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Indonesia

MORATORIUM ON STATE-OWNED COMPANIES TO ENTER INTO A JOINT VENTURE WITH THIRD PARTIES

インドネシアでは、2019 年 12 月 12 日、国営企業による子会社の設立及び第三者との間での合弁会社の設立を一時的に停止する旨の国営企業相決定が出された。国営企業との間で合弁会社の組成を検討していた外国投資家にとっては大きな影響のある決定であることからその背景と内容に関して概説する。

On 12 December 2019, the Minister of State-Owned Companies issued the Decision of Minister of State-Owned Companies No. 315/MBU/12/2019 on the Organization of Subsidiaries or Joint Venture Companies of State-Owned Companies ("**Decision 315/2019**"), which essentially sets the moratorium for state-owned companies and their subsidiaries to establish new subsidiaries or enter into joint venture agreement with third parties.

Indonesian Law No. 19 of 2003 on State-Owned Companies defines a state owned company as a company of which all or majority of the shares are owned by the Government. Further, a subsidiary of a state-owned company is defined as a company of which the majority of the shares are owned by a state-owned company or a company that is controlled by a state-owned company ("**Subsidiaries**").

Pursuant to the Decision 315/2019, the Minister of State-Owned Companies has determined the following:

1. To set a moratorium on the establishment of new subsidiaries of or joint venture companies with state-owned companies. The moratorium shall be effective immediately and valid until this decision is revoked.

2. The Ministry of State-Owned Company will conduct a review with regard to the going concern status of Subsidiaries or joint venture companies of state-owned companies. The Ministry will make a decision on the continuity of the business operation of such Subsidiaries or joint venture companies based on further study with the board of directors of relevant state-owned companies.

3. The moratorium stated in (1) shall also apply to the Subsidiaries and all affiliated companies of which the financial statements are consolidated with the state-owned companies, including the subsidiaries of Subsidiaries (companies in the second level (and onwards) under the state-owned company) ("**Affiliated Companies**").

Notwithstanding the above moratorium, the Ministry provides exceptions for (i) the establishment of Subsidiaries or joint venture companies of state-owned companies engaged in construction service and/or toll road businesses for the purpose of taking part in tender or carrying out projects, and (ii) the establishment of Subsidiaries or joint venture companies to implement Government's program. In these cases, prior approval from the Minister of State-Owned Companies must be obtained.

Based on some interviews, the Minister of State-Owned Companies said that the Government would organize and evaluate all Subsidiaries and joint venture companies of state-owned companies. The Ministry will consolidate all of the Subsidiaries and joint venture companies to become more effective and improve competitiveness.

In addition to that, this moratorium will provide wider opportunity for private companies to develop their businesses. It is expected that once the private companies enter into the market, there will be a competition with the state-owned companies group. The Government argued that such competition aims to create healthier industry and prevent monopolistic behavior.

While this moratorium may be good news for private sector, it may also impact all proposed transactions involving state-owned companies or Subsidiaries or Affiliated Companies. Foreign investors who are planning to enter into joint venture agreement with either of these parties should be aware that the transaction may not be implemented in the near future.

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Malaysia

FEDERAL COURT: PROOF OF ACTUAL LOSS OR DAMAGE IS NO LONGER REQUIRED TO RECOVER LIQUIDATED DAMAGES

契約当事者による契約違反時の損害賠償額を予め決めておくことは、実務上、広く行われている。かかる規定は損害の立証が容易でないことから設けられることが多いが、近時マレーシアの連邦裁判所では、損害賠償の予定を定める条項を適用する際の実損害額の立証の要否に関して重要な判例変更を行った。本稿では、かかる判例に関して概説する。

Introduction

The Federal Court, the apex court of Malaysia, has in the recent decision of *Cubic Electronics Sdn. Bhd. (in liquidation) v Mars Telecommunications Sdn. Bhd. [2019] CLJ 723* ("**Cubic Electronics Case**"), relating to the interpretation of Section 75 of the Contracts Act 1950 ("**CA 1950**") changed the law on the steps required to recover liquidated damages.

Law on Liquidated Damages, Pre-Cubic Electronics Case

Section 75 of the CA 1950 provides as follows:

"*When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for.*"

The Federal Court had interpreted Section 75 in the case of *Selva Kumar Murugiah v Thiagarajah Retnasamy [1995] 1 MLJ 817* ("**Selva Kumar Case**") that, where a contract has been breached, the innocent party cannot recover the sum fixed in the liquidated damages clause and he must prove the actual damage he suffered. This judgment has been applied by the Malaysian courts in cases where it is difficult to assess damages where there is no known measure for damages.

