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HIGHLIGHT

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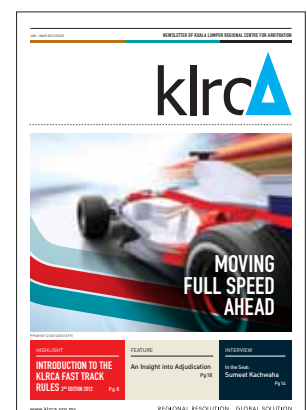
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DIRECTOR'S MESSAGE



DEAR FRIENDS,

Since this is the first newsletter for 2012, I would like to take this opportunity to wish you a Happy New Year. It feels like we have just welcomed the new year, and yet here we are, already entering the second quarter. Time moves quickly when there is a flurry of activities going on, and this is the case at KLRCA. We are continuing to work full speed ahead with our partners and stakeholders in promoting arbitration and ADR in Malaysia and the region.

On the international front, KLRCA has been actively promoting Malaysia as a seat and venue for arbitration. A KLRCA delegation, led by the former Chief Justice of Malaysia, Tun Zaki Tun Azmi and also included President of the Malaysian Bar, Lim Chee Wee, travelled to New Delhi and Mumbai to hold seminars on the dispute resolution scene in Malaysia. I was heartened to note the great response and interest shown by the participants.

KLRCA also participated in the International Bar Association (IBA) Annual Arbitration Day in Stockholm, which gained us a lot of exposure among the European and American arbitrators and litigators. In addition, KLRCA recently signed a new collaboration agreement with the Haikou Arbitration Commission to work together in promoting arbitration and ADR within the China-ASEAN Free Trade Area (CAFTA).

Locally, in our capacity as the official appointing authority, KLRCA has travelled to different states in the country to create awareness on the impending Construction Industry Payment and Adjudication (CIPA) legislation, where a series of free talks has been organised to familiarise and prepare the construction industry, the legal fraternity and the public for compulsory statutory adjudication.

CIPA will be keeping us very busy as we will also conduct training for those who are keen to be adjudicators – we are now in the process of firming up the draft syllabus for the Adjudication Training Programmes, to enable proper certification of future adjudicators. On top of that, a Conversion Course will be available for the current KLRCA Panel of Arbitrators to make them eligible for the KLRCA Panel of Adjudicators.

One of the highlights in this quarter was the launch of our new and improved KLRCA Fast Track Arbitration Rules, by the Chief Justice of Malaysia, Tan Sri Arifin Zakaria. Besides amendments to the rules which now accommodate maritime matters and admiralty disputes, the revised KLRCA Fast Track Rules also contain changes which in general, improve the arbitration process and benefit many different industries.

We are also proud to announce that KLRCA has been named as the alternative venue for the Court of Arbitration for Sports (CAS) under the International Council of Arbitration for Sports (ICAS), and we look forward to becoming the premier destination of sports dispute resolution.

Moving forward, the wheels are set in motion for the highly anticipated KLRCA Islamic Arbitration Rules, in which we plan to launch it in the second half of the year. Look out for more news on this in our next newsletter.

2012 augurs exciting days ahead and as we press on through the year, we are excited to be part of this journey towards becoming the preferred alternative dispute resolution centre in the region.

Until next time, happy reading.

SUNDRA RAJOO
Director of KLRCA



KLRC GETS INDUSTRY PLAYERS ACQUAINTED WITH **CIPA BILL 2011**

The year 2012 kicked off to a great start with 'The Introduction to the Construction Industry Payment and Adjudication (CIPA) Bill 2011' talk, the first of a nationwide roadshow which was held on 14th January 2012 at the Bar Council, Kuala Lumpur. Due to overwhelming response, the talk made its encore appearance in KL on 11th February 2012 in Wisma MCA in front of a 300-strong audience.

Under the CIPA Bill, KLRC has been appointed the official appointing authority in Malaysia. As the authority responsible for appointing adjudicators, there are a number of things KLRC will oversee. These include setting up the competency standards and criteria for adjudicators, creating the fee system, and of course, administrating the adjudication procedure accordingly.



The roadshow, which made its way to Penang, Kuching, Ipoh, Kota Kinabalu, Miri, Johor Bahru and Kuantan, is an initiative by KLRC to educate professionals in the construction industry, the legal fraternity and the public about how the new Act will affect all construction contracts that are carried out in Malaysia. Everyone, from sub-contractors to property buyers, will be affected as well as key industries such as construction, mechanical and engineering, oil & gas and telecommunications.

Having had its first reading in December 2011, the Bill is expected to be passed as the CIPA Act, and take effect by the end of 2012. It is hoped that the Act will help to address the cash flow problems that have plagued the construction industry. Adjudication will provide a speedy dispute resolution and will help parties involved in construction to regularise their cash flow.

More photos on 'The Introduction to the Construction Industry Payment and Adjudication (CIPA) Bill 2011' nationwide roadshow on pg 21.



PASSAGE TO INDIA

Namaste! KLRCA held its 'Effective Dispute Resolution: A Malaysian & Indian Perspective' roadshows in beautiful New Delhi and Mumbai on the 27th & 30th January 2012 respectively. It was a privilege to have The Right Honourable Tun Dato' Seri Zaki bin Tun Azmi, former Chief Justice of Malaysia and Chairman of the ASEAN Law Association (Malaysia) lead KLRCA's delegation on this journey to India, which was aimed to discuss how the Malaysian legal system and courts support dispute resolutions.





The delegation also comprised the Director of KLRCA, Mr Sundra Rajoo, who spoke on international commercial arbitration in Malaysia and its benefits for Indian businesses, and Mr Lim Chee Wee, President of the Malaysian Bar who spoke about the user's perspective of dispute resolution in Malaysia. It was a 'sold-out' event in both venues, with more than 300 professionals in attendance, some who even travelled from Malaysia, Pakistan and the UAE. In New Delhi, the delegation also paid a courtesy visit to the acting Chief Justice of the Delhi High Court, Justice A.K. Sikri, who very kindly hosted a tea party.





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THE LAUNCH OF KLRCA FAST TRACK RULES

2nd Edition 2012

The launch of the KLRCA Fast Track Rules 2nd Edition 2012 on 27th February in Mandarin Oriental Kuala Lumpur, officiated by Yang Amat Arif Tan Sri Arifin Zakaria, Chief Justice of Malaysia, marks another significant milestone in the Centre's journey of excellence. It was a simple yet elegant affair, graced by the presence of more than 100 guests from the legal fraternity, Judiciary, Embassies and other corporate stakeholders.

The KLRCA Fast Track Rules which was first launched in 2010 offered the option of a fast route arbitral process. Parties with claims that are less than 1 million in value can be assured that their arbitration period will only take 140 days.



However, KLRCA has revised its Fast Track Rules, given the recent developments in alternative dispute resolution (ADR) in the country, namely, the recent 2011 amendments to the 2005 Arbitration Act and soon-to-be-passed Construction Industry Payment and Adjudication Act.

In his officiating address, Yang Amat Arif Tan Sri Arifin congratulated KLRCA's and its Working Committee's swiftness in updating its Fast Track Rules. "I foresee that this set of rules will revolutionise the local arbitration scene, putting Malaysia in a promising seat of international arbitration and put KLRCA in good stead towards its aim in becoming the preferred arbitration centre in the region", he pronounced.

