MIArb NEWSLETTER

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Note From President

Dear Members,

This is the first newsletter of 2015. This issue contains interesting and informative articles and case commentaries that I hope you will find useful. This issue also covers events organised and/or participated by MIArb between October 2014 and May 2015.

It has been busy and eventful.

For the uninitiated, we run the Diploma in International Arbitration programme in collaboration with Brickfields Asia College ("the course"). The course runs for several weeks, culminating in a written assessment. My special thanks goes to S. Shanthi who coordinates and lectures extensively on the course.

In January 2015, we organised the Membership Upgrade Course for Associates desirous of making themselves eligible to be Members of MIArb. My special thanks goes to Lynnda Lim Mee Wan for organising the course.

In March 2015, MIArb had the privilege of collaborating with the Kuala Lumpur Regional Centre for Arbitration in organising a seminar entitled "The Annual Law Review of Arbitration Cases: Prominent Cases from 2013 – 2014". My special thanks goes to Jonathan Yoon Weng Foong for seeing this through.

In May 2015, MIArb hosted the immensely successful KLIAW & RAIF 2015 Networking Event and RAIF 2015. My special thanks goes to Sudharsanan Thillainathan, the Chairman of RAIF 2015 and his committee for their tireless and unrelenting efforts.

It has come to the end of my term as President of MIArb. It has been both challenging and rewarding. I wish to thank my very committed and supportive Council and Secretariat. It has been a pleasure and an honour to be working with such good company.

Last but not least, I encourage all members to play an active role in the activities of MIArb and to support its endeavours of putting MIArb on the map of the arbitral circle, both domestically and internationally.

Lam Ko Luen
President

Contents

Editor: Victoria Loi Tien Fen
Senior Associate
Shook Lin & Bok, Kuala Lumpur

Contributors: Raymond Mah
Ir. Lai Sze Ching

LexisNexis Arbitration Titles

Singapore International Arbitration: Law & Practice

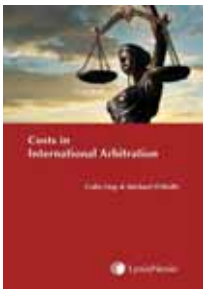
ISBN : 978-981-440-644-4
Price : RM 1254.56

This will serve as a comprehensive commentary on the current state of international arbitration in Singapore. Singapore, having adopted the UNCITRAL Model Law and a party to the 1958 New York Convention and having a strong tradition of the rule of law, is growing rapidly as a centre for International Arbitration. Constantly ranked top in international surveys, the Singapore International Arbitration Centre's caseload had increased rapidly in the past decade. This book gathers the leading names in international arbitration and each have contributed to a topic of discussion covering various aspects of international arbitration in Singapore.

Asian International Arbitration Journal

ISBN : AIAJ2013ISSUB
Subscription Price : RM 1242.00

The Asian International Arbitration Journal ('AIAJ') is the first journal to provide commentary relating to arbitration across Asia. The AIAJ comprises of quality articles written by experts in their fields and carefully selected by two esteemed independent General Editors. The journal carries articles, notes on awards, legislation updates and book reviews. It provides a current and accurate report on the development of arbitration in Asia. The AIAJ is published twice a year in collaboration with the Singapore International Arbitration Centre.



Costs in International Arbitration

ISBN : 978-981-440-615-4
Price : RM487.50

Costs in International Arbitration, written by two well-known and experienced practitioners, is the first book to focus on the increasingly important and high profile topic of costs in international arbitration. It provides a comprehensive but accessible practical guide to the law relating to all aspects of costs in arbitration proceedings and will be an essential reference for all involved in international arbitration.

SIAC Rules: An Annotation

ISBN : 978-981-440-613-0
Price : RM 386.00

This new annotation to the 2013 SIAC Rules, which came into force in April 2013, is compiled and edited by experienced international arbitration practitioners from Brick Court Chambers, one of the leading commercial sets in London. This title provides detailed and very practical guidance to any party considering the adoption of an agreement to arbitrate under the SIAC Rules and any practitioner who is involved in SIAC arbitration under the new Rules. This is a complement to other titles on Singapore International Arbitration; How arbitration under a particular set of institutional rules operates is often critical to a decision as to whether parties adopt those rules and, if they do what their effect is.

Singapore Arbitral Awards 2012

ISBN : 978-981-236-956-7
Price : RM 918.00

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Alternate Dispute Resolution : A Handbook for In-House Counsel in Asia

ISBN : 978-981-460-816-9
Price : RM 412.90

The book includes a practical examination of each process; when they arise; where each method is best used; when it is most effective; advantages and disadvantages; and relevant treatment by courts (case law) in Asian jurisdictions. The content also includes a discussion on multi-tiered dispute resolution clauses, their pros and cons, enforceability and treatment in the courts.

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Contributions
MIArb welcomes articles and other materials of interest for publication in future issues of this newsletter. By contributing an article or other material of interest to MIArb, the contributor(s) warrant(s) that the same is original and not already published elsewhere either electronically or in print. MIArb reserves the right to edit or decline any materials submitted. Enquiries may be addressed to The Editor at info@miarb.com.

This newsletter is also available on our website: www.miarb.com.

Past Events 2014-2015

15.10.2014
Evening Talk: GST – Potential Disputes

11.11.2014
Evening Talk: Perspective on BIM – for Building Contractors

17.1.2015 & 18.1.2015
The Membership Upgrade Course

31.3.2015
The Annual Law Review of Arbitration Cases: Prominent Cases from 2013 – 2014

8.5.2015
KLIAW & RAIF 2015 Networking Event

9.5.2015
9th Regional Arbitral Institutes Forum Conference (RAIF 2015)

14.5.2015
Evening Talk: Reading the Mind of an Adjudicator under CIPAA

Important Notice

Please take note that all MIArb's scales of fees have been removed and the said removal takes immediate effect. MIArb is in the midst of amending all its relevant rules to reflect the removal of all MIArb's scales of fees.

