SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
MICA (P) 164/09/2012 **MARCH** 2013 **ISSUES** NO. 5

THE PRESIDENT'S COLUMN

I hope our members have had a rousing start to 2013.

In this Message, I focus on our programs and initiatives for this year, both local and regional.

Our programs offer something for everyone with an interest in arbitration and ADR - from those in their salad days to the experienced practitioners looking to be trained as an Arbitrator, and everyone in between.

Chief Justice Menon's Arbitration Speech Prize

However I would like to start by offering congratulations on behalf of the Council and the members of the Institute, to our Chief Justice on being awarded the Global Arbitration Review prize for best speech in 2012.

This was in recognition of the keynote address he delivered at the ICCA Congress in Singapore last June, while he was Attorney General.

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ANNOUNCEMENTS UPDATES & UPCOMING EVENTS

1. **International Entry Course on 17 & 18 May 2013 with an examination on 23 May 2013**
   Candidates who pass an examination at the end of this Course may apply to be Members of the Institute and use the abbreviation "MSIArb" as part of their credentials.
2. **National Arbitration Conference on 30 July 2013**
   The keynote speaker at this conference will be Ms Indranee Rajah SC, the Senior Minister of State for Law and Education. Topics covered will include the hot-button issues of arbitration costs and ethics and Justice Quentin Loh will also be speaking in a session on the Role of the Courts in Arbitration.
3. **Fellowship Assessment Course from 23rd to 26th August 2013**
   Candidates who pass an award writing examination at the end of this Course may apply to be Fellows of the Institute and use the abbreviation "FSIArb" as part of their credentials.
4. **Seminar on Interim Relief in International Arbitrations on 16 April 2013**
   At this seminar, Sara Masters QC of 20 Essex Street chambers will speak about the availability of interim relief within the context of international arbitration proceedings.

NEW MEMBERS

The Institute extends a warm welcome to the following new members:

Fellows

1. Chia Tze Yung Justin
2. Soh Lieh Sieng
3. Pua Lee Siang
4. Peh Nam Chuan Adrian
5. Lem Jit Min Andy
6. Bell Gary Francis
7. Gagnon Douglas Paul
8. Ian Lim
9. Patrick Tan
10. Sanjay Anand
11. Martin Rodney
12. Subramaniam Magintharan

Members

1. Ramanathan Govintharasah
2. Thiyagarajan Jayaprakash

Associate Members

1. Ho Wilson Sheen Lik
2. Shaw Matthew Charles

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His speech, described by GAR's editorial board chairman J. William Rowley as a "*game-changer*", urged reflection and reform of the international arbitration process, on areas as fundamental as ethics and costs amongst others.

Secretariat

We have had some changes at our Secretariat.

Jenny Wee, our long serving Executive Officer left our employ at end January. She leaves with the Council's best wishes.

As part of the Council's broader evaluation of our Secretariat resources and support, the Council has looked to outsourcing instead of simply replacing headcount. We believe this to be a more cost efficient and productive option.

The SIArb Secretariat now consists of Subra, our Senior Accounts/Admin Executive, working closely with our outsource service provider, Intellitrain.

I would like to recognise the efforts of our Honorary Secretary, Naresh Mahtani who has tirelessly overseen and implemented the various stages of the Secretariat review.

IEC 2013

This entry level course for those keen on developing their interest in arbitration is on from ***17-18 May***.

Participants will be introduced to the basic tenets and skills of arbitration practice, with lectures and tutorials conducted by experienced trainers. This will be followed by a written exam.

Successful candidates will be invited to apply for membership of the Institute. Admission as Member allows candidates to use the abbreviation 'MSIarb' as part of their arbitration credentials in their professional biographies.

FAC 2013

For the more advanced members who are now looking to be trained as an Arbitrator, our 2013 FAC course will take place on ***23-24 August***,

The FAC Course introduces candidates to the finer points of the arbitral process, from the perspective of the Tribunal. Classes range from the preliminary meeting and directions, through the arbitration procedure, and finally award writing.

Successful candidates will be invited to apply for fellowship of the Institute. Admission as Fellow allows candidates to use the abbreviation 'FSIarb' as part of their arbitration credentials in their professional biographies.

Many arbitration centres, such as the SIAC, require applicants seeking admission to their Panel to have attained at least Fellowship status, as part of their qualifying criteria.

Regional Work

I have written previously of our World Bank funded arbitration training program with the National Arbitration Centre (NAC) in Cambodia. Our involvement began in 2010 and our work continues.

So it is particularly satisfying to report that the NAC officially opened in March this week.

The NAC has a panel of 43 arbitrators, trained under our training program.The Cambodian Ministry of Commerce, in partnership with the Asian Development Bank and the International Finance Centre, is developing a draft of arbitral rules and a code of conduct for the centre. SIArb has been assisting the NAC on the draft rules.

