SINGAPORE INSTITUTE OF ARBITRATORS
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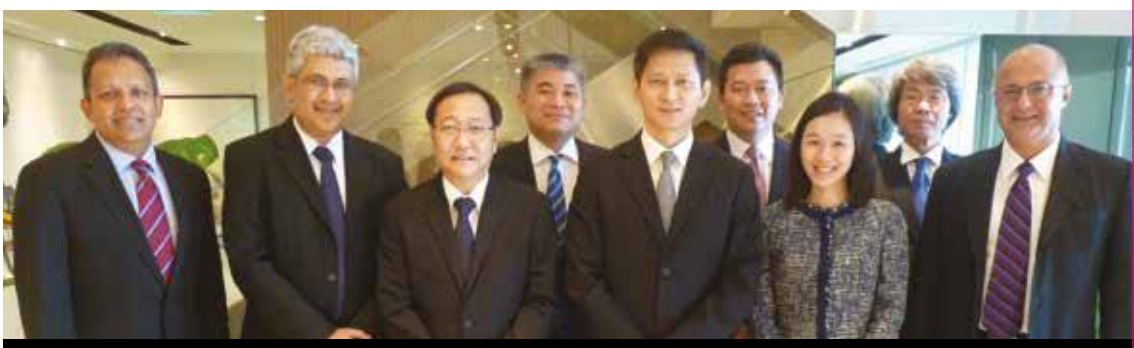

Council Members (from L to R): Mohan R, Pillay, Dinesh Dhillon, Chia Ho Choon, Steven Lim, Chan Leng Sun SC, Tay Yu-Jin, Margaret Joan Ling, Yang Yung Chong, Naresh Mahtani, (Not in the picture: Leslie Chew SC and Johnny Tan Cheng Hye BBM)

THE PRESIDENT'S COLUMN

Welcome to the first issue of the SIArb Newsletter for 2016. Many of you would have immediately noticed the fresh clean look of this Newsletter. For this, we have to thank the Publications Committee led by Council Member Margaret Joan Ling. I like the revamped format and content of the SIArb newsletter very much, and trust that it will find favour with our members as well.

Not satisfied with merely redesigning the look of the Newsletter, the tech-savvy Publications Committee is now looking into the possibility of electronisation. We will report on this project in the coming months.

The Institute welcomed the new year with its first seminar on 28 January 2016 on *The Great Divide? Convergence or Divergence in Singapore and English Contract Law*. This was presented by Rian Matthews, from a respected firm, and chaired by our own respected Leslie Chew SC. This Newsletter introduces reports by volunteer reporters who do journalistic duties on our seminars. You will find the report of Cai Chengying on this seminar, and the report of Tham Wei Chern on the seminar by Andrew Chan on *The Impact of Cross Border Insolvency on Arbitration*, which was chaired by Ashley Bell.

Coming up in April is the SIArb International Entry Course. Please inform your friends and colleagues who might be interested in joining the ranks of membership. The IEC is held on 22, 23 and 25 April.

We have the whole Year of the Fire Monkey ahead of us, so I will keep this address short and let you get into the swing of things. Have a wonderful year.

Chan Leng Sun SC
President

INTERVIEW WITH Mr. Michael Hwang SC

The SIArb Newsletter is indeed privileged to have the opportunity to engage Mr. Michael Hwang SC on his thoughts on how to improve the efficacy of arbitration proceedings and his views on the arbitration landscape in Singapore.

The Publications & Website Committee expresses its thanks to Mr. Hwang SC for taking the time out of his busy schedule to participate in this interview.

Interviewed by Margaret Joan Ling, Partner at Allen & Gledhill LLP

How has the arbitration landscape changed over the years?

International arbitration was a dream which was based on making Singapore an attractive seat for disputants around the world to hold their arbitrations. It was premised on attracting foreign disputants and foreign lawyers arguing their clients cases in the SIAC. However, in the last decade, we have succeeded beyond our original dreams to be recognised as the 3rd or 4th most popular arbitration seat, and, what is more significant, the market is now well populated by our local firms, who are holding their own against larger more well-resourced international firms in SIAC arbitrations.

In your experience, has arbitration become more time consuming and less efficient as a dispute resolution mechanism? If so, what do you think are the reasons for this?

In two words, larger claims. The amount of fight a party puts into a court or arbitration case is directly proportionate to the sums at stake. Whereas I used to be very happy to be act in a case for SGD 1 million, nowadays few cases come to the SIAC for less than $5 million because, especially if international firms are engaged, they are usually looking for minimum claims of USD 10 million to justify their fees for a major case. So, where the client really needs to win the case, it will instruct its lawyer to leave no stone unturned in the fight to win. But the criticisms of the time and cost of international arbitrations may not be sufficiently grounded to be accepted at face value. I would be more impressed by this argument if someone had analysed the actual legal and related costs of running a case which had been tried by the process of arbitration and then compared the likely costs of the case had it been tried before a major commercial court like London, New York, Singapore or Hong Kong. I have not yet read or heard a reasoned argument to the effect that international arbitration is always more costly and less efficient than had the case been run in a first world national commercial court. What part of the arbitral process is inevitably more costly and slower than a national court? Until that question is answered, I remain unpersuaded by this supposed truism.

