1. You obtained your LL.B. from the University of Tokyo in 1984, and an LL.M. from Harvard University in 1992. What was the single most important difference in terms of the philosophy of legal education in Japan and the US?

It is difficult to pick just one. Let me share two differences which I found significant.

The first is that the American legal education system was more interactive. The Japanese legal education system was more didactic. When you had a single professor lecturing a class of up to 600, it was difficult to have any form of meaningful interaction.

The second was the heavier emphasis in the American legal education system on policy arguments or fundamental principles for a particular legal theory, as compared to the Japanese legal education system which placed more emphasis on conceptual or dogmatic understanding of statues, case precedents, legal principles and legal theory – often involving the technical aspects of law. Coming from the Japanese system, I was surprised initially that classes in the US were not geared towards preparing students for the bar exam at all! I realised later on that that role was fulfilled by external organisations. The difference in philosophy could not have been more stark.

2. What will be the dominant philosophy of legal education in the not-so-distant future?

Each of the US and Japanese philosophy of legal education has its merits. Of course, where they can be combined, the benefits will arguably be maximised. In fact, that is something we are observing in Japan, with the introduction of the law graduate programme which is more practice- and policy-oriented.

One area that I think legal education will need to address is the pressure students face. I believe it is a global phenomenon but I will use Japan as an example. When I was a student, the passing rate for the bar exam was extremely low. Approximately only 450 out of 28,000 students (i.e. less than 2%) passed the exam. Now, the passing rate is about 25%. In theory, therefore, the pressure on students should be substantially lower, but that is not the case. There is something about the bar exam which seems to generate an undue amount of pressure.

More can be done to, perhaps, re-orientate the students’ perspectives. Take international arbitration for example, which I taught at the University of Tokyo Law School. Although it was not a subject in the bar exams, there was a sizeable number who took up the subject. I am heartened by the fact that many of my students go on to join the international arbitration practice of major Japanese law firms. Perhaps more can be done to encourage students to take up subjects which they have a passion for or interest in, even if those subjects are not part of the bar exam.
3. Is an interactive, policy-based approach, or the technical-driven approach more suited to a course such as international arbitration?

It really depends on the individual student’s learning capacity and preference. If there is one point which I impress on my students the most, it is the "internationality" of international arbitration. Understanding that the ruling and reasoning of foreign courts from both the common law and civil law traditions are relevant to an international arbitration practice is not intuitive, particularly in a civil law system. Further, they need to realise that in international arbitration, international norms, rules, case law, treatises and conventions are equally if not more important than their knowledge and grasp of Japanese laws and procedures. Unless the students appreciate this unique characteristic of international arbitration, they will not be able to participate in it effectively.

4. What made you decide to enter the world of international commercial arbitration?

I was recruited as a legal apprentice by the late Mr Nishimura, the founder of our firm. It was during my stint as a legal apprentice that I came to know of this other world of international arbitration.

Mr Nishimura recounted to me an interesting story about an arbitration that he was involved in. The arbitration was held in London. Broadly, the case concerned the sale and purchase of oil under a take-or-pay contract. The parties agreed that the price of the oil to be paid by Mr Nishimura’s client is the most recent prevailing market price published in a particular publication. At some point, for some unknown reason, the publication ceased publishing the market price. At that time, the price of oil was falling. The end result was that Mr Nishimura’s client was contractually obliged to pay a substantial premium over the actual market price. As you can imagine, this case threw up some interesting legal and factual issues. But the interesting part of this story is what happened after the case settled favourably before the end of the arbitration.

Mr Nishimura’s client wanted to celebrate by having a nice dinner. As they were staying at a top hotel in London, the client asked the hotel concierge to make a reservation at "the best restaurant". When Mr Nishimura and his client appeared at the...
You would not hear of such a dramatic story even in the biggest domestic litigation cases. Of course, what happened to Mr Nishimura is not a normal occurrence, even in the world of international arbitration today. Incredible as it may sound, this story naturally caught my attention as a young apprentice (laughs).

5. Japan does not have as many foreign arbitration law practices. How do you think that affects the development and growth of international arbitration in Japan?

It is true that there are not many foreign law firms that have their own arbitration teams, even in Tokyo. As a result, we have many cases where we work jointly with the foreign law firms.

That being said, arbitration practice in Japan has evolved. Let me give two clear examples. 10 to 15 years ago, many of the arbitration cases were chaired by professors or former judges. That is not as prevalent now. Second, we now see a significantly larger number of non-Japanese foreign lawyers acting as counsel – even sole counsel – in international arbitrations seated in Japan.

In some ways, this is not surprising. As a universal system of dispute resolution, the style, convention and norms will invariably merge with the local practices and customs. Even though there are still Japanese practitioners and arbitrators who are accustomed to domestic practices, the trend of convergence is likely to continue.

I believe that Japanese law firms’ arbitration law practices will need to move in the same direction. In particular, it is challenging to offer a complete international arbitration practice to clients if there is no diversity in the nationality and qualifications of your lawyers. In this regard, our firm recently welcomed two foreign lawyers with significant international arbitration expertise: Dr Lars Markert from Germany and Ms Natalie Yap from Singapore.

6. You were recognised as the Best Lawyer in Arbitration and Mediation by Best Lawyers in April 2018. Congratulations! What are your thoughts on mediation being a viable alternative to arbitration and litigation?

I am a firm supporter of mediation. The dominant thinking used to be that complicated matters involving multiple parties and issues are not suited for mediation. These matters have to be litigated or arbitrated. I disagree. In fact, my own experience is that mediation is suited to complex disputes involving multiple parties and agreements because, among other things, the amicable, customisable nature of the mediation process can eliminate the inefficiencies and unpredictability of contentious proceedings, and the risk of inconsistent judgments.

I like to use the example of Mr Antonio Piazza, a well-known mediator based in San Francisco, and his involvement as a mediator in settling a very large global dispute between Intel and AMD. This particular dispute spanned antitrust law and civil litigation in many countries, including South Korea, Japan, America and Europe. It was settled in one day in the sunny and relaxing island of Maui.

