Rockeby biomed Ltd *v* Alpha Advisory Pte Ltd
[2011] SGHC 155

Case Number : Originating Summons No 1206 of 2010

Decision Date : 22 June 2011

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Aqbal Singh and Josephine Chong (Pinnacle Law LLC) for the plaintiff; Ranjit Singh (Francis Khoo & Lim) for the defendant

Parties : Rockeby biomed Ltd — Alpha Advisory Pte Ltd

Arbitration

22 June 2011 Judgment reserved.

Judith Prakash J:

Introduction

1 This is an application to set aside an arbitration award on the ground that the award is in conflict with the public policy of Singapore as expressed and embodied in the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA") and the subsidiary legislation thereunder, namely the Securities and Futures (Licensing and Conduct of Business) Regulations 2002 (Cap 289, 2004 Rev Ed) ("the Regulations") and is thus in breach of Art 34(2)(b)(ii) of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration ("the Model Law") which has been made a part of Singapore law by the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act").

2 The originating summons contained a second ground but at the hearing that was not proceeded with.

Background

3 The plaintiff ("the Client"), the respondent in the arbitration, is a company incorporated in Australia. The defendant ("the Advisor"), the claimant in the arbitration, is a Singapore company that carries on the business of giving corporate finance advice including in relation to mergers, acquisitions and restructuring.

4 On 31 July 2007, the Client and the Advisor entered into a Consultancy Service Engagement Agreement ("the Agreement"). At that time, the Client was listed on the Australian Exchange ("ASX") and the purpose of the Agreement was, as stated by Mr Nigel Jones ("Mr Jones"), the Advisor's managing director, to secure a Singapore listing for the Client through either a reverse take-over in Singapore ("Singapore RTO") or an initial public offering ("IPO") on the Singapore Stock Exchange ("SGX") and thereafter to generate additional shareholder value by the possible sale of the listed ASX shell company through a reverse takeover in Australia ("Australia RTO"). The Advisor's role was to advise the Client on and manage its corporate exercise in Singapore.

5 Clause 3 of the Agreement provided that the Client would pay the Advisor the sum of $10,000

per month for the services of the Advisor. The Advisor duly provided its services from August 2007 to April 2008 and rendered the Client monthly invoices for the same. The Client paid the invoices for the months of August and September 2007 in full and paid half of the invoice for the month of October 2007. The total paid was $25,000 leaving an amount of $65,000 outstanding as at May 2008. The Agreement was terminated at the end of April 2008 by the Client.

6 Clause 12 of the Agreement provides as follows:

> **Applicable law and dispute resolution** . The governing law of this Agreement shall be the substantive law of Singapore. Any claim or controversy arising out of this Agreement including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force which rules are deemed to be incorporated by reference to this Clause. The Tribunal shall consist of one (1) arbitrator to be appointed by the Chairman of SIAC. The language of the arbitration shall be English.

7 The Advisor submitted a Notice of Arbitration on 3 July 2009 to recover the amounts due to it. On 10 September 2009, the Chairman of the SIAC confirmed the appointment of Mr Nicholas Stone ("the Arbitrator") as the sole arbitrator for the proceedings.

8 The hearing of the arbitration proceedings took place in Singapore in April 2010 and submissions were completed in June 2010. By the award dated 31 August 2010 ("the Award"), the Arbitrator awarded and ordered that the Client was to pay the Advisor $73,368 in respect of unpaid invoices and interest thereon calculated up to 31 August 2010. He also ordered the Client to pay various sums as legal costs, disbursements and costs of the arbitration. All other reliefs claimed in the arbitration by either party were rejected.

Issues and decision in the Award

9 The Advisor's claim in the arbitration was straight forward. It claimed the balance amount of $65,000 in respect of the unpaid invoices and a further sum of $11,225 for interest. In its statement of defence, the Client rejected liability on four grounds but, at the hearing, it abandoned two grounds. Consequently, the Arbitrator had to consider only the following defences:

(a) the assertion that the Agreement was void for illegality; and

(b) the assertion that the Advisor lacked the legal capacity to enter into the Agreement.

