



ON THE RISE

FEATURE

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Confidentiality in Arbitration: Fundamental Virtue or Mere Illusion?

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KLRCA revises its Arbitration Rules

INTERVIEW

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**In the Seat:
YB Puan Hajah
Nancy Shukri**

NOVEMBER 2013 DIPLOMA COURSE IN INTERNATIONAL COMMERCIAL ARBITRATION

This intensive residential course in International Commercial Arbitration is offered over nine days. Participants will be 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. Participants will gain the ability to appear in or act as an arbitrator in such arbitrations in different contexts.

In the first half, a series of lectures cover the fundamentals of international commercial arbitration. They follow and analyse legal concepts and issues arising during the course of an arbitration. In the second half, the lectures will examine Trade Law disputes and arbitration under Bilateral Investment Treaties and Free Trade Agreements and other specialist areas such as construction arbitration.

Meanwhile in the afternoon sessions, participants take part in practical group workshops, under the guidance of experienced arbitrators. Students will be given practical training in the conduct of an international arbitration and will discuss a range of problems which may arise in the course of conducting an international 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.

Successful completion of the course assessment will enable students to gain advanced standing in postgraduate programs offered by the Faculty of Law UNSW. Please contact student services to discuss admission to a post-graduate program before undertaking the course. Current UNSW students should contact student services to obtain information about units of credit available to your degree. A maximum of 12 units of credit advanced standing is available.

Date:

9 – 17 NOV 2013

Venue:

**Kuala Lumpur Regional
Centre for Arbitration (KLCA)**

12, Jalan Conlay, 50450 Kuala Lumpur

PLACES ARE STRICTLY LIMITED

Cost:

A\$6,600 includes tuition, course notes, morning and afternoon tea, lunch, midweek dinner and course banquet

The above cost is for Malaysian students only who do not require accommodation in Kuala Lumpur and includes the cost of the Practice and Procedure exam but NOT the Award Writing exam which is subject to an additional fee.

For registration, payment or hotel bookings, please contact:

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DIRECTOR'S MESSAGE



DEAR FRIENDS,

We have moved into the second half of the year, and things are quickly moving into top gear as we look to finish the year on a high.

The quarter started off rather ceremoniously with the launching of the Malaysian Society of Adjudicators and graduation of class 2012/2013 of the KLRCA Adjudication Training Programme. It was quite an event with more than 300 guests including most of the newly-minted adjudicators, the pioneers in Malaysia, all in celebratory mood. I could sense the support for the new society and it was truly encouraging.

The month of Ramadhan coincided the quarter and as usual, KLRCA held its Ramadhan evening ceremony for all the stakeholders as a gesture of thank you for their unwavering support. This year, as part of our CSR initiative we invited children from the shelter home, Rumah Kasih Harmoni, to join in the festivities. We are also quite delighted to have YB Puan Hajah Nancy Binti Haji Shukri to grace the event that night and to officially handover a cheque donation on KLRCA's behalf to the home. We truly hope we have helped in some small way.

Another major event during the quarter was the CIArb International Conference held in Penang. KLRCA was the headline sponsor for the event. The event was also the first one to feature the new President, Malaysia's own, Mr Vinayak Pradhan. It was a wonderful and well attended event. The discussions held were informative and useful, participants were actively contributing ideas and I can see the general enthusiasm for arbitration in Asia.

Events apart, this issue of the newsletter also features a special interview with Minister in the Prime Minister's department Puan Hajah Nancy Binti Haji Shukri. We are truly grateful that YB Puan has taken time off her busy schedule to talk to us about her political career, give insights on her Ministerial duties as well as her outlook of arbitration in Malaysia.

The rest of the quarter went as usual with a flurry of events including our KLRCA Talk Series as well as the KLRCA Adjudication Training Programme. The next KLRCA Adjudication Training Programme which is the last one for the year will be held in Penang from the 4-8 December.

Meanwhile on the regulatory front, KLRCA is in the midst of finalising a revision to the KLRCA Arbitration Rules which will be launched at the end of October. We have done an introduction to the changes in this issue, hope you find it informative and helpful.

You can look forward to more events and activities coming your way as we take our last lap for 2013. Do lend us your support and hopefully we can bring progress to arbitration in Malaysia.

PROFESSOR DATUK SUNDRA RAJOO
Director, KLRCA

VISITORS GALLERY

KLRCAs 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

5th July 2013



Visit from THE KOREAN BAR

7th July 2013



Visit from MONASH UNIVERSITY

13th August 2013



Visit from THE HONOURABLE SOCIETY OF THE INNER TEMPLE AND JUDGE JULIA SEBUTINDE

23rd August 2013





KLRCAs and MYNIC Organises Seminar to Mark MYDRP 10th Anniversary

The KLRCAs and MYNIC Berhad joined hands to organise the MYDRP 10th Anniversary Joint Event to mark 10 years of partnership on domain name dispute resolution.

The partnership, which started in 2003, began when KLRCAs was appointed as the .my domain name dispute resolution service provider by MYNIC, which is the sole administrators for .my domain.

At the half-day seminar held in Kuala Lumpur, domain name dispute resolution experts discussed various issues, including recent developments and best practises in domain names dispute resolution and a lecture on socio-cultural perspective of domain names.



CI Arb International Arbitration Conference

KLRCAs was the headline sponsor for the Chartered Institute of Arbitrators' (CI Arb) International Arbitration Conference 2013 which was held in Penang.

The conference offer a unique platform for knowledge sharing and discourse whilst exploring a plethora of issues and opportunities, ranging from the strategic to the tactical across functions, regions, jurisdictions as well as deliberation on emerging trends.



KLRCA Revises its Arbitration Rules

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) has amended its arbitration rules which will be in force from 24th October 2013. These Rules are the KLRCA Arbitration Rules, i-Arbitration Rules and KLRCA Fast Track Rules.

The amendments are aimed at enhancing the incorporation of international trends in arbitration proceedings and KLRCA's functions in line with current practices in international commercial arbitration.

The new KLRCA Arbitration Rules contain innovative additions including emergency arbitrator provisions. The emergency arbitrator provision provides an option for parties to apply where they require urgent interim relief, increasing party autonomy, providing certainty and minimizing judicial intervention. Parties are now able to obtain the full breadth of commercial remedies within the auspices of their KLRCA administered arbitration proceedings.

The power or jurisdiction for arbitrators to grant pre-award interest has also been included. Furthermore, new provisions have been added regarding consolidation of proceedings and concurrent hearings to ensure consistency with international trends. The KLRCA has also sought to enhance its confidentiality rules restraining the cases where the matter can be disclosed.

Finally, the schedule of fees and administrative costs has been revised maintaining the KLRCA's cost advantage over other institutions. Apportionment of fees and costs relative to parties' claim and counterclaim respectively promotes fairness and equitability within the arbitration procedure.

In addition to the above amendments, the KLRCA i-Arbitration Rules also includes an important amendment pertaining to the referral to a Shariah expert. This amendment offers a method of obtaining the correct and most appropriate authority for any Shariah issues that may arise therefore broadening the procedure to accommodate international parties by the removal of any reference to a particular jurisdiction.

The KLRCA i-Arbitration Rules now also contain an optional mechanism in a shariah related dispute which enables the tribunal to award compensation to parties for the late payment of an award. This mechanism allows parties to receive full compensation in line with Shariah principles.

The KLRCA Fast Track Arbitration Rules have also seen important amendments, with revisions to the timelines enhancing expediency in procedure as well as in the completion of substantive oral hearings. Furthermore, the applicable rules for the appointment of a sole arbitrator and presiding arbitrator have been changed to encourage the smooth progression of the arbitration.

