SINGAPORE INSTITUTE OF ARBITRATORS

NEWSLETTER

MICA(P)166/09/2009 **JULY** 2011 **ISSUE** NO. 2

THE PRESIDENT'S COLUMN

This is my last message as President. I have completed two terms from 2007 to 2011. As I look back on these past four years, I feel a sense of satisfaction at the growth and the development of the Institute.

Much of the progress has been achieved through your support.

Membership Growth

In 2007, membership of the Institute stood at about 600 members. Today, our membership has grown close to 800, with members coming from 23 countries. That our membership extends beyond Singapore suggests that members see value in being a part of the Institute. The challenge is to continue to grow and extend our membership – both in numbers and from farther afield.

Professional Development

In the area of professional development, the Institute has introduced compulsory continuing professional development (CPD) since 1 January 2009 for its panel of arbitrators. I am happy to report that since its introduction, the CPD committee has organised an average of 10 CPD seminars a year. Most of these evening seminars have been well attended.

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ANNOUNCEMENTS UPDATES & UPCOMING EVENTS

1. Seminar on "Mandatory Rules in International Arbitration – The Case of Vietnam" by Dr. Hop Dang on **4 August 2011**.
2. Seminar on "Issues in Construction Arbitration" by Ms Audrey Perez and Mr Ho Chien Mien on **8 September 2011**.
3. SIArb Commercial Arbitration Symposium 2011 on **20 September 2011**.

NEW MEMBERS

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

Fellows

1. Soh Lip San
2. Mark McGeoch
3. Gary Nigel Howells (Transfer)
4. Minn Naing Oo
5. Ganesan N
6. Lim Yew Huat, Steven
7. Prakaysh Nair
8. Melvin Chan
9. Bryan Ghows
10. Loh Eu-Tse Derek

Members

1. Edmund Jerome Kronenburg
2. Png Pern Tak Thomson
3. David Patrick Lewis
4. Mohamed Shahdy Anwar
5. Ranjit Chandra Saha
6. Tim Madley
7. Han Ye Won
8. Capt M R K Chowdhury
9. Gan Boon Eng, Justin
10. Low Yoke Mun

Associate Members

1. Gwee Yee Chew
2. Robert Nicholas Fenton

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In addition, since 2009, the Arbitration Bar Committee has organised an annual symposium in the interactive format of the 'Tylney Hall' style. Since its inception, the symposium has attracted about 100 participants from many countries in the region. I am happy to report that this year, the Symposium is scheduled for 20 September 2011. I am indebted to Mr Mohan Pillay and his dedicated team who have worked tirelessly to make this one of the signature events on the SIArb calendar.

The Institute has also commenced three scheme arbitrations. These are the Council for Private Education Dispute Resolution Scheme, the Council for Estate Agencies Scheme and the Alternative Dispute Resolution for Sports. Under these schemes, SIArb has been named as the appointing centre. The naming of the Institute as an appointing authority reflects the growing confidence of various industries in the standard of arbitrators on our panel.

Moving forward, I hope that more schemes will be added to this list to strengthen our role as an appointing authority for domestic arbitration.

Regional Development

I am also happy to report that the Institute's profile has been enhanced through our collaboration with other arbitral institutes from the region through the Regional Arbitral Institute Forum (RAIF). The RAIF website (http://www.raiforum.org/) was launched recently. The website provides a portal for members to access the websites of all RAIF Institute members. It gives visitors a convenient gateway to information on arbitration practices of the various institute members of RAIF and the contact details of these RAIF institutes. Unfortunately, this year's RAIF Conference scheduled for 16 June 2011 at Sydney, Australia had to be cancelled due to flight disruptions from the Chilean volcanic ash cloud. The next RAIF Conference will be held in Bali at a date to be confirmed by BANI.

