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

Case Number : CA 155/2008

Decision Date : 02 June 2009

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Goh Phai Cheng SC (Goh Phai Cheng LLC) for the appellant; Alvin Yeo SC, Nish Shetty and Richway Ponnampalam (WongPartnership LLP) for the respondent

Parties : Insigma Technology Co Ltd — Alstom Technology Ltd

Arbitration – Agreement – Validity of arbitration agreement – Whether arbitration agreement providing for arbitration to be administered by one arbitration institution under the procedural rules of another arbitration institution valid and enforceable

2 June 2009

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 This was an appeal against the decision of the High Court in Originating Summons No 13 of 2008 on the novel and important legal issue of whether an arbitration agreement may validly provide for *one* arbitral institution to administer an arbitration under the rules of *another* arbitral institution (see *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR 23 ("the Judgment")).

2 In those proceedings, Insigma Technology Co Limited ("Insigma") had applied to set aside the decision of the arbitral tribunal ("the Tribunal") constituted by the Singapore International Arbitration Centre ("SIAC") (see [20] below) in Arbitration No 087 of 2006 ("the Decision"), that it had jurisdiction to hear the arbitration between Alstom Technology Limited ("Alstom") and Insigma, on the grounds that the Tribunal lacked such jurisdiction and that the arbitration agreement between the parties was inoperative for uncertainty. The High Court dismissed Insigma's application, leading to this appeal. At the end of the hearing before us, we dismissed the appeal and awarded indemnity costs against Insigma. We now give our reasons for doing so.

Background facts

The licence agreement and the arbitration agreement

3 Insigma and Alstom were parties to a licence agreement dated 8 December 2004 ("the Licence Agreement"). The Licence Agreement was governed by Singapore law. Under the Licence Agreement, Insigma was granted a limited licence to use Alstom's "wet flue gas desulfurisation" technology in China.

4 The Licence Agreement provided for the arbitration of any disputes between the parties in Art 18(c) ("the Arbitration Agreement") which read as follows:

> 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 …

5 Sometime between late 2005 and early 2006, a dispute arose between Insigma and Alstom over the proper basis of calculating the annual royalties payable by Insigma to Alstom under the Licence Agreement. Alstom attempted to resolve the dispute by amicable means but failed. Alstom then sought to refer the dispute to arbitration.

The International Chamber of Commerce arbitration and its withdrawal

6 On 1 August 2006, Alstom filed a request for arbitration ("Request") with the International Chamber of Commerce ("ICC") in Paris, under the ICC Rules of Arbitration (1 January 1998) ("the ICC Rules"). Alstom claimed, *inter alia*, unpaid royalties and damages for breach of the Licence Agreement by Insigma. Alstom requested that the arbitral proceedings ("the ICC Arbitration") be conducted in Singapore, under the ICC Rules, at the premises of the SIAC.

7 On 3 November 2006, Insigma filed its answer and counterclaim ("Answer") to Alstom's Request, disputing, *inter alia*, the jurisdiction of any arbitral tribunal constituted by the ICC. Insigma contended that the parties had agreed, under the Arbitration Agreement, to submit the dispute to the SIAC and have the SIAC administer the arbitration under the ICC Rules, that Alstom had breached the Arbitration Agreement by invoking the jurisdiction of the ICC, and that the International Court of Arbitration ("the ICC Court") should not proceed with the ICC Arbitration. Insigma further stated that the SIAC was able to administer the arbitration under the ICC Rules (and in support of its statement, enclosed a paper prepared by the SIAC on its position in administering international arbitrations, see Sabiha Shiraz, "Interpretation and Execution of Arbitration Agreements: The SIAC Experience" (11 April 2006)). In its Answer, Insigma also noted that the parties had agreed to arbitration before the SIAC because of its lower administration costs.

8 On 13 November 2006, *before* the Tribunal was constituted but *after* each party had nominated an arbitrator and agreed that the two nominated arbitrators would subsequently nominate a third arbitrator to preside at the hearing of the ICC Arbitration, Alstom wrote to the SIAC and requested the SIAC to confirm whether it would accept jurisdiction over the dispute, and, if so, how the SIAC would administer the arbitration pursuant to the Arbitration Agreement if the dispute was submitted to it. This letter was not copied to Insigma.

