SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
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THE PRESIDENT'S COLUMN

As we pass the mid year (and look forward to a haze free 2nd half), I am happy to update you on events since my March newsletter message, as well as some important events just round the corner.

Members' Nite – 8 May 2013

We had a great turnout at this relaxing get-together at *The Pelican Seafood Bar & Grill*, with its alfresco setting and spectacular evening views of Marina Bay Sands and the Singapore Flyer.

With some 50 people in attendance, many of whom were non members, the setting provided a scenic backdrop for an evening of fellowship, camaraderie and networking. The free flow of house wine, beer and house-pour spirits, no doubt, lifted everybody's spirits.

IEC 2013

This entry level course for those keen on developing their interest in arbitration was held from ***17 - 18 May***.

In 2012 we attracted good levels of interest in this program, with some 30 registrations – a historically high level for the Institute.

Continued on page 2

ANNOUNCEMENTS UPDATES & UPCOMING EVENTS

1. **National Arbitration Conference** on 30 July 2013 with Guest of Honour, Ms Indranee Rajah, Senior Minister of State in the Ministry of Law and Ministry of Education. The Honourable Justice Quentin Loh and leading practitioners in the field of arbitration and dispute resolution will also present various papers on the issues of costs and ethics in arbitration.
2. **Good Faith, Unconscionability and Reasonableness in Dispute Resolution: Finding a way through the maze** on 1 August 2013 by David Owen QC.

NEW MEMBERS

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

Fellows

1. Nicholas Lazarus
2. Dwight Gwee
3. Ong Yu En
4. Surenthiraraj Sauntharajah
5. Erunthiyanathan Ashokan Pateloo
6. Tan Chiang Huat Edward

Members

1. Teresa Kirsten Teo
2. Sim Wei Na
3. Rakesh s/o Pokkan Vasu
4. Phin Sovath
5. Bun Youdy
6. Lim Hon

CONTENTS

Continued from page 1

I am delighted to report that the 2013 IEC course remained as popular as ever, with some 32 registrations this year.

Thanks and recognition is due to in large part to the drive and enthusiasm of Naresh Mahtani, who in addition to being our Honorary Secretary, also doubles as IEC Course Director. My appreciation also to the lecturers and tutors who so willingly give their time to train the next generation of arbitration practitioners - Immediate Past President Johnny Tan, Council Members Dinesh Dhillon and Audrey Perez, and our volunteers Glenn Cheng, Steven Lim, Kelvin Aw and B Rengarajoo.

FAC 2013

We remain on track for our 2013 FAC course scheduled for ***23 - 24 August 2013.***

The FAC Course introduces candidates to the finer points of the arbitral process, from the perspective of the Tribunal. Classes range from the preliminary meeting and directions, through the arbitration procedure, and finally award writing.

So please do pencil in the dates if you are interested.

RAIF Conference – Cebu Philippines, 22 June 2013

RAIF, the Regional Arbitral Institutes Forum, is a regional grouping of 7 arbitral institutes from Singapore, Malaysia, Hong Kong, Philippines, Indonesia, Brunei and Australia.

Having organized the Inaugural Conference in 2007, it was very gratifying to see that we have now come full circle to the 7th RAIF Conference hosted by Philippine Institute of Arbitrators, PIArb.

Sadly, professional commitments conspired to prevent both myself and Vice President Chan Leng Sun from attending the 2013 RAIF Conference. SIArb was ably represented in Cebu by Immediate Past President Johnny Tan, and Hon Sec Naresh Mahtani.

Inaugural SIArb National Arbitration Conference – Tuesday 30 July 2013

Following the '*Save the Date*' reference in my last message, I am delighted to say more about this upcoming event in this message.

The theme of SIArb's Inaugural National Arbitration Conference 2013, "*The Golden Age of Arbitration – A Multi-stakeholder Perspective*" is inspired by the speech of Chief Justice Sundaresh Menon at the ICCA Congress 2012 held in Singapore in June 2012 . His Honour referred to the increasing importance and prevalence of international arbitration underlining a golden age in arbitration. At the same time, he encouraged arbitration practitioners to embark on a process of collective self-reflection regarding improvements in arbitral practice and the vibrancy of the industry.

Chief Justice Menon echoed key parts of this message during his speech to the Institute's members at SIArb's 31st Anniversary Dinner in November 2012.

This inaugural Conference provides a platform to discuss and debate this theme from the perspectives of various stakeholders in arbitration – the practitioners, the courts, and the users.

Our Guest-of-Honour is Senior Minister of State for Law & Education, Ms Indranee Rajah, someone known to many of us from her days at the litigation bar as Senior Counsel.

The Conference flyer, which comes with this Newsletter, provides full details of speakers and topics.