Cambodia is a party to the New York Convention, and its arbitration laws are based on the UNCITRAL Model Law.

National Arbitration Conference

By way of an early save the date notice, I am delighted to announce that this inaugural event will take place on ***Tuesday 30 July***.

Fuller information will be out soon as program and speaker details are finalized.

RAIF Conference Philippines

SIArb is a founding member of the Regional Arbitral Institutes Forum, a regional grouping of 7 arbitral institutes from Singapore, Malaysia, Hong Kong, Philippines, Indonesia, Brunei and Australia.

Having organized the Inaugural Conference in 2007, it is very gratifying to see that we have now come to the 7th RAIF Conference hosted by Philippine Institute of Arbitrators, PIArb.

This event will take place in Cebu on ***Sat 22 June***.

It presents an excellent opportunity to meet fellow practitioners from the region – so do check out details on our website.

I do hope you will find something of interest in these events and look forward to your participation and continued support of the Institute's programs.

Developments in the Law of Arbitration

In this issue, we review 3 cases as follows:

(1) *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* [2012] SGHC 212.

(2) *Maldives Airports Co Ltd and another v GMR Male International Airport Pte Ltd* [2013] SGCA 16.

(3) *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2012] SGHC 226.

Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others [2012] SGHC 212

This case concerns the proper construction of Sections 19 and 24 of the International Arbitration Act (Cap 143A) ("**IAA**") as well as Articles 16 and 34 of the Model Law.

The Applications

1. The plaintiffs obtained leave under Section 19 IAA to enforce 5 domestic international awards ("**Singapore Awards**") rendered under the IAA, with Singapore as the seat of arbitration ("**Enforcement Orders**").

2. The defendants applied to set aside the Enforcement Orders, citing a lack of jurisdiction as a ground to resist enforcement of the Singapore Awards, after failing to make any applications to challenge the Singapore Awards under Articles 16 or 34 of the Model Law. As at the date of the Enforcement Orders, the time limits for applications under Articles 16 and 34 had expired.

The Issue

3. The sole issue was whether there is any statutory basis for the defendants to invoke a lack of jurisdiction as a ground to resist or refuse enforcement of the Singapore Awards, after the time limits under Articles 16 and 34 of the Model Law have expired?

The Decision

4. The Court held that there was no statutory basis for the defendants to invoke lack of jurisdiction as a ground to resist or refuse enforcement of the Singapore Awards.

Recognition and enforcement of domestic international awards

5. The Court drew a distinction between *"recognition"* and *"recognition and enforcement"*. For domestic international awards (i.e. *international commercial arbitral awards made in the same territory as the forum in which recognition and enforcement is sought*) recognition and enforcement go hand in hand. The court grants enforcement because it has *recognized* the domestic international award as final and binding.

6. In contrast, the binding effect of a foreign award under Part III IAA is qualified by Section 31 IAA, which provides grounds for refusal of enforcement similar to those in Article V of the New York Convention.

7. Under Section 3 IAA, Articles 35 and 36 of the Model Law have no force of law in Singapore. Hence, a domestic international award is not subject to refusal of enforcement on the grounds in Article 36.

8. At paragraph 90 of the Judgment, the Court stated that the decision to exclude Article 36 was consistent with a pro-arbitration stance favouring party autonomy, finality of awards and limited curial intervention.

The grounds for refusal of recognition and setting aside

Grounds under Article 34 of the Model Law

9. The Court held that the grounds under Article 34 are no longer available to the defendants after the time limits have expired, stating as follows:

> *"96 I draw support from the UNCITRAL Analytical Commentary on Draft Text of Model Law on International Commercial Arbitration, Report of the Secretary General, UN Doc, A/CN 9/264, 25 March 1985 ("UNCITRAL Commentary A/CN 9/264") on Art 34 of the Model Law, where it is stated (at para 1):*
>
> *Sole action for attacking award, paragraph (1)*
> *1. Existing national laws provide a variety of*

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actions or remedies available to a party for attacking the award. Often equating arbitral awards with local court decisions, they set varied and sometimes extremely long periods of time and set forth varied and sometimes long lists of grounds on which the award may be attacked. Art 34 is designed to ameliorate this situation by providing only one means of recourse (paragraph (1)), available during a fairly short period of time (paragraph (3)) and for a rather limited number of reasons (paragraph (2)). It does not, beyond that, regulate the procedure, neither the important question whether a decision by the Court of Art 6 may be appealed before another court nor any question as to the conduct of the setting aside proceedings itself. [emphasis added]"

Grounds under Article 36 of the Model Law

10. The Court decided that Article 36 of the Model Law cannot be imported into Section 19B(4) IAA. Section 19B(4) only provides for challenges *"in accordance with the provisions of this Act and the Model Law"* and as Section 3(1) IAA excludes Chapter VIII of the Model Law from Singapore Law, Article 36 of the Model Law, which is in Chapter VIII, has no force of law in Singapore.

