



KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

Newsletter #20 / Oct-Dec 2015

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Director's message

Dear distinguished friends,

With a brand new year inching just around the horizon, it is time to recap on another eventful quarter for the Centre that saw more significant collaborative efforts forged and informative talks and seminars held to further spread awareness on the alternative dispute resolution spectrum, particularly in the field of arbitration and adjudication.

There was a flurry of evening talks carried out this quarter, six in total. Each session drew an encouraging set of participants as recognised international arbitrators took stage to deliver timely presentations on their respective areas of expertise. Two out of the six were specialised sessions on the field of investment arbitration that continues to pick up momentum in this region.

KLRC also successfully conducted its second Adjudication Training Course for the year in November that witnessed more than forty aspiring adjudicators take part. A significant number of these candidates who passed the exams have since gone on to join KLRC's panel of adjudicators. As the CIPA 2012 Act continues to have a positive impact on the local construction industry and general interest grows, the Centre has already made plans to roll out additional sets of courses in the coming new year to ensure the pool of certified and competent adjudicators grow in tandem with the increasing caseloads being recorded.

In this quarter's edition you will also find a continued and sustained coverage on the field of international investment arbitration as experts such as Luke Nottage and Lucy Reed weigh in on the subject matter with their excellent write ups. Following closely within this scope is our 'In The Seat' interview with Tan Sri Dr Rebecca Fatima Sta Maria, Secretary General, Ministry of International Trade & Industry of Malaysia. In this issue, I would also like to officially inform you of the upcoming 'KLRC International Investment Arbitration Conference (KIIAC 2016)', in March 2016 – the first of its kind in Asia.

You will find all relevant information under the highlight section of this newsletter.

I would like to invite all our readers to come join us at this spectacle as we continue to strive together in taking international investment arbitration in this region to unprecedented heights.

2015 has been an excellent year for the Centre and I would like to round it off by thanking each one of you for your tremendous support and we wish you all the best for 2016!

Until the next issue, happy reading.

A handwritten signature in black ink, reading "Sundra Rajoo".

Datuk Professor Sundra Rajoo
Director of KLRC



KLRCAs welcomes visits from various local and international organisations as it provides a well-fortified platform to exchange knowledge and forge stronger ties.

Visitor's gallery

Visit by **UiTM Kedah (Law Faculty)**

15th October 2015



Visit by **Korean Bar Association**

30th October 2015



Visit by **Lawyers from China**

16th December 2015



_NEWS

KLRCA Signs Memorandum of Understanding with AFC

20TH OCTOBER 2015

Kuala Lumpur, 20 October – The Kuala Lumpur Regional Centre for Arbitration (KLRCA) and the Asian Football Confederation (AFC) have signed a Memorandum of Understanding to strengthen and increase the degree of cooperation and dialogue between the two organisations. The agreement was sealed by KLRCA Advisory Board Member, Vinayak Pradhan and AFC's Acting General Secretary, Dato' Windsor John during a ceremony held at KLRCA's prestigious Sulaiman Building.

This occasion marked a significant milestone in the region's sporting and alternative dispute resolution landscape. The collaborative agreement signed is focused on establishing a basis upon which both AFC and the KLRCA may explore areas for co-operation in respect of the use of services provided by both parties. The agreement will also see the AFC and KLRCA jointly organising seminars, conferences and educational programmes on sporting dispute resolution.



_NEWS

KLRCAs Signs Memorandum of Understanding with SIDREC

15TH DECEMBER 2015

Kuala Lumpur, 15 December – The Kuala Lumpur Regional Centre for Arbitration (KLRCAs) and the Securities Industry Dispute Resolution Center (SIDREC) have signed a Memorandum of Understanding to strengthen and increase the degree of cooperation and dialogue between the two organisations. The agreement was sealed by KLRCAs's Director, Datuk Professor Sundra Rajoo and Chairman of SIDREC, Dato' Ranita Mohd Hussein during a ceremony held at KLRCAs's prestigious Sulaiman Building. Attending as the Guest of Honour was Dato' Dr. Nik Ramlah the Deputy Chief Executive of Securities Commission Malaysia.

The MoU signed is focused on establishing collaboration between the institutions to further their mutual objectives in the promotion of the use of alternate dispute resolution relating to capital market products and services disputes in Malaysia and the region.

The agreement will also see SIDREC set up a representative office at KLRCAs's premises to better facilitate the promotion of SIDREC's services and of any collaborative efforts with KLRCAs. This includes jointly organizing

seminars, conferences and educational programmes towards building awareness and capacity in specialised dispute resolution expertise for capital market disputes.

The Signing of the MoU was followed by a keynote speech by Mr. Shane Tregillis, Chief Ombudsman of the Financial Ombudsman Service Australia and a panel discussion on the increasing importance and need for a specialised alternative dispute resolution avenue for financial markets. Also attending as a special guest was the President of the Bar Council, Mr. Steven Thiruneelakandan.

Sujatha Sekhar Naik, Chief Executive Office of SIDREC commented, "We are through this mandate able to draw together our experience, understanding of regulatory expectations, of industry best practice together with an insight on challenges faced by both investors and our members, to provide an informed dispute resolution service – one that is without an attachment to the outcome and as such both independent and impartial.

Professor Datuk Sundra Rajoo, Director of KLRCAs added, "When organisations have similar goals at heart, it only makes sense to forge strategic collaborations and partnerships to further accelerate and elevate efforts towards a particular committed cause; which in this case is the betterment of the local and regional alternative dispute resolution platform relating to capital market products and services".

Dato Ranita Mohd Hussein, Chairman of SIDREC concluded, "In addition to our increased claim limit of RM250,000, SIDREC now provides mediation for higher claims for investors and members who agree to use its services". Therein lies the potential to look to the provision of specialised arbitration for capital market disputes. In exploring this, we are open, where appropriate, to working with partners such as KLRCAs, to leverage off the available expertise, without, of course, compromising the priorities of our role as mandated under the law".

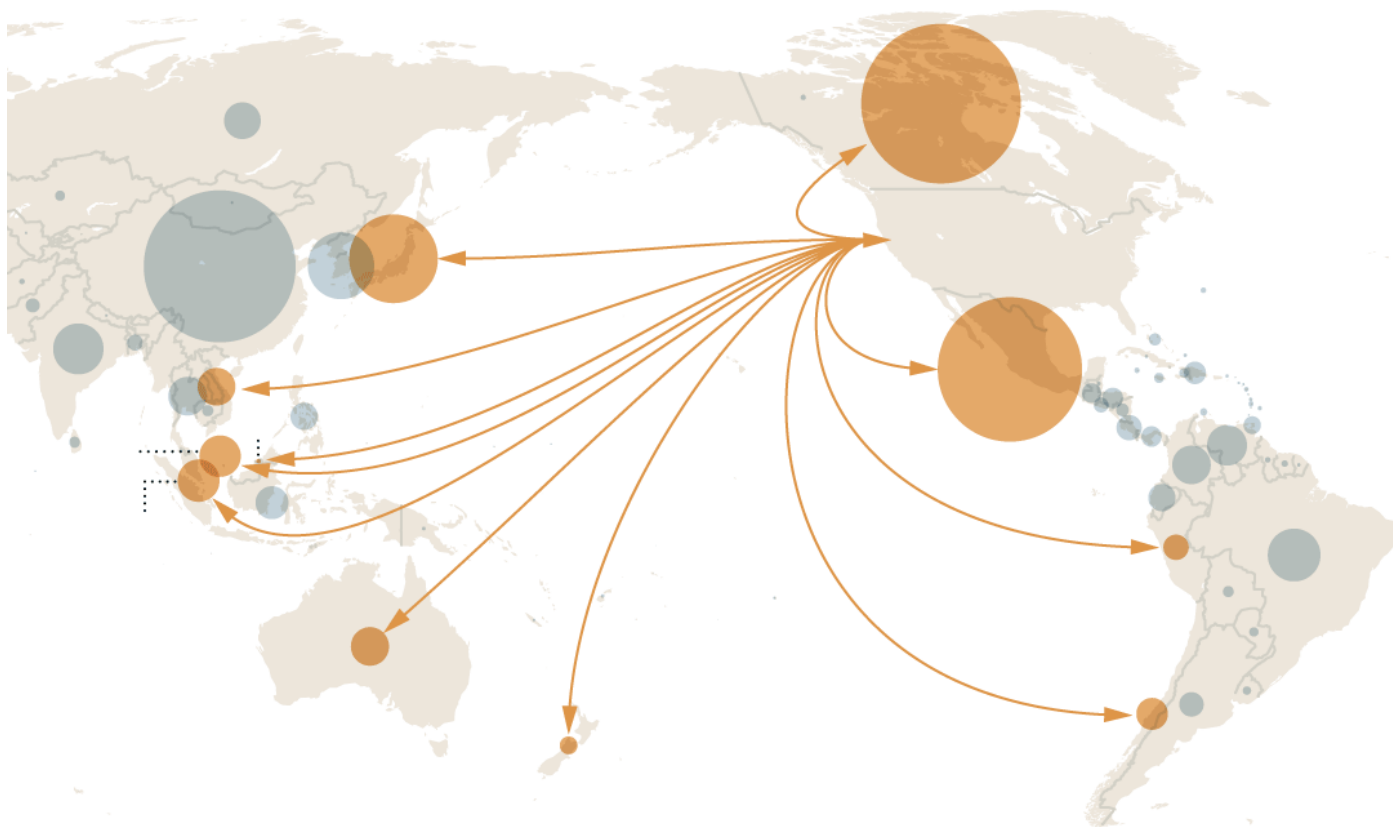
Mr. Shane Tregillis, in his keynote noted that "Recognition of alternative dispute resolution as a key element in the regulatory and consumer protection framework by global standard setting bodies is an important milestone in the development in financial sector alternative dispute resolution. I consider the development of specialist financial sector dispute resolution schemes to be one of the major regulatory and finance industry success stories over the last 20 years."



ISDS in the TPP Investment Chapter:

Mostly More of the Same

BY **DR LUKE NOTTAGE**, PROFESSOR OF COMPARATIVE AND TRANSNATIONAL BUSINESS LAW.
CO-DIRECTOR, AUSTRALIAN NETWORK FOR JAPANESE LAW (ANJEL). SYDNEY LAW SCHOOL



On 5 October the Trans-Pacific Partnership¹ (TPP) FTA was substantially agreed among 12 Asia-Pacific countries (including Malaysia, Australia, Japan and the US), and the lengthy text was released publicly on 5 November 2015. Commentators are now speculating on its prospects for ratification,² as well as pressure already for countries like China and Korea to join and/or accelerate negotiations for their Regional Comprehensive Partnership ("RCEP" or ASEAN+6) FTA in the region.³

There has also been considerable (and sometimes quite heated) media commentary on the TPP's investment chapter 9, especially investor-state dispute settlement (ISDS) protections.⁴

As outlined by Ioannis Konstantinidis in the previous KLRCA Newsletter,⁵ the ISDS alternative procedure to inter-state arbitration (itself found separately in Chapter 28 of the TPP, as in almost all investment treaties) emerged as a common extra option for foreign

investors to enforce their substantive rights⁶ if their home states did not wish to pursue a treaty claim on their behalf, for diplomatic, cost or other reasons. This mechanism has been seen as particularly important for credible commitments by developing or other countries with national legal systems perceived as not meeting international standards for protecting investors. ISDS provisions have gradually come to be accepted in treaties concluded in the Asian region, leading recently to more arbitration claims (albeit off a

1 <http://dfat.gov.au/trade/agreements/tpp/pages/trans-pacific-partnership-agreement-tpp.aspx>

2 <http://theconversation.com/as-asia-embraces-the-trans-pacific-partnership-isds-opposition-fluctuates-50979>

3 <http://www.eastasiaforum.org/2015/10/29/the-tpp-isnt-a-done-deal-yet/>

4 See eg <http://www.smh.com.au/federal-politics/political-news/australia-could-be-sued-for-billions-by-foreign-companies-for-new-laws-under-tpp-20151106-gksbjx.html>

5 "Effective Dispute Resolution Mechanisms" 19 KLRCA Newsletter 10-11 July-September 2015) at <http://klrca.org/downloads/newsletters/2015Q3newsletter.pdf>

6 For my preliminary analysis of core substantive protections offered in the TPP investment chapter, see http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp_investment.html (with a version also published in the December 2015 issue of ACICA News, via www.acica.org).

comparatively low base),⁷ as explained by Loretta Malintoppi in the previous Newsletter,⁸

The inclusion of ISDS in the TPP is not too surprising given the involvement already of a developing countries such as Vietnam, and even a middle-income country like Malaysia with a complicated political and legal system (both already subject to occasional investor-state arbitration claims). Incorporating ISDS is also explicable because the TPP aims to attract further partners. These include capital-importing developing countries like Indonesia, whose President recently declared that it “intends to join the TPP”,⁹ although this will be very difficult to achieve domestically and the country is still reviewing old BITs partly due to some recent arbitration claims – including from an Australian investor.¹⁰ Other potential candidates include capital-exporting countries like Korea, which pressed strongly for ISDS in bilateral FTAs – even with Australia and New Zealand.¹¹ China, emerging as a major exporter and importer of capital, has also come to favour ISDS protections. This is important because some already urge it to join a further expanded TPP¹² and because

China already is party to the RCEP FTA negotiations currently involving many existing TPP partners, including Australia and Malaysia.

However, the arguments are more finely balanced for including the ISDS option for treaty commitments between developed countries with strong and familiar national legal systems. Intriguingly, when the TPP is signed Australia and New Zealand proposed to exchange official side letters excluding its ISDS provisions as between themselves.¹³ They also obtained such a bilateral carve out in their FTA with ASEAN signed in 2009,¹⁴ but partly for the reason that that the two countries were then considering adding an Investment Protocol to their longstanding bilateral FTA for goods and services. That 2011 Protocol also ended up excluding ISDS, ostensibly because Australia and New Zealand have strong mutual trust and understanding of each other’s legal system. This argument does gain force in light of the conclusion in 2008 of a Trans-Tasman treaty on enforcing court judgments (and broader regulatory cooperation), in force from 2013 and unique among Asia-Pacific countries.¹⁵ Australia and New Zealand have also achieved remarkable economic integration and business law harmonisation in other respects, albeit mainly through non-treaty mechanisms.¹⁶

Australia also omitted ISDS in its bilateral FTA concluded with Malaysia in 2012, consistently with the Gillard Government’s Trade Policy Statement of April 2011¹⁷ – abandoned by the new Coalition Government after it won the general election on 7 September 2013, and reverted to including ISDS in treaties on a case-by-case assessment.¹⁸ However, omitting ISDS protection in the Malaysia-Australia FTA was largely symbolic since protection remained for respective countries’ investors under the ASEAN-Australia-NZ FTA.

By contrast, Australia does not propose any TPP side-letter with the US carving out ISDS, even though their bilateral FTA in 2004 also omitted ISDS. The official explanation given for the latter development was that both these countries also held great trust in each other’s national legal system (despite the *Loewen* case brought by a Canadian investor against the US around that time, where a tribunal chaired by a former Chief Justice of Australia sharply criticized an underlying Mississippi court procedure).¹⁹ Nor do there appear to be any other bilateral carve-outs of ISDS envisaged among TPP partners.

In terms of the ISDS procedures themselves, these also tend to follow the provisions in the US Model BIT and its FTAs from around 2004, which in turn have influenced the FTAs drafted by other TPP partners such as Australia.²⁰ For example, the TPP includes time limits for bringing claims (Art 9.20.1). It also has a now standard “fork in the road” provision (Art 9.20.2, intensified for four of the 12 countries through

7 Nottage, Luke R. and Weeramantry, Romesh, *Investment Arbitration for Japan and Asia: Five Perspectives on Law and Practice*. FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA, V. Bath and L. Nottage, eds., Routledge, pp. 25-52, 2011; Sydney Law School Research Paper No. 12/27. Available at SSRN: <http://ssrn.com/abstract=2041686>

8 “Is There an ‘Asian Way’ for Investor-State Dispute Resolution” 19 KLRCA Newsletter 12-20 (July-September 2015) at <http://klrca.org/downloads/newsletters/2015Q3newsletter.pdf>

9 <http://www.theguardian.com/world/2015/oct/27/indonesia-will-join-trans-pacific-partnership-jokowi-tells-obama>

10 Nottage, Luke R., *Do Many of Australia’s Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis of Planet Mining v Indonesia and Regional Implications* (April 14, 2014). *Transnational Dispute Management*, Vol. 12, No. 1, pp. 1-18, 2015; <http://ssrn.com/abstract=2424987>

11 Nottage, Luke R., *Investment Treaty Arbitration Policy in Australia, New Zealand – and Korea?* (August 13, 2015). *Journal of Arbitration Studies*, Vol. 25, No. 3, pp. 185-226, 2015; <http://ssrn.com/abstract=2643926>

12 <http://www.lowyinterpreter.org/post/2015/11/03/TPP-Australia-should-take-the-lead-to-bring-in-China-and-Indonesia.aspx>

13 <http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-new-zealand-investor-state-dispute-settlement-trade-remedies-and-transport-services.PDF>

14 Bath, Vivienne and Nottage, Luke R., *The ASEAN Comprehensive Investment Agreement and ‘ASEAN Plus’ – The Australia-New Zealand Free Trade Area (AANZFTA) and the PRC-ASEAN Investment Agreement* (September 26, 2013) in: *INTERNATIONAL INVESTMENT LAW: A HANDBOOK*, M. Bungenberg, J. Griebel, S.Hobe & A. Reinisch, eds., Nomos Verlagsgesellschaft: Germany, 2015; also at <http://ssrn.com/abstract=2331714>

15 <http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/D8A36F21714B92ACCA25748D0004C582>

16 Nottage, Luke R., *Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era* (October 4, 2011). Sydney Law School Research Paper No. 09/125; <http://ssrn.com/abstract=1509810>

17 Nottage, Luke R., *The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic’s View of Australia’s ‘Gillard Government Trade Policy Statement’* (June 10, 2011). *Transnational Dispute Management*; also at <http://ssrn.com/abstract=1860505>

18 <http://dfat.gov.au/trade/topics/pages/isds.aspx>

19 <http://www.state.gov/documents/organization/22094.pdf>

20 Nottage, Luke R. and Miles, Kate, ‘Back to the Future’ for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests (June 25, 2008). In L. Nottage & R. Garnett (eds), *‘International Arbitration in Australia’*, Federation Press: Sydney, 2010; *Journal of International Arbitration*, Vol. 26, No.1, pp. 25-58, 2009; <http://ssrn.com/abstract=1151167>



Annex 9-J) precluding situations as in the dispute brought by Philip Morris, whereby it claimed both before the High Court of Australia under constitutional law and (in 2011) before an ISDS tribunal under international treaty law.²¹

As in Australia's FTA with Korea (and to a somewhat lesser extent with China), Article 9.23 sets out extensive provisions for transparency in proceedings, including public hearings (still rare in WTO inter-state dispute resolution) and admission of *amicus curiae* briefs from relevant third parties. Article 9.22 requires arbitral tribunals to decide preliminary jurisdictional objections on a fast-track basis, and may award lawyer and other costs against the claimant after considering whether the claim was frivolous. (However, it does not have to award such costs, and nor is there a general "loser-pays" rule for costs as under the recent Canada-EU FTA: cf TPP Art 9.28.3).²² An (inter-state) Commission can issue an interpretation of a TPP provision that then binds the arbitral tribunal (Art 9.24.3).

However, there is some debate among commentators about whether such a Commission can make such a binding interpretation regarding a pending dispute,²³ and the China-Australia FTA

wording had helpfully clarified that it can. That FTA also adds an innovative provision, not found in the TPP (or any other FTA involving Australia) allowing a host state to issue a "public welfare notice" to the home state of the foreign investor, declaring that it invokes the (Article 9.11.4) general exception for public health measures etc. This triggers inter-state consultations and a requirement on the host state to publically announce its view on the home state's invocation of the exception.