AGM – Wednesday 28 August 2013

This year's AGM, scheduled for 5.30 pm Wednesday 28 August 2013, will see the offices of President and Treasurer due for election together with a number of Council seats.

In addition the Council will be recommending a number of Constitutional amendments for consideration at the same time. This includes an important recommendation to remove the current Constitutional restriction that all Council members and office bearers be Singapore citizens or permanent residents. The Council considers that in today's world, this unduly restricts the talent pool of individuals available to support and serve the Institute at Council and office bearer level. The Council recommends that this be replaced by a requirement that the individual be ordinarily resident in Singapore.

Further details will be found in the formal General Meeting notices to be sent to members in late July/early August.

I encourage your attendance as important matters will be discussed and decided on 28 August. Your views and your vote matter – so do come and add your voice at the 28 August General Meeting.

BIMCO DISPUTE RESOLUTION UNDER THE SINGAPORE CHAMBER OF MARITIME ARBITRATION (SCMA) RULES – IMPLICATIONS ON MARITIME CONTRACTS

Introduction

A dispute resolution clause providing for dispute resolution under the Singapore Chamber of Maritime Arbitration ("SCMA") rules was introduced in November 2012 for use in the Baltic and International Maritime Council's ("BIMCO") documents, agreements and forms.

BIMCO is a shipping association that provides a range of services to the global shipping and maritime community, such as ship owners, operators, managers, charterers, salvors, brokers and agents.

BIMCO's main objective is to facilitate its members' operations by developing standard form contracts, standard clauses for use in contracts, providing quality information, advice and education.

BIMCO also promotes fair business practices, free trade and open access to markets and is a strong advocate for the harmonization and standardization of all shipping related activity.

Accredited as a non-governmental organization ("NGO") with many agencies of the United Nations and other international regulatory authorities, BIMCO actively promotes the use of internationally agreed regulatory instruments.

BIMCO's inclusion of SCMA as one of the centers for maritime arbitration makes Singapore only the third city in the world, after London and New York, to be given such recognition.

Arbitration or Dispute Resolution Clause

Amongst the hundreds of clauses developed by BIMCO for use in various forms and contracts, is a standard dispute resolution clause that provides for arbitration with an option for mediation. This clause contains 3 options as follows:

(1) Arbitration in London with English law to apply;

(2) Arbitration in New York with US law to apply; or

(3) Arbitration in Singapore under SCMA rules with English or Singapore law to apply.

BIMCO has also developed a dispute resolution clause which can be used under any other circumstances other than the above, with the choice of law and place of the arbitration to be mutually agreed.

The Governing Law of the Dispute

The option providing for arbitration in Singapore under the SCMA rules provides a further option for the governing law to be Singapore law or English law. If the parties do not make an express choice of law then English law will automatically apply.

In deciding whether to elect English law or Singapore law, the parties need to consider how English Maritime Law is applied in Singapore.

Singapore has an Application of English Law Act (Chapter 7A). It is also called the "**Enactment Act**". The Enactment Act dictates the extent to which English statutory provisions or common law applies in Singapore.

For example, in marine insurance contracts where the contract is governed by the English Marine Insurance Act 1906, the whole act is adopted by the Enactment Act and there is no difference if either English law or Singapore law is chosen.

In deciding between Singapore law or English law, parties may be advised to consider their requirements under each case rather than a specific measure. One also may take into account that Singapore has developed its own maritime case laws and they are undisputedly applied in UK courts as well (*Marina Iris*)

Singapore International Arbitration Act

Regardless of the law which governs the contract, Singapore's International Arbitration Act (Chapter 143A) (the "**IAA**") will govern procedural issues with respect to all international arbitrations in Singapore, including arbitrations in Singapore under the SCMA rules pursuant to the adoption in a contract of BIMCO's SCMA arbitration clause. The curial law of an arbitration, the laws governing an arbitration agreement and the law governing the substantive contract need not be the same.

SCMA Rules the overriding effect

Another unique provision under the BIMCO dispute resolution clause is that the arbitration shall be

Continued from page 3

conducted under the SCMA Rules. Unlike the first provision discussed above, where there is a choice between English law or Singapore law, here only the SCMA rules are to be applied. Any deviations therefrom will bring the contract outside the scope of the BIMCO dispute resolution clause and clause will not have its full effect. Hence, the rules of other arbitral institutes and centers who also have a presence in Singapore are excluded.

Apparent Conflict between SCMA Rules and the BIMCO Clause

A conflict between the SCMA rules and the BIMCO dispute resolution clause could arise as the said BIMCO provides for English law to apply automatically if the parties do not make an express choice of law. However under the SCMA rules, the issue of applicable laws is to be resolved by applying conflict of laws principles. Therefore both methods may be applicable to the parties but they may not necessarily arrive at same conclusion. Nevertheless, this could be resolved by a finding that the parties' choice of law overrides the SCMA rules as SCMA rules do have a provision giving priority to the parties' choice (Rule 21 Applicable Law - *The tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties the tribunal shall apply the conflict of law principles to determine which particular law shall govern the contract*).

