DREW & NAPIER

INTERNATIONAL ARBITRATION 2019 UPDATE

February 2020

In this issue

The year 2019 saw many significant Singapore court decisions relating to international commercial arbitration. Singapore continues to solidify its position as a key arbitration hub.

In this update, we summarise the key decisions of 2019 and developments in the field of international arbitration.

PUBLIC CONSULTATION ON PROPOSED CHANGES TO THE INTERNATIONAL ARBITRATION ACT

On 26 June 2019, the Ministry of Law ("**MinLaw**") launched a public consultation on proposed amendments to the International Arbitration Act (Cap. 143A) ("**IAA**"). The consultation period ended on 21 August 2019 and we understand that MinLaw is still in the process of reviewing the feedback received.

During the public consultation, feedback was sought on four proposed amendments to the IAA proposed by MinLaw, as well as two third-party proposals. The proposed amendments were aimed at giving greater effect to party autonomy, upholding confidentiality, as well as facilitating a party's ability to recover its costs, all of which are important issues for arbitration proceedings. The proposed amendments are summarised below.

First, MinLaw proposed introducing a default mode of appointment of arbitrators in multi-party situations. While the current default mode of appointment applies only to two-party arbitrations, the proposed amendment will provide for a default mode of appointment in cases where there are more than two parties to the arbitration agreement. Under the proposal, in such situations, the claimants shall jointly nominate an arbitrator, the respondents shall jointly nominate another, and where co-claimants or co-respondents are unable to agree on a joint nominee, the appointing authority shall appoint the respective arbitrator. If this proposed amendment is ultimately implemented, it will help prevent a party from stalling arbitral proceedings by delaying the appointment of the Tribunal in multi-party proceedings.

Second, MinLaw also proposed an amendment which would allow parties to, by agreement, request the Tribunal to decide on jurisdiction at a preliminary stage.

Third, it was proposed that the IAA be amended to explicitly recognise the powers of the Court and the Tribunal to enforce duties of confidentiality. Given that confidentiality is a key advantage of arbitration over litigation, such an amendment would give parties an additional safeguard to enforce confidentiality obligations in addition to the already existing common law duty of confidentiality.

Fourth, MinLaw proposed allowing a party to arbitral proceedings to appeal to the High Court on a question of law arising out of an award made in the proceedings, provided parties opt in to this mechanism. This strikes a balance between parties who wish to have recourse to the Court on questions of law (who may opt in) and parties who want to preserve the finality of arbitration.

MinLaw also sought feedback on two third-party proposals.

The first third-party proposal was to allow parties to agree to waive or limit the annulment grounds under the Model Law and IAA. This is in line with the concept of party autonomy in arbitrations.

The second third-party proposal was for the IAA to expressly provide that the Court shall have power to make costs orders in respect of the costs of the arbitral proceedings in cases where a party is successful in its application to a Court to set aside a tribunal's award. This proposal resulted from the Singapore Academy of Law's Law Reform Committee's report on issues concerning costs in arbitration related court proceedings. The view was expressed that the current position is problematic because once an award is set aside, the arbitral tribunal is generally *functus officio* and is therefore unable to make any costs orders in respect of the arbitral proceedings if the award is set aside. The proposed amendments would allow the Court to deal with the issue of costs of the arbitral proceedings if the Court decides to set aside an arbitral award.

The public consultation period ended in August 2019 and based on previous public consultations, MinLaw may publish a response to the feedback received during public consultations before progressing matters further. We await further updates from MinLaw on these proposed amendments.

ARBITRATION DEVELOPMENTS

The Singapore office of the Permanent Court of Arbitration ("PCA")

The Singapore office of the PCA was officially launched on 19 November 2019. This new office will allow the PCA to better administer its growing number of cases in Singapore and Asia.

Many treaty or investment agreement disputes are administered by the PCA, and the opening of the Singapore office of the PCA may help further promote Singapore as a venue for international arbitration, including investment treaty arbitration.

Singapore Convention on Mediation

The Convention on International Settlement Agreements Resulting from Mediation, otherwise known as the Singapore Convention on Mediation, was adopted by the UN General Assembly on 20 December 2018 and thereafter opened for signature on 7 August 2019. Thus far, it has been signed by 51 state parties but has not yet come into force.

When the Singapore Convention on Mediation comes into force, it will allow parties to enforce international settlement agreements. This will address one of the key disadvantages of mediation as a cross-border dispute resolution mechanism, being the difficulty of enforcing a mediation settlement agreement. Although 51 states have signed the Singapore Convention on Mediation, including the United States, China and India, this number is still dwarfed by the 161 state parties to the New York Convention.

It remains to be seen how and whether the Singapore Convention on Mediation will affect arbitration's role as the current predominant

method of international dispute resolution. One view is that mediation may be seen as complementing rather than threatening arbitration. These two methods of dispute resolution are not true substitutes for each other, since one involves a third-party determination whereas the other involves agreement between the parties. In this sense, the Singapore Convention on Mediation appears unlikely to challenge arbitration's role but may cause both arbitration and mediation to function in tandem as part of a holistic process of dispute resolution.

GETTING AID FROM THE SEAT COURT – ANTI-SUIT INJUNCTIONS AND DECLARATIONS (12 FEBRUARY 2019)

In *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732, the Court of Appeal considered the following issues:

- how a seat court should exercise its discretion to issue an anti-suit injunction in respect of ongoing foreign court proceedings, where the issues litigated before the foreign court are the same as those in a prior arbitration; and

- the grant of declaratory relief in the arbitration context.

Hilton obtained two arbitral awards ("**Awards**") in its favour against Sun Travels & Tours Pvt Ltd ("**Sun**") following an arbitration seated in Singapore. Hilton International Manage (Maldives) Pvt Ltd ("**Hilton**") commenced enforcement proceedings in the Maldivian courts which Sun resisted. There were issues relating to the Maldivian courts' jurisdiction, which led to Hilton recommencing the enforcement proceedings in April 2017. In the meantime, Sun had commenced a civil action in Maldives against Hilton which involved the same issues as those in the prior arbitration ("**Maldivian Suit**"). Hilton filed a procedural objection in the Maldivian Suit based on the prior arbitration and Awards. However, Sun obtained a favourable judgment in the Maldivian Suit in March 2017 ("**March Judgment**"). In June 2017, in light of the March Judgment, the Maldivian court also refused Hilton's application to enforce the Awards ("**June Judgment**"). Hilton appealed against the March Judgment.

Hilton subsequently applied to the Singapore court for an anti-suit injunction and declaratory reliefs. The Court of Appeal set aside High Court's decision to issue an anti-enforcement injunction against Sun, but affirmed the declaratory reliefs which the High Court had granted to Hilton.

As regards the anti-suit injunction, the Court of Appeal acknowledged that in cases involving a breach of arbitration agreements, anti-suit injunctions will typically be granted unless there are strong reasons not to. Comity considerations such as the need to respect the foreign court's processes are generally less significant, since the seat court is simply enforcing the parties' agreement to arbitrate. However, comity considerations are relevant in cases where the applicant delayed in applying for anti-suit relief. In particular, when the delay has allowed the foreign proceedings to progress to an advanced stage, comity considerations are stronger as significant time and expenses will be wasted if the anti-suit relief is granted and the foreign proceedings are stopped. The mere fact that an applicant raised jurisdictional objections in the foreign proceedings does not justify delay. Otherwise, the applicant could attempt to challenge the foreign proceedings on jurisdictional grounds first and, if that challenge before the foreign court is unsuccessful, then seek an anti-suit injunction before the seat court. That would be giving the applicant two bites at the cherry.

The Court of Appeal also held that anti-enforcement injunctions sought only *after* a foreign court has issued its judgment will be granted sparingly. Compared to an anti-suit injunction, an anti-enforcement injunction interferes more with the foreign courts' proceedings and involves more significant comity considerations. Therefore, an anti-enforcement injunction should only be granted if there are exceptional circumstances that warrant the exercise of the Court's jurisdiction. Exceptional circumstances include cases of fraud and

cases where the applicant only realises that the foreign court's judgment was being sought by the opposing party after the judgment was made.