9 On 17 November 2006, the SIAC replied to Alstom as follows:

> We have considered [the Arbitration Agreement] ... We are of the view that there is *prima facie* jurisdiction for the SIAC to accept the request for arbitration and administer the arbitration under [the Arbitration Agreement]. While [the Arbitration Agreement] is ambiguous as it brings into play both the SIAC Rules and the ICC Rules, some weight and meaning must be accorded to the reference to the ICC Rules.
>
> If the case is submitted to the SIAC, the arbitration will be administered under the SIAC Rules with the ICC Rules to be applied as a guide to the essential features the parties would like to see in the conduct of the arbitration, e.g., use of the Terms of Reference procedure, the scrutiny of the awards. Accordingly, the SIAC is prepared and intends to undertake the Terms of Reference procedure and scrutiny of awards as contemplated under the ICC Rules. For purposes of performing these procedures, the equivalent functions of the "Secretary-General" and "Court" would, under the SIAC system, be the Registrar and the Chairman, respectively. The SIAC is also prepared to remunerate the Tribunal to be appointed in accordance with an ad valorem scale along similar lines to that applied by the ICC. As regards the other administrative and financial

aspects of the arbitration, they would necessarily have to be done by the SIAC Secretariat in accordance with the SIAC practices and procedures.

The SIAC will accept the parties' existing Request for Arbitration, Answer and Counterclaim and other documents already submitted and consider these documents served on the date they are received by the SIAC. Further, the SIAC will accept the parties' existing nominations of arbitrators subject to confirmation of their appointment by the SIAC.

10 On receipt of this reply, Alstom wrote to inform Insigma of the SIAC's confirmation on the same day:

… In the Answer, [Insigma] proposed that this arbitration be submitted to SIAC (instead of the ICC) and enclosed a paper prepared by Ms Sabiha Shiraz of SIAC in support of its proposal. Having confirmed the position with SIAC, [Alstom] hereby agrees to [Insigma's] proposal [to submit the dispute to the SIAC].

In that same letter, Alstom also informed Insigma that it would request the ICC to put the ICC Arbitration in abeyance.

11 Insigma, however, replied to object to Alstom's request to put the ICC Arbitration in abeyance and stated that if Alstom were minded to have the dispute submitted to the SIAC, it should first withdraw the ICC Arbitration from the ICC and then commence arbitration proceedings before the SIAC. Following this objection, Alstom wrote to the ICC on 11 December 2006 to withdraw the ICC Arbitration, reserving its right to bring proceedings before the ICC again if the SIAC or the Tribunal declined jurisdiction. The ICC Arbitration was eventually withdrawn by consent of the parties on 2 February 2007.

Commencement of arbitration proceedings at the SIAC

12 On 23 November 2006, Alstom commenced the arbitration at the SIAC. On the same day, Alstom also notified Prof Michael Pryles ("Prof Pryles") and Mr Michael Hwang SC ("Mr Hwang") (*ie*, the arbitrators nominated by Alstom and Insigma, respectively, under the Arbitration Agreement: see [8] above) of the transfer of the arbitration proceedings from the ICC to the SIAC. Alstom also informed Prof Pryles and Mr Hwang that their nominations as arbitrators would now be subject to the confirmation of the SIAC.

13 On 13 December 2006, the SIAC wrote to Insigma and Alstom confirming Alstom's commencement of arbitration proceedings under r 3 of the Arbitration Rules of the SIAC (2nd Ed, 22 October 1997) ("the SIAC Rules"). The SIAC also called the parties' attention to, *inter alia*, the appointment of the members of the Tribunal. On 18 December 2006, the SIAC then wrote separately to Alstom and Insigma, requesting confirmation of their respective nominations of Prof Pryles and Mr Hwang as co-arbitrators. Alstom and Insigma confirmed their respective nominations with the SIAC on 21 December 2006.

Constitution of the Tribunal

14 On 10 January 2007, the SIAC wrote to both parties confirming their appointments of Prof Pryles and Mr Hwang as co-arbitrators. The SIAC then invited the co-arbitrators to choose the third and presiding arbitrator pursuant to r 8 of the SIAC Rules. Insigma, however, replied on 11 January 2007, stating that, contrary to the SIAC's letter of 10 January 2007, the applicable rules were the ICC Rules, and not the SIAC Rules, as provided under the Arbitration Agreement. On

23 January 2007, Alstom wrote to the SIAC stating that it would agree to the appointment of the third arbitrator being determined in accordance with the manner envisaged in the ICC Rules. Alstom's letter further noted that:

> Article 8(4) of the ICC Rules provides that, in the absence of the parties' agreement upon another procedure, the ICC Court makes the appointment. [Alstom] and [Insigma] did in fact agree in previous correspondence, while the proceedings [were] before the ICC, that the third arbitrator would be jointly nominated by Professor Pryles and Mr Hwang. We informed SIAC of such agreement in our letter to you dated 23 November 2006. However, it would appear from [Insigma's] 11 January fax that [Insigma] has now resiled from that agreement.

