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THE CURRENT LEGAL FRAMEWORK FOR COMMERCIAL MEDIATION IN IRAN: NEED FOR A MEDIATION ACT

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ABSTRACT

In exploring the legal framework for commercial mediation and the current status of the Singapore Convention under Iranian law, this paper studies the lack of specifically codified rules and standards either to cover the conduct of commercial mediation - domestic or international - or to address the legitimacy and enforceability of the mediated settlement agreements. In such an absence, one may remedy the lack thereof with some specific provisions of Iranian law. The first and most relevant provision is Article 10 of the 1928 Iranian Civil Code, which implies the principle of freedom of contracts, and the legitimacy, and enforceability of settlement agreements. Articles 178 to 185 of the 2000 Iranian Civil Procedure Code are the other relevant provisions that encompass rules concerning the amicable settlement of disputes through compromise in the course of civil litigation and the enforcement of compromise agreements. Finally, this paper concludes by suggesting the choice of institutional mediation, especially until the time when a commercial mediation act is passed.

INTRODUCTION

In comparison with other jurisdictions, which have demonstrated a long history of support for arbitration, the developments in the legal framework for international arbitration happened quite late in Iran. While the traditional notion of arbitration as an alternative to court litigation for resolving domestic disputes was recognized in the Iranian legal system as early as 1906 when the Provisional Civil Procedure Code was passed, [1] the first piece of legislation addressing international arbitration, namely the International Commercial Arbitration Act, was only passed in 1997. [2] In addition, it took a while for the courts to become acquainted with international arbitration. Nevertheless, it is widely observed that currently, the courts are taking approaches that are rather based on the modern

Disclaimer: The opinions expressed in this publication are those of the authors and they do not purport to reflect the opinions or views of the Tehran Regional Arbitration Centre (TRAC).

[1] For the historical development of different arbitration laws in Iran, see ABDOH, J., (1979) "National Report: Iran", *Pieter Sanders (ed.)*, *Yearbook Commercial Arbitration*, *The Hague: Kluwer*, 4, pp. 81-103.

[2] For the 1997 Arbitration Act, see generally Seifi, J. (1999) "The New International Commercial Arbitration Act of Iran," *International Arbitration*, 15(2), pp. 5–36; Gharavi, H. G. (1999) "The 1997 Iranian International Commercial Arbitration Law: The UNCITRAL Model Law à L'Iranienne," *International Arbitration*, 15(1), pp. 85–96.

trends in international arbitration.

As regards commercial mediation, the same concerns exist as to whether a proper legal infrastructure is already in place for accommodating such a demand under Iranian law considering the current global tendency and the increase in the popularity of mediation as an alternative method for resolving commercial disputes. This paper tries to address the current legal framework for commercial mediation in Iran[3] and considers the possible need for enacting a mediation act.

SINGAPORE CONVENTION

With the aim of promoting mediation as an effective and reliable means to resolve commercial disputes in cross-border transactions, the United Nations Convention on International Settlement Agreements Resulting from Mediation of 2019, also known as the Singapore Convention, provides a mechanism for the enforcement of these agreements.[4] Iran was among the first signatories of the Singapore Convention.[5] This is in spite of the fact that Iran ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the New York Convention, only in 2001.[6] Although, under Article 125 of the 1979 Iranian Constitution, a convention becomes binding only after the full accession, i.e. approval by the Iranian legislature,[7] which ultimately takes time, this early signature of the Singapore Convention is indicative of the very fact that mediation, as a method for the resolution of commercial disputes, has been of notable importance in the Iranian legal system.

[3] While there exist specific provisions concerning mediation in family disputes or criminal matters under Iranian law, the scope of this paper is limited to the provisions of Iranian law in so far as they are of relevance to commercial mediation.

[4] Article 1(1) of the 2019 Singapore Convention in defining the scope of application of the Convention refers to 'commercial disputes' and Article 1(2) of the 2019 Singapore Convention explicitly excludes the application of the Convention to the settlement agreements relating to family law.

[5] The Singapore Convention on Mediation was signed by the Iranian Minister of Justice on 7 August 2019.

[6] Iran acceded to the New York Convention by virtue of the Law regarding Accession of the Islamic Republic of Iran to the Convention on Recognition and Enforcement of Foreign Arbitral Awards, which was adopted by the Parliament on 10 April 2001 and came into force on 15 January 2002.

[7] Iran Constitution 1979, Article 125: '*All the treaties, transactions, agreements, and contracts between the government of Iran and other governments as well as all the pacts related to the international unions, after they are approved by the Islamic Consultative Assembly, must be signed by the President of the Republic or his legal representative.*'

The Singapore Convention does not determine detailed rules about the procedure of enforcement. As inferred from Article 3(1) of this Convention which reads: '*Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.*', the approach toward the enforcement of mediated settlement agreements relies upon the relevant jurisdiction in which the relief is sought. In fact, the Convention avoids prescribing a particular enforcement procedure in order for the state parties to customize it in compliance with their own rules and procedures. Iran's legislature has not yet codified any specific rules and standards, either to cover the conduct of commercial mediation - domestic or international - or to address the legitimacy and enforceability of mediated settlement agreements. One may remedy the lack of such rules with some specific provisions of Iranian law, which are of relevance.