On the facts, the Court of Appeal found that Hilton's delay in applying for anti-suit relief had allowed the Maldivian proceedings to reach an advanced stage, to the point where the March and June Judgments were issued and there was an ongoing appeal against the March Judgment. Hilton's act of raising jurisdictional objections in the Maldivian Suit did not justify its delay, as Hilton should have simultaneously sought injunctive relief from the Singapore Courts to prevent the Maldivian proceedings from advancing further. Although the Maldivian Suit had been brought in breach of the arbitration agreement and amounted to vexatious and oppressive conduct by Sun, in light of Hilton's delay and in the absence of exceptional circumstances, the Court of Appeal was of the view that the anti-enforcement injunction against Sun should be set aside.

Regarding declaratory relief, the Court of Appeal upheld the High Court's decision to issue two declarations that:

(a) the Awards were final, valid and binding on the parties ("**1st Declaration**"); and

(b) Sun's claim in the Maldivian Suit was in respect of the contract containing the agreement to arbitrate and any consequential proceedings would be in breach of that arbitration agreement ("**2nd Declaration**").

As a starting point, the Court of Appeal recognised that save for matters which are specifically provided for in the International Arbitration Act ("**IAA**"), the Singapore Courts have wide-ranging powers to grant declaratory relief in respect of a Singapore-seated arbitration. On the facts, the Court of Appeal found that the declarations served to uphold the integrity of the arbitration agreements and Awards and could be used by Hilton as a persuasive tool in the Maldivian proceedings. The 1st Declaration reiterated section 19B(1) of the IAA and confirmed the finality, validity and binding nature of the wards. The 2nd Declaration signified that Sun had breached the arbitration agreement by commencing the Maldivian Suit despite the Awards.

The Court of Appeal's decision is useful in helping parties frame their strategies when dealing with a breach of arbitration agreement. The case underscores the importance of applying for anti-suit relief promptly once a party learns of proceedings commenced in breach of an arbitration agreement. Even if the party intends to raise jurisdictional objections before the foreign court, injunctive relief from the seat court should be sought concurrently. The case also demonstrates the availability of declaratory reliefs from the seat court which a party may obtain to strengthen its position and arguments in foreign proceedings.

NON-PARTICIPATION IN ARBITRAL PROCEEDINGS WILL NOT PRECLUDE A SUBSEQUENT CHALLENGE AT THE SETTING ASIDE STAGE (9 MAY 2019)

In *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] SGCA 33 ("***Rakna CA***"), the Singapore Court of Appeal overturned the decision of the High Court in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited* [2018] SGHC 78 ("***Rakna HC***") and held that the non-participation in an arbitration will not preclude a subsequent challenge to the jurisdiction of the arbitral tribunal ("**Tribunal**") under Article 34 of the Model Law, even if a jurisdictional challenge had not earlier been brought under Article 16 of the Model Law or s10 of the International Arbitration Act within the 30-day period.

Avant Garde Maritime Services ("**AGMS**") had commenced arbitration proceedings against Rakna Arakshaka Lanka Ltd ("**RALL**") for a breach of a Master Agreement. RALL did not respond to the Notice of Arbitration by AGMS and did not nominate an arbitrator, despite being granted an extension of time. Instead, RALL had sent a letter to the Singapore International Arbitration Centre stating that the dispute was beyond the scope of submission to arbitration.

Notwithstanding this, the Tribunal was constituted and the arbitration carried on.

Subsequently, a settlement was reached between the parties and encapsulated in a memorandum of understanding. The Tribunal was informed by RALL of this. However, AGMS sent a letter to the Tribunal stating that it would not be withdrawing the arbitration as it was of the opinion that there was no settlement and the arbitration should continue. RALL did not respond to the position of AGMS, and neither attended nor participated in a hearing on the matter. RALL also did not respond to the Tribunal's direction to file written submissions.

The Tribunal issued an interim order stating that the dispute remained alive and arbitration would proceed. As the arbitration proceeded, RALL made enquiries on its progress but did nothing else and made no submissions. A final award in favour of AGMS was made. The final award also held that the Tribunal had jurisdiction.

RALL then commenced the High Court proceedings in *Rakna (HC)* to set aside the award on the basis that the dispute did not fall within the terms of the submission to arbitration and therefore the Tribunal had no jurisdiction. The High Court in *Rakna (HC)* dismissed the application to set aside on the basis that the interim order was a preliminary ruling on jurisdiction and accordingly RALL had to challenge the interim order within 30 days under Article 16(3) of the Model Law and s10(3) of the International Arbitration Act. The High Court found that a failure to challenge a tribunal's ruling on jurisdiction precluded the party from subsequently raising it in a setting aside proceeding.

The Court of Appeal in *Rakna (CA)* overturned *Rakna* (HC) and held that while a claimant is obliged to arbitrate, a respondent who believes that an arbitral tribunal has no jurisdiction is "perfectly entitled to sit by and do nothing".

The Court of Appeal held that neither Article 16(3) of the Model Law nor s10 of the International Arbitration Act prevented a respondent, who chooses not to participate in an arbitration due to a valid objection to jurisdiction, from raising that objection as a ground to set aside an award.

The preclusive effect of Article 16(3) did not extend to a respondent who stays away from arbitration proceedings because such a party has not contributed to any wastage of costs or the incurring of additional costs that could have been prevented by a timely application under Article 16(3) of the Model Law.

The Court also held that RALL was entitled to ask for information on the proceedings despite not wishing to participate, and that such enquiries cannot be regarded as participating in the proceedings.

The Court of Appeal then went on to set aside the Final Award of the Tribunal as it had no jurisdiction because the dispute between the parties had been settled upon the execution of the memorandum of understanding.

The judgment in *Rakna (CA)* makes it clear that a respondent who disputes an arbitral tribunal's finding of jurisdiction has 2 options open to it. It can either challenge the arbitral tribunal's preliminary ruling on jurisdiction within 30 days under Article 16(3) of the Model Law, or it can ignore the ruling and refuse to participate and subsequently challenge the tribunal's jurisdiction in an application to set aside the award.

While respondents can opt not to utilise the procedure under Article 16(3) of the Model Law, the Court of Appeal noted that this is a "risky course of action". A respondent who chooses to only challenge jurisdiction at the setting aside application runs the risk that if the arbitral tribunal is found to have jurisdiction, then the result is that the respondent has lost its opportunity to present its case.

If a party does opt to utilise the procedure under Article 16 of the Model Law and fails in its jurisdictional challenge, it may still challenge jurisdiction during the enforcement stage. However, as noted by the Court of Appeal, having to defend against the enforcement of an award in multiple jurisdictions would be costlier than the setting aside of an award by a supervisory court.

SINGAPORE COURTS HAVE NO POWER TO EXTEND THE TIME LIMIT FOR SETTING ASIDE ARBITRATION AWARDS (20 JUNE 2019)

In *BXS v BXT* [2019] SGHC(I) 10, the Plaintiff applied to set aside a Singapore-seated SIAC award ("**Award**") on several grounds, including the following:

- the composition of the tribunal or arbitral procedure was contrary to the terms of the arbitration agreement;
- the Award dealt with matters outside the scope of the submission to arbitration as the arbitrator misapplied Thai law and exceeded her mandate; and
- the Award was contrary to Singapore public policy.

In response, the Defendant applied to strike out the Plaintiff's setting aside application on the basis that it was brought outside the 3-month time limit for challenging an arbitral award stipulated by Article 34(3) of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**"), and the Court had no jurisdiction to consider the setting aside application because the 3-month time limit in Article 34(3) of the Model Law cannot be extended.