AMENDMENTS IN KLRCA ARBITRATION RULES

Rule 1: GENERAL

Item ii) of sub-section 1 provides for opting out of Section 41, 42, 43 and 46 of the Malaysian Act 2005.

It adds certainty and finality by minimizing judicial intervention and increases party autonomy where the seat of arbitration is Malaysia.

It brings the Rules closer to the requirements under UNCITRAL MODEL LAW where appeal on points of law is not allowed.

RULE 4: APPOINTMENT

New Sub-section 1 states that the Director of KLRCA is the appointing authority when parties have agreed to arbitrate under the KLRCA Arbitration Rules. The Director is always the authority to confirm any appointment made by the parties. This ensures independence and impartiality of arbitrators with no restrictions for parties to select or nominate the authority.

Item 6 of sub-section 6 has been included enabling the Director of the KLRCA to appoint the presiding arbitrator where the two arbitrators fail to agree within 30 days after the appointment of the second arbitrator. This removes the requirement of a request and facilitates the expeditious progress of the arbitration.

Rule 6: SEAT OF ARBITRATION

Sub-section 1 has been included making Malaysia the seat in default of agreement to improve upon clarity, cost and time efficiency.



RULE 7: INTERIM RELIEF

Sub-section 2 provides for emergency interim relief to reflect recent arbitration trends and recognise the need of commercial parties for interim measures at all stages of proceedings.

RULE 8: CONSOLIDATION OF PROCEEDINGS AND CONCURRENT HEARINGS

Sub-section 1 has been introduced to ensure consistency in proceedings seated in Malaysia and elsewhere.

Sub-section 2 has been introduced to clarify the tribunal powers irrespective of the seat which reflects the internationalization of the Rules. The tribunal has no power to order consolidation of arbitration proceedings or concurrent hearings unless agreed by the parties.

RULE 11: AWARDS

Sub-section 8 has been included to give interim relief the same standing as an award.

New Sub-section 9 confers on the arbitrator power to grant interest pre-award, codifying the arbitrator's rights and broadening his powers. This also enables parties to receive complete compensation.

RULE 12: COSTS

Sub-section 9 has been included to empower the arbitral tribunal to apportion fees and costs relative to parties' claim and counterclaim.

RULE 13: DEPOSITS

This rule has been amended to prevent parties from making vexatious claims and/or counterclaims as well as to contribute to a more fair and equitable arbitration to parties.

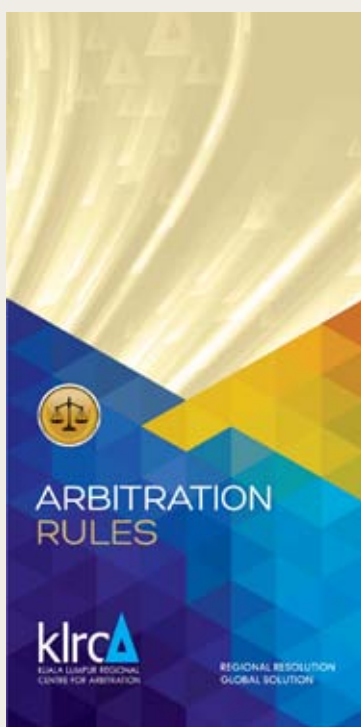
Sub-section 5 as restructured states that where counterclaims are submitted by the respondent, the Director of the KLRCA may fix separate deposits on costs for the claims and counterclaims. When the Director of the KLRCA has fixed separate advance preliminary deposits on costs, each of the parties shall pay the advance preliminary deposit corresponding to its claims.

Sub-section 7 has been included to enable the Director of the KLRCA to have the discretion to determine the proportion of deposits required to be paid by the parties.

RULE 15: CONFIDENTIALITY

Sub-section 1 has been amended to strengthen confidentiality requirements in order to enhance the privacy of any proceedings. The only exclusion becomes where the matter falls under public domain or the disclosure is necessitated by legal requirement.

Sub-section 2 has been introduced to give more clarity to the concept of "matters related to the proceedings". The provision broadens the scope to the existence of the proceedings, the pleadings, evidence and other materials



in the arbitration proceedings and all other documents produced by another party in the proceedings or the award arising from the proceedings.

SCHEDULE 1: SCHEDULE OF FEES

The schedule of fees and administrative costs has been revised to make it more attractive, suitable and competitive by decreasing the fees and costs, maintaining a 20% cost advantage with respect to other institutions.

SCHEDULE 2: EMERGENCY ARBITRATOR

This innovative provision empowers parties to seek the preservation of status quo prior to the constitution of the arbitral tribunal. By allowing the emergency arbitrator to provide this relief, it reduces the need for court intervention taking arbitration one step further to becoming a one-stop shop for the comprehensive and effective resolution of disputes.

Working in conjunction with the new Rule 7, parties are now able to further secure their position, by applying for orders relating to things such as preservation of assets and security for costs.

AMENDMENTS IN KLRCA i-ARBITRATION RULES

In addition to the above referred amendments to the KLRCA Arbitration Rules, which are likewise included, the amended i-Arbitration Rules provides for the following:

KLRCA Islamic Arbitration Clause:

The KLRCA i-Arbitration Model Clause has been restructured with the removal of reference to Shariah principles, recognising the applicability of the i-Arbitration Rules to any commercial dealing.

The new model clause reads as follows: “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 KLRCA i-Arbitration Rules.”

RULE 11: PROCEDURE FOR REFERENCE TO SHARIAH ADVISORY COUNCIL OR SHARIAH EXPERT

The new amendments give the i-Arbitration Rules a distinctly international character by removing the reference to any particular jurisdiction. This rule has been amended to broaden the referral procedure to accommodate international parties and a wide range of schools of Islamic jurisprudence.

With the amended provision for referral, the i-Arbitration Rules are equipped to accommodate any contractual arrangements by offering a method of obtaining the correct and most appropriate authority for any Shariah issues that may arise.



The revision further enables the tribunal to proceed on the issue if the shariah expert does not give a decision within its time limits which enhances and smoothens the progression of the arbitration. Subsequently, timelines are tighter ensuring the continuity and efficiency of the arbitration.

Sub-section 2 establishes that the relevant Council or Shariah expert shall be the Shariah council under whose purview the Shariah aspect to be decided falls, where there is one or where the Shariah aspect to be decided does not fall under the purview of a specific Shariah council, a Shariah council or expert that is agreed between the parties. Where the parties fail to agree to a Shariah council or expert, the provisions relating to experts appointed by the arbitral tribunal under Article 29 shall apply. Together with sub-section 1 this ensures the most appropriate authority is referred to by the Tribunal.

Sub-section 11 provides that where the relevant Council or Shariah expert fails to deliver its ruling within sixty days, the arbitral tribunal may proceed to determine the dispute and give its award based on the submissions it has before it. The validity of an award given pursuant to this Rule shall not be affected in any way by the unavailability of the relevant Council or Shariah expert's ruling.

RULE 12: AWARDS

The amendments have been included to provide a mechanism to award compensation to parties for late payment of award. This mechanism grants a proper and acceptable commercial resolution to shariah related disputes.

The new sub-section 9 states that the arbitral tribunal may on any sum of money ordered to be paid by the award a late payment charge determined by applying the principles of ta'widh and gharamah, where ta'widh refers to compensation on actual loss and gharamah refers to penalty for late payment or in any other way that the arbitral tribunal considers appropriate, including interest.

AMENDMENTS IN KLRCA FAST TRACK RULES

ARTICLE 1: GENERAL

Item ii) of sub-section 1 provides for opting out of Section 41, 42, 43 and 46 of the Malaysian Act 2005.

