

Arbitration Under the “New Model” ASEAN Investment Agreement

As a firm that specializes in international arbitration to resolve commercial disputes we often hear “people actually arbitrate in Thailand?” or something to that effect. One must admit that Thailand is not regarded as being an “arbitration friendly” jurisdiction – at least not in the international context.

On the other hand, private contract parties are free to enter arbitration agreements in Thailand and every year hundreds of such proceedings take place and are seated in Thailand. Furthermore, what is often forgotten, Thailand is currently party to twenty-two free trade agreements and thirty-seven bilateral investment treaties which generally provide for arbitration as a, or the, dispute resolution mechanism between Thailand and its foreign investors. One of the most recent, and arguably one of the most important of such treaties is the ASEAN Comprehensive Investment Agreement (the “ASEAN Agreement”).

The ASEAN Agreement is a multi-lateral treaty between the ten member States of the Association of South-East Asian Nations (“ASEAN”) which was agreed to in February 2009 (in Thailand as it happens) and which entered into force on 29 March 2012. The ASEAN Agreement is intended to assist the creation of “a free and open investment regime in ASEAN in order to achieve the end goal of economic integration [within ASEAN]”. Thus, the ASEAN Agreement’s central purpose is to encourage investors from ASEAN states to invest in other ASEAN states by giving them (with some exceptions and reservations) *enforceable rights* to protect their investments.

THE NEW MODEL

[We have previously provided an overview of the common rights and remedies that investment agreements provide to investors.](#) The decades leading up to the end of the twentieth century saw a proliferation of investment agreements entered. Currently, there are over three thousand bilateral and multilateral investments agreements in force worldwide. And by in large the consensus is that this has fostered global prosperity

and lifted hundreds of millions, if not billions, out of poverty.

However, and perhaps ironically, one indicator of the success of these treaties was the dramatic increase in investor-State disputes and arbitrations to resolve them. Since investment has been most needed and most attractive in developing States, these States have most often been the States involved in such disputes and, inevitably, these States have lost some of these arbitrations. As a result, dissatisfaction with investment agreement rights and remedies regimen grew more vocal as the turn of the century approached. Developing States argued that the investment agreements had given too much protection to the investor at the cost of the interests of the States' citizens.

In response, in 2002 the United States drafted a new model investment treaty (and first used it in the 2005 United States-Uruguay bilateral investment treaty), which incorporated a number of provisions meant to address these concerns. For example, the traditional investment treaty model prohibits an investment State from expropriating an investment by enacting a law that devalues the investment. Such action can lead to monetary damages payable by the State bound to the traditional investment agreement model. Developing/investment target States complained that this impedes their ability to reasonably protect its citizens and environment without risk of monetary damages being payable to investors.

Thus, the new model excludes any non-discriminatory measure by the investment State that is designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, from the definition of "expropriation".

The ASEAN Agreement now incorporated this same rights provision and, as we will see below, several other of the new investment model provisions regarding the enforcement of an investor's rights by arbitration.

ARBITRATION UNDER THE ASEAN AGREEMENT

Claims

The ASEAN Agreement provides several different protections to eligible investors and allows such investor to submit a claim against the investment State for loss of, or damage to, their investment as a result of a breach of the ASEAN Agreement by failing to provide such protections. The investor who incurs such loss or damage may then submit a claim:

- (a) to the courts or administrative tribunals of the investment State, provided that such courts or tribunals have jurisdiction over such claims; or
- (b) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration

proceeding, provided that both the investment State and the investor's State are parties to the ICSID Convention; or

(c) under the ICSID Additional Facility Rules, provided that either the investment State or the investor's State is a party to the ICSID Convention; or

(d) under the UNCITRAL Arbitration Rules; or

(e) to the Regional Centre for Arbitration at Kuala Lumpur, or any other regional center for arbitration in ASEAN; or

(f) if the disputing parties agree, to any other arbitration institution, provided that resort to any arbitration rules or forum under sub-paragraphs (a) to (f) excludes resort to any other.

If the investor chooses to submit its claim to arbitration under one of the five options above, then:

(a) the submission must be made within three years of the time at which the disputing investor became aware, or should reasonably have become aware, of the breach of an obligation under the ASEAN Agreement that causes the claimed loss or damage; and

(b) the investor must provide written notice of its intent to submit the claim, and details of the claim, to the investment State at least ninety days before the claim is submitted; and

(c) the notice of arbitration must be accompanied by the investor's written waiver of the investor's right to initiate or continue any proceedings before the courts or administrative tribunals of the investment State, or other dispute settlement procedures, of any proceeding with respect to any measure alleged to constitute the breach. This does not, however, preclude the investor from seeking interim measures of protection from any relevant court or tribunal.

