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VIEWPOINT

MEDIATION *by Lesile Chew, LLB(Hons), FSIArb, FCIArb*

As all lawyers and those either involved directly or indirectly in the process of dispute resolutions know, the traditional approach of litigation in Court is increasingly being re-examined to see if better and more efficient methods of dispute resolution can be found for at least certain types of disputes. For the most part lawyers have been blamed perhaps unfairly for the increasingly expensive litigation they get their clients involved. Added to the expense, so the argument goes, is the fact that quite often litigation in Court do not always provide the desired result of the parties who must necessarily hand over control of the dispute resolution process to lawyers and Court procedures. Further it is often noted that litigation almost always destroys the business relationship of parties. In the litigation process there is inevitably a loser and a winner - somebody goes away unhappy every time and often both parties to the dispute will walk away unhappy, the loser because he loses and the winner because he may have spent more time and money in the dispute process than he had first anticipated.

In recent times therefore it is not surprising that alternative methods of dispute resolution (different from litigation in Court) are being explored and increasingly encouraged even by the Judiciary. Better and more efficient case management leading to earlier and more cost effective Court assisted settlement of cases prior to trial are more and more the main approach of judges all over the world.

Better case management in the Courts (as for example in Singapore where both in the Subordinate and High Courts the Pre-trial Conferences are used to "encourage" parties to seriously explore settlement options without trial) have in turn encouraged the exploration of other alternative dispute resolution methods such as mediation. Of course the traditional and one could argue the "original" alternative dispute resolution method is Arbitration. However while arbitration as a means of dispute resolution alternative to the litigation process has been well established particularly in specialised fields such as construction disputes, arbitration has over the years taken on more and more of the structured approach of the Court system which it had originally sought to be an alternative to. Most parties involved in complex arbitrations would find that too many arbitrators and therefore arbitrations adhere too closely to Court procedures so that some of these arbitrations prove to be just as cumbersome if not more cumbersome than litigation in Court.

Against the backdrop of arbitration itself becoming as cumbersome as litigation in Court and perhaps also just as expensive (some can even prove to be more expensive) it is little wonder that the Judiciary in Singapore are themselves, in collaboration with the Singapore Academy of Law, driving the impetus towards resolution of certain suitable litigation cases through Mediation. Thus for some time prior to August 1997, the Singapore Academy of Law had established a sub-committee under the chairmanship of Justice Goh Joon Seng , to run a pilot programme to introduce and encourage the resolution of suitable cases through mediation rather than through the trial process - this was the Singapore Mediation Service. As is now well known this Mediation Service has been fully converted to the Singapore Mediation Centre which was launched by the Chief Justice on 16 August 1997.

It should also be noted that even prior to the official setting up of the Singapore Mediation Centre, the resolution of disputes through mediation had already been introduced in the form of the Court Dispute Resolution Mediation in the Subordinate Courts - this has been going on for some time now. With the official setting up and launch of the Singapore Mediation Centre however, it can be expected that Mediation as an alternative means of dispute resolution in Singapore will be both encouraged and further enhanced in the days to come so that suitable cases which would otherwise have become mired in endless litigation can and will be diverted to the more flexible less structured approach of Mediation.

What is Mediation?

Like all new things, Mediation in Singapore being a new field or area of dispute resolution, suffers from being something everyone talks about at least in passing and something everyone claims to know something of. That being the case it is perhaps not too early to ask the question just exactly what is Mediation.

While we may all claim some knowledge of what Mediation means it is perhaps useful to examine first what it is as a matter of definition or description. Mediation is susceptible to different interpretations and therefore definitions. However generally speaking it can be said to refer to a method of dispute resolution which does not involve the strictures of the Court (and its attendant rules and procedures) and the more adversarial approach of the trial but adopts rather a negotiated form of conflict resolution. The following is a definition referred to by Professor Neil Gold in his paper "The Potential of Mediation" (Feb 1997) which is in turn an adaptation from the Canadian Bar Association Task Force Report on ADR published in Canada in 1989:

"Mediation is the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no decision making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute. Successful Mediation result in a signed agreement or contract between the parties which prescribes the future behaviour of the parties. Such agreement has the form of a contract and, when signed becomes binding and enforceable."

