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Annual Review of Singapore Construction Law Developments

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Introduction

Welcome to the 2023 edition of the Annual Review of Singapore Construction Law Developments.

The cases in this third edition of a compendium of decisions handed down by the Singapore courts in 2023 have been selected to provide you with an update on the important developments in Singapore law that would be of relevance and will have an impact on projects governed by Singapore law.

We look at two decisions by the Court of Appeal and the High Court respectively in relation to the formation of contract, as well as the interpretation and the effect of its terms. The facts of these cases are not unusual in the construction industry. As such, these cases are a timely reminder of the possible repercussions and impact of proceeding with the work without having a formal and completed written contract in place. In the context of ascertaining the existence of a term of a contract (as opposed to the *interpretation* of a term), the Court of Appeal confirmed that there was no restriction on the evidence which a court may consider in a situation where the court is tasked with ascertaining the terms of the contract. Therefore, the parol evidence rule and the principles governing the admission of extrinsic evidence set out in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029, which apply in the context of contractual interpretation, do not constrain the Court in the exercise of determining the existence of a term. Meanwhile, the High Court's decision highlighted that as long as the main terms of the agreement were within the general appreciation and knowledge of the parties, it may be adequate to form a binding contract between the parties, notwithstanding that all the terms may not have been finalised.

Non-assignment clauses are prevalent in standard form construction contracts, and we explore a decision by the High Court which addressed the ambit of non-assignment clauses in contracts and confirmed that clear drafting would be required in order to extend the application of such clauses to non-contractual or tortious rights.

We also discuss two cases that shed light on the Courts' approach in measuring and valuing damages, and how expert evidence can and should be treated.

Liquidated damages continue to be an important and relevant topic to the construction industry. We look at a decision by the Court of Appeal that addressed common "make whole" clauses in loan agreements, where the Court warned that it would not hesitate to strike down such provisions that are in fact penalties. A decision by the Appellate Division of the High Court on variation clauses is important to contractors who often adopt "back-to-back" mechanisms, where a subcontractor's claims for variations will be subject to assessment by the upstream contractor / main contractor / employer, with the interposing contractor merely taking a passive and/or facilitative role between the two.

There were also several decisions of the High Court which provided clarity on the adjudication regime under the Building and Construction Industry Security of Payment Act 2004. We look at decisions of the Court which provided guidance on the following issues: the period within which an adjudication application must be made, the deeming provisions under the Act in circumstances where the contract does not specify the service date or service period for payment claims, the grounds for staying the enforcement of an adjudication enforcement, and whether the termination of the underlying contract negated the right to an adjudication determination.

Finally, we review developments in arbitration and dispute resolution which are important topics to the construction industry - particularly in an international setting – as most contracts provide for arbitration as method of resolving disputes between the parties. We discuss a decision by the Court of Appeal that explored for the first time – and took a different approach to those taken by other jurisdictions – the issue as to which law governed the arbitrability of a dispute. We also review three cases where the Court of Appeal addressed issues related to the enforcement, or the setting aside, of arbitral awards – where the Court's message on the importance of party autonomy and the finality of the arbitral process was constantly repeated.

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

Formation and Terms of Contract

Several cases on the formation of contract, interpretation of its terms and the effect of those terms were before the Singapore Courts in the past twelve months:

— In *Lim Siau Hing @ Lim Kim Hoe and another v Compass Consulting Pte Ltd and another appeal* [2023] SGCA 39, the Court of Appeal was tasked with the challenge of having to ascertain the terms of a contract that is contained in and/or evidenced by various documents. In determining whether a term existed in the agreement between the parties, the Court of Appeal reiterated that it had wide discretion in receiving and considering evidence of the background or context in which the contract was concluded, and that there was no restriction on the evidence which the court may consider in such a situation.

— In *DSL Integrated Solution Pte Ltd* v *Triumph Electrical Systems Engineering Pte Ltd* [2022] SGHC 221, the High Court found that even though the terms of the main contract, pursuant to which the parties were entering to a sub-contract, had not yet been finalised, based on the communications passing between the parties and their respective conduct, there was a binding agreement between the parties for sub-contract works. The main terms of the agreement such as the contract price and the work scope of the main contract were within the general appreciation and knowledge of the parties, and therefore it was adequate to form a binding contract between the parties.

Court of Appeal determines terms of agreement – no restriction to evidence it may consider

Lim Siau Hing @ Lim Kim Hoe and another v Compass Consulting Pte Ltd and another appeal [2023] SGCA 39

The related appeals before the Court of Appeal between Mr Lim Siau Hing ("**Mr Lim**") and his son Damien Lim (collectively "**the Lims**") and Compass Consulting Pte Ltd ("**Compass**") arose out of an agreement between the Lims and Compass to structure and execute a reverse takeover ("**RTO**") of a listed company. Compass was claiming for $500,000 worth of shares in the listed company (the "**Bonus Shares**") and $480,000 in cash over a period of two to three years (the "**Cash Fee**") upon completion of the RTO.

In order to determine whether Compass was entitled to the Bonus Shares and the Cash Fee, the Court had to first determine the terms of the agreement between the parties, complicated by the fact that the agreement between the parties was not contained in one single document.

It was common ground between the parties that the agreement between them were partly written and partly oral. Three material documents exist that could contain or evidence the written terms of the agreement between the parties. Compass says that only two out of the three documents evidence or form part of the agreement between the parties, while the Lims say that all three documents do.

Background Facts

The Lims were the executive directors and controlling shareholders of Knit Textiles Mfg Sdn Bhd ("**KTM**"). Sometime in 2016, the Lims considered listing KTM and its related companies (the "**KTM Group**"). In this context, Damien Lim was introduced to Mr Kelvin Chin

Wui Leong ("**Kelvin**"). Kelvin, together with his wife, Ms Chong Lee Ching ("**Ms Chong**") were directors of Compass, a company that provided business advisory services.

Sometime in April 2017, Kelvin approached Damien Lim with the possibility of listing the KTM Group on the Catalist board of the Singapore Stock Exchange ("**SGX**"), through an RTO of Lereno Bio-Chem Ltd ("**Lereno**"). KTM agreed to retain Kelvin's and Compass' advisory services for the purpose of the RTO. A corporate advisory agreement was signed by Kelvin and Damien, pursuant to which Compass was appointed as the "project manager" for the RTO for a fee.

On 17 July 2017, the Lims, Kelvin, Ms Chong, and the then-Managing Director and CEO of Lereno, Mr Ong, attended a meeting at Lereno's office where the structure of the RTO was finalised (the "**17 July 2017 Meeting**"). At this meeting, the Parties agreed that upon successful completion of the RTO, Compass would be paid incentives in the form of bonus shares (the "**Bonus Shares**") and a cash fee (the "**Cash Fee**") for its services in respect of the RTO (the "**Agreement**").

Three documents were signed by the Lims at the same meeting (i.e, the "**17 July Documents**"):

1. Document 1 - A document titled "*Project Libra: Sale of Knit Textile Manufacturing Sdn Bhd and its related companies (KTM) to Lereno Bio-Chem Ltd (Transaction)*" addressed to Mr Ong and Kelvin. Pursuant to Document 1, the Lims agreed to the sale of KTM to Lereno provided that their net share of equity in the listed issuer was no less than 65% at the completion of the transaction.

2. Document 2 - A document titled "*Project Libra – Corporate Service Agreements*" addressed to Mr Ong and Kelvin, Pursuant to Document 2, the Lims agreed to provide Mr Ong and Kelvin and/or their nominated representatives a corporate advisory service agreement for a period of 2 to 3 years from the completion of transaction, and the total fees for both Mr Ong and Kelvin is no less than S$480,000 per person for the duration of the agreement.

3. Document 3 - A document titled "*Project Libra: Sale of Knit Textile Manufacturing Sdn Bhd and its related companies (KTM) to Lereno Bio-Chem Ltd (Transaction)*" addressed to Lereno's board of directors. Pursuant to Document 3, the Lims agreed to sale of the entire equity in KTM to Lereno for a consideration of S$30 million.

The structure of the RTO was as follows:

(a) The KTM Group would be restructured such that the issued share capital of all the companies in the KTM Group would be held by a single holding entity, Knit Textile and Apparel Pte Ltd ("**KTA**").

(b) The share capital of KTA would in turn be 100% held by Mr Lim.

(c) Lereno would acquire all of Mr Lim's shares in KTA for a consideration of $26.4m.

(d) Lereno's consideration would be satisfied by Lereno issuing: (a) $25.3m worth of shares in Lereno to Mr Lim; and (b) $1.1m worth of shares in Lereno to Compass (as payment of its fees for managing and executing the RTO).

Lereno was struggling financially. It was looking to acquire new business to sustain its listing status on the SGX. It could only finance the acquisition through an issuance of new shares.

In September 2017, Mr Lim entered into a Put and Call Option Agreement with Lereno to sell his shares in KTA for $26.4 million. On 18 February 2019, Lereno duly issued $26.4m worth of new shares as consideration for the acquisition.

The RTO was completed. The Lims had successfully listed KTM on the Catalist board through the RTO of Lereno. Lereno was renamed as KTMG Ltd, and the Lims became the executive directors and controlling shareholders of KTMG Ltd.

The Lims now held a 77.79% stake in Lereno. $1.1m worth of Lereno shares issued to Compass by the Lims for its services. However, Compass was not paid the Bonus Shares and the Cash Fee. The Lims denied that Compass was entitled to the Bonus Shares and the Cash Fee, as they say that certain conditions had not been fulfilled.

Compass' Position

Compass position by the time the matter went to trial was that at the 17 July 2017 Meeting, it was agreed between Compass and the Lims that the Bonus Shares and the Cash Fee were payable to Compass in the event that the RTO was completed with the Lims owning no less than 65% of the issued share capital of Lereno on completion.

Thus, given that Lereno had duly paid the requisite consideration and that the Lims held 77.79% of the share capital in Lereno upon completion, Compass claimed that it had performed its side of the bargain and was therefore entitled to the Bonus Shares and the Cash Fee.

The Lims' Position

The Lims accepted that there was a partly written and partly oral agreement reached at the 17 July 2017 Meeting regarding the Bonus Shares and the Cash Fee but denied that Compass was entitled to the same for *inter alia* the following reasons:

(a) in relation to the Cash Fee, the terms of the Agreement were that Kelvin and Mr Ong would be

paid $480,000 each in exchange for a corporate advisory service agreement. As no corporate advisory service agreement was entered into, the sum of $480,000 (i.e., the Cash Fee) was not due.

(b) under the terms of the Agreement, the Bonus Shares and the Cash Fee were only payable if: (i) the Lims held more than 65% of the shares in the listed entity upon completion of the RTO (the "**65% Condition**"); and (ii) the Lims' shares were worth at least $30m upon completion of the RTO (the "**$30m Condition**") (collectively, the "**Conditions**").

According to the Lims, the Agreement was reflected in Documents 1, 2 and 3. Given that the Lims' shares were only worth $26.4m upon completion of the RTO, the $30m Condition had not been satisfied and the Bonus Shares and the Cash Fee were therefore not payable.

The Issue before the Court

The issue dividing the parties was whether the Agreement between the parties was subject to both the Conditions, i.e. the 65% Condition as well as the $30m Condition. It is Compass' contention that only the 65% Condition was applicable, while the Lims contended that both conditions needed to be fulfilled before the additional fee in the form of Bonus Shares and Cash Fee was payable.

The issue that the Court needed to decide was therefore whether the $30m Condition was a condition of the Agreement.

The Court's Approach

The Court first considered the nature of the Agreement before proceeding to ascertain the terms of the Agreement (and whether the $30m Condition was in fact a condition of the Agreement).

The Court of Appeal disagreed with the approach taken by the High Court Judge in ascertaining the terms of the Agreement. The High Court Judge had proceeded on the basis that the Agreement was wholly contained in writing, and therefore only focussed on the question of whether Document 3 should be read together with Document 1 and Document 2 as part of the Agreement.

Instead, the Court of Appeal held that the correct approach should have to determine whether there was a set of oral terms in light of which the 17 July Documents were meant to be construed, and if so, what these terms were.

This is due to the fact that even if it was undisputed between the parties that an agreement on the Bonus Shares and the Cash Fee was reached at the 17 July 2017 Meeting, the 17 July Documents do not spell out the agreement pertaining to the Bonus Shares and the Cash Fee, or stipulate the precise condition(s) under which those incentives would become payable to Compass.

On their face, the 17 July Documents do not set out the entire agreement pertaining to the Bonus Shares and the Cash Fee. Therefore, in order to make sense of the 17 July Documents and determine what were the terms of the Agreement that was concluded, regard must inevitably be had to the parties' evidence of what was orally discussed and agreed at the 17 July 2017 Meeting.

In addition, it was both parties' positions that the Agreement was partly written (i.e., evidenced in the 17 July Documents) and partly oral (i.e., as agreed verbally at the 17 July 2017 Meeting).

The Terms of the Agreement

In considering the terms of the Agreement, the Court of Appeal stressed that that the key issue in the appeals was the *existence* of a particular term (i.e., the $30m Condition), and not the proper *interpretation* of a term.

In deciding whether a term exists in the agreement between parties, the court has wider discretion in receiving and considering evidence of the background or context in which the contract was concluded. The Court of Appeal referred to its decision in case of *The "Luna" and another appeal* [2021] 2 SLR 1054 where it was held at [30] that "*there is no restriction on the evidence which the court may consider*" in such a situation.

As such, the parol evidence rule and the principles governing the admission of extrinsic evidence set out in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029, which apply in the context of contractual interpretation, do not constrain the Court in the exercise of determining the existence of a term.

In coming to its decision regarding the existence of the $30m Condition in the Agreement, the Court considered the factual background leading up to the conclusion of the Agreement, as well as the contents of the 17 July Documents. The Court weighed-up each party's respective evidence and found Compass' evidence less plausible than the Lims'.

Compass' claim was that the Lims had agreed to pay the Bonus Shares and the Cash Fee solely in exchange for the satisfaction of the 65% Condition. However, the Lims' target of holding 65% of the shares in the listed entity was already in play from as early as May 2017 when the Lims first agreed to retain Compass' services for the RTO. The Court held that there was no reason for the Lims to agree during the 17 July Meeting to nearly double Compass's fees for its role in the RTO, in exchange for Compass achieving substantially the same result.

The Court found, on the facts of the case that Compass did not provide a satisfactory explanation and did not establish the basis for its claims that the Lims had effectively agreed to increase Compass' fees in consideration for the 65% Condition. On the other hand, the Court found the Lims' explanation that the payment of the Bonus Shares and the Cash Fee was for the $30m Condition, i.e. that the Lims' shares in the listed entity were worth $30m, was much more plausible.

The Court then considered the contents of the 17 July Documents and found that when read together, the 17 July Documents collectively evidenced the Agreement between the parties regarding the Bonus Shares and the Cash Fee. It reinforces the conclusion that the $30m Condition was a term of the Agreement.

The Court also considered parties' evidence of why the 17 July Documents were prepared and signed. According to the Court, it would necessarily inform how the 17 July Documents are to be construed. The contents of the 17 July Documents could then be properly examined and the Court may then determine what they reveal about the terms that were agreed at the 17 July 2017 Meeting.

The Court preferred the Lims' evidence that Documents 1 to 3 were meant to be read together, and more specifically, that the purpose of Document 3 was to evidence the $30m Condition.

The 17 July Documents read together comport neatly with the oral agreement that the Lims say was reached at the 17 July 2017 Meeting, and that they corroborate the Lims' account that both the 65% Condition and the $30m Condition were terms of the Agreement.

The Court held that once it is recognised that the Agreement was partly written and partly oral, it was essential to examine the parties' oral evidence and the 17 July Documents in order to make sense of the terms of the Agreement.

The Court found that the factual background leading up to the conclusion of the Agreement, as well as the contents of the 17 July Documents, both weigh in favour of the conclusion that the parties did agree to the $30m Condition at the 17 July 2017 Meeting.

Given that it is not disputed that the $30m Condition was not in fact achieved, it follows that Compass is not entitled to the Bonus Shares and the Cash Fee.

Parties' Subsequent Conduct

For completeness, the Court also considered the parties' subsequent conduct as Compass had argued that the parties' subsequent conduct supported its position that the $30m Condition was not part of the Agreement. In addition, the High Court Judge had made *obiter* observations that the parties' subsequent conduct also showed that they did not agree to the $30m Condition. On the facts, the Court found that the parties' subsequent conduct did not assist Compass' case.

Of importance is the Court of Appeal's clarification that it remains an open question whether evidence of subsequent conduct may be admitted for the purposes of contractual *interpretation*.

Comment

In a situation where an agreement consists of partly written and partly oral terms, the Court will consider all the evidence in its totality in order to ascertain the existence of the terms of the agreement. Unlike cases of contractual interpretation, "*there is no restriction on the evidence which the court may consider*".

The Court will consider the background and context in which the agreement was reached. The Court is not restrained or limited by the parol evidence rule and the principles governing the admission of extrinsic evidence in determining the existence of a term. Evidence which goes towards the reasons *why* certain documents were prepared or certain actions were taken will also be considered.

This inevitably leads to a battle of evidence and comes down to whose evidence is preferred by the Courts. Further, parties may have different interpretations or attach different significance to different events or terms.

This decision highlights the importance of ensuring that all contractual terms are properly recorded, preferably within one document, and that all terms are carefully and clearly drafted.

Reference:

Lim Siau Hing @ Lim Kim Hoe and another v Compass Consulting Pte Ltd and another appeal [2023] SGCA 39

The "Luna" and another appeal [2021] 2 SLR 1054

Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR(R) 1029

Terms of "Back-to-Back" Contract & Prolonged Non-Payment

DSL Integrated Solution Pte Ltd v Triumph Electrical Systems Engineering Pte Ltd [2022] SGHC 221

The case of *DSL Integrated Solution Pte Ltd* v *Triumph Electrical Systems Engineering Pte Ltd* provides a cautionary tale for parties deciding to proceed with works without a formal contract in place. It also addresses the importance of clearly stating what terms are incorporated into an agreement on a "back-to-back" basis with the main contract.

Facts

DSL Integrated Solutions Pte Ltd ("**DSL**") had been engaged by Qingjian International (South Pacific) Group Development Co Pte Ltd ("**CNQC**") for the design, supply and installation of electrical works ("**Electrical Works**") at the Forett Condominium Project (the "**Project**"). DSL in turn subcontracted the Electrical Works to Triumph Electrical System Engineering Pte Ltd ("**Triumph**").

In the case before the High Court of Singapore, DSL was claiming against Triumph for damages arising out of alleged breaches of the sub-contract between DSL and Triumph, together with interests and costs. DSL was also claiming for an indemnity against all claims from CNQC due to the termination of the main contract between CNQC and DSL (the "**Main Contract**").

Triumph claimed that there were no breaches of contract because no sub-contract was ever formed. In the alternative, even if there was a sub-contract, Triumph was entitled to terminate the sub-contract as DSL had repudiated the sub-contract. Triumph in turn counterclaimed for quantum meruit for works carried out at DSL's request pending the negotiations and agreement on a proposed sub-contract that never materialised.

Sometime in August 2020, Triumph approached DSL to find out more about the Project. DSL then sent

to Triumph DSL's quotation to CNQC and the tender clarification and documents provided by CNQC to DSL.

On 17 September 2020, Triumph issued a quotation to DSL for the provision of the Electrical Works.

On 22 September 2020, DSL sent an email (the "**Confirmation Email**") attaching a revised version of Triumph's quotation (the "**Revised Quotation**"). In the email, DSL stated, *inter alia*, that "*…this shall be an [sic] back to back contract with commercial having certain acceptation.*" The Revised Quotation also contained the words "*This quotation approved in principle and pending official main contractor's contract.*"

On 24 September 2020, DSL sent a Whatsapp message to Triumph stating: "*Please help to state 20 mye per year purely for this forett project.*" Triumph subsequently sent an email to DSL stating:

> *"As per discussed… and agreed… we will need MYE support of 20 MYE per year. Solely for Forett project. And site dormitory of 20 Men throughout the project."*

In late September 2020, Triumph commenced the Electrical Works without having sight of the Main Contract which was only sent to Triumph on 23 December 2020.

On 23 December 2020, Triumph sent an email to the CNQC stating, *inter alia*, that: *"These are all the documents compile under Triumph Electrical System Engineering Pte Ltd as DSL sub-con".* DSL then sent Triumph a copy of the Main Contract dated 2 October 2020.

On 7 May 2021, Triumph stopped the works, and on 22 May 2021, the Notice to Cease Work was served to DSL. On 2 June 2021, DSL terminated the sub-contract.

DSL claimed that Triumph had wrongfully terminated the sub-contract by unjustifiably ceasing the Electrical Works in May 2021 and that Triumph was in breach of several obligations under the sub-contract. Triumph on the other hand argued that there was no agreement formed between the parties, so there were no contractual breaches. Alternatively, Triumph also submitted that even if there was a contract, Triumph is entitled to terminate the contract due to the repudiatory breaches of DSL.

The Issues

In issue before the Court was whether there was an agreement between DSL and Triumph in relation to the Electrical Works ("**Issue 1**"); and if there was a binding agreement, what the terms of the Agreement were ("**Issue 2**").

Issue 1 – was there a binding agreement between DSL and Triumph

In determining whether there was a binding agreement between DSL and Triumph, the Court considered the communications passing between the parties and their respective conduct.

In brief, DSL had submitted that there was a valid agreement between the parties as:

(a) both parties had intended for Triumph to be DSL's sub-contractor for the Electrical Works since the tender stage of the Main Contract.

(b) The terms of the Confirmation Email and Revised Quotation were comprehensive and contained all the necessary ingredients of a construction contract.

(c) Triumph did not raise any objections to the Confirmation Email or the Revised Quotation.

(d) Triumph commenced work on 23 September 2020.

(e) From end of September 2020 to May 2021, Triumph had completed the Electrical Works for the site office at the Project, installed temporary electrical works at the site, prepared and submitted design drawings to the project consultant, represented to CNQC that it was DSL's sub-contractors, communicated with CNQC as DSL's sub-contractor and prepared and submitted payment claims for DSL.

(f) Triumph did not reject the terms of the Main Contract which was forwarded to them on 23 December 2020

(g) Sometime in January 2021, Triumph assisted DSL to prepare its first progress claim to CNQC. This progress claim was based on the formula set out in the Revised Quotation (i.e., 8% from the Main Contract) and the price breakdown set out in the Main Contract bills of quantities. The 2nd and 3rd progress claims were made on 24 February 2021 and 25 March 2021. This was repeated by Triumph in a document dated 22 May 2021 which is labelled as its 5th payment claim.

Triumph on the other hand disagreed that there was a binding agreement as *inter alia*:

(a) the Revised Quotation was not capable of acceptance at law as the price in the Revised Quotation was indeterminate.

(b) DSL qualified the Revised Quotation with the words "*approved in principle and pending official main contractor's contract*" and it would not have been possible for a contract to come into existence in the circumstances when it was not even aware of the terms of the Main Contract. The Revised Quotation was an inchoate counteroffer pending the Main Contract.

(c) DSL had unilaterally revised several terms in the Revised Quotation and omitted to include terms relating to (i) MYE support, (ii) provision of an on-site dormitory, and (iii) payment, that had been agreed to during a meeting on 21 September 2020.