15 On 24 January 2007, Insigma wrote to the SIAC stating:

> While it is true that there was an agreement in previous correspondence that the third arbitrator be nominated by Mr Hwang and Professor Pryles jointly (with the caveat that [Insigma's] jurisdictional objections to the ICC would not be prejudiced), that agreement pertained specifically to the ICC proceedings, which are distinct from the present proceedings before the SIAC.

Despite this letter, *neither* party raised *any* objections to the subsequent nomination by Prof Pryles and Mr Hwang of Dr Michael Moser ("Dr Moser") as the third arbitrator. Significantly, Insigma wrote to the SIAC on 6 February 2007 to confirm that it had *no* objection to Dr Moser acting as the third arbitrator, although it repeated its "serious concerns" about the SIAC constituting the Tribunal in accordance with r 8 of the SIAC Rules.

16 Finally, on 14 February 2007, Insigma, in a letter to Alstom, *confirmed* its agreement to the appointment of Dr Moser *under the ICC Rules*:

> We confirm that [Insigma] agrees to the appointment of Dr Moser as Chairman of the [Tribunal] by agreement between the two co-arbitrators, Mr Hwang and Professor Pryles, pursuant to Article 8(4) of the ICC Rules.

17 On 23 February 2007, the SIAC confirmed the constitution of the Tribunal comprising Dr Moser as the presiding arbitrator, and Prof Pryles and Mr Hwang as co-arbitrators.

18 After the Tribunal was duly constituted, it heard arguments on 11 September 2007 on the preliminary issues relating to its jurisdiction and the fatal uncertainty alleged by the appellant as to the operation of the Arbitration Agreement. After hearing Insigma's objections, the Tribunal wrote to the SIAC on 22 October 2007 to ask if it "would be prepared to administer the arbitration in accordance with the ICC Rules to the exclusion of the SIAC Rules" and, if the SIAC were indeed prepared to do so, to then confirm which bodies within the SIAC would perform the functions assigned under the ICC Rules to:

(a) the Secretary General;

(b) the Secretariat; and

(c) the ICC Court.

19 On 25 October 2007, the SIAC confirmed it would be prepared to administer the arbitration on

the following terms:

> SIAC's position is that [the Arbitration Agreement] is capable of being administered under the ICC Rules, notwithstanding the reference to the ICC Rules. However, if the Tribunal's interpretation of the [Arbitration Agreement] is that the SIAC, as administering institution, should do so under the ICC Rules, we will abide by the decision and will be prepared to do so.
>
> For this purpose, we propose that the following persons undertake the respective roles under the ICC Rules:
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> | | |
> |---|---|
> | SIAC Secretariat | = ICC Secretariat |
> | SIAC Registrar | = ICC Secretary-General |
> | SIAC Board of Directors | = ICC Court |

It may be noted that the SIAC had, by this letter, modified its earlier stance on 17 November 2006 that "the arbitration will be administered under the SIAC Rules with the ICC Rules to be applied as a guide to the essential features the parties would like to see in the conduct of the arbitration" (see [9] above).

The Tribunal's decision

20 At the hearing before the Tribunal on the preliminary issues, Insigma raised, *inter alia*, the following issues:

> (a) whether the Arbitration Agreement was valid or void for uncertainty; and
>
> (b) whether the Tribunal had been validly constituted under the Arbitration Agreement when it was constituted by the SIAC under the SIAC Rules and not the ICC Rules.

On 10 December 2007, the Tribunal rendered the Decision.

21 On the issue of the uncertainty of the Arbitration Agreement, the Tribunal held as follows:

> (a) In view of the "strong international public policy … in favour of the arbitration of international commercial disputes" (at [87] of the Decision), the Tribunal must make every reasonable effort to give effect to the Arbitration Agreement.
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> (b) The Arbitration Agreement was not contrary to the law as "the rules of an arbitral institution can be legally divorced from the administration of an arbitration by that institution" (at [104]) (citing *Bovis Lend Lease Pte Ltd v Jay-Tech Marine & Projects Pte Ltd* [2005] SGHC 91 ("*Bovis Lend Lease*")).
>
> (c) The Arbitration Agreement was not inoperable due to a lack of capacity on the part of the SIAC to administer an arbitration conducted under the ICC Rules, and the SIAC was capable of administering the arbitration in accordance with the Arbitration Agreement, performing *mutatis mutandis* the functions assigned by the ICC Rules to the ICC by the various institutions it had

proposed, *viz*, the SIAC Secretariat, the SIAC Registrar and the SIAC Board of Directors, in place of, respectively, the ICC Secretariat, the ICC Secretary General and the ICC Court (at [111]).

