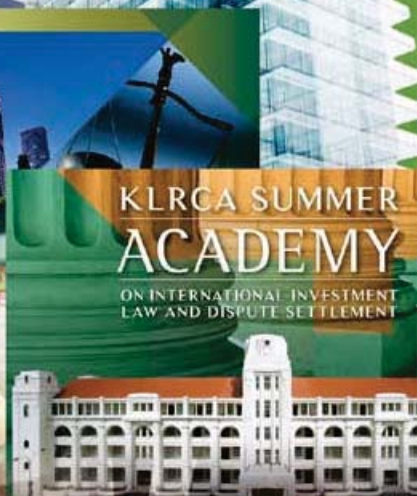




KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

Newsletter #23

Jul-Dec 2016



KLRC A

The Multi-Service Global Hub for ADR

Annulment of Investment
Arbitration Awards
(*The Investment Treaty Arbitration Review*)

By Datuk Professor Sundra Rajoo, Director, KLRC

10

Reflections on some Aspects of
International Arbitration

By The Rt. Hon. Lord Saville of Newdigate

19

KLIAW 2017

15-17
MAY

REDEFINING ADR: ASIA AND BEYOND

KUALA LUMPUR INTERNATIONAL ADR WEEK

15 May

The New Frontier

- Session 1 Opening of Conference
Launch of Rules
- Session 2 One Belt One Road –
Bridging the Gap
- Session 3 One Belt One Road –
Converting Challenges
to Opportunities
- Session 4 Breakout Sessions

16 May

The New Paradigm

- Session 1 The KLRCA Rules 2017
– Expert Committee
Perspective
- Session 2 Key Trends in
International Commercial
arbitration vis-a-vis the
procedural changes
- Session 3 Breakout sessions

17 May

CIPAA Conference – Breaking Barriers

- Session 1 Opening and CIPAA
Report
- Session 2 Panel Discussion
- Session 3 Mock Adjudication
- Session 4 Breakout Sessions

For more information, please contact **Business Development Team of KLRCA**, Phone: **+603 2271 1000** Email: **events@klrca.org**

For registration, please email your details below to **events@klrca.org** or fax to **+603-2271 1010** by **13 May 2017**

Full Name: _____

Company/Organisation: _____

Designation: _____

Address: _____

Tel: _____ Fax: _____ Email: _____

Contents

Director's message	4
Visitor's gallery	5
_ANNOUNCEMENT	
Pilot Project for Court Annexed Construction Mediation	6
_EVENTS	
Summer Academy on International Investment Law and Dispute Settlement	7
25th July – 29th July 2016	7

_EVENTS	
KLRCa Certificate Programme in Sports Arbitration	27
_EVENTS	
KLRCa Talk Series	28
_EVENTS	
ICC-KLRCa International Arbitration Conference	29
_EVENTS	
KLRCa Mediation Forum	31
_EVENTS	
CIArb Presidential Lecture 2016 & Exclusive Book Launch by Datuk Professor Sundra Rajoo	32
_EVENTS	
KLRCa-CIArb Mediation Training Programme	33

_HIGHLIGHT

Annulment of Investment Arbitration Awards	10
<i>(The Investment Treaty Arbitration Review)</i>	
<i>By Datuk Professor Sundra Rajoo, Director, KLRCa</i>	

_EVENTS

2 nd IPBA-KLRCa Asia-Pac Arbitration Day	17
---	----

_FEATURE

Reflections on some Aspects of International Arbitration	19
<i>By The Rt. Hon. Lord Saville of Newdigate</i>	

_EVENTS

Domain Name Dispute Resolution (DNDR) Conference	34
--	----

_EVENTS

KLRCa Certificate in Adjudication	35
-----------------------------------	----

_EVENTS

Sports Law Conference 2016	36
----------------------------	----

_ANNOUNCEMENT

KLRCa signs MOU with The Sharjah International Commercial Arbitration Centre (Tahkeem)	
--	--

KLRCa signs MOU with Taylor's University	37
--	----

_ANNOUNCEMENT

KLRCa around the globe	38
------------------------	----

_LEGAL UPDATES

	40
--	----

_EVENT CALENDAR

	43
--	----

Newsletter #23 /
Jul-Dec 2016

PP6818/12/2012 (031379)

Published by:

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia
T +603 2271 1000 F +603 2271 1010 E enquiry@klrca.org W www.klrca.org

The Centre invites readers to contribute articles and materials of interest for publication in future issues. Articles and materials that are published contain views of the writers concerned and do not necessarily reflect the views of the Centre.

Information in the newsletter has been compiled or arrived at from sources believed to be reliable and in good faith, but no representation, expressed or implied, is made as to their accuracy, completeness, or correctness. Accordingly the Centre accepts no liability whatsoever for any direct, indirect or consequential loss or damage arising from the use of information in this newsletter, reliance or any information contained herein, any error, omission or inaccuracy in any such information or any action resulting therefrom. This newsletter is also available on our website, <http://klrca.org/newsletters/>

Director's message



Dear distinguished friends,

As 2016 draws to a close, we bring you this bumper issue to look back at the eventful year that KLRC has had and the progress made in the final half of 2016. Our role as an institution advocating alternative dispute resolution continues as we introduced more seminars, world-class conferences and training programmes.

As a dispute resolution centre, we strive to enhance the development of ADR in Malaysia. Indeed, this has been a progressive year for mediation. The Chief Justice of Malaysia issued a Practice Direction for Institutionalised mediation in July and in furtherance of this KLRC introduced a Pilot Scheme for Construction Mediation. The KLRC also organised a Mediation Forum as well as the CI Arb Mediation Training Programme in November.

As globalisation and cross-border economic opportunities increase, it is pertinent that we expand our knowledge on how best to protect the interest of parties involved and create an environment that supports fair trade and investments in the region. Thus the month of July saw the organisation of the first ever KLRC Summer Academy on International Investment Law and Dispute Settlement.

Following the success of the inaugural IPBA-KLRC Asia-Pac Arbitration Day in 2015, we hosted the second Asia Pac Arbitration Day in September. Attended by over 150 delegates from across the region, the event was an excellent gathering of bright minds exchanging expertise on Arbitration.

KLRC as a centre that prides itself on innovation introduced the KLRC Certificate in Sports Arbitration. Having identified a crucial need for development in this niche area of law, this course was held as a measure to assist sports stakeholders to familiarize themselves with the technical aspects of dispute resolution in sports.

This has indeed been a busy 6 months as amongst the numerous courses and conferences conducted, we also hosted 4 additional evening talks. Ranging from family arbitration to digital law, these talks saw keen participation from legal practitioners.

Featured in this issue is Lord Saville of Newdigate's keynote address from the IPBA-KLRC Asia-Pac event, as he shares some of his insights on International Arbitration. Readers will also be able to get insights on the annulment of investment arbitration awards from The Investment Treaty Arbitration Review under the highlights portion of this issue.

KLRC continues to advocate the use of statutory adjudication under the Construction Industry Payment and Adjudication Act 2012. This year the Centre recorded more than double the amount of adjudication cases from 2015. Continuing the efforts to ensure that there is a competent pool of adjudicators, KLRC conducted its second Adjudication Training Programme of the year, attracting 70 aspiring adjudicators.

It has been a remarkable year, with two more cooperation agreements being signed to facilitate further knowledge and expertise exchange along with building capacity.

I would like to take this opportunity to wish you all a progressive 2017, and thank you for the continuous support.

Until next time, happy reading.



Datuk Professor Sundra Rajoo
Director of KLRC

Visitor's gallery

KLRCAs welcomes visits from various local and international organisations as it provides a well-fortified platform to exchange knowledge and forge stronger ties.



➤ Visit by Master Builders Association Malaysia
• 17th August 2016



➤ Visit by YB Dato' Sri Azalina Othman (Minister in the Prime Minister's Department) • 23rd August 2016



➤ Kuala Lumpur Open City Architectural Tour 2016
• 22nd October 2016



➤ Visit by the Institution of Engineers Malaysia
• 27th October 2016



➤ Visit by Universitas Bung Hatta and University Kebangsaan Malaysia • 21st November 2016



➤ Visit by Jeff Leong, Poon & Wong with GuangXi counterparts • 18th November 2016



➤ Visit by Hainan Arbitration Commission
• 14th December 2016

_ANNOUNCEMENT

Pilot Project for Court Annexed Construction Mediation

Greetings from the KLRCA!

The KLRCA in association with the Society of Construction Law, Malaysia (SCL) and the Chartered Institute of Arbitrators, Malaysia is pleased to announce its Pilot Scheme for construction mediation. This is in furtherance of the Practice Direction No. 4 of 2016 issued by the Chief Justice of Malaysia with effect from 15th July 2016 which provides for institutionalised mediation.

In order to promote mediation and the Direction from the Court, the KLRCA will sponsor 10 mediations referred by the Honourable Courts at no costs to either party. This is further supplemented by accredited and qualified mediators from the SCL, also empanelled with the KLRCA, who have graciously sponsored their time and expertise at no extra cost to the parties.

This project is aimed at promoting the use of institutional mediation to arrive at an amicable settlement before trial or appeal, and is greatly encouraged by the courts in Malaysia.

The KLRCA has already received enquiries and is looking forward to the successful conduct of the Pilot project.

Thank you.

Yours sincerely,

A handwritten signature in black ink, which appears to read "Sundra Rajoo".

Datuk Professor Sundra Rajoo

Director of KLRCA

10th November 2016



Knowledge sharing and capacity building is a cornerstone of KLRC's policy with regard to investment arbitration. The KLRC commonly shares with various players, eclectic types of resources and expertise, and cultivates with them a dynamic information and discussion platform through seminars, conferences and numerous events.

Following the success of its first International Investment Arbitration Conference (KIIAC 2016) – the biggest ever held in Asia – in March 2016, the KLRC proudly organised the first KLRC Summer Academy on International Investment Law and Dispute Settlement (the “Academy”) with Clifford Chance (Singapore) as the official partner of the Academy.

The Academy, designed for government officials, lawyers, specialists, practitioners, professors, researchers and students ran from 25 to 29 July 2016. The Academy provided participants with the essential theoretical and practical skills to understand and deal with investment disputes under bilateral and multilateral investment treaties.

EVENTS

Summer Academy

on International Investment
Law and Dispute Settlement

25th July – 29th July 2016



The intensive one week course provided the participants ample opportunities to engage in academic discussions and exchange their views in the sessions held. Leading practitioners and experts from around the world ensured that the participants were aware of the rights and obligations under bilateral and multilateral investment treaties and able to make full use of the opportunities for access to the dispute settlement procedures.

Apart from the knowledge sharing and lessons, participants were taken on an excursion to the Islamic Arts Museum Malaysia at the conclusion of the third day.



The Course concluded successfully with the participants demonstrating their skills and experience in the Moot Court scenario held on the final day of the Academy.



COURSE SPEAKERS:

Datuk Professor Sundra Rajoo | Director of the KLRC

Dr Ioannis Konstantinidis | Former Head of investment treaty arbitration and international law, KLRC

Dr Sufian Jusoh | Associate Professor at the Institute of Malaysian and International Studies (IKMAS)

Olga Boltenko | Senior Associate, Clifford Chance (Singapore)

Dr Sam Luttrell | Counsel, Clifford Chance (Perth)

SESSIONS:

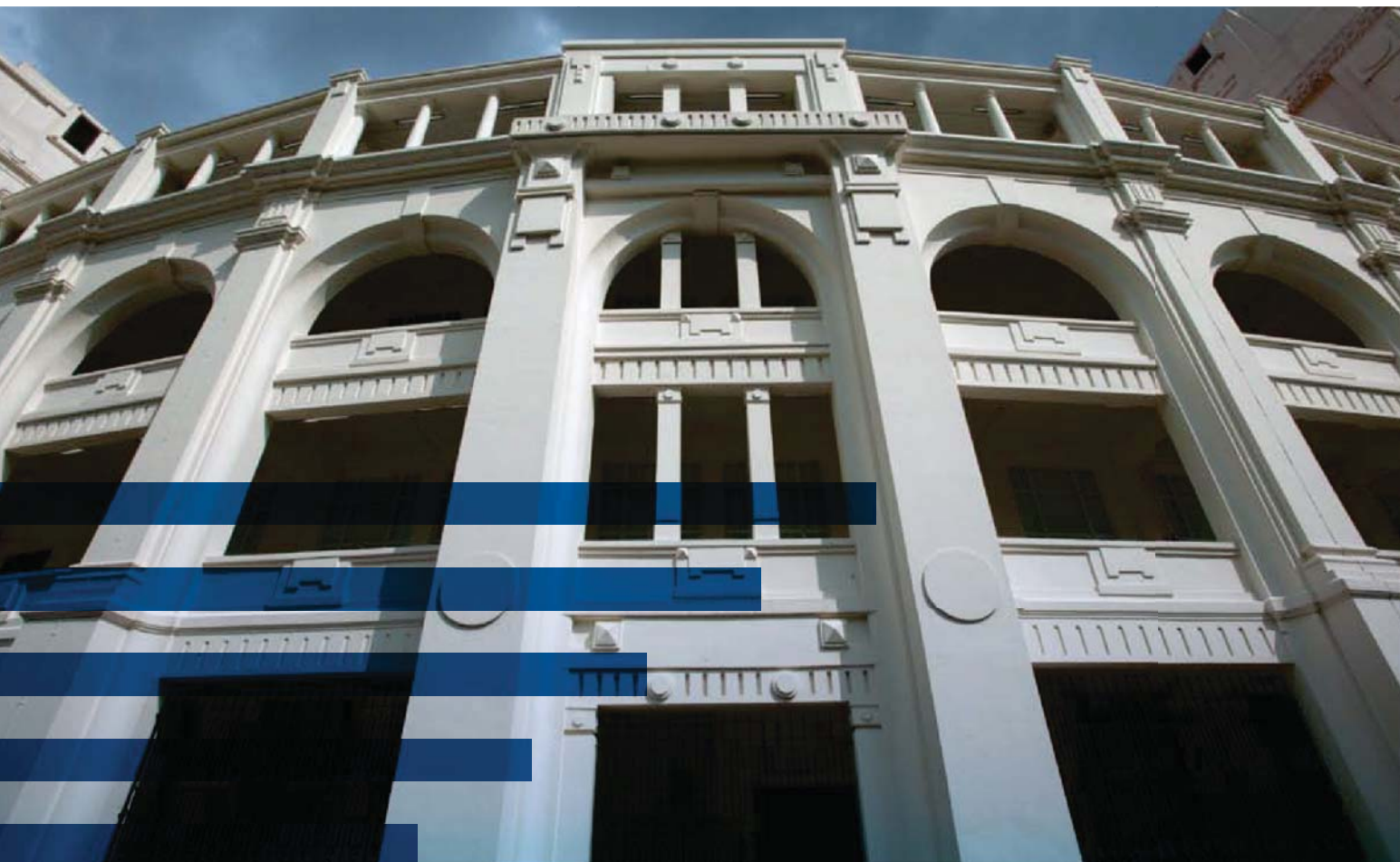
Day 1: Monday 25 July 2016
Introduction to Public International Law/International Investment Law and Substantive Protection under Investment Treaties

Day 2: Tuesday 26 July 2016
Standards of Protection and Other Substantive Clauses in Investment Treaties

Day 3: Wednesday 27 July 2016
Dispute Settlement under Bilateral and Multilateral Investment Treaties

Day 4: Thursday 28 July 2016
Jurisdiction, Admissibility, and Procedural Issues in Investor-State Arbitration

Day 5: Friday 29 July 2016
Moot Court



INVITATION TO THE FIRST **ICC / KLRCA PRE-MOOT**

FOR THE WILLEM C. VIS INTERNATIONAL COMMERCIAL
ARBITRATION MOOT COURT COMPETITION

DATE: MARCH 17-19, 2017

VENUE: Kuala Lumpur Regional Centre for Arbitration
Bangunan Sulaiman, Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia



Dear students and coaches,

On behalf of the KLRCA and the ICC, we are delighted to invite you to participate in the First ICC/KLRCA Pre-Moot for the Willem C. Vis International Commercial Arbitration Moot Competition.

