SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
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THE PRESIDENT'S COLUMN

The Institute celebrated its 31st Anniversary this year, an event commemorated at our Annual Dinner on 20 November 2012 at the Sheraton Towers.

The occasion was graced by our Guest of Honour The Honourable the Chief Justice Sundaresh Menon, and Past Presidents of the Institute Johnny Tan, Raymond Chan, and (Senior District Judge) Leslie Chew.

Appointment of Chief Justice Sundaresh Menon

As I discovered in the course of the Annual Dinner, the evening celebrated another important occasion. Chief Justice Menon had assumed office just 2 weeks before the Dinner on 6 Nov. I had therefore expected the Dinner to be one of the first few occasions he graced as Chief Justice. The fact that it turned out to be the venue of his very first public address as Chief Justice, turned it into a truly special event for the Institute.

The Dinner also provided the Institute the formal opportunity to personally extend our congratulations to our Guest of Honour on his appointment to the high judicial office of Chief Justice of Singapore.

Chief Justice Menon is called to both the Singapore & New York Bars. In the 25 years since graduating from NUS with First Class honours in Law, he earned a enviable reputation as a leading disputes lawyer, practising in both local and international law firms. In 2006 he was appointed Judicial Commissioner of the Supreme Court, and shortly thereafter served as Attorney-General from 2010 to June 2012. He was appointed Judge of Appeal on 1 August 2012, a position he held until his current appointment as Chief Justice.

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ANNOUNCEMENTS UPDATES & UPCOMING EVENTS

1. Singapore Arbitral Scene – Are we Setting The Pace? on 24 January 2013.

NEW MEMBERS

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

Fellows

1. Joshua Chai
2. Liu Tsun Kie
3. Vincent Ng
4. Christopher Yong Shu Wei

Members

1. Spring Tan
2. Kum Lai Hoong

Associate Members

1. Ang Tien Sin, Jonathan
2. Richard Hayler
3. Vivek Gupta

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Chief Justice Menon has been a long time and much valued friend and supporter of the Institute. He has given generously of his time to the Institute's programs, including Co-Chairing the Institute's Commercial Arbitration Symposiums for 2 years running in 2009 & 2010.

So I am particularly grateful to the Chief Justice for his support, and look forward to our relationship with him not just continuing, but growing steadily in the years to come.

Where the Institute is Today

The Annual Dinner is a time of reflection for the Institute. It is an opportunity to consider what we have done, while looking forward to identify goals, opportunities and challenges that lie ahead.

In the over 30 years since its founding in 1981, SIArb has developed and matured into its unique position as Singapore's national arbitral body. We have grown from 25 members in 1981 to well over 800 today, with a membership base spread over 20 countries.

A mandatory CPD program for all SIArb Panel Arbitrators has been in place since 2008. The Institute organises a broad range of training and educational programs ranging from regular evening seminars, to the annual Commercial Arbitration Symposium, a unique delegate led discussion of topical issues in commercial arbitration, which we started in 2009.

The Symposium continues to be a popular national and regional draw, with the 2012 Symposium attracting delegates from Hong Kong, India, Malaysia, Japan, Vietnam and Philippines. Chief Justice Menon has himself been involved in this initiative as Co-Chair for the very 1st 2009 Symposium, and the 2010 Symposium that followed.

We also run longer training programs every year that last 2-3 days in the form of the International Entry Course (IEC) & Fellowship Assessment Course (FAC).

On the regional front, we have expanded our work on the World Bank funded arbitration training program in Cambodia, which started in 2010. Our work will continue into 2013, as we provide technical assistance and support to Cambodia's NAC – the National Arbitration Centre. The NAC is the first commercial arbitration body in Cambodia to offer the business community an alternative commercial dispute resolution mechanism. It has been a great privilege for the Institute to be involved in the training of their pioneer batch of arbitrators.

Our involvement continues with further advanced training for their arbitrators as well as support in drafting the Rules for the NAC.

2013 Initiatives

Looking ahead, the Council is developing 2 exciting programs in 2013.

1. We will expand our professional development offerings to include arbitration surgery workshops. These workshops, which will be organised under the leadership of Vice President Chan Leng Sun, will explore practical aspects of the arbitration process using DVDs that replicate mock arbitrations,

2. Secondly, we are looking to organize our very first National Arbitration Conference in 2013, under the chairmanship of Past President Raymond Chan.

Chief Justice Menon's Address

In his address at the Institute's Annual Dinner, Chief Justice Menon called for Singapore arbitrators to "take their rightful place at the global table of arbitrators and make a meaningful contribution to the important issues that concern and affect the arbitration industry".

