

Annual Review of Singapore Construction Law Developments

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Introduction

Welcome to the 2022 edition of the Annual Review of Singapore Construction Law Developments

This edition covers developments in 2022 on decisions in the Singapore courts which would be of relevance to projects governed by Singapore law. The topics reflect issues that continue to impact projects in the shadows of the COVID-19 pandemic.

The issue of liquidated damages continues to play out in the courts. We open with a review of a decision by the Appellate Division of the High Court on the effect of condition precedent clauses in liquidated damages and extension of time provisions. This decision clarifies the position of Singapore law in respect of conflicting English and Australian authorities on the issue. Another article looks at the decision by the Appellate Division of the High Court with respect to the liquidated damages provision in the Singapore Institute of Architects Articles and Conditions of Building Contract, and whether an arbitral tribunal or court may review the failure of the contract certifier to issue a delay certificate (a precursor to a party's entitlement to liquidated damages).

We then turn to issues related to the usual provisions found in construction contracts – we look at a High Court decision that reviewed the scope, application and coverage of an indemnity clause. We then review a decision of the High Court which considered the liability of a contractor arising out of a direct payment arrangement with its subcontractor and that subcontractor's contractor. When faced with a downstream contractual counterparty in financial straits, contractors who seek to avoid potential project disruption may consider direct payment arrangements with its subcontractor's subcontractor. This High Court decision provides guidance on legal complications that may arise out of such an arrangement. Another article discusses the decision of the Court of Appeal which considered the operation and extent of a "best endeavours" clause and provided guidance on the extent of a party's "best efforts" obligation.

The next article discusses a decision of the High Court that provided guidance on issues of professional indemnity policy coverage in connection with liability assumed under settlement agreements and consent judgments.

Since the publication of the 2022 edition of our internationally focused Annual Review of English Construction Law Developments, where we provided a comparative survey of force majeure and frustration claims across four common law jurisdictions, the Appellate Division of the High Court has reviewed the High Court's decision in *GTMS Construction Pte Ltd v Ser Kim Koi* with respect to the interpretation of force majeure. We provide commentary to this decision of the Appellate Division of the High Court which provided commentary regarding the definition of a 'force majeure' clause under a contract in relation to the COVID-19 Pandemic.

We look at issues related to the enforceability and finality of arbitration awards given the importance and significance of arbitration as a method of dispute resolution in construction projects. One article discusses three Court of Appeal cases with respect to applications to set aside arbitral awards on the grounds of breach of natural justice and in particular a party's right to a fair hearing – reflecting the number of cases on the subject in 2022 – thus providing guidance on the ambit of the fair hearing rule. Another article looks at the court's approach when ordering that an arbitral award which is the subject of a setting aside application be remitted back to the tribunal.

The Singapore Building and Construction Authority ("BCA") continues in its efforts to transform the built environment sector in Singapore. We provide an update on the BCA's latest publication of a set of collaborative clauses to the public sector standard form of contract.

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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Entitlement to Liquidated Damages: The Effect of Conditions Precedent and the Termination of Contract

The Appellate Division of the High Court has provided guidance on the effect of condition precedent clauses in liquidated damages and extension of time provisions and clarified the position of Singapore law in respect of conflicting authorities on this issue. The Court also affirmed the effect of termination on entitlement to liquidated delay damages.

Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd

This was a multi-issue construction case dealing with issues such as whether (and when) the requirement for the employer's agreement for variations has been waived, whether retention sum should be set off against damages given that there was termination, and whether a party can seek to recover legal costs associated with adjudication under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) in subsequent final dispute resolution proceedings.

Nonetheless, in this article, we have only considered the decision in the context of liquidated damages provisions.

Background

Zhong Kai Construction Co Pte Ltd ("**Zhong Kai**"), a subcontractor involved in a project for the construction of airport equipment buildings and facilities in Singapore, had engaged Diamond Glass Enterprise Pte Ltd ("**Diamond Glass**") as its cladding subcontractor.

Zhong Kai had claimed liquidated delay damages against Diamond Glass for delays in the completion of its subcontract works.

Diamond Glass's position was that there were three periods of delay – for a total period of 149 days – in the procurement of cabin glass panels due to changes in specifications that were attributable to Zhong Kai.

Under the contract between Zhong Kai and Diamond Glass, Diamond Glass was required to make any application for extension of time to Zhong Kai within 30 days of the occurrence of the events entitling it to extension of time. As Diamond Glass had not made any applications for extension of time in respect of these periods of delay, Diamond Glass' position was that notwithstanding its non-compliance with the condition precedent set out in subcontract, the time for completion had been set at large, and Zhong Kai was accordingly not entitled to claim liquidated damages against it.

The Decision of the Appellate Division of the High Court

In the appeal giving rise to the decision, the Appellate Division of the High Court had to consider whether a contractor's failure to comply with contractual condition precedents for extension of time to complete its works would set time at large, and therefore prevent the employer from claiming liquidated damages where the employer is responsible for the delay.

Diamond Glass had relied on the Australian case of *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* (formerly *Concrete Constructions Group Ltd*) ("**Gaymark**") for the proposition that liquidated damages and extension of time clauses should be strictly construed, and as a result, a contractor's failure to comply with the condition precedent for an extension of time would, in the absence of special provision, set time at large and therefore prevent the employer from claiming liquidated damages, where the employer is responsible for the delay.

The court noted that *Gaymark* is at odds with earlier decisions of the Australian courts, and further considered the doubts cast on the correctness of *Gaymark* in the English decision of *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* (No 2) ("**Multiplex**"):

[103] I am bound to say that I see considerable force in Professor Wallace's criticisms of *Gaymark*. I also see considerable force in the reasoning of the Australian courts in the *Turner* and *Peninsula* cases and in the reasoning of the Inner House in *City Inn*. Whatever may be the law of the Northern Territory of Australia, I have considerable doubt that *Gaymark* represents the law of England. Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent. **If *Gaymark* is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the contractor could set time at large.**

[emphasis **bold**]

In the decision, the Court held that a contractor's non-compliance with a condition precedent for an extension of time does not prevent the employer from claiming liquidated damages. In approving *Multiplex* and rejecting the approach in *Gaymark*, the court reasoned that in essence, the liability to pay liquidated damages despite the occurrence of act(s) of prevention should be understood to be caused by the contractor's failure to give the required notice rather than by said act(s) of prevention. Since extensions of time based on employer prevention are expressly subject to strict notice requirements, such an understanding accords with contractual principles of party autonomy and of reasonable commercial intention.

The Court was further asked to address the issue whether a party would be entitled in law to claim for liquidated damages after termination.

In the proceedings below, the Judge had found that Zhong Kai was entitled to liquidated damages for the period from the contractual completion date and ending on the date of actual completion. This amounted to 198 days of delay.

Diamond Glass contended that the Judge had erred in factoring in the period after the termination of the Subcontract to the date of actual completion. Instead, the liquidated damages period should end on the date which the Subcontract was terminated. This would reduce the liquidated damages period by 92 days.

The court considered the following cases:

- (i) the Singapore High Court decision of *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* ("**LW Infrastructure**") which established that no claim to liquidated damages can be brought in respect of the period after termination, and that in the absence of express provision to the contrary, termination of a contract does not affect the entitlement to accrue liquidated damages in respect of the period before termination;
- (ii) the UK Supreme Court case of *Triple Point Technology Inc v PTT Public Co Ltd* ("**Triple Point**"), which provided for the proposition that the accrual of liquidated damages comes to an end on the termination of the contract, as the primary obligations of a contract come to an end upon termination.

These cases were unfortunately not raised to the Judge below. In a timely affirmation of first principles by an appellate court, the Appellate Division of the High Court agreed with the decision of Triple Point and endorsed the decision in LW Infrastructure. The liquidated damages period was therefore reduced by 92 days.

Conclusion

This timely: (i) clarification on the Singapore law position in respect of the decisions in Gaymark and Multiplex, and (ii) affirmation of the principle that absent special contractual provisions, liquidated damages do not accrue after the termination of a contract, by an appellate court will provide parties with greater certainty with respect to their obligations to comply strictly with contractual provisions related to applications for extensions of time and the right to liquidated damages.

References

- *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2022] SGHC(A) 44
- *Gaymark Investments Pty Ltd v Walter Construction Group Ltd (formerly Concrete Constructions Group Ltd)* [1999] NTSC 143
- *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC)
- *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] 4 SLR 477
- *Triple Point Technology Inc v PTT Public Co Ltd* [2021] AC 1148





Liquidated Damages – An Arbitral Tribunal or Court’s Power to Award

It is common in standard form construction contracts that a party’s entitlement to liquidated damages for delay is subject to the issue of a delay certificate by the contract certifier. A decision by the Appellate Division of the High Court has held that even where a delay certificate had not been issued by the contract certifier, an arbitral tribunal or the court has power to award liquidated damages for delay.

Ser Kim Koi v GTMS Construction Pte Ltd and ors (and another appeal)

The proceedings involved a project for construction of residential properties where the project owner (**Mr Ser**) had engaged Mr Chan Sau Yan (**Mr Chan**) as the project's architect under a memorandum of agreement, and GTMS Construction Pte Ltd (**GTMS**) as its contractor under a contract ("**Contract**") that incorporated the standard terms of the Singapore Institute of Architects, Articles and Conditions of Building Contract (Lump Sum Contract) (the "**SIA Conditions**").

The project's original completion date was 21 February 2013. Following requests for extension of time (**EOT**) by GTMS that were granted by Mr Chan, the project's completion date was extended to 17 April 2013. On 15 May 2013, Mr Chan issued a completion certificate certifying completion of the project as of 17 April 2013, with a schedule listing outstanding minor works.

In the proceedings, Mr Ser disputed the architect's certification of completion on 17 April 2013, and brought counterclaims for liquidated delay damages against GTMS and/or Mr Chan.

Under Clause 24(4) of the SIA Conditions, the architect shall issue a completion certificate when the contract works appear to be complete and to comply with the contract in all respects, leaving the parties free to agree upon any specific conditions or circumstances under which a completion certificate is to be issued.

Before the employer has a right to liquidated damages under the SIA Conditions and the concomitant right to start deducting liquidated damages from any sums that fall due to the contractor, Clause 24(2) of the SIA Conditions requires a delay certificate to have been issued by the architect that certifies that the contractor is in default in not having completed the works by the contract completion or extended completion date. Clause 24(2) states:

Upon receipt of a Delay Certificate the Employer shall be entitled to recover from the Contractor liquidated damages calculated at the rate stated in the Appendix ... from the date of default certified by the Architect for the period during which the Works shall remain incomplete, and may (but shall not be bound) to deduct such liquidated damages, whether whole or in part from any monies due under the Contract at any time.

In the appeal, the court held that Mr Chan had not been entitled under the Contract to issue the completion certificate until the statutory temporary occupation permit (**TOP**) for the project had been issued on 16 September 2013. The court found that Mr Chan had improperly issued the completion certificate on 15 May 2013. The court also found that GTMS was in delay for the period of 18 April 2013 to 28 May 2013. As such liquidated damages would have started to run from 18 April 2013, while operative delays after 28 May 2013 were caused by Mr Chan and not GTMS.

Absent the issue of a delay certificate by Mr Chan, the court was required to consider whether an arbitral tribunal or court could re-open an architect's refusal or failure to issue a delay certificate where no delay certificate had been issued by the architect in the first place, under the arbitration clauses in the SIA Conditions, namely Clauses 37(3) and 37(4). The material parts of these clauses are as follows:

37.(3) Such arbitrator shall not in making his final award be bound by any certificate, refusal of certificate, ruling or decision of the Architect under any of the terms of this Contract, but may disregard the same and substitute his own decision on the basis of the evidence before and facts found by him and in accordance with the true meaning and the terms of the Contract...

...

37.(4) For the avoidance of doubt, in any case where for any reason the Courts and not an arbitrator are seised of a dispute between the parties, the Courts shall have the same powers as an arbitrator appointed under this clause.

The court held that where the architect failed to issue a delay certificate, the arbitral tribunal or court as the final arbiter of all disputes under the contract is entitled to disregard the absence of a delay certificate, and can rule or decide that a delay certificate should have been issued on a particular date thereby giving rise to liquidated damages.

The court's reasoning in relation to an arbitral tribunal and court's power under Clause 37(3) of the SIA Conditions to reopen an architect's "refusal" to issue a certificate is of particular interest.

The court recognised that on the ordinary meaning of the words "refuse" or "refusal", it cannot really be said that an architect had 'refused' to issue a delay certificate where he had taken the mistaken view that the contract works had been completed without delay, and the issue of a delay certificate therefore never arose in the architect's mind.

Nonetheless, the court held that a true construction of Clause 37(3) did include an architect's failure to issue a delay certificate. The court's reasoning followed from the general scheme that underpins almost all standard form construction contracts, namely of the temporary finality of decisions and certifications of a contract certifier (commonly the architect) during construction, subject to a final resolution of all disputed matters before an arbitrator (or the court).

The court held that if the architect fails to issue a certificate or make a ruling when he ought to have done so under the contract, an arbitrator or the court seised with that issue must be able to remedy that omission at the stage of final resolution of all the disputes between the parties.

References

- *Ser Kim Koi v GTMS Construction Pte Ltd and ors (and another appeal)* [2022] SGHC(A) 34







Indemnity Clauses: Scope, Application and Coverage

In a claim brought by the insurers of the landlord of a warehouse and ancillary office space against its tenant for losses arising out of an accidental fire, the Singapore High Court reviewed the scope, application and coverage of an indemnity clause and restated the law related to the interpretation of such indemnity clauses under Singapore law.

HSBC Institutional Trust Services (Singapore) Ltd (as trustee of AIMS AMP Capital Industrial REIT) v DNKH Logistics Pte Ltd

The Plaintiff (the “**Landlord**”) was the landlord of a warehouse and ancillary office space (the “**Premises**”). The Defendant (the “**Tenant**”) was a company that provided logistics and warehousing services and had leased the Premises from the Landlord pursuant to a lease agreement (the “**Lease**”). The Tenant used the Premises to store, amongst others, large quantities of dried black peppercorns owned by one of the Tenant’s customers.