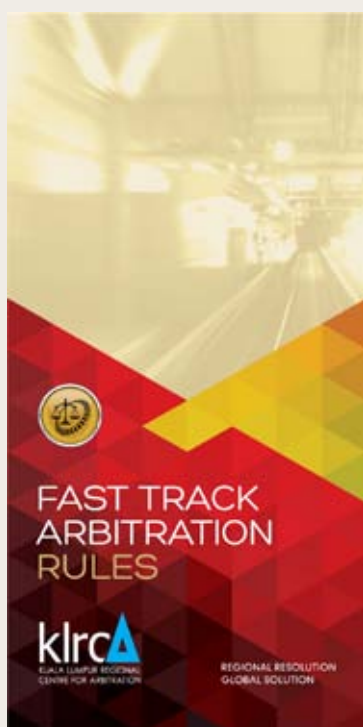
It adds certainty and finality by minimizing judicial intervention and increases party autonomy where the seat of arbitration is Malaysia.

It brings the Rules closer to the requirements under UNCITRAL MODEL LAW where appeal on points of law is not allowed.

ARTICLE 4: APPOINTMENT

This rule has been restructured by the removal of inefficient or unnecessary provisions, including those allowing for proceeding with an incomplete Arbitral Tribunal.

In addition, timelines have been reduced to enhance expediency. Requests for extension must now be made before time limits laps.



Finally, where the parties have failed to reach an agreement in writing to the appointment of a sole arbitrator within seven days of the commencement of the arbitration, the Director shall appoint the sole arbitrator without need for a request from the parties. The same will apply where two arbitrators fail to appoint the presiding arbitrator within the required timeframe.

ARTICLE 6: LAW, PROCEDURE AND JURISDICTION

Item xiv of sub-section 5 reduces the extension provided for the timelines currently to 7 days, and with the consent of the Director up to 14 days. The Director may in exceptional circumstances, upon consultation with the Arbitral Tribunal and parties, extend time further.

ARTICLE 11: SUBSTANTIVE ORAL HEARINGS

Sub-section 4 has reduced the extension previously allowed by the Rules regarding the completion of substantive oral hearings from 40 to 30 days, in line with the overall theme of enhancing expediency.

ARTICLE 19: ARBITRAL TRIBUNAL'S FEES

Sub-section 1 has been restructured to enable the Director of the Centre to fix the fees of the arbitral tribunal in accordance to the Schedule of Fees.

New sub-section 5 has been introduced to address a gap in the calculation of the amount in dispute where sufficient details are not provided. This new sub-section grants the Director the power to determine an appropriate value for the claim or counter-claim in consultation with the arbitral tribunal and the parties for the purpose of computing the arbitrator's fees and the administrative costs.

Finally, the rules on the interpretation and additional award previously stated under Article 21 and Article 22 have been removed to ensure finality.



APRAG

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10th anniversary conference

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Sofitel Melbourne on Collins
AUSTRALIA

Arbitration in the growth engine of the world economy

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IN THE SEAT – YB PUAN HAJAH NANCY SHUKRI

YB Puan Hajah Nancy Binti Haji Shukri is a Minister in the Prime Minister's Department under the cabinet of Prime Minister of Malaysia, and Member of the Parliament of Malaysia for the Batang Sadong constituency in Sarawak(PBB). She took time of her busy schedule to give us an insight into the reason she joined politics, her experiences as a member of Parliament as well as her thoughts on KLRCA and arbitration.

Have you always wanted to be involved in politics?

It never occurred to me that I would become a politician. I grew up in a political environment; my mother had been actively involved in politics at the ground level. Hence, my name was always connected with my mother's influence in politics. At the same time, I was also heavily involved with the NGO that my mother had been active in during her younger days, the Sarawak Federation of Women's Institutes (SFWI). I suppose my potential for candidacy in the 12th General Election was identified from my work with the NGO.

Last term was your first in Parliament, and now you are appointed as full minister, how has the experience been so far?

It gave me a new understanding about strategies and decision making. My outlook has to be wider and my strategies in achieving my work targets should not only focus on the political aspect, but I also need to look at my job scope.

Previously my focus was solely on my constituency in Batang Sadong, now I have to look into the needs of Malaysians.

The scope is broader, with bigger challenges, more responsibilities, higher expectations and also more demands from the public. In fact with the position, there is a need for me to look at the bigger picture and learn quickly on how the government administration works. In this regard I have to network with more people in a short span of time. Syukur Alhamdulillah (I am thankful to God) for surrounding me with very kind and cooperative people.

It is an honour for me, so I don't perceive this job as a burden. Instead, I see it as my responsibility as a Malaysian. The trust given to me indeed is an inspiration for me to do better from being an activist, a politician, a Member of Parliament, and now, a Minister.

Tell us about your journey to the top and the challenges that you faced.

First of all, as I mentioned earlier, politics was never my forte. Although having recalled all the response I got previously, I was always told that one day I would become a politician. That remark was first made to me when I was in form five. As a form five student, that kind of remark sounded strange. My interest in community work runs in the family. I believe it was due to my involvement with women throughout the state of Sarawak that I was seen as having an inspiring political characteristic.



Naturally, responses were both positive and negative. Whilst a lot of people gave me encouraging words, there were also some which were not as encouraging because they believed that my position should have been offered to them instead. These were among the challenges that I had to face in the process of climbing the ladder.

But then again, it is the people who have made their perception come through. As I said previously, remarks about my political characteristics came from the people, and I always wondered why those remarks were made. It never occurred to me that I am a "politician in the making". Similarly, those who remarked that I am too new in politics to be given a position can be perceived as threatened, most probably because they saw the qualities of a politician in me.

As a woman, we are faced with a lot of challenges in whatever we do. Therefore we have to work harder and smarter so that we can be more visible in our work. I believe that one must deliver their work to the highest standard. I also stand by my life principle; "Just do your work, leave it to God to do the rest".

Thank Allah that I have been blessed with a supportive husband, family and friends, to give me the strength to continue serving the community. Personally, I feel a great satisfaction whenever I am able to help solve people's problems. I am reminded by my first words upon being appointed as a political secretary, "with such appointment I can do more for the people, compared to just being in NGO". These words rings true especially now.

You are rather involved with NGOs and especially in women's rights issues, what do you look to bring into the cabinet with all those experiences?

Before I entered politics, I was active in SFWI. In our NGO we worked hard with our members and tried to spread our wings to a younger generation of women. I was very passionate about the independence of women, especially in the financial aspects. In order to achieve financial independence, women must have marketable skills. In view of this, I met with a lot of government agencies and even corporate bodies, seeking assistance for women to be provided with the necessary skills. I always believe that skilful women can easily market or sell products that they produced themselves. When a woman earns money for herself she would become a lot more confident as a person. My personal assumption is that independent women will not be easily 'bullied' by people, despite her gender.

With my current position, again I am thankful that I am able to speak not only for women but also for everyone. I also heard that women have a very high expectation of me. Insha'Allah (Godwilling), I will use this opportunity to continue championing women's issues in a different capacity.

Even though I am not the minister in charge of women's affair, my position still allows me to play a significant role for women and the society. I am able to personally be involved in the amendment of laws, and I could also enhance and incorporate the role of women under different laws which should benefit them. I find my present position to be a lot more substantial in helping the people because there is a lot that I can do to make things happen, by giving them their rights through legislative means.

What is your first impression of KLRCA?

Certainly my first "date" with KLRCA impressed me. This is mainly because you can sense that they are really focused on achieving a set goal. I am glad that they are targeting the Islamic commercial market as their niche area (with the introduction of the KLRCA i-Arbitration Rules). This will make KLRCA more unique compared to its regional peers. After all, Malaysia is well equipped with experienced and capable lawyers who are more than able to handle such cases.

By having a neutral, efficient and reliable dispute resolution centre, multi-national companies (MNCs) would have more confidence in doing business with the local business community as they know they have the option of a dependable dispute resolution service. I would like to see Malaysia as a good place to do business with KLRCA as the people's "first choice" for dispute resolution.