Mindful of our mission statement to "train arbitrators and promote the use of arbitration for dispute resolution", we expanded our training to Vietnam and Cambodia. This is in addition to the International Entry Course and the Fellowship Assessment Course we hold annually here in Singapore. Such regional training has opened opportunities for the Institute and our members in both these countries. Our challenge is to develop these initiatives and expand further into the Mekong Delta Region through the contacts made with the International Finance Corporation of the World Bank Group. The training courses were conducted under their auspices in Cambodia.

All these initiatives would not have been possible without the support and dedication of past and present Council Members, Committees, and a dedicated Secretariat. More importantly, I am grateful for the trust and support that the members have given me and the Council in the discharge of our duties. I am indebted to all the members for making the four years of my tenure as President fulfilling and satisfying.

Thank you for the opportunity to serve you.

Johnny Tan Cheng Hye, PBM
President

Case Law Development

By Dr. Philip Chan

Introduction

In this issue, three cases are featured. Two of these are under the domestic arbitration regime, and the third is under the International Arbitration Act ("IAA").

- In the first case, *Larsen*, the Court of Appeal considered the issue of arbitrability of disputes involving an insolvent company.
- The second case, *Healthcare*, was an application before the High Court for leave to appeal against an arbitral award on a question of law under the Arbitration Act ("AA").
- In the third case, *Doshion*, the court dealt with an application for an injunction to restrain a party from continuing with an international arbitration on the premise that the disputes were settled.

Cases under the AA

(i) Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) **[2011] SGCA 21 [Chan Sek Keong CJ, Andrew Phang Boon Leong JA and V K Rajah JA]**

In this case, the Appellant (Larsen) applied to stay in favour of arbitration certain court proceedings that had been brought by the Respondent's [Petroprod's] liquidator. The appeal was dismissed, *inter alia*, because the disputes were non-arbitrable.

Larsen had provided management services to Petroprod and its subsidiaries under a management agreement (**"MA"**), which contained an arbitration clause. The liquidator's claims were to avoid payments made by Petroprod and its subsidiaries to Larsen:

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(a) in respect of payments by Petroprod, on the ground that these amounted to unfair preferences or transactions at an undervalue within the meaning of ss 98 and 99 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) (**"BA"**), read with s 329(1) of the Companies Act (Cap 50, 2006 Rev Ed) (**"Companies Act"**); and

(b) in respect of payments by Petroprod's subsidiaries, pursuant to s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) (**"CLPA"**) on the ground that these payments were made with the intent to defraud Petroprod as a creditor of the subsidiaries.

In opening, the Court of Appeal highlighted the tension between the principles underlying arbitration and insolvency, particularly regarding the question of the appropriate forum:

> "*On the one hand, arbitration embodies the principles of party autonomy and the decentralisation of private dispute resolution. On the other hand, the insolvency process is a collective statutory proceeding that involves the public centralisation of disputes so as to achieve economic efficiency and optimal returns for creditors*." [1]

The court noted that the appeal raised an interesting and novel point of law relating to the interfacing of these two policies where private proceedings could have wider public consequences.

The court identified three issues before it, namely,

(a) whether Petroprod's claims against Larsen fell within the scope of the Arbitration Clause under the MA;
(b) whether the Court's discretion to grant a stay of proceedings pursuant to s 6(2) of the AA was dependent on the arbitrability of the dispute in question; and
(c) if the Court's discretion was dependent on the arbitrability of the dispute, whether Petroprod's claims against Larsen were arbitrable. [6]

The scope of the Arbitration Clause

As regards the first issue, the court carried out a two-step exercise. First, the court considered the proper characterisation of Petroprod's claims. It then turned to construing the arbitration clause in light of these claims as characterised.

Proper characterisation of claims

Larsen had contended that Petroprod's claims were purely contractual claims, founded on and "*intimately connected to*", Larsen's alleged breach of the MA. It argued that the alleged impropriety of the transactions could only be assessed with reference to the payment structures in the MA. As a result (so Larsen alleged) the claims fell within the scope of the Arbitration Clause.