Construction Adjudication: **Prospective, Retrospective or Somewhere In-between?**

by Raymond Mah
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Introduction

On 15 April 2014, the Construction Industry Payment and Adjudication Act 2012 ("CIPAA 2012" or "Act") came into force, almost two years after it was gazetted by the Government in June 2012. It was hoped that CIPAA 2012 would be the solution to the age old cash-flow problems in the construction industry. The long title of the Act states that the Act aims to "facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters."

There has been a steady increase in the number of payment disputes referred to adjudication under CIPAA 2012. The Kuala Lumpur Regional Centre for Arbitration ("KLRCA") is the adjudication authority responsible for administering the Act; and KLRCA has disclosed that a total of 29 matters were registered in 2014 and 53 matters have been registered up to 10 April 2015. A total of 16 adjudication decisions have been published as at 10 April 2015; and interestingly, all 16 decisions have been in favour of the claimants.

In attempts to challenge the jurisdiction of the adjudicator appointed by KLRCA under CIPAA 2012, the respondents in at least two adjudications have taken issue with the retrospective application of CIPAA 2012 to construction contracts entered into before 15 April 2014. UDA Holdings Berhad v Bisraya Construction Sdn Bhd & MRCB Engineering Sdn Bhd (Originating Summons No: 24C-6-09/2014) ("UDA v Bisraya") was heard together with Capital Avenue Development Sdn Bhd v Bauer (Malaysia) Sdn Bhd (Originating Summons No: 24C-5-09/2014) ("CAD v Bauer"). The applications were heard in the Construction Court of the Kuala Lumpur High Court and were decided by Mary Lim J on 31 October 2014. The grounds of judgment is reported as UDA Holdings Berhad v Bisraya Construction Sdn Bhd & MRCB Engineering Sdn Bhd & Another Case [2014] 1 LNS 1584.

Brief overview of the Act

Speedy dispute resolution mechanism

CIPAA 2012 introduces in Part II a dispute resolution mechanism which is supposed to last only 100 working days. The process begins with the unpaid party serving a Payment Claim[1] on the non-paying party, after which the non-paying party may respond with a Payment Response[2]. If a Payment Response is not served by the non-paying party within the time-frame, the entire Payment Claim is deemed to have been disputed. The adjudication process is then commenced by way of a Notice of Adjudication and concludes with the Adjudication Decision[3].

In order to meet the tight timeline, an adjudication can be heard and decided entirely on the documents; without hearings or meetings with the adjudicator. CIPAA 2012 adopts the *"pay now, argue later"* principle in which successful claimants are entitled to payment until the Adjudication Decision is set aside and/or finally

decided by arbitration or the court[4] in the respondent's favour. This interim measure is viewed as a benefit to the industry because it gives unpaid parties the necessary cash flow to continue with the works while giving parties who are dissatisfied with the Adjudication Decision an avenue to pursue the dispute in the usual forums.

Applicability

Section 2 of the Act says that the Act *"applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government."*

Section 3 on the other hand says that the Act *"does not apply to a construction contract entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation."*

The savings provision in Section 41 states that the Act shall not affect any *"proceedings relating to any payment dispute under a construction contract which had been commenced in any court or arbitration before the coming into operation of this Act."*

Is the Act prospective or retrospective?

As the Act is silent on whether it applies retrospectively or prospectively, KLRCA issued a circular on 23 April 2014[5] to state its position that CIPAA 2012 applies to a *"payment dispute which arose under a construction contract on or after 15 April 2014, regardless of whether the relevant construction contract was made before or after*

15 April 2014". This appeared to be a compromise between a retrospective and prospective application of CIPAA 2012: KLRCA understood the Act to operate retrospectively to construction contracts entered into before 15 April 2014 and prospectively to payment dispute which arose on or after 15 April 2015.

Determination by Court

The plaintiff in UDA v Bisraya was the respondent in adjudication proceedings commenced by Bisraya on allegations of non-payment of certified sums, non-certification and non-payment of variations, wrongful deduction of liquidated damages and wrongful set-off from an interim payment certificate. UDA filed an originating summons in the High Court to challenge the jurisdiction of the appointed adjudicator on the grounds that (i) the claims submitted by Bisraya were based on issues which arose before 15 April 2014; (ii) Bisraya, being a consortium, lacks the *locus standi* to commence adjudication proceedings; (iii) extension of time is not a payment dispute within the purview of CIPAA 2012; and (iv) the Conditions of Contract did not provide for a penultimate payment certificate.

The plaintiff in CAD v Bauer was the respondent in adjudication proceedings commenced by Bauer over a dispute in the rates for coring works for bored piles. CAD filed an originating summons also seeking from the High Court declarations that the adjudicator appointed by KLRCA to adjudicate the dispute did not have jurisdiction to do so. CAD raised three jurisdictional challenges, namely that (i) an unincorporated joint venture lacks *locus standi* to commence an adjudication claim; (ii) CIPAA 2012 does not apply retrospectively to the dispute arising from the Letter of Award dated 13 May 2013; and (iii) Bauer was prevented by issue estoppel from re-adjudicating the dispute under CIPAA 2012 after having participated in an adjudication carried out under the provisions of the contract.

At the joint hearings, the focus was clearly on the retrospective/prospective issue with parties taking differing views and arguments. Counsel for CAD argued that CIPAA 2012 is wholly prospective, applying only to contracts entered into after 15 April 2015. Counsel for Bauer and UDA both supported the position taken by KLRCA, while counsel for KLRCA appeared as *amicus curiae* to justify its circular. The wholly retrospective argument was taken by counsel for Bisraya, who submitted that CIPAA 2012 applies to all construction contracts and all payment disputes, regardless of when they arose.