Sometime in August 2015, during the duration of the Lease, an accidental fire occurred at the Premises, causing physical damage to the Premises. As a result of the fire, the Landlord allowed a reduction of the rental due from the Tenant, causing the Landlord loss of rent for a period of about 10 months.

The exact cause of fire could not be ascertained, and no third party claims had been brought against the Landlord.

The Landlord’s insurers brought an action in the name of the Landlord against the Tenant pursuant to its right of subrogation for insured losses that the insurers had already paid to the Landlord as a result of the fire.

The Landlord’s Claim

The Landlord’s claim was premised on a contractual indemnity provided under an indemnity clause (the “**Indemnity Clause**”) in the Lease, which stated:

“3.18 Indemnity by Tenant

To indemnify the Landlord against (i) all claims, demands, actions, proceedings, judgments, damages, losses, costs and expenses of any nature which the Landlord may suffer or incur as a result of or in connection with or caused by, and (ii) all penalties or fines imposed by any relevant authority resulting from:

3.18.1 any occurrences in, upon or at the Premises or the use or occupation of the Premises and/or any part of the Property by the Tenant or by any of the Tenant’s employees, independent contractors, agents or any permitted occupier.”

It was the Landlord’s position that the Indemnity Clause was a “general indemnity that simply covers any loss suffered or incurred by the (Landlord) so long as the loss is a result of any occurrence in or at the Premises” and was thus sufficiently wide to cover any claims brought by the Landlord against the Tenant.

Further, the Landlord argued that there were no words in the Indemnity Clause that confined its scope or application to third party claims or where there has been default on the part of the Tenant.

The Tenant’s Position

The Tenant on the hand, relying on Singaporean High Court and Court of Appeal decisions, argued that the Indemnity Clause only obliged them to indemnify the Landlord in respect of losses suffered by the Landlord due to third party claims brought against the Landlord.

Further, the Tenant submitted that the context in which the parties entered into the Lease supported this narrow interpretation of the Indemnity Clause. In addition, as the Indemnity Clause was for the Landlord’s benefit, the *contra proferentem* rule ought to apply in construing the Indemnity Clause against the Landlord.

The Court’s Decision

In construing the scope of the Indemnity Clause and deciding whether the Indemnity Clause covered only third party claims brought against the Landlord, or whether it included the Landlord’s claims against the Tenant as well, the Singapore High Court first confirmed the following principles relevant to the construction of indemnity clauses:

- The principles of contractual interpretation apply in construing an indemnity clause (see the Court of Appeal’s decision in *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170).
- The principles of construction relevant to exemption clauses, including the principle that they are to be construed strictly and a party seeking to exclude or limit their liability must do so in clear words, are equally relevant to the construction of indemnity clauses (see *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and another* [2013] 1 SLR 1).
- The *contra proferentem* rule of construction, which construes strictly a transaction, contract, or provision that is one-sided or onerous against the party seeking to rely on it, applies to indemnity clauses.
- Indemnity clauses must clearly state the extent to which one contracting party is to indemnify the other (see *Canada Steamship Lines Ltd v The King* [1952] AC 192).

The Court identified the following steps in the construction of indemnity clauses:

- The purpose of contractual interpretation is to give effect to the objectively ascertained expressed intentions of the contracting parties as it emerges from the contextual meaning of the relevant contractual language.
- The Court has to ascertain the meaning which the expressions in a document would convey to a reasonable person having regard to the background knowledge which would reasonably have been available to the parties at the time of contract.
- The starting point of contractual interpretation is to look at the text that the parties have used in the wording of the contractual provision.
- At the same time, it is permissible to have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties.
- In general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear.
- Where the text is clearly plain and unambiguous, the Court will usually give effect to the plain meaning of the clause, provided it does not engender an absurd result.
- Where an interpretation of the clause based on its plain wording leads to an absurd result, it is a strong indication that the text may be inconsistent with the context in which it is interpreted. In this regard, the Court should ordinarily start from the position that the parties did not intend for the term(s) concerned to produce an absurd result. The context cannot be utilised as an excuse for the Court to rewrite the terms of the contract according to its subjective view of what it thinks the result ought to be. The need to avoid an absurd result cannot be pursued at all costs. Rather, the Court must always base its decision on objective evidence. Therefore, if the objective evidence demonstrates that the parties had contemplated the absurd result or consequence, the Court is not free to disregard this in favour of what may seem to the Court to be a more commercially sensible interpretation of the contract. In such a situation, although extremely rare, the Court must give effect to the meaning contained therein, notwithstanding that an absurd result would ensue.

The Court ruled in favour of the Tenant, i.e. that the Indemnity Clause applied to third party claims only. In arriving at its decision, the Court compared the Indemnity Clause against indemnity clauses in relevant case law:

- The indemnity clause in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 ("**Sunny Metal**") which the Singapore Court of Appeal had interpreted to be "in respect of third party claims only", was similar in structure and general wording to the Indemnity Clause. Accordingly, the Court applied the interpretative outcome in *Sunny Metal* to the Indemnity Clause i.e. that parties objectively intended for the Indemnity Clause to apply to third party claims only.
- The indemnity clause in *Marina Centre Holdings Pte Ltd v Pars Carpet Gallery Pte Ltd* [1997] 2 SLR(R) 897 ("**Marina Centre Holdings**") was textually and substantively similar to the Indemnity Clause, both in terms of scope and operation. Accordingly, the Court applied the interpretative outcome in *Marina Centre Holdings* to the Indemnity Clause, i.e. that it was intended to apply only in respect of third party claims brought against the Landlord.
- On the other hand, unlike the indemnity clause in *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd and others (Chris Chia Woon Liat and another, third parties)* [2017] SGHC 22 ("**CIFG (SGHC)**") which was an unlimited and general indemnity, the Indemnity Clause did not contain wording contemplating the Tenant indemnifying the Landlord in respect of liability between the parties. On this observation, the Court took the view that the interpretive outcome in *CIFG (SGHC)* was inapplicable to the Indemnity Clause.

The Court also considered other provisions in the Lease, including provisions which governs the parties' obligations inter se. The Court considered a similarly worded indemnity provision and exemption provisions which seek to exempt the Landlord from liability for any damage or loss occasioned to the Tenant. The Court found that to interpret the Indemnity Clause as further covering liabilities between parties inter se would be duplicative and inconsistent with the obligations imposed by these other provisions. Accordingly, an interpretation that the Indemnity Clause would apply to third party claims only would accord a better consistency with the scope and intention behind these provisions.

To the Landlord's assertion that the Indemnity Clause covers claims made by the Landlord against the Tenant, the Court considered the plain and literal reading of the Indemnity Clause. The Court found that a literal meaning of the Indemnity Clause would entitle the Landlord to very wide coverage or protection for almost all kinds of losses with the only requirement being that the losses must have occurred at the Premises, and this would render the Indemnity Clause extremely broad and give rise to absurdity in its application i.e. that the Tenant is contractually obliged to indemnify the Landlord for any losses that the Landlord may suffer so long as the losses occurred at the Premises regardless of whether there is any fault on the Tenant's part, even if the losses arise from the Landlord's negligence, misconduct, wilful act or fault. The Court found that this could not have been the objective intention and contemplation of the parties at the time of the signing of the Lease as no reasonable tenant would have signed such an onerous and completely one-sided lease.

The Court then examined the context surrounding the Indemnity Clause. Having considered the nature of the transaction in question (i.e. a lease for a commercial property) and other clauses in the Lease, the Court found that the objective intention of the parties underlying the Indemnity Clause was to require the Tenant to indemnify the Landlord only in respect of losses suffered by the Landlord which can be attributed to the Tenant's fault.

Finally, for completeness, the Court also considered the application of the *contra proferentem* rule. Given the ambiguity in the wording of the Indemnity Clause in respect of its scope, and that adopting the Landlord's interpretation would lead to a particularly onerous obligation on the Tenant to indemnify the Landlord for any loss that occurred at the Premises, the Court held that the *contra proferentem* rule of construction applied against the Landlord such that it could not rely on the broad wording of the Indemnity Clause in its favour.

Key Takeaways

Parties to a contract governed by Singapore law seeking to allocate risks using indemnity clauses should ensure that they are drafted in clear and unambiguous wording, particularly, the extent to which a contracting party is to indemnify the other, such that the objective intentions of the parties are expressed clearly.

Given the onerous nature of indemnity clauses in passing liability from the indemnified party to the indemnifying party, contracting parties must be alive to the application of the *contra proferentem* rule in the event that there is ambiguity in the contractual wording, under which an indemnity clause would be construed strictly against either a party responsible for its drafting or its incorporation for its own benefit. On this note, parties may also wish to consider contracting out of the *contra proferentem* rule.

Finally, while contractual wording provides the starting point for contractual interpretation, where a plain reading of the contractual wording results in absurdity, the Court will rely on the context surrounding the contractual wording in construing the parties' underlying objective intentions based on the background knowledge which would reasonably have been available to the parties at the time of the contract. Such relevant contextual factors may include the nature of the agreement in which the contractual provision is contained in, as well as other provisions contained in the said agreement.

References

- HSBC Institutional Trust Services (Singapore) Ltd (as trustee of AIMS AMP Capital Industrial REIT) v DNKH Logistics Pte Ltd [2022] SGHC 248
- CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal [2018] 1 SLR 170
- Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and another [2013] 1 SLR 1
- Canada Steamship Lines Ltd v The King [1952] AC 192
- Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric [2007] 3 SLR(R) 782
- Marina Centre Holdings Pte Ltd v Pars Carpet Gallery Pte Ltd [1997] 2 SLR(R) 897
- CIFG Special Assets Capital I Ltd v Polimet Pte Ltd and others (Chris Chia Woon Liat and another, third parties) [2017] SGHC 22.



Managing Cash Flow through Direct Payment Arrangements – The Legal Ramifications

In a decision that would be of interest to employers and contractors who seek to avoid potential project disruption when faced with a downstream contractual counterparty in financial straits, the Singapore High Court has considered the liability of a contractor arising out of a direct payment arrangement with its subcontractor and that subcontractor's contractor.

Relationships at each level of a construction project are often governed by their own contracts, from the employer-contractor level, at the subcontract level between contractors and their subcontractors, and so on. However, employers may find themselves considering making payments directly to subcontractors engaged by their contractor, and similarly, contractors may consider making direct payments to the sub-subcontractors engaged by their subcontractors. Such a situation might arise when an employer or contractor is aware that its contractor or subcontractor (as the case may be) is having cashflow difficulties, or if payment disputes have arisen at the contractual level. In such circumstances, subcontractors or sub-subcontractors may look to suspend or terminate works for non-payment, and the employer or contractor may feel that direct payments to them are necessary to avoid potential project disruption and delay.

Yet, such direct payments pose legal complications. The employer will typically want to avoid taking on responsibility for payments due to the subcontractor from its contractor, and to recover the direct payments from its contractor. Similarly, the contractor would want to avoid responsibility for payments due to the sub-subcontractors engaged by its subcontractor, and to recover any direct payments from its subcontractor. However, the recipient of the direct payments may claim that the payment arrangement amounts to a new payment obligation on the part of the employer or contractor towards them.

The case of *Ten-League Engineering & Technology Pte Ltd v Precise Development Pte Ltd* is a good illustration of the legal issues faced by upstream parties in such circumstances, and potential ways to navigate them.

Ten-League Engineering & Technology Pte Ltd v Precise Development Pte Ltd

Precise Development Pte Ltd ("**Precise**") was the main contractor of a construction project for the Housing Development Board ("**HDB**"). Precise engaged G-Con Foundation Pte Ltd ("**G-Con**") as its piling subcontractor for the project, which in turn rented machinery and equipment to carry out its piling works from Ten-League Engineering & Technology Pte Ltd, a fully-owned subsidiary of Ten-League Corporations Pte Ltd, (collectively known as "**Ten-League**").

In January 2020, G-Con fell into arrears in respect of its payment obligations to Ten-League. Thereafter, Ten-League proposed an arrangement at a meeting on 14 January where Precise would pay Ten-League the monies due to G-Con from Precise, with a cap on the outstanding amount owed from G-Con to Ten-League. In the legal proceedings, Ten-League's position was that in consideration of this arrangement, Ten-League would refrain from shutting down its machines, so that G-Con could finish its piling works without causing delay to the project. No agreement came out of this meeting, and it was undisputed that Precise's contracts manager had expressed reservations about a contractual relationship arising between Ten-League and Precise at this meeting.

In the legal proceedings brought by Ten-League against Precise, Ten-League's position was that a tripartite contract was eventually entered into between Ten-League, G-Con and Precise at a meeting in February 2020, whereby Precise would issue direct payments to Ten-League, and a benefit that both G-Con and Precise would receive would be that Ten-League would no longer shut down its machines on the project. Flowing from this, Ten-League argued that Precise had breached the contract by making subsequent progress payments to G-Con for work done by it, rather than directly to Ten-League.

Conversely, Precise's position was that while it had consented to a direct payment arrangement on the terms of a letter dated 4 February 2020, it had not intended to create any contractual relationship between Precise and Ten-League, and that any sums payable to Ten-League would be subject to G-Con's assessment and confirmation of the actual amount payable. In its letter of 4 February 2020, Precise has stated that its agreement to make direct payments to Ten-League was "purely to assist [G-Con]'s cash flow and without any obligation to do so", that the direct payment arrangement would not relieve G-Con of any of its contractual obligations to Ten-League, and would not create any contractual relationship between Ten-League and Precise.

The court held that there was no tripartite contract as contended by Ten-League, and that Precise's letter of 4 February 2022 set out the true arrangement between the parties. In response to G-Con's request for Precise to make direct payments to Ten-League on its behalf, Precise had been prepared to make such direct payments on a goodwill basis, and had refused to undertake obligation for such payments to Ten-League. The direct payment arrangement therefore did not oblige Precise to make direct payments to Ten-League, and Ten-League's claim against Precise for breach of contract was dismissed.