Of course, there are multiple factors at play when a dispute is successfully settled by mediation. I have no doubt that the choice of Mr Piazza as the mediator was a key reason, as is the choice of Maui as the venue for the mediation. For that reason, I had proposed that the Japan International Mediation Centre be set up in the beautiful city of Kyoto, which will be opened shortly (laughs).
Another important consideration is the pace of change. Generally, because of its global nature, the laws and procedures in international arbitration evolve much faster as compared to court litigation. Having to move and learn constantly can be challenging for some, but exciting for others.

I would also tell them not to see litigation as monotonous or boring. Litigation in Japan can and frequently raises interesting, complex legal issues. One aspect which I enjoy, especially, is cross-examination. Because of the relatively more limited extent of discovery in our litigation process, there are fewer documents to rely on at trial. Effective cross-examination of witnesses, in these circumstances, can be quite challenging. At the same time, that forces and allows you to develop a state of the art technique in cross-examination (laughs).

7. You make a very persuasive case for mediation. Do you see mediation as a competitor to arbitration?

There will always be disputes where parties will never agree to mediate. There will be other disputes where mediation is attempted but unsuccessful. Not every dispute can be resolved by mediation, but it is important to realise that infusing mediation with litigation or arbitration can yield a better outcome for some disputes.

Mediation can be particularly effective after the tribunal has clarified the main issues in dispute, and even given some preliminary indications of the strengths and weaknesses of each side’s case and evidence.

Therefore, I am a believer of the Arb-Med-Arb procedure. Institutions should encourage greater uptake of the Arb-Med-Arb procedure by having clear rules and streamlining each component of the process. The SIAC-SIMC Arb-Med-Arb Protocol is a good example of this.

8. What do you say to young lawyers who indicate a strong desire to specialise in arbitration over court litigation?

I think that it is important for young lawyers to think through and understand the fundamental differences in the real-life practice of domestic and foreign litigation on the one side, and international arbitration on the other. Among other things, the lawyer’s role, the types of legal and procedural issues, the style of presentation and the manner of adjudication are very different across litigation and international arbitration. These are all relevant considerations for someone thinking about specialising in litigation or arbitration.
9. What would you tell young lawyers is the most important pitfall to avoid in international arbitration?

The biggest pitfall to avoid is not knowing enough about your arbitrator. The arbitrator controls the process and, by extension, the outcome. Where they have a right to nominate, parties and their lawyers should exercise that right wisely by spending sufficient time to understand the qualities and attribute of each potential nominee.

10. Young lawyers increasingly find themselves inadequately prepared to take on advocacy and client-facing roles expected of partners. What advice do you have for them?

More exposure for young lawyers to advocacy experience, whether in litigation or arbitration, is a perennial problem for the industry in Japan and, I believe, elsewhere.

However, young lawyers should prepare for every court or arbitration hearing as if they are the lead counsel, even if they are not. What this means, practically, is that they should familiarise themselves with the facts, the evidence, the documents, and the questions for cross-examinations. They should think carefully about the issues, and the weaknesses and strengths of their case. Even though they may not have the opportunity to articulate their thoughts to the judge or arbitrator, or cross-examine the witnesses, it is only by approaching the hearing as if they are the lead counsel can young lawyers test the quality of his or her own preparation as the hearing unfolds.

This leads to the second learning opportunity. During the actual hearing, the young lawyers should carefully observe the conduct of all parties involved – both sets of lead counsel, the judge or arbitrator, and the witnesses. He / she should constantly think and reflect on how he / she can deliver the arguments or cross-examination or respond to questions more effectively.

This role-playing approach to hearings applies equally to client and matter management. Young lawyers are not blue-collar workers. They are also not a postbox. They should not see themselves as such. They should instead practise active thinking – any instructions from the client or the partner should be processed, not merely regurgitated. Indeed, junior lawyers should challenge themselves to think of better ways of managing and running a case, and present their views to the partners and clients.

11. Still on the topic of advice for junior lawyers, what is your advice to junior lawyers on managing stress and staying the course in the profession?

This is a difficult topic because lifestyle preferences and habits differ from person to person. Personally, I do not subscribe to the view that there can never be too much preparation. If I have finished preparing for my cross-examination the next day by 5pm, and there is nothing else that requires my attention, I would go home and have a good rest. I will not pore over the questions just because I have the time to do so.

I have also noticed that many younger lawyers seem to think that the more hours they clock, the more appreciated and valuable they are to their law firm. I do not think that is the right or healthy way of thinking. That may be one contributor to the unnecessarily longer working hours. The person who is able to complete the task more quickly, to the same level of quality as another who takes a longer time, deserves more credit.

Another drawback of thinking that longer hours is better is that it disincentives the lawyer to streamline his / her work processes and systems to become more efficient. This is not beneficial to the lawyer or the law firm in the long run.

Lastly, although it sounds cliché, lawyers generally should leverage more on technologies to help them work faster and smarter. This is true of all lawyers, but especially of young lawyers who are generally more familiar and adept at harnessing new technologies.
A mandatory legal provision is one that a party has no choice but to obey, whereas a directory provision is one which the party is encouraged to obey. In other words, a mandatory provision must be observed, disobedience of which would lead to a nullification of the legal act, whereas a directory provision is optional.

In the case of State of Bihar & Ors. v Bihar Rajya Bhumi Vijas Bank Samiti, the Supreme Court of India (SC) has had occasion to decide whether Section 34(5) of the Indian Arbitration and Conciliation Act, 1996 (Act), is a mandatory or directory provision of law. In doing so, it had to play referee to two competing considerations- discouraging unscrupulous defendants by upholding strict rules of procedure, versus preventing procedural provisions of law from defeating substantive rights. The SC eventually ruled in favor of the latter.

Consequently, prior notice to an adversary is not mandatory for filing an application to set aside an arbitration award. In reaching its conclusion, the SC elucidated important principles governing the distinction between mandatory and directory provisions of procedural law.

**Precedential Backdrop**

In this case, the SC was tasked with finally resolving two contrary streams of precedent. One line of rulings, helmed by New India Assurance Co. Ltd. v Hilli Multipurpose Cold Storage Pvt. Ltd., held that procedural provisions of law (in this case the time limit prescribed for filing a written statement under the Consumer Protection Act, 1986 (CPA)) was mandatory in nature. The SC in New India Assurance was guided by observations in Dr. J.J. Merchant & Ors. v Shrinath Chaturvedi to the effect that the prescribed time limit for filing a written statement under the Code of Civil Procedure, 1908 (CPC) was “required to be adhered to.”