Partly offsetting this omission in the TPP, it adds the option (in the General Exceptions chapter) of a host state precluding claims regarding tobacco control measures. More generally, the investment chapter adds that that the arbitral tribunal can only award limited damages if the foreign investor successfully claims that it was thwarted in attempting to make an initial investment, due to the host state violating substantive treaty commitments. The tribunal must also issue a draft award to the disputing parties for comment (Art 9.22.10), albeit not to the public or even the home state of the investor. Release of draft decisions is a feature of WTO inter-state dispute resolution, and is found already in Australia's FTA investment chapters with Chile (signed in 2008) and Korea.

However, the TPP does not establish an appellate review mechanism, to correct for errors of law (as opposed to procedure or jurisdiction) as under the WTO regime. There is only a commitment to consider such a mechanism if and when developed elsewhere for international investment disputes (Art 9.22.11). The EU is now expressing stronger interest, including in its ("TTIP") FTA negotiation with the US, where it

recently even mooted the possibility of an international investment court.²⁴ Indeed, the EU has already reportedly agreed on this sort of court (including appellate review for errors of law) in an agreement just reached with Vietnam,²⁵ despite the latter being also party to the TPP and its more traditional ISDS mechanism.

Article 9.21.6 further envisages that, before the TPP comes into force, member states will "provide guidance" on extending the Code of Conduct for arbitrators (already in Chapter 28 for inter-state arbitrations) to ISDS disputes, as well as "other relevant rules or guidelines on conflict of interest". The Australian government will presumably point to the Australia-China FTA, where such a Code of Conduct has already been set out for ISDS arbitrators, and reference may also be made to further proposals now being raised in the EU and beyond.

In addition, the TPP allows ISDS claims not only for breaches of the substantive commitments set out in the treaty itself (as in the Australia-China FTA), but also where the host state has contravened its "investment authorization" or specified types of "investment agreement" relied upon by the harmed foreign investor. The latter scenarios are also covered in the Korea-Australia FTA, but the TPP goes on to expressly allow the host state then to raise a related counterclaim or set-off against the foreign investor (Art 9.18.2). Annex 9-L also restricts ISDS proceedings if certain other arbitration procedures have been agreed between the foreign investor and the host state

21 <https://www.ag.gov.au/tobaccoplainpackaging>

22 <http://ec.europa.eu/trade/policy/in-focus/ceta/>

23 See generally Burch, Micah and Nottage, Luke R. and Williams, Brett G., *Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century* (May 24, 2012). University of New South Wales Law Journal, Vol. 35, No. 3, pp. 1013-1040, also at SSRN: <http://ssrn.com/abstract=2065636>; Ishikawa, Tomoko, "Keeping Interpretation in Investment Treaty Arbitration 'on Track': The Role of States Parties" TDM 1 (2014) www.transnational-dispute-management.com/article.asp?key=2048

24 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364>

25 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409>



relating to their investment agreement. Oddly, however, this includes arbitration agreed under ICC or LCIA Rules, but not the Rules of major arbitral institutions in TPP states such as KLRCA.

Finally, each member state commits to “encouraging” its enterprises to “voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility” endorsed or supported by the relevant state. This could extend, for example, to (local and foreign) retailers in Australia with respect to adopting the Accord on Fire and Building Safety in Bangladesh, which then locks firms to a separate enforcement regime underpinned by international arbitration law.²⁶

Nonetheless, it remains to be seen whether all this is enough to assuage critics of ISDS and allow ratification of the TPP in Australia, the US itself and (arguably to a lesser extent) other TPP partners. The investment chapter’s substantive protections also largely track existing FTAs concluded by and among TPP partners. But this will provide little comfort to those who remain firmly opposed to any form of ISDS,²⁷ or concerned more broadly about cross-border investment.²⁸

ABOUT THE AUTHOR

Dr Luke Nottage is Professor of Comparative and Transnational Business Law at Sydney Law School, specialising in arbitration, contract law, consumer product safety law and corporate governance, with a particular interest in Japan and the Asia-Pacific. He is founding Co-Director of the Australian Network for Japanese Law (ANJeL) and Associate Director of the Centre for Asian and Pacific Law at the University of Sydney. He is also Managing Director of Japanese Law Links Pty Ltd (www.japaneselawlinks.com).

Luke has or had executive roles in the Australia-Japan Society (NSW), the Law Council of Australia, the Australian Centre for International Commercial Arbitration (ACICA), and the Asia-Pacific Forum for International Arbitration. He has contributed to several looseleaf commentaries and made numerous media appearances and public Submissions to the Australian government, especially regarding arbitration and consumer law reform. Luke was admitted as a barrister and solicitor in New Zealand in 1994 and in NSW in 2001. He has consulted for law firms world-wide as well as ASEAN, the European Commission, OECD, UNCTAD, UNDP and the Japanese Government. Luke is also a Rules committee member of ACICA and on the Panel of Arbitrators for the BAC, JCAA, KCAB, KLRCA and SCIA.

Luke studied at Kyoto University (LLM) and Victoria University of Wellington (BCA, LLB, PhD), and first taught at the latter and then Kyushu University Law Faculty, before arriving at the University of Sydney in 2001. He has held fellowships at other leading institutions in Japan and Australia as well as Germany, Italy and Canada. Luke’s publications include *Product Safety and Liability Law in Japan* (Routledge, 2004), *Corporate Governance in the 21st Century: Japan’s Gradual Transformation* (Elgar, 2008; lead-edited with Leon Wolff and Kent Anderson), *International Arbitration in Australia* (Federation Press, 2010; lead-edited with Richard Garnett), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011; edited with Vivienne Bath), *Consumer Law and Policy in Australia and New Zealand* (Federation Press, 2013; edited with Justin Malbon), *Asia-Pacific Disaster Management: Comparative and Socio-Legal Perspectives* (Springer, 2014; edited with Simon Butt and Hitoshi Nasu), *Who Rules Japan? Popular Participation in the Japanese Legal Process* (Elgar, 2015; edited with Leon Wolff and Kent Anderson), *ASEAN Product Liability and Consumer Product Safety Law* (Winyuchon, 2016; edited with Sakda Thanitcul); and several other books. Luke has also published over two hundred chapters and refereed or other articles, mainly in English and Japanese.

²⁶ <http://bangladeshaccord.org/about/>

²⁷ Cf eg Nottage, Luke R., ‘The ‘Anti-ISDS Bill’ Before the Senate: What Future for Investor-State Arbitration in Australia?’ (August 20, 2014) International Trade and Business Law Review, Vol. XVIII, pp. 245-293, 2015; <http://ssrn.com/abstract=2483610>

²⁸ Cf eg Nottage, Luke R., ‘The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration in Australia’ (November 3, 2015) Sydney Law School Research Paper No. 15/97; <http://ssrn.com/abstract=2685941>.

KHAC

2016

HIGHLIGHT

KLIRCA International Investment Arbitration Conference 2016



10-11^{mar}
KLIRCA

The inaugural KLIRCA International Investment Arbitration Conference (KIIAC 2016) will take place this coming March 2016, initiated and hosted by the KLIRCA in collaboration with the Institute of Malaysian and International Studies (IKMAS)

Here's everything you need to know about the biggest international investment arbitration event to take place in Asia in 2016.

The Kuala Lumpur Regional Centre for Arbitration (**KLRCA**) is proud to organise in collaboration with the Institute of Malaysian and International Studies (**IKMAS**) an international conference on investment arbitration on 10 and 11 March 2016 (**KIIAC 2016**).

The keynote speech will be delivered by the highly respected academic and arbitrator **Brigitte Stern** (France), Professor Emeritus of International Law at the **Sorbonne Law School** in Paris (*Université Paris 1 Panthéon-Sorbonne*).

Since their emergence, investor-State dispute settlement (**ISDS**) mechanisms have met with a resounding success. One of the most striking testaments to this success is the steady increase in the number of investor-State arbitrations over the past several years. However, over the past decade, an increasing sceptical attitude of States towards these mechanisms is palpable.

The Conference – the first of its kind in Asia – will be a platform for all participants to engage in rich dialogues and knowledge exchange, which are reflected in the extensive Conference programme that includes international and national keynote and plenary speakers addressing complex issues raised by investor-State arbitration, with a particular focus on the Asia Pacific region, following the signing of the Trans-Pacific Partnership Agreement (**TPPA**).

The Conference will provide a range of informative and deliberative sessions of the highest quality, to attract an audience from around the region and beyond.

KIIAC 2016 is supported, *inter alia*, by International Centre for Settlement of Investment Disputes (**ICSID**), Regional Centre for Asia and the Pacific of United Nations Commission on International Trade Law (**UNCITRAL**), the **School of International Arbitration – Queen Mary University of London**, the Chartered Institute of Arbitrators (**CI Arb**) and the Association for International Arbitration (**AIA**).

The Keynote Speaker – Professor Brigitte Stern



Brigitte Stern is Professor Emeritus at the **Sorbonne Law School in Paris** (*Université Paris 1 Panthéon-Sorbonne*). She was also a Member and the Vice-President of the United Nations Administrative Tribunal (**UNAT**) from 2000 to 2009.

She has served and serves as a Consultant and Expert for international organisations. She is active in international dispute settlement, acting as Counsel before the International Court of Justice and as Arbitrator (Sole Arbitrator, Member or President) in numerous ICSID, ICC, NAFTA, Energy Charter Treaty and UNCITRAL arbitrations.

She holds a Master's degree and a JD from the University of Strasbourg, a Master of Comparative Jurisprudence (**MCJ**) from New-York University, and a PhD from the University of Paris.

She passed the Paris Bar exam and is "Agréée" of the Law Faculties (1970). She has published many books, among others, *Le préjudice dans la théorie de la responsabilité internationale*, Paris, Pedone, 1973, *20 ans de jurisprudence de la Cour internationale de Justice*, 1975-1995, La Haye, Nijhoff, 1998, *La succession d'Etats*, Lecture at The Hague Academy of international law, RCADI, tome 262, La Haye, Kluwer, 2000, as well as numerous articles.

The Programme

10TH MARCH 2016

5.00pm
Event Registration

6.00pm
Welcome Speech by
Datuk Professor Sundra Rajoo,
Director of the Kuala Lumpur Regional
Centre for Arbitration (KLRCA)



6.10pm
Opening Address by His Highness Prince Dr Bandar
bin Salman bin Mohammed Al Saud,
Honorary President of the Gulf Arab States Lawyers Union

6.20pm
Opening Speech by Honourable
Puan Hajah Nancy Binti Shukri,
Minister in the Prime Minister's Department



6.30pm
Keynote Speech by Brigitte Stern,
Professor Emeritus at the Sorbonne Law School
(Université Paris 1 Panthéon-Sorbonne)

7.15pm
KIIAC 2016 Cocktail Reception

10.00pm
End of Programme

KIIAC 2016 will be attended by experienced lawyers, eminent academics, government executives, decision makers, and key policy makers from leading law firms, universities, regional and global government organisations, ministries, agencies, the oil and gas industry, the banking industry etc. We look forward to welcoming you to KIIAC 2016.

For more information, please log on to www.klrca.org (Featured Event)



11TH MARCH 2016

TIME	PROGRAMME
9.00am	Opening Speech by Tan Sri Dato' Cecil Abraham, KLRCA Advisory Board Member, Founding Partner of Cecil Abraham and Partners
9.15am	<p>SESSION 1: PROMOTING INVESTMENTS AND ADMINISTERING INVESTMENT DISPUTES – TALES FROM REGIONAL AND INTERNATIONAL INSTITUTIONS</p> <p>Moderator:</p> <p>Datuk Professor Sundra Rajoo, Director of the Kuala Lumpur Regional Centre for Arbitration (KLRCA)</p> <p>Speakers:</p> <ul style="list-style-type: none"> + the International Centre for Settlement of Investment Disputes (ICSID) “ICSID’s 50th Anniversary – Progress and Prospects” + Fedelma Claire Smith, Legal Counsel at the Permanent Court of Arbitration(PCA) “Provisional Measures in Investor-State Arbitration: PCA’s Experience” + Abhinav Bhushan, Deputy Counsel at the International Court of Arbitration(ICC) “How Established Is Investment Arbitration in Asia?” + João Ribeiro, Head, Regional Centre for Asia and the Pacific of United Nations Commission on International Trade Law (UNCITRAL) “The UNCITRAL Rules on Transparency” + Representative from the Association of Southeast Asian Nations (ASEAN) “Dispute Settlement in the 2009 ASEAN Comprehensive Investment Agreement” + Camilla Godman, Regional Director for the Far East/Australasia of the Chartered Institute of Arbitrators (CIArb) “ISDS in the TTIP: EU’s proposed “Investment Court System” + Wolf von Kumberg, Full Member of the Arbitration, Mediation and Dispute Board Chambers (ArbDB) “Mediation of Investor-State Disputes”
11.15am	Morning Networking Break
11.30am	<p>SESSION 2: INVESTMENT ARBITRATION – THE PRACTITIONER’S POINT OF VIEW</p> <p>Moderator:</p> <p>Vinayak P. Pradhan, KLRCA Advisory Board Member, Skrine</p> <p>Speakers:</p> <ul style="list-style-type: none"> + Andrew Pullen, Counsel, Allen and Overy (Singapore) “Investment Arbitration and Unmeritorious Claims” + Olga Boltenko, Senior Associate, Clifford Chance (Singapore) “Investment Protection in the Oil and Gas Sector” + Loretta Malintoppi, Of Counsel, Eversheds (Singapore) “ISDS under the TPPA” + Constantinos Salonidis, Senior Associate, Foley Hoag (Washington D.C.) “Jurisdiction Ratione Temporis in Investment Treaty Arbitration”
12.30pm	Networking Lunch Break

1.45pm	SESSION 2: INVESTMENT ARBITRATION – THE PRACTITIONER’S POINT OF VIEW (con’t) Moderator: Ioannis Konstantinidis, Head of Investment Treaty Arbitration and International Law, KLRCA Speakers: + Robert Kirkness, Senior Associate, Freshfields Bruckhaus Deringer (Singapore) “Costs and Damages in Investment Treaty Arbitration” + Alastair Henderson, Managing Partner, Head of international arbitration practice, Southeast Asia, Herbert Smith Freehills (Singapore) “Enforcement of Investment Arbitration Awards in the Asia Pacific Region” + Paul Tan, Partner, Rajah & Tann (Singapore) “Renegotiating International Investment Agreements: Recent developments” + Sudharsanan Thillainathan, Partner, Shook Lin & Bok (Kuala Lumpur) “Ethical Issues in Investment Arbitration: Myth or Reality?” + Robert Volterra, Partner, Volterra Fietta (London) “Recent Developments in Investor-State Dispute Settlement” + Thayanathan Baskaran, Partner, Zul Rafique & Partners (Kuala Lumpur) “State-Owned Enterprises and Investment Arbitration”	
4.15pm	Evening Networking Break	
4.30pm	SESSION 3: DOCTRINAL DEVELOPMENTS IN INVESTMENT ARBITRATION Moderator: Brigitte Stern, Professor Emeritus at the Sorbonne Law School (Université Paris 1 Panthéon-Sorbonne) Speakers: + Geneviève Bastid Burdeau, Professor Emeritus at the Sorbonne Law School (Université Paris 1 Panthéon-Sorbonne), Member of the Permanent Court of Arbitration (PCA), former Secretary General of the Hague Academy of International Law, Member of the Institut de Droit international “The Institut de Droit international and Investment Treaty Arbitration” + James Claxton, Professor at Kobe University “Counterclaims in Investor-State Arbitration” + Jean Ho Qing, Assistant Professor at the National University of Singapore “The Evolution of Investment Contract Protection” + Sufian Jusoh, Associate Professor at the Institute of Malaysian and International Studies (IKMAS) “Preparing for the Implementation of the TPPA” + Norfadhilah Mohd Ali, Senior Lecturer at the Islamic Science University of Malaysia “Investment Arbitration and Shariah Law” + Loukas Mistelis, Professor at the School of International Arbitration – Queen Mary University of London “The Concept of Public Policy in Investment Arbitration” + James Upcher, Lecturer at Newcastle University “The Connection between Rights and Remedies in Provisional Measures”.	
6.45pm	Closing	
7.00pm	End of Programme	



HIGHLIGHT

Evolution of the formal requirements for investment treaty protection of “investments” in Malaysia

BY LUCY REED & KENNETH WONG, FRESHFIELDS BRUCKHAUS DERINGER

Editorial Note:

The KLRCA introduced a new talk series in August 2015 with a focused look into the world of investor-state dispute resolution. Headlining the second edition of this talk series was Lucy Reed.

The talk entitled — In The Seat: 60 Minutes with Lucy Reed, “Investment Treaty Arbitration: Legitimate And Not-So-Legitimate Concerns”, was held on the 13th of October 2015 at KLRCA’s Seminar Room.

In this quarter’s newsletter, Lucy Reed and Kenneth Wong of Freshfields Bruckhaus Deringer share their views on the evolution of the formal requirements for investment treaty protection of “investments” in Malaysia.

INTRODUCTION

In *Philippe Gruslin v. Malaysia* (ICSID Case No. ARB/99/3, Award, 27 November 2000), the first fully-argued¹ ICSID case involving Malaysia as a respondent, the Tribunal declined jurisdiction on the ground that the claimant’s investment in securities listed on the KL Stock Exchange did not constitute an “investment” within the meaning of the bilateral investment treaty (**BIT**) between the Belgo-Luxembourg Economic Union and Malaysia as it was not an “approved project” classified as such by the appropriate Ministry in Malaysia. Signed in 1979, the Belgium-Luxembourg-Malaysia BIT was one of the earliest investment treaties that Malaysia had entered into.

Since then, much has happened with Malaysia’s investment treaty practice alongside the rapid development of its economy. This article surveys the evolution of Malaysia’s investment treaty practice in terms of the formal requirements to be fulfilled for foreign investments to benefit from investment treaty protections, assesses the current situation, and suggests recommendations related to those formal requirements so as to make Malaysia even more attractive as a destination for foreign investment.

¹ The very first ICSID case filed against Malaysia was registered in January 1994. It involved the exact same claimant under precisely the same treaty, but it was settled and the proceedings were discontinued on 24 April 1996.

Much has happened with Malaysia's investment treaty practice alongside the rapid development of its economy

THE EARLY TREATIES: SPECIFIC "APPROVED PROJECTS"

Historically, states first entered into BITs with the reciprocal intentions of, on the one hand, promoting investments by their nationals that were approved by the host country, which in turn promised to provide adequate security and protection for investments that would enhance its capacity to expand its national economy.² This intention is reflected in the preamble to the world's first known BIT, signed between Germany and Pakistan in November 1959, which refers to the recognition that *"an understanding reached between the two States is likely to promote investment, encourage private industrial and financial enterprise and to increase the prosperity of both the States"*. Malaysia's very first BIT, which was signed with Germany one year later in December 1960, contains similar preamble language, recognising that *"a contractual protection of such investments is likely to promote private business initiative and to increase the prosperity of both nations"*.

In particular, it was intended that BITs would foster the implementation of the national development plans of developing countries. Under the Germany-Pakistan BIT, to take an early example, Pakistan limited its obligation under Article 1(1) to endeavour to admit investments of German investors by granting necessary permissions *"with due regard also to their published plans and policies"*, presumably a reference to how the German investors' published plans and policies cohere with Pakistan's national development plan. It is thus not surprising that, particularly in the case of the early BITs, the relatively less economically developed of the two treaty parties would seek to assert some measure of control and oversight over the foreign investments that would be admitted into and protected within its territory in accordance with its BITs, so as to achieve its national development goals.

