ARBITRATION LAW – REFLECTIONS ON RECENT SINGAPORE DEVELOPMENTS

Introduction

1 In recent years, Singapore has made significant strides in fulfilling her aspiration of becoming a preferred international arbitration centre, alongside global leaders such as New York, London, Paris and Hong Kong.

2 We have witnessed a considerable increase in arbitration caseload even though in many such cases, they have no connection with Singapore at all. It is clear from industry players that Singapore's arbitration-friendly laws, effective overseas marketing and the business boom in Asia are the main contributing factors to her popularity.

3 In terms of hardware, Maxwell Chambers, Singapore's world-class, customised, high-tech seat for arbitration cases was also launched in January 2010. It received strong endorsement very early on when two leading London sets, Essex Court Chambers and 20 Essex Street, rushed to take up office space whilst the building was still undergoing refurbishment.

4 In terms of software, the SIAC amended its rules last year to provide for an expedited procedure for claims below S$5,000,000 and introduced rules for the appointment of an emergency arbitrator (prior to the constitution of the Tribunal) for emergency interim relief in appropriate cases. These amendments were introduced to enhance the pro-arbitration landscape in Singapore and to keep up its competitive edge.

5 With the steady upward trend of arbitration cases being heard in Singapore, it is not surprising that there have been many significant arbitration decisions from the Singapore Courts in recent years. There can be no doubt that the growth of arbitration as a form of alternative dispute resolution must be matched by the maturity and standing of the local courts.

6 In this presentation, I will deal with three areas of law covering recent decisions by the Singapore Courts on arbitration, namely:

(a) whether R 32 of the Arbitration Rules of the SIAC is sufficient to constitute an agreement to "opt-in" to the International Arbitration Act of Singapore ("IAA");

(b) the meaning of "dispute" in arbitration agreements; and

(c) the limited circumstances for court's intervention in setting aside of arbitral awards.

I Whether R 32 of the Arbitration Rules of the SIAC is sufficient to constitute an agreement to "opt-in" to the IAA

7 Singapore has taken the conscious decision of adopting a dual regime approach with respect to arbitration. In formulating this approach, the Singapore Legislature was conscious that parties should be given the full freedom to choose if they prefer a regime that involves more, or less, curial supervision by opting into or out of either the "domestic" regime under the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") or the "international" regime under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). The divide between domestic and international arbitrations determines the level

of the court's involvement. For international arbitrations, the court's intervention is limited to specific instances expressly provided by the IAA. The court does not have any residual discretion or power to grant reliefs which are not expressly provided for under the Act. – see *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush and Anor* [2004] 2 SLR(R) 14. In contrast, for domestic arbitrations, the intervention is more extensive in that a party may appeal to the court on questions of law subject to certain criteria being met.

8 The choice between the "international" or "domestic" regime is best expressed by parties in the arbitration clause by making specific reference to either the IAA or the AA (as may be desired). Where, for example, the parties to the agreement have their place of business outside Singapore and wish to have their arbitration in Singapore, the law applicable to the arbitration would be the IAA. If the parties wish for a greater degree of court supervision, they could however "opt out" of the IAA by stipulating in the arbitration agreement that the AA applies instead: s 15(1) IAA. Similarly, where the parties have their place of business in Singapore, but wish to have less court supervision over the arbitration, they could "opt in" to the IAA by stating that the IAA applies. Specifically, s 5(1) IAA provides:

> Application of Part II
>
> 5.—(1) This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration.

9 S 5(1) IAA does not prescribe how such an agreement may be reached or the required specificity in the parties' agreement to achieve the desired "opting-in" to the

regime under the IAA. Rules of arbitral institutions may at times contain references to a default *lex arbitri*; an example of which is r 32 of the Arbitration Rules of the Singapore International Arbitration Centre (3rd Ed, 1 July 2007) ("SIAC Rules 2007") that provides: Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the International Arbitration Act (Chapter 143A, 2002 Ed, Statutes of the Republic of Singapore) or its modification or re-enactment thereof.

10 Generally, the mere reference to the use of institutional rules in the arbitration agreement would not of itself be construed as an intention to opt out of the IAA regime. However, it was suggested in *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 20.013 that one of the methods of "opting-in" to the regime under the IAA is to adopt institutional rules which expressly make the IAA applicable. Judicial support for this suggestion was first expressed by V K Rajah JA in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [52] where he observed that:

> [N]otwithstanding that domestic arbitration does not fall within the ambit of 'international' arbitration as defined under the IAA, the parties can expressly opt to have the IAA apply by either agreeing in writing to this effect or adopting institutional rules which expressly stipulate that the IAA shall apply … One instance of such an institutional rule is r 32 of the SIAC Rules (3rd Ed, 2007), which provides that where the seat of arbitration is Singapore, the law of arbitration conducted under the auspices of the [SIAC] shall be the IAA.

