

Singapore Management University

Institutional Knowledge at Singapore Management University

Research Collection Yong Pung How School Of
Law

Yong Pung How School of Law

2-2018

SGCA grants Senior Indian Advocate ad hoc admission to argue arbitration-related applications

Aaron YOONG

Singapore Management University, aaronyoong@smu.edu.sg

Kartik SINGH

Aaron YOONG

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research



Part of the [Asian Studies Commons](#), and the [Dispute Resolution and Arbitration Commons](#)

Citation

YOONG, Aaron; SINGH, Kartik; and YOONG, Aaron. SGCA grants Senior Indian Advocate ad hoc admission to argue arbitration-related applications. (2018).

Available at: https://ink.library.smu.edu.sg/sol_research/4334

This Blog Post is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email cherylds@smu.edu.sg.

SGCA grants Senior Indian Advocate ad hoc admission to argue arbitration-related applications

Published on Singapore International Arbitration Blog, February 26, 2018

<https://singaporeinternationalarbitration.com/2018/02/26/sgca-grants-senior-indian-advocate-ad-hoc-admission-to-appear-before-court/>

by Wei Ming Tan, Kartik Singh, Aaron Yoong*

This article is produced by CMS Holborn Asia, a formal law alliance between CMS Singapore and Holborn Law LLC.

Introduction

In a reversal of the High Court's 2017 decision, Singapore's Court of Appeal ("CA") recently granted unprecedented ad hoc admission for Harish Salve ("Mr Salve") – a Senior Advocate of the Indian Bar – to be admitted to argue foreign law issues in applications to set aside an ICC arbitral award.

This is the first time the Singapore courts have granted foreign counsel other than Queen's Counsel admission to argue a case before the local courts.

Background to the appeal

The dispute arose out of a Share Purchase and Subscription Agreement ("**Agreement**") between Daiichi Sankyo Company, Limited ("**Respondent**" or "**Daiichi**") and certain shareholders ("**Sellers**") of Ranbaxy Laboratories Limited ("**Company**").

The Respondent intended to purchase the shareholding of the Sellers for the purpose of gaining a controlling interest in the Company. The Agreement was governed by Indian law and contains an ICC arbitration clause designating Singapore as the seat of the arbitration.

The Respondent commenced arbitration proceedings alleging fraudulent misrepresentation and concealment by the Sellers of on-going investigations by the US regulatory authorities against the Company. In a 2-1 split decision, the SIAC arbitral tribunal decided in favour of the Respondent ("Award"). The Respondent then commenced enforcement proceedings in India and Singapore.

On 18 May 2016, the Respondent was granted leave by the Singapore courts to enforce the Award in Singapore. In response, the Sellers took out two applications to set aside the Award – one by a group of 15 (fifteen) adult and corporate sellers, the other by 5 (five) minor sellers. Collectively, the Sellers made two concurrent applications for Mr Salve to gain ad hoc admission as foreign counsel. Mr Salve had already been appointed by the Sellers as lead counsel to resist the Indian enforcement proceedings.

The Singapore High Court ("**HC**") dismissed the applications for Mr Salve's admission. You can read our blog post on the earlier [High Court decision here](#).

The governing framework

The statutory framework governing ad hoc admission of foreign counsel can be found in section 15(1) of the *Legal Profession Act* (Cap. 161, 2009 Rev. Ed.) ("**the Act**"). To be admitted, the foreign counsel must:

1. be an appointed Queen's Counsel in the UK or the equivalent in any jurisdiction;
2. not ordinarily reside in Singapore or Malaysia but intends to come to Singapore for the purpose of appearing in the case; and
3. possess special qualification or experience for the purposes of the case.

Even if the above requirements (“the mandatory requirements”) are satisfied, the court retains the discretion to refuse admission, pursuant to paragraph 3 of the Legal Profession (Ad Hoc Admissions) Notification 2012 (S 132/2012) (“Notification Matters”). In exercising its discretion, the Notification Matters lists the following for the court’s consideration:

1. the nature of the factual and legal issues;
2. the necessity of a foreign senior counsel;
3. the availability of any Senior Counsel or other advocate and solicitor with appropriate experience; and
4. whether the court considers the admission of the foreign senior counsel to be reasonable.

The decision of the CA

Mandatory Requirements

It was undisputed that Mr Salve satisfied the requirements stated in s 15(1)(a) and (b) of the Act. The question was whether he had “*special qualifications or experience for the purposes of the case*” pursuant to s 15(1)(c) of the Act.

