SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
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THE PRESIDENT'S COLUMN

Another year has almost passed. A new decade is about to begin. It is timely for us to take stock of what we have accomplished and set the direction we hope to achieve in the new year.

In 2005, the Institute published the Singapore Institute of Arbitrators' Arbitration Rules and Code of Ethics. In the same year, we established our panel of arbitrators. This panel now stands at 140 and includes Queen's Counsel, Senior Counsel, retired judges, and senior practitioners in their respective fields.

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ANOUNCEMENTS UPDATES & UPCOMING EVENTS

1. Seminar on "Anti-suit Injunctions, Jurisdiction and Arbitration" by Mr. Stephen Males QC and Mr. Michael Collett on **18 January 2010**.
2. Conference on "International Arbitration Proceedings under ICC Rules" and "International Mediation under CIArb Mediation Rules" by the Chartered Institute of Arbitrators on **19 – 20 January 2010**.
3. Conference on "International Investment Arbitration" by the National University of Singapore on **20 January 2010**.
4. Singapore International Arbitration Forum 2010 on "The Future for International Arbitration" by the Maxwell Chambers and the Singapore International Arbitration Centre on **21 – 22 January 2010**.
5. Seminar on "Islamic Finance Arbitration" by Associate Professor Andrew White on **28 January 2010**.
6. Seminar on "Fast Track and Documents Only Arbitrations" by Mr. Tomas Kennedy-Grant on **16 March 2010**.
7. Fourth (4th) Regional Arbitral Institutes Forum Conference by the Malaysian Institute of Arbitrators on **8 May 2010**.

NEW MEMBERS

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

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In 2008, the Council debated and agonised over the idea of a Continuing Professional Development (CPD) programme for panel members. Despite some initial reservations, we decided that it would be in the best interest of users of arbitration services to proceed with a compulsory CPD for our panel members. From 2009, SIArb panel arbitrators must meet the CPD requirements when seeking to renew their emplacement on the SIArb panel. In this regard, we are grateful to the Singapore International Arbitration Centre (SIAC) for supporting our CPD programme by requiring the SIAC panel of arbitrators to meet similar requirements for renewal.

Given the eminence of the SIArb panel members and the compulsory CPD requirement, it is regrettable that after 4 years, SIArb has not received any request to appoint an arbitrator. I have often been asked by panel members why they have had no appointment from the Institute. The unfortunate answer to that question is that the Institute has not been asked to make an appointment. The reason for this is probably because few arbitration agreements provide for SIArb as the appointing authority in the event parties are unable to agree on the appointment of an arbitrator. This is despite having a standard model arbitration clause on the SIArb website.

So for 2010, the Council will make a concerted effort to create greater awareness of SIArb's panel and its arbitration services. We had in past years initiated efforts in this direction through discussions and presentations to the Singapore Manufacturers Federation, Singapore Infocomm Technology Federation, and Singapore Commodity Exchange. Next year, the Council intends to make further efforts to engage members of other associations such as the Singapore Corporate Counsel Association (SCCA). The SCCA is particularly relevant as their members are in the forefront in advising their organizations on the arbitration clause.

The Council cannot create this awareness on its own. With only 14 members (10 elected, one ex-officio and three co-opted), the Council has limited reach. On the other hand, our membership stands at almost 800 members, both local and overseas. We need the assistance of our members to help create awareness that SIArb has a panel of very eminent and capable arbitrators with various areas of expertise. It is only through our concerted effort that we can reach out to users of arbitration services. Members can also assist by incorporating the SIArb Model Arbitration Clause into their contracts. Thus, SIArb will grow from an institute providing development and training to an institute which is also capable of appointing tribunals.

This leads me to the recently formed Council for Private Education (CPE),a statutory board of the Ministry of Education. Launched in December 2009, the CPE set up the Enhanced Registration Framework to regulate the conduct of private education institutions operating in Singapore. Under the legislation, all private education institutions in Singapore are to subscribe to this framework which requires their mandatory participation in the appointed dispute resolution scheme. This scheme encapsulates both the mediation and arbitration rules conducted and administered by the Singapore Mediation Centre and the Singapore Institute of Arbitrators respectively. I am happy to share that our involvement in this framework allows our panel arbitrators the opportunity to be appointed when private education-related disputes are referred to the Institute.

Finally, I would like to close on a confident note: with the help of a dedicated Council, the Secretariat and your support, SIArb shall continue to grow from strength to strength.

On behalf of all of my Council Members, I wish each of you a Merry Christmas and a Happy New Year.