11. The Court explained the preference of Article V of the New York Convention over Article 36 of the Model Law as follows:

"101 The preference of Art V of the New York Convention over Art 36 of the Model Law was no accident. Notably, as stated in Halsbury's Laws of Singapore vol 1(2) (LexisNexis, 2011 Reissue) (at n 10, p 155), the intention of the Legislature in excluding Arts 35 and 36 was to have the enforcement of foreign awards governed separately under the New York Convention, with Singapore awards being governed by s 19 IAA. The New York Convention applies on the basis of reciprocity between Convention States for foreign awards. Article 36 of the Model Law applies more generally "irrespective of the country in which [the award] was made" (see Art 36(1)). This was a deliberate choice to enhance enforceability on the grounds of reciprocity."

Grounds under Section 24 IAA

12. Section 24 IAA also allows for arbitral awards to be set aside on the grounds of fraud or breaches of natural justice. However, as the defendants' challenge was not on any of the said basis, the Court did not have to decide the procedural points, but still made the following observations:

    (1) Although Section 24 IAA does not state any time bar, Order 69A r2(1)(d) of the Rules of Court read with Order 69A r2(4), provide for a time limit of 3 months.

    (2) The Rules of Court, including Order 69A, are subject to a saving provision in Order 92 r4.

    (3) In a proper case of *"preventing injustice"*, the Court may exercise its powers under Order 92 r4 to remedy any procedural breach (including non compliance with time limits) under Order 69A r2(4) of the Rules of Court.

Article 16 of the Model Law

13. The Court considered 2 issues as follows:

    (1) Whether a failure to appeal an arbitral tribunal's jurisdiction ruling under Article 16 of the Model Law precludes parties from raising an objection to the same in later proceedings to set aside or enforce; and

    (2) In what circumstances may a party be permitted to raise an objection to an arbitral award on jurisdictional ground at the setting aside or enforcement stage if it has not appealed under Article 16?

14. The Court accepted the Plaintiffs' Counsel's argument that *"where a party wishes to challenge the jurisdiction of a tribunal, it must raise the challenge at the earliest opportunity and, in any event, within the time limits prescribed; otherwise, it forfeits its right to challenge jurisdiction. Once the time limits under Art 16(3) have expired, it may be taken that the losing party has accepted jurisdiction."*

15. The Court affirmed the general principles of international arbitration that:

"it should not be open to a party to hold off bringing a jurisdictional challenge and, at the same time, participate in the arbitration on the merits in the expectation that it can revive its jurisdictional challenge at a later stage should it prove to be

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unsuccessful in the arbitration. Such behaviour is bound to make a mockery of the finality and effectiveness of arbitral awards on jurisdiction."

16. After referring to decisions in other Model Law jurisdictions, the Court concluded that if a party fails to appeal or decides not to appeal an award on jurisdiction under Article 16(3), the award will be treated as final between the parties and the hearing on the merits will proceed on the basis that the tribunal has jurisdiction. Challenging such an award on jurisdictional grounds is excluded from the grounds which a party may invoke at the setting aside or the enforcement stage if the party has chosen not to bring an appeal under Article 16(3) of the Model Law.

Maldives Airports Co Ltd and another v GMR Male International Airport Pte Ltd [2013] SGCA 16.

This case concerns an application for an interim injunction under Section 12A(4) IAA.

The Appeal

1. This is an appeal from a High Court decision to grant an interim injunction (the "**Injunction**") to restrain the appellants from interfering with the respondents' performance of its obligations under a concession agreement (the "**Concession Agreement**") for the rehabilitation, expansion, modernization and maintenance of Male International Airport (the "**Airport**").

2. A dispute arose between the parties as to whether the Concession Agreement was void *ab initio* or had been frustrated. The appellants gave notice to the respondent to vacate the Airport and commenced arbitration proceedings.

3. The respondent successfully obtained the Injunction and the appellants appealed against the grant of the same.

The Issues

4. The issues were whether a Singapore Court has the power to grant the Injunction and if so, whether the Injunction should be granted and upheld in all the circumstances?

Preliminary Jurisdictional Issue

5. Prior to dealing with the main issues, the Court of Appeal had to decide if leave of court was required under Section 34(2)(d) of the Supreme Court of Judicature Act (Cap 322) for the appeal to be brought.

6. The Court held that the application for an interim injunction by way of an originating summons was not an interlocutory proceeding. This is because it was the "sole purpose" of the originating summons to seek the injunction and "there was nothing further for the Court to deal with once the Injunction had been either granted or refused". Thus, leave was not required.