The court disagreed, however, and found that:

> "*[A]ll that Petroprod claimed was that it had made certain payments to Larsen within two years of its insolvency, and that the law presumed that the payments were made with an intention to prefer Larsen as a creditor because of Larsen's control over the management of Petroprod. Similarly, Petroprod's claims against Larsen based on an undervalued transaction and a fraudulent conveyance were entirely independent of the question of whether Larsen had breached the MA*." [9]

Accordingly, the court held that:

> "*Petroprod's claims against* Larsen *were founded entirely on the avoidance provisions of the BA and Companies Act. The focus of these avoidance provisions is to address situations where value has been subtracted from the insolvent company to the detriment of the general creditors, independent of the nature of the relationship between the parties … The only relevance of the MA to Petroprod's claims against Larsen was that it provided some evidence that the payments made from Petroprod to Larsen could have been for some legitimate commercial reason other than to prefer Larsen as a creditor*." [10]

The court therefore found that Petroprod's claims were fundamentally claims under the special regime of the BA and the Companies Act.

Proper approach towards construction of arbitration clauses

The court reviewed relevant case law from the UK, US, Australia, Canada and Singapore, and noted that "*the preponderance of authority favours the view that arbitration clauses should be generously construed such that all manner of claims, whether common law or statutory, should be regarded as falling within their scope unless there is good reason to conclude otherwise*." [19] This was on the basis of an "*assumption that commercial parties, as rational business entities, are likely to prefer a dispute resolution system that can deal with all types of claims in a single forum. This assumption is reasonable in relation to private remedial claims, which may arise either before or during the period when a company becomes insolvent*....' [20]

The court also noted, however, that "*this reasoning cannot be applied to avoidance claims pursued during insolvency proceedings. The commencement of insolvency proceedings results in the company's management being displaced by a liquidator or judicial manager. Since avoidance claims can only be pursued by the liquidators or judicial managers of insolvent companies, there is no reason to objectively believe that a company's pre-insolvency management would*

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ordinarily contemplate including avoidance claims within the scope of an arbitration agreement." [20]

Therefore, the court held that "*arbitration clauses should not ordinarily be construed to cover avoidance claims in the absence of express language to the contrary*", and opined that the Arbitration Clause did not cover Petroprod's claims against Larsen. [21]

The concept of arbitrability and s 6(2) of the AA

The court noted the clear reference to the concept of arbitrability under section 48(1)(b)(i) of the AA, which provides that the courts can set aside an arbitral award if "the subject-matter of the dispute is not capable of settlement by arbitration." However, the AA does not include any provision that explains what disputes are arbitrable: "*It has been left to the courts to shape the contours of the arbitrability exception*." [24]

The court offered two reasons why a stay should not be granted under s 6(2) of the AA if the claim is not arbitrable:

- s 11(1) of the IAA explicitly states that parties may only agree to submit a dispute to arbitration if the dispute is arbitrable. "*It would be anomalous if a dispute that was non-arbitrable, and hence not entitled to a stay of proceedings under the IAA, could be stayed in favour of arbitration under s 6(2) of the AA. The anomaly is even more striking considering that the Courts are expected to take a more interventionist approach in domestic arbitrations under the AA than international arbitrations under the IAA*." [25]

- The court noted that "*it is important to remember that arbitration is not an end in itself. Parties engage in arbitration in order to obtain an arbitral award that can be enforced. An arbitral award in respect of an non-arbitrable claim is* a *brutem fulmen as it can be set aside under s 48(1)(b)(i) of the AA even if the issue of arbitrability is not raised by the parties … Accordingly, even though s 6(2) of the AA does not make arbitrability of the dispute a pre-condition for the grant of a stay of proceedings, it cannot be seriously argued that a non-arbitrable claim should be allowed to proceed to arbitration*. " [26]

The concept of non-arbitrability

Whilst acknowledging that "*[t]he concept of non-arbitrability is a cornerstone of the process of arbitration*," as "*it allows the courts to refuse to enforce an otherwise valid arbitration agreement on policy grounds*," [44] the court accepted that "*there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dispute in question … or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute*."[44]