Have you adopted witness conferencing while sitting as an arbitrator? How successful is this in reducing the overall length of an arbitration hearing?

When I am sole or presiding arbitrator, I will normally persuade parties to agree to witness conferencing for experts, and I think more and more practitioners are becoming used to this practice. Witness conferencing is like mediation in the early days – one is sceptical about it until one sees it in action, and the unforeseen dynamics of the setting come to the fore, and experts become much more reasonable when discussing their views with a fellow expert than when they are being cross examined by relative ignoramuses like myself (when I used to do counsel work), and counsel also have much less to ask after the experts have dialogued with each other under the moderation of the Tribunal. This practice obviously saves time where two witnesses take the stand together and there are two sets of cross examination and a lot of wasted time. But the real saving in time as well as being a better forensic tool is factual witness conferencing. This usually works well in construction cases, where there are a number of discrete

issues, which can be explored in isolation issue by issue. Then I assemble all witnesses, factual or expert, who have said anything in their witness statements about issue A, and all of them sit in the hearing room as witnesses, with counsel like conductors of an orchestra, with carte blanche to ask any witness any question about the particular issue and to summon his own witnesses to reply to any factual or technical assertion, which gets to the heart of the dispute much quicker. I have done this now in more than half a dozen cases, some more successful than others. But

> *“I have not yet read or heard a reasoned argument to the effect that international arbitration is always more costly and less efficient than had the case been run in a first world national commercial court.”*

my favourite case is one where both law firms (including the firm that lost the case) wrote articles in their firm newsletters to clients praising the system and explaining the statistics as to how much time they saved, as well as the other forensic advantages like having all the evidence on each issue nicely compartmentalized so as to make Counsel’s task easier when writing closing submissions.

What do you think about the use of the Redfern Schedule in discovery for arbitrations? In your view, do they assist in making the arbitration more efficient or can the discovery process be streamlined further?

The Redfern Schedule is entirely a physical tool and you can achieve the same results by simply running the questions and inserting the answers underneath the questions. The name of the Schedule disguises the fact that the real issue in document production is the criterion for production being ordered. I hope that neophytes in arbitration will quickly realise that the test for ordering document production in arbitration and in litigation are quite different, because in arbitration, where the IBA Rules on the Taking of Evidence in International Arbitrations are widely applied, the test for ordering production is not simply that the documents requested are relevant to the case, but that the documents requested are not only relevant to the issues but material to the outcome of the case (or a significant issue in that case). My hobby horse about document production is to ask Counsel to seek clarification on whether the documents they demand actually exist before serving their Redfern Schedule on the other side. They should make use more often of Requests for Clarification/Information or even interrogatories designed to elicit factual information about the existence of the documents requested before serving a shotgun like approach of asking for “All documents etc) which immediately violate the IBA Rules which call for a request for a specific document or a small and narrow class of documents. When parties make more use of these techniques the discovery process can be further streamlined.

How do you think an arbitral tribunal should treat evidence by foreign law experts? In particular, should they be treated as additional counsel instead of witnesses subject to cross-examination? How would this assist the arbitral process?

My experience informs me that we don’t need to treat legal experts as expert witnesses subject to cross examination because, as lawyers, counsel and tribunal members know how to judge technical legal evidence given by foreign law experts because we know how legal minds work and, once a foreign lawyer explains what the relevant legal principles applicable to the issues in the case , we can absorb that information quite easily compared to trying to understand a technical field in which we have no expertise. Legal experts are also often prone to be partial to their appointing parties, and such partiality can be readily observed in their expert reports. So we should call a spade a spade and let foreign law experts simply be a member of the party’s legal team and address the tribunal from the bar.

Do you have any interesting anecdotes to share regarding the cross-examination of witnesses in your capacity as counsel?"

I was counsel cross examining an expert in Indonesian law in an arbitration. The cross examination went like this:

Q. Is this proposition (omitted for purposes of this anecdote) a correct statement of Indonesian law? Please answer my question yes or no.

A. I am a university professor. I cannot answer questions yes or no. I must explain first.

Q. Then please explain.

A. (long answer discussing principles of Indonesian law)

Q. Thank you for that explanation. But you didn't answer my question yes or no.

A. I'm sorry, I've forgotten your question.

What do you see as the most critical factor if Singapore is to continue to grow as an arbitration centre?

Continuing to attract more disputes to seat themselves in Singapore. In short, like the famous aphorism about the qualities of a prominent housing estate or shopping mall, that the answer is "location, location, location" so the best thing we can wish for is "more cases, more cases and more cases".

ARTICLE

THE CONSEQUENCES WHERE A CHARTER PARTY CONTAINS INCONSISTENT ARBITRATION PROVISIONS

BY **CAPT. FRANCIS LANSAKARA**

MSIArb. LLM (specialist in maritime law)

Transgrain Shipping BV v Deiulemar Shipping SpA (in liquidation) and Another (The "Eleni P") [2014] EWHC 4202 (Comm)

Introduction

The key issues in this case were:

(1) How to reconcile inconsistent arbitration terms in the charter party;

(2) Whether the tribunal was properly formed;

(3) Whether the arbitral tribunal had the necessary jurisdiction to rule on the appointment of arbitrators.

