

Annual Review of Singapore Construction Law Developments

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Introduction

Welcome to the 2024 edition of the Annual Review of Singapore Construction Law Developments

The fourth edition of this publication presents a selection of cases decided by the Singapore courts in 2024, and highlights significant developments pertaining to projects and arbitration agreements governed by Singapore law.

We look at a High Court decision regarding the admissibility of extrinsic evidence and the Court's approach to parties' prior negotiations and subsequent conduct after contract formation, including the role of antecedent agreements in evidencing parties' intentions. This is particularly relevant in the construction industry, where prior contractual relationships between contractor and employer often inform tender negotiations and contract documentation.

The ongoing impact of the COVID-19 pandemic on businesses remains significant, and we discuss a decision by the Court of Appeal in respect of a COVID-19 related business interruption insurance claim made under a composite perils clause. This marks the first instance where Singapore's apex court has provided its perspective on such claims, which is crucial for construction companies navigating pandemic-related disruptions.

We also review a decision of the Court of Appeal that clarifies the ambit and applicable threshold standard of common law *Derry v Peek* fraud as an exception to the strict payment obligations under letter of credit transactions. This decision is particularly relevant for construction firms dealing with complex financial instruments and payment guarantees.

The provision of performance bonds in construction contracts, and the ability to restrain calls on performance bonds continue to be important topics in construction projects. We look at a decision by the High Court which provides guidance on the law on unconscionability in the context of restraining calls on on-demand performance bonds, and the grounds on which an *Erinford* injunction should be granted pending appeal against an unsuccessful injunction application; as well as a decision of the Court of Appeal in a stay application that touches on the interplay of rights of bond beneficiaries under the bond as well as the underlying construction contract.

We consider a decision by the High Court as to when works could be considered "complete" under a construction contract, particularly in the context where there are staged payments, and how the position in Singapore compares to the UK position.



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We separately look at two decisions by the High Court in relation to latent defects in completed works, in respect of when a claimant will be found to have had requisite knowledge of latent defects for purpose of determining the relevant limitation period for its claims, and the applicability of project warranties to latent defects.

Several decisions of the High Court set out key principles in applications to set aside adjudication determinations under the Building and Construction Industry Security of Payment Act 2004, including the ambit of the statutory adjudication scheme in respect of construction contracts that are partly in writing, and the limits on the court's powers to set aside determinations in instances of fraudulent conduct by parties. These decisions are essential for understanding the ambit and procedures of the statutory adjudication scheme.

We also review developments in arbitration, which remain a common dispute resolution mechanism in construction contracts. We look at decisions by the High Court and the Singapore International Commercial Court in applications to set aside final awards that consider the availability of recourse against final arbitral awards under the International Arbitration Act 1994 and UNCITRAL Model Law on International Commercial Arbitration, and the role of the seat court when deciding on complaints of breach of natural justice. These developments underscore the effect that a choice of arbitration has on the determination and final resolution of construction disputes.

The Singapore International Arbitration Centre has also published its long-awaited set of new arbitration rules, following extensive consultation with stakeholders from the arbitration community. Some of the notable innovations under these new rules are considered in this publication, including provisions designed to address the increasing costs of arbitration, and in response to the needs of parties for procedures that provide timely and effective emergency relief.

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.

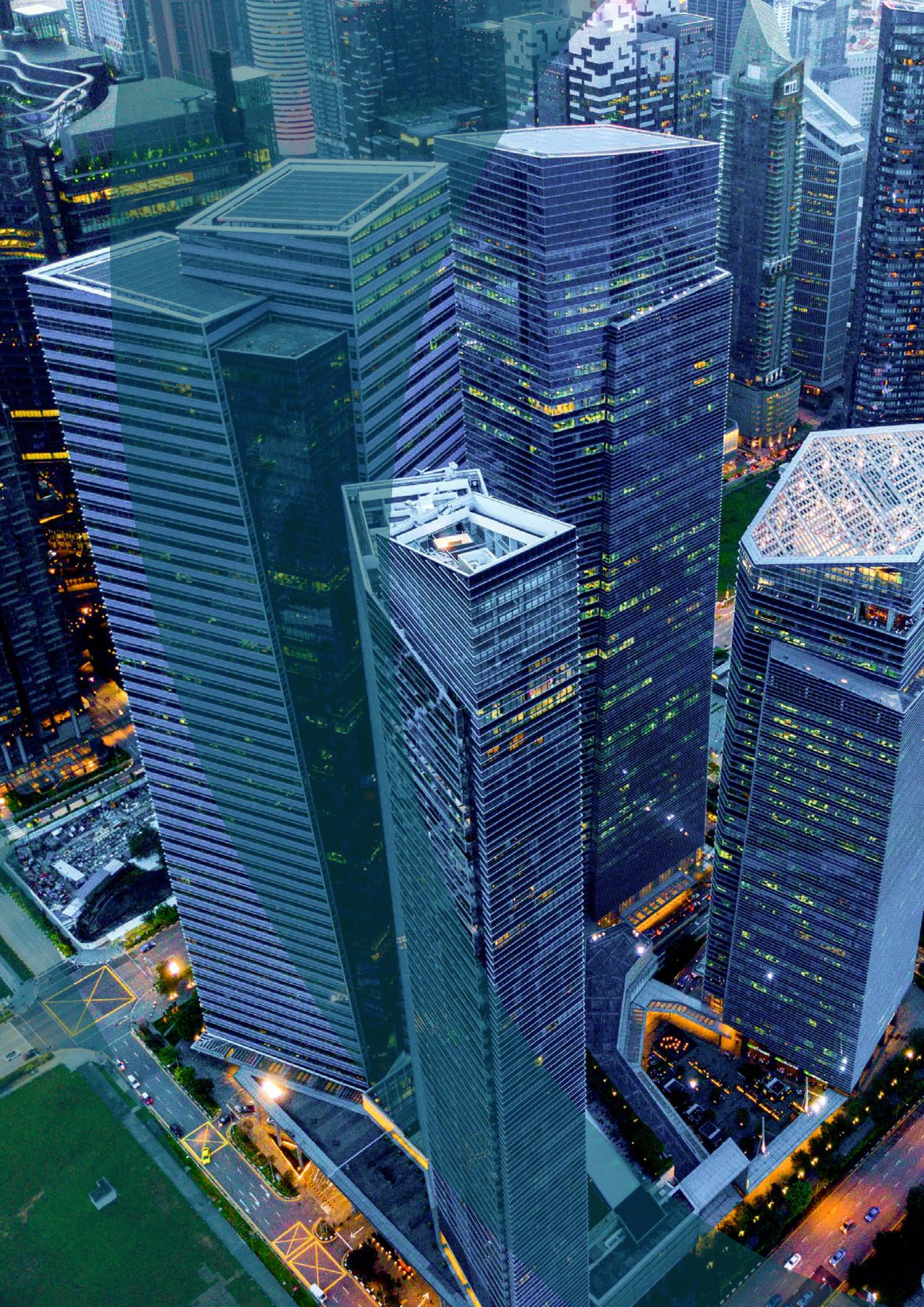


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Chapter 1

Interpretation of Contracts – Admissibility of Extrinsic Evidence

Under the contextual approach to contractual interpretation, extrinsic evidence may be admissible to ascertain the objective intention of the contracting parties. This decision looks at the court’s treatment of parties’ conduct prior and subsequent to contracting, and highlights the distinction between prior negotiations and antecedent contracts.

EBS Flow Control Ltd v Greene, Tweed & Co Pte Ltd [2024] 5 SLR 459

Background

The claimant (“**EBS**”) brought an application against the defendant (“**GT**”) for wrongful termination and breach of a distributorship agreement entered into in 2020 (the “**2020 DA**”) for GT’s sale of industrial products and materials to EBS for EBS to sell in China. GT counterclaimed for unpaid invoices and interest on the unpaid amounts.

Prior to the 2020 DA, the parties had entered into yearly distributorship agreements from 2016 to 2020 (the “**Earlier DAs**”). The 2020 DA itself contained an express term (the “**2020 Term Clause**”) that it would “remain in effect for one (1) year”, and provided either party with the option to terminate the 2020 DA by providing the other party “with not less than ninety (90) days written notice of its intention not to renew and/or allow the [2020 DA] to expire”.

In the proceedings, EBS claimed that GT had wrongfully terminated the 2020 DA by sending its notice of intention not to renew or extend the 2020 DA (“**GT Notice**”) less than 90 days before the 2020 DA was due to expire. EBS’s case was that the 2020 DA would automatically renew unless terminated before the end of its term, and the effect of GT’s failure to give the GT Notice within the required 90-day period was the automatic renewal of the 2020 DA for another year.

In defending the wrongful termination claim, GT’s case was that the 2020 DA was only effective for a year without automatic renewal, and the purpose of the notice to be given under the 2020 Term Clause was only where a party wished to terminate the 2020 DA prematurely. GT pointed to the terms of the 2020 DA, as well as extrinsic evidence, namely:

- Prior to the 2020 DA, GT and EBS had yearly entered into fresh distributorship agreements, which suggests that none of them were automatically renewed.



- The presence of an express automatic renewal clause in an earlier distributorship agreement (the “**2019 DA**”) which had been removed in the 2020 DA, as evidence of parties’ intention to remove automatic renewal of the 2020 DA.
- Parties’ correspondence post- the GT Notice, which suggested EBS recognised the 2020 DA would terminate at the end of the one-year term.

Admissibility of extrinsic evidence in aid of contract interpretation

Under the 2-stage contextual approach to contractual interpretation in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR(R) 1029* (“**Zurich Insurance**”), the first stage requires consideration of the admissibility of the extrinsic evidence sought to be adduced in aid of interpretation. From there, the second step is the task of interpretation itself, which involves ascertaining the meaning of expressions used in a contract, taking into account the admissible evidence.

The 2020 DA contained an entire agreement clause which reduced the agreement to the form of the document. Under the Evidence Act 1893 (the “**Act**”), when the terms of a contract has been reduced by or by consent of the parties to the form of a document:

- No evidence except the document itself or admissible secondary evidence may be given in proof of the terms of a contract, and
- No evidence of any oral agreement or statement is to be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from a proved term, subject to specified exceptions under the Act – including the exception that any fact may be proved which shows in what manner the language of a document is related to existing facts (“**Section 94(f) Exception**”).

To be admissible, the specific extrinsic evidence must also meet the three *Zurich Insurance* requirements:

- The evidence has to be relevant. Evidence is relevant if it would affect the way in which the language of the document would have been understood by a reasonable man;
- The evidence must be reasonably available to all the contracting parties at the time of contracting. Given that a contract is a bilateral (or multilateral) agreement involving one or more parties, its terms can only be interpreted by reference to material which all the parties to the agreement would reasonably have had access to. In this connection, the availability of the material is measured with reference to the situation in which the parties were at the time of the contract.; and



- The evidence must relate to a clear or obvious context. Evidence relates to a clear or obvious context if it would allow the court to objectively ascertain a clearly defined or definable intention held by both parties with respect to how the contractual term in question should be interpreted.

In respect of the Earlier DAs, the court found that these antecedent agreements were generally admissible, following the Court of Appeal's decision in *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR(R) 379 which drew a distinction between the two types of prior conduct:

- Prior negotiations between the parties – evidence of which does not represent any consent between parties and inadmissible, and
- Antecedent agreements between the parties – evidence of which is admissible as objective fact and should be taken into account as part of the factual matrix in which the parties made their contract.

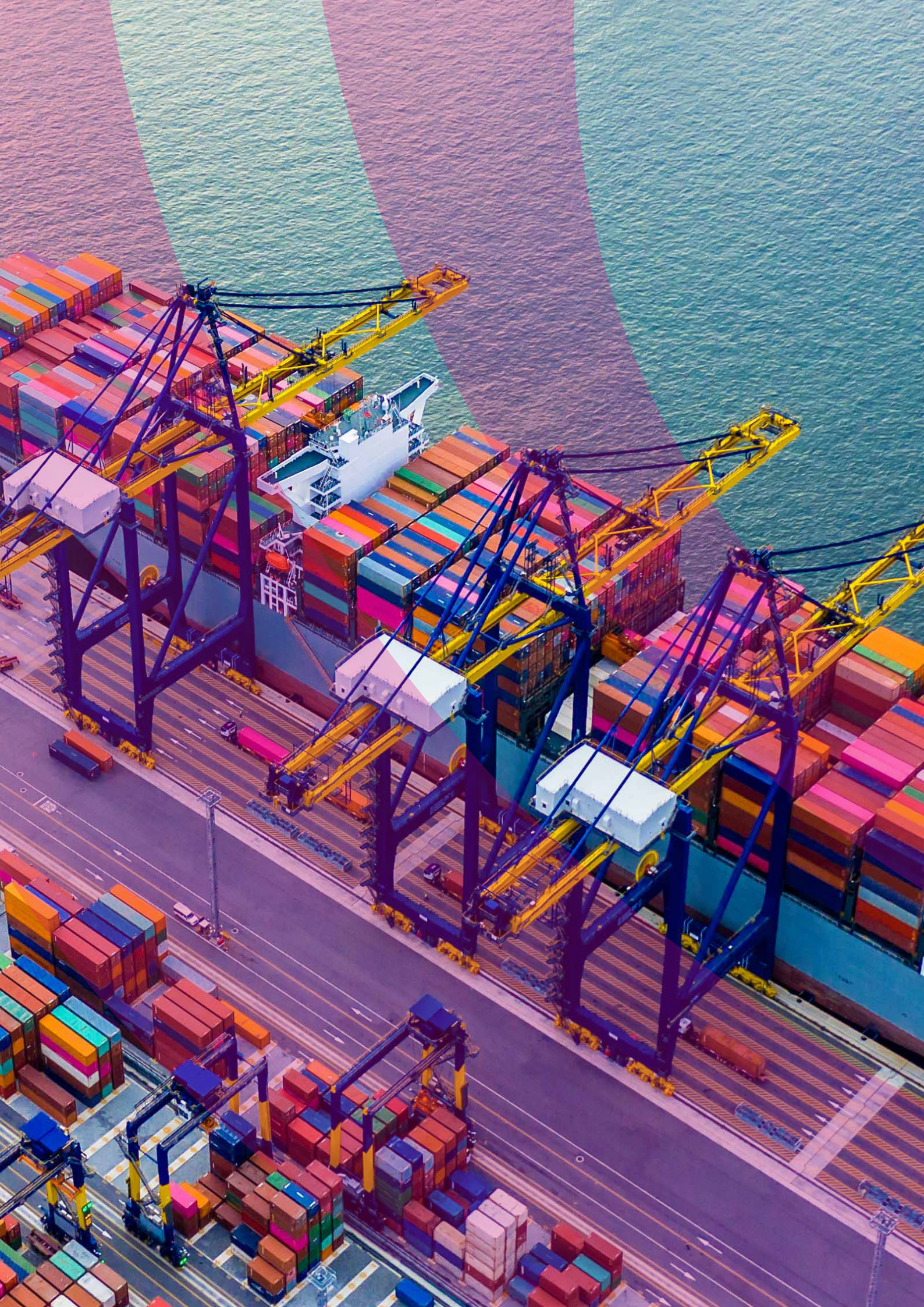
The terms of the Earlier DAs were relevant as historical context to the evolution of the term clauses in the distributorship agreements between parties from 2016 to 2020, and the express provision for automatic term renewal in some of the Earlier DAs and the removal of automatic term renewal provisions in other of the Earlier DAs was strong evidence that the parties had applied their minds to this issue and had included express language for automatic renewal when intended. From this, the court decided that the objective interpretation

of the 2020 DA was that parties had not intended for its automatic renewal.

The Court also found that there was no patent ambiguity in the language used in the 2020 DA, which would otherwise have been an absolute bar to the admissibility of extrinsic evidence under section 95 of the Act.

In respect of the post- GT Notice correspondences between parties, the court found that these were inadmissible. These correspondences could not have been available to parties at the time of contracting, and therefore did not meet the second *Zurich Insurance* requirement.

While there is no absolute prohibition against evidence of prior negotiations or subsequent conduct, this case illustrates the court's fact-sensitive approach in determining the admissibility of extrinsic evidence depending on the context and circumstances of such evidence.



Chapter 2

Business Interruption Claims – COVID-19 Events

In this case, the Court of Appeal handed down the courts' first reported judgment on a COVID-19 related business interruption insurance claim, including on issues of interpretation in respect of composite perils clauses and condition precedent notification clauses.

Although the substantive appeal had been withdrawn prior to the hearing, the Court of Appeal provided its initial views on the merits of the appeal as relevant to the question of costs that remained before it, and noting that these views pertained to a matter of interest in the wider insurance market, namely, insurance claims arising out of the COVID-19 pandemic.

