SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
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THE PRESIDENT'S COLUMN

The end of 2013 marks a bittersweet moment for the Singapore Institute of Arbitrators.

We enjoyed a number of lively events in the last quarter. I take this opportunity to thank again those volunteers who helped us with these activities.

SIArb conducted its Inaugural Mock Arbitration Workshop in September 2013, based on training videos produced by the Institute of Transnational Arbitration. Much work was done by the SIArb trainers in selecting scenes from the videos which would normally take three days to view, and compressing them into a one-day workshop. The special feature of the SIArb workshop was the live commentary and discussion led by SIArb trainers on issues that were thrown up in the selected scenes. From the reaction and feedback of the participants, this workshop was well received and served its purpose in demonstrating a real world application of arbitration law.

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ANNOUNCEMENTS UPDATES & UPCOMING EVENTS

1. **Relocation Notice: The Institute has relocated its office with effect from 13 December 2013. Please note our updated contact details as follows:**

   Level 3, 146 Robinson Road, Singapore 068909
   Email: secretariat@siarb.org.sg
   Tel: +65-6372 3930 (Main), +65-6372 3931 (Events)
   Fax:+65-3151 5797 (no 6 prefix)
2. **Seminar on Review of Awards – Have We Got the Balance Right? by Professor Lawrence Boo on 20 Feb 2014, 5-8pm**
3. **International Entry Course 2014 on 25 and 26 April with an examination on 28 April 2014**
   Candidates who pass an examination at the end of this Course may apply to be Members of the Institute and use the abbreviation "MSIArb" as part of their credentials.
4. **SIArb Commercial Arbitration Symposium 2014 followed by cocktails on 31 July 2014, 12-8.30pm**
5. **Regional Arbitral Institutes Forum on 1 Aug 2014, 8.30am-6pm**

NEW MEMBERS

The Institute extends a warm welcome to the following new associates, members and fellows

Associate

1. Katherine Mcmenamin

Fellows

1. Lim Soon Hock
2. Pham Linh
3. Goh Heng Soon
4. Ong Choon Khim
5. Yeo Choon Min Christopher
6. Veeda Vashti Maraj
7. Ong Saw Lay
8. Maurice Nhan

Members

1. Eddie Luar
2. Chandra Mohan Rethnam
3. Hoon Shu Mei Sumathi
4. Lim Chin Leng

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The President's Column (Continued)

The Fellowship Assessment Course, a core programme of SIArb, was conducted over three days in October 2013. The results are out. I congratulate those who have passed and look forward to welcoming you into the ranks of Fellows of SIArb.

November was a particularly busy month. On the lighter side, we had our Annual Dinner graced by our Guest-of-Honour, the Honourable Attorney-General, Mr Steven Chong, S.C. Even in such a setting, the Institute does not forget its duty to nourish both body and mind. In line with the cerebral trait of the Institute, Mr Chong gave the guests valued insights on specific problems related to the independence and impartiality of arbitrators. He has kindly agreed to share his speech in this Newsletter.

In November, too, SIArb held its 4th Commercial Arbitration Symposium. Participants enjoyed the usual lively debate on issues raised from the floor. This instalment was special for 3 reasons. First, it was held in the old Parliament Chamber, where Parliament actually sat in the past. Secondly, Mr Michael Hwang, S.C., launched his book, a collection of his essays, the same day. In characteristic generosity, he gave away copies of his book to all participants. Thirdly, the Symposium was followed by a Debate on the very topical question of litigation funding. Coincidentally, the Presiding Commentator of the Debate, Mr Michael Lee of 20 Essex Street was allocated a seat formerly occupied by the most important Mr Lee in the history of Singapore.

SIArb ended November with a seminar on Dispute Boards by a distinguished panel comprising Professor Doug Jones, Mr Graham Euston and Mr Gerlando Butera.

Looking ahead, SIArb is planning to host the Regional Arbitral Institute Forum (RAIF) Conference on 1 August 2014. This is the Conference I mentioned in my last message, which has come back to Singapore, its place of inauguration, after making the circuit among other RAIF members for 6 years. Please save this date.

Given these noteworthy activities and the promise of an excellent 2014, why is the end of 2013 bittersweet?

This is because the last month of 2013 is also the last month that SIArb will operate from Maxwell Chambers. Our Senior Executive Officer, Mr Subramaniam Krishnan, is leaving to pursue his career to new heights elsewhere. We wish him all the best. The Council deliberated and explored a number of options, which included urgent potential replacements or outsourcing. The Council has decided that it is not viable to constantly search for and replace full-time employees. The work of SIArb requires constant attention and continuity. A not-for-profit organisation with modest resources has difficulty competing for and keeping effective talent.

SIArb has therefore engaged the management services of Intellitrain Pte Ltd. As many members know, Intellitrain has already been organising seminars, conferences and other events for SIArb. It will now provide a full suite of services for SIArb. The founders of Intellitrain, Ms June Tan and Mr Gabriel Lim, are known to many of us. The Council looks forward to their energy and professionalism in helping us achieve our goals. We are working to keep the secretariat transition as seamless as possible. For this, I thank in particular Mr Naresh Mahtani, the Honorary Secretary of SIArb who has been working tirelessly on secretariat and administrative matters, almost at the expense of his real job. I must also acknowledge Mr Ganesh Chandru, the SIArb Council member who chairs our IT Committee, for helping to look into the question of IT migration.

Given that we will no longer have a full-time employee, SIArb cannot justify incurring rental costs just for the sake of having a prominent physical office to its name. We will be using the office of Intellitrain. You will see our new address and telecommunication details in this Newsletter. With reluctance, we say goodbye to Maxwell Chambers as a tenant. To Maxwell, we say that you have not, however, seen the last of us in our disparate and individual capacities. We will continue to turn up at your door in furtherance of the practice of arbitration.On behalf of the SIArb Council, I wish you all happy holidays and a fantastic 2014 !

SINGAPORE INSTITUTE OF ARBITRATORS ANNUAL DINNER

6 NOVEMBER 2013

SPEECH BY THE ATTORNEY-GENERAL STEVEN CHONG S.C.

Mr. Chan Leng Sun S.C., President, SIArb,
Distinguished Guests,

I. Introduction

Thank you for inviting me to your Institute's 32nd Anniversary Annual Dinner.

It is good to be back in the company of friends of the Bar and commercial arbitrators. Just for tonight I shall take leave of absence from my new life in crime! I see many familiar faces. I have appeared before some of you while some have appeared before me as arbitrator and recently as Judge. I have also crossed swords with a number of you. However, from the kind invitation to be your guest this evening, I shall take it that "all is forgiven".

