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1. What do you think are the three key traits of effective advocates?

It depends on whether we are talking about advocacy in Court, advocacy before an arbitral tribunal or even before domestic bodies.

One common trait is the level of preparation. You can tell, and certainly a Judge or tribunal member will know, if a lawyer is fully prepared or remains heavily reliant on his team. You put yourself at a huge disadvantage if you let out that you are not on top of the facts and issues. First, an advocate handicaps himself because he does not have all the answers. Second, the tribunal may after a while stop asking questions, and that is never a good thing.

The second common trait is the ability to distill from everything that you have read and all the information you have at your disposal the essence of the core of the case. I have found that many times when you go into a hearing thinking you are ready or have come to grips with the issues in the case, the focus takes a different turn arising from the interaction with the Judges or the tribunal. That happens because with argument, the issues morph or get refined. The facts or documents that are relevant to the new issues may suddenly become quite different from what you had prepared for. So it is important for a good advocate to not only marshal what is relevant, but to be sufficiently versatile to be able to let go of what you have prepared and to address the concerns of the decision-maker.

The third trait is the style of advocacy. There is a distinction between advocacy in the Court room and before arbitral tribunals. There is greater rigour and formality in Court compared to an arbitral setting.

Advocates must therefore be ready to be very flexible in how they present their case depending on which forum they are in.

2. What do you think young lawyers should do to gain more oral advocacy experience?

Previously, oral advocacy was a predominant feature; evidence-in-chief was oral, cross-examination was oral, and opening and closing submissions were oral. That was a time when arbitration had not really taken off. The focus then was on your ability to persuade the Court on your feet. You would follow and watch senior lawyers present their arguments, decide which style suited you and learn what Judges liked and disliked.

But things have now changed. There is greater emphasis on written advocacy. You begin with written advocacy: opening submissions are mostly written and evidence-in-chief is now given by way of affidavits or witness statements. Closing submissions are also mostly in writing, except where Judges or tribunals ask parties to come back to summarise their cases or deal with specific points.

The young lawyer today therefore must work on both oral and written skills. That, together with the way teams are structured, results in young lawyers spending much of their time on written advocacy. They help with the drafting and they get to see from that process how their senior writes and structures his arguments.

Oral advocacy is somewhat different and is more challenging. In the preparatory phase for oral arguments, the younger lawyers are not always privy to what the senior lawyer is thinking. Very often, they hear the senior’s arguments for the first time when he or she is in Court.

The young lawyers then pick up pointers by exposure. They work out in their minds why their senior has presented the case or cross-examined in a certain way.

That offers lessons but is no substitute for doing it yourself. Unfortunately, there are not many opportunities for young lawyers in the first few years of their practice,
particularly in larger firms. That is a legitimate concern for young lawyers and this is something that the firms continue to grapple with.

The experiences are different depending on where you work. If you join a small firm, you are likely to do your own advocacy in the lower Courts faster than in the large firms. But young lawyers quite rightly aspire to argue before the High Court: they want to appear before Assistant Registrars, and then over time, before the Judges on appeals and at trials, and in the fullness of time, before the Court of Appeal. There is no better way to learn than by jumping into the deep end. This enables young lawyers to build confidence and allows decision-makers to be exposed to them so that the juniors can build their names and reputations. But the opportunities are not always there; or at least not available for quite a while.

Firms try to find ways to give the young lawyers more exposure. But they have to have regard to client expectations that the seniors would do all or most of the advocacy. There is no easy solution. In my team, we try to give the younger lawyers opportunities to argue in the State Courts, before Assistant Registrars and, in time, at appeals before Judges. In my firm, we sometimes ask the clients for permission for our second chairs to cross-examine a few witnesses. That is a start.

Another obvious answer is to allow young lawyers to take on smaller cases. I do that, if I am satisfied that the lawyer has the time and can devote sufficient attention to the matter. Sometimes, they receive referrals from friends and relatives and are eager to do the matter themselves. I encourage that.

3. How have dispute resolution and the role of disputes counsel changed from the time you started practice?

It has changed in a number of respects.

I remember that when I first started practising, appeals used to run for days. The Judges would be hearing the arguments for the first time. Now, almost everything you want to say has already been written and read. Coupled with the fact that the Judges of Appeal would have read all the material and that you would have had a longer time in the High Court to make out your case, you are given a time within which you must complete your oral submissions. The Court of Appeal sometimes allows an advocate more time than is allotted. Even then, you often find that your script becomes largely irrelevant five minutes or so into the appeal because of the questions from the Bench. So an advocate must not only learn to persuade in writing and identify the most critical points for his oral submissions, he must be ready to jettison everything if the interaction with the Court results in the argument taking a different turn.

As stated earlier, an advocate has more time to make out his case in the High Court, but even then there is control over how much time an advocate is given. Also, because Judges are on top of the facts, there is usually very little need for lengthy oral submissions.
that oral advocacy would lose its relevance, that has not happened. There are two reasons: first, while written briefs are sometimes sufficient to determine a case, good oral advocacy can cause a Judge to reconsider his preliminary views; second, cross-examination can make or break the opponent’s case. Cross-examination is oral advocacy of a different type. Although an advocate talks to the witness, everything he says is designed to persuade the Court to his point of view.

So while writing has become a more dominant feature of advocacy and guillotines are more common, an aspiring advocate must continue to learn how to persuade on his feet.

