

klrcA

KUALA LUMPUR REGIONAL
CENTRE FOR ARBITRATION

THE BIG LAUNCH



REGIONAL RESOLUTION GLOBAL SOLUTION

KLRC ADJUDICATION TRAINING PROGRAMME



20-24 APR 2015

8.30am-6.00pm

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

The Adjudication Training Programme is conducted by KLRC 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.

The training is conducted over five days by experts from the construction industry and consists of five units.

UNIT 1 The Application of Statutory Adjudication to the Construction Industry

Enables the participants to acquire knowledge and develop a better understanding of adjudication and the effects of the Construction Industry Payment and Adjudication Act (CIPAA) 2012 on the construction industry.

UNIT 2 The Practice & Procedure of Adjudication under the CIPAA
Gives participants a deeper knowledge of the important provisions of CIPAA and understand the necessary requirements of the adjudication process.

UNIT 2A CIPAA Regulations

Introduces participants to the Regulations of the Act which will give full effect and the better carrying out of the provisions of CIPAA 2012

UNIT 3 Fundamentals of Construction Law

Introduces the participants to the Malaysian Legal System and provides the basic knowledge of construction law, which includes basic concepts of the law of contract, tort and evidence.

UNIT 4 The Construction Process

Introduces the participants to the basic knowledge of the construction process in particular procurement, processes and contractual arrangements.

UNIT 5 Writing Adjudication Decisions

Provides participants the skills necessary to write an adjudication decision in accordance with the provisions in CIPAA.

CPD POINTS

Bar Council Malaysia (T2/2024042015/KLRCA/KL152064/10)	10 points
Board of Engineers Malaysia (BEM)	<i>Pending Approval</i>
Board of Architects Malaysia (LAM)	3 points
Construction Industry Development Board (CIDB)	<i>Pending Approval</i>
Land Surveyors Board	<i>Pending Approval</i>
Board of Valuers, Appraisers and Estate Agents Malaysia (IPPEH)	<i>Pending Approval</i>
Board of Quantity Surveyors Malaysia (BQSM)	<i>Pending Approval</i>

SPEAKERS AND TUTOR



IR. HARBANS SINGH

Chartered Engineer
Advocate & Solicitor, High Court of Malaya (Non-Practising)
Bachelor of Engineering (NUS), LLB (Hons) (London)
CLP, DipICarb (CI Arb), FCI Arb



CHONG THAW SING

LLB (Hons), MSc (Construction Law & Arbitration)
LLM (Commercial Law) UK, PG Dip. Arb (UK)
B.Eng (Hons) UM
FCI Arb, FMI Arb, MIEM, P.Eng



LAM WAI LOON

LLB (Hon) London, CLP
Advocate & Solicitor, High Court of Malaya
MBA (Heriot-Watt), FCI Arb

For more information please contact **Yip Xiaoheng**
at **03 2271 1000** or email cipatraining@klrca.org

Content

NEWSLETTER | ISSUE NO 16 | OCT-DEC 2014

Introduction

A Message From Our Director 4

Highlight

Official Launch of KLRCA @ Bangunan Sulaiman 8

Feature

In The Seat: Stephen Tromans QC,
Joint Head of Chambers - Thirty Nine Essex Street 12

Standard Forms of Contract - The Malaysian
Position 17

Domain Name - Uniform Rapid Suspension (URS)
System 36

Economic Sanctions Against The Russian
Federation: Consequences For The International
Arbitration Community And Possible New
Opportunities For The Emerging Arbitration
Markets 38

Events

Visitor's Gallery 5

#2 Practical Drafting And Defending Of
Adjudication Claims 6

An Introduction To ICC Arbitration 15

ICSID 101: ICSID Practice & Current Trends In
Investment Arbitration 16

Three Books Authored By Esteemed Judge,
Launched Simultaneously 32

Signing Ceremony: Collaboration Agreement
between the Kuala Lumpur Regional Centre
for Arbitration (KLRCA) & Thailand Arbitration
Centre (THAC) 33

KLRCA Talk Series 34

Legal

KLRCA Director elected as CIArb President 2016 7

Arbitration Case Law:
Developments in Malaysia & The International
Front 41

PUBLISHED BY



**KUALA LUMPUR REGIONAL
CENTRE FOR ARBITRATION**

Bangunan Sulaiman, Jalan Sultan Hishamuddin,
50000 Kuala Lumpur, Malaysia
Tel: +603 2271 1000 Fax: +603 2271 1010
email: enquiry@klrca.org
Web: <http://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 on any information contained herein, any error, omission or inaccuracy in any such information or any action resulting therefrom.



Dear distinguished friends,

With 2015 looming around the corner of what has been another remarkable twelve months of progress for the Centre, that has seen its stature, services, case load and premises grow; it is time for us to revisit our recent achievements and the adversities faced, list down points of improvement, realign our goals for the new year and most importantly continue striving towards realising KLRCA's primary aspiration of being the region's preferred alternative dispute resolution centre.

Early 2014, brought the Centre and everyone associated with the Malaysian Construction Industry good news as the much anticipated Construction Industry Payment & Adjudication Act (CIPAA) 2012 finally came into effect after a decade of drafting, lobbying and advocating its enforcement. Having previously toured around the country creating awareness and publicity on the positive transformations that the Act will bring, KLRCA in its capacity as the official adjudication authority of CIPAA 2012; stepped up efforts by organising comprehensive conferences on the matter and conducting certification courses on adjudication - trained by a circle of pre-eminent field experts in the region.

Following up closely was the successful inaugural KLRCA International Arbitration Conference (KIAC) 2014 that was held at the exotic land of the hornbills, Kuching - Sarawak. Attendance was high and the dialogue content strong as arbitration experts from around the globe congregated under one roof and exchanged views as the industry continues to push itself on the path to a better future.

Then came the Centre's biggest milestone for the year 2014 - the move to Bangunan Sulaiman, a newly refurbished heritage building five times larger than KLRCA's previous home of twenty-three years; 12 Jalan Conlay. In last quarter's newsletter, we opened the doors to our new home by providing an in-depth pictorial look at the state of the art facilities on offer.

In this edition, we document the culmination of KLRCA's move to Bangunan Sulaiman as Malaysia's Prime Minister officially unveiled the Centre's brand new premises to the world. The quarter also saw international institutions such as the International Chamber of Commerce (ICC) and the Washington based International Centre for Settlement of Investment Disputes (ICSID) team up with KLRCA to carry out quality ADR seminars.

On a personal level, the year-end brought added elation as I was voted in as President of the Chartered Institute of Arbitrators (CI Arb) for the year 2016 and Deputy President for the year 2015; an honour that I take great pride in and a privilege that I intend to make the most of by collectively working with the institution's strong global network to raise the arbitral standards in Malaysia, the region and ultimately the international scene.

2014 has been an exceptional year for the Centre and I would like to sign off by stating; the substantial successes that KLRCA has displayed throughout the year - are a tribute to all our stakeholders who have engaged, and with passion, embarked on a shared commitment of enhancing the alternative dispute resolution industry in this country and the region we call home.

Until then, happy reading.



Datuk Professor Sundra Rajoo
Director of KLRCA



Visit by JPLW Interns
Date: (10th October 2014)



Visit by Kigali International
Arbitration Centre (KIAC)
Date: (13th & 14th October 2014)



Visit by Nanning Lawyers
Date: (23rd October 2014)

Gallery

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



Visit by Charles Taylor Singapore
(Offshore London Unlimited)
Date: (12th November 2014)



Visit by University Malaysia Terengganu
Date: (24th November 2014)



Visit by KPUM
(United Kingdom & Eire Malaysian Law Students)
Date: (27th November 2014)



Visit by Industrial Court Malaysia
Date: (3rd December 2014)



▶ CIPAA Training (KLRCA) | 7th October 2014

#2 Practical Drafting And Defending Of Adjudication Claims

With the truckloads of boxes unpacked, plastic cling wraps from freshly minted equipment removed and the customary teething challenges of moving into a new premise ironed out, it was time for KLRCA to conduct its first ever 'CIPAA Training' course at Bangunan Sulaiman. Having already organized a successful session back in early July this year, the comprehensive one-day course titled, 'Practical Drafting And Defending Of Adjudication Claims' returned for its second ever edition.

The latest course saw 70 participants encompassing a mixture of in-house counsels from prominent organizations around the country, recently certified adjudicators, a large number of representatives from the construction industry as well as several members from the legal fraternity flock KLRCA's brand new state-of-the-art auditorium to enhance their understanding on CIPAA 2012 through the carefully selected practical modules.

Ir Harbans Singh, an expert in Construction Law began proceedings for the morning by taking the participants through a brief history of CIPAA 2012 before elaborating on the overview of an adjudication process and its preliminary stages. Lam Wai Loon soon took over the podium at the hour mark to present a 'Step by Step' guide in commencing the actual proceedings and preparing the various submissions (i.e adjudication claims, responses and replies).



Upon a quick networking break, participants were segregated into five groups before being led to their respective break out rooms. Harbans and Lam doubled up as tutors for the workshop sessions with Daniel Tan, Chong Thaw Sing and Thayanathan Baskaran also joining in to take charge of the remaining three groups. Participants were exposed to 'Typical Payment Dispute Scenarios' before being handed the opportunity to work on the forms themselves. Each group was allocated sufficient time to fill up the claims with the tutors being ever ready to answer doubts and clarify enquiries along the way.

Following a two-hour plus meticulous workshop session, participants were greeted with a much-deserved lunch and networking break to rejuvenate their minds and process the influx of information attained. Proceedings resumed an hour later with the start of the

second workshop with participants once more being handed a technical CIPAA case to tackle. Freshly equipped with hands on experience from the earlier workshop, participants strengthened their understanding of filling up CIPAA claims accurately and efficiently by finishing their assignments well within the time allocated. The CIPAA Training soon drew towards its conclusion with Datuk Professor Sundra Rajoo who was away on official duty through out the day - joining in the panel of speakers and tutors to share his expert opinions during the Q & A Session and Review slot that was chaired by Harbans.



KLRCAs Director elected as CIARB President 2016

The Centre is proud to announce that Datuk Professor Sunda Rajoo, the Director of KLRCAs has been elected as the President of the Chartered Institute of Arbitrators for the year 2016.

Having joined CIARB, a world wide leader in the training, accreditation and practice of alternative dispute resolution - in the 1990's, and becoming Chairman of the Malaysian Branch in 2001; Datuk Professor Sunda will initially act as Deputy

President of the institution for the year 2015, before assuming the President's role effective 1st January 2016.

This recognition comes at a momentous time for the Centre and Malaysia, as it was only in early November 2014 that KLRCAs new state of the art premises was officially unveiled to the world by the country's Prime Minister. Datuk Professor Sunda who has built a reputation of investing an

intense amount of energy and passion to his work, delivering results almost instantaneously; will look to continue playing his role in the sculpting of the regional and global ADR scene through this newly appointed ambassadorial position.

The article from GAR titled "Rajoo and Comair-Obeid in line as CIARB presidents" below provides detailed information about the recently concluded CIARB 2016-2017 Presidential Election.

**This article was written by Kyriaki Karadelis for the Global Arbitration Review (GAR) website; dated Tuesday, 25 November 2014. It has been reproduced with permission and license by GAR.*

The Chartered Institute of Arbitrators has elected the director of the Kuala Lumpur Regional Arbitration Centre, Sunda Rajoo, and Lebanese-French arbitrator Nayla Comair-Obeid, as its presidents for 2016 and 2017.

The new appointments - which always come in pairs - were made during the CIARB's biennial congress in Dubai last weekend.

Rajoo and Comair-Obeid succeeded over five other candidates in an election carried out through a US electoral college-style voting system prescribed by the CIARB regulations - with different weight given to the 37 different branches of CIARB depending on their size.

The other candidates were Hong Kong-based arbitrator and founder of the Vis (East) moot Louise Barrington; chartered quantity surveyor Keith Blizard of Shakespeares in Birmingham; Whit Engle, a Georgia-based US arbitrator; Malcolm Holmes QC of Eleven Wentworth Chambers in Sydney; and John Tackaberry QC of Thirty Nine Essex Street Chambers in London.

Rajoo will initially act as deputy president to Charles Brown, founder of London construction boutique Charles Brown Solicitors, who is CIARB's appointed president for its centenary year, 2015.

When Rajoo takes his position at the helm the following year, Comair-Obeid will be his deputy.

The current president is Michael Stephens, a Birmingham-based solicitor elected at the last biennial congress in Edinburgh.

After qualifying as an architect and town planner, Rajoo completed a law degree with the University of London while working in the building division of Bank Negara Malaysia. He joined the CIARB in the 1990s, becoming chairman of the Malaysian branch in 2001.

He was appointed director of the KLRCAs in 2010 and has recently overseen its move to new premises in Kuala Lumpur following a rise in the number of cases it handles.

Rajoo will be the second Malaysian CIARB president. Vinayak P Pradhan, a consultant at Skrine in Kuala Lumpur, held the title in 2013.

Rajoo says the latest election result reflects the institute's determination to emphasise its



Rajoo and Comair-Obeid in line as CIARB presidents

international stance and the key role Asia and the Middle East play in arbitration.

A Lebanese-French national, Comair-Obeid is the founder of Obeid Law Firm in Beirut and specialises in international business law in the Middle East. She teaches at the Lebanese University in Beirut and the Lebanese Judicial Institute. She is also a visiting professor at the University of Paris II.

A member of CIARB since 1998, she founded the Lebanese branch in 2004 and became its first chair. She currently chairs the CIARB's board of trustees, having been appointed to the board to represent the Middle East and Indian subcontinent in 2008. Boies Schiller & Flexner partner Wendy Miles will replace her as chair of the board in 2015.

Comair-Obeid has recently been helping to design a syllabus for a new CIARB diploma for arbitrators specialising in Islamic Banking and Finance - a project which will also be of interest to Rajoo given the KLRCAs focus on Islamic arbitration in recent years.

She says she will use her time as president to promote the institute's role as a bridge between jurisdictions, nations and continents, advocating the establishment of new CIARB Branches and strengthening the CIARB's infrastructure to support these new branches and existing ones.

Comair-Obeid was vice-president of the International Bar Association's Arbitration Committee from 2010 to 2011. She has been a council member of the ICC Institute of World Business Law since 2004.

One of the runners-up in the election, Tackaberry, notes that while CIARB was founded in the UK, 60 per cent of its 13,000-strong membership is now based outside the country. The election of

Rajoo and Comair-Obeid are "very good news indeed" and evidence of "a complete break with the somewhat parochial approach that the institute manifested in the latter part of the last century," he says.

"Sunda has done an outstanding job of transforming the KLRCAs from a body with an eminent foundation and a long history, but a low profile, into a vibrant and successful player in the highly competitive world that international commercial arbitration has become," says Tackaberry. He expects Rajoo to bring the same "electrifying" energy and enthusiasm to the role of CIARB president.

Speaking about Comair-Obeid's election, Tackaberry says: "It was 24 years ago that Baroness Helena Kennedy QC [a barrister at Doughty Street Chambers in London and member of the UK's House of Lords] addressed a CIARB luncheon on the lack of women in arbitration and the importance of their male colleagues making positive efforts to open the doors and to encourage women to become involved."

"It is very satisfactory that the Chartered Institute has appointed another excellent woman to a major role."

Margaret Rutherford QC was the first female chair of the CIARB appointed in 1992 (before "chair" became "president") and Karen Gough of Thirty Nine Essex Street filled the presidential role in 2001. Teresa Cheng SC, now chair of the Hong Kong International Arbitration Centre, was president in 2008.

Alexis Moure, founding partner of Castaldi Moure & Partners in Paris, says Obeid has shown "great leadership qualities and a unique capacity for dialogue" in her positions within the IBA and the ICC Institute, as well as a "profound understanding of the issues faced by the international arbitration community". She will help CIARB to develop as a "truly global" training institution, he says.

The CIARB's biennial congress took place on 21 and 22 November, as part of Dubai Arbitration Week. It included the CIARB's annual Alexander Lecture on the evening of 21 November, given this year by Dubai-based Essam Al Tamimi, partner at Al Tamimi & Company. Following the congress, the CIARB's UAE branch held a one-day conference.



Official Launch of KLRCA @ Bangunan Sulaiman

(4th November 2014)



The grandeur of the past met Malaysia's sparkling modernity, as the eighty four year old Bangunan Sulaiman - recently refurbished into one of the world's largest arbitration centres; was spruced up with beaming lights, freshly minted banners, delicately sculpted landscape, and symmetrically pressed flags straight from the printers - all of which accompanied the air of buzzing anticipation as

the Kuala Lumpur Regional Centre for Arbitration (KLRCA)'s new premises was officially unveiled to the world. Lucent giant air balloons carrying KLRCA's logo and the Malaysian flag hovered elegantly above the art deco heritage building, signalling to the country's capital that something special and momentous was taking place.





It was only befitting that the Centre had the privilege of having the Prime Minister of Malaysia, The Most Honourable Dato' Sri Mohd. Najib Tun Razak to officiate the landmark event. It was quarter to four in the evening as the business centre of KLRCA began filling up as members of the media, honourable ambassadors, international dignitaries, eminent members of the Malaysian Judiciary and guests completed their registration prior to taking their seats in newly designed state of the art auditorium. Providing the backdrop on stage was a large animated and illuminating LED board that showcased the entire Bangunan Sulaiman with a rotating skyline. As the clock ticked closer towards the five o'clock mark, the auditorium was already recording its highest ever occupancy number; hitting its capacity limit minutes later.



Proceedings for the evening soon began, with the Prime Minister of Malaysia taking his seat in the packed function hall. He was accompanied by Tun Zaki Tun Azmi, the former Chief of Justice Malaysia; Hajah Nancy Shukri, Minister in the Prime Minister's Department; Tan Sri Gani Patail, the Attorney General of Malaysia & Chairman of KLRCA's Advisory Board; Datuk Professor Sundra Rajoo, KLRCA's Director, and Professor Dr Rahmat Mohamad, the Secretary General of the Asian-African Legal Consultative Organisation (AALCO).





KLRCA's Director vows to make Malaysia the region's premier ADR hub

KLRCA's Director, Datuk Professor Sundra was first to take stage to deliver his opening remarks. He took the audience through a brief history of the centre followed by KLRCA's achievements and revival path taken since his Directorship tenure began in 2010. Professor Sundra went on to thank all key contributors towards KLRCA's resurgence before proceeding to share his future plans of making Malaysia a premier hub for all alternative dispute resolution matters in the region. He said, "I intend to continue carrying the Centre in that direction and further hoist the Malaysian flag up high on the international ADR scene." "Strategic collaborations and partnerships will remain a key component of KLRCA's growth philosophy, as our hearts are fixed on the betterment of the local, regional, and global ADR landscape - and the only way to widen our reach is through cross border collective affiliations and endeavours," he added.



