SINGAPORE INSTIT TE OF ARBITRATORS
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CONTENTS

IEWPOINT

PRESIDENT'S MESSAGE

Following the conclusion of our recent 25th Annual General Meeting held on 7 July 2006 at the Hilton Singapore, I am pleased to invite you to join me in welcoming the new Council for 2006/2007:

Mr Raymond Chan	President
Mr Johnny Tan Cheng Hye	Vice President
Dr Philip Chan Chuen Fye	Honorary Secretary
Mr Yang Yung Chong	Honorary Treasurer
Mr Richard Tan	Immediate Past President
Mr Michael Hwang SC	Council Member
Dr Lock Kai Sang	Council Member
Mdm Meef Moh	Council Member
Mr Mohan Pillay	Council Member
Mr Goh Phai Cheng SC	Council Member
Mr Naresh Mahtani	Council Member

I am heartened by the high turn-up rate of members at the recent concluded AGM. This would not have been possible without your overwhelming support and interest in the Institute's affairs. I am pleased to welcome both Mr Mohan Pillay and Mr Naresh Mahtani to the Council and am confident of their contributions.

I wish to thank members who presented themselves for election at the recent Annual General Meeting but were not successful. The Institute will consider amending the Constitution to allow us to co-opt a few members to serve on the Council. I am confident that the additional resources will make this Council a greater team.

Together with the new Council, I would like to thank the outgoing Council Members for their invaluable contribution to the Institute and in particular to Capt Lee Fook Choon and Mr Govind Asokan for their services and contributions to the Institute.

Let me also thank Mr Michael Hwang SC for the talk he gave on "The Appointment of ICC Arbitrators" to the Institute at the AGM.

I will now highlight some of the Institute's plans and activities:

25th Anniversary Celebration

As the Institute is turning 25 this year, we will be organising a gala dinner to celebrate this milestone. The Institute is a young 25-year professional body but the future is more than promising considering the steady membership growth in the last few years. The membership figure has increased from 400 as at June 2003

Continued from page 1

to 625 members at the end of June 2006. This represents a net increase of some 56% over a 3-year period. I am pleased with this rising trend in membership growth and assure you that we continue to strive to provide value and benefits for members.

Panel of Arbitrators

Firstly, I wish to thank you for your strong support in the formation of the Panel of Arbitrators, which presently is made up of 107 members. The new Panel has definitely enhanced the profile of our Institute in the international arbitration community. Admission on the Panel will be an on-going basis undertaken by the Panel Review Committee. I encourage those who were unsuccessful to reapply once they have fulfilled the admission criteria. The criteria can be found on the Institute's website.

Shortly following the formation of the Institute's Panel of Arbitrators, ICC (Singapore) extended an invitation to the Institute together with several other key professional organisations, which are actively involved in arbitration to submit a list of their members for consideration by ICC (Singapore) as arbitrators for ICC arbitrations. ICC (Singapore) had stipulated as part of its criteria that the applicant should attain a Fellow grade with our Institute or equivalent, have Singapore nationality and ICC arbitration experience. We have invited all Panel members who are Singaporeans to apply for ICC (Singapore)'s consideration.

I see this as a very positive development for our Institute as it will serve to further enhance our standing and reputation in the arbitration community in Singapore. It also clearly reflects the recognition by the ICC (Singapore) of our Institute's reputation and of the standards that the Institute maintains for the admission of Fellows. The invitation by the ICC (Singapore) provides a great opportunity to our members for appointment as an arbitrator for ICC arbitrations.

The SIArb Special Fellowship Assessment Course

The Institute's own Fellowship Assessment Course for qualification of Fellowship was conducted on 31 March, 1 and 2 April 2006 at the Orchard Hotel. The Course consisted of a two full-day programme and a half-day award writing examination. We are grateful to Mr Michael Hwang SC, the Course Director in leading the programme and to the following tutors/assessors for their invaluable contribution and time:

Mr Richard Tan,
Mr Leslie Chew SC, and
Mr Neale Gregson

We congratulate the following successful participants and invite them to join us as Fellows:

Mr Chen Nan Chung Burton, Mr Chew Kei-Jin, Mr Fong Kwok Jen, Mr Latiff Ibrahim, Mr Justyn Adam Jagger, Ms Kim Sae Youn, Mr Leong Charn Huen, Mr Lim Joo Toon, Mr Lye Kah Cheong, Er Ong Ser Huan, Mr Peter Shelford, Mr Sunil Kumar Guliani, Mr Tan Chee Meng SC, Mr Thio Shen Yi, Mr Teo Kin Hau, Mr Toh Kian Sing and Mr Billy Wong. (Names are not in any particular order)

As another avenue for members to upgrade to Fellowship, the Institute plans to offer this Special Fellow Assessment Course on an annual basis.