Having signed a Corporate Integrity Pledge (CIP), KLRCA has made public that they would not indulge in corrupt practices and would adhere to ethical standards – KLRCA without doubt raised its standards tremendously. In this sense, KLRCA has made a commitment that they will not tolerate with negative values. I, for one, am proud to be connected with people of such values. I wish to congratulate Professor Datuk Sundra Rajoo for his commitment in signing the CIP. *(Note: KLRCA signed the CIP on 18 June 2013)*

Arbitration is fast gaining traction in this part of the world, and KLRCA has been getting global recognition (recently winning the Global Arbitration Review award). How do you see the future of arbitration and ADR in Malaysia?

Business and economic activities have become a global 'game' totally. Hence, there is a higher need for arbitration, and alternative dispute resolution (ADR) services (with globalisation and regional integration). We are looking at more cross-borders or international trade disputes which are likely to happen in the near future.

While the need for arbitration is undeniably crucial, we should not neglect the idea of promoting and developing mediation as well.

What do you think are the key challenges to promote Arbitration in your home state of Sarawak and is that an area that you think KLRCA should look into?

First and foremost, the business community in Sarawak may not be exposed about the KLRCA. This call for awareness programmes on what KLRCA can do and what they have achieved so far. There is also a need to build up an arbitration culture and an arbitration-friendly environment within the community in Sarawak.

Another challenging factor is building the network with the Sarawak lawyers so that they will respond positively and even work closely with KLRCA. KLRCA should take more initiatives to further facilitate the sustainable development of arbitration, not only locally but also within the region. KLRCA can harp on the following aspects:

- (i) the quality of arbitrators;
- (ii) arbitration costs;
- (iii) continuously look for best practices by comparing what have been practiced in other countries/ regions which are relevant to ours.

What are your hopes for KLRCA

Let us be the "first option" where arbitration is concerned. It is my wish to see KLRCA be known as an entity which provides high-end and excellent dispute resolution services to address the growing civil and commercial dispute resolution needs in the region.

KLRC TALK SERIES

KLRC Talk Series 2013 carried into the third quarter with more insightful talks by ADR experts. Below are talks that were held from July-Sept.



04.07.2013

Judicial Interventions by Indian Courts in International Arbitrations

Speaker: Mr Anirudh Krishnan, *AK Law Chambers*
Moderator: Mr T Kuhendran,
Messrs. Zul Rafique & Partners

02.08.2013

An Arbitrators' Excess of Jurisdictions and Powers

Speaker: Mr Ooi Huey Min, *Messrs. HM Ooi Associates*
Moderator: Mr T Kuhendran,
Messrs. Zul Rafique & Partners



14.08.2013

CIPAA 2012 – The Stakeholders' Perspective

Speaker: Mr Lam Wai Loon, *Messrs Skrine & Co.*
Moderator: Mr Lim Chong Fong,
Messrs. Azman Davidson & Co



28.08.2013

The Arbitration Clause: Common Pitfalls

Speaker: Mr Kevin Prakash, *Mohanadass Partnership*
Moderator: Mr Ooi Huey Miin,
Messrs. HM Ooi Associates



20.09.2013

Challenges to Awards – The Malaysian Perspective

Speaker: Mr Lam Ko Luen, *Messrs. Shook Lin & Bok*
Moderator: Mr Chang Wei Mun, *Raja, Darryl & Loh*



RAMADHAN IFTAR

23.07.2013

KLRCA held its Ramadhan Iftar ceremony at the Kuala Lumpur Convention Centre and this time around, KLRCA also invited children from Rumah Kasih Harmoni, a shelter home based in Kuala Lumpur. Children from the shelter home were invited as part of KLRCA's CSR effort, which included an excursion to Aquaria KLCC prior to the ceremony.

The iftar ceremony was attended by more than 150 friends and supporters of KLRCA with Minister in Prime Minister's Department, YB Pn Hajah Nancy Shukri, being invited as the Guest of Honor. There was also a presentation of a cheque donation by the Minister on behalf of KLRCA for Rumah Kasih Harmoni.



KLRCA HOSTS LAWASIA MOOT

24-25.08.2013

The Malaysian round of the 8th LAWASIA International Moot Competition 2013, was held from 24-25 August 2013, the fourth year in a row that KLRCA has 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 another team from the same college who came in close second. The International Rounds will be held from 25-30 November 2013 in Singapore.



The winners are:

THE LAWASIA MALAYSIAN BAR CHALLENGE TROPHY

- Champion:** Advance Tertiary College (M1310)
- 1st Runner Up:** Advance Tertiary College (M1301)
- 2nd Runner Up:** Taylor's University (M1305)

THE MAH WENG KWAI CHALLENGE TROPHY FOR BEST MOOTER

Brenda Chan Qing Wen, Taylor's University (M1305)

THE SPIRIT OF LAWASIA TEAM AWARD

Multimedia University (M1304)



CONFIDENTIALITY IN ARBITRATION: Fundamental Virtue or Mere Illusion?

By Joshua Chong Wan Ken

Introduction

Confidentiality and privacy are often touted as major benefits of arbitration in resolving disputes compared to litigation, which is neither private nor confidential. In civil courts, proceedings and documents are generally open to the public and this would be unappealing to parties who desire to keep certain information away from public scrutiny, be they allegations arising from disputes or commercially sensitive information.

Privacy in arbitration means that third parties and strangers will be excluded and have no access to the arbitration proceedings without the consent of parties. Confidentiality in arbitration refers to the fact that the proceedings, materials disclosed or created during proceedings and the arbitral award cannot be disclosed by the tribunal, parties, their representatives, witnesses or any other individuals attending without the consent of the parties.

Privacy and confidentiality are interrelated concepts. If an arbitration hearing is open to strangers then it would be quite impossible to maintain its confidentiality. If it is conducted in private but attendees are free to disclose what transpired to others, then the privacy of the proceedings would be pointless.

While many may assume and believe that confidentiality applies to arbitration, there are exceptions to the general rule.

Differing Positions

Australia, Sweden and the United States

The highest appellate court of Australia in *Esso Australia Resources Ltd v The Honorable Sidney James Plowman (Minister of Energy and Minerals) & 2 Others* (1995) 128 ALR 391 decided an appeal where a dispute had arisen when two public utility companies (the second and third respondents) refused to pay an increased price for gas supplied by Esso Australia (the appellant) under certain agreements which contained arbitration clauses. Esso Australia had refused to provide details of calculations of the price increases to the utility companies unless they entered into confidentiality agreements protecting the information.



Esso Australia had refused to provide details of calculations of the price increases to the utility companies unless they entered into confidentiality agreements protecting the information.

The minister sought a declaration that information disclosed to the utility companies (which is under his ministry's purview) by Esso Australia would not be subject to the obligation of confidence, claiming that the utility companies are under a statutory duty to disclose the information. Esso Australia sought an opposite declaration that the information revealed in arbitration would remain confidential and would not be disclosed to third parties, claiming that the information, if made public, would be detrimental to Esso Australia's commercial interests. There was an element of public interest in the case as the prices charged to the utility companies would affect the prices paid by members of the public.

The High Court of Australia decided (on a majority of four to one) that a general duty of confidentiality is not implied into an agreement to arbitrate.

Mason CJ considered that there were various instances in which an arbitration award or proceeding may be disclosed. This included various applications to court, judicial review and enforcement proceedings. Disclosure could also be necessary to comply with statutory, regulatory or insurance requirements.

His Lordship considered that confidentiality was a by-product of privacy and not "an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of arbitration". Since confidentiality was not an essential attribute, "there can be no basis for implication [into the arbitration agreement] as a matter of necessity." Confidentiality could be agreed to expressly but could not be automatically implied.