Therefore, the court considered it was proper to "*treat disputes arising from the operation of the statutory provisions of the insolvency regime per se as non-arbitrable, even if the parties expressly included them within the scope of the arbitration agreement*." [46]

In this context, the court again noted the distinction between the above types of dispute, and disputes that stem from the company's pre-insolvency rights and obligations. In these disputes, it is usually appropriate for the arbitration agreement to bind the liquidators, since they have stepped into the shoes of the company in liquidation. [47] Although this acceptance was made with an added caution that, "*Nonetheless, there are other policy issues that may militate against giving effect to them*." [47] Accordingly, "*such agreements should not be allowed to be enforced against the liquidator where the agreement affects the substantive rights of other creditors. Otherwise it will undermine the policy aims of the insolvency regime*." [50] "*However, in instances where the agreement is only to resolve the prior private inter se disputes between the company and another party there will usually be no good reason not to observe the terms of the arbitration agreement*." [51]

Accordingly, the court held that Petroprod's claims based on the BA and the Companies Act were derived from the insolvency regime, and were therefore non-arbitrable." [52]

In respect of Petroprod's claim under the CLPA, the court noted that:

- "*a s 73B CLPA claim is one that may straddle both a company's pre-insolvency state of affairs, as well as its descent into the insolvency regime*." [55]; and

- *"[I]t is apparent from Petroprod's Statement of Claim … that its s 73B CLPA claim against Larsen is based on the insolvency of the four subsidiaries when the money was paid from them to Larsen*" [57]

Accordingly, the court held that Petroprod's CLPA claim against Larsen was an insolvency claim, and therefore also non-arbitrable. [58]

***(ii) Healthcare Supply Chain (Pte) Ltd v Roche Diagnostics Asia Pacific Pte Ltd* [2011] SGHC 63 [Choo Han Teck J]**

The application before the court was for leave to appeal under s. 49(1) of the AA, which provides that:

> "*A party to arbitration proceedings may (upon notice to the other parties and to the arbitral tribunal) appeal to the Court on a question of law arising out of an award made in the proceedings.*"

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The underlying dispute concerned termination provisions in a distribution agreement for diagnostics products. Five questions were posed to the court, which concerned:

1. Construction of the termination provision;
2. Rectification of a provision in the Agreement to give effect to the intention of the parties;
3. The appropriateness of adverse inferences in the light of the conduct of the Respondent;
4. Whether extrinsic evidence of the context is inadmissible for the purpose of construing the agreement; and
5. A conjoined question concerning the Respondent's notice of termination, and the burden of proof for claiming rectification of a Contract.

The court refused the application in its entirety. As regards the applicant's contention that the Arbitral Tribunal misapplied the test in **Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR 1029**, the court held that, "*Section 49(1) of the Arbitration Act only permits an appeal against an arbitration award on a point of law. Insofar as HSC's application was based on what it considered to be a misreading of the contract as a result of applying Zurich, that was not an error of law but an error in the application of the law, which is not subject to appeal under s 49. … The questions of law that …[the] applicant under s 49(6) had stated were not questions of law, they were just questions as to the correct construction of the contract.*" [8] [Emphasis added]

The court also observed that the thrust of the *Zurich dicta* was to give the court flexibility in examining extrinsic evidence and it was not a directive that all contractual interpretation begins with examination of extrinsic evidence. [8]

Case law under the IAA

***Doshion Ltd v Sembawang Engineers and Constructors Pte Ltd* [2011] SGHC 46 [Choo Han Teck J]**

The case concerned the appropriate forum for contesting the validity of a settlement agreement, where that agreement purported to resolve disputes that had been submitted to arbitration.

The plaintiff applied to stop the arbitration (which had not reached the hearing stage), and sought:

(1) A declaration that the plaintiff and the defendant had reached a binding settlement agreement on a "drop hands" basis ("the Settlement Agreement") for all disputes in respect of or in connection with the Arbitration.
(2) A declaration that the Arbitration was terminated pursuant to the Settlement Agreement; and
(3) An injunction to restrain the defendant from continuing with the Arbitration.