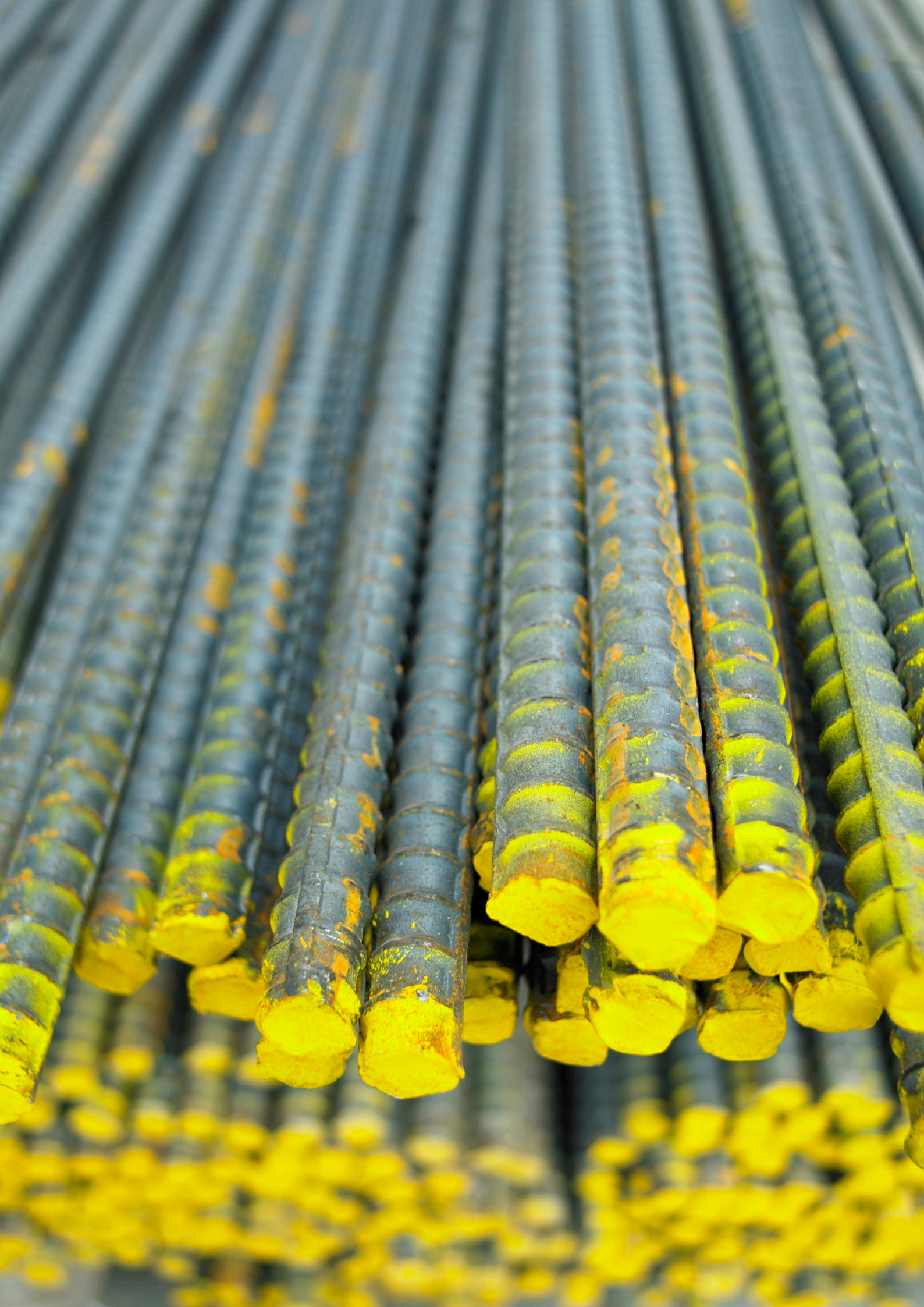
The court also dismissed Ten-League's unjust enrichment claim against Precise, which was premised on a request by Precise that Ten-League would not demobilise its equipment from the project site. The court found that there was no factual basis for the alleged request by Precise, and further that Ten-League had not identified any specific ground of restitution that would render any enrichment unjust.

Conclusion

It will not be surprising to most that arrangements for direct payment are insufficient to create a contractual obligation to do so. Of greater interest is the import the court placed on the express conditions under which Precise had stated its agreement to make direct payments, when coming to the view that Precise had a clear intent not to take on any contractual obligation to pay Ten-League, and in dismissing Ten-League's claim of an oral agreement otherwise. Parties contemplating goodwill direct payment arrangements should document in real time the basis and conditions for such arrangements, which will be of considerable assistance in the event of latter day disputes over any obligations arising under such arrangements.

Reference

— *Ten-League Engineering & Technology Pte Ltd v Precise Development Pte Ltd* [2022] SGHC 317





“Best Endeavours” Obligations – could you have done more?

The Court of Appeal of Singapore has considered the operation and extent of a “best endeavours” clause and provided guidance on the extent of a party’s “best efforts” obligation. Although best efforts or best endeavours clauses are a common feature of commercial contracts, it is often unclear how much effort is required in order not to fall foul of the obligation.

Carlsberg Breweries A/S v CSAPL (Singapore) Holdings Pte Ltd [2022] SGCA(I) 2

In deciding whether one party was in breach of its best endeavours obligation connected to a loan agreement, the Court has provided useful guidance to parties on the extent of the effort that is required by parties to such a clause.

Background

Pursuant to a loan agreement, Carlsberg Breweries A/S (“**Carlsberg**”) extended a loan to CSAPL (Singapore) Holdings Pte Ltd (“**CSAPLH**”) in order to finance of CSAPLH’s purchase of 40% shareholding in a joint venture vehicle, Carlsberg South Asia. Carlsberg South Asia was the owner of 90% of the shares in Gorkha Breweries Pvt Ltd (“**GBPL**”). 9.94% of the shares in GBPL was registered in the name of one Rajendra Kumar Khetan (“**RKK**”).

The GBPL shareholders agreement provided inter alia that “[t]he quorum for all meetings of the Board of Directors shall be more than half of the number of appointed Directors present in person, of which as a minimum 1 (one) shall be a Director nominated by the Khetan Family.” This is effect provided the Director appointed by the Khetan family a veto over resolutions passed at board meetings by not attending them and rendering them inquorate.

The parties had also entered into a deed of undertaking and a deed of release in respect of the loan agreement. Pursuant to the deed of release, CSAPLH would be released from “all its covenants, liabilities and obligations under or pursuant to the Loan Agreement” from the “Release Date”. The releases granted by Carlsberg to CSAPLH in the deed of release were subject to and conditioned on CSAPLH providing and fulfilling the undertakings given to Carlsberg under the deed of undertaking.

Clause 2(c) of the deed of undertaking provided that the CSAPLH would “use its best efforts to ensure that the director appointed by [RKK] to the board of directors of [GBPL] attends all meetings of the board of directors of [GBPL]”.

The director appointed by RKK was Pradeep Prakash Khetan (“**PPK**”). PPK did not attend GBPL board meetings on 26 February, 25 March, 26 April, and 1 July 2019.

On 26 July 2019, Carlsberg commenced proceedings in the Singapore courts seeking repayment under the loan agreement. Carlsberg alleged that the sum had fallen due because CSAPLH’s breaches of the deed of undertaking led to the releases under the deed of release being revoked.

In particular, Carlsberg alleged that CSAPLH was in breach of Clause 2(c) of the deed of undertaking by failing to use its best efforts to ensure that PPK attended the four GBPL board meetings.

It was not disputed that a breach of the deed of undertaking would entitle the Carlsberg to terminate the deed of release and declare all outstanding loans under the loan agreement as immediately due and payable.

At the end of the trial, the Judge at first instance found that there had been no breach of the best efforts clause in the deed of undertaking and dismissed Carlsberg’s claim for repayment of the balance of the loan.

Court of Appeal’s decision

On appeal to the Court of Appeal, the Court allowed Carlsberg’s appeal, holding that CSAPLH had breached its best efforts obligations under the deed of undertaking.

The issue before the Court was whether Carlsberg had complied with its best efforts obligation in ensuring that PPK attended the board meetings in question.

The Court set out the following guidelines that had been set out in *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2008] 2 SLR(R) 474:

- The obligor has a duty to do everything reasonable in good faith with a view to procuring the contractually stipulated outcome within the time allowed, including taking all reasonable steps which a prudent and determined man acting in the interests of the obligee and anxious to procure the contractually stipulated outcome within the available time would have taken.
- The test for determining whether a “best endeavours” obligation has been fulfilled is an objective one.
- In fulfilling its obligation, the obligor can take into account its own interests.
- A “best endeavours” obligation is not a warranty to procure the contractually stipulated outcome.
- The amount or extent of “endeavours” required of the obligor is determined with reference to the available time for procuring the contractually stipulated outcome. The obligor is not required to drop everything and attend to the matter at once.
- Where breach of a “best endeavours” obligation is alleged, a fact intensive inquiry would be carried out.

The Court further also set out further guidelines identified in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905:

- Such clauses require the obligor to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted to do all that it reasonably could.
- The obligor need only do that which has a significant or real prospect of success in procuring the contractually stipulated outcome.
- If there is an insuperable obstacle to procuring the contractually stipulated outcome, the obligor is not required to do anything more to overcome other problems which also stood in the way of procuring that outcome, but which might have been resolved.
- The obligor is not always required to sacrifice its own commercial interests in satisfaction of its obligations but may be required to do so where the nature and terms of the contract require so.
- An obligor cannot just sit back and say that it could not reasonably have done more to procure the contractually stipulated outcome in cases where if it had asked the obligee, it might have discovered that there were other steps which could reasonably have been taken.
- Once the obligee points to certain steps which the obligor could have taken to procure the contractually stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail.

The Court highlighted that these guidelines apply even where parties use a variation of the phrases “all reasonable endeavours” or “best endeavours”.

The Court was of the view that Carlsberg was required to establish the following three premises in respect of its argument that more could have been done by CASPLH to persuade PPK to attend the third and fourth board meetings during the period from 9 to 25 April 2019:

- First, that the CASPLH or its directors had known or had reason to suspect on 9 April 2019, that PPK did not intend to attend the 26 April 2019 board meeting.
- Second, that reasonable steps could have been undertaken and that the steps sought would have had at least a significant or real prospect of success.
- Third, and closely linked to the second requirement, that the actions that the Borrower allegedly ought to have taken could not have been futile.

Based on the facts of the case, the Court found that one of CASPLH’s director had known or had reason to suspect, that PPK did not intend to attend the 26 April 2019 board meeting, and that upon learning such, reasonable steps could have been undertaken by CASPLH that would have had at least a significant or real prospect of success. Particularly, the Court took the view that CASPLH and/or its directors could have made (but did not) at least three further efforts following the meeting of 9 April 2019 – persuading and discussing PPK’s concerns with him; informing Carlsberg of PPK’s concerns and working on a unified approach to persuade PPK and address his concerns; and keeping the ultimate controller of Carlsberg apprised such that he could have the opportunity to persuade PPK.

In the circumstances, the Court held that Carlsberg has established that there was in fact more that CSAPLH could have done in the period between 9 and 25 April 2019 to persuade PPK to attend the board meeting on 26 April 2019.

As such, the evidential burden thus shifts to CSAPLH to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail. It is not disputed that CSAPLH did not do anything that Carlsberg argues it should have. As such, it cannot be said that CSAPLH was not reasonably required to take those steps, nor can it be said that those steps would have been futile or bound to fail.

The relevant time frame for the discharge of “best endeavours” obligations involves a factual inquiry, depending on the contractual wording of the “best endeavours” obligation in question, as well as the context surrounding the contract and the alleged breach. The Court determined that the relevant time frame for the discharge of CASPLH’s “best efforts” obligations was between 9 April to 25 April 2019 i.e. commencing from the date on which CASPLH and/or its director knew or had reason to suspect that PPK did not intend to attend the 26 April 2019 board meeting, to the day before the 26 April 2019 board meeting, which was the point at which it became clear that PPK had made the final decision not to attend the 26 April 2019 board meeting.

Conclusion

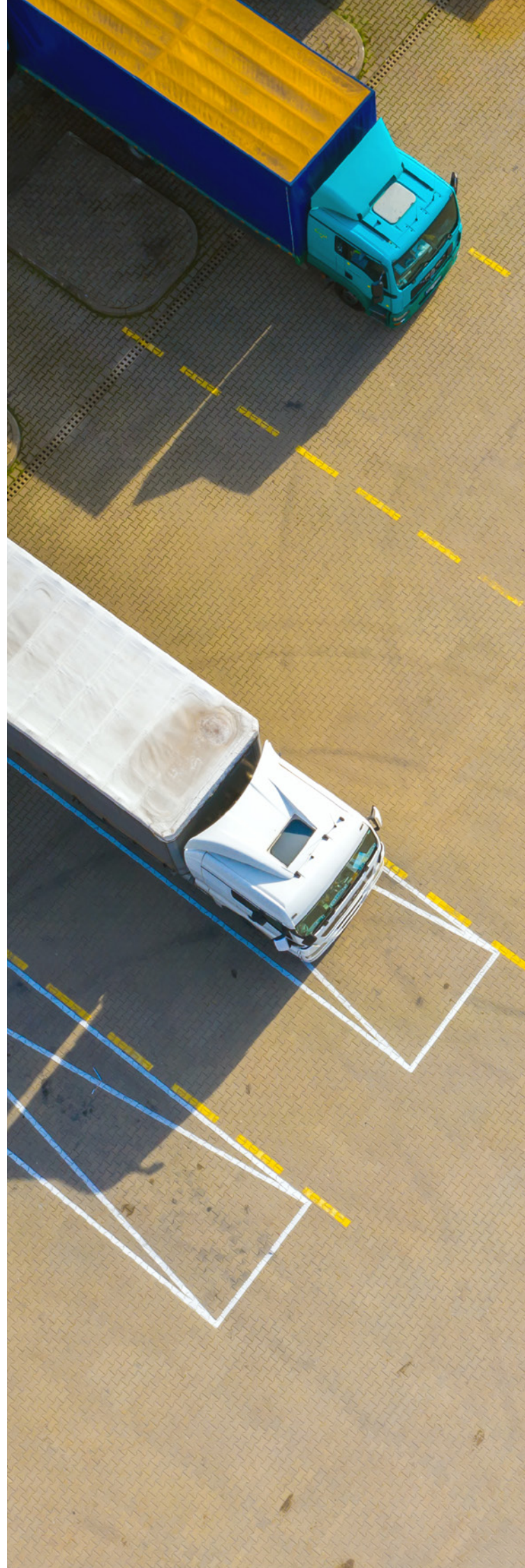
An obligor of “best endeavours” obligations who simply sits back and say that it could not reasonably have done more to procure the contractually stipulated outcome is at risk of breaching its obligations, if it is found to be in a situation where if it had asked the obligee, other steps which could reasonably have been taken could have been discovered. An obligor of “best endeavours” obligations must therefore consider taking a more active approach in discharging its “best endeavours” obligations.

