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PRESIDENT'S COLUMN

by Raymond Kuah Leong Heng

Understanding Subpoenas in Arbitration Proceedings It may be stating the obvious that it is often the case where those legally trained arbitrators often find themselves having to grapple with lingua franca of other fields of discipline such as architecture; engineering; quantity surveying, and construction industry etc.; however, the same can be said of those who are non-legally trained arbitrators that they would, in any event, need to be schooled so as to understand those aspects of Court procedures which form part of the process of dispute resolution when claiming through arbitration.

Sections 13 and 14(1) of the ***International Arbitration Act (Cap. 143A)*** enable any party to an arbitration agreement to take out a writ of subpoena duces tecum, or a subpoena ad testificandum. In the context of disputes concerning domestic arbitration, Section 26 (1) of ***Arbitration Act (Cap. 10)*** provides that any parties to a reference to arbitration may obtain subpoenas from the Court by way of Order 38 (r.14). *Subpoena is a Writ issued under authority of a Court to compel the appearance of a witness at a judicial or arbitration proceedings, and the disobedience of which may be punishable as a contempt of Court.*

In order to understand what a subpoena is, it may be essential to deal with subpoena through the principles of general application. In practice, the force of the subpoena is a document which is derived from its issue by a Court on the application of a party to the legal proceedings ordering the person to whom it is directed to be present at a particular time and place for a specified purpose with power to punish in the event of non-compliance. Such specified purpose is either to produce subpoena duces tecum, or to give subpoena ad testificandum, or both.

Arbitrators are given the same power as the Court to compel an answer to any question or production of certain documents or classes of documents by Section 14 of the ***Arbitration Act (Cap.10)***, whilst Section 32 enables a party or the arbitrator to apply to the Court in the event of non-compliance arising in relation to a subpoena, or if "any person... refuses or fails to do anything which the arbitrator may require".

Procedurally, time and place for compliance is invariably specified where a subpoena is issued by a Court. Therefore, the place for compliance is usually at the Court which issued the subpoena. However, since it is often inconvenient in connection with arbitration proceedings, the choice is often preferred to obtain the consent from the parties at the preliminary meeting for all subpoenas to be made returnable before the arbitrator at the intended hearing room.

Given that subpoenas to produce documents shall be made returnable before the hearing taking place, it has the advantage not only of giving time for the inspection of documents produced, but it is also likely that it will avoid the substantive hearing to be delayed at the beginning of the case by matters arising

Understanding Subpoenas in Arbitration Proceedings

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out of the issue of subpones. For good practice, any such return date for subpoenas to produce documents is best fixed to coincide with date of an intended hearing for giving orders for directions.

The practical requirements of the Courts in relation to the issue of a subpoena involves the form of the document, and how much notice which the Courts will require to be given as a matter of fairness. For instance, it will clearly be unreasonable to expect a busy expert witness to attend and produce a large number of documents on one day's notice. Such considerations, in any case, are best left to the decision of the Courts, who are bound to ensure uniformity as between subpoenas issued for arbitration proceedings and those issued in respect of Courts hearings.

Unless it has already been indicated that the person relating to the subject of a subpoena to give evidence is already in the hearing room, the name of such person so subpoenaed should be called three times outside the hearing room. In the event of attendance pursuant to a subpoena to give evidence, then the involvement of a person relating to the subject of the subpoena in the arbitration proceedings is no different to that of a witness who has attended voluntarily. One practical problem which commonly arises is that such a person arrives at the outset of the hearing, but is not required until much later in the arbitration proceedings. The proper management by common sense is to provide that person with some indication as to when he will likely be called and to ascertain how much notice he requires in order to attend the hearing thereby minimising the inconvenience for all concerned.

In situation where a witness within Singapore refuses to attend and give evidence, the party who wishes to call him may apply to the Court for a writ of subpoena ad testificandum to secure his attendance. In addition, a person may also be required to give evidence and at the same time to bring with him a specified document or class or classes of documents at the hearing. To this end, the party who wants production would make use of subpoena duces tecum as a means of securing documents held by third parties. In this regard, the arbitrator should ask whether the party at whose request the subpoena was issued actually intends to pursue the matter further. If so, then the arbitrator should check: that the notice was properly served on the person; and that there is no known reasonable excuse for the failure to attend. Those two matters should be considered on a preliminary basis by reasons that they are issues that the Court will consider if the party who issued the procedure wants to continue to take further steps in relation to the non-attendance. Having obtained satisfactory responses to both matters, the arbitrator should allow the party issuing the subpoena to approach the Court in respect of the enforcement of a subpoena.

Arbitration environment is perceived to be less formal, although it should be remembered that enforcement of subpoenas used in arbitration proceedings has the force of the power of the Courts from which that subpoena has been issued. Thus, where non-compliance do occur, the arbitrator shall, in normal circumstances, revert the question of enforcement back to the relevant. Court, if so requested by a party; or if the arbitrator so considers such a course to take as appropriate.

It is imperative to recognise that enforcement of subpoenas is by way of the Court's procedures for contempt of Court. The basic question which ought to be asked is whether the conduct in question either had the effect, or is likely to have the effect of interfering with the administration of justice. See ***Lane v. Registrar of the Supreme Court of NSW (Equity Division) [1981] 148 CLR 245.***

Arbitrators do not necessarily, in normal circumstances, need to be familiar with the procedures which the Court will follow in relation to the allegation of contempt of Court arising out of the issue of a subpoena; but merely have to refer non-compliance to the Court when so requested by the party.

In compliance with the principle of natural justice, it would be prudent that arbitrators should not, of their own volition, refer questions of non-compliance to the Court unless the parties have been given the opportunity to be heard on the issue that had arisen. ▲

FEATURE

"MEDIATION AT THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE"

David J Howell, International Partner, Baker & McKenzie, 2 April 1997

A. INTRODUCTION

Singapore has many obvious advantages as a primary choice of locale in this region for international commercial disputes. It is a leading trading, financial and service centre; it has a highly developed legal and business infrastructure, and an advanced and stable economy. Singapore is generally perceived as a uniquely neutral locale for disputes between Asian and Western parties. Singapore law is historically founded on English law which, as a matter of practice and usage, is the customary basis for many international commercial transactions.