THE 1928 CIVIL CODE

Being private contracts in nature, settlement agreements could fall under the purview of Article 10 of the 1928 Iranian Civil Code which reads: *'Private contracts shall be binding on those who have signed them, providing they are not contrary to the explicit provisions of law'.* By implying the principle of 'Freedom of Contracts', this provision of the Civil Code expresses that all private contracts are binding on the parties unless they are contrary to explicit provisions of the law. According to this article, contracts occur with mutual consent and do not necessarily require procedural formalities. In other words, the parties are free in choosing the form of the contract, i.e. there is no necessity to conclude a contract in the forms that are specified by the law, and the legislature respects agreements between the parties even if the format of the agreement is not expressly addressed by the law. As a result of the recognition of the principle of 'Freedom of Contracts' under Iranian law, even the court has no right to make any decision against the will of the parties when it is not in contradiction with the explicit provisions of the law. The settlement agreements are private contracts that entail the parties' mutual consent on the terms to resolve existing disputes. There is no specific formality for these agreements other than to be in writing.[8] Therefore, the legitimacy and enforceability of the settlement agreements are recognized under Article 10 of the Civil Code in so far as they are recorded in writing and are not contrary to explicit provisions of the law.

[8] Singapore Convention 2019, Article 2(2): *'A settlement agreement is "in writing" if its content is recorded in any form. …'*

THE 2000 CIVIL PROCEDURE CODE

In support of amicably settling disputes, a trait well rooted in Iranian culture and tradition, as well as religious identity, the 2000 Iranian Civil Procedure Code permits parties to settle their disputes through compromise (*Sazesh*) to prevent further quarrels.[9] According to Article 178 of the Iranian Civil Procedure Code, '*At any stage of the proceeding, the parties may settle their dispute through compromise.*' The subsequent articles respectively recognize several modes of compromise agreements, namely private and unofficial compromise agreements (which are concluded out of courts), along with official compromise agreements (which are certified by a notary public), as well as agreements that are reached in the course of proceedings in courts (which are recorded in the minutes of the hearing).[10] Furthermore, in Article 184 thereof, the legislature has clearly considered these compromise agreements comparable to a court decision and has accordingly ordered courts to terminate the proceedings in order to enforce them. This Article reads as follows:

> '*After reaching a compromise between the parties as described above, the court terminates the proceedings to issue a compromise agreement. The terms of the compromise which are prepared according to the above articles are valid and decisive for the parties, their heirs, and legal representatives and are enforceable in the same way as a court judgment, whether the compromise is specific to the filed lawsuit or includes other lawsuits or matters*.'

Although mediation and compromise as described under the provisions of the Civil Procedure Code are both methods for an amicable resolution of the dispute, it is important to note that an independent third party, i.e. mediator, plays a role in reaching the agreement in mediation proceedings while in a compromise, the usage of an independent third party is not necessarily required. Therefore, it should not be inferred that these two methods, i.e. mediation and compromise, are the same. However, the outcome of these two methods in terms of the enforcement are comparable especially since both the mediated settlement agreements and compromise agreements are binding agreements amicably reached between the parties, and at the same time a final resolution of the existing disputes.

[9] Iran Civil Procedure Code 2000, Articles 178 to 185
[10] Iran Civil Procedure Code 2000, Articles 180 to 183

To this end, the authors believe that the above-mentioned provisions of the Civil Procedure Code provide a suitable ground for the enforcement of a mediated settlement agreement, provided that the parties acknowledge its authenticity before the court as prescribed by Article 183 of this Code.[11] In absence of any piece of legislation under Iranian law that in particular addresses the detailed rules concerning the procedure of enforcement of mediated settlement agreement as referred to in Article 3 (1) of the Singapore Convention, it is the view of the authors that the provisions of the Civil Procedure Code concerning the enforcement of compromise agreements could be applied by courts until such a vacuum is filled by the Iranian legislature.

NEED FOR A COMMERCIAL MEDIATION ACT

Despite the existence of the above-discussed provisions under the current legal framework for the enforcement of the settlement agreements under Iranian law, there are areas to be improved, such as the competency of the courts on enforcement as well as procedural issues in relation to enforcement. By defining a detailed set of rules, a commercial mediation act certainly removes any doubts or impediments to the enforcement of settlement agreements.

More importantly, a commercial mediation act, which contains the rules concerning the mediation proceedings, would be of great assistance to the parties and the mediator to reach an efficient resolution of the dispute. Taking into account the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation,[12] certain procedural aspects of commercial mediation, including the appointment of mediators, the commencement and termination of proceedings, conduct of the mediation, communication between the mediator and the parties, confidentiality, and admissibility of the evidence in other proceedings as well as post-mediation

[11] Iran Civil Procedure Code 2000, Article 183: '*In case that the compromise is reached out of the court and when the compromise agreement is not official, the parties shall appear in the court and acknowledge its authenticity. Acknowledgment of the parties is recorded in the minutes of the hearing and is signed by the judge and the parties. In case of non-attendance of the parties in the court without lawful excuse, the court will continue the proceedings regardless of the content of the compromise agreement.*'

[12] UNCITRAL model law on international commercial mediation and International Settlement Agreements resulting from Mediation, 2018 commission on international trade law (2022) United Nations. United Nations. Available at: https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation (Accessed: November 9, 2022).

issues, such as the mediator acting as an arbitrator, could be adopted in the Iranian statutory framework in order to promote certainty to avoid ambiguity in the conduct of the mediation.

