

## Arbitration Alert

Dear Clients & Friends

### **Singapore Court of Appeal maintains pro-arbitration stance and considers meaning of “dispute” in arbitration agreement**

The recent Court of Appeal decision in *Tjong Very Sumito & Ors v Antig Investments Pte Ltd* [2009] SGCA 41 reiterates the Singapore courts’ pro-arbitration stance. In this case, the Court of Appeal stressed that it was fundamental that parties be held to their contractual bargain to refer their disputes to arbitration. The court will not readily find that there is no dispute referable to arbitration unless the defendant has clearly admitted to the plaintiff’s claim in terms of both liability and quantum.

In *Tjong Very Sumito*, the parties entered into a Shares Sale and Purchase Agreement (the “SPA”) under which the appellants agreed to sell, and the respondent agreed to buy, 72 per cent. of the entire paid-up share capital of a certain company. Section 11.06 of the SPA required the parties to resolve their “*disputes, controversies and conflicts arising out of or in connection with*” the SPA by arbitration if negotiations were unsuccessful. The parties subsequently entered into four further supplemental agreements. The fourth supplemental agreement stated that it was “*supplemental to and an integral part of the SPA*” and also incorporated the terms of the SPA.

A dispute arose over the amount payable under the fourth supplemental agreement by the respondent and the appellants commenced court proceedings against the respondent. In turn, the respondent wrote to the appellants’ solicitors stating, *inter alia*, that the appellants’ suit was “*without merit and misconceived*”, and sought a stay of the court proceedings in favour of arbitration.

#### **Judicial policy towards arbitration**

As a starting point, the Court of Appeal first addressed the judicial policy towards arbitration. It opined that “*the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration*”. Given all the circumstances of the case, the court would give effect to the “*parties’ contractual choice as to the manner of dispute resolution unless it offends the law*”.

#### **Obtaining a stay in favour of arbitration**

The Court of Appeal then addressed the issue of whether there was a “difference”, “dispute” or “controversy” which fell within the arbitration agreement under the SPA such that a stay of the court proceedings could be ordered pursuant to section 6 of the International Arbitration Act (the “IAA”). Section 6 provides, *inter alia*, that (emphasis added):

- “(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement *in respect of any matter which is the subject of the agreement*, any party to the agreement may, at any time after appearance and before delivering any pleading or

taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

- (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, *unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.*"

The court opined that in order to obtain a stay of proceedings in favour of arbitration, the party applying for a stay must show that he is party to an arbitration agreement and that the proceedings instituted fall within the terms of the arbitration agreement. The proceedings would fall outside the arbitration agreement should, for example, the agreement provide only for arbitration of "disputes" or "differences" or "controversies" which exist, but there was in fact no "dispute", "difference" or "controversy" between the parties. In this connection, it was "*sufficient*" for a defendant to "*simply assert that he disputes or denies the claim in order to obtain a stay of proceedings in favour of arbitration*". The court will not look into the respective merits of the parties' cases.

A matter would not, however, be referable to arbitration if the defendant had clearly admitted to the plaintiff's claim in terms of both quantum and liability. In such a case, the plaintiff may proceed to apply for summary judgment against the defendant in court. However, the Court of Appeal cautioned that the plaintiff should be armed with "*compelling evidence of the defendant's admission, because once that admission is challenged by the defendant with any semblance of credibility, the court will ordinarily be inclined to decide that a 'dispute' has arisen and order a stay of proceedings for the arbitral tribunal to resolve the 'dispute'*". Silence by the defendant *per se* and a failure to respond may be insufficient to constitute a clear and unequivocal admission of the plaintiff's claim. On the other hand, non-admission may be inferred from previous inconclusive discussions between parties, prevarication and even silence.

The Court of Appeal also acknowledged that there may be cases where a party applying for a stay may have waived or may be estopped from asserting his right to insist on arbitration. In this regard, normal contractual analysis of estoppel and/or waiver would apply and the court will not stay the proceedings on the basis that the arbitration agreement is "*inoperative*".

On the facts, it was undisputed that the fourth supplemental agreement was "*supplemental to and an integral part of the SPA*" which provided for all disputes, controversies and conflicts to be resolved by arbitration. The Court of Appeal also opined that the insertion of the words "controversies" and "conflicts" in section 11.06 of the SPA "*obviously affirm[ed] a broad intention to refer all manner of contentious matters to arbitration*". This, coupled with the fact that the respondent had made a positive assertion challenging the appellant's claim, warranted a stay of proceedings in favour of arbitration.

### ***Further information***

Should you have any queries as to how this may affect your business, please do not hesitate to get in touch with your usual contact at Allen & Gledhill LLP or either of the following:

Dinesh Dhillon  
Tel: +65 6890 7822  
E-mail: [dinesh.dhillon@allenandgledhill.com](mailto:dinesh.dhillon@allenandgledhill.com)

Edwin Tong  
Tel: +65 6890 7867  
E-mail: [edwin.tong@allenandgledhill.com](mailto:edwin.tong@allenandgledhill.com)

Yours faithfully  
**Allen & Gledhill LLP**  
Singapore

Allen & Gledhill LLP  
T +65 6890 7188 | F +65 6327 3800 | [publications@allenandgledhill.com](mailto:publications@allenandgledhill.com)  
One Marina Boulevard #28-00 Singapore 018989 | [www.allenandgledhill.com](http://www.allenandgledhill.com)

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