SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
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VIEWPOINT

THE PRESIDENT'S COLUMN

Following the recently concluded 23rd Annual General Meeting on 23 July 2004 at the Marina Mandarin, I am pleased to welcome and introduce the new Council for 2004/2005 as follows:

Mr Raymond Chan	President
Mr Goh Phai Cheng, SC	Vice President
Mr Basil Vassilios Vareldzis	Honorary Treasurer
Mr Johnny Tan Cheng Hye	Honorary Secretary
Mr Richard Tan	Immediate Past President
Mr Govindarajalu Asokan	Council Member
Dr Philip Chan	Council Member
Capt Lee Fook Choon	Council Member
Mr Leslie Chew, SC	Council Member

I take this opportunity to express my thanks and gratitude to the outgoing Council Members for their invaluable services and support to the Institute in the past year, especially to Mr Yang Yung Chong the outgoing Hon. Secretary who has served on the Council in various capacities for the past 10 years.

At the Extraordinary General Meeting on 23 July 2004, the resolution to amend the Constitution was passed with overwhelming support from the members present. The new Council was hence tasked to implement these amendments and introduce the relevant changes to the Bye Laws of the Institute.

On behalf of the Institute, I would like to express our congratulations to Associate Professor Lawrence Boo on his recent appointment as the Deputy Chairman of Singapore International Arbitration Centre. Associate Professor Boo was kind enough to give a talk to the Institute on the subject "Singapore Arbitration – A New Direction" at the recent AGM dinner. His talk was provocative and provided an insight on the impending changes within the arbitration profession in Singapore and the SIAC in particular. A copy of his paper is reproduced at page 3 of this newsletter. The Institute looks forward to working more closely and collaborating with the SIAC on the various joint projects.

Over the past 10 months, the Institute implemented the following programmes and activities to raise the professional standing of arbitrators in Singapore.

1. Introduced a Code of Conduct for members acting as or seeking appointment as arbitrator;
2. Conducted the "Diploma in International Commercial Arbitration" course jointly with the Chartered Institute of Arbitrators;

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3. Participated in the "Graduate Certificate in International Arbitration" jointly conducted with the National University of Singapore Faculty of Law and Chartered Institute of Arbitrators;
4. Conducted the Fast Track Fellowship Assessment Workshop for lawyers with more than 10 years' practice jointly with the Chartered Institute of Arbitrators and the Award Writing Course for successful candidates from the Fellowship workshop;
5. Conducted a series of talks and seminars on arbitration and dispute resolution;
6. Conducted introductory courses on arbitration in collaboration with various professional and industry groups, including the Institution of Engineers Singapore, Singapore Institute of Architects, Real Estate Developers Association of Singapore, Singapore Shipping Association and Singapore Accountancy Academy during the period January to July 2004;
7. Secured the bid to host the International Congress of Maritime Arbitrators (ICMA) XVI Conference 2006/2007 in Singapore jointly with Singapore International Arbitration Centre, Singapore Maritime Arbitrators Association & Maritime Law Association of Singapore;
8. Partnered the Singapore International Arbitration Centre, National University of Singapore, the Singapore Mediation Centre and the India Construction Industry Development Council (CIDC) on a joint project to provide training and accreditation to the Indian Construction industry.

With the successful implementation of the above programmes and the on-going initiatives, the Institute looks forward to an even more challenging year ahead to create international linkages with international arbitration organisations and raise the profile of Singapore as an international hub for dispute resolution services.

I am also pleased to announce that the Institute will be launching a new journal on Asian Arbitration in 2005, jointly with the Singapore International Arbitration Centre. This new journal will carry independent editorial content, which will be determined by the General Editors. In anticipation of a call for articles, I invite contribution of articles from members for this esteemed publication.

As the Singapore construction industry is bracing itself for the introduction of the Security of Payment Act, the Institute shall continue with its initiatives and efforts for our members to be actively involved in and contribute to the advent of adjudication in this Act. In this regard, the Institute plans to conduct a series of talks and training courses for members to prepare for adjudication.

In conjunction with the successful completion of the first run of the Graduate Certificate in International Arbitration jointly conducted by the National University of Singapore Faculty of Law, Chartered Institute of Arbitrators and the Institute, I am pleased to offer the Institute's congratulations to the following successful graduates, some of whom are already members of our Institute:

Ang Choon Keat, Chandru Ganesh, Chia Peng Chuang, Choy Kah Kin, Dag Rommen, Dinesh Singh Dhillon, Eoon Hoon Eng, Foo Yung Kuan, Hakirat Singh s/o Harnek Singh, Ho Soo Kee, Juddoo Prem Anand Kumarsingh, Law Kong Hoi, Lee Yuen Wai Dicky, Lim Aeng Cheng Charles, Lock Kai Sang, Tan Joo Seng, Tan Seng Lee Henry, Tee Tong Kwang Vincent, Vickery Evert Christopher, Rusmin Wong, Yong Eng Wah, Perinpanayagam James and Lim Sing Siong.

Finally, I look forward to receiving your warm support for the activities and events of the Institute for this coming year.

Yours sincerely
Raymond Chan
President

Call for Papers for New Asian Arbitration Journal

A new Asian Journal of International Arbitration, jointly conceived by the Singapore International Arbitration Centre and the Singapore Institute of Arbitrators, will be published in 2005. The journal will carry independent editorial content, which will be determined by the General Editors. If you wish to contribute an article for this publication, please contact us at publications@siac.org.sg for more details.

