APR - JUN 2012 ISSUE PP6818/12/2012(031379)

klrca

CHARTING NEW FRONTIERS

The CIPA Act introduces an intervening provisional stage in the dispute resolution process of "pay first argue later".

Are you ready for the impending regime of statutory adjudication?

KLRCA ADJUDICATION TRAINING COURSE

TRAINING FEE: RM 6,000

KUALA LUMPUR
29 September – 3 October 2012
Renaissance Hotel Kuala Lumpur

KOTA KINABALU
22 November – 26 November 2012
Hyatt Regency Kinabalu

PENANG
13 – 17 December 2012
Traders Hotel, Penang

KUCHING
17 – 21 January 2013
Four Points by Sheraton Kuching

The Adjudication Training Programme is conducted by KLRCA and is open to everyone, especially those in the construction industry. Aside from training future adjudicators and provide 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**
- **UNIT 2** • **Practice & Procedure of Adjudication under CIPAA**
- **UNIT 3** • **Fundamentals of Construction Law**
- **UNIT 4** • **The Construction Process**
- **UNIT 5** • **Writing Adjudication Decisions**

Participants who complete the course and pass the exams will be awarded a Certificate of Completion and will be eligible to apply to join the KLRCA panel of adjudicators.

Those who do not wish to sit for the exams will be awarded a Certificate of Attendance and will not be eligible to apply to join the KLRCA panel of adjudicators.

To apply to become a KLRCA adjudicator, the applicant must have the following:

- A degree or diploma
- A minimum of 10 years post-tertiary working experience in the construction industry or construction-related matters
- A Certificate of Completion from the KLRCA Adjudication Training Programme

For more information, please call **03-2142 0103** or email **cipatraining@klrca.org.my**

klrca
REGIONAL RESOLUTION GLOBAL SOLUTION

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION
No.12, Jalan Conlay, 50450 Kuala Lumpur T +603-2142 0103 F +603-2142 4513 E enquiry@klrca.org.my

www.klrca.org.my

CONTENTS

PUBLISHED BY

Kuala Lumpur Regional Centre for Arbitration
No. 12, Jalan Conlay, 50450 Kuala Lumpur, Malaysia
Tel : +603 - 2142 0103 Fax: +603 - 2142 4513
Email: enquiry@klrca.org.my

Website: www.klrca.org.my

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.

klrca
REGIONAL RESOLUTION GLOBAL SOLUTION

THIS NEWSLETTER IS ALSO AVAILABLE ON OUR WEBSITE, WWW.KLRCA.ORG.MY, UNDER THE RESOURCE CENTRE SECTION.

DIRECTOR'S MESSAGE

DEAR FRIENDS,

We have come to the midway of 2012, and the last quarter (April to June) has been quite a busy one for KLRCA.

The highlight has been the holding of the Diploma in International Commercial Arbitration, which was co-organised by KLRCA and the University of New South Wales with the Chartered Institute of Arbitrators (CIArb) at the Centre itself and included a weekend retreat in Melaka.

KLRCA was very honoured and grateful to be given the opportunity to co-organise the Diploma course in Malaysia again, the last time being in Penang in 2010. The course was attended not only by Malaysians but also participants from Australia, Switzerland, China, Qatar and Mongolia.

Speaking of CIArb, in this issue, we have an exclusive interview with Mr Vinayak Pradhan, the incoming President of the Chartered Institute of Arbitrators, the first Malaysian to hold the position. Mr Pradhan is also a member of KLRCA's Advisory Board. His appointment will be a proud and significant milestone for Malaysian arbitration.

During the first quarter, we also received visits from two very esteemed international arbitration bodies. In May, the Secretary-General of the International Council of Arbitration for Sport (ICAS), His Excellency Matthieu Reeb, came to Kuala Lumpur to sign an agreement with KLRCA on ICAS's for the Centre to serve as the official host of an alternative hearing centre for the Court of Arbitration for Sport (CAS).

In June, we were honoured to welcome the Secretary-General of the Permanent Court of Arbitration (PCA) in the Hague, His Excellency Hugo Hans Siblesz together with PCA's Legal Counsel, Mr Aloysius P. Llamzon, who called on KLRCA to explore possible working collaborations.

I am also thrilled to advise that the renovation and refurbishment of the Sulaiman Building, which will be KLRCA's new home, has commenced with the Works Department (JKR) calling for tender for the project in June 2012. This marks a very important step towards realising KLRCA's aim to have a new, state-of-the art premises by 2013.

Looking ahead, KLRCA has launched its revised Arbitration Rules that have come into force on 2 July 2012. The new rules were revised after taking the view of our administrative experiences as well as receiving the feedback from relevant stakeholders, comprising parties to arbitration proceedings, case administrators, legal professionals and arbitrators. The revision is also timely, given the provisions of the Arbitration (Amendment) Act 2011, which were enforced on 1 July 2011. You can read about the salient amendments in this issue.

We are also conducting our Adjudication Conversion Course for KLRCA Arbitrators in July while the Adjudication Training for Non-Legal Experts will commence in September. Meanwhile, a second national roadshow to promote the Construction Industry Payment and Adjudication Act (CIPAA) will begin in Penang in August.

Until next time, happy reading.

DATUK SUNDRA RAJOO
Director of KLRCA

Visitors Hall of Fame

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

Visit from
UNIVERSITI KEBANGSAAN MALAYSIA
18th February 2012

Visit from
DELEGATION OF LAWYERS FROM SAUDI ARABIA
21st March 2012

Visit from
THE DIRECTOR-GENERAL, LEGAL AFFAIRS DIVISION, PRIME MINISTER'S DEPARTMENT
4th April 2012

Visit from

SHANGHAI ARBITRATION COMMISSION

23rd April 2012

Visit from

JABATAN PERHUBUNGAN PERUSAHAAN W. PERSEKUTUAN KUALA LUMPUR

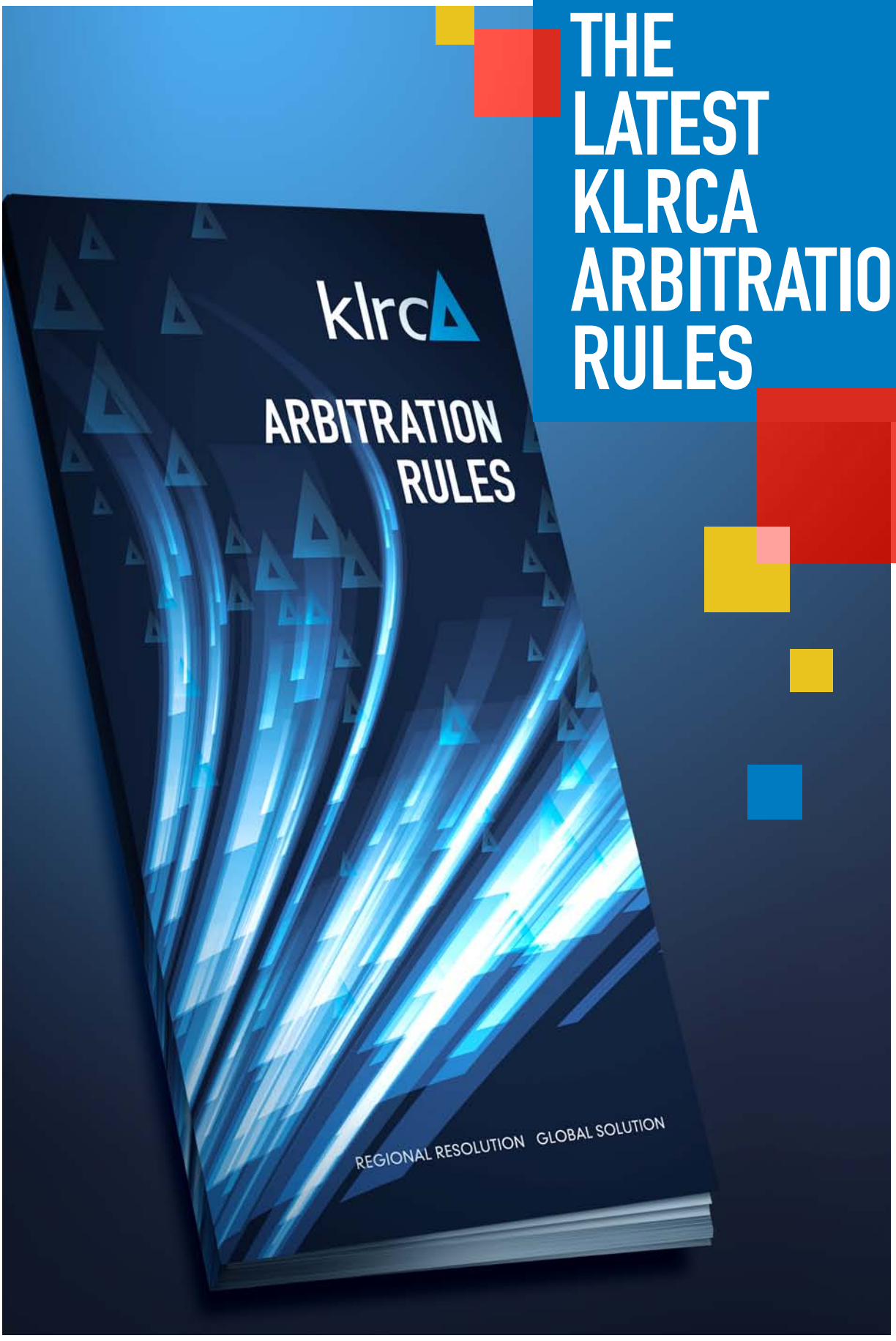
7th May 2012

Visit from

SECRETARY-GENERAL OF THE PERMANENT COURT OF ARBITRATION (PCA)

