Legal updates on Arbitration and for the Building and Construction industry

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Legal updates on Arbitration and for the Building and Construction industry

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- The Impact of the COVID-19 (Temporary Measures) Act
- Recent updates in case law
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- Electronic Lodgement of Adjudication Applications

The COVID-19 (Temporary Measures) Act 2020

The COVID-19 (Temporary Measures) Act 2020

Introduction

- Passed in Parliament on 7 April 2020
- ***Seeks to provide temporary relief to companies unable to fulfil their contractual obligations due to the COVID-19 pandemic***
- Temporary relief for 6 months i.e. the Prescribed Period, starting from 20 April 2020 to 19 October 2020

The COVID-19 (Temporary Measures) Act 2020

Scope

- Which contracts are covered by the Act?
- Contracts entered into on or after 25 March 2020 are **excluded** – i.e. contracts entered into before 25 March 2020 are covered
- Obligations to be performed on or after 1 February 2020
- Contracts which are prescribed in the Schedule to the Act

The COVID-19 (Temporary Measures) Act 2020

Scheduled Contracts

(*c*) a performance bond or equivalent that is granted pursuant to a construction contract or supply contract;

(*d*) a hire-purchase agreement or conditional sales agreement as defined under the Hire-Purchase Act (Cap. 125), where the good hired or conditionally sold under the agreement is —

(i) any plant, machinery or fixed asset located in Singapore, where such plant, machinery or fixed asset is used for manufacturing, production or other business purposes; or

(ii) a commercial vehicle;

(*e*) an event contract;

(*f*) a tourism-related contract;

(*g*) a construction contract or supply contract;

(*h*) a lease or licence of non-residential immovable property.

The COVID-19 (Temporary Measures) Act 2020

Scheduled Contracts

- “construction contract” and “supply contract” have the meaning given by section 2 of the Building and Construction Industry Security of Payment Act (Cap. 30B) (“**SOPA**”)

- Under Section 2 of SOPA:
  - “construction contract” means an agreement under which —
    - (a) one party undertakes to carry out construction work, whether including the supply of goods or services or otherwise, for one or more other parties; or
    - (b) one party undertakes to supply services to one or more other parties;
  - Section 3 of SOPA goes on to further explain and define the meaning of “construction work”

The COVID-19 (Temporary Measures) Act 2020

Scheduled Contracts

- Under Section 2 of SOPA:
  - “supply contract” means an agreement under which —
    - (a) one party undertakes to supply goods to any other party who is engaged in the business of carrying out construction work or who causes to be carried out construction work;
    - (b) the supply is for the purpose of construction work carried out or caused to be carried out by the second mentioned party; and
    - (c) the first-mentioned party is not required to assemble, construct or install the goods at or on the construction site,
  - but does not include such agreements as may be prescribed.

The COVID-19 (Temporary Measures) Act 2020

Requirements for Relief

- Section 5(1) sets out 3 requirements:
- (i) the party seeking relief is unable to perform an obligation in the contract, being an obligation that is to be performed on or after 1 February 2020 (the "**Obligation Requirement**");
- (ii) the party seeking relief's inability to do so is to a material extent caused by a COVID-19 event (the "**Materiality Requirement**"); and
- (iii) the party seeking relief has served a notification for relief in accordance with section 9(1) on —
  - the other party or parties to the contract;
  - any guarantor or surety for the party seeking relief's obligation in the contract; and
  - such other person as may be prescribed (the "**Notification Requirement**").