Singapore Arbitration – A New Direction

Assoc Prof Lawrence Boo, Deputy Chairman, SIAC
(Text of speech given at the Singapore Institute of Arbitrators Annual Dinner)

Until the 1980s, English courts had traditionally guarded their jurisdiction rather jealously. Requests to resolve disputes outside the judicial system had often been condemned as attempts to oust the court of its jurisdiction and given the sudden death. This trend slowly changed in the 1980s with the growth of international trade and investments. Businesses from export-oriented economies intent on avoiding the domestic courts of the importing economies soon found the preferred alternative in arbitration. Courts of exporting nations realised too that there is a need to realign its hitherto protected jurisdiction with the need to reinforce the use of international arbitration. Judicial decisions on arbitration evolved from the hostile to a tolerant attitude and eventually to one of favour. Retiring judges joined the bandwagon of those extolling the virtues of arbitration and when they finally retired, they too became much sought-after arbitrators.

For a long time, English courts and English law cast a heavy influence over its former colonies. These territories enacted laws drafted by English draftsmen encompassing all areas of commerce and administration. As a result English mercantile laws continue to be an important feature in many former British colonies. Arbitration laws in most of these territories were invariably copies of the English Arbitration Acts. English court decisions accordingly played a large part in influencing how the law and practice of arbitration developed over those years.

The development of the law and practice of arbitration however proceeded in quite a different way in the civil law realm. While English courts take an active interest in the development of the law and practice of arbitration, the Continental courts generally adopted a 'hands off' attitude. Into this gap came the trade bodies, chambers of commerce and professional institutions. They develop rules and introduce accepted norms into the practice of arbitration. Concepts of separabilty and *kompetenze-kompetenze*, *amiable composition* and the making of awards *ex aequo et bono* all trace their roots to civil law countries. Academic writings, commentaries and even arbitral awards soon become useful sources of arbitral jurisprudence. Underlying all these are the venerable arbitral institutions such as the Court of Arbitration of the ICC (established in 1923) in France, Arbitration Institute of Stockholm Chamber of Commerce (established in 1917) and China International Economic Trade Arbitration Commission (CIETAC, established in 1956).

Common law and civil law influences

Singapore arbitration has a relatively short history as compared to the established institutions such as the ICC, Stockholm or CIETAC. Your Institute was formed only in 1985. The SIAC was even younger, having only started in July 1991 as a fledgling arbitral institution. As an infant in the land of giants, we looked to what we were comfortable with: the tried and tested English arbitration system; just as we do our other laws and practices, with little questioning. I should confess that when I came into SIAC in 1991, I had no experience with arbitral institutions. I had only experienced *ad hoc* arbitrations and had always thought that was the way it has been and always will be. When I joined SIAC, someone had already prepared a draft set of rules based on the LCIA Rules and the UNCITRAL Rules. The names sounded good to me and I simply made minor changes and it was adopted to become the SIAC Rules. I subsequently learnt that both sets of rules were intended more for *ad hoc* arbitrations rather than institutional arbitrations and that some tweaking needed to be done. Perhaps further changes need to be made to align it with its intended institutional character.

There is perhaps a need for us in Singapore, if we want to be a leading centre in international arbitration, to unlearn some of the things that we are used to. The rich common law heritage that we have can be a strength as well as a baggage. There is always the danger that because we had done it this way before, it must be always be done in that way. We must learn to trust other systems; systems that are not familiar to us and concepts that are alien to us. I have had the privilege on several occasions to sit in arbitrations with CIETAC in China. It was an experience that I cherish and it was one in which I learned much from the Chinese. The hearings were conducted differently; there was no cross–examination, witnesses were not kept away when another witness was being asked questions. Much more reliance is placed on documents than on oral evidence. One particular lesson I learnt that remains etched in my mind was their view on privilege and 'without prejudice' discussions or letters. My Chinese colleagues believed that the more information the tribunal is given, the better the tribunal will be in the position to make a just decision. I was asked 'what kind of justice can you dispense when you keep some truths from the tribunal under the cloak of privilege and 'without prejudice' communications? I leave that for you to ponder over. I am not suggesting that we abolish the privilege rule, or that we abandon the various evidential principles that we are familiar

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with. I share this to illustrate that jurisprudential thinking is not the monopoly of those of us from the common law jurisdictions. There is much to learn from our civilian counterparts.

The Institute and SIAC

The key institutions in the development of arbitration in Singapore are your Institute and the SIAC. There are also industry-specific groups such as the Institute of Architects, the Commodity Exchange (for rubber trades), and the insurance industry. The latest entrant being the Singapore Maritime Arbitrator's Association.

Your Institute has the distinct role of providing foundational training for arbitrators. You have a comprehensive training programme and standards to be met before members are admitted to their respective levels. In recent years, it is evident that the Institute has also been more proactive in the promotion of arbitration and arbitral expertise. I am of course very pleased with the relationship between the Institute and NUS Law Faculty in jointly staging the Graduate Certificate in International Arbitration. The first batch of 23 graduands of this course will graduate on 7 August 2004. I look forward to more cooperative efforts with the Institute and the Law Faculty. When each of us bring to it value, we will be able to create greater value for members and arbitration in Singapore.

An arbitrator is only as experienced as the cases he has handled. The attainment of Fellowship in the Institute must not be seen as an end point. It is in fact only the beginning. Each arbitrator's experience in arbitration is necessarily different from another and may not always be the right one. The number of arbitrations that one has conducted is evidence only of the numbers of times parties have given us the chance to practise our vocation. We could well be repeating the wrong things all this while. It is therefore important that we open ourselves to checks and appraisals. If older, wiser and certainly more learned judges could get things wrong, what makes us assume that we arbitrators could not. (I have once heard a judge use the term 'part-time judge pretenders' to describe arbitrators) There is therefore a good case for continuing education. The SIAC is prepared to work with the Institute to conduct workshops based on lessons learnt from issues that have arisen in real life arbitrations. These sessions would be of greater importance to the more active arbitrators. It would be an opportunity to share their experiences and obtain feedback on the decisions and practices that they have been confronted with in the course of the arbitrations which they had conducted. We could sharpen our thinking process, reasoning, and hopefully dispense justice that is fair, better thought-through and acceptable to the parties.

