



## CONSTRUCTION INDUSTRY UPDATES

### SPECIALIST ACCREDITATION (VOLUNTARY) FOR BUILDING AND CONSTRUCTION PRACTITIONERS

We start the 2017 series of Newsletters considering several interesting developments that have a bearing on the Construction Industry and Law. We set these out in three categories in our first Newsletter – (1) Initiatives; (2) Legislation; and (3) Arbitration.

#### INITIATIVES

We cover two aspects here – mainly from the address by Singapore's The Honourable the Chief Justice Sundaresh Menon during the opening of the Legal Year 2017.

#### SPECIALIST ACCREDITATION (VOLUNTARY) FOR BUILDING AND CONSTRUCTION PRACTITIONERS

Sundaresh Menon C.J. announced that:

*"22. ... we will continue to rely on skilled lawyers to bring together that complex tapestry of experience, expertise, judgment, perception and morality that is necessary for a legal system to thrive. The accreditation scheme is designed to give due recognition to those who are experts in their field of specialisation."*

The Scheme will be implemented as a pilot for Building and Construction lawyers. Administered by the Singapore Academy of Law, it is aimed at recognising the high level of proficiency of legal practitioners in their chosen practice area, promote continued personal professional development and improvement; incentivise younger practitioners to hone their skills and knowledge; provide the legal industry and general public with reliable means of identifying and accessing legal practitioners so proven as possessing the requisite skills and knowledge in the practice area.

It was also announced that the Scheme is expected to extend to areas such as shipping, arbitration and other areas of specialised practice. Considering that the Family Justice Courts, established in August 2014, effectively restructured the Family Court System bringing together all family-related work under a specialised body of Court, we can but assume that such 'other areas of specialised practice' would include Family practitioners.

#### Criteria & Qualifying Assessment

It was also announced that lawyers specialising in building and construction law can apply under the Specialist Accreditation Scheme, consisting of an upper tier for more experienced legal practitioners (*Senior Accredited Specialists*) and a lower tier for younger legal practitioners (*Accredited Specialists*), and the specialist accreditation will have to be renewed every two years, a mark of recognition of particular skills and expertise. The first batch of accredited specialists in this field will be announced in January 2018.

#### Concluding Remarks

While Sundaresh Menon C.J. pointed out:

*"24. Applicants who satisfy stipulated criteria and qualify through the assessment process will be accredited. Participation in the scheme will be entirely voluntary and will not be exclusionary. Thus, non-accredited lawyers will continue to be able to practise in their field..."*

legal practitioners in the construction industry play a critical role in managing projects and claims. It will be interesting to see how the well thought out eligibility criteria for the two tiers of Accreditation may be considered by the wide spectrum of construction legal practitioners.

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### HARNESSING TECHNOLOGY TO ENHANCE THE ADMINISTRATION OF JUSTICE

During the opening of Singapore's Legal Year 2017, The Honourable the Chief Justice Sundaresh Menon announced a five-year Technology Blueprint for the Courts and a unified One Judiciary IT Steering Committee.

#### Technology Blueprint

The Technology Blueprint is established to propose various IT initiatives on harnessing technology to enhance the administration of justice while the One Judiciary IT Steering Committee is set up to review, revise and update the Technology Blueprint as and when necessary, with the Singapore Academy of Law pulling together the efforts of the Ministry of Law and the Law Society.

As stated by The Honourable the Chief Justice:

*"16. ... it would be wrong to approach technology as if it is something to be vanquished just because it threatens to disrupt or challenge how [lawyers] have been accustomed to operate. Technology holds the promise of greater productivity and effectiveness. This should translate to higher quality legal services and cost savings for law firms and, ultimately, for society."*

#### Road Map

The Vision document sets out a developmental road map with a four-pronged approach to take place over five years:

- (a) First prong – Encouraging widespread adoption of baseline technology such as office productivity suites and billing systems;
- (b) second prong – Focusing on enhancements that will streamline and improve the way law is practiced, including the possibility of shared and collaborative virtual platforms and workspaces;
- (c) Third prong – Focusing on ways the legal sector could link up with innovative professionals from other disciplines to create fresh legal technology; and
- (d) Final prong (which has no fixed time frame) – Contemplates the creation of an ecosystem in which Legal Tech can flourish.

#### Technology – Online Dispute Resolution

The advent of online dispute resolution platforms worldwide and the availability of reliable and readily-accessible standard precedents for front-end legal work demonstrates a clear shift towards the use and/or reliance on technology in the legal sector.

With respect to The Honourable the Chief Justice's stating:

*"15(a). First there is the advent of online dispute resolution platforms whose objective is to allow users to find resolution without having to litigate. These platforms blend negotiation, mediation and arbitration with the generative capacity of artificial intelligence and boast impressive success rates."*

it may be of interest to note our Anil Changaroth and Syafiq Lim had their joint paper on "Online Dispute Resolution – Suitability in the Construction Industry" published in December 2016 in the *Asian Journal on Mediation* [2016]. In which they considered how Online Dispute Resolution operates, the various platforms available internationally and how and whether ODR would be applicable for disputes in the Construction Industry.

