

A background image showing a close-up of several hands clapping, suggesting an awards ceremony or a celebratory event. The hands are in sharp focus, while the background is blurred.

# GLOBAL RECOGNITION

## EVENT

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**3<sup>rd</sup> Annual GAR Awards  
Dinner in Bogota, Columbia**

## HIGHLIGHT

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**Managing Domain Name  
Dispute in A Transforming  
Cyber Landscape**

## INTERVIEW

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**In the Seat:  
Lim Chee Wee**  
Immediate Past President, Malaysian Bar



Asia Pacific Regional Arbitration Group



中国国际经济贸易仲裁委员会  
CHINA INTERNATIONAL ECONOMIC AND  
TRADE ARBITRATION COMMISSION

# The 5<sup>th</sup> Biennial Asia Pacific Regional Arbitration Group Conference 2013

27<sup>th</sup> to 29<sup>th</sup> June 2013  
Beijing, China

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# DIRECTOR'S MESSAGE



DEAR FRIENDS,

Welcome to the first issue of the KLRCA Newsletter for the year. 2013 promises to be another eventful year for the Centre, if the first quarter is any indication.

The year started blazingly for us, we were in Bogota, Colombia to participate in the IBA International Arbitration Day, our second year of being involved in the event. In Bogota, KLRCA won international recognition from the Global Arbitration Review Award, specifically for 'Innovation by an Individual or Organisation in 2012', which was given for KLRCA's i-Arbitration Rules. Such recognition is truly an honour, especially as it is an acknowledgment by the global arbitration community of the efforts the Centre has put in to distinguish itself from its peers.

Of course, winning the Award was not the only highlight of the year so far. The Government of Malaysia and AALCO renewed the Host Country Agreement which enables KLRCA to continue functioning in Kuala Lumpur. The signing ceremony was graced by Minister in the Prime Minister's Department, Dato' Seri Mohamed Nazri Aziz, and the AALCO Secretary-General, Professor Rahmat Mohammad as well as the Attorney-General of Malaysia and Chairman of the KLRCA advisory board, Tan Sri Abdul Gani Patail among other dignitaries. I am truly heartened by the commitment shown by the government of Malaysia and AALCO as well as the level of support given by everyone involved.

This year, KLRCA continues to go global in our efforts to promote the Centre and ADR. After Bogota, we went on a roadshow to Jakarta with members of the Judiciary and the Malaysian Bar. The warm reception we received in Jakarta and the success of the event has inspired us. We are identifying potential markets and hopefully there would be at least one or two more roadshows to come this year.

Our work on Adjudication is also moving in full throttle. During the quarter, an Adjudication Briefing was held for members of the Judiciary. The programme received the full support of the Chief of Justice of Malaysia, Tun Ariffin Bin Zakaria who delivered the welcoming address during the event's opening. More than 120 judges took part in the two-day programme.

There will be more talks on ADR, and KLRCA has started the ball rolling with the first of its Talk Series in March. You can find the schedule of the rest of the Series, including the topics and speakers, inside this newsletter.

I am also pleased to advise that the refurbishment works on Bangunan Sulaiman has been progressing steadily. The appointed contractor commenced the refurbishment works in late November 2012 under the supervision of Jabatan Kerja Raya (JKR). The refurbishment works and the construction of the new car park and pavilion block is slated to be completed on 14th February 2014 and, barring any delays, KLRCA hopes to move into the new premises by end of first quarter 2014. We look forward to this new chapter of KLRCA, whereby we will be able to offer state-of-the-art facilities to our patrons in an effort to be the preferred dispute resolution centre in the Asia-Pacific region.

I am honoured that my tenure as the Director of KLRCA has been extended for another three years. This is another acknowledgment that will just spur me to do better for the Centre, and it would not have been possible if it were not for the continuous support and encouragement that I have received from all of you. For that, I thank you.

Until next time, happy reading.

**DATUK SUNDRA RAJOO**  
Director of KLRCA





**PHOTOS OF BANGUNAN  
SULAIMAN, KLRCA'S  
NEW HOME IN 2014 -  
WORK IN PROGRESS**



Rectification works to a corridor.



New window frames in place.



The new auditorium taking shape on the top floor.



Interior works.



One of the completed hearing rooms.

# VISITORS GALLERY

KLRCAs welcomes visits from various organisations from within and outside Malaysia, which is indeed a great platform to exchange knowledge and forge stronger ties.

## PADJADJARAN UNIVERSITY LAW TRIP

29 January 2013



## STUDENTS FROM KOBE UNIVERSITY

18 March 2013



# KLRCAs SIGNS MOU WITH IsFin



KLRCAs has signed a Memorandum of Understanding with IsFin, a premier alliance of independent law firms specialising in Islamic markets, Islamic finance and the Halal industry. The alliance is present in more than 40 jurisdictions around the world. Leveraging on the expertise of each parties, the MoU seeks to encourage cooperation between KLRCAs and IsFin in several work areas.

The MoU was signed by Datuk Sundra Rajoo, the Director of KLRCAs and the CEO of IsFIN, Laurent Marlière.





WINNER OF  
**gar**  
AWARD FOR  
INNOVATION  
2012

## 3<sup>RD</sup> ANNUAL GAR AWARDS DINNER

It was a proud day for KLRCA when it won the Global Arbitration Review Award for 'Innovation by An Individual or Organisation in 2012' at the 3rd Annual GAR Awards in Bogota, Colombia. The voter-based Award was given for KLRCA's i-Arbitration Rules, which was launched on 20th September last year.

Other nominees in the same category included the Permanent Court of Arbitration (PCA) in The Hague's consolidated rules, the UNCITRAL 2012 digest of case-law on Model Arbitration Law, and the China Young Arbitration Group.

More than 140 guests attended the awards dinner at the Sheraton Hotel in the Colombian capital on the eve of the IBA Arbitration Day and a total of nine awards were handed out.

Bogota also hosted the 16th IBA International Arbitration Day themed "*Making the award: need we rethink the process?*", for which KLRCA was a headline sponsor.



# GAR AWARD: INTERVIEW WITH DATUK SUNDRA RAJOO



## WHY THE NEED FOR THE i-ARBITRATION RULES?

Shariah-based commercial transactions, especially in Islamic finance and the halal products industry are at an exciting stage its annual growth reported to be at the rate of up to 20%. The Islamic finance industry alone traded at a global value of USD3 trillion in 2012. So we can see the inevitability of more businesses becoming involved in Shariah-based business agreements globally, and wanting to deal in Islamic contracts. In such circumstances, one can also expect an increase in disputes associated with these types of transactions.

With the increasing number of Shariah-compliant dealings being made and as more businesses around the world become more receptive to transactions based on Islamic principles, there is a need for an alternative dispute resolution mechanism that caters to and covers the whole spectrum of Shariah-compliant business agreements, and simultaneously takes into account the cultural and religious sensitivities of Islamic commercial parties. Such a mechanism merely recognises the importance of Shariah based commercial transactions in today's global business community.

The KLRCA i-Arbitration Rules therefore create an avenue whereby parties can settle their disputes in confidence, especially for Shariah-related contracts where the area is rather niche and requires expert advice. It is only natural for the KLRCA to pioneer these advances given Malaysia's strong legal and regulatory infrastructure in Islamic finance and banking.

## WHAT EFFECTS WOULD THE i-ARBITRATION RULES HAVE ON MALAYSIA?

From the country's perspective, the Islamic finance industry and the halal products industry will be buoyed by a mechanism that brings assurance to Islamic finance and commercial transactions. Arbitration provides for a trusted, swift, effective and enforceable dispute resolution platform. By providing a practical solution to dispute settlement outside the court process, Malaysia will become more attractive to industry participants.

Resolving disputes using Shariah-based arbitration rules is actually not too different from its conventional counterpart, and dispute settlement in both cases should also be comparable. Our hope is to give business parties the assurance and confidence that arbitration using the i-Arbitration Rules would give the same benefits – privacy and confidentiality, the flexibility to choose their tribunal as well as Shariah expertise, and international enforceability.

## WHAT DOES THE AWARD MEAN FOR KLRCA?

We are truly honoured by the recognition given by the global arbitration community. The development of KLRCA i-Arbitration Rules leveraged on the strong Islamic finance infrastructure already in place in Malaysia, and it is a boon for both KLRCA and Malaysia generally. The award is definitely a feather in the cap of our efforts towards promoting Malaysia as a leading international arbitration hub while at the same time developing solutions to identified gaps in the alternative dispute resolution market.





# Managing Domain Name Dispute in A Transforming Cyber Landscape

This keynote speech by Datuk Sundra Rajoo was delivered at the ADNDRC Conference in Hong Kong in November 2012

In the span of last decade, KLRCA has been actively providing dispute resolution services for the .my domain names administered by Malaysian Network Information Centre (MYNIC) and also the generic top level domains dispute resolution services under the banner of Asian Domain Name Dispute Resolution Centre ('ADNDRC'). We have been privileged to experience by far one of the most effective forms of alternative dispute resolution.

The domain name dispute resolution process is a form of arbitration which is rather unique. Unlike conventional or traditional arbitration, domain name dispute resolution process is mandated on the party who registers their domain name with the Registrar. The dispute resolution process, institution and costs are included in the registration documentation, and the registrant shall be bound by the same. The control is with the Registrar. This is perhaps one of the attributes that have made this online dispute resolution process successful.

Its effectiveness and success is further contributed by the speed of resolution, which is approximately 3 months, and a comprehensive precedential system voluntarily practised over the years.

We all know that conventional arbitration is not subjected to the principles of “stare decisis”. Decisions are usually not published due to the confidential nature of the proceedings. Principles of “stare decisis” only apply to civil courts in a common law jurisdiction. It is amazing how such an important principle has evolved voluntarily in the field of domain name dispute resolution.

I must say that it is a great initiative of the first and leading ICANN (Internet Corporation for Assigned Names and Numbers)-approved service provider, the World Intellectual Property Organisation (‘WIPO’). WIPO has done great by not only providing a searchable database of its decisions but one with a searchable index of decisions and an overview of the panel views on selected issues. This was crucial for the evolution of a precedential system under the UDRP (Uniform Dispute Resolution Policy). The UDRP is an important document which lays down the legal framework for settling disputes concerning second-level domain name of generic top level domain (gTLD)<sup>1</sup>.