SINGAPORE INTERNATIONAL ARBITRATION CENTRE

The Singapore International Arbitration Centre ("SIAC") commenced operations on 1 July 1991 with the aim of establishing Singapore as a leading centre for international arbitration. SIAC was formed as an independent, non-profit organization designed to cater for all forms of arbitration, whether under the Centre's own Rules, or other established or ad hoc rules that the parties may wish to select to govern their arbitration. The Centre formulated its own set of Arbitration Rules, adopted to take effect from 1 September 1991, largely based on UNCITRAL Arbitration Rules and the Rules of the London Court of International Arbitration. These Rules are to be re-issued in mid-1997 in a revised and updated form.

With these many advantages it is rightly expected that SIAC will achieve the same level of international recognition and acceptance as other established international arbitration centres. The imminent transition of Hong Kong in July of this year will only enhance the attractiveness of Singapore as the regional centre of choice for international commercial disputes in Asia.

Notwithstanding these advantages, the choice of an international dispute locale by commercial parties and their legal advisors is still very much of a "free market", and parties will continue to select the place of arbitration according to a range of criteria that include convenience and cost; legal and physical infrastructure, ease of communications and the availability of support services. The international competition to attract arbitration and other dispute business, and the economic and other benefits this brings with it, is keen.

One of the purposes of the recently-formed SIAC Advisory Committee is to find more effective means to further promote the obvious attractions of SIAC in particular, and the advantages of Singapore as an international dispute locale in general. It is recognised that the development period for an international arbitration centre will necessarily extend over a number of years, while the international legal and business community gets to know of its existence and begins to select the centre, either in the initial contract documentation or when a commercial dispute arises.

The development of SIAC to date has been encouraging. As of August 1996, 169 disputes had been referred to SIAC for resolution involving disputed amounts totalling some S$1 billion in aggregate. Of these 169 cases, over 60% involved parties or subject matter located outside Singapore. In short, SIAC shows every sign of fulfilling its obvious promise as a preferred international arbitration institution in Asia.

However, to achieve and retain this pre-eminent position it will not be sufficient to offer only traditional arbitration procedures. The international business community is increasingly looking to alternative methods to settle commercial disputes. Indeed, the leading edge of dispute resolution practice is now tending towards techniques of "dispute avoidance". Just as any effective legal practitioner should be able to offer clients a range of both traditional and alternative methods of dispute resolution, an international dispute resolution centre must now meet this increasing demand from the business community for alternative dispute resolution methods.

WHAT IS ADR?

The traditional and familiar methods of dispute resolution, litigation and conventional arbitration, are well-recognized ways of settling a dispute when negotiations have failed. Litigation is necessary where the parties cannot agree another means of dispute resolution, or where a legal precedent or a legally enforceable court order (such as an injunction) is required. If there are unusual or significant points of law to be decided, or if the case is one of public interest, or if the parties are simply not prepared to discuss a settlement or reach a compromise, litigation or traditional arbitration may be appropriate. However, these features do not arise in a significant proportion of commercial disputes. Use of ADR can avoid the substantial time and cost, both legal and commercial, that litigation and arbitration may involve. Furthermore, ADR can lead to a far more satisfactory result in overall business terms, and is particularly suitable where the parties wish to maintain an on-going business relationship.

The range of ADR techniques is very wide. In each case, the solution is produced by the parties, not imposed upon them. ADR is essentially a settlement technique, and can be considered for any case in which a court judgment is not required. ADR techniques can be used at any stage of a dispute, both before and during formal litigation or arbitration. ADR has been successfully employed in many different types of commercial dispute, both domestic and international.

ADR is an inherently flexible tool, which may be modified by the parties. Each case will usually involve an agreement by the parties to use a particular ADR process (such as mediation). The essential elements will normally be the selection of a neutral third party; the establishment of the procedural rules (which may be as structured or informal as required); followiing the agreed procedure, and setting-out and executing a binding settlement agreement at the conclusion of the process.

ADR most commonly takes the form of assisted negotiations, facilitated by a neutral third party. The involvement of that third party is the element that may allow the process to succeed, even where direct negotiations between the parties or their lawyers have failed. Various forms of ADR exist, including :-

> ***Mediation/Conciliation :*** a process by which the parties to a dispute voluntarily engage the assistance of a neutral third party to help them

resolve their dispute by negotiated agreement without adjudication. The third party has no power to make any decisions for the parties or to impose his view upon them. The parties reserve their right to resolve the matter by adjudication (e.g. litigation or arbitration) if they cannot do so by mediation/conciliation.

Mini-trial : a procedure in which the disputing parties have their respective cases presented to them on an abbreviated, non-binding basis, to enable them to assess the strengths, weaknesses and prospects of each case, and then to have an opportunity to enter into settlement discussions on a realistic basis. A neutral advisor will normally sit together with the chief executive decision-makers representing each party to hear the presentation of the respective cases. This is normally done by lawyers. The neutral advisor will assist the parties and, if required, give an opinion on the case. The advisor may also adopt a facilitative or mediating role in any settlement discussions which may follow.

Neutral fact-finding expert : a non-binding procedure for cases involving complex technical issues, such as scientific, accounting, economic or other technical disputes, requiring the specialised gathering, collation and analysis of information. It involves the joint appointment of a neutral fact-finding expert who gathers information and makes a neutral evaluation of the facts. This assists the parties by narrowing the issues and helping them to re-assess their estimate of the probability of success, thereby promoting realistic settlement negotiations.

Early neutral evaluation : a procedure by which a neutral evaluator will meet with the parties at an early stage of the dispute to assist them to narrow and define the issues, and to make a confidential assessment of the dispute, thereby promoting settlement discussions.

Mediation-arbitration or "Med/Arb" : an amalgam of mediatio and arbitration, by which an attempt is first made to resolve a dispute by mediation and, if that fails, the parties will proceed to arbitration. The parties may agree that the mediator may subsequently act as the arbitrator, although this may create a conflict of function. The parties may therefore provide that the mediator may do no more than give an advisory opinion, and then stand aside for another person to arbitrate.

It is said that Asia is the "natural home" of alternative dispute resolution, and that the peoples of this region are generallly thought to have an aversion to the confrontational and adversarial methods of dispute resolution traditionally favoured in the west, such as litigation and arbitration. (It might also be observed that in at least some of the countries in this region the local judiciary and the legal profession have never attained the same high degree of public confidence and status that their conterparts have historically achieved in some western jurisdictions.) The loss of a formally conducted dispute is thought by some to represent a "loss of face". In contrast, alternative dispute resolution methods such as conciliation and mediation are less confrontational and stress a consensual approach, leading to compromise and reconciliation. Whether or not this properly characterises the cultural tendencies of the peoples of this region, the business imperatives of the fast-expanding economies of Asia will test this theory.

