



FORGING TIES

FEATURE

Pg 24

If You Go To Caesar
You Must Take Caesar's
Judgment

HIGHLIGHT

Pg8

New ICC Rules of
Arbitration 2012

INTERVIEW

Pg 11

In the Seat:
Tun Zaki Tun Azmi
Former Chief Justice of Malaysia

CONTENTS

	04	DIRECTOR'S MESSAGE
EVENTS	05	Visitors Gallery
EVENTS	06	Minister's Visit: YB Puan Hajah Nancy Shukri
EVENTS	07	Diploma in International Arbitration
HIGHLIGHT	08	New ICC Rules of Arbitration 2012
INTERVIEW	11	In The Seat: Tun Zaki Tun Azmi
EVENTS	12	KLRCA-ACICA Joint Seminar • Launch of the Malaysian Arbitration Act 2005
FEATURE	17	CIPA Act 2012: An Exception for 'Occupiers'?
FEATURE	21	The Malaysian Society of Adjudicators
EVENTS	23	MCCA Seminar Series No.3 • KLRCA Adjudication Training Programme
FEATURE	24	If You Go To Caesar You Must Take Caesar's Judgment
EVENTS	28	KLRCA Talk Series
LEGAL UPDATES	29	Arbitration Case Law: Developments in Malaysia
	34	EVENTS CALENDAR

PUBLISHED BY

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

Website: www.klrca.org.my



The Centre invites readers to contribute articles and materials of interest for publication in future issues. Articles and materials that are published contain views of the writers concerned and do not necessarily reflect the views of the Centre.

Information in the newsletter has been compiled or arrived at from sources believed to be reliable and in good faith, but no representation, expressed or implied, is made as to their accuracy, completeness, or correctness. Accordingly the Centre accepts no liability whatsoever for any direct, indirect or consequential loss or damage arising from the use of information in this newsletter, reliance or any information contained herein, any error, omission or inaccuracy in any such information or any action resulting therefrom.



DIRECTOR'S MESSAGE



DEAR FRIENDS,

In a blink of an eye half the year has gone by. A lot has happened in the past six months and many more activities are expected for the rest of the year. This is a good sign for arbitration, and ADR generally, in Malaysia.

KLRCA welcomed a visit from the new minister in the Prime Minister's Department Yang Berhormat Puan Hajah Nancy Shukri at the KLRCA during the second quarter of 2013. We are truly humbled to have been one of the first few agencies chosen by YB Puan for a visit soon after YB Puan had taken on the helm. The interest and support in the centre is appreciated and on behalf of KLRCA, I would like to wish the heartiest of congratulations to YB Puan Hajah Nancy on being appointed a Minister. We look forward to a good working relationship with YB Puan.

As the nation waits for the enforcement date for the Construction Industry Payment and Adjudication Act 2012 (CIPAA) to be announced by the Minister of Works, the KLRCA forges ahead to create and register a new society aptly named the Malaysian Society of Adjudicators (MSA). The registering of the society is important as a new profession has emerged as a result of CIPAA. In brief, the society aims to regulate the conduct of adjudicators, promote professionalism amongst its members and push for a higher standard of adjudication in Malaysia. It is hoped that the MSA would provide an outlet for adjudicators to communicate amongst themselves as well as with the public for the betterment of the construction industry. A more detailed write-up on MSA is provided in this issue.

The centre is always busy with a flurry of activities and this quarter is no exception. KLRCA and the Australian Centre for International Commercial Arbitration (ACICA) had jointly organised a seminar on arbitration, giving a brief overview of what both countries have to offer. The seminar was very well received.

KLRCA also collaborated with the Chartered Institute of Arbitration Australia Ltd to organise the Diploma in International Commercial Arbitration course which was held in Kuala Lumpur and Melaka in a 9-day programme. The course is taught by experienced and renowned domestic and international arbitrators. It is the second time the course has been held in Malaysia and it has received rave reviews from the arbitration community as it is touted as the best course to prepare one for a career in arbitration. For those who missed the recent International Diploma course, you can book ahead for the upcoming course in November 2013.

In this issue of the newsletter, we have a very special and exclusive interview with the former Chief Justice of Malaysia, YABhg Tun Zaki bin Tun Azmi. Tun Zaki has continued to be supportive of KLRCA over the years and we sincerely appreciate the support given. This interview captures his insights and thoughts not only on arbitration in Malaysia but also on his life's journey. It is no doubt an interesting read.

Also in the second quarter of 2013 was the launch of my latest book *The Malaysian Arbitration Act 2005 (Amended 2011) – An Annotation*, which was published by LexisNexis. I would like to thank Tun Zaki who officially launched the book as well as to Lexis Nexis and everyone who attended the ceremony. I hope the book would be of great benefit to the arbitration community.

It has been a thrilling first half of the year and I personally look forward to the second half, which I genuinely hope would be as fruitful as the first.

Till next time, happy reading.

PROFESSOR DATUK SUNDRA RAJOO
Director, KLRCA

VISITORS GALLERY

KLRC 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
25th April 2013



Visit from
UNIVERSITI MALAYA
26th April 2013



Visit from
**FORMER ATTORNEY GENERAL OF NIGERIA,
OLASUPO SHASORE** 11th June 2013



Visit from
UNIVERSITI INSTITUT TEKNOLOGI MARA
17th June 2013



MINISTER'S VISIT YB PUAN HAJAH NANCY SHUKRI

4 June 2013

KLRCA received a visit from the newly appointed Minister in the Prime Minister's Department, YB Puan Hajah Nancy Shukri. The visit aimed at fostering closer relations between KLRCA and the ministry, as well as to shed some light on the roles and responsibilities of KLRCA.

During the visit, the Minister was shown the KLRCA corporate video, and was given a comprehensive briefing about KLRCA by the Director, Professor Datuk Sundra Rajoo. Following that, YB Hajah Nancy was given a tour around the premises of the KLRCA building.





DIPLOMA IN INTERNATIONAL COMMERCIAL ARBITRATION

A Diploma in International Commercial Arbitration course was held from 30 March - 7 April in Kuala Lumpur and Malacca. Participants of this intensive residential course were taught the practice of international commercial arbitration, including all major forms of international arbitration and related dispute settling mechanisms such as WIPO, WTO and Investment Treaty Arbitration. On successful completion of the Diploma course and Module 4 Award Writing Examination, candidates will be awarded a CI Arb Diploma in International Commercial Arbitration. The course was organised in collaboration with the Chartered Institute of Arbitrators (Australia) Limited.



NEW ICC RULES OF ARBITRATION 2012

By Sharon Chong

SHARON CHONG HIGHLIGHTS SOME ASPECTS OF THE NEW ICC ARBITRATION RULES

On 12 September 2011, the International Chamber of Commerce (ICC) issued its revised Rules of Arbitration, which updates its 1998 Rules of Arbitration ("the 1998 Rules") which have been in force since 1 January 1998.

The New Rules of Arbitration 2012 (the New Rules) is the result of a two-year effort by the ICC Commission of Arbitration and will come into force on 1 January 2012. The New Rules retain the essential features of ICC arbitration while adding new provisions to provide more flexible and effective procedures to meet the current developments in arbitration practice and information technology.

This article highlights some of the changes that will be introduced under the New Rules.

JURISDICTION CHALLENGES

Under the 1998 Rules, the International Court of Arbitration ("ICC Court") is required to make a *prima facie* finding on the existence of an arbitration agreement. Under Article 6 of the New Rules, any jurisdictional issues will be referred directly to and decided by the arbitral tribunal, unless the Secretary General decides to refer the matter to the ICC Court for its decision pursuant to Article 6(4).



MULTI-PARTY AND MULTI-CONTRACT ARBITRATIONS

The New Rules include provisions that deal with issues in complex arbitrations such as joinder of additional parties, claims between multiple parties, multiple contracts and consolidation of arbitrations.

(i) Article 7

Article 7 of the New Rules allows a party to join an additional party to the arbitration by submitting a Request for Joinder to the Secretariat. However, if the application is made after the confirmation or appointment of any arbitrator, the consent of all parties, including the additional party, will be required.

(ii) Article 8

Any party in a multi-party arbitration may make any claim or counterclaim pursuant to Article 8 of the New Rules against any other party prior to the approval of the Terms of Reference, after which such claims or counterclaims will require the authorisation of the arbitral tribunal.

This provision addresses a common problem arising from the 1998 Rules in relation to the filing of a cross-claim by a Respondent against a co-Respondent. Whilst Article 5 of the 1998 Rules provides for counterclaims filed by the Respondents against the Claimants, the 1998 Rules do not provide for the filing of cross-claims.