He identified 3 areas where the Institute could make an important contribution to the challenges facing the arbitration community today:

1. Ethics – a possible code of Ethics + enforcement measures for breach;

2. Costs – responding to the escalating costs of arbitration, and the lack of a proper framework to assess and fix such costs; and

3. Users – engaging the consumers of arbitration so that arbitration can be more responsive to their needs.

The Chief Justice's very thoughtful comments about the role the Institute can play in responding to today's challenges in the area of ethics, costs and responsiveness to the users, clearly demand proper thought and reflection. I am embarking on a review of this with Council and will update you on progress in the New Year.

This important speech by the Chief Justice merits consideration by the Institute's wider membership. To that end, I have happily secured the Chief Justice's permission to reproduce his speech in the this issue of our Newsletter. I commend our members to read and reflect on the Chief Justice's remarks.

His comments about the thought leadership role the

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Institute can play, call for close study and consideration from all of us.

Support for Annual Dinner 2013

Returning to the Annual Dinner, I would very much like to recognise the generous support of a number of organisations for the event.

My thanks to Pernon Ricard Singapore for their generous sponsorship of the wine. I am also very grateful to the following for taking full tables at the 2012 Annual Dinner:

1. Allen & Gledhill
2. Baker McKenzie.Wong & Leow
3. Drew & Napier
4. Khattar Wong and Partners
5. Pinsent Masons MPillay
6. Rajah & Tann
7. Singapore International Arbitration Centre

Happy New Year!

Finally, on behalf of all of us here at the Institute, may I wish you and your families an enjoyable holiday season and a happy and fulfilling 2013!

Text of the Chief Justice's Speech at the Singapore Institute of Arbitrators 31st Anniversary Annual Dinner

20 November 2012

Distinguished guests
Ladies and gentlemen,

It is my great honour and privilege to join you at the Singapore Institute of Arbitrators 31st Anniversary Annual Dinner today. As most of you know, arbitration is a field of practice that is close to my heart and it is a particular pleasure for me that my first public address as the Chief Justice is to this audience at the Annual Dinner of the Singapore Institute of Arbitrators.

When I was invited to give an address this evening, I did give some thought to what I should touch on that would be of particular interest to you. My chosen thesis is that in this new century, the time has come for Singaporean arbitrators to rise to the challenge and take their rightful place at the global table of arbitrators and make a meaningful contribution to the important issues that concern and affect the arbitration industry.

Opportunities for a Singaporean voice in the international arena

This might sound ambitious; so let me begin with a prelude. About a month ago, I spoke at an event organised by the Law Society on the privatisation of public international law and the implications of this important development for the Singapore legal community. I observed on that occasion that, in the context of investment arbitration, the arbitrators who had largely claimed the space of determining the boundaries of investor protection came primarily from a fairly small and select group of specialised arbitrators drawn mainly from the US and Europe. I argued that the principles of good governance, fair and equitable treatment and respect for individual investor rights needed to be more clearly rationalised and articulated, and that this should not be the province of such a small group of arbitrators. I called for thought leaders from government agencies, practitioners and the academic community from Singapore and elsewhere in Asia, Africa, and Latin America to emerge and engage in the dialogue about these issues and in the effort to generate an overarching set of legal norms that would have legitimacy if it was the expression of the concensus of thinkers from all affected parts of the world.

The particular context may be different for those of you involved in commercial arbitration rather than investment arbitration, as is largely the case here this evening. But this evening I make the same sort of call albeit with respect to different issues. I do so because it remains the case even today that at international conferences on arbitration, one perceives a persistent imbalance in the representation of arbitrators from these parts of the world either on the speaking podium or on the discussion panels. Yet, in a recent white paper, Australia in the Asian Century, Prime Minister Julia Gillard observed:[1]

> "Whatever else this century brings, it will bring Asia's return to global leadership, Asia's rise. This is not only unstoppable, it is gathering pace."

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More recently, Secretary of State Hillary Clinton at an event in Singapore observed: "Why is the American president spending all this time in Asia so soon after winning re-election? Because so much of the history of the 21st century is being written here. America's expanded engagement in the region represents our commitment to help shape that shared future."

If we in Singapore subscribe to this notion that we are entering the Asian age, then perhaps we need to recognise that we have a responsibility to contribute to a louder Asian voice at international conferences on commercial arbitration. I am not speaking of token representation, or empty gestures for the sake of political correctness. Rather, I identify with and am driven by the concern that Kishore Mahbubani highlighted when he observed that with the world becoming inexorably smaller, denser, more interconnected and more complex, the biggest danger it faces is western groupthink.[2] As it is with international affairs and geopolitics, so it is with ideas in arbitration.