QBE Insurance (Singapore) Pte Ltd and another v Relax Beach Co Ltd [2023] SGCA 45 ("QBE Insurance")

Background Facts

Relax Beach Co Ltd (the claimant respondent) (the "**Insured**") owns and operates a luxury hotel in Phuket, Thailand ("the "**Insured Premises**") and is a named insured under Insurance Policy No. 8-F000515-ISR-R004 (the "**Policy**"), which provides coverage for the Insured Premises.

QBE Insurance (Singapore) Pte Ltd ("**QBE Insurance**") and MS First Capital Insurance Ltd ("**MS First Capital**") (the defendant appellants, and collectively, the "**Insurers**") are co-insurers under the Policy, who indemnified the Insured in respect of business interruption losses suffered at the Insured Premises. In particular, the Insurers provided the following indemnity under

Section 2 of the Policy ("**Section 2 Indemnity**"):



THE INDEMNITY

In the event of any building or any other property or any part thereof used by the Insured at the Premises for the purpose of the Business being physically lost, destroyed or damaged by any cause or event not hereinafter excluded (loss, destruction or damage so caused being hereinafter termed 'Damage') and the Business carried on by the Insured being in consequence thereof interrupted or interfered with, the Insurer(s) will, subject to the provisions of this Policy including the limitation on the Insurer(s) liability, pay to the Insured the amount of loss resulting from such interruption or interference in accordance with the applicable Basis of Settlement. [...]

Clause 87 of the Policy (an infectious disease extension, or the "IDE") extended the coverage provided under the Section 2 Indemnity, to include loss directly from interruption of or interference with the business carried on by the Insured at the premises in consequence of specified events, including the closure of the Insured Premises by an order of a public authority as a result of an outbreak of an infectious or contagious disease:

87. INFECTIOUS DISEASE MURDER AND CLOSURE

Notwithstanding anything contained in the within policy to the contrary including but not limited to the 'material damage proviso' the Policy is extended under Section 2 to include loss directly from the interruption of or interference with the business carried on by the Insured at the premises in consequence of:

- (i) Closing of the whole or part of the premises by order of a Public Authority as a result of an outbreak of a notifiable human infectious or contagious disease or consequent upon defects in the drains and/or other sanitary arrangements at the premises.*
- (ii) Murder or suicide occurring at the premises.*
- (iii) Injury, illness or disease arising from or likely to arise from or traceable to foreign or injurious matter in food or drink provided from or on the premises.*
- (iv) Threat of violent damage to the premises and/or injury to person therein.*

[...]

Condition 7 of the Policy (the "Notification Clause") required that the Insured notify the Insurers of any claim that arises and to provide additional particulars of the claim in order to be entitled to be indemnified thereunder. It was not disputed between the parties that the Notification Clause is a condition precedent to any liability under the Policy:

7. NOTIFICATION OF CLAIMS

*On the happening of any loss... the Insured shall forthwith **give notice thereof in writing to the Insurer(s) and shall (within thirty (30) days** after such loss... or such further time as the Insurer(s) a claim, **in writing containing as particular an account** as may be reasonably practicable of the several articles or portions of property loss, destroyed or damaged and of the amount of loss, destruction or damage thereto, having regard to their value at the time of the loss, destruction or damage, together with details of any other insurances on any property hereby insured.*

*The Insured shall use due diligence and do and concur in doing all things reasonably practicable to minimise any interruption of or interference with the Business to avoid or diminish the loss and **shall also deliver** to the Insurer(s) **a statement in writing of any claim certified by the Insured’s auditor, with all particulars and details reasonably practicable of the loss and shall produce and furnish all books of accounts and other business books, invoices, vouchers and all other documents, proofs, information, explanations and other evidence and facilities as may reasonably be required for investigation and verification of the claim together with (if demanded) a statutory declaration of the truth of the claim and of any matters connected therewith. [i.e. the “Second Condition”]***

No claim under this Policy shall be payable unless the Insured has complied with the terms of this condition.

In February 2020, COVID-19 was first declared a dangerous communicable disease by the Thailand Government under the Communicable Diseases Act 2015, and the Thailand Government and the Governor of Phuket Province (“**Governor**”) (collectively, the “**Public Authority**”) implemented a series of escalating measures in Phuket to control the impact of the COVID-19 pandemic between March to April 2020. Crucially, the Governor ordered the complete closure of all hotels in Phuket until further notice on 2 April 2020 (the “**Closure Order**”). As a result of the Closure Order, the Insured Premises was completely closed by 7 April 2020 until further notice, and which formed the basis of the Insured’s claim for business interruption losses.

On 26 May 2020, the Insured submitted its claim notification to QBE Insurance, seeking indemnification in respect of its business interruption losses under the Policy (the “**Claim**”). On the same day, QBE Insurance sought further information relating to the Claim, including whether there was any outbreak of COVID-19 at the Insured Premises. In a response from the Insured to QBE Insurance on 27 May 2020, the Insured stated that there had not been any outbreak of COVID-19 at the Insured Premises, and would require time to reply to QBE Insurance’s other requests for information.

On 29 May 2020, QBE Insurance wrote to inform the Insured (the “**29 May 2020 Letter**”) that the criteria in the IDE for coverage under the Policy was not satisfied given that the Insured had informed that there was no outbreak of COVID-19 at the Insured Premises. QBE Insurance also requested that the Insured furnish further information to support the Claim within 21 days, failing which the Claim would be rejected.

As a matter of fact, the Insurers did not receive further information from the Insured after the 29 May 2020 Letter was sent.

Commencement of legal proceedings by the Insured

In February 2021, the Insured requested that QBE Insurance retract the rejection of the Claim, as an outbreak of COVID-19 at the Insured Premises was not a prerequisite for coverage under the Policy to apply. QBE Insurance instead confirmed that it would not be retracting its rejection of the Claim.

In March 2021, the Insured commenced legal proceedings against the Insurers (“**OS 299**”) to seek, among others, the following declaratory reliefs:

- (a) A declaration that the Insured had a valid claim under the Policy for business interruption suffered in respect of the Insured Premises; and
- (b) A declaration that the Insurers are liable to indemnify the Insured in respect of such business interruption losses in accordance with the terms of the Policy.

The Insured’s case in OS 299 relied on the fact that one of its hotel employees (“**Mr. K**”) had tested positive for COVID-19 in late March 2020, a few days before the Closure Order was announced on 2 April 2020. This fact was crucial to the Insured’s case, as it relied on Mr K’s singular case of COVID-19 on the Insured Premises as sufficient to trigger liability under the IDE.

Composite perils

On the substance of the Claim, the judge in the General Division of the High Court (the “**Judge**”) considered whether the Closure Order was “as a result of” the outbreak at the Insured Premises. While there was no direct evidence that Mr K’s case was specifically and individually considered by the Governor in making the Closure Order, the Judge opined there was nothing in principle or in the concept of causation which precluded an event, when combined with many other similar events (including the other COVID-19 cases occurring outside the Insured Premises), from being considered a proximate cause of the resulting consequence.

The Closure Order stated that it had been noticed that the number of COVID-19 cases in Phuket was increasing at a fast rate and that the Governor had acted pursuant to a meeting of the Committee of Communicable Disease of Phuket held on 31 March 2020. In the circumstances, the Judge found that it was “more likely than not” that Mr K’s diagnosis on 26 March 2020 “formed part of the statistics informing the deliberation” of the Committee and the decision of the Governor. Thus, Mr K’s case might be regarded as one of the many concurrent causes of the Closure Order, and the insured peril as described in the IDE was made out in the sense that the Closure Order was “as a result” of Mr K’s case.

On appeal, the Court of Appeal considered the IDE as a “composite peril” clause which required successive elements to be satisfied before a claim can be made. In particular, the IDE required the Insured to show that there was business interruption loss arising from closure of the Insured Premises, by order of a public authority as result of an outbreak of a notifiable infectious or contagious disease or defects at the premises.

Flowing from this analysis, the Court of Appeal opined that the Judge likely erred in finding that Mr. K’s singular COVID-19 case was a proximate cause of the Closure Order, or that it could be considered an “outbreak” under the IDE that would trigger the Insurers’ liability. In the Court of Appeal’s opinion:

- The parties had encapsulated their commercial risk allocation in the language of the Policy. Giving careful consideration to the language of the IDE, the requirement for an “outbreak” of a notifiable human infectious or contagious disease at the premises is a term that on a plain and commonsensical meaning ordinarily contemplates the infection of more than one person, and an increase from zero to one infected person might not readily be understood as an “outbreak”. Mr. K’s solitary case at the Insured Premises would therefore likely not have been sufficient to trigger coverage under the IDE.
- Insofar as the Judge opined that Mr K’s case might be regarded as a concurrent cause of the Closure Order – considered together with the COVID-19 statistical figures in Phuket generally – it was unclear that these general statistics of COVID-19 cases (which include cases occurring outside the Insured Premises) could be a risk under the Policy given the IDE provided that the “outbreak” must have occurred “at the premises” and in exclusion of cases occurring outside the Insured Premises.

The Notification Clause

On the issue of whether the Insured had complied with the Notification Clause, the Insurers argued that the Insured had failed to comply with this condition precedent, as the Insured had not informed them of Mr K’s COVID-19 infection and to furnish additional particulars of business interruption losses.

At first instance, the Judge found that the Notification Clause only required the Insured to give notice of the “happening of any loss, destruction or damage”, but not to give notice of the underlying causes of such losses. The Insured had therefore fulfilled the condition precedent by giving notice to the Insurers that business interruption had arisen due to the closure of the Insured Premises pursuant to the Closure Order.

On appeal,

the Court of Appeal considered that the Notification Clause’s requirement for the Insured to provide all other information, explanations and other evidence “as may reasonably be required for investigation and verification of the claim” extended to the facts said to give rise to the underlying insured risk. If this risk included an outbreak of an infectious or contagious disease at the premises, and if Mr K’s illness constituted such an outbreak, then it was a necessary part of any notification of loss said to be covered under the Policy that the existence of Mr K’s case occurring at the Insured Premises be notified to the Appellants. In the Court of Appeal’s opinion:

- The notification of claim ought to have extended to the facts that gave rise to the underlying insured risk. Given that the Insured was claiming for losses that were incurred as a result of an outbreak at the insured Premises (assuming that there was an outbreak at the Insured Premises) and Mr. K’s case had constituted an outbreak at the Insured Premises, then it was necessary for Mr. K’s case to form part of any notification of loss said to be covered by the Policy.
- The purpose of condition precedent notices was to enable insurers to investigate and ascertain the bona fides of claims within a reasonable time of the loss, take steps to mitigate the consequences and preserve evidence where necessary. Given this, it would also have been vital for the Insured to promptly inform the Insurers of Mr K’s case to enable them to properly investigate the Claim’s validity and decide whether the insured peril had occurred.
- Given the Insured’s failure to notify the Insurers of the existence of Mr K’s case until after the proceedings in OS 299 were commenced, it is likely that the Notification Clause’s requirements were not met by the Insured, and the Insurers would have had a complete defence to liability on this basis.

Comment

The Court of Appeal’s views highlight that in insurance contracts, “text and context are of the first importance” in identifying the parties’ agreed risk apportionment. While the rights and obligations of insurers and insureds will turn on the particular facts and circumstances of each case, this decision suggests that the Singapore Courts may take a strict or narrow approach to causation under composite peril clauses in COVID-19 business interruption claims.





Chapter 3

The Fraud Exception in Letters of Credit Transactions

Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd and another appeal [2024] 1 SLR 1052; [2024] SGCA 31

It has been said that letters of credit are the lifeblood of commerce. For this reason, the law developed the autonomy principle to insulate the strict payment obligation under letters of credit transactions from disputes which may arise from the underlying sale contracts. The only exception to this principle is fraud ("**Fraud Exception**") as the underlying rationale is that fraud unravels all.

In *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd and another appeal* [2024] 1 SLR 1052; [2024] SGCA 31 ("**Winson Oil Trading**"), the Court of Appeal affirmed the trite test for common law fraud in *Derry v Peek* (1889) 14 App Cas 337 ("**Derry v Peek**"), and clarified that the Fraud Exception is made out where a false representation was made "*recklessly, careless whether it be true or false*" within the meaning of the third category of fraud in *Derry v Peek*.

The Court of Appeal further clarified that the ambit and threshold standard for invoking the Fraud Exception remains the same for letters of credit transactions as with other financial instruments such as performance bonds and on-demand guarantees, on the basis of principle, precedent and policy.

Background

Winson Oil Trading Pte Ltd ("**Winson**") is a Singapore company in the business of oil trading, bunkering and supply chain services. Winson is the appellant in both appeals in CA/CA 40/2024 and CA/CA 41/2024, where Overseas-Chinese Banking Corporation Limited ("**OCBC**") and Standard Chartered Bank (Singapore) Limited ("**SCB**") were the respondents, respectively.

The disputes in Winson Oil Trading surround the last leg of a circular trade ("**Subject Transactions**") where two shipments of gasoil were sold by Hin Leong Trading (Pte) Ltd ("**Hin Leong**") to Trafigura Pte Ltd ("**Trafigura**"), Trafigura to Winson, and back from Winson to Hin Leong ("**Winson-Hin Leong Sale**").

In respect of the Winson-Hin Leong Sale, Hin Leong made applications to SCB and OCBC for letters of credits to be issued in favour of Winson to finance Hin Leong's purchase of each of the two shipments of gas oil from Winson. SCB and OCBC issued separate letters of credit to Winson.

Winson made its first presentation to OCBC under a Letter of Indemnity ("**LOI**") for a cargo shipment on the Ocean Voyager and its first presentation to SCB under an LOI for a cargo shipment on the Ocean Taipan.



OCBC rejected Winson's first presentation on the basis that no physical cargo was shipped on the Ocean Voyager. The next day, Winson made its second presentation to OCBC for the Ocean Taipan instead, and explained that the second presentation for a different vessel was due to an internal mix-up, and that revisions had been made to rectify this mix-up. On that same day, Winson made its second presentation to SCB, this time for the Ocean Voyager.

Both OCBC and SCB refused to pay under the letters of credit, contending that no cargo of gasoil pursuant to the LOIs were shipped in respect of the Winson-Hin Leong Sale, and that the copy non-negotiable Bills of Lading ("BLs") which purportedly evidenced such shipments were forgeries. These copy BLs were relied upon in preparing the LOIs presented to the banks for payments under the letters of credit.

Winson brought two suits in the Singapore High Court against OCBC and SCB in HC/S 463/2020 and HC/S 474/2020 ("Suits") respectively, for payment of the sums under the letters of credit.

The High Court's Decision

Winson's claim against OCBC and SCB in the High Court were dismissed on the basis that the Fraud Exception had been made out.

The Fraud Exception involves the beneficiary of a letter of credit fraudulently making false statements to the bank. While the parties accept that a beneficiary is fraudulent if he makes a false representation "without belief in its truth", the parties disagreed on whether a beneficiary is fraudulent if he made a false representation recklessly without caring whether it is true or false (i.e. the third category of fraud identified in *Derry v Peek*).

The High Court noted the decision of *Credit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd and another suit* [2022] 4 SLR 1 ("**CACIB v PPT**"), where the Singapore International Commercial Court ("**SICC**") held that the beneficiary would not have acted fraudulently if he made a false representation within the third *Derry v Peek* category of fraud. However, the High Court declined to follow *CACIB v PPT* and found that the Fraud Exception would be made out if the beneficiary made a false representation recklessly without caring whether it is true or false.

The High Court found that Winson made false representations.

Winson's LOIs had represented that there was cargo shipped pursuant to valid BLs onboard the Ocean Voyager and Ocean Taipan (as described in the LOIs) for the Winson – Hin Leong sale, Winson had good title to that cargo, and that Winson had passed good title to that cargo to Hin Leong. However, the BLs were found to be forged by a staff of Hin Leong, and there was no cargo shipped on the Ocean Taipan and Ocean Voyager as described in Winson's LOIs.

The High Court also found that Winson had acted fraudulently as it did not have a belief in the truth of its representations by the time of the second presentations or, at the very least, was indifferent as to whether its representations were true. The High Court made the following findings in this respect:

- First, Winson's LOIs were based on copy non-negotiable BLs of which it had only received the front page. Winson did not receive the original BLs nor copies of its reverse side showing any endorsements. Winson also did not receive any loading documents such as an independent inspector's report, certificates of quality and quantity, and was not informed of the appointment of any independent inspector and/or that any inspections had taken place.