Law on Liquidated Damages, Now

In overruling its previous decision in the Selva Kumar Case, the Federal Court in Cubic Electronics Case held, among others, that:

1. there is no necessity for proof of actual loss or damage in every case where the innocent party seeks to enforce a damages clause;

2. the innocent party is merely required to adduce evidence to show that there was in fact, a breach of contract, and the contract contains a liquidated damages clause specifying a sum to be paid upon breach; and

3. the defaulting party is able to defeat the liquidated damages clause by proving that the sum stipulated in the liquidated damages clause is unreasonable or to demonstrate from available evidence and under such circumstances what comprises reasonable compensation caused by the breach of contract.

When would a liquidated damages clause be unreasonable?

In relation to Item C(3) above, to determine whether the sum specified in the damages clause is reasonable, as opposed to only "actual loss" under the previous test laid down in the Selva Kumar Case, the Federal Court in the Cubic Electronics Case further held that it would take into account the following factors:

1. the legitimate interest which the innocent party may have; and

2. the proportionality of the clause.

The considerations of "legitimate interest" and "proportionality" were adopted from the English case of *Cavendish Square Holdings BV v Talal El Makdessi [2015] UKSC 67* ("**Cavendish Case**"). In Cavendish Case, it is said that the Court must consider whether any "legitimate commercial interest" in performance extending beyond the prospect of pecuniary compensation flowing from the breach is served or protected by a liquidated damages clause and then evaluate whether the provision made for the interest is proportionate to the interest identified except when the sum stipulated in a liquidated damages clause is unconscionably high and exorbitant by reference to the innocent party's legitimate interest in the performance of the contract. Hence, in order to derive reasonable compensation, there must not be a significant difference between the level of damages spelt out in the contract and the level of loss and damage which is likely to be suffered by the innocent party.

Thus, in summary, only in scenarios when the sum stipulated in a liquidated damages clause is unconscionably high and exorbitant by reference to the innocent party's legitimate interest in the performance of the contract that such a clause will be struck down.

Conclusion

In a nutshell, an innocent party seeking to enforce a liquidated damages clause must essentially:

1. prove there was a breach of contract; and

2. the contract contains a liquidated damages clause which sets out an amount to be paid in the event of a breach and such amount shall be the maximum amount claimable under the contract for that breach.

If the defaulting party feels that the liquidated damages amount is unreasonable, the defaulting party then must prove that such sum is unreasonable.

The decision in the Cubic Electronics Case seems to favor the upholding of the words of the contracts entered into between the parties, in that, where the terms of the contract provide for liquidated damages clause, the innocent party is no longer required to prove the losses suffered. By contract, the innocent party can now mostly rely on the liquidated damages clause that the defaulting party had contractually agreed on and the onus is on the defaulting party to prove the unreasonableness of the liquidated damages clause.

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Myanmar

OVERVIEW OF ARBITRATION IN MYANMAR

ミャンマーは、2013 年に外国仲裁判断の執行に関する条約（通称ニューヨーク条約）に加盟後、2016 年には新仲裁法を施行し、2019 年 8 月にはミャンマー商工会議所連盟によってミャンマー仲裁センターが創設される等、仲裁手続き関連の整備が進められている。そこで本稿ではミャンマーの近年の仲裁制度の現代化について概観する。

Introduction

In recent years, the Myanmar government has liberalized policies and encouraged foreign investment in Myanmar. Numerous laws and regulations have been passed to attract foreign investment into Myanmar. In turn, foreign investors expect a stable political environment and clear, unambiguous laws that meet international standards to ensure that their investments are well protected and to have a robust dispute resolution mechanism. This article sets out an overview of the arbitration landscape in Myanmar.

