

NEWSLETTER

ISSUE N°13

JAN - MAR 2014

klrc

KUALA LUMPUR REGIONAL
CENTRE FOR ARBITRATION

REFLECTING THE PAST, BUILDING THE FUTURE.

REGIONAL RESOLUTION GLOBAL SOLUTION



19TH-21ST
JUNE 2014

klrc  INTERNATIONAL
ARBITRATION
CONFERENCE

*"An Exciting New Phase in
Asia Pacific Arbitration"*



NEWSLETTER | ISSUE NO 13 | JAN-MAR 2014

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A MESSAGE FROM OUR DIRECTOR

Dear distinguished friends,

It's that time of year again. As the holiday season fades into the New Year, the first quarter of 2014 dawns upon us. Welcome to the first issue of the KLRCA Newsletter for the year. 2014 approaches the centre bringing renewed enthusiasm as we are resolved to spend this year focused not on resting on our laurels and being in our comfort zones, but rather on gaining—the strength to lift more, the endurance to run farther and the knowledge to make better decisions; All in aspiration to take KLRCA surging onto greater heights at the global arbitration front.

It seems felicitous, as 2014 is the year of the horse, according to the Chinese zodiac. Although they can be wild, incalculable and rebellious, horses are also agile, fast and free. Born to compete, they're always moving, galloping forward—never backward—in search of new pastures. They don't survive by being content; they do it by forging ahead.

The start of the year saw KLRCA rake in over 6,000 miles to participate in the 17th IBA International Arbitration Day in Paris, our third year of being involved in the event. This remains an excellent platform to strengthen and enhance ties with our international counterparts, as well as acquaint ourselves with new comrades. KLRCA added value to our Europe trip by collaborating with The Law Society of England & Wales and Thirty Nine Essex Street to carry out two enterprising talk sessions in London to coincide with our continuous efforts to build KLRCA's international repertoire and to further advocate ADR. We are grateful to have had a few members of the Bar accompany us for these talks.

Upon the conclusion of our fruitful European escapade, it was business as usual back home. This time around, KLRCA teamed up with the Malaysian Society of Adjudicators to organize the 2nd edition of the CIPAA Conference, themed "Getting Paid, CIPAA Updates". This conference was a great success as over 1000 delegates from the construction industry and related professions turned up in anticipation, support and hope of the CIPAA Act, gazetted on 22nd June 2012; being passed by the Malaysia Government in the significant near future.

Our involvement in the domain name dispute resolution scene also picked up impetus with the successful completion of the ADNDRC Workshop 2014 and the ADNDRC Conference 2014. KLRCA partnered China International Economic and Trade Arbitration Commission (CIETAC), Hong Kong International Arbitration Centre (HKIAC) and Internet address Dispute Resolution Committee (IDRC) to co-host the latest edition of the latter which attracted over 22 internationally acclaimed speakers to share their expertise and knowledge.



In our previous issue last year I promised more free talks on ADR from the world's best, and holding true to that promise, KLRCA continues its Talk Series this first quarter. You can find the schedule of the rest of the Series, including the topics and speakers, inside this newsletter. Stay tuned as we usher you into the relatively new area of legal proceedings in sports arbitration.

It has been an exhilarating start to the year in which we hope to eclipse in the next quarter by hitting a gear higher; hosting the inaugural Kuching International Arbitration Conference 2014. In this newsletter you will find a comprehensive coverage on the much anticipated and talked about conference. I would like to humbly and graciously invite all our readers to come join in this large scaled international conference as we continue to strive as one to take Arbitration in this region to unparalleled heights.

Until next time, happy reading.

Datuk Sundra Rajoo
Director of KLRCA



9th Jan 2014

Chartered Institute of Arbitrators Malaysia (CI Arb Malaysia)



27th Jan 2014

Saudi Arabia Law Ministry

GALLERY

KLRC welcomes visits from various local and international organisations as it provides a well-fortified platform to exchange knowledge and forge stronger ties.



27th Feb 2014

The Taiwan BAR Association



18th Mar 2014

Japanese Interns from Jeff Leong, Poon & Wong [JPLW]



28th Mar 2014

Students from Universiti Sultan Zainal Abidin [UNISZA]



28th Mar 2014

Students from Universiti Teknologi Malaysia [UTM]

CIPAA CONFERENCE

The Construction Industry Payment and Adjudication Act 2012

On 25th February 2014, KLRCA together with the Malaysian Society of Adjudicators jointly organized the 2nd edition of the CIPAA Conference, themed "Getting Paid: CIPAA Updates."

The inaugural CIPAA Conference was held on 24th October 2012 at KL Hilton and witnessed the attendance of 450 delegates. The 2014 conference was held in the Renaissance Kuala Lumpur with more than 1000 delegates from the construction industry and related professions.