TRAC RULES OF MEDIATION

Notwithstanding the fact that the current framework for commercial mediation under Iranian law lacks any specific rules and procedures, institutional mediation is a proper means to strengthen the conduct of mediation proceedings. As an independent international organization established under the auspices of the Asian-African Legal Consultative Organization ('AALCO'), the Tehran Regional Arbitration Centre ('TRAC') is the only organization in Iran providing world-class mediation services for international commercial disputes. The TRAC Rules of Mediation, which came into force on 15 July 2021,[13] are drafted based on the most recent trends to reflect modern practice and are tailored with a suitable framework for the conduct of mediation proceedings based on the needs of the disputing parties. The liberal approach of the TRAC Rules of Mediation provides a maximum level of flexibility, which is one of the main reasons for the choice of mediation, either as a single stage or in conjunction with other proceedings like arbitration, aimed at an efficient settlement of a dispute. Moderate fees are another great advantage that makes the TRAC Rules of Mediation a suitable choice for all businesses in all disputes regardless of their scale. The TRAC Rules of Mediation suggest a Model Mediation Agreement, which may be adjusted to the particular needs and circumstances of the parties in dispute. Finally, it should be noted that the TRAC Rules of Mediation are available in two languages, i.e. English and Farsi, with the English version taking precedence in cases of discrepancy.

CONCLUSION

After its full ratification, the Singapore Convention will become the key instrument in addressing the legal framework for the enforcement of mediated settlement agreements in Iran. It is, however, necessary to note that the Convention does not provide a detailed set of rules about the procedure of enforcement; such a matter is left to the discretion of the national law of each state party where the

[13] Mediation rules (2021) Tehran Regional Arbitration Centre. Available at: https://trac.ir/mediation-rules/ (Accessed: November 9, 2022).

relief is sought. This is in addition to the fact that the conduct of commercial mediation proceedings *per se* requires support through a legal framework. To this end, a minimal set of rules in the form of a commercial mediation act, which satisfies the above purposes, could enable mediation to flourish in Iran. Until the time that such an important matter receives the requisite attention from the Iranian legislature and until a formal act on mediation is passed, the TRAC Rules of Mediation, which are very much based on modern trends, could provide the parties with guidance and solutions.

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STAY APPLICATIONS AGAINST ADJUDICATION DECISIONS: ISSUES AND DEVELOPMENTS

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INTRODUCTION

The quintessential element of an adjudication decision is that it is immediately binding and enforceable despite that the decision may be rough around the edges resulting from the speedy nature and the interim finality of the adjudication process. This is consistent with the 'pay now, argue later' ethos of adjudication and the appreciation that 'cashflow is the lifeblood of the construction industry' and that a successful party to an adjudication ought not to be deprived of the fruits of a favourable adjudication decision simpliciter. In this context, our courts take particular caution whenever it is asked to negate the effect of an adjudication decision because to do so freely and readily would effectively render the statutory provisions under the ***Construction Industry Payment and Adjudication Act 2012*** ("**CIPAA**") and the adjudication process futile.

This article will first explore the application of ***Section 16 CIPAA***, the statutory provision that provides the mechanism for stay of an adjudication decision. Discussion will be made to examine the implementation of the landmark decision

of ***View Esteem Sdn Bhd v Bina Puri Holdings Bhd***[14] and some of the underlying rationales adopted by our courts when deciding applications for stay. Further, this article will also explore the issue of whether Stay Applications can be heard after an enforcement order has been granted.

THE APPLICATION OF SECTION 16 CIPAA

Under ***s. 16 (1) of CIPAA***, the losing party may apply for a stay of an adjudication decision ("**Stay Application**") under two circumstances:

(i) under ***s. 16 (1)(a)*** when an application to set aside the adjudication decision ("**Setting Aside Application**") has been made; or

(ii) under ***s. 16 (1)(b)*** when the subject matter of the adjudication decision is pending final determination by arbitration or courts.

Difficulties may arise in determining whether ***s.16(1)(b)*** is satisfied where a Stay Application is made and a multi-tiered dispute resolution clause is activated but arbitration has yet to commence. There are conflicting positions on this issue. In the case of ***Raps Solutions Sdn Bhd v Itramas Technology Sdn Bhd and other cases***[15], it was held that ***s. 16(1)(b)*** only applies when arbitration or litigation has lawfully commenced. In this regard, unless the conditions under the multi-tiered dispute resolution clause have been satisfied, the arbitration is not valid.[16] On the other hand, it was held in the case of ***Maju Holdings Sdn Bhd v Spring Energy Sdn Bhd***[17], that it is unnecessary that arbitration proceedings must have actually commenced, or that condition precedents to the commencement of arbitration have been fulfilled.[18] So long as there is evidence of the parties initiating final determination, ***s.16(1)(b)*** would be satisfied. However, in view of the parties' bargain and intention to enter into an arbitration agreement subject to a multi-tiered dispute resolution clause, it may arguably be seen as an affront to the parties' intention to deem that without the satisfaction of all preconditions to the commencement of arbitration, an arbitration is pending and ***s.16(1)(b)*** can be satisfied when an arbitration cannot yet be commenced. In any event, the conflict in this area of law could very well be settled by our courts in the near future.

