

INTERNATIONAL COMMERCIAL ARBITRATION MOOT 2022

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MOOT PROBLEM

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PROCEDURAL ORDER NO. 1 40

**IN THE MATTER OF AN ARBITRATION UNDER THE INTERNATIONAL
ARBITRATION ACT (CAP 143A) AND THE RULES OF THE SINGAPORE
INTERNATIONAL ARBITRATION CENTRE (SIAC) 6TH EDITION, 2016**

ARB 777/21/SPD

Between

PAG SOFTWARE PTE LTD
(Singapore)

...Claimant

And

ASIAN SUPER LEAGUE SDN BHD
(Malaysia)

...Respondent

NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

Solicitors for the Claimant

BOLT & LIGHTNING LLP
1 Kachow Road
Walker Centre Tower 1 #09-00
Singapore 123456

Dated this 30th day of September 2021

NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

1. The Claimant, PAG Software Pte Ltd, requests that its dispute with the Respondent, Asian Super League Sdn Bhd, as set out below, be referred to arbitration under the Arbitration Rules of the Singapore International Arbitration Centre (6th edition, 1 August 2016) (“**SIAC Rules**”) pursuant to Rule 3 therein.

I. THE PARTIES

2. The Claimant is a software company incorporated and carrying on business in Singapore. It specialises in the production of video games and has produced games, such as Nomekop Go, which have made it to the International Rankings for the Top 50 Video Games in the world. Its Managing Director is Ms Andiea Seet (“**Ms Seet**”).
3. The Respondent is a company incorporated under the laws of Malaysia. It runs and manages motorsport races in Asia, including the famous “Victory1 Series” (“**V1**”) and “Victory2 Series” (“**V2**”) races. Its Managing Director is Mr Zachary Ye (“**Mr Ye**”).

II. THE ARBITRATION CLAUSE AND GOVERNING LAW

4. The present dispute arises out of a License Agreement (“**Agreement**”) concluded between the Claimant and the Respondent on 25 September 2018. Clause 12 of the Agreement provides that the Agreement is governed by Singapore law. Clause 13 of the Agreement provides for any dispute between the Parties to be resolved by reference to arbitration under the SIAC Rules. [**Claimant’s Exhibit 1**]

III. THE FACTS OF THE DISPUTE

5. The Claimant is a software company, which produces many popular video games. Most of the Claimant's video games are inspired from existing sources of entertainment. For instance, the Claimant's most popular game, Nomekop Go, was based off the famous manga by Yuzuru Ishiguro. The Claimant has been in the video game industry for 15 years and much of the Claimant's success can be attributed to its state-of-the-art graphics and creative adaption of existing media.
6. In 2018, the Claimant wished to diversify its products and made plans to base its upcoming video game on real-life events.
7. The V1 race is a franchise-based tournament – every season, 15 car manufacturers compete in a prestigious racing tournament featuring venues all around Asia. The venues include exotic locations such as the Inderapura race track in Pahang, Malaysia, the Korean International Circuit, and the Ningbo International Speedway. Esteemed car manufacturers, such as Dancing Dragons, Violent Vipers, and Astonishing Andres, participate in these races, alongside famous race drivers such as Louis Lamilton, Mad Max and Du bist Welmister Wettel. The V1 race has a huge appeal amongst many around the world, especially the youths.
8. Closely connected to the V1 race is the V2 race, which appeals to a smaller target audience – mainly car enthusiasts and amateur racers who are hopeful of securing a driving seat in the prestigious V1 Series Championship. A number of less well-known car manufacturers and sponsors participate in the V2 race – a series of races around 10 domestic circuits located in various parts of South East Asia. Interest in the tournament has been somewhat lukewarm compared to the V1 race.

9. As the V1 race was very well-known internationally, the Claimant had plans to create a video game based on the V1 race. In or around 17 July 2018, Ms Seet emailed the Respondent, which was the main organiser of the V1 race, to see if the Respondent was interested in a potential partnership with the Claimant. On 19 July 2018, Mr Ivan Chiang (“**Mr Chiang**”), a Director of the Respondent, replied to confirm that the Respondent was interested in this opportunity. A call was then set up for 26 July 2018, between Ms Seet, Mr Ye and Mr Chiang. [**Claimant’s Exhibit 2**]
10. During this call, Ms Seet explained that the Claimant hoped to reproduce the features of the famous race tracks in which the V1 races occur in its next video game. To make the video game more realistic, Ms Seet emphasised that it would be critical for the Claimant to acquire the rights to use the designs of the cars in the V1 race and also the names of the famous car manufacturers (“**V1 IP Rights**”). Mr Ye informed Ms Seet that the V1 IP Rights have been assigned to the Respondent and the Respondent could license them to the Claimant. However, Mr Ye stated that the Respondent will only license the V1 IP Rights to the Claimant if the Claimant could commit to featuring the V2 race in its video games as well.
11. After extensive negotiations, the parties decided to draft a license agreement for the Claimant to acquire a non-exclusive license to produce the video games which would depict the V1 and V2 races (*i.e.*, the Agreement). At the end of the call, both Mr Ye and Ms Seet agreed that the Claimant would pay a monthly licensing fee of S\$100,000 – specifically, S\$70,000 for the V1 IP Rights and S\$30,000 for the rights to use the designs of the cars in the V2 race and also the names of the car manufacturers in the V2 race (“**V2 IP Rights**”). No other material terms were discussed over the call. [**Claimant’s Exhibit 3**]

