SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
MICA (P) 021/11/2005 OCT 2006 ISSUE NO. 7

CONTENTS

VIEWPOINT

PRESIDENT'S MESSAGE

25th Anniversary Gala Dinner Celebrations

This year marks our Institute's 25th Anniversary. We have come a long way from our humble beginnings in 1981 when we had a membership of less than thirty.

Today, we have about 650 members including Fellows and Associates. At this juncture it may be appropriate to take stock of what we have achieved so far and to reflect on our future role and direction.

It was only in June 2003 that we moved into our own office premises at UIC Building with an arbitration hearing room for rental. Our entry-level course and our Fellowship course, which we hold annually, are now recognized in the industry as setting the standards for the accreditation of arbitrators in Singapore.

We now have our own set of arbitration rules and rules of ethics. For the first time in March this year, we established our own Panel of Arbitrators with an initial list of 106 Members. I am proud to say that Fellowship in our Institute has been mandated by the Singapore International Arbitration Centre (SIAC) as one of the criteria for admission to SIAC's Regional Panel of Arbitrators. Similarly, ICC (Singapore) requires the Singapore national to be a Fellow of our Institute or equivalent in order to be considered for an appointment as arbitrator for ICC arbitrations.

Internationally, we have in the last few years established formal ties with our regional counterparts such as the Malaysian Institute of Arbitrators, the Hong Kong Institute of Arbitrators, the Institute of Arbitrators and Mediators of Australia and BANI through Memoranda of Cooperation signed with these Institutes. This year, we established contacts with the Arbitration Association of America and continue to maintain our long established ties with the Chartered Institute of Arbitrators through joint training courses such as the IEC Course.

Our achievements over the last 25 years are due in no small measure to the efforts and hard work put in by many members, too many to formally acknowledge here. It is therefore timely that we take this opportunity to celebrate how far our Institute has come and to reflect on our future plans. Our 25th Anniversary Gala Dinner is the perfect event for this.

I am pleased to inform you that Assoc Professor Ho Peng Kee, Senior Minister of State, Ministry of Law & Ministry of Home Affairs, has accepted our invitation as our Guest of Honour for the evening's celebrations. The theme for the Gala Dinner

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will be *"The Changing Face of Arbitration"* at the Four Seasons Hotel on 24 November 2006.

The Organizing Committee for the Gala Dinner has been busy planning for the event and I know that it will be a rewarding, entertaining and enjoyable evening. The invitation and the programme for the Gala Dinner will be sent to members shortly if you have not received it by now.

This Gala Dinner will provide an ideal occasion for members to meet with old friends, new members and the Council members. This is your Institute and I would urge you to attend the Celebration to show your support for the Institute and to make this event a success.

Visit To Malaysian Institute of Arbitrators (MIArb) And KL Regional Centre for Arbitration (KLRCA)

On 30 August 2006, in keeping with the spirit of our Memorandum Of Cooperation with MIARB, I together with our Vice President, Mr Johnny Tan, and two Council Members, Mr Goh Phai Cheng SC and Ms Meef Moh met the new President of MIARB Dato' Kevin Woo and his fellow Council Members in Kuala Lumpur. We explored ways for both our Institutes to collaborate on joint projects. It was a fruitful visit, which will certainly cement our excellent ties with MIARB.

We also took the opportunity to pay a courtesy call on Dato' Syed Ahmad Idid, the Director of the Kuala Lumpur Regional Centre for Arbitration to introduce him to our Institute and to brief him on our programme and activities.

New Executive Director

As some of your may be aware, Ms Teresa Ee who re-joined us in June this year as our Interim Executive Director left at the end of August 2006. We are grateful for her contribution and wish her all the best in her endeavours.

I am pleased to announce that we have a new Executive Director, Ms Evelyn Chang who will come on board in early October 2006. She is a Fellow of our Institute and I am sure will make a positive contribution.

Yours sincerely

Raymond Chan
President

ANNOUNCEMENTS

• NEW MEMBERS •

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

Fellows

1 Anwar Bin Mohamed
2 Chang Sau Sheong
3 David James Llewellyn
4 Dr Michael Joseph Moser
5 Gordon Smith
6 Heng Gee Fat
7 Ho Mun Wai
8 Ibrahim Latiff
9 John Morris
10 Kachwaha Sumeet
11 Kau Yong Meng
12 Kwa Guian Sin
13 Lee Li Choon
14 Lye Hoong Yip Raymond
15 Narayanan Screenivasan
16 Ng Kin Chue William
17 Robert Gaitskell
18 Stephen Woodruff Fordham
19 Tan Hock Soon Adrias
20 Tan Liam Beng
21 Teo Lay Khim
22 Thio Shen Yi
23 Woo Tchi Chu
24 Yang Yung Chong

Members

1 Lim Wee Ling
2 Krishnan HK Rangan

Associates

1 Lim Tau Chin Sydney

• UPCOMING EVENTS •

1 "Arbitration, Adjudication and other contractual disputes processes?" by Prof Phillip Capper on **13 October 2006**

2 Social Gathering/Talk by Wordwave on **3 November 2006**

3 "The Buyer's Guide to Arbitration: Dispute Resolution from a Party's Perspective" by James Booker on **8 November 2006**

4 25th Anniversary Dinner & Celebration on **24 November 2006**

5 "ICC Workshop" in **October/November 2006**

6 ICMA XVI Conference on **26 February to 2 March 2007**

Do Costs Always "Follow the Event"?