Eventually, the SC upheld its previous rulings in Topline Shoes v Corporation Bank, Salem Advocate Bar Association v Union of India, State v N.S. Gnaneswaran and Kailash v Nankhu & Ors, where similar procedural provisions prescribing timelines were considered directory in nature.

**Facts and Arguments**

The newly introduced Section 34(5) of the Act provides that applications to set aside arbitral awards “shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.” Section 34(6) further provides that such an application is to be disposed of expeditiously and in any event within one year from the date on which such notice is served upon the other party.

The appellants in this case (Appellants) had filed an application for setting aside an arbitral award under Section 34 of the Act (Application) before the High Court of

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1 Civil Appeal No. 7314 of 2018
2 Section 34(5) of the Arbitration Act (inserted vide Section 18 of the Arbitration and Conciliation (Amendment) Act, 2015) states as follows: An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.
3 (2015) 16 SCC 20
4 (2002) 6 SCC 635
5 (2002) 6 SCC 33
6 (2005) 6 SCC 344
7 (2013) 3 SCC 594
8 (2005) 4 SCC 480

This article was first published in the Kluwer Arbitration Blog.
Supreme Court of India ‘rules out’ the Rulebook in favor of Substantive Rights

Patna (Patna HC) without issuing prior notice to the respondents (Respondents). The Respondents challenged the validity of the Application on the ground that no prior notice had been issued to them. The Appellants countered this by stating that the requirement to provide notice under Section 34(5) of the Act was only directory in nature.

The two arguments came to a head before a single judge of the Patna HC, who relied upon the SC ruling in Kailash to hold that the requirement to issue notice under Section 34(5) of the Act was only directory in nature. However, a division bench of the Patna HC struck down the single judge’s order, opining that the obligatory language in which the provision was couched, and the object of the section, indicated that the provision was mandatory in nature.

Accordingly, the Appellants appealed the decision of the Patna HC division bench before the SC.

**Game, Set, Match: SC upholds appeal, ruling that prior notice is not mandatory**

On appeal, the SC initially observed that the language of Section 34(5), namely the words “shall”, “only after” and “prior notice” supported the Respondents’ argument that the provision was mandatory in nature. The SC also took note of the 246th Indian Law Commission Report (Law Commission Report) which documented that the object of Section 34(5) and 34(6) was that an application under Section 34 be disposed of expeditiously within a period of one year from the date of service of the notice.

However, the SC ultimately served three decisive strikes against the Respondents’ arguments.

(i) **Strike 1: No consequence under the Act for non-service of notice**

Relying upon a plethora of judgments, the SC held that the Section 34(5) of the Act was directory in nature because no consequences were provided for its contravention. The SC also drew a parallel with Section 29A of the Act which prescribes the time limit within which an arbitration award is required to be made and also provides that if the same is not met, the mandate of the arbitrator stands terminated. This stands in stark contrast to Sections 34(5) and 34(6) which did not prescribe a consequence if an application under Section 34 was not decided within the prescribed time limit.

(ii) **Strike 2: Object of Section 34 was to advance justice, not defeat it**

The SC held that procedural provisions of law, such as Sections 34(5) and 34(6), ought not to be construed in a manner that justice itself was trampled upon. The Law Commission Report
indicated that the object behind them was to dispose of applications under Section 34 expeditiously. However, as had been observed in Kailash, the intent behind such provisions was to “expedite the hearing and not scuttle the same.” The SC emphasised the time-honored principle that “all rules of procedure were the handmaids of justice”. It noted that “if, in advancing the cause of justice, it is made clear that such provisions should be construed as directory, then so be it.”

Apart from alluding to the ratio in Kailash to this effect, the SC also noted similar observations in Topline Shoes wherein it was held that a similar provision under the CPA did not create any substantive rights in favor of the complainant that bars a respondent from advancing his defense.

Relying upon the principles propounded in these previous judgments, the SC held that to construe the requirement of “prior notice” in Section 34 as mandatory in nature would defeat the advancement of justice.

(iii) Strike 3: New India Assurance judgment liable to be set aside

The SC was conscious of the contrary finding of the SC in New India Assurance wherein it was held that the time period for filing a written statement under the CPA was mandatory. In doing so, the SC in New India Assurance relied upon observations in JJ Merchant wherein it was observed that a speedy trial in summary proceedings did not necessarily indicate that justice had not been administered.

In New India Assurance, the SC had reasoned that the remarks in JJ Merchant would prevail, as JJ Merchant was decided prior to Kailash.

The SC in the present case, however, noted that the judgment in New India Assurance had completely overlooked a crucial paragraph in Kailash which underscored that (i) the observations in JJ Merchant were obiter; and (ii) Topline Shoes had not been cited before the court in JJ Merchant, and that therefore the critical ratio on the consequence of no penalty being provided had not been considered in JJ Merchant.

Additionally, the reasoning in Kailash had been successively upheld by a bench of three judges in Salem Bar Association. In light of this, the SC reasoned that the reliance on the observations in JJ Merchant in New India Assurance was misplaced, and that it was principles propounded in Kailash that held the field.

What this means for procedural provisions of Indian law

This judgment clarifies that before construing a particular provision to be mandatory or merely directory in nature, one has to assess whether there are any penal consequences provided for the same, and whether or not adhering to such a procedural requirement would in any manner take away a vested right of a party and in effect scuttle the administration of justice. This would certainly affect the applicability of the various new provisions introduced across various statutes in India, such as provisions imposing strict timelines for the resolution of disputes, whether through arbitration, litigation, or corporate insolvency.

Some of these statutory timelines are arguably unreasonable given the judicial backlog, pendency of cases and lack of judges in India. What this judgment re-affirms is that while adhering to procedure is important, administration of justice remains paramount.
Article 16(3) of the Model Law provides in relevant part that, “if the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request ... the court ... to decide the matter”. One question that arises is, to the extent issues of evidence arise, what rules of evidence should the court apply when “decid[ing] the matter”? Does the court apply national rules of evidence, or does the court apply the same rules of evidence, if any, that the tribunal was obliged to apply?