DEVELOPMENT OF ADR

The true breeding ground for the alternative dispute resolution movement has been the United States, followed by Australia and the United Kingdom. These are all highly-developed common law jurisdictions in which there is no historical or cultural aversion to referring disputes to the courts or to traditional arbitration.

The driving force behind this development has been the perceived failure of the court systems and, to a lesser extent, traditional arbitration procedures to meet the requirements of litigants in terms of efficiencies of timing and cost. Court procedures and the traditional practices of the legal profession in pursuing these traditional adversarial methods have resulted in costs and delays widely regarded by the business community as prohibitive. Even in those cases where the parties have no real desire to compromise, and simply seek an independent determination of their dispute, the timing and costs of seeking a determination through traditional arbitration or court proceedings, using conventional lawyers, is increasingly unacceptable.

To the extent commercial parties have tended to seek alternatives to these traditional methods of dispute resolution, this is perceived in some quarters as a threat both to the standing of the courts and the prosperity of the legal profession. If for no other reason, the legal profession and the judiciaries in these three jurisdictions have shown a gradual acceptance of alternative dispute resolution methods, or "ADR" techniques, in response to this market demand.

UNITED STATES

The first substantial growth in the use of ADR techniques for the settlement of commercial disputes occurred in the United States during the 1980s. The American Arbitration Association (AAA), established in 1926, offers a variety of ADR methods in addition to formal arbitration. The Center for Public Resources, now named CPR Institute for Dispute Resolution (CPR), was established in New York in 1989 by over 400 major corporations which undertook to explore ADR in the settlement of disputes between themselves before resorting to litigation. CPR established a judicial panel of retired judges and lawyers able to act as neutral advisors, conciliators, fact-finders or arbitrators. The American Bar Association and some 120 state and local bar associations have established specialised ADR sections. ADR services are provided by a number of private organisations, including the Judicial Arbitration and Mediation Service (JAMS). Court-annexed mediation and early neutral evolution are now features of the courts in a number of U.S. states. The California Code of Civil Procedure provides that a "qualified referee" may be appointed by the Court with the agreement of the parties to "try any or all of the issues in action, whether of fact or of law and to report a finding and judgment thereon." The finding of the referee is entered as a final judgment of the trial court, although appeals may be made through the normal court process.

AUSTRALIA

Following these developments in the U.S., ADR techniques have also found favour in Australia. The Australian Centre for International Commercial Arbitration (ACICA) was established in 1985 by the Institute of Arbitrators, the Law Council of Australia, the Australian Bar Association and the Victoria Attorney-General, supported by Victoria State Government funding. The Australian Commercial Dispute Centre (ACDC), was established in 1986 in Sydney to provide a range of ADR services.

The Victoria Supreme Court Act 1986, the Supreme Court Rules (Order 50) and the County Court Act 1958 together allow the whole or part of a civil matter to be referred to arbitration by an independent arbitrator or judge, as well as providing for the reference of certain matters to a specialist third party for investigation or resolution. Pre-trial conferences conducted by court personnel are intended to provide savings in time and costs by clarifying issues and improving communications between the parties. The Commercial Arbitration Act 1984 (Vic) contemplates that the parties may seek settlement of the dispute by alternative, less formal methods such as conciliation or mediation. Independent experts may also be invited to resolve issues of fact. Rule 6(a) of the Queensland Supreme Court Commercial Causes A List provides that the court may, on such terms as it thinks fit, as any time direct that the parties confer on a "without prejudice" basis for the purpose of resolving or narrowing points of difference between them. Rule 6(b) provides that in an appropriate case the Judge in charge of the Commercial Causes A List may conduct such a conference (in which event he will not preside any subsequent trial of the action). The New South Wales Supreme Court Rules allow the court to direct mediation and neutral evaluation, with the agreement of the parties.

THE U.K. EXPERIENCE

In Europe, despite the earlier commercial success of ADR in the United States, there were relatively few signs that ADR had been accepted into the mainstream of legal or business practice prior to 1990. CEDR was launched in London in 1990 to promote ADR in the UK and raise awareness of alternative dispute resolution techniques in the UK legal and business community. It is significant that CEDR was launched by and with the support of the Confederation of British Industry and a large number of leading UK companies, to send a strong signal to the English legal profession that ADR was actively required by the UK business community.

Since it was launched in 1990 CEDR has attracted a membership of some 400 top firms of solicitors, companies and public bodies, including 75 of the top 100 English law firms. By mid-1996 CEDR had been involved in over 1,000 cases to a value of over £1.5 billion, from a range of businesses in the public and the private sector. 90% of these disputes resulted in a settlement.

CEDR is keen to emphasize that ADR is promoted as an additional structure to national legal systems, and not as a mechanism which aims to substitute them. It is held up as a valuable additional facility, able to provide a fast and cost-effective method of preserving business relationships. It is also promoted as a means of enabling cultural differences (which may otherwise hinder negotiations) to be bridged.

The recent Woolf Report on the U.K. civil justice system recommended that the Lord Chancellor and the court services should aim to make the public aware of the possibilities which ADR offers. Court-annexed schemes were initially launched in the Central London County Court and the Patent County Court to launch the development of ADR within the UK judiciary. The first High Court Practice Direction on ADR was issued in early 1990 by the Official Referees Court, which deals with construction disputes. This was followed by a Commercial Court Practice Direction in December 1993 indicating that the Commercial Court was keen to encourage parties to consider alternative methods of resolving disputes; the Practice Direction requires that parties inform the court at both the summons for directions and the pre-trial stages whether they have considered using ADR. (In January 1995, the other Divisions of the High Court introduced the same questions into their pre-trial review questionnaire.) A Practice Direction from the Court of Appeal in 1995 set-out ways of identifying those cases that might be settled by mediation. In early 1996 the Commercial Court issued a Report which concluded that the settlement of actions by ADR could substantially reduce costs and delays, and preserve existing business relationships and reputations. The Commercial Court will now actively require the parties to consider mediation, and may order that a case will not be set-down for trial unless the parties have first considered mediation, and explained to the court in writing what they have attempted.

