SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
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VIEWPOINT

PRESIDENT'S MESSAGE

The Institute welcomes the recent the appointments of Justice V K Rajah and Justice Belinda Ang as specially designated High Court Judges to decide arbitration matters filed in the High Court. These new appointments in addition to the appointment of Justice Judith Prakash reflect the growing importance of and the support given to both local and international arbitration proceedings heard in Singapore. Singapore's efforts to position itself as an international arbitration hub will certainly be enhanced with these new appointments of High Court Judges well versed with commercial arbitration to preside over arbitration matters.

Appointment of Mr Goh Joon Seng as Honorary Fellow

I am pleased to announce that the Council has unanimously agreed to appoint Mr Goh Joon Seng, a former High Court Judge and the present Chairman of the Singapore International Arbitration Centre as an Honorary Fellow of the Institute. This appointment, which Mr Goh has graciously accepted, is in recognition of his significant contribution to the development of arbitration in Singapore.

Increased attendance at Seminars

The year 2004 has been an exciting one for the Institute. Members will note that there is a significant increase in the attendance of participants at the recent seminars organised by the Institute. This indicates that the Institute's initiatives in this area are valued and appreciated by members. The seminars that proved very popular included the following:

ß *"Taking Evidence in International Arbitration under Civil and Common Law Systems - Production of Documents and Witnesses' Testimony"* by Michael Schneider & Professor Dr Schütze on 21 October 2004 (Jointly organised with The Law Society of Singapore);

ß *"Converting to Adjudication: Thoughts for Arbitration Practitioners"* by John Barber on 25 October 2004 (supported by The Singapore Institute of Architects and Institution of Engineers Singapore);

ß *"Maritime Arbitration: Current Issues & Procedural Matters* - A Perspective from the UK & USA" by Patrick O'Donovan & Manfred W Arnold on 8 November 2004 (supported by The Singapore Maritime Foundation, The Singapore Shipping Association, The Singapore Corporate Council Association, The Maritime Law Association of Singapore and The Singapore Maritime Arbitrators Association).

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The Institute will continue to organise seminars and talks relevant to members.

FORMATION OF SINGAPORE CHAMBER OF MARITIME ARBITRATION

The Institute is honoured to be one of the supporting organisations of the Singapore Chamber of Maritime Arbitration officially launched by the Minister of State for Finance and Transport Mrs Lim Hwee Hua on 8 November 2004. The formation of the new Singapore Chamber of Maritime Arbitration is a significant milestone for maritime arbitration in Singapore. On our part, the Institute is pleased to play a leading role as the training facilitator for the new entrants in maritime arbitration and to provide continuing professional development for practising maritime arbitrators. I urge our members in the maritime-related industries to take a more active role in the activities of the Institute.

Authorised Nominating Body

The Institute has made and will continue to make representations to the relevant authority to be appointed as one of the Authorised Nominating Bodies in the appointment of adjudicators under the Building and Construction Security of Payment Bill. It is clear that our Institute is ideally placed to act as an Authorised Nominating Body as it a neutral body with a ready pool of well-qualified members of good standing in the dispute resolution community to act as adjudicators. Further, our Institute has also the necessary resources to act as an Authorised Nominating Body.

Code of Conduct and Arbitration Rules

The Institute had recently finalised and published a Code of Conduct for Members acting or seeking appointment as arbitrator. Our Institute has also established a set of Arbitration Rules for use by members. I urge and encourage members who are appointed as arbitrators to consider using our Institute's Arbitration Rules. With the Code of Conduct, our members will now be guided in their conduct when acting as arbitrators. The Code of Conduct and the Arbitration Rules may be found and downloaded from the Institute's website at www.siarb.org.sg.

Proposed Increase in Subscriptions

Many of you would have received an email message from me seeking your feedback on the proposed increase in membership fees. I will briefly touch on this. The Institute must consider how it will be able to meet its financial obligations for the post-LEAP period after September 2005 without dipping into its reserves. We need to sustain the resources presently available to the Institute in terms of support from its full-time Secretariat staff. It was after a long period of deliberation that the Council proposed that membership subscription fees be raised as one of the measures to address this concern. I hope that you will let me have your feedback.

Memorandum of Co-Operation

The Institute has recently concluded a Memorandum of Co-Operation with the Malaysian Institute of Arbitrators. The formal signing of the Memorandum will take place sometime in December this year. With this Memorandum, members can look forward to closer co-operation with our Malaysian counterparts including the holding of joint programs and activities. The Institute plans to enter into similar Memoranda of Co-Operation with other Arbitral Organisations in the region.

Finally, as the year is coming to an end, let me thank all of the members who have supported and assisted the Institute in one way or another this past year. Together with the Council, let me wish each and every member a joyful holiday season and a Happy New Year!