Technology has also changed the way we work. It has allowed more people to be involved in the drafting process with the result that they can contribute and learn. Much of the time previously spent in libraries finding the right case is now saved because of access to online research tools. “Live” notes of hearings, in particular of cross-examination, are very useful. It can make a difference if one can immediately verify what a witness said about a point 20 minutes ago.

However, technology will not replace the art of advocacy. No matter how advanced it gets, we are still going to end many days in Court thinking “I should have made this other point” or “I should have addressed that point by saying this”.

4. What challenges do you see facing younger lawyers today and how do you think these challenges can be overcome?

The first challenge is the exposure that you need to build your name and reputation.

At the SIAC, we are thinking about how we can help younger lawyers in the international arbitration space. When the SIAC appoints arbitrators, it is very careful to ensure diversity, subject of course to qualifications and expertise. Since becoming Chairman, I have met many young lawyers who are very eager to sit as arbitrators. But they do not have the opportunity because they are not yet well known, and the international arbitration arena is still largely dominated by established names.

It is admittedly a very difficult situation for younger lawyers. It is taking longer and longer for them to argue their own cases and even longer to sit as arbitrators. They worry about when their time will come. I have therefore asked the SIAC team to come up with plans to draw young lawyers into our network. YSIAC is doing a wonderful job. We also need to reach out to more of the younger lawyers in the US, Europe and elsewhere in Asia and give them a chance to sit as arbitrators in the smaller cases. They must know that SIAC is different and that they can cut their teeth with us.

We want to build goodwill with this generation of lawyers because one
day, they will be the ones who are going to be advising clients on where to resolve disputes. There is no better way to build that goodwill than to give them a leg up and a decent shot at being appointed arbitrator by SIAC. When smaller cases come up, in terms of value, we dig into our database to find young lawyers to sit as arbitrators. It works out well because they are hungry, clever, enthusiastic and diligent in reading the papers and writing awards.

The impetus for these plans is a conversation I had with some young lawyers in the US earlier this year. One of them later sent me an email saying he is prepared to pay his own expenses to come to Singapore if SIAC is prepared to appoint him. That is real hunger. SIAC can help them, and they can contribute to SIAC’s goals.

5. What advice would you give younger lawyers today who would like to achieve success in their legal careers?

There are two key ingredients for success that have remained unchanged through the years. First, uncompromising and wholehearted attention to your work. It has countless benefits: when you are completely on top of the relevant material, you impress your clients, your opponents, your colleagues and, most importantly, the Judge or the tribunal. People will soon talk about you. That of course means huge sacrifices: evenings, weekends, public holidays. The ideal time to start doing that is in your early years. You will find that it will become habit-forming. If you develop that discipline during your first few years of practice, you will expect nothing less from yourself for the rest of your career.

Second, adopt someone else’s advocacy style. If someone writes well and persuasively and you want to be as good, adopt the style. If necessary, adapt. Unless you are especially gifted, you should, like the rest of us, follow in the footsteps of others.

It will also help if you constantly equip yourself with knowledge in areas outside the law and read international newspapers and journals or writers who are known to write well, so that you can write better and analyse issues from a practical and real-world perspective.

6. Litigator or arbitration lawyer - would you advise younger disputes lawyers to choose one over the other, or a mix of both? Why?

You will be a better lawyer in an arbitration setting if you have spent a number of years in the Courts. The Courts tend to be more demanding in terms of preparation and presentation. Courts keep a watchful eye over how cross-examination is conducted. After a few trials, you will begin to develop a feel for how to cross-examine. If you then move to arbitration, you will find to your surprise that it is a more forgiving environment where, depending on the tribunal, there is more informality and you are given more latitude about how you present your case. You will find that you are better placed to advocate on your client’s behalf. I suspect that if you devote your time to arbitration and are then required to plead a case in court, you might find the change quite challenging.

7. Are there any aspects of Singapore court procedure that you think work particularly well and should be adopted in arbitration procedure?

The latest procedural rules published by many of the main arbitral institutions have largely bridged this gap. For example, the new 2016 SIAC Rules now provide for early dismissal of meritless claims and defences, joinders and consolidation, expedited procedures and the appointment of emergency arbitrators. Since arbitration is a consensual process, and parties do place a premium on the differences between Court and arbitral processes, there is only so far that you can go. I think we have reached a point where most concerns about material differences between Court and arbitration procedures have been addressed.

8. You were appointed Chairman of SIAC in December 2016. What is your vision for SIAC?

SIAC is where it is today for a number of reasons.

Most importantly, SIAC is seen as a Singapore institution with backing from the Singapore government. SIAC would not be where it is today without
the Singapore handle. The world regards Singapore as synonymous with the rule of law, the absence of corruption, integrity of the judicial process and a judicial system which is highly sophisticated, commercial and at the cutting edge of developments in international arbitration. The commercial world knows that under the leadership of the Chief Justice, a renowned authority on international arbitration, the Singapore Courts strive to offer maximum support to the arbitral process.

The second key driver behind SIAC’s success is its people. SIAC was privileged to have had an outstanding Chairman, Mr Lucien Wong. With him at the helm, SIAC broke records. SIAC is also very fortunate that Gary Born is the President of the Court. He is a shining star in international arbitration and hugely respected throughout the world. SIAC has a superb Board and an illustrious Court, both comprised of big international names and pre-eminent practitioners in the international arbitration community. They are always thinking of ways to keep SIAC at the forefront.

