

A high-angle, long-exposure photograph of a busy pedestrian crossing. The image shows many people in motion, their figures blurred horizontally, creating a sense of a fast-paced, crowded environment. The white stripes of the zebra crossing are clearly visible against the dark pavement.

ADVANCING ASIA

HIGHLIGHT

**The Legal Implication
of CIPAA**

Pg 9

INTERVIEW

**In the Seat:
Professor Philip Yang**

Pg 15

FEATURE

Arbitration in Asia

Pg 19

The 5th Biennial Asia Pacific Regional Arbitration Group Conference 2013

27th to 29th June 2013
Beijing, China



Asia Pacific Regional Arbitration Group



For more information and update:

Email: info@cietac.org

Website: www.cietac.org.my

CONTENTS

.....

	04	DIRECTOR'S MESSAGE
EVENTS	05	Visitors Gallery
EVENTS	06	CIPAA 2012 Conference • What The Speakers Said
HIGHLIGHT	09	The Legal Implication of CIPAA
INTERVIEW	15	In The Seat: Professor Philip Yang
EVENTS	17	KLRC Adjudication Training Programme
FEATURE	19	Arbitration in Asia
FEATURE	26	Much Ado About Nothing? A Review of The Mediation Act 2012
EVENTS	29	KLRC Around The Region
	31	EVENTS CALENDAR

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Kuala Lumpur Regional Centre for Arbitration
12, Jalan Conlay, 50450 Kuala Lumpur, Malaysia
Tel : +603 - 2142 0103 Fax: +603 - 2142 4513
Email: enquiry@klrca.org.my

Website: www.klrca.org.my



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DIRECTOR'S MESSAGE



DEAR FRIENDS,

In 2011, I predicted that 2012 would be KLRCA's busiest year yet, and indeed, if there is one word that would aptly summarise our 2012, that word would be 'progress'.

We made much progress in 2012 and dare I say, by leaps and bounds. New rules were launched during the year including the second edition Fast Track Rule and a revision of the KLRCA Arbitration Rules. We were also very proud to launch a new set of arbitration rules for Syariah-based transactions, the KLRCA i-Arbitration Rules, the first of its kind in the world.

Also in 2012, KLRCA was appointed the official adjudication authority under the newly gazetted Construction Industry Payment & Adjudication Act 2012, which is expected to come into force in 2013. In this new role, we have been busy going around the country to create awareness and publicity on the transformations that the Act will bring to the Malaysian construction industry.

I am pleased that we have since trained and certified more than 280 adjudicators in anticipation of the Act, with more expected to be certified in 2013. We are currently working with the Attorney-General's Chambers and the Works Ministry on the CIPAA Regulations as well as coming up the KLRCA Adjudication Procedural Rules to facilitate the conduct of adjudication.

2012, thus, ended on a high, and 2013 will be just as exciting.

We will continue to strengthen our regional engagements to promote and market KLRCA internationally. With that in mind, KLRCA is translating some of our Rules into other languages, such as Arabic, Mandarin and Korean so that they can reach a wider audience.

Our engagements with the legal fraternity will continue. For instance, there are plans in the pipeline to hold briefings for the Judiciary on statutory adjudication as well the latest practices of international arbitration. There will also be more free talks on arbitration, ADR and adjudication, which will be done on a monthly basis.

We are looking forward to introducing a new set of rules for sports arbitration, in line with our role as an alternative hearing venue for the Court of Arbitration for Sport. We are also excited with the progress that has been made with our new building, which should be ready for occupation in early 2014.

I will share more of our plans and developments in our next newsletter.

For now, allow me to thank our stakeholders and partners for their strong commitment and support in 2012, namely, the Asian-African Legal Consultative Organisation (AALCO), the Prime Minister's Department, the Attorney-General's Chambers, the Malaysian Judiciary, the Malaysian Bar, and KLRCA's panellist arbitrators as well as the Chartered Institute of Arbitrators Malaysia branch and the Malaysian Institute of Arbitrators. Not forgetting also, our friends in the construction industry who have supported us in our promotion of CIPAA.

I am confident that 2013 will be an even more fulfilling year for all of us.

Until next time, happy reading.

DATUK SUNDRA RAJOO
Director of KLRCA

VISITORS GALLERY

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

Visit from
**THE LEGAL TEAMS OF KHAZANAH NASIONAL BERHAD
AND GOVERNMENT-LINKED COMPANIES (GLCs)**

18th October 2012



Visit from
UNIVERSITI MALAYA

1st November 2012



Visit from
UNIVERSITI MALAYA

4th December 2012



Visit from
THE UZBEKISTAN SUPREME COURT

13th December 2012





CIPAA 2012 CONFERENCE

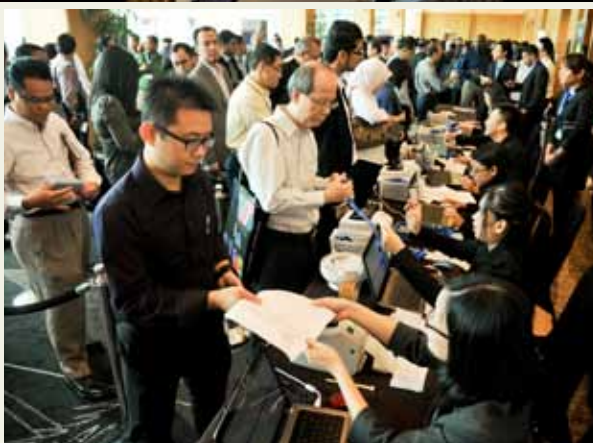
24th October 2012
Hilton Kuala Lumpur

On 24th of October 2012, KLRCA successfully organised the Construction Industry Payment and Adjudication Act (CIPAA) 2012 Conference to discuss the future of the construction industry with the advent of the CIPA Act 2012. It was attended by more than 400 local and foreign delegates from the construction industry and the public sector.

The conference, themed "Transformation by Statute: Compulsory Adjudication in the Construction Industry", aimed to educate concerned stakeholders on the implications of the CIPA Act which, among others, makes it compulsory for payment-related construction disputes to be settled through adjudication.

Among the matters discussed during the conference were: the practical challenges and legal implications of CIPAA; the impact of CIPAA on Government procurement procedures; lessons from other jurisdictions; and the impact of CIPAA in the Malaysian construction industry. There was also a mock adjudication session which gave delegates a clearer picture of the process of adjudication under the CIPA Act.





CIPAA 2012 CONFERENCE: WHAT THE SPEAKERS SAID



DATUK SUNDRA RAJOO

Director of KLRCA

"The Act would expedite the payment procedures and resolve disputes in the industry by way of arbitration and speedy adjudication. The statutory adjudication under the new law will provide a simple and speedy resolution to disputes and reduce issues of delayed payments."



DR. YEOW YOON FOO

President, Chartered Institute of Builders

"Delayed payment, non-payment, under-payment and conditional payment have been the major issues of dispute in the construction industry. Unless efficient and timely dispute resolution processes are available under the contract, disputes over payment will remain unresolved, resulting in severe cash flow problems that will finally put the building consultants, contractors, subcontractors and suppliers out of business. Whether this law in Malaysia will be implemented effectively is yet to be seen, but based on the experience of other countries, the prospects are promising."



WILFRED ABRAHAM

Partner, Messrs Zul Rafique & Partners

"The effects of the Act which provides a fast solution to payment issues in the construction industry are yet to be seen. [But] players in the construction industry should change their mindset and accept CIPAA which applies to public and private building projects, building consultants and suppliers."



AMRAN MOHD MAJID

Public Works Department
Contract and Policy Director

"The government has taken the lead to simplify payment procedures for projects in anticipation of the implementation of the Construction Industry Payment and Adjudication Act, 2012 (CIPAA)... The Act would have a positive impact on the cash flow of the construction sector."

THE LEGAL IMPLICATION OF CIPAA

The Construction Industry Payment and Adjudication Act (CIPAA) 2012 (Act 746) was gazetted on 22nd June 2012. The enactment of the CIPAA is a significant milestone in the transformation of construction justice in Malaysia.

This paper was first presented at the CIPAA 2012 Conference and is published with kind permission from the author, a partner at Messrs Azman Davidson & Co.

Background

The construction industry is an important segment of the Malaysian economy that contributes approximately 6% of the Gross Domestic Product. It generates wealth, improves quality of life and creates work opportunities for many. It has an indirect multiplier effect on other segments of the Malaysian economy.

Though the Malaysian construction industry is a matured industry, it is nevertheless plagued with problems¹. The problem of major concern is payment. Payment critically affects the construction industry because construction projects are of long duration involving multiple phases as well as multiple tiered parties. Problems in payment at the higher end of the hierarchy will lead to a serious knock on cash flow problems down the chain of contracts. Terms of payment are also often based on credit. Once the project is completed, it becomes a fixture disabling

any unpaid party from having a possessory lien or recovering by removing any part of the completed project. The recourse is only by way of legal action. There is however no security of payment.