The conference was officially opened by the Minister in the Prime Minister's Department, YB Puan Hajah Nancy Haji Shukri, and was followed by presentations by renowned figures in the practice and law of adjudication such as Professor Datuk Sundra Rajoo, Ir Harbans Singh, Wilfred Abraham, Ivan Loo, Lam Wai Loon, Chow Kok Fong, and Oon Chee Kheng.

Meanwhile, Minister in the Prime Minister's Department Nancy Shukri, in expressing her support, said

"The introduction of this Act will be a great relief for most contractors in Malaysia as it is one of the solutions to delayed payments, non-payment and disputes in the construction sector as disputes could be resolved through statutory adjudication instead of long-drawn trials and waiting period."

"With CIPAA, Malaysia has now joined the likes of the United Kingdom, Australia, New Zealand and Singapore as nations that recognize the importance of resolving payment dispute in a fair, just and expeditious manner," she said.

The first session of the conference was handled by Ir Harbans Singh. He spoke on the parameters and application of the CIPAA 2012. Thereafter, Professor Datuk Sundra Rajoo updated the delegates on the Regulations expected to be promulgated pursuant to CIPAA 2012.





After the networking break, the conference continued with a session on “Effective Management of the Adjudication Process & Enforcement of Adjudication Decisions.” Lam Wai Loon presented on “Making and defending a claim under CIPAA” followed by Wilfred Abraham who spoke on “choosing an adjudicator”.

The intriguing topic of “Creative Drafting of Construction Contracts” was provided by Ivan Loo. This presentation was followed by “Enforcement of Adjudication Decisions and Jurisdictional Challenges” by Oon Chee Kheng.

Chow Kok Fong, an esteemed speaker from Singapore with the topic of exemptions from CIPAA 2012 being feistily debated by all stakeholders within the adjudication community spoke on the topic of “Escaping the Reach of CIPAA.” He reviewed the 2014 Singaporean legislation and discussed the exemptions that could occur under CIPAA 2012. To date Singapore has not utilized the exemption order.

The 2014 CIPAA Conference garnered wide-spread praise from delegates and participants as timely and informative.

CIPAA was first mooted 10 years ago to solve the long-standing issue of delayed payments to contractors and sub-contractors which had caused tremendous hardship to the industry, especially the smaller sub-contractors. Construction Industry Payment and Adjudication Act (CIPAA), was passed and gazetted in 2012. The industry is still waiting for the effective operation date.

**Editorial Note:*

At the time of printing CIPAA 2012 had come into effect on 15th April 2014.



klrc INTERNATIONAL ARBITRATION CONFERENCE

19TH-21ST
JUNE 2014

"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 200 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 are set to influence the way arbitration is practised.



THE LOCATION: Kuching, Sarawak

A great city built on history, traditions and legends, Kuching is a city of culture, diversity and contemporary living. The state itself is an ecotourism heaven, as it attracts travellers around the world with its charm, grace and subtlety.

Kuching is Sarawak's capital. Sarawak also happens to be the largest state in Malaysia, an outback of sheer beauty rich in resources such as cocoa, palm oil and timber. Sarawak is a region of endless fascination, possessing the largest cave chamber in the world, verdant jungles, unique fauna and flora, white beaches and remote islands.

Sarawak is known to international visitors primarily because of the extraordinary natural wonders of its national parks; including Gunung Mulu, the Niah Caves and Bako. Sarawak's cultural treasures are also fascinating, reflecting the influence not only of the state's many ethnic people, but also the western influence of Sarawak's "White Rajahs."

WHY YOU SHOULD ATTEND?



3-DAY
WORLD-CLASS
CONFERENCE



200 PARTICIPANTS
FROM
OVER 25 COUNTRIES

25
SPEAKERS

OVER 25
EMINENT SPEAKERS



LESSON FROM
THE EDGE FROM
INDUSTRY LEADERS



TRADE DISPLAY FOR
ORGANIZATION



NUMEROUS OPPORTUNITIES
TO EXCITE, ENERGISE
& EMPOWER YOURSELF



RIVER
CRUISE



PARTICIPATION OF
PRACTITIONERS AND
THOUGHT LEADERS FROM
VARIOUS INDUSTRIES



NETWORKING
SESSIONS

5

5 EXCITING TRAILS
FOR ADVENTURES
AND RELAXATIONS



RAINFOREST
WORLD MUSIC
FESTIVAL



EXTRAVAGANT
GALA DINNER



WELCOME DINNER
BY THE
OLD COURTHOUSE



COCKTAIL
PARTY



AFTER HOURS AT
VARIOUS
NIGHT SPOTS

PROGRAMME FLOW

DAY ONE

19TH JUNE 2014, FRIDAY



Rise & Shine



Sarawak Cultural Village Tour (Optional)



