OON & BAZUL

December 2011

Dear Valued Clients,

As we approach the close of the year, it would be timely for me to update you on the Firm's developments in the course of the year and our plans for the year ahead.

With the increase in international arbitration work in Asia, the Firm has seen a significant increase in the number of instructions on international arbitration matters for this year. In line with this, we have strengthened our international arbitration practice with the addition of new partners. I am confident that with their addition, we will continue to provide excellent and timely legal services which you are used to.

Moving forward, the Firm will continue to expand in the year to come. With a sizeable number of trainees joining us in January 2012, the Firm is looking forward to cultivating the next generation of lawyers in the Firm.

We have also further extended our commitment to supporting bright and young talents in the legal industry by offering financial assistance to outstanding students who require it.

I believe that with these initiatives and your continued support our Firm will grow from strength to strength and maintain its position as one of the leading law firms in Asia. I would also like to take this opportunity to thank you all for your kind support, without which these accomplishments would not have been possible.

On behalf of partners and staff of the Firm, I wish you and your loved ones a Merry Christmas and a Happy New Year ahead.

Regards,
Bazul Ashhab
Managing Partner

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Oon & Bazul continues to strengthen its International Arbitration practice

In July 2011, we boosted our Firm's International Arbitration practice with the appointment of Mr Nicholas Lum as a Partner of the Firm.

Nicholas, who was previously working in the Shanghai office of Clyde & Co, has since his appointment contributed to strengthening the firm's focus on International Arbitration in the Asian region. Nicholas is also responsible for leading the development and strengthening of the Firm's China practice.

In continuing our efforts to build on our Firm's International Arbitration practice, we are pleased to announce that Suresh Divyanathan will be joining our team on 3rd January 2012.

Suresh will be joining us from Drew & Napier LLC. He brings on board strong expertise and a wealth of experience in the field of commercial arbitration that will undoubtedly contribute substantially to our firm's continuous efforts to providing our clients with the best possible legal services.

Legal 500 continues to rank Oon & Bazul as a leading law firm.

We are proud to announce that we have, once again, been ranked as a leading law firm in Legal 500 Asia Pacific 2012.

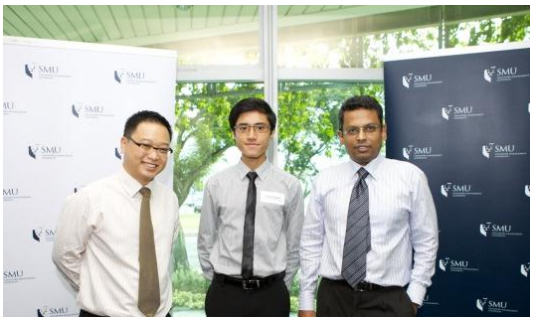
The firm has been ranked and commended in the 'Singapore: Shipping (Local Firms)' category and also in the 'Singapore: International Arbitration' category.

The firm's associate office, TS Oon & Partners, has also been ranked a leading law firm in Malaysia under the 'Shipping' category.

Partner Bazul Ashhab has been named a leading individual and Partners Oon Thian Seng and Goush Marikan have also been recommended.

For more information, please visit http://www.legal500.com/firms/32666-oon-bazul-llp/33670-singapore

Commitment to Aiding Needy Students



Oon & Bazul, through its collaboration with Singapore Management University (SMU), has started the 'Oon & Bazul Bursary' with the intention of providing funds to full-time undergraduates from SMU's School of Law. The Bursary will be awarded to outstanding students, who need financial assistance, to free them from worrying about school fees and to motivate them to achieve excellence in their legal studies.

The first Bursary for the year 2011/2012 has been awarded to Adam Bin Iryadi, currently a first year student in SMU's School of Law.

Amendments to Malaysian Arbitration Act 2005 facilitate arbitration in maritime disputes

As more maritime disputes are being referred to arbitration in recent years, it becomes vital for countries to adjust their arbitration laws to accommodate to commercial practicability. Along these lines, with the aim to move Malaysia forward in providing a competitive edge in this growing global arbitration arena, the Arbitration Act 2005 in Malaysia has recently been amended to provide extra measures to facilitate arbitral proceedings involving admiralty dispute.