This approach has also been adopted by the courts of Sweden (*Trade Finance Incorporated v Bulgarian Foreign Trade Bank Ltd.* [(1998) Stockholm City Court, Case No. T-111-98]) and the United States (*United States v Panhandle Eastern Corp.* [1998] 118 F.R.D. 346 [D. Del]). In view of this, parties would be well advised to expressly incorporate an obligation of confidentiality in their arbitration agreements when they intend to arbitrate in any of these countries.

The United Kingdom, France and Malaysia

The *Esso Australia* case went against the grain of common law in the UK where the courts have generally implied a term of confidentiality into an arbitration agreement either as a matter of business efficacy (*Insurance Co. v Lloyd's Syndicate* and *Hassneh Insurance Co v Mew* [1993] 2 Lloyd's Rep 243) or as a term arising out of the very nature of the arbitral process, the contract itself or as a matter of law (*Liverpool City Council v Irwin* [1976] All ER 39; *Dolling-Baker v Merret* [1991] 2 All ER 136 and *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136;). In France the courts recognised an unqualified duty of confidentiality (*Aita v Ojeh*).

In *Ali Shipping Corp's case*, the English Court of Appeal stated, "...so far as the juridical nature of that term is concerned, while I note that in *Hassneh Insurance Co v Mew* [1993] 2 Lloyd's Rep 243 at 246, Coleman J remarked that the 'implication of the term must be based on custom or

business efficacy' I consider that the implied term ought properly to be regarded as attaching as a matter of law. It seems to me that, in holding as a matter of principle that the obligation of confidentiality (whatever its precise limits) arises as an essential corollary of the privacy of arbitration proceedings, the court is propounding a term which arises 'as the nature of the contract itself implicitly requires'"

There is yet to be any Malaysian jurisprudence where the limits of confidentiality in arbitration are tested as part of its subject matter. However, the High Court made an obiter remark that "it is now accepted, by all and sundry, that arbitrations are private and confidential" quoting supporting English cases (*Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc* [2008] 5 MLJ 254.). Short of any other judicial pronouncements, this suggests that Malaysian courts will follow the UK position.

The Limits of Confidentiality

Confidentiality is wide enough to cover the arbitration proceedings (including witness' testimony), the arbitral award and its reasons as well as materials disclosed, discovered and created in the proceedings (including pleadings, reports, documents submitted, witness statements, transcripts, notes of evidence and written submissions). However, confidentiality is not absolute and is subject to various exceptions.

Under the UK position, Potter LJ in *Ali Shipping Corp's case* listed the following exceptions where disclosure can be made:

- i. Where the party who originally produced the material expressly or impliedly consents;
- ii. Disclosure pursuant to an order of the court or with leave of court;
- iii. Disclosure to the extent reasonably necessary for the protection of a party's legitimate interests, in particular in establishing or defending a claim against or from a third party; and
- iv. Disclosure where the interests of justice requires it. His Lordship differentiated this from "public interests" to avoid the suggestion that the exception extended to cases of public interest as in *Esso Australia*.

"Reasonable necessity" under exception (iii) was stated by Potter LJ to decidedly reflect flexibility in the Court's approach. Rather than requiring a party seeking disclosure to prove necessity regardless of difficulty or expense, the court "should approach the matter in the round", taking into account various factors such as the nature and purpose of the proceedings where the material is required, powers and procedures of the tribunal where the latter proceedings are conducted, issues the information sought were directed at and the practicality and expense of obtaining the information elsewhere.

In considering "the interests of justice" under exception (iv), Potter LJ approved the approach taken by Mance J in *London and Leeds Estates Ltd (No 2)* [1995] 1 EGLR 102 where it was held that a party to court proceedings was entitled to call for the proof of an expert witness in a previous arbitration where it appeared the expert had expressed views contrary to those he expressed in court. Potter LJ was of the opinion that the information affected the judicial decision being reached upon the basis of the truthful or accurate evidence of the witnesses concerned.

The concepts of "reasonable necessity" and "interests of justice" as exceptions have much potential of diluting the obligation of confidentiality as they leave the door open to judicial interpretation as seen above.

Our Arbitration Act 2005 itself provides for various provisions where arbitral proceedings or awards may be disclosed in Court. These include:

- i. Applications for interim measures under Section 11;
- ii. Challenges of an appointments of arbitrators under Section 15;
- iii. Applications to set aside under Section 37;

- iv. Enforcement of awards under Section 38; and
- v. References on questions of law under Section 42.

In instances where confidentiality in arbitration is unlawfully breached, actions based on either contract or the tort of breach of confidential information giving rise to injunctive relief to protect from potential or further breaches are available. Each of these remedies has its own respective requirements at law which must be met by claimants intending to enforce them.

Practical Safeguards

As a practical matter, one can imagine many other situations where confidentiality in arbitrations can be compromised whether legitimately or otherwise. Some of the reasons would include: winning parties may be tempted to reveal proceedings or awards to non-parties and statutory bodies, a party may have to disclose to comply with legal regulations, police enquiries or insurance policies, expert witnesses may engage third party assistance in producing reports who would then know of the arbitration or parties may internally inform related or holding companies.

There are some measures which can be taken to protect confidentiality in arbitration. One suggestion would be to expressly incorporate a confidentiality clause in the arbitration agreement, stating the extent of confidentiality and remedies for breach. Contracts of engagement for transcribers and interpreters should similarly incorporate such obligations.

Another measure would be to consider how different governing rules of arbitration may affect confidentiality when deciding which rules to adopt. The UNCITRAL model law provides for the privacy of proceedings and the confidentiality of the award (Articles 25.4 and 32.5) but does not cover confidentiality beyond the award itself. The ICC rules do not have any express provisions regarding confidentiality. In contrast, Rule 12 of KLRCA's Arbitration Rules expressly provide that the tribunal, parties and KLRCA shall maintain confidentiality relating to the arbitral proceedings and award. The WIPO rules have a whole chapter on confidentiality.

Another step to protect confidentiality would be to communicate the obligation, particularly to witnesses and permitted individuals who are not subject to any contractual obligation so as to expressly warn of a tortious obligation not to disclose confidential information. Parties can also limit the copies of documents used in the arbitration proceedings to avoid unwanted disclosure.

Conclusion

There are so many exceptions to the general rule of confidentiality in arbitration that it is clear confidentiality is not absolute. Whilst the limits of confidentiality in arbitration have yet to be tested in Malaysian courts, parties to arbitrations would do well to take extra precautions in protecting confidentiality, especially if there is sensitivity involved with the arbitrations proceedings and materials arising therein.



ABOUT THE AUTHOR

Joshua Chong Wan Ken graduated with a degree in Law from the University of Manchester in 2008 and obtained his Certificate in Legal Practice the following year. He was called to the Malaysian Bar in 2010 after his pupillage in Messrs Jeff Leong, Poon & Wong where he continued to practice. He joined Messrs Raja, Darryl & Loh's Construction and Energy Practice Group in 2012 and is currently focusing on dispute resolution there. He is a member of the Kuala Lumpur Young Lawyers Committee and is also serving as a Council Member of the Malaysian Institute of Arbitrators (2012 and 2013).

INDOCHINA ROADSHOW

17.07.2013 19.07.2013

KLRC co-organised an Arbitration Conference, themed "An ASEAN Perspective" with ZICOlaw in Yangon, Myanmar on the 17th of July and Ho Chi Minh City, Vietnam on the 19th of July.

The seminar aims to provide participants with an overview of arbitration and its advantages as a means of resolution for commercial, shareholder and transactional disputes in the ASEAN region and beyond. Participants were introduced to available options, skill sets and accessibility to advice and give representation as well as venues that offer expedient rules and effective results that are also cost efficient.