11 The issue of whether r 32 of the SIAC Rules 2007 is sufficient to constitute an agreement to "opt-in" to the IAA eventually arose for determination by the Court of Appeal in *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 ("*Navigator Investment*").

12 In *Navigator Investment*, the arbitration clause called for arbitration "in Singapore in accordance with the Arbitration Rules of the [SIAC] for the time being in force. The Arbitration Rules shall be deemed to be incorporated by reference into this Agreement". It was argued by Acclaim that the arbitration clause in the contract did not satisfy the requirement under s 5(1) of the IAA in that parties had not expressly agreed to adopt "Part II of the IAA" or "the Model Law". It further argued that the reference to the IAA in r 32 was not intended to mean that the IAA applied as a governing law of the arbitration as the Rules (including r 32) were primarily concerned with the procedural aspects of the arbitration and not the "substantive legislation" impacting the arbitration.

13 Andrew Phang JA in the Court of Appeal rejected these arguments, preferring to adopt the *dicta* of V K Rajah JA in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565. He noted at [39] of *Navigator Investment* that the parties had by the arbitration clause adopted the SIAC Rules 2007 "for the time being in force" and had also "deemed [the Rules] to be incorporated by reference into this Agreement". This, in the court's view, means that the parties were adopting the Rules not merely as regards the procedural aspects but the "legal substance" contained in the Rules, which ought to include the reference, via r 32, to the application of the IAA. The court accordingly concluded that the IAA applied to the arbitration by consensual adoption notwithstanding that it would otherwise have fallen within the regime under the AA. The consequence of this holding is to significantly reduce the extent of the court's supervision as provided for under the IAA.

14 The view taken by the Court of Appeal accurately reflects what the Legislature had intended when crafting the IAA and the AA, *viz*, to give maximum liberty to parties to either "opt-in" or "opt-out" of the IAA or the AA.

15 Shortly after *Navigator Investment*, another case involving the application of r 32 of the SIAC Rules 2007 came before the Singapore High Court. In *Car & Cars Pte Ltd v Volkswagen AG* [2010] 1 SLR 625 ("*Car & Cars*"), Andrew Ang J had to consider the case involving the dealership arrangement between the manufacturers of Volkswagen cars and its Singapore importer and dealer of its Volkswagen cars. The dispute arose following Volkswagen's decision to import and market the cars directly by themselves and to incorporate its own Singapore subsidiary for that purpose. As part of the process of unwinding their relationship, the parties entered into four agreements, namely: (1) termination of importer agreement; (2) termination of dealership agreement; (3) sale of assets and parts agreement; and (4) an assignment of the lease of the local dealer's business premises. The dispute resolution clause in the sale of assets and parts agreement contained a reference to arbitration under the AA, whereas the clause in the termination of dealership agreement made specific reference to arbitration in accordance with "the Rules of the Singapore International Arbitration Centre for the time being in force".

16 Volkswagen was late in making the payments due under the termination of importer agreement and the termination of dealership agreement whereupon the local dealer elected to treat the failure as a repudiatory breach of the entire arrangements and commenced court action.

17 It was the local dealer's case that the four agreements ought to be read together as part of a "global settlement", *viz*, one indivisible agreement, whereas Volkswagen took the view that each of the agreements was a separate and distinct "standalone" contract, with different rights and obligations. The suit was commenced by the local dealer on the basis that Volkswagen was in breach of all four agreements. Volkswagen applied to stay the action pursuant to the arbitration clause in the termination of dealership agreement, arguing, *inter alia*, that the stay ought to be mandatorily ordered under the IAA. The Registrar granted the stay order, ruling that the matter fell within the IAA under which stay is mandatory. He added that even if the AA was applicable, there were no grounds to justify refusal of such a stay.

18 The decision was affirmed on appeal. The High Court took the view that the SIAC Rules 2007 were procedural in nature even though the rules could have substantive effect. Following the decision of the Court of Appeal in *Black & Veatch Singapore Pte Ltd v Jurong Engineering Ltd* [2004] 4 SLR(R) 19 at [19] in which the court had said that "a *prima facie* inference that where the rules contained mainly procedural provisions, then the rules in force at the time of commencement of arbitration would be the ones that applied to the arbitration", Ang J held at [30] of *Car & Cars* that the SIAC Rules 2007 at the time of the commencement of arbitration applied to the proceedings. He also noted at [42] of *Car & Cars* that although there was no provision like the one in *Navigator Investment* where the Rules were "deemed to be incorporated by reference", it would not in his view make a difference once the SIAC Rules 2007 were found to have been adopted and r 32 made applicable.

