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Hybrid ICC/SIAC arbitration clause upheld in Singapore

Richard Hill (Fulbright & Jaworski LLP) · Wednesday, June 10th, 2009 · YIAG

In a judgment dated June 2, 2009, the Singapore Court of Appeal has upheld a “hybrid” arbitration clause which provided that all disputes should be resolved “by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce”.

In the case of *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24, Insigma failed in its application to set aside an award rendered by an eminent three-member tribunal in an arbitration that was administered by the SIAC applying the ICC Arbitration Rules.

The decision is to some extent explained by Insigma’s conduct in the matter. When Alstom initially commenced an ICC arbitration, Insigma objected to the ICC’s jurisdiction, arguing that the SIAC could administer the arbitration under the ICC Rules. This caused Alstom to enquire of the SIAC whether they would in fact administer such an arbitration, and then to withdraw the ICC arbitration and commence arbitration at SIAC, which agreed to apply the ICC Rules. Notwithstanding this background, Insigma then argued before the arbitral tribunal and the Singapore High Court and Court of Appeal that the “hybrid” arbitration clause was invalid and void for uncertainty.

While this important factual background was a significant factor in the outcome of this case, the Singapore Court of Appeal set out a number of general principles to be applied in such cases, including the following: (i) where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to that intention even if certain aspects of the agreement are ambiguous, inconsistent or incomplete; (ii) where a clause can be interpreted in two different ways, the interpretation enabling the clause to be effective should be adopted in preference to that which prevents the clause from being effective; (iii) as far as possible, a commercially logical and sensible construction is to be preferred over another that is commercially illogical; (iv) there was no reason why a clause providing for the rules of one arbitral institution to be applied by a similar institution should be too uncertain to be given effect to; (v) a defect in an arbitration clause does not necessarily render it unworkable, since it may often be cured by the assistance of state courts, arbitral institutions and arbitrators, and in this case the clause was rendered workable by the SIAC agreeing to administer the arbitration in accordance with the ICC Rules; and (vi)

no policy considerations would bar the SIAC from agreeing to administer an arbitration under the ICC Rules.

Comment

The potential controversy inherent in the Singapore Court's decision is whether or not the SIAC can truly administer an arbitration "under the ICC Rules" given that the ICC Rules specify steps to be taken by "the Court" which is a reference to the ICC's International Court of Arbitration. The Court's role under the ICC Rules includes scrutiny of the draft award under Article 27. In this case, the role of the International Court of Arbitration was performed by the SIAC Board of Directors. The Singapore Court of Appeal's decision however upheld the clause on this modified basis since it considered that to do so achieved a result that was closer to the intention of the parties than the alternative outcome of declaring the arbitration agreement unworkable. But while the Court of Appeal held that the clause "was rendered certain and workable in the present case by the SIAC agreeing to administer the arbitration in accordance with the ICC Rules" can the uncertainty as to what the parties actually agreed by this clause really be solved by the SIAC unilaterally electing to play a role of its choice? That uncertainty is perhaps demonstrated by the SIAC first having interpreted the clause as providing for arbitration in accordance with the SIAC rules but with the essential features of ICC arbitration that the parties would like to see, such as terms of reference and scrutiny of the award, only for the tribunal later to invite the SIAC to conduct the arbitration "in accordance with the ICC Rules to the exclusion of the SIAC Rules" which the SIAC then agreed to do.

Also controversial is the Court of Appeal's finding that "The substitution by the SIAC of the various actors ... designated under the ICC Rules ... was within the degree of flexibility allowed by the ICC Rules." It is perhaps questionable whether the ICC would agree with this analysis. In practice, of course, the Singapore Court of Appeal was very substantially influenced by Insignia's own previous assertion to the ICC that the SIAC could administer the arbitration under the ICC Rules.

While in this case the Singapore Court focused on the question of whether an arbitral institution could administer arbitrations under the rules of another institution, arbitral institutions are likely to consider whether they should do so, and what this may lead to. The SIAC's agreement to administer the arbitration in accordance with ICC Rules potentially raises issues of comity as between arbitral institutions. A possible concern is that the Singapore Court of Appeal's decision has endorsed this practice, which could conceivably prompt parties to write in such clauses in order to obtain "cut price" ICC (or LCIA) arbitration administered by various other institutions around the world. Parties would be ill-advised to do this however. Although in this case the arbitration clause, and the resulting award, were ultimately upheld, the complexity of this hybrid clause caused the parties to incur costs in appearing before the ICC, the SIAC, the Singapore High Court and the Singapore Court of Appeal. Moreover, it should not be assumed that other courts or arbitral institutions would follow the SIAC's approach in this case. Hybrid institutional clauses should therefore be avoided.

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This entry was posted on Wednesday, June 10th, 2009 at 2:32 pm and is filed under [Arbitration Agreements](#), [Arbitration Institutions and Rules](#), [Asia-Pacific](#), [Commercial Arbitration](#)

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