The court dismissed the application.

The court first addressed the issue of whether the arbitral tribunal would become *functus officio* by reason of the settlement agreement. It held that "*the position of the arbitrator in this case was not* functus *when it had not even begun to hear*." [2]

The court then addressed, in the light of the existence of the settlement agreement, (a) whether there was a dispute; and (b) whether the dispute fell within the scope of the arbitration clause.

The court held that, "…*once a dispute arises, including a dispute as to whether there is a dispute at all, the matter falls into the hands of the arbitrator*." The court relied on the English case of **Fiona Trust & Holding Corp v Privalov [2007] UKHL 40** for the proposition that "*the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal*."[3]

The court took a pro-arbitration stance and held that "*the dispute over the existence of the Settlement Agreement is … a 'dispute arising out of the relationship into which [the parties] had entered' … Whether the Settlement Agreement was a separate contract unrestrained by an arbitration clause was not the question. Unless the wording of the arbitration clause in the Sub-Contracts clearly states otherwise, the determination of the existence of the Settlement Agreement is for the arbitral tribunal and should not be stolen from its hands by an injunction*..." [4]

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JIVRAJ -v- HASHWANI

On 27 July 2011 the UK Supreme Court delivered its judgment in **Jivraj -v- Hashwani**.[1] At stake was the standing of London as one of the leading global destinations for arbitration. As well as reviewing the judgment, this edition charts the earlier progress of the case through the lower courts, and also offers some brief comments on the issues.

1. FACTS

The dispute arose out of a joint venture for real estate investment, entered into in 1981. The agreement provided for arbitration, and stated that "*all arbitrators shall be respected members of the Ismaili community and holders of high office within the community*". [2]

In July 2008 Mr Hashwani started an arbitration, claiming a total of around US$ 4.4 million from Mr Jivraj. He appointed a retired English High Court judge as one of the arbitrators. In response, Mr Jivraj applied to the Commercial Court for a declaration that the appointment was invalid, because the retired judge was not a member of the Ismaili community. Mr Hashwani in turn defended the appointment on the grounds that, while the appointment did not in fact comply with the requirement in the arbitration agreement, that requirement was illegal (and therefore void) because the Employment Equality (Religion or Belief) Regulations 2003 (the **"Regulations"**)[3] have outlawed in the UK any discrimination on the grounds of religion.

The Regulations implemented European Union Employment Directive 2000/78 (the **"Directive"**). The relevant provisions of the Regulations are:

- *"employment" means employment under a contract of service … or a contract personally to do any work…"* (Regulation 2(3)) [emphasis added]
- *Discrimination on grounds of religion or belief:*

  3. - (1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if -

  (a) on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons; or

  (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but -

  (i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons,

  (ii) which puts B at that disadvantage, and

  (iii) which A cannot show to be a proportionate means of achieving a legitimate aim.
- *Applicants and employees:*

  6. – (1) It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to discriminate against a person –

  (a) in the arrangements he makes for the purpose of determining to whom he should offer employment; or (b) in the terms on which he offers that person employment…"

2. THE COMMERCIAL COURT JUDGMENT

The Commercial Court rejected Mr Hashwani's argument, saying that the requirement in the arbitration agreement was not void.

The Court considered that the relationship of the arbitrator and the parties did not involve a contract of employment for the purpose of the Regulations. The Court commented on various features of the arbitrator's relationship to the parties, and found that: "*[e]ven if the role or status of an arbitrator can be classified as akin to that of an "independent" contractor, the 'employer' cannot give instructions as to how he is to work or what outcome he is to achieve. In short, the arbitrator is indeed entirely independent and has no client. Indeed it is only then that he can act impartially.*"

The Court also ruled that, even if the Regulations had applied, the requirement for the arbitrators to be "*respected members of the Ismaili community and holders of high office within the community*" was a "genuine occupational requirement" so as to exempt the arrangement from the invalidating effect of the Regulations. The Court observed that the Ismaili community places a strong emphasis on a non-adversarial approach to dispute resolution, and has created various structures for dispute resolution within the community, which include arbitration. As a result, the Court considered that there exists an "*ethos based on religion*" which was a genuine occupational requirement for the resolution of the dispute in a manner that would be satisfactory to the parties.

