

SPOTLIGHT:
THE NEW DRIVING FORCE
THE RULE OF LAW:
MALAYSIAN ARBITRATION ACT 2005: SECTION 10

KLRC the proud host
of **APRAG 2011**

THE DAWN OF A NEW ERA



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KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

**REGIONAL RESOLUTION
GLOBAL SOLUTION**



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Welcome!

It is with immense pleasure that I present to you the inaugural edition of KLRCA Newsletter, the first issue since the rebranding exercise of Kuala Lumpur Regional Centre for Arbitration (KLRCA) in May 2010.



This rebranding exercise gave birth to KLRCA's new logo, which is the acronym of KLRCA in lower case. Emphasis is given to the letter 'A', depicted as a triangle with a high peak to resemble KLRCA's high level of commitment, achievement, stability and reliability as a world-class dispute resolution systems provider.

We also take on a new tagline, "Regional Resolution, Global Solution", to reflect the centre's commitment towards the promotion of arbitration with a view to fair resolution of disputes through the adoption of fast-paced, cost-saving and fair procedures by its panel of arbitrators and the efficient enforcement of domestic and international arbitration awards.

These changes are also reflected on our website, which has been enhanced with a fresh look and feel, coupled with improved usability and interactivity. This is in line with our initiatives to provide information and increase awareness about alternative dispute resolutions in Malaysia.

Apart from this successful rebranding exercise, I am pleased to note that KLRCA is the first arbitration centre in the world to adopt the new United Nations (UNCITRAL) arbitration rules as of August 2010. The new rules provide more power to arbitrators to speed up proceedings, enhance procedural efficiency and most importantly, ensure that the final award is enforceable.



On this happy note, I would like to welcome you to our first edition of KLRCA Newsletter. Happy reading!

Sundra Rajoo

Director, Kuala Lumpur Regional Centre for Arbitration

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.

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This newsletter is also available on our website, www.rcakl.org.my, under the Resource Centre section.

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First arbitration for TNB



National power company Tenaga Nasional Bhd (TNB) has prevailed in its first arbitration, a counterclaim suit against independent power producer (IPP) MMC Corp Bhd's Prai Power Sdn Bhd.

The dispute was in connection with the payment for capacity vis-a-vis the IPP's performance targets under the power purchase agreement (PPA).

The Arbitral Tribunal in early October 2010 dismissed Prai's claim, which is for a sum of RM114mil for supposedly wrongfully reducing its capacity payments from June 2003 to November 2006, except for a RM2.35 million sum. Prai is directed to pay TNB some RM10.16 million and also pay TNB's legal costs, expenses and disbursements in the arbitration as well as travel and other expenses for the tribunal.

TNB's chief financial officer Mohamed Rafique Merican said TNB had anticipated a positive outcome from the arbitration proceedings as it had equitably applied the provisions of the PPA.

"The award is significant as it is a clear signal that all players in the industry cannot expect to underperform with impunity, because failure to achieve targets would put the system at risk," he added.

Focus on Women Arbitrators

The International Dispute Resolution Conference 2010 in May gave attention to women in arbitration when it opened with a session entitled "Women in Dispute Resolution: Bringing Down Barriers".

Chairing the session was former Chief Judge of Malaya Yang Bahagia Tan Sri Dato' Seri Siti Norma Yaacob, who is also a Judge of the Dubai International Financial Centre. Speakers at this session included Dato' Ambiga Sreenevasan, a former Malaysian Bar president; Juliet Blanch, arbitrator/counsel and director of the London Court of International Arbitration; Suchitra Chitale, leading advocate of the Indian Supreme Court; and arbitrators Michelle Sindler and Rashda Rana.

Organised by the Malaysian Institute of Arbitrators (MIArb) in collaboration with the Malaysia Bar Council and the IPBA, with the support of the Kuala Lumpur Regional Centre for Arbitration, the conference aimed at addressing a broad spectrum of current issues in dispute resolution, including areas such as energy, women in dispute resolution and maritime issues.

New additions to High Court and Judicial Commission

Judicial commissioner Datuk Hinshawati Shariff, 55, has been confirmed as a High Court judge while See Mee Chun, M. Gunalan and Rosilah Yop were appointed judicial commissioners effective from 11 May 2010.

They took their oath of office before Chief Judge of Malaya Tan Sri Arifin Zakaria at the Palace of Justice in Putrajaya.

See, 51, who hails from Kuantan, is the head of the Civil Division in the Attorney-General's Chambers. She started service with the Government in 1983 and has held various posts including federal counsel in the Attorney-General's Chambers.

Currently a senior judge of the Shah Alam Sessions Court, the 52-year-old Gunalan has served as a magistrate and a Sessions Court judge.