SINGAPORE COURTS MEDIATION MODEL

The Singapore judiciary has led the way in promoting methods of alternative dispute resolution in Singapore, as part of reforms at increasing the effectiveness and efficiency of the Singapore court system. The Singapore Courts Mediation Model introduced an innovative Court Dispute Resolution Mechanism, by which mediation is court-directed with the judge-mediator playing a pro-active role. A Code of Ethics has been issued to govern the conduct of mediators, and mediation at conferences. The use of mediation has been extended from civil disputes to criminal matters, as well as Family Court disputes.

At the Opening of the 1997 Legal Year the Honorable Chief Justice, Justice Young Pung How, reported that as a result of these various initiatives the settlement rate in writ actions in the Singapore Courts has improved from 89% in 1995 to 93% settlement rate in 1996. In 1996 less than 5% of criminal disputes referred to mediation proceeded to trial. Over 90% of family cases referred to mediation were settled without trial.

These reforms will obviously have a powerful and positive effect in raising awareness of alternative dispute resolution methods amongst the Singapore legal profession and the public at large. This early success clearly indicates the receptiveness of litigants in Singapore to the use of these methods, under the encouragement of the Singapore Courts.

DEVELOPMENT OF COMMERCIAL ADR IN SINGAPORE

At the opening of the 1996 Legal Year the Singapore Attorney-General, The Honourable Mr. Chan Sek Keong,

spoke of the need for Singapore to develop a Commercial Mediation Centre, similar to CEDR, and proposed that the Singapore Academy of Law might be the appropriate body to develop this venture initially.

In mid-1996 the Executive Committee of the Academy formed the Commercial Mediation Centre Sub-Committee, under the chairmanship of the Honourable Justice Goh Joon Seng. Following the recommendations of that Sub-Committee, Commercial Mediation Services were made available by the Academy from December 1996. The Academy has issued a Mediation Procedure, and its mediators will be required to comply with a Code of Conduct drawn up by the Academy .

1994 INTERNATIONAL ARBITRATION ACT

In early 1992, as part of the overall effort to enhance Singapore as a premier international arbitration locale, a Sub-Committee of the Law Reform Committee commenced a detailed review of the then-existing arbitration law of Singapore, which largely reflected the UK Arbitration Act (both the UK 1950 Act, and the 1979 amendments to that Act).

The result was the 1994 Singapore International Arbitration Act ("IAA"), which largely adopts the Model Law on International Commercial Arbitration (adopted by the United Nations Commission of International Trade Law on 21 June 1985). This brings Singapore into line with those many other countries that have adopted the Model Law as a basis for their international arbitration law, giving the Singapore arbitration framework a greater degree of familiarity to international commercial parties.

The IAA enhances the freedom of the parties to decide arbitration procedures, within the framework set-out in the Model Law. It also better defines the powers of the Singapore Courts to provide appropriate support to the arbitration process, and the limited extent of curial supervision over international arbitration proceedings. The IAA contains a number of innovative provisions. (For example, Section 23 provides that court proceedings ancillary to an international arbitration held pursuant to the provisions of the Act will be held in camera unless the parties to the proceedings agree otherwise, thus preserving one of the major perceived advantages of arbitration, that of confidentiality.)

The long title of the IAA describes it as, "An Act to make provision for the conduct of international commercial arbitrations.. and conciliation proceedings...".

It may be noted that the Act refers to "conciliation" and not "mediation", which of the two expressions is perhaps now the more common international usage. Many of the established alternative dispute resolution rules refer to rules of conciliation, although some refer to both conciliation and mediation. This terminological difference does not have a basis in any universally accepted distinction between the two terms. In the UK a "mediator" is often considered to have a more pro-active role than a "conciliator", and will be authorised by the parties to put forward proposals for their consideration, whereas a conciliator will adopt a more passive intermediary role. Unfortunately, the two terms sometimes carry opposite connotations in the US and even, on occasion, in the UK. More frequently, the terms are simply used interchangeably, although mediation seems to be emerging as the common generic term to describe both of these roles. The term "conciliation" (and not mediation) is used in the IAA, and should be interpreted to include any of processes commonly described as conciliation or mediation.

The effectiveness of a mediator or conciliator will depend upon the extent to which he retains the confidence of the parties, sufficient to allow them to put forward their views on the strengths and weaknesses of their case on a confidential basis. There are disclosures that a party may be willing to make to a mediator in the course of a mediation that they would withhold from an arbitrator in the more adversarial arbitration process. The function of a mediator is essentially facilitative, as compared with the more dispositive and quasi-judicial role of an arbitrator. Following from this issue is the extent to which the parties will have faith in the ability of a person who has acted as mediator or conciliator to subsequently discharge the proper function of a n arbitrator, once having heard the frank disclosures and views the parties have expressed in the context of the conciliation or mediation.

INTERNATIONAL ARBITRATION ACT - CONCILIATION

Section 17(1) of the IAA expressly provides that an appointed arbitrator may act as a conciliator, "If all parties to any arbitral proceedings consent in writing and for so long as no party has withdrawn his consent in writing...".

Section 17(2) provides that an arbitrator acting as a conciliator may communicate with the parties collectively or separately. The arbitrator acting as conciliator is also expressly required to treat information obtained by him from a party to the arbitration as confidential, unless that party otherwise agrees (Section 17(2)(b)).

Where confidential information is obtained by an arbitrator during the conciliation process, and the conciliation ends without the parties having reached a settlement. Section 17(3) expressly requires that the arbitrator shall, before resuming the arbitration proceedings, "... disclose to all other parties to the arbitral proceedings as much of that information as he considers material to the arbitral proceedings". Section 17(3) is therefore an exception to the general rule in Section 17(2)(b) that an arbitrator acting as conciliator shall treat all information obtained by him from any party as confidential, unless that party otherwise agrees.

Section 17 addresses perhaps the most difficult issue that arises in the context of the mediation process, that of confidentiality. On the one hand, for the conciliation process to be successful the parties should not be inhibited from disclosing information to the conciliator which they may be reluctant to give to an arbitrator. In the event that the conciliator resumes his role as arbitrator, the parties may doubt that the arbitrator will be able to put out of his mind information or comments he has received from a party which may indicate a weakness in that party's case. Additionally, although the conciliator can be expected to be more effective if he has a discretion to disclose information to another party for the purposes of achieving a settlement in the conciliation, this discretion must be very carefully exercised since, in the event the conciliation fails, the other party may have received a material advantage in the subsequent arbitration proceedings having obtained this information.