It is such a precedential system that leads to an effective dispute resolution process which ensures fairness, efficacy and veracity. Like cases have been treated alike, persuasive reasons are applied in decisions over again, and users develop trust in the process.

As of October 2012, a total of 24,475 domain name disputes have been filed with WIPO<sup>2</sup> and a total of about 953 disputes were registered with ADNDRC<sup>3</sup>.

The above statistics indicate that the UDRP is working incredibly well in managing and settling domain name disputes. Other factors contributing to the success, we feel, are its international cross-border applicability, regardless of the location of the registrant and the complainant, and the fact that the procedure is by way of documents only leading to time and costs saving.

In June 2011, ICANN, in their effort to encourage competition among registry service providers decided to open up space and allow private entities and organisations to own and manage a piece of their own cyber real estate by allowing the registration of ‘dot.anything’ gTLD.

Previously, only about 20 generic top level domains were allowed such as the .com (for commercial contents), .org (for non-profit organizational institutions), .edu for (educational institution), .net (for organizations involved in networking technologies) and .gov (for governmental departments).

With this new expansion, registry can now begin to offer a top level domain that is specific to a certain brand, community or industry. Since the application window was

opened in mid-January 2012, a lot of interest was shown and a total of 1,930 application received, which includes applications from Africa (17), Asia-Pacific Region (303), Europe (675), Latin America/Caribbean (24) and North America (911).<sup>4</sup>

This huge milestone in the industry which transformed the landscape of the cyber-world is certainly due to the success of a reliable and effective dispute resolution process.

Every transformation creates new areas and issues to be tackled. There may be a resulting rise in the infringement of trademark and cyber-squatting, which would call for greater security and improved ways of resolving disputes.

To pre-empt some of the potential harm to trademark owners, whilst ICANN has put in place certain safeguards for any application of new gTLDs, we, as the dispute resolution service providers, have to be more vigilant.

Although the UDRP appears to be adequate at the moment in dealing with the possible dispute arising from the registration of domain names of the new generic top level domains, a review may be needed to cater for new development and demands.

At the same time, dispute resolution service providers have to equip ourselves with the necessary knowledge and capacity to be able to deal with any dispute that may arise from this expansion. Arbitrators or panellists may require training in dealing with new areas of disputes.

On our home ground, MYNIC has taken the initiative to cater for different types of domain name dispute and has developed the .my Domain Registry’s Sensitive Name Dispute Resolution Policy and Rules to deal with complaints by any individual against the registration of domain names which contain word or words deemed sensitive to the Malaysian public. KLRCA has been appointed as the dispute resolution service provider for the sensitive domain name disputes.

In addition, MYNIC together with KLRCA organises training and seminars from time to time for the public and KLRCA panellists to create awareness on new developments in the area of domain names and domain name dispute resolution. This is to ensure that our panellists are up to date on any new initiatives and are well-equipped to deal with any issues that may arise with regard to domain names.

To ensure a smooth operation of the new gTLD and the rapid transformation of the cyber landscape, the relevant bodies need to begin educating all the relevant stakeholders of new developments and recent trends. The domain name dispute resolution process is certainly a great alternative for other forms of intellectual property infringements such as trademarks and patents.

1 The Management of Internet Names and Addresses: Intellectual Property Issues, Final Report of the WIPO Internet Domain Name Process, April 30, 1999

2 WIPO Arbitration and Mediation Centre at <http://www.wipo.int/amc/en/domains/statistics/cases.jsp>

3 Asian Domain Name Dispute Resolution Centre at [https://www.adndrc.org/cn/case\\_decision.php?set=1&sort=705&](https://www.adndrc.org/cn/case_decision.php?set=1&sort=705&)

4 ICANN New Generic Top Level Domains <http://newgtlds.icann.org/en/program-status/statistics>



## Signing Ceremony of the HOST COUNTRY AGREEMENT between the Government of Malaysia and AALCO

The government of Malaysia and the Asian-African Legal Consultative Organisation (AALCO) renewed a host country agreement (which was first signed in 1978) at a signing ceremony held at Hilton Kuala Lumpur on 26 March 2013.

Minister in the Prime Minister's Department, Datuk Seri Mohamed Nazri Aziz and Secretary-General of AALCO, His Excellency Professor Rahmat Mohamad signed the agreement, witnessed by the Attorney General of Malaysia, Tan Sri Gani Patail, who is also Chairman of the KLRCA Advisory Board.

The renewal reiterates the Malaysian Government's commitment to continue supporting KLRCA as a regional arbitration centre.

The ceremony was attended by government officials, KLRCA advisory board members, the centre's panellist arbitrators, members of the Bar council, judiciary personnel and other KLRCA stakeholders.





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## IN THE SEAT – LIM CHEE WEE

Mr **LIM CHEE WEE** is an Advocate & Solicitor, and a partner at SKRINE. He was the President of the Malaysian Bar for 2011/12 and 2012/13. He has a broad commercial practice having experience in a wide variety of commercial and corporate disputes and litigation including international arbitrations in Asia and Europe. In this exclusive interview he talks about, among others, his career choice, his experience in helming the Malaysian Bar and the ADR scene in Malaysia

### Have you always wanted to be a lawyer?

I had wanted to be a doctor when I was in school but quickly changed my mind when I found out that medical students would spend at least 40 hours a week in the classroom. There was also the slight problem of higher tuition fees of a medical degree from a foreign university. I chose to study the double degrees of law and accounting in Australia where I went to high school partly because I was required to spend no more than 20 hours a week in the classroom and also to give myself career options. My interest in the legal profession developed when I was in university. The most wonderful aspect of the study of law was my realisation that the law cuts across almost every sphere of human activity. My short stint at the legal aid centre run by the law school was the first experience to have given me this insight<sup>1</sup>.

I am happy with my decision to be a lawyer especially practising in Malaysia because of the opportunities it has provided me. I have had the privilege of being a part of Malaysia's transformation towards a modern democracy where the rule of law is paramount. Malaysia is a wonderful country. It is still transforming in a positive direction with tremendous potential to be a major player on the world stage. I find being a litigation counsel in Malaysia satisfying, especially in a complex commercial case or public interest litigation. There is a close camaraderie amongst the members of the Malaysian Bar. This is despite the occasional frustration and disappointment with the system, a normal reaction if one has high expectations and appreciation of the potential of the system.

**You have had many accolades some of which are, you are listed in Chambers Asia 2010 as a “leading individual for Dispute Resolution”, Chambers Asia 2012 that you have “a high profile in the international arbitration field and worked on a number of cases in London and Singapore over the past year”, whilst Legal 500 2011/2012 described you as “energetic, young but with a wealth of experience, resourceful, creative, attentive to detail and highly ethical”, and Legal 500 2012/2013 described you as “extremely resourceful” and “works his socks off for his clients”, and you are listed in the 2013 Guide to the World’s Leading Experts in Commercial Arbitration. What do you think are the attributes of a good lawyer and who are your idols in the legal profession?**

A good lawyer must at least have these attributes – integrity, discipline, tenacity and courage, as well as an ability to be civil to all despite some times encountering exasperatingly different views.

<sup>1</sup> Kingsford Legal Centre, University of New South Wales, Australia.



Mr Lim and members of the Bar Council during the Walk for Freedom 2011.



The lawyers I look up to are Vinayak Pradhan<sup>2</sup>, Cecil Abraham<sup>3</sup>, Michael Hwang SC<sup>4</sup> from Singapore, and Richard Siberry QC<sup>5</sup> from the United Kingdom. Vinayak who is my senior partner in Skrine is eloquent, very intelligent and a great guy to hang out with. I admire Cecil's diligence. Michael's intellect and productivity is outstanding. The cross-examination and advocacy skills of Richard, with whom I had the pleasure of working with, are qualities I aspire to have.

### How has the experience of helming the Malaysian Bar affected or changed you professionally and personally?

The Malaysian Bar is a very special body indeed.

The United Nations in its citation for the Malaysian Bar for the United Nations Malaysia Organisation of the Year Award 2012 described the Malaysian Bar in these words,

*"Throughout its 66-year existence, the Malaysian Bar has admirably fulfilled its role as guardian of the rule of law, and defender of human rights and the public interest, in Malaysia. The Malaysian public has come to know it and look towards it for guidance on what the law is, what the law should be, and what the law must never be.*

*As a statutory body set up under the Legal Profession Act 1976, the Malaysian Bar is tasked to "uphold the cause of justice without regard to its own interests or that of its Members, uninfluenced by fear or favour", and to "protect and assist the public in all matters touching ancillary or incidental to the law". The Malaysian Bar has been exemplary in discharging its responsibilities. In particular, the Malaysian Bar has shown unfailing commitment in standing up, and unwavering zeal in speaking out, against abuse of power by those in authority.*<sup>6</sup>

Andrew Harding and Amanda Whiting described the Malaysian Bar as having *"developed and sustained a capacity to support and defend the core liberal legal values of the rule of law, the independence of the judiciary and the integrity of the constitution and of constitutional government, and to speak and act, sometimes vigorously, in defence of civil and political rights"*.<sup>7</sup>

<sup>2</sup> President of the Chartered Institute of Arbitrators, <http://www.ciarb.org/about/whos-who/patron-presidents-and-companions/> and <http://www.skrine.com/dispute-resolution-division/vinayak-p-pradhan>.

<sup>3</sup> [http://www.zulrafiq.com.my/index.php?option=com\\_content&view=article&id=31%3Atan-sri-dato-cecil-wm-abraham&catid=32%3Aour-partners&Itemid=13](http://www.zulrafiq.com.my/index.php?option=com_content&view=article&id=31%3Atan-sri-dato-cecil-wm-abraham&catid=32%3Aour-partners&Itemid=13).

<sup>4</sup> Non-resident Chief Justice of the Courts of the Dubai International Financial Centre, <http://www.mhwang.com/intro1.htm>.

<sup>5</sup> <http://www.essexcourt.net/members/8/richard-siberry>.

<sup>6</sup> For more details, please see [http://www.undp.org.my/news\\_details.php?nid=78&title=UN celebrates 67th Anniversary](http://www.undp.org.my/news_details.php?nid=78&title=UN%20celebrates%2067th%20Anniversary), and [http://www.malaysianbar.org.my/bar\\_news/berita\\_badan\\_peguam/malaysian\\_bar\\_receives\\_united\\_nations\\_malaysia\\_organisation\\_of\\_the\\_year\\_award\\_2012.html](http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/malaysian_bar_receives_united_nations_malaysia_organisation_of_the_year_award_2012.html).