There are other reasons for SIAC’s pre-eminence: these include its impressive panel of international arbitrators, and of course YSIAC, which is doing a fantastic job. Add to this the great SIAC team led by the very focused and hardworking CEO, Registrar and Deputy Registrar & Centre Director. Despite being incredibly busy, including on scrutiny of awards which is a huge selling point for SIAC, the team constantly thinks of new initiatives to improve efficiencies and to keep
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Going forward, we would like to focus on further enhancing SIAC’s reputation in the following respects: first, as a thought-leader, second, as an institution that is friendly to younger lawyers and women practitioners; and third, to further embed our name in the countries which provide us most of our cases, as we continue to grow elsewhere.

First, thought-leadership. SIAC is already known for being at the forefront of addressing the most prominent issues of the day in international arbitration. I would like SIAC to continue to build on that reputation. We are now discussing how we can position SIAC at the forefront of thought-leadership in international arbitration.

Second, younger lawyers and women practitioners. SIAC is already making great strides in this area, but there is a lot more we can do. When the SIAC Court selects arbitrators from the panel, it pays particular attention to whether there are women candidates who are equally qualified for the role. I like that and I fully support it. As I mentioned earlier, we would also like to bring younger lawyers into the fold. It is important that they know that they can build their names with SIAC. We of course have to strike the right balance between continuing to appoint those who are now on the panel and appointing members of the younger generation.

Finally, a few words on SIAC’s presence in key countries in the region. There are many more opportunities for SIAC in India, China and the region. However, further expansion into these markets is not without its challenges. New institutions are being created in those countries as we speak, and competition is fierce. They want to succeed. We need to think of novel ways to reach out to practitioners and thought-leaders in these markets, even as we work out how to make inroads elsewhere.

There is so much to do.
Have the Singapore Courts Faltered in the Enforcement of Arbitration Agreements?

*TMT Co Ltd v The Royal Bank of Scotland plc [2017] SGHC 21*

By

Darius Chan,

*Ascendant Legal LLC*

In *TMT Co Ltd v The Royal Bank of Scotland plc [2017] SGHC 21*, the Singapore High Court took the view that an arbitration clause did not meet the *prima facie* standard to warrant a stay of court proceedings because it designated an inapplicable arbitral institution. Commentators have suggested that the decision is “surprising” and out of line with the prevailing judicial policy of upholding arbitration agreements. This note takes the view that the ultimate decision is defensible because, on a proper interpretation of the dispute resolution clauses, there was no clear intention to arbitrate the dispute at hand.

**Facts**

TMT Co., Ltd (“TMT”), a Liberian ship-owning company, opened a trading account with the Royal Bank of Scotland plc (“RBS”) in May 2007. The trades were cleared by RBS through the London Clearing House, of which RBS was a Clearing Member.

In 2010, TMT commenced proceedings against RBS in England for breach of the trading account agreement (referred to in the judgment as the “FFA Account Agreement”), negligence, breach of statutory duty concerning risk management and other obligations, and negligent misrepresentation as to the margin requirements of the trading accounts. It was essentially alleged that incorrect information was provided by RBS and relied upon by TMT to make trading decisions, leading to substantial losses. The FFA Account Agreement was governed by English law. Clauses 20 and 22 of the FFA Account Agreement provided as follows:

> 20. Arbitration

> Any dispute arising from or relating to these terms or any Contract made hereunder shall, unless resolved between us, be referred to arbitration under the arbitration rules of the relevant exchange or any other organization as the relevant exchange may direct and both parties agree to, such agreement not to be unreasonable [sic] withheld, before either of us resort to the jurisdiction of the Court.

...
In 2015, TMT sued RBS’s Singapore branch and a number of RBS’s officers (collectively the “Defendants”) for losses arising from imposing improper and erroneous margin requirements, improper and erroneous valuation, diversion of monies and delay of instructions, wrongful or fraudulent assistance, and conspiracy to carry out the wrongful acts, relating to TMT’s margin trades.

The Defendants applied for a stay of the Singapore proceedings and succeeded before an Assistant Registrar. On appeal before the Singapore High Court, TMT argued, *inter alia*, that:

(a) The Settlement Agreement covered only claims raised in the English proceedings.

(b) The arbitration clause in the FFA Account Agreement was inoperative and incapable of being performed. There was no relevant exchange because the London Clearing House was not an exchange.

(c) The arbitration rules governing the London Clearing House Clearing Members were inapplicable because they were intended solely for Clearing Members. TMT was a non-clearing member.

(d) Under the jurisdiction clause in the FFA Account Agreement, TMT must submit to the jurisdiction of the English courts if RBS commenced proceedings there. Otherwise, both parties were entitled to commence legal proceedings anywhere else.

On the other hand, the Defendants raised various alternative arguments, including:

(a) Any dispute about the scope of the Settlement Agreement should be determined by the English courts pursuant to the exclusive jurisdiction clause in the Settlement Agreement.

(b) All the claims in the Singapore proceedings arose from or related to the terms of the FFA Account Agreement, and would be subjected to the arbitration clause under the FFA Account Agreement.

(c) All the claims were subjected to the exclusive jurisdiction of the English courts under the FFA Account Agreement.

Eventually, the Singapore High Court decided that properly construed, the Singapore proceedings fell within the scope of the Settlement Agreement. The Court also found that, even if there was any dispute about the scope of the Settlement Agreement, such a dispute would fall within the scope of the
exclusive jurisdiction clause in the Settlement Agreement. The proceedings in Singapore should thus be stayed.

By way of obiter, the Court proceeded to examine whether a stay would be warranted on the basis of the arbitration clause in the FFA Account Agreement. The Court’s reasoning was that, because there was no relevant exchange in this case, the arbitration clause did not on its face apply to the present dispute. On the evidence before the Court which appeared to be undisputed, the trades that were executed under the FFA Account Agreement were carried out through a clearing house, which was different from an exchange.