Of course, there are some in the room tonight who regularly put forward their views in the international arbitration arena, either through speaking engagements or in their writing. While they are to be applauded, there is space for more diversity of views, and I am confident that the members of the Institute are more than capable of contributing to the global thought leadership on various aspects of commercial arbitration. I therefore strongly encourage Singapore arbitrators to put forward ideas at the cutting edge.

To start the ball rolling, I would like to suggest three particular areas that warrant close attention and might present the Singapore arbitrator community with the opportunity to make a contribution.

Ethics

First, I have spoken previously about the dissatisfaction some users have with the somewhat unregulated state of the arbitration industry. Let me briefly sketch the problem. The golden age of arbitration has attracted a tremendous inflow of new entrants to the ranks of arbitrators. In the absence of regulation, this inflow has seen all-comers unfamiliar with arbitration culture, yet alive to the commercial possibilities that abound. These are not your self-regulating artisans of yesteryear; not the closely knit group of honourable practitioners of the past. Indeed, it is unrealistic to expect that the old ways can continue because the numbers are too large, and the geography too vast for old fashioned peer pressure to suffice. Yet, we in Singapore must not lose sight of the fact that Singapore Inc is a brand that connotes trust, integrity, the lack of corruption and the rule of law. Perhaps the time is upon us for the Institute to take the lead in crafting a code of ethics that the Institute's members will be identified with.

If peer pressure and influence is unrealistic at the global stage, it is certainly much more realistic at this level. Let me illustrate the need for this with an anecdote conveyed to me by a leading arbitration counsel. He was engaged in an ongoing arbitration with an opposite number who was just as illustrious a practitioner and they were before arbitrator X. A second unrelated dispute emerged with both counsel again pitched on opposite sides. Before they could get round to discussing potential appointees to hear the case, the same arbitrator X called the first practitioner, told him that the opposing counsel had already spoken to arbitrator X and informed him that he was willing to appoint arbitrator X provided the first practitioner agreed. Arbitrator X asked if the counsel would agree to appoint him. Everybody knew that the fee for the second engagement was potentially large; and at the time of this conversation, arbitrator X was considering his award in the first arbitration. Most of us would agree that there are any number of things wrong with this. But we need to go the next step and make it wholly unacceptable, even unthinkable that such a thing should happen.

As a former arbitration practitioner myself, I have seen the dark side of the profession and it is disturbing. It is especially so when those engaged in it lose sight of the fact that beyond the fees and the expenses lie the parties who depend on the integrity of arbitrators, and who count on arbitrators who will see beyond their fees and be constantly mindful of their duty to secure justice. I would therefore ask you to carefully examine the prospect of developing a standard setting code of ethics accompanied by the means for sanctioning those who disregard it. The name of your Institution is much more important than the narrow commercial interests of any individual, especially one unwilling to abide by the rules or the best practices in the industry.

Costs

Another area for study relates to the issue of costs. As I mentioned in my ICCA address, the quantum of costs in arbitration has sky-rocketted and users of arbitration are often astounded by the costs involved. Arbitration is now seldom the economic alternative. Not an insignificant number of users have complained that arbitration costs too much. In a recent case that has come to my attention, the total costs awarded after a one day hearing on an emergency application approached the staggering sum of $400,000. Some might say this is a function of the market and is of no

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concern to anyone aside from the parties.

But there are serious issues at stake. First, arbitration may be a private means of adjudication but it nonetheless remains a search for justice according to law. If people cannot afford to arbitrate then there is a problem and this is clearly a trend we are seeing emerge with greater frequency. Setting aside the problems associated with skyrocketing costs, one is still left with the problem that no coherent doctrine or approach exists for determining costs. Tribunals make decisions on costs with minimal reasoning and without regular citation of authorities. We have all heard or read of situations where a tribunal awards the amount claimed without closely examining the reasonableness of the costs claimed either in principle or as a matter of quantum. All these factors contribute to arbitration being seen as an enigmatic adjudicative process. Over time, arbitration's credibility and public confidence will steadily be eroded if no corrective action is taken.

