

arbitrator

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CONFERENCE HIGHLIGHTS

Inaugural Regional Arbitral Institutes Conference 12 – 13 July 2006, Singapore

The Singapore Institute of Arbitrators will host the inaugural regional conference of arbitral institutes which will feature speakers from the region and current topics relating to arbitration. The conference will rotate annually to its regional counterparts, the Malaysian Institute of Arbitrators, Badan Arbitrase Nasional Indonesia, the Institute of Arbitrators & Mediators Australia and the Hong Kong Institute of Arbitrators.

For more information, visit www.intellitrain.biz/SIARB.

Second Annual Asian Leading Arbitrators' Symposium 11 – 12 October 2007, Singapore

With the support of SIAC, HKIAC and the JCAA, Juris Conferences presents its second annual symposium on the conduct of international arbitration in Asia. Learn about discovery, advocacy, presentation of evidence and management of arbitral proceedings.

For more information, visit www.jurisconferences.com.

SIAC – German Singapore Lawyers' Association – German Institution of Arbitration Seminar 19 October 2007, Singapore

In conjunction with IBA 2007 in Singapore, SIAC, the German Singapore Lawyers' Association and the German Institution of Arbitration will jointly host an afternoon seminar on recent developments in arbitration in Singapore and Germany.

For more information, contact Geraldine Ng at geraldineng@siac.org.sg or (65) 6334 1277.

SIAC'S NEW 2007 RULES AND FEES

SIAC announces the release of the 3rd Edition of the SIAC Rules which take effect on 1 July 2007. The new 2007 Rules embody 10 years of experience in the institutional administration of cases. A new schedule of fees for case administration and arbitrators' remuneration based on a quantum scale comes into effect on the same day.

The main changes to the new 2007 Rules are fourfold: it specifies the institution's role as the appointing authority and administrator of cases submitted or referred to SIAC; it introduces the concept of Memorandum of Issues, aimed at promoting efficiency by encouraging parties to define the issues coming within the scope of the reference; it formalises the use of Practice Notes in the administration of cases; and it repeals the 2001 SIAC Domestic Arbitration Rules with the exception of the summary arbitration procedure.

The new 2007 Rules and schedule of fees are posted at www.siac.org.sg. Hardcopies are also available from the Secretariat.

INTERNATIONAL MEDIATION INSTITUTE FORMED

The formation of the International Mediation Institute ("IMI") was officially announced on 30 April 2007. Based in The Hague, IMI is established to create a global ISO competency standard to certify and ensure quality assurance of mediators, and enable users to identify IMI certified mediators with ease.

A consultation period is currently in progress. All persons interested in mediation and mediator training are welcomed to

participate in this consultation process. IMI's formation has been well received, with many leading mediation personalities echoing support for this initiative.

The founding members of IMI are the American Arbitration Association and its international division the International Centre for Dispute Resolution, the Netherlands Mediation Institute, SIAC and the Singapore Mediation Centre.

More information is posted at www.IMImediation.org.

NEW SIAC REGISTRAR



SIAC is pleased to announce the appointment of Sabiha Shiraz as the new Registrar of SIAC. Her appointment takes effect from 1 July 2007.

Sabiha received her LLB (Hons) from the University of Warwick and her LLM from the University of London. She joined SIAC as an Assistant Director in 2002 and moved up quickly as Counsel and Senior Assistant Registrar in 2004. As Registrar, Sabiha will head the SIAC Secretariat supervising the day-to-day administration of cases. Deputy Chairman Lawrence Boo adds: "I am confident that Sabiha will acquit herself well in this new appointment."

CHINA AND ICSID ARBITRATION



BY JUN WANG
SOLICITOR
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“China ratified the Washington Convention in 1993 ... and has become the world’s largest foreign direct investment recipient since 2003. To date, however, China has not as yet been involved in any arbitral proceedings before the International Centre for Settlement of Investment Disputes.”

China ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the Washington Convention”) in 1993. The Washington Convention establishes an arbitration regime for the resolution of investment disputes arising from a foreign investor and its host State. An obvious advantage of this regime is that it provides a way for foreign investors to resolve investment disputes in the context of international standards and procedures, instead of standards of the host State and the efficiency and quality of domestic court judgments.

According to statistics of the Organisation for Economic Co-operation and Development, China has become the world’s largest foreign direct investment recipient since 2003. To date, however, China has not as yet been involved in any arbitral proceedings before the International Centre for Settlement of Investment Disputes (“ICSID”).