Johnny Tan Cheng Hye, PBM
President

DISCOVERY IN ARBITRATION

by mr. chan leng sun

"The known is finite, the unknown infinite."
TH Huxley

Common Law and Civil Law Approaches

As common law practitioners understand it, discovery of documents is an entrenched obligation of parties to disclose and produce all documents relevant to issues in dispute, whether they are favourable or adverse to their respective positions. It stands separately as a procedural step. Common law litigation sets out procedures for, first, a general discovery by which both parties disclose all documents in their possession, which are relevant to the issues at hand. Subsequently, either party may request further disclosure of specific documents or classes of documents.

Discovery is not an independent doctrine in civil law jurisdictions. A guiding maxim of the civil law system is onus probandi incumbit ei qui affirmat ("the burden of proof rests on he who asserts the fact"). From this civil law maxim springs the antithesis to the common law discovery obligation, namely the immunity from any requirement to produce documents adverse to one's case. There is no counterpart to the discovery concept in common law, and indeed, some civil law jurists view this as an invasion of privacy.[1]

The harmonization of procedural practices in international commercial arbitration has resulted in an erosion of the traditional dichotomy between the civil law and the common law approaches to discovery.

Arbitration Rules and Laws

Many international arbitration rules now contemplate disclosure of documents, although not to the particular degree required in common law litigation regimes. The UNCITRAL Arbitration Rules, for example, provide that the statement of claim submitted by the claimant may annex documents that it considers relevant to his case.[2] At any time during the proceedings, the tribunal may require a party to produce documents and other evidence. [3] The SIAC Rules require that all written statements be accompanied by all supporting documents and empowers the tribunal to order production of any documents which the tribunal considers relevant.[4] The ICC Rules of Arbitration are less explicit, but empower a tribunal to summon a party to provide additional evidence.[5] The ICC Techniques for Controlling Time and Costs in Arbitration contemplate that a party may request for production of documents but urges that this be avoided "unless such production is relevant and material to the outcome of the case."[6]

The UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") says that the parties "may submit with their statements all documents they consider to be relevant" or add a reference to these documents[7] but does not mention the power of the tribunal to order disclosure. Few will doubt the tribunal's power to do so. It has to the power to "conduct the arbitration in such manner as it considers appropriate" in the absence of parties' agreement on procedure.[8] In the Singapore context, the tribunal has express power to order discovery under the International Arbitration Act ("IAA") which gives the force of law to the Model Law and govern international arbitration, as well as the Arbitration Act which governs domestic arbitration.[9]

> **Discovery is not an independent doctrine in civil law jurisdictions. A guiding maxim of the civil law system is onus probandi incumbit ei qui affirmat ("the burden of proof rests on he who asserts the fact").**

The IBA Rules on the Taking of Evidence in International Commercial Arbitration are relatively detailed on the production of documents.[10] They expressly provide for a procedure on requests to produce documents, but like the ICC Techniques, also require that the documents requested are "relevant and material" to the outcome of the case. While different individuals, especially if they are from different legal traditions, will have different inclinations when faced with a discovery application, "relevant and material" is apparently a narrower test than the "train of inquiry" formulation found in, for example, the Singapore Rules of Court. The Rules of Court permit a party to request discovery of specific documents that might not be immediately relevant, but could lead that party to other, relevant documents.[11] While it has been said that the Court would not allow fishing, there can be understandable anxiety among parties on where the line might be drawn. One is reminded of the parody from the popular British comedy series, *Yes Minister*:

1 Giogio Bernini, *The Civil Law Approach to Discovery: A Comparative Overview of the Taking of Evidence in the Anglo-American and Continental Arbitration Systems*, in Newman and Hill (eds.), *The Leading Arbitrators' Guide to International Arbitration (2nd ed)*, pp. 270-275.

2 *Art. 18(2). Amendments to the UNCITRAL Rules are underway and it has been suggested that the wording will be changed to require that the statement of claim should, as far as possible, be accompanied by all documents and other evidential materials relied upon by the claimant, or contain references to them; see UNCITRAL Secretariat Note A/CN.9/619, paras, 147-154.*

3 *Art. 24(3).*

4 *Rule 16.8; Rule 24(h).*

5 *Art. 20(5).*

6 *Para. 53.*

7 *Art. 23(1).*

8 *Art. 19(2).*

9 *Section 12(1)(b) IAA; section 28(2)(b) AA.*

10 *Arts. 3 and 9.*

11 *Order 24, rule 5(1) Rules of Court.*

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> *"So that means you need to know things even when you don't need to know them. You need to know them not because you need to know them but because you need to know whether or not you need to know. And if you don't need to know you still need to know so that you know that there was no need to know."*

