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In our November Issue, we take a look at the case of *Dathena Science Pte Ltd v JustCo (Singapore) Pte Ltd*, which is particularly relevant given that it involves two very contemporary developments (a) co-working spaces; and (b) the effect of Covid-19 related lockdown measures on contractual performance. We also consider the passing of the Apostille Act 2020, and what it means for the authentication of legal documents in the future.

I. Dathena Science Pte Ltd v JustCo (Singapore) Pte Ltd

Leon Ryan, Attorney-at-law

In the recent case of *Dathena Science Pte Ltd v JustCo (Singapore) Pte Ltd* [2021] SGHC 219, the High Court had the opportunity to consider what it called "one of the first cases, if not the very first case, that resulted from the measures that were taken by the Singapore government to control the spread of the Covid-19 pandemic". Indeed in addition to offering guidance on how Covid-19 related disputes will be considered, the judgment also tackled another recent development, namely co-working spaces and their operators.

Around the end of 2019, the plaintiff, Dathena Science, entered into discussions with the defendant, JustCo, regarding the leasing of some office space at OCBC Centre East (the "**OCBC Offices**"). As Dathena was a cybersecurity company, an important point of the lease was that the office could support Dathena's IT requirements and that Dathena could move into the premises to set up its servers prior to the start of the lease. JustCo confirmed that such requirements could be met.

Parties then entered into a Membership Agreement ("**MA**"), under which Dathena agreed to lease the OCBC Offices for 2 years, commencing on 1 May 2020. The terms of the MA were standard terms from

JustCo and hence very much in favor of JustCo. For example, Dathena had no specified right to terminate the MA. On the other hand, JustCo had a right to take a number of unilateral actions under the MA, including replacing the allocated office space.

Pursuant to the MA, Dathena then made initial payments for the lease. Unfortunately, the Covid-19 pandemic occurred. Under the Circuit Breaker Measures ("**CB Measures**") announced by the Singapore Government, all non-essential services effectively ceased and companies like Dathena had to implement work-from-home arrangements. The CB Measures were originally due to end in May 2020 but were later extended to June 2020.

As a result, JustCo informed Dathena that it could not ready the offices in time for Dathena to move in on 1 May 2020. Electrical systems necessary for Dathena's servers allegedly could not be installed due to the CB Measures. Dathena then asked for a revision of the commercial terms of the MA. As Dathena was required to vacate from its existing office by 5 May 2020, Dathena thus faced an immediate and urgent need to locate a venue to place its IT servers.

JustCo declined to change the terms of the MA. On 29 May 2020, Dathena wrote to JustCo stating that Dathena considered the MA to be terminated or frustrated ("**the Notice of Termination**"), due to Dathena being unable to move into the premises on 1 May 2020. JustCo rejected Dathena's position, and considered the MA to still be in effect. JustCo also made reference to its right under the MA to provide alternative office space to Dathena in lieu of the originally provided OCBC Offices. There were some further attempts by JustCo to offer alternative premises. However none of the alternatives met Dathena's requirements.

When the case came before the court, the court considered the following issues:

(a) Was Dathena was entitled or justified to issue its Notice of Termination?
(b) Do the terms of the MA offend the provisions of the Unfair Contract Terms Act (UCTA)?
(c) Was the right to terminate waived by Dathena when it considered JustCo's alternative premises?
(d) Was the MA frustrated by the CB Measures?

In relation to the first issue, the Court held that Dathena was entitled to issue the Notice of Termination. Notably, the court found that JustCo had a clear understanding of Dathena's specific IT Requirements. Further, even though the MA did not contain grounds for Dathena to terminate the MA, Dathena would in any event be able to do so under common law, and to the extent that the MA's entire agreement clause would exclude Dathena's right to terminate, such an exclusion clause would have to pass the requirements of the UCTA.

In relation to the second issue, the Court found a number of provisions under the MA to be unenforceable as they did not meet the requirements of reasonableness under the UCTA. The UCTA generally provides that exclusion clauses will not be enforceable unless they can pass the reasonableness test.

Reasonableness under the UCTA is in turn defined as a term which is a "*fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made*".

In fact the court had harsh words ("grossly unfair and disadvantageous") for the impugned provisions. Some of the clauses deemed unenforceable include:

(a) The unilateral right to replace the office space with another;
(b) The obligation on Dathena to pay in full the Membership Fee even if the Agreement is terminated;
(c) The indemnity provided by Dathena in favour of JustCo;
(d) An exclusion of liability clause that excluded liability on the part of JustCo for "*any interruption, disruption or cessation in… use of the [office premises]*".

In relation to the third issue, the court found that once the MA was validly terminated, it was entirely up to Dathena as to whether it wished to waive the termination and accept an alternative office space. The evidence showed that the termination was not waived.