Treaty Reservations

One major reason for this is that when signing the Washington Convention, China expressed a reservation that it would only consider submitting disputes to the jurisdiction of ICSID over compensation resulting from expropriation or nationalisation. This is likely attributable to the fact that in the early 1990s, the Chinese government was struggling to reconcile its domestic reform objectives and foreign trade policies. As such, Chinese officials tended

to take a more cautious stance to what was to them, a rather unfamiliar notion of investor-state arbitration. Another probable reason could be that prior to China’s entry to the World Trade Organisation (“WTO”), foreign-invested enterprises often had to structure in-China entities as joint ventures. Article 25(2)(b) of the Washington Convention requires as part of its jurisdictional basis, that an investor party who is a juridical person of the host State must show that the host State has agreed to treat it as a non-national of the host State (ie, not subject to Chinese control). Under China’s legal framework, this is a complex question that requires a thorough scrutiny of a joint venture’s corporate structure, among others.

A judicial interpretation issued by the Supreme People’s Court in 1987 concerning the implementation of the New York Convention further created difficulties for foreign investors. It stipulated that Chinese courts could only consider applying the New York Convention for arbitral awards made regarding “contractual and non-contractual commercial disputes”. Investor-state arbitration was, unfortunately, excluded from this category.

China, BITs and FTAs

China’s cautious approach towards ICSID was also reflected in its earlier bilateral investment treaties (“BIT”). For instance, the

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Contribute to the Asian International Arbitration Journal

The Asian International Arbitration Journal is published bi-annually by Kluwer Law International. It carries independent editorial content, which is determined by the General Editors – Professor Michael Pryles and Dr Philip Chan.

If you wish to contribute an article to the journal, please contact us at publications@siac.org.sg for more details.

China-United Kingdom BIT does not contain ICSID arbitration provisions, nor does the BIT between China and Australia.

Nevertheless, China's continuing economic reform, the milestone event of its accession to the WTO and its strategy of actively strengthening bilateral and regional cooperation appear to be reshaping the landscape. From the late 1990s, this cautious stance has been liberalised. This can be seen in the China-Germany BIT, which under Article 9, permits a German investor to initiate an ICSID arbitral proceeding against China concerning any investment dispute, provided the dispute cannot be settled within six months from the date it has been raised by the German claimant.

It bears notice that there are comprehensive undertakings for use of the ICSID mechanism in China's recent Free Trade Agreement ("FTA") engagements too. Whilst China had not incorporated investor-state dispute settlement clauses in its FTA or FTA in nature deals with Hong Kong, Macao, ASEAN and Chile, it did reach an unlimited protocol with Pakistan to settle investor-state disputes at the ICSID forum. Article 54 of the China-Pakistan FTA provides that an investor may submit any legal disputes in connection with an investment in the territory of the State to ICSID.

Causes of this Shift

The causes for this liberalisation remain unspoken. There is an assertion that China's concession further optimises the country's investment environment and improves foreign investors' confidence. One may however question whether the concessions made in the China-Germany BIT and the China-Pakistan FTA are too generous because they arguably go beyond treaty provisions.

Another possible reason is that China, as the world's largest holder of foreign exchange reserves, has called upon its own enterprises to venture overseas. Therefore it needs to incorporate ICSID provisions as a protective measure in favour of Chinese investors

overseas. This reason is probably sensible regarding investments in developing economies. However, the liberal ICSID clauses also appear in China's BITs with sophisticated economies such as Germany, Holland and Finland.

Invoking ICSID Jurisdiction Through the MFN Clause

In relation to those States with whom BITs have been inked before this change, it is suggested that the same liberal reference to ICSID could be used by invoking the most-favoured-nation ("MFN") provision in the respective BITs. For example, under Article 3(c) of the China-Australia BIT, an Australian investor should enjoy the same rights available to their German or Dutch counterparts and thus could bring an investment dispute against China in ICSID. Recent ICSID arbitral awards, however, have made this contention fairly questionable. For example, in *Telenor Mobile Communications AS v The Republic of Hungary* (ICSID Case No ARB/04/15, at paragraph 91), the Arbitral Tribunal indicated four compelling reasons why a MFN clause in a BIT should not be construed as extending the jurisdiction of the Tribunal:

- (i) Article 31 of the Vienna Convention on Treaties requires a treaty to be interpreted in good faith according to the ordinary meaning of the terms of the treaty and in the light of its object and purposes. The ordinary meaning of MFN clauses is that the investor's substantive rights in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State, and there is no warrant for construing the above phrase as importing procedural rights as well.
- (ii) The effect of the wide interpretation of the MFN clause is to expose the host State to treaty-shopping by the investor among an indeterminate number of treaties to find a dispute resolution clause wide enough

to cover a dispute that would fall outside the dispute resolution clause in the base treaty, and even then there would be questions as to whether the investor could select those elements of the wider dispute resolution that were apt for its purpose and discard those that were not.