Background of the case

The vessel *Eleni P* was chartered under a charter party to Deiulemar Shipping SpA (Deiulemar) in May 2009 and subsequently sub-chartered on the same charter party (back to back) terms (except for the hire period and the rates) to Transgrain Shipping (Transgrain) in April 2010. During the sub-charter period she was hijacked by pirates and later released. Upon release the dispute amongst the three parties about the charter hire was referred to arbitration in accordance with the charter party. Transgrain in its appeal to the English High Court claimed *inter alia* that the arbitration tribunal so appointed had not been formed in accordance with the charter party agreement and therefore it had no jurisdiction.

The Charter Party

Clause 75 reads as follows:-

"Both parties hereby agree that any dispute arising out of this contract, where all claims below USD100, 000 (One Hundred Thousand Dollars) excluding interest and cost, shall be settled as per current LMMA Small Claims Procedure.

Any dispute arising out of this contract the amount in dispute exceeds USD 100, 000 (One Hundred Thousand Dollars) shall, unless the parties agree forthwith on a single Arbitrator, be referred to the final Arbitrament of two Arbitrators carrying on business in London who shall be a members of the Baltic Exchange or London Maritime Arbitrators Association, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire who shall be a member of Baltic Exchange or London Maritime Arbitrators Association" .
(The amount in dispute was in excess of USD100 000 and therefore there was no doubt that small claim procedures would not apply.)

Other Terms which could be implied in the Charter Party

Although clause 75 was independent of the Baltic International Maritime Commission's (BIMCO) dispute resolution clause, it appeared, partly from the conduct of the parties and partly due to BIMCO's recognition of LMAA and *vice versa*, that the parties had to some degree recognized the existence of the BIMCO dispute resolution clause and it (the BIMCO clause) had priority over clause 75 of the charter party. In contrast, one of Transgrain's arguments was that clause 75 has priority over the BIMCO dispute resolution clause.

Communication between the Parties & Inconsistencies

The communication between the parties during the appointment of the arbitrators appeared confusing as the following communications were reported to have taken place:

Transgrain initiated arbitration against Deiulemar under the sub-charter in October 2011. It informed Deiulemar that it had appointed its arbitrator and invited Deiulemar to do so as well. There were no comments about the invitation from Deiulemar. About three months later, around January 2012, Deiulemar informed Transgrain of the appointment of its arbitrator and invited Transgrain to appoint its arbitrator within 20 days. On the same day, Transgrain informed Deiulemar that it had appointed an arbitrator for Deiulemar since Deiulamar had not responded to the earlier invitation made in October 2011 to appoint an arbitrator.

Since there were three arbitrators appointed the tribunal was formed but Transgrain rejected the arbitration tribunal and relied on clause 75 of the charter party. Transgrain argued that the tribunal was not formed in accordance with clause 75 and further argued that when Deiulemar appointed its arbitrator it was to be considered as a separate case as Deiulemar had not responded to Transgrain's invitation on time. Transgrain's other argument was that the procedure described under clause 75 shall have priority over the BIMCO dispute resolution clause.

Holding

The tribunal's view was that the BIMCO arbitration clause should prevail over clause 75 of the charter party so that the dispute was to be referred to a tribunal of three arbitrators. The first arbitrator had been appointed by Transgrain in October 2011, the second had been appointed by Deiulemar in January 2012 and they (the two appointed arbitrators) had appointed the third arbitrator who was the same person Transgrain had appointed in January 2012.

The Tribunal's view was disputed by Transgrain and upon appeal to the English High Court, the Court took into account the parties' conduct, the fact that both clause 75 and the BIMCO arbitration clause referred to LMAA rules, the fact that the LMAA itself highly recommended the use of the BIMCO dispute resolution clause in charter parties, the fact that the BIMCO dispute resolution clause is generally considered as the "industry standard" and the fact that both parties recognized the application of the LMAA rules and procedures, and held that the arbitral tribunal formed in accordance with the BIMCO dispute resolution clause was valid.

Comments

There are many instances in which maritime contracts contain arbitration agreement or dispute resolution clauses which set out certain rules and procedures which can also be found in standard form clauses such as the BIMCO dispute resolution clause but they are described in a different manner. It is therefore to be expected that a scenario such as arose in *The Eleni P* may arise again. The best advice is to eliminate such inconsistencies in the existing contracts, for instance by inserting a clause that stipulates that it is paramount, before disputes arise. For the courts to judge which one of the two clauses shall apply to the charter party may require a significant amount of evidence indicating the objective intention of the parties.

IN THE HOT SEAT! WITH LIM SEOK HUI

In each issue of our newsletter, we interview an SIArb member to get their views on the alternative dispute resolution scene in Singapore, and to obtain some insight into what makes them tick. In this issue, we interview **LIM SEOK HUI**, Chief Executive Officer of Singapore International Commercial Centre (SIAC) and Singapore International Mediation Centre (SIMC).

Interviewed by Tan Weiyi, Local Principal at Baker & McKenzie.Wong & Leow

- ***How would you describe yourself in three words?***

  Optimistic, determined, friendly.