Summary of the High Court Judgment

On 31 October 2014, the High Court dismissed both cases after several days of submissions, on the basis that CIPAA 2012 does apply retrospectively to all construction contracts, save for contracts within the meaning in sections 3 and 41 of the Act. The Court dealt only with the retrospective/prospective issue and left the other issues for determination by the respective adjudicators. In summary, the learned Judge's reasons are:

(i) CIPAA 2012 is a procedural and adjectival legislation. Such a legislation is presumed in law to apply retrospectively unless there is clear intention to the contrary in the statute itself.[6]

In arriving at this conclusion, the Court considered the case of Tribunal Tuntutan Pembeli Rumah v Westcourt Corporation Sdn Bhd & Other Appeals [2004] 2 CLJ.[7] In that case, the Tribunal for Homebuyer Claims was established by an amendment to the Housing Developers (Control and Licensing) Act 1996

1 *Section 5 of CIPAA 2012*

2 *Section 6 of CIPAA 2012*

3 *Sections 7 to 12 of CIPAA 2012*

4 *Section 13 of CIPAA 2012*

5 *KLRCA CIPAA Circular 01*

6 *Paragraph 160 of UDA Holdings Berhad v Bisraya Construction Sdn Bhd & MRCB Engineering Sdn Bhd & Another Case [2014] 1 LNS 1584 ("High Court Judgment")*

7 *The Federal Court affirmed the Court of Appeal's decision in Westcourt Corporation v. Tribunal Tuntutan Pembeli Rumah [2004] 4 CLJ 203*

by the Housing Developers (Control and Licensing) (Amendment) Act 2012. The Court of Appeal there took the purposive approach in interpreting the amending act and said that to limit the tribunal's jurisdiction to disputes arising from sale and purchase agreements entered into after the appointed date would be to defeat Parliament's intention of helping claimants with breaches of sale and purchase agreements entered into prior to the appointed date. The Court of Appeal justified the purposive approach by finding that the amending act was a piece of "social legislation" which created a new forum for the speedy disposal of consumer disputes.[8]

Adopting the same approach, the learned Judge held that CIPAA 2012 is essentially a choice of forum legislation. She also concluded that CIPAA 2012 is a "social legislation" as it was enacted for the benefit of society.

(ii) CIPAA 2012 does not affect substantive rights because there are no existing rights conferred by any written law which are affected in any way.[9] The learned Judge made a distinction between contractual rights and rights which were conferred by a statute. To the learned Judge's mind, CIPAA 2012, being an entirely new legislation, *"does not alter any existing or vested/accrued rights which were conferred under repealed or amended laws as there was no existing laws to begin with"*. She found that parties had not in fact acted on any rights that were directly affected by CIPAA 2012, but that in any event, the only vested rights which Parliament intended to preserve were those subject to section 41 of the Act that had been exercised before CIPAA 2012 came into operation.

(iii) CIPAA 2012 should be read plainly and interpreted purposively.[10] The finding that CIPAA 2012 is applicable to all construction contracts will *"do no harm or violence to the plain language of the Act, including sections 2, 3 and 41 or any other provisions in the Act."*

(iv) The argument that the CIPAA 2012 could have partial retrospective application cannot not be sustained. The learned Judge opined that there are ample reasons for a holistic construction and interpretation of the Act. In consequence, any existing "pay when paid" and "pay if paid" clauses are rendered void pursuant to section 35, which prohibits conditional payment. Further, section 36 imposes default provisions for the payment of progress payment on existing construction contracts which are silent on payment terms.

The plaintiffs in both suits have appealed the High Court decision to the Court of Appeal. The appeals were heard on 9 March and 19 May 2015. The Court of Appeal reserved its decision to 24 June 2015.

Conclusion

As the law currently stands, CIPAA 2012 applies to all constructions contracts, regardless of when they were entered into. All payment disputes may be referred to adjudication under the Act, subject only to sections 2, 3 and 41 of the Act and any exemption order issued by the Minister under section 40. KLRCA issued its CIPAA Circular 1A on 11 November 2014 giving effect to the High Court decision and superseding Circular 01 with immediate effect. ■

(MahWengKwai & Associates are solicitors for Capital Avenue Development Sdn Bhd. Raymond Mah and Hannah Patrick appeared as counsel for Capital Avenue Development Sdn Bhd at the High Court hearing)

8 *Paragraphs 163 to 167 of the High Court Judgment*

9 *The Court considered the arguments in Sim Seoh Beng v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 CLJ 491 and Tenaga Nasional Bhd v Kamarstone Sdn Bhd [2014] 1 CLJ 207 that if amendments to legislations affect substantive rights, the acts will not have retrospective effect unless there is express language to say so.*

10 *The Court looked at section 17A of the Interpretation Act and the case of Andrew Lee Siew Ling v. United Overseas Bank (M) Sdn Bhd [2013] 1 CLJ 24.*

Recognition and Enforcement of International Arbitral Awards

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Introduction

Once an arbitral award is made, the successful party is generally entitled to enforce the award against the losing party. For international awards involving parties from different countries, the question arises as to how the award may be enforced in another country. The answer may be found in treaties such as the *Convention for the Recognition and Enforcement of Arbitral Awards 1958* ("the New York Convention").

The New York Convention

Where a country is a signatory to the New York Convention, the award may be enforced in that country provided certain requirements are fulfilled. Article V(1) of the New York Convention does however prescribe various grounds under which a losing party may resist the recognition and enforcement of the arbitral award provided he can prove that such grounds exist. In particular, Article V(1)(a) and (e) of the New York Convention provides, that:-

> "Recognition and enforcement of an award *may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that*:
>
> *(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made…*
>
> …
>
> *(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."*

The use of the word "may" suggests that the Court retains its discretion on whether to refuse recognition or enforcement even where a party provides proof. The issue of recognition and enforcement of an award arose in the controversial case of *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan.*

The Case of Dallah

Facts

Dallah Real Estate and Tourism Holding Company ("Dallah") entered into a memorandum of understanding with the Government of Pakistan ("the Government") in July 1995 to provide accommodation for pilgrims from Pakistan to Mecca. The Government later established the Awami Hajj Trust ("the Trust") to collect and invest donations received from pilgrims for the project.

