



## ARBITRATION: WHEN WILL THE COURT GRANT A STAY OF ARBITRATION PROCEEDINGS UNDER SECTION 10(9)(a) OF THE IAA

*BLY v BLZ [2017] SGHC 59*

### IN SUMMARY

This Singapore High Court decision of 27 March 2017 discussed how the Singapore High Court will exercise its discretion to stay (temporarily suspend) arbitration proceedings pending the Singapore High Court's review of the Arbitration Tribunal's ruling on its jurisdiction over the dispute concerned.

### FACTS

BLY (the "Plaintiff") and BLZ (the "Defendant") were parties in an international arbitration proceeding under the International Chamber of Commerce (the "Arbitration").

As a preliminary matter, the arbitral tribunal (the "Tribunal") ruled that it had jurisdiction (i.e. authority) to arbitrate the dispute. The Plaintiff then sought to appeal the Tribunal's ruling of jurisdiction under *Section 10(3)* of the *Singapore International Arbitration Act* (the "IAA").

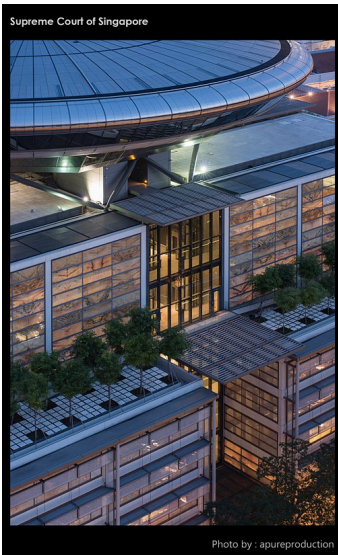
Subsequently, the Plaintiff sought to rely on *Section 10(9)(a)* of the IAA to ask the Singapore High Court (the "Court") to stay the Arbitration pending the outcome of its appeal on the Tribunal's ruling of jurisdiction. The application was made because the Tribunal had proceeded to make its ruling on document production.

### ISSUES BEFORE THE SINGAPORE HIGH COURT:

The Court noted that there were not many instructive cases dealing with how the Court exercises its discretion under *Section 10(9)(a)* of the IAA. The Court thus had to spell out the relevant factors governing an application for a stay of arbitration proceedings when that arbitral tribunal's jurisdiction was being challenged in court.

### HOLDING OF THE SINGAPORE HIGH COURT

The Court declined to exercise its discretion to stay the Arbitration pending the outcome of the Plaintiff's appeal on the Tribunal's ruling of jurisdiction.





**LEGISLATIVE INTENT OF THE INTERNATIONAL ARBITRATION ACT**

Upon close examination of the relevant legislation, the Court observed that the IAA envisaged minimal intervention from the courts so as to minimise delays to arbitration proceedings. This is due to the following reasons:

- (a) the default position established in the IAA was that a stay will not be granted unless an application under *Section 10(9)(a)* of the IAA was made to the Court (giving rise to the Plaintiff's application in this case);
- (b) in an arbitration, an arbitral tribunal could choose whether to give a preliminary holding on its jurisdiction, or decide the jurisdictional question at the end together with the merits of each party's claim. This suggests that the IAA had struck a balance which prioritised reducing delays over preventing unnecessary arbitration; and
- (c) while rulings of jurisdiction came under court's control, the IAA stipulated a short time period for an appeal to be made, and expressly mentioned that the arbitral tribunal had the discretion to continue the proceedings while the court review was going on.

**FACTORS GOVERNING AN APPLICATION UNDER SECTION 10(9)(A) OF THE INTERNATIONAL ARBITRATION ACT**

Accordingly, the Court held that a stay of arbitral proceedings will only be granted when there are "special circumstances" that justify it. These special circumstances are highly fact-specific, but the Court gave the following guidance on what can and cannot constitute special circumstances:

- (a) "Special circumstances" are wide enough to include the conduct of all parties in relation to the arbitration proceedings;
- (b) "Special circumstances" mean that the applicant does not need to show that it suffered any loss or detriment. Rather the focus was on the whether the surrounding facts and circumstances were drastic enough. For example, if a tribunal was acting in an improper manner, a stay of proceedings may be granted even if no loss or detriment had been suffered by the parties;
- (c) Loss of time and money due to useless arbitration do not constitute "special circumstances". The Court reasoned that these were common losses that were probably factored in when the IAA were drafted;
- (d) similarly, inconvenience, uncertainty and loss of confidentiality are also not circumstances which are "special";



- (e) that being said, the Court acknowledged that a stay may be granted when the documents were shown to be of such a sensitive nature that their disclosure might constitute a special circumstance; and
- (f) the strength of the jurisdictional appeal could not, in and of itself, justify a stay. The Court reasoned that it would run the risk of deciding on the merits of the jurisdictional appeal if it were to take this factor into account at this stage.

Applying these guidelines to the facts of the Plaintiff's case, the Court held that there were no special circumstances warranting a stay of arbitral proceedings under Section 10(9)(a) of the IAA.

### **Concluding Views**

*This case provides a useful reminder that Singapore courts will be slow to intervene with arbitration proceedings, and will endeavour to minimise delays to arbitration proceedings.*

*The authors take the view that "special circumstances" is a high threshold that is very fact-specific. Showing detriment or loss may not amount to "special circumstances", and it is unclear how unique or drastic the applicant's situation must be before the court will deem it as "special circumstances". Readers are thus advised to be mindful of litigation risks and potential uncertainty when making an application under Section 10(9)(a) of the IAA.*

*Accordingly, readers are also advised to continue participating diligently in arbitration proceedings, even if they are appealing that arbitral tribunal's ruling of jurisdiction. This is to prevent any adverse inferences being drawn against them.*

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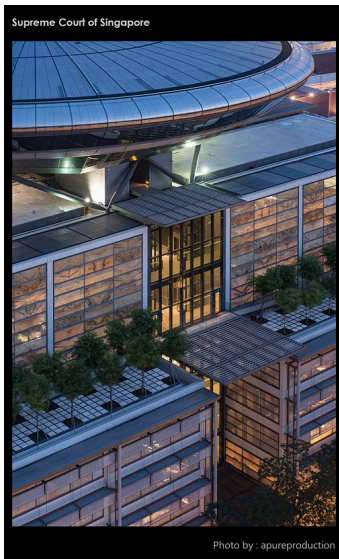


## ADJUDICATION: APPARENT BIAS OF AN ADJUDICATOR & EFFECT ON DETERMINATION

*UES Holdings Pte Ltd v KH Foges Pte Ltd [2017] SGHC 114*

### IN SUMMARY

This Singapore High Court decision of 29 May 2017 deals with the issue of the apparent bias of an adjudicator in the rendering of this adjudication determination pursuant to the *Building and Construction Industry Security of Payment Act* ("SOP Act")



### FACTS

#### Adjudication Application & Determination

UES Holdings Pte Ltd (the "Plaintiff") entered into a sub-contract ("the Sub-Contract") with the KH Foges Pte Ltd (the "Defendant") for the provision of works. On 25 August 2016, the Defendant served a progress payment claim (the "Payment Claim") on the Plaintiff for the sum of S\$1,642,751.13. On 14 September 2016, the Plaintiff responded to the Payment Claim with a payment response (the "Payment Response") which indicated that, far from being entitled to the sum sought in the Payment Claim, the Defendant was liable to pay the Plaintiff S\$ 91,371.23.

On 30 September 2016, the Defendant lodged its Adjudication Application with the Singapore Mediation Centre, and on 8 November 2016, the Adjudicator rendered the Adjudication Determination, in which he ordered the Plaintiff, *inter alia*, to pay the Defendant the sum of \$1,199,179.96.

#### Application to Set Aside Determination

On 8 December 2016, the Plaintiff filed its application in this suit for the court to set aside the Adjudication Determination. The Plaintiff submitted that the Adjudication Determination should be set aside on 3 (alternative) grounds:

- (a) the Adjudicator had violated *Section 16(3)(a)* and/or *Section 16(3)(c)* of the SOP Act due to apparent bias on his part ("the Apparent Bias Issue");
- (b) the Adjudication Application had been lodged out of time ("the Timing Issue");



- (c) the Notice had failed to comply with Regulation 7(1)(f) of the Building and Construction Industry Security of Payment Regulations (“the Regulations”) and was therefore defective (“the Content Issue”).