The event will be held at the state-of-the-art facilities of the KLRCA on March 17-19, 2017, and will bring together established arbitration practitioners, academics and students from different corners the world.

To express your interest as a team or arbitrator, we kindly request you to fill out and send the attached registration form to: pre-moot@klrca.org

We look forward to welcoming you in Kuala Lumpur and will update you with a Preliminary Program, Awards and List of Social Events soon.

Best regards,

Organising Committee
Of the First ICC/KLRCA Vis Pre-Moot

Please complete the application form and return by 11:59 p.m., 15th Feb 2017, (Malaysian Standard Time) to pre-moot@klrca.org. Registered teams will be contacted by the ICC KLRCA Organising Committee.

SOCIAL EVENTS

Please indicate your interest in attending social events to be organised during the First ICC KLRCA Vis Pre-Moot. For more information, please contact us at: pre-moot@klrca.org.

ACCOMMODATION

Please note that the Organising Committee of the First ICC KLRCA Vis Pre-Moot will provide stipends to cover accommodation costs for a limited number of teams on a first-come-first-serve basis. Up to RM1,200.00 per team. Contact us at pre-moot@klrca.org to find out more.

AWARDS

A number of awards, including internships with the KLRCA, will be provided to the best teams.

Institution details

Name of College/University:

Whether participating in: ☐ Vienna ☐ Hong Kong ☐ Both

(Please note that each institution must register only once. If there are two separate teams participating in the Vienna and Hong Kong rounds and both teams are interested in participating in the pre-moot, both teams should register together within the same form. In the event of a common contingent travelling to both competitions, please fill only under the option for Vienna. In case of a common contingent, please clearly indicate oralists of each moot as pursuant to Rule 32, oralists must be different in the two moots)

Principal contact information

(Please make sure that the information below will be valid from now until the end of the First ICC KLRCA Vis Pre-Moot)

First and last name:

Email: Mobile:

_HIGHLIGHT

Annulment of Investment Arbitration Awards

(The Investment Treaty Arbitration Review)

By **Datuk Professor Sundra Rajoo**, Director, KLRC

The first edition of *The Investment Treaty Arbitration Review* was recently published by the Law Business Research. This publication consists of 15 chapters, categorised under 5 parts.

Part 1 – Jurisdiction

Part 2 – Admissibility and Procedural Issues

Part 3 – Damages

Part 4 – Post Award Remedies

Part 5 – Multilateral Treaties

KLRC's Director, Datuk Professor Sundra Rajoo authored and contributed a chapter under Post Award Remedies. His contribution, Chapter 12 – Annulment of Investment Arbitration Awards is published below with permission from Law Business Research Ltd.

THE INVESTMENT TREATY ARBITRATION REVIEW

EDITOR
BARTON LEGUM

LAW BUSINESS RESEARCH



ABOUT THE AUTHOR

Datuk Professor Sundra Rajoo Rajoo is the director of the Kuala Lumpur Regional Centre for Arbitration (KLRC) and current president of the Chartered Institute of Arbitrators (CI Arb) Global. His roll of honour includes being founding president of the Society of Construction Law, Malaysia and past president of the Asia Pacific Regional Arbitration Grouping (APRAG), which is a federation of nearly 40 arbitral institutions in the Asia-Pacific region.

Datuk Professor Sundra Rajoo is a Chartered Arbitrator and an advocate and solicitor of the High Court of Malaya (non-practising). He is a professional architect, registered town planner and a Fellow of the Royal Institution of Chartered Surveyors. He has had numerous appointments as chairman, co-arbitrator of three-man panels and sole arbitrator in international and domestic arbitrations. He serves on the panel of numerous international arbitral institutions and organisations.

He is a visiting professor at the Faculty of Built Environment, University of Technology Malaysia and a visiting professor and external examiner at the Faculty of Law, National University of Malaysia. He is a member in the Monetary Penalty Review Committee set up under the Malaysian Financial Services Act 2013.

Datuk Professor Sundra Rajoo has authored several books on arbitration and contract law, including, "Law, Practice and Procedure of Arbitration" (2003); "The Malaysian Standard Form of Building Contract (The PAM 1998 Form)" (1999); the Arbitration title for Halsbury's Laws of Malaysia (2002); "The Malaysian Arbitration Act 2005 (Amended 2011) – An Annotation" (2013); and "Law, Practice and Procedure of Arbitration 2nd Edition" (2016). He was also the co-author of "Arbitration Act 2005 – UNCITRAL Model Law as Applied in Malaysia" (2007), "The PAM 2006 Form" (2010), "Construction Law in Malaysia" (2012) and "Arbitration in Malaysia: A Practical Guide" (2016).

In July 2015, Datuk Professor Sundra Rajoo was conferred an Honorary Doctorate in Laws from the Leeds Beckett University in England.

Editorial Note:

Reproduced with permission from Law Business Research Ltd. This article was first published in *The Investment Treaty Arbitration Review*, 1st edition (published in April 2016 – editor Barton Legum). For further information please email Nick.barette@lbresearch.com

THE INVESTMENT TREATY ARBITRATION REVIEW

Chapter 12

ANNULMENT OF INVESTMENT ARBITRATION AWARDS

Sundra Rajoo¹

I INTRODUCTION

Annulment is a mechanism utilised as a post-award remedy aiming to nullify and invalidate an arbitral award. The increasing number of unsuccessful applications for annulment in the past few years reflects the impact of previous experiences on the awards rendered by arbitral tribunals and expresses the maturity of the system.

The purpose of this article is to compare and contrast the annulment mechanism in relation to ICSID and non-ICSID systems and to analyse the different ways of pursuing the annulment of an investment award. In addition, it exposes issues and inconsistencies in the current practice of annulment of an investment award and briefly discusses how the system can be improved.

II OVERVIEW OF THE ANNULMENT MECHANISM

i What is annulment in investment arbitration?

Investment arbitration offers litigants a few options when it comes to post-award remedies. Rectification, supplementation, revision and interpretation are methods of resubmitting issues to the same tribunal that rendered the final award.²

The modern system of international arbitration is guided by the principle of finality, which involves the sacrifice of usual methods of review to obtain greater efficiency and

Post-Award Remedies

economy.³ The national court logic of establishing a multi-tiered appeal mechanism that submits decisions to the better judgment of a superior court usually extends the time needed for a final judgment and subsequent enforcement.

The annulment procedure is designed to preserve the legitimacy of the process of decision-making contained in the award.⁴ It is a safeguard mechanism that protects the integrity of the law contained without addressing issues of substantive accuracy of awards. It is an exceptional remedy designed for specific causes.

Annulment struggles with the increasing number of awards being challenged and the complexity involved in those cases. In particular, it faces the problem of crafting a coherent system that reconciles the principle of finality with the correctness of an award, both essential to investment arbitration.⁵

Investor–state dispute settlement presents no unified legal regime that governs annulment proceedings. There is a dichotomy between a self-contained regime⁶ and another that uses extended rules of review designated for commercial arbitration awards.⁷

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention or the ICSID Convention)⁸ established the ICSID system, a fully autonomous procedure where arbitration is independent from any national legal system. This self-contained regime is extended to all phases of the arbitral process, including enforcement and annulment of awards.⁹

Recognition and enforcement of non-ICSID awards is not automatic, as it may be refused under certain conditions set forth by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).¹⁰ Should a party

- 3 C Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope', *The Law and Practice of International Courts and Tribunals*, v. 10, 2011, pp. 216–217.
- 4 R Dolzer and C Schreuer, *Principles of International Investment Law* 2nd ed., Oxford, Oxford University Press, 2012, p. 302.
- 5 M Kinnear, 'Appeal, review, annulment ... What's it all about?', 2015, available at: <http://isdsblog.com/2015/10/23/icsid-guest-post-appeal-review-annulment-whats-it-all-about/> (accessed 1 February 2016).
- 6 The ICSID system has been described as a self-contained regime because it provides specific rules for arbitration, annulment, revision and enforcement.
- 7 J Fernández-Arnesto, 'Different Systems for the Annulment of Investment of Investment Awards', *ICSID Review*, v. 26, 2011, pp. 131–132.
- 8 The Convention on the Settlement of Investment Disputes between States and Nationals of Other States was signed on 18 March 1965 in Washington, DC. It established the International Centre for Settlement of Investment Disputes (ICSID) under the auspices of the World Bank.
- 9 P Bernardini, 'ICSID Versus non-ICSID Investment Treaty Arbitration', p. 9, available at: www.arbitration-icca.org/media/4/30213278230103/media012970223709030bernardini_icsid-vs-non-icsid-investent.pdf (accessed 1 February 2016).
- 10 Article V of the New York Convention, available at: www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (accessed 1 February 2016).

1 Sundra Rajoo is the director of the Kuala Lumpur Regional Centre for Arbitration and current president of the Chartered Institute of Arbitrators.

2 C Schreuer, 'Revising the System of Review for Investment Award', BIICL, 2009, available at: www.univie.ac.at/intlaw/wordpress/pdf/99_rev_invest_awards.pdf (accessed 1 February 2016).

want to oppose the enforcement of an award, it has the prerogative to pursue its setting aside at the place where it was rendered. The situs of the arbitration plays an undeniable controlling role in ascertaining the correctness of a decision.¹¹

The Model Law on Commercial Arbitration of the United Nations Commission on International Trade Law (the UNCITRAL Model Law)¹² successfully sets forth the basis for setting aside an arbitral award.¹³ Under those grounds, national courts are entrusted with the analysis of an award without exercising an extensive *de novo* revision over issues settled by an award.

ii How is annulment used?

The challenges to an investment award under the ICSID Convention are submitted to an annulment committee formed on a case-by-case basis and appointed by the president of ICSID's administrative council. The designated *ad hoc* committee has limited powers to analyse grievous mistakes that may cause nullity to awards issued over treaty or contractual cases. This 'arbitration-based process' protects a decision made by an annulment committee against intervention or interference by a national court.¹⁴

The application for the annulment of a non-ICSID investment award follows the same logic as the setting aside of a commercial arbitration award. The *vacatur* of an investment award is a challenge against the recognition and enforcement of an award at the courts of the seat of the arbitration. It is a process that must comply with the legal framework established by national laws.¹⁵

An analysis based on the numbers of challenged investment awards shows that the majority of annulled awards refer to ICSID cases. A total number of 63 annulment proceedings generated 13¹⁶ full or partial annulments. In comparison, out of the 46 cases brought to national courts for setting aside, only five awards were annulled.¹⁷

11 C F Dugan, D Wallace Jr, N D Rubins and B Sabihi, *Investor-State Arbitration*, Oxford, Oxford University Press, 2008, p. 627.

12 UNCITRAL Model Law on Commercial Arbitration, available at: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (accessed 1 February 2016).

13 A J van den Berg, 'Should the Setting aside of the Arbitral Award Be Abolished?', ICSID Review, 2014, pp. 4–5.

14 Idem.

15 C F Dugan et al., *Investor-State Arbitration*, op. cit., p. 635.

16 The updated number of proceedings and annulled awards represent the findings of 'The ICSID Caseload – Statistics (Issue 2015-2)', available at: [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20\(English\).pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20(English).pdf) (accessed 1 February 2016).

17 K Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review', *Journal of International Arbitration*, v. 32, n. 6, 2015, pp. 621–623.

III FUNDAMENTAL ASPECTS OF THE ANNULMENT MECHANISM

i Annulment of ICSID awards

The Washington Convention, in its Article 53, envisages the prompt enforcement of the arbitration award. It defines that ICSID awards are binding upon the parties without the possibility of being subjected to any appeal or remedy, with the exception of those provided by the Convention in its Articles 50 to 52.¹⁸

Article 52(1) of the ICSID Convention establishes the hypothesis where a party may request the annulment an award. The general grounds for challenging an award are: (1) the improper constitution of the arbitral tribunal; (2) manifest excess of powers, lack, excess or non-exercise of jurisdiction, and the failure to apply proper law; (3) the arbitral tribunal was involved in corruption; (4) the tribunal's decisions present a serious departure from a fundamental rule of procedure, there is lack of impartiality, they threaten the parties' right to be heard, lack of proper deliberations, and lack of opportunity to present evidence and proof; (5) the tribunal's failure to state the reasons of the decision, silence or absence of reasons, insufficient or inadequate reasons, contradictory reasons, or failure to address all the issues in dispute.

Improper constitution of the arbitral tribunal

The improper constitution of the arbitral tribunal is regulated by Chapter IV, Section 2 of the ICSID Convention. Regardless of not being a recurrent ground for pursuing annulment, this issue was brought up at the annulment proceedings in *Vivendi v. Argentina II*.¹⁹

On its application for annulment, Argentina affirmed that the tribunal was not properly constituted and had no powers to hear the dispute. It argued that an arbitrator lacked the impartiality requirements imposed by the ICSID Convention because she occupied an important position at a company interested in the dispute. Furthermore, it contended that by not revealing this fact and by refusing to step down, the arbitrator created, objectively viewed, a conflict of interest that was incompatible with the necessary appearance of impartiality required of an ICSID arbitrator.²⁰

After criticising the arbitrator's conduct, the annulment committee decided not to annul the award. They reasoned that the arbitrator's judgment was not impaired, 'despite most serious shortcomings', because she was unaware of an existing conflict of interest until after the rendering of the award.²¹

18 Articles 50, 51 and 52 deal, respectively, with interpretation, revision and annulment of arbitration awards.

19 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Second Annulment.

20 Ibid., para. 77.

21 Ibid., para. 238.

Annulment of Investment Arbitration Awards

Manifest excess of powers

The first two annulment cases before ICSID, *Klöckner v. Cameroon*²² and *Amco Asia v. Indonesia*,²³ were challenged and annulled on the basis of excess of powers of the arbitral tribunal. In both cases, the annulment committees were criticised for crossing the line between annulment and appeal, and exercising an extensive examination of the merits.²⁴ The boundaries between jurisdictional issues and the applicable law became a highly complex problem to solve.