Sundra Rajoo, Director of KLRCA highlighted that apart from the advantage of speedy resolution, the revised rules ensure that the overall cost of resolving disputes is kept within predictable and reasonable realms. In this regard, besides amendments that now accommodate maritime matters and admiralty disputes, the revised KLRCA Fast Track Rules also contain changes which in general, improve the arbitration process and benefit many different industries.



The Chairperson of KLRCA Maritime Arbitration Working Committee, Sitpah Selvaratnam was also on hand to introduce the salient features of the KLRCA Fast Track Rules 2nd Edition 2012 and presented a comparison between the former and revised rules.

The event ended with a spectacular launch gambit and was concluded in a joyful manner with hope for a great beginning to the KLRCA Fast Track Rules 2nd Edition 2012.

Complimentary copies of the Rules are available from the Centre and downloadable from KLRCA's website, www.klrca.org.my

INTRODUCTION TO THE KLRCA FAST TRACK RULES

2nd Edition 2012

KLRCA recently launched its Fast Track Arbitration Rules (2nd Edition, 2012).

Sitpah Selvaratnam, chairperson of the KLRCA Working Committee that revised the rules, explained the changes on the day of the launch. Her speech below is reproduced with her kind permission.

The landscape of dispute resolution in Malaysia has changed so dramatically over the last three years; with the concerted efforts of the Judiciary, the KLRCA, the Malaysian Bar and the various professional and arbitral institutions in Malaysia. It would have been unimaginable 5 years ago that a litigant would have its claim that is lodged in the Malaysian High Court, fully heard and decided, and appeals exhausted all in a matter of months, as opposed to years. It is the reality of today, although it is very hard work for our Judges and lawyers.



Very much an integral part of this progressive change are the roles played by the Chief Justice of Malaysia, Tan Sri Ariffin Zakaria, and Mr. Sundra Rajoo as Director of KLRCA. Although it is a constant challenge to strive for a proper balance between speed and quality, the stakeholders are by large appreciative of these initiatives.

In 2010, the KLRCA published the revised rules of the KLRCA. By doing so, the KLRCA became the first arbitral institution in the world to adopt the revised UNCITRAL Arbitration Rules, paving the way for the implementation of the best practises of arbitration, as framed by international leaders of dispute resolution.

A year later, in August 2011, a maritime working committee was empanelled by the KLRCA to integrate the maritime industry's needs and expectations into its second set of rules - the Fast Track Rules of 2010 that KLRCA had earlier drafted in collaboration with the MI Arb. We were put on a tight leash - to have the revision completed in four months. This we achieved only because the maritime working committee stood on the strong shoulders of the draftsmen of the 1st Edition of the Fast Track Rules, aiming only to inject aspects of dispute resolution which the maritime community desired, that would also benefit all other sectors of business. In a nutshell, the maritime players want speed, quality and decisiveness, at moderate costs. The 2nd Edition of the Rules more particularly caters for this.

The key features of the 2nd Edition of the Fast Track Rules are:

- 1) That it ensures a quick Tribunal appointment, by providing 7 days for parties to consent to a sole arbitrator, or to nominate their arbitrator, where there is an agreement for a Tribunal to comprise of 3 arbitrators. In default, the Director of the KLRCA is empowered to appoint the Tribunal within 14 days.
- 2) Where parties expressly agree, or the sum in dispute is USD 75,000 and less, or RM 150,000 and below as the case may be, the claim will proceed on a documents-only basis without witnesses, unless the Tribunal considers an oral hearing necessary. [Article 9]
- 3) In a documents-only arbitration, although parties may have at the outset agreed to have three arbitrators, if both party nominated arbitrators are in agreement over the outcome, the third arbitrator need not be appointed. The consensual award of the two arbitrators is valid and binding. The third arbitrator is only appointed if the two arbitrators are not in agreement over any matter. This reduces the fee payable to the Tribunal by 1/3. This provision however, is not applicable where parties require an oral hearing. [Article 9 and Article 4 Rule 3 (f) and (e)]
- 4) In a documents-only arbitration, the award is to be handed down by the Tribunal within 90 days. Where an oral hearing is involved, the award is to be published within 160 days. Extensions of time are possible in two tiers. The first is where the parties and the Tribunal consent to extending time. The second tier of extension requires the consent of the Director of the KLRCA, whose consent is to be sought prior to the expiry of the stipulate time period with written grounds proffered for the desired extension. [Articles 12 and 13]
- 5) Costs recoverable by a party are capped at 30% of the sum claimed for documents-only arbitrations, and 50% where the parties elect or there is otherwise a need for an oral hearing. This sets the maximum recoverable costs, but the Tribunal may cap the amount at a lower level where the circumstances warrant it. An element of certainty in costs is introduced. The Tribunal's fees, and the administrative charges of the KLRCA, are included in these capped costs. [Article 14]
- 6) If the parties agree to the 2nd Edition of the KLRCA Fast Track Rules, they are deemed to accept Malaysia as the seat of arbitration, and the application of the Arbitration Act 2005 of Malaysia, with English as the language of the arbitration. [Article 6]
- 7) The Tribunal is empowered to use its specialist knowledge, provided the parties are given an opportunity to address the points raised by the Tribunal in asserting its specialist knowledge. [Article 6 Rule 5(f)]
- 8) The Tribunal is free to adopt the most suitable procedures to ensure the just, expeditious, economical and final determination of the dispute, and in doing so may make adverse inferences, disregards non-compliant documents, and hear witnesses together. [Article 6 Rule 5]
- 9) The corner stone of the Rules remains the impartiality and independence of the Tribunal, who shall not act as advocate for its nominating party. [Article 5]

In totality, we believe the Rules provides for a fair process, quick determination, and an inexpensive resolution of disputes.

The infrastructure would seem to be well laid, particularly to maritime claimants who now have in these Rules the facets of the 2009 LMAA Rules for intermediate claims, which was introduced by LMAA after a survey undertaken of the maritime industry. Maritime claimants have in Kuala Lumpur since 1st October 2010, a specialist Admiralty Court to support its arbitration in Malaysia. The amendment to the Malaysian Arbitration Act, which came into force on 1st July 2011, empowers the Admiralty Court to arrest ships as security for their arbitration claims. In this regard the Admiralty Court Practice Directions have recently been issued on 21st February 2012 under the directions of Yang Amat Arif Tan Sri Arifin Zakaria, to take effect on 1st March 2012, adding clarity and efficiency to the entire maritime process.

The Malaysian maritime industry is now placed in a position where it can truly bargain with its contractual counter-parties for Malaysia to be stipulated as the forum for resolution of its disputes. The long term maritime vision is to have Malaysia chosen by foreign maritime claimants as a neutral and credible venue for dispute resolution.

To sustain the credibility of the Malaysian dispute resolution system, the quality and integrity of the arbitrators are critical. The supervisory powers vested in the Court as caretaker is potent, and the role of the Court delicate - in balancing non-interference and the protection against injustice.



About the author

Sitpah Selvaratnam qualified with a First Class Honours degree in law from the University of Wales, Cardiff, in 1988 and in 1991 with an LLM from the University of Cambridge. She was conferred a Diploma in International Commercial Arbitration by the Chartered Institute of Arbitrators in 2008, upon completion of study at Keble College Oxford.