13th June 2012

THE LATEST KLRCA ARBITRATION RULES



The Kuala Lumpur Regional Centre for Arbitration (KLRCA) has introduced revisions to its Arbitration Rules which take effect on 2nd July 2012. The revisions are aimed at enhancing KLRCA's administrative roles and functions in line with current practices in international commercial arbitration.

The KLRCA Arbitration Rules provide a comprehensive procedural set of rules and processes upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship. It adopts the UNCITRAL Arbitration Rules (as revised in 2010) with some modifications and came into effect on the 15 August 2010. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.

The latest revised rules now collate the necessary internal administrative practices and regulate the methods of fee and costs computation, collection and disbursements.

Key revisions include:

- Specification of information, documents and fee required for a registration of matter with the KLRCA. Previously, the rules only required the initiating party to copy the notice of arbitration to KLRCA, and the onus is left to KLRCA to make follow-up requests for further information. Time is usually taken in the submission of the necessary documentation for KLRCA's verification.

- The time for appointment of arbitrator is reduced to 30 days. This is in line with the requirements under the Arbitration Act 2005.

- The Director of KLRCA will now confirm the appointment of arbitrators appointed by parties or any appointing authority agreed by them. An agreement between the parties to appoint an arbitrator by them or any appointing authority agreed by them shall be treated as an agreement to nominate an arbitrator and not an agreement to appoint an arbitrator.

- Provisions relating to challenge of arbitrators have been included and henceforth the KLRCA will administer the procedures relating to the challenge.

- Provisions relating to the rendering of award have been restructured to provide better clarity on the procedure for extension of time, and codify the process for delivery of awards to the KLRCA and the release of award to parties. The rules lay down requirement for consent awards.

- The KLRCA's schedule of costs will now apply immediately, unless parties agree otherwise. The onus has now shifted to the parties and the arbitral tribunal to inform KLRCA if there is an agreement to agree on a different set of fees. The time allocated for the discussion and agreement between the parties and the arbitral tribunal is within the period of 30 days from the appointment of the tribunal. Failing notification, the Director of KLRCA will fix the fees as per the published scale.

- To encourage the due payment of fees and costs by parties, the parties are now required to pay a provisional deposit at the beginning of the arbitral proceeding. This will be supplemented by advance deposits that shall be payable in the course of the proceedings, once the amount of dispute is quantifiable. The arbitral tribunal reserves the right to discontinue a matter where deposits of fees have not been paid by parties.

- To streamline and regulate payments of arbitrator's disbursements especially for international arbitration, the rules now stipulate the methods for claim. Disbursements to the arbitrators shall be made on a per diems basis based on the disbursement policy published by KLRCA from time to time.

- Notes to the KLRCA Schedule of Fees have been included to clarify and regulate the payment of fees to the arbitrators as well as KLRCA's administrative costs.

Other amendments have also been made to ensure that the arbitral process is conducted in an expeditious and cost-effective manner.

Unless parties stipulate otherwise, the revised KLRCA Arbitration Rules will automatically apply to all arbitrations under the auspices of KLRCA commenced after 2nd July 2012.

REVISIONS

1.0 Rule 1: GENERAL

- Sub-section 3 has been included to state that in cases of conflict between Part I and Part II of these rules, Part I shall apply.

2.0 Rule 2: COMMENCEMENT OF ARBITRATION

- This rule has been introduced to specify the stage for the commencement of the arbitration.
  - Sub-section 1 state the requirement that the notice of the arbitration sent under Article 3 of the UNCITRAL Arbitration Rules must be copied to the KLRCA along with documents and also accompanied by the registration fees.
  - Sub-section 2 states that the arbitration shall be commenced only upon the receipt of the documents and the registration fees as specified in sub-section 1.

3.0 Rule 4: APPOINTMENT

- Sub-section 1 has been amended to curtail the time limit from 40 days to 30 days.
- New Sub-sections 4 and 5 have been introduced and provide for the confirmation of the appointment by the Director of KLRCA where arbitrators have been appointed by parties or any appointing authority agreed by them.
  - Sub-section 4 states that an agreement between the parties to appoint an arbitrator by them or any appointing authority agreed by them shall be treated as an agreement to nominate an arbitrator and not an agreement to appoint an arbitrator.
  - Sub-section 5 empowers the Director of KLRCA to confirm the appointment of such nominated arbitrator under sub-section 4.
- Sub-section 6 has been restructured to empower the Director to seek a copy of the arbitration agreement or any other information from the parties, in making an appointment or confirmation of the appointment of a nominated arbitrator.
- Sub-section 7 has been added to specify the requirement of list procedure. The Director of KLRCA may to follow the list procedure set out in Article 8 of the UNCITRAL Arbitration rules where appropriate and practicable.

4.0 Rule 5: CHALLENGE TO THE ARBITRATORS

- Sub-sections 1 and 2 the grounds for the challenge have been provided.
- Sub-section 3, 4, 5, 6 and 7 provide for the procedure for the challenge.
- Sub-section 8, empowers the Director for ordering costs with respect to the challenge.

5.0 Rule 8: AWARDS

- Sub-section 1 has been restructured to give a better clarity to the meaning originally conveyed by the original text.
- Sub-section 2 has been amended to include a new provision which requires the arbitrator and the parties to consult the Director of KLRCA in granting the extension of time.
- Sub-section 3 has been added to state the requirement of further extending the time, by the Director of KLRCA, earlier extended under sub-section 2.
- Sub-section 4 has been introduced to require the arbitrator to deliver the awards to KLRCA before giving it to the parties. Parties are entitled to the award upon full settlement of the costs of the arbitration.
- Sub-section 5 has been introduced deal with consent awards. Where such settlements have been reached by the parties, they shall request the arbitral tribunal and upon such request the tribunal shall deliver a consent award.
- Sub-section 6 imposes a mandatory duty on the parties to carry out the award immediately and without any delay.

6.0 Rule 7: COSTS

- Sub-section 1 has been restructured to give clarity to the meaning of the term "costs".
- Sub-sections 2, 3 and 4 of the KLRCA Rules have been amended.
  - The new subsection 2 provides that unless otherwise agreed by the parties, the tribunal's fees shall be calculated in accordance with KLRCA's schedule of costs.
  - Sub-section 3 has been restructured to provide clarity on the applicable schedule of fees in cases of international arbitrations and other types of arbitrations.
- Sub-section 4 specifies that the parties and the arbitral tribunal are free to agree on the fees and expenses of the arbitral tribunal within 30 days from the appointment of the tribunal. In case of any default, the KLRCA's schedule of arbitrator's fees shall apply.
- Sub-section 5 has been introduced to specify that in exceptional circumstances the arbitrator's fees and administrative costs of the arbitration may be adjusted from time to time, at the discretion of the Director of the KLRCA.
- Sub-section 6 of the KLRCA rules has been amended to clarify the computation of the dispute amount for calculating the arbitrator's fees and the administrative charges of KLRCA.

7.0 Rule 10: DEPOSITS

- Sub-section 1 of the KLRCA rules has been amended to request the parties for a provisional deposit in equal shares.
- Sub-section 2 stipulates the time limit for the payment of the provisional within 21 days from the date of request. It further requires that the arbitral tribunal does not proceed with the arbitration proceedings until the required provisional deposit is paid in full.

- Sub-section 3 deals with the calculation of the additional deposit payable by the parties in accordance with the agreement between the parties or the KLRCA's schedule of fees in the absence of any such agreement.

