Hearsay Evidence in Expert Reports – General and Specific Hearsay

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The rule against hearsay evidence prevents the admission of evidence of information from a third party. The evidence from a third party will generally be regarded as hearsay evidence and thus inadmissible, unless the third party him/herself testifies on the said evidence. This rule has been applied to witnesses of fact and opinion.

However, to what extent should this rule be relaxed when experts seek to rely on hearsay evidence in their reports, and in what circumstances should such evidence be admissible? This was the question that arose, amongst many others, for the determination of the Singapore International Commercial Court ('SICC') in *Kiri Industries Ltd v Senda International Capital Ltd and another*[1].

Whilst the SICC had dealt with the issues concerning the valuation of a company, this article focuses on the SICC's decision concerning the applicability of the hearsay rule to an expert's evidence given in Court proceedings, where an expert seeks to rely on a third party's opinion or evidence, and the importance of the distinction to be drawn between general and specific hearsay evidence.

Facts

In *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries*[2], the SICC had previously held that Senda International Capital Ltd ('Senda') had engaged in instances of oppressive conduct against Kiri Industries Ltd ('Kiri') ('Main Judgment'). Pursuant then to this Main Judgment, Senda was ordered to purchase Kiri's shares in DyStar Global Holdings (Singapore) Pte Ltd ('DyStar'), their joint venture.

However, disputes then arose on the valuation of Kiri's shares. Kiri and Senda both appointed their own respective experts, where Kiri appointed one Ms. Harfouche, while Senda appointed Mr. Lie as its principal expert together with a litany of other experts. Both Ms. Harfouche and Mr. Lie provided four valuation reports and gave oral testimony at trial.

[1] *Kiri Industries Ltd v Senda International Capital Ltd and another* [2020] SGHC(I) 27
[2] *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries* [2018] 5 SLR 1

It was observed that both Ms. Harfouche and Mr. Lie applied a similar method of evaluating DyStar, i.e. the discounted cash flow method ('DCF Method') albeit to varying degrees. The main difference lay in the data they used in applying the DCF Method. The former in carrying out her valuation primarily relied on independent market and broker forecast reports. These were reports on companies similar to DyStar in terms of business conducted, revenue figures and other financial metrics such as earnings before interest, tax, depreciation and amortization ('Independent Reports'). Contrastingly, Mr. Lie in his valuation, relied on a set of forecasts prepared by DyStar's management ('April 2019 Forecasts') and a financial model that purportedly updated the April 2019 Forecasts ('February 2020 Model').

Consequently, Ms. Harfouche and Mr. Lie arrived at different valuations of DyStar. One of the main issues that arose therefore was which expert's approach should be adopted and preferred over the other. In this regard, Senda argued, amongst others that Ms. Harfourche's approach was wrong as the Independent Reports are hearsay and are hence inadmissible.

SICC's Decision

The Independent Reports were unanimously held by the SICC to be admissible. However, there were divergences in the judges' bases of reaching this conclusion.

Judgment of Kannan Ramesh J and Anselmo Reyes IJ

On this point of admissibility, Kannan Ramesh J and Anselmo Reyes IJ emphasised that Senda had failed to take into account the purpose of Ms. Harfouche relying on the Independent Reports, and that is to substantiate, supplement and fortify her view. In their Lordships' judgments, it thus could not be said that Kiri's failure to call the makers of the Independent Reports rendered their contents unproven and would therefore be regarded as hearsay. The views of these reports so incorporated into the testifying expert's opinion, were found to be relevant as they are the opinions of market sentiment, i.e., what the market thinks, forecasts or is saying about a company, an industry or the economy at the given time.

Their Lordships were of the view that the hearsay rule could be relaxed in such a case for two pertinent reasons, namely, impracticality of calling the makers of such third-party reports and the need to recognise the purpose of such reports. As to the latter, their Lordships emphasised that it is the opinions advanced in the reports that are being sought rather than the data upon which they are based; the truth of the underlying data is not being sought to be proven.

Whilst the starting point (in so far as the Singaporean position is concerned[3]) is that all factual basis for an expert's opinion must be established in admissible evidence and not hearsay,[4] it has also been recognised that this rule is not absolute. In *Amita Damu v Public Prosecutor*[5], the court held that the hearsay rule could be relaxed where general hearsay is concerned in the interests of allowing experts to "*rely on evidence from authoritative publications or other extrinsic material customarily employed in their line of work*."[6]

A common form of general hearsay would be where an expert gives evidence relying in part on the work of other members of other members of the profession. In contrast, specific hearsay is where an expert puts forth an opinion founded on the truthfulness of another expert's opinion, where such truthfulness is contested. The emphasis is thus very much on the purpose of which the relevant reports are adduced and the nature of the reports.