The Defendants tendered an English legal opinion which took the view that the English courts would not limit the arbitration clause to only situations where an exchange is involved. The English courts would focus on the provision for arbitration, treating the rest of the clause as the relevant mechanism which could be modified to the situation at hand.

The Court rejected the Defendants’ argument on the premise that the Courts would be slow to override the plain words in the parties’ agreement. The Court was unable to conclude on the evidence that there is any absurdity or that parties had intended to give an expanded meaning to the word “exchange”. The Court took the view that the threshold for granting a stay under section 6 of the International Arbitration Act was not met.

Comments

Observers have suggested that the Court’s decision was “unusual” because the arbitration clause in this case was coherently drafted—the Singapore Courts have on previous occasions, such as HKL Group Co Ltd v Rizq International Holdings Pte Ltd [2013] SGHCR 5 and Insigma Technology Co Ltd v Alstom Technology Ltd [2009] SGCA 24, saved other defective arbitration agreements between commercial parties when the defect was more apparent. These observers have suggested one way of rationalizing this decision: a bad arbitration clause is more likely to be saved than one that is coherent but inapplicable, because the Court would be reluctant to “rewrite” the clause.

In this writer’s view, the Court’s decision was defensible. The outcome of such cases does not simply turn on how well-drafted the clause is; a fundamental touchstone is whether the parties have evinced, prima facie, an intention to arbitrate the specific dispute at hand. On the facts of this case, the intention of the parties is gleaned by reading both the dispute resolution clauses in the FFA Account Agreement, ie clauses 20 (arbitration clause) and 22 (jurisdiction clause), together.

It is uncontroversial that, as a starting point, Singapore courts strive to uphold arbitration clauses—a paradigm example would be K.V.C. Rice Intertrade Co., Ltd v Asian Mineral Resources Pte Ltd [2017] SGHC 32, where the Singapore High Court recently enforced “bare” arbitration clauses which specified neither the seat or means of appointing arbitrators. However, unlike a typical case where the parties only included an arbitration clause but not a jurisdiction clause, in this case the dispute resolution mechanism included a jurisdiction clause. One would need to give effect to the existence and language of the jurisdiction clause.

On a plain reading of clauses 20 and 22 of the FFA Account...
Agreement, it is arguable that, under the FFA Account Agreement:

(a) Before parties “resorted to the jurisdiction” of the courts, parties would first submit disputes that are amenable for resolution “under the arbitration rules of the relevant exchange or any other organization as the relevant exchange may direct”; and

(b) Any disputes not so amenable would then be resolved by way of the jurisdiction clause in clause 22.

If the Defendants’ expansive interpretation of clause 20 were accepted, clause 22 may be rendered practically otiose. There is no evidence that that was the intention of the parties. Furthermore, that outcome would be inconsistent with the language of clause 20 because clause 20 itself refered to the possibility of parties “resort[ing] to the jurisdiction” of the courts. On its terms, clause 22 applied to any disputes that are not amenable for arbitration under clause 20.

Put simply, it is arguable the scope of the arbitration agreement here was expressly limited to disputes that are amenable for resolution “under the arbitration rules of the relevant exchange or any other organization as the relevant exchange may direct”. There appears to be no evidence, *prima facie* or otherwise, that the Singapore proceedings fell within that scope.

The decision at hand is a good example of how, despite adopting a pro-arbitration policy, the Singapore courts will not enforce arbitration clauses indiscriminately. The mere existence of an arbitration clause does not, without more, carry the day.
The ability of a party to be able to obtain urgent interim relief is central to the efficacy of any method of dispute resolution. In case of disputes that are subject to an arbitration agreement, until recently parties had only two options: either approach national courts for interim relief in support of the arbitration, or wait for the formation of the arbitral tribunal and then make an application for interim relief. The former would essentially require parties to initiate local proceedings before national courts (the avoidance of which may in fact have been the principal reason for choosing arbitration in the first place). The latter would expose a party to the risk of dissipation of assets while the arbitral tribunal is being constituted.

Emergency arbitration is often cited as one of the solutions to the parties’ conundrum. But is emergency arbitration genuinely a substitute to urgent interim relief from courts? In this article, we compare the pros and cons of obtaining urgent interim relief from national courts and emergency arbitrator. In doing so, we focus on India’s experience and provide statistics from the practice of Indian courts.

By way of background, under Section 9 of India’s Arbitration and Conciliation Act, 1996 (the Act), Indian courts can grant interim relief in support of arbitration. Parties can approach courts for interim relief at any point before the constitution of the arbitral tribunal. However, after the tribunal has been constituted, parties are generally expected to seek interim relief from the tribunal directly. Further, interim relief is available even in cases where the seat of arbitration is outside India, unless the parties have agreed otherwise.

As for emergency arbitration, while the Act makes no reference to it, rules of Indian arbitration institutions – such as the Mumbai Center for International Arbitration and the Indian Council of Arbitration – allow parties to seek orders from emergency arbitrators. Moreover, Indian parties are often involved in emergency arbitration proceedings conducted by foreign institutions, particularly SIAC.