The Arbitration (Amendment) Act 2011 ("the 2011 Amendment Act") amends the Arbitration Act 2005 to bring forth some significant changes. One of the changes is that it is now possible to arrest vessel in Malaysia as security in aid of foreign arbitration proceedings.

The amendments empower the Malaysian Courts to order the arrest or retention of property, bail or security pursuant to the admiralty jurisdiction of the High Court pending the determination of arbitral proceedings in relation to admiralty disputes. These powers of the Courts are also extended to foreign arbitrations where the seat of Arbitration is not in Malaysia.

The 2011 Amendment Act also gives the Malaysia High Court powers to grant interim measures such as injunctions pending determination of international arbitration proceedings where the seat of arbitration is not in Malaysia. This amendment fundamentally overturns the position in ***Aras Jalinan v Tipco Asphalt Public Company Ltd & Others [2008] 5 CLJ 65*** which held that the Courts in Malaysia are not allowed to grant any interim orders to protect assets if the seat of arbitration is outside of Malaysia.

Section 10 has been amended by inserting sub-section 2(A), 2(B) and 2(C). The combination effects of these amendments empowers the Court to order that any property arrested (i.e. vessel), or bail or other security to be retained as security in aid of arbitration proceedings or to order that a stay of court proceedings be conditional until equivalent security is furnished for the satisfaction of any award in the arbitration proceedings. The scope of these powers of the Court has been extended to foreign arbitrations where the seat of arbitration is not in Malaysia.

Section 11(e) has been amended to give the Courts power to order arrest of property, bail or other security before or during arbitral proceedings pursuant to admiralty jurisdiction of the High Court to secure the amount in dispute if a party applies for any interim measure. And, **section 11(3)** has been added to empower Courts to make any interim orders in aid of arbitration even if the seat of arbitration is not Malaysia.

Oon & Bazul's associate office in Malaysia, TS Oon & Partners, is one of the first law firms which successfully obtained an injunction to preserve the assets of the defendants in a charterparty dispute subject to London arbitration several days after the 2011 Amendment Act took effect

from 1 July 2011. In doing so, TS Oon & Partners protected its clients' interests by preserving disputed funds in aid of the London arbitration.

These aforementioned amendments and other amendments in the 2011 Act that now have come into force will undoubtedly play an important role in making Malaysia a not only a more arbitration friendly jurisdiction but a jurisdiction which will play its part to assist in arbitrations elsewhere. The Amendments serve to make Malaysia a jurisdiction to consider when parties seek to obtain security for their claims and interim relief such as *Mareva* injunctions and orders to take evidence or to preserve evidence such as Mare del Nord orders in aid of foreign arbitration.

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Yograj Infrastruction Ltd v Ssang Yong Engineering & Construction – A departure from the interventionalistic approach of Indian Courts in foreign arbitrations?

Background

In this case, the Supreme Court of India heard an appeal by an Indian sub-contractor in an arbitration with a Korean company over the termination of an agreement to upgrade a highway in the state of Madhya Pradesh. By way of background, the Korean company, Ssang Yong Engineering & Construction ("Ssang Yong"), was awarded a contract by the National Highways Authority. Ssang Yong then sub-contracted this project to Yograj Infrastructure Ltd ("Yograj"). The sub-contract provided for disputes to be determined by way of arbitration in Singapore under the applicable Singapore International Arbitration Centre Rules ("SIAC Rules"). The governing law for the sub-contract was Indian law. Subsequently, a dispute arose between parties and Ssang Yong terminated the sub-contract alleging delay on the part of Yograj.

In May 2010, the dispute between parties was referred to arbitration in accordance with the arbitration agreement. Both parties had applied to the Tribunal for interim relief. In June 2010, the Tribunal directed, amongst other things, that Yograj immediately release various forms of plant, machinery and equipment to Ssang Yong so that construction work could continue on the project. Yograj appealed against the Tribunal's interim order before the Indian Courts. After failing with the appeal in the District Court and the High Court in India, Yograj brought its case before the Supreme Court of India.

