# Daimler South East Asia Pte Ltd *v* Front Row Investment Holdings (Singapore) Pte Ltd [2012] SGHC 157

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| **Case Number** | : Originating Summons No 312 of 2012 (Summons No 1927 of 2012) |
| **Decision Date** | : 31 July 2012 |
| **Tribunal/Court** | : High Court |
| **Coram** | : Woo Bih Li J |
| **Counsel Name(s)** | : Jimmy Yim SC and Mahesh Rai (Drew & Napier LLC) for the plaintiff; Chong Yee Leong, Michelle Chiam and Ng Si Ming (Rajah & Tann LLP) for the defendant. |
| **Parties** | : Daimler South East Asia Pte Ltd — Front Row Investment Holdings (Singapore) Pte Ltd |

*Arbitration – Award – Recourse against award*

31 July 2012

**Woo Bih Li J:**

**Introduction**

1 The issue between the parties was whether they had agreed to exclude the right of appeal to the High Court under s 49(1) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the AA") when they agreed to submit any dispute under a joint venture agreement to arbitration to be conducted under the Rules of Arbitration of the International Chamber of Commerce ("the ICC"). It was common ground that under s 49(2) of the AA, the parties could exclude the right of appeal under s 49(1) of the AA and that the reference to the ICC rules was to the ICC Rules of Arbitration in force as from 1 January 1998. I will refer to such rules as "the ICC Rules 1998" for convenience.

2 After hearing arguments, I made a declaration that the parties had excluded the right of appeal. As I was informed that this was the first time that the High Court had decided the point, I set out my reasons below.

**Background**

3 On 15 September 2005, the parties had entered into a joint venture agreement in which they agreed "to work together in order to carry on the business of AMG Experience/lifestyle in the territory of South East Asia". I will refer to the plaintiff as "DSEA" and the defendant as "FR" and to their joint venture agreement as "JVA".

4 The JVA provided, *inter alia*, that:

> ...
>
> This Agreement shall be governed by the laws of Singapore.
>
> All disputes arising out of or in connection with the present agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one arbitrator in accordance with the said Rules. Place of arbitration will be Singapore.

5 Disputes arose between the parties. DSEA brought a claim against FR for the payment of the salary of an employee. FR counterclaimed for contractual breach and misrepresentation.

6 DSEA's claim and FR's counterclaim were dismissed by an arbitrator in an award dated 3 July 2009 ("the 1st Award").

7 FR then applied in Originating Summons 1126 of 2009 to the High Court to set aside the findings in the 1st Award in respect of its counterclaim and for the part set aside to be tried afresh before a newly appointed arbitrator. On 20 November 2009, Justice Andrew Ang set aside the parts of the 1st Award dealing with FR's counterclaim and costs of the arbitration as a whole and directed that the parts so set aside be tried afresh by a newly appointed arbitrator.

8 Pursuant to Justice Ang's decision, FR commenced fresh arbitration proceedings against DSEA on 20 September 2010 to recover damages for contractual breach and misrepresentation ("the 2nd Arbitration"). For the present purposes, the material provisions of the terms of reference for the 2nd Arbitration were paras 44(a) to 44(d) which stated:

> [44]a) Whether the previous arbitration award established the findings of breach of the Agreement alleged by [FR].
>
> [44]b) If so, whether the alleged findings of breach in the award remains final and binding in spite of the High Court order and whether [DSEA] is estopped from making any assertion contrary to the alleged findings due to res judicata or issue estoppel.
>
> [44]c) Whether the High Court order rendered nugatory all findings in the award concerning the counterclaim based on misrepresentation and whether [FR] has to prove all aspects of both liability and damages in this second arbitration with respect to its misrepresentation claim.
>
> [44]d) Whether [FR] is precluded from pleading its claim for breach of contract in this second arbitration by reason of the previous arbitration award and the subsequent setting aside proceedings as alleged by [DSEA].

9 The new arbitrator issued a partial award dated 29 February 2012 ("the Partial Award") which stated, *inter alia*, that FR was not precluded from pleading its claim for breach of contract in the 2nd Arbitration.

10 DSEA then filed the present Originating Summons ("the OS") to seek leave of the High Court to appeal against the Partial Award on a question of law, which DSEA framed as follows:

a. Is [FR] precluded from pleading breach of contract in the 2nd arbitration proceedings?

    i. Whether it is correct for the Arbitrator to answer in the negative by drawing a distinction in law between a withdrawal of a claim before an Arbitral Tribunal as being a procedural matter and a waiver of the same claim as a substantive matter such that the claim can be revived in the former situation but not in the latter; and/or

    ii. Whether a party before an Arbitral Tribunal, by not proceeding with a claim at the opening submissions stage, closing submissions stage and subsequent setting-aside stage, would preclude that party from resurrecting that same claim in later arbitration

proceedings, when the former arbitration proceedings were set aside.

