

Kluwer Arbitration Blog

Insignia Revisited: Singapore High Court Finds Arbitration Clause to be Operable

Sean Izor (Herbert Smith Freehills LLP) · Monday, February 25th, 2013 · Herbert Smith Freehills

In the case of *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* the Singapore High Court (the “High Court”) has considered whether an arbitration clause in a contract which provided for disputes to be settled by arbitration in Singapore by a non-existent institution under the rules of the ICC was inoperable. The High Court found that the arbitration clause in question contained the necessary elements and was workable as long as the parties were able to secure the agreement of an arbitral institution in Singapore to conduct the arbitration.

The facts of the case are as follows. HKL Group Co Ltd (“HKL”) entered into an agreement with Rizq International Holdings Pte Ltd (“Rizq”) for the sale of sand which was to be shipped from Cambodia to Singapore (the “Agreement”).

HKL claimed that it had issued invoices to Rizq for amounts owed pursuant to the Agreement and that Rizq had failed to pay these amounts. HKL began court proceedings in Singapore to recover these amounts.

Under Section 6(2) of the Singapore International Arbitration Act (the “IAA”), the court can make an order, upon such terms or conditions as it may think fit, staying court proceedings so far as the proceedings relate to a matter which is the subject of an arbitration agreement, unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

Rizq applied for the court proceedings to be stayed in favour of arbitration under s6(2) of the IAA on the basis of the arbitration clause contained in the Agreement which stated:

Any dispute shall be settled by amicable negotiation between [the] two Parties. In case both Parties fail to reach [an] amicable agreement, all dispute [sic] out of in connection with the contract shall be settled by the Arbitration Committee at Singapore under the rules of The International Chamber of Commerce [the ICC Rules] of which awards shall be final and binding [on] both parties . . .

HKL resisted Rizq’s application, saying that the arbitration clause was inoperable because there was no entity in Singapore named the “Arbitration Committee”. Rizq argued that although the arbitration clause was defective, it was clear that the parties’ intention was to arbitrate and the High

Court should rely on the principle of effective interpretation to find that the “parties could still agree to arbitrate the matter in Singapore . . .”

Approach to pathological arbitration clauses in Singapore

The High Court gave interesting guidance on the general approach to be taken in considering pathological arbitration clauses, as well as considering the clause in question. The High Court started off by noting that in the majority of cases, when the contractual requirements for the validity of an arbitration clause are met and the meaning of the clause can be discerned by a court applying the general principles of contractual interpretation, the clause will be found to be operable as long as the conditions stipulated in the arbitration agreement have been complied with. If the court is unable to discern the meaning of the clause, either in part or entirely, then the clause will be considered inoperable, or pathological.

When faced with interpreting a potentially pathological arbitration clause, the High Court noted that the general approach is to give effect to the clause. The High Court cited the judgment of *Insignia Technology Co Ltd v Alstom Technology Ltd* in which the Court of Appeal of Singapore stated:

[W]here the parties have evinced a clear intention to settle any dispute 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 . . . so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party . . .

The Court of Appeal in the *Insignia* case went on to note that this approach is similar to the principle of effective interpretation in international arbitration law; “where a clause may be interpreted in different ways, the interpretation which enables the clause to be effective should be adopted in preference to the others which lead to contrary effect.”

Nonetheless, the High Court found that the court will need to decide on a “case by case basis” whether arbitration clauses should be upheld or found to be pathological, but that the Singapore courts will “give primacy to the decision of the parties to arbitrate and will seek to resolve the various pathologies with the aid of the principle of effective interpretation.”

The High Court’s view of the clause in question

Readers of the Kluwer Blog will already have noticed that the defect in the arbitration clause related to the reference to the non-existent “Arbitral Committee at Singapore”.

The High Court noted that in general “an incorrect reference to the arbitral institution has not prevented the courts from referring the matter to arbitration.”

The High Court found that the arbitration clause was operable for various reasons:

1. It clearly demonstrated the intention of the parties to resolve disputes by arbitration;
2. It required the mandatory consequence of a matter being referred to arbitration if a dispute arose;

3. It provided for the place of arbitration (Singapore); and
4. It provided that the arbitration was to be governed by a particular set of rules (the ICC Rules).

However, the issue arose as to whether the reference to the ICC Rules in the arbitration agreement rendered the agreement inoperable as there was no National Committee of the ICC to administer the ICC arbitration in Singapore. The High Court found that although the arbitration clause was uncertain in relation to the arbitral institution, it was open to the parties to approach any arbitral institution in Singapore to administer the arbitration while applying the ICC Rules. The High Court specifically mentioned the *Insigma* case in which the Court of Appeal noted that the Singapore International Arbitration Centre (SIAC) “was able and willing, for that particular case, to conduct a hybrid arbitration, applying the ICC rules.”

Therefore, the High Court stayed the court proceedings in favour of arbitration but imposed “the condition that parties obtain the agreement of the SIAC or any other arbitral institution in Singapore to conduct a hybrid arbitration applying the ICC rules, with liberty to apply should they fail to secure any such agreement.”

