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Singapore Court of Appeal considers SICC decision on effect of “subject to contract” stipulation

Bumi Armada Offshore Holdings Limited and another v Tozzi Srl (formerly known as Tozzi Industries SpA) [2018] SGCA(l) 05 confirmed that where there is a clearly expressed “subject to contract” stipulation, an arrangement that would otherwise give rise to a contract as a matter of law, would negate the existence of such a contract.

The dispute arose from the project for the supply of facilities and services in connection with the development of a gas and condensate field in Indonesia. The contractor, Bumi Armada Offshore Holdings Limited (BAOHL) and its parent company, Bumi Armada Berhad (BAB), had asked Tozzi Srl to provide engineering and construction services for three of the seven Modules. BAOHL agreed to give a right of first refusal to Tozzi Srl. The right was ultimately breached when BAOHL awarded the subcontract to another company without giving Tozzi Srl the opportunity to exercise its right of first refusal.

The Court of Appeal affirmed the SICC’s finding that the right to Tozzi Srl had been infringed but found the breach was in relation to three of the seven Modules. The Court of Appeal disagreed with the SICC that BAB was liable for inducing BAOHL. You can read a detailed summary of the case [here](#).

Singapore High Court clarifies the circumstances in which a Mareva injunction can be granted in support of foreign proceedings

The decision in *China Medical Technologies Inc (in liquidation) and another v Wu Xiaodong and another* [2018] SGHC 178 demonstrates that if there is a good arguable case on the merits and a real risk of asset dissipation then an additional form of relief is accessible to a foreign plaintiff.

In this case, the plaintiffs claimed against the defendants in the Hong Kong High Court for, inter alia, breach of fiduciary duties, fraud and conspiracy after it was found that the company from which various medical technologies were acquired was a sham entity controlled by the defendants, who were also the first plaintiff’s former management. The Hong Kong Court granted the plaintiffs a worldwide Mareva injunction against the defendants, which included assets in Singapore. The plaintiffs applied for a Mareva injunction in the Singapore High Court and were granted the injunction against one of the defendants. In this decision, the Singapore High Court had to decide whether to grant the Mareva injunction against the other defendant as well.

The Court granted the Mareva injunction applying the position in *Multi-Code Electronics Industries (M) Bhd and another v Toh Chin Toh Gordon and others* [2009] 1 SLR (R) 1000 in its judgment to determine the power of the court to grant a Mareva injunction in aid of foreign court proceedings. You can read a detailed summary of the case [here](#).

Singapore High Court clarifies the law on when it is “unconscionable” to make a call on a performance bond



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The Court in *AES Façade Pte Ltd v Wyse Pte Ltd and another* [2018] SGHC 163 clarified the law on when it is "unconscionable" to make a call on a performance bond and the Court's approach in deciding this issue.

The plaintiff and the first defendant entered into a subcontract for works on the building façade of a commercial development. The plaintiff procured from the second defendant, an insurance company, a performance bond in favour of the first defendant. The first defendant made a call on the performance bond after it failed in arbitration where it tried to seek liquidated damages for late completion from the plaintiff; and its application to set aside an enforcement order for it to pay sums to the plaintiff was dismissed, and the sum paid in court by it was paid to the plaintiff.

The Court found that the plaintiff had failed to discharge its burden of proving a strong *prima facie* case that the first defendant had made the call on the performance bond unconscionably. The court considered a number of factors that pointed to the fact that the first defendant made the call in order to recuperate liquidated damages, which it legitimately believed to be owing and was not motivated by any improper purpose or bad faith. You can read a detailed summary of the case [here](#).

Singapore High Court enforces first foreign judgment under the Hague Convention on Choice of Court Agreements

In *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8, the Singapore High Court determined its first application brought under the Choice of Court Agreements Act (CCAA) since its inception on 1 October 2016. In granting the application, the Singapore High Court provided an analysis of the legal framework surrounding the CCAA and the factors the Court would consider in such application. You can read a detailed summary of the case [here](#).

Absence of a direct contractual relationship does not mean there is no duty of care

The case of *Wei Siang Design Construction Pte Ltd v Euro Assets Holding (S) Pte Ltd* [2018] SGHC 182 demonstrated the risks that come with contracting through multiple parties so as to create degrees of separation. However, these degrees of separation do not in themselves exclude a duty of care in tort.

In this case Wei Siang Design was contracted to carry out a renovation project on a shophouse and entered into a contract with Nota Group for architectural services who in turn subcontracted Nota Design Architects + Engineers for engineering services. The project breached the Conservation Guidelines of the Urban Redevelopment Authority, resulting in the URA refusing to give its approval to the Building and Construction Authority issuing a Temporary Occupation Permit (TOP) for the shophouse. The owner claimed losses suffered for having to rectify the deviations and losses suffered for the delay in obtaining a TOP for the shophouse.

The Court held that the contractor breached its contract when it failed to give notice to the architect of the divergence between the structural drawings and the written permission drawings. The architect and engineer breached their respective supervision duties and failed to ensure consistency between the drawings. You can read a detailed summary of the case [here](#).