(d) Accordingly, "the [Arbitration Agreement] is valid, enforceable and capable of being performed" (at [86]).

22 On the issue of whether the Tribunal had been validly constituted, the Tribunal decided in the affirmative that: (a) it had been appointed in accordance with the Arbitration Agreement; and (b) whether the confirmation of the appointment of the Tribunal by the ICC or the SIAC was made with reference to the ICC Rules or the SIAC Rules "would have made no difference at all to the outcome" (at [116] of the Decision).

Insigma's arguments before the High Court

23 Dissatisfied with the Tribunal's decision, Insigma appealed to the High Court and raised the same issues on the same grounds. On the issue of the uncertainty of the Arbitration Agreement, Insigma argued that:

(a) The agreement was that the arbitration would be administered by the SIAC, using the ICC Rules. This could not be done as the ICC Rules had many unique features which could not be administered by an institution other than the ICC.

(b) An arbitration without the involvement of the ICC Secretariat and the ICC Court would not bear the "ICC's hallmark of quality", which was what Insigma had bargained for, and the Tribunal, in construing the Arbitration Agreement to provide for an SIAC-administered arbitration under the ICC Rules with the relevant SIAC bodies substituting the roles of the corresponding ICC bodies, had rewritten the Arbitration Agreement.

24 On the issue of whether the Tribunal was validly constituted, Insigma argued that it was not, as it had been originally constituted under the SIAC Rules whereas the Arbitration Agreement required the Tribunal to be constituted under the ICC Rules.

The decision of the High Court

25 The High Court rejected Insigma's arguments on both issues and dismissed its application. The holding of the High Court is summarised below.

Issue of the uncertainty of the Arbitration Agreement

26 On the issue of the uncertainty of the Arbitration Agreement, the High Court held as follows:

(a) The parties had not bargained for an ICC institutional arbitration but for a hybrid *ad hoc* arbitration to be administered by the SIAC, applying the ICC Rules only and not the SIAC Rules.

(b) In principle, so long as no significant inconsistency arose, there was no problem with parties agreeing to an arbitration agreement providing for *one* arbitral institution to administer an *ad hoc* arbitration under the procedural rules of *another* arbitral institution.

(c) The substitution by the SIAC of the various actors (*ie*, the ICC Secretariat, the ICC Secretary General and the ICC Court) designated under the ICC Rules with the appropriate corresponding actors in the SIAC to perform their respective functions was within the degree of flexibility allowed by the ICC Rules which respected party autonomy. Party autonomy also meant

that the parties were free to decide the conduct of the arbitration and the constitution of the arbitral tribunal and such freedom was an inherent feature of arbitration, especially *ad hoc* arbitration.

(d) Insigma's earlier position that the SIAC and not the ICC should administer the arbitration contradicted its present position that the ICC and not the SIAC should administer the arbitration (see [7] above).

(e) Since it was clear and undisputed that the parties intended to resolve their disputes by arbitration and not litigation, all reasonable effort should be made to give effect to the parties' intention to arbitrate in an *ad hoc* arbitration. Party autonomy should trump institutional self-interest.

(f) While it was generally not advisable or efficient to adopt or adapt institutional rules such as the ICC Rules for use in an *ad hoc* arbitration because of the need for an administering body, there was no practical problem nor objection in principle if the parties to the *ad hoc* arbitration nominated a substitute institution (the SIAC in this case) to administer the arbitration and substituted various organs to carry out similar functions to those carried out by the different parts of the ICC apparatus.

Issue of the validity of the constitution of the Tribunal

27 On the issue of the validity of the constitution of the Tribunal, the High Court held that the Tribunal was validly constituted for the following reasons:

(a) Insigma had acknowledged that the Tribunal was *properly* constituted under Art 8(4) of the ICC Rules (see [16] above).

(b) Article 8(4) of the ICC Rules provided that where the parties had agreed upon the appointment procedure of the three arbitrators, the nomination of these three arbitrators would only be subject to the confirmation of either the ICC Court or the ICC Secretary General pursuant to Art 9 of the ICC Rules. Here, Insigma (through its appointed arbitrator, Mr Hwang) and Alstom (through its appointed arbitrator, Prof Pryles) had *already* agreed to the appointment of Dr Moser as the third arbitrator. Hence, their appointments need only be confirmed pursuant to Art 9 of the ICC Rules.

