SINGAPORE INSTITUTE OF ARBITRATORS

# NEWSLETTER

MCI (P) 125/11/2014 **DECEMBER** 2014 **ISSUES** NO. 12

## THE PRESIDENT'S COLUMN

Even as we prepare our farewell to 2014, we welcome the new Council of SIArb which was formed after the Annual General Meeting on 30 September 2014. Mr Chia Ho Choon is re-elected Vice President and Mr Naresh Mahtani as Honorary Secretary without contest. As a result of popular vote and an unprecedented recourse to Article 7.7.4 of the Constitution (which required a casting vote from the Chairman), we welcome back Mr Tay Yu-Jin and Mr Dinesh Dhillon, as well as Mr Leslie Chew SC. Mr Chew has been a stalwart of SIArb both before and even after he joined the judiciary from which he has now retired. Our heartfelt thanks to former Council members, Mr Ganesh Chandru, Mr Sundareswara Sharma and Ms Audrey Perez, for their service of the Institute and our members.

The Council for 2014/2015 can be seen on the right hand column of this Newsletter.

Members of the Council have agreed to take lead of the various Committees of SIArb, as follows:

| Committees | Chair(s) |
|---|---|
| Membership | Mr Naresh Mahtani |
| Education | Mr Leslie Chew SC |
| Continual Professional Development (CPD) | Mr Dinesh Dhillon |
| Panel Arbitrators | Mr Mohan Pillay |
| Publications & Website | Mr Kelvin Aw |
| Activities | Mr Chia Ho Choon |
| Scheme Arbitration | Mr Steven Lim |
| External Relations | Mr Johnny Tan |
| Arbitration Bar | Mr Tay Yu-Jin |

## ANNOUNCEMENTS UPDATES & UPCOMING EVENTS

1. Developments in Singapore Arbitration Law (16 January 2015)
2. International Litigation and Mediation for International Businesses in Asia – Singapore's Game-Changing Initiatives (29 January 2015)
3. Extraordinary General Meeting of the Singapore Institute of Arbitrators (29 January 2015)
4. International Entry Course (24, 25 and 27 April 2015)
   Candidates who pass an examination at the end of this Course may apply to be Members of the Institute and subject to meeting membership requirements may use the abbreviation "MSIArb" as part of their credentials.

## NEW MEMBERS

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

### Associate Members

1. Chung Sheuan Seen
2. Lim Meng Juan
3. William Sefton Bowman
4. Wong Chear Ching

### Members

5. Ng Poh Chuan
6. Richard Lim Teck Hock
7. Matthew Paul Richards
8. Ng Shyang Long Eric
9. Ruben Potter
10. Matthew Minuzzo
11. Ng Wei Wei Henry
12. Annie Lai Lee Ling

### Fellows

13. Leong Kah Wah
14. Lau Chin Huat
15. Prakasam Malayala Nagesh
16. Sudhir Singhal
17. Rowena Magdalene Goh
18. Wong Chin Sing
19. Loke Kwok Him, Christopher

## PANEL ARBITRATORS

The Institute congratulates the following on their admission to the panel of arbitrators

### Primary Panel of Arbitrators

1. Chooi Yue Wai, Kenny
2. Mark McGeoch
3. Soh Lieh Sieng



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The AGM was preceded by a refreshingly candid and insightful talk by the Registrar of SIAC, Ms Tan Ai Leen, on *A Day in the Life - Behind the Scenes in an Arbitral Institution*, chaired by Mr Naresh Mahtani. Ms Tan offered snapshots of what working in SIAC is like and the kinds of policy, practical as well as legal issues that the SIAC team have to cope with. It engrossed the audience. Not surprisingly, it triggered some lively questions and exchanges from the floor.

In October 2014, Mr Raymond Chan helmed yet another successful Fellowship Assessment Course ("FAC"). Participants said they enjoyed it, and I look forward to welcoming new Fellows to the ranks of SIArb. Mr Raymond Chan will step down as Course Director of the FAC after many years of quiet, selfless service. We really owe him a lot for his past service as President and as Course Director of the FAC. I am comforted that the FAC remains in good hands, as Mr Leslie Chew SC will take over the helm in 2015. My gratitude to the Faculty members too, who have devoted time away from their demanding day jobs to teach at the FAC and mark the award writing exam papers.

In November, a joint SIBL-SISV-SIArb seminar on *Common Pitfalls under the "SOP Act", and Interactions between ADR mechanisms in Construction Disputes* attracted 110 participants. The stars of the half-day event were Mr Peter Chua, Mr Stephen Wong, Mr Chow Kok Fong, Mr Christopher Chuah, Mr Edwin Lee and Mr Naresh Mahtani.

We were privileged to have leading silks from 20 Essex Street speak on recent English and Singapore cases on lifting the corporate veil. The seminar *Reaching Beyond the Obvious - Recent Developments in Piercing the Corporate Veil, Non-Cause of Action Defendants and Hard Cases: Petrodel v Prest, Mahakam and Alyazov* was delivered by Duncan Matthews QC, Co-Head of Chambers and Ms Sara Masters QC, and chaired by Mr Leslie Chew SC.

In December, we signed a MOU with the Singapore Institute of Architects. This MOU envisages collaboration on specific projects such as conferences and training programmes. Preferential rates will be offered for members of each other's events. This collaboration with SIA is meaningful. Construction and building professionals have always been leading members of the arbitration community. Construction arbitration has been key in the development of arbitration jurisprudence and expertise long before international arbitration took root in Singapore. We look forward to renewing ties with our colleagues in this profession.