Comment

This decision is interesting for two reasons. First, it provides further evidence of the strong support given to arbitration in the Singapore courts and the willingness to abide by parties’ agreement to arbitrate.

The second interesting point is the interplay between the court’s decision and the 2012 ICC Rules. In the *Insigma* case, cited by the High Court, the Court of Appeal upheld an arbitration clause that provided for the SIAC to administer a case under the ICC Rules.

However, after the *Insigma* ruling the ICC adopted a new set of rules (the “2012 ICC Rules”). The 2012 ICC Rules include Rules 1(2) and 6(2) which state:

The [International] Court [of Arbitration] is made the only body authorised to administer arbitrations under the ICC Rules

and

By agreeing to arbitration under the [ICC] Rules, the parties have accepted that the arbitration shall be administered by the Court.

In short, the 2012 ICC Rules are drafted to expressly exclude another institution from administering an ICC arbitration. However, the Singapore court did not discuss these provisions in the new ICC Rules or their implications as regards the possibility of the case being administered by another institution. Thus there was no discussion of whether the parties, by choosing Rules with these express requirements for administration by the ICC Court, had impliedly excluded the possibility of case administration by any other institution.

Conceivably, the Singapore court could have chosen another option, namely that ‘the Arbitration

Committee’ was not intended as a reference to an arbitral institution at all but was merely a terminologically inaccurate reference to the tribunal that would decide the case in Singapore. That would have avoided any need to re-engage in the *Insignia* debate but the court may not have been presented with this option. In any event, the court did not adopt that interpretation but determined instead that the reference to ‘the Arbitration Committee’ was to be treated as the designation of an unspecified administering institution, and therefore that it would be for the SIAC (or any other arbitral institution in Singapore approached to administer the arbitration) to determine if it can and will administer the arbitration under the ICC Rules.

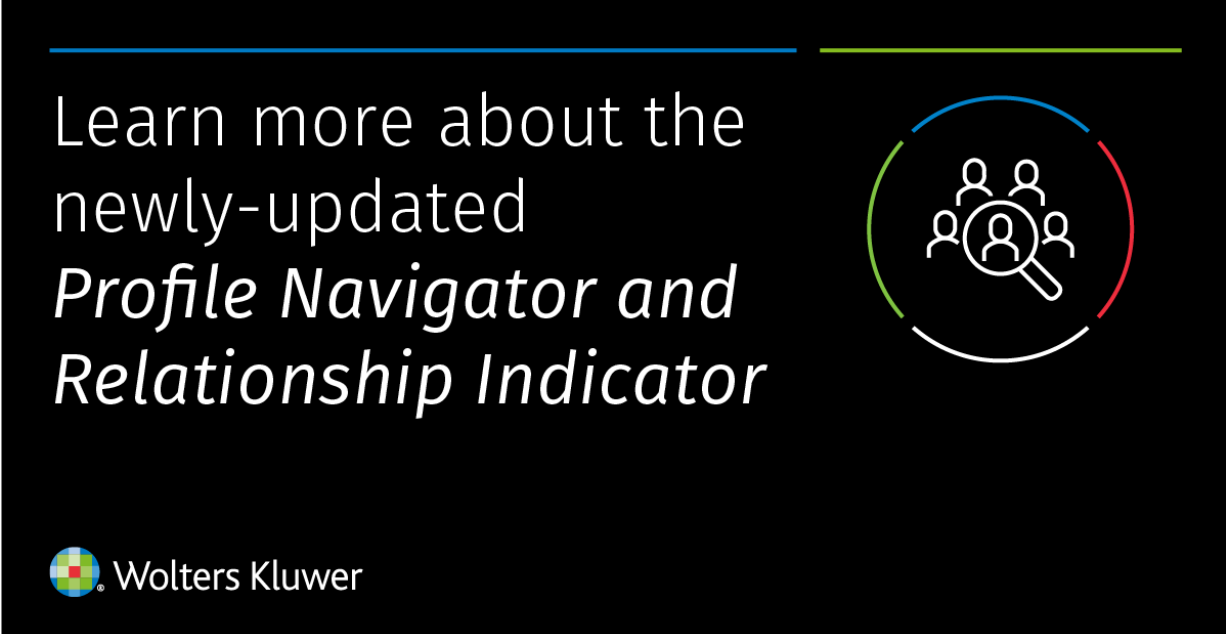
Although the SIAC agreed to administer the arbitration relevant to the *Insignia* case, it is unclear whether the SIAC, or another arbitral institution, will now agree to administer a “hybrid” arbitration under the ICC Rules given the introduction of Rules 1(2) and 6(2) in the 2012 ICC Rules, and the controversy that followed the earlier decision. It will also be interesting to see whether the court’s decision is appealed and whether the judgment stands. On any basis, it appears that the recent amendments to the ICC Rules have not yet fully doused the flames of the debate that was sparked by *Insignia* in 2009.

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