11 In turn, FR filed Summons 1927 of 2012 to set aside the OS on the ground that the parties had agreed to exclude their right of appeal to the High Court under s 49(1) of the AA when they had agreed to submit any dispute under the JVA to arbitration under the ICC Rules 1998.

12 Both Summons 1927 of 2012 and the OS were fixed for hearing on 27 June 2012 before me. Parties proceeded on the basis that if I was able to and did decide FR's summons in its favour, then there was no need to hear the OS itself.

**The court's reasons**

13 As intimated above at [2], I decided in favour of FR. Consequently, I struck out the OS with costs.

14 As mentioned above, the relevant provisions were ss 49(1) and 49(2) of the AA, which stated:

> 49.—(1) A party to arbitration proceedings may (upon notice to the other parties and to the arbitral tribunal) appeal to the Court on a question of law arising out of an award made in the proceedings.
>
> (2) Notwithstanding subsection (1), the parties may agree to exclude the jurisdiction of the Court under this section and an agreement to dispense with reasons for the arbitral tribunal's award shall be treated as an agreement to exclude the jurisdiction of the Court under this section.

15 It was undisputed that the parties could exclude the right of appeal by adopting rules of arbitration. For example, *Halbury's Laws of Singapore* vol 1(2) (LexisNexis, 2011 Reissue) states at para 20.126, that the "adoption of the institutional rules which excludes an appeal to court without specific reservation has the effect of an exclusion agreement". It then refers to footnote 4, which states:

> 4 Rules excluding appeal need not make specific reference to the provisions of the Arbitration Act. Terms like 'parties have waived their rights to any form of appeal in so far as such waiver can be validly made' (ICC Rules art 24), 'Any appeal to a court of law is expressly excluded' (Singapore Bunker Claims Procedure r 7.3) will suffice.

The reference in footnote 4 to "ICC Rules Art 24" is to the predecessor of the ICC Rules 1998.

16 The relevant provision in the ICC Rules 1998 is Art 28(6), which states:

> Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of *recourse* insofar as such waiver can validly be made.
>
> [emphasis added]

17 The predecessor of Art 28(6) was Art 24 which states:

> 1. The arbitral award shall be final.
>
> 2. By submitting the dispute to arbitration by the International Chamber of Commerce, the

parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any forms of *appeal* insofar as such waiver can validly be made.

[emphasis added]

18 It is stated in Yves Derains and Eric A Schwartz, *A Guide to the ICC Rules of Arbitration* (Kluwer Law International, 2005 2nd Ed) ("the Guide") at p 320 that:

> Prior to 1998, the Rules provided in this regard for the waiver by the parties of their right to any form of "appeal". However, in 1998, the word "recourse" was substituted for "appeal" in order to cover all of the various forms of judicial action that may be initiated in different jurisdictions against an Award, whether for appeal, remission, setting aside or annulment. The extent to which this deemed waiver is recognized and given effect in different jurisdictions is, however, a matter to be determined in accordance with the applicable law. Thus, while Article 28(6) should generally have the effect of preventing appeals against the Arbitral Tribunal's findings of fact or law in jurisdictions where such appeals may still be permitted, there are many jurisdictions that will not give effect to a waiver of all recourse, *e.g.*, in respect of possible violations of due process, international public policy or the competence of the Arbitral Tribunal or that might not otherwise recognize the efficacy of a waiver incorporated by reference from the ICC Rules. Thus, for example, while Article 192 of the Swiss Private International Law Act permits non-resident parties to an arbitration in Switzerland to exclude various grounds of recourse against an Award rendered there, this provision has been construed as requiring a specific exclusion agreement to this effect, which the relevant provision in the ICC Rules is not considered to satisfy. In contrast, however, in an important recent ruling of the French Court of Cassation, it was decided that, by virtue of Article 28(6) of the ICC Rules, a State that has agreed to ICC arbitration is deemed to have waived its immunity from execution in France.

19 It was quite clear, from the previous Art 24, the present Art 28(6) and the Guide, that the purpose of the present Art 28(6) was to widen the scope of the previous Art 24. It was also quite clear that, by adopting the ICC Rules 1998, the parties had agreed to exclude the right of appeal under s 49(1) of the AA.

20 DSEA did not attempt to rely on the case cited by the Guide in respect of the Swiss Private International Law Act to persuade me otherwise. Instead, it referred to, *inter alia*, two cases.

21 First, DSEA referred to *American Diagnostica Inc v Gradipore Ltd* [1998] 44 NSWLR 312 ("*Diagnostica*") for the proposition that it was insufficient to exclude a right of appeal by saying that an arbitration award should be final, conclusive and binding.

22 Second, DSEA also referred to *Holland Leedon Pte Ltd v Metalform Asia Pte Ltd* [2011] 1 SLR 517 ("*Holland Leedon*") to show how the High Court had granted leave to appeal even though the contractual provision there appeared to exclude the right of appeal under s 49(1) of the AA.

