Dispute Resolution Hotline

July 14, 2009

'HYBRID' ARBITRATION AGREEMENT HELD VALID BY SINGAPORE COURT

An interesting question came up for consideration before the Singapore Court of Appeal in the matter of *Insigma Technology Limited Co Ltd*. v. *Alstom Technology Ltd*., [2009] SGCA 24[1], wherein the Court of Appeal considered the complex legal issue of whether an arbitration agreement can validly provide for the arbitration to be administered by one arbitral institution according to the rules of another arbitral institution. The Court decided in the affirmative and once again upheld that the intention of the parties to arbitrate is of paramount importance and procedural technicalities should not come in the way of operation of the arbitration agreement.

BACKGROUND

Insigma and Alstom had entered into a License Agreement dated 8 December 2004 ("the LicenceAgreement"). The Licence Agreement was governed by Singapore law. Under the Licence Agreement, Insigma was granted a limited licence to use Alstom's "wet flue gas desulfurisation" technology in China. The License Agreement provided that disputes between the parties would be referred to arbitration and the arbitration clause read as follows:

"Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English"

Disputes arose between the parties over the proper basis of calculating the annual royalties payable by Insigma to Alstom under the License Agreement. After resolution of the disputes by amicable means failed, Alstom filed a request for arbitration ("**Request**") with the International Chamber of Commerce ("**ICC**") in Parisas per the ICC rules of Arbitration. Alstom claimed, *inter alia*, unpaid royalties and damages for breach by Insigma of the Licence Agreement and requested that the arbitral proceedings ("**the ICC Arbitration**") be conducted in Singapore, as per the ICC Rules, at the premises of the Singapore International Arbitration Centre ("**SIAC**"). Insigma filed its reply to the Request, disputing interalia, the jurisdiction of any tribunal constituted by the ICC on the ground that the arbitral clause provided that the parties would submit their disputes to the SIAC and have the SIAC administer the arbitration under the ICC Rules, which clause was agreed by the parties because of the lower administration costs of the SIAC compared to the ICC. Insigmafurther stated that the SIAC was able to administer the arbitration under the ICC Rules and in support of its statement, enclosed a paper titled, "Interpretation and Execution of Arbitration Agreements: The SIAC Experience" (11 April 2006) prepared by the SIAC on its position in administering international arbitrations. Insigma stated that Alstom had breached the Arbitration Agreement by invoking the jurisdiction of the ICC, and that the International Court of Arbitration ("the **ICC Court**") should not proceed with the ICC Arbitration.

Alstom then wrote to the SIAC, (*before* the arbitral tribunal was constituted but *after* each party had nominated an arbitrator and agreed that the two nominated arbitrators would subsequently nominate a third arbitrator to preside at the hearing of the ICC Arbitration) enquiring if the SIAC would be able to administer the arbitration as per the ICC rules. In its reply, the SIAC *inter alia* stated as follows:

"We have considered [the Arbitration Agreement] ... We are of the view that there is *prima facie* jurisdiction for the SIAC to accept the request for arbitration and administer the arbitration under [the Arbitration Agreement]. While [the Arbitration Agreement] is ambiguous as it brings into play both the SIAC Rules and the ICC Rules, some weight and meaning must be accorded to the reference to the ICC Rules.

If the case is submitted to the SIAC, the arbitration will be administered under the SIAC Rules with the ICC Rules to be applied as a guide to the essential features the parties would like to see in the conduct of the arbitration, e.g., use of the Terms of Reference procedure, the scrutiny of the awards."

Alstom at first proposed abeyance of the ICC Arbitration, however, upon objections raised by Insigma

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Alstom at first proposed abeyance of the ICC Arbitration, however, upon objections raised by Insigma, Alstomwithdrew the ICC Arbitration with the consent of Insigma and commenced the arbitration proceedings at the SIAC.