12. On 15 August 2018, the Respondent circulated a draft of the Agreement for the Claimant's review. On 21 August 2018, Ms Seet replied to suggest an addition of a warranty clause that the Respondent did have ownership over the V1 IP Rights and the V2 IP Rights. On 11 September 2018, Mr Chiang sent an email stating that Mr Ye was agreeable to the amendment. **[Claimant's Exhibit 3]**
13. On 25 September 2018, the Claimant and the Respondent executed the Agreement. The Claimant then began the production of two separate video games which were based off the V1 and V2 races. The launch of these 2 video games was estimated to take place in August 2020 ("**Victory Launch**").
14. In or around March 2019, a huge scandal started to develop around the V2 race. At the United Nations' 25th Climate Change Conference on 3 March 2019, delegates from Danubia produced a report that race cars in the V2 race have been utilising dirty fuel for their races. This had caused a substantial amount of carbon dioxide and other noxious substances to be released into the environment. Things then took a turn for the worse when an anonymous snapchat user, "sgduckrice#", revealed that the drivers and car manufacturers in the V2 race had taken kickbacks and compromised the results of the races. Both events surrounding the V2 race were heavily featured in the media. **[Claimant's Exhibit 4]**
15. The scandal over the V2 race greatly worried the Claimant as it may lead to reduced sales for the Claimant's video game based on the V2 race.
16. On 8 April 2019, Ms Seet reached out to Mr Chiang. Over email, Ms Seet indicated to Mr Chiang that the Claimant was reconsidering its position on making the video game based on the V2 race. **[Claimant's Exhibit 5]**

17. The next day, Mr Chiang called Ms Seet and emphasised that if the V1 race were to be showcased in a video game, the V2 race had to be featured as well. He had clear instructions from Mr Ye on this. Ms Seet reluctantly agreed to continue to license the V2 IP Rights, but countered that given recent developments, she would need to renegotiate the monthly fee for the V2 IP Rights. Instead of S\$30,000, the fee should be reduced to S\$10,000 per month. Mr Chiang agreed and said he would send a follow-up email on this. **[Claimant's Exhibit 6]**

18. Immediately after the call on 9 April 2019, Mr Chiang replied Ms Seet's email from the day before, stating that he was grateful that the Claimant would continue to produce the video game based on the V2 race. Additionally, Mr Chiang stated that he would alert Mr Ye on the reduction in fees for the V2 IP Rights. Ms Seet forwarded this email to the Claimant's finance department and instructed them to start paying S\$80,000 to the Respondent instead of S\$100,000 starting from the end of April 2019. **[Claimant's Exhibit 5]**

19. This practice of the Claimant paying S\$80,000 in licencing fees per month continued until July 2020, since the Victory Launch took place as planned in August 2020 and the Development Phase (as defined in the Agreement) ended. For each payment, the Respondent's finance team had sent an email to acknowledge receipt of this sum of S\$80,000. **[Claimant's Exhibit 7]**

20. For completeness, Mr Ye had raised some concerns on this reduced payment but had done so only in May 2021, over a year after parties had agreed to the new payment amount and with only 3 more months of payment left. Ms Seet did not respond to this email and Mr Ye also did not follow-up on this.

21. In August 2020, the Victory Launch proceeded as planned. While the V1 video games proved to be an instant hit amongst many fans, the V2 video games fared poorly.
22. On 1 September 2020, the Claimant received a cease and desist letter from Dancing Dragons. The letter stated that Dancing Dragons had never authorised the use of its trademarks, logos or other IP rights for any gaming software. Over the next few days, the Claimant received similar letters from other car manufacturers, like Violent Vipers and Astonishing Andres, who stated that they too have never granted permission for the Claimant to use any of its IP rights.
23. On 15 September 2020, Ms Seet met with representatives from Dancing Dragons, Violent Vipers and Astonishing Andres (the “**Car Manufacturers**”). The Car Manufacturers offered to settle the dispute by having the Claimant pay certain sums of money to utilise the IP in their games. This was rejected by the Claimant, who instead said, in no uncertain terms, “We know our legal rights. If you want to sue us for allegedly infringing these IP rights, go ahead. We will not pay a dime more. We will not withdraw our video games from the shelf either.”
24. Subsequently, the Car Manufacturers applied to the Singapore High Court for summary judgment for their claim that the Claimant had infringed their IP rights. On 8 July 2021, the Court released its judgment and ordered the Claimant to cease the sale of the video games and to also pay damages of S\$2,000,000 to the Car Manufacturers. [**Claimant’s Exhibit 8**]
25. Relying on the indemnity clause in the Agreement (*i.e.*, Clause 5), the Claimant delivered a written demand to the Respondent and asked for S\$2,000,000 and an additional S\$30,000, which were the Claimant’s legal expenses for defending the claim

against the Car Manufacturers. To date, the Respondent has refused to pay the sum of S\$2,030,000.

IV. REQUESTED RELIEF

26. Accordingly, the Claimant requests that the Tribunal issue a final award in the following terms:

- a. A declaration that Clause 10 of the Agreement did not preclude any subsequent oral modification of the Agreement;
- b. A declaration that the Claimant is entitled to claim under the indemnity in Clause 5 of the Agreement for the full sum of S\$2,030,0000;
- c. An order for the Respondent to pay S\$2,030,000 to the Claimant;
- d. An order for the costs of this arbitration to be borne by the Respondent;
- e. An order for the legal costs incurred by the Claimant in this arbitration to be borne by the Respondent;
- f. Interest; and
- g. Such further or other reliefs that the Tribunal may deem fit.