The Essence of Mediation

Mediation like any other method of dispute resolution requires the intervention of a third party who is neutral and impartial to the disputing parties just as a judge in the case of a trial and an arbitrator, in the case of an arbitration. The Mediator is the neutral and impartial third party in Mediation - the Mediator beings to bear upon the parties and the dispute all his abilities and skills as a mediator to bring about or at least attempt to bring about a negotiated settlement to the dispute. If that is the essence of Mediation then, the key to successful mediation is a "well trained and skilful mediator".

The Mediator

If the Mediator is the key to a successful mediation then the Mediator must be trained to possess the right skills and abilities to assist and facilitate the mediation process. The Mediation process unlike judicial processes as in a trial process, is more interest-based rather then rights-based. In view of this fundamental difference, the Mediator must possess the ability and skill to differentiate the mediation process from that of a trial or arbitration. Thus the mediator in a Mediation must principally concern himself and assist the parties to concern themselves with their underlying needs, concerns and goals (their interests) to utilise these as the bases of reaching an agreement rather than focussing on their "legal rights or obligations".

Since the mediator is neither a judge nor an arbitrator and since he is also not an advisor, the mediator is not meant to judge or to arbitrate and certainly not to advise the disputing parties through a mediation. Rather, the mediator "employs a combination of analytical and communication skills to assist the parties to focus on the real issues between them and to bridge their conflict in order to derive a result that satisfies as many of their needs as possible"[1]. Through the above process, the mediator helps the parties to identify their true disputes and assist them in devising a variety of optional solutions that aim to meet diverging or mutual needs. [2] It is therefore important to note a fundamental difference between a mediator and a party's counsel - a mediator is neither a negotiator nor the source of solutions but in the ideal situation, the mediator provides each party the opportunity to find the strength to seek wise and personally satisfying solutions. [3]

Basic Requirement of a Good Mediator

Since a mediator is neither a judge nor an advocate, but is a neutral and impartial party seeking to facilitate the discovery of the real interests of the parties in a dispute, he must be able to approach the disputing parties in a manner which will allow him to discover the real interests of each of the disputing parties. One of the mediator's most important skills is his ability to undertake "Active Listening". Active Listening has been identified as "one of the mediator's most powerful tools". [4] Active Listening is the technique the mediator uses to understand what is really going on with the party in dispute and it is a skill that every mediator must learn, must practice and must use in all stages of mediation. [5]

The Attributes of a Good Mediator

It has been suggested that there are twelve principles which a good mediator should rely upon and emphasize and these are the following: [6]

1. Place the service of others above all other goals.
2. Always turn the other cheek.
3. Leave no stone unturned.
4. Seek first to understand, then to be understood.
5. Maintain neutrality.
6. Be prepared.
7. Fulfill all commitments which you make.
8. Seek to empower, not to diminish.
9. Be honest in all dealings.
10. Be satisfied with private victory.
11. Be courageous in living by your principles
12. Above all, do no harm.

Against the backdrop of the requirements of a good mediator, the good mediator employs various techniques in order to get at the underlying interests of each party to a dispute and more critically to facilitate each party in getting to a negotiated settlement. One of the facilitative approaches is to pose the following five key questions to each of the disputing parties to focus them to their true position in the dispute as opposed to the position they may have adopted based on emotion rather than objective criteria:

1. What are the strengths of your case?
   - This question helps the mediator to understand the party's case but at the same time helps the party believe that the mediator sufficiently understands his case to represent his position adequately.
2. What are the weaknesses of your case?
   - The analysis of weakness is designed to engender a frank assessment by the parties of their position and to plant seeds of uncertainty that will generate movement towards settlement.
3. What is your percentage likelihood of winning?
   - This question is designed to determine how good the chances are of prevailing. It is used because it demonstrates that even a good case has some chance of being lost.
4. What is the range of most likely potential results?
   - Combined with question 3, this question allows the mediator to undertake a probability risk analysis to determine the potential range of settlement.
5. What do you think the other side will offer in settlement?
   - This question is designed to further define a realistic range of settlement. The corollary to the question is what the party concerned is willing to offer in settlement of his case.