[14] [2018] 2 MLJ 22
[15] [2022] MLJU 729
[16] Ibid, para 34
[17] [2020] MLJU 1162
[18] Ibid, para 15

The High Court in the case of ***Subang Skypark Sdn Bhd v Arcradius Sdn Bhd***[19] explained that only under the two situations specified under ***s.16 (1) CIPAA*** can a Stay Application be lodged and not otherwise.[20] Where a Stay Application is made and at least one of the two limbs under ***s. 16 (1)*** is satisfied - ***s. 16 (2)*** becomes operative. In that, the High Court may, *inter alia*, then grant a stay of an adjudication decision. Just because one of the limbs under ***s. 16 (1)*** has been satisfied, it does not mean that the grant of the stay is automatic or as of right; the court still retains the discretion as to whether to grant a stay.

In the case of ***PWC Corp Sdn Bhd v Ireka Engineering & Construction Sdn Bhd and another appeal***[21], the court opined that allowing a stay merely on the ground of a pending arbitration in the absence of special circumstances would defeat the object of CIPAA[22] and statutory adjudication which is to facilitate regular and timely payment for work done and services rendered under construction contracts by providing a speedy intervening provisional process to resolve disputes. Hence, satisfying one of the limbs under ***s. 16 (1)*** merely prequalifies a Stay Application in which our courts must then consider whether there are any other factual circumstances that would justify a stay.

THE ADVENT OF VIEW ESTEEM

In the landmark case of ***View Esteem Sdn Bhd v Bina Puri Holdings Bhd***[23], the Federal Court held that ***s. 16 CIPAA*** affords a degree of flexibility, where each case ought to be determined on its merits without fetter of a pre-determined test.[24] A stay of an adjudication decision should be allowed only where there are "clear errors" or where "justice of the individual case is met".[25] It was held that the financial capacity of the winning party of an adjudication decision is one of the factors that can be taken into account, however, it should not be the only consideration when deciding whether the court should grant a stay.[26] Accordingly, this article will proceed by discussing the scope and meaning of "clear error" and also some circumstances of interest that would fall within the purview of determining whether "justice of the individual case is met".

[19] [2015] 11 MLJ 818
[20] Ibid, para 25
[21] [2018] MLJU 152
[22] Ibid, para 118
[23] [2018] 2 MLJ 22
[24] Ibid, para 82 - 84
[25] Ibid
[26] Ibid

CLEAR ERROR

i. Merits of an Adjudication Decision

With the advent of ***View Esteem,*** parties can obtain a stay where there are 'clear errors' in the adjudication decision. As such, two questions become relevant. First, what constitutes a 'clear error' warranting the grant of stay? Secondly, to what extent are our courts allowed to review merits of the adjudication decision?

Both these questions were answered in the case of ***EA Technique (M) Sdn Bhd v Malaysia Marine and Heavy Engineering Sdn Bhd***[27]. On the issue of 'clear error', the High Court affirmed its previous findings in the case of ***Maju Holdings Sdn Bhd v Spring Energy Sdn Bhd***[28], that a 'clear error' has not been clearly defined, nevertheless, such error must be so grave that it pricks the conscience of the court if it were left unrectified.[29] A general example of 'clear error' is where the adjudicator had decided on the merits of the dispute in blatant disregard of statutory provisions or trite case law of the Federal Court.[30]

On the extent in which our courts may review the merits of an adjudication decision, the High Court held that the Federal Court in ***View Esteem*** had opened the window but certainly not the flood gates to permit courts to review the merits of an adjudication decision under very rare and exceptional circumstances of error.[31] The court opined that the size of this window cannot be ascertained because it would depend on the facts of each case.[32] However, it must be borne in mind that our courts are not at liberty to review an adjudication decision in a Stay Application as if it were an appeal against the adjudication decision.[33]

Accordingly, our courts must limit the grant of a stay on the grounds of 'clear error' of an adjudication decision only where the court's conscience is pricked by the special circumstances of the case. Furthermore, the merits of an adjudication decision ought only to be reviewed under very rare and exceptional

[27] [2021] 1 AMR 594
[28] [2020] MLJU 1162
[29] N14, para 25
[30] N14, para 26
[31] Ibid
[32] Ibid
[33] see Enra Engineering and Fabrication Sdn Bhd v Gemula Sdn Bhd and another case [2020] 7 MLJ 482

circumstances depending on the facts of each case and such review must not be done as though it were an appeal against the adjudication decision.

ii. Breach of Natural Justice and Excess of Jurisdiction of the Adjudicator

In the case of ***Vision Development Concept Sdn Bhd v Low Sheh Ling and another case***[34], the High Court noted that this was a rare case in which it had been successfully shown that there were clear errors in the making of the adjudication decision on the balance of probabilities warranting not only the stay of the adjudication decision but the setting aside of it as well.[35] This was because the court had found that there was a denial of natural justice and the adjudicator had acted in excess of her jurisdiction.[36]

In this regard, it was previously held in the case of ***Subang Skypark*** (which was decided before the advent of ***View Esteem***) that the likelihood of success of a Setting Aside Application against an adjudication decision is not a relevant consideration in deciding a Stay Application. The case of ***Vision Development Concept***, appears to conflict with ***Subang Skypark*** on this principle. In any event, it would seem reasonable for our courts to at the very least take into consideration breaches of natural justice and/or where adjudicators act in excess of their jurisdiction when determining whether there are any 'clear errors' in the adjudication decision.

JUSTICE OF THE INDIVIDUAL CASE

i. Offering of Security Pending Arbitration Proceedings

It is settled that reference of the dispute to arbitration does not render the grant of a stay of an adjudication decision as an automatic right. Could, however, the subsequent act of offering security pending final determination constitute valid grounds for granting a stay?