The fascinating aspect of commercial arbitration lies in the highly specialised nature of the disputes. You get to acquire knowledge beyond black letter law. From my own experience in commercial arbitration, I was taught how to calculate Weighted Average Cost of Capital (WACC) to cross-examine accounting experts. I learned about Build Own Operate Transfer contracts- BOOT in short. Somehow skills such as WACC and BOOT may come in useful in my new role as the Public Prosecutor.

When Leng Sun extended the invitation to me, I asked him whether I would be required to give an address. He was very fair. He gave me the option of either addressing you or doing a duet with him. I decided that speaking is probably easier. I reserve my limited talent in singing to exceptional charity events. I don't think the audience tonight quite fits the profile of a charity. Besides it will cost you big time for me to sing on stage. The last time I did it, I helped raise more than $300,000!

Tonight, what I would like to say can be encapsulated in two words: "independence" and "impartiality". They are concepts so fundamental and so well-entrenched in dispute resolution that they can traced *through the centuries*, from the ancient days when King Solomon arbitrated between two women, both of whom claimed to be the real mother of a child, to the recent bilateral investment treaty dispute between Argentina and British Gas over gas distribution.

In arbitration, all of us can agree that there is "almost universal consensus"[1] on the general requirements of arbitrator independence and impartiality. I would say that, in Singapore, there is also no doubt that the arbitrator ought to be impartial and indifferent, both as regards the parties and on the issues he is to decide upon. [2]However, the precise application of these essential requirements has attracted much controversy, for instance:

1. If parties agree, can they waive the need for arbitrator's impartiality or independence?

2. If the arbitral rules simply state that the arbitrator shall disclose any circumstance that may give rise to justifiable doubts as to his impartiality or independence, how much should he actually disclose?

3. Is repeat appointment of an arbitrator by the same party or the party's counsel a cause for concern?

From these questions, it should be quite apparent that the practice of impartiality and independence in arbitration is one that is increasingly troubled by diversity. It does not help that, since almost three decades ago, it is not uncommon for counsel to look for an arbitrator "with the maximum predisposition towards [one's client], but with the minimum appearance of bias."[3] Some view this as a disquieting trend, while others regard their ability to select such arbitrators to be value-add service.

Given that the legitimacy of arbitration hinges upon how questions of impartiality and independence will be answered by the arbitration community, I hope to share some of my reflections on this topic tonight.

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II. The question of waiver

Let me start with the issue of waiver.

There are two diametrically opposite positions on whether impartiality is a requirement capable of contracting out by parties to an arbitration.

At one end of the spectrum, the position in the United States has generally been permissive of parties to agree on non-neutral arbitrators.

The reasoning of the US courts is simply premised on a trade-off between impartiality and expertise.[4] The price for having someone who has the expertise to decide the matter can sometimes be the loss of some degree of impartiality because arbitrators, unlike judges, are viewed to be "not apart from but of the marketplace".[5] In this respect, the US courts have upheld arbitrations with "a single arbitrator so closely allied with one of the parties as to be presumed partial to him".[6]

Following from this view, the US courts have held that the requirement of impartiality in the Federal Arbitration Act is only a "presumptive rule".[7] If parties have elected to waive the protection granted to them under the Federal Arbitration Act, it is perfectly sensible, according to US jurisprudence, to give due regard to party autonomy and not allow the parties to subsequently raise a challenge on the ground of evident partiality of the arbitrator.

The UK position is however on the other end of the spectrum. The UK courts have been firm that the arbitrator must remain impartial despite the fact of his appointment by the parties or his contract for services with the parties.

In the recent case of *Jivraj v Hashwani* [2011] UKSC 40, the Supreme Court, in the context of deciding whether arbitrators were employees for the purposes of the UK Employment Equality (Religious or Belief) Regulations, was quick to dispose of an argument that arbitrators are in a position of subordination to the parties. In fact, the Supreme Court held that the contrary applies. [8]As a quasi-judicial adjudicator, the arbitrator is obliged to "rise above the partisan interest of the parties".[9]

On this second view, even though the arbitrator is under a contract with the parties to render services, the services contracted for are "*not* personal services *under the direction of the parties*".[10] My reading of the case is that impartiality[11] is an essential requirement in the UK, and therefore cannot be waived in advance by any party.

I would lean towards this view. It seems to me that arbitrator impartiality and independence remain an important underpinning of the arbitral process. I am not persuaded that the US approach of allowing parties to contract out of arbitrator impartiality should be the approach in Singapore. Without maintaining certain standards of impartiality and independence that all parties should adhere to, "justice" that should have been administered in arbitration as *a system of "private justice"*, might altogether be contracted away. Given that the issue of waiver has yet to be settled in a number of jurisdictions, it will definitely be interesting to see how this area eventually develops.

III. The refining of rules

I press on with the second question, which relates to the arbitral rules on disclosure of conflict of interests. There are two difficulties here.

First, arbitration institutions tend to promulgate broadly-worded rules. There are perhaps good reasons why this is so. Many would argue that in matters such as conflict, it would be imprudent, if not ineffectual, to be overly prescriptive. However, a consequence is that the rules lend little practical guidance on what arbitrators should disclose. For example, Article 4.2A of this Institute's Rules states that an arbitrator's disclosure shall cover "any circumstances likely to give rise to *justifiable doubts* as to his impartiality or independence". Rule 10.4 of SIAC Rules is similarly-worded. Article 11(2) of ICC Rules of Arbitration is somewhat different – it mandates disclosure of "any facts or circumstances which might… *call into question the arbitrator's independence in the eyes of the parties* [or] give rise to *reasonable doubts as to the arbitrator's impartiality"*. None of these rules, by themselves, tells the arbitrator how he should act in the grey areas. Compliance with the rules will in turn depend on the attitude of each arbitrator – whether he is conservative or enterprising. Should he disclose his non-executive directorship with one of the primary competitors to one party to the dispute?[12] His similar ancestry with one party?[13] How about the fact that the arbitrator and counsel shared matriculation at the same law school some twenty years before the start of the arbitration?[14] The answers may not be immediately obvious.

Secondly, if one is to expound in greater detail the duty of disclosure, one will find this to be the subject of great controversy, as is the case with the IBA Guidelines on Conflicts of Interest in International Arbitration. Let me illustrate with section 3.1.3 of the IBA Guidelines. According to this section, the arbitrator who has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or its affiliate should disclose the prior appointments. In *Tidewater Inc. et al v The Bolivarian Republic of Venezuela* (2010) ICSID Case No. ARB/10/5, no such disclosure was made. Much to the vexation of Tidewater, the arbitrator appointed by

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Venezuela and their external counsel, had in fact, been appointed four times by the Venezuela's AG and in three out of these four times, by the external counsel representing Venezuela in the *Tidewater arbitration*. Tidewater sought to disqualify the arbitrator, but its application failed for a variety of reasons including the non-binding nature of the IBA Guidelines.