The Client also mounted a counterclaim by which it sought restitution of the sum of $25,000 paid to the Advisor, and interest thereon.

10 The Client's defence was based on the provisions of the SFA. This statute regulates the conduct of business involving the provision of capital market services. Generally speaking, persons who provide capital market services in Singapore need to be licensed under Part IV of the SFA. There is, however, provision for exemption from the licensing requirements provided that certain criteria are met and the business is carried on in a certain way. It was the Advisor's position that it carried on business as an exempt financial advisor and therefore did not need a capital market services licence. The Client's contention was that by entering into and performing the Agreement, the Advisor was operating outside the exemptions to which it was subject with the result that the Agreement was void through illegality and/or lack of capacity of the Advisor to enter into it. The specific contentions that the Client made were that:

(a) the Client did not qualify as a "accredited investor" under cl 7 of the Second Schedule of the Regulations; and

(b) the advice given by the Advisor did not meet the criterion that it had to be "advice [that] is not specifically given for the making of any offer of securities to the public by the accredited investor to whom the advice was given".

11 The Arbitrator found against the Client on both counts. First, in relation to the "accredited investor" issue, the Arbitrator noted that under s 4A(1)(a)(ii) of the SFA, the term means a corporation with net assets exceeding $10m as determined by the most recent audited balance sheet of the corporation. He stated that it was not disputed that at the time the Agreement was entered into, namely 31 July 2007, the audited balance sheet contained in the Client's Financial Report as at 31 December 2006 was the most recent audited balance sheet of the Client available in the public domain. This showed the Client's net assets as being A$9,331,000 which at the time was in excess of $10m. The Client argued that the audited accounts for the period ending 30 June 2007 which showed a net asset balance of less than $10m were available at the time the Agreement was entered into. The Arbitrator found that no evidence had been produced by the Client to substantiate its assertion that these accounts were available but the Advisor had not asked for them. He found that the balance sheet of 31 December 2006 was the most recent audited balance sheet of the Client in accordance with the terms of s 4(a)(1)(ii)(A) and, whilst the 30 June 2007 accounts may have been in the course of preparation, that did not meet the statutory definition. Accordingly, the Client was an "accredited investor" when the Agreement was concluded.

12 On the second issue, the Client had argued that the primary purpose of the rendering of the services by the Advisor under the Agreement was the raising of funds by the Client by making an offer of securities to the public and therefore the Advisor could not provide the services under the exemption set out in cl 7(1)(b) of the Second Schedule of the Regulations. The Advisor's stand was that the corporate exercise contemplated in the Agreement and the advice that was given by the Advisor involved a range of options and therefore was not specifically given for the making of any offer of securities to the public.

13 The Arbitrator noted that the second paragraph of cl 2 of the Agreement limited the services to be provided by the Advisor and specifically envisaged that if in the future there was to be an IPO or a Singaporean or Australian RTO, other professional advisors would be appointed to deal with these matters. The Arbitrator also considered that the deal structures contemplated in the Agreement appeared to fall under the exemptions contained in cl 7(1)(c) rather than cl 7(1)(b) of the Second Schedule.

14 After reviewing the evidence, the Arbitrator found that the advice given by the Advisor to the Client was not specifically given for the making of any offer of securities to the public and therefore did not fall outside the exemption contained in cl 7(1)(b)(i) or that in cl 7(1)(c)(i). He also found the scope of services contemplated in the Agreement would fall within the exemption set out in cl 7(1)(c).