This again is an area where the Institute's members might take the lead on developing reasoned perspectives. There are a number of interesting questions: Is there a public interest at all in checking the explosion of costs? Or is it purely a private matter to be resolved between an arbitrant and its representatives? Should there be a guide to best practices in assessing and fixing costs? Can a process be developed to engender greater transparency and accountability in the area of costs in arbitration? It is my lot today to raise the questions; fortunately, I am not required to provide the answers. But my purpose here is to identify yet another important issue on which this community could weigh in.

The users of arbitration

The third area I would like to raise for your further reflection is the need to consider ways in which you can enhance the degree to which the arbitration community is responsive to the interests of its users.

In September this year, I gave a lecture at the School of International Arbitration at Queen Mary's College in London. I raised a number of concerns with commercial arbitration including such things as costs, problems with unilateral appointments, the perceived lack of transparency and accountability and the need for some degree of regulation and standard setting. My lecture, was well attended but I am afraid it was not as well received. There was an almost universal push back to these ideas which were said to be overstated and not reflective of the true state of arbitration. For almost an hour, to borrow a cricketing analogy, I batted back the bouncers that were being bowled at me from the floor and also from the others on the panel. I couldn't wait for the session to end. Lord Mance, who was chairing the session, invited one more question and to my dismay, a gentleman sitting in the front row put up his hand. As it turned out, he was the only one to make a contribution that day, who was not an arbitrator or a counsel. He was a user of arbitration, the General Counsel of a large oil company. And for the first time that evening I heard a rousing endorsement of my points; and an enthusiastic affirmation that this indeed was what the community needed to hear and to consider. The speaker pointed out that those in the community were self-satisfied and comfortable to the point of being oblivious to the concerns of the users of arbitration.

The gentleman's contribution highlighted the grave disconnect between the insiders whose professional interests are tied with arbitration and for whom the golden age of arbitration has brought unparalled opportunities and wealth; and the users of arbitration who shockingly are seen as the outsiders.

This brings me to the third suggestion I wish to raise: the Institute could perhaps lead the way in engaging with the users of arbitration. If you want arbitration to grow in vibrance and vitality, you must listen to what the users have to say about what they want and what they most definitely do not like about arbitration. Perhaps a committee of users could be set up; or a forum organised specifically to hear from the parties about how they feel about arbitration today and this could form the basis for future work that the Institute might embark on.

Conclusion

On the 31st Anniversary of the Institute, I would like to take this opportunity to congratulate the Institute on its work in the last three decades; but I also want to encourage the Institute to play a larger role in the future development of the arbitration industry in Singapore and in the region. The Institute should undoubtedly continue to proactively provide training for its members; but it should also seek to become a think tank for issues relating to arbitration in the region.

Tonight, we celebrate the past; but in doing so, let us examine the present realities with open minds that are deeply attentive, and then let us chart the future. Thank you.

[1] Gillard: Australia must embrace 'Asian Century', CNN, http://edition.cnn.com/2012/10/28/world/asia/australia-gillard-asian-century/index.html
[2] Kishore Mahbubani, The west must work to understand a new world order, Financial Times A-List, 20 April 2012

Indian Courts will not interfere in foreign seated arbitration proceedings

By: Dharmendra Rautray[1]

Barrister-at-Law (Lincoln's Inn) Partner, Kachwaha & Partners

In the recent decision of the Supreme Court of India in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. ("Balco case") the Constitution Bench of five judges, comprising the Chief Justice of India and Justices D.K. Jain, S.S. Nijjar, J.S. Khehar and R.P. Desai, has overruled its earlier decision in Bhatia International v. Bulk Trading SA, (2002) 4 SCC 105 and Venture Global Engg. v. Satyam Computer Services Ltd, (2008) 4 SCC 190.

The Supreme Court held that Part I of the Arbitration and Conciliation Act, 1996 ("Act") only applies to arbitrations where the place / seat is in India. The Supreme Court followed the ratio laid down in *Karaha Bodas Company LLC ("KBC") v. Perusahaan Pertambangan Minyak Dan gas Bumi Negara ("Pertamina")*, 335 F.3d 357, and held that Indian courts would not entertain a challenge to an award under the Act even if the award is made under Indian law and the seat of arbitration is not in India. However, the court has put a rider by observing that its decision in Balco case shall apply *"prospectively, to all the arbitration agreements executed hereafter"* i.e. after 6th September, 2012.

In *Bhatia International*, the Supreme Court had held that the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties were free to deviate to the extent permitted by the provisions of Part I. It further held that even in the case of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions.