Raymond Chan
President

NUS and SIArb Initiate Research Project on International Commercial Arbitration

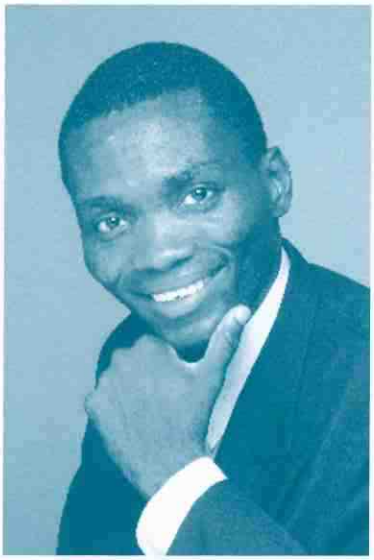
By Ajibade Ayodeji Aibinu, Graduate Student Researcher, NUS

We are delighted to announce that the Institute is collaborating with the National University of Singapore (NUS) on a research project titled "The Impact of International Commercial Arbitration in Singapore". The project team from NUS is led by Associate Professor Philip Chan (the Principal Investigator) and assisted by Dr Evelyn Teo (Co-Principal Investigator) and Mr Ajibade Ayodeji Aibinu (Graduate Student Researcher). On behalf of the Institute, Mr Richard Tan, the Immediate Past President, and the Chairman, Arbitration Capability Enhancement (ACE) Programme is working closely with the NUS team. The research project is under Economic Development Board, Singapore (EDB) LEAP support.

The intent and purpose of the research, as the title suggests, is to identify and estimate the level of economic activities being generated by international commercial arbitration in Singapore. Additionally, the study will investigate some of the underlying issues which may impact disputants' choice of Singapore as their seat of international commercial arbitration. We seek your feedback and support in this research project and look forward to sharing the findings with you when the project is completed by 2006.

Here is a brief write-up on Ajibade, the Graduate Student Researcher on the project – how he came to Singapore, why Singapore and what he has to say on the project?

"Hello! I am Ajibade Ayodeji Aibinu – a Nigerian. I am currently pursuing a Doctor of Philosophy (PhD) Degree in the Department of Building, School of Design and Environment, National University of Singapore. My research is in the area of construction project management with particular interest in claims, conflict and dispute management. I have chosen Singapore for the pursuit of my doctorate on the advice of the head of department in my former University. From my experience over the last two and a half years of studying here, I think Singapore provides excellent facilities and offers a friendly and conducive environment for research. I am working as the Graduate Student Researcher in the on-going project. I would like to say that the knowledge developed from this research would be useful to policy makers, arbitrators, arbitration service providers, and commercial entities in Singapore. Firstly, estimating the level of economic activities being generated by arbitration would provide vital information on the basis of which to design appropriate policies and devices to promote the use of arbitration in Singapore. It would also indicate the cost of dispute resolution through international arbitration. Secondly, investigating the factors influencing disputants' choice of Singapore as their place of arbitration would form a basis upon which current arbitration practice and services in Singapore can be improved. I think the research is interesting and would be a useful and significant exercise."



"I have chosen Singapore for the pursuit of my doctorate on the advice of the head of department in my former University. From my experience over the last two and a half years of studying here, I think Singapore provides excellent facilities and offers a friendly and conducive environment for research."

Ajibade Ayodeji Aibinu

Converting to Adjudication: Thoughts for Arbitration Practitioners

Talk by John Barber

On 25 October 2004, the Institute organized an evening talk by John Barber on "Converting to Adjudication: Thoughts for Arbitration Practitioners". The talk was very timely as the first reading in Parliament of "The Building and Construction Industry Security of Payment Bill" was on 19 October 2004.

The event was supported by the SIA - Singapore Institute of Architects and the IES - Institute of Engineers, Singapore.

Mr John Barber highlighted some of his observations between the Singapore Bill and the UK Act which has certain shortcomings that were avoided by the Singapore Bill. He noted the following:

- The Bill is complete - it avoids a separate 'scheme';
- The Bill provides expressly for a response;
- The Bill makes clear that the rules of natural justice apply;
- The Bill provides an express power to award interest; and
- The Bill provides an express mechanism for enforcement of decisions.

He remarked that the Bill provides for adjudicators necessarily to be appointed by an Authorized Nominating Body (ANB), with no allowance for appointment by agreement. He suggested that parties should be permitted to agree an adjudicator and to opt out of the review procedure.

He further observed that the Bill limits adjudicable disputes to those arising out of interim payment applications. He noted that it also appears to have a limited vision of the nature of such disputes and questioned the wisdom of this, in that the boundaries are themselves should be opened to dispute and the parties should be enabled not restricted.

He opined that the Bill does not explain clearly a 'time line' for the stages of adjudication. It obscures the need for a Notice of Adjudication. It does not make clear what should be contained in an adjudication application and directs that the adjudication application should go to the ANB.

The speaker hopes that these issues will be fully debated during the second reading.

WITHOUT PREJUDICE - PRINCIPLES & MYTHS

By Naresh Mahtani - Consultant, Alban Tay Mahtani & de Silva

Very often, in arbitrations, one comes across issues relating to discovery and/or admissibility of "without prejudice" communications or *seemingly* "without prejudice" communications. This is because negotiations and correspondence between parties, some "open" and some "without prejudice", and some a mixture of both, are part and parcel of the process of claims and communications between parties to commercial disputes.

In this article, I have attempted to set out some principles (and dispel some myths) regarding the concept of "Without Prejudice" communications. We will also examine some of the practical and procedural aspects of dealing with this in arbitrations, particularly in connection with disclosure and admissibility.

Definition, Policy and Extent of "Without Prejudice" protection

"Without prejudice" means "without prejudice *to the maker* of the statement".