There are many ways in which BIT provisions can be drafted to preserve for one or both parties the desired degree of control and oversight over the foreign investments that would be admitted and protected under the BITs. One way is to restrict the scope of protections under the BIT to cover only those investments for which *specific approval* has been granted by the relevant authorities of the host state. This was the means by which Pakistan restricted the scope of protection under the Germany-Pakistan BIT. By way of an Exchange of Letters signed on the same day as the Germany-Pakistan BIT, the parties recorded their understanding that the term *"investment"* in respect of Pakistan refers to investments *"approved by the Government agencies authorizing such investments"*, and that, significantly, if *"at any time later free investment is allowed in Pakistan, the term 'investment' will cover all investments made in the territory of Pakistan"*.

Perhaps drawing inspiration from the Exchange of Letters between Germany and Pakistan, the Germany-Malaysia BIT also restricted the term *"investment"* in respect of investments in the territory of Malaysia (then known as the Federation of Malaya) to *"all investments made in projects classified by the appropriate*

Ministry of the Federation of Malaya in accordance with its legislation and administrative practice as an 'approved project'." This was the model adopted in each of the 13 Malaysia BITs signed between December 1960 and January 1992, for which the official English texts are publicly available.³

One of these 13 BITs is the UK-Malaysia BIT, signed in London on 21 May 1981. In the Respondent's Comments on the Issue of "Investment" Within the Meaning of Article 25(1) of the ICSID Convention filed in relation to *Malaysian Historical Salvors, Sdn. Bhd. v. The Government of Malaysia* (ICSID Case No. ARB/05/1), which was an investment dispute under the UK-Malaysia BIT, Malaysia explained that by virtue of the mechanism of the classification of *"approved project"*, the host country reserved the right to screen the establishment of individual investments. This way, the host country could exclude any specific investment. It ensured that *"only those investments that have been approved by the host country are entitled to protection under the investment treaty"*, and approval of an investment *"signifies, in principle, conformity to the host country's development goals"*. Further, Malaysia drew attention to the fact that the UK-Malaysia BIT was concluded in 1981, at a time when Malaysia was in need of foreign direct investment and long term capital investments in fixed assets in labour-intensive manufacturing and other manufacturing-related infrastructure, and thus wanted to *"create favourable conditions for greater investments in these sectors"*.⁴

² See, e.g., Professor Sompong Sucharitkul, "Fifty Years of Bilateral Investment Treaties with Germany: The Experience from Thailand's Perspective" in *ICSID Review* (2009) 24(2): 333-338, at 335.

³ These are Malaysia's BITs with (1) Germany in 1960; (2) Netherlands in 1971; (3) Sweden in 1979; (4) Belgium-Luxembourg Economic Union in 1979; (5) the United Kingdom in 1981; (6) Norway in 1984; (7) Austria in 1985; (8) Finland in 1985; (9) the Republic of Korea in 1988; (10) the People's Republic of China in 1988; (11) the United Arab Emirates in 1991; (12) Denmark in 1992; and (13) Viet Nam in 1992. The authors were not able to find official English texts of Malaysia's BITs with France, Switzerland, Sri Lanka and Italy, although these were signed in the same period as the other 13 BITs identified here.

⁴ See *Malaysian Historical Salvors, Sdn. Bhd. v. The Government of Malaysia* (ICSID Case No. ARB/05/1, Respondent's Comments on the issue of "Investment" Within the Meaning of Article 25(1) of the ICSID Convention, 22 March 2007), at paras 20 – 21.



This means of restricting the foreign investments to which investment treaty protections would apply was similarly adopted in the 1987 ASEAN Agreement on the Promotion and Protection of Investments (the **1987 ASEAN IGA**), to which Malaysia is a State Party, being an ASEAN Member State. Under Article II, the 1987 ASEAN IGA applies only to investments that are “specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement”. Where investments are made prior to its entry into force, the 1987 ASEAN IGA shall also apply to such investments provided they are “specifically approved in writing and registered by the host country and upon such conditions as it deems for purposes of this Agreement subsequent to its entry into force”. In *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar* (ASEAN I.D. Case No. ARB/01/1, Award, 31 March 2003), the Tribunal noted that the requirement of specific approval and registration already existed under the legislation of certain parties to the 1987 ASEAN IGA, “especially those with centrally-managed economies”.⁵ This was the situation in Myanmar where no foreign investment could be made without specific approval of the Government of Myanmar acting through the Foreign Investment Commission under the Foreign Investment Law. In that case, the Tribunal declined jurisdiction because the claimant’s investment, most of which effectively had been made before 23 July 1997, had not been specifically approved in writing by Myanmar subsequent to that date, when the 1987 ASEAN IGA entered into force for Myanmar.

⁵ See *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar* (ASEAN I.D. Case No. ARB/01/1, Award, 31 March 2003) at para 58.

THE MIDDLE TREATIES: COMPLIANCE WITH LOCAL LAWS, REGULATIONS AND NATIONAL POLICIES

Apart from the requirement of specific approval in writing, another common means of limiting the scope of protections under investment treaties is to define “investments” as those which have been made “in accordance with the laws, regulations and national policies” of the host country.⁶ This was the means adopted in the 18 BITs that Malaysia entered into between February 1993 and October 2000, for which the official English texts are publicly available,⁷ as well as the Investment Chapter of the Agreement between Pakistan and Malaysia for a Closer Economic Partnership signed in November 2007. These investment treaties do not require covered investments to be made in “approved projects”, even though foreign investments are still subject to review and approval in Malaysia. As a broad generalisation, in contrast with the

more economically developed treaty partners with which Malaysia entered into BITs between 1960 and 1992,⁸ Malaysia’s treaty partners between 1993 and 2000 were at a stage of economic development comparable to Malaysia’s at the time they entered into the BITs with Malaysia.⁹

Investment arbitration tribunals have interpreted this requirement of conformity with the laws, regulations and national policies of the host country as directed at the validity of the investment, the aim of which is to prevent the investment treaty from “protecting investments that should not be protected, particularly because they would be illegal”.¹⁰ This requirement has not been interpreted to mean that the term “investment” under the investment treaty should be defined according to the host country’s local laws and regulations. Thus, it appears that under the BITs that incorporate this requirement, a foreign investment need not be affirmatively approved in writing or made in projects classified by the appropriate Malaysian Ministry as “approved projects” in order to benefit

⁶ See, e.g., *Inceysa Vallisoletgana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26, Award, 2 August 2006), at para 186.

⁷ These are Malaysia’s BITs with (1) Hungary in 1993; (2) Albania in 1994; (3) Jordan in 1995; (4) Bangladesh in 1994; (5) Bosnia and Herzegovina in 1994; (6) Croatia in 1994; (7) Pakistan in 1995; (8) Mongolia in 1995; (9) India in 1995; (10) Romania in 1996; (11) the Czech Republic in 1996; (12) Ghana in 1996; (13) Egypt in 1997; (14) Macedonia in 1997; (15) Turkey in 1998; (16) Lebanon in 1998; (17) Ethiopia in 1998; and (18) Saudi Arabia in 2000. The authors were not able to find official English texts of Malaysia’s BITs with Chile, Poland, Indonesia, Argentina, Spain, Uruguay, Peru, Guinea, Uzbekistan, Cuba, the Democratic People’s Republic of Korea, Burkina Faso, Morocco and Iran, although these were signed around the same time as the other 18 BITs identified here.

⁸ See note 3, above.

⁹ These include countries such as Hungary, Albania, Jordan, Bangladesh, Bosnia and Herzegovina, Croatia, Pakistan, Mongolia, India, Romania, the Czech Republic, Ghana, Egypt, Macedonia, Turkey and Ethiopia.

¹⁰ See, e.g., *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001) at para 46; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005) at para 109; and *Inceysa Vallisoletgana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26, Award, 2 August 2006), at para 187.

from the investment protections under those BITs, provided the investments are not prohibited under Malaysia's local laws and regulations.

Another way of drafting an investment treaty to limit the scope of investment protections is to preclude an investor whose investments are not made in compliance with the laws and regulations of the host country (which are not inconsistent with the investment treaty) from submitting an investment dispute to binding arbitration or other dispute settlement procedures under the investment treaty. This is the case in the Investment Chapter of the Japan-Malaysia Economic Partnership Agreement, which does not otherwise restrict the definition of "investment" covered by the Investment Chapter.

In 2009, the 1987 ASEAN IGA was revised and replaced by the ASEAN Comprehensive Investment Agreement (the **ACIA**). Under Article 4(a) of the ACIA, "covered investment" is defined as an investment that "*has been admitted according to [the host country's] laws, regulations and national policies, and where applicable, specifically approved in writing by the competent authority*". In *Yaung Chi Oo Trading v. Myanmar*, the Tribunal observed that a State Party to the 1987 ASEAN IGA could create a separate register of protected investments for the purposes of the 1987 ASEAN IGA, in addition to or in lieu of approval under its internal law, or at the least notify the ASEAN Secretariat of any special procedure. Yet, Myanmar had done none of these things. Thus, the Tribunal held that if a State Party unequivocally and without reservation approves in writing a foreign investment proposal under its internal law, that investment must be taken to be registered and approved also for the purposes of the 1987 ASEAN IGA.¹¹ Perhaps as a reaction to the Tribunal's observations in *Yaung Chi Oo Trading*, the ACIA includes an Annex 1 (Approval in Writing), which specifies the procedures relating to specific

approval in writing for the purpose of investment protection under the ACIA. These procedures are as follows:

Where specific approval in writing is required for covered investments by a Member State's domestic laws, regulations and national policies, that Member State shall:

- (a) inform all the other Member States through the ASEAN Secretariat of the contact details of its competent authority responsible for granting such approval;
- (b) in the case of an incomplete application, identify and notify the applicant in writing within 1 month from the date of receipt of such application of all the additional information that is required;
- (c) inform the applicant in writing that the investment has been specifically approved or denied within 4 months from the date of receipt of complete application by the competent authority; and
- (d) in the case an application is denied, inform the applicant in writing of the reasons for such denial. The applicant shall have the opportunity of submitting, at that applicant's discretion, a new application.

Based on the model of the ACIA, the definition of "covered investment" under Article 1(c) of the ASEAN-Korea Investment Agreement signed in June 2009 is identical in all material respects to that under Article 4(a) of the ACIA, including a reference to Annex 1 (Approval in Writing).

However, unlike the ACIA and the ASEAN-Korea Investment Agreement, two other investment treaties signed in 2009 between ASEAN and major trading partners do not incorporate an option to require "specific approval in writing" in the definition of "covered investments".

First, under Article 2(a) of the Investment Chapter of the ASEAN-Australia-New Zealand FTA (**AANZFTA**) signed in February 2009, "covered investment" is defined as an investment that "*has been admitted by the host Party, subject to its relevant laws, regulations and policies*". A footnote to this definition provides that for greater certainty: (a) in the case of Thailand, protection under this Chapter shall be accorded to covered investments that have been specifically approved in writing for protection by the competent authorities; and (b) in the case of Viet Nam, "has been admitted" means "has been specifically registered or approved in writing, as the case may be". No such qualification has been entered in respect of Malaysia.



¹¹ See *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar* (ASEAN I.D. Case No. ARB/01/1, Award, 31 March 2003) at para 59.



Second, under the ASEAN-China Investment Agreement signed in August 2009, the term “investment” is defined to mean every kind of asset invested by the investors of a Party “in accordance with the relevant laws, regulations and policies of another Party”. Under Article 3(3), Thailand qualified that the ASEAN-China Investment Agreement shall apply only in cases where the investment in the territory of Thailand has been admitted and specifically approved in writing for protection by its competent authorities (the name and contact details of which shall be informed to the other Parties through the ASEAN Secretariat), in accordance with its domestic laws, regulations and policies. No similar qualification is entered in the case of Viet Nam, unlike under the ASEAN-Australia-New Zealand FTA. Nor is there any such qualification in the case of Malaysia under the ASEAN-China Investment Agreement.

Perhaps not surprisingly, the Investment Chapters of the FTAs that Malaysia entered into with New Zealand and Australia in October 2009 and May 2012, respectively, define “investment” in terms similar to those in the AANZFTA. Under both the Malaysia-New Zealand FTA and the Malaysia-Australia FTA, “covered investment” is defined as an investment that “has been admitted by the former Party, subject to its relevant laws, regulations and policies”. Just as under the AANZFTA Investment Chapter, the Malaysia-New Zealand and Malaysia-Australia FTAs do not include any requirement for investments in the territory of Malaysia to be specifically approved in writing to be covered by their Investment Chapters.

THE LATEST TREATIES: HAVING THE CHARACTERISTICS OF AN INVESTMENT

In a slight variation from Malaysia’s previous investment treaty practice, the Investment Chapter of the Malaysia-India FTA signed in February 2011 employed a characteristic-based definition of “investments”. Thus, under Article 10.2(d), the term “investments” is defined not only as “every kind of asset ... invested in accordance with the latter Party’s laws, regulations and national policies” (so far, consistent with Malaysia’s previous investment treaty practice), but also “has the characteristics of an investment, such as the commitment of capital, the expectation of gain or profit, or the assumption of risk”.

Similar language found its way into the ASEAN-India Investment Agreement, which was signed in November 2013 but has not yet entered into force. Under Article 2(e), “investment” is defined as “every kind of asset ... that has the characteristics of an investment, including such characteristics as the commitment of capital, the expectation of gain or profit, or the assumption of risk”. A footnote to this definition makes it clear that the definition of “investment” shall be read in accordance with subparagraph 1(b) of Article 1 (Scope), which provides that the ASEAN-India Investment Agreement shall apply to investment that “where applicable, has been admitted by that Party, subject to its relevant laws, regulations and policies”. In the case of Thailand, protection under this agreement shall be accorded to investments that

have been “specifically approved in writing for protection by the competent authorities”. In the case of Cambodia and Viet Nam, “has been admitted” means “has been specifically registered or approved in writing, as the case may be”. No similar qualification is entered in respect of investments in Malaysia.

Interestingly, Malaysia is among the States Parties to the prospective Trans-Pacific Partnership (TPP) that have agreed on a similar characteristic-based definition of “investment”. Under Article 9.1, “investment” means every asset that “has the characteristics of an investment, including such characteristics as the commitment of capital, the expectation of gain or profit, or the assumption of risk”. In order for an investment to be covered under the TPP, there is no requirement that an investment be admitted in accordance with or subject to a State Party’s laws, regulations and policies. Nor is there a requirement that an investment has to be specifically registered or approved in writing to be covered by the TPP investment protections. This is consistent with Malaysia’s practice in relation to its most recent investment treaties, namely the AANZFTA, the Malaysia-Australia FTA, the Malaysia-New Zealand FTA, the ASEAN-China Investment Agreement, the Malaysia-India FTA and the ASEAN-India Investment Agreement.

WHERE MALAYSIA STANDS NOW AND POSSIBLE FUTURE DIRECTIONS

The survey of Malaysia's investment treaty practice above shows that Malaysia has taken bold steps in moving away from the requirement in its earliest BITs that protected foreign investment be made in projects classified by the appropriate Ministry as an *"approved project"*. Beginning in the early to mid 1990s, Malaysia has required instead in its investment treaties that covered investments be made *"in accordance with"* Malaysia's laws, regulations and national policies. It thus progressed from positive selection of certain preferred foreign investments in projects classified as *"approved projects"* (seemingly on a case-by-case basis) to which the promotion and protections under its investment treaties would be offered, to negative filtering of foreign investments that did not comply with Malaysia's laws, regulations and national policies, to which investment treaty protections would not apply. This development in Malaysia's investment treaty practice is clear from the absence of any qualification in respect of investments in Malaysia under its most recent investment treaties, including the AANZFTA, the ASEAN-China Investment Agreement and the ASEAN-India Investment Agreement. (In contrast, Thailand has consistently qualified in these same investment treaties that in the case of investments in its territory, only investments that have been *"specifically approved in writing for protection by the competent authorities"* would be accorded protection.) As a sign of further maturity in its investment treaty practice, as an aspect of its prospective membership of the TPP, Malaysia has agreed to accord investment protections under the TPP Investment Chapter to foreign investments that have the characteristics of an investment, without any requirement for the investments to be made in *"approved projects"* or in compliance with its laws, regulations and national policies.

This evolution in Malaysia's investment treaty practice appears to have taken place in tandem with its liberalisation of its investment regulatory regime. Since its establishment in 1967 under the Malaysian Industrial Development Authority (**MIDA**) Act to attract foreign investment and to serve as a focal point for legal and regulatory queries, MIDA (which has since been renamed the Malaysian *Investment Development Authority* in 2011) has become internationally recognised as an effective investment promotion agency, particularly for foreign investors at the establishment phase.¹² MIDA guides foreign investors interested in the manufacturing sector and in several service sub-sectors including tourism and hospitality, healthcare, education and industrial training, information technology, environment management and business services (including regional establishment and supply chain services), in respect of which Malaysia has begun allowing 100% foreign ownership since 2011.¹³

To be clear, such liberalisation does not mean that Malaysia has removed its internal approval processes in respect of foreign investments. In the manufacturing sector, under the Industrial Coordination Act 1975, an investor seeking to engage in manufacturing will need a licence if the business claims capital of RM 2.5 million (approximately US\$ 690,000) or employs at least 75 full-time staff. The Malaysian Government's guidelines for approving manufacturing investments, and by extension, manufacturing licences, are generally based on capital-to-employee ratios. Projects below a threshold of RM 55,000 (approximately US\$ 15,000) of capital-per-employee are deemed labour-intensive and will generally not qualify for a manufacturing licence. Manufacturing investors seeking to expand or diversify their operations are required to apply to do so through

MIDA.¹⁴ In the services sector, foreign investments are subject to review and approval by ministries and agencies with jurisdiction over the relevant sectors.¹⁵ More generally, the Ministerial Functions Act 1969 grants the relevant ministries broad discretionary powers over the approval of specific investment projects. In practice, this review and approval process also serves as a means for the Malaysian Government to assess whether the proposed investment meets the criteria for the various incentives available in sectors and regions targeted by its national development plans.¹⁶

Notwithstanding the evolution surveyed above, Malaysia still requires in several BITs that investment be made in an *"approved project"* for protections to be accorded. In practice, all foreign investments are still subject to review and approval by the Malaysian Government. In MIDA's media release on growth of investments in the first half of 2015, it was reported that the *"total investments approved were in 2,487 projects"* [emphasis added], of which RM 1.9 billion worth of investment in the manufacturing sector originated from Europe.¹⁷ So as to enhance the attractiveness of Malaysia's investment environment, especially for those foreign investors that would seek protections for their investments under the relevant investment treaties (including those with the *"approved project"* requirement), the following recommendations may be considered by the Malaysian investment policymakers.

First, where investment protection is contingent on compliance with Malaysia's laws, regulations and national policies, it is important to ensure that these laws, regulations and national policies are transparent and readily available. One such commendable example in Malaysia's investment treaty

12 See *OECD Investment Policy Reviews: Malaysia 2013*, at p 35 of the Summary (available at: <http://www.oecd.org/daf/inv/investment-policy/IPRMalaysia2013Summary.pdf>)

13 See *Malaysia Investment Climate Statement 2015*, produced by the US Department of State in May 2015 (available at <http://www.state.gov/documents/organization/241858.pdf>), at p 4

14 *Ibid.*, at p 5

15 *Ibid.*, at p 4

16 *Ibid.*, at p 8

17 MIDA Media Release dated 19 August 2015: "Malaysia Sees Modest Growth of Approved Investments in 1H2015" (available at: http://www.mida.gov.my/home/administrator/system_files/modules/photo/uploads/20150827124518_Media%20Release_Jan_June%202015_Investment_Performance_final.pdf)

practice is the explicit provision in the Investment Chapter of the Japan-Malaysia EPA that in respect of Malaysia, investments not made in compliance with the laws and regulations include investments not made in compliance with transparent national policies: policies “*endorsed by the Cabinet and announced and made publicly available in a written form by the Government of Malaysia*”. Similarly, in the ASEAN-China Investment Agreement, a footnote to the definition of “*investment*” provides that for greater certainty, “*policies*” shall refer to those affecting investment that are “*endorsed and announced by the Government of a Party, and made publicly available in written form*”. Such innovations in investment treaties go some distance toward achieving greater transparency and certainty in determining whether an investment is in compliance with Malaysia’s laws, regulations and national policies.