- Sub-section 7 has been added to state the requirement of making the disbursements to the arbitrators by the parties in equal shares. Such disbursements to the arbitrators shall be made on a per diems basis based on the disbursement policy published by KLRCA from time to time.

8.0 APPENDIX C: NOTES ON SCHEDULE OF FEES

- Sub-section 1 specifies that registration fees are payable by the Claimant and that is non-refundable and not subject to any deductions.

- Sub-section 2 deals with arbitrator's fee and disbursements to arbitrators in the following manner:-

  - arbitrator's fee does not include any taxes and that the arbitrator shall be responsible to pay any such taxes personally.

  - lays down the requirements and procedure for the disbursement of the arbitrator's expenses based on actual costs incurred for out-of-pocket expenses and per diem for accommodation and travel.

  - such expenses shall have to be borne by the parties in equal shares and shall be in addition to the arbitrator's fees.

  - arbitrator's fee shall only be payable upon the receipt of the final award by KLRCA and in no case, any interim payments shall be made to the arbitrator. Further, in cases where the tribunal consists of a panel of 3 arbitrators, the arbitrator's fee shall be divided in the ratio of 40% to the chairman and the remaining 60% to be divided equally among the co-arbitrators.

- Sub-section 3 has been introduced to clarify the components of KLRCA's administrative costs. It also states that the KLRCA's administrative costs shall not include other services such as rental of facilities, refreshments etc. which shall be chargeable on the requesting party separately.

- Sub-section 4 lays down the administration and management of the Advance Preliminary Deposits requested from the parties.

KLRCA Signs Collaboration Agreement with Haikou Arbitration Commission

The Director of KLRCA, Mr Sundra Rajoo was in Haikou from 25th to 28th March 2012 to attend the Launching Ceremony of the Huanyu Centre for China-Asean Legal Cooperation. The establishment of the Centre was a result of the China Law Society's proposal to set up a centre to promote legal cooperation between China and ASEAN countries. The idea was mooted at the 5th China-ASEAN Forum on Legal Cooperation and Development held in Kuala Lumpur, Malaysia in September 2011, and received enthusiastic support from representatives of the legal circles of China and the ten ASEAN countries.

During his visit, the Director also signed a collaboration agreement between KLRCA and the Haikou Arbitration Commission (HAC). Among the contents of the agreement are for HAC and KLRCA to consider the use of their respective arbitration centres as alternative venues for administered proceedings. HAC and KLRCA will also jointly organise seminars/ conferences/ educational programmes on arbitration and alternative dispute resolution (ADR) from time to time.

CIPAA and Beyond Talk

3 MAY 2012

The practical considerations in moving forward with the Construction Industry Payment and Adjudication Bill 2011 (CIPA), which has been passed and received the Royal Assent on 22 June 2012, and its legal implications to the construction industry, were the main focus of the 'CIPAA & Beyond' talk, organised by KLRCA.

The half day talk, which was held at Wisma MCA, Jalan Ampang, saw a huge turnout with an attendance of more than 400 participants from different construction-related fields as well as the legal fraternity.

Mr. Sundra Rajoo, Director of KLRCA, imparted relevant points on how the public can prepare for the impending Act, such as practical guidelines before commencing adjudication. Meanwhile, author and arbitrator, Ir. Harbans Singh, provided the audience insight into how the Act will affect all construction contracts that are carried out in Malaysia, including government contracts.

KLRCA Evening Talk:

Rapid Real Time Dispute Resolution Processes in the Construction Industry: Time for Best Practice Protocols to be Adopted?

8 MAY 2012

It was a great turnout at the special evening talk on "Rapid Real Time Dispute Resolution Processes in the Construction Industry: Time for Best Practice Protocols to be Adopted?" which was held at KLRCA. Mr. Belden Premaraj, partner of Messrs. Belden, provided practical insight on Compulsory Fast Track Adjudication and Fast Track Arbitration Processes, The Standard of Documentary Proof and Time for Contractual Protocols on Variation, among others.

In the Seat — Vinayak Pradhan

Besides being one of Malaysia's leading advocates and solicitors for over 35 years, **Vinayak Pradhan** is also acknowledged by Chambers & Partners as being one of the most-in-demand arbitrators in Asia for international arbitration and was described as an "eloquent lawyer" and "a leading name in arbitration circles". Mr Pradhan was also named as one of the best Malaysian arbitrators in *The International Who's Who of Commercial Arbitration 2012* and sits on the KLRCA Advisory Board. He talks about his career and the future of arbitration in this exclusive interview.

ON HIS CAREER IN ARBITRATION:

"I drifted into arbitration in the late 1970s. In the course of doing litigation work, thanks to my mentor, Mr Stanley Peddie, I began to get involved in construction disputes. Standard form construction contracts invariably had and have arbitration clauses, and I started doing solicitor's work as well as appearing as counsel in construction arbitrations.

"Over the years, one of the results was that my court work began to diminish because of the demands of time for arbitrations, particularly as construction arbitrations could be quite involved and tended to take a long time.

"This led to my greater involvement in arbitrations, which also extended to commercial arbitrations. At some time during this process, I was appointed as an arbitrator in domestic arbitrations and, in the mid-1990s, I had my first appointment in an international arbitration. I should also mention that as a result of my appearing as counsel in international arbitrations, I was recommended for and was appointed as a Commissioner of the United Nations Compensation Commission in Geneva between 1998 and 2003. Since then, my work as an arbitrator has increased.

ON HIS CAREER PATH AND CHALLENGES FACED:

"I have been very fortunate in that I never had to make any compelling career decisions and more or less, drifted on a rudderless raft down the stream of my professional life without having any particular focus or ambition. The great challenges one faced were properly getting up the cases which one had to present to court and standing one's ground in the face of strong judges who made their views and feelings known."

ON HIS MOST MEMORABLE CASE:

"That's a difficult one – I cannot place any case as being more memorable than others. Nonetheless, the most significant case was when I was part of the Skrine team which acted for Tan Sri Wan Suleiman, the senior-most of the 5 Supreme Court Judges who were the subject of misconduct proceedings in 1988 before what is now known as the Second Tribunal. I have clear memories of the hearing which took place in the Public Accounts Committee Room of Parliament House, of the members of the Tribunal, the five Judges and of the lawyers for both sides who participated in this sad, unfortunate affair in which our leading judges were treated unjustly."

ON THE JOYS OF WORKING IN ARBITRATION:

"One of the major enjoyments of the arbitration process is attempting to understand different kinds of disputes and generally engaging with the lawyers concerned as well as experts and other professionals or businessmen who turn up as witnesses. Every case is different, and each case provides a different insight into human transactions and human behaviour.

"Another joy of working as an arbitrator is when you get competent counsel whose ability and advocacy make the hearing interesting as well as enable the arbitrator to deliver a better Award."

ON BECOMING THE FIRST MALAYSIAN TO BECOME THE PRESIDENT OF THE CHARTERED INSTITUTE OF ARBITRATORS IN 2013:

"This is a great honour but this is not an honour to me personally, but an honour to Malaysia and a reflection of the work and commitment of previous Chairmen of the Malaysian Branch of the Chartered Institute of Arbitrators.

"I feel humbled and warmed by the fact that the proposal was made by people in the Malaysian Branch of the Chartered Institute. At least one of whom could very easily have named himself and who, in fact, suggested that I should consent to my name being put up. It was also great to see that I had the support of various international branches."

ON WHAT HIS APPOINTMENT SIGNIFIES FOR MALAYSIA:

"It is a recognition that Malaysia can hold its own in the international arbitration community. I am not going to say it puts Malaysia on the map, so to speak, as that has already been done through the efforts of the past Chairmen and officials of the Malaysian Branch.

"It does, however, emphasise Malaysia to the 12,000 odd members of the Chartered Institute. As a consequence of my appointment, it is likely that Malaysia will again be given the honour of organising an international conference in Kuala Lumpur in August next year, which should see people from various countries participating and hoping to meet Malaysians involved or showing interest in arbitration.

"It is an opportunity to demonstrate that there is no reason why Malaysians cannot be appointed as arbitrators in respect of disputes in other parts of the world where there is a necessity to appoint an arbitrator from a neutral country."

ON THE STATE OF ARBITRATION IN MALAYSIA:

"There is a big divide between international arbitrations and domestic arbitrations. A number of domestic arbitrations seem to have remained mired in the bad habits of the past when one could get a repetitious cross-examiner delving into every irrelevant detail.