19 The decisions of Court of Appeal in *Navigator Investment* and the High Court in *Car & Cars* acknowledged the important role which arbitral institutions and their published rules and practices play in the conduct of international arbitration. Parties in choosing the rules of an arbitration institution must realise that in most instances in doing so, they would, unless the clause provides otherwise, be likely to be taken to have adopted its institutional rules of arbitration both procedurally and substantively. Institutional rules should reflect international best practices while taking into account the distinctive features of each institution. Frequent amendments to institutional rules may create confusion and cast a shadow on their predictability. A longer period of usage of the rules will inevitably engender better understanding and evolve better practices. A corpus of arbitral and judicial decisions over the interpretation of the rules also adds transparency, consistency and strengthens their acceptability to future users.

20 While Singapore has embraced the view that parties should have complete freedom to choose for themselves when and under what rules a dispute should become referable to arbitration, the arbitral process only becomes operative when a dispute exists within the ambit of the arbitration agreements.

II The meaning of "dispute" in arbitration agreements

21 The question of whether a "dispute" exists is often the starting point that a party seeking a stay in favour of arbitration has to overcome. The general definition of "dispute" requires the making of a claim by one party and the rejection of it by the other. Although this issue may appear relatively straighforward, it has, ironically, generated many *disputes* as to whether *a dispute* has arisen for the purposes of arbitration.

22 The Singapore Court of Appeal recently delivered an important judgment on this question in *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 ("*Sumito*"), where the Court went into considerable depth in laying down the parameters of what would constitute a "dispute" for the purposes of arbitration. The judgment sets out a useful guide as to when an action in court is justified in the face of a valid arbitration clause. In particular, it goes into the finer points about the meaning and quality of an admission and silence and what it takes to put it beyond doubt that it is not a dispute. It is certainly an instructive case for those who need to advise or decide on whether to proceed with a court action instead of arbitration.

23 The salient facts of *Sumito* are as follows. The parties entered into a Shares Sale and Purchase Agreement ("SPA") under which the appellants agreed to sell, and the respondent agreed to buy, 72 per cent of the entire paid-up share capital of a certain company. Section 11.06 of the SPA required the parties to resolve their "disputes, controversies and conflicts arising out of or in connection with" the SPA by arbitration under the SIAC Rules if negotiations proved to be unsuccessful. The parties subsequently entered into four further supplemental agreements. The fourth supplemental agreement stated that it was "supplemental to an integral part of the SPA" and also incorporated the terms of the SPA. A dispute arose over the amount payable under the fourth supplemental agreement by the respondent and the appellants commenced court proceedings against the respondent. In turn, the respondent wrote to the appellants' solicitors stating that the appellants' suit was without merit and misconceived, and sought a stay of the court proceedings in favour of arbitration.

24 The Registrar dismissed the respondent's stay application on the ground that there was no dispute in connection with the SPA. However, on appeal to the High Court, it was held that a dispute existed and accordingly a stay was granted in favour of arbitration. The appellants appealed.

25 The Court of Appeal dismissed the appeal and agreed with the High Court that there was indeed a dispute referable to the SPA that would justify a stay of the court proceedings. In coming to its conclusion, it laid down a number of useful propositions that should form the broad canvas against which applications for stay of proceedings ought to be evaluated:

(a) If the arbitration agreement provides for arbitration only if “disputes” or “differences” or “controversies” exist, then the subject matter of the proceedings would fall outside the terms of the arbitration agreement if there is no “dispute”, “difference” or “controversy” or if the alleged “dispute” is unrelated to the contract which contains the arbitration agreement.

(b) In line with the prevailing philosophy of judicial non-intervention in arbitration, the court will interpret the word “dispute” broadly. A dispute exists unless the defendant has unequivocally admitted that the claim is due and payable.

(c) The court will not assess the merits of a “dispute” since these matters should properly be left for assessment by the arbitrator.

(d) An unequivocal admission must be one extending to *both* liability and quantum in order to exclude the existence of a "dispute". Where a defendant makes a clear and unequivocal admission as to liability but not to quantum then there is still a dispute referable to arbitration.

(e) In addition to an express denial or rejection of the claim, the court can also infer that the claim is not admitted from the previous inconclusive discussions between the parties, prevarication or even silence. In the case of prevarications, where a defendant unequivocally admits the claim, but then later purports to deny the claim, there may well be a "dispute" and the matter should ordinarily be referred to arbitration. Silence is also insufficient to constitute the clear and unequivocal admission necessary to exclude the existence of a "dispute".