(c) To determine whether the Tribunal had been validly constituted under the Arbitration Agreement, the court had to look at what the substantive appointment procedure was. Since the appointment procedures under the SIAC Rules and the ICC Rules were the same in effect and agreed to by the parties, whether the subsequent confirmation of the appointments by the SIAC was made with reference to the SIAC Rules or to the ICC Rules would have made no difference at all to the outcome. Hence, the Tribunal was actually constituted by the SIAC in accordance with (albeit without express reference to) the ICC Rules, and it was therefore validly constituted under the Arbitration Agreement.

28 We should also mention that, as the High Court noted (at [29]–[30] of the Judgment), Insigma did advance an alternative argument that the Arbitration Agreement was a "pathological clause" (see the explanation of a "pathological clause" at [37] below) when it responded to Alstom's Request (see [6] above). However, this was merely a "cursory and alternative submission", as the "main position taken [by Insigma in objecting to the ICC Arbitration] was for an SIAC-administered arbitration in accordance with [the] ICC Rules" (at [30] of the Judgment).

The issues on appeal and our decision

29 Insigma obtained leave of the High Court, under s 10 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), to appeal against the decision of the High Court. Before us, Insigma raised the *same* two issues it had raised before the Tribunal and the High Court (see [20] above). As we had mentioned earlier (at [2] above), we dismissed the appeal at the conclusion of the hearing as we agreed entirely with the reasons given by the High Court in dismissing Insigma's application. However, we wish to make some observations on certain aspects of this case because, as we have mentioned at [1] above, this is the first occasion this court has had to consider the legal validity of a hybrid form of international arbitration.

30 Our first observation is that an arbitration agreement (such as the Arbitration Agreement) should be construed like any other form of commercial agreement (see Julian D M Lew QC, Loukas A Mistelis & Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 7-60). The fundamental principle of documentary interpretation is to give effect to the intention of the parties as expressed in the document.

31 Our second observation is that, where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars (see *Halsbury's Laws of Singapore*, vol 2 (LexisNexis, 2003 Reissue, 2003) at para 20.017) so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party. This approach is similar to the "principle of effective interpretation" in international arbitration law, which was described in *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) (Emmanuel Gaillard & John Savage eds) ("*Fouchard*") at p 258 as follows:

> B. – THE PRINCIPLE OF EFFECTIVE INTERPRETATION
>
> **478**. — The second principle of interpretation of arbitration agreements is the principle of effective interpretation. This principle is inspired by provisions such as Article 1157 of the French Civil Code, according to which "where a clause can be interpreted in two different ways, the interpretation enabling the clause to be effective should be adopted in preference to that which prevents the clause from being effective." This common-sense rule whereby, if in doubt, one should "prefer the interpretation which gives meaning to the words, rather than that which renders them useless or nonsensical," is widely accepted not only by the courts but also by arbitrators who readily acknowledge it to be a "universally recognized rule of interpretation." To give just one example of the application of this principle, an arbitral tribunal interpreting a pathological clause held that:
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> > when inserting an arbitration clause in their contract the intention of the parties must be presumed to have been willing to establish an effective machinery for the settlement of disputes covered by the arbitration clause.

32 A subsidiary principle to the principle of effective interpretation is the principle that an arbitration agreement should also not be interpreted restrictively or strictly. An arbitration agreement is not a statute. This was noted in *Fouchard* at pp 260–261:

> D. – REJECTION OF THE PRINCIPLE OF STRICT INTERPRETATION

...

[T]his principle [that an arbitration agreement should be interpreted "restrictively"] is generally rejected in international arbitration. It is based on the idea that an arbitration agreement constitutes an exception to the principle of the jurisdiction of the courts, and that, as laws of exception are strictly interpreted, the same should apply to arbitration agreements. …

This has been frequently confirmed in arbitral case law. For example, the Decision on Jurisdiction rendered in the *Amco* arbitration sets out the principle in general terms:

> like any other convention, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law.

The interpretation of arbitration agreements by the French courts has, likewise, never been strict nor restrictive.

33 Another subsidiary principle is that, as far as possible, a commercially logical and sensible construction is to be preferred over another that is commercially illogical (see *Law Debenture Trust Corporation Plc v Elektrim Finance BV* [2005] 2 Lloyd's Rep 755 at [39]). In the present case, the Judge applied this principle at [33]–[34] of the Judgment:

In the absence of an administering authority, the adoption of the ICC Rules is likely to be construed as designating the ICC to be the institution conducting the arbitration. Further the selection of a particular institutional arbitral body to conduct the arbitration will be construed as also selecting the rules of that body to govern the procedure adopted in the arbitration. [David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2005)] states at para 4.27:

> In many cases parties will expressly agree to submit disputes to a particular institutional arbitral body. … An agreement to refer disputes to such a body will be deemed to incorporate an agreement to abide by the rules and procedures of that body in force at the time arbitration is commenced. Not only will the arbitration be governed by that institution's rules but it will also be administered by that organisation.