The signing of the MOU was followed by a lively talk by Mr Leslie Chew SC on Stay of Court Proceedings in Favour of Arbitration.

2014 draws to a close with measures of both anxiety and hope. True, Ebola, ISIS and the pervasive economic rut cast a pall over much of the globe. These may seem the worst of times. Yet, compared to 2008, these are the best of times. Let's not forget our blessings. We have friends, we have dedicated colleagues, and we have dedicated colleagues who are also friends. Given the demographic profile of SIArb, there are probably many still who also look forward to 2015 for the seventh Star Wars film. On that note, I offer you a toast for riding out 2014 with us. Cheers.

**Chan Leng Sun SC**
4 December 2014

**SIArb Council 2014/2015**
From left: Mr Leslie Chew SC, Mr Yang Yung Chong, Mr Naresh Mahtani, Mr Mohan Pillay, Mr Chan Leng Sun SC, Mr Tay Yu-Jin, Mr Chia Ho Choon, Mr Steven Lim, Mr Johnny Tan and Mr Kelvin Aw. Absent: Mr Ganesh Chandru and Mr Dinesh Dhillon.



# RECENT DEVELOPMENTS IN ARBITRATION LAW IN SINGAPORE

## By Kelvin Aw / Tan Min-Hui

This article examines two recent Singapore cases in arbitration case law, *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2014] SGHC 220 and *PT Central Investindo v Franciscus Wongso and others and another matter* [2014] SGHC 190.

***Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2014] SGHC 220**

The Singapore High Court considered when, under the International Arbitration Act ("**IAA**") and the Model Law, a failure to abide by agreed arbitral procedures might be grounds for setting aside an arbitral award.

This judgment provides a useful analysis of when Art 34(2) of the Model Law and s 24(b) of the IAA may be invoked to set aside an arbitral award, and is an important reminder that the Singapore courts will take a robust approach in scrutinising the evidential foundation of the applicant's complaints, in its setting-aside application, in order to guard against applicants re-packaging and introducing new arguments in its case, in order to challenge the award.

**Background**

Triulzi Cesare SRL ("**Triulzi**"), an Italian company, contracted with Xinyi Group (Glass) Company Limited ("**Xinyi**"), a Hong Kong company, for the sale of three of Triulzi's washing machines. The contracts provided for any disputes between the parties to be resolved by arbitration in Singapore.

**Dispute**

A dispute arose between the parties arising from the non-compliance of two washing machines with contractual specifications, and the non-delivery of a third washing machine. Xinyi cancelled the contracts and commenced arbitration in the International Court of Arbitration of the International Chamber of Commerce.

During the arbitration proceedings, the tribunal issued a direction that parties were to file and exchange their witness statements by the stipulated date. Pursuant to the direction, on 1 April 2013, Xinyi filed the expert witness statement of Dr Bao Yiwang ("**Dr Bao**") along with other factual witness statements. However, Triulzi only filed factual witness statements, and the following day, applied to the tribunal to exclude Dr Bao's expert witness statement. In the alternative, Triulzi sought permission from the tribunal to file its expert witness statement 8 weeks later, which would necessitate the evidentiary hearing dates to be vacated.

After hearing submissions from both parties, the tribunal directed that Triulzi file its expert witness statement by 4 pm of 15 April 2013, and that the hearing dates of 22-25 April 2013 will not be vacated. Subsequently, Triulzi was unsuccessful in its attempts to vacate the hearing dates.

At the evidentiary hearing which began on 22 April 2013, Xinyi called two witnesses of fact and Dr Bao. On the last day of hearing, 25 April 2013, Triulzi applied to the tribunal to adduce the expert witness statement of one Dr Alberto Piombo ("**Dr Piombo**").

However, the tribunal directed that the evidentiary hearing proceed without Dr Piombo's expert witness statement, because Triulzi had not raised any compelling arguments to persuade the tribunal to admit the statement.

The tribunal subsequently rendered an award in favour of Xinyi ("**Award**").

**Singapore Court Proceedings**

Triulzi applied before the Singapore High Court to set aside the Award on the basis of the following issues (amongst others):

- Issue 1: Breach of an agreed arbitral procedure

  The tribunal's decision to admit Xinyi's expert witness statement was in breach of the parties' agreed arbitral procedure, and the Award should therefore be set aside pursuant to Art 34(2)(*a*)(iv) of the Model Law

- Issue 1A: Award was not in accordance with Art 18 within the meaning of Art 34(2)(*a*)(iv) of the Model Law

  Triulzi's fall back argument why the Award should be set aside under Art 34(2)(a)(iv) of the Model Law was that it was not in accordance with Art 18. Art 18 sets out the non-derogable minimum procedural requirements (equality of treatment of the parties and that each party shall be given a full opportunity of presenting its case) as regards the procedural conduct of an arbitration.

- Issue 2: Breach of natural justice

  Alternatively, Triulzi asserted that by disallowing it to adduce an expert witness statement, Triulzi was not afforded a reasonable opportunity to be heard in respect of expert evidence. Hence, as Triulzi was treated unequally compared to Xinyi, it was entitled to set aside the Award on the basis of Art 34(2)(*a*)(ii) of the Model Law and s 24(b) of the IAA, being an alleged breach of natural justice.