The table below contains a comparison of interim relief available under Section 9 of the Act with emergency arbitration.
Choice between Interim Relief from Indian Courts and Emergency Arbitrator

<table>
<thead>
<tr>
<th>Parameter</th>
<th>Interim Relief from Indian Courts</th>
<th>Emergency Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duration</td>
<td>3 days (Delhi High Court)</td>
<td>Varies depending on the institution</td>
</tr>
<tr>
<td>Success rate</td>
<td>73% (Delhi High Court)</td>
<td>Data not available</td>
</tr>
<tr>
<td>Availability of orders against third parties</td>
<td>✓</td>
<td>X</td>
</tr>
<tr>
<td>Availability of ex-parte orders</td>
<td>✓</td>
<td>X</td>
</tr>
<tr>
<td>Enforceability</td>
<td>✓</td>
<td>X</td>
</tr>
</tbody>
</table>

**How long it takes to obtain interim relief?**

For the purposes of this study, we randomly selected 300 Section 9 applications filed before the Delhi High Court in the year 2016. Next, we excluded those applications that were either withdrawn or granted with the consent of the parties. For the applications that remained in our dataset, we analysed the time it took to obtain the first ad-interim order. Ad-interim orders are orders of Indian courts that are operative either till the final disposal of an interim application or till the next hearing. For example, in urgent matters, a court might grant an ad-interim injunction restraining the respondent from calling upon a performance bank guarantee, pending the final adjudication of the Section 9 application. Accordingly, in evaluating the efficacy of Section 9 proceedings, the relevant time period is between filing of Section 9 application and grant of the first ad-interim, as opposed to the date on which the Section 9 application is finally disposed of.

The study revealed that the median time it took the Delhi High Court to grant ad-interim relief from the date of filing is 3 days.

In the context of emergency arbitration, it is not possible to carry out a similar empirical study because arbitration institutions do not disclose data about individual cases. Also, time periods set out in the rules of the various institutions vary. For example, SIAC Rules provide that...
the emergency arbitrator must issue an award/order within 14 days of his appointment, while the ICC Rules provide 15 days. Experience shows that SIAC and ICC emergency arbitrators often issue their orders more quickly than that; nevertheless, it is likely to remain the case that parties can receive even quicker relief by filing a Section 9 application in Indian courts.

**Success rate**

Out of the 300 Section 9 applications filed before the Delhi High Court, 72 applications were either granted, withdrawn by consent or remained pending with no interim relief ordered to date. Of the remaining 228 applications, interim relief of some sort was granted in 167 cases. This represents a success rate of 73 per cent for the applicant. The most common forms of interim relief granted by the Delhi High Court was freezing injunction prohibiting dealing with or disposing of certain assets, deposits of sums in court, creation of bank guarantee in favour of the applicant, and disclosure of assets.

In the case of emergency arbitration, again very limited data is publicly available to evaluate the success rate in a methodical manner. In the case of SIAC for example, between July 2010 and 31 March 2017, 57 emergency arbitration applications were filed, of which 29 applications were granted while 2 remain pending, 6 were withdrawn and 4 were granted by consent.³ That represents a success rate of 64.4 per cent. Other institutions have not however published similar statistics.

**Orders against third parties**

Emergency arbitrators cannot grant relief against third parties. That is an important limitation, which derives from the fact that the jurisdiction of emergency arbitrators and the (eventual) arbitral tribunal is limited to those parties who have consented to submit their dispute to arbitration. For example, article 29(5) of the ICC Rules expressly provides that the ICC’s Emergency Arbitrator Provisions apply only to signatories to the arbitration agreement or their successors.

On the other hand, Indian courts, like courts of other jurisdictions, can grant interim relief against third parties in certain circumstances (for example, where such orders are necessary to protect the subject

³ SIAC Statistics available at:
The classic situation is when a freezing order is granted against a bank that holds funds on behalf of one of the respondents. An emergency arbitrator would not be able to make the bank a party to the freezing order.

**Ex-parte orders**

The ability of a party to obtain ex parte interim orders can be crucial in circumstances where an element of surprise is necessary (for example, where prior notice to the respondent would lead him to remove his assets from the jurisdiction of the court). Like in other jurisdictions, Indian courts can grant ex parte orders in exceptional circumstances. Emergency arbitrators, on the other hand, cannot grant relief on an ex parte basis. That is because one of the central tenets of arbitration is that all parties be given equal opportunity to present their case.

**Enforceability**

Even if a party is successful in obtaining relief from an emergency arbitrator, it must still deal with the question of enforcement. With the exception of Singapore and Hong Kong, orders of emergency arbitrators have not received statutory recognition in other countries. In India, the Law Commission considered this issue at the time of suggesting amendments to the Act; however, ultimately no such amendment was made. Therefore, orders of emergency arbitrators are not enforceable in India. The fact that certain rules permit emergency relief to be granted as “awards”, and not just “orders”, will make no difference to their enforcement in India (compare Schedule 1(6) of the SIAC Rules with Article 29(2) of the new ICC Rules).

Despite concerns regarding their enforceability in India, emergency relief can be crucial in Indian related arbitrations. To start with, orders of emergency arbitrators may be extremely helpful if the respondent has assets in jurisdictions where such orders are enforceable (e.g. Singapore and Hong Kong). Further, experience shows that parties often voluntarily comply with emergency orders. That may be because losing parties fear that arbitral tribunals would not look too kindly on their failure to comply with the orders of emergency arbitrators. Moreover, to further incentivize compliance, arbitration rules allow arbitral tribunals to reflect non-compliance with the orders of emergency arbitrators in their final award (see, e.g., Article 29(4) of the ICC Rules). Finally, and rather counter-intuitively, orders of emergency arbitrators may assist a party in obtaining relief from an Indian court under Section 9 of the Act (see, e.g., HSBC v. Avitel⁴, where the Bombay High Court granted interim relief in the same terms as that of a SIAC appointed emergency arbitrator; but see Raffles Design⁵, where the Delhi High Court in the context of a Section 9 application effectively ignored the orders of a SIAC appointed emergency arbitrator).

