

# BRIDGING BOUNDARIES

PIONEERING ISLAMIC ARBITRATION GLOBALLY

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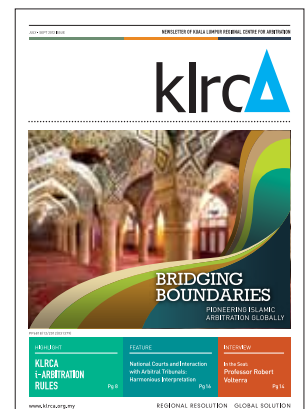
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# DIRECTOR'S MESSAGE

DEAR FRIENDS,



KLRCA has had an action-packed and eventful year so far, and we continue with the third quarter of 2012 has in the same vein with no signs of slowing down.

The highlight during this quarter has been the launch of the KLRCA i-Arbitration Rules on 20<sup>th</sup> September 2012 at the Global Islamic Finance Forum. It was a great honour and recognition for KLRCA to be invited to introduce our Shariah-compliant Rules to such an esteemed audience of global Islamic financiers and bankers. The launch also marked a historical milestone for arbitration as the KLRCA i-Arbitration Rules is the first set of rules in the world to adopt the UNCITRAL Arbitration Rules, while allowing for the resolution of disputes arising from any contract that may contain Shariah (Islamic Law) issues. A more detailed account of the Rules is featured in this issue.

In another significant development, as many of you would have been aware, on 22<sup>nd</sup> June the Construction Industry Payment and Adjudication Act (CIPAA) was gazetted and KLRCA has been named as the adjudication authority, a huge responsibility that was entrusted to us.

As part of our responsibility to train and certify adjudicators, two specially-tailored Adjudication Conversion Courses were conducted for KLRCA's Arbitrators, and the response was tremendous as you will see in the following pages. We will continue to train and certify more people from the construction industry, legal fraternity and the public through our Adjudication Training Programmes which will be run throughout the country from September 2012 until January 2013.

With CIPAA affecting both the private and public sector, KLRCA has not only been educating the public but we have also engaged government agencies such as JKR/KKR (the Works Ministry and the Works Department), the Attorney-General's Chambers and the Ministry of Finance, and have been invited to give presentations by professional bodies to elaborate further on the impact on CIPAA.

In our continuous effort to create awareness and highlight pertinent issues in adjudication, KLRCA is also organising a conference entitled, "Transformation By Statute: Compulsory Adjudication in the Construction Industry" on 24<sup>th</sup> October 2012. As we speak, the response has been overwhelming, and it is heartening to see that so many people are interested in finding out more about adjudication and how it will impact the Malaysian construction sector.

These efforts are just setting the motion for an extremely exciting period ahead, once the Act comes into force. I genuinely hope you find this issue of the newsletter informative and engaging.

Until next time, happy reading.

**DATUK SUNDRA RAJOO**

Director of KLRCA



## VISITOR'S GALLERY

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

### VISIT FROM JAPANESE INTERNS OF JLPW ADVOCATES & SOLICITOR 3<sup>rd</sup> August 2012



### VISIT FROM UNIVERSITI TEKNOLOGI MALAYSIA

6<sup>th</sup> September 2012



## KLRC A HOSTS LAWASIA MOOT

The Malaysian round of the 7th LAWASIA International Moot Competition 2012, was held on 8-9 September 2012, the third year in a row that KLRCA hosted and sponsored the competition.

Vying for two spots to represent Malaysia at the International Rounds of the LawAsia Moot Competition, representatives from local colleges and universities squared off in front of the learned judges in a hard-fought legal battle. After two days, the team from Advance Tertiary College came out on top and will represent Malaysia together with the team from Universiti Kebangsaan Malaysia who came in at close second. The International Rounds will be held from 17-21 November 2012 in Bali, Indonesia.

### THE WINNERS

#### THE LAWASIA MALAYSIAN BAR CHALLENGE TROPHY

##### Winner

Advance Tertiary College (M1219)

##### 1st Runner Up

Universiti Kebangsaan Malaysia (M1208)

#### THE MAH WENG KWAI CHALLENGE TROPHY FOR BEST MOOTER

Mr Daniel Chua Wei Chuen,  
Advance Tertiary College

#### THE SPIRIT OF LAWASIA TEAM AWARD

Taylor's University (M1214)





## KLRCA i-ARBITRATION RULES OFFICIALLY LAUNCHED

KLRCA was honoured to be invited to launch its i-Arbitration Rules at the Global Islamic Finance Forum (GIFF) 2012 on 20<sup>th</sup> September 2012.

The launch ceremony was held at Sasana Kijang, Kuala Lumpur with Bank Negara's Deputy Governor, Dato' Muhammad Ibrahim doing the honours. The KLRCA i-Arbitration Rules is the first of its kind in the world to adopt the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, while allowing for the resolution of disputes arising from any contract that may contain Shariah issues.

Among those in attendance for the launch were YABhg Tun Zaki Bin Hj Tun Azmi, former Chief Justice of Malaya, His Excellency Professor Rahmat Mohamad, Secretary General of the Asian-African Legal Consultative Organisation (AALCO), YBhg Tan Sri Cecil Abraham, Chairman of the Working Committee on the KLRCA i-Arbitration Rules and Mr Lim Chee Wee, Chairman of the Malaysian Bar Council as well as more than 300 GIFF delegates.





# THE KLRCA i-ARBITRATION RULES BRIEFING SESSION

Sasana Kijang, 20<sup>th</sup> September 2012



Nearly 50 invited guests attended a briefing session on the KLRCA i-Arbitration Rules, which was organised as a side event at the Global Islamic Finance Forum (GIFF) 2012. The briefing was given by Datuk Sundra Rajoo, Director of KLRCA who explained the concept of the Rules as well as the procedures for reference to the relevant Shariah Advisory Council on Shariah-related issues.

The talk was preceded by welcoming remarks by H.E. Prof Rahmat Mohamad, Sec-Gen of AALCO and an introduction by Tan Sri Cecil Abraham, Chairman of KLRCA Working Committee on the KLRCA i-Arbitration Rules.

# INTRODUCTION TO THE KLRCA i-ARBITRATION RULES

KLRCA launched the KLRCA i-Arbitration Rules on 20th September 2012. The Rules seeks to present a platform for international commercial arbitration that is suitable for commercial transactions premised on Islamic principles.



Malaysia's first Islamic bank was set up in 1983 as an impetus to mobilise the funds of Muslims in a manner compliant with accepted Islamic practices. Since then Islamic Finance has thrived, and Malaysia is internationally recognised a leader in Islamic Banking and Finance globally.

Based on the Ministry of Finance's Economic Report 2011/2012<sup>1</sup>, Malaysia continues to be at the forefront of the global sukuk market and accounts for 62.7% of the total global sukuk outstanding as at the end of the first half of 2011. As at the end of July 2011, Bursa Malaysia (the stock exchange) attracted 19 sukuk listings amounting to RM88.3 billion (USD29.6 billion).

Apart from the sukuk market, the Islamic banking sector, including Development Financial Institutions (DFIs), expanded 15.4% to RM389.3 billion within the first seven months of 2011. The takaful industry, meanwhile, grew 16.8% and accounted for 8.7% of the total assets in the insurance and takaful sector. Notably, a Bahrain-based Islamic bank has established a branch in Malaysia indicating recognition of Malaysia's Islamic finance structure from the Middle-Eastern market.

In response to these developments and recognising that the conventional methods of dispute resolution may not be suitable for a dispute between parties involved in a commercial transaction that is premised on Shariah principles, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) has taken on the challenge of pioneering the customised Islamic arbitration structure.