V. NOMINATION OF ARBITRATOR

27. The Claimant nominates Ms Yallie Koh as its arbitrator. Ms Koh has consented to this nomination.

CLAIMANT'S EXHIBIT 1

LICENCE AGREEMENT

This Agreement is concluded on this 25th day of September 2018 between:

- (1) **PAG SOFTWARE PTE LTD**, a company duly incorporated and validly existing under the laws of Singapore and having its principal place of business at 23 Rainbow Road, Singapore 146448 (“**Licensee**”); and
- (2) **ASIAN SUPER LEAGUE SDN BHD**, a company duly incorporated and validly existing under the laws of Malaysia and having its principal place of business at Taman Saga Ria 2, Jalan Kuala Kedah, Alor Star, Malaysia (“**Licensor**”).

(each a “**Party**”, collectively “**Parties**”)

RECITALS

WHEREAS:

[...]

- C. The Licensor has agreed to grant the Licensee the non-exclusive right and license to authorise the Licensee and its affiliates, third party publishers, distributors and manufacturers to use and reproduce any and all intellectual property rights associated with the Victory1 Series (“**V1**”) and Victory2 Series (“**V2**”) races, including the names of all the car manufacturers participating the V1 and V2 races, their marks and car design (“**IP Rights**”) ...

[...]

NOW, THEREFORE, in consideration of the mutual promises and covenants obtained herein and for other good and valuable consideration, the Parties hereto agree as follows:

1. Definitions

“**Development Phase**” means the period starting from 26 September 2018 and ending on the month prior to the Victory Launch Date;

[...]

“**Victory Launch Date**” means the date in which the video games based on the V1 and V2 races are available for sale to the general public;

[...]

3. Licensee's Rights and Obligations

3.1 The Licensee is entitled to use the photographs and still images of all cars in both the V1 and V2 races, including images of car liveries, any logos and trademarks associated with the car manufacturers and their cars...

3.2 [...]

3.3 During the Development Phase, the Licensee shall pay a monthly fee of S\$100,000, which shall be payable on the last day of every month for a period of up to 3 years. The breakdown of the licensing fee is as follows:

3.3.1 S\$70,000 for the intellectual property rights associated with the V1 race;
and

3.3.2 S\$30,000 for the intellectual property rights associated with the V2 race

3.4 After the Development Phase, the royalty payment would be....

3.5 [...]

4. Licensor's Warranties

4.1 The Licensor warrants to the Licensee that it has the legal ownership over the IP Rights and has the power to grant all the rights and licenses which the Licensee is entitled to under this Agreement.

4.2 The Licensor warrants that the use of any of the IP rights will not infringe, violate or breach any intellectual or industrial property or moral right (or any rights of a similar nature) anywhere in the world.

4.3 [...]

5. Indemnity

5.1 The Licensor agrees that it will, upon written demand, indemnify the Licensee and hold the Licensee harmless against all loss, damage, costs and expenses the Licensee may sustain. Such loss, damage, costs and expenses include, and are not limited to loss, damage, costs and expense caused by:

5.1.1 a breach of this Agreement by the Licensor; or

5.1.2 the negligence of the Licensor, its employees, servants and agents.

5.2 The amount of the Licensee's loss, damage, costs and expenses for the purposes of this clause shall be the amount of the Licensor's liability under this Agreement plus all expenses that the Licensee may incur in the exercise, preservation, or enforcement of its rights under this Agreement and/or any liability that the Licensee may incur in defending claims against third parties as a result of the Licensor's breach of this Agreement.

[...]

10. Variation of Terms

Any and all variations to this contract must be agreed, set out in writing and signed on behalf of both parties before they take effect.

[...]

12. Governing Law

This Agreement is governed by the laws of Singapore.

13. Dispute Resolution

Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre in accordance with the Arbitration Rules of the Singapore International Arbitration Centre for the time being in force, which rules are deemed to be incorporated by reference in this clause. The seat of the arbitration shall be Singapore. The Tribunal shall consist of 3 arbitrators. The language of the arbitration shall be English.

CLAIMANT'S EXHIBIT 2

Date: 19 July 2018
Time: 10:46 PM SGT (GMT +08:00)
From: andiea.seet@pagsoftware.com
To: ivan.chiang@asiansuperleague.com

RE: RE: Exciting Invitation from Pag Software

Dear Ivan,

That's great to hear!

26 July 2018, 3pm works for me. I will circulate a Zoom link in due course.

Looking forward to the call.

Cheers,
Andiea

Date: 19 July 2018
Time: 6:07 PM SGT (GMT +08:00)
From: ivan.chiang@asiansuperleague.com
To: andiea.seet@pagsoftware.com

RE: Exciting Invitation from Pag Software

Dear Andiea,

Your invitation is one that cannot be refused.

My boss, Zach, is super psyched. He would love to chat more with you over a call, say on 26 July 2018 at 3pm?

Regards,
Iv

Date: 17 July 2018
Time: 11:02 AM SGT (GMT +08:00)
From: andiea.seet@pagsoftware.com
To: info@asiansuperleague.com

Exciting Invitation from Pag Software

Dear Asian Super League,

I am Andiea, the managing director of Pag Software. We have been producing blockbuster video games for 15 years and our state-of-the art graphics remain undefeatable. I am sure you have heard of Nomekop Go – that's us.

We are *dream makers*.

The next big thing for us would be a video game based on real-life car racing events. I just know I **absolutely** have to reach out to the organiser of the V1 races. Would you be keen on this exciting liaison to make our dream come true?

Hand in hand, we certainly will take both industries by storm.

Looking forward to your favourable reply.