In most, if not all, common-law countries, what this means is that negotiations by parties and letters sent to each other labelled "without prejudice" are privileged, inadmissible as evidence and should not be considered by the judge or arbitrator for deciding the factual issues.

They can be disclosed during the proceedings only if both parties consent to their disclosure, and are admissible either when there is a waiver by the maker or if the communication falls into the several categories of exceptions (both of these aspects will be covered later in this article).

In Singapore, the Evidence Act (*Cap 97, 1997 ed*) section 23, states: "In civil cases, no admission is relevant if it is made either upon express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given". However, as the Evidence Act does not apply to arbitrations, this is not the "bottom-line", and one must therefore look, for guidance, to the underlying policies and principles concerning without prejudice communications.

The policy of the courts and legislation in common-law countries in recognising the "without prejudice" rule is to encourage parties engaged in disputes to try to settle their disputes as far as possible without resorting to litigation. Conversely, the parties should not be discouraged in genuine attempts at peaceful resolution by any trepidation that their communications during negotiations may be used to their prejudice in due course during arbitration proceedings.

The other policy and rationale for the rule is that there is an implied agreement between the parties to not refer to settlement negotiations during proceedings.

The general principle as restated by Lord Griffiths in **Rush & Tompkins Ltd v Greater London Council & Anor [1988] WLR 939**, is that the rule applies "to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence."

A natural corollary is that certain limitations and exceptions must govern the protection afforded to "Without Prejudice" communications, or communications bearing this label, or else the privilege will become the subject of abuse. These limitations and exceptions will be dealt with further categorically in this article.

Discovery and Admissibility

As to whether such privileged documents are subject to discovery, the House of Lords in **Rush & Tompkins** summarised as follows: (1) the right to discovery and production of documents does not depend upon the admissibility of documents in evidence. To put it another way, a party is entitled to discovery of all documents that relate to the matters in issue irrespective of admissibility. (2) However, as a distinct exception, privileged documents are protected from discovery and production, between the parties to the communications, and also to other parties in a multi-party litigation (See page 947 B to H of this case for Lord Griffith's explanation of the rationale for this).

On the question of discovery, from a practical point of view, we must remember that, in the absence of a "without prejudice" marking on the document in question, and in the absence of evidence of an intention that the documents in question were written "without prejudice", the documents are not protected from discovery (Note: "Admissibility" being in

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evidence is a different matter). (See, for example the case of **Panjacharam Raveentheran v Mookka Pillai Rajagopal [1998] 1 SLR 28**, where the documents were not marked "without prejudice" and subject to discovery, and in due course ruled to be admissible).

If any party in a proceeding seeks to adduce in evidence as to any "without prejudice" communications with the other party, the other party is entitled to object to such evidence being admitted or allow it to be admitted and/or give his own version of the negotiations.

Upon objection to the production of any document, on the grounds of privilege or otherwise, as stated in **"RE Daintrey ex p Holt [1893] 2 QB 116"**, "the judge or arbitrator is entitled to look at the document to determine its character", that is, to see if it really is "without prejudice", whether any exceptions apply to it or whether should be admissible in evidence.

Where a party chooses to waive the privilege, either expressly, or by implication (eg if he chooses to give his own version of events in relation to the document or admission in question) it is worthwhile for him to remember there is no such thing as a "temporary waiver" and that the waiver of privilege cannot be retracted (See **Lim Tjoen Kong v A-B Chew Investments Pte Ltd [1991] SLR 188**).

If the documents in question are ruled to be part of a continuous course of "without prejudice" negotiations, it often follows that all the documents in the series will be treated as being written "without prejudice", even if some of the documents in the series are not marked "without prejudice". (See, for example, **Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd [2002] 3 SLR 289; South Shropshire District Council v Amos [1987] 1 AER 340**). However, this principle is not absolute, and subject to the facts of the case (see, for example, **Re Sunshine Securities (Pte) Ltd [1975-1977] 1 SLR 282**).

A common occurrence in practice is where a party inadvertently allows a privileged document to be inspected.

In **Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors [1989] 3 MLJ 445**, a privileged document was inadvertently included in a bundle of documents at a trial of an action. There was an application for expungement of the document from the bundle. The Court allowed the application, as the document in question was clearly privileged and there was no consent or waiver by the party concerned.

For litigations in Singapore, we have **Order 24 Rule 19** of the Rules of Court, which provides: "Where a party inadvertently allows a privileged document to be inspected, the party who inspected it may use it or its contents only if the leave of the Court to do so is first obtained." There is no reason why an arbitrator should not be in the same procedural situation.

Whether a communication is really "Without Prejudice"

Sometimes, it is not clear on the face of the document if the communication is really "without prejudice". The Court or Tribunal will then have to look at the surrounding circumstances and evidence before making a ruling on the admissibility of such evidence. The following are relevant considerations:

Sometimes, there is a clear *stipulation* by the maker of the document that the document is "Without Prejudice". The *stipulation* situation occurs when a party makes any communication on the condition that the admission or communication concerned will be *irrelevant* and *inadmissible* in civil proceedings. The consent of the other party is immaterial.

If it is obvious from the contents and background that the communication is privileged the stipulation is genuine and ought to be respected (in view of the abovementioned policy and rationale for protecting such documents), then that is the end of the matter and the document is not admissible, unless there is some distinct exception to make it admissible.