Various writers have commented on the scope of Article 5 of the 1998 Rules and its applicability to the filing of a cross-claim. Bernard Hanotiau in *Complex Arbitrations* (Kluwer Law International, 2005) commented that “in the absence of any express provision and taking into account the objection raised by one of the respondents, ... the cross-claim brought by one respondent against another was not admissible, and that consequently, the respondent should pursue the matter with the said co-respondent in a separate arbitral proceeding. The Court considered that claims between co-respondents would only be admissible with the consent of the parties, since the ICC Rules do not provide for this type of cross-claim.”

Similarly, Yves Derains and Eric A. Schwartz in *A Guide to the New ICC Rules of Arbitration* (Kluwer Law International) were of the view that it is the exclusive privilege of the Claimant to determine who are the parties to the arbitration and that where there are multiple Respondents, “a Respondent is also not entitled to make a cross-claim against another Respondent, unless all of the parties otherwise agree. In such circumstances, a Respondent party wishing to join a third party to the proceedings or to file a cross-claim against a co-Respondent will be left with no alternative but to commence a new arbitration against such party, unless all of the parties concerned otherwise consent.”

This view was shared by Michael W. Buhler and Thomas H. Webster in their book, *Handbook of ICC Arbitration* (2nd Edition, 2008) which states that the current view is that in the absence of an arbitration agreement drafted to cover also cross-claims, it is generally not possible to pursue such claims under the 1998 Rules.

Article 8 of the New Rules now empowers a Respondent to file a cross-claim against a co-Respondent without having to commence a new arbitration.

(iii) Article 9

With regards to multi-contract arbitrations, Article 9 of the New Rules allows claims arising out of or in connection with more than one contract to be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement.

(iv) Article 10

Article 10 of the New Rules allows the parties to request for the consolidation of two or more arbitrations into a single arbitration provided that all parties agree to the consolidation or where all the claims in the arbitrations are made under the same arbitration agreement.

In cases where the claims in the arbitrations are made under more than one arbitration agreement, the following conditions must be satisfied – (a) the arbitrations must

be between the same parties, (b) the disputes in the arbitrations arise in connection with the same legal relationship, and (c) the ICC Court must be satisfied that the arbitration agreements are compatible.

When arbitrations are to be consolidated, they will be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.

CONDUCT OF THE ARBITRATION AND CASE MANAGEMENT CONFERENCES

(i) Article 22

Article 22 of the New Rules imposes an express general obligation on the arbitral tribunal and the parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

(ii) Article 24

To encourage the avoidance of unnecessary delay and expense in the arbitral process, Article 24 of the New Rules requires the arbitral tribunal to convene a case management conference with the parties when drawing up the Terms of Reference or soon thereafter to consult the parties on procedural measures which it considers appropriate. The tribunal may, after the consultation, adopt such procedural measures. Appendix IV of the New Rules provides examples of case management techniques that can be used by the tribunal and the parties for controlling time and cost.

(iii) Article 37

Article 37(5) empowers the arbitral tribunal to take into consideration the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner when it decides on the costs of the proceedings.

EMERGENCY ARBITRATORS

Article 29 of the New Rules permits the parties to make an application pursuant to the Emergency Arbitrator Rules in Appendix V of the Rules for an emergency arbitrator for urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal, provided that such application is received by the Secretariat before the file is transmitted to the tribunal.

The emergency arbitrator's order does not bind the arbitral tribunal and may be modified, terminated, or annulled by the tribunal. Article 29 and the Emergency Arbitrator Rules (collectively “Emergency Arbitrator Provisions”) are inapplicable where (a) the arbitration agreement was concluded before the effective date of the New Rules (1 January 2012), or (b) the parties have

agreed to opt out of the Emergency Arbitrator Provisions, or (c) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures. These provisions do not preclude the parties from seeking interim relief from a competent judicial authority.

IMPARTIALITY, INDEPENDENCE AND AVAILABILITY OF ARBITRATORS

Article 11 of the New Rules imposes on the arbitrators an additional requirement, apart from being independent, to be impartial. Arbitrators will be required to confirm their availability before accepting an appointment or confirmation. Further, arbitrators must sign a statement disclosing any facts or circumstances which might be of such a nature as to call into question their independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to their impartiality.

NEW TECHNOLOGY MEASURES

In order to update the rules to reflect changes in the technology age, Article 3 of the New Rules specifically allows communications to be made by e-mail. Although the New Rules omit references to communications by facsimile transmission, telex and telegram which were expressly permitted under the 1998 Rules, communications by facsimile transmission and telex (but not telegram) are still permitted as they comprise "other means of telecommunication that provide a record of sending thereof" which has been retained from the 1998 Rules.

NEW TERMINOLOGY

The designation of the 'Chairman' and 'Vice-Chairmen' of the ICC Court have been replaced by the designation 'President' and 'Vice-Presidents' respectively.

CONCLUSION

The amendments are welcomed as they provide more modern and flexible procedures in order to address and deal with the increasing number of complex arbitrations and to ensure expeditious and cost-effective resolution of disputes without compromising on the quality of decisions.

This Article was first published in Issue 03/2011 of Legal Insights, a Skrine Newsletter. Reproduced with permission of Skrine.



ABOUT THE AUTHOR

Sharon Chong is a Senior Associate with the Dispute Resolution Division of SKRINE. Her main practice areas are Corporate and Commercial Litigation and International Arbitration.



IN THE SEAT — TUN ZAKI TUN AZMI

In the seat for this issue is Yang Amat Berbahagia **TUN ZAKI TUN AZMI**, the former Chief Justice of Malaysia and one of the most prominent figures in the Malaysian legal scene. With more than 30 decades of experience working in the legal field, YAB Tun Zaki Tun Azmi is highly regarded for his legal opinions. He sits down with us to discuss how he ended up exploring a career in law, the state of the Malaysian judiciary and his views on Malaysian arbitration, among other things.

Why did you choose law as a career? Was it something that you have always wanted to do?

The truth is the decision to read law was made by my father, not me. Initially I wanted to study economics because at that time economics was rather more appealing. However, my father asked me to take up law because it is not a strictly professional qualification and that is one of its many advantages. It provides numerous career options, allowing a person to build a career in management or administration for example. Meaning one does not necessarily have to practise law. This is different from many other professions; for example, dentistry or engineering whereby both are strictly professional disciplines and does not provide too much leeway in terms of career opportunities.

I was also reluctant to take up law because I thought my English was weak. I only had a credit in my Malaysian Certificate of Education (now known as SPM) national examination, but at that time the standard was really high. You have to be very good to obtain a distinction, not only in English but in most subjects as well. My father's response was that one need not excel in the language to be a good lawyer.

So it was for those reasons I acceded to my father's request and read law. Praise be to Allah, I have never regretted that decision.

Did you ever think that you would follow the footsteps of your late father (who was one of the earliest Lord Presidents of the, then, Supreme Court) in becoming the highest ranking judge in the country? How did you end up becoming a judge?

To be honest, the thought of becoming the Chief Justice had never crossed my mind. Even when I was a magistrate earlier in my career, the highest position I thought I would attain in the judiciary is as a judge in the High Court. Moving up to the level of Chief Justice was something that I have never wished or hoped for. It was never my ambition.

My career began in the civil service where I worked for 15 years; first as a judge in the lower courts, then I worked in the drafting division of the Attorney General's Chambers, and later on as a legal adviser at the Ministry of Home Affairs. After so many years with the government, I made a calculated decision to practise law and subsequently became an advocate and solicitor with the firm Rashid and Lee (now Shahrizat, Rashid and Lee) where I honed my legal skills for 22 years.

The events that led to my appointment as a judge began on one fine day as I was advising my clients in Kuala Lumpur. During the meeting, I received a phone call from the (then) Prime Minister, Tun Abdullah Ahmad Badawi. He spoke to me in a soft voice and it was difficult to make out what he was saying. As the message was not coming across, he invited me to personally meet him at the MATRADE building at Jalan Duta instead. I straightaway instructed my driver to pick me up and drive me there.



Upon my arrival at the MATRADE building, I could see the Prime Minister standing at the lobby. I greeted him there and was immediately told to join him in his Perdana as he was heading to Malacca for an event. I readily agreed to it.

We started having a conversation in the car and the Prime Minister told me that he wants me to become a judge. As he was telling me this, a lot of things raced through my mind. I started thinking about my young family as two of my boys were still in primary school and I am not quite sure whether we can live off a judge's salary.

At that time I provided him eight reasons why it would not be a good idea to appoint me as a judge. Among some of the reasons were that; I was the legal advisor to UMNO, I am also a businessman and I have investments in some companies. I foresaw many other factors which could sway people's perception about my independence as a judge. Furthermore, my wife would not be happy if I accepted a job in a public office as she was already comfortable with the life we had, out of the view of the public eye. Nevertheless, the Prime Minister shot down each reason that I gave. Finally I told the Prime Minister that my appointment will certainly raise the ire of certain sections of the public and it is vital that he defends me and my accession to the position, after all he was the one who appointed me.