**Decision**

The High Court rejected Triulzi's application to set aside the Award. Addressing the grounds upon which the application was made, the Court determined as follows:

- Issue 1: Breach of an agreed arbitral procedure

  The High Court stressed that with respect to the supervising court's discretionary powers under Art 34(2) of the Model Law, it is clear that prejudice is not expressly stipulated to be a requirement for setting aside an award under Art 34(2)(*a*)(iv) of the Model Law. The

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operative word "*may*" used in Art 34(2) of the Model Law underscored the discretionary powers of the supervising court to refuse to set aside an award even if there was a breach of the agreed procedure.

The High Court highlighted the Singapore Court of Appeal's decision in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 where V K Rajah JA also observed in general terms at paragraph [100] that:

> "*the court may, in its discretion, decline to set aside an arbitral award even though one of the prescribed grounds for setting aside has been made out*".

In the context of the court's general discretion, the High Court said at paragraph [64] that:

> *"prejudice is a factor or element relevant to, rather than a legal requirement for the application of Art 34(2)(a)(iv) of the Model Law. In other words, prejudice is merely a relevant factor that the supervising court considers in deciding whether the breach in question is serious and, thus, whether or not to exercise its discretionary power to set aside the award for the breach".*

The High Court also emphasised the fact-sensitive nature of each case and that much depends on the circumstances of each case.

Regarding the separate principle that the setting-aside procedure should not be used to raise new arguments that were not previously before the tribunal, the High Court said at paragraph [67] that:

> "*The supervising court would also be wary of any attempts by a party to re-package or re-characterise its original case and arguments that were previously advanced in the arbitration for the purpose of challenging the award*".

The High Court found that on the facts, there was no procedural agreement between the parties to dispense with expert evidence. Hence the High Court did not need to investigate further if the alleged breach was so material that the court should exercise its discretion in favour of setting aside the Award.

Separately, the High Court considered that on the facts, the exclusion of Dr Bao's expert witness statement would not reasonably have made a difference to the deliberations of the tribunal.

- Issue 1A: Award was not in accordance with Art 18 within the meaning of Art 34(2)(*a*)(iv) of the Model Law

The High Court said that the evidence in the case pointed, at best, to a misunderstanding of the scope of the direction on the "*Filing of Witness Statements*" or some other mistake on Triulzi's part.

In the circumstances of the case, Art 18 was not engaged. The High Court clarified that the purpose of Art 18 of the Model Law was to protect a party from the arbitral tribunal's conduct. It was certainly not intended to protect a party from its own "*failures or strategic choices*". The High Court noted that Triulzi had the same amount of time as Xinyi (11 December 2012 to 1 April 2013) to prepare and file an expert witness statement.

The High Court stressed at paragraph [116] that:

> *"The Tribunal is only required to ensure that both Triulzi and Xinyi had an opportunity to submit expert evidence. It is not required to ensure that both Triulzi and Xinyi made full and best use of such an opportunity. Triulzi cannot complain of its own failure to make use of the opportunity given to it by the Tribunal. Triulzi's complaint, in effect, is premised on it being denied an opportunity to adduce expert evidence rather than the bare fact that it did not adduce such evidence at the hearing. From this perspective, Triulzi's main contention does not relate to equality of treatment under Art 18 of the Model Law and should be re-characterised as an allegation that it was not afforded a reasonable opportunity to present expert evidence. The question then is whether Triulzi was afforded a reasonable opportunity to be heard in the arbitration and this is raised by Triulzi under Issue 2."*

- Issue 2: Breach of natural justice

Triulzi raised three specific criticisms of the tribunal's procedural orders and directions that were said to have effectively denied Triulzi a reasonable opportunity to present its own expert evidence.

In particular, Triulzi was prevented from advancing arguments before the tribunal that the subject machines complied with the contractual technical specifications, and that any non-compliance was due to Xinyi's lack of maintenance and the very dirty environment of Xinyi's facility. Triulzi was further prevented from refuting the tribunal's reliance on Xinyi's expert evidence in respect of the contractual requirement to run the subject machines for 8 hours for the acceptance test.

Triulzi argued that, as a result of such procedural orders and directions, Triulzi was treated unequally as compared with Xinyi.

However, the High Court said that Triulzi's challenge was effectively against the procedural orders and directions made in the course of the arbitral proceedings rather than a challenge to the making of the Award. Hence, Triulzi had to persuade the court that the tribunal's procedural decisions (which could be a matter of case management) amounted to a breach of natural justice (i.e. the procedural nature of the right to be heard) as a result of which Triulzi's rights were prejudiced under s 24(*b*) of the IAA.

The High Court noted that Triulzi's accusations were not that the tribunal had not dealt with all the central issues of the dispute or that the tribunal had dealt with the issues without hearing the parties. Triulzi's difficulty was because it was unable to establish that its complaints arose from circumstances attributable to the tribunal, or that the circumstances were not a result of Triulzi's own failures or choices (tactical or otherwise).

Hence, the High Court said that in the final analysis, the three procedural orders and directions could not even be treated as evidence of the tribunal's culpability and this meant that Triulzi's criticisms of the tribunal must fail because they were unfounded.



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***PT Central Investindo v Franciscus Wongso and others and another matter* [2014] SGHC 190**

This case dealt with the unusual situation where the arbitrator was challenged for his apparent bias. In this case, the arbitrator had already rendered his award before the determination of the removal application under Art 13(3) of the Model Law.

This posed the following conundrum: if the challenge was successful, did the supervisory court have the power to make a consequential order to declare the award invalid or to set it aside following the removal of the arbitrator?