The Tribunal may also have to consider whether there is a compelling context for the document in question to be considered to be "without prejudice", in the sense that there is a bona fide dispute and the communication was made in the course of negotiations or attempts to resolve that dispute, or during mediation. (**Wong Nget Thau & Anor v Tay Choo Foo [1994] 3 MLJ 723**).

Examples of cases, which illustrate the concepts of stipulations and compelling contexts, are the following:

Ted Bates v Balbir Singh Jholl [1979] 2 MLJ 257, in which the party admitted in a letter that he owed money, but asked for an extension of time to repay the monies. The Court of Appeal held that the letter was not privileged. In this connection, we must remember

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that a mere assertion or "reservation of rights" is not enough.

Buckinghamshire County Council v Moran [1990] 1 Ch 623, in which a party wrote a letter, marked "Without Prejudice", asserting certain proprietary rights but adding they were in the process of seeking legal advice. The Court of Appeal decided that as the letter was not an offer to negotiate, it was not entitled to privilege and was admissible as evidence.

In relation to negotiations, a common difficulty is where discussions between parties on an "open" basis evolve or change at some point into "without prejudice" discussions; or vice versa. It is no easy task to resolve such a situation, and an examination of the facts and surrounding circumstances is called for (for example, in **Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd [1992] 4 AER 942**).

Use or Failure to use the words "Without Prejudice"

The application of the "*Without Prejudice*" rule is not dependent upon the use of the phrase 'without prejudice". If it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the proceedings and cannot be used to establish an admission or partial admission. (See **Rush & Tompkins**).

For example, in **Chocoladefabriken Lindt v Nestle Co. [1978] RPC**, one of the issues was whether evidence comprising of a telephone conversation and two telexes without the words "without prejudice" were inadmissible. The High Court held that the evidence was inadmissible. This was because "it is perfectly plain that the disputed telephone conversation and the disputed telexes related to a proposed settlement of the dispute between the parties, though in none of them was the term 'without prejudice' or its equivalent used."

In **Chocoladefabriken Lindt**, Sir Robert Megarry said: "The mere failure to use the expression 'without prejudice' does not conclude the matter. The question is whether there is an attempt to compromise actual or impending litigation, and whether from the circumstances the court can infer that the attempt was in fact to be covered by the 'without prejudice' doctrine."

Exceptions and Limitations

In certain situations, the Court or Tribunal may decide to admit evidence even if it was part of a "without prejudice" communication.

As stated by Lord Griffiths in **Rush & Tompkins** (at 740E), "the rule is not absolute and resort may be had to the without prejudice material for a variety of reasons when the justice of the case requires it."

Unilever v The Procter & Gamble Company [2000] FSR 344 and Rush & Tompkins (at page 943A) list out some of the exceptions.

The notable exceptions include:

(a) Where the issue is whether the without prejudice communications had resulted in a concluded compromise settlement **(Walker v Wilsher (1889) 23 QBD 335; Tomlin v Standard Telephones and Cables [1969] 1 WLR 1378; Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17).**

(b) Where it was admissible to show that an agreement apparently concluded between the parties during negotiations should be set aside on the ground of misrepresentation, fraud or undue influence **(Underwood v Cox (1912) 4 DLR 66; Chocoladefabriken Lindt [1978] RPC 287).**

(c) Where a statement might be admissible as giving rise to an estoppel **(Hodgkinson & Corby Ltd v Wards Mobility Services Ltd [1997] FSR 178).**

(d) Where the exclusion of the evidence would act as a cloak for perjury, blackmail, threat or other unambiguous impropriety **(Kitkat v Sharp (1882) 48 LT 64; Kurtz & Co v Spence & Sons (1888) 58 LT 438).**

(e) Where the evidence is admissible in order to explain delay or apparent acquiescence, for instance, in applications to strike out proceedings for want of prosecution. **(Walker v Wilsher (1889) 23 QBD 335; Family Housing Association (Manchester) Ltd v Michael Hyde & partners (a firm) & others [1993] AER 567).**

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Talk On Adjudication By John Barber

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(In relation to this, note that, it has been held that, evidence of "without prejudice" negotiations was not admissible in applications for security for costs – see **Simaan General Contracting Co v Pilkington Glass Ltd [1987] AER 345**).

(f) Where in an action for negligence, the evidence was admissible to show that the Claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a third party **(Muller v Linsley & Mortimer 1994, 139 SJLB 43).**

(g) Where the evidence was admissible as being an offer made without prejudice save as to costs **(Cutts v Head [1984] Ch. 290)**. This is a very common situation in modern arbitrations.

(h) Without Prejudice communications which are an election between two mutually inconsistent alternative courses of action **(Haynes v Hirst (1927) 27 SR (NSW) 480).**

(i) Where the communication is an act of bankruptcy **(IN re Daintrey, Ex parte Holt [1893] 2 QB 116).**

(j) For handwriting authentication **(Waldridge v Kennison (1794) 1 Esp. 142).**

"Without Prejudice Save as to Costs"

There has been an increasing use of "*without prejudice* save as to costs" letters in recent years, as costs are a major factor in proceedings. These missives are also known commonly as "Sealed Offers" or "Calderbank Offers". (The latter term is interesting, because, as stated by Fox LJ in **Cutts v Head [1984] 1 All ER 597**, "In fact, one thing that was quite absent from *Calderbank v Calderbank* was a Calderbank offer.")