Welcoming Address / Opening Remarks



Session 1, 2 & 3



Keynote Address



Launch of the Conference



Exclusive Entry! Dinner & Party @ Rainforest World Music Festival



End of Day One

DAY TWO

20TH JUNE 2014, SATURDAY



Rise & Shine



Gala Dinner



Riverside Cruise



Session 4, 5 & 6



Closing Remarks

DAY THREE

21ST JUNE 2014, SUNDAY

THE PROGRAMME

A Critical Look at Core Issues - The very essence of Arbitration first came into existence 219 years ago during The Jay Treaty of 1795. As the human mind set and needs evolved, Arbitration underwent constant transformation to ensure continuity of the alignment that was required to serve its purpose and sustain relevance. As businesses of the world continue to vastly grow and Arbitration becomes even more necessitated, a series of thought provoking topics have been identified to ennoble the significance of this International Arbitration Conference.

The Kuching International Arbitration Conference 2014 kicks off on 19th June 2014 with a unique and spectacular first day as delegates are taken on a series of adventure trails around picturesque and captivating Sarawak to unwind, bond with fellow delegates and to prepare their minds for a series of engaging in-depth talk sessions that are laid out over the following two days.

LISTING OF TALK SESSIONS

20TH JUNE 2014 (DAY 2)

SESSION 1:

RETHINKING THE NOTION OF CONFIDENTIALITY

The need for Greater Arbitral Accountability

SESSION 2:

BALANCING PARTY AUTONOMY IN INTERNATIONAL ARBITRATION

SESSION 3:

MINIMALIST JUDICIAL INTERVENTION IN ARBITRATION: BOON OR BANE?

Rethinking the rationale behind the notion of minimal court intervention -should there be greater judicial intervention in arbitration?

21ST JUNE 2014 (DAY 3)

SESSION 4:

BALANCING THE SCALE: THE RISE AND FALL OF INVESTOR TREATY ARBITRATION

What are its pitfalls and the measures that should be taken to create a more balanced and sustainable regime?

SESSION 5:

PROMOTING A FAIR, ECONOMICAL AND EFFECTIVE ARBITRATION REGIME: THE ROLE OF LEADING ARBITRAL BODIES

The Role of Arbitration Institutions - The Institutions' perspective of a more regulated regime in international arbitration, with a view to providing or supporting a quick, economical and fair resolution of commercial disputes by arbitration

SESSION 6:

FOCUS GROUP: ARBITRATION IN PRACTICE AN INTERACTIVE SESSION WHICH INVOLVES DISCUSSION ON VARIOUS CURRENT TOPICS, PARTICULARLY:

- Is there a need, and if so, the ways to curb the arbitration costs?
- Should the old common law rules against maintenance and champerty apply to arbitration?
- What are the roles to be played by in-house counsel and other representatives in the effective management of arbitration?

SPEAKERS HIGHLIGHT

Over 25 decorated experts from the arbitration industry will be taking stage to address and share new revelations on the aforementioned thought provoking topics.

- | | | | |
|---|--------------------------------------|--------------------------------|-------------------------------------|
| • Ms Sitpah Selvaratnam | • YBhg Datuk Cyrus Das | • Mr Wilfred Abraham | • YBhg Tan Sri Dato' Cecil Abraham* |
| • Professor Doug Jones | • Mr Sumeet Kachwaha | • Mr Thomas R. Klotzel | • Mr Michael A. Stephens* |
| • Mr Michael Hwang S.C | • YA Dato Mohamad Ariff bin Md Yusof | • Ms Chiann Bao | • Mr Philip Koh* |
| • Mr Paul Hayes | | • Ms Lim Seok Hui | • Mr Christopher Leong* |
| • Mr Rajendran Navaratnam | • Mr Hiroyuki Tezuka | • Mr Andrea Carlevaris | • Mr Lim Chee Wee* |
| • Mr Peter M. Wolrich | • Mr Eun Young Park | • Professor Datuk Sundra Rajoo | |
| • Mr Philip Yang | • Ms Eloise Obadia | • H.E Hugo Sibesz | * Session moderators |
| • Ms Shanti Mogan | • Professor Robert Volterra | • Dr Li Hu | |
| • Mr John Wright | • Mr Ivan Loo | • Mr. Vinayak Pradhan* | |
| • The Right Honourable Sir Vivian Arthur Ramsey | • Ms Rashda Rana | | |
| | • Mr John Tackaberry QC | | |

THE SOCIAL EVENTS:

An Experience Not To Be Missed

In a spirited endeavour to ensure this conference balances business and pleasure, seriousness and fun, thought-provoking discussions and relaxing sessions; an array of invigorating and enterprising social events have been meticulously planned out for the delegates that will leave them reminiscing for years to come.

