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Annual Review of Singapore Construction Law Developments

November 2021

Contents

Introduction

Welcome to the 2021 edition of the Annual Review of Singapore Construction Law Developments.

This inaugural edition contains updates on decisions in the Singapore courts which would be of relevance to projects governed by Singapore law. Many of the topics come amidst ongoing developments of relevance in the common law world. We look at the Court of Appeal's decision to uphold the orthodox ambit of the penalty rule in relation to the enforceability of liquidated damages clauses, in view of the wider approach that has been taken by the Australian and English courts in recent years. Restraints on demands under performance bonds continue to be an area of development in Singapore law, and an article looks at an instructive framework for evaluating injunction applications brought on the ground of unconscionability laid down by the High Court, and another decision in which the circumstances of a bond beneficiary's financial difficulties were found to be insufficient to render its call under a performance bond to be unconscionable.

"No oral modification" (NOM) clauses are prevalent in standard form construction contracts, and we explore a decision by the Court of Appeal – in a considered break with the UK Supreme Court's reasoning in the *Rock Advertising* case – that an NOM clause did not preclude an oral recission of contract.

Three articles are included that relate to developments in dispute resolution of relevance to the construction industry, looking at the construction of hybrid dispute resolution clauses, the forced joinder of third parties to Singapore-seated arbitrations, and the setting aside and remission of arbitral awards.

In terms of other forms of alternate dispute resolution, two articles explore decisions by the Court of Appeal that conclude the statutory construction adjudication regime does not give rise to an independent statutory entitlement to progress payments, and the effect of the United Nations Convention on International Settlement Agreements Resulting from Mediation (also known as the Singapore Convention) since it came into force in 2020.

We have also seen a number of developments in response to the economic disruption brought about by the COVID-19 pandemic. This includes new "pandemic resilient" contracting practices jointly put forward by public and private sector stakeholders that relate to contractors' additional time and costs claims, and the public sector's incorporation of these practices for future public sector construction tenders. Also included is an overview of the extraordinary legislative reliefs that have been introduced under the COVID-19 (Temporary Measures) Act 2020 and the effects of this temporary legislation on the construction industry.

We hope you find this publication of use and welcome any comments or feedback you may have. Should you wish to receive more frequent updates throughout the coming year, please sign up for our Law-Now service at www.cms-lawnow.com and select "Construction" as your chosen area of law.

We look forward to assisting you in any way possible over the coming year.

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Liquidated damages and the rule against penalties

A decision by the Court of Appeal in *Denka Advantech Private Limited and another v Seraya Energy Pte Ltd and another* [2020] SGCA 119 ("***Denka Advantech***") has provided guidance as to the law relating to contractual penalties ("**Penalty Rule**"). A contractual term requiring payment from a party in breach that has the effect of penalising that party is generally unenforceable under Singapore law, with the central inquiry being whether the term concerned represents a genuine pre-estimate of the likely loss caused by the breach.

This decision clarifies the position at Singapore law following significant developments in this area of law in Australia and the UK, and has significant implications for parties considering liquidated damage scenarios. The Court of Appeal's reasoning suggests that the principle of overarching importance is whether the liquidated damages clause was extravagant or out of all proportion to the greatest loss that could arise under the contract, especially where the court is dealing with sophisticated commercial parties.

The law relating to contractual penalties (the "Penalty Rule") recapped

Damages for breach of contract are generally intended to put the innocent party back in the same position as if the contract had been performed. A clause that imposes a monetary sum which goes beyond compensating the innocent party for its loss would be unenforceable under the Penalty Rule. Until recently, the 1914 case of *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79 ("***Dunlop***") was the seminal case on the Penalty Rule for common law jurisdictions. In *Dunlop*, the UK House of Lords was concerned with the liquidated damages ("**LD**") that were payable under a LD clause on the respondents' breach of contract. To assist with the court's construction of the contract, Lord Dunedin posited four principles, which became the leading statement of the law on contractual penalties for much of the last century:

a. that the provision would be penal if the sum stipulated for is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach;
b. that the provision would be penal if the breach consisted only in the non-payment of money and it provided for the payment of a larger sum;
c. that there was a rebuttable presumption that the provision would be penal if the sum stipulated for was payable on a number of events of varying gravity; and
d. that the provision would not be penal because of the impossibility of precise pre-estimation in the circumstances of the true loss.

However, in the lead up to the Court of Appeal's decision in *Denka Advantech Private Limited and another v Seraya Energy Pte Ltd and another* [2020] SGCA 119 ("***Denka Advantech***"), the legal principles in relation to the Penalty Rule were in a relative state of flux across the Commonwealth and especially due to developments in the apex courts of Australia and the UK.

In a radical departure from the position in *Dunlop*, the High Court of Australia in *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30 ("***Andrews***") held that the Penalty Rule's scope of application was not limited to clauses purporting to take effect only upon a breach of contract, and that equitable relief against penalties was available in respect of payments and detriments activated by various events. This decision was premised on the court's survey of the historical development of the Penalty Rule, and its conclusion that the rule is one of equity rather than the law.

In 2015, the UK Supreme Court parted ways with *Andrews*. In *Cavendish Square Holding BV (Appellant) v Talal El Makdessi (Respondent)* [2015] UKSC 67 ("***Cavendish Square Holding***"), the UK Supreme Court maintained that the scope of the Penalty Rule in English law was limited to situations involving a breach of contract. However, in a move away from Lord Dunedin's principles in *Dunlop*, Lord Neuberger of Abbotsbury and Lord Sumption in their leading judgment reformulated the Penalty Rule: "*[t]he **true test** is whether the impugned provision is a **secondary obligation** which imposes a detriment on the contract-breaker out of all **proportion to any legitimate interest** of the innocent party in the enforcement of the primary obligation*". Under the Cavendish test, an innocent party's "legitimate interest" could involve interests that go beyond compensation for breach to include wider commercial interests.

Denka Advantech - The Singapore Approach

In the case of *Denka Advantech*, the Court of Appeal had cause to consider whether the Penalty Rule as formulated in *Dunlop* ought be extended to situations outside of a breach of contract, and whether to incorporate the wider concept of "legitimate interest" as embodied in *Cavendish Square Holding* to extend beyond that of compensation.

In its decision, the Court of Appeal affirmed that the Penalty Rule did not apply to situations outside of breach of contract as posited by *Andrews*. It was the Court of Appeal's view that to extend the Penalty Rule to situations outside of a breach of contract would vest in the courts a discretion that was both too wide and too uncertain, and if the courts were so permitted to review a wide range of clauses on substantive grounds that this would constitute a significant legal incursion into parties' freedom of contract. By confining the Penalty Rule to the sphere of secondary obligations - specifically the obligation on the part of the wrongdoing party to pay damages to the innocent party, the Court of Appeal's decision means that primary obligations between contracting parties are not interfered with at all.

The Court of Appeal also declined to follow the approach of the UK Supreme Court in *Cavendish Square Holding*. The Court of Appeal affirmed that the applicable test remains the statement of principles set out by Lord Dunedin in *Dunlop*, as the Dunlop test as to whether or not the contractual provision concerned provided a genuine pre-estimate of the likely loss is consistent with the fact that the focus is on the secondary obligation on the part of the defendant to pay damages by way of compensation.

In rejecting the legitimate interest test, the Court of Appeal considered that a contractual provision which stipulates for an amount of damages to be paid in the event of breach that is more than the pre-estimate of the likely loss is necessarily penal, rather than compensatory, in nature – notwithstanding that it might have been in the commercial interests of the innocent party to have included such a provision.

However, the Court of Appeal's rejection of the legitimate interest test does not mean a party's commercial interests or the relative bargaining power of the contracting parties – considerations which featured prominently in *Cavendish Square Holding* – are wholly irrelevant, and these remain relevant factors to be considered in the context of the principles in *Dunlop*. For example, the equal bargaining power of the parties could be a strong factor in favour of upholding the clause concerned. Another consideration could be the purpose of the underlying transaction and the particular primary obligation breached, on a composite view of the parties' contract and the nature of their relationship.

Applying the applicable legal principles to the facts of the present case, the Court of Appeal found that the LD clauses in question were secondary obligations, where the events giving rise to termination were a breach of contract. Turning to the substantive question of whether these clauses were penalties which were therefore unenforceable, the Court of Appeal could not say that the LD formula was extravagant when compared to the greatest conceivable loss of the respondent when the contracts were terminated.

The Court of Appeal noted that apart from the greatest loss test in *Dunlop*, there was a presumption – but no more – that when "*a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage*", it is a penalty.

The Court of Appeal observed that while the provisions in questions did appear to violate the single lump sum test, this only gave rise to a rebuttable presumption that the clauses were penalties. Between principles (a) and (c) laid down in *Dunlop*, the Court of Appeal was of the view that it is the former, ie, the greatest loss test, that is of overarching importance. Where the court has found that the LD clause is not extravagant or out of all proportion to the greatest loss that could arise under the contract, this should lead the court to the conclusion that the LD clause is a genuine pre-estimate of loss and not a penalty. This is especially true where the court is dealing with sophisticated commercial parties who can be expected to look after their interests at the time of contracting.

Conclusions

This decision provides authoritative guidance to the legal principles that apply in relation to the Penalty Rule, and can be summarised as follows:

— First, the Penalty Rule applies only in the context of a breach of contract.

— Second, the legal criteria to ascertain whether the Penalty Rules applies may be found in the statement of principles enunciated by Lord Dunedin in *Dunlop*. The focus is whether the clause concerned provided a genuine pre-estimate of the likely loss at the time of contracting. In this regard, the only "legitimate interest" which the Penalty Rule is concerned with is that of compensation.

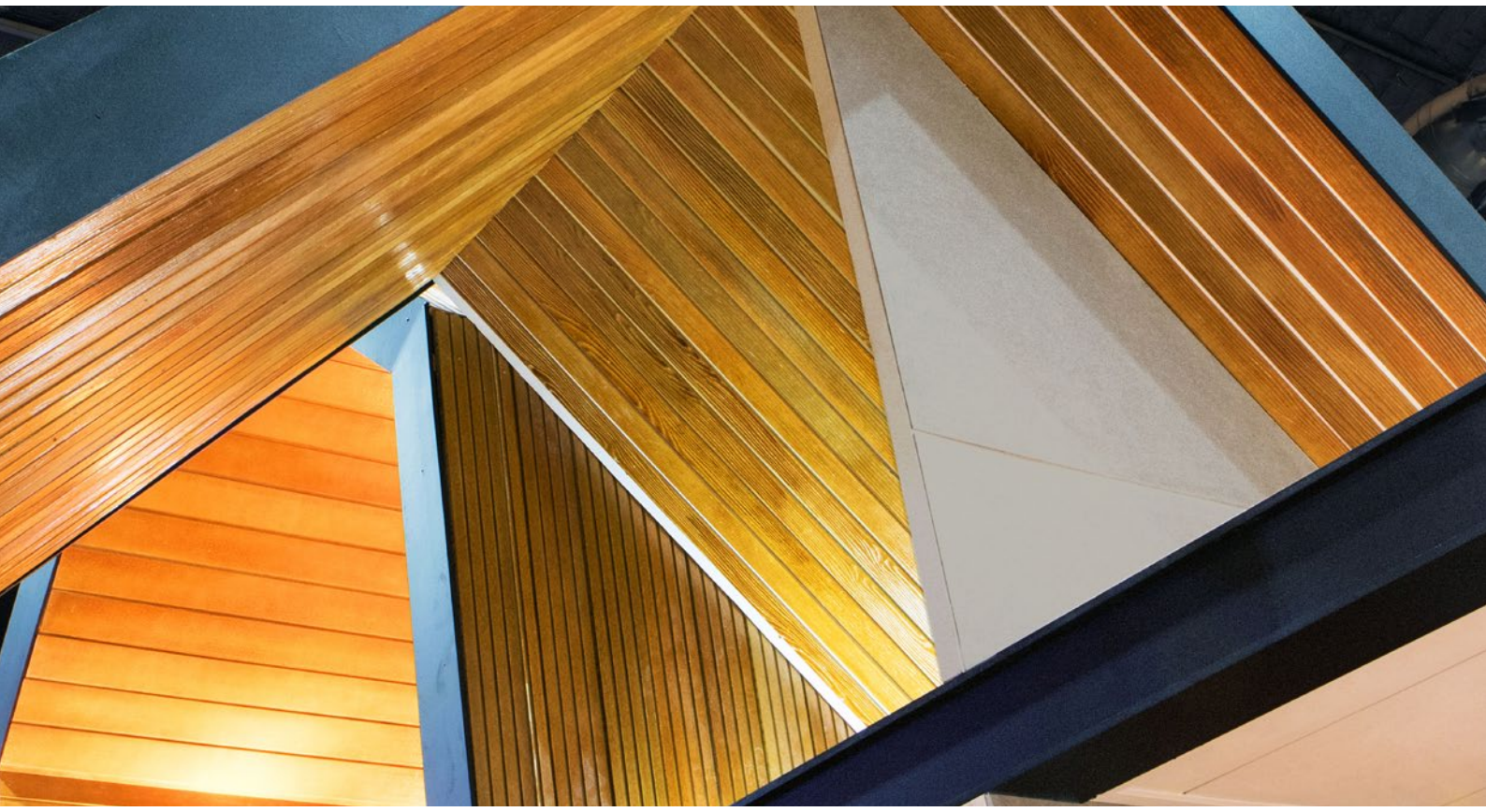
— Third, it is nevertheless important to emphasis that in applying the aforementioned principles, much would depend on the precise facts and circumstances of the case itself. Hence, factors such as the relative bargaining power of the parties as well as the purpose for which the parties entered into the contract concerned would be relevant.

The developments in the Australian and UK courts relating to the Penalty Rule post-*Dunlop* have been considered in a number of earlier High Court decisions, and this decision by the Court of Appeal provides conclusive affirmation of the orthodox ambit of the Penalty Rule as formulated in *Dunlop*. The Penalty Rule continues to apply only in the context of a breach of contract, and while other considerations may not be entirely irrelevant, whether the clause concerned represents a genuine pre-estimate of loss remains the central inquiry.

Calls on on-demand performance bonds

Two recent cases before the Singapore High Court have explored the framework and limits of unconscionability as a ground for restraining a call on a performance bond in the particular context of the construction industry.

The general approach to the granting of injunctions to prevent a performance bond call balances competing policy considerations: - on one hand, there is a need to protect the beneficiary's right to call on the bond to protect its liquidity; on the other hand, calls made in bad faith would result in the beneficiary receiving something he was not entitled to and damage the liquidity of the obligor, making the bond susceptible to usage as an instrument of oppression. Against these considerations, injunctions may be granted on grounds of fraud or unconscionability - the latter to cater for situations where the conduct of the beneficiary did not amount to fraud but was sufficiently reprehensible to justify an injunction.



After the decision in *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and another* [1999] 3 SLR(R) 44 affirmed unconscionability as a separate and distinct ground from fraud permitting injunctive relief (in an unequivocal departure from English law), the precise concept and scope of unconscionability continues to be developed by the courts.

In *CEX v CEY* [2021] 3 SLR 571, the High Court analysed the legal authorities and mapped out a 3-step framework for evaluating whether an injunction restraining a performance bond should be granted on the ground of unconscionability. In *Sulzer Pumps Spain S.A. v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] SGHC 122, the High Court considered whether a beneficiary's restructuring proceedings were sufficient to render its call on an unconditional performance bond unconscionable.