The Trust and Dallah entered into an agreement in September 1996 under which Dallah was to acquire land

for the construction of housing near Mecca, which would then be leased to the Trust. The Government was involved in pre-contractual discussions, but was not named as a party to the agreement. The agreement contained an ICC arbitration clause but did not specify a choice of governing law. While the Government was not a signatory to the agreement, the Government guaranteed the Trust's loan obligation and was empowered to assign the rights and obligations incurred by the Trust without Dallah's authorisation.

The Trust ceased to exist as a legal entity in December 1996. In January 1997, a government official from the Ministry of Religious Affairs wrote to Dallah, purporting to terminate the agreement. Claims in the courts in Pakistan were later dismissed as the Trust no longer existed as a legal entity.

In May 1998, Dallah commenced an ICC arbitration against the Government in Paris. The arbitral tribunal held that the Government was a true party to the agreement. Therefore, in accordance with French international arbitration law, the Government was

bound by the arbitration clause as an alter ego of the Trust. The arbitral tribunal concluded that it had jurisdiction to determine Dallah's claim against the Government. In June 2006, the tribunal made its final award of US$20.5 million in Paris in favour of Dallah. Dallah then sought to enforce the award in England and France.

Enforcement Proceedings

England

The Government resisted enforcement in England, claiming that it was not a party to the arbitration agreement on which the award was based and that "*the arbitration agreement was not valid ... under the law of the country where the award was made*" (i.e. French law).

Dallah on the other hand argued that, even if the arbitration agreement was not valid under the law of the country where the award was made, the English court still had the discretion to enforce the award.

The High Court[1], the Court of Appeal[2] and the Supreme Court[3] refused to allow enforcement of the award in England. In particular, the Supreme Court held that the arbitral tribunal's findings on jurisdiction were not final, and concluded that the Government was not a party to the arbitration agreement.

On the issue of whether the Government was a party to the agreement as a matter of French law, the Supreme Court took the view that the fact that the Government was itself involved in the contractual negotiations between Dallah and the Trust, was named in the original memorandum of understanding and remained interested throughout the project, did not mean that the Government, or Dallah, had the intention that the Government were to be a party to the agreement.

The Supreme Court held that the arbitral tribunal had improperly applied French law when concluding that the Government was a party to the agreement. In the Court's view, any other conclusion would mean that "*many third persons were party to contracts deliberately structured so that they were not party*." After a detailed examination of French and comparative law, the Court held that there was no "common intention" for the Government to be a party to the agreement.

The Supreme Court rejected Dallah's argument that the Court could nonetheless exercise its discretion to allow enforcement pursuant to Section 103(2) of the Arbitration Act 1996 even in circumstances where the Court had concluded there was no agreement to arbitrate. The Supreme Court held that:-

> *"Absent some fresh circumstance such as another agreement or an estoppel, it would be a remarkable state of affairs if the word 'may' enabled a court to enforce or recognise an award which it found to have been made without jurisdiction, under whatever law it held ought to be recognised and applied to determine that issue."*

The Supreme Court further held:

> *"... there is no arbitrary discretion: the use of the word "may" was designed to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have an award set aside arising in the cases listed in section 103(2). ... [a] possible example would be where there has been no prejudice to the party resisting enforcement: ... But it is not easy to see how that could apply to a case where a party had not acceded to an arbitration agreement."*

As such, the Supreme Court concluded that the exceptions in Section 103(2)(b) of the Arbitration Act 1996 and Article (V)(1)(a) of the New York Convention were applicable to deny the enforcement of the award.

1 *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan [2008] EWHC 1901 (Comm.)*

2 *Dallah Real Estate & Tourism Holding Co v Pakistan [2009] EWCA Civ 755; [2010] 2 WLR 805*

3 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46*

France[4]

Having obtained a favourable ruling in England, the Government applied to the French courts to annul the award previously decreed against it pursuant to Article 1502(1) of the French Code of Civil Procedure.

In an interesting twist of events, the French Court however concluded that the Government had intended to be a party to the agreement. The Court drew particular attention to the Government's involvement in the pre-contractual stages and its active role throughout the agreement. The Government was seen to act "*as if the Contract was its own; … this involvement… confirm[s] that the creation of the Trust was purely formal and that [the Government] was in fact the true Pakistani party in the course of the economic transaction.*"

It is this author's view that the conflicting decisions of the English and the French Courts as discussed above are disconcerting. This is particularly so as both the English and the French Courts were considering the same facts and principles but yet approached the issues differently and arrived at completely opposite results. It is this author's observation that the decision of the English Courts has departed from its traditional pro-enforcement attitude and this may signify that the English courts may be prepared to adopt a more interventionist approach in future.

Malaysia

The decision of the English Supreme Court in Dallah was discussed extensively and applied by the High Court in *Food Ingredients LLC v Pacific Inter-Link Sdn Bhd*[5]. The High Court held that there was no evidence whatsoever to show that there was an arbitration agreement between the parties and therefore refused to allow the recognition and enforcement of the arbitral award.

Upon appeal, the Court of Appeal[6] reversed the decision of the High Court and held that there was an agreement to arbitrate and that the parties were bound by such an agreement. The Court of Appeal accordingly allowed the award to be recognised and enforced in Malaysia. The Court of Appeal held that the factual matrix in the case of Dallah differed substantially from the present and as such did not warrant a consideration of which principles may be adopted.