Conclusion

BIMCO's inclusion of SCMA as a center for maritime arbitration is welcomed by the industry. For the local shipping community who use BIMCO documents, this move saves legal costs and time by a respectable margin.

However, it is noteworthy that the clause is new and has yet to be widely used or tested. Parties should consider advice from their P&I clubs or counsel before inserting the clause.

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Developments in the law of Arbitration and Procedure

In this issue, we review 3 cases as follows:

A. *Sulamerica CIA Nacional De Seguros S.A. and others v Enesa Engenharia S.A. and others* [2012] 1 Lloyd's Rep 671.

B. *Arsanovia Ltd and other companies v Cruz City 1 Mauritius Holdings* [2013] 1 Lloyd's Rep 235.

C. *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH* [2013] EWHC 338 (Comm).

A. Sulamerica CIA Nacional De Seguros S.A. and others v Enesa Engenharia S.A. and others [2012] 1 Lloyd's Rep 671 ("Sulamerica")

Introduction

In this appeal, the English Court of Appeal considered what the proper law of arbitration agreements should be when such arbitration agreements are not free-standing, but sit within substantive agreements where there was an express choice of law governing the substantive agreements, but no express choice of law governing the arbitration agreements.

Background Facts

The respondents were insurers from whom the appellants obtained two insurance policies. Claims were made under the policies but the insurers declined liability on the ground that the claims were excluded by the express terms of the policies. Both policies

Continued from page 4

contained materially similar clauses, amongst which are the following choice of law and dispute resolution clauses:

(a) Condition 7 (Law and Jurisdiction) - the policy would "*be governed exclusively by the laws of Brazil*" and that "*[a]ny disputes arising under, out of or in connection with this Policy shall be subject to the exclusive jurisdiction of the courts of Brazil.*";

(b) Condition 11 (Mediation) - "*if any dispute or difference of whatsoever nature arises out of or in connection with this Policy including any question regarding its existence, validity or termination, hereafter termed as Dispute, the parties undertake that, prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation … .*"

(c) Condition 12 (Arbitration) - "*[i]n case the Insured and Insurer(s) shall fail to agree as to the amount to be paid under this Policy through mediation as above, such dispute shall then be referred to arbitration under ARIAS Arbitration Rules… . The seat of the arbitration shall be London, England.*"

The insurers commenced arbitration and the insured started court proceedings in Brazil for an injunction restraining the appellants from commencing arbitration as Condition 7 provided for the exclusive jurisdiction of the Brazilian courts. The Brazilian court issued this injunction.

The insurers, in turn, applied for an anti-suit injunction from the English Commercial Court restraining the respondents from pursuing the proceedings in Brazil. In determining whether or not to continue with the anti-suit injunction, the Commercial Court had to firstly decide if the arbitration agreements were enforceable against the appellants. This hinged on the preliminary issue of what the proper laws of the arbitration agreements were.

The insured argued that Condition 7 called for the policies to be governed by Brazilian law under which arbitration agreements can only be invoked with the consent of both parties. The insured gave no such consent. The insurers, however, argued that English law governed the arbitration agreements and under this law, the arbitration was validly commenced.

The English Commercial Court held that the proper laws of the arbitration agreements was English law, despite the express choice of Brazilian law as the law governing the substantive contract. The Commercial Court took the view that the choice of the seat of the arbitration was London. Hence, English law was the law with which the arbitration agreements had the closest and most real connection. Thus, the Commercial Court granted the injunction.

The appellants appealed to the English High Court. The High Court agreed with the decision of the Commercial Court and continued the injunction. The appellants further appealed and the matter reached the English Court of Appeal.

The Issues

Proper law of the arbitration agreement

The primary issue before the Court of Appeal concerned the proper laws of the arbitration agreements. The enforceability of the arbitration agreements and continuation of the anti-suit injunction, depended on what the proper laws of the arbitration agreements were.

The insured argued that Brazilian law governed the arbitration agreements as:

(a) The express choice of law governing the substantive policies is Brazilian law;

(b) The parties agreed, under Condition 7, to the exclusive jurisdiction of the Brazilian courts; and

(c) There was a close commercial connection between the parties, the policies and Brazil (the policies being policies to cover risks in the construction of a hydroelectric power plant in Brazil).

