

INTERNATIONAL ARBITRATION UPDATE

The Trouble With Some Multi-Tiered Arbitration Clauses

Insigma Technology Co. Ltd v Alstom Technology Ltd [2008] SGHC 134

Executive Summary

The Singapore High Court has upheld an arbitration agreement which provided for an arbitral institution to administer arbitration proceedings in accordance with the procedural rules of a different arbitral body chosen by the parties since, on the facts of the case, this arrangement did not result in any inconsistency. This case also signals that care should be taken when drafting consultation or mediation clauses in the context of a multi-tiered approach to alternative dispute resolution. If such clauses are worded too vaguely or subjectively, they may be unenforceable.

Background facts

The plaintiff and the defendant were parties to a License Agreement (the "**Agreement**") governed by Singapore law.

Article 18(c) of the Agreement set out a multi-tiered dispute resolution clause. The first part of the clause provided for settlement through consultation, as follows:

"Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to executive representatives of the Parties for settlement through friendly consultations between the Parties. In case no agreement can be reached through consultation within 40 days from either Party's notice to the other for commencement of such consultations, the dispute may be submitted to arbitration for settlement by either Party..." (the "**Consultation Clause**").

The rest of the clause made provision for arbitration in these terms:

"... Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English. The tribunal shall consist of three arbitrator(s) to be appointed in accordance with the Rules which are hereby incorporated by reference into this clause. The arbitration award shall be final and binding on both Parties. Both Parties shall perform the award accordingly" (the "**Arbitration Clause**").

When a dispute arose under the Agreement, the parties held a meeting to resolve matters but were unable to reach a settlement. The defendant eventually initiated arbitration against the plaintiff before the Singapore International Arbitration Centre (the “SIAC”). Prior to so doing, the defendant’s solicitors obtained the SIAC’s confirmation that it would be prepared to administer the Rules of Arbitration (the “ICC Rules”) of the International Chamber of Commerce (the “ICC”), with the SIAC Secretariat undertaking the role of the ICC Secretariat, the SIAC Registrar that of the ICC Secretary General and the SIAC Board of Directors the role of the ICC Court.

A tribunal was constituted and heard preliminary arguments pertaining to its jurisdiction. In the tribunal’s opinion, it was “*clear enough*” that the parties had intended for the SIAC to administer the arbitration in accordance with the ICC Rules. It concluded that Article 18(c) was a valid arbitration agreement. On the facts, the tribunal also reached the conclusion that the defendant had not breached the Consultation Clause by failing to engage in “friendly consultations” for 40 days.

Dissatisfied, the plaintiff applied to the High Court to set aside the tribunal’s decision.

Proceedings before the High Court

Before the High Court, the plaintiff argued that:

- The Arbitration Clause (which provided for the SIAC to administer the arbitration in accordance with the ICC Rules) was invalid and void for uncertainty because the SIAC was unable to administer the ICC Rules. The plaintiff contended that the ICC Rules had many features that are unique to the ICC; and
- The defendant breached the Consultation Clause by failing to engage in “*friendly consultations*” for the requisite 40 days and by not referring the dispute to “*friendly consultations*” between the parties.

Whether the Arbitration Clause was valid

The High Court rejected the plaintiff’s arguments and held that the Arbitration Clause was valid.

Justice Judith Prakash took the view that there was, in principle, no problem with an institution administering arbitration proceedings in accordance with the procedural rules of another body chosen by the parties, as long as the choices made “*do not result in significant inconsistency*”. Such inconsistency may arise if, for instance, the administering authority is unable to designate suitable substitute actors to perform the functions of the organs of the institution whose procedural rules are to be observed.

In the present case, the SIAC had confirmed that it would be able to follow the ICC Rules and to substitute the appropriate corresponding actors to perform the functions of the ICC

Secretariat, Secretary-General and Court. There would therefore be no inconsistency which would render the arbitration inoperative.

Whether the Consultation Clause had been complied with

While it acknowledged that the parties had met briefly in an attempt to resolve their differences, the plaintiff asserted that this meeting did not comply with the requirement of “friendly consultations” under the Consultation Clause as the defendant had been unwilling to compromise on its claim and its representative (allegedly) stormed out of the meeting.

While she noted that there was no need to express a concluded decision on the enforceability of the Consultation Clause, Justice Prakash ventured the view that the clause was likely to be unenforceable for being “vague and subjective”, particularly as to the meaning of the words “friendly” and “consultations”. Notably, the clause did not prescribe a procedure for the parties to follow. The direction to hold “friendly consultations” seemed more akin to a direction to “attempt in good faith to resolve the dispute” than a mandatory mediation order.

The Consultation Clause did not require the parties to consult with each other for 40 days; it was only necessary that the consultations take place within 40 days of either party’s notice to the other. As the parties’ meeting fell within the relevant 40-day period, the obligations imposed by the Consultation Clause had been met.

Comment

This case once again reinforces the general approach of the Singapore courts in upholding arbitration agreements and in giving parties a very considerable degree of flexibility and autonomy in crafting their dispute resolution mechanisms. The decision also highlights that, where parties intend for an arbitral institution to administer arbitration proceedings using the institutional rules of another arbitral body, sufficient thought needs to be given as to whether the chosen mechanism is workable in practice. In this case, the very real practical uncertainties as to how the SIAC would apply the unique features of the ICC Rules were overcome *via* the SIAC Secretariat agreeing to undertake the role of the ICC Secretariat, the SIAC Registrar that of the ICC Secretary General and the SIAC Board of Directors the role of the ICC Court.

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 the members of our **International Arbitration Group**, or:

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- Singapore Chamber of Maritime Arbitration
- Singapore Institute of Arbitrators
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- UNCITRAL Rules arbitrations
- Other *ad hoc* arbitrations

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