As a basic ground rule for the conciliation or mediation process, there are two obvious possible approaches to the confidentiality issue. The conciliator may be required to keep confidential all information of a confidential nature which is disclosed to him by a party, except to the extent that party expressly authorises the conciliator to disclose specific information to another party in the conciliation. Alternatively, the conciliator can be given a general power to disclose any information he receives from one party to any other party in the conciliation, except to the extent the disclosing party specifically imposes a condition of confidentiality in respect of specific information. Section 17(2)(b) adopts the former approach.

However, Section 17(3) also recognises the relative benefit to the parties of utilising certain of the information that has been disclosed during the conciliation process in the subsequent arbitration phase. If the conciliation process fails, the conciliator/arbitrator is therefore required to make a judgment as to which of the information disclosed to him "... he considers material to the arbitral proceedings, and to disclose this information to all other parties before resuming the arbitration phase". It may be that the arbitrator will consider it inappropriate to disclose any comment that has been made by one party during the conciliation phase as to the strength or weakness of their own or some other party's case.

It may be noted that the IAA makes no provision for those circumstances in which parties agree to refer a dispute to mediation or conciliation either prior to, or in the absence of, any agreement to arbitrate. Sections 16 and 17 of the IAA contemplate an existing arbitration agreement, in the context of which the parties also agree to a prior conciliation.

Section 16(3) of the IAA expressly contemplates that an arbitration agreement may provide for the appointment of a "conciliator", and that the agreement "may" provide that the person appointed as a conciliator shall act as an arbitrator in the event the conciliation fails to produce a settlement. Section 16(3)(a) provides that where such an agreement has been made between the parties, no objection shall subsequently be taken to the appointment of the conciliator as an arbitrator, or to his conduct of the arbitral proceedings, solely on the ground that he has previously acted as a conciliator in connection with some or all of the matters referred to arbitration. (Section 16(3)(b) provides that where such person declines to act as an arbitrator, any other person appointed to act as arbitrator shall not be required first to act as a conciliator, unless a contrary intention appears in the arbitration agreement.)

In recommending these provisions, the Sub-Committee largely adopted the recommendations made by the Hong Kong Law Reform Commission on improvements to the conciliation provisions of the Model Law, which were enacted by the Hong Kong Arbitration Amendment (No. 2) Ordinance 1989.

Although the process of mediation followed by arbitration (sometime referred to as "Med/Arb") has its critics, it has certain advantages in terms of efficiency, timing and cost, where both parties are comfortable with the procedure and with the capacity of the individual who is acting in these two successive capacities.

The IAA contains an express statutory recognition of the role of SIAC in conciliation proceedings in Singapore in Section 16(1) which provides that where an appointing authority agreed between the parties refuses or fails to make the appointment within the time specified (or if no time is specified, within a reasonable time of the request to do so), the Chairman for the time being of SIAC may on the application of any party to the agreement appoint a conciliator. (Section 16(2) provides that the Chief Justice may, if he thinks fit, appoint any other person to exercise the powers of the Chairman of SIAC under Sections 16(l).)

Section 16(4) of the IAA provides that an agreement to conciliate shall be deemed to contain a provision (unless a contrary intention appears) that if the conciliation process fails to produce a settlement within four months of the date of appointment of the conciliator (or such longer period as the parties may agree) the conciliation proceedings shall terminate. This is to prevent any party using the conciliation process simply to delay the resolution of the dispute by prolonging the conciliation process without any intention of reaching a settlement. The Law Reform Sub-Committee took the view that four months was a sufficient period for it to become clear to the parties whether there is any genuine possibility of resolving the dispute through conciliation. If such a possibility exists, the parties may agree to extend the conciliation process, which in any event will depend for its success upon the continuing support of all of the parties.

B SIAC RULES OF MEDIATION AND CONCILIATION

The Rules of Mediation and Conciliation of the Singapore International Arbitration Centre (the "Rules") are published by SIAC to take effect from 2 April 1997.

The Rules are intended to provide SIAC with rules of mediation and conciliation that follow best international practice. They provide parties to international commercial disputes with a clear framework for mediation and conciliation, under the auspices of SIAC.

In preparing the Rules, the SIAC Advisory Committee had reference to the published rules of conciliation and mediation of all of the major international arbitration and mediation bodies and institutions (including UNCITRAL, the American Arbitration Association (AAA), the Centre of Dispute Resolution (CEDR), the Australia Commercial Dispute Centre (ACDC), and the International Chamber of Commerce (ICC)).

The primary objective is to provide a simple and user-friendly set of rules which can be well-understood and easily adopted by international commercial parties and their legal advisers. SIAC aims to provide mediation procedures that conform to the highest international standards of mediation and conciliation practice.

MEDIATION-CONCILIATION

The Rules begin by addressing the terminological issue of the usage of "mediator" and "mediation" and "conciliator" and "conciliation", by providing that the former shall be read to include the latter. No distinction is made between these terms for the purposes of the Rules. Thus, a "Mediator" may adopt a passive

intermediary function or a more pro-active role in putting forward a possible basis of settlement for consideration by the parties, as the parties may choose to agree. Rule 12 provides that the Mediator may "... at any time with the agreement of all of the parties..." suggest a possible basis for settlement, either to all parties or to any party individually.

Similarly, for the purpose of the IAA any reference in the Rules to a "mediator" should be deemed to include a "conciliator" within the meaning of the IAA (subject to the construction of the actual agreement between the parties.) For the purposes of the Rules it is not to be assumed that in appointing a "mediator" the parties intended to appoint a person with functions other than those of a "conciliator", as contemplated under the IAA.

APPLICATION OF THE RULES

Rule 1 provides that wherever the parties have agreed to mediation or conciliation under the auspices of SIAC, they shall be deemed to have accepted the Rules "... subject to such modifications as the parties may agree." The parties are therefore free to modify the application of any of the Rules. Where the mediation takes place in Singapore the procedure will be subject to the relevant procedural provisions of the IAA. The extent to which the relevant provisions of the IAA are mandatory, and the extent to which the parties may agree otherwise, is expressly provided for in Sections 16 and 17 of the IAA.

It may also be noted that given the consensual nature of the mediation process, which depends upon the parties' continuing support for its success, few of the Rules are expressed to be mandatory. The Rules are intended to provide a procedural framework within which the parties and the Mediator may adopt a flexible approach, with a view to seeking a mutually acceptable settlement.