This question was answered in the case of ***Econpile (M) Sdn Bhd v ASM Development (KL) Sdn Bhd and another summons.***[37] In this case, the court held that offering a parcel of commercial development land as security pending

[34] [2021] 12 MLJ 193
[35] Ibid, para 91 - 92
[36] Ibid
[37] [2020] MLJU 1146

the completion of arbitration proceedings which was not immediately liquidated does not amount to special circumstances to allow the grant of a stay of the adjudication decision.[38] This was because the successful party of the adjudication is under no obligation to accept the offer and in all likelihood, this would involve much discussion on terms of arrangement which would serve to deprive the successful party of enjoying the fruits of the adjudication decision.[39]

If, however, the security offered was in a form more liquid in nature, would the court have decided the matter differently? This has largely been left unanswered. In this view, it is submitted that in view of the principles under ***View Esteem***, such circumstances could very well constitute valid grounds which our courts may take into account when determining a Stay Application, where it is just to do so.

ii. Merits of the case in Arbitration or Litigation

In the case of ***Ceylon Builders Sdn Bhd v Ultimate Pursuit Sdn Bhd and another appeal***,[40] the contention was raised that stay ought to be granted because there were serious defective work issues that ought to be decided in the arbitration proceedings.[41] The court noted that this contention was subject to proof and can be raised at arbitration.[42] However, in alignment with the "pay now and argue later" ethos of adjudication, regardless of the merits of a party's case in litigation or arbitration, where an adjudication decision has been delivered against said party, the monies ought to be paid first and thereafter the issues can then be ironed out during arbitration or litigation. As such, it can be seen that the merits of the case in arbitration or litigation generally would not constitute valid grounds for the grant of a stay.

iii. Where the Successful Party of an Adjudication Decision is based in a Foreign Country

In view of the rapid growth of the international construction industry, situations in which the successful party of an adjudication decision is based abroad could commonly arise. If such a party is based in a nation which is not a reciprocating country under the ***First Schedule of Reciprocal Enforcement of Judgments Act 1958***, the losing party may inevitably face substantial risk of being unable to

[38] Ibid, para 102
[39] Ibid
[40] [2018] MLJU 1918
[41] Ibid, para 42
[42] Ibid

recover monies paid in the event the adjudication decision is later set aside or where final determination later rules in favour of the losing party of the adjudication decision.

This issue was explored in the recent case of ***Tecnicas Reunidas Malaysia Sdn Bhd v Petrovietnam Engineering Consultancy JSC (PVE) & Anor and other cases***[43]**.** In this case, Tecnicas Reunidas Malaysia, the Plaintiff in making a Stay Application, adopted the ground that stay should be allowed because of its fear of the risk of enforcement difficulties against Petrovietnam Engineering Consultancy, the Defendant based in Vietnam. This is because Vietnam is not a part of the reciprocating countries with regards to the enforceability of foreign judgments.[44] The court opined that because Tecnicas Reunidas Malaysia did not perceive this to be an issue when it contracted with the company based in Vietnam, the court held that such a ground is untenable and is a red-herring in determining the Stay Application.[45]

In view of ***Tecnicas***, our courts appear willing to consider matters that were known to the parties at the time of contract when determining a Stay Application. As such, grounds may be heavily scrutinised and/or even disregarded entirely if parties were made well aware of circumstances at the time of contract but later adopt the very same as grounds for a Stay Application. This line of reasoning shows similarities to the principle that even if evidence can show that the successful party of an adjudication decision is not in the financial position to repay the judgment sum when it falls due, the losing party should not be granted a stay if the successful party's financial position is the same or similar to when the contract was entered.[46]

WHERE AN ENFORCEMENT ORDER HAS BEEN GRANTED

Once an adjudication decision is obtained, the winning party would likely apply under ***s. 28 CIPAA*** for an order to enforce the adjudication decision as if it was a court judgment or order ("**Enforcement Order**"). In this conversation and in the context of stay, the issue of whether a Stay Application can be made subsequent to the grant of the Enforcement Order may arise.

[43] [2021] MLJU 2633
[44] Ibid, para 197
[45] Ibid, para 204
[46] See Herschell Engineering Limited v Breen Property Limited [2000] BLR 272; Subang Skypark

A. THE POSITION IN EA TECHNIQUE

In the case of ***EA Technique (M) Sdn Bhd***[47], the High Court held that as there is no express prohibition in CIPAA providing that Stay Applications cannot be made or allowed after an Enforcement Order has been granted, Stay Applications under ***s. 16 CIPAA*** can be made (notwithstanding an existing Enforcement Order) so long as the threshold under ***s. 16*** is satisfied.[48] The High Court adopted the finding in the case of ***ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd*** **(2020) MLJU 282**[49] which held that an Enforcement Order merely permits the adjudication decision to be enforced as a judgment of the court, but the adjudication decision does not become or merge into a judgment of the court.[50]

B. THE POSITION IN MKP BUILDERS

On the other hand, in the case of ***MKP Builders Sdn Bhd v PC Geotechnic Sdn Bhd***[51]**,** it was held that where an Enforcement Order has been granted and a Stay Application is made subsequently, the Stay Application cannot be heard.[52]