3. THE COURT OF APPEAL JUDGMENT

Mr Hashwani appealed the judgment. The Court of Appeal granted his appeal, and overturned the Commercial Court judgment. It concluded the appointment of an arbitrator was "employment" for the purposes of the Regulations. This meant that the requirement in the arbitration agreement was void because the parties were "*refusing to offer, or deliberately not offering*" employment on religious grounds.

The Court of Appeal noted that the Regulations implemented the Directive, and the Directive is very widely drawn. As a result, an arbitration agreement which specified who could or could not be an arbitrator did involve employment "arrangements" for the purposes of the Regulations.

The Court of Appeal also disagreed with the Commercial Court's interpretation of the "genuine occupational requirement" exception. The Court noted that this exception might have applied if the arbitrators had to determine the dispute *ex aequo et bono*, in which case a particular cultural background might be needed to apply the appropriate moral values to the dispute. However, the agreement required the application of English law, for which no particular background was required.

4. THE SUPREME COURT JUDGMENT

The Supreme Court has now reinstated the Commercial Court's judgment. It has decided that the Regulations do not apply to arbitrators, because the appointment of an arbitrator does not involve "*a contract personally to do any work*". The Court also held by a majority that, even if

the Regulations had applied, the requirement for an Ismaili arbitrator would fall within the exception for "genuine occupational requirements".

The Supreme Court examined in detail several cases of the European Court of Justice (**"ECJ"**), as a guide to its interpretation of the Regulations. The main case among these was **Allonby –v- Accrington and Rossendale College**.[4] The Court gave particular weight in this case, firstly, to the interpretation of the term "worker" as "*a person who … performs services for and under the direction of another person*" [emphasis added]; and secondly, the "*clear distinction*" drawn by the ECJ between such workers and independent providers of services. Applying **Allonby**, the Supreme Court held that an arbitrator is not an employee: an arbitrator is "*in critical respects independent of the parties*" and "*in no sense in a position of subordination to [them]; rather the contrary*." The Court also considered various of the powers and duties of arbitrators which are addressed in the English Arbitration Act 1996. Section 24 of that Act provides that an arbitrator can be removed from his or her position only in limited circumstances, and section 40 provides that the parties must comply with the directions of the arbitrator. The Court noted that both of these provisions are inconsistent with the characterisation of an arbitrator's status as that of an employee.

5. ISSUES

5.1 Status of the Arbitrator

The debate before the courts went to the fundamental issue of the relationship of the arbitrator to the parties. In the Commercial Court, Steel J observed difficulties in classifying an arbitrator as an employee, and preferred the view that the arbitrator's role is fundamentally different: "*The closest analogy to the role of an arbitrator is that of a judge.*" Key factors which he considered included:

(a) the parties' inability to demand how the arbitrator is to work, or the outcome he is to achieve; and

(b) the arbitrator's immunity from claims by the parties.

The Court of Appeal drew the opposite conclusion. Although it noted the factors considered in the Commercial Court, it found that these were of subsidiary relevance in the context of "employment" in the Regulations. In addition, since even the quasi-judicial function was only brought about by contract, a contractual analysis must be dominant.

The "judicial" analysis of the arbitrator's position has been favoured in several common law jurisdictions, whereas the contractual view of the arbitrator's position is commonly upheld in some civil law countries. It is helpful that the Supreme Court has now given judicial weight to the middle position, in which the arbitrator has a "*sui generis*" character. This view accords with the views of two of the leading academic sources on this subject: Mustill & Boyd,[5] and the more recent explanation advanced by Gary Born.[6]

5.2 Nationality Restrictions

It is unusual to include religious qualifications in a commercial arbitration agreement, and so the case might have been of limited interest even within the UK. However, UK legislation now protects "employees" against all types of discrimination, including discrimination based on nationality.