If a letter is "without prejudice save as to costs", it only enjoys privilege up or is "sealed" up to the appropriate time when the Court or Arbitrator is asked to consider the question of costs (after the Award or Decision) in relation to the subject of the "Sealed Offer". The Court or Arbitrator is not divested of, but maintains the discretion on the question of costs. However, such "sealed offers" can be very effective devices for a party to put forward a case that costs in his case do not necessarily "follow the event" and that the special terms as to costs in the "sealed offer" should prevail.

The usual argument put forward in relation to such offers, at least from the date the offer was made, is that the legal costs incurred were totally unnecessary, since the plaintiff/claimant could have then got everything he wanted without a contest.

A concise treatment of this subject, in relation to arbitrations, can be found in the often cited judgment of Donaldson J in **Tramountana Armadera SA v Atlantic Shipping Co SA [1978] 2 AER 870.**

Note: This article is adapted and abridged from the original, which was first published in the October 2003 issue of The Singapore Law Gazette.

IEC Course 2004

The Institute and the Chartered Institute of Arbitrators jointly held the International Entry Course (IEC) 2004 on 4, 5 and 11 September 2004 at the Regent Singapore. The course was supported by the Singapore International Arbitration Centre.

The Co-Course Directors were Mr Richard Tan, Immediate Past President of the Institute and Mr Philip Yang from The Chartered Institute of Arbitrators, East Asia Branch in Hong Kong. The panel of lecturers and tutors were Ms Teresa Cheng SC JP, Associate Professor Lawrence Boo, Mr Raymond Chan, Mr Michael Hwang SC, Capt Lee Fook Choon and Mr Leslie Chew SC. We are very grateful indeed for the continuing warm support given by the panel of lecturers and tutors, especially Mr Philip Yang and Ms Teresa Cheng SC JP, who took precious time off from their busy schedule to be with us over the weekend.

We had a total of 33 candidates attending the course with a good mix of lawyers and non-lawyers from different professional backgrounds: construction, maritime, insurance, taxation and other disciplines. We are also delighted to have two overseas candidates from Kuala Lumpur and Jakarta among the list of participants.

Candidates who pass the IEC Course may, subject to satisfying other relevant criteria, qualify for admission as a Member of the Singapore Institute of Arbitrators and Associate Member of the Chartered Institute of Arbitrators, United Kingdom.

LEGAL DEVELOPMENTS AFFECTING ARBITRATION

By Dr Philip Chan Chuen Fye

In a jurisdiction that has a dual system of arbitration regime of international and domestic, there is always a risk that parties may be surprised by the decision of the Court telling them that the applicable arbitration regime is not what they intended, or rather, what one of the parties contended. This is especially so when the parties do not clearly indicate whether the Arbitration Act (Cap 10) or the International Arbitration Act (Cap 143A) is applicable in their arbitration clause or agreement.

In this article, the first case, the *Black & Veatch Case*, belongs to this category where parties have brought the matter before the Singapore Court of Appeal for a decision on whether the AA or IAA is applicable when the only indication of their choice of law is the indication of the chosen rules of arbitration. The second case involved the interpretation of the UNCITRAL Model Law which is part of the IAA. In particular, only Art 16(3) of the Model Law was interpreted in the *Sabah Shipyard Case*. The third and fourth cases concern the interpretation of the old Arbitration Act before the enactment of the Arbitration Act 2001. In the third case, *Northern Elevator Manufacturing (No 2) Case*, the Court of Appeal was asked to interpret section 28 on an application for leave to appeal against the decision of the arbitrator. The fourth case, *Hurry General Contractor Case*, also concerns the interpretation of section 28 but it was at the High Court level.

Applicable arbitration legislation in dispute

The decision of the Court of *Appeal in Black & Veatch Singapore Pte Ltd v Jurong Engineering Ltd [2004] 4 SLR 19* (Court of Appeal comprising Yong Pung How CJ, Chao Hick Tin JA and Woo Bih Li J) confirms that the failure to refer directly to the applicable arbitration legislation in an arbitration clause would lead to the uncertainty as regards the applicable arbitration legislation which deadlock as to the answer to the uncertainty if encountered can only be resolved by a determination by the Court.

Parties in the case before the Court of Appeal had provided in their arbitration clause that, "***...any arbitration will be conducted in English in Singapore under and in accordance with the rules of arbitration promulgated by the Singapore International Arbitration Centre...***" it is important to note that at the time of the contract, the SIAC had only one set of rules: the Arbitration Rules of the SIAC ("the SIAC Rules"). The SIAC Domestic Arbitration Rules ("SIAC Domestic Rules") were introduced later but before the commencement of the arbitration. The appellants had appealed against the decision of the High Court which held that the SIAC Domestic Rules applied.

The Court of Appeal noted at paragraph 8 that, "It was common ground that if the SIAC Rules applied, then the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") was also applicable and if the SIAC Domestic Rules applied, then the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") was also applicable."