<sup>1</sup> Ministry of Finance, 'Malaysia Economic Report 2011/2012'  
Available at: <http://www.treasury.gov.my/pdf/economy/er/1112/chap3.pdf>



## BACKGROUND

Historically, arbitration has been a common component within the lives of the Muslim community, and it is well-documented that the Prophet and Caliphs alike had used alternative dispute resolution as a means to resolve disputes.

Shariah law is not something which can be found in a textbook and pinpointed to be applied by a judge<sup>2</sup>. Understanding that much of Islamic jurisprudence is developed through the acceptance of Islamic scholars' interpretation of the basic texts of Islam in relation to modern-day living, the KLRCA i-Arbitration Rules retains the reference of points of Shariah principles to an independent Shariah Advisory Council (SAC). However, if such a council is not present within any particular framework, then a Shariah expert may be appointed with the agreement of both parties.

Rule 8 of the KLRCA i-Arbitration Rules states that where the arbitral tribunal has to form an opinion on a point related to Shariah principles or has to decide on a dispute arising from the Shariah aspect of an agreement which is based on Shariah principles, the matter shall be referred to the relevant SAC or a Shariah expert. The arbitral tribunal may proceed to decide on all other non-Shariah issues arising out of the dispute. Ultimately, the ruling of the SAC or opinion of the Shariah expert is not determinative of the dispute as the arbitral tribunal has to treat them as an expert opinion and draw its own conclusion on the merits of the issue. This interpretation is necessary to ensure that the rules against delegation are complied with, thereby ensuring enforcement of the arbitral award under the 1958 New York Convention.

As an illustration of how the KLRCA i-Arbitration Rules work, an example is given below of a typical sales and purchase agreement:

Parties may choose to enter into a regular sale and purchase agreement with terms for repayments to be made in accordance with Shariah principles, and no interest or *riba* may be charged. Let's assume that there is an arbitration clause referring the matter to the KLRCA i-Arbitration Rules, and a dispute then arises between the parties.

In such an event, parties may appoint an arbitrator, and the arbitrator may then proceed to decide on all matters relevant to the parties' agreement such as breach of contract, performance of contractual duties or other matters which may arise.

However, should one of the issues at hand involve payment (which is governed by a Shariah principle), the arbitrator would have to refer the matter to the Shariah Advisory Council (SAC) or where the Council has no jurisdiction, to a Shariah expert as chosen by the parties. The arbitrator would then apply the decision from the SAC or Shariah expert to the facts of the dispute in formulating its final award.

<sup>2</sup> Essam al-Tamimi, 'Islamic Influences on International Arbitration' International Arbitration Lecture 2011, Sydney  
Available at: <http://www.tamimi.com/en/publication/publications/section-3/law-update-april-2012/sharia-law-and-its-application-to-international-arbitration.html>

## THE APPLICATION OF THE KLRCA i-ARBITRATION RULES

The KLRCA i-Arbitration Rules apply both locally and internationally. Unlike the 2007 KLRCA Rules for Arbitration For Islamic Banking and Financial Services, it is not restricted to transactions and business arrangements involving financial instruments and commodities as defined under the Malaysian Central Banking Act 2009 and Capital Market and Services Act 2007. Now, any commercial transactions with Shariah components, whether domestic or international, may arbitrate under the KLRCA i-Arbitration Rules so long as parties choose the rules as the procedure governing the arbitration.

In Malaysia, the Shariah Advisory Councils under the Central Banking Act 2009 and the 2010 Amendments to the Capital Market and Services Act 2007 are the highest points of reference with regards to Islamic finance and banking and capital market transactions. In the event a point of reference falls beyond the scope of the SACs, parties may alternatively make reference to a Shariah expert or a Shariah Advisory Council of the parties' choice. This provision is included to cater for international parties who may wish to refer the issue to a SAC or Shariah Expert from their own respective countries.

## INTERNATIONALLY RECOGNISED AND ENFORCEABLE

The KLRCA i-Arbitration Rules is divided into two parts, whereby the first comprises the point of reference as aforementioned and incorporates the current version of the KLRCA Arbitration Rules. Thus the KLRCA i-Arbitration Rules includes all the administrative modifications which had been made to the conventional KLRCA Arbitration Rules as of 2nd July 2012.

The second part of the Rules adopts the UNCITRAL Arbitration Rules 2010. This synchronisation of Rules ensures all arbitration administered under KLRCA will be based on and are compliant with the most up-to-date international standards. The adoption of the UNCITRAL Arbitration Rules effectively complies with all the requirements of the 1958 New York Convention enabling international recognition and enforcement of awards in 146 countries.

With the launching of the KLRCA i-Arbitration Rules, the platform has been set for dispute resolution which takes into account the cultural and religious sensitivities of Islamic commercial parties. It elevates arbitration to a more viable option for Shariah-related disputes.

Given that trade, regardless of creed is premised on human relationships, it would indeed be prudent for Islamic commercial parties to look to a mechanism of dispute resolution which would preserve long-standing ties.

# KLRCA Hosts Ramadhan *iftar* Session

Kuala Lumpur, 7<sup>th</sup> August 2012



Prince Hotel and Residence, Kuala Lumpur was the venue for KLRCA's Ramadhan *iftar* session held on 7<sup>th</sup> August 2012 as a gesture of appreciation to our friends who have continuously supported us all these years. Minister in the Prime Minister's Department, YB Dato' Seri Mohamed Nazri Abdul Aziz was Guest of Honour for the night. The event, a rather quaint and relaxed affair, provided the perfect opportunity for guests as well as those from KLRCA to socialise and get to know each other better outside the business of arbitration. Guests for the night included KLRCA panellist arbitrators, stakeholders, partners and friends of KLRCA.



IN THE SEAT:

# PROFESSOR ROBERT VOLTERRA



**Professor Robert Volterra** is a Canadian barrister, an English solicitor-advocate and a world-renowned expert in public international law. According Chambers and Partners 2011 sources, “There are very few lawyers in the world who can boast his level of knowledge.” He regularly represents investors and states in investment treaty arbitrations and has advised and represented governments, international organisations and private clients on public international law and international dispute resolution issues. Aside from sitting on the KLRCA Advisory board, he is a Visiting Professor of International Law at University College, University of London (UCL). In this interview, he talks about, among others, what inspired him to venture a career in law and his views on the development of arbitration in Malaysia.



## *How did your interest and career in law begin?*

Law is a language used to create rules that allow social organisms to regulate their conflicting interests. Social organisms include schools, countries, the international community and families. In this sense, the concept of “law” is not limited merely to the edicts of parliaments and courts. Law empowers those who “speak” it fluently, and who understand its true function, to take an effective role in the dialogue that constructs and manages a social organism.

This understanding, combined with my interest in domestic Canadian and international politics, made it natural that I seek to learn the language of law. My career in law began in Toronto. I had the luck to work each summer during my undergraduate law studies at different leading law firms. I then did my articles and qualified at one of them.

### *What were some of the challenges that you faced earlier on in your career?*

I enjoyed working at leading law firms in Canada practicing corporate and commercial law. But, however intellectually stimulating the work was there, it was not spiritually fulfilling. I was interested in the many different ways in which international law can improve the condition of the globe's inhabitants, such as by helping to ensure that States comply with the rule of law in the international community or by enabling commercial actors to resolve their international disputes through consensual mechanisms like arbitration.

However, opportunities to develop a career in international law were – and still are, although less so now – very limited in number. There are few lawyers who genuinely practice international law now and there were even fewer back then. Such practices tended to be based in Washington DC, London, Paris and Geneva. And I was in Toronto.