Both applications were transferred from the Singapore High Court to the Singapore International Commercial Court ("**SICC**").

The SICC allowed the striking out application and dismissed the setting aside application, noting that, among other things:

- there was no basis for setting aside the Award, because: (i) the composition of the tribunal and arbitral procedure were not contrary to parties' arbitration agreement; (ii) the Award did not deal with matters outside the scope of the submission to arbitration, and the arbitrator did not misapply Thai law or exceed her mandate; and (iii) the Award was not contrary to Singapore public policy;
- regardless of its merits, the Plaintiff's setting aside application should be struck out as being out of time. This is because the 3-month time limit to apply to set aside an arbitral award under Article 34(3) of the Model Law is a mandatory one that the Court has no power to extend; and
- once the 3-month time limit under Article 34(3) of the Model Law has expired, the right to apply to set aside an award is extinguished. The Court's general power to extend time under section 18(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("**SCJA**") read with paragraph 7 of the First Schedule to the SCJA does not apply to Article 34(3) of the Model Law.

This decision is a reminder that any application to set aside an award should be brought as early as possible, and must be brought within the 3-month time limit under Article 34(3) of the Model Law. After the 3-month time limit has lapsed, the right to apply to set aside is extinguished and the Court has no power to extend this time limit, regardless of the merits of such an application.

AN ASSIGNMENT OF RIGHTS AND THE INTEREST UNDER A CONTRACT DOES NOT NECESSARILY RESULT IN AN ASSIGNMENT OF THE RIGHT TO ARBITRATE (19 JULY 2019)

BXY and others v BXX and others [2019] SGHC(I)11 concerns two issues; first, whether the nomination of another party to receive shares pursuant to a share sale agreement would also result in a transfer of the right to arbitrate to that party, and second, whether the Court has the inherent jurisdiction to grant extensions of time in respect of jurisdictional challenges that are brought out of time, when the relevant Article in the Model Law / section of the International Arbitration Act (Cap. 143A, 2002 Rev Ed) ("**IAA**") do not allow for such an extension.

The plaintiffs were the respondents in an arbitration. They applied to the Tribunal for an

order that the 1st defendant BXX ("**D1**") be struck out as a party in the arbitration on the basis that D1 was not a proper party. The ground of the application was that D1 had assigned all of its rights in the relevant agreement, which included the arbitration clause, to the 2nd defendant ("**D2**").

The plaintiffs' application was dismissed by the Tribunal, and it applied to the Singapore High Court under section 10(3) of the IAA to reverse the Tribunal's ruling. The matter was subsequently transferred to the Singapore International Commercial Court, which then dismissed the plaintiffs' application, finding *inter alia* that D1 was a proper party to the arbitration and that the Tribunal had the necessary jurisdiction. It also found that the plaintiffs' application had been brought out of time.

The plaintiffs managed a business that was acquired by D1 in 2015. Pursuant to that acquisition, the business was transferred to a new company ("**NewCo**") incorporated by the 2nd and 3rd plaintiffs ("**P2**" and "**P3**"). The share sale agreement ("**SSA**") was between D1, P2, and P3 only. Prior to completion of the SSA, D1 provided a letter to P2 and P3, designating D2 as the registered owner of the sale shares and "*vest*[ing] *unto* [D2] *all of* [D1's] *rights, title and interest in, under and/or pursuant to*" the SSA. This letter ("**Letter of designation**") was endorsed by D2, P2, and P3.

D1 and D2 subsequently commenced arbitration at the Singapore International Arbitration Centre against the P2 and P3 for alleged breaches of non-compete / non-solicitation clauses in the SSA. Concurrently, NewCo (which is also the 3rd defendant, "**D3**") also commenced arbitration against P1 and P2, alleging breaches of a related management agreement. Both arbitrations were consolidated.

The plaintiffs argued that pursuant to the letter of designation, D1 had performed a complete assignment of "*all its rights, title and interest in, under and/or pursuant*" to the SSA to D2, which included the arbitration clause therein, and hence, was not entitled to submit its claims to arbitration. On that basis, the plaintiffs applied to the Tribunal to strike out D1 as a party. In submissions, the plaintiffs also argued that D1 had assigned the benefit of the non-compete / non-solicitation clauses in the SSA and hence, was not the proper party to enforce those clauses against P2 and P3. The defendants did not argue that the arbitration clause survived *vis-à-vis* D1 and P2/P3 in spite of the letter of designation. Instead, they argued that, properly interpreted, the language in the letter of designation merely vested the relevant rights, title and interest in the shares to D2 as D1's nominee, but did not extinguish D1's overall entitlement to those rights.

On the substantive issue, the Singapore International Commercial Court ("**SICC**") agreed with the defendants. It held that the Letter of designation merely served to nominate D2 as the transferee of the shares, and did not contemplate a complete assignment of all D1's rights as purchaser. In other words, properly read, the subject of the language of vesting was the sale shares, and not the rights under the SSA itself. The SICC also considered that D1's obligations under the SSA continued to exist even after the Letter of designation; hence, it made no sense for D1 to purportedly assign its rights under the SSA while remaining subject to all obligations. As for D2, P2, and P3's endorsement of the letter of designation, that was nothing more than an acknowledgement and acceptance of the nomination and transfer of shares to D2.

Separately, there was a preliminary issue regarding whether the application had been brought out of time. The Tribunal determined that the plaintiffs' striking out application was properly an application to challenge its jurisdiction under Article 16(3) of the Model Law and/or section 10(3) of the IAA; under those sections, parties could apply to court within 30 days of a tribunal's ruling on jurisdiction. In that regard, the Tribunal's decision dismissing the plaintiffs' application was given on 8 January 2019, and the plaintiffs filed their application to court on 22 February 2019. The plaintiffs sought a declaration that it had been filed within the prescribed time, alternatively, an extension of time or leave to file the application out of time. The SICC found that on the facts, the plaintiffs' application had been brought out of time. Further, it held that the Court derived its jurisdiction to hear such matters under Article 16(3) of the Model Law and/or section 10(3) of the IAA, and neither article nor section

permitted an extension of time. The plaintiffs could not rely on the inherent jurisdiction of the Court to seek an extension, as the Court's jurisdiction in this regard arose solely from the Model Law / IAA.

HIGH COURT RECONCILES CONFLICTING ARBITRATION AND JURISDICTION CLAUSES IN FAVOUR OF ABITRATION (3 SEPTEMBER 2019)

In *BXH v BXI* [2019] SGHC 141, the defendant had obtained an arbitral award against the plaintiff for sums due on unpaid invoices for goods sold and delivered and finance charges accruing on those invoices under a Distributor Agreement. The plaintiff sought to set aside the award, amongst other grounds, under Article 34(2)(a)(i) of the UNCITRAL Model Law on International Commercial Arbitration on the basis that the tribunal lacked jurisdiction.

The plaintiff argued that the Distributor Agreement contained inconsistent dispute resolution provisions. On the one hand, it provided that the Singapore courts would have jurisdiction over any legal action arising out of or connected with the agreement. On the other hand, there was provision that disputes arising out of or in connection with the agreement would be finally settled by arbitration in Singapore. The two provisions read as follows:

> *"**25.8 Governing Law, Jurisdiction and Venue.** This Agreement shall be governed by and interpreted in accordance with the laws of Singapore, except for its rules regarding conflict of laws. The jurisdiction and venue for any legal action between the parties hereto arising out of or connected with this Agreement, or the Services and Products furnished hereunder, shall be in a court located in Singapore. …*
>
> ***25.9 Disputes.** Disputes arising out of or in connection with this Agreement shall be finally settled by arbitration which shall be held in Singapore in accordance with the Arbitration Rules of Singapore International Arbitration Center ("SIAC Rules") then in effect. …"*

In reconciling the conflicting clauses in favour of arbitration, the High Court interpreted them to mean that substantive disputes would be resolved in arbitration, and disputes arising out of any such arbitration would be resolved by the Singapore courts in the exercise of their supervisory jurisdiction.