The Malaysian construction industry payment problems have been identified² to be caused by several factors – project finance, unfair contract terms, under-certification, withholding of payment and inadequate dispute resolution procedures & security of payment.

By the resolution of the Construction Industry President's and CEO's Roundtable discussion held in mid 2003, the Malaysian Construction Industry Development Board (CIDB) was tasked to research, consult and examine the payment problems including the experiences and solutions of other countries³ having similar construction norms.

After extensive consultation and feedback⁴ from all construction industry players both in the public and private sector, the CIDB formulated a statutory solution by way of the proposed enactment of the CIPAA. There was a mixed reaction and response to the CIPAA proposal. After many meetings and debates, a compromise was struck and the CIPAA bill was finally tabled in Parliament for first reading on 1st December 2011.



BY LIM CHONG FONG

Objectives of the CIPAA

The principal objectives of the CIPAA have remained 3-pronged since conception, to wit,

- (i) facilitate regular and timely payment;
- (ii) provide a mechanism for speedy dispute resolution through adjudication; and
- (iii) provide remedies for the recovery of payment in the construction industry.

Scope and Coverage of the CIPAA

The CIPAA applies⁵ to all construction contracts⁶ relating to construction work⁷. The scope and coverage can be gauged from four interrelated perspectives – in terms of geography, parties, type of work and contracts. That notwithstanding, there is an equally wide exemption provision⁸ contemplated to be utilized in special circumstances which have not been defined in the statute but left to the order of the Works Minister. The exemption powers conferred upon the Minister are wide and discretionary. Nevertheless, the Minister has to consider the recommendation of the KLRCA. In other words, the Works Minister cannot act on his own

⁵ Sections 2 and 3 of the CIPAA.

⁶ The definition of construction work in Section 4 of the CIPAA is synonymous with that in Section 2 of the Akta Lembaga Pembangunan Industri Pembinaan Malaysia 1994 (Act 520).

⁷ The definition of construction work in Section 4 of the CIPAA is synonymous with that in Section 2 of the Akta Lembaga Pembangunan Industri Pembinaan Malaysia 1994 (Act 520).

⁸ Section 40 of the CIPAA.

¹ Lim: The Malaysian Construction Industry. The Present Dilemma of the Unpaid Contractors: Inadequacy of Present Laws & the Need for the Proposed CIPAA – 2007 MBJ Vol. 1, 72.

² Lim: Malaysian Construction Industry Payment – Strategies for Reform – December 2009 LL.M dissertation submitted to the University of Malaya.

³ United Kingdom, Australia, New Zealand, Singapore and Hong Kong.

⁴ CIDB: A Report on the Proposed for a Malaysian Construction Industry Payment and Adjudication Act – December 2008.

volition. The criteria and procedure on exemption are not stated in the CIPAA. Any party that wishes to seek exemption has to apply to the KLRC or to the Works Minister who has then to refer the application to the KLRC for recommendation, probably the latter. It is submitted that the qualifying cases would be small, particularly confined to projects where key national interest is paramount. The exercise of the exemption powers can in principle be subject to judicial review⁹ but there is likely to be the problem of overcoming the locus standi¹⁰ to sustain the challenge.

In respect of geography, the work must be carried out wholly or partly within Malaysian territory. This provision is adequate to deal with marine structures in oil and gas extraction that may be anchored in joint operating areas between Malaysia and another country. But what if it is in the sea within the Exclusive Economic Zone ("EEZ")¹¹? It is submitted that the CIPAA would not apply by reason that the EEZ is not within the territory of Malaysia albeit there is the right to exploit resources by international treaty and convention. It is unclear as to whether ship building such as a FPSO vessel common in the oil & gas industry is encompassed by the CIPAA. Again, it is submitted that the CIPAA does not apply because the genus of the definition of construction work relates to fixtures¹² whereas the FPSO is a chattel. What about professional services carried out in Malaysia for a foreign project or conversely foreign services carried out for a Malaysian project? By similar reasoning, the CIPAA applies to the latter but not the former because the former is not a Malaysian fixture.

As to parties, all construction contracting parties — natural individuals, body corporates and statutory bodies are covered by the CIPAA. Both the Federal and State Governments are also included. It is submitted that the exemption provision cannot be utilised to exempt the Federal or any State Government altogether as that would be contradictory to the purpose of exemption.

As for type of work, it is plain that all construction works are captured by the CIPAA. The sole exemption is only a residential building less than four storeys high wholly intended for occupation by a natural person who entered into the construction contract¹³. Thus, this provision will exempt the typical lay man undertaking house renovation and unfamiliar with the demands of the CIPAA from being ambushed by the contractor. Nevertheless, there can be arguments as to whether occupation for business or commercial premises may also qualify. It is submitted that it may not, following *Samuel Thomas Construction v Anon*¹⁴. In that case, it was held that the construction contract to refurbish a few farm houses which were mixed for dwelling and sale was not within the ambit of the HGCRA.

With regard to construction contracts, it is clear that all work contracts, supply contracts and consultancy services contracts relating to Construction Works are covered by the CIPAA. Accordingly, there is a minefield of potential challenges that will centre on what constitutes a contract in writing and the consequences of a contract made partly orally and partly in writing, particularly collateral contracts. It is not defined in the CIPAA as to what constitutes a contract in writing and

it is submitted that a good guide by analogy would be s.9(4)(a) and (b) of the Arbitration Act 2005 (Act 646). Nevertheless, the English cases may also be illustrative. In *RJT Consulting Engineers Ltd v DM Engineering (NI) Ltd*¹⁵, the English Court of Appeal held in relation to an underlying oral contract later confirmed in writing that all terms of the agreement must be evidenced in writing. It appears insufficient if only the material terms are recorded in writing¹⁶ though it is submitted that this is probably too strictly construed. In another English Court of Appeal case of *Thomas-Frederic's (Construction) Ltd v Keith Wilson*¹⁷, it was held that the provision in the HGCRA required contract in writing has not been satisfied because it was unclear whether the signatory of a letter evidencing an oral agreement was signed by the author or on behalf of another company.

Facilitate Regular and Timely Payment

It is trite that cash flow is paramount in the construction industry¹⁸ and this is tied to contract payments under the construction contract.

Cash flow will undoubtedly be facilitated by way of progress payments. Nevertheless, payment under Malaysian construction contracts takes many forms. There are "bullet payments"¹⁹, "payment upon certification"²⁰, "pay when paid" payments²¹, "payment upon invoice", "payment in kind", etc. The CIPAA only prohibits two modes of conditional payment that inhibit cash flow, to wit, payment conditional upon a party

9 Order 53 Rules of Court 2012.

10 *Government of Malaysia v Lim Kit Siang & Anor* [1988] 1 CLJ 219.

11 Exclusive Economic Zone Act 1984 (Act 311).

12 Section 5 National Land Code 1965; see *Goh Chong Hin & Anor v The Consolidated Malay Rubber Estates Ltd* 5 FMSLR 86.

13 This is similar to the exclusion found in Section 106 of the UK Housing, Grants, Construction and Regeneration Act 1996 (HGCRA), Sections 4(1) and (3) of the Singapore Building and Construction Industry Security of Payment Act 2004 (SOPA).

14 (Unreported) TCC Exeter 28.1.2000.

15 [2002] BLR 217.

16 *Trustees of the Stratfield Saye Estate v AHL Construction Ltd* [2004] EWHC 3286 (TCC).

17 [2003] EWCA Civ 1494.

18 *Pembinaan Leow Tuck Chui & Sons Sdn Bhd v Dr. Leela Medical Centre Sdn Bhd* [1995] 2 MLJ 57.

19 *Pekeliling Triangle Sdn Bhd & Anor v Chase Perdana Bhd* [2003] 1 CLJ 153.

20 See for example Clauses 30.1 and 28.0 of the PAM 2006 and PWD 2007 forms of contract.

21 *Antah Schindler Sdn Bhd v Ssangyong Engineering & Construction Co Ltd* [2008] 3 CLJ 641 and *Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd* [2010] 2 CLJ 28.

having received payment from a third party and upon availability of funds or financing facility drawdown²². This is so notwithstanding that the third party is insolvent in contrast with the English's position. However and unlike the Singapore Security of Payment Act (SOPA) where it is obligatory for construction contracts to adhere to the payment scheme stipulated in the statute, the CIPAA (save for the aforesaid prohibition on conditional payments) gives liberty to contracting parties to otherwise stipulate their payment terms. In this respect, the paying party can still stipulate the period of honouring payment that accords with its financing capability and the recipient party will have to provide for it accordingly in the bid to manage the cash flow risk.

If there is however "no payment" terms agreed in the construction contract, the CIPAA provides for "default payment" terms on a periodic basis²³. This provision benefits construction consultancy contracts where professional services are often long rendered without agreement reached on the fee payable. In such instance, it is now clear that the fee would be that as prescribed by the relevant regulatory board and payable monthly within 30 days from the receipt of invoice provided there is a contract in writing evidencing at least the scope of the professional services.