Sitpah has been practising law in Malaysia since 1991, focused on corporate insolvency, commercial and shipping litigation and disputes. She represents diverse Malaysian and foreign corporations and commercial interests; including ship owners, commodity traders, port operators, Protection and Indemnity Clubs, insurers, financial institutions, Malaysia's national asset management corporation, the Malaysian deposit insurance corporation and securities commission.

KLRCA HOSTS CAS ALTERNATIVE HEARING CENTRE

We are pleased to announce that the Kuala Lumpur Regional Centre for Arbitration now serves as the official host of an alternative hearing centre for the Court of Arbitration for Sport (CAS).

The Court of Arbitration for Sport (CAS) is an institution independent of any sports organisation which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world. The CAS was created in 1984 and is placed under the administrative and financial authority of the International Council of Arbitration for Sport (ICAS).

The hosting of the prestigious secretariat undoubtedly puts KLRCA and Malaysia on the map, and catapults the nation's status as a centre for sports dispute resolution in the Asia Pacific region.



DELAY AND EXTENSION OF TIME: A KLRCA - SCL MALAYSIA - HILL INTERNATIONAL PRESENTATION

More than 300 participants turned up in full force at the Delay & Extension of Time presentation, jointly organised by KLRCA, Society of Construction Law (SCL) Malaysia, and Hill International on 21st March 2012 at Wisma MCA.

Mr Sundra Rajoo, Director of KLRCA, sparked the audience's interest in his introduction of the Construction and Payment Adjudication (CIPA) Bill 2011. The other speakers present were Mr Simon Silbernagl and Mr Derek Nelson of Hill International, who spoke on methods of delay analysis as well as the matter of concurrent delay and the circumstances in which it commonly arises. Mr Wilfred Abraham, President of the Society of Construction Law (SCL) Malaysia, was also on hand to discuss expert evidence in arbitration. The evening ended with a cocktail and networking session.





IN THE SEAT: SUMEET KACHWAHA

Sumeet Kachwaha is one of India's top arbitrators, and enjoys an excellent reputation for his arbitration skills. He figures as a Leading Individual in Asia Pacific Legal 500, and was one of two from India named in the International Who's Who of Commercial Arbitration 2012 by the esteemed Global Arbitration Review. He also sits on the KLRCA Advisory Board. In this exclusive interview, Mr Kachwaha provides his views and outlook on the evolving landscape of arbitration in the region.



How did you begin your career in arbitration?

I guess it started in right earnest in the late 90's when I got involved with two major arbitrations from US and UK. We worked alongwith a top tier US firm and a U.K. Magic Circle firm. The stakes were high and the matters interesting. The opening up of the Indian market and the new Arbitration & Conciliation Act in 1996, made this a happening branch and I embraced this chapter of my legal career.

What would you say have been the major changes in the arbitration market compared with when you began practising?

It is a new ball game now. India has changed and so has the arbitration market. Indeed the change is at the global level. The (UNCITRAL) Model Law of 1985 and the more visible presence of the arbitral institutions has contributed to the growth of the arbitration bar and the arbitration market. A new arbitration jurisprudence has taken shape. If one attends the IBA (or any other law association) conference, one would notice that the arbitration committee is amongst the most active ones.

What do you enjoy most about working in the arbitration field?

For me, the most satisfying aspect is that parties have their day in “court”. In a regular civil court one is generally at the mercy of the judge, his moods, pleasures and priorities. In India, case management is very poor and you have little idea when your case may be heard and to what extent. In an arbitration, you are more in control and have at least one assurance that you would have reasonable opportunity to put across your views before an open minded tribunal. This comes from the nature of arbitrations and the fact that parties have some role in its constitution. Secondly, arbitration is the only mechanism for a dispute resolution lawyer to be of assistance to his client in any jurisdiction. An arbitration can take place anywhere in the world but the lawyer will always be at home!

Tell us about your journey to the top. What were the challenges that you faced?

To begin with, I cannot call it a journey to the top. Yes, it is a journey (and hopefully will remain one). I miss the absence of an arbitration bar and lack of trained arbitrators (who understand the best practices for efficient arbitrations). Further, in India most arbitrations are ad hoc and end up following court procedures. Local arbitral institutions have yet to catch up with the global leaders.

From your experience, what are three important qualities an arbitrator should have?

In an international arbitration, the arbitrator should understand and bridge the cultural divide which may apply to the parties and their advocates. Further, too often, arbitrators get stuck in conducting arbitrations “their way”, (which may take one or the other party by surprise). It is best to clarify to the parties at the threshold how the arbitration will proceed and (to the extent possible) have consensus on procedural issues. Last and the most important is that the arbitrator must try and send back both parties with a feeling that justice was done. This will come naturally if they see fairness in action coupled with an open minded approach.

What is your advice to upcoming arbitrators?

Indian arbitrators must make effort to understand and imbibe the international practices, culture and jurisprudence of arbitration. They need to be on the same page as the international community. Further, serious practitioners must create for themselves a platform to share thoughts and views so that there is a visible growth of the arbitration bar. To the extent possible, they must start participating in international conferences.

Which living persons do you most admire in the legal fraternity and why?

I would say that I admire Mr. F.S. Nariman the most. He was the top litigation lawyer here (in India). *[Editor's note: Mr Fali Sam Nariman is one of India's most distinguished constitutional lawyers, and is considered as one of the living legends in the field of law in India.]* He need not have forayed into arbitrations. The fact that he did so bears testimony to his desire to learn and venture beyond his known territory. Despite India being nowhere near a centre for arbitration, through sheer brilliance and gifted qualities he became a leader in the arbitration bar, gaining recognition and respect not only for himself but for his country. As all great personalities, he wears his success lightly on his shoulders and with minimum fuss, continues to contribute to the growth and development of the law.

I consider it a privilege to have worked closely with him in some of the largest and significant cases to come up before courts.

What is the potential growth of arbitration industry in South Asia, and India in particular?

Let me first talk of India. In India, the commercial courts are so badly clogged that arbitration mechanism is a matter of necessity. However, the perception is that India suffers in comparison with some of the more sophisticated arbitration centres. Thus, arbitrations have started getting shifted outside. This needs to be overcome in order for us to achieve our potential.



As far as rest of East & South Asia is concerned, the balance of international trade and commerce is tilting here and it is but natural that parties would wish their disputes to be resolved here. Indeed, the process has started and it is only a matter of time for it to gain momentum. Therefore, I see exponential growth in the arbitration industry in the region.

In your opinion, how can India and Malaysia work together in promoting arbitration and ADR in ways that can benefit parties from both countries?

India and Malaysia have geographical proximity, cultural ties and share the Common Law heritage. I was very happy to see the recent initiative taken by the KLRCA in coming to India with two excellent seminars and also meeting up with the Indian judiciary. This sort of an exchange is invaluable in building mutual trust. The process may take a while but it is certainly worth pursuing in our mutual interest.

What do you think the key challenges will be for arbitrators in the Asia-Pacific region and what can arbitral institutions do to help?