CEX v CEY [2021] 3 SLR 571

The facts in *CEX v CEY* [2021] 3 SLR 571 were as follows: - CEY was the developer of six detached homes, and CEX was the main contractor. The project's architect who had been appointed by the developer, Mr Seah, had taken ill, and was hospitalised in early January 2019. While he was hospitalised, the architect purported to authorise one Mr Ng to take over his responsibilities. By this authority, Mr Ng issued a notice to proceed with due diligence or expedition to the main contractor.

Mr Seah passed away in late January 2019. Over three weeks later, Mr Ng issued a termination certificate stated to be "*on behalf of* [Mr Seah]" on the main contractor, stating that the main contractor had failed and was still failing to proceed with due diligence or expedition. Relying on this termination certificate, the developer then issued a notice of termination. The main contractor denied any breaches and promptly served a notice of arbitration the following day, claiming that, amongst other things, its employment had been wrongfully terminated. The developer subsequently sought to recover losses from the main contractor for its alleged breaches. When the main contractor refused to pay the developer's claim, the developer called on the performance bond.

Mr Seah had held the permit to carry out the project's building works in his capacity as the qualified person appointed to supervise these works under the Building Contract Act (Cap 29, 1999 Rev Ed) ("**Act**"), and the main contractor argued that the permit was no longer valid when Mr Seah was hospitalised (and subsequently deceased), and thus unable to carry out his duties. It would have been illegal for the main contractor to continue with the construction works without a valid permit, and the main contractor's position was that the developer had acted unconscionably by expecting the main contractor to and ultimately penalising it for failing to carry out illegal construction works.

The court found that the building permit had been issued personally to Mr Seah and was not transferable. It had lapsed when he was hospitalised and unable to carry out his duties as a qualified person, and it would have been illegal for the main contractor to continue with the building works until a new qualified person was appointed and a new permit obtained.

The High Court considered earlier jurisprudence on unconscionability as a ground to restrain calls on performance bonds, and laid down a 3-step framework for evaluating whether an injunction restraining a performance bond should be granted on the ground of unconscionability:

- Identify the nature of the performance bond, applying the principles of interpretation enumerated in *Master Marine AS v Labroy Offshore Ltd and others* [2012] 3 SLR 125.
- Ascertain whether the call falls within the terms of the bond.
- Evaluate whether the "*overall tenor and entire context of the conduct of the parties support a strong prima facie case of unconscionability*", unconscionability having been broadly described to involve elements of unfairness and conduct lacking in good faith, and such elements having most commonly manifested in the following manner:
  - calls for excessive sums;
  - calls based on contractual breaches that the beneficiary of the call itself is responsible for;
  - calls tainted by unclean hands, eg, supported by inflated estimates of damages or mounted on the back of selective and incomplete disclosures;
  - calls made for ulterior motives;
  - calls based on a position which is inconsistent with the stance that the beneficiary took prior to calling on the performance bond.

Applying the above 3-step framework, the court found the call on the performance bond unconscionable. In the present case, the court held that what made the bond call unconscionable was the fact that the developer itself was responsible for at least part of the delays faced by the Project. After Mr Seah took ill and became unable to carry out his duties, the permits issued under the Act had automatically lapsed. The developer then failed to appoint a substitute architect without delay, as it was required to do under the Act. The main contractor therefore had no valid permit under which it could continue works legally. The developer, having contributed to a delay it complained of, should be restrained from having the benefit of this performance bond.

More importantly, the court also found that a beneficiary simply cannot rely on an illegality when calling on a performance bond. In granting the injunction to restrain the bond call, the court considered that the developer could not penalise the main contractor for failing to continue works when it would have been illegal to do so.

The 3-step framework in *CEX v CEY* is non-exhaustive and the High Court hastened to remark that the list of circumstances where unconscionability arises will probably never be closed. In an immediate demonstration, the developer's call on the performance bond was held to be unconscionable by its reliance on an illegality, a factor that was not captured by the 3-step framework laid down.

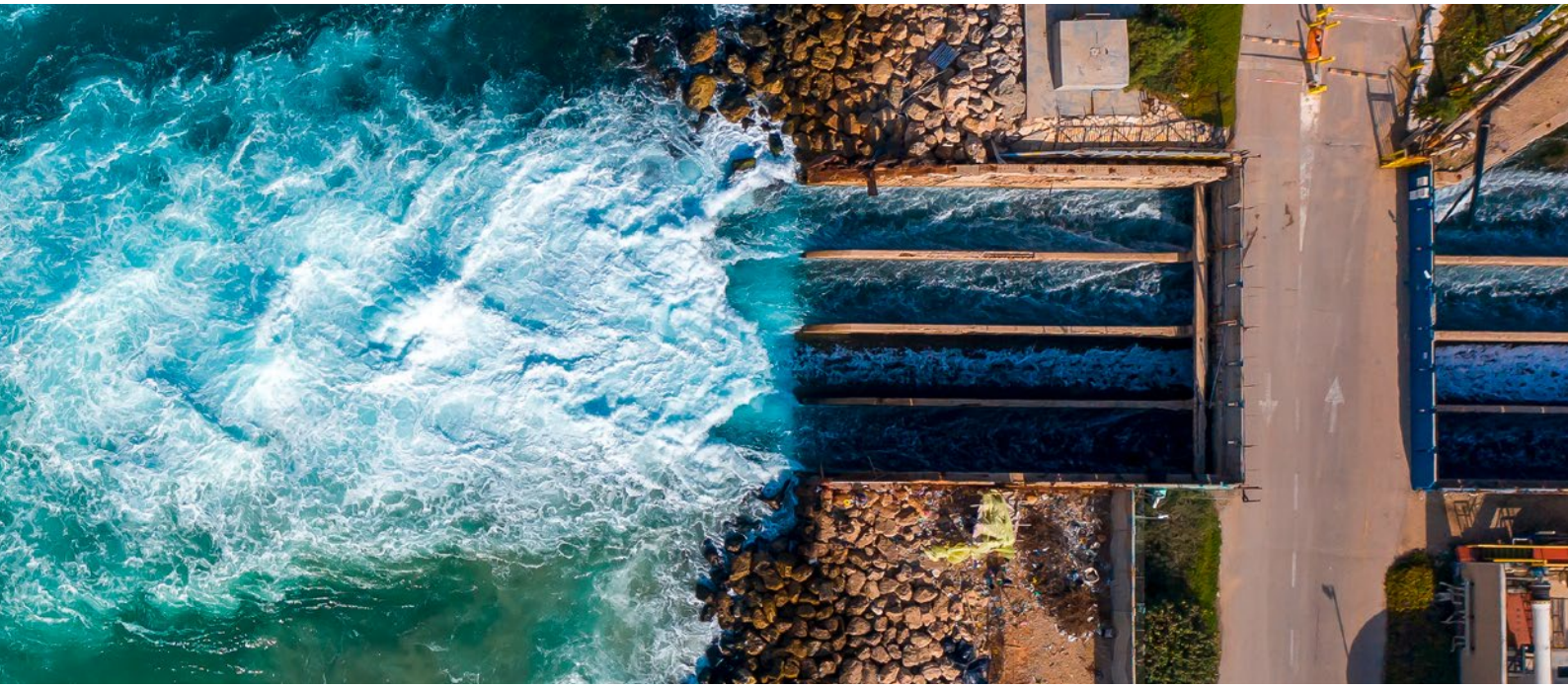
The framework in *CEX v CEY* nonetheless represents a more concrete mapping of the ground of unconscionability in restraining enforcement of performance bonds and will likely provide a valuable reference point to parties who find themselves considering the unconscionability exception from either side.

Sulzer Pumps Spain S.A. v Hyflux Membrane Manufacturing (S) Pte Ltd [2020] SGHC 122

In *Sulzer Pumps Spain S.A. v Hyflux Membrane Manufacturing* (S) Pte Ltd [2020] SGHC 122, the High Court had cause to consider whether the fact of a beneficiary undergoing restructuring was sufficient to render its call on an unconditional performance bond unconscionable.

The beneficiary, Hyflux Membrane Manufacturing (S) Pte Ltd (**Hyflux**), had engaged Sulzer Pumps Spain, SA. (**Sulzer Pumps**) to supply and install pumps for a project concerning the design and construction of a desalination plant in Oman. Deutsche Bank AG (**Bank**) issued an unconditional first demand bond in favour of Hyflux as security for Sulzer Pump's warranty obligations under contract.

The pumps subsequently failed, with Hyflux alleging that the failure was caused by design flaws and that Sulzer Pumps was in breach of its warranty obligations, and Sulzer Pumps in turn alleging that the failures were caused by Hyflux's use of the pumps outside of the permitted flow and speed ranges.



In October 2019, Hyflux called on the bond. At this time, the Hyflux group of companies had been involved in court-supervised restructuring proceedings since May 2018[1]. Following failed negotiations for withdrawal of the bond call, Sulzer Pumps obtained an ex parte injunction against Hyflux calling on the bond, citing urgency given that Hyflux had already called on the bond, and Sulzer Pumps' fear that any payouts to Hyflux would be irretrievable due to its financial difficulties.

In Hyflux's subsequent application to discharge the injunction, Sulzer Pumps argued that the injunction should be maintained on ground of unconscionability, and that if there was any doubt about the existence of unconscionability then the injunction should be granted considering Hyflux's financial state. In respect of the latter, Sulzer Pumps contended that any payment to Hyflux would be difficult to recover due to its financial difficulties and thus unfair.

In discharging the injunction, the High Court affirmed that unfairness – although an important factor in determining unconscionability – was not equal to unconscionability or itself a separate ground for injunction. Unconscionability is not a free ranging inquiry of fairness in a loose sense, and the High Court reasoned that to introduce unfairness as a standalone criterion would broaden the scope of such injunctions to such an extent that the bond's role as security would be significantly undermined.

The High Court also emphasised that the high threshold for establishing unconscionability – being the applicant's burden of showing a strong prima facie case of unconscionability – was a strict threshold that balanced competing policy interests and prevented unnecessary interference with the parties' contractual arrangements. The fact that the beneficiary was in the midst of restructuring proceedings – as was the case with Hyflux – or even if hypothetically on the verge of insolvency, would not be reason in itself to treat the beneficiary differently, or be reason to grant an injunction if unconscionability (or fraud) is not made out.

It is worth noting the High Court's emphasis that the purpose of injunctions against performance bond calls are solely to prevent the injustice of the beneficiary calling on the bond without *bona fides*, and not to preserve the rights of parties pending any substantive proceedings. This distinction is acutely illustrated where the party seeking injunctive relief has valid reason to believe that it would have little recourse against an insolvent beneficiary even if it ultimately succeeds at trial on the substantive dispute, but may still be unable to restrain the beneficiary's call on a performance bond if unable to demonstrate unconscionability or fraud on the part of the beneficiary.

[1] In a present-day epilogue, the Hyflux group of companies has gone into liquidation after over 3 years of restructuring attempts.

Court of Appeal declines to follow Rock Advertising: endorses more liberal approach to NOM clauses

A five-judge Court of Appeal has considered the legal effect of no oral modification clauses ("**NOM clauses**") under Singapore law. In a break from the position in the UK (decided in the *Rock Advertising* case), the Court of Appeal reasoned that NOM clauses merely raise a rebuttable presumption that in the absence of an agreement in writing, there would be no variation. Under the strict approach adopted in *Rock Advertising*, NOM clauses are given full effect such that any subsequent modification to the contract will be invalid unless it complies with the formalities stipulated in the NOM clause. The Court of Appeal also suggested that a more liberal approach to estoppel would apply than indicated in *Rock Advertising* were a NOM clause to result in the invalidity of an oral agreement. Given the prevalence of such clauses in commercial contracts, this divergence between the English and Singapore courts gives rise to significant considerations for parties' choice of governing law of contract.

Charles Lim Teng Siang v Hong Choon Hau [2021] SGCA 43

Mr Lim and other parties (the "**Sellers**") entered into a sale and purchase agreement ("**SPA**") with Mr Hong and Mr Tan (the "**Buyers**"), pursuant to which the Sellers were to sell 35 million shares in a public listed company to the Buyers for S$10.5million.

The SPA provided for a completion date of 17 October 2014 ("**Completion Date**") and that time would be of the essence. It also contained an NOM clause which provided that "*No variation, supplement, deletion or replacement of any term of the SPA shall be effective unless made in writing and signed by or on behalf of each party*" ("**SPA NOM Clause**").

Over 3 years had passed after the Completion Date before the Sellers' solicitors issued a letter to the Buyers, demanding compliance with the SPA and threatening legal action. The Sellers subsequently commenced action in the High Court of Singapore, claiming damages for breach of the SPA due to the Buyers' failure to complete.

The Buyers denied being in breach of the SPA and amongst other things, claimed that pursuant to an alleged telephone call between Mr Lim and Mr Hong on or about 31 October 2014, the SPA was rescinded by mutual agreement. The High Court accepted the Buyers' evidence in this regard and rejected the Sellers' claim. On appeal to the Court of Appeal, the Sellers raised, among other things, a new argument that the alleged oral rescission, even if proved, was invalid because the requirements of the SPA NOM Clause had not been satisfied. The Buyers argued that the SPA NOM Clause did not apply to rescission and could not in any event invalidate an oral agreement contrary to its terms which had been adequately proved.

NOM clause not applicable to recission agreements

The Court of Appeal held that based on its plain language, the SPA NOM Clause did not apply to the rescission of the SPA as it only expressly provided that a "variation, supplement, deletion and replacement" must be made in writing. The common denominator underlying these four forms of modifications is that the SPA will continue to remain valid and in force, which is in contrast to the effect of a rescission. The appellants' arguments that a rescission amounted to "replacing" the SPA with an agreement to rescind, or that it "deleted" the clauses in the SPA which required performance of the share transaction, and that such deletion led to the rescission of the SPA, were rejected by the Court of Appeal.

On the facts, the Court of Appeal agreed with the High Court that the parties had orally agreed to rescind the SPA via the telephone call on 31 October 2014.

The legal effect of NOM clauses

Even though it was not strictly necessary to do so, the Court of Appeal also proceeded to discuss and clarify the legal effect of NOM clauses in general.

The Court of Appeal examined the current schools of thought in this regard by reference to law from other jurisdictions:

— First, the strict approach taken in the majority decision of the UK Supreme Court in Rock *Advertising Ltd v MWB Business Exchange Centres Ltd [2018] All ER 21* ("***Rock Advertising***"), delivered by Lord Sumption. Under this approach, any subsequent modification to the contract must comply with the formalities stated in the NOM clause, otherwise it will be deemed invalid. As such, an NOM clause can only be removed by an agreement of the parties which complies with the formalities set out in the NOM clause.

— Second, the approach developed by Lord Briggs in *Rock Advertising*. Under this approach, the parties' oral agreement specifically to depart from an NOM clause will be treated as valid. Such oral agreement may be express or by necessary implication. However, in situations where an oral variation is made without express reference to the NOM clause, a strict test should be applied before the court finds that parties had, by necessary implication, agreed to depart from the NOM clause.