There were some initial glitches in the appointment of arbitrators because of the difference in the ICC and the SIAC Rules. The arbitral tribunal ("**Tribunal**") was finally constituted under the ICC Rules and arguments commenced. It is pertinent to note that the SIAC later on confirmed it would be prepared to administer the arbitration as per the ICC Rules and modified its earlier stance that the arbitration will be administered under the SIAC Rules with the ICC Rules to be applied as a guide to the essential features. For this purpose, SIAC assigned the roles of its following members to undertake their responsibilities under the ICC Rules:

SIAC Secretariat	= ICC Secretariat
SIAC Registrar	= ICC Secretary-General
SIAC Board of Directors	= ICC Court

ISSUES RAISED BY THE PARTIES:

Insigma contested the validity of the arbitration clause on the ground that the arbitration clause was uncertain and thus inoperative. Insigma also contested the Tribunal's jurisdiction on the ground that the Tribunal had to be constituted by the ICC and not the SIAC as per the ICC Rules. The contentions of Insigma were rejected by the Tribunal on the ground that international public policy strongly favored resolution of disputes by international commercial arbitration and so the Tribunal must make every reasonable effort to give effect to the arbitration agreement. The Tribunal also held that the rules of an arbitral institution can be separated from the administration of arbitration by that institution and that the SIAC was capable of administering an arbitration proceeding in accordance with the ICC Rules. Accordingly the Tribunal held that the arbitration clause was valid, enforceable and capable of being performed.

Dissatisfied by the Tribunal's decision, Insigma appealed to the Singapore High Court and raised the same issues on the same grounds. The High Court also rejected Insigma's arguments and held that the parties had negotiated for a hybrid ad hoc arbitration to be administered by the SIAC by applying the ICC Rules and so long as no significant inconsistency arose, the parties must be held to their bargain.

JUDGMENT

On appeal, the Singapore Court of Appeal agreed with the reasoning of the High Court and dismissed Insigma's application. The Court of Appeal ("**Court**") also felt that since it was the first time it had an occasion to consider the validity of such a hybrid arbitration clause, it was important to give some observations with regard to operation of such clauses. The Court observed the followings:

1. An arbitration agreement should be construed like any other form of commercial agreement and the fundamental principle of documentary interpretation of giving effect to the intention of the parties as expressed in the document should be applied to arbitration agreements as well.

2. Where the parties have evinced a clear intention to settle disputes by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars.

3. While it might not be advisable to use the ICC Rules for most ad hoc arbitrations because of the need for an administering body, if a substitute institution is designated and that institute can arrange for organs to effectively undertake the roles of the different organs of the ICC apparatus, there would be no practical problem in allowing for such hybrid ad hoc arbitration.

4. Insigma's contention that the arbitration clause was a "pathological clause" and thus inoperative was rejected by the Court. The expression "pathological clause" refers to arbitration clauses that contain defects liable to disrupt the smooth progress of the arbitration. The Court noted the approach of courts in other jurisdictions, in particular the French courts, which invariably interpret pathological arbitration clauses in a manner rendering them as effective as possible.

5. There were no policy considerations to bar the SIAC from administering the arbitration of the kind agreed by the parties in the arbitration clause.

ANALYSIS

The decision upheld the intention of parties to arbitrate. The reasoning of the Court, especially with regard to the operation of "pathological clauses", reflects the approach being taken by courts worldwide in interpretation of such clauses. A similar view has been taken by the courts in India which have time and again emphasized the importance of giving effect to the intention of the parties to arbitrate and the need for such intention not to be negated by technical or strict interpretations of

procedural requirements[2]. However, though the courts endeavor to uphold such clauses where the intention of the parties to arbitrate is manifest, parties must carefully draft arbitration clauses to avoid disputes on the validity of the arbitration clauses. Such disputes invariably result into long drawn legal battles, leading to frustration of the very essence of an arbitration proceeding, which is aimed at being an alternative to litigation and an efficient and speedy method of resolving disputes.

- Gautam Dembla & Shafaq Uraizee-Sapre

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1 Judgment available at

http://www.singaporelawwatch.sg/

2 See *VISA International Ltd. v. Continental Resources (*USA*) Ltd.*2008 (15) SCALE 497; *Great Offshore Ltd. v. Iranian Offshore Engineering and Construction Company 2008 (11) SCALE 777; Nandan Biomatrix Limited v. D – 1 Oils Limited 2009 (2) SCALE 380*