So, I took a job as a human rights lawyer in Colombia, then enrolled in a graduate degree in international law at the University of Cambridge, then became a professor of law at Osgoode Hall Law School in Toronto, then returned to Cambridge to work with the Chair of international law in his practice and then joined leading international arbitration practices in Paris and then London. I had quite a few lucky breaks along the way.

### *In your opinion, how has arbitration evolved in Asia?*

There is a view outside Asia that Asian commercial actors tend to avoid confrontation when a dispute arises between themselves and another party. However, the reality is that the regionalisation and globalisation of investment, trade and commerce in and from Asia has resulted in an increase in the use of arbitration in recent years.

This is because one of the advantages of arbitration is that it enables parties to have their disputes resolved by neutral tribunals in neutral countries. This trend will continue in Asia.

There are a number of Asian cities that are developing reputations as neutral centres for arbitration. Amongst these are Hong Kong, Kuala Lumpur and Singapore. The next few years are likely to be critical in determining which select Asian cities will become leading arbitration centres regionally and globally.

### *What are your views on the Malaysian arbitration scene?*

Malaysia now has all of the components in place to really take off as a centre for international arbitration. There is a modern law on international arbitration. The domestic courts have shown that they are willing to be supportive of international arbitration. Malaysia is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Award New York 1958 (New York Convention). The government has rejuvenated the KLRCA [through its funding and support].

Malaysia has excellent international transportation links, state-of-the-art technological infrastructure. Kuala Lumpur is a convivial and economic venue for parties to use as a seat for hearings. Malaysia is a multicultural country that is open to the world and is a natural regional and international hub.

It boasts a well-educated, well-trained, English language-proficient local legal community and an engaged litigation bar that is familiar with international arbitration. With the proper support from the government and courts, and leadership from the KLRCA, the future of arbitration in Malaysia should be in growth mode.

### *What would Malaysia (and KLRCA) have to do to stand out as a major arbitration centre in the region?*

KLRCA (and Malaysia) is a major arbitration centre in the region already. Its challenge is to seize the historical opportunity of sustained regional economic integration and globalisation to move up to the next level and be a major arbitration centre globally. To do that, KLRCA and the government will need to continue ensuring that the various positive attributes that I listed above continue to exist.

In addition, KLRCA must be able to provide prospective arbitration counsel with a sophisticated venue for the conduct of hearings and the efficient management of cases. That will require the political will from the government to continue supporting KLRCA, including financially.

KLRCA will need to continue promoting the many positive aspects of Malaysia as a fantastic venue for arbitration to the international arbitration bar around the world. There is nothing like actually being in a place to realise that it is user-friendly for arbitration. The more KLRCA can attract leading international arbitration counsel to visit Kuala Lumpur (inviting and subsidising visits to participate in conferences and so on), the more this will be likely to succeed.

### *In relation to Question 5, what would be the key challenges?*

Having a dynamic, energetic, charismatic and strategic-thinking director of the KLRCA; having a supportive Attorney-General's Chambers; having a committed and supportive (especially financially) government; having the right arbitration laws; having a judiciary that understands and supports the role of international arbitration; having sufficient members of the local bar interested in international arbitration and willing to work with (and not feel threatened by) foreign practitioners in Malaysia.

At present, it seems, each of these factors is either already in place or coalescing. The challenge is for Malaysia and the KLRCA to grab the opportunity, now that all their arbitration stars are in alignment.

### *What would be your definition of a top-notch arbitrator? Who comes to mind?*

A top-notch arbitrator is intelligent, open-minded, fair, culturally sensitive, organised, decisive, meticulous and experienced in international arbitration. In Malaysia, I have had the pleasure of working with a number of senior lawyers, including Tan Sri Cecil Abraham, Lim Chee Wee, Sundra Rajoo and Tan Sri Gani Patail, who fit that description.

### *What do you consider your greatest achievement in the course of your career?*

Providing opportunities for younger lawyers to practice international law that did not exist when I started my career.

### *Any words of wisdom that you would like to impart to future arbitrators?*

Enable all parties a fair opportunity to be heard; do not condone any party engaging in guerrilla tactics.



# NATIONAL COURTS AND INTERACTION WITH ARBITRAL TRIBUNALS: HARMONIOUS INTERPRETATION

by **Datuk Sundra Rajoo**

▶ **The success of international commercial arbitration is largely due to the acceptance by 146 countries of the Convention on the Recognition and Enforcement of Foreign Arbitral Award New York 1958 ('the New York Convention' or 'NYC') to enforce foreign arbitral awards in their jurisdiction. This process requires the assistance of the national courts of the member states to provide the force of law.**

**Arbitration freed itself from the traditionally strict control and supervisory powers of the national courts. Many states have enacted legislations that seek to restrict interferences of the courts in arbitration proceedings and laid down more defined areas where courts continue to assist in the enforcement of appropriate orders and arbitral decisions.**

**The result we see now is a more balanced interaction between arbitral tribunals and the national courts. This paper looks into the development of Arbitral Law in Malaysia and the transformation process of its national courts from 'interventionist' to 'complementary and supportive' and was originally delivered at the Regional Arbitral Institutes Forum (RAIF) Conference on International Arbitration in Bali, May 2012.**

As an alternative to court litigation, international commercial arbitration has an autonomous character and exists in a domain independent of and separate from national laws and jurisdictions (Lew, 2007). It is a private process and the cycle completes with an award which can only be enforced by a national court in the enforcement state. There is, therefore, a necessary link between arbitration and national courts.

National arbitral legislation defines the roles and interfaces between the tribunal and national courts in the arbitral proceedings. As we know, the entire system works well due to instruments such as the NYC where 146 countries accept and agree to recognise and enforce foreign arbitral awards in its jurisdiction.

Whilst the NYC allows for recognition and enforcement, the United Nations Commission on International Trade Law (UNCITRAL) Model Law provides best practices as well as streamlines and sets out the acceptable parameters of the courts' involvement in the arbitration process. Many sovereign states have adopted, if not, modelled their arbitral enactments close to the Model Law.

## 1.0 NYC AND THE MODEL LAW

A close reading of Articles II, III and V of the NYC reveals that in an international arbitration, court involvement is required as a form of "support" for the arbitral process

and for recognition and enforcement of arbitration agreements and awards.

The UNCITRAL Model Law also contains similar provisions to the NYC but is more expansive as to the role of the courts. At the very outset, Article 5 provides that "no court shall intervene except where so provided in this Law".

As is evident from the overview of the NYC and the UNCITRAL Model Law, the involvement of courts is most likely in these stages of arbitration:

- i. **Prior to the establishment of tribunal:**
  - Where a party initiates proceedings to challenge the validity of the arbitration agreement;
  - Where one party institutes court proceedings despite, and perhaps with the intention of avoiding the agreement to arbitrate; and
  - Where one party needs urgent protection that cannot await the appointment of the tribunal.
- ii. **Commencement of arbitration:**
  - Assisting with the appointment of arbitrators and the challenges faced in case of default.

### iii. During the arbitration process:

- Assisting in taking evidence, especially with regard to third parties;
- Making procedural orders that cannot be ordered or enforced by arbitrators, or orders for maintaining the status quo.

### iv. Enforcement Stage:

The courts may become involved in two instances:

- Arbitration, i.e., when a party challenges and seeks to set aside the award, or lodges an appeal against the award under the applicable arbitral law or regime; or
- Enforcement, where the successful party seeks the recognition and enforcement of the award.

At all these stages, emphasis is added to the term “court assistance” instead of “court intervention”. The distinctive line between the two terms is maintained by the layout of the respective national laws which gives jurisdiction to the courts and the extent of adoption of the Model Law.

