CLIFFORD CHANCE

Cavenagh Law LLP

SINGAPORE CONTENTIOUS COMMENTARY: APRIL – JUNE 2018

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Welcome to the first issue of Singapore contentious commentary. In this round-up, we look at important or interesting decisions of the Singapore courts and regulators issued in the second quarter of 2018 (April to June).

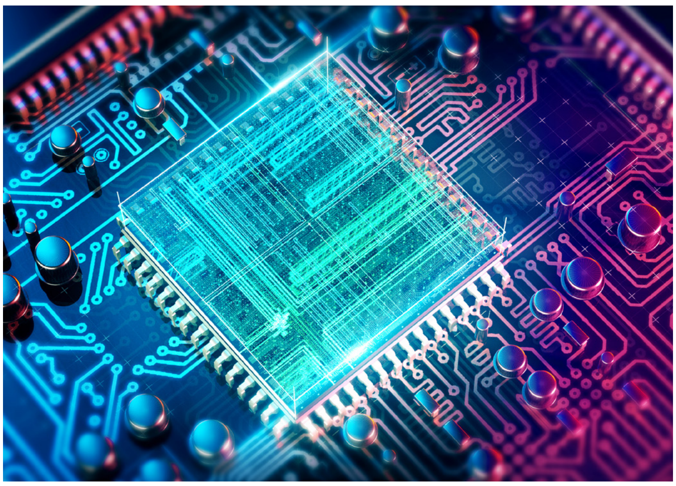
During this period, the courts have grappled with a wide range of issues including directors' liabilities, questions of civil procedure, decisions with consequences for the shipping and construction industries, as well as the hot topic of data privacy and confidentiality. There were also a number of interesting developments in international arbitration and the first foreign judgment enforced under the Hague Convention, reflecting Singapore's status as a global hub for dispute resolution.

Directors' liabilities

No personal liability where directors not in breach of personal legal duties to company

The Court of Appeal has clarified the circumstances in which liability may be imposed on directors in respect of contractual breaches by the company.

The dispute in *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] SGCA 17 arose out of a contract for the supply of microchips for use in an electronic identification card project in Indonesia. The buyer commenced proceedings, claiming that the microchips supplied were not compatible for use with the electronic identification cards. The High Court dismissed the buyer's claims, found that the buyer was in breach of the supply contract for failing to pay for and accept delivery of the chips, and that the buyer and its directors were liable for the tort of conspiracy by attempting to unlawfully extract the buyer from its contractual obligations under the supply contract. The Court of Appeal dismissed the buyer's appeal in relation to the contractual claims, but allowed the appeal against the finding of conspiracy by unlawful means.



Key issues covered in this round-up

- Directors' liability for contractual breaches of their company
- Data privacy in mobile apps
- Information requests in cross-border tax investigations
- Conditions for service out of jurisdiction
- Bank's contractual rights to reject payment
- Legal principles relating to the quality of confidentiality
- Important cases on enforcement and setting aside applications in international arbitration
- Role of an adjudicator in construction disputes
- Registration of liens in the shipping industry
- Equitable considerations when granting Mareva relief
- Construction of patents and relief against groundless infringement proceedings
- First foreign judgment enforced in Singapore under the Hague Convention
- Criteria for admission of further evidence on appeal

The Court of Appeal referred to the principle set out in the English authority *Said v Butt* [1920] 2 KB 497, which provides that when a director acts *bona fide* within the scope of his authority, he is immune from tortious liability for procuring his company's breach of contract. The precise scope of this principle was, however, uncertain. The Court of Appeal elucidated that "*a director would ordinarily be immune from tortious liability for authorising or procuring his company's breach of contract in his capacity as a director, unless his decision is made in breach of any of his personal legal duties to the company*". The onus is on the plaintiff to prove that the defendant-directors' acts were in breach of their personal legal duties to the company (whether fiduciary or contractual duties). Importantly, the applicability of the principle focuses on the director's conduct and intention in relation to his duties towards his company, and not towards the third party.

"(…) we must be mindful of the need to ensure that directors are free to make decisions on behalf of the company without fear of attracting unwarranted legal actions against themselves."
PT Sandipala, para 5

While the directors in this case authorised and directed the buyer's breach of the supply contract, there was no evidence that they had acted in breach of their personal legal duties to the buyer company. Even though the directors unsuccessfully attempted to misrepresent the terms of the supply contract and acted in bad faith towards the supplier, they were entitled to the protection of the *Said v Butt principle.* Hence, the directors were not personally liable for the breach.

Data privacy health goals

Guidance for designing privacy policy statements in mobile apps

Guarding the privacy of personal data collected through mobile apps came under scrutiny in *Actxa Pte. Ltd.* [2018] SGPDPC 5. The Commissioner for Personal Data Protection found that Actxa was in breach of sections 13 (Consent Obligation) and 18 (Purpose Limitation Obligation) of the Personal Data Protection Act 2012 (PDPA) and directed the company to pay a financial penalty of S$6,000.