Second, where investment protection is contingent on specific approval in writing, it is important for the approval process also to be transparent. Contracting parties and their investors should be made aware not only that

they must specifically obtain written approval from the host country to benefit from treaty protections, but also be informed how to apply for such approval and to whom. In this regard, the inclusion of Annex 1 (Approval in Writing) in the ACIA and the ASEAN-Korea Investment Agreement is an encouraging step toward providing safeguards against arbitrariness and discrimination in the process of granting written approval. To go further, MIDA and the other ministries dealing with the promotion of investment in Malaysia may wish to include information about the approval mechanisms in their provision of information to a prospective foreign investor. As an important first step in this direction, as required under paragraph (a) of Annex 1 (Approval in Writing) to the ACIA and the ASEAN-Korea Investment Agreement, Malaysia has informed all the other ASEAN Member States through the ASEAN Secretariat that MIDA is the Malaysian competent authority involved in administering investment applications.¹⁸

¹⁸ The information is available at: <http://www.asean.org/news/item/applications>.

As Malaysia continues to negotiate more investment treaties, and enter plurilateral investment treaties such as the Regional Comprehensive Economic Partnership, one can expect Malaysia’s investment treaty practice to keep evolving in ways that reflect and improve its advancing state of economic development and market liberalisation.

Perhaps in time, Malaysia will find itself renegotiating those earliest BITs that still limit their protections to investment in “*approved projects*”, and harmonise those BITs with the more recent investment treaties into which Malaysia has entered, bearing in mind the need to enhance transparency in its investment approval processes.

ABOUT THE AUTHOR

Lucy Reed, now based in Singapore, is the global co-head of the international arbitration and public international law groups of Freshfields Bruckhaus Deringer. A specialist in investment treaty arbitration, she represents private and public clients in arbitrations, and selectively sits as arbitrator. Consistently at the top of league tables, Lucy is rated Band 1 for international arbitration by Chambers Global and Chambers Asia Pacific. In her more unusual arbitration roles, Lucy sat on the Eritrea-Ethiopia Claims Commission and directed the Claims Resolution Tribunal for Dormant Accounts in Switzerland. Before joining Freshfields, she was the first General Counsel for the Korean Peninsula Energy Development Organization and, while with the US State Department, the US Agent to the Iran-United States Claims Tribunal.

Lucy serves on the ICC Court, the SIAC Court, the ICCA Governing Board and the advisory board of the Investment Treaty Forum. She formerly was chair of the Institute for Transnational Arbitration and president of the American Society of International Law. A frequent writer and speaker, Lucy is co-author of *A Guide to the SIAC Arbitration Rules* (OUP), the *Guide to ICSID Arbitration* (Kluwer) and *The Freshfields Guide to Arbitration Clauses in International Contracts* (Kluwer).

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in the seat



In this final issue for the year 2015, The KLRCA Editorial Team interviews the Secretary General of the Ministry of International Trade & Industry Malaysia; Tan Sri Dr Rebecca Sta Maria.

Tan Sri Dr Rebecca shares with us a comprehensive yet simplified overview of the TPPA and talks about how regional institutions like the KLRCA have a role to play in the implementation of the ISDS provision of the TPPA.

Tan Sri Dr Rebecca Fatima Sta Maria

SECRETARY GENERAL, MINISTRY OF INTERNATIONAL TRADE & INDUSTRY OF MALAYSIA

Do you perceive the TPPA as a platform for wider, regional economic integration?

In November 2011, the leaders of the TPPA countries endorsed a framework for evolving a trade pact that envisions “a comprehensive, next-generation regional agreement that liberalizes trade and investment and addresses new and traditional trade issues and 21st century challenges”.

The TPPA is expected to widen regional economic integration especially in the Asia Pacific region, as well as potentially influence the global trading system. It sets out rules for a number of new areas, especially in the area of labour, State owned enterprises, and intellectual property rights (IPR) among others.

The TPPA sets new standards that will contribute towards the competitiveness of the countries that are part of it and help facilitate trade and promote investment between them, increasing their economic growth and development. It will further advance trade liberalisation, as well as regional economic cooperation.

The TPPA is also seen as paving the way towards the Free Trade Area of the Asia Pacific currently being explored under the Asia-Pacific Economic Cooperation (APEC). The primary goal of APEC is to support sustainable economic growth and prosperity in the Asia-Pacific region, mainly by championing free and open trade and investment, promoting and accelerating regional economic integration, and encouraging economic and technical cooperation.

What are, in your opinion, the most important elements of the institutional structure of the TPPA?

The TPPA sets the terms of trade across a wide range of trade topics, which includes tariff reductions, services liberalisation, investment protection and market access commitments, as well as many new behind-the-border commitments, such as government procurement, intellectual property rules, labour and environmental rules, and State owned enterprises.

In the 30 chapters, many areas go beyond existing commitments in global or regional settings. It is a forward looking agreement with provisions for review, including the re-examination of some existing commitments. A number of country specific annexes also have timelines and review of threshold. This would allow TPPA members the opportunity to review and update their commitments over time.

As the TPPA is considered a living agreement, chapters which are currently developmental in nature, for example in areas such as regulatory coherence, or small and medium enterprises, can evolve overtime to ensure commitments are translated into meaningful outcomes.

On institutional set up, TPPA members would still need to examine ways to strengthen the secretariat functions for the TPPA, given the extensive commitments from the 12 member countries. In addition, more members are likely to join in the future. Managing these will require a dedicated team and structure.

The TPP has also provided guidelines for new members. However, the requirements would be further deliberated once the TPPA enters into force. The current TPPA members would need to ensure that some degree of flexibility is also accorded to new members, without compromising the key areas that have been agreed.

What are the benefits of the TPPA for Malaysia and the region?

(i) MARKET ACCESS

Malaysian exporters will gain competitive advantage over regional competitors in exporting products such as electrical and electronics, chemical products, palm oil products, rubber products, wood products, textiles as well as automotive parts and components.

The TPPA will provide preferential access for goods and services from Malaysia into four “new” free trade agreement (FTA) markets, namely the US, Canada, Mexico, and Peru. For these markets, upon entry into force of the TPPA:

- for the US, import duties for almost 90% of the products will be eliminated;
- Canada, 95% of the products;
- Mexico, almost 77%; and
- for Peru, tariff on almost 81% of the products will be eliminated.

In addition, Japan, which did not include plywood in the Malaysia-Japan Economic Partnership Agreement and the ASEAN-Japan FTA, will offer preferential access to plywood and its products sourced from Malaysia.

The rules of origin that allow for accumulation of inputs from all TPPA parties will make it easier for goods from Malaysia to qualify for preferential duty. This also offers greater opportunities for Malaysian producers of parts and components products to supply to the regional value chain.

The high regional value content in the rules of origin for automotive vehicles and parts and components will encourage auto manufacturers, currently sourcing parts and components from outside TPPA countries, to source them from Malaysia.

(ii) BENEFIT TO CONSUMERS

Malaysia will eliminate import duties for almost 85% of products imported from TPPA countries upon entry into force of the agreement. We can generally expect consumers in Malaysia to enjoy a wider choice of better quality TPPA-origin products, at competitive prices.

(iii) IMPROVING GOVERNANCE AND TRANSPARENCY

The TPP is also expected to enhance transparency and good regulatory practices, both internally and among TPP members, through better coordination and information exchange.

(iv) TPPA AND SMALL AND MEDIUM ENTERPRISES (SMEs)

SMEs are already competing under existing FTAs, where more than 90% of import duties have been eliminated.

SMEs will benefit from the TPPA as they now have access to a more liberalised market under the TPPA for their exports, in particular access to the 4 new markets where Malaysia does not currently have an FTA, namely the US, Canada, Mexico and Peru.

SMEs will benefit through participation in the regional supply chain, as more inputs will be sourced from TPPA members to meet the rules of origin requirement.

Under the TPPA, a chapter is dedicated to facilitate SMEs participation in the global supply chain, by enhancing transparency and sharing of information on-line, as well as capacity building programmes to assist SMEs.

(v) BENEFITS TO SUPPLIERS

Malaysian suppliers will be able to expand and penetrate new markets through wider Government Procurement (GP) market access opportunities for their products and services.

For example, the Buy American Act restricts products and services that come from non-FTA country to be supplied to the US Government. With the TPPA, this restriction will be waived for Malaysian products, services and suppliers.

When Malaysian suppliers participate in GP of other TPPA countries, they will be given the same treatment as the local suppliers and shall not be discriminated against in the procurement process.

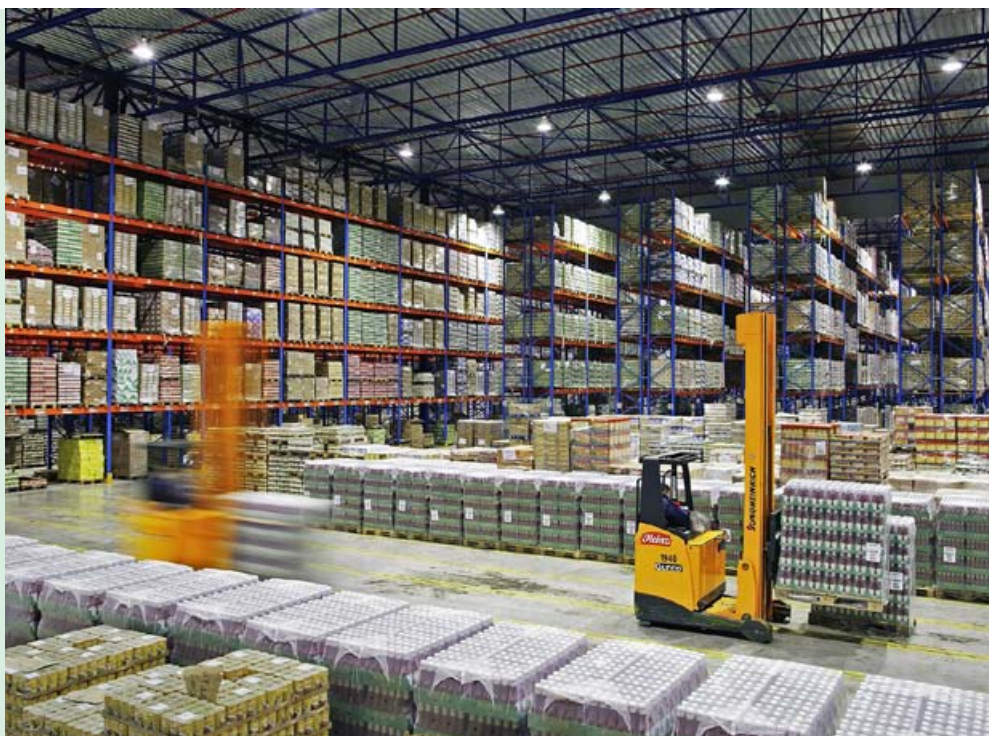
Malaysian suppliers are also able to establish networking and integrated supply chain with TPPA suppliers through trade facilitation, reduced trade barriers and lower tariffs on imported materials/components.

The GP Chapter provides predictability to suppliers on the whole procurement process and reduces risk of doing business.

(vi) BENEFITS TO GOVERNMENT

The TPPA sets high standards in many areas. This would require the Government to further improve our current practices but at the same time does not prevent the Government from regulating for legitimate public policy reasons. This will give not only the investors but also local businesses more confidence and certainty when conducting business in Malaysia.

The Government will have better selection and obtain best value for money based on wider range of offers from local and international suppliers as a result of competitive bids. The GP Chapter adopts good governance and best practices, enhances transparency in procurement processes and thus, brings greater alignment of Malaysia's GP to international practices. Adherence to the GP



chapter could be a platform for Malaysia to improve its global position, such as in the Global Competitiveness Index and Corruption Perception Index.

The TPPA also promotes transparency and good governance practices, which would curb corruption.

Do you believe that regional arbitral institutions like the KLRCA have a role to play in the implementation of the ISDS provision of the TPPA?

Regional arbitral institutions, such as the KLRCA can provide an avenue to facilitate dispute resolution between an investor and the host government. Like many international investment agreements, the ISDS provision under the Investment Chapter of the TPPA, subject to certain requirements therein, provides a selection of arbitral fora and rules to disputing parties.

Besides offering administrative and organisational support to disputing parties, regional arbitral institutions play a key role in harmonising established standards and increasing reliability and certainty as to the neutral conduct and outcome of arbitral proceedings.

No doubt, competition among a growing number of regional arbitral tribunals with respect to the availability, or lack thereof, of certain procedural rules or standards offered by them (to the extent that they attract or discourage parties) could also hinder harmonisation of such procedural rules or standards. This unwanted outcome can be addressed by offering a high level of subject-matter expertise, and by improving procedural standards in arbitral proceedings, such as the observation of the rule of law to the merits of the dispute, which in turn will be gradually recognised and adopted by other institutions in their own procedural rules.

Regional arbitral tribunals must also be able to anticipate the nature and substance of the issues that may be referred to them in the advent of a complex and multifaceted agreement like the TPPA. Rather than promoting competition in the choice of forum, regional arbitral tribunals should encourage the sound and consistent legal interpretation of the TPPA provisions concerning the rights and obligations of parties - for example, in relation to the minimum standard of treatment of investments under customary international law, and the equitable assessment of damages

and compensation resulting from expropriatory measures. The sound and consistent application and interpretation of common ISDS articles across treaties will provide a certain level of assurance and predictability, and instil confidence in investors and host governments alike to favour competent regional arbitral institutions over dominant international centres such as International Centre for Settlement of Investment Disputes (ICSID) or the International Chamber of Commerce (ICC).

The TPPA's ISDS provisions further provide a new approach on consolidation proceedings, namely the opportunity to consolidate claims which involve common questions in law or in fact brought by different disputing parties who have respectively submitted their disputes before, possibly, different arbitral fora. This is a relatively new and less tested area for regional arbitral institutions, particularly those that have not adopted any rules of procedure

for consolidation proceedings. The aforementioned harmonisation initiative should therefore not only involve the consistent application of rules of procedure and the interpretation of treaty provisions, but also transparent exchanges among regional centres to accommodate and safeguard the interests of disputing parties across related arbitral fora/ institutions dealing in particular with non-consensual consolidation requests affecting ongoing proceedings.

In general, regional arbitral institutions must embrace their role in the development of international law in treaty disputes, rather than limiting their support for and specialisation in purely commercial and contractual disputes. Indeed, regional arbitral institutions possess the ability to better understand the needs of local and regional players, as well as the laws and regulations that apply to them in treaty disputes. As such, regional arbitral institutions can play an effective role in strengthening and developing local

and regional approaches to arbitration, especially in the context of the TPPA, which comprises economically powerful State parties whose interests should not balance out those of the smaller economies in the pact.

In the context of the negotiation of the Transatlantic Trade and Investment Partnership, the European Union proposed the establishment of an International Investment Court. Would you consider this proposal as an alternative to the ISDS provision of the TPPA?

On the proposed International Investment Court under the Transatlantic Trade and Investment Partnership, it is still unclear how the establishment of a new court would be materialised. It is therefore premature to assess how this proposal could otherwise be an alternative to the SDS provisions of the TPPA.



TAN SRI DR. REBECCA FATIMA STA. MARIA

Secretary General, Ministry Of International Trade and Industry (MITI)

Rebecca Fatima Sta. Maria is the Secretary-General of the Ministry of International Trade and Industry (MITI). Prior to this appointment, she was the Deputy Secretary-General (Trade) of MITI, providing oversight for the formulation and implementation of Malaysia's international trade policies and positions.

She began her career in the Administrative and Diplomatic Service in 1981 and served in various capacities in the then Ministry of Trade and Industry. In 1988, she was seconded to the ASEAN Plant Quarantine and Training Centre as its Chief Administration and Procurement Officer.

Rebecca has been involved extensively in ASEAN. In 2006, she chaired the ASEAN Senior Economic Officials Meeting (SEOM). Currently, she is the Chair of the ASEAN High Level Task Force for Economic Integration.

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She is a graduate of the University of Malaya with a B.A. (Hons) in English Literature. She received a Diploma in Public Administration from the National Institute of Public Administration (INTAN), Malaysia in 1981. She also has an M.S. (Counselling) from Universiti Pertanian Malaysia (now known as Universiti Putra Malaysia). After receiving her Ph.D from the University of Georgia in Athens, U.S.A., Rebecca was awarded the Malcolm Knowles Award for the best Ph.D dissertation in the field of Human Resource Development by the American Academy of Human Resource Development in 2000.

She is a trustee for the MyKasih Foundation; and a member of the Board of Directors of the Emmaus Counselling Centre.

Astro Lippo: Is 'Passive Remedy' An Anathema to The Enforcement of International Arbitration Award?¹

MALAYSIAN CHAPTER

BY DATUK DR. HAJI HAMID SULTAN BIN ABU BACKER²
JUDGE, COURT OF APPEAL MALAYSIA



INTRODUCTION BY TUN ZAKI BIN TUN AZMI (Former Chief Justice of Malaysia)

I am delighted to note that Justice Datuk Dr Hamid Sultan's 2nd chapter of his forthcoming book on Janab's Key to 'International Arbitration: Malaysian Arbitration Act 20015' comprehensively deals with the conditions, demands and compliance faced in securing an international arbitral award. It also addresses the adversities faced in securing an international arbitral award that can be recognized in the seat country of arbitration and enforced in numerous countries under the New York Convention.

He has also revealed the intricacies of how to understand and appreciate the UNCITRAL Model Law, UNCITRAL Arbitration to ensure that the award rendered by the arbitral tribunal is capable of recognition and enforcement under the New York Convention. Before proceeding to elaborate on the mechanism to activate an arbitral proceeding under the Model Law he adeptly reminds parties that both the court of the seat of arbitration and the country where the award is to be enforced continues to reserve its respective rights to scrutinize such award. But he cautions that such courts "should only refuse recognition and

enforcement of the award in extremely rare occasions and only when it can be demonstrated that the claimant had abused the arbitration process which has materially prejudiced an innocent respondent" and not otherwise.

This is indeed a timely reminder to our Malaysian Courts to respect the decision of an international arbitral award rather than attempting to use "circuitous jurisprudence" in refusing recognition and enforcement. The article, very briefly but concisely analyses the author's views on issues regarding arbitration in Malaysia, taking into consideration Astro v Lippo case decided by the Singapore Apex court of which many in the arbitration are critical of. The issues can be quite easily understood by reading this well written article.

1 This Article is a reproduction of writers' proposed Second Chapter to the book titled Janab's Key To 'International Arbitration: Malaysian Chapter with Commentary to Malaysian Arbitration Act 2005'.

2 The previous article "Birds Eye View of International Arbitral Process: Malaysian Chapter published in the previous KLRCA publication must be read together with this article to appreciate the concept and jurisprudence relating to New York Convention 1958 and Model Law 1985 UNCITRAL Rules. Both articles are dedicated to the Law students of DSLU, Vishakhapatnam for the pursuit and dissemination of knowledge.

INTRODUCTION

It would not be an understatement to say that passive remedy is a core feature of New York Convention 1958 (New York Convention), and choice of remedies is a feature of the Model Law 1985 (Model Law). However, passive remedy is arguably not a feature of domestic international arbitration in Malaysia when the respondent to a written arbitration agreement and/or submission agreement to the award had participated in the arbitration proceedings and did not take active steps to set aside the award.