Next to take stage, was KLRCA's Advisory Board Chairman - Tan Sri Gani Patail who congratulated the Centre on successfully putting itself back on the regional and international map. Tan Sri Gani spoke about the advantages and growing importance of arbitral proceedings in the region before continuing to share an example of the recent successful and peaceful resolution of a 24-year old issue arising from differing interpretations of the 1990 "Points of Agreement on Malayan Railway Land in Singapore" between the Malaysian and Singaporean governments.



Malaysian Prime Minister unveils KLRCA's new premises to the world

The evening's guest of honour, Malaysia's Prime Minister - The Most Honourable Dato' Sri Mohd Najib Tun Razak was then called by the ceremony's emcee to grace the podium to present his keynote address. Prime Minister Dato' Seri Najib Tun Razak said arbitration had today emerged as a strong alternative dispute resolution for commercial and corporate entities in South East Asia, and the government, in recognising its growing importance in this region, was willing to invest in its future.

On KLRCA, The Prime Minister said the centre that was formed in 1978 had now become an integral part of the international arbitration scene and it "must make full use of Malaysia's competitive advantages to continue to thrive and succeed in the international arena." "We are convinced that KLRCA, the first institution of its kind to be established in South East Asia, possessed all the right qualities to become the region's arbitration centre of choice," he added.



Proceedings for the evening continued with KLRCA's Director leading the Prime Minister and the VIPs on a special tour around the building. Amongst the points of interest shown were 'KLRCA's Memory Wall' at the centre's lobby, the large hearing room equipped with court recording & transcribing services and the arbitrators' lounge. High tea was held in the arbitrators' lounge for the Prime Minister and other dignitaries before official matters with regards to the official launch were brought to a close.

A cocktail reception and dinner was then later held in the evening at the pavilion for the invited dignitaries, local and international arbitrators and other associates of KLRCA. It was certainly a significant day to celebrate as a new dawn of arbitration in the region officially commences.

What The Media Had To Say





In The Seat: **Stephen Tromans QC** Joint Head of Chambers – Thirty Nine Essex Street

In this final issue for the year 2014, The KLRCA Editorial Team interviews the Joint Head of Chambers - Thirty Nine Essex Street; Stephen Tromans QC.

Stephen who has made a name for himself as Britain's leading practitioner in environmental, energy and planning law; shares with us what went on behind the scenes as Thirty Nine Essex Street became the first ever foreign chambers to set up an office in Malaysia. He goes on to elucidate the significance of this move and the positive impact it could have on the local arbitration scene.

Q: How did your interest and career in law begin? Was it something that you always wanted to do?

I was an aspiring lawyer from the age of about eleven! I don't know why exactly as there were no lawyers in my family. I was however fascinated by it from an early age and it's a career I have never regretted following.

Q: You are recognised as a leading practitioner in environmental and energy law. What sparked a special interest in both these fields?

When I initially qualified as a lawyer I almost immediately got a job lecturing at Cambridge University, which I did for seven years from 1981-1987 before going

back into practice. As a young academic you of course have to find a niche in which to write articles and research. I had grown up in a highly industrialised part of the UK and was generally interested in pollution and ways to control it, so I lighted on environmental law. At that time there were really no articles, cases or books, so I started writing! Energy law was a result of environmental law - I have always acted for large energy companies, such as oil companies and electricity generators on environmental issues, but over the past ten years environment and energy law and policy have become inextricably linked. Much of my work is now in fields such as renewable and nuclear energy.

Q: Major legal publications have labelled you as a barrister with "encyclopaedic knowledge". Dedicated and continuous reading must surely have a hand in this. How do you juggle attending hearings, heading the chambers and still find the time to pursue your reading interest?

The honest answer is "with difficulty" I think. However, I do try and find some time each week to keep on top of what is happening, which is easier with electronic media (although this can result in information overload). Time commuting on the train is useful for this. Also, I am the author of a number of books which have to be updated every few years, which provides some discipline - I am currently working on the third edition of my book on Nuclear Law. Also, I accept invitations to speak at conferences and seminars, which again makes me keep up to date.

Q: Thirty Nine Essex Street Chambers recently became the first British chamber to take up accommodation in KLRCA's new premises - The Sulaiman Building. In doing so, Thirty Nine Essex Street also becomes the first foreign chambers to set up an office in Malaysia. How do you think the alternative dispute resolution (ADR) industry in Malaysia will benefit from having a reputable foreign institution joining the fray?

My key message is that we are in Malaysia to help where we can, for example by co-counselling with the many excellent local firms. I hope we will be seen as a useful resource of specialist knowledge and experience, which is the real function of

“My key message is that we are in Malaysia to help where we can, for example by co-counselling with the many excellent local firms.”

the English Bar. I hope also that our taking accommodation in the Sulaiman Building (and equally importantly entering into partnering arrangements with KLRCA to promote arbitration there) will be seen as an important vote of confidence in the future success and growth of the Centre. So for example, we organised a seminar on relevant areas of law at the time the Centre opened, which included members of 39 Essex Street and local lawyers. We see that type of initiative as important and as benefitting both our Chambers and the Centre.

Q: Thirty Nine Essex Street Chambers currently operates from London, Manchester and Singapore; with Malaysia being the latest addition. How did opening an office in Malaysia come about? What are the factors considered when a decision is being made to expand the Chambers' international presence?

A few years ago we identified South East Asia as an important area for the growth of our practice as a Chambers. We appointed one of our former barristers, Roderick Noble, as our Director of Asian business. Rod grew up in KL and now lives there with his wife, Joan. Our first step was to take an office in Maxwell Chambers in Singapore. At the same time I had met Datuk Professor Sundra Rajoo and was impressed with his plans for the new building. We were therefore very pleased when discussions led to us being invited to be the first Chambers to take space there. The factors considered when deciding whether to open an overseas operation are really the business case in terms of the potential for future work there, the importance of the location in the wider region, existing contacts, and how we would manage and resource the operation.

Q: What are your views on the Malaysian arbitration scene? With KLRCA moving into its latest state-of-the-art building which happens to be one of the largest of its kind in the world, how much will it boost the local and regional arbitration landscape?

It seems to me very vibrant. KLRCA as I believe have established a number of important and cutting-edge initiatives such as the i-Arbitration Rules and in Islamic finance. As you say, it also has huge physical capacity. It is therefore



Stephens Tromans QC pictured here during a panel discussion at the Law & Infrastructure Seminar co hosted by Thirty Nine Essex Street Chambers and KLRCA back in September 2014.

well placed to provide a major boost to arbitration both in Malaysia and the region, where I think it will complement very well the other centres in Singapore and Hong Kong.

Q: What future challenges do you foresee dawning upon the local arbitration scene as Malaysia shapes up to be a prime player in the Asian region?

Obviously the field is competitive and KLRCA and Malaysia will have to establish its niche in that field. However, it has a great deal going for it. It also appears to me that the judicial climate is very supportive. The key I think will be the establishment of a reputation for quality, speed and competitive costs of arbitration.

Q: What do you consider your greatest achievement in the course of career?

That's a hard question. I am pleased to have made a contribution to scholarship and legal practice in establishing what was effectively a new area of law. Before coming to the Bar I was a partner at Simmons & Simmons in London and in the early 1990s; and established what was consistently regarded as the best environmental department in the UK. Also my four years as Joint Head of Chambers at 39 Essex Street have seen huge growth and modernisation of Chambers. I think though that the achievement which gives me most satisfaction is my appointment as a QC in 2009, 10 years after making the move across to the Bar.



Pictured here with KLRCA's Director Datuk Professor Sundra Rajoo during the 'Soft Launch of KLRCA's New Premises & The Welcoming of Thirty Nine Essex Street Chambers into Bangunan Sulaiman.

Q: Any words of wisdom that you would like to impart to future arbitrators and legal practitioners?

I think the best advice is to be yourself. It never works as an advocate to try and imitate someone else. You learn from them, but develop your own style. I would also stress the fundamental importance of integrity, being someone who from experience people can trust. Ultimately we are a profession which operates on trust. Finally, don't be too hard on yourself. We all make mistakes. Learn from them, and move on.

“It never works as an advocate to try and imitate someone else. You learn from them, but develop your own style.”



An Introduction To ICC Arbitration

10th November 2014

Barely a week after the Centre's biggest event to date - The Official Launch of KLRCA's new premises, Bangunan Sulaiman by the Prime Minister of Malaysia, the auditorium was buzzing once more with a packed hall as KLRCA collaborated with the International Chamber of Commerce (ICC) Malaysia to organise a half day seminar titled, 'An Introduction To ICC Arbitration.'

With statements being made the previous week by the Centre's Director Datuk Professor Sundra Rajoo, on the benefits of forging strategic collaborations and partnerships in aiding the nation's and region's alternative dispute resolution (ADR) scene to reach further excellence, this seminar could not have come at a better time.

The ICC Rules of Arbitration, used worldwide to resolve hundreds of business disputes, have been revised in 2012 to take account of current requirement and development in international arbitration practice and procedures, with the rules being last revised in 1998. The main objective of this seminar was to educate and empower interested legal practitioners and the public on the key changes made to the Rules and application of the Rules; before going further into the practical aspects of arbitrating disputes under the ICC Rules of Arbitration.

First to take stage was KLRCA's Head of Legal Services, Lai Jen Li to deliver the welcoming speech on behalf of Datuk Professor Sundra who was away attending to pertinent official matters. Miss Lai proceeded to present on, 'Recent Developments at KLRCA and its future as a Regional Hearing Centre'. Next on the agenda was a four-part presentation on, 'ICC Arbitration - The Rules and Procedures' - with Rajendra Navaratnam covering the



first part on, 'Commencing an Arbitration' and Chang Wei Mun dissecting the second part on, 'The Arbitral Tribunal'.

A brief panel discussion commenced allowing the audience to interact with Mr Rajendra and Mr Chang on the recently concluded topics. The seminar then broke for a swift networking and refreshment session, allowing the attendees and speakers to exchange business cards whilst regrouping their thoughts and focus. The next personality to take stage was the Vice Chair of the ICC Commission on Arbitration, Vinayak Pradhan - who presented the third part on, 'Arbitral Proceedings & The ICC Arbitration Commission'.

Mr Vinayak took the attendees through a series of significant articles involved in the arbitral proceedings before providing telling examples for each one. Shanti Mogan, Vice Chairman of the ICC Malaysia Arbitration Committee then took stage to talk on the final part of, 'ICC Arbitration - The Rules and Procedures: Terms of Reference, Procedural Timetable & Interim Measures'.

The final topic of the evening was covered by the Chairman of the ICC Malaysia Arbitration Committee, Tan Sri Dato' Cecil Abraham. Tan Sri Cecil who is also a member of the esteemed ICC Court of Arbitration, presented on, 'Awards, Emergency Arbitrator and the Role of the ICC Court of Arbitration'. Proceedings for the evening reached its pinnacle as Mr Vinayak and Miss Shanti joined Tan Sri Cecil on stage for a concluding panel session that took on a series of engaging questions from the floor. The informative and interactive seminar then drew to a close with Tan Sri Cecil delivering the closing remarks.



ICSID 101: ICSID Practice & Current Trends In Investment Arbitration

20th November 2014

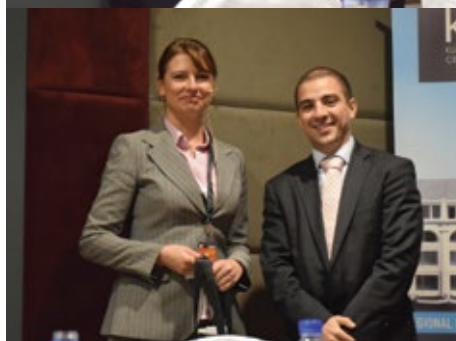
The month of November proved to be an eventful period for the Kuala Lumpur Regional Centre for Arbitration. The excitement from the Official Launch of the Centre's new building; Bangunan Sulaiman by the Prime Minister of Malaysia in early November, spilled over to the following week when a packed auditorium greeted the collaborated talk session between KLRCA and the International Chamber of Commerce (ICC) Malaysia. The trend of bringing in quality international talks and seminars to the public was continued when the Centre teamed up with The International Centre for Settlement of Investment Disputes (ICSID) to organise a one day seminar titled, 'ICSID 101: ICSID Practice & Current Trends In Investment Arbitration.'

ICSID - an autonomous international institution established under the World Bank in 1966 is considered to be the leading international arbitration institution devoted to investor-State dispute settlement; as evidenced by its large membership, considerable caseload, and by the numerous references to its arbitration facilities in investment treaties and laws.

Kicking off proceedings for the day was KLRCA's Advisory Board Member, Tan Sri Cecil Abraham - taking stage to deliver the welcoming remarks on behalf of KLRCA Director, Datuk Professor Sundra Rajoo who was away attending a conference in the Middle East. Tan Sri Cecil touched on the recent developments of investment treaties in the region and the influence that ICSID has played. He then shared with the audience;

the significance of a new collaborative agreement that was to be signed between the KLRCA and ICSID.

ICSID's Secretary-General, Meg Kinnear was then invited on stage to join Tan Sri Cecil for the official signing of the 'Agreement On General Arrangements Between The International Centre for Settlement of Investment Disputes and The Kuala Lumpur Regional Centre for Arbitration'. Bearing witness to this signing ceremony were; Lai Jen Li, KLRCA's Head of Legal Services and Martina Polasek, ICSID's Team Leader & Legal Counsel.



With the signing ceremony completed, Miss Meg and Miss Martina remained on stage to begin the ICSID 101 seminar. The attendees were given a brief overview of ICSID's history and functions before being taken through a comprehensive lecture on ICSID's practices and current trends in investment arbitration. Topics that were covered either side of an one hour networking lunch were; Commencement of the Proceedings and Constitution of the Tribunal, Written and Oral Proceedings, Transparency, Cost of Arbitration and Post Award Remedies and Enforcement.

Proceedings for the evening were concluded with a forty-five minute interactive question and answer session, with the questions coming from all corners of the auditorium - from final year law students to senior corporate figures to senior arbitrators; before Miss Meg Kinnear took the stage one last time to deliver her closing remarks.

Standard Forms of Contract – The Malaysian Position

By: Datuk Professor Sundra Rajoo, Director of KLRCA



A paper presented at the International Bar Association (IBA) Annual Conference 2014 in Tokyo on the session entitled “East meets West - a comparative approach to EPC project delivery”, organised by the International Construction Projects Committee on 20th October 2014.

**The author would like to express his sincere gratitude to Mr Lam Wai Loon, Ir Harbans Singh KS and Mr Danaindran Rajendran for their respective contributions towards this paper.*

Introduction

- i. A successful standard form of contract would lend itself to regulate the day-to-day relationship on a construction site and provide a clear and definitive understanding to the parties, professionals and site personnel of their roles and responsibilities. Users and practitioners must be familiar with the particular standard form of conditions of contract being used. It would therefore be useful in expressing the obligations of the parties and setting out with reasonable clarity the scope of the project. It is based on the perceived good sense of providing for the problems which experience has taught in the course of construction contracts. Precision in the drafting of a contract is critical to the avoidance of disputes.
- ii. In Malaysia, standard forms of contract which are predominantly formulated and published by authoritative bodies of the industry, as well as recognised by the contracting parties, are among the most popular choice of standard form of contracts being used among industry leaders.
- iii. This paper discusses the Malaysian position relating to the aforesaid topic in four sections:
 - The first section introduces the various types of standard forms of contract which are commonly used in Malaysia in both the private and the public sectors, and according to the kind of construction works involved.
 - The second section sets out the author's view on the popularity, or otherwise, of the use of foreign standard forms of contract, such as FIDIC, by the Malaysian industry players, and the reasons for the same.
 - In the third section, the author highlights the growing trend of the usage of bespoke contract, describes the parties preferring the use of such contracts, and the reasons for this growing trend.
 - In the fourth and last section, the author highlights and discusses various issues peculiar to Malaysia, and the recent development relevant to the contracting practice in Malaysia.

1. Types of Standard Forms of Contract Commonly Used in Malaysia

1.1 Upon settlement by the parties on their choice of contractual arrangement and contract procurement method, the next step involves the determination of issues pertaining to the terms of the preferred legal framework that is intended to form the basis of the agreement between the parties. This is usually achieved through the employment of Forms of Contract which may be any of the types listed below:

- Standard Forms of Contract;
- Modified Standard Forms of Contract; and
- ad hoc or *bespoke* Forms of Contract.

In Malaysia, whilst standard forms still form the bulk of all engineering/construction contracts let out¹, there is a growing preference by the larger employers to utilize modified or ad hoc forms. The latter also seem to prevail in the sub-contracting and material supply fields, perhaps due to the unavailability of any Standard Forms covering these categories of contracts on the local scene.

1.2 Categories of Standard Forms of Contract utilized in Malaysia

1.2.1 For a relatively small country, Malaysia boasts of quite a number of Standard Forms of Contract in the engineering/

construction field. This may or may not augur well for the industry as a whole since these Standard Forms are being supplemented by an increasing number of modified or 'bespoke' forms. This may also reflect on the extent of fragmentation of the industry. Nevertheless, for the purposes of this paper, it may be prudent to review the fundamental forms under the following **categories**²:

- government/public sector contracts;
- private sector contracts; and
- contracts of an international nature.

1.2.2 Whilst there are other so called *standard* forms involving particular sectors of the industry, e.g. petrochemical, power generation, highways, etc. or being generated by specific employers, i.e. Petronas, Tenaga Nasional Berhad (TNB), MAB, etc., the general scope that is about to be discussed in this paper does not permit for these to be addressed in detail.

1.3 Government/Public Sector Contracts

1.3.1 Historically, the initial set of government Standard Forms were drafted by various government agencies for works in the public sector. In the local context, this is evidenced by the genesis of the Public Works Department (PWD)³ / Jabatan Kerja Raya (JKR)⁴ Standard Forms; these being modelled on the 1931: RIBA⁵ Standard Form of Contract⁶. Over the years the above Standard Forms were modified progressively to suit local conditions and to keep up with the current political and industry developments; the latest revisions coming in 2010 (and issued in June 2011).

1.3.2 As the bulk of all engineering/construction work let out until the mid-nineteen eighties were through governmental agencies, the said Standard Forms enjoyed widespread popularity. However, with the advent of privatisation and a consequential reduction of projects undertaken directly by governmental agencies, be these Federal, State or Statutory, the usage of such forms has shown a marked decrease with further erosion in utility expected to continue in the coming decades. Nevertheless, these Standard Forms do remain of importance to the industry and the practitioners in small to medium projects involving primarily the state and/or quasi-governmental project.