7. The Court of Appeal went on to state - "Whether a particular decision is one that is made upon an interlocutory application depends in the first place on the nature of the application which is the subject matter of the decision", citing ***Wellmix Organics (International) Pte Ltd v Lau Yu Man*** [2006] 2 SLR(R) 525 in support.

Issue 1: Whether a Singapore Court has the power to grant the Injunction?

8. Having disposed of the above issue and other preliminary jurisdictional issues under the State Immunity Act (Cap 313) and the Act of State doctrine, the Court of Appeal ruled that the Singapore court has the *power* to grant the Injunction under section 12A(4) IAA.

Meaning of "assets" under Section 12A(4)

9. Through the Injunction, the respondent sought to preserve 2 assets, namely:

   (a) 2 contractual rights being the rights to:

      (i) Be served the appropriate notice under the Concession Agreement before termination was effected; and

      (ii) Have any dispute over the parties' entitlements under the Concession Agreement resolved by arbitration before the entitlements were destroyed.

   (b) Its interest in the land on which the Airport is situated.

10. The Court of Appeal held that the reference to "*assets*" in Section 12A(4) encompasses rights

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under a contract as evident from Parliament's intention reflected in the:

(a) Explanatory Statement to the International Arbitration (Amendment) Bill 2009 (Bill 20 of 2009) ("**Bill**"), which explained that it was intended that a wide meaning of the term "*assets*" be adopted to include choses in action and "*rights under a contract*"; and

(b) Second reading of the Bill in Parliament by the Minister of Law, where the Minister repeated that "assets" should be read *"in line with current case law… to include intangible assets or 'choses in action' such as bank accounts, shares and financial instruments"* : Singapore Parliamentary Debates, Official Report (19 October 2009) vol. 86 at col. 1628.

11. However, the Court of Appeal went on to hold that in the context of Section 12A(4), *"this must be confined to such contractual rights as lend themselves to being preserved. In the normal course of events, a party faced with a threatened breach of a contract is not entitled to preserve his right to have the contract performed; rather, the primary obligation to perform the contract gives way to a secondary obligation to pay damages: see Photo Production Ltd v Securicor Transport Ltd [1980] 1 AC 827 at 848-849 per Lord Diplock."*

12. If all types of contractual rights may be the subject matter of a injunction under Section 12A(4), it would *"ineluctably open the floodgates to applications for interim mandatory injunctions to compel parties to perform any and all types of contractual obligations pending the resolution of the dispute."*

13. The type of contractual rights which would come within the meaning of "assets" under Section 12A(4) are *"those which lend themselves to being preserved or, put another way, those which, if lost, would not adequately be remediable by an award of damages."*

"Necessary" for the purpose of preserving evidence or assets under Section 12A(4)

14. As for the meaning of the word *"necessary"*, the Court of Appeal held as follows:

"44 …In our view, "necessary" ordinarily imports the notion that without the order in question, the evidence or asset which is sought to be preserved would be lost. If there are other reasonably available alternatives for securing the evidence or asset, then it cannot be said that the order is necessary for the preservation of that evidence or asset……Naturally, if the order sought does not in effect preserve the evidence or asset in question, the order cannot be considered necessary for the preservation of that evidence or asset."

15. Of the various assets sought to be preserved, the Court of Appeal took the view that only the respondent's interest in the land (i.e interest as a lessee to occupy, use and enjoy the land for a term) is the sort of contractual right that comes within the meaning of "asset" under Section 12A(4) IAA. If the Injunction were set aside and if the appellants take over the Airport, the respondent's rights to have exclusive use, occupation and peaceful enjoyment of the land would be destroyed. On this ground, the Court of Appeal was satisfied that in principle, the Injunction may be *"necessary"* for the preservation of an *"asset"* and it had powers to grant such injunction under Section 12A(4) IAA.

Issue 2: If the Singapore Court has the power to grant the Injunction, whether the Injunction should be granted and upheld in all the circumstances?

16. Having the power to grant the Injunction does not mean that the Court must do so, the Court still had to apply the balance of convenience test laid down in *American Cyanamid Co Ltd v. Ethicon Ltd* [1975] AC 396 to decide if the Injunction ought to be granted.

17. On the facts, the Court of Appeal decided that the balance of convenience lay in favour of not granting or upholding the Injunction as the respondent was unable to satisfy the Court that there would not be an adequate remedy in damages should it turn out that the Injunction should have been granted.

18. Further, the Court of Appeal considered the following practical problems, namely the:

(a) Wide scope of the Injunction made it difficult for 3rd parties, particularly the

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Maldives Government, to have any certainty of what is required of them in order to ensure that they do not breach its terms;

(b) Injunction would affect or restrict the operations and duties of 3rd parties such as domestic regulators with important ongoing duties and responsibilities related to the operation of the Airport;

(c) Injunction requires an unacceptable degree of supervision in a foreign land; and

(d) Injunction forces unwilling parties who do not wish to co-operate with each other, to work together.