The test is an objective one. Therefore, it does not matter if the obligor thinks it has done its best. It is evident from the case that even if parties no longer have a working relationship, the obligor would still be required to comply with its obligations and cannot use the bad relationship between the parties to say that they have discharged their obligations as they could not have done more.

Contracting parties looking to impose contractual “best endeavours” obligations must ensure that their objective intentions are properly conveyed by the contractual wording deployed. While the intention to impose “best endeavours” obligations may be conveyed through the use of the phrases such as “best endeavours”, “all reasonable endeavours”, or “best efforts” (as in the present case), such intentions may not be borne out by the use of phrases such as “reasonable endeavours”. On this note, the Court in *KS Energy* observed that an “all reasonable endeavours” obligation was ordinarily more onerous than a “reasonable endeavours” obligation, where the latter might require the obligor to take only one reasonable course of action (and not all of them).

References

- *Carlsberg Breweries A/S v CSAPL (Singapore) Holdings Pte Ltd* [2022] SGCA(I) 2
- *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905
- *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2008] 2 SLR(R) 474





Professional indemnity insurance policies: the impact of settlement agreements

A general principle of insurance law is that liability insurance provides an indemnity against actual established liability, as opposed to mere allegation. A decision by the High Court has provided guidance on issues of professional indemnity policy coverage in connection with liability assumed under settlement agreements and consent judgments. The decision holds that insureds can show actual liability by the reasonableness of the settlement agreement in order for policy coverage to be engaged, and provides guidance as to the considerations that the court considers relevant in assessing the reasonableness of settlements.

SYT Consultants Pte Ltd v QBE Insurance (Singapore) Pte Ltd

Background

The plaintiff firm of engineering, architecture and project management consultants (**SYT Consultants**) had been engaged to design an earth retaining or stabilizing structure (**ERSS**) for a residential construction project by the project's builder. In addition to design, SYT Consultants and its director – a registered professional engineer ("**Mr Ng**") – were also to obtain the necessary regulatory building approvals for the ERSS works from the Building and Construction Authority (**BCA**), supervise the ERSS works, and monitor the related excavation works. SYT Consultants was insured by the defendant insurer ("**QBE Insurance**") against legal liability for any breach of professional duty by it in its supply of professional engineering services to third parties.

Damage was caused to two properties adjoining the project in the course of construction, and the neighbouring owners brought damages claims against the project's developer and the builder. In turn, the developer and builder brought proceedings ("**Suit A**") against SYT Consultants and Mr Ng for breach of contract and negligence in respect of the ERSS works for the project, and QBE Insurance was brought in as a third party. Although SYT Consultants and Mr Ng denied all liability to the developer and the builder in Suit A, they entered into a settlement agreement with the developer and builder consenting to 100% liability, and further to which a consent judgment was entered. QBE Insurance was not party to the settlement agreement.

SYT Consultants then brought proceedings against QBE Insurance for coverage under the terms of its insurance policy ("**Policy**") in respect of its liability under the consent judgment in Suit A. QBE Insurance's position was the Policy did not cover SYT Consultants' liability under the consent judgment in Suit A.

Clauses 2 and 3 of the Policy provide the situations in which cover will be provided to the plaintiff, and Clause 8 of the Policy contains definitions of terms used in the Policy. The relevant terms are set out below:

2. COVER

2.1. Civil Liability

We will pay You or on Your behalf for:

2.1.1. any legal liability to pay Compensation; and

2.1.2. any costs and expenses awarded against You;

arising from any civil liability resulting from a Claim for breach of professional duty in the conduct of Your Business provided that the Claim is first made during the Period of Insurance and reported to Us during the Period of Insurance or, where applicable, during the extended reporting period.

...

3. SCOPE OF COVER

This Policy covers Your civil liability, which includes liability for:

...

3.2 Contractual Liability (Tort Liability) – Claims arising from a breach of contractual obligations or a duty of care to provide professional services in the conduct of Your Business, but this does not extend to cover any liability assumed by You under any express warranty, guarantee, representation, hold harmless agreement, indemnity contract or similar agreement unless such liability would attach in the absence of any such agreement.

...

8.1. Claim – means:

8.1.1. the receipt by You of any written or verbal notice of demand for Compensation made by a third party against You;

8.1.2. any writ, statement of claim, summons, application or other originating legal or arbitral process, cross-claim, counter-claim or third or similar party notice served upon You.

8.2. Compensation – means monies paid or agreed to be paid by judgment, award or settlement for civil liability and/or costs of non-monetary civil relief, including any costs awarded against You.

QBE Insurance's premise was that on a proper construction of the Policy, the scope of coverage did not include all legal liability to pay compensation, but was restricted to legal liability arising from civil liability. As such, QBE Insurance's position was that where coverage was sought in respect of liability pursuant to a settlement agreement, the insured party was required to show that the settlement was reasonable, either by showing that it would have been liable even in the absence of the settlement agreement for at least as much as the settlement amount, or as a secondary position, that the settlement agreement reasonably reflected the insured party's arguable liability.

The court agreed that coverage under the Policy was restricted to legal liability to pay monies arising from civil liability – with the types of civil liability covered under Clause 3.2 of the Policy including claims for breach of contract or a duty of care to provide professional services in the conduct of business, but expressly excluded liability assumed by SYT Consultants unless such liability would attach in the absence of its assumption of liability.

On the terms of the Policy, the court held that SYT Consultants was required to show it had actual, as opposed to arguable, liability independent of the settlement agreement. This was also in line with the general principle of insurance law, whereby liability insurance provides an indemnity against actual established liability, as opposed to mere allegations.

Where the civil liability arose from a tortious claim, an insured party who has settled a claim for alleged professional negligence can but is not necessarily limited to showing actual liability by establishing on a balance of probabilities that his own professional negligence would have led to liability in the amount of the settlement sum.

In addition, the court held that the insured could also show actual liability by simply establishing that the settlement agreement was reasonable. In this regard, the court considered that the approach to actual loss and the principles governing the reasonableness of a settlement agreement laid down by the Court of Appeal's decision in *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 ("**Britestone**") to also be of application.

In *Britestone*, the Court of Appeal considered that where a party intends to rely on a settlement as a basis to recover a claim in damages against an upstream defaulter in a liability chain, there was a balance to be struck between upholding settlements and assessing the reasonableness of imposing a settlement on an ultimate payor who may not be privy to that settlement. The Court of Appeal held that while the broad principle was that the downstream party must prove its actual loss, the courts would adopt a pragmatic approach that if a settlement is reasonably reached and reasonable in nature, the amount agreed therein will be regarded as accurately reflecting the actual loss suffered by the downstream party.

In the decision discussed in this article, the court considered that a similarly pragmatic approach as that in *Britestone* should be adopted for an insured party's proof of actual liability, and the insured party could show that liability would have attached in the absence of a settlement agreement by simply establishing that the settlement agreement was reasonable. In this regard, the court also considered that the following

non-exhaustive list of considerations set out in *Britestone* to be relevant to determining the reasonableness of a settlement agreement in the context of professional indemnity insurance coverage:

- the duration or period of negotiations as well as their general content;
- whether the negotiations were conducted bona fide;
- the assessment which could properly be made at the time of settlement of the prospects of success or failure of the claim based on materials then available;
- the availability of and/or reliance on legal advice or expert advice taking into account considerations of cost and time;
- whether the settlement amount has been paid, and, if so, how and when;
- the bargaining strengths of the parties involved in the settlement, taking into account (among other things) alternative means by which the dispute could have been concluded; and
- whether, in the round, the settlement figure was objectively assessed and properly calibrated against the context of the entire factual matrix.

In the present case, the court was not satisfied that SYT Consultants had shown actual liability independent of the settlement agreement. Critically, Mr Ng had testified that both he and SYT Consultants believed that they were not liable to the developer and builder, and that he had entered the settlement agreement on his and SYT Consultants' behalf due to other considerations. The court was also not satisfied that there was any evidence to show that the settlement agreement was reasonable.

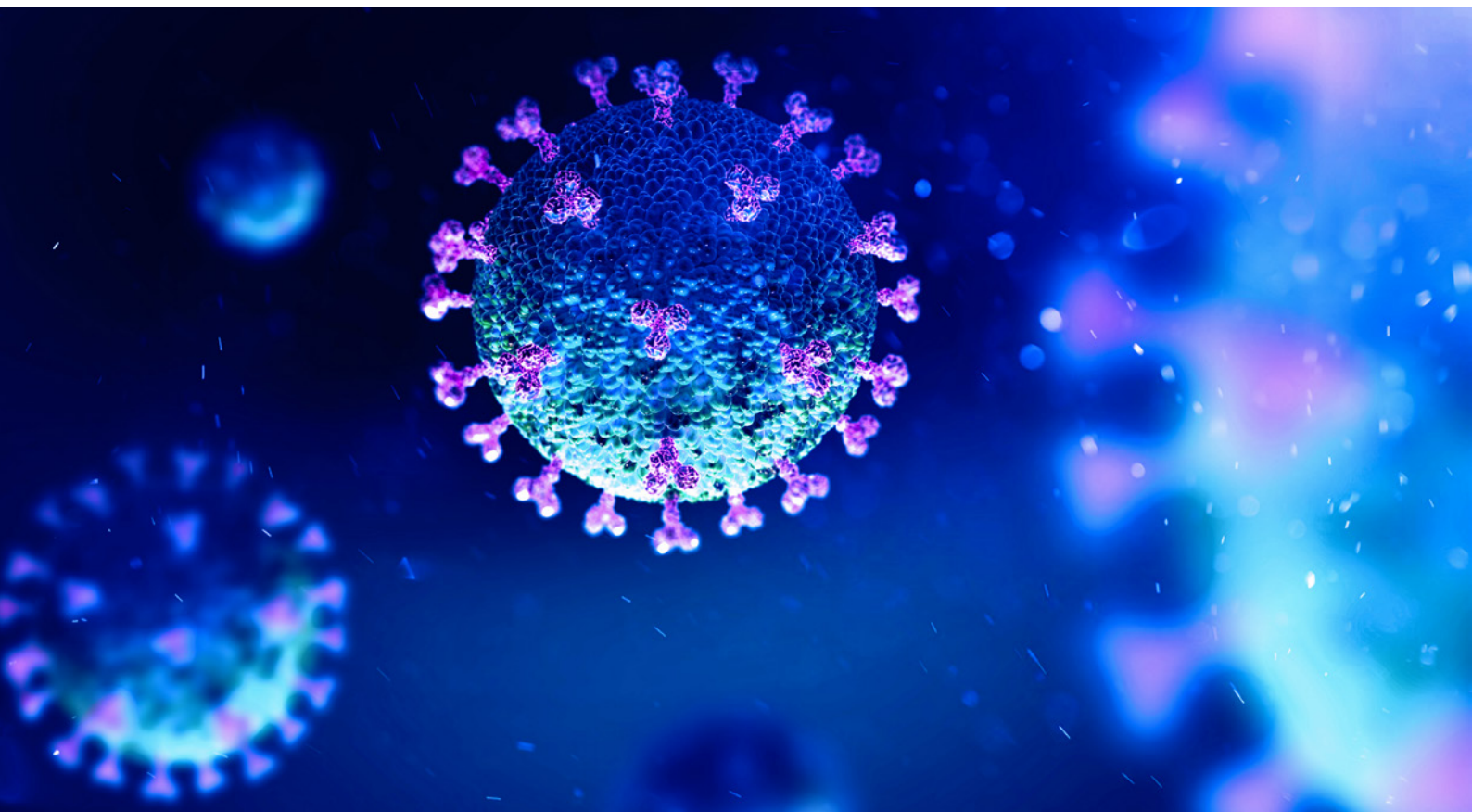
Observations

The decision demonstrates that the courts will adopt a pragmatic approach in assessing the actual liability of an insured party in a professional indemnity insurance context, and are not bound by mechanistic requirements. This avoids the potentially difficult situation where an insured must establish on a balance of probabilities each element of his own liability in order for policy coverage to be engaged. It remains the case that where an insured intends to rely on a settlement to claim policy coverage, the burden of proving the reasonableness of said settlement to the court lies with the insured party. Generally, insureds should where possible seek their professional indemnity insurers' consent before agreeing to any settlements.

References

- *SYT Consultants Pte Ltd v QBE Insurance (Singapore) Pte Ltd* [2022] SGHC 251





COVID-19 as a Force Majeure Event

In the 2022 edition of our internationally focused Annual Review of English Construction Law Developments, we had provided a comparative survey of force majeure and frustration claims across four common law jurisdictions and in doing so, reviewed the High Court of Singapore's decision in *GTMS Construction Pte Ltd v Ser Kim Koi*. This decision has now been reviewed on appeal by the Appellate Division of the High Court.

As the effects of the COVID-19 pandemic continue to play out across the global construction industry, this commentary by Appellate Division of the High Court on COVID-19 related events in the interpretation of force majeure clauses is timely.