Actxa is a seller of smart weighing scales and wearable fitness trackers which collect health-related personal data. A user can download and install an app (Actxa App), which reflects the data collected by the devices. The data is automatically collected by Actxa's servers through the Actxa App.

Actxa sought to rely on its website privacy policy to notify its customers of the purposes, and to obtain the customers' consent, for the collection of personal data. However, this policy did not contain any reference to the App or the fitness devices. Although this privacy policy was shown to Actxa App users prior to their use of the app, the Commissioner held that a privacy policy that has no relevance to the Actxa App cannot amount to proper notification for the Actxa App users and consent (if any) obtained in this manner is not valid.

Having considered the UK and Hong Kong guidelines applicable to mobile app developers, the Commissioner expressed the view that a privacy policy for a mobile app should, amongst other things:

- aim to enhance a user's understanding as to why certain personal data needs to be collected, accessed or shared;

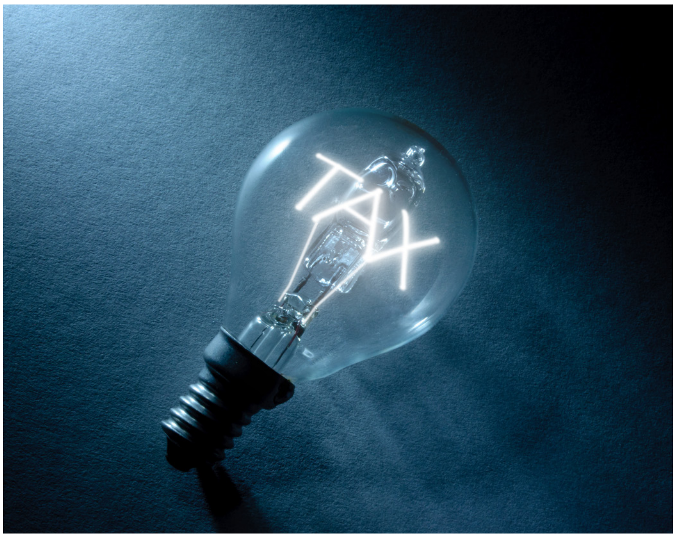
- avoid technical terms and elusive language, be easily readable and understandable, and be of an appropriate length;
- be prominently located on the app;
- consider using icons and/or just-in-time notifications to obtain specific consent dynamically; and
- be reviewed carefully to ensure relevance and accuracy if a standard template is used.

Cross-border tax cooperation

Duties of Singapore Comptroller in cross-border information requests clarified

In *AXY and others v Comptroller of Income Tax* [2018] SGCA 23, the Court of Appeal rejected a bid by a Korean family challenging the Singapore Comptroller of Income Tax's move to give the National Tax Service of the Republic of Korea information involving at least US$250 million in Singapore bank accounts. The South Korean authorities are investigating suspected tax evasion on the investment income of 51 companies created by the father of the family and wanted the Singapore branches of three banks to disclose information such as bank statements and certificates of deposit.

The Court of Appeal examined the scope of the Comptroller's role and duties when assessing Exchange of Information (EOI) requests from foreign tax authorities. The Court confirmed that the EOI standard for determining whether the requested information is "foreseeably relevant" for carrying out the provisions of the tax treaty concerned or enforcing the domestic tax laws of the Requesting State (as laid down in *ABU v Comptroller of Income Tax* [2015] 2 SLR 420) remained applicable,



notwithstanding the 2013 amendments to the Income Tax Act which transferred the substantive decision-making authority on EOI requests from the court to the Comptroller.

In assessing EOI requests under the present EOI regime, the Comptroller (like the court before the 2013 Amendments) only has to satisfy himself of the validity of the request *on its face*; he has no duty to hold an independent investigation or a mini-trial to test the correctness of statements made by a foreign tax authority. That said, the Comptroller cannot act uncritically or unthinkingly in processing an EOI request. Instead, the Comptroller must strike the balance between the competing interests of facilitating the exchange of tax information "*to the widest possible extent*" on the one hand and safeguarding the confidentiality of taxpayers' information on the other hand.

Two cases on service out

Two recent tort cases have examined the circumstances in which a plaintiff is entitled to serve out of the jurisdiction.

Leave to serve out refused despite alleged failure to receive payments into a Singapore bank account

In *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 Nippon sued Trans-Pacific for conversion and detinue, and sued Pertamina, Trans-Pacific's largest shareholder, for conspiracy – in relation to the continued use of catalysts without consent. As both Trans-Pacific and Pertamina are located in Indonesia, Nippon sought and obtained an *ex parte* order granting it leave to serve out of jurisdiction. Pertamina challenged the jurisdiction of the Singapore court.

