SINGAPORE INSTITUTE OF ARBITRATORS

NEWSLETTER

MITA (P) 031/08/94

NOVEMBER 1994 ISSUE No. 5

PUBLISHER

SINGAPORE INSTITUTE OF ARBITRATORS

170 Upper Bukit Timah Road
#09-04 Bukit Timah Shopping Centre
Singapore 2158, Tel: 4684317 Fax: 4688510

Printed by
Ngai Heng Book-Binder Pte Ltd.

PRESIDENT'S COLUMN by Raymond Kuah Leong Heng

Duty of Arbitrator to Award Interest. The question of interest on the award has become a subject of keen public interest in light of the recent high Court decision reported in (1994) 2 SLR in the case of Ahong Construction (S) Pte. Ltd. v United Boulevard Pte. Ltd. (Lai Kew Chai J)

Unless a contrary intention is expressed in the arbitration agreement the arbitrator may, if he thinks fit, award simple interest on any sum which he has awarded, for the period ending not later than the date of the award.

Although the statutory power to award interest under section 33 of the Arbitration Act (Cap. 10) is discretionary; nonetheless, like all discretionary powers, the arbitrator has a right and duty to exercise judicially the award of interest in specified circumstances. It is submitted that the exercise of such discretion should make commercial sense in that interest ought ordinarily to be awarded on a successful claim; unless there is a good reason for not doing so.

It must be recognised that the object to award interest is not to penalise the party who is ordered to pay the interest; it is basically to compensate the successful claimant for being kept out of his money between the date it ought to have been paid, and the date of payment on the award itself.

It is also submitted that to award a sum of money without awarding interest for delay in payment may amount to misconduct; and unless the arbitrator gives an explicit explanation to show good cause for not doing so, the Court may remit the award for the question of interest to be reconsidered by the arbitrator. If the failure to award interest is an oversight, the arbitrator has the power to add an award of interest under the "slip rule".

If the award contains an explanation or where the arbitrator volunteered an explanation, and which clearly is such that the arbitrator has misdirected himself as to the principles on which the discretion ought to have been exercised judicially, (Cargill Inc. v Marpro Ltd. (1983) 2 Lloyds''s Rep. 570), particularly when he decides that a party is entitled to succeed in his claim in respect of which he has made the award, and yet no interest was awarded; then moral posturing has no place in the exercise of the judicial duty of the arbitrator to award interest based upon facts put before him.

There are two points which ought to be highlighted with regard to the question of interest. The first relates to the period for which interest should be paid. On this, it is wrong in principle not to award interest to a successful party merely on the ground that there has been a delay in bringing the claim or that there has been a delay in the prosecution in that claim.

In general terms, it is very difficult to see what specific damages the Respondents had suffered as a result of being ordered to pay interest on a sum which is due. After all, the Respondents had the use of that money for that period and had no

EDITORIAL

The Straits Times reported on 15th August 1994 that a new settlement system would soon be introduced in the courts where the judges can initiate conferences to settle all civil cases outside the courtroom. Briefly, a settlement conference is presided over by a judge on the disputed issues to be discussed with counsel for both parties. Litigants are encouraged to participate in the discussion where ways are explored in which the case can be settled without trial. Where the parties are deadlocked after the initial discussion, the judge will have a second discussion with each party separately.

The aspirations as well as expectations of the respective parties are then ascertained, with the assurance by the judge that the disclosures made are strictly confidential. After separate discussions with each party, the judge will meet with both parties together and suggest possible solutions or compromises. The parties will then indicate if they are prepared to accept the suggested solution or compromise. Should there be no resolution, the parties can still proceed with the trial with full assurance that neither party would be prejudiced or disadvantaged by the settlement conference held.

This advance of the courts into such dispute resolution procedure signifies a more pro-active role for judicial officers in settling the civil cases. This is a significant move towards the adoption of an alternative dispute resolution process which has become increasingly popular as a way of settling disputes in Australia and in the United States.