The Court acknowledged that such an interpretation was "not entirely satisfactory" given that the jurisdiction clause would appear to envisage that substantive disputes, and not only the matters of curial review of an arbitration, would be determined by the Singapore courts. However, the Court took the view that its interpretation was the only practical solution to give effect to the parties' intention to arbitrate.

Another issue that the High Court considered was whether the arbitration agreement could survive the expiry of the Distributor Agreement. The Court affirmed that parties are generally presumed to intend for a dispute resolution clause to survive the substantive agreement, although it is ultimately a matter of contractual interpretation. The principle of separability does not mean that an integrated arbitration agreement can never expire together with the substantive agreement.

On the facts, the Court held that the circumstances did not suggest that the parties intended for the arbitration clause to end upon the expiry of the Distributor Agreement. It held that the arbitration clause fell within the scope of a provision in the Distributor Agreement for the survival of "*terms which by their nature survive the expiration or termination of this [Distributor Agreement]*".

This decision continues the trend in Singapore arbitration jurisprudence of upholding parties' intention to arbitrate in international commercial contracts, and reinforces Singapore as an arbitration-friendly jurisdiction.

COURT SEES THROUGH DISGUISED CHALLENGE TO TRIBUNAL'S SUBSTANTIVE DECISION (16 SEPTEMBER 2019)

In *BTN & Anor v BPT & Anor* [2019] SGHC 212, the Singapore High Court dealt with what had been described by the Plaintiffs as a negative jurisdictional decision contained in a partial arbitral award dated ("**Partial Award**"). The Partial Award was a decision on legal questions submitted by the parties to the Tribunal pursuant to a list of agreed legal issues.

The Plaintiffs sought a review of the tribunal's decision pursuant to Section 10(3)(b) of the International Arbitration Act ("**IAA**"), and (in the alternative) sought to set aside the Partial Award on "a *multitude of grounds*" pursuant to Section 24(b) of the IAA and Article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**").

The Defendants were the owners of a group of companies ("**Group**"), of which the 2nd Plaintiff ("**BTO**") is the principal holding company. The Defendants, along with two other owners of the Group, entered into a share purchase agreement ("**SPA**") with the 1st Plaintiff ("**BTN**"), a public-listed company in Mauritius, pursuant to which BTN acquired 100% ownership and control of the Group. The consideration for the purchase was a minimum sum of US$25 million and a variable sum that could reach a maximum of US$35 million depending on certain targets being attained.

The SPA stipulated that the Defendants had to be employed by BTO. The Defendants' employment agreements contained clauses that provided for their termination both 'with cause' and 'without cause'. BTO subsequently purported to terminate the Defendants' employment on a 'with cause' basis. The Defendants commenced proceedings in the Malaysian Industrial Court claiming that their dismissal had in fact been 'without cause', and obtained judgment in their favour and compensation for lost salary. The Defendants also commenced arbitration proceedings under the SPA, seeking a sum of US$35 million.

The Tribunal rendered the Partial Award, holding (among other things) that it was bound by the findings of the Malaysian Industrial Court and that the issue of whether the Defendants had been terminated 'without cause' was therefore *res judicata*.

The Plaintiffs commenced proceedings in the Singapore High Court, arguing that:

- The Partial Award was in substance a negative jurisdiction ruling as the Tribunal had abdicated the jurisdiction conferred upon it by the parties to decide disputes under the SPA, and this decision should therefore be determined by the Court *de novo*.

- The parties had, pursuant to the SPA, given the Tribunal jurisdiction to determine any dispute arising out of the SPA, including any dispute as to whether the Defendants had been terminated 'without cause' within the meaning of the SPA. The Partial Award was therefore no an award at all as the Tribunal had failed to enter into the merits of this question at all.

The Court held that the Partial Award was not a ruling on jurisdiction, describing it as "*nothing other than a clever argument to mask a challenge on the substantive decision by the Tribunal on the questions submitted by the parties for decision*". The Court also held that the Tribunal had not abdicated its jurisdiction as it had decided on the substantive merits of the legal dispute between the parties – namely, "*whether the decisions of the Malaysia Industrial Court are binding as a matter of contract on a proper interpretation of [the Defendants' employment contracts]*". The Tribunal had exercised its jurisdiction to interpret the contracts, and any errors in contractual construction are errors of law and fact and such errors are not subject to review.

The Court also dismissed the Plaintiffs' alternative attempts to set aside the Partial Award pursuant to Section 24(b) of the IAA and Article 34(2) of the Model Law.

This case is noteworthy for two reasons:

First, the Court emphasized that it is alive to parties seeking to disguise a challenge to a Tribunal's substantive decision as a jurisdictional challenge, and will be robust in refusing such challenges.

Second, in dismissing the Plaintiffs' attempt to set aside the Partial Award on the grounds that it was contrary to Singapore's public policy, the Court reiterated the Court of Appeal's decision in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 that any challenge on this ground would only succeed in cases where upholding or enforcing the arbitral award would "*shock the conscience*" or be "*clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public*".

A CLAIMANT HAS A FUNDAMENTAL RIGHT TO CHOOSE ITS CAUSE OF ACTION AND THE PARTY TO SUE (22 OCTOBER 2019)

In *Rex International Holdings Ltd and another v Gulf Hibiscus Ltd* [2019] 2 SLR 682, the respondent ("**Gulf Hibiscus**") commenced court proceedings against the appellants (collectively "**Rex International**") in respect of alleged wrongs committed by the latter and their associated companies in relation to certain joint ventures. Rex International sought a stay of the proceedings in reliance of an arbitration clause in the in a shareholders' agreement between Rex International's subsidiary ("**RME**") and Gulf Hibiscus.

The Judge at first instance granted a conditional stay. Subsequently, on Gulf Hibiscus' application, the Judge ordered that the stay was to be lifted unless arbitration was commenced or another order of court was granted before a certain date. Rex International appealed and argued that Gulf Hibiscus, as claimant, ought to have commenced arbitration against RME and having not done so, ought not to be allowed to lift the stay.

The Court of Appeal dismissed the appeal and explained that the stay should not have been granted in the first place. The Court of Appeal found that there was no applicable arbitration clause because Rex International were not party to the shareholders' agreement containing the arbitration clause and Gulf Hibiscus harboured no intention of commencing any proceedings in any form against RME, the actual party to the shareholders' agreement containing the arbitration agreement. The Court of Appeal also held that there should not be any case management stay granted when the court proceedings would not depend on the resolution of issues that may arise in the putative arbitration, which in any event was illusory since Gulf Hibiscus was not claiming against RME.

Rex International then contended that Gulf Hibiscus' real complaint was against RME for breaches of the shareholders' agreement. With regard to this, the Court of Appeal emphasised that a claimant has the right to choose its cause of action and to sue the party it wishes to sue, in whichever forum it wishes, subject only to any applicable legal constraint, such as an arbitration agreement, and that this is a fundamental right. Ultimately, while Gulf Hibiscus' claims do concern RME and the shareholders' agreement, the allegations were directed towards the alleged misconduct of Rex International in various joint venture businesses.

This case shows that a claimant's prerogative to choose its cause of action and which party to sue is a fundamental entitlement, even if the cause of action might have been formulated to engage a particular forum or certain parties.

APPLICATIONS TO APPEAL AND SET ASIDE ARBITRAL DECISION DISMISSED BY HIGH COURT, EMPHASIS ON NON-INTERVENTIONIST APPROACH (5 NOVEMBER 2019)

In *Ng Tze Chew Diana v Aikco Construction Pte Ltd and another matter* [2019] SGHC 258

and *Ng Tze Chew Diana v Aikco Construction Pte Ltd* [2019] SGHC 259, the Applicant sought to set aside the arbitral award for breaches of natural justice ("**Setting Aside Application**") and to appeal the arbitral award on a question of law ("**Leave Application**") respectively. The Singapore High Court dismissed both applications, finding that they were effectively a disguised attempt to challenge the merits of the arbitral award.