Nippon argued that service out should be permitted under O11 r(1)(f)(ii) of the Rules of Court, which provides that service out of Singapore is permissible with leave if there is "*damage suffered in Singapore*". This was for three reasons: Nippon was a Singapore entity, it had a bank account in Singapore, and all payments made to it by Trans-Pacific were to be made to the Singapore bank account. Nippon relied on *Metall Und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, a decision of the English Court of Appeal on O11 r(1)(f). In that case there was "*damage suffered in*" England because the claimant had not received a payment which should have been made in England, had not received warrants which should have been delivered in England, and had suffered the detrimental closing out of its accounts in England. In response, Pertamina relied on *Alfred Dunhill Ltd v Diffusion Internationale de Maroquinerie de Prestige SARL* [2002] 1 All ER (Comm) 950, a decision of the English High Court on article 5(3) of the Brussels Convention, to support its case that it is insufficient to show that a plaintiff has a bank account within the jurisdiction.

The Court preferred Pertamina's argument on the basis that Nippon "*ha[d] not explained in any of its affidavits how it ha[d] suffered damage*" in Singapore. One might have expected the court to have drawn some distinction between *Metall Und Rohstoff* and *Alfred Dunhill* to make clear where the line was, but it declined to do so. From a policy perspective the decision is also slightly surprising, since a more expansive jurisdiction on *Metall Und Rohstoff* lines would be useful for a court seeking to attract international business.

In the alternative, Nippon argued that service out should be permitted because there was a "*cause of action arising in Singapore*" (under O11 r (1)(p)). In respect of the claims in conversion and detinue, the court held that the essential elements of those torts were the appropriation and retention of property, which had clearly occurred in Indonesia. In respect of the claim in conspiracy, the Court noted that the relevant factors were the "*identity, importance and location of the conspirators, the locations where any agreements or combinations took place, the nature and places of the concerted acts or means, the location of the plaintiff and the places where the plaintiff suffered losses*". Of these, the judge believed that the location of the "*agreement forming the alleged conspiracy*" was the most important. While it was not expressly cited, this accords with the position of the UK Supreme Court in *JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19, [2018] 2 WLR 1125 where it said that (for the purposes of article 5(3) of the Lugano Convention) the place of the event that causes the damage is the place where the conspiratorial agreement is made.

Leave to serve out granted where damage suffered and cause of action arose in Singapore

In *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123, Skaugen had bought six marine engines from MAN, incorporated in Germany. Skaugen alleged that MAN had misrepresented the engines' fuel consumption, and sought damages. MAN challenged the jurisdiction of the Singapore court.

Skaugen argued that service out should be permitted because the tort was "*constituted… by an act or omission in Singapore*" (under O11 r(1)(f)(i)). Before the assistant registrar, Skaugen had said that the acts in question were acts of reliance that took place in Singapore. MAN had submitted that, for the purposes of the rule, the only relevant acts were acts of the tortfeasor (i.e., acts of the person making the representations, not of the person relying on them). The assistant registrar had agreed with MAN, and the judge thought that the assistant registrar was right. Before the judge, however, Skaugen adopted a new argument, relying on MAN's omission to rectify the misrepresentation in Singapore. This argument failed because an omission happens where the person fails to act, not where the consequences are felt.

In the alternative, Skaugen argued that service out should be permitted because there was "*damage suffered in Singapore*" (under O11 r (1)(f)(ii)). The court accepted this argument. Skaugen was suing on the basis of assignments of causes of action from Singapore companies which had owned the ships. The Singapore companies had suffered losses in the form of increased fuel costs (and possibly also in the form of decreases in the ships' capital value). Since the companies were Singapore companies, they had suffered these losses in Singapore. The reasoning here (unlike in *Nippon*) is consistent with *Metall und Rohstoff*.

In the further alternative, Skaugen argued that service out should be permitted because there was a "*cause of action arising in Singapore*" (under O 11 r (1)(p)). The court accepted this argument, once again on the basis that the Singapore companies had suffered losses in the form of increased fuel costs, and so the "*cause of complaint*" occurred in Singapore.

"As the Court of Appeal indicated in Accent Delight, a relevant factor in the forum non conveniens analysis is a possible transfer to the SICC."
IM Skaugen, para 213

The Court further held that Singapore is clearly an appropriate forum for the trial, because the multi-jurisdictional nature of the dispute made it ripe for a possible transfer to the Singapore International Commercial Court.

Bank entitled not to accept payment

A bank does not ordinarily owe fiduciary duties to its customer

In *AL Shams Global Ltd v BNP Paribas* [2018] SGHC 143, AL Shams, a BVI company, sued BNP Paribas Wealth Management in respect of actions taken by the bank in refusing to accept a payment into its account with the bank. The payment in question related to the sale and purchase of the shares in a Zimbabwe company. After requesting various documents and information in respect of the payment, the bank informed AL Shams that due to internal policy reasons, the bank was unable to process the incoming funds transfer and returned the payment. AL Shams sought various declarations, including that

the bank was in breach of contract or a duty of care and/or a fiduciary duty by refusing to accept the payment and/or not giving any reason for the refusal.

Dismissing the AL Shams' application, the Court found that the bank was well within its contractual rights not to accept the payment, given that the terms and conditions governing AL Shams' account with the bank provided that the bank shall be entitled "*at its sole discretion*" to refuse to accept any deposit for any reason and there was nothing in the evidence which suggested that the bank had exercised its discretion in an arbitrary, capricious or perverse manner, or in bad faith.