The COVID-19 (Temporary Measures) Act 2020

Obligation Requirement

- Is the obligation due to be performed on or after 1 February 2020?
- Likely to be easily met since COVID-19 started gaining commercial significance after 1 February 2020
- Obligations that must be performed prior to 1 February 2020 can still be enforced in the usual manner:
  - Letters of demand
  - Payment claims and adjudication
  - Calling on performance bonds
  - Legal proceedings

The COVID-19 (Temporary Measures) Act 2020

The Materiality Requirement

- The party seeking relief's inability to perform is to **a material extent** caused by a COVID-19 event
- What does "material extent" mean?
- Likely to result in a lot of controversy but guidance may be obtained from the Explanatory Notes to the Bill

- Example 1:
  - A leases premises from B for a restaurant business. **The COVID-19 pandemic resulted in a sharp decline in the restaurant's business**. Because of this, A did not have sufficient money to pay the rent that is due on 29 February 2020.

The COVID-19 (Temporary Measures) Act 2020

The Materiality Requirement

- Example 2:
  - A carries on a manufacturing business. B is a bank.
  - A took a loan facility from B that is partially secured against A's machinery and stock-in-trade. Under the loan facility, an instalment is due and payable on 20 April 2020.
  - A imports materials from other countries for A's manufacturing business. **Due to the outbreak of COVID-19 globally, the import of such materials into Singapore is adversely affected**.
  - A has not been able to manufacture a sufficient amount of goods and its sales revenue falls sharply. Because of this, A is not able to repay the instalment on 20 April 2020.

The COVID-19 (Temporary Measures) Act 2020

The Materiality Requirement

- Example 3:
  - A is a hirer under a hire-purchase agreement with B for a motor vehicle which A uses as a private hire car.
  - **A's income was reduced since the beginning of February 2020 as more people started to work from home, and the number of visitors to Singapore fell, due to the COVID-19 pandemic**.
  - Because of this, A was unable to pay the monthly instalment due on 30 March 2020 under the hire-purchase agreement.

COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020

The Notification Requirement

- The party seeking relief must serve a Notification for Relief on the other parties to the contract
- The Notification of Relief must be in the Form as found on MinLaw's website (http://www.mlaw.gov.sg/covid19-relief) (Rg 4)
- The Notification must contain the information and relevant supporting documents as set out in the Form, including:
  - Particulars of the parties;
  - Category and details of contract;
  - Nature of contractual obligation unable to be performed;
  - How the inability to perform the obligation was materially caused by a COVID-19 event

COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020

The Notification Requirement

- The Notification can be served by the following means (Rg 5):
  - MinLaw's electronic system at https://www.mlaw.gov.sg/covid19-relief/notification-for-relief (login with SingPass or CorpPass);
  - If the electronic system cannot be used, to the party's last email address;
  - If both the electronic system and email cannot be used, other electronics means which the parties have previously corresponded on matters concerning the contract in question (example WhatsApp, WeChat, social media);
  - If all of the above methods cannot be used, by prepaid registered post to the party's last postal address

COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020

The Notification Requirement

- Once you have **received** a Notification for Relief, you may not commence certain actions such as (Section 5 of the Act):
  - Calling on a performance bond or equivalent
  - Commencing Court or arbitration proceedings
  - Enforcing an adjudication determination under SOPA
  - Enforcing security over immovable property
- However, it does not mean that the obligation is extinguished. The obligation will continue to accrue.

COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020

What if the other party does not agree?

- If you do not agree that the party seeking relief's inability to perform is due to COVID-19, discuss with them and try to reach a compromise
- If you cannot agree, either party may apply for an Assessor from MinLaw pursuant to section 12 of the Act
- The assessor will make a determination on whether the party seeking relief's obligation has been materially affected by COVID-19
- The assessor takes into account:
  - The **ability** and **financial capacity** of the party seeking relief ;
  - The work schedule
- The assessor seeks to achieve an outcome that is just and equitable in the circumstances of the case:
  - Whether there are savings in cost now
  - Any costs that are covered by the government
  - Whether there are any other types of relief available
  - Whether savings can be used to accelerate works when COVID-19 is over

COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020

What if the other party does not agree?