The Applicant was a property owner who employed the Respondent to build a two-storey semi-detached house. After completion, the Applicant commenced arbitration proceedings against the Respondent for damages due to, *inter alia*, delay and defects in the project. The Respondent raised a counterclaim for payment of work done.

The arbitrator issued an award dated 25 July 2017 which decided that monies were due from the Applicant to the Respondent. However, parties only received the award on 17 May 2018 as they had not paid the outstanding arbitrator's fees. The arbitrator eventually released the award without having his fees fully paid.

The Applicant took out the Setting Aside Application under s.48(1)(a)(vii) of the Arbitration Act, and claimed that there was a breach of natural justice which prejudiced her because:

(a) There was a failure to determine whether she was entitled to general damages for delay in completion;

(b) There was a failure to consider particular submissions related to the validity of delay certificates;

(c) The arbitrator had relied on a "well-known fact", that leaving defects in a building unrepaired would cause the defects to deteriorate, for the purposes of his determination; and

(d) There was apparent bias and/or prejudgment by the arbitrator when he rejected particular evidence from the Applicant's witnesses.

The Court dismissed all of the above claims.

For the first issue, the Court held that an arbitrator would be in breach only if:

(a) the issue was essential to the resolution of the dispute; and

(b) a clear and inescapable inference may be drawn that the arbitrator did not apply his mind at all to the said issue. However, the Applicant had failed to raise a claim for general damages for delay. Thus, there was no failure to consider this issue.

For the second issue, the Court found that the arbitrator had made references to the submissions. He did not have to deal with all arguments, but only those which were essential and necessary for his decision.

In relation to the third issue, the Court stated that arbitrators, like judges, are entitled to rely on own common sense when analysing and determining issues in the case.

For the last issue, the Court found that the arbitrator was entitled to ask open ended questions to witnesses, and consider the appropriate reliance to be placed on evidence. Even if the arbitrator had not given sufficient reasons for rejecting evidence, this was insufficient to conclude that there was apparent bias. The lack of detailed reasons alone was also insufficient to show that the arbitrator had breached the rules of natural justice.

The Applicant took out the Leave Application within 28 days after she had received the award on 17 May 2018. However, as the award was dated 25 July 2017 the Court held that she was out of time to file the application. The Court refused to grant an extension of time for the application for four reasons.

First, there was a substantial delay of nine and a half months. By contrast, the next longest precedent cited before the Court was only slightly less than 4 months.

Second, there was no valid reason for the delay. The Applicant argued, *inter alia*, that she could not collect the award earlier because the Respondent had failed to pay the arbitrator's fees. It was also argued that

the Respondent was in clear financial difficulty, and as such, potential prejudice would have been caused to the Applicant had she first paid on the Respondent's behalf. This was rejected by the Court, which emphasised that as parties were jointly and severally liable for the arbitrator's fees, one party cannot rely on the other party's non-payment of the fees to justify the delay in filing the application of appeal.

The third reason was the chance of the appeal succeeding. The Court reiterated that leave to appeal will only be granted if:

(a) the appeal was on a question of law;

(b) the determination of that question will substantially affect the rights of one or more of the parties;

(c) the question was one which the arbitrator was asked to determine;

(d) on the basis of the factual findings, the decision was obviously wrong, or if the question is one of general public importance and the decision is at least open to serious doubt; and

(e) despite the arbitration agreement, it is just and proper in all the circumstances for the court to determine the question.

The Court found that the chance of the appeal succeeding was "hopeless". None of the questions posed by the Applicant satisfied the requirements.

A number of the "questions" were essentially allegations that the arbitrator committed an error of law. This is not the same as a question of law. The former is an erroneous application of the law, whereas the latter turns on whether there is a point of law in controversy.

Lastly, the Court found that there would be some prejudice suffered by the Respondent if leave to appeal was granted. The prejudice suffered would be more than in the usual case because of the length of delay by the Applicant in bringing the application.

In conclusion, the Leave Application is a reminder that the timelines for an appeal on a question of law (for domestic arbitrations) start running from the date of the award and not the date the award was received. In order not to prejudice a party's right of appeal on a question of law, it is prudent for a party to obtain a copy of an award as soon as possible by paying all of the arbitrator's fees even if the counterparty refuses to pay its share.

Parties should also be aware that notwithstanding that an arbitral decision does not expressly make reference to parties' arguments, this alone does not amount to a breach of natural justice. To establish a breach of natural justice, the arbitrator must have dramatically departed from the submissions, received extraneous evidence, arrived at a view wholly at odds with established evidence or a conclusion unequivocally rejected by parties as being trivial or irrelevant. The standard required is irrationality or capriciousness.

Lastly, this case also illustrates the Singapore Courts' pro-arbitration policy, and how that they are slow to disturb an arbitral award, notwithstanding that there may be errors in law and fact that are committed by an arbitrator. The Court in the cases had re-emphasised the policy of minimal curial intervention. Parties need to be very clear about this before they enter into an arbitration agreement as the ability to challenge an arbitration award is far more limited than in the case of a judgment in court proceedings.

TRIBUNAL'S CHOICE OF WRONG ARBITRAL SEAT SUFFICIENT TO JUSTIFY REFUSAL OF ENFORCEMENT OF ARBITRAL AWARD EVEN IN THE ABSENCE OF PREJUDICE (18 NOVEMBER 2019)

In *ST Group Co Ltd and others v Sanum Investments Limited and another appeal* [2019] SGCA 65, a group of Laotian companies, together with their Laotian corporate controller (collectively referred to as the "**Lao Parties**"), applied to the Singapore

Courts to refuse enforcement of an SIAC arbitral award (**Award**") obtained by Sanum Investments Limited ("**Sanum**"). Sanum is a Macau-incorporated company that had entered into a joint venture with the Lao Parties.

The Lao Parties sought refusal of enforcement on the grounds that:

(a) not all the Lao Parties were party to the arbitration agreement;

(b) the Award dealt with a dispute outside the scope of the submission to arbitration; and

(c) the composition of the tribunal and the seat of the arbitration were not in accordance with the parties' agreement.

The High Court refused enforcement against one of the Lao Parties (namely STV Enterprise) on the ground that it was not a party to the arbitration agreement, but upheld enforcement of the award against the remaining Lao Parties. In particular, the High Court held that the arbitral tribunal ("**Tribunal**") had incorrectly constituted Singapore (instead of Macau) as the seat of the arbitration, but found that the Tribunal's choice of the wrong arbitral seat was a mere procedural irregularity that did not warrant the refusal of enforcement of the Award as no material prejudice arose from this error. Sanum appealed against the Court's decision to refuse enforcement against STV Enterprise, while the remaining Lao Parties appealed against the Court's decision to allow enforcement against them.

The Court of Appeal dismissed Sanum's appeal, but allowed the appeal by the remaining Lao Parties. The apex court concurred with the High Court in most regards, including that the Tribunal ought to have selected Macau (instead of Singapore) as the arbitral seat. However, the Court of Appeal held that enforcement of the Award should have been refused as the seat was not in accordance with the parties' agreement.

In particular, the Court of Appeal held that once an arbitration is wrongly seated, in the absence of waiver, any award that ensues should not be recognised and enforced by other jurisdictions as such award has not been obtained in accordance with the parties' arbitration agreement – it is not necessary for a party who is resisting enforcement in such a situation to demonstrate actual prejudice arising from the wrong seat. This is because the parties' choice of an arbitral seat is one of the most important expressions of party autonomy in an arbitration agreement, which the courts should give full effect to.