(d) Triumph did not approve the terms of the Revised Quotation and informed DSL as such. There was no acceptance of the Revised Quotation by conduct.

(e) DSL had requested Triumph to start work first due to the urgency in completing the works, while DSL sorted out the disputed terms.

The Court's Decision

The High Court disagreed with Triumph that the price in the Revised Quotation was indeterminate and found a plain reading of the phrase *"8% from CNQC's contract sum"* showed that parties had intended for the contract price to be 8% less than the Main Contract sum, and this was also confirmed in the Confirmation Email from DSL.

As to Triumph's submission that Revised Quotation was an inchoate counteroffer pending the Main Contract, the Court found that parties could not have intended for a "back-to-back" contract in the manner argued by DSL — that all the terms in the Main Contract are to be incorporated in their agreement on 24 September 2020.

The Court referred to the case of *GIB Automation Pte Ltd v. Deluge Fire Protection (SEA) Pte Ltd* [2007] 2 SLR(R) 91 which held that the term "back-to-back contract" is "not a term of art" and the Court should look into the factual matrix of the case to determine *"the terms said to be affected by the back-to-back provision are matters that would fall within the general appreciation and knowledge of the parties to the subcontract…"*[1]

To determine whether the terms are within the general appreciation and knowledge of the parties to the contract, the Court shall establish:

> *"…as what was objectively known to the parties at the time they entered into the contract, what specific references were made to the main contract document, and whether the terms of the main contract relevant to the back-to-back provision were of such a nature that they should have been and were specifically brought home to the sub-contractor or whether they were sufficiently general that they would fall within the general appreciation and knowledge of the parties…"*[2]

In the present case, the High Court was of the view that the contract price (i.e., 92% of the contract price as set out in the Main Contract) and the work scope of the Main Contract were incorporated into the sub-contract since they were within the general appreciation and knowledge of the parties. Although the overall contract price and the price breakdown of items in the Main Contract were not incorporated by the back-to-back clause, the Court also found that they were incorporated on the basis of Triumph's conduct that relied on them while preparing for the progress claims.

On the other hand, the High Court took the view that the payment term, MYE term (i.e., 20 MYE per year) and dormitory term submitted by Triumph were not part of the agreement since there was no agreement reached by the parties on these terms.

Triumph had also argued that it was impossible for the contract to be in existence as DSL had included a qualification in the Revised Quotation (i.e., *"approved in principle and pending official main contractor's contract"*), and the Main Contract was not yet concluded at the time of the Revised Quotation being sent. The Court was of the view that such qualification did not negate the intention of the parties of being legally bound by the Revised Quotation. Instead, the Court found that such a phrase was intended to allow the parties to terminate the agreement in case the Main Contract was not awarded to DSL.

The Court found that Triumph has accepted the counteroffer from DSL (Revised Quotation and Confirmation Email) that contained the essential terms (i.e., parties, scope of works, contract period and price) through its email on 24 September 2020 based on the following considerations:

(a) Triumph commenced the works around the same time as Triumph's reply to the Confirmation Email. Upon receiving the Confirmation Email with the Revised Quotation on 22 September 2020, Triumph replied to DSL through its email on 24 September 2020. In its email, Triumph did not raise any objections to the DSL and proceeded to commence the works not long after. Accordingly, the Court took the view that Triumph agreed to commence the work upon the request from DSL and without any agreement at all.

(b) Triumph represented itself to the Main Contractor, CNQC, as 'DSL's sub-contractor'. The Court found that the representation made by Triumph to CNQC in its email on 23 December 2020 was not just a matter of ease of reference and suggested that Triumph accepted that there was a valid agreement between the parties.

(c) The Court also found that Triumph's conduct of preparing and submitting the payment claims (i.e., 1st to 5th progress claims) to CNQC which also consisted of the works items in the Main Contract that were not covered by its original quotation dated 17 September 2020, undermined its argument that there was no agreement between the parties.

The Court thus held that notwithstanding the fact that there remained some unresolved issues between the parties after the 29 December meeting, Triumph's conduct (not raising any objections to the existence or the validity of the contract, continuing to carry out the

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1 GIB Automation Pte Ltd v. Deluge Fire Protection (SEA) Pte Ltd [2007] 2 SLR(R) 918, para 48.

2 *Ibid*, para 50.

Electrical Works, preparing and sending progress claims) suggest that there was a binding contract between DSL and Triumph.

The Court further held that even if it were to accept Triumph's case that there was no binding contract between the parties as of 24 September 2020 pending the conclusion of the Main Contract, it was of the view that there must have been a binding agreement between the parties as of 23 December 2020 when the Main Contract was concluded and sent to Triumph.

- Issue 2 – The Terms of the Agreement

The Court held that terms of the agreement would include the terms set out in the Confirmation Email and the Revised Quotation.

However, the Court found that there was no clear indication that Triumph had accepted all the terms contained in the Main Contract. The "back-to-back" clause in the Revised Quotation did not have the effect of incorporating the Main Contract terms as of 24 September 2020, since Triumph had not even seen the Main Contract at that time.

When DSL emailed the Main Contract to Triumph on 23 December 2020, there is no written confirmation from DSL that it accepted the terms of the Main Contract.

The Court found that clauses related to the provision of MYE and dormitory did not form part of the agreement between DSL and Triumph. Consequently, there was no breach of such clauses.

In addition, the Court found that the obligation to issue a performance bond remained with DSL under the Main Contract and was not transferred to Triumph via the "back-to-back" clause in the Revised Quotation. Under the terms of the sub-contract between DSL and Triumph, the parties agreed that DSL will issue the performance bond to CNQC.

DSL failed to do so, and as a result, CNQC was entitled under the Main Contract to refrain from making payment to DSL. Triumph did not receive any progress payments for its eight months of work, because DSL failed to issue the performance bond to CNQC, which resulted in CNQC setting-off the progress payments from the outstanding performance bond sum. DSL was not able to inform Triumph when it would be issuing the performance bond to CNQC and therefore there was no clarity as to when Triumph would eventually get paid, or if Triumph would eventually be able to recover the sums that CNQC had deducted as payment towards the performance bond.

The Court referred to the Court of Appeal decision in *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 which held that while it appears to be settled law that a contractor/subcontractor has no general right at common law to suspend work unless this is expressly agreed upon, even if payment is wrongly withheld, there may be instances in which a persistent course of payment delays, or a protracted delay in the payment of a very substantial sum amount to a repudiation of the contract.

The Court examined the circumstances surrounding the non-payment in order to determine whether DSL's conduct demonstrated an intention not to be bound by payment obligations.

On the facts, the Court found that Triumph was justified in terminating the agreement with DSL. DSL's claims for a declaration that Triumph indemnify DSL for CNQC's losses and damages, and DSL's claim for the loss of profit of $552,000 arising from the termination of the Main Contract by CNQC were dismissed. In conclusion, the Court found on the facts that Triumph was entitled to claim for 92% of the value of the work done prior to its termination of the works on 22 May 2021.

Comment

The facts of the *DSL v Triumph* case are not unusual in the construction industry. Contractors are often asked to commence work pending finalisation of detailed terms and conditions. A main contractor may then ask its sub-contractor to commence work pending finalisation of the main contract, which would to be incorporated into the sub-contract.

However, *DSL v Triumph* tells us that vague terms such as "back-to-back" may not have the intended effect. Only terms within the sub-contractor's "*general appreciation and knowledge*" would be incorporated into the sub-contract.

Parties must therefore take care to ensure that all the terms of the contract are carefully considered and drafted. At the very least, in the absence of a formal contract (with detailed terms), the parties should have the essential terms (among others, the parties, the price, and the subject matter) clearly drafted before commencing the works.

Finally, while the Court found that Triumph was justified in terminating the agreement with DSL for prolonged and substantial non-payment, it is clear that this was a fact-specific situation. On the facts, it was not apparent when DSL would resolve the performance bond issue, and the Court was able to infer that DSL demonstrated an intention not to be bound by payment obligations. The case of *DSL v Triumph* should therefore not be taken as proposition that prolonged non-payment per se is tantamount to repudiatory breach.

Reference:

Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd [2021] 2 SLR 510

DSL Integrated Solution Pte Ltd v *Triumph Electrical Systems Engineering Pte Ltd* [2022] SGHC 221

GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd [2007] 2 SLR(R) 918

Chapter 2

Assignment of Rights under a Contract

The High Court of Singapore addressed the issue of assignment of non-contractual rights in the context of a contract containing a non-assignment clause

Re Ocean Tankers (Pte) Ltd (in liquidation) [2023] SGHC 330 ("*Ocean Tankers*").

In *Re Ocean Tankers (Pte) Ltd (in liquidation)* [2023] SGHC 330, the High Court of Singapore considered the validity and enforceability of an assignment of non-contractual rights arising out of the contract to a third party, notwithstanding the existence of a non-assignment clause in a contract. The High Court found a non-assignment clause in a contract did not prohibit the assignment of non-contractual (or tortious) rights arising out of or in connection with the contract.

Contractual vs non-contractual rights

First, it is useful to understand the difference between "contractual" rights and "non-contractual" (or "tortious") rights. We will use the terms "non-contractual" and "tortious" interchangeably in this article to refer to the latter category of rights.

"Contractual" rights are rights which are set out in the provisions of the contract, reflecting the express agreement of the parties to the contract. Conversely, "non-contractual" rights are rights which arise as a matter of law and which are connected with (or which arise from) that contract, but are not specifically provided for in the text of a contract.

Background Facts

Ocean Tankers (Pte) Ltd (the "**Company**") was placed under judicial management in August 2020. In the interim period between Company's judicial management and its subsequent winding-up, the judicial managers of the Company (the "**JMs**") brought actions concerning purported assignments of claims made by a creditor of the Company (the "**Assignor**") in favour of a third-party debtor of the Company (the "**Debtor**").

One of the issues the High Court had to consider concerned the validity of an assignment of non-contractual claims made by the Assignor in favour of the Debtor, and whether that assignment was enforceable against the Company.

The assignment in question sought to assign the Assignor's rights, title, interests and benefits in and to (amongst other things):

1. a storage agreement (the "**Storage Agreement**") made between the Assignor and the Company;

2. a document (the "**Document**") issued by the Company evidencing the existence and transfer of certain cargo; and

3. any and all causes of action the Assignor had or may have had against the Company in connection with or arising from (amongst other things) the Document.

Of interest was the purported assignment of the Assignor's causes of action against the Company in connection with or arising from the Document (which the High Court referred to as the "**Vessel [B] Document Claim**").

The Court had to consider if the assignment of the Vessel [B] Document Claim was valid in light of the non-assignment clause set out in the Storage Agreement (the "**Non-Assignment Clause**"). The High Court held that the Document was "*not separate and independent from the Storage Agreement*", implying that the Document was subject to the provisions of the Storage Agreement, including the restrictions on assignment set out in the Non-Assignment Clause, which read in the following terms:

> ***TRANSFER OR ASSIGNMENT OF AGREEMENT***
>
> *Unless otherwise provided hereunder, the rights and obligations of [the Assignor] and [the Company] under the Agreement shall not be assigned or novated without the prior written consent of the other Party, whose consent shall not be unreasonably withheld. [emphasis added]*

The High Court noted that the text of the Non-Assignment Clause required the Company's consent for the assignment and novation of rights under the Storage Agreement (and, by extension, the Document), and the parties did not dispute that no such consent was obtained.

The High Court was of the view that there were "*clear indications in the [Non-Assignment Clause] itself that it relates to contractual rights but not tortious rights*". Three reasons were given by the High Court in reaching this conclusion.

— First, the Non-Assignment Clause referred to "novation", which the High Court noted is a process "by which a contract between the original contracting parties is discharged through mutual consent and substituted with a new contract between the new parties". In the High Court's view, when the Non-Assignment Clause referred to the novation of "rights and obligations", this must be understood to mean contractual rights and obligations, and the Non-Assignment Clause did not prohibit the assignment or novation of tortious rights and obligations.

— Second, the heading of the Non-Assignment Clause – "*TRANSFER OR ASSIGNMENT OF AGREEMENT*" (emphasis added) – indicated the intention of the parties for the clause to cover only contractual rights.

— Third, the High Court noted that the Storage Agreement itself referred to rights other than contractual rights. For example, the Storage Agreement made references to claims "*in tort, under contract or otherwise at law*" as well as obligations or liabilities "*under or arising from [the Storage] Agreement or at law*". The High Court was accordingly of the view that the Assignor and the Company (i.e., the original parties to the Storage Agreement) intended to refer specifically to contractual rights and obligations where the Non-Assignment Clause specifically referred to rights "under" the Agreement.

On the facts, the High Court found that the assignment of the Vessel [B] Document Claim was a tortious claim and, consequently, held that the assignment of the Vessel [B] Document Claim was outside the ambit of, and therefore did not breach, the Non-Assignment Clause.

In reaching its conclusion, the High Court considered the judgment of the English High Court in *Burleigh House (PTC) Ltd v Irwin Mitchell LLP*[1] ("**Burleigh House**") which held that the non-assignment clause in that case prohibited both assignments of contractual and tortious rights. However, the High Court declined to follow *Burleigh House* for the following reasons:

— First, *Burleigh House* concerned assignments in the context of a former client's claim against a law firm for professional negligence. The High Court was of the view that the implications that such an assignment would have on the solicitor-client relationship were a significant consideration for the English High Court in its interpretation of the non-assignment clause in the law firm's retainer. The High Court was quite clear that this concern did not apply in the context of the case before it and, accordingly, distinguished Burleigh House;

[1] [2021] EWHC 834

— Second, Burleigh House sought to apply the approach taken towards the construction of arbitration clauses, as set out in *Fiona Trust & Holding Corp v Privalov*[2] ("**Fiona Trust**"). The Court in *Fiona Trust* held that rational businesspeople who agree to such clauses, regardless of whether they refer to disputes "arising under", "in connection with" or "under" a contract, intend any dispute arising out of their relationship to be decided by the same tribunal. While noting that *Fiona Trust* had been found by the Singapore Court of Appeal to apply to jurisdiction clauses generally,[3] the Court did not agree that the approach towards the interpretation of arbitration clauses as set out in *Fiona Trust* should *ipso facto* apply to other clauses in a contract or to non-assignment clauses generally. In the High Court's view, a non-assignment clause is not a dispute resolution clause and is intended to perform a very different function.

Comment

Ocean Tankers illustrates the potential limits of a non-assignment clause under Singapore law and provides valuable guidance as to the type of rights and obligations parties can assign – or prohibit the assignment of.

The judgment does, however, indicate that appropriate drafting can extend non-assignment clauses to prohibit or restrict the transfer of non-contractual rights. Such a prohibition on the assignment of non-contractual rights would work in tandem with the prohibition of an assignment of contractual rights under the agreement, such that any rights related to the agreement can be prevented from being assigned.

Ocean Tankers has practical implications. Some industry standard form documents use language which is similar to that of the Non-Assignment Clause in prohibiting assignments of rights or obligations "under" certain specifically identified documents. For example, clause 7.1 of the *JCT Standard Building Contract with Quantities 2016* provides that "*…neither the Employer nor the Contractor shall without the consent of the other assign this Contract or any rights thereunder.*"

Ocean Tankers indicates that a Singapore court would construe this as applying only to contractual rights, and not to non-contractual/tortious ones. To the extent that a party would like to also prevent the assignment of non-contractual/tortious clauses, the clause would have to be reworded so as to categorically state that such assignment is also not allowed.

Prior to Ocean Tankers, parties to a contract would not have considered that such a clause would treat contractual and non-contractual rights differently and would have assumed that such drafting would apply to both categories of rights; there now appears to be a need to re-look and re-draft these clauses to reflect the contracting parties' intentions.

Having expended considerable effort to explain why the assignment of the Vessel [B] Document Claim did not breach the provisions of the Non-Assignment Clause, the High Court ultimately found that the assignment of the Vessel [B] Document Claim was a "champertous assignment of a bare right to litigate and therefore void and/or ineffective against the Company, the JMs and the liquidators [of the Company]".

This, however, does not have any bearing on (and should not distract us from) the High Court's conclusion that the Non-Assignment Clause did not prohibit the assignment of non-contractual rights.

Reference:

Re Ocean Tankers (Pte) Ltd (in liquidation) [2023] SGHC 330

Burleigh House (PTC) Ltd v Irwin Mitchell LLP [2021] EWHC 834

Bunge SA and another v Shrikant Bhasi and other appeals [2020] 2 SLR 1223

Fiona Trust & Holding Corp v Privalov [2007] Bus LR 1719

[2] [2007] Bus LR 1719

[3] *Bunge SA and another v Shrikant Bhasi and other appeals* [2020] 2 SLR 1223

Chapter 3

Quantification and Valuation of Damages

In the past twelve months, several cases that shed light on the measure and valuation of damages were decided by the Singapore Courts. Of note were the following cases:

— In *CSDS Aircraft Sales & Leasing Inc v Singapore Airlines Limited* [2023] SGCA(I) 5, the Court of Appeal addressed the court's role and function in assessing expert and factual evidence when determining the fair market value of an asset, and how weight should be apportioned between the two categories of evidence.

— In *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] SGHC(A) 9 the Appellate Division of the High Court reaffirms key principles relating to damages and provides guidance as to the court's approach in assessment of damages. Of note is the appeal court's decision to overturn the trial court's treatment of the expert evidence.

Court of Appeal determines fair market value of aircraft – apportions weight between factual and expert evidence

CSDS Aircraft Sales & Leasing Inc v Singapore Airlines Limited [2023] SGCA(I) 5

The appeal before the Court of Appeal was by CSDS Aircraft Sales & Leasing Inc ("**CSDS**") against an award of damages made by an International Judge (the "**Judge**") of the Singapore International Commercial Court (the "**SICC**") following an assessment of damages hearing. After the trial on liability, the SICC found that CSDS was in repudiatory breach of its contract with Singapore Airlines Ltd ("**SIA**") and that SIA had accepted this breach which brought the contract to an end on 4 November 2018. The assessment of damages hearing was to assess SIA's losses consequent upon the breach.

Facts

CSDS had entered into a contract to purchase from SIA, a Boeing 777-212 aircraft (the "**Aircraft**") *without engines* at the price of US$6.5m. Having paid the deposit of US$250,000, CSDS failed to make payment of the balance sum of US$6.25m.

SIA accepted CSDS' repudiatory breach of contract and brought the contract to an end in November 2018. Despite various efforts by SIA to resell the Aircraft *without engines* after the termination of the contract, SIA was not able to conclude a successful substitute sale.

SIA had issued several Requests for Proposals ("**RFP**") over different points in time. However, SIA did not receive any meaningful bids.

— SIA received a bid pursuant to an RFP issued in November 2018 for US$2.1m. This bid was subsequently withdrawn as there were a number of difficulties that made the purchase of the Aircraft uneconomic, for example the extensive and expensive maintenance checks the Aircraft needed to go through before it could be ferried to another destination outside Singapore; and the significant costs involved in removing the Aircraft which was being sold without engines.

— SIA also requested for *revised bids* for the Aircraft components, without the airframe, landing gear, windows and doors. The highest bid received by SIA only amounting to US$600,000.

— Pursuant to an RFP issued in March 2019 for a selected list of harvested components, SIA received several bids, the highest bid of which was US$1.315m for the components without the airframe.

Between November 2019 and May 2020, SIA entered into settlement discussions with CSDS, during which time SIA did not pursue any steps to sell or advertise the Aircraft. When the settlement discussions came to an end without any progress, SIA decided to part out the Aircraft and brought a claim for the following heads of damages:

(a) The difference in the contract price and the market value of the Aircraft, under s 50(3) of English Sale of Goods Act 1979 (c 54) (UK) (the "**SGA 1979**"), which would, it was submitted, allow for a reasonable time for negotiation and conclusion of a substitute sale following acceptance of the repudiation;

(b) Parking and maintenance fees from 4 November 2018 until the expiry of that reasonable time; and

(c) Marketing, brokerage and legal costs.

It was common ground between the parties that the measure of damages for the repudiatory breach would be the difference between the contract price and the market value of the Aircraft under s 50(3) of SGA 1979. In issue before the Court was therefore what constituted the proper determination of the market value of the Aircraft.

Expert Evidence on the Market Value of the Aircraft

SIA adduced expert evidence from Mr Philip Seymour ("**Mr Seymour**"), a senior certified aircraft appraiser. Mr Seymour's valuation of the Aircraft was based on information obtained from the International Bureau of Aviation Group Limited ("**IBA**") which publishes the Aircraft Values Book ("**AVB**") of various aircrafts at various dates.

However, IBA does not publish the AVB of a B777-212 aircraft, which was the Aircraft's actual model. The nearest models with published AVBs were the B777-200 and B777-200ER aircrafts. As such, Mr Seymour had to make certain adjustments in order to arrive at the Aircraft's notional valuation. Mr Seymour could either: (i) start from the market value of the cheaper B777-200 model and adjust upwards to reach the Aircraft's model (a B777-212 model), or (ii) start from the more expensive B777-200ER model and extrapolate downwards.

Mr Seymour adopted the first method. He was of the opinion that the Aircraft (a B777-212 model) had specifications that were more similar to those of the B777-200 model than the B777-200ER model. One of the reasons for Mr Seymour's opinion is that the maximum take-off weight ("**MTOW**") values of the B777-212 model and the B777-200 model were closer. The B777-212 model uses Trent 884 engines with an MTOW of 555,000lbs. This was only 10,000lbs less than the B777-200 model which uses Trent 875 engines.

Mr Seymour derived at the notional value of the Aircraft by:

— First, ascertaining the AVB of the B777-200 model as published by the IBA at the relevant times;

— Second, marking up these values by approximately 11% to account for the difference in the MTOW for the Aircraft, which was 10,000lbs higher; and

— Third, adding a premium for the "better than average" standard of maintenance of the Aircraft.

This provided him with the notional market value of the Aircraft *with engines* at US$15.62m in February 2019 and US$15.4m in August 2019.

As the Aircraft was sold *without engines*, Mr Seymour then deducted the value of two Trent 884 engines found on B777-212 models like the Aircraft to determine the value of the Aircraft *without engines*. This provided him with the value of US$3.86m in February 2019 and US$3.64m in August 2019.

Pausing here, it is noted that a key point of contention regarding Mr Seymour's valuation methodology was whether he was correct in deducting the value of two Trent 884 engines instead of deducting the value of Trent 875 engines which are found on the B777-200 models. Mr Seymour also conceded at the trial that he could have been mistaken in this regard. This issue is revisited below.

After obtaining the value of the Aircraft *without engines*, Mr Seymour then made several adjustments to the Aircraft's valuation to account for specific technical and maintenance factors, and the Aircraft being out of use for a long period etc. He achieved a final median point market value as of US$2.14m in February 2019 and US$1.17m in August 2019. The mid-point of these figures for May 2019 was US$1.66m.

Decision of the SICC

The Judge concluded that the maximum market price obtainable for the Aircraft was US$1.5m. Therefore, the consequential damages suffered by SIA amounted to US$4.75m, being the contract price of US$6.5m less the US$250,000 deposit paid and the US$1.5m market valuation. The Judge also awarded parking and maintenance charges for storing and maintaining the Aircraft for inspection by potential buyers for six months amounting to S$233,829.87, and miscellaneous legal costs of US$10,000.