## 2.0 ARBITRATION LEGISLATION IN MALAYSIA

In Malaysia, arbitration can be officially traced back in the form of the Arbitration Ordinance XIII of the Straits Settlements in the 1890's. In 1950, the Arbitration Ordinance 1950 (based on the English Arbitration Act 1889) replaced the 1890 Ordinance for all the States of the then Federation of Malaya. British North Borneo and Sarawak adopted the English Arbitration Act of 1952 as their Ordinance in the same year. On 1 November 1972, Malaysia adopted the arbitration laws prevailing in Sabah and Sarawak and it was known as the Arbitration Act 1952, which was based on the English Act.

An amendment to the Arbitration Act 1952 on 1 February 1980 (Arbitration (Amendment) Act 1980), solidified a separate regime for arbitrations in Malaysia. Section 34 was introduced which prescribed as follows:

*'(1) Notwithstanding anything to the contrary in this Act or any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the ICSID 1965, UNCITRAL Rules 1976 and the KLRCA Arbitration Rules; (2) where an award made in an arbitration held in conformity with the Convention or the Rules specified in subsection (1) is sought to be enforced in Malaysia, the enforcement proceedings shall be taken in accordance with the provisions of the NYC, as may be appropriate.'*

By virtue of the amendment, a special regime was

created and effectively excluded the jurisdiction of the courts in respect of such arbitrations. There was total exclusion of the court's powers of judicial review, intervention, supervision, as well as the court's powers of procedural and other forms of support, for example, power to subpoena witnesses.

There were attempts to involve Malaysian Courts in arbitrations held under KLRCA but these - including the challenging of KLRCA arbitration awards and an attempt to invoke the supervisory ancillary powers of the High Court (see *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd* (1998) and *Jati Erat Sdn Bhd v City Land Bhd* (2002)) - were largely unsuccessful. The courts in *Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd* (1990) held that it did not have the power under Section 34(1) to intermeddle in KLRCA's arbitrations, whether by way of inherent jurisdiction or at common law or otherwise. It was clear that the role of the courts was confined only to the enforcement of the arbitral award if the award was sought to be enforced in Malaysia.

In time, there was pressure from the Malaysian Bar Council and the arbitral community to replace the 1952 Act with the Model Law and this resulted in the enactment of the Arbitration Act 2005. The 2005 Act is largely based on the Model Law and the New Zealand Arbitration Act of 1969, and it came into effect on 15 March 2006 (Abraham, 2011). This brought Malaysia closer in line with other nations who had risen as key players in the international arbitration field.

More recently, the Act was amended by the Arbitration (Amendment) Act 2011 (“Amendment Act”). The amendments which came into force on 1st July 2011, sought to fill up the lacunas which had become apparent following a series of judicial decisions and other recent/best practices observed.

## 3.0 COURT INTERVENTION AND ARBITRATOR'S INDEPENDENCE

The courts have an equally important role to play in the transformation of arbitral legislation in Malaysia. Case law often works toward filling the lacunas of legislation and thereby assists in the development of law. While there are obvious differences between arbitration and court litigation, fundamentally, their symbiotic relationship cannot be severed. As evident from an overview of the NYC and Model Law, courts are involved throughout various stages of the arbitration process.

The balance between acceptable court intervention and the independence of arbitrators have improved tremendously in Malaysia and will continue to evolve. In this next section, we look at the areas in which the powers of arbitral tribunals have crossed paths with

that of the courts, and the prevailing trends at the moment in Malaysia:

### 3.1 DELINEATION OF BOUNDARIES

Section 8 of the recent Amendment Act follows closely the wording of the Model Law by expressly limiting court intervention to circumstances provided for in the Act. Prior to this amendment, the courts had already been placing high regard to the self-governance of arbitral tribunals and were very careful in intervening in the proceedings itself.

In *Taman Bandar Baru Masai Sdn Bhd v Dinding Corporations Sdn Bhd* (2009), it was held that the 2005 Arbitration Act seeks to prohibit court intervention in arbitral awards and therefore the Court should refrain from intervening. A similar attitude is reflected in the formerly contentious area of jurisdiction. Although the Arbitration Act since 2005 has provided for arbitral tribunals to determine its own jurisdiction (Section 18), probably due to the previous regime which did not allow arbitral tribunals to determine matters pertaining to its own jurisdiction, it has only been in the past four years that judicial decisions have been more open to this notion.

In *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* (2007), it was held that arbitral tribunals have the power to determine its own jurisdiction, competence or scope of authority as well as the existence and validity of the arbitration agreement. This was subsequently restated in *Chut Nyak Isham bin Nyak Ariff v Malaysian Technology Development Corp Sdn Bhd & Ors* (2009), wherein the competency of the arbitral tribunal to decide on its own jurisdiction without interference was acknowledged. The Court, in reading Section 10 with Section 18, concluded that arbitration proceedings take precedence over court proceedings. This was further supported by Article 16 of the Model Law. *NetSys Technology Group AB v Open Text Corp* (1999), a case applying UNCITRAL Model law, where it was decided that an arbitrator could decide on the validity of an arbitration agreement.

### 3.2 STAY OF COURT PROCEEDINGS

Malaysian courts give effect to an agreement to arbitrate in two ways; namely, to stay an action or refer the dispute to arbitration pursuant to Section 10 of the 2005 Act.

Initially, the 2005 Act provided that an application must be made before taking any steps to stay the action. The courts would give effect to the agreement and have no discretion in the matter when there is an application for stay of proceedings, unless the agreement is null and void, inoperative, or incapable of being performed; or there is in fact no dispute between the parties – as

reasoned by The Court of Appeal in *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* (2010) and *Lembaga Pelabuhan Kelang v Kuala Dimensi Sdn Bhd & Anor* (2010), which is considered the general approach in Malaysian courts.

The Amendment Act amended Section 10 and deleted Section 10(1)(b) that had allowed the courts to refuse a stay where there was in fact no dispute between the parties. This was another amendment which took the Model Law approach wherein the courts would have to stay proceedings unless the agreement is null and void, and need not delve into the facts of the matter in determining whether there is dispute in the first place.

It is the general approach of the courts to give effect to the intention of the parties to arbitrate. In the case of *Innotech Asia Pacific Sdn Bhd v Innotec GmbH* (2007) involving a dispute between a Malaysian company and a German company, the dispute concerned a partnership contract where the reseller's agreement contained an agreement to make reference to arbitration in Germany, which the German company commenced. The Plaintiff, the Malaysian company, filed an application for injunction to restrain the Defendant from commencing the arbitration whilst the Defendant applied for stay pursuant to Section 10. The High Court dismissed the injunction and allowed the application for stay. The court held that it was incorrect to suggest that the 2005 Act only applies to arbitration where the seat was in Malaysia. The language of Section 10 of the 2005 Act allows the court to stay proceedings for the purpose of referring the matter to arbitration based on their agreement. In fact, the requirement to stay is generally mandatory.

This position has been clarified in the Amendment Act which now expressly provides under Section 10(4) that the High Court has jurisdiction to stay proceedings for arbitration where the seat or arbitration is outside Malaysia.

### 3.3 ENFORCEMENT OF AWARDS

The role of the courts is of the utmost importance when it comes to the enforcement of awards. This is the strongest foundation for the relevancy of arbitration and its popularity today.

The law provides that after an award is made, an application in writing must be made to the High Court of Malaysia for the award to be recognised as binding and enforceable (Section 38). Once this has been successfully completed, the award would be recognised as binding and may be enforced by entry as a judgment. While Section 37 and Section 39 respectively lay down grounds in which the court may set aside an award or



refuse recognition or enforcement of an award, the general stance is that an award will be enforced.