In this case, the High Court had previously ruled in favour of PC Geotechnic Sdn Bhd ("**PC**") and allowed its application for an Enforcement Order and dismissed MKP Builders Sdn Bhd's ("**MKP**") Setting Aside Application. MKP subsequently applied for a stay of the adjudication decision pending the disposal of MKP's suit against PC. The High Court dismissed the Stay Application and premised its decision on several grounds:[53]

1) a Stay Application can only be made before the grant of an Enforcement Order. This is because if the High Court were to stay an adjudication decision when there is already an existing Enforcement Order, there would effectively be two conflicting High Court decisions. Hence, there is an implied interpretation of ***s. 16*** and ***s. 28 CIPAA***, that a Stay Application can only be made *before* the Enforcement Order has been granted;

[47] N14
[48] Ibid, para 18
[49] (2020) MLJU 282
[50] N14, para 19
[51] [2021] MLJU 1061
[52] Ibid, para 25
[53] Ibid

2) The above interpretation does not prejudice a party against whom the Enforcement Order is made, this is because he may still apply to stay the execution of the Enforcement Order;

3) The above interpretation is consistent with the object and purpose of ***CIPAA***, i.e., to ensure that a party who has done construction work is paid expeditiously for the work; and

4) Pursuant to ***s. 13 (c) CIPAA***, all adjudication decisions are only "temporarily final" and are subject to Litigation or Arbitration. In view of this, any errors or omissions under an adjudication decision can easily be remedied through Litigation or Arbitration. Thus, no irreparable prejudice against whom the Enforcement Order is made arises from the above interpretations.

It must be noted that the court caveated its position by holding that in the event the court has erred in its interpretation, the court ought to proceed to discuss all other issues pertaining to the application.[54] On the issue of estoppel, the court held that because a Stay Application could have been filed at the time of the hearing of the setting aside application and the Originating Summons for the Enforcement Order, it was only just to invoke the doctrine of estoppel in this case by virtue of the indolence of MKP.[55] In other words, MKP was estopped from proceeding with its Stay Application.

C. RESOLVING THE UNCERTAINTY

It is apparent that there is a lack of certainty in this area of law. To resolve this uncertainty, it is posited that reference can be made to the test in obtaining an Enforcement Order. In the case of ***Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd***[56], the Court of Appeal held that the interpretation of ***s. 28 CIPAA*** must be congruous with the other provisions under ***CIPAA***.[57] An Enforcement Order may be granted if the applicant can satisfy to the court that:[58]

1) there is an adjudication decision rendered in the applicant's favour;

[54] Ibid, para 26
[55] Ibid, para 27 - 28
[56] [2018] MLJU 1710
[57] Ibid, para 24
[58] Ibid, para 25

2) there has been non-payment of the adjudicated sum by the date specified in the adjudication decision; and

3) there is no prohibition to the grant of the Enforcement Order sought.

This means that the adjudication decision has not been set aside or stayed. Once these matters have been established the Enforcement Order ought to be granted.[59]

The principle laid out in ***Inai Kiara*** provides that an adjudication decision which is stayed or set aside amounts to a prohibition for the grant of an Enforcement Order. In turn, this would entail that an Enforcement Order contravenes an order for stay or setting aside of an adjudication decision, and vice versa. Therefore, it would be reasonable to understand that if an Enforcement Order was first allowed, a later stay or setting aside of the adjudication decision being allowed would necessarily result in contradictory decisions of the court. This line of reasoning is consistent with the decision in ***MKP Builders***.

The conflict between the High Court judgments in ***MKP Builders*** and ***EA Technique*** could very well be settled in the near future. However, it would be prudent for a losing party of an adjudication decision to take heed of the position under ***MKP Builders*** and be mindful that once an Enforcement Order has been granted against him, he would risk being barred from making a Stay Application. In this regard, a losing party of an adjudication decision should attempt to expeditiously pursue his right to make a Stay Application***,*** as soon as practicable and ideally before an Enforcement Order is granted

CONCLUDING REMARKS

This article has highlighted the conflicting positions adopted by our courts in the application of ***s. 16(1)(b) CIPAA*** in the event there is an activated multi-tiered dispute resolution clause but where arbitration had yet to be commenced. Further, emphasis is drawn on the principle that the satisfaction of one of the limbs under ***s.16 CIPAA***, will prequalify a Stay Application, however, a stay will not be granted without some other factual circumstances that would justify the stay.

[59] Ibid, para 26

As such, it is clear that our courts adopt the approach in determining Stay Applications on the factual circumstances and merits of each case without the fetter of a pre-determined test. Examples have been provided in this article so to illustrate some rationales adopted by our courts when determining Stay Applications. In this context, firstly, a 'clear error' which would warrant the grant of a stay is one which pricks the conscience of our courts if it were left unrectified. And valid considerations under a Setting Aside Application may also be relevant under a Stay Application. Secondly, offering securities pending final determination, especially if such securities are not immediately liquidated will likely not constitute valid grounds for the grant of a stay because respective parties are not obligated to accept terms of the security. Finally, our courts may consider the knowledge of parties at the time of contract and if those matters are later adopted as grounds in a Stay Application, our courts are likely to disregard those grounds.

Further, the answer to the question of whether a Stay Application can be made in the event there is an existing Enforcement Order presents some uncertainty in the law. In practice, applications for: (1) setting aside; (2) stay; and (3) enforcement of an adjudication decision are heard together, sequenced in that respective order.[60] However, it would nevertheless be prudent for a losing party of an adjudication decision to pursue its right to make a Stay Application as soon as practicable, with uncompromising vigour.

