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# CLIENT UPDATE
# 2016 FEBRUARY

**INTERNATIONAL ARBITRATION, CONSTRUCTION & PROJECTS**

# Developments in International Arbitration, Construction & Projects in 2015

This Client Update summarises some of the notable developments in Singapore case law in 2015 in the fields of International Arbitration, Construction & Projects.

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## International Arbitration

### Recording Arbitration Agreements in Writing

It is commonly understood that an arbitration agreement has certain formalities, such as the requirement of being in writing. However, recent amendments have extended what it means for an arbitration agreement to be 'in writing'. The scope of this provision was examined in the recent case of *AQZ v ARA* [2015] SGHC 49.

In Singapore, the requirement for arbitration agreements to be in writing is contained in the International Arbitration Act ("**IAA**"). Section 2A(4) of the IAA also states that an arbitration agreement is in writing if "*its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means.*"

In this case, there was an oral agreement which imported an arbitration agreement from a separate written contract. Even though the contract was oral and not in writing, the High Court accepted the arbitration agreement as valid because it had been recorded 'in writing' in the separate written contract, and in a written draft of the contract (albeit an unsigned draft).

### The Arbitrability of Minority Oppression Actions

Certain questions regarding the interaction of international arbitration with the court system remain at large, particularly where the two regimes overlap. In the recent case of *Tomolugen Holdings Limited v Silica Investors Limited* [2015] SGCA 57, the Singapore Court of Appeal shed some light on the threshold for a stay of court proceedings in favour of arbitration, and whether minority oppression actions are arbitrable at all.

The Plaintiff in this case had brought an action for minority oppression against the Defendants. In turn, the Defendants sought a stay of proceedings under the IAA.

The Court of Appeal clarified that, in a stay application, a court need only be satisfied that there is a *prima facie* case that:

(i) There is a valid arbitration agreement;

(ii) The dispute falls within the scope of the arbitration agreement; and

(iii) The arbitration agreement is not null and void, inoperative or incapable of being performed.

The Court also clarified that minority oppression disputes are in fact arbitrable. Such disputes generally do not engage public policy considerations, nor does the relevant legislation suggest that the subject matter is unsuitable for arbitration.

The main Defendant was successfully represented by Sim Kwan Kiat, Avinash Pradhan and Chong Kah Kheng of Rajah & Tann Singapore LLP.

### Court of Appeal Overturns Decision to Set Aside Arbitral Award

In *AKN v ALC* [2015] SGCA 18, the Appellant had obtained an award in its favour before an arbitral tribunal. The Respondent sought to challenge the award and, before the High Court, managed to get the award set aside in its entirety on the grounds of breach of natural justice, as well as acting in excess of jurisdiction on the part of the tribunal.

However, the Court of Appeal overturned the High Court's decision, effectively reinstating the award, with only parts of the award being set aside. The Court of Appeal found that the High Court had, on certain issues, engaged with the merits of the underlying dispute rather than limiting its inquiry to whether there was a breach of natural justice. Further, where there were in fact breaches of natural

justice, the Court of Appeal found that only the directly related parts of the award should be set aside, and not the entire award.

The judgment reaffirms the judicial policy of minimum curial intervention in arbitral proceedings and the Singapore courts' continued refusal to interfere with the merits of an award. Furthermore, the Court of Appeal highlighted the distinction between:

(i) a situation where the arbitral tribunal misunderstood a party's argument and therefore failed to appreciate its merits (which is a mere error of law not amounting to a breach of natural justice); and

(ii) a situation where the arbitral tribunal failed to even consider an important pleaded issue or argument, and therefore did not apply its mind at all to the dispute (or an important part thereof) before it (which would be a breach of the *audi alteram partem* rule justifying a setting-aside).

The Appellant was successfully represented by Andre Yeap S.C., Adrian Wong, Jansen Chow, and Ang Leong How of Rajah & Tann Singapore LLP.

## Setting Aside and Consequential Orders

The Court of Appeal subsequently had to consider issues of costs and consequential orders arising from the above decision in *AKN v ALC* [2015] SGCA 63. The Court examined the orders that it was entitled to make after the setting aside of an arbitral award, in particular, whether it could refer matters back to the same or a new tribunal. The Court also discussed the effects of a setting aside order on the state of the arbitration, the arbitration agreement, and subsequent proceedings.

In this judgment, the Court clarified that it has no power to refer matters to arbitration before a new tribunal or the same tribunal after having set aside an arbitral award. However, where the award has not been set aside, the Court has the limited power under Article 34(4) of the Model Law to remit an award to the same tribunal in certain circumstances where it considers it possible to avoid setting aside an award.

The Court also held that the partial setting aside of the award did not revive the arbitration with respect to the impinged issues. In holding that a party would need to commence fresh arbitration proceedings after an award has been set aside, the Court highlighted possible limitations, such as limitation defences, attempts to re-appoint tribunal members, and issues of *res judicata*.

## The Difficulty in Proving Breach of Natural Justice

In the High Court case of *Coal & Oil Co LLC v GHCL Ltd* [2015] SGHC 65, the Court observed the trend of parties seeking to set aside arbitral awards for alleged breach(es) of natural justice, and looked back on instances where such challenges have succeeded or failed. The Court also reiterated that it takes a serious view of such allegations, and that it would not easily find that such a breach has taken place.

The case involved an application to set aside an arbitral award, in part based on the alleged breach of natural justice. The applicant claimed that the Tribunal had failed to declare the proceedings closed before issuing the award, and that the award was only issued 19 months after the closing submissions. However, the Court held that this did not constitute a breach of natural justice, nor did it warrant setting aside the award.