Institutional arbitration

A FAQ made in relation to arbitrations in common law jurisdictions is the differences or advantages of *ad hoc* and institutional arbitration. Due to the historical development of arbitration over the last 70-80 years, common law jurisdictions tended towards the use of *ad hoc* arbitrations whereas continental or civil law countries adopted a more institutional approach to arbitration.

In *ad hoc* arbitration, parties surrender most of their autonomy and control over to the arbitral tribunal once the tribunal has been constituted. It is the tribunal that lays the ground rules, sets the time table and makes all procedural rulings without need for reference to any supervisory institution, unbridled by any institutional rules. The tribunal also sets its own rate of remuneration and time sheets. Most charge fees based on time spent. It is the tribunal who would decide how much and when payment of advances or deposits for their own fees ought to be made. The only check against any abuse would be the courts wherein the arbitration is sited which is dependant on the statutory powers given. Awards rendered by the arbitrators would be delivered to the parties directly upon payment of any outstanding fees. The freedom and autonomy enjoyed by the tribunal is the main reason many arbitrators favour *ad hoc* arbitrations.

The obvious weakness of *ad hoc* arbitrations is the lack of checks and balances over the arbitral tribunal. Complaints normally involve the high rate of fees demanded, delay in making decisions, in delivering the award, and unnecessarily prolonging of hearings... etc. Not all of these are always justified. Yet it is indeed difficult for any party to an arbitration to raise these with the tribunal for fear of losing favour with them which they perceive could impact the eventual outcome of their case.

Institutional arbitration on the other hand entails a supervisory institution under which the arbitration is conducted. Arbitrators are normally appointed or confirmed by the institution upon nomination by the parties. Most institutions draw their arbitrators from a pre-selected panel whose members agree to adhere to certain codes of ethics in their conduct of the arbitration. They must agree to conduct the arbitration in accordance with the institutional rules adopted. The tribunal's fees are normally set by the institution and the tribunal would not be directly involved in the financial aspects of the arbitration. The tribunal is thus tasked primarily to concentrate on the adjudicative aspects of the case. When the tribunal makes awards, they would normally be scrutinised by the institution for procedural compliance before their release to the parties. The tribunal's fees are then ascertained or fixed and paid by the institution.

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Institutional involvement varies in wide degrees. Some organisations merely rent out rooms and provide secretarial and logistics support when requested. These would normally be sponsored by an association of arbitrators or in some cases, by a group of private arbitrators. The target beneficiary of such an institution would be the institute and their members or the group of arbitrators who sponsor the institution. Others are formed by specific industry groups aimed at solving certain problems that have been identified as peculiar to their sector e.g. Chambers of Commerce, guilds, trade associations and professional bodies.

SIAC's role

SIAC as an arbitral institution indeed seeks to provide more than hiring out rooms and providing physical facilities for arbitrations. SIAC wants to:

- Be the initiator of arbitral programmes;
- Be the repository for arbitral expertise;
- Ensure that its panel of arbitrators are of the highest quality and integrity;
- Maintain a transparent and professional system of appointing arbitrators;
- Maintain a high level of scrutiny of awards made by our arbitrators;
- Work with industry sectors to customise an arbitration process according to their needs;
- Create niche areas that are clearly identifiable to Singapore arbitration;
- Provide a forum for intellectual discourse on arbitration.

Some of the immediate initiatives that we are embarking on include:

a. Possible change in the current practice of basing arbitrator's fees on time to one that is directly linked to the quantum in dispute;

b. Implementing a more transparent system of appointing arbitrators;

c. Revival of SIAC's quarterly newsletter 'Singapore Arbitrator';

d. Publication of a professional Asian arbitration journal;

e. Publication of SIAC sanitised arbitral awards.

Of these initiatives, perhaps fees of arbitrators and the appointing process to be adopted by the SIAC is probably of greater interest to you.

Arbitrator's fees

Time-based fees assume that a certain value be attached to an arbitrator. It assumes that the arbitrator will act with promptitude and conduct the arbitration efficiently. It is sometimes suggested that one who commands a higher hourly rate is more efficient and proficient in dealing with the matter in dispute. In reality, time rates depend on the profession, the seniority and popularity of the person appointed as well as the cost of living of the country he normally resides. There is therefore no logical link between the time rate of an arbitrator and the severity of the matter.

The strongest argument that can be made in favour of time-based charging is that it is a fairer gauge of the complexity of the case rather than a quantum-based fee structure. It will also deter parties from unnecessarily prolonging cases or making unmeritorious or unnecessary applications. It represents a fair compensation to the arbitrator for the time he would otherwise be employed in his full-time vocation. Against this however is the uncertainty that the disputant parties often face, viz. how much will it cost them when the case is eventually completed. I have personally seen a few cases in which a party simply gives up in the course of the arbitration because they could not finance the arbitration as they had not anticipated the full costs involved. I should add of course that that factor includes the costs of legal representation and not just the tribunal's fees. For an institution like the SIAC, one question that we hitherto could never give a satisfactory answer to lawyers and potential disputants is, how much the arbitration costs in the worst-case scenario would be.