### 3.4 JUDICIARY AS AN ENFORCER ONLY

Furthermore, an arbitrator's award unless falling under the grounds set out in the Act, is generally regarded as final. This position was confirmed in *Bauer (M) Sdn Bhd v Embassy Court Sdn Bhd* (2010) where it was concluded that when asked to recognise and register an award, courts were not required to enter into minute analysis and the examination of an award. Thus, the role of the judiciary on this end is relegated to that of an enforcer unless the party wishing to set aside the award is able to provide sufficient proof fulfilling the stipulated grounds.

### 3.5 COURTS PRO-ARBITRATION STANCE

A spate of recent cases further reinforces Malaysia's pro-arbitration stance. The Federal Court of Malaysia in *The Government of India v Cairn Energy India Pty Ltd & Anor* (2011), held that where a specific matter is referred to arbitration, it ought to be respected in that, 'no such interference is possible upon the ground that the decision upon the question of law is an erroneous ground'. Also, the construction of an agreement is a question of law, thus, if it is submitted to an arbitrator, parties cannot later challenge the decision. This decision was well-received by the international community (Ross, 2011).

The Malaysian judiciary has also been actively working along a parallel nexus with international standards and recent government initiatives to promote arbitration, as upheld in a case involving a conflict in jurisdiction that came before the High Court.

In *Open Type Joint Stock Company Efirnoye (EPKO) v Alfa Trading Ltd* (2012), the disputing parties' arbitration clause had made provision for arbitration in different venues. The arbitration should follow the procedural law of the venue, based on the circumstances and which party initiates the arbitration as the claimant. Both parties initiated arbitration proceedings; one in accordance with Russian law, the other Ukrainian. One of the parties went to the High Court to seek a refusal on the enforcement of the award (under the Russian law) and argued that they had not agreed or submitted to arbitration under Russian law and that the matter was *res judicata* as the Ukrainian tribunal had already made an award. However, it was held that the lack of protest throughout the proceedings and the party's participation in proceedings (filing of counter-claim) was evidence of their acquiescence. It is also important to note that the High Court ruled that arbitration awards must be followed, and foreign and transnational tribunals and international commercial systems must be respected even if a domestic court rules differently. This is indeed very encouraging as it bores

right to the essence of arbitration which is to give effect to the agreement made by the parties.

### 4.0 COURT'S COMPLEMENTARY AND SUPPORTING ROLE

Whilst the recent Amendment Act restricts court's intervention (Section 8), it ironically also enhances and empowers the courts to play the role of enforcer to support and complement the tribunal's role.

The new Section 10 and Section 11 have dispelled doubts on Malaysia's ability to provide adequate interim reliefs such as securing the subject matter of the dispute. Interim reliefs have also been expanded to include the arrest of property in admiralty proceedings for security. This is to accommodate the growing maritime industry. The legislative reforms have also expressly provided for stays and interim measures to also apply to arbitrations where the seat of arbitration is not in Malaysia.

Interestingly, the courts played a pivotal role in contributing to the recent legislative reforms. In *Thye Hin Enterprises Sdn Bhd v Daimler Chrysler Malaysia Sdn Bhd* (2005), an issue arose as to whether or not courts could intervene in arbitrations to grant an interim injunction in view of maintaining the status quo between parties. The Court of Appeal held that an interim injunction did not amount to interference in the arbitration proceedings itself and that if the justice of the case would be affected by not securing the disputed amount, then interim relief could be granted.

In *Plaza Rakyat Sdn Bhd v Datuk Bandar Kuala Lumpur* (2012), an application for an interim injunction by the plaintiff was allowed as there was a danger that the defendant would take possession of the land before the matter was settled. It was stated that the purpose of Section 11 of the Arbitration Act 2005 is to preserve the subject matter which has been referred to arbitration. It was held that justice lay in maintaining the status quo pending arbitration.

### 5.0 INTERNATIONALLY HARMONISED INTERPRETATION ADOPTED BY COURTS IN OTHER JURISDICTIONS

The recent legislative and judicial developments represent the general direction of greater harmonisation of practices in line with Singapore, Hong Kong, United Kingdom, Australia and other parts of Europe. In Australia, we have begun to see the express acceptance of the decision of other jurisdictions (Singapore's Supreme Court) as precedence in setting arbitral standards. This was seen in the recent cases of *Altain Khuder LLC v IMC Mining Inc* (2011) and *Aloe Vera of America v Asianic Food (S) Pte Ltd & Anor* (2006) which stated that a party resisting enforcement of an award bears the burden of establishing grounds to do so.

It is submitted that based on the current movement of arbitration-related court decisions, the above position is a realistic reflection of Malaysia's practice perhaps not too far into the future. After all, we are already able to see some semblance of internationally harmonious interpretation in certain areas of arbitration law. For example, the restrictive approach of most jurisdictions towards the term, 'public policy':

- In Canada, public policy is construed to apply only where enforcement would violate basic notions of morality and justice of which corruption, bribery or fraud is an example. (*Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al v STET International, S.p.A. et al.* (2000).
- The position in New Zealand is that a fundamental error of law or fact leading to a substantial miscarriage of justice can render an award contrary to public policy. However, a high threshold needs to be satisfied, and a mere mistake is insufficient: see *Downer-Hill Joint Venture v Govt of Fiji* (2005).
- Singapore, in *AJT v AJU* (2011), also attached a narrow definition to public policy by upholding an arbitration award which had been set aside on grounds of public policy in the first instance. In this case, Singapore adopted the English Law approach of intervention on public policy grounds, which is that an award cannot be reopened unless there was proven incompetence by the arbitrators or collusion to produce an award enforcing an illegal contract (*Westacre Investments Inc v Jugoinport SDPR Holding Co Ltd* (1998).
- Malaysia, too, in citing other jurisdictions such as Hong Kong and New Zealand and India (above) has adopted a restrictive approach towards the interpretation of public policy (*Open Type Joint Stock Co Efirnoye (EFKO) v Alfa Trading Ltd* (2012); *Infineon Technologies (M) Sdn Bhd v Orisoft Technology Sdn Bhd* (previously known as Orisoft Technology Bhd) and another application (2011); and *Harris Adacom Corporation v Perkom Sdn Bhd* (1994)). This is also because of the judiciary's positive position which regards arbitral awards as 'akin to a judgement' (*Tan Kau Tiah @ Tan Ching Hai v Tetuan The Kim The Salina & Co (a firm) & Anor* (2010).

Even so, it is observed that there remain some jurisdictions that are yet to fully embrace this concept of harmonious interpretation. China, for example, has generally accepted the terminology in Article 258 of the

Civil Procedural Law of the PRC which allows for courts to refuse enforcement of an arbitral award if it is found that the award is against the 'social and public interest' of China. Thus far, the definition has been somewhat ambiguous and one also has to bear in mind China's absolute immunity (*Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* (2011)). Nevertheless, the recent statement by the Standing Committee of the National People's Congress that the effects of the Congo judgment (above) are not adverse since the state-owned enterprises of the People's Republic of China are not state organs and that most of these enterprises have gained independent legal personality anyway, could be construed as a positive sign (Global Arbitration Review, 2012).

In India too, the phrase 'public policy of India' in the Arbitration and Conciliation Act 1996 is said to have a wide meaning and connotes some matter concerning public good and public interest. Thus, an award is liable to be set aside on public policy grounds where it is contrary to fundamental policy of Indian law, the interest of India, justice or morality, or if it is patently illegal, in that there is an illegality which is not merely trivial but goes to the root of the matter (*Oil and Natural Gas Corp Ltd v SAW Pipes Ltd* 2003).