In addition, a written arbitration agreement or its nexus is a *sine qua non* for securing an arbitration award for it to be enforceable under the New York Convention and in consequence an award may not be given recognition if the claimant cannot produce the arbitration agreement with the respondent notwithstanding the fact that an arbitral tribunal may have ruled that there was an agreement by reference or conduct, etc. In **International Bulk Carriers Spa v CTI Group Inc [2014] 8 CLJ 854**, the Court of Appeal dealt with section 9 of Malaysian Arbitration Act 2005 (AA 2005) at the stage of recognition and enforcement of the award pursuant to sections 9, 38 and 39 of the Act (article 7, 35 and 36 of Model Law), and stated:

“(1) Parties relying on the provision of the Arbitration Act 2005 must strictly comply with the provisions of the Act and more so when they are given exclusive privilege and benefit to register a foreign award which can only be challenged in limited circumstances as set out in s. 39 of the Act. An award registered under s. 38 can be set aside as of right if the conditions stated in the section is not satisfied. On the facts, there were flaws in the registration of the award under s. 38 and the mandatory requirement of s. 38 was not complied with on the face of the record. There was no obligation to make an application under s. 39 to set aside an award even though the applicant can satisfy one of

the criteria in the said section. The registration of the award herein was ab initio a nullity and ought to be set aside as of right.

- (2) The appellant was not a signatory to the agreement or had any form of nexus as provided in s. 9(1) to (5) of the Act. Prima facie, it could not be registered pursuant to s. 38 as an arbitration agreement under s. 38(2) (b) must refer to signatories or at least to persons referred to in s. 9(1) to (5) of the Act.”

This paper will address the scope and shortcomings of ‘passive remedy’ as a mode to defeat the enforcement of arbitral award in Malaysia with reference to Malaysian Arbitration Act 1952 (AA 1952) (old regime) as well as AA 2005. [See **Bilta (UK) Ltd v Muhammad Nazir (2010) EWHC 1086 (Ch)**; **Ajwa For Food Industries Co v Pacific Inter-Link Sdn Bhd [2013] 7 CLJ 18**; **Food Ingredients v Pacific Inter-Link Sdn Bhd & Others [2011] 1 LNS 1631**].

ANATHEMA

A claimant to an award must take cognisance of the fact that passive remedy may stand as an anathema for him to enjoy the fruits of the successful arbitral award as the award can be challenged at the enforcement stage, pursuant to the New York Convention on the following grounds: (i) incapacity of the parties; (ii) invalidity of the agreement; (iii) lack of procedural fairness; (iv) jurisdiction issues such as arbitrability on the scope of arbitration agreement; (v) composition of arbitral tribunal not in accordance with agreement; (vi) the award is not yet binding; (vii) subject matter not capable of settlement by arbitration under the law of the country; (ix) recognition and enforcement will be contrary to public policy.

In support of ‘passive remedy’, Lord Collins in **Dallah Real Estate Co v Ministry of Religious Affairs Pakistan [2011] AC 763** (Dallah), had asserted as follows:

It would not be an understatement to say that passive remedy is a core feature of New York Convention 1958 (New York Convention)

"103. Nor is there anything to support Dallah's theory that the New York Convention accords primacy to the courts of the arbitral seat, in the sense that the supervisory court should be the only court entitled to carry out a re-hearing of the issue of the existence of a valid arbitration agreement; and that the exclusivity of the supervisory court in this regard ensures uniformity of application of the Convention. There is nothing in the Convention which imposes an obligation on a party seeking to resist an award on the ground of the non-existence of an arbitration agreement to challenge the award before the courts of the seat.

104. It follows that the English court is entitled (and indeed bound) to revisit the question of the tribunal's decision on jurisdiction if the party resisting enforcement seeks to prove that there was no arbitration agreement binding upon it under the law of the country where the award was made."

It must be noted that Dallah's case arguably advocates a proposition that when an arbitration award is enforced even through the seat court, it will not be an improper exercise of discretion for the seat court to promote passive remedy and/or re-examine the issues relating to the jurisdiction of the arbitral tribunal or breach of New York Convention Article I to V.

Adopting a 'passive' strategy and objecting at the time of enforcement may not be productive in all jurisdictions more so in Malaysia. In **Bauer (M) Sdn Bhd v Daewoo Corp [1999] 4 CLJ 545**, the Court of Appeal when dealing with an issue relating to passive remedy under the old regime, which did not have a provision like that of article 4 of the Model Law, had this to say:

"(3) Where parties agree to refer some of their disputes to an arbitrator selected by them, they can by words or conduct acquiesce to have the same arbitrator decide other disputes between them although

these disputes are not covered by their original agreement. However, the party that chooses to do so may be estopped from later asserting that the arbitrator lacked jurisdiction. On the facts, this was not a case where the respondent merely took steps in the conduct of the arbitration proceedings. This was a case where the respondent requested to go forward upon a matter that fell outside the scope of the arbitration agreement. The dispute the respondent raised directly brought into issue all those matters over which the respondent had earlier claimed the arbitrator lacked jurisdiction. In these circumstances, a reasonable man in the shoes of the appellant would have been entitled to assume that the respondent was no longer pursuing its challenge to the arbitrator's jurisdiction. The respondent, having regard to its conduct, should therefore be estopped from asserting that the arbitrator had no jurisdiction to adjudicate the disputes raised before him."

The test emerging from Bauer's case appears to be 'whether the respondent to the award had participated during the arbitration proceedings'. In **Government of India v. Cairn Energy India Pty Ltd & Anor [2012] 3 CLJ 423**, the Federal Court asserted that (i) the seat of the arbitration is the place where challenges to an award are made; and (ii) the curial law ought to be that of the seat. The Federal Court's decision as a general rule does not promote passive remedy as a choice when dealing with foreign arbitral awards.

It must be noted that in Dallah's case, the respondent objected to the arbitral process as the purported written arbitration agreement was in dispute. In consequence, the court under the New York Convention was arguably obliged on the facts to refuse recognition and enforcement. The other statements in the quote of Dallah's case above as well as the judgment that the court has powers to re-evaluate the award must be taken

as obiter only and in practice the English Courts are more likely to promote the comity and reciprocity principle if the seat court has ventilated the issue and also where the seat court is known for its independence and impartiality. The English Courts are generally vigilant to ensure the arbitral process and/or its sovereignty is not compromised in recognising a foreign award. [See **Soleimany v Soleimany [1999] QB 785**].

WRITTEN AGREEMENT – A SINE QUA NON

It must be emphasised that notwithstanding the right of the claimant to the award, to challenge it, Article IV of the New York Convention, which has been subsumed under article 35 of the Model Law and Section 38 of AA 2005, does not permit the claimant to seek recognition of the award if there is no written arbitration agreement with the respondent to the award. Difficulties in obtaining recognition of the award may arise if the respondent to the award is a non-party to the award, notwithstanding the arbitral tribunal may have ruled that there is an arbitration agreement by conduct or reference, etc. That is to say, the respondent to the award need not even rely on passive remedy to object to the award as the court by its own motion ought not to give recognition to an award if there is no written agreement. Article IV of the New York Convention reads as follows:

"1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.

2."

DOMESTIC INTERNATIONAL ARBITRATION AND ASTRO V LIPPO

When an international arbitration award is enforced through the seat court, the award is referred to as domestic international arbitration award. The new phrase 'domestic international arbitration' appears to originate from the decision of Belinda Ang Saw Ean J, judge of the High Court of Singapore, pursuant to the case of **Astro Nusantara International BV v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 (Astro I)**. It received endorsement by the Honourable Chief Justice of Singapore, Sundaresh Menon, in an iconic judgment of the Court of Appeal Singapore, in the case of **PT First Media TBK v Astro Nusantara Internationalo BV & Ors [2014] 1 SLR 372 (Astro II)**. Both of these cases were referred to by Chow J in the Hong Kong case of **Astro Nusantara International BV v. PT First Media TBR HCCT 45/2010 [2014] 1 SLR 372 (Astro III)**. The trilogy of these cases are also referred to as 'Astro v Lippo' as the claimants to the award in those cases were the Astro Group and the respondents were the Lippo Group.

CHOICE OF REMEDY AND PASSIVE REMEDY

(a) AA 2005 and AA 1952

A meaningful appreciation of the concept and jurisprudence relating to choice of remedies as well as passive remedy in the Malaysian context cannot be appreciated without reference to: (i) the three 'Astro' cases with the English case of *Dallah* and the relevant Malaysian cases referred herein; (ii) as well as section 27 of AA 1952 which was the old regime which recognises 'passive remedy'. The old regime did not recognise passive remedy in the context when choice of active remedies is available within the spirit and intent of the Model Law or AA 2005. The Court's power under the old regime is not related to the concept of 'to assist and supervise the arbitral process'. The Model Law gives absolute power as well as places the responsibility on the

seat court to assist and supervise the arbitral process. This distinction is akin to differentiating between an apple and an orange. Thus, when concluding to choice of remedies available one should not lose sight of the difference to reach a conclusion. The said section 27 of AA 1952 reads as follows:

"Enforcement of award

An award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a Judgment or order to the same effect, and, where leave is so given, judgment may be entered in terms of the award."

(b) CREFAA 1985

Convention On the Recognition of Enforcement of Foreign Arbitral Awards Act 1985 (CREFAA 1985) in Malaysia which has been repealed pursuant to section 51 of AA 2005, specifically states that a convention award shall be enforceable in Malaysia either by action or in the same manner as the award of an arbitration is enforceable by virtue of section 27 of AA 1952. The other provisions of CREFAA 1985 are now subsumed under sections 38 and 39 of AA 2005.

(c) Dallah's Case and Malaysia

Even under the old regime, Dallah's case and its obiter was not strictly followed in Malaysia when it relates to enforcement stage. In the case of **Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd [2010] 2 MLJ 23**, the Federal Court had refused to entertain 'passive remedy' at the enforcement stage relating to a foreign arbitral award where the seat was in the UK. This was, notwithstanding the fact that the respondent to the said award had not participated in the arbitral proceedings. Arifin Zakaria CJ (Malaya) (as His Lordship then was) speaking for the Federal Court when allowing the recognition of that award, had this to say:

"[44] In Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd [1993] 2 MLJ 396, it was similarly held that a party who had been given

every opportunity to submit and to take part in arbitration proceedings in London ought to have challenged the conduct of the arbitrator and/or validity of the award in the English Courts and not here. Similarly in Hebei Import & Export Corp v Polytek Engineering Co Ltd FAC V No 10 of 1988 (Hong Kong), the Court of Final Appeal of Hong Kong held that a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point or issue before the court of enforcement.

[45] For the above reasons, I am in agreement with the appellant's submission that this issue could not be raised in the court here being the court of enforcement. If at all the respondent wanted to raise the issue that the respondent was not a party to the arbitration agreement this must be done in the English courts as the supervisory courts."

(d) The New York Convention and Enforcement

The New York Convention is relevant only to 'foreign arbitral awards'. It has got nothing to do with foreign judgments. Foreign arbitral awards in Malaysia are enforced through the provision of Sections 38 and 39 of AA 2005. Sections 38 and 39 have literally subsumed articles 35 and 36 of the Model Law. Articles 35 and 36 had subsumed the criteria for recognition and enforcement as stated in the New York Convention. Articles 35 and 36 arguably, have preserved 'passive remedy'.

What is pertinent to note under the New York Convention as well as article 36 of the Model Law is that the court where the enforcement proceeding is commenced always has a judicial discretion to enforce an arbitration award. [See **Dalmia Cement Ltd v National Bank of Pakistan [1975] QB9**]. What this points to is that although the New York Convention does not guarantee a foreign arbitral award will be recognised as of right but it nevertheless places the discretion to enforce the award in the hands of the enforcement court. It is

trite that this discretion cannot be arbitrarily exercised but in the realm of international arbitration, the courts are expected to do so within the jurisprudence of comity as well as the reciprocity principle to give deference to Article III of the New York Convention. The Contracting States as well as the Model Law states are expected to show deference to the judgement of seat court which is empowered to ensure the arbitral process is assisted and supervised to deliver an award which will be recognised by another contracting state for its enforcement. Article III states as follows:

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.
.....”.

(e) **Scheme of New York Convention and Model Law**

The scheme of the New York Convention and the Model Law has been formulated to enable the seat court to assist and supervise the arbitral process to deliver an award which will be recognised and enforced under the New York Convention. The Model Law complements the New York Convention and attempts to achieve a universal standard of fairness relating to arbitration proceedings as well as in the enforcement of the awards. When both are read conjunctively, it demonstrates the fact that the enforcement court should refrain itself from re-evaluating the award making process as there is already in place a specific procedure at the seat court to set aside an arbitration award which has been agreed upon by the parties. The registration process should only be administrative in nature if a court of competent jurisdiction of the seat has evaluated the complaint of the respondent unless that seat court is not reputed for its independence or impartiality or the complaint has not been taken up in the seat court at all. [See **Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd [2010] SGHC 304**].

Thus, if ‘passive remedy’ is not caveated within the cornerstones of comity or reciprocity jurisprudence as well as scheme of the Model Law, it will encourage dilatory tactics leading to the addition of circuitous jurisprudence by courts, justifying as to why an award at the enforcement stage ought not be enforced. A wrong employment of passive remedy will only promote economic stress and unjust result to the claimant considering the fact that the party autonomy concept requires parties to settle the difference in relation to the award at the seat court pursuant to article 34 when the respondent had participated in the arbitration process.

The jurisprudence applicable for refusing to set aside recognition and enforcement was explained by Sir Anthony Mason, sitting in the Hong Kong Court of Final Appeal in the case of **Hebei Import & Export Corporation v Polytek Engineering Co. Ltd.: CFA 1999** as follows:

“What I have said does not exclude the possibility that a party may be precluded by his failure to raise a point before a court of supervisory jurisdiction from raising that point before the court of enforcement. Failure to raise such a point may amount to an estoppel or want of bona fides such as to justify the court of enforcement in enforcing award.”

(f) **Extrinsic Material and SIAA**

One of the primary obstacles in appreciating principles of international arbitration takes place when one attempts to reconcile case laws from various jurisdictions which may not have *pari materia* provisions as that of Malaysia notwithstanding these case laws are not binding on the Malaysian courts.

Confusion may arise when Malaysian courts employ the foreign cases in the judicial process or adopt the views of foreign jurists and/or academicians on the subject matter. Lack of harmonisation in judicial decisions of the Contracting States has resulted in a number of avoidable consequences. For

example, (i) an award may not be given recognition and enforcement in one state but will be given in another state; (ii) it leads to forum shopping; (iii) issues are re-litigated thereby adding to costs; (iv) the judicial process of one country becomes the subject of adverse comment in another; (v) it creates a field day for jurists and academicians to write on the inconsistencies which may not have practical value in all contracting states. In essence, lack of harmonisation creates commercial uncertainty which is not good news for promoting international arbitration as a better option to litigation. For example, Malaysia and Singapore are said to be Model Law countries but their legal provisions for international arbitration are not exactly identical though in many aspects they are similar. In interpreting the provisions of AA 2005, Malaysian courts are constrained to look only at the Act and apply the normal canons of construction and interpretation and cannot use *per se* extrinsic materials other than the Hansard (Parliamentary Report). [See **Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC**]. The dangers of employing extrinsic material when interpreting a statute like the AA 2005 may lead to commercial uncertainty. Moreover, common law jurisprudence does not permit such employment, although there may be differences in approach in civil law jurisdictions or in cases where statute expressly allows for such employment. The position in Singapore is different from that of Malaysia.

For example, Section 4 of the Singapore, International Arbitration Act (SIAA) allows the court when interpreting the Model Law to use extrinsic materials such as document of the United Nations Commission on International Trade Law (UNCITRAL) and its working group, etc. which resulted in the publication of the Model Law. In essence, documents such as *travaux préparatoires* cannot be used as extrinsic materials for the purpose of interpreting the Model Law or AA 2005 in Malaysia whereas they can be used in Singapore. Section 4(1) of SIAA reads as follows:

“4. —(1) For the purposes of interpreting the Model Law, reference may be made to the documents of —

- (a) the United Nations Commission on International Trade Law; and
- (b) its working group for the preparation of the Model Law, relating to the Model Law.”

In ‘Astro II’, the Singapore Court of Appeal, when interpreting the Model Law had this to say:

“Thus, in our view, the *travaux* make it clear beyond argument that the Model Law provides for the system of “choice of remedies”, and that this system applies equally to both foreign and domestic awards which are treated uniformly under the Model Law. It follows that under the Model Law, parties that do not actively attack a domestic international award remain able to passively rely on defences to enforcement absent any issues of waiver.”

(g) Old Regime, Model Law, AA 2005, CREFAA 1985 and Passive Remedy

A simple methodology can be employed to explain the concept and jurisprudence relating to the New York Convention, the Model Law and AA 2005, premised on the common law canons of construction and interpretation as well as statutes in contrast to Singapore, to deal with the question whether ‘passive remedy’ is an anathema to the enforcement of international arbitration award.

As stated earlier, the New York Convention recognises ‘passive remedy’ in respect of foreign arbitral awards. That is to say, when an arbitral tribunal delivers an award, that award has no force of law for the purpose of execution in a Contracting State. It will only be good for execution if the claimant can satisfy that it is a New York Convention Award pursuant to Articles I to IV of the Convention. The respondent can object to its enforcement on any of the grounds stated in Articles I to IV on the grounds it is not a New York Convention Award, and/or under Article V of the convention. [See *FJ Boeman Pty Ltd v*

Council of the City of Gold Coast (1973) AC 115; Union of India v Popular Builders AIR 2000 SC 3185].

Article II(3) of the convention obliges the seat court to ventilate the issue of arbitrability if the complaint is that the purported arbitration agreement is null and void, inoperative or incapable of being performed. [See *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603 SGHC 104]. The AA 1952 had provision to check the arbitrability issue, but it did not sub-delegate that power at the first instance to deal with the issue of arbitrability to the hands of the arbitral tribunal. [See *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716; *Alagappa Chettiar v Coliseum Café* [1962] MLJ 111].

AA 1952 was similar to the Arbitration Act 1950 of England and the legislation of many other countries within the Commonwealth had provision to address the arbitrability issue under the old regime. [See Singapore Arbitration Act 1940; Indian Arbitration Act 1940]. The old regime was not based on the recommendation of UNCITRAL. It was state based law to condone arbitration proceedings. It was not formulated to allow the court to assist and supervise the arbitration proceedings in order to enable the arbitral tribunal to deliver an award which would be enforceable under the New York Convention.

Even under the old regime, the respondent to the purported arbitration agreement had many choices if he takes the view it is not arbitrable. For example, (i) he could refuse to participate in the arbitration; (ii) object to its enforcement at a contracting state. If the objection is taken at the seat court, whether it was successful or not, the enforcement court under the convention is arguably expected under Article III to recognise the award as binding, with a small window to refuse recognition under Article V. However, in view of Article III if read with Article II(3), it will appear that the enforcement court is obliged to give deference to a decision on the issue of arbitrability by the seat court and in this process, will have to accord weightage to the decision of the seat court.

The claimant under the old regime had at least three choices when enforcing an arbitration award. They are as follows: (i) by registering the award under section 27 of AA 1952 and enforcing the award in that state; (ii) upon registering the award, it becomes a judgment of the court and can be executed in a foreign state if Reciprocal Enforcement of Judgment statute in that state permits to do so; (iii) the award can be registered as a ‘foreign award’ in a Contracting State. [See *Koninklijke Bunge NV v Sinitrada Co Ltd* [1973] 1 MLJ 194; *Christopher Martin Boyd v Deb Brata Das Gupta* [2014] 9 CLJ 887].