While procedural irregularities may arise in the course of arbitration, it is important to note that they do not often provide sufficient grounds to set aside an award.

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## Construction & Projects

### Limits on Regularity of Payment Claims

The Building and Construction Industry Security of Payment Act ("**SOPA**") was introduced to facilitate the efficient recovery of payments in a sector where cash flow is vital to the survival of construction projects. However, the SOPA has generated its fair share of litigation, as parties have brought before the courts disputes over the operation of its mechanisms. In *Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2015] SGHC 279, the High Court sought to clarify the operation of payment claims and the frequency at which they can be issued.

The SOPA allows contractors to make payment claims throughout the course of a project. Each payment claim will request for payment in respect of work done during a particular period (the "**reference period**"). Ordinarily, the contract between the parties will state that the contractor may serve payment claims at certain intervals (e.g. once a month, or by a certain date every month) (the "**payment claim period**").

The High Court here clarified that:

(i) There can only be one payment claim served in respect of a progress payment.

(ii) Unless otherwise stated in the contract, a contractor is not obliged to make a payment claim during each payment period; it can hold over claims till a subsequent time.

(iii) In each payment claim period, the contractor can only make a maximum of one payment claim, even if the payment claims are for different claim reference periods. Contractors should not be allowed to abuse the system by holding over payment claims and serving multiple payment claims all at once.

(iv) However, if the contractor has indeed held over certain payment claims, it can serve one payment claim in a later payment claim period specifying the enlarged reference period. Therefore, the contractor can serve one payment claim in April specifying that it is for work done in January, February and March (provided this is not barred by the contract).

### Adjudication Applications for SOPA Payment Claims

The operation of the SOPA payment claim system also came into question in *Newcon Builders Pte Ltd v Sino New Steel Pte Ltd* [2015] SGHC 226. The SOPA allows for disputed payment claims to be submitted for adjudication. Here, the High Court considered when an application for adjudication should be made following a payment claim, and the effect of a failure to comply with the timeline provided in the SOPA.

(i) **Payment claim** – Payment claims are to be served at such time as specified in the contract. Where the contract does not specify, payment claims must be served by the last day of each month.

(ii) **Payment response** – Payment responses are to be provided by such time as specified in the contract, or within 21 days after the service of the payment claim, whichever is earlier. Where the contract does not specify, payment responses must be provided within 7 days after the service of the payment claim.

(iii) **Dispute settlement period** – There is a mandatory dispute settlement period of 7 days after the date on which the payment response is to be provided. During this period, no adjudication application may be made.

(iv) **Adjudication application** – If there has been no settlement or payment response after the dispute settlement period, the claimant may make an adjudication application in

relation to the payment claim. However, the adjudication application must be made within 7 days after the entitlement to make the adjudication application first arises.

The main issue of this case was whether an adjudication application may be made during the dispute settlement period. The Court held that such an application would be premature and thus invalid. The Court would then be entitled to set aside the resulting adjudication determination.

## Setting Aside SOPA Determinations

Where a SOPA payment claim has been submitted for adjudication, the Court maintains the jurisdiction to set aside the adjudication determination in certain situations. In *Quanta Industries Pte Ltd v Strategic Construction Pte Ltd* [2015] SGHC 2, the High Court had to deal with two interesting questions involving the role of the claimant and the respondent in a SOPA adjudication. First, is the adjudicator allowed to determine that the claimant should pay the respondent? Second, is the claimant allowed to file a setting aside application, or is it only the respondent who may do so?

The Court held that an adjudicator is only entitled to award payment from the respondent to the claimant, and not the other way around. By ordering the claimant to make payment, the adjudicator had acted outside his jurisdiction, and the determination would be set aside.

The Court also found that any party to the adjudication (i.e. both claimant and respondent) is entitled to file a setting aside application.

## Injunction to Restrain Call on Performance Bond on Ground of Unconscionability

In *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] 1 SLR 987, the High Court found *inter alia* that a clause in a building contract, which stipulated that the contractor was not (execpt in the case of fraud) entitled to restrain a call by the developer on a performance bond on any ground, including the ground of unconscionability, was void and unenforceable because it was contrary to public policy as an ouster of the jurisdiction of the court.

This aspect of the High Court decision has now been overturned on appeal. In *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another and another appeal and another matter* [2015] SGCA 24, the Singapore Court of Appeal upheld the enforceability of the clause in question. The Court reaffirmed that it will rarely override the contractual rights of the parties in favour of public policy, unless the clause in its true nature purported to deny a party's access to the court, as compared to a clause which only sought to limit or exclude the rights and remedies ordinarily available to the parties.

The Court acknowledged that the development of the doctrine of unconscionability in the context of calls on performance bonds centred on considerations of policy. However, that particular conception of policy is quite different from the concept of public policy which underpins the basis upon which contracts seeking to oust the jurisdiction of the court are held to be void and unenforceable as being contrary to public policy.

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***ASEAN Economic Community Portal***

With the launch of the ASEAN Economic Community ("**AEC**") in December 2015, businesses looking to tap the opportunities presented by the integrated markets of the AEC can now get help a click away. Rajah & Tann Asia, United Overseas Bank and RSM Chio Lim Stone Forest, have teamed up to launch "Business in ASEAN", a portal that provides companies with a single platform that helps businesses navigate the complexities of setting up operations in ASEAN.

By tapping into the professional knowledge and resources of the three organisations through this portal, small- and medium-sized enterprises across the 10-member economic grouping can equip themselves with the tools and know-how to navigate ASEAN's business landscape. Of particular interest to businesses is the "Ask a Question" feature of the portal which enables companies to pose questions to the three organisations which have an extensive network in the region. The portal can be accessed at http://www.businessinasean.com/.

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