Rosilah, 52, is the Penang director of sessions courts. Among her previous appointments were assistant director of the Legal Aid Bureau and deputy registrar of the Penang High Court.

KTM land development charges to be settled in Arbitration Court



Malaysia and Singapore have agreed, in September 2010, to bring the outstanding issue on the development charges payable on Keretapi Tanah Melayu Berhad (KTMB) land in the city-state that will be jointly developed by both countries, to the international court for arbitration.

After Malaysian Prime Minister Datuk Seri Najib Tun Razak met his Singapore counterpart Lee Hsien Loong, both leaders agreed to settle the issue amicably through arbitration under the auspices of the Permanent Court of Arbitration. The arbitration award would be accepted as final and binding.

This issue arises from the differing views of both countries relating to the charges payable on the three parcels of Points of Agreement (POA) land in Tanjong Pagar, Kranji and Woodlands.

Any business that wants to develop any land in Singapore will have to pay development charges. M-S Pte Ltd, a 60-40 joint-venture company to be set up between Malaysia's Khazanah Nasional Berhad and Singapore's Temasek Holdings Ltd, is to develop the three parcels of land. The POA entered into by both countries in 1990 does not clearly state who should pay the development charges. Malaysia's stand is that there should be no cost at all, while Singapore interpreted that the company should pay for the development charges.

Role of Shariah Advisory Councils

Malaysia has dedicated Shariah Advisory Councils (SACs) for the Islamic banking and takaful sectors, as well as for the Islamic Capital Market (ICM).

The Shariah Advisory Council of Bank Negara Malaysia (BNM) is responsible to advise on matters relating to Islamic banking and takaful businesses or any other Islamic finance area that is supervised and regulated by BNM.

The Shariah Advisory Council of the Securities Commission Malaysia (SC) is responsible to advise on matters pertaining to the ICM.

Consisting of prominent Shariah scholars, jurists and market practitioners, members of the two SACs are qualified individuals who can present Shariah opinions and have vast experience in banking, finance, economics, law and application of Shariah, particularly in the areas of Islamic economics and finance.

In executing its duties and responsibilities, both SAC examine and endorse the validity of application of Shariah in Islamic financial products which are submitted by Islamic financial institutions.

The SAC would also issue Shariah resolutions and decisions relating to their relevant jurisdictions from time to time. Both SAC have published their resolution, which have been translated into various languages and is being used as a reference point by industry and academia around the world.

Lord Bingham passed on at 76

One of Britain's most eminent judges, Lord Bingham, died of cancer at his family home in Wales on 11 September 2010. He was 76.

A commercial lawyer, Thomas Henry Bingham became known after chairing the inquiries into the sanction-busting in Rhodesia by oil companies and the collapse of the bank BCCI. He has served as the Master of the Rolls (the head of the civil judiciary) from 1992 to 1996 before being appointed Lord Chief Justice of England and Wales, from 1996 to 2000, and became Baron Bingham of Cornhill. From



2000 to 2008, he was the Senior Law Lord. He was made a Knight of the Garter in 2005, reportedly the first judge to be granted the honour.

The Bingham Centre for the Rule of Law, due to open in October 2010, was set up to develop the promotion of international law, which was the foundation of Lord Bingham's judicial career.

Lord Bingham was regarded as a staunch defender of judicial independence, which he saw as vital to the protection of human rights.

Australia's first global disputes centre opens in Sydney

The state-of-the-art Australian International Disputes Centre in Sydney was officially opened in early August 2010.

Established with the assistance of the Australian Government and the Government of the State of New South Wales, Australia's first global disputes centre houses leading ADR providers which include the Australian Centre for International Commercial Arbitration (ACICA), the Chartered Institute of Arbitrators (Australia) Limited (CI Arb), the Australian Maritime and Transport Arbitration Commission (AMTAC) and the Australian Commercial Disputes Centre (ACDC). The Centre offers a premier one stop full alternative dispute resolution service including panels of accredited dispute resolvers.

Michelle Sindler, who has an impressive background in alternative dispute resolution, has been appointed the inaugural chief executive of the Centre. She is an expert in international arbitration and alternative dispute resolution, with more than 20 years experience as counsel and mediator in disputes in Europe and Asia.

The Centre was officially opened by the Australian Attorney General Robert McClelland and NSW State Attorney General John Hatzistergos, in the presence of Chief Justice of the Federal Court of Australia Patrick Keane, Chief Justice of the Supreme Court of NSW James Spigelman and other distinguished guests.