A fee system pegged directly to the quantum in dispute on the other hand would give parties and their lawyers a fairly accurate estimate of the costs involved. It is a transparent system that will remove any possible embarrassment that could arise over time sheets and the subjective assessment of case complexity by the arbitrator. It gives certainty and introduces proportionality into arbitration process. Fees pegged to quantum of claims are not a new concept. It is not at all revolutionary. All the leading international arbitral institutions, ICC, CIETAC and Stockholm Chamber use such a fee structure. English institutions (e.g. LCIA) and bodies in countries that have common law influence tended towards a time-based fee structure.

Since my return to SIAC, I have met up with some 50 arbitrators/lawyers involved in arbitration during several tea sessions to gather feedback on the role of SIAC and on arbitration in Singapore generally. One of the issues that we discussed relates to the time or quantum-based fees structure. A large majority favours a quantum-based fee structure as it is a consumer-friendly move. Several 'senior' practitioners however voiced their preference to retain the time-based fees system. They see a quantum-linked structure as disadvantageous to them. To be fair, a quantum-linked fees structure does level the playing field for all arbitrators. The factors that give them value viz. seniority or experience

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would be displaced by the weight attached to the severity of the parties' matter in dispute. I am apprehensive that if we implement the quantum-based fees structure, SIAC may face some opposition from this segment of the legal profession. I welcome views and suggestions from the Institute on this issue.

SIAC Panel and appointing procedure

The SIAC gets a constant flow of applications for appointments to its Panel of Arbitrators, both from local professionals as well as many from overseas. This fortifies my belief that SIAC panel membership is regarded as a mark of excellence and achievement. I would like to assure you that SIAC treasures the relationship with the Institute. While it may not be possible for the SIAC to admit all Fellows onto its Panel, the SIAC certainly considers the Fellowship qualification as a serious value indicator for admission. The Panel Review Committee will consider applications for admission annually and will not do so *ad hoc*. This year the exercise will be carried out in August.

The appointing process for arbitrators to an arbitration is of course another area of interest to many. While I have been entrusted by virtue of office as Deputy Chairman to make appointments under the SIAC Rules, and by the Chief Justice for appointments under the IAA and the AA, the SIAC has put in place a system of checks and measures to ensure that a professional and transparent process is involved in making such appointments. Candidates for appointment are first shortlisted by SIAC secretariat based on the qualifications or disqualifications called for under the arbitration clause, the nature of the dispute, the specific expertise required, the quantum of claim, the degree of complexity anticipated and the availability of the candidates. A list of 3-4 names is then submitted to another committee comprising of four SIAC Board members who may agree, disagree or re-rank the list proposed. The list is then submitted to me for final decision on the appointment. This three-tiered process is intended to ensure transparency and to avoid any semblance of favour dispensation. I believe it can and will instil greater even greater confidence in the SIAC and institutional arbitration in Singapore.

As members of the Institute, I am sure one of your concerns will be how you can be more involved in arbitration, as arbitrators. The SIAC would be looking into ways to work with your Institute to create industry-specific arbitration processes. We will also be looking beyond our shores to the emerging economies in our region to seek partnering opportunities. Some initiatives are already underway. One project in which the Institute has joined hands with us is the proposed publication of the Asian journal of international arbitration. There will be some measure of risks and some degree of uncertainty but I believe the greater risk lies in any inaction. If the Institute comes alongside the SIAC in such endeavours, there could well be benefits yet unknown. I see the Institute as a valuable partner with us in promoting Singapore as the venue of choice for arbitration in Asia. I see the road ahead as one in which there will be close inter-connection and partnership. I hope you too see it that way.

23RD ANNUAL GENERAL MEETING/ EXTRAORDINARY GENERAL MEETING

The Institute held its 23rd Annual General Meeting, and an Extraordinary General Meeting, on 23 July 2004, at the Marina Mandarin Singapore. Forty-two members attended the Meeting.

The Institute's President, Mr Raymond Chan, chaired the Meeting. Mr Goh Phai Cheng, SC and Mr Johnny CH Tan were returned unopposed for the posts of Vice-President and Hon. Secretary respectively. Dr Philip Chan, Capt Lee Fook Choon and Mr Govindarajalu Asoka were elected into the Council.

During the Extraordinary Meeting, Mr C Arul, Chairman of the Constitution Committee, explained the rationale for the amendments to the Institute's Constitution. The proposed amendments were passed by an overwhelming majority.

The Meeting ended with a dinner during which, Associate Professor Lawrence Boo, the newly appointed Deputy Chairman of the Singapore International Arbitration Centre, presented a talk entitled "Singapore Arbitration—A New Direction". In his speech, Prof Boo noted the growth and increasing acceptance of arbitration over the years, and highlighted the benefits of a more comparative approach to international arbitrations. He also provided members with an overview of possible improvements at the SIAC in the near future.

The evening ended with a presentation of membership certificates to the new members.

Consolidation in Construction Arbitrations – Procedures and Pitfalls

by Matthew Wills – Consultant, James R. Knowles (Singapore) Pte Ltd

In today's modern business transactions, contracting practices will frequently involve multiple parties along the supply chain. The business of construction is no different. In a typical construction project, there will be contracts between say, the materials supplier and the specialist installation sub-contractor; between the sub-contractor and the main contractor; between the main contractor and the owner; and between the owner and his designers and other direct contractors. Should disputes arise between any two of these contracting parties, such may be resolved in the courts or (as is often provided for under the terms of most forms of construction contract) in arbitration. But what happens if the dispute between two specific parties concerns the same facts or the same legal issues as a dispute between one of those parties and a third party under a different agreement?

One example of such a dispute might be where the owner of a high-rise office development is in dispute with the main contractor regarding materials and workmanship defects in the building's external façade, which is also the subject of a dispute between the main contractor and the external cladding sub-contractor on the same issues.