- By Naresh Mahtani & Connie Yao, Alban Tay Mahtani & de Silva

It is widely accepted that the general rule in arbitrations in common law countries, in respect of interim and final awards, is that costs "follow the event" i.e. a successful party is entitled to be compensated by the adverse party for costs incurred, and the unsuccessful party has to bear the "costs of the arbitration".

In the first part of this article, we will deal with the important and well-established exceptions available in the school of thought that "costs follow the event". In the second part, we will deal with the fact that in international arbitrations, costs may not always necessarily "follow the event". Finally, we will suggest that "judicial pragmatism" coupled with "intuitive fairness" may be the way forward for tribunals' exercise of their discretion on costs".

DEPARTURE FROM THE GENERAL RULE

The general principles governing the award of costs are:

(a) Costs are in the discretion of the court.

(b) Costs should follow the event, except when it appears to the court that some other order should be made.

The exceptions would be relevant when the second limb of the general rule is invoked, *viz.* that the court should make some other order. Apart from cases where, for example, the terms in a "sealed offer" or Calderbank Offer", "Payment into Court" or "Offer to Settle" are relevant, the exception may also come into play if special circumstances of the case so demand. Where such "special circumstances" justify a deviation from the general rule, the court or arbitrator may direct that the successful party bear the whole or part of its own costs and/or pay the whole or part of the "unsuccessful" party's costs.[1]

The exception have in recent decades evolved thus:

In the well-known case of *Re Elgindata Ltd (No. 2)* [1993] 1 All ER 232, the English Court of Appeal effectively set out, *inter alia*, two kinds of instances where the court or tribunal can use their discretion to depart from the "costs follow the event" rule (emphasis added):

> *"The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a* ***significant increase in the length or cost of the proceedings*** *he may be deprived of the whole or part of his costs.*
>
> *Where the successful* ***party raises issues or make allegations improperly or unreasonably,*** *the court may not only deprive him of his costs but order him to pay the whole or a part of the unsuccessful party's costs."*

We take the liberty to observe that this, in a sense, may not indeed be a "departure" from or exception to the concept of "costs following the event". An "*event*" need not necessarily be the *final* outcome of a case - the causing of significant delays or raising of improper allegations can themselves be considered "events" which invite appropriate responses in terms of the all important carrot-and-stick, or remedy, of costs.

Mustill & Boyd classifies "Matters justifying a departure from the general rule"[2] as

> *(1) Gross exaggeration of claims - Unsatisfactory conduct by a party in the course of the arbitration or unreasonable or obstructive conduct which has protracted the proceedings or increased the costs by the other party.*
>
> *(2) Failure by the successful party on an issue or issues on which a large amount of time was spent.*
>
> *(3) An offer by one party before or during the reference to compromise the dispute, which the other party has unreasonably refused to accept.*
>
> *(4) Extravagance in the conduct of the hearing, e.g. the employment of an excessive number of counsel or expert witnesses.*

Further guidance can be obtained from some decisions of the Singapore courts over the past decade.[3] In *Tan Tiang Hin Jerry v Singapore Medical Council* [2000] 2 SLR 274, the Court of Appeal was presented with a case where a great deal of time and costs had been incurred in dealing with grounds which were decided to have no substance or merit. The Court of Appeal ruled, citing *Re Elgindata Ltd (No 2)* and *Tullio v Maoro* [1994] 2 SLR 489 for that reason (emphasis added):

> *"the general rule should not fully apply, namely, that costs follow the event. In view of the fact that the unsuccessful grounds have caused a significant increase in the length and costs of the proceedings both here and below, Dr. Tan should not be allowed the full costs here and below."*

Rajabali Jumabhoy and Others v Ameerali R Jumabhoy and Others (No 2) [1998] 2 SLR 489 saw the Court of Appeal frowning on the respondents' mounting of "*multiple defences to the claim some of which had no merit and incurred additional costs and expenses, which could otherwise be avoided*". This was notwithstanding the dismissal of the appeal.

In the recent case of *Jet Holding Ltd and Others v Cooper Cameron (Singapore) Pte Ltd and Another* [2006] SGHC 20, attention was drawn to the "*inordinate amount of paperwork placed before the court and the indiscriminate manner in which the first and second plaintiffs advanced their case. The first and second plaintiffs exchanged affidavits of evidence-in-chief of ten witnesses of fact, but they only called six to the stand. Their documents were contained in 60 lever arch files* [whereas] *only a few documents were actually referred to. Seemingly, the approach adopted was to "throw in everything available" with little or no regard for saving costs and time. That approach had also created and brought about the magnitude of the litigation that was pursued before* [the High Court]."

