# The hiatus in arbitral appointments by Director of AIAC: are Courts the answer?

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Alternative dispute resolution in Malaysia has grown by leaps and bounds in the past decade. Fundamental to this growth, undoubtedly, has been the role played by the Asian International Arbitration Centre ("**AIAC**" – formerly known as the Kuala Lumpur Regional Centre for Arbitration). AIAC's ability to keep pace with global growth through a multitude of reforms placed Malaysia in an enviable position, in particular, in the arbitration community.

AIAC's achievements are not limited at institutional level. AIAC's contributions, including in respect of the Arbitration Act 2005, as amended ("**the Arbitration Act**") is well documented, and has been recognised by the Right Honourable Chief Justice of Malaysia, Tan Sri Dato' Seri Utama Tengku Maimun Binti Tuan Mat no less, in a key note speech in late 2019. Her Ladyship stated[1] that: *"the significant role of the AIAC cannot be understated [and] the work it has done in the past has greatly improved the arbitration scheme in Malaysia [by not only its] tremendous job in establishing its own set of rules that parties may feel free to adopt … [but] drafting of rules aside, the AIAC constantly undertakes efforts to ensure that our arbitration laws remain up to date".*

## The six-months mark: post of the Director of AIAC remains unfulfilled

On 8 March 2020, the AIAC had announcing the untimely passing of its Director, Mr. Vinayak P Pradhan. Mr. Pradhan was appointed to the post in November 2018. The post of the Director of AIAC has been left unfulfilled since – and we are now reaching the six-months mark. The passage of time has rendered the unfortunate situation increasingly untenable.

The Director of AIAC, a position expressly identified in the AIAC Arbitration Rules 2018[2] ("**Rules**"), is central at institutional arbitration level i.e. in circumstances where parties have agreed to refer any disputes that have arisen to AIAC.

A review of the Rules demonstrates that the sanction from the Director of AIAC is required in some form at almost every level of the proceedings. For starters, Rule 3(2) of the Rules provides that the date on which the arbitration has commenced is the "*date on which the Director has received the Commencement*". At appointment stage, Rule 4(1) of the Rules provides that "*[w]here the Parties have agreed to the AIAC Arbitration Rules, the Director shall be the appointing authority*". Further, Rule 4 (7) of the Rules provides that even when parties have agreed to the appointment of an arbitration, such "*agreement shall be treated as an agreement to nominate an arbitrator under the AIAC Arbitration Rules and shall be subject to confirmation by the Director at his own discretion*". Rule 10(1) of the Rules provides that the discretion to consolidate two or more arbitrations rests with the Director. While the Arbitral Tribunal, once instituted, has full control over the proceedings, the release of the final award remains subject to the Director. This is as Rule 12(2) of the Rules provides that the "*arbitral tribunal shall, before signing the award, submit its draft of the final award…, to the Director within three months for a technical review*". The technical review process will only be completed upon notification by the Direction of such completion (Rule 12(6) of the Rules). Finally, Rule 12(7) of the Rules provides that "*the award shall only be released to the Parties by the Director upon full settlement of the costs of arbitration*."

With the unfulfilled position, parties who had opted for their arbitration agreement to be governed by the AIAC Rules are unable to progress with the appointment process. Even if the arbitration proceedings are already underway, the award cannot be released until the Director consents.

Put simply, significant procedural impediments have arisen as a result of the vacancy. While there remains the possibility that parties may agree to

[1] Keynote Speech

[2] AIAC Arbitration Rules 2018

waive any one of the procedural rules as between themselves by modifying the arbitration agreement and application of the Rules, this may not necessarily be a workable solution. In most cases, more often than not, disputing parties are no longer on good terms when a reference to arbitration has become unavoidable. An opponent not keen to progress the reference may simply point to the vacancy of the post of the Director of the AIAC, and take the position that it is simply not possible to proceed until and unless a Director of AIAC is installed. The arbitration agreement allows the opponent to take such position.

The AIAC itself has recognised the aforesaid implications and this is evident from the special bulletin published by the AIAC on 6 May 2020[3]. AIAC, as part of the bulletin, explained that a new Director may only be appointed by the Government of Malaysia in consultation with AIAC's parent organisation, the Asian-African Legal Consultative Organisation ("**AALCO**").

It is unclear why the appointment of a new Director has not been announced as at the date of publication of this note – with there being no indication as to when the appointment will occur.

**Arbitral Appointments**

In this note, we examine the possibility of progressing the appointment process by turning to the Courts.

First, a distinction ought to be drawn between the post, i.e. the office of the Director of the AIAC and that of the office holder. The title, "Director", is not created by statute, but is a product of a host agreement between the Government of Malaysia and AALCO[4].

The title has been recognised in law, including in Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 (P.U. (A) 120/1196) whereby a "*High Officer" has been defined as "the person for the time being holding the* ***post of the Director*** *of the Kuala Lumpur Regional Centre for Arbitration*" (emphasis added).

While the post may be presently vacant i.e. in the absence of an office holder, the post itself continues to be in existence – save that powers attributed exclusively to the post cannot be exercised at the present moment, including those relating to arbitral appointments.

Second, it is opportune, at this juncture, to refer to the Arbitration Act[5]. AIAC is recognised as the default appointing authority in a number of scenarios in s .13 (Appointment of Arbitrators). Pertinently, s. 13 (7) provides as follows:

*"(7) Where the Director of the Asian International Arbitration Centre (Malaysia) is* ***unable to act or fails to act*** *under subsections (4), (5) and (6) within thirty days from the request, any party may apply to the High Court for such appointment."* (emphasis added)

The Act caters to a situation where parties may apply to the High Court if the Director of AIAC *"is unable to act or fails to act"* within the prescribed period.