A. "Dispute" to be given wide interpretation

26 The Court of Appeal decided that the term "dispute" must be given a wide interpretation. In arriving at this decision, it cited Mustill and Boyd's *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed., 1989) which said that the "dispute" must be construed by reference to the subject matter of the contract.

27 If the arbitration agreement provides for arbitration only if "disputes" or "differences" or "controversies" exist, then the subject matter of the proceedings would fall outside the terms of the arbitration agreement if:

(a) there is no “dispute”, “difference” or “controversy”, as the case may be; or

(b) the alleged “dispute” is unrelated to the contract which contains the arbitration agreement.

28 The court will readily find that a “dispute” exists unless the defendant has unequivocally admitted that the claim is due and payable.

29 The decision to construe the term “dispute” broadly by the Court of Appeal is in line with the policy that Singapore has adopted towards arbitration. The court held that it ought to give effect to the parties’ contractual choice as to the mode of dispute resolution unless it offends the law. Acknowledging that arbitration and other forms of alternative dispute resolution, such as mediation, assist to effectively unclog the arteries of judicial administration, the court also stated that alternative dispute resolution mechanisms offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with.

B. Merits not to be delved into

30 The court stated that the merits of the “dispute” were irrelevant to the question of whether there exists a dispute or not. This is in line with the holdings of another High Court decision in *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR(R) 646 (“*Dalian*”).

31 However, despite this, from the approaches adopted by some of the decisions of the Singapore Courts, it appears that there might have been some misapprehension that the stay provisions under the IAA (Cap 143A, 2002 Rev Ed) were similar to the English Arbitration Act 1950 (c 27) (UK). Pre-1996, English courts were able to consider in each case whether a dispute existed before allowing a stay application because of the specific extending words in the relevant section of the English Arbitration Act 1950 which directed the court to stay proceedings "unless satisfied … that there is not in fact any dispute between the parties with regard to the matter agreed to be referred". These extending words have never been incorporated in the IAA and the English Arbitration Act 1996 has since deliberately omitted these extending words. Following its deletion, the English courts have since adopted the view that the merits of any dispute is a matter to be considered by the arbitral tribunal and not by the courts. *Halki Shipping Corp v Sopex Oils Ltd* [1998] 1 WLR 726 ("*Halki*") is one such case where the court ruled that if the defendant contests liability, then, whether or not he has an arguable case on the merits for doing so, there is a dispute and the court must stay its own proceedings, as the existence or otherwise of a valid defence is a matter for the arbitrators.

32 While holding that the merits of the dispute were irrelevant in determining its existence, the court in *Sumito* also recognised the tension between the efficient disposal of apparently indefensible claims and "rigorous and scrupulous" enforcement of arbitration agreements. Nonetheless, it tilted the scale in favour of the enforcement of arbitration agreements.

33 A case is made for the rigorous enforcement of arbitration agreements when you take into consideration that arbitrations are not necessarily slow processes. It has been

argued that arbitrators have ways and means (in particular by making interim awards) of proceeding as quickly as the courts. If a claimant can persuade the arbitral tribunal that in truth there is no defence to his claim, then there is no good reason why that tribunal cannot resolve the dispute in his favour without any delay at all. However, the Court of Appeal was of the view that in "open-and-shut" cases, the above might not hold true given the necessity to appoint arbitrators to constitute the tribunal.

34 Even if so, the efficient disposal of claims in unmeritorious cases will not necessarily be hindered in all cases where a "dispute" is found. Given the court's respect for party autonomy, parties can easily provide for such situations in the arbitration agreement should they require a meritorious dispute as a valid incident to trigger arbitration and form the basis for a stay of court proceedings. Instead of using the terms "all disputes" or "any dispute" in the arbitration, parties can stipulate for a "real" or "genuine" dispute.

35 The Court of Appeal also accorded great weight to Saville J's reasoning in *Hayter v Nelson Home Insurance Co* [1990] 2 Lloyd's Rep 265 ("*Hayter*") at 268–269, which stood in favour of holding parties firmly to their arbitration agreement:

> … it must not be forgotten that by their arbitration clause the parties have made an agreement that in place of the Courts, their disputes should be resolved by a private tribunal. Even assuming that this tribunal is likely to be slower or otherwise less efficient than the Courts, that bargain remains – and I know of no general principle of English law to suggest that because a bargain afterwards appears to provide a less satisfactory outcome to one party than would have been the case had it not been made or had it been made differently, that bargain can be simply put on one side and ignored.