15 Clause 7(1)(d) of the Second Schedule of the Regulations provides that a person is exempted from the requirement to hold a capital market services licence if he carries on business in giving advice to another person concerning compliance with or in respect of any laws or regulatory requirements related to the raising of funds not involving any securities. Before the Arbitrator, the Advisor had claimed to be such a person. It said that the advice it gave to the Client related to compliance with local rules and regulations and that it also gave advice in respect of a take-over which would have involved the issuance of shares in the Client to a Chinese company's principal

shareholder. However, this advice on the issuance of securities was not given to the public. Further, the Advisor did not require a licence to provide services under cl 7(1)(d) as the Agreement clearly provided that if securities were to be offered, the Client would have to engage other professionals for that purpose. The Arbitrator agreed with the Advisor and found the advice given did not fall outside the exemption provided by cl 7(1)(d). If the Agreement had come to fruition and funds were to be raised either by reverse take-over or initial public offering, the Agreement expressly provided that other professionals would be engaged for the purpose of issuing securities to raise funds.

The application

The law

16 It is common ground that the arbitration proceedings at issue in this case were subject to the provisions of the Act. The Act and the Model Law do not permit appeals against arbitration awards. Instead, they provide certain limited grounds on which dissatisfied parties may apply to set aside an arbitration award. Under Art 34(2)(b) of the Model Law as implemented by the Act, an award may be set aside if the court finds that it is in conflict with the public policy of Singapore. In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, the Court of Appeal gave valuable guidance on the situations in which an award might be found to be in conflict with the public policy of Singapore. It said at [59]:

> Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would "shock the conscience" ... or is "clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public" ... or where it violates the forum's most basic notion of morality and justice ... This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law.

17 In the present case, the Client's contention is that the Award offends the public policy of Singapore because it upholds an illegal contract. The extent to which illegality can found a challenge to an award was considered by Chan Seng Onn J in *AJT v AJU* [2010] 4 SLR 649. He stated at [15] and [16]:

> 15 Thus, in order for [AJT] to succeed in setting aside the Award on the ground that upholding the Award would be in conflict with the public policy of Singapore, it has to establish, first, that the Tribunal decided erroneously on the issue of illegality of the Concluding Agreement. Next, it has to show that the error was of such a nature that enforcement of the Award would "shock the conscience," be "clearly injurious to the public good" or would contravene "fundamental notions and principles of justice".
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> 16 In determining whether the Tribunal decided correctly on the issue of illegality of the Concluding Agreement, the approach of the Court in exercising its supervisory jurisdiction has to be borne in mind. In Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation* Annotated. (London Informa, 2009) the authors stated the following at p 75:
>
> > The mere fact that an award contains an error of law is not enough. The cases recognise public policy issues in the following situations:
> >
> > ...

(c) [T]he award is tainted by illegality. If the arbitrators have jurisdiction under the arbitration clause to determine the legality of the underlying contract, and have concluded that the contract is valid under its applicable law, the award is generally enforceable ... Equally, if the arbitrators have ignored 'palpable and indisputable illegality' the award will not be enforced. By contrast, if illegality under the applicable law has not been raised before the arbitrators, the court may consider whether the underlying contract was illegal under its applicable law although the presumption is in favour of enforcement.

18 Chan J also considered that the court has the inherent jurisdiction to reconsider the issue of illegality although the arbitral tribunal may have determined that the contract in question was not illegal. At [24], Chan J held:

Thus, on the facts of this present case, while the Tribunal determined that the Concluding Agreement was not illegal, this was not conclusive. In an appropriate case, the court, in exercising its supervisory jurisdiction, may examine the facts of the case and decide the issue of illegality. While there is a need to uphold the public interest in ensuring the finality of arbitral awards, the court must also safeguard the countervailing public interest in ensuring that its processes are not abused by litigants.

19 From the above authorities, it appears that I must first determine whether the Arbitrator came to an erroneous conclusion on the issues relating to illegality under the SFA. If he did, I would have to determine whether the illegality was of such a nature that to enforce the Award would conflict with the public policy of Singapore. In deciding the issue of illegality, I have the power to examine the facts of the case afresh.