International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another [2012] SGHC 226

1. The plaintiff, International Research Corporation Public Company Ltd ("**IRC**") applied to set aside an arbitral tribunal's ruling that the tribunal had jurisdiction to resolve a dispute between Lufthansa Systems Asia Pacific Pte Ltd ("**Lufthansa**") (i.e. the first defendant) and IRC. The second defendant in the action is Datamat Public Company Ltd ("**Datamat**").

Background facts

2. All three parties are engaged in the business of providing technology services. By a Cooperation Agreement between Lufthansa and Datamat (the "**Cooperation Agreement**"), Lufthansa agreed to supply, deliver and commission a new Maintenance, Repair and Overhaul System.

3. The Cooperation Agreement contained a multi-tiered dispute resolution mechanism (the "**Dispute Resolution Mechanism**") which provides for a mediation process, and for disputes to be referred to arbitration, if they cannot be settled by mediation.

4. Datamat subsequently ran into financial difficulties and was unable to meet its payment obligations to Lufthansa under the Cooperation Agreement. Lufthansa informed Datamat that it would cease work unless Datamat could secure another party to pay the outstanding as well as future invoices. IRC was the third party identified to pay such outstanding and future invoices. By way of 2 Supplemental Agreements (the "**Supplemental Agreements**"), IRC agreed to, *inter alia*, pay Lufthansa the sums payable by Datamat under the Cooperation Agreement. Certain payment mechanisms were also agreed under the Supplemental Agreements.

5. The Supplemental Agreements did not contain a dispute resolution clause, but made reference to the Cooperation Agreement and stated that provisions of the Cooperation Agreement would remain effective and enforceable.

6. The dispute in the arbitration proceedings pertains to payments due to Lufthansa under the Cooperation Agreement. Lufthansa had commenced arbitration proceedings pursuant to the Dispute Resolution Mechanism set out in the Cooperation Agreement.

Grounds for challenge to jurisdiction

7. IRC contended, *inter alia*, that the tribunal had no jurisdiction to resolve the dispute, for 2 reasons:

(i) IRC was not a party to the Cooperation Agreement and therefore not bound by the Dispute Resolution Mechanism;

(ii) Alternatively, the tribunal did not have jurisdiction as the preconditions for the commencement of arbitration in the Dispute Resolution Mechanism had not been satisfied.

Decision of the High Court

(i) Whether IRC was bound by the Dispute Resolution Mechanism

8. The Court held that fundamentally, determining whether an arbitration agreement contained in one contract binds the parties to another contract is an objective inquiry into the parties' intentions. The question was whether, by entering into the Supplemental Agreements and having regard to the factual matrix where the Supplemental Agreements are not only supplemental to but are annexed to and form an integral part of the Cooperation Agreement, the three parties had intended the terms of the Cooperation Agreement, and in particular the Dispute Resolution Mechanism, to be binding on all three parties.

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9. While the absence of specific words referencing the arbitration agreement is a strong indicator that the parties do not intend to be bound by arbitration, it is not conclusive.

10. In conducting its objective inquiry into the parties' intentions, the Court considered the following main factors:

    (a) The Supplemental Agreements were intended to supplement the original two parties' shortcomings in the performance of their obligations to Lufthansa under the Cooperation Agreement (i.e. the original agreement). IRC's payment obligations to Lufthansa are inextricably tied to Datamat's obligations under the Cooperation Agreement.

    (b) The Supplemental Agreements and Cooperation Agreements were intended by the parties to function essentially as one agreement and should be read as a whole.

    (c) IRC must have been fully aware of the terms of the Cooperation Agreement, including the arbitration agreement adopted therein.

    (d) It made little commercial sense to have different dispute resolution mechanisms, the applicability of which depending on the identity of the parties.

11. In light of these factors, the Court found that the parties had intended the Dispute Resolution Mechanism in the Cooperation Agreement to bind all three parties to the Supplemental Agreements. Accordingly, IRC was bound by the arbitration agreement contained in the Cooperation Agreement.

(ii) Whether the preconditions for the commencement of arbitration in the Dispute Resolution Mechanism had been satisfied.

12. The Dispute Resolution Mechanism provided that parties shall commence arbitration if the disputes cannot be settled by negotiation or mediation in accordance with the process stipulated therein.

13. IRC argued that the tribunal did not have jurisdiction because the preconditions for the commencement of arbitration (i.e. the requirement for parties to go through the negotiation or mediation process) had not been satisfied.

14. The arbitral tribunal took the view that the requirement for negotiation or mediation was too uncertain to be enforceable. Consequently, it would have been unnecessary to consider if the negotiation or mediation process had been adhered to as a precondition to arbitration, in determining if the tribunal had jurisdiction.