<sup>7</sup> In the chapter entitled "Custodian of Civil Liberties and Justice in Malaysia": The Malaysian Bar and the Moderate State written by Andrew Harding and Amanda Whiting in the book *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* edited by Terence C Halliday, Lucien Karpik and Malcolm M. Feeley, Cambridge University Press (2012).



In helming such a great institution, the burden of responsibility and expectation of leadership are enormous.

Professionally, I had to learn to improve my advocacy and communication skills because as President of the Bar, I had to persuade important, powerful and influential people (including the Prime Minister, Ministers, parliamentarians, Chief Justice and judges) why the position of the Bar should prevail on various issues, such as freedom of assembly, freedom of information legislation, greater safeguards in counter-terrorism legislation, freedom from prosecution and persecution on account of sexual orientation, constitutionality of ouster clauses in legislation, purposive and liberal interpretation of the Federal Constitution, and Malaysia being a signatory to all nine core United Nations Human Rights Conventions.

Personally, I had to quickly develop courage and keep steadfast in the face of reprisals against me for speaking out and standing up for and in the interest of the Bar, where at times my message was unpopular with certain individuals/bodies. I found myself being on the receiving end of my own statements on freedom of speech and assembly when these individuals and bodies strongly criticised, if not condemned me in the mainstream newspapers and social media, and some even protested against me outside of my Bar and Skrine offices.

At the same time, I am appreciative of the Prime Minister and the Chief Justice for their public acknowledgement of the role of the Bar which went some way to alleviate the hostile reaction of these parties.

When the Honourable Prime Minister spoke at the Bar's International Malaysia Law Conference (IMLC) in September 2012 he said that,

*"The Malaysian Bar is an important partner in the rule of law and the administration of justice. When it speaks, we listen. We may not always agree with the views emanating from the Malaysian Bar, or even some of the activities that they undertake, but we hear what they say and observe what they do with interest. We may make the occasional joke about lawyers, but they nonetheless have a unique and important role to play in our country."*<sup>8</sup>

The Chief Justice at the same conference in his Closing Address said that,

*"... with the cooperation of the Bar, who is undeniably our close partner, and the other agencies, we were able to overcome all initial problems. Our common goal is to serve the legal profession and public better. ... In the administration of justice, the Bar is always our partner. Indeed, we now consult the Bar more than ever. ... the Malaysian Bar is no less an equal partner in the administration of justice".*<sup>9</sup>

The greatest lesson I have learnt from being President of the Malaysian Bar is that if you are a tenacious and courageous advocate of human rights, your submission will eventually prevail.

### **What would you say is your proudest achievement during your tenure as President and what do you feel could have been done differently?**

At the outset, I would like to say that the achievements are that of the Bar. Most of these achievements involve influencing the policies of the Government to uphold the rule of law and to promote Malaysia as a dispute resolution centre.

The last two Prime Ministers of Malaysia believe that for our administration of justice to be effective and respected, an independent, honest, efficient and competent Judiciary is necessary and this is equally true of an arbitral institution.

<sup>8</sup> [http://www.malaysianbar.org.my/speeches/opening\\_address\\_by\\_the\\_right\\_honourable\\_dato\\_sri\\_mohd\\_najib\\_b\\_tun\\_abdul\\_razak\\_prime\\_minister\\_of\\_malaysia\\_at\\_the\\_international\\_malaysia\\_law\\_conference\\_2012\\_klcc\\_26\\_sept\\_2012.html](http://www.malaysianbar.org.my/speeches/opening_address_by_the_right_honourable_dato_sri_mohd_najib_b_tun_abdul_razak_prime_minister_of_malaysia_at_the_international_malaysia_law_conference_2012_klcc_26_sept_2012.html).

<sup>9</sup> [http://www.malaysianbar.org.my/speeches/closing\\_remarks\\_by\\_yaa\\_tun\\_arifin\\_bin\\_zakaria\\_chief\\_justice\\_of\\_malaysia\\_at\\_the\\_international\\_malaysia\\_law\\_conference\\_2012\\_klcc\\_28\\_sept\\_2012.html](http://www.malaysianbar.org.my/speeches/closing_remarks_by_yaa_tun_arifin_bin_zakaria_chief_justice_of_malaysia_at_the_international_malaysia_law_conference_2012_klcc_28_sept_2012.html).

Mr Lim with the Prime Minister of Malaysia, Dato' Sri Najib Razak and other VIP delegates, IMLC 2012.



The present Government has implemented and will continue to implement various measures to strengthen these two institutions including the establishment of a Judicial Appointments Commission to make recommendations of appointment and promotion of Judges<sup>10</sup>, a substantially better remuneration scheme for judges, and pro-arbitration measures such as law reform, increased funding and support for KLRCA and encouraged use by Government agencies and government-linked companies of KLRCA as the appointing authority. The Bar would like to think that its representations had some role in these measures.

I am happy to have seen during my tenure, the start of the revival of the KLRCA which saw the appointment of Datuk Sundra Rajoo as its director and increased Government financial support of and commitment to KLRCA being a regional centre for arbitration. Sundra is doing a spectacular job in improving and promoting KLRCA.

During my term, the Bar worked closely with the Attorney General (AG) and his officers to draw up the legislation and guidelines for the liberalisation of the legal profession. We target liberalisation to come into force middle of this year with licences being issued in the second half of the year. If they satisfy the requirements, foreign lawyers will be able to practise foreign law in Malaysia in one of three ways: through a qualified foreign law firm, an international partnership or a local law firm<sup>11</sup>. For arbitration, any one (including foreign lawyers) is permitted to advise, prepare and appear as counsel in domestic or international arbitrations in Malaysia. Similarly, anyone can be appointed as arbitrator. There will be further amendments to the law to make this position clearer and to the provision prohibiting 'fly in fly out' to make it less restrictive. Such changes are a reflection of Malaysia's recognition that the practice of law is not parochial but international.

Apart from this, the other law reform initiatives included consultations between the Bar and the AG over our counter-terrorism legislation.

The change in the mindset of the members of the Bar towards welcoming foreign lawyers (when previously they were against liberalisation) also extended to their acceptance of the need for continuing professional development courses. The Bar Council, the governing body of the Bar, convinced the members to participate in training ranging from advocacy training (following England's Advocacy Training Council programme) to tax law workshops.

The Bar's proudest moment would be the successful commencement of operation of Malaysia's National Legal Aid Foundation (NLAF) which guarantees access by Malaysians involved in the criminal justice system to legal representation. The Malaysian Government provides funding to pay for NLAF's operating expenses and the remuneration of lawyers who act for these accused persons.

<sup>10</sup> <http://www.jac.gov.my/>.

<sup>11</sup> For more details, please see [http://www.malaysianbar.org.my/trade\\_in\\_legal\\_services\\_formerly\\_known\\_as\\_gats/liberalisation\\_of\\_legal\\_services.html](http://www.malaysianbar.org.my/trade_in_legal_services_formerly_known_as_gats/liberalisation_of_legal_services.html) and [http://www.federalgazette.agc.gov.my/outputaktap/20120920\\_A1444\\_BI\\_BI%20A1444.pdf](http://www.federalgazette.agc.gov.my/outputaktap/20120920_A1444_BI_BI%20A1444.pdf).

Article 5(3) of the Malaysian Federal Constitution provides that every person arrested is entitled to legal representation. This constitutional right is being fulfilled through one of the most successful public-private partnerships in Malaysia, the NLAF. The Prime Minister readily agreed to establish, and with the Government, to fund (including making provision for payment of legal fees) the NLAF. The AG generously provides leadership in chairing NLAF, and all three Bars in Malaysia (Malaysian Bar, Sabah Law Association and Advocates Association of Sarawak) responsibly provide lawyers to assist all Malaysians who require legal representation during arrest, detention, remand, bail, trial or appeal, and in Syariah criminal proceedings.

In Peninsular Malaysia, the NLAF operates through Legal Aid Centres (LAC) under the Bar Council. The total number of lawyers trained by NLAF to date is 985 nationwide and the total number of lawyers registered with NLAF is 788.

The total amount of NLAF work done as at 31 December 2012 is 2,136 arrests, 37,492 remands, 5093 mitigation/bail and 953 trials. It is safe to say that more than 37,492 Malaysians have been assisted in the first eight months of operation since its commencement in April 2012.

In terms of what I could have done better, I do think that I could have been a better advocate by being more persuasive, effective and patient, in my arguments of the Bar's position. The arguments which I regret not being more persuasive would be not being able to persuade the Government to change its mind on mandatory sentencing and on freedom of choice of sexual orientation. I do sometimes wish I could do more for the Bar but after two years (the maximum period of service) as President, I am exhausted and I am confident that my successor, Christopher Leong, would be able to move forward and make advances on unfinished business.

**From a counsel's perspective, what's your take on the arbitration and ADR scene in Malaysia, including challenges and improvements?**

Malaysia is one of 148 countries which are parties to the New York Convention<sup>12</sup> and the present Arbitration Act 2005 is based on the UNCITRAL Model Law<sup>13</sup>.

According to the 2010 International Arbitration Survey: Choices in International Arbitration<sup>14</sup>, the choice of seat of arbitration is mostly influenced by formal legal infrastructure, the law governing the contract and convenience.

Malaysia inherited the English common law system and more than half of the members of the Malaysian Bar (presently with almost 15,000 practising members) hold a law degree from law schools in common law jurisdictions such as England & Wales, Australia, Singapore and New Zealand. Such diversity in education and the ability to speak more than one language other than English make Malaysian lawyers able to adapt in any environment. In my dealings with many local and foreign lawyers, I do find that the better Malaysian lawyers are as good as any in the region. Further, Malaysian lawyers have a competitive edge in terms of being value for money since our fees are relatively low in this region.

In terms of Malaysia's rankings in the World Bank's Ease of Doing Business 2013, we are ranked 12<sup>th</sup> overall, 4<sup>th</sup> in protecting investors and 33<sup>rd</sup> in enforcing contracts. The Bar works very closely with the Judiciary and government agencies to continuously improve the efficiency and effectiveness of the legal system.

An independent, honest, competent and efficient Judiciary is crucial to the confidence of businesses to choose that country as its seat of arbitration.

<sup>12</sup> Convention of the Recognition and Enforcement of Foreign Arbitral Awards, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html).