- The Application must be made in the form and manner prescribed using MinLaw's electronic system at https://www.mlaw.gov.sg/covid19-relief/application-for-assessor (login with SingPass or CorpPass) (Rg 12)
- **Within 2 working days** of receiving the document from the Registrar, the Applicant must serve the Application (and documents received from the Registrar) on the other parties (Rg 14).

COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020

What if the other party does not agree?

- **Within 1 working day** of serving the documents, the Applicant must submit a Declaration of service at https://www.mlaw.gov.sg/covid19-relief/application-for-assessor (Rg 14(10))
- **Within 5 working days** after being served the documents, the party receiving the Application must serve a Response using MinLaw's electronic system (Rg 15).
- If all the documents are in order, a hearing will be fixed before an Assessor (Rg 17).
- The hearing will ordinarily be conducted by way of email, or online hearings (using Webex) or physical hearings (e.g. at the State Courts) (Rg 18).
- No party may be represented by a lawyer at proceedings before an Assessor. Each party will bear its own costs (Section 14-15 of the Act).
- If a party is absent, the Assessor may dismiss the application or make a determination. If that party had a good reason for being absent, they may make an application to set aside the dismissal or determination.
- The Assessor's decision is final and binding on all parties. It is not appealable (Section 13(9) – (10) of the Act).

The COVID-19 (Temporary Measures) Act 2020

Additional Relief for Construction Contracts

- Impact on Performance Bonds
  - If the party seeking relief is unable to perform the contract, you may not call on the performance bond in relation to the subject inability at any time earlier than 7 days before:
    - The expiry of the performance bond as stated in the performance bond; or
    - Date the of expiry of the performance bond that has been extended.
- This protection does not apply if:
  - The party seeking relief has withdrawn his Notification for Relief; or,
  - An assessor determines that the party seeking relief cannot rely on the Act

The COVID-19 (Temporary Measures) Act 2020

Additional Relief for Construction Contracts

- Impact on Performance Bonds
  - The party seeking relief may make an application to the issuer of the performance bond, not less than 7 days before its expiry, to extend the term of the performance bond
  - The party seeking relief must serve a notice of the application on you at the same time.

The COVID-19 (Temporary Measures) Act 2020

Additional Relief for Construction Contracts

- Example
  - B engaged A to construct a building, to be completed on 31 March 2020.
  - Under the terms of the contract, A procured a bank to issue a performance bond in favour of B.
  - A had placed orders for construction materials from several overseas factories. However, these factories suspended operations in early February 2020 due to the COVID-19 pandemic. As a result, A was unable to complete the construction of the building by 31 March 2020.
  - A may serve a notification for relief in accordance with section 9(1) on B.
  - Once served with the notification for relief, B may not make a call on the performance bond at any time before 7 days of the original expiry date of the bond or the extended expiry date of the bond under section 6(3).

The COVID-19 (Temporary Measures) Act 2020

Additional Relief for Construction Contracts

- If the inability is caused to a material extent by a COVID-19 event, there is no liability for:
  - Delay (damages) (section 6(5) of the Act)
  - Breach of contract i.e. COVID-19 is a contractual defence (section 6(6) of the Act)
- Does not affect any judgment, arbitral award, adjudication determination, compromise or settlement made before the service of the notification for relief.

The COVID-19 (Temporary Measures) Act 2020

Additional Relief for Construction Contracts

- Example
- B engaged A to install fittings in B's building.
- The contract provides for A to complete the work by 10 March 2020.
- Most of A's employees travelled to Country X in early February 2020.
- On 15 February 2020, Country X closed its borders to curb the spread of COVID-19 and A's employees were therefore not allowed to return to Singapore. As a result, A faced a manpower crunch and was unable to complete the work by 10 March 2020.
- A is not liable for liquidated or other damages for the period of the delay insofar as the delay is caused to a material extent by the fact that A's employees were not allowed to return to Singapore.
- A is also not liable to B under the contract for failing to complete the work by 10 March 2020

5 Recent Cases concerning Arbitration and relevant to the Building and Construction Sector

Seat of the Arbitration

What is the “seat”?