In this regard, the CA took great pains to emphasise the importance of framing the legal issues prior to undertaking an analysis. In its view, the framing of the legal issues must strike a level of particularity to avoid being both unduly restrictive or unhelpfully vague, whilst remaining neutral.

Accordingly, the CA re-framed the issues to as follows:

- What damages should be awarded for fraudulent misrepresentation under Indian law;
- What constitutes consequential damages under Indian law; and
- What constitutes the law and public policy of India in relation to the contractual capacity of minors and their liability for contracts made on their behalf?

The CA ultimately found that Mr Salve had the requisite experience to address these issues because:

1. his curriculum vitae demonstrated deep expertise and experience in the relevant area of law;
2. in contrast to the HC’s reasoning, it was unnecessary to demonstrate specific experience with the actual issues in consideration;
3. Mr Salve had adduced further substantiation that corroborated his expertise in commercial and contractual disputes in India; and
4. being the Solicitor-General of India for three years, he would have had considerable experience in Indian public policy.

Notification Matters

The CA found that the factors listed in the Notification Matters had been satisfied such that it would exercise its discretion in favour of granting Mr Salve ad hoc admission.

This was because:

- the relevant issues of Indian law and policy were complex and unsettled such that substantial disagreements had arisen both between the arbitral tribunal, and “high calibre” Indian experts relying on numerous legislation and case authorities;
- an Indian lawyer with substantial experience in the law and policy of the country would naturally be of greater assistance than local counsel; and
- the court must have the most complete picture in disputes involving challenge to jurisdiction of arbitral tribunal governed by complex foreign law.

The Court's Decision

Having re-framed the issues, the CA acknowledged the complexity of the Indian law issues and concluded that the court would be more assisted by Indian counsel than local counsel.

Further, given that the governing law of the arbitration was foreign law but the seat was Singapore, admission of foreign counsel would aid the court in having “the most complete picture of foreign law and policy”, especially in relation to the Sellers’ challenge of the tribunal’s jurisdiction.

Key Takeaways

The Court’s paramount objective: In granting Mr Salve ad hoc admission, the CA emphasised that it is paramount that the court has “what the court needs to assist it in achieving a correct and just result in the case before it”. The touchstone for the admission of foreign senior counsel must be on the basis of need, and not desirability or convenience.

To this end, the matters relevant to the court are:

1. whether foreign law is central to the issue in dispute;
2. whether the experts on foreign law are diametrically opposed or opposed to a significant degree;
3. whether there are adequate independent written materials to help the court find its way through the issues of foreign law;
4. whether the issues of foreign law go towards the jurisdiction of the tribunal; and
5. whether the court may have to come to a view on foreign law in an uncertain situation.

The SICC regime vs. the domestic regime: Interestingly, the CA appears to subtly endorse the Singapore International Commercial Court (“SICC”) regime for permitting foreign counsel to make submissions on issues of foreign law as opposed to the domestic regime, which provides for foreign law to be proved as an issue of fact.

According to the CA, by allowing foreign counsel to make submissions on foreign law, the SICC framework permits these issues to be “*presented in a holistic manner by counsel who can apply techniques of legal reasoning in their submissions and analysis*”.

The CA’s observation is particularly timely given the recent amendments to the Supreme Court of Judicature Act (“SCJA”) clarifying the SICC’s jurisdiction over arbitration-related proceedings. Read our discussion here for more on how the SCJA amendments affect the SICC.

Consistency with Act’s amendment: The admission of Mr Salve was also consistent with the amendment of the Act in 2012, which, according to Law Minister Mr K Shanmugam, was aimed at “giving flexibility to clients” in view of the growth of Singapore’s international arbitration industry and the corresponding increase in arbitration proceedings governed by or involving foreign law.

Alternative solution: A potential alternative to the ad hoc admission of foreign counsel may be to engage such foreign counsel via the Amicus Curiae scheme. This would avail the courts of foreign counsel’s expertise whilst maintaining the court’s trust in the proficiency of local counsel.

Other developments: In other developments to this ongoing legal saga, the Delhi High Court has on 31 January 2018 allowed Daiichi’s application to enforce the ICC Award valued at US\$550 million in India. Justice Jayant Nath rejected the objections raised by the Singh brothers that the Award was not in line with Indian law or public policy. The decision may be subject to further appeal to a two-member panel of the Delhi High Court or to India’s Supreme Court.

**This article is co-written by Wei Ming Tan (CMS Holborn Asia), Kartik Singh and Aaron Yoong (students at Singapore Management University [“SMU”]) as part of a joint initiative by CMS Holborn Asia and the Society of International Law (Singapore) based at SMU’s School of Law.*