At that time there was no mention of me becoming the Chief Justice. Although it was hinted, no actual promise was made. By the time we reached the destination, the Prime Minister asked me for my decision. Since it was the Prime Minister himself who personally approached me, I do not think I have any other choice! So I accepted his proposal. That was how I became a judge of the Federal Court (Tun Zaki was made President of the Court of Appeal in a matter of months, and eleven months later, he was appointed the sixth Chief Justice of Malaysia).

You are rather active in promoting Malaysian arbitration with KLRCA, why is that so?

In all honesty, my involvement in the promotion of Malaysian arbitration began after I was invited by Datuk Sundra Rajoo. Arbitration is undoubtedly a very important part of alternative dispute resolution and it would continue to be even more important in the future. The real question is; where can we place KLRCA and Malaysia in the global arbitration scene? At the moment, the most noteworthy centres in the region are in Hong Kong and Singapore, whilst internationally there are London, Paris and New York. Malaysia should not be left behind as far as arbitration is concerned.

Since Datuk Sundra took over as the Director of KLRCA, he has put in a lot of effort to make KLRCA stand out on the world map. For that reason, it should be given all the support that we can give and I am very happy to help promote Malaysia as an arbitration destination in the region.

The Malaysian arbitration scene is experiencing a kind of resurgence these past few years, has this got something to do with the developments in the judiciary?

In Malaysia, two things are happening as far as arbitration is concerned. Firstly, the courts are becoming arbitration-friendly, meaning that more and more arbitral decisions are being upheld by the courts. Secondly, court cases are moving fast and matters are being decided swiftly.

The courts' attitude towards arbitration has only changed in recent years. I remember having a conversation with the then Chartered Institute of Arbitrators (CIArb) President, Ms Teresa Yeuk Wah Cheng from Hong Kong at a dinner function hosted by the Institute back in 2008. She complained that the Malaysian courts were meddling in arbitration decisions (reviewing, making changes to awards) and this defeated the objective of arbitration, which is to provide a speedy and fair resolution, among other things. I apologised to her and admitted that I was unaware it was happening. I asked if she was prepared to speak to the judges about this as I would like to conduct a course on the matter. She agreed to it.

So we conducted a weekend arbitration course to the judges in February 2009. Teresa roped in local and international speakers to speak on relevant subject matters. Immediately after that course, the scenario improved. The judges began to understand the nature of arbitration and how it worked. In the past, judges were looking at arbitration cases as if they were doing a judicial review. The judges realised that they should not interfere with arbitral decisions, and ultimately that was what we wanted to promote.

Additionally, due to the on-going judicial reform, court cases are also moving rapidly. Even if a party is unhappy with an arbitrator's decision and takes the matter to court, it would be settled very quickly as cases are being decided within 6-9 months. If there is an appeal, the matter would be settled within 3 months in the Court of Appeal and if there is further appeal, it would take another 3 months in the Federal Court. All and all, it should not take more than 18 months for a case to be settled. In comparison, I once sat in a case to set aside an arbitration decision that was already in its eighth year when it reached the Federal Court. At that time, this kind of scenario was not unusual. Parties who were at the losing end of an arbitration decision would gladly drag the matter in court. Now such situation does not occur anymore.

What can be done to improve arbitration further in Malaysia?

Malaysia must have good, experienced and trained arbitrators. Apart from that, Datuk Sundra Rajoo and KLRCA have introduced certain procedures to speed up arbitration including the KLRCA Fast Track Rules and this is good for arbitration in Malaysia. KLRCA has also introduced the i-Arbitration Rules and I am very pleased that they have won an international award for it (the Global Arbitration Review Award for 'Innovation by An Individual or Organisation' in 2012). These are all initiatives that will improve the local arbitration scene and there should be more of such efforts.

What would you say is your greatest achievement throughout your illustrious career? What about your time with the judiciary?

Recently I was asked to speak at the Multimedia University (MMU) Malacca on the subject of 'being a successful leader'. At the outset I expressed my hesitance at being considered as a model of a successful leader to the students. All I can say is; this is what I have done and achieved in my life, so let people be the judge. That being said, having done a bit of research via the internet on what makes a successful leader, some of the things that I have done are featured as things that a successful leader would do.

My time with the judiciary was certainly special. When I was appointed as a judge in 2008, I saw two main problems in the judiciary which I wanted to correct. First was to clear the backlog and second was to improve the image of the judiciary. As far as the backlog is concerned, the problem has seen massive improvements – with at least 80% of the backlog cleared – bearing in mind that this was done in less than 3 years of my time in office. But I must put on record that it would not have been successful if I had not received the support from the judges, Sessions Court judges, magistrates, registrars and other court staff right down to the file searchers. The judiciary would not have been able to move as expeditiously as it did if I had not received their full support.

I even managed to get the support of the Malaysian Bar even though many of them were initially against what we were trying to do. Having said that, I think the senior members of the Bar were supportive of the speedy disposal of cases even when I was the President of the Court of Appeal. The past president of the Bar, Mr Lim Chee Wee, was very happy because he was able to settle a lot of cases in 2009 and made a lot of income that year!

The judiciary actually expected the resistance from many quarters, especially from the Bar. I remember being criticised by both the then President of the Bar, Mr Ragunath Kesavan and the Malaysian Attorney General, Tan Sri Abdul Gani Patail in their speeches at the Opening of the Legal Year 2010. However, I am glad that while there were complaints and threats to protest through various means, nothing really took off. This could be because of



our diplomatic approach. Every time we hear something is going to happen or people are planning something, we called those people in to discuss the issues. For example, we once found out that the Penang lawyers wanted to hold an EGM to deliberate on the speedy resolution of cases. Immediately upon knowing this, the Managing Director of Penang Courts, Tan Sri James Foong flew to Penang, met with the lawyers and by the end of the day the problem was sorted out. The same thing happened with the Pahang and Johor lawyers. What I tried to do at that time was to build a relationship with the lawyers and it worked because in the end they understood what the judiciary was trying to do.

So back to the question; actually it is not for me to say what my greatest achievement is. It is for others to tell me. I would say being a good father is also an achievement and one that I would be proud of.

You have worked with many prominent individuals throughout your career, be it in the government, the law firm and the judiciary, who would you say had the greatest influence on you?

I worked with Tun Ghazali Shafie and Tun Musa Hitam while I was the legal advisor to the Home Affairs Ministry for almost nine years. These two individuals have such contrasting characters and each have their own qualities. Tun Ghazali was a very fierce, impatient and aggressive leader, while Tun Musa was very gentle, quiet, persuasive, soft-spoken and friendly person. But I learned a lot from both individuals.

I was also able to gain valuable knowledge from my other superiors as well, like Tan Sri Abu Talib who was my boss in the Attorney-General's Chambers. From the private sector Tan Sri Basir Ismail, who was the Chairman of Petronas and later the Chairman of Malaysian Airports Berhad, had provided me with great insight into the corporate world. I was a Director in both companies and therefore had the opportunity to work with him.

It was through these experiences that I was able to learn and later on implement what I did when I was with the judiciary. It is difficult to really pinpoint who had the greatest influence on me, but as I see it, they are all part of my growth, and I became wiser from the experiences gathered.

Do you have any words of wisdom for the young legal practitioners out there?

When you disagree with something, just say it. I have personally expressed disagreements with the likes of Tun Dr Mahathir as well as all those people I mentioned earlier. That is why I always encourage people to express disagreements with me and challenge me if they think I am wrong.

Apart from that, I would say honesty and hard work are the two most important things in life. Without both you cannot achieve success.



KLRCA-ACICA JOINT SEMINAR

01.04.2013

Renaissance Kuala Lumpur Hotel

The KLRCA-ACICA Joint Seminar on Malaysian and Australian Arbitration Law & Practice, was held successfully on 1 April 2013 in Kuala Lumpur. More than 60 people attended the seminar which featured Malaysian and Australian arbitration experts. The seminar began with welcoming remarks by Professor Datuk Sundra Rajoo of KLRCA and Prof Doug Jones of ACICA.

Tan Sri Cecil Abraham spoke about investor relations and its challenges in the Asia Pacific Region while Mr John Wakefield and Mr Rajendra talked about the arbitration law in Australia and Malaysia, respectively, as well as the relevant rules and its developments. The talks were followed by a case law study by expert panellists including, Mr John Wakefield, Prof Doug Jones, Ms Rashda Rana, Mr Rajendra, Mr Lim Chee Wee and moderated by Mr Wong Chong Wah



LAUNCH OF THE MALAYSIAN ARBITRATION ACT 2005 (AMENDED 2011) — AN ANNOTATION

27.04.2013

Kuala Lumpur Golf and Country Club

LexisNexis Malaysia and KLRCA launched the publication of The Malaysian Arbitration Act 2005 (Amended 2011) – An Annotation, on 22 April 2013. The book was authored by the Director of KLRCA, Professor Datuk Sundra Rajoo.