Notwithstanding the relaxation of the hearsay rule as above, the expert's reliance on any external report is still subject to challenge, and hence, this would go towards a question of weight to be given to the testifying expert's report rather than admissibility.

Here, Ms. Harfouche relied on the Independent Reports as evidence of market forecasts and opinions of companies believed by her to be comparable to DyStar, rather than to prove the truth of the underlying data upon which the Independent Reports were based. Accordingly, the Independent Reports, in their Lordships' judgments were regarded as general hearsay, which warranted a relaxation of the hearsay rule.

<u>Judgment of Roger Giles IJ</u>

Conversely, in the judgment of Roger Giles IJ, His Lordship was of the view that the Independent Reports were hearsay evidence that should nevertheless be admitted. In His Lordship's judgment, the Independent Reports were specific rather than general hearsay. His Lordship reached this conclusion as he had observed that Ms. Harfouche had in her report significantly included historical financial information of the comparable companies and her forecasts had rested on this information. His Lordship however went on to hold that although the Independent Reports were specific hearsay evidence, one of the exceptions within section 32 of the Singaporean Evidence Act 1997 was applicable to admit such evidence. Notwithstanding that Kiri had failed to give the requisite notice under section 32 of the Singaporean Evidence Act 1997, His Lordship held that this failure could be cured under Order 2 of the Singaporean Rules of Court.

[3] See also *Pathmanabhan A/L Nalliannen v Public Prosecutor and another* [2017] MLJU 257 where the Federal Court of Malaysia adopted the Singaporean approach.
[4] *Amita Damu v Public Prosecutor* [2020] 3 SLR 825.
[5] *Ibid.*
[6] *Amita Damu v Public Prosecutor* [2020] 3 SLR 825, at para 31.

Overall, the SICC found Ms. Harfouche's approach to be the more reasonable approach at valuating DyStar. In so holding, the SICC held that she had meticulously prepared her report and adopted a more sound methodology in applying the DCF Method, as compared to Mr. Lie. The SICC held that Ms. Harfouche was correct in relying on the Independent Reports rather than on the April 2019 Forecasts and the February 2020 Model.

Commentary

From the judgment in *Kiri (supra)*, it is evident that experts in forming their opinions would be entitled to rely on information from a third party, if the expert is using such information as a basis of the testifying expert's own opinion. However, the expert cannot do so if the expert is using the third party's information to prove the truthfulness of a fact in issue in that particular case.

Jeffrey Pinsler SC opines that from the above, it can be observed that there are difficulties in distinguishing between general and specific hearsay. Such difficulties stem from among others, the fact that statute, whether the Singaporean Evidence Act 1997 or the Singaporean Rules of Court, has not recognised such a distinction.[7] Likewise, the Malaysian Evidence Act 1950 does not distinguish general and specific hearsay.

One approach which may be taken here, as Mr. Pinsler states, is to regard Ms. Harfouche's reliance on the Independent Reports as being part of the process of reaching an opinion. As such, while an expert cannot base his opinion on unproven facts in issue, the expert is nevertheless entitled to consider related facts, even if they are unproven. In Mr. Pinsler's opinion, although Giles JI was right when he found that significant reliance had been placed by Ms. Harfouche on the Independent Reports in arriving at her valuation, the Independent Reports could not be regarded as specific hearsay evidence because the Independent Reports did not constitute the primary facts in issue. The primary facts in *Kiri (supra)* was DyStar's actual financial position and the value of DyStar's shares. As such, Ms. Harfouce should very much be entitled to rely on the Independent Reports to explain her opinion as the Independent Reports are general hearsay.

Although the distinction between general and specific hearsay can be hard to draw, Mr. Pinsler opines that the principles given in *Kiri (supra)* give guidance on how this distinction is to be made. The distinction to be drawn is justified in his view for the reasons that the hearsay rule has wide applicability in almost every case, that the hearsay rule does not prevent the admissibility of evidence and, because where the hearsay rule is not applicable, experts can rely on questionable information when their opinion is based on the facts in issue in the case.

[7] The Expert and The Hearsay Rule – Recent Developments and Proposals for Updating the Evidence Act (2021) 33 SAcLJ 1.

A reform to the Malaysian Evidence Act 1950, as with the Singaporean Evidence Act 1970 is hence perhaps in order to give further clarity on the distinction between general and specific hearsay, and the rules which should be applicable when an expert seeks to rely on either type of hearsay.

In arbitrations, where parties are not shackled by the constraints of the Malaysian Evidence Act 1950, drawing a distinction between general and specific hearsay evidence may serve a greater purpose in regulating the use of hearsay evidence by expert witnesses. In light of the rapid advancements in technology and the increasing ability of an expert to source various resources from around the world, the time has perhaps come for a more concrete guidelines; lest parties find themselves in a similar situation with experts' evidence as in *Kiri (supra)*.

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