- ***What made you change your work focus from being a M&A lawyer and In-House General Counsel to heading an arbitration institution?***

  I was drawn to the management aspects of the CEO role and the opportunity to be involved in the development of Singapore as a dispute resolution hub. It is an exciting time to be at SIAC, with strong case numbers and a quality product to promote. Coming up with creative ideas to market SIAC and Singapore as the dispute resolution forum of choice for parties from all over the world is another enjoyable and interesting part of my job. In 2014, for instance, we produced an SIAC arbitration training video that was filmed on-location in Maxwell Chambers to showcase the excellent hearing facilities that Singapore has to offer that is now widely used as an educational, training and promotional tool by a wide range of users ranging from universities and arbitral institutes to law firms and in-house counsel. The video, which is based on a fictional case scenario and features a stellar cast of the top names in international arbitration, enabled us to reach out to multiple audiences in different cultures and jurisdictions based on the adage "a picture speaks a thousand words" and simply because everyone loves watching a movie. Another fun project we embarked on in 2014 was the re-launch of the YSIAC group with a dynamic new YSIAC Committee, to engage younger arbitration practitioners under 40 from all over the world, and we are delighted that membership numbers have reached 1000 since then. In 2015, we held the inaugural YSIAC Conference in Singapore and inaugural YSIAC Essay Competition, followed by a series of YSIAC Advocacy Workshops (mock arbitration training workshops) in several cities where we held our SIAC overseas conferences, including Delhi, Mumbai, Jakarta, Beijing, Seoul and Tokyo. We aim to promote gender, age and cultural diversity through the YSIAC initiative.

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> *It is an exciting time to be at SIAC, with strong case numbers and a quality product to promote.*

- ***From your perspective of managing an arbitration institution, what advice do you have for a young practitioner interested in arbitration work?***

  In my view, young arbitration lawyers would certainly benefit from spending some time with a leading international arbitral institution. This trains them to see issues from an institutional perspective. Their familiarity with the rules after working with an institution will also inform their work as counsel later on in practice. Speaking for SIAC, apart from gaining an in-depth understanding of institutional practice and procedures as counsel in SIAC's multinational Secretariat (which is comprised of Singaporean and foreign lawyers from both civil and common law systems), one would acquire practical knowledge and experience through case management work and have the rare opportunity to interact and work with the internationally renowned arbitration practitioners who are members of the SIAC Court of Arbitration.

  As a practical tip, I would also encourage young practitioners to network, speak at events, contribute blogs and articles, and engage as active members of young lawyer groups such as the YSIAC.

- **What are the challenges you think arbitration institutions in general and SIAC in particular will face in the upcoming years?**

  Institutions have to constantly innovate to stay at the forefront of international arbitration practice in the face of intensifying competition from an increasing number of new entrants. Revising their arbitration rules to incorporate global best practices and latest arbitral developments to make them more efficient and user-friendly is a key challenge for institutions. SIAC is in the process of revising its 2013 rules and will be launching a new set of Investment Arbitration Rules in addition to its main set of Arbitration Rules at the SIAC Congress on 27 May 2016. Another challenge is to make arbitration quicker and more cost-efficient for parties, e.g. through the introduction of special procedures such as the Expedited Procedure, Emergency Arbitrator provisions and promoting the use of alternative dispute resolution methods such as the SIAC-SIMC Arb-Med-Arb service to encourage parties to settle their disputes through mediation. Also, enhancing the enforceability of awards is a key point. SIAC aims to provide for this through its scrutiny process. Challenges present opportunities, and these are just some of the measures undertaken by SIAC to maintain its leading position as a premier global arbitral institution based in Asia.

- **Who is the person(s) who has had the greatest impact and/or influence on your career?**

  My mother. She always manages to maintain a positive attitude and good sense of humour in all that she does.

- **What's your guilty pleasure?**

  Sinful desserts.

- **What is one talent that not many people know you have?**

  Perhaps squash, but that was in another lifetime.

CASE LAW DEVELOPMENTS

By Eric Chew, Director at ECYT Law LLC & Sharon Wong Qiao Ling, Researcher at ECYT Law LLC

Mount Eastern Holdings Resources Co., Limited v H&C S Holdings Pte Ltd [2016] SGHC 01

Introduction

This case involves an appeal to a Judge in Chambers of the Singapore High Court over an Assistant Registrar's:

(a) Grant of leave to enforce an arbitral award under Section 19 of Singapore's International Arbitration Act (the "**IAA**");

(b) Refusal to grant an application for an extension of time to set aside an *ex parte* order to enforce an arbitral award; and

(c) Dismissal of an application to set aside an arbitral award.

Facts

Mount Eastern Holdings Resources Co., Limited ("**Mount Eastern**") and H&C S Holdings Pte Ltd ("**H&C**") entered into two agreements concerning the supply of iron ore. The dispute involved a contract providing for H&C to deliver 90,000 wet metric tonnes ("**MT**") of iron ore to Mount Eastern in August 2013. H&C failed to make such delivery.

Mount Eastern commenced arbitral proceedings against H&C and the tribunal rendered an award (the "**Award**") in favour of Mount Eastern. Leave was also granted to Mount Eastern by an assistant registrar of the Singapore High Court to enforce the Award.