Articles 12 and 13 of the Model Law do not provide clarity, as they are unhelpfully silent on this question, and neither is the removal of an arbitrator listed as a ground to set aside an award under Art 34(2).

**Background**

PT Central Investindo ("**PTCI**") an Indonesian company was in the business of leasing telecommunication towers. It entered into an arranger fee agreement with the first two defendants to secure PT Natrindo Telepon Seluler ("**NTS**") as a customer to lease its telecommunication towers, for an arranger fee. Although PTCI successfully secured the business of NTS, it failed to pay the arranger fee to the first two defendants on the ground that it was PTCI's key representative and the third defendant who had secured the business instead. This was disputed by the first two defendants.

The parties referred the dispute to arbitration pursuant to the arbitration clause in the arranger fee agreement. Arbitral proceedings commenced in 2009 with the substantive hearing conducted in April 2011. Although the arbitrator gave no indication when his award would be ready, he sought updates as to quantum of damages and made consequential directions on supplemental submissions between November 2012 and April 2013. PTCI was unhappy with the substance of these directions and the manner in which they were issued, and invited the arbitrator to withdraw as arbitrator in the matter.

PTCI then applied to the Singapore international Arbitration Centre ("**SIAC**") to remove the arbitrator which application was dismissed by the Chairman of the SIAC. PTIC then applied to the Singapore High Court to remove the arbitrator pursuant to Art 13(3) read with Art 12(2) of the Model Law. The challenge was on the basis that there were justifiable grounds to doubt the impartiality of the arbitrator. However, the arbitrator rendered the award before the determination of the removal application. The award was not in PTCI's favour.

**The High Court's analysis of Art 13(3) and Art 34(2) of the Model Law**

Following the High Court's examination of the drafting of the Model Law and relevant case authorities, the High Court opined at paragraph [123] that:

> "*With Art 13(3) being silent on the issue of setting aside an award following a successful removal of the challenged arbitrator, and having regard to the terms of Art 5, it would appear that the supervising court has no consequential powers to annul the award and that a separate application to set aside the award based on Art 34 grounds must be filed. Article 5 provides as follows:*
>
> *In matters governed by this [Model Law], no court shall intervene except where so provided in this [Model Law]."*

In arriving at the above conclusion, the High Court rejected two alternative scenarios outlined in paragraph [121]:

> *"(a) The first is that the removal of an arbitrator would necessarily render the award to be of no effect, and therefore it was unnecessary to expressly provide for it as a ground to set aside the award under Art 34.*
>
> *(b) The second is that the drafters did not quite anticipate the present scenario where an award would be rendered before the court's decision on the challenge. Given the fifteen-day and thirty-day timelines contained in Art 13(2) and Art 13(3) respectively, challenges against the arbitrator would in all likelihood be during the early stages of arbitral proceedings, and that there is a lacuna in the Model Law as result of the failure to contemplate the occurrence of a situation such as that in the present case."*

The High Court reiterated the Court of Appeal decisions in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 and *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125. In essence, the effect of Art 5 of the Model Law was to confine the power of the court to intervene in an arbitration under the IAA to the IAA, and that the Singapore courts had no general, residual, or supervisory jurisdictional powers outside the IAA.

The High Court stated that a challenge to an arbitrator's impartiality or independence is a ground for setting aside under Art 34(2)(*a*)(iv). However, even if the challenge was successful, the setting aside of the award would still in principle be subject to the more stringent requirements of Art 34(2). That said, the High Court pointed out that from an evidential point of view, the task of satisfying the requirements of Art 34(2)(*a*)(iv) or Art 34(2)(*b*)(ii) may not be so difficult in application. This is because the proof that the applicant has to furnish is the court order to remove the arbitrator, and the opposing party will not be allowed to go behind the decision which is non-appealable under Art 13(3).

Accordingly, the High Court dismissed both PTCI's application to remove the arbitrator and to set aside the Award.

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# "The Non-Signatory Problem" – an Overview of Recent Developments

By Dr. Andreas D. Blattmann and Lic.iur. Tamir Livschitz

## 1. Introduction

Admittedly, the question whether an arbitration agreement may be extended onto third parties,[1] i.e., particularly whether so called "non-signatories" may be bound by an agreement to arbitrate, is not new. It remains, however, a hot topic in international arbitration and merits revisiting from time to time. Undeniably, the said question has practical significance. Yet, the true reason for the continuing interest in this topic is probably that it touches upon the very heart of arbitration as a consensual means of dispute resolution, i.e., the principle of "privity of contracts".

Before focusing on new developments in international case law, this article will as a starting point briefly outline the most important aspects of the theoretical foundation of extending an arbitration agreement onto non-signatories.

## 2. The involvement of third parties in general

### a) *The basics*

If one were to ask 100 arbitration practitioners which is the most fundamental principle of arbitration, the predominant answer would most certainly be that only parties to an arbitration agreement are bound by it. The consensual nature of arbitration, which is a "*creature of contract*"[2] that derogates ordinary state-court jurisdiction, basically excludes any extension of an agreement to arbitrate onto third parties.[3] Redfern/Hunter et al. emphasize that "[t]*he foundation stone of modern international arbitration is (and remains) an agreement by the parties to submit to arbitration any disputes or differences between them.*"[4] Consequently, only those "individuals" that agreed to arbitrate are subject to the jurisdiction of an arbitral tribunal.[5]

Despite the above, there is an increasing willingness of (particularly) arbitral tribunals to extend arbitration agreements onto third parties, i.e., "parties" who have never signed such agreements. Presumably, this is owed to the complexity of international commercial disputes, a practical necessity, including considerations of efficiency or appropriateness, and a general tendency of arbitral tribunals to accept rather than deny their own jurisdiction.