Cheers,
Andiea

CLAIMANT'S EXHIBIT 3

Date: 11 September 2018
Time: 10:46 PM SGT (GMT +08:00)
From: ivan.chiang@asiansuperleague.com
To: andiea.seet@pagsoftware.com
CC: zach.ye@asiansuperleague.com

RE: RE: RE: Draft licence agreement
Attachment(s): 11 September 2018 Licence Agreement.pdf

Dear Andiea,

Zach is okay with your proposed amendment. We have included the warranty in the agreement, as attached.

The agreement should be good to go then. We assume you have no issues with the rest of the clauses. Anyway, they are standard clauses which are always present in our contracts with other parties – should be unproblematic.

Regards,
Iv

Date: 21 August 2018
Time: 8:42 AM SGT (GMT +0800)
From: andiea.seet@pagsoftware.com
To: ivan.chiang@asiansuperleague.com
CC: zach.ye@asiansuperleague.com

RE: RE: Draft licence agreement

Dear Ivan,

Thanks for the agreement. Looks good generally, just one point – can we have Asian Super League give a warranty that it does have ownership over the V1 and V2 IP rights?

I know I keep harping on it, but that's really important.

Hope to hear from you soon.

Cheers,
Andiea

Date: 15 August 2018
Time: 11:02 AM SGT (GMT +08:00)

From: ivan.chiang@asiansuperleague.com
To: andiea.seet@pagsoftware.com
CC: zach.ye@asiansuperleague.com

RE: Draft licence agreement

Attachment(s): 15 August 2018 Licence Agreement.pdf

Dear Andiea,

As promised, attached is a copy of the draft licence agreement. It should capture the terms agreed between Zach and you during the 26 July discussion.

Have a look and let me know if there are any issues. If not, could you sign and execute the agreement and send it back to me?

Regards,
Iv

Date: 26 July 2018
Time: 9:21 PM SGT (GMT +08:00)
From: andiea.seet@pagsoftware.com
To: zach.ye@asiansuperleague.com; ivan.chiang@asiansuperleague.com

Draft licence agreement

Hi Zach, Ivan

Thank you for the productive discussion earlier. I can already see our dreams coming true right before my eyes now.

To summarise:

1. I cannot emphasise this enough – it is ***absolutely*** essential for us to get the rights to use the designs of the cars in your V1 race + the names of the famous car manufacturers. Happy to have gotten your assurance that these IP rights have already been assigned to Asian Super League, and that you are willing to licence them to us if we feature V2 race as well. Like I said earlier, we can agree to that.
2. Agreed terms are: 70K/mth for V1 IP rights and 30K/mth for V2 IP rights. So, 100K/mth in total.

Since you have standard form contract ready, we can work off that. Always nice to be saving some legal fees!

When you are here in October, we have to celebrate this happy collaboration over that legendary duck rice I told you about.

Cheers,
Andiea

CLAIMANT'S EXHIBIT 4

Printout of GSE search results for “V2 race scandals” dated 8 March 2019

[...]

Danubian delegates spill ‘dirt’ on V1’s lesser known cousin racing event, V2 | Green News

3 March 2019 | During the last hour of what would have been a relatively uneventful United Nations’ 25th Climate Change Conference, the delegates from Danubia made a shocking revelation about the “Victory2 Series” (“V2”) race. Producing a report procured from the internationally-renowned environmental investigative agency – the Green Watchers – the Danubian delegates showed that the race cars in the V2 race have been using ‘dirty’ fuel for their races, causing substantial amount of carbon dioxide and other noxious substances to be released into the environment. The exposé has caused a huge uproar amongst fans of the famous “Victory1 Series” (“V1”) race which share the same organiser as the V2 race, Asian Super League. In contrast to the cars in the V2 race, race cars in the V1 race are based on the “hybrid” model and employ green technology to ensure that their emissions remain within acceptable and safe standards. The discrepancy throws into question the sincerity of Asian Super League’s high-profile pledges to reduce emissions [...]

V2 races: not just dirty fuel, dirty racers as well? | CNB Breaking News

5 March 2019 | While V2 race’s ‘dirty’ fuel controversy is showing no sign of assuaging, adding fuel to fire is yet another allegation that the racers and car manufacturers in the race had taken kickbacks, compromising the results of the races. The allegation was made by an anonymous snapchat user “sgduckrice#”. While attempts to verify the true identity of “sgduckrice#” have proven futile, “sgduckrice#” has proffered what many would consider compelling first-hand anecdotal accounts of the alleged instances of corruption [...]

CLAIMANT'S EXHIBIT 5

Date: 9 April 2019
Time: 12:30 PM SGT (GMT +08:00)
From: andiea.seet@pagsoftware.com
To: finance@pagsoftware.com

FW: RE: ?? V2 race video game ??

Finance team,

Please note latest development below. Asian Super League has agreed to reduce the monthly licence fee for V2 from 30K to 10K. We have been paying them 100K each month so far. From April 2019 onwards till the Victory Launch, just pay 80K.

Thanks.
Andiea

Date: 9 April 2019
Time: 11:52 AM SGT (GMT +08:00)
From: ivan.chiang@asiansuperleague.com
To: andiea.seet@pagsoftware.com

RE: ?? V2 race video game ??

Dear Andiea,

Thanks for the call earlier.

Look, I am deeply appreciative of what you are doing. I think my superiors would rather prefer to be paid a lower price of 10K for the licensing and have the V2 race game made than having no game at all. I will pass on what you have said to me to management and I am sure they will be more than accommodating.

Regards,
Iv

Date: 8 April 2019
Time: 11:48 PM SGT (GMT +08:00)
From: andiea.seet@pagsoftware.com
To: ivan.chiang@asiansuperleague.com

?? V2 race video game ??

Ivan,

I understand that you must have been very stressed and swamped over the V2 race scandals.

