

Directorship of the Former Director of the Asian International Arbitration Centre (AIAC) is non-justiciable

The appointment of a Director of the Asian International Arbitration Centre (AIAC) is not justiciable by our courts.

On 12 October 2020, the Kuala Lumpur High Court struck out two originating summonses¹ as against the former Director of the AIAC, the late Vinayak Pradhan.

The originating summonses were taken out by Prestij Mega Construction Sdn Bhd (“**Prestij Mega**”) against the claimants in two separate adjudication proceedings. Prestij Mega sought to set aside the adjudication decisions on the grounds, among others, that the appointments of the adjudicators were invalid. To this end, Prestij Mega sought the following declarations:

- (a) that Pradhan’s acting directorship had been revoked by the Secretary General of Asian-African Legal Consultative Organization (“**AALCO**”) on 8 May 2019; and
- (b) that Pradhan was no longer a director or acting director of the AIAC after 8 May 2019.

Pradhan was named as the first defendant. The Government of Malaysia (“**Government**”) was subsequently brought in as the third defendant, in both originating summonses. After the passing of Pradhan on 8 March 2020, on Prestij Mega’s application, the court ordered the substitution of Pradhan with his personal representative.

Prestij Mega’s Arguments

Prestij Mega’s challenges against Pradhan were built on various correspondences issued by the Secretary General of AALCO. In these correspondences, the Secretary General of AALCO purported to dispute the Government’s appointment of Pradhan as the then Director of the AIAC on the ground that AALCO was not consulted prior to the appointment.

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Prestij Mega argued that the appointment of the director of the AIAC must be done in accordance with the Host Country Agreement. Based on the correspondences, Prestij Mega argued that Pradhan ceased to be the Acting Director of the AIAC when he was appointed as the then Director of the AIAC, and such appointment without prior consultation with AALCO is invalid under the Host Country Agreement.

On that basis, it was argued that Pradhan did not have power to subsequently appoint the adjudicators in both the adjudication proceedings. Therefore, Pradhan's appointments of the adjudicators in both the adjudication proceedings are null and void. In the course of the submissions, Prestij Mega took a step further to allege that Pradhan had usurped the office of the director.

Pradhan's Personal Representative's Arguments

The Personal Representative argued that the court has no jurisdiction to adjudicate the dispute arising from the Host Country Agreement, for three reasons:

- (a) The Host Country Agreement is an international treaty. It is trite that treaty rights of sovereign states are non-justiciable by the domestic/ municipal courts.
- (b) The Host Country Agreement has provided for a dispute resolution mechanism which expressly precludes the intervention of third party.
- (c) The court cannot properly adjudicate the dispute as to the directorship of Pradhan without joining AALCO as a party to the proceedings. Nevertheless, AALCO, being an international organisation, has not submitted to the jurisdiction of the court.

Besides, Pradhan also enjoyed immunity from legal proceedings for the appointments of the adjudicators as the acts were done in his capacity as the then Director of the AIAC. The immunity is derived from reading the International Organisations (Privileges and Immunities) Act 1992 ("**IOPIA**") together with the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 and the Diplomatic Privileges (Vienna Convention) Act 1966. Apart from that, Pradhan also enjoyed immunity from suit and action under section 34 of the Construction Industry Payment and Adjudication Act 2012 ("**CIPAA**").

Further, the originating summonses did not disclose a reasonable cause of action against Pradhan or his Personal Representative. Prestij Mega did not seek any remedies against Pradhan in his personal capacity or against his Personal Representative. The declarations sought by Prestij Mega concern the act of the Government in appointing Pradhan as the then Director of the AIAC and do not concern the action or inaction of Pradhan in his personal capacity.

The Personal Representative also argued that, Pradhan's appointment was made by the Government and section 114(e) of the Evidence Act 1950 provides that until and otherwise proven, the appointment by the Government must be presumed to have accorded with the necessary procedure.

Even assuming Prestij Mega is correct that Pradhan was wrongly appointed the then Director, his acts when he was a Director remain valid under the *de facto* doctrine.

High Court's Decision

Both originating summonses were heard by Justice Datuk Wong Kian Kheong. His Lordship struck out the originating summonses as against Pradhan/ his Personal Representative, on amongst others the following oral grounds:

- (a) The dispute as regards the validity of the appointment of Pradhan arose from the Host Country Agreement. The Host Country Agreement is an international treaty and it is non-justiciable by domestic courts.
- (b) Pradhan enjoyed immunity from these challenges in the discharge of his official duties. In this case, Pradhan was discharging his duty in appointing adjudicators.
- (c) In any event, the appointment of the adjudicators is not invalidated by any defect afterwards discovered, if any, in the appointment of Pradhan.
- (d) There is in law a presumption the official act of appointment of the late Director by the Government was regularly performed. There is no evidence to rebut that the appointments of the adjudicators of both matters had been irregularly performed.
- (e) Further, these challenges against the late Director are public actions and not private actions. Thus, these proceedings commenced by way of originating summons constitute abuse of the process of the court.
- (f) It would defeat the purpose of CIPAA and stifle its object to ensure speedy payment, if challenges of this nature are allowed.

These grounds may be supplemented or amended in the written grounds, which are not yet issued at the time of this publication.

Comments

Similar grounds were raised to challenge the Director's appointment in [Mega Sasa Sdn Bhd v Kinta Bakti Sdn Bhd & Ors](#)².

One procedural difference between both cases is that in *Mega Sasa*, the High Court had refused to strike out the originating summons on the ground that the law on immunity conferred under the CIPAA and IOPIA was not settled. The High Court therefore held that it was not a plain and obvious case that warrants a striking out without hearing full arguments in the originating summons. The High Court however did dismiss the originating summons at the end of those proceedings.

It is noted that when *Mega Sasa* was heard, caselaw had not significantly developed on the issue of the AIAC and its officers' immunities in law. With the benefit of the well-reasoned judgments in *Mega Sasa*, and now *Prestij Mega*, it is likely that future actions against the Director of similar nature may not sustain a striking out application.

Further, the non-justiciability of the Host Country Agreement is an important factor. In *Prestij Mega*, the challenge was premised on Pradhan's appointment as Director not complying with the Host Country Agreement.

The High Court held the view that the Host Country Agreement can only be ventilated in the international plane but not in municipal courts as it has not been passed by the Parliament as a domestic legislation. The High Court further held that under the Federal Constitution, external affairs are within the purview of the Parliament and the Executive. Therefore, an intervention from the municipal courts would amount to judicial overreach.

It is hopeful that both decisions in *Mega Sasa* and *Prestij Mega* will put similar challenges to rest. These challenges are not only vexatious, but also a waste of judicial time and resources. Costs were ordered in both *Mega Sasa* and *Prestij Mega*.

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