## **Holding of the High Court**

### **The Apparent Bias Issue**

The Defendant submitted that the Adjudication Determination was tainted with apparent bias, in the light of the following:

- (a) the Adjudicator had previous dealings with one Mr Foo Hee Kang (“Mr Foo”), Resource Piling Pte Ltd (“RPPL”), and companies related to RPPL. Mr Foo participated at the Preliminary and Merits Conferences (“the Conferences”) as a representative of the defendant, and had been the Managing Director (“the MD”) of RPPL;
- (b) the Adjudicator had failed to fully disclose his relationship with Mr Foo, RPPL and RPPL’s related companies;
- (c) the Adjudicator had not been forthcoming in replying to queries for details about his relationship with Mr Foo.

The High Court then cited Section 16(3)(a) of the SOP Act which sets out the rule against apparent bias – that the tribunal which decides a dispute must be independent and impartial.

Apparent bias arises if “*there are circumstances which would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the relevant facts that the tribunal was biased*”, also known as the reasonable suspicion test, which has been held to apply to adjudicators of payment claim disputes under the SOP Act. If the reasonable suspicion test has been satisfied, the court may set aside the adjudication determination, as set out in the case of *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797. However the High Court emphasised that only material breaches of natural justice will suffice.

In its application of the reasonable suspicion test to the facts of this case, the High Court held that the starting point is that the mere fact that a tribunal is associated with a party to the dispute before it, or a representative of a party, does not suffice to raise a reasonable suspicion of bias. Where apparent bias is said to arise from the tribunal’s associations, a rational connection must be shown between the associations and the prospect of bias. A suspicion is reasonable if and only if it is founded on a reason which is supported by the evidence. This is akin to the definition of a reasonable doubt, in the context of the criminal standard of proof, as a doubt “for which there is a reason that is, in turn, relatable to and supported by the evidence presented”. Therefore, the High Court held that a party who alleges apparent bias based on a tribunal’s associations must show that there is reason to hold that the tribunal’s associations might influence its decision.



In determining if there is a rational link, the court should consider the duration, intensity and nature of the tribunal's relevant associations, along with the time which has passed since the last renewal of the associations. Apparent bias is established if there is reason to hold, upon analysing the tribunal's associations through the prism of these factors, that those associations might influence the tribunal's decision.

### **The Disclosure Issue**

With regard to the adjudicator's non-disclosure of his associations, whilst a tribunal's failure to (fully) disclose its associations with a party or a party's representative is one factor which may lead to a reasonable suspicion of bias, a failure to disclose will only give rise to apparent bias if there are other circumstances which support such a finding.

### **Waiver Issue**

The Defendant submitted that even if apparent bias arose, the Plaintiff had waived its right to challenge the Adjudication Determination on that basis, as while the Adjudicator had told the parties that he had previous dealings with Mr Foo, the Plaintiff did not challenge his impartiality during the proceedings, and had only made queries about the Adjudicator's relationship with Mr Foo after the release of the Adjudication Determination.

The High Court held that in this case, the Adjudicator had put the Plaintiff on notice in stating that he had "previous dealings" with Mr Foo at the start of the Merits Conference, that an issue of apparent bias might lie because the Adjudicator had disclosed sufficient information

to the Plaintiff to alert it to the facts, viz, previous (business) dealings, underlying this issue.

As such, the Plaintiff was deemed to have full knowledge of all the material facts at the relevant time such that the first element of waiver was fulfilled. Accordingly, the High Court found that the Plaintiff had waived its right to challenge the Adjudication Determination on the ground of apparent bias.

The High Court also rejected the other 2 grounds for challenge of the Adjudication Determination, and thus set aside the Plaintiff's application to set aside the Adjudication Determination.