<sup>13</sup> <http://www.skrine.com/publications/legal-insights/221?itemid=412>, <http://www.skrine.com/the-arbitration-amendment-act-2011>, and <http://arbitration.practicallaw.com/9-507-1479>.

<sup>14</sup> <http://www.arbitrationonline.org/research/2010/index.html>.



Mr Lim next to the Malaysian Attorney-General, Tan Sri Abdul Gani Patail at the opening of Legal Year 2013.



The Judiciary's commitment to the rule of law is reflected in a few recent and significant court decisions: abuse of power by the Executive was condemned, and the victims promptly awarded damages;<sup>12</sup> legislation that unreasonably restricted the exercise of the right of university students to express support for, or opposition against, a political party was struck down for being unconstitutional;<sup>13</sup> Opposition politicians successfully sued for defamation against newspapers owned by the ruling party;<sup>14</sup> and Orang Asli's (natives of Malaysia) native land rights were recognised.<sup>15</sup> These civil cases show that victims of abuse of Executive power can hold the Executive accountable, unreasonable Parliamentary restrictions on constitutional freedoms will be struck down, and Opposition politicians and minorities have equal access to justice.

Apart from upholding the rule of law, the Malaysian Judiciary in the last five years has undergone substantial transformation in improving its efficiency and competence.

The Judiciary was successful in its reduction of the backlog of cases through various measures such as establishing new courts to hear new cases within a prescribed time period (not more than 9 months from filing to disposal/decision); establishing specialist courts such as intellectual property, admiralty and Islamic finance; more appointment of judges from the Bar who are senior practitioners with extensive commercial experience; and electronic filing, electronic case management, and court recording transcription (an audio visual recording of open court proceedings).

These measures have been documented by the World Bank report ("Malaysia: Court Backlog and Delay Reduction Program – A Progress Report")<sup>15</sup>, published in August 2011. The World Bank Report stated that the Judiciary's programme offers an interesting model for other countries wanting to pursue a similar reform, and notes that it was able to do so in a very short amount of time.

With the improvement in the efficiency and operation of the courts, the Chief Justice is now placing greater emphasis on the quality of judgment where steps such as selection and training of judges play an important role<sup>16</sup>.

Equally important is that Malaysia's Judiciary is pro-arbitration as evidenced by the trend of recent decisions<sup>17</sup> interpreting the Arbitration Act 2005 and the Chief Justice's speech on arbitration.

15 [http://www.malaysianbar.org.my/legal/general\\_news/world\\_bank\\_report\\_malaysia\\_court\\_backlog\\_and\\_delay\\_reduction\\_program\\_a\\_progress\\_report\\_august\\_2011.html](http://www.malaysianbar.org.my/legal/general_news/world_bank_report_malaysia_court_backlog_and_delay_reduction_program_a_progress_report_august_2011.html)

16 [http://www.malaysianbar.org.my/speeches/closing\\_remarks\\_by\\_yaa\\_tun\\_arifin\\_bin\\_zakaria\\_chief\\_justice\\_of\\_malaysia\\_at\\_the\\_international\\_malaysia\\_law\\_conference\\_2012\\_klcc\\_28\\_sept\\_2012.html](http://www.malaysianbar.org.my/speeches/closing_remarks_by_yaa_tun_arifin_bin_zakaria_chief_justice_of_malaysia_at_the_international_malaysia_law_conference_2012_klcc_28_sept_2012.html) and [http://www.malaysianbar.org.my/speeches/speech\\_by\\_tun\\_arifin\\_bin\\_zakaria\\_chief\\_justice\\_of\\_malaysia\\_at\\_the\\_opening\\_of\\_the\\_legal\\_year\\_2013\\_palace\\_of\\_justice\\_putrajaya\\_12\\_jan\\_2013.html](http://www.malaysianbar.org.my/speeches/speech_by_tun_arifin_bin_zakaria_chief_justice_of_malaysia_at_the_opening_of_the_legal_year_2013_palace_of_justice_putrajaya_12_jan_2013.html).

17 [http://klrca.org.my/userfiles/File/KLRCAroadshowJakartaslides%20\(LCW\).pdf](http://klrca.org.my/userfiles/File/KLRCAroadshowJakartaslides%20(LCW).pdf).

There have been phenomenal improvements in the institution of the KLRCA with its new products, membership of its arbitrator panel is similar to other institutions, cost advantage (it is around 20% cheaper than other centres in the region), substantially improved efficiency and extensive promotion of its abilities<sup>18</sup>. KLRCA recently received the prestigious Global Arbitration Review Award for 'Innovation by An Individual or Organisation in 2012' at the 3rd Annual GAR Awards in Bogota, Colombia. This is a testament to its drive to always improve.

Notwithstanding these improvements in the Judiciary and KLRCA, there is much room for improvement. The Judiciary has to continue to improve the quality of judges and their judgements, KLRCA has to work harder to persuade foreign lawyers to use it as an appointing authority, local legal talent have to learn to promote themselves where their talent is comparable to our neighbours and there is lack of knowledge of and promotion of these local talent, and there is a need for more capacity building of the local talent pool of lawyers. Various steps are being taken by all stakeholders to raise the bar.

With this desire to improve, a supportive Government, a pro-arbitration Judiciary and a fiercely independent Bar and Judiciary, which will invariably improve perceptions and engender a sense of security for foreign litigants in the country, I am confident that Malaysia is a viable option for the business community to consider Malaysia as seat of arbitration.

#### **In your opinion, what part can arbitration and ADR play in developing the legal profession in Malaysia?**

An increase in the number of arbitrations, especially international arbitrations, would have the most positive impact on the legal profession. With increased volume, there will be the consequential increase in experience and track record. With international arbitrations, the local talent will be exposed to international best practices and the latest trends in arbitral procedure, and opportunity to build on the experience for outreach in regional legal work. What we would like to see is more "Vinayak Pradhans" being nurtured in the Bar. With the centre of gravity of international arbitrations moving away from London and New York to Asia Pacific, there is a need for more lawyers in Asia to be equipped with the relevant skills and experience in arbitration.

#### **From your experience, you've also done arbitration abroad, in Europe for example – how different is it from Malaysia?**

The difference is not so much between Europe and Malaysia but between domestic and international arbitrations. The main difference is that of speed and efficiency, and the common purpose to get on with and complete the proceedings in a fast and fair manner. There is a noticeable trend in Malaysia of international arbitration practices (such as limited time period and "hot tubbing") being adopted in domestic arbitrations.

I must share an anecdote from a recent arbitration which reveals the cultural misconceptions of certain foreign lawyers. In the course of a spat over the presence of certain witnesses in the hearing, a London solicitor stated that my position was not how international arbitrations are conducted in London. The arbitrator, during the course of the hearing, commented that the statements of the London solicitor was not how international arbitrations are conducted.

#### **What are your own goals as an arbitrator?**

Simply this – to do more arbitrations.

<sup>18</sup> <http://klrca.org.my>.



# KLRC ADJUDICATION TRAINING PROGRAMME

## KUCHING

17 — 21.03.2013

Four Points by Sheraton Kuching

KLRC had rolled out its Adjudication Training Programme for the general public in Kuala Lumpur, Kota Kinabalu and Penang between August and December 2012. This time around the training programme continued in Kuching from 17-21 January 2013.

The programme aims to train future adjudicators and provide them with the necessary skills to conduct an adjudication.





# ADJUDICATION TRAINING PROGRAMME FOR THE JUDICIARY

## PUTRAJAYA

16.03.2013

Putrajaya Marriott Hotel

In an effort to promote a better understanding of the new Construction Industry Payment and Adjudication Act 2012 among the judiciary, a special training programme was conducted for them on 16 March 2013 at the Putrajaya Marriott Hotel. It was a collaborative effort by the Judicial Appointment Commission of Malaysia and KLRCA.

The Chief Justice of Malaysia, Yang Amat Arif Tun Ariffin Bin Zakaria was in attendance to deliver the opening speech after KLRCA Director, Datuk Sundra Rajoo, had delivered his welcoming remarks. The two-day programme was attended by more than 120 court judges and judicial officers and was conducted by international adjudication experts, Adrian Hughes QC from UK, Rashda Rana from Australia and Ir Harbans Singh from Malaysia.



# UPDATE ON THE ROLE OF KLRCA ON CIPAA 2012



The Construction Industry Payment and Adjudication Act 2012 was gazetted on 22 June 2012 and is expected to take effect this year. KLRCA has been named the adjudication authority by virtue of Part V of CIPAA, giving the centre a key role in being the default appointing and administrative authority. KLRCA has taken steps to ensure the smooth implementation of the Act. Below is an update on what has been done so far.

Throughout 2012, KLRCA had held roadshows around the country to raise awareness on the impending CIPAA 2012. Altogether, 11 free public talks were held from February to August 2012.

On 24 October 2012, KLRCA held the CIPAA Conference 'Transformation by Statute' which was an overwhelming success that saw the participation of 450 participants from the construction industry.

The Centre has also successfully trained more than 300 adjudicators to date to join our KLRCA Panel of Adjudicators, a number which is still growing with continuous training efforts around the nation. The KLRCA Panel of Adjudicators is no doubt ready to adjudicate upon CIPAA 2012 being implemented.

KLRCA has offered 33 scholarships to government officials to attend the adjudication training to date. The response and participation of some key government personnel have been tremendous. There was participation from the Ministry of Works, the Public Works Department, the AG's Chambers and members of the judiciary who elected to take up the scholarships to attend the training.

Thus far, a total of 36 candidates from the public sector, both scholarship (27) and non-scholarship (9) holders, have attended the KLRCA adjudication training programmes and are ready to sit as adjudicators.

Apart from the training programmes, and CIPAA awareness and preparation talks, briefings with government personnel from the Public Works Department (25 September and 6 November 2012) and the AG's Chambers (13 July 2012) were also held.

Division Head of Contracts & Policy of the Public Works Department, Sr Amran bin Mohd Majid, who presented a paper at the CIPAA Conference, also mentioned that the Public Works Department has begun reviewing their documentation and have amended their contracts in anticipation of CIPAA being implemented.

KLRCA has also drafted the Exemption Order (Appendix 1) and a set of Regulation (Appendix 2) to complement the CIPAA 2012 in line with Section 1, 39 and 40 of the Act. The draft Regulation is based on KLRCA's interpretation, upon consulting with industry experts on how best to complement the Act.

