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# Pathological clauses in arbitration agreements – a Singapore approach?

**By Boey Swee Siang**

The decision of the Singapore Court of Appeal in the case of *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] re-affirmed the approach of the Singapore courts to give effect to parties' intention to arbitrate where this was clearly evinced in an arbitration agreement, even if the agreement contained defects. This article deals only with the Court of Appeal's discussion of "pathological clauses".

In this particular matter, the parties had entered into a licence agreement governed by Singapore law which, according to the reported judgment, contained an arbitration clause (the Arbitration Agreement) stating:

> *"Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English…"*

At some point after entering the licence agreement, Alstom Technology Ltd (the respondent) commenced an ICC arbitration, which was later discontinued. The respondent then commenced an SIAC arbitration. Upon the SIAC's confirmation that it was agreeable to administer the arbitration in accordance with the ICC's Rules of Arbitration, the tribunal rendered a preliminary decision on jurisdiction, stating that the Arbitration Agreement was *"valid, enforceable and capable of being performed."*

Insigma Technology Co Ltd (the appellant) appealed to Singapore's High Court on the grounds that the Arbitration Agreement was unenforceable, raising various issues including an "alternative" argument that the Arbitration Agreement was a "pathological clause". However, the High Court did not deal substantively with this, taking the position only that it was a *"cursory and alternative submission"*. The appeal was dismissed.

The appellant then filed an appeal with the Court of Appeal, which was again dismissed. However, the Court of Appeal dealt at greater length with the appellant's submissions that the Arbitration Agreement was unenforceable as a "pathological clause". As stated in the judgment, the idea of a "pathological clause" derives from the civil law, and is one (quoting from the text of *Fouchard, Gaillard, Goldman on International Commercial Arbitration*) containing defects which may disrupt the smooth progress of the arbitration.

The Court of Appeal held that the concept of a "pathological clause" fulfils a descriptive function, rather than a prescriptive one. Labelling a clause "pathological" does not automatically invalidate it.

In any event, the Court of Appeal took the view that the Arbitration Agreement did not satisfy the qualifying conditions of a "pathological clause", and that it was rendered certain and workable by the SIAC applying the ICC Rules to the arbitration.

This begs the question of whether the concept is recognised at all under Singapore law. It appears from the judgment that the Court of Appeal impliedly accepts that, if the SIAC had not agreed to administer the arbitration in accordance with the ICC Rules, this could have rendered the Arbitration Agreement unworkable. Would it thereby then render the Arbitration Agreement a "pathological clause"? Certainly, any refusal by the SIAC to administer the arbitration according to the ICC Rules of Arbitration would disrupt the progress of the arbitration. In such an event, if an arbitration clause is "pathological" because the defect contained therein cannot be cured, does this not then contradict the approach that the term "pathological clause" is only descriptive, and not prescriptive?

If, on the other hand, the term is a mere descriptive one, does such a concept add anything at all to the Singapore jurisprudence, which takes the approach that an arbitration clause shall be construed to give effect to parties' intentions?

Perhaps some more light can be thrown on this issue by subsequent decisions of the Singapore courts, since the problem of defective arbitration clauses is not an uncommon one.

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