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[60] See Skyworld Development Sdn Bhd v Zalam Corp Sdn Bhd and other appeals [2019] MLJU 162

A BOOK REVIEW ON RICHARD HAPP AND STEPHEN WILSKE, "ICSID RULES AND REGULATIONS 2022: ARTICLE-BY-ARTICLE COMMENTARY" (VERLAG C.H.BECK – HART PUBLISHING, 2022)

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He has had over 310 appointments in international and domestic arbitrations across numerous international arbitral institutions. In 2015, he was conferred an Honorary Doctorate in Laws from the Leeds Beckett University, UK. He recently published the Law, Practice and Procedure of Arbitration in India (Thomson Reuters) and Standard Form of Building Contracts Compared (LexisNexis)

ABSTRACT

ICSID Rules and Regulations 2022 is the product of a six-year long revision project to modernize, simplify and streamline the rules of ICSID proceedings while leveraging information technology to reduce the environmental footprint. It is the most extensive amendment to date drawing upon lessons learned from

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hundreds of ICSID cases. Dr. Stephen Wilske and Dr. Richard Happ who are both prolific editors with long-standing practicing experience in ICSID proceedings have again produced a timely and comprehensive article-by-article commentary on the ICSID Rules and Regulations 2022 with the contribution of selected authors from different jurisdictions and the administrative support of two assistant editors. This book covers various aspects of ICSID procedures and practices from the understanding of administrative and financial regulations, institution rules, arbitration rules, and conciliation rules to the enforcement of ICSID awards, the significance between ICSID and permanent investment courts to the future of investment arbitration. This commentary is definitely a book of great interest for both seasoned ICSID practitioners as well as industrial players. It not only provides guidance on the new rules but also sets a standard for the practice of investment arbitration internationally.

KEYWORDS: commentary, ICSID Rules and Regulations 2022, international investment arbitration, investor-state dispute settlement, ICSID Convention

International Centre for Settlement of Investment Dispute ("ICSID") is one of the premier global institutions for the resolution of international investment disputes. As such, it is known for its unique dispute resolution process which is designed to take account the special characteristics of international investment disputes and the parties involved. In so doing, ICSID strives to maintain a careful balance between the interest of investors and the host States.

In order to meet the needs of stakeholders, ICSID has continuously revised and amended its Investor-State dispute settlement ("ISDS") rules. The latest 2022 ICSID Rules and Regulations is the fourth amendment since 1968. Suffice it to say, this is also the most extensive revision of the said rules to date.

The avowed objective of the revision as stated by ICSID is to modernize, simplify and streamline the legal framework of ISDS proceedings. As such, 2022 amendment to the rules has addressed some challenging issues. In particular, the amendments now deal with the multi-layered structure of the rules and regulations spreading over the ICSID Convention, the Arbitration Rules, the Ancillary Rules and the Additional Facility Rules.

In brief, the 2022 ICSID Rules and Regulations also contain a number of new

sections dealing with new concepts and procedures. Some of the changes are similar to changes adopted by other major institutions in the recent updates of their rules, such as the requirement that all fillings are to be made electronically[62].

Other changes are more specific and applicable to the ICSID procedure such as the transparency rules. It is suggested that these changes are aimed to strengthen the legitimacy of the process in light of criticism by various States and interest groups

Being ahead of the curve, Dr. Richard Happ and Dr. Stephen Wilske, both prevailing ICSID practitioners have gathered a team of other ICSID practitioners which consists of many rising stars in the field of investment arbitration to provide a clearly outlined analysis of this updated framework on ICSID Rules and Regulations.

This commentary not only provides a thorough and structured insights to the ICSID practitioners who are seeking guidance on the new rules, as well as the first-time ICSID counsel or arbitrator to understand the differences between ICSID rules with and other commercial arbitration rules. It also sets forth the practical foundation for the future ICSID practitioner in understanding ICSID processes and procedures. Besides that, the book also provides useful analysis on the past, present and future of ICSID in driving the evolution of international dispute settlement to meet the users' needs.

Unlike the usual method of commentary, this book is a compilation of articles contributed by as many as 38 authors[63] from all over the world bringing in the diverse background, age, culture, and perspective on ICSID rules and

[62] Gabriela alvarez-avilaa, ben sanderson,lucia bizikova, '*The 2022 ICSID Rule Amendments: What investors and States need to know*' (*DLA Piper*, 6 June) <https://www.dlapiper.com/en-pr/insights/publications/2022/06/the-2022-icsid-rule-amendments-what-investors-and-states-need-to-know> accessed 10 January 2023.

[63] Ralf Lewandowski; Mathilde Raynal; Alexander Bedrosyan; Saadia Bhatty; Jeremy Bloomenthal; Karl-Heinz Böckstiegel; Bianca Böhme, James H. Boykin, Marc Bungenberg, Björn P. Ebert; Susan Franck; Amy Frey; Lindsay Gastrell; Ankita Godbole; Anne-Karin Grill; Eva Kalnina; Swee Yen Koh; Barton Legum; Silvia Marchili; Lars Markert; Tatiana Minaeva; Enrique Molina; William W. Park; Tim Rauschning; Noah Rubins; Monique Sasson; Georg Scherpf; Lukas Schultze-Moderow; Sungjean Seo; Hi-Taek Shin; Laurence Shore; Cedric Soule; Nandakumar Srivatsa; Anna Stier; Anastasiya Ugale; Baiju Vasani; Sebastian Wuschka; Alvin Yeo.

regulations. This variety of authors, some having different writing styles, is reflected in the distinguishable sentencing or paragraphing in certain chapters. However, the editors have done a remarkable job in editing, compiling and restructuring the chapters into a whole and complete commentary with proper and well-connected divisions.