— Third, the approach endorsed by the Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("***Comfort Management***"). Under this approach, an NOM clause merely raises a rebuttable presumption that in the absence of an agreement in writing, there would be no variation. This approach was adopted from the English Court of Appeal's decision in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604 ("***Rock Advertising CA***"), which decision was reversed on appeal in *Rock Advertising*.

The Court of Appeal confirmed the third approach in *Comfort Management*, siding with the English Court of Appeal's decision in *Rock Advertising CA* and disagreeing with the two approaches of the UK Supreme Court in *Rock Advertising*. Underlying this difference is the emphasis the respective courts placed on parties' intentions at the time of entering into a contract. Lord Sumption's view in *Rock Advertising* was to the effect that once parties had agreed to regulate their legal relations, then they are bound by those regulations. Each party's autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows.

On the other hand, the Court of Appeal took the view that fixing parties' intention at the time the contract was entered into overlooks the fact that parties to a contract have the autonomy to change the terms of the contract. In the Court of Appeal's opinion, Lord Sumption's view conflated the parties' individual autonomy (which should necessarily be bound by the terms of the contract) with the parties' collective autonomy. Collectively, the parties to a contract should be able to jointly agree to vary any aspect of their own agreement and the court should uphold their autonomy to do so.

While the Court of Appeal recognised there are several legitimate commercial reasons why parties may choose to include NOM clauses in their contract, those reasons do not provide a legitimate basis to prevent parties from varying a contract orally where such an oral variation can be proved. The Court of Appeal distinguished between proving the fact that an oral variation had taken place (and the evidential difficulties that come with it) and recognising an oral variation at all in cases where there are NOM clauses.

Nevertheless, the Court of Appeal emphasised that compelling and cogent evidence is required before the court will find and give effect to an oral variation in order to rebut the presumption that there is no oral variation. This does not modify the standard of proof, but rather "*serves to reflect the inherent difficulty in proving such an oral variation in the face of their express agreement to the contrary as prescribed in the NOM clause*." However, this perceived evidential difficulty in proving the oral variation should not be confused or conflated with the question of the legal effect of a NOM clause.

Once the burden of proof in relation to the oral variation is discharged, the NOM clause will cease to have legal effect because such is the collective decision of both parties to the contract. The test, according to the Court of Appeal, should be whether at the point when parties agreed on the oral variation, they would necessarily have agreed to depart from the NOM clause had they addressed their mind to the question, regardless of whether they had actually considered the question or not.

The Court of Appeal's views on the legal effect of NOM clauses is *obiter* and strictly speaking non-binding. However, this decision by a specially convened five-judge panel of the apex court – typically convened for cases of jurisprudential significance – means that the Court of Appeal's expressed preference for the *Comfort Management* approach in the treatment of NOM clauses will weigh heavily in future cases.

NOM clauses and estoppel

The Court of Appeal also observed that even were NOM clauses to have the strict effect found by the UK Supreme Court in *Rock Advertising*, the doctrine of equitable estoppel would nevertheless be likely to apply in most cases where an oral agreement had been proved. This was because in most cases such an agreement is likely to be provided by the parties' subsequent conduct in performing the contract as orally varied. Accordingly, "*in most circumstances where an oral variation (which would in itself constitute a clear and unequivocal representation) is proved, the parties should be able to establish detrimental reliance on the oral variation (the act of performing the obligations of the oral variation), and thereby satisfy the doctrine of equitable estoppel.*"

This finding contrasts with a stricter approach to such estoppels indicated by Lord Sumption in *Rock Advertising* and subsequently applied in later English decisions. This approach requires more than mere reliance on an oral promise; some statement or conduct is needed which unequivocally represents that the oral variation was valid notwithstanding its non-compliance with the NOM clause.

Consequences and wider application

NOM clauses are prevalent in commercial contracts, included to ensure commercial and legal certainty, and to prevent such situations of having to prove oral modifications. In these circumstances, a party to a contract governed by Singapore law seeking to rely on an NOM clause should ensure that any oral discussions that may have the effect of, and/or be relied upon as, modifying the terms of the underlying contract be properly clarified as not being binding unless documented in accordance with the formalities set out in the NOM clause.

In circumstances where parties are seeking to rely on such oral discussions, the safest approach is still to comply with the NOM clause, but if that is not practical then proper notes and records should be taken. As stated by the Court of Appeal, compelling and cogent evidence is required in order to make a finding that there has been an oral agreement to modify the terms of the contract.

Further, clear policies and guidelines should be established in respect of the day-to-day management and execution of the contract so that daily discussions or off the record conversations do not have the unintended effect of modifying the terms of the contract. Where there has been some form of discussion or communication that has the effect of modifying the terms of the contract, a party that has allowed the other party to rely on this discussion or communication to its detriment could also be estopped from relying on the NOM clause.

As NOM clauses appear in many standard form contracts and international model forms, the decision of the Court of Appeal is of wide relevance across a variety of sectors. For example:

— The AIPN Model Form Operating Agreement (2012) requires an amendment to be a "*written amendment*" and "*signed*".

— Clause 74.5 of the BP Oil International Limited General Terms & Conditions for Sales and Purchases of Crude Oil and Oil Products (2015) also require modifications to be "*evidenced in writing*".

— The NEC suite of contracts requires amendments to be "*in writing and signed by the parties*".

On a practical front, it should also be remembered that an email, in some jurisdictions, may be 'in writing' for the purposes of a NOM clause. For example, in *C&S Associates UK Ltd v Enterprise Insurance Company plc*, the English Commercial Court decided that:

— An exchange of emails was "*in writing*" for the purposes of a NOM clause.

— An email with a signature block was able to satisfy the requirement for an agreement to be "*signed*".

Finally, the wider implication of this divergence between English and Singapore law (as well as the laws of other jurisdictions) for parties' choice of governing law should not be understated, particularly on multinationals and international parties conducting business globally. Parties should have a proper appreciation of the legal effect of their particular NOM clauses under the relevant governing law.

References:

— *Charles Lim Teng Siang v Hong Choon Hau* [2021] SGCA 43

— *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] 4 All ER 21

— *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979

— *C&S Associates UK Ltd v Enterprise Insurance Company plc* [2015] EWHC 3757 (Comm)

Hybrid dispute resolution clauses

It is not uncommon for contracts to provide for some disputes to be resolved by litigation, and other by arbitration. In *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251, the High Court considered the different approaches to interpretation of arbitration clauses when faced with seemingly inconsistent arbitration and jurisdiction clauses, and upheld its jurisdiction over the parties' dispute which concerned the interpretation of an industrial all risks policy arising from the closure of all hotels in Phuket and the cessation of all flights to Thailand by government authorities in response to the COVID-19 pandemic.

Silverlink Resorts Ltd v MS First Capital Insurance Ltd [2020] SGHC 251

Silverlink Resorts Ltd ("**Silverlink**") is the ultimate holding company of the Aman Group, which owns and manages luxury hotels in various parts of the world, including the Amanpuri resort in Pansea Beach, Phuket, Thailand. MS First Capital Insurance Ltd ("**MS**") is in the business of writing and providing non-life insurance.

Silverlink was one of the insured parties under an "Industrial All Risks Policy" (the "**Policy**") issued by MS. The Policy comprised a Renewal Certificate and a set of terms and conditions. Section I of the terms and conditions was entitled "*Material Loss or Damage*", with Section II of the terms and conditions entitled "*Business Interruption*".

To mitigate the risk of the spread of COVID-19, the Governor of the Province of Phuket ordered the closure of all hotels in Phuket, and the Civil Aviation Authority of Thailand banned all international fights to Thailand. This led to Silverlink making a claim under the Policy for the business interruption it suffered.

MS rejected the claim on the grounds that for a claim to be admitted under Section II of the Policy, a claim under Section I must have been made and accepted. Silverlink filed an originating summons seeking a declaration that it had a valid claim under the Policy (the "**Dispute**"). MS subsequently applied to the High Court to stay proceedings in favour of arbitration.

In a decision handed down in November 2020, the High Court dismissed MS's application for a stay of proceedings in favour of arbitration. In this article, we focus on MS's application for a stay of proceedings.

The Key Issue: Did the Arbitration Clause or the Jurisdiction Clause apply to the Dispute?

The difficulty in interpretation in this case arose because the general conditions of the Policy contained potentially overlapping dispute resolution provisions. Clause 11 (the "**Arbitration Clause**") provided for the resolution of "*any dispute arising out of or in connection with*" the Policy which was not settled pursuant to cl 10 (the "**Mediation Clause**") by arbitration. Clause 13 (the "**Jurisdiction Clause**") on the other hand provided for the resolution of "*any dispute … regarding the interpretation or the application of*" the Policy by the "competent court in Singapore". The Renewal Certificate for the Policy also contained a "*Choice of Law and Jurisdiction*" clause which provided that in the event of any dispute over the interpretation of the Policy, the applicable governing law was Singapore and the "*Courts of Singapore*" had jurisdiction.

MS's application was made under section 6 of the International Arbitration Act which states that "where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court… in respect of any matter which is the subject of the agreement, any party to the agreement may… apply to that court to stay the proceedings so far as the proceedings relate to that matter". As the High Court noted in its decision, it is well established that a court hearing a stay application should grant a stay in favour of arbitration if the application is able to establish on the face of it that: (i) there is a valid arbitration agreement between the parties to the court proceedings; (ii) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement, and (iii) the arbitration agreement is not null and void, inoperative or incapable of being performed.

The High Court therefore had to decide which clause should apply to the Dispute: If the Arbitration Clause applied, then the proceedings should *prima facie* be stayed, and the Dispute referred to arbitration.

The Applicable Legal Principles

The starting point for the High Court was that when interpreting an arbitration clause, it should be construed based on the presumed intentions of the parties as rational commercial parties, and that there is an assumption that all disputes between the parties will fall within the scope of the arbitration clause. The High Court noted that this approach is well demonstrated by the "*Paul Smith*" approach, named after the decision in *Paul Smith Ltd v H&S International Holding Inc* [1991] 2 Lloyd's Rep 127 ("***Paul Smith***"). In that case, the agreement provided for adjudication under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, and for the Courts of England to have exclusive jurisdiction, leading to potential inconsistency/conflict. The Court in *Paul Smith* resolved the inconsistency by interpreting the latter clause as applying to the arbitration, itself meaning that any dispute under the agreement would be decided by arbitration, whilst the jurisdiction provided for the English courts' supervisory jurisdiction over the arbitration. This is an approach that would not render the clauses invalid on the grounds that they were conflicting.

MS submitted that this same approach should be adopted in this case, meaning that the Dispute should be resolved by arbitration, with the Jurisdiction Clause interpreted as giving the Singapore courts a supervisory role. Silverlink's position however was that the *Paul Smith* approach should not be adopted because, on its interpretation, the Jurisdiction Clause specifically carved out from the Arbitration Clause disputes regarding the interpretation or application of the Policy.

In considering whether the parties intended the Jurisdiction Clause to carve out disputes regarding the interpretation or application of the Policy from the Arbitration Clause, the High Court considered and applied the approach to "carve outs" in decisions from several jurisdictions including Singapore, England & Wales, Australia and New Zealand (notably the decision in "*Transocean*")[1] favouring the jurisdiction clauses which covered specific types of disputes only. The High Court held that such an interpretation would make commercial sense, would be consistent with the rule of construction that the general should give way to the specific, and evince the parties' intention to carve out specific disputes from the arbitration clause.

The High Court therefore held that the *Paul Smith* approach was not appropriate, and ruled in favour of Silverlink, finding that: (i) the Jurisdiction Clause did not apply to all disputes (its scope was narrower than the Arbitration Clause); (ii) the Jurisdiction Clause confirmed the parties' intention that disputes relating to the interpretation of the Policy were to be resolved through court proceedings; (iii) reserving disputes relating to the interpretation or application of the Policy to be decided by the courts made commercial sense because such disputes may be resolved effectively, efficaciously and efficiently; and (iv) applying the *Paul Smith* approach could result in the arbitration being subject to the supervisory jurisdiction of different courts depending on whether the issue in dispute falls within the jurisdiction clause or not.

In coming to its decision, the High Court provided useful guidance on the appropriateness of the *Paul Smith* approach, finding that it should not apply in every case where an arbitration clause and a jurisdiction clause are contained in the relevant contract. Rather, as the Singapore Court of Appeal found in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455, the generous approach in *Paul Smith* has its limits and interpretation will ultimately depend on the intention of the parties, objectively ascertained.

The High Court went on to say that parties can decide to have certain types of disputes resolved by arbitration, and others by litigation, depending on the suitability of those forums to the dispute. For example, questions of default such as failure to pay an instalment due may be suited to litigation, which summary procedures have no direct counterparty in arbitration, whilst valuation and/or technical questions in the same contract might be settled more simply by expert determination. The key issue when dealing with such provisions is to ensure that it is clear precisely which types of disputes fall to be resolved by each mechanism.

In cases where the arbitration and jurisdiction clauses evince the intention of the parties to have different disputes resolved by arbitration and litigation, the intention of the parties will be given effect, and there is no reason to apply the *Paul Smith* approach since the arbitration and jurisdiction clause are not inconsistent with each other; both clauses perform entirely separate functions and are independently enforceable.

[1] *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] SLR 821 ("***Transocean***").

Conclusion

This decision sets out in summary the principles the Singapore courts (and courts in other jurisdictions) will apply to seemingly inconsistent arbitration and jurisdiction clauses, and confirms that the analytical exercise is all about ascertaining the intention of the parties. In the instant case, the question to be answered was whether the parties' intention, objectively ascertained, was for the Jurisdiction Clause to carve out disputes regarding the interpretation or application of the Policy from the Arbitration Clause. The High Court agreed with Silverlink that reserving disputes relating to the interpretation or application of the Policy to be decided by the courts made commercial sense because such disputes may be resolved effectively, efficaciously and efficiently through the originating summons procedure.

Certain disputes may be more appropriately resolved by arbitration or litigation depending on the nature of the dispute in question and other considerations, and commercial parties should pay careful regard that the language of dispute resolution clauses clearly and unambiguously expresses their choice of dispute resolution mechanisms in order for such intention to be given effect. In this regard, the following observation by the High Court in this decision serves as an apt reminder:

> *"Businessmen should be familiar enough with arbitration by now to realise that arbitration is an alternative mechanism for dispute resolution. One cannot have recourse to both arbitration and the court for the same dispute. It is possible that parties may intend some types of disputes arising from an agreement to be resolved by arbitration and others by litigation in court. Obviously, such clauses need to be very carefully thought through and drafted. The irony is not lost; such dispute resolution clauses tend to lend themselves to dispute over which dispute resolution mechanism should apply."*

Consent in joinder of third-parties to arbitration

The High Court has held that a third-party parent company of one of the parties to a Singapore-seated LCIA arbitration had not consented to being joined to the arbitration, despite being a signatory to the underlying agreement between the Parties. This decision reinforces the high threshold to be met for the forced joinder of third-parties to Singapore-seated arbitrations, and provides clarity on the operation of Article 22.1(viii) of the LCIA Rules (2014) under Singapore law.

CJD v CJE [2021] SGHC 61

This case concerned a Singapore-seated arbitration between two of the five parties (referred to as "**CJE**" and "**CJD**") to a joint-venture agreement for the development of a mixed-use residential/commercial tower, hotel and/or serviced apartments complex, in a jurisdiction referred to as 'Narnia'. A joint venture company was established pursuant to the joint-venture agreement, with CJE and CJD each holding a 50% interest in the joint-venture company. The joint-venture agreement was subject to 'Narnian' law and provided for disputes to be resolved by way of arbitration seated in Singapore pursuant to the LCIA Rules (2014) (the "**Rules**") (the "**Arbitration Agreement**").

