

# International Arbitration in Project Finance Transactions

**Prakash Pillai, Partner, Clyde & Co Clasis Singapore**

# Introduction to Project Finance Transactions

- Generally used for large infrastructure projects, e.g. oil and gas, electricity telecommunications, transportation, and natural resources
- Such infrastructure projects frequently have "design, construct and maintain" structures – maintenance / operation aspect can go on for years after construction is complete
- Therefore, require a form of financing that is "long term" in nature:
  - Multi-year horizon for repayment – can be instalments or a "bullet" repayment at the end upon completion of the project
  - Lenders may take equity in the project vehicle / company
- Can be secured by the project assets or some form of "change of control" mechanism
- Contrast with “short-term” loans: Difference in “risk-allocation” – In a project finance transaction, financiers take on more risk as they stand to lose their entire investment if the project is unsuccessful

# Typical Project Finance Transactions

- Typical parties to a project finance transaction:
  - Original promoters / sponsors
  - Lenders
  - Security agent / trustee
  - Joint venture company
  - *Others:* Contractor(s), Equipment supplier(s), Operator(s), Insurer(s), Off-taker(s)
  
- Typical structure of a project finance transaction:
  - Creation of a Special Purpose Vehicle (SPV) by the promoters
  - Formation of a consortium or syndicate of lenders – usually involves a number of financing contracts:
    - Consortium Agreement
    - Facility Agreement
    - Security Deed / Agreement
    - Share Subscription Agreement
    - Shareholders Agreement

# Nature of Project Finance Transactions

- Interwoven nature of a project financing transactions – a dispute over one contract may have ramifications for the whole project and the other contracts.
- Given the multiple contracts involved, the contracts may have different choice of law or jurisdiction clauses.
- Multiple parties are also involved: Potential involvement of third parties who are not parties to any of the contracts.

# Arbitration as an Effective Dispute Resolution Tool

- Historical reliance on litigation in finance disputes:
  - Certainty from use of precedent (at least in common law jurisdictions)
  - Availability of summary procedures
  - Typical enforcement procedures in many jurisdictions required Court assistance – arbitration seen as an unnecessary "middle step"
- However, there has been a shift towards arbitration in project finance disputes given the complexity of such transactions (multiple contracts, multiple governing laws and jurisdiction, multiple parties).
- Benefits of arbitration in project finance transactions:
  - Theoretical ease of cross-border enforceability – New York Convention
  - Ability to choose a neutral venue and neutral arbitrator(s)
  - Possibility of appointing expert decision-makers to the arbitral tribunal
  - Confidentiality
  - Procedures by major arbitral institutions to address complexities (consolidation of proceedings; joinder of parties)

# Comparison of Institutional Rules: Consolidation of Proceedings

Arbitration Rules	Who can apply?	When can an application be made?	Criteria for Consolidation
ICC Rules 2017 (Article 10)	A party	<ul style="list-style-type: none"> <li>Prior to the constitution of the tribunal (Article 10)</li> </ul>	<ul style="list-style-type: none"> <li>The parties have agreed to consolidation; or</li> <li>All of the claims in the arbitrations are made under the same arbitration agreement; or</li> <li>Where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.</li> </ul>
LCIA Rules 2014 (Article 22.1(ix), (x), 22.6)	Any party	<ul style="list-style-type: none"> <li>Prior to the constitution of the tribunal, or</li> <li>After the constitution of the tribunal</li> </ul>	<ul style="list-style-type: none"> <li>To order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations into a single arbitration subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing;</li> <li>To order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal(s) is(are) composed of the same arbitrators.</li> </ul>
SIAC Rules 2016 (Rules 8.1, 8.7)	A party	<ul style="list-style-type: none"> <li>Prior to the constitution of the tribunal or</li> <li>After the constitution of the tribunal (<i>in italics</i>)</li> </ul>	<ul style="list-style-type: none"> <li>All parties have agreed to the consolidation;</li> <li>All the claims in the arbitrations are made under the same arbitration agreement [<i>and the same tribunal has been constituted in each of the arbitrations or no Tribunal has been constituted in the other arbitration(s)</i>]; or</li> <li>The arbitration agreements are compatible [<i>the same tribunal has been constituted in each of the arbitrations or no Tribunal has been constituted in the other arbitration(s)</i>,] and: (i) the disputes arise out of the same legal relationship(s); (ii) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (iii) the disputes arise out of the same transaction or series of transactions</li> </ul>

# Comparison of Institutional Rules: Joinder of Parties

Arbitration Rules	Who can apply?	When can an application be made?	Criteria for Joinder
ICC Rules 2017 (Article 7(1))	A party	<ul style="list-style-type: none"> <li>• Prior to the constitution of the tribunal</li> </ul>	<ul style="list-style-type: none"> <li>• A Request for Joinder to be submitted by a party to the Secretariat, and no additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree.</li> </ul>
LCIA Rules 2014 (Article 22.1(viii))	Any party	<ul style="list-style-type: none"> <li>• After the constitution of the tribunal</li> </ul>	<ul style="list-style-type: none"> <li>• Any such third person and the applicant party have consented to such joinder in writing.</li> </ul>
SIAC Rules 2016 (Rules 7.1,7.8)	A party or non-party	<ul style="list-style-type: none"> <li>• Prior to the constitution of the tribunal or</li> <li>• After the constitution of the tribunal</li> </ul>	<ul style="list-style-type: none"> <li>• the additional party to be joined is prima facie bound by the arbitration agreement; or</li> <li>• all parties, including the additional party to be joined, have consented to the joinder of the additional party.</li> </ul>

# Arbitration as an Effective Dispute Resolution Tool: Practical Solutions

- *Practical solutions where there are no formal institutional rules for consolidation / joinder?*

## Facts:

- Claimant / Promoter of Indian origin: Company incorporated in Singapore
- Respondent / Investor: Consortium of funds incorporated in Mauritius
- Three contracts: Shareholders Agreement, Share Subscription Agreement, Earn-out Agreement, all executed in March 2010
- Three Projects: Development of a hydro electric project, a coal-based thermal power plant and a hydro power plant. Each of the Project Companies also had separate sources of financing (equity financing & debt financing)
- Parties agreed to be shareholders of Joint Venture Company, and use reasonable best efforts / cooperate in good faith towards the completion of the projects and thereupon, the procurement of an "Exit Event", defined under the SHA as including an IPO.
- Upon an Exit Event, the Respondent would receive a return on its investment and the Claimant would be entitled to be paid an "Earn-Out".



# Arbitration as an Effective Dispute Resolution Tool: Practical Solutions

- *Practical solutions where there are no formal institutional rules for consolidation / joinder?*

Issues:

- Cost overruns due to alleged force majeure events
- Promoter claimed that the Respondent had breached the agreements
- Loss and damage suffered by Joint Venture

Arbitrations:

- SIAC Arbitration filed under the 3 Contracts
- Claimant took the position that the 3 contracts constituted a unified transaction between the parties.



**Prakash Pillai**  
Partner  
Clyde & Co Clasis Singapore

Prakash.Pillai@clydeco.com  
+65 6544 6587

**415**

Partners

**2200**

Legal  
professionals

**3800**

Total staff

**50+**

Offices\* worldwide

\* Includes associated offices

Clyde & Co Clasis Singapore accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary. No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co Clasis Singapore.  
© Clyde & Co Clasis Singapore 2018