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LEGAL UPDATE

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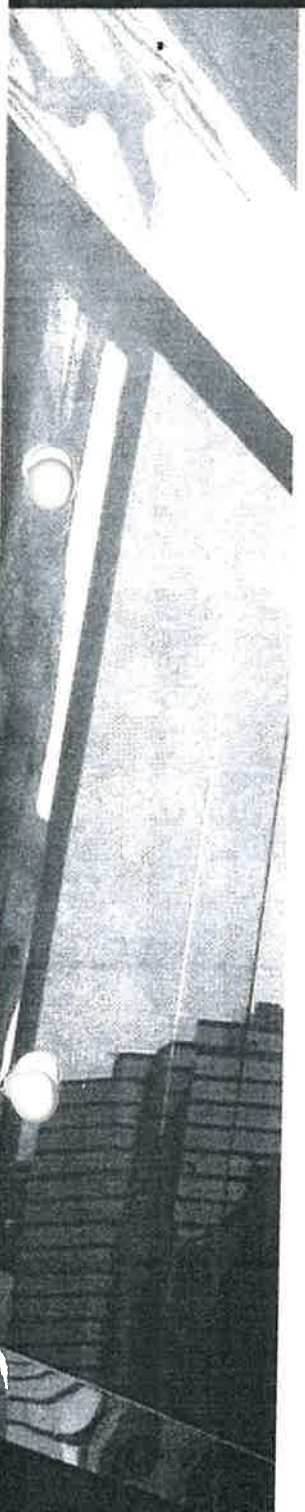

INTERNATIONAL ARBITRATION UPDATE

COURT OF APPEAL AFFIRMS PRINCIPLE OF PARTY AUTONOMY IN ARBITRATION; UPHOLDS AGREEMENT FOR HYBRID *AD HOC* ARBITRATION

Insigma Technology Co Ltd v Alstom Technology Ltd **[2009] SGCA 24**

Executive Summary

The Singapore Court of Appeal has upheld the principle of party autonomy in the selection of the kind – and terms – of arbitration. It has also confirmed that an arbitration agreement which provides for an arbitral institution to administer an arbitration under the rules of another may be valid, provided that the institution administering the arbitration is able to substitute similarly equipped actors to perform the roles of the other arbitral institution.

Background

Insigma Technology Co. Ltd ("**Insigma**") and Alstom Technology Ltd ("**Alstom**") were parties to a Licence Agreement (the "**Licence Agreement**") governed by Singapore law. Article 18(c) of the Licence Agreement provided for the arbitration of any disputes between the parties in the following terms:

> *"... Any and all such disputes shall be finally resolved by arbitration* ***before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce*** *then in effect and the proceedings shall take place in Singapore and the official language shall be English ..."* (the "**Arbitration Agreement**")

A dispute arose between Insigma and Alstom over the proper basis of computing annual royalties under the Licence Agreement and Alstom eventually referred the dispute to arbitration before the Singapore International Arbitration Centre (the "**SIAC**"). Prior to so doing, Alstom's solicitors obtained the SIAC's confirmation that it would be prepared to administer the International Chamber of Commerce (the "**ICC**") Rules of Arbitration (the "**ICC Rules**"), with the SIAC Secretariat undertaking the role of the ICC Secretariat, the SIAC Registrar that of the ICC Secretary General and the SIAC Board of Directors the role of the ICC Court.

A tribunal (the "**Tribunal**") constituted by the SIAC heard preliminary arguments pertaining to its jurisdiction. In the Tribunal's opinion, it was *"clear enough"* that the parties had intended for the SIAC to administer the arbitration in accordance with the ICC Rules. It concluded that the Arbitration Agreement was valid.

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Dissatisfied, Insigma applied to the High Court to set aside the Tribunal's decision on, among other things, the grounds that the Arbitration Agreement was inoperative for uncertainty.

The High Court's decision

The High Court held that the Arbitration Agreement was valid for reasons which included the following:

- There was no problem in principle with an institution (the SIAC in this case) administering arbitration proceedings in accordance with the procedural rules of another body chosen by the parties (the ICC Rules in this case) as long as no significant inconsistency arose.

- The SIAC had substituted the various actors designated under the ICC Rules with similarly equipped actors from the SIAC. This was within the degree of flexibility allowed by the ICC Rules which respected party autonomy.

- Since it was clear and undisputed that the parties intended to resolve their disputes by arbitration and not litigation, all reasonable efforts should be made to give effect to the parties' intention to arbitrate in an *ad hoc* arbitration.

The High Court dismissed Insigma's application. Dissatisfied, Insigma appealed to the Court of Appeal.

The Court of Appeal's decision

The Court of Appeal dismissed Insigma's appeal, agreeing entirely with the High Court's reasons.