"There are, however, some changes and one does see a greater use of written witness statements and a dispensation with examination-in-chief. Perhaps, these developments have been helped by the fact that courts have now adopted these procedures, and practitioners no longer can resent spending time doing the solicitor's work which is necessary to achieve detailed written statements.

"However, a number of procedures that save time and costs, and that are customarily and commonly used in international arbitrations – such as the tendering of witness statements responsive to initial statements of evidence, having limited discovery, and having the case run on a limited time basis in which the available hearing time is divided equally between the parties – are still being resisted by lawyers when they deal with domestic arbitrations.

"On another aspect of arbitration, many solicitors drafting arbitration clauses have very little idea of arbitration processes or even of available arbitration alternatives, and this has not changed significantly over the years. Nonetheless, there is a greater consciousness of the availability of arbitration, and more lawyers are getting involved both as counsel and as arbitrators.

"This is being particularly helped by the fact that the present Director of the KLRCA, Datuk Sundra Rajoo, is now the default appointing authority for arbitration and has various lists from which he can pick a suitable person as arbitrator. Datuk Sundra has made it a point to appoint as many people as possible as arbitrators with the result that a talented base of experienced arbitrators is now being created in Malaysia."

ON THE POTENTIAL GROWTH OF ARBITRATION IN MALAYSIA:

"The potential for growth is enormous, as has been said fairly frequently. Whether this is achieved will depend on various factors.

"One of the critical factors is the attitude and policy of the courts in relation to arbitration awards, particularly international arbitration awards. In Singapore, for example, international arbitration awards are rarely interfered with by the courts, and this is a known consideration with international investors.

"It is good to see, particularly with the Arbitration Act 2005, that the courts appear to be more conscious of recognising that they should not interfere with an arbitration award and should allow registration and enforcement except in the clearest of cases where things have manifestly gone horribly wrong.

"Apart from that, Malaysian lawyers have the opportunity to grow their firms or practices to show that they can compete on equal terms with lawyers from foreign jurisdictions who are recognised as experts in handling arbitration cases. Malaysian arbitrators, in turn, must be conscious that they should conduct their cases in a manner which will not attract serious adverse criticism."

ON WHAT QUALITIES AN ARBITRATOR SHOULD HAVE:

"The first one is, of course, integrity. To that, I would add the quality of being patient but firm and of having a judicial temperament. I also believe that one's function is to resolve the dispute between the parties as expeditiously as the parties want it and not to override the parties' joint agreement on any matter. Party autonomy is something which I believe all arbitrators should respect."

ON WHAT ASPIRING ARBITRATORS SHOULD DO:

"I have always had the view that if one has been a foot soldier in legal battles as solicitor, counsel or assisting professional consultant, it will be easier to become a good arbitrator as one would understand dispute resolution from a litigant's perspective. One understands when a lawyer is trying his luck and when there are genuine difficulties.

"My suggestion is that lawyers and other professionals who want to become arbitrators should spend as much time as possible in their younger years acting for a disputant in arbitral proceedings and gaining invaluable experience. In the old days, arbitrators from the Bar were appointed by their adversaries in court who had observed the manner in which they had conducted their cases and had gained some insight into the capability and integrity of the arbitrator.

"Apart from this, potential arbitrators should get involved in international institutes, such as the Chartered Institute of Arbitrators which provides excellent training programmes and literature and also with the Malaysian Institute of Arbitrators which has seen a new drive in the last few years.

"Further, if you want to be an arbitrator, do not look to the fees you expect to earn from the case. One should not be driven by that. Prospective arbitrators should bear in mind that their function is to do justice between the parties and their monetary gain from it is incidental to the process, not its focus."

Dispute Resolution for the Construction Industry in Malaysia

BY DATUK SUNDRA RAJOO

OVERVIEW OF CONSTRUCTION INDUSTRY IN MALAYSIA

The year 2012 will mark a very high growth in the construction industry. The industry is expected to grow at the rate of 7%, higher than any other industry and will contribute extensively to the overall GDP of the country at the target rate between 5.5 to 6.0%. [1]

The government of Malaysia is cautious with the impact to the economy resulting from the rise in inflationary percentages due to the increase in commodity prices and European debt crisis. In its budget plans for the year 2012, the government had incorporated a "stimulus package" with substantial allocation for the construction industry and introduced a number of incentives to attract foreign investors.

A number of major construction projects such as the RM40bil MRT Project have been approved. This project itself is set to increase the property values and encourage development along the proposed MRT Lines. Other infrastructure projects include the Gemas-Johor Bahru double track rail project, new highways (Lebuhraya Pantai Timur Jabor-Kuala Terenggany; Lebuhraya Pantai Barat Banting-Taiping, Segamat-Tangkak, Central Spine) creating greater accessibility and spur development in new areas.

INCREASED PARTICIPATION IN INTERNATIONAL CONSTRUCTION PROJECTS

Malaysian construction companies have started to move beyond the home ground to working at global scale. There has been a serious increase in participation in international construction projects. MATRADE reported that Malaysian construction companies have an international project portfolio worth USD 15bil mainly in infrastructure.

For example, Malaysian expertise in infrastructure building has been deployed to 73 projects across the Middle East, including landmark initiatives such as Burj Khalifa, Al Reem Island, Dubai Metro, Dubai Mall and Meydan Race Course.[2]

Another example is India, where Malaysian companies have so far completed 51 construction projects worth USD2.33bil while 21 projects valued at USD2.28bil are currently under various stages of implementation. Some of the examples include Scomi Engineering Bhd's involvement in the Monorail Project in Mumbai with a RM2 bil contract award, Ranhill Utilities Bhd's joint venture in a project to lease and build water treatment plants in West Bengal, and IJM Corp Bhd's participation in a major highway project worth RM500mil in Andhra Pradesh.

1 StarProperty.my Budget 2012 boost to property and construction sectors by Datuk Abdul Rahim Rahman, Oct 29,2011.

2 StarBiz.Malaysia pushing for more Middle East construction projects, March 30,2010.

According to a recent report on the global construction market, it has been estimated that construction activity in the key developing markets in China, India, Asia Pacific, Middle East, Africa, parts of East Europe and South America will grow at a staggering 110% (representing over 55% of global construction activity) over the next 10 years. This will create a US$7 trillion market in those developing economies.

Considering the massive growth of the industry in both the local and international front, Malaysia has been proactively making available swift and effective mechanisms for dispute resolution and in dealing with the legal implications. This is certainly as important as the financial incentives and stimulus for economic growth.

The liberalisation and opening up of services globally calls for attention to a key area pertaining to dispute resolution, which is the recognition and enforcement of judgements and decisions made in countries other than the home countries. For this the New York Convention is considered as one of the best innovative inventions, providing great solution to inter-nation business relationship and economic globalisation.

TRANSFORMATION IN THE MALAYSIAN DISPUTE RESOLUTION FRAMEWORK

We have seen a transformation from 2010 in terms of the focus given and the increasing need to improve the platform and framework for alternative dispute resolution in Malaysia. There has been legislative changes, extensive support and incentives to the Kuala Lumpur Regional Centre for Arbitration (KLRCA) for improvement of services and facilities and a welcoming change in the Judiciary's attitude towards alternative dispute resolution (ADR).

In construction-related disputes, arbitration stands out as a popular mode of ADR. It is not even considered as "alternative" nowadays because it has its own unique features and effectiveness. It is extensively used in construction industry in Malaysia due to the use of standard forms in building contracts. The typical standard forms used in the industry provide for arbitration – for example, the Public Works Department forms, the Malaysian Institute of Architects forms for public and private sector works, and the International Federation of Consulting Engineers (FIDIC) forms for International Projects.

Last year, the Malaysian Arbitration Act 2005 was amended by the Arbitration (Amendment) Act 2011 which came into operation 1st July 2011. This change was much awaited for and effectively resolved concerns caused by the drafting of the 2005 Act. With the amendment, the courts are now allowed to stay proceedings and grant interim measures in respect of international arbitrations with a seat outside of Malaysia.

Furthermore, an award made in an international arbitration with its seat in Malaysia would now be enforced by the Courts. The Amendment Act has also moved closer to the Model Law. The courts ability or power to intervene in arbitration is now strictly limited to those areas covered under the Act. This restricts the inherent jurisdiction of the courts and would ultimately reduce the uncertainty in case law.

EVOLUTION OF THE MALAYSIAN JUDICIARY

The current attitude of the Malaysian Judiciary is towards giving effect to parties pre-agreed dispute resolution mechanism, unless the courts finds that the agreement is null and void, inoperative or incapable of being performed. There are a number of recent cases where the courts maintain that it is mandatory to stay court proceedings when there is an arbitration agreement.