The Court of Appeal held that:

- "15 ...there was a presumption that clauses such as [the one the appellants have relied on] would refer to such rules as are applicable at the date of commencement of arbitration and not at the date of contract. We will elaborate on that presumption later."
- "19 We now come to the presumption mentioned above. In *Bunge SA v Kruse [1979] 1 Lloyd's Rep 279* (affirmed on other grounds in [1980] 2 Lloyd's Rep 142), a question arose as to whether a provision providing for any dispute to be settled by arbitration in accordance with the rules of an association meant that the rules of the association at the date of the contract was entered into applied or the rules in force at the date of commencement of the arbitration applied. In the view of Brandon J, at 286, there was a prima facie inference that where the rules contained mainly procedural provisions, then the rules in force at the date of commencement of arbitration would be the ones that applied to the arbitration. However, if the rules contained mainly substantive provisions, then those in force as at the date the contract was entered into would apply."
- "20 This decision was followed by Robert Goff J in *Peter Cremer v Granaria BV [1981] 2 Lloyd's Rep 583* where Goff J said, at 592-593:

  Indeed, if one looks at it as a matter of common-sense, I do not think it can be expected that arbitrators in any particular case should have to

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look at the date of the contract, ascertain the relevant procedure for arbitrations which were in force as at the date and then, regardless of the fact that new procedures, which may or may not be fundamental, may have been introduced and applicable and keing [sic: being] applied at the date when the arbitrators were appointed, go back to and apply the old procedure in force as at the date when the contract was made."

The appellants attempted to rebut the presumption but were not successful and their appeal was dismissed.

International Arbitration under IAA

In Sabah Shipyard (Pakistan) Ltd v Government of the Islamic Republic of Pakistan [2004] 3 SLR 184, the High Court was asked to exercise its powers under Article 16(3) of the Model Law found in the First Schedule of the International Arbitration Act (Cap 143A), that is, to declare whether the Arbitral tribunal had the jurisdiction in contention.

The arbitral tribunal whose jurisdiction was in doubt had been asked to determine the costs of an arbitration which preceded the one in which the arbitral tribunal was appointed. The arbitral tribunal was appointed pursuant to the arbitration clause set out below:

- "The Parties expressly consent that any dispute or difference between the Parties arising out of or in connection with this Agreement (each a "Dispute") shall be settled by arbitration..."

The learned judge, Judith Prakash J, held:

- "19 ...it appears to me that a dispute over the costs of arbitration held to resolve a dispute over an issue such as whether the [agreement between the parties] has been properly terminated is also a dispute arising in connection with the [said agreement]. The dispute over the costs cannot be described as entirely unrelated to the [said agreement]. It has arisen because there was a dispute under the [said agreement], that dispute went to arbitration and costs were incurred but not dealt with. It was intimately connected with the adjudication of the dispute and not something that arose at one remove after the award..."
- "20 Accordingly, I hold that the arbitral tribunal ...had the jurisdiction to adjudicate on the dispute over costs of the First arbitration..."

Domestic Arbitration under the old Arbitration Act

In Northern *Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd (No 2) [2004] 2 SLR 494* (CA comprising Chao Hick Tin JA and Choo Han Teck J), the Court of Appeal was asked to determine whether leave to appeal against the arbitrator's decision ought to have been granted by the High Court. The applicant had set out three grounds for challenging the High Court's grant of leave to appeal against the arbitrator's decision. Only the first ground is discussed here as the Court of Appeal decided in favour of the applicant and reliance on the first ground was good enough to grant the applicant his appeal against the High Court's decision.

The first ground used by the applicant was that the High Court should not have granted leave to appeal against the arbitrator's decision, as there was no valid question of law that was to be determined on an appeal made pursuant to section 28 of the Arbitration Act. The question of law was framed as:

- "Whether on the facts set out in his [second] award, there were any grounds upon which the Arbitrator could properly at law have assessed damages in the manner he did?"

The Court of Appeal at page 499 held that:

- "17 ...As a preliminary point, it is essential to delineate between a "question of law" and an "error of law", for the former confers jurisdiction on a court to grant leave to appeal against an arbitration award while the latter, in itself, does not."
- "19 To our mind, a "question of law" must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere "error of law" (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal."
- "22 ...it appeared to us that the Arbitrator had rightly based his assessment of damages on the compensatory principle. If there was a problem, it lay in the factors he considered or omitted to consider when computing the quantum of the cost of rectification. ...This was an error in his application of the compensatory principle. We were, therefore, of the opinion that the question of law formulated by United was

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artificial. On the facts, the real issue turned on the validity of the factors that the Arbitrator had taken into account when assessing the quantum of damages. United's application for leave should not have succeeded on the grounds above."

In *Liew Ter Kwang v Hurry General Contractor Pte Ltd [2004] 3 SLR 59* (HC), there was an application for leave to appeal against the arbitrator's decision on the interpretation of the clauses found in the Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract) 5th Ed, 1997 made pursuant to section 28 of the Arbitration Act. The learned judge, Judith Prakash J, noted at paragraph 5 of her judgment that the principles by which a court will allow or disallow leave to appeal has been established by both cases in England and Singapore. These cases are *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724, American Home Assurance Co v Hong Lam Marine Pte Ltd [1999] 3 SLR 682, and Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Ltd [2000] 2 SLR 60*. She proceeded to set out the principles:

- (a) The discretion to grant leave would be exercised differently according to whether the question of law arises in the context of a one-off contract or clause or relates to a standard form.
- (b) Where the issue concerns a one-off contract or clause, the discretion would be strictly exercised and leave to appeal would normally be refused unless the judge hearing the matter was satisfied that the construction given by the arbitrator was "obviously wrong".
- (c) Where the question of law arises from a standard form contract a less restrictive approach is adopted and leave is granted when the court is satisfied that the resolution of the question of law would add significantly to the clarity, certainty and comprehensiveness of the law and also considers that a strong prima facie case had been made out that the arbitrator has been wrong in his construction.