Without going any further, one can gather that different conclusions have been reached about an arbitrator's disclosure requirements. This is not particularly helpful to an arbitrator who needs to decide, within a short timeframe, what he has to disclose to the parties in a pending case. Even if he refers to case law, his confusion may grow instead of abate; he will find that some decisions have relied on the IBA Guidelines as a ground for decision, whereas others, like the *Tidewater* case, have downplayed its applicability, stating that the guidelines are "*not a binding instrument*".

How then can these arbitrators be guided if case law, rules and guidelines offer little help in relation to the grey areas in practice? At a high level of abstraction, I think we can all agree that arbitrators must uphold the values of "truthfulness, fairness, independence, loyalty, and confidentiality". However, when it comes to practical implementation, it can become rather contentious. Clearly, sound judgment can only be honed with much training, guidance, experience and peer input, so I will urge all arbitrators to collectively deliberate on the issues of conflict and disclosure, and freely share your insights on this matter.

IV. The problem of repeat appointments

I now turn to my third and last question for tonight, which is on repeat appointments.

From the *Tidewater* case, you would have appreciated that repeat appointment of the same arbitrator by one party can have an impact on impartiality, or at least give rise to an appearance of bias. The concern is that an arbitrator who has been continually appointed is likely to be more receptive to the interests of the party who appointed him, and that this receptiveness is concretised in an arbitral award that favours the party who has made the appointment. This problem will be further exacerbated if the pool of arbitrators develops into an Old Boy's network.

Growing the pool of arbitrators

May I share some thoughts on the way forward. For starters, I believe that we should grow our existing pool of arbitrators to give parties more choices in arbitrators. I am aware that this is not a complete solution to the concentration of arbitration cases in the hands of a few arbitrators, especially if parties actively seek partiality in their arbitrators. However, I believe that it would at least ameliorate the situation for parties who are simply constrained in their appointments because, in some cases, they are looking for someone with a narrow field of expertise, and there are limited number of arbitrators who possess it.

To this end, I have made a brief study of the number of arbitrators available at SIAC as well as its caseload in 2012, and compared the figures with that of other arbitral institutes in Asia to see if there is a case for saying that there needs to be more arbitrators in Singapore. My survey of the selected arbitration institutes shows that, yes, Singapore could do with more arbitrators.

Let me first qualify that the numbers I am about to refer to are based on website statistics and have not been independently verified.

In 2012, SIAC had a record high of 235 cases received, for which it had a pool of 358 arbitrators to draw upon. Its ratio of available arbitrators to new cases in 2012 falls far below that of the Korean Commercial Arbitration Board (KCAB), which had 360 cases and an astonishing 1,224 arbitrators, or that of our neighbouring Kuala Lumpur Regional Centre for Arbitration (KLRCA), which had 50 cases and 716 arbitrators.

Now, some of you might say that we should not focus on the number *per se* and that "more" is not necessarily "better" or "better quality". I would readily agree with such a view. That said, we must be mindful that key to a party's decision on arbitration appointment are factors such as the arbitrator's *commercial understanding* of the relevant industry, *knowledge of the applicable law*, and *experience* with the arbitral process. As such, one might find that the list of arbitrators who are actually *suitable* for any particular case is shortened considerably after one takes into account these considerations. And so, all said, I think there is a case to be made that we should be working towards a larger pool of available and actively practising arbitrators in Singapore.

Regardless, I think there is also a need to consider how we can match the growth in the market for arbitration services with a comparable growth in the number of arbitrators. It is undisputed that SIAC is one of the fastest growing arbitral institutions in the world, and so, going forward, it can only be prudent and apt to develop the capacity to meet the already increasing demand. I believe this Institute can complement the growth of SIAC. I note that this Institute has, as one of its objectives, the "provision of training and continuing education of its members". Thus far, this Institute has vigilantly organised seminars

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and conferences on broad spectrum of topics, including changes to the International Arbitration Act, scope of interim relief, and effects of party insolvency on arbitration agreements, all so as to help arbitrators keep abreast of the developments in arbitration law. You have done an excellent work and there is good reason to congratulate yourself on that score. As a premier arbitration hub, we have invested in and have established strong infrastructure and robust hardware.

I have shared tonight about the very real challenges that arbitrators face in the area of arbitrator impartiality and independence. To better prepare and support the Institute's members in the conduct of arbitral proceedings, perhaps this Institute can delve deeper into this area. It is not inconceivable that there exist different kinds of arbitrators, each with a different perception on how arbitration should be conducted, ranging from the arbitrator who does not care which party wins, to the arbitrator who may quite acceptably share the legal or political philosophy of his appointees, and finally, to the arbitrator who is patently an advocate of one party.

Finally, let me say this: the arbitration community in Singapore has done well to position Singapore as a leading arbitration hub not just regionally but internationally as well. Besides the hardware, I believe the software (and here, I am referring to the quality of our arbitrators) is critical for Singapore to maintain our ascendancy in the arbitration space. Impartiality and independence immediately come to mind as key qualities to enhance our software. Whether through additional training, dialogues or developing specific guidelines, arbitrators bear the ultimate responsibility to uphold the integrity of their proceedings, and I think they must fulfill Lord Hewart's pronouncement that "[i]t is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[16]

Thank you for your attention. I hope my address has provided you with some food for thought and that it was not too impolite of me as your guest to speak on a subject which may have the effect of curtailing some potential appointments for you.

[1] Martin F. Gusy, James M. Hosking and Franz T. Schwarz, A Guide to the ICDR International Arbitration Rules (Oxford University Press, 2011) at p 87.
[2] Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd and another [1988] 1 SLR(R) 483 at [65].
[3] Martin Hunter candidly reported doing so in "Ethics of the International Arbitrator" The Journal of the Chartered Institute of Arbitrators (November 1987) at 219.
[4] Merit Insurance Co v Leatherby Insurance Co 714 F.2d 673 at 681 (7th Cir, 1983) per Posner J.
[5] Commonwealth Coatings Corp v Continental Casualty Co 393 U.S. 145 per White J.
[6] Alan Scott Rau, "Integrity in Private Judging" (1997)38 S. Tex. L. Rev. 485 at 511.
[7] Sphere Drake Ins v All American Life Ins 307 F.3d 617 at 620 (2002).
[8] At [41].
[9] At [41], citing K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd [1992] QB 863 at 885.
[10] At [45].
[11] Note that UK has a similar standard as Singapore for the removal of an arbitrator – what must be shown is "justifiable doubts as to his impartiality": section 24(1)(a) of the English Arbitration Act of 1996.
[12] AT&T Corp v Saudi Cable Co [2002] 2 All E.R. 625 (held to be insufficient to lead to a "real danger of bias").
[13] See generally Ilhyung Lee "Practice and Predicament: The Nationality of the International Arbitrator" (2008) 31 Fordham Int'l L.J. 603.
[14] Alpha Projektholding GMBH v Ukraine (2010) ICSID Case No. ARB/07/16 (held that there is no duty to disclose).
[15] Catherine A. Rogers, "Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration" (2001-2002) 23 Mich. J. Int'l L. 341 at 357-8.
[16] King v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256 at 259.