> … if the Courts are to decide whether or not a claim is disputable, they are doing precisely what the parties have agreed should be done by the private tribunal. An arbitrator's very function is to decide whether or not there is a good defence to the claimant's claims – in other words, whether or not the claim is in truth indisputable. Again, to my mind, whatever the position in the past, when the Courts tended to view arbitration clauses as tending to oust their jurisdiction, the modern view (in line with the basic principles of the English law of freedom of contract and indeed International Conventions) is that there is no good reason why the Courts should strive to take matters out of the hands of the tribunal into which the parties have by agreement undertaken to place them.

36 Undoubtedly, the above would be consistent with what has been regarded as the cornerstone underlying judicial non-intervention in arbitration; the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract.

C. Dispute does not exist where there has been an admission

37 The court will readily find that a "dispute" exists unless the defendant has unequivocally admitted that the claim is due and payable. The court held that such an unequivocal admission must extend to both *liability* and *quantum*, and, in such a case, there is no dispute *mandatorily* referable to arbitration. The claimant thus has the recourse of summary judgment, but the court cautioned that the claimant must be prepared to show compelling evidence of the defendant's admission, because once that admission is challenged with any semblance of credibility, the court will ordinarily be inclined to decide that a "dispute" has arisen, and order a stay of proceedings for the arbitral tribunal to resolve the "dispute".

38 The Court of Appeal referred to the case of *Getwick Engineers Ltd v Pilecon Engineering Ltd* [2002] 1020 HKCU 1 as an obvious example of where both liability and quantum were admitted. In that case, three cheques were issued to the plaintiff and one was dishonoured. The plaintiff sought summary judgment for, *inter alia*, its claim in the amount stated in the dishonoured cheque. Geoffrey Ma J (as he then was) ordered a stay of proceedings for the rest of the plaintiff's claims but granted summary judgment for the amount in the dishonoured cheque. Ma J held that the dishonoured cheque was:

> … to be regarded as a clear and unequivocal admission on the defendant's part of its liability and quantum (in that amount) under payment certificates. This cheque was issued following the 28 April letter … It was one of three cheques sent to the plaintiff by the defendant as an acknowledgement of its liability under payment certificates which had been issued to the plaintiff … In reaching this conclusion, I have borne in mind that cheques are to be regarded as cash and save in exceptional circumstances, no set off or counterclaim will be permitted … Two of the three cheques have been honoured. I see no reason why the third cheque should not be seen in the same light. I have not been referred to any case in which a cheque or bill of exchange has been regarded as constituting a clear and unequivocal admission of liability and quantum, but in principle, I do not see why it cannot be so regarded.

39 The court also noted that implicit in the holding that there is a "dispute" unless there has been an unequivocal admission, is the converse proposition that where there has been an admission, there is no longer any dispute and the claim falls outside the arbitration agreement:

> [L]ogically, the arbitral tribunal would not have jurisdiction to hear the claim or make an award, and that a mischievous and recalcitrant defendant might use precisely the argument that its defence was hopeless to thwart the arbitration. As Saville J perceptively pointed out [in *Hayter*], the conundrum created by the analysis that the arbitration agreement does not apply to the claim at hand because the defendant has made a clear and unequivocal admission giving rise to often-inevitable summary judgment, is that, by the same token, the arbitral tribunal would have no

> jurisdiction and the claimant would only be able to commence litigation proceedings.

40 The court convincingly reasoned that where there has been an admission, the claimant could still prosecute its claim in arbitration as the arbitral tribunal has the competence to decide whether it has jurisdiction. Where faced with a recalcitrant defendant as envisaged above, the arbitral tribunal could rule that it has jurisdiction and make a summary award. The court stated that under the IAA, such an award would not be impeachable for an error of law alone and it was hard to conceive of a court entertaining any challenge to such an award by a defendant who had admitted liability but refused to pay and then resisted arbitration on the ground that there was no dispute because of its own admission.

41 Therefore, in order to uphold the policy of judicial non-intervention, it is necessary to regard the refusal to grant a stay as an exception only to be invoked in obvious cases where *both* liability and quantum have been admitted.

D. Significance of prevarication or silence

42 Apart from an express denial or rejection of the claim, the court can also infer that the claim is disputed from the previous inconclusive discussions between the parties, prevarication or even silence.

43 The court held that prevarication is where a defendant unequivocally admits the claim, but then later purports to deny the claim on the ground that the admission was mistaken, or fraudulently obtained, or was never made. It is to be regarded that there

might well be a “dispute” before the court, both over the substantive claim as well as over whether the defendant can challenge the alleged earlier admission, and the matter should ordinarily be referred to arbitration.