15. The Court took a different view. It considered the decision of the Court of Appeal in *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] SGCA 481, and held that the requirement for negotiation or mediation was not too uncertain to be enforceable.

16. An issue in *Toshin* was whether an express term in a contract which obliges the parties to endeavor, in good faith, to agree on a new rent, as part of a rent review mechanism, was enforceable. The Court of Appeal in *Toshin* answered this affirmatively.

17. The Court opined that if an obligation to negotiate in good faith which is part of a contractual framework such as a rent review mechanism under a lease agreement is enforceable, the obligation to refer a dispute to various specifically constituted panels (as part of the negotiation or mediation process) pursuant to the Dispute Resolution Mechanism should also be enforceable. They are, after all, essential steps stipulated in the Dispute Resolution Mechanism and expressly made condition precedents to resolution of a dispute by arbitration.

18. The Court also took the view that the negotiation or mediation process outlined in the Dispute Resolution Mechanism was sufficiently certain for it to be enforceable. A court looking at the conduct of the parties can easily discern if the entire mediation procedure had been complied with or not.

19. The negotiation or mediation process was a condition precedent to the commencement

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of arbitration and until it is fulfilled, neither party is obliged to participate in the arbitration. On the facts, the Court found that the parties had several meetings and went through a negotiation process prior to the commencement of arbitration proceedings, thereby satisfying the condition precedent. The arbitral tribunal therefore had jurisdiction.

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How may the Thai government compensate the limited availability of arbitration in contracts involving the state?

It has been some time since the new Thai Cabinet Resolution 2009 (the "**Resolution**") limiting the use of arbitration in relation to any contracts involving the State came into effect. By virtue of the Resolution, the default position is that the Thai Government will not incorporate arbitration clauses in any of its standard contract terms. The incorporation of arbitration clauses shall be approved by the Thai Cabinet on a case by case basis, only when necessary. This approach by the Thai Government has been criticised by both academics and practitioners. The main concern is that limiting the inclusion and/or application of arbitration may, in the larger scheme of things, hold back economic growth in Thailand, in particular the inflow of international investment. This article shall look only at international investments with the Government e.g. infrastructure works and construction of Thai Government facilities. The reference to "investors" in this article shall include foreign construction companies undertaking projects for or with the Thai Government. The objective of this article is not to criticise the Resolution but to offer a potential solution to this matter: the legal techniques which the Thai Government may offer to compensate for the limited availability of arbitration in activities involving the State.

Background

Government infrastructure projects relating to public facilities, for example mass transport systems, are considered one of the key factors of Thailand's development and modernisation. However, the Government may face difficulties undertaking such projects as they require large capital investment, expertise, high technology and good management. The participation of international contractors may bring about transfer of technologies and professional skills from inbound foreign companies. Also, the employment rate of the local workforce is likely to be increased. Moreover, having domestic and international construction companies participating in Thai public procurement can create a competitive climate among all potential contractors, resulting in the projects being awarded to the most economically advantageous tenderer. From the investors' point of view, they can also enjoy the monopoly projects and, of course, substantial profits therefrom.

Arbitration is considered to be a highly respected international dispute resolution process which may help attract foreign companies. This is because arbitration offers parties a high level of control over the law governing their contracts, the rules of any settlement procedure, the forum of the settlement, and the expertise of decision-makers. More importantly, subject only to exceptional circumstances, arbitral awards are currently recognised and enforceable in more than 150 jurisdictions who are members of the 1958 New York Convention, including Thailand.[1] This is beneficial to the successful party as the competent Thai courts, subject only to some exceptional circumstances, will recognise and enforce an award. This unique characteristic of arbitration is generally accepted as *final and binding*. Furthermore, foreign contractors may perceive that arbitration can potentially be a safeguard against

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the '*home field*' advantage of the host government, especially when entering into contracts with the Thai Government. However, the problem is that the Thai Government has been encountering awards which impose considerable damages against the State. The Resolution arguably aims to deal with this problem by attempting to move away from arbitration.

The Resolution

Recently, Thailand has been ordered to pay large amounts of compensation to foreign investors as a result of arbitral awards. Some scholars claim that the Thai Government has lost more than 100 cases.[2] For example, in 2003, an arbitral tribunal ordered the Ministry of National Resource and Environment of Thailand to pay approximately six billion THB as compensation for a breach of the Klong Dan wastewater treatment project agreement.[3] The large number of arbitral awards against the Government has posed a substantial burden to annual government expenditure. As a result, the Resolution was passed.