1.3.3 In more recent times, the Construction Industry Development Board (CIDB)⁷ has drafted and published a standard form of its own for building works (undertaken under Traditional General contracting) under the style of the 'CIDB Standard Form of Contract For Building Works: 2000 Edition'. A standard form for the nominated sub-contract⁸ has also been published. Whether there are still more Standard Forms to be issued by the CIDB is still not clear⁹. Although it appears that CIDB's intention is to make the use of their forms commonplace, the question as to whether these CIDB Standard Forms will ultimately replace the existing JKR Standard Forms for the moment at least begets no precise answer.

1.3.4 JKR Standard Forms for Traditional General Contracts

Currently, JKR has a couple of Standard Forms of Contract for both engineering and building works undertaken on the basis of traditional general contracting. These are:

- JKR Form 203A (Rev 1/2010): Conditions of Contract to be used where bills of quantities form part of the contract;
- JKR Form 203 (Rev 1/2010): Conditions of Contract to be used for contract based on drawings and specifications;

- JKR Form 203N (Rev 1/2010): form of contract to be used for nominated subcontractors where the main contract is based upon Form JKR 203 or 203A;
- JKR Form 203P (Rev 1/2010): form of contract to be used for nominated suppliers where the main contract is based upon Form 203 or 203A

The above-mentioned Standard Forms are time-tested and as adverted to hereinbefore, have been utilised quite successfully for a wide range of building, infrastructure and engineering projects of varying sizes and complexities.

1.3.5 JKR Standard Form for Turnkey Design & Build Contracts

Owing to the popularity, as of recent, of works being let out on the *Design & Build* method of contract procurement, JKR has developed and published a set of standard Conditions of Contract for such works under the title of 'PWD Form DB (Rev 1/2010)'. This form represents at the moment the only local standard form for such contracts. However, there is no similar form for *turnkey* contracts.

1.3.6 JKR Standard Form for Other Contracts

To date JKR has no Standard Forms for the other types of contracts previously discussed, e.g. *Turnkey*, domestic sub-contracts, management contracts, construction management contracts, serial contracts, continuation contracts, etc. Judging by the current trend in privatising more projects, it is doubtful if JKR will, in the future, generate/publish such Standard Forms.

1.3.7 CIDB Standard Forms

As discussed above, CIDB has started the ball rolling by drafting and publishing Standard Forms of Contract with the 'CIDB Standard Form of Contract for Building Works (2000 Edition)' being the first such form. This form has been joined by the Standard Form of Contract for Nominated Sub-contractors, i.e. Form CIDB.B(NSC)/2002. For domestic sub-contracts, CIDB has introduced the 'Model Terms of Construction Sub-Contract Work (Rev 2007)' whilst a standard Form for Design & Build Contracts remains in the pipeline and is speculated to be published in the coming years. Unfortunately, just like JKR, CIDB has still not generated any Standard Forms for the other types of contracts, such as, *turnkey*, management contracts, etc.

1.3.8 Miscellaneous Forms

Some statutory bodies and also private sector employers utilise the JKR Standard Forms with slight modifications and/or amendments. Examples of such usage include projects involving the Drainage and Irrigation Department (DID/JPS), Lembaga Pelabuhan Kelang (LPK), Urban Development Authority (UDA), to name a few.

1.4 Private Sector Contracts

Parallel to the procurement path adopted by the public sector for its works up to the mid-eighties, the private sector inevitably developed its own Standard Forms to cater for projects undertaken along the traditional general contracting route. The impetus was provided by the Malaysian Institute of Architects or Pertubuhan Arkitek Malaysia (PAM) for its primary activity, i.e. building works, which saw the publication of the PAM/ISM series of Standard Forms in 1969. Engineers did not find the PAM/ISM forms suitable for their applications in the engineering and infrastructure fields. Early attempts to modify the PAM/ISM and ICE, IMECHE and IEE Forms to meet the particular local applications did not result with much success as evidenced by

the lack of enthusiasm in such usage and the litany of disputes generated. This resulted in the Institution of Engineers Malaysia (IEM) developing their own Standard Forms in the late-eighties and early nineties. Presently the PAM and IEM forms represent the main Standard Forms used in the private sector; with CIDB making a recent entry.

1.4.1 PAM Forms

Rather than developing and drafting a new standard form on its own, PAM in collaboration with the Institute of Surveyors Malaysia (ISM) in 1969 adopted the 1963: JCT¹⁰ Standard Form of Building Contract (Reprinted 1968)¹¹ with necessary modifications as its flagship standard form. These forms to be used for private sector building works undertaken through the traditional general contracting contract procurement method comprised:

- PAM/ISM 69: Standard Form of Building Contract With Quantities;
- PAM/ISM 69: Standard Form of Building Contract Without Quantities; and
- PAM NSC 70: Standard Form of Contract for Nominated Sub-contractors to be Used With PAM/ISM 69.

Though the JCT 1963 Form was revised progressively over the years to rectify its weaknesses and shortcomings, the PAM/ISM Form remained relatively unaltered until its complete overhaul and replacement with a new standard form in 1998, i.e. the PAM 1998 Form¹².

1.4.2 The PAM 1998 Forms

The anachronistic and archaic PAM/ISM 69 Forms were replaced with the new and updated PAM 1998 Forms which included, inter alia, the following Standard Forms:

- The Malaysian Standard Form of Building Contract (PAM 1998 Form 'With Quantities' edition);
- The Malaysian Standard Form of Building Contract (PAM 1998 Form 'Without Quantities' Edition); and
- The PAM 1998 Sub-contract Form (to be used for nominated sub-contracts where the main contract is based upon the PAM 1998 Form).

For details on the philosophy behind and the making of these forms, reference can be made to the scholarly treatise entitled, *The Malaysian Standard Form of Building Contract* [2nd Edn].¹³

1.4.3 The PAM 2006 Forms

After only five years of the publication of the PAM 1998 Form, PAM started a review process to produce a more balanced Standard Form of Contract. The above culminated in the drafting and publication of the latest revised forms comprising:¹⁴

- Agreement and Conditions of PAM Contract 2006 (With Quantities);
- Agreement and Conditions of PAM Contract 2006 (Without Quantities); and
- Agreement and Condition of the PAM Sub-Contract 2006.

It should be noted that the PAM 2006 Forms are used essentially for:

- i) Private sector projects;
- ii) Building works; and
- iii) Contracts undertaken through Traditional General contracting (TGC) procurement route.

Cognisance should be taken of the fact that there are currently no standard PAM forms for the following contracts:¹⁵

- i) Engineering/construction contracts (other than building contracts);
- ii) *Package deal/turnkey* types of contracts;
- iii) Management types of contracts, e.g. management contracting and construction management;
- iv) Domestic sub-contracts;
- v) Serial contracts;
- vi) Periodic/term contracts;
- vii) Continuation contracts; and
- viii) Other miscellaneous types of contracts.

It is submitted that save for *package deal/turnkey* type of contracts where there may be some motivation to draft a standard form, it is highly unlikely to see PAM generating any other forms for the remaining contracts. Therefore, reliance may have to be placed on the other Standard Forms available in the market to fill this void.

1.4.4 IEM Forms

Realising the rigours and pitfalls of the JKR forms and the unsuitability of the PAM forms for primarily engineering and infrastructure projects, practitioners in the engineering/construction field attempted to employ various British engineering forms such as the ICE Forms, IMECHE forms, IEE forms, JCT forms and to a lesser extent, FIDIC forms. Modifications to these forms were undertaken on a job specific and ad hoc basis leading to much uncertainty and disputes in the local engineering industry¹⁶.

The Institution of Engineers, Malaysia (IEM) then stepped in to rectify the seemingly confusing situation and addressed the lacuna in this area of the industry by drafting and publishing a series of Standard Forms for engineering works procured by way of traditional general contracting. The process commenced in 1989 with the advent of the first form and five years later a much awaited form for Mechanical and Electrical works made its debut.

1.4.5 To date IEM has published three main forms, viz:

- IEM.CE 1/89: IEM Conditions of Contract for Works mainly of Civil Engineering Construction (Second Reprint September 1994). This has recently been replaced with the IEM.CE 2011: IEM Form of Contract for Civil Engineering Works (Second Edition, July 2011).
- IEM.CES 1/90: IEM Standard Conditions of Sub-contract for use in conjunction with the IEM Conditions of Contract for Civil Engineering Works (First Reprint September 1994); and
- IEM.ME 1/94: IEM Conditions of Contract for Mechanical and Electrical Works (First Edn 1994).

Markedly absent is the IEM Standard Conditions of sub-contract for use in conjunction with the IEM Conditions of Contract for Mechanical and Electrical Works.

1.4.6 The IEM Standard Conditions of Contract are used essentially for:

- i) Private sector projects;
- ii) Civil Engineering, Mechanical and Electrical Works; and
- iii) Contracts procured under the Traditional General Contracting (TGC) procurement route.

However, they do not cater for the following contracts:

- i) *Package deal type/ turnkey* type of contracts;
- ii) Management types of contracts, eg management contracting and construction management;
- iii) Domestic sub-contracts;
- iv) Serial contracts;
- v) Periodic/term contracts;
- vi) Continuation contracts; and
- vii) Other miscellaneous types of contracts.

The IEM Forms, in addition, also do not cover building contracts as there is a desire not to duplicate the existing PAM Forms (and perhaps the new CIDB form)

1.4.7 With the emergence of CIDB as the new source of Standard Forms for the construction industry, it is anticipated that IEM may not, in the near future, draft and publish any new forms. However, for engineering works (as distinct from construction works), IEM will still be looked upon as a source of the relevant Standard Forms within the local context. Attempts have been made over the years to review and revise the above forms. Although drafts of these forms have been generated, these have to date not been finalised for publication except for the recently published IEM.CE 2011.

2. Usage of Foreign Standard Forms of Contract in Malaysia

2.1 Standard forms of contract of foreign origin have been, and continue to be employed in Malaysia for various projects despite the emphasis on the use of the so called local or 'home grown' forms. The reasons for such usage are many but for conciseness these can be classified under the following principal categories¹⁷:

- Where the contract is essentially of an international nature funded by an international agency such as the World Bank, Asian Development Bank or foreign promoter or investor, e.g. a multi-national corporation;
- Where, though locally funded or promoted, the employer or contractor is of foreign domicile and insists on the adoption of a foreign or international standard form of contract with which he is familiar or which meets his expectations;
- Where there is no local standard form available to cater for the particular contract involved, e.g. a management contract or a construction management contract; or
- Where though there is a local standard form at the disposal of the parties, it is nevertheless not wholly suitable for the particular project or contract involved, e.g. either its provisions are not extensive or its stipulations lacking in clarity as to the respective obligations and/or liabilities of the parties.

In situations as adverted to above, to ensure that the legal framework to be put in place adequately meets the commercial and legal expectations of the respective parties, there is a compulsion to use a standard form whatever its origin so long as the objectives of the agreement reached are ultimately met. Hence, the necessity to explore the possibility of using

international/foreign Forms of Contract which in all probabilities will be of British origin due to our traditional association with and dependence on British sources of engineering/construction Conditions of Contract¹⁸.

The following are some of the main types of international/foreign standard forms of contracts utilized in Malaysia:

- FIDIC Standard Forms of Contract;
- JCT Standard Forms of Contract;
- ICE Standard Forms of Contract; and
- 1MechE and IEE Standard Forms of Contract.

2.2 FIDIC Standard Forms of Contract

FIDIC¹⁹, the International Federation of Consulting Engineers, in association with the European International Federation of Construction (FEIC) produces a whole series of Standard Forms of Contract for use worldwide with modifications, if necessary to suit the legal system of the country of a particular application, i.e. the domicile of the employer.

In the Malaysian context, FIDIC forms are used in specific instances particularly where:

- The project is being funded by or is being under the purview of an international agency of the likes of the World Bank, Asian Development Bank, etc;
- Where the parties find the FIDIC forms the most appropriate for their transaction owing to factors such as familiarity, comprehensiveness, etc; and
- Where there are either no local forms available for the particular application or if there exist such forms, these being inadequate or deficient.

2.2.1 Locally to date, the most frequently used FIDIC forms comprise:

- FIDIC Conditions of Contract for Civil Engineering Works (4th Edn.): *The Red Book*;
- FIDIC Conditions of Contract for Mechanical and Electrical Works (3rd Edn.): *The Yellow Book*; and
- FIDIC Conditions of Contract for Design, Build and Turnkey: *The Orange Book*.

The contracting practice in Malaysia also seems to be consistent in adapting the 1999 revisions made by FIDIC upon the abovesaid forms and in utilizing the following new forms, namely:

- FIDIC Conditions of Contract for Construction: *The New Red Book* - for building and engineering works designed by the employer;
- FIDIC Conditions of Contract for Plant and Design Build: *The New Yellow Book* - for electrical and mechanical plant and for building and engineering works designed by the contractor;
- FIDIC Conditions for EPC Turnkey Contracts: *The New Silver Book* - for privately or public/private financial EPC Turnkey projects - BOT Model; and
- FIDIC Short Form of Contract: *The New Green Book* - for minor building or relatively uncomplicated construction works.

2.2.2 Application of FIDIC Standard Form of Contract as a choice of contract in a Malaysian construction project

In general, the doctrine of freedom to contract continues to be applied by the Malaysian court to all contracts before it. The courts take the view that the parties to a contract have the right to determine the terms and conditions it wishes to contract upon so long as such terms do not conflict with the Contracts Act 1950.

It is only in very limited circumstances that a Malaysian court would rewrite the terms of the contract entered into by the parties freely and with consent. In respect of the application of FIDIC standard forms of contract in Malaysia, parties to a contract would be free to contract to the terms and conditions of the FIDIC Conditions for EPC Turnkey Contract (*"The Silver Book"*), FIDIC Conditions of Contract for Construction: (*"The Red Book"*) and the FIDIC Conditions of Contract for Plant and Design Build: (*"The Yellow Book"*).²⁰

The FIDIC Form of Contract in its present day form traces its roots to the ICE Form used by the Federation of Civil Engineering Contractors and the Institution of Civil Engineers in the United Kingdom after the Second World War (and the different forms prior to the War)²¹. However, despite the fact that Malaysia's legal system and common law is to a large extent derived from that of the United Kingdom, the FIDIC Form appears not to have received wide-spread application for domestic contracts. This is particularly in light of certain local standard forms which has received widespread use.

2.2.3 Pertinent revisions were introduced in the Fourth Edition of the FIDIC Conditions of Contract for Works of Civil Engineering Construction (*"the Red Book"*) as well as in the 1999 Red Book. In 1987, a revision was made which involved the change of name which removed the reference to the contract as an *international contract*. It was perhaps feared that the title of the Red Book would imply its use be restricted to construction contracts with an international flavour to it.²²

2.2.4 In most ways, international building contracts may involve the application of several laws instead of just one. When considering the choice of law applicable to a particular contract, the Malaysian courts would refer to the following factors, in addition to the express terms of the contract -

- the country where the contract was executed;
- the country wherein entire or substantial performance of the contract is to take place;
- the country where one or more of the parties to the contract are domiciled;
- the country where a significant part of the works are manufactured; and/or
- the country from which the contract is financed.

2.2.5 It is common practice for the employer to determine the choice of law applicable to the project. To the extent that the choice²³ of law is made in good faith based on relevant considerations, the courts do not often find reason to interfere with the choice. What remains undisturbed is the autonomy of the parties to determine the law under which they are subject to.

2.2.6 In the Malaysian decision of *Aloe Vera (M) Sdn. Bhd. v Avacare Inc.*²⁴ the court held that it would give effect to an exclusive jurisdiction clause contained

in a contract. However, the court went on to say that it would, in exceptional circumstances, allow a party to sue in Malaysia notwithstanding the agreement. The reason for this was that the court held that if not, the action would have to be commenced first in the foreign jurisdiction, and then in Malaysia. The court was of the opinion that this would lead to duplicity of proceedings as well as costs, not to mention generate a significant delay in enforcing the claim thus further inhibiting the Plaintiff from ultimately obtaining his remedy.

2.2.7 A closer look at the Malaysian Court of Appeal decision of *Inter Maritime Management Sdn. Bhd. v Kai Tai Timber Co. Ltd., Hong Kong*²⁵ brings about further discussion. The appeal court held that the merits of having a trial in Malaysia or in a foreign country and the considerations that had to be weighed in deciding whether to give effect to a forum selection clause was a matter which laid entirely within the discretion of the trial judge. An appellate court would very rarely interfere with this exercise of the trial judge's discretion.

As such, the aforementioned Court of Appeal decided not to adopt the American approach to forum selection. Thus when dealing with a forum selection clause, the test to be satisfied before effect can be given to the clause is whether the court considers the forum selected or some other forum elsewhere to be more convenient for the purpose of adjudicating the dispute. In such instance, the party disputing the clause must show reason why the clause ought not to be enforced.

2.2.8 In short, it ought to be clear that a Malaysian court is not bound to give effect to such a clause for the simple reason that the parties cannot by agreement create or confer jurisdiction upon a court of law where the facts show that the court is or is not already seized of jurisdiction.²⁶

2.2.9 The following is a brief guide for understanding the contractual context within which the Engineer under a FIDIC contract operates in Malaysia:

Role of Engineer (FIDIC Clause 5 - apart from the Red Book)

i) Design

The design is the first of the engineer's tasks to be completed by the time the Employer finalises the terms and conditions of the construction contract. The definition of design is varied and its limits would be defined by the circumstances of the contract.²⁷ Where the design is complete by the tender stage, the eventual contractor who successfully bids for the project would enter the scene with more complete knowledge of the circumstances of the project and what would be expected of the contractor.

Amongst the elements that the engineer has to ensure the design of the project encompasses are the shape and dimensions of the project bearing in mind the ultimate objective the employer has in mind. This would include the use of skills and materials which would further the objectives. The anticipated cost of the project is a further item to be in the forefront of the engineer's mind. An accurate bill of quantities, where such is the responsibility of the engineer is a major factor that would impact on the overall cost of the project.²⁸

ii) Agent of Employer

The fact that the consultant engineer is the agent of the employer is not something easily disputed. The engineer is rightfully considered the agent of the employer for various reasons. First, the work carried out by the engineer is carried out for the benefit and with the objectives of the employer in mind. Also, upon the appointment of the contractor, certain duties devolve upon the employer. These duties require some familiarity with the design philosophy of the works and the engineer best performs it. The engineer's role as supervisor in terms of quality control is another factor. As agent of the employer, the engineer may have the authority to authorise variations or further work to be performed. This would depend upon the contract and its terms.²⁹

iii) Supervisor

The duty of achieving the quality objective under a construction contract lies with the contractor. However, owing to the engineer's first-hand knowledge in the construction design and specifications, the role as supervisor of construction has evolved. In *Oldschool vs. Gleeson*,³⁰ the judge had to determine the extent of the consulting engineer's duty in relation to the design and supervision of the works. The court held that the consultant was not under the obligation to instruct the contractor as to how to perform his duties. He has the right to offer advice but the obligation ultimately falls on the contractor to achieve the design agreed upon. The supervisory role is therefore supportive and ancillary to the contractor's duty of achieving the standard prescribed by contract.³¹

Certification of Progress and Project Completion (FIDIC Clause 14)

The contract would normally provide for the issue of certificates of progress to mark the approach towards completion. These certificates, where the contract provides so, allows for payments to be released to the contractor. It is a fact in most instances where certificates of payment are not issued that the contractor would become physically hampered in performing the contract due to cash flow problems. The certificate records the value of the work so far performed, and it may be contractually mandated that the issue of such certificate be a condition precedent to the release of funds to the contractor.