44 This must be the correct conclusion on the issue given that the defendant in resiling on his previous admission is resisting the claim and a “dispute” should still be considered to exist.

45 With regard to silence, the High Court in *Dalian* observed at [75]:

> The more difficult question is when it can be said that a dispute exists. For example, is there a dispute when the defendant simply refuses to pay or to admit the claim or remains silent? Although there have been statements that suggest that such conduct is sufficient to constitute a dispute I do not share that view. A defendant may refuse to pay or to admit a debt or remain silent because he has no money to pay or simply because he is intransigent. To my mind that is not a dispute. It is different if the defendant at least makes a positive assertion that he is disputing the claim.

46 The Court of Appeal in *Sumito* however adopted a different view and stated that a defendant’s silence, without more, may be insufficient to constitute the clear and unequivocal admission necessary to exclude the existence of a dispute, controversy or conflict. Silence, on its own, is often equivocal at best. Notably, such an approach is in line with Art 25(b) of the UNCITRAL Model Law on International Commercial Arbitration; even if the respondent fails to submit its statement of defence, the arbitral tribunal is required to continue the proceedings “without treating such failure in itself as an admission of the claimant’s allegations”.

47 The court enumerated various reasons as to why a party's silence would not be sufficient to constitute an admission:

> [A] party may be silent because he has no money to pay or may even want to delay a just resolution of a claim. Even so, there may be good reasons why a party remains silent. A failure by a party to respond is equivocal, especially when there are unresolved issues or there has been earlier prevarication … Further, in some cases, a party may think (rightly or wrongly) a claim so preposterous that 'silent treatment' is the most appropriate response. In other cases, a party may view the need to place its stand on record unimportant or even disadvantageous. For example, a defendant who adopts a policy of 'masterly inactivity' has not made an admission. Judges must also bear in mind that commercial persons usually do not accord the same importance and urgency to documenting responses as lawyers do. One must also be particularly mindful when dealing with cross border transactions, since there may even be cultural reasons for silence: in certain societies, a non-confrontational approach is prized. It is impossible to generalise on the effect of silence and each matter must be assessed contextually. *In essence, we are of the view that generally speaking, the court ought to be ordinarily inclined to find that there has been a denial of a claim in all but the clearest of cases. It should not be astute in searching for admissions of a claim.*

48 It is indisputable that these reasons hold true. Silence generally does not mean consent and certainly not an admission in the arbitral scenario. Certain Asian cultures shy away from confrontation, businesses might not be able to respond with the urgency required as they could be having discussions internally on the appropriate response and it is definitely usual for parties involved in disputes to want to "buy time" while they evaluate the situation and available options. Indeed, it is impossible and even pointless to generalise on the effect of silence and the court has rightly held it to so.

49 In conclusion, it is clear that *Sumito* is a long awaited clarification on what constitutes a "dispute" in an arbitration agreement. With the parameters of the subject matter laid down definitively there should be less confusion in this area of the law. While

questions could still be raised in the future when the principles are applied to more tricky factual matrixes, which undoubtedly will arise even in the most developed areas of law, the Court of Appeal has done the best it can now in providing a proper framework conducive to the resolution of such issues.

III Setting aside arbitral awards

50 From this review, it is apparent that Singapore Courts have adopted a very liberal interpretation in staying court proceedings in favour of arbitration. However, in order to ensure that the integrity and reliability of the arbitral process is preserved at all times, it is essential for the courts, in limited situations to intervene. A losing party in arbitration has very limited avenues for recourse. In domestic arbitration, he may appeal against the decision on a question of law (s 49 AA) or set it aside on procedural grounds (s 48 AA). In an international arbitration, a losing party may only apply to set it aside under one of the prescribed grounds in s 24 of the IAA and no other. Such a process is to be distinguished from an appeal where the merits of the arbitral decision are to be examined.

51 In 2010, there were several significant rulings by the Singapore Courts relating to the setting aside of arbitral awards on various grounds. Of the 4 decisions covered in this presentation, initially all 4 were subject to appeal. Since then, one appeal has been withdrawn, two are pending decisions by the Court of Appeal and the remaining one is yet to be heard. Whatever the eventual outcome, these decisions merely illustrate the point that while the Singapore Courts have adopted a liberal view in upholding and

enforcing the parties' agreement to arbitrate, it will nonetheless intervene when the circumstances require.