I have waited for a month before finally deciding to send this email. As the scandals don't look like they will simply blow over, at least not before the next race, the Pag team is compelled to reconsider the logic of making a video game based on V2...

As you know, our company is known for its staunch support for the environment. Any gesture implying that we condone V2's (alleged) misconduct or just association with V2 would not go down well with our following.

I hope to discuss more over a call.

Andiea

CLAIMANT'S EXHIBIT 6

Contemporaneous Minutes of Telecon Meeting taken by Andiea Seet, later circulated to finance team

Date: 9 April 2019, 1100 – 1135

Venue: Over Zoom

Attendees: Andiea Seet, Ivan Chiang

[...]

- We talked about the scandals and their broad media coverage.
- Ivan tried to joke about the ominous “*duck rice*” – I was very stern and told him that my team has been very concerned about the entire saga and this is no joking matter. I said we are considering dropping V2.
- Ivan then insisted that if we feature V1 race, V2 race has to be in as well – they will not budge on this, and Zach was beyond clear on this point.
- Ivan told me that Asian Super League’s PR team has been actively managing the scandals, and that the media furore would soon die down and there would still be demand for the V2 game when it is released at the end of 2020.
- I told him that based on the way things have transpired, I am not optimistic and I cannot justify the costs of V2 IP rights.
- We finally agreed on sticking to original terms, but reducing the licensing fees for V2 IP rights to 10K/mth.

CLAIMANT'S EXHIBIT 7

Date: 5 July 2020
Time: 08:00 AM SGT (GMT +08:00)
From: finance@asiansuperleague.com
To: finance@pagsoftware.com

Acknowledgment of payment

Dear Sirs,

We confirm receipt of the sum of S\$80,000 received on 30 June 2020.

Regards,
Finance Team

[...]

Date: 5 June 2019
Time: 08:00 AM SGT (GMT +08:00)
From: finance@asiansuperleague.com
To: finance@pagsoftware.com

Acknowledgment of payment

Dear Sirs,

We confirm receipt of the sum of S\$80,000 received on 31 May 2019.

Regards,
Finance Team

Date: 5 May 2019
Time: 08:00 AM SGT (GMT +08:00)
From: finance@asiansuperleague.com
To: finance@pagsoftware.com

Acknowledgment of payment

Dear Sirs,

We confirm receipt of the sum of S\$80,000 received on 30 April 2019.

Regards,

Finance Team

Date: 5 April 2019
Time: 08:00 AM SGT (GMT +08:00)
From: finance@asiansuperleague.com
To: finance@pagsoftware.com

Acknowledgment of payment

Dear Sirs,

We confirm receipt of the sum of S\$100,000 received on 31 March 2019.

Regards,
Finance Team

[...]

CLAIMANT'S EXHIBIT 8

Dancing Dragons and others v PAG Software Pte Ltd

[2021] SGHCR XX

Case Number : Suit No XX of 2021

Decision Date : 8 July 2021

Court : High Court

Coram : Assistant Registrar Garome Go

Counsel Name(s) : ...

Trade Marks – Infringement – Assessment of Damages

[...]

Conclusion

[36] For the foregoing reasons, I find that the Defendant has infringed upon the intellectual property rights of the Plaintiffs. I grant the Plaintiffs' application for an injunction on the Defendant's continued sale of the video games based on the V1 and V2 races.

[36] Further, having assessed the evidence before me, I arrive at the conclusion that the quantum of S\$2,000,000 in damages will be appropriate in this case. This amount of damages is commensurate with the duration of time that the Defendant had infringed upon the intellectual property rights of the Plaintiffs. If the Defendant had withdrawn the games based on the V1 and V2 races earlier, the quantum of damages awarded would be lower.

[37] I will now hear submissions on costs.

**IN THE MATTER OF AN ARBITRATION UNDER THE INTERNATIONAL
ARBITRATION ACT (CAP 143A) AND THE RULES OF THE SINGAPORE
INTERNATIONAL ARBITRATION CENTRE (SIAC) 6TH EDITION, 2016**

ARB 777/21/SPD

Between

PAG SOFTWARE PTE LTD
(Singapore)

... Claimant

And

ASIAN SUPER LEAGUE SDN BHD
(Malaysia)

... Respondent

**RESPONSE TO NOTICE OF ARBITRATION AND STATEMENT OF DEFENCE
AND COUNTERCLAIM**

Solicitors for the Respondent

THUNDER & CLOUD LLC
1 McQueen Road
Diesel Tower 3 #27-00
Singapore 987654

Dated this 22nd day of November 2021

RESPONSE TO NOTICE OF ARBITRATION AND STATEMENT OF DEFENCE

AND COUNTERCLAIM

I. INTRODUCTION

1. This is the Respondent's Response to the Claimant's Notice of Arbitration and Statement of Claim dated 22 November 2021 ("SOC").
2. The Respondent denies all claims made by the Claimant in the SOC. The Respondent further denies that the Claimant is entitled to any of the reliefs sought in the SOC.
3. Where appropriate, this Response will adopt all the abbreviations used in the SOC. This should not be taken as an admission of their truth or accuracy.

II. FACTUAL BACKGROUND

4. The Claimant's account is a distortion of the true facts. The SOC mischievously omits key facts of the present dispute. The Respondent will endeavour to correct such omissions, in order to provide an accurate picture of the facts of this dispute to the Tribunal.
5. During the call on 26 July 2018 between Ms Seet, Mr Ye and Mr Chiang, Mr Ye clearly stressed the need for the V2 races to be featured in the video game. Mr Ye saw the Claimant's video game as an opportunity to increase the publicity for the V2 races. Mr Ye was not willing to enter into a license agreement for only the V1 IP Rights. Mr Ye made it clear that the Respondent would either grant a licence for both the V1 and V2 IP Rights or not grant a licence at all. A compromise was eventually reached with the Claimant.