#### Concluding Remarks

With technology transforming the legal sector more rapidly in recent years, and that it is crucial that lawyers rethink of the way they operate and learn to harness the advantages of technology in order to benefit our society as a whole, the Honourable Chief Justice's initiative is perfectly timed.

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### THE MEDIATION BILL PASSED TO ENACT THE MEDIATION ACT

The *Mediation Bill* passed by Parliament on 9<sup>th</sup> January 2017 seeks to enact a new *Mediation Act* as part of a series of measures to strengthen Singapore's international commercial mediation services, and to promote, encourage and facilitate the resolution of disputes by mediation. The *Mediation Bill* is a product of one of the recommendations made by the International Commercial Working Group set up by the then Honourable the Chief Justice Chan Sek Keong in 2013 to provide further legislative support for international commercial mediation. Amongst these recommendations were also the establishment of the Singapore International Mediation Centre ("SIMC") and the Singapore International Mediation Institute – both of which were launched on 5<sup>th</sup> November 2016.

#### Policy Consideration for the Benefits of Mediation

Senior Minister of State for Law Indraneel Rajah SC in her speech in Parliament during the Second Reading of the *Bill* stated that mediation provides a more cost effective, flexible and faster means of settling disputes, and is particularly attractive for parties who desire to continue to do business and preserve long-term relationships. On a wider scale, strengthening Singapore's position as an international dispute resolution centre and a legal service hub will bolster the country's overall attractiveness as a business hub and also deepen the legal expertise available for domestic cases.

#### Applicability of the Mediation Act

The *Mediation Act* (when enacted) will apply to mediations conducted under any mediation agreement where: (a) the mediation is wholly or partly conducted in Singapore; or (b) the mediation agreement provides for the applicability of the *Mediation Act* or the law of Singapore.

It will codify certain issues currently dealt with under common law such as confidentiality of communications, which will in turn provide greater certainty for commercial parties mediating in Singapore.

#### Key Provisions

Key provisions of the new *Mediation Act* will fall into four main categories – (1) the recording of mediated settlement agreement as a court order, where parties will be allowed to apply to court by agreement to record a written and signed mediation settlement agreement as an order of court, thereby strengthening the enforceability of mediation agreements; (2) the confidentiality of mediation proceedings, where the general duty of confidentiality in mediation is emphasised, and the circumstances in which disclosure may take place and a piece of mediation communication may be admitted as evidence in court will be clearly outlined; (3) stay of court proceedings, where parties will be allowed to apply for a stay of court proceedings whilst they enter the mediation process; and (4) exceptions under the *Legal Profession Act*, where relevant law may be discussed during the mediation session, especially by foreign mediators and foreign-qualified counsel without amounting to unauthorised practice of Singapore law.

#### Concluding Remarks

With the enhanced enforceability, finality and certainty of mediation settlements and the clearly defined mediation process, the enactment of the *Mediation Act* may well create an environment where Mediation will be the primary means of dispute resolution with many of the other *appropriate dispute resolution* mechanisms becoming less favourable alternatives.

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### THIRD PARTY FUNDING FOR ARBITRATION AND RELATED LITIGATION

Singapore's Parliament passed the *Civil Law (Amendment) Bill* (Bill No. 38/2016) on 10 January 2017 to amend Singapore Law to permit third-party funding for certain categories of dispute resolution proceedings.

Third party funding refers to the funding of proceedings by an unconnected entity to a dispute to a party, typically the claimant, in turn for financial gain, such as a share of the damages awarded or a share of the settlement sum. It is also commonly referred to as litigation funding, specialist funding, and/or legal financing.

#### Key Changes

Specific changes introduced through the Act would include:

- (a) abolishing the common Law Tort of *Champerty* (an illegal agreement in which a person with no previous interest in a lawsuit finances it with a view to sharing the disputed property if the suit succeeds) and *Maintenance* (the intermeddling of a disinterested party to encourage a lawsuit) in Singapore – collectively being doctrines in common law jurisdictions that aim to preclude frivolous litigation;
- (b) allowing Third Party Funding contracts to be valid and enforceable in certain prescribed categories of proceedings such as international arbitration and related legal proceedings in Singapore;
- (c) Third Party funders will be subject to certain prescribed qualification or requirements; and
- (d) through a related amendment under the *Legal Profession Act*, lawyers can introduce/refer funders to clients as long as there is no direct financial benefit derived. They can also advise clients on third party funding contracts and any disputes arising out thereof.

#### Concluding Remarks

Such developments should be seen as a positive development and a step forward for the dispute resolution scene in Singapore (which has been described as the key seat of arbitration in Asia by the Singapore Ministry of Law), as third-party funding is an established feature of international dispute resolution.

This is also in line with Singapore's goal of maintaining its position as a regional business hub and to attract global companies to set up and/or relocate their Asia headquarters to Singapore.