The Basic Mediation Model[8]

The basic mediation model or format such as those taught in mediation training in Hawaii, involves two stages or phases namely the Forum and Negotiation Phases. Each of these phases can then be divided into different stages:

The Forum Phase

1. The Mediators' Opening - Opening Session
2. The Disputants' Statements
3. The 1st Private Caucus

The Negotiation Phase

1. The 2nd Private Caucus
2. The Joint Session (To Negotiate General Terms)
3. The Drafting Session - leading up to a settlement being drafted.
4. It is perhaps useful to examine briefly each of the above stages to appreciate the basics of these stages:

The Forum Phase:

The Opening Statement - This is the start point of the Mediation and is first led by the Mediator(s) who state briefly what the Mediation is about and their roles as Mediator(s). Frequently and very necessarily Mediators will seek to assure and allay the fears of the parties before him or them to set a positive tone for the Mediation. Courtesy remarks and salutations and even "small talk" may not be out of place.

The Disputants' Statements - At this juncture the Mediation process can take a fundamentally different turn from the Trial in that it is at this stage that the Mediator will frequently allow the parties to state their case in brief. Note that frequently the Mediator will invite the parties themselves rather than their counsels to state their cases. This can be a useful differentiation from a Trial where certainly only the counsels have speaking rights as it were. The flexibility of allowing the parties to state their own cases empowers the parties in that it gives them the feeling that they still maintain control of their own cases or least a feeling that they have not lost total control .

The 1st Private Caucus - As the name suggests it is a meeting held in private in the sense that the Mediator meets with each of the parties separately "caucusing" with them to get at the real feelings and positions of each of the parties in the absence of the other party. Where the Mediation involves a single Mediator it requires the Mediator to shuttle back and forth between the parties, giving rise to the adage "shuttle diplomacy". It is in these private sessions as opposed to the Opening Session and Disputants' Statements stages which are conducted jointly with all parties at one go, that parties can speak openly, even critically of their own and more importantly the other party's position as they perceive it. Thus it can be seen that this private session if used skilfully or by a skilful Mediator, can prove to be very effective in getting at the real "interests" of the parties rather than their legalistic positions or non-bargainable positions rooted in emotion rather than rationality.

The Negotiation Phase

The 2nd Private Caucus - Frequently there will be a need to have another round of private caucuses to either iron out the last difficulties or to steer the parties back to the correct track if they have strayed. Sometimes it is for the Mediator to "extract" a little more from one party out of "ear-shot" of the other.

The Joint Negotiation Session (to negotiate General Terms) - After the private caucuses and after the Mediator has had a better understanding of the issues and interests of the parties through such sessions, the Mediation then moves back to a joint session where again all parties are together speaking in the presence of all concerned. At this joint session the parties facilitated by the Mediator attempts to negotiate specifically on their interests which they wish to protect or advance. This is a delicate stage where the Mediator must exercise considerable diplomatic skill employing his new-found knowledge obtained during the private caucus with each party.

The Drafting Session - If the Mediation reaches this stage then it is this stage that works on the negotiated settlement in a specific formal way to produce an agreement which will bind the parties. This is stage is perhaps all too familiar to the lawyers in that it involves the parties negotiating the specific terms. It is to be noted however, that in Mediation, this stage is the last lap as it were and not the battleground in which lawyers pit their skills to outmanoevre the other side. Of course there is no doubt that the lawyers will be intimately involved in this phase of the process.

The Non-Caucus Model: What has been described briefly above is the model which utilises the private caucus as a facility towards the resolution of differences between the parties, hence it is frequently referred to as the Caucus Model. The alternative is the Non-Caucus Model which as the name proclaims does not entail the Mediator going into private caucuses with each party to the exclusion of the other party. Instead in this model all the stages are carried

out in joint sessions where all concerned the parties, their counsels and the Mediator are all present all the time.

The comparative differences, benefits and problems of the two models are too numerous to be dealt with in detail here or even to be listed in any exhaustive fashion here. It is however worth noting that quite obviously in the Non-Caucus model parties are expected (though they may find themselves to be more constrained instead) to be more open and frank with one another and the Mediator since they are all present in the same session without any opportunity to say things away from the other side. Further it is also quite evident that if a party desires to state a position say provisionally without letting the other side know of it as yet but without appearing to want to "hide" the same this would be difficult if not impossible outside of a private caucus.