As a result, the implication of the Court of Appeal's judgment might have been that any provisions in an arbitration agreement which restrict the appointment of an arbitrator on the basis of nationality would be unlawful in the UK. Other restrictions might also have been discriminatory: for example, a requirement for an arbitrator to have a certain number of years' experience might have involved age discrimination.

Many arbitration institutions (e.g. the ICC and the LCIA) include a provision in their rules which deals with the nationality of the arbitrator. In addition, parties commonly include nationality restrictions in the arbitration clause. After the Court of Appeal's decision, it had been thought that parties opting to arbitrate in the United Kingdom would have needed to include specific amendments in their arbitration agreements to disapply any nationality requirements in the relevant arbitration rules. It is also possible that parties would have chosen to hold their disputes elsewhere or under different rules, to avoid these issues. This would have had a significant effect both on arbitration in the UK, and on the relevant institutions. The concern over this was reflected in the fact that both the ICC and the LCIA submitted special *amicus curiae* briefs to the Supreme Court, to explain their views.

The Supreme Court judgment will thus come as a considerable relief both to these institutions and to the UK arbitration community.

5.3 Other considerations

Commentators on the **Jivraj** case have focussed on the effect on arbitration in London. However, it is possible that there could be implications for other countries where similar anti-discrimination laws apply. Parties may try to run similar arguments as those suggested by Mr Hashwani, in an attempt to render arbitration agreements void under the relevant legislation. It is to be hoped that the UK Supreme Court's judgment will provide support for the dismissal of such applications.

James Arrandale
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1 The full case name is **Jivraj –v- Hashwani; Hashwani –v- Jivraj** (due to the origins of the case in two reciprocal applications made by the parties). The case citations are: **[2009] EWHC 1364 (Comm)** (in the Commercial Court); **[2010] EWCA Civ 712** (in the Court of Appeal); and **[2011] UKSC 40** (in the Supreme Court).

2 The Ismaili community is part of the Shia branch of Islam.

3 The Regulations implement European Union Employment Directive 2000/78 (the "**Directive**").

4 (Case C-256-01) [2004] ICR 1328

5 Mustill & Boyd, Commercial Arbitration, 2nd Ed., cited at paragraph 24 of the Commercial Court judgment.

6 Born, International Commercial Arbitration (2009), cited at paragraph 77 of the Supreme Court judgment.

SIARB SEMINARS AND EVENTS

APRIL 2011 TO JUNE 2011

Seminar on

"ARBITRATION WITH INDONESIAN PARTIES"

DATE: 30 JUNE 2011
SPEAKER: MR. CHEW KEI-JIN
CHAIRPERSON: MR. TAN CHUAN THYE

SIArb organized a seminar at Maxwell Chambers on 30 June 2011 which focused on 'Arbitration with Indonesian Parties'. The speaker was Mr. Chew Kei-Jin from Tan Rajah & Cheah and the chairman for the session was Mr. Tan Chuan Thye from Stamford Law. Singapore is often the arbitration seat for the resolution of disputes between foreign investors and Indonesian parties. The speaker dealt with matters that usually arose in these arbitrations such as: (a) how Indonesian law (which may be the governing law of the underlying contract) should be adduced before an arbitral tribunal that comprises non-Indonesians; (b) the interplay between Singapore law, Indonesian law and international arbitration principles in governing various aspects of the arbitration including: (i) substantive matters such as applicable remedies and, more generally, (ii) arbitral procedure; (c) issues pertaining to local court proceedings including seeking interim relief and enforcement of arbitral awards; and (d) costs issues. The question and answer session after the talk was very interesting in that the delegates shared practical issues and experiences in enforcing arbitral awards in Indonesia.

Publisher

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Printed by Ngai Heng Book Binder Pte Ltd.

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