The statutory regime governing the Agreement

20 The relevant sections of the SFA provide as follows:

Need for capital markets services licence

82. — (1) Subject to subsection (2) and section 99, no person shall, whether as principal or agent, carry on business in any regulated activity or hold himself out as carrying on such business unless he is the holder of a capital markets services licence for that regulated activity.

(2) Subsection (1) shall not apply to any person specified in the Third Schedule.

(3) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $150,000 or to imprisonment for a term not exceeding 3 years or to both and, in the case of a continuing offence, to a further fine not exceeding $15,000 for every day or part thereof during which the offence continues after conviction.

...

Exemptions from requirement to hold capital markets services licence

99. —(1) The following persons shall be exempted in respect of the following regulated activities from the requirement to hold a capital markets services licence to carry on business in such regulated activities:

...

(h) such other person or class of persons in respect of any regulated activity as may be exempted by the Authority.

21 In s 2 of the SFA, "regulated activity" is defined as an activity specified in the Second Schedule to the SFA. Part I of the Second Schedule sets out the various types of regulated activities and includes among these "advising on corporate finance". This phrase is defined in Part II of the Second Schedule as meaning:

... giving advice —

(a) to any person (whether as principal or agent, or as trustee of a trust) concerning compliance with or in respect of laws or regulatory requirements (including the listing rules of a securities exchange) relating to the raising of funds by any entity, trustee of a trust on behalf of the trust or responsible person of a collective investment scheme on behalf of the collective investment scheme;

...

(c) concerning the arrangement, reconstruction or take-over of a corporation or any of its assets or liabilities ...

22 To find out who is exempted from holding the prescribed licence one must turn to the secondary legislation. The Second Schedule to the Regulations is entitled "Exemptions from Holding Capital Markets Services Licence or Representative Licence". The clauses in the Second Schedule to the Regulations create exemptions to the types of regulated activities set out in the SFA. The relevant clause in this portion of the Regulations is cl 7 and the relevant parts of that clause provide as follows:

Exemption from requirement to hold capital markets services licence to advise on corporate finance

7. (1) The following persons shall be exempted from the requirement to hold a capital markets services licence to carry on business in advising on corporate finance, subject to the conditions and restrictions specified:

(a) ...

(b) a person resident in Singapore who carries on business in giving advice on corporate finance to accredited investors, provided that –

(i) such advice is not specifically given for the making of any offer of securities to the public by the accredited investor to whom the advice was given; and

(ii) where the accredited investor is –

(A) a public company;

(B) listed on a securities exchange; or

(C) ...

such advice is not circulated to the shareholders (other than shareholders who are accredited investors) of (in the case of sub-paragraph (A) or (B)) the accredited investor or (in the case of sub-paragraph (C)) the listed corporation, or is otherwise made known to the public;

(c) a person who advises another person concerning any arrangement, reconstruction or take-over of any corporation or any of the corporation's assets or liabilities, provided that –

(i) such advice is not specifically given for the making of any offer of securities to the public by the second-mentioned person; and

(ii) where the second-mentioned person is –

(A) a public company;

(B) listed on a securities exchange; or

(C)....

such advice is not circulated to the shareholders (other than shareholders who are accredited investors) of (in the case of sub-paragraph (A) or (B)) the second-mentioned person or (in the case of sub-paragraph (C)) the listed corporation, or is otherwise made known to the public;

(d) a person who carries on business in giving advice to another person concerning compliance with or in respect of any laws or regulatory requirements relating to the raising of funds not involving any securities.

...

(5) a person who is exempted under sub-paragraph (1)*(b)* shall –

(a) take reasonable measures to verify that the persons to whom he carries on business in advising on corporate finance are accredited investors; and

(b) ensure that proper records are kept of any document evidencing the status of such persons.