In relation to the fourth issue, the court agreed that the MA had indeed been frustrated (i.e. there has been a frustrating event which now renders the contractual obligation radically fundamentally different from what was agreed, or the contract has become impossible to perform). The court took the view that it was clear from the conduct of the Parties at the time (in particular JustCo's attempts to get Dathena to agree to an alternative location) that the Parties including JustCo were aware that due to the CB Measures, the original contractual obligations were not impossible to perform. The alternative locations were found to be "fundamentally different contract[s]" since the alternative venues were of different sizes and were also shared with other tenants (i.e. Dathena's use was not exclusive). As the contract was found to have been frustrated, this also entitled Dathena to specific relief under the Frustrated Contracts Act (this is in addition to a successful termination of the contract). In particular Section 2(2) generally allows for all sums paid under the contract prior to the frustrating event to be refundable.

JustCo made a counterclaim against Dathena seeking payment of the Membership Fees that would have been payable for the entire duration of the lease. However, the counterclaim was dismissed for the following reasons. First, in the course of the court proceedings, JustCo itself was already forced to concede that the counterclaim should be reduced from the original amount of approximately $2.3 million to approximately $1.5 million. This was because JustCo had found an alternative tenant at some point, and hence no longer suffered the "full loss" of the entire duration of the lease. Second, even for the reduced amount of $1.5 million, the court held that JustCo had failed to fulfill the duty under common law to take reasonable steps to mitigate its losses.

While the decision may yet be appealed, the judgment does provide some interesting observations, namely:

(a) The court did not give detailed reasons for why the specific clauses are unenforceable due to the UCTA. That being said, it can be generally observed that extremely one-sided standard form clauses will be heavily scrutinized by the court. While not expressly stated in the judgment, it may be the case that in the context of an intervening event like Covid-19 (which by definition is not due to the fault of anyone particular party), attempts to allocate all liability onto just one of the parties will be a difficult position to take before the court.

(b) Based on the above, the unenforceable clauses identified in the judgment will have to be carefully considered by any company which frequently uses standard form contracts which contains such clauses. It is however important to bear in mind that the reasonableness test under the UCTA is fact specific. Merely having such clauses in a contract will not mean that they are unenforceable, and the reasonableness of a term must be assessed in light of the rest of the contract and the context of the contractual relationship.

II. Singapore and the Hague Apostille Convention

Sherman Ng, Attorney-at-law

1. Introduction

On 16 September 2021, the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents[1] (the "**Convention**") officially entered into force in Singapore through the Apostille Act 2020[2] (the "**Act**").

The Convention is an international treaty that facilitates the authentication of "public documents" originating in one contracting state (the "**Originating Country**"), for use in another contracting state (the "**Recipient Country**"), through a simplified one-step process. Singapore is the latest in a long line of countries to participate in the Convention, which includes the likes of the United States, the United Kingdom, Japan, Germany, India, China, Brazil, and Australia.[3]

2. What is a "Public Document"?

Before exploring the effect of the Convention, it is necessary to first understand what a "public document" is. The Convention specifies[4] that the following types of documents may be apostilled, and terms these documents "public documents":

(a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-

[1] https://assets.hcch.net/docs/b12ad529-5f75-411b-b523-8eebe86613c0.pdf

[2] https://sso.agc.gov.sg/Act/AA2020

[3] https://www.hcch.net/en/instruments/conventions/status-table/?cid=41

[4] Article 1 of the Convention.

server;

(b) administrative documents;

(c) notarial acts; and

(d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

In Singapore, examples of public documents may include, without limitation, court documents, company business profiles issued by the Accounting and Corporate Regulatory Authority (ACRA) of Singapore, National Registration Identity Cards (NRICs), marriage and death certificates, and notarial acts. Considering what constitutes a "public document" under the Convention (as set out above), documents executed by an individual in their personal capacity (for example, a private contract) cannot be apostilled, although potential workarounds exist in respect of such documents.[5]

The Convention also expressly states that documents executed by diplomatic or consular agents, and administrative documents dealing directly with commercial or customs operations, are excluded from the remit of the Convention.

3. Legalisation of Documents Generally

In many cross-border business and legal transactions, documents from one country are often required to be produced and used in another country (for example, in support of an application or filing to the local authorities or banks).

Before a document can be produced for use abroad, it must undergo a series of legalisation procedures. The completion of these procedures serves as proof that the document is authentic, and allows its recipient in the foreign country to rely on such proof of authenticity without having to personally verify the document with its issuing person / authority.

The aforesaid legalisation procedures typically involve a series of certifications, including the certification by foreign ministries of the Originating Country and of the Recipient Country (usually through their consulate or embassy).[6] This effectively means that the document must minimally be certified twice, before it can be used abroad. On top of the burden and expense associated with obtaining the signatures of multiple parties / authorities on a single document, this has the potential to cause significant delays in a cross-border transaction or matter.

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[5] See Section 5 below for more details.