The Court of Appeal also noted that the respondent had not given any explanation for its failure to raise its objection to jurisdiction before the arbitral tribunal and had only raised the same at the High Court, after having fully participated in the arbitration. In this connection, the Court of Appeal held, *inter alia*, that the doctrine of estoppel would work against the respondent.

In light of the aforesaid, it is this author's view that if parties wish to object to the jurisdiction of the arbitral tribunal, such objections should be raised early in the arbitration proceedings and not kept till the stage of enforcement as the court may invoke the doctrine of estoppel to deny the right of objection at the enforcement stage.

Conclusion

This author takes the view that the enforcement of an arbitral award should be refused if it has been held to be invalid at the seat of arbitration. This view is supported by the principle of *ex nihilo nil fit* ('nothing comes of nothing') i.e. if an award has been set aside in the country where it was made, then jurisprudentially the award does not exist and cannot be enforced elsewhere. ■

4 *Gouvernement du Pakistan v Sociere Dallah Real Estate and Tourism Holding Company, Cour d'Appel, Paris, Feb 17, 2011, 09/28533, 09/28535 and 09/28541*

5 *(2011) 1 LNS 1631*

6 *Agrovenus LLP v. Pacific Inter-Link Sdn. Bhd. [2014] 4 CLJ 525*

From the Editor's Desk – Commentary on: Government of Malaysia v. Perwira Bintang Holdings Sdn. Bhd.

Facts

Perwira Bintang Holdings Sdn. Bhd. ("Perwira Bintang") and the Government of Malaysia ("the Government") entered into a design-and-build contract for the construction of an office tower block in Bukit Aman for the project described as "Cadangan Pembinaan Kompleks KDN/KA & Logistik, Bukit Aman, Wilayah Persekutuan" ("the contract"). During the course of piling works, Perwira Bintang had to bore through hard rock as a result of a variation to the piling design required by the Government. Perwira Bintang subsequently submitted a claim to the Government for "extra over" payment in excess of RM4.05 million for its piling works through hard rock. The Government disclaimed liability, contending that any extra cost occasioned by a variation to the piling design is to be borne by Perwira Bintang pursuant to clause 27.3 and 27.4 of the contract. Displeased with the position taken by the Government, Perwira Bintang commenced arbitration against the Government.

At the arbitration, there was no dispute that Perwira Bintang had bored through hard rock and the general length of piling through hard rock or material was available in the piling records. The exact length of piling through hard rock however was not established. On this basis, though the arbitrator found in favour of Perwira Bintang in terms of liability, the arbitrator dismissed Perwira Bintang's claim in terms of quantum. Dissatisfied, Perwira Bintang applied to the High Court to set aside part of the award pursuant to Section 37(1)(a)(iv), 37(2)(b) and 37(3) of the Arbitration Act 2005. Perwira Bintang also applied to vary or set aside award pursuant to Section 42 of the Arbitration Act 2005.

High Court[1]

In relation to Section 37 of the Arbitration Act 2005, Perwira Bintang's principal argument was that the arbitrator had dealt with a "dispute not contemplated by or not falling within the terms of the submission to arbitration". As for Section 42 of the Arbitration Act 2005, Perwira Bintang's argument was that the case concerned a "reference on questions of law" said to "arise from the award".

The High Court agreed with Perwira Bintang and set aside part of the final award pursuant to Section 37(1)(a)(iv). The High Court found that it was evident from the pleadings filed in the arbitration that there was no dispute between the parties as to the length of hard rock. The High Court noted in particular that the Government had paid Perwira Bintang without any protest on the length of hard rock bored through according to the rates the Government thought was appropriate i.e. the rate for "all soils" in the Bill of Quantities. The High Court therefore held that it was apparent that the award involved a "*new difference or such matters which would have been irrelevant to the issues requiring determination*" by the arbitrator and was liable to be set aside.

As for Section 42, the High Court held, inter alia, that two of the six questions referred by Perwira Bintang were valid and ought to be answered in the Plaintiff's favour. In particular, the High Court held, amongst others, that "*the conclusions reached by the Arbitrator are patently and obviously illogical and perverse*" given that the length of hard rock bored through by Perwira

1 *Perwira Bintang Holdings Sdn. Bhd. v. Kerajaan Malaysia [2013] 1 LNS 1336*

Bintang was never an issue in dispute between the parties.

Accordingly, the High Court set aside several paragraphs and varied paragraph 152 of the final award to read that Perwira Bintang's claim is allowed at RM3,300,727 with costs.

Dissatisfied, the Government appealed to the Court of Appeal against the decision of the High Court.

Court of Appeal[2]

On 9.12.2014, the Court of Appeal dismissed the appeal with costs and in so doing, upheld the decision of the High Court.

In relation to Section 37, the Court of Appeal agreed with the High Court that the arbitrator had dealt with a new difference which was irrelevant to the issues between the parties and therefore dismissed the appeal with costs. In particular, the Court of Appeal held at paragraph [39] that:-

> "*[39] …In as much as our courts must embrace the principles of finality of awards, party autonomy and minimal court intervention in the context of the Model Law legal regime, and the more general considerations that our courts should be arbitration-friendly and pro-enforcement, we cannot allow an award to stand in the face of a clear excess of jurisdiction and a breach of the equally important principle that arbitration proceeding is consensual and the mandate of the chosen arbitrator has to be limited to the terms of the submissions and the agreed issues*."

As for Section 42, the Court of Appeal agreed with the High Court that only two of the six questions referred by Perwira Bintang ought to be allowed. The Court of Appeal found that the rest of the questions referred were "*essentially questions of facts 'dressed up' as questions of law*". The Court of Appeal also took the opportunity to lay down some of the governing principles under Section 42 based on cases from various jurisdictions. The Court of Appeal further opined that grounds raised under Section 37 could be raised under Section 42 "*if all the requirements under the section can be fulfilled*".

