

NORTHERN TERRITORY BAR ASSOCIATION 2016 CONFERENCE

Timor Plaza, Dili, Timor Leste Thursday 14 July 2016 to Saturday 16 July 2016

Session: Regional opportunities for commercial arbitration

Title: Timor-Leste; at the Crossroads of Opportunity

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I would really like to give you a very national, that is Timor-Leste focused outline of how this is an emerging area for Timor-Leste and the opportunities for our fellow legal practitioners in the region.

Timor-Leste is currently at crossroads in the Alternative Dispute Resolution field. 16 years after the restoration of our national independence, we finally have a draft law on arbitration, also encompassing mediation and conciliation.

This draft legislation was drafted by Dr. Jorge Graça, currently the President of the TL Law Reform Commission for the office of the Senior Minister of State Coordinating Economic Affairs, Estanislau da Silva, and provides for an arbitration, mediation and conciliation regime which will seek to adopt the most modern legislative approaches, but in essence adopting the UNCITRAL model law.

The draft legislation aims at establishing in Timor-Leste and International commercial arbitration friendly legal regime, as well as promoting the most up-to-date mediation and conciliation legal regimes as alternative dispute resolution mechanisms.

As many of us know, especially litigation practitioners, Timor-Leste courts are snowed under with cases, especially in the civil and commercial jurisdiction, and appeal processes are often used as delay tactics to successfully thwart otherwise sound court judgments from being executed. The courts are so busy and the lack of more robust leave to appeal provisions in the civil procedure code leaves it open to abuse with relative impunity.

There is a widespread recognition and acceptance amongst TL justice sector actors that alternative dispute mechanisms such as mediation, conciliation and arbitration would help to alleviate the increasing caseload in the courts. This recognition acceptance is also come every member of the judiciary with whom I have discussed the current development of a mediation, conciliation and arbitration legal regime.

There are of course at play currently “vestiges of the parochialism” and “provincialism” manifested by some, not in the legal profession or the judiciary, but in the government advisor profession (a large professional group in our country), resisting any reform initiatives that introduce modern alternative dispute resolution solutions, and excluding the formal role of the courts. By

parochial I mean the attachment to the law and state institutions controlling mediation, conciliation and arbitration, even deriding the widely recognized value and contribution of the New York Convention. Instead they defend the need for the mandatory review by a national court of any foreign arbitral awards sought to be recognized and enforced in the TL jurisdiction. These same actors also deride the need to value and respect the autonomy of the parties to determine the manner and form of arbitration or other dispute resolution process and mechanism themselves, and advocate some interventionist mechanisms. This parochialism and provincialism though very much in the minority, stills permeates in its influence, and it takes time and effort to offset or combat these negative views regarding alternative dispute resolution from influencing decisions makers and legislators.

However, everyone from the judiciary, to most of my legal profession colleagues, non-government organizations working in the justice sector, legislators and members of government are supportive and enthusiastic of Timor-Leste taking bold and strident steps towards enacting and implementing modern and effective alternative dispute resolution, including commercial alteration.

An inter-ministerial steering committee is slowly, but I'm told surely, working through the draft proposed legislation which was drafted by Dr. Jorge Graça.

I was hoping that I could share some more details regarding the proposed legislation, but the government is still reviewing the options put forward before public consultation gets on the way hopefully the second half of this year. It is fundamentally though, as earlier stated, following the UNCITRAL model law.

In the meantime some more dynamic institutions within the Timor-Leste government structure have taken important international steps forward in the area of arbitration.

28 March 2016 this year the President of the Authority for the Special Administrative Region of our enclave with Indonesia Oé-cusse Ambeno and Special Zones for Social Market Economy (ZEESM) Timor-Leste signed a Memorandum of Understanding with Singapore International Arbitration Centre and Special Zones for Social Market Economy (ZEESM) Timor-Leste (SAROA-ZEESM TL), formalizing a collaboration under which SIAC will provide dispute resolution services for the Special Administrative Region of Oé-cusse Ambeno and Special Zones for Social Market Economy (ZEESM) Timor-Leste in relation to contracts between SAROA-ZEESM TL and private sector firms, investors and service providers.

Former Prime Minister of Timor-Leste, and President of the Authority of SAROA-ZEESM TL Dr Mari Alkatiri, stated that the MOU aimed to strengthen investor confidence in the region he oversees from a governance point of view: He committed the SAR to providing "Access to high quality dispute resolution services is a prime concern for investors and contractors. By partnering with SIAC, we have ensured that anyone investing in Oé-Cusse can be assured of dispute resolution services of the highest standards. This is an innovative step we have

taken and sends a clear message to the private sector: Oé-Cusse offers an enabling, world class business environment.”

Ms Lim Seok Hui, CEO of SIAC and the Singapore International Mediation Centre (SIMC) stated that about the MOU: “Arbitration and the innovative Arb-Med-Arb process offer international investors and businesses from different legal systems and cultures, the benefits of certainty coupled with flexibility within an institutionalised framework that is user-friendly, practical and saves parties time and costs. Over the past 25 years, SIAC has worked closely with parties from all over the world, including governments and private sector firms, to develop and promote international arbitration as an efficient and cost-effective means to resolve their cross-border commercial disputes. By providing quality, efficient and neutral dispute resolution mechanisms, we aim to contribute to Oé-Cusse economic development.”