Is there room for this same process to be applied in arbitration proceedings? The immediate answer must be, why not? Provided of course that the parties agree to submit themselves to the settlement process without prejudice to their positions in arbitrations if the settlement process were to fail.

The aim of arbitration proceedings is no different from that of the court; and if this system works, there appears to be no reason why it should not be adopted in arbitration. The arbitrator should not, in the event that the disputes proceeds to trial despite attempts to have them settled in the discussion, be prejudiced in any way whatsoever by the aspirations and the expectations of the parties revealed in the discussions. In the courts, this is not likely to be a problem as the settlement judge will usually not be the same judge who presides at the trial.

Can the arbitrator be expected or so trusted to perform this dual role of mediator and arbitrator? Will the parties still have sufficient confidence in the arbitrator that he would act fairly under such circumstances? Unless these questions are answered in the affirmative, it may be better to preserve the status quo with mediation and arbitration as separate and distinct processes of dispute resolution. ▲

Oh Joo Huat

Duty of Arbitrator to Award Interest

(continue from page 1 of President's Column)

doubt earned interest on it. It is not after all a punishment, but merely a compensation to the injured party for the loss of money during that particular period of time.

The second point on this subject of interest relates to the House of Lord's remarks made concerning the question of special damages. The decision in London Chatham & Dover Railway Co. referred to in La Pintada 1984 2 LLR 9, applied only to general damages, but the Court of Appeal in Wandsworth v Lydall (1981) 1 WLR 598 appears to have given arbitrators power to make an award on interest by way of special damage. This would involve the arbitrators deciding that interest for late payment could constitute damage as might reasonably be supposed to be in the contemplation of both parties when they made the contract. If the Claimants can show that, as a probable result of the breach, it was within the contemplation of the parties that damages might accrue, interest can be awarded provided that the claim is brought and pleaded as a claim for special damages.

It would seem that in an ordinary transaction, it must be within the reasonable contemplation of the parties to a contract that the creditor will lose the use of that money, which means that he should be deemed to have suffered at least equivalent to what he could have earned by putting that money on deposit. It should be interesting to see how arbitrators and indeed solicitors acting for the parties deal with this particular point. It clearly cannot give a right in every case to award such special damages, but it might be a way in which more creative litigants may get around this particular problem. ▲

FEATURE

The author, Mr. Scott Donahey, is a partner of the Law Firm of Haltzmann, Wise & Shepard, Palo Alto, California, USA. The following article on "Avoiding Discovery in US Arbitration" should prove to be interesting for Singapore Lawyers with business in the United States.

AVOIDING DISCOVERY IN U.S. ARBITRATION

By M. Scott Donahey, Esq.

Non-U.S. based companies frequently balk at including dispute-resolution clauses calling for arbitration in the United States in their contracts. In virtually all cases, they fear falling subject to U.S. discovery processes. However, designating the law of California - or another state that limits discovery in arbitration - as the governing procedural law for contract disputes is the safest way to minimize the risk that arbitration will be accompanied by discovery.

In many European and Asian civil law systems, cases are tried largely on the basis of pleadings and documents. Cross-examination is virtually nonexistent. Therefore, American-style discovery appears burdensome, harassing and terribly expensive to many clients from these other countries.

Knowledgeable counsel will advise clients to situate their arbitration in a jurisdiction hostile to arbitration discovery, to specify in their contracts the procedural laws of a state that does not permit arbitration discovery, and either to expressly prohibit discovery in their contract, or to adopt procedural rules of arbitration that do not provide for pre-hearing discovery. Even commercial entities from civil law nations can feel "at home" in an arbitration in the United States.

The arbitration clause is, like any other provision in a contract, subject to negotiations. The relative importance placed on the situs of the arbitration, the relative bargaining strength of the parties, and the give and take involved in negotiating an agreement all play a role in determining where the parties agree to arbitrate their dispute.