The question of materiality arose, albeit in a different context, in the case of *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2009] SGHC 231. In that case, the tribunal awarded a certain amount of damages to the seller of iron ore fines against the buyer for breach of a sale and purchase contract. Subsequent to the award, the buyer applied to the Singapore court to set aside the award on the ground that the seller had fraudulently suppressed documents that showed, first, that the seller did not have the cargo that it purported to sell, and secondly, that the actual losses incurred by the seller were less than those claimed. Therefore, the buyer argued that the award ought to be set aside as it was obtained by fraud or was against public policy. Judith Prakash J dismissed the application. The judge found that the first ground was not made out on the facts. On the second ground, the buyer inferred from the documents that the seller probably managed to sell the goods at a higher price sometime after the breach occurred. Cases were submitted to argue that a benefit obtained subsequent to the breach can be taken into account in assessing damages, but there were authorities going the other way, in particular section 52(2) of the Sale of Goods Act that puts the seller's loss as the difference between the contract price and the value of the goods to the seller at the time and place of the breach. The judge held that the facts alleged were legally immaterial to the damages suffered by the seller, and it was therefore not fraudulent or wrongful that the documents were not disclosed.

And if you don't need to know you still need to know so that you know that there was no need to know.

Enforcement

If a tribunal does order discovery or production of documents, its primary force lies in the adverse inference that may be drawn against a party that refuses to obey the order without good reason.[12]

In addition, an interim order made by a tribunal seated in Singapore, including a discovery order, may be enforced as a court order, with leave of the court.[13] A Singapore Court will not enforce an interim order of a tribunal seated outside Singapore.[14] Therefore, a discovery order of a tribunal seated outside Singapore will not be directly enforced as a court order in Singapore.

[12] *See, e.g. Art 9 IBA Rules on the Taking of Evidence in International Commercial Arbitration.*

[13] *Section 12(6) IAA; section 28(4) AA.*

[14] *Swift-Fortune Ltd v Magnifica Marine SA [2006] 2 SLR 323, per Judith Prakash J.*

Section 12(7) IAA which empowers the Court to make orders in relation to all interim orders that may be made by the tribunal is deleted by the latest amendments to the IAA. The new section 12A(7) empowers the Court to make interim orders in aid of arbitration wherever seated, but it expressly excludes judicial power to make orders on security for costs and discovery. Section 31 of the AA is left untouched in this regard, so that the Court may still order discovery in relation to arbitration where appropriate. The Court will generally avoid doing so without very good reason, as it does not wish to usurp the role of the tribunal.

Pre-arbitral Discovery

As an endnote, there have been cases in Singapore where discovery was sought before arbitration commenced. The parallel to this is pre-action discovery, where discovery is sought of documents that are relevant and necessary to show whether there is a cause of action (right to claim) available to the applicant. It must be shown that the discovery is necessary for disposing fairly of the proceedings or for saving costs.[15] Doubts have been expressed whether the court has power to order pre-arbitration discovery, i.e. discovery of documents for the purpose of arbitration that has not yet commenced. But it is possible to get a pre-action discovery even where there is an arbitration agreement. This is because the Court will not decide at the discovery stage whether the arbitration agreement in fact applies to enjoin continuation of the court proceedings. Nonetheless, the existence of an arbitration agreement that is likely to be operative will raise a question whether the application for discovery is an abuse of process. The Singapore Court will be guided by a policy that promotes or facilitates arbitration, rather than undermine it.[16]

** This paper follows a seminar organized by the Law Society on Discovery in Court and Arbitration. I am grateful to my fellow panelists and the Chairman at that seminar for a lively discussion.*

Chan Leng Sun

FSIArb, FCIArb, FMIArb

ANG & PARTNERS

Tel: +65-6224 2530

Email: lengsun@angpartners.com

Website: www.angpartners.com

[15] *Order 24, rules 6 and 7 Rules of Court.*

[16] *Woh Hup (Pte) Ltd v Lian Teck Construction Pte Ltd [2005] SGCA 26; Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd [2009] SGCA 45.*

case law development

by dr. philip chan

Introduction

In this issue, two Court of Appeal decisions are discussed. The first case, *Tjong Very Sumito*, examines what constitutes a "dispute", the existence of which is required for a successful application for a stay of court proceedings so as to refer the matter arbitration. The judgment sets out a useful guide as to when an action in court is justified in the face of a valid arbitration clause. In particular, it goes into the finer points about the meaning and quality of an admission and silence and what it takes to put it beyond doubt that it is not a dispute. It is certainly an instructive case for those who need to advise or decide on whether to proceed with a court action instead of arbitration.

In the second case of ***Navigator Investment Services Ltd***, the Court of Appeal was invited to decide on two practice points. The first point required the interpretation of the common practice of making reference to the SIAC Rules in an arbitration clause with the understanding that the International Arbitration Act (IAA) would be the applicable law as provided by Rule 32. The second point required the interpretation of section 6(1) of the IAA to determine whether the right to apply for a stay of court proceedings is available to a defendant in an application for pre-action discovery and/or pre-action interrogatories.