- Second, the Subject Transactions were pre-structured circular trades. On appeal, the Court of Appeal agreed that this was not necessarily indicative of a sham, but was unusual in the circumstances where all the relevant parties were based in the same country, and should have put an honest trader to query.
- Third, the Ocean Taipan’s quantity figures on the copy BL were changed after the vessel had sailed.
- Fourth, although a trader who had sold a cargo might be expected to be open to repurchasing it if the price was right, Winson was unwilling to repurchase the Ocean Voyager cargo in its discussions with OCBC about the purchase of the Ocean Voyager cargo. Winson had also emphasised the need to check if the title to the cargo was clean, showing that Winson had doubts on this point.
- Fifth, while an honest trader would have sought to understand why OCBC had claimed that “no physical cargo... was shipped” in one of the shipments in its rejection of Winson’s first presentation for the Ocean Voyager, Winson did not engage with OCBC to understand the basis of its rejection nor conduct necessary checks thereafter. Winson further lied to OCBC about the reason for its second presentation to OCBC.
- Last, Winson had claimed to have done several checks after OCBC rejected its first presentation for the Ocean Voyager. However, these checks were either not conducted or did not assist Winson’s claim.

Accordingly, the High Court held that the Fraud Exception was made out in respect of the third category of fraud in *Derry v Peek* and dismissed Winson’s claims.

Winson appealed against the High Court’s decision.

The Court of Appeal’s Decision

The Court of Appeal dismissed Winson’s appeals and affirmed the High Court’s decision that Winson had made false representations fraudulently, in that Winson was reckless and did not honestly believe in the truth of its representations.

The Court of Appeal observed that the “autonomy principle” was one of the three fundamental characteristics that feature prominently in letters of credit transactions. This refers to the notion that the credit is treated as an independent transaction, independent of the terms of the underlying transaction giving rise to it. This supports two distinct concepts:

- an assurance that the seller/beneficiary will be paid by the issuing bank so long as documents that conform to the requirements of the credit are presented regardless of any dispute with the buyer; and

- an assurance that the bank can confidently pay a seller/beneficiary who presents conforming documents that the bank will be entitled to claim reimbursement thereafter without having to look into issues in the underlying sale contract.

As such, letters of credit are often described as the “life-blood of international commerce” and the courts have developed only limited exceptions to payment under a letter of credit, with the Fraud Exception generally considered to be the only exception to the autonomy principle.

Common law fraud in *Derry v Peek* engages the Fraud Exception

Upon appeal, Winson relied on *CACIB v PPT* for the proposition that recklessness (i.e. the third category of *Derry v Peek* fraud) would not amount to fraud.

The Court of Appeal observed that for the third category of fraud in *Derry v Peek*:

- Recklessness did not entail the existence of any duty of care.
- Recklessness in the *Derry v Peek* sense is subjective in nature and refers to an indifference to a risk of which the defendant is actually conscious of.
- Recklessness is an instance of the second category of fraud in *Derry v Peek*, that is, without belief in the truth of the false representation.

Following on from the above, the Court of Appeal disagreed with the SICCC’s analysis of the Fraud Exception in *CACIB v PPT*. While the Court of Appeal agreed that the autonomy principle meant that there is no duty of care owed by the bank or beneficiary to investigate the documents presented under the letter of credit, it did not agree that this led to the conclusion that a lack of duty of care meant that recklessness would not engage the Fraud Exception. In this sense, subjective *Derry v Peek* recklessness was neither synonymous with negligence, nor founded on any duty of care.

Fraud Exception involving letters of credit vs independent guarantees

The Court of Appeal then examined the Fraud Exception in restraining payments under letters of credit and independent guarantees.

In contrast to the comparative lacuna of direct authority on the Fraud Exception involving letters of credit, the law in Singapore is markedly clear that common law fraud, in particular, recklessness as postulated in *Derry v Peek*, applies to the Fraud Exception in the context of independent guarantees.



Independent guarantees are guarantees entered into by a bank at an applicant's request to pay money to the beneficiary in certain circumstances. These guarantees are intended to protect the beneficiary in the event of breach of obligations by the applicant under the substantive contract. Such undertakings can take different forms such as "performance guarantees", and "on-demand guarantees" and have been described as the "mirror image" of letters of credit, sharing important similarities with letters of credit, including the principle of autonomy.

In *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557, the Court of Appeal held that a beneficiary who recklessly presented an invalid demand under a demand guarantee would be acting fraudulently, and opined further that there should be no distinction in the operation of the fraud exception in the context either of letters of credit or of demand guarantees.

The same standard of fraud for the Fraud Exception applies for independent guarantees and letters of credit

Winson's contention was that the law on the Fraud Exception should differ as between letters of credit and independent guarantees as these are different financial instruments, with letters of credit being primary in form and intent (i.e. that parties intend that the beneficiary should turn to the instrument as the first port of call for payment); and independent guarantees are intended as a fall back (i.e. to be invoked where there has been default in the performance of the underlying contract).

This difference had been relied on in earlier decisions to justify the application of different legal tests in restraining a call on independent guarantees, as in *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 ("**JBE Properties**") and *Chartered Electronics Industries Pte Ltd v Development Bank of Singapore* [1992] 2 SLR(R) 20 ("**Chartered Electronics Industries**").

- In *JBE Properties*, the Court of Appeal was concerned with whether unconscionability should be a separate ground for restraining a call on performance bonds, and in this context, suggested that "a less stringent standard ... can justifiably be adopted for determining whether a call on a performance bond should be restrained [in contrast to letters of credit]".
- In *Chartered Electronics Industries*, the High Court was concerned with the applicable standard of proof in allowing an injunction to restrain the bank from payment to the beneficiary under a performance guarantee on account of a fraudulent demand, and held that a less onerous test of a "strong prima facie case" of fraud applied for performance guarantees in contrast to the "higher standard" of whether it is "seriously arguable that, on the material available, the only realistic inference is that [the beneficiary] could not honestly have believed in the validity of its demands", as letters of credit could not be treated the same as performance guarantees.

In the instant case, the Court of Appeal considered that the different legal tests in *JBE Properties* and *Chartered Electronics Industries Pte Ltd* had no bearing on the particular issue as to whether the ambit of the Fraud Exception should differ for independent guarantees and letters of credit. Rather, the same standard of fraud should apply for independent guarantees and letters of credit, on the basis of principle, precedent and policy.:



- The common law maxim that the court will not assist a fraudster in his/her fraud means that the standard for fraud should not be so narrow as to allow a beneficiary to bury its head “ostrich-like in the sand”. The Court of Appeal considered there is no principled reason even under letters of credit to compel the bank to pay the beneficiary on presentation of the allegedly complying documents where the beneficiary has no honest belief in the truth of its representations.
- There is no discernible difference between a person who is aware of the risk of untrue representations but not caring about whether it is true or not, and a person with no honest belief in the truth of the representations.
- The autonomy principle does not go far as to allow one to benefit from his/her own wilful disregard of the truth of his/her own representations.
- Similar to *Arab Banking* which adopted the *Derry v Peek* formulation for fraud in the context of independent guarantees, the same should be adopted in the context of letters of credit.

In the present case, the Court of Appeal considered that despite numerous ‘red flags’ surrounding the transactions which should have prompted Winson to do the necessary checks in the circumstances, Winson had exhibited an indifference amounting to recklessness and the absence of honest belief in the truth of its representations. Winson had either failed to carry out or adequately carry out the necessary checks given HL’s failure to provide loading documents and original BLs, the change in the quantity of gasoil in the copy BL provided by Hin Leong for the shipment on the Ocean Taipan, its own doubts over whether it had ‘clean title’ to the cargo, and OCBC’s rejection of the first presentation and communication to Winson that no cargo had been shipped despite the compliant documents.

Key Takeaways

While the autonomy principle insulates the strict payment obligation under letters of credit transactions from disputes which may arise from underlying sales contracts, the courts have long recognised the Fraud Exception so as not to aid fraud.

While this decision affirms the scope of the autonomy principle, it also serves as a salutary reminder for parties to letters of credit transactions that the courts will not extend the principle such as to allow a person to benefit from their own fraud. Should the circumstances of the transaction raise ‘red flags’ as to the truth of a person’s representations, the courts will look to the person’s response in determining whether those representations are fraudulently made within the second and third categories of *Derry v Peek* fraud, in particular, whether they could be said to have carried out the necessary checks and obtained reasonable explanations for those red flags.

References:

Arab Banking Corp (BSC) v Boustead Singapore Ltd [2016] 3 SLR 557

Chartered Electronics Industries Pte Ltd v Development Bank of Singapore [1992] 2 SLR(R) 20

Credit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd and another suit [2022] 4 SLR 1

Derry v Peek (1889) 14 App Cas 337

JBE Properties Pte Ltd v Gammon Pte Ltd [2011] 2 SLR 47

Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd and another appeal [2024] 1 SLR 1052; [2024] SGCA 31



Chapter 4

Injunctions – Restraint of Performance Bond Calls & *Erinford* Injunctions

In dismissing an application for an injunction to restrain a beneficiary of a performance bond from receiving payment under the bond, the General Division of the High Court of Singapore provided guidance on the law on unconscionability in the context of calls on on-demand performance bonds and the grounds on which an *Erinford* injunction should be granted.

Shanghai Chong Kee Furniture & Construction Pte Ltd v Church of St Teresa [2024] SGHC 5

The decision of *Shanghai Chong Kee Furniture & Construction Pte Ltd v Church of St Teresa* [2024] SGHC 5 involved an application by the claimant contractor, Shanghai Chong Kee Furniture & Construction Pte Ltd (“**Shanghai Chong Kee**”), for a declaration that the defendant, its employer under a contract for the restoration works, Church of St Teresa (the “**Church**”) had acted unconscionably in making a call on the whole of the performance bond issued in favour of the Church, and consequently, for an injunction restraining the Church from receiving payment under the said bond.

Shanghai Chong Kee also made an application for an *Erinford* injunction to restrain the Church from calling on, demanding or receiving payment under the Bond until determination of Shanghai Chong Kee’s appeal.

Background Facts

The Church had engaged Shanghai Chong Kee under a contract (“**Contract**”) to carry out restoration works (“**Project**”) at its premises. Pursuant to the Contract, Shanghai Chong Kee procured an unconditional performance bond in the sum of S\$629,998.70 to be issued by an insurer (“**Insurer**”) in favour of the Church (the “**Bond**”).

The Contract provided for a completion date of 2 September 2020. Due to Covid-19 related restrictions, progress of the works was delayed.

On 20 July 2023, the Church made a call on the whole of the Bond (“**Bond Call**”) for a claim amount of S\$825,660.00 comprising the sum of: (i) S\$345,000.00 for liquidated damages (“**LDs**”) in respect of Shanghai Chong Kee’s delay; (ii) S\$87,000.00 for outstanding warranties not yet received; and (iii) the sum of S\$393,660.00 for outstanding rectification works; as well as further anticipated costs to be incurred due to Shanghai Chong Kee’s alleged delay. The amount of this Bond Call exceeded the Bond amount of S\$629,998.70.



In response, on 29 August 2023, Shanghai Chong Kee took out the Application. Shanghai Chong Kee also sought, in the alternative, a reduction of the sum which the Church was allowed to call upon and receive under the Bond, to account for the retention sum of S\$233,116.67 retained by the Church under the Contract; and the value of its claims for “*Additional Preliminaries amounting to SGD 600,000, which (Shanghai Chong Kee) has submitted to the Architect*”.

On 30 August 2024, the Court granted an interim injunction restraining the Church from receiving payment from the Insurer under the Bond until the ex partes hearing of the Application. After the ex partes hearing, the Court found that the Church had not acted unconscionably when it made the Bond Call. The Court dismissed the Application, setting aside the interim injunction granted on 30 August 2024.

Unconscionability as a ground to restrain a call on a performance bond

In dismissing the Application, the Court laid out the law on unconscionability in the context of calls on on-demand performance bonds.

- **Settled Law:** unconscionability is a ground for the court to grant an injunction restraining a beneficiary from calling on a performance bond.
- **Definition:** Unconscionability refers to conduct so lacking in bona fides that it warrants an injunction restraining the beneficiary’s substantive rights. It encompasses elements of abuse, unfairness and dishonesty.

- **High Threshold:** The threshold of establishing unconscionability is high one. The burden is on the applicant to demonstrate a strong prima facie case of unconscionability.
- **Contextual Consideration:** When assessing whether a strong prima facie case has been made, the entire context of the case must be thoroughly considered. The courts’ discretion to grant such injunctions is exercised sparingly, making it challenging for an applicant to establish a strong prima facie case.
- **Reason for High Threshold:** The high threshold is due to the harsh nature of interim prohibitive injunctions, which restricts the beneficiary from enforcing a substantive right contracted for.
- **Mistaken Premise:** Calls on performance bonds on mistaken premises can still be legitimate if the beneficiary genuinely adopted the position and honestly believed the counterparty was in breach.
- **Court’s Role:** The court’s role is not to appraise the merits of the parties’ decisions but to be alive to the lack of bona fides in those decisions.
- **Clear Case of Fraud:** A clear case of fraud or unconscionability must be established. Mere allegations are insufficient

No strong prima facie case of unconscionability

On the facts of the case, the Court held that Shanghai Chong Kee had not established a strong *prima facie* case of unconscionability on the part of the Church. The Court rejected all the grounds raised by Shanghai Chong Kee to demonstrate unconscionability on the part of the Church.

The Church's LDs claim

The Court disagreed that unconscionability could be inferred solely from the Architect's supposed error in calculating liquidated damages (LDs) and the Church's hesitancy in demanding them. Shanghai Chong Kee knew of the Church's LD entitlement as certified by the Architect since September 2022, even if an express claim was only made later. There was no evidence of bad faith by the Architect or the Church.

While the Court acknowledged that the Architect and the Church were not as clear as they could have been regarding the LD claim, it held that this did not amount to unconscionability. The court's role in interlocutory proceedings is not to conduct a detailed merits review.

The Court did not need to rule on the merits of the LD claim or whether the Architect erred in certification. Even if there was an error, it did not equate to unconscionability, as the Architect was contractually required to act independently and impartially. The Architect was not the Church's agent, and the Church was entitled to rely on the Architect's decision. There was no unconscionable conduct in this reliance, as there was no explicit impropriety by the Architect or the Church.

Tarmac and Dome repair works

Shanghai Chong Kee argued that the tarmac and dome works were not within its scope of work, and thus, the Church was not entitled to damages for these repairs and acted unconscionably in seeking them. In response, the Church presented correspondence showing Shanghai Chong Kee's acknowledgment of undertaking the tarmac and dome repairs and provided a convincing explanation for the tarmac repairs.

The Court reiterated that issues related to the tarmac and dome repairs, including the parties' conduct, correspondence, Architect's instructions, and the extent of Shanghai Chong Kee's scope of work, are disputed matters that the Court cannot resolve in the current interlocutory proceedings. The key question was whether the Church's conduct demonstrated a strong prima facie case of unconscionability, which the Court found it did not.

Warranties

The Court held that Shanghai Chong Kee did not establish unconscionability on the issue of warranties due to a lack of cogent evidence for proper examination. Consequently, the Court did not find unconscionability on the part of the Church.

Reduction of the quantum of the Bond Call

Shanghai Chong Kee alternatively requested a reduction in the sum the Church is entitled to receive from the Bond Call, accounting for the retention sum of S\$233,116.67 retained by the Church under the Contract, and the value of its claims for "Additional Preliminaries" amounting to S\$600,000, which Shanghai Chong Kee had submitted to the Architect.

The Court stated that its role was not to quantify damages precisely but to take a broad approach to determine whether the Bond Call provided the Church with ample security without being excessively unconscionable. The Court was unconvinced that the Bond Call was excessively unconscionable.

The Court Division found that the Church did not lack bona fides in quantifying its claims at S\$825,660.00. Even accounting for the retention sum of S\$233,116.67, the Call Amount would not have been disproportionate to the Bond Amount. This consideration was based on the fact that the Statement of Final Account had not been issued, the claim estimates were rough, and there was some uncertainty in the claim quantification,

Regarding Shanghai Chong Kee's claim for "Additional Preliminaries" amounting to S\$600,000, the Court found this claim irrelevant as it was raised after the Bond Call and did not affect the assessment of the Church's bona fides at the time of the Bond Call.

Erinford injunction

On 22 November 2023, Shanghai Chong Kee filed a notice of appeal against the Court's decision. On the same day, Shanghai Chong Kee sought an Erinford injunction via letter to restrain the Church from calling on, demanding, or receiving payment from the Insurer under the Bond until the appeal was determined

Form of application

Regarding the form of application for an Erinford injunction, the Court referred to the decisions in *SH Design & Build Pte Ltd v BD Cranetech Pte Ltd* [2018] SGHC 133 and *Sin Herh Construction Pte Ltd v Hyundai Engineering & Construction Co Ltd* [2017] SGHC 3, where applications were made orally and by letter, respectively. In line with the "Ideals" under O. 3, r. 1 of the Singapore Rules of Court 2021, the Court adopted a practical approach, allowing Shanghai Chong Kee to proceed with the application by letter. While formal applications by summons are not discouraged, Erinford injunctions often require urgent action, justifying oral or letter applications when practicalities demand.