This is the beauty of this commentary. It gathers perspectives of different authors where, ultimately every author works towards the same direction despite the differences. The final product is commendable as it is in tandem with the principle of 'diversity' and 'inclusivity' that is being upheld by the ICSID throughout its work in promoting international investment arbitration[64].

As precisely pointed out by Prof. Dr. Jacomijn J. van Haersolte-von Hof in the foreword:

> "*The Commentary is logically presented, following the system of the various rules and regulations, and includes a section with short contributions focusing on new perspective of ICSID Arbitration*." [65]

The provision-by-provision commentary of this book offers practical and theoretical guidance for experienced practitioners, as well as beginners in the field alike. Detailed definitions are set out in certain paragraphs. For instance, in the commentary of Rule 22, the particular author has divided the paragraphs into individual sections with analysis provided on the practicality and procedure behind the rule[66].

Furthermore, following the individual provisions, the commentary provides detailed background information on the amendment procedures and insights into how the existing case law remains relevant to the application of the new ICSID Rules and Regulations.

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[64] Meg Kinnear, 'Advancing diversity in international dispute settlement' (World Bank Blog, 8th March) <https://blogs.worldbank.org/voices/advancing-diversity-international-dispute-settlement> accessed 10 February 2023.
[65] Happ and Wilske, ICSID Rules and Regulations 2022, (2022) XXIII.
[66] Happ and Wilske, ICSID Rules and Regulations 2022, (2022) 210.

An example is the discussion of the Tribunal's power to issue an order of security for costs which is now regulated based on the landmark cases of *RSM v Saint Lucia*[67] and *Kazmin v Latvia*[68] which demonstrate its application[69]. This approach only enhances our understanding of the application of the newly amended rules as compared with the previous edition of the said rules.

There is a useful discussion of ICSID historical context and its development premised on the adage that "*We are not makers of history. We are made by history'*[70]*.* The history of ICSID since the Cold War era had built upon the foundation of the World Bank as one of the investor-state dispute resolution providers. The editors and authors have, therefore, brilliantly presented and connected the history and future of ICSID in the final chapter in illustrating its ever-growing and evolving nature[71].

Despite the tractions that ICSID has gained, it has also faced various challenges due to the recent anti-ISDS animus. Thus, with a complete commentary and guidance provided in this book, it assists to clarify some misconceptions on the involvement of ICSID in international investment and in ISDS.

One of the recent examples is the declaration from Australia's Trade Minister that the new government '*will not include ISDS in any new trade agreements'*[72]*.* Further to that, the uprising trend of eliminating ISDS in the new and incoming bilateral treaties such as the new Canada-United States-Mexico Agreement ("CUSMA") has raise concerns of the continued relevance of the international investment dispute settlement system[73].

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[67] RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10.
[68] Eugene Kazmin v. Republic of Latvia, ICSID Case No. ARB/17/5.
[69] Happ and Wilske, ICSID Rules and Regulations 2022, (2022) 555.
[70] Martin Luther King Jr. (1968).
[71] Happ and Wilske, ICSID Rules and Regulations 2022, (2022) 817
[72] Luke Nottage, 'Australia (Dis)Engagement with Investor-State Arbitration: A Sequel' (Kluwer Arbitration Blog, 21st December) <http://arbitrationblog.kluwerarbitration.com/2022/12/21/australias-disengagement-with-investor-state-arbitration-a-sequel/> accessed 10 January 2023
[73] Happ and Wilske, ICSID Rules and Regulations 2022, (2022) 10.

All of these negative statements and omissions may be prompted by various reasons. However, this may be caused by misconceptions of the ISDS scheme by such persons or States. Such misgiving may be ameliorated by this commentary. It provides a clear perspective and understanding of the role of ICSID as well as ISDS. The overall and main purpose is to make available a dispute resolution mechanism where investors can enforce states' obligations under investment treaties[74].

In a nutshell, this commentary is not only timely with the recent amendment on the ICSID Rules and Regulations 2022, it also brings clarity to the ICSID mechanisms with its recent challenges. With its long-standing history, the mechanism and structure of ICSID may have been complicated and confusing for even seasoned practitioners, it is thus a remarkable work coming from both eminent figures in the industry to edit and publish this article-by-article commentary on the ICSID rules.

The final chapter of this commentary is usefully entitled "*A look into the Crystal Ball*". It brilliantly concludes the commentary. In short, this book provides practical guidance to the readers. It interpolates what ICSID scheme will be in the future. As such, this commentary is definitely a must read and gift for all ICSID practitioners or first time ICSID users to gain a useful and deep understanding of the structure of ICSID and its role in the global investor-state dispute settlement mechanism. It is a must have book in every legal library.

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[74] Jessica Ji, 'Attacking ISDS provisions for causing regulatory chill: a moving target' (*Thomson Reuters: Practical Law Arbitration Blog*, 25th May) <http://arbitrationblog.practicallaw.com/attacking-isds-provisions-for-causing-regulatory-chill-a-moving-target/> accessed 10 January 2023.

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