Mechanism for Speedy Dispute Resolution through Adjudication

Before the advent of the CIPAA, the traditional mode of construction dispute resolution is either arbitration or court litigation. Both are perceived to be protracted and increasingly expensive. This may be necessarily so because they are final and binding processes. Consequently, the disputing parties ought to accorded

reasonable opportunity to prosecute and defend their respective case including the utilisation of discovery, administration of interrogatories and extensive cross examination of witnesses. These procedures can be time consuming.

The CIPAA introduces²⁴ statutory adjudication. In comparison with arbitration and court litigation, adjudication is a swift and cheaper process that is binding but not final²⁵. In other words it is a "pay first and argue later" rough justice procedure. In *Macob Civil Engineering Ltd v Morrison Construction Ltd*²⁶, Dyson J (as he then was) held in respect of the HGCRA:-

"The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement: see s 108(3) of the Act and paragraph 23(2) of Part 1 of the Scheme. The timetable for adjudications is very tight (see s 108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (s 108(2)(e) of the Act and paragraph 12(a) of Part 1 of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (s 108(2)(f) of the Act and paragraph 13 of Part 1 of the Scheme). He may, therefore, conduct an entirely inquisitorial process, or he may, as in the present case, invite representations from the

parties. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."

This is sound conceptually in view of the short time frame. The adjudication procedure is suitable to tackle the pervasive and prevailing under-certification and withholding of payment problems as well as the protracted dispute resolution problem in Malaysia. Since the adjudication decision is only binding but not final, it is attractive in that a party that is dissatisfied with the adjudication decision may have the dispute finally determined by arbitration or court litigation *de novo* without being subjected to *res judicata*.

The adjudication procedure under the CIPAA is similar but not identical to that in other countries with security of payment legislation. The total duration of the adjudication process under the CIPAA is 95 working days, which by comparison is the longest amongst the countries. It is said to be a "mini arbitration". The CIPAA gives the parties and adjudicator a realistic and reasonable time frame to present and determine the dispute on the merits rather than on technicalities. In fact, if it is a simple dispute, the decision can be made earlier. Since Malaysian construction disputes have traditionally been determined in excess of a year, it is thought that a period of around 4 months is a vast improvement.

²² Section 35(2) of the CIPAA. This is generally consistent with the position in the United Kingdom, Australia, New Zealand and Singapore under their respective legislation.
²³ Section 36 of the CIPAA.

²⁴ Sections 5 to 27 of the CIPAA.
²⁵ Sections 13 and 37 of the CIPAA.
²⁶ [1999] BLR 93

As to commencement of adjudication under the CIPAA, it is premised on a payment dispute²⁷ instead of any dispute²⁸ as in the United Kingdom. In other words, it is less pro-active because the unpaid party has to await and be “out of pocket” before adjudication can be initiated. Thus, in a typical delay and extension of time dispute, it is not possible to have the dispute adjudicated at source unless and until the delay has developed into liquidated damages that is set off against payment.

Besides, payment has also been narrowly defined in the CIPAA to mean payment for work done or services rendered under the express terms of the construction contract. This definition should include both progress and final payment²⁹. The definition of payment can nevertheless still give rise to jurisdictional challenges as to whether it encompasses variation work, prolongation loss and expense, damages and quantum meruit claims. It has to await judicial clarification as to what constitutes or is encompassed by work done or services rendered under the express terms of the contract, especially whether a strict literal or otherwise, a purposive interpretation is accorded to the meaning of express terms. On the one hand, it can mean that there ought to be express itemised claimable provision for each head of work done or services rendered in the construction contract or on the other hand, it can simply mean the work done or services rendered must be pursuant to the written construction contract.

On the face, it should be clear that variation work under most standard forms of contract would be part and parcel of work done since there is express power for ordering and certification of variations. Variation work may thus not be as clear in a

bespoke contract if it is silent on the express power to order variations. Prolongation loss and expense are unclear even for standard forms that expressly provide for certification of direct loss and expense. Nevertheless, it was held in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty & Ors*³⁰ based on the NSW SOP legislation that such prolongation claims can be adjudicated because they constituted construction work carried out if in substance they represent the increased cost or price of the work actually carried out. Quantum meruit may arguably be claimable as work done depending on its context. It clearly cannot be claimed if it arose from a void contract (because there is no contract in writing in existence) but may perhaps be claimable if it arose from a terminated contract³¹ if the meaning of express terms is liberally construed. What about a payment claim pursuant to a terminated contract or a settlement agreement? In the former, it should be in principle claimable for work done or services rendered computed based on the express terms of the contract even if that is narrowly construed but not the former because there is no construction work involved. As for damages, it is submitted that it is probably not though damages have been allowed in *Parkview Construction Pty Ltd v Sydney Civil Excavation Pty Ltd & Anor*³² pursuant to the NSW SOP legislation. Will payment based on terms prescribed by Section 36 of the CIPAA be capable of adjudication? It depends here on whether they are construed as statutorily implied terms³³ or express terms.

The other potential jurisdictional challenges that can arise is: when does a payment dispute accrue and whether more than one payment dispute can be referred at the same

time to adjudication? As to the former, it should generally be when the payment claim is disputed by the service of the payment response³⁴. In respect of the latter, multiple payment disputes do not appear to be prohibited in the CIPAA. It should be sufficient if they are put into the payment claim.

In respect of the appointment of the adjudicator, the disputing parties are only at liberty to agree on the adjudicator after the dispute has arisen³⁵. By this provision, the parties are clearly not permitted to name an adjudicator or an appointing authority upfront in the construction contract. If the parties are unable to agree, the default appointing body is the Director of the Kuala Lumpur Regional Centre for Arbitration (KLRCRA)³⁶.

The parties may conduct the adjudication process themselves or through representatives, such as Advocates & Solicitors³⁷. Since adjudication is a rights based process, the parties should be accorded the liberty to have legal representation if they so desire. Nevertheless, it is desirable for the parties to be legally advised because the CIPAA stipulates that the losing party in the adjudication process would be subjected to costs³⁸, particularly to discourage vexatious adjudication.

The adjudicator under the CIPAA is clothed with heavy duties and responsibilities³⁹ but at the same time given fairly extensive powers⁴⁰. In consideration, the adjudicator is entitled to agree on his fees with the parties⁴¹, otherwise, the fees will be charged at the standard scale of fees prescribed by the KLRCRA⁴². In discharging his duties and

27 Sections 4, 5(1) and 7(1) of the CIPAA.

28 Section 108 of the HGCRA.

29 *Tiong Seng Construction (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364 where progress payments in the SOPA were held to include final payment too.

30 [2005] NSWCA 228.

31 *31 Tan Hock Chan v Kho Teck Seng* [1980] 1 MLJ 308.

32 [2009] NSWSC 61.

33 see for example, Sections 14 and 16 of the Sale of Goods Act 1967 (Rev. 1989) (Act 382).

34 The jurisdiction of the adjudicator is also determined therefrom; see *Northern Developments (Cumbria) Ltd v J&J Nichol* [2000] BLR 158 but see also s.27(3) of the CIPAA.

35 Section 21(a) of the CIPAA.

36 Section 21(b) of the CIPAA.

37 Section 8(3) of the CIPAA.

38 Section 18 of the CIPAA.

39 Section 24 of the CIPAA.

40 Section 25 of the CIPAA.

41 Sections 22(2) and 23(2) of the CIPAA.

42 Section 32(b) of the CIPAA.

Though the Malaysian construction industry is a matured industry, it is nevertheless plagued with problems. The problem of major concern is payment.



responsibilities, the most onerous one upon the adjudicator which may lead to challenge⁴³ is the administration of natural justice.

Natural justice is not defined in the CIPAA. It is situational and fact sensitive. The English HGCRA cases are again illustrative as a guide. In *Discairn Project Services Ltd v Opecprime Developments Ltd* (No. 1)⁴⁴, it was held that the adjudicator did not act impartially where he had two private conversations with the personnel of the contractor that were recorded and not communicated to the employer even though the adjudicator did not initiate the conversations. It was held in *Glencot Development & Design Co. Ltd v Ben Barrett & Son (Contractors) Ltd*⁴⁵ that the adjudicator failed to observe the rules of natural justice when he acted as both as adjudicator and mediator particularly by having to and fro caucuses separately with the parties. Likewise, it was held in *Woods Hardwick Ltd v Chiltern Air-Conditioning Ltd*⁴⁶ that the adjudicator was not impartial when he utilised his own initiative to consult the sub contractors of one of the parties without telling the parties that he had obtained the information as well as the contents thereof.

It was also a failure to observe natural justice as held in *Balfour Beatty Construction Ltd v The Mayor & Burgesses of the London Borough of Lambeth*⁴⁷ where the adjudicator appointed his own programming expert and applied the methodology without sharing with the parties in particular for their comments.

Finally, it is seen in *Shimizu Europe Ltd v LBJ Fabrications Ltd*⁴⁸ and *Humes Building Contracts Ltd v Charlotte Homes (Surrey) Ltd*⁴⁹ that the adjudicator acted in breach of natural justice when the decision was based on a legal premise which had not been argued by or put to either party for arguments.