The argument of failure to apply the proper law is a recurrent ground for pursuing the annulment of an award. In spite of not being expressed *ipsis litteris* by the ICSID Convention, it is understood that the application of the proper law is an essential part of the tribunal's powers granted by the parties' agreement.²⁵

The annulment committee in *El Paso v. Argentina*,²⁶ emphasised the 'manifest' aspect of the jurisdictional excess of powers analysis. The *ad hoc* committee reached the conclusion that the wording of Article 52 of the ICSID Convention should be interpreted as 'obvious, clear, self-evident, and extremely serious'.

In *Soufraki v. UAE*,²⁷ the annulment committee refused to annul the award and set up a crucial distinction between 'failure to apply the proper law' – which is a reason for annulment – and an 'error in the application of the law', which is not a ground for annulment.

Similarly, in *CMS v. Argentina*,²⁸ the *ad hoc* committee considered that annulment is not an automatic response to the presence of errors in an award.

The thin line between improperly applying the law and failing to apply the law is an easy one to cross. On dismissing the application for annulment in *Duke Energy v. Peru*,²⁹ the *ad hoc* committee provided a clear interpretation of the concept of proper law. The committee pointed out that the proper law criteria refer to an entire legal system of a contracting state and the 'whole of the law', which cannot be restricted to a 'particular portion of it'.³⁰

In *Sempra v. Argentina*,³¹ the annulment committee reasoned that because of its 'egregious nature', in 'exceptional cases', a manifest error of law may be equivalent to

Post-Award Remedies

a manifest excess of powers. Likewise, in *Enron v. Argentina*,³² the *ad hoc* committee annulled the arbitration award on the basis that the tribunal failed to address Argentina's argument. The necessity defence was not properly interpreted in connection with a specific provision of the bilateral investment treaty.

Another issue of interpretation may arise out of the concept of investment. In *Malaysian Historical Salvors v. Malaysia*,³³ the annulment committee was criticised for creating a different notion of investment. The tribunal applied an overly restrictive definition to the term when it included the jurisdictional element of 'contribution to the economic development of the host State'.³⁴ The annulment committee considered that the tribunal's restrictive interpretation of the term 'investment' diverged from the broad definition provided by the bilateral investment treaty and it was not in line with the ICSID Convention.

More recently, in *Occidental v. Ecuador*,³⁵ the annulment committee found that the tribunal had exceeded its powers by 'compensating a protected investor for an investment which was beneficially owned by a non-protected investor'. As a result, it annulled the quantification of damages reducing the value of compensation. It is worth noting that the *Occidental Petroleum ad hoc* Committee decision differs significantly from recent annulment decisions, where tribunals refused to examine the real beneficial ownership of the investment.

Grave departure from a fundamental rule of procedure

The *Fraport*³⁶ case represents a procedural heavy battle that took place between a potential investor and the Philippines, which resulted in a partial award recognising the lack of jurisdiction of the arbitral tribunal. The award was successfully challenged on the grounds of a grave departure from a fundamental rule of procedure. The annulment committee had to analyse whether the tribunal's decision to disregard a motion filed by the claimant containing substantive information had an impact on the final judgment of the award.

The *ad hoc* committee annulled the award and stated that Article 52(1)(d) was meant to control the integrity of the arbitral process and the fundamental rules of procedure, which included the right to be heard.³⁷

22 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise de Engrais*, ICSID Case No. ARB/81/2.

23 *Amco Asia Corp. & others v. Republic of Indonesia*, ICSID Case No. ARB/81/1.

24 C Schreuer, 'Three Generations of ICSID Annulment Proceedings', available at: www.univie.ac.at/intlaw/wordpress/pdf/69.pdf (accessed 1 February 2016).

25 C Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope', op. cit., p. 223.

26 *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15.

27 *Husein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7.

28 *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision, para. 158.

29 *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28.

30 *Ibid.*, para. 96.

31 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Annulment Decision, para. 164.

32 *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3.

33 *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10.

34 T-H Cheng, 'The Role of Justice in Annulling Investor-State Arbitration Awards', *Berkley Journal of International Law*, vol. 31, n. 1, 2013, p. 265.

35 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Annulment Decision.

36 *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25.

37 T-H Cheng, 'The Role of Justice in Annulling Investor-State Arbitration Awards', op. cit., p. 262.

Failure to state reasons

In *Klöckner*,³⁸ the annulment committee ruled in favour of annulling the award against Cameroon on the grounds of failure to state the reasons. The *ad hoc* committee confirmed that the tribunal failed to explain why it applied a particular rule that would affect the statute of limitations under the contract.³⁹ The annulment committee was heavily criticised for making a detailed examination of every aspect of the ICSID review process and analysing substantive and factual questions. It mentioned that the criteria for analysing the reasoning expressed by the tribunal should not be 'purely formal or apparent'. It concluded that the reasoning must be 'sufficiently relevant' and have 'some substance' to provide the basis for a decision.⁴⁰

In *Amco*,⁴¹ the award against the host state was annulled after an extensive revision of facts and the applicable law. The annulment committee elaborated over the requirement of 'sufficiently relevant' reasoning, established by *Klöckner*, and created a higher standard by demanding 'sufficiently pertinent reasons'.⁴²

In this context, it is worth referring to *MINE v. Guinea*.⁴³ The *ad hoc* committee distanced itself from the previous annulment cases when it reinforced the principle of finality of the award. It considered that only frivolous or contradictory reasons would satisfy the minimum requirement for annulment.⁴⁴

The *ad hoc* committee in *CMS*⁴⁵ faced an award with several mistakes and lacunae on the application of the law and interpretation of a bilateral investment treaty. However, the committee argued that even if the reasoning were flawed and although applying the law 'cryptically and defectively, it applied it'.⁴⁶

ii Annulment of non-ICSID awards

Article 34 of the UNCITRAL Model Law provides the grounds for the setting aside of arbitration awards.⁴⁷ In spite of providing clear guidelines,⁴⁸ these provisions can read differently when in the context of several arbitration laws. The implementation of the Model

Post-Award Remedies

Law is not uniform and leaves room for states to deviate in certain respects.⁴⁹ Nevertheless, an overview of case law demonstrates that national courts conduct a careful examination when faced with applications for setting aside an award.

Validity of the arbitration agreement

The attacks on awards on the grounds of a violation of the arbitration agreement is a manifold option for those seeking to annul an award. Under its umbrella, this ground for setting aside includes issues of consent, formal requirements, content of the agreement, and scope of the arbitration.

Problems arising out of consent to arbitrate are a recurrent issue in annulment proceedings. In *OKKV v. Kyrgyz Republic*⁵⁰ and in *Stans Energy v. Kyrgyz Republic*,⁵¹ both awards were annulled by Russian courts on jurisdictional grounds because of the contracting state's lack of consent to arbitrate.

Regarding the scope of the agreement, the Singaporean High Court ruled in favour of the annulment of *Sanum Investment v. Laos*.⁵² It ruled that the parties had no intention of extending the application of a bilateral investment treaty to a territory of the contracting state. A different approach was taken by the Swedish courts when they dismissed the arguments for annulment in *Kyrgyz Republic v. Petrobart Ltd*. In that case, the tribunal decided to apply provisionally the Energy Charter Treaty to investors from Gibraltar, a UK territory.

Due process of law

Procedural fairness embodies the principle of natural justice and it is, perhaps, the most common ground for challenging an arbitration award. The protection of the proper conduct of the proceedings is a constant in almost all national laws and arbitration statutes, and this concept is almost indissociable from public policy concerns.⁵³

These types of challenge, however, tend not to be fruitful. Investment arbitration tribunals meticulously observe procedural rules in the context of their broad powers to combine civil law and common law elements and create a flexible practice that differs from a court system, but at the same time provide the parties with equal opportunities to present their cases.⁵⁴

Excess of authority

Among the examples of excess of authority, the *ultra petita*⁵⁵ judgment, the failure to apply the proper law, and the tribunal's disregard of the parties' choice of law are clear-cut definitions of conduct that exceeds the powers granted to the arbitral tribunal.

38 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise de Engrais*, op. cit.

39 *Ibid.*, p. 257.

40 *Idem.*

41 *Idem.*

42 *Idem.*

43 *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4.

44 K Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review', op. cit., p. 660.

45 *CMS Gas Transmission Co. v. Argentine Republic*, op. cit.

46 *Ibid.*, para. 136.

47 See Article 34 of the UNCITRAL Model Law.

48 UNCITRAL Model Law, Part Two, Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, Section B. 7.

49 A J van den Berg, 'Should the Setting aside of the Arbitral Award Be Abolished?', op. cit., p. 6.

50 *OKKV (OKKB) and others v. Kyrgyz Republic*, Russian Award, 21 November 2013.

51 *Stans Energy v. Kyrgyz Republic*, Moscow Arbitrazh Court, 25 May 2015.

52 *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13.

53 C F Dugan et al., *Investor-State Arbitration*, op. cit., p. 643.

54 *Idem.*

55 A decision that goes beyond the scope of the matters submission to arbitration.

Annulment of Investment Arbitration Awards

In *CME v. Czech Republic*, the Swedish Court of Appeals stated that the award had to be set aside because of the arbitrators' 'evident' application of a law of a different country in violation of the parties' agreement.⁵⁶

The consolidation of different proceedings was argued on multiple setting-aside proceedings. The results, however, were mostly unfavourable to the applicants. The French Court of Cassation reversed the annulment of an award in *Organisation pour l'investissement et l'assistance économique et technique en Iran c. Société Eurodif et Sodedif et Commissariat à l'énergie atomique*.⁵⁷ Similarly, in *Karaha Bodas Company v. Pertamina*,⁵⁸ a US court rejected a challenge brought against an award rendered in Switzerland under the UNCITRAL Rules that ruled on the consolidation of claims arising out of closely related projects.⁵⁹

Failure to state reasons and manifest disregard of the law

Failure to state reasons is not a usual ground for pursuing the setting aside of an award before national courts. State courts have taken a restrictive approach to this concept by presenting higher thresholds for its interpretation. In the United Kingdom, a failure to state reasons can be indicative of a 'serious irregularity', a circumstance where an award expresses no conclusion to a specific claim or argument.⁶⁰

In the United States, the failure to state reasons is not considered to be part of the grounds for vacating a decision; however, the issue of manifest disregard of the law has been brought before US federal courts in different circumstances.

The legal concept commonly utilised by the US courts was established by the decision in a commercial arbitration case, *Wilco v. Swan*,⁶¹ and considers a manifest disregard of law as 'situations in which it is evident, from the record, that the arbitrator recognised the applicable law, yet chose to ignore it'.

Public policy

The violation of public policy is frequently invoked by parties as grounds for seeking to have an award set aside. It brings national courts into the merits of the dispute, to evaluate whether the arbitrators substantively rendered an unjust or morally unconscionable decision.⁶²

Public policy has no specific definition. It is a broad term with multiple interpretations under different legislative systems. As a concept, however, it can be analysed on the basis of its scope of application. It is generally accepted that domestic public policy is broader than international public policy and that both are broader than transnational public policy.⁶³

Post-Award Remedies

A frequently cited explanation of public policy defines it as the state's 'most basic sense of morality and justice'.⁶⁴ In *Feldman v. Mexico*,⁶⁵ the Ontario Superior Court of Justice applied a similar test to dismiss the application for annulment. It maintained that to cause the setting aside of an award, a violation of public policy must 'offend the most basic and explicit principles of justice and fairness'.

As a rule, public policy grounds have been interpreted narrowly by national courts. In *Saar Papier v. Poland*,⁶⁶ the Swiss courts set aside the award and held that the incorrect interpretation of a bilateral investment treaty constituted a breach of general principles of international law, which violated international public policy.

In *SD Myers v. Canada*,⁶⁷ the application for the setting aside of the arbitration award based on the violation of international public policy was dismissed. The courts held that the award rendered by the tribunal was not 'patently unreasonable', 'clearly irrational' or 'totally lacking in reality' such as to create a 'flagrant denial of justice'.

iii Outcomes and effects of the annulled awards

Once an award is annulled, it ceases to exist and it can produce no legal effects. The operative part of the award is not affected by *res judicata*, therefore the underlying dispute continues unsettled.⁶⁸

According to Article 52(6) of ICSID,⁶⁹ parties interested in pursuing the dispute further must submit their claims to a new arbitral tribunal.⁷⁰

In jurisdictions influenced by the Model Law, an award set aside can be revisited by a national court, which may order the dispute to be sent back to the original arbitral tribunal, otherwise, a new tribunal will be entrusted with resolving the controversy.⁷¹

Furthermore, under non-ICSID systems, after an award is set aside at the seat of arbitration, it can be recognised and enforced by other states.⁷²

64 *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974).

65 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1.

66 *Saar Papier Vertriebs GmbH v. Poland*, UNCITRAL, Final Award, 16 October 1995.

67 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Final Award, 30 December 2002.

68 J Fernández-Arnesto, 'Different Systems for the Annulment of Investment of Investment Awards', op. cit., p. 142.

69 Article 52(6) of the ICSID Convention: 'If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter'.

70 *Klöckner II*, *Amco II*, and *Vivendi II* are examples of decisions disputes that were brought to arbitration after the annulment of their initial awards. See also P Rambaud, 'La compétence du tribunal C.I.R.D.I. saisi après une décision d'annulation', *Annuaire Français de Droit International*, vol. 34, 1988, pp. 209–215.

71 J Fernández-Arnesto, 'Different Systems for the Annulment of Investment of Investment Awards', op. cit., p. 142.

72 P Bernardini, 'ICSID Versus non-ICSID Investment Treaty Arbitration', op. cit., p. 35.

56 K Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review', op. cit., p. 657.

57 *OIAETI v. SOFIDIF*, Cour de Cassation, Decision of March 8, 1988, *Revue de l'Arbitrage*, 1987, p. 339.

58 *Karaha Bodas Co. L.L.C. v. Pertamina*, 190 F. Supp. 2d 936 (S.D.Tex. 2001), 125 S. Ct 59, 2004.

59 C F Dugan et al., *Investor-State Arbitration*, op. cit., p. 638.

60 K. Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review', op. cit., pp. 665–666.

61 *Wilco v. Swan*, 346 U.S. 427 (1953), 346 U. S. pp. 436–437.

62 C F Dugan et al., *Investor-State Arbitration*, op. cit., p. 643.

63 *Ibid.*, p. 640.

IV IS THERE A NEED FOR A REFORM?

Investor–state arbitration, the ICSID system in particular, has been criticised for creating a judicial environment where inconsistent decisions can coexist. Much has been discussed regarding the improvement of the system and the possibility of extending the scope of revision of an award.

It has become a routine for the losing party to try to overturn an award in annulment proceedings. Applications for annulment became complex documents that scrutinise unfavourable awards and attack several points of the decision under the grounds for annulment.⁷³

Some *ad hoc* committees have condemned the awards of the original tribunals. They have adopted the posture of a superior court and reprimanded tribunals for making mistakes on the application of the law.⁷⁴

An effective manner of controlling such annulment committee activism could be the introduction of a ‘material violation standard’. Implying that, to annul an award, the grounds for annulment need to be followed by a material impact upon the parties and the outcome of the case.⁷⁵

Alternatively, an appeal mechanism aiming to assure correctness and consistency is a recurrent topic of discussion. Crafting a coherent ICSID appeal mechanism would be a big task. It would require substantive restructuring of the system and require numerous alterations to the ICSID Convention.