A dispute arose between CJE and CJD, resulting in CJE commencing arbitration proceedings against CJD in 2018 pursuant to the Arbitration Agreement. In 2019, CJD filed a number of applications in the arbitration, one of which sought to join CJE's parent company; CJF, to the arbitration proceedings pursuant to Article 22.1(viii) of the Rules. CJF owned 100% of the issued shares in CJE and was also a party to the joint-venture agreement.

The arbitral tribunal issued a decision rejecting the joinder application on the basis that: (i) Article 22 of the Rules provides that the party to be joined to the arbitration must consent to the joinder in writing; (ii) the mere fact that CJF was a party to the joint-venture agreement did not mean that it had consented to be joined to the present arbitration; and (iii) such consent would need to be evidenced through express wording (either in the provisions of the joint-venture agreement, or provided after the commencement of the arbitration), which was absent in this case.

As a result, CJD made an application to the High Court of Singapore for the tribunal's decision to be reversed and/or set aside pursuant to section 10(3)(b) of the International Arbitration Act. In a judgement dated 19 March 2021, Judicial Commissioner S. Mohan upheld the tribunal's decision.

The consent requirement

Firstly, Mohan JC reminds us that a "forced joinder" refers to a third party consenting to be joined as a party to extant arbitration proceedings on the application of one of the arbitrants, despite objections to the joinder raised by the other arbitrant(s), and that it does not in fact refer to forcing a third party to join an arbitration against its wishes.

In establishing whether CJF had consented to be joined to the extant arbitration, Mohan JC considered the operation of Article 22.1(viii) of the Rules, and in particular, what is required to demonstrate that a party has consented to be joined to an arbitration. In this regard, CJD argued that CJF had consented to the joinder by: (i) signing the joint-venture agreement, which by virtue of the arbitration agreement contained therein, incorporated Article 22.1(viii) of the Rules; and (ii) its conduct in "*behaving as if it was already a rightful party to the Arbitration*". CJD also argued that the intention behind the joint-venture agreement was that every party to it could be joined to any arbitration arising from that agreement.

In rejecting these arguments, Mohan JC relied on three key bases of reasoning:

1. That "*consent*" under Article 22.1(viii) of the Rules could be established in the following three ways: (i) the third party and the applicant consent to the joinder in writing, after the arbitration has commenced; (ii) the third party and the applicant expressly consent to joinder in writing earlier in the arbitration agreement; or (iii) a combination of (i) and (ii) above. It was trite that the first permutation was not applicable as the third party; CJF, actively opposed its joinder to the arbitration proceedings. Accordingly, in order for the application to succeed, the second or third options had to be met.
2. That it was not permissible to assert that simply by virtue of having signed the joint-venture agreement (and being a party to the arbitration agreement contained therein), CJF had consented in writing to being joined to the arbitration itself. There were two bases for this decision. First, that it would require a "*strained and unnatural*" reading of Article 22.1(viii) of the Rules to hold that signature of a contract containing an arbitration agreement amounted to consent to joinder. This would result in the possibility of joining a signatory to a contract to an ongoing arbitration involving other parties to the contract "*at any point*" in time. This would cause great uncertainty and could potentially result in third-parties being joined at the later stages of arbitration proceedings where they would not have had an opportunity to participate in the selection of the arbitral tribunal and/or may be deprived of the opportunity to properly respond to the positions advanced by the other parties, all of which "*would represent a significant derogation from the fundamental requirement of party autonomy in international commercial arbitration.*" Second, if it was intended for the arbitration agreement to operate in this way, the parties were free to draft the agreement in those terms "*clearly and unambiguously*". However, the arbitration agreement in this case did not contain any such clear

or unambiguous wording. It was noted that forced joinder is a "*drastic*" step and therefore consent to joinder should be stated clearly in the arbitration agreement, and consent cannot be "*implied or inferred*" by the third party simply being a signatory to the arbitration agreement.

3. That, as noted by the Court of Appeal in the oft-cited *PT First Media* decision, the doctrine of 'double separability' distinguishes between the arbitration agreement between the parties, and the separate agreement between the parties to a particular arbitration reference. The effect of this doctrine in this case is that, even though CJF was a party to the arbitration agreement, it was not a party to the second agreement between CJD and CJE arising out of their specific referral of the dispute to arbitration, and must still provide further consent in writing to be joined and made a party to the separable agreement between CJD and CJE.

This decision can also be read consistently with Article 22.1(x) of the newly released LCIA Rules (2020), which now notes that a third party must have consented "*expressly*" in writing to the joinder.

It is also notable that the 2020 LCIA Rules also contain expanded powers (in Article 22A) which allow the arbitral tribunal to consolidate more than one set of proceedings commenced under the same or any compatible arbitration agreement, including between different parties, provided the proceedings arise out of the same transaction or series of related transactions. This potentially provides a way around the difficulties encountered by CJD in this case through the commencement of separate proceedings against CJF followed by an application for consolidation under the new provisions.

Consequences and Wider Application

Whilst dealing specifically with forced joinder pursuant to the LCIA Rules, the guidance provided on what constitutes 'consent to joinder' under Singapore law has wider application for Singapore-seated arbitrations pursuant to the rules of other arbitral institutions, particularly in respect of applications for joinder made under: (i) Article 7.1(b) of the current rules of the Singapore International Arbitration Centre ("**SIAC**"); (ii) Article 27.1(b) of the current rules of the Hong Kong International Arbitration Centre ("**HKIAC**"); or (iii) Article 7.1(a) of the current rules of the International Chamber of Commerce ("**ICC**), all of which refer to the need for 'consent' or 'agreement' of the party being joined to the arbitration.

Unlike the LCIA and HKIAC Rules, the SIAC and ICC Rules do not prescribe that consent for joinder has to be provided in writing, which does leave open the possibility of arguing that the party to be joined has consented impliedly. However, based on this decision, the mere fact that a third-party is party to an arbitration agreement is not evidence of implied consent to be joined to a specific arbitration reference between other parties which had arisen out of that same arbitration agreement. Applying the doctrine of 'double separability' and the other bases of the Singapore High Court's decision, an applicant would arguably need to show sufficient evidence demonstrating that the third-party has impliedly consented to be joined to the specific arbitration, even in circumstances where it is a party to the underlying arbitration agreement.

In addition, this decision also highlights the potential difficulties faced by applicants seeking to join a non-signatory third-party to Singapore-seated arbitrations. By reinforcing the applicability of the doctrine of 'double separability', it clarifies that the joinder of a non-signatory faces two significant hurdles: first, to establish that the third-party has consented to be a party to the arbitration agreement and second, to then establish that the third-party has consented to be joined to the specific arbitration.

For parties seeking to enter into arbitration agreements providing for arbitration seated in Singapore, this decision highlights the need to carefully consider: (i) whether there is a need for express wording in the arbitration agreement to confirm which parties (including third-parties) consent to be joined to arbitration proceedings arising out of that arbitration agreement; and/or (ii) whether the rules for joinder prescribed by the arbitral institution selected provide any basis for joinder without the consent of the party to be joined (such as Article 22A in the 2020 LCIA Rules discussed above).

References:

— *CJD v CJE [2021] SGHC 61* [-2021-sghc-61-pdf.pdf (supremecourt.gov.sg)]

— *PT First Media TBK v Astro Nusantara International BV and others* [2013] SGCA 57

— *LCIA Rules* (2014) [LCIA Arbitration Rules (2014)]

Setting aside and remission of arbitral awards

A dissatisfied party in a Singapore seated arbitration can seek recourse to set aside an arbitral award under section 48 of the Arbitration Act (Cap. 10), or section 24 of the International Arbitral Act (Cap. 143A) (**IAA**) and Article 34 of the UNICTRAL Model Law on International Commercial Arbitration ("**Model Law**"), including on grounds of a breach of the rules of natural justice in connection with the making of the award by which the rights of any party have been prejudiced. The judicial approach of the Singapore courts continues to emphasise a 'light touch' in review of arbitral awards.

Nonetheless, recent decisions alleging breaches of natural justice in the making of awards show that the Singapore courts have not shied away from setting aside awards in the right circumstances. The High Court's decision in *BZV v BZW and another* [2021] SGHC 60 provides guidance to the court's approach in determining breaches of the fair hearing rule for the tribunal's failure to apply its mind to the essential issues arising from the parties' arguments or arising from defects in the chain of reasoning which the tribunal adopts in the award. The Court of Appeal's decision in *CBS v CBP* [2021] 1 SLR 935 illustrates potential limitations to a tribunal's procedural power to "gate" witnesses when balanced against parties' right to be heard and given a full opportunity to present their case under Article 18 of the Model Law, and provides guidance as to the availability and exercise of the court's discretionary power to remit arbitral awards to the tribunal.

BZV v BZW and another [2021] SGHC 60

In *BZV v BZW and another* [2021] SGHC 60, the claimant buyer had entered into a shipbuilding contract with the respondent shipbuilders. The buyer had accepted delivery of the vessel from the shipbuilders, and in turn made delivery of the vessel to the end-buyer. Subsequently, the buyer brought two claims against the shipbuilders in an arbitration held under the Arbitration Rules of the Singapore International Arbitration Centre for: (1) liquidated damages due to the delay in delivery of the vessel ("**delay claim**"); and (2) damages for breach of contract by delivery of the vessel with generators rated IP23 instead of IP44 and therefore failed to meet contractual specifications for ingress protection against water ("**IP44 claim**").

The shipbuilders denied the buyer's claims in the arbitration, and the 3-member arbitral tribunal delivered an award dismissing the buyer's delay and IP44 claims (with a minority dissent on the IP44 claim), as well as the shipbuilders' counterclaim in the arbitration. The buyer then filed an application to set aside the award for *inter alia* breach of natural justice under s 24(b) of the IAA, on the basis that the tribunal had breached the fair hearing rule in dismissing its delay and IP44 claims.

The High Court found that on the applicable principles, the award had been made in breach of the fair hearing rule on two grounds: namely that (1) the tribunal had failed to apply its mind to the essential issues arising from the parties' arguments, and (2) for defects in the chain of reasoning which the tribunal adopted in its award. In coming to its decision, the High Court considered the following principles of law for both grounds set out in earlier decisions:

— An award will be set aside on the ground that the tribunal failed to apply its mind to an essential issue arising from the parties' arguments where the failure is a clear and virtually inescapable inference from the award; and

— To set aside an award on the basis of a defect in the chain of reasoning, a party must establish that the tribunal conducted itself either irrationally or capriciously such that "*a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award*". In this connection, the tribunal's chain of reasoning must be: (i) one which the parties had reasonable notice that the tribunal could adopt; and (ii) one which has a sufficient nexus to the parties' arguments, in order to comply with the fair hearing rule.

An issue that arose in the application was whether the tribunal, in dismissing the delay claim had applied its mind to the essential issues: (1) arising from the shipbuilders' defence that the time for delivery of the vessel under the contract had been set at large by alleged acts of prevention by the buyer, and (2) arising from the buyer's case that the defendants had failed to adduce any evidence of the critical path analysis necessary to establish the plaintiff's acts of prevention as the cause of delay.

The High Court found it significant that the shipbuilders had framed its case at arbitration on the prevention principle by reference to the leading judgment of *Jackson LJ in the English Court of Appeal in Carillion Construction Ltd v. Woods Bagot Europe Ltd* (2017) 170 ConLR 1:

> *"If (a) an employer delays a contractor … and (b) there is no mechanism for extending the time allowed for completion of that contractor's … work, then time becomes at large. The contractor or sub-contractor is no longer required to complete by a specified date or within the contractually specified period. There is, ordinarily, substituted an obligation to complete within a reasonable time."*

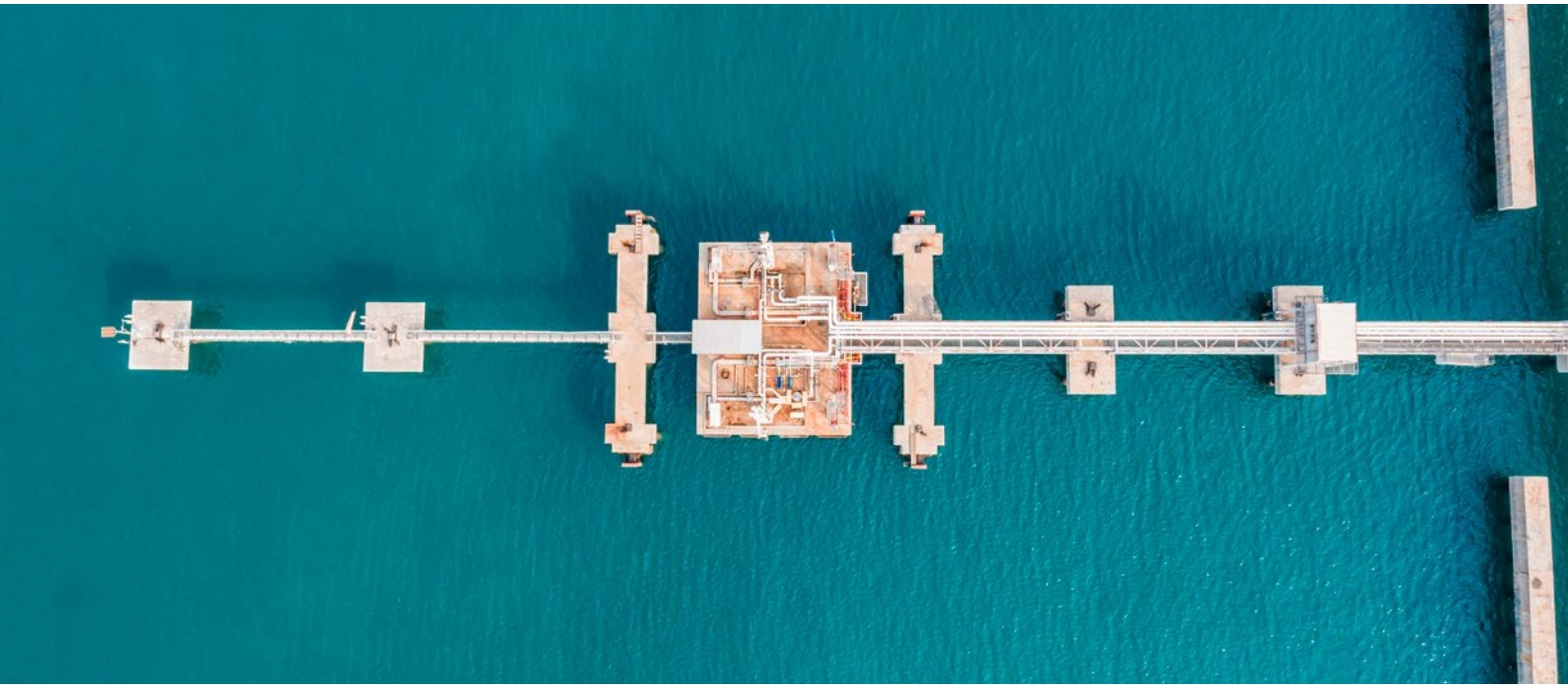
The High Court concluded that on the shipbuilders' case, as the tribunal had adopted the prevention principle as part of its chain of reasoning, the tribunal had been required to ask itself whether the buyer's acts of prevention had caused the shipbuilders' delay in delivery of the vessel. However, the High Court found that the tribunal had failed in this regard as an analysis of the award showed no sign that the tribunal had identified the essential issues of whether the buyer's acts of prevention had been on the shipbuilders' critical path to achieving delivery of the vessel by the required date, or whether the shipbuilders had failed to adduce evidence of the critical path analysis necessary to establish the buyer's acts of prevention as the cause of the delay.