The engineer performs the role of certifier when he issues extension of time, including dates by which certain portions of work have to be completed and when he values variations to the contract or design specifications.³²

Adjudicator and Quasi-Arbitrator (FIDIC Clause 3.5)

Generally, the engineer is an arbitrator only when he has to determine a dispute between the contractor and the employer. The contractor often provides for the engineer to hear disputes that may arise from time to time. The fact that the engineer has useful expertise and first-hand experience in the subject construction is thought to allow an expedient means of dispute resolution. In contrast, the rationale behind the appointment of the engineer as quasi-arbitrator has been questioned so far as the duty of impartiality of the quasi-arbitrator is concerned.³³ The contractual relationship between the engineer and employer is often used as reasons why the engineer might well be biased in reaching his decision, although

the duties owed by the engineer to the employer as agent do not impinge on his duty as quasi-arbitrator.

Naturally, in order to perform his role the engineer must be free to decide without first seeking the approval of the employer.³⁴ Where this is an obstacle,³⁵ it is fuel for the argument that the choice of engineer as dispute resolver is not wise. A quasi-arbitrator is required to be impartial and to use his faculties of logic and reason in reaching a decision. In performing the role of a quasi-arbitrator/adjudicator, it can be seen how the law might impose the above conditions on him. It might be seen also how he would be encouraged to provide reasoned decisions, though arguably the failure to do so would not nullify the decision or determination. A subsequent arbitrator may however revise the decision more readily where a reasoned decision is not provided.³⁶

Upon closer examination of Clause 4.4 of the 1999 Edition of the Red Book, there is no reason why the assigning or subcontracting of the contract would lead to problems as seen in the English decision of *Linden Gardens v. Lenesta Sludge Disposals Ltd.*; *St. Martin's Property Corporation Ltd. v. Sir Robert McAlpine & Sons Ltd.* [1994] 1 A.C. 85. In Malaysia, the requirements for a legal assignment are provided in section 4(3) of the Civil Law Act 1956. For a valid legal assignment, the assignment must be absolute and granted by the assignor in writing with notice. The Courts in Malaysia would also recognise and enforce an equitable assignment provided that the common law requirements for an equitable assignment are satisfied.

2.2.10 It is submitted that going by the current trends in the industry and the swing towards globalization, we will see quite a bit of the new *Yellow* and *Silver Books*. As for the 2006 *Blue-Green Book* or "*Dredger's Contract*", except for marine works involving dredging, there appears to be no other field where it can be employed locally. However, the major factor militating against the adoption of these new forms is the relative novelty of such forms. No one knows for sure their shortcomings nor their ambit as these forms have not been applied/tested in the market. It is averred that the time tested 'old' forms will still be preferred until the 'new' forms have established a foot-hold in the industry.

2.2.11 The fourth section of this paper shall review the relevant Malaysian law as construed where a foreign standard form of contract (e.g. FIDIC Forms of Contract, ICE Forms of Contract, etc.) is used as the choice form of contract in a construction project, or where one of the local forms of contract are used, which is also subject to the Contracts Act 1950. In addition, the fourth section shall provide a more detailed look at the pertinent developments within the contracting practice in Malaysia in relation to civil engineering and building works which have no doubt affected the application of these forms.

2.3 JCT Standard Forms of Contract

The Joint Contracts Tribunal (JCT) is an 'affiliation of interest groups within the British construction industry which operates as a forum for discussing and determining the content of the clauses of the standard form of building contracts'.³⁷ It issues and regularly amends the Standard Forms of Contract with supporting documentation and Practice Notes.

2.3.1 Application

JCT Standard Forms of Contract in their original form are rarely used in Malaysia. The only limited exceptions have been in very specific applications involving special types of contracts, e.g. management contracts, continuation contract, etc. In most cases, the JCT forms have been used either with necessary modifications or as a basis of a locally generated ad hoc or 'bespoke' form of conditions of contract, e.g. one with contractor's design.³⁸

2.3.2 Common Types³⁹

JCT has, since its inception, generated a whole list of Standard Forms of Contract. Of relevance to the Malaysian construction industry are only the following main types; which at one time or another have been used in various styles:

- JCT Standard Forms of Building Contract (1980): JCT 80;
 - i) Private With Quantities;
 - ii) Private Without Quantities;
 - iii) Private With Approximate Quantities;
 - iv) Nominated Sub-contracts: NSC/1 to 4; and
 - v) Domestic Sub-contracts: DOM/1;
- JCT Standard Form of Building Contract With Contractor's Design (1981): JCT CD 81;
- JCT Intermediate Form of Building Contract (1984): JCT IFC 84;
- JCT Standard Form of Management Contract (1998): JCT MC 98;
- JCT Standard Form of Measured Term Contract (1989);
- JCT Standard Fixed Fee Form of Prime Cost Contract (1967); and
- JCT Standard Form of Construction Management Agreement (C/CM 2002).

2.3.3 As part of its general revision and updating, JCT has recently issued a new set of Standard Forms listed below, cognisance of which should be taken:

- JCT Standard Forms of Building Contract (1998 Edn.);
- JCT Standard Form of Building Contract With Contractor's Design (1998 Edn.);
- JCT Intermediate Form of Building Contract (1998 Edn.);
- JCT Standard Form of Management Contract (1998 Edn.);
- JCT Standard Form of Measured Term Contract (1998 Edn.); and
- JCT Standard Form of Prime Cost Contract (1998 Edn.).

Whether these new forms will be used by local practitioners is purely speculative at the moment. Much depends on the ability of local bodies, e.g. CIDB to generate suitable standard forms to cover the major applications adequately.⁴⁰

2.4 Standard Institutional Forms

History reveals that even in Britain, before bodies such as FIDIC or JCT started developing Standard Forms of Contract, the principal institutions, i.e. the Institution of

Civil Engineers (ICE), Institution of Mechanical Engineers (IMechE) and Institution of Electrical Engineers (IEE) had initiated the process of drafting Standard Forms to address their respective areas of concern, i.e. engineering works.

2.4.1 Notable is the emphasis of JCT on building works whilst FIDIC appeals more to an international engineering/construction audience. The institutions seem more focused to their fields of specialisation. Hence, it is inevitable that they represent the most suitable bodies to draft and issue Standard Forms of Contract in their particular areas of competence; hence the so called institutional forms. It is no secret that when local bodies such as the Institution of Engineers, Malaysia develop their own Standard Forms, they fashion these after the British institutional forms.⁴¹

2.4.2 Application

Well before JKR came out with its standard form for Turnkey/Design & Build contracts, the local practitioners used to employ the 'ICE Design and Construct Conditions'. Since the local private sector is still without such a standard form, the ICE's version continues to be the basis of private design and construct contracts. In parallel, the ICE's 'Standard Form of Contract for Civil Engineering Works' is adopted in situations where it is preferred over the corresponding IEM or FIDIC Forms.

2.4.3 As for the IMechE and IEE Standard Forms, these have been adapted for local use by employers for certain Mechanical and Electrical works; a classic example being Tenaga Nasional Berhad.⁴² Such forms will continue to fill in the voids on the local scene where there is a lack of motivation to address issues pertaining to Mechanical and Electrical works in favour of the seemingly more lucrative building and civil works.⁴³

2.4.4 Common Types

The primary forms of ICE Standard Forms of Contract utilised locally are:

- ICE Conditions of Contracts for Works of Civil Engineering Construction (6th Edn). The 7th Edn, which has been recently issued supercedes the 6th Edn.;
- ICE Conditions of Contracts for Design and Construct [1992];
- ICE Conditions of Contract for Minor Works (2nd Edn.) [1995]; and
- ICE Conditions of Contract for Ground Investigation [1983].⁴⁴

Of the above-mentioned forms, the first two are the most popular. The last form is suitable only for investigations carried out under the control and supervision of an independently employed engineer.

2.4.5 Miscellaneous Standard Forms

From time to time local practitioners have looked upon or may be compelled to look at various other Standard Forms that may suit their particular applications, examples of which include:

- the New Engineering Contract;
- ACA⁴⁵ Forms of Contract;

- GC⁴⁶ Forms of Contract;
- 'New Singapore SIA'⁴⁷ Forms of Contract.

This does not mean that the parties cannot employ any other Standard Forms from any other jurisdiction provided it is in line with their requirements and meets their legal and commercial objective.

3. Usage of "Bespoke" or "Ad hoc" Forms of Contract in Malaysia

3.1 Whilst standard forms of contracts generated and published by the authoritative bodies of the construction industry in Malaysia remain a popular choice for use amongst parties, it must be noted that it is rare for the aforementioned standard forms to be used without amendments or modifications being undertaken to suit the principal's particular requirements. Unless such amendments are undertaken by competent professionals, experience has shown that they have led to serious claims and disputes, thereby "watering down" the purpose and effectiveness of the said standard forms.

3.1.1 In Malaysia, it is quite common to encounter the use of standard forms of conditions, of which have been subjected to amendments or modifications to meet local conditions and the particular requirements of the parties (principally the employer as the principal).

3.1.2 Certain employers or specific sectors of the industry may prefer not to use any of the above mentioned standard forms even with amendments or modifications but prefer to have these drafted from their own point of view. These are popularly called "bespoke" or "ad hoc" or "client-specific" or even "custom-made" forms of conditions of contract. Among the examples of such "bespoke" conditions of contract are the 'Putrajaya' Form, 'KLCC' Form, 'KLSSB' Form, and 'KLIA' Form.

3.1.3 A more direct example of such "bespoke" forms are the so-called JKR or PWD Standard Forms of Conditions of the Contract; the word "standard" connoting that these are standardised for use in all public sector projects under purview of JKR (Jabatan Kerja Raya / Public Works Department). These comprise the JKR Forms 203 (Rev 1/2010), Form 203A (Rev 1/2010), Form 203N (Rev 1/2010) and 203P (Rev 1/2010) for Main Contracts and Nominated Subcontracts undertaken along the traditional general contracting route of procurement. A separate form, i.e. the JKR Form DB (Rev 1/2010), is to be used for Design & Build Contracts. JKR Sarawak has published its own Form of Contract in 2006 which is meant to apply to traditional general contracts based on Bills of Quantities as well to those based on drawings and specifications.

3.1.4 The FIDIC form, whilst not often used in its original form except for international contracts, is noteworthy in that it often forms the template for other forms, some of which have been used for some very substantial projects in Malaysia.

3.1.5 Other institutional or corporate employers, both in the public and private sectors, have generated and are drafting their own bespoke forms of conditions of contract either due to their particular policies, or specific requirements. This has resulted in a myriad range of forms of conditions of contract with which practitioners must be familiar in undertaking their works.

3.1.6 It is pertinent to note that a true standard form which is produced by a body which is representative

of the industry, e.g. CIDB, is in principle unlikely to attract the application of the “*contra proferentem*” rule of construction. In the case of *Union Workshop (Construction) Co. v Ng Chew Ho Construction Co. Sdn. Bhd.* [1978] 2 MLJ 22, it was held that the meaning of the sub-contract in question was perfectly clear that there could be no resort to other documents to give another meaning to it. The facts were that the appellant had sub-contracted to build steel frames for the respondent in fulfilment of the respondent’s much larger contract with the contract principle.

The dispute was related to the question whether payment for the construction was to be by the nett weight of the structural frames only or was to be by the gross weight of the steel used including bolts, washers and connecting plates. The terms of the sub-contract between the parties were clear and provided for payment not only for the steel girders or frames but also for ancillary steel used in the erection of the girders.

The High Court held that where the draftsmen had purposely left out any condition which he could without difficulty have put in, then the *contra proferentem* rule applied so that the inevitable conclusion was that the clause of the main agreement did not form part of the agreement between the parties and that payment was to include the weight of steel other than the girders.

- 3.1.7 However, the position may well be different where the parties contract on the basis of a standard form of contract containing the parties’ own amendments or one that is self-styled as a standard form. Referable is the case of *Chester Grosvenor Hotel Co. Ltd. v. Alfred McAlpine Management Ltd.* (1995) 56 BLR 115 where J Stannard held that a management contractor should not be held responsible for a trade contractor’s default:

“I accept that where a party invariably contracts in the same written terms without material variation, those terms will become its ‘standard form contract’ or ‘written standard terms of business’. However, it does not follow that because terms are not employed invariably, or without material variation, they cannot be standard terms.

What are alleged to be standard terms may be used so infrequently in comparison with other terms that they cannot realistically be regarded as standard, or on any particular occasion may be so added to or mutilated that they must be regarded as having lost their essential identity. What is required for terms to be standard is that they should be regarded by the party which advances them as its standard terms and that it should habitually contract in those terms. If it contracts also in other terms, it must be determined in any given case, and as a matter of fact, whether this has occurred so frequently that the terms in question cannot be regarded as standard, and if on any occasion a party has substantially modified its prepared terms, it is a question of fact whether those terms have been so altered that they must be regarded as not having been employed on that occasion.”

- 3.1.8 In a similar fashion to construction contracts as alluded to above, the conditions of contract for the engagement of professionals such as consultants can also be of various types. Professional bodies such as the Board of Engineers Malaysia (BEM), Pertubuhan Arkitek Malaysia (PAM), etc. have developed and published Standard Forms of Conditions of Contract such as the BEM Model Form of Agreement (BEM Form 1999) and the PAM Standard Form

of Memorandum of Agreement for Professional Services Fifth Schedule (Rule 28), which are recommended to be used in the construction industry.

- 3.1.9 However, this has sadly not occurred in practice where most employers, including the government, have either modified these standard forms, or even drafted “bespoke”, or “client-specific” conditions for the engagement of professionals. Whether the latter has really protected the rights of the parties and improved professionalism and the quality of service rendered is a moot point but it reflects the often misguided lack of confidence in standard forms generally, be these for professional work or even the actual works under a construction contract.⁴⁸
- 3.1.10 Most of the standard forms provide for the professionals to be paid according to a Standard Scale of Fees. In practice however this has been taken to be merely a guide and no more by the industry and the courts.⁴⁹

4. Pertinent Issues and Development Affecting the Contracting Practice in Malaysia

- 4.1 Construction and building contracts in Malaysia are governed by the general law of contract which is embodied in the Contracts Act of 1950. The Malaysian Act has been derived largely from the Indian Contract Act 1872⁵², appropriately amended to suit commercial conditions prevalent in Malaysia. The courts of law in Malaysia frequently refer to decisions pronounced by the Indian courts. English common law is also held to be a part of Malaysian law and is used extensively by the courts in cases where provisions of a statute cannot be directly applied.

- 4.1.1 The courts of law in Malaysia have upheld the doctrine of freedom of contract by taking the view that parties are free to contract into any terms they wish to by mutual agreement provided that the agreement is legal and is capable of being enforced by law in Malaysia. Section 24 of the Act specifies that the consideration or object of an agreement is lawful unless:

- i) It is forbidden by law;
- ii) It is of such a nature that, if permitted, it would defeat any law;
- iii) It is fraudulent;
- iv) It involves or implies injury to the person or property of another; or
- v) The courts regard it as immoral, or opposed to public policy.

We will now focus our attention on some pertinent developments in the contracting law applicable in Malaysia.

4.2 Section 75 of Contracts Act 1950

- 4.2.1 Under the Malaysian law, the contractual right to liquidated damages in the sum as agreed under a contract is not automatic. In the landmark decision by the Federal Court in the case of *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, it was held that, pursuant to Section 75 of the Malaysian Contracts Act 1950, notwithstanding the stipulated liquidated damages entitlement under the contract, no damages would be awarded to the employer if it failed to prove actual loss suffered as a result of the delay caused by the contractor’s breach of contract, unless the employer could show to the satisfaction of

the court that the losses suffered by it were such that it would be impossible for the court to assess. These principles enunciated by the Federal Court in *Selva Kumar* was subsequently confirmed by the majority decision of the Federal Court in the case of *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 3 MLJ 445.

4.2.2 Section 75 of the Contracts Act reads as follows:

“Compensation for breach of contract where penalty stipulated for...” 75. *When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for...”*

4.2.3 In *Selva Kumar*, the appellant and the respondent were both medical practitioners. The appellant purchased a fully functional medical practice from the respondent, and the payment terms agreed between the two stipulated that apart from the sum paid at the signing on the contract, the appellant would pay the balance contract amount in installments, and his failure to do so would entitle the seller (respondent) to forfeit the amounts paid up to the date of the breach as liquidated damages and also to terminate the contract.

4.2.4 As it so happened, the appellant failed to pay the scheduled installments after several payments, and the respondent proceeded to forfeit the amounts paid and terminated the contract. The question before the court was whether or not the respondent was entitled to forfeit the moneys as liquidated damages agreed by the parties under the express terms of the contract.

4.2.5 The Federal Court held that (1) in Malaysia, there is no distinction between liquidated damages and penalties as understood under English law; (2) the words of the section ‘*whether or not actual damage or loss is proved to have been caused thereby*’ must be given a restricted interpretation. Therefore, the plaintiff who is claiming for damages in an action for breach of contract must still prove the actual damages or reasonable compensation in accordance with the settled principles in *Hadley v Baxendale*⁵¹. (3) However, in cases where the court finds it difficult to assess damages for the actual damage as there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently which is not too remote, then the words of the section would apply. The court ought to award damages which are reasonable and fair according to the court’s good sense and fair play.

4.2.6 Having set out the abovementioned principles, the apex court went on to rule that the respondent could have proved his damages by settled principles, but failed to do so. As such, apart from the reasonable amount of the deposit, the respondent was not entitled to retain the installments paid to him as liquidated damages.

4.2.7 Following the *Selva Kumar* case, there was an uproar in the construction community as it was thought that the very purpose of having the liquidated damages clause was so that the aggrieved party’s need to prove actual loss could be negated following the specific breach of contract by the defaulting party.

