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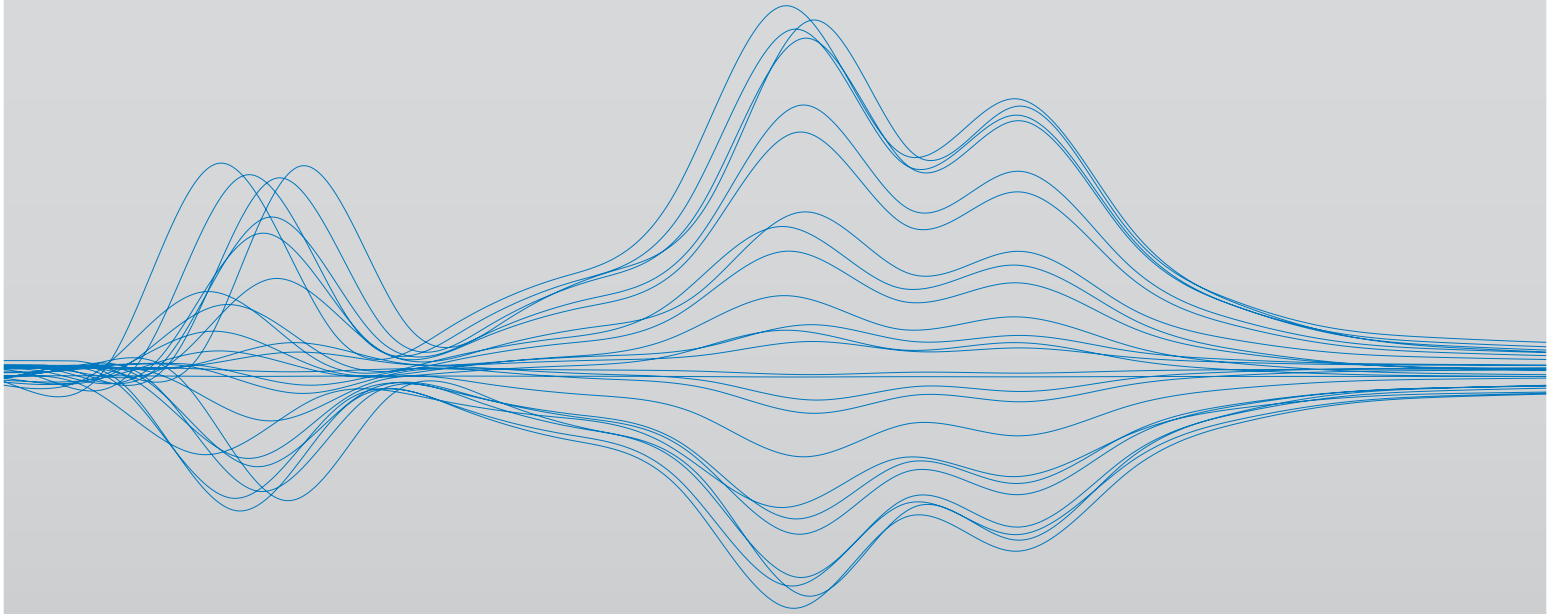
SEAChange



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Contents

SEAChange – investigations, compliance, and regulatory developments in Southeast Asia (SEA)

Our first issue covers a wide range of jurisdictions, and an even wider range of issues.

We'll cover a new view from the SICC on admitting evidence of corruption in arbitral proceedings, Lord Mance's analysis (with potentially far-reaching consequences) on what, in the age of COVID-19, constitutes a "competent local authority", the Australian Federal Court's thinking on the limits of privilege in relation to internal investigations and an important decision of the Indian Supreme Court on the interplay between court and tribunal issued interim relief.

SEAChange

Welcome to SEAChange! Each month we feature updates across the disputes and investigations space with relevance to your business in Southeast Asia. The various articles are provided by teams within our Asian operation and benefit from their close monitoring of their respective markets. Our region provides both opportunity and significant risk; we hope these insights help you manage legal issues and navigate some of that risk.

Maintaining the balance: Indian Supreme Court clarifies the interplay between court-ordered and tribunal-ordered interim measures

By Apoorvaa Paranjpe

The Supreme Court of India in *Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Limited*[1] clarified the scope of the court's power to grant interim relief in relation to arbitration proceedings.