Tan Sri Dato' Cecil Abraham Elected as a Bench



The Parliament of the Honourable Society of the Middle Temple on 12th October 2010 unanimously elected Tan Sri Dato' Cecil W. Abraham as a Bench of the Middle Temple. He was called to the Bench on 23rd November 2010 during the Michaelmas term.

The principal role that Tan Sri Cecil would play is to act as a bridge between the Middle Temple Association of Malaysia and the Inn, to foster closer relationships between members of the Middle Temple Association and the Inn.

"The other Inns, such as Inner Temple, Grays and Lincolns Inn, have already formed their alumni. Various seminars, lectures and other aspects of continuing legal education programmes have been held between the various Associations and their respective Inns. It is my intention to see our Middle Temple Association does likewise," says Tan Sri Cecil.

"There are, among the Benchers, many prominent arbitrators and this will give me an opportunity to meet up with them and to introduce to them to the Malaysian Arbitral Community and especially to the Kuala Lumpur Regional Centre for Arbitration (KLRC), he adds.

Tan Sri Cecil commenced his pupillage in 1969 in Malaysia and was admitted as an Advocate & Solicitor of the High Court of Malaya in February 1970. He is a trial lawyer who practises exclusively as an advocate in the High Courts in Malaya, Sabah and Sarawak and he also has an extensive appellate court practice in the Court of Appeal and the Federal Court of Malaysia.

He also has a flourishing arbitration practice in that he appears frequently as Arbitrator and Counsel in domestic and international arbitrations conducted under the UNCITRAL, ICC, SIAC, KLRC, LCIA and ICSID Rules since the 1990s. Tan Sri Cecil is also a trained mediator and has mediated disputes for the Malaysian Bar Council Mediation Centre.

Vinayak P. Pradhan



Vinayak P. Pradhan, a Chartered Arbitrator, Fellow of the Chartered Institute of Arbitrators, UK (CI Arb) and Partner of SKRINE, has been elected to serve as the vice president of the CI Arb in 2011, the deputy president in 2012 and the president in 2013.

Vinayak has been called to the Malaysian and Singapore Bars and has been practising as an advocate and solicitor in Malaysia for over 36 years, appearing in arbitrations and at all levels of the Malaysian courts.

He heads SKRINE's Dispute Resolution Division as well as the firm's Construction, Engineering and Arbitration Practice Group. Vinayak is also an Associate Tenant of Littleton Chambers, Kings Bench Walk, London.

Vinayak has acted in domestic and international arbitrations as presiding arbitrator, co-arbitrator and sole arbitrator. These arbitrations include those conducted under the ICC Rules, the KLRC Rules, the UNCITRAL Rules, the LCIA Rules, the HKIAC Rules, the PORAM Rules and the SIAC Rules. Many of these disputes are cross-border disputes and have involved many territories.

His other special appointments have included the following:

- Commissioner with the United Nations Compensation Commission dealing with construction and civil engineering claims, from corporate entities, arising out of the Iraqi invasion and occupation of Kuwait which are compensable pursuant to UN Security Council Resolution No. 687 of 1991 from August 1998 to 2003. The panel dealt with 196 claims approximating US\$3 billion.
- Member of the Permanent Court of Arbitration, The Hague (May 2003)
- Vice Chair of the ICC Commission on Arbitration (January 2008)
- Panel of Conciliators and Panel of Arbitrators of ICSID (July 2008)
- Member of the Court of Arbitration for Sport, Lausanne (2006)
- Register of Arbitrators of the Olympic Council of Malaysia (2006)
- Council of Advisors of the SIAC (2009)

He regularly appears as a guest speaker and delivers lectures and papers at local and international conferences and seminars. He has also written articles and chapters on arbitration and other dispute resolution processes which have been published in legal journals and in books on arbitration in Malaysia.

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The dawn of a new era

Since its inception in 1978, the Kuala Lumpur Regional Centre for Arbitration has come a long way. To further revitalise its operations, the centre has embarked on a rebranding exercise since May 2010.

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) was the first regional centre established by the Asian-African Legal Consultative Organisation (AALCO) in Asia to provide institutional support in a neutral and independent venue for the conduct of domestic and international arbitration proceedings in Asia. While it has the support of the Malaysian government, KLRCA is a non-profit organisation and is not a branch or agency of the government. This ensures independence and autonomy in any arbitration proceeding. KLRCA also has immunity to carry out its functions and is independent from court's interference as an appointing authority by virtue of the Arbitration Act 2005.

Since the appointment of Sundra Rajoo as the fifth director of KLRCA on 1st March 2010, a number of new initiatives have been put in place to transform KLRCA into the preferred arbitration and ADR centre in the Asia Pacific region.

The Transformations

One of the key initiatives is a rebranding exercise, which includes the creation of a new visual identity and tagline for the centre, as well as the introduction of an Information Kit on KLRCA.