The CIPAA does not also have the “Kompetenz - Kompetenz” provision. In other words, the adjudicator is not empowered to determine and conclusively decide on his own jurisdiction⁵⁰. The parties have a limited right by consent to enlarge the adjudicator’s jurisdiction⁵¹. As a result, all jurisdictional challenges that arise are left to be determined

by the High Court⁵². In the face of challenge, the adjudicator must make his own inquiry into his jurisdiction. He should resign if he holds that he has no jurisdiction or proceed⁵³ if he holds otherwise subject to the challenge to be taken up by the parties in the High Court⁵⁴.

In contrast with the Singapore SOPA where successful challenges⁵⁵ have been made in court for non compliance with the statute in relation to the adjudication process, the CIPAA⁵⁶ on the advice of Mr. Justice Sir Vivian Ramsey (formerly Chief Judge of the UK Technology and Construction Court) provides that the powers of the adjudicator to adjudicate the dispute are not invalidated nor the adjudication proceedings or decision nullified due to non compliance with the provisions of the Act. This is an important provision to save the adjudication process from technical challenges and to ensure that they are determined and enforced on the merits of the dispute.

43 Section 15(b) of the CIPAA

44 [2000] BLR 402

45 [2001] BLR 207

46 [2001] BLR 23

47 [2002] BLR 288; see also *RSL (South West) Ltd v Stansell Ltd* [2003] EWHC 1390 (TCC).

48 [2003] BLR 381.

49 (Unreported) TCC Salford 4.1.2007

50 *Farebrother Building Services Ltd v Frogmore Investments Ltd* [2001] CILL 1762

51 Section 27(2) of the CIPAA but this is confined to matters not previously referred pursuant to Sections 5 and 6 of the CIPAA and not whether the construction contract is in writing or whether the payment claim can be adjudicated

52 Sections 27 and 15(d) of the CIPAA

53 Section 27(3) of the CIPAA

54 The challenge can be by way of declaration and injunction; see *ABB Power Construction Ltd v Norwest Holst Engineering Ltd* [2000] TCLR 831 and *John Mowlem & Co. Plc v Hydra-Tight & Co. Plc* [2002] 17 Const LJ 358 or setting aside pursuant to Section 15(d) of the CIPAA

55 See for example *Chua Say Eng v Lee Wee Lik Terence* [2011] SGHC 109

56 Section 26 of the CIPAA which is modified from Order 2 Rules (1) and (2) of the Rules of the High Court 1980

The aim of the CIPAA is to produce positive adjudication decisions that can be enforced in genuine unpaid cases. Accordingly, the grounds for setting aside the adjudication decision by the High Court are limited⁵⁷. There is the omission in the CIPAA that the parties and the contract administrator of the construction contract must give effect to the adjudication decision. This omitted provision is to prevent parties attempting to ignore or avoid the adjudication decision by not giving effect to it for example in the certification in a subsequent certificate pursuant to the construction contract⁵⁸. It is also open for argument whether an adjudication decision can be adjudicated again unless a declaration and injunction are sought in the High Court to bar re-adjudication.

If any party is dissatisfied with the adjudication decision, the proper recourse is to have the dispute re-determined finally via arbitration or court litigation. In that regard, the party that is dissatisfied with the adjudication decision may apply to the High Court to stay the adjudication decision⁵⁹. The CIPAA does not prescribe the principles governing the stay but the High Court has to carry out a delicate balancing act between providing cash flow and recovery of the pay-out particularly if the winning party is financially strapped or insolvent. In *Wimbledon Construction Company 2000 Ltd v Vago*⁶⁰, it was held that the probable inability on the part of the claimant to re-pay the judgment entered on the adjudicated sum is a special circumstance warranting a stay, especially if the claimant was in insolvent liquidation. Since the respondent had in that case not shown that the claimant would probably be unable to re-pay the judgment sum if that was the outcome of the dispute

finally determined by arbitration coupled with the fact that the claimant's financial position was very similar to that when it entered the contract but caused in a significant measure by the respondent's failure to pay the adjudicated sum, the stay was refused.

Remedies for Recovery of Payment

The twin objects in the CIPAA on remedies are both to permit the recovery of monies found to be due pursuant to an adjudication decision as well as to prevent further financial exposure until the adjudicated amount has been paid. As to the former on recovery, the adjudication decision can be enforced as a High Court judgment or order by modes of execution available under the Rules of Court 2012⁶¹. There is also the provision for direct payment⁶² to the successful party by the principal⁶³ of the unsuccessful party in the adjudication which is targeted for the benefit of unpaid sub-contractors and suppliers. It is however unclear as to whether the direct payment is discretionary or mandatory on the part of the principal particularly when the principal alleges a set off against the unsuccessful party. It is submitted that it is probably discretionary as it be otherwise unjust to the principal. In regard to the latter, to avoid financial exposure, there is the provision⁶⁴ for suspension or reduction of rate of progress of performance which would otherwise be wrongful at common law⁶⁵.

The aforesaid remedies can be exercised concurrently⁶⁶ to effectively realise the aforesaid twin objects. Nevertheless, the unpaid party may also resort to other recourses available in the construction contract

or at written law⁶⁷. The former may include the determination of the construction contract⁶⁸ whilst the latter may involve the non-renewal of contractor registration of the non-paying unsuccessful party pursuant to the *Akta Lembaga Pembangunan Industri Pembinaan 1994*. The latter is a proposal mooted by the CIDB to ensure compliance of adjudication decisions by registered contractors. It will be arguable whether a statutory demand under Section 218 of the *Companies Act 1965* (Act 125) can be utilized as well⁶⁹.

Contracting Out

There is no express provision in the CIPAA stipulating that the parties cannot contract out of its provisions unlike the *Singapore SOPA*⁷⁰. Nevertheless, it is submitted that the oblique intention is that there can be non-consensual contracting out otherwise the exemption provision is redundant⁷¹.

Conclusion

The CIPAA is aimed to resolve the Malaysian construction industry payment problems. However, no statute can be drafted perfectly envisaging all eventualities. The success of the CIPAA is critically dependent on the competency and integrity of the adjudicators as well as the efficient and effective implementation of the CIPAA by both the KLRCA and the High Court⁷². The eventual decisions of the High Court will steer and illuminate the obscurities found in the CIPAA.

57 Section 15 of the CIPAA

58 *Ballast plc v The Burrell Company (Construction Management) Ltd* [2001] BLR 529

59 Section 16 of the CIPAA

60 [2005] 101 Const LR 99

61 Section 28 of the CIPAA

62 Section 30 of the CIPAA

63 Section 4 of the CIPAA

64 Section 29 of the CIPAA.

65 *Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd* [1997] 1 CLJ Supp 448

66 Section 31(1) of the CIPAA

67 Section 31(2) of the CIPAA

68 See for example Clause 26.1(a) of the PAM 2006 standard form of contract

69 See *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295 in relation to an arbitration award

70 Section 36 of the SOPA

71 Section 40 of the CIPAA and see also *S.E.A. Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31

72 The Bar Council and CIDB towards this end has proposed to set up the specialist construction court; see *Bar Council Malaysia – A plea towards creating a specialist construction court - 2011*; see also *Lim: The Quest for Construction Justice Reform – 2009 MBJ Vol.2, 46*



IN THE SEAT – PROFESSOR PHILIP YANG

PROFESSOR PHILIP YANG is a world-renowned arbitrator specialising in international trade, shipping and commercial disputes. He also teaches arbitration law and practice in the City University of Hong Kong and the Hong Kong University. He has published over 450 awards as a sole or co-arbitrator. He is the Past Chairman of the Hong Kong International Arbitration Centre and is currently its Honorary Chairman as well as the current Hong Kong Representative of ICC International Court of Arbitration. He also sits on the KLRCA Advisory Board. In this exclusive interview, Professor Yang tells us how he started to venture into arbitration, the importance of maritime cases in arbitration and his greatest achievement.

WHY ARBITRATION AND HOW DID YOU COME ABOUT DOING ARBITRATION FULL TIME?

I was interested in arbitration when I worked in the chartering department of a major Hong Kong shipping company some 35 years ago. My background is no different with a lot of the London maritime arbitrators who worked as chartering brokers, ship-owners' chartering men or charterers' chartering men. In those days, a well-known standard form of arbitration agreement had a qualification requirement of: "The arbitrator shall be a commercial/shipping man and a member of the Baltic Exchange".

For many years until now, charter-party disputes remain to be the most common type of maritime arbitration.

After working as a chartering man for a number of years, I changed my work to act as a claim consultant. I was quickly occupied with the handling of a lot of charter-party arbitration cases, many in London and some in New York. This experience proved valuable in my latter years as an arbitrator. I can quickly guess or appreciate the motive behind every step in parties' case-handlers, be they lawyers or non-lawyers.

So 15 years ago, because I have had so many appointments as arbitrator, I decided to turn to a full-time arbitrator in maritime and other commercial disputes. I had to cease the work as a claim consultant.

YOU ARE REGARDED AS ONE OF THE WORLD'S TOP MARITIME ARBITRATORS – WHAT MADE YOU INTERESTED IN THAT AREA OF ARBITRATION?