The most relevant clauses of the MOU are as follows:

Article II Objectives and Agreements

- 2.1 The SAR-ZEESM TL and SIAC share the following objectives:
 - 2.1.1 Strengthening confidence of existing and potential investors in the SAR-ZEESM TL through provision of world-class arbitration services.
 - 2.1.2 Enabling the SAR-ZEESM TL to provide a better business environment for businesses and investors and thus promote private sector development and attract foreign direct investment.
 - 2.1.3 Provide a robust, independent and high quality dispute resolution mechanism for all contractual relationships between the SAR-ZEESM TL and service providers, investors or partners who operate within the geographical limits of the SAR-ZEESM TL.

- 2.2 Specifically, SIAC and the SAR-ZEESM TL agree:
 - 2.2.1 That the SAR-ZEESM TL will identify SIAC as the preferred provider of dispute resolution services through the arbitration modality, for all disputes arising out of contracts and investment agreements relating to Oé-Cusse SAR and ZEESM.
 - 2.2.2 That the SAR-ZEESM TL will include a clause in all contracts and investment agreements relating to Oé-Cusse SAR and ZEESM, providing for all disputes to be referred to arbitration as the dispute resolution method, with Singapore as the seat of arbitration and SIAC as the arbitration service provider.

2.2.3 That SIAC will invite the staff of the SAR-ZEESM TL to participate in its networking initiatives and events to broaden and deepen their understanding and knowledge of arbitration.

2.2.4 That both parties will publicize the partnership, if and to the extent that it is proper, reasonable and appropriate to do so. The parties further agree that the form and content of all such publicity, including any announcements to be made by the SAR-ZEESM TL and/or SIAC, shall be mutually agreed upon in writing in advance by the two parties. Each party will give the other reasonable time to review publicity and promotional material prepared by the other.

I am very honored to have been appointed as the focal point for the SAR of Oé-cusse Ambeno/ZEESM in the process of working with the SIAC towards implementing this vital MOU.

It is envisaged that disputes arising out of or in connection with the SAR, and any others agreed to by parties opting for Singapore and SIAC Rules based commercial arbitrations will also utilize the fast emerging infrastructure facilities in the way of an international standard hotel and conference facility which is close to completion, with another hotel facility close to approval in the SAR, as well an international airport which is well under construction and scheduled to be completed in mid 2017. Already, the Indonesian and Malaysian arbitration bodies are engaged in seeking out opportunities for dispute resolution involving their nationals arising out of Timor-Leste based commercial disputes.

This is a partnership in this area well worth watching, an opportunity, for those commercial disputes emerging from the Timor-Leste national market, centred mostly around the large infrastructure projects, but also due to the ever growing inward FDI presence in TL. Those of us with a commercial practice have seen a growth in the area of arbitration and even mediation cases, as investors look for more efficient means of dispute resolution. 90-95% of the contracts I have involved in drafting or advising on contain arbitration agreements, and most of these refer to Singapore as the seat of arbitration, even if not always electing the SIAC rules. Many of these foresee ad hoc arbitration. More attention is now being paid by practitioners with the drafting of appropriate clauses.

Finally, there are initiatives well on the way involving private legal practitioners, both national and international, as well as international organizations to establish a non-government national mediation, conciliation and arbitration body that will seek to influence positively the development of a national body of accredited practitioners in the alternative dispute resolution field to respond to the increasing needs of users in the area.

Quite a number of us local practitioners have experienced a growth in the labour mediation area, and legislation such as the long awaited special regime for determining land title rights also proposes mediation and arbitration as a step prior to formal court litigation proceedings.

The national legal profession firmly believes that the profession has to step up to provide a response in terms of training and providing in due course accredited mediators and arbitrators to deal with these very important dispute resolution opportunities, in areas such as land law, that are vital for our national economic development.

In order to do so, aspiring national practitioners in mediation and conciliation will be looking to the region for relevant and much needed capacity building. These will present their own challenges, with the language of the training being a key issue, given that the overwhelming legal practitioners do not speak English, and similarly, Portuguese is still very limited for most practitioners. Singapore and Malaysia provide some very viable opportunities in this regard because they have the advantage of speaking Bahasa Malayu, which most of the new generation of lawyers speak as they were educated in Bahasa Indonesian.

However, for the English speaking lawyers, and there are an increasing number, there are training opportunities in alternative dispute resolution which I personally believe are worth exploring from an expert profession such as in Australia. I have already established a good contact with the US based JAMS formerly known as the Judicial Arbitration and Mediation Services, under whom I have personally undertaken training. If we could get DFAT interested as much as USAID is interested in such areas, then it would be a very good outcome indeed.

At the SIAC congress in May this year, in his opening speech to the gathered international commercial arbitration community Mr Lucien Wong, the chairperson of the SIAC board of directors, in referring to emerging opportunities referred twice to Timor-Leste state investor and other arbitrations in the first 5 minutes of his speech.

I am not sure whether that is good news or not for us Timorese, but it certainly illustrates the point that Timor-Leste is definitely an opportunity in the region for commercial arbitration practitioners.