There is a variety of approaches upon which courts and arbitral tribunals have relied when "imposing" an arbitration proceedings onto a "party" who is not party to the arbitration agreement. Case law[6] and doctrines have developed theories upon which an extension onto an additional party may be justified, including apparent agency, alter ego/veil-piercing, incorporation by reference, assumption, or estoppel.[7] However, most explanations for an extension of an arbitration clause onto non-signatories ultimately resort to two central doctrines: (a) implied consent, and (b) disregard of corporate personality (or, in civil law jurisdictions, the concept of abuse of rights).[8]

### b) *Practical scenarios*

Despite the necessity of an analysis on a case-by-case basis, it is possible to identify a few very specific (and sometimes overlapping) general scenarios: *Apparent agency*, e.g., refers to a situation in which a party acting on behalf of a principal vis-à-vis a third party without proper authority is deemed to bind such principal to an arbitration agreement if the principal created the appearance of proper authorization on which the third party could reasonably and in good faith rely.[9] *Interference or contractual performance* describes a situation in which an entity may become subject to an arbitration agreement impliedly, typically by virtue of its conduct.[10] According to the *alter ego / piercing of*

1 Please note that continental lawyers often use the term "extend", whereas lawyers trained in a common law jurisdiction rather refer to the "joining of non-signatories"; see Park, Non-Signatories and International Contracts: An Arbitrator's Dilemma, in: Multiple Parties in International Arbitration, Oxford 2009, at para. 1.02

2 See Thomson-CSF, S.A. v. American Arbitration Association, 64 F.3d 773 (Second Circuit, August 24, 1995), at 776.

3 AT & T Technologies Inc. v. Communications Workers of America, 475 U.S. 643, 648 (1986)

4 REDFERN/HUNTER ET AL. Redfern and Hunter on International Arbitration, 5th ed. Oxford 2009, at para. 1.38.

5 See Stucki, Extension of Arbitration Agreements to Non-Signatories, p. 1, ASA Below 40 Conference, Geneva 2006 [available at http://www.docstoc.com/docs/47479901/Main-Contract-Arbitration-Agreement].

6 See, particularly, Thomson-CSF S.A. v. American Arbitration Association, 64 F.3d 773 (2nd Circuit 1995).

7 Park, op. cit., p. 3; note that the phrasing of such theories may vary from jurisdiction to jurisdiction.

8 Park, op. cit., p. 3.

9 Decision of the Swiss Federal Supreme Court of 1 September 1993, ASA Bull. 4/1996, p. 623.

10 Pursuant to international arbitration practice, under certain circumstances performance by a third party of contractual obligations of a contract containing an arbitration clause or other kinds of interference in the contractual negotiations or performance may extend the applicability of such clause to the interfering third party. See already back in the 1980s the Dow Chemical Case, ICC Case No. 4131, Y.C.Y. Vol. IX (1984), 131; Further, with regard to Swiss court practice, the published decision of the Swiss Federal Supreme Court ("BGE") 129 III 727, and more recently BGE 134 III 565.



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*the corporate veil* doctrine, a non-signatory party can be held bound under an arbitration agreement, if such non-signatory party can be regarded as an alter ego of a party formally bound by the arbitration agreement.[11] Finally, the *group of companies doctrine*[12] *refers to a situation in which two or more entities belonging to one joint corporate group act in connection with a contract featuring an arbitration agreement, whereby their actions occur solely based upon instructions by their parent entity, which is not a signatory to the arbitration agreement. In such a situation, the non-signatory parent may nevertheless be held bound by the arbitration agreement if it has indeed played an active role in the negotiations, performance or termination of the contract in question.*[13]

## 3. Recent developments in international case law

### a) *Switzerland: Determining the parties to an arbitration agreement based on principles of good faith*

In one of its recent cases, the Swiss Federal Supreme Court ("Court") had to decide whether a parent company was bound to an arbitration agreement entered into by one of its subsidiaries. In this case, "X" and "Y Engineering" entered into a contractual relationship and agreed, among others, to an arbitration clause. Subsequently, Y Engineering initiated arbitral proceedings against X who, in turn, filed a counter-claim with the arbitral tribunal against Y Engineering and its parent company Y.

The arbitral tribunal held that Y did not sign the contracts containing the arbitration clause and was, therefore, not bound by said clause. On appeal, the Court first recalled the principles and practical scenarios under which an arbitration clause may be extended onto non-signatories. In this regard one must first remind itself of the constant case law of the Court, adopting a two-stepped approach in such matters. In a first step, the Court adopts a restrictive assessment of the question of whether or not an agreement to arbitrate exists at all, given that by means of such agreement the parties agree to waive their constitutional right to have their dispute adjudicated by a state-court. Once the existence of an arbitration agreement is confirmed, the Court however adopts a liberal approach when it comes to assessing the scope of such arbitration agreement, including its extension onto a third party.[14]