Ser Kim Koi v GTMS Construction Pte Ltd and ors (and another appeal)

To recap, the case was in respect of a project for the construction of residential properties under the standard terms of the Singapore Institute of Architects, Articles and Conditions of Building Contract (Lump Sum Contract) (the “**SIA Conditions**”).

One of the events or circumstances entitling the contractor to extension of time under Clause 23(1)(a) of the SIA Conditions is delays in completion caused by “Force Majeure”. This phrase was not defined in the contract. The issue on appeal was whether the architect had properly granted an extension of time to the contract for force majeure to account for the need to install an overground connection box (an “**OG Box**”).

The Judge at first instance had found that the delays that had been brought about by the need for the OG Box had occurred without the fault of either party and were outside their control. In response to the employer’s claim that the delays were foreseeable, the Judge had held that “*the element of foreseeability is not critical to the concept of force majeure*” and that “*the true question is whether the event was such that it rendered performance of the contract ‘radically different’ from what was originally undertaken*”, which he thought it was. As such the Judge had held that delays qualified as a force majeure event.

The Appellate Division of the High Court held that the essence of a force majeure event is a “radical” and “external” event that prevents the performance of the relevant obligation (and not merely making it more onerous), and which is due to circumstances beyond the parties’ control.

In particular, the words “*radical*” and “*external*” suggest that the phrase “force majeure” would cover only those events or circumstances which were generally not, at the time the contract was entered into, contemplated or expected to or which might reasonably have been foreseen to occur during the performance of the contract.

The Court held that cl 23(1)(a) covers radical external events and circumstances that prevent the performance of the relevant obligations and which are due to circumstances beyond the parties’ control – for example, the COVID-19 pandemic and the “lock down” that followed over much of 2020 and 2021, the shortage of labour and materials due to the COVID-19 pandemic lock-downs, the prohibition of travel between countries and the ensuing disruption of supplies and manufacture of goods and material.

The Court disagreed with the High Court Judge that the requirement for an OG Box constituted an event of force majeure within the meaning of the SIA Conditions. The Court found that the requirement for an OG Box does not amount to such a radical or external event that is beyond the contemplation or control of the parties or something unforeseen to occur during the performance of the contract.

While the outcome of any force majeure claim will depend on the specific circumstances of the matter and the particular contract provisions in question, this decision provides support for the position that where a contract’s force majeure clauses do not expressly provide for COVID-19 events and circumstances, the courts are open to considering these as force majeure events

References

- Ser Kim Koi v GTMS Construction Pte Ltd and ors (and another appeal) [2022] SGHC(A) 34

The setting aside of arbitral awards for breach of natural justice – parties’ right to a fair hearing

Through a series of cases, the Court of Appeal of Singapore has provided guidance on the ambit of the fair hearing rule in applications to set aside arbitration awards due to a breach of natural justice.

Dissatisfied parties in Singapore seated arbitrations may seek recourse to set aside arbitral awards under section 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) on the ground that a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced; and under and Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (“**Model Law**”) on grounds that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.

In agreeing to set aside some awards, while refusing to set aside others, the Court continues to emphasise a principled approach in its review of arbitral awards.



BZW and another v BVZ [2022] 1 SLR 1080

In the first of the cases, the Court in BZW and another v BVZ [2022] 1 SLR 1080 ("**BZW**") agreed with the High Court that a breach of the fair hearing rule could arise from the defects in the chain of reasoning adopted by a tribunal in its award. In its judgment, the Court also clarified the ambit of parties' rights to a fair hearing at arbitration.

In agreeing with the High Court that the breach of the fair hearing rule was connected to the making of the award, and had prejudiced the respondent's rights, the Court pointed out that the fair hearing principle requires a tribunal to pay attention to what is put before it and to give its reasoned decision on the arguments and evidence presented. Although the court in a setting aside application does not sit in appeal over the award, the court remains entitled to interfere if it considers the tribunal to have been manifestly incoherent in the making of the award. Such a decision would show that the tribunal had not understood or dealt with the case at all, which meant that parties would not have been accorded a fair hearing.

Background

The respondent buyer had entered into a shipbuilding contract with the appellant shipbuilders, two associated companies, for the construction and delivery of a vessel by the appellants to the respondent. Post-delivery of the vessel, the respondent commenced arbitration proceedings against the appellants in a Singapore-seated arbitration administered by the Singapore International Arbitration Centre for: (1) a claim for liquidated damages due to the delay in delivery of the vessel (the "**Delay Claim**") and (2) a claim in damages for breach of contract as a result of the installation of inadequate generators (the "**Rating Claim**"). The appellants, in turn, filed a counterclaim for payment for additional work.

In the Delay Claim, the respondent claimed for liquidated damages for a period of 73 days, totalling about US\$3.65 million. In their defence, the appellants pleaded seven alternative defences, including relying on the "prevention principle", i.e. as the appellants were prevented from completing its contractual obligations on time by the respondent's own acts, and there being no contractual mechanism to extend time, the time for the appellants to deliver the vessel to the respondent was set at large. The contractual dates were therefore no longer applicable, and the appellants were subject only to a broader requirement to deliver the vessel within a "reasonable period of time".

The appellants also pleaded that the liquidated damages clause was a penalty clause, and that the respondent had waived any right to claim liquidated damages. The four other defences to the Delay Claim contend that: (i) the appellants had delivered the vessel before the contractual date, (ii) that the appellants were entitled to an extension of time for delivery, (iii) that the starting date to pay liquidated damages had shifted and (iv) the appellants' liability to pay liquidated damages had lapsed because a change in the Contract provided that the obligation to pay liquidated damages would end on a certain date.

In the Rating Claim, the respondent claimed that contractually, the appellants were obliged to equip the vessel with generators rated IP44. Instead, in breach of contract, the appellants delivered the vessel installed with generators only rated IP23. In their defence, the appellants claimed, inter alia, that the respondent was estopped from asserting that the appellants were under an obligation to upgrade the vessel's generators from IP23 to IP44 as the appellants had complied with the respondent's own request.

The award handed down by the tribunal consisting of three arbitrators dismissed both the respondent's claims and the appellants' counterclaim.

Subsequent to receiving the award, the respondent submitted a request to the tribunal for correction of the award. The award had originally stated that the "*(respondent's Mr Tan) provided supporting documents to show that IP23 was fit for purpose*". In its request for correction, the respondent pointed out that Mr Tan was the appellants' representative, not the respondent's. The tribunal subsequently reworded the award to state: "*(t)he Tribunal has noted that (the appellants' Mr Tan) provided supporting documents to show that IP23 was fit for purpose*".

The respondent applied to set aside the award – alleging six breaches of natural justice in relation to the Delay Claim. The two most important breaches cited were that: (i) there was no nexus between the chain of reasoning which the tribunal adopted and the cases which the parties had advanced; and (ii) the tribunal failed to direct its mind to the merits. In respect of the Rating Claim, the respondent cited five breaches of natural justice, with the most important breach being the absence of any nexus between the tribunal's chain of reasoning in dismissing the Rating Claim and the parties' cases on this head of claim.

The High Court held that the tribunal was in breach of natural justice in the way it dealt with the Delay Claim and the Rating Claim, as when it dismissed the respondent's claim, the tribunal's chain of reasoning had no nexus to any of the appellants' defences. The appellants appealed.

The Court of Appeal's Decision

The Court referred to the four elements set out in *John Holland Pty Ltd (formerly known as John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [18] that needed to be established in order to set aside an award on grounds of natural justice, namely: (a) first, the specific rule of natural justice that was breached; (b) second, how it was breached; (c) third, how the breach was connected to the making of the award; and (d) fourth, how the breach prejudiced the respondent's rights.

The Court agreed with the High Court that the specific rule of natural justice that was breached was the fair hearing rule, and identified the two types of breaches of the fair hearing rule that were present in the award: (i) the failure by the tribunal to apply its mind to the essential issues arising from the parties' arguments in respect of the Delay Claim, and (ii) a defect in the tribunal's chain of reasoning in the Rating Claim that had no nexus with the parties' submissions.

With respect to the Delay Claim, the High Court found that when the tribunal dismissed the Delay Claim, the tribunal's chain of reasoning had no nexus to any of the appellants' defences. There was no indication anywhere in the award, apart from the prevention principle, that the tribunal had adopted as part of its reasoning any aspects of the appellants' six other defences.

The award did not mention the appellants' defence that the liquidated damages was a penalty clause or that the respondent had waived any right to claim liquidated damages.

Neither did the tribunal refer to any of the other defences that would logically have been defeated by the dismissal of the appellants' counterclaim. In dismissing the appellants' counterclaim, the tribunal held *inter alia* that:

1. the appellants had delayed in delivering the vessel under the contract - this would necessarily have entailed a rejection of the appellants' defence of no breach and that they had delivered the vessel before the contractual date;
2. there had not been an extension of the delivery date - this would have amounted to a rejection of the two defences that there had been an alteration in the contractual dates; and
3. the appellants were not entitled to an extension of time as they did not comply with the contractual conditions precedent - this would have necessarily meant a rejection of the defence that there had been an extension of time.

The only defence to the Delay Claim that could have had a nexus to the tribunal's chain of reasoning was the appellants' defence in reliance on the prevention principle. This would have required a discussion as to: (i) whether an act of prevention had been committed by the respondent; (ii) whether there was a mechanism in the Contract for the appellants to claim an extension of time; and (iii) whether the act of prevention caused the delay to the vessel being ready for delivery. Nonetheless, the tribunal expressly stated in the award that it did not need to deal with the issue of extension of time. The causation point was not therefore addressed at all in the award. The Court of Appeal agreed with the High Court that the tribunal had simply failed to apply its mind to these essential issues.

With respect to the Rating Claim, the High Court held that the majority of the tribunal did not rely on a chain of reasoning with a nexus to any of the appellants' three defences, namely: (i) there was no contractual requirement for any particular rating for generators; (ii) the respondent was estopped from asserting that the appellants were under an obligation to upgrade the vessel's generators from IP23 to IP44; and (iii) minutes of negotiations that had been signed by the parties superseded any specific technical obligations in the contract and permitted the appellants to deliver the vessel with generators rated IP23.

The majority of the tribunal had found that the end-buyer of the vessel required the generators to be rated IP44 and that as a result of meetings with the end-buyer, the parties "understood that the [vessel's] generators had to be upgraded from IP 23 to IP 44". As this meant that the appellants understood that they were obliged to upgrade the generators, this necessarily meant that the tribunal had rejected the appellants' first defence that they were not in breach as there was no contractual requirement to deliver the vessel with IP44 generators.

In relation to the appellants' second defence of estoppel, the tribunal's original chain of reasoning referred to an email by Mr Tan which stated that the IP23 generators were "fit for purpose". However, having wrongly identified Mr Tan as being the respondent's representative in the award, the tribunal subsequently amended the award to (correctly) state that Mr Tan was the appellants' representative. This therefore meant that there was no longer a finding or evidential support in the amended award for the assertion that the respondent had represented to the appellants that the IP23 generators were "fit for purpose". As held by the Court of Appeal, "...once the Tribunal amended ... the Award to simply rely on the appellants' own assessment that the IP23 generators were fit for purpose, the element of representation on the part of the promisor needed for the estoppel defence could not be established. The inescapable inference that has to be

drawn from the Tribunal's amendment of ... the Award in the way that it did is that the Tribunal failed to apply its mind to the essential issue arising from the parties' arguments, that of the existence of representation in the estoppel defence."

As for the appellants' third defence that the minutes of negotiations had superseded specific technical contractual obligations, the award did not refer to the minutes of negotiations at all.

These breaches of the fair hearing rule were directly connected to the making of the award – the Delay Claim and the Rating Claim were dismissed either: (i) because the tribunal adopted the appellants' prevention principle and estoppel defences or (ii) for reasons other than those defences. Either way, the connection between the breaches of natural justice and the award was clear. The tribunal had not applied its mind to the issue of causation as regards the prevention principle for purpose of the Delay Claim, or as to the element of representation as regards the estoppel defence for purpose of the Rating Claim. Equally, if the tribunal had dismissed these claims for reasons other than those particular defences, then nothing in the award supported any connection whatsoever to the appellants' defences in the arbitration and the dismissal of the respondent's claims.

These breaches prejudiced the respondent's rights, as had the tribunal applied its mind to the parties' cases and essential issues, it could have found in favour of the respondent. The Court held that it was not necessary for the Court to hold that the tribunal would have found in the respondent's favour on both claims. It was sufficient that there was prejudice arising from the failure to consider the submissions which arguably could have succeeded.

During the appeal, the appellants argued that the fact that the High Court Judge had pored over thousands of pages of the award, pleadings and submissions in great detail in reaching its judgment to set aside the award in the first instance was wrong, as an application to set aside an award is not a pretext for the losing party to appeal on the merits. Referring to *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972, the appellants asserted that the court should only set aside an award if the breach of natural justice is "demonstrably clear on the face of the record without the need to pore over thousands of pages of facts and submissions".

The Court disagreed and held that the allegations in the present case that the impugned portions of the award had no nexus to the case as actually presented to the tribunal required the Judge to undertake the exercise it did. The Judge needed to understand what happened in the arbitral proceedings and analyse the award in some

depth in order to decide whether there was substance to the allegations.

The appellants also argued that the enquiry as to whether a tribunal's chain of reasoning is sufficiently connected with the essential issues is not concerned with whether a tribunal's reasoning is cogent or correct. The Court was clear that on the applicable standards, even if the courts consider that, in reaching its decision, a tribunal had made mistakes of facts or law or both, the courts would not interfere with an award by reason of such mistakes alone. However, the Court held that applying that principle would still not allow for or support the right of any tribunal to be manifestly incoherent in making its decision.

CJA v CIZ [2022] 2 SLR 557

The second of the cases, *CJA v CIZ* [2022] 2 SLR 557 ("**CJA**") demonstrated that when it comes to challenges based on natural justice, it was important to look at the question of whether an issue had been sufficiently raised by or to the parties.