- The first 2 cases deal with the “seat” of the arbitration
- Seat vs venue of the arbitration
- Venue: The physical location where the arbitration hearing takes place
- Seat: The law governing the arbitration process, the jurisdictions whose courts have the authority to supervise the arbitration process e.g. grant an injunction where the tribunal has not been appointed; deal with applications to set aside an award.
- A Singapore-seated arbitration can be heard in any country (venue) but the laws of Singapore (e.g. the IAA) still apply to that arbitration.

Seat of the Arbitration

Why is it important?

- “The *seat* of an arbitration is *essential* to arbitration law.” (per the Court of Appeal in BNA v BNB [2019] SGCA 84 at [65])
- The choice of seat identifies the state or territory whose laws will govern the arbitral process – the curial law
- The seat will also be considered to be the jurisdiction in which the arbitral award is “made” for the purposes of the New York Convention
- The venue on the other hand is not essential to be specified and can change during the arbitration process

BNA v BNB [2019] SGCA 84

Background

- The Arbitration Clause:

"Art 14: Disputes

14.1: This Agreement shall be governed by the laws of the **People's Republic of China**.

14.2: With respect to any and all disputes arising out of or relating to this Agreement, the [p]arties shall initially attempt in good faith to resolve all disputes amicably between themselves. If such negotiations fail, it is agreed by both parties that such disputes shall be finally **submitted to the Singapore International Arbitration Centre (SIAC)** for **arbitration in Shanghai**, which will be conducted in accordance with its Arbitration Rules. The arbitration award shall be final and binding on both [p]arties (emphasis added)."

BNA v BNB [2019] SGCA 84

Background

- Governing Law: PRC Law
- What does “arbitration in Shanghai” mean?
  - Venue?
  - Seat?
- What was the seat of the arbitration / proper law of the arbitration agreement?
- Appellants argued that the arbitration agreement was invalid and the Tribunal had no jurisdiction because:
  - (i) PRC was the seat
  - (ii) PRC law does not permit a foreign arbitral institution (like the SIAC) to administer a PRC-seated arbitration; and
  - (iii) PRC law did not permit a foreign arbitral institution to administer a purely domestic dispute.

BNA v BNB

The High Court's Decision

- The issue on whether the Tribunal had jurisdiction came before the Singapore High Court
- High Court held that the Tribunal had jurisdiction because:
  - The arbitration agreement incorporated the SIAC Rules which provided that, in the absence of parties' express provision, the default seat would be Singapore
  - The Arbitration Agreement did not specify where the seat would be
  - Shanghai was a city not a "law district" unlike Singapore

BNA v BNB [2019] SGCA 84

The Court of Appeal's Decision

- The Court of Appeal disagreed with the High Court and held that the governing law of the arbitration agreement itself was PRC law
- The Court of Appeal applied a 3-step test:
  - Express Choice
  - Implied Choice
  - Close Connection Test

BNA v BNB [2019] SGCA 84

The Court of Appeal's Decision

- Express Choice:
  - The Court of Appeal did not find that the parties had made an express choice of law for the arbitration agreement
  - "14.1: This Agreement shall be governed by the laws of the **People's Republic of China**."
  - The governing law clause applied to the governing law of the main agreement and not the arbitration agreement

BNA v BNB [2019] SGCA 84

The Court of Appeal's Decision

- Implied Choice:
  - There is a presumption that the governing law of the main agreement is also the governing law of the arbitration agreement but this can be **rebutted**
  - The Court of Appeal considered other similarly phrased clauses:
    - "arbitration in London" - signalled a choice of London as the seat of the arbitration
    - "arbitration to be held in Hong Kong. English law to be applied" – Hong Kong was the seat of the arbitration
  - This signals a trend that the Courts interpret the reference to the country/city as the seat
  - In this case, "arbitration in Shanghai" was held to indicate an implied choice of the PRC as the seat and the governing law of the arbitration agreement