KLRCA's new logo is its acronym KLRCA, with an emphasis on the letter 'A', depicted as a triangle with a high peak to resemble KLRCA's high level of commitment, achievement, stability and reliability as a world-class dispute resolution systems provider. KLRCA's new tagline, "Regional Resolution, Global Solution", reflects the centre's commitment towards the promotion of arbitration with a view to fair resolution of disputes through the adoption of fast-paced, cost effective and fair procedures by its panel of more than 500 arbitrators with diverse specialisation and the efficient enforcement of domestic and international arbitration awards.

As Internet has become an integral part of marketing strategies, KLRCA has revamped its website to be more informative, visually arresting and user friendly. A brand new corporate video, which showcases the facilities and services available at the centre, is downloadable from the website. Visitors to the website can also



▲ KLRCA's new interactive website



▲ *Hearing room*

download all the relevant Rules together with the necessary information, guidelines and documentations to start a proceeding for arbitration, mediation, conciliation and domain name dispute resolution.

Facilities at KLRCA are added on and upgraded in line with the rebranding exercise. Currently there are seven conducive (7) hearing rooms that seat between 8 and 30 persons and equipped with document storage facilities. Other facilities include two consultation / breakout rooms, a comprehensive Resource Centre and a private Arbitrators' Lounge. The whole centre is equipped with WiFi connectivity and state-of-the-art tele- and video-conferencing facilities. Apart from these additions, KLRCA continues to offer interpreting and transcribing services and other administrative services such as photocopying and faxing.

The New Rules

KLRCA's new rules of arbitration adopt the latest UNCITRAL Arbitration Rules as of August 2010 with modifications. The new rules have a number of benefits for both local and foreign businesses. From a procedural standpoint, benefits include a shorter time frame for the arbitrator or arbitral tribunal to render its final judgement (award) from three to nine months. In terms of appointment of the arbitrator or arbitral tribunal, the selection of the arbitrators can be done within 48 hours.



▲ *Resource centre*

In short, the new rules provide more power to the arbitrator or arbitral tribunal to speed up proceedings, enhance procedural efficiency and most importantly, ensure that the final award is enforceable. Businesses will save significant time and costs through arbitration.

"With the adoption of the new arbitration rules, we certainly expect to handle more disputes. In fact, the number of disputes at KLRCA has increased significantly since the new management team was appointed in March this year. We would like to at least double the number of cases by next year," says Sundra Rajoo.



▲ *Arbitrator's lounge*



and holding roadshows. Some of these activities are already in progress while the others will be implemented in stages," Sundra Rajoo divulges.

The KLRCA was established 32 years ago, and is now undergoing a progressive transformation exercise to make itself significantly attractive as a preferred choice location for arbitration and ADR. The last few months of the year 2010 continues to be a whirlpool of activity for this centre, with exciting happenings to build awareness about KLRCA and its services to place KLRCA in its rightful position as a globally recognised arbitration centre in the region that offers services and expertise in ADR at highest standards.

The People

The number of KLRCA staff has increased fivefold, from four to more than twenty as of October 2010, and is organically growing with the inclusion of new services and growth trajectory.

Sundra Rajoo comments: "We have seen an increase in the number of cases at KLRCA since the new team was appointed. Currently, there are about 70 cases being heard at KLRCA. The second and third quarter of 2010 has seen a positive growth compared to the previous corresponding period.

"In anticipation of further growth and increase of business that our promotional exercises will bring, KLRCA's staff numbers will be increased to ensure that optimum service levels are maintained."

The Activities

In the pipeline is a series of activities to generate awareness and to promote the use of arbitration and other ADR mechanisms in resolving commercial disputes. These activities will be targeted at stakeholders including but not limited to professional bodies, the public and private sectors and educational institutions both in and outside the country.

"We are embarking on a marketing and publicity campaign, holding dialogues with trade bodies/associations, engaging with government and regulatory bodies, knowledge sharing with academia, participation in international conference/exhibition





KLIRCA the Proud Host of APRAG 2011

Kuala Lumpur Regional Centre for Arbitration is honoured to be the official conference host, organiser and secretariat of the fourth edition of the Asia Pacific Regional Arbitration Group (APRAG) Conference in July 2011. Delegates can look forward to a high-impact, well organised and interactive conference in Kuala Lumpur while experiencing the Malaysian hospitality during this three-day biennial event. Registration details and event information will be made available soon.