Nor could the action of the bank be said to give rise to any issue of negligence. The Court further reiterated the well-established principle that a bank does not ordinarily owe fiduciary duties to its customer and rejected AL Shams' claim based on such ground. In the absence of any contractual obligation, the bank was not obliged to provide reasons for refusing to accept the payment and in any event, there was no factual basis for AL Shams to allege that the bank had failed to do so.

Confidentiality revisited

Two recent decisions considered the legal principles relating to the quality of confidentiality.

"Key Customers List" deemed confidential, but no unauthorised use

In *Adinop Co Ltd v Rovithai Ltd and another* [2018] SGHC 129, the Singapore High Court revisited the law on confidentiality agreements and clarified situations amounting to the "unauthorised use" of confidential information.

Adinop and Rovithai were distributors and suppliers of food, beverage and nutritional products in Thailand. Their 20-year relationship came to an end in 2014 when the Rovithai terminated the distribution agreement. Adinop alleged that Rovithai had made unauthorised use of its "Key Customers List" to reach out to its clients after the termination of the distribution agreement.

In determining what constituted confidential information, the Court relied on the three-fold test in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, applied in local decisions such as *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045. Information is confidential where (i) it has the necessary quality of confidentiality; (ii) it was received in circumstances such as to given rise to an obligation of confidentiality; and (iii) there is unauthorised use and detriment.

The Court held that the "Key Customers List" constituted confidential information as it was, in totality, not available in the public domain, affirming the English High Court decision of *Personal Management Solutions Ltd v Brake Bros Ltd* [2014] EWHC 3495. The list was a product of work, time and effort and bore a confidentiality mark – thus having the "*necessary quality of confidentiality*".

However, the Court held that there was no unauthorised use given the "*nature, scope and reason*" for the confidentiality. The Court found that partial usage was insufficient to constitute unauthorised use as the information was only confidential as a whole. Rovithai's use of the clients' names alone was thus insufficient to constitute an unauthorised use of the confidential information, distinguishing the case from earlier decisions in *Tang Siew Choy v Certact Pte Ltd* [1993] 1 SLR(R) 835.

No implied duty of confidentiality in relation to a creditor-debtor relationship

In *International Financial Services (S) Pte Ltd and another v Old Mutual International Isle of Man Ltd Singapore Branch and another* [2018] SGHC 127, the High Court discussed whether it is possible for a duty of confidentiality to be implied in law by virtue of the parties' relationship of creditor-debtor with respect to information relating to (i) the existence of a creditor-debtor relationship between parties; (ii) the default of the debtor on the guarantee and loan; and (iii) the fact that the creditor was in the process of recovering the loan.

Old Mutual had extended a loan to IFS and its director, with guarantees to Old Mutual by IFS and its director's wife. The dispute arose when IFS alleged that Old Mutual had disclosed confidential information relating to the loan and guarantees to the employees of IFS and commenced an action against the defendants for breach of confidence. The defendants applied to strike out the Statement of Claim on the basis that the information said to be confidential was not protected by a duty of confidence. On appeal, the Court allowed the application, and ordered for the claim to be struck out.

As a preliminary point, the Court noted that the contracts did not contain any express term regarding confidentiality, and that Old Mutual, as an entity beyond the purview of the Banking Act, does not have a statutory obligation of confidentiality relating to a loan. Therefore, whether there is an implied duty of confidentiality depends on whether it is reasonable to imply such a duty. The Court held that in this case, it is unreasonable to regard the information as confidential information as the risk of such information becoming public knowledge is a risk which borrowers in the market commonly bear and disclosure of non-payment by a creditor is part and parcel of the creditor's pursuit of any remedy.

In addition, it is also unreasonable to imply a duty of confidentiality into the contracts simply by virtue of the parties' creditor-debtor or creditor-guarantor relationship, which is unlike an agent/bank-depositor relationship. This is because when financial agents keep deposits, there is a fiduciary relationship in relation to the management of the account and naturally a duty to keep the financial information confidential, which does not exist in a creditor-debtor relationship.

Since there is no reasonable expectation that information will be kept confidential in the context of creditor-debtor relationship, the onus is for concerned parties to negotiate express confidentiality provisions into their contracts.

Arbitration in the spotlight

A number of decisions added to the ever-increasing body of Singapore case-law on applications to set aside and resist enforcement of arbitral awards.

"Attorney-eyes only" order not a breach of natural justice

In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2018] SGHC 101, the High Court dismissed an application to set aside an award made in a Singapore seated arbitration under the 1998 ICC Rules which involved an "attorney-eyes only" (AEO) disclosure order. The Court also dismissed challenges alleging bad-faith conduct and use of guerrilla tactics during the arbitration proceedings, and failure of the Tribunal to investigate corruption allegations.

During the arbitration (which, pursuant to the arbitration agreement, had to be conducted in highly expedited fashion), Jaguar refused to disclose certain documents containing

sensitive information to CMNC which led the tribunal to make an AEO order that also permitted CMNC to apply for disclosure to specified CMNC employees on confidential terms for seeking instruction to counsel. While recognising that AEO orders are rare in international arbitration, the Court held that the AEO order did not cause a material breach of natural justice or interfere with the parties' agreed arbitral procedure. The Tribunal was empowered to issue an AEO under the 1998 ICC Rules as a measure of protecting confidential information, and in furtherance of its broad case management powers.