In addition, arbitral tribunals seated in Switzerland will for purposes of interpreting an existing arbitration agreement apply art. 178 para. 2 of the Private International Law Act (PILA), which provides that an arbitration agreement is valid if, alternatively, it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.
In the case at hand, the Court eventually resorted to the *principle of good faith*, a concept mostly familiar to civil law jurisdictions.[15] The Court argued that based on Y's conduct it was justified for X to believe that it entered also into a legal relationship with Y, including the arbitration clause. In particular, the Court stated that the parent company appeared to assume responsibility for the contractual obligations of its subsidiary. Interestingly, the Court also noted that Y could have avoided such appearance by way of its conduct, but that it did not do so. Instead, it acted in a manner which supported the said appearance, even though it was fully aware that for X the "transfer of responsibilities" to Y was important.[16]

It is obvious from the Court's considerations that in the case at hand it eventually relied on the doctrine of *implied consent*, although the *principle of good faith* may be applied in various constellations which do not necessarily relate only to that doctrine. Nevertheless, one may conclude from the Court's decision that under Swiss law – admittedly being one of the most arbitration-friendly laws – neither doctrine is *per se* excluded from application. However, although the Court had, as far as the *group of companies* doctrine is concerned, not entirely rejected its applicability, it had nevertheless explained that its application might not be assumed lightly, but only in exceptional circumstances which would justify a liability of the non-signatory based on a created legal appearance.[17] Moreover, the Court had repeatedly explained that in many cases (also including situations of *group of companies*), especially where the *principle of good faith* is applied, there is formally no disregard of a corporate identity. Instead, the parent company becomes party to the arbitration agreement in addition to the subsidiary – although it had not signed such an agreement.[18]

Therefore, the practical relevance of the *disregard of corporate personality* doctrine in Switzerland appears to be rather limited.

11 Decision of Swiss Federal Supreme Court of 29 January 1996, in: ASA Bull. 3/1996, p. 505; Assumption of an alter ego requires that a party exerts complete and exhaustive control over another party and has misused such control to such extent that it may be appropriate to disregard the separate legal forms of the two parties and treat them as one entity.

12 Note that the group of companies doctrine is well established in France. In other jurisdictions, however, it remains highly disputed.

13 "Dow Chemical", ICC Case No. 4131, Y.C.Y. Vol. IX (1984), p. 136 et seq.; Note that the group of companies doctrine is based on the parties' objective intent which requires at least at some point of the contractual negotiations or performance the parties' intent (based on their conduct) that the non-signatory parent company should be bound by the arbitration agreement. In many of the circumstances that may give rise to an application of the group of companies doctrine, an extension onto a non-signatory third party may be achieved by construing such implied consent of the "interfering party" as described above.

14 BGE 116 1a 56, BGE 128 III 50.

15 Note that, under Swiss law, the principle of good faith – also called the principle of reliance – is intended to protect a party's erroneous, but nevertheless reasonable, belief that it entered into a contract with the parent company (or with the parent and the subsidiary) and not with its subsidiary alone, cf. BGE 137 III 550.

16 BGer 4A_450/2013, decision of 7 April 2014; It is noteworthy that, under Swiss law, if a parent company wants to avoid the risk of becoming (a non-signatory) party to an arbitration agreement entered into by a subsidiary, it must ensure that it clearly expresses that it has not adhered to the contract containing the arbitration clause, especially in situations which might cause confusion as to the identity of the contracting parties.

17 Decision 4P.330+332/1994 of 29 January 1996.

18 BGE 137 III 550.

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*b) Germany: Group of Companies doctrine v. Conflict of Laws rules and Public Policy*

Contrary to the situation in France and, to a certain extent also in Switzerland, the applicability of the *group of companies* doctrine remains disputed in many jurisdictions. English courts, for e.g., have raised doubts as to the applicability of such doctrine under English law.[19] Similarly, the German courts have chosen a prudent approach, and in a recent ruling the German Federal Supreme Court ("Court") has reconfirmed its position.[20]

The claimant, a Danish company, initiated proceedings before the national courts in Germany against respondent, an Indian company, based on alleged infringements of intellectual property rights. The respondent objected to the court's jurisdiction, claiming that the matter was subject to an arbitration agreement contained in a license agreement between its legal predecessor and a company based in Mauritius, the latter's representative being the sole shareholder and managing director of the claimant. The respondent submitted that the claimant should be bound by the arbitration agreement due to its close links with its sole shareholder and, therefore, also with the Mauritius-based company as licensor.[21]

The lower court dismissed the respondent's objections by holding that – apart from the fact that the requirements for an application of the *group of companies* doctrine were not met – under Danish law, which it considered applicable since it was the *lex incorporationis*, the said doctrine was not recognized. Moreover, the lower court found that the *group of companies* doctrine would violate German public policy for various reasons.[22]

The Court, however, disagreed with the lower court's decision and confirmed the extension of the arbitration agreement onto the non-signatory claimant. With reference to the doctrine, the Court held that it would appear disputed which law should be applicable to decide whether a non-signatory might be bound by an arbitration agreement.[23] The Court, however, pointed out that the applicable law would have to be determined pursuant to the relevant conflict of laws rules. Hence, the Court most notably did not follow the approach taken in the *Dow Chemical* case, where the said question was answered based on principles of international law.