Tjong Very Sumito and Others v Antig Investments Pte Ltd **[2009] SGCA 41 [Court of Appeal** – Andrew Phang Boon Leong JA, V K Rajah JA]

This is an appeal against the decision of the learned judge of the High Court who was hearing an appeal against the decision of the assistant registrar. At the first level, it was decided that, "the dispute in question was not referable to arbitration because it did not arise in connection with the contract in which the arbitration agreement appeared." [see para 15].

On appeal, the learned judge allowed the appeal. The learned judge had held that, "a dispute referable to the SPA [the contract] existed; and that the respondent had made a positive assertion challenging the appellants' claim, albeit after the commencement of court proceedings." [see para 18]

The Court of Appeal held that the sole issue before the court was, "whether the appellants' claim was embraced by the arbitration agreement in the SPA under s 6 of the IAA" [see para 20] Having heard the parties, the court, "dismissed the appeal with indemnity costs" [see para 71]

The relevant part of the arbitration clause is reproduced below for ease of reference.

> Section 11.06
>
> (b) Failing such amicable settlement, any and *all disputes, controversies and conflicts arising out of or in connection* with this Agreement or its performance (including the validity of this Agreement) shall be settled by arbitration

The application for a stay was summarised by the court at paragraph 22 as:

- In order to obtain a stay of proceedings in favour of arbitration under s 6, the party applying for a stay ("the applicant") must first show that that he is party to an arbitration agreement, and that the proceedings instituted involve a "matter which is the subject of the [arbitration] agreement".
- If the applicant can show that there is an applicable arbitration agreement, then the court *must* grant a stay of proceedings unless the party resisting the stay can show that one of the statutory grounds for refusing a stay exists, *ie*, that the arbitration agreement is "*null and void, inoperative or incapable of being performed*".

The court observed the following:

- If the arbitration agreement provides for arbitration of "disputes" or "differences" or "controversies", then the subject matter of the proceedings would *fall outside* the terms of the arbitration agreement if: (a) there is no "dispute", "difference" or "controversy" as the case may be; or (b) where the alleged "dispute" is unrelated to the contract which contains the arbitration agreement. [see para 23]
- it is only in the *clearest* of cases that the court ought to make a ruling on the inapplicability of an arbitration agreement… [see para 24]
- If there is no binding arbitration agreement or if the arbitration agreement has no application, then the court has no jurisdiction to grant a stay under s 6 of the IAA, although it is of course open to the court to do so under its inherent jurisdiction. [see para 24] [author's observation - it is interesting to note that the Court of Appeal entertains the concept of "inherent jurisdiction" but it remains to be seen what form and scope this will take]

In elaborating the first point concerning dispute, the court carried out an analysis of the topic. It held at paragraph 49 that, "that it *is* sufficient for a defendant to simply assert that he disputes or denies the claim in order to obtain a stay of proceedings in favour of arbitration." Further, "the court is not to examine whether there is "in fact" a dispute, or a genuine dispute."

The court observed that the language used in the matter before the court, "extended beyond "disputes" to include "controversies and conflicts"." It then held that, "the addition of these two terms in the arbitration agreement

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obviously affirms a broad intention to refer all manner of contentious matters to arbitration." [see para 50] and "that the respondent's positive assertion challenging the appellants' claim warranted a stay of proceedings in favour of arbitration." [see para 51] in the process, the court noted that, "As a matter of principle, general words such as those mentioned above should be generously interpreted when they appear in arbitration agreements." [see para 50]

The court raised to other points in its judgment, namely, (a) the situations when a stay is not granted; and (b) the significance of a defendant's admission or silence.

If the arbitration clause is in Scott v. Avery form, an admitted liability does not prevent a dispute from arising.

As regards the first point, the court set out a non-exhaustive list of the situations where a stay will not be granted:

- the court concludes that one of the parties named in the legal proceedings is not a party to the arbitration agreement;
- if the alleged dispute does not come within the terms of the arbitration agreement;
- if the application is out of time [see para 52]
- where the party applying for a stay has waived or may be estopped from asserting his rights to insist on arbitration, such as where the parties have agreed subsequently that disputes may be resolved by litigation [on the basis that the arbitration agreement is "inoperative" [see para 53];
- where the defendant had admitted liability but was simply unable to pay, [we would recognise an exception to judicial non-intervention and refuse to grant a stay only in obvious cases] [see para 59]

As regards the second point on admission and silence, it would appear that admission could be one situation where a stay is not granted as can be seen from the above list. However, the court issued a warning at paragraph 61 and held that, "*the court ought to be ordinarily inclined to find that there has been a denial of a claim in all but the clearest of cases. It should not be astute in searching for admissions of a claim*."

Relating to admission, the court highlighted the situation where a defendant makes an admission but later purports to "deny the claim on the ground that the admission was mistaken, or fraudulently obtained, or was never made". It noted that, "In such a case, there might well be a dispute before the court, both over the substantive claim as well as over whether the defendant can challenge the alleged earlier admission, and the matter should ordinarily be referred to arbitration."