The present case, however, despite the nomination of the SIAC as the body to conduct the arbitration, is not an example of institutional arbitration by the SIAC, since the arbitration agreement specifically designated the use of [the] ICC Rules instead. … *By designating a separate administering authority, the parties indicated that the adoption of the ICC Rules was not a selection of the administering authority but only an agreement for the arbitration to take place by reference to those rules*.

[emphasis added]

34 This approach to the interpretation of an arbitration agreement is necessary to uphold the underlying and fundamental principle of party autonomy as far as possible in the selection of the kind of arbitration and the terms of the arbitration. Given the inherently private and consensual nature of arbitration, our 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.

35 Our third observation is that, in this appeal, Insigma did not argue that:

(a) in international arbitration, parties must opt either for an institutional arbitration (where the rules of that institution apply) or a non-institutional arbitration (where the parties make their own rules or, in the absence of such rules, the arbitrators make their own rules); or

(b) it is inherent in the nature of arbitration that *one* institution (such as the SIAC or the ICC) may not administer an arbitration applying the rules of *another* institution.

Rather, Insigma's argument was that, at an operational level, the Arbitration Agreement was too uncertain to be given effect to. However, Insigma was unable to explain or to convince us where the uncertainty lay, and why the Arbitration Agreement could not or did not work in the manner explained by the Tribunal or the High Court. All that Insigma could contend in support of its argument was that the root of uncertainty arose because the ICC Rules were procedural rules drafted for an arbitration to be administered by the ICC and not by any other arbitral institution (such as the SIAC). In this respect, we agreed with the views of the High Court at [35] of the Judgment:

> The arrangement provided for in [the Arbitration Agreement] would be unworkable if the SIAC was unable to provide similarly equipped actors to fulfil the roles that the ICC Rules gave to the institutional bodies of the ICC. However, while it might not be advisable to use the ICC Rules for most *ad hoc* arbitrations because of the need for an administering body, if the *ad hoc* arbitration nominates a substitute institution to administer the arbitration and such substitute can arrange organs to carry out similar functions to those carried out by the different parts of the ICC apparatus, there should be no practical problem, as well as no objection in principle, to providing for such a hybrid *ad hoc* arbitration administered by one institution but governed by the rules (as adapted where necessary) of another. This freedom is inherent in the flexible nature of arbitration, especially *ad hoc* arbitration. In any case, inefficiency alone cannot render a clause invalid so long as the parties had agreed and intended for the arbitration to be conducted in this manner.

36 Our fourth observation concerns Insigma's argument based on branding in the service industry, including that of institutional arbitration. As we had mentioned earlier, Insigma contended that it had bargained for an "ICC's hallmark of quality" with respect to the arbitration (see [23] above), and that it would not get this "hallmark" in an SIAC-administered arbitration. We would agree that branding in services is just as crucial as the branding of products. Many consumers know the quality of a product or a service by its brand, and that is why a trade or service mark may be a valuable asset. Motorists know the quality and prestige of a Rolls Royce by its name alone. Many business people in Asia might not know the precise structure of an ICC-administered arbitration, but certainly all commercial lawyers who are familiar with international arbitration would be familiar with the ICC brand of arbitration, and also with SIAC arbitration. We would expect Insigma's legal advisers to have known about the ICC and the SIAC when they advised Insigma to accept the ICC Rules in an SIAC-administered arbitration rather than an ICC-administered arbitration. And it was reasonable for this court to assume that when they did so each thought the arrangement was necessary to avoid any impasse as to which institutional arbitration to adopt. Both parties agreed to arbitrate their differences subject to the terms of the Arbitration Agreement with knowledge of the quality of an ICC arbitration and also the quality of an SIAC arbitration on the advice of their legal advisers. Therefore, in our view, Insigma's argument that it was receiving an inferior brand of arbitration made no sense. This was especially so when Insigma objected to the ICC Arbitration which Alstom had originally initiated on the ground that the Arbitration Agreement had "clearly" provided for an SIAC-administered arbitration (see [7] above)

and had even insisted that Alstom first withdraw the ICC Arbitration before submitting the dispute to the SIAC for arbitration (see [11] above). It was also ironic that Insigma chose to avoid an SIAC-administered arbitration which it itself had earlier agreed to because of the SIAC's lower costs of administration (see [7] above).