Arguably, in such circumstances, it may be sensible to allow one court or arbitrator to hear both disputes, thereby saving both time and costs. This process is called "consolidation". In the courts, consolidation of disputes is commonplace and is one of the areas that the English Civil Procedural Rules has specifically addressed and provided for under Part 19. The advantages in litigation are clear in that it can serve the good administration of justice by preventing inconsistent or contradictory judgements. However, in arbitration, the arbitrator does not have the same powers as a judge and much will depend in the first instance on the construction of the relevant arbitration agreement(s), procedural rules and applicable law.

The consolidation of a dispute is essentially the combination in one action of several causes of action against the same party or other parties. This may be achieved through the consolidation of proceedings where two or more disputes are amalgamated or by holding concurrent hearings on the disputes with separate directions and awards issued by the arbitrator. However, in order to consolidate proceedings, it will be necessary to show that there are common questions of law or fact, as its main purpose is primarily to save both the time and costs of the parties involved.

The circumstances of a dispute may develop particular situations where a claimant may have a claim based on the same set of facts against one or more parties or a party to whom a claim is made against may wish to bring in (with their agreement) a third party. Other circumstances may require the use of multi-party arbitrations in a contractual arrangement where each party passes down liability to the final contract.

The typical mechanisms that are available for the consolidation of arbitration proceedings include:

> '***Statutory***. *The statutes of the jurisdiction may provide for some form of consolidation, such as, e.g. the Hong Kong Arbitration Ordinance and the Netherlands Arbitration Act.*
>
> ***Conditions of Contract***. *The contracts themselves may provide for some form of consolidation or other procedure for multi-party disputes.*
>
> ***Institutional or other applicable procedural rules***. *Institutional rules adopted by the parties to the separate contracts may provide for consolidation with or without consent."*[1]

The English Arbitration Act 1996 deals with the specific issue of consolidation of proceedings and concurrent hearing under s 35. It is a non-mandatory section and therefore the parties' are free to agree on its inclusion or exclusion to the proceedings. These provisions are as follows:

(a) That the arbitral proceedings shall be consolidated with other arbitral proceedings, or

(b) That concurrent hearings shall be held.

(c) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.'[2]

The Singapore Arbitration Act 2001 under s 26 has almost identical provisions.

As it is expressly stated in subsection (2) of the Act, without the parties' agreement neither the Arbitrator nor (in most situations) the courts can order the consolidation of proceedings or concurrent hearings. This maintains one of the key principles of Arbitration, that the parties decide on how their dispute is resolved and maintain the private and confidential resolution of the dispute. It will also ensure that a party does not find themselves part of someone else's dispute without their formal agreement.

Standard forms of contract often make provisions for consolidation through the joining of hearings, for example

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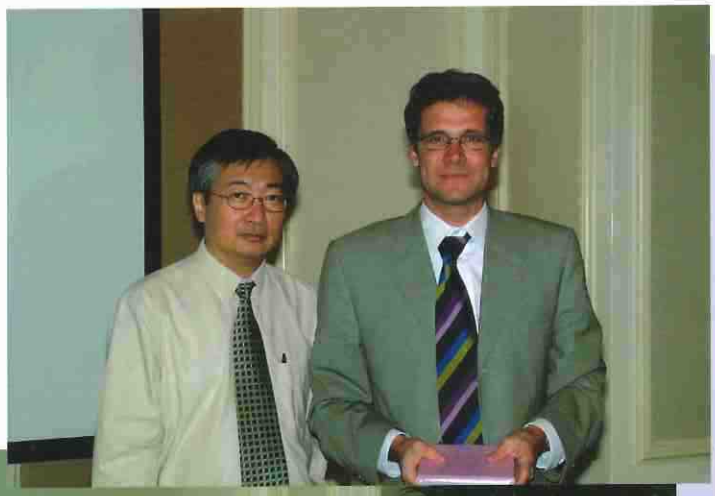
23rd Annual General Meeting/ extraordinary general meeting (23 July 2004)

Lecture by Dr Philipp Habegger on Arbitrators as Settlement Facilitators (24 May 2004)



DIRECTOR-GENERAL OF THE CHARTERED INSTITUTE OF ARBITRATORS VISITS SINGAPORE (5 MAY 2004)

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JCT (1998) Clause 39 and SIA (1996) Clause 37(8). Such provisions, if operated correctly, are intended to result in overall cost savings where related contracts would normally require two different arbitrators, two different hearings and all the associated works that would normally be expected. Furthermore, the consolidation of arbitration proceedings will also reduce the risk of inconsistent or contradictory awards being made or the application of the related governing law.

However, it has also been seen in the past that consolidation clauses have been open to abuse by main contractors in delaying making payment to a subcontractor, relating to a dispute under the subcontract. It was held by the English Court of Appeal in *Redlands Aggregates Ltd v Shepherd Hill Engineering Ltd* (1998), that under the ICE 'blue' form of subcontract, if the reference to arbitration under the main contract is not made within a reasonable time, the subcontractor is entitled to commence an independent arbitration. In addition, if the employer is unwilling to participate in arbitration under the main contract, the subcontractor is entitled to proceed with an independent arbitration.

The provision for the consolidation is also a feature of many institutional rules of arbitration and such rules can easily be incorporated into the contract by contract draftsmen. Singapore's SIAC Domestic Rules at Rule 22.1 (c) provides the tribunal with the power to *'allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes between them.'*[3] Both the UK's Institute of Civil Engineers Arbitration Procedure (1997) and the Construction Industry Model Arbitration Rules (CIMIR) take this further and extend the powers of the arbitrator (under the 1996 English Arbitration Act) by removing the decision on consolidation from the parties. Although this may appear to be contrary to the principles of arbitration, it can be an effective tool where parties to a dispute are unlikely to agree on the time of day, let alone to the consolidation of the dispute.