Diploma in International Commercial Arbitration

(jointly organised by KLIRCA; CLE Faculty of Law, University of New South Wales, Australia; and CIARB [Malaysia, Australia and Singapore branches] with the support of the Australian Centre for International Commercial Arbitration (ACICA) and the Law Society of New South Wales)

Date : 2nd – 10th October 2010

Venue : Parkroyal Hotel, Penang, Malaysia

Conversion Course for Attorney-General's Chambers' Senior Officers

(organised by the Kuala Lumpur Regional Centre for Arbitration)

Date : 23rd October 2010

Venue : Attorney General's Chambers, Putrajaya, Malaysia

e-discovery Exchange Platform

(organised by the Singapore Academy of Law with the support of the Kuala Lumpur Regional Centre for Arbitration, the Singapore International Arbitration Centre, the Singapore Corporate Counsel Association, the Hong Kong International Arbitration Centre and the Inter-Pacific Bar Association)

Date : 27th – 28th October 2010

Venue : Carlton Hotel Singapore

SIAC's Talk on the New 2010 Rules

(jointly organised by the Singapore International Arbitration Centre and the Kuala Lumpur Regional Centre for Arbitration)

Date : 12th November 2010

Venue : The Westin Kuala Lumpur, Malaysia

HKIAC 25th Anniversary Celebrations

The Kaplan Lecture 2010 & Opening Reception

Date : 17th November 2010

Venue : Hong Kong Club, Hong Kong

Conference: "Rethinking International Arbitration"

Date : 18th – 19th November 2010

Venue : JW Marriott Hotel, Hong Kong

Mock Arbitration

Date : 20th November 2010

Venue : Hong Kong International Arbitration Centre, Hong Kong SAR

SCLHK International Construction Law Conference 2010

Date : 5th – 7th December 2010

Venue : Hong Kong Convention & Exhibition Centre, Hong Kong SAR

Business Dispute Resolution Forum

Jointly organised by MCCA and KLIRCA, in collaboration with AAA / ICDR and MIARB

Date : 9th December 2010

Venue : KLIRCA

Mauritius International Arbitration Conference

Date : 13th – 14th December 2010

Venue : Republic of Mauritius

Construction Industry Arbitration Council Conference

Date : 17th December 2010

Venue : New Delhi, India



EC Law and Intra-EU Investment Treaties: AES Summit Generation Limited and AES-Tisza Eromu Kft. v Republic of Hungary

By John Gaffney

The debate over the proper role of European Community (EC) law in investment treaty arbitration involving an intra-EU BIT is likely to be renewed following the publication of the Award in AES Summit Generation Limited and AES-Tisza Eromu Kft. v Republic of Hungary (ICSID Case No. ARB/07/22) in end September 2010. The case involved various claims pursuant to the ECT in relation to long-term power purchase agreements, aspects of which the European Commission considered as violating EC competition law. In fact, the Commission applied to and was permitted by the Tribunal (von Wobeser (President), Stern, Rowley) to participate as *amicus curiae* in the arbitral proceedings.

The Tribunal considered the following questions, raised by the parties' submissions, on the proper role of EC law in the dispute:

- (i) Should any interpretation of the ECT be a historical interpretation of its formation (and therefore take into account EC law principles) or the Vienna Convention?
- (ii) Did Article 16 of the ECT* apply to the dispute (as regards the relationship between the ECT and EC law)?

- (iii) Should Article 307 of the EC Treaty** be applied to this dispute?

The Tribunal played down (a) the potential conflict between EC law and the ECT and (b) the role of EC law in settling the dispute, by finding that Hungary's acts/measures were to be assessed under the ECT as the applicable law with the EC law to be considered and taken into account as a relevant fact. In summary, the Tribunal concluded that:

- if interpretation of the ECT is required, the general rules of interpretation of the Vienna Convention, established in its Articles 31 and 32, should be applied. Although Article 32 provides for the use of historical interpretation, the Tribunal notes that such use is only as a complementary method of interpretation.
- the [EU] competition law regime has a dual nature: on the one hand, it is an international law regime; on the other hand, once introduced in the national legal orders, it is part of these legal orders... it will be considered by this Tribunal as a fact, always

taking into account that a state may not invoke its domestic law as an excuse for alleged breaches of its international obligations.

- the application of Article 16 of the ECT only requires to be analysed in the event the ECT contains a provision that conflicts with EC law... properly understood, the dispute under analysis in the present arbitration is not about a conflict between the EC Treaty or [EU] competition law and the ECT.
- the dispute is about the conformity or non-conformity of Hungary's acts and measures with the ECT. Therefore, it is the behaviour of the state... which must be analysed in light of the ECT, to determine whether the measures, or the manner in which they were introduced, violated the Treaty. The question of whether Hungary was, may have been, or may have felt obliged under EC law to act as it did, is only an element to be considered by this Tribunal when determining the "rationality",



“reasonableness”, “arbitrariness” and “transparency” of the reintroduction of administrative pricing and the Price Decrees***

- Article 307 only applies to agreements between member states and non-member states, and Hungary and the United Kingdom are both member states. Moreover, the Claimants are not states, and even if sometimes individuals are granted rights under international law, Article 307 of the EC Treaty specifies that it only applies to states.