Mediation in Practice

In practice, certainly in Singapore in these early days of Mediation, most parties and their lawyers will invariably view Mediation as yet another judicial process foisted on them by a pushy judge or registrar to "settle" the case when they, the parties and their lawyers already know that any further attempts at "settlements" will be fruitless. This sort of attitude is unhelpful but understandable for unless the lawyers are familiar with the objectives and intent of Mediation, at least the theory of it if not the practice thereof, then the feeling that Mediation is just another attempt to wrest control of the case from the rightful parties namely the disputants and their lawyers is certainly an inevitable one. It is for the Mediator and his handling of the process that must somehow assuage this negative feeling or misconception. Certainly there is no doubt that the Mediation process if properly and skilfully carried out can be successful both in resolving disputes and in helping disputants understand and appreciate that there are more benign and productive alternatives to a litigation process which always attract unnecessary grief in terms of time and money as well as making enemies of parties who may have been good business partners to begin with, destroying any goodwill they may have built up over time and in the process killing any chance of rehabilitation of bruised relationships.

It is submitted that one of the keys to ensuring that disputant parties and their lawyers do not go away believing that the Mediation process is nothing more than yet another side-show or diversion foisted upon them to save the Court's time or to socially engineer out of our system of justice the adversarial approach to resolving disputes altogether, is to devise a system whether institutionally or otherwise to ensure that ONLY suitable cases susceptible to resolution through mediation are referred to Mediation. It is not difficult, in this writer's view to see that there would be cases where Mediation is not appropriate - these are cases which are firstly complex (whether by virtue of the facts or the law) and secondly where it requires or need a more authoritative pronouncement of rights or obligations than merely by contractual agreement.

Concluding Observations

It is timely that Singapore's judicial system has added yet another dimension to provide for more efficient and innovative dispute resolution processes. Given the drive by Singapore's Judiciary to shift the focus in legal services from the traditional approach of "the client must have his day in Court" to more efficient and cost effective methods of dispute resolution, with proper management and education, Mediation is set to play an important role to the whole process of dispute resolution in Singapore. This writer believes that three factors are important to the successful development of Mediation in Singapore.

(1) The selection and allocation of the right type of cases for Mediation.
(2) The training of Mediators.
(3) The education of lawyers on Mediation and their role in the context of Mediation.

In respect of the factors enumerated above, this writer would argue that the proper and sensible selection and allocation of cases for Mediation is the key to persuading or "educating" lawyers (who obviously have an important role to play in advising clients on the merits of Mediation) to make a "paradigm shift" and so as not to alienate them by allowing them to think that Mediation is yet another ploy to reduce the importance of lawyers and their role in dispute resolution. ▲

Footnotes

(1) The Potential of Mediation - A paper by Professor Neil Gold, Faculty of Law, University of Windsor, 7 February 1997.
(2) Ibid. (3) Ibid.
(4) State Bar Mediation Training Presentation by R. Stephen Goldstein, October 1996.
(5) Ibid.
(6) From a paper by J. Ross Hostetter, Dean of the American Academy of Attorney - Mediator, Irving, Texas.
(7) From training materials prepared for the British Columbia Association of Attorney Mediators by the American Academy of Attorney-Mediators, Irving, Texas, USA.
(8) From an extract by Professor John Barkai, University of Hawaii, Law School.

COMMUNITY MEDIATION CENTRES ACT

The Straits Times, Wednesday, 8th October 1997, reported that Parliament had on 7th October 1997 passed the new Community Mediation Centres Act, which was announced by the Minister of State (Law), Ho Peng Kee.

The Institute indeed welcomes the timely enactment by Parliament of this new Act, the aim of which is to provide resolution of disputes by community leaders acting as mediators to help resolving disputes in a non-confrontational way. The Minister of State (Law) went on to say that there will be a pool of trained mediators whose expertise shall form the backbone to the success of the new Community Mediation Centres Act. "Mediators will be carefully selected. They will be bound by a Code of Conduct to uphold confidentiality and to safeguard any personal information made available to them in the course of mediation", said the Associate Professor Ho.

The new Act empowers the Minister for Law to authorise suitable community leaders with the necessary temperament, standing and experience to conduct mediation sessions at these community mediation centres. "This framework envisages a network of CMCs spread over different parts of Singapore to bring mediation to the ground. We hope to set up the first CMC to be co-located with a regional Small Claims Tribunal somewhere in the eastern part of Singapore by early next year".

Members of the public are encouraged to settle relational disputes, not involving a sizeable offence, at the CMCs on a voluntary basis. These would include quarrels between neighbours, family members, and members of the local community. Under the scheme, neighbourhood police MPs, and neighbourhood leaders would be able to refer disputes to the Community Mediation Centres. "Overtime, we will develop a pool of such leaders who will help to promote inter-personal relationships and stronger community bonding amongst our residents", he said.