23 The term "accredited investor" in respect of a corporation is defined in s 4A(1)(a)(ii) of the SFA as meaning:

a corporation with net assets exceeding $10 million in value (or its equivalent in a foreign currency) or such other amount as the Authority may prescribe, in place of the first amount, as determined by –

(A) the most recent audited balance-sheet of the corporation; or

(B) where the corporation is not required to prepare audited accounts regularly, a balance-sheet of the corporation certified by the corporation as giving a true and fair view of the state of affairs of the corporation as of the date of the balance sheet, which date shall be within the preceding 12 months ...

The submissions made on behalf of the Client

24 Mr Aqbal Singh, counsel for the Client, took me through the evidence in the arbitration proceedings in some detail in order to establish the illegality he complained of. Dealing first with the Agreement, he pointed out that it had several references to an IPO in Singapore. First, under cl I of the Introduction, the Client had stated that it wished to consider certain corporate exercises which might lead it to pursuing its own IPO on SGX. In cl II, it was provided that one of the ways in which

the Advisor's assignment would conclude would be with the accomplishment of a successful IPO on SGX. He noted also that the Agreement stated that the Advisor would not be required to provide legal, tax, independent financial advice ("IFA") or other specialist services and that it envisaged that the Advisor would assist the Client in appointing such additional professional advisors if necessary. The Agreement specifically stated that in the event of an IPO, a Singapore underwriter and Australian IFA would be required. However, counsel submitted, this exclusion left untouched the area of advising generally on the strategy and technique for an IPO. In addition to the $10,000 monthly fee, the Agreement also provided for different levels of success fee depending on what corporate exercise was eventually achieved. If a Singapore IPO was undertaken, the success fee payable for successful listing would be $100,000.

25 The Client's case was that from day one, the Advisor plunged into advising on an IPO in Singapore. The Advisor did not say that it could not give such advice. The Arbitrator had noted at para 36 of the Award that the Advisor's own account of the work it had done for the Client had the following in respect of the month of August 2007:

> In the first few weeks of the Agreement, the [Advisor] worked with the [Client's] CEO to review the [Client's] financial status and eligibility for an IPO in Singapore. The [Client] advised the [Advisor] that it was in discussions to acquire a business in China [this is what the parties referred to as the "Anheal deal"] and that a Singapore listing would be integral to securing the necessary funding to acquire the business. Further, the Chinese acquisition would provide the [Client] with the necessary profitability to meet the Singapore SGX listing criteria.

The Client's managing director, Mr Jones, had in his witness statement for the arbitration, stated that on 12 August 2007, there had been a discussion of the Client's corporate strategy and this included assessing the pros and cons of securing an SGX listing by way of a Singapore IPO or RTO. Mr Jones had also confirmed the various events that had taken place during the currency of the Agreement. The summary of this account provided to the Arbitrator, included preparing a memorandum in October 2007 giving an initial analysis of the China acquisition, and meeting, together with the Client's chief executive officer, with a number of Singapore broking firms to discuss the potential for listing the Client on the new SGX Catalist market that was due to be launched in 2008. Then, in November and December 2007, there were further enquiries with the Singapore IPO brokers about the listing rules for the new SGX Catalist market. In February 2008, the Advisor made a presentation to the Client's board of directors which included updating findings on the potential to move the listing to the SGX Catalist board.

26 Mr Aqbal Singh ("Mr Singh") submitted that the IPO in Singapore was very important and this is what the advice was required for. He pointed to the management discussion note dated 12 August 2007 which contained a whole section entitled "Moving the listing" which dealt with listing on SGX. Then, in a presentation which the Advisor gave to the Client's board on 17 August 2007, the Advisor discussed the benefits of the Anheal deal and also discussed the various options available to the Client including primary listing on SGX, secondary listing on SGX and dual listing on SGX and ASX. These options were discussed in some detail. Counsel submitted that Singapore IPO advice was constantly reiterated during this presentation and it was inseparable from all the other advice given.