Grounds to grant an *Erinford* injunction

The Court outlined the grounds for granting an *Erinford* injunction based on *Erinford Properties Ltd v Cheshire County Council* [1974] 2 WLR 749:

- **Likelihood of Appeal Succeeding:** The Court accepted that there was a likelihood of success for the appeal. Shanghai Chong Kee's submissions were substantive and not merely frivolous or bare denials. The standard should not be overly strict; applicants should provide detailed reasons why their appeal arguments will succeed based on a fair and objective standard.
- **Negation Test:** The Court disagreed that the appeal would be rendered nugatory if the *Erinford* injunction was not granted, leading to the dismissal of the application. The Negation Test must stand independently and relate directly to the appeal or dispute. Shanghai Chong Kee's solvency issues, which might deter potential investors if the Insurer paid out under the Bond, were deemed outside the Church's control and irrelevant to the contractual obligations.

Court's View

The Court held that the substance of the dispute would survive regardless of Shanghai Chong Kee's insolvency issues. If the Bond Call was excessive, the excess could be recovered by Shanghai Chong Kee, its liquidators, or judicial managers. The amounts called under the Bond would be reflected as liabilities in Shanghai Chong Kee's accounts, whether contingent or actual, making little difference from an investor's perspective.

Primary Remedy

Shanghai Chong Kee would not be denied its primary remedy if the appeal succeeded, as any sum received by the Church under the Bond would have to be repaid. The Court also rejected the argument that denying the *Erinford* injunction would create a negative perception of Shanghai Chong Kee's case, as the negative perception of the dismissal of the Application was already present and the denial of an *Erinford* injunction would do little to worsen those perceptions.

Irreparable Prejudice

Last, the Court was not persuaded by Shanghai Chong Kee's argument on the lack of irreparable prejudice to the Church from granting the *Erinford* injunction, observing that prejudice to the defendant is not a recognised ground for granting *Erinford* injunctions.

Conclusion

This case underscores the high threshold required to establish unconscionability in resisting a call on a performance bond. A claimant must present cogent evidence to demonstrate a strong prima facie case of unconscionability; mere allegations are insufficient.

However, the court in interlocutory proceedings is not equipped to and does not engage in a full, detailed, and exhaustive review of the merits of the parties' assertions. This case also clarifies that the courts can adopt a practical approach to *Erinford* injunction applications: while a formal application by summons is not discouraged, there is no rule disallowing oral applications or applications by letter if the practicalities of the case are demonstrated as demanding such an approach.

Bond procurers seeking to injunct a call on a performance bond should consider whether to lodge an appeal if the injunction application is denied, and whether to seek an *Erinford* injunction pending the appeal's outcome. An applicant intending to make an oral application for an *Erinford* injunction immediately after the court's dismissal must be prepared to substantiate why the practicalities of the case demand this approach and address the court on why the injunction should be granted.





Chapter 5

Stay of Proceedings; Rights of Bond Beneficiaries

In dismissing an appeal against the High Court’s decision to allow a stay in favour of arbitration of an application to restrain a beneficiary under an unconditional performance bond payable on demand from inter alia receiving payments under the bond, the Court of Appeal reminded parties of the need to have a clear understanding how their rights under contract and as bond beneficiaries may be affected or compromised by subsequent conduct.

Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd & Great Eastern General Insurance Limited [2024] SGCA 30

In the case of *Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd & Great Eastern General Insurance Limited* [2024] SGCA 30, we witness how a bond beneficiary’s rights under an unconditional on-demand performance bond were impacted as a result of its decision to seek a stay of the injunction application brought by the bond procurer against a call on the performance bond, in favour of arbitration of the disputes in the underlying construction contract between the bond beneficiary and the bond procurer. This case highlights that what might seem to be the taking of a purely procedural position can have significant implications for parties’ substantive rights, and that parties in construction projects should

appreciate the different sets of rights and obligations under performance bonds and the underlying construction contracts.

When faced with an application by Star Engineering Pte Ltd (“**Star Engineering**”) to restrain it from inter alia receiving payment under a performance bond, Pollisum Engineering Pte Ltd (“**Pollisum Engineering**”) applied to stay the application in favour of arbitration of its disputes with Star Engineering. As a result, instead of being able to assert its entitlement to payment of the bond monies upon demand from the bond issuer, Great Eastern General Insurance Limited (“**Great Eastern**”), Pollisum Engineering found its entitlement to payment by Great Eastern becoming subject to proof and pending the arbitration of its disputes with Star Engineering under the underlying contract. This arguably removed nearly all the benefits Pollisum Engineering enjoyed as the beneficiary under an unconditional performance bond.

Background Facts

Star Engineering, the appellant in this case, had been engaged by Pollisum Engineering, the first respondent, as the contractor for the design, construction, and maintenance of the works for a construction project, under the REDAS Design and Build Conditions of Contract (3rd Ed, October 2010) (the “**REDAS Conditions**”).

Under the REDAS Conditions, Star Engineering was to provide Pollisum Engineering with “*an unconditional on-demand bond... in lieu of the cash deposit*” for the sum of SGD 856,000, which Star Engineering did. The performance bond was issued by the second respondent, Great Eastern.

After disputes arose between the parties, Pollisum Engineering gave notice to Star Engineering to terminate the contract. A few months after terminating the contract, Pollisum Engineering made a demand for payment under the performance bond (“**Payment Demand**”), on the basis that it had incurred rectification costs and significant losses and expenses due to Star Engineering’s alleged breaches of contract.

Star Engineering then filed an application in the High Court of Singapore seeking the following orders: (a) that Pollisum Engineering be restrained from receiving payment of the sum of \$856,000 or any part thereof from Great Eastern pursuant to the demand for payment; (b) that Great Eastern be restrained from making any payment under the performance bond of the sum of S\$856,000 or any part thereof to Pollisum Engineering pursuant to the demand for payment; (c) that Pollisum Engineering be restrained from making any further demand to Great Eastern for payment under the performance bond; and (d) that in the event that Pollisum Engineering receives the sum of \$856,000 or any part thereof from Great Eastern, it be restrained from using, depleting and/or disposing the sums received, and for those sums to be repaid to Great Eastern (the “**Injunction Application**”).

Star Engineering then sought and obtained temporary restraining orders on the same terms against Pollisum Engineering and Great Eastern, pending the resolution of the Injunction Application.

In response, Pollisum Engineering sought a stay of the Injunction Application in favour of arbitration (“**Stay Application**”). The Stay Application was initially refused at first instance, but was allowed on Pollisum’s appeal by a judge in the High Court (the “**High Court Judge**”).

Star Engineering then brought the present appeal before the Court of Appeal, against the decision of the High Court Judge.

The High Court Decision

The High Court Judge granted the Stay Application sought by Pollisum Engineering on *inter alia* the following grounds:

- he was satisfied that the dispute over the demand on the performance bond fell within the scope of the arbitration agreement. According to the High Court Judge, it was clear from the contract that the parties intended any disputes between the parties, including those arising out of the performance bond, to be referred to arbitration notwithstanding the non-exclusive jurisdiction clause in the performance bond
- there was “*sufficient reason*” to stay the court proceedings. Arbitration was the more appropriate forum for deciding the overlapping issue of whether Pollisum Engineering’s demand under the performance bond was made fraudulently. Further, the real dispute in the Injunction Application was between Star Engineering and Pollisum Engineering, and that ultimately turned on determining what their respective rights and liabilities were under the contract between them.
- the High Court Judge was satisfied that Pollisum Engineering was ready and willing to arbitrate the disputes.

The Decision by the Court of Appeal

The Court of Appeal dismissed the appeal, stating that there was no reason to interfere with the decision of the High Court Judge.

However, the reasons for the Court of Appeal’s dismissal of the appeal were more to do with the “*ill-advised positions... taken by both sides*”, as opposed to the substantive merits of the Injunction Application.

The Dispute Resolution Clauses

The performance bond provided by Great Eastern and the REDAS Conditions contained different dispute resolution clauses, which informed the decision and reasoning of the Court of Appeal:

- The performance bond provided that “*the parties agree to submit to the non-exclusive jurisdiction of the Singapore Courts*”.
- The REDAS Conditions contained an arbitration agreement, stating that “*[i]n the event of any dispute between the [p]arties in connection with or arising out of the [c]ontract or the execution of the [w]orks ... the [p]arties shall refer the dispute for arbitration*”.
- Parties also added a clause to the REDAS Conditions which provided that “*[a]ny dispute which the [c]ontractor has in relation to such call, demand, receipt, payment ... shall be resolved in accordance with [the arbitration agreement of the REDAS Conditions]*”.



Therefore, any disputes between Star Engineering and Pollisum Engineering relating to the performance bond were also to be referred to arbitration.

The Appeal

In the appeal, Star Engineering argued that the issue of Pollisum Engineering's entitlement to make the Payment Demand was an overlapping issue in the disputes between Star Engineering and Pollisum Engineering, and between Star Engineering and Great Eastern, and sufficient reason to refuse a stay in favour of arbitration. Star Engineering also argued that the validity of the demand on the performance bond was not a dispute within the scope of the arbitration agreement.

Pollisum Engineering on the other hand argued that Star Engineering's objection to the demand on the performance bond and/or payment of moneys under the performance bond fell squarely within the arbitration agreement between Star Engineering and Pollisum Engineering, on the wording of the underlying construction contract which made clear that any dispute over the validity of a demand made under the performance bond should be referred to arbitration.

In considering the parties' arguments, the Court of Appeal opined that both parties had taken erroneous positions, and that Pollisum Engineering had also rendered irrelevant the issue of whether the dispute over the Payment Demand fell within the scope of the arbitration agreement between it and Star Engineering by its conduct.

The Performance Bond

The Court of Appeal made some observations in relation to the nature of the performance bond, which it said was overlooked by the parties, and that had an impact on the proceedings. According to the Court of Appeal, this greatly contributed to the "*needless complexity, delay and expense being incurred in this case.*"

First, the Court of Appeal pointed out that there was no real dispute between the parties that the performance bond was an unconditional bond payable on demand. The Court of Appeal also found that on the true construction of the performance bond, Great Eastern was not under any duty to inquire into the circumstances underlying the demand on the performance bond.

Having considered the performance bond in its contractual context, the Court of Appeal found that the performance bond was intended to operate as the equivalent of a cash deposit. The Court of Appeal also found that the parties had contractually limited the grounds on which a demand on the performance bond could be restrained to the sole ground of fraud. Parties had excluded unconscionability as a ground, which would have otherwise been an additional ground available at law for restraining a demand for payment under an unconditional performance bond.

The Court of Appeal further held that the dispute resolution clause in the REDAS Conditions (which stated that any dispute in relation to the performance bond was to be resolved by way of arbitration) did not alter or change the character of the performance bond such that it became a conditional bond.



The correct interpretation was that these provisions, taken together, meant that any interference with a payment demand under the performance bond by Pollisum Engineering was only permitted on the ground of fraud, and any such interference should be sought from the court pursuant to the dispute resolution clause in the performance bond.

Absent such fraud, Great Eastern has undertaken to pay the money pursuant to a simple demand for payment made by Pollisum Engineering, and the dispute between Pollisum Engineering and Star Engineering under the underlying contract is irrelevant to the question of whether payment should be made pursuant to a demand under the bond.

In respect of the disputes between Star Engineering and Pollisum Engineering arising from the underlying construction contract between them, these would fall to be resolved by arbitration.

On the terms of the REDAS Conditions, if Pollisum Engineering first received cash proceeds from Great Eastern and it was subsequently determined at arbitration that there was any over-payment, then there would be repayment of such amount to Star Engineering. Therefore, "any dispute" in relation to the call, demand, receipt, payment or utilisation of the cash proceeds would be resolved by an arbitrator, who would determine whether Pollisum Engineering had received cash proceeds from Great Eastern greater than the amount of loss or damage actually incurred by it after it had received the cash proceeds. The Court of Appeal found this interpretation, along with the terms of the REDAS Conditions was consistent with the parties' express agreement that payment under the performance bond may only be interfered with if fraud was shown.

Coming back to the performance bond, the court will only grant an injunction which interferes with the obligation of the financial institution to honour the demand on two grounds - where the demand was made fraudulently, or where it would be unconscionable for the party to make a demand under the performance bond. In this case, this ground of unconscionability was contractually excluded.

Where a restraining order is sought that interferes with payment under a bond, the court is not concerned at all with that underlying dispute. It is rather concerned with the separate question of whether there is sufficient ground to interfere at all, even temporarily, with the beneficiary's right to be paid under the bond. The presumptive position is that there will be no such interference unless sufficient evidence is adduced of the possibility of the demand itself being fraudulent or, where applicable, unconscionable.

Therefore, when Star Engineering sought and obtained the temporary restraining order, the Court of Appeal held that Pollisum Engineering ought to have applied to set aside the temporary restraining order, unless it accepted that there was strong prima facie evidence that it had acted fraudulently or unconscionably in making the demand.

However, due to Pollisum Engineering's failure to appreciate the distinction between its substantive dispute with Star Engineering under the contract, and its right to be paid pursuant to its demand for payment under the performance bond, Pollisum Engineering did not challenge Star Engineering's attempted interference with the payment under the performance bond.



Pollisum Engineering did not argue that there was no basis for restraining its call on the performance bond, and had not challenged the Injunction Application on that ground. Instead, it chose to seek a stay of the Injunction Application in favour of an arbitration with Star Engineering. Effectively, Pollisum Engineering was seeking to refer to arbitration the issue of its entitlement to call on the performance bond.

The Court of Appeal found that by doing so, Pollisum Engineering had in effect converted its position from that of a party holding an unconditional on-demand bond into something akin to that of a party holding a conditional bond payable only upon proof of its entitlement to receive payment thereunder.

As for Star Engineering, the Court of Appeal considered that its appeal against the Judge's orders allowing the stay of the Injunction Application in favour of arbitration to be "*wholly illogical and baseless*".

As a result of Pollisum Engineering's actions, the performance bond is in effect being treated by the parties as a conditional bond, which is payable only upon proof that Pollisum Engineering is actually entitled to payment of the sum demanded.

If Star Engineering succeeded in the arbitration, by establishing that no part of the sums demanded are due to Pollisum Engineering, that would be the end of the matter. Pollisum Engineering would be restrained from demanding any payment and Great Eastern would not make any payment. If, on the other hand, Star Engineering is found to owe part or all of the sums demanded, Great Eastern will be called on to make payment.

Given that the substantive dispute was only between Pollisum Engineering and Star Engineering, and because of the stance taken by the former in respect of its entitlement to payment under the performance bond, there was no reason for the matter not to proceed to arbitration, or for Star Engineering to appeal the High Court Judge's grant of the Stay Application.

The Court of Appeal held that Pollisum Engineering's failure to seek immediate payment under the performance bond and its agreement to have the question of its ultimate entitlement to demand for payment resolved at arbitration meant that it was no longer relevant whether or not the dispute over the demand for payment fell within the scope of the arbitration agreement between it and Star Engineering.

As a result, the Court of Appeal found that there was no reason to interfere with the decision of the Judge and dismissed the appeal.

Conclusion

This decision by the Court of Appeal underscores the need for parties in construction projects to have a clear understanding of their rights under different contractual arrangements, and to take stock of the effect of their subsequent conduct which may implicate the waiver or modification of these rights.



Chapter 6

Completion of Works

In dismissing an application for leave to appeal against the decision of the Magistrate Court, the General Division of the High Court had to decide whether works under a renovation contract subject to staged payments had been completed, underscoring the fact that in Singapore, absent specific conditions stipulated in the contract, the intended usage of the property plays an important role in determining whether the works under a construction contract have been completed.

Tid Plus Design Pte Ltd v Kwek Seng Wee John [2024] SGHC 187

The case of *Tid Plus Design Pte Ltd v Kwek Seng Wee John [2024] SGHC 187* was in respect of an application by Tid Plus Design Pte Ltd (“**TPD**”) for leave to appeal against the decision of the District Judge dismissing its claim for unpaid sums under a contract for renovation works.

In dismissing the claim, the District Judge had to decide whether certain works under the contract had been “completed”. The case illustrated the Singapore courts’ approach in deciding whether completion had been achieved.