International Arbitration: End-Users' Perspective

Audrey Perez[1] - Head of QSE and Maintenance, Dragages Singapore Pte Ltd

(This is an adaptation of the speech presented at the Inaugural National Arbitration Conference organized by the SIArb on 30 July 2013)

Ladies and gentlemen, I am very honored and privileged to join in this conference and lead this first session. I am very impressed as much and humbled to stand alone, facing judges and more than 80 lawyers and more emotional am I speaking before my International Arbitration teachers, for providing you a feed back on International Arbitration from an end-user's perspective.

To start, I must first ask you to bear with my candid and direct style as that is the only way to be for a Mediterranean, with passion embedded in my DNA! As for the accent, well, it will tell that I am a French working in Singapore for the past 19 years.

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I must confess that I have been very lucky recently and matters have been eased for me here today, as the principle of hearing feed-back from an end-user was very recently and finally made legitimate and loudly across the world, from Singapore to the United Kingdom, by The Honourable the Chief Justice Sundaresh Menon. Nine years ago, my job progression made me discover litigation and arbitration and it has been more than six years that I have started to research on the obvious disconnect I have been feeling and seeing between Construction reality and Construction Law. For this and being in charge of compliance, risk management and disputes resolution in Dragages, I had to and have studied Law, International Arbitration and participated actively in various councils, forums and various committees to realize that this disconnect is in fact an actual daunting gap that will be indeed difficult to bridge[2]. Education was then proposed, to start with, having construction lawyers and non-engineers learning about construction and engineering principles on the one hand and on the other hand, providing an opportunity to Construction practitioners and non-lawyers to learn about Construction Law (the Engineering 101 course was conceived in 2009 and soon after the Construction Law 101 course).

As my search took a turn into International Arbitration, a similar disconnect was found between Arbitration practice and actual end-users' concerns, interests and expectations. As if there was some disconnect between International Arbitration's noble principles and value system and the reality of Arbitration practice.

Again, today, the legitimacy of my presence here as an end-user in this large forum has been specifically set, and you may refer into the following texts, speeches and lectures of the Honourable the Chief Justice Sundaresh Menon, namely:

- The ICCA Congress opening plenary session, June 2012
- Lecture at the School of International Arbitration at Queen Mary, University of London, September 2012
- The SIArb Annual Dinner opening speech, November 2012
- The ICCA Newsletter article, April 2013
- The LSE 4th Debate on 9 May 2013, "*Is self regulation in Arbitration a myth?*", 9 May 2013

As an end user having tasted arbitration in an international organization and in Singapore, hearing His Honour's SIArb Annual Dinner opening speech in November 2012 was such a happy surprise'. It was a demonstration of discernment where for the first time, the end-users' views were voiced out and made legitimate, in putting up a subject of importance and consideration, for International Arbitration's sustainability. His Honour's words revived my hopes of seeing one day end-users being given an opportunity to present their views and being heard in order to initiate a dialogue between the Arbitration community and the users of Arbitration, in an attempt to bridge a gap that has, unfortunately, become daunting, between the original Arbitration purpose and values and its current practice. In his lectures and papers on the subject matter, His Honour describes aptly and with great fairness the actual deep frustrations felt by end-users vis-à-vis International Arbitration's contemporary practice. I invite everyone here to read such papers available on the internet. Allow me here to share with you our – the end-users – concerns briefly:

- Issues of ethics (the ethical conduct of arbitrators) and the accountability of appointing institutions;
- Issues with the conduct of Arbitration itself, the competence and ability of arbitrators to handle arbitrations (with new entrants or restricted groups of arbitrators);
- The issue of new trends in the practice of arbitration such as:
    - Over legalistic[3] arbitrations by arbitrators who are often from a litigation background, unable to structure and control the process and therefore unable to maintain it as a commercial and efficient one.
    - Over legalistic approach by counsels representing parties putting aside or drowning technical matters into unhelpful legal concepts and legal points as, like the arbitrator, they are mostly litigators, lawyers, and they simply cannot look at matters in any other manner.
    - Over legalistic post-award scenarios with a myriad of challenges to arbitration awards and applications to set aside awards in the High Court. Even High Court decisions are appealed more frequently to the Court of Appeal.

In the LSE 4th debate, more elegantly than what I could do here, His Honour describes this situation for the end-users as having to deal with or accept a dramatic change in the International Arbitration environment due to two major facts:

- A dramatic growth of new entrances (new arbitrators).
- A disconnect between the current practice of Arbitration and the original conception of Arbitration, "*a commercial alternative to traditional litigation*". His Honour rightly adds:

    "In the old world, arbitration practitioners shared an implied or tacit understanding of what constitutes an acceptable conduct and held themselves to self

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prescribed standards without the need of express rules or intervention of Court or Tribunals. Challenges against arbitrators were unheard of not because there were no rules but because of this shared value system. And here lies the crux of the problem."

A dispute that is not settled commercially becomes not only the nightmare of the end-user but the worst nightmare of an end-user is to find itself engaged in an uncontrollable process transformed into a legal battle ending in an over legalistic post-award scenario, challenging the award in the Courts, whether it was the arbitrator, counsels or parties' fault. Confidentiality – being the most important aspect of Arbitration to the end-user – is lost and at this stage, nothing is predictable anymore.

To the arbitration-educated end-user, this can be a traumatic nightmare with post traumatic permanent effects, to cite two examples:

- The *VV v. VW*[4] case, where the arbitration resulted in a public legal debate, stretched to deal with whether legal costs were an issue of public policy!
- The *Astro v. PT Ayuna*[5] case, where major law firms, coupled with currently very popular English QCs have debated and are still debating, among many other legal concepts, on whether a letter from a party to another during the early process of the arbitration, disagreeing on the tribunal's jurisdiction, while still agreeing to go through the arbitration process, constituted a waiver or a reservation!

To end-users, *today, indeed, International Arbitration is law without borders*[6] that is very likely to turn matters into an outrageous scenario. This is not an "*icy chill sent in the collaborative spine of the audience*[7]" of this forum and not just another controversy or criticism but simply the candid and plain feed-back from end-users of Arbitration to the contemporary Arbitration community.

Connected and inter-linked issues are:

- The duration and costs of arbitration that Chien Mien will present in a short while;
- The general lack of transparency and accountability of Institutes and arbitrators: who appears in arbitrations, whether as counsel or as arbitrator; I will read to you the words of His Honour even if my talk is turning into a pure plagia, so much of His Honour's words reflect sharply the truth of end-users' frustrations and substance of their current thoughts:

"Arbitration is seen as a big lucrative business by many of its practitioners and perhaps an area of legal practice with some of the brightest prospects. It's law without borders. It will draw many who dream of having the whole world as the field in which to apply their craft."