KLRC ADJUDICATION TRAINING PROGRAMME

11.09.2013 - 15.09.2013

KLRC held its third Adjudication Training Programme in Kuala Lumpur from 11-15 September 2013. The programme, which aims to train future adjudicators and provide them with the necessary skills to conduct an adjudication, first began in August last year following the gazettal of the Construction Industry Payment and Adjudication Act 2012. The training has been held throughout Malaysia including Sabah and Sarawak.



Launch of the Malaysian Society of Adjudicators & Graduation of Class 2012/2013

The night of the 5th of July 2013 celebrated achievements as well as the birth of a new society. The Royale Chulan hotel, Kuala Lumpur was the venue for the launch of the Malaysian Society of Adjudicators and the graduation of class 2012/2013 of the KLRCA Adjudication Training Programme. The night saw the attendance of more than 300 individuals, including the very first adjudicators in Malaysia.

The occasion started off with a speech by the Chief Justice of Malaysia, YABhg Tun Arifin bin Zakaria, read out on his behalf by YA Dato' Ahmad bin Haji Maarop, Federal Court judge, who also proceeded to launch the society. Later in the evening, Sr Amran B. Mohd Majid a graduate of the KLRCA Adjudication Training Programme also gave a speech on behalf of the 358 graduates of class 2012/2013 who went through a gruelling 5-day training to earn the title of 'Adjudicator'.

The Malaysian Society of Adjudicators was launched with a common purpose of having a professional body to promote ethical and professional standards of service and conduct of adjudicators in Malaysia. Tun Arifin, in his speech, remarked that "The launch of the Malaysian Society of Adjudicators (MSA) is also important to this cause (ensuring the success of the Construction Industry Payment and Adjudication Act 2012). There is a need for a body that regulates the adjudicator and make certain that these adjudicators perform to a high level of professionalism".

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



5th July 2013

GUEST OF HONOUR
The Right Honourable
TUN ARIFIN BIN ZAKARIA

klrca
KUALA LUMPUR REGIONAL INSTITUTE OF CONSTRUCTION ADJUDICATORS



MALAYSIAN
SOCIETY OF
ADJUDICATORS

The Sulaiman Building: The Next Phase for KLRCA



Since its inception in 1978, KLRCA has moved through leaps and bounds going through different phases of highs and lows. The past few years however, the Centre has been on the rise and gaining overwhelming recognition not only from the arbitration community, but also from the government of Malaysia. KLRCA's progress can also be seen in the number of cases being administered by the Centre which has given rise to the need for a solid structural support, which includes having proper facilities to handle disputes.

A world class facility would not only enable cases to be carried out smoothly, but it also serves as a great marketing tool to attract international parties to bring their case to these shores. Fortunately for KLRCA, the Malaysian government shares the Director's vision and supports the Centre's move to a new state of the art building – a natural progression to the next exciting phase for KLRCA.

The Malaysian government has approved the budget for the refurbishment and renovations works for the Sulaiman Building, the former Shariah Court, to be converted into new premises for KLRCA. Located in Kuala Lumpur's historical enclave, the Sulaiman Building is an art deco heritage building that is very close to the city's central hub and tourist district and was constructed in the early 1920's.

The building will house state-of-the-art facilities with 19 hearing rooms, 22 breakout rooms, a business centre, a specialised ADR and construction law library, dining areas, a mini museum and an auditorium. It is strategically located, being just minutes away from the city's largest transit hub, a national railway station, flanked by 5-star hotels and is also near national heritage sites like the National Mosque and the Islamic Museum. The building would also open its doors to other institutions looking to set up an office in Kuala Lumpur.

So far, the building has courted the interest of the Permanent Court of Arbitration (PCA), the International Courts of Sports Arbitration (ICAS), the Chartered Institute of Arbitration (CI Arb Malaysia), Malaysia Institute of Adjudicators and several international legal firms specializing in ADR practice. The building would also be the host to i-Cells, the think-tank and research arm of the Attorney General Chambers of Malaysia and YBGK which is the National Legal Aid Foundation of Malaysia, which would contribute to making it the ultimate dispute resolution centre in the country.

The refurbishment works on the Sulaiman Building has been progressing steadily. The appointed contractor commenced the refurbishment works in late November 2012 under the supervision of Jabatan Kerja Raya (JKR). The refurbishment works and the construction of the new car park and pavilion block is slated to be completed by the second quarter of 2014 and barring any delays, KLRCA hope to move into the new premises by the second half of 2014. Hopefully, with the new building, KLRCA will be able to offer state-of-the art facilities in its quest to be the preferred dispute resolution centre in the Asia-pacific region.

FEATURE

Auditorium ▶

Hearing Room ▼



▲ Conference Room

◀ Library

▼ New car park & pavilion



CHALLENGES TO AWARDS: The Malaysian Perspective

By Lam Ko Luen



Introduction

The Malaysian Arbitration Act 2005

Parties go to arbitration with the objective of resolving once and for all a dispute or difference that has arisen. Indeed, arbitration proceedings typically culminate with an award intended to be final and binding as between the parties. The Malaysian Arbitration Act 2005 (Act 646) (“the Act”), in force since 15.3.2006, clearly provides for this. Like the arbitration laws in many other jurisdictions, Malaysia has, by enacting the Act, joined the bandwagon in adopting the UNCITRAL Model Law on International Commercial Arbitration (“the UNCITRAL Model Law”). The Act, amended in 2011, noticeably places importance on party autonomy and in so doing, provides for the finality of arbitration awards and for minimal Court intervention.

Challenges to Awards

In an arbitration that has run its course, the net result is usually an award favourable to one party. Very often, the losing party is not satisfied and will consider challenging the award. The Act affords 2 avenues for a party to challenge an arbitration award, namely by applying to set aside the award pursuant to Section 37 of the Act and/or by reference of questions of law pursuant to Section 42 of the Act.

Setting Aside – Section 37

Malaysia has adopted Article 34 of the UNCITRAL Model Law vide Section 37 of the Act, albeit with modifications. Recourse to Section 37 is generally available to awards emanating from domestic and international arbitrations where the seat of the arbitration is Malaysia.

Procedure

Section 37(4) of the Act prescribes a time limit of 90 days (from the award) for one to bring a Section 37 challenge. The use of the word “*may*” in Section 37(4) suggests that such time limit is not mandatory. The discretion of the High Court to extend time to apply to set aside an award has been affirmed by the Court of Appeal in *Government of the Lao People’s Democratic Republic (“GOL”) v. Thai-Lao Lignite Co. Ltd., A Thai Company & Anor* [2011] 1 LNS 1903. Such discretion however is likely to be exercised sparingly, inline with the objectives of the Act. The procedure for commencing a Section 37 challenge is also prescribed in Order 69 rules 2, 4 and 5 of the Rules of Court 2012.

Substance

Sections 37 (1) (a) and (b) of the Act contain an exhaustive list of the circumstances where an award may be set aside. The applicant has the burden of proving at least one of the circumstances set out therein [see *AJWA for Food Industries Col (MIGOP), Egypt v. Pacific Inter-Link Sdn. Bhd. & Another Appeal* [2013] 2 CLJ 395 (Court of Appeal, affirmed by the Federal Court on 16.7.2013); see also *Kelana Erat Sdn. Bhd. v. Niche Properties Sdn. Bhd. and another application* [2012] 5 MLJ 809 (High Court)].

Of late, the cases that have come to be decided by the Malaysian Courts appear to be based invariably on jurisdictional challenges. These jurisdictional challenges may be brought under the circumstances set out in Sections 37(1)(a)(ii), (iv) and (v) of the Act. Some examples of these challenges are as follows.