Background Facts

In 2021, the respondent, John Kwek, had hired the applicant, TPD, an interior design company, to perform renovation works on his newly purchased house. Pursuant to the terms of the contract, the respondent was to make 10% payment at the signing of the

renovation contract, 40% at the commencement of actual works, and then another 45% upon the completion of wet works (“the third instalment”). It was later agreed between the parties that the sums owing at the completion of wet works would only be payable upon the completion of carpentry works. Therefore, 95% of the contract price would have been due and owing upon the completion of the carpentry works.

The renovation works were delayed considerably. Mr Kwek, who had been staying in a room at a friend’s house with his family while the renovation works were on-going and had been storing their belongings in a storage facility, elected to move into the property on 18 September 2021. At the time of moving back into the property, Mr. Kwek had paid S\$61,400 (75% of the contract price).



Mr Kwek was complaining of substandard workmanship. The fact that there were outstanding defects after Mr Kwek had moved back into the house with his family was not in dispute. Mr Kwek continued to request updates on when rectification works would be carried out. TPD, on its part refused to perform any further work, including rectification work, until the S\$20,651.80 was paid.

After a period of impasse, TPD halted work and terminated the contract due to non-payment. TPD pursued legal action for the remaining amount, while Mr. Kwek counterclaimed for rectification costs totalling S\$33,114.25.

In the first instance, the District Judge had found that the case turned primarily on whether TPD had completed the wet works – if so, then the third instalment would have become due to TPD, and Mr Kwek would have been in breach of the contract for not paying it. If not, then TPD would have been in breach for terminating the contract.

The District Judge found that TPD had failed to substantially complete the wet works, and that Mr Kwek was entitled to withhold the (remainder of the) third instalment as he did. The District Judge held that TPD was not entitled to the moneys it sought and was in breach of the renovation contract, therefore being liable to pay the costs of rectification.

Dissatisfied with the decision of the District Judge, TPD sought leave to appeal. When the District Judge the application, TPD applied for leave to the High Court.

Issues Before the Court

In determining whether to grant leave to appeal, the High Court had to decide inter alia whether the District Court had made a prima facie error, which TPD contended the District Judge had done when it reached the conclusion that the wet works were not completed.

First, it was TPD's case that the District Judge had misdefined "completion" by including an element of fitness for occupation since in the context of staged payments, it would be impossible to achieve such a standard, and the property would still be in an uninhabitable state.

The High Court did not agree. Considering that the definition of completion is that "the works are ready for use or occupation with the exception of minor defects or outstanding work" that "do not detract from the enjoyment or utility of the facility", completion does not contemplate a situation where the "property" is ready for use or occupation but rather whether the "works" is ready. Therefore, to the extent that the parts of the property completed by the wet works were ready for use, it is irrelevant whether the entire property is ready for use or not.

The District Judge had found that waterproofing works were so shoddy that it "substantially deprived [Mr Kwek] and his family of access to proper sanitation in their house" and that even after all other works (eg, carpentry) have been completed, the property without proper sanitation would still be "not objectively suitable for occupation".

The High Court agreed with the District Judge, holding that “completion” of any stage of the renovation, for staged payments, must essentially connote substantial completion of such a stage, such that the work for that stage is largely complete, less minor defects.

Second, TPD contended that the term “wet works” should encompass wet works for all areas of the property, and not just wet works for the bathrooms. It was TPD’s case that the incomplete wet works to the bathroom constituted just a minor proportion of the wet works, so the wet works were in fact “substantially completed” despite the defects in the bathrooms.

The High Court acknowledged that the term “wet works” meant wet works for the entire property. However, the evidence showed that there was significant water leakage in all three bathrooms in the house which prevented the bathrooms from being used without the risk of further damaging the surrounding structures of the property and beyond. In the circumstances, the High Court held that the bathrooms could not be used as intended.

Third, TPD claimed that the District Judge had disregarded undisputed evidence from a single joint expert who stated the wet works were completed. The High Court found that this evidence was inconclusive and held that it was the court that ultimately determines whether the works were completed legally and contractually.

In conclusion, the High Court found no errors in the District Judge’s decision and dismissed the application for leave to appeal.

Commentary

This case illustrates the interpretation of completion under Singapore law, particularly in the context of staged payment obligations subject to the completion of certain type of works. It also emphasises the importance of readiness of the works for use despite minor defects.

It would be useful to compare the position under Singapore law with the English position.

Position Under English Law

Historically, English courts have approached the definition of “completion” in two ways:

- One approach focuses on the “intended purpose of the works,” allowing for completion despite minor outstanding tasks and defects that do not significantly affect use (see the view of Salmon J in *Jarvis & Sons Limited v. Westminster Corporation & Another* [1969] 1 WLR 1448)

- The other stricter approach requires all construction work to be finished, except for *de minimis* or trivial defects (see *Westminster City Council v J Jarvis & Sons* [1970] 1 W.L.R 637, *P&M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 W.L.R. 146 and *H.W. Neville (Sunblest) Ltd v William Press and Son Ltd* (1981) 20 BLR 78).

The English Court of Appeal in *Mears Ltd v. Costplan Services (South East) Ltd and others* [2019] EWCA Civ 502 (“**Mears**”) confirmed the stricter approach as the standard under English law, emphasising that only *de minimis* defects would not prevent practical completion. It summarised the common law key principles in determining the completion of works as follows:

- Practical completion is easier to recognise than define – as recognised in Keating.
- The existence of a latent defect (by its very nature) cannot prevent practical completion.
- In relation to patent defects, there is no difference between an item that has yet to be completed and one that has been completed but is defective.
- The existence of patent defects will be sufficient to prevent practical completion, save where they are *de minimis* or trifling in nature.
- Whether or not an item is trifling is a matter of fact and degree, to be measured against “*the purpose of allowing the employers to take possession of the works and to use them as intended*”. The ability to use the works as intended does not mean that the works must be regarded as practically complete. Instead, the nature and extent of items of works which remain to be completed/remedied must be regarded.
- Just because a defect is irremediable, it does not mean that the practical completion is prevented.

Accordingly, in the absence of a contractual definition of “practical completion”, the English common law takes the position that the practical completion of the works must be free from patent defects (apparent defects) except to the extent that they are “trifling”, and the ability to use the works for their intended purpose is not evidence on its own that practical completion has occurred.

Position Under Singapore Law

The position under Singapore law focuses on the readiness of the property for its intended use.

- In *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2017] SGHC 246, (“**Smile Inc v. OP3**”) the High Court held that where a contract lacks a specific definition of completion, substantial or practical completion is generally acknowledged when the works are reasonably ready for use by the employer. Justice Chan Seng Onn noted that the respondent began operations at the clinic on 1 November 2013, leading him to conclude that the clinic must have been handed over by 31 October 2013. Therefore, the court ruled that the date of practical completion was 31 October 2013, even though around 36 incomplete and outstanding items remained at that time.
- In *Ser Kim Koi v. GTMS Construction Pte Ltd and others and another appeal* [2022] SGHC(A) 34, the High Court interpreted the definition of “completion” pursuant to the Articles and Conditions of the Singapore Institute of Architects Building Contract (Lump Sum Contract) (9th Ed, 2010) which specified that the architect is not allowed to issue the completion certificate until all parts of the work were in the architect’s opinion ready for occupation and use. The High Court disagreed that the completion certificate could still be issued before the issuance of Temporary Occupation Permit (“TOP”) (which were due to non-construction factors which were not in the scope of construction contract). The High Court held that without obtaining the TOP, it suggests that the works would not have been fit for purpose.

The case of *Tid Plus Design Pte Ltd v Kwek Seng Wee John* emphasises this position of prioritising the ability of the owner to use the property in deciding whether completion has been achieved.

This difference in approaches also appears to be reflected in the standard form contracts from the respective jurisdictions. For example, the JCT Major Project Construction Contract from the UK provides that in order to achieve practical completion, there must have been compliance with statutory requirements, all necessary consents and approvals obtained, there are no minor outstanding works that would affect use, any stipulations identified for practical completion have been satisfied and the requisite health and safety file and other information have been provided.

On the other hand, the SIA Building Contract 2016 Without Quantities, for example, provides that the architect may issue a completion certificate even though there shall be outstanding works if the outstanding works were minor works that could be completed “without unreasonable disturbance of the Employer’s full enjoyment and occupation of the property”.

References :

H.W. Neville (Sunblest) Ltd v William Press and Son Ltd (1981) 20 BLR 78

Mears Ltd v. Costplan Services (South East) Ltd and others [2019] EWCA Civ 502

P&M Kaye Ltd v Hosier & Dickinson Ltd [1972] 1 W.L.R. 146

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

Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd [2017] SGHC 246

Tid Plus Design Pte Ltd v Kwek Seng Wee John [2024] SGHC 187

Westminster City Council v J Jarvis & Sons [1970] 1 W.L.R 637

JCT Major Project Construction Contract, 2016 Edition

SIA Building Contract 2016 Without Quantities, 1st Edition





Chapter 7

Latent defects – Limitation and warranty obligations

Defects claims after project completion are typically subject to a six-year statutory limitation period in contract and tort, although an alternative extended limitation period can apply to latent defects. Post-completion project warranties typically also provide for a fixed term of warranty coverage for defects. This article looks at the following decisions that considered the allowable time to bring such claims for latent defects:

— *In The Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd* [2024] SGHC(A) 32, where an appellate decision of the High Court provided guidance on when a claimant will be found to have had requisite knowledge of latent defects, and

— *In Seatrium New Energy Ltd (formerly known as Keppel FELS Ltd) v HJ Shipbuilding & Construction Co, Ltd (formerly known as Hanjin Heavy Industries and Construction Co Ltd)* [2024] SGHC(A) 26, where an appellate decision of the High Court considered whether latent defects that were not discovered during the relevant warranty period would nonetheless be caught by the warranty.

The Management Corporation Strata Title Plan No 4099 v KTP Consultants Pte Ltd [2024] SGHC(A) 32

Background

The appeal before the Appellate Division of the High Court was brought by the management corporation of a residential development (the “**MCST**”), against a decision to strike out its claims against the structural engineer and qualified person responsible for the development’s structural works (“**KTP**”), in relation to the installation of allegedly defective cladding at the development.

The MCST's case against KTP was that it had breached contractual obligations as the civil & structural consultant to the development's main contractor ("TPS"). The MCST also intended to prove claims in respect of KTP's alleged failures relating to the submissions of designs for the fixings and framing of cladding to the Building and Construction Authority (the "BCA").

In its striking out application, KTP argued that the MCST's tortious claim against it was stale under the Limitation Act 1969. The MCST had commenced suit against TPS on 21 February 2022, and was allowed to join KTP as co-defendant in the suit in February 2023, together with the supplier of composite engineered timber alike panels ("Polydeck") and the firm of architects that designed the development ("AGA").

In the decision appealed against, the court had found that the alleged cladding defects in the suit ("Cladding Defect") were of the same nature as those identified in a report produced on 22 September 2016 for the MCST (the "Bruce James Report") by a firm of building surveyors who had conducted a visual inspection of the development that same year. On this basis, the MCST's cause of action was said to have accrued by the date of the Bruce James Report on 22 September 2016. As the Suit was brought against KTP in February 2023, the action against KTP was time-barred under the 6-year limitation period for actions founded on tort under section 6 of the Limitation Act 1969.

The court also held that the claim was time-barred under the extended three-year limitation period under section 24A(3)(a) of the Limitation Act 1969, which runs from the date the claimant has the requisite knowledge for bringing an action for damages in respect of the relevant latent damage. After the Bruce James Report was issued, TPS had carried out rectification works for the Cladding Defect in March 2017 which were certified as completed in June 2017. However, sometime between March 2017 and September 2017 the MCST discovered that the Cladding Defect had recurred.

Taking these facts together, the court held that:

- First, the MCST knew the factual essence of its claim in negligence against KTP from the Bruce James Report, as the systemic or widespread issue with the development's cladding facade and KTP's role in it was something that the MCST was reasonably expected to have acquired from facts observable or ascertainable by it;
- Second, that by latest September 2017 – with the recurrence of the Cladding Defect – the MCST had knowledge of the material facts about the Cladding Defect which rendered the case sufficiently serious for a claimant to actually invoke the court's process; and
- Third, the MCST was reasonably expected to have

sought the identity of the structural designer, that is, KTP, after having read the Bruce James Report, or at latest, upon discovering the recurrence of the Cladding Defect by September 2017.

On this basis, the Court held that the MCST had the requisite knowledge to sue KTP more than 3 years before the actual commencement date of its claim against KTP (on 17 February 2023), and as the MCST's claim had therefore not been brought within the three-year limitation period, the court allowed the striking out of the MCST's claims against KTP.

In the MCST's appeal, the MCST challenged the judge's findings that the Cladding Defect had been identified in the Bruce James Report as a structural defect, as the MCST argued that the Cladding Defect had instead been identified in the Bruce James Report as resulting from a wrong choice of material rather than the structural design of the external cladding facade.

The MCST also argued that the Bruce James Report was not sufficient for the MCST to know that it could pursue a claim against KTP, and that the Judge had erred in dismissing the utility of expert evidence and cross-examination.

The Attributability Requirement and the Justification Requirement

On appeal, the Appellate Division clarified that a claimant's requisite knowledge of the contents of any claim for latent damage, referred to as the "Attributability Requirement", comprised 3 things:

- (a) The first is knowledge of the damage on which the claim is founded.
- (b) The second is knowledge of the act or omission alleged to constitute negligence, nuisance or breach of duty.
- (c) The third is knowledge that the damage was attributable (whether wholly or in part) to the act or omission complained of. The word "attributable" bears its grammatical meaning of "capable of attribution" rather than the looser usage of "in fact attributed".

The Appellate Division also clarified that a claimant's requisite knowledge of the material facts about the damage which would lead a reasonable person who had suffered such damage to consider it sufficiently serious to institute proceedings had 2 aspects to it:

- (a) First, the 'reasonable person' approach is to first ascertain what the claimant knew (including constructive knowledge) about the injury or damage he had suffered, before asking if a reasonable person armed with that knowledge would have considered it sufficiently serious to justify the institution of proceedings;
- (b) Second, the requirement for a claim to be

“sufficiently serious” means that the action considered must not be frivolous or wholly without merit, taking into account the effort required in instituting a court action.

On the facts, the Appellate Division found that while the MCST would have known from the Bruce James Report of aesthetic issues with the development’s cladding, the building surveyors’ recommendation for investigation of the cladding system’s suitability for ‘external’ or outdoor use would not of itself implicate any structural or design issue, or point to wider structural issues in the fixing. In this regard, the appellate court found it significant that the Bruce James Report was issued by the building surveyors on basis of a purely visual inspection, and that nothing in the Bruce James Report suggested that they had been engaged to check the structural integrity of the cladding or in fact had done so. The Appellate Division therefore held that the MCST could not be said to ought have reasonably known of systemic issues with the development cladding façade attributable to KTP’s deficient design and supervision, as the Bruce James Report had not identified system-wide issues implicating KTP.

The Appellate Division also held that as the Bruce James Report did not implicate structural issues or issues concerning the fixings, and the full context to the Bruce James Report had not been established at the current stage of proceedings, it was not safe to conclude that the MCST ought reasonably to have appointed a façade specialist or structural engineer to investigate the cladding, including to check the fixings and framings.

The Appellate Division noted that the evidence at trial may well lead to different findings on the MCST’s knowledge, actual or constructive, of its claim against KTP. However, the appellate court stressed that it was the rare case in which fact-sensitive inquiries would be amenable to determination on a summary basis, such as in striking out applications. In the present matter, the MCST’s case that it only knew its claim in respect of the Cladding Defect was attributable to KTP upon receipt of an expert report in August 2022 was an arguable and viable one that should go to trial.

A cause of action in tortious negligence arises upon damage being suffered, and the time to bring a claim will expire after 6 years unless the claimant can rely on the alternative limitation period of three years calculated from the date it had the knowledge required to bring an action for damages. As illustrated in this decision, the availability of the remedy for damages will then often turn on whether the claimant ought to have undertaken a more thorough investigation earlier and whether, if it had done so, the potential defendant would have been identified then.

Seatrium New Energy Ltd v HJ

Shipbuilding & Construction Co, Ltd [2024] SGHC(A) 26

Background facts

This appeal was brought by Seatrium New Energy Ltd (“**Seatrium**”) against a decision that dismissed its claim against the respondent subcontractor (“**HJ**”) for defective work carried out by it pursuant to a subcontract dated 17 January 2013 between them in relation to the fabrication, assembly and erection of an accommodation support vessel.