Furthermore, the current set-up of the annulment committee is incompatible with the far-reaching review of an appellate process.⁷⁶ An appeal process that avoids exposing the award to the higher degree of experience of an appellate body would not serve its goals of achieving correctness. It would be a review of the award by another panel of three arbitrators that is unlikely to carry legitimacy or authority over this scrutiny.⁷⁷

An effective means of achieving judicial coherence and consistency could be the adoption of preliminary rulings. The model, as proposed by G Kaufmann-Kohler, envisages a situation where the tribunal can suspend the proceedings to request a decision on a question of law from another body established for that purpose.⁷⁸

V CONCLUSION

The annulment mechanism is an exceptional remedy that deals with extraordinary circumstances. As a consequence, ICSID and non-ICSID arbitration systems establish strict grounds to void awards rendered by international arbitral tribunals.

The self-contained ICSID regime possesses a unified annulment process that protects the award against the intervention of a national court. It offers clear-cut advantages if compared with the annulment of non-ICSID investment awards, where the recognition and enforcement of the awards, as well as the application for the setting aside of an award are subjected to review in multiple jurisdictions.

The ICSID practice sets forth principles that guide and explain the role of an annulment committee. It is well established that an *ad hoc* committee has a narrow and limited mandate that does not allow it to correct the law, but provides it with a minor discretion to reconstruct reasons if the tribunal failed to address the law.

Therefore, to improve the annulment regime and preserve the integrity of the system, without promoting drastic reforms, the current system could adopt a standardised criterion of material violation, or consider implementing the preliminary rulings model. With these updates, annulment of investment awards would be made in a consistent and cohesive manner.

73 C Schreuer, ‘From ICSID Annulment to Appeal Half Way Down the Slippery Slope’, op. cit., p. 213.

74 C Schreuer, L Malintoppi, A Reinisch and A Sinclair, *The ICSID Convention: A Commentary*, 2009 art. 52, pp. 210–232.

75 C Schreuer, ‘Revising the System of Review for Investment Award’, op. cit., p. 4.

76 See J Karl, ‘An Appellate Body for International Investment Disputes: How Appealing Is It?’, Columbia FDI Perspectives, Perspectives on Topical Foreign Direct Investment Issues, vol. 147, 2015, available at: <http://ccsi.columbia.edu/files/2013/10/No-147-Karl-FINAL.pdf>. See also Y Ngangjoh-Hodu and C Ajibo, ‘ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration’, *Journal of International Dispute Settlement*, vol. 6, n. 3, 2015, pp. 308–331.

77 C Schreuer, ‘Revising the System of Review for Investment Award’, op. cit., p. 2.

78 G Kaufmann-Kohler, ‘Annulment of ICSID Awards in Treaty Arbitrations: Are There Differences?’, in E Gaillard and Y Banifatemi (eds.), *Annulment of ICSID Awards*, Huntington, Juris Publishing, 2004, p. 199.

EVENTS

2nd IPBA-KLRCA Asia-Pac Arbitration Day 8th September 2016

Building upon the success of the inaugural IPBA-KLRCA Asia-Pac Arbitration Day in 2015, the second edition of the event was held on the 8th of September 2016 at the Kuala Lumpur Regional Centre for Arbitration.

The one day conference opened with remarks by Mohanadass Kanagasabai of Messrs Mohanadass Partnership who welcomed delegates to the event. This was followed by the keynote speech presented by The Rt. Hon. Lord Saville of Newdigate. Lord Saville addressed the three main aspects of Arbitration namely that arbitration as a method of dispute resolution must involve an impartial tribunal seeking to resolve the dispute without undue delay or expense, in accordance with what the parties have agreed, and with the minimum of interference by the courts. *[Keynote Address can be found on pages 19 – 26]*

This conference witnessed the participation of close to 150 delegates from across Asia. The 2nd IPBA-KLRCA Asia-Pac Arbitration Day provided an excellent opportunity for delegates to evaluate a wealth of information and exchange insights pertaining to the trending issues in the arbitration world.



SESSION 1 Guidelines: Their Legitimacy and Utility in International Arbitration

Virtually every reputable arbitral institute has come up with its set of guidelines on various aspects of arbitration. Which of these to choose and their potential legal impact and utility were among the issues in this session. The session included a discussion on the independence, impartiality and conflicts of interests in arbitration particularly the recent comments of the English Commercial Court in *W v M* 2016 EWHC 429 (Comm) on the IBA guidelines on conflict of interest arising from a dispute involving a Malaysian party.

MODERATOR: Kevin Prakash | Mohanadass Partnership, Malaysia
PANELISTS: Luke Parsons QC | Quadrant Chambers, UK
 Andrea Martignoni | Allens, Australia
 Khoo Guan Huat | Skrine, Malaysia



SESSION 2 Transparency in Arbitration Trumps Confidentiality



Moderated by Sudharsanan Thillainathan from Shook Lin & Bok, this session examined whether confidentiality is overrated as one of arbitration's strong points, and if arbitration is better served by embracing transparency. Issues for discussion included the role of transparency in arbitration, communications between arbitrators, the use of Tribunal appointed secretaries or assistants and potential transparency issues this might create, parties access to arbitrator's appointment history and previous awards.

MODERATOR: Sudharsanan Thillainathan | Shook Lin & Bok, Malaysia
PANELISTS: Denis Brock | O'Melveny & Myers, Australia
 Dato' Nitin Nadkarni | Lee Hishammuddin Allen Gledhill, Malaysia
 Dr. Christopher To | Counstruction Industry Council, Hong Kong
 Wendy Lin | Wong Partnership, Singapore

SESSION 3 Expert Evidence



Fact finders or advocates of their cause - An examination of how best to elicit the evidence of experts in an independent, effective, and non partisan manner with a view to achieving efficiency and cost benefits and key points in expert cross examination. The session witnessed a discussion on the CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration; biased experts in arbitration; encouraging early interaction and conferencing between party appointed experts; the benefit of joint statements and giving concurrent evidence during the hearing; and the role of the expert from a maritime law perspective.

MODERATOR: Dhinesh Bhaskaran | Shearn Delamore & Co, Kuala Lumpur
PANELISTS: Matthew Christensen | Bae Kim & Lee, Korea
 Iain Potter | MDD, Singapore
 Jeremy Joseph | International Malaysian Society of Maritime Law
 Rodney Martin | Charlton Martin, Malaysia

SESSION 4 Best Practices in International Arbitration



An interactive analysis of current issues in the arbitral process offering views from diverse cultural and legal backgrounds on best practices and navigating potential pitfalls. This session will examine best practices in arbitration including methods of reducing costs and time in arbitration including drafting the proper arbitration clause; mid-stream conferencing; crystallising issues after the exchange of the first memorials; confining disclosure with strict approach interim costs awards; directions on major issues to be dealt with in the Post Hearing Briefs, use of party-appointed experts as tribunal's experts at the last stage of the proceedings, Kaplan openings and experts' conclaves and examination.

MODERATOR: Sanjay Mohanasundram | Mohanadass Partnership, Malaysia
PANELISTS: Blossom Hing | Drew Napier, Singapore
 Gavan Griffith QC | Owen Dixon Chambers, Australia
 Urs Weber-Stecher | Wenger & Viele, Switzerland
 Hiroyuki Tezuka | Nishimura Asahi, Japan





FEATURE

Reflections on some Aspects of International Arbitration

By *The Rt. Hon. Lord Saville of Newdigate*

Editorial Note:

Lord Saville was the keynote speaker at the 2nd IPBA-KLRCA Asia-Pac Arbitration Day that took place at KLRCA's Auditorium on 8th September 2016. The following is the full transcript of Lord Saville's keynote address.

This is the second Arbitration Day co-hosted by the Inter-Pacific Bar Association and the Kuala Lumpur Regional Centre for Arbitration. I am greatly honoured to be invited to make the keynote address on this day. The first edition was by all accounts a great success, but I have some trepidation in following in the footsteps of Sir Jack Beatson, who made the widely acclaimed keynote address on that day.

In many ways, I am beginning to feel a little out of date. Although I still practice as an international arbitrator, my chief claim to fame, if that is the right expression, is chairing the Committee that promoted the passage of legislation through the UK Parliament, the Bill that became the Arbitration Act 1996. A main purpose of the Act was to encourage international arbitration to come to London.

That statute is now 20 years old; and I am 20 years older. Much has changed in the world of international arbitration, and I shall touch on some of those changes in the course of this address.

But some things have remained unchanged, and in my view should remain unchangeable.

In Part 1 of the English Act, the part that set out the operative provisions, we made these subject to three general principles. The principles were set out in Section 1 in the following terms:

- a. **the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;**
- b. **the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;**
- c. **in matters governed by this Part the court should not intervene except as provided by this Part.**

In essence, these principles encapsulate the idea that arbitration as a method of dispute resolution must involve an impartial tribunal seeking to resolve the dispute without undue delay or expense, in accordance with what the parties have agreed, and with the minimum of interference by the courts.

At this point I should take the opportunity to lay to rest the rumour that when we were preparing the 1996 Act we came under great pressure from arbitrators and arbitral institutions to add a fourth principle, namely that in no circumstances should arbitrators be overworked or underpaid.

I would like to touch on each of the three principles in the course of this address.

Turning to the third of these principles, the relationship between arbitration and the courts is one that in international arbitration has given rise, and continues to give rise, to differences of opinion.

Appeals on Questions of Law

A topic of lively interest in the UK at the moment is that of appeals to the court on questions of law arising out of arbitration awards. In Malaysia, of course, you have Section 42 of the Arbitration Act 2005, amended in 2011. Under this Section, there is a right of appeal to the court on questions of law that substantially affect the rights of one or more of the parties. However, unless the parties otherwise agree, this right of appeal does not apply to international arbitrations, but only to domestic ones.

This solution was not available to us in the United Kingdom, since any such distinction would fall foul of European Community law by drawing a distinction between UK citizens and citizens of other Community countries. There are sections of the English Arbitration Act which apply only to domestic arbitrations, but because of the constraints of European Community law these have never been brought into effect. However, now the United Kingdom has voted to leave the European Union, it is possible that there will be a move to resurrect these provisions. I personally hope not as I can see little reason for having two arbitration regimes in the United Kingdom.

In the course of drafting the 1996 Act, there was considerable discussion about this question of appealing to the courts on questions of law arising from the awards of arbitral tribunals. Some were in favour of having no right of appeal at all, (save perhaps where all parties agreed), pointing out that under the UNCITRAL Model Law, there is no such right. In the end, we reached a compromise solution, which in effect only allowed an appeal on questions of law (and only questions of English law) where there was real doubt that the arbitral tribunal had correctly applied the law.

The question of appeals has recently been revived in a lecture given by our Lord Chief Justice. In this lecture the Chief Justice pointed out that the

substantial limitations on the right to appeal from arbitration awards have led to many fewer cases coming to the courts, with the result that the development of English commercial law has been seriously hampered. He suggested that consideration should be given to expanding the right of appeal from arbitration awards in order to remedy this position, which he regarded as devaluing the status in which English commercial law was regarded throughout the world.

I am opposed to any such suggestion. To my mind parties choose to arbitrate because they do not want to go to court. Furthermore, I am far from convinced that parties are ready and willing to expend their own time and money in order for cases to come from arbitral awards to the courts, often wending their way up the appellate system to the Supreme Court. To my mind, to expand the right of appeal to the courts, with all the delay and extra cost this necessarily entails, is hardly consistent with the first of the principles to which I have referred, namely that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal *"without unnecessary delay or expense."*

If English commercial law is to develop, I do not see why the parties who have chosen to resolve their disputes in a private tribunal should have to pay in extra time and money for that development. In an article I wrote for the London Times newspaper I quoted from something that Lord Devlin said some 40 years ago, when there was a similar argument being raised about the need for appeals from arbitration awards. To those who were urging an extension of the right to appeal he observed: *"So there must be an annual tribute of disputants to feed the minotaur. The next step would, I suppose, be a prohibition placed on the settlement of cases concerning interesting points of law."*

In the same Times article, I concluded: *"To expand the right to appeal from arbitration awards would, far from helping to develop English law, be*

calculated instead to drive international commercial arbitration away from London, to the great loss of this country."

In my view, (and of course I would say this!) the balance that we struck in the English Arbitration Act on appeals on questions of English law is a fair compromise between two irreconcilable positions. There are those who regard any such interference by the courts as wholly contrary to the parties' agreement to resolve their disputes by arbitration instead of litigation. If the parties agree to litigate, all well and good; but if there is no such agreement, any interference by the court by way of challenge to the merits of the arbitral award in effect ignores and overrides their agreement to arbitrate rather than litigate.

This is a very powerful argument, supported of course by the fact that the Model Law provides for no right of appeal on the merits at all. However, there is a counter argument, which also relies on the agreement that the parties have made. This arises where the parties have chosen the law to govern their relationship, so that any disputes or differences are to be determined in accordance with that law. If, for example, the parties have chosen English law, it can be said with some force that the job of their arbitral tribunal is to decide the matter in accordance with that law. If it is obvious that the tribunal have clearly failed to apply English law properly, then it has failed to carry out the agreement that the parties have made; and only the court can put things right.

The answer that is given to arguments of this kind is that although the parties have agreed that their disputes are to be determined in accordance with their chosen law, their full agreement is that their disputes are to be resolved by their chosen arbitral tribunal applying what that tribunal considers to be the law, and that it matters not that a court would have reached a different conclusion on the law. Many years ago the late Sir Michael Kerr, a former judge of the English Court of Appeal and one of the leading figures in the recent developments in international arbitration in London, put it thus:

“Remember, when parties agree arbitration, they buy the right to get the wrong answer.”

The compromise we reached on what in the end are irreconcilable positions is to be found in Section 69 of the English Arbitration Act. Unless the parties otherwise agree, an appeal will only be granted where the court concludes that: –

- i. the decision of the tribunal on the question is obviously wrong, or
- ii. the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
- iii. that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

It remains to say that under the English Arbitration Act, the parties are free to exclude the right of appeal given by Section 69; while arbitral institutions such as the LCIA and the ICC, do likewise in their rules, either excluding the right of appeal altogether or providing that the parties must opt in to such a right rather than opt out. I should note at this stage that there seems to be some international misapprehension over the frequency with which Section 69 is successfully invoked in the United Kingdom, with people expressing the view that there is a constant stream of court cases. This is not so. In the last three years only about ten appeals were heard each year of which about six were allowed. Most of these, some 75%, were shipping cases. Over this period there were only five appeals to the Court of Appeal, of which only one was successful. There was only one appeal that reached the Supreme Court.

During the last few months there have been a number of seminars in London considering whether the 1996 Act, after twenty years, is now in need of reform. I am glad to report that the general view on this question of appeals to the court, is that the Act does not need to be changed.