H&C sought an extension of time for the filing of an application to set aside the Award and also sought to set aside the Award. Both applications were dismissed by an Assistant Registrar and H&C appealed against the said dismissals.

Crux of the Contention: Breach of Natural Justice

H&C's main contention was premised on a breach of natural justice. The High Court confirmed that in such applications, the law as set out in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("***Soh Beng Tee***") still stands and a party challenging an arbitration award on the ground of a breach of natural justice must establish the following elements:

(a) Which rule of natural justice was breached;

(b) How it was breached;

(c) In what way the breach was connected to the making of the award; and

(d) How the breach prejudiced its rights.

Further, in determining if there was such a breach, the Court also had regard to two principles of natural justice:

(a) *nemo judex in causa sua* (ie, an adjudicator must be disinterested and biased); and

(b) *audi alteram partem* (ie, parties must be given adequate notice and an opportunity to be heard).

Considering that the tribunal had not concerned itself with an issue outside the pleadings and both parties were given a fair hearing, the High Court found no breach of natural justice on the facts. Accordingly, both of H&C's applications were dismissed.

With regard to H&C's application for an extension of time, the Court also held that being unable to take instructions because a party was overseas was not a valid reason for an extension, especially since instructions could be taken to apply for an extension.

Conclusion

In light of increasing challenges mounted by dissatisfied parties, the decision in *Mount Eastern Holdings* is a lucid instance of the High Court's pro-arbitration emphasis and the high threshold required for a party to successfully set aside an arbitral award.

Five Ocean Corporation v Cingler Ship Pte Ltd (PT Commodities & Energy Resources, Intervener) [2015] SGHC 311

Introduction

In this case, the Singapore High Court exercised its powers under s 12A of the IAA and ordered the sale of 77,000 MT of Indonesian steam coal (the "**Cargo**") to preserve its value pending arbitration in Singapore.

Facts

The Plaintiff, Five Ocean Corporation ("**FOC**"), time-chartered the *Corinna* from her owners, Corrina Maritime Inc ("**CMI**").

FOC then voyage-chartered the *Corinna* to the defendant, Cingler Ship Pte Ltd ("Cingler"), under a head-voyage charterparty. The head-voyage charterparty included a lien clause and an arbitration clause.

Cingler then sub-voyage chartered the *Corinna* to the interveners, PT Commodities & Energy Resources ("**CER**"). The Bill of Lading incorporated the terms of "*the Charter Party*", but did not make clear which charterparty it was referring to. The Bill of Lading named Adani Enterprises Ltd ("Adani") as the Notify Party.

As Cingler failed to pay freight and nominate a discharge port, FOC and CMI gave notice of the lien and the exercise of the lien to Cingler, CER and Adani.

When negotiations for a settlement broke down, FOC proceeded to file the application for the sale of the Cargo, which was fully supported by CMI.

At the time of this application, the Cargo, the *Corinna* and her crew had been kept in international waters off the last nominated discharge port for months owing to the ongoing disputes between the concerned parties and earlier delays by Cingler in the nomination of a discharge port. There were signs of heat damage to the Cargo, evidence of deterioration in value and hardship suffered by the stranded crew.

Issues before the Court

The issues before the Court were threefold:

(a) First, was the clause giving rise to a contractual lien incorporated in the bill of lading under which the cargo was shipped;

(b) Secondly, could FOC (or CMI for FOC's benefit) exercise a lien over the cargo for unpaid freight; and

(c) Did the court have jurisdiction to order a sale of assets outside Singapore under section 12A(4) of the IAA, the corollary to which was whether the requirements under section 12A(4) of the IAA were met.

Issue 1: Whether FOC possessed a contractual right of lien to assert an interest in the Cargo

In relation to the issue of incorporation, the Court first found that the head-voyage charterparty was governed by English law.

Next, the Court found that under English law, the general rule is that when "*a head time charterer voyage charters the vessel and then the sub-charterer in his turn sub-voyage charters her on different terms*" and "*a bill of lading is issued in such circumstances and is silent as to the identity of the charterparty whose terms are to be incorporated, "the incorporated charterparty is the head voyage charter*" (citing Cooke, Voyage Charters (Informa Law, 4th Edition, 2014)).

Based on the above, the Court concluded that it was the head-voyage charterparty that was incorporated into the Bill of Lading. It found the following facts relevant:

(a) The word "*freight*" was used in the Bill of Lading, which often refers to sums payable under a voyage charter, as opposed to the word "*hire*" which often refers to sums payable under a time charter;

(b) The Master of the *Corinna* signed the Bill of Lading under authority of Clause 8 & 60 of the time charter, which obliged the Master to sign bills of lading in CONGENBILL 94 form, "*as presented*", leaving the Master with a "*very narrow right to refuse to sign a bill of lading*; and

(c) CONGENBILL 94 form referred to sums payable as "*freight*", as distinct from a time charter with its "*hire*" terms.

Issue 2: Could FOC (or CMI for FOC's benefit) exercise a lien over the Cargo for unpaid freight.