6. Right before the call ended, Ms Seet stated that she would send a follow-up email immediately after the call to ensure that the pricing term agreed upon was put on record. Mr Ye agreed that having written records is extremely important. He specifically asked Ms Seet to email him if there were to be any changes to the draft license agreement and that correspondence should be, as far as possible, by way of emails and not phone calls. Ms Seet agreed to this. **[Respondent's Exhibit 1]**
7. Subsequently, the Agreement was concluded on 25 September 2018.
8. While it is accepted that Ms Seet did send an email to Mr Chiang in April 2019, indicating that the Claimant was reconsidering its position on making the V2 race video game, there was no written evidence of the Claimant suggesting a modification of the Agreement. As stated at Clause 10 of the Agreement, “[a]ny and all variations to this contract must be agreed, set out in writing and signed on behalf of both parties before they take effect”.
9. On 9 April 2019, Mr Chiang sent an email to Mr Ye to update that Ms Seet had concerns over the marketability of the V2 race video game. Mr Chiang said that he had allayed Ms Seet's concerns and repeated the Respondent's stance for both the V1 and V2 races to be featured in the Claimant's video games. Mr Chiang then said that Ms Seet eventually agreed to continue with the license for the V2 IP Rights. As is clear from the internal email correspondence, there was no agreement reached on the reduction of licencing fees for the V2 IP Rights. **[Respondent's Exhibit 2]**
10. Further, the invoice which the Respondent issued to the Claimant for the licensing fees at the end of May 2019 was for S\$100,000, the sum agreed upon in Clause 3 of the

Agreement. This was the case for all the invoices issued by the Respondent from May 2019 to July 2020. **[Respondent's Exhibit 3]**

11. It was only in April 2020, after the end of the fiscal year, when Mr Ye discovered that the Claimant had been paying S\$80,000 on the last day of each month since April 2019 instead of S\$100,000.
12. On 1 May 2020, Mr Ye sent an email to Ms Seet, highlighting this shortfall of payment. Mr Ye stressed that no agreement had been reached on the reduction of licencing fees for the V2 IP Rights and that in any case, there was no written and signed agreement recording the purported variation to the Agreement. Mr Ye also clarified that the emails sent by the Respondent's finance department acknowledging receipt of the Claimant's monthly payments were automated and did not signify the Respondent's acceptance of the reduced licensing fees. In addition, Mr Ye proposed that the Claimant could make payment of the shortfall first while parties enter into negotiations on the reduced licencing fee for the V2 IP Rights moving forward and to have such amendment to the Agreement recorded and signed. **[Respondent's Exhibit 4]**
13. However, Mr Ye did not receive a response. Mr Ye did not press any further as he knew that Ms Seet was extremely busy with the upcoming Victory Launch, and thought this could be resolved after.
14. On 16 September 2020, Ms Seet wrote to Mr Ye and Mr Chiang and stated that the Car Manufacturers were alleging that the Claimant had breached the Car Manufacturers' IP rights. At this point, Mr Chiang checked with the Respondent's in-house counsel and discovered that the contract to assign the Car Manufacturers' IP rights to the Respondent had inadvertently not been properly executed. **[Respondent's Exhibit 5]**

15. Separately, Mr Chiang also reached out to Dancing Dragons on 17 September 2020 to find out more about this meeting and to see if a quick resolution to the dispute was possible. In her response on 20 September 2020, Dancing Dragons' Ms Raya Long told Mr Chiang that the Car Manufacturers were prepared to meet with the Claimant to try and reach a settlement. **[Respondent's Exhibit 6]**
16. On 21 September 2020, Mr Chiang responded to Ms Seet to acknowledge that there was a breach of the warranty at Clause 4 of the Agreement. Mr Chiang also added that it would be in both parties' interests if the Claimant were to settle the dispute with the Car Manufacturers out-of-court and to withdraw the games from the market so that the amount of damages that the Claimant might be liable to the Car Manufacturers would be limited. **[Respondent's Exhibit 5]**
17. Unfortunately, while the Car Manufacturers appeared to be willing to reach a compromise, the Claimant insisted on its unreasonable position, and refused to consider a settlement with the Car Manufacturers. In fact, Ms Seet had said in an email on 24 November 2020 that this was the Respondent's fault and the Claimant wanted a written judgment from the Singapore courts as proof. **[Respondent's Exhibit 5]**
18. Subsequently, the Car Manufacturers applied to the Singapore High Court for summary judgment. On 8 July 2021, the Court released its judgment, granting the Car Manufacturers' application for an injunction on the Claimant's continued sale of the video games based on the V1 and V2 races, and ordering the Claimant to pay damages of S\$2,000,000 to the Car Manufacturers. Critically, the judgment noted that the amount of damages awarded by the court was commensurate with the duration of time that the Claimant had infringed upon these rights – in other words, had the Claimant withdrawn

the games earlier, the quantum of the damages ordered against the Claimant would have been lower. **[Claimant's Exhibit 8]**

19. After the judgment was released, the Claimant delivered a written demand to the Respondent and asked for S\$2,000,000 and an additional S\$30,000, which the Claimant claimed were its legal expenses for defending the claim against the Car Manufacturers. While the Respondent accepts that it has an obligation under Clause 5 of the Agreement to indemnify the Claimant, the Respondent submits that the Claimant also has an obligation to mitigate its losses. The Respondent is thus not obliged to pay the full judgment sum of S\$2,000,000 and the Claimant's legal expenses which were unreasonably incurred.
20. In addition, the Claimant has breached Clause 3 of the Agreement by failing to pay the full contractual sum of S\$100,000 each month from April 2019 to July 2020. As stated in Clause 3 of the Agreement, the monthly payments only stop after the Development Phase (*i.e.*, when the Claimant makes its video games available for sale to the public). As the Claimant only started selling its video games in August 2020, monthly payments of S\$100,000 should have continued until July 2020. However, the Claimant has only made payment of S\$80,000 each month from April 2019 to July 2020, which translates to a shortage of S\$20,000 per month for 16 months.

