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Message

From the Managing Partner

It gives me great pleasure to launch the first issue of Ad Litem.

We feel that it may be beneficial to clients to keep them up to date with developments of the law which may have a bearing on their business activities. We have therefore decided to publish Ad Litem.

Ad Litem will be published periodically and circulated to our clients and business associates. I hope you will find reading Ad Litem informative and interesting. If you want us to elaborate or clarify on any matter contained in the newsletter, please send us an email or drop us a note.

My partner, Paul Kwong, is the editor. I wish to thank him and his team for their efforts.

Francis Tan
Managing Partner

Editor in Chief – Paul KW Kwong;

Editorial Team – Shireen Selvaratnam, Sonia Abraham, Toh Chia Hwa, Annette Soh & Rohan Arasoo.

Message

From A Founding Partner of the Firm

[This is based on a talk given to the chambering students some time ago, and is directed to young lawyers and 'chambies' practising or hoping to practice in the litigation field].

What is the most important quality needed for litigation practice, apart of course from hard work and honesty? People are surprised when I say RESILIENCE. Why?

Advocacy is the 'school of hard knocks'. No one wins all his cases. Unless you are very selective, you will lose on average half your cases. You will lose some that you ought to have won either because the Judge got it wrong or you failed to do your homework or you were out-manoevred by a more experienced opponent.

Provided that you were satisfied at the outset that you had a credible argument to advance which did not involve deception on the Court, you should not be ashamed of losing a case.

There are days when you will just wish you were in a different less stressful line of work. You will also have unreasonable clients who make your life miserable.

There are days when you will feel like quitting.

No purpose is served for writing letters of complaint about the Judge or taking out your frustrations on your nearest and dearest or your colleagues in the office. You have to buckle down, learn your lesson and make sure you do not make the same mistake again.

Fortunately in practice there are the good days too, when the Judge is persuaded by your arguments and your client is over the moon and wants to give you a celebratory dinner.

If you learn this lesson well, the chances are you will prosper in practice.

Dato' W.S.W. Davidson
Co-founder and Consultant
16th May, 2008



Arbitration

Managing Construction Arbitration Advocacy & Tactics

by Lim Chong Fong



Introduction

Most Malaysian construction disputes are resolved via arbitration. This is because there is always an arbitration agreement found in the standard form of construction contracts, for e.g. clauses 34 and 54 of the PAM and JKR forms of contract respectively. The courts also support arbitration by staying court actions which are brought in breach of arbitration agreements, with limited exceptions.¹ There is also the perception that it simply takes too long to litigate a construction dispute and wherever possible, the parties try to agree to move the forum from the courts to arbitration. This is so even if there is the absence of an arbitration agreement, particularly in sub contract disputes.

Handling dispute resolution is often called advocacy in the legal fraternity. Advocacy can be defined as the art of advancing, presenting or arguing a case from its inception to conclusion. This role in court is exclusively undertaken by an Advocate & Solicitor. In arbitration, this role need not necessarily be performed by an Advocate

& Solicitor.² Thus it is not uncommon to find claims consultants who are trained in engineering or quantity surveying arguing cases on behalf of parties as advocates in construction arbitrations. It is nevertheless the present trend that parties are increasingly represented by Advocates & Solicitors and they tend to be from firms specializing in construction law.

The construction arbitrator on the other hand comes from various backgrounds. The appointment of the arbitrator can be either by the parties' mutual agreement or by a designated body stipulated in the arbitration agreement. In the former, it is in reality more the choice of the respective advocate of the parties and they tend to agree to a legally trained person, usually a retired judge. As to the latter, it depends on the designated body. If it is the President of the Pertubuhan Aritek Malaysia (PAM), then the arbitrator will invariably be an architect. On the other hand, the Director of The Regional Centre of Arbitration (KLCA) appoints arbitrators according to the nature of the dispute. Hence

Consequently, the selection of the right arbitrator is crucial and that is why advocates try to agree on a mutually acceptable arbitrator

if the dispute is primarily a legal one such as the termination of a building contract, the likely appointee would be a retired judge or an Advocate & Solicitor. The appointees for technical disputes such as geotechnical failures or building contract final accounting issues are usually either engineers or quantity surveyors respectively.

Advocacy in construction arbitration is therefore at the on-set dissimilar from the courts. The advocate and the arbitrator need not necessarily be from the same professional background. There is also no prefixed uniform set of procedural rules such as the Rules of the High Court 1980. The applicable set of procedural rules is unique for each arbitration as determined by the disputant parties or the advocate and the arbitrator.

That notwithstanding, it is statutorily intended that the ultimate award of the arbitrator is final and enforceable as a court judgment by way of action or registration.³

**Stage 1: Pre hearing
Pre commencement of arbitration**

Since the arbitrator's award will have the effect of a court judgment, the advocate would and should work on the underlying assumption that the arbitrator will decide in accordance with the law. This essentially means the advocate must have advised the disputant party on the strengths and weaknesses of the case based on the application of the law on the facts of the case, as perceived.

This is supported by case law which unequivocally states that the arbitrator must apply principles permitted and recognized by law.⁴ It is the duty of the arbitrator to

decide the questions submitted to it according to the legal rights of the parties and not according to what it may consider fair and reasonable in the circumstances.⁵

Though it may sound common-sensical, it is in reality a highly difficult proposition especially since many construction arbitrators are not legally trained.

The advocate's expectation of the arbitrator to manage the arbitration and make his award in accordance with the law is thus the biggest concern in every arbitration.

Consequently, the selection of the right arbitrator is crucial and that is why the advocate particularly Advocates & Solicitors practicing in the "construction bar" increasingly try to agree on a mutually acceptable arbitrator rather than surrender the appointment to a designated body.

Besides the selection of the arbitrator, the advocate must also advise the disputant party as to the realities of running a construction arbitration which is likely to be long drawn in terms of time frames. In addition, the disputant party must also be advised to have available adequate financing to go the distance as the arbitrator's fees must be shared equally by the parties and paid at regular intervals until the publication of the award.

Commencing the arbitration

Upon appointing the arbitrator, a preliminary meeting akin to case managements in Court will be called by the arbitrator to set out the ground rules of the arbitration. In this regard, some rules governing the arbitration procedure will be agreed and directed such as the PAM rules of arbitration or the KLRCA rules which incorporates the UNCITRAL rules.

The time table for the entire arbitration process will

In construction claims, the advocate is often faced with the difficulty of claims dependant on a number of separate causes, each of which has contributed to delay and extra costs

also be set down which includes:

- i) the submission of pleadings,
- ii) the discovery and bundling of documents,
- iii) the submission of expert reports,
- iv) the submission of witness statements,
- v) the hearing,
- vi) the submission of closing arguments, and
- vii) the publication of the award.

It is important for the advocate at this preliminary meeting to request the arbitrator to publish a reasoned award which may form the basis of challenging the award on the ground of error of law on the face of the award under the regime of the Arbitration Act 1952,⁶ particularly if the arbitrator ultimately decides based on a principle which the law does not countenance. By Section 33(3) of the Arbitration Act 2005, the giving of reasons is now mandatory unless the parties otherwise agree. This is necessary for any eventual application to refer to the High Court any question of law arising out of an award under Section 42(1) of the Arbitration Act 2005.

At times, the advocate may also have to consider, usually upon the suggestion of the arbitrator, as to whether the dispute can be resolved via "documents only".

The pleadings

The pleadings to be submitted to the arbitrator need not necessarily be similar in style to the pleadings used in courts, though many advocates increasingly adopt this style. Many non Advocate & Solicitor advocates tend to submit statements of cases which are a detailed narrative of the facts of the case and relief sought. These statements are accompanied with the material documentary evidence relied upon. Where there are

itemized claims for variations or defective work, it is common for the pleadings or statements of case to be done up in the form of Scott's schedules.⁷

In construction claims, the advocate is often faced with the difficulty of claims dependant on a number of separate causes, each of which has contributed to delay and extra costs. The easy way is to simply submit global claims. It is clear that the loss attributable to each cause should be separately identified, particularized and pleaded; otherwise the claim may be struck out by the arbitrator.⁸ This may again sound common-sensical though it is often difficult to plead in practice. The advocate must separately identify and link factual consequences constituting the disputant's entitlement to claim and the losses claimed. Generally, pleading a composite financial claim may be permissible⁹ but composite allegations of delay and disruption are not permissible.

Discovery and pre hearing preparation

This is a very intensive phase of work for the advocate. In a large construction dispute, the number of documents is likely to be in the thousands. As a result, the listing, production and inspection process will be very tedious. Advocates often apply for specific discovery of documents either before the arbitrator or the High Court.¹⁰ In a main contract dispute, the contractor often seeks to specifically discover the internal communications between the employer and its professional team of the architect, engineer, etc. On the other hand, the employer often seeks the communications and claims between the main contractor and its sub contractors. Though often initially held back, these documents are invariably relevant

It is also common after detailed preparation that the defending party's advocate advises the issuance of a sealed offer or "Calderbank" letter, to protect against costs

and will be ordered for production.

The discovered documents will ultimately be classified and reduced into manageable bundles usually by agreement between advocates.

Once the documents have been bundled, the advocate is confronted with the tedious task of detailed reading of all the documents and interviewing the disputant party's own witnesses for the purposes of reducing the examination in chief substantially into witness statements. If there are expert witnesses of technical opinion particularly involving disputes on defective work, the expert report will be produced by the expert after a conference with the advocate. As to delay disputes, it is still the trend here that it is fought with witnesses of fact only. It is however conceivable that it will be fought with expert witnesses as well in the future. In this regard, the ruling in **John Barker Construction Ltd v London Portman Hotel Ltd**¹¹ which held that extension of time claims must be assessed on a logical and methodical analysis and not on an impressionistic and subjective basis is instructive.

It is increasingly the trend that all witness statements and expert reports are submitted and exchanged in advance of the hearing. Witness statements are normally done in narrative form, with extensive cross referencing to the bundles of documents.

It is now the trend for the advocate to administer interrogatories on the opposite party to elicit advance information for the purpose of pinning down that party in subsequent cross examination.

It is also common at this stage after detailed preparation that the advocate of the defending disputant party advises the issuance of a sealed offer or "Calderbank" letter akin to the payment into court

procedure,¹² to protect against costs. This is necessary if the advocate is of the view that some minimum amount is ultimately due to the other party.

Look out for "**Stage 2: Arbitration hearing and beyond**" in our next newsletter.

- 1 Section 6 Arbitration Act 1952; *Tan Kok Cheng & Sons Realty Sdn Bhd v Lim Ah Pat* [1995] 3 MLJ 273; see also Section 10 Arbitration Act 2005
- 2 *Zublin Muhibbah Joint Venture Sdn Bhd v Government of Malaysia* [1990] 3 MLJ 125
- 3 Sections 17 & 27 Arbitration Act 1952; see also Section 36 Arbitration Act 2005
- 4 *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2001] 6 MLJ 727
- 5 *Re Astley and Tyldesley Coal and Salt Co and Tyldesley Coal Co* (1899) 68 LJ QB
- 6 *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428
- 7 *Keating on Building Contracts 8th Edn at paras 18-022 to 18-030*
- 8 *Wharf Properties v Eric Cumine Associates* 52 BLR 1
- 9 *Crosby Ltd v Portland UDC* 5 BLR 51
- 10 Section 13(6) (b) Arbitration Act 1952; see also Section 11(1) (b) Arbitration Act 2005
- 11 83 BLR 31
- 12 Order 22 RHC 1980

The writer can be contacted at
lim.chongfong@azmandavidson.com.my

Property Law

Recent Changes to the Law Affecting Housing Development in Malaysia

by HY Chong

The year 2007 saw a number of changes to the law affecting housing development. Amendments were made to the Housing Development (Control & Licensing) Act 1966, the Strata Titles Act 1985, and the Street, Drainage and Building Act 1974; and a new piece of legislation—the *Building and Common Property (Maintenance and Management) Act 2007*—was passed by Parliament. All these have an impact on the housing development industry and came into force simultaneously on 12 April 2007.

Significant amendments to Housing Development Act

One significant consequence arising from the latest amendment to the Housing Development (Control & Licensing) Act 1966 is to bring within the purview of the Act developments which contain a mixture of residential units and commercial ones, and developments of the so-called “serviced apartments”. Prior to the 2007 amendment, housing accommodation erected on land designated for or approved for commercial development were expressly exempted from the Housing Development Act. Developers of apartments mixed with commercial lots and of serviced apartments did not have to apply for licenses because their developments were considered to fall within the exemption. The house-buying public’s dissatisfaction with the way many of these developments turned out in the past led to the removal of this exemption.

Another important amendment to the Housing Development Act was the introduction of a law that deems an absolute assignment in writing of the rights in the sale and purchase agreement of a housing accommodation (which had complied with certain

prescribed statutory conditions for assignment) to be effective to transfer the rights from the purchaser-assignor to the assignee without the need of the purchaser-assignor having to obtain the consent of the developer for the assignment. The new law was intended to overcome the difficulties faced by purchasers in getting developers to recognise the purchasers’ sub-sale of their houses or apartments to third parties prior to the issuance of separate documents of title to those houses or apartments. Many developers in the past tend to impose unreasonable charges on the purchasers as a condition for recognising the sub-sales. With the new law, consent of a developer to a sub-sale (and the consequent assignment of rights following the sub-sale) is no longer required.

Introduction of land parcel concept into Strata Titles Act

The 2007 amendments to the Strata Titles Act 1985 saw the introduction of the concept of “land parcel” into the Act. This concept enables subdivision of land into separate strata titles and was introduced in response to rising popularity of “gated community” developments. Prior to the amendment, only a building of two or more storeys (as opposed to land) was capable of subdivision under the Act. The development of landed properties sharing common facilities was not legally possible as the properties could not be divided into strata parcels. With the amendment, land with a completed building of not more than four storeys can be held under a land parcel. Developers of gated communities can now subdivide their development into land parcels and eventually hand over common facilities within the gated development to the management corporation. New statutory forms of contract have been added into

The amendment to the Street, Drainage and Building Act in 2007 shifted that responsibility to the architect of the building

the Housing Development (Control and Licensing) Regulations to enable the sale and purchase of land parcels to be conducted.

Certificate of completion and compliance

The assessment and certification of a building's fitness for occupation was traditionally the responsibility of the local authority. The amendment to the Street, Drainage and Building Act in 2007 shifted that responsibility to the architect of the building. The certificate of completion and compliance (issued by architects) has now replaced the certificate of fitness for occupation. The change is intended to help speed up the process of certification of a building's fitness for occupation. With the amendment, future house buyers should see a shorter waiting period between the date vacant possession of the houses is delivered by developers to them and the date they are legally permitted to enter into occupation of the houses.

Building and Common Property Act

Pending the issuance of strata titles and the establishment of the management corporation in accordance with the Strata Titles Act, the maintenance and management of the common property in a completed building lies with the developer of the building. As it is not uncommon for delays to occur in the issuance of strata titles, a developer could manage the common property for years. The introduction of the Building and Common Property (Maintenance and Management) Act 2007, however, limits the period which a developer can have sole control over the maintenance and management of the common property to twelve months from the date of commencement of the Act, where vacant possession of the parcels in a

building has been delivered before commencement of the Act, and to twelve months from the date of delivery of vacant possession of the parcels, where the date of delivery of vacant possession is after the date of commencement of the Act. A joint management body, consisting of the developer and the purchasers of the parcels in the building, to manage the common property in a building is required to be formed within the 12-month period, and the developer is obliged to convene a meeting of the purchasers for the purposes of forming the body within that period.

The writer can be contacted at
chong.hy@azmandavidson.com.my

Sale of Goods

The Law on the Sale of Goods Forming Part of a Bulk

by Paul Kwong

The Shipping and Admiralty Law Sub-Committee (SALC) of the Bar Council has proposed amendments to be made to the Sale of Goods Act, particularly in respect of Section 18 in relation to the passing of property of goods forming part of a bulk.

The Sale of Goods Act 1957 (Act 382) "SOGA 1957") is the legislation which governs the law of sale of goods in West Malaysia and the Contracts Act 1950 (Act 136) is applicable in so far as the provisions are not inconsistent with the express provisions of SOGA 1957.

The law governing the states of Sabah and Sarawak are determined by the Sabah Application of Laws Ordinance 1951 and the Sarawak Application of Laws Ordinance 1949 respectively.

SOGA 1957 was based on the Indian Sale of Goods Act 1930, and the Indian Sale of Goods Act 1930 was in turn based on the English Sale of Goods Act 1893.

The English position

The English Sale of Goods Act 1893 was a codifying Act, and in England, it was superseded by the Sale of Goods Act 1979 "SOGA 1979").

SOGA 1979 came into force on the 1st January 1980, and has since been amended by the Sale and Supply of Goods Act 1994 and the Sale of Goods (Amendment) Act 1995 "SOG(A)A 1995").

The starting point for the consideration of the issue of passing of property in unascertained goods is Section 16 (in para materia with Section 18 of SOGA 1957) prior to the amendment in SOG(A)A 1995, which states,

"Where there is a contract for the sale of unascertained goods, no property in the goods is

transferred to the buyer unless and until the goods are transferred"

Difficulties arose with the application of the pre-amended Section 16 as seen in the unreported case of **The Gosforth**. This was a decision of the District Court at Rotterdam on 20 February 1985.

The claim concerned the sale of a consignment of bulk cargo from A to B, which B then sold on to 13 sub-buyers (Cs). Cs paid B, but B unfortunately did not pay A. A applied for attachment of the goods for non-payment.

Upon arrival at the port of discharge, the goods were off-loaded into a warehouse for the account and risk of A. The claim in the District Court at Rotterdam was, inter-alia, between Cs, as plaintiffs and A, as defendants.

The dispute turned on, inter alia, the issue of who had title to the goods, and in particular whether title had passed to Cs. Pursuant to Section 16 of SOGA 1979, Cs were prevented from becoming owners until physical delivery of the goods.

The effect of Section 16 of SOGA 1979 was that the buyer of bulk goods acquired no proprietary interest in the goods paid for unless and until the goods are ascertained. Consequently, in the event of the seller going insolvent, the buyer is merely an unsecured creditor for the return of the price.

This prompted the Law Commission to make recommendations as follows:

- i) Where there is a contract for the sale of a specified quantity of unascertained goods, and the goods form part of an identified bulk, a pre-paying buyer should be able to acquire an undivided proprietary share in the bulk, notwithstanding section 16 of

Two conditions have to be satisfied before the buyer obtains proprietary interest in an undivided share in the bulk

- SOGA 1979, before ascertainment of the actual goods covered by the contract;
- ii) All co-owners should be deemed to consent to certain dealings with, and deliveries out of the bulk;
 - iii) Co-owning buyers who take delivery out of the bulk are not liable to account to other co-owning buyers who receive short delivery; and
 - iv) The undivided share would be an interim nature, pending the appropriation of the actual goods purchased to the contract, and would be without prejudice to the buyer's full contractual rights.

Two conditions have to be satisfied before the buyer obtains proprietary interest in an undivided share in the bulk under the new Section 20A of SOG(A)A 1979, and that is firstly the bulk must be identified, and secondly that the buyer must have paid for that share.

The Malaysian position

The SALC recommends that the Law Commission Report and SOG(A)A 1995 be adopted in Malaysia. The general reasons for adopting SOG(A)A 1995 are as follows:

- i) SOG(A)A 1995 was drafted primarily to cure the problems of the sale of a specified quantity of unascertained goods, and the goods forming part of an identified bulk;
- ii) the proposed SOG(A)A Bill would bring Malaysian law in line with existing international trade practices; and
- iii) the proposed SOG(A)A Bill would also bring Malaysian law in line with the laws in other jurisdictions.

The latter two factors are perceived to facilitate

implementation and also the use of the legislation by foreign traders.

Conclusion

The most compelling argument was however the following comment by the Law Commission:

"Underlying many of the comments was a clear feeling that it was unjust and anomalous that a buyer who had paid for goods forming part of an identified bulk should have no proprietary interest in the bulk and should stand to lose both the price and the goods on the seller's insolvency".

The writer can be contacted at
paul.kwong@azmandavidson.com.my

Case Review

The Application of the Arbitration Act 2005 to pre-existing Arbitration Agreements

Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd Kuala Lumpur High Court (Commercial Division)

Suit No. D5-22-984-2007

by Dato' W.S.W. Davidson

On 14th February 2008, Datuk Ramly J delivered an as yet unreported decision in the above case which has thrown some confusion on the interpretation of s. 51 of the Arbitration Act, 2005 (the New Act). In the above suit filed after the commencement of the New Act the defendant made a counterclaim in a matter within the scope of an arbitration agreement. The Plaintiff then applied for a stay of proceedings on the counterclaim pursuant to section 10 of the New Act. The Defendant however contended that the application for stay should have been brought under section 6 of the Arbitration Act 1952 (the Old Act).

The issue was whether the New Act or the Old Act applied. The issue was of importance as the stay provisions of the New Act are in mandatory terms while the provisions of the Old Act left the Judge with a wide discretion; also the Old Act, by s. 25(1), gave the Court a right to retain proceeding where there were allegations of fraud whereas under the New Act there are no such provisions.

The Learned Judge held that the Old Act should be applied to the application for stay and that the stay should be rejected in the exercise of the discretion given by s. 6 of the Old Act in particular by reason of the allegation of fraud made by the defendant and the provision of s. 25(2) of the Old Act.

There are several issues which need commenting on in this judgment.

Firstly, the learned judge lays great stress on the wording of clause 63.5 of the Building Contract which states with reference to the arbitration clause that "*In this condition reference shall be deemed to be a reference within 'the meaning of the Arbitration Act, 1952'*" as showing a clear intention that the parties intended to

apply the Old Act and no other act. (paragraph 17). He even goes so far as to say that the Defendant would not have entered into the arbitration agreement had he been aware that s. 25(2) of the Old Act would not apply (paragraph 30). With all due respect, I doubt that this conforms to the reality of the situation where the Defendant in practice has little option but to enter into the Putrajaya Holdings standard form contract and it is most unlikely that the Defendant would have given a thought to the content of the arbitration clause.

The Learned Judge also in my view overemphasises the effect of the words "*deemed to be referred*" (in paragraph 24) as excluding article 63.5 from the effect of clause 1.10 of the Building Contract which states "*all references to provisions of statutes, regulations, by laws or any written law includes such provisions as amended, modified, recertified or re-enacted.*" In my view it is more likely that the draftsman simply referred to the Old Act being the then existing Act without considering the possibility of its replacement by the New Act, which at that time was hardly in contemplation.

In my view there is no good reason for not applying clause 1.10 so as to construe the reference to the Old Act in article 63.5 as a reference to the New Act after its commencement, which would then mean applying the transitional provisions of s. 51 of the new Act to decide which Act would apply.

The Learned Judge has placed great emphasis on section 30(1) of the Interpretation Act which states the principle that "*the repeal of a written law ... shall not affect any right, privilege, obligations or liability acquired, accrued or incurred under the repealed law*" (see paragraph 33) but in my view has erred in characterizing s. 25(2) of the Old Act as conferring a right or a vested

The issue was of importance as the stay provisions of the New Act are in mandatory terms while the provisions of the Old Act left the Judge with a wide discretion

right on the parties to a High Court trial. In fact s. 25(2) of the Old Act only gives a discretionary power to the High Court to revoke the authority of the arbitrator and does not give a right to the litigant. It is not therefore a vested right, but it could possibly be a privilege.

Three cases are cited in paragraph 42 for the proposition that the Court will not allow a stay of proceedings if a prima facie case of fraud is shown. The first case cited is **Camilla Cotton Oil Co. v Granadex SA [1976] 2 Lloyds Representative 10**. That case does not at all support that proposition. In fact the House of Lords granted the stay despite allegations of fraud. Lord Willberforce also commented that the fraud relied on must be fraud alleged against the party opposing the stay and not fraud alleged by the party opposing the stay. **Sarawak Shell Bhd v PPES Oil and Gas Sdn Bhd [1998] 2 MLJ 20**, the second case cited, also does not support the proposition. In that case Mahadev Shankar JCA states at p. 28H that *"It would not be correct to say that the courts can be compelled to refuse arbitration merely because one party alleges that the dispute involves a question of fraud."* The third case **Lai Siew Wah Sdn Bhd v Ng Chin [1988] 1 MLJ 393** is more to the point but the Supreme Court merely held that, where the High Court had refused a stay on the grounds that there was a bona fide allegation of fraud, the discretion given to him under s. 25(3) was properly exercised.

The case also raises an issue of more general concern in the passage starting at paragraph 45 where he points out the unfortunate discrepancy in relation to the wording of s. 51(2) of the English and Bahasa Malaysia text. As pointed out by the Learned Judge, the English text reads:

"Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted."

Whereas the Bahasa version reads:

"Jika perjanjian timbang tara dibuat atau prosiding timbang tara dimulakan sebelum permulaan kuat kuasa Akta ini, undang-undang yang mengawal perjanjian timbang tara dan prosiding timbang tara itu adalah undang-undang yang sepatutnya terpakai seolah-oleh Akta ini tidak diperbuat."

The underlined words in the Bahasa text are missing from the English text.

While the Learned Judge accepts (in paragraph 55) that the authoritative text is the English text, he argues that the Bahasa text which was tabled and debated in both Houses of Parliament clearly represents the manifest intention of Parliament and can be resorted to by applying the purposive approach sanctioned by s. 17A of the Interpretation Act.

However he justifies the resort to the purposive approach by arguing that the English text is *"incongruous, absurd and inconsistent"* (see paragraph 52). This proceeds on the premise that no purpose is served by including the words 'the arbitration agreement' in the second part of the paragraph after the comma if it is not also included in the first part, and this clearly shows that the Bahasa text reflects the true intention.

Again with the greatest respect I do not see any inconsistency in the English text. The cut off date is the date when the arbitral proceedings are commenced. If before that date, the Old Act continues to apply. If after that date, the New Act applies. It is **(continued on page 13)**

Case Review

Trade Mark Expungement Due to Non-use

GODREJ SARA LEE LTD V SIAH TEONG TECK & ANOR (NO. 2) [2008] 7 CLJ 24

by Janice Kon

The case of **Godrej Sara Lee Ltd v Siah Teong Teck & Anor (No. 2) [2008] 7 CLJ 24** is one of the latest cases from the High Court of Malaya exhibiting the classic application of section 46(1)(b) of the Trade Marks Act 1976 ('TMA 1976'). This provision is pertinent insofar as applications for expungement and removal from the Register of Trade Marks is concerned. The court in *Godrej* held that actual use of the trade mark in the course of trade must be in relation to the goods claimed in the registration and this could be done by affixing the mark to the goods in question or in an advertisement, circular or catalogue. The use of the trade mark during the material period (as provided under section 46(1)(b) of the TMA 1976) must be by the registered proprietor or a registered user. Furthermore, use outside the material period, whether before or after, cannot be considered to deflect the assertion of non-use.

The aforesaid case serves to illustrate that whilst

one may succeed in obtaining registration for his mark, one cannot sleep on his rights thereafter. Use of a trade mark during the material period of time is crucial in preserving one's rights in a trade mark – otherwise, the said trade mark would be vulnerable to expungement from the register by an aggrieved party. In any event, proprietors who are interested in obtaining protection for their trade marks in Malaysia should bear in mind that the position is *'the first to use the mark in Malaysia trumps the first to file the application'* – irrespective of whether any trade mark applications have been filed at the Trade Marks Registry or not.

The writer can be contacted at
janice.kon@azmandavidson.com.my

(from page 12) well recognized that a different law may govern the construction of the arbitration agreement from the law (the curial law) which governs the arbitration proceedings. The subsection as per the English text makes it clear that the New Act will apply to both if filed after the cut off date.

We should be grateful to the Learned Judge for

pointing out this discrepancy; however his decision could have far reaching consequences as there must be many other cases where the arbitration agreement will have been signed years before the filing of arbitration proceedings. An amending provision would be desirable to clear up the discrepancy between the two versions and make the position clear.

**Azman
Davidson
& Co**

Suite 13.03, 13th Floor, Menara Tan & Tan, 207 Jalan Tun Razak, 50400 Kuala Lumpur, Malaysia
T 603 2164 0200 F 603 2164 0280 W www.azmandavidson.com.my

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