A Breach of Natural Justice

52 This is a fairly common ground to set aside an arbitration award. In *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80, the Plaintiff successfully persuaded the Singapore High Court to set aside an arbitral award on the ground of breach of natural justice. However it did not concern the typical breach where a party was denied the right to be heard. Instead it concerned a case where parties were given the full latitude in the conduct of the arbitration. This is significant given that the Singapore Courts have often demonstrated that a high threshold must be satisfied before it will set aside an arbitral award.

53 Here, the claim before the arbitrator was essentially based on three alleged misrepresentations. Inexplicably, the arbitrator mistakenly concluded that the claimant had abandoned its pleaded assertion that there were three misrepresentations made and relied upon; and was only seeking to rely on one instance of misrepresentation.

54 Andrew Ang J held that, in failing to consider the claimant's arguments and submissions on the other misrepresentations, the arbitrator had committed a breach of natural justice in failing to consider the submissions on the other misrepresentations. Since this breach prejudiced the claimant's rights, the arbitral award must be set aside.

B Award Contrary to Public Policy

55 The Model Law permits the court to set aside or refuse to enforce an award, as the case may be, on the ground of public policy. The New York Convention similarly allows states to refuse recognition and enforcement on the grounds of public policy.

56 The main problem posed by public policy is that every jurisdiction is entitled to define and give effect to its own public policy. An award which is perfectly unobjectionable in one jurisdiction may be wholly repugnant to the public policy of another jurisdiction. But such inconsistency is inevitable in the international arena and the most a pro-arbitration jurisdiction can do is to refrain from adopting parochial attitudes in framing its public policy.

57 However the starting point for any challenge on the ground that the award offends public policy is to identify the public policy which the award allegedly breaches and to show which part of the award conflicts with that policy. General and vague assertions of breach of public policy are plainly insufficient.

58 A controversial application of public policy happened in the recent English Court of Appeal decision in *Nurdin Jivraj v Sadruddin Hashwani* [2010] EWCA Civ 712. In that case, two Ismaili gentlemen made an arbitration agreement which provided that "All arbitrators shall be respected members of the Ismaili community and holders of high office within the community." The court accepted that the parties may subjectively have good reasons for having this provision, but held that membership of the Ismaili community was, objectively speaking, not needed to arbitrate the dispute between the

parties, which was governed by English law. In the result, the clause was held to violate English and European Union legislation against discrimination in employment. The case created an uproar in the English arbitration community, and understandably so, because it represents a considerable curtailment of parties' freedom of choice in their arbitrators. The UK Supreme Court has granted leave to appeal and it will be interesting to see what happens next.

59 In *AJT v AJU* [2010] 4 SLR 649, the Singapore High Court set aside an arbitral award that upheld a settlement agreement which entailed the stifling of the prosecution of compoundable and non-compoundable criminal offences under Thai Law. It was observed that while there is a need to preserve the integrity of the arbitration process in ensuring the finality of arbitral awards, the court must also safeguard the interest of the public in ensuring that its processes are not abused by litigants. The court has a role to determine whether the parties intend to frustrate the ends of justice by concluding an agreement that is contrary to public policy.

60 Here, the Court found that the settlement agreement, which required one party to withdraw his police complaint relating to fraud and forgery against the defendant, was contrary to public policy. This was so because to allow such agreements might expose an innocent person to extortion or to permit a guilty person to evade punishment by offering reparation to the victim and in doing so would defeat the primary purpose of criminal jurisprudence and the administration of criminal justice. On the evidence, the agreement was also found to be illegal and void under the law of the place of performance, *ie*, Thai Law.

C Award in Excess of Tribunal's Power

61 The power of the court to set aside an award on the ground that the tribunal exceeded its power in deciding a dispute falling outside the terms of reference to arbitration is well settled under Art 34(2)(a)(iii) of the Model Law. As is often the case, the controversy is in its application. In *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] 4 SLR 672 ("*PT Gas Negara*"), a binding though not final decision of the Dispute Adjudication Board ("DAB") was made in favour of the respondent. The applicant failed and/or refused to make payment and the respondent applied to enforce the DAB decision by way of arbitration. This issue was never referred to the DAB for decision. The majority members of the tribunal ruled that the DAB decision was binding on the parties though not final and ordered the applicant to make immediate payment to the respondent. The applicant applied to set aside the award before the Singapore Court, *inter alia* on the ground that the tribunal exceeded its powers.

62 The High Court in setting aside the tribunal award held that the tribunal exceeded its power by rendering a final award pertaining to a dispute which had not been referred first to the DAB pursuant to the Conditions of Contract for Construction which the parties had agreed to govern their contract. What the respondent could have done was to challenge the underlying disputes and not frame the dispute as one pertaining to the respondent's obligation to make immediate payment (an issue not referred to the DAB).