Graduate Certificate in International Arbitration (GCIA)

The GCIA programme jointly conducted by the Law Faculty of National University of Singapore, the Chartered Institute of Arbitrators and our Institute is growing in popularity as the premier arbitration course in the region. Successful graduates of the programme will subject to other criteria qualify for admission as a Fellow of the Institute. I am pleased to offer our sincere congratulations to the following successful 3rd batch of GCIA graduates:

Mr Anwar Bin Mohamed, Mr Chang Sau Sheong, Ms Chang Wai Fun Evelyn, Mr Ching Heng Hoe, Dr David James Llewellyn, Mr Heng Gee Fat, Mr Ho Chien Mien, Mr Ho Mun Wai, Mr Kau Yong Meng, Mr Kwa Guian Sin, Mrs Lee Li Choon, Mr Lim Kheng Chye, Mr Louis D'Souza, Mr Lye Hoong Yip Raymond, Mr M. Packirisamy Kanisan, Mr Ng Kin Chue, Mr Sim Yong Chan, Mr Stephen Woodruff Fordham, Mr Tan Hock Soon Adrias, Ms Teo Lay Kim, Ms Wee Mae-Yih Tania and Ms Wong Pui Kay. (names are not in any particular order)

Memorandum of Co-operation with Hong Kong Institute of Arbitrators

As part of our on-going efforts to establish new links and ties with our overseas counterparts, we will continue to explore the feasibility of establishing overseas chapters as an avenue to expand the Institute's international presence. I am pleased to announce that the Institute has entered into a Memorandum of Co-operation with the Hong Kong Institute of Arbitrators on 29 June 2006. We will be planning an official signing ceremony to celebrate the new friendship between the Institutes.

I look forward to your continued support in the activities and events of the Institute for this new Council year.

Yours sincerely

Raymond Chan
President

Issues Arising from the First and Second Adjudications under the Building and Construction Industry Security of Payment Act: Lessons to Note

By: Mr Christopher Chuah

Introduction

The Building and Construction Industry Security of Payment Act ("SOPA") came into force on 1 April 2005. Modelled on the New South Wales Security for Payment Act 1999 and enacted with the objective of facilitating cash flow in the construction industry, the SOPA allows contractors, sub-contractors and suppliers to enforce their right to progress payment through adjudication, a new form of dispute resolution introduced by the Act. Since the enactment of the SOPA and at the time of writing this article, six adjudications have taken place. The present article examines some of the issues that have arisen in the first two adjudications.

Time of Service of Payment Claim

One issue that has arisen for determination is whether early service of the payment claim before the date of service of the payment claim stipulated in the contract constitutes valid service. The Act is silent on the effect of a payment claim, which is not served strictly in accordance with the timing provision in the contract. There are two possible approaches. One view ("literal approach") would be that for the payment claim to be valid, it must be served on the stipulated date. The other approach ("purposive approach") is that a payment claim will not be rendered invalid simply because it has not been served in accordance with the contractual provision regulating time of service although this may affect when the payment response has to be furnished.

As the Act is modelled on the New South Wales Building and Construction Industry Security of Payment Act 1999, authorities from New South Wales are helpful. There is judicial support for both the literal and purposive approaches. In *Beckhaus Civil Pty Ltd v Brewarrina Shire Council* [2002] NSWSC 960, Macready AJ emphasised that the statutory claim, and presumably also the timing of service of the statutory claim, must comply with the relevant section of the SOPA in order to attract statutory protection and rights afforded to persons claiming for progress payments under the SOPA. Where the contract stipulates the date of service of the payment claim, section 10(2)(a) of the SOPA provides that "*a payment claim shall be served at such time as specified in or determined in accordance with the terms of the contract.*" Applying Macready AJ's approach, a payment claim served before the stipulated service date will render the service invalid. On the other hand, *Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 135 held that the provision in the statute should not be approached in an unduly technical manner. As the words are used in relation to events occurring in the construction industry, they should be applied in a common sense manner.