Article 16 ECT states

“Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,

- (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and
- (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment.”

Article 307 states:

“The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.”

*** The Tribunal would note later that “[s]everal factors – the state aid investigation, the obstacles to liberalisation and the generators’ excessive returns – were clearly interrelated, in the minds of the Hungarian government and regulators, when faced with the high profits of the generators. To arbitrator Stern, the evidence is overwhelming that the decision to reintroduce maximum administrative prices was a rational, non-arbitrary response to a complex set of legitimate policy concerns.”

John Gaffney is a partner with Donegans Solicitors. He is one of four practising solicitors from Ireland included in the list of The International Who’s Who of Commercial Arbitration for 2011, and the only solicitor from Cork to receive this honour. Prior to joining Donegans, John worked with the international law firms, Freshfields in Paris and Skadden Arps in London, and served in the United Nations Compensation Commission in Geneva.

The Kuala Lumpur Regional Centre for Arbitration invites readers to contribute articles and materials of interest for publication in future issues. Send your articles and materials to: info@rcakl.org.my





The New Driving Force

Sundra Rajoo, the new director of the Kuala Lumpur Regional Centre for Arbitration (KLRCA), takes some time off his busy schedule to share his aspirations and vision for the centre.

"I would like KLRCA to regain its footing as one of the preferred arbitration centres in the Asia Pacific region," declares the new man at the helm of the Kuala Lumpur Regional Centre for Arbitration (KLRCA) with much enthusiasm"

Appointed as the fifth director of KLRCA on 1st March 2010, Sundra Rajoo brings a wealth of experience to the centre. He is a Chartered Arbitrator. He had also practised as an Advocate and Solicitor, an Architect and a Town Planner. He was the founding President of the Society of Construction Law (Federal Territory and Selangor) Malaysia and past Chairman of the Chartered Institute of Arbitration (Malaysia Branch). He has recently been elected as a Fellow of the Malaysian Institute of Architects (PAM).

The Background

Born on 3rd January 1956 in Melaka, Malaysia, Sundra Rajoo obtained his first honours degree in Housing, Building and Planning from Universiti Sains Malaysia, Penang, in 1979 before proceeding to Australia and obtaining two professional degrees in Architecture and Town Planning.

Apart from these qualifications, he holds a Masters in Construction Law and Arbitration (With Merit) from Leeds Metropolitan University, where he was the winner of the Annual Prize, North-East Branch, The Chartered Institute of Arbitrators, England. He also holds a Master in Philosophy in Law from Manchester University, which he completed as a Chevening Award holder.

He started work with Bank Negara Malaysia (BNM), the central bank of Malaysia. While working in BNM's Building Division, he read law and subsequently obtained the Certificate in Legal Practice (CLP). He has been awarded the Diploma in International



“Usually, before going into an arbitral hearing, I will prepare myself by familiarising myself with the pleadings, witness statements and documents lodged by the parties for the case”

Commercial Arbitration held at Keble College, Oxford by Chartered Institute of Arbitrators, where he was the winner of the Cedric Barclay Prize for the highest marks in the Award Writing examination of the Diploma.

In July 1999, Sundra Rajoo became a Chartered Arbitrator, one of 291 persons so designated in the world at that time. He was also the first Malaysian to be admitted as a member of the Academy of Experts in England.

The Arbitrator

Being an arbitrator is a natural progression for Sundra Rajoo, as he has been an architect, a town planner and a lawyer. Over the years and sitting as an arbitrator since 1990, he has had over a hundred and fifty appointments as arbitrator for both international and domestic arbitrations. He has presided over disputes and differences which relate to breach of construction and engineering contracts, oil and gas, professional consultancy, sale and purchase, insurance contracts, palm oil, commercial contracts and commercial joint-venture agreements.

“Usually, before going into an arbitral hearing, I will prepare myself by familiarising myself with the pleadings,

witness statements and documents lodged by the parties for the case. My very first arbitration was in 1990. It was quite telling when the parties immediately settled the dispute after the preliminary meeting with me. They must have felt that it would be better for them to resolve the dispute than leaving it to me. It was then that I decided to study and train in arbitration and construction law. It has made a difference,” he discloses with a smile.

The Vision

The current scenario in Malaysia provides tremendous potential for alternative

dispute resolution (ADR), especially with the many cross-border business deals taking place today.