The insurers argued that English law governed the arbitration agreements as:

(a) An arbitration agreement is severable and separate from the underlying substantive agreement (so it does not matter that the policies were governed by Brazilian law); and

(b) Like the judge in the Commercial Court had reasoned, London was the seat of the arbitration. Hence, English law had the most real connection with the arbitration.

Decision of the Court of Appeal

The Court of Appeal recognised that while it is common for parties to expressly define the law governing contracts, it is more unusual for them to make an express choice of law governing an arbitration agreement contained within the main contract. The Court of Appeal further noted that in the absence of

Continued from page 5

the latter, there were, as gleaned from a review of relevant jurisprudence, two possible lines of argument, namely that arbitration agreements:

(a) Should be governed by the law of the substantive contract. The Court of Appeal cited Dicey, Morris & Collins, The Conflict of Laws, 14th ed., paragraph 16-017: "*If there is an express choice of law to govern the contract as a whole, the arbitration agreement will also normally be governed by that law: this is so whether or not the seat of the arbitration is stipulated, and irrespective of the place of the seat.*"; and

(b) Are separate from the substantive contract and are governed by the law of the chosen seat of arbitration. In support of this approach, the Court of Appeal cited *C v D* [2007] EWCA Civ 1282 wherein Longmore L.J. said that "… *it would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration. The reason is that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place.*"

The two lines of argument lead to different outcomes in this appeal. With the first approach, Brazilian law governs the arbitration agreements, but with the second, English law governs.

The Court of Appeal accepted that although there is a wealth of *dicta* on the issue, it was not bound by the authorities. However, the authorities establish two uncontroversial propositions that provide the starting point for any enquiry into the proper law of an arbitration agreement. Namely that the proper law of an arbitration agreement:

(a) May be different from the law of the substantive contract in which the arbitration agreement is contained; and

(b) Is to be determined by a three-stage enquiry into (i) express choice, (ii) implied choice, and (iii) closest and most real connection.

The Court of Appeal held that all three stages should be embarked on separately and in the order presented, but the Court of Appeal also acknowledged that in practice, the second stage often merges into the third stage because identification of a system of law with which the agreement has the closest and most real connection will likely be an important factor in deciding if parties have made an implied choice of law.

The Court of Appeal also commented that the doctrine of separability simply reflects the parties' intention that their agreement to arbitrate remains effective when the substantive contract is rendered ineffective. The purpose of separability is not to insulate the arbitration agreement from the substantive contract for all purposes, such as the purpose of construing the proper law of the contract as being the proper law of the arbitration agreement contained therein should the latter not be specified by parties. In fact, in the absence of anything to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intentions with regard to the law of the arbitration agreement.

The Court of Appeal eventually ruled that English law was the proper law of the arbitration agreements for the following reasons:

(a) The choice of another country as the seat of the arbitration inevitably imports an acceptance that the law of that country relating to the conduct and the supervision of arbitrations will apply to the proceedings. The fact that the parties chose London as the seat of the arbitration suggests that they intended English law to govern all aspects of the arbitration agreement, including matters touching on the formal validity of the agreement and the jurisdiction of the arbitrators.

(b) Just because the parties chose Brazilian law as the proper law of the substantive contract does not mean that there is an implied choice of Brazilian law as the proper law of the arbitration agreement. Under Brazilian law, an arbitration agreement can only be enforced against the respondents with the respondents' consent. This seriously undermines the agreement to arbitrate and parties could not have intended such consequences; and

(C) Although the substantive contract had a close and most real connection with the law of Brazil, the agreement to arbitrate, though connected with the contract of which it is part, has a different nature and purpose. It is an agreement to resolve disputes by arbitration in London and hence has the closest and most real connection with the law of the place where the arbitration is to be held and which will

Continued from page 6

exercise the supporting and supervisory jurisdiction necessary to ensure that arbitration is effective.

Enforceability of mediation agreements

The insured submitted that Condition 11 of the policies contained an enforceable obligation to mediate and that compliance with its terms was an essential precondition to arbitration. As this condition was not satisfied, the insurers had therefore not validly commenced an arbitration which called for protection by the grant of an injunction.

The Court of Appeal held that in order for an agreement to mediate to be enforceable, it must define the parties' rights and obligations with sufficient certainty to enable it to be enforced.

In this case, Condition 11 neither sets out a defined mediation process nor refers to the procedure of a specific mediation provider. It merely contains an undertaking to seek to have the dispute resolved amicably by mediation, but no provision is made for the process by which that is to be undertaken. Consequently, Condition 11 does not create an enforceable obligation to commence or participate in a mediation process as a precondition to arbitration.

Scope of arbitration agreement

Finally, the insured also submitted that the dispute between the parties which concerned the insurer's liability to indemnify them under the policies, falls outside the scope of the arbitration agreement encapsulated in Condition 12 of the policies, which is limited to disputes about the amount to be paid in respect of any individual loss.