Because a United States company often has superior bargaining power, a location in the United States is frequently the site for contractual arbitration. However, U.S. companies also frequently agree to have their disputes arbitrated in other jurisdictions, most commonly in Europe, and often pursuant to the rules of the International Chamber of Commerce.

The procedural laws of certain states are inimical to the use of discovery procedures in arbitration. California Code of Civil Procedure S 1283.05 outlines the discovery which may be permitted in arbitration, but C.C.P. S 1283.1 limits such discovery to wrongful death and personal injury cases or where there is express incorporation of discovery provisions into arbitration agreements. In New York, arbitration discovery has been ruled unavailable, absent a showing of extraordinary circumstances. DeSapio v. Kohlmeyer, 321 N.E.2d 770 (N.Y. 1974)

International arbitrations are most frequently held in major commercial centers. Thus, California and New York host far most arbitrations than other states. However, Illinois, which is the third most popular situs for arbitrations behind the two large coastal states, has enacted the Uniform Arbitration Act into its state statutes at Chap. 10, para. 107. The act permits the subpoena of books and records and application to the arbitrator for permission to take the deposition of a person who cannot be subpoenaed or is otherwise unable to attend the hearing.

New Jersey and Kansas are other states that provide for discovery in arbitration, in N.J. Stat. Ann. 2A:23A-10 and Kan. Stat. Ann. 5-407. New Jersey, a hub for much trade and shipping, might be selected as the situs for an arbitration simply because an American company has its headquarters in that state and it is therefore a convenient location. Frequently, no further thought is given to the legal significance of choice of an arbitration site, or the negative implications of unimpeded discovery.

Most American Lawyers who serve as arbitration counsel, and as arbitrators, are primarily courtroom litigators. From their litigation practice, they assume that discovery is always available. They simply do not know about the varying procedures from state to state concerning arbitration discovery.

Often, parties in states which do not permit discovery in arbitration nonetheless will apply for such discovery. Because the opposing side also wishes to take discovery, or because it, too, is unaware of the law, no objections will be raised. The arbitrator, who may also be unaware of the law, may assume that he has the power to order discovery, and the parties, out of ignorance or from a desire for discovery, will comply with the order. The foreign client, unfamiliar with the federal system, assumes all states are the same or that discovery is universally available under procedures used throughout the United States.

Attorneys should include choice of law clauses in contracts to designate the procedural law as well as the substantive law that is to govern any potential dispute. The U.S. Supreme Court, in Volt Information Sciences, Inc. v. Stanford University, 489 U.S. 468 (1989), recognized the parties' right to choose a procedural law to govern their dispute - even where the selected law displaces the Federal Arbitration Act, which otherwise would be applicable.

The Federal Arbitration Act generally does not permit discovery except under extraordinary circumstances. In 1980, for example, in Burton v. Bush, 614 F.2d 389 (4th Cir. 1980), denial of pre-hearing discovery was approved on the reasoning that parties forego discovery procedures by agreeing to arbitration. Even judicially imposed discovery was prohibited in arbitration proceedings in 1961 by a New York federal district court in Penn Tank Co. of Delaware v. C.H.Z. Rolimpex Warszawa, 199 F.Supp. 716.

However, other federal courts have implied that under the Federal Arbitration Act, the arbitrators have the authority to order discovery as they see fit: Stanton v. Paine Webber Jackson & Curits, Inc., 685 F.Supp. 1249 (S.D. Fla. 1988); Corcoran v. Shearson/ American Express, 596 F.Supp. 1113 (N.D. Ga. 1984).