As arbitration is a widely respected international dispute resolution mechanism, limiting arbitration may be deemed as an outdated approach. It may also have a negative impact on the *arbitration friendly* image of Thailand, which may cause a decrease in inbound investment. However, some practitioners argue that resorting to arbitration is not the only determinative factor in restrictions on the flow of investment. Indeed, investors may be more concerned about the various business aspects of their investment (e.g. cash flow of the country and payment discipline of the Thai Government) other than dispute resolution.[4] One potential solution is the introduction of the model of *market liberalisation*.[5] Generally speaking, this model suggests that foreign investors are more concerned about the size of the market, profitability, investment promotion policy, and other business aspects including liberalization of the policy regarding tax revenue, rather than the type of dispute resolution mechanisms available.

Rightly or wrongly, the Resolution has taken effect and the better question to ask is how to maintain the inflow of international investment whilst arbitration is being limited. In response, the next task for the Government is to strengthen other decisive factors in order to attract foreign investment. It has been suggested that a well-defined legal framework and honouring the rule of law may be another inducement for inbound investment.[6]

A legal framework and the rule of law

A well-defined legal framework may include (a) Thai laws which may directly regulate foreign investment; for example, the Foreign Business Act of 1999 (concerning the Activities Restricted to Thai Nationals), the Investment Promotion Act 1977 (the Amendment Acts No.3, 2001) (concerning investment promotions including fiscal provision),[7] and the Regulations of the Office of the Prime Minister on Procurement 1992 (the Amendment Acts No.7 2009) (concerning public procurement); and (b) laws which may not directly relate to foreign investment e.g. anti-corruption laws. Moreover, legislation should reflect the principle of *equal treatment* for foreigners and Thais.

On the international level, Thailand, as a member of conventions or treaties (e.g. BITs), should clearly define to what extent investors can rely on benefits such as available incentives. Investors can therefore make a thorough evaluation of the investment and calculate the potential risks into their contract price.

The rule of law is also essential. The host country has to provide an independent, transparent and efficient legal framework together with fair, equitable, consistent and coherent law enforcement.[8] For example, there should not appear to be a high frequency of corrupt practices, dishonouring the supremacy of law or the abuse of power by the Government. Particularly with regards to international investment, the rule of law should be considered in two aspects:[9] (a) its objective to create a fair competitive atmosphere in procurement processes, to protect the property rights of contractors and to increase the capacity to enforce in the event of default of contracts; (b) it is a safeguard for foreign investors in the sense that the Thai authority can only intervene in the investment activity in very limited circumstances. Therefore, promoting the rule of law can reflect the Government's commitment to provide investors with a level of *transparency, certainty*, and *predictability* in accordance with international standards in cross border investments.

Domestic Legal Mechanism: Dispute Prevention and Dispute Resolution

Currently, it is rarely the case that either a dispute prevention policy or an amicable settlement mechanism, such as negotiation and mediation, is incorporated into any Thai legislation regarding construction disputes.[10] Although the Thai Office of the Judiciary is active in promoting this legal mechanism, it appears to be the only authority doing so and its attempt has yet to make satisfactory progress. As arbitration is often not an option, this may pose some concerns to construction companies who are unfamiliar with Thai litigation. Therefore, to restore the confidence of contractors, adopting a domestic legal mechanism could be helpful for the Government.

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The mechanism, in broad terms, may consist of two principles: preventing the dispute from arising and finding a resolution. Dispute prevention policies and some Alternative Dispute Resolution ("ADR") policies can act as an *early alert* mechanism for the government to share information with investors and submit a notice of dissatisfaction or any concerns on their conflicts. Furthermore, in the event of disputes, neutral third parties will assist in finding a solution before resorting to litigation or arbitration. This mechanism provides a *win-win* creative solution in the parties' best interests. In infrastructure construction projects, it is appropriate to introduce the role of the Dispute Boards (DBs).

The Dispute Boards

The DBs will function to effect: (a) dispute prevention – working on the construction site – so that the investors (the contractors) can submit any complaints to the board at an early stage; (b) if disputes arise, the DBs, who will already be familiar with the issues and information of the disputes, will act as either adjudicators (Dispute Adjudication Board - DAB) or mediators (Dispute Review Board - DRB). Ideally the DBs, consisting of technical experts including perhaps a construction lawyer, will be constituted at the outset of the project—preferably before the disputes arise. This is to ensure that the DBs are familiar with the project, and to ensure that the DBs can effectively provide 'a real-time consideration of disputes'.[11] Moreover, the DBs will periodically visit the construction site and hold meetings between the Thai Government and the contractors. One may ask about the status of the decision of the DB. The answer will be subject to the type of DBs agreed by the parties: binding or non-binding recommendation. Regardless of the binding effect, the recommendation of DBs is likely to be accepted by the parties since they appointed the panel of experts to settle their disputes.[12] Furthermore, a number of surveys also indicate that the use of ADR can reduce the number of disputes before otherwise resorting to arbitration or litigation.[13] In Hong Kong, up to 80% of construction claims were settled in mediation or negotiation.[14]

One concern however is that this mechanism is new for Thailand and Thailand does not have clear legal provisions supporting the admissibility of the DBs' recommendations in litigation, the removal of the DBs, the claims relating to the third party (e.g. subcontractors), and the time frame for appealing DBs recommendation. This area may therefore require further consideration.