Background

The parties had entered into a consultancy agreement wherein the appellant was to provide consultancy services to the respondent in relation to mergers and acquisitions of oil and gas fields around the world. In exchange, the respondent would pay the appellant a "success fee" upon the latter's presentation of an "Opportunity" and the respondent's completion of the acquisition of an interest in an oil field pursuant to a sale and purchase agreement or similar document. A dispute subsequently arose over whether the appellant was entitled to payment of success fees under the agreement. The appellant commenced arbitration proceedings against the respondent alleging that despite the successful completion of two Opportunities, the respondent had failed to pay it the corresponding success fees. The respondent rejected the appellant's claim on the basis that the agreement had expired, and therefore nothing was due. The appellant pleaded that despite the expiration of the agreement, the success fees were still payable since, among other things, it was orally agreed between parties that the agreement would be extended for a further period. However, the respondent denied the existence of any subsisting agreement after the agreement expired at the end of 2013.

The tribunal issued the award which upheld the appellant's claim in respect of one of the Opportunities. In making the award, The tribunal rejected the appellant's assertion of an agreement that was partly oral and partly written. The parties' contract was entirely contained in the written documents. However, it considered that the real matter at the heart of the proceedings was whether the appellant could maintain

claims in respect of the Opportunities proposed by it which had been accepted by the respondent before the expiry of the agreement. The tribunal considered that the determination of the issue turned on the interpretation of the material terms of the agreement. The tribunal held that it was not necessary for a sale and purchase agreement (“**SPA**”) in respect of an Opportunity be entered into and/or completed before the expiry of the agreement, and the right to recover success fees was not lost as long as a clear link to the successful completion of the Opportunity was shown. All that happened on the expiry of the agreement was that the exclusivity enjoyed by the appellant in referring to the respondent further Opportunities would terminate. However, the obligation to pay the success fee continued. Although the agreement referred to an SPA being executed, the tribunal found that it was plain it also extended to an SPA that was being negotiated or in relation to an Opportunity that bore fruit later.

On the application of the respondent to set aside parts of the award, the High Court judge found that the tribunal had exceeded its jurisdiction and allowed the setting aside. The High Court observed that the appellant’s claim, according to its pleadings, had been based on the fact that the agreement had been extended whether orally or impliedly, for a further period. The respondent argued that there was no such extension. The substance of the tribunal’s decision was that: (i) yes, the agreement had expired before an SPA was signed, but (ii) the appellant was entitled to its success fee because the agreement did not require the SPA to be entered into before the expiry of the agreement.

The Judge was of the view that since the tribunal found that there was no subsisting agreement after the agreement expired, “the very premise” of the appellant’s claim had been rejected and that ought to have been the end of its claim. “The tribunal... should have respected the appellant’s decision as to how it chose to frame its case.”

The appellant appealed.

The Court of Appeal’s Decision

The main issues before the Court of Appeal were whether the judge had correctly held that the tribunal’s findings were not within the scope of submission to the tribunal and therefore in excess of its jurisdiction; and if not, whether there was a breach of natural justice by the tribunal in the making of the award, such that the setting aside of the impugned portions of the award should nevertheless be upheld.

To the first point as to whether the tribunal acted in excess of jurisdiction, the Court of Appeal referred to the case *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 2

SLR 1279 (“**Bloomberry**”) which had restated the principles governing a challenge on the basis of Art 34(2)(a)(iii) of the Model Law for an excess of jurisdiction. While fundamentally an arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination by the parties, a practical view has to be taken regarding the substance of the dispute which has been referred to arbitration. (*Bloomberry* at [68])

The Court of Appeal held that the court must look at matters in the round to determine whether the issues in question were live issues in the arbitration. The court should not apply an unduly narrow view of what the issues were but instead to have regard to the totality of what was presented to the tribunal and consider whether, in the light of all that, these points were live. Referring to *CDM v CDP* [2021] 2 SLR 235 (“**CDM**”), the Court of Appeal reiterated that the question of what matters were within the scope of the parties’ submission to arbitration would be answerable by reference to five sources: (i) the parties’ pleadings, (ii) the list(s) of issues, (iii) opening statements, (iv) evidence adduced, and (v) closing submissions at the arbitration.

The assessment of whether an arbitral award should be set aside for an excess of jurisdiction follows a two-stage inquiry: (a) first, the court must identify what matters were within the scope of submission to the arbitral tribunal; and (b) second, whether the arbitral award involved such matters, or whether it involved a “*new difference ... outside the scope of the submission to arbitration and accordingly would have been irrelevant to the issues requiring determination.*” (*CDM* at [17])

The Court of Appeal reviewed the scope of parties’ submission to arbitration by reviewing the five sources stated above, and noted that the appellant’s second list of issues, which was submitted following the close of the evidential hearing, tracked the eventual reasoning of the tribunal, i.e., that on an interpretation of Article 2 of the agreement, the respondent would be obliged to pay a success fee in relation to an Opportunity that was embraced by the agreement, even if the Opportunity only bore fruit subsequently. The inclusion of this issue in the appellant’s list of issues was a result of a prompting by the tribunal on the first day of hearing to the parties to consider (i) whether there could be liability after the pendency of the agreement, and (ii) what was the position of an Opportunity notice that had been presented but not executed.

The evidence adduced by the parties at the arbitration also dealt in some detail with the issue of whether the respondent could continue to be liable under the agreement following the expiry date. The appellant’s closing submissions contended that the success fee was payable upon the completion of the Opportunity regardless of when such a completion took place.

Significantly, the respondent's closing submissions argued against the fundamental point raised by the appellant, i.e., that the respondent's obligation to pay the success fee was not constrained by the duration of the agreement.

What was clear was that the fundamental point upon which the tribunal eventually found for the appellant – namely, that various provisions of the agreement pointed to the success fee being payable upon completion of the Opportunity regardless of when that took place – was present in the appellant's submissions in the arbitration. The tribunal had to interpret various provisions of the agreement in arriving at this conclusion. However, the Court of Appeal held that these findings did not involve "*a new difference*" outside the scope of parties' submission to arbitration. They were in fact premised on the fundamental point raised by the appellant in its submissions that the respondent's obligation to pay the success fee was not constrained by the term limits of the agreement.

The Court of Appeal held that the questions of the interaction between the payment obligations and the expiry date of the Amended Agreement were clearly canvassed before the tribunal, even though the eventual reasoning of the tribunal on the effects of relevant articles of the agreement were not explicitly in the terms argued by the appellant. The impugned findings of the tribunal were within the scope of the dispute submitted to arbitration.

As to the second point of whether the tribunal had acted in breach of natural justice, the Court of Appeal reiterated that a party's right to a full opportunity of presenting its case is the embodiment of "*basic notions of fairness and fair process which underpin the legitimacy of all forms of binding dispute resolution*". Nonetheless, a party's right to an opportunity to present its case in an arbitration is not unlimited in scope, but "*impliedly limited by considerations of reasonableness and fairness*" (China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another [2020] 1 SLR 695 at [97] and [104(b)]).

The thrust of the respondent's challenge on the ground of breach of natural justice was founded on the fair hearing rule. According to the respondent, the tribunal had based its decision on matters not submitted or argued before it. The respondent alleged that by adopting a chain of reasoning in its award which it did not give the respondent a reasonable opportunity to address, the tribunal denied it a reasonable opportunity to present its responsive case.

The Court did not agree with the respondent. The tribunal had specifically asked the parties to consider the situation in which an Opportunity was presented but, through no fault of either party, the sale and purchase

agreement relating thereto was only executed after the expiry of the agreement. Both parties addressed the issue in their respective closing submissions. This was therefore not, according to the Court, a case "where the reasoning of the Tribunal simply did not feature in the course of the arbitration, or where the tribunal 'select[ed] an issue to decide on [its own] and in so doing, deprived parties of the opportunity to adduce evidence or make arguments on that issue."

The Court held that the more fundamental point is that an arbitral tribunal is entitled to arrive at conclusions that are different from the views adopted by parties (regarding contractual interpretation, or otherwise as the case may be), provided that these conclusions are based on evidence that was before the tribunal and that the tribunal had consulted the parties where the conclusions may involve a dramatic departure from what has been presented to it.

The Court further stated:

- The focus must be on whether the tribunal has adopted "reasonable inferences, findings of fact or lines of argument" even if they have not been specifically addressed by the parties.
- It is often a matter of degree as to how "unexpected the impugned decision is" in order for it to be said that parties were deprived of an opportunity to argue it. There may well be cases where it is reasonable for the arbitral tribunal to arrive at conclusions or draw inferences that are opposed to the views of both parties, even without further consultation with them.
- There is a difference between, on the one hand, a party having no opportunity to address a point or his opponent's case, and a party failing to recognise or take the opportunity which exists. The nature of the issue is also relevant in determining the extent of opportunity that a party ought to be granted to address the determinative issues - in a situation involving questions of fact, pleadings assume greater significance in indicating the kind of opportunity that natural justice requires to be given.

In the present case which involved a legal issue of the contractual interpretation of various provisions of the agreement, the Court was satisfied that parties had submitted on the issue and that the respondent had sufficient opportunity to canvass evidence on, amongst other things, the contextual dimension and commercial purpose of the agreement and that no breach of the fair hearing rule had occurred in the circumstances. Further, the Court was of the view that that the chain of reasoning adopted by the tribunal in arriving at its findings also bore sufficient nexus to parties' cases,

arising either by reasonable implication on parties' pleadings, or at the very least, been brought to the notice of the respondent. The Court of Appeal allowed the appeal.

CEF and another v CEH [2022] SGCA 54

Finally, in *CEF and another v CEH* [2022] SGCA 54 ("**CEF**"), the Court partially allowed the setting aside of an arbitral award on the basis that the tribunal's chain of reasoning in respect of a damages order was not one which the parties had reasonable notice that the tribunal could adopt, and that it did not have a sufficient nexus to the parties' arguments, thus constituting a breach of natural justice. The Court further affirmed that the assessment of damages by an arbitral tribunal also remains subject to the fundamental rules of natural justice.

Background

The appellants had contracted with the respondent to design and build a steel making plant for the respondent.

In 2011, the first appellant entered into a contract with the respondent's parent company pursuant to which the first appellant was to provide engineering equipment and services to design and build a steel-making plant.

- The first appellant's scope of supply under the contract was to: (i) supply the engineering for the plant; (ii) supply the equipment for the plant; (iii) supervise the erection of the plant; (iv) supervise the commissioning of the plant; and (v) train workers to operate the plant.
- The respondent's parent company's scope was to: (i) install the foundations of the plant; (ii) manufacture and erect the steel building of the plant; (iii) erect the equipment of the plant; and (iv) install, start up, operate and maintain the plant in conformity with, *inter alia*, the technical specifications.

Subsequently, the respondent's parent company assigned the contract to the respondent. In 2014, the first appellant's obligation to provide supervision and training services to the respondent was assigned to the second appellant.

There were delays in the construction of the plant. In addition, the completed plant failed to achieve its production target. The respondent purported to terminate the contract. In August 2016, the appellants commenced an arbitration against the respondent. Some three weeks later, the respondent commenced

its own arbitration against the appellants. The two arbitrations were consolidated by consent. The claimants and respondent in the arbitration were the appellants and the respondent, respectively.

The majority of the tribunal found that the respondent had been induced to enter into the contract by the appellants' misrepresentations, and that the respondent was therefore entitled to rescission of the contract. The tribunal made various orders including that:

1. The appellants were to pay the respondent the contract price, less sums to account for two loans which the first appellant had previously extended to the respondent, the respondent's use of the plant after it had been completed and the diminution in value of the plant (the "**Repayment Order**").
2. The respondent was to transfer the title to the plant to the appellants in return for payment under the Repayment Order (the "**Transfer Order**").
3. The appellants were to pay the respondent damages under the Misrepresentation Act (Cap 390, 1994 Rev Ed) to compensate the respondent for five heads of loss and/or expenses which it would not have incurred but for the first appellant's misrepresentations (the "**Damages Order**"). The tribunal only permitted the respondent to recover 25% of the damages it had sought under each of the five heads as it found the respondent's evidence of the quantum of the loss it had suffered under each head to be deficient.

The appellants applied to the High Court to set aside the award. The High Court judge declined to set aside the award.

Court of Appeal's Decision

On appeal to the Court of Appeal, the Court of Appeal set aside the Damages Order, and allowed the rest of the award to stand.

Transfer and Repayment Orders

The appellants asserted that the Transfer Order should be set aside on the basis that it was uncertain, ambiguous, impossible and/or unenforceable; contained decisions on matters beyond the scope of the submission to the arbitration; and that it was obtained in breach of natural justice and/or without giving the appellants an opportunity to present their case on the same.

The appellants also asserted that the Repayment Order should be set aside on the basis that it was issued in breach of the fair hearing rule and/or the "no evidence rule", and is therefore contrary to natural justice. Further, if either the Transfer Order or the Repayment Order were set aside, the appellants further asserted

that the other Order should be set aside on the basis that both Orders were “reciprocal, interdependent and necessarily contingent on each other”

The Court of Appeal did not accept the appellants’ arguments with respect to the Transfer Order. With respect to the appellant’s assertion that the Transfer Order contained decisions on matters beyond the scope of submission to the arbitration, (i.e. that the respondent only sought a monetary order and did not seek a transfer of title or counter-restitution), the Court found that the applicable rules only required the terms of reference to include a summary of the parties’ respective claims and of the relief sought by each party. Thus, just because a particular head of relief did not appear in the terms of reference did not mean it was outside the scope of the submission to arbitration. In the Court’s view, counter-restitution of the plant was the natural legal consequence of the respondent’s counterclaim for rescission, as set out both in the terms of reference and in the respondent’s pleadings.

With respect to the Repayment Order, the appellants had submitted that the tribunal had made the Repayment Order without any evidence of the current value of or the diminution in value of the plant. If the tribunal had wished to arrive at its conclusion on an issue where direct and relevant evidence was sorely lacking, the parties ought to have been given a chance to comment and provide submissions on the tribunal’s thinking or proposed line of reasoning.