DAY ONE, 20TH JUNE 2014

Enthralling adventures, breath-taking scenes and an evening of finesse emulsified with nostalgia and history best elucidate the opening of the Kuching International Arbitration Conference 2014.

ADVENTURE TRAILS

(Five entlivening trails to choose from)

Golf Tournament

Sandwiched between the foothills of the lush Mount Santubong and the northern coastline of Kuching with a view of the sea, rocky outcrops and mangrove forests, Damai Golf and Country Club is an absolute gem. With its international standard 18-hole, par 72 golf course, buggies, caddy service, swimming pool and tennis court among others, it will guarantee a good time with spectacular and serene views.

**Semenggoh Wildlife Centre**

The best place in Sarawak to view semi-wild orang utans that have been rescued from captivity and trained to survive in the surrounding forest reserve. The rehabilitated animals roam freely in the rainforest, and often return to the centre at feeding time. Delegates will also pass by the ethno-botanical gardens, with their unique collection of rain-forest plants.

**Malay Fishing Village**

This full day trip explores the many branches of the Santubong and Salak River Delta systems as they join the South China Sea. Enjoy a close view of the heavily silted mangrove swamp which is a safe haven to the myriad creatures like the reptiles, mud skippers, crabs, shell fish, and monkeys. Delegates will be introduced and adopted to each family (3-4 persons per family) for the day. The families will cook for the delegates and the delegates will proceed to have lunch with their respective families. After lunch, each family will bring the delegates to the river mouth by their individual boats to help the fishermen cast their nets. Delegates will have the opportunity to learn the ways and techniques of the fishermen.



19TH-21ST
JUNE 2014

Heritage & Museum Tour

The tour commences with a visit to the “Tua Pek Kong” Chinese temple and Chinese Historical Museum where the historical Fort Margherita can be viewed on the other side of the Sarawak River. The tour then takes delegates to visit historical buildings and monuments built during the Brooke dynasty such as the Round Tower, the Pavilion, the Brooke Memorial Monument, the Square Tower and the Old Court House; to the State Mosque, old railway station, and St Thomas’ Cathedral.

The tour also takes delegates to view the Sarawak Museum, built in 1891 in the Queen Anne style reminiscent of the Victorian era and one of the oldest buildings in Kuching; Art Museum, built after World War II; Islamic Heritage Museum, which consists of 7 galleries; Textile Museum, with its eye-catching architecture which is a mixture of English Renaissance and colonial design; Chinese History Museum, showcasing the history of the Chinese community in Sarawak; and Cat Museum, a cat person’s wonderland with 2000 cat-themed exhibits, artefacts and statues.

Survivor Course

The combination of being in the rainforest with its sights, sounds and smells and its stark contrast with the hustle and bustle of city life, this will guarantee the delegates a trekkin’ good time. With Mount Santubong in the background and the sea in the horizon, Permai Rainforest Resort is the place to go back to nature. Courses are conducted with licensed and seasoned instructors who are experts in their field and will guide their wards every step of the way.

WELCOME RECEPTION
& WELCOME DINNER

Delegates will be whisked away to a setting that encompasses colonial grandeur with evocative links to the law fraternity for a dazzling evening of great drinks, sumptuous meals and sterling camaraderie.

THE SOCIAL EVENTS:

DAY TWO, 20TH JUNE 2014

Shouts of exclusivity, thunderous beats and unadulterated gratification are set to greet the delegates on the second day.

Especial Entry: Rainforest World Music Festival 2014

The Rainforest World Music Festival is a celebration of the finest song and dance found both locally and internationally. The very atmosphere is charged with a pulse of magic and anticipation that grips the expectant audience long before the first beats resound in tandem from the exotic drums. The night is laced with sounds of laughter and exuberance as various cultures take centre stage and demonstrate with gusto and fervour their moves and twists all in perfect rhythm to the resonance of age old and modern music. It is a sight to behold and the spectators are held in a reverie by the flawless performances and one cannot help but get entangled in the zeal and zest and sway in time to the thumps and bangs of each instrument so skilfully played.

The sheer diversity of the cultures is enough to sate any desire for variety and where familiarity to the shows is lacking, enthusiasm from the performers more than caters for it. During the Rainforest World Music Festival, a longhouse, nuzzled in a private area and secluded from the crowd, has been reserved for one night to allow the delegates to enjoy the full experience of the culture. This particular social event will exert a lasting impression on the delegates that will last for years to come.

DAY THREE, 21ST JUNE 2014

The third day promises a fitting and coruscating finale to the Kuching International Arbitration Conference, as delegates will be treated to an enchanted evening that will leave attendees basking in the marvel of Sarawak's waterfront splendour.