Section 9(1) of the Indian Arbitration Act, enables a party to an arbitration agreement to apply to a court for interim relief before or during the arbitral proceedings, or at any time after an award is made and published, but before the award is enforced. Section 9(3) of the Arbitration Act provides that once the tribunal has been constituted, the court shall not entertain an application under Section 9(1), unless the court finds that the tribunal cannot grant efficacious relief under Section 17 of the Arbitration Act. Under Section 17, a tribunal has the same power to grant interim relief as the court.

Disputes having arisen between the parties under a cargo handling agreement, the Appellant commenced arbitration against the Respondent. Prior to the constitution of the tribunal, the parties sought interim relief from the court under Section 9(1). The court heard the parties' interim relief applications and reserved the orders. Meanwhile, the tribunal was constituted. The Appellant, relying on Section 9(3), challenged the court's jurisdiction to proceed further with the applications and sought reference of the applications to the now-constituted tribunal.

The Supreme Court held that the bar of Section 9(3) would not operate, if the interim relief applications have been 'entertained and taken up for consideration' by the court, prior to the tribunal constitution. The Court determined that the relevant test is whether the '**process of consideration [by the Court] has commenced, and/or whether the Court has applied its mind to some extent before the constitution of the Arbitral Tribunal**'. In the instant case, where the hearing was concluded and orders reserved by the court, the interim relief application was held to have been entertained before the constitution of the tribunal and not subject to the bar under Section 9(3).

Key takeaways:

- the decision to approach the courts for interim relief requires careful consideration. It may be challenging to pivot to the tribunal for interim relief if the court has 'applied its mind to some extent' before the tribunal constitution;
- for India-seated institutional arbitrations, obtaining interim relief from an emergency arbitrator may be a time-efficient alternative to approaching courts; and
- court-ordered interim relief remains better suited to circumstances where ex-parte relief is sought or where the interim relief is intended to bind third parties.

Our team[2] here in Singapore focusses on India-related disputes. We can help you explore the availability of court-ordered interim measures and how it interacts with interim measures available within the arbitration process.

[1] Civil Appeal No. 5700 of 2021 (Judgment dated 14 September 2021).

[2] India Arbitration Team.

You Can Run But You Cannot Hide: The Public Duty to Consider Evidence of Corruption in Arbitrations

By Gowri Kangeson, Matthew Shaw, Reid Hadaway

The Singapore International Commercial Court (the SICC), in its decision in *Lao Holdings N.V. v The Government of the Lao People's Democratic Republic and another matter* [2021] SGHC(I) 10, wherein the SICC upheld the awards in two related Bilateral Investment Treaty arbitrations, has considered the arbitrator's duty to accept evidence of corruption regardless of any contrary agreement between the parties.

In the course of its judgment, the SICC said that "*arbitral tribunals… have a duty to consider corruption, which includes illegal conduct, bribery or fraud*". Notably, the SICC reinforced the importance of this duty by taking the view that "*no agreement between the parties can prevent the arbitral tribunal from reviewing and, where appropriate, admitting [evidence of corruption]*".

Although this is a finding made in the alternative, it raises important considerations for future commercial and investor-state arbitrations.

Fundamental to arbitration is party autonomy, that is the principle that the parties may, by agreement, constrain the arbitral tribunal's jurisdiction and the procedure to be followed throughout the proceedings. The SICC accepted that the Settlement Deed in this case was a legitimate procedural agreement that was binding on the tribunal. However, the "public duty" to consider evidence of corruption acts as a notable exception to this rule. It appears from the broad wording adopted by the SICC that the spectre of corruption or illegality is too serious to be excluded from a tribunal's consideration by agreement of the parties, who themselves may have engaged in the alleged corruption in question. Furthermore, allowing the exclusion of such evidence by agreement may result in tribunals inadvertently issuing awards that accept, condone or enforce corrupt behaviour. As such, although it may be a violation of an agreement between the parties, the SICC has signalled supervisory courts' willingness to disregard such a violation where issues of corruption are in play.

The SICC's conclusion on this point highlights the pro-active role that arbitrators, like judges, must play in ensuring corruption is strongly discouraged by adjudicatory bodies, whether they are courts, which as state organs have a public policy interest in denouncing corruption, or arbitral tribunals, where the integrity of arbitrations may be fundamentally undermined by ostensible support for corruption.