In arriving at the market price, the Judge also assessed the factual evidence in relation to SIA's attempts to sell the Aircraft from November 2018 to October 2020 and the various RFPs issued. The best offer obtained by SIA was the US$1.315m bid from the RFP issued in March 2019.

The Appeal

CSDS appealed against the decision of the SICC. In particular, CSDS was dissatisfied with what it said was the Judge disregarding Mr Seymour's expert evidence and instead relying on unsubstantiated factual evidence to determine the Aircraft's market value. CSDS submitted that the third-party offer of US$1.315m should not have been considered as the price at which the seller can resell the goods to a third party is irrelevant.

Instead, according to CSDS, the Judge should have corrected Mr Seymour's valuation methodology and relied solely on the expert evidence. In particular, CSDS submitted, in view of Mr Seymour's concession that he was mistaken in deducting the value of Trent 884 engines instead of the Trent 875 engines, the Judge should have concluded that Mr Seymour was indeed mistaken and deducted the value of the Trent 875 engines instead.

The Trent 884 engines were valued at US$11.76m. The Trent 875 engines were valued at US$7.06m. Had the Trent 875 engines been deducted instead, along with other adjustments, SIA would not be entitled to any damages as the market value of the Aircraft would have exceeded the purchase price of US$6.5m.

The Court of Appeal's decision

The main issue to be decided by the Court of Appeal was whether the Judge was wrong in determining that the market value of the Aircraft was US$1.5m at the time when the substitute sale ought to have been concluded.

In deciding, the Court of Appeal addressed the court's role in assessing factual and expert evidence, and set out the following points:

— In determining whether it should accept parts of an expert's evidence, the Court would need to be guided by considerations of consistency, logic and coherence, and in doing so, scrutinise the expert's methodology and the objective facts which he relied on to arrive at his opinion - *Armstrong, Carol Ann (executrix of the estate of Peter Traynor, deceased, and on behalf of the dependents of Peter Traynor, deceased) v Quest Laboratories Pte Ltd and another and other appeals* [2020] 1 SLR 133 at [90].

— When determining fair market value, the Court should take into account evidence of a genuine third-party offer to acquire an asset, made at arm's length, and which is not speculative or conditional - *Abhilash s/o Kunchian Krishnan v Yeo Hock Huat and another* [2019] 1 SLR 873 at [76]; *Lim Chong Poon v Chiang Sing Jeong* [2020] SGCA 27 at [20].

In other words, the Court must factor into its analysis all categories of evidence (both factual and expert) when arriving at its conclusion on valuation. The Court held at [35] that there was no binary choice to be made in only considering one category of evidence to the exclusion of the other.

How the court apportions weight between factual and expert evidence will depend on the issue in question, the nature of the evidence and its inherent reliability and the Court will be guided by the needs of the case in question. Referring to *Tristram Hodgkinson and Mark James, Expert Evidence: Law and Practice* (Sweet & Maxwell, 5th Ed, 2020) at [12-010]), the Court held at [35] that the Court is at liberty to decide which class of evidence it prefers, and there is no hierarchy of evidence on particular issues including the determination of the market value of an asset.

CSDS had argued that the Judge had completely disregarded Mr Seymour's expert evidence when ascertaining the market value of the Aircraft. The Court of Appeal disagreed with this submission as it was clear from the Judgement that the Judge had considered both the expert and factual evidence. The Court found at [36] that the Judge had "*considered holistically all facets of the evidence, both expert and factual*" in coming to its conclusion that the maximum market value obtainable was US$1.5m. This according to the Judge "*represented an uplift from the bid of US$1.315m*" and that it was "*not too different from Mr Seymour's conclusion for that date*".

The Court of Appeal found that the Judge had merely decided to ascribe more weight to the March 2019 RFP bid which he was entitled to do.

In determining what weight should be attributed to the March 2019 RFP bid, the Court further held at [38] that in a situation where it was difficult to ascertain the market value of the asset in question, reference to third-party offers was relevant, and that the actual resale price to a third party be treated as evidence of the market value.[1]

The Court also referred to the English High Court case of *AerCap Partners I Ltd v Avia Asset Management AB* [2010] EWHC 2431 (Comm) which concerned the sale of two Boeing aircrafts. The seller was held to be entitled to the difference between the contract price and the substantially lower resale price at which the aircrafts were actually resold, on the basis that the resale price constituted good evidence of the market value, and no other available market had appeared until the time of the resale. The Court held at [38] that:

> *"The aggrieved seller may be able to establish proof of the market value by "*seeking several offers for the goods from prospective buyers with a view to accepting the best price obtainable*" (Chitty on*

[1] The Court referred to *James Edelman, McGregor on Damages* (Sweet & Maxwell, 21st Ed, 2021) at [25-121] and *Chitty on Contracts vol 2 (Hugh G Beale gen ed)* (Sweet & Maxwell, 34th Ed, 2021) at [46-380].

*Contracts at [46-380], footnote 1709) and these include "*the price of an offer not yet crystalised into a contract*" (McGregor on Damages at [25-121], footnote 547)."*

The present case related to the sale of the Aircraft *without* engines, which the Court found, based on the evidence presented, made it difficult to ascertain the market value of the Aircraft. As such, reference to third party offers were relevant. The Court agreed with the Judge's finding that the third party offers represented the most cogent evidence of the market value of the Aircraft.

In the context of there being both factual and expert evidence with respect to the market value of an asset, the Court held that the probative weight both categories of evidence should be evaluated in order to determine whether any adjustments should be made to best reflect the market value. The factual evidence provides a "reality check" on the expert evidence. The Court agreed at [44] with the Judge's approach in comparing the factual and expert evidence, and that he had "*adequately given weight to both sources of evidence in arriving at the eventual valuation*".

Concession made by Mr Seymour

In the appeal, CSDS further averred that the Judge was wrong to disregard Mr Seymour's concession.

To recap – Mr Seymour conceded during cross-examination that he was wrong when he deducted the value of Trent 884 engines and that he should have deducted the value of the Trent 875 engines instead.

The Aircraft was a B777-212 model which used Trent 884 engines. Mr Seymour had derived the AVB of the Aircraft by using the B777-200 model as a starting point, which used Trent 875 engines. After obtaining a notional market value of the Aircraft with engines, Mr Seymour then deducted the value of two Trent 884 engines found on B777-212 models like the Aircraft (instead of Trent 875 engines found on B777-200 models) to determine the value of the Aircraft without engines.

The impact of Mr Seymour's concession would be that the market value of the Aircraft would have been in excess of US$6m (as there would be a lower deduction of US$7.06m instead of US$11.76m). This would result in CSDS not being liable for damages.

The Judge disagreed that Mr Seymour was wrong and stated that he was of the view that Mr Seymour's original methodology in deducting the Trent 884 engines was correct. Having arrived at the notional value of the Aircraft by taking account of the difference in MTOW, the Judge was of the opinion that Mr Seymour should take out the engines that are on the Aircraft and not on the other aircraft.

The Court of Appeal held that the Judge was entitled to reject Mr Seymour's concession, stating:

— there is no rule of law that the court must unquestioningly accept the unchallenged evidence of any witness, even for expert witnesses. It is still the court's role to evaluate the evidence. Concessions extracted from cross-examination will be given weight, but, the court must still apply its mind as to the conclusions to be drawn from such concession.

— the Judge was thus entitled to find that Mr Seymour was mistaken in making the concession. The Court of Appeal agreed with the Judge that it would not have been logical to deduct the value of the two cheaper Trent 875 engines found on the B777-200 model after marking up the value of the B777-200 aircraft to arrive at the more expensive model of the Aircraft, a B777-212 model, that would notionally possess Trent 884 engines.

The Court emphasized that factual evidence served a valuable function of providing a reality check on expert evidence. If Mr Seymour's concession was accepted, the higher market value of the Aircraft would bear no resemblance to the factual evidence which showed that after multiple rounds of issuing RFPs to more than 200 potential buyers over a period of two years, SIA managed to only attract the highest viable offer of US$1.315m. On this basis, the Court affirmed the Judge's finding on the market value of the Aircraft at US$1.5m.

Comment

The measure of damages in a case of a breach of a contract for the sale and purchase of an asset is straightforward – it would be the difference between the contract price and the market value of the asset. However, in situations where the contract involves the sale of bespoke assets or equipment, arriving at the market value of the asset may not be straightforward, especially when there is not a readily available market for the asset.

The case illustrates the role of the expert witness and the Court's approach in balancing potentially competing factual and expert evidence in ascertaining the market value of the asset.

Ultimately, the Court's role is to evaluate evidence in the context of the factual matrix for its inherent reliability, content credibility and coherence, and this applies equally to factual and expert evidence. If there is sound ground for doing so, and if the evidence of an expert does not make sense, the Court is entitled to reject the views or concessions extracted during cross examination of the expert.

The case also illustrates the importance and value of factual evidence in ascertaining the market value of the asset, particularly when the valuation made by the expert was ultimately an extrapolation of the market value of a similar asset. Without readily available published figures of the asset, the expert Mr Seymour had to adjust the available values of a similar aircraft in order to achieve a value for the Aircraft at the relevant time. The available factual evidence in the form of third party offers made pursuant to the RFPs, which were made at arm's length and were not speculative or conditional, served a useful check on the expert evidence.

Reference:

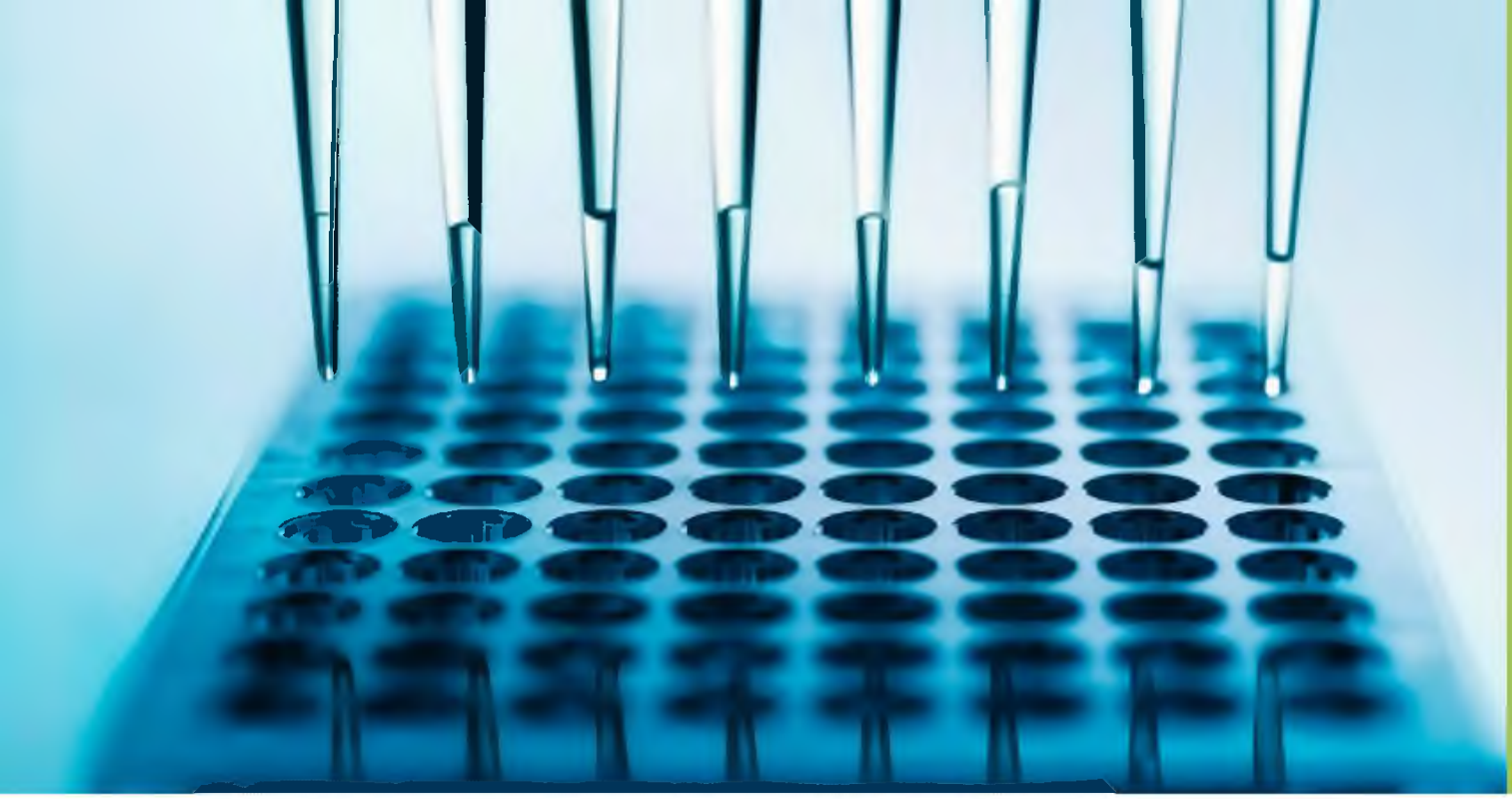
Abhilash s/o Kunchian Krishnan v Yeo Hock Huat and another [2019] 1 SLR 873

AerCap Partners I Ltd v Avia Asset Management AB [2010] EWHC 2431 (Comm)

Armstrong, Carol Ann (executrix of the estate of Peter Traynor, deceased, and on behalf of the dependents of Peter Traynor, deceased) v Quest Laboratories Pte Ltd and another and other appeals [2020] 1 SLR 133

CSDS Aircraft Sales & Leasing Inc v Singapore Airlines Limited [2023] SGCA(I) 5

Lim Chong Poon v Chiang Sing Jeong [2020] SGCA 27



Causation and Quantification of General Damages for Delay

Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd [2023] SGHC(A) 9

In *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] SGHC(A) 9, three appeals were heard by the Appellate Division of the High Court arising from a trial in a High Court suit ("**Suit**") between Crescendas Bionics Pte Ltd ("**Crescendas**"), a property developer and Jurong Primewide Pte Ltd ("**JP**"), the management contractor engaged by Crescendas to build Biopolis 3, a business park development envisaged as a research and development hub for biomedical sciences ("**BMS**") institutes and organisations.

The decision provides useful illustration of the Courts' approach to issues of causation and quantification of general damages for delay.

Facts

By a Letter of Intent dated 26 June 2008 ("**LOI**"), Crescendas had engaged JP, and JP had been required to complete Biopolis 3 within 18 months under clause 5.0 of the LOI. i.e. by 22 January 2010. However, the completion was delayed, and the Temporary Occupation Permit ("**TOP"**) was only obtained on 12 January 2011. Crescendas subsequently commenced the Suit against JP for delays in completion.

The Suit was bifurcated on issues of liability and assessment of damages. During the liability phase, the first instance decision by the High Court in *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 (the "**Liability Judgment (HC)**") was affirmed on appeal in *Jurong Primewide Pte Ltd v Crescendas Bionics Pte Ltd and another appeal* [2019] SGCA 63 (the "**Liability Judgment (CA)**").

In gist of these judgments, Biopolis 3 was held completed on 22 December 2010, based on the Building and Construction Authority's determination that it was ready for the TOP application. The completion of Biopolis 3 was therefore delayed by a total of 334 days, from 23 January 2010 to 22 December 2010 (the "**Combined Delay**").

Out of the 334 days of delay, Crescendas was held responsible for 173 days' delay due to its own acts of prevention. As a result, the time for completion was set at large and JP was required to complete Biopolis 3 within a reasonable time of 18 months (the original period) plus 173 days, that is, by 14 July 2010, and JP was held liable for 161 days of delay to completion. The actual periods of delay attributable to Crescendas and JP were spread out over the Combined Delay period: Crescendas incurred delays of six days in December 2008, 147 days from January to June 2009, seven days in November 2010, 13 days in December 2010, and JP's delays were interspersed between Crescendas' delays.

JP was also found liable to Crescendas in general damages for delay, but not for liquidated damages under the LOI's liquidated damages clause as the latter clause – in the absence of an extension of time clause – had been rendered inoperative by Crescendas' acts of prevention.

Claim for loss of net rental revenue

At the assessment of damages phase, Crescendas claimed pre-completion and post-completion "loss of chance" to earn net rental revenue flowing from the Combined Delay, namely pre-completion loss of net rental revenue for the period of the Combined Delay itself, and post-completion losses of net rental revenue.

In respect of the claim for post-completion loss, Crescendas claimed loss of five pre-commitment tenants who would otherwise have taken up a lease at the start of 2010, and quantified its net rental revenue loss using the "Multi-Year Model". This model calculated the difference between projected and actual net rental revenue over multiple years from the period of the Combined Delay to the years thereafter with an applied 8% discount rate:

— First, from each year of a tenancy that a pre-commitment tenant would have entered into if not for the Combined Delay and whose lease term would have been longer than the Combined Delay; and

— Second, all other loss of net rental revenue from the additional time required for Biopolis 3 to achieve stabilised occupancy due to the Combined Delay, referring to the percentage of net lettable area that would be leased once Biopolis 3 achieved its market potential, and the percentage at which the occupancy level would remain steady over a long period of time. The attainment of stabilised occupancy would signify the dissipation of the economic effect of the Combined Delay.

In response, JP contended that the "Single-Year Model" should be used instead of the Multi-Year Model to calculate Crescendas' net rental revenue loss, due to its reduced speculative elements. The Single-Year Model calculated Crescendas' loss of net rental revenue solely for the year 2010.

The Multi-Year Model would have calculated net rental revenue loss from 23 January 2010 to January 2015. In contrast, the Single-Year Model assesses the net rental revenue loss suffered by Crescendas during the period of the Combined Delay (i.e, from 23 January 2010 to 22 December 2010

Both models were similar in that they put into practice the compensatory principle, assessing the difference between (a) the net rental revenue that Crescendas would have earned if the Combined Delay had not occurred ("**No-Delay Scenario**"), and (b) the net rental revenue that Crescendas would have earned had it taken reasonable mitigatory steps in light of the Combined Delay ("**Delay Scenario**"). Both models also utilised the same variables to determine the projected net rental revenue in a particular year, namely: (a) occupancy level; (b) gross monthly rental rate; and (c) net rental revenue margin.

In the trial below, there were five experts giving evidence on Crescendas' loss of net rental revenue claim: three engaged by Crescendas, one by JP and one by the Court. Both Crescendas and JP's experts had initially prepared their reports based on the Multi-Year Model to compute the loss of net rental revenue over multiple years. On the judge's invitation, parties' experts and the court's expert considered whether the Single-Year Model should have been used instead of the Multi-Year Model. Crescendas' experts and the court's expert had preferred the Multi-Year Model, and while JP's expert acknowledged the possibility of using the Single-Year Model, he stopped short of preferring it over the Multi-Year Model, and had further noted the model's shortcoming, namely, that a year did not fully reflect the typical tenancy period of 3 or more years.

The trial judge subsequently adopted the Single-Year Model and rejected the Multi-Year Model for the following shortcomings:

— The speculative nature of the Multi-Year Model, which depended on a multitude of variables that were uncertain, subjective, and which could be endlessly contested.

— The Multi-Year Model depended primarily on variables, such as the stabilised occupancy level, which were outside JP's control.

— The Multi-Year Model was capable of yielding illogical and plainly inequitable outcomes. In particular, it was conceptually possible for the difference in net rental revenue between the No-Delay and Delay Scenarios to yield a negative figure.

On appeal to the Appellate Division of the High Court, the Court disagreed with the judge's reasoning as to why the Multi-year Model should not be adopted and overruled the judge's adoption of the Single-Year Model. The Court found for Crescendas' post-completion losses based on the Multi-Year Model for the following reasons:

— The expert evidence supported the *existence* of damage suffered by Crescendas over multiple years post-completion. The Court noted that even if the Multi-Year Model computations involved speculative variables outside JP's control, that is a point going towards quantification of damage, which is distinct from the *existence* of damage.

— Crescendas' post-completion losses over multiple years would have resulted even if it had taken reasonable efforts to mitigate its loss, given that Biopolis 3 was a multi-tenanted development that would take several years to fill up, coupled with Crescendas' income stream based on multi-year leases.

— Given the fact of damage, the court should as a matter of principle allow the claim for damages.

— The judge's rejection of the Multi-year Model effectively held the nature and circumstances of Crescendas' loss against it. The net rental revenue projections in the No-Delay Scenario were based on parameters that were influenced by market factors and were therefore inherently uncertain. In quantifying such loss, Crescendas had done its best in the proof of quantum and there was sufficient material for the court to make a reasoned estimate of such loss.

— A discount on the final award could be applied to "fairly and reasonably accommodate" the uncertainties in determining the multi-year net rental revenue loss.

Remoteness of damages

JP also argued that Crescendas' entire claim for net rental revenue loss fell within the second limb of *Hadley v Baxendale* – being "extraordinary damages" that are not by its nature within the reasonable contemplation of contracting parties, but arising due to special circumstances which are outside the usual course of things. JP's position was that Crescendas' loss did not flow naturally from a breach of contract but arose from circumstances outside of JP's control, such as Crescendas' pricing strategy, negotiations between Crescendas and prospective tenants, each prospective tenant's decision-making calculus, and the global financial crisis in late 2008.

Depending on the nature of the property, loss of rent is an ordinary and foreseeable loss arising from delayed completion, especially when the main contractor must have been aware that the building will be let out. On the facts of this case, the Appellate Division of the High Court found that Crescendas' pre- and post- completion net rental revenue loss under the Multi-Year Model came within the first limb of *Hadley v Baxendale* – being "ordinary damages" arising naturally from the breach of contract.

At the time of contracting, both parties had been aware that Biopolis 3 was a multi-tenanted development, and the fact that such a development would take multiple years to fill up was also within the reasonable contemplation of parties. The Combined Delay had a multi-year impact on Crescendas' net rental revenue stream and had caused Crescendas to suffer post-completion net rental revenue loss in the years following the Combined Delay.

The Court also found that it would have been within the reasonable contemplation of parties that a not insubstantial delay in completion would, in the usual course of things, cause potential tenants to walk away from Biopolis 3, and that tenancies in the BMS R&D industry would run for several years instead of a year in view of the costs that would be incurred for fit out and relocation for each tenancy.

Further, the appeal court held that JP's lack of knowledge and control over the circumstances of Crescendas' post-completion net rental revenue loss – such as the terms of each specific lease – did not preclude the recoverability of such loss under the first limb of *Hadley v Baxendale*. As long as the *type or kind* of loss that has occurred was reasonably contemplated at the time of the contract, even if its precise detail or extent were not, the contract breaker is liable.

Comment

This decision reaffirms key principles relating to damages and provides guidance as to the Court's approach in assessment of damages:

— It is trite that a claimant must satisfy the court as to the fact of damage and its amount to justify an award of substantial damages.

— The law takes a flexible approach towards proof of damage and does not demand that the claimant prove with complete certainty the exact amount of damage suffered. It only requires the claimant to attempt its level best, as far as the circumstances permit, to put forward cogent evidence of its loss.

— Where it is clear that substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the loss is no reason for awarding no damages or merely nominal damages. The court will allow the claim and do the best it can to assess the loss suffered by the claimant.

Separately, it is notable that post-completion net revenue rental loss for multiple years after the delaying event can be "ordinary damages" within the reasonable contemplation of parties at time of contracting, being a fact-sensitive inquiry. Employers and contractors should consequently take note during tender exercises of what is known or made known regarding the nature of projects and the likely effects of delays to completion.

Reference:

Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd [2023] SGHC(A) 9

Chapter 4

Liquidated Damages and the Penalty Doctrine

In the 2021 edition of our Annual Review of Singapore Construction Law Developments, we discussed the Court of Appeal's guidance in respect of the law relating to contractual penalties in the case *Denka Advantech Private Limited and another v Seraya Energy Pte Ltd and another* [2020] SGCA 119 ("***Denka***"). In a recent case, the Court of Appeal reiterated the distinction made by the penalty doctrine between primary and secondary obligations, and examined how the nature of an obligation should be ascertained in light of seemingly contradictory clauses in a contract.

Court of Appeal Addresses Obligation to Pay Entire Interest of Loan Facility Upon Default

Ethoz Capital v Im8ex Pte Ltd and others [2023] SGCA 3

In hearing an appeal against the decision of the High Court which found that provisions in a loan facility demanding for upfront payment of the aggregate all interest payments in the event of a default at a higher default interest rate were unenforceable penalties, the Court of Appeal recapped the Singapore jurisprudence on the penalty doctrine – which makes a distinction between primary and secondary obligations, with only the latter attracting its application.

Where parties have agreed that a particular obligation, even if it a particularly onerous one, is a primary obligation, the court will generally uphold such obligations. However, where parties attempt to draft agreements with the intention of obscuring the true nature of a provision by obfuscating its substance as a secondary obligation, the Court of Appeal observed that such efforts will not be encouraged. The court will subject such provisions to rigorous analysis and will not hesitate to strike it down if it is found in substance to be a secondary obligation that is in fact a penalty.

In determining whether a clause creates a primary obligation or secondary obligation triggered upon breach, the Court of Appeal held that the prevailing test in Singapore for whether a provision is an unenforceable penalty is set out in seminal decision of *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co, Ltd* [1915] AC 79.

Facts

Ethoz Capital Ltd ("**Ethoz**"), is an excluded moneylender under the Moneylenders Act (Cap 188, 2010 Rev Ed). The first respondent, Im8ex Pte Ltd ("**Im8ex**"), is a privately held company. The second respondent, Mr Chua Soo Liang ("**Mr Chua**"), is the sole director and shareholder of Im8ex. He is also the nephew of the third respondent, Mr Tan Meng Kim ("**Mr Tan**").

Ethoz lent a total principal sum of $6.3m to Im8ex under three loan facilities for a term of 12 months, with interest rates between 6.25% to 6.5% per annum (the **"Prior Facilities**"). The Prior Facilities were secured by mortgages over four different properties (the "**Properties**") and guarantees by Mr Chua and Mr Tan.

In November 2019 and January 2020, Ethoz and Im8ex renewed the Prior Facilities and signed new loan facilities (the "**Facilities**"). The total principal amount borrowed by Im8ex under the Facilities was similarly $6.3m (the "**Loan Sum**"), but this amount had been split into four loans instead of three. The Facilities were once again secured by guarantees from Mr Chua and Mr Tan and mortgages over the Properties.

The terms of the Facilities were identical. The Loan Sum under the Facilities were extended at an interest rate of 3.75% per annum, with instalment payments to be made every month over 15 years, i.e., over 180 months.

Schedule 3 of the Facilities set out the 180 instalment payments that Im8ex was obliged to make, which were equal instalment payments, made up of repayments of the principal Loan Sum and interest payments. It also included an amount termed "**Total Interest**" which was the aggregate of all the interest payments. It is also the amount arrived at when the flat rate of 3.75% per annum is applied to the Loan Sum.

A new term was introduced in the Facilities that was not present in the Prior Facilities, and this was that the Total Interest "*shall be deemed earned and accrued in full upon the drawdown of the (Loan Sum)*".

Provisions in the event of default

The Facilities also provided several provisions in the event of default of payments by Im8ex. These included:

— A "Default Interest" provision – upon default on payment, In8ex will pay interest ("**Default Interest**") on such sums from its due date to the date that it is paid, calculated at at a rate of 0.0650% per day (the "**Default Interest rate**"). This would be "*calculated daily with monthly rests*". Further, any unpaid Default Interest "*shall be added to the relevant outstanding amount on a monthly basis and shall itself bear interest*" at the Default Interest rate.

— Immediate and full payment provision - in default of payment of any of the instalments in Schedule 3 of the Facilities, Ethoz "*may treat the whole of [the Facilities] or the balance thereof … together with interest thereon and all other sums due and owing under this Agreement as immediately due and payable without any demand.*"

— Additional immediate and full payment provision – failure to pay any of the "*sum[s] payable under [the Facilities] when due*" will entitle Ethoz to declare that "*all amounts due and owing under [the Facilities], including the Advance and the Total Interest and any default interests … be immediately due and payable.*"

Within the first year of all the Facilities, Im8ex defaulted. Ethoz subsequently filed the High Court suit against Im8ex, Mr Chua and Mr Tan for full payment of the Loan Sum, Total Interest and Default Interest due under the Facilities. They also sought delivery of vacant possession of the Properties.

The High Court Decision

The case was first heard by an assistant registrar who gave his decision in favour of Ethoz. Im8ex appealed against all the orders made by the assistant registrar to the High Court. In the High Court's decision, the High Court canvassed the following issues in relation to the liquidated damages and the penalty doctrine:

— In relation to the claim for Total Interest, the High Court Judge concluded that the payment of the Total Interest upon default of the Facilities was a secondary obligation and ultimately a penalty.

— In relation to the claim for Default Interest, the High Court Judge also found that there was sufficient evidence to conclude that the Default Interest rate was a penalty, on the basis that there an "extravagant increase" in the Default Interest rate.

Appeal to the Court of Appeal

Ethoz appealed against the decision of the High Court Judge. The main issue in relation to the liquidated damages and the penalty doctrine before the Court of Appeal was whether the Judge erred in finding that the payment of the Total Interest upon default, and the Default Interest, were unenforceable penalties (the "**Penalty Issue**")

The High Court Judge had found that payment of the Total Interest upon default is an unenforceable penalty. The Judge had also rejected Ethoz's claim that Im8ex is liable to pay Default Interest, and found that Default Interest rate was also an unenforceable penalty.

The Court of Appeal held at [33] that:

> *A contractual provision will be held to be an unenforceable penalty where: (a) it creates a secondary obligation triggered by a breach of contract (the "threshold issue" …) that (b) requires the defaulting party to pay an amount of money that seeks to hold the defaulting party in terrorem to their primary obligations….*

Ethoz did not dispute that the payment of the Default Interest is a secondary obligation.

Ethoz was only contending that the payment of Total Interest under the Facilities did not fall within the scope of the penalty doctrine, as the payment of Total Interest upon default was an "*accelerated primary obligation*".

Ethoz relied on a clause in the Facilities which provides that the "*Total Interest … shall be deemed earned*

and accrued in full upon the drawdown of the (Loan Sum)". According to Ethoz, the deeming provision in the Facilities created a "*present debt to be paid at a future time*". Therefore, as the Total Interest is a debt, it was thus a primary obligation and that its payment upon default was thus the "acceleration" of a primary obligation.

The Court of Appeal did not disagree that the Total Interest was a debt, and that an accrued debt can in principle constitute a primary obligation.

However, Court of Appeal held that the acceleration of the obligation can change the nature of the primary obligation.

The Court of Appeal addressed the concept of time value of money in the context of payment of the Total Interest in instalments or in full immediately upon default.

— when the Total Interest is paid in 180 instalments over 15 years, the Court of Appeal pointed out that Ethoz would only have use of the Total Interest as and when it is paid through each instalment payment which corresponds to the same period where Im8ex would enjoy the full benefits of the Facilities.

— if Im8ex was to pay the Total Interest in full immediately upon default, Ethoz would have immediate use of the money while Im8ex would lose the corresponding benefit.

Therefore, the Court of Appeal was of the view that it is clear that there is a substantial difference between paying a debt which includes the Total Interest in full immediately upon default as opposed to paying that same debt over 180 instalments.

The key inquiry, according to the Court of Appeal was which of the two situations (i.e., the payment of the Total Interest in instalments or the full and payment of the Total Interest) is the primary obligation, and which one is a secondary obligation triggered upon breach of contract.

In deciding this query, the Court of Appeal gave guidance on the distinction between primary and secondary obligations. In essence:

— A primary obligation is defined as the "essential purpose" of the contract. A secondary obligation is one that is incidental to the primary obligation.

— In the context of the penalty doctrine, the specific category of secondary obligation that the law is concerned with is an obligation to pay money upon a breach of contract.

As observed, clever drafting may mask a secondary obligation as a primary obligation. In order to distinguish between the obligations, the Court of Appeal referred to *Denka Advantech Private Limited and another v SerayaEnergy Pte Ltd and another* [2020] SGCA 119 ("***Denka***") and reiterated that several factors should be explored:

(a) the overall context in which the bargain in the clause was struck;

(b) any particular reasons for the inclusion of the clause; and

(c) whether the clause was contemplated to form part of the parties' primary obligations to secure some independent commercial purpose, or was only to secure the affected party's compliance with his primary obligations.

Ultimately, it is a substance over form approach, and the Court must analyse the whole contract, and not just the clauses in question.

In applying this approach to the facts of the case, the Court of Appeal found that the immediate and full payment of the Total Interest is a secondary obligation that is only triggered upon breach; and that it was not Im8ex's primary obligation under the Facilities. The Court of Appeal found that Im8ex's primary obligation was to pay the Total Interest in *instalments*.

The Court of Appeal addressed Ethoz's reliance on the English House of Lord's case of *John Wallingford v The Directors of the Mutual Society* (1880) 5 App Cas 685 ("***Wallingford***"). In the case of *Wallingford*, the appellant was to repay an advance of £6,000 and a premium of about £5,000 in equal quarterly payments over 20 years, which was secured by a mortgage bond given by the appellant to the respondent. When the appellant failed to make the scheduled payments, the respondent commenced an action against him seeking the recovery of the advance and the premium. The respondent's rules stipulated that if there was default in payment, the payment of the advance and the premium would be accelerated. The House of Lords disagreed with the appellant that the acceleration was a penalty.

The Court of Appeal disagreed with Ethoz's reliance on *Wallingford* on various grounds, but in particular, the House of Lords had found that the agreement in *Wallingford* was that the premium was to be paid immediately but it could be paid in instalments if such instalments were paid punctually. The House of Lords drew an analogy to mortgages which provided for a reduction of interest rates in the event of punctual payment. This would not be a penalty, "*but a relaxation of [the contract]*" which is an "*indulgence*" given in exchange for punctual payment. Therefore, the Court of Appeal found that in *Wallingford*, the primary obligation was for the premium to be paid immediately, with an additional stipulation that its payment could be deferred if the appellant made punctual instalment payments.

In the present case, the Court of Appeal found that on the plain text of the Facilities, the full and immediate payment of the Total Interest would only occur in the

event of default. This, according to the Court of Appeal, was a strong indicator that the immediate and full payment of the Total Interest is a secondary obligation that only arose upon breach.

The Court of Appeal also further analysed the Facilities and found that in the event Im8ex decided to prepay the Facilities, the Total Interest would not be payable on prepayment. Therefore, it cannot be said that the immediate and full payment of the Total Interest is the "*essential purpose*" of the Facilities. Instead, as it is only payable upon default, it is in substance, a secondary obligation which is triggered upon a breach of contract.

Genuine pre-estimates of loss?

Having found that the full and immediate payment of the Total Interest upon default is a secondary obligation, the Court of Appeal then considered whether such an obligation and the separate obligation to pay the Default Interest (which is undisputedly a secondary obligation triggered upon breach) are unenforceable penalties.

The Court reiterated that parties to a contract are free to change their mind and break their contractual undertakings if they so wish, albeit at a price. Any clause that essentially *forces* compliance with the primary obligation is a clause that interferes with the parties' freedom to break their contractual undertakings and therefore this will be held to be an unenforceable penalty.

The Court of Appeal found that the immediate and full payment of the Total Interest was clearly a payment of money that operates *in terrorem* of Im8ex, forcing it to comply with its primary obligation under the Facilities.

The prevailing test in Singapore for whether a provision is an unenforceable penalty is set out in the seminal case of *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 ("***Dunlop***") where the classic statement of principle is that "[*t*]*he essence of a penalty is a payment of money stipulated as in terrorem of the offending party*" while "*the essence of liquidated damages is a genuine covenanted pre-estimate of damage*". (*Dunlop* at [87])

The Court of Appeal referred to the (non-exhaustive and non-conclusive, albeit helpful) tests developed in *Dunlop* to determine whether a clause is penalty:

— the "Greatest Loss Test" which states that a provision will be a penalty "*if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.*"

— the "Greater Sum Test" which provides that a provision will be a penalty if "*the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.*"

— the "Single Lump Sum Test" which states that a penalty will be presumed where "*a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.*"

The Court of Appeal reiterated that the material inquiry is not whether a provision is a genuine pre-estimate of loss, but whether the provision stipulates a payment of money *in terrorem* of a defaulting party (at [79]). A penalty essentially forces a compliance with the contract breaker's primary obligation.

The Court of Appeal found that the payment of the Total Interest provisions in the Facilities satisfies the Single Lump Sum Test and the Greater Sum Test.

— the Single Lump Sum Test - the Total Interest is a single lump sum made payable on the occurrence of one or more of 25 different "events of default" provided for in the Facilities, some of which are serious such as insolvency, and some of which may be "trifling".

— the Greater Sum Test - In a situation where Im8ex defaults on its tenth payment under one of the Facilities, it would have failed to pay a sum of between $8,680.56 and $18,663.19 (such figures representing the lowest and highest monthly instalment payments under the Facilities). This would entitle Ethoz to claim the Advance, as well as the Total Interest. Putting aside the Advance, the Total Interest that would be owed would be between $507,805 and $1,091,778 (such sums representing the remainder of the Total Interest from the lowest to the highest outstanding amount under the Facilities). These sums clearly dwarfed the defaulted payments.

The Court of Appeal further found that the Default Interest rate 0.0650% per day which is "calculated daily with monthly rests" was an unenforceable penalty.

It was ascertained that the "effective" rates for the Default Interest rate amounted to an effective interest rate of 26.08% per annum; while the contractual interest rate amounted to an effective rate of 6.444% per annum. This was an increase of almost 20% between the regular contractual interest rate and the Default Interest rate, which is tantamount to a three-fold increase of the effective rate of 6.444% per annum.

Referring to its previous decision in *Hong Leong Finance Ltd v Tan Gin Huay and another* [1999] 1 SLR(R) 755, the Court of Appeal stated that the three-fold increase was an "*extravagant increase*" which meant that the default interest provision was *prima facie* unenforceable.

This meant that it then fell on Ethoz to show that the Default Interest rate is a genuine pre-estimate of its loss, which Ethoz failed to do.

In the circumstances, the Court of Appeal affirmed the High Court Judge's decision that both the full and immediate payment of the Total Interest and the Default Interest are unenforceable penalties.

Comment

This case was interesting as it addresses such common "make whole" clauses in loan agreements. In light of the Court's warning that it would not hesitate to strike down such provisions which are secondary obligations that are in fact penalties, parties should seek legal advice in the future drafting of such provisions.

With the Court making it clear that it will take a "substance over form" approach, lenders will need to ensure that any provision which seeks to make unaccrued interest due and payable upon default will have to represent a genuine pre-estimate of its loss in order for such provisions to remain valid.

Reference:

Ethoz Capital v Im8ex Pte Ltd and others [2023] SGCA 3

Denka Advantech Private Limited and another v Seraya Energy Pte Ltd and another [2020] SGCA 119

Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79

Hong Leong Finance Ltd v Tan Gin Huay and another [1999] 1 SLR(R) 755

John Wallingford v The Directors of the Mutual Society (1880) 5 App Cas 685

Chapter 5

Entitlement to payment for variation works

Contractors frequently carry out, or are asked to carry out, work for which they consider entitle them to payment in excess of the original contract sum. A recent case provides useful guidance on identifying condition precedent variation clauses which may bar claims for payment for variation works.

— In *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2, the Appellate Division of the High Court considered the correctness of a subcontractor's claim for variation works, specifically with reference to requirements of written notice, whether this was waived and who had the requisite authority to do so, and whether the quantum sought was substantiated.

Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd [2023] SGHC(A) 2

Facts

A main contractor had engaged the respondent, Deluge Fire Protection (SEA) Pte Ltd ("**Deluge**") as a subcontractor in respect of the design, supply and installation, engineering, project management and testing and commissioning of plumbing, sanitary and gas work for a building.

In an effort to ameliorate complained-of delays, Deluge engaged the appellant, Vim Engineering Pte Ltd ("**Vim**") to carry out a limited scope of plumbing works, namely the installation and testing of sanitary pipes on and above the 20th storey of a residential block.

Subsequently, Deluge agreed to pay Vim to complete a specified scope of plumbing and sanitary works (excluding payment for variations) in respect of the building. This agreement was set out in a sub-subcontract (the "**Subcontract**"), which made reference to a purchase order, a set of tender clarifications, and a quotation.

The temporary occupation permit ("**TOP**") was obtained on 20 October 2017. Owing to disagreements with Deluge, Vim left the project site on 5 February 2018 and did not complete any further work.

The dispute featured various heads of claim and counterclaim. Vim's claims were made pursuant to sums promised under the Subcontract, or in the alternative reasonable remuneration. The dispute featured Vim's head of claim comprising variation works, which referred to work outside the original scope of works set out in the Subcontract and including additions or modifications that Vim had to carry out.

Each variation work claim comprised of two components: an invoice which contained the breakdown of the cost of the variation, and a form that included a signed acknowledgement by the project manager or site engineer. In support of its claim for variation works, Vim invoked the Subcontract, which provided that any variation works would be on a back-to-back basis with the main contract, and such variation would be carried out only with written instructions from Deluge's project manager.

To show that Deluge had given Vim written instructions, Vim adduced in evidence drawings that Deluge had furnished to it, which Vim claimed to constitute a type of written instruction. Even assuming that Deluge had not given Vim written instructions, Vim argued that Deluge had given oral instructions for such variation works to be carried out. Furthermore, Deluge's representatives had signed the variation works forms and in these circumstances, the requirement of Deluge's written instructions had been waived or, alternatively, Deluge was estopped from enforcing the written requirement.

Deluge contended that the claimed "variation works" were actually main works falling within the scope of the Subcontract or were rectification works. In any event, Deluge had never issued Vim any written instructions in respect of variation works as required under the Subcontract, and the language of the Subcontract provided that such written instructions was plainly a condition precedent for a claim in variation works. Even if Vim had a claim for variation works, the quantum should be reasonable and not contain, among other things, excessive rates and man-hours spent as indicated in its variation works invoices.

Written notice requirement for variation works

On the issue of the written notice requirement for variation works under the Subcontract, the Appellate Division of the High Court (the "**Court**") noted that in general, to claim for work as a variation under a contract, it is necessary to establish that:

(a) the work is an "extra" (not included in the work for which the contract sum is payable);

(b) there is an express or implied promise to pay for the work;

(c) the work was instructed by a person with authority to vary the contract; and

(d) any condition precedent to payment has been fulfilled.

It was not disputed that the Subcontract contained an implied promise on Deluge's part to pay Vim for extra work, that is, variation work. However, Deluge argued that it never requested Vim for such work to be carried out since the Subcontract stipulated that variation works would be carried out *only* with written instructions from Deluge's project manager.

Vim argued that the words "shall be carried out *only* with written instructions" must be regarded not as a condition precedent but rather as a procedural provision. In this regard, Vim relied on the Court of Appeal's guidance in *Comfort Management v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("**Comfort Management**") at [89] that "*it is not invariably the case that the absence of writing, or more generally, the failure to follow the prescribed procedure, will disentitle the party who has performed the variation works from claiming for those works*".

In response, Deluge contended that the Subcontract should be construed strictly, as was the case in *Mansource Interior Pte Ltd v CSG Group Pte Ltd* [2017] 5 SLR 2023 ("***Mansource***").

In the Court's judgment, the Subcontract was not drafted in a stringent manner requiring strict compliance failing which a variation claim would fail. For example, a clause might expressly state that a written authorisation of work done or written confirmation of an oral order was a condition precedent for any right to additional payment, or it might specify a time within which the contractor was to inform the architect or owner in writing that it considered an instruction, direction, or request to do certain work to be a variation with time and cost consequences. This approach would be justified on the ground that employers and architects might legitimately require an opportunity to reconsider, and possibly withdraw an instruction or mitigate its effect by giving a still further or different instruction if the first is found to provoke a claim to additional payment or too costly a variation.

In the Court's view, that kind of stringent language was missing from the Subcontract. The Subcontract did not state that if there were no written instructions for variations from Deluge's project manager, Vim would forfeit the right to any payment or was otherwise barred from claiming payment for work that it considered a variation.

The Court further observed that the standard authoritative texts on construction law also recognise that in spite of cases which uphold provisions stipulating variation orders in writing as a condition precedent to the right of payment, the courts have enabled contractors to recover without an order in writing by "implied contract" or "unjust enrichment" reasoning or by finding that there was a waiver of the required formalities, amongst other things.

The Court considered the contract in Mansource contained strict language and was different from the Subcontract, as it states the following "*This Sub-Contract shall be on a back-to-back basis to the contract between [the plaintiff] and [the main contractor] and there shall be* ***no claim whatsoever unless*** *it is a variation work* ***authorised and approved*** *by [the main contractor]* ***only***."

The court in *Mansource* also took into consideration the defendant's lack of effort to make good its submissions on the basis of a waiver. Regardless, the court in

Mansource decided that even with stringent drafting, a claim may still succeed on alternate bases, provided that they had been pleaded.

Waiver

The Court then turned to address the issue of waiver. The Court first noted that Deluge had accepted correctly that the contractual stipulation of written notice may be departed from, to permit a claim for variation work where there is sufficient proof of waiver or estoppel – such an approach comports with a commercial reality that intermediate contractors and sub-contractor in large-scale building projects are engaged in complex and overlapping scopes of work set out in "back-to-back" contracts.

The relevant clause of the Subcontract provided that any variation works would be on a back-to-back basis with Deluge's contract - ease confusion with the main contractor, but went on to provide that such variation would be carried out only with written instruction from Deluge's project manager. Deluge thus reserved to itself control over sanctioning of variations – it was telling that Deluge did not in the present case rely on the "back-to-back" mechanism to argue that its approval of the variation works claims was subject to the main contractor's approval and that the main contractor had not approved those claims.

This was relevant to the question of the clarity of Deluge's acknowledgment where Vim's argument of waiver by election was concerned.

As the Court of Appeal explained in *Audi Construction v Kian Hiap Construction* [2018] 1 SLR 317 at [54], if a party elects not to exercise one of two inconsistent rights, he will be held to have abandoned that right if he has communicated his election in clear and unequivocal terms to the other party. He must also be aware of the facts which gave rise to the existence of the right he is said to have elected not to exercise. Once the election is made, it is final and binding, and the party is treated as having waived that right by his election.

What was of particular significance in the present case was the fact that Deluge's employees made written comments on 24 of 32 signed variation works forms stating that these claims would be subject to the main contractor's approval. Against the backdrop of the operating "back-to-back" mechanism as noted above, this was a clear acknowledgement that Deluge was not disallowing the claims on the basis of not having given written instruction under the Subcontract to carry out such work. Subsequently, even when the claims passed into the domain of Deluge's administrators, there was no evidence that the administrators rejected the variation work claims on the basis of the requirement of written notice, nor did they appear to regard Deluge's employees to be in error for receiving and accepting the same invoices and forms. Deluge's administrators must be taken to have known of the notice requirement in the Subcontract and their silence amidst the passage of time indicated to the Court that there had been a voluntary relinquishment of this right.

In the Court's judgment, it was irreconcilable for Deluge's representatives to sign the variation work claims and include written comments that these would be subject to the main contractor's approval, and then for them to subsequently insist that the work ought to have been carried out only under written instructions from Deluge pursuant to the Subcontract. The Court was amply satisfied that Deluge, by the totality of the circumstances, had – in at least 24 of Vim's variation works claims – by election waived the requirement of written notice and could not now demand its strict adherence.

It was not in dispute that Deluge's project manager had the authority to issue written instructions under

the Subcontract. As he had signed on the hard copies of Vim's variation claims and later wrote comments, Deluge was in no position to contend that Vim's claims were invalid because they were not pursuant to written instructions under his hand. Deluge's project manager was the one person who should have, but did not, reject Vim's variation claims at the material time as not being carried out pursuant to his written instructions.

In respect of the quantum of Deluge's variation claims, the Court had cause to consider whether Vim's use of hourly "star rates" for supervising manpower and general manpower were an agreed schedule of rates. These rates had been mentioned in Deluge's sample invoice, which had been provided by Deluge's contract department to Vim in an email requesting Vim to substantiate its claimed rates for manpower. When Vim used these "star rates" in subsequent submissions of its variation works forms, it appeared that Deluge's representatives acknowledged these forms in a manner to indicate that the claims were forwarded to the main contractor for approval. This suggested to the Court that Deluge did not in principle object to these "star rates". In the Court's judgment, having considered the evidence in support of Vim's claims, all of which had been acknowledged by Deluge as having been forwarded to the main contractor, the Court was satisfied that Vim had substantiated the quantum sought for in respect of the variation work invoices and forms.

Comment

It is common in contracting chains for contractors to adopt "back-to-back" mechanisms, where a subcontractor's claims for variations will be subject to assessment by the upstream contractor / main contractor / employer, with the interposing contractor merely taking a passive and/or facilitative role between the two.

The case of *Vim Engineering* puts forward several key takeaways for parties in such positions, as well as those downstream/upstream of such relationships:

(a) if it is intended that a proper written order is a condition precedent to payment of variations, the relevant contractual clause(s) should be drafted stringently to require as such;

(b) even where contractual clause(s) are drafted stringently to require written orders as a condition precedent to payment of variations, such requirements should be enforced strictly and contemporaneously, with recorded receipt of any claims for payment of variations by those personnel with the requisite authority to order/approve and/or certify variations;

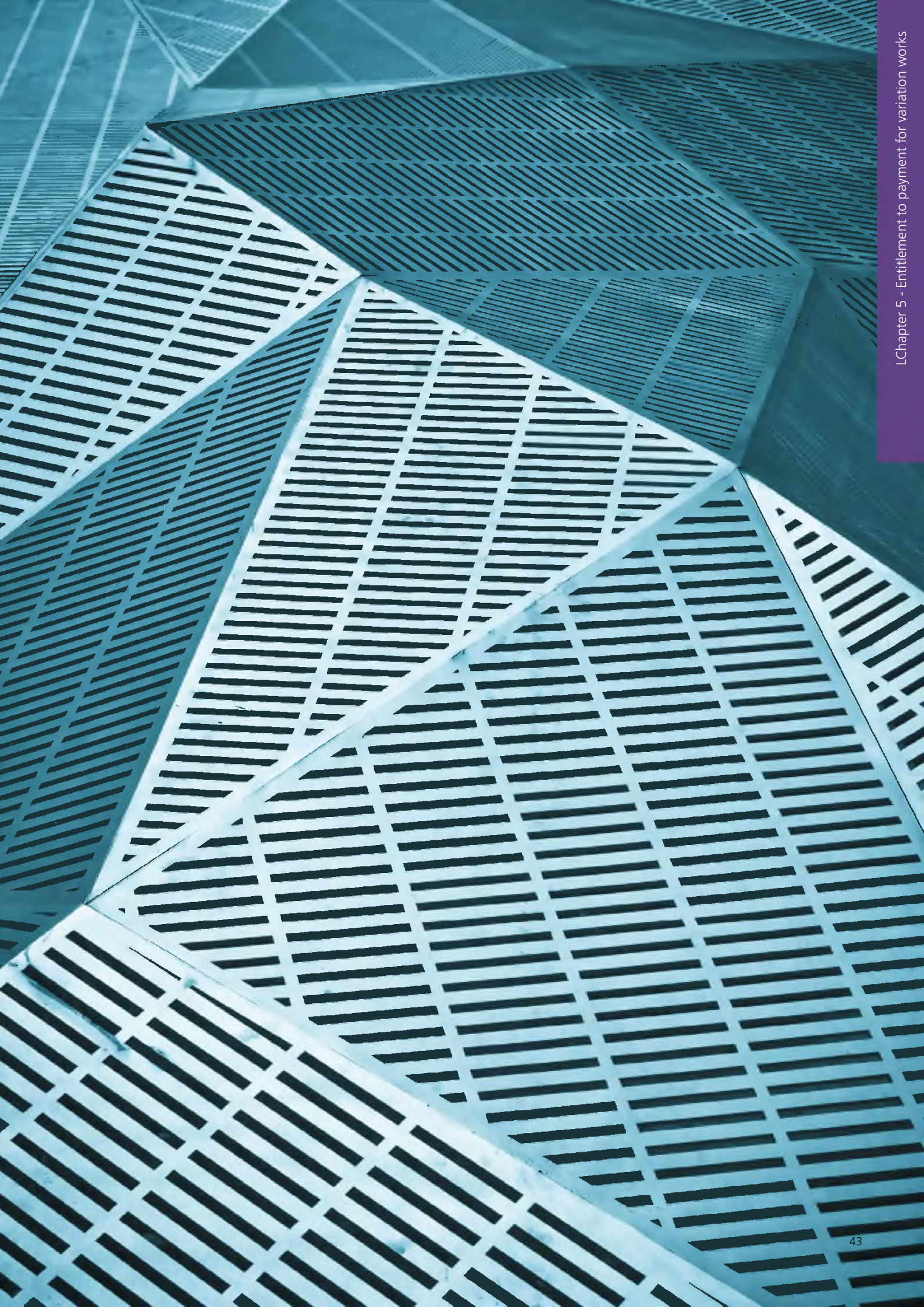
(c) it is not sufficient for parties to simply pass a downstream contractor's claim for variations upstream, and rely on any potential certification/non-certification by the upstream party to shield it from downstream claims. Especially in light of the unenforceability of "pay when paid provisions" under the Building and Construction Industry Security of Payment Act 2004, each party should undertake its own assessment and due diligence in respect of direct contractual claims, or face the danger of awards which it may not necessarily be able to recover upstream.

Reference:

Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd [2023] SGHC(A) 2

Mansource Interior Pte Ltd v CSG Group Pte Ltd [2017] 5 SLR 2023

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



Chapter 6

Adjudication

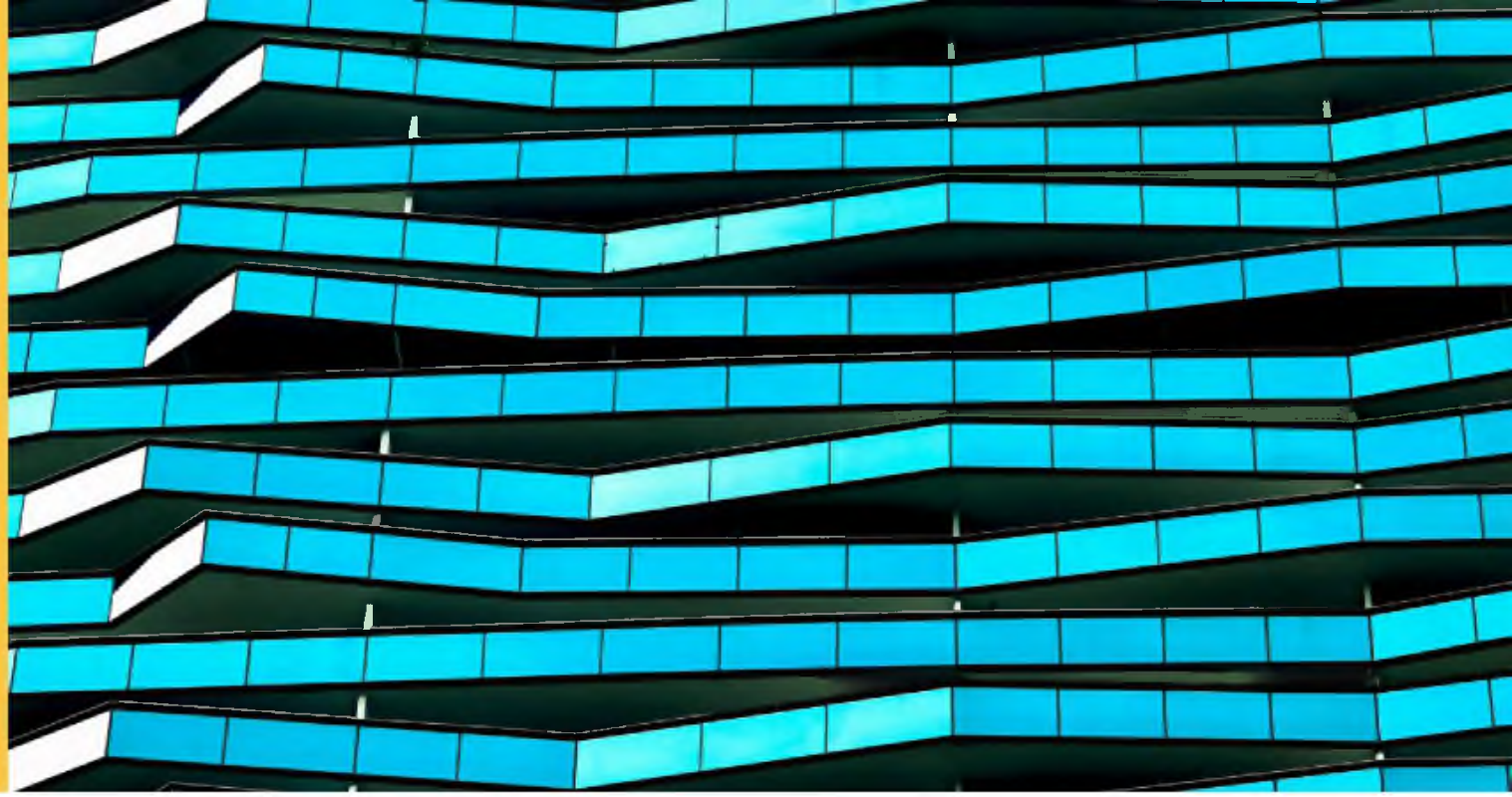
Several decisions of the High Court of Singapore over the past twelve months provided clarity on the adjudication regime under the Building and Construction Industry Security of Payment Act 2004. Of note were:

— In *HP Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2023] SGHC 298 where the High Court provided guidance to future parties utilising the adjudication regime in Singapore on the seven-day period to file an adjudication application.

— In *Asia Grand Pte Ltd v AI Associates Pte Ltd* [2023] SGHC 175 where the High Court provided clarification on the meaning of the deeming provisions of section 10(3)(b) of the Building and Construction Industry Security of Payment Act.

— In *Wan Sern Metal Industries Pte Ltd v Hua Tian Engineering Pte Ltd* [2023] SGHC 46 where the High Court of Singapore declined to stay enforcement of adjudication determination on grounds of potential insolvency of enforcement respondent, reiterating that there is high threshold that needed to be met before a stay of enforcement of an adjudication determination will be ordered.

— In *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2023] SGHC 120 where the High Court clarified that subsequent termination does not in itself negate, suspend or otherwise affect a contractor's right to apply for adjudication under the Building and Construction Industry Security of Payment Act 2004 on the basis of a payment claim that has been validly served before that termination.



High Court clarifies the commencement of the seven-day period to file the adjudication application

HP Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd [2023] SGHC 298

In deciding an application to set aside an adjudication determination made under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("**SOPA**"), the High Court of Singapore addressed the issue of the period within which an adjudication application must be made under s 13(3) of SOPA in order to provide guidance to future parties utilising the adjudication regime as set out in SOPA.

Facts

HP Construction & Engineering Pte Ltd ("**HP**") had engaged Mega Team Engineering Pte Ltd ("**Mega**") to supply labour under a sub-contract in relation to a building and construction project.

Mega submitted a payment claim to HP on 30 May 2023. Pursuant to SOPA, HP was required to respond to the payment claim by 20 June 2023, but failed to do so. Consequently, pursuant to s 12(2)(b) read with ss 11(1) and 12(6) of SOPA, the seven-day dispute settlement period commenced.

Parties agreed that the dispute settlement period ended on 27 June 2023, by which time HP had still not provided a payment response to Mega's payment claim. On 6 July 2023, Mega made an adjudication application under s 13 of SOPA. The adjudicator issued his determination on 21 August 2023.

On 28 August 2023, HP filed an application to the High Court for the adjudicator's determination to be set aside *inter alia* on the ground that the adjudication application was made after the end of the prescribed period for making it under s 13(3)(a) of SOPA; and/or

The issue before the Court was whether the adjudication application "*must be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12*": see s 13(3)(a) of SOPA.

— s 12(2) of SOPA provides that the right to make an adjudication application arises "*if, by the end of the dispute settlement period, the dispute is not settled or the respondent does not provide the payment response, as the case may be*".

— s 13(3)(a) of SOPA provides that the adjudication application "*must be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12*".

The issue before the Court was whether the seven-day period to file the adjudication application after the entitlement to do so arises includes or excludes that day.

It is HP's case that Mega's right to make an adjudication application ended on 5 July 2023 at 2359hrs:

— Mega's right to make the application arose on 28 June 2023.

— The seven-day period under s 13(3)(a) of SOPA therefore commenced on 28 June 2023 at 0000hrs.

— As 29 June 2023 was a public holiday, (as parties agreed) this day was excluded from the calculation of the seven-day period.

— Mega was therefore required to make the adjudication application by 5 July 2023 at 2359hrs.

— Mega only made the application on 6 July 2023. As such, it is HP's case that it was made out of time and hence the determination should be set aside. Pursuant to s 16(2) of SOPA, an adjudicator must reject an adjudication application that is not made within the time period prescribed by s 13(3)(a).

The adjudicator's interpretation of s 13(3)(a) of SOPA was that Mega's entitlement to make the adjudication application "*first arose on 28 June 2023, and the 7-day period to lodge the [a]djudication [a]pplication was to commence on 29 June 2023 … and would therefore end on 6 July 2023*". This is the same as Mega's submission.

The Court's Decision

The High Court decided the ordinary meaning of s 13(3)(a) of SOPA in two steps:

— the first step by determining when the entitlement arose.

— The second step is to consider what is meant by the phrase "*must be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12*".

When the entitlement arose

Mega submitted that the seven-day period commences the day after entitlement arises, and does not include the day on which it does so. In support, Mega relied on s 50(a) of the Interpretation Act 1965 (2020 Rev Ed) (the "**IA**") which states that "*unless the contrary intention appears — a period of days from the happening of an event or the doing of any act or thing is deemed to be exclusive of the day on which the event happens or the act or thing is done*". The day on which the entitlement arose should therefore, unless a contrary intention appears, be excluded from the seven-day period.

HP submitted that s 50(a) of the IA ought not to apply to the interpretation of s 13(3)(a) of SOPA because:

— there is no need to apply s 50(a) of the IA to ensure that a claimant under SOPA regime enjoys the full seven-day period; and

— applying s 50(a) of the IA would result in an "absurd outcome" because parties making an adjudication application would be conferred a period of eight days instead of seven as envisaged by SOPA.

The High Court disagreed that it would be an "absurd outcome" if the proper interpretation provides the adjudication applicant a period of eight days after the expiry of the dispute settlement period, which equates to seven days after the day on which entitlement arose.

The High Court held that as a matter of ordinary language and common sense, and within the context of the time periods adopted within SOPA, the entitlement to make the adjudication application arises on the day following the end of the dispute settlement period and not at any particular time on that day. The Court held that "*to have a day to do something after that would mean a complete day*".

The Court referred to the decision of Chan Seng Onn J in the case of *Suresh s/o Suppiah v Jiang Guoliang* [2016] 4 SLR 645. The general rule at common law was that the day of the event was excluded from the computation of the period within which a person must act upon that event.

The Court also stated that there was no contrary intention in SOPA that would justify not applying s 50(a) of the IA to the interpretation of s 13(3)(a) of SOPA.

Comment

SOPA demands strict adherence and compliance of the timelines it prescribes. Given the short timelines provided for under SOPA, it is necessary to have a proper appreciation of when they begin and end.

This decision by the High Court provides clarity on the interpretation and application of s 13(3)(a) of SOPA.

Reference:

Suresh s/o Suppiah v Jiang Guoliang [2016] 4 SLR 645

HP Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd [2023] SGHC 298

High Court clarifies meaning of SOPA deeming provisions

Asia Grand Pte Ltd v AI Associates Pte Ltd [2023] SGHC 175

In deciding an application to set aside an adjudication determination, the High Court of Singapore addressed sections 10(2)(a)(ii) and 10(3)(b) of the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("**SOPA**") and provided clarification on the meaning of the deeming provisions in those sections.

Facts

Through a letter of award dated 13 July 2022 Asia Grand Pte Ltd ("**AGPL**") awarded AI Associates Pte Ltd ("**AI**") a contract (the "**Contract**") to carry out works for a project known as the "Remodelling of Chinese Restaurant at #03-22 Fairmont Hotel, 80 Bras Basah Road, Singapore 189560" (the "**Project**").

The Contract did not specify the date on which payment claims under the Contract were to be served or date on which payment responses under the Contract were to be served. However, the Contract provided for "weekly progress claims" under cl 14, which was titled "Terms of Payment & Retention".

On 16 November 2022, AI served its payment claim on AGPL for a sum of $133,529.08.

On 13 December 2022, AI served a Notice of Intention to Apply for Adjudication in respect of the payment claim. On the same day, AI lodged an adjudication application claiming the sum of $133,529.08 as stated in payment claim.

On 14 December 2022, AGPL served a payment response in respect of the payment claim, asserting that its payment response was served in compliance with the timelines provided under SOPA and the Building and Construction Industry Security of Payment Regulations (2006 Rev Ed) ("**SOPR**") and that AI's 13 December 2022 notice was defective.

During the adjudication, the Adjudicator addressed the two jurisdictional issues:

— the first jurisdictional issue was whether the adjudication application was premature – the issue turned on the time at which the payment claim was served by AI, which had a direct bearing on when the payment response from AGPL was due, which in turn affected the question of when AI's entitlement to make an adjudication application under s 12(2) of SOPA first arose.

— The second jurisdictional issue was whether the PC fell outside the ambit of SOPA because the Contract provided for weekly (as opposed to monthly) progress claims.

The Adjudicator determined that he had jurisdiction to adjudicate the adjudication and determined that AGPL was to pay AI the adjudicated amount of $94,097.21 (inclusive of GST) plus 100% of the costs of the adjudication.

AGPL applied to the High Court of Singapore to *inter alia*, set aside the adjudication determination. The jurisdictional issues were amongst the issues to be decided by the High Court.

The first jurisdictional issue

AGPL averred that the adjudication application had been prematurely, and therefore invalidly, lodged, rendering the learned Adjudicator devoid of jurisdiction.

AGPL submitted that since the Contract did not specify a date for service of payment claims, pursuant to ss 10(2)(a)(ii) and 10(3)(b) of SOPA, read with regs 5(1) and 5(3) of the SOPR, the deemed date of service of the payment claim was the last day of the month in which it was served (i.e. 30 November 2022).

The determination of the date of service of the payment claim (i.e. 16 November 2022, which is the actual date on which the payment claim was served, or 30 November 2022) will ascertain the date on which the payment response would become due under s 11(1) of SOPA and the time frame within which an adjudication application must be filed under s 13(3)(a) read with s 12 of SOPA.

Sections 10(2)(a) and 10(3) of SOPA provide as follows:

Payment claims

…

(2) A payment claim must be served —

(a) not later than —(i) the date, or the last day of a period, specified in, or determined in accordance with, the terms of the contract relating to the purpose of this subsection; or (ii) the date prescribed for the purpose of this subsection if the contract does not contain such terms; and…

(3) In subsection (2) —

(a) a payment claim that is served before the date or last day mentioned in subsection (2)(a)(i) is deemed to have been served on that date or day, as the case may be; and

(b) a payment claim that is served before the prescribed date mentioned in subsection (2)(a)(ii) is deemed to have been served on that date.

Regulation 5 of the SOPR, which deals with payment claims, states at regs 5(1) and 5(3) as follows:

Payment claims

5.—(1) Where a contract does not contain any provision specifying the time at which a payment claim must be served or by which such time may be determined, then a payment claim made under the contract must be served by the last day of —

(a) the month following the month in which the contract is made; or

(b) any subsequent month.

…

(3) In this regulation, "month" means a period of time beginning on the first day of each of the 12 calendar months into which a year is divided, and ending on the last day of each of these months.

As a starting point, the High Court reiterated the timelines under SOPA as follows:

— Where the contract does provide for a date or period for the service of a payment claim, pursuant to s 10(2)(a)(ii) of SOPA, the payment claim must be served not later than the date prescribed for the purpose of s 10(2)(a)(ii) of SOPA (the "**Prescribed Date**").

— Pursuant to s 10(3)(b) of SOPA, if a payment claim is served before the Prescribed Date, it is deemed to have been served on the Prescribed Date.

— After service of the payment claim, the respondent is required to provide the claimant with a payment response within 14 days after the payment claim is "served under section 10": *see s 11(1)(b) of SOPA*.

— If a respondent fails to provide a payment response pursuant to s 11(1)(b) of SOPA, the respondent may still do so during the Dispute Settlement Period, which is the period of seven days after the period within which the payment response is required to be provided under s 11(1) of SOPA: *see s 12(5)(b) and s 12(6) of SOPA*.

— If, by the end of the Dispute Settlement Period, the dispute is not settled or the respondent does not provide the payment response, the claimant is entitled to make an adjudication application in relation to the payment claim: *see s 12(2) of SOPA*

— the adjudication application must be made within seven days after the entitlement to make the adjudication application first arises under s 12 of SOPA: *see s 13(3)(a) of SOPA*.

If the date the payment claim was "*served under section 10*" was the actual date of service on 16 November 2022, the payment response filed by AGPL on 14 December 2022 would have been out of time. The

adjudication application filed by AI on 13 December 2022 would have been filed in accordance with the statutory timelines and valid.

However, if the date on which the payment claim was "served under section 10" was deemed to be 30 November 2022, then the payment response filed by AGPL on 14 December 2022 would have been filed within time, and the adjudication application filed by AI on 13 December 2022 would have been premature and invalid.