The CIMIR rules include a provision whereby the parties agree at the time of entering into the initial contract to empower an Arbitrator to consolidate arbitral proceedings where it is considered appropriate to do so. However, the parties can opt to amend the rules at this time, but once the Arbitrator has been appointed, no amendment to the rules will be allowed. However, consolidation will only apply where rules containing this provision apply to both contracts. This is seen by some commentators as a strong argument for the adoption of a single set of rules to be used on all construction contracts[4], as without the same rules there can be no consolidation in this way.

The Arbitrator may have appointment on two separate proceedings in which the parties have given him the power to consolidate. However, the Arbitrator will need to be satisfied that all parties agree to consolidate and that there will be genuine saving in both cost and time in adopting this approach. If the Arbitrator has the agreement to consolidate the hearing, the Arbitrator must also consider the implications on the conduct of the proceedings, on the award and the relationship between the parties and their respective claims.

Consolidation may be appropriate where the same or joint claimants make claims against a number of different respondents. However, if the respondent claims against a third party or another respondent, it is usual to order the concurrent hearings of these claims.

The case of *Trafalgar House Construction (Regions) Ltd v. Railtrack PLC* (1995), based on the English Arbitration Act 1950, suitably demonstrates the significant difficulties in conducting concurrent hearings, but also confirms the jurisdiction for the Arbitrator to order such hearings. This case concerned the procedure of 'name borrowing' where the subcontractor, although not part of the main contract, was put at a disadvantage by a decision of the employer. The courts held that although the main contract and the subcontract were legally separate they were *'plainly connected with each other both commercially and in their terms'.*

While various arbitration acts, standard conditions of contract and institutional rules all make provisions for consolidation, it must be considered that in practice consolidation will be made difficult, if not impossible, in a number of situations. If one party has an arbitration agreement contained in the contract and the other party does not, if the parties' arbitration agreements are with different appointing institutions or if the parties themselves are unwilling to participate in consolidation. As the learned editors of the Building Law Report No.75 when commenting on *'Trafalgar House'* highlighted, *'one great disadvantage of multiple proceedings is that three parties have more excuses for delay than two, and that fewer procedural difficulties will be overcome by consent'* [5]. Furthermore, if care is not taken in drafting contract clauses for the consolidation of hearings, there is a considerable danger that the savings in time and cost so intended by these provisions will not be achieved.

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1. Bernstein R, (1998) *Handbook of Arbitration Practice*, 3rd Edition, Sweet & Maxwell, London
2. The English Arbitration Act 1996, Section 35 (1) (a) and (b).
3. Domestic Arbitration Rules of the Singapore International Arbitration Centre. Rule 22 - Powers of the Tribunal : Orders and Directions.
4. Powell-Smith V, Sims J & Dancaster C (1998) *Construction Arbitrations* 2nd Edition. Blackwell Science.
5. [1996] 75 BLR 64. B

Legal Development Affecting Arbitration

by Dr Philip Chan Chuen Fye

The first case reviewed in this newsletter concerns those who may be involved in drafting arbitration clauses. Two lessons may be learnt from this case. A clause that is vague will not be effective as an arbitration clause. On the other hand, just relying on an existing arbitration clause by way of incorporation may also pose its own difficulty. The parties must show a clear intention to incorporate the clause as illustrated by the example below

Teck Guan Sdn Bhd v Beow Guan Enterprises Pte Ltd [2003] 4 SLR 276 [Tan Lee Meng J].

This case involved an appeal against the assistant registrar's decision to dismiss the defendants' application for a stay of proceedings made pursuant to section 6(1) of the International Arbitration Act. The main issue was whether there was a valid arbitration clause to compel them to refer their disputes to arbitration. The learned judge held that the clause relied on by the defendants was vague and did not make it clear that the parties agreed to resolve disputes by arbitration. The clause is reproduced below:

> "Any quality dispute would be settle [sic] amicably with reference to an independent surveyor. However, any dispute out of this contract to be governed by the rules of the Cocoa Merchants' Association of America Inc ...in force on that date."

The learned judge reviewed the case and said the following:

- "[The] defendants' application for a stay of proceedings can only succeed if there is an arbitration clause in the contract or if an arbitration clause in another document is incorporated by reference."
- "The clause in the contract relied on by the [defendants] ...is badly drafted and rather vague. It cannot be seriously argued that the words "*any dispute out of this contract to be governed by the rules of the Cocoa Merchants' Association of America*" make it clear that disputes that do not concern quality of the goods delivered are to be resolved by arbitration."
- "As for whether these words incorporate an arbitration clause in another document, it is worthwhile reiterating at the outset that '*the law as regards the purported incorporation by general wording of arbitration clauses in other contracts must be regarded as firmly settled and that general words will not suffice in the absence of a clear intention held by the parties to incorporate the arbitration clause*' (see Arbitration Law by Robert Merkin (1991 Ed), para 4.2.4, which was endorsed in Concordia Agritrading Pte Ltd v Cornelder Hoogewerff (Singapore) Pte Ltd [2001] 1 SLR 222)"
- "...it ought to be noted at the outset that neither [plaintiffs] nor [defendants] were members of the CMAA when the contract was made, when the dispute arose, when the writ was filed or when [the defendants] filed their application for a stay of the action against the [plaintiffs]. More importantly, there is nothing in the CMAA's rules and regulations that require non-members to have their disputes settled through arbitration. As such, the question of incorporating by reference an arbitration clause in another document does not arise."