River Cruise

The river cruise promises to be a memorable experience as delegates will be able to watch the warming colours and intensity of the panoramic Sarawak skies winding down in idyllic symphony from the comfort of the open deck, while savouring the fresh breeze above the majestic Sarawak River.

Gala Dinner

Sticking close to the resplendent ambiance of Sarawak's waterfront, delegates are cordially invited to savour an evening of contemporary elegance as suits and ties take a back seat to welcome in a more uninhibited atmosphere of khakis and beige tops as comradeship is strengthened and lifelong partnerships are forged.

BRING A GUEST, SHARE THIS DELIGHTFUL SARAWAK EXPERIENCE!

With a venue as inviting and picturesque as Kuching and exhilarating social activities lined up, you might consider bringing along a guest to double your fun. (You might even add a few days to your visit!). Barring the conference, guests are welcomed to join all social affairs that have been planned out throughout the three days, including the Rainforest World Music Festival 2014.

For full listing of registration fees, registration details, cancellation policies and additional information on the Conference, please log on to www.klrkakuching2014.com

or call us +603 2142 0103 (Ms Azreen Mohamad).

Please also feel free to direct any enquiries to our dedicated Event Secretariat at info@klrcakuching2014.com

Don't Miss Out on the most exciting International Conference to EVER grace this region!

Come experience exotic Sarawak with Us!!

REFLECTING THE PAST, BUILDING THE FUTURE

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



Q + A

Datuk Sundra Rajoo

Provides an encapsulating breakdown on the highly anticipated International Arbitration Conference 2014



Q Something colossal is brewing in the Arbitration scene within the next quarter. Do tell us more.

A In June 2014, Malaysia will open its door to one of the year's most important arbitration event. Kuching, Sarawak will play host to the KLRCA International Arbitration Conference and it promises to be as exciting as the "Land of Hornbills" itself. With the theme "Reflecting the Past, Building the Future", the 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 city of Kuching is Sarawak's capital. A great city built on history, traditions and legends, Kuching is a city of culture, diversity and contemporary living. The state itself is an ecotourism heaven, as it attracts travellers around the world with its charm, grace and subtlety. You will be enchanted by Kuching, the land of adventures.

I would like to sincerely extend my invitation to all of you; join the conference and be part of this exciting new phase in Asia Pacific arbitration.

Q Why has Sarawak been selected as the venue in 2014?

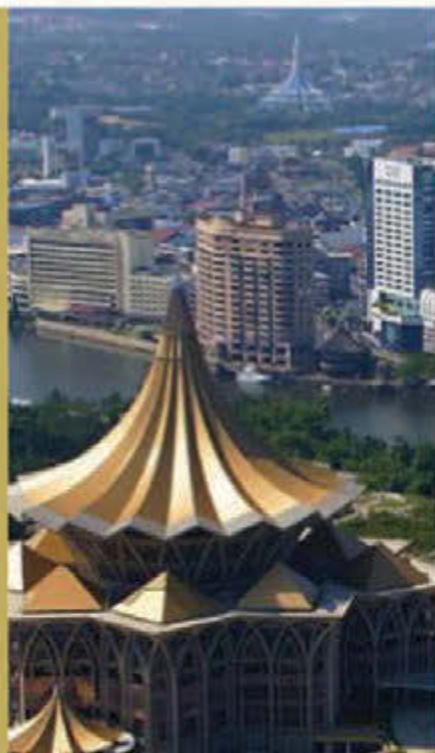
A This being KLRCA's inaugural International Arbitration Conference, from the word start we had a conceptualized notion of it being somewhere of near proximity within the region, someplace facilely accessible to all, a setting that could offer an awe-inspiring cultural experience and most importantly, someplace exotic. All the aforementioned pre-requisites pointed us to one extraordinary location within the country itself, the land they call Sarawak. It remains one of the most stunning and vibrant places in the world. Apart from possessing a rich heritage, Sarawak is culturally diverse while remaining progressive in nature. In a way it exemplifies Malaysia as a nation. Sarawak will provide a wondrous experience for the delegates; as such it is the quintessential venue for an international conference.

Q What is in store at the KLRCA International Arbitration Conference 2014?

A The Conference 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. We are looking to have thought-provoking sessions that would not only address the issues but also chart our way forward to help realise the immense potentials of arbitration.

The speakers will be of international pedigree, the best that global arbitration can offer. This includes the likes of Vinayak Pradhan (President of CI Arb Malaysia), Professor Doug Jones (Australian Centre for International Commercial Arbitration President), Sir Vivian Arthur Ramsey (Judge in charge of Technology and Construction Court, UK), and Hugo Siblesz (Secretary-General of Permanent Court of Arbitration), among others.

There is also an enthralling list of activities and great networking socials that await the delegates, including special jungle trails for young arbitrators, a golf tournament, the world's rainforest music festival and many more. We are currently expecting up to 200 participants from over 25 countries.