However, the Court disagreed. The High Court judge had not erred in finding out that the diminution in the value of the plant was a live issue in the arbitration from the very outset. The appellants failed to adduce evidence. They cannot now argue that they had been denied a fair hearing. Even if the tribunal had made an error of law in finding that the burden of proving the diminution in value was the appellants’ to bear, this was not a ground for setting aside an award under the Model Law.

The appellants had also urged the Court to consider adopting the “no evidence rule” – i.e. where an award which contains finding of fact made with no evidential basis at all is liable to be set aside for breach of natural justice. This was rejected by the Court of Appeal, as to do so would run contrary to the policy of minimal curial intervention in arbitral proceedings.

The Damages Order

However, the Court did find that the tribunal’s chain of reasoning in respect of the Damages Order was not one which the parties had reasonable notice that the tribunal could adopt, nor did it have a sufficient nexus to the parties’ arguments. The Court referred to the case of BZW discussed above with respect to the fact that a breach of the fair hearing rule could arise from the chain of reasoning which the tribunal adopts in its award.

The tribunal had expressly stated that there were deficiencies in the respondent’s evidence due to the respondent’s failure to produce the relevant supporting documents or to explain how the existing documents substantiated its claim, but nonetheless proceeded to award the respondent 25% of each claimed head of reliance loss.

The Court found that a reasonable litigant in the appellants’ shoes could not then have foreseen the possibility of reasoning of the type revealed in the award – i.e., that the tribunal, having noted all the deficiencies in the respondent’s evidence, would then go on to adopt a figure of 25% of the amount claimed as being the loss incurred. Both parties would have expected that the tribunal would only award what the respondent was able to prove. If the tribunal were to award 25% of the award, it would have been because the tribunal found that the respondent had only proved 25% of its claim.

The tribunal had justified its reasoning with reference to the “flexible approach” referred to in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* and another [2008] 2 SLR(R) 623 (“**Robertson Quay**”) at [28]-[30]. This chain of reasoning did not have a sufficient nexus to the parties’ arguments.

The Court noted that the sole reference to *Robertson Quay* was in the respondent’s reply post-hearing submissions, under a sub-heading concerning the respondent’s claim for expectation loss. Even in the respondent’s own reply post-hearing submissions, the respondent did not cite *Robertson Quay* for the proposition that, if the tribunal was not satisfied as to the state of the respondent’s evidence concerning proof of its loss, the tribunal could then rely on the “flexible approach” to justify awarding a certain percentage of the respondent’s total claim (assuming the case could have been cited for that proposition which seemed doubtful). Even the respondent acknowledged that, on the “flexible approach”, the tribunal had to first be satisfied that the respondent’s evidence was “more likely to be true than not” in order to award any damages to the respondent.

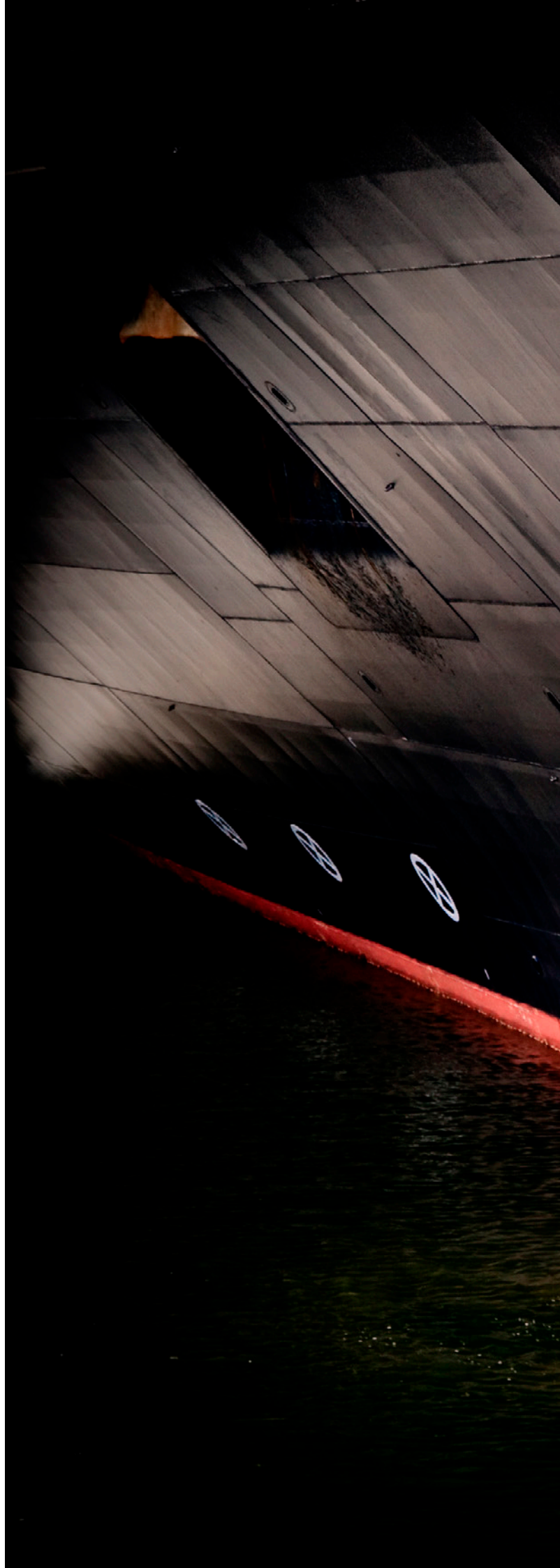
The Court considered that this breach of natural justice was connected to the making of the award (referring to BZW at [62]). Had the tribunal informed the parties of its intention to apply the “flexible approach” in this manner, the appellants would have had the opportunity to inform the tribunal of its objections to such an approach, or the appellants would have had the opportunity to decide whether to ask the respondent to produce the source documents or to take a forensic risk by resting their defence only on the burden of proof. This compliance with the rules of natural justice could reasonably have made a difference to the outcome of the arbitration. This was a breach of natural justice that had prejudiced the appellants’ rights.

Conclusion

While the courts will accord fair latitude to tribunals and respect a tribunal's autonomy in coming to its own decision, it is clear from the cases of BZW and CEF that the rights of the parties to a fair hearing and to be provided with reasonable notice of the tribunal's chain of reasoning remain paramount and sacrosanct.

Nonetheless, the threshold for setting aside an award is still high. As demonstrated in the case of CJA, a party seeking to set aside an award based on a breach of natural justice should be aware that tribunals do not need to adhere strictly to the pleaded cases of the parties, but that it can adopt chains of reasoning that flow from parties' arguments and are ancillary to the dispute submitted by parties, especially as regards points of law.

The recent cases by the Court of Appeal provide helpful clarification on when and how a breach of the fair hearing rule might arise and provides guidance on arbitration practitioners when considering their approach to burden of proof arguments and damages claims.

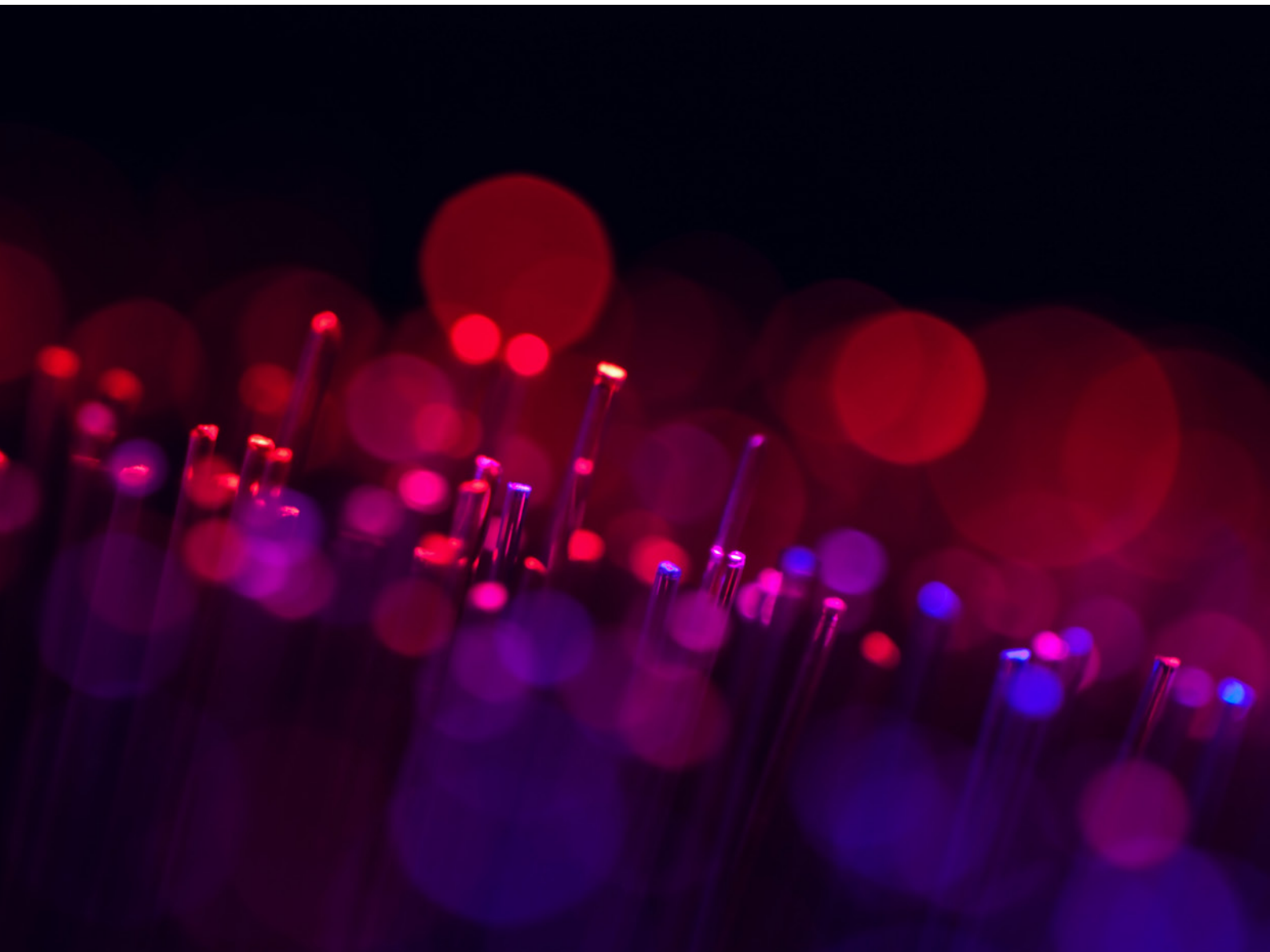




Remission of Arbitral Awards: The Scope of The Tribunal's Powers

Art 34(4) of the UNCITRAL Model Law on International Commercial Arbitration ("**the Model Law**") provides the Judge in application to set aside an award with the power to suspend proceedings, and to remit the award back to the tribunal, providing the tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the tribunal's opinion will eliminate the grounds for setting aside.

A recent decision of the Court of Appeal demonstrates that this power and scope of remission is defined strictly.



CKH v CKG [2022] SGCA (I) 6

Background

A strongly contested arbitration had led to a final award which was subsequently corrected by two memoranda of corrections made by the tribunal. Previous proceedings to set aside the award had reached the Court of Appeal in *CKH v CKG and another matter* [2022] SGCA(I) 4. In that case, the Court of Appeal upheld the High Court judge's decision that the award as corrected failed to take into account the existence and quantum of a debt and interest owing by the appellant to the respondent in relation to freight and taxes for logs supplied.

The High Court judge exercised its power under Art 34(4) of the Model Law, and ordered that the “[t]he Remitted Matters shall be remitted to the Tribunal on the Terms of Reference set out in Annex A”.. The “Remitted Matters” had been debated between the parties and were carefully formulated and defined by the High Court Judge.

Before the tribunal, the appellant raised a number of points relating to the principal debt and interest which the respondent contended fell outside the scope of the remission ordered. The tribunal considered it necessary for parties to revert to the High Court judge who had ordered the remission of the Remitted Matters, for him to resolve that dispute.

The High Court judge held that the tribunal's role was strictly limited to the exercise defined by the order for remission contained in Annex A, and that the further points which the appellant claimed to raise were not open to it before the tribunal on such remission.

Court of Appeal's Decision

The Court of Appeal held that the power conferred by Art 34(4) of the Model Law is on its face a relatively broad power. However, the scope of remission is necessarily defined by the terms of the order ordering remission. Apart from the remission ordered, there is no basis on which a party or the tribunal itself can seek to re-open or expand the subject matter of the award or arbitration. The tribunal's original award renders it functus officio, save to the extent that the order for remission gives it revived power. The order for remission defines the limits of the exercise which the parties and the tribunal can undertake when the matter returns before the tribunal.

The appellant sought to challenge the accuracy of, or to qualify, the recitals in the order of court ordering remission. The Court of Appeal held that such course of action was not open to the appellant. The recitals and order were integral aspects of the remission ordered by the Judge under Art 34(4) of the Model Law, and were therefore res judicata.

All that was left open for the Court to deliberate were issues related to the interpretation on the meaning and scope of the remission that was ordered.

The Court of Appeal held that the limited remission ordered could not be misused so as to raise matters clearly falling outside the scope of the ordered remission. The recitals to the remission fixed the parameters to the order and those were not open to being revisited by the tribunal on the remission. The insuperable obstacle faced by all the suggested arguments was that they fell outside the scope of the limited remission ordered.

These observations gave a summary account of the reasoning which led the Court of Appeal to reject the appellant's case regarding the scope of the remission. The courts will not give a tribunal the latitude to determine further issues arising from the parties' arguments, beyond what has been expressly remitted in terms of the issues. This decision is a reminder that the question of whether to remit involves, among other considerations, applying the objective test of whether a reasonable person would be confident that the tribunal would be able to reconsider the issue remitted in a fair and balanced manner and would not, even sub-consciously, be influenced toward justifying or re-instituting its previous decision. In this case, the courts' satisfaction that a reasonable person would have that necessary confidence was expressed in the scope of the remission, which did not allow these matters to be relitigated further.