4.2.8 There was an opportunity for the apex court to re-visit the decision of the Federal Court in *Selva Kumar* in the subsequent case of *Johor Coastals*, but the apex court decided, by a majority decision, to maintain the principles in *Selva Kumar* as good law. The facts in *Johor Coastals* are similar to those in *Selva Kumar*. There was failure on part of the buyer to make complete payment of the installments under the sale agreements and due to such default, the seller forfeited the amounts that had been paid till that date as penalty envisaged under the said agreement. However, it is to be noted that in the sale agreement entered into by the parties included a special clause, purportedly intended to circumvent the provisions of section 75 of the Contracts Act. The provision was as follows:

‘...16.2 Reasonable Compensation Both parties hereby unconditionally and irrevocably acknowledge that the sums stipulated in this Agreement to be payable by the defaulting party would constitute reasonable compensation to the non-defaulting party and each party hereto hereby waives any objection it may now or hereafter have that those sums would be otherwise than fair and reasonable compensation.’

The forfeiture of the moneys was challenged by the buyer.

4.2.9 The majority in the Federal Court bench reiterated the principles formulated in *Selva Kumar* and held that the appellant had no right to forfeit the amounts as stipulated under the contract as he had failed to prove actual loss.

4.2.10 Since the decision of *Selva Kumar*, there have been attempts made to circumvent the requirement to prove actual loss through creative drafting. One example is Clause 22 of the Malaysian Institute of Architects (PAM) 2006 Standard Form, which expressly provides that the liquidated damages amount agreed by the parties is a genuine pre-estimate of the loss and/or damage which the employer will suffer in the event of the contractor’s breach, and that the parties agree that the employer is not required to prove his loss and/or damage unless the contrary is proven by the contractor.

4.2.11 As far as the author is aware, this clause has not been tried and tested in the local courts, and it remains to be seen as to the effectiveness of such clause 22 of PAM 2006, or any similar provision, to overcome the decision in the *Selva Kumar* case.

4.2.12 However, there is a decision of the High Court, in the case of *Allson International Management Limited & Anor v LA Cemara Resort Management Sdn Bhd* [2001] MLJU 634, where it was held that the plaintiff was entitled to claim for the liquidated sum of RM1 million for the defendant’s breach of contract and that the plaintiff was not required to prove actual loss. In this case, the relevant provision in the contract expressly stipulated that the RM1 million liquidated sum is deemed to be a compensation entitlement and not a penalty, and it represents a payment in lieu of damages sustained by the plaintiff because of the difficulty in quantifying actual damages. The High Court held that by agreeing to this provision of the contract, the defendant had agreed that the loss to be suffered by the plaintiff by his breach would not be quantifiable, and therefore expressly agreed that the loss shall fall within the exception to the rule set out in *Selva Kumar* case. The

author's research so far reveals that there is no other case after *Allson* which followed or criticised this decision, and as such, is still good law.

4.2.13 It therefore appears that the parties may be able to circumvent the strictness of the rule set out in *Selva Kumar* by having a clause as that in the *Allson* case.

4.2.14 Also noteworthy is the suggestion by the authors, M.S. Mohd Danuri, M.E. Che Munaaim and L.C. Yen of the article titled "*Liquidated Damages in the Malaysian Standard Forms of Construction Contract: the Law and the Practice*"⁵², to provide a certain calculation / mechanism for the calculation of loss in the contract in the event of breach by the defaulting party. Although this method may ease the employer's burden of proving his actual loss, it is humbly submitted that it will not completely relieve the employer's obligation to prove actual loss. This is because the requirement to prove actual loss would only arise after loss has been suffered by the employer. Further, the disadvantage of putting a formulae for the calculation of loss in the provision is that it implies that the parties agreed that the loss which would be suffered by the employer would be calculable, thereby depriving the employer's right to rely on the exception to the *Selva Kumar* test.

4.3 *Kerajaan Malaysia v Ven-Coal Resources Sdn Bhd* [2014] AMEJ 0026

4.3.1 To avoid the possibility of ambiguity relating to the time frame for completion of contract, the employer and the contractor usually agree to a set date called the 'completion date'. This is the date by which time the works stipulated under the contract must be completed.

4.3.2 However, during the process of completion of the works, the contractor might face challenges and delays which were not contemplated by the parties at the time of signing of the contract. Such challenges may cause the date of completion of the project to be delayed. In these cases, if the contract does not contain a provision regarding the course of action to be followed, then the time of the contract becomes at large and the contractor is only liable to complete the project within a 'reasonable time'. What is 'reasonable time' is a matter of fact and is to be decided keeping in mind the peculiar facts of each case.

4.3.3 To remove themselves from the ambiguity of 'reasonable time', the parties to a contract usually negotiate an 'extension of time' clause, by which the employer, if satisfied as to the *bona fides* of the cause of delay, may agree to extend the 'completion date' of the contract.

4.3.4 In this case, the High Court went into much detail to determine the meaning of the 'extension of time' clause in the contract and the remedies available to the contractor if a valid extension of time is not granted.

4.3.5 The facts of the case follow. The plaintiff and the defendant entered into a construction contract to build a new building for a school. The contract entered into was the Standard Form PWD 203 (Rev. 10/83) Contract. One part of the contract stated that the contractor would first erect a temporary structure so that the school could continue operation and thereafter proceed to demolish the existing school building before constructing a new building at the site.

4.3.6 Despite a smooth beginning to the construction work, issues arose when the principal of the school herein

refused to occupy the temporary structure constructed until a store had been built for the storage of the school's paraphernalia. This store was not a part of the scope of the contract. Subsequently, the plaintiff submitted the drawings of the store to the contractor and the latter commenced work which finished in three months' time, therefore delaying the original contract by three months.

4.3.7 Later, during the demolition of the original school structure, the load test conducted for piling works was unsuccessful and therefore fresh instruction had to be taken from the employer/ plaintiff and only then could the work restart. This led to consumption of additional time.

4.3.8 Based on the above two events, the contractor requested in writing from the employer for Extension of Time (EOT) of 189 days, but received no response.

4.3.9 The employer, comparing the status of the project with the Critical Path Method (CPM) submitted by the contractor before the commencement of the project, after issuing three warning letters, proceeded to terminate the contract on the ground that the contractor had breached the contract by failing to proceed regularly and diligently with the Works. At the time of termination of the contract, the contractor still had three and a half months to go before the Completion Date.

4.3.10 The employer then filed a suit in the court of law to claim for additional costs incurred by it in appointing a new contractor to continue with and complete the project. On the other hand, the contractor filed a counterclaim for damages for wrongful termination of the contract.

4.3.11 The court examined in detail the contention of both parties and decided that the delay caused to the contract was *bona fide* and that the employer should have granted the EOT as envisaged in the contract. In its decision, the court held that the refusal and neglect of the employer in granting the EOT was, in the circumstances of the case, unconscionable, unreasonable and improper. The court went on to declare that when the Supervising Officer refuses to grant an EOT in a situation that would warrant the grant of an EOT, then time for completion would be set at large.

4.3.12 In the circumstances, the court held that the termination of the contract by the employer was premature, unreasonable and wrong in law.

4.3.13 This decision by the court has reinforced the faith of the contractor companies in the EOT clauses of the contracts and that their interests would be safeguarded in cases of *bona fide* extension of time requests.

4.4 *Federal Court decision in Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd* [2014] MLJU 604

4.4.1 In this recent case, the Federal Court went in depth to analyze the 'pay if paid' and the 'pay when paid' clauses commonly found in contracts with sub-contractors in a construction project. A 'pay when paid' clause basically states that the main contractor would pay the sub-contractor the moneys under their contract with a specified number of days from receiving the payment from the employer. A 'pay if paid' contract, on the other hand, mandates that the main contractor

incurs the obligation to pay the sub-contractor if, and only if, he is first paid by the employer. We can see that the difference between the two clauses lies in the liability of the contractor to pay his sub-contractor. In a 'pay when paid' clause, the liability of the contractor to pay is definite, the only contingent factor being the time of payment. Whereas, in a 'pay if paid' clause, the liability of the contractor to pay would only arise when he is paid by the employer and not before that.

- 4.4.2 The courts in Malaysia have had to face the conundrum of the enforceability of these contracts on multiple occasions and the intervention of the Federal Court was required to finally settle the principles regarding these ambiguous concepts in the *Globe Engineering* case.
- 4.4.3 In this case, the employer engaged the Respondent as the main contractor to execute some construction works who in turn engaged the Appellant as a sub-contractor to supply and install the required fire protection works for the project.
- 4.4.4 The pre-sub-contract letter of award contained a 'pay when paid' clause worded as follows:

'..Within seven (7) days of the receipt by the Contractor from the Employer of the amounts included under on Architect's Certificate for which the Contractor has made an application under clause 11(a), the Contractor shall notify and pay to the Sub-Contractor the total value certified therein...less: i) Retention money, that is to say the proportion attributable to the Sub-Contract Works of the amount retained by the Employer in accordance with the main contract...; and ii) the amounts previously paid.'

Paragraph 14 Letter of Award:

Payments - Back to back basis. Within seven (7) days upon [the Contractor] receiving from the Client [Employer], "Sum Projects (Brothers) Sdn. Bhd.'

Clause 19 of the sub-contract stated,

'19. If for any reason the Contractor's employment under the Main Contract is determined (whether by the Contractor or by the Employer and whether due to any default of the Contractor or otherwise), then, the employment of the Sub-Contract under this Sub-Contract shall thereupon also be determined and the Sub-Contractor shall be entitled to be paid:

- (i) *The value of the sub-Contract Works completed at the date of such determination, such value to be calculated according to clause 10 of the Sub-Contract;*
- (ii) *The value of the work begun and executed but not completed at the date of such determination...;*
- (iii) *The value of any unfixed materials and goods delivered upon the site for use in the Sub-Contract Works the property has passed to the Employer under the terms of the Main Contract;*
- (iv) *The cost of materials or goods properly ordered for the Sub-Contract Works for which the Sub-Contractor shall have paid or of which he is legally bound to accept delivery...;*
- (v) *Any reasonable cost for removal from the site of his temporary buildings, plant, machinery, appliances and goods and materials.'*

- 4.4.5 In accordance with the sub-contract, the sub-contractor/Appellant proceeded to fulfil his part of the works.

- 4.4.6 However, the contractor/ Respondent later terminated the main contract with the employer on the grounds that the latter had not paid the sums due and payable to it. With the termination of the main contract, the sub-contract came to an end as well. The final claim amount issued by the sub-contractor was not paid by the contractor and therefore the sub-contractor filed an action in the court of law.

- 4.4.7 The contractor/ Respondent argued that it was not liable to pay the sub-contractor "until and unless it had received the moneys claimed" from the employer pursuant to the provisions of the sub-contract entered into between the parties.

- 4.4.8 On the other hand, the Appellant claimed that pursuant to clause 19 of the sub-contract, it was entitled to payment on the date of termination, regardless of the receipt of payment by the Respondent from the Employer.

- 4.4.9 The Federal Court, in its decision, noted,

'It is safe to say that there is no unanimity of opinion on pay-when-paid clauses. Locally, there are decisions for and against both sides of the divide.'

The court then went on to cite various case laws and articles describing the clause in detail holding that,

'they appear to be overly sensitive to the unpaid sub-contractor who, in such cases, is probably the innocent party in a building project gone awry.'

In relation to the clauses, the Court held that,

'...all approaches agree that where it is clear and explicit, a pay-if-paid clause is enforceable. Where they differ is only with respect to the standard of proof. While some courts construct the pay-when-paid clause as it appears in the contract, others require more than just the pay-when-paid clause. In the literal approach, it is a construction of the pay-when-paid clause. In the strict approach, the pay-when-paid clause may not be enough for a construction that it is a pay-if-paid clause. But where it is clear and unambiguous, all approaches give effect to pay-when-paid clauses. They also agree that pay-if-paid clauses are equally valid. Where it is clear and unambiguous that the pay-when-paid clause is in fact a pay-if-paid clause, then the pay-when-paid clause is enforceable as a pay-if-paid clause.'

After these general statements, the court went on to hold specifically that,

'upon its proper construction, the instant so called pay-when-paid clause was a provision that merely fixed time for payment but did not absolve the Respondent of liability to pay the amount certified and attributable to the work executed by the Appellant...upon termination of the sub-contract, all rights and liabilities were governed by clause 19...upon termination of the sub-contract, the entitlement of the Appellant to be paid in accordance with clause 19 was not contingent upon actual receipt by the Respondent of such payment from the employer.'

In light of this case, it would seem that a 'pay when paid' clause, which is time contingent, as opposed

to a 'pay if paid' clause which is liability contingent, will not prevent the sub-contractor from pursuing its claim against the main contractor after a lapse of reasonable time even though the main contractor has not been paid by the employer.

- 4.4.10 Given this Federal Court decision, it is important for the parties to set out clearly in the payment term as to whether they intend that the obligation for payment is only activated upon actual payment received, or after a lapse of a reasonable period. If it is the former, then it is incumbent upon the parties to adopt the wordings which have the effect of a "pay-if-paid" clause.

4.5 Construction Industry Payment and Adjudication Act 2012

4.5.1 Introduction

Malaysia took a giant leap in the field of execution of construction contracts with the enactment of the Construction Industry Payment and Adjudication Act 2012 ("the CIPAA" / "the Act"). The CIPAA was passed by the Parliament of Malaysia in March 2012, received Royal Assent on 18 June 2012 and finally came into force on 15 April 2014 to the enormous gratitude of all stakeholders in the construction industry in Malaysia. Malaysia closely follows in the footsteps of other jurisdictions having their own enactments on statutory adjudication such as the United Kingdom, Australia, New Zealand and Singapore.

4.5.2 Aims of CIPAA

Recognizing the inequality of financial and bargaining strength between the employer and the contractor (including the subcontractor) in a construction contract, and also acknowledging that a financially weak contractor or subcontractor becomes unable to continue with work when it has not been paid sufficiently and in time, CIPAA provides for a summary mechanism for resolution of payment related disputes arising from such contracts via the process of statutory adjudication, which makes for relief long due in an industry plagued by delays and oft disputed non-payment/ under-payment for works or services.

The CIPAA has the primary objective to address cash flow problems in the construction industry.

4.5.3 Statutory Adjudication - An Introduction

Statutory adjudication, as opposed to voluntary adjudication and contractual adjudication, is a process mandated by statute that does not require the agreement of the parties to commence and prevails over any contractual agreements to the contrary between the parties. A specific piece of legislation related to such adjudication stipulates what disputes should be so adjudicated, the procedure to be adopted, default provisions, the enforcement of the adjudicator's decision, etc.

4.5.4 Features of the CIPAA

- **Procedure** - The statutory adjudication provided for in the CIPAA is a summary procedure for the resolution of payment disputes under construction contracts at an intermediate stage, where the parties do not wait for the final resolution of their disputes through traditional processes of arbitration or litigation.

- **Scope** - The CIPAA is wide ranging and covers *inter alia*, the building industry, the oil and gas industry, the petrochemical industry, telecommunication, utilities, infrastructure, supply contracts and consultancy contracts.

- **Application** - The CIPAA applies to every 'construction contract' made in writing relating to any construction work carried out wholly or partly in Malaysia, including a construction contract entered into by the Government. The 'partly in Malaysia' in the provision means that the Act can be made applicable to international contracts provided some part of the works is carried out in the territory of Malaysia.

- **Construction contract** - The CIPAA defines 'construction contract' to include construction work contracts and consultancy services contracts.⁵³

- **Binding decisions** - Adjudication decisions under the CIPAA are immediately binding, till the final resolution of the subject disputes by arbitration, litigation or agreement between the parties.

- **Enforcement** - The CIPAA provides various remedies for the enforcement of adjudication decisions. The winning party has the following options:

- o He may apply to the High Court⁵⁴ for an order to enforce the adjudication decisions as a judgment/ order of the High Court ; or
- o He may suspend performance or reduce the rate of progress of performance of the construction works or consultancy services under a construction contract⁵⁵ ; or
- o He may make a written request for payment of the adjudicated amount directly from the principal of the losing party.⁵⁶

The CIPAA allows the winning party to exercise one or all of these remedies concurrently or one after another.

- **Exemptions** - Pursuant to the Construction Industry Payment and Adjudication (Exemption) Order 2014, the following categories of construction contracts are exempted from the application of the CIPAA⁵⁷:

- o The first category includes Government contracts for any construction works that involve emergency, unforeseen circumstances and that relate to national security or security related facilities.
- o The second category includes those Government construction contracts of contract sum of twenty million ringgit (RM 20,000,000) and below. These contracts are merely exempted from the application of subsections 6(3), 7(2), 10(1), 10(2), 11(1) and 11(2) of the CIPAA, which relate to the timeline of submissions. It is also a temporary exemption from 15 April 2014 to 31 December 2015.
- o The CIPAA also does not apply to an individual owner i.e. resident, who erects a building not more than four-storeys high which is wholly intended for his own occupation.

- **Conditional payment provisions** - The CIPAA expressly outlaws conditional payment provisions, such as "pay when paid", "pay if paid" and "back to back payment" provisions, which have contributed to the delay in payments in the construction industry.⁵⁸

• **Default provisions in absence of terms of payment**

- The Act provides in Section 36 that in case the contract price or the variation price in the contract are absent in the construction contract, then reference shall be made to the fees prescribed by the relevant regulatory board under any written law, and in the absence of such fees, the fair and reasonable prices or rates prevailing in the construction industry at the time of carrying out of the construction work would be made applicable. The section also stipulates the default frequency of progress payment as being monthly for construction work and construction consultancy services, and upon the delivery of supply for the supply of construction materials, equipment or workers in connection with a construction contract. The default due date for such payment has been set to be thirty calendar days from the receipt of the invoice.

4.5.5 *Process of statutory adjudication*

- Statutory adjudication can be commenced at any time whether during or after project completion.
- The process is confidential in nature.
- The parties have the option of choosing their own adjudicator or of requesting the Director of the KLRCA to choose an adjudicator on their behalf.
- The process of adjudication is simpler, cheaper and faster compared to arbitration and court proceedings.
- Only disputes relating to payment for work done and services rendered may be referred to adjudication under the CIPAA. However, the parties may agree after the appointment of the adjudicator to extend the jurisdiction of the adjudicator to decide on any other matter arising from the contract.
- Section 41 of the CIPAA states that the Act would not have any effect on any proceeding relating to a payment dispute under a construction contract which had been commenced in any court or arbitration before the coming into the force of the Act.
- The adjudicator is under an obligation to decide the dispute and deliver his decision within forty five (45) working days from the date of service of adjudication response from the respondent, or reply from the claimant to the adjudication response, whichever is later, or the period prescribed for the submission of adjudication response (if no adjudication response is received). However, this period can be extended by mutual agreement of the parties. If the adjudicator fails to comply with this time period, his decision will be regarded as void and he will not be entitled to any fees or expenses relating to the adjudication.⁵⁹
- The decision of the adjudicator is temporarily but immediately binding pending the final resolution of the subject disputes by arbitration, litigation or agreement between the parties. In the interim, the losing party is required to comply with the adjudicator's decision and pay the adjudicated amount unless the decision has been stayed or set aside by the High Court.
- However, if there is no challenge to the decision given by the adjudicator, then it will achieve finality.