The mediation session, conducted with as little formality and technicality as possible, would not required rules of evidence , and parties need not be represented by lawyers. He added that settlement would not be binding but the parties may enter into a written agreement stating clearly that it was binding on them. Breach of the agreement could then provide the basis for a civil action for breach of contract.

He also reveal that a new Alternative Dispute Resolution division will be set up in the Law Ministry to provide overall coordination and promotion of mediation activities here. ▲

RKLH

AMENDMENT TO LEGAL PROFESSION ACT

On 27 February 1992, the Legal Profession (Amendment No. 2) Act 1991 was passed by Parliament. It came into force on 27th March 1992. The amendment to the Act was rendered necessary by the High Court decision in Turner (East Asia) Pte. Ltd. v Builder's Federal (HK) Ltd. & Anor {[1988] 2MLJ 280} in which the Court ruled against foreign lawyers appearing in arbitration proceedings. ***Such amendments had effectively reinstated the rights of parties to select their own representation in the arbitral proceedings.***

The wordings of the new Section 34A are set out hereinunder:

"34A(1): For the avoidance of doubt, it is hereby declared that Sections 32 and 33 shall not extend to any person acting as an advocate and solicitor in-

(a) Proceedings before an arbitrator or umpire lawfully acting under any written law relating to arbitration (referred to in this section as arbitration proceedings) where the law, designated by the parties or otherwise determined by the rules of the conflict of law, as applicable to the dispute to which the proceedings relate is not the law of Singapore; and

(b) Arbitration proceedings, where the applicable law referred to in paragraph (a) is the law of Singapore, if that person appears in the proceedings jointly with an advocate and solicitor who has in force a practising certificate.

(2) Nothing in this section shall be construed as derogating from or adversely affecting any power or right of any person to appear or act in arbitration proceedings or in connection therewith. ▲ ***RKLH***

CONFERENCE

Announcement

The 14th ICCA Congress will be held in Paris from 27 to 30 May 1998 and will be hosted by the Comite Français de l'Arbitrage. The theme of the Congress has now been announced and is as follows:

Increasing the Effectiveness of Arbitration Agreements and Awards (in the light of 40 Years of Application of the New York Convention)

Those of you who are interested in international arbitration may obtain a notice of the Congress (with a reply coupon to register your interest with the Comite and obtain further information) from HKIAC.

LEGAL DEVELOPMENT AFFECTING ARBITRATORS

ARBITRATION ACT 1985 - 'ARISING OUT OF AN AWARD' IN S.28

The jurisdiction of the High Court to review arbitration awards under section 28 of the Arbitration Act, 1985 (Cap 10) is confined to any 'question of law arising out of an award'. There are two components to the phrase quoted. The first is that it must be a question of law. But that alone is not sufficient. There is a further requirement - the question of law must arise out of the award. The following note concerns this second requirement.

Is the phrase 'arising out of an award' a descriptive term in that any question of law arising out of an arbitration and finalized in the award may be appealed - or are the words one of delimitation so that only questions of law arising out of the award, as distinct from the arbitration, may be raised.

The English courts have adopted the narrower view. It was first approved by Goff J. in ***Mondial Trading Co. G.m.b.H. v. Gill and Duffus Zuckerhandelsgesellschaft m.b.H.***(1) and restated by him the ***The Barenbels*** (2). In the latter case the judge of the first instance allowed extrinsic evidence to be admitted in an appeal from the arbitrator's decision. Robert Goff L J (as he then was), in giving the judgement of the Court of Appeal, said (at 532):

> *'..., if such an appeal is to be brought, it must in our judgement be based upon material which is contained in the award and reasons of the arbitration tribunal, and cannot be based on extraneous evidence as is done where, for example it is sought to allege misconduct on the part of an arbitrator. If a party wishes to raise a point on an appeal to the High Court, he should invite the arbitration tribunal to make the necessary findings of the award; if no such findings are made, he can apply to the court for an order, under s.1(5) of the Act, for further reasons to be given, though he should not expect the court to react enthusiastically to such an application in a case of this kind.*
>
> *No such application was made in the present case. So the only subject matter which it was proper for the learned judge to consider, with regard to the appeal before him on a question of law arising out of the arbitrators' award, was the award itself which of course included the reasons given by the arbitrators for reaching their conclusion.'*