The High Court disbelieved the first and second plaintiffs' attempted justification for the overwhelming quantity of documents and held that "*in the circumstances of this case, a departure from the application of the "costs to follow the event" principle was necessary to penalise the first and second plaintiffs who had not been focused and selective as to the points they took and had unnecessarily or unreasonably overburdened the proceedings and added to the costs thereof.*"

The position is summarized succinctly in Halsbury's Laws of Singapore (emphasis added):[4]

> *"When ordering costs, the tribunal may take into account* ***the conduct of the parties*** *in the arbitration such as* ***non-compliance with directions made;*** *or* ***obstructive conduct***

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> ***leading to wasted time*** *at an oral hearing or otherwise protracting the arbitration;* ***gross exaggeration of claims; furnishing unnecessary evidence over irrelevant issues,*** *or* ***excessive evidence over non-substantive issues****. Generally, conduct which protracts time taken for the arbitration or increases the expenses by the other party may be considered in departing from the 'follow the event rule."*

The reason for courts or tribunals departing from the general rule was explained in *Jet Holding Ltd and Others v Cooper Cameron (Singapore) Pte Ltd and Another*:

"Courts have been known to deprive a successful party of full costs because it was responsible for some "wasted costs". The court's approach as to costs is intended to influence the manner in which litigants advance or defend their case. Litigants have to be focused and selective in the points taken, for it is decidedly foolhardy to assume that they will be able to recover full costs as long as they win."

The same sentiments were expressed in *Khng Thian Huat and another v Riduan bin Yusof and another* [2005] 1 SLR 130 (emphasis added):

> *"[A] successful party may be deprived of his costs in full or in part, if [his] conduct has been sufficiently blameworthy. Disallowing his entitlement to costs is one way that the court can effectively express its view of the misconduct of the successful party during the pre-litigation or litigation process and show its displeasure. In an exceptional case, the court may even order the successful party to pay the costs of the unsuccessful party."*

The High Court in *Khng Thian Huat* emphasized that (emphasis added):

> *"The importance and specific relevance of the parties' conduct in assessing costs is now legislatively encapsulated in O 59 r 5 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("ROC"). The sub-rule, inter alia, now states that:*
> *The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances,* ***take into account... the conduct of all the parties, including conduct before, as well as during, the proceedings...****"*

The case of *Khng Thian Huat* drew support from the earlier case of *Denis Matthew Harte v Dr Tan Hun Hoe & anor* [2001] SGHC 19, where the High Court had helpfully laid down examples of when the general rule may be deviated from:

> *"For the purpose of exercising its discretion on the award of costs, the court is thus entitled to take account of the conduct of the parties before as well as during the trial itself. I do not propose to give an exhaustive list, but it is useful to set out some of the relevant conduct and circumstances. They include whether or not:*
>
> *(a) Pre-trial procedures have on the whole been promptly and correctly adhered to, or disregarded most of the time;*
> *(b) Proper and full disclosure of all relevant documents and materials as part of the discovery process has been given;*
> *(c) Adequate accounts have been rendered and interrogatories answered with all the necessary information and details provided;*
> *(d) 'Ambush techniques or like strategies' and late disclosures are deliberately resorted to, thereby prejudicing the fair, proper and expeditious disposal of the matter at hand;*
> *(e) Sufficient effort has been taken to ensure that all relevant and material facts have been included in the affidavits of evidence-in-chief to avoid causing delays and unnecessary surprises to the other party, thereby forcing him to take last minute instructions and conduct urgent further investigations in the course of the trial;*
> *(f) Portions of the claim or defence are wholly unrealistic or exaggerated;*
> *(g) Plainly unsustainable, unmeritorious or unreasonable issues have been put forward and argued at length;*
> *(h) The successful party has lost or abandoned issues, which have consumed a substantial amount of the trial time;*
> *(i) Court time has been wasted by unnecessarily long-winded or repeated cross-examination, or by cross-examination on rather inconsequential and peripheral matters;*
> *(j) An excessive number of witnesses have been called to prove the same point or to prove rather inconsequential and peripheral matters or matters not really necessary to establish the party's case;*
> *(k) Costs and expense have been unnecessarily, unreasonably or improperly incurred;*
> *(l) There are last minute amendments of pleadings and inclusion of new heads of liability or damage at the trial itself;*
> *(m) Fresh evidence and new witnesses have been brought forward in the midst of the trial;*
> *(n) Strict proof of documents evidently authentic has been incessantly insisted upon when their authenticity could have been readily investigated and then agreed upon well before the trial;*
> *(o) The parties or their witnesses in conspiracy with the parties concerned have lied in evidence, fabricated evidence for use or misled the court, or have been dishonest in anyway. A successful party may be deprived of his costs if he presents a false case or false evidence (See Baylis Baxter Ltd v Sabath [1958] 2 All ER 209);*
> *(p) There is disgraceful behaviour deserving of moral condemnation so as to warrant denying costs in full or in part to the culpable party.*
> *(q) There is oppressive, unreasonable or unnecessarily argumentative behaviour, which has increased the costs of the litigation, or impeded the expeditious, fair and proper disposal of the case.*
> *(r) Intolerable or prejudicial conduct of the litigation of any kind is present;*
> *(s) The hearing has been prolonged through incompetence, negligence or simply dilatory conduct, and costs and expenses have been driven up by unnecessary delays, which are not limited to those that are inordinate, inexcusable or prejudicial, or caused by deliberate delaying tactics."*

Ultimately, the award of costs is in the discretion of the arbitrator upon considering the "special circumstances" of each case. However, the arbitrator is not exempt from complying with the rules of natural justice (such as giving both parties the right to be heard on the issues concerned) and the duty to act judicially. The High Court cautioned in *Denis Matthew Harte v Dr Tan Hun Hoe & anor* (emphasis added):

> *"How then is the discretion on award of costs to be exercised? The normal rule is that the court shall order the costs to follow the event except when the circumstances of the case require the court, in exercise of its discretion, to make some other cost order: Order 59 Rule 3(2).*
>
> ***Although the court has an unfettered discretion to make whatever cost order the justice of the case demands, this discretion obviously cannot be exercised arbitrarily, or on***

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extraneous grounds and irrelevant considerations. It must be exercised judicially guided by established rules and principles."