Commentary

The decision of the Court of Appeal illustrates that whilst the courts are inclined to be arbitration-friendly and pro-enforcement, consistent with the UNCITRAL Model Law principles, the courts will not hesitate to exercise its supervisory role to set aside or vary an award in appropriate circumstances as prescribed under the Arbitration Act 2005.

2 *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn. Bhd. [2015] 1 CLJ 617*

From the Editor's Desk – Commentary on: Interactive Brokers LLC v. Neo Kim Hock & Others

Facts

The Plaintiff is an online securities and commodities brokerage firm based in the United States of America. Apart from engaging in the business of buying and selling companies' shares for its customers, the Plaintiff provides loans to its customers for the purchase of these shares. The Defendants were customers of the Plaintiff who had allegedly defaulted on loans taken out to trade in shares in Singapore. Arising therefrom, the Plaintiff commenced arbitration proceedings against the Defendants at the International Centre for Dispute Resolution.

Related to this were investigations carried out by the Singapore Stock Exchange and Monetary Authority of Singapore into three companies, Blumont Group Limited, Asiasons Capital Ltd. and Lion Gold Corp. Ltd. ("the said companies"). The investigations into the activities of the said companies were prompted by the acute volatility of share prices, culminating in a sharp drop of the same, wiping out billions of Singapore dollars in a span of a few months of active trading. In this regard, the Plaintiff alleged that all the Defendants had borrowed the former's monies to trade on the shares of the said company and had manipulated such shares.

High Court[1]

Having commenced arbitration, the Plaintiff applied for an injunction pursuant to Section 11 of the Arbitration Act 2005 against the Defendants from using, disposing and dealing with their assets so as to frustrate the outcome of the arbitration. The Plaintiff alleged, amongst others, that there was a "*real risk of the defendants dissipating their assets*". The Defendants on the other hand contended, amongst others, that there was material non-disclosure of crucial and relevant facts on the part of the Plaintiff, contrary to Order 29 rule 1(2A)(f) of the Rules of Court 2012, in that the Plaintiff had not disclosed that there had already been a similar application in the Singapore High Court.

The High Court confirmed that the courts have the powers to grant a Mareva injunction pursuant to Section 11(1)(g) of the Arbitration Act 2005. Having found that the requirements for granting a Mareva injunction had been fulfilled, the High Court allowed the Plaintiff's application. In particular, the High Court held that parties were not limited to seeking an injunction before the arbitral tribunal but could resort to the High Court for an injunction pending arbitration since the same is provided for under Section 11 of the Arbitration Act 2005. The High Court also held that Order 29 rule 1(2A)(f) of the Rules of Court 2012 was limited to applications in Malaysia and did not extend to applications made in Singapore. Dissatisfied, the Defendants appealed to the Court of Appeal against the decision of the High Court.

Court of Appeal[2]

On 13.10.2014, the Court of Appeal unanimously upheld the High Court's decision of freezing the assets of the Defendants (at the High Court), reportedly to the tune of S$79 million. The decision of the Court of Appeal received wide media coverage at the time it was decided. The Court of Appeal reportedly held that there was a "real risk of dissipation" of the assets as the matter among others arose from suspicious transactions investigated by both the Singapore Stock Exchange and the Monetary Authority of Singapore.

Commentary

Section 11 of the Arbitration Act 2005 generally provides that a party to an arbitration may, before or during arbitral proceedings, apply to the High Court for any interim measure. Section 11(3) of the Arbitration Act 2005 in particular provides that Section 11 also applies to an international arbitration where the seat of arbitration is not in Malaysia. The case of Interactive Brokers above shows that where appropriate, the Malaysian courts are prepared to exercise its discretion to grant injunctions in aid of arbitration where the arbitration had originated from a foreign jurisdiction and involved a foreign claimant. ■

1 *Interactive Brokers LLC v. Neo Kim Hock & Ors [2014] 8 CLJ 747*

2 *"Court of Appeal upholds asset freeze order in S'pore penny stock collapse", The Star Online, Qishin Tariq, 14 October 2014; see also "Frozen", Legal Insights Issue 4/2014, December 2014, Ong Doen Xian, Skrine*

Evening Talk

GST – Potential Disputes

Secretariat, The Malaysian Institute of Arbitrators

15 October 2014

Soh Lieh Sieng

Managing Partner, Contract Solutions-i PLT

Lieh Sieng spoke about the impact of the Goods and Services Tax (GST) to the construction industry and the potential disputes which may arise as a result of the implementation of GST in connection with construction contracts. The talk received overwhelming response with approximately 83 attendees.

Evening Talk

Perspective on BIM – for Building Contractors

Secretariat, The Malaysian Institute of Arbitrators

11 November 2014

NV Kumaran
General Manager, Bina Initiatives Sdn. Bhd.

Mike Tang
Technical Support Executive, Bina Initiatives Sdn. Bhd.

NV Kumaran and Mike Tang spoke on Building Information Modelling (BIM), the latest intelligent 3D model-based process in planning, design, construction and management of buildings and infrastructure. The talk centred on the effectiveness of BIM and its benefits to building and construction projects.

The Membership Upgrade Course

Secretariat, The Malaysian Institute of Arbitrators

17 & 18 January 2015

The Membership Upgrade Course is an intensive 2-day course with an assessment programme ("the Course") designed to impart key and relevant knowledge of the practice and procedures of arbitration to the Associates of MIArb. Upon successful completion of the Course, participants may apply to be upgraded to become Members of MIArb. The Course was organised by Lynnda Lim Mee Wan and the course and/or assessment was conducted by Lai Sze Ching, Elaine Yap, Kevin Prakash, Ow Sau Pin, Rajendra Navaratnam, Rueben Mathiavaranam, Ooi Huey Miin, Lam Ko Luen, Sudharsanan Thillainathan, Hor Shirley, Victoria Loi and Joshua Chong. A total of 23 participants attended the Course.