After considering detailed arguments and following *Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 135, the adjudicator leaned in favour of a purposive approach. As a result, it was decided at the first adjudication that early service of the payment claim will not invalidate the payment claim.

Requirements of Payment Response

A payment response has to comply with the requirements stipulated in section 11 of the SOPA, read together with section 6 of the Security of Payment Regulations. Amongst other requirements, section 11(3) and section 6 stipulate that a payment response should state the payment claim to which it relates, the response amount (if any) and where the respondent does not propose to pay any part of the claimed amount, state "nil" for the response amount and the reason for any amount withheld. A strict compliance with these stipulations is required.

In one of the recent adjudications, an issue has arisen over whether the following letter constitutes a valid payment response under the SOPA. The letter states as follows:

"From our records and letters, we have not received the following documents from you:
Schedule of rates for the contract;

Letter of demand;

Performance bond.

Please be reminded that incomplete documentation will result in payment of the claim being withheld. Your prompt action will be appreciated."

It was decided that the letter above does not qualify as a payment response under the SOPA because firstly, it does not identify vitally, the particular payment claim that it is supposed to relate to. Secondly, the response amount has not been stated in the letter. The SOPA requires that even if no response amount is offered, "nil" and the reasons should be stated in the payment response, which has not been complied with. Thirdly, the sentence that "*incomplete documentation will result in payment of the claim being withheld. Your prompt action will be appreciated*" is too ambiguous and does not constitute the reason for the difference between the payment claim and the payment response.

Continued on page 4

Continued from page 3

Entitlement to adjudicate

Another issue that has arisen concerns one's entitlement to apply for adjudication. Section 13(2) of the SOPA provides that "*an adjudication application shall not be made unless the claimant has, by notice in writing containing the prescribed particulars, notified the respondent of his intention to apply for adjudication of the payment claim dispute.*"

The prescribed particulars are contained in section 7(1) of the Regulations, which provides that every notice of intention must contain the names and service addresses of the claimant and the respondent, the date of the notice, the particulars of the relevant contract, comprising the project title or reference, or a brief description of the project, the contract number or a brief description of the contract, the date the contract was made, the claimed amount, the response amount (if any), and a brief description of the payment claim dispute.

In the second adjudication, an issue arose as to whether a letter from a contractor constitutes a valid notice in writing under section 13(2) of the SOPA. In the letter concerned, the contractor requested for payment to be made, failing which they would "*…instruct their solicitors to take the necessary action to recover payment*". It was decided that this letter did not fulfil the requirements stated in section 13(2) of the Act and rule 7(1) of the Regulations, because the particulars listed in rule 7(1) were not stated in the letter, and there was no express intimation in the letter or for that matter, any other correspondence that the contractor is going to refer the matter to adjudication.

As section 13(2) makes it mandatory for a notice in writing to be given before adjudication can be started, the adjudicator in this instance ruled that the adjudication application was premature and failed.

Conclusion

The SOPA is designed to expedite payments in the construction industry. However, as gleaned from the brief discussion of some of the issues that have arisen in recent adjudications, the SOPA prescribes certain procedural requirements to be fulfilled before adjudication can be commenced properly. To ensure that the SOPA achieves its purpose, the SOPA should be studied carefully to ensure compliance with the procedural requirements, so that adjudication can be smoothly carried out and pitfalls avoided.

Legal Development Affecting Arbitration

By: Dr Philip Chan Chuen Fye

Introduction

In this issue there are two cases examined. The first case concerns the powers of the courts under the International Arbitration Act (IAA) under section 12. The High Court was invited to decide whether the court may grant an injunction to restrain the dissipation of assets in Singapore in support of a foreign arbitration. The answer was no. In order to arrive at the answer the court had to interpret several provisions in the IAA by taking the purposive approach allowed by section 9A of the Interpretation Act.

In the second case, the High Court had to distinguish the duties and role of an expert in an expert determination situation as compared to an arbitrator. The High Court warned that the use of a label itself cannot conclusively determine whether a person is acting as an expert or as an arbitrator. It then set out several important differences between the two. An important difference was that the expert is not bound by "procedural" requirements under the concept of natural justice.