In the Venture Global case the justification to entertain a challenge to an award made outside India with the seat of arbitration in London and the governing law of the contract being the laws of the State of Michigan, was based on the reasoning that to apply section 34 to foreign international awards would not be inconsistent with Section 48 of the Act or any other provision of Part II. The judgment-debtor cannot be deprived of his right under section 34 to invoke the public policy of India, to set aside the award. The public policy of India includes—(a) the fundamental policy of India; or (b) the interests of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. Therefore, the extended definition of public policy cannot be bypassed by taking the award to a foreign country for enforcement.

Issues before the Constitution Bench:

1. The meaning of the expression "the country….or under the law of which, that award was made" in Section 48(1)(e) of the 1996 Act or Article V(1)(e) of the New York Convention, 1958 and whether it refers to the proper law of the contract or the curial law of the arbitration?

2. Whether the competent Court in India under section 48(1)(e) of the 1996 Act (Article V(1)(e) of the Convention) could set aside an award, even though the seat of arbitration was in London and where the contract provided that the law of arbitration shall be the English law?

3. Whether Part I of the 1996 Act would apply only if the 'place of arbitration' was in India?

4. Whether a substantive suit is maintainable in aid of an arbitration proceeding held outside India?

5. Whether the courts in India have power to grant interim measures in absence of a specific statutory power in aid of arbitration proceedings held outside India?

Factual background of BALCO case:

Bharat Aluminium Co. Ltd. (appellant) and Kaiser Aluminium Technical (respondent) entered into an agreement. Under the agreement the respondent was to supply and install equipment for modernization and upgrading of the appellant's production facilities. The agreement provided for settlement of disputes by arbitration. Disputes between the parties were referred to arbitration. The arbitration was held in England and the arbitral tribunal passed two awards. Appellant filed applications under section 34 of the Act for setting aside the two awards. The District Judge held that the applications for setting aside the two foreign awards were not maintainable. This was upheld by the High Court. Bharat Aluminium Co. aggrieved by the order filed a Special Leave petition before the Supreme Court.

Supreme Court held:

(i) The conclusion arrived at in Bhatia International

[1] The author was an arguing counsel in the matter before the Supreme Court of India. Author also acknowledges the assistance rendered by Ms. Ankit Khushu in writing this article.

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and Venture Global cases are not correct and therefore both the decisions are overruled.

Interpreting section 2(2) of the Act the Court held that Part I of the Act was limited in its application to arbitrations which take place in India. The court observed that it would not be correct to say that the omission of the word "only" from section 2(2) indicates the applicability of the Act to arbitrations taking place outside India because it is not the function of the court to supplant the omission which can only be done by the Parliament. The court observed that Parliament limited the applicability of Part I to arbitrations taking place in India and has given recognition to the principle of territoriality embodied in the UNCITRAL Model Law. Further, the scheme of the Act makes it clear that the territoriality principle accepted by the Model Law had been adopted by the Act.

Referring to the word "only" in Article 1(2) of the UNCITRAL Model Law the Supreme Court observed:

> "68…The genesis of the word "only" in Article 1(2) of the Model Law can be seen from the discussions held on the scope of application of Article 1 in the 330th meeting, Wednesday, 19 June, 1985 of UNCITRAL. This would in fact demonstrate that the word "only" was introduced in view of the exceptions referred to in Article 1(2) i.e. exceptions relating to Articles 8,9,35 & 36…It was felt necessary to include the word "only" in order to clarify that except for Articles 8,9,35 & 36 which could have extra territorial effect if so legislated by the State, the other provisions would be applicable on a strict territorial basis. Therefore, the word "only" would have been necessary in case the provisions with regard to interim relief etc. were to be retained in section 2(2) which could have extra-territorial application. The Indian legislature, while adopting the Model Law, with some variations, did not include the exceptions mentioned in Article 1(2) in the corresponding provisions Section 2(2). Therefore, the word "only" would have been superfluous as none of the exceptions were included in Section 2(2)."

This analysis is unfortunately not correct. Howard M. Holtzmann and Joseph E. Neuhaus in "A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary" in their Commentary to Article 1 of the UNCITRAL Model Law relating to the Scope of Application of the Model Law note at page 27 that:

> "Second, Article 1 fixes the territorial limits on the scope of application of the Law. The Law applies only to arbitrations as to which the "place of arbitration" is in the State adopting the Law …"

Therefore, the word 'only' is to emphasise the intention of the Commission's decision to adopt the "strict territorial" application and reject the "autonomy criterion". The word 'only' therefore limits the application of the Model Law provisions to the 'place of arbitration' and does not relate to the four exceptions of Article 1 (2) i.e. Article 8, 9, 35 and 36. Further, the word 'only' defines the scope of application of the Model Law provisions to the 'place of arbitration' by stating that "[T]he provisions of this Law…. apply only if the place of arbitration is in the territory of this State".