Procedure

The ASEAN Agreement also regulates certain matters regarding the conduct of any arbitration pursuant to the ASEAN Agreement as follows:

(a) where any preliminary objection to admissibility or to the tribunal's jurisdiction is raised, the arbitration tribunal is required to decide it in the form of an award before proceeding to any remaining merits of the case;

(b) where a preliminary objection is to any claim against the investment State specifically, the investment State must file its objection no later than thirty days after

the constitution of the tribunal stating as specifically as possible why the claim is: (1) “manifestly without merit”; or (2) “outside the jurisdiction or competence of the tribunal”;

(c) the tribunal is explicitly empowered to award reasonable costs in connection with any preliminary objection to the prevailing party;

(d) where the parties have not agreed to the place of arbitration, the tribunal is empowered to determine the place of arbitration provided that such place is a party to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards;

(e) where the dispute relates to an alleged taxation measure, the investment State and the investor’s State, including representatives of their tax administrations, are required to hold consultations to determine whether the measure in question is, indeed, a taxation measure.

This is of import because the ASEAN Agreement does not protect investors from taxation measures by a party State, except where such taxation affects the transfer of an investor’s funds or where it amounts to an “expropriation” (as defined by the ASEAN Agreement).

Where the investor claims that the investor State’s adoption or enforcement of a taxation measure has resulted in the “expropriation” (as defined by the ASEAN Agreement) of the investor’s investment, the investment State and the investor’s State, upon request from the investment State, are required to hold consultations with a view to determining whether the taxation measure in question has an effect equivalent to such expropriation.

The arbitration tribunal is not required to defer to either of the States’ decisions in these regards but it is required to “accord serious consideration”

to them. But, if the either State fails to provide their decision in a timely manner, then the tribunal must proceed without it; and

(f) The ASEAN Agreement also allows an investment State to provide transparency regarding any arbitration proceeding to its citizens by allowing the parties to make publicly available all awards, and decisions produced by the tribunal. However, both the parties and the tribunal are required to keep any information submitted in the proceeding (that is specifically designated as confidential) protected from public disclosure.

Provisions giving the investment State’s the right to:

(1) submit an objection that the claim is manifestly without merit (essentially without merit as a matter of law assuming the facts are as agreed, i.e. what would be referred to in American jurisprudence as “summary judgment motion”) *and* to have that objection ruled on before the tribunal proceeds further;

(2) to have reasonable non-discriminatory taxation measures excluded from any basis of a claim of expropriation *and* to have the right to official comment thereon with the tribunal bound to give due consideration thereto; and

(3) to provide transparency to its citizens by making public any non- specifically-confidential information regarding the arbitration,

are all radical departures from the old investment agreement model. For example one will not find any of these measures under Thailand’s bilateral investment agreements with the United Kingdom (1978), China (1985), Sweden (2000), nor Germany (2002). These new model provisions are intended to provide a more equitable consideration of the investment State’s interests.

Awards

Any arbitration under the ASEAN Agreement may only award:

- (a) monetary damages and any applicable interest; or
- (b) restitution of property, in which case the award must provide that the investment State may pay monetary damages and any applicable interest in lieu of restitution; and
- (c) costs and attorney’s fees in accordance with the ASEAN Agreement and the applicable arbitration rules.

Notably, the ASEAN Agreement explicitly prohibits any award of punitive damages. □ The ASEAN Agreement also prohibits an investor from enforcing an award issued under the ICSID Convention until either:

- (a) one hundred twenty days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
- (b) revision or annulment proceedings have been completed.

In the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or other arbitration rules selected by the parties, an investor may not enforce the award until:

- (a) ninety days have elapsed from the date the award was rendered and no disputing

party has commenced a proceeding to revise, set aside, or annul the award; or

(b) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

Provisions such as:

(1) essentially limiting damages awardable to an investor to sums of money and excluding punitive damages; and

(2) prohibiting an investor from immediately enforcing an award,

were also unheard of in the old investment model agreements (including the ones that Thailand is a party to mentioned above) and are also intended to give due consideration to the investment State's interests.

Finally, the ASEAN Agreement also defines any claim that is submitted to arbitration under the ASEAN Agreement to be a "commercial" relationship or transaction for purposes of Article 1 of the New York Convention. This is important because some countries enforce arbitration agreements under the New York Convention only if they are "commercial" in nature. These countries have in the past presumed that awards issued pursuant to investment treaties did not arise from a commercial relationship and are, therefore, not commercial in nature. Thus, the ASEAN Agreement provides for the broadest possible enforcement breadth under the Convention.

CONCLUSION

Only time will tell if the new model investment agreements prove more satisfactory. But given the economic and investment environment disparities between the ten ASEAN nations, choosing the new model as a basis for the Agreement was likely a wise decision. It is definitely something both cross-ASEAN investors and anyone advising cross-AESEAAN investors should be aware of.

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