The courts take a more pro-enforcement stance of arbitral awards, are very slow to interfere and recognise the benefits of ADR for settlement of disputes. New commercial courts have been introduced to improve the time taken by courts to hear a matter or decide on interim reliefs. The courts system has improved tremendously, which we see as a positive development towards working hand in hand with other forms of ADR mechanism complementing the chain of a multi-tier dispute resolution process.

KLRCA'S ROLE IN CONSTRUCTION INDUSTRY

KLRCA has a set of Fast Track Rules (FTR) that deal with disputes which are of smaller quantum and less complex. FTR as the name suggests, provides for the resolution of dispute within 140 days. It also allows for document only arbitration for a shorter duration of about 90 days.

The arbitration fees under the FTR have been reduced to ensure that it is affordable and widely used. The rules are extremely suitable to be applied for the construction industry especially for dispute relating to payment in the course of a project. Not only it provides a quick process but there is finality.

For payment disputes, despite the changes to the law, improvement to the courts system and having in

place good services and facilities for arbitration, the construction industry still faces problems in the swift resolution of disputes relating to payment in the course of a project. Arbitration or litigation is usually a last option when parties are unable to resolve the dispute and is ready to terminate the contract. However in a typical construction project, disputes relating to payment commonly arise in the course of the works.

Another recent advent in Malaysia, forming an alternative not only to courts, but to arbitration as well, is Statutory Adjudication. Malaysia will soon follow the likes of the United Kingdom, Australia, New Zealand and Singapore. The Construction Industry Payment and Adjudication Act (CIPAA) has been gazetted on 22 June 2012 and is expected to be effective by early 2013.

Payment default has been the main issue of dispute in the construction industry. Surveys were carried out by the construction industry itself, namely, Construction Industry Development Board (CIDB) and the Master Builders Association Malaysia (MBAM), to determine the root of the problem and all roads led back to payment default.

Delayed payment, non-payment and conditional payment namely 'pay when paid' and 'pay if paid' have severely crippled the construction industry. Payment default triggers a domino effect in the construction industry affecting all the players. The main reason for this is because construction projects especially mega projects are stretched over long periods of time and involves a large sum of monetary payment per progress payment. Hence, any delay or payment on condition would inadvertently have a huge impact on the construction project.

This form of dispute is nothing new or related solely towards mega construction projects alone. Experience from other countries showed that the consequences of payment default can result in insolvencies. Several countries in the world namely the United Kingdom, several States and Territories in Australia, New Zealand and Singapore have taken these problems to heart and have enacted specific legislation to deal with disputes of this nature in the construction industry.

The United Kingdom enacted the Housing Grants, Construction and Regeneration Act 1996, Australia saw the advent of the Building and Construction Industry Security of Payment Act 1999 amended in 2022 (NSW), Building and Construction Industry Security of Payment Act 2002 (Qld), Construction Contracts Act 2004 (WA), Construction Contracts (Security of Payment) Act 2004 (NT), New Zealand enacted the Construction Contracts Act 2002 and Singapore ushered in the Building and Construction Industry Security of Payment Act 2004.

THE MALAYSIAN CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT (CIPAA) 2012

The construction industry has been pushing for statutory adjudication since 2003 to address the cash flow problems plagued by the industry. The primary objective of the proposed Act is to address critical cash flow issues in the construction industry. It aims to remove the practice of conditional payments ('pay when paid' and 'pay if paid') and reduce payment default by establishing a cheaper, speedier system of dispute resolution in the form of adjudication. According to the provisions of CIPAA, every construction contract made in writing that relates to construction work carried out in Malaysia would be affected by the regime of adjudication.

This would essentially mean that if you have entered into a construction contract and there is a problem with regards to payment, an adjudication process can be commenced either by you or against you. A construction contract can be a construction work contract and or a construction consultancy contract.

To this extent, the parties will be subjected to compulsory adjudication or statutory adjudication. This would mean that both parties will be brought into the adjudication process which is dictated by the provisions of CIPAA. The provisions of CIPAA does not, however, affect natural persons entering into a construction contract in respect of a building wholly intended for his own occupation, and is four storeys and below.

The purpose of adjudication is to expedite cash flow and facilitate payment in the construction industry. Parties are free to opt for arbitration or court litigation to deal with the legal matters concerning the same. CIPAA simply provides a statutory right for the parties to demand payment for work done and to create a simple process to ensure that a decision and payment is made. This, of course, is in the form of adjudication as a process.

In fact, the parties can commence adjudication and concurrently arbitrate or litigate the matter as well. Of course, common sense would dictate that the adjudication process will be terminated if the dispute is decided by arbitration or the court before the adjudication decision can be made. If however, the adjudication decision comes first then it is a binding decision and payment must be made.

ADJUDICATION AS A MEANS OF DISPUTE RESOLUTION IN THE CONSTRUCTION INDUSTRY

Although construction disputes can be solved by either going to court or arbitration, the industry is keen for an alternative form of dispute resolution, one that is contemporaneous, speedy and economical.

This is why adjudication is apt. It is a means of dispute resolution that allows a party (the claimant) who are owed monies under a construction contract to promptly obtain payment from the respondent, based on an assessment of the merits of the claim by an appropriately qualified and independent adjudicator.

In short, adjudication describes the dispute resolution process for construction disputes. It is not possible to contract out of the Act. The adjudication process is prescribed by CIPAA itself. Unlike arbitration or mediation, adjudication does not require the parties' agreement for the process to begin. As such, once either party opts for adjudication it becomes a compulsory process wherein both parties are involved whether they agree to or not.

In the United Kingdom, the adjudication process was described by UK arbitrator and adjudicator, Tony Bingham as "[A] dispute management process which dramatically improves upon litigation performance and saves huge resources in public money. The UK Courts are relieved of mass expenditure. The new system of Adjudication is cost effective and recommended world-wide. This machinery coupled with the new Payment Provisions has improved UK construction beyond all expectations... even the lawyers are delighted, though surprised at its success."[3]

Adjudication is not a dispute resolution system that provides the adjudicator with the luxury of time to hear all the parties and listen to evidence in great detail akin to an arbitration or court trial. A list of powers granted to the adjudicator can be found in the Act.[4] Some of the procedures adopted by the adjudicator, besides conducting a short trial would be to review the construction contract and other documents[5] to decide whether there is compliance with the standard of work required by that contract. The Evidence Act 1950 does not apply to adjudication proceedings under this Act.[6] The adjudicator can also visit the construction site to investigate the dispute[7]. The adjudicator would then give a decision with the primary aim to alleviate cash flow problems between the disputing parties and to remove payment conditions[8] such as 'pay when paid' and 'pay if paid'.

Adjudication is a dispute resolution system that is intended to be simple and fast. The process as prescribed by the Act is concise and the time accorded to the adjudicator to produce the written decision itself is forty five (45) days from the receipt of the adjudication reply or response unless the parties extend the time.[9] The entire process promises an outcome within an approximate one hundred (100) day time frame from the day the payment claim is served until the decision is passed. This would ensure that the cash flow problems in the construction industry can be dealt with swiftly.

Hence although the role of adjudication is limited to these circumstances as prescribed by the proposed Act, the adjudicator provides fast justice to the parties. Adjudicators are to always act independently, impartially and in a timely manner. The principles of natural justice are strictly followed and if there is any conflict of interest, the adjudicator should resign from office unless the parties agree otherwise.[10]

Statutory adjudication has the following characteristics -

1. It is a mandatory and statutory process that does not require the agreement of the parties' to commence the process.

2. It offers a much faster process compared to arbitration and court litigation because the time frame is as prescribed by the proposed CIPAA itself. It is the only form of dispute resolution that has a statutory time period in which the dispute must be resolved in forty five (45) working days from the receipt of the adjudication reply or response.