- An adjudication decision can only be set aside on limited grounds⁶⁰, namely:

- o where the adjudication decision was improperly procured through fraud or bribery; or
- o there has been a denial of natural justice; or
- o the adjudicator has not acted independently or impartially; or
- o the adjudicator has acted in excess of jurisdiction.

• **Role of the Kuala Lumpur Regional Centre for Arbitration**

- The KLRCA has an extensive role to play in the administration of the CIPAA. The KLRCA is the statutory authority to administer all adjudication cases according to the KLRCA Adjudication Rules & Procedure. The KLRCA has additional responsibility to certify qualified adjudicators and listing them on the panel of adjudicators, to set the competency standards and provide training to those who wish to become adjudicators, among other things.

4.5.6 *Implications on Contract Drafting*

Although it is not expressly provided in CIPAA, it is submitted that no party is allowed to contract out of CIPAA. Notwithstanding this, there will be parties who wish to limit (or obviate) the impact of the harshness of the summary adjudication process under CIPAA through some creative contract drafting. The following are some of the possible actions which may be seen:

- (a) The provision of a detailed, clear and structured payment clause in a construction contract, with a view to prolong the payment process. This may include a step by step procedure which the contractor will be required to comply with before payment will be released by the employer;
- (b) Partly written and partly oral construction contract. Under section 2 of CIPAA, it expressly provides that the Act will only apply to a construction contract made in writing. Case laws from the UK suggest that this would require the entire construction contract must be made in writing. Given the circumstances, the parties who wish to avoid the application of CIPAA may deliberately enter into a construction contract, which is partly in writing and the rest orally.

Conclusion

Construction contracts in Malaysia are as varied in their form, nature, type and content as the projects or works they circumscribe within their ambit. From a mere handshake agreement to a multi-party, multi-volume express document, they span the complete spectrum of contracts that are hitherto known to the industry. Whatever the purpose behind their conception, the importance of standard forms of construction contracts especially in Malaysia has evolved over the years as the construction industry has matured from ad-hoc arrangements into formal/legalistic relationships evidenced by express pronouncements of the parties' dealings, rights, obligations and liabilities.

Whilst authoritative bodies within the Malaysian industry play an important role in formulating and publishing standard forms that cater to the ever more specific needs of the parties to a contract, the proper selection of these forms ultimately depend on the choice for the parties to make based on the type of construction contract concerned, the particular circumstances of the case, as well as the



relative bargaining powers of the parties, although in most cases it is dictated by the principal.

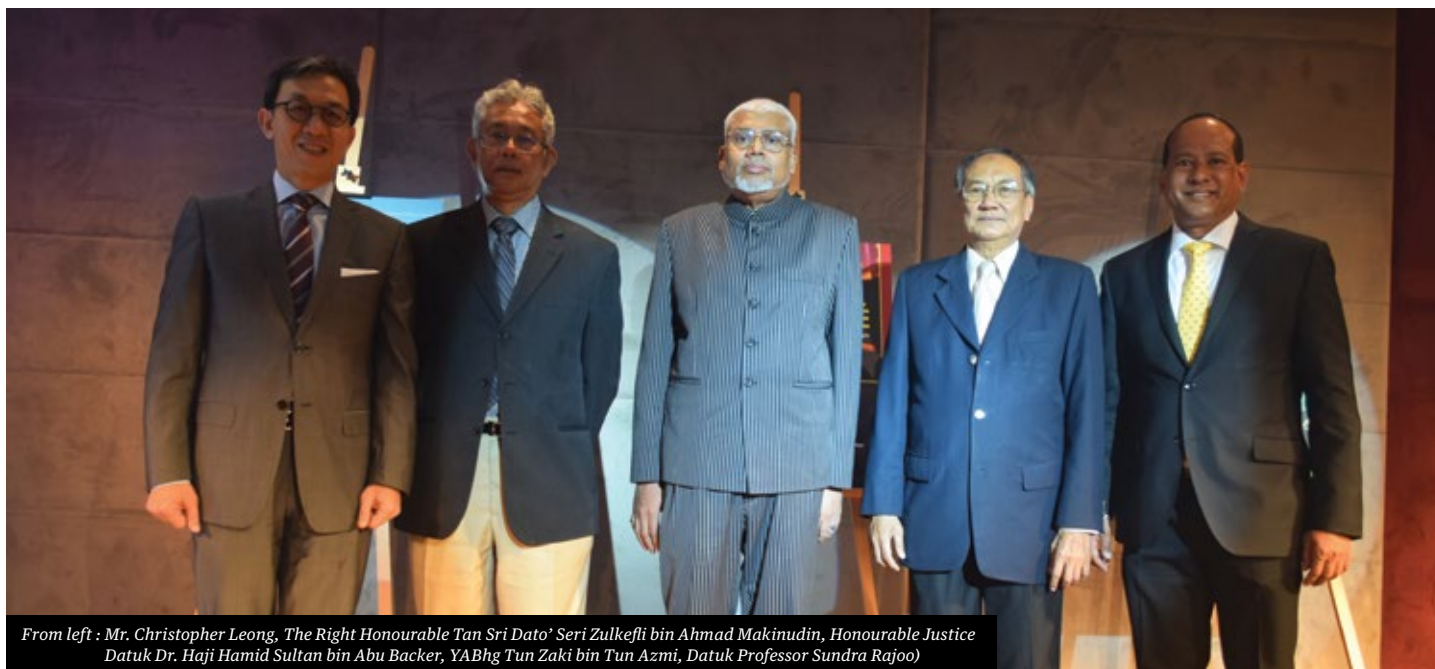
As such, parties to a construction contract are also reminded of the potential problems of modifying conventional or standard forms of construction contracts to cater to their specific needs. The growing practice of adoption of these “bespoke” or “ad-hoc” or even “custom-made” forms of conditions of contract has its pitfalls. Unless such amendments are undertaken by competent professionals, experience

has shown that they have led to serious claims and disputes, thereby “watering down” the purpose and effectiveness of the said standard forms.

With the enactment of the CIPAA legislation relating to security of payment, a change in contract management practices is anticipated to accommodate the adjudication regime as prescribed within the said Act.

Endnotes

1. See Barbara Colledge - *Construction Contracts: Towards A New Relationship* at p 232.
2. *Ir Harbans Singh KS, Harbans' Engineering and Construction Contracts Management - Law and Principles* (2nd Edn) 2011, LexisNexis.
3. Now called Jabatan Kerja Raya (JKR).
4. See note 3 above.
5. Royal Institute of British Architects
6. See Robinson and Lavers - *Construction Law in Singapore and Malaysia* (2nd Edn.) at p 18.
7. CIDB was established under the Construction Industry Development Board Act (Act 520) with the main objective of developing the capacity and capability of the construction industry in Malaysia through the enhancement of quality and productivity by placing great emphasis on professionalism, innovation and knowledge.
8. Called the 'Form CIDB.B (NSC)/2002' published in February 2002 and for use in conjunction with the CIDB Standard Form of Contract for Building Works: 2000 Edn.'
9. A Form for Design & Build Contracts was speculated to be ready for publication by late 2011 (to date, there has been no further movement on its publication) whilst a Standard Form for domestic Sub-Contractors entitled, 'Model Terms of Construction Sub Contract Work (Rev 2007)' has been published.
10. Joint Contracts Tribunal.
11. See Robinson and Lavers - *Construction Law in Singapore and Malaysia* (2nd Edn) pp 18 & 19.
12. For a detailed review on the making of the PAM 1998 Form, see Sundra Rajoo - *The Malaysian Standard Form of Building Contract* (2nd Edn) pp 1-7
13. By Sundra Rajoo at pp 7-18
14. For a better insight behind this process, see the chapter 'The Making of the PAM 2006 Form' from *The PAM 2006 Standard Form of Building Contract* by Sundra Rajoo, WSW Davidson, *Ir Harbans Singh KS*, at pp 15 to 22; and PI Tan, KS Low, PM Sum Jerry & ST Chee in 'Handbook for PAM Contract' (1st Edn), Pertubuhan Arkitek Malaysia at pp XV - XVII.
15. *Ir Harbans Singh KS, Harbans' Engineering and Construction Contracts Management - Law and Principles* (2nd Edn) 2011, LexisNexis.
16. *Ir Harbans Singh KS, Harbans' Engineering and Construction Contracts Management - Law and Principles* (2nd Edn) 2011, LexisNexis.
17. *Ir Harbans Singh KS, Harbans' Engineering and Construction Contracts Management - Law and Principles* (2nd Edn) 2011, LexisNexis.
18. *Ir Harbans Singh KS, Harbans' Engineering and Construction Contracts Management - Law and Principles* (2nd Edn) 2011, LexisNexis.
19. Federation Internationale des Ingenieurs - Conseils; in Malaysia the local representative is the Associate of Consulting Engineers (ACEM) from which the Forms can be procured.
20. Robert Knutson and Wilfred Abraham, *FIDIC: An Analysis of International Construction Contracts*, 2005 International Bar Association, Kluwer Law International.
21. Robert Knutson and Wilfred Abraham, *FIDIC: An Analysis of International Construction Contracts*, 2005 International Bar Association, Kluwer Law International.
22. A contract may properly be referred to as 'international' where performance is provided to take place in a third country or where the parties' normal place of business or residence is so located.
23. *Ibid*.
24. [1986] 2 CLJ 218, applying the English Court of Appeal decision of *Evans Marshall & Co. Ltd. v Bertola SA* [1973] 1
25. [1995] 1 MLJ 322. Further see *American Express Bank Ltd. v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160
26. Robert Knutson and Wilfred Abraham, *FIDIC: An Analysis of International Construction Contracts*, 2005 International Bar Association, Kluwer Law International.
27. The Red Book at p.117 (4th Edition) states: "It is difficult, if not impossible, to define in general terms the word 'Design' because each civil engineering project is a unique artefact and the design parameters and boundaries are therefore different."
28. See note 24 above.
29. Robert Knutson and Wilfred Abraham, *FIDIC: An Analysis of International Construction Contracts*, 2005 International Bar Association, Kluwer Law International.
30. 4 B.L.R. 103.
31. See note 27 above.
32. See note 27 above.
33. Robert Knutson and Wilfred Abraham, *FIDIC: An Analysis of International Construction Contracts*, 2005 International Bar Association, Kluwer Law International.
34. *Ibid*.
35. There are sometimes constraints placed on the powers of engineers by internal regulations within the Government Departments concerned, if it is a public works contract.
36. See note 31 above.
37. See Murdoch & Hughes - *Construction Contracts Law and Management* (2nd Edn.) p 110.
38. *Ir Harbans Singh KS, Harbans' Engineering and Construction Contracts Management - Law and Principles* (2nd Edn) 2011, LexisNexis.
39. See S. Lupton, S. Cox & H. Clamp - *Which Contract: Choosing the appropriate form of building contract* (3rd Edn.) RIBA Enterprises pp. 49-54.
40. *Ir Harbans Singh KS, Harbans' Engineering and Construction Contracts Management - Law and Principles* (2nd Edn) 2011, LexisNexis.
41. *Ibid*.
42. See *TNB Standard General Conditions of Contract for use in connection with Export Contracts (including Delivery and Erection of Site of Electrical and Mechanical Plant)* Edn. B (May 1976)
43. See note 38 above.
44. See Cottingham and Akenhead - *Site Investigation and the Law*.
45. Association of Consulting Architects, UK.
46. Government Contracts, UK.
47. Singapore Institute of Architects.
48. Sundra Rajoo, *Ir Harbans Singh KS - Construction Law in Malaysia*, 2012, Sweet & Maxwell Asia.
49. *Sri Palmar Development & Construction Sdn Bhd v Jurukur Perunding Services Sdn Bhd* [2010] 6 MLJ 166; see also *Mott Macdonald (M) Sdn Bhd v Hock Der Realty Sdn Bhd* [1996] MLJU 342
50. Robert Knutson and Wilfred Abraham, *FIDIC: An Analysis of International Construction Contracts*, 2005 International Bar Association, Kluwer Law International.
51. (1854) 9 Exch 341; [1843-60] All ER Rep. 461.
52. (2009) 25 Const. L.J. No.2, pages 103 - 116.
53. See Section 4 of the Act.
54. See Section 28 of the Act.
55. See Section 29 of the Act.
56. See Section 30 of the Act.
57. Construction Industry Payment & Adjudication (Exemption) Order 2014.
58. See Section 35 of the Act.
59. See Section 12 of the Act.
60. See Section 15 of the Act.



From left : Mr. Christopher Leong, The Right Honourable Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin, Honourable Justice Datuk Dr. Haji Hamid Sultan bin Abu Backer, YABhg Tun Zaki bin Tun Azmi, Datuk Professor Sundra Rajoo)

Three Books Authored By Esteemed Judge, Launched Simultaneously

18th October 2014

Kuala Lumpur Regional Centre for Arbitration (KLRCA) together with Lincoln's Inn Alumni Association Malaysia and Bar Council Malaysia recently organised a book launch authored by the Honourable Justice Datuk Dr. Haji Hamid Sultan bin Abu Backer from the Court of Appeal Malaysia. This unprecedented launch saw three of the judge's books titled, 'Janab's Key to Criminal Procedure 3rd Edition', 'Janab's Key to Law of Evidence 4th Edition' and 'Janab's Key to Islamic Banking with Medjelle (Ottoman Code)', unveiled simultaneously. The event was well received with the presence of The Right Honourable Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin, the Chief Judge of Malaya along with a bench of judges from the Malaysian judiciary. Also in attendance were a host of legal practitioners.

The books were launched by YABhg Tun Zaki bin Tun Azmi who is the President of the Honourable Society of Lincoln's Inn Alumni, Malaysia and former Chief Justice of Malaysia; Mr Christopher Leong, President of the Malaysian bar; and Datuk Professor Sundra Rajoo, Director of the Kuala Lumpur Regional Centre for Arbitration (KLRCA). "KLRCA has always been a keen advocate towards the development of the nation's legal scene. Being an Alternative Dispute Resolution Centre, we make it our mission to source for industry related seminars, conferences and reading materials that have the capacity to enhance our existing knowledge and comprehension on this subject matter," said Datuk Professor Sundra Rajoo, in his opening address. Hon. Justice Datuk Dr. Haji Hamid Sultan has also authored numerous books prior to these releases. Amongst them being Janab's Key to Civil Procedure in Malaysia and Singapore, the 5th edition of which was published in 2012.

The book launch was then followed by a seminar titled "Is Knowledge in Adjectival Law the Key to Successful Trial and Appellate Advocacy?". The distinguished panelists included



Hon. Justice Dato' Mohamad Ariff bin Mohd. Yusof, Hon. Justice Dato' Mah Weng Kwai, Hon. Justice Dato' Umi Kalthum binti Abdul Majid, Hon. Justice Tuan Vernon Ong Lam Kiat and Hon. Justice Dr. Prasad Sandosham Abraham. The session was moderated by Hon. Justice Dato' Nallini Patmanathan.

The morning's proceedings were concluded by a winding-up speech on Procedural Law by YBhg Datuk Seri Gopal Sri Ram, Vice President of the Honourable Society of Lincoln's Inn Alumni Association, Malaysia.

Signing Ceremony: Collaboration Agreement between the Kuala Lumpur Regional Centre for Arbitration (KLRCA) & Thailand Arbitration Centre (THAC)



The 4th of November 2014 proved to be a significant day in KLRCA's calendar. Apart from having the privilege of witnessing the Prime Minister of Malaysia officially launch the Centre's newest premises, Bangunan Sulaiman; the Centre also had the honour of signing a collaboration agreement with the region's latest alternative dispute resolution centre, the Thailand Arbitration Centre (THAC).

Staying true to the promises made by KLRCA's Director, Datuk Professor Sundra Rajoo, in his speech delivered earlier in the day - to continue synergizing with other regional institutions to collectively elevate the standards of Asia's alternative dispute resolution standing, a signing ceremony was held to formally commemorate the memorandum of understanding between the two Asian arbitration counterparts.

The collaborative venture will see the KLRCA and THAC jointly organising seminars, conferences, educational training and internship programmes on arbitration from time to time - with the main goal of enhancing each party's contribution to their respective nations and continent.

A large crowd comprising of honourable ambassadors, senior arbitrators and eminent members of the KLRCA's Advisory Board bore witness to the ceremony as KLRCA's Director Datuk Professor Sundra Rajoo and THAC's Managing Director Mr Pasit Aswawattananorn took centre stage to officially sign the collaborative agreement documents.

Representatives of both centres then exchanged gifts to signify the mutually beneficial agreement and as a show of goodwill.

KLRCATalk Series

KLRCATalk Series continued into the fourth quarter of 2014 with more insightful and engaging talks by ADR experts. Below are talks that were held from October - December 2014.

1. Topic: Enforcement Of Arbitral Awards In The Region

30th October 2014

Speaker: Mr David Bateson (King & Wood Mallesons)
Moderator: Mr Nahendran Navaratnam (Navaratnam Chambers)

KLRCATalk Series returned in the month of October, bringing with it a rousing session titled, 'Enforcement of Arbitral Awards In The Regions'. The talk was presented by David Bateson who has been labelled by numerous legal publications - as "one of Hong Kong's most experienced arbitration experts" and "one of the top arbitrators in the region".

Moderating this session was Nahendran Navaratnam. The speaker, Bateson started the session by touching on the importance of the successful New York Convention 1958 that allows cross border enforceability of arbitration awards. He further pointed out how international enforcement and limited court intervention have attributed towards the rise of arbitration. The audience were then reminded that despite of the positive impact of the New York Convention 1958 on the arbitration landscape, across the Asia Pacific region there has been mixed records on the enforcement. Bateson proceeded to examine on the region's history on enforcement and its many challenges and adversities faced.

Countries put under the spotlight were; Hong Kong, Singapore, Brunei, Philippines, India, Australia, New Zealand and Malaysia. The talk edged towards its finale as Nahendran took over to moderate the Question and Answer session that went on for close to forty minutes as a series of engaging questions were thrown to the speaker from the floor. The evening's proceedings concluded with a teatime networking session at the centre's outdoor cafeteria.