MODEL CLAUSE(S)

The Rules are issued together with a Model Clause, to be inserted in the dispute resolution provisions of a contract agreed between the parties. This may be agreed at the outset of contractual relations between the parties, long before any dispute has arisen, or when a dispute has arisen. The Model Clause provides, "If any dispute arises out of or in connection with this contract, including any question regarding its existence, validity or termination, the parties agree to endeavour to settle the dispute in accordance with the Rules of Mediation and Conciliation of the Singapore International Arbitration Centre for the time being in force, which Rules are deemed to be incorporated herein by reference". A further Model Clause may be adopted by the parties that provides for mediation followed by arbitration, in the event the mediation fails (i.e. "Med/Arb"). The latter provides that the subsequent arbitration will take place under the auspices of SIAC, in accordance with the SIAC Arbitration Rules.

MODEL MEDIATION AGREEMENT

The Rules are also issued together with a Model Mediation Agreement. Again, a short and simple style has been adopted, bearing in mind the practical needs and wishes of international commercial parties. The Model Mediation Agreement is a one page agreement, which expressly incorporates the Rules by reference (subject to such modifications as the parties may agree). The Model Agreement allows the parties to specify their choice of mediator and to agree the time and place of the initial mediation meeting. The Model Mediation Agreement is expressed to be made between the parties to the dispute, the chosen Mediator and SIAC. The relevant provisions may be modified in the event no agreed Mediator has been identified.

CODE OF CONDUCT

The Code of Conduct issued together with the Rules is intended to be a basic statement of the broad principles which will be observed by a mediator in conducting a mediation pursuant to the Rules. It is not intended to be exhaustive, but is intended to provide both mediators and users of the SIAC Rules with a statement of the basic considerations that will apply in every mediation. Paragraph 1 of the Code provides that the Mediator "... shall conduct the mediation fairly, impartially, honestly, efficiently, and diligently with a view to assisting the parties reach a mutually acceptable settlement".

INITIATING A MEDIATION UNDER THE RULES

The procedure for initiating a mediation pursuant to the Rules is intended to be simple and straightforward. Any party to a dispute may request mediation or conciliation under the Rules by delivering a written request to SIAC (the "Request") containing the name and address of the parties, and a brief description of the dispute (including the amount in issue, and any relief or remedies sought). This information is partly to assist SIAC in identifying an appropriate person to recommend as Mediator, in event the parties have not previously agree upon a choice of Mediator.

Upon receiving the Request from any party SIAC is required ("shall") to send within ten days a written invitation (the "Invitation") to each other party to submit to mediation in accordance with the Rules. SIAC is required to nominate the proposed Mediator in the Invitation, and to attach a copy of the Request. At the same time, a copy of the Invitation is required to be sent to the party that originally submitted the Request to SIAC (Rule 3).

Any party who receives an Invitation from SIAC is required to notify SIAC and each other party within ten days whether, firstly, the Invitation is accepted and, secondly, whether any Mediator nominated by SIAC is acceptable. The parties and their legal advisers may choose a separately agreed upon a choice of mediator, and inform SIAC accordingly.

APPOINTMENT OF MEDIATOR

It will be left to SIAC, when identifying a Mediator to name in the Invitation, to liaise with the Mediator as to his general availability and willingness to act. There should therefore generally be no issue as to whether the Mediator nominated in the Invitation will agree to act, in the event the parties agree to his appointment.

In the event the nominated Mediator is unacceptable to any party or otherwise refuses the appointment, SIAC is required ("shall") to propose a further nominee as Mediator. Rule 4 provides that the parties shall attempt to complete the process of agreeing a suitable Mediator within thirty days of the original Invitation. That

period may be extended by agreement between the parties, if necessary or appropriate.

Some mediation centres will undertake the process of mediator selection by providing the parties with a list of names, requesting the parties to delete or mark names in order of preference, so that the parties may feel that they are playing an active role in the mediator selection process. SIAC may choose to adopt this procedure by agreement with the parties. Whether this procedure is adopted will largely depend upon the wishes of the parties and their legal advisors.

Rule 4 further provides that the parties may agree to appoint more than one Mediator although, given the nature of the mediation process, the appointment of more than one Mediator will generally prove cumbersome.

REMUNERATION OF MEDIATOR

Paragraph 6 of the Code of Conduct provides that the sole remuneration of the Mediator shall be the hourly fees referred to in Rule 19 of the Rules, to be determined in consultation with SIAC prior to the appointment. The fees agreed in this manner will no doubt be the subject of communications between the parties and SIAC before each party signifies its acceptance of the Mediator nominated by SIAC in the Invitation. It will normally not be appropriate for any individual party to enter into direct discussions with the Mediator to determine the amount of his hourly fee. Paragraph 6 of the Code of Conduct emphasizes that the Mediator shall not seek or receive any other remuneration whatsoever from any of the parties for acting as Mediator.

INDEPENDENCE AND IMPARTIALITY

Prior to accepting the appointment (and, thereafter, forthwith upon any such circumstances arising) the Mediator is required to disclose to SIAC and to all of the parties any circumstances which "... may compromise the independence, impartially or ability to act of the Mediator..." (Rule 5). This obligation is emphasized in the Code of Conduct, and is an obvious and fundamental principle of the mediation process.

Paragraph 2 of the Code requires the Mediator to act impartially at all times, and to "... avoid any conduct which may give the appearance of partiality towards any one or more of the parties". Paragraph 2 also re-states the requirement of full disclosure by the Mediator of any circumstances which compromise the independence or impartiality of the appointment, both prior to accepting the appointment and immediately upon any such circumstances arising subsequently.

The arbitrator must be, and be seen to be, both independent and impartial. Independence connotes the lack of any additional obligation to any individual party. Impartiality connotes the requirement to approach the case fairly and without favour, and with the absence of any factor which may reasonably give rise to a perception that impartiality is lacking. The requirement of full disclosure (erring, if at all, on the side of excessive disclosure) is appropriate since it may be that all parties, having full knowledge of any factor which may be thought to create a lack of independence or impartiality, may agree to waive that consideration and allow the appointment to proceed. (For example, where the person nominated as Mediator, being a lawyer, has previously performed legal work in a professional capacity for one of the parties several years earlier, the other parties, having received all relevant details, may nevertheless choose to proceed with the appointment.)