The Court then went on to clarify that whether or not a party might invoke a specific doctrine, e.g., the *group of companies* doctrine, would depend on whether the applicable law recognized such a doctrine. Only if the (possibly foreign) law – in a concrete situation – would recognize a doctrine, such as the *group of companies* doctrine, one would have to analyze whether such a doctrine violates public policy.[24] In this respect, the Court pointed out that a violation of public policy should only be assumed in exceptional cases. It would not suffice that a national judge would, due to application of mandatory rules, come to a different conclusion. Moreover, the fact alone that an application of the *group of companies* doctrine would deprive a non-signatory from its constitutional right of access to national courts would not, as such, justify the assumption of a violation of German public policy.[25]

This case allows for two conclusions to be drawn: Firstly, although the Court does not *per se* exclude an application of the *group of companies* doctrine, such a doctrine must form part of the law governing the arbitration agreement (and not of international principles of law). Secondly, although adopting a rather liberal approach, it would appear that the Court reserves the right to analyze any kind of *group of companies* doctrine under German public policy principles.

*c) England: Doubts on whether the power to pierce the corporate veil exists*

Under English law, practitioners used to resort to arguments relating to the *disregard of a corporate identity*, particularly to the concept of *piercing the corporate veil*, to extend an arbitration clause onto a non-signatory. However, two rather recent – *although not arbitration related* – decisions of the UK Supreme Court ("Court") have cast doubts on whether the power of a court or tribunal to pierce the corporate veil exists under English law, particularly when it comes to extending an arbitration clause on non-signatories.

In *VTB Capital plc. v. Nutritek International Corp.* the Court considered the case of VTB, a bank, which had lent money to a company based in Russia to finance the purchase of a dairy business from Nutritek. Subsequently, VTB had discovered that the Russian company and Nutritek were under common control. It therefore accused Nutritek of, among others, misrepresentation and initiated proceedings. It asked the court to consider Nutritek as a party to the finance agreement and to hold it jointly and severally liable with the Russian company by piercing the corporate veil.

Lord Neuberger, who gave the leading judgment in this respect, first declined to decide whether, as a matter of general principle, a power to pierce the corporate veil exists under English law.[26] However, he noted that the English courts had so far only pierced the corporate

19 See, e.g., Peterson Farms Inc. c. C&M Farming Ltd. [2004] EWHC 121.

20 Decision of the Federal Supreme Court ("BGH") dated 8 May 2014, case no. III ZR 371/12.

21 BGH III ZR 371/12, paras. 1–5.

22 BGH III ZR 371/12, paras. 14 et seq.

23 Surprisingly, the Court held that to ensure a third party's protection from heteronomy, the applicable law could also be the law presumably applicable to the relationship with the non-signatory; see BGH III ZR 371/12, para. 25.

24 See BGH III ZR 371/12, paras. 17 et seq.

25 See BGH III ZR 371/12, paras. 33 et seq.

26 VTB Capital plc. v. Nutritek International Corp. [2013] UKSC 5, judgment of 6 February 2013, at para. 130.



Continued from page 8

veil where "*special circumstances exist indicating that* [the involvement of the company] *is a mere façade concealing the true facts*".[27] That aside, the courts have never pierced the corporate veil to treat the person behind the veil *as a party to a contract* signed by the company. According to Lord Neuberger, a court would need strong justification to extend its previous practice to such a case.[28] Finally, he added that contracts must be understood in the light of the contractual parties' intentions. Here, neither the signatories nor the third party (allegedly sheltering behind the veil) intended to enter into an agreement with each other.[29]

Interestingly, as to the applicable law, Lord Neuberger held that "*it seems to me, however, that there may be a choice of law question to be addressed in cases which concern the piercing of the veil of a foreign incorporated company. That question is whether the proper law governing the piercing of the corporate veil is the lex incorporationis, the lex fori, or some other law (for example, the lex contractus, where the issue concerns who is considered to be party to a contract entered into by the company in question). The ultimate conclusion may be that there is no room for a single choice of law rule to govern the issue.*"[30]

In *Prest v. Petrodel*, however, the Court finally tried to tackle the main issue: It held that the power to pierce the corporate veil under English law should be recognized, but only in carefully defined circumstances. Lord Sumption concluded that "*there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control*". In such a case, the court may pierce the corporate veil for the purpose of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.[31]

These two cases permit the following conclusions: (1) The power to pierce the corporate veil exists as a limited principle of English law. (2) Such power, however, is limited to rare and exceptional cases. (3) With respect to situations in which a party argues that an agreement to arbitrate (and governed by English law) should be extended onto a non-signatory, it is difficult to imagine how a court or tribunal could rely on such limited principle since it would be necessary to show that there was an existing right and that the company structure was used to evade such right. Therefore, at least as far as English law is concerned, it appears to be more promising to resort to less controversial legal arguments, such as the ground of agency.

27 See VTB Capital plc. v. Nutritek International Corp. [2013] UKSC 5, at para. 120, with reference to Woolfson v Strathclyde Regional Council (1978) SLT 159.

28 VTB Capital plc. v. Nutritek International Corp. [2013] UKSC 5, at para. 137.

29 VTB Capital plc. v. Nutritek International Corp. [2013] UKSC 5, at para. 132 and 140.

30 VTB Capital plc. v. Nutritek International Corp. [2013] UKSC 5, at para. 131.

31 Prest v. Petrodel [2013] UKSC 34, judgment of 12 June 2013, at para. 35.

## 4. Conclusions

From a practitioner's point of view, it is important to emphasize that we face a plethora of different theories or doctrines which try to tackle the issue. It appears that there are no overriding principles of international law which would provide for a uniform solution. Instead, it is ultimately a question of the applicable rules of conflict of laws, which in turn leads to a considerable unpredictability as to the applicable law and, as a consequence, as to the applicable theories and doctrines. For example, even within common law jurisdictions there is only little consensus as to the piercing of the corporate veil as a general principle under their national law, as Lord Neuberger noted in the Prest case.[32] In this regard arbitration practitioners must note the utmost importance of the seat of an arbitration, and thus the applicable *lex arbitri*.