In the second case, the legislative framework governing arbitration in Singapore is tested as regards the latitude of the court's power to intervene in an on-going arbitration proceeding. The general position in Singapore is found in the UNCITRAL Model Law on International Commercial Arbitration which is part of the International Arbitration Act (Cap 143A) where it is provided that "no court shall intervene except where so provided in this Law". It was found by the learned judge that the court has no power to grant an injunction to restrain an arbitrator from "continuing or assisting in the prosecution or further prosecuting or taking any further step" in an arbitration.

Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush and another [2004] 2 SLR 14 [Woo Bih Li J]

This case involved an application for an injunction to restrain the arbitrator from "continuing or assisting in the prosecution or further prosecuting or taking any further step" in an arbitration until another application to remove the arbitrator and to set aside the arbitrator's first interim award was determined. The application for injunction was dismissed by the learned judge because the court did not have the jurisdiction, or power, to grant the required injunction. However, the learned judge added that the absence of the power to grant the interlocutory injunction would not render a court's eventual decision to set aside an award nugatory if so decided.

The starting point according to the learned judge is "section 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) [which] states that an injunction may be granted either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient to do so. However, it was not in dispute that the arbitration between the parties is an international arbitration and is

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governed by the International Arbitration Act (Cap 143A, 2002 Rev Ed) which incorporates the UNICTRAL Model Law on International Commercial Arbitration."

Although under the Model Law, Article 5 provided that, "In matters governed by this Law, no court shall except where so provided in this Law.", the plaintiffs were not relying on a general supervisory power of the court but a residual power of the court when an arbitrator is being challenged pursuant to Article 13 of the Model Law and when an application is being made to set aside an award pursuant to Article 34 of the Model Law and section 24 of the Act.

The learned judge held as follows:

- "Since the Model Law does not provide for the Interlocutory Injunction in respect of an application under Arts 13 and 24, the court does not have the power to do so. In any event, I did not rely on this view alone."
- "It will be recalled that the last clause of Art 13(3) allows an arbitrator to continue the arbitral proceedings and even make an award pending the outcome of the court's ruling on the challenge. In my view, this clause hints that it is for the arbitrator, and not the court, to decide whether the arbitral proceedings should be stayed in the meantime."

  "Article 13(3)
  If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this Article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in Article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings, and make an award."

- "First, ...Art 34 and s 24 IAA are aimed at challenging the result of an arbitrator's decision (by way of an award) and not the arbitrator himself. Accordingly, there was no need for a similar clause as in Art 13(3) to be included in the Model Law. In Art 16 which deals with a challenge on an arbitrator's jurisdiction, there is a similar clause."
- "Secondly, Art 34 does in fact have a provision which seems to hint that it is for the arbitrator, and not the court, to decide whether to stay arbitral proceedings. This is Art 34(4)... It allows the court to suspend the setting aside proceedings in order to give the arbitrator an opportunity to resume arbitral proceedings."

  "Article 34(4)
  The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."

- "Thirdly, ...[as] an application to set aside an award can be made on less serious grounds than those for challenging an arbitrator[,] I was of the view that it is incongruous for the court to have the power to grant the Interlocutory Injunction under Art 34 if it does not have the power to do so under Art 13."
- "Fourthly, ...Art 34(1) states that recourse to a court against an arbitral award may be made `only' by an application for setting aside. It seemed to me that it would be contrary to Art 34(1) if the court has the power to order a stay of arbitral proceedings in respect of an award given."

In the third case, the Court of Appeal was asked to rule on an amendment made to Order 14 rule 1 of the Rules of Court in relation to an application for a stay of proceedings. Prior to the amendment, an application under O 14 for summary judgment is usually heard at the same time with an application for a stay of proceedings. After the amendment, an application for summary judgment can only be made after the Defence is filed. Hence an application for stay of proceedings would now be heard before and therefore independent of the application for summary judgment since the former must be made before the filing of the Defence while the latter can only be made after the filing of the Defence.

"O 14 r1
Where a statement of claim has been served on a defendant and that defendant has *served a defence to the statement of claim*, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant."[emphasis added]

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Samsung Corp v Chinese Chamber Realty Pte Ltd and others [2004] 1 SLR 382 [Court of Appeal comprising Chao Hick Tin JA and Woo Bih Li J]

This case involved an appeal against the decision of a judge in chambers who held that an O 14 application could only be made after the defence had been filed but ordered the defendants to file its defence with the caveat that this was not to be construed as a step in the proceedings.

The Court of Appeal made the following observations:

- "Under the previous rule, even though the defendant had already applied for a stay of the proceeding, there was nothing to stop a plaintiff from applying for summary judgment. This was because it was then not a requirement that a defence must be filed before the O 14 application could be made. It was also then the practice, in the interest of avoiding delay, that both the stay and the O 14 applications would be heard at the same time."
- "It seems to us that as a matter of logic, it makes absolute sense that when the question of stay is put in issue that should first be determined before any further step is taken by either party in the action. In the context of an arbitration clause, it is all the more so as under s6(1) of the Arbitration Act (Cap 10) it is expressly provided that the party who wants a stay of the court proceeding should apply 'after appearance and before delivering any pleading or taking any other step in the proceeding'. Once the stay question is finally determined, then everything else will follow from that."
- "It is quite apparent that implicit in the provision of cl 31(11) [of the SIA contract], that interim certificates be honoured notwithstanding any dispute, is the recognition that in the building industry cash flow is vital. It is thus understandable why under the previous O 14 r 1, the O 14 applications were invariably inter-linked. While the issues or tests may not be identical in the context of an SIA contract, if the defendant should fail in their stay application, the plaintiff would in all probability succeed in the O 14 application."
- "...there will be some delay if the O 14 application should only be allowed after the stay application has been disposed of. ...in the context of cll 31(11) and 37(3) of the SIA contract, if the defendant should fail to show by credible evidence that there is fraud or undue pressure being brought to bear on the Architect, and here we must add that mere assertion would not be good enough (see RB Burden Ltd v Swansea Corporation [1957] 3 All ER 243 and Hickman & Co v Roberts [19134] AC 229), then the stay application is likely to fail. In that circumstance, it would be hard to imagine what further arguments could be raised by the defendant to resist an O 14 application for summary judgment."