Similarly in ***Universal Petroleum Co. Ltd. v. Handels Und Transport G.m.b.H.***(3), Kerr and Nourse L.JJ said (at):

> *'...(ii) Under subsection (2) appeals are only permitted 'on any question of law arising out of an award....', and question of law in subsection (4) has the same meaning. The emphasized words are crucial. The question law must arise out of (the) award, not out of the arbitration. The emphasized words are entirely consistent with, and preserve, the settled restrictions on challenges to primary findings under the former system.'*

In Australia, Victoria adopted the strict interpretation advocated in *Universal Petroleum*. New South Wales initially followed Victoria but have since moved away from that position. Initially the courts justified their departure on the ground that those documents were referred to in the arbitrator's award and reference to them was necessary to understand the arbitrator's decision.

The issue was specifically raised before Smart J in the Supreme Court of New South Wales in ***Warley Pty Ltd v. Adco Constructions Pty Ltd*** (4). One of the matters adverted to in that appeal was the failure of the arbitrator to deal with a substantial body of evidence which was adduced during the arbitration hearing but not dealt with in the award. The proprietor, Warley Pty Ltd appealed to the Supreme Court. Naturally the respondent, Adco Constructions Pty Ltd argued that only those questions of law which arose out of the award as distinct from the arbitration could be considered. Since the point raised by the proprietor did not arise out of the award but rather out of the arbitration, it should not be heard.

Unlike the English Act, the New South Wales Commercial Arbitration Act 1984 does not confer the court the power to order an arbitrator to set out the reasons for his award. Smart J had to decide between the wide interpretation, as was advocated by the proprietor, and the narrower application, as was advocated by the respondent and supported by the English authorities.

In the end, Smart J opted for the middle course (at 147 - 148)

> *The proprietor submitted that 'award' in the context of s.28 was a descriptive term and that in arbitrations this is the form which the arbitrator's decision takes. The phrase 'arising out of an award' mean arising out of the arbitrator's decision including the reasons given. While I would not give a narrow meaning to the word 'award' I would not approach the matter as broadly as the proprietor, as indicated earlier, I would not exclude reference to necessary background materials and those necessary to understand the award and assess the point being made. However, I would draw the line at considering the evidence to assess a no evidence point. The arbitrator is a master of the facts.'*

The judge was particularly concerned with the situation before him in which the arbitrator failed to deal with a substantial point or body of evidence. On this issue he held that such failure on the part of the arbitrator amounted to a question of law arising out of the award (at 147):

> *'...The question of law arises out of the award - it does not deal with a necessary matter.'(5)*

The trend was followed in ***R.P. Robson Constructions Pty Ltd v. D & M Williams*** (6), where Giles J Held that it was not only appropriate but necessary to refer to counsel's submissions during the appeal. Earlier in ***Stavropoulos v. Kordas*** (7), the Full Court of New South Wales, in an appeal, considered the entire transcript of the proceedings before the arbitrator without first deciding on its admissibility. Similarly the Court of Appeal of New South Wales in ***Reynard Constructions (ME) Pty Ltd v. Minister for Public Works*** (8) referred to the transcripts, pleadings and even to some of the correspondence when the matter went before them.

In Singapore, the power of the High Court to order an arbitrator to provide reasons or sufficient reasons is broadly provided for in s.28(5). Nevertheless this power is limited to cases where it appears that the award does not or does not sufficiently set out the reasons for the award. Accordingly it is in cases where it is apparent that there are no reasons or insufficient detailed reasons for the court to consider a question of law arising out of the award that resort to this procedure will be granted. The English courts have also held that the jurisdiction under s.28*5) should be used sparingly as such orders will inevitably lead to a process of 'toing and froing' between the court and the arbitrator, with the consequent escalation in costs and delays.

It may seem trite to remind arbitrators that they should deal with all issues raised in the arbitration and give reasons for his or her decisions on all those issues. This will avoid the necessity for any party of having to apply for further or more detailed reasons, as the consequence of such an application is to postpone the effective finality of the award that the Act intends it should have.