It is interesting to note that The Committee on International Commercial Arbitration of the International Law Association (ILA) had previously reviewed the development of public policy. The Committee observed that beyond domestic public policy, there exists a narrower category of 'truly international' or 'transnational' public policy. This policy comprises fundamental rules of natural law, principles of universal justice, jus cogens in public international law, and general principles of morality accepted by "civilised nations" (ILA Committee on International Commercial Arbitration's Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards [London Conference, 2000]). Indeed it appears that this was an apt predictive description of arbitration's fate.

## 6.0 CONCLUSION

Given the finality of arbitral awards, courts have a definitive and pertinent role as an effective check and balance on the arbitral process. The Malaysian courts are pro-arbitration and recent cases show that the approach is one that is complementary to the tribunal. The courts assist the tribunals at difference stages of the proceedings to give its bite of effectiveness. The recent Amendment Act enhanced the courts' roles in granting interim relief to foreign arbitration matters not seated in Malaysia. This is a great support and encourages the growth of international commercial arbitration in Malaysia.



## Adjudication Conversion Course

More than 150 KLRCA Arbitrators went through the Adjudication Conversion Course, which was held over two sessions (14-15 July at Novotel, Kuala Lumpur and 11-12 August at Renaissance Hotel, Kuala Lumpur) and in doing so, became the first batch of certified adjudicators in Malaysia.

The two-day course was designed specifically for KLRCA Panellists in anticipation of the adjudication work a result of the gazetting of the Construction Industry Payment and Adjudication Act (CIPAA) 2012 on 22<sup>nd</sup> June 2012.

The training was conducted by two highly experienced adjudicators, Ir Harbans Singh and Mr Mohan Pillay from Singapore. The course covered topics such as the application of statutory adjudication to the construction industry, practice and procedure of adjudication under CIPAA, and writing adjudication decisions.





# ADJUDICATION: EFFECTIVE PREPARATION FOR PARTIES



The Construction Industry Payment and Adjudication Act 2012 (CIPAA) received the royal assent on 18<sup>th</sup> June 2012 and was gazetted on 22<sup>nd</sup> June 2012. As the coming into force of the Act draws nearer, **Gananathan Pathmanathan**, KLRCA panelist arbitrator and adjudicator, discusses practical tips that would be relevant to parties making a claim or resisting a claim.

CIPAA provides for compulsory statutory adjudication with its principal aim being “to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.”<sup>1</sup>

The legislation has been promoted as a significant development as it encourages cash flow in the construction industry. With its tight timeframes for resolution of disputes, it is very often referred to as a mechanism that is based on the “pay now – argue later” principle. It is a resolution of temporary finality with final recourse through arbitration or the courts.<sup>2</sup>

The expectation would be for CIPAA to be a simple process for disputes to be resolved inexpensively and quickly. Can claims be dealt with through minimal preparation and can external help be excluded? Is it really “rough justice”? This may be true in a straightforward case for example, where a contractor is merely seeking to enforce a claim which the employer refuses to pay.

Whilst CIPAA is designed to promote speedy and cost effective resolution, which is what it should be, experiences from other jurisdictions would indicate that a proper preparation and presentation of the case to the adjudicator would be critical to whether the claim succeeds or fails. The timeframes under CIPAA would provide for a resolution within 90 days from the time the notice of adjudication is issued unless extended by the parties<sup>3</sup> or the adjudicator<sup>4</sup>. Effectively, parties to the adjudication only have 45 days from the time the notice of adjudication is issued with the adjudicator utilising the remaining 45 days to make his or her decision.

## Effective Preparation: The Referring Party

### THE STARTING POINT – MATTERS TO INITIALLY CONSIDER

It would be obvious to any unpaid party seeking to make a claim to trigger CIPAA at the first signs of defiance or non-action. However, the importance of assessing and reassessing one’s case before launching into a claim cannot be over emphasised. You should not rush head in to make the claim only to later realise that the claim was poorly presented, was premature, or subject to jurisdictional challenges.

Where there are potential technical or legal issues, you may want to consider external professional help prior to presenting the claim. Preferably, this should be done at the earliest opportunity and in some cases, even before a payment claim is made.

1 Preamble to CIPAA

2 Section 13 of CIPAA – The adjudication decision is binding unless amongst other reasons, the dispute is finally decided by arbitration or the court

3 Section 12 (2) of CIPAA

4 Section 25 (p) of CIPAA



One of the main areas in consideration would be whether a dispute has arisen from a payment claim<sup>5</sup>. If there is no dispute, there is no recourse to adjudication under CIPAA. When does a dispute arise or crystallise? The issue has generated a fair amount of litigation in adjudications and arbitrations alike.

CIPAA takes away a lot of this uncertainty by providing for specific provisions on the payment claim and payment response<sup>6</sup>. In other words, the non-paying party when faced with such a payment claim can decide either to admit or dispute partially or wholly the claim made.

The interesting part of CIPAA, which is not found in other jurisdictions, is that a non-paying party who fails to respond to a payment claim in the manner provided is deemed to have disputed the entire payment claim<sup>7</sup>. As the unpaid party, you would still have to go through the process of referring a dispute on a payment claim to adjudication under circumstances where the non-paying party is silent or fails to respond. Arguably, your obligation would be to prove the entire claim in light of any inaction on the part of the non-paying party.

The right to refer a claim to adjudication would be dependent on many factors. These are some of the issues:-

- Is it a payment claim? A dispute can only be referred to adjudication if it arises from a payment claim. Payment is defined as *"a payment for work done or services rendered under the express term of a construction contract"*<sup>8</sup>. Whilst a construction contract by reference to construction work is wide in application, not all claims may fall within the definition. For example, you may not be able to seek adjudication on matters arising before the coming into existence of the construction contract or matters that occurred during the negotiations leading up to the contract (such as misrepresentation) or seek claims on matters outside the construction contract (quantum meruit or claims for nuisance). It is also debatable and untested as to whether a loss and expense claim would fall within the definition of construction work to enable a payment claim.
- Is the claim premature in accordance with the express terms of the construction contract? For example, the claim may not be due to be assessed or the work giving rise to the claim has not been completed. Have all condition precedents (if any) been met?
- Are you an unpaid party? By virtue of the right of set off or any argument of non-performance, is your claim likely to be defeated by the non-paying party? How realistic is your claim in light of the arguments that you know will be raised when you make the payment claim?
- Is it too late to bring the claim? You will not succeed in a claim that will be defeated by limitation.<sup>9</sup>

## BEING VIGILANT

You may have decided that your claim has merit after assessment. An equally important consideration is when to launch the claim or the effectiveness of making the claim:-

- Is the non-paying party flushed with cash? When is the non-paying party receiving its next payment and would that be the right time to seek effective recovery?
- Is the non-paying party insolvent? There may be no point in pursuing the claim if the opposing party would not be able to pay.
- Are you one of many contractors who have not been paid? Would there be any sense in working out a strategy with other contractors before launching a claim?
- Is the company against whom the claim is made, is in a winding up or scheme of arrangement or in any form of administration? Considerations of obtaining court sanction before commencing adjudication may be required.