Another connected issue is the limited choice of arbitrators or unilateral appointments and/or the end-users having no choice but ending with facing a lawyer-arbitrator in most, if not all, cases, while the source of the issues at hand, in construction at least, are always purely technical. The Arbitrator, even being the most competent construction lawyer, would not be able to understand the facts, the engineering principles and the stakes at hand. The fear increased as now Arbitration has become – and it seems accepted by the Arbitration community while it is a heresy not only to the end-users – another litigation forum, but without the Rules of Court. There are many examples and illustrations to this point that I can take from my professional experience heading a dispute resolution department for Dragages, the Maintenance Department (the original department name translated literally from French would be: end-users department or after sales service, while in English, it would be called in contract law terms post-defects liability period defects management. Reputable construction companies look at construction end-users' perception as one of the key aspects managed with good care for a sustainable good reputation in the construction market). Here is one of them. During the procurement stage for a D&B sub-contract of a value of about S$ 35 million, it was agreed that 5 value engineering options would be included in the agreement following the award, the costs of such value engineering options would be deducted as they were confirmed following the various approvals from consultants and authorities. This meant that the D&B Contractor and the D&B Sub-contractor agreed that such technical options leading to multi-million cost savings were technically viable yet the only risk left was the consultants' comments and the authorities' validation. The price was awarded before the options were exercised as the latter had not yet been confirmed. Two months following the award, the D&B Sub-contractor's mother company went into receivership and the local branch sought an amicable termination of the sub-contract and assisted diligently in the assignment of the sub-contract. The dispute arose in relation to the 5 value engineering options as the D&B Sub-contractor refused to take into consideration in the termination and assignment the full contract amount, including the risk of having the 5 options rejected either by the consultants or by the authorities. The D&B Sub-contractor's receivership "*specialist*" even denied the technical validity of the value engineering options despite the many meetings held at all levels. Deep injustice was felt by the D&B Contractor who had no choice but to proceed with arbitration as millions were at stake. The arbitrator designated was an English

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lawyer. Here is a short description of the worst nightmare to D&B contractors and sub-contractors wanting to settle their disputes in Arbitration: (1) The Arbitrator was not technically trained, experienced and qualified to understand the matter. (2) The Arbitrator not residing in Singapore for a fairly long period to have the capacity of understanding the many stakes within the construction sector, the local context and practices in Singapore and the region would never be able to arbitrate fairly and objectively the matter. (3) The lawyers appointed, no matter how brilliant, were even less able to figure out the 5 options' meaning and validity. That was the end-user's worst nightmare: not being able to be understood and/or when matters discussed in Court and/or in Arbitration are disconnected from the technical reality and/or simply having the Judge or the Arbitrator unable to understand and determine fairly and objectively liabilities. In our case here, soon both the D&B Contractor and D&B Sub-contractor agreed that given the nightmare starting in Arbitration, it was still best to settle amicably. With deep regret – and I am the first one to be very sad about it – I have to admit that my bosses were right in saying: The worst amicable settlement is still better than the best arbitration award, at least in some regions and institutions.

I had a dream of a noble value system that I have enjoyed while learning and studying the Law and International Arbitration; yet this dream seems to be of a lost system and yet to be achieved, given the contemporary practice of International Arbitration. I had a dream of competent Arbitrators in the field of the dispute and not just transforming and maintaining International Arbitration into a lawyers' forum. Like judges, Arbitrators should practice Arbitration as a full time job, having sufficient time to practice Arbitration ethically.

So, the response to the questions *Is there a problem? Is the problem actual? Is there a breakdown in the trust in the process or issues of lack of transparency?* The response from the end-users is: *Absolutely yes!* And therefore end-users having tasted contemporary Arbitration will still look at litigation in Court more favorably as the trustable service provider for settling disputes. Having been forced into settling disputes in Arbitration, the end-user has become aware of its practice contemporary transformations and has become very selective while choosing Arbitration Centers and/or Arbitrators.

Is there any need to do something about it? Is there a need for some degree of regulation and standard setting? Our response is: Yes, absolutely!

What form of regulation or intervention might be appropriate? What are the instruments that we might look for? Are we looking at changes of laws allowing more scrutiny? Are we looking for changes in institutional rules for more guidance to all actors intervening in arbitration and not only booklets on arbitrators' book shelves? While the response from the end-users' perspective is yes to all such questions, the latter have yet to be practically addressed in the next step of consciousness, once the Arbitration community and some States have realized that end-users are seriously dissatisfied with the current turn the Arbitration process has taken in the hands of some. Arbitration contemporary practice will have to change, before losing entirely the end-users' trust and therefore prevent the decline and the complete end of Arbitration.

Allow me to quote His Honour's brilliant words:

Will change be easy? No

Will it take time? Yes

Is it essential? Absolutely!

Singapore Inc.[8], is a brand that connotes indeed, more than ever, trust, integrity, lack of corruption and the rule of Law. In my area of practice and with more than 18 years of practice in Singapore, I dare say that *Singapore Inc.* is in addition a brand associated with excellence, innovation, adaptability and quick reactivity with the required scrutiny if not with a minimum statutory and/or regulatory framework and review of performance for continuous and sustainable improvement and transparency. This should apply to Arbitration practice. Auditing and certification may be healthy as much for Arbitration Institutions and Arbitrators. The access to Arbitration panels should be structured to provide for various sectors and be regulated. Arbitrators should be experienced professionals in all fields and not exclusively lawyers. Only when end-users trust that their matters will be heard and understood by the professional experienced arbitrator, will they then look again at Arbitration as an efficient and favored means of ADR.

This should be the case for International Arbitration with Singapore pioneering innovative steps – like it does in many sectors, including construction – to adapt to an inescapable reality, the new international and domestic operating environment. A research carried out between 1999 and 2009 in Singapore, shows that the average challenges to International Arbitral awards in the Singapore Courts had increased from about three per year to 10 challenges per year! This is a dramatic yet confirmed trend in Singapore's Arbitration operating environment. Such trends, among few others, are part of the considerations that end-users will seriously look at in evaluating confidentiality, time, costs and finality risks of various ADR options.

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In this regard, the Singapore Institute of Arbitrators has set in place since November 2011 a tailor-made committee, the Special Focus Committee with three sub-committees, Construction, IT and Maritime – Shipping, an Arbitration think-tank and an R&D laboratory in Singapore and the region, in order to study, advise on, feed-back and contribute to better reach-out to end-users' needs vis-à-vis Arbitration.

Mr. Ho Chien Mien, Mr. Paul Wong and I, with visiting committee members from Singapore, HK, the UK, Japan and France and several other countries including from the Middle-East, are working actively on the construction chapter. The other two committees are progressing as well. There have been and will be reports, lectures, publications and hopefully a guide-book in order to participate actively in the change required, in order to "*examine the present and assist to chart the future*[9]".