- (iii) The wide interpretation also generates both uncertainty and instability in that at one moment the limitation in the basic BIT is operative and at the next moment it is overridden by a wider clause in a new BIT entered into by the State.
- (iv) The importance to investors of independent arbitration cannot be denied, but the Tribunal's task is to interpret the BIT and to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties. A State intends that the jurisdiction of the Tribunal is to be limited to the specified categories and is not to be inferentially extended by a MFN clause. To invoke the MFN clause to embrace the method of dispute resolution is to subvert the intention of the parties to the basic treaty, who have made it clear that this is not what they wish.

The proliferation of FTAs and the possibility of inserting ICSID arbitration regime into FTAs provide a remedial avenue for countries who signed BITs with China in the 1980s (eg, Australia and Singapore). Notwithstanding the fact that both the Australia-China BIT and Singapore-China BIT have MFN clauses, the legal challenges postulated by recent ICSID awards may alert Canberra and Singapore FTA negotiators to rethink the critical importance of getting Beijing's express unconditional consent on the ICSID regime through the FTA vehicle. On the part of China, how to reconcile treaty obligations and domestic rules, and how to respond to challenges that the liberalisation brings remain to be key issues that it has to consider.

CASE BRIEF

SETTING ASIDE QUASHED – COURT REAFFIRMS MINIMAL INTERFERENCE IN ARBITRATION

Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd

[2007] SGCA 28; COURT OF APPEAL; CORAM: CHAN CJ, PHANG JA, RAJAH JA; DECISION DATE: 9 MAY 2007

Facts – This is an appeal against the decision of the High Court [reported in *Singapore Arbitrator* [2007] 2 SINARB 4] where it had set aside an award made under the Arbitration Act in favour of the appellant on the finding that there had been a breach of natural justice in connection with the making of the award. It ruled that the arbitrator had deprived the respondent of an opportunity to be heard when the arbitrator's finding included one where time for completion of a construction contract was said to be set at large, when this was allegedly not raised during the oral submissions.

Held – Appeal allowed. [1] There was no breach of natural justice as the issue in dispute was argued during the arbitration. An arbitrator is also entitled to extract the alternative position of time being set at large from the submissions made. [2] Even if it could be said that the

respondent was deprived of being heard on that issue, there was no casual link between that breach and the final decision made by the arbitrator as the award was fully justified by other cogent grounds. [3] The policy of minimal curial intervention in arbitration is underpinned by the need to recognise the autonomy of the arbitral process by encouraging finality and the accepted risks of limited right of recourse to the courts. [4] Singapore courts will support and not frustrate these primary objectives and will only intervene where there is a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously, culminating in actual prejudice to a party. [5] An arbitrator is not expected to consult the parties on his thinking process before finalising his award and is entitled to come to his own conclusions or inferences so long as it is based on what is presented before him.

COURT ENDORSES SEPARABILITY PRINCIPLE

Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc

[2007] 1 SLR 278; HIGH COURT; JUDGMENT DELIVERED BY PRAKASH J; DECISION DATE: 17 NOVEMBER 2006

Facts – By several Concession Contracts made in 1997 and 1998, PIATCO was awarded the right to build and operate an airport terminal. PIATCO claimed that the terminal was practically ready and prepared to start operations. In 2002, the Government of Philippines (“Philippines”) obtained an order from the Philippine Supreme Court declaring that the Concession Contracts were null and void *ab initio*. In January 2003, PIATCO commenced arbitration against the Philippines with the ICC. The Philippines challenged the right to commence arbitration. At a preliminary meeting between the Tribunal and the parties, questions arose relating to the governing law of the arbitration and the arbitration agreement. The Tribunal ruled on these questions as a “Partial Award” that the laws of Singapore applied. Philippines challenged this “Partial Award” principally on the allegation of breach of natural

justice in that the Tribunal dealt with the question of separability therein without allowing them to address the Tribunal fully and that this had, in their view, pre-judged the issue of arbitral jurisdiction before it was argued.

Held – Application dismissed. [1] The Philippines’ challenge of jurisdiction was premised on the reasoning that the Concession Contracts had been declared void and as such nothing remained and no Tribunal could be constituted to consider disputes of parties arising from a non-existent contract. [2] The Tribunal was asked by the parties as a precursor to deciding its jurisdiction, to decide the law governing the arbitration agreement and *lex arbitri*. This, the court held necessitated the Tribunal to discuss the concept of separability as a distinct feature in international arbitration in determining these choice of law issues.

INTERNATIONAL ARBITRATION

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The Tribunal shall consist of _____* arbitrator(s) to be appointed by the Chairman of the SIAC.

The language of the arbitration shall be _____.

*State an odd number. Either state one, or state three.

Parties should also include an applicable law clause. The following is recommended:

This contract is governed by the laws of _____*.

*State the country or jurisdiction.

SECRETARIAT

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