The Court of Appeal held that:

- "The order made by the judge ...requires the defendant to file his Defence, which is clearly inconsistent with the rule laid down in s 6(1) of the Arbitration Act that a defendant who applies for a stay on the ground of there being an arbitration clause must not take any step in the proceeding and, on the other hand, it provides that a Defence so filed by the defendant would not be taken to mean that the defendant had taken a step in the proceeding. But should the court go to the extent of performing what appears to be a 'gymnastic' exercise in order to achieve a result, which as a matter of principle, is far from logical? The defendant is being required to run two contradictory courses of action. The Rules Committee must have been aware of the practice under the previous rule,... In amending O14 r 1 in the way we now see it, the intention of the Rules Committee is wholly consistent with the standpoint that while a stay application is pending, no O 14 application should be made."

ANNOUNCEMENTS

• NEW MEMBERS •

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

Members

Lam Wei Yaw
Sanmuganathan Devaraj

Associate Member

Evert Christopher Vickery

UPCOMING EVENTS

- International Entry Course **on 4, 5 & 11 September**
- **Talk by** *Prof John Uff* **in October**
- **Talk by** *Michael Schneider* **in October**
- **Talk on Adjudication by** *John Barber* **in October**
- **Talk by** *Prof Schutze Rolf A* **in October**
- **Talk by** *Prof Michael Pryles* **in October**
- Maritime Conference **(one-day) in October**

Lecture by Dr Philipp Habegger on Arbitrators as Settlement Facilitators

On 24 May 2004, the Singapore Institute of Arbitrators hosted a lecture by Dr Philipp Habegger on "Arbitrators as Settlement Facilitators".

Dr Habegger is a partner of the business law firm of Walder Wyss & Partners, and has practised in Zurich and New York. Dr Habegger has had extensive experience both as arbitrator and counsel in over 45 arbitrations, including in ICC, LCIA, ZCC, Stockholm Arbitration Institute and *ad hoc* proceedings.

Dr Habegger's choice of subject was extremely topical, given the increasing interest in this issue in recent years. Traditionally, one of the strengths of arbitration has been its procedural flexibility. However, opinions are still divided on the permissibility and degree of involvement that international arbitral tribunals should have in parties' settlement negotiations. In particular, there are concerns over whether arbitrators, to facilitate settlement discussions, should be permitted to provide an interim assessment of the merits, and whether they should be permitted to participate in private caucusing.

Section 17 of the International Arbitration Act (Cap 143A), for example, allows parties to consent to an arbitrator acting as a conciliator. However, in practice, this power has been rarely expressly relied on.

Dr Habegger provided the audience with an interesting overview of the approach under the German and Swiss Codes of Civil Procedure, prescribing that a judge should work toward a settlement of the dispute. He noted that in practice, Swiss and German arbitrators were comfortable with applying these processes, by analogy, to arbitrations. He noted that Swiss and German arbitrators often went as far as giving non-binding assessments of the merits of the case, to facilitate settlement initiatives. Dr Habegger also provided the audience with a number of interesting and novel suggestions on how to raise settlement issues in an arbitral context, and what pitfalls to avoid.

The Question and Answer session was chaired by Mr Michael Hwang, SC. It elicited interesting queries, as well as a range of divergent views from the audience on what approach should be taken by an arbitrator. The audience also benefited from a lively discussion on the differences between civil and common law court practice and, by extension, arbitral practice.

(Full text of Dr Habegger's Talk can be found at the Institute's website at www.siarb.org.sg)

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Tel: 6836 3610 Fax: 6836 3613

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WORDWAVE℠

Director-General of The Chartered Institute of Arbitrators visits Singapore

On 5 May 2004, the Singapore Institute of Arbitrators held a social gathering to welcome Dair Farrar-Hockley MC, the Director-General of The Chartered Institute of Arbitrators.

The event provided members with an opportunity to mingle, followed by a talk by Mr Farrar-Hockley, entitled "Agenda for Change: A Platform for Evolution". The title of the talk was in reference to developments at The Chartered Institute, including its recent Extraordinary General Meeting in March 2004 where members overwhelmingly supported a motion to approve a proposed Revised Royal Charter, Bye-laws and Schedule to the Bye-laws for The Chartered Institute.

In his speech, Mr Farrar-Hockley noted the close working relationship between the Singapore Institute and The Chartered Institute, as well as the unique historical relationship of the two institutes, under which it had been agreed that The Chartered Institute would not set up a branch in Singapore. He also made reference to the increasingly global organisation that The Chartered Institute has evolved into, presently with members from around 96 countries, and the need for this to be reflected in The Chartered Institute's governing body.

In his speech, Mr Farrar-Hockley made reference to Singapore's reputation as an arbitral venue, and alluded to the opening of the ICC Asia head office in Singapore in 2002. He also suggested looking at expanding arbitration into other sectors, such as in the Information Technology sphere and considering using private dispute resolution mechanisms as alternatives in areas such as sports mediation/arbitration.

Helpfully, he described The Chartered Institute's own encouraging experience with small scheme arbitrations. In response, the President of the Singapore Institute, Mr Raymond Chan, thanked Mr Farrar-Hockley for his time, and expressed the Singapore Institute's wish to work further together with The Chartered Institute in the future.

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