This decision shows how the tribunal's constitution of the wrong arbitral seat could give rise to insuperable impediments to the successful enforcement of any eventual award. It is thus a welcome reminder for parties to be especially mindful of the need to expressly specify the arbitral seat when drafting arbitration agreements, so as to leave no room for any doubt about the seat that should be constituted by the tribunal during the arbitration.

THE TIME LIMIT TO BRING AN APPLICATION TO SET ASIDE AN ARBITRAL AWARD ONLY COMMENCES ON DISPOSAL OF A REQUEST FOR CORRECTION OF THE ARBITRAL AWARD (18 NOVEMBER 2019)

BRQ and another v BRS and another and another matter [2019] SGHC 260 concerned a Sale and Purchase Agreement ("**SPA**") of a special purpose vehicle ("**SPV**") established to construct and operate a hydroelectric plant.

There are three takeaways from this judgment.

First, the three-month period to set aside an award under Art 34 of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") is strict. However, timelines can be extended if parties apply to correct an award under Art 33 of the Model Law. The three-month period only commences when the tribunal disposes of a request for correction of the award.

Second, mere silence will not suffice to show that the tribunal had failed to take into account arguments or evidence tendered by

one party. A tribunal coming to a conclusion not argued by either party did not mean that parties did not have an opportunity to address the tribunal on that issue – the tribunal could come to its own conclusions as long as it did not involve a dramatic departure from what was argued.

Third, the tribunal's jurisdiction includes not only issues specifically presented to it in the pleadings but also those questions of fact and law that arise (whether expressly or impliedly) from the pleadings.

In this case, the respondents were the sellers under the SPA, while the first claimant was the buyer. The second claimant was the SPV itself. The key terms of the SPA were that:

(a) Part of the payment monies would be paid to the SPV by the buyer and recorded as a Sellers' Subordinated Loan ("**SSL**").

(b) The sellers would indemnify the buyers for any cost overruns in the project.

(c) The buyers would be entitled to deduct sums from the SSL if not indemnified by the sellers in the event of a cost overrun.

(d) The buyer had the right to take over the construction of the project if it was not completed by a specified "Wet Commissioning Date" ("**WCD**") and would have to complete the project in the most prudent and cost-effective manner.

The construction was significantly delayed, and the buyer took control. While the project was eventually abandoned, parties agreed to take the date of partial completion as the WCD. The operators claimed to be indemnified pursuant to the SPA. The sellers counterclaimed for the SSL which had been written down.

The tribunal held that:

(a) the sellers had to indemnify the sellers, but the project had deviated from the sellers' plans, and therefore the quantum of the sellers' liability was reduced.

(b) the sellers could not recover the SSL, as it had been written down in the SPV's books due to the cost overrun, and had been extinguished.

In court, the buyers argued that the sellers' application was out of the 3 month time period prescribed by Art 34 of the Model Law. The court disagreed, and found that while the sellers had made the application more than 3 months after receiving the final award, they had applied to correct the award under Art 33 of the Model Law. This prevented the commencement of the 3 month time period until the tribunal disposed of the request.

The buyers argued that an application for correction must be genuine and material to the setting-aside application for it to postpone the running time under Art 34. The court noted that:

(a) the plain language of the Model Law did not support such a qualitative gloss;

(b) the fear of abuse was ameliorated by the deadlines in Art 33 and the power of the tribunal to make cost orders;

(c) a qualitative gloss would reduce the certainty and finality of the award;

(d) parties would engage in wasteful concurrent applications under Art 33 and 34; and

(e) Model Law drafters had not intended a qualitative test.

Both the buyers and the sellers argued that the award should be set aside for failure to take into account their respective arguments and evidence, as well as for not giving parties an opportunity to make arguments in respect of new points raised. The sellers also claimed that the tribunal had acted in excess of its jurisdiction.

The High Court upheld the award. It held that parties had received a fair hearing, the tribunal had considered the issues before them, and the inference from silence on the part of the tribunal regarding issues, evidence, or arguments in the award must be "clear and virtually inescapable" before the court would find that the tribunal had failed to consider it. This was not so on the present facts, as the tribunal had alluded to the arguments and evidence made by parties.

The court also said that the tribunal did not need to solicit parties' submissions on every point, and could come to its conclusions based on the available evidence before it unless it involved a dramatic departure from what was presented.

Finally, the court found that the tribunal had acted within its jurisdiction despite coming to a conclusion on a line of reasoning not argued by either party, as it was a finding reached on the evidence tendered to the tribunal. In any event, there had been no prejudice caused, since the same outcome was reached based on another line of reasoning which had been argued.

COURT OF APPEAL ALLOWS APPEAL TO THE LIMITED EXTENT THAT SINGAPORE IS NOT THE SEAT OF ARBITRATION, DECLINING TO DECIDE WHETHER THE TRIBUNAL HAS JURISDICTION (27 DECEMBER 2019)

BNA v BNB and another [2019] SGCA 84 concerned the interpretation of an arbitration agreement, and was an appeal against a jurisdictional challenge commenced in the High Court against an Singapore International Arbitration Centre ("**SIAC**") Tribunal's jurisdictional ruling. The Court of Appeal was required to determine the proper law of the arbitration agreement, the seat of the arbitration, and whether the SIAC tribunal had jurisdiction.

The arbitration agreement was found in Article 14 of the substantive contract, entitled "Disputes". Article 14.1 was an express choice of the law governing the substantive agreement, stating that *"[t]his Agreement shall be governed by the laws of the People's Republic of China"*. Article 14.2 was the arbitration agreement, which stated that "…*disputes shall be finally submitted to the SIAC for arbitration in Shanghai, which will be conducted with its Arbitration Rules*."

The Appellant failed to make certain payments under the substantive contract, and the Respondents filed a Notice of Arbitration thereafter. The Appellant responded by challenging the tribunal's jurisdiction.

The crux of the jurisdictional dispute before the tribunal was whether the proper law of the arbitration agreement was Singapore law, or the law of the People's Republic of China ("**PRC**"). The Appellant argued that if PRC law was the proper law of the arbitration agreement, then the arbitration agreement would be invalid for two reasons:

- Shanghai was the seat of the arbitration, and PRC law did not permit a foreign arbitral institution such as the SIAC to administer a PRC-seated arbitration.
- The dispute was a purely domestic dispute, and PRC law did not permit a foreign arbitral institution such as the SIAC to administer such a dispute.

After the tribunal dismissed the Appellant's jurisdictional challenge, the Appellant challenged that ruling in the High Court. The High Court dismissed the Appellant's jurisdictional challenge and held that the tribunal had jurisdiction.

In particular, the High Court found that on a proper interpretation of the phrase "*arbitration in Shanghai*", parties had chosen Shanghai as the physical venue of arbitration, whereas Singapore was the legal seat. It reached this conclusion by considering that:

- Parties had not chosen a seat, and the SIAC Rules 2013 (particularly Rule 18.1) indicated that the seat of arbitration would, in the absence of express selection by the parties, be Singapore.
- Shanghai was a city and not a law district, and thus the phrase "*arbitration in Shanghai*" was a reference to a venue rather than a seat.

With the leave of the High Court, the Appellant submitted an appeal to the Court of Appeal. On appeal, the following issues had to be determined:

- In considering the express choice of law governing the arbitration agreement, was

the title of Article 12 ("Disputes") sufficient to extend the choice of law governing the substantive contract in Article 12.1 to the arbitration agreement in Article 12.2?

- In considering the implied choice of law governing the arbitration agreement, was there anything to displace the starting point that the law governing the substantive contract also governed the arbitration agreement?

- On a proper interpretation of "arbitration in Shanghai", was Shanghai the legal seat and / or physical venue of the arbitration?

- Do the parol evidence rule and its exceptions apply in a jurisdictional challenge before the Court?

- Can the Court hearing a jurisdictional challenge under Section 10(3) of the International Arbitration Act ("**IAA**") refrain from making a conclusive finding as to the tribunal's jurisdiction?