Audrey Perez

[1] Civil Professional Engineer (Ecole Speciale de Travaux Publics – Paris – France), GCIA (Faculty of Law – 2007), FSIArb, SIArb Council Member, SIArb Special Focus Committee Chair, International Arbitrator, International Auditor

[2] "Bridging the gap between Construction Law and Actual Construction Challenges" – Paper presented by Audrey Perez at the Society of Construction Law (Singapore) & Law Society Joint Construction Law Conference, 31 July 2008.

[3] "Over legalistic" here refers to the practice of transforming or drowning technical matters into legal points and concepts, while technical matters are the crux of the dispute. One of the reasons for such a practice is that technical matters are incomprehensible to the arbitrator-lawyer and/or the parties' lawyers-representatives-counsels and therefore, the contemporary practice is diverting arbitration to legal concepts that are much more familiar to the trio of tribunal-lawyers and both claimant and respondent's lawyers. Even the practice of arbitration is often – and mostly in common law jurisdictions – shifted from a commercial alternative dispute resolution of factual technical matters into an all-lawyers' litigation forum and context, with again legal points overly put up that are more familiar to lawyers. Example: A defect in construction is looked at as a technical issue by an engineer. To the lawyer, it is a breach of contract or the tort of negligence, connected to legal concepts of fitness for purpose and/or duty of care and/or due skill and care, all quite disconnected or remote from the factual matter at hand, its reality, the defect causes per se, related liabilities, and establishing a quantum of damages taking into account the defect consequences and whether it is actually, physically a defect or not, what are the actual technical remedies and to which extent they are applicable. The non-over-legalistic process is driven in a consensual context where everyone speaks the same language, the language of the matter at hand, in this instance, engineering language for defects.

[4] [2008] SGHC 11

[5] [2012] SGHC 212

[6] The Honourable the Chief Justice Sundaresh Menon, LSE 4th Debate

[7] Jan Paulson, LSE 4th Debate – commenting on His Honour's opening keynote speech at ICCA, June 2012.

[8] The Honourable the Chief Justice Sundaresh Menon, LSE 4th Debate

[9] The Honourable the Chief Justice Sundaresh Menon, LSE 4th Debate

Case Summaries

By Tan Weiyi, Baker & McKenzie.Wong & Leow

PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal [2013] SGCA 57

Introduction

In this appeal, the Singapore Court of Appeal considered two main issues:

1. Whether Section 19 of the International Arbitration Act (Cap 143A) ("**IAA**") permitted an award debtor to apply to resist enforcement of a "*domestic international award*" even if the award debtor has not actively challenged the award at an earlier opportunity under Article 16(3) or Article 34 of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**").

2. Whether Rule 24(b) of the 2007 Singapore International Arbitration Centre Rules (3rd Edition) ("**SIAC Rules**") conferred on an arbitral tribunal the power to join third parties who are not party to an arbitration agreement.

Facts

The dispute concerned various companies involved in a joint venture ("**JV**") between an Indonesian conglomerate ("**Lippo Group**") and a Malaysian media group ("**Astro Group**"). The vehicle for the JV was a company, PT Direct Vision ("**DV**"), and the Lippo Group's share in the JV was held by PT Ayunda Prima Mitra ("**Ayunda**"). The terms of the JV were contained in a subscription and shareholders' agreement dated 11 March 2005 ("**SSA**"), the parties to which were the appellant, 1st to 5th respondents, Ayunda and DV.

The SSA contained a number of conditions precedent upon which parties' respective obligations in the JV were predicated. The parties agreed that pending the fulfillment of such conditions precedent, funds and services would be provided by the 6th to 8th respondents to DV to build up the latter's business. The conditions precedent were not fulfilled and a dispute arose over the continued funding of DV, specifically, whether the 6th to 8th respondents (who were not parties to the SSA) had separately agreed that they would continue funding and providing services to DV.

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The Astro Group (including the 6th to 8th respondents) commenced arbitration proceedings, purportedly pursuant to the arbitration agreement in the SSA. As the 6th to 8th respondents were not parties to the SSA, the Astro Group stated in their Notice of Arbitration that the 6th to 8th respondents had consented to being added as parties to the arbitration. The 1st to 5th respondents filed an application to join the 6th to 8th respondents as parties to the arbitration, relying on Rule 24(b) of the SIAC Rules. This was objected to by the appellant, Ayunda and DV ("**Joinder Objection**").

The tribunal held, in an award on preliminary issues, that it had the power to join the 6th to 8th respondents as long as the latter consented to being joined, and went on to exercise such power. The appellant, Ayunda and DV did not appeal against this award pursuant to Article 16(3) of the Model Law. The tribunal proceeded to render several awards ("**Awards**").

The appellant subsequently applied to the High Court to resist enforcement of the Awards, which were dismissed on the basis that:

a. the grounds raised by the appellant were not recognised grounds for resisting enforcement of a "*domestic international award*" (i.e. international arbitral awards made in the same territory as the forum in which enforcement is sought) under the IAA; and

b. the appellant was precluded from raising the same jurisdictional objections which formed the subject-matter of the award on preliminary issues given that it had not challenged the latter as it was entitled to under Article 16(3) of the Model Law within the prescribed time.

Issues

Whether the courts have a power to refuse enforcement of a "domestic international award" under Section 19 of the IAA, and if so, the ambit or content of that power

Section 19 of the IAA finds its origins in the Section 26 of the 1950 English Arbitration Act ("**1950 EAA**"). Under the 1950 EAA, an award debtor could avoid the consequences of an award, either by setting it aside under Section 23 ("**active remedy**") or resisting enforcement under Section 26 ("**passive remedy**").

Having considered various commentaries on the rationale behind the Model Law, the Court of Appeal held that the idea of a "*choice of remedies*" available under the 1950 EAA was consistent with the Model Law's philosophy towards the enforcement of domestic awards. Therefore, Parliament, in receiving the Model Law into Singapore, must have intended to retain the power for the courts to refuse enforcement of domestic international awards under Section 19 of the IAA, even if the award could have been but was not attacked by an active remedy.

The content of the power to refuse enforcement under Section 19 must be construed in accordance with the purpose of the IAA, which is to embrace the Model Law. The most efficacious method of giving effect to the Model Law philosophy would be to recognise that the same grounds for resisting enforcement under Article 36(1) of the Model Law are equally available to a party resisting enforcement under Section 19 of the IAA. This is despite Section 3(1) of the IAA expressly providing that Article 36, amongst others, shall not have the force of law. Section 3(1) of the IAA was not motivated by an intention to limit the content of the court's power to refuse enforcement under Section 19 of the IAA, but to avoid conflict with the New York Convention regarding enforcement of foreign awards.