In addition, KLRCA has drafted a set of KLRCA Adjudication Procedural Rules (Appendix 3) to enable the Centre to administer its function as adjudication authority under the requirements of Section 32 of CIPAA 2012. This system of prescribing a set of Regulation and thereupon a set of procedural rules for the adjudication authority is similar to that practised in Singapore.

KLRCA is also in the process of setting up the Malaysian Institute of Adjudicators, and has put in place the necessary internal infrastructure and is ready to commence operation.



# Adoption of UNCITRAL Rules: The KLRCA Perspective

**By Rammit Kaur Charan Singh**

## **KLRCA's Head of Legal Services explains how KLRCA adopted the UNCITRAL Rules**

The Kuala Lumpur Regional Centre has been administering arbitrations applying the UNCITRAL Rules for 34 years, since its inception in 1978.

Upon its formation, the administration of KLRCA assisted in the conduct of arbitrations under the UNCITRAL Arbitration Rules, even receiving reference from the Permanent Court of Arbitration (PCA).

Then, in 1991, the KLRCA formulated its institutional rules by incorporating UNCITRAL Arbitration Rules with minimal modifications. As a regional centre, the KLRCA's role was to promote the wider use and application of UNCITRAL Rules within the region and render assistance in the conduct of ad hoc arbitrations under such rules.

Further revisions were made in 2010, with the adoption of the latest version of the UNCITRAL Arbitration Rules, as part of the Centre's strategy in its revitalisation process. The KLRCA launched these new 2010 Rules on the same day the UNCITRAL text was released.



This marked a great milestone for the Centre, showing its developmental and adaptability capacity. Then, two years later in July 2012, further improvements were made to cater for changing times and user demands.

In practice the UNCITRAL Rules were adopted wholesale as Part 2 of the KLRCA Rules without any direct amendments to the text. This way, KLRCA perfected the ease of managing administration of arbitration matters under the KLRCA Arbitration Rules and the UNCITRAL Arbitration Rules. Through this process, it is easily visible to parties when deciding on the choice of institution rules to decipher how far the spirits in the text were incorporated or applied.

Most importantly, over the years, KLRCA has been able to develop its administration and rules consistent with international standards. The UNCITRAL Rules were not drafted for purposes of administration by a particular institution and therefore, it is of course not adoptable wholesale. This is why, KLRCA maintained a modified version in Part I of its Rules, which contains 14 specific rules. To fill in gaps and manage any conflicting provisions, clarifications were made whereby if Part I conflicts with Part II, Part I of the rules will prevail.

Further modifications were incorporated making KLRCA the designated appointing authority and conferring on the Director the power to appoint arbitrators. So where the UNCITRAL text refers to an appointing authority designated by parties, KLRCA Rules states that unless otherwise agreed to by the parties, KLRCA is the appointing authority. This is consistent with KLRCA's role as the default appointing authority under the Malaysian Arbitration Act 2005.

The most current version of the Rules also provides for a confirmation process of the arbitrators appointed by parties. Under the Rules, parties' appointment will be regarded as merely a nomination and it will be subject to confirmation by the Director. This is to help ensure that arbitrators make formal undertakings as to their impartiality and independence and register the same with the centre. By assisting in the confirmation process, KLRCA hopes to save considerable time and effort otherwise spent on challenges, although the Centre does provide guidance on the procedure for challenges.

KLRCA now decides on the challenge raised against arbitrators. The procedure is similar to the UNCITRAL Rules and merely expands on the administrative tasks of KLRCA. This again is motivated with the hope that it will speed up the challenge process by giving parties a sense of security with a neutral entity to make the decisions.

## ARBITRATOR'S ROLE

The arbitrator is accorded with some control over the proceedings and they have the capacity to limit the time available for each party to present its case. However, this is to be read together with Section 20 of Arbitration Act 2005, which requires fair treatment to be given to all parties.

The Rules further require that arbitrators render the final award within three months from the closing of oral submissions. The parties may agree to extend the limit or else the Director of KLRCA can grant an extension. The Court also has the power, under the Malaysian Arbitration Act, where specific time limits are imposed for the delivery of award, to extend the time period. However, it is for the tribunal or any party to the proceedings to make such applications.

## FEES AND DEPOSITS

The Rules clarified the administrative requirements and process for determination of fees and costs. It is for the Centre to fix the fees. However under the current Rules, upon formation of the tribunal the parties and tribunal have 30 days to agree on the arbitrator's fees. If no agreement is reached, the KLRCA's scheduled fees will apply. These fees are calculated on an ad-valorem basis, based on the amount of the dispute.

The Rules now provide detailed steps on deposit taking, the requirement of provisional deposits and prior finding of fees and costs. This is necessary as sometimes at initial stages the amount of dispute may not be known as yet. This process has been found to work very well.



UNCITRAL has accomplished great milestones in the uniformity and harmonisation of arbitration practices in the region.

The remaining amendments were made to the general requirements, on registration of matters and communication between parties. Provisions on confidentiality were also included. In addition to facilitate continuity of the dispute resolution process, the Rules provide for costs savings should a matter escalate to arbitration, from unsuccessful mediation, under the KLRCA Mediation Rules.

Upon reading UNCITRAL's recent recommendations to institutions, it can be seen that KLRCA has adopted most of the suggestions, which goes to show that the recommendations are excellent tools of reference for institutions. The recommendations will be analysed further to identify other improvements that can be made.

## MOVING FORWARD

UNCITRAL has accomplished great milestones in the uniformity and harmonisation of arbitration practices in the Asia-Pacific region. From an institutional view point, the trend or demand is now towards customised Rules for specific industries.

The KLRCA Fast Track Rules were implemented as expedited rules to cater for the construction and maritime areas. The same now seem viable for domestic sports-related arbitration. The KLRCA i-Arbitration Rules, which cater for arbitration surrounding Shariah-related commercial transactions, was also launched late last year. For the purposes of ensuring internationalisation of the Rules, the approach of incorporating the UNCITRAL text as the main body of rules with modifications enabling reference procedures to a Shariah Advisory Council or a Shariah expert was maintained.

Another main concern for the future would be catering to demands for a quicker process. The UNCITRAL Rules have limitations on the imposition of timelines. It is time for some focus and concerted efforts in finding a solution to meet those demands. There are a number of innovations for expedited processes – expedited Rules, fast track, claims only, online arbitration, and enforcing arbitration. These innovations are great and have assisted in providing varied options for parties, but each of these caters for specific types of claims. However they may not be suitable for all, which is why arbitration is still tainted with delay issues.

The Malaysian judiciary recently implemented timeline checks for the resolution of cases. Some of these cases had, in truth, spanned over three years. However, the courts have improved their efficiency and now a matter may be resolved within 9-12 months. Perhaps it is time that arbitral institutions take example of the courts and review the arbitration practice itself. Although implementation of a timeline regime may not be as smooth with the arbitral tribunal being an independent entity, it seems viable.

An empirical study should be conducted on reasonable timelines for arbitration matters. A guideline on an appropriate timeline applicable in each phase of arbitration proceedings would be more persuasive coming from UNCITRAL and cultivate a true harmonised approach to arbitration practice.

# KLRCA OUT & ABOUT

18.01.2013

Singapore Management  
University, Singapore



Datuk Sundra Rajoo was invited to give a presentation on KLRCA's Islamic Arbitration ("i-Arbitration") Rules by Singapore Management University (SMU) Centre for Dispute Resolution & SMU International Islamic Law & Finance Centre in Singapore on 18 January 2013.



## KLRCA TALK SERIES

22.03.2013

KLRCA

KLRCA Talk Series 2013 kicked off with a talk on "Recent Trends in Investment Arbitration, with a focus on South East Asia" by Anna Joubin-Bret. Anna is a partner in Foley Hoag's International Litigation and Arbitration Practice, where she primarily focuses on representing and advising sovereign States in Investor-State dispute settlement. The talk was moderated by Mr Rajendra Navaratnam of Azman Davidson & Co.