BNA v BNB [2019] SGCA 84

The Court of Appeal's Decision

- The Court held that Shanghai was the seat and not Singapore and allowed the appeal only to the extent that Singapore **was not the seat**.
- The Court did not take any concluded view as to whether the tribunal had jurisdiction or not.
- Having determined that PRC law was the proper law of the arbitration agreement not Singapore law, whether the Tribunal had jurisdiction or not, was a matter for the PRC Courts to decide.

ST Group Co and others v Sanum Investments and another appeal [2019] SGCA 65

Consequences of a wrongly-seated arbitration

- 2 agreements (Master Agreement & Participation Agreement) with 2 different arbitration clauses
- Parties were involved in the gaming industry. Dispute concerned the alleged failure by ST Group etc (the "**Lao Parties**"), pursuant to the Master Agreement, to turn over to Sanum a Laotian club called the Thanaleng Slot Club. The Master Agreement also contemplated that the parties would subsequently enter into further joint ventures which were to be governed by "sub-agreements". One such sub-agreement was the Participation Agreement.
- The arbitration clause in the main agreement i.e. the Master Agreement, provided that the seat of the arbitration was Macau, whereas the Participation Agreement identified Singapore as the seat.
- Sanum obtained an SIAC award pursuant to the Singapore-seated arbitration clause in the Participation Agreement.
- Sanum obtained an order for recognition and enforcement of the SIAC award and the Lao Parties challenged this

ST Group Co and others v Sanum Investments and another appeal [2019] SGCA 65

Consequences of a wrongly-seated arbitration

- The High Court dismissed the Lao Parties' challenge but the Court of Appeal overruled the High Court
- The Court of Appeal held that the dispute resolution clause under the Master Agreement should have been followed
- The seat of the arbitration should have been Macau and not Singapore
- Once an arbitration is wrongly seated, and in the absence of a waiver by the parties of that wrong seat, any award that ensues should not be recognised and enforced by other jurisdictions.
- This is because such award had not been obtained in accordance with the parties' arbitration agreement
- Actual prejudice does not need to be demonstrated by the party resisting enforcement

Daisho Development Singapore Pte Ltd v Architects 61 Pte Ltd [2020] SGHC 16

Background

- An architect was sued for negligence by the buyer of a hotel.
- The architect was engaged by the seller for the development of a hotel and had advised the seller on certain use restrictions imposed by the URA.
- When the hotel was sold to the buyer, the buyer was not aware of these use restrictions and only subsequently discovered them.
- The buyer attempted to hold the seller liable for breach of contract and fraudulent misrepresentation but failed in the arbitration
- The buyer then commenced court proceedings against the architect alleging that the architect was negligent towards the buyer
- The claim was for the tort of negligence as there was no contract between the buyer and the architect.

Daisho Development Singapore Pte Ltd v Architects 61 Pte Ltd [2020] SGHC 16

No Duty of Care – Foundation of a claim in Negligence

- The High Court held against the buyer for a variety of reasons.
- In particular, the High Court held that the architect owed no duty of care to the buyer
- The buyer had **NOT** even satisfied the "factual foreseeability threshold":
  - It was not foreseeable to the architect that the buyer of the Hotel would take the Advice into consideration and suffer economic loss
  - It was also not foreseeable that the buyer would take into consideration the architect's advice to the seller given that the buyer would conduct its own due diligence when purchasing a 5-star hotel
- The High Court observed the principles of "*caveat emptor [buyer beware] and corporate governance*" required the buyer to "*conduct proper and comprehensive due diligence before the endorsement of the SPA*"