In *Malayan Flour Mills Bhd v Raja Lope & Tan Co* [2000] 6 MLJ 591, the court dealt with section 27 of AA 1952 and had this to say:

“Section 27 of our Arbitration Act 1952 is *pari material* to s 26 of the English Arbitration Act 1950. This section provides for the enforcement of the award which is similar to judgment of court provided leave is obtained from the High Court. If leave is granted to enforce the award ‘all enforcement proceedings available in the High Court like writ of seizure and sale, garnishes proceeding including bankruptcy or winding up proceedings will be available to the award holder’ (see Janab’s Key to Civil Procedure in Malaysia and Singapore (2nd Ed) April 1995 at p 796). [See *Mohamed Abdullah Tpe Abdul Majeed v Habib Mohamed* [1986] 1 MLJ 526].

In essence, the old regime (i) did not define international or domestic awards; (ii) did not have provision for arbitral tribunal to rule on its jurisdiction with a right of appeal to the High Court as an active remedy as per article 16 of the Model Law; (iii) did not have provision to set aside an award on all the grounds stated in Article I to V of the New York Convention as a positive remedy like that of article 34 of the Model Law; (iv) did not provide for recognition and enforcement of an award like that of articles 37 or 39 of the Model Law. If it is a foreign arbitral award, the enforcement was made pursuant to CREFAA 1985.

It must be noted that, even under the Reciprocal Enforcement of Judgement Act 1958, the Malaysian courts have shown great respect and deference to the judgments of foreign courts, from a respected jurisdiction premised on the jurisprudence of comity and reciprocity. For example, in **Dato' Ho Seng Chuan v Rabob Bank Asia Ltd [2002] 3 AMR 2606**, an application to register a judgment of the Court of Singapore was made pursuant to the Reciprocal Enforcement Judgment Act 1958 and the respondent objected to the same. The court had refused to entertain the objection. Vincent Ng Khim Khoay J (as His Lordship then was) without mincing words, stated:

“The plaintiff ought not to be permitted to use (or rather to abuse) the privilege of the Malaysian courts’ process to reverse or attack or denude the order of the Singapore court or Singapore judgment, emanating from proceeding in which he had actively participated. It is circuitous in nature.”

To promote international arbitration, the sacrosanct words of wisdom of the learned judge is one which the arbitral community would need to give deference especially so when dealing with jurisprudence on the availability of a ‘passive remedy’. Even though the above case relates to a foreign judgment, the jurisprudence applicable in the Malaysian context is likely to remain the same as the test is simply not whether the respondent to the award has the right to passive remedy but whether the respondent ought to be allowed to abuse the privilege of the Malaysian court process. Learned authors, Mustill and Boyd on Commercial Arbitration, 2nd ed. p. 90 on a similar issue have this to say:

“Mutual recognition of awards is the glue which holds the international arbitrating community together, and this will only be strong if the enforcing court is willing to trust, as the Convention assumes that they will trust, the supervising authorities of the chosen venue.”

The AA 1952 had minimum role in assisting and supervising the arbitral process when contrasted with the Model Law. It is significant to note that unlike the old regime, the new regime forcefully advocates *inter alia* – (i) party autonomy; (ii) equal treatment of parties; (iii) free to determine the seat court; (iv) free to determine the law of substantive dispute; (v) recourse against award; (vi) enforcement of award, etc. In essence, parties submitting to the seat court had agreed to allow the seat court to assist and supervise the arbitral process for the arbitral tribunal to deliver an award which is enforceable under the New York Convention. A literal interpretation of the Model Law as well as AA 2005 applying the lay or common sense approach arguably would be as follows:

- (a) parties are free to determine the seat court and in consequence submit to the *lex arbitri* of the seat court. That is to say, pursuant to article 34 of the Model Law or section 37 of AA 2005, an award had to be challenged in the seat court if it involves international arbitration as it says ‘exclusive recourse’. Even if it is domestic international arbitration, the challenge has to be under article 34 or section 37 of AA 2005, and passive remedy challenge under section 39 will arguably be only available if the respondent to the award did not participate at all or is relying on grounds other than those provided under article 34 or section 37 of AA 2005.
- (b) whether it is international and/or domestic international arbitration, a challenge can be mounted on jurisdictional issues, etc. before the arbitrator. [See article 16 of Model Law; Section 18 of AA 2005]. If this challenge has been exhausted by a ruling of the seat court, it may become *res judicata* and the challenge will not be entertained again by the court. [See **Pasukhas Constructions Sdn Bhd & Anor v MTM Millenium Holdings Sdn Bhd [2015] 4 AMR 377**].
- (c) AA 2005 envisages a one-stop adjudication process in relation to any challenge to the integrity of the

arbitral award of the seat court. [See **Lesotho Highlands Development Authority v Impreglio Spa [2005] UKHL 43; Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd [2010] CLJ 83**].

What is important to note is that whether it is international arbitration and/or domestic international arbitration, parties having chosen the seat and agreed to the law to challenge the award only pursuant to article 34 or section 37 of AA 2005, thereby is said to have indirectly or tacitly agreed not to challenge the award in any foreign jurisdiction under the New York Convention 1958. [See **Twin Advance (M) Sdn Bhd v Polar Electro Europe BV [2013] 3 CLJ 294**]. This is how article 34(1) of the Model Law is framed:

“CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award (emphasis added).

- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.”

The head-note to article 34 is explicit that the ‘exclusive recourse against arbitral award’ is to set aside the award, thereby destroying *in toto* the jurisprudence on passive remedy to be engaged in foreign jurisdiction or under article 36 at the seat court. Section 37 of AA 2005 is similar to article 34. If courts are not prepared to enforce agreed contractual terms by virtue of the concept of *lex arbitri* of the seat jurisdiction, it will cause uncertainty as well as promote distrust in employing arbitration as a mode of alternative dispute resolution.

Essentially, section 39 of AA 2005 is intended to address foreign awards and/or the administrative enforcement of domestic or domestic international arbitration awards. If the losing party had participated in the seat court in a foreign jurisdiction and had challenged the award under the equipollent article



34 of the seat court, the Malaysian court is more than likely to give deference to the decision of the seat court. This would be in accordance with the concept of party autonomy wherein the parties have chosen and agreed to the process at the seat court. The exception to this would be if the objection is mounted on some good reasons premised on public policy, etc. in which case the courts in Malaysia may exercise its discretion not to accord recognition and disallow enforcement of the said award.

As to whether public policy should be made strictly applicable to arbitration proceedings is debatable as no 'public' is involved in an arbitration proceeding when it is between private parties and is also concealed by the jurisprudence relating to confidentiality. Further, the underlying reasons for the award by the arbitral tribunal are not a precedent and they do not bind other cases, unrelated to the arbitration proceedings. In **PT Asuransi Jasa Indonesia v Dexia Bank SA [2007] 1 SLR(R) 597**, Chan Sek Keong CJ Singapore asserted that public policy would encompass a narrow scope and for the purpose of setting aside or upholding of the arbitral award, the test would be to see whether the award would 'shock the conscience' or would be clearly injurious to the public good or wholly offensive to an ordinary reasonable and fully informed member of the public.

(h) **Arbitration Friendly Courts, Nominal Fee Structure and KLRCA**

The decisions of the Malaysian courts as well as the courts' fees structures have been arbitration friendly, thereby obviating the need to employ 'passive remedy'. These circumstances will also arrest the development of cases that would promote 'passive remedy'. For example:

- (a) If a losing party intends to take a jurisdictional challenge on the arbitration award, he may do so under section 18 of AA 2005 (article 16), i.e. appeal to the High Court which will be heard by a single judge. The court fees for filing an originating summons and a supporting affidavit for this purpose will be only about RM208 ringgit (less than USD\$50) to settle the issue of jurisdiction of the arbitral tribunal.
- (b) Instead of challenging the jurisdictional award under section 18, the losing party is also at liberty to set aside the award before the High Court under section 37 (article 34) for which he has to pay court fees of RM208 (less than USD\$50) and he has a further right of appeal to the Court of Appeal presided by three judges with court fees for the notice of appeal, memorandum of appeal, etc. and a refundable security deposit, all amounting to about RM2,000.00 (i.e. less than USD\$220.00). A further right of appeal to the Federal Court with similar fee structure where five judges would also be available to be pursued.

That is to say, with a court fees and a refundable security deposit all in about RM3,000.00 (less than USD\$350.00), the losing party will eventually have the benefit of nine judges to look at the propriety of the award. However, if it is international arbitration and the award is attempted to be registered in Malaysia, the Malaysian courts as stated earlier will be slow to intervene and the losing party still has a right of appeal to the Court of Appeal as well as the Federal Court for a minimal fees, as stated earlier.

It is unlikely that other Contracting States will provide such a low fee structure as to enable a litigant as of right, to reap the benefits of a judgment on an award by a total of nine judges. With such an arbitration friendly mechanism in place to challenge an award at the expense of the tax payer, and appropriate procedural framework given by arbitral institutions like KLRCA which has a good mix of arbitrators and counsel not only from Malaysia but from outside of Malaysia to enter the country as of right by fiat of statute for purpose of the arbitration proceeding; it is doubtful whether Malaysian courts will entertain any dilatory tactics by way of 'passive remedy', when the court in a litigation process does not permit the litigant to advocate a case or complaint on instalment basis, as that would amount to an abuse of process. [See **Shahidan bin Shafie v Atlan Holdings Bhd & Anor [2013] 7 MLJ 215; Henderson v Henderson [1843] 3 Hare 100**].

In addition, the decisions of the Malaysian courts have always been arbitration friendly and proactive in assisting and supervising the arbitral tribunal and in the decision making process have only employed common law canons of construction and interpretation giving priority to literal rule and common sense approach so as to maintain commercial certainty. [See **Hilas & Co v Arcos Ltd [1932] All ER 494; Sejati Education Sdn Bhd v S3M Development (Sabah) Sdn Bhd (S-02-1282-08/2014)**]. Support for this proposition can be found in a number of cases.

The canons of interpretation of statutes in Malaysia does not encourage convoluted arguments when interpreting AA 2005 so as to promote circuitous jurisprudence which may result in commercial uncertainty more so in the realm of commercial international arbitration. Arguably, it will be ludicrous for the courts to entertain passive remedy when parliament has given great concession by fee structure as well as employment of nine judges to deal with the issue of jurisdiction as an active remedy in international commercial arbitration as a commitment to promote international arbitration and provide a one stop dispute settlement mechanism. In **Middlemiss & Gould v Hartlepool Corporation [1972] 1 WLR 1643**, Lord Denning MR asserted that the leave to enforce the award should be given unless there is a real ground for doubting the validity of the award.

(i) **Arbitration and Submission Agreement**

It is important to note that, if in the first instance there is no arbitration agreement and/or submission agreement according to law and the respondent by conduct has not submitted to the arbitral proceedings, then the award cannot be registered as a foreign award at all under the New York Convention. If the enforcement court enforces the award, it will amount to a breach of the convention obligation, but the losing party will have no recourse whatsoever. This is one of the greatest set backs of the New York Convention. In essence, the

integrity of the enforcement court plays a significant role to preserve the administration of commercial justice in international arbitration. [See **Karaha Bodas Co. LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara 2004 WL 541837**].

It must be noted that agreeing to Institutional Rules which enable the inclusion of third parties in the arbitration proceedings may result in a valid arbitration between the original parties to the arbitration agreement and the third parties. [See **Astro I and II**]. Difficulties may arise in seeking recognition of the award if there is no written arbitration agreement unless the seat court had dealt with the issue and had concluded that there is in fact a valid and enforceable arbitration agreement and the enforcement court is prepared to accept that ruling for the purpose of recognition as well as enforcement premised on the jurisprudence anchored on comity as well as reciprocity. [See **Commonwealth Development Corp (UK) v Montague [2000] QCA 252; International Bulk Carriers Spa v. CTI Group Inc (2014) 8 CLJ 854**].

(j) **Recognition and Enforcement**

A claimant must take cognisance of the fact that a favourable award and/or favourable decision of the seat court relating to the arbitral proceedings such as arbitrability, etc. is not a guarantee that the final award will be recognised and enforced in the state the claimant intends to execute. Various objections may be taken at the court where enforcement and recognition is sought pursuant to New York Convention. If the enforcement court is arbitration friendly, it may allow the enforcement of the award even though the respondent is able to establish a ground for refusing enforcement under the New York Convention. Essentially, a victory in court, in litigation matters guarantees enforcement in the court of its judgment. That, however, may not be the case for arbitral awards. [See **Apex Tech Investment Limited v Chuang's Development (China) Limited (CA) Hong Kong Civil Appeal No. 231 of 1995**].

(k) **Astro I, II and III**

In Astro II, the Court of Appeal, Singapore was vigilant not to recognise an arbitration award when parties who were not signatories to the arbitration agreement, although they had some nexus to the dispute and were joined in as parties by the arbitral tribunal on an application by the claimant as well as with the consent of the third parties, but without the consent of the respondents. The arbitral tribunal had rendered an award on jurisdiction but it was not challenged under article 16(3) of the Model Law. The respondents also did not apply to set aside the award under article 34 of the Model Law. The respondents mounted a challenge at the enforcement stage under article 36 of the Model Law. The thrust of the respondents' argument was that they were entitled to 'passive remedy' at the enforcement stage as they had a choice of remedies both under the Model Law as well as New York Convention. The Singapore High Court (Astro I) allowed enforcement on the grounds that the respondent to the award is required to take a positive step to challenge the issue as to jurisdiction under article 16(3) or set aside the award under article 34 of the Model Law. The High Court emphasised that a court did not have 'double control' over a domestic international award both at the setting aside and enforcement stage, when the respondent to the award had participated in the arbitral proceedings though he had reserved his right to challenge the issue on jurisdiction.

On appeal to the Court of Appeal, the court asserted that 'passive remedy' in domestic international arbitration was intact and the respondent to the arbitral award had a choice of remedies, and as long as the respondent had preserved its right to challenge the award the concept of waiver under article 4 of the Model Law or the doctrine of issue estoppel will not apply. The Court of Appeal *inter alia* held:

“(a) In the course of determining if the ground for refusing enforcement was established, the enforcement court was entitled to undertake a fresh examination of the issues which

were alleged to establish that ground of challenge.

- (b) An arbitral award bound the parties to the arbitration because the parties had consented to be bound by the consequences of agreeing to arbitrate their dispute. Their consent was evinced in the arbitration agreement. Therefore, in a multiparty arbitration agreement, the vitiation of consent between two parties did not *ipso facto* vitiate the consent between other parties."

On the issue of joinder, without the consent of all parties, CJ Singapore stated:

"(2) Agreement to arbitrate under a set of rules:

195. Although our construction of r 24(b) is dispositive of the Joinder Objection, we would make one comment on Mr Joseph's principal argument that FM had implicitly consented to the joinder of the 6th to 8th Respondents by agreeing to the 2007 SIAC Rules and, by extension, r 24(b); under those circumstances, no *further* consent by FM was required.
196. We are cognisant of the raging controversy in this area of multiparty arbitrations (for an overview of such situations, see Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Kluwer Law International, 2006) at pp 163-196) where a prevalent argument is that there is *default* consent to a forced joinder whenever the joinder is properly ordered pursuant to the applicable institutional rules. The reasoning is fairly straightforward. Parties, by agreeing to arbitrate under those rules, are deemed to have consented to the exercise of the power to force a joinder: Tobias Zuberbuhler *et al*, "Introductory Rules: Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties (Art 4) in *Swiss Rules of International Arbitration: Commentary* (Tobias

Zuberbuhler *et al* eds) (Kluwer Law International, 2005) at para 12; *Lew, Mistelis & Kroll* at para 16-42.

197. In principle, this is not objectionable as parties can contractually agree to any rules which they would like to subject their arbitrations to. This may include rules which confer on the tribunal ultimate discretion to order forced joinders without having to obtain further consent from the parties who are already part of the arbitration reference. However, as emphasised earlier, the idea of forced joinders is a drastic one. Because the power of the tribunal to join non-parties to an arbitration at any stage without the consent of the existing parties and at the expense of the confidentiality of proceedings is such utter anathema to the internal logic of consensual arbitration, a rule which allows the tribunal to order a forced joinder without obtaining 'fresh' consent to the joinder must be decidedly unambiguous. Rule 24(b) is not so. At a more general level, in the face of linguistic ambiguity in the provision which regulates the power to join without obtaining further consent, the consent under an arbitration agreement to arbitrate in accordance with a set of institutional rules cannot be taken as an *ex ante* consent to the forced joinder."

The hallmark of the judgment by the Court of Appeal was its attempt to give great deference to one of the important obligations of Contracting State i.e. the duty not to recognise an arbitration award if all parties have not agreed to the arbitration agreement and/or submitted to arbitration proceeding. The debatable issues in the Malaysian context are: (i) whether such deference should be given in the case of domestic international arbitration when it is a seat court and party autonomy principles requires the respondent who had participated in the arbitral process of the award to ventilate his

grievance pursuant to section 37 of AA 2005 (article 34); (ii) whether in the case of international arbitration the respondent to a 'foreign award' should be allowed to challenge the award under section 39 of AA 2005 (article 36), when the respondent has participated in the arbitration proceedings but had not challenged the award according to due process of law as provided under section 37. In this respect, it must be noted that the High Court of Hong Kong in the case of *Astro III* had allowed the enforcement of the award, which was refused enforcement in Singapore. The decision was not based on article 35 or 36 of the Model Law or its equivalent but rather on the grounds that the claimant had obtained recognition and enforcement of the award fourteen months before the respondent filed an application to condone delay to set aside the award. The High Court of Hong Kong considered the good faith principle in international arbitration on the peculiar facts of the case and refused extension of time to set aside recognition and enforcement of the award.

It will be interesting to study how the Court of Appeal, Hong Kong will deal with the issue when 'Astro III' appeal reaches its purview. In the Malaysian context, seat court as well as if it is the enforcement court, the court is likely to take a literal approach to the provisions of AA 2005 and rule that in the case of domestic International arbitration the grounds to set aside the award under section 37 of AA 2005 (article 34) are mandatory unless compelling exception applies to extend time and refuse recognition. If Malaysian courts venture into circuitous and convoluted jurisprudence by recognising dilatory tactics, it may defeat the spirit and intent of AA 2005 within the canon of interpretation, and cause great hardship to a fair minded international arbitration community which seeks certainty and finality. Unless the exception applies, it is not for the court to say what is just to a respondent at the enforcement stage, when the respondent has failed to take the necessary steps and/or abandoned his rights to address his grievance but attempts to promote a technical

advantage couched as ‘passive remedy’, regardless of whether it is domestic or domestic international arbitration or international arbitration. Entrenched legal doctrines, such as estoppel, res judicata, good faith, laches, contractual breach to the provisions of the seat court, etc.; may assist the claimant to obtain recognition and enforcement of an arbitration award and doctrines such as abuse of process, finality to the litigation process in the public interest, etc.; may deny the claimant to the award the right to ventilate any grounds under the New York Convention.

CONCLUSION

As a general rule and subject only to rare exceptions:

- [a] ‘Passive remedy’ at the enforcement stage, is an anathema to domestic international arbitration if the losing party has participated in the arbitral process.
- [b] ‘Passive remedy’ will be an anathema to the enforcement of foreign award if a foreign award which has been ventilated by a seat court of reputable jurisdiction is denied registration.
- [c] ‘Passive remedy’ will be an anathema too if the claimant to a foreign arbitral award where the respondent was not a party to the arbitration agreement and had not participated in the arbitral process is granted recognition and registration of the award. Such recognition and registration of the award is a nullity *ab initio* not only for breach of the New York Convention but also for the violation of section 38 of AA 2005, unless the respondent to the arbitral award had participated in the arbitral proceedings and submitted to the jurisdiction of the seat court where the award was issued. [See **Badiaddin bin Mohidin & anor v Arab-Malaysian Finance Berhad** [1998] 1 MLJ 393].

- [d] ‘Passive remedy’ has a lesser role to play within the ambit of the Malaysian Jurisprudence as the consideration here is not whether passive remedy should be allowed but whether it should be allowed to be abused.
- [e] Passive remedy is a good option which all enforcement court must take cognizance of and should only be refused recognition in an exceptional case to protect the integrity of the arbitral process as well as the sovereignty of the enforcement court.

