

Triumph of the tiger

By Natasha Mellersh

Malaysia wins a significant award in ad hoc proceedings in London, in a SGD 1.47 billion claim.

A third party tribunal has handed down an arbitral award in favour of Malaysia, releasing the country from paying development charges for a number of land parcels exchanged with Singapore.

Historically, the relationship between the two Asian economic giants has not always been easy. Almost 50 years since Singapore made the decision to break away from its sister state, tensions have continued to simmer below the surface. Border disputes have not been uncommon and the city state's prominence and popularity as an international business hub has at times overshadowed its close neighbour. The recent international arbitration, and the collegial manner in which it was conducted, has redressed some of those tensions.

Singapore claimed that Malaysia was liable to pay SGD 1.47 billion in relation to development charges (a tax charged on the increase in the value of land after the granting of planning permission) following amendments made to the original points of agreement (POA) in later negotiations.

Conflicting interpretations of a number of the clauses meant that the POA was not implemented until 20 years later in 2010, when a landmark land swap deal was finally negotiated between Prime Minister Lee Hsien Loong and his Malaysian counterpart Najib Razak.

AN UNLIKELY DEVELOPMENT

The new deal set out that Singapore was to gain six land parcels, including three plots of old railway land in Tanjong Pagar, Kranji and Woodlands, currently used as parkland. Malaysia, on the other hand, was to acquire four parcels of land in the prime business locations of Marina South and a further two in Ophir-Rochor. The investment arms of both countries set up a joint venture company, **M+S Pte Ltd**, to develop the land, with Malaysia owning a 60% stake in the venture, and Singapore holding the remaining 40% stake.

At issue was whether Malaysia was responsible for paying any development charges to Singapore, under the original 1990 terms of agreement. The factual technicalities of the case turned on a complex series of subsequent discussions and negotiations regarding the land, which evolved over a period of 25 years, during which there were several changes in government on both sides along with substantial changes to Singaporean law.

The dispute was brought before a star-studded three person tribunal of **Lord Phillips of Worth Matravers KG, PC** (former President of the UK Supreme Court), **Murray Gleeson AC, QC** (former Chief Justice of the High Court of Australia) and **Judge Bruno Simma** (formerly of the International Court of Justice), which was overseen by the **Permanent Court of Arbitration** (PCA). The tribunal was appointed by both countries and applied a set of arbitral rules published by the PCA. While the PCA provided support and registry services to the parties, it played no role in deciding the case.

Malaysia was represented by London partner **Matthew Weiniger QC**, Hong Kong-based global disputes head **Justin D'Agostino** and Hong Kong partner **Simon Chapman**, all of **Herbert Smith Freehills**, as well as **Robert Volterra** London-based **Volterra Fietta**, who acted as lead counsel, **Professor James Crawford** of **Matrix Chambers** and **Simon Olleson** of **Thirteen Old Square Chambers**.

Singapore was represented by **Debevoise & Plimpton's** London partner **Lord Goldsmith QC**, as well as **Vaughan Lowe QC** and **Toby Landau QC** of **Essex Court Chambers**.

Volterra recognises that "the stakes for both parties in the dispute were high. However, the underlying land-swap deal was always intended to be a 'win-win' situation. The outcome of the arbitration has ensured that this original intention of the countries is realised".

WIN, WIN – LOSE, LOSE

The tribunal found that the so-called "development charge" was intended to ensure that the state benefitted from an increase in land value after development permission was granted, rather than being designed to raise revenue. According to the arbitrators, Malaysia had already provided consideration for the joint venture, M-S Pte, to receive the three parcels of land and for permission to develop them by releasing the former railway land to Singapore. They concluded that Malaysia was cleared of Singapore's claims for the payment of development charges.

In a joint statement released by the parties on 31 October 2014, both countries stated that they were satisfied with the outcome, and that they agreed to accept the agreement as final and binding.

In conversation with *CDR*, Volterra says that the award is “extraordinarily important” as a piece of regional dispute resolution. He highlights that this is the “first time that these countries have agreed to a binding third party dispute resolution based on public international law to interpret a bilateral treaty and its application”. Both parties noted just that, in their joint statement: "By resolving this matter through third party arbitration, both countries have demonstrated our common commitment to settling disputes in an amicable manner, in accordance with international law."

A spokesperson for **Herbert Smith Freehills**, tells *CDR* "it was always intended that this process would enable both sides to resolve their differences in an amicable fashion." highlighting the wider impact of the award, they added: "The resolution of this matter is a chapter in the continued fruitful cooperation between the two states."

In reality, the award will have little effect on the land itself – as the arbitration solely regarded the payment of development charges and both parties agreed to proceed with its development regardless of the outcome – but nevertheless, the award has important implications.

LOOKING TO THE FUTURE

The decision is not only likely to improve the relationship between the neighbouring countries, as Volterra notes that “such statesmanlike and positive conduct by both countries can only be an example to parties in dispute everywhere”.

Volterra emphasises that while his clients are satisfied with the result, this is in large measure because the case represents “an enormously positive milestone, by allowing a seemingly intractable dispute to be resolved by agreed questions being jointly submitted to a neutral tribunal in a friendly and collegial manner”. Both states emphasised that this will pave the way for stronger and improved relations and greater business and development opportunities.

The result is not without political implications; in their joint statement both states underline their commitment to work together on future projects: “The full and successful implementation of the POA has paved the way for joint development projects and closer collaboration between Singapore and Malaysia.”

The award could also change to the way the countries interact. Singapore has successfully brought claims against Malaysia on a number of occasions. The tribunal's decision in favour of its larger neighbour could change Singapore's approach, by encouraging greater cooperation on both sides, the use of ADR to resolve remaining claims.