I believe I was fortunate to have started my career as a maritime arbitrator. It is a vast area and futile for arbitration over hundreds of years. The knowledge and experience gained in maritime arbitration is adaptable to many other commercial activities. In the 1979 English Arbitration Act, it had singled out three types of contracts, entitled "special category", which was not allowed to exclude in advance an appeal on points of law to the High Court. The purpose is to assist in the continuous development of English commercial law. The "special category" contracts are (1) those falling within the Admiralty jurisdiction of the High Court, or simply put, traditional maritime disputes such as charter-parties, bills of lading, ship's sale contract, etc; (2) Commodity contracts transacted on FOB & CIF basis, which are heavily related to shipping; and (3) Insurance contracts, which are again related to shipping, albeit to a smaller extent than commodity contracts.

The latest Lord Mance's interim report in the working of section 69 under the 1996 English Arbitration Act again reconfirmed the bulk of cases appealed to the High Court were maritime cases.

To therefore conclude, being a maritime arbitrator and trying my best to learn, I can keep pace with the continuous development of commercial law.

WHAT ARE THE CHALLENGES OF MARITIME ARBITRATION AND WHAT ROLE CAN MALAYSIA PLAY?

Maritime arbitration has always been an important source of arbitration/litigation cases. I believe any place wanting to be an international arbitration centre must pay attention to this area. If attracting maritime arbitration becomes successful even in a limited way, it will bring side benefits such as the grooming of expertise in related areas such as shipping and international trade (especially in sales of commodities).

Malaysia is an important nation with a lot of shipping and trading activities. Malaysia also wants to be an international arbitration hub, therefore it becomes logical that Malaysia must focus in attracting and developing maritime arbitration.

HOW DO YOU SEE THE FUTURE OF ARBITRATION – WHAT ARE THE KEY AREAS THAT ARBITRATORS SHOULD PAY ATTENTION TO AND WHAT AREAS WOULD BE IRRELEVANT IN THE FUTURE?

The future of international arbitration is pretty much assured in the foreseeable future. National courts simply cannot fulfil the role in dispute resolution in a globalised world. There are important and unique benefits in international arbitration such as enforceability of awards or the certainty of an agreed neutral venue to decide disputes, which cannot be matched by national courts.

I cannot tell what will be the key areas of growth in international arbitration in the longer term [but] in recent years, a lot of people have talked about investment arbitration as the growth area. All I can be certain is that maritime arbitration will always be there to provide an important source of work to arbitrators.

WHO ARE YOUR HEROES?

I guess the question is my heroes in arbitration and not in other areas such as sports or movies. In that case, I can say that I know a number of very good and competent arbitrators (worldwide and/or in Asia) whom I respect a lot. But I am not sure I like to call them my heroes. I don't think I have a hero because I believe most of the younger generation aspired to go into arbitration can become one of the many good and competent arbitrators in years to come. All they need is hard work, dedication, patience and with a bit of luck in order to break in.

WHAT WOULD YOU CONSIDER TO BE YOUR GREATEST ACHIEVEMENT IN ARBITRATION?

The achievement in arbitration I am proud of is education in Asia. I have been doing it for well over 25 years. I was involved in the first CIArb Entry Course and the first Special Fellowship Course (now the Accelerated Route to Fellowship Course) many years ago at Kuala Lumpur, Singapore and Hong Kong.

I have taught the LLM in Arbitration course at the Hong Kong City University for over 20 years. I have conducted numerous courses in arbitration in China for over 25 years. I remain dedicated and love teaching arbitration, even though I have to divide my time with the handling of arbitration cases in order to make a living. As a practicing full-time arbitrator, I can also gain experience in this fast-changing arbitration world so that I can keep improving in my teaching. So the two roles of teaching and arbitrating intertwine perfectly.

KLRC ADJUDICATION TRAINING PROGRAMME

KLRC rolled out its Adjudication Training Programme for the general public in Kuala Lumpur, Kota Kinabalu and Penang between August and December 2012. The programme aims to train future adjudicators and provide them with the necessary skills to conduct an adjudication. Around 200 people in total attended and opted to take the examinations that would allow them to be certified adjudicators.

The training programme will continue in Kuching in January 2013.

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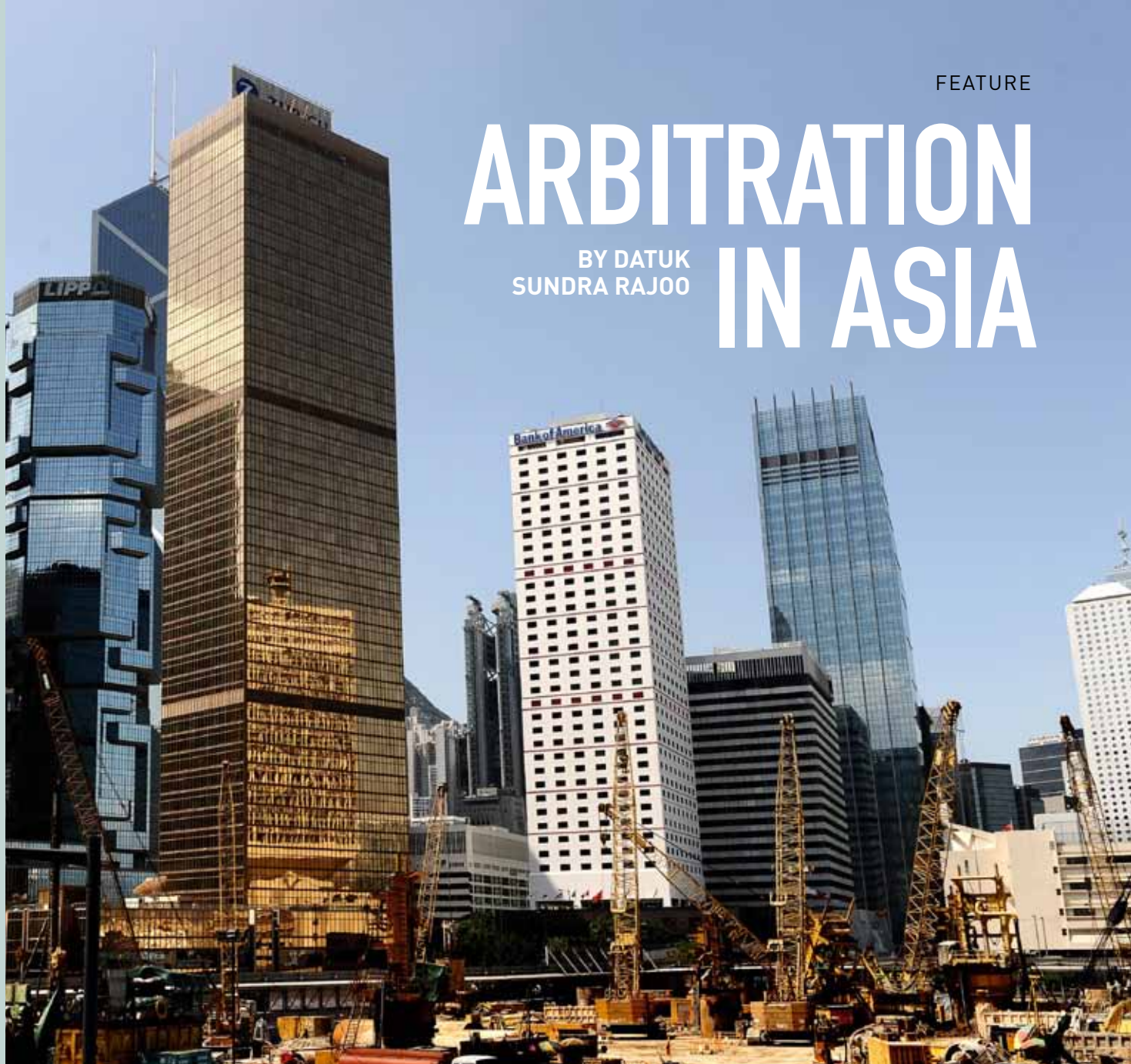


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ARBITRATION IN ASIA

BY DATUK
SUNDRA RAJOO



This paper was first delivered during the the Diploma in International Commercial Arbitration in Oxford, UK in September 2012 and has been edited for brevity.

HISTORY OF ARBITRATION IN ASIA

It would be difficult to trace the history of arbitration in Asia, but we can first look back to 1923, when the International Chamber of Commerce (ICC) Court conducted its first arbitration. Despite it involving an Asian party (a Thai Claimant, to be specific¹), it was only up till five years ago that arbitration was deemed virtually non-existent within the Asian terrain.

Today, statistics however reveal an indubitable surge in arbitration in that more Asian parties are submitting themselves to arbitration (ICC statistics reveal that from 195 Asian parties in 2005, there were 257 Asian parties in 2010), as well as an increase of places of arbitration in Asia and reform of substantive laws².