In essence, the courts have a power to refuse enforcement of a "*domestic international award*" under Section 19 of the IAA, on the grounds provided under Article 36(1) of the Model Law.

Whether Article 16(3) is a "one-shot" remedy" such that the appellant's failure to challenge the preliminary ruling in the Award on Preliminary Issues precludes it from raising the Joinder Objection

Apart from the notion of "*choice of remedies*", the Court of Appeal held that Article 16(3) is not a "*one-shot*" remedy and noted that Articles 16(3) and 13(3) of the Model Law, which provide a timeline of 30 days for a party to apply to challenge a tribunal's finding on jurisdiction, is reflective of a policy of the Model Law to achieve certainty and finality in the seat of the arbitration. As such, a party may not apply to set aside a final award on the merits under Article 34 of the Model Law on a ground which they could have raised via other active remedies before the supervising court at an earlier stage when the arbitration process was still ongoing. However, the position with regard to the availability of a later active remedy following the failure to trigger earlier active remedies in Articles 13(3) and 16(3) has no effect on a party's ability to invoke its passive remedies at the time of enforcement.

The Joinder Objection

The appellant's Joinder Objection, upon which basis the appellant resisted enforcement of the Awards, rested on the premise that the tribunal rendered the Awards without jurisdiction as the 2007 SIAC Rules did not empower the tribunal to join non-parties to the arbitration. There was consequently no arbitration agreement between the appellant and the 6th to 8th respondents. The issue was whether Rule 24(b) of the 2007 SIAC Rules conferred on a

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tribunal the power to join third parties who are not parties to an arbitration agreement.

Rule 24(b) of the 2007 SIAC Rules provides:

> "Rule 24: Additional Powers of the Tribunal
> 24.1 … the Tribunal shall have the power to:
>
> (b) allow ***other parties*** to be joined in the arbitration with their express consent, and make a single final award determining all disputes among the parties to the arbitration."
>
> [Emphasis added.]

The tribunal took the view that "*other parties*" for purposes of Rule 24(b) of the 2007 SIAC Rules referred to strangers to the agreement to arbitrate. This was to be contrasted with parties who are parties to an agreement to arbitrate, but had not been involved in arbitration proceedings commenced pursuant to such agreement.

Applying a de novo standard of review, the Court of Appeal held that the tribunal's interpretation of the phrase "*other parties*" was incorrect and considered the following reasons:

a. Rule 24(b) is silent on the procedure or requirements of a joinder application. This is to be contrasted with rules of other institutions which expressly provide for the tribunal's power to join non-parties, together with the procedure and requirements for the exercise of such power;

b. a tribunal cannot extend its jurisdiction to disputes over which it has no jurisdiction by simply purporting to rely on Rule 24(b), which is only a procedural power, and not a means for extending jurisdiction;

c. the dispute resolution clause in the SSA did not pertain to disputes outside the scope of the SSA;

d. the forced joinder of non-parties is a significant procedure which raises issues that go to the very core of arbitration, and could not have been intended by the 2007 SIAC Rules, without a full articulation of the issues at the time of drafting;

e. forced joinder impinges upon party autonomy and confidentiality;

f. the centrality of confidentiality to arbitration in the SIAC is at odds with the tribunal's understanding of Rule 24(b). Rule 34 of the 2007 SIAC Rules provides that a party or any arbitrator shall not, without the prior written consent of all the parties, disclose to a third party any matter relating to the proceedings, save in certain situations. The reference to "*third party*" points to parties outside of the arbitration agreement. A similar phrase was not used in Section 24(b);

g. the interpretation of "*other parties*" in Section 24(b) of the 2007 SIAC Rules as referring to other parties which are party to the arbitration agreement but not involved in arbitration proceedings would not make it redundant. It is conceivable that in a tripartite commercial transaction where all three parties agree to submit any disputes to arbitration, separate disputes may arise between two out of the three parties. Arbitration proceedings may be commenced between two parties, and there may be occasion to add the third subsequently; and

h. Rule 24(b) of the 2007 SIAC Rules has also since been amended. Under the 2013 SIAC Rules, only other parties to the arbitration agreement can be joined to the reference.

Accordingly, the tribunal's exercise of its power under Rule 24(b) of the 2007 SIAC Rules to join the 6th to 8th respondents to the arbitration was improper with the corollary that no express agreement to arbitrate existed between the appellant and the 6th to 8th respondents. The Court of Appeal further held that on the facts, the appellant did not waive its rights or conduct itself in such a way that estopped it from raising the Joinder Objection. The Court of Appeal therefore allowed the appellant's appeal to the extent that leave to enforce the Awards as against the 6th to 8th respondents was refused. The joinder of the 6th to 8th respondents to the arbitration had been predicated upon a mistaken construction of the 2007 SIAC Rules. The Awards rendered in their favour suffered from a deficit in jurisdiction and were refused enforcement pursuant to Section 19 of the IAA.

International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another [2013] SGCA 55

Introduction

This was an appeal against the decision of the Singapore High Court in respect of a challenge to an arbitral tribunal's ruling that it had jurisdiction over a dispute between the respondent, Lufthansa Systems Asia Pacific Pte Ltd ("**Lufthansa**") and the appellant, International Research Corp PLC ("**IRCP**"). The challenge was made pursuant to Article 16(3) of the Model Law read with Section 10 of the IAA. The High Court found that the tribunal had jurisdiction over the dispute and dismissed IRCP's application[1]. The Court of Appeal allowed the appeal and ruled that the tribunal did not have jurisdiction over the IRCP.

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Facts

IRCP, Lufthansa and the second respondent, Datamat Public Company Ltd ("**Datamat**"), were engaged in the business of providing technology services. By a cooperation agreement between Lufthansa and Datamat ("**Cooperation Agreement**"), Lufthansa agreed to supply, deliver and commission a new maintenance, repair and overhaul system to Datamat. Datamat subsequently ran into financial difficulties and was unable to meet its payment obligations to Lufthansa under the Cooperation Agreement. By two supplemental agreements ("**Supplemental Agreements**"), IRCP agreed to pay Lufthansa the sums payable by Datamat under the Cooperation Agreement, together with certain payment mechanisms.

The Cooperation Agreement contained a multi-tiered dispute resolution mechanism ("**DR Mechanism**") which provided for a mediation process, and for disputes to be referred to arbitration if they could not be settled by mediation. The Supplemental Agreements however did not contain a dispute resolution clause.

The dispute in the arbitration proceedings pertains to payments due to Lufthansa under the Cooperation Agreement ("**Payment Dispute**"). Lufthansa had commenced arbitration proceedings pursuant to the DR Mechanism set out in the Cooperation Agreement.