In India, the key challenge for arbitrators is “acceptability”. Most arbitrations here end up before retired judges (as they carry the brand of independence and impartiality into their post retirement). But this is not a healthy practice. Retired judges are too stuck in court procedures. They are not in tune with the best arbitration practices and consequently arbitrations drag on.

Meanwhile, non-Judge arbitrators face an uphill task. They need recognition and acceptability. Therefore, we have to emerge from this “Catch 22” situation. Here the arbitral institutions have a key role to play. Indeed arbitrators and arbitral institutions have a symbiotic relationship - they strengthen each other.

I look forward to the growth, development, recognition and acceptability of the arbitration bar and the arbitral institutes in the Asia Pacific region.

Sumeet Kachwaha is the founding partner of Kachwaha & Partners, a leading Indian firm in dispute resolution and arbitration. He has handled landmark and high-stake disputes (including a large number of cross-border disputes). Mr Kachwaha figures in Band One in the litigation and the arbitration section of Chambers Asia 2009, 2010 and 2011. He also figures as a ‘Leading Individual’ in Asia Pacific Legal 500 for Dispute Resolution and in the World’s Leading Commercial Arbitration Experts. He also figures in the Who’s Who Legal in three Sections viz; Procurement, Construction and Arbitration. Mr Kachwaha is currently Vice President of Asia Pacific Regional Arbitration Group (APRAG) and sits on KLRCA’s Advisory Board.

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The past decade has brought dramatic changes to our economy and to our world, resulting in changes which created a great impact on dispute management and resolution and dominantly in the ADR field. The Corporate and business world now use Conflict Managers in their in-house and project managements. The reason being that the use of effective Conflict Management prevents almost 99% of all disputes from escalating into time consuming and costly litigation. ADR is consensual justice. The actors of international trade expect it, among other advantages, to be able to adapt the procedure to the characteristics of each case taking into account the parties' mutual expectations and their cultural origins. Based on consent, a successful arbitration supposes a harmonious cooperation between parties, mediators, arbitrators, and other actors of the proceedings, including arbitral institutions.

Considering the new development allowing foreign lawyers to practice international arbitration in India, the Master Conference looks at the Global perception of arbitration and mediation in India - making India more user-friendly. The panels will include an outstanding group of leading General Counsel, Attorneys, International Arbitration and Mediation experts and top Academics. The discussion outcome will form the recommendatory note for making India ADR friendly. The Panel will offer their expertise on an array of relevant topics on conflict prevention, management and resolution techniques, and the future of ADR.

The Conference will also provide executive-level networking, business development opportunity, highest quality thought leadership, and the most practical take-away learning in the field.

The inaugural address will be delivered by Mr. Justice M.N. Venkatachaliah, former Chief Justice of India. The panelists include Mr. Michael McIlwrath from GE Italy, Prof. Nadja Alexander from Hong Kong, Ms. Hannah Tumpel from ICC Paris, Ms. Irena Vanenkova from IMI The Hague, Mr. Loong Seng Onn from SMC Singapore etc.

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AN INSIGHT INTO ADJUDICATION



Payment default has been an issue in the Malaysian construction industry. Delayed payment, non-payment and conditional payment namely 'pay when paid' and 'pay if paid' have severely crippled the construction industry. **Sundra Rajoo** looks at how a new legislation will help address the issue.

A recent advent in Malaysia, forming an alternative not only to courts, but to arbitration as well, is the concept of Statutory Adjudication. Malaysia is soon to follow the likes of the United Kingdom, Australia, New Zealand and Singapore. The Construction Industry Payment and Adjudication Bill 2011 (CIPA) having recently passed through a third reading in Parliament and is expected to be enacted in April/May 2012.

Payment default has been the main issue of dispute in the construction industry. Surveys were carried out by the Construction Industry Development Board (CIDB), and the Master Builders Association Malaysia (MBAM) to suggest that payment default is a serious problem in the Malaysian construction industry. Delayed payment, non-payment and conditional payment namely 'pay when paid' and 'pay if paid' have constrained the construction industry. Payment default triggers a domino effect in the construction industry affecting all the players. The main reason for this is because construction projects especially mega projects are stretched over long periods of time and involves a large sum of monetary payment per progress payment. Hence any delay or payment on condition would inadvertently have a huge impact on the construction project.

This form of dispute is not something new or related solely towards mega construction projects alone. Experience from other countries showed that the consequences of payment default can result in

insolvencies. Several countries in the world namely the United Kingdom, several States and Territories in Australia, New Zealand and Singapore have taken these problems to heart and have enacted specific legislation to deal with disputes of this nature in the construction industry. The United Kingdom enacted the Housing Grants, Construction and Regeneration Act 1996, Australia saw the advent of the Building and Construction Industry Security of Payment Act 1999 amended in 2002 (NSW), Building and Construction Industry Security of Payment Act 2002 (Qld), Construction Contracts Act 2004 (WA), Construction Contracts (Security of Payment) Act 2004 (NT), New Zealand enacted the Construction Contracts Act 2002 and Singapore ushered in the Building and Construction Industry Security of Payment Act 2004.

The Malaysian Construction Industry Payment and Adjudication Bill 2011

The Construction Industry Payment and Adjudication Bill 2011 (CIPA) has been passed by Parliament. Particular promoters namely CIDB, MBAM and RISMA have been pushing the government to enact this piece of legislation since 2003 to address the cash flow problems in the industry. The primary objective of the proposed Act is to address critical cash flow issues in the construction industry. It aims to remove the practice of conditional payments ('pay when paid' and 'pay if paid') and reduce payment default by establishing a cheaper, speedier system of dispute resolution in the form of adjudication.

According to the provisions of CIPA every construction contract made in writing that relates to construction work carried out in Malaysia would be affected by the regime of adjudication. This would essentially mean that if you have entered into a construction contract and there is a problem with regards to payment, an adjudication process can be commenced either by you or against you.

A construction contract can be a construction work contract and or a construction consultancy contract. To this extent, the parties will be subjected to compulsory adjudication or statutory adjudication. This would mean that both parties will be brought into the adjudication process which is dictated by the provisions of CIPA. The provisions of CIPA does not however affect natural persons entering into a construction contract in respect of a building wholly intended for his own occupation and is four storeys and below.

The purpose of adjudication is to facilitate cash flow in the construction industry. Parties are also free to go for arbitration or litigation to deal with the legal matters concerning the same. CIPA simply provides a statutory right for the parties to demand payment for work done and to create a simple process to ensure that a decision and payment is made. This of course is in the form of adjudication as a process. In fact, the parties can commence adjudication and concurrently arbitrate or litigate the matter as well.

Adjudication as a means of dispute resolution in the construction industry

Although construction disputes can be solved by either going to court or arbitration, the parties are keen for an alternative form of dispute resolution. One that is contemporaneous, speedy and economical. In comes adjudication as a method of dispute resolution.

The adjudication process is prescribed by the proposed CIPA Act itself. Unlike arbitration or mediation, adjudication does not require the parties' agreement for the process to begin. As such, once either party opts for adjudication it becomes a compulsory process wherein both parties are involved whether they agree to or not. Adjudication is a dispute resolution system that is intended to be simple and fast. The process as prescribed by the proposed CIPA Act is concise and the time accorded to the adjudicator to produce the

written decision itself is forty five (45) days from the receipt of the adjudication reply or response unless the parties extend the time. The entire process promises an outcome within an approximate one hundred (100) day time frame from the day the payment claim is served until the decision is passed. This would ensure that the cash flow problems in the construction industry can be dealt with swiftly.