On the IP44 claim, the only dispute in the arbitration was whether the shipbuilders had been contractually obliged to upgrade the generators from IP23 to IP44 before delivery. The buyer contended that the tribunal's dismissal of the IP44 claim was based on findings that had no causal nexus to either party's case on that claim. In turn, the shipbuilders' position was that the tribunal's findings showed its chain of reasoning had a nexus to its first and second defences in the arbitration: namely (1) that there had been no breach of contract as the shipbuilding contract did not require delivery of the vessel with generators of any specific IP rating and required only that the generators satisfy the American Bureau of Shipping's (**ABS**) requirements for class; and (2) a second defence in estoppel on the basis of the buyer's alleged representation that led the shipbuilders to believe that the end-buyer was prepared to accept generators rated IP23 provided this was acceptable to the ABS.

One of the tribunal's findings in the award was that "*there was no breach by the [shipbuilders] in supplying generators of IP23 rating, as the [buyer] …confirmed that IP 23 was fit for purpose*". The shipbuilders argued that this finding established a causal nexus between the tribunal's dismissal of the IP44 claim and both of its defences.

By analysis of the award, the High Court found that the tribunal's findings could only have meant its rejection of the shipbuilders' defence that there had been no breach of contract. The tribunal's express findings that the end-buyer had required the generators to be rated IP44, and that the parties had understood that the vessel's generators had to be upgraded to IP44 resulting from meetings with the end-buyer, amounted to a finding that the shipbuilders understood that they were obliged to upgrade the generators to IP44 to meet the end-buyer's requirements. This rejection in turn excluded any nexus between the shipbuilders' first defence and the tribunal's chain of reasoning in dismissing the IP44 claim.

The High Court considered that it must assume in the tribunal's favour that it had intended to deliver an award which was coherent and internally consistent. Given the tribunal's rejection of the first defence, the High Court therefore could not accept the shipbuilders' argument that the tribunal's finding of 'no breach' by the shipbuilders in delivery of the vessel ought to be given a literal interpretation to mean 'no breach of contract', as this would render the award internally inconsistent and incoherent. Rather, the High Court found that it could only give the tribunal's finding of 'no breach' a liberal construction to mean 'no liability' to the buyer in connection with the shipbuilders' second defence in estoppel.



Another issue that arose in the application was whether corrections made to the award had rendered the tribunal's chain of reasoning in dismissal of the IP44 claim one with no causal nexus to the shipbuilders' promissory estoppel defence.

Prior to correction of award, the tribunal's chain of reasoning resulting in dismissal of the IP44 claim had rested entirely on an email and enclosed supporting documents showing that generators rated IP23 were "fit for purpose" from one of the shipbuilders' staff (a Mr Tan). In an undisputed and inexplicable error of fact, the tribunal had misidentified Mr Tan as the buyer's representative in the award prior to correction. The tribunal thus misattributed Mr Tan's supporting documents as the buyer's contemporaneous confirmation and admission to the shipbuilders that the generators rated IP23 were fit for its purpose to meet the ABS class requirements, and also fit in a specific sense for the purpose of the shipbuilding contract. On this basis, the tribunal also held that related issues in the arbitration pertaining to whether the supplied generators had been fit for purpose or had been supplied in breach of contract were rendered academic and unnecessary for decision.

In an addendum to the award, the tribunal subsequently corrected its misidentification of Mr Tan (at paragraph 220 of the award) as being correction of "*clerical error or error of similar nature arising from an accidental slip*", in the following manner (with deletions and insertions indicated by strikethrough and underlining respectively):

> *The Tribunal has noted that the ~~[the buyer's]~~ [the shipbuilders'] Mr Tan provided supporting documents to show that IP23 was fit for purpose. ~~It is hard for the Tribunal to disregard what the Claimant itself had stated, particular in contemporaneous documents. In the premises, there is no need for any party to expressly demonstrate that the rating of IP23 is adequate or sufficient.~~*

The High Court's view was that the tribunal had erred in correcting the award – the misattribution of Mr Tan had been an accurate reflection of what the tribunal intended to find, and the deleted sentences from the award expressed the tribunal's reasoning in according almost dispositive weight to what it had mistakenly found to be a clear and contemporaneous admission by the buyer on a contested issue of fact – these could not be said to be computational, typographical or clerical errors.

Notably, the High Court considered its analysis was of the award subject to the tribunal's corrections. While a generous reading of the award before correction would have shown a nexus between the tribunal's mistaken finding of a representation by the buyer to the shipbuilders and the shipbuilders' promissory estoppel defence so as to be sufficient to defeat the setting aside application, the effect of the tribunal's corrections was that nothing in the award post-correction could be read as a finding by the tribunal that the buyer had made any representation of any sort to the shipbuilders or that the buyer had represented to the shipbuilders that generators rated IP23 were fit for any purpose at all. The tribunal's deletion of its reasoning (at paragraph 220 of the award) also took away any nexus between that part of the award and subsequent references in the award to evidence attributed to the buyer.

On both the delay claim and the IP44 claim, the High Court was satisfied that the tribunal had either dismissed both claims for reasons other than and with no connection to the shipbuilders' defences in the arbitration, or had failed to apply its mind at all to an essential issue arising from the parties' arguments: principally the issue of causation between the buyer's acts of prevention and the shipbuilders' delivery of the vessel for the delay claim, and the existence of a representation by the buyer giving rise to an estoppel for the IP44 claim. On both possibilities, the tribunal's breach of natural justice was causally connected to the making of the award.

The courts will give a tribunal fair latitude to determine what is and is not an essential issue arising from the parties' arguments, and in the reading of awards to determine whether the tribunal had failed to apply its mind to the essential issues. However, this decision is a reminder that a tribunal's fundamental misapprehension of the parties' arguments and a total failure to appreciate the correct questions it has to pose to itself can amount to an uncurable defect in the award.

CBS and CBP [2021] 1 SLR 935

In *CBS and CBP* [2021] 1 SLR 935, the Court of Appeal upheld the setting aside of an arbitral award on the basis that the arbitrator's denial of the entirety of the respondent's witness evidence constituted a breach of natural justice, and affirmed that the broad procedural powers of an arbitral tribunal are subject to the fundamental rules of natural justice.

The respondent (**Buyer**) had purchased 50,000 metric tonne of coal from a seller, which had assigned its present and future trade debts to the appellant bank in Singapore (**Bank**) by way of an accounts receivable purchase facility. The Bank then sought payment for a shipment of coal received by the Buyer from the seller. The Buyer refused to make payment, on basis that the full shipment had not been delivered and that there had been a subsequent oral agreement with the seller to pay less for the coal.

The Bank, not having received any payment from the Buyer, commenced arbitration against it pursuant to the Rules of the Singapore Chamber of Maritime Arbitration (3rd Ed, 2015) (**SCMA Rules**). In the final award, the arbitrator found that the full shipment of coal had been delivered and that there had been no subsequent agreement adjusting the price to be paid for the coal. The arbitrator accordingly allowed the Bank's claim as well as interest.

The Buyer challenged the final award claiming that there had been a breach of natural justice. The High Court judge who heard the application agreed with the Buyer and set aside the entirety of the final award. The Bank appealed.

The primary issue before the Court of Appeal was whether there had been a breach of the fair hearing rule in the making of the final award, i.e., the right of a party to be given a full opportunity of presenting its case, and, in particular, the opportunity of responding to the case against it.

In the course of the arbitration, the arbitrator had asked parties to consider whether an oral hearing was necessary, and in response to which the Buyer requested for a hearing for its witnesses to give evidence on what transpired at an alleged meeting and an oral agreement to reduce the purchase price of coal. The arbitrator then directed the Buyer to submit its proposed witness statements so that he could decide if they had substantive value before he would convene a hearing. The Buyer refused to do so, and insisted on its right to call witnesses without such a condition. The arbitrator nonetheless convened a hearing for oral submissions only, stating that there would be no witnesses presented at the hearing because of the Buyer's failure to provide witness statements or any evidence of the substantive value of presenting witnesses. Following further objections by the Buyer, it then withdrew from further participation in the arbitration.

On appeal, the Bank relied on the broad case management powers conferred upon the tribunal under r 25 of the SCMA Rules - as set out below - to contend that the arbitrator had not breached the rules of natural justice by gating all of the Buyer's witnesses:

> *25. Conduct of the Proceedings*
> *25.1. The Tribunal shall have the widest discretion allowed by the Act (where the seat of the arbitration is Singapore) or the applicable law (where the seat of the arbitration is outside Singapore) to ensure the just, expeditious, economical and final determination of the dispute.*
>
> *25.2. Subject to these Rules, it shall be for the Tribunal to decide the arbitration procedure, including all procedural and evidential matters subject to the right of the parties to agree to any matter.*

In dismissing the appeal, the Court of Appeal considered the correct approach to the ambit of a tribunal's case management powers. The Court of Appeal observed that the fair hearing rule in the arbitral context under Art 18 of the Model Law provides that each party shall

have a "*full opportunity*" of presenting its case – such opportunity is not an unlimited one and must be balanced against considerations of reasonableness, efficiency and fairness. In turn, the tribunal's control of proceedings before it must balance the desire for efficient and effectual arbitral proceedings against the necessity of affording parties their right to be heard.

Within this framework, the general case management powers conferred by r 25.1 of the SCMA Rules were not an unfettered power that override the rules of natural justice. The court further noted that even if a witness-gating power can be implied from the general case management powers of a tribunal, it is difficult to envision a scenario where such powers should not be weighed against the rules of natural justice.

On the facts, the Court of Appeal was satisfied that the arbitrator's direction barring all of the Buyer's witness testimony constituted a breach of natural justice and did not fall within the range of what a reasonable and fair-minded tribunal in those circumstances might have done. The Court of Appeal also agreed with the High Court's observation below that faced with what appeared to be reluctance or dilatory tactics on the part of the Buyer, a better route for the arbitrator may have been to fix a hearing for the presentation of the Buyer's witness evidence and, at the same time, ask for the witness statements from the Buyer (even though this would probably still have excluded some evidence of the witnesses identified by the Buyer); or the arbitrator could have managed the evidentiary process by limiting the amount of time for individual witnesses at the hearing, as he was empowered to do so under the case management powers conferred by the SCMA Rules.

The particular issues in this case may not have presented themselves had the SCMA Rules contained an express witness-gating provision – such as those found under the London Maritime Arbitrators Association Terms 2017 or the International Bar Association Rules on the Taking of Evidence in International Arbitration 2010 – or alternatively if the arbitrator had not summarily and effectively excluded all the Buyer's witnesses from giving any evidence at the hearing. Nonetheless, this decision is a salutary reminder that while the courts will generally accord a margin of deference to the tribunal's decisions, especially on procedural matters, tribunals should generally be cautious in making directions that exclude all of a party's witnesses from giving evidence, and parties should likewise consider the ramifications of seeking such directions.

The Court of Appeal also refused the Bank's application on appeal to remit the matter back to the arbitrator pursuant to Art 34(4) of the Model Law. The Bank had 'went for broke' in the initial application before the High Court by only seeking the full sum due, and had not applied for remission of the award. In the appeal, the Court of Appeal held that it had no jurisdiction to deal with the Bank's *ab initio* application to remit, as only the High Court could order a remission of the award pursuant to Art 34(4) of the Model Law. A party seeking remission of an award in a setting aside application, even as a plan B, should not wait until the appeal stage in a mistaken attempt to keep its powder dry.

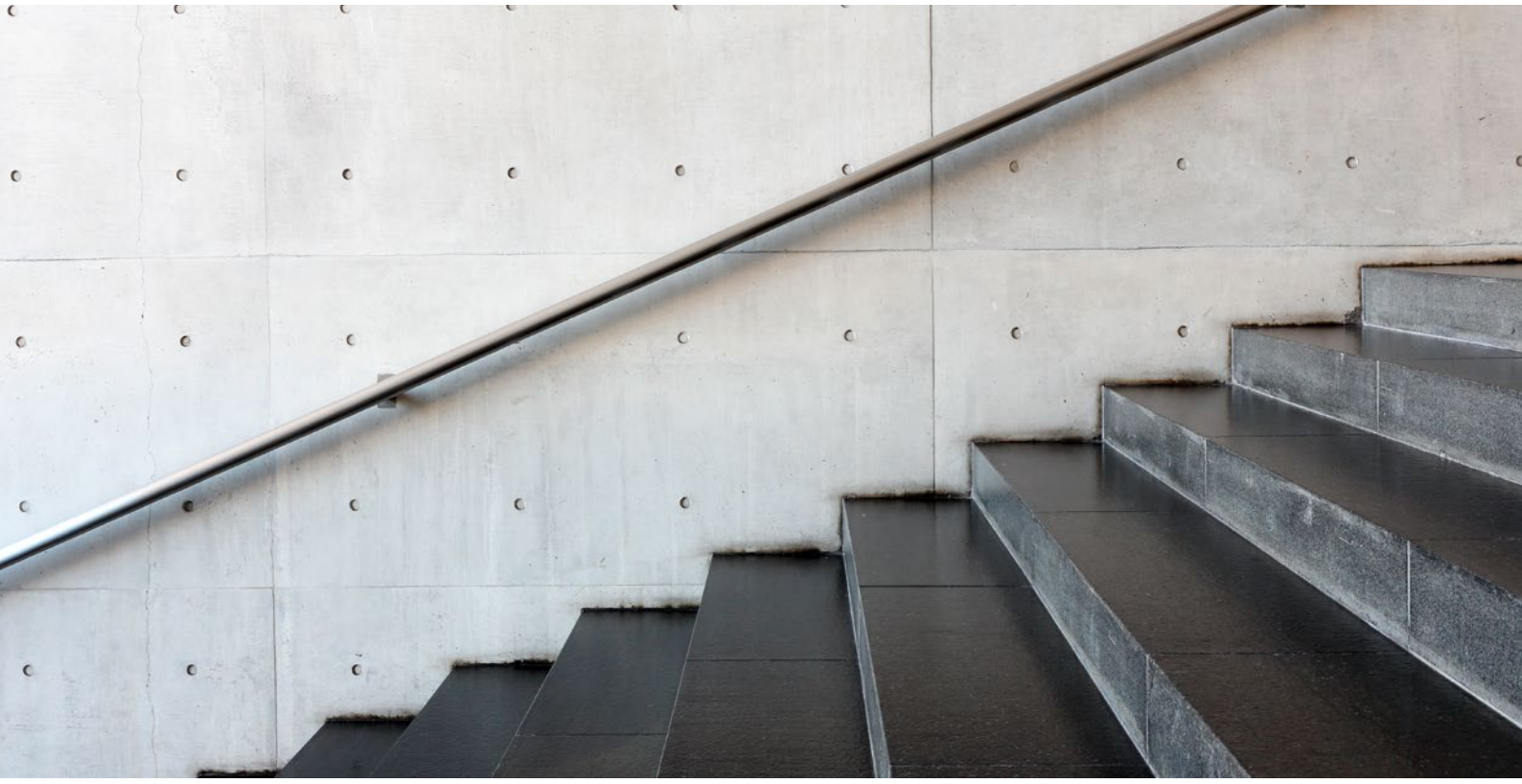
References:

BZV v BZW and another [2021] SGHC 60
CBS and CBP [2021] 1 SLR 935

Statutory adjudication – The 'dual-track regime' jettisoned

Two recent decisions of the Court of Appeal conclusively rejected the argument of a "dual railroad track system" (also referred to as the 'dual-track regime') under the Building and Construction Industry Security of Payment Act (Cap. 30B) ("**SOP Act**"), i.e. that a party's statutory entitlement to progress payments under the SOP Act was separate and distinct from its contractual entitlement to payment.