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⁴ 2014 SCC OnLine Bom 102
⁵ (2016) 234 DLT 349
Hong Kong Court of Appeal Affirms that the Choice of Remedies Doctrine Does Not Offend Principle of Good Faith Under the New York Convention

by Nicholas Poon, *Drew & Napier LLC*

# Introduction

The dispute over the enforcement of an arbitration award between the Astro and Lippo groups of companies ("Award") has been fought out in numerous jurisdictions, notably Singapore and Hong Kong. In a nutshell, Astro had obtained the Award against Lippo in a Singapore-seated arbitration ("Arbitration"). When Astro sought to enforce the Award against Lippo in Singapore, Lippo resisted on the ground that the Tribunal in the Arbitration ("Tribunal") lacked jurisdiction as it had improperly joined some of the parties to the Arbitration. Astro contended that Lippo could not raise this objection at the enforcement stage as Lippo could elected not to avail itself of its right under Article 16(3) of the Model Law to challenge the Tribunal’s preliminary ruling that it had jurisdiction.

# Decisions in Singapore and Hong Kong

In Singapore, the Court of Appeal held that Lippo’s decision not to exercise its right under Article 16(3), or to set aside the Award under Article 34 of the Model Law, did not preclude Lippo from resisting enforcement on the ground that the Tribunal lacked jurisdiction. The basis for the Singapore Court’s decision was that the Model Law gave parties the choice to elect between active and passive remedies against an award. Accordingly, Lippo may still enforce its passive remedy to resist enforcement, despite not having availed itself of the active remedies in Article 16(3) or Article 34. On the merits of the jurisdictional objection, the Court agreed with Lippo, holding that the Tribunal had improperly joined several of the parties to the Arbitration and thus lacked jurisdiction in relation to those parties. But that was not the end.
Astro had taken out parallel enforcement proceedings in Hong Kong which Lippo did not resist initially. Leave was hence granted to Astro to enforce the Award, and judgment was entered. It was only after the time for setting aside the enforcement orders had expired, and Astro had obtained a garnishee order to attach a debt due from a third party to Lippo, that Lippo sought an extension of time to set aside the enforcement orders and the judgment obtained by Astro.

When the Hong Kong High Court finally heard the matter after the Singapore Court of Appeal had rendered its judgment, the Hong Kong High Court (a) declined to extend time for setting aside the enforcement orders and judgment, and further (b) held that in any event, Lippo was precluded from resisting enforcement as its conduct – its failure to challenge the Tribunal’s preliminary ruling on jurisdiction under Article 16(3) – constituted a breach of the good faith principle under the New York Convention.

The Hong Kong Court of Appeal agreed with the High Court on the first issue, but not the second, which is the focus of this commentary.

Hong Kong Court of Appeal’s decision

The Hong Kong Court of Appeal affirmed the position under Hong Kong law that even if one of the grounds for resisting enforcement under the New York Convention was established, the court had a discretion to enforce the award “in circumstances where there has been [a] breach of the ‘good faith’ principle by the award debtor”. The Court however agreed with Lippo’s submission that it had not breached any good faith principle because:

(a) the Tribunal’s wrongful joinder of some of the parties was a “fundamental defect”. In this regard, it is “particularly relevant” to take into account the law of the seat of arbitration and the ruling of the supervisory court of the seat of arbitration (i.e. the Singapore Court of Appeal’s decision);
Hong Kong – two major international arbitration hubs – in relation to the raising of jurisdictional objections before the courts are now aligned. Parties involved in arbitrations or with arbitration agreements providing for Singapore or Hong Kong as the seat of arbitration can plan and progress their arbitration accordingly.

It should be noted, however, that the global treatment of choice of remedies is far from homogenous. There are other jurisdictions which have adopted a contrary approach. For instance, section 73(2) of the English Arbitration Act 1996 expressly provides that a party to an arbitration which could have questioned the tribunal’s ruling on jurisdiction by any available process of review or appeal or by challenging the award on jurisdiction, but did not do so within the prescribed time, may not object later to that tribunal’s substantive jurisdiction on any ground which was the subject of that ruling.

On that note, it is understandable that there are some who will be disappointed that the Hong Kong Court of Appeal did not disapprove of the choice of remedies doctrine as anti-arbitration. Nonetheless, any such disappointment should not be overstated.

First, even if an award debtor succeeds in resisting enforcement in one jurisdiction (as opposed to setting aside the award in the supervisory court), the award remains valid. It may still be enforced elsewhere, subject of course to the application of any estoppel.

Second, while there is a default expectation that awards should be enforceable, it must not be forgotten that the grounds for refusing enforcement under the New York Convention exist to protect an award debtor from an unjustified award. Thus, the discretion to enforce an award notwithstanding that a ground for refusing enforcement is established should be exercised judiciously, and only in the clearest of cases. The idea that the liberal enforcement of awards in and of itself is somehow pro-arbitration is deeply flawed. Where an award is successfully challenged, it could be as much pro-arbitration as when a challenge is dismissed. The integrity of arbitration as a system cannot be tied to the outcome in particular cases; rather, it is promoted only when the outcome is driven by the principled application and enforcement of the rules which comprise and regulate the system.