Federal courts have also permitted discovery in certain limited situations where evidence may be destroyed, such as by construction in progress as in Biage Crane & Rigging Co. v. Docutel Corp., 371 F.Supp. 240 (E.D.N.Y. 1973), or lost entirely, because of departure of witness/employees on the vessel on which they are employed as in Bergen Shipping Co. v. Japan Marine Services Ltd., 386 F.Supp. 430 (E.D.N.Y. 1974), and Ferro Union Corp. v. S.S. Ionic Coast, 43 F.R.D. 11 (S.D. Tex. 1967).

The careful draftsperson seeking to avoid discovery should include a reference to a set of institutional arbitration rules that will have the same effect as a specific contract requirement. Arbitrators are bound to follow such provisions.

Unfortunately, many of the attorneys involved in drafting international commercial contracts are unaware of the various systems of arbitration available. Arbitration provisions are generally used to avoid the possibility of being brought into a foreign court proceeding. Most attorneys, out of ignorance, do not take the additional step of further fine-tuning their contract terms by specifying the arbitration rules to be used.

None of the most frequently used rules in the area of international commercial arbitration provide for discovery. These are the Commercial Arbitration Rules and the International Arbitration Rules of the American Arbitration Association, the Arbitration Rules of the International Chamber of Commerce and the United Nations Commission on International Trade Law Arbitration Rules (the "UNCITRAL Rules"). Arbitration rules, while they do not provide for discovery, also do not expressly prohibit it. Parties may include a clause in their contract prohibiting, or permitting, discovery if they wish.

All of these arbitration rules are similar in that they do not provide for discovery, but there are certain procedural differences. Before specifying any set of rules, the draftperson should obtain and review the various alternative systems. For example, under the ICC and UNCITRAL rules, the arbitrator may elect to decide the matter on written submissions, unless a party requests a hearing. Under the AAA Commercial and International Rules, a hearing is required. Attorneys fees are awardable under the ICC, UNCITRAL, and AA International rules, even in the absence of a contract provision providing for them. Under the AAA Commercial Rules, the tribunal cannot award attorneys fees without an agreement of the parties. Whether one set of rules is preferable to another depends on the points of view and goals of the parties and their counsel.

The AAA rules have one advantage in that they have been the subject of American judicial interpretation, as in United Nuclear Corp. v. General Atomic Co., 597 P.2d 290 (N.M. 1979), and Harlevsville Mutual Casualty Co. v. Adair, 218 A.2d 791 (Pa. 1966), in which the courts ruled that parties who have elected to submit their disputes to arbitration pursuant to AAA rules have effectively waived their rights to engage in discovery. Thus, established precedent recognizes that the selection of AAA arbitration rules precludes discovery.

With such precedent, it should be easier to assure non-American clients and negotiating partners, who believe that the American discovery process is both economically inefficient and subject to abuse, that an agreement to arbitrate potential disputes within the United States will not subject them to these most American of procedures. ▲

The author is a member of the Singapore Institute of Arbitrators and a partner in the Seattle office of the Perkins Cole law firm and specializes in international and domestic dispute resolution. He is a member of the Panel of Arbitrators, the Asian-Pacific Center for the Resolution of International Business Disputes, the British Columbia International Commercial Arbitration Centre, the Commercial Arbitration Association of The Republic of China, the center for International Commercial Dispute Resolution in the Asia-Pacific Region and a member of the China-U.S. Conciliation Center Advisory Committee, among other dispute resolution and professional organizations.

This Article appeared originally in The Lawyer magazine, London, April 19, 1994.
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TAKING UP A ROLE ON THE WORLD STAGE

By David Wagoner

David Wagoner recommends using a neutral expert in international disputes.

There is a growing need for neutral experts in resolving international disputes. Arbitration has traditionally been considered a faster, less costly alternative to court proceedings, but it has recently taken on many of the characteristics of court litigation, leaving alternatives dispute resolution (ADR) as an attractive alternative.

Using neutral experts to determine the issues could help. The process of expert determination is voluntary, requiring the parties' agreement.

Expert determination by agreement has a long history. Although its possibilities are limitless, in the US at least there is a general reluctance to use experts to make determinations as fact finders or decision makers.