This thorny question reared its head recently in a Singapore High Court decision of BQP v BQQ [2018] SGHC 55, which follows an earlier discussion by a different Judge in HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd [2015] SGHC 93.

Background

By way of background, as a general rule under English law but subject to various exceptions, pre-contractual negotiations, such as prior drafts of contracts, are inadmissible to interpret a contract. At least where Singapore litigation proceedings are concerned, the issue of whether pre-contractual negotiations are admissible in evidence to construe written agreements, and if so, the applicable limits or safeguards (the “admissibility issue”), remains an unsettled question.

The Singapore Court of Appeal has held that extrinsic evidence (including pre-contractual negotiations) to interpret a contract is admissible under Singapore law only if it is “relevant, reasonably available to all the contracting parties and relates to a clear or obvious context” (Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] SGCA 27 (hereinafter called the “Zurich criteria”).

Subsequently, the Court of Appeal formulated specific court pleading requirements to ensure that the Zurich criteria are met (Sembcorp Marine Ltd v PPL Holdings Pte Ltd [2013] SGCA 43), namely:

(a) parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract;

(b) the factual circumstances in which the facts in paragraph (a) above were known to both or all the relevant parties must also be pleaded with sufficient particularity;

(c) parties should in their pleadings specify the effect which such facts will have on their contended construction; and

(d) the obligation of the parties to disclose evidence would be limited by the extent to which the evidence is relevant to the facts pleaded in paragraphs (a) and (b).

In 2015, the Singapore Court of Appeal (eg, Xia Zhengyan v Geng Changqing [2015] SGCA 22 and other cases) sounded the caution that the admissibility issue is still an open question under Singapore law. Reliance on prior drafts of contracts should not be permitted as a matter of course. At a minimum, the Zurich criteria must still be met.

In the 2015 High Court decision of HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd [2015] SGHC 93, the Judge opined, by way of dicta, that a dispute over how a contract is to be construed must yield the same final determination whether the contract is construed by a court or in arbitration. The Judge’s observation did not sit comfortably with Singapore’s Evidence Act, which provides expressly in section 2 that certain parts of the Evidence Act do not apply to “proceedings before an arbitrator”. The Judge’s observation also does not sit well with institutional rules which typically provide that an arbitral

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triable tribunal can determine whether to apply strict rules of evidence to determine the admissibility of evidence. For instance, the current SIAC Rule 19.2 expressly provides that evidence need not be admissible in law.

The Judge’s observation also raises questions concerning whether, and if so how, arbitral tribunals ought to apply the Court’s caution in *Xia Zhengyan v Geng Changqing* when considering whether to admit or rely on pre-contractual negotiations. Is extrinsic evidence admissible in *international arbitrations* where the underlying contract is governed by Singapore law? If an arbitral tribunal finds jurisdiction by construing a contractual provision in a certain manner by relying on prior drafts and negotiations in construing a certain contractual provision, found that the tribunal enjoyed jurisdiction.

The plaintiff applied before the Singapore courts to challenge the tribunal’s jurisdiction ruling under section 10 of Singapore’s International Arbitration Act read with Article 16(3) of the Model Law. After meticulously analysing the evidence (including extrinsic evidence) that had been adduced before the tribunal, the Singapore High Court agreed with the tribunal’s interpretation, and dismissed the plaintiff’s challenge.

The plaintiff applied for leave to appeal, contending *inter alia* that the issues surrounding admissibility of pre-contractual negotiations were questions of importance or questions of general principle to be decided for the first time. The Court refused, holding that the Singapore Court of Appeal had already decided that rules concerning admissibility of evidence are rules of *evidence* or procedural law (which generally would not bind arbitral tribunals), and not a matter of substantive law.

In essence, the Court held that national rules concerning admissibility of evidence, including the *Zurich* criteria, are procedural in nature, and do not bind international arbitration tribunals. The Judge made the following observations:

(a) There is a specific provision in Singapore’s Evidence Act that precludes the Act’s applicability to “*proceedings before an arbitrator*”.

(b) Parties resort to international arbitration precisely because they wish to avoid national laws shackling their quest for a speedy, commercial and practical outcome to their dispute, and preclude the application of laws and procedures which may be alien to them.

(c) To the extent parties may have agreed to institutional arbitration, many institutional
rules give the tribunal broad discretion to decide on the admissibility, relevance, materiality and weight of evidence offered.

**Discussion**

The Court in *BQP v BQQ* had meticulously reviewed the evidence (including extrinsic evidence) adduced before the tribunal before eventually reaching the same interpretation of the relevant contract as the tribunal. This can be understood as an exercise where the Court was simply applying rules of contractual interpretation (found in the law of contract) against the body of evidence that had already been adduced before the tribunal.

Separate from the issue of whether a tribunal was bound to apply national rules concerning admissibility of evidence (which the Court in *BQP v BQQ* ruled in the negative), it is not evident whether there was any argument questioning whether the Court itself was bound to apply national rules concerning admissibility of evidence in an Article 16(3) application. Yet, at the same time, the Court in *BQP v BQQ* (at para 123) stated that the *Zurich* criteria (which according to the Court was a rule of evidence) had been met may well be an academic question. Practically speaking, to the extent the Court disagrees with the tribunal’s reliance on a certain piece of evidence that had already been adduced before the tribunal, the Court can simply assign limited weight to that evidence, rather than revisit a tribunal’s decision on admissibility.

Be that as it may, one can imagine scenarios where national rules of evidence may, in fact, be relevant.

Under Singapore law, in applications under Article 16(3) or Article 34(2)(a) of the Model Law, parties are not precluded from advancing new arguments that were not previously advanced before the tribunal. In determining whether new evidence could be adduced, the Singapore High Court in *Sanum* had applied what the Court called a “modified *Ladd v Marshall* test” which, in fact, stems from national rules of evidence.