It would be too optimistic to expect that national courts would soon adopt a more internationalized and uniform approach, e.g. by creating an international principle of law delineating the general parameters on the basis of which an agreement to arbitrate may be extended onto a third party. Presently, national courts, even if benevolent to arbitration, remain careful when applying theories which deprive a party of its (often constitutional) right to submit its disputes to state-courts. However, this is by all means not the only possible solution to safeguard parties' constitutional right of state-court adjudication, as in particular the liberal French and Swiss case law have shown.

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32 "In Australia, 'there is no common, unifying principle, which underlies the occasional decision of courts to pierce the corporate veil', and that 'there is no principled approach to be derived from the authorities'. In Canada, '[t]he law on when a court may … '[lift] the corporate veil' … follows no consistent principle'. In New Zealand, ''to lift the corporate veil' … is not a principle. It describes the process, but provides no guidance as to when it can be used.' In South Africa, '[t] he law is far from settled with regard to the circumstances in which it would be permissible to pierce the corporate veil'. Similar confusion was also noted in US corporate law and in academic reviews", see Prest v. Petrodel [2013] UKSC 34, judgment of 12 June 2013, at para. 75.

## Fellowship Assessment Course 2014







| Date | Event |
|---|---|
| 10, 17, 18 and 20 October 2014 | Fellowship Assessment Course 2014 |

The Institute's annual Fellow Assessment Course 2014 was well attended, as always. Participants were privileged to be coached by a team of seasoned arbitration practitioners. The three day course culminated in an award writing examination. The Institute congratulates those who have passed and look forward to them qualifying as Fellows of the SIArb. The Institute would also like to extend its gratitude to Mr Raymond Chan for having performed the role of course director for this annual programme with distinction. As he steps down from this role, he will be succeeded by Mr Leslie Chew, SC in 2015.



## Common Pitfalls under the "SOP Act" and Interactions between ADR mechanisms in Construction Disputes




| Date | Event |
|---|---|
| 7 November 2014 | Joint Seminar: Common Pitfalls under the "SOP Act" and Interactions between ADR mechanisms in Construction Disputes |

In collaboration with the Singapore Institute of Building Limited and the Singapore Institute of Surveyors and Valuers, the Institute was honoured to have organised this joint seminar concerning the Building and Construction Industry Security of Payment Act (Cap. 30B). Departing from a lecture-styled presentation, this seminar incorporated a role-play segment based on past adjudication cases in which each of the speakers were tasked to present and explain their respective cases before the "tribunal". The seminar closed with a presentation surveying the various alternative dispute resolution mechanisms available in the construction industry, and a panel discussion involving Mr Peter Chua and Mr Stephen Wong. The Institute also congratulates the speakers, Mr Chow Kok Fong, Mr Christopher Chuah, Mr Edwin Lee and Mr Naresh Mahtani for a well-crafted and informative seminar.

## Reaching Beyond the Obvious - Recent Developments in Piercing the Corporate Veil, Non-Cause of Action Defendants and Hard Cases: Petrodel v Prest, Mahakam and Ablyazov



| Date | Event |
|---|---|
| 18 November 2014 | Lunchtime Seminar: Reaching Beyond the Obvious - Recent Developments in Piercing the Corporate Veil, Non-Cause of Action Defendants and Hard Cases: Petrodel v Prest, Mahakam and Ablyazov |

The Institute was pleased to host this thought-provoking seminar presented by Mr Duncan Matthews, QC and Ms Sara Masters, QC from 20 Essex Street. The eminent speakers shared with participants recent judicial thinking in combating fraud through the piercing of the corporate veil. In particular, the talk centred on the expansive approach adopted by the English Courts against non-cause of action defendants (the recent Ablyazov litigation) and the restrictive approach adopted in cases such as *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 and *VTB Capital plc v Nutritek International Corp and others* [2013] UKSC 5. Although there remains much debate over whether the doctrine of piercing the corporate veil exists in English law, this seminar has helpfully condensed the various view points in a bite-size lunch treat, giving the participants much food for thought. The seminar was chaired by Mr Leslie Chew, SC.

# Stay of Court Proceedings in Favour of Arbitration cum MOU signing ceremony with the Singapore Institute of Architects




| Date | Event |
|---|---|
| 2 December 2014 | Evening Seminar: Stay of Court Proceedings in Favour of Arbitration |

In this evening seminar, Mr Leslie Chew, SC conducted an interactive session with the participants exploring the scope and mechanics of the stay of proceedings provisions under both the Arbitration Act (Cap. 10) and the International Arbitration Act (Cap. 143A). The seminar was aptly chaired by Mr Johnny Tan, who also oversaw the signing of a memorandum of understanding between the Institute and the Singapore Institute of Architects providing for collaboration on conferences and training programmes.

## Call for Contribution of Articles

The SIArb Newsletter is a publication of the Singapore Institute of Arbitrators aimed to be an educational resource for members and associated organisations and institutions of higher learning. Readers of the newsletter are welcome to submit to the Secretariat at secretariat@siarb.org.sg well-researched manuscripts of merit relating to the subject matter of arbitration and dispute resolution. Submissions should be unpublished works between 1,500 to 2,500 words and are subject to the review of the editorial team.


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