“Traditionally, Singapore and Hong Kong are recognised as the favoured venues for ADR in Asia. For KLRCA, we want to offer a high level of service to help boost ADR in the Asia Pacific Region so that Malaysia too becomes an arbitration destination. We have taken the step of rebranding the Centre and to disseminate information about the benefits of using ADR in resolving disputes,” says the current director of KLRCA.

He continues: “Our focus is to change the perception and garner support from all the stakeholders especially the domestic and international business communities to use our Arbitration Rules and facilities.”

The Lighter Side

Even though he has a busy schedule, Sundra Rajoo makes a point of finding time to read.

“I love to read and collect books. Currently I have about 17,000 books at home. And I have a habit of reading three or four books at the same time, it keeps me ticking,” he says.

To relax and unwind after a long day, he listens to music and indulges in selected DVDs. He also likes to travel in his spare time.

He declares: “I love good food and wines!”





Case: Majlis Ugama Islam v Adat Resam Melayu Pahang v Far East Holdings [2007] MLJU 0523

In this case, the High Court upheld an application for a stay of arbitral proceedings under section 10 of the 2005 Act pending a reference to arbitration. In that case, there was a dispute involving a joint venture agreement which contained an arbitration clause. The parties could not agree on the choice of arbitrator. The appellant took the position that the matter could only be referred to arbitration provided the choice of arbitrator was agreed by the parties.

As it had not been so agreed, the matter could not be referred to arbitration and the appellant commenced a civil suit in court. The respondent in turn filed an application for a stay of proceedings and a stay was granted. The court took advantage of the provision in section 10(2) of the 2005 Act to make a consequential order to refer to the matter of the appointment of an arbitrator to the director of the Kuala Lumpur Regional Centre for Arbitration. Section 10(2) allows the court, in granting a stay, to impose any conditions it deems fit.

Case: Asia Pacific v Innotec Gmbh [2007] 8 CLJ 304

In this case, the court, in granting a stay of proceedings, spoke in favour of upholding arbitration clauses. The dispute in that case was in relation to a partnership contract and resellers agreement. There was an arbitration clause which provided for arbitration at the 'SIHK'.

It was contended by the plaintiff that the arbitration clause was void for uncertainty as the reference to 'SIHK' could be a reference to any number of institutions. The court there held that in construing the arbitration agreement, the court should not hold a provision void for uncertainty unless the ambiguity could not be resolved. The court found that there was no uncertainty as to whether 'SIHK' referred to the other localities as identified by the plaintiff. The court also held that so long as the seat of arbitration is capable of being made certain with reasonable certainty, the court will uphold the agreement to arbitrate. The fact that the respondent had not objected to the inclusion of arbitration clause in the agreement was held to be a relevant consideration in upholding the arbitration clause. The court further held that even if there was a mistake as to the venue or seat of arbitration, such a mistake was not 'essential' to the arbitration agreement within the meaning of section 21 of the Contracts Act 1950 such as to render the agreement unenforceable.

On a separate note, the court recognised that the 2005 Act empowers the arbitral tribunal to decide on a dispute relating to the law applicable to the arbitration. On the construction of section 10 of the 2005 Act, the court was of the view that section 10 does not exclude the courts' general jurisdiction to grant a stay of proceedings on any appropriate grounds including the ground to refer the dispute to an international arbitration (outside Malaysia). The court held further that any objection as to the propriety of the commencement of arbitration proceedings or the objection as to the failure to abide by the relevant procedure on the appointment of an arbitration was not a ground within section 10(1)(a) or (b) of the 2005 Act. As such, it was not a ground upon which the court could properly exercise its power not to grant stay. In any event, the court recognised that such objection should be made to, and decided by, the arbitral tribunal.



Malaysian Arbitration Act 2005: Section 10

Arbitration agreement and substantive claim before court

- (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds—
 - (a) that the agreement is null and void, inoperative or incapable of being performed; or
 - (b) that there is in fact no dispute between the parties with regard to the matters to be referred.
- (2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.
- (3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

Proposed amendments to the Malaysian Arbitration Act 2005: Stay of proceedings

Criticisms have been levelled against the proviso to section 10 of the 2005 Act (which deals with the grant of a mandatory stay). The proviso empowers the court to refuse a stay where there is no dispute between the parties with regard to the matters to be referred. The proposed amendment seeks to do away with the proviso, which is not in line with the Model Law, and may well breach the New York Convention, which requires contracting states to make it mandatory to refer parties to arbitration unless the arbitration agreement is null, void, inoperative or incapable of being performed.

The introduction of the proviso with respect to the existence or otherwise of a dispute leaves too much discretion with the courts to determine if there is in fact a dispute. The exercise of such wide powers is likely to result in protracted litigation and is an unnecessarily wide conferment of discretion to the courts.

