (d) Insigma's earlier position that the SIAC and not the ICC should administer the arbitration contradicted its present position that the ICC and not the SIAC should administer the arbitration (see [7] above).
> (e) Since it was clear and undisputed that the parties intended to resolve their disputes by arbitration and not litigation, all reasonable effort should be made to give effect to the parties' intention to arbitrate in an ad hoc arbitration. Party autonomy should trump institutional self-interest.
> (f) While it was generally not advisable or efficient to adopt or adapt institutional rules such as the ICC Rules for use in an ad hoc arbitration because of the need for an administering body, there was no practical problem nor objection in principle if the parties to the ad hoc arbitration nominated a substitute institution (the SIAC in this case) to administer the arbitration and substituted various organs to carry out similar functions to those carried out by the different parts of the ICC apparatus.

Continued on page 10

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In addition, the Court of appeal declared 6 of their observations.

1. Rule of construction for commercial agreement
2. "principle of effective interpretation"
3. points not considered
4. branding
5. "pathological clause"
6. Singapore policy

- Rule of construction for commercial agreement – … an arbitration agreement (such as the Arbitration Agreement) should be construed like any other form of commercial agreement (see Julian D M Lew QC, Loukas A Mistelis & Stefan M Kröll, Comparative International Commercial Arbitration (Kluwer Law International, 2003) at para 7-60). The fundamental principle of documentary interpretation is to give effect to the intention of the parties as expressed in the document. [see paragraph 30]
- "principle of effective interpretation" – …where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars (see Halsbury's Laws of Singapore, vol 2 (LexisNexis, 2003 Reissue, 2003) at para 20.017) so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party. This approach is similar to the "principle of effective interpretation" in international arbitration law, which was described in Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer Law International, 1999) (Emmanuel Gaillard & John Savage eds) ("Fouchard") [see paragraph 31]
  This approach to the interpretation of an arbitration agreement is necessary to uphold the underlying and fundamental principle of party autonomy as far as possible in the selection of the kind of arbitration and the terms of the arbitration. [see paragraph 34]

- points not considered – Insigma did not argue that:
  (a) in international arbitration, parties must opt either for an institutional arbitration (where the rules of that institution apply) or a non-institutional arbitration (where the parties make their own rules or, in the absence of such rules, the arbitrators make their own rules); or
  (b) it is inherent in the nature of arbitration that one institution (such as the SIAC or the ICC) may not administer an arbitration applying the rules of another institution. [see paragraph 35]
- branding – …branding in the service industry, including that of institutional arbitration. …Both parties agreed to arbitrate their differences subject to the terms of the Arbitration Agreement with knowledge of the quality of an ICC arbitration and also the quality of an SIAC arbitration on the advice of their legal advisers. Therefore, in our view, Insigma's argument that it was receiving an inferior brand of arbitration made no sense. [see paragraph 36]
- "pathological clause" – The concept of a pathological clause fulfils a descriptive function rather than a prescriptive function and labelling or describing a clause as "pathological" does not automatically invalidate it as an agreement. [see paragraph 38]
  The approach of the French courts is thus invariably to interpret pathological arbitration clauses so as to render them effective if at all possible. The same trend can be found in other jurisdictions. [see paragraph 39]
- Singapore policy – Singapore's policy on the role of international commercial arbitration in resolving commercial disputes in Singapore. This is set out in s 15A of the IAA, [see paragraph 41]
  Section 15A implicitly recognises that an arbitral institution may play or be asked to play many roles in a particular arbitration, depending on the parties.
  David St John Sutton, Judith Gill & Matthew Gearing, Russell on Arbitration (Sweet & Maxwell, 23rd Ed, 2007) at para 3-052 also comments on this industry practice:
  (d) supervise the conduct of the arbitration by acting as an administrator for the proceedings.
  The role of the SIAC in the present case is precisely that of an administrator of arbitration proceedings to be conducted under the ICC Rules. [see paragraph 43]

Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd [2009] SGHC 112 [Judith Prakash J]

This case involved Zhong Da and Lanco Industries which are companies incorporated in China and India respectively. [see paragraph 2] in an arbitration between the two parties, Lanco Industries two awards were given in its favour. Zhong Da has applied to the Singapore High Court in the current proceeding to set aside the arbitral award on the ground that the making of the ward was induced or affected by fraud pursuant to section 24 of the International Arbitration Act, (Cap. 143A, 2002 Rev Ed). Lanco Industries in response applied for security for costs which was made pursuant to O. 23, r. 1(1)(a) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). This is reproduced below for ease of reference.

> Security for costs of action, etc. (O. 23, r. 1)
> 1. – (1) Where, on the application of a defendant to an action or other proceeding in the Court, it appears to the Court –
> (a) that the plaintiff is ordinarily resident out of the jurisdiction;
> …
> then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just. [paragraph 8]

As the matter brought before the court is not part of an arbitration proceeding, the applicable procedural rules concerned the conduct of the courts and not the conduct of an arbitration. The court applied the "well known" two-stage test. The first stage involves ascertaining whether the plaintiff is ordinarily resident out of the jurisdiction.