Parties interested in third party funding in Singapore should ascertain the reliability of their third party funders, as well as being aware of the qualifying criteria that needs to be met in order to be eligible for third party funding.

It is encouraging that as a leading centre for international commercial arbitration, Singapore recognises the importance of the practices and business requirements of commercial parties, and that introducing third party funding in Singapore for international arbitration will not only allow international businesses to use funding tools available to them in other centres, but also promote Singapore's growth as a leading venue for international arbitration.

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**CONSTRUCTION INDUSTRY UPDATES**

**THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE'S ("SIAC")  
INVESTMENT ARBITRATION RULES ("IA RULES")**

The SIAC on 30<sup>th</sup> December 2016, announced the official release of the first edition of the SIAC *Investment Arbitration Rules* (which came into effect on 1 January 2017), a specialised set of rules to address the unique issues present in the conduct of international investment arbitration. With this, the SIAC is the first arbitral institution with rules to cater separately to investment and commercial arbitrations.

**Streamlining with Commercial Arbitration**

The SIAC *IA Rules 2017* combines the best features of commercial arbitration rules and specialist investment arbitration rules in a bid to streamline and speed up the investment arbitration process. The rules apply to any type of arbitration, with no objective criteria, such as the existence of a qualifying 'investment' or 'investor' to be considered (however, any requirements or restrictions in the underlying instrument shall prevail).

Applicable to disputes involving States, State-controlled entities or intergovernmental organisations, whether arising out of a contract, treaty, statute or other instrument, the parties must agree to adopt the *IA Rules* in their agreements and if parties have previously agreed to adopt the 2016 SIAC Rules, they may subsequently consent to use the *IA Rules 2017* instead.

**Key Features**

Some of the key features of the SIAC *IA Rules 2017* include: (1) a default list procedure for the appointment of the sole or presiding arbitrator and an opt-in mechanism for the appointment of an Emergency Arbitrator; (2) strict timelines on challenges to arbitrators with built-in discretion for the arbitration to proceed during the challenge; (3) procedure for early dismissal or claims and defences; (4) provisions for submissions by non-disputing parties; (5) provisions tackling the issue of third-party funding directly; and (6) provides for more transparency with respect to the publishing of an award.

**Concluding Remarks**

While international investment arbitration involving regional and bilateral investment treaties are often regarded as examples of administrative law globally, arbitration of Investment treaties as with international commercial matters, provide for fundamental process in resolving disputes. As such, the SIAC *IA Rules 2017* provide for clear directions/ guidance for investment treaty disputing parties to expeditiously resolve their disputes.

The SIAC *IA Rules 2017* bring onboard a clearer regime that may well appeal to commercial parties, investors, states and state-owned entities, as users will for the first time have the option of submitting their investment treaty dispute to a commercial arbitration centre to be administered under a customised set of rules.

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**INTERNATIONAL CHAMBER OF COMMERCE (ICC)  
AMENDED RULES OF ABRBITRATION**

The ICC released its amendments to the *ICC Rules of Arbitration* coming into force on 1<sup>st</sup> March 2017, it essentially streamlines the ICC's arbitration process to reduce Cost and length of arbitration and includes claims less than US \$ 2 million being on a new expedited procedure (*ICC Expedited Rules*).

**Changes to Standard Procedure Rules**

The changes include:

- (a) **Terms of Reference** established within one (instead of the existing two) month of the file's transmission to the Tribunal with the ICC Court retaining the right to extend the time limit as necessary;
- (b) **Reasons for Decision on Challenges** are allowed on such challenges on arbitrators or jurisdiction, without having to seek parties' consent to do so.

**ICC Expedited Procedure Rules**

After 1<sup>st</sup> March 2017, these rules apply by default to all cases where the amount in dispute are less than US \$ 2 million unless parties expressly opt out of such rules in their arbitration agreement providing several efficient steps and reduced fee scale for the arbitrator's fees and the administrative expenses.

With these expedited rules allow parties nominating a sole arbitrator, failing which the ICC Court may do so within a short period; the ICC court has the discretion to appoint a sole arbitrator even if the agreement provides otherwise; after the tribunal is constituted parties can make new claims only if so authorised by the tribunal; the tribunal has the discretion to adopt procedures as it considers appropriate (including limiting document production, length if witnesses evidence, scope of written submissions) and the Terms of Reference need

not be drawn up; in consultation with parties, the case may be decided on a Documents-Only basis with no oral hearing to examine witnesses or experts nor production of further documents; and final award made within six months form initial case management conference (which itself is carried out no later than fifteen days after date the file is sent to the arbitral tribunal).

**Concluding Remarks**

While the ICC's expedited rules apply with all disputes of less than US \$ 2 million with significantly reduced Fees, these changes are timely considering several international arbitration centres/institutions have over the last couple of years already put in place such changes – including the Hong Kong International Arbitration Centre (first introduced in 2008 with new features added in 2013), Kuala Lumpur Regional Centre for Arbitration (in July 2012) and Singapore International Arbitration Centre (in July 2010).

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