As the Cargo was in CMI's possession, it was CMI who had the right to a lien over the same. All FOC had a right to do was to direct CMI to retain the Cargo and not to discharge until sums secured by CMI's lien were paid – the issue was whether this would be considered a lien over the Cargo.

Based on an extract from Voyage Charters at paragraph 35 of the Judgment, the Court found that FOC had:

(a) A right to postpone discharge and delivery of the Cargo vis-à-vis Cingler; and

(b) An equitable or beneficial right derived from CMI's exercise of its lien (as trustee for FOC's benefit) under the Bill of Lading over the Cargo against CER.

The Court was of the view that a shipowner who is paid freight under a charter party seeks and receives freight under a bill of lading for the benefit of the charterer. If freight is sought but not paid and the shipowner exercises a lien, the shipowner does so for the charterer's benefit. Hence, FOC had a chose in action.

Issue 3: Whether the Court possessed jurisdiction to grant sale orders for assets outside Singapore pursuant to section 12A(4) of the IAA

The Court then considered the ambit of its powers under section 12A(4) of the IAA to order a sale of the Cargo, which was on board the *Corinna*, in international waters.

As a starting point, the Court noted that the legislative intent behind section 12A was to give the Court powers over assets and evidence situated in Singapore. It concluded that the language of section 12A was wide enough to confer on the High Court the power to preserve assets and evidence situated outside Singapore, provided that the Court possessed *in personam* jurisdiction over the parties to the local proceedings.

On the facts, the Court found that all parties who had an interest in the Cargo were present before the Court and amenable to the Court's jurisdiction. Additionally, at the time of the hearing, the Court also considered how the grant of the sale order would not have interfered with the jurisdiction of any Court, given that the Cargo and the *Corinna* were in international waters outside the last nominated port.

The Court then looked into the following requirements under s 12A(4) which an applicant has to satisfy:

(a) Whether there was an "asset" within the meaning of s 12A(4);

(b) Whether the asset could be preserved through a sale order; and

(c) Whether the application was urgent and necessary.

The Court held that FOC's right to detain possession is a chose in action and qualified as an "*asset*" within the meaning of s 12A(4) of the IAA.

The Court also found that, although a sale order of the Cargo *prima facie* appeared inconsistent with the concept of a right to detain, which typically does not give rise to a right to sell unless expressly provided for in the contract, what FOC sought to preserve was the "*value*" of the

asset and not the asset itself and this could be achieved by selling the asset and keeping the proceeds of sale in Court. Hence, the 2nd requirement under s 12A(4) was satisfied.

Finally, the Court concluded that the application was urgent and necessary based on the facts already cited in the introduction.

Conclusion

In the wake of the decision in *Five Ocean Corporation*, parties may be able to obtain interim orders from the High Court in aid of international arbitration, even if the assets are located outside Singapore, provided that the Court possesses *in personam* jurisdiction over the parties to the local proceedings.

The Court also affirmed its powers to grant sale orders relating to such assets so long as the various requirements under s 12A(4) were satisfied.

AUF v AUG and other matters [2015] SGHC 305

Introduction

This case involves three challenges against an arbitral award arising out of a building construction dispute. The High Court affirmed its pro-arbitration attitude by dismissing all three applications, holding that the tribunal had not acted beyond its jurisdiction or denied parties a fair hearing.

Facts

AUF (the "**Contractor**") and AUG (the "**Owner**") were engaged in a dispute over the design, supply and installation of an external wall system (the "**NSC Works**"), carried out by a nominated sub-contractor (the "**NSC**"), for a 13-storey commercial development in a premier shopping district of Singapore (the "**Building**").

The dispute between the Owner and the Contractor was over the issues of whether the Contractor was liable to the Owner for defective cladding work (water was leaking into the building through the cladding) carried out by the NSC and if so, the amount of damages payable by the Contractor to the Owner.

At the conclusion of the Arbitration, the sole Arbitrator found in favour of the Owner, holding that the Contractor was liable for the NSC's defective cladding pursuant to Clause 28(2) of the Singapore Institute of Architect's Conditions of Contract for Measurement Contract (4th Edition). The Arbitrator awarded damages based on 40% of the Final Sub-Contract Sum (the "**Award**").

A court order for enforcement of the Award was subsequently obtained by the Owner by way of an *ex parte* application.

The Contractor then took out the following applications:

(1) The first challenge ("**OS 790**") sought to set aside in part the Award pursuant to s 17(2) of the Arbitration Act (the "**1985 Act**");

(2) The second challenge ("**OS 791**") sought leave to appeal on questions of law arising out of the Award; and

(3) The third challenge ("**SUM 4899**") sought to set aside an *ex parte* Order of Court to enforce the Award as a judgment of the High Court pursuant to s 46 of the Arbitration Act (the "**2002 Act**").

The High Court dismissed all three applications.

Issues before the Court

<u>Preliminary Issue: s 17 of the 1985 Act</u>

The Court considered the statutory framework of s 17 of the 1985 Act, which provided recourse against arbitration awards where the arbitrator had misconducted himself or the proceedings.

The Court affirmed the position that s 17(2) of the 1985 Act centred on due process and not on the correctness of the tribunal's decision.