Imagine further an Article 16(3) or Article 34(2)(a) application where the applicant seeks to introduce a new argument based on interpreting a contract using new extrinsic evidence (such as prior drafts of contracts). In this scenario, can an objection based on the *Zurich* criteria be sustained in relation to the new evidence sought to be adduced? Perhaps more practically, would the caution in *Xia Zhengyan v Geng Changqing* (namely, reliance on prior drafts of contracts should not be permitted as a matter of course) apply in this scenario? A possible argument would be that the Court can decide the issue of admissibility by applying national rules of evidence when there has been no prior decision on admissibility by the tribunal.

Given the steady stream of arbitration cases flowing through the Singapore Courts, one might not have to wait long before the Court has to grapple with these issues again.

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2 [http://www.singaporelawblog.sg/blog/article/140](http://www.singaporelawblog.sg/blog/article/140)
Can Directors Rely on Their Companies’ Arbitration Agreements?

by Ramandeep Kaur, Joseph Tan Jude Benny LLP

This article was first published in the Kluwer Arbitration Blog.

Joint venture agreements increasingly provide for arbitration, allowing the JV partners to resolve matters privately. Where a director of a JV company (or JV partners) is sued in his capacity as a director in relation to matters arising out of the joint venture agreement, can he also rely on the arbitration agreement in the joint venture agreement? Or, must he be left to contend with the public scrutiny of litigation?

Unsurprisingly for a legal problem, the answer is “it depends”. It depends, according to the Singapore High Court in A co and others v D and another [2018] SGHCR 9, on the objective intentions of signatories to the arbitration agreement. As a general proposition, this is uncontroversial. Its application however is instructive, indeed cautionary, for directors wishing to avoid litigation, who might otherwise be lulled into an assurance of confidentiality based on arbitration agreements signed by their companies.

The Court clarified that just because a director may be acting in his capacity as a director cannot justify his reliance on his company’s arbitration agreement, even if it is broadly drafted (as most arbitration agreements now are). A lot more is required – nothing short of an express statement covering claims against a director might suffice.

Facts

In A co and others v D and another, Company A was incorporated pursuant to a joint venture between Companies F and G. The relationship between parties to the joint venture was governed by an investment agreement concluded between, among others, Companies A, F and G (IA).

The incorporated JV, Company A, was the holding company of Companies B and C, and Company B in turn was the parent company of Company H. D was the executive chairman and CEO of Company G, and his son, E, was the managing director of Company C. D and E were also directors of Company A.

Various persons and entities connected with the IA were embroiled in a string of acrimonious proceedings, which included 4 litigations and 1 arbitration. The latest salvo in this series was a court action by Company F against D and E. In this suit, Company F, acting on behalf of Companies A, H and C (Companies), alleged that D and E were in breach of their fiduciary duties to the Companies.

D and E applied to stay the suit in favour of arbitration under section 6 of Singapore’s International Arbitration Act (IAA), on the basis that the arbitration agreement in the IA applied to them, even though they had not signed it. They emphasised the breadth of the arbitration agreement, which applied to “any dispute, controversy or conflict arising out of or in connection with” the IA. This, they argued, on a “holistic” reading of the IA, included claims brought by “Group Companies” (as defined in the IA, to include the Companies) against “Affiliates” (which included D and E).

Alternatively, relying on the “agency principle” from American jurisprudence, they contended that they could compel the Companies to arbitrate simply because the Companies’ claims concerned D and E’s conduct as directors of companies which were governed by the IA.

The Decision

The High Court declined the stay application. There appears to have been no serious argument on whether the subject matter of the suit was indeed connected...
with the IA. The issue was instead framed as whether D and E were parties to the arbitration agreement, which they had not signed.

**Objective, the arbitration agreement did not apply to D and E**

Importantly, the Court held that the mere wording of the arbitration agreement, wide though it was, was insufficient to imply that it covered the Companies’ claims against D and E. It was significant to the Court that the arbitration agreement had on a separate occasion been expressly incorporated into a deed (which was unrelated to this dispute). This, the Court held, demonstrated that if parties intended to arbitrate disputes between the Companies and D and E, they could similarly have made an express provision to that end.

The Court concluded that nothing in the IA demonstrated the necessary objective intention to arbitrate the Companies’ claims against D and E, and in the absence of any other supporting circumstances or parties’ conduct, such intention simply was not there. A clause in the IA, which provided that claims by Company A against D and E (as “Affiliates”) shall be prosecuted on behalf of Company A by directors of Company F was found to be irrelevant, as it dealt only with who has the authority to prosecute, not with the mode of the dispute resolution.

**Directors cannot rely on “agency principle” to compel arbitration**

D and E also argued that they could compel the Companies to arbitrate simply because their allegations concerned D and E’s conduct as directors of companies which were governed by the IA. This was based on the “agency principle” espoused in a 2011 American decision, *Kiskadee Communications v Philip Father* 2011 US Dist Lexis 34974, which allowed an agent to benefit from an arbitration agreement if claims against him (i) concerned acts done in his capacity as an agent, and (ii) arose out of or related to the contract containing the arbitration agreement.

The Court declined to import this “novel” point to Singapore law for a number of reasons, of which the most compelling appears to be the criticism of the “agency principle” (even within American jurisprudence) for its potential to offend parties’ objective intentions, i.e. by allowing an “agent” to invoke an arbitration agreement when objectively, parties may not have intended such an outcome.

Company F’s submissions about the differences between the tests for stay under American and Singapore legislation also found favour with the Court in reaching this conclusion. The
Court accepted that section 3 of the Federal Arbitration Act did not require the party seeking the stay to be a party to the arbitration agreement; all that was required was “an issue referable to arbitration under an agreement in writing for such arbitration”. On the other hand, section 6 of Singapore’s IAA only allows a party to the arbitration agreement to make an application for stay.

This difference however, appears more apparent than real. Singapore’s IAA does not define “party”, and where an “agent” seeks to rely on an arbitration agreement, his party status is the very question that needs to be decided. Further, section 9 of Singapore’s Contract (Rights of Third Parties) Act allows third-party beneficiaries of arbitration agreements to invoke them in prescribed circumstances, thus expressly allowing non-parties to rely on them. On the other hand, it is highly doubtful whether the American Federal Arbitration Act allows anyone other than a party to (or a third-party beneficiary of) an arbitration agreement to stay court proceedings in favour of arbitration. It requires an issue referable to arbitration “under an agreement”, and an agreement can only be invoked by those who agree to it or are otherwise intended to be its beneficiaries.