VI. REQUESTED RELIEF

28. For the aforementioned reasons, the Respondent requests that the Tribunal issue a final award in the following terms:
 - a. A declaration that Clause 10 of the Agreement precluded any subsequent oral modification of the Agreement;

- b. A declaration that the Claimant is only entitled to a claim of damages from the Respondent and is required to mitigate its loss;
- c. An order for the Claimant to pay S\$320,000 to the Respondent;
- d. An order for costs of the arbitration to be borne by the Claimant;
- e. An order for the legal costs incurred by the Respondent in this arbitration to be borne by the Claimant;
- f. Interest; and
- g. Such further or other reliefs that the Tribunal may deem fit.

III. NOMINATION OF ARBITRATOR

29. The Respondent nominates Mr Sean Low as its arbitrator. Mr Low has consented to this nomination.

RESPONDENT'S EXHIBIT 1

Contemporaneous Minutes of Meeting taken by Ivan Chiang, later circulated to management

Date: 26 July 2018, 1500 – 1525

Venue: Over Zoom

Attendees: Zachary Ye, Ivan Chiang, Andiea Seet

[...]

- Seet shared her plans to tap into the synergy between the two industries by featuring our V1 race in their video games. She presented her market research (mainly the growing size of following for her video games) to show how such publicity would bring tangible benefits to Asian Super League.
- Zach agreed that the numbers look optimistic and that Seet's platform would be a great publicity platform for us.
- Zach expressed that we are willing to give this a shot, but only if Seet enters into a licensing agreement for both V1 and V2. It is either that, or no deal at all. Seet was reluctant at first but relented, and agreed to get the licence for both V1 and V2.
- The agreed upon price is 70K/mth for V1 IP rights, 30K/mth for V2 IP rights.
- Seet said that it is important that we own the rights over the designs of the cars in our race and the names of the famous car manufacturers – Zach reassured her that there is no issue there.
- Seet said that she will send a follow-up email to put the pricing term on record. Zach said that, based on his years of doing business, written records are extremely important – and told Seet to email him if there were to be any changes to the draft licence agreement and that correspondence should primarily be through emails and not phone calls.
- Seet agreed that it is always good to put things on record to avoid misunderstandings.

RESPONDENT'S EXHIBIT 2

Date: 9 April 2019
Time: 4:09 PM SGT (GMT +08:00)
From: zach.ye@asiansuperleague.com
To: ivan.chiang@asiansuperleague.com

RE: Licensing agreement with Pag Software

Ivan,

It's not our fault that those hooligans in V2 are using dirty fuel and taking kickbacks. I don't see why we should have to give Pag a discount on the V2 licencing fees. Let's wait and see if Seet follows up; otherwise, we'll just continue to bill as usual.

Regards,
Zach

Date: 9 April 2019
Time: 2:21 PM SGT (GMT +08:00)
From: ivan.chiang@asiansuperleague.com
To: zach.ye@asiansuperleague.com

Licensing agreement with Pag Software

Hi Zach,

Seet contacted me, expressing concerns over whether V2 race video game will even sell.

Just FYI, nothing to concern you about.

I told Seet that our PR team is working a tried and tested strategy on the media, which we know will very quickly move on and forget all about us.

Seet tried to drop V2, but I stressed to her that you will not allow for that. After much convincing, Seet agreed to continue with the licence for V2 rights, though she asked for a discount on the licencing fee. I told her I will check and get back to her, and that if we do make any changes, it has to be done in writing.

Regards,
Iv

RESPONDENT'S EXHIBIT 3

ASIAN SUPER LEAGUE SDN BHD

Taman Saga Ria 2, Jalan Kuala Kedah, Alor Star, Malaysia

Attention: Ms Andiea Seet

PAG SOFTWARE PTE LTD

23 Rainbow Road
Singapore 146448

RE: Invoice for Licensing Agreement

Bill for period ending 31 May 2019

Bill Summary

[...]

[...]

Monthly licensing fee	SGD 100,000.00
Invoice total	SGD 100,000,00

Asian Super League

Asian Super League Sdn Bhd

RESPONDENT'S EXHIBIT 4

Date: 1 May 2020
Time: 9:26 AM SGT (GMT +08:00)
From: zach.ye@asiansuperleague.com
To: andiea.seet@pagsoftware.com
CC: ivan.chiang@asiansuperleague.com

Payment for licensing agreement

Hi Andiea,

Hope this email finds you well, it's been a while since we last spoke.

I am emailing as there have been some payment issues with the licensing agreement. I have been alerted by my finance department that, in the months between January 2020 and May 2020, Pag has only been paying Asian Super League 80K, instead of the contractual sum of 100K, every month.

I understand that this might be due to some confusion regarding your call with Ivan in April last year. Please note that Asian Super League did not agree to reduce the licence fees payable, and in any case, any agreement would have to be recorded in writing and signed by both parties as stated in the contract.