Under the subcontract, HJ had been required to complete its works by 30 October 2013. HJ failed to meet the deadline and Seatrium agreed to take over construction of the outstanding works. This agreement was set out in various documents that effectively varied the subcontract, including a “Side Letter” and a “Letter Agreement” dated 27 December 2013. The 5th paragraph of the Letter Agreement (“**5th Para**”) provided as follows:

In consideration for the Sub-Contractor’s [HJ] acknowledgement and agreement above, Builder [Seatrium] acknowledges and agrees that, save for Sub-Contractor’s warranty obligations for the Sub-Contract Works which it has carried out, Builder shall not have any claims whatsoever against Sub Contractor for the works which will have to be carried out by Builder to complete/ remedy the Sub-Contract Works.

Seatrium then completed the outstanding works and delivered the vessel on 16 April 2015 to Floatel Endurance Ltd (“**Floatel**”). Around mid-August 2016, Floatel notified Seatrium of defects in the vessel, which Seatrium attributed to the work that HJ had carried out. However, HJ replied that Seatrium’s claim was subject to the warranty period which had since expired. The warranty period had commenced on 16 April 2015 – when the Vessel was delivered to Floatel – and expired 12 months later on 16 April 2016, before the first defects were discovered in mid-August 2016. Further defects were later identified in the vessel in inspections between December 2017 and July 2018, and after January 2019.

The warranty claim

In the legal proceedings, Seatrium sought to hold HJ liable for the defects and claimed damages for alleged breaches by HJ of its contractual and tortious duties. Seatrium's claim was dismissed at first instance. The court held that under the 5th Para, Seatrium had no claim against HJ for any work that it would have to carry out either to complete the outstanding works under the subcontract that HJ had failed to do or to remedy the works that HJ had already carried out but were defective prior to Seatrium taking over the subcontract. The only exception in the 5th Para was if the work that HJ had carried out was caught by its warranty obligations under the subcontract. While it was undisputed that the defects were latent and undiscovered during the warranty period, the court concluded that HJ was not liable under its warranty obligations as the warranty had expired before the defects were discovered.

In respect of the warranty claim against HJ, Seatrium argued on appeal that the vessel's defects were inherent at the time it had been delivered by HJ to Seatrium, and as such its claim fell within the warranty provided and should have been allowed. The appellate court rejected this argument, and held that on a proper construction of the warranty terms, latent defects that do not manifest or are not discovered during the warranty

period are not caught by the warranty. The appellate court considered that this accorded with the nature and purpose of a warranty obligation – i.e., to provide assurance to the warrantee as to the quality of its work or goods by warranting that they will be of a certain condition and free from defects for a defined period of time, that is, the warranty period. Therefore, only defects that manifest or are discovered during the warranty period fall under the warranty, unless the warranty terms provided otherwise. Otherwise, the extension of a warranty to latent defects discovered outside of the warranty period would effectively mean an open-ended warranty, which did not sit well with the purpose and nature of a warranty obligation.

The appellate court accordingly dismissed the appeal in respect of Seatrium's warranty claim. As illustrated by this decision, the courts will uphold the parties' agreement in contractual warranties as provided by the terms of the warranty. Parties in construction contracts should accordingly take care to review warranty terms for completed works – in particular any provisions in respect of latent defects – and whether these give proper effect to parties' intended scope of rights or liabilities under the warranty.





Chapter 8

Statutory Adjudication

- In *CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd* [2024] SGHC 183, the High Court looked at the grounds for setting aside adjudication determinations in relation to contracts not being in writing under Sections 4(1) and 4(5) of the Building and Construction Industry Security of Payment Act 2004 (“**SOPA**”); and the definition of construction work under Section 3 of SOPA.
- In *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2024] SGHC(A) 28, the appellate court considered the limits on the courts’ power to set aside or vary adjudication determinations in instances of fraud by a party.

CGS Construction Pte Ltd v Quek & Quek Civil Engineering Pte Ltd [2024] SGHC 183

Facts

Quek & Quek Civil Engineering Pte Ltd (“**Q&Q**”), the applicant, had been engaged by the National Environment Agency (“**NEA**”) as the main contractor for the operation and maintenance of landfill equipment, vehicles, and floating platform at Semakau Landfill (“**Project**”). Q&Q subcontracted the entire works to CGS Construction Pte Ltd (“**CGS**”) (the “**SMK3 Works**”), who completed the SMK3 Works around 28 February 2023.

CGS commenced an adjudication application against Q&Q under SOPA for payment in respect of the SMK3 Works, and obtained an adjudication determination for payment of approximately S\$1.63 million against Q&Q (“**Determination**”). Q&Q subsequently applied to set aside the Determination, and this article looks at following grounds relied on by Q&Q in its application:

- That the SMK3 Works were not the subject of a qualifying contract for the purposes of SOPA (the “**First Ground**”)
- That the SMK3 Works did not constitute “construction work” for the purposes of SOPA (the “**Third Ground**”)



The First Ground

The statutory regime under SOPA applies to contracts “made in writing”. However, where the contract between the parties is only partly in writing, section 4(5) of SOPA provides that such a contract would still be treated as being made in writing provided that “the matter in dispute between the parties to the contract is in writing” (“**Section 4(5) Requirement**”).

In its application, Q&Q argued that its contract for the SMK3 Works was purely oral, and the adjudicator lacked threshold jurisdiction to make the Determination. In response, CGS pointed to certain documents which it said meant that the contract was partly in writing and that evidenced the matter in dispute, which included:

- The “NEA Tender Documents” – which set out the Project and the undisputed work scope of the SMK3 Works;
- A letter from Q&Q enclosing its final accounts (“**Final Account**”);
- A payment claim by CGS which set out its claim, and its disputes with Q&Q over deductions made in the Final Account for variation omissions, expenses, and retention monies; and
- Correspondences between the parties which set out the parties’ dispute over the SMK3 Works’ contract price, in particular whether this was to be calculated as a percentage of CGS’s quote price or of the NEA tender price.

The Judge in this case observed that the key concern with the adjudication of purely oral contracts within the framework of SOPA is the lack of certainty over the contractual terms giving rise to the dispute, rendering

these less susceptible for expeditious resolution by the summary procedure under SOPA. This concern can be addressed within the framework of the statutory regime provided that the contract be partly in writing and, more critically, that the Section 4(5) Requirement is met. This would enable an adjudicator to adjudicate that dispute with greater clarity, on the basis of the written documents that evidence the matter in dispute.

As a matter of general application, the Judge held that the following principles should apply in determining if a matter in dispute is in writing:

- The court should take a broad approach in making the assessment and take into account the commercial context.
- Where contractual terms or agreement may be relevant to the dispute, then the contractual term or agreement relied on by a party should be in writing (even if there are disputes over the evidence or construction of a particular term or agreement). In such a scenario, written correspondence alone that set out the positions of disputes between the parties will not be sufficient.
- Where a party only relies on an alleged fact (and does not rely on a contractual term or agreement) for its claim, that alleged fact should be in writing (even if there are disputes over the evidence of that fact).

In the instant case, the Judge found that part of the contract between CGS and Q&Q was plainly in writing, given that the work scope of the SMK3 Works was set out in the NEA Tender Documents. The Judge also held that the facts relevant to the disputes between Q&Q and CGS in the adjudication proceedings were sufficiently evidenced in writing, and therefore that the Section 4(5) Requirement was satisfied. The Judge therefore declined to set aside the Determination.

The Third Ground

The Judge had cause to consider when works would constitute “construction work” within the scheme of SOPA, given Q&Q’s contentions that the main scope of the SMK3 Works were for transportation of waste for disposal by way of landfill, and did not constitute construction activity. In this regard, Q&Q also relied on the Ministry of Manpower’s (**MOM**) rejection of similar contract works as ‘construction work’ in Q&Q’s earlier applications to it for labour man-year entitlements.

The Judge found that the work scope of the SMK3 Works set out in the NEA Tender Documents clearly included construction work. In particular, the construction work relating to the bunds under the SMK3 Works were integral to the landfill operation. The Judge also reasoned that the classification of works by MOM for its purposes is not dispositive of this issue. Ultimately, whether there is “construction work” within the scheme of SOPA is a matter of the evidence relating to the nature of the works in question.

Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd [2024] SGHC(A) 28

Under the statutory scheme of SOPA, a party may apply to set aside an adjudication determination if “the making of the adjudication determination was induced or affected by fraud or corruption”. However, it is not every fraud practiced by a party that will invoke the innocent party’s right to have a determination set aside, as illustrated in this case.

Facts

The appellant in this case, JP Nelson Equipment Pte Ltd (“**JPN**”), had engaged a main contractor (Builders Hub Pte Ltd or “**BH**”) for a project to build an office/dormitory and factory with office (“**Project**”). BH subsequently obtained an adjudication determination (“**Adjudication Award**” or “**AA**”) against JPN in respect of a Payment Claim No. 37 (“**PC 37**”), which awarded BH a sum of approximately \$847,000. Upon JPN’s application for review, the amount payable by JPN to BH was determined by the review adjudicator at a lower figure of approximately \$581,000 in the review adjudicator’s award (“**Review Award**” or “**RA**”), in corresponding deduction of a sum of monies which had already been paid by JPN to BH, but which had not been disclosed to the adjudicator before the AA was made.

JPN then applied to set aside both the AA and the RA in an originating application in the General Division of the High Court (“**OA 616**”). In OA 616, JPN’s initial ground for setting aside was that BH’s application for adjudication had been filed prematurely. Subsequently, JPN also relied on an additional ground of fraud for the setting aside application, relying on five documents (the “**Five Cappitech Documents**”) to prove the alleged fraud.

The Five Cappitech Documents purportedly showed payments from BH to a third party for the supply of aircon equipment, and which JPN claimed it had relied on to certify payment of an amount of \$155,160 to BH (the “**Cappitech Payment**”) under two earlier payment claims made by BH. However, JPN claimed that the Five Cappitech Documents were false, as no payment had in fact been made by BH to third party.

Under section 27(6)(h) of the SOPA, a party may apply to set aside an adjudication determination if “the making of the adjudication determination was induced or affected by fraud or corruption” – this applies to both the determination of an adjudicator and a review adjudicator. The two-stage in setting aside an adjudication determination on the ground of fraud is set out in *Facade Solution Pte Ltd v Mero Asia Pacific Pte Ltd [2020] 2 SLR 1125*, namely:

- Step 1: The adjudication determination must be based on facts which the party seeking the claim knew or ought reasonably to have known were untrue.
- Step 2: Whether the facts in question were material to the issuance of the adjudication determination.

In the present case, the Judge hearing OA 616 found that while BH had fraudulently submitted the “Five Cappitech Documents” to deceive JPN in its earlier payment claims, the AA and RA were not affected by this fraud. However, the Judge considered that it would not be just to allow BH to retain the fruits of its fraud and, on the basis that ‘fraud unravels everything’, reduced the amount due to BH under the RA by the amount of the Cappitech Payment.

BH appealed against the Judge’s decision.

On appeal, the Appellate Division of the High Court likewise held that neither the AA or RA was affected by the fraud perpetrated by BH in respect of the Five Cappitech Documents. Although the appellate court echoed the Judge’s disapproval of BH’s fraudulent conduct and opined that it was open to JPN to make a claim for overpayment, the appellate court considered that the scheme under the SOPA did not permit the Judge to reduce the RA where neither the AA and the RA were affected by the fraud. Adjudication determinations have temporary finality under SOPA, and can only be set aside or varied if is affected by fraud within the ambit of section 27(6)(h) of the SOPA. The appellate court therefore set aside the Judge’s decision to reduce the RA, and awarded costs below and of the appeal to BH.



Chapter 9

Setting Aside Arbitral Awards

These decisions set out relevant principles in relation to the availability of recourse against final arbitral awards under the International Arbitration Act 1994 and UNCITRAL Model Law on International Commercial Arbitration, and standards applicable to complaints of breach of natural justice in applications to set aside arbitral awards.

- In *Swire Shipping Pte Ltd v Ace Exim Pte Ltd* [2024] SGHC 211, the High Court reminded parties of the minimal role the court played in international commercial arbitrations. Save for the limited circumstances set out in the International Arbitration Act and the Model Law, the court will not “rescue” the parties from a “bad” award, unless the parties are able to come within one of the grounds set out in Section 24 of the International Arbitration Act 1994 (the “**IAA**”) and Article 4(2) of the UNCITRAL Model Law on International Commercial Arbitration (“**Model Law**”). Having subscribed to have their disputes resolved by arbitration, they are deemed to accept “*the attendant risks of having only a very limited right of recourse to the courts*”.
- In *DJO v DJP, DJQ and DJR* [2024] SGHC (I) 24, the Singapore International Commercial Court allowed an application to set aside an arbitration award administered by the International Chamber of Commerce on the grounds that it was rendered in breach of natural justice.

In Swire Shipping Pte Ltd v Ace Exim Pte Ltd [2024] SGHC 211

The case before the High Court was an application by Swire Shipping Pte Ltd (“**Swire**”) to set aside a final award dated 23 September 2023 (the “**Award**”) issued by a sole arbitrator (the “**Arbitrator**”) in a Singapore seated arbitration administered by the Singapore Chamber of Maritime Arbitration (“**SCMA**”), on the grounds of breach of natural justice and the Arbitrator acting in excess of his jurisdiction.

In dismissing Swire’s application, the High Court held that although it sympathised with Swire and agreed that the Award was “*very difficult to read and understand*”, it was of the view that the Award had not crossed the line so as to warrant curial intervention. Mohan J held at [31] that:

"...the mere fact that it would not be unfair to describe an award as being borderline unintelligible is not per se a ground for setting it aside. It is axiomatic that the court should strive to read an award in a reasonable and commercial manner and supportively instead of destroying it... Unless the intelligibility of the Final Award directly implicated one of (the grounds exhaustively set out in the IAA and the Model Law), it is not a relevant consideration insofar as the present application was concerned".

Parties' ability to choose arbitrators – accounting for considerations of legal, subject matter or technical expertise in relation to the parties' disputes – is well known as an advantage of arbitration, and the right choice of arbitrator can greatly impact the conduct and outcome of arbitration proceedings. However, the principle of minimal curial intervention that guides the interaction between the courts and arbitral tribunals means that parties who find themselves fundamentally dissatisfied with an arbitral tribunal's conduct and the outcome of the arbitration may nonetheless remain bound by such outcomes, as underscored by this case.

Background Facts

Pursuant to a contract dated 24 February 2020, Swire agreed to sell, and Ace Exim Pte Ltd ("**Ace Exim**") agreed to purchase, the vessel MV Melanesian Pride (the "**Vessel**") for scrap for a purchase price of US\$2,152,585.50. Pursuant to the contract, Ace Exim paid a 30% deposit of the purchase price, with the balance of the purchase price to be paid no later than two banking days after tender of a notice of readiness ("**NOR**") by Swire.

Pursuant to the terms of the contract, the Vessel was to be delivered at the "Place of Delivery", which was stipulated to be "1 safe anchorage at the Port of Alang, West Coast of India". In the event that the stipulated Place of Delivery was inaccessible, the contract provided that the Place of Delivery would either be:

- (i) "as near [to the Place of Delivery] as [the Vessel] may safely get at a safe and accessible berth or at a safe anchorage which shall be designated by [Ace Exim]"; or
- (ii) failing Ace Exim's nomination of an alternative place, "the place at which it is customary for vessels to wait" ("**the Customary Waiting Place**").

In March 2020, the Government of the Republic of India put in place measures to combat the spread of the COVID-19 pandemic, which restricted access to the Port of Alang.

On 23 March 2020, Swire requested Ace Exim to designate an alternative place for delivery within 24 hours. In its response, Ace Exim did not designate any alternative place for delivery. Consequently, Swire ordered the Vessel to proceed in the direction of Alang.

On 24 March 2020, the Vessel arrived at the mouth of the Gulf of Khambhat. Swire tendered its NOR. Pursuant to the contract, upon receipt of the NOR, Ace Exim was to take over the Vessel.

On 25 March 2020, Ace Exim rejected the NOR on the basis that the Vessel was not at the Place of Delivery. Specifically, it was Ace Exim's position that, *inter alia*:

- (i) the Vessel was not at the place of delivery as defined by the contract which is a safe anchorage the Port of Alang;
- (ii) the Vessel was on the high seas and not at the Customary Waiting Place in accordance with the terms of the contract, and
- (iii) the MOA was "null and void" under the terms of the contract as the COVID-19 measures instituted by the Indian Government had rendered delivery of the Vessel impossible.

The Arbitration

Ace Exim commenced the arbitration seeking a refund of the deposit it had paid. Swire counterclaimed for the balance purchase price under the contract.