Adjudication is not a dispute resolution system that provides the adjudicator with the luxury of time to hear all the parties and listen to evidence in great detail akin to an arbitration or court trial. A list of powers granted to the adjudicator can be found in the Act. Some of the procedures adopted by the adjudicator, besides conducting a short trial would be to review the construction contract and other documents to decide whether there is compliance with the standard of work required by that contract. The Evidence Act 1950 does not apply to adjudication proceedings under this Act. The adjudicator can also visit the construction site to investigate the dispute. The adjudicator would then give a decision with the primary aim to alleviate cash flow problems between the disputing parties and to remove payment conditions such as 'pay when paid' and 'pay if paid'.

In short the focus is primarily and steadfastly on removing cash flow problems in the construction industry by helping move things along by dispensing fast decisions on payment disputes alone. It was never meant to be a process that allows the parties the luxury to ventilate every single proposition in great detail unlike litigation in court or arbitration for that matter. A dispute referred to adjudication can, at the same time that the adjudication is taking place, also be referred to mediation, arbitration or litigation. This does not bring the adjudication to an end or 'affect it'. However, if another form of dispute resolution determines the matters first, the adjudicator must terminate the adjudication.

The Role of KLRCA

KLRCA is the adjudication authority by virtue of Part V of CIPA. As the adjudication authority, KLRCA is responsible for the determination of the standard terms of appointment and fees of that adjudicator and the setting of the competency standard and the criteria required of an adjudicator

in Malaysia. In setting the competency and criteria required for adjudicators in Malaysia, KLRCA has prepared an Adjudication Training Programme to enable proper certification for all future adjudicators. It is mandatory for all persons who are interested in providing adjudication services to partake in the programme.

The KLRCA Adjudication Training Programme would consist of specific lectures on the workings of the proposed CIPA Act, construction law, construction technology and training on writing adjudication decisions. Those who have passed the examination and thus successfully completed the programme will be awarded with a Certificate of Adjudication and would be eligible to apply to join the panel of KLRCA Adjudicators. The criteria to be an adjudicator would include a relevant degree or diploma, a certain number of years' experience in the building and construction industry and a Certificate of Adjudication from KLRCA. This would effectively ensure that the quality of adjudicators is of the highest standard possible.

KLRCA has also been tasked with providing administrative support for the conduct of adjudication and any functions as may be required for the efficient conduct of adjudication as prescribed by the proposed Act.

The effectiveness of statutory adjudication

The pertinent question at this stage, is whether this new form of statutory adjudication is the key answer to solving disputes for the construction industry? CIPA is still at its early stage, and the full impact of the proposed Act is yet to be known. Lessons from other countries seem to suggest that adjudication is an effective method and their construction industry has benefitted from it. Literature from Australia, United Kingdom, New Zealand and Singapore has indicated a successful, swift and cost-effective resolution of disputes in each relevant jurisdiction (Dancaster, 2008; Uher & Brand 2008; Kennedy-Grant, 2008; and Chan, 2006).

In the UK, adjudication is now being used more extensively than anticipated (Kennedy, 2006). Claimants are satisfied to a high degree with the NSW adjudication scheme. In New Zealand, anecdotal evidence suggests that there has been a positive change in the culture of payment since the introduction of adjudication under the Construction Contracts Act 2002 (Kennedy-Grant, 2008). Similarly in Singapore, adjudication as underpinned by the Building and Construction Industry Security of Payment Act 2005 has had an impact on the industry players' mindset towards payment (Teo, 2008).

Many believe that adjudication is a new layer to the methods of dispute resolution in Malaysia. It is definitely not a pre-condition to a court litigation, arbitration or mediation for that matter, nor does it prevent parties from using those forms of dispute resolution means. For all intents and purposes it does not replace the existing dispute resolution systems but merely adds on to it. It provides the parties with another useful form of dispute resolution which promises to be fast, cheap and effective. It allows the aggrieved party to trigger the statutory adjudication process.

Conclusion

The employers and those in the construction industry or related industry must be well prepared to handle the effects of the proposed Act whether commencing an adjudication or defending themselves against an adjudication action. Certain sectors of the industry felt that more could have been done. Be that as it may, what is important is that the problems highlighted by the parties in the construction industry are being dealt with seriously.

The construction industry in Malaysia is seeing great transformation in its dispute resolution framework. Special attention is given to resolving the industry's main problem relating to timely payment. An effective, swift and robust dispute resolution is a need of the hour in ensuring that the industry grows at a world class level.

CIPA PENANG



CIPA KUCHING



CIPA IPOH





CIPA KOTA KINABALU



CIPA MIRI

CIPA KUANTAN



CIPA JOHOR



ARBITRATION CASE LAW: DEVELOPMENTS IN MALAYSIA

Open Type Joint Stock Company Efirnoye (EPKO) v Alfa Trading Ltd [2012] 1 CLJ 323

The Plaintiff (P), a Russian Company, entered into a sale of goods contract for palm oil products with the Defendant (D), a Malaysian company. An arbitration clause in the contract provided for two options:

- a) If D files the claim, arbitration is to be carried out under the International Commercial Arbitration (ICAC) Court at the Chamber of Commerce and Industry (CCI) of Ukraine.
- b) If P files the claim, arbitration is to be carried out by ICAC at the CCI of Russia.

A claim was filed by D (3rd October 2008) against P's termination of the contract and arbitration commenced in the Ukrainian court. On 17th November 2008, P instituted a claim against D in Moscow, Russia.

P at the time did not object to D's claims as he felt that it was different. D on the other hand objected saying that the Russian tribunal lack jurisdiction. However, D filed a counter claim.

P is seeking Registration and Enforcement of the award from the Russian Tribunal while D is opposing the registration and enforcement of the Arbitration Award on two grounds:

- a) The arbitral procedure was not in accordance with the parties' agreement (Section 39(1)(a) (vi) Arbitration Act 2005).

- b) The award is in conflict with the public policy of Malaysia (Section 39(1)(b)(ii)).

Held:

1. No failure to adhere to procedure as the parties had acting according to the terms in the agreement. Furthermore, D had effectively submitted to the jurisdiction of the Russian arbitral tribunal by filing a counterclaim to P's claim in the Russian proceedings.
2. There is no issue of *res judicata* as both arbitral tribunals heard different matters. Nallini Pathmanathan J held that different matters can arise from the same contract. Furthermore, in both proceedings, the counterclaims raised were different.
3. It is not the court's function to re-hear or re-assess an arbitration award. The court is bound to recognise and enforce unless one of the grounds in Section 39 is established.
4. Relying on former Malaysian precedence and that from New Zealand, Hong Kong and Canada, a narrow/restrictive approach was applied towards the concept of "public policy" and that a high order must be met to apply this defence and also that arbitration awards and respect for foreign & transnational tribunals and international commercial systems, even if a contrary result would be forthcoming in a domestic court.