In *Shimizu Corporation v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 ("***Shimizu v Stargood***"), the Court of Appeal found that there was no dual-track regime under the SOP Act such that a party could possess a statutory entitlement to a progress payment that was separate and distinct from its contractual entitlement to receive payment. This view was reinforced by the Court of Appeal in *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd and another appeal* [2021] 1 SLR 791 ("***Orion-One v Dong Cheng***"), where the court considered a contractor's entitlement to statutory adjudication of claims for payment submitted after termination of its employment under contract.



These decisions follow the decision in *Far East Square Pte Ltd v Yau Lee Construction* (Singapore) Pte Ltd [2019] SGCA 36 ("***Far East Square***") that the SOP Act does not give rise to an independent payment regime, and conclusively reject the line of authorities that had followed the High Court's decision in *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852 ("***Tienrui Design***") which had supported the dual-track regime under the SOP Act.

Parties should carefully review in contract negotiations the provision of terms for payment, particularly those which govern parties' post-termination rights to payment. The SOP Act will not assist to create rights to payment where such entitlement is not contractually provided for, or to create rights to adjudication of claims for payment other than progress payments within the meaning of the statute.

Shimizu Corporation v Stargood Construction Pte Ltd

In *Shimizu Corporation v Stargood Construction Pte Ltd* [2020] 1 SLR 1338, the respondent Stargood Corporation Pte Ltd ("**Stargood**"), was engaged by the appellant, Shimizu Corporation ("**Shimizu**") as one of Shimizu's subcontractor for a project in Singapore. The subcontract incorporated, with some amendments, the REDAS (Real Estate Developers' Association of Singapore) Design and Build Conditions of Contract (3rd Ed, 2013) ("**Subcontract**").

Clause 28 of the Subcontract provided for Stargood to submit payment claims to the Project Director appointed by Shimizu, who would in turn issue a payment response reflecting the amount he believed was due from Shimizu to Stargood. Shimizu was only obligated to pay such amount stated in the payment response, which thus served as a condition precedent to Stargood's right to receive progress payments.

In March 2019, following allegations of breaches of the Subcontract by Stargood, Shimizu issued a notice of default and exercised its termination rights under clause 33.2 of the Subcontract. Pursuant to clause 33.4 of the Subcontract, in the event the Subcontract is terminated pursuant to clause 33.2, Shimizu shall be entitled to damages on the same basis as if Stargood had wrongfully repudiated the Subcontract. No provision is made for Stargood to make any payment claim in this scenario. By contrast, clause 33.5 of the Subcontract provides that if the Subcontract is terminated due to the termination of the main contract (between Shimizu and the project owner) for some reason unconnected to any default by Stargood, Stargood would entitled to payment for work done prior to termination.

In April and May 2019 respectively, Stargood served on Shimizu a payment claim (**PC 12**) for work done up till April 2019, and a payment claim (**PC 13**) that was for all intents and purposes identical to PC 12, save that the claimed sum was stated as for work done up till May 2019. No payment response was issued to PC 12 by the Project Director, and Stargood subsequently lodged an application under the SOP Act for the adjudication of PC 12 (**AA 203**) and PC 13 (**AA 245**).

In a determination dismissing AA 203, the adjudicator found, *inter alia*, that since no termination payment certification regime existed under the Subcontract, Stargood could no longer serve a payment claim as the Project Director did not have the power to certify the same. The adjudicator in AA 245 dismissed the application as he found that Stargood was bound by the determination in AA 203.

Stargood then applied to the High Court to set aside the two determinations, and for a declaration that it was entitled to serve a further payment claim on Shimizu.

The High Court considered whether the Project Director was *functus officio* when PC 12 was served on the main contractor, and whether Stargood was entitled to serve PC 12 and PC 13 for work done prior to the termination of the Subcontract. In setting aside both determinations and granting a declaration that Stargood was entitled to serve payment claims for work done prior to termination of the Subcontract, the High Court found that the SOP Act provided Stargood an independent right to progress payments even if the Subcontract had been terminated. The High Court reasoned that an interpretation of the SOP Act as not applying to works done before termination of the underlying construction contract would place downstream parties at the mercy of upstream parties who could resist or delay payment by terminating the underlying contract on tenuous grounds. The High Court also found it significant that the definition of a contract under the SOP Act had been amended in 2018 to include construction or supply contracts that have been terminated.

On appeal to the Court of Appeal, Shimizu argued that the decision in *Far East Square* stood for the proposition that once a certifier is unable to certify further payment claims, then any such payment claims would fall outside the SOP Act and be incapable of adjudication. The effect of the termination of the Subcontract under clause 33.2 meant that there was no role for the Project Director to certify payment claims submitted past the termination of the contract.

In turn, Stargood relied on the dual-track regime under the SOP Act to argue that a claimant has an independent right under the SOP Act to serve a payment claim after termination of the underlying contract even absent express language to that effect in the contract, and cited a number of earlier authorities to that effect including *Tienrui Design, CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 ("***CHL Construction***"), and *Choi Peng Kum and another v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210 ("***Choi Peng Kum***").

Alternatively, Stargood's position was that Shimizu's exercise of its termination rights in March 2019 under Clause 33.2 of the Subcontract amounted to a termination of Stargood's employment under the Subcontract rather than a termination of the Subcontract itself, such that the Project Director remained capable of certifying PC 12 and PC 13 at the time these were served.

In allowing the appeal, the Court of Appeal found that there was no dual-track regime under the SOP Act such that a party could possess a statutory entitlement to a progress payment that was separate and distinct from its contractual entitlement, for the following reasons:

— On a construction of the SOP Act itself, there is no separate statutory entitlement to a progress payment where a contract already provides for such payments. The provisions of the SOP Act accord primacy to the underlying contract terms (excluding such unenforceable terms as 'pay when paid' provisions). It is only where the contract is silent – in respect of provisions for the calculation of the progress payment amount or mechanism for the valuation of progress payments – that the provisions of the SOP Act would operate in a limited sense as a "*gap filler*".

— The legislative inclusion of terminated contracts in the SOP Act only means that the SOP Act can in principle apply to progress payment claims after termination, but does not override the terms of an underlying contract which provides to the contrary. In a termination scenario, the SOP Act would not go so far as to allow a certifier to continue certifying payments under a contract when he can no longer do so under the terms of the contract.

— The Court of Appeal's decision in *Far East Square* had found that the SOP Act was not meant to alter the substantive rights of the parties under the contract, nor give rise to a payment regime independent of the contract. Earlier cases which suggested a dual-track regime under the SOP Act were inconsistent with *Far East Square.*

— The Court of Appeal noted that the co-existence of two payment regimes would create intolerable uncertainties as to which regime applies, with much confusion over when or how each regime would apply, and the availability and effect of a claimant's election between contractual and statutory rights to payment.

Following *Shimizu v Stargood*, there is no longer any question of a claimant's election between a statutory and contractual entitlement to payment. It would not be possible for a payment claim to be validly submitted for purpose of statutory adjudication if this would be contrary to the terms of the contract. Further, where there is no contractual basis for a payment claim and no question of any gap in the contract being filled by the provisions of the SOP Act, there is simply nothing to be adjudicated under the SOP Act.

In the instant appeal, the Court of Appeal held that following termination of the Subcontract for Stargood's default, Stargood did not have a contractually provided right to serve a payment claim for work done prior to termination, and that there was no "gap" in the Subcontract to be filled by the SOP Act. As such, any distinction between termination of employment or termination of contract was irrelevant, as was any question as to whether the certifier had become *functus officio* upon the termination of the Subcontract.

Arising from Stargood's alternative argument that it could submit payment claims under the Subcontract after termination of its employment under the contract, the Court of Appeal also clarified the legal position on the validity of payment claims upon termination of a party's employment under a construction contract as opposed to the termination of the construction contract. The Court of Appeal observed that where a party's employment under a contract is terminated, the key point is that any contractual provisions which expressly survive the termination of employment will continue to bind the parties. There is otherwise no implication that other powers under the contract would necessarily continue to exist upon the termination of a party's employment under a contract, and any question of a certifier's power to certify payment post-termination falls to be determined by the terms of the contract.

Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd

In *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd and another appeal* [2021] 1 SLR 791, the Court of Appeal affirmed its observations in *Shimizu v Stargood* in allowing the setting aside of a determination obtained under the SOP Act in respect of a payment claim served by a contractor on the employer after the contractor's employment had been terminated.

The parties had entered into a contract ("**Contract**") incorporating the REDAS Design and Build Conditions of Main Contract (3rd Ed) ("**REDAS Conditions**") for the construction of a residential project, as varied by a supplementary agreement ("**SA**"). The employer, Orion-One Residential Pte Ltd ("**Orion**"), had issued a notice terminating the employment of the contractor, Dong Cheng Construction Pte Ltd ("**Dong Cheng**"). The residential project was completed by another contractor.

Subsequently, Dong Cheng served a payment claim on Orion, and lodged an application to adjudicate the payment claim under the SOP Act. In his determination, the adjudicator found that the payment claim had been validly served by Dong Cheng, and allowed the application in part. The High Court dismissed Orion's application to set aside the adjudication determination and found that the payment claim for works performed prior to the termination of Dong Cheng's employment was validly served after termination.

Separate provisions under the REDAS Conditions and the SA provided Orion with separate entitlements to terminate Dong Cheng's employment for breach. On Orion's appeal to the Court of Appeal, the main point of contention was the operative provision under which Dong Cheng's employment had been terminated. Dong Cheng's position was that its employment had been terminated under provisions of the REDAS Conditions that entitled it to a final settlement of accounts, and which it said preserved its right to serve a payment claim on Orion after its termination.

In allowing the appeal to set aside the determination, the Court of Appeal found that Orion had instead exercised its termination rights under clause 2.5 of the SA – as had been expressly stated in Orion's notice of termination – and without relying on the grounds for termination provided under the REDAS Conditions. As such, Dong Cheng was not entitled to rely on the termination for breach regime under the REDAS Conditions as basis for entitlement to serve a payment claim on Orion after its termination.

Dong Cheng's right to payment under the termination for breach regime provided in the REDAS Conditions was conditional – with the relevant clause stating that Orion shall not be liable to make further payments to Dong Cheng until the ascertainment of costs (such as liquidated damages) incurred by Orion due to termination – and that it was not entitled to payment until such costs were ascertained either by agreement or failing which by final determination of a competent court or tribunal.

The Court of Appeal noted that the termination for breach regime was intended to provide a mechanism for the final settlement of accounts between the parties upon Orion's termination of Dong Cheng's employment. Any payments to Dong Cheng would therefore not be "*progress payments*" for the carrying out of construction work or the supply of goods or services under a contract within the ambit of the SOP Act, and could not give rise to a right to serve a progress payment claim.

The Court of Appeal reinforced this finding by the fact that s 17(2A) of the SOP Act expressly precludes an adjudicator from considering the damages suffered by the employer as result of the termination. Pursuant to s 17(2A) of the SOP Act, an adjudicator is precluded from considering any part of a payment claim or payment response related to "*damage, loss or expense*" that is not supported by: (a) a document showing agreement between the parties on the quantum; or (b) any certificate or other document that is required to be issued under the contract.

This decision affirms the Court of Appeal's earlier observations in *Shimizu v Stargood*, and is a reminder that a party's right to serve a progress payment claim must necessarily be found in contract, and without which there can be no entitlement to statutory adjudication of claim.

Conclusion

Prior to *Shimizu v Stargood*, the prior state of the law in respect of the dual-track regime under the SOP Act had not been specifically considered by the Court of Appeal as a basis for asserting a claimant's independent right to payment under the SOP Act, and there had remained some uncertainty as to the availability of such arguments even after the decision in *Far East Square*.

Following the conclusive departure in *Shimizu v Stargood* and *Orion-One v Dong Cheng* from the prior state of the law, the underlying contract is of central importance in determining a party's entitlement to serve a payment claim under contract and the adjudication of its claims under the SOP Act. Parties should carefully review in contract negotiations the provision of terms for payment including those which govern parties' rights of and in the event of termination, such as the conditional suspension of payment rights. In termination scenarios, parties should particularly assess the exercise of rights governing termination and implications for post-termination rights to payment. The SOP Act will not assist to create rights to payment where such entitlement is not contractually provided for, or to create rights to adjudication of claims for payment other than progress payments within the meaning of the statute.

Mediation and the Singapore Convention - Two Years On

It has now been over two years since the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "**Singapore Convention**") was signed in Singapore on 7 August 2019, and over a year since it entered into force on 12 September 2020. Since then, 55 countries have signed the Singapore Convention, and 8 have ratified or approved it.[1]

The speed with which the Singapore Convention has been accepted by member states is encouraging. When it opened for signature on 7 August 2019, 46 countries signed it, including major economies such as the United States, China and India. If one were to compare these figures to the number of signatories on 10 June 1958 at the time the New York Convention[2] was opened for signature, it is clear that the international commercial community is ready for an alternative method of resolving disputes.

In this article, we look at how the focus and attention on mediation as a method of resolving disputes has increased and progressed since the Singapore Convention came into force. By exploring the greater interest in the use of mediation in Singapore and internationally, and the construction sector, we will also discuss what we can expect for the future of mediation.

[1] *https://www.singaporeconvention.org/*
[2] *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.*

The Singapore Convention Recapped

The Singapore Convention elevates the position of a mediated settlement agreement that has been concluded in writing by parties to resolve an international commercial dispute to that of a court judgment, or an arbitral award enforceable under the New York Convention. Mediated settlement agreements concluded by a consumer for personal, family or household purposes, or relating to family, inheritance or employment law are excluded from the scope of the Convention. Neither does the Convention apply to settlement agreements that had been approved by a court or were concluded in the course of proceedings before a court (and are thus enforceable as a judgment in the State of that court); nor to settlement agreements that have been recorded and are enforceable as an arbitral award.

In order to qualify as being "international", at least two of the parties to the mediated settlement agreement must have their place of business in different States; or the State of the parties' place of business is different from either: (i) the State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) the State with which the subject matter is most closely connected.

