

**CONSTRUCTION LAW: BUILDING AND CONSTRUCTION CONTRACTS – FREE-HAND RIGHTS CLAUSE IN CONTRACT**

***Ng Boo Han & Koo Oi Lian Audrey-Ann v Teo Boon Hiang Edward [2014] SGHC 267***

**In Summary**

The Singapore High Court decision of 18 December 2014 discussed the effect of a “free-hand rights” clause (allows for creative flexibility) in the contract between the Appellants and the Respondent, and whether there was bad faith and/or unconscionable behaviour on the part of the Appellants in their dealings with the Respondent during the course of the work done.



**Facts**

The Appellants engaged the Respondent to demolish and rebuild their property with a “rustic”, “English-country style” for a sum of \$ 350,000. However upon completion of the renovation works, the Appellants were not satisfied with the Respondent’s work, and made several requests to the Respondent to rectify various defects, withholding payment to the Respondent until the rectification works were carried out, to which the Respondent refused. The Respondent then brought legal action against the Appellants for the outstanding sum owed to him and the costs of the additional work done.

**Holding of the District Judge**

The District Judge found in favour of the Respondent by holding that the Appellants had agreed to give the Respondent a free-hand to build a “rustic style” house, and thus could not complain that the materials used and effectively the work done was not up to industry standards, insofar as they reflected the parties’ agreed “rustic style”.

The Appellants then appealed against the District Judge’s decision.

**Issues Before the High Court**

The High Court had to consider the following issues raised in the Appellants’ appeal:

- (a) whether the parties had agreed on building a “rustic country-type” house similar to that of the Respondent’s;

- (b) Whether the Appellants had substantially failed to prove that the rectification works were carried out; and
- (c) whether the Appellants, in refusing to sign the Defects List, had unreasonably prevented the Respondent from rectifying the defects.

### **Holding of the High Court**

The Honourable Edmund Leow JC overturned the District Judge's decision and found in favour of the Appellants instead on the following grounds:

- (a) the Appellants were impressed not so much by the rusticity of the Respondent's house, but rather its efficient use of space and unique façade, meaning that the parties did not come into an agreement to build a "rustic" style house;
- (b) the "free-hand rights" clause did grant the Respondent wide discretion in designing and building the house, thus allowing him to build the house in a "rustic" style manner as he so wished, however the "rustic" concept could not be used by the Respondent to whitewash the defects in his work;
- (c) whether damages for defective works may only be awarded if the Appellants prove that the rectification works had in fact been carried out and paid for.

### **Agreement to build a rustic-type house**

Edmund Leow JC disagreed with the District Judge's finding by firstly stating that the parties had contracted for the Respondent to build a "rustic" style house like his own, as the contract did not make any mention of this condition in any of its clauses. He held that if it was a material element of the construction works the parties would have provided for it in the Contract.

Secondly, Edmund Leow JC held that the point about the renovation works having a "rustic style" was only raised after legal proceedings were commenced, as at that point in time when the Appellants pointed out the defects in the Respondent's work, the Respondent appeared to have accepted the Appellants' criticisms and carried out the relevant rectification works. In the situation, it would have been commonplace for the Respondent to immediately raise the point about the "rustic style" adopted in his renovation works at the moment the Appellants raised their concerns relating to the defective works.

Furthermore, in hearing the evidence of the Appellants, Edmund Leow JC concluded that the Appellants were impressed not so much by the "rustic" design of the Respondent's house, but rather its unique façade and its efficient use of space.

### **Free-hand Rights Clause**

Edmund Leow JC held that the free-hand rights clause did in fact grant the Respondent wide discretion and creative control in the design and renovation of the Appellants' property, and hence, although it was not expressly stated in the contract that the house was to be built in a "rustic" manner, the Respondent could still do so if he wished to, under this free-hand rights clause. Nevertheless, there was a limitation on this discretion afforded to the Respondent, in that the "rustic" argument could not be used to mask the defective works carried out by him. The distinction was in the fact that items that were in breach of building regulations, were a result of poor workmanship or were flawed on a functional level, which would clearly constitute defects that should be rectified, despite them falling under the "rustic style" for aesthetic reasons.

### **Rectification works must have been carried out and paid for**

Edmund Leow JC disagreed with the District Judge's ruling that damages for defective works may only be awarded if the Appellants prove that rectification works had in fact been carried out and paid for, holding that there is no such rule. It was not crucial that the Appellants had carried out and/or paid for the said rectification works, and the District Judge should have awarded the Appellants damages based on the estimated costs of rectification.

As such, Edmund Leow JC awarded damages of two-thirds of the amount paid by the Appellants to a third party contractor to rectify the defects amounting to S\$ 99,250 (of S\$ 150,000.00).

### **Concluding Views**

This case is important in setting out the principles for construing the extent and more importantly the limitation of free-hand rights clauses in building and construction contracts. It demonstrates the importance of contracting parties to state clearly in the contract the particular "style" in which they wish the works to be carried out, and also to expressly provide that any works carried out that are in breach of building regulations, are functionally flawed or are a result of poor workmanship would constitute as defects and must be rectified by the relevant party.