The Annual Law Review of Arbitration Cases

Prominent Cases from 2013 – 2014

Auditorium, KLRCA, Bangunan Sulaiman, Kuala Lumpur

31 March 2015

This interactive seminar was a collaborative effort between MIArb and the Kuala Lumpur Regional Centre for Arbitration (KLRCA), focused on prominent cases on arbitration from 2013 – 2014 and contemporary issues and emerging trends in arbitration. Lam Ko Luen and Sudharsanan Thillainathan spoke on setting aside of awards and references on questions of law respectively. Chang Wei Mun spoke on grounds for refusal of recognition and enforcement of arbitral awards. Rajendra Navaratnam spoke on whether it was permissible to transfer an arbitration agreement and Mohanadass Kanagasabai spoke on the consequences of a party's failure to pay its advance share of costs. This event was chaired by Datuk Professor Sundra Rajoo, Director of the KLRCA, followed by a networking cocktail reception. The event drew a crowd of approximately 86 people.

Kuala Lumpur International Arbitration Week (KLIAW)

KLIAW & RAIF 2015 Networking Event

Rooftop Pavilion, KLRCA, Bangunan Sulaiman, Kuala Lumpur

8 May 2015

The Malaysian Institute of Arbitrators hosted the KLIAW & RAIF 2015 Networking Event on 8.5.2015 in conjunction with the inaugural KLIAW organised by the KLRCA. The highlight of the evening was the Special Dinner Address delivered by Yang Amat Mulia Tunku Zain Al-'Abidin ibni Tuanku Muhriz, Founding President, Institute for Democracy and Economic Affairs (IDEAS). Guests were also treated to an a cappella performance by Tapestry. The Master of Ceremonies for the evening was Daphne Iking. The event drew a crowd of approximately 130 people.


RAIF CONFERENCE 2015
9 MAY 2015


RAIF CONFERENCE 2015


klrc


klrc

Kuala Lumpur International Arbitration Week (KLIAW)

9th Regional Arbitral Institutes Forum Conference (RAIF 2015)

Auditorium, KLRCA, Bangunan Sulaiman, Kuala Lumpur

9 May 2015

MIArb hosted RAIF 2015 on 9.5.2015 in conjunction with the inaugural KLIAW, organised by the KLRCA.

MIArb is one of the founding members of the Regional Arbitral Institutes Forum (RAIF). For the uninitiated, RAIF is a collaboration established in 2007 between the national arbitral institutes in the region. Aside from MIArb, the other members of RAIF are the Institute of Arbitrators & Mediators Australia (IAMA), the Arbitration Association of Brunei Darussalam (AABD), the Hong Kong Institute of Arbitrators (HKIArb), the Indonesian Arbitrators Institute (IArbI), the Singapore Institute of Arbitrators (SIArb), and




the Philippine Institute of Arbitrators (PIArb). RAIF has several objectives, all with the common thread of promoting the resolution of disputes by way of arbitration. One of these objectives that deserves particular mention is that of developing a common arbitral culture, enhancing consistency in regional arbitration practice and promoting understanding and fostering fellowship between the member institutes of RAIF. The key event of RAIF is its annual conference that its member institutes take turns to host.

The theme for RAIF 2015 was **'Arbitration in a Changing World'**. RAIF 2015 saw a congregation of experts and eminent thinkers, law and non-law, from various jurisdictions, presenting and discussing contemporary ideas and issues affecting the regional arbitral community. The conference started off with the Distinguished Speaker Lecture on *'Whither Adversarial Dispute Resolution'*. There were two round table discussions on *'Can ASEAN Prosper Without an Economic Union?'* and *'Hot Topic in Arbitrations'* respectively. There was also a session on *'Investor State Arbitration'*. In keeping with a tradition that goes to the very heart of RAIF, the Presidents or representatives of the RAIF member institutes presented on the developments in arbitration in their respective jurisdictions during the session on *'Regional Updates'* (see pages 26-27). RAIF 2015 was attended by approximately 150 people.


RAIF CONFERENCE 2015
KIrcA

RAIF 2015
Regional Updates Session
Continuing with Tradition

The Hong Kong Institute of Arbitrators (HKIArb)

Samuel Wong, President of HKIArb, spoke on, amongst others, the new developments in arbitration in Hong Kong, including arbitration-friendly initiatives by the Hong Kong Government, and the various educational and promotional activities of HKIArb.

The Philippine Institute of Arbitrators (PIArb)

Teodoro Kalaw IV, President of PIArb, spoke on, amongst others, several significant cases, showing the extent the Philippine Courts have applied UNCITRAL Model Law and/or its principles.

The Institute of Arbitrators & Mediators Australia (IAMA) (now LEADR & IAMA)

Rowena McNally, Immediate Past President of IAMA (now LEADR & IAMA), spoke on, amongst others, the Australian legal framework on arbitration and the extent the Australian Courts have upheld UNCITRAL Model Law and/or its principles.

The Indonesian Arbitrators Institute (IArbI)

Ir. H. Agus Gurlaya Kartasasmita, Board Member of IArbI, spoke on behalf of Anangga W. Roosdiono, Chairman of IArbI. Agus spoke on, amongst others, the various industry specific arbitration institutions in Indonesia and IArbI's continuous efforts in providing education and training in arbitration.

The Singapore Institute of Arbitrators (SIArb)

Chan Leng Sun SC, President of SIArb, spoke on the Singaporean Court's approach in applying UNCITRAL Model Law principles, in particular, in the Court of Appeal decision of AKN v. ALC [2015] SGCA 18.

The Arbitration Association of Brunei Darussalam (AABD)

Mohamad Daud Bin Ismail, Treasurer of AABD, spoke on the significant developments in arbitration in Brunei, including the adoption of Brunei's Arbitration Order 2009 and International Arbitration Order 2009 which are based on the UNCITRAL Model Law.