The Center for Public Resources in New York, an organisation dedicated to the promotion of ADR, has developed a model agreement for neutral expert fact-finding in intellectual property disputes. The key ingredients of this model agreement are:

- a clear definition of the issue to be resolved;
- provisions relating to the information to be supplied to the expert;
- a process for conducting the expert's fact-finding programme;
- preparation of an interim report;
- preliminary findings;
- an opportunity for parties' comments in the preparation of a final report.

The expert's findings are binding and conclusive between the parties, and confidentiality is a vital part of the agreement.

Another use of neutral experts in the resolution of international disputes is when they are appointed by the court or arbitral tribunal before whom the dispute is at issue. The purpose of the appointment is not to delegate decision making to the expert, but to provide instead a neutral expert to assist the tribunal in the resolution of the case. It is generally believed that both a trial court and an arbitral tribunal have the inherent power to appoint an expert.

In the US this practice was codified in the federal court through Rule 706 of the Federal Rules of Evidence promulgated in 1975. The basic provisions of Rule 706 are that a court may, on its own motion or the motion of any party, appoint an expert who is either agreed upon by the parties or of its own selection. The court informs the expert of his duties in writing, which is available to the parties; the expert advises the parties of his findings and the parties are allowed to challenge those findings through deposition, by calling the expert to testify, and through cross-examination.

In the US, as in Britain, the actual appointment of a court expert does not often happen. One reason is the healthy scepticism that lawyers often develop about an expert's neutrality. Another is the concern that court-appointed experts may acquire an aura of infallibility to which they may not be entitled.

The appointment of an expert to assist in an arbitral tribunal in an international dispute is provided for by the rules of many arbitration associations.

The American Arbitration Association's International Arbitration Rules, Article 23, provide that the tribunal may appoint one or more independent experts to report to it in writing on specific issues designated by the tribunal and communicated to the parties.

Similar provisions for the appointment of experts by arbitral tribunals are found in the UNCITRAL arbitration rules, Article 27; the Rules of the London Court of International Arbitration, Article 12; and the Chartered Institute of Arbitrators Arbitration rules, Article 10. ICC Rules, Article 14.2, simply provide that: 'The arbitrator may appoint one or more experts, define their terms of reference, receive their reports

and/or hear them in person."

Because of the confidentiality on international arbitration proceedings, it is difficult to find out how often arbitrals tribunals utilise their power to appoint an expert. It is safe to assume that the same reluctance found in court practice exists in international arbitration practice.

It seems inevitable that the use of appointed experts in international arbitration proceedings will grow as disputes become more technical and complex. In the US, the Carnegie Commission recently completed a study on the subject of judicial decision-making in an increasingly complex technical and scientific world. The study was concerned about the courts' ability to handle complex scientific and technological issues on the frontiers of science where scientific evidence is uncertain or incomplete.

One solution is to use tribunal-appointed experts to help in all phases of the decision-making progress. This assistance could include helping the fact finder understand the technical terminology, the nature of the issues and the opinions of the parties' experts.

The appointed expert could suggest procedures for presenting expert testimony in an orderly and understandable fashion.

The neutral expert could also be asked to give an advisory opinion. In the future, the process of arriving at rational decision-making in an increasingly sophisticated, scientific world will make the appointment of a neutral expert a compelling alternative. ▲

NEWSFRONT

BASIC MEDIATION WORKSHOP
24 - 25 November 1994

ADVANCED MEDICATION WORKSHOP
24 - 27 November 1994

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organised by
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BOOK REVIEW

INTERNATIONAL COMMERCIAL AND MARITIME ARBITRATION
by Philip Yang, FCIArb, ACII, FICS, Master Mariner

Reviewed by *Raymond Kuah, MSIA, ARIBA, ARIAS, FSIArb, FCIArb, FBIM*

It takes considerable temerity and impetus for the author, who is a well-known Hong Kong maritime arbitrator with wide experience, to have undertaken such an unenviable task of launching a book in Chinese on *"International Commercial and Maritime Arbitration"*. Only those who are conversant with Chinese language can truly appreciate such an immense task. Indeed, the book is hardly for "light reading" for the enthusiastic students and practitioners alike who may wish to acquire a general overview of international commercial and maritime arbitration.

The book seeks to discuss and examine the ways in which the process of international commercial and maritime arbitration works, and how it deals with the realm of the practice of international commercial and maritime arbitration.

This is as much a book for laymen as it is for practitioners. The author attempts to cover an immensely wide subject in a relatively small book; and ought to be commended on his difficult undertaking that combines clarity and at the same time able to deal with various aspects of the international arbitral process and provide a wealth of information in readily accessible form. It should be a useful tool for those who wish to make reference therein. Indeed, it should have an appeal to the serious Chinese educated student of the law of arbitration who would most profitably turn to this book for its descriptions of arbitral process in the field of commercial and maritime arbitration.

It is quite clear, as the author has mentioned in his introductory chapter, that the primary framework of this book is centred around the English system of the practice of international commercial and maritime arbitration. In fact, the English Law is also well discussed, both in its general and international aspects.

This book does not easily lend itself to comparison with others because of its approach. There are some ten Chapters and each of which is broken down into a numbers of sections. As an example, Chapter Six and Seven deal with arbitrator's power and responsibility inter se. There are some ten appendices among which the English Arbitration Acts 1950; 1975; 1979; The L.M.A.A. Terms (1987) are set out therein.

This book is unbelievably low-priced. Those who wish to purchase the book should contact the author at Unit A, 18th Floor, Casey Building, 38, Lok Ku Road, Hong Kong. ▲

ANNOUNCEMENT

COURSE DIRECTORS:
The Hon. Justice Neil Kaplan of Hong Kong
and
Raymond Kuah Leong Heng, President, Singapore Institute of Arbitrators

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NEWSFOCUS

The following were admitted to membership of the Institute during second quarter of 1994

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TRANSFER FROM MEMBER TO FELLOW (By Examination)

Engelin Teh Guek Ngor

Raymond Chan

MEMBERS

Wong Chong Thai, Bobby

Dr. Sim Loo Lee

Neo Kok Leong

ASSOCIATE MEMBER

Oon Soon Lee, Dennis

WHAT IT SHOULD HAVE BEEN...

Of the congratulatory message extended to Mr. John H. M. Sims in the last issue of the SIArb Newsletter, he was inadvertently referred to as "President" of CIArb when it should have been CHAIRMAN of CIArb.
The current President of Chartered Institute of Arbitrators is of course The Rt. Hon. Sir Thomas Bingham, MR, FCIArb.
We apologise for the error.

NATIONAL DAY AWARD (9TH AUGUST 1994)

CONGRATULATIONS *to Assoc. Prof. Khoo Chen Lim, Chairman, Urban Redevelopment Authority, on being awarded The Public Service Star.*

CONGRATULATIONS *to Mr. Chiam Boon Keng, Registrar, Supreme Court, on being awarded The Public Administration Service (Gold).*

CONGRATULATIONS *to Mr. Richard Rokmat Magnus, Senior District Judge, Subordinate Courts, on being awarded The Public Administration Service (Gold).*

CONGRATULATIONS *to Mr. Jeffrey Chan Wah Teck, Director, Legal Services, Ministry of Defence, on being awarded The Public Administration Medal (Silver).*

CONGRATULATIONS *to Mr. Frank J. Shelton, Past President, Institute of Arbitrators Australia, on being appointed as an Australian County Court Judge.*

The SIArb Newsletter is a quarterly publication of the Singapore Institute of Arbitrators. Distribution is restricted to members and those organisations and institutions of higher learning associated with the Institute.