In the light of the above, it would be wise for the arbitrator to give reasons for departure from the general costs rule, especially where this is so required by the parties.

MUST COSTS GENERALLY "FOLLOW THE EVENT"?

In view of the importance that the above so-called "exception" may have in guiding tribunals, we would go further to suggest that "costs following the event" may not necessarily always be the starting point or rule in arbitrations especially in international arbitrations. This is especially so where parties are divided on a multitude of legal, jurisdictional or complex factual issues, which are difficult to determine and thus left to an international tribunal to decide.

Redfern & Hunter[5], for example, states that (emphasis added):

> *"An arbitral tribunal in an international commercial arbitration is generally reluctant to order the unsuccessful party to pay the whole of the winning party's legal costs. There are many reasons why this should be so. First, as already noted, the practice under which the unsuccessful party is expected to pay or contribute towards the other party's legal costs is by no means a universal practice, either in international arbitrations or, indeed, in national systems of law. Secondly, it is rare indeed for the winner to have been wholly successful on all the issues in dispute in the arbitration. Thirdly, even where a tribunal decides that some contribution towards the winning party's costs should be ordered, there is the problem of deciding upon what basis, and when, this contribution should be assessed...."*

This is also echoed in the article, *Awarding Costs in International Commercial Arbitration: an Overview*[6], where the author Bühler, in the course of various observations on costs, doubts the principle of "costs follow the event" as a universal starting point in international arbitrations.

> *"...other factors cast doubt on the idea that the loser-pays rule has emerged as the universally recognized principle for the treatment of costs in international commercial arbitration. First, the most widely used 'truly international' arbitration rules do not require a tribunal to award costs to the successful party. The ICC Rules are silent on cost allocation inasmuch as Article 31(3) does not offer any criteria for the arbitrators' decision on which party should bear the costs of arbitration. In the absence of any guidelines in the ICC Rules, the matter is left to the absolute discretion of the arbitrators. (65) While adopting the principle that costs follow the event with regard to the procedural costs in Article 40(1), the UNCITRAL Rules (66) omit any reference to the outcome of the proceedings with regard to the legal costs. Rather, Article 40(2) expressly states that the tribunal is free to decide on such costs as it sees fit. This would suggest that, as far as legal costs are concerned, the outcome on the merits does not serve as the prevailing yardstick."*

Bühler recommends that in an arbitration where no party has substantially prevailed, arbitrators regularly order each party to bear their own costs, stating (emphasis added):

> *"All in all, an allocation of costs based on the outcome of the case rarely can or should be a strict arithmetic exercise. Although arbitrators should not use "too broad a brush", pointillism is of no use either. Little, if anything, is gained if the allocation and determination of the costs degenerates into a costly mini-arbitration.* ***As a consequence, in cases where no party substantially prevailed, arbitrators regularly order each party to bear half of the procedural costs and its own costs.***"

JUDICIAL PRAGMATISM AND INTUITIVE FAIRNESS

"Costs following the event" and the established exceptions may be a useful overall guide in relatively straightforward and simple cases. However, in cases where difficult issues and grey areas are left to the discretion and final decision of an objective and impartial tribunal, even an issue-based or time-based approach may not be sufficient for a just result. In these cases, we suggest that judicial pragmatism coupled with "intuitive fairness" in apportioning costs may well be a welcome revolution from the general rule of "costs following the event".

Where the tribunal finds difficulty in apportioning costs, the practical approaches in *Harte Denis Matthew v Tan Hun Hoe* and *Khng Thian Huat and another v Riduan bin Yusof and another* (cited above) are useful in providing guidance. In *Khng Thian Huat*[7], the High Court, citing *Ho Kon Kim v Lim Geok Kim Betsy (No 2)* [2001] 4 SLR 603, recognized the possibility that:

> *"The usual direction is for costs to follow the event. However, in some cases such as this, there is no clear demarcation as to which party has been successful on an overall basis. A sterile issue-based approach or a pure time-based approach might create mathematical partisanship that will not embrace the entire spectrum of discretionary factors inherent in trial proceedings. The assessment of costs ought not to be a clinical scientific exercise divorced from considerations of intuitive fairness. The court almost invariably ought to "look at all the circumstances of the case including any matters that led to the litigation".*

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[1] See, for example, *The Law and Practice of Commercial Arbitration in England*, 1989, 2nd Edition, Butterworths, Mustill & Boyd, page 396.