Astro II ought to be seen as a rare exception, in the Malaysian context, for at least six reasons: (i) extrinsic material can be used in Singapore to interpret the Model Law in order to conclude choice of remedies is available at all stages; (ii) Lippo was not objecting against all the claimants to the award on the grounds there was no arbitration agreement; (iii) the Court of Appeal in fact had allowed part of the award to be enforced; (iv) the parties who

were joined without the consent of Lippo had no arbitration agreement with Lippo and in consequence part of the award cannot be said to be a New York Convention award; (v) Astro will not be able to produce the arbitration agreement for recognition of the award under section 38 of AA 2005 (article 35) which is a mandatory requirement under Article IV of the New York Convention. [See **International Bulk Carriers Spa v CTI Group Inc** (2014) 8 CLJ 854].

It is without doubt that ‘Astro II’ is an iconic judgment in the nuance of ‘choice of remedies and passive remedy’ for all those in the study, practice and administration of international arbitration to take cognizance of. [See **Renato Nazzari, ‘Consistency on the Res Judicata and Abuse of Process under the New York Convention (2014) 80 Arbitration, Issue 3; Rishabh Jogani, ‘The Role of National Courts in the Post-Arbitral Process; The Possible Issues with the Enforcement of a Set-Aside Award; (2015) 81 Arbitration, Issue 3**].



ABOUT THE AUTHOR

Justice Datuk Dr. Haji Hamid Sultan bin Abu Backer, a Judge of Court of Appeal Malaysia, is an Honorary Visiting Professor of Damodaran Sanjivayya National Law University, Visakhapatnam, India; a barrister and a fellow of the Chartered Institute of Arbitrators. He is a graduate in economics and also an honours and masters degree holder from University of London in Insurance, Shipping and Syariah Law. He also holds post graduate diplomas in Islamic Banking and Finance and also in Syariah Law and Practice from International Islamic University Malaysia. He was a member of the Malaysian Bar Council for more than 6 years and has served as Chairman in various committees. He has been invited as a visiting Scholar of University of Sheffield in United Kingdom and also participates in various other activities of Universities such as examiner of PhD thesis, external examiner, Guest Speaker, etc. He has written on various subjects, inclusive of Civil Procedure, Criminal Procedure, Evidence, Conveyancing, Islamic Banking and many more areas, on commercial law. His books grace the libraries of law firms and the chamber of judges. His books are not only used as text books in all institutions of higher learning offering law but also used by all who are involved in the practice and administration of law in Malaysia. His doctorate thesis was on Civil Procedure and Justice.



FEATURE

May The Odds Be Ever in Your Favour

Selecting the most appropriate dispute resolution forum for outbound investments

BY **HENDERSON ALASTAIR & EMMANUEL CHUA**, HERBERT SMITH FREEHILLS LLP

Editorial Note:

Henderson Alastair and Emmanuel Chua of Herbert Smith Freehills LLP delivered an evening talk on the 8th of October 2015 at the KLRCA titled, 'May The Odds Be Ever In Your Favour – Selecting the most appropriate dispute resolution forum for outbound investments'.

This article is derived from their 8th October 2015 presentation.

Introduction

As little as 25 years ago, dispute resolution in Asia typically meant litigation in domestic courts, with choice of jurisdiction often representing the only meaningful variable. In contrast, parties today are presented with a larger array of options spanning from mediation to expert determination; review boards to arbitration and international commercial litigation.

Whilst increase in choice is welcome, it becomes even more important for parties to properly consider and understand the pros and cons of dispute resolution mechanisms in the context of their commercial goals. This is often easier said than done – in the eagerness to get the deal done, dispute resolution clauses often end up as an afterthought

to the primary commercial and legal aspects of a transaction. Even where one party has reservations about the dispute resolution provision in question, there is often commercial pressure to close an eye to a clause that, in most circumstances, will not be used. However, failure to properly consider the dispute resolution mechanism at an early stage can lead to severe problems if a dispute arises later.

We highlight in this article some of the benefits and limitations of the key dispute resolution options available to litigants today to emphasise the importance of careful selection of an appropriate dispute resolution forum.

Desirable features of a dispute resolution mechanism

Some of the key factors that international businesses look out for in deciding which dispute resolution mechanism to adopt include:

COST: Inevitably one of the most important factors in play. Each dollar spent on dispute resolution equals to a dollar less for investment in the business. Even where the chosen process allows for recovery of these costs, that recovery is (almost) never complete.

FAIRNESS: Clearly, it is fundamentally important that disputes should be resolved in a process that is fair, transparent and impartial. The carefully-negotiated balance of rights and obligations in a contract may be rendered worthless if the decision-maker and the process are unreliable, unfair or corrupt.

SPEED: A dispute that drags on for years not only means increased costs, it can also prolong uncertainty and drain significant time and resources that could have been put to better use.

FINALITY: Connected to the previous factors, a judgment or award that can be reopened or appealed at various levels will lead to further wastage of costs and time.

FAMILIARITY/CERTAINTY: It is important that parties are not “ambushed” by unfamiliar procedural rules or processes so they can prepare and present their cases effectively.

CONFIDENTIALITY: This is a key factor in certain industries and in disputes involving sensitive subject matters such as trade secrets or alleged wrongdoing.

SPECIALIST EXPERTISE: Especially important in specialist industries (e.g. construction or shipping), where having an arbiter well versed in the discipline can often translate into significant savings in time and costs.

Benefits and limitations of the main dispute resolution options available today

With these points in mind, we explore exactly how well the more popular dispute resolution options available today are suited to achieving the aims of international businesses.

I. DOMESTIC LITIGATION

Domestic litigation was for a long time the default choice for dispute resolution. There is still much to commend about it in appropriate cases, in particular in countries where the courts are efficient and fair. Here, litigation may often be the quickest and cheapest form of formal dispute resolution, especially where both parties are based in that country, and a binding court judgment brings with it a valuable measure of certainty. Courts also have mechanisms to ensure that their judgments are complied with and, where assets are located within the jurisdiction, can issue appropriate orders to aid enforcement.

However, some courts have reputations for being less than fair or efficient, and their judgments may be subject to several levels of appeals. Where one of the parties is foreign, domestic litigation may not be the preferred choice due to lack of familiarity and (particularly) due to the relative weakness of international mechanisms for cross-border enforcement of court judgments.

II. ARBITRATION

Over the last two decades, arbitration has undoubtedly become the most popular alternative to litigation in many parts of the world. Its buzzwords of speed, confidentiality and ease of enforcement have made it especially popular amongst international businesses.

Enforcement and finality are particular strengths. The New York Convention¹, with 156 signatories, ensures (on paper and to a significant degree in practice) an ease of enforcement of arbitral

awards across a significant number of jurisdictions that is not available to regular court judgments. There is no appeal or reconsideration of the decision unless the very limited grounds set out in the Convention are made out. Parties are not bound by strict rules of procedure commonly found in national courts, and also have a say in the identity (and therefore expertise) of the arbitrator(s) that will determine the dispute.

These perceived advantages have led to the explosive growth of arbitration, notably in Asia. For example, in 2014 more than 220 cases were filed with the KLRC², up from 156 cases in 2013 and less than 20 cases a decade earlier.³

However, arbitration is not perfect and users quite frequently report a less rosy picture. An arbitral tribunal’s relative lack of coercive powers and its fear of being accused of procedural unfairness leave the arbitral process prone to delay and dilatory tactics, translating to increased time and costs. In some regions (including parts of Southeast Asia), scarcity of experienced arbitrators presents real problems in ensuring fair and efficient procedures. Joinder and consolidation are problematic issues insofar as an arbitration agreement can only bind the parties to it. As a result, arbitration may not be best suited to multi-party transactions or where issues involving third parties arise. Even the oft-touted advantages of speed and efficiency do not always hold true – it is not uncommon for awards to be held up for months and even years⁴ at costs greater than an equivalent court action.⁵ Indeed, it is now commonly accepted that international arbitration is typically more expensive than comparable court litigation.

² <http://www.legalbusinessonline.com/reports/arbitration-asia-next-generation>.

³ <http://eng.viac.vn/about-us/case-statistic-from-different-arbitration-centres-a273.html>.

⁴ For example, in *PT Central Investindo v Wongso & Others* [2014] SGHC 190 the arbitral tribunal had taken more than 18 months to render its award.

⁵ Indeed, costs may be decidedly disproportionate to the amounts claimed. For example, in *VV & Another v VW* [2008] SGHC 11, SGD 3.5 million in legal fees was incurred defending a claim for SGD 590,000 and bringing an unsuccessful counterclaim.

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

As the Chief Justice of Singapore, Sundaresh Menon, aptly put:

*“arbitration, by its very nature, cannot provide a complete solution to propel the vessel of global commerce forward. Arbitration was conceived as an ad hoc, consensual, convenient and confidential method of resolving disputes. It was not designed to provide an authoritative and legitimate superstructure to facilitate global commerce. It cannot, on its own, adequately address such things as the harmonisation of substantive commercial laws, practices and ethics.”*⁶

III. INTERNATIONAL COMMERCIAL LITIGATION

Given these inherent limitations, the spotlight has more recently been cast on international commercial litigation. This essentially refers to litigation in a court that is “foreign” to one or both litigants, which has been specially created as an international forum for judicial resolution of commercial disputes. The concept of “foreign” litigation first gained popularity with the English Commercial Court, whose jurisdiction was described by Lord Denning as such:

*“No-one who comes to these courts asking for justice should come in vain. This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this “forum shopping” if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.”*⁷

The Commercial Court today hears over 1,000 commercial disputes a year, with almost half these matters involving solely non-English litigants.⁸

Other institutions have more recently jumped on the international litigation bandwagon, including the Dubai International Financial Centre Courts (DIFC), the Qatar International Court and Dispute Resolution Centre (QICDRC) and, most recently, the Singapore International Commercial Court (SICC), which opened in 2015.

International commercial courts generally seek to combine the best features of international arbitration and domestic litigation. Common features include the ability to be represented by foreign counsel, flexible rules of procedure, the ability to apply for proceedings to be heard in confidence and an international panel of jurists who are specialists in their respective fields. Commercial courts have in addition the powers of traditional courts, and can therefore take steps to ensure compliance with their orders and judgments.

However, limitations remain, in particular the (current, relative) lack of cross-border enforceability of international commercial court judgments. In the absence of widely-adopted reciprocal enforcement treaties, a successful litigant would have to bring fresh proceedings to enforce a judgment in domestic courts where assets are based, adding another layer of time, cost and uncertainty.

The Hague Convention on Choice of Court Agreements, which essentially seeks to be the equivalent of the New York Convention for national court judgments, seeks to provide a solution to this. However, whilst it entered into force on 1 October 2015, so far only the European Union and Mexico have ratified the Convention (Singapore and the United States having signed but not ratified), and it is therefore likely to be some time yet before national court judgments can enjoy the same ease of enforceability as arbitration. Once the Hague Convention gains widespread applicability, however, it may become a real game-changer in international dispute resolution.

A dispute that drags on for years not only means increased costs, it can also prolong uncertainty and drain significant time and resources that could have been put to better use.

⁶ Opening lecture for the DIFC Courts Lecture Series, 2015.

⁷ *The Atlantic Star* [1973] QB 364; [1972] 3 WLR 746.

⁸ “Commercial Court: ahead of the game”, Grania Langdon-Down, Law Society Gazette, 29 September 2014 (accessed via <http://www.lawgazette.co.uk/practice/commercial-court-ahead-of-the-game/5043604.fullarticle>, 3 December 2015).



IV. MEDIATION AND HYBRID PROCESSES – A NEW PARADIGM?

Generally understood as a consensual process facilitated by a neutral third party, mediation is often the method of choice for attempts to reach an amicable settlement where direct negotiations have failed. Remaining outside the formal dispute resolution processes has clear advantages in terms of time and cost, and can also help to preserve the parties' commercial relationships.

On the other hand, unfamiliarity, the lack of a formal structure and lack of a guaranteed, definitive resolution can dissuade parties from engaging in the process. Notwithstanding the implied duty of confidentiality in mediation, parties remain concerned that the process may expose weaknesses in their case to the counterparty. In certain cultures, parties are reluctant to propose mediation as it may be perceived as a concession of weakness in one's position.

Partly as a response to these limitations, another recent development has been the promotion of hybrid processes that introduce mediation into more formal dispute resolution processes. Prominent institutions including the ICC, CIETAC and HKIAC have introduced variations on the "med-arb" procedure in which mediation is used either as a precursor to arbitration or during the arbitration process. More recently, the Singapore International Mediation Centre (SIMC) has collaborated with the Singapore International Arbitration Centre (SIAC) to issue and administer an Arb-Med-Arb Protocol⁹, which may be summarised as follows:

- (i) A party commences arbitration under the SIAC Rules.
- (ii) The arbitration is stayed following the filing of a Response to the Notice of Arbitration and the constitution of the tribunal.
- (iii) The matter is transferred to the SIMC, which will fix a date for the

mediation. The mediation will be conducted under the rules of the SIMC before a mediator who will not, as a general rule, be a member of the arbitral tribunal. Unless extended, mediation will be completed within eight weeks of commencement.

- (iv) If a resolution to part or all of their disputes is reached, the parties may formalise any settlement in the form of a consent award on the agreed terms of the settlement. A consent award is generally accepted as an arbitral award and is therefore enforceable in any of the New York Convention states.
- (v) Matters that remain unsettled may be referred to and resolved in the pending arbitration.

This process arguably provides the best of both worlds. Parties can explore the possibility of having their disputes resolved via mediation whilst retaining the option of proceeding to arbitration if it becomes necessary. Any resultant settlement can be recorded as an arbitral award and enforced with the same ease.

⁹ Also known as the AMA Protocol: <http://simc.com.sg/siac-simc-arb-med-arb-protocol/>.

Other options

Aside from the well-known triumvirate of litigation (domestic or international), arbitration and mediation, and hybrid processes combining these alternatives, the menu of dispute resolution options also offers more specialist processes such as adjudication (often used in construction cases), review boards (again in construction) and expert determination (typical in technical cases or in valuation or price/quality disputes). Space does not permit a longer discussion about these choices but in suitable specialist cases they can represent very effective alternatives. At the very least, their existence confirms the range and complexity of the options that have to be considered.

Some guiding principles

As is clear from the above discussion, selecting an appropriate dispute resolution forum can be far from straightforward. Each option comes with certain benefits and limitations that parties should bear in mind given the circumstances and context of the transaction that they intend to enter into.

One key consideration, for example, is the location of the counterparty's assets. Where these are located in multiple jurisdictions or jurisdictions that do not have a reciprocal enforcement regime for court judgments, arbitration may be a more suitable forum for the purposes of eventual enforcement. Parties may consider including a mandatory negotiation or mediation

provision, particularly if the parties have a good relationship or long standing commercial arrangements (such as long-term oil and gas supply agreements). Where the matter is likely to require technical or specialist expertise, parties may even consider including submitting disputes to adjudication or expert determination.

Parties are therefore advised to apply their minds to the question of dispute resolution clauses at an early stage. Too often, parties fail to do this only to find, when a dispute arises, that the dispute resolution provision in their agreement turns out to be wholly unsuitable. This invariably leads to further wasted time and costs and, ultimately, a very real risk that the aggrieved party will be unable to meaningfully exercise its contractual or other rights.

ABOUT THE AUTHOR

Henderson Alastair is ranked among the leading arbitration lawyers in Asia and is one of the region's best-known names in this field. He graduated in law from Oxford University and worked for 5 years in London before moving to Asia in 1993. After several years each in Hong Kong and Bangkok, he is now based in Singapore from where he works on cases across the region and beyond. Alastair is also Herbert Smith Freehills' managing partner for Singapore and Southeast Asia.

Alastair has more than 20 years' experience handling major disputes across many sectors and industries, concerning a wide variety of trade, commercial and financial activities, with particular experience of oil, gas and power, construction and engineering, infrastructure and projects, and major foreign investment. He is very familiar with disputes in or concerning the countries of Southeast Asia, as well as international cases outside the region. His clients include governments and public bodies, state-owned and independent companies, international banks, and other multinational and leading regional companies.

Alastair has served numerous times as sole arbitrator, co-arbitrator and presiding arbitrator and has handled many cases as counsel under the rules of the ICC, LCIA, SIAC, HKIAC, KLRCA, SI Arb, CIETAC, Thai Arbitration Institute and Indonesian National Arbitration Institute (BANI) as well as UNCITRAL rules and pure ad hoc cases. He is a Fellow of the Singapore Institute of Arbitrators; a national committee member of the Chartered Institute of Arbitrators; and a former member of ICC Thailand national arbitration commission.

Emmanuel Chua is a disputes lawyer with Herbert Smith Freehills in Singapore. His practice focuses on complex, multi-jurisdictional commercial disputes, with an emphasis on finance and insolvency matters. He has advised and represented multi-national corporations, financial institutions and high net-worth individuals in court proceedings and ad hoc and institutional arbitrations (including under the SIAC, UNCITRAL, ICC and KLRCA rules) sited in various jurisdictions. He has also appeared in and argued as lead counsel at all levels of the Singapore court system.

Emmanuel read law at the National University of Singapore ("NUS") and graduated in 2008 with an LL.B. (Hons), serving as class president of his graduating cohort. He qualified as an advocate and solicitor of the Supreme Court of Singapore in 2009. He is presently an adjunct faculty teaching trial advocacy at the NUS, and also teaches the insolvency and trial advocacy modules of the Part B Course leading up to the Singapore Bar Examinations. Emmanuel also serves as a member on the Law Society of Singapore's Alternative Dispute Resolution Committee.



KLRC A Talk Series

KLRC A Talk Series continued with numerous engaging talks by ADR experts. Below are talks that were held from July–September 2015

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DIFFERENCES BETWEEN CIVIL LAW AND THE COMMON LAW FROM THE PERSPECTIVE OF A CONSTRUCTION LAWYER

Speaker: Emerson Holmes (Partner, Jones Day)

Moderator: Rodney Martin (CEO, Charlton Martin Construction Contracts Consultants)

Emerson, based upon his experience of acting for construction and engineering companies on disputes across Asia, Africa and the Middle East, provided an overview of the key similarities and differences between the common law and the civil law from the perspective of a construction lawyer so that risks can be properly considered.

MAY THE ODDS BE EVER IN YOUR FAVOUR – SELECTING THE MOST APPROPRIATE DISPUTE RESOLUTION FORUM FOR YOUR INTERNATIONAL INVESTMENTS

Speaker: Henderson Alastair & Emmanuel Chua
(Herbert Smith Freehills LLP)

Moderator: Chelva Ratnam SC (Tan, Rajah & Cheah), Harman Faiz (Head of Group Legal, UEM Group Berhad), Lee Shih (Partner, Skrine) and Ben Olbourne (Barrister, 39 Essex Chambers)

This talk equipped counsels with practical knowledge needed to make an informed decision on the appropriate dispute resolution mechanism to adopt for international transactions. A panel discussion then followed, involving a prominent judge, in-house counsel and external counsel, who each provided their unique perspectives on the factors to look out for in deciding on an appropriate dispute resolution option.

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IN THE SEAT: 60 MINUTES WITH LUCY REED, “INVESTMENT TREATY ARBITRATION: LEGITIMATE AND NOT-SO-LEGITIMATE CONCERNS”

Speaker: Lucy Reed (Partner, Freshfields Bruckhaus Deringer)

Moderator: Philip Koh (Senior Partner, Messrs Mah-Kamariyah & Philip Koh)

Investment treaty arbitration generates substantial attention and debate in South East Asia, often led by vociferous- and more or less informed- proponents and opponents. This warrants stepping back, which Ms Reed did during her talk. She (1) revisited the basic goals and processes of treaty arbitration, (2) reviewed what is and is not happening in treaty arbitration, with a focus on the region, (3) described how transactions should and should not be (re)structured for treaty protection, and (4) catalogued both positive and negative trends in treaty ISDS chapters. Ms Reed highlighted and separated legitimate from less legitimate concerns, both legal and popular.