Third, while it is true that much time and resources spent in obtaining an award may be wasted should an award debtor succeed in resisting enforcement...
on the grounds of a jurisdictional objection which could have been decided earlier by the courts, this risk can be ameliorated in at least one of two ways.

The first way is for the putative award creditor to bring the tribunal’s preliminary ruling on jurisdiction before the court for determination. Contrary to initial presumptions, Article 16(3) is party-blind. This is evidenced by the Model Law’s careful and deliberate choice of words “any party may request”, which may be contrasted with the use of the words “the challenging party” under Article 13(3) which deals with curial review of a challenge against an arbitrator. The use of the words “decide the matter” further adverts to the Model Law’s intention not to restrict Article 16(3) to a specific type of application. Thus, a claimant can avail itself of Article 16(3) when the tribunal has ruled that it has jurisdiction. By choosing not to avail itself of Article 16(3) to determine the tribunal’s preliminary ruling on jurisdiction, the putative award creditor absorbs the risk that a setting aside or enforcement court may subsequently disagree with the tribunal’s ruling. The belief that it is only the award debtor who is responsible for any wastage of time and resources should the final award be refused enforcement is therefore not entirely fair.

The second way is to request the tribunal to codify its jurisdictional rulings in an award. Leaving aside the issue of taxonomy – whether jurisdictional awards should be properly termed partial or interim awards – there is a legitimate body of jurisprudence that a tribunal’s ruling on jurisdiction which is final and binding on the parties is an award and ought to be enforceable as such under the applicable national arbitration laws and the New York Convention. Under this approach, once the tribunal issues an award declaring that it has jurisdiction over the dispute, the claimant can take that award on jurisdiction and enforce it in the seat of arbitration, or any other jurisdiction in which it is likely to seek enforcement of a final award on the underlying substantive dispute. Indeed, this possibility was directly referenced in the Commission Report on the Model Law.³ This will immediately place the burden on the respondent to resist the enforcement of the jurisdictional award. If the respondent elects not to resist enforcement or is unsuccessful, and the jurisdictional award is enforced as a judgment of the enforcing court, any subsequent attempt to challenge the final award on the same jurisdictional objections determined in the jurisdictional award is most likely to fail. The issue of the tribunal’s jurisdiction would be res judicata. This approach however remains to be tested fully in Singapore.⁴

In conclusion, the Hong Kong Court of Appeal’s decision represents another victory for the choice of remedies doctrine. But the contours of the doctrine are only starting to take shape. It will likely take many more arbitrations and court cases to work out its optimum operative parameters.

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How Should “Bare” Arbitration Clauses Be Enforced By The Courts?

*K.V.C. Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd [2017] SGHC 32*

by Darius Chan, *Ascendant Legal LLC*

Disputes arose between the sellers and buyer. Initially, both sellers proposed ad hoc arbitration in Singapore with a sole arbitrator. The buyer refused to cooperate. This led to the sellers commencing litigation before the Singapore courts. The buyer applied for a stay of proceedings in favour of arbitration under section 6 of Singapore’s International Arbitration Act (IAA).

The Court characterised the arbitration clauses as “bare” arbitration clauses which did not specify either the place of arbitration nor the means of appointing arbitrators. The Court observed that the enforcement of “bare” arbitration clauses would give rise to practical difficulties over how the arbitral tribunal would be appointed. Under section 8 of the IAA and Article 11(3) of the Model Law, the President of the SIAC Court of Arbitration was statutorily designated as the appointing authority. By virtue of Article 1(2) of the Model Law, this power applied “only if place of arbitration is [Singapore]”.

It is unclear whether Article 11(3) would apply where the place of arbitration is unclear or not yet determined.

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<th>(a) Does Article 11(3) of the Model Law apply when there is no agreement that Singapore is the place of arbitration?</th>
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<td>(b) What condition should the Court have applied when granting a stay in favour of a “bare” arbitration clause?</td>
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**Facts**

The case involved two contracts for the sale and purchase of rice. Under each contract, the sellers were different, but the buyer was the same. Each of the two contracts contained an arbitration clause. Both arbitration clauses were similar. The arbitration clause in the first contract read as follows:

The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per Indian Contract Rules.

The arbitration clause in the second contract read as follows:

The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per Singapore Contract Rules.

In *K.V.C. Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd [2017] SGHC 32*, the Singapore High Court enforced so-called “bare” arbitration clauses, *ie*, clauses that specified neither the place of arbitration nor the means of appointing arbitrators.

In Singapore, the President of the SIAC Court of Arbitration was designated as the statutory appointing authority under Section 8(2) of Singapore’s International Arbitration Act (IAA) and Article 11(3) of the Model Law. Article 11(3) applied only if the place of arbitration is Singapore. This case is noteworthy because the Court took the *prima facie* view that, even when the place of arbitration was unclear or not yet determined, the IAA nevertheless allowed the President of the SIAC Court to act as the statutory appointing authority.

While the pro-arbitration ruling will not come as a surprise to readers, this note considers two issues which may have affected the outcome of the case:

- How should “bare” arbitration clauses be enforced by the courts?
The Court framed two issues as follows:

First, whether, notwithstanding the absence of provisions in the IAA empowering the President of the SIAC Court of Arbitration or the Court to make appointments in cases where the place of arbitration was unclear or not yet determined, avenues existed under Singapore law to break a deadlock between parties concerning the appointment of the arbitral tribunal.

Second, whether the inability to establish the arbitral tribunal without the cooperation of the buyer rendered the arbitration clauses in question “incapable of being performed”.