While it stands to reason that this "public duty" is particularly important in the context of investor-state arbitration (a reality the SICC notes in its judgment), that does not mean that parties to a commercial arbitration are immune. Evidence of possible corruption or financial irregularity may enliven this duty in a commercial arbitration. This may well act as a powerful incentive for commercial actors to ensure a high degree of propriety in the conduct of their business regardless of arbitration's usual subordination to the agreement of the parties.

The UK Government is not a "competent local authority"

By Andrew Robinson

In the matter of *Policyholders v China Taiping Insurance (UK) Co Ltd*, heard in arbitration before Lord Mance, ex-member of the Supreme Court, it has been determined that the policyholders' claim in the UK for losses for business interruption as a consequence of closures relating to Covid-19 failed because the instructions to oblige the closures were not issued by either of the specific authorities referenced in the policy wording.

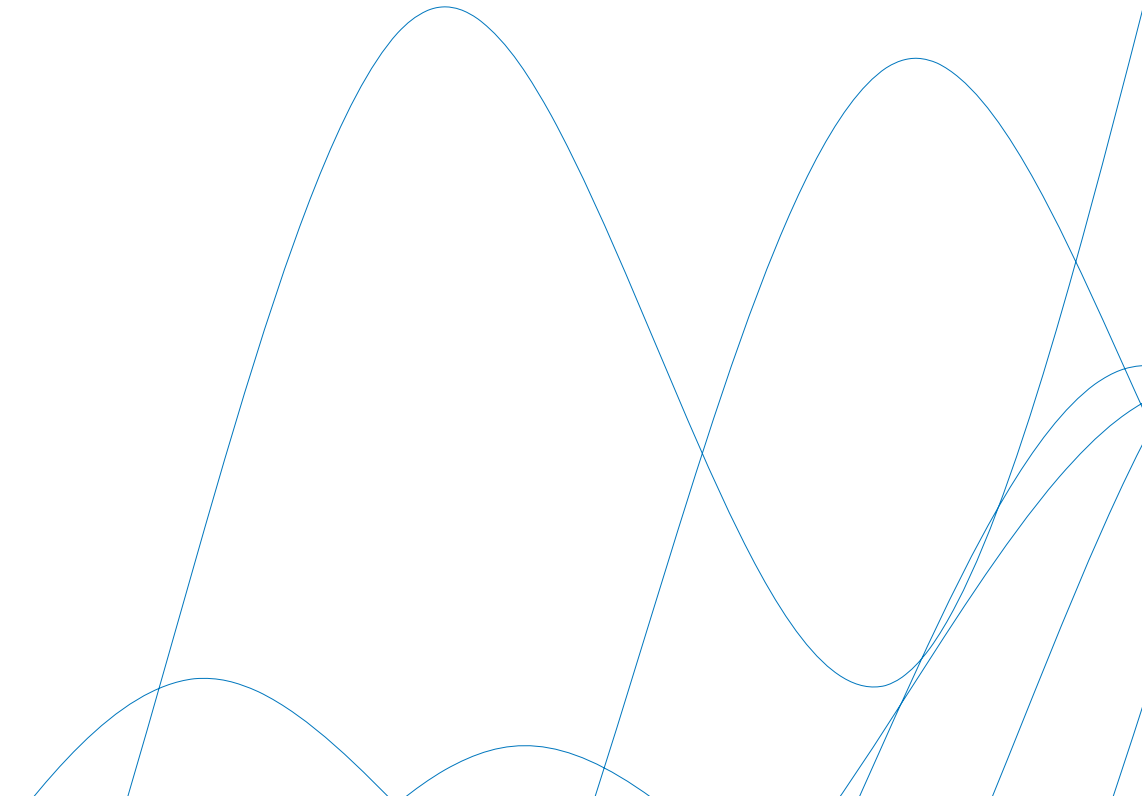
Under the policy Extension 1(b) and (c) dealing with *Denial of Access*, cover is extended to include interruption or interference with the policyholder's business in consequence of:

> (b) the closing down or sealing off of the *Premises* or property in the vicinity of the *Premises* in accordance with instructions issued by the Police or other competent local authority for reasons other than the conduct of the Insured.....;
>
> (c) the actions or advice of the Police or other competent local authority due to an emergency threatening life or property in the vicinity of the *Premises*;

The Policyholders each run hospitality businesses including a variety of restaurants, cafes, bars and public houses. All claimed to have suffered loss within Extension 1 due to interruption of or interference with their businesses, arising from the UK Government's orders or advice issued at various times in 2020 in response to the Covid-19 pandemic.