This case is also significant in laying out the principle of the measure of damages, being the costs of rectifying or completing the work, and that it is not necessary for such rectification works to have already been carried out for such damages to be awarded, and that damages may still be awarded on a cost estimation basis.

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**ARBITRATION (INDIA): STAY OF ARBITRATION PROCEEDINGS**

**Vikram Bakshi & Anr. v. Mc Donalds India Pvt. Ltd. & Ors. IA No.6207/2014 in C.S. (OS)  
No. 962/2014**

**In Summary**

The Indian Delhi High Court on 22 December 2014 granted an anti-suit injunction against commencing arbitral proceedings in London and held that the Court's jurisdiction over proceedings would not be ousted if the arbitration agreement was inoperative or incapable of performance.



**Facts**

The Plaintiff and Defendant entered into a Joint Venture Agreement which contained an arbitration clause providing that disputes would be submitted to arbitration through the London Courts of International Arbitration (LCIA) in London. The Defendant issued a Call Option notice (a contract that purports to give a buyer the right to buy a specific quantity of security) purporting to offer to buy out all the shares owned and controlled by the Plaintiff. In turn, the Plaintiff filed a company petition before the Company Law Board ("CLB") alleging oppression and mismanagement, as well as seeking the reinstatement of the Plaintiff as managing director.

The CLB directed the Defendant to maintain status quo over the shareholding pattern of the company and the right of call option when the Defendant applied under *Section 45 of the Indian Arbitration and Conciliation Act (1996)* for proceedings to be referred to arbitration pursuant to the arbitration clause contained in the Joint Venture Agreement. The Plaintiff in turn applied for a stay of proceedings, which was rejected. The application for arbitration was subsequently withdrawn but the Defendant later initiated arbitration proceedings before the LCIA and terminated the Joint Venture Agreement. The Plaintiff applied for an injunction to stay the arbitration proceedings.

## **Issue**

Whether the Civil Court had jurisdiction over the arbitration proceedings and whether the LCIA arbitration in London would be *forum non conveniens* (a discretionary power that allows a court to dismiss a case where another court or forum is better suited to hear the case) whereby an injunction should be granted.

## **Holding**

### **Arbitration proceedings**

The Court granted the Plaintiff's request for an injunction, as the Plaintiff was able to satisfy the requirements for the grant of an injunction restraining the Defendants from pursuing the arbitration proceedings before the tribunal. The Court further held that the Plaintiff was able to *prima facie* (on the face of it) show that the arbitration agreement was inoperative or incapable of performance since the Plaintiff had already filed a suit for oppression and mismanagement in CLB whom had directed the Defendants to maintain status quo.

The Court noted two opposing approaches adopted by the Indian Supreme Court – (a) the civil court has no jurisdiction to entertain a suit where an arbitration agreement exists and a party has referred the case to arbitration (*Chatterjee Petrochem (Mauritius) Co. and Anr. v. Haldia Petrochemicals Ltd.*, 2013 (4) Arb. L.R. 456 (SC)); and (b) reference of the dispute to an arbitrator does not bar the Court from assuming jurisdiction if the agreement is, inter alia, null and void, inoperative or incapable of being enforced, pursuant to *Section 45 of the Arbitration and Conciliation Act (World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte. Ltd* 2014 (1) Arb L. R. 197 (SC))

The Court preferred the second approach on the grounds that (a) the facts of *World Sport Group* is *in pari materia* with the facts of the current case and that the case was a later judgement and thereby more persuasive; and (b) the decision of the Supreme Court in *Shi-Etsu Chemicals v. Aksh Optifibre Ltd* (2005) 7 SCC 234 whereby the majority held that in the case of international arbitration if a party invoked the jurisdiction of a court, the court is obligated by statute by way of preliminary hearing to *prima facie* decide whether the parties' agreement to decide the dispute by an arbitral tribunal is null and void or is incapable of performance or inoperative.

Consequently, the Court's jurisdiction was not ousted, as the agreement is *prima facie* incapable of performance or inoperative.

**Forum non conveniens (A forum which is not convenient)**

With regards to *forum non conveniens*, LCIA was *forum non conveniens* given that all the parties were carrying on business in India, the cause of action arose in India, the governing law was Indian, and the award if granted would have to be enforced in India, according to Indian laws, and so carrying on arbitration proceedings in London when the company law petition is pending is oppressive and vexatious, given the overlapping disputes raised by the Plaintiff and that by the Defendant in the CLB and the arbitration proceedings, respectively.

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**Concluding Views**

The Delhi High Court's decision is surprising in that while parties agreed to have their disputes arbitrated at LCIA, the Court found that LCIA was a *forum non conveniens*. The Court's reasoning conflicts with the earlier ruling of the Indian Supreme Court in *Modi Entertainment Network v W.S.G. Cricket Pte (2003) 4 SCC 341* where the Court held that reasons such as hardship due to parties or subject matter being in India would not cause to turn a *forum conveniens* into a *forum non conveniens*. It is unlikely that the judgement of the High Court would be final as the Defendant can appeal for the High Court's decision to be reversed in the Indian Supreme Court

This seems to be taking a further step back from the general position in arbitration whereby courts would not interfere with the course of arbitration proceedings, which is consensual in nature.

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