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INTERNATIONAL ARBITRATION UPDATE

SINGAPORE HIGH COURT DISCUSSES RISKS OF HAVING DIFFERENT DISPUTE RESOLUTION CLAUSES IN RELATED AGREEMENTS

***Car & Cars Pte Ltd v Volkswagen AG and Anor* [2009] SGHC 233**

Executive Summary

The Singapore High Court has highlighted the potential pitfalls of parties entering into various agreements, each containing different dispute resolution clauses. If a dispute arose out of these agreements, parties would run the risk of multiplicity and inconsistent decisions.

The court also interpreted the phrase "for the time being in force" to mean, in the context of determining which set of rules governed an arbitration clause, the rules in force at the time of the commencement of the arbitration.

Background

The Appellant is the former importer and distributor of Volkswagen vehicles. The Respondents are the manufacturer of Volkswagen vehicles and its subsidiary in Singapore. The parties entered into various arrangements with respect to the import and dealership of Volkswagen vehicles.

Subsequently, the relationship between the parties soured and they entered into four separate written agreements (the "**Agreements**"), including an agreement relating to the termination of dealership of the vehicles (the "**Termination of Dealership Agreement**"), which set out the terms for the termination of their relationship.

A dispute arose between the parties in relation to the Termination of Dealership Agreement and the Appellant commenced court proceedings against the Respondents. The 2nd Respondent applied to court, seeking a stay of proceedings in favour of arbitration on the grounds that the Termination of Dealership Agreement contained the following arbitration clause:

> *"This agreement herein shall be governed by and its provisions interpreted in accordance with the law of Singapore. Any disputes arising out of or in connection with this agreement herein shall be referred to arbitration in the Singapore International Arbitration Centre in accordance with* ***the Rules of the Singapore International Arbitration Centre for the time being in force."*** (emphasis added) (the "**Arbitration Clause**")

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The Appellant argued that the stay application should be considered under the provisions of the Arbitration Act (Cap 10, 2002 Rev Ed) (the "**AA**"), and not the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "**IAA**"). If the AA applied, the court would have the discretion to decide whether to grant or refuse a stay. If the applicable statute was the IAA, the grant of a stay would be mandatory.

Interpretation of the phrase "for the time being in force"

Whether the IAA or AA applied depended on the phrase "for the time being in force" in the Arbitration Clause – did the phrase refer to the rules of the Singapore International Arbitration Centre (the "**SIAC**") in force at the time of the conclusion of the contract, or to the rules of the SIAC in force at the time of the commencement of the arbitration?

The Appellant argued that the phrase "for the time being in force" referred to the time of the conclusion of the contract. At that time, there were two sets of rules of the SIAC, the SIAC Domestic Arbitration Rules (the "**SIAC Domestic Rules**") and the SIAC Rules (2nd ed, 1997 (the "**SIAC Rules 1997**"), both of which have since been repealed. The Appellant further argued that it was the SIAC Domestic Rules that applied, which would have led to the AA being the applicable statute. In that situation, the court had discretion whether to stay the proceedings.

On the other hand, if the phrase "for the time being in force" referred to the time of the commencement of the arbitration, the SIAC Rules (3rd ed, 2007) (the "**SIAC Rules 2007**"), which were the only set of SIAC rules in force then, would apply and the IAA would govern the stay application, and mandatorily require a stay.

The court held that, as a matter of construction, the phrase "for the time being in force" must refer to rules in force at the time of the *commencement of the arbitration*. If parties had intended to refer to the rules existing at the time of the conclusion of the contract, they could have easily identified the rules by name.

The court endorsed the Singapore Court of Appeal's decision in ***Black & Veatch Singapore v Jurong Engineering Ltd*** [2004] 4 SLR 19, where the Court of Appeal stated that there is:

> *"…a* prima facie *inference that where the rules contained mostly procedural provisions, then the rules in force at the time of commencement or arbitration would be the ones which applied. However, if the rules contained mainly substantive provisions, then those in force as at the date the contract was entered into would apply."*

This is because arbitrators cannot be expected to look at the date the contract was entered into and apply the relevant procedures which were in force at that date, notwithstanding that new procedures which may or may not be fundamental may have been introduced and were being applied at the date of commencement of the arbitration.

Agreements with different dispute resolution clauses

The Appellant also argued that, because the parties expressly chose to apply the AA in two of the four Agreements, this showed that the parties also intended for the AA to apply to the Termination of Dealership Agreement. This argument was made on the basis that the Agreements were part of a "global settlement".

While the court acknowledged that this line of reasoning had "some intuitive appeal", it took the view that this it was of no help to the Appellant. If anything, it served only to highlight that parties had chosen *not* to apply the AA to the Termination of Dealership Agreement.

Even if parties had entered into a global settlement, they had expressly chosen to enter into four *separate* agreements with significantly different dispute resolution clauses. Parties should have foreseen that by so doing, there would be a "risk of multiplicity and inconsistent decisions" if disputes arose out of these agreements.

In such cases, parties ought to be held to their respective contractual bargains. In this case, this meant that the dispute under the Termination of Dealership Agreement ought to proceed to arbitration at the SIAC.

Comment

The decision in this case highlights the importance of giving careful thought to the negotiation and drafting of arbitration clauses.

If there are irreconcilable inconsistencies in the arbitration clauses of a series of agreements, the court may give effect to the differing terms of such clauses, and not re-write or construe the clauses merely for the sake of consistency.

If it is regarded as important that a particular arbitral regime govern arbitration proceedings arising out of disputes over an agreement, parties would do well to state the governing regime clearly.

If you would like more information about this update or wish to discuss how it may potentially affect you or your business, please feel free to contact any member of our **International Arbitration Group** or:

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- Other *ad hoc* arbitrations

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