The Court of Appeal rejected this argument and held that Condition 12 enables either party to refer to arbitration any dispute arising out of or in connection with the policies. Conditions 11 and 12, read together, are intended to form part of a composite dispute resolution process applicable to disputes of every kind, including matters of liability, coverage and quantum.

B. Arsanovia Ltd and other companies v Cruz City 1 Mauritius Holdings [2013] 1 Lloyd's Rep 235

Introduction

In this case, the English High Court considered, amongst others, the question of which law should govern the arbitration agreement in instances where the law governing a contract (the *lex causae*) is different from the curial law of the arbitration. This case applied Sulamerica.

At paragraph 9 of the Judgment, the English High Court made very clear distinctions between the following laws and held that they need not be the same:

(a) The law of the reference – *"the law that governs the scope of the jurisdiction of the tribunal ……it is the law applicable to the …… agreement between the parties to the reference and the members of the tribunal;*

(b) The law of the arbitration agreement – *"the law applicable to the arbitration agreement whereby the parties agreed ……to refer a dispute to arbitration";*

(c) The lex causae – *"the law (or any of the laws) applicable to any matrix contract containing the arbitration agreement or to the substantive dispute that is the subject of the reference….."*; and

(d) The curial law – the law *"which governs the conduct of the reference (sometimes called the lex fori or lex arbitri), which is often determined by the choice of the seat of the arbitration and therefore often involves acceptance that that law governs the supervision of the arbitration by the courts".*

Background facts

Arsanovia and Burley, both subsidiaries of Unitech, entered into a joint venture with Cruz City to set up a company, Kerrush, to develop slums in Mumbai. Arsanovia, Cruz City and Kerrush entered into a Shareholders' Agreement, whilst Burley subscribed to identified parts of it, although not the arbitration clause. There was also an agreement relating to financial arrangements called the Keepwell Agreement entered into by Unitech, Burley and Cruz City.

Both Agreements were governed by Indian law (the *lex causae*) but contained arbitration clauses nominating London as the seat of arbitration, making English law the curial law. The arbitration clauses also included a specific agreement not to seek interim relief under section 9 of the Indian Arbitration and Conciliation Act 1996. There was no express law governing the arbitration agreements.

Following an arbitration, three LCIA awards were rendered by the same tribunal in July 2012:

(a) Award 1 concerned Cruz City seeking damages and specific performance against Arsanovia and Burley under the Shareholders' Agreement;

Continued from page 7

(b) Award 2 concerned Cruz City seeking damages against Unitech and Burley under the Keepwell Agreement; and

(c) Award 3 concerned Arsanovia seeking a declaration against Cruz City and Cruz City in turn counterclaiming against Arsanovia and Burley seeking relief similar to that sought under Award 1.

The Issues

The claimants challenged Awards 1 and 2 on the ground that the tribunal did not have substantive jurisdiction over the disputes. In relation to Award 3, the tribunal had dismissed both the claim and the counterclaim without making any findings on jurisdiction.

Award 1

Award 1 was challenged in the English High Court on the basis that:

(a) The law governing the arbitration agreement was Indian law and Indian law determines whether Burley is a party to it;

(b) Under Indian Law, Burley had not agreed to be bound by the arbitration clause in the Shareholders' Agreement; and

(c) Because the tribunal had no jurisdiction over Burley, under Indian Law it also had no jurisdiction over Arsanovia.

The issues before the English High Court were therefore as follows:

(a) What the proper law of the arbitration agreement was; and

(b) Whether, under the applicable law, the tribunal had jurisdiction over Burley and/or Arsanovia.

Decision of the English High Court

The High Court applied the three-stage test in *Sulamerica* to determine the proper law of the arbitration agreement.

As regards the first stage, neither party argued that Indian law was expressly chosen as the proper law of the arbitration agreement. However, the High Court indicated that if such arguments had been made, it might have been receptive to a submission that the express choice of law in the substantive contract should have applied to all clauses within the contract, including the arbitration agreement.

Parties instead focused on the second stage - implied choice of law. The claimants contended that by having chosen Indian law to govern the substantive contract, the parties had impliedly also chosen Indian law as the law governing the arbitration agreements. In contrast, the respondents argued that the choice of London as the seat of arbitration implied instead a choice of English law as the law governing the arbitration agreements.

The High Court rejected the respondent's argument. It cited *Sulamerica* as authority for the proposition that the location of the seat of arbitration is not of itself an implied choice of the law governing the arbitration agreement. Although the election of London as the arbitral seat was a factor to be considered, it was not in itself enough to displace the inference to be drawn from the express choice of Indian law as the governing law of the substantive contract. The High Court referred to Moore-Bick LJ 's statement in *Sulamerica* describing the express choice of proper law of a contract as a "*strong pointer*" that parties intended the same law to apply to arbitration agreements contained within those substantive contracts.