Court's power to assist a foreign arbitration by granting injunction under the IAA

***Swift-Fortune Ltd v Magifica Marine SA* [2006] SGHC [2006] 2 SLR 323** [Judith Prakash J]

The plaintiff successfully obtained an injunction in an ex parte hearing to restrain the defendant from removing or in any way disposing of or dealing with or diminishing the value of assets in Singapore up to a value of US$2.5m. In the supporting affidavit, it was revealed that "The plaintiff was concerned …that the purchase moneys would be dissipated and there would be no assets against which an arbitration award in the plaintiff's favour could be enforced". The parties had agreed that any dispute arising out of the agreement would be referred to arbitration in London.

The defendant applied to set aside the originating process by which the proceedings were commenced and the order of court granting leave to serve the same out of the jurisdiction as well as for a discharge of the Mareva injunction granted against the defendant. The learned judge identified the fundamental issue at paragraph 15 of her judgment as, "whether this court had the power to issue a Mareva injunction over the Singapore assets of a foreigner in support of a foreign arbitration.

From the judgment, it can be seen that it would be an issue involving the interpretation of the International Arbitration Act. In particular, section 12(7) as read with sections 6(3) and 7(1) in conjunction with Article 9 of the Model Law. Further, an interpretation of Order 69A

Continued on page 5

Continued from page 4

r4 was required. For convenience of reference, these are reproduced below.

> Section 6(3)
>
> Where a court makes an order under subsection (2), the court may, for the purpose of preserving the rights of parties, make such interim or supplementary orders as it may think fit in relation to any property which is the subject of the dispute to which the order under that subsection relates.
>
> Section 7(1)
>
> Where a court stays proceedings under section 6, the court may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest, order —
>
> (a) that the property arrested be retained as security for the satisfaction of any award made on the arbitration; or
> (b) that the stay be conditional on the provision of equivalent security for the satisfaction of any such award.
>
> Section 12(7)
>
> The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part applies, the same power of making orders in respect of any of the matters set out in subsection (1) as it has for the purpose of and in relation to an action or matter in the court.
>
> *Article 9. Arbitration agreement and interim measures by court*
>
> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure

The learned judge expounded two principles concerning arbitration and the court's powers. First, she said at paragraph 42 of her judgment that the courts do not have any inherent powers to assist arbitrators under the common law. Accordingly, the courts must be given such powers by Parliament.

> "42. …Arbitration is a method of private dispute resolution which takes place outside the curial regime. Whilst the courts have long exercised a supervisory power over domestic arbitrators and arbitrations, they do not, under common law, have any inherent powers to assist such arbitrators in the gathering of evidence or in any other of the matters set out in s 12(1) of the IAA. The courts had to be given such powers by statute…."

Second, she added at paragraph 43 that unless Parliament specifically provides for the court's power to go beyond the shores of Singapore, the court would have no power to assist or affect an arbitral tribunal conducting an arbitration outside Singapore.

> "43. …Singapore legislation has, generally, only territorial effect and therefore unless it specifically provides otherwise, it must be read as applying only to persons and bodies that are ordinarily subject to Singapore law. An arbitral tribunal conducting an arbitration outside Singapore which is subject to a foreign law is not such a body…."

The starting point would be that it can be seen from the judgment that there is no express provision in the IAA that provided an answer to the issue identified. Therefore, in order to address the issue identified by the learned judge, the provisions of the IAA requiring interpretation included that of section 12(7) as read with sections 6(3) and 7(1) in conjunction with Article 9 of the Model Law as well as Order 69A r4.

The next step is to discover whether the use of the purposive approach made possible by section 9A of the Interpretation Act in interpreting section 12(7) would allow the court to conclude that the courts have power to assist foreign arbitration. Accordingly, two documents were looked at, namely, the report of the Law Reform Committee, which recommended the passing of the bill of the IAA and the Parliamentary Report of 25 July 1994 when the bill was read for a second time. It was noted that section 12(7) was not included in the Committee's recommendation but was included in the second reading in Parliament.