Notwithstanding the above anomaly the Supreme Court rightly concludes that the omission of the word "only" in Section 2(2) of the Act cannot be interpreted in a manner to show that the Indian Legislature had deviated from the 'territoriality principle' embodied in Article 1(2) of the Model Law or had not limited the application of section 2(2) of Part I of the Act only to arbitrations where the place / seat is in India.

(ii) *The territoriality principle of the 1996 Act precludes Part I being applied to a foreign seated arbitration even if the arbitration agreement governing the parties provide that the arbitration proceedings will be governed by the Indian 1996 Act.*

The Court held that the territoriality principle embodied in the UNCITRAL Model Law has been adopted by the Indian Arbitration Act.

(iii) *Provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions (sub-sections 2(4) and 2(5)) either in Part I or in Part II of the Arbitration Act, 1996.*

The court observed that the words "every arbitration under any other enactment for the time being in force" in section 2(4) of the Act contemplated only an Act made by the Indian Parliament and must be read as limited to all arbitrations that take place in India. Section 2(5) of the Act cannot be interpreted to mean that any provisions of Part I would apply to arbitrations which take place outside India.

(iv) *Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India.*

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The court held that section 2(7) of the Act clearly distinguished the domestic award covered under Part I from the "foreign award" covered under Part II of the Act.

(v) *The choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings.*

The Supreme Court followed the ratio laid down by the English Courts in Naviera Amazonica Peruana SA, C v. D and in Sulamerica CIA Nacional de Seguros SA v. Enesa Engenharia SA wherein it was held that the courts at the seat of arbitration shall have supervisory jurisdiction over the arbitration process.

(vi) *Meaning of the expressions "country in which the award was made" and "under the law of which the award was made" in Section 48 (1) (e) (Article V(1)(e) of New York Convention) .*

The question posed by the Supreme Court was "does section 48 (1) (e) recognize the jurisdiction of Indian Courts to annul a foreign award falling within Part II?"

The answer must be in the negative but having accepted that the Model Law is based on strict territoriality principle in paragraphs 69 to 71 the Supreme Court goes on to hold that the second alternative i.e. "under the law of which the award was made" continues to be available to a party under section 48 (1) (e) as a ground for refusal of enforcement of a foreign award. The court observed:

> "138…The provision merely recognizes that courts of the two nations which are competent to annul or suspend and award.
>
> 139… As noticed above, this section corresponds to Article V(1)(e) of the New York Convention. A reading of the Article V (1)(e) [Section 48(1)(e)] makes it clear that only the courts in the country "in which the award was made" and the courts "under the law of which the award was made" [hereinafter referred to as the "first alternative" and the "second alternative" respectively] would be competent to suspend /annul the New York Convention awards…
>
> 142…In our opinion, the disjunction would also tend to show that the "second alternative" would be available only if the first is not…
>
> 146…Therefore, we are of the opinion that appropriate manner to interpret the aforesaid provision is that "alternative two" will become available only if "alternative one" is not available."

Although the Court in paragraph 138 of the judgment holds that the Indian Parliament has confined the powers of the Indian Courts to set aside an award relating to international commercial arbitrations which take place in India, it does not expressly state that the "second alternative" has in fact turned into a 'fossil' and will not be invoked by the Indian courts because of the acceptance of the strict territoriality principle by adopting the Model Law.

(vii) *In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India.*

The core issue in Bhatia International case was the lack of availability of a remedial measure under section 9 of the Act in a foreign seated arbitration. Addressing the argument that if the applicability of Part I is limited to arbitrations which take place in India it would leave many parties remediless, the Court observed that if parties have voluntarily chosen the seat of the arbitration outside India they must be deemed to have chosen the necessary incidents and consequences. In any event, providing a remedy is a matter to be dealt with by the Legislature.

The Supreme Court rightly left the issue to be addressed / rectified by the Indian Parliament.

(viii) *Non-convention award cannot be incorporated into the Act by process of interpretation as was done in Bhatia International.*

The court held that the task of removing any perceived lacuna or curing any defect lies in the hand of the Parliament. The intention of the Legislature was not to include the non-convention awards within the Act.

As a result non-convention awards will not be treated as domestic awards. It is however, not certain as to whether the prospective application of the judgment (paragraph 201) would also hold good for enforcement of non-convention awards

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which had been delivered prior to the date of the present decision.