The Court further noted that there is no misconduct amounting to a breach of natural justice just because an arbitrator reaches a conclusion which is not argued by either party, so long as that conclusion, when objectively assessed, reasonably flowed from or may be foreseen from the parties' arguments. Accordingly, errors of fact or law would not qualify as misconduct for the purposes of s 17(2).

For misconduct to amount to a breach of natural justice, and in order to succeed in challenging the award as having been made in contravention of the rules of natural justice, the Contractor must establish:

(a) Which rule of natural justice was breached;

(b) How it was breached;

(c) In what way the breach was connected to the making of the award; and

(d) How the breach prejudiced a party's rights?

Issue 1: Whether the Arbitrator had exceeded his jurisdiction by awarding damages based on the diminution of value of the Building, which was not raised by the Owner or referred to the Arbitrator for determination

It was argued for the Contractor that a claim for damages based on a diminution in value of the Building was not pleaded and therefore, the Arbitrator acted outside the terms of his reference in making such an award.

It was found on the facts that a claim for damages based on a diminution in value of the Building was pleaded in the alternative and that the Contractor did not unequivocally abandon this alternative claim. Hence, based on the following principles, the Court also found that the Arbitrator did not exceed his jurisdiction:

(a) On ordinary principles, when a contract is breached, the innocent party is to be put in the same position, so far as money can, as if there had been no breach. Hence, the Arbitrator's reference was to decide on liability and quantum and the question to be determined is, "*What was the true amount of the loss suffered by the innocent party*"; and

(b) An important distinction had to be drawn between an "*erroneous exercise by an arbitral tribunal of an available power vested in it (which would amount to no more than an error of law)*" and the "purported exercise by the arbitral tribunal of a power which it did not possess".

Issue 2: Whether the Arbitrator had failed to give the Contractor a fair hearing as it was deprived of the opportunity to present its case

The Contractor argued that it had been deprived of the opportunity to present its case on:

(a) Contesting the Building's alleged diminution in value;

(b) Responding to the Owner's May 2014 submissions;

(collectively, the "**Fair Hearing Issue**")

(c) Diminution in value before making the relevant orders in relation to the interest on the sum to be paid (the "**Interest Award**"); and

(d) The costs of the claims and the fees and expenses incurred in the arbitration (the "**Costs and Arbitrator's Costs Award**").

Issues 2(a) and (b): The Fair Hearing Issue

The Court dismissed the Contractor's arguments for breach of natural justice, reiterating that the focus of an inquiry under s 17(2) was due process, not the correctness of the Arbitrator's decision.

The Court found that the Contractor had ample opportunity to make – and had in fact made – submissions in respect of issues relating, *inter alia*, to the diminution in value of the Sub-Contract Works and of the Building. Thus, on closer analysis, the Contractor's real complaint was that the Arbitrator reached the wrong result and such a complaint does not meet the criteria for setting aside the Award.

The Court further opined that, even if the Arbitrator's case management decision could be characterized as a breach of natural justice, the Contractor would not have suffered any prejudice and the fourth requirement for a successful claim for a breach of natural justice has not been met. The Contractor must show that the alleged breaches of natural justice were not merely technical or inconsequential.

Finally, the finding that the Building had decreased in value as a result of the faulty Sub-Contract Works was a finding of fact, which, on the evidence before him, the Arbitrator was entitled to arrive at.

In this regard, the Contractor's complaint, at its very best, only raised the contention that the Arbitrator made an error of fact. This, however, did not amount to a breach of natural justice constituting misconduct under the 1985 Act.

Issue 2(c): The Interest Award

The Court held that an award of interest is in-disputably at the discretion of the arbitral tribunal. The Interest Award could not be set aside for an error of fact or law, as s 17(2) was inapplicable here, given that the complaint is nothing more than a failure to apply the correct principles governing the exercise of the Arbitrator's discretion.

Issue 2(d): The Costs and Arbitrator's Costs Award

On the facts, both parties had requested the Arbitrator to reserve his jurisdiction to hear parties on costs if either of them won on the main claim. As the Arbitrator saw it, the Owner won and costs followed the event.

It was arguable that the Arbitrator, in deciding not to hold a hearing on costs, was exercising his discretion having regard to the submissions to reserve costs. There was also no complaint that the Arbitrator, in exercising such discretion, acted in excess of jurisdiction when both parties had asked for costs to be held over.

Nevertheless, the Court was of the view that one may argue that the Arbitrator had committed an error of law and/or fact in exercising his discretion on costs in light of the parties' submissions for costs to be held over. However, the Court also opined that this error did not amount to misconduct within s 17(2) of the 1985 Act.

Conclusion

In reaching the decision in *AUF*, the Singapore High Court affirmed its pro-arbitration stance, reiterating the high threshold required to successfully set aside an Award, be it misconduct, absence of fair hearing, or breach of natural justice.

RECENT EVENTS

The Great Divide? Convergence or Divergence in Singapore and English Contract Law

28 January 2016

Speaker: Rian Matthews
Chair: Leslie Chew SC

Reported by Cai Chengying, Senior Associate at Allen & Gledhill LLP

The seminar was well-attended with over 50 participants. The speaker was Mr. Rian Matthews, a Local Principal from Baker & McKenzie.Wong & Leow and the session was chaired by Mr. Leslie Chew SC.