[2] *The Law and Practice of Commercial Arbitration in England*, 1989, 2nd Edition, Butterworths, Mustill & Boyd, page 396; Also Sutton & Gill, *Russell on Arbitration*, 2003, 22nd edition, Sweet & Maxwell Limited, paragraph 6-170

[3] For example, *Tullio v Maoro* [1994] 2 SLR 489, *Ho Kon Kim v Lim Gek Kim Betsy & Ors (No. 2) and another appeal* [2001] 4 SLR 603 and the recent case of *Tan Yeo Hiang Kenneth & Others v Tan Chor Chuan* [2006] 1 SLR 557.

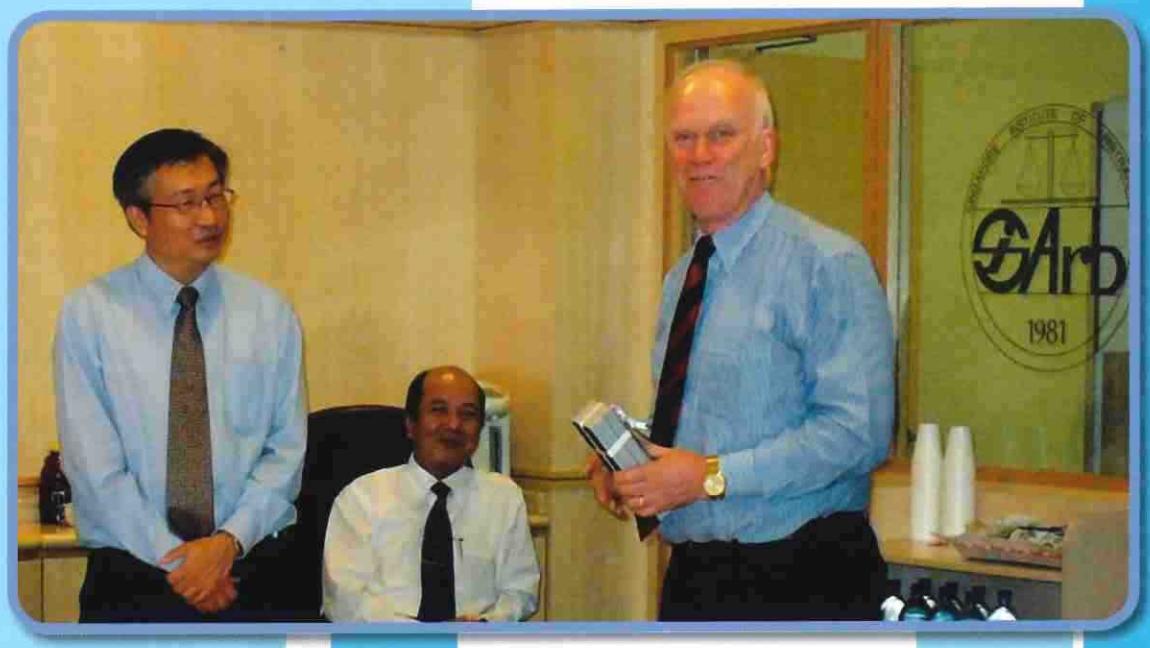
[4] *Halsbury's Law of Singapore*, Vol. 2, 2003 Reissue, Lexis Nexis

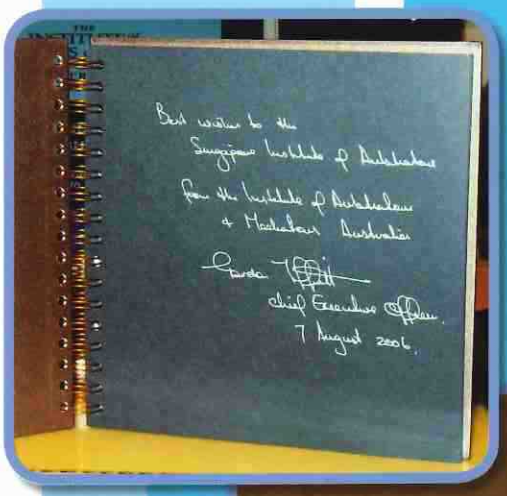
[5] Law & Practice of International Commercial Arbitration, 4th edition, 2004, Sweet & Maxwell.

[6] Buhler, *Awarding Costs in International Commercial Arbitration: an Overview*, ASA Bulletin, Vol. 22 No. 2 (2004) at page 264.

[7] The High Court decision of *Khng Thian Huat* went on appeal before the Court of Appeal *in Riduan bin Yusof v Khng Thian Huat and Another (No 2)* [2005] 4 SLR 234. The Court of Appeal opined that the comments of the High Court judge are probably understandable, but his remarks were probably too harsh in relation to that case. Nonetheless, the High Court's general remarks as to principles remain relevant, applicable and helpful.

Visit By Gordon Tippets, IAMA
7 August 2006





Talk by Cpt. Lee Fook Choon

Immunity of Classification
24 August 2006

Visit to MIARB - 30 August 2006

Legal Development Affecting Arbitration

- By Dr Philip Chan Chuen Fye

Introduction

In this issue, there is only one case examined. It concerns the enforcement of a foreign arbitral award in Singapore under the International Arbitration Act. (Cap 143A, 2002 Rev Ed) ("IAA"). Its international nature is immediately evident as cases from six foreign countries were considered. Whilst the court was required to decide on whether a foreign arbitral award should be enforced, the court had been instructive in expressing its opinion on why a person who does not accept his/her status as a party to an arbitration and who chooses to stay out of the arbitration preferring to ventilate their non-acceptance in court may run the risk of having an arbitral award made as well as successfully enforced against him/her.

***Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and Another* [2006] SGHC 78, [2006] 3 SLR 174 [Judith Prakash J]**

This report concerns an appeal against the decision of the assistant registrar who dismissed the second defendant's application to set aside the plaintiff's order to enforce a foreign award under the IAA.

The plaintiff entered into a contract with the first defendant, which was signed by the second defendant, one Mr Chiew, on behalf of the first defendant. The arbitration clause is Clause 13.7 which provided, *inter alia*, that "The Arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. Sec 1 et.seq.," and further, that, "Any substantive or procedural rights other than the enforceability of the arbitration agreement shall be governed by Arizona law, without regard to Arizona's conflict of laws principles."

Two main issues were raised for the court to decide. First, whether there exists, an arbitration agreement to satisfy the requirement of enforcement of a foreign arbitral award. Second, whether there exists, any ground for the court to refuse granting an order to enforce the foreign award. In the appeal, four grounds were raised.

Definition of arbitration agreement

It was noted by the learned judge that the IAA provides for two definitions of arbitration agreement found respectively in ***section 2*** which refers to Art 7 of the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration ("the Model Law") and ***section 27*** which refers to the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded on 10th June 1958" ("the Convention"), often referred to as the "New York Convention".

- "...the term "arbitration agreement" as used in s 19 had to be understood in the way defined in s 2. That section defines an arbitration agreement as an agreement in writing as referred to in Art 7 of the Model Law. Article 7 of the Model Law provides that the arbitration agreement shall be in writing and an agreement is in writing if, *inter alia*, it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement." [see paragraph 15]

- "The definition of "arbitration agreement" in s 27 of the Act is slightly different as it says that an arbitration agreement is an agreement in writing of the kind referred to in para 1 of Art II of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded on 10th June 1958" ("the Convention"), often referred to as the "New York Convention". The first two paragraphs of Art II read:

  > Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.
  > The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." [see paragraph 16]

This led the learned judge to observe that:

- "...the definition of arbitration agreement in the Convention is both wider and looser than that in s 2 of the Act." [see paragraph 16]

Further, the learned judge held that arbitration agreements are nevertheless valid even if they are not executed.

- "It is worth bearing in mind that, just looking at the list of exchanges by which an arbitration agreement can be brought into existence it seems to me unlikely that in all cases the parties' signatures are required to constitute an agreement." [see paragraph 15]

The court then held that the applicable definition is the one offered by the New York Convention as the other definition is meant for international commercial arbitration where the seat is Singapore.

- "It is clear to me that in the case of an award which, like the Award here, was made by an arbitral tribunal with its seat in a foreign state (here Arizona) and where the law governing the arbitration was not Singapore law, the correct part of the Act to apply is Part III which contains ss 27 and 29 and is entitled "Foreign Awards"." [see paragraph 18]

- "Part II of the Act entitled "International Commercial Arbitration" generally applies only to arbitration proceedings with their seats in Singapore and which are "international arbitrations" within the meaning of that term in s 5 of the Act. The only exception to this is in respect of the court's powers under ss 6(3) and 7(1) but those sections are not relevant in the present case. Part III of the Act, on the other hand, applies to "foreign awards" which are defined as arbitral awards made in pursuance of an arbitration agreement in the territory of a country, other than Singapore, which is a party to the Convention." [see paragraph 18]

The learned judge then held that a reference to section 19 for enforcement of a foreign award does not impose on the parties the section 2 definition of arbitration agreement.

- "s 29(1) of the Act states that a foreign award may be enforced in a court in the same manner as an award of an arbitrator made in Singapore is enforceable under s 19 (that means that as with an award rendered in a Singapore international arbitration, where leave to enforce a foreign award is given, judgment may be entered in terms of the award). That wording allows a recourse to s 19 which would not otherwise be possible. It does not incorporate the definition of "arbitration agreement" found in Part II into that term as used in Part III." [see paragraph 18]

The next issue raised by the second defendant concerned the court's approach to scrutinising the arbitration agreement. It was decided by the learned assistant registrar and affirmed

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by the learned judge that the approach, which the court should use, is a formalistic or mechanistic one rather than a substantive one.

- "[the assistant registrar's] conclusion was that the examination that the court must make of the documents under O 69A r 6 is a formalistic one and not a substantive one." [see paragraph 39] "...I have come to the conclusion that the assistant registrar was correct." [see paragraph 41]

- The approach adopted by the assistant registrar is also supported by authority. The idea that the enforcement process is a mechanistic one which does not require judicial investigation by the court of the jurisdiction in which enforcement is sought was expressed in Robert Merkin, *Arbitration Law* (LLP, 1991) (Service Issue No 42: 5 December 2005) at para 19.48 as follows:

  > The Arbitration Act 1996, s 101(2) provides that a New York Convention award may, by permission of the court, be enforced in the same manner as a judgment or order of the court to the same effect, and s 101(3) goes on to state that "where leave is so given, judgment may be entered in terms of the award". This wording makes it clear that the enforcement process is a mechanistic one, and that the court may simply give a judgment, which implements the award itself. It follows that the award cannot be enforced on terms not specified in the award, and in particular it can only be enforced against a person who was the losing party in the arbitration. [see paragraph 42]

- This approach was the one taken by the English Court of Appeal in the *Dardana* case ([31] *supra*), which involved the submission that the appellant, Yukos, was not a party to the arbitration. [see paragraph 43]

Grounds of challenge against enforcement

The court having decided on the issues relating to the arbitration agreement proceeded to examine the issues raised in respect of the grounds of challenge afforded by the IAA in respect of the enforcement of a foreign award in Singapore. It was held by the learned judge that the second defendant is entitled to rely solely on the prescribed grounds to challenge, as the court has no residual discretion to refuse enforcement outside the prescribed grounds.