As regards CMNC's allegations of Jaguar resorting to "guerrilla tactics", the Court held that such tactics would lead to setting aside an award only if those constitute a breach of public policy or lead to the award being induced by fraud or corruption. The guerrilla tactics alleged in this case did not fall under either of the above two categories.

In this context, the Court noted that "extreme" guerrilla tactics (e.g. "severe criminal acts and blatant use of state authority") or "common" guerrilla tactics (e.g. bribery or harassment of arbitrators and witnesses) may lead to invalidation of an award. That is not the case for "rough riding" tactics (e.g. withholding evidence and ambushing the opposing parties with evidence) but which nonetheless "[violate] *the very spirit of international arbitration*".

As for CMNC's claim that the tribunal had failed to investigate corruption allegations, the Court noted that although the Tribunal had a duty to investigate corruption allegations in appropriate cases, no such duty arose in this case, since the corruption allegations had no bearing on the issues in the arbitration.

No choice of active remedies for party challenging a ruling on jurisdiction

In *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited* [2018] SGHC 78, Rakna Arakshaka Lanka Ltd (RALL), the respondent in the arbitration sought to set aside a SIAC award on the basis that a MOU entered into between the parties had terminated the reference to arbitration.

The High Court ruled that based on the facts, the MOU did not terminate the reference to arbitration. However, regardless of the factual analysis, RALL was precluded from challenging the jurisdiction of the Tribunal in a setting aside application because it had failed to raise the matter with the Court within 30 days of having received notice of the Tribunal's ruling on its own jurisdiction as a preliminary issue.

The Court held that section 10(3) of the International Arbitration Act and Art 16(3) of the Model Law placed a mandatory obligation on a party to place its jurisdictional objection before the High Court within 30 days of receiving notice of the Tribunal's ruling (despite the provisions using the word "*may*" instead of "*shall*"). The Court went on to state that a party would not be barred from raising the same jurisdictional challenge when defending an application made by the other party for enforcement of the award.

In essence, the Court stated that a party wishing to challenge the Tribunal's decision as to its own jurisdiction has a choice between pursuing the "active" remedy under Art 16(3) of the Model Law and the "passive" remedy of resisting enforcement later on. However, a party is not at liberty to choose between the two "active" remedies i.e. appealing a Tribunal's ruling on jurisdiction under Art 16(3) and applying to set aside the award under Art 34(2)(a)(iii) of the Model Law.

The decision underscores the need for parties to adhere to the 30-day timeline for appealing any preliminary decision of the Tribunal on its own jurisdiction. Failure to do so could have a preclusive effect on raising the matter in subsequent setting aside proceedings.

Court elaborates on factors to be considered in application to adjourn enforcement of foreign award

Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd [2018] SGHC 132 was the first time the Courts have considered an application based on section 31(5) of the IAA. This provides that the Court may adjourn proceedings for enforcement of a foreign award pending the determination of an application to set aside the award at the seat.

The Denmark-seated arbitration arose out of two sale and purchase agreements for certain propellers and engines. A final award was issued in favour of Man Diesel who then sought to enforce the award in Singapore by obtaining an *ex parte* Leave Order.

IM Skaugen applied under section 31(5) of the IAA to adjourn the enforcement of the final award pending the determination of its application to set aside the final award in the Danish courts. Man Diesel made a cross-application for IM Skaugen to furnish security if the court found that a stay was appropriate.

In determining whether or not to grant the adjournment, the Court took guidance from the factors considered in the English authorities dealing with the equivalent provision of the English Arbitration Act 1996, namely:

(a) whether the application to set-aside before the seat court is *bona fide* and not simply a delay tactic;

(b) the enforcing court should consider the length of adjournment, the likely consequences as a result of adjournment and any resulting prejudice; and

(c) there is no comprehensive list of factors and they depend on the circumstances of each case.

The Court also observed that the issues of adjournment and security in the English authorities tend to be considered together and are interrelated. Considering the merits of IM Skaugen's application to set-aside the award in the seat-court, the Court held that the application was not a strong one as most of the issues in the application had been dealt with by the Tribunal in its final award. As such, no adjournment was granted and the *ex parte* Leave Order was affirmed.

The Court also noted that, as a matter of procedure, after a judgment on a foreign award is affirmed, the enforcing court has no power to adjourn under section 31(5) of the IAA. Once a judgment is entered, it should be treated as any other judgment rendered by the court and the other party seeking to stay the judgement would have to turn to the procedural principles of a stay of execution of a civil judgment.

Enforcement of US$270 million SIAC award in Lao slot club dispute – despite finding of "wrong seat"

In *Sanum Investments Limited v ST Group Co, Ltd and ors* [2018] SGHC 141, the High Court allowed enforcement of a US$270 million SIAC award in favour of Sanum against ST Group, despite finding that the Tribunal had incorrectly determined the seat of arbitration.