Singapore's section 28 is similar to the English equivalent. In legal theory at least, it is attractive to follow the English position and adopt the narrower view. England, however has had a longer history and experience in arbitration - and with that, more experienced arbitrators. In my view there are practical reasons for adopting the middle course taken by the courts in New South

Wales. Although the High Court of Singapore has the power to order an arbitrator to provide reasons or sufficient reasons for his award, such power is not without its own strictures. In fact, it may be worthwhile to consider requiring all arbitrators to provide reasons for their decisions, as is the case generally in Australia. ▲

Lim Chuen Ren

FOOTNOTES

(1) (1980) 2 Lloyds Rep. 376 (2) (1985) 1 Lloyds Rep. 528 (3) (1987) 2 All E R 737
(4) (989) BCL 141 (5) see also Re Poyser and Mills Arbitration (1964) 2 Q.B. 467
(6) (1990) 6 BCL 219 (7) unreported, 24 October 1987 (8) (1992) 26 NSWLR 234

VANOL FAR EAST MARKETING PTE. LTD. v. HIN LEONG TRADING (PTE) LTD.(1997) 3 SLR 484

The issue in this case was whether the particular arbitration fell within the definition of "international arbitration" in the International Arbitration act ("IAA") (Cap. 143A).

The respondents contracted to sell high sulphur fuel oil, fob Yosu, South Korea, to the applicants. Both were companies incorporated in Singapore. The fob contract provided for laytime and for demurrage to be paid by the respondents where the laytime under the fob contract was exceeded. The applicants duly nominated a vessel. The allowed laytime was exceeded and the applicants claimed demurrage. The claim was referred to arbitration, and the arbitrator found in favour of the respondents in his award. The applicants therefore sought leave to appeal under s.28 of the Arbitration Act (Cap 10) ("AA").

The present action was concerned with the respondents' preliminary objection that the AA was in applicable and that instead, the proceedings were governed by the IAA. It was clear that the arbitration proceedings were commenced after the IAA came into force. The question was whether it was an "international" arbitration within that Act. The distinction was important as the court would have different powers in relation to awards under the two Acts.

Christopher Lau JC recognised the restricted power of the court to review arbitration awards under the IAA, as compared with the right of appeal (albeit also limited) under the AA. To resolve the issue, he examined s.5(2) of the IAA, which gives the criteria for an "international" arbitration. S.5(2) states:

> Notwithstanding Article 1(3) of the Model Law, an arbitration is international if:
>
> (a) at least one of the parties to an arbitration agreement at the time of the conclusion of the agreement, has its place of business in any State other than Singapore; or
>
> (b) one of the following places is situated outside the State in which the parties have their places of business:
>
> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
>
> (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with the subject-matter of the dispute is most closely connected, or...

Since both parties were incorporated in Singapore, and the arbitration was conducted in Singapore, s.5(2)a and (b)(i) were inapplicable. The focus therefore fell upon s.5(2)(b)(ii). The respondents' argument was that the place where a substantial part of the obligations of the fob contract were to be performed, or the place with which the subject-matter of the dispute was most closely connected, was Yosu, South Korea, and not Singapore.

The respondents based their argument on a number of points. First, based on a detailed table of obligations which they drew up, they showed that a preponderance of the obligations under the fob contract was to be performed in South Korea. They also submitted that the place of performance of an fob contract was the place at which the cargo was delivered on board the nominated vessel. Here, that place was South Korea. They also argued that the place with which the subject-matter of the dispute was most closely connected was Yosu, South Korea, since the delay in berthing, leading to exceeding of laytime allowed, was due to circumstances at Yosu.

The applicants relied on the following points: the fob contract was made in Singapore between two companies registered in Singapore, which selected Singapore law as the governing law. In addition, they argued that the shipping and payment arrangements were to be made in Singapore. This did not persuade Lau JC. He held that, although shipping (nomination) and payment arrangements were important, they "did not solely determine the issue". Instead, he held that:

> "....under s.5(2)(b)(ii) each of the various contractual obligations to be performed by the applicants and the respondents under an fob contract, has to be examined in detailed and if such examination indicates that the place where a substantial part of the obligations of the commercial relationship between the parties such as, delivery of the cargo, is to be performed outside Singapore or the place with which the subject-matter of the dispute is most closely connected is outside Singapore, the provisions of s.5(2)(b)(ii) are met and the IAA provisions will apply."