- "This language indicates that the grounds stated in s 31(2) of the Act are meant to be exhaustive and that the court has no residual discretion to refuse enforcement if one of those grounds is not established." [see paragraph 46]

It was further held by the learned judge that the approach which the court is required to take in the evaluation of an application to set aside a foreign award in Singapore is dependent only on the prescribed grounds and that the court must not look into the merits of the case as decided by the arbitral tribunal.

- "I do not think that it is correct for a court that is asked to enforce an award under the Convention to go behind the holding on the merits on this aspect that has been made by the Arbitrator except to the extent that this is permitted by the Convention grounds during the second stage of the enforcement process." [see paragraph 47]

The learned judge reminded all that it is open to anyone resisting the enforcement of an arbitral award to challenge the said award at the seat of the arbitration in the supervisory court or to challenge the said award at the place of enforcement in the enforcement court. However, it is recognised that the grounds for challenge may be different in the two jurisdictions. Accordingly, the party resisting enforcement may choose to launch his/her challenge in the friendlier court.

- "It is axiomatic that an application to a supervisory court to set aside an award has to be based on one of the grounds which the jurisdiction of that court provides for such an order. In a jurisdiction applying the Model Law, an award by the arbitral tribunal on jurisdiction may be challenged in court and, at common law too, an award may be overturned by the supervisory court on the basis that the tribunal did not have jurisdiction. It is also axiomatic that an application to an enforcement court to resist a grant of leave to enforce must be based on one of the grounds as the jurisdiction of that court provides for such setting aside. It is not necessary nor is it logical that the grounds for both types of application would be identical." [see paragraph 55]

On the other hand, the party resisting enforcement must realise that if a decision is made to challenge in both courts, then, a failure to raise a point in the supervisory court may result in an estoppel preventing the person from raising the same point subsequently in the enforcement court as noted by the court.

- "As the enforcement court, I can only permit Mr Chiew to resist enforcement if he is able to establish one of the grounds set out in s 31(2) of the Act. Except to the extent permitted by those grounds, I cannot look into the merits of the Award and allow Mr Chiew to re-litigate issues that he could have brought up either before the Arbitrator or the supervisory court. As Mason NPJ also pointed out in the *Hebei* case, a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point before the court of enforcement. This is because failure to raise such a point may amount to an estoppel or a want of *bona fides* such as to justify the court of enforcement in enforcing an award." [see paragraph 56]

It is now appropriate to set out the sections relied by the second defendant as grounds to challenge the enforcement of the foreign award.

(a) Section 31(2)(*b*) - the assertion is that there was no valid arbitration agreement as Mr Chiew was not a party to the same.

(b) Section 31(2)(*d*) - the assertion is that the Award went beyond the scope of the submission to arbitration as the arbitration only bound AVA and Asianic.

(c) Section 31(4)(*a*) - the assertion is that the subject matter of the difference between the parties to the Award was not capable of settlement by arbitration as questions such as whether a person is the alter ego of a corporation are not arbitrable but must be resolved by the courts.

(d) Section 31(4)(*b*) - the assertion is that the enforcement of the Award would be contrary to the public policy of Singapore. [see paragraph 58]

The first ground relied upon by the second defendant is found in section 31(2)(b). Essentially it is an allegation that there is no valid arbitration agreement. As in all grounds, it is the second defendant who is required to discharge the necessary burden of proof. It was held by the learned judge that the second defendant failed to do so and therefore the arbitral award is not set aside based on this ground.

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- ***Section 31(2)(b) - No valid arbitration agreement***

  "60. Section 31(2)(*b*) provides that a court may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that "the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication in that respect, under the law of the country where the award was made".

- "...it should be remembered that under s 31(2) of the Act, it is the party who wishes the court to refuse enforcement of the award who has the burden of establishing that one of the grounds for refusal exists. Sub-section (2)(*b*) calls on the challenger to establish that the arbitration agreement in question is not valid under the law to which the parties have subjected it." [see paragraph 61]

- "There was therefore no independent expert evidence from Mr Chiew on the law of Arizona as it applied to the Award. ...For me to refuse to enforce the Award on this ground, I would need to be satisfied that, under the law of Arizona, the arbitration agreement was invalid *vis-à-vis* Mr Chiew and that the Arbitrator was not entitled to find that Mr Chiew was a party to the Agreement and the arbitration. No basis has been given to me for such a finding." [see paragraph 63]

The second ground relied upon by the second defendant is found in section 31(2)(d). It alleges that the arbitrator has acted outside his scope of reference. Like the first ground, it was held by the learned judge that the second defendant failed to discharge the necessary burden of proof and therefore the arbitral award is not set aside based on this ground.