> First, before the court can even consider making such an order, it must be shown that the plaintiff is ordinarily resident out of the jurisdiction. Where the plaintiff is a corporation, the plaintiff is resident in the jurisdiction where its central management and command takes place: see Wishing Star Ltd v Jurong Town Corp, [2004] 1 SLR 1. [paragraph 9]

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In the second stage, the court is empowered with "total discretion to consider all relevant factors, including the fact that the plaintiff is ordinarily out of jurisdiction, in determining whether it is just to order security for costs." [see paragraph 10] the following guide was quoted from the decision of the Court of Appeal in Jurong Town Corp v Wishing Star Ltd, [2004] 2 SLR 427 ("Wishing Star") at paragraph 14:

- it is not an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs.
- The court has a complete discretion in the matter: see Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534 …
- There is no presumption in favour of, or against, a grant. …
- No objective criteria can ever be laid down as to the weight any particular factor should be accorded. It would depend on the fact situation.
- Where the court is of the view that the circumstances are evenly balanced it would ordinarily be just to order security against a foreign plaintiff.

The court noted that the position in Singapore contrasted with the position in England where "…the fact that the claimant is resident outside the jurisdiction is not in any circumstances to be regarded as the ground, or even one ground among others, for ordering security for costs… "under section 38 of the English Arbitration act 1996.[1] [paragraph 11]
:
In Singapore, the court held that the arbitration legislation[2] "has been slightly modified" so that the out-of-the-country residency of the claimant is one of the factors that may affect the decision in any application for security of cost before the arbitral tribunal.

> Lord Mustill's proposition that an arbitral tribunal, in deciding whether to order security for costs, should not consider whether a claimant is ordinarily resident outside the jurisdiction has been slightly modified in relation to arbitration proceedings in Singapore. In such cases, residence outside Singapore is not a sufficient factor for the grant of the security. The legislation does not, however, rule out consideration of residence as one of the factors that may affect the decision. …[paragraph 12]

However, the court held that when the application for security for costs is made in an arbitration related matter, the final rule in Wishing Star do not apply, that is, "where the circumstances are evenly balanced, it would ordinarily be just to dismiss the application for security."

> …in a case where parties seek relief under the IAA the approach to be taken in deciding whether to grant security should be somewhat different from the norm. … in an application under the IAA, it is my view that where the circumstances are evenly balanced, it would ordinarily be just to dismiss the application for security. The fact of the plaintiff's foreign residence will be the pre-condition for invoking the court's powers under O 23 r 1, but that fact on its own will bear little weight, if any, in the second stage process. [paragraph 13]

Merrill Lynch Pierce, Fenner & Smith Inc v Prem Ramchand Harjani and Another [2009] SGHC 133 [Lee Seiu Kin J]

This case involved an appeal against the Assistant Registrar's decision not to grant a stay of proceedings in respect of the plaintiff's claim against the defendant in debt. The issue before the court is whether there is a dispute when there is evidence that the second defendant has admitted liability.

The court noted that there is a double duty of determining: (a) whether there is a dispute; and whether (b) the dispute falls within the terms of the arbitration agreement.

> "While the Court will not determine the merits of the dispute, it is fully entitled to determine if a dispute exists which falls within the terms of the arbitration agreement." [see paragraph 19]

Thus, it is possible to establish that there is no dispute if "there has been a clear and unequivocal admission of liability".

> …it is clear that the Court has jurisdiction to construe the arbitration agreement to discover its full ambit and will determine whether there has been a clear and unequivocal admission of liability – Getwick Engineers Ltd v Pilecon Engineering Ltd [2002] HKCU 1020 ("Getwick") at [23]. A clear and unequivocal admission of liability and quantum can take a variety of forms. [see paragraph 20]

Indeed, the court held that, "mere refusal to pay an amount that is indisputably due will not constitute a dispute".

> A mere refusal to pay an amount that is indisputably due will not constitute a dispute entitling the defaulting party to an arbitration – see London and North Western Railway Co v Jones [1915] 2 KB 35. [see paragraph 21]

Accordingly, the court dismissed the second defendant's application for a stay of court proceeding as there was no dispute in existence.

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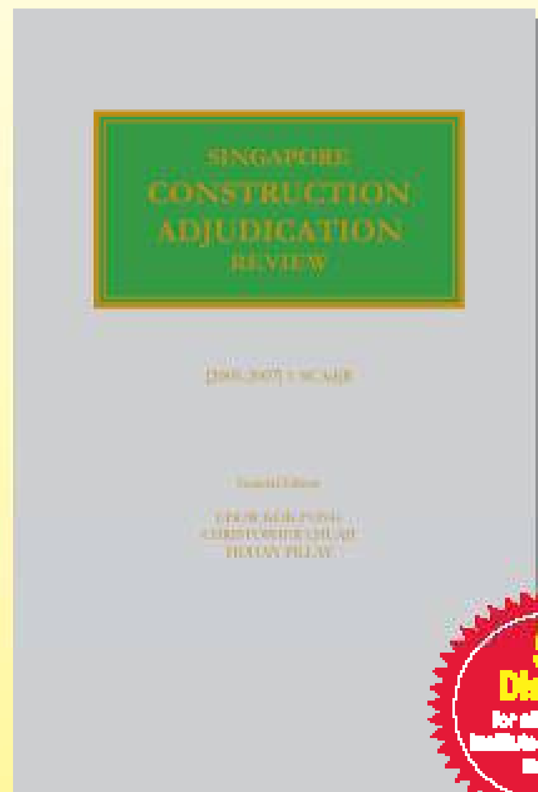

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