The Stay of Legal Proceedings

In many jurisdictions, the courts deal with applications for a stay of legal proceedings allegedly brought in breach of an arbitration clause by applying a *prima facie* test in order to decide if there is arguably an arbitration agreement. If the answer is in the affirmative, the court refers the matter to the arbitral tribunal for decision. For example, in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] 1 SLR 373, the Singapore Court of Appeal held that a court hearing an application for a stay should grant it, deferring the actual determination of the tribunal's jurisdiction to the tribunal, if the applicant is able to establish a *prima facie* case that:

- a. there is a valid arbitration agreement between the parties to the court proceedings;
- b. the dispute in the court proceedings falls within the scope of the arbitration agreement; and
- c. the arbitration agreement is not null and void, inoperative or incapable of being performed.

The reasoning behind applying a *prima facie* test is that for a court to give instead a definitive ruling would undermine the principle of *kompetenz-kompetenz*, enshrined in the Model Law, and which gives the arbitral tribunal

the power to decide questions of its own jurisdiction. It is the case, as I understand it, that most Asia-Pacific jurisdictions have gone down the route of applying a *prima facie* test.

The English Courts have taken a rather different view. Under Section 9 of the Arbitration Act 1996 the Court must grant a stay of legal proceedings “unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.” These words are, of course, those of the Model Law and the New York Convention. Section 30 of this Act enshrines the doctrine of *kompetenz-kompetenz* in the following terms:

COMPETENCE OF TRIBUNAL TO RULE ON ITS OWN JURISDICTION.

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
 - a. whether there is a valid arbitration agreement,
 - b. whether the tribunal is properly constituted, and
 - c. what matters have been submitted to arbitration in accordance with the arbitration agreement.
- (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

The Courts in England have drawn a distinction between cases where the very existence of the arbitration agreement is in question and where the issue concerns its validity. In the former case the courts will in effect decide the point one way or the other, whereas in the latter case the courts presume that the parties wanted their chosen tribunal to decide such matters. Thus, generally speaking, under Section 9 of the Arbitration Act 1996, the court will make a binding decision on the question whether or not the arbitration agreement exists, while if the issue goes not to the existence of the agreement, but its validity, if the court will, in effect, remain unsatisfied that the conditions of Section 9 have been met and will stay the legal proceedings. See *Premium Nafta Products Ltd v Fili Shipping Co. Ltd* [2007] UKHL 40 and *AES Ust-Kamenogorsk* [2013] UKSC 35.

My own view, for what it is worth, is that to apply a *prima facie* test across the board in all cases is to go too far in support of the arbitral process. If the question is whether there was any arbitration agreement at all, whatever the tribunal concludes will not be binding on the party disputing its jurisdiction, since the doctrine of ***kompetenz-kompetenz***, while enabling the arbitral tribunal to decide questions of its own jurisdiction, cannot make it

the final arbiter. If in truth there never was an arbitration agreement binding the parties, the arbitral tribunal simply has no power to decide otherwise. To suggest otherwise involves begging the very question in issue, namely by assuming that the tribunal has the very jurisdiction that is in question. In a case where the very existence of the arbitration agreement is in issue, the net result of applying a *prima facie* test will be likely to be to force the parties into going through an arbitration process for what, in my view, would be no good reason, since even if the arbitral tribunal decides that it does have jurisdiction, this can be challenged in court. See, for example, *Dallah Real Estate & Tourism Holding Co. v Pakistan* [2010] UKSC 46. In truth, to my mind the main purpose behind the doctrine of ***kompetenz-kompetenz*** is to avoid delays and difficulties when a question is raised as to the jurisdiction of the tribunal. Clearly the tribunal cannot be the final arbiter of a question of jurisdiction, but without having the power to consider questions of jurisdiction the door is open to recalcitrant parties to delay the proceedings indefinitely by making spurious challenges to its jurisdiction. I am not persuaded that the court, by making definitive rulings at the outset on whether the arbitration agreement exists, makes any inroads at all on the principle of *kompetenz-kompetenz*.

Confidentiality

The question of confidentiality in arbitral proceedings is one that we shall be considering in the course of today's proceedings and I am particularly looking forward to the session devoted to this subject.

I believe that one of the chief attractions of arbitration is the belief that it provides a private means of dispute resolution. In his 1995 Bernstein lecture Sir Patrick Neill QC stated that it would be difficult to conceive of any greater threat to the success of English arbitration than the removal of the general principle of confidentiality and privacy.

I agree. But you will look in vain in the English Arbitration Act to find any mention of confidentiality or privacy. Likewise, the Model Law.

So far as the Arbitration Act 1996 is concerned, the reason why we did not include any provisions about privacy or confidentiality was that we concluded that any attempt to formulate statutory principles would, far from solving difficulties, be likely to create new ones; and that the way forward was to leave the courts to develop the law on a pragmatic, case by case basis.



The difficulty with confidentiality and privacy mainly lies in the exceptions and qualifications that have to be made. Knowledge of the proceedings (and the result) have to be shared with many non-parties, such as parent companies, insurers, guarantors, partners, licensors and licensees, as well as arbitral institutions playing a part in the proceedings, to mention but a few. Furthermore, the duty of companies to shareholders means that they have to make disclosure of, for example, arbitration proceedings and actual or prospective awards which have an effect on the financial position of the company. Enforcement of awards under the New York Convention through the courts almost inevitably leads to publicity.

It is, however, noteworthy that in one jurisdiction an attempt has been made to legislate in detail for confidentiality and privacy. I would like to read this provision to you, since its exceptions and qualifications demonstrate the limits on confidentiality in arbitration. In a Schedule to the Arbitration (Scotland) Act 2010 there is the following provision:

26(1) Disclosure by the tribunal, any arbitrator or a party of confidential information relating to the arbitration is to be actionable as a breach of an obligation of confidence unless the disclosure—

- a. is authorised, expressly or impliedly, by the parties (or can reasonably be considered as having been so authorised),*
- b. is required by the tribunal or is otherwise made to assist or enable the tribunal to conduct the arbitration,*
- c. is required—*
 - i. in order to comply with any enactment or rule of law,*
 - ii. for the proper performance of the discloser's public functions, or*
 - iii. in order to enable any public body or office-holder to perform public functions properly,*

- d. can reasonably be considered as being needed to protect a party's lawful interests,*
- e. is in the public interest,*
- f. is necessary in the interests of justice, or*
- g. is made in circumstances in which the discloser would have absolute privilege had the disclosed information been defamatory.*

(2) The tribunal and the parties must take reasonable steps to prevent unauthorised disclosure of confidential information by any third party involved in the conduct of the arbitration.

(3) The tribunal must, at the outset of the arbitration, inform the parties of the obligations which this rule imposes on them.

(4) "Confidential information", in relation to an arbitration, means any information relating to—

- a. the dispute,*
- b. the arbitral proceedings,*
- c. the award, or*
- d. any civil proceedings relating to the arbitration in respect of which an order has been granted under section 15 of this Act, which is not, and has never been, in the public domain.*

Section 15 of this Act gives the Court power to prohibit the disclosure of the identity of parties in civil proceedings relating to an arbitration.

This is not a mandatory provision so the parties can contract out of it if they so wish. It is, in my view, a brave attempt to legislate on this subject, but whether it will succeed in its purpose remains to be seen. There remain problems, such as how to enforce the obligation of confidentiality and how to assess damages for its breach.

Although I have no doubt that confidentiality and privacy are very important to those who choose arbitration as their preferred method of dispute resolution, it must not be

forgotten that there are many who view the matter in a different light. In his recent lecture, to which I have already referred when discussing the question of appeals to the court, Lord Thomas, the Lord Chief Justice of England and Wales, said that other issues arose from the resolution of disputes firmly behind closed doors –

"retarding public understanding of the law, and public debate over its application. A series of decisions in the courts may expose issues that call for Parliamentary scrutiny and legislative revisions. A series of similar decisions in arbitral proceedings will not do so, and those issues may then carry on being taken account of in future arbitrations. As has been put: Arbitration confidentiality perpetuates public ignorance of continuing hazards, systemic problems, or public needs... Such lack of openness equally denudes the ability of individuals, and lawyers apart from the few who are instructed in arbitrations, to access the law, to understand how it has been interpreted and applied. It reduces the degree of certainty in the law that comes through the provision of authoritative decisions of the court. As such it reduces individuals' ability to fully understand their rights and obligations, and to properly plan their affairs accordingly."

This too is powerful stuff, and from the point of view of a Chief Justice wanting to promote English law in general, and commercial law in particular, is wholly understandable.

Lord Neuberger, the President of the UK Supreme Court, gave an address last year at the Hong Kong Chartered Institute of Arbitrators Centenary Celebration Conference, entitled *Arbitration and the Rule of Law*. In the course of this address, Lord Neuberger pointed out that the most obvious human right engaged by arbitration is the right to a fair trial. This is reflected in the first of the principles to which I referred at the outset of this address; and indeed is enshrined in Article 10 of the Universal Declaration of



Human Rights. But, as Lord Neuberger said, *“one of the most important limbs of a fair trial is open justice, whereas arbitration almost always takes place in a private context. Open justice is essential because the judge must be publicly accountable and independent of all outside influence, and justice must famously be seen to be done.”* He suggested accordingly that the credibility of arbitration, and therefore the self-interest of all those involved in arbitration, pointed firmly in the direction of more transparency. He observed that if there is no transparency, many arbitrators will feel free to do what they want rather than give effect to the law. *“This,”* he said, *“is a temptation which is particularly great now that it is so difficult to appeal an arbitration award.”* He also made much the same point as the Lord Chief Justice made in the lecture to which I have referred, about the common law becoming ossified through an increase in awards and a concomitant decrease in judgments, though he did not suggest that this could be remedied in the way suggested by the Lord Chief Justice. What he did welcome was the increase in the publication of awards and the fact that many international investor dispute arbitrations are not merely the subject of published awards, but are routinely held in public. He also made the point that the increased involvement of states in arbitration is another factor against privacy: *“it raises serious questions of accountability if large amounts of public money are to become payable pursuant to awards made by tribunals which hear evidence and arguments in secret and even whose decisions may be secret.”*

A recent and, if I may say so, wholly admirable example of applying openness and transparency is the published award of the arbitral tribunal in the recent arbitration between Malaysia and Singapore over Malaysian railway land in Singapore.

There are undoubtedly are extremely important considerations relating to privacy and confidentiality in arbitrations, and I agree with Lord Neuberger that the arbitration community cannot afford to be complacent about calls for greater openness. However, I remain unpersuaded, especially in the context of international arbitration, that private parties, as opposed to public bodies, who wish to resolve their disputes privately through arbitration should be prohibited from keeping their chosen method of dispute resolution private and confidential if they wish to do so. To my mind any suggestion that privacy and confidentiality should be watered down, notwithstanding the views of the parties, runs counter to the second of the principles I mentioned at the outset, namely that the parties should be free to agree how their disputes are to be resolved, subject only to such safeguards as are necessary in the public interest. I cannot accept that the public interest is such that the parties’ desire for privacy and confidentiality should be overridden against their wishes. And as I have just pointed out, there are already wide-ranging exceptions and qualifications to privacy and confidentiality as a matter of common law.

Emergency Arbitrators

In the 1990s, when we were drafting what became the Arbitration Act 1996, the concept of emergency arbitrators was yet to come, but in recent years emergency arbitration provisions have been included in many institutional rules, including the 2014 London Court of International Arbitration (LCIA) Rules, the 2012 International Chamber of Commerce (ICC) Rules, the 2012 Swiss Rules, the 2013 Singapore International Arbitration Centre (SIAC) Rules, the 2013 Hong Kong International Arbitration Centre (HKIAC) Rules, the 2010 Stockholm Chamber of Commerce (SCC Rules), as well as the Kuala Lumpur Regional Centre for Arbitration (KLRCA) Rules current here. There is no doubt that it has been considered across the world of international arbitration to be worthwhile to incorporate provisions in the rules of arbitral institutions.

The basic reason for a system of emergency arbitrators is that parties who have chosen to resolve their disputes through arbitration may be in urgent need of interim measures before their tribunal can be constituted. There may, of course, be as there is in London, an expert Commercial Court which can provide interim relief. This is provided for in Section 44 of the 1996 Arbitration Act, though we were careful to ensure that the court could only act *“if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.”*

In the case of London, I am not sure whether emergency arbitrators fulfill any useful purpose, given there is an expert and internationally accepted commercial court which is ready and willing to act extremely quickly to provide interim relief. I recall myself, when sitting as the judge in charge of the London Commercial Court, making interim orders within only an hour or two of the application. The court also has the power, which so far as I know, no emergency arbitration rules possess, of acting on what used to be called an *ex parte* basis, namely where one party makes an application without notice to the other parties. Where there is shown to be a risk of the disposition of assets or evidence, notification of the application could well be self-defeating, allowing the Respondent an opportunity to transfer assets or dispose of evidence before the hearing.

I do see the value of emergency arbitrators in jurisdictions where the courts are unable to act quickly or lack the expertise to deal with the matter. I also accept that there is something to be said generally for emergency arbitrators, in the sense that by signing up to the rules of arbitral institutions, the parties have in effect agreed, as part of their decision to use arbitration as their preferred means of dispute resolution, to cover through arbitral means rather than the courts, disputes that require an immediate ruling.

I should add that I am opposed in principle to any provisions that would enable an emergency or indeed any arbitral tribunal to act without notice to all parties. So far as English arbitration is concerned, power to act on the application of one party without notice to the other would to my mind run counter to the general duty of arbitral tribunals, set out in Section 33 of the English Act, namely to “*act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.*” This reflects, of course, Article 18 of the original Model Law. You may not be surprised to learn that I am not in favour of the 2006 amendments to the Model Law allowing (under Article 17B)

a party to apply for what are called preliminary orders without notice to the other party. I am afraid that to my mind such provisions are simply incompatible with the original Article 18, which still appears in the revised Model Law, that “*the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.*”

Article 18 of the Model Law and Section 33 of the English Arbitration Act, and indeed Section 20 of the Malaysian Arbitration Act 2005 (amended in 2011) all reflect what is one of the most important rules of justice – *audi alteram partem*, which can be translated as – *hear all sides*. It has equal status with another basic rule – *nemo iudex in causa sua*. No-one should be a judge in his own cause.

These rules are often referred to as rules of natural justice. I used to refer to them as such for many years, until Lord Mustill, now sadly no longer with us, observed that if such rules formed part of natural justice, what then was unnatural justice!

Applications to any court or tribunal without notice to the other party or parties break the first of these basic rules of justice. They do so on the grounds that justice can only be truly served if the rule is disregarded. But the dangers of doing so are very great. The very fact that such an application has been made may have an immediate, devastating and irreversible effect on the business of the respondent even before he is given an opportunity to put his side of the case. The voluminous case law on without notice applications demonstrates the complexity of the problems that arise and the need for the most careful approach to all such cases. It also requires the highest standards of probity and common rules governing the conduct of legal representatives making such applications. Despite the laudable efforts of the International Bar Association, the highest common standards of probity and common rules of conduct are not always present in international arbitrations. I am firmly of the view that as matters at present stand, applications without notice are the business of courts, not arbitral tribunals.

The Independence of Arbitrators

The second basic principle, *nemo iudex in causa sua*, leads to an observation I have made on several occasions, and is often met with disagreement. This is the provision found in Article 12 of the Model Law and indeed in many jurisdictions including Malaysia, that in effect arbitrators are precluded from acting and may be removed if there are or arise justifiable doubts as to their impartiality or independence.