However, in his non-confidential arbitration award published on 10 September 2021, while Lord Mance agreed with the Policyholders that losses from Covid-19 could in principle be covered under the Denial of Access provision, he considered that "*in so far as the Policyholders claim to have suffered recoverable loss in consequence of the alleged instructions, actions or advice... such claim fails in that the instructions, actions or advice alleged were not issued by or of "the Police or other competent local authority*"". In doing so, Lord Mance accepted the submissions on behalf of China Taiping, that the orders and/or advice direct from the UK Government, and which caused the business interruption losses, were in fact outside the scope of Extension 1.

The award is significant (albeit not binding on third parties) in that Lord Mance clearly did not ascribe the same extensive meaning to the title of "*competent local authority*" as had been decided in the closely-followed test case brought by the Financial Conduct Authority in London in 2020. It will therefore be interesting to watch what guidance (or persuasion) might be taken from the award in any future litigation relating to similar Covid-19 business interruption losses.



Privilege – you can't have your cake and eat it too

By Jonathon Ellis, Natalie Caton, Matthew Spain and Tania Saleh.

You can't have your cake and eat it too... Federal Court of Australia finds waiver in privileged documents

Internal investigations into corporate wrongdoing undoubtedly involve highly sensitive matters and it is crucial for inhouse lawyers and legal advisers to understand the extent to which legal professional privilege applies when conducting investigations.

In *Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Ltd [2021] FCA 511*, the Federal Court of Australia has handed down an important reminder on privilege – finding conduct that was inconsistent with maintenance of confidentiality waived privilege, even when done with the best of intentions.

Background

This case relates to the 2018 prosecution of cartel conduct offences by the Commonwealth Director of Public Prosecutions (**CDPP**), following an investigation by the Australian Competition and Consumer Commission (**ACCC**) into an institutional share placement undertaken by various financial institutions.

JP Morgan Australia Pty Limited (**JP Morgan**) had conducted an internal investigation into its own conduct in relation to the share placement and subsequently self-reported to the ACCC. In this process, JP Morgan's administrative corporate entity was granted conditional immunity[3] from civil and criminal action in relation to the ACCC's investigation – one such condition was "*to provide full, frank and truthful disclosure and cooperation to the ACCC and withhold nothing of relevance.*"

The partial disclosure

In the course of JP Morgan's investigation, its inhouse lawyers and legal advisors had prepared a variety of documents, including notes of employee interviews and outlines of evidence for each employee, which it ended up later producing to the CDPP in redacted form, asserting privilege on various bases over the redacted portions of the documents.

The ACCC pressed for unredacted copies of the documents by way of subpoena, and, eventually, an agreement was reached between the parties to give partial disclosure to the CDPP which included reading aloud portions of the outlines of evidence. JP Morgan had understood that, by not complying with the subpoena, it was at risk of losing its immunity deal.

Ultimately, the Federal Court found that, while the notes of interviews and outlines of evidence were protected by privilege at the time they were created, JP Morgan waived that privilege by its partial disclosure of the documents by its lawyer reading them aloud.

Comment

As seen in this case study, two vital elements in internal investigations that will be highly sensitive and may attract privilege are any contemporaneous documents and records of interviews with individuals. Inhouse lawyers and legal advisers conducting investigations in Australia should be aware, and this judgment serves as a reminder, that any disclosure to third parties risks waiving privilege in Australia.

There are obvious commercial and strategic consequences when a business has to disclose such material to a regulator following an investigation – here are some safeguards for your business to limit that risk:

- clearly identify or mark confidential and/or privileged documents;
- specify the limited purpose for which legal advice is being disclosed – make it clear that no waiver of privilege is intended;
- minimise the circulation of legal advice or communications around your business;
- consider the use of confidentiality agreements/regimes; and
- consider carefully the form in which any interviews are documented.

[3] This immunity was granted pursuant to the ACCC's Immunity and Cooperation Policy for Cartel Conduct, the purpose of which is to encourage "*insiders to provide information and enables the ACCC to penetrate the cloak of secrecy.*"

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