Applying the purposive approach in interpreting section 12(7), the learned judge held at paragraph 42,

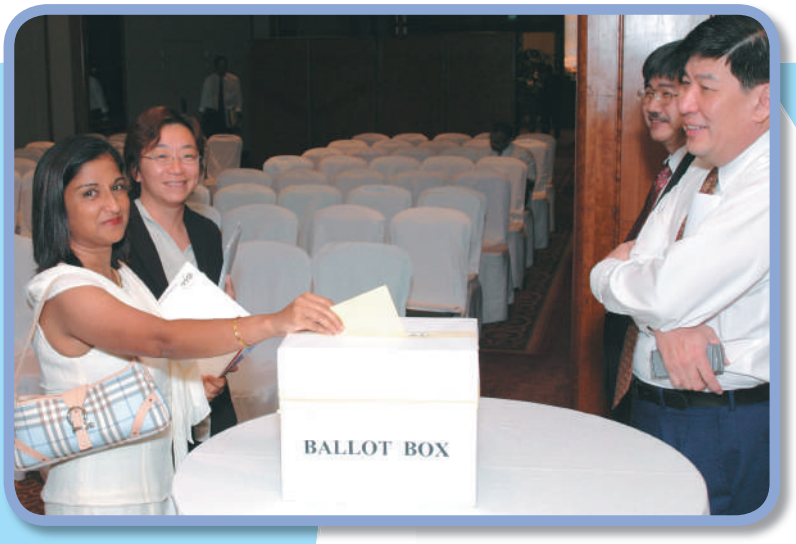
> "42 …Thus, when Parliament came to consider and pass the IAA, it realised that just as the courts could assist domestic arbitral tribunals they should be able to assist the international arbitral tribunals that were being encouraged by the IAA. Therefore, it was logical to give the High Court the same powers in relation to such arbitrations as it had in relation to domestic arbitrations. Parliament then inserted s 12(7) into the IAA and, significantly, in drafting it, chose a form of wording that was similar to that used in s 27(1) of the Arbitration Act (Cap 10, 1985 Rev Ed). That wording (in the form of s 12(6) of the Arbitration Act 1950 (c 27) (UK)) had long been interpreted in England as not giving the courts power to make orders in respect of foreign arbitrations: see, for example, *Channel Tunnel* ([37] *supra*)."

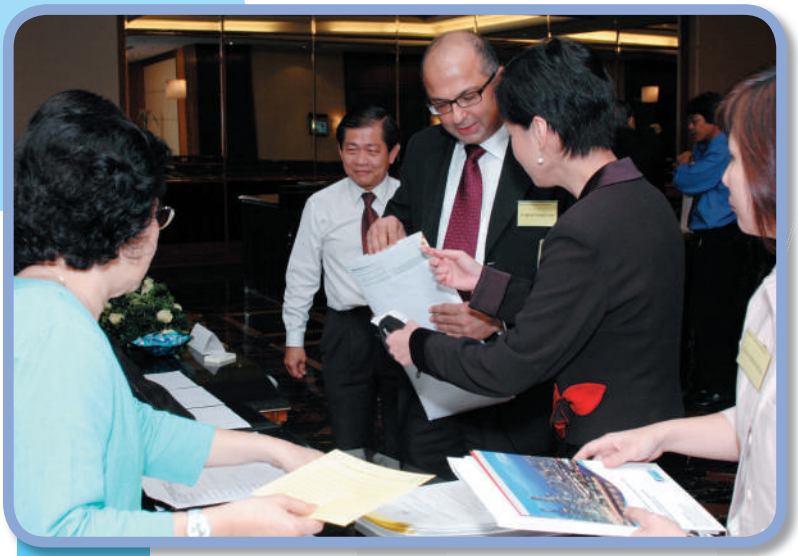
By examining the Parliamentary Report, the learned judge posed a relevant question at paragraph 43,

> "43 The question remains whether in giving the courts power to assist international arbitrations, Parliament intended to permit them to be able to do such things as order security for costs or make orders for discovery of documents or for the preservation and interim custody of evidence

Continued on page 8

25TH ANNUAL GENERAL MEETING
7 JULY 2006





Seminar by Neil Kaplan QC and Robert Gaitskell QC

Challenging the Norms
29 June 2006

Continued from page 5

not only for an international arbitration that had its seat here (a so-called "Singapore international arbitration") but also for a foreign international arbitration that was being or would be conducted outside of Singapore…."

She then answered in the same paragraph,

"43 …Parliament does not appear to have considered the possible extra-territorial ramifications of the legislation during the debate in Parliament. That debate was concentrated on encouraging Singapore international arbitrations and no mention at all was made of assisting foreign arbitral tribunals. This is not surprising since the conduct of foreign arbitrations is not a matter which would naturally concern it."

Finally, the learned judge set out to discover whether it could be implied into the IAA that the courts were empowered to assist foreign arbitration in respect of the grant of a mareva injunction in respect of assets that are in Singapore. The learned judge rejected this possible implication at paragraphs 45 and 46.