With the world economic progression today, in order to accommodate counterparty in the Asian region, there has been tendency to refer disputes to arbitral institutions located in Asia, namely CIETAC, BAC, SIAC, HKIAC, KLRCA, KCAB, ICC Asia and others. Based on the Global Arbitration Review's most recent report on Asia-Pacific, the number of cases regionally stands as below³:

¹ Jason fry and Khong Cheng-Yee, 'ICC Arbitration in Asia' in *Asia Arbitration Handbook* (Oxford University Press, 2011) 1127.

² See *ibid*.

³ Michael Pryles 'Preface' in *Asia-Pacific Arbitration Law Review 2013* (Law Business Research, 2012).

ARBITRATION CENTRE	NUMBER OF NEW CASES REGISTERED IN 2012
SIAC	188
HKIAC	275 (65% International) (35% Domestic)
KLRCA	85 (20% International)
JCAA	19
CIETAC	965 (Domestic) 470 (International)
Beijing Arbitration Commission	1433 (Domestic) 38 (International)

THE OUTLOOK OF ARBITRATION IN ASIA

In recognition of the growth of arbitration, many Asian countries have undergone extensive arbitration related legislative changes and judicial reforms, even more so in these past five years.. Many nations have opted to incorporate international standards such as the UNCITRAL Model Law. In fact, Asia currently has the highest concentration of Model Law adopters worldwide⁴. This comes quite timely, as a 2010 survey on the choices of international arbitration (venues? seats?) tells us that 62% of the respondents opine that formal legal infrastructure or the statutory framework of a country is a decisive factor in selecting a place of arbitration⁵.

MALAYSIA

The arbitration regime of Malaysia is presently at the brink of a new horizon. In 2011, the government of Malaysia publically reiterated its commitment to the growth of arbitration in Malaysia by passing the Arbitration (Amendment) Act 2011 which came into effect on 1 July 2011. The amendments address lacunas which emerged from the former Arbitration Act 2005 (Act 646).

Under the amendment act, court intervention in Malaysia has been modified to adopt the language of UNCITRAL, thus only allowing for intervention 'where it is so provided in this Act'⁶. This limits the use of inherent powers to matters specifically mentioned in the Act as opposed to the former text which created a sliver of manoeuvrability with the phrase, 'unless otherwise provided'.

In light of development of maritime litigation, the Amendment Act also expands its scope by providing for the arrests for security of property related to admiralty proceedings⁷. In terms of practice, it should be noted that KLRCA launched the second edition to its Fast Track Rules⁸, which was drafted in consultation with prominent lawyers of the maritime industry and discards the previous RM1million limit of the previous edition whilst maintaining the speed of resolution.

Other notable reforms in Malaysian law are the granting of stay of proceedings in favour of arbitration unless an agreement is void, inoperative or incapable of being performed⁹, the granting of interim awards and stay of proceedings where the seat of arbitration is not in Malaysia¹⁰, the provision for laws of other countries to be used in a domestic arbitration¹¹, the clarification of enforcement of awards of international arbitrations seated in Malaysia¹², the use of laws of other States in the determination of the validity of an arbitration agreement¹³ to state a few¹⁴.

4 See *ibid*.

5 'Choices in International Arbitration' by the *School of International Arbitration at Queen Mary, University of London* (White & Case LLP, 2010).

6 See Section 8 Arbitration (Amendment) Act 2011.

7 See Section 10 & 11 Arbitration (Amendment) Act 2011.

8 27 February 2012.

9 See section 10 Arbitration (Amendment) Act 2011. In practice, courts will stay court proceedings in favour of arbitration *Chut Nyak Isham bin Nyak Ariff v Malaysian Technology Development Corp Sdn Bhd & Ors* [2009] 6 MLJ 729; *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233.

10 See Section 10 & 11 *ibid*

11 See Section 30 *ibid*

12 See Section 38 *ibid*

13 See Section 39 *ibid*

14 See also Section 42 & 51 *ibid*

CHINA

Around two decades ago, arbitration in China was quite a different creature from today. There were strict distinctions between international and domestic arbitrations and arbitration as a whole exuded a predominantly administrative flavour. However, in 1994, the Arbitration Law of the People's Republic of China (PRC) was introduced and established a system more convergent with international practices. Today, the China International Economic and Trade Arbitration Commission (CIETAC – China's forefront arbitration body) is gaining prominence as a favoured option for dispute resolution in complex, bilingual commercial cases.¹⁵ In 2011 alone, CIETAC dealt with 1,435 cases.

In 2011, the Law on Application of Law for Foreign-related Civil Relations (the PRC Law on Conflict of Laws) brought some key changes to arbitral practice in China. Article 41 of the Law on Conflict of Laws states that substantive law shall be the laws at the habitual residence of the party whose fulfilment of obligations can best reflect the characteristics of the contract; or other laws which have the closest relation with the contract. Article 10 of the Law on Conflict of Laws states that the People's Courts, the arbitration institutions and the relevant administrative authorities shall ascertain the content of foreign law intended to be applied by the parties. Article 18 states that where parties have not agreed on the governing law of foreign-related arbitration agreement, the governing law shall be either the law of the place where the arbitration commission is located or the law of the place of the arbitration.

New rules came into force on 1 May 2012 and the rules show a strong commitment to reconcile arbitration in China with international practice. CIETAC's new rules expand on previous improvements, such as by empowering CIETAC to order any interim measure as it deems necessary or proper on a party's application. Also, the new rules allow CIETAC to designate any language of the arbitration in the absence of party agreement. In terms of the summary procedure, it will apply to any case where the amount in dispute is below 2 million renminbi. For fairness, the new rules provide that if either side defaults in appointing the party-appointed arbitration, then the chairman of CIETAC will appoint all three arbitrators. The new rules also allow consolidation of two or more CIETAC arbitrations into one arbitration, freedom to agree on the governing law of the contract consistent with PRC law, and clarification that the 'Secretariat of CIETAC' or CIETAC in Beijing would administer the case where the parties had failed to agree on the administering body. Such improvements will be useful for parties seeking arbitration in China.¹⁶

HONG KONG

Hong Kong has quite a unique position. Being a colony of the United Kingdom up till recent times (1997), Hong Kong perched precariously between two vastly different arbitral regimes. Pursuant to an arrangement made between Hong Kong and the Mainland government (21 June 1999), it was agreed that arbitration awards made in Hong Kong are to be enforced in the Mainland as if the New York Convention would apply and vice versa. Hong Kong thus maintained its status as per under British rule.

More recently, a new Arbitration Ordinance 2011 (chapter 609) came into force on 1 June 2011. One of the most striking changes is the unification and streamlining of domestic and international arbitration into a single framework based on the UNCITRAL Model Law (as amended in 2006).

Overall, the new ordinance has set the ideal stage for arbitration proceedings, i.e. it stresses on the finality of arbitral awards by limiting the grounds for setting aside, it encourages party autonomy by allowing parties to select the institution and rules they would prefer to submit to and it imposes more stringent confidentiality requirements on parties¹⁷. The ordinance also legislates for arbitration-related court proceedings to be conducted in camera unless

¹⁵ Luming Chen, 'Notes on Recent Development of International Arbitration in China' in *The Asian Lawyer* (ALM Publications, Winter 2012).

¹⁶ Richard Chalk & Adam Silverman, China, *The Asia-Pacific Arbitration Review* 2013, Global Arbitration Review

¹⁷ See Section 18 of the Arbitration Ordinance 2010 (Chapter 609).



otherwise required by the court or parties¹⁸. However, due to the requests of the construction industry, 'opt-in' provisions were drafted into the ordinance to allow for parties to opt for the old domestic regime to apply¹⁹.

Another interesting aspect of Hong Kong's new ordinance is the use of hybrid dispute resolution methods such as Med-Arb or Arb-Med²⁰ which have been popular in China. However, the verdict on the prudence of conglomerating dispute resolution methods is still out. In the recent case of *Gao Haiyan v Keeneye Holdings*²¹, the Court of Appeal reinstated an arbitral award previously set aside by the lower courts under the grounds of biasness. The Court of Appeal held that respondents had not raised any concerns as to the med-arb procedure throughout the arbitration itself. Furthermore, the Court of Appeal undertook to construe public policy grounds narrowly.

SINGAPORE

We would not be far off in saying that Singapore ranks quite closely among the giants of arbitration. Its Maxwell Chambers, opened in 2009, was nominated for an award in the most significant development of the year category at the 2011 GAR30 Awards²². Statistics reveal that from 58 new cases in 2000, the number of new cases handled by the Singapore International Arbitration Centre (SIAC) has increased tremendously to 198 in 2010²³, and 188 in 2011²⁴.

Interestingly, Singapore practises a dual regime system following the enactment of the International Arbitration Act in 1995. The most recent amendments to the International Arbitration Act (IAA) was on 1 January 2012. The most salient features would be: the broadening of the definition in the IAA for "arbitration agreements", allowing the Singapore courts to review a ruling by an arbitration tribunal that it does not have jurisdiction to hear a dispute, clarifying the scope of arbitral tribunals' powers to award interest in arbitral proceedings, and providing legislative support for the 'emergency arbitrator' procedure by granting emergency arbitrators appointed under any arbitration rules the same legal status and powers as that of a conventionally-constituted arbitral tribunal²⁵.