Challenges on Jurisdiction

1) Is there a valid arbitration agreement?

Sections 37(1)(a)(ii) of the Act provides that “*An award may be set aside by the High Court ... if the party making the application provides proof that ... the arbitration agreement is not valid under the law to which the parties have subject it, or, failing any indication thereon, under the laws of Malaysia*”.

In *AJWA* (above), the Appellant argued that since there was no arbitration agreement between the parties, the arbitral tribunal had no jurisdiction and thus the awards ought to be set aside. The Respondent argued the converse i.e. that the arbitration agreement was incorporated by reference pursuant to Section 9(5) of the Act. Section 9(5) provides that “*A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.*”

The Federal Court ultimately held, *inter alia*, that the document referring to an arbitration clause need not be signed and incorporation by notice is sufficient. *AJWA* shows the willingness of the Courts to adopt an expansive interpretation of an arbitration agreement.

2) Not within the terms or beyond the scope of submission?

Sections 37(1)(a) (iv) and (v) of the Act provides that “*An award may be set aside by the High Court ... if the party making the application provides proof that ...the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration*”

In *GOL* [2013] 2 AMR 375, Lee Swee Seng JC found that the arbitral tribunal had wrongfully exercised jurisdiction over disputes that ought properly belong to a different arbitration agreement and exercised jurisdiction over non-parties to the arbitration agreement. The Learned JC consequently set aside the award pursuant to, *inter alia*, Sections 37(1)(a)(iv) and (v) of the Act. *GOL* (above) illustrates the type of complaint which comes within the meaning of Sections 37(1)(a)(iv) and (v) of the Act and suggests that the starting point would be a thorough

examination of the arbitration agreement between the parties. This decision is now a subject matter of a pending appeal in the Court of Appeal.

Remedy

A successful applicant is generally entitled to have the award in question set aside. However, where severance is possible, the Court has the power to order that the award be set aside only insofar as the offending part is concerned. This is specifically provided for in Section 37(3) of the Act. It is clear that the objective is to uphold or preserve an award wherever possible.

Reference on Questions of Law – Section 42

Recourse to Section 42 is available to domestic arbitrations unless parties opt out. It is however not available to international arbitrations where the seat of arbitration is in Malaysia unless parties opt in. There is no equivalent in the UNCITRAL Model Law.

Procedure

It is observed that Courts have placed strict procedural requirements that must be complied with by a party seeking to invoke the Section 42 challenge. First, the deadline for a challenge under Section 42 (*in contrast to a Section 37 challenge*) is shorter i.e. 42 days of the publication and receipt of the award. Second, the use of the word “shall” in Section 42(2) of the Act suggests that the time limit of 42 days is mandatory [see *Chip Lam Seng Berhad v. R1 International Pte. Ltd.* [2010] 1 LNS 64; see also *Government of the Lao People’s Democratic Republic v. Thai-Lao Lignite Co Ltd (“TLL”), A Thai Company & Anor* [2012] 10 CLJ 399 and *Dato’ Muhammad Ridzuan Mohd Salleh & Anor. v. Syarikat Air Terengganu Sdn. Bhd.* [2012] 6 CLJ 156]. Third, the reference must identify the question of law to be determined and state the grounds on which the reference is sought [see *Taman Bandar Baru Masai Sdn. Bhd. v. Dindings Corporation Sdn. Bhd.* [2010] 5 CLJ 83]. Last but not least, Order 69 rules 2, 4 and 6 of the Rules of Court 2012 should also be complied with.

Substance

Question of law arising out of an Award

Firstly, the High Court in *Majlis Amanah Rakyat v. Kausar Corporation Sdn. Bhd.* [2011] 3 AMR 315 and *Sabah Medical Center Sdn. Bhd. v. Syarikat Neptune Sdn. Bhd.* [2011] 1 LNS 849, have held that the question(s) referred to the High Court for determination under a Section 42 challenge must arise from the award and not the arbitration proceedings. What this means is that it must be clear from the award itself that a question of law has arisen and the Court ought not undertake a minute investigation or a review of the arbitration proceedings. This tie in with the principle that the Courts exercise a complementary and/or supervisory role and does not function as an appellate court [see *Sabah Medical Centre* (above)].

Secondly, the Court has held that the test to decide whether an arbitral tribunal had committed an error of law arising out of an award is the same test that was applicable under the Arbitration Act 1952 i.e. error of law on the face of the record [see *Majlis Amanah Rakyat* (above)]. This means that the decisions made under the old Arbitration Act 1952 continue to be applicable where “error of law on the face of the award” is concerned [see *Maimunah Deraman v. Majlis Perbandaran Kemaman* [2011] 9 CLJ 689; see also *Rmarine Engineering (M) Sdn. Bhd. v. Bank Islam Malaysia Bhd.* [2012] 7 CLJ 540, upheld by the Court of Appeal on 12th April, 2013 ([2013] 1 LNS 318)].

Thirdly, the Court has a limited jurisdiction to intervene and would only do so where there is a serious or grave error of law apparent from the award, for example a failure to consider material and relevant evidence or applying principles of construction which the law does not countenance [see *Maimunah Deraman* (above)].

Substantially affects the rights of one or more of the parties

Section 42 (1A) of the Act provides that the High Court shall dismiss a reference on a question of law unless it substantially affects the rights of one or more of the parties. In this respect, Section 42(1A) merely states the trite principle that would have otherwise been implicit i.e. that the function of the Courts is to decide on live issues affecting the parties and not matters that are academic or speculative.

Remedy

Section 42(4), (5) and (6) of the Act essentially provides that the High Court upon determination of a reference may confirm, vary, remit in whole or in part or set aside the award, in whole or in part.

Conclusion

The trend in Malaysia, as apparent from recent cases, is one of a minimal curial intervention. However, Malaysian Courts do rightly in limited instances exercise their power as provided for under the Act to set aside awards where circumstances justify. This is necessary as it provides a balance in ensuring that justice is served rather than abused. It is also important to appreciate that whilst the powers to set aside awards as provided for in the Act should not be exercised sparingly, they are there for a reason. The position in Malaysia is indeed not much different from its immediate neighbour. The Singapore Court of Appeal in *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 said at para 27 that, “While the Singapore courts infrequently exercise their power to set aside arbitral awards, they will unhesitatingly do so if a statutorily prescribed ground for setting aside an arbitral award is clearly established.” The Malaysian Courts similarly will only exercise their powers to set aside awards where the party seeking for such an order could bring their case within the prescribed grounds set out in Sections 37 or 42 of the Act. With that, the Malaysian Courts have been consistent in their approach with the other jurisdictions which promote arbitration as an alternative mode of dispute resolution.

The article was co-written by Ms. Victoria Loi [LL.B (King’s College London); LL.M (National University of Singapore); Advocate & Solicitor (Malaya); MMIArb; Senior Associate, Shook Lin & Bok, Kuala Lumpur; Council Member of MIArb].



ABOUT THE AUTHOR

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Arbitration Case Law: Developments in Malaysia

by **Rammit Kaur**, Head of Legal Services, KLRCA
Laura Jimenez Jaimez, Case Counsel, KLRCA

**DUTA WAJAR SDN BHD (APPELLANT) v
PASUKHAS CONSTRUCTION SDN BHD & ANOR (RESPONDENT)**

Court: Court of Appeal, Putrajaya

Case Citation: [2012] 4 CLJ 844

Date of Judgment: 06 July 2012

Facts

The appellant and the respondents entered into a sub-contract. Once the appellant had completed his work, the defendants failed to pay; accordingly the appellant filed a suit. The respondents applied to stay the proceedings and sought to refer the dispute to arbitration according to the agreement between the parties.