For completeness, I also understand that my finance department has been sending emails each month, confirming receipt of each monthly payment. Please note that these responses are automated and is not to be taken as our agreement to the reduced licencing fees.

I propose that you pay the outstanding sum of S\$260,000 (13 months from Apr 2020 to Apr 2021 x S\$20,000) and we can in the meantime discuss further on whether a discount moving forward may be appropriate. We would then have to record this amendment to the contract in writing and have it signed. Hope to hear from you ASAP.

Yours,
Zach

RESPONDENT'S EXHIBIT 5

Date: 24 November 2020
Time: 6:46 PM SGT (GMT +08:00)
From: andiea.seet@pagsoftware.com
To: ivan.chiang@asiansuperleague.com

RE: RE: Breach of IP Rights??

Dear Ivan,

This is unacceptable and I am very disappointed that you did not do the proper checks before you told me that your company owned the IP rights.

We refuse to settle this with the car manufacturers. PAG is now in this state because of your error and we want the written judgment from the Singapore Courts as proof that damage was caused as a result of your mistake. We're indemnified by you, anyway, so we're covered for any damages.

All our rights are expressly reserved.

Regards,
Andiea

Date: 21 September 2020
Time: 6:03 PM SGT (GMT +08:00)
From: ivan.chiang@asiansuperleague.com
To: andiea.seet@pagsoftware.com

RE: Breach of IP Rights??

Dear Andiea,

I have checked with my in-house counsel and, unfortunately, the contract which assigned the IP rights of the car manufacturers to my company had not been properly executed. As such, we acknowledge that there is a breach of the warranty at Clause 4 of our Agreement.

I have also spoken to my contact at Dancing Dragons, and she confirms that while they (and the other car manufacturers) are prepared to sue, they would much rather reach a settlement out of court to save on time and legal costs. Given this, it would benefit us both if PAG could settle the dispute with the car manufacturers and withdraw the games from the market. This will limit the amount of damages that PAG will have to pay to the car manufacturers.

Regards,
Iv

Date: 16 September 2020
Time: 3:02 PM SGT (GMT +08:00)
From: andiea.seet@pagsoftware.com
To: zach.ye@asiansuperleague.com; ivan.chiang@asiansuperleague.com

Breach of IP Rights??

Dear Zach and Ivan,

We recently met up with representatives from Dancing Dragons, Violent Vipers and Astonishing Andres. All these car manufacturers are threatening to sue us for breaching their IP rights by using their trademarks and cars in our video games. They said they never assigned their IP rights to Asian Super League.

What is going on?? Can you get back to me as soon as possible?

Regards,
Andiea

RESPONDENT'S EXHIBIT 6

Date: 20 September 2020
Time: 4:29 PM SGT (GMT +08:00)
From: raya.long@dancingdragons.com
To: ivan.chiang@asiansuperleague.com

RE: Meeting with PAG Software

Dear Ivan,

Yes, it's unfortunate that we're in this position. I hope you understand that we have to protect our IP rights very seriously otherwise someone might swoop in and ruin our reputation, especially given the bad publicity from the V2 races.

My team has spoken to Vipers and Andres, and we all agree that it would be best if we can settle this outside the courts. We don't really want to have to incur legal fees or have the dispute become part of the public record, but we will do what we must to protect our rights. If you can get PAG to the negotiating table, perhaps we can have a further discussion on how to resolve this?

Regards,
Raya

Date: 17 September 2020
Time: 11:17 AM SGT (GMT +08:00)
From: ivan.chiang@asiansuperleague.com
To: raya.long@dancingdragons.com

Meeting with PAG Software

Dear Raya,

I understand that Dancing Dragons, together with Violent Vipers and Astonishing Andres, had met up with PAG recently in respect of an alleged breach of your IP rights by using your trademarks and cars in their video games.

Based on our records, my predecessor didn't follow up on the assignment agreement, and it's unfortunate that your IP rights weren't properly assigned to Asian Super League. We should sort this out soon.

But on a more pressing note, I'm concerned about PAG. I hear from my contact that you're considering legal action against them? This is all just a misunderstanding, really. Is there any chance we can resolve this without having to go through the courts? It'll be further bad publicity for us all.

Let me know ASAP, thanks.

Regards,
Ivan

SIAC ARBITRATION NO. 777 OF 2021 (ARB 777/21/SPD)
IN THE MATTER OF AN ARBITRATION BETWEEN PAG SOFTWARE PTE LTD
(CLAIMANT) AND ASIAN SUPER LEAGUE SDN BHD (RESPONDENT)

PROCEDURAL ORDER NO. 1

1. Pursuant to Rule 19.1 of the SIAC Rules 2016, the Tribunal hereby makes the following orders.
2. On 21 December 2021, the parties to this arbitration, through their counsel, and the Tribunal had a conference call to determine the procedure that would be followed in this arbitration.
3. Pursuant to the conference call, the parties have agreed that at this stage of the proceedings, the Tribunal will first hear the parties' arguments on the following issues:
 - a. Whether Clause 10 of the Agreement precluded any subsequent oral modification of the Agreement; and
 - b. Whether a claim for indemnity is to be characterised as a claim for damages (for which the principles of mitigation and remoteness should apply) or as a claim of debt (for which such principles do not apply).
4. The Tribunal will determine all other issues at a later date.
5. A memorandum setting out arguments in support of either the Claimant's or the Respondent's position on the issues above must be submitted by **27 January 2022, 12pm** via email. Oral arguments will be heard from **10am to 3pm on 29 January 2022**.
6. No party should raise any issue other than those at paragraph 3 above in their memorandum or at the oral hearing.

Dated this the 10th day of January 2022

IAN SPEED

Chairman