"45 …Section 6(3) allows the court upon staying proceedings that have been commenced in the court in breach of an arbitration agreement to make such orders as it may think fit in relation to any property which is the subject matter of the dispute. Section 7(1) is similar in that where such a stay is given, the court may, when property has been arrested, order that the property arrested be retained as security for the satisfaction of any award made on the arbitration or that the stay be conditional on the provision of equivalent security for the satisfaction of any such award. In my mind, these sections do not indicate that Parliament intended to give the courts general powers to assist foreign arbitrations. …

45 …There are two reasons for this. First, both sections contemplate a situation in which the parties initiating the proceedings concerned have validly invoked the court's jurisdiction in respect of a substantive dispute that is amenable to that jurisdiction and therefore, had the application for a stay not been requested, the court could have gone on to deal with the merits of the dispute and enter a final judgment in respect of the same. Such final judgment would have an impact on the property referred to in s 6(3) or the arrested vessel mentioned in s 7(1). Thus, it is not unreasonable to give the court power to make its stay conditional on terms relating to such property or vessel. Secondly, in relation to s 7(1) itself, it bears mentioning that this was the result of a specific recommendation of the Committee. It considered that provision should be made to allow ships arrested under the High Court's admiralty jurisdiction to be used as security for pending foreign arbitrations. In the Committee's view, such arrests of ships for maritime claims were widely accepted by shipowners and allowing them to be made available as security in foreign arbitrations would not add to the shipowners' burden nor discourage shipowners from using the facilities of the Port of Singapore or render Singapore any less attractive as a venue for international maritime arbitrations. There is nothing in the Committee's report to indicate that in making this recommendation, it was considering giving the court power to issue a Mareva injunction against assets in Singapore to support a foreign arbitration. That is an entirely different form of relief from the well-established rights of arrest of a vessel to support a maritime claim."

The learned judge held at paragraph 46 that Article 9 of the Model Law also does not support the implication of the abovementioned interpretation.

"46 The other point is whether Art 9 of the Model Law itself should affect the interpretation of s 12(7) since the Model Law (with the exception of Chapter VIII thereof) has the force of law in Singapore. Article 9 states:

Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

Article 9 is one of the few articles of the Model law that, by Art 1(2), applies to an international arbitration whether or not the place of arbitration is within Singapore (see Art 1 (2)). One possible interpretation of Art 9 is that it confers jurisdiction on the court to give interim measures of protection. Another is that it is merely a permissive article that allows parties to international arbitrations to apply to domestic courts for protection where the relevant domestic law already has provisions making such protection available to arbitrants."

The learned judge concluded at paragraph 49 by noting that had Parliament wanted to confer the said powers to the courts, the IAA would have clearly worded it.

"49 …the courts do not have any inherent powers to make orders to aid any proceedings except those that take place before them. Specific jurisdiction has to be given to the courts to enable them to make orders to assist foreign court proceedings. As noted above, the courts even required specific statutory provision to enable them to make orders to assist arbitrations within the jurisdiction. If Parliament had intended to effect such a far-reaching change in the law as would allow our courts to make orders to assist foreign arbitrations notwithstanding that they would still be powerless to aid foreign court proceedings, the legislation would have been clearly worded to effect such a drastic change and it would not be necessary to imply it…"

Continued on page 9

Continued from page 8

Fundamental difference between arbitration and expert determination

Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd **[2005] SGHC [2006] 1 SLR 634** [VK Rajah J]

This was an application to set aside an expert's award. The relevant terms of appointment of the expert are set out below which are reproduced from paragraph 5 of the judgment.

> "3. …
> d. *Once selected, the independent assessor be at liberty to determine all issues of procedure for the assessment which shall be final;*
>
> 4. The independent assessor be *at liberty*, including but not limited to, interview witnesses, consult parties, collate information and evidence as in *[sic]* his sole discretion deems fit;
>
> 5. The independent assessor shall submit his report to the parties and to the Honourable Court within 120 days from the date of appointment. *The independent assessor's decision and findings on all issues of procedure, liability and quantum be final*;"

The questions identified by the learned judge as set out in paragraph 1 of his judgment are:

> "What is the difference between the role of an expert as contrasted to that of an arbitrator? In what circumstances can a decision of an expert be challenged? Is an expert under any legal obligation to give reasons for his determination?"