**What amounts to "unable to act or fails to act"**

There has been no documented situation similar to the issue at hand in recent times i.e. where the post of the Director (or in similar capacity) helming an institutional arbitration has been left vacant for such period. However, reference, in our view, can be drawn from other similar situations.

By way of example, the Arbitration Act provides that a member of an arbitral tribunal may be replaced or substituted after the constitution of the tribunal. In ***The Government of India v Vedanta Ltd (legal successor to Cairn India Ltd) & Anor*** **[2018] MLJU 630**, the High Court at [94] held as follows: "*It cannot be overstated that the replacement of a member of an arbitral tribunal does not change the character of the arbitral tribunal - it is still the same arbitral tribunal albeit with a different composition of members. Section 17(1)(b) and (3) of the Arbitration Act 2005 address*

[3] Special bulletin published by the AIAC on 6 May 2020

[4] See [4] and [5], ***Sundra Rajoo a/l Nadarajah v Menteri Hal Ehwal Luar Negeri, Malaysia & Ors*** **[2020] 10 MLJ 583**. See also [71], ***Mega Sasa Sdn Bhd v. Kinta Bakti Sdn Bhd & Ors*** **[2020] 4 CLJ 201**

[5] Arbitration Act

*the issue of a member of an Arbitral Tribunal moving on in life and even moving out of life…".*

In the case, the arbitration agreement is set out at [86], i.e. *"…**"If any of the arbitrators fails or is unable to act, his successor shall be appointed by the Party or person which originally appointed such arbitrator or as may be otherwise agreed by the Parties to the dispute."** (emphasis added)"* (further emphasis added).

The High Court at [96] proceeded to observe that "*A member of an Arbitral Tribunal may, for a multitude of reasons, be unable to carry on performing his duties as an Arbitrator whether because of health or other personal reasons. The law is not so flimsy as to cause an Arbitral Tribunal to fall apart merely because a member is not now in a position to proceed to continue as a member of the Arbitral Tribunal ....*". The learned Judge continued at [97], as follows: *"On the contrary the law here is flexible to address the problem arising out of the vagaries and variables of life such that its mandate does not terminate merely because a member of the Arbitral Tribunal cannot continue for any reason whatsoever."*

In ***CEX v CEY and another* [2020] SGHC 100**, the Singapore High Court observed that *"**It goes without saying that when he passed away, he was most definitely unable to carry out his duties**…."* (emphasis added).

On the same basis, in ***Malaysian Bar v Tan Sri Dato Abdul Hamid Omar* [1989] 1 CLJ Rep 92**, the Supreme Court in discussing the powers of Lord President construed s. 9 (1) of the Courts of Judicature Act 1964 as follows: *" …The powers of the Lord President of any person acting as Lord President under ss. 38 and 39 of the Act are express statutory powers which cannot be exercised by others unless properly exercised under s. 9(1) of the Act during illness or absence from Malaysia or owing to any other cause when the Lord President is unable to exercise the functions of his office. We read the words **"any other cause" in s. 9(1) to relate to physical inability in the sense that the Lord President is unable to perform his functions**."* (emphasis added)

Further, ***MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577 (FC)**, the Federal Court in discussing retirement of a judge held as follows as part of the judgment of the majority, "*…in specifying the reasons for the absence of a judge are wide enough to include a judge who has retired, died or dismissed. This is clear from the words "any other cause" appearing in the phrase **"unable through illness or any other cause to attend the hearing or otherwise exercise his function of a judge of the court."** Those words admit to the interpretation that the other reasons why the absent judge cannot function as one may well be due to his retirement, death or dismissal*." (emphasis added).

Against the aforesaid background, it can be argued that the proposition that the Director of the AIAC is "*unable to act*" due to the passing of the holder of the post has its merits. In particular, there is a broad consensus in construing "*unable to act*" and "*unable to exercise his functions*" with that of death.

Thus, a party may, potentially, cut through the stalled appointment process, by applying to the Director of the AIAC as required under s. 13 of the Arbitration Act, observe the timeline stated therein, and subsequently, to the High Court for such appointment under s. 13 (7) of the Act. Undoubtedly the aforesaid proposition has not been tested in the Courts but it does provide potential avenue for redress until the post of the Director of the AIAC is fulfilled.

On the same basis, a party may also, potentially, seek consequential orders from the Courts on matters arising from or caused by the Director of the AIAC's inability to act i.e. orders which are necessarily adjunct to the application of s.13 (7) of the Act, including, for example, the declaration of commencement of arbitration proceedings. The Arbitration Act is silent in this regard (unlike the specific provision relation to appointments under s. 13 (7) of the Act) but the Court is only being asked to state what is self-evident on a plain reading of s.23 of the Act.

**Moving forward**

It is not an understatement, in our view, to take the position that faith in the arbitration process may have been shaken by the prolonged vacancy of the post of the Director of the AIAC. Prospective litigants may be put off by the fact that they may be faced with the very same issue in the future and may be more inclined to resort to litigation in the Courts or opt for other institutional arbitrations. This has the potential effect of undoing the undeniable progress achieved by AIAC over the past few years. An amendment to the Arbitration Act to include provisions providing for the vacancy of the post may be one mechanism to alleviate this concern. For now, one can only hope that the post of the Director of AIAC will be fulfilled without further delay.

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