YA Bhg Tun Dato' Seri Zaki bin Tun Azmi, Former Chief Justice of Malaysia, was on hand to launch the book at the Kuala Lumpur Golf and Country Club.

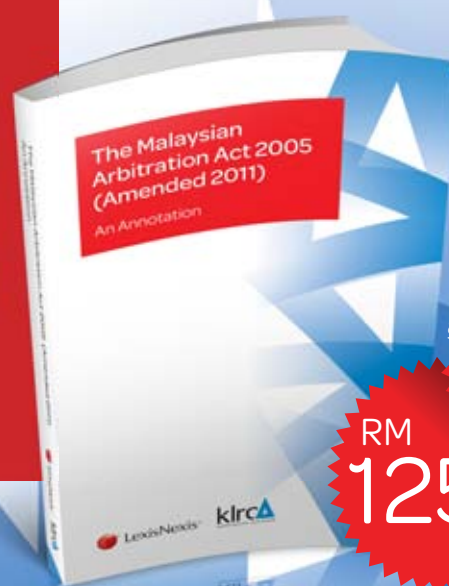
The book provides a commentary on the overall Malaysian experience in arbitration, relevant legislative reforms, the UNCITRAL Model Law, the 2011 legislative reforms and the use of case law, legislation and codes. This is followed by an in-depth annotation of the Arbitration Act 2005 and the reproduction of the UNCITRAL Model Law.

It is available for purchase at LexisNexis online bookstore - <http://www.lexisnexis.com.my/store/my/>



The Malaysian Arbitration Act 2005 (Amended 2011) An Annotation

by Datuk Sundra Rajoo



RM
125.00

This is a handy one volume reference for an overview on Arbitration in Malaysia, it is the **first** publication updated with the 2011 legislative reforms. The book starts with a commentary on the overall Malaysian experience in arbitration, relevant legislative reforms, the UNCITRAL Model Law, the 2011 legislative reforms and the use of case law, legislation and codes. This is followed by an in-depth annotation of the Arbitration Act 2005 and the reproduction of the UNCITRAL Model Law. The last part of this book provides a write up about the KLRCA and their commentary on the relevant Rules. This should be a first point of reference for anyone wishing to understand how arbitration works in Malaysia.

Key features

The book explains both the background and philosophy of the Arbitration Act 2005 with its background in the UNCITRAL Model Law on International Commercial Arbitration. It contains a compilation of current judicial and academic references that help elucidate the topic and implementation of the Act.

Table of contents

Part 1: Introduction

- (1) A Brief Survey
- (2) The Malaysian Experience
- (3) The Legislative Reforms of 2005
- (4) UNCITRAL Model Law
- (5) The 2011 Reforms
- (6) The Format of the Act
- (7) Use of Case Laws and Legal Text

Part 2: Annotations to the Arbitration Act 2005

- (1) Arbitration Act 2005 and its Annotations
- (2) UNCITRAL Model Law on International Commercial Arbitration 1985 and its Explanatory Note by the UNCITRAL Secretariat (*the text reproduced)

Part 3: KLRCA and commentaries on the rules

- (1) The Kuala Lumpur Regional Centre for Arbitration
- (2) Services and Functions of KLRCA
- (3) KLRCA's Rules: A commentary
 - (a) The genesis and conception of the rules
 - (b) Current enhancements to the rules
 - (c) KLRCA Arbitration Rules
 - (d) KLRCA i-Arbitration Rules
 - (e) KLRCA Fast Track Arbitration Rules

Appendix

- (1) Rules for Arbitration of the Regional Centre for Arbitration Kuala Lumpur
- (2) UNCITRAL Arbitration Rules
- (3) Fast Track Rules of the Regional Centre for Arbitration Kuala Lumpur
- (4) Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Order Now! via our eBookstore @ www.lexisnexis.com/store/my

To purchase, please contact our Helpdesk at Tel: 1800-88-8856 or Email: help.my@lexisnexis.com or Twitter (Helpdesk): @HelpLNMY



CIPA ACT 2012: AN EXCEPTION FOR 'OCCUPIERS'?

By Lam Wai Loon & Ivan Y.F. Loo



Introduction

The scope of the Construction Industry Payment and Adjudication Act 2012 (CIPA Act 2012) is principally set out in section 2, which provides that the CIPA Act 2012 applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory in Malaysia including a construction contract entered into by the Government of Malaysia.

However, the application of the CIPA Act 2012 is subject to two provisions in the Act which restrict the scope of its application. They are section 3 and section 40 of the CIPA Act 2012. Section 3 excludes contracts entered into by a natural person for the carrying out of construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation, while Section 40 confers upon the Minister of Works a discretion to exempt 'any person or class of persons' or 'any contract, matter or transaction or any class thereof' from all or any of the provisions of the CIPA Act 2012.

This article discusses the scope and application of section 3 of the CIPA Act 2012. In this regard, reference will be made to decisions made by the Technology and Construction Courts (TCC) in the United Kingdom on a similar exclusion provision in its statutory adjudication regime.

Section 3 of the CIPA Act 2012

For a construction contract to come within section 3 of the CIPA Act 2012, three requirements must be satisfied. First, it must be entered into by a natural person. Secondly, it must relate to construction work in respect of any building which is less than four storeys high. Thirdly, the building must be wholly intended for the person's occupation.

"NATURAL PERSON"

The expression 'natural person' in Section 3 refers to a real person occupying the building. A company is not a natural person.¹

In *Edenbooth Limited v Cre8 Developments Limited*², the defendant, a development company, engaged the plaintiff to carry out certain construction works at two adjoining properties, one of which was owned by a director of the defendant. Disputes arose about payment of the works carried out by the plaintiff, which were referred to adjudication. The adjudicator gave his decision in favour of the plaintiff. On enforcement, the defendant- argued, *inter alia*, that the adjudicator lacked the jurisdiction on the ground that it was a residential occupier and therefore, the contract fell within section 106(1)(a) of the Housing Grants, Construction and Regeneration Act 1996 (UK 1996 Act) which excludes any construction contract with a residential occupier. Coulson J rejected the defendant's contention for three reasons. First, the word 'residential' conveys a requirement that a real person must be living or residing in the house or flat in question. Secondly, the defendant was engaged in property development and therefore negated the suggestion that the work was carried out by or on behalf of a residential occupier. Thirdly, the defendant was not the registered owner of the properties.³

Although the decision of Coulson J in *Edenbooth Limited* was based on the words 'residential occupier' under section 106(1)(a) of the UK 1996 Act, it is instructive for determining the ambit of section 3 of the CIPA Act 2012. This is because the main policy reason for both exclusion provisions is similar, which is to exclude private dwelling houses from its application. There is, however, a caveat in respect of Coulson J's third reason for rejecting the defendant's contention, namely, the defendant was not the registered owner of the properties. Although the fact that the contracting person is not the registered owner of the property in question could be an indication that the work was not carried out for the purpose of residential occupation, this fact alone is not sufficient to take the construction contract outside the exemption provision.

For the purposes of Section 3 of the CIPA Act 2013, it appears that the 'natural person' need not necessarily be the registered owner of the property in question. He may be a tenant who entered into a construction contract for the carrying out of construction work on a house rented by him which is wholly for the purpose of his own occupation during the tenancy period.

"CONSTRUCTION WORK IN RESPECT OF ANY BUILDING WHICH IS LESS THAN FOUR STOREYS HIGH"

The exemption provision in section 3 of the CIPA Act 2012 also requires that the building in respect of which the construction work is to be carried out must be less than four storeys high. Applying the ordinary meaning to the words 'less than' in this context, it should mean that any construction contract for any construction work in respect of a building which is four storeys high or above is not excluded from the operation of the CIPA Act 2012.

The word 'storeys' is not defined in the CIPA Act 2012 but, the following expressions defined in by-laws of the Uniform Building By-Laws 1984 are instructive for its interpretation:

1 In *Edenbooth Ltd v Cre8 Developments Ltd* [2008] EWHC 570 (TCC), the TCC judge, Coulson J, concluded that a company was not a "residential occupier" within exclusion provision in s 106 of the UK 1996 Act. The learned judge held that the "residential occupier" must be a real person residing in the property in question.

2 [2008] EWHC 570 (TCC).

3 Paragraphs 8 -11 of the judgment.



Section 3 excludes contracts entered into by a natural person for the carrying out of construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation

'storey' is defined as 'the space between the upper surface of every floor and the surface of the floor next above it, or if there be no such floor then the underside of the tie or collar beam of the roof or other covering or if there be neither tie nor collar beam then the level of half the vertical height of the underside of the rafters or other support of the roof';

'floor' is defined as including 'any horizontal platform forming the surface of any storey and any joist, board, timber, stone, concrete, steel or other substance connected with or forming part of such platform';

'basement' is defined as 'any storey or storeys of a building which is or are at a level lower than the ground storey';

'ground storey' is defined as 'the lowest storey of a building to which there is an entrance from the outside on or above the level of the ground at the front of the building'.