At first instance the court dismissed the respondent's application on the grounds that the plaintiff never agreed to submit the dispute to arbitration by signing any document containing such clause. On appeal the High Court allowed the application, finding that there was acceptance of the provision to refer the dispute to arbitration based on the conduct of the plaintiff in bidding for and proceeding with the work. Subsequently the plaintiff appealed to the Court of Appeal.

Issues

The main issue in these proceedings was whether there was an agreement to arbitrate between the parties in writing. In a case such as this where there is reliance on circumstantial evidence, a standard of proof must be met to establish the agreement.

Held

The High Court allowed the appeal, finding that there was no agreement in writing as required by s.9(3) of the Arbitration Act 2005. The conduct of the appellant in 'bidding for and proceeding with the works' was not sufficient to establish acceptance of the provision to refer disputes to arbitration. On the contrary, the appellant had not signed nor responded to the sub contract agreement containing the provision. In the circumstances, there was no exchange of letters or faxes or other means of communication providing a record of a written arbitration agreement.

Impact

This case clarifies the requirements for a written arbitration agreement to exist. An agreement in writing can exist in the form of unsigned documents, however in that case sufficient evidence must be brought to show acceptance of the unsigned terms and therefore of the agreement to arbitrate. This can be difficult where there is no response at all to a purported agreement, as is the case here.

**KNM PROCESS SYSTEMS SDN BHD (PLAINTIFF) v
MISSION BIOFUELS SDN BHD (DEFENDANT)**

Court: High Court Malaya, Kuala Lumpur
Case Citation: [2013] 1 CLJ 993
Date of Judgment: 03 September 2012

Facts

The parties entered into an EPPC Contract by which the plaintiff undertook to construct, complete and commission a biodiesel project for the defendant. The EPPC Contract contained an Arbitration Clause by virtue of which disputes between parties in connection with, or arising out of the EPPC Contract would be settled in the first instance by mutual discussion, failing which, they would proceed to arbitration.

The plaintiff alleged the defendant had not paid after having delivered items to the defendant's sub-contractor. The plaintiff filed an action to recover the due payment, considering the claim to fall outside the scope of the agreement. The defendant applied for stay of proceedings based on the grounds of the aforesaid agreement, relying on the English decision of the House of Lords in the Fiona Trust Case. The plaintiff argued that the Fiona Trust Case should not be the reference because of differences in the wording and that the decision of the Court of Appeal in the Duta Wajar Case should be followed.

Issues

How broad of a reading should be given to arbitration agreements, and the connected question of parties' motivation when doing business, form the main issues in this case. The Court was asked to determine what meaning should be given to terms like 'in relation to', 'in connection with' or 'arising under', and to decide what the intent of rational businessmen behind those terms is.

Held

The Court, after examining the language of the Arbitration Act 2005 regarding the degree of permissible court intervention, gave a broad meaning to the terms of the arbitration agreement. The Court held that the dispute in question did in fact fall within the terms of the arbitration agreement and thus granted a stay. They also held that the Fiona Trust Case was good law, accepting the presumption that 'rational businessmen would intend to have the same forum decide disputes between themselves in respect of the same broad subject matter unless they have expressed otherwise by clear language.'

Impact

The Court in this decision has remained in line with accepted international standards on the interpretation of arbitration agreements. The approach taken in looking at the motives of the rational businessman is consistent with the efficient, commercial nature of arbitration, and serves to protect the expediency of commercial arbitration. This decision further reflects the Malaysian judiciary's support for commercial arbitration.

**CORPORACIÓN MEXICANA DE MANTENIMIENTO INTEGRAL, S. DE R.L DE C.V
(PLAINTIFF) v PEMEX-EXPLORACIÓN Y PRODUCCIÓN (RESPONDENT)**

Court: United States District Court Southern District of New York
Case Citation: 10 Civ. 206 (AKH)
Date of Judgment: 27 August 2013

Facts

The dispute is related to a contract between the parties relating to the construction and installation of two offshore platforms and ancillary structures. The parties subsequently entered a specific agreement for additional work. Disputes arose due to the administrative rescission of both contracts by the respondent, a state agency. Thereafter the plaintiff commenced arbitration proceedings against the respondent and was awarded damages; the award was issued by an ICC panel sitting in Mexico City. In January 2010, the plaintiff filed a petition to confirm the arbitration award in the U.S. District Court for the Southern District of New York. The District Court confirmed the award in favour of the plaintiff.

Subsequent to the District Court's decision, the 11th Collegiate Court of Mexico set aside the award on the application of the respondent. This decision was based on changes to the legislation concerning the arbitrability of administrative rescission disputes as well as the limitation period associated with such disputes.

The respondent appealed to the Second Circuit U.S. Court of Appeals, relying on the Mexican Court's decision to set aside the award. The respondent moved to vacate the District Court's order confirming the award. The Appeals Court granted the respondent's motion and remanded the case back to the District Court.

Issues

The appeals court noted that on remand, the District Court must address in the first instance whether enforcement should be denied because it "has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made." The District Court was required to examine what discretion was afforded to it under the Panama Convention (and by extension the New York Convention), relative to the decisions of foreign courts when considering the enforcement of awards. The Court needed to ascertain whether it was bound by the Mexican court's decision to nullify the award.

Held

The judge ultimately held that the award should still be enforced; determining that the Mexican annulment decision violated basic notions of justice. This was because the Mexican decision applied a law that was not in existence at the time the parties' contract was formed and further left the plaintiff without any available avenue to litigate its claims. The judge also noted that the Mexican court was expressly trying to "favour a state enterprise over a private party" when considering its decision.

The court read the use of the word "may" in the enforcement provisions of the Panama Convention and the New York Convention as granting certain discretion to the court when deciding on enforcement, to consider whether the nullifying decision violates basic US notions of justice.

Impact

The District Court's decision has implications when considering the finality and certainty of awards. Outside of limited jurisdictions (French being the most notable), it is accepted that enforcement proceedings will be determined pursuant to any setting aside order made at the seat. This is not necessarily a negative development, however, as it recognises the aim of international commercial arbitration to separate itself from issues of national law. In addition, circumstances giving rise to discretions such as are used in this case are specific and unlikely to occur frequently. Notwithstanding, parties ought to take care when selecting the seat of arbitration, in order to avoid the issues and uncertainties encountered in this case.

SAVE THE DATE!

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

DATE	3 October 2013
EVENT	KLRCA-Labuan FSA MOU Signing & Seminar on Arbitration
ORGANISER	KLRCA / Labuan FSA
VENUE	The Royale Chulan Hotel, Kuala Lumpur

DATE	25 October 2013
EVENT	Asean Law Association (Malaysia)-KLRCA Dinner & Talk
ORGANISER	KLRCA / Asean Law Association
VENUE	Hilton Kuala Lumpur

DATE	8 October 2013
EVENT	KLRCA & British High Commission Joint Seminar
ORGANISER	KLRCA / British High Commission
VENUE	The Royale Chulan Hotel, Kuala Lumpur

DATE	21 November 2013
EVENT	Diploma in International Commercial Arbitration 2013 / Series 2
ORGANISER	KLRCA / CIArb (Australia)
VENUE	The Royale Chulan Hotel, Kuala Lumpur

DATE	21-22 October 2013
EVENT	IFN Asia Forum
ORGANISER	REDmoney Events
VENUE	Kuala Lumpur Convention Centre

DATE	4-8 December 2013
EVENT	CIPA Training Penang
ORGANISER	KLRCA
VENUE	Sunway Hotel, Penang

DATE	24 October 2013
EVENT	The launch of KLRCA Revised Rules
ORGANISER	KLRCA
VENUE	Aloft Hotel, Kuala Lumpur



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.

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

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No visa and withholding tax imposed on arbitrators.

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

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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."

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