3. It provides a binding decision on a payment dispute.

4. The parties can choose their own adjudicator or request for the Director of KLRCA to choose an adjudicator on their behalf.[11]

3 Bingham T, Adjudication and Claim Settlement for the Construction Industry, Seminar, Kuching, Sarawak, 14 April 2001, < *http://www.nadr.co.uk/articles/published/Adjudication/ConstructionBetterBuilding.pdf*>, (accessed on 30 Jan 2012)
4 Section 25 Powers of the adjudicator, CIPAA
5 Section 25(m) CIPAA
6 Section 12(9) Adjudication and decision, CIPAA
7 Section 25(h) CIPAA
8 Section 35 Prohibition of conditional payment, CIPAA
9 Section 12(2) Adjudication and decision, CIPAA
10 Section 24 Duties and obligations of the adjudicator, CIPAA
11 Section 21 Appointment of adjudicator

In short, the focus is primarily and steadfastly on removing cash flow problems in the construction industry by helping move things along by dispensing fast decisions on payment disputes alone. It was never meant to be a process that allows the parties the luxury to ventilate every single proposition in great detail unlike litigation in court or arbitration for that matter. A dispute referred to adjudication can, at the same time that the adjudication is taking place, also be referred to mediation, arbitration or litigation.[12] This does not bring the adjudication to an end or 'affect it'.[13] However, if another form of dispute resolution determines the matters first, the adjudicator must terminate the adjudication.[14]

THE EFFECTIVENESS OF STATUTORY ADJUDICATION VIA CIPA 2011

Statutory adjudication is simply an adjudication process prescribed by statute. Parties who are compliant with their construction contract have no need to fear. However, parties who are non-compliant would now be subject to statutory adjudication as the aggrieved party will as mentioned above, trigger the adjudication process.

The more pertinent question at this stage, is whether this new form of statutory adjudication is the key answer to solving disputes for the construction industry? Lessons from other countries seem to suggest that adjudication is an effective method and their construction industry has benefitted from it. Literature from Australia, United Kingdom, New Zealand and Singapore has indicated a successful, swift and cost-effective resolution of disputes in each relevant jurisdiction (Dancaster, 2008[15]; Uher & Brand 2008[16]; Kennedy-Grant, 2008[17]; and Chan, 2006[18]). In the UK, adjudication is now being used more extensively than anticipated (Kennedy, 2006[19]). In New Zealand, anecdotal evidence suggests that there has been a positive change in the culture of payment since the introduction of adjudication under the Construction Contracts Act 2002 (Kennedy-Grant, 2008). Similarly in Singapore, adjudication as underpinned by the Building and Construction Industry Security of Payment Act 2005 has had a positive impact on the industry players' mindset towards payment (Teo, 2008[20]).

Many believe that adjudication is a new layer to the method of dispute resolution in Malaysia. It is definitely not a pre-condition to a court litigation, arbitration or mediation for that matter, nor does it prevent parties from using those forms of dispute resolution means. For all intents and purposes, it does not replace the existing dispute resolution systems but merely adds on to it. It provides the parties with another useful form of dispute resolution which promises to be fast, cheap and effective. It allows the aggrieved party to trigger the statutory adjudication process.

First and foremost, the Act applies to every construction contract made in writing relating to construction work carried out wholly or partly within Malaysia including Government contracts.[21] Construction contracts include construction work contracts and construction consultancy contracts. The Act is wide ranging and covers inter alia, the oil and gas industry, petrochemical, telecommunication, utilities, infrastructure, supply contracts, project and management. However, only written contracts are subject to the provisions of CIPAA which is a cause of concern as some parties may escape the clutches of CIPAA especially if their work instructions are not properly documented in written format.

CIPAA enables either the unpaid party or a non-paying party to refer the dispute arising from a payment claim to adjudication.[22] As such, this enables either party to bring an action in adjudication. Reference can be made to a research paper by M.E. Che Munaaim[23], where he stated that the key features of the effective operation of an adjudication regime is that firstly adjudication should be used to help the right vulnerable parties which are contractors, subcontractors, consultants and suppliers. Employers may also be equipped with the right to adjudication to enable them to claim ex-contractual claims. In other words, adjudication should be accessible to both parties to prevent a severe imbalance.

12 Section 37 Relationship between adjudication and other dispute resolution process
13 Section 37(2)
14 Section 37(3)
15 Dancaster, C. (2008). Construction Adjudication in the United Kingdom: Past, Present, and Future. *Journal of Professional Issues in Engineering Education and Practice*, *134* (2), 204-208.
16 Brand, M. C., & Uher, T. E. (2008). Review of the Performance of Security of Payment Legislation in New South Wales. *RICS Construction and Building Research Conference 2008 (COBRA 2008).* Dublin: Royal Institution of Chartered Surveyors (RICS).
17 Kennedy-Grant, T. (2008). Adjudication: The New Zealand Position. *Construction Law Journal , 24* (5), 382-409.
18 Chan, P. C. (2006). Security of Payment Legislation - Case of a Blunt but Practical and Equitable Remedy. *Journal of Professional Issues in Engineering Education and Practice ,132* (3), 248-257.
19 Kennedy, P. (2006). Progress of Statutory Adjudication as a Means of Resolving Disputes in Construction in the United Kingdom. *Journal of Professional Issues in Engineering and Education Practice , 132* (3), 236-247. p. 244.
20 Teo, P. J. (2008). Adjudication: Singapore Perspective. *Journal of Professional Issues in Engineering Education and Practice , 134* (2), 224-230.
21 Section 2 Application
22 Section 7 (1) Right to refer dispute to adjudication
23 Che Munaaim, Key Features to an Effective Adjudication Regime, AUBEA Conference, Melbourne July 2010, *www.msd.unimelb.edu.au/events/conferences/aubea2010/*, (accessed 30 Jan 2012)

Understandably, adjudication must be speedy - however, this does not mean that the entire system must be rushed. Compared to other jurisdictions in the world, which have a basic 28 day turnaround time for adjudicators to submit a decision, CIPAA allows for a 45-day period, thus providing ample time for careful consideration is granted.

Other jurisdictions have express stipulations against contracting out. In New Zealand, there is Section 12 of the Construction Contracts Act 2002 whereas in Singapore, there is Section 36 of the Building and Construction Industry Security of Payment Act 2004. There is no similar provision in CIPAA to prohibit a contracting out from the Act.

Nonetheless, on considering the spirit of CIPAA and construing it as a whole, in particular Section 2 connoting the strict application, Section 35 on the prohibition of conditional payment and Section 40 which deals with the exemption exercised by the Minister, it appears to be little room is given for any attempt to contract out of CIPAA. Perhaps the only avenue available to avoid the clutches of CIPAA is by seeking an exemption from the Minister under Section 40 itself. The extent of this exemption appears to be from all or any provisions of CIPAA. As such, it is a very wide power which needs to be exercised sparingly.

The definition of payment under Section 4 includes any payment for work done, for example, a construction work, payment for services rendered such as consultancy services, or work done or services rendered and stated in express terms of the contract including progress payment, final payment and variations. Payment for construction contracts outside the ambit of the definition in Section 4 or payment for work done or services rendered under implied terms, extra-contractual, common law, ex-gratia claims etc are not, however, included.

An effective and important provision in CIPAA is the prohibition of conditional payment following Section 35. Any conditional payment provision in a construction contract in relation to payment under the construction contract is void. This is as mentioned earlier the "pay when paid" and "pay if paid" clauses and reverses the judicial decisions in cases such as Pernas Otis Elevator CO Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Snd Bhd (2004)5 CLJ 34 and Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd & Ors (2010)3 MLJ 7. As a result, the pervasive unfair cash flow risk transfer practice prevalent in the construction industry is effectively curbed.

KLRCA has been named the official adjudication authority in Malaysia by virtue of Part V of CIPAA. As adjudication authority, KLRCA is responsible for the determination of the standard terms of appointment and fees of that adjudicator and the setting of the competency standard and the criteria required of an adjudicator in Malaysia. In setting the competency and criteria required for adjudicators in Malaysia, KLRCA will conduct an Adjudication Training Programme to enable proper certification for all future adjudicators. It is mandatory for all persons who are interested in providing adjudication services to participate in the programme.

The Adjudication Training Programme will consist of specific lectures on the workings of the CIPA Act, specific lectures on key legal areas/key areas in construction matters, training on writing adjudication decisions and a written examination which includes the drafting of a mock adjudication decision. Those who have successfully completed the KLRCA Adjudication Training programme will be awarded with a Certificate of Adjudication and would be eligible to apply to join the panel of KLRCA Adjudicators. The criteria to be an adjudicator include a relevant degree or diploma, a certain number of years' experience in the building and construction industry and a Certificate of Adjudication from KLRCA. This would effectively ensure that the quality of adjudicators is of the highest standard possible.

KLRCA has also been tasked with providing administrative support for the conduct of adjudication and any functions as may be required for the efficient conduct of adjudication as prescribed by the Act.

Employers and those in the construction industry or related industries must be well prepared to handle the effects of the Act whether commencing an adjudication or defending themselves against an adjudication action. Certain sectors of the industry felt that more could have been done. Be that as it may, what is important is that the problems highlighted by the parties in the construction industry are being dealt with seriously.

The construction industry in Malaysia is seeing great transformation in its dispute resolution framework. Special attention is given to resolving the industry's main problem relating to timely payment. An effective, swift and robust dispute resolution method is a need of the hour in ensuring that the industry grows at a world class level.