27 There was considerable e-mail correspondence passing between the Client and the Advisor during the currency of the Agreement. Many of these e-mails referred to possible listing plans. In one dated 24 August 2007, sent out by one of the officers of the Client, two employees of the Advisor were introduced to a third party as having been engaged by the Client for "funding and listing plans in Singapore". In an e-mail from Mr Jones sent on 5 December 2007, he asked the Client whether the Advisor should review the Catalist market during its wait for some financial documents from Anheal. In

his response the same day, Dr Tan Sze Wee of the Client agreed to the review of the Catalist market and mentioned a firm that was willing to be the Client's sponsor for a Catalist listing. He also said "We're aiming for listing sometime in late second quarter or early third quarter next year, so ... we're not the first few to go out". In an e-mail to a third person on the preparation of pre-IPO reports, dated 16 January 2008, Dr Tan mentioned the possibility of the Client's IPO being pushed to "3rd quarter 2008 due to the volatility in the market and the clarity of the Catalist sector". In the same e-mail Dr Tan informed the recipient that he had copied Mr Jones in the e-mail since the latter was the Client's financial advisor and would get back to the recipient "with further details on [their] listing plans".

28 Counsel also drew my attention to a presentation which the Advisor had made to the Client sometime in February 2008. Part of the presentation was entitled "Related issues – the listing domain" and dealt with a possible listing on Catalist.

29 Mr Singh emphasised that the evidence of the Advisor itself was crucially important as showing the work that it had done. In this regard, matters were encapsulated in paras 30 and 31 of Mr Jones' witness statement which read as follows:

> 30. The Agreement very clearly states that '[the Client] wishes to consider and review certain corporate exercises which may include either the sale of its business through a Reverse Take-Over in Singapore ("Singapore RTO") or pursue its own public offer ("IPO") on the Singapore Stock Exchange ("SGX").
>
> 31. The purport and intention of the [Client] as set out above were very clear in that the [Client] had engaged the [Advisor] to advise the [Client] on the possibility of either a sale of the [Client's] business through a RTO or an IPO in Singapore. The various presentations, e-mails and notes to the [Client] are all in relation to this aim. From the first meetings with the Singapore stockbroking firms it was clear that the [Client's] business was too small for a Singapore listing. Accordingly, the [Advisor] was instructed by the [Client's] CEO (and later confirmed during the Board Meeting in August, 2007) to expedite the Anheal acquisition to give the [Client] the necessary critical size for the SGX listing.

30 Mr Singh submitted that the evidence clearly showed that the advice given by the Advisor to the Client was specifically given for the purpose of a listing in Singapore and therefore was outside the scope of the exemption given to the Advisor. According to the dictionary definition, the word "specific" means "express" or "precise". It does not mean "only limited to". In Mr Singh's submission, the Arbitrator had wrongly interpreted the word "specific" as meaning "exclusive" and that wrong interpretation had led to his erroneous conclusion that the Agreement was not illegal under Singapore law.

Analysis

31 It was common ground both in the arbitration and before me that the Advisor's business was to give advice on corporate finance and that therefore unless it was exempted under s 99 of the SFA, it required a capital markets services licence to carry on such activity. The Advisor's position was that it was so exempt because it and the advice it gave fell within cl 7(1)(b), or cl 7(1)(c) or cl 7(1)(d). The question before me was whether the Arbitrator had wrongly interpreted cll 7(1)(b) and (1)(c) in relation to the activities of the Advisor.

32 The difference between cll 7(1)(b) and (1)(c) is that the first relates to a person who gives advice on corporate finance to accredited investors whilst the second relates to a person who

advises another person concerning any arrangement, reconstruction or takeover of any corporation or any of the corporation's assets or liabilities. There are other conditions to be met which are common to both categories but for present purposes, the important one is that the advice given under sub-cl (b) and sub-cl (c) must in both cases not be "specifically given for the making of any offer of securities to the public". As can be seen from my summary of the Client's submissions, the Client did not challenge the Arbitrator's finding in the Award that it had been an accredited investor at the time the Agreement was entered into or the basis of the Arbitrator's further holding that the loss of that status subsequently did not invalidate the Agreement. Therefore, I do not have to deal with that issue. What I have to deal with is whether the advice was "specifically given for the making of any offer of securities to the public". This is an issue of statutory interpretation.