The learned judge went through the law relating to experts starting at paragraph 27 through paragraphs 28 and 29.

> "27 …The starting point for the modern statement on the law relating to experts is to be found in *Campbell v Edwards* [1976] 1 WLR 403, where Lord Denning MR opined at 407:
>
> > It is simply the law of contract. If two persons agree that the price of property should be fixed by [an expert] on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. *Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it.* If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything. [emphasis added]
>
> 28 In *Baber v Kenwood Manufacturing Co Ltd and Whinney Murray & Co* [1978] 1 Lloyd's Rep 175 Lawton LJ said at 181:
>
> > They [the auditors] were to be experts. Now experts can be wrong; they can be muddle-headed; and, unfortunately, on occasions they can give their opinions negligently. Anyone who agrees to accept the opinion of an expert accepts the risk of these sorts of misfortunes happening. What is not acceptable is the risk of the expert being dishonest or corrupt.
>
> 29 In the absence of fraud or any corrupt colouring of the IA's determination, there is neither liberty nor latitude to interfere with or rewrite the parties' solemn and considered contractual bargain, see [5]. It is quite inappropriate for a court to substitute its own view on the merits when the parties have already agreed to rely on the expertise of an expert for a final and irrevocable determination. I must in the context of the current circumstances add that, even if there were a discretionary right to reopen the award, I would not exercise that option – given the wholly inappropriate and cavalier conduct manifested by the plaintiff throughout the assessment process."

The learned judge noted at paragraph 35 that the labeling of the appointment as "arbitrator" or "expert" is not important.

> "35 …At the end of the day, the modern distinction between an expert and arbitrator does not lie purely in whether the office holder is performing a judicial, quasi-judicial or purely discretionary function. The essential difference is in the duties and/or functions the terms of appointment impose on an appointee. The labelling of an appointment as "arbitrator" or "expert" is not in itself always conclusive. It is the precise contractual arrangement and the ensuing obligations of the office holder that is, in the final analysis, paramount…."

The learned judge held at paragraph 36 that a fundamental requirement in an arbitration is the requirement for procedural natural justice. This is not so in expert determination.

> "36 There are two fundamental aspects or facets of natural justice that generally apply to dispute resolution. The first is that a decision maker should be disinterested in the outcome. The second is due process; both parties have the right to be heard on all the issues that are to be determined. This second facet of natural justice does not apply to an expert's determination. This is the single most significant distinction between expert determination and litigation/arbitration."

Further, the learned judge held at paragraph 35 that another fundamental difference between the expert and an arbitrator is that an expert is not obliged to make a decision based on the evidence presented to him but can act on his subjective opinion.

> "35 …Is he obliged to act solely on the evidence before him and the submissions made to him or does he have a discretion to adopt an inquisitorial function? Does he have complete discretion over the applicable rules of procedure? If he has the sole discretion to arrive at his determination

Continued on page 10

Continued from page 9

without being hamstrung by procedural and evidential intricacies or niceties, it is most unlikely that the court will view the proceedings to be arbitration proceedings. An expert is permitted to inject into the process his personal expertise and to make his own inquiries without any obligation to seek the parties' views or consult them. An expert is also not obliged to make a decision on the basis of the evidence presented to him. He can act on his subjective opinion; that is the acid test."

In the recognition of awards by experts and arbitrators, the learned judge acknowledges at paragraph 33 that both flow from contracts made by parties.

> "34 Both arbitration and expert awards, however, have the same fundamental and common foundation – contract law. The law upholds and recognises such agreements and the consequential awards because of the sanctity it accords to contractual arrangements. I can do no better than to echo the observations of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 353:
>
> > [T]hose who make agreements for the resolution of disputes must show good reasons for departing from them, …"

However, the learned judge noted at paragraph 33 that arbitral awards have been given an exalted status.

> "33 …Arbitration and expert awards also have different legal status. Experts' decisions are founded purely on contract and must be enforced as contractual bargains both within and without the jurisdiction. Arbitration awards, on the other hand, have an exalted status by virtue of domestic statutes and international treaties such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("the New York Convention"). They can, subject to certain conditions, be enforced in the same manner as judgments."

Finally, the learned judge compared the scope of setting aside of awards by experts and arbitrators at paragraph 34 to distinguish the difference between the two.