A party seeking to rely on the mediated settlement agreement will have to provide the competent authority of the Convention State (i.e., a court) with a copy of the signed settlement agreement and evidence that the settlement agreement resulted from mediation. The court of a Convention State may refuse to grant relief if there is proof that:

— a party to the settlement agreement was under some incapacity;

— the settlement agreement is null and void, inoperative or incapable of being performed, is not binding or is not final or has been subsequently modified;

— the obligations in the settlement agreement have been performed or are not clear or comprehensible;

— granting relief would be contrary to the terms of the settlement agreement;

— there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

— there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

It is worth highlighting at this stage that the last two grounds for refusal to grant relief under the Singapore Convention which relate to the mediator's conduct and breach do not have an equivalent under the New York Convention. It is too early to say how the courts will interpret the "*standards applicable to the mediator or the mediation*" and what would constitute "*circumstances that raise justifiable doubts as to the mediator's impartiality or independence*". Unlike international arbitration that has had years to regulate its practice, there are no equivalent guidelines such as the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration that are used as extensively in mediation. However, institutions including SIMC have adopted best practices of requiring its mediators to sign code of ethics before the conduct of each mediation.

It is also noteworthy that the Singapore Convention does not operate on the basis of reciprocity, as does the New York Convention. Therefore, a mediated settlement agreement concluded in a state which is not a signatory of the Singapore Convention could be recognised and enforced in a contracting state. International commercial parties who do not belong to a Convention State will still be able to avail itself of the benefits of the Singapore Convention.

Mediation's Growing Popularity

There is no doubt that mediation has been gaining popularity as a method of resolving commercial disputes. In the UK, statistics published by the Centre for Effective Dispute Resolution[3]'s Ninth Mediation Audit[4] in May 2021 show that there was a 38% increase in the annual number of cases mediated since its 2018 Audit.

This experience is echoed in Singapore. The Singapore International Mediation Centre ("**SIMC**"), established in 2014 as an independent not-for-profit organisation focussing on cross-border mediation services, witnessed an increase in its case filings year on year. In the first seven months of 2021, case filings at the SIMC have exceeded its entire caseload for 2020. In turn, the caseload for 2020 was nearly twice of that filed in 2019.

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[3] The Centre for Effective Dispute Resolution is an independent non-profit organisation and a registered charity based in the United Kingdom that specialises in mediation and alternative dispute resolution. https://www.cedr.com/aboutus/

[4] *A survey of commercial mediator attitudes and experience in the United Kingdom.*

Matters of high value are being referred to mediation and this figure is increasing. The CEDR approximates that GBP 17.5 billion in value of cases are being mediated each year. This is out of an estimate of 16,500 cases per annum.[5] The Singapore Mediation Centre ("**SMC**"), which launched in August 1997, reports that it has mediated more than 5,000 matters worth over SG$10 billion. The SIMC, between its launch in November 2014 and July 2021, has had a caseload value of over SG$6 billion for 180 cases. Parties from some 40 jurisdictions have mediated with SIMC, including China, India and the United States of America. SIMC's settlement rate ranges from 70 to 80%. This demonstrates the high value and complex nature of cross border disputes that are being mediated in the SIMC successfully.

Infrastructure and construction cases also make up a significant portion of cases that are being mediated. It makes up a sizeable proportion of SIMC's caseload, while the SMC reports that construction disputes account for 40 per cent of the cases it resolves.[6] This could well be a result of the well-trained Specialist Mediators in SIMC's panel with specialist knowledge in the infrastructure, construction & engineering practice and the increased efforts taken in Singapore to promote the use of mediation to resolve disputes as well as construction disputes.

— Starting with the introduction of the SIAC-SIMC Arb-Med-Arb Protocol in November 2014 by the Singapore International Arbitration Centre and SIMC, parties are given the option to attempt mediation during the course of arbitral proceedings. If the dispute is settled through mediation, the mediated settlement agreement may be recorded as a consent award, and is generally enforceable in over 160 countries under the New York Convention. Whilst the Singapore Convention continues to gain traction, hybrid dispute resolutions processes are in the meantime a valuable and increasingly popular option, leveraging the benefits of mediation and the widespread enforceability of arbitral awards.

— In 2017, Mediation Act 2017 was enacted in Singapore and has as a key feature, a provision which allows parties to apply to court to record their mediated settlement agreement as an order for court, allowing the agreement to be directly and immediately enforceable as an order of court.

— Soon after, in October 2018, the Singapore Infrastructure Dispute-Management Protocol ("**SIDP**") was launched, with a view to helping parties proactively manage differences and prevent them from escalating into disputes. Designed and recommended for construction or infrastructure projects of more than SG$ 500 million in value, parties will convene a Dispute Board ("**DB**") from the start of the project to work collaboratively with the parties to enable early and efficient resolution of differences and disputes. Under the SIDP, the SIMC

[5] *https://www.cedr.com/ninth-mediation-audit-2021/*
[6] *https://www.mediation.com.sg/about-us/about-smc/*

or the SMC may be designated as the "Authorised Appointing Body", to which the request for the appointment of a DB shall be made. A difference or dispute referred to the DB could be resolved in a number of ways including by way of mediation with the DB members acting as mediators. If mediation is adopted, and leads to a mediation settlement agreement, such agreement could then be recorded as an order of court under the Singapore Mediation Act 2017 or other regimes.

— In October 2019, an MOU was signed between the Ministry of Communications and Information of Singapore and the Shenzhen Municipal People's Government, under the auspices of which the Shenzhen Court of International Arbitration ("**SCIA**") and SIMC collaborated to jointly provide a "mediation-arbitration" service. This enables settlement agreements obtained from SIMC mediations to be recorded as an arbitral award by the SCIA. The ability for parties to convert SIMC's mediated settlement agreements to SCIA arbitral awards gives parties the confidence that an SIMC mediated settlement agreement can be effectively enforced in China as an arbitral award, to obtain greater finality of outcomes.

— In May 2020, the SIMC launched the SIMC COVID-19 Protocol with the aim of providing "a swift and inexpensive route to resolve commercial disputes during the COVID-19 period".

— There has been further international collaboration in the creation of joint COVID-19 protocols. SIMC collaborated with partner institutions in Japan and India in launching the JIMC – SIMC Joint Covid-19 Protocol and the SIMC – CAMP Joint Covid-19 Protocol in September 2020 and July 2021 respectively. These protocols aim to provide seamless case management to international parties who will be able to appoint two mediators to co-mediate the case, in order to navigate and overcome any physical, cultural and jurisdictional barriers to settlement.

The signing and entry into force of the Singapore Convention has clearly contributed to this momentum. It has brought increased focus and attention to mediation as a means of resolving disputes while preserving commercial relationships, especially given the rigours of the Covid-19 pandemic.

There is also impetus in the international community to harmonise the laws and rules related to mediation. Alongside the Singapore Convention, the UN General Assembly also adopted the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (the "**Mediation Model Law**"), which amended the UNCITRAL Model Law on International Commercial Conciliation (2002). The Mediation Model Law was designed to assist States in reforming and modernizing their laws on mediation procedure, provides uniform rules in respect of the mediation process and aims at encouraging the use of mediation and ensuring greater predictability and certainty in its use.[7]

Further, UNCITRAL is also updating the UNCITRAL Conciliation Rules (1980) and is expected to publish the UNCITRAL Mediation Rules and the UNCITRAL Notes on Mediation at the end of 2021. These continuing efforts by UNCITRAL to enhance the use of mediation will result in the harmonisation of laws, rules and enforcement mechanisms for international commercial mediation, all of which will serve to promote the use of mediation.

Mediation No Longer an "Alternative" Method of Resolving Disputes

Mediation is no longer considered as an alternative to litigation and arbitration, or something that was more suited to family and neighbourhood disputes. There is growing recognition that it needs to form part of a holistic dispute resolution ecosystem. In March 2021, Sir Geoffrey Vos, Master of the Rolls and head of civil justice in England and Wales, in a speech at the re-launch of Hull University's Mediation Centre[8] questioned the use of the word "alternative" when describing dispute resolution processes such as mediation, early neutral evaluation or judge led resolution. He was of the view dispute resolution should be an integrated whole with mediated interventions being part and parcel of the dispute resolution process – whether between businesses and consumers, amongst families or between the citizen and the state.

While there are clearly areas that need to be addressed before disputes are settled more frequently,[9] there is undoubtedly momentum and appetite for mediation to be the primary method of avoiding, mitigating and resolving conflicts internationally. Users are clearly expecting faster and more creative solutions to the resolution of their disputes, and mediation seems to be filling this gap.

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[5] *https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation.*

[6] *https://www.judiciary.uk/announcements/speech-by-sir-geoffrey-voss-master-of-the-rolls-speech-to-hull-university/*

[5] *Chew, Seraphina; Reed, Lucy; Thomas QC, J Christopher, "Report: Survey on Obstacles to Settlement of Investor-State Disputes" NUS Law Working Paper 2018/022, September 2018, www.law.nus.edu.sg/wps/.*

Building a Pandemic-Resilient Construction Sector

Standard forms of contract for construction projects typically delimit contractors' entitlement to claim additional time and costs for performance of works. The COVID-19 pandemic has called into question the adequacy of these mechanisms in addressing time and costs claims arising from a pandemic event. The continuing uncertainties in contractors' pricing of COVID-19-related costs and risk also highlights inefficient over- or under- pricing of tenders for pandemic events as a factor that may result in project failure.

In response, a New Contracts Workgroup ("**Workgroup**") co-led by the Building and Construction Authority of Singapore (**BCA**) was convened to look into strategies for equitable risk sharing among project parties for pandemic events in construction and consultancy tenders. The BCA's announcement in September 2021 that public sector construction tenders will incorporate the Workgroup's suggestions for "pandemic resilient" contracting practices to be incorporated into standard forms of contract, and that the Real Estate Developer's Association of Singapore (**REDAS**) and the Singapore Institute of Architects (**SIA**) would also incorporate the Workgroup's suggestions into their widely used standard forms of contract, is considered below.

Workgroup's Suggestions

The Workgroup's suggestions to incorporate certain key provisions into existing standard forms of contract are aimed at addressing identified pandemic-related risks, namely:

— Delays caused by pandemic events should be recognised as grounds entitling contractors to claim extension of time ("**EOT**") for the completion of works.

— Project owners should provide a provisional sum for additional known cost items that are anticipated due to pandemic with unknown extent or costs at point of tender ("**known-unknown costs**"), but excluding additional costs arising from contractor's default. An example of known-unknown costs arising from COVID-19 are existing mandatory workplace requirements for Polymerase Chain Reaction (**PCR**) and Antigen Rapid Test (**ART**) tests which duration are subject to regulation and unknown at point of tender.

— Cost-sharing mechanisms between contract parties should apply to additional costs incurred due to pandemic which are unknown to all parties at the point of tender ("**unknown-unknown costs**"), including additional direct costs of labour, plant and equipment, materials or goods and site overheads incurred due to pandemic, but excluding profits and non-project-related overheads and after consideration of any government or statutory relief or subsidy. As part of the Workgroup's suggestions, cost-sharing mechanisms should provide for equal co-sharing of unknown-unknown costs between contract parties, with the contractor's entitlement to claim co-shared costs subject to a cap based on a percentage of the awarded contract sum. An example of unknown-unknown costs due to pandemic are governmental pandemic- management and control measures that do not exist prior to tender.

Amendments to the PSSCOC and public sector tenders

Following the Workgroup's suggestions, the public sector will incorporate these suggestions in future public sector construction tenders to allow for contractor's pandemic-related claims for EOT and loss and expense, and the provision of provisional sums for known-unknown costs due to pandemic.

The Public Sector Standard Conditions of Contract (**PSSCOC**) is developed and published by the BCA as a common contract form for public sector projects. As originally published, the PSSCOC for Construction Works 2020 (8th Edition July 2020) ("**PSSCOC for Construction Works**") and the PSSCOC for Design and Build 2020 (7th Edition July 2020) ("**PSSCOC for D&B**") had recognised epidemic- or pandemic- caused delay to completion of contract works as an EOT event ("*Epidemics or pandemics resulting in shortages of the labour, goods, materials or Construction Equipment required for the Works or inability to proceed with any part of the Works*").

The BCA has published[1] amendments to both the PSSCOC for Construction Works and the PSSCOC for D&B. The amended PSSCOC and the inclusion of provisional sums for known-unknown costs will apply to public sector construction tenders called on or after 1 November 2021, and may apply to public sector construction tenders called before 1 November 2021 if so amended by corrigendum.

Clause 14.2(q) of the amended PSSCOC provides an expanded definition of a "Pandemic Outbreak" and removes the earlier provision of 'epidemic'-caused delay as a ground for an EOT application, as follows:

> *Pandemic or an outbreak of infectious disease occurring over a wide geographical area crossing international boundaries, usually affecting a large number of people, declared by —*
>
> *i. the World Health Organisation or any international health related authority; or*
> *ii. the health-related authority in the geographical area where the pandemic or infectious disease is occurring; or*
> *iii. the Ministry of Health of Singapore, ("Pandemic Outbreak")*
>
> *resulting in shortages of the labour, goods, materials or Construction Equipment required for the Works or inability to proceed with any part of the Works.*

[1] *https://www1.bca.gov.sg/procurement/post-tender-stage/public-sector-standard-conditions-of-contract-psscoc*

Clause 14.2(qa) of the amended PSSCOC introduces an additional ground of pandemic-caused delay to include delays caused by government measures or measures that any other statutory or public authority of Singapore require of the contractor arising from a Pandemic Outbreak:

> *Measures that the government or any other statutory or public authority of Singapore requires the Contractor to implement in respect of the Works arising from any Pandemic Outbreak.*

Clause 22.1 of the PSSCOC entitles the contractor to recover defined loss and expense arising as result of the regular progress and/or completion of contract works having been disrupted, prolonged or otherwise materially affected by specified grounds under the clause. Claimable loss and expense under the PSSCOC include (i) the contractor's direct relevant costs of labour, plant, construction equipment, materials, or goods, (ii) site overheads, and (iii) a fixed 15% of such direct costs and site overheads in lieu of all other costs, loss or expense (e.g. loss of profits, head office overheads or financing charges), with stated exceptions.

Clauses 22.1(j) and (ja) of the amended PSSCOC incorporates the Workgroup's suggestion for co-sharing of unknown-unknown costs, and makes provision for the contractor's entitlement to claim defined loss and expense sustained or incurred arising as result of:

- a Pandemic Outbreak (as defined under the amended Clause 14.2(q)), or
- government measures or measures that any other statutory or public authority of Singapore require of the contractor arising from a Pandemic Outbreak.

Both clauses 22.1(j) and (ja) of the amended PSSCOC entitle the contractor to recover 50% of direct costs and site overheads as loss and expense, subject to an aggregate 5% cap on the awarded contract sum for loss and expense under both clauses. The fixed 15% of contractor's direct costs and site overheads that are otherwise claimable as loss and expense under the PSSCOC are excluded under clauses 22.1 (j) and (ja), and is any loss and expense for which the contractor has received any government or statutory relief or subsidy.

Private Sector Construction Tenders

Members of the Workgroup also include the Real Estate Developer's Association of Singapore (**REDAS**) and the Singapore Institute of Architects (**SIA**), whose standard forms of contract are widely used in private sector projects. The BCA has indicated that REDAS and the SIA will incorporate some of the Workgroup's suggested principles for pandemic resilient contracting into their respective standard forms of contract at an unknown time.

Conclusion

The Workgroup's suggestions of "pandemic resilient" and equitable risk sharing contracting practices are intended to provide greater price and risk certainty for pandemic events, and appear not dissimilar to some of the legislated reliefs under the COVID-19 (Temporary Measures) Act 2020 (**COTMA**) for the construction industry (discussed elsewhere in this publication).