The ST Group applied for refusal of enforcement of the award, including on the basis that the composition of the Tribunal and the seat of the arbitration were not in accordance with the agreement of the parties.

The arbitration agreement was a convoluted "multi-tiered" arbitration clause which required the parties to exhaust various pre-requisite procedures before commencing arbitration. Parties who were dissatisfied with the results of those procedures were entitled to call for international arbitration "*using an internationally recognized mediation/arbitration company in Macau, SAR PRC.*" The Court considered whether the arbitration agreement could accommodate a Singapore-seated arbitration under the SIAC Rules.

The Court's preferred construction of the arbitration agreement was that the choice of arbitral institution was left to the party who was dissatisfied with the result of the pre-arbitral procedures, so long as the institution chosen was "*internationally recognized*". SIAC was undoubtedly such an internationally recognized institution. However, the clause clearly provided for a Macau-seated arbitration. The Tribunal was therefore wrong to have held that the arbitral seat was Singapore. Furthermore, the Court found that the appointment of a three-member tribunal was incorrect as it was made on the basis of a participation agreement, which was not the source of the dispute in this case.

In declining to exercise its discretion to refuse enforcement of the award, the Court rejected the ST Group's argument that the Tribunal's error as to seat obviated the need to show prejudice. While recognising that the parties' chosen seat is an important aspect of an arbitration, the Court found the choice of a seat for arbitration was less critical here since the application was not to set aside the award but to refuse enforcement. Enforcement could be brought in any jurisdiction (in contrast to setting-aside applications which can only be brought before the curial court). The ST Group had not shown how the law of the incorrect seat had impacted the arbitral procedure adopted by the Tribunal or any material prejudice.

Adjudication in construction disputes

Ambit of an adjudicator's duty explained

In an important case for the construction industry, *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [[2018] SGCA 19, the Court of Appeal examined the remit of an adjudicator's task in adjudicating a payment claim dispute under the Building and Construction Industry Security of Payment Act (the Act).

In particular, the decision focussed on an interpretation of s17(3) of the Act, which provides that in determining an adjudication, an adjudicator "*shall only have regard*" to certain matters identified in a list set out under the provision, e.g. the provisions of the Act, the provisions of the contract and so on.

The dispute arose in relation to a payment claim issued by OGSP to Comfort, in response to which Comfort failed to file a payment response. In accordance with s15(3) of the Act, the adjudicator was precluded from considering reasons for withholding payment that were not in the materials before him (i.e., not in a duly filed payment response). The adjudicator found in favour of OGSP.

The High Court upheld the adjudicator's decision and Comfort appealed.

The Court of Appeal dismissed the appeal, finding that s17(3) of the Act was *both* restrictive and prescriptive. The Court held that s17(3) required the adjudicator to have regard to all matters prescribed therein. The first of these referred to having regard to the provisions of the Act. This was held to be prescriptive on the basis that the intention could not have been to allow an adjudicator to decide whether or not to have regard to the provisions of the Act. As there was no reason for the other matters listed in s17(3) to be treated differently, the Court found s17(3) as a whole to be prescriptive.

"(…) It is an issue which concerns the heart of the adjudication scheme established by the Act. After all, the issue concerns the proper role of an adjudicator in

determining the merits of a payment claim, ie, what the adjudicator must consider in arriving at his determination." (*Comfort Management*, para 17)

The Court also laid down the standard to which an adjudicator was to conduct an examination of a claim under s17(3). It held that to discharge his general and independent duty to adjudicate, an adjudicator must proactively satisfy himself as to whether the Claimant has established a *prima facie* case that the construction work which is the subject of the payment has been completed and if so, the value of that work. In doing so, he must consider all the matters stated in s17(3), in so far as they are properly before him. This duty must be discharged even if he is precluded from considering reasons for withholding of payment where no payment response has been filed.

The Court of Appeal further held that for an adjudication determination to be set aside, there must have been a breach of a mandatory provision of the Act. s17(3) was held to be mandatory and the test for whether it had been breached was the existence of a patent error. The Court found that such a patent error must be an error that is obvious, manifest or otherwise easily recognisable and is an error in the material before the adjudicator. An error in the adjudicator's decision making would not constitute a patent error.

Registration of liens: Inconvenient but necessary

Shipowners required to register liens on sub-freights

The Court of Appeal made waves in the local shipping industry in *Diablo Fortune Inc v Duncan, Cameron Lindsay* [2018] SGCA 26 when it held that liens on sub-freights should be characterised as floating charges that are registrable under s131(3)(g) Companies Act.

Diablo chartered a vessel to SSI under a bareboat charter which provided that Diablo would "*have a lien upon all cargoes, sub-hires and sub-freights belonging or due to*" SSI. SSI then sub-chartered the vessel to V8. After SSI filed a winding-up application, Diablo sought to exercise its lien on the sub-freights due from V8 to SSI. SSI's liquidators argued that Diablo's lien was void for want of registration, succeeding in the High Court and again in the Court of Appeal (on appeal by Diablo).