The need for independence as well as impartiality has long puzzled me. It is difficult to see how a lack of independence, or justifiable doubts as to independence, is of any concern unless it gives rise to partiality or justifiable doubts as to impartiality. If, as indeed may very often be the case, lack of independence gives rise to justifiable doubts as to impartiality, then the position is covered by the use of the word impartiality. So logically the use of the word independence could only be justified if it covered cases where the lack of independence, or justifiable doubts as to independence did not give rise to justifiable doubts about impartiality, for otherwise there would be no point including lack of independence as a separate ground.

When we were preparing the English Arbitration Act we asked whether justifiable doubts as to independence added anything to justifiable doubts as to impartiality. No-one was able to persuade us that there were cases where lack of independence which did not give rise to justifiable doubts as to impartiality that needed to be covered.

The phrase *Justifiable doubts as to impartiality or independence* has a fine sounding ring to it, but to my mind it has its dangers, chief among which is the scope it gives recalcitrant parties to delay proceedings by calling in aid any connection, however remote, and without any suggestion that it cast justifiable doubts as to impartiality, to challenge the “*independence*” of an arbitrator.

It was for these reasons that in the 1996 Arbitration Act we did not use the Model Law phrase, but confined ourselves to justifiable doubts as to impartiality. In this connection it is noteworthy that even the oath taken by those appointed to the International Court of Justice refers only to impartiality. The oath that I took, when appointed a High Court Judge, and again when I became a member of the United Kingdom Supreme Court, similarly contains no reference to independence. I swore to do right to all manner of people, without fear or favour, affection or ill-will. If independence were to be included as a separate requirement, then there would indeed be difficulties, since judges are paid by the state and their courts and administration organised by the state, so they could hardly be described as independent of the state; and thus could not sit on any case to which the state is a party.

At this stage, may I mention something about which I am often asked, which is why the United Kingdom did not opt simply to adopt the Model Law.

There are several reasons why we took this course, but I cannot emphasize too strongly that when we were drafting the Bill which became the Arbitration Act 1996, our starting point was the Model Law, and the Act follows closely both the structure and content of the Model Law. It would be accurate to say that the Act is based upon the Model Law. We only departed from or added to the Model Law where there were very good reasons for doing so. There is only time to mention a few examples, though I would refer anyone interested to the two reports that we wrote at the time, which set out in full the reasons for drafting the Act in the way that we did.

For example, under Article 10 of the Model Law, failing the agreement of the parties, the number of arbitrators shall be three. We preferred the existing English rule of one, (now found in Section 15 of the Act) since three arbitrators are likely to cost three times as much as one, and we felt that this extra burden should not be imposed on the parties without their agreement.

Again, under the Model Law, there is a requirement that the arbitration agreement be in writing. In view of rapidly evolving means of recording we expanded the meaning given to “*in writing*” from that found in the Model Law. In addition, we considered that the definition we adopted was more consonant with that contained in the English text of the New York Convention.

We altered the wording of the Model Law so that counterclaims were encompassed.

We set out specific provisions providing arbitrators with immunity from suit unless they were shown to have acted in bad faith, and (in Section 74) provided a like immunity to arbitral institutions with regard to the appointment of arbitrators and anything done by arbitrators appointed by them.

But at the end of the day there is no doubt that the English Act is firmly and clearly based on the Model Law. It should always be remembered that the Model Law was never intended as a complete code for international arbitrations, as Lord Mustill, who represented the United Kingdom during the UNICTRAL meetings leading to the Model Law, frequently pointed out.

I referred a moment or two ago to the judicial oath which I took. Without telling you who it was, (save that it was not me!) it so happened when our Supreme Court was opened that one of the Supreme Court Justices who took the oath misread from the card; and instead of swearing to do right to all manner of people, without fear or favour, affection or ill will, promised to do right to all manner of people without fear or favour, affection or *goodwill*!

I now look forward to the rest of today’s proceedings, particularly to listening to those who may well disagree with some of the views that I have expressed.

Thank you.

Mark Saville
September 2016



ABOUT THE AUTHOR

LORD SAVILLE was Lord of Appeal in Ordinary from 1997 to 2010 with judgments spanning diverse areas of law, and was instrumental in the coming into force of the UK Arbitration Act 1996. In his keynote speech, he will address issues which are likely to define and shape the relevance of arbitration in the coming decade. Delegates will hear from him on topics, which include, “*Appeals to the courts on questions of law (in the wider context of the relationship between the courts and arbitral tribunals); Confidentiality; Emergency arbitrators and the power to make orders in the absence of one of the parties.*”

Lord Saville also chaired the “*Bloody Sunday*” inquiry concerning an incident where troops opened fire on civilians in Londonderry, Northern Ireland. The findings of this inquiry are available on the internet.



_EVENTS

KLRC A Certificate Programme in Sports Arbitration

22nd September 2016

The Kuala Lumpur Regional Centre for Arbitration identified the need for resolution of disputes in the sports industry in Malaysia. Arbitration has been known to be an effective medium to resolve disputes amicably and that conviction remains a principal catalyst that led to the inception of the Malaysian Sports Tribunal (MST). With the upcoming establishment of MST, the sports ministry and associations alike will be able to pass on the intricacies of dealing with sporting disputes to the newly formed body and in turn focus on the development and capacity refinement of their respective portfolio.

To this end, a specialised set of MST Arbitration Rules is currently being finalised, along with a specialist panel of Sports Arbitrators drawing on both arbitration and sports communities, and the drafting of a flexible cost structure. Accordingly, there will exist a need for sports stakeholders to familiarize themselves with the technical aspects of MST's framework, which to an extent mirrors the CAS system.

In Malaysia, sporting dispute resolution remains at its infancy, where knowledge and experience in the theoretical and practical aspects of sports dispute resolution at national and international levels amongst sports stakeholders throughout Malaysia has been scarce at best.

This course aims to enable participants to gain more insight in this budding field of law and they were guided by Paul J Hayes and Professor Richard McLaren OC.



KLRC Talk Series

In the final half of 2016, the KLRC Talk Series returned with more captivating talks by ADR experts. Below are the talks held from July to December 2016.

4
AUG



SECURING YOUR DIGITAL ASSETS

Speaker: Yeo Yee Ling (MYNIC Berhad) & Jayce Yeo (CSC® Digital Brand Services)

Moderator: Khoo Guan Huat

The Internet, domain names, social media sites, and mobile apps offer an organisation a place to build brand presence, and interact with audiences in new and creative ways. Social media and networking sites such as Facebook®, and YouTube now boast hundreds of millions of subscribers. Together with the expansion of the Internet with the new gTLD programme, organisations are rightfully concerned about risks of cyberattacks, fraud and infringements that lead to negative exposure and brand erosion.

This session looked into the opportunities associated with these digital channels and discussed the technology, processes and remedies to help organisations understand what they can do to protect, monitor, and enforce their brand rights.

29
AUG



DEVELOPMENTS IN UK FAMILY ARBITRATION

Speaker: Judge Cryan and Pamela Scriven QC

Moderator: Honey Tan Lay Ean

His Honour Judge Cryan and Miss Pamela Scriven QC set out how the Institute of Family Law Arbitrators was founded and became a successful provider of arbitration in a family context in such a short time. They dealt with the legal context of arbitration in relation to both financial and children matters; the relationship between arbitration and the Family Courts; the qualification and regulation of Arbitrators; and the rules and conduct of arbitrations.

8
NOV



STRAYING FROM THE FACTS IN A HOT TUB: EXPERT EVIDENCE AND MANAGING THE EXPERT WITNESS

Speaker: Revantha Sinnetamby

Moderator: Kevin Prakash

Expert witnesses have for some time played a key role in the resolution of construction disputes. What is expert evidence and how does it differ from other forms of evidence? Expert evidence can bring clarity to complex issues in dispute by providing specialist opinions that can assist a tribunal to understand and interpret the facts of a dispute. In order to fulfil this role, experts must be independent, whatever the dispute resolution process being applied. Both the experts, who must discharge his/her duty effectively, and, the parties, who must select an appropriate witness and ensure that the witness is properly and adequately instructed, face challenges. Tribunals also face challenges in ensuring that contradictions between competing experts are addressed effectively and that experts do not stray of limits.

Revantha focused on the practical issues arising from the nature of expert evidence and the role of the expert witness in assisting arbitral tribunals to resolve construction disputes.

24
OCT



AN EVENING WITH DAVID W. RIVKIN: EFFICIENCY IN INTERNATIONAL ARBITRATION

Speaker: David W. Rivkin

Moderator: Tan Sri Cecil Abraham and Steven Thiru

In this evening talk co-hosted with the Bar Council of Malaysia, David W. Rivkin, President of the International Bar Association (IBA) discussed on the developments and challenges to efficiency in International Arbitration.

ICC-KLRCA International Arbitration Conference

10th October 2016



On the 10th of October 2016, the ICC International Court of Arbitration and the Kuala Lumpur Regional Centre for Arbitration (KLRCA) proudly hosted and organised a joint international arbitration conference at the KLRCA in Kuala Lumpur, Malaysia.

As Asia gains prominence on the world's investment stage, the rise of disputes and the need for effective dispute resolution is imperative. This first-of-its-kind Conference, co-organized by two of the world's leading arbitral institutions, reflects a joint effort to address key issues in international arbitration from an Asian perspective.

The participants were welcomed with speeches by Datuk Professor Sundra Rajoo as well as Alexis Mourre, President of the ICC International Court of Arbitration. YB Dato' Sri Azalina Othman Said, Minister in the Prime Minister's Department, gave the opening speech which was followed by the Keynote address by Michael Hwang S.C whose topic was on the manner countries in Asia adopt and interpret the UNCITRAL Model Law.

Split into three sessions, the full day conference discussed emerging issues and best practices in the fast-developing area of international commercial arbitration, with one session focusing on investment arbitration.

Fostering a discussion around the continuing changes in the international arbitration paradigm in Asia, the Conference witnessed the participation of leading international arbitration experts from around the world and was attended by users, practitioners, and arbitrators.



PANEL I

'Transparency in Arbitration: A bird's eye view'

MODERATOR: Abhinav Bhushan | Director, South Asia, ICC Arbitration and ADR, ICC International Court of Arbitration

SPEAKERS: Philip Yang | Member of ICC International Court of Arbitration, Immediate Past Chairperson (HKIAC)

Abraham Vergis | Managing Director, Providence Law Asia LLC

Christopher Lau | Senior Counsel, Chartered Arbitrator (FCIARB, FSIARB)

Sapna Jhangian | Partner, Clyde & Co

Ben Olbourne | Barrister, 39 Essex Chambers



PANEL II

'Cost Effective Arbitration: Myth or Reality?'

MODERATOR: Datuk Professor Sundra Rajoo | Director of the KLRCA

SPEAKERS: Dr. Nicolas Wiegand | Partner, CMS Hasche Sigle

Ing Loong Yang | Partner, Latham & Watkins

Vinayak Pradhan | Consultant, Skrine

Thavakumar Kandiahpillai | Group Head, Legal and General Counsel, Sapurakencana Petroleum



PANEL III

'Investor-State Arbitration in South East Asia and Pacific'

MODERATOR: Tan Sri Dato' Cecil Arbraham | Member of the KLRCA Advisory Board

SPEAKERS: Olga Boltenko | Counsel, International Arbitration Practice, CMS (Hong Kong)

Dr Jean Ho Qing | Assistant Professor, National University of Singapore:

"Investment Arbitration: The Importance Bringing Theory and Practice to Teaching"

Alastair Henderson | Managing Partner, Head of international arbitration practice, Southeast Asia, Herbert Smith Freehills (Singapore):

"The Proliferation of Bilateral and Multilateral Investment Treaties in South East Asia & Pacific"

Robert Kirkness | Senior Associate, Freshfields Bruckhaus Deringer (Singapore):

"Investment Claims in the Region: Recent Developments"

Thayananthan Baskaran | Partner, Zul Rafique & Partners (Kuala Lumpur):

"Does Asia Need a Permanent Investment Court"



EVENTS

KLRC Mediation Forum

24th November 2016

The KLRC in collaboration with leading ADR Institutions, including the Chartered Institute of Arbitrators (CI Arb), International Mediation Institute (IMI) and ArbDB Chambers London, hosted a one day Forum on the 24th of November, exploring mediation and its development in the Asia Pacific Region.

With a keynote speech from the former Chief Justice of Malaysia, YBhg Tun Dato' Seri Zaki Bin Tun Azmi, together with leading practitioners, academics, judiciary and Government Officials, the Forum provided an overview of the mediation process, examining its benefits for international and domestic commerce and hosted a discussion group to address the growth of mediation in the Region.

Attended by 100 delegates, the forum was most enriching and provided the interdisciplinary scholarly gathering an excellent venue for dialogue and deliberation to further contribute towards the positive evolution of mediation in this region.



MEDIATION – A NEW TOOL FOR LEGAL PRACTITIONERS AND BUSINESS PEOPLE

Speaker: George Lim

MEDIATION IN ACTION – ROLE PLAY

Facilitator: Mark Appel

Panellists: Rouven F. Bodenheimer, Paul Rose, Anthony Abrahams, Michael Cover, Sheila Bates

MEDIATION AND BUSINESS – VARIOUS INDUSTRY PERSPECTIVES

Moderator: Wolf Von Kumberg

Speakers:

- (a) *Intellectual Property/IT* by Michael Cover
- (b) *Employment and Workplace* by Sheila Bates
- (c) *Construction and Engineering* by John Wright
- (d) *Investor State Mediation* by Mark Appel
- (e) *Maritime* by Jayems Dhindra
- (f) *Insurance and Real Property* by Paul Rose

PANEL DISCUSSION ON GROWING MEDIATION IN THE REGION

Moderator: Kuthubul Zaman Bukhari

Panellists: Harbans Singh K.S., George Lim, Michael Cover, Anthony Abrahams, Wolf von Kumberg, Sujatha Sekhar Naik



EVENTS

CIARB Presidential Lecture 2016 & Exclusive Book Launch by Datuk Professor Sundra Rajoo 25th November 2016

- Law, Practice & Procedure of Arbitration 2nd Edition
- Arbitration in Malaysia: A Practical Guide

The Chartered Institute of Arbitrators (Malaysia Branch) together with the Kuala Lumpur Regional Centre for Arbitration (KLRC) held the Inaugural CIARB Presidential Lecture 2016 on November 25th at Bangunan Sulaiman, Kuala Lumpur. The Presidential Lecture was graced by the presence of The Right Honourable The President of The Court of Appeal Malaysia Tan Sri Dato' Seri Md Raus and The Right Honourable Chief Justice of Singapore, Sundaresh Menon who delivered the Keynote Address.

Sir Vivian Ramsey and Justice Datuk Mary Lim then took stage to deliver their respective papers. Also present were; CIARB's Director General, Anthony Abrahams and Chair of the CIARB Malaysia Branch, Lam Wai Loon.

As the glittering evening progressed, The CIARB Malaysia Branch presented the *Malaysian Arbitrator Award for the year 2016* to its first ever recipient, Vinayak Pradhan for his outstanding contribution to the promotion, development and implementation of ADR in Malaysia.