# KLRCA TALK SERIES

ALL TALKS WILL BE HELD  
FROM 3PM-5PM

**29 MAY 2013**



**SPEAKER** Mr Chang Wei Mun  
**TOPIC** Privacy and Confidentiality  
in Arbitration

**2 AUGUST 2013**



**SPEAKER** Mr Ooi Huey Miin  
**TOPIC** An Arbitrator's Excess of  
Jurisdiction and Powers

**12 APRIL 2013**



**SPEAKER** Mr Campbell Bridge  
**TOPIC** Mediation – the best  
way to resolve medical  
negligence actions

**5 JULY 2013**



**SPEAKER** Mr Kevin Prakash  
**TOPIC** Arbitration Clause:  
Common Pitfalls

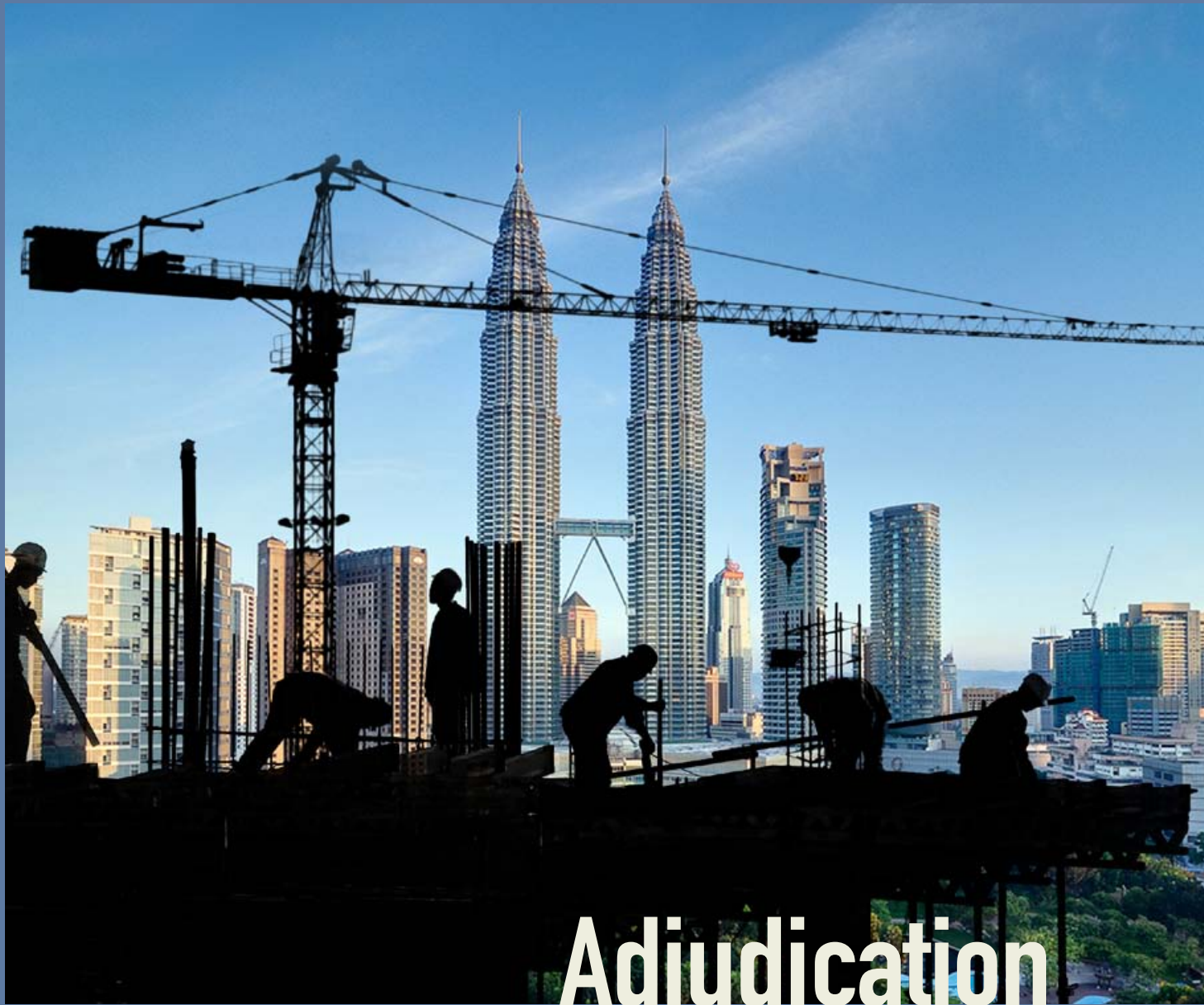
**20 SEPTEMBER 2013**



**SPEAKER** Mr Lam Ko Luen  
**TOPIC** Challenges to Awards –  
The Malaysian Perspective

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# Adjudication in Malaysia

## A PRACTICAL VIEW

Adjudication and payment legislation is imminent in Malaysia in the form of the Construction Industry Payment and Adjudication Act (CIPA). This article discusses ways in which statutory adjudication may work for you and make comparisons to how it has been implemented in the UK. What is it actually likely to mean to the users of adjudication, whether contractors, sub-contractors, owners or legal representatives?

By Alastair Farr

Adjudication was first introduced into law in the UK 14 years ago. Since then it has been introduced in various forms by other countries: Northern Ireland 1999, Isle of Man 2004, various territories of Australia (New South Wales 2000, Queensland 2004, Western Australia 2005), New Zealand 2003, and Singapore 2005.

The background to adjudication in all of these countries has been the desire to tackle the issue of delayed payment and non-payment in the construction industry. Cash flow is the lifeblood of the construction industry, and it was thought necessary to introduce legislation to protect it.

Adjudication provides a quick and inexpensive means of resolving a dispute, certainly compared to arbitration or litigation. It allows the claimant to get a temporarily binding and enforceable decision. Although these can be opened up and retried by the high court or in arbitration, our experience in the UK is that in the vast majority of cases the parties accept the decision as binding and do not reopen them, even where there are large disputes.

There have been a number of cases in the UK where the losing party has gone to court to try to resist the enforcement of a decision but in the majority of cases the court has upheld the adjudicator's decision and enforced it even where the adjudicator has made a clear mistake.

We would imagine that the same would be the case in Malaysia, with the courts seeking to uphold adjudicator's decisions. From a practical view point, companies are unlikely to wish to go through the cost and time of arbitration or litigation after they have been through adjudication. So a clear understanding of adjudication will be necessary.

Adjudication under CIPA will apply to every construction contract made in writing and relating to construction work carried out wholly or partly within the territory of Malaysia. It includes government contracts and also consultancy agreements. Unlike in the UK, CIPA also includes oil and gas contracts. The only exclusion will be residential construction under four storeys where the contract is entered into by a natural person intending to occupy the building.

Adjudication is fast. In the UK it takes 28 calendar days from referral (extendable to 42 days). In practice, many adjudications go on longer by agreement of the parties. Under CIPA, it is 90 working days so the parties have a little more time and again, it is extendable by agreement of the parties. It is still a very quick procedure, particularly if dealing with a large dispute.

In practical terms, whether you are the claimant or respondent, it will mean you diverting all your efforts to the case in this period, during the submission stages and during the period in which the adjudicator makes a decision. Adjudicators have extensive powers under CIPA (in fact greater than what UK adjudicators have), and can order disclosure, act inquisitorially if they wish, and can require a hearing. All of this will require the parties to be reactive during the process as it will be a pull on resources.

You must be alert to the ambush. Under CIPA, once a payment claim is made there are just 10 working days to respond. If you do not, it is assumed that you dispute the whole amount, at which point you may receive the notice of adjudication. In the early days of adjudication in the UK, many parties would wait until the start of a public holiday

to serve the adjudication notice, as the timetable would commence knowing that the responding party would be unable to react quickly. Watch out for the Notice just before Chinese New Year.

In the UK, any dispute can be referred, so it is common to see all types of contractual issues (payment, extensions of time, quality, practical completion, etc.) being referred, often in a single adjudication. CIPA only refers to payment disputes. However, it is likely that many of these will involve wider issues. For example, the claimant seeks payment of prolongation costs as loss and expense under a contract. This will involve the adjudicator forming a view as to whether the claimant has been delayed. So by default, adjudicators are going to have to deal with wider issues anyway.

The jurisdiction of the adjudicator under CIPA comes from issues set out in the payment claim and response, and it is likely that there will be many reasons why payment is being claimed and denied. The payment claim might actually be the final account. This can lead to very complex adjudications. In the UK, we have dealt with some adjudications up to £15m, with many complex interlinked issues. If you are the claimant, then you are in the driving seat because you will have had time to prepare. If you are the respondent, however, you need to act quickly and have your project team and consultants in place very quickly to defend it. You have to be able to respond quickly and decisively.

In the UK, the hope was that adjudication would be used early during construction and to deal with issues quickly. The reality has been that adjudication is adversarial and that parties, not wishing to confront the other during the project, have left it until the end to refer, often after handover. Again, this has led to large disputes being referred.

One of cases we dealt with concerned an £8million dispute and involved a final account, extensions of time (EOT) on three sections of work, and a counterclaim for liquidated damages. The backup papers to the submission ran to 26 boxes of files. Many had not been opened by the adjudicator when the decision was made. However, the case was convincing and we were able to present it succinctly and clearly allowing him to reach his decision. The claimant (client) was awarded £6million, full EOT on all three sections of work, and the counterclaim dismissed. Our client had only expected £2million. The award was paid without enforcement being necessary, and it was not re-opened in arbitration. The case demonstrates that complex decisions can be made in a short period of time, but much depends on it being presented clearly so that the adjudicator is convinced.



In our experience in the UK, there has been a presumption with adjudication in favour of the claimant. In other words, because he is claiming he must be entitled to something! This presumption is hard to rebut, and it is rare for an adjudicator to decide that the claimant is not entitled to anything at all. Furthermore, as mentioned earlier, the claimant will have had time to put its argument together. So as the responding party, you need to have your case set out well and in advance of any likely adjudication, including any financial counterclaims you might have. These need to have been included in the payment response; otherwise, the adjudicator is unlikely to have jurisdiction to consider them.

One of the most important features of adjudication is the adjudicator's jurisdiction. I have already mentioned that under CIPA this is derived from the payment claim and response, which precede the notice of adjudication. In the UK, we have seen a lot of case law develop as to whether the adjudicator had, or exceeded their, jurisdiction in deciding an issue. I imagine that the same will be true in Malaysia, because if you can demonstrate that an adjudicator has done so, his decision is unlikely to be enforced.

What does this mean in practical terms? It means making sure the payment claim and response are carefully and thoroughly prepared, and the adjudication submissions likewise.

Tactically, how can you improve your chances in adjudication?

1. Firstly, be familiar with the act itself and the procedures within.
2. Secondly, if you are referring, make sure that your case is fully prepared, and if you are likely to be the respondent, be aware of the likelihood that you will be drawn in to adjudication and be prepared to act quickly.
3. Thirdly, no matter which party you are, be sure to have your project team, consultants and lawyers ready and on hand for the duration of the proceedings.

There are many differences between the CIPA and the Housing Grants Construction and Regeneration Act in the UK, some have been mentioned already.

Much of what we learned and some of the problems we encountered after our Act came into force have been dealt with in CIPA. For example, the adjudicator can award party costs and this prevails over any other agreement by the

parties prior to the adjudication. This effectively prevents what is known in the UK as the 'tolent clause' where Party A could state in a contract that no matter whether Party B won or lost an adjudication against it, they would pay its costs and those of the adjudicator. The effect of such a clause was that Party B would never wish to bring proceedings.

This is just a flavour of what adjudication may entail and some of the practical issues that may be faced in Malaysia.

There are also some important payment clauses in CIPA. Firstly, conditional payment or 'pay when paid' and 'pay if paid' clauses will be void under the Act. Secondly, there is an important direct payment from principal clause which allows a party with an enforceable adjudication award to ask the principal of the party who does not pay the award to pay the amount. The principal must then pay and recover the amount from the party as a debt or by way of set off against the party who had the decision made against him. This mechanism can only be invoked if the principal owes money to that party at the time the request for payment is made. These are both useful and welcome provisions and will assist greatly in the flow of cash in a construction projects.



#### ABOUT THE AUTHOR

**Alastair Farr** is managing director of Driver Trett's Asia Pacific region. His specialisms include construction claims and risk management together with dispute resolution. Alastair has extensive experience of adjudication, arbitration and litigation as well as ADR and is a practising mediator. He also provides expert witness reports in quantum and delay.

KLRCA embarked on an international promotional campaign with a roadshow to Indonesia on 20 March 2013.

The Jakarta roadshow, themed Effective Dispute Resolution: A Malaysian Perspective, was organised with the aim of promoting the Malaysian legal system especially on alternative dispute resolution (ADR). The delegation was led by Datuk Sundra Rajoo and included the President of The Court of Appeal Malaysia, Tan Sri Dato' Seri Md Raus Bin Sharif; former Chief Justice of Malaysia, Tun Dato' Seri Zaki Tun Azmi; and the Immediate Past President of the Malaysian Bar, Lim Chee Wee.