The amendments to the PSSCOC will be of relevance to parties in public sector construction tenders. In addition, parties in public sector projects should consider the impact of or any inconsistencies arising from the amended PSSCOC in respect of the rights and obligations of downstream parties, such as a subcontractor's entitlement to rely on the EOT grounds under the PSSCOC (as main contract) to claim extension of time for delay caused to the subcontractor's contract works.

In respect of private sector projects, the forthcoming amendments to existing standard forms of contract and just how these will incorporate the Workgroup's suggestions into the existing mechanisms for time and cost claims of present editions remain of great interest. The Workgroup's suggestions for project owners to bear some pandemic-related costs of construction projects represent a call to industry for continuation in the same vein as the mandated cost-sharing mechanisms under the COTMA. It remains for parties to balance the distribution of pandemic-related costs across the project chain as a cost of project stability against other relevant commercial considerations in every case.

References:

— BCA Circular on Adopting Pandemic Resilient Contracting Practices For Public Sector Construction Contracts, 23 September 2021

— PSSCOC for Construction Works 2020 (8th edition Jul 2020) - for construction tenders with tender closing date on or after 1 November 2021

— PSSCOC for Design & Build 2020 (7th edition Jul 2020) - for construction tenders with tender closing date on or after 1 November 2021

— Standard Conditions of Nominated Sub-Contract 2008 (5th edition December 2008)

Reliefs under the COVID-19 (Temporary Measures) Act 2020

The introduction in April 2020 of the omnibus COVID-19 (Temporary Measures) Act 2020 ("**COTMA**") aimed to provide temporary and targeted protection to businesses and individuals – including stakeholders in the construction industry – unable to perform certain contractual obligations due to the COVID-19 global pandemic.

COTMA represents an extraordinary intervention in private contract rights, and was conceived as a temporary measure to help affected parties. More than a year on, the construction industry continues to face increased costs and delays in projects due to tightened border controls and disruptions in the global supply of construction materials. Post-enactment amendments to the COTMA have extended the initial 6-month duration of key reliefs – including a moratorium on legal and enforcement actions in respect of non-performance of certain contractual obligations – and introduced further reliefs for the construction industry in the form of a universal extension of time for completion of construction work, and mechanisms for cost-sharing of non-manpower-related costs between contractual parties and the adjustment of contract sums to account for increased foreign manpower costs.

This article considers salient aspects of the COTMA for the construction industry in light of the most recent extension of key reliefs to the end of 2021.

Part 2 of the COTMA: Moratorium, other reliefs, and assessor's determinations

Part 2 of the COTMA enables a party to a construction contract or supply contract (within the meaning of section 2 of the Building and Construction Industry Security of Payment Act (Cap. 30B) ("**SOP Act**")), among other scheduled contracts, to obtain a temporary moratorium in respect of certain legal and enforcement actions when it is unable to perform certain contractual obligations due to the COVID-19 pandemic, namely:

— The commencement or continuation of an action in court or arbitral proceedings under the Arbitration Act (Cap. 10).

— The enforcement of security over immovable property, and movable property used for the purpose of a trade, business or profession.

— Making applications under section 210(1) of the Companies Act (Cap. 50) for a creditors' meeting to approve a compromise or an arrangement, or for a judicial management order.

— Making winding up or bankruptcy applications.

— The appointment of a receiver or manager over any property or undertaking.

— The commencement or levying of execution, distress or other legal process, except with the leave of the court.

— The repossession of goods under chattels leasing agreement, hire purchase agreement or retention of title agreement, being goods used for the purpose of a trade, business or profession.

— The termination of a scheduled contract (being a lease or licence of immovable property) where the subject inability is the non payment of rent or other moneys.

— The exercise of a right of re-entry or forfeiture under a scheduled contract (being a lease or licence of immovable property), or the exercise of any other right that has a similar outcome.

— The enforcement of a judgment of a court, an arbitral award made in arbitral proceedings conducted under the Arbitration Act, or an adjudication determination under the SOP Act.

The moratorium does not apply without qualification nor takes effect automatically. These reliefs only apply to cases where:

— The party to a scheduled contract (**A**) is unable to perform an obligation in the contract to be performed on or after 1 February 2020;

— A's inability to perform the contractual obligation is to a material extent caused by a COVID-19 event ("**subject inability**"); and

— A has served the required notification for relief (**NFR**) on the other party or parties to the contract, any guarantor or surety for A's obligation in the contract, and such other person as may be prescribed.

Other reliefs in Part 2 of the COTMA that apply to the inability to perform construction contracts or supply contracts include:

— Extension of the period of limitation prescribed by law or contract for the taking of an action in relation to the subject inability.

— The stay of certain pending legal proceedings.

— Extension of the specified statutory periods of time in relation to winding up applications, applications for judicial management, and bankruptcy applications.

— Preventing calls on a performance bond or equivalent given pursuant to a construction contract or supply contract in relation to the subject inability at any time earlier than 7 days before the date of expiry of the performance bond or equivalent.

— Ability to extend the term of a performance bond or equivalent given pursuant to a construction contract or supply contract, despite anything in such performance bond or equivalent.

— Relief against liability for delay damages in performance of a construction contract or supply contract.

— Availability of defence in a party's inability to perform contractual obligations that was to a material extent caused by a COVID-19 event.

The prescribed period for the reliefs under Part 2 of the COTMA for parties in construction contracts and supply contracts, and any performance bond granted thereto, has been thrice extended from the original duration of 6 months, with the prescribed period presently extended to 31 December 2021.

The relief from legal and enforcement actions afforded by COTMA has provided individuals and businesses breathing space to work out contractual disputes arising from COVID-19, and provides a defence to parties against the inability to perform contractual obligations in construction and supply contracts due to COVID-19 even after the expiry of the COTMA (subject to service of an NFR).

Part 2 of the COTMA also offers a framework to resolve disputes between parties regarding whether the relief triggered by filing of a NFR apply, through assessors who determine whether the reliefs under the COTMA apply, and may also make certain further determinations in order to achieve just and equitable outcomes in the circumstances of the case. Assessors' determinations are binding on all parties to the application and all parties claiming under and through them, and from which there is no appeal. Assessors may vary or replace determinations to account for material changes in circumstances, to extend the time for any payment required by determination, or require parties' attendance for further review and further determination as appropriate.

Applications for a COTMA determination in relation to construction or supply contracts must be made within 2 months after the end of the relevant prescribed period under Part 2 of the COTMA. With the prescribed period for construction contracts or supply contracts extended to 31 December 2021 at time of this article, related COTMA applications must be made within 2 months after the end of the prescribed period, i.e., by 28 February 2022.

Applications for a COTMA determination in relation to a performance bond or equivalent given pursuant to a construction contract or supply contract must be made within the prescribed period under Part 2 of the COTMA.

Part 8 of the COTMA: Assessor's determinations and alignment with other proceedings

In September 2020, legislative amendments provided relief for specific individuals and businesses affected by delays or breaches in separate construction or supply (or related) contracts due to COVID-19. It also aligned the operation of proceedings under Part 8 of the COTMA with other proceedings, including the SOP Act. Relief under Part 8 was applicable in the following situations: (i) where a person who rented goods used for construction work is or will be liable for additional rental expenses; (ii) where a lessee or licensee (i.e., a tenant) of non-residential property is unable to carry out or complete renovation or fitting out works during the rent-free period; and (iii) where a lessor or licensor (i.e., a landlord) of non-residential property is unable to deliver possession by the date stated in the lease or licence agreement.

Affected parties could submit an application for relief under Part 8 of the COTMA, with such application triggering a temporary moratorium (separate from the Part 2 moratorium) on the commencement or continuation of other actions, including applications under the SOP Act.

The relief period for applications under Part 8 of COTMA ended on 31 March 2021. A court or arbitral tribunal may make orders in any proceedings in relation to any matter arising under or by virtue of a contract in relation to a determination under Part 8 of the COTMA as it considers appropriate, having regard to the determination and any action taken by a party to the contract in good faith and in reliance on the determination.

Parts 8A and 8B: Universal EOT and cost-sharing of non-manpower-related costs

Parts 8A and 8B of the COTMA provide reliefs for all construction contracts where one party undertakes to carry out "construction works" as defined in the SOP Act, including contracts and subcontracts in the private and public sectors, and construction contracts excluded under the SOP Act:-

— that were entered into before 25 March 2020, but not if renewed (other than automatically) on or after that date,

— remaining in force on 2 November 2020, and

— where, as at 7 April 2020, any construction works to be performed under the contract have not been certified as completed in accordance with the contract.

— In addition, qualifying contracts under Part 8B of the COTMA exclude construction contracts where the party for whom the construction works are performed is an individual, save for individuals acting as a sole proprietor in the course of the business of the sole proprietorship.

Part 8A of the COTMA provides a universal and automatic extension of time (**EOT**) of 122 days for completion of construction works under qualifying contracts in order to address delays to construction works that arose for the period between 7 April 2020 and 6 August 2020. The EOT of 122 days does not apply to any completion date for construction works if the parties actually carried out those construction works during the period from 20 April 2020 to 30 June 2020; any legal proceedings have been commenced or any judgment, arbitral award, or compromise or settlement has been entered into as a result of those proceedings before 2 November 2020, in relation to a failure to comply with the completion date for those construction works; and will be reduced insofar as EOT was previously granted or agreed for such period falling between 7 April 2020 and 6 August 2020.

The automatic EOT of 122 days allows consistency in treatment across projects in the public and private sectors, and provides certainty in the calculation of extensions of time across all affected construction contracts.

Part 8B of the COTMA provides a cost-sharing mechanism between contracting parties of certain non-manpower-related qualifying costs due to delays caused by COVID-19 during the period from 7 April 2020 to 31 December 2021, provided that: (i) the party is or will be unable to complete any construction works under a construction contract by the completion date (prior to the EOT of 122 days under Part 8A); (ii) such inability is to a material extent caused by COVID-19; and (iii) as a result of said inability has incurred or incurs any qualifying costs for purpose of or in connection with the performance of construction works.

A party performing construction works is entitled to 50% of qualifying costs incurred during the prescribed period from the party for whom the construction works are performed under a construction contract, subject to a monthly cap of 0.2% of the contract sum per month, and a total of 1.8% of the contract sum.

Qualifying costs are:

— any rent or hire-purchase instalment for any plant or equipment required to perform the construction works that contractors are or will be unable to complete;

— any costs for maintaining the construction site at which those construction works are performed (including for vector and pest control, site security, provision of utilities and cleaning of the construction site) by any person engaged by contractors other than the contractors' employees;

— any costs to extend the validity period of any insurance obtained and any performance bond issued in respect of the construction contract because of contractors' inability; and

— any rent or other fee for the use of premises in Singapore to store any materials or equipment required to perform those construction works.

Where the cost-sharing mechanism under COTMA is inconsistent with any contractual provisions for the cost-sharing of any qualifying costs, the cost-sharing mechanism will exclude those contractual provisions to the extent of the inconsistency.

A party seeking to rely on the cost sharing mechanism under COTMA must make a claim for the qualifying costs to the other contractual party to the construction contract. Where the construction contract is within the ambit of the SOP Act, such claim must be made by inclusion of the amount of qualifying costs in any payment claim made and served under the SOP Act, and may be determined by adjudication under the SOP Act.

Part 10A: Costs-sharing of foreign manpower costs

Part 10A of the COTMA commenced on 6 August 2021, and provides a relief framework to allow parties to adjust contract sums for prescribed construction contracts, to address the increase in foreign manpower salary costs due to COVID-19 during the period from 1 October 2020 to 31 December 2021. The relief framework applies to construction contracts entered into prior to 1 October 2020 but not if renewed (other than automatically) on or after that date, and where as at 10 May 2021, any construction works under the construction contact have not been certified as completed.

The intent of Part 10A is for parties to reach a mutually agreeable outcome (premised on party-to-party negotiations) on how to deal with the increased manpower costs in a fair, and shared, manner.

If parties are unable to reach an amicable outcome, Part 10A allows contractors in eligible contracts to apply for adjustment of the contract sum by an assessor, to take into account an increase in the amount of foreign manpower salary costs incurred by contractors at any time during the prescribed period over what the contractor would otherwise have incurred because of a COVID-19 event. Contractors must show proof of a reasonable attempt to negotiate a contract sum adjustment with the other party to the construction contract in their application for adjustment by an assessor.

Assessors who determine applications under Part 10A of the COTMA can adjust the contract sum of eligible construction contracts in consideration of a contractor's actual increase in foreign manpower salary costs incurred anytime during the prescribed period because of a COVID-19 event, and whether it is just and equitable in the circumstances of the case to adjust the contract sum to take into account such increase. Assessors' determinations are binding on all parties to the application and all parties claiming under and through them, and from which there is no appeal. Assessors may vary or replace determinations to account for material changes in circumstances, to extend the time for any payment required by determination, or require parties' attendance for further review and further determination as appropriate.

The last adjusted contracted sum as determined by an assessor is considered the contract sum for all purposes under the construction contract, and any construction contract the contract sum of which has been adjusted by determination is considered the contract for the purpose of taking any action (including determining an adjudication application or adjudication review application) in relation to it under the SOP Act.

A court or arbitral tribunal may make orders in any proceedings in relation to any matter arising under or by virtue of a contract in relation to a determination under Part 10A of the COTMA as it considers appropriate, having regard to the determination and any action taken by a party to the contract in good faith and in reliance on the determination.

Contractors may submit an application for an assessor's determination up to two months after the end of the prescribed relief period presently ending 31 December 2021, i.e. by 28 February 2022.

Conclusion

Described as a temporary legislative measure borne out of necessity, there is no guarantee that the extended reliefs under COTMA for the construction industry will see further extension past 2021 given its inherent nature, and indications of a paradigm shift in governmental responses to COVID-19 which places greater emphasis on long-term solutions such as "pandemic resilient" contracting and construction practices. Parties who may have taken a more cautious approach to their entitlements in view of the inherent uncertainties resulting from COVID-19 and the state of play under COTMA should evaluate their positions and avoid being caught off guard when the reliefs under COTMA do come to an end.

References:

— COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020)

— BCA Circular on the Extension of Relief Periods for Construction & Supply Contracts under the COVID-19 (Temporary Measures) Act, dated 26 March 2021

— BCA Circular on the Commencement of the COVID-19 (Temporary Measures) Act 2020 - Part 8A & Part 8B, dated 30 November 2020, updated 19 April 2021

— BCA Circular on the Further Simplified Claim Process for Prolongation Costs in Public Sector Construction Contracts due to COVID-19 Events, dated 7 July 2021

— BCA Circular on Commencement of the COVID-19 (Temporary Measures) Act 2020 - Part 10A (Relief for Construction Contracts Affected by Increase in Foreign Manpower Salary Costs), dated 6 August 2021

— BCA Circular on the Public Sector Approach for COVID-19 (Temporary Measures) Act 2020 Part 10A – Relief for Construction Contracts Affected by Increase in Foreign Manpower Salary Costs, dated 18 August 2021

— BCA Circular on the Extension of Relief Period under the COVID-19 (Temporary Measures) Act for Relevant Contracts in the Built Environment Sector, dated 29 September 2021

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