References

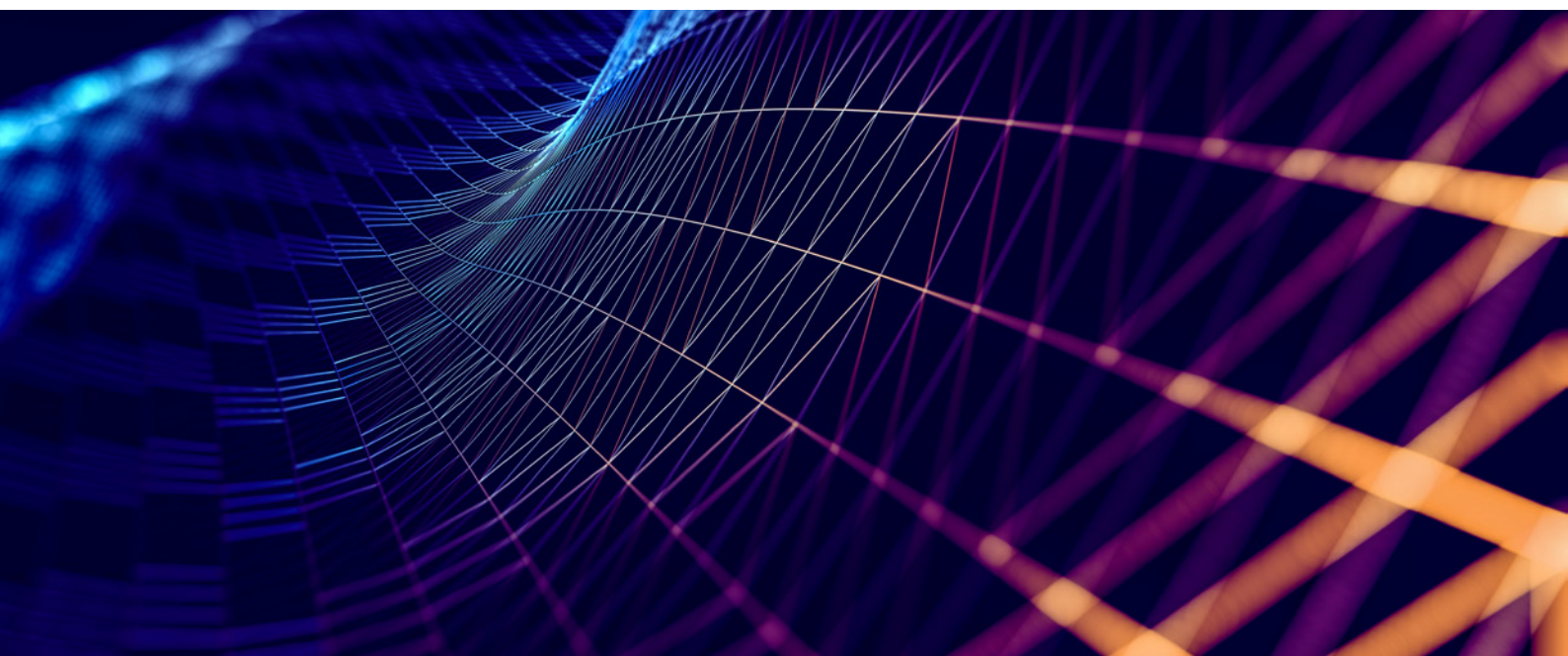
— CKH v CKG [2022] SGCA (I) 6

Singapore Building and Construction Authority further develops Collaborative Contracting Regime

In a move to encourage greater collaboration and mutual trust between stakeholders in the built environment sector, Singapore's Building and Construction Authority ("**BCA**") has developed a set of collaborative clauses as options to the Public Sector Standard Conditions of Contract ("**PSSCOC**").

The PSSCOC is the standard form used for all public sector construction projects in Singapore, and available in three versions, namely (i) PSSCOC for Construction Works; (ii) PSSCOC for Design & Build; and (iii) PSSCOC for Nominated Sub-Contract. First published by the BCA in 1985, it has gone through several updates throughout the years. We had written about the latest edition of the PSSCOC published in 2020 and the key amendments and updates [here](https://www.cms-lawnow.com/ealerts/2020/08/latest-amendments-to-the-public-sector-standard-conditions-of-contract-psscoc) <<https://www.cms-lawnow.com/ealerts/2020/08/latest-amendments-to-the-public-sector-standard-conditions-of-contract-psscoc>>.

This publication by BCA of a set of collaborative clauses in the form of option modules to the PSSCOC is the latest in BCA's holistic efforts to transform the built environment sector in Singapore. BCA has been promoting collaborative practices in the construction sector since 2017. By way of background, we highlight some of the key developments below.



Construction Industry Transformation Map

Recognising that the construction sector in Singapore was being impacted by global issues such as the digital revolution, rapid urbanisation and climate change, and that transformation of the built environment sector required effort and collaboration from all stakeholders; the BCA consulted and engaged extensively with stakeholders for over a year before developing and launching the Construction Industry Transformation Map (“**ITM**”) in October 2017.

It was the goal of the Construction ITM to create an advanced and integrated built environment sector and sought to adopt productive construction methods and embrace digitalisation. One of the main components of the Construction ITM was a push towards a collaborative approach amongst stakeholders as a means to increase productivity in the industry. The Construction ITM identified three transformation areas as being key to address the challenges faced by the sector: (i) the Integrated Digital Delivery (“**IDD**”); (ii) Design for Manufacturing and Assembly (“**DfMA**”); and (iii) green buildings.

IDD leveraged on cloud and digital technology to connect stakeholders across the project delivery process by sharing accurate and timely digital information with the aim of inter alia minimising delays and reworks, improving production and delivery coordination of factory-produced building parts, speeding up the construction process, as well as reducing noise and disruption to the surrounding environment. DfMA sought to change the way buildings were constructed by shifting labour-intensive construction processes to a controlled factory environment by prefabricating quality building components before onsite assembly, thus enabling builders to complete their projects faster, safer, cleaner, quieter, and with better quality. Green buildings focussed on the design aspect of the buildings and sustainable practices in operations and maintenance of buildings.

Collaborative bidding for consultancy services

From October 2018, in line with the Construction ITM, BCA introduced collaborative bidding for the procurement of construction relation consultancy services tenders for public sector building and construction projects. This was to build up capabilities and facilitate collaboration among firms with complementary competencies to create a wider pool of competent firms in the sector.

Built Environment Industry Transformation Map

The COVID-19 pandemic exposed and exacerbated many of the sector’s vulnerabilities, particularly with respect to issues of manpower and supply chains. Recognising the need for collective transformation across the built environment sector, the Construction ITM was refreshed and amalgamated with the Real

Estate (Facilities Management) ITM (launched in 2018) into a single ITM known as the Built Environment ITM.

The Built Environment ITM focusses on a value-chain approach. A key work area of the Built Environment ITM is to encourage stakeholders within the sector to collaborate more effectively across the value chain which would enable better planning and execution of a project. A key transformation area is in relation to Integrated Planning and Design (“**IPD**”) which sought to build on the IDD under the Construction ITM. Under the IPD, design considerations for the building’s entire life cycle, including facilities management, are factored in at the design stage, allowing for stronger collaboration across the building life cycle.

Importantly, the Built Environment ITM also encouraged the industry to move towards collaborative contracting, where contracting parties, including the builder and facilities management firm, work together towards shared project goals at the start of the project.

Introduction of Collaborative Contracting Option Modules

In 2022, BCA launched the collaborative contracting option modules to the PSSCOC. This follows a long period of consultation on the adoption and application of a collaborative contracting regime in Singapore which had proceeded in tandem with the implementation of the Construction ITM.

In September 2017, i.e. around the time the Construction ITM was launched, BCA had set up a working committee comprising government agencies and industry associations/practitioners to study the collaborative contracting forms used overseas for adoption in Singapore. The working committee looked at the various collaborative contracting models used in different jurisdictions such as the United States, the UK as well as in Hong Kong SAR (which had adopted the New Engineering Contract (“**NEC**”) form for all government projects tendered from 2015).

Ultimately, BCA did not adopt any of the model forms used in overseas jurisdictions, such as the NEC. Neither did BCA come up with a new form of its own. Instead, BCA, together with industry associations and government agencies, have created a regime where the principles of collaborative contracting are applied onto the existing PSSCOC by way of “Option Modules”. It was considered that the best principles of collaborative contracting could then be adopted into any of the current available standard forms, without changing the essence of the conditions of contract.

“Option Module E (Collaborative Contracting)” was the option module to the PSSCOC for Construction Works, while “Option Module C (Collaborative Contracting)” was the option module to the PSSCOC for Design and Build.

The key principles in the Option Modules include establishing:

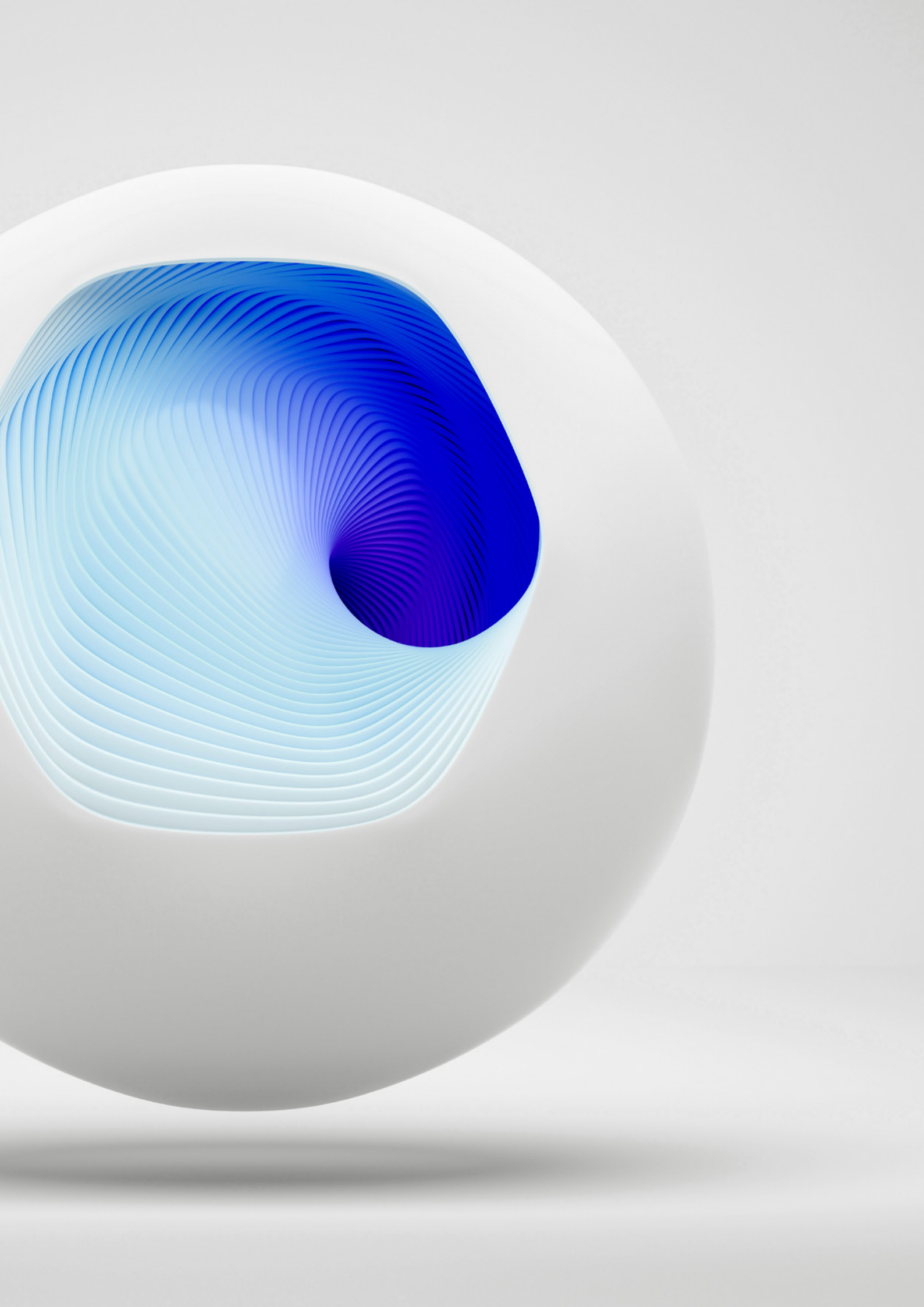
1. **a collaborative work environment** – the contractor and the employer agree to use their best endeavours to work together in a collaborative environment and act in a spirit of mutual trust and cooperation;
2. a set of **Key Performance Indicators (KPIs)** as a form of incentive, as the achievement of the KPIs may entitle the contractor to a bonus payment; and
3. **the use of an Early Notification Register by both parties** – to provide early notice to the other party of any matter which may impact the time, cost, performance of the works and the achievement of the KPIs.

Both Option Modules provide the choice of implementing the use of a dispute board to facilitate dispute avoidance and early resolution of disputes based on the Singapore Infrastructure Dispute-Management Protocol 2018 (the “**SIDP**”). The SIDP was launched by the Singapore Ministry of Law in 2018 as a tool to assist parties involved in mega infrastructure projects manage disputes and minimise risk of time and cost overruns. Under the SIDP, Dispute Boards are appointed at the start of the project to proactively manage issues as they arise.

Implementation & the Future of Collaborative Contracting in Singapore

The Built Environment ITM aims to drive collaboration across the value chain and to create a conducive environment that would allow for such collaboration. The introduction of the Option Modules to the PSSCOC is another spoke in the wheel of this collaborative regime being created.

The Option Modules are currently being piloted in selected public sector projects. It will be interesting to see the data and statistics that come out of such projects. Transforming the industry from one where traditionally each party has focussed on its own scope of works and interests (to the exclusion of the project sometimes) to one where the interests of the project are paramount to and rank above an individual firm’s own interest will require a massive change in organisational culture and mindset.



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