AUSTRALIA

The July 2010 amendments to the International Arbitration Act (IAA) radically transformed Australia's legislative façade. The amendments adopt the 2006 amendments of UNCITRAL Model Law and repeal the former section 21 IAA which allowed parties to 'opt out' of being in accordance with Model Law. Under the amendments, case law on UNCITRAL Texts (CLOUT) reports may be used in interpreting the IAA²⁶.

18 See Section 16 *ibid*.

19 See Section 99-103 *ibid*

20 See Section 32 & 33 *ibid*

21 [2011] HKCU 2399

22 Alvin Yeo and Chou Sean Yu, 'Singapore' in the *Asia-Pacific Arbitration Review 2012* (Law Business Research, 2011).

23 Taken from the SIAC website at www.siac.org.sg

24 SIAC CEO's Annual Report 2011

25 Alvin Yeo SC and Chuo Sean Yu, Singapore, *The Asia-Pacific Arbitration Review 2013*, Global Arbitration Review

26 See Section 17 International Arbitration Amendment Act 2010.

These amendments have also greatly impacted arbitration on the domestic front in that it has prompted the Standing Committee of the Attorneys-General to introduce uniform arbitration legislation in all states²⁷. Thus far, only New South Wales and Tasmania has introduced new legislations. However, these new enactments carry are rife with interesting features such as mandatory stay of proceedings in the light of an arbitration agreement and provisions for the appointment of a temporary arbitrator.

JAPAN AND SOUTH KOREA

Both Japan and South Korea have amended their arbitration laws to be more compliant with UNCITRAL Model Law in 2004 and 2010 respectively. This was quite a leap for Japan as its Code of Civil Procedure 1890 (based on the German Code of Civil Procedure 1877) remained virtually unchanged until 2003.

Both Japan and South Korea's legislations contain deviations from UNCITRAL Model Law. For example, Japan's Arbitration Act contains some provisions for a similar procedure as that of med-arb where arbitrators, pending arbitral proceeding, may attempt to settle the dispute²⁸.

One of the notable features of South Korean Arbitration Act is Article 3(2) where it defines arbitration agreement as 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them out of defined legal relationship, whether contractual or not. Article 35 states that the arbitral award shall have the same effect on the parties as a final and conclusive judgment of a court. South Korea continues to maintain a pro-enforcement stance and in 2009, the Supreme Court reaffirmed that an award rendered in the jurisdiction of New York Convention signatories shall have the same effect as a domestic judgement²⁹.

INDIA

In 2010, the Indian Ministry of Law and Justice released a consultation paper addressing some of the major failings within the Indian Arbitration and Conciliation Act (IACA) 1996. The key amendment contained in the paper was the need to amend Section 2(2) to ensure that Part 1 of the Act that confers wide intervention powers only applies to arbitrations in India, whilst still ensuring that Sections 9 and 27 continue to apply to international commercial arbitration where the place of arbitration is not in India.

A further important amendment proposed deals with the term 'public policy' in Section 34. Following the decision in *Oil & Natural Gas Corporation Ltd (ONGC) v Saw Pipes Ltd (2003)*, which held that the term 'public policy', is to be given a wider interpretation, the need for express legislation has arose in order to negate the effect of this unruly judgement.

Although serious action towards amending the Act has yet to be taken, there has been some significant advancement recently which can only be described as positive. For example, the High Court's decision in *Coal India v Canadian Commercial Corporation* wherein the High Court refused to set aside an award rendered under the ICC Arbitration Rules in Geneva. This decision gives credence to parties' choice in seat of arbitration. As stated by *Redfern and Hunter*, if an English woman decides to drive her car in France, she has chosen to abide by French traffic law. It would now be interesting to see how the Supreme Court decides the batch of consolidated appeals considering the correctness of *Bhatia International v Bulk Trading SA*³⁰ which had extended Part I of the Act into international matters outside India.

Other notable developments are opening of an Indian branch of the London Court of International Arbitration, the employment of an Indian lawyer to the International Court of Arbitration of the ICC, and the encouragement of the use of arbitration under the National Litigation Policy.

27 Doug Jones and Clayton Utz 'Australia' in *Asia-Pacific Arbitration Law Review 2012* (Law Business Research, 2011) 22.

28 See Article 38(4) (5) of the Arbitration Act.

29 Korean Supreme Court Dec. No.2006Da20290.

30 2002(4) SCC 105

EMERGING COUNTRIES

Despite the surge of development in certain parts of Asia, arbitration is just beginning to find its footing in the dominions of other countries such as the Philippines, Thailand, Indonesia, Vietnam and Cambodia.

Even so, it must be recognised that there has been a marked increase in receptivity to international arbitration. For example, all of the abovementioned countries are member states to the New York Convention and have their own respective arbitration laws.

Vietnam, in June 2010, passed the Arbitration Law 2010 which came into effect on 1 January 2011 and established some positive elements. The law itself is not based on the UNCITRAL Model Law, but it allows for parties to select the law applicable to the dispute regardless of whether it conflicts with Vietnamese law. While there are no nationality restrictions on the tribunal's panel, the new law sets down a list of requirements which any local or foreign must first meet before being deemed qualified to act as an arbitrator. Vietnam is one of the few countries who still impose restrictions. At present, the system of enforcement of awards remains largely untested.

Another country which has fairly recently amended its laws is Thailand which enacted the Arbitration Act 2002 BE 2545, substantially based on UNCITRAL Model Law. It has been considered a generally "modern and workable arbitration statute"³¹ by most within the arbitration sector. Some of its key features are the unification of domestic and international cases, the competency of the tribunal to rule on its own jurisdiction, the principle of separability, representation by foreign lawyers may only occur where a dispute is not governed by Thai Law and there is no need to apply for enforcement of an award in Thailand. However, foreign nationals may act as arbitrators. Perhaps one of the biggest challenges faced by Thailand is the exclusion of government organs from arbitration unless exempted by Cabinet and also the absence of a stipulated time limit for the delivery of an award.

The developments of legislation in other parts of the region are similar including that it consists gaps which have led to doubt and a lack of confidence in the system. Nevertheless, we must not undermine the efforts which have been taken by some of these States in promoting the use of Alternative Dispute Resolution (ADR). The Philippines have taken initiatives to establish training programmes for ADR providers and practitioners, and have been promoting the use of ADR to various industries.

It may be surmised that a common trend that poses an issue for arbitration in developing countries is the lack of deadlines for awards. The non-existence of strict stipulations of time erodes at the confidence of international parties as there is no assurance that an award will be made, and the entire arbitral process becomes subject to arbitrary delays.

There also appears to be some form of cultural resistance. For example, the Indonesian requirement for Bahasa Indonesia as the predominant language even in the event that a translation of the award from another language is a deterring factor. It is not only a hassle but also creates the apprehension that the true intention and meaning of documents may be lost in translation.

The past five years can be categorised as an era of reforms wherein we saw many Asian countries and institutions generating new legislations and rules to be more harmonised with their Western counterparts. Thus, having formed the hypothesis and created the would-be ideal environment, the region is now entering a period wherein their systems will be put to the test. It will also be establishing best practices for other developing countries within the region.

CONCLUSION

Although change does not occur overnight, the rapid development of arbitration in Malaysia and its neighbours leaves little option but for stakeholders to pick up the pace. This bodes extremely well for the regional business and trading parties and it is with much interest that we as one of the leading institutions monitor the product of our hard work.

³¹ Alastair Henderson and Surapol Srangsomwong, 'Thailand' in *Asia Arbitration Handbook* (Oxford University Press, 2011) 584.

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MUCH ADO ABOUT NOTHING?

BY SHANNON RAJAN



A REVIEW OF THE MEDIATION ACT 2012

After more than five years in the Malaysian legislative pipeline, the much anticipated Mediation Act 2012 ("the Act") came into operation on 1 August 2012. The Act has been criticised by certain quarters as being a redundant piece of paper. Shannon Rajan discusses the main provisions of the Act and considers whether the aforementioned criticism is justified.

THE OBJECT AND PURPOSE OF THE ACT

The objective of the Act is to "promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating the parties in disputes to settle disputes in a fair, speedy and cost-effective manner." The Parliament formulated an exceedingly modest purpose of the Act by failing to adopt uniform laws relating to the accreditation, qualification and professional standards of mediators, and perhaps less controversially, implement mandatory mediation in Malaysia.

Many mediators in Malaysia belong to professional institutions, such as the Malaysian Mediation Centre and the Chartered Institute of Arbitrators, and are required to adhere to the code of ethics and other related standards of their institution. There is no uniformity and consistency of accreditation, qualification and standards between these organisations and the Parliament's failure to introduce legislative consistency concerning the same can only be viewed as a missed opportunity to promote and encourage mediation in Malaysia.