Therefore, the determination of the date of service of the payment claim turns on the question of what the Prescribed Date is.

The Court held at [33] that both ss 10(2)(a)(ii) and 10(3)(b) apply to scenarios where the contract does not contain terms that specify, or provide for the determination of, a contractual service date or contractual service period. Specifically, s 10(2)(a)(ii) provides for a service period and s 10(3)(b) provides for a deemed service date.

Where s 10(2)(a)(ii) applies, reg 5(1) of the SOPR also applies, and read together, the Prescribed Date contemplated in s 10(2)(a)(ii) is the last day of the relevant calendar month. Therefore, where s 10(2)(a)(ii) applies, (i.e. where the contract does not contain terms that specify, or provide for the determination of, a service date or service period) the payment claim must be served not later than the last day of the relevant calendar month.

The Court held at [32] that pursuant to s 10(3)(b), if the contract does not contain terms that specify, or provide for the determination of, a date or period for the service of a payment claim, then a payment claim that is served before the Prescribed Date is deemed to have been served on the Prescribed Date.

The deemed date of service under s 10(3)(b) is therefore also the last day in the relevant calendar month, i.e. the Prescribed Date.

Accordingly, the Court held at [35] that if the contract does not contain terms that specify, or provide for the determination of, a service date or service period, then any payment claim will be deemed to have been served on the last day of the calendar month in which it was served, regardless of when it was actually served.

In the circumstances, AI's payment claim was deemed to have been served on 30 November 2022, being the last day of November 2022. As such, AGPL's payment response should have been provided by 14 December 2022 (14 days after the deemed date of service of the payment claim).

This means that AI was entitled to make an adjudication application within 7 days from 22 December 2022 (i.e. after adding 7 days of the dispute settlement period). In these circumstances, the Court found that the adjudication application was lodged prematurely.

The Court held that as the right to make an adjudication application had not yet arisen at the time it was filed, the adjudication application was invalid. The Court found that the Adjudicator therefore had no jurisdiction to render a determination in the adjudication. The Adjudication Determination was thus set aside.

The second jurisdictional issue

The Court's decision with respect to the Adjudicator's jurisdiction was sufficient to dispose of AGPL's application. Nonetheless, for completeness. the Court addressed *obiter* AGPL's further averment that as the Contract provided for weekly payment claims, the Contract fell outside the ambit of SOPA, and that the payment claim was therefore not amenable to adjudication under SOPA regime. AGPL asserted that SOPA only applies to monthly valuated claims.

The Court disagreed with AGPL's submissions. Section 4(2) of SOPA excludes certain contracts from the ambit of SOPA. However, none of the exclusions in SOPA were relevant in the present case and specifically, it did not exclude a contract providing for quantified weekly payment, thereby confirming the wide application of SOPA, and that the exceptions in s 4(2) are exhaustive.

Comment

This decision by the High Court provides clarity in situations where the contract does not specify the service date or service period for payment claims. As observed by the Court, the fact that the respondent's deadline for payment response is fixed to run only from the last day of the calendar month provides certainty for the respondent and helps to facilitate the timely service of payment responses. Such a payment process keeps SOPA mechanism running smoothly, prevents the missing of deadlines due to inadvertence, and minimises disputes. It also relieves a respondent from the need to constantly keep track of payment claims that are not served according to any stipulated contractual timelines.

Reference:

Asia Grand Pte Ltd v AI Associates Pte Ltd [2023] SGHC 175

Potential Insolvency Not Ground to Stay Enforcement of Adjudication Determination

Wan Sern Metal Industries Pte Ltd v Hua Tian Engineering Pte Ltd [2023] SGHC 46

In an application to stay the enforcement of an adjudication determination issued pursuant to the Building and Construction Industry Security of Payment Act (the "**Act**"), the Singapore High Court was asked to consider a "novel" ground in support of the stay application, i.e. that a stay should be ordered in circumstances where the enforcement of the adjudication determination would push the enforcement respondent into insolvency.

Facts

Wan Sern Metal Industries Pte Ltd ("**WS**") had engaged Hua Tian Engineering Pte Ltd ("**HT**") as its sub-contractor in respect of works for a property development project.

Claiming that it had not been paid for works done, in May 2022, HT commenced adjudication proceedings against WS pursuant to section 13 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (the "**Act**"). In June 2022, the adjudicator issued the adjudication determination ("**AD**") in favour of HT, for WS to pay HT the sum of $616,670.80.

Dissatisfied with the AD, WS commenced arbitration proceedings against HT.

HT, on the other hand, sought for and obtained leave to enforce the AD as a judgment or order of the Court pursuant to s 27 of the Act. In August 2022, HT applied to the Singapore court for, and obtained, an enforcement order to attach a debt due to WS from a Singaporean bank.

In September 2022, WS then applied to Court for a stay of the enforcement order pending disposal of the arbitration proceedings. The stay application was dismissed in the first instance before the Assistant Registrar. WS then appealed against the Assistant Registrar's decision to the High Court of Singapore.

The WY Steel test

Enforcement respondents seeking the stay of an adjudication determination will have to satisfy the *WY Steel* test set out by the Singapore Court of Appeal in *WY Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 *("**WY Steel**")* at [70] which are:

(i) there is clear and objective evidence of the successful claimant's actual present insolvency, or

(ii) where the Court is satisfied on a balance of probabilities that if the stay were not granted, the money paid to the claimant would not ultimately be recovered if the dispute between the parties were finally resolved in the respondent's favour by a Court or tribunal or some other dispute resolution body.

Issues such as: (i) whether the claimant's financial distress was, to a significant degree, caused by the respondent's failure to pay the adjudicated amount; and (ii) whether the claimant was already in a similar state of financial strength or weakness (as the case may be) at the time the parties entered into their contract, will also be considered by the court.

WS's Application for Stay of Enforcement Proceeding

WS's appeal against the Registrar's decision to refuse the stay of enforcement proceedings was based on the two limbs of the *WY Steel* test, as well as additional novel ground that the enforcement of the AD would push WS into liquidation.

The Court found that WS did not satisfy the *WY Steel* test.

No clear and objective evidence of actual present insolvency

WS submitted that the sole and determinative test for insolvency should be the "*cash flow test*" as cited in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] 2 SLR 478 which assesses whether HT's current assets exceed its current liabilities such that it is able to meet all debts as and when they fall due". HT did not dispute the applicability of the "*cash flow test*".

Instead, HT demonstrated that it was asset and cash flow positive and that it had made regular payments to its staff, had ongoing projects, and had liquidity in its daily accounts, over the course of the year. HT adduced financial documents such as payment records, payslips, quotations, letters of award and bank statements, which the High Court considered as evidence demonstrating that HT was solvent.

Whether there was a likelihood of recovery of moneys

WS submitted that based on the fact that: (i) the cash in HT's bank account was relatively low; (ii) HT had a low paid-up capital; (ii) a bulk of its assets were trade receivables; (iv) it could not be demonstrated whether HT had any life and/or substantial projects and what the status of these projects were; (v) the nature of HT's were appeared unsubstantial; (vi) HT had an extraordinarily slim workforce; (vii) its office was rented rather than owned; and (viii) if the dispute was resolved against HT, HT could easily close its business.

The Court did not find that that these factors proved that, on a balance of probabilities, moneys paid to HT would not ultimately be recovered if the stay were not granted and the dispute was resolved in WS' favour.

The Court held that low cash balances and a low paid-up capital did not, in themselves indicate that there was a risk of non-recovery. There was nothing to suggest that HT was in financial trouble, and fundamentally, HT was asset and cashflow positive. Ultimately, WS has not been able to demonstrate that HT was in some form of financial trouble. Neither had WS satisfactorily explained how issues such as having a slim workforce, or renting office premises were indicative of risk recovery. In addition, WS did not adduce any evidence that indicated a likelihood of HT choosing instead to close its business instead of paying WS. The Court observed that based on the evidence before the Court, there was nothing to suggest that HT intended to cease operations which would leave WS with a paper judgement.

Therefore, on the basis of the *WY Steel* test, the Court therefore declined to grant a stay of the enforcement of the AD.

Whether enforcement of the AD would push WS into liquidation

WS had also sought a stay of the enforcement of the AD on the ground that enforcement of the AD would push WS into liquidation.

WS submitted that given its weak financial position, payment pursuant to the AD would render it insolvent. This, WS argued, would defeat the purpose of SOPA regime, which WS, basing it off the court's decision in WY Steel as "*pay now, argue later*". Once it was insolvent, WS submitted, it would not be able to "*argue later*."

This argument did not persuade the High Court. The court found that (1) there was no legal basis for this submission. In fact, the Court was persuaded by HT's submission that if WS did have genuine financial difficulties, that would equally point to a need to ensure that HT recovered the adjudicated amount without further delay.

Further, the High Court held that WS had not provided any evidence that payment pursuant to the AD would push WS into liquidation. The Court also held that it was not clear on the evidence available to the Court that WS would be put into liquidation even if there was a winding up application.

For these reasons, the Court held that WS had not met the high threshold that was required to justify granting a stay of enforcement of the AD, and that granting WS a stay would defeat the purpose of the Act which was to ensure that, in light of the need for timely payment in the construction industry, there is a fast and low cost system to resolve payment disputes. WS' appeal to the High Court was dismissed.

Comment

The Singapore High Court's decision in *Wan Sern Metal Industries Pte Ltd v Hua Tian Engineering Pte Ltd* reiterates the position in Singapore that a stay of the enforcement of an adjudication determination will not be readily granted.

As held by the Court of Appeal in *WY Steel* at [71]:

> *An adjudication determination is provisional in the sense that it may ultimately be reversed if it is challenged in a court or tribunal or some other dispute resolution body. However, as far as the rights of the parties to the adjudication are concerned, to the extent that the adjudication determination remains intact pending any such challenge, it has the effect of absolutely and conclusively determining the parties' rights until and unless it is eventually reversed in accordance with the provisions of the Act…*

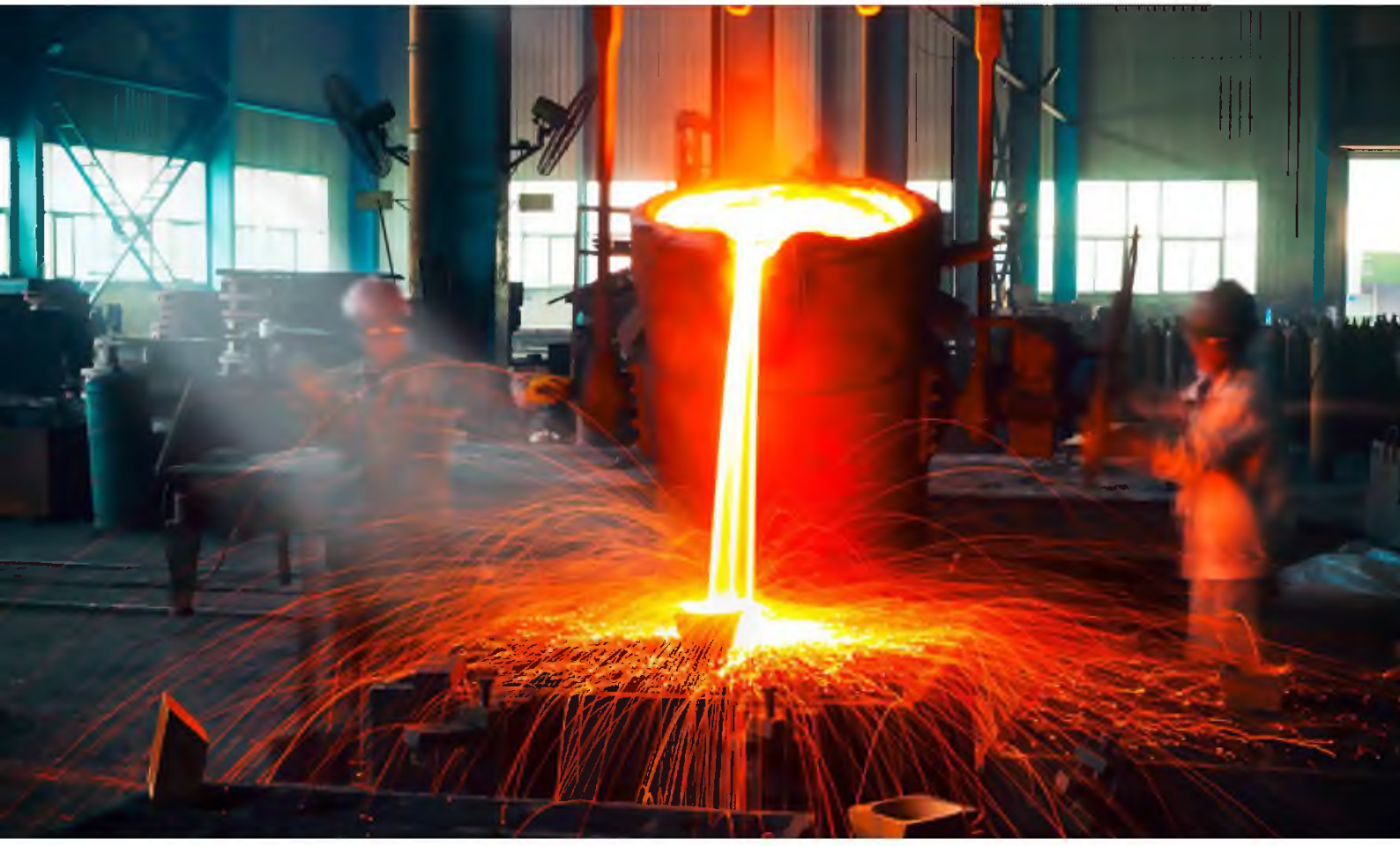
Having regard to the overall purpose of the Act, which is to ensure timely payments in the construction industries and that building and construction companies are not pushed "*over the financial precipice*", a high threshold needs to be met before the Courts are willing to consider the possibility that a stay of an enforcement of an adjudication determination was possible.

Reference:

WY Steel Construction Pte Ltd v Osko Pte Ltd [2013] 3 SLR 380

Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd [2021] 2 SLR 478

Wan Sern Metal industries Pte Ltd v Hua Tian Engineering Pte Ltd [2023] SGHC 46



Right to Adjudication not necessarily negated by termination of Contract

Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd [2023] SGHC 120

In an application to set aside an adjudication determination by the adjudicator that he had no jurisdiction to adjudicate the proceedings before him, and to remit the adjudication to the adjudicator for the determination of its merits, the High Court of Singapore clarified the ambit of section 4(2(c) of the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("**SOPA**").

The current section 4(2)(c) was included in SOPA pursuant to amendments made in 2018. It provides that SOPA does not apply to any terminated contract to the extent that "*(i) the terminated contract contains provisions relating to termination that permit the respondent to suspend progress payments to the claimant until a date or the occurrence of an event specified in the contract; and (ii) that date has not passed or that event has not occurred*".

Facts

JP Nelson Equipment Pte Ltd ("**JP**") engaged Builders Hub Pte Ltd ("**BH**") as its contractor for the construction of a building in a project ("**Project**") by way of a contract ("**Contract**") incorporating the REDAS Design and Build Conditions of Contract (3rd Ed, October 2010) ("**REDAS Conditions**").

On 2 August 2022, the Employer's Representative nominated by JP served a notice on BH notifying BH that:

- The revised contract completion date was 19 December 2021.
- BH was liable to JP for liquidated damages for its delay in the completion of the Project.
- The notice was issued under clause 30.2.1 of the REDAS Conditions, which empowered the Employer's Representative to give written notice to require BH to recommence the design or construction of the works, or to proceed with due diligence and expedition in the works.
- BH was required to complete the Project by no later than 30 September 2022, failing which JP would be entitled to terminate the Contract for default.

On 18 August 2022, BH served a payment claim ("**PC 40**") on JP.

On 22 August 2022, BH issued a letter to JP, alleging various repudiatory breaches of the Contract by JP.

On 25 August 2022, JP issued a reply letter to BH, rebutting the allegations in BH's 22 August 2022 letter.

On 26 August 2022, BH responded to JP's 25 August 2022 letter, stating that JP had indicated that it would continue with its alleged repudiatory conduct and informed JP that BH was accepting JP's alleged repudiatory breach of the Contract.

On the same day, JP issued a response to BH's letter by which JP purported to terminate BH's employment for the Project under clause 30.2.2 of the REDAS Conditions by issuing a notice of termination under that clause.

Clause 30.2.2 of the REDAS Conditions provides that:

> *"30.2.2. If the Contractor commits any of the following:*
>
> *30.2.2.1. fails to comply with the Employer's Representative's Written Notice under clause 30.2 within 28 days from the date of receipt of the same, or*
>
> *30.2.2.2. abandons the Works, or …*
>
> *then, the Employer, may without prejudice to any other rights and remedies under the Contract (including the right to treat the Contract as repudiated under general law), give a Notice of Termination of the employment of the Contractor. Upon receipt of such Notice, the Contractor's employment shall immediately terminate."*

Clause 30.3 of the REDAS Conditions further provides that:

> *"30.3. Effects of Termination for Default*
>
> *In the event of the termination of the employment of the Contractor under clause 30.2,*
>
> *30.3.1. the Employer shall not be liable to make any further payments to the Contractor until such time when the costs of the design, execution and completion of the incomplete Works, rectification costs for remedying any defects, liquidated damages for delay and all other costs incurred by the Employer as a result of the termination has been ascertained."*

By way of a further letter on the same day, BH informed JP that its purported termination was "*too late*" as JP "*cannot terminate a contract in the afternoon that has already come to an end in the morning*" and "*cannot rely on clauses in a contract that has already been repudiated*".

On 15 September 2022, JP served a payment response ("**PR 40**") in response to PC 40.

On 22 September 2022, BH filed an adjudication application ("**SOP/AA 164 of 2022**") in respect of PC 40 under SOPA.

By way of a determination dated 27 October 2022 ("**Adjudication Determination**"), the Adjudicator dismissed SOP/AA 164 of 2022 on the basis that PC 40 fell outside the purview of SOPA and consequently, that he had no jurisdiction to adjudicate the proceedings that were commenced on the basis of PC 40.

The Adjudicator relied on the decisions of *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 ("**Far East Square**"), *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 ("**Shimizu**"); and *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd and another appeal* [2021] 1 SLR 791 ("**Orion-One**") and took the view that a claimant claiming for progress payment under SOPA must show that it was entitled to be paid under the contract, and where a contract bears an express termination clause providing for termination of a contractor's employment and consequences of such termination, the "default position" is that a contractor has no right to submit further payment claims or to be paid progress payments even if the relevant payment claim was served prior to such termination, unless the contract expressly provides otherwise ("**Default Position**").

Applying the Default Position, the Adjudicator found that there was no express provision in the Contract providing that BH was entitled to have payment claims submitted prior to termination evaluated and paid after termination. As such, upon termination of BH's employment, BH lost its entitlement to be paid notwithstanding that PC 40 might have been served prior to termination.

In this regard, the Adjudicator decided that the question of who had terminated the Contract and on what basis were immaterial.

BH applied, amongst others, to set aside the Adjudication Determination and to remit SOP/AA 164 of 2022 to the Adjudicator for determination of its merits.

The Court's Decision

The main issue before the Court was whether BH was precluded from applying for adjudication of PC 40 as a result of the contractual termination that occurred before SOP/AA 164 of 2022 was filed, even though PC 40 was validly served prior to termination.

In the Court's judgment, this depended on whether upon the contractual termination event, there is an applicable provision in the Contract that negates or suspends BH's entitlement to be paid based on a validly served payment claim.

The valid service of PC 40 prior to the termination of the Contract or the employment of BH did not, in and of itself, give BH an unqualified entitlement to adjudication after termination. Neither did the occurrence of the contractual termination event *per se* disentitle BH from applying for adjudication under SOPA of a payment claim that had been validly served prior to the termination.

It was not disputed that PC 40 was validly served and that the Contract had been terminated. However, the basis of the termination (i.e. whether BH terminated JP or vice versa, and whether the termination mechanism in Clause 30.2.2 of the REDAS Conditions was engaged) was disputed.

The Court held that the inquiry was whether a term of the contract precluded the SOPA adjudication process, rather than whether a term of the contract permitted the adjudication process. In this regard, the Court rejected the Default Position which did not consider whether the employment termination clause was engaged, and held that the mere existence of an employment termination clause in the Contract does not affect a contractor's entitlement under the contract if it was not engaged. Only if the contract was terminated pursuant to that employment termination clause, then the contents and effect of that clause and its constituent parts become engaged.

The Court relied on the Second Reading of the Building and Construction Industry Security of Payment (Amendment) Bill on 2 October 2018 and interpreted section 4(2)(c) of SOPA to apply only in limited situations to exclude the application of SOPA to a terminated contract if there are terms in that contract "*relating to termination that permit the respondent to suspend progress payments*" that have been engaged.

The Court examined the decisions in *Far East Square*, *Shimizu*, and *Orion-One* and took the view that the case authorities do not support the Default Position. The Court further distinguished these decisions on the basis the subject payment claims in those cases were issued after the material event in question – whereas PC 40 in the present scenario was served before termination.

1. In *Far East Square*, the contract had incorporated the Singapore Institute of Architects Articles and Conditions of Building Contract (Measurement Contract), (7th Edition, April 2005) ("**SIA Form of Contract**"). The Singapore Court of Appeal held that a payment claim submitted after issuance of the architect's final certificate under the contract fell outside the ambit of SOPA, because once the architect issued the final certificate that was *prima facie* valid (i.e. under the SIA Form of Contract), the architect is rendered *functus officio* and his role under the contract comes to an end. As such, the contractor no longer had a basis to submit further payment claims.

2. In *Shimizu*, the employer had terminated the contract pursuant to a termination clause in the contract on the basis of the contractor's alleged default. The Singapore Court of Appeal held that payment claims served after termination of the contract were invalid and incapable of supporting adjudication applications under SOPA as there were provisions in the contract (which had been engaged) that precluded service of payment claims following contractual termination.

3. In *Orion-One*, the Singapore Court of Appeal considered the validity of a payment claim served more than two years following the termination of the contractor's employment. In its decision, the court stressed that "*the starting point of the analysis must always be the terms of the contract*", and held that on proper construction, none of the clauses relied upon by the contractor served as a valid basis to entitle it to submit payment claims after the termination of its employment.

Instead, the Court relied on the Singapore High Court decision of *Choi Peng Kum and another v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210 ("***Choi Peng Kum***"). In *Choi Peng Kum*, the contractor issued a payment claim seeking a progress payment under a contract that incorporated the SIA Form of Contract. In response, the employer terminated the contract and did not serve any payment response. The contractor subsequently lodged an adjudication application under SOPA and the adjudicator found in favour of the contractor. Upon the employer's application to set aside that adjudication determination, the court held that the contractor was not precluded from lodging the adjudication application and that the adjudicator was not deprived of jurisdiction to hear the payment claim simply because the contract had been subsequently terminated after issuance of the payment claim.

Although the case of *Choi Peng Kum* pre-dated the 2018 amendments to SOPA, its consideration of the effect of a subsequent contractual termination on a contractor's right to apply for adjudication based on a validly served payment claim was referred to with approval by in *Shimizu*, which post-dated the 2018 amendments, where the Court of Appeal held that *Choi Peng Kum* is entirely consistent with its interpretation of SOPA.