“

Imagine 200 of the brightest minds in the world in one room exchanging stimulating thoughts and views.

”



Q What will be the top 5 reasons why international delegates should attend the Conference?

- A**
- The Conference will pit together international speakers who are experts in the field of arbitration, so delegates can expect world class dialogues that are set to influence the way arbitration is practised.
 - The interactive discussions will give delegates an opportunity to participate and be a part of the knowledge sharing process. Imagine 200 of the brightest minds in the world in one room exchanging stimulating thoughts and views.
 - An international conference of this calibre is infrequent in this part of the world therefore this is an enriching experience for the delegates as well as the arbitration community in this part of the region.
 - As the Conference will coincide with the world renowned Sarawak rainforest music festival, it is a great time for delegates to not only be involved in galvanizing discussions on arbitration, but to also experience cultural performance from every part of the world.
 - The activities lined up will surely thrill the delegates and introduce them to Malaysia's best kept secret. Sarawak is a place for history, mystery, beauty and adventures; it is certainly an experience not to be missed.

Q Could you elaborate on the theme “Reflecting the Past, Building the Future” - What does that mean?

- A**
- 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 an envisaged future that is balanced and progressive.

Q How will the 2014 Conference be different from the previous Conferences?

- A**
- It is essential to find the right balance in all that we do to ensure it remains enjoyable and the take backs remain far-fetched. This conference will balance business and pleasure, seriousness and fun, thought-provoking discussions and relaxing sessions. Delegates will come out of the conference inspired, stimulated and refreshed all at the same time. Not forgetting the priceless cultural experience that will have them reminiscing for years to come.

We are continuously striving for excellence to ensure arbitration in this region surpasses its current capacity. This conference will bring together a host of business matter experts to ensure knowledge and ideas are well shared and debated; with all delegates leaving empowered with renewed enthusiasm and passion for the art of arbitration. So, cogitate no further as I would like to personally extend a warm invite to all of our readers to register and confirm your participation in one of 2014's most leading and promising arbitration conferences as we endeavour to elevate arbitration in this region to unprecedented heights.

Dispute Resolution in Malaysia: Realities & Challenges

10th FEB 2014 | LONDON



KLRCA in collaboration with The Law Society of England and Wales had organised a seminar titled Dispute Resolution in Malaysia: Realities & Challenges on 10th January 2014 October 2013 at The Law Society's Hall at 113 Chancery Lane, London.

The seminar featured KLRCA's Director Datuk Sundra Rajoo as well as two other prominent speakers from the Malaysian Law fraternity; Mr Lim Chee Wee (Partner, Skrine & Co) and Mr Philip Koh (Senior Partner, Mah - Kamariyah & Philip Koh).

As a nation state, Malaysia is an example of post-colonial struggle to reconcile emergent democracy and traditional polities of race, relation and ruler ship. This seminar reflected on the methods of dispute resolution involving various legal, judicial and political actors and factors that determine outcomes which impacts on how a democratic governance and rule of law are played out.

Growth of International Arbitration in Asia

11th FEB 2014 | LONDON

In efforts to further enhance KLRCA's reputation on the global front, KLRCA teamed up with UK based barristers' chambers powerhouse, Thirty Nine Essex Street to organise an enterprising talk titled Growth of International Arbitration in Asia on 11th February 2014 at The Honourable Society of Gray's Inn, London.



This event was of particular significance as it also proved to be the venue of the formal signing of the lease that officially made Thirty Nine Essex Street Chambers the first set of chambers to join the Kuala Lumpur Regional Centre for Arbitration (KLRCA). They will be the first UK barristers' chambers to have a presence in Malaysia and will be managed by Roderick Noble, Director of Asian Business at Thirty Nine Essex Street, which will offer both domestic and international arbitration services.

David Barnes, Chief Executive and Director of Clerking went on to explain:

"There has been a distinct growth of arbitration in Asia, directly related to the economic growth of the region. As we have many specialist arbitrators, with extensive international experience, and an established relationship with the KLRCA, it seemed a natural move for us to open a dedicated office in Kuala Lumpur."

The event was attended by some of the most renowned names in the legal market.



4th Annual GAR Awards

10th FEB 2014 | PARIS

KLRCA was the headline sponsors for the sold out GAR Award Dinner that took place at the Four Seasons Hotel George V, Paris. This was the largest instalment to date as 275 attendees from the world of international arbitration came together. Datuk Sundra took to the stage to present the 'GAR Guide to Regional Arbitration award for the up-and-coming regional institution of the year' which went to Cairo Regional Centre for International Commercial Arbitration.

The event also saw 81 year old Egyptian Mr Ahmed Sadek El-Kasheri being honoured with the Lifetime Achievement Award.