33 In this connection, it is worth noting some of what was said in Parliament on 5 October 2001 when the Securities and Futures Bill ("SF Bill") came up for its second reading. The Deputy Prime Minister (BG Lee Hsien Loong) who was presenting the Bill stated, *inter alia*:

> ...
>
> Part IV of the SF Bill will require an intermediary to hold only a single licence, known as a Capital Markets Services licence, to conduct one or more regulated activities. These regulated activities will include securities dealing, futures trading, leveraged foreign exchange trading, advising on corporate finance, fund management, securities financing and custodial services for securities.
>
> The single licensing regime will reduce both capital and compliance cost, and allow our intermediaries to be competitive across a broader spectrum of financial services.
>
> The SF Bill will provide for licensing exemptions so long as these do not compromise the standard of investor protection.

34 During the ensuing debate, Mr Sin Boon Ann expressed the hope that the conditions to be set up by the Monetary Authority of Singapore relating to the application process for a capital markets licence could be made easier for the boutique firms comprising ex-bankers and employees of financial institutions providing services in the area of corporate finance because such persons performed a useful function by providing advice and services to small and medium enterprises and to clients who might not have the wherewithal to engage the services of merchant bankers or other financial institutions. In response to that point, BG Lee Hsien Loong said:

> I would just like to address one point which Mr Sin raised, which is the issue of boutique firms or individuals who are small and who want to become market intermediaries. It is not our intention to make it difficult for ex-bankers and employees of financial institutions to start up on their own and enter corporate finance or other activities. So we will have a level playing field. And if they are able to do it and if they have the expertise, I think the framework will enable them to do so.

35 As can be seen from the foregoing extracts of the debate, one of the aims of the SFA was to protect the investing public whilst at the same time allowing for diversity of service providers in the capital markets services sector by ensuring that there were areas within which boutique firms could operate and reach clients who would find it expensive to engage the services of investment banks.

36 It is in the light of the foregoing intention that I think the phrase "specifically given for the making of any offer of securities to the public" must be interpreted. It is not enough to concentrate on the meaning of "specifically" without bearing in mind the "public" at whom the offer concerned is to be directed. In this case, the public means the investing public who would purchase securities in a

listed company. The dictionary definitions of "specific" given to me by both counsel show that generally it means "clearly defined or identified" or "precise". Counsel for the Client emphasised that "exclusively" is not one of the meanings of the word. That may be so but it appears to me that the way in which "specifically" is used in the phrase in question does imply a degree of exclusivity in that it implies that the advice must be precisely concerned with or directed to an offer of securities to the public which is imminent or ongoing. Thus, the advice must relate directly to an actual offer to the public. If the purpose of the advice is to put a particular company in such a position that it may qualify to subsequently make an offer of securities to the public, it appears to me that such advice would not be specifically given for the making of any offer of securities to the public even though that may be the ultimate purpose for which the advice is taken. The fact that after the advice is implemented, the company concerned may want, and may thereby be in a position, to initiate steps to make such an offer to the public is in my view not material for the purpose of the interpreting cl 7. The exemptions in cl 7 are aimed at insuring that when securities are to be sold to the investing public, for the protection of that public, the persons advising the issuer or seller of the securities are qualified to do so and are not persons who are only exempted from the licensing requirement pursuant to that clause. The Regulations, however, do not stop firms like the Advisor from giving advice to clients to put such clients into a position in which they can subsequently consider whether to implement an actual public offering and to hire suitably qualified professionals to advise them on the same.