From the definitions, it would appear that for the purposes of section 3 of the CIPA Act 2012, the expression 'storeys' would include any storey of and above the basement including the ground storey of a building.

The expression 'building' is defined in section 3 of the Street, Drainage and Building Act 1974 (Act 133) to include '*any house, hut, shed or roofed enclosure*' and '*any wall, fence, platform, staging, gate, post, pillar, palling, frame, hoarding, slip, dock, wharf, pier, jetty, landing-stage or bridge, or any structure support or foundation connected to the*' house, hut, shed or roofed enclosure. The 'building' can be temporary or permanent in nature. A 'building' can also be a separate and self-contained premise in, or form part of, a larger building so long as the entire premise is less than four storeys high. Thus, a building which is a unit, say in a ten storeys high residential apartment, it should still fall within the ambit of section 3 of the CIPA Act 2012 irrespective of whether the unit is sited on the first floor or the tenth floor of the apartment.

"WHOLLY INTENDED FOR HIS OCCUPATION"

A construction contract is only excluded from the CIPA Act 2012 if the construction work in question relates to a building which is 'wholly intended for his occupation'. Although there is no express requirement for such occupation to be for residential purposes in section 3 of the CIPA Act 2012, it is considered that the word 'wholly' and the purpose of the provision are clear indications that there shall not be any commercial elements or intent relating to the use of the building. As such, if a construction contract entered into by a natural person was for the carrying out of construction work at a building which is intended wholly for commercial purposes, or partly for his own occupation and partly for other commercial purposes, then the construction contract will not be excluded under section 3 of the CIPA Act 2012.

However, the determination of such an intention can sometimes be difficult. In the TCC case of *Westfields Construction Limited v Lewis*⁴ which concerned the application of section 106(2) of the UK 1996⁵, the Honourable Justice Coulson took the view that, although the date of the formation of the contract was particularly important in any consideration of any intention to occupy the subject premises as the employer's residence⁶, his Lordship agreed with the Claimant's counsel that 'occupation' was an on-going process and could not be tested by reference to a single snapshot in time. His Lordship held that therefore, the evidence about the position at the date that the contract was made has to be considered in the context of all of the evidence of occupation and intention, both before and after the date of the contract. His Lordship further emphasised that the question had to be approached with common sense, in that it ought to be plain, on a brief consideration of the facts, whether the employer is or is not a residential occupier within the meaning of section 106(2) of the UK 1996 Act.

In *Samuel Thomas Construction v Anon*⁷, the construction contract in question concerned the refurbishment of two dwellings, one was intended for occupation by one of the parties to the contract and the other was for onward resale. The TCC judge, HHJ Overend, held that the construction contract could not be considered as principally related to works on a dwelling which one of the parties to the contract occupied because of the commercial elements of the works. Therefore, HHJ Overend held that the contract did not fall within the exemption provision under section 106(2) of the UK 1996 Act and rejected the argument that the adjudicator lacked the necessary jurisdiction.

Value of construction contract is immaterial

Section 3 of the CIPA Act 2012 does not impose any limit on the value of this category of construction contracts. As such, the value of the works involved in a construction contract is immaterial for the purposes of section 3 of the CIPA Act 2012.

Onus of proof

Generally, the onus to prove that the construction contract is within the included class of contracts lies with the person seeking to resort to the statutory adjudication mechanism under the CIPA Act 2012.⁸ Once that is satisfied, the onus of prove then shifts to the person seeking to avoid the operation of the CIPA Act 2012 to prove that the construction contract is within the excluded class of contracts.

Conclusion

The mere fact that a person is an occupier of the subject building would not be sufficient to bring the construction contract within the exclusion provision of section 3 CIPA Act 2012. The person also needs to show that the construction contract is for construction work in respect of a building which is less than four storeys high and which is wholly intended for his occupation. Whilst decided cases from the TCC in the United Kingdom would be instructive in interpreting our section 3 in the CIPA Act 2012, which has yet to come into force, the outcome on its scope and application will certainly have to await the decisions from our courts.

LAM WAI LOON & IVAN Y.F. LOO are Partners at Skrine, and co-authors of the to-be published text titled "*Construction Adjudication In Malaysia*"

4 [2013] BLR 223; [2013] EWHC 376 (TCC).

5 Section 106(2) of the UK 1996 Act provides that its statutory adjudication regime does not apply to 'a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence'.

6 In coming to this decision, the Learned Judge was aware that he had in his previous decision in *Shaw v Massey Foundation and Pilings Limited* [2009] EWHC 493 (TCC) held that what mattered was the employer's intention at the time of the formation of the contract, see para. 6 of the judgment.

7 (Unreported) 28 January 2000. See also *Mr. and Mrs. Christopher Shaw v Massey Foundation and Pilings Ltd* [2009] EWHC 493.

8 *Walter Construction v CPL (Surry Hills)* [2003] NSWSC 266.



MALAYSIAN
SOCIETY OF
ADJUDICATORS

The Malaysian construction industry has seen unprecedented growth over the past few years, driven mainly by government projects. The billion-ringgit industry has contributed extensively to the overall GDP of the country. However, one of the major hurdles to the industry is on the issue of payments.

In a collaborative effort to address the issue, the Construction Industry Payment & Adjudication Act 2012 (CIPAA 2012) was passed by Parliament in June 2012 following years of industry-led discussions. With the introduction of the Act, Malaysia joins the few jurisdictions in the world that practices statutory adjudication as a dispute resolution method in construction claims, namely the United Kingdom, Australia, New Zealand and Singapore.

CIPAA 2012 aims to address cash flow problems in the construction industry. The Act will see the removal of pervasive and prevalent practices of conditional payment ('pay when paid', 'pay if paid' and 'back to back') and reduces payment default by establishing a cheaper and speedier system of dispute resolution in the form of adjudication.



At present, the Act has yet to come into force as the industry awaits the much anticipated date of operation by the Minister of Works.

The introduction of the Act also saw the emergence of a new profession called adjudicator. An adjudicator will normally be a qualified and independent industry expert who will assess the merits of the adjudication claim and decide on it within 45 working days or any other time frame as agreed by disputing parties.

The Kuala Lumpur Regional Centre for Arbitration (KLRC) as the official adjudication authority appointed by virtue of Part V of the Act has been tasked with setting the competency standard and criteria of an adjudicator.

BECOMING AN ADJUDICATOR

KLRC, in setting the competency standards and criteria of an adjudicator, prescribes that; the person must have successfully completed the KLRC Adjudication Training Programme and awarded the "*Certificate in Adjudication*", holds a relevant degree and have at least 7 years of working experience preferably in the building and construction industry.

Five training programmes have been held nationwide and more than 300 adjudicators are now qualified and ready to adjudicate payment claims once the Act comes into operation.

MALAYSIAN SOCIETY OF ADJUDICATORS

With the emergence of this new profession, KLRC sees the need for a professional body to regulate the standards and conduct of an adjudicator.

The Malaysian Society of Adjudicators (MSA) is formed with a common purpose of having a professional body to promote ethical and professional standards of service of adjudicators in Malaysia.

The Society aims to encourage and develop adjudication as a method of resolving construction disputes (without denouncing other dispute resolution methods, such as arbitration, mediation and conciliation) and also to provide a communication channel for which adjudication practices and issues may be discussed among professionals.

MSA is also tasked with providing training and educational facilities for members who would like to become adjudicators and to promote the study of the law and practice relating to adjudication. The training and education would keep adjudicators on the edge of current policies, practices, procedures and standards.

The Society also aims to publish papers, periodicals, magazines, journals, books and other relevant literatures as means of promoting the study of the law and practice relating to adjudication.

ACROSS OTHER JURISDICTIONS

The setting up of the Society sees Malaysia going in line with the other jurisdictions across the world that have similar practise.

For example in the United Kingdom, the Adjudication Society was founded and set up in the year 2000 with similar aims and objectives as the Malaysian Society of Adjudicators. Membership with the Adjudication Society comes with numerous benefits.

Members of the UK Adjudication Society also get yearly subscription to adjudication case transcripts, conference papers and talks and special rates to participate in yearly conferences related to the adjudication and construction industry.

HOW TO JOIN THE MSA?

Membership of the Society is open to anyone whose work, business or services are related to the area of law or practice relating to adjudication. There are 4 categories of membership, namely Affiliates, Associates, Members and Fellows.

Each category of membership comes with certain criteria that have to be fulfilled before a person is admitted as a member of the particular category of the Society. The criteria for membership can be found in the Membership form of the Society (which will be made available in the Society's website once it is published).

For more information about the Malaysian Society of Adjudicators, drop an e-mail to events@klrca.org.my.