Effective Dispute Resolution for Corporate Malaysia

KLRCA organised a high-level forum to educate Malaysian companies on the alternative dispute resolution (ADR) options available to settle domestic or international commercial disputes. The seminar entitled "Effective Dispute Resolution for Corporate Malaysia" which was held on the 25th of April 2012 at the Kuala Lumpur Convention Centre, saw a turnout of more than 300 participants comprising senior corporate counsels and legal advisors from various industries as well as lawyers, arbitrators and other members of the legal fraternity and educational institutions.

Supported by the Malaysian Bar and moderated by top Malaysian litigator Tan Sri Dato' Cecil Abraham, a panel of distinguished speakers discussed the alternative dispute resolution (ADR) methods that can be adopted by large Malaysian companies to resolve their business disputes, as opposed to resorting to litigation and going to court.

The speakers comprised legal luminaries led by Tun Dato' Seri Zaki bin Azmi, former Chief Justice of Malaysia and Chairman of ASEAN Law Association (Malaysia), who spoke on how recent reforms in the Malaysian Judiciary have impacted on the resolution of commercial cases. Mr. Sundra Rajoo, Director of KLRCA discussed international commercial arbitration in Malaysia and its benefits for Malaysian businesses, while Mr. Lim Chee Wee, President of the Malaysian Bar touched on the user's perspective of dispute resolution in Malaysia.

In his welcoming remarks, Tan Sri Cecil Abraham said, "As Malaysia progresses into a developed nation and we increase our commercial transactions within and across borders, it is only natural that we also see an increase in business disputes. As such, it is pertinent that Malaysian companies know their legal rights and what options are available to them when it comes to settling disputes."

Having held similar events in China, Korea and India to promote Malaysia as an alternative dispute resolution hub in the region, KLRCA plans to organise more seminars locally to heighten the awareness among Malaysian corporations on the advantages of ADR.

Kuala Lumpur Official Host of Alternative Hearing Centre for Court of Arbitration for Sport

Joining an exclusive circle of a select few, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) has signed an agreement with the Switzerland-based International Council of Arbitration for Sport (ICAS) to serve as the official host of an alternative hearing centre for the Court of Arbitration for Sport (CAS), in Kuala Lumpur.

Sundra Rajoo, Director of KLRCA, and Matthieu Reeb, ICAS Secretary General sealed the deal in a signing ceremony held on the 8th of May 2012 at Carcosa Seri Negara, attended by members of the sports and legal fraternity, including Tun Dato' Seri Zaki bin Azmi, former Chief Justice of Malaysia; Dato' A. Sani Karim, Deputy President of the Olympic Council Malaysia; Lim Chee Wee, President of the Malaysian Bar, as well as other stakeholders.

The CAS alternative hearing centre in KLRCA will manage sports disputes through arbitration or mediation according to international sporting rules, including cases pertaining to doping charges, television rights and sponsorship contract issues.

According to the agreement, in addition to the arbitration sessions, ICAS may utilise KLRCA to organise meetings, seminars and any other activities related to the development and promotion of sports' legal aspects in the region.

The Court of Arbitration for Sport (CAS), headquartered in Lausanne, Switzerland, is an institution independent of any sports organisation which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world. The CAS was created in 1984 and is placed under the administrative and financial authority of the International Council of Arbitration for Sport (ICAS). In 2011, the CAS registered 365 arbitration procedures.

KLRCA Co-Organises Diploma in International Commercial Arbitration

From April 7 to 13, the Centre was the venue for aspiring arbitrators who signed up for the Diploma In International Commercial Arbitration, which was co-organised by KLRCA and the University of New South Wales with the Chartered Institute of Arbitrators (CIArb).

There were more than 20 participants from Malaysia, Australia, Switzerland, China, Qatar and Mongolia with a lecturer panel made up of distinguished and renowned international arbitrators. Following an intensive week of classes and tutorials, the participants then went to the historical town of Melaka, where more classes were held. The second location provided a more relaxed environment and gave the participants a much-needed change of air in order to prepare for the amount of learning that they did.

The participants have since taken their Practice and Procedure of Arbitration exam and are expected to the Award-Writing exam later in the year.

Arbitration Case Law: Developments in Malaysia

DUTA WAJAR SDN BHD V PASUKHAS CONSTRUCTION SDN BHD & ANOR [2012] MLJU 355

FACTS:

The defendants were awarded a construction contract by a company called MTM Milennium Holdings Sdn Bhd. The defendants later invited the plaintiff to tender a quotation for certain works on the project site. Eventually, the plaintiff and defendants entered into a sub-contract agreement. The dispute arose because the defendants alleged that the sub-contract was in writing and was entered into by parties on 16 October 2007, whereas the Plaintiff contended that the sub-contract was not in writing and an agreement had already been entered into prior to 27 August 2007.

The sub-contract contended by the defendants had an arbitration clause. However, the plaintiff had begun work since 27 August 2007. A dispute then arose between the parties, and the defendant made an application to stay proceedings pursuant to Section 10 of the Arbitration Act. The Senior Assistant Registrar dismissed the application to stay but the stay was granted on appeal to the High Court.

ISSUE:

The issue was whether or not there was an existing arbitration agreement between the parties.

HELD:

The Court of Appeal stated that based on the evidence, there was a contractual relationship that existed even before 27 August 2007. There was no evidence that this agreement was in writing but it was pursuant to the sub-contract that the plaintiff commenced work on 27 August 2007. Thus, as there is already an existing contract, the defendants could not impose another agreement unless the plaintiff agreed to be bound. By refusing to sign the second contract, the plaintiffs had disagreed with the terms. It was further held that the existence of an arbitration agreement in writing must be clearly established, particularly where the party intending to establish that fact is relying on circumstantial evidence. The evidence must be clear.

DATO' DR. MUHAMMAD RIDZUAN BIN MOHD SALLEH & ANOR V SYARIKAT AIR TERENGGANU SDN BHD [2012] 3 MLJ 737

FACTS:

Parties went to arbitration to resolve a dispute. There were two plaintiffs and one defendant, and the dispute involved a Joint Venture Shareholder's Agreement. Mid-way through the arbitration, on the advice of the arbitrator, the parties entered into a consent award agreeing to negotiate a settlement. It was later discovered that after his appointment, the arbitrator was appointed as a Non-Independent, Non-Executive Director and a Member of the Credit Review Committee of Malayan Banking Bhd (the bank which had financed the Joint Venture Shareholder's Agreement).

ISSUE:

The plaintiff applied to court for the consent award and the award on costs to be set aside on grounds of breach of natural justice. The court had to decide whether or not an award registered in court can be set aside and if the 90 days' time frame pursuant to Section 37 of the Arbitration Act 2005 can be extended.

HELD:

The High Court agreed that there was a discernible difference between a peremptory "shall" and a permissive "may". "Shall" indicates that something is mandatory whereas the latter is not. Thus, the former would take away the discretion for an extension of time whereas the latter leaves room for the exercise of discretion. According to the High Court, Parliament could have used "shall" if they had wanted to make the time limit absolute. Hence, the 90 days' time frame in Section 37 can be extended.

On the issue of whether an award registered in court could be set aside, the High Court considered previous case law which gave rise to the principle that there are exceptions to the finality of a final order if a judgment had been made in absence of a party and where a decision is null by reason of want of jurisdiction or illegality.

Based on these considerations, the High Court held that the award can be set aside. The plaintiff had earlier submitted that since they only found out about the arbitrator's interest after the award had been registered, they were unable to ask the arbitrator to recuse himself or to challenge the appointment of the arbitrator. In this matter, that the arbitrator continued to act after becoming aware of a circumstance that may give rise to justifiable doubt as to his impartiality or independence goes to the core of his appointment and strikes at the very issue of lack of jurisdiction. Hence the award and later, the order given after registration of the award were tainted.

It was also established by the High Court that the arbitrator had a continuing duty of disclosure until the conclusion or termination of the arbitral proceedings. The fact that MBB was a financier of the project was sufficient nexus compelling disclosure. This was a nexus that raised the likelihood of circumstances giving rise to justifiable doubts as to the arbitrator's impartiality and independence. All that was necessary to trigger disclosure is 'justifiable doubt' or 'reasonable suspicion'. A finding of certainty is not necessary.