> "34 …An expert's decision can be set aside on the basis of fraud or partiality. Beyond that it is probably correct to say that only a breach of an expert's terms of appointment would suffice to set aside his decision. Errors of fact or law will not vitiate an award if the expert acts within his contractual mandate. In contrast, there is a statutory mechanism albeit a very limited one for the review of both domestic and international arbitration awards."

Announcements

• NEW MEMBERS •

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

Fellows

1 Teo Ju Ping Paul
2 Conrad Melville Campos
3 Chang Wai Fun Evelyn
4 Ching Heng Hoe
5 Chow Teck Ern Peter
6 Fong Kwok Jen
7 Justyn Adam Jagger
8 Kim Sae Youn
9 Leong Charn Huen
10 Lim Joo Toon
11 Lim Kheng Chye
12 Lye Kah Cheong
13 Ong Ser Huan
14 Peter Bengt McNeill Shelford
15 Sarup Singh
16 Sim Yong Chan
17 Stephen Andrew Furst QC
18 Sunil Kumar Guliani
19 Tan Chee Meng, SC
20 Teo Kin Hau
21 Toh Kian Sing
22 Wong Billy
23 Yogarajah Indrayogan

Members

1 Chew Sui Gek Magdalene
2 Choa Sn-Yien Brendon
3 Chua Kae-Shin
4 Ho Kong Mo (transfer)
5 Ng Chee Weng
6 Soh Kar Liang

Associates

1 Loh Yew Fatt
2 Mohamed Faizal s/o Mohd Abdul Kadir
3 Oh Beng Teck Danny
4 Tan Kee Cheong

• UPCOMING EVENTS •

1 Social Gathering to welcome Mr Gordon Tippett, CEO of IAMA on 7 August 2006
2 "Immunity of Classification Societies?" by Capt Lee Fook Choon on 24 August 2006
3 "Med-Arb" by Dr Anne Netto, Mr Patrick Chia & Mr Loong Seng Onn on 28 September 2006
4 International Entry Course 2006 on 30 September, 1 & 7 October 2006
5 Social Gathering/ Talk by Wordwave on 3 November 2006
6 The Institute's 25th Anniversary Celebration in November 2006
7 ICMA XVI Conference from 26 February to 2 March 2007

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25TH ANNUAL GENERAL MEETING
7 JULY 2006

This year's AGM, on the evening of 7 July 2006 at the Hilton Singapore, witnessed a relatively large turnout of 57 members.

Preceding the formal AGM was a talk given by Mr Michael Hwang SC on the subject of "The Appointment of ICC Arbitrators". Also in attendance were Mrs Lee Ju Song, Director, ICC Asia and Mr Roger Yeo, Deputy Director, ICC Singapore/SBF to assist in answering members' queries on this subject, pursuant to the ICC's invitation to arbitrators in Singapore to apply to be on the Panel of Arbitrators of ICC (Singapore).

The President, Mr Raymond Chan, chaired the AGM and welcomed members. Following the formal tabling and adopting of the Annual Report for 2005/6, Audited Accounts and Minutes of the previous year's AGM, the AGM continued with the election of office-bearers for the year 2006/2007.

Mr Raymond Chan, Mr Yang Yung Chong, Mr Michael Hwang SC, Dr Lock Kai Sang and Ms Meef Moh continue to serve their second year in their respective positions on the Council. Mr Johnny Tan and Dr Philip Chan were nominated and returned unopposed as Vice-President and Hon. Secretary respectively.

There were six candidates for the remaining three Council-member vacancies. The six candidates were invited to give brief presentations to the members in respect of their candidacy, and the election was thus one of the lively highlights of the evening. Following the voting, whilst the returning officer, Mr Jamshid Medora, assisted by scrutineers Mr William Jansen and Mr Hee Theng Fong, carried out the counting of ballots, the members had a refreshment break, which was an opportunity to network and catch up with each other. When the ballots were tallied, the three Council members elected to the Council for 2006/7 were Mr Goh Phai Cheng SC, Mr Mohan Pillay and Mr Naresh Mahtani.

The President then presented his report of activities for the preceding year and the Institute's aspirations for the years ahead. A summary of his speech is in the President's Message. The meeting ended with a vote of thanks by members to the President and Council for their selfless contributions and service to the Institute and the Secretariat for organizing the AGM and executing the Institute's activities.

HEARING ROOM FOR HIRE

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

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