Chief Justice Chan Sek Keong also made the following observations concerning the validity of a hybrid form of international arbitration:

Approach to the interpretation of an arbitration agreement

The court favours an approach which upholds, as far as possible, the underlying and fundamental principle of party autonomy in the selection of the kind – and terms – of arbitration. Given the inherently private and consensual nature of arbitration, the Singapore courts will ordinarily respect the principle of party autonomy and give effect to workable agreed arbitration arrangements in international arbitration, subject only to any public policy considerations to the contrary.

Arbitration agreement to be construed like any other commercial agreement | An arbitration agreement should be construed like any other form of commercial agreement. The

fundamental principle of documentary interpretation is to give effect to the parties' intention as expressed in the document.

"Principle of effective interpretation" to be given effect to | 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 arbitration agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars, provided that the arbitration can be carried out without prejudice to the parties' rights and giving effect to such intention does not result in an arbitration that is outside the parties' contemplation.

Regard should be had to the "principle of effective interpretation" in international arbitration law which states that one should *"prefer the interpretation which gives meaning to the words, rather than that which renders them useless or nonsensical"*. An arbitration agreement should also not be interpreted restrictively or strictly; it is not a statute. A commercially logical and sensible construction is to be preferred over another that is commercially illogical.

Hybrid ad hoc arbitrations not objectionable in principle

Insigma argued that the Arbitration Agreement was operationally too uncertain to be given effect to. However, Insigma was unable to explain where the uncertainty lay, and why the Arbitration Agreement could not or did not work in the manner described by the Tribunal and the High Court.

The Court of Appeal agreed with the High Court that there should be no practical problem in, and no objection in principle to, providing for a hybrid *ad hoc* arbitration administered by one institution but governed by the rules (adapted as necessary) of another if the institution administering the arbitration can arrange for organs to carry out functions similar to those performed by the other arbitral institution.

This freedom is inherent in the flexible nature of arbitration, especially *ad hoc* arbitration. In any case, inefficiency alone cannot render an arbitration agreement invalid if the parties had agreed and intended for the arbitration to be conducted in this manner.

Arbitration Agreement not a "pathological clause"; not uncertain or unworkable

Before the High Court, Insigma argued that the Arbitration Agreement was a *"pathological clause"*, which denotes an arbitration agreement that contains a defect or defects liable to disrupt the smooth progress of the arbitration.

The Court of Appeal noted that a defect in an arbitration clause does not necessarily negate the arbitration agreement constituted by it. A "pathological clause" is not void *ab initio*.

The Court of Appeal found that the Arbitration Agreement was not a "pathological clause". Further and in any event, the Arbitration Agreement was rendered certain and workable by the SIAC agreeing to administer the arbitration in accordance with the ICC Rules and to nominate appropriate functional bodies that corresponded to the bodies required under the ICC Rules to, among other things, supervise the arbitration.

No policy considerations preventing the SIAC from administering the arbitration in accordance with the ICC Rules

The choice of a hybrid form of arbitration is a matter of agreement between the parties. This is wholly consistent with Singapore's policy on the role of international commercial arbitration in resolving commercial disputes in Singapore.

Section 15A of the International Arbitration Act and the international arbitration industry recognise that an arbitral institution may play a number of different roles in an arbitration. The parties may agree on what an arbitral institution's role should be. It is not uncommon for an arbitral institution to, for example, supervise the conduct of an arbitration by acting as an administrator in the proceedings, as was the SIAC's role in the present case.

If you would like more information about this update or wish to discuss how it may potentially affect you or your business, please feel free to contact:

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INTERNATIONAL ARBITRATION GROUP

Drew & Napier LLC is the first Singapore law firm to win the International Arbitration Firm of the Year award, and has won this award twice (*Asian Legal Business SE Asia Law Awards 2007, 2009*). *Asia Pacific Legal 500* recognises that our "stellar team" has brought its "formidable reputation" and "excellence" in disputes into the arbitration sector. Members of our International Arbitration Group, whose arbitration work is "widely respected throughout the Southeast Asian region" (*Asialaw Profiles*), are recognised as "one of the best around" (*Who's Who Legal*), "very highly regarded" (*Asia Pacific Legal 500*) and having a "strong presence" (*Chambers Asia*) in this field.

Our International Arbitration Group has extensive experience with many major arbitral institutions and different arbitration rules. Our experience includes arbitration representation before the following:

- Singapore International Arbitration Centre
- London Court of International Arbitration
- American Arbitration Association
- International Chamber of Commerce
- China International Economic & Trade Arbitration Commission
- Hong Kong International Arbitration Centre
- Kuala Lumpur Regional Centre for Arbitration
- Singapore Chamber of Maritime Arbitration
- Singapore Institute of Arbitrators
- Singapore Institute of Architects
- UNCITRAL Rules arbitrations
- Other *ad hoc* arbitrations

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