Mr. Matthews compared areas of interest in contract law in Singapore and England with reference to recent cases. The discussion covered the different approaches taken to areas such as contractual construction and damages.

One interesting topic related to the applicability of the traditional two-limb *Hadley v Baxendale* test for remoteness of damages. The first limb of the test states that general damages arising from breach of contract are those which parties would have reasonably contemplated to flow naturally from that breach at the time they made the contract. The second limb states that where special circumstances have been communicated between the parties, damages may be awarded based on what parties ought to have contemplated would ordinarily flow from such circumstances. In the case of *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, the House of Lords moved towards a new test premised on the assumption of responsibility rather than foreseeablility, stating that the question is "*whether the loss was a type of loss for which the party can reasonably be assumed to have assumed responsibility*". However, in the case of *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] SGCA 15, the Singapore Court of Appeal rejected the new test in *The Achilleas* and endorsed the traditional *Hadley v Baxendale* test.

At the end of the seminar, the audience was also invited to consider the effects which the different approaches have in practice, in particular, the ease with which the tests may be applied and whether the outcomes would have been different in each case.

In all, it was an extremely useful and informative session as the audience was provided with a broad and comprehensive overview of the different approaches in Singapore and England.

The Impact of Cross Border Insolvency on Arbitration

25 February 2016

Speaker: Andrew Chan & Ashley Bell
Chair: Michael Hwang SC

Reported by Tham Wei Chern, Director at Duane Morris & Selvam LLP

As modern business becomes more international and cross-border in nature, it is inevitable that the areas of insolvency and arbitration intersect. This leads to fundamental tensions between the private intentions of parties expressed in arbitration clauses, and in the broader public issues that are addressed by insolvency laws.

On 25 February 2016, we were privileged to have Andrew Chan of Allen & Gledhill LLP and Ashley Bell of DLA Piper share with us their insights into the intersection between insolvency and arbitration. Chairing the session was the illustrious Mr Michael Hwang SC. The talk was jointly organised by the Singapore Institute of Arbitrators and the Turnaround Management Association, and was well attended with 34 attendees, attesting to the interest in the topic.

The topics that were covered ranged from the effect of insolvency on an arbitration agreement to recognition and assistance of foreign insolvency proceedings, and on whether insolvency proceedings could be subject to arbitration. Andrew and Ashley also expounded on anti-suit injunctions and insolvency, and whether cross-border insolvency meant an immediate stay of proceedings.

One area of interest which was discussed was whether insolvency claims were capable of arbitration. In Singapore, the position set out in *Larsen Oil and Gas Ptd Ltd v Petropod Ltd* [2011] 3 SLR 414 and *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 is that they are not. This prompted the Chairman, Mr Michael Hwang SC to pose the question whether it was possible for an arbitrator to make an order for parties to voluntarily wind up a company. As this issue has not yet been decided, Andrew Chan ventured that based on the general principles pertaining to both arbitration and liquidation, this might very well be possible.

Another issue of interest was the enforcement of an arbitration award when there was an ongoing rehabilitation of the company. Ashley Bell presented on the Hong Kong court's decision on this issue in *HKIE v Aoki* [2005]. In that case, an arbitration was commenced in Hong Kong, but before the award was rendered the respondent entered into a court-supervised rehabilitation process in Japan. When the Applicant applied to enforce the award, the Hong Kong courts allowed judgment to be entered, but took into account the Japanese rehabilitation proceedings and exercised its discretion to refuse enforcement. This suggests that where there are ongoing court supervised insolvency proceedings in a foreign jurisdiction, local courts may still refuse to enforce a local arbitration award on grounds of international comity as a public policy grounds.

A cocktail mixer capped off the successful event, and participants took the opportunity to mingle and pose further questions to Andrew and Ashley. We look forward to more such events in the coming months.

ANNOUNCEMENTS

New Members

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

Members:

1. Tony Sim Meng Keng
2. Eoin O Muimhneachain
3. Geraldine Bernadette Bourke

Fellows:

1. Chng Hwee Hong
2. Chong Peng Soon Patricia Sandra
3. Joy Chew
4. Chin Li Nah
5. Trevor George De Silva
6. Lim Hseng Iu
7. Hiroki Aoki
8. Olivier Monange
9. Ji Yeon Yu
10. Sivasankar Chelliah
11. Richard Lim Teck Hock
12. Chong Sze Fui

Panel Arbitrators

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

Secondary Panel of Arbitrators

1. Tham Wei Chern
2. P.M. Nagesh
3. Cameron Samuel Ernest Ford

UPCOMING EVENTS

- **International Entry Course 2016 (22 and 23 April with an examination on 25 April 2016)**. 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.
- **SIArb Commercial Arbitration Symposium (29 September 2016)**
- **Fellowship Assessment Course 2016 (14, 21 and 22 October 2016 with an examination on 24 October 2016)**. Candidates who pass an examination at the end of this Course may apply to be Fellows of the Institute and subject to meeting membership requirements may use the abbreviation "FSIArb" as part of their credentials.

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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