The Judgment issued by the Supreme Court of India

It must be noted that the arbitration agreement provided that the dispute shall be determined by way of arbitration in Singapore under the applicable SIAC Rules (the 2007 Version). Rule 32 of the SIAC Rules 2007 provides that where the seat of arbitration is Singapore, the law applying to the arbitration shall be the Singapore International Arbitration Act ("IAA"). The SIAC Rules 2007 further provide that "*if any of the SIAC Rules is in conflict with a mandatory provision of the applicable law of the application from which parties cannot derogate, that provision shall prevail*".

In its appeal before the Indian Courts, Yograj argued that since Indian law was the governing law in the arbitration agreement, the Indian Arbitration and Conciliation Act 1996 ("IACA") shall apply accordingly. More specifically, Yograj relied on Sections 9 and 37 of the Indian Arbitration and Conciliation Act 1996 (the "IACA"). Section 9 of the IACA allows the Court to grant interim measures before or during arbitral proceedings or at any time after the making of an award, but before the enforcement of

an award. Section 37 of the IACA then allows for an appeal to the Court against an order of the arbitral tribunal granting or refusing to grant an interim measure sought. Although these two sections, strictly speaking, relate to domestic arbitration in India (and not international arbitration overseas), there are case authorities in India, such as the Supreme Court decision of *Bhatia International v Bulk Trading SA* [2002] INSC 132, which held that these provisions can also apply to arbitrations taking place outside India, *unless* parties have expressly excluded this possibility in the arbitration agreement. What this effectively means is that despite parties having already chosen a foreign seat of arbitration, an appeal from the Tribunal's decision may still find its way before the local Indian Courts and subject to local Indian law. Essentially, the nub of Yograj's argument was that Section 37 of the IACA can be invoked as the basis of its appeal, given the absence of a specific clause in the arbitration agreement excluding the application of the same to the SIAC proceedings.

Consequently, the Supreme Court of India rejected the arguments raised by Yograj. It agreed with the findings of the District Court and the High Court that Rule 32 of the SIAC Rules 2007 was sufficient to exclude the application of Sections 9 and 37 of the IACA and the general jurisdiction of the Indian Courts in this matter. The Supreme Court held that having agreed to the SIAC Rules, it was now not available to Yograj to argue that the "proper law" of the agreement would apply to the arbitration proceedings. The Supreme Court further stated that "*once the parties had specifically agreed that the arbitration proceedings would be conducted in accordance with the SIAC Rules, which includes rule 32, the decision in Bhatia International and the subsequent decisions on the same lines would no longer apply*…" The Supreme Court commented that from the point when the arbitrator was appointed and arbitration proceedings commenced in Singapore, any appeal from the Tribunal's decisions would have to be heard by the local Courts in Singapore.

Observations

The international consensus is that India is not an arbitration-friendly jurisdiction – Indian Courts are seen as being extremely keen to assume jurisdiction and intervene in foreign arbitrations. At first blush, this latest decision appears to mark a change in that tradition.

However, it must be noted that this decision was made having regard to the SIAC Rules 2007, where Rule 32 clearly provides for the applicable law of the arbitration. The SIAC has since amended its Rules in 2010 and the original Rule 32 has been deleted. In the circumstances, this decision is unlikely to apply to many SIAC arbitrations going forward, on the assumption that they are subject to the

latest SIAC Rules 2010. It is also likely that this judgment would only apply to arbitration proceedings involving Indian parties and foreign parties (i.e. there must be a foreign element involved) – Indian Courts are likely to want to retain jurisdiction should the matter involve two local Indian parties, in which case this judgment is unlikely to be of much help.

Having said that, this decision would be very useful in scenarios where the arbitration institutions have rules specifying the curial law of the proceedings. Should parties wish to take advantage of this judgment and avoid the scenario of having the Indian Courts seize jurisdiction when parties have already chosen a foreign arbitration seat, they can expressly state that the SIAC Rules 2007 shall apply (in the event of a Singapore arbitration) or specifically exclude the relevant parts of the IACA.

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