### **Concluding Views**

*This High Court's decision demonstrates the caution exercised in determining if an adjudicator acted with apparent bias in rendering his or her adjudication determination. This decision also highlights the importance of an aggrieved party in an adjudication to raise its objections with regard to the jurisdiction or bias of an adjudicator once it has come to knowledge of such fact, and any delay could be considered a waiver on his part to raise any such objections.*

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## **SPORTS LAW IN SINGAPORE: ALLEGED MISUSE OF FUNDS BY TIONG BAHRU FOOTBALL CLUB & DEVELOPMENT OF LOCAL FOOTBALL**

The latest controversy to hit the Singapore football scene was the lodgement of a police report on 19 April 2017 by SportSG, a statutory board under the Ministry of Community Development, Youth and Sports, with regard to suspected misuse of Tiong Bahru Football Club ("TBFC")'s funds, coupled with one of TBFC's senior officer's purported attempt to delay and/or obstruct the completion of audits into the S.League sit-out clubs.

The allegations of misuse of funds were in relation to a S\$ 500,000.00 donation made by TBFC, owned by Mr. Bill Ng (who is also the Chairman of Hougang United Football Club), which Mr. Ng claimed was made to the Football Association of Singapore ("FAS"). However, FAS's General Secretary Mr. Winston Lee has since produced evidence to show that Mr. Ng was aware that his said donation was meant for the Asean Football Federation ("AFF") for its Football Management System, and that then-FAS president Mr. Zainudin Nordin had approached Mr. Ng to make the said donation.

The lodgement of the police report led to the arrests of Mr. Ng, his wife Ms. Bonnie Wong, Mr. Lee and Mr. Nordin, with all four individuals currently out on bail.

The donation raised eyebrows for several reasons, *inter alia*, that the sizeable donation was made to a foreign entity AFF (although fiercely refuted by Mr. Ng himself). TBFC's Constitution states that profit and monies accruing to the club can be applied "towards

*the furtherance, promotion and execution of the objects of the Club".*

Yet the said donation could arguably not be in breach of the Club's Constitution for the fact that it was made to the AFF's Football Management System, aimed at enhancing the capabilities of football associations and clubs through the sharing of resources among football associations in the region to strengthen ongoing efforts to raise standards of football management in Southeast Asia. In turn, local clubs in Singapore would also reap the benefits, according to AFF.

The hefty donation amount also raised red flags in terms of the amount of revenue sit-out clubs (clubs which sit out of the S-League to strengthen their financial position before applying to return to the league) earn annually. These clubs generate revenue by operating jackpot rooms at their clubs. TBFC's annual revenue was claimed to be S\$ 36.8 million last year. Licences for these jackpot machines are granted based on the number of members for each club, and clubs are told that profits from these machines are to be put back into the club for the promotion of football.

The newly-elected FAS President Mr. Lim Kia Tong and the FAS Council was quick to act, approaching four inactive S-League clubs that operate jackpot rooms, and informing them to either return to playing in the S-League, or be de-affiliated and surrender their jackpot machines. These four inactive clubs were Tanjong Pagar United, Gombak



United, Woodlands Wellington FC and Sinchi FC. Mr Lim's initiative is part of efforts to prevent de-affiliated clubs from running jackpot rooms under the umbrella of professional football clubs. The premise is that it is only fair for clubs operating jackpot machines to give back to local football, and having more clubs participate in the S-League will make it a viable competition once more. Several of the above-mentioned sit-out clubs have expressed keen interest to return to S-League again, although others are worried about whether they have the funding to run a professional team, which was the main reason for their sitting-out in the first place. Currently only 9 teams participate in the S-League, demonstrating a dire need for the participation of more teams to raise the standards of competition.

Besides the initiative to ban sit-out clubs from running jackpot rooms, FAS has also expressed plans to introduce club promotion and relegation, and to instill financial prudence amongst local clubs.

### **Concluding Remarks**

Whilst we await the outcome of the investigations in relation to the alleged misuse of funds, the swift action of the FAS's newly-elected Council demonstrates the association's dedication to the development of Singapore's football scene. This is a silver lining for the growth of the Singapore football scene amidst the cloud of alleged misconduct by Mr. Ng.

*These are general information/personal views of the writer and not legal advice or opinion. On the legal issues, you should at all material times seek the advice of legal counsel of your choice.*

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*If you would like more information on this or any other area of law, you may wish to contact us.*

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