[6] In Singapore however, the legalisation of documents to be used abroad is now performed by the Singapore Academy of Law instead of the Ministry of Foreign Affairs. See Section 4(1)(kb) of the Singapore Academy of Law Act (Chapter 294A) of Singapore (https://sso.agc.gov.sg/Act/SALA1988#pr4-)

4. Effect of the Convention

Insofar as public documents are concerned, the Convention effectively replaces the aforesaid legalisation procedures[7] with a one-step procedure where such documents are certified solely by a competent authority of the Originating Country[8], through their issuance of a certificate (or an "apostille") in respect of that document. On the other hand, the Recipient Country is obliged under the Convention to accept apostilles (in lieu of any legalisation procedures and notwithstanding any legalisation requirements in the Recipient Country) for public documents received from other contracting states to the Convention.

Generally, the Act does not require public documents to be apostilled before being used. If, prior to the Act, a foreign-issued public document did not require legalisation to be used in Singapore, it would not suddenly need to be apostilled before such use. With the coming into force of the Act, whether the traditional legalisation procedures or the new apostille procedure should be used would depend on the needs of the parties and the laws of the jurisdiction in which the public document is to be used.[9] For example, if certification is required in respect of matters and documents falling outside the remit of the Act, the traditional legalisation procedures should be employed.

In this regard, it should be noted that the effect of an apostille is limited in that it only certifies the origin and authenticity of a public document, and does not certify the truthfulness, correctness, or accuracy of the content of the said document, nor does it certify that it was executed in accordance with the domestic laws of the Originating Country. It certifies the authenticity of the signature on the document, the capacity in which the person signing the document acted and, where appropriate, the identity of the seal or stamp which the document bears.[10]

Furthermore, a contracting state to the Convention may, when giving effect to the Convention under its domestic laws, choose to limit the types of documents to which the Convention applies. Therefore, in determining whether a particular document may be apostilled and subsequently recognised in the Recipient Country, the domestic laws of both the Originating Country and the Recipient Country would have to be assessed (as opposed to merely the Convention itself) to ensure that the document in question is recognised as a public document under the domestic laws of both countries. If the document is recognised as a public document by (for example) the Recipient Country but not the Originating Country, authentication by apostille might not be possible as a competent authority in the Originating Country will not have the authority under the Convention to issue an apostille for such a document.

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[7] See Section 9 of the Act.

[8] In the case of Singapore, this is the Singapore Academy of Law with effect from 20 January 2021. See n.6 above.

[9] However, what is clear is that under the Act, legalisation can no longer be performed in Singapore for foreign-issued public documents (see Sections 8 and 9 of the Act).

[10] Article 5(2) of the Convention.

5. Exceptions and Workarounds to the Convention

Where a document is not a public document, or where it originates from and/or is to be used in a country that has not given effect to the Convention under its domestic laws, the authentication of that document will be subject to the cumbersome legalisation procedures mentioned at Section 3 above. Practically speaking, this would require the party(ies) (seeking to use the document abroad) to obtain advice on matters such as the relevant requirements, fees, and locations of the consulates and/or embassies involved in the legalisation process, as well as to make arrangements for the various certification appointments.

However, where a document is not covered by the Convention solely by reason of it not being a public document, authentication by apostille may still be possible, assuming the Originating Country and Recipient Country have both given effect to the Convention under their respective domestic laws. To illustrate, while a private contract executed by an individual in their personal capacity is not a public document within the meaning of the Convention, and therefore cannot be apostilled pursuant thereto, the domestic laws of the Originating Country and Recipient Country may both provide that an official may attest to the authenticity of a document by issuing and signing a certificate, and that such certificate is to be secured to the document for which it is issued.[11]

This official certificate would technically constitute a public document under Article 1(2)(d) of the Convention (and in any event it is noted that notarial acts in general also constitute public documents under Article 1(2)(c) of the Convention)[12], which may be apostilled. This greatly extends the application of the Convention indirectly to non-public documents as well, thereby facilitating their use abroad even though they do not technically constitute public documents within the meaning of the Convention (and the Act). However, it is the official certificate, and not the private contract itself, that will be be apostilled.

6. Conclusion

The ratification of the Convention is a welcome change to Singapore law that effectively eliminates the existing legalisation procedures required to authenticate and use public documents abroad in a contracting state, and replaces it with a simple and secure authentication procedure that is not only convenient, but also has the effect of promoting international judicial assistance.

Parties seeking to rely on the Convention in Singapore should however ensure that they refer to the Act (as opposed to only the Convention itself) in determining whether to proceed with authentication by apostille, as the Act may limit the application of the Convention, and sets out the requirements for the apostille regime in Singapore.

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[11] For example, see Rule 8 of the Notaries Public Act (Chapter 208) of Singapore (https://sso.agc.gov.sg/SL/NPA1959-R1?DocDate=19990101#pr8-).

[12] The relevant provisions under the Act are Sections 6(a)(i)(C) and (D) (for foreign public documents) and Sections 14(a)(i)(C) and (D) (for Singapore public documents).

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  Mariko Nagata, Attorney-at-law（mariko.nagata@amt-law.com）
  Leon Ryan, Attorney-at-law（leon.ryan@amt-law.com）
  David Ong, Advocate & Solicitor (david.ong@amt-law.com)
  Adalia Ong, Advocate & Solicitor (adalia.ong@amt-law.com)

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