63 The Court highlighted that the adjudication of the "immediate payment" issue without confirming the correctness of the DAB decision was tantamount to converting

the binding but not final DAB decision into a final arbitration award and ignoring the dispute resolution provisions of the Conditions of Contract.

64 This decision illustrates the importance of appreciating that not all arbitration agreements operate in the same manner and that in some cases, there might be conditions to be satisfied before a dispute becomes referable to arbitration.

D Award Declining Jurisdiction

65 As demonstrated in *PT Gas Negara*, an award can be set aside if the tribunal is found to have acted beyond its remit. But the decision of the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 raises the interesting issue – what happens when an arbitral tribunal rules that it has no jurisdiction?

66 In that case, the Court of Appeal ruled that a pure negative ruling on jurisdiction and not on the substance or merits of the dispute was not an award for the purposes of section 2 of the IAA. And since it was not an “award”, a decision by a tribunal that it did not have jurisdiction to hear the dispute cannot be set aside under article 34 of the Model Law.

67 The Court of Appeal also stated that article 16(3) of the Model Law only provided recourse in the case of a positive ruling on jurisdiction, and that there was no recourse in the case of a negative ruling. In this regard the court accepted Associate Professor Lawrence Boo’s *amicus* opinion that there was no recourse in the case of a negative

ruling because it would be inappropriate to compel the tribunal to continue with the arbitration in such case; (this was view of UNCITRAL as well: see UNCITRAL Yearbook, 1985 XVI, para.163).

68 The Court of Appeal's decision raises very practical issues. First, the effect of the Court of Appeal's decision is to create a legal black hole in a case where the court grants a stay in favour of arbitration, but the tribunal then rules that it has no jurisdiction. The dispute will then be suspended as far as the arbitral process is concerned. It seems odd that there should be no recourse when a tribunal plainly and wrongly rules that it has no jurisdiction. If the court can decide that a tribunal is wrong when it decides it has jurisdiction, why should it not be able to do the reverse? An inability to give relief in such situations would defeat the parties' intention to arbitrate.

69 Secondly, this outcome also creates some practical difficulties. In the cases where the tribunal correctly rules that it has no jurisdiction, there is the question of enforcement of the costs order. Issues of jurisdiction can be an expensive exercise involving expert evidence on law or otherwise and expensive counsel. But, on the basis of *PT Assuransi,* the party who successfully argues that the tribunal has no jurisdiction might not be able to recover its costs because the tribunal's decision is not an award.

E "Perversity" or "Wednesbury unreasonableness"

70 In *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1, the issue before the Singapore High Court was whether it could set aside an

arbitral award on the grounds that the decision was “perverse” and/or “manifestly unreasonable and irrational”.

71 In deciding not to set aside the award, the Court held that independent of the provisions of the IAA, it did not have the power to set aside arbitral awards for irrationality or manifest unreasonableness. The applicant sought to rely on “*Wednesbury unreasonableness*” to set aside the award. This ground was purportedly based on US case law which was in turn premised on different US legislation. It was observed that while such a ground is available to quash an administrative decision, it has no place in the context of arbitral awards. The alleged perversity was ultimately held to be nothing more than a challenge that the tribunal had committed a serious error of law.

72 This decision highlights the fact that the Singapore Court will not easily set aside an arbitral award particularly on grounds which do not fall squarely within the provisions of the governing Act.

IV Conclusion

73 I would like to conclude by making some observations about the developments in the field of arbitration in Singapore.

74 First, Singapore has provided the environment, the physical infrastructure and progressive rules to promote arbitration as an effective mode for alternative dispute resolution. The pro-arbitration attitude of the Singapore Courts is in line with the

statutory objective to encourage the use of arbitration. Consistent with this objective, the level and extent of curial involvement is to be decided by the parties' choice of the governing rules.

75 Second, the pro-arbitration attitude of the Singapore Courts is sufficiently balanced by its robust supervisory role to intervene when the circumstances demand it.

76 Third, there is a clear symbiotic relationship between the growth of arbitration and the corresponding sophistication of the local courts. The confidence in the arbitral process is typically a reflection of the parties' confidence in the local courts. This is borne out by the experience of the leading arbitration capitals all over the world. Each of them is supported by developed and independent judiciaries. They are not stand alone institutions. They must be developed in tandem with one another.

Steven Chong
Judge
Supreme Court of Singapore

Speech delivered by Justice Steven Chong at the 3rd Judicial Seminar on Commercial Litigation in Sydney (21 – 23 March 2011)