Issues

Incorporation of arbitration clauses by reference

IRCP argued that clear and express reference to an arbitration clause contained in one contract was required before a court would find that the clause had been incorporated into a separate contract ("**strict rule**"). The Court of Appeal however took the view that the strict rule had been overextended impermissibly from its original application in the context of bills of lading and charter parties. It should not be taken as a rule of general application for, amongst others, the following reasons:

a. the notion that to oust the jurisdiction of the court is something odious and therefore has to be established by proof of the requisite intention to a higher degree is an outdated one;

b. while, as a matter of legal technicality, an arbitration clause was an independent and self-contained contract, it does not mean that it cannot be incorporated in the absence of an express reference to the arbitration clause. Businessmen would not discriminate between the terms of a contract such that an arbitration clause would be regarded as part of a contract and capable of incorporation together with the other terms of the contract.

The issue of incorporation of an arbitration clause is ultimately a matter of contractual interpretation. The purpose of the Supplemental Agreements was of vital importance. The Supplemental Agreements were entered into not with a view to IRCP guaranteeing or undertaking any obligation under the Cooperation Agreement. IRCP's only substantive obligation was to act as a payment agent. The Cooperation Agreement, which was between Lufthansa and Datamat, was the only contract dealing with the rights and obligations between them, save that IRCP agreed to act as a payment agent in accordance with the terms of the Supplemental Agreements. The Supplemental Agreements expressly provided that IRCP shall have no other obligations other than the payment obligations provided in the Supplemental Agreements.

While the Cooperation Agreement had to be read with the Supplemental Agreements to understand the nature of IRCP's obligation as a payment agent, IRCP undertook no obligation under the Cooperation Agreement. IRCP's obligations under the Supplemental Agreements were not dependent upon Datamat's obligations under the Cooperation Agreement.

In agreeing to the payment obligations under the Supplemental Agreements, IRCP would not have expected to get involved in an arbitration concerning disputes as to whether Lufthansa had or had not performed its substantive obligations in relation to the works and services stipulated in the Cooperation Agreement.

Further, the DR Mechanism in the Cooperation Agreement provided for preconditions for arbitration that included a procedure for specific persons from each party to meet to try and resolve any dispute between them, before the commencement of arbitration proceedings. If such mechanism were to be incorporated into the Supplemental Agreements and included IRCP, its workability would become questionable.

Accordingly, the Court of Appeal held that the parties had not intended for the DR Mechanism (including the arbitration clause) contained in the Cooperation Agreement to be incorporated as part of the Supplemental Agreements. IRCP was therefore not bound by it, and the tribunal did not have jurisdiction over IRCP and its dispute with Lufthansa.

Whether the preconditions for the commencement of arbitration in the DR Mechanism under the Cooperation Agreement had been satisfied

The Court of Appeal agreed with the High Court that the preconditions for commencement of arbitration set out in the DR Mechanism were sufficiently certain for it to be

Continued from page 13

enforceable. There was also no suggestion that IRCP had waived the preconditions for arbitration.

However, the Court of Appeal disagreed with the High Court that such preconditions were satisfied. The DR Mechanism contemplated that a dispute would be escalated up the hierarchies of the respective parties with representatives of increasing seniority meeting to attempt resolution. Although there were several meetings between the parties prior to arbitration, the personnel who attended those meetings were not the persons required to be involved in these meetings. Further, it was unclear what was discussed at the meetings. This was not sufficient to fulfill the preconditions intended by the parties.

Whether there is a lacuna in Section 10 of the IAA and Article 16(3) of the Model Law

The High Court had observed a lacuna in Section 10 of the IAA and Article 16(3) of the Model Law in that a Singapore court could not "set aside" a tribunal's finding on jurisdiction because such a ruling was not an "*award*" as defined in Section 2(1) of the IAA.

The Court of Appeal however disagreed and clarified that an application to the court to decide on the jurisdiction of a tribunal pursuant to Section 10 of the IAA read with Article 16(3) of the Model Law is a perfectly legitimate means of challenging a tribunal's preliminary ruling on jurisdiction. In praying for the tribunal's positive ruling on jurisdiction to be "set aside", IRCP was merely asking that the tribunal's positive ruling be reversed. The Court is empowered to grant such relief pursuant to Article 16(3) of the Model Law. There is therefore no lacuna in the law in this respect.

[1] A more detailed summary of the High Court's decision is provided in the SIArb Newsletter, March 2013 issue.

Mock Arbitration Surgery Workshop

Date	Event
27 September 2013	Mock Arbitration Surgery Workshop

This inaugural one-day workshop provided a demonstration of arbitration law and practice in a controlled environment. The SIArb trainers led the participants through live commentaries and discussions based on thoughtfully selected scenarios, and were assisted by training materials produced by the Institute of Transnational Arbitration. The participation was lively and the workshop was certainly well received.

Fellowship Assessment Course

Date	Event
8-9 and 11 November 2013	Fellowship Assessment Course

Participants of this annual programme were coached intensively over the three day course culminating in an award writing examination. This course was well attended and the SIArb congratulates those who have passed *en route* to qualifying as Fellows of the SIArb.

SIArb Annual Dinner

Date	Event
6 November 2013	SIArb Annual Dinner

We have had the privilege of the Honourable Attorney-General, Mr Steven Chong, S.C. gracing our Annual Dinner, during which he shared with us his thoughts on current issues relating to independence and impartiality of arbitrators. With his kind permission, we have reproduced his speech in this issue of the Newsletter. The SIArb would also like to express its gratitude to Pernod Ricard Singapore Pte Ltd and Mr Rajan Menon for contributing two cases of wine to the event.

SIArb Commercial Arbitration Symposium

Date	Event
14 November 2013	SIArb Commercial Arbitration Symposium

For the fourth time running, the SIArb Commercial Arbitration Symposium has become a main stay in the arbitration circuit. Discussions at the symposium adopted the ever popular interactive format inspired by the LCIA's Tylney Hall tradition, with no set speakers or speeches. Ahead of the event, participants submitted a number of arbitration-related topics which were reorganised by themes for discussions at the working sessions. This was followed by a lively debate on Litigation Funding in Singapore.

Dispute Boards – A New Approach to the Management and Resolution of Disputes of Large Projects

Date	Event
25 November 2013	Dispute Boards – A New Approach to the Management and Resolution of Disputes of Large Projects

Dispute Boards have gained some traction in this region particularly in major projects. The distinguished panel comprising Professor Doug Jones, Mr Graham Euston and Mr Gerlando Butera, led this Seminar and shared with the participants their experiences with Dispute Boards in various jurisdictions and the forms Dispute Boards may take having regard to published clauses in international construction contracts. The Seminar was chaired by Mr Mohan Pillay.

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Singapore Institute Of Arbitrators
Level 3, 146 Robinson Road, Singapore 068909
Tel: (65) 6372 3930 (Main), (65) 6372 3931 (Events) Fax: (65) 3151 5797 (no 6 prefix)

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