(ix) *No suit for interim injunction simplicitor would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.*

The court held that existence of a cause of action is a sine qua non for the maintainability of a civil suit and an arbitration proceeding pending outside India cannot provide a cause of action to a party for filing a suit where the main prayer is for injunction. A suit will not lie because an interlocutory injunction can only be granted in a pending civil suit in which the relief granted is likely to result in a final decision on the subject in dispute.

(x) *The law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.*

In its final observation the court reversed all the good deed done. It would take several years, maybe decades before application of Bhatia International case ceases. The prospective application of the judgment may give rise to serious complications. One such situation would be where disputes have arisen between the parties for the same work under an additional or supplementary contract entered into after 6th September, 2012 i.e. the date of the decision, which incorporates by reference the arbitrating clause under the main contract entered prior to 6th September, 2012.

Thus, all Foreign awards rendered pursuant to arbitration agreements executed prior to 6th September, 2012 would continue to be governed by the law laid down in Bhatia International and Venture Global.

Dharmendra Rautray has over 18 years of experience in arbitration and has acted as arguing counsel in several landmark decisions delivered by the Supreme Court of India. He has authored a book entitled "Master Guide to Arbitration In India" published by Wolters Kluwer; 2008. He presently acts as counsel in arbitrations governed by the AAA, ICC and SIAC Rules involving large infrastructure and construction disputes

REVIEW of "Law and Practice of Construction Contracts"

by Chow Kok Fong - 4th Edition, 2012, Sweet & Maxwell Asia, Thomson Reuters, Singapore

During the past few decades, many practitioners of construction law and professionals and contractors involved in the construction industry in Singapore and the region have looked to the text-books and writings by Mr. Chow Kok Fong as handy reference sources for research, insights and practical solutions for legal and contractual issues.

I have found it very useful to have in my firm's library (as well as a complete set in my room for quick reference) Mr. Chow's books as reference material for our contracts and disputes lawyers. These include his classic textbook *"Security of Payments and Construction Adjudication"* of 2005 on statutory adjudication under the Security of Payments Act as well as his *"Construction Contracts Dictionary"* of 2006, which I especially love for its one-stop quick "A to Z" guides on almost every issue on contracts and construction law.

In my view, Mr. Chow's towering work is his *"Law and Practice of Construction Contracts"*, now recently published in June 2012 in its 4th Edition by Sweet & Maxwell Asia and Thomson Reuters.

This work debuted in 1988 as *"An Outline of the Law and Practice of Construction Contract Claims"* (although an earlier incarnation was the author's *"The Law Relating to Building Contracts"* in 1981). In what I might say were still "early days" of construction law in Singapore, I found the 1988 book (as well as the 2nd Edition in 1992) to be very timely and useful indeed, since there were in those decades really relatively few references on this subject in Singapore, and we had to look very much to textbooks and cases from England on any basic or curious point. In 2004, Mr. Chow's book (by then already re-named to its current title) had grown to a veritable tome of over a thousand pages and had

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already become the standard construction law textbook in Singapore.

The recently launched 4th Edition has now doubled to two hefty volumes, with 21 chapters on subjects ranging from general contract principles to dispute resolution, covering almost all the issues one might encounter in construction law practice.

One can say that there is no one more qualified in Singapore to write and undertake such an exhaustive and informed work on this subject, as recognized by Honorable Judge of Appeal Justice V.K. Rajah in the Foreword to the 4th Edition. Chow Kok Fong, a Chartered Arbitrator, and much sought after in the region as arbitrator, adjudicator and mediator, has eminent academic qualifications (in law and quantity surveying) and extensive practical international experience in the construction and infrastructure industry. His corporate career included his years as head of the Construction Industry Development Board (now known as the Building and Construction Authority) and later Chief Executive of Changi Airports International; and as executive Director in three of the largest development companies in Singapore. He was, amongst his other appointments, former Chairman of the Society of Construction Law and the founding President of the Society of Project Managers in Singapore. It is indeed admirable that amidst such a busy professional background, and continuing civic and professional responsibilities, Mr. Chow has found the time and energy to fulfil his passion for research and to write such an exhaustive text on this wide subject.

The width of the subject is covered in the book systematically in several sections. Volume 1, Chapters 1 to 3 by themselves can form a basic primer to construction, starting with an overview of the construction and development process, through contract formation (including diverse issues such as those relating to the tender process, letters of intent, implied terms and warranties). There follows a discussion on contract models and standard forms. Other than examining the various standard forms(such as the SIA, FIDIC, PSSCOC, ICE, NEC and others), this section also discusses models of contracting, such as design & build, management contracting, pricing and other risk allocation strategies and issues.