MCCA SEMINAR SERIES NO.3

ALTERNATIVE DISPUTE
RESOLUTION

05.06.2013

KLRCA

The seminar, a collaborative effort by KLRCA and the Malaysian Corporate Counsel Association (MCCA), is the first event in the series that focuses on dispute resolution strategies and the range of ADR options available, as well as Malaysia's new adjudication legislation.

The seminar featured experienced arbitrators and corporate counsels including the Director of KLRCA, Professor Datuk Sundra Rajoo; Chartered Arbitrator and Accredited Mediator, Mr Chong Thaw Sing; President of the MCCA, Mr Thavakumar Kandiahpillai; and the General Counsel of Scmi Engineering Bhd, Mr Revantha Sinnnetamby.

KLRCA ADJUDICATION
TRAINING PROGRAMME19th – 23th April 2013

The Royale Chulan Hotel

KLRCA was back in Kuala Lumpur for the final installment of the KLRCA Adjudication Training Programme. Participants were trained with the necessary skills to conduct adjudication. The programme, which began in August last year, has attracted more than 300 participants some of whom have opted to take an exam which, if passed, qualifies them to be an adjudicator.

The training programme has been halted for the moment as KLRCA awaits the coming into force of the Construction Industry Payment and Adjudication Act 2012 which is slated to take effect this year.





IF YOU GO TO CAESAR YOU MUST TAKE CAESAR'S JUDGMENT

A commentary on *The Government of India v Cairn Energy India Pty Ltd*
by Janice Tay

The decision of the Federal Court in *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 provides authoritative confirmation of the circumstances in which an arbitral award may be set aside under the Arbitration Act 1952 (1952 Act).

BACKGROUND

Cairn Energy India Pty Ltd (Cairn) and Ravva Oil (Singapore) Pte Ltd (Ravva) had entered into a Production Sharing Contract (Contract) with the Government of India (GOI). As disputes arose between the contracting parties concerning the "costs recoveries" and the "calculation of Post Tax Rate of Return (PTRR) for production sharing purposes", these disputes were referred to arbitration, the chosen seat of arbitration being Malaysia.

The Arbitration

Six issues were referred to and decided by a panel of three Arbitrators (Arbitral Tribunal). In the final Award, the Arbitral Tribunal determined four issues in favour of GOI, and the other two, in favour of Cairns and Ravva. Dissatisfied with the determination, the GOI applied to the Malaysian High Court to set aside the Award pursuant to Section 24(2) of the 1952 Act.

The sole issue of challenge raised by GOI concerned the part of the Award that determined “*the Companies are entitled to include in the accounts, for the purposes of PTRR calculation in accordance with the provisions of Article 16 and Appendix D of the said Contract, sums paid by the Companies in accordance with Article 3.3 of the said Contract*”. The challenge was premised on three grounds, namely, that there had been (i) an error of law on the face of the Award, (ii) an excess of jurisdiction, and (iii) misconduct by the majority Arbitrators.

The Decisions of the High Court and Court of Appeal

The learned Judicial Commissioner in the High Court held that there was a manifest error on the face of the Award and set aside that part of the Award.

The High Court's decision was overturned on appeal to the Court of Appeal. Although the judges in the Court of Appeal differed in their grounds for allowing the appeal, their Lordships were unanimous in their view that the learned Judicial Commissioner had erred in his decision warranting the decision to be set aside. The decision of the Court of Appeal was reported at [2010] 2 CLJ 420.

Leave to Appeal to the Federal Court

The Federal Court allowed GOI's application for leave to appeal against the decision of the Court of Appeal on 5 questions of law, 4 of which were raised for the first time before the Federal Court. These 5 questions may be summarised as follows:

- (1) Where an award from an international commercial arbitration is submitted for review before the Malaysian Courts under Section 24(2) of the 1952 Act, and the contract provides for the application of one foreign law to govern the contract (namely the laws of India) and another foreign law to govern the arbitration agreement (namely the laws of England), is it proper for the Malaysian Court to apply Malaysian law exclusively to decide the scope of intervention in arbitration awards or the dispute at hand where the seat of arbitration is in Malaysia?
- (2) If English law is to apply, whether the appropriate law is that as stated in the English Arbitration Act 1979 which provides for an appeal to the High Court on any question of law arising out of an award?
- (3) If Malaysian law is to apply, whether the common law limitation adopted in *Sharikat Pemborong Pertanian dan Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 (Sharikat) between a specific reference and general reference in determining the scope of intervention is valid in the light of section 24(2) of the 1952 Act, which carries no limitations by itself or where a construction question is involved?
- (4) Whether the scope of intervention in arbitration awards is that as stated in *Ganda Edible Oils Sdn Bhd v Transgrain BV* (1988) 1 MLJ 428 (Ganda Edible) given that there are conflicting positions presently taken by the Court of Appeal?
- (5) Whether the Court of Appeal, as did the Majority Arbitrators before them, failed to appreciate that the paramount rule in the construction of contracts under Indian law is to ascertain the intention of the parties to the bargain and should therefore rely on the wording of the contract as opposed to the commercial sense or industry practice as aids to construction?

THE DECISION OF THE FEDERAL COURT

In determining the first question, the Federal Court held that the curial law applicable for a challenge to an arbitral award was to be determined in accordance with the chosen seat of arbitration. As the seat of arbitration for this Arbitration was Malaysia, the Malaysian law would be the applicable curial law.

Given the Federal Court's finding that Malaysian law was the applicable curial law, the second question which was premised on the finding that English law would be the applicable law was thus rendered redundant.

With regard to the third question, the Court held the common law distinction adopted in *Sharikat* between a specific reference and general reference in determining the scope of intervention was valid. The Federal Court endorsed the observations made in *Sharikat* and the distinction made between a specific reference and general reference in determining the scope of intervention. The Federal Court said:

"With respect, we are not persuaded that we should depart from the long line of authorities holding such a distinction. Where a specific matter is referred to arbitration for consideration, 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 one'. However, if the matter is a general reference, interference may be possible if and when any error appears on the face of the award."

The Court took the view that the question of construction of an agreement referred for determination by the Arbitral Tribunal was a question of law which came within the category of specific reference. Hence, it was not open for any challenge in the broad sense except in the limited circumstances of illegality. In this regard, reference was made to the observation made by the Supreme Court in *Ganda Edible* which stated that an award may be set aside if the decision of the arbitrator was tainted by illegality by deciding on evidence which was not admissible or on principle of construction which the law did not countenance.

As to the fourth question, it was contended that there was conflict between 3 Court of Appeal decisions, 2 of which did not follow *Ganda Edible* while the other did. The Court took the view that the Court of Appeal cases were not in conflict with each other in applying *Ganda Edible* and that they could be read harmoniously. Nevertheless, the Federal Court emphasised that the decision of the Supreme Court in *Ganda Edible* would prevail in the event of any conflict between those Court of Appeal cases.

The Federal Court agreed with the views of the majority of the Court of Appeal on the fifth question, that the issue in question was a specific reference on a question of law. The Court held that as the Appellant could not establish any illegality in the Award, the Court would not intervene. The Federal Court cited with approval, a passage from Scrutton LJ's judgment in *African & East Malaya Ltd v White Palmer & Co Ltd* [1930] 36 Lloyd's LR 113, 114:

"... if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesar's judgment."

Accordingly, the Federal Court dismissed the appeal as the decision of the Arbitral Tribunal on the referenced issue had not been tainted with illegality.

ANALYSIS

The Federal Court has made it expressly clear that if the parties have agreed to refer a specific question of law to an arbitral tribunal for its determination and the arbitral tribunal has done so, the parties must accept the determination by the arbitral tribunal and none of them can thereafter ask the Court to intervene in the Award on error on the face of the award except in the limited circumstances of illegality as set out in *Ganda Edible*.



Cairn India is one of the largest independent oil and gas exploration and production companies in India. Cairn India and its JV partners account for more than 20 percent of India's domestic crude oil production.

Although the Federal Court decision was in respect of an application made pursuant to Section 24(2) of the now repealed 1952 Act, it has been held in at least two High Court cases after the introduction of the Arbitration Act 2005 ("2005 Act") that the common law principles relating to challenging an award on the ground that there has been an error on the face of the award would still be applicable under Section 42(1) of the 2005 Act which allows a party to refer to the High Court any question of law arising out of an award.

However, it should be noted that Section 42 falls within Part III of the 2005 Act which *inter alia* provides that the provisions of this Part would apply to domestic arbitrations unless the parties have agreed to opt out of it and would not apply to international arbitrations unless the parties have agreed to apply it.

Nevertheless, the Federal Court's decision on the principles on "error on the face of the award" may be less significant as a result of the recent amendments made to the 2005 Act under the Arbitration (Amendment) Act 2011 ("Amendment Act") which came into effect on 1 July 2011.