Further, the court made an interesting observation about contracts with arbitration clauses that are in the form of *Scott v Avery*, "if the arbitration clause is in *Scott v. Avery* form, an admitted liability does not prevent a dispute from arising and accordingly the claimant must seek an arbitration award which is then to be enforced by an application to the court, rather than a direct application to the court for summary judgment." [see para 62]

The final point on admission noted by the court was that the admission must be to both liability and quantum. It said at paragraph 64 that, "a dispute as to quantum is as much a dispute as a dispute as to liability. As long as a claim is not admitted in full, the parties should be held to their contractual bargain, and the dispute should be resolved by arbitration."

The position of silence is somewhat different in that, "a defendant's silence (even in the face of repeated claims against it), without more, may be insufficient to constitute the clear and unequivocal admission necessary to exclude the existence of a dispute (or controversy or conflict)." Further, the court observed that, "One must also be particularly mindful when dealing with cross border transactions, since there may even be cultural reasons for silence: in certain societies, a non-confrontational approach is prized. It is impossible to generalise on the effect of silence and each matter must be assessed contextually." [see para 61]

The court also looked at the situation of non-admission. The court noted that, "non-admission is not constituted only by an express denial or rejection of the claim, but may also be inferred from previous inconclusive discussions between parties, prevarication and even silence." [see para 61]

Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd **[2009] SGCA 45 [Court of Appeal** – Andrew Phang Boon Leong JA, Chao Hick Tin JA]

This is an appeal against the decision of the High Court where the learned judge who had refused to grant a stay of an application for pre-action discovery and pre-action interrogatories. The court allowed the appeal against the decision on applicability of the IAA but dismissed the application for a stay.

In the process of the appeal, the Court of Appeal identified two important points of practice that had to be interpreted: (a) whether by the adoption of the SIAC Rules, parties would have effectively opted for the applicable law named in the Rules; and (b) whether a stay of an application for pre-action discovery and/or pre-action interrogatories could be granted. [see para 1]

In answer to (a), the court held that the International Arbitration Act (IAA) was the applicable law as section 5(1) allows the parties to agree that the IAA applies. [see para 31] In answer to (b), the court held that, "an an application for pre-action discovery and/or pre-action interrogatories would, by its very nature, fall *outside* this particular cut-off point and, hence, *not* fall within the scope of s 6 of the IAA." [see para 54].

SIAC Rules & IAA

The issue before the court was identified in paragraph 34 of the judgment as, "whether the reference to, as well as the incorporation of, the SIAC Rules 2007 was sufficient to bring an arbitration commenced pursuant to the Arbitration Clause within the purview of the IAA."

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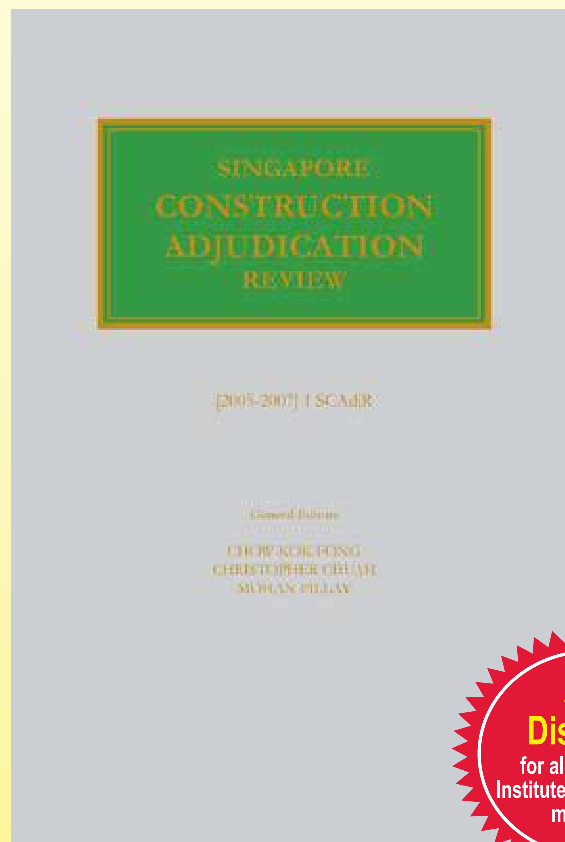

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The arbitration clause that was being interpreted was reproduced at paragraph 28 and is set out below.