Allowing the appeal to the limited extent that Shanghai (not Singapore) is the seat, the Court of Appeal held as follows:

- On a proper interpretation of Article 12, the express choice of the proper law of the substantive contract in Article 12.1 did not also constitute an express choice of the law governing the Article 12.2 arbitration agreement.

- In determining the implied choice of law governing an arbitration agreement under the *BCY v BCZ* [2017] 3 SLR 357 framework, the starting point is that the governing law of the substantive contract is an implied choice of the proper law of the arbitration agreement. This starting point can be displaced.

- There was nothing to displace the implied choice of PRC law in this case, particularly as the parties had chosen Shanghai as the seat (and not merely the physical venue) through the phrase "arbitration in Shanghai".
    - Where parties specify only one geographical location in an arbitration agreement, that location should most naturally be construed as a reference to the seat (and not venue) of the arbitration.
    - It is best practice to specify both the city *and* the country in the arbitration agreement (to avoid arguments being raised about where the arbitration is seated), but the omission to do so will not render a clear reference to a seat, as here, a reference to venue instead.

- There were no contrary indicia displacing the reading that Shanghai was the seat, and the Respondents' arguments were to be rejected.
    - The parol evidence rule and its exceptions apply in a jurisdictional challenge before the Court (even if not in a jurisdictional challenge before a tribunal). The pre-contractual negotiations adduced by the Respondents did not fulfil the *Zurich Insurance* requirement of relating to a clear and obvious context, and was thus inadmissible as evidence that parties had intended for their arbitration to be seated in Singapore.
    - There was no evidence that the parties were aware of any interplay between PRC law and the express choice of SIAC as the administering institution, so it was not open to the Respondents to argue that PRC law (as it existed at the time parties contracted) would have invalidated the arbitration agreement

- Since PRC law was (i) the law of the seat (Shanghai) and also (ii) the implied choice of law governing the arbitration agreement, there was no issue of whether the former should displace the latter in order not to nullify parties' intention to arbitrate. Thus, it was also unnecessary to deal with the principles of 'effective interpretation' and 'validation' raised by the High Court.

- Shanghai, not Singapore, was the seat of the arbitration: thus, the Shanghai court which has supervisory jurisdiction over the arbitration is best placed to next decide the issue of whether the tribunal has jurisdiction.
    - However, given that the tribunal had ruled that Singapore was the seat, it was still justified for the Appellant to bring the jurisdictional challenge to the Singapore High Court at the time. The Singapore High Court had as good a claim as the Shanghai courts to hear the initial challenge against the tribunal's jurisdictional ruling. Any rule that only the courts of the seat can hear a jurisdictional challenge would create an unsolvable contradiction.
- The Court of Appeal therefore allowed the appeal to the limited extent that Shanghai (not Singapore) was declared as the seat of the arbitration, but declined to decide definitively whether the tribunal has jurisdiction. This was consistent with the structure of Section 10 of the IAA, which does not require that the court make a conclusive finding as to the tribunal's jurisdiction.
- The Court of Appeal remarked in *obiter* that parties' manifest intention to arbitrate is not to be given effect at all costs. The terms of the arbitration agreement have to undergo a process of construction, giving the words of the arbitration agreement their natural meaning, unless there are sufficient contrary indicia to displace that reading. If the result of the construction process is that the arbitration agreement is unworkable, then the parties must live with the consequences of the terms chosen.

This decision is significant for clarifying that where parties specify only one geographical location in an arbitration agreement, that location is most naturally construed as a reference to the seat (and not venue) of the arbitration. Parties should also take note that the parol evidence rule applies in jurisdictional challenges before the Singapore courts, and they might therefore be barred from admitting pre-contractual negotiations or draft agreements as extrinsic evidence. The Court of Appeal also signaled that the Singapore courts will not give effect to parties' intention to arbitration at all costs. The parties had not only chosen to arbitrate – they chose to arbitrate in a certain way, in a certain place, under the administration of a certain arbitral institution. Those all had to be given effect to by a process of construction which critically gave the words of the arbitration agreement their natural meaning, unless there were sufficient contrary indicia to displace that reading. If the result of this process of construction was that the arbitration agreement is unworkable, then the parties would have to live with the consequences of their decision.

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THE INTERNATIONAL ARBITRATION PRACTICE

Drew & Napier's International Arbitration Practice is renowned as a top practice in the Asia Pacific region, and is listed as one of the world's leading practices.

We are dedicated to achieving winning outcomes for our clients no matter the jurisdiction, institution or tribunal. Each year, the aggregate quantum of our arbitration matters totals several billion dollars.

We represent clients from a diverse range of industries and countries. Many of our clients come back to us for further representation. Our clients include Fortune 500 companies, financial institutions, foreign governments, multinational corporations and state-owned entities.

We handle all stages of the arbitral process; from strategising to the commencement of arbitration proceedings to the final evidential hearing, as well as enforcement of arbitral awards in the Singapore Courts and beyond. We are experienced in handling matters spanning a range of governing and procedural laws, from both common law and civil law traditions.

In addition, we are frequently instructed by international law firms to act as lead counsel at arbitration hearings in Hong Kong, India, London, Milan, Shanghai, Dubai and Singapore.

Our group comprises a strong core team which focuses almost exclusively in international arbitration, as well as eminent advocates who are well versed in arbitration practice. We have specialist arbitration lawyers who practise in specific industry sectors, such as building and construction, energy & utilities, finance, commodities, information technology, intellectual property, oil & gas, property and shipping, corporate joint ventures, franchising, distribution and investments. We have capability and expertise in both commercial arbitrations and investment-treaty or investor-state arbitrations, having advised and acted for both states and investors.

OUR EXPERIENCE

Our lawyers have acted for international and local clients in arbitrations before the following institutions:

- American Arbitration Association (AAA)
- Chartered Institute of Arbitrators (CIArb)
- China International Economic & Trade Arbitration Commission (CIETAC)
- Hong Kong International Arbitration Centre (HKIAC)
- International Chamber of Commerce (ICC), International Court of Arbitration
- Asian International Arbitration Centre (AIAC)
- London Court of International Arbitration (LCIA)
- Singapore Chamber of Maritime Arbitration (SCMA)
- Singapore Institute of Arbitrators (SIArb)
- Singapore International Arbitration Centre (SIAC)
- Malaysian Institute of Arbitrators (MIArb)
- Pacific International Arbitration Centre (PIAC)

In addition to acting as counsel in arbitrations, our lawyers also sit as arbitrators, giving us better perspective of cases. Some of us are also fellows or members of a number of arbitration institutions.

Cavinder is one of two Vice Presidents of the SIAC Court of Arbitration and was the former Deputy Chairman of the SIAC.

Jimmy and Cavinder are on the panel of the SIAC.

Jimmy is a recommended International Arbitrator of the Pacific International Arbitration Centre (PIAC), Vietnam.

Cavinder has been appointed to the ICSID Panel of Arbitrators and has sat as an arbitrator in ICC, LCIA, ICSID, SIAC and UNCITRAL cases. He was a recent member on the inaugural Disciplinary Tribunal of the International Association of Athletics Federations (IAAF). In addition, Cavinder is on the Governing Board of the International Council for Commercial Arbitration (ICCA), on the World Bank Sanctions Board, and the Vice-President of the Asia Pacific Regional Arbitration Group.

Randolph has been appointed Panel Arbitrator of the Singapore Institute of Arbitrators, Kuala Lumpur Regional Centre for Arbitration, Malaysian Institute of Arbitrators, Shanghai

Arbitration Commission, Shenzhen Court of International Arbitration, The Chinese Arbitration Association, Taipei and Shanghai International Economic and Trade Arbitration Commission, among others.

ACCOLADES

Based on client and market feedback, prestigious legal directories like Chambers and Partners, Legal 500 and Global Arbitration Review consistently confirm our leadership with top rankings in International Arbitration.