<sup>5</sup> Section 7 (1) of CIPAA – the Section refers to an unpaid or non-paying party referring a dispute to adjudication

<sup>6</sup> Sections 5 and 6 of CIPAA  
<sup>7</sup> Section 6(4) of CIPAA

<sup>8</sup> Section 4 of CIPAA  
<sup>9</sup> Section 7(3) of CIPAA

- Are you able to adhere to the statutory time scales prescribed under CIPAA? Do note that in most cases, the work carries on whilst the claim is being made. Do you have sufficient resources to address the claim and would material witnesses be able to dedicate their time? Or would it be better to roll up the claim with future claims?

If you have decided on adjudication, it would be prudent to prepare the payment claim, the notice of adjudication and all the supporting documents and materials well in advance.

Given the short timeframe available, you will find it difficult to await a payment response and still achieve the timeframes provided for without early preparation. After all, since it is you who are initiating a claim, you have time to properly prepare your claim unless limitation has set in. In larger contracts, it would be cost efficient to assemble an exclusive adjudication team who can assist in the “nuts and bolts” of gathering evidence and preparing claims.

The payment claim must comply with the statutory requirements which include:-

- The amount claimed and the due date for payment of the amount claimed;
- Details to identify the cause of action including the provision of the construction contract to which the payment relates;
- Description of the works or services rendered to which the payment relates; and
- A statement that it is made under CIPAA.<sup>10</sup>

Failure to comply with these basic provisions could raise all sorts of challenges, jurisdictional or otherwise, and could cause the claim to be defeated. You are likely to be confined to the claim specified under the payment claim unless the parties agree to extend the jurisdiction of the adjudicator.<sup>11</sup>

### **CHOOSING AN ADJUDICATOR**

It is important to get the right adjudicator for the dispute and wherever possible, it would be beneficial to obtain the agreement of the other party on the choice of adjudicator. In absence of a consensual appointment or upon request of either party, the Director of the KLRCA will make the appointment.<sup>12</sup>

### **GUIDING THE ADJUDICATOR**

After receiving the response from a non-paying party, it would be beneficial to narrow down and identify the issues for the adjudicator. This would help in pointing the adjudicator in the right direction and making sure that issues are not left out for his consideration.

Given the constraints of time, you should be focused on what needs to be presented in written or oral form. It would be advisable to put your best points forward in a concise and easy to understand manner and invite the adjudicator to see that your case has cut out all the unnecessary frills and issues which you will not succeed on. Also consider whether you will need third party expert advice on technical issues or invite the adjudicator to do so.

### **BE REALISTIC**

Consider carefully your limitations and negotiate well in advance with the non-paying party, a feasible timetable and if necessary, do not hesitate to extend time by agreement.

This would also help the adjudicator immensely in arriving at a well-considered decision. As far as possible, try and comply with directions of the adjudicator, and do not hesitate from being realistic about achieving the statutory timelines. The adjudicator may, for good reasons, extend time as provided for under CIPAA.<sup>13</sup>

Consider well in advance as to what you would do if the adjudicator’s decision is in your favour. Enforcement of the adjudicator’s decision by applying to the High Court for an order is available but is not the only remedy.<sup>14</sup>

<sup>10</sup> Section 5 (2) of CIPAA

<sup>11</sup> Section 27 (2) of CIPAA – arguably this can only occur after the adjudication process is initiated

<sup>12</sup> Section 21 of CIPAA

<sup>13</sup> Section 25 (p) of CIPAA

<sup>14</sup> Section 28 of CIPAA

You would also be entitled to suspend performance or reduce the rate of progress of the work if the amount adjudicated upon has not been wholly or partly settled.<sup>15</sup>

There is also a corresponding right to a fair and reasonable extension of time and loss and expense subject to compliance. You could also have recourse to the principal of the losing party provided that payment is due from the principal to the losing party.<sup>16</sup> You could simply decide to use the decision as a bargaining tool or enter into a commercial compromise, which would serve your purposes.

## Effective Preparation: The Responding Party

### ANTICIPATION AND ASSESSMENT

Adjudication would be akin to a “*run-away train*”. In larger contracts, the commercial / contractual team should be tuned in to potential claims coming their way. You will know where the unpaid party is heading from the exchange of correspondences and events at site.

When the claim comes in, assess your chances of success and the cost of adjudication, and do not hesitate to take advice where necessary. You could either admit the claim or attempt to negotiate well in advance.

### JURISDICTIONAL CHALLENGES AND STRATEGY

Consider all aspects of the payment claim and work out a strategy to challenge the payment claim if jurisdictional issues arise. The adjudicator’s jurisdiction in relation to any dispute is limited to the dispute referred to adjudication by the parties pursuant to Sections 5 and 6 of CIPAA.<sup>17</sup>

You must therefore consider whether the payment claim has been properly brought by reference to the construction contract and CIPAA.<sup>18</sup> Also consider what your response will be and when will be the right time to raise the jurisdictional challenge.

An adjudication decision may be set aside even at the enforcement stage or on your own accord by application to the High Court.<sup>19</sup> Also bear in mind that the adjudicator may ignore or has the power to amend any objections as to time limit, form, content or any other irregularity.<sup>20</sup>

### EFFECTIVE RESPONSE

Be focused on the response and identify the issues clearly for the adjudicator. Keep relevant issues in the forefront of your argument as opposed to throwing in “*the kitchen sink*”. Do not forget that the adjudicator is under a very tight time constraint to come up with a fair decision, and you will not be doing yourself any favours by intimidating the other party and the adjudicator with all sorts of objections and lengthy correspondence.

## Conclusion

Statutory adjudication of payment claims under CIPAA is inevitable. It is essential to consider resources and pay attention to the workings of CIPAA, whether you are an unpaid party or non-paying party.

In other jurisdictions, statutory adjudication has proven to be a preferred choice of dispute resolution notwithstanding its critics. In the United Kingdom, parties have since evolved to accept it as part and parcel of the construction industry and the trend points towards final acceptance of an adjudication decision without further recourse to arbitration or the courts. Hence, it is important for those involved in the process to get it right from day one.

### About the author

**Gananathan Pathmanathan** has been in legal practice for more than 19 years. He is a partner at Messrs. Gananathan Loh and specialises in dispute resolution in construction and commercial disputes and front end advisory on construction contracts. He has served on the Construction Adjudication Sub Committee of the Bar Council. He is also a panel arbitrator and adjudicator with the Kuala Lumpur Regional Centre for Arbitration.

<sup>15</sup> Section 29 of CIPAA

<sup>16</sup> Section 30 of CIPAA

<sup>17</sup> Section 27 (1) of CIPAA

<sup>18</sup> See bullet 1 above

<sup>19</sup> Section 15 (d) of CIPAA

<sup>20</sup> Section 26 of CIPAA



**CIPAA PENANG**  
 Bayview Hotel,  
 Georgetown, Penang,  
 4 August

KLRCA has been in full swing organising a nationwide roadshow to further educate and raise awareness on the recently gazetted Construction Industry Payment and Adjudication Act 2012 (CIPAA).

With KLRCA being named the adjudication authority for CIPAA, KLRCA has a key role in administering matters under the Act. One of KLRCA's main tasks is to conduct training and certification courses for those who are interested to become adjudicators.

The nationwide roadshow this time around went into further practicalities and greater details of CIPAA, including what CIPAA brings to the construction industry and what industry players can expect with its implementation. Participants in Penang and Sabah were fortunate to have had the opportunity to listen from Datuk Sundra Rajoo, Director of KLRCA who spoke on practical considerations with implementation of CIPAA and Ir. Harbans Singh, author and arbitrator, who spoke about the implications of CIPAA to the construction contracts that are carried out in Malaysia.