1. Recent developments in relation to arbitration

On 3 August 2019, the Myanmar Arbitration Center ("**MAC**") was established by the Union of Myanmar Federal Chambers of Commerce ("**UMFCCI**"). With the establishment of the MAC, both foreign and local companies could resolve their disputes at the MAC. The Arbitration Law (2016) ("**Arbitration Law**") was enacted on 5 January 2016 and replaced the Burma Arbitration Act (1944) ("**Arbitration Act**"). The Arbitration Act covered arbitral proceedings in Myanmar, but did not contain provisions on the enforcement of foreign arbitral proceedings. While the focus of the Arbitration Act was solely on domestic arbitration in Myanmar, the Arbitration Law recognized arbitral proceedings in Myanmar to cover international arbitration and foreign arbitral awards, and the domestic enforcement thereof. The enactment of the Arbitration Law was intended to give effect to Myanmar's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "**New York Convention**") , which was acceded to by Myanmar on 16 April 2013. As an acceding country to the New York Convention, Myanmar is obliged to implement its provisions on enforcing arbitral decisions made in other acceding countries, by enacting the same into domestic law. Further to the enactment of the Arbitration Law, the Office of the Attorney General recently issued the Notification No.643/2018 ("**Arbitration Procedures**") on 31 July 2018. The Arbitration Procedures set out certain procedures to be followed by the parties to arbitration and by the arbitrators and courts administering and enforcing such arbitration.

2. Arbitration agreement

The Arbitration Law, Section 3 (b) defines "arbitration agreement" as an agreement in writing by the parties to submit to arbitration all or certain disputes which may arise between them in respect of legal relationship, whether contractual or otherwise. Under Section 9(b) of the Arbitration Law, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Section 18 (a) of the Arbitration Law stipulates that the clause(s) or provision(s) of any contract that relate to arbitration are treated as an agreement independent of the other terms of the contract.

Under Section 23 (a) of the Arbitration Law, the parties to an arbitration agreement are free to agree upon the location of any potential arbitration. If the parties fail to determine a place, the arbitral tribunal (constituted by the parties to the dispute or court in accordance with Section 13 (d) of the Arbitration Law) will make a determination based on the circumstances of the case and convenience of the parties. The Arbitration Law, Section 3 (f) defines an arbitral tribunal as comprising a sole arbitrator or a panel of arbitrators. Under Section 23 (c) of the Arbitration Law, the arbitral tribunal is free to meet at any place of their choosing for consultation among its members; to hear witness, experts, or the parties; or for the inspection of goods, other properties, or documents. However, the parties to an arbitration agreement may preclude this right of the arbitral tribunal, subject to an agreement.

3. Foreign Arbitration under Myanmar Law

Generally, courts in Myanmar accept that parties are free to agree to opt for arbitration, including foreign arbitration. However, it should be noted that contracts concluded with the Union Government are typically governed by Myanmar law and are typically subject to domestic litigation/arbitration. Section 3(i) of the Arbitration Law provides that an "international arbitration" is an arbitration where:

(a) one of the parties to the arbitration has its place of business situated in a country other than Myanmar at the time of execution of the arbitration agreement; or

(b) the place of the arbitration as stated in the arbitration agreement or the place to conduct the arbitration in accordance with the arbitration agreement is situated outside the country in which the parties have their place of business; or

(c) taking into account commercially-related business obligations, the place where a substantial part of the obligations to be performed or the closed place connected to the subject matter of the dispute, is situated outside the country in which the parties have their place of business; or

(d) the parties to the arbitration agreement have expressly agreed that the subject matter relates to more than one country.

It is to be noted that if a party has more than one place of business, the party's place of business shall be that which is the closet to the place of execution of the arbitration agreement and if a party does not have a place of business, reference to its place of business shall be the place of its permanent residence.

4. Recognition and Enforcement of a Foreign Arbitral Award

Section 45(a) of the Arbitration Law provides that a party seeking to enforce a foreign arbitral award is required to follow a specific procedure. It is to apply to a court in Myanmar by submitting:

(a) the original foreign arbitral award or a copy, which must be duly authenticated in the country it was issued;

(b) the original arbitration agreement, or a duly certified copy; and

(c) such evidence as may be necessary to prove that the award is a foreign arbitral award.

Where the award or arbitration agreement required to be submitted under item (1) above is in a foreign language, the party seeking to enforce the award shall produce a translation in English certified as correct by the ambassador or consular office of the country to which that party belongs, or certified as correct in such other manner as may be sufficient according to the law in force in the Republic of the Union of Myanmar.

Conclusion

The establishment of the Myanmar Arbitration Center in August 2019 certainly represents a significant step forward in achieving dispute resolution in Myanmar. Simultaneously, the enforcement of foreign awards by courts in Myanmar is fundamental to boost investor sentiment. While on the legislation front, the Government is seeking to bring appropriate laws and procedures in place, the actual enforcement is yet to be tested.

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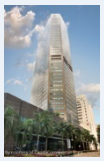

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