The Amendment Act introduced a new Section 42(1A) to the 2005 Act which limits the scope of reference to the High Court to questions of law which substantially affect the rights of one or more of the parties. There has yet to be any reported decision in Malaysia in relation to an application for reference on a question of law under Section 42 of the 2005 Act after the introduction of Section 42(1A). However, it is likely that the application of the common law jurisprudence on error of law on the face of the awards will now be subjected to the criterion that the question of law must be one that substantially affects the rights of one or more of the parties.

The Amendment Act also introduced a new sub-section (4) to Section 51 of the 2005 Act which provides that the 2005 Act will govern all court proceedings relating to arbitration which are commenced after 15 March 2006 notwithstanding that such proceedings arise from arbitration proceedings that were commenced before 15 March 2006. In other words, while arbitration proceedings which were commenced before 15 March 2006 continue to be governed by the 1952 Act, any court proceedings which arise from such arbitration are to be governed by the provisions of 2005 Act and not the 1952 Act.

This Article was first published in Issue 01/2012 of Legal Insights, a Skrine Newsletter. Reproduced with permission of Skrine.



ABOUT THE AUTHOR

Janice Tay is a graduate from the University of Cambridge and was called to the English Bar (Lincoln's Inn) in 2008. Upon returning to Malaysia, she commenced her pupillage in the Construction and Engineering Department at Skrine. She was admitted as an Advocate and Solicitor of the High Court of Malaya in 2009 and is now a Legal Associate with Skrine.

KLRC TALK SERIES

KLRC Talk Series 2013 carried into the second quarter with more insightful talks by ADR experts. Below are talks that were held during the 2nd quarter of 2013.

Topic: Mediation – the best way to resolve medical negligence actions
Speaker: Mr Campbell Bridge, Senior Counsel, Mediator & Arbitrator
Moderator: Shanti Abraham Mathew, Partner M/s Putucheary



Topic: Maritime Dispute Resolution in Malaysia
Speaker: Ms Sitpah Selvaratnam, Consultant, Tommy Thomas Advocates & Solicitors
Moderator: Mr Nagarajah Muttiah, Partner, Shook Lin & Bok



Topic: Privacy and Confidentiality in Arbitration
Speaker: Mr Chang Wei Mun, Management Partner – Dispute Resolution, Raja, Darryl & Loh
Moderator: Tan Sri Dato' Cecil Abraham, Partner, Zul Rafique & Partners



Arbitration Case Law: Developments in Malaysia

by **Rammit Kaur**, Head of Legal Services, KLRCA
Faris Shehabi, Case Counsel, KLRCA

UST-KAMENOGORSK HYDROPOWER PLANT JSC (APPELLANT) v AES UST-KAMENOGORSK HYDROPOWER PLANT LLP (RESPONDENT)

Court: UK Supreme Court

Case Citation: [2013] UKSC 35

Date of Judgment: 12 June 2013

On appeal from: [2011] EWCA Civ 647

Facts

The Appellant is the owner of a concession to operate an energy processing hydroelectric plant in Kazakhstan. By agreement, the Appellant granted the concession to the Respondent. The concession agreement is governed by Kazakh law and contains a London arbitration clause – the arbitration clause is governed by and construed in accordance with English law. The arbitration clause provides for settlement of disputes by arbitration in accordance with the ICC Rules and conducted in London.

On 8 January 2004 the Kazakh Supreme Court issued a ruling that the arbitration clause was invalid, on two grounds: first that the arbitration included tariff disputes and was therefore contrary to public policy, second that the reference to the ICC Rules was insufficient in specifying the arbitral body. In June 2009 the Appellant brought proceedings against the Respondent in Kazakhstan. The Respondent sought, and was granted, from the English Commercial Court a declaration that claims could only be brought in arbitration and an injunction against the continuation or commencement of the foreign proceedings. This was upheld by the Court of Appeal, that decision being subsequently appealed before the Supreme Court.

Issues

There are two key issues. Firstly, whether the English Supreme Court has the power to declare that a claim can only be brought in arbitration, and subsequently whether it has the power to injunct foreign proceedings (in this case proceedings outside the European regime of the Brussels Regulation). Secondly, if the answer to the first issue is in the affirmative, whether that power can be exercised where arbitration proceedings have not been commenced and there is no apparent intention to do so.

Held

The Court identified the negative aspect of an arbitration agreement as a contractual duty not to sue in a foreign court, equating '(as) a feature shared with an exclusive choice of court clause... as fundamental as the positive (aspect)'. The Court, quoting Millett LJ, stated at para 25 that '*An injunction should be granted to restrain foreign proceedings... on the simple and clear ground that the defendant has promised not to bring them.*' The Court went on to separate a tribunal's power to determine its own jurisdiction from the Court's power to do the same, holding that the Court's power was independent from and not contingent on the presence or potential commencement of arbitral proceedings.

On the question of injuncting foreign proceedings, the Court held that in some cases it will be more appropriate to leave it to the foreign court to recognise an agreement on forum, however *'in the present case the foreign court has refused to do so... on a basis which the English courts are not bound to recognise and on grounds which are unsustainable under English law which is accepted to govern the arbitration agreement.'* Hence there was no reason for the Court not to intervene.

Accordingly the appeal was dismissed.

Impact

The unique facts of this case give the Court the opportunity to reaffirm the sanctity of the arbitration agreement, not through the usual hands-off approach but by active recognition of the contractual responsibilities therein. The importance in choosing a strong and arbitration friendly seat is also apparent, especially when doing business in jurisdictions that may not be conducive to arbitration.

TWIN ADVANCE (M) SDN BHD (PLAINTIFF) v POLAR ELECTRO EUROPE BV (DEFENDANT)

Court: High Court (Pulau Pinang)

Case Citation: [2013] 7 MLJ 811

Date of Judgment: 7 August 2012

Facts

The parties arbitrated a dispute in Singapore. The Plaintiff seeks to set aside the award in the High Court in Malaysia pursuant to section 37 of the Arbitration Act 2005. The Defendant seeks to set aside the application.

Issues

The issue here is whether the High Court in Malaysia has the power under section 37 of the Arbitration Act 2005 or inherently to set aside an arbitration award made in Singapore. Since sections 38 and 39 regarding recognition and enforcement apply to both domestic and international awards, does section 37 apply similarly to both, or does section 37 apply only to arbitrations seated in Malaysia pursuant to section 3.

Held

The Court distinguishes between section 37 and sections 38 and 39 of the Arbitration Act 2005, noting that the latter include the words 'an award from a foreign state' (section 38) and 'an award, irrespective of the State in which it was made' (section 39). Section 37 contains no such terminology. Section 3 construes the Act as referring only to arbitrations seated in Malaysia. Looking at section 37 then, *'In the absence of such express provision, the principle of law that the seat of arbitration was the place where challenges to an award were made remains applicable and good law.'* Further, the intention of the Parliament is clear that section 37 read in harmony with section 3 is not applicable to awards where the seat is outside Malaysia.

In determining its inherent jurisdiction, the Court examined the background of the Arbitration Act 2005 with reference to 'The Arbitration Act 2005 UNCITRAL Model Law as applied in Malaysia' by Sundra Rajoo and WSW Davidson. The Court noted that the inclusion of provisions restricting court intervention has the effect of excluding *'any general or residual powers given to the courts in a domestic system which are not listed in the model law'*. In addition, there is no injustice since the Plaintiff is at liberty to apply to set aside the award in Singapore.

Impact

Of the important roles that the seat of arbitration plays, providing a forum for applications to set aside arbitral awards is among the most important. This case highlights the need for careful consideration of seat, ensuring a neutral, independent and efficient forum for applications such as this.

AJWA FOR FOOD INDUSTRIES CO (MIGOP), EGYPT (APPELLANT) v PACIFIC INTER-LINK SDN BHD & ANOR (RESPONDENT)

Court: Court of Appeal, Putrajaya

Case Citation: [2013] 2 CLJ 395

Date of Judgment: 16 May 2011

On appeal from: [2010] MLJU 1876

Facts

The parties, who have had a long trading relationship of over 20 years, entered into an agreement for the appellant to purchase products from the respondent. Following a dispute, the respondent obtained two separate awards in his favour. The appellant applied to the High Court to set aside both awards. The High Court dismissed both applications. The appellant now appeals both decisions, with both appeals to be heard together.

The respondent relies on four sales contracts incorporating standard terms and conditions to complete the agreement. The appellant contends that said contracts were never incorporated into the agreement and had never been sighted. Respondent contends that the agreement consisted of oral contracts generated through telephone and e-mail exchanges. The sales contracts were never signed. The standard terms and conditions contained an agreement to arbitrate. Relevantly, it was past practice for the parties to refer their disputes to arbitration via FOSFA or PORAM.

Issues

The appellant relies on the grounds that the Arbitral Tribunal had no jurisdiction to hear the disputes in question. The basis of this contention is twofold. Firstly, that there was no valid arbitration agreement between the parties. Secondly, that the Arbitral Tribunal acted outside its jurisdiction in calculating damages utilising evidence not submitted by the parties.