**CIPAA KOTA KINABALU**  
 Hyatt Regency Kinabalu,  
 Kota Kinabalu, Sabah  
 25 August







KLRCA was the proud Gold Sponsor of the International Malaysia Law Conference (IMLC) 2012 at the Kuala Lumpur Convention Centre from 26<sup>th</sup> - 28<sup>th</sup> September 2012. This year's conference, themed Asian Perspectives, Global Viewpoints, aimed to highlight the rise of Asia and Asian lawyers to the world.

KLRCA was also invited to open a booth at the exhibition centre for the three days. A steady stream of delegates visited the booth throughout the event including the Prime Minister of Malaysia, Dato' Sri Mohd Najib Bin Tun Abdul Razak who visited the booth after giving his Opening Address on the first day.

KLRCA Director Datuk Sundra Rajoo also moderated a session titled, "Statutory Adjudication: Boon or burden for litigants?", whilst KLRCA Deputy Director, Azimeer Manaf was one of the speakers for the session on "Asia's contribution to international commercial arbitration: The tools and skills".

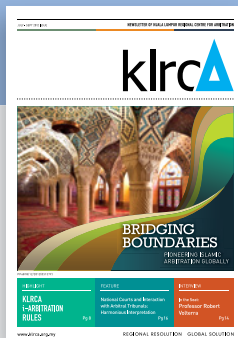


## KLRCA-UKM Signs MoU to Mutually Promote ADR

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) and Universiti Kebangsaan Malaysia (UKM) renewed their Memorandum of Understanding (MoU) recently, which is aimed at promoting and developing teaching and research on Alternative Dispute Resolution (ADR).

The MoU was signed by Datuk Sundra Rajoo on behalf of KLRCA and Professor Aishah Bidin, who represented UKM with Professor Dr Rahmat Mohamed, the Secretary-General of Asian African Legal Consultative Organization (AALCO), witnessing the signing. The initial MoU was signed on 1st October 2009.

By signing the MoU, KLRCA and UKM agrees to mutually promote ADR by, among others, developing undergraduate and postgraduate degrees in arbitration and ADR, allowing staff attachment for exposure and knowledge enhancement of UKM's Faculty of Law academic staff, conducting joint research, and promoting student internship programmes.



## WOULD YOU LIKE TO CONTRIBUTE TO THE KLRCA NEWSLETTER?

We are constantly on the lookout for good articles to share with the world. If you would like to contribute an article or a paper on arbitration or alternative dispute resolution (ADR), feel free to send it to us at the following email address: [syazwan@klrca.org.my](mailto:syazwan@klrca.org.my)

Do send your article together with your brief profile of not more than 100 words and a high-resolution picture.

**WE LOOK FORWARD TO RECEIVING YOUR CONTRIBUTION!**





by Rammit Kaur &  
Adeline Choo

## **ITOCHU CORPORATION V JOHANN M.K. BLUMENTHAL GMBH & CO KG & ANOTHER [2012] EWCA civ 996**

### **FACTS**

The Appellant contended that the arbitration clause provided for the appointment of more than one arbitrator whilst the Respondent contended that the clause provided for a sole arbitrator. An application to the commercial court for an order under s.18 (3) (d) of the English Arbitration Act 1996 was made.

The two relevant sections pertaining to this issue are:

- Section 15, which provides for party autonomy to agree on the number of arbitrators and in default for the tribunal to consist of a sole arbitrator. Alternatively, unless expressly stated otherwise, if an even numbers of arbitrators are selected, an additional arbitrator or chairman shall be required to be selected.
- Section 18 provides for when there is a failure in the appointment procedure, parties may make an application to court. An appointment made by the court under this section shall be deemed to have been made by parties' agreement and the leave of the court is required for any appeal from a decision of the court under this section.

### **ISSUE**

At the Commercial Court, the matter was decided in favour of the Respondent. Furthermore, the Commercial Court denied the Appellant's leave to appeal to the Court of Appeal. The issue now is whether or not the Court of Appeal has jurisdiction to consider the appeal.

### **HELD**

Relying on previous precedence, the Court of Appeal held that the issue here would be whether or not the parties had entered into an exclusion agreement which would deprive the lower court of jurisdiction to refuse leave. In the absence of such, the position was quite clear and as the judge's decision was made under S18 (regardless that his reasons may include S15), the requirement to apply for leave to appeal would stand.

This decision is important as it is a reiteration of the English Court's reluctance to become involved in the arbitral process. It also shows the Court's commitment to keeping arbitration as simple as possible. It had been stated obiter that even if the Court of Appeal had the jurisdiction to entertain the Appellant's appeal, the appeal would have failed on the merits. Thus on this ground as well, the court is of the view that permission should be refused.

## WERNER SCHNEIDER V THE KINGDOM OF THAILAND (DOCKET NO. 11-1458-cv) (8 August 2012)

The dispute arose concerning unlawful interference with investments made by the predecessors of the Claimant in interest.

### ISSUE

The Kingdom of Thailand appealed against the judgment of the United States District Court for the Southern District of New York which confirmed the arbitral award in favour of the Claimant. It was contended that the Respondent's investments were not approved investments, thus not arbitrable. The issue at hand was that the District Court should have independently adjudicated the arbitral tribunal's jurisdiction instead of performing only a deferential review of the decision.

### HELD

The court reviewed *de novo* whether the District Court should have made an independent determination of the arbitrability of the dispute. It was held that arbitrability is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise. Pursuant to this, a party resisting enforcement of an award is entitled to an independent court review of the question of arbitrability unless there is evidence indicating otherwise.

Nevertheless, the Court went on to distinguish between issues of *formation* of an arbitration agreement and issues pertaining to the scope of the agreement. The latter being one which goes to the merit of the case hence the decision of the arbitral tribunal should not be interfered with.

It was further stated that where there was no evidence stating the contrary, questions of arbitrability are presumptively resolved by the court. In this regard, the district court should have first determined that there is clear and unmistakable evidence of the parties' intent to submit the question to arbitration before refusing to independently hear the matter. However, where parties have incorporated rules that empower an arbitrator to decide on issues of arbitrability (in this case Article 21 UNCITRAL Arbitration Rules), the incorporation serves as evidence of intent for these issues to be arbitrated.



# SAVE THE DATE!

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

Date 11<sup>th</sup> October 2012  
 Event **Skrine International Arbitration Day**  
 Organiser Skrine  
 Venue Sime Darby Convention Centre, Kuala Lumpur

Date 12<sup>th</sup> - 13<sup>th</sup> November 2012  
 Event **IFN Saudi Arabia Roadshow**  
 Organiser Islamic Finance News (IFN)  
 Venue Riyadh

Date 20<sup>th</sup> - 21<sup>st</sup> October 2012  
 Event **Accelerated Programme to Fellowship**  
 Organiser CIARB Malaysia  
 Venue Park Royal Hotel, Kuala Lumpur

Date 18<sup>th</sup> - 21<sup>st</sup> November 2012  
 Event **LawAsia Moot Competition (Final Rounds)**  
 Organiser LawAsia  
 Venue Westin, Bali

Date 24<sup>th</sup> October 2012  
 Event **KLRCA Conference on the Construction Industry Payment and Adjudication Act (CIPAA) – Transformation By Statute: Compulsory Adjudication in the Construction Industry**  
 Organiser KLRCA  
 Venue Hilton Kuala Lumpur

Date 22<sup>nd</sup> - 23<sup>rd</sup> November 2012  
 Event **UNCITRAL-MOJ-KCAB Conference on International Arbitration**  
 Organiser UNCITRAL  
 Venue Seoul

Date 26<sup>th</sup> November 2012  
 Event **HKIAC ADNDRC Conference 2012**  
 Organiser HKIAC  
 Venue Renaissance Hong Kong Harbour View Hotel