17th Annual IBA International Arbitration Day

13th-14TH FEB 2014 | PARIS

Efforts to further aggrandize the Centre's global presence continued with KLRCA being the headline sponsors for the 17th Annual IBA International Arbitration Day that was held at the Maison de la Mutualit, Paris, France.

Topic: Simplifying Construction Claims for Adjudication 16th January 2014

Speaker: Mr John Wong, Charlton Martin Consultant Sdn Bhd
Moderator: Mr C. Michael Heihre

Topic: Hot Topics in Arbitration 29th January 2014

Speaker: Mr Paul Emerson, Lamb Chambers, UK
Moderator: Mr Lim Chee Wee, Skrine & Co.

KLRCA Talk Series

JAN-MAR 2014 | KUALA LUMPUR

KLRCA Talk Series surged into the New Year, 2014 with insightful talks by ADR experts. Below are talks that were held from January-March 2014.

Topic: Two Centres: One Approach? 19th February 2014

Speaker: Mr Yang Ing Loong, Latham & Watkins, HK, Mr Lim Chee Wee, Skrine & Co
Moderator: Dato' W.S.W Davidson, Azman Davidson & Co

A Case for a Right of Appeal from Negative Jurisdictional Rulings in International Arbitrations Governed by the UNCITRAL Model Law

by Paulo Fohlin

This article proposes the extension of rights of appeal to the courts against negative jurisdictional rulings by arbitral tribunals in cases governed by the UNCITRAL Model Law. It is based upon a submission to the ICC Arbitration Committee of Hong Kong relating to the Hong Kong Department of Justice's December 2007 Consultation Paper: Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill¹.

Editorial Note:

This article was first produced in Asian Dispute Review, October 2008 and is published with kind permission from the author and Asian Dispute Review. Mr Paulo Fohlin will be heading a KLRCA Talk Series titled 'Interesting & Important Differences between National Arbitration Laws' on 7th April 2014.

Introduction

The UNCITRAL Model Law on International Commercial Arbitration ('the Model Law') does not, on the face of it, allow court review of negative jurisdictional rulings by arbitral tribunals. Only rulings that tribunals have jurisdiction to decide a dispute, ie affirmative or positive rulings, are subject to such review. It is submitted that negative jurisdictional rulings should also be subject to court review in respect of relevant questions of law and fact.

Background

Under the Model Law, an arbitral tribunal may rule on an objection to its jurisdiction, either as a preliminary question or in an award on the merits.

If the tribunal rules as a preliminary question that it has jurisdiction, any party may request the court to decide the matter (art 16 (3)).

An arbitral award may be set aside by the court if (inter alia) the arbitration agreement were not valid (art 34(2)(a)(i)), or if it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission (art 34(2)(a)(iii)).

As to court intervention generally, art 5 provides that no court shall intervene in matters governed by the Model Law, except where so provided therein. Article 34 provides that recourse to a court against an award may be made only by an application for setting aside in accordance with that provision. For completeness, art 33(3) entitles a party to request an "additional award" from the tribunal as to claims "omitted", but does not apparently apply to claims omitted by virtue of a negative jurisdictional ruling.

That only positive jurisdictional rulings are subject to court review under the Model Law has been confirmed by judicial decisions in three Model Law countries - Germany, Croatia and Singapore. In the German case, the Supreme Court held that although, under German law, the tribunal's ruling terminating the arbitration for lack of jurisdiction constituted an "award" for the purposes of art 34 of the Model Law, the ruling could not be reviewed on its merits as art 34(2)(a) (iii) applies only to positive rulings.² The Singapore Court of Appeal has held that art 16(3) of the Model Law, read with art 5, would preclude any recourse to the courts concerning a negative jurisdictional ruling.³

Arguments for court review of negative jurisdictional rulings in international arbitration

General observations

Not allowing court review of negative jurisdictional rulings risks frustrating one of the principal purposes of an international commercial arbitration agreement, namely that no party should be able to bring the dispute to a national court. The seat of an international arbitration often has no connection

with the parties, their contract or the merits of the dispute. If the arbitral tribunal wrongly makes a negative jurisdictional ruling, and there is no way to review that finding in court, the claimant is denied access to the agreed form of justice under the law of that neutral seat. The national courts of the home State of one party will then normally have jurisdiction to decide the dispute - a situation the parties intended to avoid. The courts of the neutral State in question will have no jurisdiction, absent any relevant jurisdictional connection between the parties or the dispute and that State.

The Hong Kong Draft Arbitration Bill amends art 16 of the Model Law by expressly providing that a negative jurisdictional ruling by the tribunal shall be subject to no appeal. The Draft Bill adds that a court shall then, “if it has jurisdiction”, decide that dispute.⁴ In light of previous comments, however, an international claimant who is denied the right to arbitrate in Hong Kong as a neutral jurisdiction would be unable to turn to the Hong Kong courts to decide the dispute, owing to the lack of any jurisdictional connection.