37 As the legislation was enacted, boutique firms like the Advisor were exempted from holding a capital markets services licence as long as they ensured that the business that they did and the clients they serviced fell within the descriptions in cl 7. The Regulations envisage that among the services to be provided by such boutique firms would be the provision of corporate finance including advice on acquisition of corporations. Such advice must of course include the methodology of financing acquisitions. This could take various forms such as cash or the issue of securities or a combination of the two. In financing an acquisition, however, an offer to the public need not necessarily be involved. In this particular case, an offer to the public was not envisaged in relation to the acquisition of Anheal which was the immediate corporate acquisition on which the Advisor was working.

38 From an examination of the facts, it is clear that the Client had, as one of its ultimate purposes, a listing on a stock exchange in Singapore. Much of the advice given by the Advisor was directed at considering how the Client could be put into a position such that it would be able to go on to apply for a listing. The Advisor determined that the Client needed to acquire another corporation such as Anheal in order to qualify for a Singapore listing and therefore considered in some detail how this could be achieved. In that connection, advice was given for the issue of securities but the securities would not have been issued to the public at large but rather to the owner of Anheal.

39 Mr Jones in his evidence was quite categorical that the advice given was corporate finance advice on arrangement, reconstruction and takeover and that the Advisor had at all times carried on business within the bounds permitted by cl 7. He emphasised that to the extent that something needed "to touch the public" *ie* when advice had to be given for the making of an offer of securities to the public, a Singapore underwriter or Singapore broker had to be employed and that what the Advisor did did not touch the public.

40 If the phrase "specifically given for the making of any offer of securities to the public" is construed in the manner suggested by counsel for the Client, the result would be to greatly limit the scope of work which could be done without a licence pursuant to cl 7. As it is, cl 7 contains a number of restrictions which must be observed by the corporate advisor and I think it would be wrong to further restrict the scope of the advisor's activities by reading the phrase in the rather wide manner

that counsel has suggested. To so interpret it would increase the costs of small and medium sized firms who are in the initial stages of considering listing and prevent them from conducting the necessary investigatory work with the help of a corporate advisor like the Advisor.

41 Notwithstanding the events and advice emphasised by counsel for the Client, it is clear that nothing the Advisor did pertained immediately to the issue of securities in the Client which would be offered to the public. There was advice on what steps had to be taken if the Client wanted an IPO in Singapore but that advice related generally to the matters needed to have a successful IPO and did not directly relate to an immediate or actually impending offer of shares to the public. There was also advice on the issuance of securities but the proposed acquirer of those securities was Anheal's principal shareholder and that proposal could not, in the context of the Anheal acquisition, be considered a proposal of a public offering. Although the Agreement envisaged an IPO in Singapore as one of the ultimate purposes to be achieved, I am satisfied, as was the Arbitrator, that in implementing the Agreement, the advice given by the Advisor was not specifically given for the making of any offer of securities to the public.

42 Further, the Agreement, as the Arbitrator pointed out too, envisaged that if the work that the Advisor did under it resulted in the need or desire to raise funds from the public, other duly qualified professionals would be engaged to run the public offering. I do not accept, as counsel suggested, that this provision was simply for show. In my judgment, it indicates not only that the Advisor was aware of the limitations on its ability to advise but also that it wanted to make it plain to the Client that the Client could not look to it for advisory services relating to a public offering and would have to engage a person who was qualified under the SFA to handle such issue. I accept, as did the Arbitrator, that the Advisor acted within the bounds of the exemptions in cl 7 and that it was not wrong to understand the prohibition against giving advice specifically on an offering of securities to the public as allowing it to give the kind of advice that it did. I also agree with the Arbitrator's holding that the services provided by the Advisor fell more within the remit of cl 7(1)(c) than of cl 7(1)(b).

Conclusion

43 For the reasons that I have given, there was no illegality involved in the Agreement or in the way that it was implemented. Accordingly, I do not have to consider the next issue which would have been whether the illegality found was against public policy and would justify the setting aside of the Award. This application must be therefore dismissed with costs.