2. Topic: Arbitrability: The Limits of Arbitration

27th November 2014

Speaker: Mr Chan Leng Sun, SC (Baker & McKenzie, Wong & Leow)
Moderator: Mr Lam Wai Loon (Skrine)

KLRCATalk Series returned in the month of November after a series of jointly organised seminars with international arbitral bodies the previous weeks. The Centre's auditorium once again provided the backdrop for an intriguing weekday evening talk session as Chan Leng Sun, Senior Counsel took stage to present on, 'Arbitrability: The Limits of Arbitration'. Leng Sun who is Baker & McKenzie's Asia Pacific Head of International Arbitration brought to the session his years of experience in maritime-related work and broad commercial practice that covers international trade, insurance and company law.

Moderating the talk was Lam Wai Loon, a familiar face within the KLRCATalk circle who is known for his extensive role in the Centre's adjudication training courses. With the auditorium filled - Leng Sun, Senior Counsel began proceedings for the evening by stating that the foundation of arbitration lies in the agreement of parties to arbitrate and that party autonomy is often invoked as a guiding principle. He further added, "There are instances where a dispute just cannot be decided by a private tribunal, whatever the parties say; as it is accepted that the validity of an arbitration agreement, and the enforceability of an arbitral award, are subject to the concept of arbitrability."

Leng Sun provided examples of cases from countries within the region - elaborating to the audience that arbitrability is an evolving concept, the contents of which vary from jurisdiction to jurisdiction that even changes over time. The attendees were also given a look into the constraints of arbitrating difficult subject matters, as Leng Sun touched on issues surrounding insolvencies, oppression of minority shareholders and trust disputes.

A question and answer session soon followed at the hour mark, with Wai Loon stepping in to address the audience before posing the first question to Leng Sun. This kick started an engaging and interactive thirty-minute session with questions coming in from all corners of the auditorium. Special interest was reserved towards a number of recently concluded cases and comparisons between the Singaporean and Malaysian arbitration frameworks.

Upon the speaker's closing remarks, the evening talk soon drew to a close as both participants and presenters adjourned to the Centre's new outdoor cafeteria to network and further exchange views on the limits of arbitration.



3. Topic: Soft Law In International Arbitration - A Tool To Fight Or To Foster Guerilla Tactics

11th December 2014

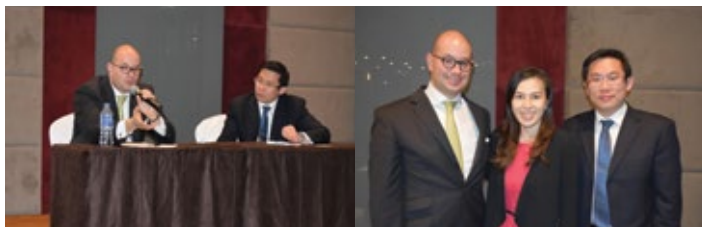
Speaker: Professor Dr Rouven F. Bodenheimer
(Lungerich, Lenz & Schuhmacher)
Moderator: Mr Lam Ko Luen (Shook Lin & Bok)

As the year end festivities continue to take shape, KLRCA greeted the month of December by organising yet another insightful Talk Series session titled, 'Soft Law In International Arbitration - A Tool To Fight Or To Foster Guerrilla Tactics.' Taking stage to present the topic was Professor Dr. Rouven Bodenheimer; with Lam Ko Luen, the current President of the Malaysia Institute of Arbitrators (MIArb) moderating the two hour evening slot.

Professor Rouven, a German who was recently named in 'Who's Who Legal: Arbitration 2015 Guide' as one of the world's leading arbitrators, began proceedings by inviting the audience to express their views openly as the topic was meant to be slightly on the thought provocative side. He then went on to share the definition of 'Soft Law' - a term that refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat "weaker" than the binding force of traditional law, often contrasted with soft law by being referred to as "hard law". The attendees were then taken through a list of the alleged purposes of soft law that included; establishing a common playing field, familiarization with foreign tools, ensuring that basic issues for each stage are remembered, establishing ethical standards, prevention of obstructive behaviour and increasing efficiency. Professor Rouven expounded on each point briefly before going on to list 'Marketing tool for Institutions', 'Visibility for practitioners', and 'Marketing tool for law firms' as further purposes of soft law. At this point, a few heads were already turned seeking out in anticipation for the connecting slides on guerrilla arbitration; in which Professor Rouven duly obliged by projecting an exhaustive list of guerrilla tactics on the screen. He said, "Soft law aims only partly at fighting guerrilla tactics." Elaborating further on this statement, Professor Rouven provided examples that included 'bribery', 'delay tactics', 'frivolous challenges', and 'guerrilla tactics on evidence and within the Arbitral Tribunal'.

The attendees were challenged to look beyond the conventional guidelines of multiple arbitral institutions, and as to how certain 'loopholes' incline towards fostering guerrilla tactics. The thought stimulating presentation was concluded with Professor Rouven stating; 'soft law as a great help in technical matters' and 'soft law as the enemy of common sense and the greatness of being different.' He then proceeded to pose 'the hen and the egg problem' linking it to the talk's topic - a conundrum that set the scene for an intriguing question and answer session.

Lam Ko Luen stepped in to moderate the remaining half and hour of the evening's proceedings. There was a fair and balanced share of feedback from the audience covering both aspects of the argument. The evening talk soon drew to a close as both participants and presenters adjourned to the Centre's outdoor cafeteria to network and further exchange perspectives on the topic.



4. Topic: Faith Arbitration - The UK Experience

18th December 2014

Speaker: Professor Mark Hill QC (Francis Taylor Building)
Moderator: Mr Andrew Khoo Chin Hock (Messrs Andrew Khoo & Daniel Lo)

With 2014 approaching its final weeks and businesses swapping their hectic operation cycles for a more pedestrian paced schedule in light of the year-end holidays, KLRCA held its final Talk Series session for the year. Taking stage to present the topic, 'Faith Arbitration: The UK Experience' was famed ecclesiastical law and religious liberty specialist - Professor Mark Hill QC.

Moderating the session was Andrew Khoo; the recipient of SUHAKAM's 2013 Human Rights Award. Participants from numerous religious groups and academic scholars comprising of Imams, Priests, Pastors and university professors turned up for the two hour-long session. Professor Hill began proceedings for the evening by sharing with the attendees compelling points from a well-publicised lecture given by Dr Rowan Williams, Archbishop of Canterbury back in 2008 on the status of religious courts and tribunals in the United Kingdom; and

The talk focused on the legitimate uses that can be made of the Sharia Courts, the Beth Din and the Tribunals of Catholic and Protestant Churches. Professor Hill also touched on the complementary jurisdictions that allow for the resolution of matrimonial and property disputes through the agency of religious custom and tradition. He then posed a question to the floor, "Can secular courts safely delegate decision making to faith-based processes of arbitration?"

This sparked an absorbing question and answer session with references taken from the Cardiff University's Research Study Report on Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts (2011) and numerous related judgements in the UK Supreme Court; to fortify the attendees' understanding on the matter discussed. The session soon concluded with evening tea being served at the outdoor cafeteria, providing both speakers and participants with an opportunity to network further.



DOMAIN NAME - UNIFORM RAPID SUSPENSION (URS) SYSTEM

By D.Saravanan (KLRC Panelist from Madras)

New generic Top-Level Domains (gTLDs):

In June 2011, the Internet Corporation for Assigned Names and Numbers (ICANN), the organisation responsible for the management of the domain name system, announced that the registrants are now allowed to expand the internet beyond the traditional top-level domains (TLDs), and could submit their own invented suffixes for registration of 2nd level domains called new generic top-level domains (gTLDs). Until then, ICANN only allowed for registration of TLDs such as .com, .net, .org. This expansion encompasses, for example, .club, .catering, .tech, .fashion, .youtube, .samsung, .ikea, .hyundai, .hotel, .music, .food, .catering, .paris, .nyc, .seoul, .basque, etc. The new gTLDs are not concerned with current gTLDs like .com, .net and so forth or with country code TLDs (ccTLDs) such as .my, .in etc. New gTLDs pave the way for trademark owners to acquire new top-level domains that incorporate their trademarks. For example, Apple could acquire the .apple domain.

The trademark owners are bound to take steps in law to prevent cybersquatting of their trademarks in second-level domain names across all of the new gTLDs. For instance, some internet user, without authorization from Apple and in bad faith, might try to register apple.mobile in the new .mobile gTLD. So far, 83 new gTLDs have been approved. Hence, disputes have arisen and will continue to arise abundantly. In such cases, in spite of the existence of several mechanisms to address cybersquatting, such as the Uniform Domain Name Dispute Resolution Policy (UDRP), the new gTLD program has provided room for cybersquatting which increases the need for additional rights protection.

Uniform Rapid Suspension System (URS): URS is one of the new rights protection mechanisms which have been designed to give trademark owners a cheaper and faster alternative to the UDRP for combating cybersquatting and other forms of trademark infringement by domain name registrants across all of the new gTLDs. The URS mechanism is incorporated into all registry agreements executed by the

operators of the new gTLDs, and it may be adopted voluntarily by incumbent gTLD operators (such as .com, .org, and .net). The trademark owners can use the URS as an additional weapon against cybersquatting and other abuses of their trademarks in the domain name space.

UDRP and URS:

UDRP, an administrative proceeding, is used to cancel or recover infringing domains permanently from cybersquatters. Under the UDRP, a decision would be rendered within a maximum of 60 days from the date of nomination of the Panelist/ Arbitrator. In comparison, the URS, also an administrative proceeding, is designed to clear cases of trademark infringement where there are no disputed questions of material fact. In the URS System, the Arbitrator is called an Examiner. The Examiner has a duration of 3 days to render his decision. URS proceedings provide no opportunity for complainants to either cancel or obtain a transfer of the domain. As stated above, those remedies exist solely in UDRP proceedings or court proceedings. Therefore, the URS is not the appropriate mechanism for trademark owners seeking to recover infringing domains. However, a URS determination does not preclude any party from seeking additional remedies by bringing a UDRP action or an action in a court of competent jurisdiction. Further, a URS determination for or against a party does not prejudice the party in any such further proceeding.

URS System Providers:

Only two URS providers have been approved by ICANN to date. They are the National Arbitration Forum (NAF), USA and the Asian Domain Name Dispute Resolution Centre (ADNDRC). The Kuala Lumpur Regional Centre for Arbitration is one of the four offices of the ADNDRC providing URS services, the others being located in Beijing, Hong Kong and Seoul.

Governing Rules:

The URS system is governed by the Uniform Rapid Suspension System Rules and Procedures. The important requirements for a URS complaint are substantially similar to those in a UDRP proceeding. To

state a claim for relief, a URS complainant must show that:

- (1) The registered domain name is identical or confusingly similar to a word mark:
 - (a) for which the complainant holds a valid national or regional registration that is in current use; or
 - (b) that has been validated through a court proceeding; or
 - (c) that is specifically protected by a statute or treaty in effect at the time the URS complaint is filed;
- (2) The registrant has no legitimate right or interest to the domain name; and
- (3) The domain was registered and is being used in bad faith.

Procedures Electronically:

Trademark owners may initiate a URS proceeding by electronically filing a complaint with a URS provider and the Respondent may submit their response electronically. Correspondingly, the decision is also rendered electronically.

Fee:

The fees associated with a URS proceeding are generally much lower than UDRP fees. The Supplemental Rules for URS define the costs associated with pursuing a URS claim, which vary depending on the number of domain names at issue.

Review by URS provider:

Within two business days of filing, the URS provider conducts administrative review of the URS complaint to ensure that it complies with the filing requirements. Non-compliance results in the complaint's dismissal without prejudice and forfeiture of the filing fee. If the complaint complies with the URS filing requirements, the URS provider notifies the relevant registry operator, who locks the domain within 24 hours. When a domain is locked, it continues to resolve to a website but the registry restricts any changes to registration data, including changes to the domain name(s). Within 24 hours of locking the domain, the URS provider must notify the registrant of the complaint. The registrant of the domain then has 14 days to file a response. If the registrant fails to respond within 14 days, the registrant is deemed in

default, and the complaint proceeds to the Examiner for review on the merits.

Examination by URS Examiner:

The high standard of proof is the fundamental characteristic of the URS proceedings. The Examiner must determine, by clear and convincing evidence, that there is no genuine issue of material fact for the claimant to prevail, like a motion for summary judgment, streamlining and expediting the resolution of clear cases of infringement. There is no discovery or hearing; the evidence consists only of the materials submitted with the complaint and the response (if any), and those materials will serve as the entire record forming the basis of the Examiner's decision. If the complainant prevails in a case of default, the registrant may still file a response within six months of the decision. Such responses are not considered appeals; rather, the case is examined de novo, as if the registrant had filed a timely response.

Relief(s):

Decisions are to be made within 3 - 5 days of the response. If a complainant is successful in a URS proceeding, the registrant's domain will be suspended for the balance of the registration period. While suspended, the domain will not resolve to the registrant's website but will provide information on the URS. Successful complainants may also extend the registration period, and with it, the suspension period for an additional year at the commercial registration price.

Appeal:

Either party may appeal against an adverse determination within 14 days. The appeal is simply a de novo review of the case by either a single Examiner or by a panel of three. The appellant is permitted to introduce new material into the record for an additional fee but such material must clearly predate the complaint's filing date in order to be admitted. According to the Forum's Supplemental Rules, which include the fee schedule for appeals proceedings, the appellant bears the cost of the appeal. The domain(s) at issue will remain locked during the appeal if the complainant prevailed in the original determination. Where the URS proceeding is conducted by the URS Provider, parties also have the option of instituting a UDRP proceeding. In such cases, the URS Provider, which also administers UDRP proceedings, will credit half of the filing fee from the URS proceeding to the filing fee for the UDRP case, provided the parties and domains at issue remain the same and the UDRP is filed within 30 days of the URS outcome.

Facebook Inc., a first URS Determination/ Decision:

On August 21, 2013, Facebook Inc. filed the first URS complaint against the registrant of the domain name facebook.pw. The entire process was completed in less than 5 weeks from initiation to resolution. This decision demonstrates how efficient and effective the URS can truly be in dealing with obvious cases of cybersquatting, including typo squatting.

A case of Radisson Hotels International Inc., The author, one of the Panelist Examiners for both the NAF and the ADNDRC, has determined various new gTLD disputes, including, but not limited to, <radisson.club> and <radissonblu.club> under the NAF, in which it was found inter alia that the Complainant, Radisson Hotels International Inc., USA, is the registered trademark owners of RADISSON and RADISSONBLU under the category of Hotel, Bar, and Restaurant Services. The Complainant are also the registered owners of the domain names <radisson.com> and <radissonblu.com>. The disputed domains <radisson.club> and <radissonblu.club> registered by the Respondent, Robert Wooroffe of London, comprises the Complainant's registered trademark and domain names. The disputed domains are identical and confusingly similar to the Complainant's trademarks. .club is a gTLD suffix which is non-distinctive and is incapable of differentiating the disputed domain names from the Complainant's registered trademarks and domain names. The Respondent's name does not correspond to the disputed domain names. The disputed domain names could be used to disrupt the business of the Complainant. Since the Respondent himself offered to sell the disputed domain names to the Complainant, the registration of the disputed domain names were in bad faith. Finding all three elements of the URS and satisfied by clear and convincing evidence, it was determined that the domain name be suspended for the duration of the registration.

URS System is rapid, effective and cheaper:

URS is an alternative to the UDRP in cases of clear-cut trademark infringement as it is a cheap and efficient tool for fighting trademark abuse in the new gTLDs.

Growth and importance of URS procedure: The URS will grow in importance and value to intellectual rights holders. Implementation of the URS by major incumbent TLDs such as .com, .net, and .org would also significantly increase its value

to rights holders. No doubt, the URS System will be a weapon in the arsenal of trademark owners to combat cybersquatting and other online infringements of intellectual property in a fast track and rapid mode.



D.Saravanan, Author, is an Advocate practising in the High Court, Madras and an international Arbitrator.
Email: arbitratorsaravanan@gmail.com

ECONOMIC SANCTIONS AGAINST THE RUSSIAN FEDERATION: CONSEQUENCES FOR THE INTERNATIONAL ARBITRATION COMMUNITY AND POSSIBLE NEW OPPORTUNITIES FOR THE EMERGING ARBITRATION MARKETS

By Andriy Stetsenko (International Intern, KLRCA)

1. Introduction and determination of issues to be discussed

Just a few decades ago diplomatic pressure and military actions were the most common tools used by governments as the means of punishment or influence on other states to coerce them to take or refrain from taking of certain actions. Although the military potential and the influence of diplomacy still play significant roles in international politics, today's globalized world creates new types of battlefields for the states and their governments. In particular, those are international trade and economic relationships between states. The depth of economic connections as well as the dependence of certain states on the import of different goods and services may lead to the situation in which economic restrictions would cause even greater damage than military actions. Nowadays such restrictions are usually defined as "economic sanctions". Although economic embargoes has been occasionally applied by various countries since the start of the 20th century and

even earlier, in the previous times application of such measures was usually connected with open warfare hostilities. In the modern times, however, economic sanctions may be caused by the greater variety of political and social factors.

In brief, economic sanctions can be described as various trade bans and barriers, restrictions on financial transactions and other economic penalties imposed by the country on one other country or a group of countries. As examples from the recent history, it is appropriate to mention the sanctions of international community against Libya, North Korea and Iran. The topic of the given article, however, concerns more recent and significant events, which is the imposition of economic sanctions against the Russian Federation by the USA, European Union as well as a number of other countries. In particular, the purpose of the paper is to analyze the consequences of such sanctions for the international commercial arbitration practice involving Russian companies as well as the overall impact on the international arbitration community.

Apart from that, it is interesting to discuss the possible new horizons opening in this connection for the arbitration markets in Asia in general and specifically in Malaysia.

2. Sanctions and possible resulting international arbitration disputes involving Russian parties

2.1. The causes, substance and consequences of the sanctions

The recent Russian's actions in Ukraine has caused USA, EU as well as a number of other countries to introduce economic sanctions against it. The first wave of such sanctions came with the annexation of the Crimea region from Ukraine in March 2014. Orchestration of the warfare by Russia in Eastern Ukraine during the June-September period of 2014 provoked the subsequent batches of economic sanctions. In particular, certain Russian politicians and businessmen became subjects to travel bans as well as assets freezing. The most substantial part of sanctions, however, concerns various

restrictions and bans regarding the cooperation in the financial, military, energy and some other sectors. For instance, the sanctions prohibit supply of arms and military equipment as well as the technologies for the deep-water oil and gas exploration. A number of Russian banks were restricted to access EU and US financial markets.