COAL INDIA V CANADIAN COMMERCIAL CORPORATION (20TH MARCH 2012 AP NO 172 OF 2002)

FACTS:

This was a case concerning ICC arbitration with the seat of arbitration being Geneva. The arbitration had resulted in an award in favour of the Canadian Commercial Corporation and Coal India was now attempting to have the award set aside. The Canadian Commercial Corporation on the other hand insisted that Part I of the Indian Arbitration and Conciliation Act 1996 which allows the court broad interventionary powers did not apply where the place of arbitration was not in India.

HELD:

The High Court stated that "Courts in this country operating under the constitutional scheme of things do not have plenary, all-pervasive authority to receive any grievance and proceed to redress the perceived wrong".

Drawing distinctions between the proper law of the contract, the law of the arbitration agreement and the law of the arbitration, it was accepted that the seat of arbitration determines the governing law, notwithstanding that an agreement was concluded and executed in India.

It was also further held that the law of the arbitration being the closest law in connection with the award should be the law applied in assessing the validity of an award.

The High Court stated that given that the executive saw it fit to be a member to the New York Convention, it would be redundant for courts to give a judgment contradictory to State policy.

Nevertheless, it remains to be seen whether or not the Supreme Court of India will recognise this judgment in *Bharat Aluminium Company v Kaiser Aluminium Technical Services* which is currently being heard (as at 6 June 2012).

JOINT STOCK ASSET MANAGEMENT COMPANY INGOSSTRAKH-INVESTMENTS V BNP PARIBAS SA [2012] EWCA CIV 644

FACTS:

The issue before the Court of Appeal was against an anti-suit injunction which was made against a third party dismissing the judgment of a foreign court.

The matter in question was in relation to a Guarantee in a loan agreement between the 1st Defendant (D1) and the Respondent (R). The Guarantee stated that D1 would be liable to R (a bank) for certain liabilities of a subsidiary company. The Guarantee was governed by English law and had an arbitration clause submitting to LCIA Rules.

A dispute arose and R sought to enforce the Guarantee. D1, however, claimed that the Guarantee was invalid for want of consideration. The matter was brought to arbitration. However, the Appellant (A), a minor shareholder of D1, commenced proceedings in Moscow, Russia seeking to invalidate the Guarantee on the basis that under Russian Joint Stock Company Law, a General Meeting had to be held and the approval of the Board of Directors of D1 and its shareholders must be sought.

R then brought an anti-suit injunction action on A. The High Court granted permission for R to serve an anti-suit injunction against A on the basis that it had the jurisdiction as the issue had been submitted to arbitration, the decision of the Russian court may render the arbitration otiose. Also, there were serious issues to be tried as the High Court held that D1 and A were acting in collusion.

ISSUES:

The issues being heard before the Court of Appeal were:

a. Was there jurisdiction to grant the injunction granted by the High Court?

b. If so, was the judge entitled to exercise his discretion by granting the injunction?

c. Were the procedural requirements for the grant or continuation of the injunction satisfied?

There were also further subsidiary issues raised, such as considerations of comity excluding the grant of injunctive relief.

HELD:

Attempts to have an issue within an arbitration agreement decided by any other means is a breach, and courts will generally grant an anti-suit injunction against the party in breach. However, what was unusual in this case was that an injunction had been granted not only against a party to the arbitration agreement, but also against a non-party. Generally, a party not within the arbitration agreement should not be restrained from taking the issue to court simply because the issue in the proposed suit was already the subject of arbitration proceedings involving an associated company.

However in this case, given the circumstances such as the control D1 has over A, the improbability of such a minor shareholder as A bringing an action on its own, the timing of the claims and other factors, the Court of Appeal held that there was sufficient cause giving rise to a serious issue to be tried as to whether or not A and D were collusive. If this was so, it was unconscionable for A to bring and obtain a decision at the Russian courts as D1 had already submitted to arbitration.

A had also raised that the Russian proceedings had created an issue of estoppel. However, it was held that A had lost the Russian proceedings, and an issue of estoppel was not created by a decision against a successful party on an issue he had lost.

Finally, the Court of Appeal considered the issue of comity. Citing previous decisions, the Court of Appeal agreed that an anti-suit injunction always requires caution because it involves interference with the process or potential process of a foreign court. Hence, the stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention.

In this matter, that the A had in fact lost its case in the Russian court, the effect of comity was somewhat mitigated. Also, the parties had already expressly agreed in the Guarantee that the issues should be dealt by arbitration in England. If R's case was well founded, then A acting in collusion with D1 or on a joint venture would be party to the breach of the arbitration agreement made by D1. Hence, R was entitled to protection from that breach and in such cases, considerations of comity were of reduced importance. Thus R's right to anti-suit injunction was not precluded.

SAVE THE DATE!

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

DATE 14 – 15 JULY 2012
EVENT KLRCA Adjudication Conversion Course (KL) Session 1
ORGANISER KLRCA
VENUE Novotel Hotel, Kuala Lumpur

DATE 4 AUGUST 2012
EVENT The Construction Industry Payment & Adjudication Act (CIPAA) Roadshow #2
ORGANISER KLRCA
VENUE Bayview Georgetown, Penang

DATE 11 – 12 AUGUST 2012
EVENT KLRCA Adjudication Conversion Course (KL) Session 2
ORGANISER KLRCA
VENUE Renaissance Hotel, Kuala Lumpur

DATE 25 AUGUST 2012
EVENT CIPAA Roadshow #2
ORGANISER KLRCA
VENUE Novotel Hotel, Kota Kinabalu

DATE 5 SEPTEMBER 2012
EVENT KLRCA Fast Track Rules Talk
ORGANISER KLRCA
VENUE Renaissance Hotel, Kuala Lumpur

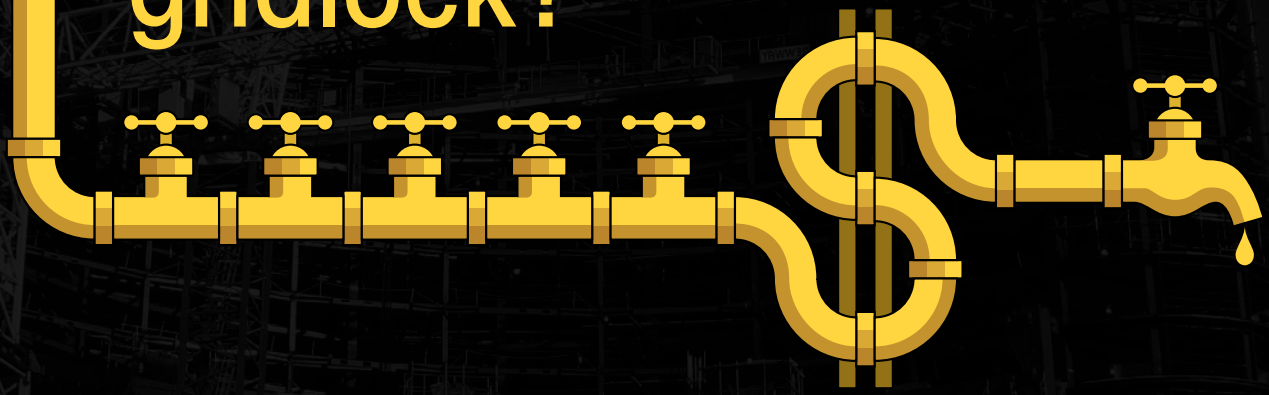
DATE 29 SEPTEMBER – 4 OCTOBER 2012
EVENT CIPA Training KL
ORGANISER KLRCA
VENUE Renaissance Hotel, Kuala Lumpur

DATE 24 OCTOBER 2012
EVENT CIPA Conference – Transformation by Statute: Compulsory Adjudication in the Construction Industry
ORGANISER KLRCA
VENUE Hilton Hotel, Kuala Lumpur

TRANSFORMATION BY STATUTE

COMPULSORY ADJUDICATION IN THE CONSTRUCTION INDUSTRY

Cash flow gridlock?



Attention Construction Industry Players!

Get ready for the most highly anticipated CIPAA conference of the year. Don't miss out on this opportunity to have a firmer understanding of the provisions of CIPAA and prepare for the revolution…

Programme Highlights:

- CIPA – The Past, Present and Future
- Getting down and dirty with CIPA
- Adjudication in Action (interactive session)
- Is the Construction Industry Ready for Statutory Adjudication?

24th Oct 2012
9:00am – 6:15pm
Hilton Kuala Lumpur

Conference fee: **RM 300**

More details available at
www.klrca.org.my

klrca
REGIONAL RESOLUTION GLOBAL SOLUTION

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION
No.12, Jalan Conlay, 50450 Kuala Lumpur T +603-2142 0103 F +603-2142 4513 E enquiry@klrca.org.my

www.klrca.org.my