The High Court was further persuaded that Indian law was intended to govern the arbitration agreements because of the express exclusion of the Indian Arbitration and Conciliation Act 1996 ("**IACA**"). The Court's view was that if Indian law was not meant to apply to the arbitration agreements, there would have been no need to specifically exclude the IACA.

Accordingly, it was held that Indian law was the proper law of the arbitration agreement and the tribunal had no jurisdiction over Burley. Consequently, the tribunal also had no jurisdiction over Arsanovia in respect of Award 1 because under Indian Law, *"a dispute cannot be adjudicated in arbitration if the entire subject matter of the suit is not covered by the arbitration agreement between the parties or if the dispute concerns a person or persons who are not a party to the arbitration agreement".*

There was no need to consider the third stage of the *Sulamerica* test since the issue was decided upon at the second stage. However, the High Court held obiter that had it been required to determine which system of law had the closest and most real connection to the arbitration agreements, it would have concluded, having regard to London as the chosen arbitral seat, that it was English law.

Award 2

Adopting the reasoning above, the High Court similarly found that the arbitration agreement contained in the Keepwell Agreement is governed by Indian law.

Continued from page 8

Pursuant to the Keepwell Agreement entered into by Unitech, Burley and Cruz City, Unitech undertook to:

(a) Cause Burley to pay sums due to Cruz City under the Shareholders' Agreement in a timely manner; and

(b) Make sufficient funds available to Burley, no later than five business days after receipt of notice from Cruz City requiring payment of any sums due by Burley, so as to enable Burley to make payments to Cruz City in a timely manner.

The claimants contended that the provisions of the Keepwell Agreement relating to Unitech's obligations, when construed under Indian law, prevent a claim from being brought against Unitech or Burley under the Keepwell Agreement unless Burley's liability under the Shareholders' Agreement has already been determined by a court or proper arbitral tribunal. Since Burley's liability under the Shareholders' Agreement had not been so determined, the tribunal did not have substantive jurisdiction over the arbitration proceedings in respect of Award 2 and had made a "premature" award against Unitech.

The High Court did not accept this argument and held that the Tribunal had jurisdiction in relation to Award 2. The claimants' complaint did not go to a question of the Tribunals' jurisdiction and the question of whether Unitech's liability had accrued in the circumstances was one that the Tribunal had jurisdiction to determine. The High Court further held that the Tribunal needed to determine whether Burley was liable under the Shareholders' Agreement in order to determine whether Unitech was liable under the Keepwell Agreement, and that question was similarly within the tribunal's substantive jurisdiction.

C. Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH [2013] EWHC 338 (Comm)

The English Commercial Court considered the circumstances under which a term containing an arbitration agreement may be implied into a contract as a result of a course of dealings.

Background facts

The claimant, Lisnave, was a shipyard that entered into an agreement with the Defendant fleet agent, Chemikalien, for vessel repair services to be provided by Lisnave to vessels under Chemikalien's management (the "**Fleet Agreement**").

Lisnave subsequently entered into separate ship repair contracts with the individual ship owners whose vessels were managed by Chemikalien and sent to Lisnave for repairs.

The purpose of the Fleet Agreement was thus to set out the terms which would in turn apply to each of the individual repair contracts with the respective shipowners.

The repair contracts expressly incorporated Lisnave's set of General Conditions, in particular, Article 15.2 which provided for disputes to be resolved by arbitration in London. The Fleet Agreement, on the other hand, did not expressly incorporate the General Conditions.

A dispute subsequently arose in relation to a fleet rebate under the Fleet Agreement. Chemikalien referred the matter to arbitration on the basis that Article 15.2 of the General Conditions, even though not expressly referred to in the Fleet Agreement, was incorporated into the Fleet Agreement by virtue of parties' prior course of dealing.

At arbitration, the tribunal, by majority, was of the view that Article 15.2 had indeed been incorporated into the Fleet Agreement. There was therefore a valid agreement to arbitrate. Lisnave, dissatisfied with this finding, applied to have the arbitral award set aside.

Issue

The issue was whether the Fleet Agreement incorporated the arbitration clause in Article 15.2 of Lisnave's General Conditions as there was no reference to the same in the Fleet Agreement.