The described measures will obviously make a serious impact on the future trade and other economic, political and military cooperation between the Russian companies and institutions and those from the countries supporting the sanctions. Another implication, which is significant in the context of the given article, is the impact of the sanctions on the various commercial contracts concluded before the sanctions were introduced but performance of which subsequently became legally impossible or complicated when the sanctions entered into force. The latter basically means that some contracts entered with Russian parties for the supply of military equipment and other items falling with the scope of sanctions may be refused to be performed by the suppliers from EU, USA, Canada and other countries supporting the relevant measures against the Russian Federation. Probably the most well-known example of the latter situation that has already took place is the deal between Russia and France for the purchase of two Mistral class helicopter carriers. Although initially the French side was stating that it would perform the contract anyway, in September 2014, after the new escalation of the conflict in the Eastern Ukraine, France stated that it decided to suspend the performance of the contract. No particular solution has been found so far and thus it remains unclear how this situation will be resolved.

2.2. Commercial deals impacted by the sanctions and resulting dispute resolution

In view of the situation described above, there is quite high probability that non-performance of the Mistral deal as well as other contracts tainted by sanctions may result in claims raised by the Russian parties. It is not difficult to guess that a big part of such contracts contain arbitration clauses and thus the arising disputes will fall within the jurisdiction of the arbitral tribunals rather than state courts. The major part of such disputes is likely to concern claims by the Russian parties for the damages caused by non-performance of the contractual obligations or for the specific performance of such obligations

by parties constrained by the sanctions, which prohibit the performance.

The key issue that may arise in connection with initiation of the arbitration proceedings by the Russian parties is whether such disputes will be legally capable of being settled by arbitration in view of the imposed economic sanctions. In other words, the question to be analyzed is whether the fact that the underlying contract is tainted by sanctions influence arbitrability of disputes arising out of such contract. The reason for the concern is that the dispute may be declared non-arbitrable by the arbitral tribunal on the public policy grounds, i.e. that arbitrating disputes arising out of the transactions prohibited by sanctions is contrary to the applicable rules of public policy. As demonstrated below, the relevant precedents exist in international arbitration practice.

2.3. Similar examples from the past

In fact, today's situation with the sanctions against Russia is not a new one. Similar consequences were taking place in connection with sanctions against Iran, Libya and Iraq. Thus, it is appropriate to discuss how the resulted arbitration disputes were dealt with in that cases. For instance, invasion of Iraq in Kuwait was followed by introduction of international sanctions against Iraq. Soon thereafter the dispute between Italian company Fincantieri-Cantieri and Ministry of Defense of Iraq had arose. The underlying contract concerned the supply of corvettes by the Italian party and Italian courts stated that the dispute may not be resolved by arbitration. The court referred to the sanctions against Iraq and ruled that the legal resolution of such dispute would lead to the result forbidden by embargo legislation (e.g. restitution if the claim were to be accepted). In other cases, however, arbitrators accepted jurisdiction despite the sanctions in place and the relevant state courts confirmed such decisions. Such outcome took place in case *La Compagnie Nationale Air France v. Libyan Arab Airlines*, which arise after the UN Security Council imposed sanction on Libya following Lockerbie bombing organized by Libyan individuals. The underlying contract concerned supply of the aircraft components by the French party (Air France), which subsequently refused to perform it due to the measures against Libya prohibiting supply of the aircraft components. The Libyan party initiated arbitration proceedings and the ad hoc UNCITRAL arbitral tribunal, with its seat in Montreal, ruled that the dispute is arbitrable despite the sanctions in place.

Canadian courts subsequently upheld the tribunal's award. Another interesting precedent is the case of *Ministry of Defense of Iran v Cubic Defense Systems*. It is similar to the situation with the Russian sanctions and the above-mentioned Mistral case in the sense that the sanctions against Iran were imposed by a number of individual states rather than by the UN Security Council. The ICC tribunal sitting in Switzerland declared the dispute arbitrable and rendered the award in favor of the Iranian company. On the enforcement stage the US courts rejected the respondent's arguments and confirmed the award.

2.4. Meaning of the previous arbitration practice and the sanctions against Russia

The above overview of the arbitration practice suggests that no consistent approach has been established so far as regards to the resolutions of the disputes arising out of commercial contracts falling under the regime of economic sanctions. Arbitral tribunal's decision regarding arbitrability of the dispute depends on the circumstances of each particular case as well as the law of the arbitration seat. The same applies to the state courts of the arbitration seat in control of the arbitration proceedings. The particular sanctions regime also plays a significant role. If the sanctions are imposed by the UN (like in Iraq and Libya cases), it is more likely than the party may encounter problems when submitting the relevant contractual dispute to arbitration. However, in case the sanctions were introduced by certain individual states only, the problem may arise only if the arbitration is held in one of such states. This was the mentioned situation with the US sanctions against Iran following the Iranian revolution.

As to the current measures against Russia, the sanctions were imposed by the US, EU and a number of other individual states rather than the UN, which did not make any decisions in this respect. Therefore, in certain respects the Russian situation resembles those with Iran and thus it may be suggested that risks for Russia exist only if the arbitration is held in one of the states supporting the sanctions. The arising problem, however, is that the majority of leading arbitration institutions and legal seats, including those traditionally used by Russia, are located in the states that approved the sanctions. The possible implications and solutions regarding this situation are discussed in the next section of the article.

3. Looking into the future. Impact on the international arbitration practice and new perspectives for Malaysia and other emerging arbitration venues

Terms of the majority of contracts entered by the Russian parties regarding the supply of armament, certain types of equipment and technologies as well other items prohibited by sanctions are not available in the public domain. It means that it is not known what kind of dispute resolution clauses are contained in those contracts. However, the assumption can be made that many of them indicate SCC (traditional choice for the Russian parties), ICC, LCIA as well as Swiss Chamber's Arbitration Institution. All those institutions are located in the states that introduced sanctions against Russia. The same applies to the choice of arbitration seat. Commonly the arbitration is held in the state neutral to both parties and which has arbitration-friendly legal environment. In practice, this often happens to be the state where the arbitration institution is located, i.e. Sweden (SCC), England (LCIA), etc.

The above means that in case the performance of relevant contracts is refused due to sanctions and the Russian parties decide to resort to arbitration, there is a quite high probability that the arbitration will be held in the jurisdiction that is a part to the sanctions regime. It is a well-known fact that the choice of the arbitration seat is usually made at the stage the parties sign the principal contract including the arbitration clause. Thus, unless the parties subsequently agree to modify the clause and agree for an alternative seat (that is highly unlikely), there are no other options for the Russian parties rather than follow the prescribed contractual dispute resolution mechanism and thus encounter all the associated problems.

The described situation is likely to have an impact on the worldwide arbitration practice. Although not much can be done regarding the contractual arrangements made by the Russian parties in the past, the future arrangements will probably be influenced by the hostile attitude in the leading arbitration jurisdictions in the EU countries. This means that the Russian companies may start to search for the alternative arbitration venues located in the states, which do not support the sanctions against the Russian Federation. In case such scenario develops, the negative consequences for the EU arbitration market is inevitable. For instance, disputes involving Russian

parties traditionally form a substantial part of the SCC yearly caseload. Of course, not all the international commercial deals entered by the Russian companies fall within the sanctions regime. However, considering the traditional types of Russian export and import, the overall amount of such deals is significant.

It is also interesting to note one particular recent development in connection with the discussed topic. JSC Rosneft, one of the largest Russian companies and the number one public company in the world in terms of oil production, has apparently came up with the proposal to introduce certain changes into the Russian arbitration legislation. According to those changes, Russian companies entering international commercial contracts shall be explicitly prohibited to opt for the arbitration in the states, which introduced sanctions against Russia. Only litigation and arbitration in Russia or arbitration in the states that did not introduce sanctions should remain the available methods of dispute resolution for the international commercial transactions involving Russian companies. Although at the moment this is just an initiative of one particular company, it should be noted that this company is controlled by the Russian government. Thus, it can be assumed that the initiative indirectly represents the position of the government as well. In case such changes are indeed introduced into the Russian legislation, this will signify a big shift in the worldwide market of international arbitration. The traditional leading arbitration hubs will be deprived of not only the disputes arising out of the deals affected by sanctions, but all kind of cases where the Russian company is a party. On the other hand, the new emerging arbitration markets may face an increased caseload.

Although the majority of reputable arbitration institutions and seats are indeed located in the EU and other countries supporting the sanctions, a number of good alternatives can be identified. Among such alternatives, the Asia region is probably the first that comes to mind. Singapore, Hong Kong and Malaysia have already become recognized venues for their high quality of arbitration services. In addition to the progressive legislation and arbitration-friendly court systems, SIAC, HKIAC and KLRCA are modern institutions able to handle efficiently all kinds of commercial disputes. In certain aspects arbitration in Asia may be even more preferable than in the Western countries.

For instance, the costs charged by the mentioned institutions are often lower than those the parties would need to bear when arbitrating with ICC or LCIA. Various associated expenses (e.g. rent of the premises for hearings, etc.) are also usually considerably lower.

As to Malaysia in particular, the arbitration market has made significant big steps forward in recent years. Apart from positive transformations in judiciary and enactment of the modern arbitration act, KLRCA has become one of the leaders of the industry in the region. Advanced arbitration rules, availability of well-trained secretariat, reasonable costs as well as excellent facilities make the institution an attractive alternative on the regional level as well as in the worldwide perspective. In addition to that, Malaysia is a fairly neutral country and does not support any sanction regimes against other countries. Therefore, arbitrating in Malaysia should be a good option for the Russian companies and generally for all those who cannot or who are not willing to use arbitration services in the EU and other Western countries.

Arbitration Case Law:

DEVELOPMENTS IN MALAYSIA & THE INTERNATIONAL FRONT

By: Eden Taddese Gila (International Intern, KLRCA)
& Laura Jimenez Jaimez (Senior International Case Counsel, KLRCA)

Alapli Elektrik B.V. V. Republic Of Turkey

Court:
ICSID Ad Hoc Committee

Case Citation:
(ICSID CASE NO: ARB/08/13)

Date of judgment:
10th July 2014

Facts

The dispute concerned a concession to develop, finance, construct, own, operate and transfer a combined cycle power plant in Turkey (hereinafter referred to as “the Project”). The Project investment was carried out through a combination of Turkish investment vehicles and joint development agreements. The Applicant company was established in the Netherlands.

The dispute was submitted to the International Centre for Settlement of Investment Disputes (“ICSID”) pursuant to the terms of the Energy Charter Treaty (“ECT”), the Agreement on Reciprocal Encouragement and Protection of Investments between Netherlands and Turkey (“BIT”) and the ICSID Convention.

The Applicant asserted that the Respondent’s actions in connection with the conversion process and some of the legislative changes led to the loss of its investment and violated a number of investment protection provisions of the ECT and the BIT. By majority, the Arbitral Tribunal concluded that it did not have jurisdiction to hear the dispute pursuant to both the ECT and the BIT.

Issues

The Applicant asserts that the Award on jurisdiction ought to be annulled on several grounds. Firstly, that there was a serious departure from a fundamental rule or procedure pursuant to Article 52(1)(d) of the ICSID Convention in how the Tribunal came to its decision. The Applicant contends that the reasoning adopted by the majority arbitrators was contradictory, and based on the reasoning there was actually a majority opinion upholding jurisdiction. Secondly, that the Tribunal failed to state its reasons for its decision pursuant to Article 52(1)(e). Thirdly, that there

was a manifest excess of powers pursuant to Article 52(1)(b). The Applicant submitted that the Tribunal manifestly exceeded its powers by failing to apply the proper law to the facts of the case.

Held

The ad hoc committee dismissed the Applicant’s claims for annulment under Article 52(1)(b); (1)(d); (1)(e) of the ICSID Convention in their entirety. On the issue of whether the Tribunal must deal with in its decision, the Committee distinguished between general ‘questions’ that must be dealt with under Article 48(1) and specific heads that must be considered by the Tribunal in its award pursuant to Article 48(3). Therefore, when dealing with heads of claims, it is for the Tribunal to determine which questions are material and put those to a vote in order to dispose of issues before it. The Tribunal was not under an obligation to vote on separately on each objection to jurisdiction so as it dealt with the heads of claims presented, and the question on jurisdiction was correctly resolved in compliance with Article 48(1). The Committee further found that the reasoning of the tribunal members making up the majority need not be identical, only their actual votes. In this case the majority was clearly not in favour of upholding jurisdiction, albeit for different reasons.

Impact

In dismissing the Applicant’s claims for annulment, the Committee has clarified the tribunal’s power to determine heads of claim by resolving material questions and issues. In doing so, they have underlined the primacy of the tribunal’s decision making power as well as the reluctance of ad hoc committees to interfere with a tribunal’s award. This is reinforced by the Committee placing the burden of proof on the Applicant in relation to its claims.

Arbitration Case Law:

DEVELOPMENTS IN MALAYSIA & THE INTERNATIONAL FRONT

By: Eden Taddese Gila (International Intern, KLRCA)
& Laura Jimenez Jaimez (Senior International Case Counsel, KLRCA)

BLC and others v BLB and another

Court:
Singapore Court of Appeal

Case Citation:
[2014] SGCA 40

Date of judgment :
30 July 2014

Facts

The dispute arose from a joint venture between two groups of companies made through a series of agreements. The Appellants are a group of German companies which specialize in producing pipe components using hydro forming technology; the Respondents are a group of Malaysian companies in the automotive industry. The Appellants had commenced arbitration proceedings pursuant to the International Arbitration Act with the Respondents making counterclaims as well. Following the close of the hearing, the sole arbitrator issued an award in favour of the Appellants and completely dismissed the Respondents' Counterclaims.

The Respondents applied to set aside the award. Before the Singapore High Court, the Respondents argued that the Tribunal had failed to address one of the Respondents' Counterclaims, occasioning a breach of natural justice. The High Court agreed with the Respondents and set aside the Tribunal's finding with respect to the Disputed Counterclaim. The High Court also remitted the Disputed Counterclaim to a new tribunal (which was to be constituted). The appellants appealed to the Singapore Court of Appeal.

Issues

The issue was whether there was a breach of natural justice and whether an award can be set aside on the basis that the tribunal had failed to deal with an essential issue.

Held

On the facts, the Court of Appeal disagreed with the High Court's finding that the Tribunal did not consider the Disputed Counterclaim. Instead, the Court of Appeal found that the Tribunal had rendered a decision in respect of that claim. The Court of Appeal allowed the appeal and ruled that there was no breach of

natural justice.

The Court of Appeal stated that there was "no right of recourse to the courts where an arbitrator has simply made an error of law and/or fact". The Court further held that it was not required to conduct a "hypercritical or excessively syntactical analysis" of the arbitral award. Instead, arbitral awards are to be read such that only "meaningful breaches ... that have actually caused prejudice are ultimately remedied"; and The Court should be wary of displeased parties attempting to criticise an arbitrator for failing to consider arguments or points which were never before the arbitrator.

Impact

This decision is an affirmation of the principle of minimal court intervention. It also provides guidance to parties looking to set aside an award issued in a Singapore seated arbitration. The Court will not consider the substantive merits of the arbitral proceedings; neither will an error of fact or law be sufficient to satisfy this threshold. Even in respect of breaches of natural justice, the Court will only remedy "meaningful breaches" of natural justice which have actually caused prejudice to a party. The Court will be wary of an aggrieved party's attempts to fault an award for not considering points or arguments which were allegedly raised by the parties. This policy reflects the trend in many jurisdictions, with courts actively moving to discourage set aside applications.

SAVE THE DATE!

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

JANUARY 2015

CIArb 2015 Diploma Course in International Commercial Arbitration

Date : 3rd to 11th January 2015
Organiser : KLRCA & CIArb
Venue : Bangunan Sulaiman

KLRCA Talk - by Robert Rhodes QC (Bias In Arbitration)

Date : 6th January 2015
Organiser : KLRCA
Venue : Bangunan Sulaiman

Arbitrating In The Middle East

Date : 22nd January 2015
Organiser : KLRCA, Trowers & Hamlins and Steward Consulting
Venue : Bangunan Sulaiman

KLRCA Talk - by Dr. Axel Reeg

Date : 26th January 2015
Organiser : KLRCA
Venue : Bangunan Sulaiman

KLRCA Talk - by Professor Tang Hang Wu

Date : 28th January 2015
Organiser : KLRCA
Venue : Bangunan Sulaiman

FEBRUARY 2015

Indonesia National Board of Arbitration (BANI) Collaboration Agreement and Half Day Seminar

Date : 5th February 2015
Organiser : KLRCA & BANI
Venue : Bangunan Sulaiman

KLRCA Talk - Mediating Data Protection Breaches and Disputes

Date : 10th February 2015
Organiser : KLRCA
Venue : Bangunan Sulaiman

MARCH 2015

The Impact of Building Information Modelling (BIM) on Dispute Resolution

Date : 3rd March 2015
Organiser : KLRCA & King's College London Alumni Malaysia (KCLAM)
Venue : Bangunan Sulaiman

Adjudication Training Programme

Date : 21st to 25th March 2015
Organiser : KLRCA & KIAC (Kigali International Arbitration Centre)
Venue : Kigali, Rwanda

APRIL 2015

KLRCA Adjudication Training Programme

Date : 20th to 24th April 2015
Organiser : KLRCA
Venue : Bangunan Sulaiman

MAY 2015

KLRCA International Arbitration Week 2015

Date : 7th to 9th May 2015
Organiser : KLRCA
Venue : Bangunan Sulaiman

Special Highlights

- CIArb Centennial Lecture by Professor Doug Jones
- Conferences on i-Arbitration, Sports Arbitration & Sanctions
- Exclusive KLRCA Book Launch 'Acknowledging The Past, Building The Future'
- RAIF 2015 Conference

JUNE 2015

CIPAA Conference 2015

Date : 17th June 2015
Organiser : KLRCA
Venue : Bangunan Sulaiman

Recommended model clause to be incorporated in any contract:

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

ADVANTAGES OF ARBITRATING AT THE KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

Malaysia is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which enable KLRCA's arbitral awards to be enforceable in countries that are also signatories to the Convention.

KLRCA is internationally recognised as an experienced, neutral, efficient and reliable dispute resolution service provider since 1978.

KLRCA has a panel of experienced domestic and international arbitrators from diverse fields of expertise.

Costs of arbitration proceedings in KLRCA are comparatively lower than other established arbitral jurisdictions.

No visa and withholding tax imposed on arbitrators.

Foreign arbitrators are exempted from applying for a Work Permit or a Professional Visit Pass when entering into Malaysia to conduct hearings which are held for a short duration.

Arbitrators and foreign counsel will be exempted from the "fly-in fly-out" prohibition. They will not be subjected to the restriction of 60 days nor require immigration approval to enter into Malaysia to conduct arbitral proceedings.



**A MALAYSIAN
HERITAGE
BUILDING WITH
STATE-OF-
THE-ART
FACILITIES**

KLRCA NEW PREMISES 2014

Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia.

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

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

Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia.

T +603 2271 1000 F +603 2271 1010 E enquiry@klrca.org

www.klrca.org