The Court also found *Choi Peng Kum* to be consistent with the principle that ordinarily, the termination of a contract does not affect rights accrued before termination.

On this holding, the Court found that it was important to determine the question of who had terminated the Contract and on what basis. The Adjudicator found this issue to be immaterial and did not consider it in its determination. The Court allowed the setting aside application and remitted SOP/AA 164 of 2022 to the Adjudicator for determination on whether Clause 30.3 of the REDAS Conditions, which suspends further payments to BH, has application in this case.

Comment

This decision in *Builders Hub* introduces much needed clarity to the question on a claimant's entitlement to pursue its claims in an adjudication application under SOPA post contractual termination, in light of the insertion of the current section 4(2) of the SOPA by way of the 2018 amendments. It affirms the primacy of the terms of the contract in determining parties' rights within the context of SOPA.

As such, parties preparing a contract to which SOPA will apply ought to consider the additional question of whether a contractor shall be entitled to pursue its claims in an adjudication application post termination.

As illustrated in *Builders Hub*, even where a contract contains a contractual termination provision which precludes the SOPA adjudication process, parties should be aware of the following:

— it is necessary for such contractual provision to be triggered before the SOPA adjudication process is precluded;

— an exercise of a right to termination which arose independent of that specific provision would not preclude the SOPA adjudication process; and

— If parties wish for the SOPA adjudication process to be precluded on any termination, then the clause should be drafted in a way to ensure that.

References:

Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd [2023] SGHC 120

Choi Peng Kum and another v Tan Poh Eng Construction Pte Ltd [2014] 1 SLR 1210

Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd [2019] 2 SLR 189

Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd and another appeal [2021] 1 SLR 791)

Shimizu Corp v Stargood Construction Pte Ltd [2020] 1 SLR 1338

Chapter 7

Arbitrability of a Dispute

Singapore Court of Appeal adopts a "composite" approach in holding that the arbitrability of a dispute is, at the pre-award stage, determined by the proper law of the arbitration agreement in question

— In its decision of *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1, the Singapore Court of Appeal adopted a "composite" approach in holding that the arbitrability of a dispute is, in the pre-award stage, determined by the law that governs the arbitration agreement in question.

— This is in contrast to the position taken by other national courts, including those of the United States, France, Switzerland, Holland, Belgium, Italy, Austria and Sweden, which have applied the law of the seat at the pre-award stage in relation to the arbitrability of a dispute.

— In determining what constitutes the proper law of the arbitration agreement, the Court also affirmed the three-stage test set out in the Singapore High Court decision of *BCY v BCZ* [2017] 3 SLR 357 and provided its analysis in respect of each of the stages in reaching its decision that Singapore law was the proper law of the arbitration agreement.

Anupam Mittal v Westbridge Ventures II Investment Holdings [2023] SGCA 1

In an appeal against the decision of the High Court of Singapore which granted a permanent anti-suit injunction restraining the appellant from: (a) pursuing Company Petition No 92 of 2021 before the National Company Law Tribunal ("**NCLT**") in Mumbai, India (the "**NCLT Proceedings**"); and (b) commencing other proceedings in respect of disputes relating to the management of a company incorporated in India named People Interactive (India) Private Limited (the "**Company**"), the Court of Appeal had to decide the issue of which law governed subject matter arbitrability - the law of the arbitration agreement, or the law of the seat.

The appeal was also the first opportunity for the Court of Appeal to consider the threshold question of which law governed and, additionally, provide some guidance on what law governs an arbitration agreement which does not contain an express choice of law.

Background Facts

The disputing parties were shareholders of an Indian incorporated company which owns and operates a matrimonial service ("**Company**"). The Appellant was one of the founders of the Company and the Respondent is a private equity fund incorporated under the laws of Mauritius, which had invested in the Company.

The founders of the Company (including the Appellant) and the Respondent entered into a Shareholders' Agreement ("**SHA**"). Clause 20 of the SHA ("**Clause 20**") provides for the governing law and the arbitration agreement between the parties ("**Arbitration Agreement**"), states as follows, amongst other things:

> *"20 GOVERNING LAW AND ARBITRATION*
>
> *20.1* ***This Agreement and its performance shall be governed by and construed in all respects in accordance with the laws of the Republic of India. In the event of a dispute relating to the management of the Company or relating to any of the matters set out in this Agreement****, parties to the dispute shall each appoint one nominee/ representative who shall discuss in good faith to resolve the difference. In case the difference is not settled within 30 calendar days, it shall be referred to arbitration in accordance with Clause 20.2 below.*
>
> *20.2 All such disputes that have not been satisfactorily resolved under Clause 20.1 above shall be referred to arbitration before a sole arbitrator to be jointly appointed by the Parties. In the event the Parties are unable to agree on a sole arbitrator, one of the arbitrators shall be appointed jointly by the Founders and the second arbitrator will be appointed by [the respondent] and the third arbitrator will be appointed by the other two arbitrators jointly. The arbitration proceedings shall be carried out in accordance with the rules laid down by International Chambers of Commerce and the place of arbitration shall be Singapore. The arbitration proceedings shall be conducted in the English language. The parties shall equally share the costs of the arbitrator's fees, but shall bear the costs of their own legal counsel engaged for the purposes of the arbitration.*
>
> *…"* **(Emphasis Added)**

The parties' relationships deteriorated sometime in 2017. On 3 March 2021, the Appellant filed a petition in the National Company Law Tribunal in India, seeking remedies for corporate oppression ("**NCLT Proceedings**").

The Respondent subsequently filed an action before the Singapore High Court seeking an anti-suit injunction against the NCLT Proceedings. The anti-suit injunction was granted by the Judge on the grounds that the Arbitration Agreement was breached by the commencement of the NCLT Proceedings and there were no good reasons to withhold the injunction.

In concluding that the Arbitration Agreement was breached, the Judge held that:

- the law that governed the issue of arbitrability at the pre-award stage was the law of the seat;
- the disputes between the parties were arbitrable under Singapore law being the law of the seat; and
- assuming Indian law governed the Arbitration Agreement, the disputes fell within the scope of the Arbitration Agreement

The Appellant appealed, arguing that the parties' disputes do not fall within the scope of the Arbitration Agreement, and alternatively, that the parties' disputes referred to the NCLT are objectively non-arbitrable.

The Court's Decision

The Court dismissed the Appellant's appeal and maintained the anti-suit injunction.

The following four issues were determined in the appeal:

- Are questions of arbitrability to be determined according to the law of the seat or the proper law of the Arbitration Agreement?
- What is the proper law of the Arbitration Agreement in this case?
- What is the proper characterisation of the disputes here?
- Even if the disputes are arbitrable, should the Court order a stay of the anti-suit injunction on case management grounds?

On the question of arbitrability, the Court disagreed with the Judge and held that the arbitrability of a dispute is, in the first instance, determined by the proper law of the Arbitration Agreement.

The Court observed that most national courts, including those of the United States, France, Switzerland, Holland, Belgium, Italy, Austria and Sweden, have applied the law of the seat at the pre-award stage. The UK Supreme Court in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] 1 WLR 4117 held the view that, in the context of the validity of the arbitration agreement, there should be harmony on the applicable law between the pre and post-award stages and opined at [136] that "*it would be … illogical if the law governing the validity of the arbitration agreement were to differ depending on whether the question of validity is raised before or after an award has been made. To ensure consistency and coherence in the law, the same law should be applied to answer the question in either case*".

Nonetheless, the Court took the view however, that such an approach had not placed sufficient weight on

the importance of public policy in relation to issues of arbitrability. The Court referred to Section 11 of the International Arbitration Act 1994 ("**IAA**") and interpreted it to the effect that if it is contrary to either the local or the relevant foreign public policy to determine a dispute arising under an arbitration agreement by arbitration, then that dispute cannot proceed to arbitration in Singapore.

Citing its decision in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373, the Court emphasized that *"the essential criterion of non-arbitrability is whether the subject matter of the dispute is of such a nature as to make it contrary to public policy for that dispute to be resolved by arbitration"* – which was the obverse of the proposition espoused by Section 11 of the IAA that an arbitration agreement must be abided by unless it is contrary to public policy.

The Court took the view that an arbitration agreement derives its authority from the consensus of the parties and hence the arbitration agreement together with the law that governs it must determine what the parties have agreed to arbitrate – and is the source of the tribunal's jurisdiction.

The Court cautioned that this does not mean that the law of the seat is irrelevant to the arbitrability issue. If the arbitration concerns an issue that is considered to be non-arbitrable by the law of the seat, it would be an additional obstacle by reason of Art 34(2)(b)(i) of the Model Law.

In this context, the Court adopted a "composite" approach in addressing the arbitrability issue in respect of a Singapore seated arbitration:

— The arbitrability of a dispute is, in the first instance, determined by the proper law of the arbitration agreement.

— If it is a foreign governing law and that law provides that the subject matter of the dispute cannot be arbitrated, the Singapore Courts will not allow the arbitration to proceed as it would be contrary to public policy (though foreign public policy) to enforce such an arbitration agreement.

— By the operation of Section 11 of the IAA, even if the dispute is arbitrable under the proper law of the arbitration agreement (foreign governing law in this example), so long as Singapore law as the law of the seat, considers that dispute to be non-arbitrable, the Singapore courts would not allow the arbitration to proceed.

The Court then applied the three-stage test set out by the High Court of Singapore in *BCY v BCZ* [2017] 3 SLR 357 to determine the proper law of the Arbitration Agreement:

— Stage 1: Whether parties expressly chose the proper law of the arbitration agreement.

— Stage 2: In the absence of an express choice, whether parties made an implied choice of the proper law to govern the arbitration agreement, with the starting point for determining the implied choice of law being the law of the contract.

— Stage 3: If neither an express choice nor an implied choice can be discerned, which is the system of law with which the arbitration agreement has its closest and most real connection.

At the first stage of the inquiry, the Court found that there was no express choice of governing law for the Arbitration Agreement. In its finding, the Court affirmed its decision in *BNA v BNB and another* [2020] 1 SLR 456,

that simply specifying for an underlying contract to be governed by a particular law is *"insufficient to constitute an express choice of the proper law of the arbitration agreement"*. The Court further emphasised that an express choice of law for an arbitration agreement would only be found where there is explicit language stating so in no uncertain terms.

At the second stage of the inquiry, the Court considered whether the express choice of Indian law as governing the SHA makes Indian law the implied choice of law as governing the Arbitration Agreement. The Court found that an implied choice of Indian law as the proper law of the Arbitration Agreement was inconsistent with and would frustrate the parties' intention to settle their disputes *"relating to the management of the Company or relating to any of the matters set out in [the SHA]"* by arbitration, particularly, since oppression claims (which are often intertwined with management disputes) are not arbitrable in India.

At the third stage of the inquiry, the Court found Singapore law to have the most real and substantial connection with the Arbitration Agreement, as it was the law of the seat that would govern the procedure of the arbitration. Accordingly, the Court concluded that Singapore law was the proper law of the Arbitration Agreement.

The Court then determined that the disputes in the NCLT Proceedings relate either to the management of the Company or to the SHA in some way and accordingly, that the institution of the NCLT Proceedings was in breach of the Arbitration Agreement. Having decided that the disputes are arbitrable, the Court considered the list of non-exhaustive factors set out in the Singapore International Commercial Court's decision of *BNP Paribas Wealth Management v Jacob Agam and another* [2017] 3 SLR 27 and determined that no stay of the anti-suit injunction should be granted.

Comments

Under the "composite" approach, the Singapore courts would not allow a Singapore-seated arbitration to proceed so long as the disputes therein are considered to be non-arbitrable either under Singapore law and/or the relevant foreign law i.e. if foreign law governs the arbitration agreement. The "composite" approach therefore signifies the Singapore court's commitment towards upholding the public policy concerning arbitration, be it local or foreign public policy.

This decision highlights the potential impact of the applicable law of the arbitration agreement and the law of the seat on the arbitrability of potential disputes arising under the underlying contract. It also highlights the risk of the Court applying a system of governing law to the arbitration agreement that is not contemplated by the parties should parties choose not to provide for the governing law of an arbitration agreement explicitly in no uncertain terms.

In light of this decision, parties are encouraged to expressly provide for the governing law of an arbitration agreement whenever possible, to avoid unnecessary risks. In deciding the applicable law of the arbitration agreement and the seat of the arbitration, parties should also be alive to the potential impact of the same on the arbitrability of potential disputes arising under the underlying contract.

References:

Anupam Mittal v Westbridge Ventures II Investment Holdings [2023] SGCA 1

Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals [2016] 1 SLR 373

BCY v BCZ [2017] 3 SLR 357

BNA v BNB and another [2020] 1 SLR 456

BNP Paribas Wealth Management v Jacob Agam and another [2017] 3 SLR 27

Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] 1 WLR 4117

Chapter 8

Enforcement of Arbitral Awards

Several important decisions were handed down by the Singapore Courts with respect to the enforcement, or the setting aside, of arbitral awards, which all emphasised that a "generous approach" should be taken when reviewing arbitral awards and importance should be given to party autonomy, and the finality of the arbitral process.

— The Court of Appeal's ruling in *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10 established important principles regarding the enforcement of arbitral awards, specifically addressing the application of transnational issue estoppel in international commercial arbitration and the primacy of the seat court's decision, providing clarity and guidance on the treatment of prior seat court decisions and underscores the significance of honouring arbitration obligations.

— In the case of *CVV v CWB* [2023] SGCA(I) 9 (1), the Court of Appeal emphasized the limited grounds for setting aside arbitral awards as prescribed by the International Arbitration Act, noting that challenges based on alleged breaches of natural justice often delve into the merits of the award, resulting in unsuccessful applications. The Court highlighted the distinction between challenging a judgment and challenging an arbitral award, emphasizing that parties must accept the consequences of their choice of the arbitral tribunal.

— In the case of *COT v COU* [2023] SGCA 31 the Court of Appeal considered the limits of the minimal curial intervention policy in arbitration proceedings. In situations where an application to set aside an arbitral award is based on a jurisdictional challenge premised on the substantive issue of the presence of a concluded contract, the Court will have to navigate the thin line between a merits examination and the policy of minimal intervention.

Court of Appeal Upholds Enforcement of Arbitral Award in Landmark Case, Recognizes Transnational Issue Estoppel and Seat Court's Primacy

The Republic of India v Deutsche Telekom AG [2023] SGCA(I) 10

In an appeal by the Republic of India ("**India**") against the decision of the Singapore International Commercial Court ("**SICC**") dismissing India's application to set aside an enforcement order of an arbitral award made in favour of Deutsche Telekom AG ("**Deutsche**"), the Court of Appeal addressed important questions of transnational issue estoppel and also how an enforcement court should treat an earlier decision of the seat court that pertains to the validity of an arbitral award.

Background Facts

The dispute arose out of India's termination of an agreement between Devas Multimedia Pte Ltd ("**Devas**"), and Antrix Corporation Ltd ("**Antrix**"), an Indian state-owned entity (the "**Agreement**"). Deutsche was a shareholder in Devas through its wholly-owned subsidiary, Deutsche Telekom Asia Pte Ltd.

The Agreement between Devas and Antrix was in respect of a collaboration on the construction of satellites and the provision of multimedia and information services to mobile receivers through satellite and terrestrial systems. On 25 February 2011, Antrix notified Devas that it was terminating the Agreement.

Deutsche commenced arbitration against India in 2013, claiming India's termination of the agreement breached the bilateral investment treaty between India and Germany entered into in 1995 (the "**India-Germany BIT**"). Article 2 of the India-Germany BIT provides that the agreement would apply to all investments made by the investors of either party in the territory of the other party. The term "*investment*" is defined in Art 1(b) as *"every kind of asset invested in accordance with the national laws of the Contracting Party where the investment is made*".

Deutsche contended that India's annulment of the Devas-Antrix Agreement was in breach of various provisions of the India-Germany BIT which included:

(i) under Art 3(1), each contracting party is required to "*encourage and create favourable conditions for investors of the other Contracting Party and also admit investments in its territory in accordance with its law and policy*".

(ii) Art 3(2) provides that each contracting party is to accord "*fair and equitable treatment and full protection and security in its territory*" to investments and investors.

(iii) Art 12 provides that nothing in the India-Germany BIT prevents a contracting party from applying prohibitions or restrictions "*to the extent necessary for the protection of its essential security interests*".

The arbitration was seated in Geneva, Switzerland under UNCITRAL rules.

In 2017, the tribunal issued an interim award on jurisdiction and liability. The tribunal found India liable for breaching its obligation to accord fair and equitable treatment under the India-Germany BIT to Deutsche's investment in Devas. The quantum phase of the arbitration was heard in 2019 and in May 2020, the tribunal issued the final award. In August 2020, the Civil Court of Geneva certified that the final award was enforceable and legally binding.

In 2022, India applied, unsuccessfully, to revise and annul the interim and final award in the Swiss Federal Supreme Court. The Swiss Federal Supreme Court dismissed India's application on the basis that the awards were not open to revision.

Proceedings before the Court of Appeal

The current proceedings arose from Deutsche's application to enforce the final arbitral award in Singapore. Deutsche obtained an order for leave to enforce the final award. India resisted enforcement and applied to set aside the leave granted. This led to the proceedings before the Singapore Court of Appeal, with India arguing primarily that the tribunal lacked jurisdiction over the dispute.

India's grounds for resisting enforcement before the Singapore Courts were the same grounds canvassed before the Swiss Federal Supreme Court when India brought the Swiss setting-aside application. The Swiss Court, which is the seat court, had affirmed the tribunal's jurisdiction and the validity of the award. It was India's position that, notwithstanding this, India was not precluded from raising these arguments before the courts of Singapore.

Deutsche submitted that India was estopped and/or precluded from relying on the same grounds canvassed before the Swiss Courts. because these had been unsuccessfully raised before the Swiss Federal Supreme Court which is the seat court.

Issues Raised by the Court of Appeal

The Court of Appeal identified two issues that arose for determination as follows:

On the assumption that the seat court decision was not preclusive under Swiss law:

i. *Is an enforcement court bound by a decision of the seat court on matters that go to the validity of an award? If yes, what is the basis for this view?*

ii. *If the answer to (i) is 'no', should an enforcement court nonetheless accord a high degree of deference to a decision of the seat court on matters that go to the validity of the award rather than on questions of public policy? If yes, what is the basis for this view and are there limits to this principle?*

iii. *If the answer to both (i) and (ii) is 'no' what is the basis for this view?*

Whether the Seat Court Enjoyed Special Status

The Court of Appeal asked the question of whether the decision of a seat court enjoys a special status within the framework for the judicial supervision and support of international arbitration that is established by the body of law including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, legislation based on the UNCITRAL Model Law on International Commercial Arbitration and case law.

India submitted that an enforcement court would only be bound by a decision of the seat court if the elements of transnational issue estoppel were met. Where the elements of transnational issue estoppel are not met, India submits that an enforcement court should treat the seat court's decision like any other foreign judgment without according it any special status or primacy. The enforcement court is not bound by a decision of the seat court and is entitled to make an independent assessment.

India further submitted that the decision by the Swiss court which set aside the award did not give rise to issue estoppel because there is no equivalent doctrine of issue estoppel under Swiss law. Therefore, India was not estopped from canvassing the same issues before the SICC and the Court of Appeal.

Deutsche on the other hand contended that transnational issue estoppel applies as a general principle of public international law and prevents parties from re-litigating issues conclusively determined between them in an earlier proceeding. Even on the assumption that an enforcement court is not in any case bound by a decision of the seat court, Deutsche submitted the enforcement court should generally give effect to decisions of the seat court on issues of the tribunal's jurisdiction and the award's validity, or that a decision of the seat court would typically enjoy "primacy" in the scheme of modern international arbitration (save in highly exceptional circumstances) (the "**Primacy Principle**").

The Decision of the Court of Appeal

The Court of Appeal began by deciding the threshold question of whether India is precluded from making arguments which have already been argued before and determined by the Swiss Federal Supreme Court. If this is answered in the affirmative, then the Court of Appeal held there would be no need to undertake a separate review of India's substantive arguments and their merits.

- Issue Estoppel under Singaporean Law

Under the laws of Singapore, a party against whom a judgment has been rendered in a prior litigation in Singapore may be estopped from raising certain issues in future proceedings if the following conditions are satisfied:[1]

(a) the prior judgment must be final and conclusive on the merits;

(b) the prior judgment must be given by a court of competent jurisdiction;

(c) there must be commonality of the parties to the prior proceedings and to the proceedings in which estoppel is raised; and

(d) the subject matter of the proposed estoppel must be the same as what has been finally decided in the prior judgment.

Where the prior judgment was rendered by a foreign court, the same test applies with some modification:[2]

(a) the foreign judgment must be capable of being recognised in this jurisdiction, where issue estoppel is being invoked. Under the common law, this means that the foreign judgment must:

i. be a final and conclusive decision on the merits;

ii. originate from a court of competent jurisdiction that has transnational jurisdiction over the party sought to be bound; and

iii. not be subject to any defences to recognition;

(b) there must be commonality of the parties to the prior proceedings and to the proceedings in which the estoppel is raised; and

(c) the subject matter of the estoppel must be the same as what has been decided in the prior judgment.

The Court held at [67] and [68] that the doctrine of issue estoppel is grounded in the principle of finality of litigation. In a transnational setting, balance needs to be struck between considerations of comity (i.e. generally treating the foreign court's judgment with great respect and being slow to pass judgment on the reasoning in the foreign court's decision) and recognising the Court's constitutional role as the guardian of the rule of law within its own jurisdiction.

- Transnational Issue Estoppel under Singaporean Law

However, in the context of international commercial arbitration, the applicability of transnational issue estoppel had not been settled. The Court of Appeal therefore took the opportunity to analyse the position in Singapore and held that transnational issue estoppel does apply as a matter of Singapore law in international commercial arbitration.

The Court found that several of the grounds India relied on in the appeal, including the tribunal's jurisdiction, were identical to issues fully argued and dismissed before the Swiss seat court. India was therefore precluded from re-litigating these issues based on transnational issue estoppel. This applied even if new arguments were raised as the core issues remained the same.

Having disposed of the appeal on issue estoppel grounds, the Court stated it was unnecessary to determine the appropriate level of deference owed to seat court decisions pursuant to the Primacy Principle. However, the Court explored the limits of the Primacy Principle and held that even where issue estoppel doesn't apply, the enforcement court may grant primacy to a seat court's ruling on validity issues pertaining to the tribunal's jurisdiction and the award.

In analysing the Primacy Principle, the Court considered that its effect and operation was not in any material way different from the application of transnational issue estoppel save that the stringent criteria required to invoke the latter doctrine might not even have to be met. The Court reflected that the key difficulties with the adoption of the Primacy Principle seem to lie in identifying its doctrinal basis and in formulating its substantive content and outer limits. Having considered how the Primacy Principle had been formulated and applied in other jurisdictions as well as Singapore, the Court summarised the Primacy Principle as follows, which the Court held, would subject to further elaboration as the law develops:

a) An enforcement court will act upon a presumption that it should regard a prior decision of the seat court on matters pertaining to the validity of an arbitral award as determinative of those matters.

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[1] *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 at [14] and [15]; *The Sennar (No 2)* [1985] 1 WLR 490 at 499.