The applicant had asked for leave to appeal on three questions of law, details of which are found in the case report. Those who are involved in construction arbitrations are urged to read this case. As the questions of law involved a standard form of contract, the learned judge held that principle (c) applied and proceeded to find that the arbitrator had been wrong in his construction on each question of law at paragraphs 14, 18 and 22. She also held at paragraph 23 that the determination of the questions of law would have a substantial effect on the rights of one or more parties to the arbitration as each of the questions of law affected the number of days which the contractor had to complete the works and if extensions of time granted by the architect were set aside or varied, there would be a financial consequence in the form of liquidated damages payable by the contractor to the applicant.

Upcoming Events

- Talk on "Investment Treaty Arbitration" by John Savage on Thursday 6 January 2005 (jointly organised with The Law Society of Singapore)
- Golf Day - 18 March 2005
- Fellowship Fast Track Assessment Workshop - 19 to 20 March 2005
- Proposed talk by Hew Dundas on 12 April 2005

Announcements

• NEW MEMBERS •

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

Honorary Fellow

1. Goh Joon Seng

Fellows

1. Lee Yuen Wai, Dicky
2. Naresh Mahtani
3. Evert Christopher Vickery (Dr)
4. Law Kong Hoi
5. M Rajaram
6. Tan Heng Thye
7. Foo Yung Kuan
8. Ho Soo Kee
9. Capt James Perinpanayagam
10. Rusmin Wong
11. McCartin Edward John
12. Yong Eng Wah
13. Prof. Michael Charles Pryles
14. Singh Hakirat S H
15. Tan Joo Seng
16. Eoon Hoon Eng
17. Lock Kai Sang
18. Tan Seng Lee, Henry
19. Neo Monica, Kim Cheng
20. Venkiteswaran Hariharan
21. P. Jeya Putra
22. Chia Peng Chuang, Michael
23. Kennedy-Grant Tomas
24. Williamson Harper
25. Dundas Hew Ralph
26. Booker Arthur James
27. Choy Kah Kin
28. Ganesh Chandru
29. Parmar Karam Singh
30. Lim Aeng Cheng, Charles
31. Tee Tong Kwang, Vincent

Members

1. Chan Leng Sun
2. Dr Lehmkuhl Heiko
3. Dato Jude Philomen Benny
5. Koh Juay Kherng
6. Tan Ai Leen
7. Savage John
9. Loong Seng Onn
10. Trennes Claus

Associates

1. Edward Lee
2. Ammaiyappan Geetha
3. Chew Lian Chee Priscilla
4. Ignatius Hwang
5. Serwer Nicholas J
6. Low Chien Fatt
7. Dr Ong Geok Quee
8. Lim Wee Ling
9. Lim Benson T.C.

Hearing Room for Hire

Please DO consider the Institute if you are looking for a hearing venue. The Institute offers competitive members' rates of S$200 per day/S$100 per half-day inclusive of two breakout rooms and free flow of refreshments. We welcome all enquiries. Please give us a call at 6323-1276 or email us at siarb@siarb.org.sg. You may also log-on to our website at www.siarb.org.sg for more details.