Paragraph 4 of the Code further provides, "The Mediator shall avoid any unilateral communication with any of the parties, other than as contemplated under the Rules or by agreement between the parties".

MEDIATION AGREEMENT

Once these initial requirements have been satisfied, it will normally be appropriate for the parties, the Mediator and SIAC to enter into a Mediation Agreement in the form of the Model Agreement (which appears at Schedule 1 to the Rules) with such modifications as parties may agree (Rule 6). This requirement is expressed to be mandatory ("shall"), although the parties may modify the Rules by agreement and may choose to dispense with a written Mediation Agreement in this form. It can be expected that SIAC will urge the parties and the Mediator to enter into a Mediation Agreement in this form, in most cases. However, for the sake of convenience and flexibility, this is a formality which the parties may agree to dispense with, particularly in small disputes.

The Execution of a Mediation Agreement, or the adoption of the Rules by contractual agreement, gives rise to the obvious question of the extent to which such an agreement is enforceable. Such an agreement can be expected to give rise to enforceable legal obligations (for example, as to confidentiality), although the remedies for a breach of any of these obligations will be somewhat limited in extent. Thus, where the parties have agreed to attend a mediation meeting on a date specified in the Mediation Agreement and one party simply fails to appear, the other party might seek to recover the wasted expense by way of damages for that breach. However, since the mediation process is consensual in nature, without any obligation on the part of the parties to reach any final agreement, it is doubtful that any form of contractual remedy would be available in respect of the substantive claims in dispute in the event of a breach of the Mediation Agreement.

MEDIATION PROCEDURE

Rule 7 provides that the Mediator shall conduct the mediation in such manner as he thinks fit, subject to any agreement between the parties, with a view to expeditiously assisting the parties reach a mutually acceptable settlement, "... taking into account any wishes the parties may express". The parties are also under a broad obligation to give their cooperation and assistance to the Mediator in "good faith" in the conduct of the mediation.

WRITTEN SUMMARY

Rule 9 provides that the Mediator "may" invite each of the parties to make a brief written summary (the "Summary") of their position, which may be accompanied by relevant documents. Rule 9 anticipates that any Summary "shall" be sent to every other party and to the Mediator not less than ten days before any mediation meeting, to avoid the element of surprise. Rule 9 further provides that the parties may

agree to a maximum number of pages of the Summary. The provision of a written Summary is not mandatory, as there may be disputes in which the parties do not wish to reduce their positions to writing. However, a written Summary will generally assist in giving the Mediator the facts and issues in dispute, and to focus the minds of the parties on relevant issues prior to any mediation meeting.

MEDIATION MEETING

Rule 10 provides that the Mediator "may" invite each party to attend a mediation meeting, at which each party shall each be given an opportunity to make a brief formal presentation of their position. The Mediator may also "caucus" privately with any of the parties. Any party may request a private caucus with the Mediator at any time (Rule 10). This is subject to the requirement in Rule 7 that the "...Mediator shall impartially conduct the mediation..." in such manner as he thinks fit. He should not show partiality to any one or more of the parties in the manner in which the mediation is conducted. However, this obligation need not prevent the Mediator from spending more time with one party than another, if in his judgment this is the most effective way of achieving the ultimate objective of "expeditiously assisting the parties reach a mutually acceptable settlement". The success of the mediation process will to a large extent depend upon the personality and imagination of the trained mediator, in assisting the parties towards this end. The Mediator should therefore be allowed a degree of flexibility in pursuing this objective, subject to the basic requirements of fairness and impartiality.

It may be noted that the holding of a mediation meeting is not mandatory under Rule 10. There may be cases in which the parties will simply wish to rely on written submissions to the Mediator. However, the mediation process may be carried out most effectively in the context of a mediation meeting. A distinctive element of most successful mediation is the "caucusing" process, in which the Mediator will meet initially with all of the parties to get a better understanding of their positions. He will then be free to separate the parties (usually into separate rooms) and pass between them. This will provide the Mediator with an opportunity to gradually bring each party to a better realisation of the strengths and weaknesses of their respective positions.

DISCLOSURE TO PARTIES

It is in the context of these caucusing sessions that the critical issue of confidentiality (referred to above) will arise. Rule 13 provides, "The Mediator shall retain all information disclosed by any party as confidential unless the party making that disclosure specifically agrees that disclosure should be made to one or more of the other parties". Rule 13 is therefore consistent with the provisions of Section 17(2)(b) of the IAA. The Mediator must at all time retain the confidence of the parties that information which they may disclose to him in confidence will be kept confidential, except to the extent they expressly agree otherwise. In order to be more effective the Mediator may on occasion request the permission of one party to disclose a particular document or piece of information to the other, if he believes this will assist in achieving a mutually acceptable settlement.

REPRESENTATIVE(S)

For the purpose of facilitating the mediation process Rule 8 provides that the parties may be represented by such person(s) as they consider appropriate, provided that such person(s) shall forthwith be made known to each other party and the Mediator, as and when they are identified.

Rule 10 specifically provides that prior to any mediation meeting, each party should identify to the Mediator and to each other party at least one representative having full authority to settle the dispute. This has been found to be an essential element of many successful mediations. It will obviously hinder the mediation process if the Mediator and the other parties are not able to deal with an individual who is authorised to fully represent the party in question. The nature of the mediation process requires the presence of a representative with adequate authority to agree appropriate disclosures and concessions, and to indicate agreement on key points, for the purpose of ultimately reaching a mutually acceptable settlement.

PRIVACY

A further basic requirement of mediation is that the proceedings will be held in private. Rule 11 provides that, other than the parties and their representatives (who may be legal representatives), no other person shall attend any mediation meeting without the agreement of every other party and the Mediator. In addition, Rule 11 provides that there shall be no recording or transcript of any mediation meeting, in order that the parties may communicate freely in the context of the mediation process.

CONFIDENTIALITY

Similarly, Rule 14 provides that the parties, the Mediator, SIAC (and any officer or employee of SIAC) shall keep confidential all matters relating to the mediation. All documents, records or other information received by the Mediator, SIAC (or any officer or employee of SIAC) shall be kept confidential. Rule 14 further provides that the parties "... shall not refer to, or introduce as evidence, in any arbitration or judicial proceedings, any communication relating to a possible settlement of the dispute; any comments made by any party in the course of the mediation; any comment or view expressed by the Mediator, or the fact that any party indicated any willingness, or otherwise, to accept any proposal for settlement". Paragraph 3 of the Code of Conduct re-iterates this confidentiality requirement.