37 Our fifth observation relates to Insigma's argument that the Arbitration Agreement should not be given effect to because it was a "pathological clause" as the hybrid form of arbitration contemplated in the Arbitration Agreement was uncertain or unworkable. Calling the Arbitration Agreement "pathological" does not, of course, change its legal character or its substance. The idea of a pathological clause is derived from the civil law. That expression is defined in *Fouchard* ([31] *supra*) at p 262 as follows:

> **484**. — The expression "pathological clause"… denotes arbitration agreements, and particularly arbitration clauses, which contain a defect or defects liable to disrupt the smooth progress of the arbitration.

38 A defect in an arbitration clause does not necessarily negate the agreement thereby constituted. It depends on the nature or the substance of the defect, or whether the defect is curable. The concept of a pathological clause fulfils a *descriptive* function rather than a *prescriptive* function and labelling or describing a clause as "pathological" does not automatically invalidate it as an agreement. In Benjamin G Davis, "Pathological Clauses: Frédéric Eisemann's Still Vital Criteria" (1991) 7 Arb Int 365 at 379, the author noted:

> Certain pathologies that have touched on some or all of the essential functions of the arbitration clause have been examined. Notwithstanding the severe defects of many of the clauses, the fortuitous – but unpredictable – assistance of state courts, able institutions, and imaginative arbitrators, could still make them work. My intention has been to show what pitfalls should be avoided, while yet noting that arbitration under these clauses could still proceed to a final award susceptible of enforcement.

39 The acceptance by arbitration practitioners that a pathological clause is not void *ab initio* is also expressed in *Fouchard* at pp 262–263 in the following terms:

> Arbitration agreements can be pathological for a variety of reasons. … At worst, the defect will prevent the arbitration from taking place at all. This will be the case where it is impossible to infer an intention which is sufficiently coherent and effective to enable the arbitration to function.
>
> These clauses will need to be interpreted by the arbitrators, and by the courts reviewing the existence of an arbitration agreement and ensuring that the arbitrators remained within the bounds of their jurisdiction. *In most cases, the arbitrators or the courts – relying on the principle of effective interpretation more than on any rule* in favorem validitatis *– will salvage the arbitration clause by restoring the true intention of the parties, which was previously distorted by the parties' ignorance of the mechanics of arbitration*.
>
> [emphasis added]

Fouchard also noted at p 266 that:

> The approach of the French courts is thus invariably to interpret pathological arbitration clauses so as to render them effective if at all possible. The same trend can be found in other jurisdictions.

40 In our view, the Arbitration Agreement does not satisfy the qualifying conditions of a pathological clause as understood in *Fouchard* and by Davis (see [38] above), but whatever it is, it was rendered certain and workable in the present case by the SIAC agreeing to administer the arbitration in accordance with the ICC Rules, and to nominate appropriate functional bodies that correspond to the bodies required under the ICC Rules to, *inter alia*, supervise the arbitration. In our view, the only aspect of uncertainty or inoperability with regard to the Arbitration Agreement was the contingency of the SIAC declining to administer the arbitration according to the ICC Rules, a position it appeared to have taken originally (see [9] above), but one which it sensibly abandoned subsequently (see [19] above). If the SIAC had so declined, then it could be said that neither Insigma nor Alstom got what they had bargained for in the Arbitration Agreement. That, however, was not the case here, and Insigma's argument that the clause was pathological had no factual or legal basis.

41 Our final observation pertains to the question of whether there are policy considerations to bar the SIAC, as a matter of jurisdiction or power, from agreeing to administer the arbitration of the kind agreed to by the parties in the Arbitration Agreement. In this connection, it is useful to refer to Singapore's policy on the role of international commercial arbitration in resolving commercial disputes in Singapore. This is set out in s 15A of the IAA, which provides as follows:

> **Application of rules of arbitration**
>
> **15A**.—(1) It is hereby declared for the avoidance of doubt that a provision of rules of arbitration agreed to or adopted by the parties, whether before or after the commencement of the arbitration, shall apply and be given effect to the extent that such provision is not inconsistent with a provision of the Model Law [UNCITRAL Model Law on International Commercial Arbitration] or this Part from which the parties cannot derogate.
>
> (2) Without prejudice to subsection (1), subsections (3) to (6) shall apply for the purposes of determining whether a provision of rules of arbitration is inconsistent with the Model Law or this Part.
>
> (3) A provision of rules of arbitration is not inconsistent with the Model Law or this Part merely because it provides for a matter on which the Model Law and this Part is silent.
>
> (4) Rules of arbitration are not inconsistent with the Model Law or this Part merely because the rules are silent on a matter covered by any provision of the Model Law or this Part.
>
> (5) A provision of rules of arbitration is not inconsistent with the Model Law or this Part merely because it provides for a matter which is covered by a provision of the Model Law or this Part which allows the parties to make their own arrangements by agreement but which applies in the absence of such agreement.
>
> (6) The parties may make the arrangements referred to in subsection (5) by agreeing to the application or adoption of rules of arbitration or by providing any other means by which a matter may be decided.
>
> (7) In this section and section 15, "rules of arbitration" means the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation.

42 At the second reading in Parliament of the International Arbitration (Amendment) Bill (Bill 28 of 2002) to amend the IAA by enacting s 15A of the IAA, the Senior Minister of State for Law, Assoc Prof Ho Peng Kee, explained Singapore's policy with regard to party autonomy in the choice of

arbitration rules to govern the parties' arbitration (see *Singapore Parliamentary Debates*, *Official Report* (1 October 2002) vol 75 at cols 1107–1109):

> **INTERNATIONAL ARBITRATION (AMENDMENT) BILL**
>
> …
>
> **The Senior Minister of State for Law (Assoc. Prof. Ho Peng Kee)**: Mr Speaker, Sir, I beg to move, "That the Bill be now read a Second time."
>
> *This Bill amends the International Arbitration Act to make it clear that parties to an arbitration in Singapore are free to adopt the arbitration rules of their choice to govern their arbitration, and that their choice of arbitration rules will be respected by Singapore law and be given the fullest effect possible. Examples of arbitration rules are the UNCITRAL Rules, SIAC Rules, ICC Rules and LCIA [London Court of International Arbitration] Rules*.
>
> …
>
> … The first subsection of the new section 15A declares, for the avoidance of doubt, that arbitration rules adopted by parties shall apply and must be given effect to the extent that they are not inconsistent with a mandatory provision of the Act [the International Arbitration Act] or the Model Law. A mandatory provision is one whereby the Act or Model Law does not permit the parties to derogate from or vary [it]. *This therefore reinforces the principle of party autonomy, and makes it clear beyond doubt that no set of arbitration rules ought ever to be regarded as incompatible with the Act or the Model Law*.
>
> The remaining subsections seek to flesh out the concept of inconsistency, by referring to a number of scenarios where there could be doubts as to whether any inconsistency exists. …
>
> *To summarise, the general approach is that arbitration rules adopted by the parties will be given full effect*. Where there is a conflict between the arbitration rules and the Act or the Model Law, the rules will prevail unless the conflict is with a mandatory provision of the Act or the Model Law. *Hence, in effect, with this narrow exception, parties to a Singapore arbitration will have the full freedom to adopt arbitration rules of their choice*.
>
> [emphasis added]

In this connection, counsel for Insigma did not advance any argument to suggest that the ICC Rules are inconsistent with any mandatory provision of the IAA or the Model Law.

43 Section 15A implicitly recognises that an arbitral institution may play or be asked to play many roles in a particular arbitration, depending on the parties. David St John Sutton, Judith Gill & Matthew Gearing, *Russell on Arbitration* (Sweet & Maxwell, 23rd Ed, 2007) at para 3-052 also comments on this industry practice:

> **Role of institutions in arbitration agreements**. Arbitration institutions can play an important role in arbitration agreements. They and their rules are often specified in the arbitration agreement, although the parties may agree to take advantage of the services offered by an institution after a dispute has arisen. An arbitral institution may adopt a number of different roles in relation to the arbitration proceedings depending upon what the parties have agreed their role should be. In particular the institution may:

(a) provide arbitration rules pursuant to which the arbitration will be conducted;

(b) act as the appointing authority which, in the absence of agreement between the parties, appoints the tribunal to hear the dispute and may also deal with any challenges to or replacement of arbitrators;

(c) act as an account holder for fees and deposits and administer the funds necessary to pay for the tribunal's fees and expenses;

(d) supervise the conduct of the arbitration by acting as an administrator for the proceedings.

The role of the SIAC in the present case is precisely that of an administrator of arbitration proceedings to be conducted under the ICC Rules. The choice of a hybrid form of arbitration is a matter of agreement between the parties and is wholly consistent with the policy considerations we have noted at [41]–[42] above.

Conclusion

44 For the above reasons, we unanimously dismissed the appeal. As for costs, we decided to award indemnity costs against Insigma for the following reasons:

(a) it approbated the Arbitration Agreement when it objected to the ICC Arbitration initiated by Alstom, but subsequently (and unreasonably) reprobated the Arbitration Agreement when it objected to Alstom initiating the SIAC-administered arbitration; and

(b) having already lost two rounds on arguments which both the Tribunal and the High Court had demonstrated to be unmeritorious, it nevertheless persisted with an appeal to this court, and thereby wasted judicial time and made Alstom incur unnecessary costs in this appeal.

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