> Any dispute arising out of or in connection with this Agreement [*ie*, the Distributorship Agreement] will be negotiated in good faith by the Parties with a view to a resolution of such dispute. If the dispute [is] not resolved within thirty (30) days of the date of the dispute first arising, *it shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the [SIAC] for the time being in force. The Arbitration Rules shall be deemed to be incorporated by reference into this Agreement*. [emphasis added]

In the analysis of the case, two concerns were raised by the court, as prompted by the decision of the assistant registrar below, namely: (a) whether the arbitration clause would, by a mere provision for incorporation of the SIAC Rules, satisfy the section 5(1) requirement of, "*express*" agreement; and (b) whether a general averment to the applicability of IAA would satisfy the section 5(1) requirement of agreement to the applicability of specifically, "*Part II of the IAA*" or the "*Model Law*".

Any application (including an application for pre-action discovery and/or pre-action interrogatories) will be carefully scrutinised by the court concerned to ensure that the arbitration process is not being circumvented or otherwise undermined.

As regards the first concern, the court held at paragraph 39 that given the arbitration clause above, "the parties must be taken to have agreed to the *legal substance* contained in, *inter alia*, those rules (including Rule 32). If so, then it is clear that the parties must have *expressly* agreed (as is clearly stated in Rule 32 itself) that the law of the arbitration shall be the IAA."

As regards the second concern, the court adopted the decision of the assistant registrar, namely, "the choice of the [IAA] as the law of the arbitration may be construed as amounting to an agreement that the [IAA] generally applies to the arbitration." In addition, the court held that, "there is nothing in the records of Parliamentary debates to oppose the proposition that an agreement that the [IAA] is the law of the arbitration suffices for the operation of s 5(1) of the [IAA]."

Pre-action discovery and/or pre-action interrogatories

The issue before the court was identified in paragraph 44 of the judgment as, "whether or not the court should grant a stay under s 6 of the IAA in the context of an application for pre-action discovery and/or pre-action interrogatories." The court then added that, "This particular issue appears simple in form but belies (in its substance) crucial issues centring on the interface between court proceedings on the one hand and arbitration proceedings on the other."

Section 6(1) as quoted in paragraph 45 is reproduced below for ease of reference.

> "Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, *at any time after appearance and before delivering any pleading or taking any other step in the proceedings*, apply to that court to stay the proceedings so far as the proceedings relate to that matter."

In the analysis of this issue, the court had raised two concerns. The first concern raised was the time within which an applicant could invoke section 6(1). The second concern was the extent to which the court had to consider the impact of an arbitration clause on an application for pre-action discovery and/or pre-action interrogatories.

As regards the first concern, the court held at paragraph 54 that under section 6(1), the defendant can apply to stay a particular claim only "when a substantive claim has already been crystallized", ie , when the defendant is "cognisant of a clear claim that has *in fact* been brought against it", "subject, of course, to the *latest* point in time at which such an application can be made, as stipulated in s 6(1) of the IAA." Thus, the court held that, "an application for pre-action discovery and/or pre-action interrogatories would, by its very nature, fall *outside* this particular cut-off point and, hence, *not* fall within the scope of s 6 of the IAA."

As regards the second concern, the court made the following observations:

- the mere *availability* of pre-action discovery and/or pre-action interrogatories does *not* mean that such an application will be *granted automatically* by the court or as of right. [see para 55];
- In *Woh Hup* ([48] *supra*), this court, whilst holding that the court has the power to grant an application for pre-action discovery, notwithstanding the fact that the respondent concerned was a party to an arbitration agreement, opined thus, "This does not mean, however, that parties to arbitration agreements may indiscriminately apply to the courts to obtain pre-action discovery." [see para 55];
- any application (including an application for pre-action discovery and/or pre-action interrogatories) will be carefully scrutinised by the court concerned to ensure that the arbitration process is not being circumvented or otherwise undermined. [see para 56];

Dr. Philip Chan
Associate Professor
Department of Building
School of Design and Environment
National University of Singapore
Tel: (65) 6516 3437
Email: bdgccf@nus.edu.sg
Website: www.nus.edu.sg

SIARB SEMINARS AND EVENTS
JULY TO DECEMBER 2009

SEMINAR ON "ISSUES CONCERNING COSTS IN CONSTRUCTION ARBITRATIONS"

Date	Event	Speaker	Chairperson
28/7/09	Seminar – "Issues Concerning Costs In Construction Arbitrations"	Mr. Naresh Mahtani	Ms. Audrey Perez

This interactive seminar provided the audience with insights of costs in construction arbitrations. Mr. Naresh Mahtani gave his views on whether a systematic analysis of arbitration costs beforehand was a good exercise prior to starting or deciding to start an arbitration action. The audience actively exchanged their thoughts during the seminar and Q & A session which made this event meaningful, exciting and enjoyable.

28TH ANNUAL GENERAL MEETING & TALK ON "SAVING PATHOLOGICAL ARBITRATION CLAUSES"

Date	Event	Speaker	Chairperson
31/7/09	28th Annual General Meeting Talk Topic: "Saving Pathological Arbitration Clauses"	Mr. Minn Naing Oo	Mr. Chan Leng Sun

The Annual General Meeting (AGM)on 31st August 2009 was preceded by a talk by Mr. Minn Naing Oo, CEO and Registrar, Singapore International Arbitration Centre, on "Saving Pathological Arbitration Clauses" with an attendance of close to 40 members.