Diablo argued that the shipowner's lien was a *sui generis* right to intercept the sub-freight before it is paid to the charterer and thus exempt from registration (the "contractual right of interception" theory). However, the Court rejected this approach, as the absence of a direct contractual relationship between the

shipowner and the sub-charterer meant that the right conferred under the lien would be unenforceable for lack of privity.

Instead, the Court favoured the well-settled English position that a lien on sub-freights creates an immediate security interest on the date of the charterparty, and the shipowner has a dormant right to the sub-freights as and when they come into existence (the "floating charge" theory). The shipowner holds no proprietary interest in any particular sub-freights until sums due under the charter go unpaid and the shipowner crystallises the charge by giving notice of the lien. Until that point, the charterer is free to deal with the sub-freights as its own for its own business operations. The Court further held that the holder of a lien on sub-freights enjoys rights that are no different from a floating charge, and that it is not an essential prerequisite of a floating charge that it creates an immediate proprietary interest.

Accordingly, the Court held that any shipowner holding a lien on sub-freights must register the charge, even if the charter is for a short duration or for a single voyage. While the Court acknowledged the commercial inconvenience and impracticability of requiring registration, it deferred to Parliament for legislative reform, noting industry sentiment and the statutory exception for liens on sub-freights in Hong Kong.

Equity of Mareva relief

Collateral or ulterior purpose is sufficient to deny a plaintiff Mareva relief

In *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] SGCA 27, the Court of Appeal held that the presence of a collateral or ulterior purpose in seeking Mareva relief is sufficient to deny a plaintiff such relief even if he has

established the principal requirements for the grant of Mareva relief by: (1) establishing a good arguable case on his claim; and (2) demonstrating a real risk that the defendant will dissipate his assets to frustrate any eventual judgment.

"While the court's jurisdiction to grant Mareva relief is well established (…) the variety of equitable considerations which necessarily feature in any proper assessment of whether such relief should be granted continues to raise questions which probe at the boundaries of the court's discretion to grant it."
JTrust Asia, para 1

JTrust applied *ex parte* for and obtained from the duty judge domestic Mareva injunctions against a Thai Company which it invested in, Group Lease Public Company Limited, its Singapore subsidiary and another Singapore Company owned and controlled by the Chairman of Group Lease Thailand, Cougar Pacific Pte Ltd ("Cougar"). JTrust alleged that the Defendants had conspired to defraud JTrust of its investment in Group Lease Thailand and there was a real risk that the Defendants would dissipate their assets to frustrate the enforcement of an anticipated judgment in JTrust's action.

The injunctions were discharged by the High Court. JTrust appealed the High Court decision.

Upon examination of the facts, the Court of Appeal held that JTrust had shown a good arguable case on its conspiracy action and it was also satisfied that there was a real risk that the defendants would dissipate their assets to frustrate the enforcement of an anticipated judgment in JTrust's action. However, the Court went on to consider whether relief should be denied on the basis of the presence of a collateral or ulterior purpose in seeking Mareva relief. The defendants argued that JTrust's collateral purpose for application for Mareva relief was to bully the Group Lease group of companies into agreeing to a merger.

The Court held that even where the two principal requirements for the grant of Mareva have been met, the presence of a collateral or ulterior purpose in seeking Mareva relief may, in principle, deny a plaintiff such relief. The reason for this lies in the general concept of abuse of process, which pervades the whole law of civil procedure and informs the exercise of the court's procedural powers. The court is to consider whether the plaintiff applying for Mareva relief truly has no genuine interest in obtaining a legal remedy through the underlying action and decide whether, in all the circumstances, his predominant purpose behind the application is properly to be regarded as collateral or ulterior. If so, that would justify denying a plaintiff Mareva relief. Just because the injunction will have an inevitable financial impact on the defendant does not mean that the plaintiff has a predominant collateral purpose to cause that impact.

On the facts, however, it was found that there was no conclusive evidence of ulterior purpose. The Mareva injunctions were reinstated and the injunctions against two of the defendants were expanded to worldwide Mareva injunctions.

Patent construction

Court examines approach to granting relief against groundless threats of infringement proceedings

In *Lee Tat Cheng v Maka GPS Technologies Pte Ltd* [2018] SGCA 18, the Singapore Court of Appeal declined to follow the approach to patent construction adopted by the UK Supreme Court in *Actavis UK Limited v Eli Lilly and Company* [2017] UKSC 48. In reversing the High Court's decision to grant an injunction restraining Lee Tat Cheng from making threats of infringement proceedings, the Court also gave some helpful guidance on applying for relief against groundless threats of patent infringement under s77 of the Patents Act.

Under Singapore law, the approach to determining the scope of protection conferred by a patent remains the purposive construction of the claim in the patent. This approach requires the Court to consider what the words used in the patent would convey to the notional skilled person at the date of the patent application.