This was then concluded with the exclusive book launch of Datuk Professor Sundra Rajoo's *Law, Practice & Procedure of Arbitration 2nd Edition* and *Arbitration in Malaysia: A Practical Guide*.



EVENTS

KLIRCA-CIArb Mediation Training Programme

28th November –
4th December 2016



The CIArb Malaysian Branch and The Kuala Lumpur Regional Centre of Arbitration conducted the CIArb Mediation Training Programme from 28th November to 4th December 2016. The seven day intensive course is designed for people who wish to become mediators, who are involved in, or organise, mediation processes or who wish to have a greater understanding of the skills involved in mediation.

The first five days comprised of Module 1 which included theory and workshop exercises for the purpose of educating the participants in the theory and practice of mediation. The programme consisted of a series of interactive lectures covering the fundamental philosophy, principles and practice of mediation. These sessions were then followed by an analysis of the legal and ethical issues arising during the course of a mediation as well as an exploration of the strategic interventions applied by mediators in the event of an impasse.

Over the five days, participants took part in practical coaching sessions under the guidance of experienced accredited mediators from both Malaysia and Australia. Participants were given practical skills training in the conduct of mediation, using the widely accepted facilitative model which is transferable across industries and contexts. Participants had the opportunity to explore a range of challenges and problems which might arise within a mediation.

On the sixth and seventh day, participants wishing to become accredited mediators took the Module 2 assessment.



Domain Name Dispute Resolution (DNDR) Conference

1st December 2016

Since the first ADNDR Conference took place in Kuala Lumpur in 2005, the ADNDR Conference has been organised annually in different venues around the Asia-Pacific region, including Hong Kong, Beijing and Seoul with side support from professional bodies in the region.

This year, the conference was hosted by the KLRCA and co-organised with the Hong Kong International Arbitration Centre (HKIAC), China International Economic and Trade Arbitration Commission (CIETAC), Internet Address Dispute Resolution Committee (IDRC), with MYNIC Berhad as event sponsors. The conference attracted numerous key IP lawyers and Trademark/Patent consultants from across the globe.

SESSION 1 – Recent changes to the UDRP and the ADNDR Supplemental Rules

- Ms. Janet Toh, Partner, Shearn Delamore [Moderator]
- Ms. Carrie Shu Shang, Head of HKIAC's ADR team
- Professor Dae-Hee Lee, IDRC
- Ms. Lu Yahan, CIETAC
- Ms. Smrithi Ramesh, Head of Legal Services, KLRCA

SESSION 3 – International Brand Defence Strategies – Legal and marketing perspectives

- Ms. Mariette Peters, Partner specialising in IP, Zul Rafique [Moderator]
- Mr. Paddy Tam, IP Advisor, CSC Digital Brand Services
- Ms. Karen Abraham, Partner and IP Head, Shearn Delamore
- Mr. Eugene Low, Partner, Hogan and Lovells; ADNDR Panelist
- Mr. Chew Kherk Ying, IP Partner, Wong and Partners

SESSION 2 – Direction of gTLD and ccTLD domain protection in Asia

- Mr. Ike Ehiribe, Chartered Arbitrator & Accredited Mediator [Moderator]
- Ms. Mary Wong, ICANN
- Ms. Yeo Yee Ling, MYNIC
- Mr. Dennis Cai, ADNDR
- Mr. Bahari Yeow Tien Hong, Partner, Lee Hishammuddin Allen & Gledhill

SESSION 4 – Trends and important substantive and procedural issues in ADNDR decisions

- Ms. Hemalatha Parasa Ramulu, IP Partner, Skrine [Moderator]
- Mr. Ike Ehiribe, Chartered Arbitrator & Accredited Mediator
- Ms. Samrith Kaur, Managing Partner at Samrith Sanjiv & Partners
- Hon Neil Brown QC, Queens Counsel, Arbitrator and Mediator
- Wong Jin Nee, Partner at Wong Jin Nee & Teo

The conference kicked off with welcome speeches by the organising Institutions followed by The Honourable Neil Brown QC taking stage to deliver an enriching keynote address. Among the highlights of this conference were tackling online infringements in relation to new gTLDs, notable procedural issues in UDRP and updates on new trends of online infringement and domain name dispute resolution which were dealt with by renowned experts from the international arena.

Received well by the participants, this event has been recognised as a unique and unrivalled forum for participants to exchange views on current and contentious topics on domain name dispute resolution.

The KLRCA, in its continuous efforts to promote domain name dispute resolution, endeavours to undertake the following initiatives for the coming year:


- Capacity building among IP rights owners and related stakeholders
- Raising awareness on tackling online infringement of the new gTLDs implemented by ICANN
- Continuous collaborations with MYNIC, ADNDR & other institutions
- Create awareness on the products and services provided by the centre under the MYDRP Rules, among relevant stakeholders, IP rights owners and IP practitioners



EVENTS

KLRC A Certificate in Adjudication

3rd—7th December 2016



The KLRC A's Certificate in Adjudication Course returned in the final quarter of 2016, attracting 70 aspiring adjudicators from various professional backgrounds including engineers, quantity surveyors, architects, lawyers, contractors, government officials and employees of NGO's that are engaged in the design and procurement of construction contracts.

The Course structure included four days of intensive lectures focusing on substantive and technical issues, along with sets of tutorials and practical exercises. The Course concluded with a series of examinations on the final day.

The lectures were broken down into five units; Unit 1 (The Application of Statutory Adjudication to the Construction Industry), Unit 2 (The Practice & Procedure of Adjudication under the CIPAA), Unit 2A (CIPAA Regulations), Unit 3 (Fundamentals of Construction Law), Unit 4 (The Construction Process), and Unit 5 (Writing Adjudication Decisions).

This Course is recognised by the CIPAA Regulations as a required qualification to be an Adjudicator under the Construction Industry Payment and Adjudication Act (CIPAA) 2012.

At the conclusion of the KLRC A Certificate in Adjudication course, should participants pass the adjudication decision writing examination, they would then be able to apply for empanelment into the KLRC A's panel of adjudicators. Upon empanelment, they may be considered for appointment by the Director of KLRC A to adjudicate any potential cases administered by the KLRC A. The appointment process however, is a stringent one that involves consideration of other external factors such as suitability, merit and experience levels.



Sports Law Conference 2016

8th December 2016


The Sports Law Conference 2016 was held at the Kuala Lumpur Regional Centre for Arbitration (KLRC) in collaboration with the Sports Law Association of Malaysia (SLAM) (Pro-tem). Highlighting the value and importance of rules in sports, the theme for the event was 'Play by the Rules'.

The event opened with a welcome speech by Conference Chairman Richard Wee, which was then followed by the Keynote Address and launching of the conference by His Royal Highness Tunku Tan Sri Imran Tuanku Ja'afar, President of the Olympic Council of Malaysia. Being the premier conference on Sports Law in Malaysia, it was well received and was attended by 180 delegates.

SESSION 1 Updates on Doping in Sports and the Architecture to control them

In this session, Tan Sri Dr. Mani Jegathesan spoke about the rules regarding doping in Malaysia, as well as around the world.

SESSION 2 Hypothetical

This session saw a collection of leaders of respective areas from the sports industry taking the stage and tackling the challenge of being posed hypothetical situations, incidents and dilemmas involving sports.

PANELISTS: H.R.H Tunku Tan Sri Imran Tuanku Ja'afar (President, Olympic Council Malaysia)
Tan Sri Dr. Mani Jegathesan (Chairman, Medical Committee for the Olympic Council of Asia)
Dato' Low Beng Choo (Secretary General, Olympic Council Malaysia)
Ms Khoo Cai Lin (Olympian and National Swimmer)
Ms Cheong Jun Hoong (Olympian and National Diver)
Mr Benoit Pasquier (Director of Legal Affairs, Asian Football Confederation)
Mr Nick De Marco (Barrister at Law, UK)
Ms Esti Sciucatti (Owner of Persija Jember)
Ms Beverly Hon (President, Cheerleading Association and Register of Malaysia (CHARM) and former journalist)

SESSION 3 Play by the Rules

With the upcoming SEA Games 2017 in Kuala Lumpur, massive improvisations of the National Sports Complex at Bukit Jalil are currently on-going. Eventually, the National Sports Complex will re-invent itself into the KL Sports City. The Chief Executive Officer of the Stadium Board of Malaysia, Encik Azman Fahmi presented his vision of the future for Malaysia's stadiums. Representatives of FIFA and AFC presented their respective papers pertaining to rules regarding football, transfers and stadium management. A barrister from the UK, Mr Nick De Marco, also presented an overview in sports arbitration and its potential in Malaysia.

PANELISTS: Azman Fahmi Bin Osman (Perbadanan Stadium Malaysia / Stadium Board of Malaysia)
Kelly Sathiraj (AFC)
Omar Ongaro (FIFA)
Nick De Marco (Barrister at Law, UK)

SESSION 4 Emerging Sports

In this final session, the captains of three new and emerging sports in Malaysia shared their views about their concerns and aspirations about their respective emerging sports. Through this special session, delegates got to hear about the success stories of the dodgeball and floorball teams, the rise of the cheerleading sports, and the romance of the old traditional dragon boat race re-emerging in Malaysia as a new team event.

MODERATOR: Jeffrey Ong (Former national and Olympic swimmer)

PANELISTS: Beverly Hon (Cheerleading Association and Register of Malaysia (CHARM))
Mohamad Heidy bin Mohd Yusoff (Malaysia Dodgeball Federation)
Rizal bin Mohd Razman (Malaysia Floorball Association)
Lee Shih (KL Barbarians Dragon Boat Team)

_ANNOUNCEMENT

KLRCAsigns MOU with The Sharjah International Commercial Arbitration Centre (Tahkeem)



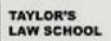
The Kuala Lumpur Regional Centre for Arbitration (KLRCAsigns) and the Sharjah International Commercial Arbitration Centre (Tahkeem) have signed a Memorandum of Understanding (MOU) on the 7th of December 2016. The agreement was signed ahead of the opening of the 1st International Forum on Commercial & Islamic Arbitration, organised by Tahkeem in collaboration with the University of Sharjah (UoS) at the Al Razi Auditorium.

The agreement, signed by Datuk Professor Sundra Rajoo (Director of the KLRCAsigns) and Ahmed Saleh Alechla (Director of Tahkeem), establishes a basis upon which both parties may explore areas for further co-operation in respect of the use of facilities and services on Alternative Dispute Resolution (ADR) provided by both institutions.

Datuk Professor Sundra Rajoo, Director of KLRCAsigns then went on to deliver a working paper titled, ***'Islamic Commercial Arbitration as a Model'***, at the conference. Distinguished Islamic and commercial arbitrators from the United Arab Emirates and across the globe attended the opening ceremony of the event.

**_ANNOUNCEMENT**

KLRCAsigns MOU with Taylor's University



The Kuala Lumpur Regional Centre for Arbitration (KLRCAsigns) and Taylor's University signed a Memorandum of Understanding (MOU) at Bangunan Sulaiman on the 14th of December 2016.

The agreement, signed by Datuk Professor Sundra Rajoo (Director of the KLRCAsigns) and Professor Michael Driscoll (Vice-Chancellor and President of Taylor's Law School), states that both institutions will collaborate, promote and develop teaching and research cooperation on Alternative Dispute Resolution (ADR) areas, which include Arbitration, Mediation and Adjudication.

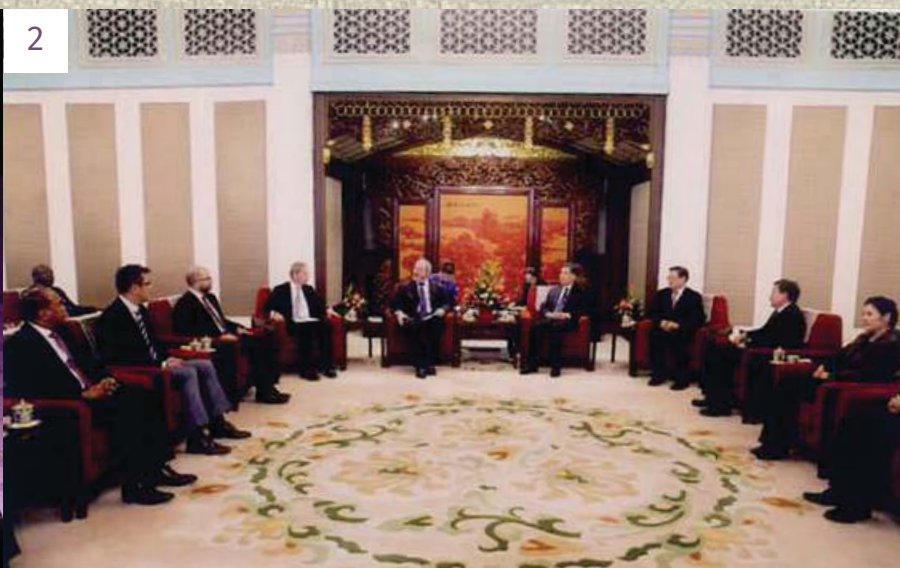
The mutually beneficial collaboration facilitates, among others, internship placements for Taylor's Law School students and staff attachment for exposure and knowledge enhancement.



EVENTS

KLRC around the globe

The Centre continued to enhance its international standing through its presence at conferences, training workshops and other knowledge sharing initiatives held at home and around the globe.



1 6th Society of Construction Law International Biennial Conference
13th – 15th September 2016,
Sao Paulo, Brazil

3 Indonesia and SE Asia: 4th Annual International Arbitration Summit
29th September 2016,
Jakarta, Indonesia

4 National Initiative on Strengthening Arbitration and Enforcement in India
21st – 23rd October 2016,
New Delhi

2 CIETAC China Arbitration Summit
28th – 29th September 2016,
Beijing, China



5 The Asia-Pac Regional Arbitration Group Conference 2016

6th – 8th October 2016,
Bali, Indonesia

7 The 2016 Dispute Resolution in Asia Workshop

5th – 6th November 2016,
Kobe, Japan

9 NIAC: Nairobi International Arbitration Conference

4th – 6th December,
Nairobi, Kenya

6 Mediation Skills Training Course

16th October 2016,
Penang, Malaysia

8 Official Launch of The Admiralty Court User Guide

16th November 2016,
Palace of Justice, Putrajaya,
Malaysia

10 First International Forum on Commercial & Islamic Arbitration

7th December 2016,
Sharjah, UAE

Arbitration Case Law: Developments in Malaysia & The International Front

By KLRCA Legal Services

Essar Oilfields Services Limited v
Norscot Rig Management PVT Limited

COURT HIGH COURT OF JUSTICE QUEEN'S
BENCH DIVISION COMMERCIAL COURT

CASE CITATION [2016] EWHC 2361 (COMM)

HEARD BEFORE JUDGE WAKSMAN QC

BACKGROUND:

The case between Essar and Norscot essentially dealt with the question whether an arbitrator has the discretion to award the costs of the litigation funding which the opposing party had obtained in order to bring the arbitration, which amounted to almost \$2 Million.