More than 150 people attended the afternoon seminar. Aside from the seminar, the delegation also held meetings with BANI Arbitration Centre and PERADI (the Indonesian Advocates Association) as well as other associates. In addition, the delegation also met the Malaysian Ambassador to Indonesia, His Excellency Dato' Syed Munshe Afdzaruddin Syed Hassan and embassy officials over dinner.

## KLRCA ROADSHOW IN JAKARTA



# IMMUNITY OF ARBITRAL INSTITUTIONS

By Sharon Chong



**Sharon Chong discusses key aspects of the immunity status received by arbitral institutions, focusing mainly on KLRCA and its Director**

Arbitral institutions have, of late, been increasingly dragged to court by aggrieved parties who have lost in arbitration proceedings or who are dissatisfied with the exercise of an appointing authority's powers.

The general view is that there is a contractual relationship between parties to the arbitration and the arbitral institution administering the arbitration; Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edition, 2004).

Arbitral institutions in common law jurisdictions have immunity for their appointing and nominating functions, and are not liable for their acts or omissions in the discharge of the function, unless the act or omission is shown to have been in bad faith.

However, arbitral institutions in the United States are given blanket immunity with regard to both judicial and administrative decisions taken by the arbitral institutions in arbitration proceedings; *Austern v Chicago Board Options Exchange Inc* [1990] USCA2 213.

In France, the courts have recognised a contractual relationship between the parties to the arbitration and the arbitral institution. In the French case of *Societe Cubic Defense System v Chambre de Commerce Internationale*, 1997 Rev. Arb. 417, the French court held that the ICC is contractually obligated to fulfil its essential function as

an arbitral institution to follow the rules applicable to the arbitration, and could be liable for any breach of the arbitration agreement.

In Malaysia, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) enjoys immunity and independence from court interference in carrying out its function as an appointing authority, where there is no agreed procedure in the arbitration agreement or the procedure agreed by the parties fails; section 13 of the Arbitration Act 2005. This immunity is extended to the Director of KLRCA in the exercise of his powers under the Arbitration Act 2005 and/or the KLRCA Rules of Arbitration to appoint or nominate an arbitrator.

The role of KLRCA is to provide for arbitration under the auspices of KLRCA, to facilitate the arbitration proceedings, and to assist parties in finding fair and mutual compromise in accordance with the rules they have decided to be governed by.

In the High Court case of *Infineon Technologies (M) Sdn Bhd v Orisoft Technology Sdn Bhd* (previously known as Orisoft Technology Bhd) and another application [2011] 7 MLJ 539, the High Court held that there is a measure of supervision by arbitral institutions pursuant to their administrative and procedural rules to ensure compliance with these rules and that the framework is in the main facilitative or administrative in nature.



KLRCAs are also recognised in the Arbitration Act 2005 as the appointing authority. The Director of KLRCAs is conferred statutory authority to appoint arbitrators under the Arbitration Act 2005 as the default provision. The Director of KLRCAs will now confirm the appointment of arbitrators appointed by parties or any appointing authority agreed by them. An agreement between the parties to appoint an arbitrator by them or any appointing authority agreed by them shall be treated as an agreement to nominate an arbitrator and not an agreement to appoint an arbitrator.

KLRCAs and their Directors are conferred immunity from suit or any other legal process pursuant to the following legislation and legal instruments:

- (i) Asian-African Legal Consultative Organization (AALCO);
- (ii) Section 48 of the Arbitration Act 2005 – Immunity of arbitral institutions; and
- (iii) International Organizations (Privileges and Immunities) Act 1992 and Kuala Lumpur Regional Centre For Arbitration (Privileges and Immunities) Regulations 1996 as amended by the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) (Amendment) Regulations 2011.

#### ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (AALCO)

KLRCAs were established in 1978 under the auspices of AALCO. KLRCAs are non-profit non-governmental international arbitral institutions and are administered by a Director under the supervision of the Secretary General of AALCO. Pursuant to clause 7(b) of an agreement between the Malaysian Government and AALCO signed on 29 July 1981, KLRCAs have been accorded independence and certain privileges and immunities for the purposes of executing their functions as an international organisation.

#### SECTION 48 OF THE ARBITRATION ACT 2005 – IMMUNITY OF ARBITRAL INSTITUTIONS

Section 48 of the Arbitration Act 2005 expressly confers immunity on KLRCAs and their directors and officers for anything done or omitted in the discharge of the appointing or nominating function, subject to the existence of bad faith.

This section applies when the Director exercises both his statutory powers under section 13 of the Arbitration Act 2005 (appointment of arbitrators) and also his powers under the KLRCAs Rules of Arbitration or otherwise when designated as appointing authority by an arbitration agreement.

However, this immunity only extends to KLRCAs or their Directors in relation to their or his appointing or nominating function (and not when acting in any other capacity), and is limited to acts done or omitted in respect of the discharge of that function. In cases where KLRCAs or their Directors act in bad faith, section 48 of the Arbitration Act 2005 will not apply.

KLRCAs will not be able to rely on such immunity if the plaintiff can show proof that KLRCAs acted in bad faith. The plaintiff would have to produce cogent evidence to justify any allegation of bad faith. “Bad faith” is not defined in the Arbitration Act 2005. In the context of the tort of misfeasance in public office (or, as it is sometimes called, deliberate abuse of power), a moral element is an essential ingredient and lack of good faith connotes either “(a) malice in the sense of personal spite or a desire to injure for improper reasons or (b) knowledge of absence of power to make the decision in question; *Melton Medes Ltd and another v Securities and Investments Board* [1995] 3 All ER 880 (Eng). The UK House of Lords also opined in the case of *Three Rivers District Council and others v Bank of England* [2000] 3 All ER 1 that the act of the public officer must involve “bad faith in the sense of the exercise of public power for an improper or ulterior motive” or “where a public officer acts knowing that he has no power to do the act complained of, and that the act will probably injure the plaintiff”. Similarly, the Indian High Court held in the case of *Bhupinder Singh v State of Haryana & Ors* AIR 1968 Pun 406 that the term “bad faith” is a shade milder than malice, and implies breach of faith or wilful failure to respond to one’s known obligation or duty. Bad judgment or negligence is not “bad faith”, which imports a dishonest purpose, or some moral obliquity and implies conscious doing of wrong. It is much more than a mistake of judgment and is synonymous with dishonesty.”

#### INTERNATIONAL ORGANIZATIONS (PRIVILEGES AND IMMUNITIES) ACT 1992 (“PRIVILEGES AND IMMUNITIES ACT”)

To give legal effect domestically to the Charter and the Convention on the Privileges and Immunities of the United Nations 1946, the legislature in Malaysia had passed the Privileges and Immunities Act, which provides for privileges and immunities to international organisations and their officers. The correctness of the exercise of the responsibilities and duties of the international organisations and their officers is not to be considered. Immunity granted under the Privileges and Immunities Act is to ensure the smooth functioning of international organisations.

The Privileges and Immunities Act confers absolute privilege on KLRCA and its Director. Section 4 of the Privileges and Immunities Act provides that the Minister may, by regulation, confer upon a person who is, or is performing the duties of, a high officer all or any of the privileges and immunities specified in Part I of the Second Schedule, which in turn confers on the “high officers” the like privileges and immunities as are accorded to a diplomatic agent. “High officer” is defined in section 2 of the Privileges and Immunities Act as a person who holds, or is performing the duties of, an office prescribed by regulations to be a high office in an international organisation.

By virtue of the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996, as amended by the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) (Amendment) Regulations 2011 (the Regulations), KLRCA has been declared as an international organisation and the Director of KLRCA is conferred the privileges and immunities as specified in Part 1 of the Second Schedule to the Privileges and Immunities Act; section 3A(2) of the Regulations.

The Director of KLRCA, a “High Officer” pursuant to section 1A of the Regulations, is entitled to privileges and immunities in respect of acts and things done in his capacity as the Director of KLRCA, if he is a citizen of Malaysia.

If he is not a citizen of Malaysia, he will be entitled to privileges and immunities accorded to diplomatic agents, which has the same meaning assigned to it by the Diplomatic Privileges (Vienna Convention) Act 1966, which adopted the Articles of the Vienna Convention. Under the Regulations, even former directors of KLRCA have immunities; section 3A (3) of the Regulations.

Article 31 of the Vienna Convention confers on a diplomatic agent immunity from the criminal jurisdiction of the receiving State and immunity from its civil and administrative jurisdiction, subject to a few exceptions; for instance, actions relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions. If the diplomatic agent is a national of or a permanent resident in the receiving State, Article 38 of the Vienna Convention provides that he will enjoy only immunity from jurisdiction and inviolability, in respect of official acts performed in the exercise of his functions.

The Malaysian courts have acknowledged and recognised the immunity conferred on KLRCA and its Director by virtue of the Privileges and Immunities Act and the Regulations in the High Court case of *Regional Centre for Arbitration v Ooi Beng Choo & Anor* [No 2] [1998] 7

MLJ 193 and more recently in the High Court case of *Infineon Technologies (M) Sdn Bhd v Orisoft Technology Sdn Bhd* (previously known as Orisoft Technology Bhd) and another application, [2011] 7 MLJ 539 where KLRCA and its Director were successful in their interlocutory application to strike out the claim against them on the ground of absolute immunity pursuant to the Privileges and Immunities Act.

The Malaysian High Court was recently presented with an opportunity to deal with this issue of immunity in a striking out application filed by the Director of KLRCA on this ground. Unfortunately, the action was withdrawn as against the Director in the morning of the hearing.

It is regrettable that the other common law jurisdictions lend little assistance to the construction of our immunity provisions but it is the author’s considered view that the relevant provisions in the Arbitration Act 2005, the Privileges and Immunities Act and the Regulations have made it amply clear that KLRCA and its Director are conferred immunity from legal proceedings.

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#### ABOUT THE AUTHOR

**Sharon Chong** is a Senior Associate with the Dispute Resolution Division of SKRINE. Her main practice areas are Corporate and Commercial Litigation and International Arbitration.