The Court reviewed the travaux of the Model Law carefully. The Court’s decision can be summarised as follows:

First, the effect of Article 11(3) was that the President of the SIAC Court could not act in a case where it was clear that the place of arbitration was not Singapore. However, it did not necessarily follow that the President of the SIAC Court was powerless to assist in cases where the place of arbitration was unclear or not yet determined.

Second, notwithstanding the silence in the IAA and Model Law, there was a prima facie case that, even when the place of arbitration was unclear or not yet determined, the President of the SIAC Court could still act as the “statutory appointing authority”.

Third, before the President of the SIAC Court exercised his statutory powers, he needed to be satisfied that there was a prima facie case that Article 11(3) applies, viz Singapore was the place of arbitration.

Fourth, considering the arbitration clauses at hand, the President of the SIAC Court could form a prima facie view that his powers of appointment under Article 11(3) applied.

Fifth, even if the President of the SIAC Court declined to appoint the arbitrators for whatever reason, the Singapore court retained “residual jurisdiction” to ensure that the arbitration under both arbitration clauses proceeded notwithstanding any deadlock between the parties on the appointment of arbitrators.

As the Court answered the first issue in the affirmative, the Court stated that the second issue did not arise.
Before the Court, the buyer’s position was that, the President of the SIAC Court could appoint the arbitrator in the absence of mutual agreement. The Court ultimately ordered a stay but on a condition. The condition was that the buyer would raise no objections to the President of the SIAC Court’s jurisdiction to appoint an arbitrator under Article 11(3) of the Model Law in the event that the parties could not reach agreement on the appointment.

Further, if the President of the SIAC Court declined to make an appointment, either party may apply for further orders or directions as part of the Court’s “residual jurisdiction”.

Comments

A. Can Article 11(3) of the Model Law apply when there is no agreement on the place of arbitration?

In the Court’s prima facie view, the travaux indicated that the answer to the aforecaptioned question was "yes".

It is possible to read the travaux differently. Where the place of arbitration had not been determined, such as the case at hand, Article 11(3) did not apply—this was left to domestic laws. Unlike countries such as England and France, there are no other provision in Singapore’s IAA empowering the President of the SIAC Court to act as the appointing authority.

As the Court recognised, the travaux states that “the prevailing view was that the model law should not deal with court assistance to be available before the determination of the place of arbitration”. The USSR and United States representatives in particular expressed the view that “the case where the place of arbitration had not yet been agreed upon should remain outside the scope of the Model Law”. In a paragraph not cited by the Court, the travaux records that “[i]n the subsequent discussion concerning the territorial scope of application of the model law, the Commission decided not to extend the applicability of articles 11, 13, 14 to the time before the place of arbitration was determined”.

B. Should a different condition have been imposed by the Court in granting the stay?

Ultimately, the Court enforced the arbitration clauses under a condition that the buyer would raise no objections to the SIAC President’s jurisdiction to appoint an arbitrator under Article 11(3) of the Model Law in the event that the parties could not reach agreement on the appointment.

As the applicability of Article 11(3) was questionable, the Court could have enforced the arbitration clauses without having to invoke Article 11(3). Neither was it necessary to find that the Court enjoyed some kind of “residual jurisdiction” not otherwise expressed in the IAA.

This is because major arbitral institutions, such as SIAC and ICC, offer their services as appointing authorities for ad hoc arbitrations upon the agreement of the parties and upon the payment of certain fees to the institution. Such powers of appointment could be consensual and not statutory in nature.

With that in mind and returning to first principles, the Singapore apex court in Tomolugen Holdings Ltd and another v Silica Investors Ltd held that, a court hearing a stay application under the IAA should grant a

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2 [2015] SGCA 57.
stay in favour of arbitration if the applicant could establish a *prima facie* case that:

(a) there was a valid arbitration agreement between the parties to the court proceedings;

(b) the dispute in the court proceedings (or any part thereof) fell within the scope of the arbitration agreement; and

(c) the arbitration agreement was not null and void, inoperative or incapable of being performed.

To satisfy the first and third limbs above, in a case where the arbitration clause was a typical “model” arbitration clause commended by major arbitral institutions, an applicant seeking a stay likely did not have to do much more than show the existence of that clause in a contract signed by both parties.

However, in a case where the arbitration clause was a “bare” arbitration clause, the applicant seeking a stay could be asked how the “bare” arbitration clause could be capable of being performed. After a position is taken by the applicant on that issue, assuming all other requirements for a stay are met, a stay could be granted on the condition that the applicant abides by the position it had taken.

For instance, in the present case, the buyer took the position that the clause was capable of being performed because the President of the SIAC Court could appoint the arbitrator. The Court could have ordered a stay on the condition that the buyer would consent should the seller(s) propose that the parties appoint SIAC as the appointing authority. Any appointment by the President of the SIAC Court would be based on the consensual subsequent agreement of the parties, and not pursuant to Article 11(3) of the Model Law.

An additional benefit of this approach is that the President of the SIAC Court would not be left with the unenviable task of having to determine whether his statutory powers under Article 11(3) applied in the first place.

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3 The Singapore High Court in *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 highlighted there may be a potential inconsistency on the burden of proof articulated in Tomolugen and an earlier decision of the Singapore apex court in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 3 SLR(R) 732. In *Tjong Very Sumito*, the Singapore apex court earlier held that the burden is on the party resisting the stay to show that the arbitration agreement is incapable of being performed. Even if the legal burden may ultimately rest on the party resisting the stay, it would not be inconsistent for the applicant to articulate its position on how the “bare” arbitration clause could be capable of being performed.