[2] *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102 at [35]–[40].

b) The presumption may be displaced:

i. by public policy considerations applicable in the jurisdiction of the enforcement court;

ii. by demonstration: (A) of procedural deficiencies in the decision making of the seat court; or (B) that to uphold the seat court's decision would be repugnant to fundamental notions of what the enforcement court considers to be just; or

iii. where it appears to the enforcement court that the decision of the seat court was plainly wrong.[3]

Ultimately, the Court dismissed India's appeal against Deutsche's order for enforcement on the basis that issue estoppel precluded several of the grounds of appeal, and that the requirements for transnational issue estoppel to arise had been met.

Comment

This decision by the Court of Appeal is a significant contribution to the development of international arbitration law and practice in Singapore.

The recognition of transnational issue estoppel in the context of international commercial arbitration is important as it promotes consistency and finality in arbitration proceedings. It preserves the integrity of the arbitration process and avoids repetitive and costly litigation.

Equally, while not a dispositive part of the judgment, the Court's discussion on the primacy of the seat court's decision emphasizes the importance of the seat court's role in international arbitration. Granting primacy to the seat court's determination on the validity of an arbitral award enhances the credibility and authority of the seat court and promotes certainty in the enforcement of arbitral awards.

Reference:

The Republic of India v Deutsche Telekom AG [2023] SGCA(I) 10

Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301 [2005] 3 SLR(R) 157

The Sennar (No 2) [1985] 1 WLR 490

Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck) [2021] 1 SLR 1102

[3] This is not, the Court elaborated, satisfied by mere disagreement with a decision on which reasonable minds may differ. As to where in the range between those two extremes, an enforcement court may land on, is something that is open for development.

Singapore Court of Appeal Upholds Arbitral Award, Emphasizing Finality and Limited Grounds for Intervention

CVV and others v CWB [2023] SGCA(I) 9

In the case of *CVV v CWB* [2023] SGCA(I) 9 (1), the Court of Appeal dismissed an appeal by the appellants (CVV, CVU, CVX, CVQ, CVW, CVZ, CVR, CVY, CVT, CVS, and CWA) against the decision of a judge of the Singapore International Commercial Court refusing to set aside an arbitral award for, inter alia, breach of the rules of natural justice. In doing so, the Court emphasized the limited grounds for setting aside arbitral awards as prescribed by the International Arbitration Act.

Background Facts

The case arose from an arbitration proceeding between the appellants and the respondent, CWB. The dispute centred around fees owed by CVQ, a fund management company, to the respondent CWB, an asset advisor, for their services in relation to two investment funds.

The arbitral tribunal had issued its final award (the "**Award**") on 20 June 2022. A memorandum of corrections to the Award was subsequently issued on 19 July 2022. In the Award, the Tribunal dismissed all the appellants claims and allowed CWB's counterclaims.

The appellants had sought to challenge the arbitral award and have it set aside in its entirety under s 24(b) of the International Arbitration Act as it was issued in breach of the rules of natural justice.

Amongst the arguments raised by the appellants was that the arbitral tribunal had breached the fair hearing rule by failing to properly consider certain aspects of the case. Specifically, the appellants claimed that the tribunal had not adequately determined whether the performance fee was due and payable, and had wrongly accepted calculations presented by a witness, Mr. B. The appellants also disputed whether CWB's claims were awarded as a debt or as damages, contending that they were improperly awarded as a debt rather than as damages. They also raised concerns about the arbitral procedure, claiming that it deviated from the parties' agreement.

Additionally, the appellants argued that they did not receive reasonable notice regarding the tribunal's decision on the quantum of the performance fee. They contended that the lack of sufficient notice deprived them of an opportunity to respond adequately to the tribunal's determination.

On the other hand, the respondent, CWB, defended the arbitral award, asserting that the appellants' arguments were essentially challenges to the merits of the award. They contended that dissatisfaction with the outcome does not justify setting aside the award, as parties must accept the consequences of their choice in selecting the arbitral tribunal.

Setting Aside an Arbitral Award for breach of the Natural Justice: The Applicable Law

The Court of Appeal set out the law on setting aside an arbitral award for a breach of the rules of natural justice in Singapore which is relatively well-settled.

Firstly, a party challenging an arbitration award as having contravened the rules 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 prejudiced its rights.[4]

One of the pillars of natural justice is that the parties must be given adequate notice and opportunity to be heard, which encompasses the right to be given a fair hearing and a fair opportunity to present its case.[5]

The Court referred to *BZW and another v BZV* [2022] 1 SLR 1080 in addressing two types of breaches of the fair hearing rule, which can arise from (1) a tribunal's *failure to apply its mind* to the essential issues arising from the parties' arguments; and (2) the *chain of reasoning* which the tribunal adopts in its award.

With respect to the appellant's argument that another aspect of fairness in proceedings is the need for the tribunal to give reasons for its decision, the Court noted

[4] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29].

[5] *Soh Beng Tee* at [43].

that the case law on the duty of an arbitral tribunal to give reasons is sparse and made two observations: (i) the case law on whether a tribunal's failure to give adequate reasons is itself a reason to set aside an award it is not settled; and (ii) the content of a tribunal's duty to give reasons is not settled either, although it emphasized that the scope of a tribunal's duty to give reasons would differ from that of a judge's, and it is therefore inappropriate to apply standards applicable to judges in the context of arbitration proceedings.[6]

Finally, the Court also noted that a party seeking to rely on a breach of the rules of natural justice to set aside an award must demonstrate that it has been prejudiced by the alleged breach.[7]

Decision by the Court of Appeal

After considering the arguments presented by both sides, the Court concluded that the appellants' challenges were essentially challenges to the merits of the award disguised as breaches of natural justice.

The Court examined the appellants' contention that the tribunal had failed to determine whether the performance fee was due and payable. It noted that the tribunal had indeed considered this issue and concluded that the performance fee was owed. The Court found no basis for the appellants' assertion that the tribunal had neglected to make a determination on the matter.

The Court examined the evidence in relation to the appellants' claim that the tribunal had accepted incorrect calculations presented by a witness, Mr. B. The Court found that the tribunal had properly assessed and weighed the calculations. It concluded that the appellants' argument lacked merit and that the tribunal had not erred in accepting the calculations.

The Court also addressed the appellants' dispute regarding the nature of CWB's claims, specifically whether they were awarded as a debt or as damages. It determined that the form of the award was a matter for the tribunal's discretion and that the appellants had not demonstrated any legal error in this regard. The Court rejected the appellants' argument that the award should have been structured differently.

In addition, the Court examined the appellants' contention that the arbitral procedure had deviated from the parties' agreement. It found no evidence to support this claim and concluded that the procedure followed by the tribunal was in accordance with the parties' agreement.

Lastly, the Court considered the appellants' argument that they did not receive reasonable notice regarding the tribunal's decision on the quantum of the performance fee. It found that the appellants were given sufficient notice and an opportunity to respond to the tribunal's determination. The Court dismissed the appellants' claim of inadequate notice.

The Court held that the tribunal had not breached the fair hearing rule and had properly considered the relevant issues. Consequently, the Court dismissed the appeal and upheld the arbitral award in favour of CWB.

The Court highlighted that curial intervention to set aside arbitral awards is only warranted on limited grounds prescribed by the International Arbitration Act. It noted that many challenges based on alleged breaches of natural justice often delve into the merits of the award, leading to unsuccessful applications.

The Court emphasized the distinction between challenging a judgment, which involves a review of legal errors, and challenging an arbitral award, which requires demonstrating serious procedural irregularities.

The Court stressed that parties must accept the consequences of their choice to resolve disputes through arbitration and should not seek to challenge an award simply based on dissatisfaction with its outcome.

Comments

This case underscores the importance of recognizing the finality of arbitration and the limited grounds for intervention - emphasizing the need for serious procedural irregularities and breaches of fundamental principles of law. The Court of Appeal emphasized the need for parties to accept the consequences of their choice in selecting the arbitral tribunal, even if they are dissatisfied with the outcome. By dismissing the appeal and upholding the arbitral award, the Court reaffirmed the principle of finality in arbitration proceedings.

Reference:

CVV v CWB [2023] SGCA(I) 9 (1)

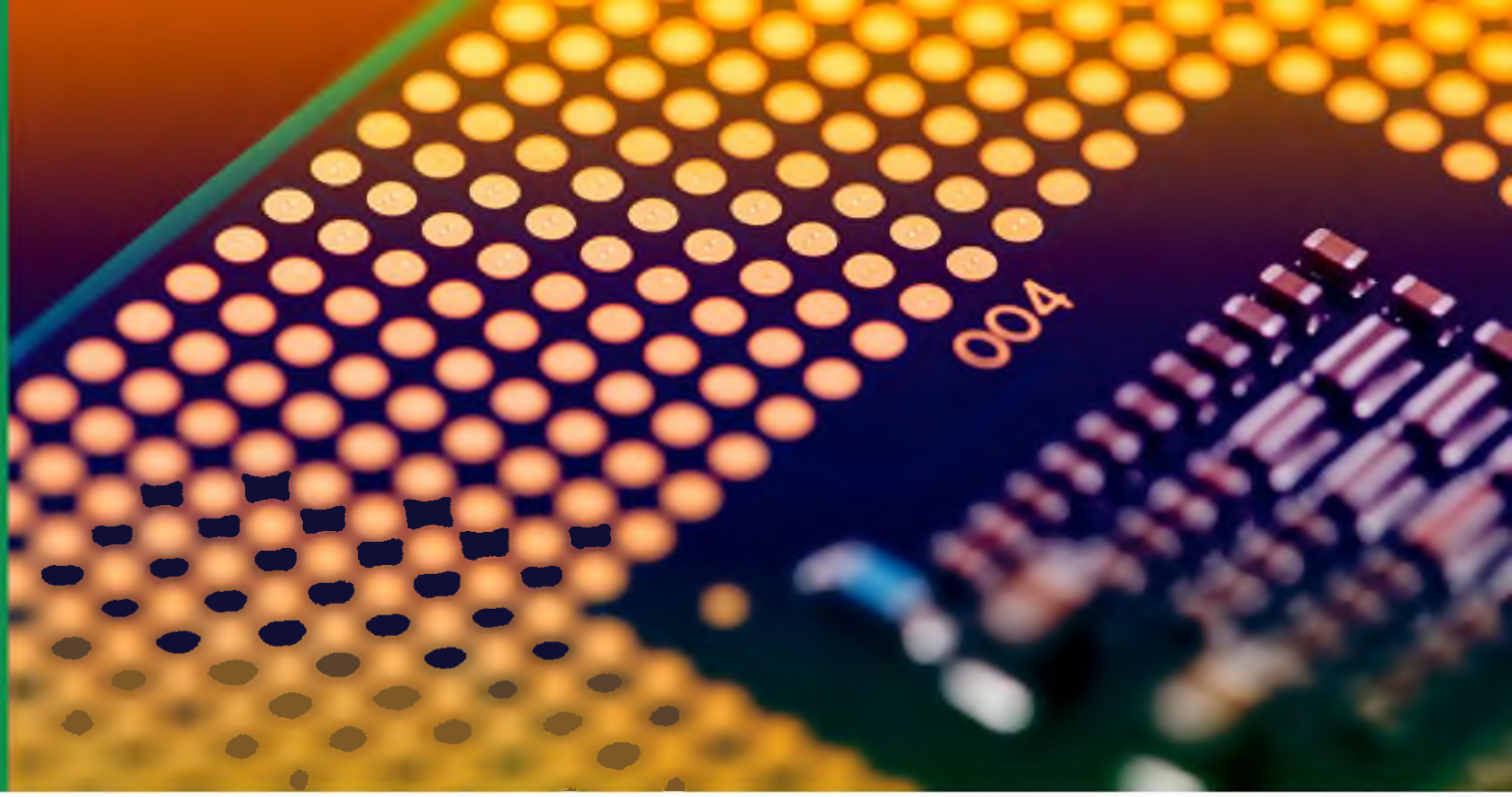
BZW and another v BZV [2021] 1 SLR 1080

Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR(R) 86

L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal [2013] 1 SLR 125

[6] At [33].

[7] *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54].



Court of Appeal Clarifies the Limits of a Seat Court's Supervisory Role in Setting Aside of Arbitral Award Applications

COT v COU and others [2023] SGCA 31

In an appeal against the decision of the lower court judge dismissing an application to set aside an arbitral award, the Court of Appeal considered the limits of the policy of minimal curial intervention in arbitral proceedings in Singapore.

The policy of minimal curial intervention in arbitral proceedings is well settled in Singapore arbitration jurisprudence. It dictates that the Courts should act with a view to "*respecting and preserving the autonomy of the arbitral process*".[8] The Court hearing the setting aside or enforcement application has no jurisdiction to examine the substantive merits of the arbitration.

However, in a situation where the application to set aside the award is being made on the basis that the arbitral tribunal lacked jurisdiction because there was no concluded contract and hence no binding arbitration agreement, the Court deciding on the setting aside application would inevitably have to address the issue as regards the existence of the contract containing the arbitration agreement. Where the jurisdictional challenge bleeds into the merits of the arbitral award, the Court is faced with a challenge of managing the tension between a jurisdictional and a substantive challenge.

Background Facts

The case arose out of an arbitration related to an infrastructure project in Gondor (the "**Project**"). COU, the respondent in the appeal, and the claimant in the proceedings below, produced and supplied technologically advanced industrial products known as "Modules". COU was supplying the Modules for the Project.

The appellants in the appeal comprised:

— COT, the "**Project Company**", which had been incorporated for the sole purpose of owning and operating the Project.

[8] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [59].

— COW, an engineering, procurement and construction ("**EPC**") contractor (the "**EPC Company**"). Its business is in constructing and commissioning infrastructure projects for the Rohan Group (the "**Procurement Company**" in Gondor.

— COV is the "**Shareholder Company**". Until late 2016, the Shareholder Company held 99.99% of the shares in both the Project Company and the EPC Company. The Project Company and the EPC Company have since been sold, respectively, to an unrelated group of companies and another unrelated company. For this reason, each of the appellants are separately represented in the appeals.

COU had supplied the Modules needed to complete the Project through a chain of contracts. Under this chain: (a) COU sold the Modules to the Procurement Company; (b) the Procurement Company in turn sold the Modules to the EPC Company; and (c) the EPC Company sold the Modules to the Project Company.

By March 2016, COU had received payment on only six of its invoices. On or around 13 March 2016, COU indicated that it would suspend all further deliveries of the Modules for the Project until it received full payment for the delivered Modules.

Negotiations ensued. On 18 March 2016, COU released the remaining Modules. COU was paid for some of its invoices by the EPC Company and the Procurement Company. However, a sum of $7.35 million remained outstanding.

In 2017, COU commenced arbitration against the appellants for payment of the outstanding invoices. The Tribunal allowed COU's claim, and made the following key findings:

(a) The parties had entered into a partly written, partly oral "Modules Delivery Agreement (the "**MDA**") on 18 March 2016. Under the MDA, the appellants agreed to pay COU all the unpaid invoices for the Modules, whereupon COU would release the remaining Modules to complete the Project.

(b) There was a valid arbitration agreement in one of the documents that formed the MDA, the "**NDU-3**".

(c) The party entering into the MDA had the authority to agree, and did agree, on behalf of the appellants jointly and severally to pay the unpaid invoices in consideration of COU agreeing to release the remaining Modules. Accordingly, the appellants had collectively entered into the MDA.

In the Court of first instance, the appellants sought to set aside the Award on three grounds:

(a) The absence of a valid arbitration agreement - none of the appellants had concluded any contract whatsoever with COU at any time. Therefore, there was no valid arbitration agreement between the parties within the meaning of the second limb of Art 34(2)(a)(i) of the Model Law.

(b) The tribunal exceeding its jurisdiction - the tribunal acted *ultra petita* and exceeded the scope of its jurisdiction within the meaning of Art 34(2)(a)(iii) of the Model Law. Alternatively, the tribunal acted *infra petita* in that it failed to decide on certain matters which the parties had submitted to arbitration.

(c) The tribunal breached the rules of natural justice.

The judge found that there were no grounds to set aside the award, holding that:

(a) A contract on "basic or essential terms" was formed on 17 March 2016 and a contract on full terms was formed on 18 March 2016. COU had released the Modules on 18 March 2016 in performance of its obligations under and as consideration for the concluded contract. The concluded contract incorporated NDU-3. Since cl 9 of NDU-3 contained an agreement to arbitrate disputes, there was a valid arbitration agreement.

(b) The Tribunal's findings fell well within the terms and scope of the submission to arbitration. The dispute as framed by COU in the notice of arbitration was sufficiently wide to encompass a partly oral and partly written contract arising out of the negotiations.

(c) The appellants had failed to establish a single instance in which any of them was unable to present its case or denied natural justice.

The appellants appealed to the Court of Appeal against the decision of the judge.

Application Before the Court of Appeal

In dismissing the appeal, the Court of Appeal emphasized the policy of minimal curial intervention in arbitration proceedings, highlighting party autonomy and the finality of the arbitral process as the two principal considerations that underpin the policy.

Having chosen arbitration as their dispute resolution process, and taken advantage of the benefits of party autonomy, parties must also accept its consequences. Quoting its own decision in the case of *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("***AKN***"), the Court of Appeal reiterated that seat courts "*do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits*

of their respective cases".[9] In addition, the finality of the arbitration process must be upheld, being one of the crucial considerations motivating parties to choose arbitration.[10]

In discharging its supervisory role, the seat court should striveto uphold arbitral awards. Curial intervention is limited and warranted only on specific grounds prescribed in the law.

The Court clarified that the seat court does not have jurisdiction to examine the substantive merits of the arbitration. Parties choose their arbitrators and are bound by their decisions, reflecting party autonomy. Accordingly, the Court held at [28] that the seat court takes a "*generous approach*" when reviewing arbitral awards.

In an application to set aside an arbitral award on the grounds that the tribunal had no jurisdiction to hear the dispute, the seat court will take a *de novo* or new review of the tribunal's decision on its jurisdiction.

Therefore, in a situation such as the one presented by this case where the setting aside application is based on the absence of a concluded contract, and when the absence of this contract is the substantive issue in dispute in the arbitration, the seat court will then have to navigate the thin line between a merits examination and the policy of minimal intervention.

The Court reviewed previous authorities to determine how seat courts have navigated this line and held as follows:

— The standard of review undertaken by the seat court is *de novo*.

— The seat court must be aware of the limits of its supervisory role.

— A Court hearing a setting aside application premised on the absence of a binding contract need only concern itself with whether such a contract *existed*.

— The Court need not engage in a comprehensive interpretation exercise as to the terms of the contract and the parties' liability under those terms – that is a question of the merits and a task for the arbitral tribunal.

The Court of Appeal then proceeded to determine whether a contract or arbitration agreement was concluded during the March 2016 negotiations. The Court agreed with the tribunal's findings that the MDA was concluded between COU and the appellants on 18 March 2016. NDU-3 formed part of this contract, which included the arbitration agreement.

The Court also found that there was no merit in the appellants' challenge to the award on the grounds of excess of jurisdiction or breach of natural justice.

Comment

The case highlights the delicate balance between jurisdictional and substantive challenges in arbitral proceedings and the need to draw a clear line to ensure the limited exercise of the seat court's supervisory jurisdiction. In cases where a jurisdictional challenge is raised, the Court may conduct a limited review of the merits of the underlying dispute to determine the existence of a valid arbitration agreement.

Reference:

COT v COU and others [2023] SGCA 31

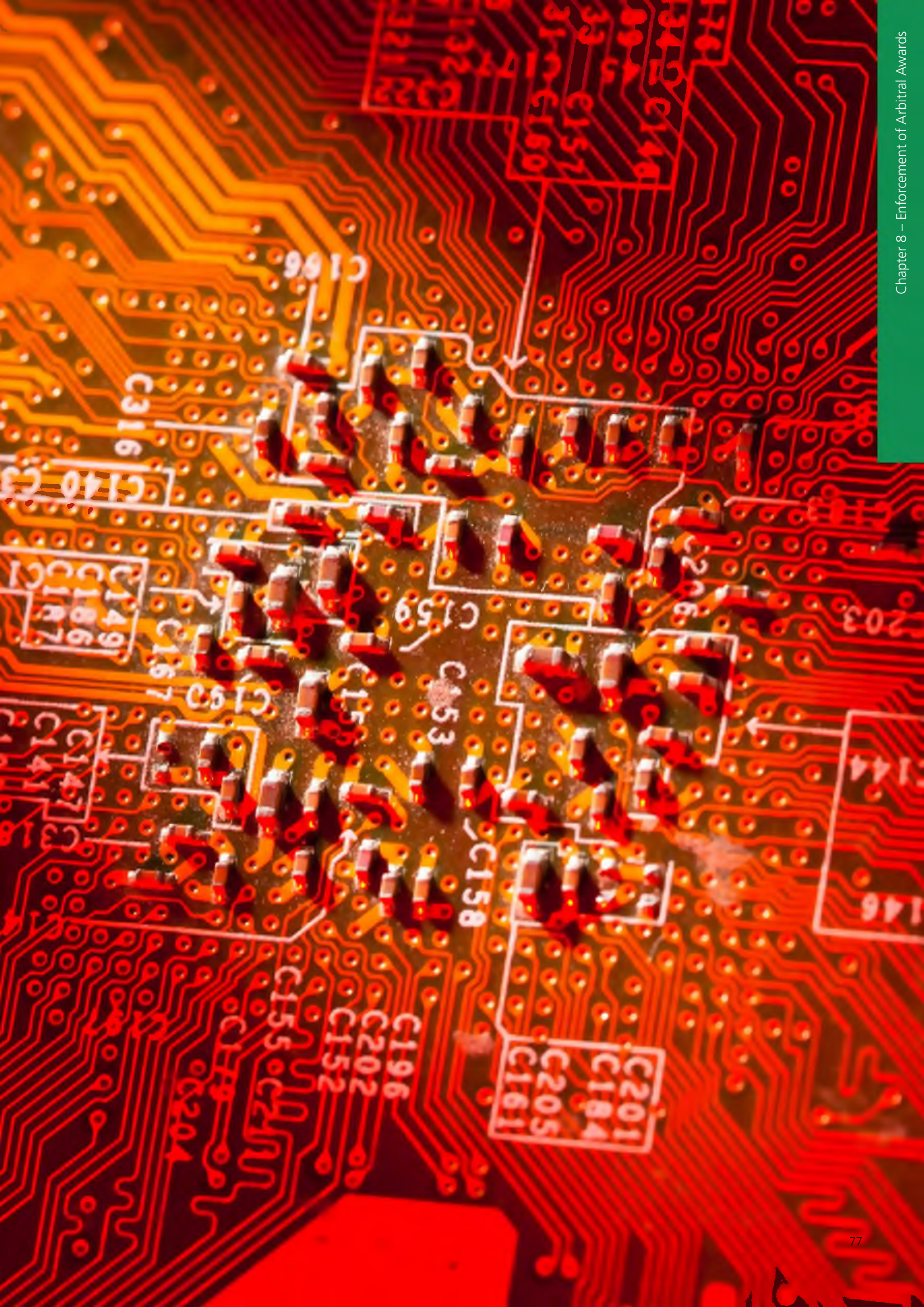
Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR(R) 86

AKN and another v ALC and others and other appeals [2015] 3 SLR 488

Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others [2013] 1 SLR 636

[9] *AKN* at [37].

[10] *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* [2013] 1 SLR 636 at [90].



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