Daisho Development Singapore Pte Ltd v Architects 61 Pte Ltd [2020] SGHC 16

Break in the Chain of Causation

- Even if the architects had provided wrong advice to the seller which was relied on by the buyer, there was no causation
- The buyer could have found out about the Use Restrictions if it had properly conducted its due diligence but failed to do so
- The due diligence process was rushed and took about 6-8 weeks because the buyer wanted to obtain certain tax savings

Daisho Development Singapore Pte Ltd v Architects 61 Pte Ltd [2020] SGHC 16

Importance of Conducting Due Diligence

- When the burden is on the buyer to conduct due diligence, it will be very difficult for the buyer to hold the seller liable for something the buyer should have been aware of
- In this case, there was no duty of care, neither was there causation

Min Hawk Pte Ltd V SCB Building Construction Pte Ltd [2020] SGHC 13

Background

- Min Hawk was engaged by SCB in respect of a project owned by Big Box.
- Ongoing disputes between SCB and Big Box.
- SCB and Big Box reached an agreement to resolve their disputes. Big Box breached the agreement and SCB successfully took out a court application to enforce the agreement. SCB enforced this order and Big Box was placed in liquidation.
- Meanwhile, Min Hawk and SCB entered into a two-tranche payment agreement over the outstanding amount owed to Min Hawk. For the second tranche:
  - $286,641.56 was to be paid by 31 January 2018, "*which payment is subject to and/or conditional upon [SCB's]* ***full resolution of all outstanding issues*** *with [Big Box], in relation to the work done by [SCB] and to payment payable by Big Box to [SCB] in connection with the said work."* (Clause 1.2).
  - In the event there was no resolution by 31 December 2017, the parties shall review the terms and conditions of the Agreement and where necessary extend the payment timeline (Clause 2).

Min Hawk Pte Ltd V SCB Building Construction Pte Ltd [2020] SGHC 13

Background

- On 19 December 2017, SCB's representative updated Min Hawk via email on the status of the legal action against Big Box, which was adjourned to 19 February 2018.
- SCB proposed extending the second tranche payment date to 30 June 2018.
- Min Hawk rejected SCB's proposal and commenced legal proceedings for the second tranche payment.

Min Hawk Pte Ltd V SCB Building Construction Pte Ltd [2020] SGHC 13

“full resolution of all outstanding issues”

- Min Hawk argued that the payment payable by Big Box to SCB was resolved.
- The High Court held that “*full resolution*” and “*all outstanding issues*” presupposes that the determination of the amount payable must be final.
- This requires the liquidator of Big Box to ascertain the final accounts, pay off the secured creditors and notify SCB of the final amount (if any) that it would be receiving.

Obligation to review

- Min Hawk breached this obligation under Clause 2.
- This duty requires both parties to review the terms and minimally requires Min Hawk to respond to SCB’s email.
- Min Hawk demonstrated bad faith through a plain rejection of SCB’s proposal.

Min Hawk Pte Ltd V SCB Building Construction Pte Ltd [2020] SGHC 13

Implied obligation to perform within a reasonable time

- There was no “full resolution of all outstanding issues” and the parties did not agree on an extension. Hence, the issue of when the second tranche was due was considered.
- Where a contract does not specify the time for performance, an obligation to perform within a reasonable time is implied.
- Min Hawk issued a letter of demand on 21 May 2018.
- Therefore, the High Court found that a reasonable due date was 28 May 2018, which was the due date for payment stipulated in the letter of demand. This letter of demand was the first time Min Hawk had communicated a reasonable alternative payment date following its earlier rejection of SCB’s proposal.
- SCB was therefore found liable to make payment to Min Hawk for the sum of $286,641.56, with interest of 5.33% per annum accruing as of 28 May 2018.

Ramo Industries Pte Ltd v DLE Solutions Pte Ltd [2020] SGHC 4

Background

- The parties entered into a contract for the supply, fabrication, painting and delivery of structural steel (the "**Steel Contract**").
- **In addition to issuing a purchase order and a letter of credit in respect of the steel supply**, the parties also signed a letter of award (the "**LOA**").
- The parties had not agreed on the price at the time of signing of the LOA – this was an essential term of the contract.
- A dispute arose over whether the LOA formed part of the Steel Contract.
- By extension, an issue arose as to whether the parties were bound by the terms in the LOA.