As a further extension of this principle, Rule 16 provides the Mediator shall not act in any capacity with regard to the subject matter of the mediation in any arbitration or judicial proceedings (whether as an arbitrator, witness, consultant or representative of any party), ... "except as all of the parties may otherwise agree." Rule 16 further provides that no party shall call upon the Mediator or any officer or employee of SIAC to give evidence in any such proceedings, except as all of the parties may agree.

SETTLEMENT AGREEMENT

The ultimate objective of the mediation process will be to achieve a mutually acceptable settlement. It may be noted that there can be no contractual or other obligation to achieve a settlement, which will depend upon the positive consent and agreement of the parties. Rule 7 merely gives rise to a general obligation that the parties "... shall in good faith give their co-operation and assistance to the Mediator".

In the event that the mediation is successful, and the parties succeed in reaching a mutually acceptable settlement, it is advisable that the parties draw up and execute a binding written settlement agreement. Rule 12 accordingly provides, "If the parties reach agreement on a settlement of the dispute they shall draw up and sign a binding written settlement agreement, with the assistance of the Mediator as appropriate".

TERMINATION

Rule 15 provides that the mediation shall terminate upon the execution of a settlement agreement in writing between the parties (Rule 15(ii)).

Rule 15 further provides that the mediation shall terminate upon a written declaration of any or all of the parties that the mediation is terminated (Rule 15(i)); upon a written declaration of the Mediator that in his opinion a settlement is unlikely to be achieved (Rule 15(iii); or within four months of the appointment of the Mediator, or on such date or within such period as may be agreed between the parties and the Mediator (Rule 15(iv)) (which reflects sections 16(4) of the IAA).

Paragraph 7 of the Code of Conduct provides that an individual Mediator shall cease to act as Mediator in the event of a failure or inability to act in accordance with the Rules or Code of Conduct, "... or if requested to withdraw by SIAC or by any of the Parties". It may be noted that this will not automatically result in a termination of the mediation process, as the parties may choose to proceed with the appointment of a new Mediator, despite the withdrawal of the original Mediator in the circumstances contemplated in Paragraph 7 of the Code.

ROLE OF SIAC

It will be apparent that SIAC will have an initial function in receiving a Request from any party to mediate under the Rules, and in the nomination of a Mediator to be named in the Invitation to be sent to all of the parties.

Thereafter, Rule 17 provides, "SIAC, in conjunction with the Mediator, may assist in the arrangements for the mediation including, as necessary, organising a suitable venue and assisting in the exchange of written communications and documentation."

Rule 20 provides that any Request filed with SIAC pursuant to Rule 2 shall be accompanied by a specified filing fee, and this filing fee is intended to cover a reasonable level of activity on the part of SIAC pursuant to Rules 3, 4 and 17, respectively. Depending upon the size and complexity of the dispute, SIAC may from time to time discuss with the parties any appropriate additional amounts to cover expenses relating to the activities contemplated within Rule 17.

Rule 20 provides that SIAC may, at the commencement of the mediation "... and at any time thereafter, require each party to deposit such amount covering the expenses of the mediation as SIAC shall reasonably direct. Upon termination of the mediation, SIAC shall render an accounting, and return any unused balance, to the parties". Rule 19 provides that all expenses of the mediation (which shall include the hourly fees, travelling and other reasonable expenses of the Mediator) shall be borne equally by the parties, unless they agree otherwise. Each party is required to bear its own costs and expenses, including the expenses of any witness or expert advice procured by any party, "unless otherwise agreed between the parties".

Rule 17 does not oblige SIAC to provide the assistance mentioned therein. It may also be noted that Rule 2 does not place upon SIAC any obligation to accept a mediation initially referred to it under a Request. There may by occasions, or the existence of grounds, which make it appropriate for SIAC to refuse to accept a particular dispute for mediation under the Rules.

LIABILITY

Rule 18 provides that neither the Mediator nor SIAC (or any officer or any employee of SIAC) "... shall be liable for any act or omission arising out of or in relation to the mediation, in the absence of fraud or wilful misconduct". Rule 18 further provides, "The Mediator shall be an independent contractor and shall not be an agent or employee of SIAC." ▲

NEWSFOCUS

The followings were admitted to membership of the Institute during second quarter of 1997

FELLOW *(By Examination)*

K. Shanmugam
Sir Michael Ogden QC
Sundra Rajoo
Robert J M Morgan

MEMBERS *(By Examination)*

Chia Wah Lee (Ms)
Mohamad Nasir Juri

ASSOCIATES

Chin Cheong
Leong Chee Mun
Tan Hock Soon Adrias

SIAC FACILITIES

SIAC has facilities for the conduct of conciliation, arbitration hearings and the taking of depositions for foreign arbitrations or judicial proceedings. Interpretation and transcription services are available. SIAC will on request administer arbitrations from the onset of dispute to the making of the award.

SIAC is a non-profit organisation. All fees received will help to defray the expenses of maintaining the Centre.

SIAC NEWS

SIAC ADVISORY COMMITTEE

In the SIAC's January 1997 issue of the Singapore Arbitration in which it was reported that an Advisory Committee has recently been set up by SIAC to, inter alia, review and make recommendations for the revision of the existing SIAC Rules; and in addition, to also consolidate its objectives by seeking to improve the Centre's facilities and services to cater to its user.

The following persons are appointed Members of the Advisory Committee, of which the Chairman is Mr Tan Boon Teik:-

Mr Sam Bonifant	—	*Clifford Chance*
Mr Jeffrey Chan	—	*Attorney-General's Chambers*
Mr Giam Chin Toon	—	*Wee Swee Teow & Co.*
Mr David Howell	—	*Baker & Mc Kenzie*
Mr Michael Hwang	—	*Allen & Gledhill*
Mr John Koh	—	*John Koh & Co.*
Mr Raymond L. H. Kuah	—	*KLH Associates, Chartered Architects & Arbitrators*
Prof. Michael Pryles	—	*Australian Centre for International Commercial Arbitration*
Mr Tan Chee Meng	—	*Harry Elias & Partners*
Mr Wong Meng Meng	—	*Wong Partnership*
Mr Simon Stebbings	—	*Freshfields*

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