The first issue therefore is whether a valid arbitration agreement can be constituted by incorporation of and reference to additional unsigned documents. The second issue is whether the Arbitral Tribunal is entitled to rely on its own expertise and knowledge in the course of discharging its duties.

Held

The Arbitral Tribunal made findings of fact, based on the course of dealings and conduct between the parties that supported the finding that the sales contracts constituted part of the agreement between the parties. The Arbitral Tribunal, further, was correct in doing so and the High Court was correct in not interfering with those findings. The Court therefore, making reference to section 9 of the Arbitration Act 2005, held that there was a valid arbitration agreement between the parties. The Court also noted that *'international agreements between parties doing business from different parts of the world are concluded and performed without the need for signature.'*

Concerning the calculation of damages, the Court noted that *'an arbitration tribunal is empowered to draw from its own knowledge and expertise in its determination especially when the arbitration is conducted by a specialised trade body with knowledge and expertise'*. With reference to section 74 of the Contracts Act 1950, the Court thus found that the Arbitration Tribunal took into account all relevant considerations in calculating damages and awarding compensation.

Impact

Parties must be clear in their business dealings and sure to document their full intentions. Written arbitration agreements can be formed without traditional formalities such as signatures. Care must be taken especially, since courts are increasingly reluctant to interfere with arbitral awards, whether it be in investigating findings of fact, altering compensation awarded or setting aside the award altogether.

**GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC v
THAI-LAO LIGNITE CO LTD, A THAI CO & ANOR**

By Shanti Mogan, Shearn Delamore & Co.

Court:	1. Court of Appeal, Putrajaya – Decision on 26 July 2011 2. Kuala Lumpur High Court
Case Citation:	1. Civil Appeal No: W – 02 (NCC) – 1287 – 2011 2. High Court Kuala Lumpur – [2013] 3 MLJ 409
Judgment by	1. Ramly Hj Ali, JCA, Jeffrey Tan Kok Wha, JCA and Zaharah Ibrahim, JCA 2. Lee Swee Seng, JC

Case Summary

The case looks at the three important issues; whether a party may file an application to set aside an arbitral award outside the timeframe provided under the Arbitration Act 2005 (AA); whether a challenge may be made on jurisdictional grounds in an application to set aside an award after participation in the arbitration; the applicable law in dealing with non signatories to the arbitration agreement, the proper law of the contract or the law of the seat. The application for extension of time was granted by the Court of Appeal and the award was subsequently set aside by the High Court. This case summary looks at both those decisions.

Dealing first with the Court of Appeal judgment on the extension of time, section 37 of the AA provides the grounds on which an aggrieved party may seek to set aside an arbitral award. A 90 day timeframe is provided to make the application. The AA provides that: *“an application to set aside an award may not be made after expiry of ninety days from the date on which the party making the application had received the award”*. In this case, there was a 9-month delay.

Prior to the enactment of the AA, the law governing arbitration in Malaysia was the Arbitration Act 1952. Whilst there is authority which allowed an extension of time to set aside an arbitral award under the old Act, the same issue arose for the first time under the new AA in the above referenced case. The Court of Appeal held it had jurisdiction to extend time notwithstanding the absence of an express provision enabling the same in the AA. The Court of Appeal, in so finding, relied, inter alia, on the Courts of Judicature Act and the Rules of Court which provide the court with power to enlarge time. The Court of Appeal also held that quite apart from jurisdiction to extend time, it also has an unfettered discretion to grant an extension of time.

In exercising its discretion, the Court held that the following factors need to be considered; the length of the delay, the reason for the delay, the prospect of success and the degree of prejudice to the respondents if the application is granted. The Court of Appeal took into account the fact that the appellant, the Government of Lao (GOL) in this case was a foreign sovereign and the matter involved an award made against the sovereign in excess of US\$56 million. The Court also held that whilst an individual may be quick in taking decisions, a state machinery may take time to filter down instructions. Further the Court of Appeal held that GOL should not be prejudiced by the fact that it was not conversant with local law requirements and did not receive adequate advice from its legal advisors. An extension of time to file an application to set aside the arbitral award was granted and the case was remitted to the High Court to hear the setting aside application. An application for leave to appeal to the Federal Court was dismissed, making the Court of Appeal decision, authority for the proposition that the Malaysian courts have jurisdiction to set aside an arbitral award filed out of time.

In the High Court, GOL successfully set aside the arbitral award, on inter alia, jurisdictional grounds; that the award (i) deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration and (ii) decides on matters beyond the scope of the submission to arbitration.

In this regard, the following matters were taken into account by the High Court; the arbitral tribunal exercising jurisdiction over mining contracts which were not within the scope of the reference to arbitration and were governed by Laotian law; the arbitrators wrongly exercised jurisdiction over non parties, i.e. companies that were not signatories to the Project Development Agreement (PDA) by amalgamating their costs with the 1st Defendant's costs in awarding damages under the PDA; the arbitrators granted a 'premium' of 10% of investment costs, to the 1st and 2nd Defendants to the suit.

With respect to the issue of non signatories to the PDA, New York law applies to the PDA, pursuant to which the arbitrators found the doctrine of 'intended beneficiary' applied and admitted a non-party to the PDA to the arbitration. The question of whether the non signatories could be recognized as 'third party beneficiary' under the American doctrine was raised in the High Court. The High Court held that whilst there was a question of law and of interpretation of contract in the application of the 'third party beneficiary' doctrine, the question was inherently a question of jurisdiction and incidentally a question of law and contractual interpretation. The High Court further held that the proper law to determine the question of whether the non parties could be recognized as parties to the arbitration agreement ought to be determined in accordance with Malaysian law, the law of the seat, not New York law, the law of the contract. On this basis the High Court held the award ought not to have extended to a non party.

Estoppel was raised in respect of the jurisdictional challenges by GOL, ie that GOL had participated in the arbitration. The High Court found that the jurisdictional challenge was raised timeously before the Arbitral Tribunal. With regard to GOL's subsequent participation in the arbitration, the High Court took the view that passive participation, after raising the jurisdictional challenge in the arbitration, did not preclude the plaintiff from subsequently applying to set aside the arbitral award, leaving open the question as to whether his position would have been the same had the participation been 'passionate' and not merely 'passive'.

This matter is on appeal and it will be interesting to see if the jurisdictional challenges will be upheld on appeal. Whilst the Malaysian Courts have been known for upholding the 'non interference' approach when it comes to giving effect to an arbitral award, jurisdictional challenges are dealt with in accordance with Section 37 of the AA. It remains to be seen how the appellate courts will deal with this issue.

SAVE THE DATE!

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

DATE 17 – 19 July 2013
EVENT Arbitration Conference – An Asean Perspective
ORGANISER KLRCA & ZICOLaw
VENUE Yangon & Ho Chi Minh City

DATE 14 August 2013
EVENT KLRCA Talk Series – CIPAA 2012 – The Stakeholders' Perspective
ORGANISER KLRCA
VENUE KLRCA

DATE 23 – 25 August 2013
EVENT LawAsia Moot Competition National Rounds
ORGANISER LawAsia
VENUE KLRCA

DATE 11 – 15 September 2013
EVENT KLRCA Adjudication Training Programme
ORGANISER KLRCA
VENUE TBA

DATE 26 September 2013
EVENT DNDRC 10th Anniversary Conference
ORGANISER KLRCA
VENUE The Royale Chulan Hotel, Kuala Lumpur

DATE 5 July 2013
EVENT Launch of The Malaysian Society of Adjudicators & Dinner for the Class of 2012/2013
ORGANISER KLRCA
VENUE The Royale Chulan Hotel, Kuala Lumpur

DATE 2 August 2013
EVENT KLRCA Talk Series – An Arbitrator's Excess of Jurisdiction and Powers
ORGANISER KLRCA
VENUE KLRCA

DATE 22 – 24 August 2013
EVENT CIArb Conference – Tapping on Asia's Growth
ORGANISER CIArb Malaysia
VENUE Penang, Malaysia

DATE 28 August 2013
EVENT KLRCA Talk Series – Arbitration Clause: Common Pitfalls
ORGANISER KLRCA
VENUE KLRCA

DATE 20 September 2013
EVENT KLRCA Talk Series – Challenges to Awards – The Malaysian Perspective
ORGANISER KLRCA
VENUE KLRCA



ADVANTAGES OF ARBITRATING AT THE KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

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

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

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

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

No visa and withholding tax imposed on arbitrators.

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

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

12, Jalan Conlay,
50450 Kuala Lumpur, Malaysia

T +603 2142 0103

F +603 2142 4513

E enquiry@klrca.org.my

www.klrca.org.my

Recommended model clause to be incorporated in any contract:

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

REGIONAL RESOLUTION GLOBAL SOLUTION