It was held that the place of substantial performance of obligations was South Korea, and the place with which the subject-matter of the dispute was most closely connected was Yosu, South Korea. This meant that the arbitration was "international" within the meaning of the IAA. The respondents therefore succeeded in their preliminary objection. As it was common ground that the grounds for what Lau JC referred to "appeal against an award" under the IAA were inapplicable, the applicants' application for leave to appeal against the arbitration award was dismissed.

This case is interesting in that it is one of the first in Singapore to determine applicability of the IAA. In so doing, it provides an indication that the courts will not simply look at a few contractual obligations of the parties (although important ones). Rather, each obligation of each party has to be examined. In this respect, the respondents' diligence in preparing a table of obligations showing that most of them were to be in South Korea, paid off.

Secondly, the so-called grounds of "appeal" against awards under the IAA referred to by Lau JC are really divisible into two categories. The first category referred to, where there is an issue as to capacity of a party, validity of the arbitration agreement, validity of the notice of appointment of arbitrator, or whether the subject-matter may be beyond the terms of the reference, or whether the dispute is capable of settlement by arbitration under Singapore law, or *enforcement of an award* (italicised words were omitted in the judgement) is against public policy, are grounds for a court to *refuse enforcement of an award under s.31 of the IAA*. They are therefore not strict grounds for "appeal". The second category referred to, cases where there is fraud (he omitted corruption) or a breach of natural justice, are grounds for *setting aside an award under s.24*. To avoid confusion between these and the grounds of appeal under the AA, it is probably best not to refer to the above grounds under the IAA as those of "appeal". ▲

Locknie Hsu
Senior Lecturer NUS

NEWSFOCUS

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

FELLOWS (By Examination)

MORGAN Robert James Marcello
BODDY Ronald Victor
HOWELL David John

Transfer to FELLOW

JC Choo Han Teck

MEMBERS (By Examination)

HEE Theng Fong
LEK Siang Pheng
LEONG Lai Onn Susan
SINGH Manjit
HARTLEY David Michael Godwin
GREGSON Neale Richard
TAN Lam Siong
LIM Tat
HEAH Eng Siang Capt.
YUEN Kwok Fan
VARAPRASAD Natarajan Dr
SEAH Seow Kang, Steven
ONG Ting Lan Lauren
LUM Kok Keong Patrick
HIRTH Rene-Alexander Dr
SOMERS Scott Alexander
CHUA Tat Jin
SANTHANA KRISHNAN Muthu Kumaran

ASSOCIATES

LIM Meng Tong
LIM Boon Han
ONG See Bu
KWAN Toh Hoong
LAI Chee Ern Daryl
LEE Fun Simon
GOH Tow Peng
YIEN Yew Sin
PERUMAL Magayson

CONGRATULATORY MESSAGE

CONGRATULATIONS to JC Chan Seng Onn on being appointed as Judicial Commissioner for a six-month stint in the Supreme Court. JC Chan, 43, was a President's Scholar, earned a first-class Engineering Degree from University College, London University in 1976. He joined the Defence Engineering Service of the Government. In 1986, he obtained a law degree from NUS. He joined the A - G Chambers and was head of the Crime Division.

CONGRATULATIONS to JC Lee Seiu Kin on being appointed as Judicial Commissioner for a six-month stint in the Supreme Court. JC Lee, 43, obtained a Civil Engineering Degree from University of Adelaide in 1977. His first job was with the PWD. He obtained his law degree from NUS in 1986. In 1987 he jointed the A-G Chambers and became the Deputy Head of the Civil Division.

CONGRATULATIONS to JC Tay Yong Kwang on being appointed as Judicial Commissioner for a six-month stint in the Supreme Court. JC Tay, 41, obtained his law degree from NUS in 1981, and joined the Legal Service, serving as a Magistrate and Coroner, Assistant Registrar, Senior Assistant Registrar and Deputy Registrar of the Supreme Court. He has also been a District Judge since 1991.

CONGRATULATIONS to Mr George Lim Teong Jin on his being elected as the President of the Singapore Law Society.

CONGRATULATIONS to the following eight new Senior Counsels who were appointed by the Chief Justice Yong Pung How at the opening of the Legal Year on 10th January 1998:-

Chelva Retnam Rajah
Sarjit Singh Gill
Belinda Ang Fong Saw Ean
Engelin Teh Guek Ngor
Molly Lim Kheng Yan
Steven Chong Horng Siong
Jimmy Yim Wing Kuen
Kasiviswanathan Shanmugam

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