Swire's case in the arbitration was:

- as the Vessel could not proceed to the Place of Delivery specified in the contract due to the Indian Government's COVID-19 measures and Ace Exim had not designated an alternative Place of Delivery, Swire had to, in accordance with the terms of the contract, deliver the Vessel at "... the place at which it is customary for vessels to wait".
- The location of the Vessel at the time that Swire tendered the NOR – five nautical miles South of Jafarabad (the "**Jafarabad Waiting Place**") – was the Customary Waiting Place.
- Further, the English High Court decision of *NKD Maritime Ltd v Bart Maritime (No 2) Inc (The Shagang Giant)* [2022] EWHC 1615 (Comm) ("*The Shagang Giant*"), was on all fours with the parties' dispute in the Arbitration. In *The Shagang Giant*, the English High Court held that the Jafarabad Waiting Place was a place at which it was customary for vessels to wait.
- This finding in *The Shagang Giant* is was also reinforced by additional evidence in the arbitration.
- As the Jafarabad Waiting Place was the Customary Waiting Place and the NOR had been validly tendered, Ace Exim's refusal to pay the balance of the purchase price was a breach of the MOA.

Ace Exim's case in the arbitration was:

- As the Place of Delivery designated under the contract was inaccessible, and Ace Exim had not nominated an alternative, the Place of Delivery was to be the Customary Waiting Place.

- The Jafarabad Waiting Place was not the Customary Waiting Place. The Vessel was situated in the open seas at the mouth of the Gulf of Khambhat. For vessels waiting to enter the port of Alang, Bhavnagar Anchorage was the Customary Waiting Place, as confirmed by the Gujarat Marine Board, the port authority administering the ports of Alang and Bhavnagar and VTS Khambhat, the agency tasked with vessel traffic control in those waters.
- Consequentially, the NOR was invalid, and Ace Exim was not bound to accept delivery of the Vessel and pay the balance of the purchase price.
- Swire’s reliance on the *Port Guide* as support for the proposition that the Jafarabad Waiting Place was the Customary Waiting Place was misplaced as the *Port Guide* only referred to heavily laden vessels entering Bhavnagar Port for cargo operations. The Vessel (unladen and bound for Alang for recycling) was not such a vessel. In any event, the *Port Guide* could not supersede the Indian authorities’ position on the designated waiting place.

The central issue to be determined by the Arbitrator in the Arbitration was whether Swire had validly tendered a NOR in accordance with the terms of the contract, and in particular whether the Jafarabad Waiting Place was the Customary Waiting Place, within the scope of the contract. The arbitrator also had to decide whether it was bound to follow the English High Court in *The Shagang Giant*.

The arbitrator found for Ace Exim. He held that Vessel was not at a place entitling Swire to validly tender the NOR. The Arbitrator found as follows:

- The Jafarabad Waiting Place was the customary waiting place only for “heavily laden vessels” bound for Bhavnagar Port.
- The customary waiting place for vessels like the Vessel, which were destined for recycling at Alang (and therefore would not be heavily laden), was an area other than the Jafarabad Waiting Place, and instead was the area bounded by coordinates known as the “VTS Alang Anchorage Coordinates”. The VTS Alang Anchorage Coordinates had been set out in an email from VTS Khambhat dated 25 March 2020 and timestamped 2.45pm.
- Consequentially, the Vessel was not at the Customary Waiting Place at the time that Swire had tendered the NOR.

Swire’s Setting Aside Application

Swire applied to set aside the Award namely on two grounds:

- That the Arbitrator’s finding that the Jafarabad Waiting Place was the customary waiting place only for “heavily laden vessels” (the “**Jafarabad Finding**”) was made in breach of natural justice that prejudiced Swire, as Swire had not been provided a reasonable opportunity to present its case on the issue. Alternatively, the Jafarabad Finding was a finding made by the Arbitrator acting in excess of his jurisdiction.
- That the Arbitrator’s finding that Swire’s expert witness, Mr Shashank Agrawal had given evidence aligned with the Jafarabad Finding (the “**Agrawal Evidence Finding**”) was made in breach of natural justice as the Agrawal Evidence Finding: (i) entailed a dramatic departure by the Arbitrator from the parties’ submission; and (ii) was wholly at odds with the evidence on record; indicating that for the Arbitrator to have come to the conclusion that he did, he must have failed to apply his mind to the evidence and submissions before him.

The Court rejected Swire’s arguments and dismissed its application to set aside the Award. Briefly, the Court found the following:

The Jafarabad Finding

Swire’s application with respect to the Jafarabad Finding was premised on Article 34(2)(a)(iii) of the Model Law that provides that an award may be set aside if it 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”.

Referring to the cases of *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 2 SLR 1279 (“**Bloomberry**”) and *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 (“**CRW Joint Operation**”), the Court reiterated that the enquiry as to whether the arbitral tribunal had exceeded its jurisdiction under Art 34(2)(a)(iii) of the Model Law proceeds in two stages:

- First, the court must determine the matters that are within the scope of submission to the arbitral tribunal; and
- Second, whether the award involved these matters or whether it involved a new difference outside the scope of submission to arbitration and that was, accordingly, irrelevant to the issues requiring determination.



On the facts, the Court held that the Jafarabad Finding was clearly within the Arbitrator's jurisdiction as it had its genesis in, and was intertwined with, the broader issues of: (a) whether the Jafarabad Waiting Place was the Customary Waiting Place; and (b) whether the Vessel was at the Customary Waiting Place at the time that it tendered the NOR. The Court also found that on the facts, the issue had been put into issue by the parties in the course of the arbitration.

The Court referred to the decisions of the Court of Appeal in *CAJ and another v CAI and another* [2022] 1 SLR 505 and *CKH v CKG* [2022] 2 SLR 1 as well as the decision of the High Court in *DGE v DGF* [2024 SGHC 107] and reiterated that in assessing the scope of the parties' submission to arbitration, the court would approach the matter holistically and take a balanced approach. The court will not approach the issue mechanistically as a box-ticking exercise by seeking to match an issue to the parties' pleadings, evidence and submissions.

The Court also held that the Jafarabad Finding was not made in breach of natural justice.

Section 24(b) of the IAA provides that an award may be set aside if "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".

As held by the Court of Appeal in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695, an applicant seeking to set aside an award on the ground of breach of natural justice must establish: (a) which rule of natural justice

was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach did or could prejudice its rights.

Swire had argued that it did not have a reasonable opportunity to respond to the issue related to the Jafarabad Finding, and that the chain of reasoning adopted by the Arbitrator in making the Jafarabad Finding caught it by surprise.

The court had to decide whether there was sufficient nexus between the chain of reasoning adopted by the tribunal and the cases the parties had advanced in the arbitration. As held by the High Court in *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [159], there would be the requisite nexus if the tribunal's chain of reasoning: (a) arises from a party's express pleadings; (b) is raised by reasonable implication by a party's pleadings; (c) does not feature in a party's pleadings but is in some other way brought to the opposing party's actual notice; or (d) flows reasonably from the arguments actually advanced by either party or is related to those arguments. In addition, the breach of natural justice must also prejudice the rights of the aggrieved party before the Court would intervene (the Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [82]).

On the facts, the Court found that Swire had reasonable opportunity to address the issue. The Court also found that the Jafarabad Finding was reasonably connected to the arguments raised by the parties. In any event, the Jafarabad Finding did not cause Swire prejudice.

The Agrawal Evidence Finding

The Court also found that the Agrawal Evidence Finding was not in breach of natural justice. Swire had submitted that the Agrawal Evidence Finding was made in breach of natural justice as (i) the Agrawal Evidence Finding was a dramatic departure from the parties' submissions in the Arbitration and (ii) the Agrawal Evidence Finding was wholly at odds with the evidence on record.

The Court disagreed. The Court found on the facts that the Agrawal Evidence Finding was reasonably connected to the Parties' submissions.

The Court warned at [108] against trying to challenge an award by *"subdividing the tribunal's decision and findings into as many layers as possible in a bid at identifying a subsidiary finding that the tribunal apparently did not directly consult parties on"*.

The court's position in approaching an award is not to scrutinise the award letter-by-letter, and by stacking up grievances. The Court referred to the Court of Appeal's decision in *Soh Beng Tee* at [65(f)] which held that *"it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process"*.

With respect to Swire's submission that the Agrawal Evidence Finding was wholly at odds with the evidence on record, the Court found that this objection was in effect a challenge on the merits.

The Court held that the Court of Appeal's statement in *BZW v BZV* that "[a] manifestly incoherent decision shows that the tribunal has not understood or dealt with the case at all and, in our view, that would mean that parties have not been accorded a fair hearing" should be read and relied on with caution. At [116], the Court held that the fact that an award is incoherent per se does not justify the setting aside of the award. The question is whether the *"incoherence is sufficient, whether directly or through some inference, to bring the case within one of the recognised grounds for setting aside an award under Art 34(2) of the Model Law or s 24 of the IAA"*.

On the facts, the Court found that there was no disconnect between what Mr Agrawal had said and the Arbitrator's finding. This is notwithstanding the fact that the Court agreed with Swire that the Arbitrator's reasoning vis-à-vis Mr Agrawal's evidence could be described as *"incoherent"*.

In conclusion, the Court dismissed Swire's application to set aside the Final Award in its entirety.

Conclusion

In conclusion however, the Judge felt compelled to address the quality of the award. Having started off by reminding the parties that the court *"will not rescue them from the consequences of their choice to resolve their dispute through arbitration"* (save of course in the limited circumstances set out in the IAA and the Model Law), the Judge also stated the fact that the *"court has not set aside an award should not be treated as unqualified imprimatur of the quality of the award or reasons"*.

The Court was sympathetic to Swire. It agreed that the award in this case was of poor quality and did *"sail close to the wind"*. However, it did not cross the line so as to warrant curial intervention.

This case reminds parties to arbitration agreements of the paramount importance of selecting arbitrators with the appropriate legal or other subject matter expertise that is appropriate to their disputes and the conduct of the arbitration, whether by way of qualifying criteria in their arbitration agreements, or at the time of appointment of arbitrators at the commencement of arbitration proceedings.

DJO v DJP, DJQ and DJR [2024] SGHC (I) 24

The case before the Singapore International Commercial Court ("**SICC**") was an application by DJO to set aside a final award dated 24 November 2023 (the "**Award**") issued by a three-member arbitral tribunal in an International Chamber of Commerce ("**ICC**") arbitration case on the grounds of: (i) non-compliance with the parties' agreed arbitral procedure (under Article 34(2)(a) (iv) of the Model Law); (ii) the award being in conflict with the public policy of Singapore (under Article 34(2) (b)(ii) of the Model Law); and (iii) a breach of the rules of natural justice (under section 24(b) of the IAA).

It is said that having the same arbitrator or arbitrators in parallel or related arbitrations carries the advantage of the arbitral tribunal having familiarity with the common facts or issues in these arbitrations, and can reduce the likelihood of inconsistent findings across different arbitrations. This case highlights the converse risks that parties in multiple arbitrations face with such tribunal compositions.



Background Facts

This article looks at the procedural aspects of the Arbitration and the Award as are relevant to the setting aside application in the case. Three arbitrations were proceeding in parallel, which involved similar parties, and the same presiding arbitrator:

- (a) The first arbitration, being the arbitration before the SICC in this case (the “**Arbitration**”), was an arbitration between the respondents in this case – DJP, DJQ and DJR, known as Consortium X, as the claimant and DJO, (the applicant in this case) as the respondent. The Arbitration was administered by the ICC and was seated in Singapore. The arbitral tribunal consisted of eminent retired Indian judges, with Judge C being the presiding arbitrator.
- (b) The second arbitration (known as the “**CP-301 Arbitration**”) was between a consortium referred to as Consortium Y, consisting of the DJR and another Indian company as the claimant, and DJO as the respondent. The CP-301 Arbitration was conducted under the rules of the Arbitration of the International Centre Alternative Dispute Resolution, New Delhi and was seated in New Delhi. It was subject to the provisions of the Indian Arbitration and Conciliation Act 1996. The arbitral tribunal consisted of three arbitrators, with Judge C being the presiding arbitrator.
- (c) The third arbitration (known as the “**CP-302 Arbitration**”) was between the consortium referred to as Consortium Z, consisting of the DJR and another Indian company as the claimant, and DJO as the respondent. The CP-302 Arbitration was also conducted under the rules of the Arbitration of the International Centre Alternative Dispute Resolution, New Delhi and was seated in New Delhi. It was subject to the provisions of the Indian Arbitration

and Conciliation Act 1996. The arbitral tribunal consisted of three arbitrators, with Judge C once again being the presiding arbitrator.

The Arbitration was held over the period between April 2022 and August 2023. The arbitral tribunal in the Arbitration issued the Award on 24 November 2023 and found for Consortium X on every issue.

The award in the CP-301 Arbitration had been issued on 1 August 2023 (the “**CP-301 Award**”), while the award in the CP-302 Arbitration had been issued on 27 August 2023 (the “**CP-302 Award**”).

DJO’s Setting Aside Application

DJO’s application to set aside the Award was premised on the fact that the Award was largely copied from the CP-301 Award and/or the CP-302 Award, arguing that 278 out of 451 paragraphs in the Award were reproduced or substantially reproduced from the CP-301 Award. Consortium X also accepted that at least 212 paragraphs of the Award had come from the CP-301 Award, although it took issue with the exact number and degree of reproduction.

DJO argued that the “*scale, scope and source of the cut-and-pasting breached the parties’ contractual expectations that their tribunal would independently and impartially weigh, deliberate and decide their arguments*”.

DJO also asserted that the incorporation of “plagiarised material” on the scale in this case is the antithesis of an independent and impartial analysis.

Breach of Natural Justice

DJO's Submissions

DJO submitted that the Tribunal's copy-and-pasting in the Award related to the main arguments on liability and on the interpretation of the relevant contract as well as on issues related to statutory limitation and waiver and/or estoppel. It could therefore be inferred that:-

- (a) Judge C, as presiding arbitrator, had prepared the draft of the Award in breach of his obligations of confidence as an arbitrator in the parallel arbitrations, and in breach of his obligation of independence and impartiality in the Arbitration.
- (b) The two co-arbitrators, Judge A and Judge B, did not read the draft Award either properly or at all, as, had they done so, they would have appreciated that it did not address the facts or arguments presented to them in the Arbitration. Accordingly, they failed to apply their minds independently to verify that the Award was prepared based on the materials before them and thus failed in their duties of independence and impartiality in the discharge of their decision-making function.

DJO submitted that the similarities between the Award and the CP-301 Award demonstrated that the Tribunal had, in reaching its decision in the Award:

- (a) placed weight on submissions in the earlier arbitrations and did not restrict itself to the submissions made in the Arbitration;
- (b) drew upon authorities cited in the earlier arbitrations which were not cited in the Arbitration;
- (c) recited and relied upon provisions in the CP-301 Contract which differed from those of the contract which was the subject of the Arbitration;
- (d) applied the wrong *lex arbitri* to the assessment of interest and costs; and
- (e) failed to properly consider the issues of (i) limitation (both statutorily and under the contract), as well as waiver and estoppel, on the basis of the facts and arguments in the Arbitration.

As such, DJO asserts, the following breaches of natural justice occurred in the process of making the Award:

- (a) Judge's C willingness and actual use of his accumulated knowledge in preparing the Award constituted impermissible pre-judging of the case, which is prohibited by the rule against bias.
- (b) The right to a fair hearing includes the right to a fair, independent and impartial decision. The Tribunal's copious copy-and-pasting in the Award shows that the parties were not provided with a fair hearing.
- (c) When the tribunal relied on arguments and facts from the parallel arbitrations which were extraneous to the parties' dispute in the Arbitration, the parties were not provided with a fair hearing, which expects a tribunal to deal with the dispute before it based on, and only on, the material before it.

- (d) by lifting reasoning from the CP-301 Award and the CP-302 Award, and therefore relying on factual or legal reasoning that has not been canvassed before tribunal in the Arbitration, and therefore not providing the parties the opportunity to respond, the tribunal removed the parties' right to a fair hearing.

As to the prejudice it had suffered, DJO submitted that if the Tribunal had considered the facts and arguments before it in vacuo, as it was required to and should have done, it could reasonably have come to different conclusions.

Consortium X's Submissions

Consortium X, on the other hand, argued that the real issue is whether the Tribunal applied its mind to the essential issues in the Arbitration, which it contended the Tribunal had done so.

Consortium X further argued that it was understandable that there would be similarities and consistencies across the awards in the three arbitrations, given the similarities between the contracts across the three arbitrations, the fact of the same main issues being in dispute, the use of common counsel amongst the parties across all three arbitrations, and having Judge C as presiding arbitrator in all three arbitrations. This did not mean that the Tribunal made no attempt to apply its mind independently to the issues in the Arbitration before reaching the same conclusions as in the other parallel arbitrations, and choosing to use the same language in the Award to express those conclusions.

Consortium X had examined each issue and identified passages in the Award that focused on each issue in the Arbitration, and on this basis, Consortium X submitted that the Tribunal had adequately performed the task of applying its mind to each essential issue in the Arbitration.