It was observed that Essar had set out to cripple Norscot and to exert commercial pressure on Norscot before and throughout the arbitral proceeding. This resulted in a David and Goliath battle, which forced Norscot's managing director to re-mortgage his home for almost 1\$ Million. Furthermore, Essar made unjustifiable attacks and allegations of fraud and dishonesty against two of Norscot's members, which were so serious that Norscot was entitled to costs on an indemnity basis.

Norscot was consequently forced into entering into the litigation funding to the full costs of 300 per cent on the sum advanced or 35 percent of the sum recovered – whichever was the highest.

"It was blindingly obvious to [Essar] that the claimant was at a distinct financial disadvantage ... and would find it difficult if not impossible to pursue its claim by relying on its own resources."

"The conduct of the respondent before and during the dispute was a blatant attempt to drive Norscot 'from the judgment seat'. ... They pursued their claims with courage and determination. They undertook a huge financial burden and gamble in entering into the funding arrangement. The claimant's conduct throughout ... cannot be faulted. Justice and the merits point in [the direction of the claimant's]"

ISSUE(S)

- i) Whether "other costs" under s.59(1)(c) of the Arbitration Act 1996 ('the Act') include the cost of litigation funding;
- ii) Whether the arbitrator exceeded his power which lead to a serious irregularity under s.68(2)(b) of the Act;
- iii) Whether this would cause insubstantial injustice to Essar.

HELD

It was held that s.68(2) of the Act is a last resort, only available in extreme cases, where the tribunal has gone so wrong [...] that justice calls out for it to be corrected. The focus of s.68 is due process, rather than the correctness of the decision.

Not included are thus a mere excess of power or an error in law. Rather the tribunal must have exercised a power it did not have at all.

Here it was concluded that no serious irregularity within the meaning of s. 68(2)(b) if the Act lay at hand, even if the arbitrator was wrong to include litigation funding costs into "other costs" as the arbitrator had in principle to award costs.

The Definition of "other costs" posed some difficulties, however, Essar's representative came close to the essence of it while trying to contest the opposite: "something necessary to get the arbitration off the ground or on the road"; that could include the costs of third party funding. The judge tried to limit down the term with the functionality of the costs. He posed the question whether the costs relate to the arbitration and whether they are for the purposes of it. If the costs have not been incurred in order to bring or defend the claim in question, [...] they [would] fall outside the definition of "other costs".

Reference is made to the ICC Commission Report of 2015 in para 87, 90, 92 where it can be derived that Third Party Funder Costs may be recoverable.

As a matter of language, context and logic "other costs" can include the costs of obtaining litigation funding. The judge recognized that while doing so, the arbitrator took

into account Essar's misconduct before and during the proceedings.

Thus the arbitrator was entitled to interpret "other costs" so as to include the costs of third party funding. An error of law was no present anyhow.

However, the court conceded that, if there were a serious irregularity, then that would have lead to a substantial injustice for Essar as, without the irregularity (it being in theory the awarding of third party funding) Essar would not have had to pay the substantial sum awarded against it. However, this is merely academic.

SIGNIFICANCE

This was the first case – at least so far as the public is aware of it – where a English-seated arbitration tribunal has awarded third party funding costs in addition to legal costs as "other costs". One will have to wait to see whether this will become precedent. It definitely will further the interest in Third Party Funding.

Still, as the situation with Essar's conduct is rather exceptional, it remains to see whether this can be used as path-breaking precedent.

By KLRCa Legal Services

Alami Vegetable Oil Products Sdn Bhd v Hafeez Iqbal Oil & Ghee Industries (PVT) Ltd

COURT	COURT OF APPEAL (PUTRAYAJA)
CASE CITATION	[2016] MLJU 746 / [2016] 7 CLJ 19 [CA]
HEARD BEFORE	ABDUL WAHAB PATAIL JCA; HAMID SULTAN ABU BACKER JCA; UMI KALTHUM ABDUL MAJID JCA

BACKGROUND

The case deals with the objection to the enforcement of two arbitral awards issued in Malaysia. Objection had been raised under section 38 of the Arbitration Act 2005 ('AA 2005') and the statutory interpretation of section 3(3) of the AA 2005.

Respondent acquired a judgement of the High Court enforcing two arbitral awards issued in Malaysia. The Appellant filed an opposing affidavit to the Court of Appeal as to why the respondent's application should not be allowed.

S. 38 AA 2005 is a 'recognition' procedure to convert an arbitral award into a judgement, this can only be done by the person holding the award. The respondent to the arbitral award – the Appellant in this case – can file an objection to the procedure, however, the arguments of this objection must be based on the procedure as set out in s. 38 AA 2005¹. If the respondent wants to object to the

enforcement, thus wants to object to the legal validity of the award, an application under s. 39 AA 2005 is required.

The appellant however, filed an application under s. 38 AA 2005, but provided arguments referring to validity of arbitral award under s. 39(1)(a)(ii) AA 2005 – "the arbitration agreement is not valid under the law to which the parties have subjected to, or [...] under the laws of the State where the award was made".

The appellant took the stance that before the 2011 amendments, s. 38 of the AA 2005 only allowed domestic or foreign awards to be recognized and that s. 2 defines domestic arbitration to mean any arbitration which is not international.

S. 3 of the AA 2005 covers domestic awards, domestic international awards (the seat of arbitration is in Malaysia) or foreign awards. This however, is irrelevant to this case. While ss. 37 and 42 of the AA 2005 do not apply to all three types, so do ss. 38 and 39 of the AA 2005. It therefore is not of any concern what type of arbitration is in dispute.

With this, appellant did neither submit any technical arguments on s. 3 of the AA 2005, or on the purposive arguments under s. 17A of the Interpretation Act or on common sense.

¹ *International Bulk Carriers Spa v CTI Group Inc* [2014] 8 CLJ 854; [2014] 6 MLJ 851 – the Appellant was not party to the arbitration agreement, thus the award could not be registered pursuant to s 38 as the 'arbitration agreement' under s 38(2)(b) of the AA.

ISSUE(S)

The Court had to decide on the following questions:

- i) Whether issues relating to the merits of the award could be raised under s. 38 of the AA 2005 or whether they should have been brought under s. 39 of the AA 2005.
- ii) Whether s. 38 of the AA 2005 only permitted domestic and foreign award to be recognised and enforced.
- iii) Whether appellant failed to appreciate s. 3 of the AA 2005 which recognises domestic international arbitration and whether common sense approach to the interpretation of a statute is to be recognized.

HELD

The Court held that it is not permissible to argue issues relating to the merit if the award under s. 38 of the AA 2005. This section is a 'recognition procedure' and thus a mere procedural provision to seek enforcement. An application under s. 39 of the AA 2005 must be made by the respondent of the award, however, the respondent – the Applicant in this case – did not file such an application. The Appellant filed an application with respect to the merits of the award which was irrelevant under s. 38 of the AA 2005. The Appeal therefore had no merit and was an abuse of judicial process.

The appellants simplistic arguments that s. 38 of the AA 2005 only allowed domestic or foreign awards to be recognized before the 2011 amendments, bereaves common sense as well as destroy the efforts by the KLRCA and the Government to make Malaysia the preferable seat and/or destination for international arbitration. Common sense, also called purposive approach, must be applied when interpreting a statute as codified in s. 17A of the Interpretation Act.

The court held it was an abuse of judicial process and dismissed the appeal.

Save the date!

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

January 2017

Date	11 JANUARY 2017
Event	How Do The Malaysian and Chinese Legal Professionals Benefit From The 'One Belt One Road' Initiative?
Organiser	KLRCA & Malaysia-China Legal Cooperation Society
Venue	Bangunan Sulaiman

Date	16 JANUARY 2017
Event	Access To Justice In Investment Arbitration: Getting Your Funding Arrangements In Place
Organiser	KLRCA & Young ICCA
Venue	Bangunan Sulaiman

February 2017

Date	4-12 FEBRUARY 2017
Event	Diploma in International Commercial Arbitration
Organiser	KLRCA & Chartered Institute of Arbitrators (CI Arb, Malaysia Branch)
Venue	Bangunan Sulaiman

Date	20 FEBRUARY 2017
Event	Construction Arbitration Two Ways: Practical and Strategic Considerations for Managing Construction-Related Contract and Treaty Arbitrations
Organiser	KLRCA & Freshfields Bruckhaus Deringer
Venue	Bangunan Sulaiman

Date	22 FEBRUARY 2017
Event	YPG KLRCA – YSIAC Advocacy Workshop
Organiser	Young Practitioners Group KLRCA & Young SIAC
Venue	Bangunan Sulaiman

Date	23 FEBRUARY 2017
Event	Keeping Financial Experts Objective in Arbitral Proceedings
Organiser	KLRCA & The Malaysian Institute of Arbitrators
Venue	Bangunan Sulaiman

MARCH 2017

Date	17-19 MARCH 2017
Event	The First ICC / KLRCA Pre-Moot for the Willem C. Vis International Commercial Arbitration Moot Court Competition
Organiser	KLRCA & International Chamber of Commerce
Venue	Bangunan Sulaiman

APRIL 2017

Date	19 APRIL 2017
Event	Multi-tiered Dispute Resolution Clauses
Organiser	KLRCA & The Malaysian Institute of Arbitrators
Venue	Bangunan Sulaiman

MAY 2017

Date	5-9 MAY 2017
Event	KLRCA Certificate in Adjudication
Organiser	KLRCA
Venue	Bangunan Sulaiman

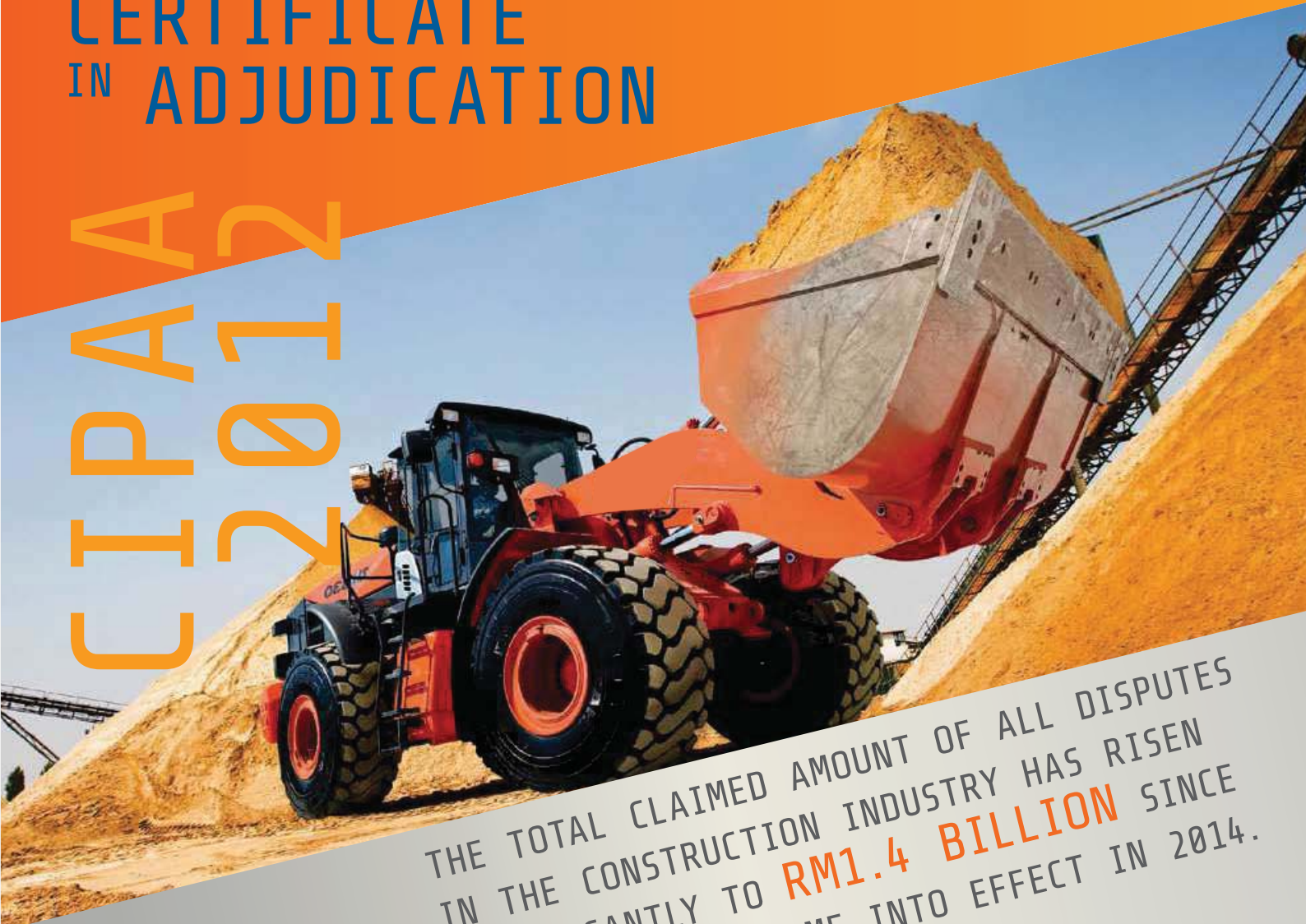
KLRCA's event of the year!

Date	15-17 MAY 2017
Event	Redefining ADR: Asia and Beyond: Kuala Lumpur International ADR Week (KLI AW)
Organiser	KLRCA (CIPAA Conference is jointly hosted with the MSA)
Venue	Bangunan Sulaiman

KLRCACERTIFICATE IN ADJUDICATION



CIPAA 2012



THE TOTAL CLAIMED AMOUNT OF ALL DISPUTES
IN THE CONSTRUCTION INDUSTRY HAS RISEN
SIGNIFICANTLY TO **RM1.4 BILLION** SINCE
THE CIPAA 2012 CAME INTO EFFECT IN 2014.

— Datuk Professor Sundra Rajoo, Director of KLRCa

SAVE THE DATE!

5-9 MAY 2017

8.30am-6.00pm

Kuala Lumpur Regional Centre for Arbitration
Bangunan Sulaiman, Jalan Sultan Hishamuddin
50000 Kuala Lumpur

CPD POINTS

Bar Council Malaysia
Board of Engineers Malaysia (BEM)
Board of Architects Malaysia (LAM)
Construction Industry Development Board (CIDB)
Land Surveyors Board
Board of Valuers, Appraisers and
Estate Agents Malaysia (IPPEH)
Board of Quantity Surveyors Malaysia (BQSM)

pending approval
pending approval
pending approval
pending approval
pending approval
pending approval
pending approval

KLRCa Certificate in Adjudication is conducted by KLRCa and is open to everyone, especially those in the construction industry. Aside from training future adjudicators and providing them with the necessary skills to conduct an adjudication, the programme is also suitable for those who do not want to become adjudicators but would just like to seek more knowledge on the subject. This programme is recognised by the CIPAA Regulations as necessary qualification to be a CIPAA Adjudicator under CIPAA 2012.

DON'T MISS OUT! This programme is recognised by the CIPAA Regulations as necessary qualification to be a CIPAA Adjudicator under CIPAA 2012

For more information please contact
Paul Savuriar at 03 2271 1000 or email cipatraining@klrca.org