At the AGM that followed immediately after the talk, the Institute's President, Mr. Johnny Tan, PBM, declared the meeting open and chaired the AGM proceedings. He presented the annual report and the audited statement of accounts for the year 2008/2009. The President further engaged with the members in details concerning the activities and operations of the Institute.

The Council for term 2009/2010 comprises Office Bearers and Members as follows:

President	Mr. Johnny Tan, PBM
Vice President	Mr. Mohan Pillay
Hon. Secretary	Mr. Yang Yung Chong
Hon. Treasurer	Mr. Chan Leng Sun
Imm. Past President	Mr. Raymond Chan
Members	Mr. Andrew Chan, Mr. Edwin Lee, Ms. Audrey Perez, Mr. Govindarajalu Asokan, Dr. Chris Vickery, Mr. Anil Changaroth and Mr. Mark Errington

In closing, Mr. Johnny Tan thanked the outgoing members, Mr. Richard Tan, Ms. Meef Moh and Mr. Tan Siah Yong, for their support and contributions in the running of the Institute and welcomed the involvement of the newly elected members in the Council's activities.

FELLOWSHIP ASSESSMENT COURSE

Date	Event	Faculty
14/8, 21/8, 22/8 & 24/8/09	Fellowship Assessment Course	Course Director: Assoc Prof. Neale Gregson Lecturers: Mr Richard Tan, Mr. Raymond Chan, Mr. Mohan Pillay, District Judge Leslie Chew, Dr. Philip Chan, Mr. Govind Asokan and Mr. Andrew Chan

Held on 21st and 22nd August 2009, the Fellowship Assessment Course saw a total of 22 participants who opted to take the entire fellowship programme comprising 5 modules on topics related to arbitration law and practice followed by a 3-hour examination on Award Writing. Non-legally trained participants were required to sit for the module on Contract, Tort and Evidence in addition to the arbitration law and practice modules.

The Course Director for the course was Assoc. Prof. Neale Gregson, and the other lecturers and tutors were Mr. Mohan Pillay, Mr. Raymond Chan, Mr. Richard Tan and District Judge Leslie Chew.

THE INAUGURAL COMMERCIAL ARBITRATION SYMPOSIUM

Date	Event	Co-Chairs
3/9/09	"The Inaugural Commercial Arbitration Symposium"	Mr. Chelva Rajah, SC, Mr. Christopher Lau, SC, Prof. Lawrence Boo, Mr. Lok Vi Ming, SC, Prof. Michael Pryles and Mr. Sundaresh Menon, SC

Organised by the SIArb Arbitration Bar Committee, the half-day symposium held in Marina Mandarin Singapore, attracted a good turnout of 75 participants who stayed engaged in the highly interactive session. The current issues and developments of commercial arbitration were expertly guided by the Co-Chairs comprising Mr. Chelva Rajah, SC, Mr. Christopher Lau, SC, Professor Lawrence Boo, Mr. Lok Vi Ming, SC, Professor Michael Pryles and Mr. Sundaresh Menon, SC for Sessions 1, 2 and 3 respectively. With no set speakers and speeches, the participants had a remarkably vibrant, free-flowing discussion throughout the symposium. The feedback received has been most encouraging with many echoing a "Yes!" to a repeat of the event next year.

SEMINAR ON "TEN QUESTIONS NOT TO ASK IN CROSS EXAMINATION IN CONTRACTUAL DISPUTES"

Date	Event	Speaker	Chairperson
10/9/09	Seminar – "Ten Questions Not To Ask In Cross Examination In Contractual Disputes"	Mr. Michael Hwang, SC	Mr. Raja Bose

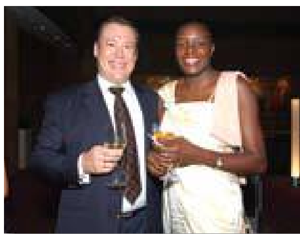
This seminar provided the participants an opportunity to hear Mr. Michael Hwang, SC, sharing generously on the dos and don'ts in arbitration hearings particularly, in cross examination in contractual disputes. Fundamental rules of arbitration practice were concisely conveyed vis-à-vis the parties involved, including the options available to the arbitrator in an arbitration hearing.