The Court's Decision

In coming to its decision, the SICC conducted an assessment of the Award against the CP-301 Award in order to address the issues raised by DJO.

The Tribunal's references to submissions made in the other arbitrations

The Court found that the Award contained substantially identical words as in the CP-301 Award, including attributing submissions made by counsel in the CP-301 Arbitration to counsel made by counsel in the Arbitration.



The Tribunal also reproduced paragraphs from the CP-301 Award in the Award which made no sense in the context of the Arbitration. For example, the CP-301 Award continued a paragraph relating to an computation carried out by DJO that the Tribunal found to be erroneous. This same paragraph had been produced verbatim in the Award. Strikingly, however, DJO had not produced any equivalent computation in the Arbitration.

This, according to the SICC, justified the inference that the Tribunal had not applied its mind specifically to DJO's submissions in the Arbitration.

The Tribunal's references to authorities not cited in the Arbitration

With regard to the Tribunal making reference in the Award to authorities which were not cited in the Arbitration, the Court agreed that this meant that the Tribunal was drawing upon material other than that which was presented to it by the parties, without giving parties the opportunity to address them on these authorities.

The Tribunal's references to provisions that were not found in the underlying contract

The Tribunal had purported to set out certain provisions of the relevant underlying contract (the "**CPT-13 Contract**") in the Award that related to the adjustments to be made to the contract price for specified changes in the cost of labour, goods, and other inputs. However, it was apparent that these provisions as set out in the Award were instead the differently worded contract provisions from the underlying contract in the CP-301 Award (the "**CP-301 Contract**"), and that the Tribunal's error had resulted in the Tribunal's erroneous application of the terms and reference data in the CP-301 Contract in the Award.

Consortium X submitted that even though the Tribunal had reproduced the wrong contract's provisions in the Award, it was not significant in the context of the Arbitration. In this respect, the SICC held that this error was nonetheless a clear demonstration that the Tribunal had drawn upon the submissions made to, and the labours of, the Tribunal in the CP-301 Arbitration, rather than focussing on the submissions made to them in the Arbitration.

*The Tribunal's application of the wrong *lex arbitri* to determining interest and costs*

The *lex arbitri* for the Arbitration was Singapore law, whereas the parallel arbitrations were seated in New Delhi.

In the CP-301 Award, the tribunal had addressed the question of interest and cost under Indian law by reference to the Indian Arbitration Act. In the Award, the Tribunal considered the question of interest and costs based upon these passages from the CP-301 Award, many of which were reproduced verbatim, and including references to the Indian Arbitration Act instead of the IAA and Singapore law.

The Court agreed with DJO that this demonstrated that the thinking and approach of the Tribunal was influenced and guided by events remote from those in the Arbitration. While an error of law by the Tribunal would in and of itself be irrelevant in a setting aside application, the fact that the Tribunal's knowledge, reliance upon and adoption of the reasoning in the earlier awards cast doubt on their independence of thought in the Award.

The Tribunal's failure to consider certain unique issues to the Arbitration properly

The Court did not consider it necessary to conduct an examination of the minutiae of the Award to ascertain whether any failure by the Tribunal to focus on the unique particularities of the Arbitration had undermined the Tribunal's reasoning and conclusion. On the contrary, the Court observed that to do so would give rise to an inevitable risk of a review of the merits of the Tribunal's findings on the implicated issues, which was not the role of a seat court in a setting-aside application.

However, the Court found that the Tribunal had hardly focused on the specific factual matrix of the case in the Award. Considering the issues in the Arbitration and the manner in which the Tribunal addressed them in the Award, the Tribunal's reasoning was influenced – probably heavily influenced – by the parallel arbitrations and by the way the issues had been argued and resolved in those proceedings. It was therefore clear that the actual (and quite different) factual matrix was not at the forefront of the Tribunal's deliberations for the Arbitration.

The Court's Decision

The SICC held that the question which arose for the court's determination in this case to be as follows:

... not whether the Award was allegedly plagiarised or contains cut-and-pasted paragraphs without attribution from the July Award and the August Award (and the extent of such "copying"), but whether it can be borne out from the Award that the Tribunal did not exercise its mind properly in respect of the issues in the Arbitration and decide them independently and impartially.

The SICC held that, on considering the facts and circumstances of this case, the hypothetical fair-minded, informed and reasonable observer would undoubtedly have held suspicions or apprehensions that the arbitrator had approached the matter with a closed mind.

Having found that the Award did not refer to the submissions actually made to the Tribunal, but instead to submissions made in an earlier arbitration, the Court held that this was a clear indication to the hypothetical observer that Judge C may have approached the matter with a closed mind. The SICC also held that the assertion of apparent bias against Judge C was well-founded.

The SICC also held that it was abundantly clear from the facts that the Award was not the independent work of the Tribunal based solely on the material and submissions before them in the Arbitration. As the Tribunal had drawn heavily on facts and arguments in the previous arbitrations, and did not distinguish between those facts and arguments with those in the present case, and had in addition failed to give the parties an opportunity to address it on the previous case or award, it cannot be said that the parties had the right to a fair, independent and impartial award.

As such, the SICC held that the Award was made in breach of natural justice and was liable to be set aside on that ground.

Conclusion

It was noted that neither party made any criticism of the manner in which the Arbitration was conducted, although at the time Judge C was proposed as the presiding arbitrator in the Arbitration, he was already the presiding arbitrator in the CP-301 and CP-302 Arbitrations, and the hearings in the CP-301 Arbitration had already begun. However, neither party objected to Judge C's appointment in the Arbitration, and neither Judge C himself nor the ICC saw this as a reason for him not to be appointed to preside over the Arbitration. The issues raised in this decision only arose after the Award was handed down.

Judge C was theoretically able to start afresh in the Arbitration with an open mind, and not seek to influence his co-arbitrators or the proceedings in the Arbitration with any accumulated knowledge or opinions from his role as arbitrator in the CP-301 and CP-302 Arbitrations.

As observed from this case, this process is fraught with difficulty, and parties in related or similar arbitrations should carefully weigh the balance of benefits and risks associated with having the same arbitrators sitting as tribunal members across related arbitrations.



Chapter 10

The SIAC Rules 2025

Following extensive consultation with a diverse group of stakeholders, including arbitration practitioners, businesses, in-house counsel, government representatives, and academics, on 1 January 2025, the Singapore International Arbitration Centre (“**SIAC**”) has officially released the 7th edition of the SIAC Arbitration Rules. We discuss the key changes made in these rules and the implications for parties, arbitration practitioners as well as tribunals.

Singapore International Arbitration Centre Arbitration Rules, 7th Edition, 1 January 2025 (the “**2025 Rules**”)

The previous edition of the SIAC Arbitration Rules were issued in 2016. The 6th Edition was groundbreaking at the time they were issued - introducing innovative concepts like Early Dismissal of Claims and Defences without legal merit or manifestly outside the jurisdiction of the tribunal; and the Consolidation of Disputes and Joinder of Parties which addressed issues related to multi-contract and multi-party arbitrations.

The 2025 Rules continue in the same vein of addressing the concerns of stakeholders and innovating to ensure that SIAC remains an attractive institution at a time when arbitration is facing its own challenges in relation to costs – 67% of the respondents in the *Queen Mary University of London, School of International Arbitration and White & Case, “2018 International Arbitration Survey: The Evolution of International Arbitration” (2018)* identified “cost” as the worst characteristic of international arbitration.

The main changes in the 2025 Rules from the 2016 Rules address issues related to cost, efficiency and transparency. Key highlights include: (i) the introduction of new procedures (such as the Streamlined Procedure, Preliminary Determination and Coordinated Proceedings); (ii) the expansion of cases eligible for the expedited procedure; (iii) enhancements to the Emergency Arbitrator procedure; (iv) the incorporation of SIAC Gateway; (v) the updated appointment provisions and codification of the power of tribunals to appoint tribunal secretaries in SIAC arbitrations; and (vi) the inclusion of specific provisions encouraging parties to consider mediation.

New Procedures Aimed at Increasing Efficiency and Transparency

Streamlined Procedure

The Streamlined Procedure (governed by Rule 13 read with Schedule 2 of the SIAC Rules 2025) is a new procedure designed for low value disputes not exceeding S\$1 million. It is designed to be fast and cost-effective.



Matters will be decided by a sole arbitrator, whose fees, as well as the SIAC's fees shall not exceed 50% of the maximum limits set by the SIAC's Schedule of Fees, unless the Registrar decides otherwise. The default position (unless the Tribunal determines otherwise) is that the arbitration shall be decided on the basis of written submissions and documentary evidence; parties will not be entitled to make requests for disclosure; there will not be a right to file any fact or expert witness evidence; and there is no automatic right to a hearing.

The tribunal shall state the reasons upon which any award is based in summary form, unless parties agree that no reasons are to be given. Final awards are to be made within three (3) months from the date of constitution of the tribunal, unless the Registrar extends the time for making the final award. The tribunal also has the general power to conduct the streamlined proceedings in a manner that it considers appropriate, and is empowered to set time limits on the expiry of which parties shall not be entitled to file interlocutory applications without leave of the Tribunal.

Rule 46 does not limit the Tribunal's inherent powers to direct a preliminary determination of any issue that arises for determination in the arbitration.

Preliminary Determination

Pursuant to Rule 46 of the SIAC Rules 2025, Parties may now apply to the tribunal for a final and binding Preliminary Determination of any issue that arises for determination in the arbitration, if one of the following conditions are met: (a) the parties agree that the tribunal may determine such an issue on a preliminary basis; (b) the applicant demonstrates that the

determination of the issue on a preliminary basis is likely to contribute to savings of time and costs and a more efficient and expeditious resolution of the dispute; or (c) the circumstances of the case otherwise warrant the determination of the issue on a preliminary basis.

Once a tribunal accepts an application for a preliminary determination, it must render its determination within 90 days from the date of the application unless the time is extended by the Registrar, by way of a decision, ruling, order or award, with reasons which may be in summary form.

Coordinated Proceedings

Rule 17 of the SIAC Rules 2025 provides for the coordination of proceedings where the same tribunal is constituted in two or more arbitrations, and a common question of law or fact arises out of or in connection with all the arbitrations. Under this Rule, a party to the arbitrations may apply to the tribunal for the arbitrations to be coordinated.

If allowed, the arbitrations could be conducted concurrently or sequentially; or be heard together with any procedural aspects aligned; or any of the arbitrations to be suspended pending a determination in any of the other arbitrations.

These new procedures under the SIAC Rule 2025 provide tribunals with greater flexibility and discretion in managing the arbitration process. Given the increasingly complex scenarios that may arise in arbitration proceedings, these new procedures will allow parties and counsel find innovative solutions in order to increase the overall efficiency and cost-effectiveness of arbitration proceedings.

Developments to Current Procedures

Expansion of cases eligible for Expedited Procedure

The SIAC Rules 2025 refreshes the Expedited Procedure as was introduced in the SIAC Rules 2016. Changes to the qualifying criteria include a raise to the ceiling on eligible disputes from S\$6 million to S\$10 million under Rule 14.2(a), and a new criterion for the applicability of the Expedited Procedure where the circumstances of the case warrant under Rule 14.2(c). Parties may also agree for the Expedited Procedure to govern arbitral proceedings prior to the constitution of the tribunal.

Enhancements to Emergency Arbitrator procedure

Under the SIAC Rules 2025, parties may now request for the appointment of an Emergency Arbitrator before a Notice of Arbitration (“**NOA**”) is filed. Under the prior SIAC Rules 2016, a party would only be able to apply for an Emergency Arbitrator concurrent with or after the filing of an NOA. This refinement provides parties with greater flexibility and enhanced protections in the event of the need for urgent interim measures. However, the NOA must then be filed within 7 days of the Registrar’s receipt of the Emergency Arbitrator application, if not already filed with the application.

The SIAC Rules 2025 also allows parties to obtain without notice protective preliminary orders in aid of intended emergency interim or conservatory measures. Under paragraph 25 of Schedule 1, a party requesting for appointment of an Emergency Arbitrator to consider a request for an interim measure may at the same time apply for such protective orders to direct another party not to frustrate the purpose of the requested emergency interim or conservatory measure, without notifying the other party. The Emergency Arbitrator must decide on such applications within 24 hours of his appointment. Any order made by the Emergency Arbitrator on the application shall be transmitted by the SIAC to all parties to the arbitration subsequently, and the applying party is also required to deliver a copy of all the case papers filed in the arbitration, the Emergency Arbitrator’s order, and all other communications between the SIAC and the applying party to all the parties. The party against whom the order is directed will have an opportunity to present their case at the earliest practicable time.

Simplification of Processes and Increasing Collaboration

Measures that are designed to ease case administration, simplify the process of commencing arbitration and constituting the tribunal have been introduced in the SIAC Rules 2025.

Simplified Filing Procedure

Under Rule 6.3(d) and (e) of the SIAC Rules 2025, it is permissible but no longer mandatory to include a copy of the contract and arbitration agreement in the NOA – a description of the relevant contract and arbitration agreement will suffice.

Additionally, the SIAC Rules 2025 do away with the default requirement under Rules 3.1(h) and 4.1(d) of the SIAC Rules 2016 for claimants to provide nomination or proposal for arbitrator or sole arbitrator, respectively, when filing the NOA, and for respondents to provide nomination, comments on claimant’s proposal or counter-proposals for an arbitrator or sole arbitrator, respectively, when filing the Response to the NOA (“**Response**”), subject to the parties’ agreement otherwise. Instead, under Rule 6.3(g) of the SIAC Rules 2025, parties are required only to provide “any comment as to the... number of arbitrators, and procedure for the constitution of the Tribunal”.

Subject to any such agreement otherwise, the aforesaid amendments provide parties with the opportunity for a more neutral and collaborative approach towards the constitution of the Tribunal at the NOA and Response stages. This will also have an impact on parties’ strategy with respect to arbitrator appointments.

Incorporation of SIAC Gateway

SIAC Gateway is SIAC’s newly developed and launched cloud-based management platform that provides features such as electronic filing, an online payment system, secure document and storage for use by parties and tribunals in SIAC arbitrations. SIAC Gateway serves as an enhancement to the existing modes for managing the administration of arbitrations.

Under Rule 4.2 of the SIAC Rules 2025, the Registrar may, after considering the views of the parties and the Tribunal, direct the parties to upload all written communications to SIAC Gateway.

Tribunal’s power to appoint Tribunal Secretaries

Rule 24 of the SIAC Rules 2025 provides for the power of tribunals to appoint tribunal secretaries, and the expected and permitted roles of tribunal secretaries. In particular, the tribunal may: (a) after considering the views of the parties and in consultation with the Registrar, appoint a tribunal secretary; or (b) after considering the views of the parties and with approval from the Registrar, appoint a member of the SIAC Secretariat as a tribunal secretary.

In addition, Rule 24 provides that tribunals shall not delegate any of its decision-making functions to the tribunal secretary, and that all tasks carried out by the tribunal secretary shall be carried out on behalf of, and under the supervision of, the tribunal. The appointment of any tribunal secretary is subject to the same duties of disclosure applicable to arbitrators under Rule 20, and parties may challenge a tribunal secretary. Tribunal secretaries may also be removed by the tribunal – unless the tribunal secretary is a member of the SIAC Secretariat, in which case the tribunal must consult with the Registrar before removing them. These provisions safeguard against concerns over the supervision and delegation of functions to tribunal secretaries, and the impartiality or independence of tribunal secretaries.

Encouraging Parties to Consider Mediation

The SIAC Rules 2025 actively encourage the early settlement of disputes. Rule 32.4 provides a new mechanism for tribunals to consult with parties as soon as practicable after the tribunal's constitution in a first case management conference with the parties on the potential for settlement of all or part of a dispute, including through adoption of amicable resolution methods such as mediation.

Unless otherwise agreed by the parties or prohibited by mandatory rules of any applicable law, Rule 50.2(l) empowers the Tribunal to make any necessary directions, including a suspension of proceedings, for the parties to adopt any amicable dispute resolution methods such as mediation under the SIAC-SIMC AMA (Arb Med Arb) Protocol.

Conclusion

The SIAC Rules 2025 introduces rules and revisions that are clearly aimed at enhancing and expediting the efficiency of the arbitration process for users and arbitration practitioners.

New procedures such as the Streamlined Procedure and enhancements such as expanding the ambit of cases eligible for the Expedited Procedure are responsive to issues prevalent in international arbitration - rising costs, increasingly complex substantive and procedural disputes, and the need of parties for procedures that provide time-sensitive and effective emergency relief.

Overall, the SIAC Rules 2025 reflect a welcome commitment to modernising the arbitration process with a view to enhancing its effectiveness.



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