# Arbitration Case Law: Developments in Malaysia

By Rammit Kaur & Adeline Choo

**FOOD INGREDIENTS LLC V PACIFIC INTER-LINK SDN BHD  
AND ANOTHER APPLICATION [2012] 8 MLJ 585**

## FACTS:

The Plaintiffs entered into identical Agreements with the Defendant to buy certain goods. After the goods had been delivered and the Plaintiff had paid the monies owed under the Agreement, there was an oral agreement in Istanbul that the freight rate for the goods delivered would be reduced by a certain margin. There was a draft memorandum of understanding drawn up for this purpose but it was never signed. The Plaintiffs issued a demand for the over-paid freight and when it was refused, the Plaintiffs referred the matter to arbitration pursuant to Clause 6 of the Agreement. The Defendant raised a challenge that there was no valid arbitration agreement for the oral arrangement from which the arbitral tribunal could validly render an award. The Plaintiff took the point that by participating in the tribunal proceedings without objection, the Defendant was estopped from questioning the jurisdiction of the arbitral tribunal at the enforcement stage. The arbitral tribunal that sat in England was in favour of the Plaintiffs. The Plaintiffs then applied for recognition and enforcement of the award in Malaysia.

## ISSUE:

The issue was whether or not Section 38 and Section 39 of the Arbitration Act 2005 can empower the court to recognise and enforce an award from a foreign state. The court had to decide whether the arbitral tribunal could validly render an award when there was no valid arbitration agreement.

## HELD:

The Court upheld the Defendant's challenge and did not recognise the arbitral award in Malaysia. The Court considered *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] 3 WLR 1472 and held that there must be an express clause in the contract for there to be a valid arbitration agreement. It found in favour of the Defendant, that there was no evidence of an express intention by either party to incorporate the arbitration clause into the oral agreement in Istanbul that any dispute regarding the freight rate will be resolved by arbitration. The act of submitting a matter to an arbitral tribunal is insufficient to cloak the tribunal with jurisdiction to hear and determine the dispute.

The Court of Appeal has overturned the decision but has yet to deliver its grounds. The matter is pending leave of the Federal Court.



**THE GOVERNMENT OF INDIA V CAIRN ENERGY INDIA PTY LTD  
& ANOR [2012] 3 CLJ 423****FACTS:**

The Government of India and Cairn Energy India Pty Ltd entered into an oil and gas venture. The Production Sharing Contract was governed by Indian Law while the arbitration agreement was governed by English law. The seat of arbitration was Kuala Lumpur and the UNCITRAL Model Law applied. The dispute was regarding the cost recoveries claimed by Cairn and the Calculation of Post Tax Rate of Returns. The Government of India posed a challenge to a point found in favour of Cairns; whether companies are entitled to include in the accounts, for the purposes of the Post Tax Rate of Returns calculation, sums paid pursuant to particular provisions of the contract.

**ISSUE:**

The first issue for the Federal Court was the effect of the seat of arbitration in Malaysia. The second issue was whether it was possible for a specific matter that is referred to arbitration to have no interference on grounds of law and therefore, whether the award should be set aside.

**HELD:**

For the first issue, the court held that curial law was Malaysian law and the seat of arbitration being the place where challenges to an award are made. Parties have to follow the mandatory rules of the seat of arbitration since the application of such mandatory procedural rules will remain subject to the jurisdiction and control of the courts of the seat of the arbitration when considering applications to set aside awards.

For the second issue, the court relied and endorsed the decision of *Interlek Timur Sdn. Bhd. v Future Heritage Sdn. Bhd.* [2004] 1 CLJ 743. If the matter is one of general reference to arbitration, interference may be envisaged where errors appear on the face of the award but this was not possible for a specific matter. The rationale behind this decision was that a specific question of law is referred to arbitration, that is a matter for the arbitrator and no interference by the Court on the grounds of error of law should be encouraged. The court also held that an award could be set aside on grounds of illegality. This is an error of law as the award is tainted with some form of illegality. The Federal Court also held that all matters regarding the construction of a document are questions of law.

**By Shanti Mogan, Shearn Delamore & Co.**

**MALAYSIAN NEWSPRINT INDUSTRIES SDN BHD  
V BECHTEL INTERNATIONAL INC & ANOR**

**Citation:** [2012] 9 CLJ 993

**Court :** Federal Court, Putrajaya

**Judgment by :** Raus Sharif CA, Abdull Hamid Embong FCJ, Suriyadi Halim Omar FCJ, Hasan Lah FCJ, Zaleha Zahari FCJ

**CASE SUMMARY:**

The issue in this case involved what amounts to an agreement to arbitrate. An application was made to stay court proceedings pursuant to section 6 of the Arbitration Act 1952 ("AA 1952"). Whilst AA 1952 has since been repealed by the Arbitration Act 2005 ("AA 2005"), the considerations in the case remain relevant under the 2005 Act which requires an arbitration agreement to be in writing (albeit what that entails is quite widely defined). Pursuant to Section 6 of the AA 1952, the grant of a stay of court proceedings is conditional upon the existence of an agreement between the parties to arbitrate the dispute.

The parties entered into a Technical Services Agreement ("TSA") in 1996 pursuant to which the Respondents (the defendants) were to provide project services for the Appellant (the plaintiff). The project services were due to end on 30.9.1996. Thereafter, the parties entered into negotiations to extend the period for the project services. The Respondents submitted six proposals, five of which provided for an express term incorporating the TSA (comprising an arbitration clause) ("express term"). That express term was omitted in the sixth and final proposal made by the Respondents which also did not contain an express arbitration clause. Subsequently, the Appellant sued the Respondents for breach of contract, negligence and breach of statutory arising out of the latter's engagement as a consultant under the sixth proposal. A stay of proceedings pending arbitration was granted on the Respondents' application by the High Court (and affirmed by the Court of Appeal). The Court of Appeal was of the view there was an arbitration agreement between the parties in relation to the dispute on the basis that the parties had always conducted themselves on the understanding that the extension of the project services were subordinated to the TSA.

The Appellant appealed to the Federal Court. The questions of law framed for determination in relation to whether an agreement to arbitrate existed in respect of the dispute at hand were as follows:-

- (i) can an arbitration agreement be incorporated into the contract upon which the action is based without a written incorporation of the arbitration agreement itself;
- (ii) can the court look beyond the contract upon which the action is based for an arbitration agreement which does not appear in and has not been incorporated in writing into the contract on which the action is based;
- (iii) can the court investigate and make a finding that the operative contract between the parties is one other than that upon which the appellant commenced its action.

The Federal Court answered the questions in the negative and overturned the judgment of the Court of Appeal. The Federal Court held that an agreement to refer disputes to arbitration must be in writing and cannot be by way of inferences. In this regard, the Federal Court relied on the case of **Aughton Ltd v MF Kent Services** 57 BLR 1 where the court held that the object or effect of the statutory requirement (requiring an agreement to arbitrate to be in writing) must be *“to emphasise and seek to ensure, that one is not to be deprived of his right to have a dispute decided by a court of law, unless he has consciously and deliberately agreed that it should be so”* and further *“If, as is the position by statute, an oral agreement will not suffice, it must surely follow that an agreement depending, in any essential part, on inference will not suffice”*.

The Federal Court construed the agreement in respect of which the dispute had arisen as the sixth proposal, on which the Appellant's claim was founded. The sixth proposal did not contain an express term incorporating the TSA (which had the arbitration clause). As such, the Federal Court held there was no agreement between the parties to arbitrate under the sixth proposal and the stay ought not to have been granted. The Federal Court took the position that the Court of Appeal fell into error when it “incorporated” the arbitration agreement by drawing inferences from the conduct of parties or documents other than the contract documents itself.

The Federal Court concluded by recognising minimal interference with parties seeking to have their dispute arbitrated but requiring clear terms and written evidence of an agreement to arbitrate as a requirement for the grant of a stay.

This decision will have far reaching effects even for arbitrations conducted under the AA 2005 by reason of the requirement for an arbitration agreement to be in writing under the AA 2005. The AA 2005 sets out three situations in which an arbitration agreement will be said to be in writing; where it is contained in a document signed by the parties; where there is an exchange of written communication which provides a record of the agreement; where there is an exchange of statement of claim and defence in which the existence of an agreement to arbitrate is alleged by one party and not denied by the other. Incorporation by reference to a document is also permitted under the AA 2005.

In a matter where there is an exchange of written communication going back and forth between the parties, the question arises whether the courts will take into account such communication in determining if an agreement to arbitrate exists when the written agreement (in this case, the 6<sup>th</sup> proposal) omits such express reference. It therefore appears important to have in place a clear agreement to arbitrate where services rendered are no longer referable to the original agreement, if the parties intend is to have disputes arbitrated.



# SAVE THE DATE!

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

**DATE** 9 May 2013

**EVENT** Malaysian Maritime Law Association Talk

**ORGANISER** MMLA & KLRCA

**VENUE** KLRCA

**DATE** 4 – 5 May 2013

**EVENT** CIArb Accelerated Route To Membership (International Arbitration) Course

**ORGANISER** CIArb

**VENUE** Parkroyal Hotel, Kuala Lumpur

**DATE** 28 – 29 May 2013

**EVENT** IFN Europe Forum 2013

**ORGANISER** Red Money Events

**VENUE** The Guildhall, London

**DATE** 29 May 2013

**EVENT** KLRCA Talk Series – Privacy and Confidentiality in Arbitration

**ORGANISER** KLRCA

**VENUE** KLRCA

**DATE** 30 May 2013

**EVENT** MCCA Seminar Series No 3 – Alternative Dispute Resolution

**ORGANISER** MCCA & KLRCA

**VENUE** KLRCA

**DATE** 19 June 2013

**EVENT** IFN Africa Forum 2013

**ORGANISER** Red Money Events

**VENUE** Jumeirah Emirates Towers, Dubai

**DATE** 11 – 12 June 2013

**EVENT** FIDIC Asia-Pacific Contract Users' Conference

**ORGANISER** FIDIC & ILB

**VENUE** Sunway Resort, Hotel & Spa, Kuala Lumpur

**DATE** 27 – 29 June 2013

**EVENT** APRAG Conference 2013

**ORGANISER** CIETAC

**VENUE** Beijing, China

**DATE** 5 July 2013

**EVENT** KLRCA Talk Series – Arbitration Clause: Common Pitfalls

**ORGANISER** KLRCA

**VENUE** KLRCA



# 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.

## KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

( ESTABLISHED UNDER THE AUSPICES OF THE  
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## 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."

REGIONAL RESOLUTION GLOBAL SOLUTION