The law

The Commercial Court reviewed various authorities on the incorporation of terms into contracts, including the following:

(a) *McCutcheon v David Macbrayne Ltd* [1964] 1 WLR 125: The House of Lords provided that a term could be incorporated into the last of a series of similar contracts where such a term was used in the previous contracts and for some reason, was omitted from the last contract under consideration;

(b) *Capes (Hatherden) Ltd v Western Arable Services Ltd* [2010] LLR 447: The incorporation of terms by a prior course of dealing is a question of fact and degree. Factors to be considered include the number of previous contracts, how recent these prior contracts are, as well as the similarities

between them and the contract in question (in terms of subject matter and manner of conclusion);

(c) *SIAT v Tradex* [1987] 1 All ER 81: It is not necessary for the prior course of dealings to be exactly identical to the contract under consideration for terms in prior contracts to be implied into the contract under consideration; and

(d) *Attorney General of Belize v Belize Telecom* [2009] 1 WLR 1988: A term can be implied into a contract only where the court finds that the parties have intended for such a term to form part of the contract. It does not matter than it would have been reasonable to imply a term; reasonableness itself is insufficient; what matters is the intention of parties.

In respect of arbitration agreements, there is a presumption that parties are likely to have intended any disputes arising out of the relationship into which they have entered to be decided by the same tribunal (*Fiona Trust & Holding Corporation v Privalov* [2008] 1 LLR 254). Further, there is a presumption that for related matters arising out of separate but related contracts, the parties would prefer to have all the proceedings consolidated within one forum.

Decision of the Commercial Court

The Commercial Court was not satisfied that parties intended for Article 15.2 to apply to the Fleet Agreement. While there was a strong relationship between the Fleet Agreement and the individual repair contracts, such relationship concerned the effect of the Fleet Agreement on the repair contracts. The reverse cannot be true. The terms of the individual repair contracts did not have any impact on the Fleet Agreement. In the Court's opinion, the dispute arising from the Fleet Agreement also had no direct relevance to the individual repair contracts.

Allowing the incorporation of arbitration clauses, when parties obviously did not intended to do so, risks lowering the bar for the incorporation of terms, to a standard of reasonableness rather than a standard of necessity or obviousness. This latter standard runs against the requirements for incorporation of a term under English law.

The Court noted that the majority of the arbitrators found that the Fleet Agreement was supplementary and closely related in subject matter to the individual repair contracts. By such reasoning, they found that parties would have anticipated that Article 15.2 would apply to the Fleet Agreement. On this, the Court held that the relationship between the Fleet Agreement and the repair contracts, no matter how close, cannot lead to an inexorable conclusion that parties must have intended for Article 15.2 to apply to the former. The Court reiterated that the test for the implication of terms is objective with high and exacting standards.

In the Court's view, the Fleet Agreement's language was inconsistent with an intention to incorporate any part of the General Conditions. While Clause B of the Fleet Agreement made reference to "Conditions", there was nothing else to indicate that this meant a reference specifically to Lisnave's General Conditions.

Article 15.2 was a part of Article 15 - a dispute resolution article with other dispute resolution clauses. The Court found it difficult to accept the proposition that only Article 15.2 was incorporated into the Fleet Agreement and not the entire Article 15. There was no reason, in the Court's view, why parties could have intended to incorporate only Article 15.2 by itself.

For the above reasons, the Court set aside the arbitral award and made a declaration that the tribunal did not have jurisdiction over Chemikalien's claim under the Fleet Agreement.

THE USES AND ABUSES OF ECONOMIC EVIDENCE




Date	Event	Speaker	Chairperson:
19 March 2013	The Uses and Abuses of Economic Evidence	Mr. James Searby	Mr. Tan Chuan Thye

Valuation specialist Mr James Searby, shared his experiences in assessing complex damages in arbitration and litigation matters. Drawing on his own experience in a large petrochemical sector arbitration, James eagerly informed participants about how microeconomics can be used to decide the accuracy of assumptions in evidence presented by forensic accountants.

INTERIM RELIEF IN INTERNATIONAL ARBITRATION



Date	Event	Speakers	Chairperson:
16 April 2013	Interim Relief in International Arbitration	Ms. Sara Masters QC	Mr. Matthew Shaw

Ms Sara Masters *QC* rewarded participants with a thought provoking presentation on the scope of interim relief and the circumstances in which such relief is available. Ms Masters *QC* also touched on the principles of law and considerations which should form a tribunal's basis for ordering interim measures. It was a very informative session for practitioners and users.

MEMBERS' NITE




Date	Event
8 May 2013	Members' Nite

A relaxing evening under the stars! Members new and old got together, alfresco, at *The Pelican Seafood Bar & Grill*. With a light breeze, a spread of finger foods, free flow of drinks and a remarkable view of Marina Bay, new friendships were forged and old ones renewed.