- ***Section 31(2)(d) - The Award went beyond the scope of the submission to arbitration***

- "64 Under s 31(2)(*d*), enforcement of the Award may be refused if it "deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration".

- "65 Mr Loh submitted that the Award should not be enforced in Singapore because it contains a decision on matters that are beyond the scope of the submission to arbitration - the arbitration agreement was between AVA and Asianic and the submission to arbitration was restricted to those parties only

- "In this case, Mr Chiew had brought no evidence based on Arizona law to prove that the Award contained a decision on a matter beyond the scope of the submission to arbitration." [see paragraph 68]

- "I agree with the assistant registrar that this ground of challenge relates to the scope of the arbitration agreement rather than to whether a particular person was a party to that agreement. Mr Chiew has not established that this ground avails him in this instance." [see paragraph 69]

The third ground relied upon by the second defendant is found in section 31(4)(a). It alleges that the subject matter referred to arbitration is not arbitrable. It was held by the learned judge that the applicable law to determine arbitrability is Singapore law and not Arizona law. The learned judge then held the subject matter submitted for arbitration is arbitrable in accordance with Singapore law and therefore the arbitral award is not set aside based on this ground.

- ***Section 31(4)(a) - The subject matter of the difference between the parties to the Award was not capable of settlement by arbitration***

- "70 Under s 31(4)(*a*) of the Act, the court may refuse to enforce a foreign award if it finds that "the subject-matter of the difference between the parties to the award is not capable of settlement by arbitration under the law of Singapore".

- "It is clear from the wording of the section itself that the determination of whether a matter is arbitrable or not is governed by Singapore law. The law of Arizona is irrelevant. ...Whether a person is the *alter ego* of a company is an issue, which does not have a public interest element. It normally arises in a commercial transaction in which one party is trying to make an individual responsible for the obligations of a corporation. In my judgment, such an issue can in an appropriate case be decided by arbitration." [see paragraph 72]

The fourth ground relied upon by the second defendant is found in section 31(4)(b). It alleges that the enforcement of the foreign award would be contrary to the public policy of Singapore as there was a breach of natural justice in the proceeding and the enforcement of the said award would effectively make a person liable for a contract in which he is not a signatory. These allegations were rejected by the learned judge and therefore the arbitral award is not set aside based on this ground.

- ***Section 31(4)(b) - The enforcement of the Award would be contrary to the public policy of Singapore***

- 73 Under s 31(4)(*b*), the court may refuse to enforce the award if it finds that the enforcement of the award would be contrary to the public policy of Singapore.

- "This was a breach of natural justice. At another point in the submissions, it was contended ...that the enforcement of foreign arbitral awards that seek to bind non-signatory Singapore citizens to such awards would be contrary to Singapore's public policy." [see paragraph 74]

- "...an award must be enforced unless it offends against our basic notions of justice and morality. In *Re An Arbitration Between Hainan Machinery Import and Export Corporation and Donald & McArthy Pte Ltd* [1996] 1 SLR 34, I held that the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist. I have not changed my mind since then." [see paragraph 75]

- 76 In this particular case, the enforcement of the Award would not by any stretch of imagination offend against the most basic of the notions of justice that the Singapore court adheres to. Firstly, strictly speaking, it is not accurate to describe Mr Chiew as a "non-signatory" to the Agreement. He did in fact sign it although he did so as the manager of Asianic. That was evidence that he had something at least to do with the Agreement. Secondly, in Singapore, legal principles exist which allow liability for breach of contract to be imposed on a person who, ostensibly, is not a party to the contract concerned. Singapore legal principles also recognise that a person who is not named in a particular contract may in fact be a party to it and responsible for the obligations purportedly undertaken by somebody else. Such liability can be imposed on the basis of theories such as *alter ego* and agency. So the findings on Mr Chiew's position *vis-à-vis* the Agreement and the arbitration are not strange to us. Whether on the evidence adduced in the proceedings, a Singapore court would have come to the same conclusion as the Arbitrator did is irrelevant to my consideration of the public policy issue. Thirdly, Mr Chiew was at all times given the opportunity to deal with the substantive issues involved in the arbitration.

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SIArb 25th Anniversary

The Changing Face of Arbitration

Gala Dinner

Guest-of-Honour:
Associate Professor Ho Peng Kee,
Senior Minister of State for Law & Home Affairs

Date:
Friday, 24 November 2006

Venue:
Four Seasons Ballroom, Level 2, Four Seasons Hotel

Pre-dinner Cocktails:
7.00 pm

Dinner commences:
7.45pm.

Dress code:
Formal

Fee:
S$100/- per person

I/We wish to attend the SIArb 25th Anniversary Dinner at the Four Seasons Hotel Ballroom on 24 November 2006, 7-11pm.
My/Our details are:

Full Name *(please underline surname)*	Telephone	Fax	Email *(required for confirmation)*	Special Dietary Requirements

Mode of payment (Please select one only and make full payment for all above persons) :

1. By Cheque: Enclosed is a _____ (name of bank) Cheque No. _____

drawn in favour of "Singapore Institute of Arbitrators" in the amount of S$ _____

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