Plaza Rakyat Sdn Bhd v Datuk Bandar Kuala Lumpur [2012] 7 MLJ 36

This dispute involved a Joint Venture Agreement (JVA) between wherein the Plaintiff (P) agreed to construct at his own cost certain agreed structures and to hand them to the Defendant (D). The entire project was to take 72 months. However, due to the conditions of the ground and nationwide shortage of cement, P ended up having to seek extensions. P encountered further problems in completing the work and even subsequent attempts and agreements to enable the completion of the project did not materialise. D on 21st April 2010 issued letters purporting to terminate the JVA and some lease agreements. It was agreed that all disputes arising from the JVA and lease agreements would be submitted to arbitration.

P sought an interim injunction pending the final disposal by arbitration and also sought to restrain D from repossessing the land and cancelling the leases. D attempted to set aside the interim injunction and sought a declaration that D is entitled to vacant possession of the land and for removal of the five leases.

Held:

The application for interim injunction by the plaintiff was allowed as there was a danger that the defendant would take possession of the land before the matter was settled. Mah Weng Kwai JC stated that the purpose of S11 Arbitration Act 2005 is to preserve the subject matter which has been referred to arbitration. It was held in the instant that justice lies in maintaining the status quo pending arbitration.

Cyber Business Solutions Sdn Bhd v Elsaga Datamat SPA [2011] 1 CLJ 115; [2010] MLJ 2079

The Plaintiff (P) and Defendant (D) collaborated to tender on a project to replace a computer loan management system. The P is the main contractor while D is P's subcontractor.

Disputes arose and D requested for arbitration under the parties' Supply and Terms Conditions agreement to commence. This agreement contained an arbitration clause for three person panel arbitration in the International Court of Arbitration under ICC rules.

P contended that the Supply and Terms agreement had not been signed and submitted that the Sub-contract, which was signed and finalised in 2008 should apply. The Sub-contract contained an arbitration clause for disputes to be settled under KLRCA rules by a single arbitrator.

Meanwhile D had already attempted to commence ICC arbitration and P also seeks an injunction on these proceedings.

Held:

1. The issue at hand (dealing with jurisdiction) is too serious to be determined via documents only and needs to be heard in court via viva voce evidence.
2. The jurisdiction of Malaysian courts over a contract can never be ousted even in the light of a valid Arbitration Clause as courts have compulsory jurisdiction (Section 23(1) Courts of the Judicature Act 1964).
3. S18 Arbitration Act 2005 – the language of the Act indicates that Arbitral Tribunals can

only determine its own jurisdiction and not the jurisdiction of others. Hence, if the ICC can determine the jurisdiction of other tribunals, then KLRCA can also determine the jurisdiction of ICC rendering no help or resolution to the issue.

4. Courts are seised with jurisdiction to determine jurisdictional issues of competing forums.

5. The injunction against ICC arbitration should be given as the claim is a monetary one, thus even if this injunction is found to be wrongly granted D can be reimbursed. Also, to proceed with ICC arbitration, parties might be spending a lot only to later discover that the ICC does not have jurisdiction. Finally, D is not prejudiced as the dispute will be arbitrated once the jurisdiction has been determined.

Federal Court case of *The Government of India v. Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441

A dispute arose from a product sharing contract ('PSC'), which was entered into between the parties pursuant to an oil and gas joint venture agreement between them. The dispute is with regard to the costs recoveries claimed by the respondents and the calculation of post tax rate return ('PTTR') as computed by the respondents.

There are several laws involved to govern different parts of the matter, wherein Indian Law was chosen as the law governing the contract, English Law as the law governing the arbitration agreement, UNCITRAL Model Law was chosen to govern the arbitration proceedings and Kuala Lumpur was chosen as the seat of the arbitration proceedings.

6 points were referred to arbitration and the tribunal decided 4 points in favour of the appellant and 2 in favour of the respondent. Subsequently, the respondent applied to the Kuala Lumpur High Court to set aside/remit for reconsideration of the arbitral tribunal, of a part of the arbitral award. The respondent's application was allowed by the learned judicial commissioner based on his finding that the arbitral tribunal had erred in deciding the case as there was an error of law on the fact of the award. The respondent then appealed to the Court of Appeal which set aside the High Court's decision.

This was an appeal by the appellant to the Federal Court against the decision of the Court of Appeal on the following questions:

- (i) Whether it is proper for Malaysian Courts to apply Malaysian Law to decide the scope of intervention in an international commercial arbitration award under S24(2) Arbitration Act 1952 where the seat of arbitration is in Malaysia, although the contract and the arbitration agreement are governed by other foreign laws;
- (ii) If Malaysian Law is to apply, whether the common law limitation adopted in the case of *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [191] 2 MLJ 210 between specific reference and general reference to determine scope of intervention valid in light of s.24(2) which carries no limitation by itself or where a construction question is involved;
- (iii) Whether the scope of intervention in arbitration awards under Malaysian Law is as per stated in the case of *Ganda Edible Oils Sdn Bhd v. Transgrain BV* [1988] 1 MLJ 428 given that conflicting positions are presently taken by the Court of Appeal over the question;
- (iv) Whether the Court of Appeal erred in law in failing to appreciate that the paramount rule in the construction of contract under Indian law is to identify the intention of parties to the bargain and, for this purpose, rely on definitions of words given in the contract as opposed to relying on commercial sense or industry practice as aids to construction.



The Federal Court presided by Richard Malanjum CJ (Sabah and Sarawak), Mohd Ghazali and Raus Sharif FCJJ dismissed the application.

Held:

1. Malaysian courts, like the English courts, can give effect to the agreement of parties to apply foreign law (being the choice of substantive law) as opposed to curial law unless perhaps where the application of the foreign law runs contrary to the sense of justice or decency (...).
2. (...) the seat of the arbitration is the place where challenges to an award are made. The curial law ought to be that of the seat of arbitration.

(...) mandatory procedural rules (curial law) of the seat will remain subject to the jurisdiction and control of the courts of the seat of the arbitration including when considering applications to set aside awards.

3. Where a specific matter is referred to arbitration for consideration, it ought to be respected in that 'no such interference is possible upon the ground that the decision upon the question of law is an erroneous one'. However, if the matter is a general reference, interference may be possible 'if and when any error appears on the face of the award'. Even where a specific reference has been made to the arbitrator, if the award subsequently made is tainted with illegality, it can be set aside by the courts on the ground that an error of law had been committed (...).
 4. The construction of an agreement is a question of law. It follows that if the construction of an agreement is the sole matter that is referred to arbitration, it is not open for challenge in the broad sense. Nevertheless, it still may yet be challenged in extremely limited circumstances (...).
- * Under the Arbitration Act 2005, the application to set aside an arbitral award is provided for under S37.



KLRCAS SPONSORS IBA'S 15TH INTERNATIONAL ARBITRATION DAY

KLRCAS was in Stockholm, Sweden on 8th - 9th March 2012 for a series of events relating to the International Bar Association (IBA)'s 15th Annual International Arbitration Day.



On 8th March, KLRCAS was a guest of the Arbitration Institute of the Stockholm Chamber of Commerce seminar, "Innovation in Arbitration" which was officiated by Sweden's Minister for Trade, Ewa Björling and held at the Konserthuset, home of the yearly Nobel Prize Ceremony.