The Asia Pacific Legal 500

International Arbitration 2020 – Ranked Tier 2 for 5 consecutive years

Leading Individuals:
Cavinder Bull, SC – 8 consecutive years

Recommended Lawyers:
Jimmy Yim, SC – 2 consecutive years
Randolph Khoo – 5 years
Foo Yuet Min – 3 consecutive years

Next Generation Lawyer:
Mahesh Rai

Sources say: *'First class technical and practical advice that is consistently delivered according to the timelines required."*

'The team was extremely thorough at each step of the dispute and ensured that they were always one step ahead. Their proactive attitude in managing the dispute enabled us to forecast several potential matters which could have hindered our case.'

'The intensity and dedication shown by the team working on our arbitration is unparalleled and explains why Drew & Napier is such a tough opponent to have in a dispute.'

'dispute resolution giant with a high degree of focus on international arbitration. It has an impressive mix of investor-state, construction and engineering, and commercial cases.'

'The team is "the best in town"…"business-oriented" approach, "deep knowledge" and "relevant experience"; commended for attracting "big-ticket items", especially arbitration-related court proceedings, with senior figures in the team handling both litigation and arbitration work.'

'Formidable player in the international arbitration scene, and is praised for its "management of expectations" and "value for money". The strength of its practice and the eminence of its senior team members has led it to be engaged in a series of major arbitrations, including a number of investor-state disputes.'

"First-rate' team 'impresses with its knowledge and professionalism"; "the group's capabilities are 'comparable to any top arbitration practice in the Asia Pacific region'"

Impresses with its "creativity, stamina and level of legal work"

"a leading firm for international arbitration in Singapore."

Chambers Asia-Pacific and Chambers Global

Domestic Firms (Singapore) 2020 – Band 2 (11 years ranked)

Leading Individuals:
Jimmy Yim, SC – Band 4 (11 years ranked)
Cavinder Bull, SC – Band 1 (8 years running)

Arbitration (International): Asia-Pacific 2020 – Leading firm (10 years ranked)

Chambers says: "Formidable line-up of disputes lawyers with an established reputation for handling complex, high-value arbitration."

Interviewees say: "I am always impressed with the no-nonsense, down-to-earth legal advice provided by the team."

One client appreciates the team's "use of good strategy" and ability to "give assurance and confidence along the way."

"Their reputation is well deserved: they are the top firm overall in Singapore, unlike a lot of multinational firms. They really are focused on operating from Singapore, but they work all around the world."

"They are among the top at their game in Singapore and they have a good network of solid friendly firms in other jurisdictions that they work very well with."

'active on both commercial and investor-state mandates on behalf of a multinational clientele and increasingly sought after for the arbitration of matters of international public law.'

"They are very well versed in their field, meticulous and thorough, and we're sure that their calculated actions gave us the results that we wanted to achieve."

"seeks innovative solutions"; *"the firm is always updating its capabilities to meet the challenges of future requirements."*

"The team is technically sound and commercial in its approach. I felt great ease with them handling the case and this was vindicated by a total win."

"'dedication of the team" was emphasised by a number of contributors'

"They were very thorough and patient when sifting through the many stacks of documents relating to the disputes, their pre-trial preparations were intensive and, most importantly, they were always available to discuss any issues we raised or were not confident about."

"A number of commentators regard Drew & Napier as Singapore's pre-eminent home-grown arbitration team, with one maintaining that it is 'definitely the leading local firm in arbitration'. Another concurs: 'Arbitration and dispute resolution are the special forte of Drew & Napier. They have demonstrated remarkable skills and abilities in handling very complex matters'."

"Sources point to rigorous preparation as a key reason for the practice's excellent reputation. One notes: 'They show clarity of thought, clear strategy and the legal opinion has been well researched and is strong; preparation is thorough for the conduct of any case'."

"They take their cases and clients seriously and put their heart and soul into the matters they accept."

"Extremely impressed: they have intellectual capacity, a very strategic mindset and a focus on the elements in which you want them to invest."

"I would say Drew & Napier are still a go-to firm if a client is looking for the strongest possible representation in dispute resolution."

"I was really impressed not just with the legal work but the adaptation of success to the clients. Extremely impressed."

"Their in-depth legal and industry knowledge, business awareness and professional advice have all been of a high standard. They are equally adept at the representation of out-of-region clients in Asian-based disputes, and of Asian clients in both regional and international cases."

"The choice was obvious when we were considering a firm to represent us: their dispute resolution work is simply unparalleled, they're in touch with matters arising in the China market, and the value-added service of providing arbitration-related litigation work is indispensable."

"I can't speak highly enough of them: everyone we've worked with from senior to junior has been incredibly professional, prompt and diligent in approach and manner."

"'World-class' counsel Cavinder Bull SC is described by sources as 'very easy to deal with' and an 'excellent advocate' who 'writes compelling briefs and makes superb oral presentations.'"

Global Arbitration Review 100 - 12th edition (2019)

Listed as one of the top 100 arbitration practices in the world since 2010

Benchmark Litigation Asia-Pacific Awards

Commercial & Transactions Firm of the Year 2019

National Law Firm of the Year 2018 – Singapore

Disputes Star of the Year, Singapore 2018 – Cavinder Bull, SC

Asian Legal Business SE Asia Law Awards

Dispute Resolution Lawyer of the Year 2019 - Cavinder Bull, SC

Young Lawyer of the Year 2019 – Mahesh Rai

SE Asia Law Firm of the Year 2017

Who's Who Legal

Arbitration Thought Leader 2020 – Cavinder Bull SC (4 consecutive years)

Arbitration 2020 – Cavinder Bull, SC (8 consecutive years)

Arbitration Future Leaders 2020 – Foo Yuet Min (4 consecutive years) and Mahesh Rai (debut)

Asialaw Profiles

Dispute Resolution 2020 – Outstanding firm for 10 consecutive years

"Keen attention to detail, comprehensive knowledge of evidence at trial and a thorough grasp on preceding interlocutory applications including notes of evidence prepared by the court."

"Excellent practical advice. The particular highlights are: consistent ability to meet tight deadlines; written advice contains a short summary of position on key points; willing to give a clear assessment of the likelihood of success of each argument."

"The team delivers advice which reflects a deft balance between technical proficiency and commercial sensibilities. They are diligent and thorough, able to quickly pick up a solid understanding of technical industry matters, and very responsive."

Asialaw Leading Lawyers

Dispute Resolution 2020

Recommended Individuals:
Jimmy Yim, SC – Elite Practitioner for 3 consecutive years
Cavinder Bull, SC – Elite Practitioner for 3 consecutive years
Siraj Omar, SC – Distinguished Practitioner

Dispute Resolution 2019

Recommended Individuals:
Blossom Hing – Market Leading lawyer for 2 consecutive years
Tony Yeo – Market-Leading lawyer for 2 consecutive years
Mahesh Rai – Leading lawyer for 2 consecutive years

Benchmark Litigation Asia-Pacific 2019 edition

International Arbitration – Tier 1 (2 consecutive years)

Identified as Dispute Resolution Stars:

Jimmy Yim, SC
Cavinder Bull, SC
Siraj Omar, SC
Randolph Khoo
Blossom Hing

"They are responsive and immediately look into the problems and provide possible solutions at hand." (2019 edition)

"The professionalism and friendliness of Drew & Napier is noticeable." (2018 edition)

Best Lawyers International: Singapore (2019 edition)

Recommended Individuals:

International Arbitration
Cavinder Bull, SC (Lawyer of the Year)
Randolph Khoo

Arbitration & Mediation
Jimmy Yim, SC
Cavinder Bull, SC
Randolph Khoo

India Business Law Journal

In the India Business Law Journal (2018 issue), a client praised Drew as *"very professional, works under minimal guidance and is very smooth on timelines"*; Jimmy Yim SC was recommended by his client as someone whose *"experience, knowledge and strategy is supreme and unparalleled".*

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