INTERNATIONAL ENTRY COURSE




Date	Event
17, 18 & 20 May 2013	International Entry Course

Once again, candidates seeking more information about arbitration or entry to the Institute as Members attended this very popular course. Conducted over two full days by seasoned arbitrators such as Mr. Naresh Mahtani, Mr. Mohan R Pillay, Mr. Johnny Tan Cheng Hye and Mr Dinesh Dhillon, participants who completed the course were well rewarded with greater insights into the law and practice of arbitration. We hope to see them again at the Fellowship Assessment Course and at all future events of the Institute.

ARBITRATION & INSOLVENCY - EFFECTS ON THE ARBITRATION AGREEMENT OF PARTY INSOLVENCY



Date	Event	Speakers	Chairperson:
28 May 2013	Arbitration & Insolvency – Effects on the Arbitration Agreement of Party Insolvency	Mr. Steven Lim	Mr. Andrew Chan

In the muddled area of arbitration and insolvency, where the arbitration agreement sometimes survives the insolvency and sometimes does not or where arbitration is sometimes inconsistent with the insolvency regime and sometimes is not, Mr Steven Lim, provided an in depth analysis of how this labyrinth could be navigated. Steven's illuminating presentation was well received and beneficial to participants facing issues in this confusing area of law.

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RECENT CHANGES AT SIAC

On 1 April 2013, the fifth edition of the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules 2013) came into force. A key change brought about by the SIAC Rules 2013 is the establishment of the SIAC Court of Arbitration.

Given SIAC's rapid growth and rise in case load in recent years (since 2005, the annual caseload has tripled), it was felt that it would be more efficient, from an organizational perspective, to separate the technical legal functions of SIAC from its corporate and business development functions. The establishment of the SIAC Court of Arbitration, headed by Founder President Dr Michael C. Pryles, allows a specialist body of eminent arbitration experts to devote full attention to the administration of arbitration cases, the appointment of arbitrators and the operation of the SIAC Rules.

The Chairman of the newly re-constituted SIAC Board of Directors is Mr Lucien Wong, Chairman and Senior Partner of Allen & Gledhill LLP and a recognized leading lawyer in the areas of banking, finance, mergers and acquisitions and corporate governance. The SIAC Board oversees the corporate management and business development functions of SIAC.

The SIAC Rules 2013 incorporate and give effect to the structural changes at SIAC and provide for the SIAC Court of Arbitration and the President to perform case administration functions previously performed by the Board of Directors and the Chairman. Under the new rules, the President of the Court will appoint arbitrators and decide requests for the expedited procedure and the appointment of emergency arbitrators; while the Court will decide challenges to arbitrators and challenges to jurisdiction.

Some substantive changes introduced by the SIAC Rules 2013 include improvements to the rules in relation to:

- **Commencement of arbitrations** (*Rule 3*) – the Registrar is granted express power to determine whether an arbitration is deemed to have commenced based on "substantial compliance" with the requirements of *Rule 3.1* in a Notice of Arbitration;

- **Jurisdictional Objections** (*Rule 25.1*) – the Registrar now has discretion to determine if an objection as to jurisdiction will be referred to the SIAC Court of Arbitration for a *prima facie* determination;

- **Deposits by Parties on Costs of the Arbitration** (*Rule 30.2*) – the Registrar is granted express discretion to fix separate advances for claims and counterclaims, respectively;

- **Power of Tribunals to Award Post-Award Interest** (*Rule 28.7*) – following from amendments made to Singapore's arbitration legislation, tribunals are no longer limited to awarding interest ending not later than the date of the award;

- **Pleadings in International Arbitrations (incorporation of recent Singapore case law)** (*Rule 24(n)*) – in view of the Singapore Court of Appeal's decision in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] SGCA 35, the Rules now provide that tribunals may decide any issue not expressly or impliedly raised in a party's submissions provided the issue has been brought to the notice of the other party and that other party has been given adequate opportunity to respond;

- **Publication of Redacted SIAC Awards** (*Rule 28.10*) – SIAC is now able to publish redacted arbitral awards to provide users with a better understanding of how the Rules are applied by tribunals;

- **Notice of Challenge** (*Rule 12*) – *Rule 12.1* clarifies that the time to bring a challenge to an arbitrator's qualifications must be brought within 14 days of the *nomination* of the arbitrator (*Rule 10.6*) whereas the time to bring a challenge to an arbitrator's impartiality or independence must be brought within 14 days of the *appointment* of the arbitrator (*Rule 11.1*) or the circumstances becoming known to the party (*Rule 11.2*); and

- **Time Limits for Various Stages** (*Rules 2.5 and 9*) – Except as provided in the Rules, *Rule 2.5* allows the Registrar to extend or shorten any time limits prescribed under the Rules. In the case of multi-party appointment of arbitrator(s), *Rule 9* provides that joint nominations must be made within 28 days of *receipt by the Registrar* of the Notice of Arbitration or within the period agreed by the parties or *set by the Registrar*.