**Third party rights under Contract (Rights of Third Parties) Act (CRTPA)**

Although D and E did not seek to rely on the CRTPA, the Court affirmed the theoretical possibility of a non-signatory invoking an arbitration agreement in his capacity as an intended third-party beneficiary of the arbitration agreement, provided:

1. the arbitration agreement purported to confer a benefit on him, such that the benefit was intended (not merely incidental); and
2. parties intended to entitle him to enforce the arbitration agreement.

**Comment**

The key takeaway for directors (or other corporate officers and agents) wishing to rely on arbitration agreements signed by their companies is to say so expressly in writing. Otherwise, they face the uphill task of convincing the court that the signatory companies also objectively intended to make the directors parties to the companies’ arbitration agreement.

This is not easy, and as A v D demonstrates, arguments based on the interpretation of the underlying contract and the scope of disputes it envisages will likely not pass muster. The CRTPA will also be of little, if any, assistance to a director in this predicament, as it too requires demonstration of parties’ intention to benefit a third party, and to allow him to enforce the arbitration agreement. The safest course is to spell out the parties and the disputes that the arbitration agreement is to cover.
Consolidation of Arbitration under “Entire Agreement” Clauses

by Hu Ke, Jingtian & Gongcheng

This article was first published in the Kluwer Arbitration Blog.

**Introduction**

In many commercial transactions, there will be multiple agreements among various parties, and those agreements often contain entire agreement clauses to ensure that the parties are bound only by the terms of the agreement(s) they sign. However, such a clause may be invoked and interpreted in a way surprising to the parties, especially in terms of dispute resolution.

While an entire agreement clause typically reads as “this Agreement contains the entire agreement and understanding between the parties hereto and supersedes all prior negotiations, representations, undertakings and agreements on any subject matter of this Agreement”, its variation in a complex transaction with multiple instruments may provide that the agreement containing the clause and another agreement constitute the entire agreement between the parties and/or affiliates of the parties and supersede all previous communications, representations and agreements, whether oral or written, between the parties with respect to the subject matter hereof.

**One West v. Greata Ranch**

The issue has been emerging in M&A disputes according to a presentation by Tunde Ogunseitan, counsel at the ICC International Court of Arbitration, and in energy disputes according to David R Haigh QC and Paul Beke of Burnet, Duckworth & Palmer LLP, often involving different dispute resolution clauses in different instruments.

So far few cases have come to the public’s knowledge, except *One West Holdings Ltd. v. Greata Ranch Holdings Corp.*, 2014 BCCA 67, an interesting case heard before the courts of British Columbia.

The case involved three agreements, a Limited Partnership Agreement (LPA) with an arbitration clause, a Project Management Agreement (PMA) and a Purchase Agreement (PA). One West was a party to the PMA but not a party to the LPA; Greata Ranch was a party to the LPA but not to the PMA.

The “entire agreement” clause in the PMA read as:

“This Agreement, [the LPA] and [the PA] and any documents expressly contemplated by this Agreement, constitute the entire agreement between the parties and/or affiliates of the parties and supersede all previous communications, representations and agreements, whether oral or written, between the parties with respect to the subject matter hereof.”

The arbitration clause in the LPA read as:

“All disputes arising out of or in connection with this Agreement, or in respect of any legal relationship associated therewith or derived therefrom, shall be referred to and finally resolved by arbitration administered by the British Columbia International Commercial Arbitration Centre pursuant to its Rules. The place of arbitration shall be Vancouver, British Columbia, Canada.”

Disputes arose and Greata Ranch initiated an arbitration against other parties to the LPA and One West, relying on the arbitration clause in the LPA. One West asserted that it should not be joined to the arbitration because a different mechanism, or the claim may be pursued against a party not bound by the latter contract, in accordance with terms thereof.
it did not sign the LPA and was not a party to any arbitration agreement with Greata Ranch. The arbitrator determined the issue in favor of Greata Ranch, concluding as follows:

“The intention of the parties is explicit that the LPA and PMA are to be part of one comprehensive agreement and the only reasonable interpretation of the [Arbitration Clause] is that all disputes connected with that agreement ‘shall be referred to and finally resolved by arbitration...’”

One West sought judicial review. The Supreme Court agreed with One West, holding that the entire agreement clause in the PMA did not incorporate terms of the LPA and the PA by reference, and set aside the award.

On appeal, the Court of Appeal disagreed with the Supreme Court’s judgment, opining that:

“[The entire agreement clause] does two things: it defines the agreement of the parties and it limits the scope of inquiry. The [Supreme Court]’s approach appears to eliminate the first part of the provision merely because it is called an ‘entire agreement’ clause.”

Comments

As one commenter said, the One West decision gave entire agreement clauses “greater implications than expected.”

There is no dispute about the function of “limiting the scope of inquiry” of entire agreement clauses. Black’s Law Dictionary defines an “entire agreement clause” (also called “integration clause”, “entire contract clause”, “merger clause” and “whole agreement clause”) as “[a] contractual provision stating that the contract represents the parties’ complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract.” It points to the “parol evidence rule”, which is described as “[t] he common law principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence earlier or contemporaneous agreements that might add to, vary, or contradict the writing.”

The Court of Appeal in One West also agreed that entire agreement clauses “set out the document or documents to which the court may refer” and “attempt to limit the scope of contractual relevance to the four corners of the specified document or documents”. The key issue was how “the agreement of the parties” was to be construed. In my view the reasoning of the arbitrator and the Court is doubtful in three aspects.

Cross-referencing other agreements in an entire agreement clause is usually not intended to incorporate other agreements or terms thereof into the agreement between the parties; the latter should stay as it is.