23 I did not think that *Diagnostica* assisted DSEA. Article 28(6) stated more than that an award would be binding and final and conclusive.

24 As for *Holland Leedon*, the provision there was different. The High Court there found that it was meant to apply to a different provision, *ie*, s 45 of the AA rather than s 49 AA. Justice Philip Pillai said at [6]:

> 6 I turn now to cl 21.7. The Purchaser submitted that cl 21.7 tracks s 45 of the Act, which

provides in material part as follows:

> Determination of preliminary point of law
>
> 45.-(1) Unless otherwise agreed by the parties, the Court may, on the application of a party to the arbitration proceedings who has given notice to the other parties, determine any question of law arising *in the course of the proceedings* which the Court is satisfied substantially affects the rights of one or more of the parties.
>
> [emphasis in original]

This is a linguistic argument, and ordinarily the court will not engage in fine linguistic distinctions when construing commercial contracts - a relevant example being the construction of the scope of arbitration agreements. In this case, however, the Act draws a distinction between a party's right to apply to court to "determine any question of law arising *in the course of* the proceedings", contained in s 45(1), and a party's right to appeal to court "on a question of law arising *out of an award* made in the proceedings", contained in s 49(1). The precise language adopted by the parties is therefore important. On the facts, cl 21.7 only relates to "questions of law arising *in the course of* any arbitration" [emphasis in original]. This, in my view, is referable only to s 45(1) and is insufficient to exclude the right of appeal in s 49(1).

25 On the other hand, FR relied on a number of English authorities on the basis that ss 49(1) and 49(2) of the AA were modelled on s 69(1) of the English Arbitration Act 1996. Indeed, in the Parliamentary Reports of 5 October 2001, the Minister of State for Law, Assoc Prof Ho Peng Kee said at the second reading of the Arbitration Bill:

> Sir, This Bill is largely based on the UNCITRAL Model Law, which already forms the basis of Singapore's International Arbitration Act. The Bill also incorporates useful provisions from the 1996 UK Arbitration Act.

26 It is stated in Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* by (Informa London, 2009) at p 166 that:

> NOTES
>
> IAA and the Model Law do not permit an appeal against the merits of the award. By contrast, AA does permit such appeals for non-international arbitrations, but subject to the very restrictive conditions in s. 49. The section is closely modelled on AA 1996 (Eng), s. 69. ...

27 A few of the various English decisions which FR relied on dealt with the previous Art 24. Nevertheless, in *Lesotho Highlands Development Authority v Impregilo SpA and others* [2006] 1 AC 221, Lord Steyn stated at p 224-225 that, "The parties are free to exclude this right of appeal by agreement. They did so by ICC Rules, article 28.6 in the case before the House". Therefore, Lord Steyn proceeded on the basis that Art 28.6 (of the ICC Rules 1998) did exclude the right of appeal there. The actual dispute in that case was on another point.

28 DSEA did not dispute that ss 49(1) and 49(2) of the AA were modelled on s 69(1) of the English Arbitration Act 1996. Instead, it submitted that the regime for an appeal in arbitration under the English statute was different from the AA because, in England, the avenue for appeal is available to both international and domestic arbitration, whereas in Singapore, it is only available to the latter, which is governed by the AA. The submission was that because the avenue for appeal was also

available to international arbitration and because the regime for such an arbitration generally eschewed intervention by the courts, the English courts were more likely to conclude that there was an agreement to exclude the avenue for appeal to the courts there than if the avenue was restricted to domestic arbitration.

29 I did not find such a submission to be persuasive. In England, the principle was a general one for domestic and international arbitration. An interpretation that Art 28(6) was an agreement to exclude the right to appeal would apply equally to all arbitration agreements which adopted such rules.

30 Furthermore, the background leading to the drafting of the terms of Art 28(6), as mentioned in the Guide, made it clear that adopting Art 28(6) meant an agreement to exclude the right of appeal. It was not a question of distinguishing between international and domestic arbitration.

31 DSEA also submitted that FR's interpretation would mean that everyone who adopted the ICC Rules 1998 would be found to have agreed to exclude the right of appeal under s 49(1) of the AA even if he had not addressed his mind to the specific issue.

32 In my view, that was not a legal argument. It is trite law that parties are bound by the terms of their contract, regardless of whether they had addressed their minds specifically to each and every term. Otherwise, there would be confusion rather than certainty.

33 Besides, DSEA's argument cut both ways. If I were to conclude that the adoption of the ICC Rules 1998 did not constitute an agreement to exclude the right of appeal, then that would equally bind all parties even if they had not addressed their minds to the specific issue.

34 I would add that FR had said, in one of its supporting affidavits, that it believed that DSEA had consulted "lawyers and/or its in-house legal team before entering into the [JVA]" which was not disputed.

35 In the circumstances, I made the declaration stated at [2] above.