By contrast, following the decision in *Actavis*, the UK courts apply the "doctrine of equivalents". Under this doctrine, a patent is infringed if the defendant's product performs substantially the same function in substantially the same way of the invention disclosed in the patent so as to achieve the same results as that invention. This extends the scope of protection beyond the terms of the claims in the patent and is capable of introducing undue uncertainty for third parties. The Court noted that the "doctrine of equivalents" applied in the UK by virtue of the Convention on the Grant of European Patents and that any change in the law in Singapore was a matter for legislation rather than for the courts.

The Court also held that the approach to granting relief under s77 of the Patents Act (which provides the remedy for groundless threats of infringement proceedings) is similar to that under s200 of the Copyright Act as laid down by the Court in *Singsung Pte Ltd v LG 26 Electronics Pte Ltd* [2016] 4 SLR 86 – it does not follow that whenever an allegation of infringement failed, it would necessarily result in relief being granted under either s200 of the Copyright Act or s77 of the Patents Act. In this regard, the Court also observed that an applicant would be unlikely to satisfy the court that he is "aggrieved" by threats of infringement proceedings as required under s77 if there was no evidence that (a) the applicant suffered any loss, (b) it is appropriate for the court to grant a declaration to the effect that the threats were unjustified or (c) it is appropriate to grant an injunction to restrain the continuation of such threats.

This decision confirms that the Singapore courts will pay close attention to the language of patent claims in infringement proceedings and that making such claims requires careful deliberation and drafting. Similarly, a party considering an application for relief under s77 of the Patents Act needs to carefully marshal and consider the evidence that would satisfy the requirements of the provision. If the application is for declaratory or injunctive relief, the applicant would also have to satisfy the court that that it should grant such discretionary relief.

Enforcement of foreign judgments

First Singapore enforcement under the Hague Convention

In *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8, the Court enforced a summary judgment granted by the English High Court against Sixcap Financials, a Singapore registered company. This is the first reported decision involving an application under the Choice of Courts Agreement Act (Cap 39A) (the Act) and new Order 111 of the Rules of Court (Cap 322). The Act was implemented pursuant to Singapore's ratification of the Hague Convention on Choice of Court Agreements, which provides an international framework for the mutual recognition and enforcement of court judgments.

Granting the order for recognition and enforcement of the Judgment, the Court held that Act applied to the application, noting that:

- the UK was a Contracting State under the Convention;
- the application for enforcement of the Judgment was an "*international case*" within the meaning of section 4(2)(a) of the Act;
- there was an "*exclusive choice of court agreement*" within the meaning of section 3(1) of the Act, as the contract underlying Ermgassen's claim contained an exclusive jurisdiction agreement in favour of the English courts.

The Court held that the procedural requirements for recognition and enforcement of a judgment under the Act had been met, and the Court had not "*detected*" any grounds to refuse recognition or enforcement of the Judgment under section 14 or 15 of the Act.

The Hague Convention, which to date has been ratified by all EU Member States (excluding Denmark), Mexico and Singapore, was notably signed by China in September 2017 (although is not yet ratified). As it gains traction, it is expected to form an increasingly important part of the cross-border dispute resolution landscape in the coming years.

Admission of further evidence on appeal

Law on admission of further evidence on appeal clarified

In *BNX v BOE and another appeal* [2018] SGCA 29, the Court of Appeal clarified the conditions for admitting further evidence on appeal to the Court of Appeal.

The dispute arose out of a sale and purchase agreement for the sale of a hotel in Singapore. BNX commenced arbitration proceedings, bringing allegations of fraudulent misrepresentation against BOE. The High Court rejected BNX's application to set aside the arbitral award. BNX sought to adduce further evidence in the appeal arguing that this would have a material bearing on the appeal.

The Court dismissed BNX's application to adduce further evidence, holding that it had not shown that "special grounds" existed as defined by the conditions laid down in the English Authority *Ladd v Marshall* [1954] 1 WLR 1489. These conditions are, in essence: (1) non-availability of the evidence at trial, (2) relevance and materiality of the evidence to the appeal, and (3) credibility of the evidence.

BNX raised two key arguments in an attempt to dispense with the first *Ladd v Marshall* requirement. First, there was fraud on the part of BOE. Second, the further evidence came into existence only after the date of the High Court decision.

The Court explained that the first *Ladd v Marshall* requirement may only be relaxed if two conditions are satisfied. First, the further evidence must be shown to uncover fraud or deception. Second, such fraud must strike at the very root of the litigation (or arbitration) proceedings. The evidence in this case did not meet the threshold for establishing fraud, which is a high one rooted in dishonesty, much less fraud that went to the root of the arbitration.

The Court of Appeal also acknowledged that the first *Ladd v Marshall* requirement would not apply in the usual way where further evidence came into into existence after the date of the Judge's decision which is being appealed. In such a situation, only the second and third requirements of *Ladd v Marshall* remain relevant in assessing whether leave should be given for such evidence to be admitted and the weight placed on such evidence. In those circumstances, the test should be whether *"the further evidence would have a perceptible impact on the decision such that it is in the interest of justice that it should be admitted*".

In this case, BNX did not manage to show that the further evidence concerned matters that had incurred after the date of the High Court decision. Hence, BNX was not able to bypass the first *Ladd v Marshall* requirement.

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