Firstly, the arbitrator might be wrong in concluding that “the intention of the parties is explicit that the LPA and PMA are to be part of one comprehensive agreement and the only reasonable interpretation of the ss. 13.13 is that all disputes connected with that agreement ‘shall be referred to and finally resolved by arbitration...’” (emphasis added). There is no language which would suggest the parties’ intention to create one comprehensive agreement...
(with the word “agreement” used as a collective noun) – the parties agreed that the three instruments should constitute the entire agreement (with “agreement” probably used in its singular meaning), and nothing beyond. If the parties intended to make “one comprehensive agreement” explicitly, the parties would have used language to that effect, such as “a comprehensive agreement” or “a single agreement”, but they did not. From a linguistic perspective, it also makes little sense to have “entire” describe “agreement” as a collective noun in the context, and neither the arbitrator nor the appellate judges used the counterintuitive “an entire agreement”.

Secondly, following the analysis to its logical conclusion, the fact that these instruments constitute “the entire agreement between the parties” does not necessarily lead to the conclusion that all the parties are bound by each instrument within the entire agreement. It could reasonably be construed as each party was bound by the instrument(s) it signed, and nothing beyond, as a reasonable business person (and their legal advisor) would expect in entering into such agreements in a complex transaction. The use of “and/or” rather than “and” before “affiliates of the Parties”, is simply indicative that not all of them are bound by each instrument, otherwise the “or” is simply redundant. On the other hand, it would cause absurdity to drag a party into a contractual relationship when the language of the instrument stipulates no right or duty of that party, and provides bad incentives for an opportunistic disputant.

Thirdly, the Court perhaps understated the fact that in a transaction with multiple contracts many terms cannot be reconciled with one another and some terms may conflict with other terms. A common rationale for the parties to sign multiple contracts instead of “one comprehensive agreement” is so as to set out different aspects of their relationships with different conditions and among different parties in different agreements. The asserted “consolidation” of agreements would prove to be difficult in reconciling these agreements in a “battle of forms”. The commercial reality is that entire agreement clause is indeed a term of legal art, and it should be interpreted as common lawyers intend it.

That said, incorporation clauses, including “integral part” clauses, which incorporate the terms of a contract into another, should be distinguished from entire agreement clauses, as in the case of Karah Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (2004), 364 F 3d (5th Cir), where the Tribunal correctly consolidated disputes under two contracts.

Conclusion

“If there is such an ambiguity in the words used, the court should interpret them in a manner that accords with commercial reality and that avoids a commercial absurdity.” Cross-referencing other agreements in an entire agreement clause is usually not intended to incorporate other agreements or terms thereof into the agreement between the parties; the latter should stay as it is. The consolidation of agreements and consequent consolidation of disputes, through entire agreement clauses, would probably go against the genuine intention of the parties and bring consequential chaos. Though it would never be wrong to ask parties to be more careful in contract drafting, the misinterpretation of “entire agreement” clauses for consolidation purposes should be, and can be, ceased.
Is Article 16(3) of the Model Law A ‘One-Shot Remedy’ for Non-Participating Respondents in International Arbitrations?

by Darius Chan, Norton Rose Fulbright (Asia) LLP

It is not uncommon for practitioners acting for claimants in an arbitration to encounter a respondent who chooses to boycott the arbitral process. In cases involving such ‘non-participating’ respondents, what are the rights and obligations of each party? Specifically, insofar as Model Law jurisdictions are concerned, if a Tribunal decides on jurisdiction as a preliminary issue, must the non-participating respondent apply under Article 16(3) of the Model Law to the curial court to review that decision, or otherwise lose the right to challenge any eventual award thereafter on jurisdictional grounds? Can the non-participating respondent surface at a later stage to set aside, or alternatively resist enforcement, of any eventual award based on jurisdictional grounds?

There are two Singapore High Court decisions which appear to have given differing guidance on this issue.

‘Participating Respondents’

Preliminarily, it would be helpful to remind ourselves of the position for ‘participating’ respondents.

Insofar as participating respondents are concerned, the Singapore High Court in Astro Nusantara International BV v PT Ayunda Prima Mitra [2013] 1 SLR 636 (Astro HC) had ruled that a party who does not seek curial review of a Tribunal’s decision under Article 16(3) of the Model Law cannot subsequently set aside or resist enforcement of any eventual award on the same jurisdictional objections. In so deciding, the Singapore High Court was motivated by concerns of “minimis[ing] dilatory or obstructionist tactics so as to avoid unnecessary wastage of time and money”.

However, this was reversed on appeal. The Singapore Court of Appeal in PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others [2014] 1 SLR 372 (Astro CA) opined that Article 16(3) is not a “one-shot” remedy. A party who does not seek curial review of a Tribunal’s decision under Article 16(3) of the Model Law can subsequently resist enforcement of any eventual award on the same jurisdictional objections. However, that party may be precluded from setting aside the award on the same jurisdictional objections. The Court of Appeal opined in dicta (at [130]) as follows: ‘[the Court of Appeal] would be surprised if a party retained the right to bring an application to set aside a final award on the merits under [Article 34 of the Model Law] on a ground which they could have raised via other active remedies before the supervising court at an earlier stage when the arbitration process was still ongoing’.

We turn now to address two cases which have considered the rights of ‘non-participating’ respondents.

‘Non-participating Respondents’

(1) Astro Nusantara International BV v PT Ayunda Prima Mitra [2013] 1 SLR 636

The first case is the first instance decision of Astro HC by Belinda Justice Ang.

Justice Ang took the view that a non-participating respondent who does not seek curial review of a Tribunal’s decision under Article 16(3) can subsequently seek to set aside or resist enforcement of any eventual award on jurisdictional grounds. A non-participating respondent could be a party who boycotts the arbitral process from the commencement of the
Is Article 16(3) of the Model Law A ‘One-Shot Remedy’ for Non-Participating Respondents in International Arbitrations?

In this case, Justice Loh citing the Court of Appeal’s ruling in Astro CA, held that non-participating respondents who do not seek curial review of a Tribunal’s decision under Article 16(3) can subsequently seek to resist enforcement of any eventual award under jurisdictional grounds. However, such non-participating respondents cannot seek to set aside any eventual award on jurisdictional grounds.

Justice Loh reasoned that where a tribunal has chosen ‘to decide jurisdiction as a preliminary issue, considerations of finality, certainty, practicality, cost, preventing dilatory tactics and settling the position at an early stage at the seat militate against allowing a [non-participating] respondent to reserve its objections to the last minute and indulge in tactics which result in immense delays and costs’. In Justice Loh’s view, it is an ‘abuse of process’ for ‘a [non-participating] party to wait till the opposing party goes through the whole arbitral process, obtains an award, only to be met by a setting aside application at the seat on the ground of a lack of jurisdiction’.