THE DEFINITION AND APPLICABILITY OF MEDIATION

Section 3 defines "mediation" as a voluntary process in which a mediator facilitates communication and negotiations between parties to assist the parties in reaching an agreement regarding a dispute. Although the independence and neutrality of the arbitrator are not included in the definition of mediation, such omission is not material as all appointed mediators are obliged to confirm their independence and neutrality under the Act.

The Act does not apply to matters which are set out in *Section 2* and the Schedule. These matters include, but are not limited to, disputes as to the effect of any provision of the Federal Constitution, prerogative writs, the issue of injunctive relief, election petitions and land acquisition proceedings.

COMMENCEMENT OF MEDIATION

Section 4(1) read together with *Section 4(2)* provides that parties may initiate mediation under the Act at any time and that mediation will not operate to stay, extend or prevent the commencement of any civil action in court or arbitration.

The procedures for the commencement of mediation are set out in *Section 5* and are as follows:-

- (a) a person may initiate mediation by sending a written invitation to mediate to the person with whom he has a dispute;
- (b) the written invitation must briefly specify the matters in dispute;
- (c) upon receipt of the written invitation, the person with whom he has a dispute may accept the same in writing; and
- (d) a mediation shall only be commenced if the person who initiates it has received the acceptance of the written invitation from the person with whom he has a dispute.

The written invitation is deemed to be rejected if the person initiating the mediation does not receive a reply from the person with whom he has a dispute within 14 days from the date he sent the written invitation or such other period of time specified in the invitation.

The Act has placed somewhat onerous procedural requirements for parties to comply with in order to commence mediation and they are counter-productive to the object and purpose of the Act. For instance, a verbal agreement for mediation appears to be insufficient for the purposes of the Act.

Some other problems that may arise from the procedures are as follows:-

- (a) as the Act does not define a "written" invitation, it is unclear whether it includes electronic communication such as e-mail and short messaging service (SMS);
- (b) an acceptance is ineffective if a person has accepted, in writing, a written invitation within the period stipulated in the invitation, but his acceptance is received by the other person after the expiration of the stipulated period; and

- (c) there is no saving provision which allows parties to mutually waive the requirements under *Section 5* to preserve the commencement of mediation.

Section 6 requires the parties to enter into a mediation agreement upon the commencement of mediation to record *inter alia* the parties' agreement to submit their disputes to mediation, appoint a mediator and bear the costs of mediation.

APPOINTMENT OF MEDIATOR

Sections 7(1) to 7(3) provide that the parties shall (if necessary, with the assistance of an institution) appoint a mediator who possesses the relevant qualification, special knowledge or experience in mediation or satisfies the requirements on an institution.

Section 7(4) stipulates that, unless the parties agree otherwise, there shall be a sole mediator while *Section 7(6)* prescribes that the appointment of any mediator is to be valid only upon his written consent.

The appointed mediator has a mandatory obligation under *Section 7(7)* to disclose, prior to accepting the appointment, any known facts that a reasonable person would consider likely to affect his impartiality as a mediator, including a financial or personal interest in the outcome of the mediation. From the wordings of this section, there appears to be no continuing obligation on the mediator to disclose any matters affecting his impartiality and neutrality after the mediation has commenced.

TERMINATION OF APPOINTMENT

The parties may terminate the appointment of the mediator under *Section 8(1)* if the mediator has infringed the requirements of *Sections 7(2) and 7(7)* or obtained his appointment through fraud or is unable to serve as a mediator for the mediation. *Section 8(2)* allows the parties to terminate the appointment of a mediator for any reason whatsoever and requires them to inform the mediator of their reasons for the termination.

THE MEDIATION PROCESS

Section 9 highlights the role of the mediator, which *inter alia* includes facilitating mediation, determining the method of mediation and suggesting options for the settlement of the dispute. It is interesting to note the choice of words used in the provision i.e. "suggest options" as opposed to generate options, which may be in reference to other processes such as early neutral evaluation and binding and non-binding evaluation.

Section 11(1) provides that the mediator shall conduct the mediation privately and he may meet with the parties together or separately. Section 11(2) permits any party (with the consent of the mediator) or the mediator (with the consent of the parties) to appoint a non-party to assist in the mediation.

A mediator may end the mediation under Section 11(3) if he is of the opinion that further efforts at mediation would not contribute to a satisfactory resolution of the dispute between the parties.

CONCLUSION OF MEDIATION

Section 12 provides that mediation shall conclude upon:-

- (a) the signing of a settlement agreement by the parties;
- (b) the issuance of the mediator's written declaration that further efforts at mediation would not contribute to a satisfactory resolution of the dispute;
- (c) the issuance of the parties' written declaration that the mediation is terminated; or
- (d) the withdrawal from a mediation by death or incapacity of any party.

Section 13 stipulates that the parties shall enter into a settlement agreement when an agreement is reached regarding a dispute. The agreement must be in writing, signed by the parties and authenticated by the mediator.

Section 14 provides that a settlement agreement is binding on the parties and the same may, if proceedings have been commenced in court, be recorded as a consent judgment or judgment before the court.

CONFIDENTIALITY, PRIVILEGE AND IMMUNITY

To augment the mediation process, Section 15 prohibits a person from disclosing any mediation communication and Section 16 declares that such communication is privileged and is not subject to discovery. These safeguards are subject to the exceptions set out in the respective provisions.

To safeguard a mediator, Section 19 exempts a mediator from liability for any act or omission in the discharge of his function as mediator save where the act or omission is fraudulent or involves wilful misconduct.

CONCLUSION

The Act is largely a regurgitation of the procedural rules of various institutions relating to mediation. It does not contain any provisions to regulate the practice of mediation by mediators or establish standards of competency (including minimum qualifications) for mediators or establish an accrediting authority to confer and revoke accreditation in appropriate circumstances.

The Malaysian Parliament has also shied away from introducing mandatory mediation, which would have relieved the court system of the pending cases in the dockets and placed Malaysia alongside with other nations with modern and sophisticated mediation process.

The Act is not completely devoid of merits. It contains some provisions that would promote mediation in Malaysia. It expressly provides for the enforceability of a settlement agreement that is signed at the conclusion of a successful mediation and protects from liability, a mediator who has properly discharged his duties as such.

Despite its shortcomings, it would be unduly harsh and premature at this juncture to conclude that the Act is much ado about nothing.

"This Article was first published in Issue 03/2012 of Legal Insights, a Skrine Newsletter. Reproduced with permission of Skrine."



ABOUT THE AUTHOR

Shannon Rajan is a member of the Alternative Dispute Resolution Practice Group at Skrine & Co. He is a Panel Mediator in the Malaysian Mediation Centre and KLRCA.

KLRC AROUND THE REGION

The period proved to be a busy one for KLRCA as we participated in events organised by our regional partners.

12TH NOVEMBER 2012

KLRC's Deputy Director Azimeer Manaf spoke at the Islamic Finance Forum in Riyadh, Saudi Arabia.



18TH – 21ST NOVEMBER 2012

KLRC Director Datuk Sundra Rajoo and Deputy Director Azimeer Manaf were in Bali, Indonesia for the LawAsia Conference 2012 as well as the LawAsia Moot Competition (final rounds). Datuk Sundra was one of the judges for the finals whilst Azimeer spoke at the conference.



22ND – 23RD NOVEMBER 2012

Datuk Sundra and KLRC's Head of Legal Service, Rammit Kaur spoke at the UNCITRAL-MOJ-KCAB Conference on International Arbitration in Seoul, Korea.



26TH NOVEMBER 2012

KLRCA was the Headline Sponsor for the IBA Asia Pacific Regional Forum Conference.



26TH NOVEMBER 2012

Datuk Sundra delivered the keynote speech at the HKIAC ADNDRC Conference 2012 in Hong Kong.



29TH NOVEMBER 2012

KLRCA's Deputy Head of Legal Services, Ann Quah spoke at the 2nd Annual Legal Era Conclave 2012, Singapore.



30TH NOVEMBER 2012

Datuk Sundra gave a talk at the Conference On the Istanbul Arbitration Center in Ankara, Turkey.



SAVE THE DATE!

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

DATE 17 – 21 January 2013

EVENT KLRCA Adjudication Training Programme

ORGANISER KLRCA

VENUE Kuching, Sarawak

DATE 20 February 2013

EVENT GAR Annual Awards Dinner

ORGANISER Global Arbitration Review

VENUE Bogota

DATE 21 – 22 February 2013

EVENT 16th Annual IBA International Arbitration Day

ORGANISER International Bar Association

VENUE Bogota

DATE 18 – 20 March 2013

EVENT Indonesia Roadshow

ORGANISER KLRCA

VENUE Surabaya, Jakarta

DATE 15 – 16 March 2013

EVENT Adjudication Training For Judiciary

ORGANISER KLRCA

VENUE TBC

DATE 19 – 23 April 2013

EVENT KLRCA Adjudication Training Programme

ORGANISER KLRCA

VENUE Royale Chulan Hotel, Kuala Lumpur

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

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

12, Jalan Conlay,
50450 Kuala Lumpur, Malaysia

T +603 2142 0103

F +603 2142 4513

E enquiry@klrca.org.my

www.klrca.org.my