Ramo Industries Pte Ltd v DLE Solutions Pte Ltd [2020] SGHC 4

The High Court's Decision

- The High Court held that an oral price agreement for the works set out in the LOA was sufficient for the formation of the Steel Contract.
- The LOA was to be viewed as an incomplete agreement, with the terms of the scope of works having been agreed upon, subject to the finalisation of the price.

Ramo Industries Pte Ltd v DLE Solutions Pte Ltd [2020] SGHC 4

Reasons for the High Court's Decision

- The Court undertook a factual analysis and accepted the Plaintiff's testimony.
- Importantly, the Defendant's managing director alleged that he had been informed that the LOA was a mere formality by the Plaintiff's director.
- In rejecting this assertion, the Court took note of the express wording of the LOA.
- The preamble of the LOA stated:
  - "***This letter shall constitute a binding agreement*** *between [the Plaintiff] & [the Defendant] based on the following terms and conditions…*"

    [Emphasis added]

Ramo Industries Pte Ltd v DLE Solutions Pte Ltd [2020] SGHC 4

Reasons for the High Court's Decision

- The Court also took note of other contractual documents.
- The relative length of the LOA in comparison with the brevity of the purchase order and letter of credit reinforced the holding that the LOA was meant to form part of the Steel Contract, and that the terms contained in the LOA were binding on the parties.
- Accordingly, the Court held that the Defendant was bound by the LOA.
- Pursuant to the terms of the LOA, the Plaintiff was entitled to liquidated damages.

Ramo Industries Pte Ltd v DLE Solutions Pte Ltd [2020] SGHC 4

Importance of Ensuring Pre-Contractual Negotiations are not Binding

- This case demonstrates the importance of ensuring pre-contractual negotiations are just that
- It may be useful to bring lawyers/in-house counsel on board prior to commencing contractual negotiations with the counterparty
- It should also be highlighted in the exchange of correspondence that the terms are “subject to contract”

SMC’s Supplementary Rules for Electronic Adjudication Lodgement

SMC’s Supplementary Rules for Electronic Adjudication Lodgement

- Applies to documents lodged on or after 15 April 2020
- Normally, documents must be lodged by hand at SMC’s counters.
- Permits the electronic lodgement of documents by email, including adjudication applications and adjudication responses.
  - Documents submitted shall not exceed 10MB per email
  - Submissions to be made during SMC’s opening hours (i.e. before 4.30pm on weekdays)
- Where one party lodges the documents electronically, the service shall be made by SMC on the other party by email.

SMC's Supplementary Rules for Electronic Adjudication Lodgement

- The Supplementary Rules shall apply only if both the parties have an "email address" as defined in s 37(2A) of the SOPA.
- "Email address" means:
  - the last email address given by the addressee to the other party for the service of documents; or
  - the last email address of the addressee known to the other party.
- Ideally, both parties provided email addresses for the service of documents
- If not, and a representative or employee uses his individual email address to correspond, this may not constitute an "email address"
- Commentary draws a distinction between the entity or company's email and an employee's individual email address

SMC’s Supplementary Rules for Electronic Adjudication Lodgement

- Payment of fees to be made by telegraphic transfer to SMC

- Permits an adjudicator to hold adjudication conferences electronically. The adjudicator shall:
  - Obtain the parties’ agreement on the platform to be used
  - Make his own arrangements for the use of the agreed electronic means of communication
  - Liaise with the parties on the collection of fees that may be incurred

- Permits an adjudicator to provide the determination electronically

Questions?

Look for the “Questions” Chat Box in the control panel on the right, and type in your questions.

For further queries, please drop us an email

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