The Malaysian Institute of Arbitrators (MIArb)

Lam Ko Luen, President of MIArb, spoke on, amongst others, the Malaysian Court's approach in applying UNCITRAL Model Law principles as illustrated in several reported decisions and on the Construction Industry Payment and Adjudication Act 2012.

Moderator

The Regional Updates Session was moderated by Rodney Martin, Managing Director of Charlton Martin Consultants Sdn. Bhd., Kuala Lumpur.

Evening Talk

Reading the Mind of an Adjudicator under CIPAA

Secretariat, The Malaysian Institute of Arbitrators

14 May 2015

Ir. Harbans Singh

Professional and Chartered Engineer, Arbitrator, Adjudicator, Mediator, Advocate & Solicitor (Non-practicing)

Ir. Harbans Singh spoke about the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"), in particular the decision making process of an adjudicator and challenges faced by an adjudicator. He also highlighted several developments since CIPAA had come into force on 15.4.2014. Approximately 38 participants attended the talk.

Upcoming Events

4.6.2015

MIArb Evening Talk: "Expert Witness: A bare knuckle price fight or can we do better?"

Speaker: *Nick Powell, Principal, Axiom Consultants Sdn. Bhd., Kuala Lumpur*

Nick will speak on the role and responsibilities of the expert witness in court and arbitration proceedings and discuss his views on how certain disputes could better use experts.

23.6.2015

The Annual General Meeting (AGM) of MIArb

28.7.2015

MIArb Evening Talk: "Performance Bonds: Can on-demand bonds be stopped?"

Speaker: *Ir. Lai Sze Ching, Deputy President, MIArb*

Ir. Lai will speak on the types of performance bonds and their characteristics, and discuss how an on-demand performance bond may be stopped when the principal calls on the bond.

17.10.2015 & 18.10.2015

The Membership Upgrade Course

This is an intensive two-day course and assessments programme designed and organised by MIArb to impart key and relevant knowledge of the practice and procedures in arbitration to the Associates of MIArb, who upon successful completion of the course and assessment, may apply to be upgraded to become Members of MIArb.

For more information about the events on this page and other upcoming events organised or participated by MIArb, visit our website: www.miarb.com.

New Members/Upgrade for Session November 2014 to April 2015

The Malaysian Institute of Arbitrators extends a warm welcome to our new Fellows, Members, Associates and Affiliates.

Fellow	M/No.	Date Approved
1.Mr. Thayananthan Baskaran	F/113	20-11-2014
2.Mr. Zaki Ullah Khan	F/114	16-04-2015

Member	M/No.	Date Approved
1.Mr. Tabian bin Tahir	M/414	20-11-2014
2.Ms. Santhini a/p Thanapalan	M/416	20-11-2014
3.Ms. Ng Yen Fah	M/418	18-12-2014
4.Tan Sri Zaleha binti Zahari	M/420	05-02-2015
5.Mr. Teh Phoay Keat	M/421	05-02-2015

Upgraded from Associate to Member	M/No.	Date Approved
1.Mr.Yap Chua Soon	M/415	20-11-2014
2.Mr. See Jooi Hong, Adrian	M/417	18-12-2014
3.Mr. Chandra Segar a/l Kalimuthu	M/419	15-01-2015
4.Mr. Mansoor Saat	M/424	19-03-2015
5.Mr. Imaduddin Suhaimi	M/425	19-03-2015
6.Mr. Chin Kok Wah	M/426	19-03-2015
7.Mr. Wee Joon Hau	M/427	19-03-2015
8.Mr. Goh Wooi Beng	M/428	19-03-2015
9.Mr. Wong Tat Yee	M/429	16-04-2015
10.Mr. Gregory Matthew Zysk	M/430	16-04-2015
11.Mr. Mohd Haris bin Abdul Rani	M/431	16-04-2015
12.Mr. Har Yee Ken	M/432	16-04-2015
13.Ms. Nurnazida binti Nazri	M/433	16-04-2015

Upgraded from Affiliate to Member	M/No.	Date Approved
1.Ms. Lye Ca-Ryn	M/422	05-02-2015
2.Mr. Tan Yew Hong	M/423	05-02-2015

Associate	M/No.	Date Approved
1.Mr. Chew Wee Ban	A/205	18-12-2014
2.Ms. Nur Hidayah Binti A. Suhaimi	A/206	18-12-2014
3.Ms. Ratnaning Wulandari	A/207	18-12-2014
4.Mr. Chin Kok Wah	A/208	18-12-2014
5.Mr. Yoong Weng Leong	A/209	18-12-2014
6.Ms. Voon Ah Kam	A/210	15-01-2015
7.Mr. Mohd Haris bin Abdul Rani	A/211	15-01-2015
8.Ms.Nahzatul Ain binti Mohd Khalid	A/212	15-01-2015
9.Ms. Nurnazida binti Nazri	A/213	15-01-2015
10.Mr. Imaduddin Suhaimi	A/214	15-01-2015
11.Mr. Har Yee Ken	A/215	15-01-2015
12.Mr. Tin Peng Ann	A/216	15-01-2015
13.Mr. Vinod Kumar a/l P Ramansamy	A/217	15-01-2015
14.Mr. Wong Tat Yee	A/218	15-01-2015
15.Mr. Chen Meng Yong	A/219	15-01-2015
16.Mr. Gregory Matthew Zysk	A/220	15-01-2015
17.Ms. Sharifah Kadnariah binti Syed Ahmad	A/221	15-01-2015
18.Mr. Sandraruben a/l Neelamagham	A/222	15-01-2015
19.Mr. Narendran Naidu a/l Ravindran Naidu	A/223	15-01-2015

Affiliate	M/No.	Date Approved
1.Mr. Kamal bin Abd Ghafur Korusamy	AF/191	19-03-2015
2.Ms. Janitha Navaratnam	AF/192	19-03-2015

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