SINGAPORE DISPUTE RESOLUTION GROUP UPDATES

Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama and PT Pertamina [2018] SGHC 126

We successfully represented, PT Pertamina, the second defendant, in the above Singapore High Court proceedings where the Court agreed with our submissions that the fact that the ultimate financial loss may have been felt by the plaintiff in its principal place of business, where its bank accounts are located, does not mean that damage had occurred in that jurisdiction. The Court for the first time decided that the location of a plaintiff's Singapore bank account is insufficient to show that the plaintiff's claim is for the recovery of "*damages suffered in Singapore*" under the Rules of the Court. We recently issued a client alert on this case, which can be accessed [here](#).

Mukherjee Amitava v DyStar Global Holdings (Singapore) Pte Ltd and others [2018] SGCA 57

In the above proceedings, we represented three directors of Dystar Global Holdings (Singapore) Pte Ltd who had been joined by the appellant, also a director of Dystar, to his section 199 of the Companies Act (Cap 50, 2006 Rev Ed) application. We successfully argued that it was wrong that the directors were joined in proceedings that were brought under section 199. The Court of Appeal highlighted that pursuant to clause 114(a) of the Companies (Amendment) Act 2014 (No 36 of 2014), section 199 was amended to make clear that the obligation under section 199(1) is imposed on the company only, and not on its directors.

The Court of Appeal commented that the appellant's reliance on section 399 of the Companies Act was misplaced as that provision merely meant to compel compliance from a "person in contravention of this Act". To come within that provision, the appellant would have first had to establish there was a breach of section 199, which imposes an obligation only on the company to keep the records and to permit access.

You can read the full judgment [here](#).

The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited [2018] EWCA Civ 2006

We issued a client alert on the recent landmark decision in the above English Court of Appeal proceedings, where the Court of Appeal overturned a controversial first instance decision and found that litigation privilege can apply even if a formal criminal investigation has not been commenced. The alert can be accessed [here](#).

Singapore Construction Law Conference

On 12 September, Singapore Dispute Resolution Partner, **Kumar Ponnaya**, spoke at the Singapore Construction Law Conference on "Collaboration and Technology in Construction Law & Practice". Kumar shared his perspective on the effectiveness of traditional contract models for procurement of construction



work, in terms of sensible risk allocation and the achievement of positive project outcomes for the various stakeholders, and what the main sources of difficulty are perceived to be. The conference brought together legal practitioners and construction industry members from around Asia to discuss the changing face of the construction industry.

Adam Giam, Senior Associate, returns from secondment with SCB

We welcome back Adam after a successful eight month secondment with Standard Chartered Bank, one of the leading financial institutions in Singapore. Adam has been working with SCB in its Employment Law Group. During his secondment, he has provided legal support for employment matters regionally including advising on employment-related investigations and disputes and assisting with the documentation, negotiation and review of HR policies and projects (covering Mergers and Acquisitions, Outsourcing and Technology).

UPCOMING EVENTS

3 October 2018: Asia Pacific Risk & Crisis Management Symposium (Tokyo)

On 27 September 2018, Baker McKenzie held a symposium on risk and crisis management in Hong Kong. This symposium will also be held in Tokyo on **3 October 2018** where Singapore Dispute Resolution Partner, **Celeste Ang**, will be sharing on helping companies identify risks and best practices in crisis management.

3 - 5 October 2018: Taipei Compliance and Regulatory Sandbox Roadshow

Please contact us for details.

5 October 2018: 9th Employment Club Breakfast Meeting (Jakarta)

Please contact us for details.

29 October - 2 November 2018: Hong Kong FinTech Week

Our Baker McKenzie Hong Kong colleagues will be participating in Hong Kong FinTech Week. This event will hold a conference from a number of speakers on financial technology. You can find out more details on the event program and registration [here](#).

12 - 16 November 2018: Singapore FinTech Festival

Similar to the Hong Kong FinTech Week, Baker McKenzie Wong & Leow is participating in the Singapore FinTech Festival. The Festival will include a FinTech Conference and Exhibition, Global FinTech Hackcelerator Demo Day, AI in Finance Summit and more. You can find out more details on the Festival and registration [here](#).

November 2018: Employment Club Meeting (Singapore)



Singapore Dispute Resolution Partner, **Celeste Ang**, who is also the co-head of the Employment practice group will be sharing on employment and compensation hot topics.

For more details on any of the listed events, please contact Singapore.events@bakermckenzie.com.

KEY RESOURCES

We have recently updated our Comparative Chart of Investment Arbitration Rules, which compares the key arbitration rules frequently adopted in investment arbitration claims. The chart can be accessed [here](#).

For the latest arbitration news from across the world, including a calendar of upcoming events, visit www.GlobalArbitrationNews.com.

For updates on compliance-related topics such as new legislation, important court decisions as well as decisions by public authorities that may have an impact on companies, visit www.GlobalComplianceNews.com.

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This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

This alert is provided as general information and does not constitute legal advice.