Conclusion

Although international arbitration enjoys a good reputation in international dispute resolution, considering the substantial burden placed on the Thai Government so far, and considering the fact that the Thai Government has yet to entirely comply with the awards made against it, it may be wise to limit references to arbitrations. The '*arbitration restriction*' notion of the Government could, however, potentially affect investor confidence. To solve the problem and provide a boost to investor confidence, Thailand should promote a well-defined legal framework and honour the *rule of law*. Further, a Thai ADR system should be effectively adopted to reduce disputes. To be more precise, DBs should be introduced to prevent the disputes and to provide a *first-stop* for the parties to talk and attempt to resolve the dispute before litigating. This approach is likely to give a sufficient degree of confidence, predictability, and certainty to investors and may result in maintaining the inflow of foreign investment.

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[1] See members of the Convention available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html
[2] Dharmniti Editor, 'Minister of Justice suggests Thailand should stop using arbitration in State-involved disputes to overcome the 100 stupid cases and impose no limitation for corruption claims' (in Thai), 2009 http://www.dlo.co.th/node/223 assessed on 20 November 2012
[3] See more the case of Walter Bau AG (in liquidation) v The Kingdom of Thailand date 1 July 2009
[4] Ranjit Lamech and Kazim Saeed, What International Investors Look For When Investing In Developing Countries (ENERGY AND MINING SECTOR BOARD DISCUSSION PAPER NO.3, 2003), 7
[5] Susan D Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' 19 McGeorge Global Business and Development Law Journal 337, 362
[6] Jean-Yves P. Steyt, 'Comparative Foreign Direct Investment Law: Determinants of the Legal Framework and the Level of Openness and Attractiveness of Host Economies' (LL.M. Graduate Research Papers, Cornell Law School 2006), 10
[7] In practice, the Government authority will provide bidders the eligibility for BOI promotion and the conditions in the contract terms so that all potential bidders can decide as to joining the tender.
[8] Steyt, 117
[9] Jean-Yves de Cara, 'International Trade and The Rule of Law: The Sixth Annual John E. James Distinguished Lecture', (Mercer Law Review Vol.58 2007) 1357, 1361 available at www2.law.mercer.edu/lawreview/getfile.cfm?file=58416.pdf
[10] See an example of the Regulation of the Office of the Prime Minister on Procurement, B.E. 2535 (1992)
[11] McMillan Daniel D. and Rubin Robert A., Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements, 25 Construction Law. 14 (2005), 15
[12] American Society of Civil Engineers (ASCE), Avoiding & Resolving Disputes During Construction 45-60 (1991), 51
[13] Alternative Dispute Resolution: Mediation and Conciliation, Law Reform Commission, November 2010, <http://www.lawreform.ie/_fileupload/Reports/r98ADR.pdf> 150-152
[14] Report of the Working Group on Mediation (Hong Kong Department of Justice, February 2010), <www.doj.gov.hk>, 16

Singapore Arbitral Scene – Are we setting the pace?



Date	Event	Speaker	Chairperson:
24 January 2013	Singapore Arbitral Scene – Are we setting the pace?	Prof. Lawrence Boo	Mr. Dinesh Dhillon

This was another successful and well attended conference with one of the foremost figures in Singapore arbitration giving participants a lively run down of the year's events in the arbitration community. Professor Boo gave participants a deeper understanding of the changes to the International Arbitration Act and the impact of recent case law both in Singapore and other Model Law jurisidictions.

The New HKIAC Rules: A Sneak Preview and Comparison with the SIAC Rules




Date	Event	Speakers	Chairperson:
21 February 2013	The New HKIAC Rules: A Sneak Preview and Comparison with the SIAC Rules	Mr. Justin D'Agostino Ms. Ruth Stackpool-Moore Ms. Camilla Godman	Mr. Tay Yu-Jin

Another well-attended seminar with speakers from Hong Kong and Singapore! Participants were rewarded with a thorough and thoughtful discussion of things to come in Hong Kong with the upcoming revision to the Hong Kong International Arbitration Centre's revised Administered Arbitration Rules and a useful comparison of those rules with the 2010 SIAC Arbitration Rules.

Publisher

Singapore Institute Of Arbitrators
32 Maxwell Road #02-07, Maxwell Chambers, Singapore 069115
Tel: (65) 6372 3931 / 32 Fax: (65) 6327 1938

Printed by Ngai Heng Book Binder Pte Ltd.

The SIArb Newsletter is a quarterly publication of the Singapore Institute of Arbitrators. Distribution is restricted to members and those organisations and institutions of higher learning associated with the Institute.