That same evening, KLRCAS attended a welcome cocktail reception for all the IBA delegates at the Vasa Museum, a museum built around a 17th century shipwreck. Later that night, the Global Arbitration Review Awards and Charity Dinner was held at the Grand Hotel, of which KLRCAS was a sponsor. The Director of KLRCAS, Mr Sundra Rajoo was at hand to present the "Best Innovation by An Arbitral Organisation or Institution" award to the London Court of International Arbitration (LCIA) for its publication of redacted challenge decisions.



The International Arbitration Day itself was on 9th March 2012 and KLRCAS was one of the headline sponsors, the first time that the Centre had participated in an event of such a scale in Europe. The event was attended by more than 500 arbitrators, litigators, judges, government officials and all those involved in dispute resolution from Europe, US, Africa and the Middle East, with a small representation from Asia.

CHALLENGES OF ARBITRATING IN ASIA

In this article, **Chong Thaw Sing** discusses the trials and tribulations of arbitrating in Asia.

Introduction

The Asian region has seen a phenomenal growth in international arbitrations over the last 25 years. The trend is hardly surprising as Asia has emerged as the most vibrant region for international trade. The emergence of numerous free trade agreements (FTAs) and the implementation of the Asean Free Trade Area (AFTA) have quite positively contributed to the exponential growth in trade and investments in this region. In tandem with this development is the growth in international arbitrations. This trend is evident in the statistics involving Asia based international arbitrations. In 1983, 3.1% of the parties involved in international arbitrations were based in Asia; this number rose to 17% in 2005. Whilst the problems highlighted in this paper are not unique to arbitrations in Asia, they nevertheless are problems which parties to international arbitration in the region should do well to avoid.

Cross Cultural Differences

In Asian cultures, a person's credibility or reputation is usually judged by the attire he/she wears for the occasion. Asians generally frown upon casual attire for important business meetings. Therefore, it is always safe to dress conservatively, at least until you have tested the waters. Amongst other cultural elements of significance to Asians, giving 'face' is probably the most important. Almost every Asian values 'face', or respect of self and others demonstrating respect for them. Western aggressive litigation practices which often resulted in the witness losing 'face' are frowned upon in Asia.

Seizing of Jurisdiction by Courts

The tendency of some national courts to unjustifiably seize or retain jurisdiction over a dispute where the parties have a valid arbitration agreement is another common problem. Such action is contrary to New York Convention's treaty obligations imposed on the signatory States. For example, in the case of *Perusahaan Dagang Tempo v PT Roche Indonesia*, despite the arbitration agreement, *Tempo* commenced an action before the

South Jakarta District Court asserting that *Roche* could not unilaterally terminate the agreement without their consent. *Tempo's* action was despite the existence of a valid arbitration agreement between the parties. The Indonesian Court held that the arbitrator may only resolve disputes relating to 'technical and business' matters. The Court viewed the dispute between *Tempo* and *Roche* as a 'a tortious act'. Hence, in Indonesia only the court has jurisdiction to hear such dispute. This decision caused a furore amongst the international arbitral fraternity, prompting many publications to criticise the decision. One of the publications was scathing in its comments, saying that:

The South Jakarta District Court's decision, of course, is quite surprising. The Arbitration Law stipulates unambiguously that a state court is not competent to adjudicate a dispute that is within the scope of a written arbitration agreement pertaining to a commercial matter over which the parties have authority. As far as we are aware, the South Jakarta District Court is only court in the world that limits the jurisdiction of arbitration to 'technical and business issues'. The Court either should reject the complaint and refer the matter to arbitration, or articulate some permissible basis for its retention.

Anti-Arbitration Injunction

An anti-arbitration injunction is not only disruptive to the arbitration proceeding but it infringes Article II of the New York Convention, which obliges the Convention countries to recognise and enforce a valid arbitration agreement. In *HUBCO v WAPDA*, a dispute arose as to the tariff of electricity the Claimant (*HUBCO*) could charge the Respondent (*WAPDA*) in a power purchase agreement. The arbitration agreement specified that all disputes arising out of the power purchase agreement shall be referred to ICC arbitration in London. The disputed contentions by the parties whether the revised power purchase rate had been appropriately procured became a subject matter of an arbitration in London. Contrary to Pakistan's treaty obligation as a NYC signatory, *WAPDA* applied and was successful in the Lahore High Court for

an injunction preventing *HUBCO* from continuing with the arbitration in London. *HUBCO*'s appeal to the Pakistan Supreme Court was dismissed with a 3:2 majority decision that the High court was correct in granting the anti-arbitration injunction. The Supreme Court contends that 'fraud and illegality' are not arbitrable under Pakistan law.

Asserting Jurisdiction to set aside an Arbitral Award

An unjust assertion of jurisdiction by enforcement court to set aside an award, made at the proper seat of arbitration, has scuttled the enforcement of many awards in Asia. In *Karaha Bodas v Pertamina*, *Karaha Bodas* was successful in an ICC arbitration seated in Zurich, Switzerland. The New York Convention which *Karaha Bodas* would have to rely on for the enforcement of the award states that an enforcement court may refuse enforcement of the award if the award has been set aside by a competent authority. The 'competent authority' is understood to be the courts in the seat of arbitration. And the 'law under which the award was made' refers to the law at the seat of the arbitration. In this case, the law of the seat is the Swiss procedural law and not the Indonesian substantive law. In the circumstance, the correct approach is for *Pertamina* to annul the award in the Swiss Court, not in the Jakarta Central District court. The action by the Jakarta Central District court had prevented the successful *Karaha Bodas* from enforcing the award in Indonesia though it could not prevent enforcement of this award in other Convention countries.

Reliance on Public Policy Exception

Public policy has been widely acknowledged as 'an unruly horse', more so in certain Asian countries. A statement made by Justice Burrough in Richardson (1824) nearly 200 years ago appears to be true even today. Burrough J said:

[P]ublic policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail.

And as if to reaffirm the relevance of Justice Burrough's statement, Justice Atkin in 1937 implored judges to exercise extreme caution in regards to the doctrine. He said:

"... the doctrine [of public policy] should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds."

Like many national courts in Asia, Malaysian courts had on occasions in the past relied on public policy for some of its decisions. For example, a Malaysian High Court was

seized with an action to enforce an arbitration award from the USA. Abu Mansor J (as he then was) ruled in favour of the claimant to enforce the award in Malaysia despite arguments from the Respondent that the enforcement was against 'public policy' of Malaysia as the Claimant allegedly owned 68% of an Israeli Company. Whilst Mansor J found favour with the Claimant, principally, because he was satisfied that the goods supplied to the Respondent were made in the USA, his obiter comments did, however, reveal the tendencies of Malaysian courts to interpret public policy very broadly. In his obiter comments, Mansor J said:

[if] it is so found that the plaintiff is an Israeli company, it is against public policy to enforce it, as trade with Israel is prohibited.

Public policy has also become a convenient tool in the Philippines to deny enforcement of a foreign arbitral award. In the enforcement proceeding of an ICC award against Luzon Hydro Corp in the Philippines, the Philippine appeal court refused enforcement of the award on public policy ground. It said the award of costs of arbitration by the arbitral tribunal using the principle of 'costs follow event' was against Philippine's public policy. As expected, the Philippine court of appeal's decision was roundly criticised by the international business community. It was unfortunate that the Philippines Supreme Court could not put right this perverse decision as the parties have decided then to settle the dispute and not make any further appeal to the Philippine Supreme Court. Hence, by this turn of events, this decision remains a good law in the Philippines.