It is interesting to note that, even though concerns with dilatory, obstructionist tactics as well as time and costs had played central roles in both cases described above, the Judges appeared to reach differing conclusions on the
rights of the non-participating respondent. Four points can be made.

First, in reaching his conclusion, Justice Loh purported to adopt the Court of Appeal’s ruling in Astro CA described above. However, it is not clear that the Court of Appeal in Astro had in mind the specific situation of a non-participating respondent. Justice Loh did not specifically engage the views of the travaux cited by Justice Ang.

The travaux speaks of another situation where a party ought to be precluded from raising objections at the setting aside or enforcement stage: under Article 4 of the Model Law, a party is taken to have impliedly waived any objection to another party’s non-compliance with certain procedural requirements if that first party knew about the non-compliance, but proceeds with the arbitration without making a timely objection. A corollary to the travaux is that any party that does not proceed with the arbitration arguable has not waived its objection(s) to jurisdiction; in other words, it should be permitted to raise that objection in a future setting.

Second, taking a step back, assume an arbitral tribunal does not decide jurisdiction as a preliminary issue, but in a final merits award instead. In that scenario, it appears to be currently accepted (and which finds support from the travaux cited above) that a non-participating respondent may seek to set aside and resist enforcement of any eventual award on jurisdictional grounds. It is not intuitively obvious why the rights of the same non-participating respondent should automatically be diminished (by losing the right to set aside any eventual award on jurisdictional grounds) if the tribunal chooses instead to decide the issue of jurisdiction as a preliminary issue. The practical implication of Justice Loh’s decision is that there may be tactical advantage for a claimant facing a non-participating respondent to press a tribunal to decide the issue of jurisdiction as a preliminary issue. If the tribunal agrees, that places the respondent under pressure: if the respondent continues not to participate in the arbitration, it loses the right to seek a setting aside of any eventual award on jurisdictional grounds.

Third, insofar as Justice Loh’s decision was motivated by concerns of finality, certainty, time and costs, those same concerns arguably ought to lead to an outcome where, in addition to losing its rights to set aside any eventual award on jurisdictional grounds, a non-participating party should not be permitted to resist enforcement of any eventual award on jurisdictional grounds. It is therefore not intuitive why concerns of abuse of process, finality, and certainty should justify barring the non-participating respondent from setting aside the award, but not preclude the same respondent from resisting enforcement of the same award. This observation has led some commentators to question the correctness of Astro CA, and led to calls that the Singapore legislature should consider the stance adopted by section 73(2) of the English Arbitration Act by precluding a party, who could have but did not object to the tribunal’s ruling on its jurisdiction, from raising those objections in a future setting. According to these commentators, this is justifiable on the policy bases of preventing an abuse of process, good faith and efficiency. However, such arguments by commentators are not without problems.

First, in Astro CA the Court of Appeal had signaled (at [117]) that the architecture of Art 16(3) is not certainty-centric; concerns of certainty, time and cost efficiency are not paramount objectives. In fact, English Arbitration Act itself in section 72 preserves the rights of persons who take no part in arbitral proceedings, including the right to challenge any ultimate award on jurisdictional grounds. The Model Law is therefore not alone in giving similar rights to a non-participating party. In court proceedings in common law...
jurisdictions, a non-participating defendant is, generally speaking, not precluded from applying to set aside a judgment obtained in default of appearance simply because the defendant was non-participating.

Furthermore, these arguments are premised on the assumption that a non-participating party is an abuser of process out to obstruct a process that it had earlier signed up for. Whilst that may be often the case, that assumption may not always be true. Arguably, the claimant needs to go through the process, in any case, to obtain an award. Second, in many cases, the non-participating respondent would already have made known to the claimant and the tribunal its views as to the tribunal’s lack of jurisdiction. In that sense, the non-participating respondent cannot be said to be inducing the claimant to proceed on a false or misleading basis. Finally, as the commentators themselves have recognised, the curial review mechanism under Article 16(3) is as much for the claimant and the tribunal its views as to the tribunal’s lack of jurisdiction. In that sense, the non-participating respondent cannot be said to be inducing the claimant to proceed on a false or misleading basis. Finally, as the commentators themselves have recognised, the curial review mechanism under Article 16(3) is as much for the claimant and the tribunal its views as to the tribunal’s lack of jurisdiction. In that sense, the non-participating respondent cannot be said to be inducing the claimant to proceed on a false or misleading basis.

Finally, coming back to the fundamental issue, how should courts apply Article 16(3) to different types of respondents? Given the silence from the text of the Model Law (see [110] and [131] of Astro CA), this is a difficult issue worthy of a separate discussion. Preliminarily, it is suggested one would have to consider distinctions between:

(a) a fully participating respondent, who continues to participate in the arbitration after receiving an unfavourable award on jurisdiction decided as a preliminary issue; and

(b) a partially participating respondent, who boycotts the arbitral process after receiving an unfavourable award on jurisdiction decided as a preliminary issue; and

(c) a fully non-participating respondent, who does not participate in the tribunal’s determination of jurisdiction as a preliminary issue.

For the first two categories, Astro CA has indicated an inclination towards precluding the respondent from raising jurisdictional objections at the setting aside stage. If one had to support this position, one could formulate a waiver argument along the lines of Article 4 of the Model Law, namely, by electing to participate in the arbitration – whether fully or partially – without invoking a curial challenge under Article 16(3), that respondent has waived its rights to set aside any eventual award on jurisdictional grounds. This would have a similar effect as section 73(2) of the English Arbitration Act.

For the third category, as a matter of principle, these respondents ought to be no worse off than a non-participating respondent in an arbitration where the tribunal decides the issue of jurisdiction alongside the merits. Since it currently appears the latter has unfettered rights to set aside or resist enforcement of any eventual award on jurisdictional grounds, the third category of respondents should enjoy the same unfettered rights. This would have a similar effect as section 72 of the English Arbitration Act.