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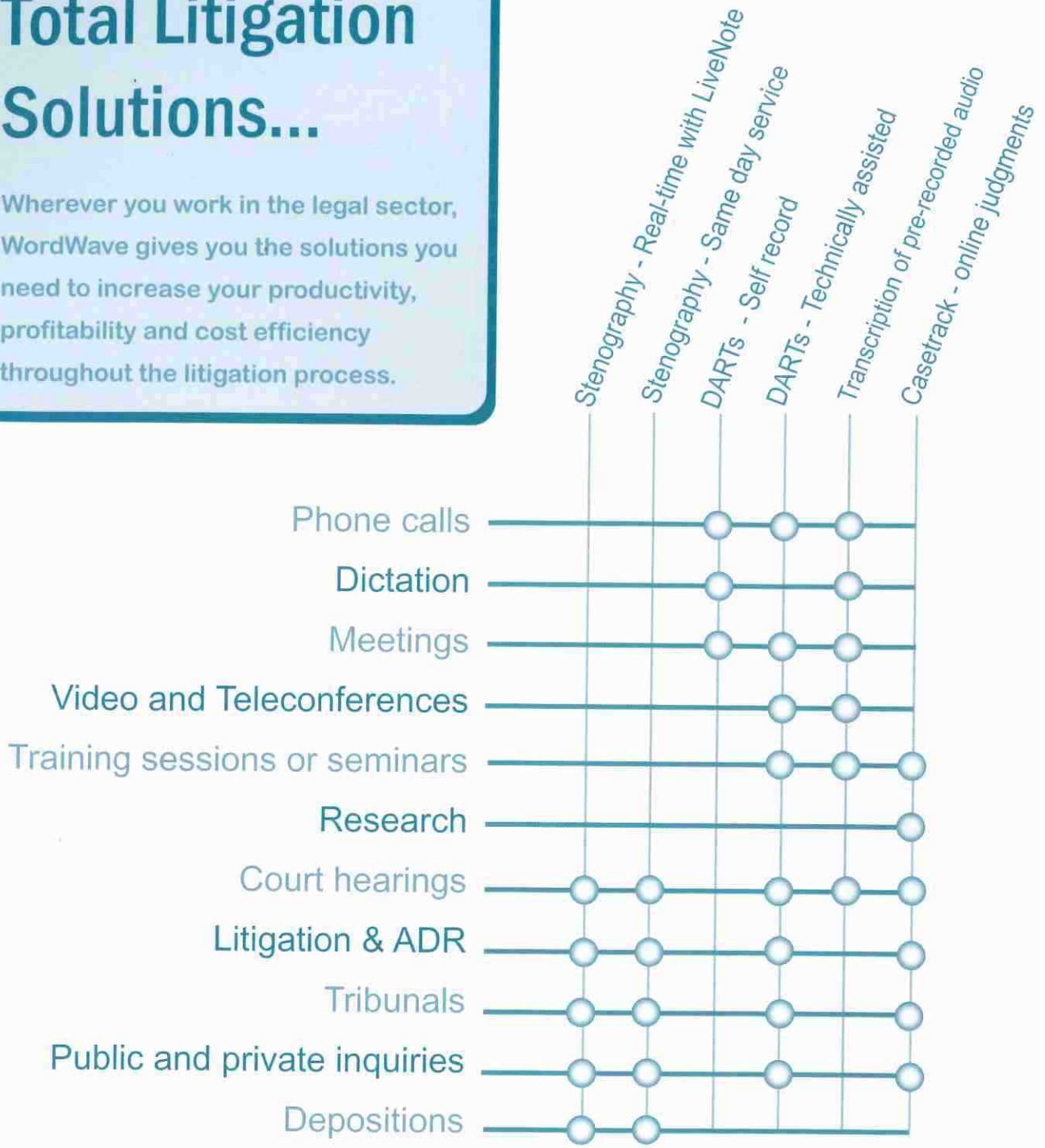

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Japan's New Arbitration Law

[A Report filed by Goh Phai Cheng who recently paid a courtesy call on Mr Kosuke Yamamoto, President of JCCA and Dr Toshio Sawada, President of the Japan Association of Arbitrators during his recent visit to Tokyo.]

A new Arbitration Law (Law No. 138 of 2003) has come into force in Japan on 1 March 2004. An English translation of the text of the new law is available on the website of the Japan Commercial Arbitration Association (JCAA). The new law is modeled upon the UNCITRAL Model Law. Article 4 of the Law 138 of 2003 expressly provides that no court shall intervene except where so provided in the Law. Japan's code of Civil Procedure is based on the old German Code of 1890. Japan acceded to the New York Convention in 1961 and foreign awards are thus enforceable.

A new Alternative Dispute Resolution is expected to be enacted in Japan soon.

JCAA will be organising a Seminar on New Trends in International Arbitration – Current Situation and Future Issues for Japan and the US to be held on 1 December 2004 at New York. At this Seminar, Dr Toshio Sawada will be presenting a paper on the new Japanese Arbitration Law and its links with the UNCITRAL Model Law.

The JCAA was established in 1953 as an independent commercial arbitral institution to contribute to the resolution of disputes arising from international and domestic business transactions. The JCAA has its own rules but parties are free to adopt the UNCITRAL Rules. Parties are also free to choose their own arbitrators.

The Japan Association of Arbitrators ("the Association") was established in the autumn of 2003 for the purpose of conducting research in the law and practice of arbitration including ADR as well as to train arbitrators and mediators. The Association currently has around 200 members and its membership is expected to grow rapidly as more join the training courses conducted by the Association. Dr Toshio Sawada is the first President of the Association. Dr Sawada is Vice Chairman of the ICC International Court of Arbitration and Emeritus Professor of Sophia University in Tokyo. The Association has a Board of Management comprising leading Japanese and foreign lawyers and scholars.

SIAC-led Delegation to New Delhi

The Institute, represented by Council Member Johnny Tan, participated in a SIAC-led delegation to New Delhi from 21 to 25 September 2004. The delegation was there to attend the Construction Industry Development Council's (CIDC) annual conference which culminated in the signing of a memorandum of understanding between CIDC and SIAC.

The memorandum of understanding sets out a framework for co-operation in the creation of a joint dispute resolution centre, in New Delhi, for disputes tied up in the construction industry, estimated by the CIDC to be worth US$12 billion. Under this memorandum of understanding, the Institute will be called upon to develop a training and accreditation programme, in collaboration with the SIAC, for the appointment of arbitrators to the panel of arbitrators of this centre.

The Institute is already actively in discussions with SIAC to develop and organize the first training workshop for Indian arbitrators, in early 2005.

This regional drive holds the promise of many more future enterprises, as the Institute and SIAC work together to profile Singapore as the location of choice for international commercial arbitration.

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B1-11 UIC Building 5 Shenton Way Singapore 068808.
Tel : 6323 1276 Fax : 6323 1477

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