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The creation of a hybrid arbitration from a pathological arbitration clause

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The creation of a hybrid arbitration from a pathological arbitration clause

HKL Group Co Ltd v Rizq International Holdings Pte Ltd [2013] SGHCR 5

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In *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5, the Singapore High Court was asked to grant a stay of proceedings in favour of arbitration under the International Arbitration Act. One of the two issues in that case was that the arbitration clause suffered a drafting defect. The clause provided as follows:

> *"Any dispute shall be settled by amicable negotiation between two Parties. In case both Parties fail to reach amicable agreement, all dispute 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 of which awards shall be final and binding both parties. Arbitration fee and other related charge shall be borne by the losing Party unless otherwise agreed".*

The defect of the clause was that it is unclear what "the Arbitration Committee at Singapore" refers to. The party resisting the stay, HKL, contended that the arbitration clause was so defective as to be inoperable because it refers to a non-existent entity. Rizq, on the other hand, submitted that the court should rely on the principle of effective interpretation to find that parties could still agree to arbitrate the matter in Singapore, for instance, by referring the matter to the Singapore International Arbitration Centre ("SIAC") for ad-hoc arbitration and agreeing that the International Chamber of Commerce ("ICC") rules are to apply.

The Singapore High Court reasoned as follows:[1]

> "*The pathology would be easily overcome if there was a National Committee in Singapore as the reference to the ICC rules would then be strongly indicative of an ICC arbitration administered by the National Committee.... But, there being no National Committee of the ICC to administer an ICC arbitration in Singapore, the reference to the ICC rules does not aid the court in applying the principle of effective interpretation.*"

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[1] At para. 26.

Nevertheless, the Court held that the clause was workable and stayed the proceedings with the following condition:[2]

> "*...I impose 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.*"

The Court went on to add that:[3]

> "*I must emphasise that while my decision compels the parties to resolve the matter by way of arbitration in the form of a hybrid arbitration applying the ICC rules, as I am empowered to do so under the IAA and giving effect to the arbitration clause as it stands, it in no way impedes the parties from resolving the matter in a more practical manner by now agreeing as between themselves to simply submit the dispute to another form of arbitration, for instance, a straightforward SIAC arbitration, as opposed to a hybrid arbitration applying the ICC rules.*"

That the proceedings ought to be stayed is justifiable, but two questions may be asked of the condition imposed.

The first question is whether Article 1(2) of the ICC Rules was raised before the Court. As pointed out by others,[4] following the Singapore Court of Appeal decision in *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936, the ICC Rules were amended, with a new Article 1(2) effective as of 1 January 2012, providing as follows:

> "*The [International Court of Arbitration] does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC (the "Rules"). The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules. It draws up its own internal rules, which are set forth in Appendix II (the "Internal Rules").*"

It could be said that the condition imposed with the stay creates an awkward situation. The ICC has stated that it is the "*only body*" authorised to administer an arbitration in accordance with its own Rules, yet the Court's condition "*compels*" parties to obtain the agreement of another arbitral institution to administer the arbitration under the ICC Rules.

The second question is why the purported absence of a National Committee in Singapore meant that the arbitration had to be administered by an institution other than the ICC.

It is worth mentioning that the ICC website identifies the Singapore Business Federation as the National Committee for ICC Singapore.[5]

Be that as it may, it is arguable that whether there is a National Committee in Singapore is irrelevant. As Article 1(2) of the ICC Rules stipulates, the ICC International Court of Arbitration ("ICC Court") — and not National Committees — administers arbitrations in accordance with the ICC Rules. The ICC Court is aided by a Secretariat.[6] The ICC Court can

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[2] At para. 37.
[3] At para. 38.
[4] *See* Shaun Lee, "Case Update: Singapore High Court gives effect to pathological arbitration clause" http://singaporeinternationalarbitration.com/2013/02/22/case-update-singapore-high-court-gives-effect-to-pathological-arbitration-clause/, last accessed 22 February 2013.
[5] http://www.iccwbo.org/worldwide-membership/national-committees/icc-singapore/, last accessed 22 February 2013.
[6] The ICC website further explains that "the Secretariat is divided into eight case-management teams, each dealing principally with cases relating to certain regions or language groups. Seven of the teams are based in Paris

administer arbitrations seated anywhere in the world, regardless of whether a National Committee is present in that particular jurisdiction.

The introductory comments in the ICC's booklet titled *Arbitration And ADR Rules* (September 2011) further explains that the ICC Rules "*are applicable to disputes between parties in nay part of the world, whether or not members of the ICC. They are intended for use worldwide in proceedings conducted in any language and subject to any law*."

Consequently, there is a good case that the clear reference to the ICC Rules and Singapore militates in favour of a straightforward ICC arbitration with its seat in Singapore. As has been suggested elsewhere, the reference to an "Arbitration Committee" could be effectively interpreted as a reference to an arbitral tribunal.[7] Unlike *Insigma*, there was no suggestion here that either party deliberately intended for a "hybrid arbitration".

In any event, it could also be argued that the Court need not have gone so far as to impose a condition. A possible resolution could have been to simply grant a stay of proceedings based on a clear intent to arbitrate, leaving (sensible) parties to reach an agreement on what form the arbitration should take, with liberty to apply if parties fail to do so. If that question then arises, it would be open to the Court to construe the clause as a straightforward ICC arbitration seated in Singapore, avoiding a construction that would unnecessarily create an awkward "hybrid arbitration" when there was no evidence either party intended for it to be so.

and the eighth in Hong Kong operating under the same management structure as the other teams. Each team is led by a Counsel, and comprises two or three deputy counsel plus administrative assistants", http://www.iccwbo.org/About-ICC/Organization/Dispute-Resolution-Services/ICC-International-Court-of-Arbitration/Secretariat-of-the-Court/, last accessed 22 February 2012.

[7] *See* Shaun Lee, "Case Update: Singapore High Court gives effect to pathological arbitration clause" http://singaporeinternationalarbitration.com/2013/02/22/case-update-singapore-high-court-gives-effect-to-pathological-arbitration-clause/, last accessed 22 February 2013.