The ensuing chapters in Volumes 1 and 2 are useful references for the principles and laws in relation to the usual as well as peculiar issues, dealing methodically chapter-by-chapter with topics such as redress for breach of contract, performance bonds, variations, unexpected conditions, subcontracting and assignments, certifications and claims in respect of time and money. I am glad to see special chapters on termination, insurance matters and negligence, as these areas are often intriguing and vexing (both for contract users and legal practitioners alike).

In Volume 2, there is an extensive section dealing with dispute resolution – with separate sections for construction Litigation, Arbitration, Adjudication (including the seminal court decisions during the past few years) and for claim preparation. For completeness, there is a discussion on Dispute Adjudication Board decisions. (I noted that Expert Determination was not dealt with, but perhaps this increasingly discussed form of dispute resolution can be dealt with by Mr. Chow in a separate work or in future editions).

Chapter 21 in Volume 2 is a useful 200-page commentary on the SIA Standard Form of Contract, which remains the leading standard form for private construction work in Singapore. The SIA Form, as well as the PSSCOC form, are set out in separate appendices for easy reference.

The various subjects in the book cite some 1900 court decisions in Singapore, UK, Malaysia, Australia and other jurisdictions, as well as some 4 dozen statutes from those countries on those subjects. Although written by an author in Singapore, this book is therefore a useful reference book in those jurisdictions as well, especially since many areas of construction and construction law are generic and relevant internationally, in both common law and civil law countries.

Mr. Chow's work reflects the tremendous growth of the body of construction law and construction dispute resolution during the past three decades. Further, the dedication and tremendous time, energy, analysis and thought process in organizing and writing such a work is reflected in the resulting breadth, thoroughness and detail in the book. The various topics, from the basic principles to the complex issues, are covered in a straightforward, simple and practical style, which makes it readable not only for construction lawyers and industry consultants, but also for the users: namely the employers, contractors, sub-contractors, architects, engineers, surveyors and other professionals in the building industry.

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Across the Causeway- The Malaysian Construction Industry Payment and Adjudication Act 2012: A New Regime

Date	Event	Speakers	Chairperson:
26 September 2012	Seminar	Datuk Sundra Rajoo Mr. Chow Kok Fong	Mr Mohan Pillay

This seminar introduced Malaysia's new Construction Industry Payment and Adjudication Act ("CIPAA") and how is it expected to operate. It gave insights on the current issues in relation to the construction industry in Malaysia and also addressed the differences between CIPAA and the equivalent in Singapore, the Building and Construction Industry Security of Payment Act ("SOP"). Two very eminent speakers, Datuk Sundra Rajoo and Mr. Chow Kok Fong imparted much insight and wisdom to seminar participants.

Getting the Architecture of the Arbitration Right

Date	Event	Speakers
6 November 2012	Seminar	Mr. Michael Hwang, Steven Lim & Ben Giaretta

Michael Hwang , a name synonymous with arbitration in Singapore and the region, engaged us in discussions about common procedural orders made in most arbitrations and when they might be modified, omitted or added. A Model Procedural Order 1 was used to depict problems faced in arbitrations and constructive comments and discussion were led by Steven Lim and Mr Ben Giaretta. The internationally recognized "Hwang Model Procedural order on Confidentiality" used to protect confidentiality in arbitrations was also included in the Model Procedural Order 1. Seminar participants gained greater insight and understanding of arbitration procedures.

31st Anniversary Dinner

Date	Event
20 November 2012	31st Anniversary Dinner

We were honoured to celebrate our 31st anniversary with The Honourable the Chief Justice Sundaresh Menon as our guest of honour at Sheraton Towers. Chief Justice Menon made his first public address after taking office at the dinner and we have published his address in full in this issue. We would like to thank the sponsors and everyone who attended the dinner and made it a memorable evening for us all.

The New CIETAC Rules- Do They Make CIETAC A Choice Which Will Rival SIAC, HKIAC and The ICC?

Date	Event	Speakers	Chairperson:
29 November 2012	Seminar	Mr. John Bishop	Mr. Raymond Chan

This seminar highlighted the changes in CIETAC's new rules which came into effect on 1 May 2012 and discussed if these rules will rival SIAC, HKIAC and the ICC rules. Mr. John Bishop addressed this matter in depth and offered participants a quick update on the various events taking place at CIETAC.

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