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THE ADJUDICATION PROCESS AND RECENT DEVELOPMENTS ON CIPAA 2012

Speaker: Ir. Harbans Singh KS (HSKS Dispute Resolution Chambers)

Moderator: Lam Wai Loon (Partner, Harold & Lam Partnership)

Statutory Adjudication was introduced under the Construction Industry Payment & Adjudication Act 2012 (CIPAA 2012) as a new mechanism for speedy dispute resolution of payment disputes under a construction contract. Since the coming into operation of the Act on 15 April 2014, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) as the official adjudication authority under the Act has administered over 100 adjudication matters. This talk provided construction professionals especially the engineers and architects on the latest development of CIPAA 2012, adjudication process, practice and procedure of the Act and challenges faced by adjudicators in dealing with an adjudication matter.

WITNESS PREPARATION IN INTERNATIONAL ARBITRATION

Speaker: Claus H. Lenz (Merris LLS Lungerich Lenz Schuhmacher),
Prof. Dr. Rouven F. Bodenheimer
(Merris LLS Lungerich Lenz Schuhmacher)

Moderator: Sudharsanan Thillainathan (Partner, Shook Lim & Bok)

Different regimes and sets of national laws, professional standards and international guidelines allow for, or even oblige different measures to be taken with regard to witness preparation. The speakers provided an overview of the approaches used in different jurisdictions.

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MULTI-TIERED DISPUTE RESOLUTION CLAUSES AND ARBITRATION

Speaker: Denys Hickey (Barrister, 39 Essex Street Chambers)

Moderator: Ernest Jai Kumar Azad (Arbitrator, Adjudicator & Mediator)

Mr Hickey covered current trends in dispute resolution clauses and took the attendees through a series of case studies from around the world.

IN THE SEAT: 60 MINUTES WITH GORDON NARDELL QC, "INVESTMENT TREATY ARBITRATION IN ASIA – WHAT'S HAPPENING?"

Speaker: Gordon Nardell QC (Barrister, 39 Essex Street Chambers)

Moderator: Ragunath Kesavan (Messrs Kesavan)

There are signs that Asian investors are increasingly warming to the use of investment treaties to challenge State conduct. Despite an apparent loss of appetite for Investor-State Dispute Settlement (ISDS) on the part of some States in the region, this form of dispute resolution is likely to grow in prominence over the coming years. The trend has been anticipated by KLRCA's 2014 co-operation and venue agreements with the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA), and the successful presentations on investment arbitration by Loretta Malintoppi and Lucy Reed in August and October this year. Following on from those developments, this talk focused on contemporary issues in ISDS likely to be of particular interest to practitioners in the Asia-Pac region.

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KLRC around the globe



The Centre continued to enhance its international standing through its presence at conferences and training workshops held at home and around the globe.



1 9th October 2015

Datuk Professor Sundra Rajoo pictured here at the CI Arb Ireland Centenary Forum in Dublin.

2 11th – 12th October 2015

KLRC's Head of Investment Treaty Arbitration and International Law, Ioannis Konstantinidis at the International Conference on Judiciary and Arbitration which was held at the Al Imam Mohammad Ibn Saud Islamic University, Riyadh, The Kingdom of Saudi Arabia.

3 20th October 2015

Datuk Professor Sundra Rajoo pictured here at the 2nd Annual International Arbitration Summit in Tokyo.



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4 21st – 22nd November 2015

KLRCA's Ioannis Konstantinidis pictured here delivering a presentation at the Inaugural Kobe (Japan) Conference for Leading International Arbitration Institutions in Asia.

5 24th November 2015

Datuk Professor Sundra Rajoo taking part in a panel discussion at the 3rd International Arbitration Conference in Sydney.

6 10th November 2015

Datuk Professor Sundra Rajoo, who was in Kingston (Jamaica) on the invitation of the University of the West Indies School of Law, paid a courtesy visit to the International Seabed Authority (ISA), where he discussed potential collaboration efforts between the KLRCA and the ISA.

7 16th December 2015

KLRCA's Senior Case Counsel, Danaindran Rajendran presenting at a seminar organised by the Badan Arbitrase Nasional Indonesia (BANI) in Jakarta.

Arbitration Case Law: Developments in Malaysia & The International Front

By KLRCA Legal Services

Tomolugen Holdings Ltd and Another v Silica Investors Ltd and Other Appeals

COURT SINGAPORE COURT OF APPEAL

CASE CITATION [2015] SGCA 57

HEARD BEFORE SUNDARESH MENON CJ,
CHAO HICK TIN JA,
CHAN SEK KEONG SJ

BACKGROUND

The respondent in this appeal is Silica Investors Ltd (“Silica”), a minority shareholder in Auzminerals Resource Group Limited (“AMRG”). The appellants are, amongst others, Lionsgate Holdings Pte Ltd (“Lionsgate”) and Tomolugen Holdings Ltd (“THL”). These latter two companies constitute majority shareholders in AMRG.

In 2013, Silica had initiated, pursuant to Section 216 of the Companies Act (Cap 50, 2006 Rev Ed), a suit against Lionsgate and THL, alleging oppressive or unfairly prejudicial conduct towards it as a minority shareholder (Suit No. 560 of 2013). In particular, Silica contended that AMRG had, *inter alia*, issued shares in flagrant breach of AMRG’s memorandum and articles of association. In consequence of these acts, Silica’s shareholding had suffered a diminution of more than 50% – a considerable erosion of shareholding serving to preclude Silica’s further participation in the management of AMRG.

In response to Silica’s minority oppression claim, Lionsgate invoked Section 6(1) of the International Arbitration Act (Cap. 143A) (“the IAA”) and sought to have the court proceedings stayed in favour of arbitration. The primary basis for this application was that, as Lionsgate submitted, Silica’s dispute was encompassed by the ostensibly broad scope of the arbitration clause that had been incorporated into the original Share Sale and Purchase Agreement (“SPA”) concluded between Silica and Lionsgate on 23 June 2010 and by virtue of which Silica had initially acquired its shares in AMRG. Significantly, this agreement called for

arbitration (seated in Singapore and in accordance with the Singapore International Arbitration Centre (SIAC) rules) in relation to “any dispute arising out of or in connection” with the SPA.

ISSUE(S)

In the course of their extensive decision, the Singaporean Court of Appeal had occasion to consider the following salient issues:

Whether a dispute pertaining to minority oppression or unfairly prejudicial conduct is arbitrable;

Whether the court proceedings between Silica and Lionsgate, or any part thereof, fall within the scope of the arbitration clause in the SPA; and

In the event that the court proceedings between Silica Investors and Lionsgate (or any part thereof) are covered by the arbitration clause and are stayed in favour of arbitration, whether the remainder of the court proceedings (whether against Lionsgate or against the remaining defendants) should also be stayed pending the resolution of the arbitration.

JUDGMENT

At first instance, the Singaporean High Court categorically dismissed the applications for stays of proceedings. Crucially, the High Court deemed the dispute to be manifestly non-arbitrable in view of the fact that Silica’s claim had arisen under statute. Specifically, to the mind of the learned judge, “a claim for relief under s 216 of the Companies Act straddled the line between arbitrability and non-arbitrability, and that in most circumstances, such a dispute would [ultimately] fall on the side of being non-arbitrability.” Indeed, it was suggested that a determination of non-arbitrability was particularly apposite in and almost mandated by the present circumstances as the types of remedies contemplated by Section 216 of the Companies Act were purportedly of a form and nature which an arbitral tribunal, as distinct from a court endowed with wide-ranging remedial powers, could not grant without acting in excess of its predetermined jurisdiction.

ON APPEAL

The Court of Appeal allowed the appeal thereby overturning the High Court decision by granting the stay of proceedings in favour of arbitration. Speaking for the Court, Chief Justice Menon expounded when allowing the appeal that as opposed to an explicit decision on arbitrability which would result in concurrent determinations as to the interdependent questions of jurisdiction and scope of the arbitration agreement, the proper inquiry to be pursued by the Court in this instance was whether the relevant “threshold” for ordering a stay of proceedings had been reached.

Having expounded the two dominant and in fact divergent views regarding what in particular this threshold or test entailed, the Court pronounced that the correct approach to be adopted was whether the Court was satisfied, on a *prima facie* basis, that the preconditions to the grant of a stay – i.e. the existence of a valid arbitration clause which embraces the dispute at hand – were present. In the view of the Court, a *prima facie* approach was required, as such a standard would crucially serve to “preserve the arbitral tribunal’s *kompetenz-kompetenz* to examine the existence and scope of its jurisdiction afresh and determine it fully.” Indeed, as Chief Justice Menon observed, “the arbitral tribunal’s jurisdiction to determine its own jurisdiction – known as *kompetenz-kompetenz* – cannot be based entirely on the parties’ consent. This form of jurisdiction necessarily precedes and exists independently of such consent.” As such, in order to comply with the doctrine of *kompetenz-kompetenz* and the corresponding precept – also enshrined in Singapore’s International Arbitration Act – that “the arbitral tribunal is to be the first arbiter of its own jurisdiction, with the court having the final say,” the *prima facie* standard was necessarily held to prevail.

Satisfaction of this *prima facie* test would automatically give rise to a rebuttable presumption that the subject matter of the dispute was arbitrable. However, as the question of arbitrability was also inherently a question of public policy, it therefore followed that such a presumption could only be successfully rebutted where the dispute at hand pertained to matters which “so pervasively involve ‘public’ rights and concerns, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve...disputes [over such matters] by ‘private’ arbitration should not be given effect.” Ultimately, in the present circumstances, there existed “no public element in disputes of this nature [that] mandate[d] the conclusion that it would be contrary to public policy for them to be determined by an arbitral tribunal rather than a court.”

SIGNIFICANCE

Overall, in the instant case the Singaporean Court of Appeal was faced with the problem of a discernible overlap between court and arbitral proceedings, a problem which culminated in the Court being obliged to undertake the daunting task of striking an acceptable balance between “upholding the statutory mandate and [implementing] the strong legislative policy in favour of arbitration.” Notably, in holding that a presumption exists that all claims (including those arising under statute) which *prima facie* fall within an arbitration clause are arbitrable, the Court adopted a position analogous to that espoused by numerous other jurisdictions, including Australia, the British Virgin Islands and Canada. In light of this ruling and its implied inverse formulation whereby non-arbitrable matters are now ostensibly limited to manifest contraventions of public policy, the decision thus ultimately also serves as unequivocal testament to Singapore’s unreservedly pro-arbitration stance.

save the date!

The following are events in which KLRCA is organising or participating.

JANUARY 2016

DATE 9 – 17 JANUARY 2016

Event Diploma in International Commercial Arbitration
Organiser KLRCA & CIArb Malaysia Branch
Venue Bangunan Sulaiman

DATE 16 JANUARY 2016

Event KLRCA Talk Series: Practical Views on Dispute Prevention and Resolution in Major International Projects
Organiser KLRCA
Venue Bangunan Sulaiman

DATE 20 JANUARY 2016

Event KLRCA Talk Series: Bid Rigging – Are you at Risk?
Organiser KLRCA
Venue Bangunan Sulaiman

DATE 26 JANUARY 2016

Event KLRCA Talk Series: Multiplication of Arbitral Institutions in Asia & the Middle East – Promoting Synergies and Collaboration
Organiser KLRCA & The Four Inns (Lincoln's Inn, Inner Temple, Middle Temple & Gray's Inn)
Venue Bangunan Sulaiman

DATE 29 JANUARY 2016

Event KLRCA Talk Series: Reflections on Construction Disputes in Mega-Projects
Organiser KLRCA
Venue Bangunan Sulaiman

MARCH 2016

DATE 10 – 11 MARCH 2016

Event KLRCA International Investment Arbitration Conference (KIIAC 2016)
Organiser KLRCA & IKMAS
Venue Bangunan Sulaiman

DATE 31 MARCH 2016

Event KLRCA Talk Series: Efficient Arbitration: Lessons To Be Learnt From The Civil Law
Organiser KLRCA
Venue Bangunan Sulaiman

APRIL 2016

DATE 6 APRIL 2016

Event KLRCA Talk Series: Mediating Oil, Gas, Engineering & Construction Disputes
Organiser KLRCA
Venue Bangunan Sulaiman

MAY / JUNE 2016

DATE 18 MAY 2016

Event CIPAA & MSA Conference
Organiser KLRCA & The Malaysia Society of Adjudicators (MSA)
Venue TBC

DATE 28 MAY – 1 JUNE

Event KLRCA Adjudication Training Programme
Organiser KLRCA
Venue Bangunan Sulaiman

25 SPEAKERS FROM AROUND THE GLOBE



- + **Representatives from international organisations and institutions:** the International Centre for Settlement of Investment Disputes (**ICSID**), the Permanent Court of Arbitration (**PCA**), the International Court of Arbitration (**ICC**), the Kuala Lumpur Regional Centre for Arbitration (**KLRCA**), the Association of Southeast Asian Nations (**ASEAN**), the United Nations Commission on International Trade Law (**UNCITRAL**), the Chartered Institute of Arbitrators (**CIARB**), the Arbitration, Mediation and Dispute Board Chambers (**ArbDB**).
- + **Leading practitioners** from Allen and Overy, Clifford Chance, Eversheds, Foley Hoag, Freshfields Bruckhaus Deringer, Herbert Smith Freehills, Rajah & Tann, Shook Lin & Bok, Volterra Fietta, Zul Rafique & Partners.
- + **Eminent professors/researchers** from the Sorbonne Law School (*Université Paris 1 Panthéon-Sorbonne*), the National University of Singapore, the School of International Arbitration – Queen Mary University of London, the Newcastle University, Kobe University, the National University of Malaysia, the Islamic Science University of Malaysia.

BRIGITTE STERN is Professor Emeritus at the University of Paris I – Panthéon-Sorbonne. She was also a Member and the Vice-President of the United Nations Administrative Tribunal (UNAT) from 2000 to 2009. She has served and serves as a Consultant and Expert for international organisations. She is active in international dispute settlement, acting as Counsel before the International Court of Justice and as Arbitrator (Sole Arbitrator, Member or President) in numerous ICSID, ICC, NAFTA, Energy Charter Treaty and UNCITRAL arbitrations. She holds a Master's degree and a JD from the University of Strasbourg, a Master of Comparative Jurisprudence (MCJ) from New-York University, and a PhD from the University of Paris. She passed the Paris Bar exam and is "Agrége" of the Law Faculties (1970). She has published many books, among others, *Le préjudice dans la théorie de la responsabilité internationale*, Paris, Pedone, 1973, *20 ans de jurisprudence de la Cour internationale de Justice. 1975-1995*, La Haye, Nijhoff, 1998, *La succession d'Etats*, Lecture at The Hague Academy of international law, *RCADI*, tome 262, La Haye, Kluwer, 2000, as well as numerous articles.

PROGRAMME

10 MARCH 2016 (Thursday)

- 5.30pm Event Registration
- 6.00pm **Welcome Speech** by
Datuk Professor Sundra Rajoo
Director of the Kuala Lumpur Regional Centre for Arbitration (**KLRCA**)
- 6.10pm **Opening Address** by His Highness Prince
Dr Bandar bin Salman bin Mohammed Al Saud
Honorary President of the Gulf Arab States Lawyers Union
- 6.20pm **Opening Speech** by The Honourable
Puan Hajah Nancy Binti Shukri
Minister in the Prime Minister's Department
- 6.30pm **Keynote Speech** by Brigitte Stern
Professor Emeritus, Sorbonne Law School
- 7.15pm **KIIAC 2016 Cocktail Reception**
- 10.00pm End of Programme

11 MARCH 2016 (Friday)

- 8.15am Registration
- 9.00am **Opening Speech** by Tan Sri Dato' Cecil Abraham
KLRCA Advisory Board Member; Founding Partner, Cecil Abraham and Partners
- 9.15am **Session 1: Promoting Investments and Administering Investment Disputes – Tales from Regional and International Institutions**
- 11.15am Morning Networking Break
- 11.30am **Session 2: Investment Arbitration – The Practitioner's Point of View**
- 12.30pm Networking Lunch Break
- 1.45pm **Session 2: Investment Arbitration – The Practitioner's Point of View (con't)**
- 4.15pm Evening Networking Break
- 4.30pm **Session 3: Doctrinal Developments in Investment Arbitration**
- 6.45pm Closing
- 7.00pm End of Programme

REGISTER NOW!

Kindly complete the registration form as below and send it together with your payment by **1 MARCH 2016** via:
FAX: +603 2271 1010 **EMAIL:** events@klrca.org
COURIER: KLRCA, Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia

Full Name: _____

Company/Organisation: _____

Designation: _____

Address: _____

Tel: _____ Fax: _____ Email: _____

Dietary Requirements: (Please tick one)

☐

Vegetarian

☐

Non-vegetarian

Conference Fee: (Please tick one) (Includes welcome reception, lunch and tea breaks)

☐

Corporate/Individual — RM 1000

☐

Full-time Academic/ Government/ NGO — RM 600

☐

Full-time Student — RM 250

Mode of Payment: (Please tick one) (Please ensure that payments are free of any bank charges)

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Cheque payable to "KLRCA Events"

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Bank Transfer/ Account Deposit

Bank details:

Maybank Berhad, Wisma Genting SSC, Jalan Sultan Ismail, 50250 Kuala Lumpur

Account Number: **5143-5650-4056**

Swift Code: **MBBEMYKL**

Payment by bank transfer or account deposit must be evidenced by a copy of the bank-in slip or transaction reference and submitted with the registration form. Registration will be confirmed after receipt of payment. No cancellations allowed after confirmation but you may send another person to attend in your place. The organisers reserve the right to (1) postpone or change the timing and content of the programme and venue at any time; or (2) cancel the event at any time and under such circumstances, will refund the registration fee in full.

KHAC

2016

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REGIONAL RESOLUTION GLOBAL SOLUTION

In collaboration with:



KLRCA INTERNATIONAL INVESTMENT ARBITRATION CONFERENCE

The **Kuala Lumpur Regional Centre for Arbitration (KLRCA)** is proud to organise in collaboration with the **Institute of Malaysian and International Studies (IKMAS)** an international conference on investment arbitration, on 10 and 11 March 2016.

The keynote speech will be delivered by the highly respected academic and arbitrator Brigitte Stern (France), Professor Emeritus of international law at the **Sorbonne Law School** in Paris (*Université Paris 1 Panthéon-Sorbonne*).

Since their emergence, investor-State dispute settlement (**ISDS**) mechanisms have met with a resounding success. One of the most striking testaments to this success is the steady increase in the number of investor-State arbitrations over the past several years. However, over the past decade, an increasing sceptical attitude of States towards these mechanisms is palpable. The Conference – the first of its kind in Asia – will address the complex issues raised by investor-State arbitration, with a particular focus on the Asia Pacific region, following the signing of the Trans-Pacific Partnership Agreement (**TPPA**).

Through its many attentive sessions, luncheons, and evening receptions – the KLRCA International Conference on Investment Arbitration 2016 seeks to encourage and induce active participation and interaction amongst the brightest practitioners, leading regional and international institutions, eminent professors/researchers and investment treaty arbitration enthusiasts from around the globe.

Keynote speech by

Brigitte Stern

Professor Emeritus, Sorbonne Law School
(*Université Paris I – Panthéon-Sorbonne*)

DATE:

10-11 MARCH 2016

VENUE:

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

Bangunan Sulaiman, Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia

CONFERENCE FEE (inclusive of GST):

Corporate/Individual – RM 1000

Full-time Academic/ Government/ NGO – RM 600

Full-time Student – RM 250

For more information, please contact:

Business Development Team

Phone: +603 2271 1000 Email: events@klrca.org

Supporting institutions:

