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i-Arbitration Rules:  
Islamic finance in the  
global commercial arena



INTERNATIONAL  
ARBITRATION  
CONFERENCE  
2014

## REFLECTING THE PAST BUILDING THE FUTURE

KUCHING, SARAWAK  
19 -21 JUNE 2014

### THE CONFERENCE

#### An Exciting New Phase in Asia Pacific Arbitration

In June 2014, Malaysia will open its door to one of the year's most important arbitration events. With the theme "Reflecting the Past, Building the Future", the KLRCA International Arbitration Conference will feature eminent arbitration experts from across the globe to deliberate the foundations of arbitration, scrutinize the current state of the practise and form a roadmap for the future. The conference, which will have over 400 delegates from all over the world participating, is set to have a critical look at core issues in international arbitration, including basic fundamental questions on confidentiality, party autonomy and judicial intervention among others. Thought-provoking sessions will be held that would not only address the issues but also chart our way forward to help realise the immense potentials of arbitration.

The conference will pit together international speakers who are experts in the field of arbitration, so delegates can expect world class dialogues that is set to influence the way arbitration is practised.

### THE THEME

#### Reflecting the Past, Building the Future

Arbitration used to be synonymous with quick, cheap and informal resolution of disputes that carried with it a fair, impartial and commercially sensible decision making that is comprehensively recognized by all parties. Arbitration has now reached a new stage and gaining greater foothold in global dispute resolution, and some are questioning whether the very fundamentals of arbitration has side-tracked from its original formation.

Therefore, this conference is a stage for reflection, to determine the real qualities of the practise and how we can build a future that is balanced and progressive.

For more information and sponsorship opportunities, please contact **Azreen Mohamad**

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## Why You Should Attend:

### 3-day World Class Conference

400 participants from  
over 25 countries

Over 50 eminent speakers

Lessons from the edge from  
industry leaders

Trade Display for organization

- River Cruise
- Rainforest World Music Festival
- Numerous opportunities to excite, energise & empower yourself
- 5 exciting trails for adventures and relaxations
- After hours at various night spots
- Participation of practitioners and thought leaders from various industries
- Networking sessions
- Cocktail Party
- Extravagant Gala Dinner
- Welcome Dinner by the Old Courthouse

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# DIRECTOR'S MESSAGE



DEAR FRIENDS,

We have reached the last quarter of 2013. Time has certainly flown this year quickly.

The main highlight for the centre this quarter was the unveiling of the KLRCA's Revised Rules. This was launched and officiated by the Minister in the Prime Minister's Department, Yang Berhormat Puan Hajah Nancy Haji Shukri at the Aloft KL Sentral on 24<sup>th</sup> October 2013. Having identified the areas that needed to be addressed, modifications were made to improve the Rules, namely the KLRCA Arbitration Rules, KLRCA i-Arbitration Rules, the KLRCA Fast track rules and the KLRCA Mediation Rules. The amended Rules is aimed at enhancing the KLRCA's standards and quality to be on par if not better than the international standards, trends and practices in international commercial arbitration. We have also taken the liberty in translating the KLRCA's Rules into six different languages namely; Spanish, Arabic, Korean, Mandarin, Bahasa Indonesia and Bahasa Malaysia. These modifications and translations have been made with the sole intention of making the KLRCA the best that the Asia-Pacific region can offer in alternative dispute resolution.

We wrapped up the year not only with the launch of the KLRCA's Revised Rules but also with a series of very interesting seminars and events organised in conjunction with the British High Commission of Kuala Lumpur, the Labuan Financial Services Authority and MYNIC.

This last newsletter of 2013 also puts a focus on mediation. With the launch of the new KLRCA Mediation Rules on 24<sup>th</sup> October 2013, we are expecting to see mediation grow in Malaysia. The new KLRCA Mediation Rules seeks to provide for a simpler and practical mediation process aimed at providing a fast and cost effective method of resolving commercial disputes.

Among the highlights of the new KLRCA Mediation Rules are improvisation and simplification of the appointment process of the mediator, setting out of the conduct and ethics of the mediator, provisions on participation of parties in the mediation process. It must also be noted that the paramount factor in a mediation process which is confidentiality is further enhanced under the new KLRCA Mediation Rules. A write-up on the new KLRCA Mediation Rules can be found on page 12 of this newsletter.

As we complete the year, we at the Centre are grateful to everyone who have contributed and played a part in our growth and success.

As we reminisce on 2013, we look forward to an even better year in 2014. Next year, we are proud to hold two very important conferences, the Construction Industry Payment & Adjudication Act 2012 (CIPAA) conference on 25<sup>th</sup> February 2014 and our flagship KLRCA International Arbitration Conference 2014 from the 19-21 June 2014 in Kuching, Sarawak. So, mark your calendar for these two very important events in the year of 2014.

I would like to wish all our readers a Happy New Year and a wonderful 2014 ahead.

**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 by students from KOLEJ PROFESIONAL MARA SERI ISKANDAR

30 September 2013



## Visit by THE JAPANESE LICENSING EXECUTIVE

20 November 2013



## Visit by students from KDU UNIVERSITY COLLEGE

27 November 2013



## Visit by students from UNIVERSITI INSITUT TEKNOLOGI MARA

28 November 2013





# Launch of the KLRCA Revised Rules and Translation

KLRCA has unveiled its revised Rules in a launch event officiated by Minister in the Prime Minister's Department, Yang Berhormat Puan Hajah Nancy Haji Shukri at the Aloft KL Sentral on 24 October 2013.

The Rules, namely the KLRCA Arbitration Rules, KLRCA i-Arbitration Rules and KLRCA Fast Track Rules has been revised and the KLRCA Mediation Rules revamped with the aim of enhancing the incorporation of international trends in alternative dispute resolution proceedings and KLRCA's functions, to run cohesively with current best practices in international commercial arbitration.

According to the Director of KLRCA, Datuk Sundra Rajoo, "This revision of the Rules is quite timely and is evidence of KLRCA's determination to keep abreast with both global and national developments of alternative dispute resolution,"

"KLRCA has retained the essence of the Rules, and the modifications have been made with the sole intention of uplifting Malaysia to the same competitive ranks as the best that the Asia-Pacific region can offer," He added.

In her speech at the launch, YB Puan Hajah Nancy Shukri congratulated KLRCA and stated, "The government welcomes this move by KLRCA to further develop their rules which would enable the Centre to provide the standards of service required of an international arbitration Centre."

Apart from revising its Rules, KLRCA also took the bold step of translating the Rules into six different languages, namely Arabic, Spanish, Korean, Mandarin, Bahasa Malaysia and Bahasa Indonesia. The unprecedented move is done with the aim of drawing the interest of the global arbitration community, demonstrating KLRCA's intents to be the leading alternative dispute resolution centre in the Asia-Pacific region.





## Speech by Director of KLRCA, Professor Datuk Sundra Rajoo at the launch of the KLRCA Revised Rules

The KLRCA is a non-profit, non-governmental international arbitral institution that was established in 1978 under the auspices of the Asian-African Legal Consultative Organisation (AALCO). It was the first centre of its kind to be established by AALCO in Asia. Prior to 2010, and despite being the first regional arbitral institution to be established, the KLRCA was trailing behind the newer arbitral centres. The number of cases registered with the KLRCA were between 10 and 20 cases per year. Currently, the numbers have increased to more than 100 cases with the value of disputed amounts adding up to about RM4bil. And the KLRCA now has a 23-member management team compared to a paltry four member team just a few years ago and we are still small in numbers compared to the work being done.

Arbitration is clearly gaining traction quickly and becoming an essential part of the dispute resolution fabric in Asia. The 10 countries that make up the Association of Southeast Asian Nations (ASEAN) now have a combined population of more than 600 million and an aggregate economy worth some US\$1.8trn (£1.1trn), and continue to grow at a rate of 6% per year. And with the rise in regional trade and investment there has been an increasing number of cross-border transactions which inevitably has given rise to cross-border disputes, which involve multinational organisations from across the globe. Given the complexity and sheer volume of resolving such disputes in national courts a large proportion of such disputes are referred to arbitration.

If Malaysia is to continue to develop as a major centre of commerce and finance, it needs to have a world class arbitral institution equipped with the best legal infrastructure in place.

A decade ago KLRCA would not have been mentioned in the same breath as other leading arbitration centres in the region. But times have changed and as international arbitration bodies around Asia-Pacific continue to innovate and re-sculpt their rules and laws on arbitration and ADR, the KLRCA has been closely monitoring the movement and have been relentless in our efforts to upgrade, revitalise and improve in order to be recognised as a world class trailblazer.

Of course, this success cannot be achieved overnight, nor can it be done in isolation. KLRCA is here today, due to the collective efforts by various parties and stakeholders.

The statistics illustrate an astounding growth in arbitration cases in the Centre. In 2012, KLRCA registered 85 new cases and so far in 2013 there has already been around 110 cases referred for arbitration with 20% of them being international cases, showing a marked increase from past years. Malaysia has seen a growing volume of arbitration cases and this clearly attributable to modern arbitration laws and a supportive government, judiciary and the Bar.

Ongoing legislative, judicial and practical reforms are necessary to attract the international business community to look at Malaysia for their dispute resolution needs.

The most recent amendments to the Legal Profession Act 1976 now allow both foreign Arbitrators and foreign lawyers to enter into Malaysia to participate in arbitral proceedings and are exempted from the “fly-in fly-out” prohibition. They will not be subject to the restriction of 60 days nor require immigration approval to enter into Malaysia to conduct arbitral proceedings. This is a positive step taken by the Malaysian government in its continued vision for arbitration in Malaysia.

Having addressed the larger issues, we must now look forward to a new challenge. We need to iron out the creases and ensure that KLRCA and Malaysian ADR community is able to offer the highest levels of service, on par with other international arbitral institutions.

Over the past several months, we in KLRCA has been working overtime analysing the Centre’s Rules whilst keeping in check the current international standards. Having identified areas which needed to be addressed, modifications were made to the Rules, namely, the KLRCA Arbitration Rules, KLRCA i-Arbitration Rules, the KLRCA Fast Track Rules and the KLRCA Mediation Rules. I invited Mr Campbell Bridge and Ms Shanti Abraham to help us with the Mediation Rules and we are grateful for their support and hardwork.

The amendments to the rules whilst keeping the costs attractive are aimed at enhancing the incorporation of international trends in arbitration proceedings and KLRCA’s functions, to run cohesively with current best practices in international commercial arbitration.

Allow me to briefly describe the salient points of the revised Rules.

## **KLRCA Arbitration Rules**

### Emergency Arbitrator

The KLRCA Arbitration Rules now makes available a procedure for reference to emergency arbitrator where parties require an urgent interim and conservatory relief. 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. Parties are now able to obtain the full breadth of commercial remedies within the auspices of their KLRCA administered arbitration proceedings.

Seat of arbitration

For clarity, the rules makes it clear that in default of parties' agreement the seat of arbitration is Malaysia. And where the seat is Malaysia, the rules provides for opting out of Section 41, 42, 43 and 46 of the Malaysian Arbitration Act 2005 (Amended 2011). This effectively removes the procedure for reference on preliminary points of law and appeal to court on questions of law arising out of an arbitration award. It applies to both domestic and international arbitration and is in line with the spirits of international commercial arbitration projected by the UNCITRAL Model Law.

Consolidation and Concurrent Hearings

A consistent approach in relation to consolidation of proceedings and concurrent hearings are adopted for arbitrations seated in Malaysia and elsewhere. In effect, the tribunal may only consolidate or order for concurrent hearings with parties' agreement.

Grant of pre-award interest

Arbitration legislations usually do not explicitly provide for the grant of pre-award interest. In most of the common law countries the arbitrator makes reference to case laws to justify the grant of pre-award interest. For purposes of consistency, where arbitration matter is administered under the KLRCA Rules, the arbitrator may now rely on the rule to provide for pre-award interest.

Confidentiality

There is an upcoming trend in a number of arbitral institutions for the publication of redacted awards. KLRCA however will not be publishing any awards rendered in the spirit of ensuring that the requirement of confidentiality is maintained to the strictest sense.

To strengthen confidentiality requirement and in order to enhance privacy of proceedings, the only exception allowed is when the matter falls under the public domain or the disclosure is necessitated by legal requirement.

Fees and Costs

KLRCA has also revised the schedule of fees and administrative costs maintaining the Centre's cost competitiveness. Parties are assured that the fees and costs of a matter administered under the auspices of KLRCA is 20% lesser than other established institutions in the region.

Deposits

To contribute to a more fair and equitable arbitration to parties and preventing parties from making vexatious claims and/or counterclaims, the method for deposit collection have been improvised. Previously, the rules provide for equal contribution from parties of the fees and costs derived from the total amount of disputes. Now, where there is a huge disparity between claims, the KLRCA may require parties to contribute the deposits corresponding to its claims.

**KLRCA i-Arbitration Rules**

A significant amendment was also made to the KLRCA i-Arbitration Rules, in particular the provision on referral to a Shariah expert in Rule 11. The modification broadens the referral procedure to accommodate international parties and a wide range of schools of Islamic jurisprudence with no reference to a particular jurisdiction.

The revision further enables the tribunal to proceed on the issues should the shariah expert fail to provide its decision within the time limits. It is to encourage time efficiency and smooth progression into the arbitral proceedings to its finality.

The KLRCA i-Arbitration Rules now contains an optional mechanism in Rule 12 allowing the tribunal to award compensation to parties for late payment of an award in a Shariah related dispute. It is based on principles of *ta'widh* and *gharamah*, where *ta'widh* refers to compensation on actual loss and *gharamah* refers to penalty for late payment. It's a widely accepted Shariah principle for parties to benefit full compensation.

## KLRCA Fast Track Rules

The KLRCA Fast Track Arbitration Rules have also seen important amendments. The rules also provides for opting out of Section 41, 42, 43 and 46 of the Malaysian Arbitration Act 2005 (Amended 2011). There are 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 improved to encourage the smooth progression of the arbitration.

Most of the improvements made to the KLRCA Arbitration Rules in relation to fees and costs and collection of deposits were applied in the KLRCA's Fast Track Rules.

## Mediation Rules

The new set of rules provide for a simpler and practical mediation process aimed at providing a fast and cost efficient alternative dispute resolution. It improvises and simplifies the appointment process of the Mediator. Further, it sets out the conduct and ethics of the Mediator as well as the participation of Parties to the Mediation process. The confidentiality of the Mediation process is further enhanced in the new Rules. The fee tariffs have been simplified.

This revision of the Rules is quite timely and is evidence of KLRCA's determination to keep abreast with both global and national developments of alternative dispute resolution.

KLRCA has retained the essence of the Rules, and the modifications have been made with the sole intention of uplifting Malaysia to the same competitive ranks as the best that Asia-Pacific region can offer.

## Translation of the rules in 6 different languages

In embarking towards this journey of internationalisation, the KLRCA has also sought other means to draw the interests of international parties and practitioners. We feel that one of the best methods to appeal to anyone is if we are able to speak their language. As such, we took the bold step of translating all of KLRCA's Rules into six different languages such as Spanish, Arabic, Korean, Mandarin, Bahasa Indonesia and Bahasa Malaysia.

These endeavours, revising our rules and translating them in various international languages, represents our determination to consolidate Malaysia's position in the arbitration world. I am personally very enthusiastic about it. I trust it will achieve its aim in raising the relevancy and standards of arbitration and dispute resolution in Malaysia.

I would like to express my appreciation and congratulations to my team at the KLRCA who worked hard to make today possible. Also to everyone who provided support, be it by providing input, sharing insights or for just being here today, your support is truly felt. I would also like to say a big thank you to Yang Berhormat Hajah Nancy Binti Haji Shukri for gracing the Rules launch with her honourable presence. The government's support is invaluable to us.

I believe that together we can bring Malaysian arbitration to greater levels and before long our aim of becoming the leading arbitration centre in the region will materialise.

I end my speech today with a quote from Anatole France, who said "To accomplish great things, we must not only act, but also dream; not only plan, but also believe."

# The New KLRCA Mediation Rules



The Kuala Lumpur Regional Centre for Arbitration (KLRCA) introduces the new set of Mediation Rules which was launched on 24th October 2013 together with the other set of revised Arbitration Rules.

The new set of rules provide for a simpler and practical mediation process aimed at providing a fast and cost efficient alternative dispute resolution. It improvises and simplifies the appointment process of the mediator. Further, it sets out the conduct and ethics of the mediator as well as the participation of parties to the mediation process. The confidentiality of the mediation process is further enhanced in the new Rules and the fee tariffs are simplified.

The Mediation Rules start off with a clear and concise explanation of the steps required to commence the mediation process. Parties are informed of the required necessary documentation and the role of the KLRCA in the process is also defined and explained.

Upon commencement of the mediation process, the rules clarify on the appointment of the mediator. The new Rules enable the Director of the KLRCA to appoint the mediator where the parties fail to agree within 30 days of the 'request for mediation'. The appointment of the mediator under Rules 7 to 11 of the KLRCA Mediation Rules removes the requirement of request from parties and facilitates expeditious commencement of the mediation process.

The KLRCA has also sought to enhance the ethics of the mediators by incorporating requirements on independence, impartiality and code of conduct under Rules 10 and 11. Further, the rules also provide for the disqualification of the mediator if any party to the mediation objects to the continued service of the mediator.



The roles of the mediator and parties are clarified under Rules 12 to 16. In addition to the requirement of independence and impartiality, the mediator's role prior to the commencement of the mediation is also laid out in terms of communication with parties as well as participation in pre-conferences. The Rules lay down the fundamental requirement of good faith of all parties participating in the mediation process. The clarification of the roles of the parties is to encourage efficient conduct of all those involved in the mediation process.

To encourage meaningful participation of all parties to the mediation, Rule 17 requires that parties' representatives involved in the mediation process have the necessary mandate and authorization to settle the dispute. This is to ensure that parties participate in the mediation with the intention of resolving the dispute in the most timeous manner.

In line with the intention to encourage expeditious resolution of the mediation, Rule 27 (d) provides that the mediation shall be deemed terminated if it is not resolved upon expiry of 3 months from request of mediation. Parties with interest in continuing with the mediation may agree to extend the time.

One of the more important introductions of the new Mediation Rules is the enhancement of confidentiality found under Rules 19-21. A 'Confidentiality Agreement and Undertaking' has been incorporated under Schedule A of the rules. All parties to the mediation are bound to keep all matters relating to or arising out of the mediation private and confidential.

The streamlining of the new Mediation Rules further clarifies the schedule of fees and administrative costs of the mediation. Both the schedule of fees and administrative costs has been restructured to a scale based on per day rate to objectively assess time consistent cost allocation. Parties may now adjust mediation meetings to their actual needs. The rules promote consistency with international trends by considering international as well as domestic mediation under the Schedule of Fees.

The Mediation Rules comes with a series of frequently asked question to guide parties and assist in the better understanding of the application of the rules.

With the all new Mediation Rules, KLRCA aims to promote mediation as a viable commercial option for parties in Malaysia and abroad as interest-based mediated negotiations can result in settlements that are more satisfactory to all parties than simple compromised decisions. The streamlined new rules ensure that the mediation process addresses all parties' interests which in turn will preserve the working relationship of parties and ensure those who negotiate their own settlements have more control over the outcome of their dispute.



# Mediation in Malaysia

By Shanti Abraham

**A COMMENTARY ON THE INCREASING PROMINENCE OF MEDIATION AS A DISPUTE RESOLUTION MECHANISM AS WELL AS THE ASPECTS, NEW DEVELOPMENTS AND ANTICIPATED CHALLENGES TO THE GROWTH OF MEDIATION.**

## Introduction

MEDIATION has been growing in stature as a form of alternative dispute resolution in Malaysia for over a decade. This was given a further lift by the enactment of the Mediation Act 2012 which has statutorily protected confidentiality and privilege (with exceptions). The apparent legislative aim is to promote and encourage mediation as a method of dispute resolution and to facilitate the settlement of disputes in a fair, speedy and cost-effective manner.

At the same time, mediation is having a profound impact on the way law is practiced around the globe. Increasingly clients expect both corporate lawyers and litigators to have a working knowledge of the mediation process and to promote alternative dispute resolution as an important step in a dispute resolution journey.

It is no secret that over the next decade, Asia is expected to experience fast growth and expanding trade and numerous projects. The number as well as the complexity of cross border disputes will also be expected to increase. To this end, the demand for swifter and more cost effective solutions to disputes is likely to rise and the legal advisory sector will need to respond to meet these rising expectations.

Mediation will be well placed to address this need and it is likely that this aspect of legal services will grow significantly in the years to come.

Accordingly, mainstreaming mediation for dispute resolution seems to be inevitable and traditional advocacy may need to be refined and redefined as mediation advocacy skills gain in significance in dispute resolution.

### New Developments

Anticipating the rise of mediation and, in tandem with global trends, the KLRCA revised and launched its Mediation Rules 2013 in October 2013. Key in the simple and practical revised rules is the recognition for the need to now provide for international mediation. The KLRCA Mediation Rules (Rev 2013) provides a framework within which mediation can be effectively be engaged as envisioned by the Malaysian Mediation Act 2012.

The swift legislative and procedural changes herald an age where mediation is an early logical step in dispute resolution that is, before impasses are declared insurmountable and arbitration and litigation become necessary.

### Key aspects of Mediation

Using the Mediation Act as a guide, "Mediation" means a voluntary process in which an independent and neutral mediator facilitates communication and negotiation between parties to assist them in reaching an agreement regarding a dispute. The Act does not apply to mediation in courts.

Any type of commercial or civil dispute, regardless of quantum of dispute can be mediated. Cases that are generally not suitable for mediation are those which involve criminal elements and where at least one of the disputing parties is keen to bank roll litigation and establish legal precedent.

There is much flexibility associated with mediation. Parties are not obliged to mediate before commencing litigation or arbitration, though sensibly it appears they should. A mediation could take place simultaneously with any civil court action or arbitration. The Act provides that where proceedings have already commenced, mediation does not act as a stay of proceedings.

Individuals may attend a mediation in person. It is not mandatory to be legally represented at a mediation. However, there are many advantages for individuals to attend mediation together with their lawyer who is ideally experienced in mediation advocacy. Where the disputant is a corporate entity, an authorised representative ought to attend with a mandate to resolve a dispute.

It is important to bear in mind that a Mediator makes no findings and draws no binding conclusions. The Mediator however, affords the parties an opportunity to generate options in tandem with their interests in a private environment which is not prejudicial and where parties always have the option to terminate the process.

Unlike litigation and arbitration, the parties in a mediation make their own decisions on how to conclude the dispute. The role of the mediation advocate is important to help frame the issues together with the mediator and advance his/her clients' interests. The participation of lawyers also minimizes the temptation by parties to suggest unwarranted pressure or vacillate from their agreement post settlement.

Unlike litigation, mediation is not a battle advanced with the sole purpose of declaring a winner or a loser. A key advantage of mediation is the creative solutions that parties can reach under circumstances where neither party risks having an adverse decision imposed upon them by a judge or arbitrator.

In a climate where escalating costs pursues the lips of current and potential litigants, mediation is in my view a forward looking dispute resolution mechanism.

While in the course of a mediation, issues are likely to arise over the finer details of the dispute, the beauty of mediation is that there is scope to agree or to disagree and then to refocus on finding a practical solution that is acceptable to everyone involved.

Upon the conclusion of a mediation and the reaching of an agreement, the parties would enter into a binding settlement agreement. If proceedings have been commenced in court, the settlement agreement may be recorded before the court as a consent judgment or the parties may agree on a withdrawal of the legal action.

No transcript or formal record will be made of the mediation proceedings. Only the mediator, the parties and/or their authorised representatives and advisers will generally be permitted to be present during the mediation.

A typical mediation will generally follow the following process:

1. An introduction and explanation of the mediation process to the parties.
2. The parties will then be given an opportunity to explain their perspectives of the dispute.
3. An agenda will be set to identify all relevant issues to be discussed.
4. Parties will be asked to consider each issue. The mediator may request to see the parties privately. Joint discussion will be encouraged where possible.
5. There is enormous flexibility in the mediation process and qualified mediators often have an arsenal of techniques to deal with the underlying interests that gave rise to the dispute while at the same time ensuring that the parties are dealt with fairly.
6. Where a settlement is reached in the mediation, the terms of the settlement will usually be reduced into writing and signed by or on behalf of the parties.

### **Mainstreaming Mediation**

How can legal practitioners position themselves to take advantage and widen their scope of practice to include mediation? Some suggestions follow:

1. Familiarize oneself with the Mediation Act and the KLRCA Mediation Rules (Rev 2013)
2. Prepare a case as comprehensively as possible before embarking on mediation.
3. Prepare communications to potential disputants (also known as letters of demand) that make it clear that mediation is the claimant's preferred first step to resolve a dispute.
4. Consider including a respectful term that cost consequences may follow in the event that an overture to mediate is rejected in favour for more expensive litigation.
5. Mediation is a serious dispute resolution process and preparation for mediation may require the involvement of experts to overcome technical issues.

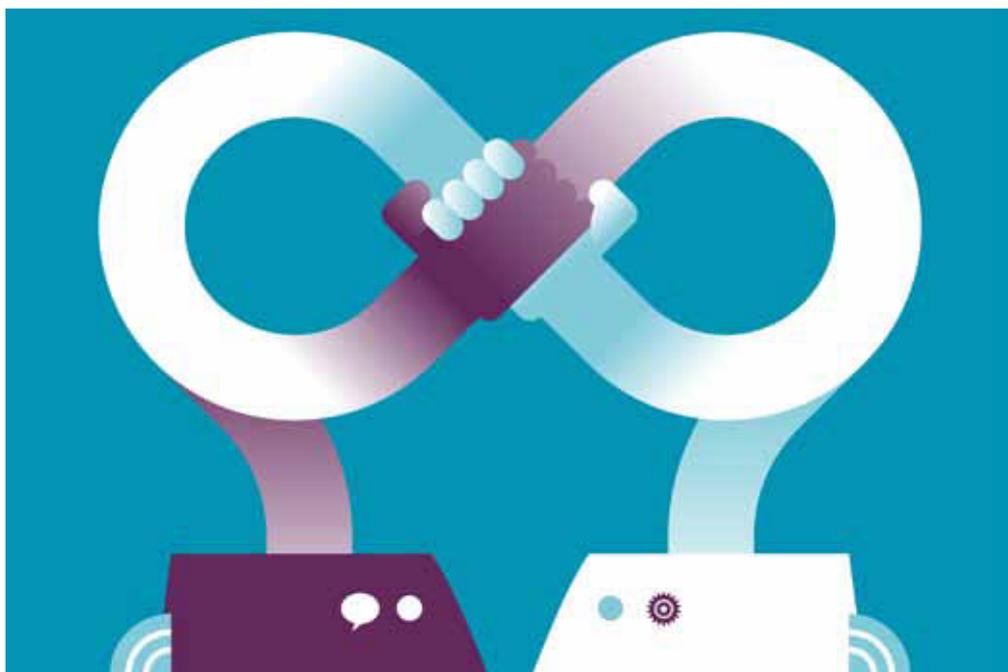
### **Notable benefits of mediation**

#### **Time and costs savings**

While advance preparation by mediation advocates may take significant time, the mediation itself is often done in one or two days. In jurisdictions where mediation has become more mainstream, disputants have anecdotally reported significant savings in time, and an appreciation for avoiding a potentially long-drawn bruising dispute. Depending on the body offering mediation, a mediation session can also be arranged quickly and for urgent cases, within short notice

For complicated matters, significant preparatory work is often required before parties feel comfortable enough to sit through a mediation. As the goal is to achieve a fair and reasonable solution to a dispute, preparatory work with a lawyer is a sensible first start.

Cost-savings will vary but the unique process of mediation ensures that the final cost of resolving the dispute is likely to be lower.



Mediation aims to provide a constructive approach and improve relationships whenever possible. Mediation works well to preserve on-going commercial or contractual relationships.

### Confidentiality

Mediation provides a process which is privileged and confidential. The Malaysian Mediation Act prohibits against disclosing any information relating to the mediation. As a result, the parties are given a safe environment to explore issues and the opportunity to consider different options without prejudice to their own case. Mediators then can work with the parties to reach creative and workable solutions to their disputes.

### Managed risks

As parties will settle only when they are satisfied with the proposal for resolution, there is control over the outcome of the dispute in that the parties themselves decide on the terms of settlement. The mediator assists the parties to consider the risks of declining a resolution and helps the parties recognize the benefits of managing the risks of a full blown litigation. In arbitration or litigation, both parties carry the risk of having a judge or an arbitrator deciding against them and of losing their case and having to foot costs.

### Relationships

Mediation aims to provide a constructive approach and improve relationships whenever possible. Mediation works well to preserve on-going commercial or contractual relationships. Restoration of relationships may not be the goal of disputants. However, underlying interests which may need to be overcome often root from breakdowns in relationships to begin with. Experienced mediators will often be rife with anecdotes where the feelings of being cheated, let down etc. may captivate disputants more and take up more air time than the details of any actual damage or injury caused.

### Concerns: Enforceability

Assuming mediation results in an amicable settlement, there are often concerns regarding the enforceability of settlement agreements. Settlement agreements are based on contract and enforcement may require court action. International anecdotes suggest that amicable resolutions following from mediation appear to result in relatively high compliance rates of settlement agreements. However, actual data is scarce on this. Enforcement concerns may therefore be an issue to be addressed. It would be interesting if, with the growth and prominence of mediation, settlement agreements flowing from mediation become enforceable in the same vein as an arbitration award.

### The challenges

Claimants often require the court machinery of discovery to enable them to consolidate their claim. The Mediation Act does not assist in this process and a claimant may be required to commence litigation in order to move the court machinery to obtain all relevant documents. Where discovery is warranted, parallel proceedings are likely to arise.

A concern routinely raised by those promoting mediation is that the right to commence mediation in tandem with a civil action or arbitration appears to counter-cost efficient. In its present form the Act allows disputing parties to explore multiple dispute resolution routes simultaneously, and this may not make economic sense and will hamper the growth of mediation to some extent.

In the UK and Australia, attempts to scuttle mediation or other ADR are taken seriously and cost consequences can result. Likewise, as clients gain sophistication in dispute resolution and reward their legal advisors for formulating expeditious strategies for dispute resolution, mediation is likely to gain momentum.

Therein lies one of the difficulties of mediation around the globe – the perception that mediation potentially solves problems too fast – making it economically disadvantageous to lawyers whose pre-mediation backroom efforts are not rewarded with as much enthusiasm as rabid litigation.

### Thinking Forward

Mediation is likely to grow in tandem with a growth in mediation advocacy. It may be time to rethink the commercial benefits of expeditious resolutions of dispute. Mediation advocacy is still low on the uptake in view of the perception of limited fee opportunities. There is currently little incentive for legal advisers to moot mediation, and in Malaysia there is no strict ethical obligation to do so. That is, unless clients demand it and rewards their advisers appropriately for swift settlement.

Once the rewards and savings make commercial sense to the legal advisors and clients alike, mediation is likely to surge forward as one of the more effective dispute resolution mechanisms around.



#### ABOUT THE AUTHOR

**Shanti Abraham** is a partner of M/s Puthuchery. She has practiced as an advocate and solicitor in both Singapore and Kuala Lumpur. Her areas of practice are corporate law and dispute resolution. She is a Mediator with the KLRCA, Malaysian Mediation Centre and an Associate Mediator and Trainer with the Singapore Mediation Centre. Shanti believes in mediation as a first line approach to dispute resolution and has acted as mediation advocate/mediator in several matters.

## Signing of Memorandum of Understanding between KLRCA & Labuan Financial Services Authority (LFSA)



03.10.2013

KLRCA and the Labuan Financial Services Authority (LFSA) had entered into a Memorandum of Understanding on 3 October 2013 with the aim of strengthening, promoting, co-operating and mutually assisting each other in the respective functions of KLRCA and LFSA towards enhancing the stature of Labuan International Business and Financial Centre as a preferred business destination internationally.



## Key Issues in International Arbitration & Commercial Litigation: The English & Malaysian Perspective



08.10.2013

KLRCA together with the British High Commission Kuala Lumpur had organised a seminar titled Key Issues International Arbitration & Commercial Litigation on 8 October 2013 at Royale Chulan Kuala Lumpur in conjunction with the visit of the Lord Mayor of the City of London, Alderman Roger Gifford.

The seminar featured prominent speakers from both the Malaysian & English jurisdiction namely Tan Sri Cecil Abraham (Senior Partner, Zul Rafique & Partners), Mr Christopher Leong (President of the Malaysian Bar), Mr Nick White (Partner, Trowers and Hamlins) and Mr Richard Wise (Managing Associate, Addleshaw Goddard)



## MYNIC 10<sup>th</sup> Anniversary Seminar



26.09.2013

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) and MYNIC Berhad had joined hands on 26 September 2013 to organise the MYDRP 10th Anniversary Joint Seminar to mark 10 years of partnership on domain name dispute resolution at the Royale Chulan Hotel Kuala Lumpur.

The half-day seminar saw domain name dispute resolution experts discuss various issues, including recent developments and best practises in domain names dispute resolution and a lecture on socio-cultural perspective of domain names.



## KLRCA Talk Series

10.10.2013

### Arbitrating maritime and trade disputes in Asia

Speaker: Ms Mary BL Thomson, *Pacific Chambers*

Moderator: Mr Jeremy M Joseph



KLRCA Talk Series 2013 carried into the third quarter with more insightful talks by ADR experts. Below are talks that were held from October-December.

12.12.2013

### Managing Adjudication Under CIPAA 2012 – Users' Perspective

Speaker: Mr Lam Wai Loon, *Skrine & Co.*

Moderator: Ivan Y. F. Loo, *Skrine & Co.*



# **KLRCAs new i-Arbitration Rules: Islamic finance in the global commercial arena**

*This article was first featured in the Islamic Finance News Supplements December 2013 Issue*





### Introduction

Commercial arbitration has long been an effective and efficient means of resolving disputes both domestic and international, providing speed, autonomy and most importantly reliable enforcement. As Islamic finance spreads outside its conventional borders, the need for such dispute resolution avenues has grown in parallel. This paper, the first in a three part series, will look at the problems faced by Islamic finance users across Asia and internationally when looking to resolve disputes in a commercially viable manner, and highlight the role that the Kuala Lumpur Regional Centre for Arbitration (**KLRCA**) and its award winning i-Arbitration Rules (**the Rules**) will play moving forward.

The second paper in this series, to be published in the upcoming *IFN: Capital Markets* supplement, will examine how parties to contracts utilising Islamic finance are able to select the appropriate Shariah laws to govern their transaction, particularly in a cross border context. The third and final paper, due to be published in the *IFN: Middle East* supplement will compare dispute resolution under the i-Arbitration Rules with traditional Islamic arbitration and some of the existing forums available.

### Islamic banking in Asia

The Islamic banking industry in Malaysia is one of, if not the, most developed in the world. At May 2013, total Islamic banking assets in Malaysia stood at RM525.63 billion (US\$161.97 billion), comprising 24.24% of the country's total banking assets. At the same time, Malaysia was responsible for 17% of global takaful contributions and 68% of total global sukuk issued<sup>1</sup>, with similar trends visible in the equities market, foreign currency market and total Islamic funds market share. The launch of the Malaysia International Financial Centre, aiming to cement Malaysia as the 'World's Islamic Finance Marketplace', signals a move to develop Islamic finance in Malaysia beyond merely economic terms. Education, communication and cooperation are among the areas that are being developed, most relevantly through various joint ventures and a robust legal regime.

Hong Kong, in addition to restructuring its tax framework to support Islamic finance<sup>2</sup>, has engaged with Malaysia by way of a Memorandum of Understanding as well as a recent meeting in Kuala Lumpur for the exchange of ideas. Hong Kong is seen as the gateway for Islamic finance into China. Japan, likewise, has engaged with Malaysia on discussions relating to a bilateral swap agreement with the intention of facilitating Japanese investment into the Malaysian Islamic finance sector. South Korea and Singapore are both expected to amend their taxation structures pertaining to Islamic finance, with Singapore having also established its first Islamic bank. All of these measures represent an extension of growing Islamic financial activity across the continent.

Supporting its Islamic banking sector, Malaysia boasts a strong and reliable regulatory and legal framework. Malaysia maintains its own Shariah Advisory Councils; one attached to Bank Negara (the Central Bank of Malaysia) and established under the Central Bank Act 2009, and one to the Securities Commission pursuant to the Securities Commission Act 1993. Together with the special Muamalat Division of the High Court of Kuala Lumpur – designed specifically to hear Islamic banking cases and created in 2003 – this approach recognises the need in the Islamic banking industry for consistent, just and knowledgeable rulings in relation to Shariah points of law.

Given the relatively early stage of development of Islamic finance across the rest of Asia, it is imperative that a country like Malaysia is able to offer the strength and expertise of its own legal structure to the international Islamic banking industry. The introduction of the KLRCA's i-Arbitration Rules goes a long way to achieving this goal.

<sup>1</sup> Figures obtained from "Malaysia International Financial Centre: Media Briefing, 1<sup>st</sup> August 2013"

<sup>2</sup> In July 2013 Hong Kong amended its Inland Revenue Ordinance and Stamp Duty Ordinance to harmonise the tax structure relative to certain types of Sukuk.

### How the i-Arbitration Rules function

In 2012 the KLRCA at the Global Islamic Finance Forum launched the i-Arbitration Rules, a remodelled set of its Arbitration Rules designed for Islamic arbitration. The new rules aim to provide a tool for the resolution of disputes arising from any contract that contains Shariah transactions and issues, suitable for international commercial agreements and providing international recognition and enforcement.

### Provisions under the Rules

Previously, the 2007 KLRCA Rules for Islamic Banking and Financial Services Arbitration only applied domestically. Originally their use was restricted to transactions and business arrangements specifically involving financial instruments and commodities as defined under the Central Banking Act and Capital Market and Services Act 2007.

The Rules in their current incarnation<sup>3</sup> bring in amendments to the 2012 revision of the conventional KLRCA Arbitration Rules which incorporate the 2010 UNCITRAL Arbitration Rules. The i-Arbitration Rules Model Arbitration Clause provides *“[A]ny dispute, controversy or claim arising out of a commercial agreement which is based on Shariah principle or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the KLRCA i-Arbitration Rules“*.

The Rules are presented in 2 parts:-

- Part 1 is based on Part 1 of the current KLRCA Arbitration Rules (2nd edn. 2012) with a modification to provide for a specific procedure for reference to the Shariah Advisory Council or a Shariah expert including necessary changes to provide for clarity and definitions of Shariah related terminologies.
- Part 2 adopts the most current UNCITRAL Arbitration Rules 2010 [when conflicted, provisions under Part 1 will supersede those of part 2].

Salient provisions under the KLRCA i-Arbitration Rules include:

- Specification of information, documents and fee required for registration of a matter with the KLRCA.
- Provisions relating to the appointment of arbitrators, including provisions ensuring their independence and impartiality.
- Provisions relating to rendering of the award are clearly set out, whereby the arbitrator shall be required to render its award within a period of 3 months from closing of pleadings.
- The KLRCA's schedule of costs applies immediately unless parties agree otherwise.
- To encourage the due payment of fees and costs by parties, the parties are required to pay deposits at the beginning and during the course of the arbitral proceeding.

<sup>3</sup> A new edition of the i-Arbitration Rules will be released in October 2013.

### Dealing with points of Shariah law – reference to the Shariah Advisory Council

Rule 8 of the current Rules provides that where the arbitral tribunal has to “[f]orm an opinion on a point related to Shariah principles; and [d]ecide on a dispute arising from the Shariah aspect of any agreement which is based on Shariah principles”, the tribunal must refer the matter to one of the two Shariah Advisory Councils in Malaysia. If the issue is beyond the purview of the Malaysian Shariah Advisory Councils, the parties may agree on an alternative Shariah council or expert to which the issue will be referred. Purview of the Shariah Advisory Councils, puts simply, refers to those matters falling within the scope or jurisdiction of the Advisory Councils under the relevant legislation establishing the Advisory Councils.

The new edition of the Rules, due to be launched in October 2013, seeks to remove any ties to a specific jurisdiction and create a tool suitable to parties of any nationality equally. There is no reference to a specific Shariah council or expert; rather, the appropriate council or expert will be determined according to the characteristics of the transaction. A transaction regulated by Malaysian legislation, for example, will fall under the purview of the relevant Shariah Advisory Council, and will necessitate a referral to that authority. A transaction with the Bahrain Islamic Bank, conversely, may come under that bank’s own Shariah Board. In this way the Rules are capable of handling any Shariah issues that may arise in any transaction, irrespective of the appropriate Shariah authority.

Upon referral to the relevant Advisory Council or expert, the tribunal will adjourn the arbitration proceedings until a ruling has been given. In the meantime, proceedings will continue regarding areas of the dispute independent of the Shariah issues referred. The relevant Advisory Council or expert will deliver the ruling within 30 days<sup>4</sup> from the date of the reference and the tribunal must then apply it within 15 days. The costs of the reference incurred by the tribunal form part of the “arbitration costs” as defined under the Rules.

Through the i-Arbitration Rules, the KLRCA has leveraged Malaysia’s expertise and status as a global Islamic finance hub to provide a truly commercial avenue of dispute resolution taking advantage of all the benefits offered by international commercial arbitration, providing access to industry and commercial expertise, a wide panel of international arbitrators and the most up to date processes and standards of international commercial dispute resolution. By utilising the i-Arbitration Rules, parties can be confident in exploring Islamic finance opportunities across the globe with the certainty and support of a strong legal regime.

<sup>4</sup> These timelines have been reviewed for the new edition of the i-Arbitration Rules.

## KLRCA Adjudication Training Programme

11.09.2013 - 15.09.2013

The KLRCA Adjudication Training Programme, which aims at training future adjudicators, was conducted from 11-15 September 2013 at the Sheraton Imperial hotel Kuala Lumpur.

A total of 35 participants had attended the training programme which was conducted by renowned local speakers namely Ir Harbans Singh KS, Mr Lam Wai Loon & Mr Chong Thaw Sing.



## CIArb Diploma in International Commercial Arbitration



09.11.2013 - 17.11.2013

KLRCA, together with the Chartered Institute of Arbitrators (Australia) Limited, had organised an intensive 9 days Diploma in International Commercial Arbitration course which was held at the Royale Chulan Hotel, Kuala Lumpur.

Earlier in the year, KLRCA had organised the same Diploma course in the month of April 2013. This time around, the Diploma course gained the interest of 27 individuals both local and international. On successful completion of the Diploma course and Module 4 Award Writing Examination, candidates will be awarded a CIArb Diploma in International Commercial Arbitration.





# An Overview of the Construction Industry Payment & Adjudication Act 2012

By Garth McComb

The Malaysian Construction Industry Payment & Adjudication Act 2012 (CIPAA) was gazetted in June 2012 and is expected to be implemented soon. While adjudication is by no means new to Malaysia, it has not been widely used in the past and was certainly not a statutory right until now. This article aims to provide some insight into who is likely to take advantage of the new legislation (as opposed to being taken advantage of) and some of the considerations that both potential claimants and respondents might want to consider once the legislation is enforced.

## Who will be affected?

Clause 2 of CIPAA states that *“This Act applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government”*.

Clause 4 of the act defines construction work as being *“the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of:*

- a) Any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
- b) Any road, harbour works, railway, cableway, canal or aerodrome;
- c) Any drainage, irrigation or river control work;
- d) Any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work; or
- e) Any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work,

I believe the above list gives the Malaysian CIPAA wider coverage than any other statutory adjudication law in any other country.

In fact the only confirmed non-application is contained in Clause 3 of the Act which states that *“This act does not apply to a construction contract entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation”*.

Whilst CIPAA does not apply to a contract between an employer building his own home which is less than 4 stories and the main contractor engaged to construct it, it would appear as though the Act might nevertheless still apply to any contracts signed between the main contractor building the property and any sub-contractors / suppliers that he engages.

The only other possible exception would require an exemption to be granted by the Minister for Works under Clause 40 of CIPAA by way of an order published in the Gazette. By doing so the Minister may exempt *“(a) Any person or class of persons; or (b) Any contract, matter or transaction or any class thereof, from all or any of the provisions of this Act, subject to such terms and conditions as may be prescribed.”* It remains to be seen how difficult or easy obtaining such an exemption might be.

### **What are the main intentions of the Act?**

A commonly quoted reason for the introduction of statutory adjudication is to help facilitate cash flow in the construction industry. It is intended to be used to help secure payment by an unpaid party of money that is rightfully due under a contract.

The Act is not intended as an avenue to try and correct pricing errors in a contract or to get a fair price when you have already signed and agreed on a contract sum which may be less than fair. It is simply intended to help an organisation engaged under a written ‘construction contract’ to secure payment of the amount they are *contractually* entitled to under the terms and conditions stipulated in the contract.

In any jurisdiction in which it has been introduced, another of the primary objectives of adjudication has been to outlaw, or at least overrule, the traditional ‘pay when paid’ or ‘pay if paid’ type payment clauses that have been prevalent within the construction industry.

Mr Sceptic (not his real name), a member of a large main contracting organisation that I spoke to recently, said that he did not think CIPAA would have much of an impact in Malaysia *“because it doesn’t matter what the law says, a contractor will only pay his sub-contractor’s after he has received payment himself”*.

This statement was made despite Mr Sceptic being aware that clause 35 (1) of CIPA states that *“Any conditional payment provision in a construction contract in relation to payment under the construction contract is void”*.

One wonders whether Mr Sceptic will be one of the first recipients of a payment claim referred under CIPAA.

To leave no one, except maybe Mr Sceptic and his like, in any doubt as to the intention of the Act, CIPAA clause 35(2) states that *“For the purposes of this section, it is a conditional payment provision when: (a) The obligation to make payment is conditional upon that party having received payment from a third party; or (b) The obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of that party.”*

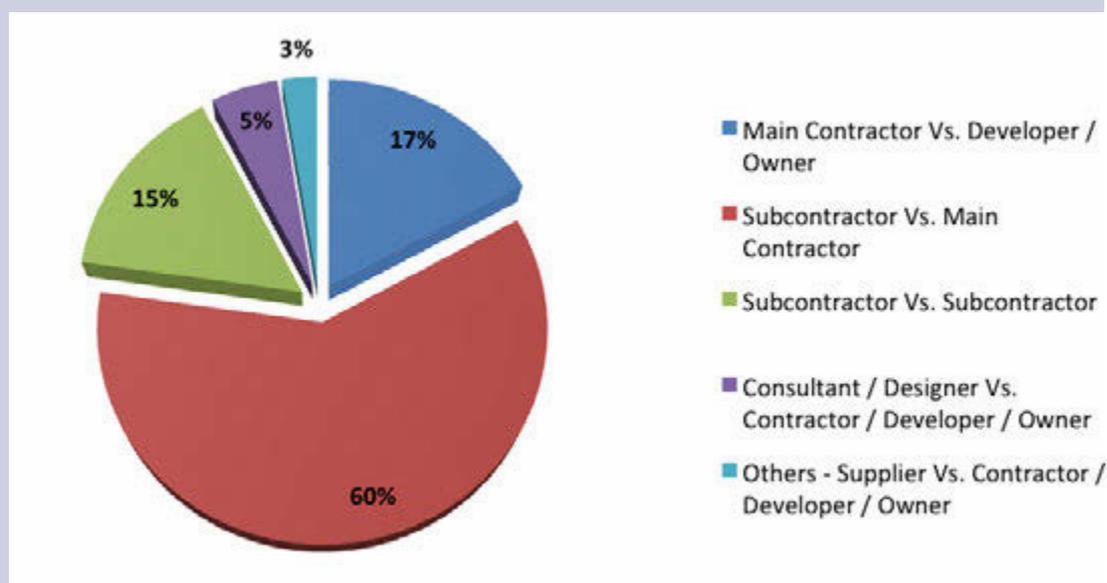
At the risk of overstressing the point, I would highlight again that any conditional payment provisions in a contract, even one that both parties have negotiated, agreed and signed, will be considered void in the eyes of an adjudicator.

### Who is likely to make use of the act?

While different jurisdictions have different payment regulations governed by statutory legislation similar payment issues tend to arise throughout the world and it is expected that the trends seen in other countries that have introduced statutory adjudication will be repeated in Malaysia.

Statutory adjudication was introduced in Singapore in 2005 under the Security of Payment Act. Recent statistics published by the Building Control Authority (summarised in the diagram below) indicate that the vast majority of matters that have been referred for adjudication since 2005 have been payment disputes between sub-contractors and main contractors.

Chart: Adjudication Cases in Singapore



Source: extracted from statistics published on the Building and Construction Authority (Singapore) website.

A similar pattern can be seen in the UK where again more than half of all adjudication referrals are related to payment disputes between main contractors and sub-contractors, and we expect that a similar pattern will be seen in Malaysia once the Act is implemented.

### What type of issues can be expected to be referred for adjudication under CIPAA?

One of the main differences between the legislation in Singapore and under CIPAA is the time allowed for the adjudication process. The Singapore process would normally be concluded within 35 days and the result may even be known before the next payment certificate becomes due.

Under the Malaysian Act, given that the process can take more than three months, two or three subsequent payment certificates may have been made following the disputed payment and the matter may have been resolved even before the adjudication decision is issued (for example the matter may have been resolved by way of a joint site measurement before the adjudication is concluded).

It seems likely therefore that adjudication in Malaysia will more often be initiated where the dispute is one of principle rather than quantum. Unpaid parties are unlikely to risk damaging the working relationship of the project team and possibility of incurring additional unnecessary costs when the dispute may well be resolved in the next payment certificate anyway. Referrals under CIPAA are more likely to relate to 'in principle' payment disputes that may be debated for several months before the unpaid party considers making a referral.



Secondly, the Singapore legislation was not intended as a process by which to adjudicate final account claims. The adjudicators in Singapore have just 10 days to prepare their decisions and this short period of time is simply too short to allow for a detailed analysis that would be required to give a reasoned fair decision on a large multi claim final account.

Having said that it is noted that in the UK final account referrals account for almost a quarter of all matters referred for adjudication. The other most popular issues adjudicated in the UK being the valuation of interim payments and the valuation of variations.

In Malaysia it appears that both interim and final account claims can be brought under the Act, as long as the claims are payment related (but then again aren't all disputes payment related?). This may result in a slightly different set of statistics for Malaysia than those seen in Singapore and elsewhere. I would not be surprised to see many Contractors still waiting to see 'how they get on' in final account negotiations before referring any disputed final account to adjudication as a cheaper means of settling the disputes than arbitration or litigation. It is worth remembering however that an adjudication decision does not mean the dispute *is* settled and if either party does not accept the decision adjudication and/or litigation will still be an option.

Finally it must also be said that much of the construction industry in Malaysia is relationship based. Some Main Contractors seem to work almost exclusively for a particular client while some sub-contractors get most if not all of their work from one or two main contractors. Under such circumstances it may still take extreme circumstances before an 'unpaid party' will consider making a payment application under CIPAA.

However one would still expect adjudications between main contractors and sub-contractors to constitute the highest number of referrals, particularly in the first few years after the legislation is introduced.

### **How to prepare for life under CIPAA?**

A good document management system and good system for compiling of contemporaneous documents and records will be of great benefit whether you are the party submitting or responding to a payment claim.

Where possible try to agree schedules of payment in the contract or at least prior to the commencement of work.

The preparation and agreement of a cost loaded programme early in a project can help reduce the risk of payment disputes during the course of the works.

When claiming for variations, submit as much 'relevant' details/evidence as possible including photographs of the work done where appropriate and supported explanations of how the variation has been priced.

When assessing/certifying a payment which is less than the amount claimed, always be prepared with valid reasons why you are not paying the full amount claimed. Statements like *"Contractor's always claim double so I only certify half"* are unlikely to convince an adjudicator to accept your assessment. Credible evidence of current market prices and records of joint site measurement and valuation for example are likely to be much more persuasive.

### How to minimise potential exposure under the Act?

Follow the payment terms stipulated in the contract.

It would obviously be preferable to have clear (valid) payment terms stipulated in the contract to minimise disputes.

If no such payment terms are specified however, it is likely that the 'default provisions in the absence of terms of payment' under the act will apply.

**CIPAA Clause 36 (3) states:** *"The frequency of progress payment is:*

- a) Monthly for construction work and construction consultancy services; and*
- b) Upon the delivery of supply, for the supply of construction materials, equipment or workers in connection with a construction contract".*

Note the potential for disputes even if the default provisions apply. For example a labour only sub-contractor might contend that he is entitled to payment under clause 36(3)(b) as soon as he has supplied (delivered) workmen to a site. The contractor will likely only agree to make payment once those workmen have actually performed some work.

Try to keep the pricing of contracts as clear and consistent as possible.

Some tips to consider when pricing include:

1. For measurement contracts, price the works as described but be sure to include any related works required by the specifications and/or drawings that may not be readily apparent in the descriptions but which the contract would deem included in the rates;
2. For lump sum contracts identify significant cost items which are not readily apparent in the contract sum analysis by inserting separate descriptions and sums rather than just 'lumping' the cost into an existing item;
3. As far as possible price supply only items separately from other works;
4. For expensive equipment always separate mobilisation, monthly and demobilisation rates/prices;
5. Identify whether major equipment is a) rented or b) owned/purchased by the Contractor;
6. Ensure that as far as possible, Sub-contract payment terms follow or are compatible with the main contract payment terms (bearing in mind that conditional payment terms will be void);
7. Keep preliminary and general costs separate rather than making allowance for them in the rates for the work.

### Who will the adjudicators be and how will they operate?

In many cases the adjudicator will not be a legal professional but may well be an architect, engineer or other such professional.

The KLRCA adjudication course that I attended in October 2012 saw around 100 delegates from a wide spectrum of backgrounds taking part. Probably less than 10% were lawyers and most, if not all of them, are now qualified for appointments as an adjudicator.

Irrespective of their background however, any adjudicator appointed to decide an adjudication dispute between two parties will refer, first and foremost, to the contract between the parties.

Fortunately it is likely that the KLRCA will take the nature of the dispute into consideration when appointing an adjudicator to a particular dispute and you can be sure that any adjudicator so appointed will be suitably qualified and experienced to make the appropriate findings.

### And Finally...

Based on our experience in other jurisdictions where statutory adjudication has been introduced the first few years following enactment will see a large number of legal issues being raised pertaining to the interpretation of the Act itself.

No matter how well it is drafted, there will always be avenues for legal experts to interpret the wording to gain an advantage that may not have been anticipated by the authors of the Act. It is also likely that in the beginning, unless the nature of the dispute clearly dictates otherwise, the adjudicator will also be an experienced and qualified legal professional.

While not specifically required under the act I would recommend, particularly in the early years of the legislation, that anyone making or defending a claim under the act engage the services of an experienced lawyer and (at the risk of being somewhat self-serving) an experienced claims consultant.



#### ABOUT THE AUTHOR

**Garth McComb** is the General Manager of Driver Trett's Kuala Lumpur Office. He has been managing the KL office for 2 and a half years since he moved from Singapore where he had been working since 1996. Garth has over 20 years post graduate experience and is a member of the Royal Institution of Chartered Surveyors, Chartered Institute of Arbitrators the Society of Construction Law and the Malaysian Society of Adjudicators. He has considerable experience of preparing and presenting claims for adjudication under the Singapore Security of Payment Act. Driver Trett have offices across the globe and has been involved in thousands of adjudications in almost every jurisdiction in which it has been introduced.

# KLRC A ON THE SCENE

The period proved to be a busy one for KLRC A as we participated in events organised by our regional partners.

**21.10.2013**  
KLRC A's International case counsel, Mr Faris Shehabi spoke at the IFN Issuers & Investors Asia Forum at the Kuala Lumpur Convention Centre on 21 October 2013.



**19.11.2013**  
Professor Datuk Sundra moderated a session on the Trans-Pacific Partnership Agreement organized by Associated Chinese Chambers of Commerce and Industry of Malaysia on 19 November 2013.



**10.12.2013**  
Professor Datuk Sundra spoke at the Korea Biz Dialogue on 10 December 2013.



# Arbitration Case Law: Developments in Malaysia

By **Rammit Kaur**, *Head of Legal Services*  
**Laura Jimenez Jaimez**, *International Case Counsel*

## DATO' DR MUHAMMAD RIDZUAN MOHD SALLEH & ANOR (PLAINTIFF) v SYARIKAT AIR TERENGGANU SDN BHS (DEFENDANT)

**Court:** High Court Malaya, Kuala Lumpur

**Case Citation:** [2012] 6 CLJ 156

**Date of Judgment:** 14 March 2012

### Facts

The first plaintiff and the defendant entered into a Joint Venture Shareholder's Agreement. The second plaintiff and the defendant entered into a related Water Purchase Agreement. Disputes arose in relation to both, and the matter was referred to arbitration.

In April 2010 the parties negotiated a settlement, with a Consent Award entered by the arbitrator. A subsequent Consent Award on costs was made requiring the plaintiffs to pay the defendant. The defendant filed an application in the High Court to enforce the Consent Award on costs, obtaining an enforcement order in April 2011.

In September 2011, the plaintiffs discovered that, shortly after his appointment, the arbitrator had become the Director of the Malayan Banking Bhd (hereinafter "MBB") which financed the joint Venture between the parties. He did not disclose this fact to the parties. In May 2009 the sole arbitrator signed his Statement of Independence declaring no facts or circumstances likely to give rise to justifiable doubts as to his impartiality or independence. Subsequently, the plaintiffs filed an action pursuant to the Arbitration Act 2005 to set aside the Consent Award, the Consent Award on costs, and the High Court's enforcement order.

### Issues

There are two key issues in this case. Firstly, the main issue was whether the award could be set aside on the grounds of breach of disclosure and lack of independence. There was also a further issue of whether the 90-day timeframe for setting aside the award could be extended.

### Held

The High Court Malaya set aside the awards and the enforcement order and ordered each party to bear their own costs.

Regarding the obligation to disclose, the court ruled that the arbitrator had a continuing duty of disclosure until the conclusion or termination of the arbitral proceedings. The appointment of the arbitrator as director of the bank that financed the joint venture in respect of which the dispute arose was considered such a matter for disclosure. It was a nexus that raised the likelihood of circumstances giving rise to justifiable doubts as to the arbitrator's impartiality and independence (see paras 28, 30, 52 and 59).

With respect to the extension of the time frame, under Section 37(4) of the Arbitration Act 2005, an application to set aside may not be made after the expiry of 90 days from the date on which the party making the application received the award. However, the court held there is a discernible difference between a peremptory "shall" and a permissive "may". The former is mandatory and allows for no extension; the latter leaves room for the exercise of discretion in extending the time allowed to carry out a particular act. The court therefore retained the discretion to extend the time for a party to file an application to set aside an award beyond the 90-day timeframe from the date on which the award was received.

Accordingly, the court allowed the award to be set aside.

### Impact

The importance of disclosure is paramount, even where there is no apparent bias or partiality. Regarding the discretion to extend time frames, "shall" is mandatory and allows for no extension whereas "may" leaves room for the exercise of discretion in extending the time allowed to carry out a particular act. The second approach taken by the Judge is of great import within the concept of time frames when it comes the discretion to set aside an award.

## CYBER BUSINESS SOLUTIONS SDN BHD (PLAINTIFF) v ELSAG DATAMAT SPA (DEFENDANT)

**Court:** High Court Malaya, Kuala Lumpur

**Case Citation:** [2012] 1 CLJ 115

**Date of Judgment:** 13 August 2010

### Facts

The plaintiff and the defendant collaborated to tender for a BSN project. BSN filed a suit against the plaintiff alleging breach of contract. The plaintiff filed a third party notice against the defendant claiming indemnity against the BSN suit.

The defendant claimed that the arbitration agreement was contained in the "General Supply Terms and Conditions" (hereinafter "GSTG") of the defendant's proposals, providing for ICC arbitration. However, the plaintiff claimed he never signed the GSTG or the arbitration clause therein and that the operative arbitration agreement was that contained in the subcontract concluded in June 2008 and signed by the defendant, providing for disputes to be settled by way of arbitration under the KLRCA Arbitration Rules.

The defendant applied for an order that the disputes be referred to arbitration pursuant to the GSTC. The Judge did not grant that order. In the interim, the defendant referred the dispute to the ICC. The plaintiff applied for injunctive relief to restrain the defendant from continuing with the arbitration proceedings in Paris.

### Issues

The issue in this case is whether any reference for arbitration of disputes between the Plaintiff and the Defendant, ought to be pursuant to the ICC Arbitration Clause or the KLRCA Arbitration Clause.

This is a situation of two competing arbitration agreements, where each prescribes an arbitration under two different, distinct and separate commercial bodies in two different countries providing dispute resolution services. There is issue as to whether reference to the ICC ousts the jurisdiction of the Malaysian courts, and secondly whether by 'submitting' to the jurisdiction of the ICC the Plaintiff had ousted the jurisdiction of the Malaysian courts.

### **Held**

The court found firstly that the dispute as to which of the two arbitration clauses prevailed constituted bona fide issues that should be left to determination at trial. The defendant had first contended that, by virtue of the ICC arbitration clause, the jurisdiction of the Malaysian courts had been ousted. In its decision, the court held that the presence of an arbitration clause did not oust the jurisdiction of the Malaysian courts.

The defendant then contended that the plaintiff had "wilfully submitted" to the jurisdiction of the ICC, such as to oust the jurisdiction of the Malaysian courts. The court found that the plaintiff had maintained the position all along that the ICC arbitration clause was not binding on it, and that the issue of competing arbitration clauses should be resolved by the court.

The court therefore found that the plaintiff had not submitted to the jurisdiction of the ICC. The court held it was not for either the ICC or the KLRCA to determine the jurisdictional issue of which tribunal was seized in view of the competing forums. In this regard, the court found that the balance of convenience favoured the grant of the injunction.

### **Impact**

The Court explicitly stated that the jurisdiction of the Malaysian courts can never be ousted, regardless of the presence of an arbitration clause, reaffirming the rights of parties to seek injunctive relief. The approach of the Court in relation to the plaintiff's participation in the ICC proceedings is also instructive, as to how parties can protect their interests without forfeiting the right to approach another forum for relief.

# 2014

## SAVE THE DATE!

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

**DATE** 16 January 2014

**EVENT** Simplifying Construction Claims for Adjudication: The Essentials for Lawyers

**ORGANISER** KLRCA & CIArb (Young Members Group)

**VENUE** KLRCA

**DATE** 17 January 2014

**EVENT** ADNDRC Workshop

**ORGANISER** KLRCA, HKIAC & CIETAC

**VENUE** Prince Hotel, Kuala Lumpur

**DATE** 18 January 2014

**EVENT** ADNDRC Conference

**ORGANISER** KLRCA, HKIAC & CIETAC

**VENUE** Sheraton Imperial, Kuala Lumpur

**DATE** 23 January 2014

**EVENT** International & Domestic Mediation – The 2013 KLRCA Mediation Rules

**ORGANISER** KLRCA

**VENUE** Renaissance Hotel, Kuala Lumpur

**DATE** 11 February 2014

**EVENT** The Growth of International Arbitration in Asia

**ORGANISER** 39 Essex Street Chambers & KLRCA

**VENUE** London, United Kingdom

**DATE** 12 February 2014

**EVENT** 4<sup>th</sup> Annual Global Arbitration Review (GAR) Awards

**ORGANISER** Global Arbitration Review

**VENUE** Paris, France

**DATE** 13 – 14 February 2014  
**EVENT** 17<sup>th</sup> Annual IBA International Arbitration Day  
**ORGANISER** International Bar Association  
**VENUE** Paris, France

**DATE** 26 February 2014  
**EVENT** Construction Industry Payment & Adjudication Act Conference  
**ORGANISER** KLRCA  
**VENUE** Renaissance Hotel, Kuala Lumpur

**DATE** 26 – 28 March 2014  
**EVENT** APRAG 10<sup>th</sup> Anniversary Conference  
**ORGANISER** APRAG  
**VENUE** Melbourne, Australia

**DATE** 10 – 14 April 2014  
**EVENT** KLRCA Adjudication Training Programme  
**ORGANISER** KLRCA  
**VENUE** Sunway Hotel Georgetown, Penang

**DATE** 19 – 27 April 2014  
**EVENT** Diploma in International Commercial Arbitration  
**ORGANISER** CIArb (Australia) & KLRCA  
**VENUE** G Hotel, Penang



# KLRCA ADJUDICATION TRAINING PROGRAMME

**10-14 APRIL 2014** 8.30AM  
-6.00PM  
**SUNWAY HOTEL GEORGETOWN PENANG**  
33 New Lane (Off Macalister Road), 10400 Penang

## CPD POINTS

Bar Council Malaysia	10 CPD points
Board of Architects Malaysia	3 CPD points
Construction Industry Development Board	20 CCD points
Land Surveyors Board	5 CPD points
Board of Valuers, Appraisers and Estate Agents Malaysia	<i>Pending approval</i>
Board of Engineers Malaysia	8 CPD points
Board of Quantity Surveyors Malaysia	6 CPD points

## SPEAKERS AND TUTORS



### IR. HARBANS SINGH

Chartered Engineer  
Advocate & Solicitor, High Court of Malaya (Non-Practising)  
Bachelor of Engineering (NUS), LLB (Hons) (London)  
CLP, DiplCArb (CIArb), FCI Arb



### CHONG THAW SING

LLB (Hons), MSc (Construction Law & Arbitration)  
LLM (Commercial Law) UK, PG Dip. Ard (UK)  
B.Eng (Hons) UM  
FCI Arb, FMI Arb, MIEM, P.Eng



### LAM WAI LOON

LLB (Hon) London, CLP  
Advocate & Solicitor, High Court of Malaya  
MBA (Heriot-Watt), FCI Arb

The Adjudication Training Programme is conducted by KLRCA and is open to everyone, especially those in the construction industry. Aside from training future adjudicators and providing them with the necessary skills to conduct an adjudication, the programme is also suitable for those who do not want to become adjudicators but would just like to seek more knowledge on the subject.

The training is conducted over five days by experts from the construction industry and consists of five units.

#### UNIT 1 The Application of Statutory Adjudication to the Construction Industry

Enables the participants to acquire knowledge and develop a better understanding of adjudication and the effects of the Construction Industry Payment and Adjudication Act (CIPAA) 2012 on the construction industry.

#### UNIT 2 The Practice & Procedure of Adjudication under the CIPAA

Gives participants a deeper knowledge of the important provisions of CIPAA and understand the necessary requirements of the adjudication process.

#### UNIT 2A CIPAA Regulations (Subject to Minister's approval)

Introduces participants to the Regulations of the Act which will give full effect and the better carrying out of the provisions of CIPAA 2012

#### UNIT 3 Fundamentals of Construction Law

Introduces the participants to the Malaysian Legal System and provides the basic knowledge of construction law, which includes basic concepts of the law of contract, tort and evidence.

#### UNIT 4 The Construction Process

Introduces the participants to the basic knowledge of the construction process in particular procurement, processes and contractual arrangements.

#### UNIT 5 Writing Adjudication Decisions

Provides participants the skills necessary to write an adjudication decision in accordance with the provisions in CIPAA.

For more information please contact **Yip Xiaoheng**  
at **03-2142 0103** or email **cipatraining@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."*

## 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 **KLRC**A's arbitral awards to be enforceable in countries that are also signatories to the Convention.

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

**KLRC**A has a panel of experienced domestic and international arbitrators from diverse fields of expertise.

Costs of arbitration proceedings in **KLRC**A are comparatively lower than other established arbitral jurisdictions.

No visa and withholding tax imposed on arbitrators.

Foreign arbitrators are exempted from applying for a Work Permit or a Professional Visit Pass when entering into Malaysia to conduct hearings which are held for a short duration.

Arbitrators and foreign counsel will be exempted from the "fly-in fly-out" prohibition. They will not be subjected to the restriction of 60 days nor require immigration approval to enter into Malaysia to conduct arbitral proceedings.



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HERITAGE  
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KLRC A NEW PREMISES 2014

BANGUNAN SULAIMAN, JALAN DAMANSARA, KUALA LUMPUR

**KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION**

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

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