Review of Merits of the Case

In international arbitration practice, it is an unassailable corollary that the enforcing court does not review the merits of the case. Unfortunately, not every court in Asia accepts this time tested practice in international arbitration. In the enforcement in Xiamen, China of *Hong Kong Huaxiang Development Company v Xiamen Dongfeng Rubber Manufacturing Company*, award, the Xiamen Intermediate Court concluded that the arbitral award was incorrect because of lack of sufficient evidence and the award could not be enforced. This perverse decision by the Xiamen court is an unnecessary blot in international arbitration practice in China that needs to be put right by the Chinese judiciary.

Courts' Lack of Familiarity with Recognition and Enforcement of Foreign Award

Lack of familiarity and/or understanding of the internationally expected standard in recognition and enforcement of foreign arbitral award are acute in certain

Asian countries. For example the enforcement of arbitral awards in the People's court in China poses several problems. Mr. Li Hu from CIETAC put these difficulties succinctly in the following passage:

In China as a whole, lack of a basic knowledge regarding arbitration among some local judicial personnel-the standard practices of arbitration as well as the New York Convention- is a general phenomenon. Some local judges still have little understanding of how the Convention works and the uniform judicial interpretation of its provisions accepted by courts worldwide. It is still necessary to organise relevant judicial personnel to earnestly and systematically study the New York Convention and international practices regarding enforcement of arbitral awards, and duly and conscientiously to implement it.

Li's concern is clearly manifested in the case of *Repower Ltd v Shanghai Far East Aviation Technology Import and Export Corporation* (SFAT) (1996) where the unfamiliarity of the People's Court with the norm in enforcement proceedings led the court to read the provision in a manner which impede enforcement of the award.

In the most recent decision by the Vietnamese Supreme People's Court (Court of Appeal) in *Steelco Pacific Trading Ltd Company (HK) v Petrovietnam Manpower Development and Services Joint Stock Company* (7th November 2011), a HKIAC award was refused enforcement in Vietnam due to the court's lack of understanding of the New York Convention. The People's Court held that the reason the HK award could not be recognized because there was no valid arbitration agreement between the parties. Since the Vietnamese party in the agreement was not a legal entity according to Vietnamese law, it therefore did not have the capacity to sign the arbitration agreement with the HK party. In making that decision the Court was referring to Article

370.1 of Vietnam's Civil Proceeding Code that states the arbitration agreement would be void if "the parties signing the arbitration agreement did not have the capacity to sign the agreement in accordance with the applicable laws of each party." This decision is contrary to the spirit of Article V(1)(a) of the New York Convention, which permits the enforcement court to refuse enforcement of a Convention award only if the arbitral agreement is invalid according to the law the parties have subjected it or, failing indication, under the law of the seat of arbitration. In this case, the parties had not indicated the governing law of the agreement, hence the law of the seat, i.e Hong Kong law, applies. The Vietnamese People's Court as well as the Supreme People's Court, however, wrongly displaced Hong Kong law in favour of the Vietnamese law, in order to refuse recognition and enforcement of a Hong Kong award. This most recent example showed the misapplication/mis-interpretation of the provisions of the New York Convention by national courts in certain Asian countries, to deny enforcement of arbitration award, remains a serious aberration for arbitration in Asia.

Conclusion

One cannot deny that many of the problems discussed above arose out of overzealous national bias by courts in these countries. Whilst such problems remain quite acute in certain countries, there is, however, an encouraging move by some national courts to support arbitration. For example, the Malaysian Federal court's decision in *Government of India v Cairn Energy Pte Ltd*, was lauded by international arbitral community for its pro-arbitration stance. The Malaysian judiciary has sent a clear signal to the world that Malaysia was willing to take the all-important step towards fully embracing international arbitral practice. It is hoped that the relentless international pressures on other national courts in Asia will bear similar fruits.



About the author

Chong Thaw Sing practised as a civil engineer as his first career. In 1999, he responded to a calling in arbitration as his second career to help fill this long-felt need in the arbitral fraternity for technically trained and legally savvy arbitrators. Along the way to achieving his present profession as arbitrator, Chong spent 7 years (the last two as Branch Chairman) with the Chartered Institute of Arbitrators (Malaysia branch) participating in the administration of CI Arb Malaysia branch's activities. Since stepping down as branch chairman in 2008, he has been fully immersed in resolving parties' disputes in the capacity of an arbitrator in both construction and commercial disputes.

In addition, Chong was appointed to CI Arb London's Practice and Standards Committee in 2008 for a two-year term. Amongst others, this committee was set up (under the CI Arb's Royal Charter 2005) to develop and promote best practices in private dispute resolution all around the world and act in an advisory role to the CI Arb Executive arm on matters concerning CI Arb as a learned society.

SAVE THE DATE!

The following are events in which KLRCA is organising or participating.

Date 7th - 13th April 2012
Event **Diploma in International Commercial Arbitration**
Organiser KLRCA and CIArb (Australia)
Venue KLRCA & The Majestic Malacca

Date 5th May 2012
Event **The 6th Regional Arbitral Institute Forum (RAIF) Conference**
Organiser Indonesia National Board of Arbitration (BANI)
Venue Bali Intercontinental Resort, Jimbaran

Date 19th - 23rd April 2012
Event **The CLA Regional Law Conference**
Organiser Commonwealth Lawyers Association
Venue Sydney Convention and Exhibition Centre, Sydney

Date 13th - 19th May 2012
Event **International Congress of Maritime Arbitrators**
Organiser The Vancouver Maritime Arbitrators Association
Venue Vancouver, Canada

Date 25th April 2012
Event **Effective Dispute Resolution for Corporate Malaysia**
Organiser KLRCA
Venue Plenary Theatre, Kuala Lumpur Convention Centre

Date 20th - 22nd May 2012
Event **Litigation Asia Summit**
Organiser Marcus Evans
Venue The Marina Bay Sands Integrated Resort, Singapore

Date 3rd May 2012
Event **Construction Industry Payment and Adjudication Act 2012 (CIPAA) & Beyond Talk**
Organiser KLRCA
Venue Wisma MCA, Level 3, Auditorium Jalan Ampang

Date 10th - 13th June 2012
Event **21st ICCA Congress**
Organiser Singapore International Arbitration Centre (SIAC)
Venue The Marina Bay Sands Integrated Resort, Singapore

Advantages of Arbitrating

at the **Kuala Lumpur Regional Centre for Arbitration**

- ▶ Malaysia is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which enable **KLRCA's** arbitral awards to be enforceable in countries that are also signatories to the Convention.
- ▶ **KLRCA** is internationally recognised as an experienced, neutral, efficient and reliable dispute resolution service provider since 1978.
- ▶ **KLRCA** has a panel of experienced domestic and international arbitrators from diverse fields of expertise.
- ▶ Costs of arbitration proceedings in **KLRCA** are comparatively lower than other established arbitral jurisdictions.
- ▶ No visa and withholding tax imposed on arbitrators.

**Recommended model clause
to be incorporated in any contract:**

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration.”

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

(ESTABLISHED UNDER THE AUSPICES OF THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANISATION)

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