On a separate note, a new provision has been proposed with respect to the stay of admiralty proceedings and the powers of the court pending the determination of an arbitration in relation to an admiralty dispute. The provision includes the power to order the retention of the vessel or the provision of security in lieu.

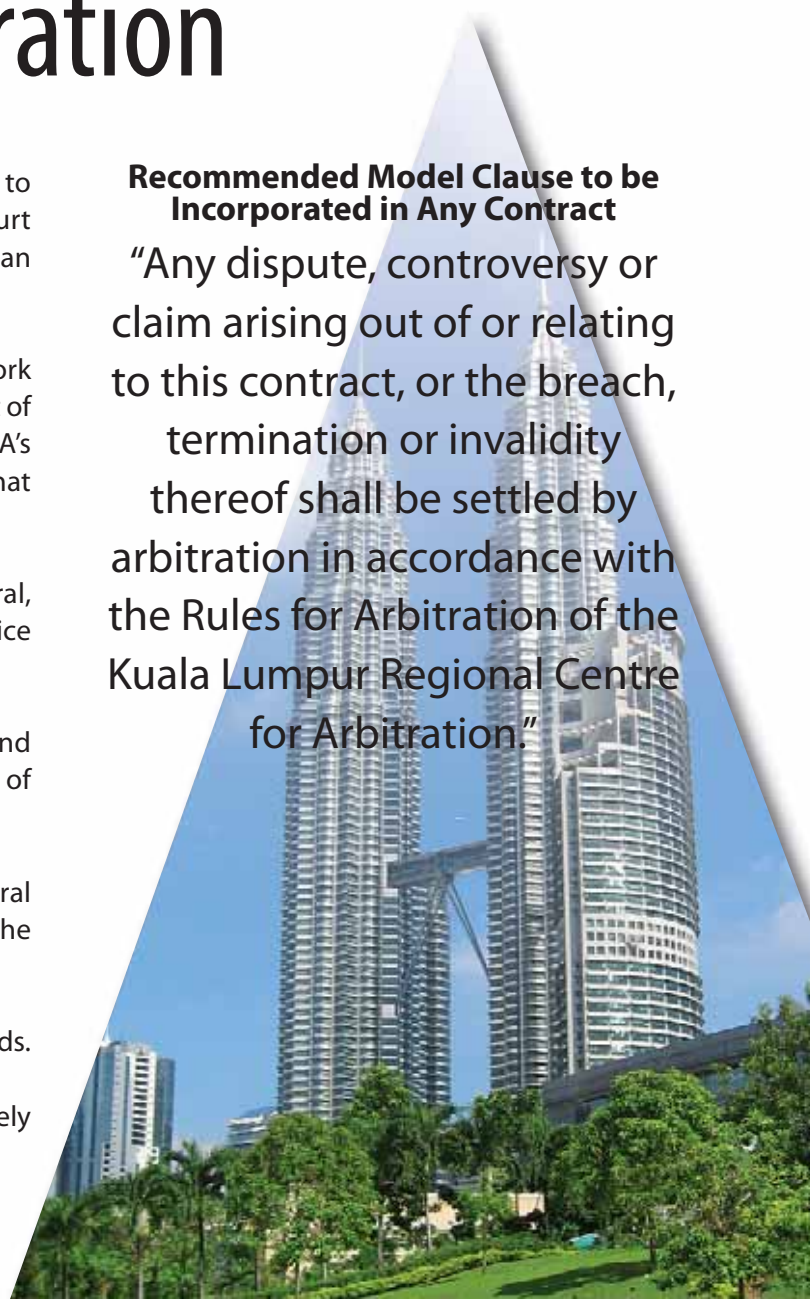


Advantages in Arbitrating at the Kuala Lumpur Regional Centre for Arbitration

- The Director of KLRCA has the statutory authority to appoint arbitrators independently from any court interference, as provided for in the Malaysian Arbitration Act 2005.
- Malaysia is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which enables KLRCA's arbitral awards to be enforceable in countries that are also signatories to the Convention.
- KLRCA is internationally recognised as a neutral, efficient and reliable dispute resolution service provider.
- KLRCA has a panel of experienced domestic and international arbitrators from diverse fields of expertise.
- KLRCA administers and monitors arbitral proceedings, including any challenges against the arbitrator.
- KLRCA assists in the enforcement of arbitral awards.
- Costs of arbitration proceedings are comparatively lower than other arbitral institutions.
- No withholding tax imposed on arbitrators.

Recommended Model Clause to be Incorporated in Any Contract

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



Kuala Lumpur Regional Centre for Arbitration

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