SEMINAR ON "MULTI-CONTRACT ARBITRATIONS"

Date	Event	Speaker	Chairperson
8/10/09	Seminar – "Multi-Contract Arbitrations"	Mr. Alastair Henderson	Mr. Paul Wong

The foundation stone of arbitration is the arbitration agreement. From it concepts like party autonomy and confidentiality in arbitration ensue. However, because the process is based entirely on the agreement of the parties, new or additional parties cannot be added without the agreement of all the parties. Often, in complex construction projects or commodity "string" sales, the dispute often involves several parties who more often than not have arbitration agreements with some but not all of the parties in the dispute. The challenge for any party in such situations to manage the dispute or to make the necessary provisions in contracts at the beginning of a project was the topic of an interesting seminar by Alastair Henderson of Herbert Smith LLP on 8 October 2009 at the Marina Mandarin. The seminar on "Multi-Contract Arbitrations" was chaired by Paul Wong of Rodyk & Davidson LLP. Alastair shared his experience on this issue arising from complex construction projects in Indochina. He captured the attention of the audience of arbitration practitioners well with his clear and concise discussion of the topic. The talk ended with a Q&A session in which several members of the audience shared their own experiences dealing with an issue which arises quite frequently but not very often given the attention it deserves.

SIARB ANNUAL DINNER



Date	Event
21/10/09	SIArb Annual Dinner

The Annual Dinner 2009 was one held with a touch of tradition at the Marina Mandarin Singapore. The Guest-of-Honour, Justice Quentin Loh gave his opening speech with much candour and along with the warm ambience and the enthusiastic members enjoying the food, the wine and networking, a live rock jazz band added glamour to the evening with its genre of music. Mr. Naresh Mahtani, the emcee of the evening, brought much cheer and fun to the members with his mind boggling questions during the quiz competition. Kudos to Mr. Mahtani! The event certainly brought about fond memories to members of SIArb.

SIARB INTERNATIONAL ENTRY COURSE

Date	Event	Faculty
23/10, 24/10 & 31/10/09	International Entry Course	Course Director: Mr. Chan Leng Sun Lecturers: Mr. Andrew Chan, Mr. Naresh Mahtani, Mr. Johnny Tan and Mr. Ganesh Chandru

The Institute held its entry course on arbitration at the Marina Mandarin on 23rd, 24th and 31st October 2009. Under the modular course structure, candidates have the option of taking either the entire course and a written examination or attending only the selected modules of arbitration law and practice. The four modules offered were "An Introduction to Arbitration", "Commencement of Arbitration and the Tribunal", "The Arbitration Procedure" and "The Award" which included lectures and tutorials. A 2-hour written examination followed a week later. A total of 34 participants took part in this course and all of them opted to take all 4 modules and the examination.

The Course Director for the course was Mr. Chan Leng Sun, and the other lecturers and tutors were Mr. Johnny Tan, Mr. Andrew Chan, Mr. Naresh Mahtani and Mr. Ganesh Chandru. The Institute was also grateful to have as facilitators and observers to help in the tutorials, Mr. Dinesh Dhillon, Dr. Chris Vickery, Mr. Mahendra Rai, Mr. Samuel Chacko, Mr. Danny Oh, Mr. Aziz Tayabali and Mr. Glenn Cheng.

FORUM ON "CURRENT ISSUES RELATING TO SINGAPORE'S INTERNATIONAL ARBITRATION ACTS"

Date	Event	Speaker	Chairperson
17/11/09	Forum – "Current Issues Relating To Singapore's International Arbitration Act"	Panelists: Ms. Valerie Thean, Mr. Chan Leng Sun, Asst. Prof. Mahdev Mohan, Mr. Andrew Chan and Mr. Nicholas Peacock	Mr. Tay Yu-Jin

There was an interesting evening spent at the SIArb Forum on proposed changes to the International Arbitration Act (Chapter. 143A) with a selection of panelists and participants from private practice, academia and the Government contributing to an informative session involving lively debate and a very pleasant evening.

SEMINAR ON "WHO ARE PARTIES TO AN ARBITRATION AGREEMENT?"

Date	Event	Speaker	Chairperson
8/12/09	"Who are parties to an arbitration agreement?"	Prof. Lawrence Boo	Dr. Andreas Respondek

The talk which was held on 8th December 2009 was chaired by Dr. Andreas Respondek. Prof Boo dived straight into the exceptions to the principle that a stranger cannot enforce rights arising under a contract to which he is not a party. These exceptions include (a) incorporation by reference; (b) agency; (c) assumption; (d) estoppel; (e) third party beneficiary; (f) veil piercing/ alter-ego; and (g) successors in title.

In his usual simple but erudite style Prof Boo took the audience on a journey around various jurisdictions worldwide which had had the opportunity to discuss the issues raised regarding non-signatories to an arbitration agreement.

Prof Boo left the audience with two takeaways. The first (non-serious) related to grandparent birds. The other was this statement, well worth some serious reflection especially for those of us too bound in our common law practice:
"Courts whether in Singapore or elsewhere should be ready to unshackle itself from historical baggage and be more open to embrace legal theories and thinking that take into consideration the internationality of arbitration."

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