Moreover, in investment treaty arbitrations, the harm done to the claimant investor by the lack of a right of appeal from an incorrect negative jurisdictional ruling may be even greater, as there is no national court at all before which the claimant may bring a treaty claim against the respondent host State. The claimant’s substantive treaty claim is therefore de facto extinguished by such a ruling.⁵ It is entirely another question, and one of little comfort to the claimant, whether in the circumstances a claim may be brought otherwise than under an investment treaty against the respondent State in, for instance, the latter’s own courts.

There is something fundamentally unfair about denying claimants entitlement to court review of negative rulings, given the wide acceptance of the right of respondents to challenge positive rulings in court. Why should parties not have equal opportunity in this important matter?

The present system of appeal from arbitral tribunals’ jurisdictional rulings

Whilst there is international consensus that the courts should have the last word with respect to the formation and scope of application of arbitration agreements, this is limited to the review of positive findings by the arbitral tribunal. Thus, an erroneous positive ruling on jurisdiction as a preliminary question is subject to appeal under art 16(3) of the Model Law⁶ and a substantive award may be set aside by a court on the same basis under art 34 of the Model Law.⁷ Enforcement of such an award may be refused on similar grounds under art V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (‘the New York Convention’). Under the ICSID Convention 1965, such an award may be set aside by an ICSID ad hoc committee.⁸

There is, however, no such consensus with regard to erroneous negative jurisdictional rulings by arbitral tribunals. The arbitration laws of a number of non-Model Law countries make no provision for appeal from negative rulings. Conversely, the laws of some other countries, both Model Law and otherwise, expressly make such provision, or such rights are established by case law.⁹ Examples of the latter include countries that are frequently the seat of international commercial arbitrations. Sweden¹⁰, Belgium, Switzerland, England & Wales, Scotland, Northern Ireland, France, Italy, New Zealand and India are among such jurisdictions.¹¹ With regard to ICSID arbitrations, in respect of which there is no right of review by a court, it has been held that both negative and positive jurisdictional rulings, are subject to annulment.¹²

A right of appeal from negative jurisdictional rulings may lie regardless of whether or not an applicable arbitration law (eg as in Sweden and Switzerland) requires the termination of an arbitration for lack of jurisdiction to be made in an ‘award’. Some may feel uncomfortable with terming such a ruling an ‘award’, as it does not deal with any substantive issue.¹³ When adding a provision on court review of negative rulings to the Model Law, therefore, it is not necessary for an adopting State or territory to add a provision defining what constitutes an ‘award’. In Scotland and New Zealand, the adopting legislation has simply deleted the words “that it has jurisdiction” from the second sentence of art 16(3) of the Model Law, thus providing that both positive and negative jurisdictional rulings as a preliminary question are subject to appeal.

As a negative jurisdictional ruling included in an award is not currently subject to the setting aside provisions in art 34, this provision could be amended to the effect that, if part of the award contains a ruling that the tribunal did not have jurisdiction but the court finds that it did, the ruling may be changed by the court.

Arguments against court review of negative jurisdictional rulings

1. It is inappropriate to compel the arbitrators to continue the arbitration

An early draft of art 16(3) of the Model Law provided for court review of negative jurisdictional rulings. The main reason for its rejection was apparently that it would have been inappropriate to compel arbitrators to continue an arbitration if they had found a lack of jurisdiction.¹⁴ This view was upheld by the Report on Hong Kong Arbitration Law (2003) (‘Hong Kong Report’).¹⁵ In the Croatian case mentioned earlier, the judge stated that the court had power to instruct the tribunal to adjudicate the case if the former found that the latter did have jurisdiction; no court could, however, instruct a tribunal to adjudicate if the latter found that it had no jurisdiction.¹⁶

This argument is not, however, convincing as regards the general question whether the court should have power to review negative jurisdictional rulings, although it would probably be inappropriate - at least as a general rule - to compel the same tribunal to continue the arbitration. Such inappropriateness does not necessarily mean, however, that a court should be unable to review a negative ruling at all. As previously discussed, the court could be empowered by an amended art 16(3) to review any jurisdictional ruling (eg as in Scotland and New Zealand) and by an amended art 34 to make a binding decision to ‘change’ a negative jurisdictional ruling. Such review could be provided for without empowering the court to remit the dispute to the same tribunal.

2. According to the travaux préparatoires to the Swedish Arbitration Act 1999 (‘the Swedish Act’), the setting aside of a negative ruling means a binding decision that there is an arbitration agreement applicable to the dispute.¹⁷ Whether,

upon a party request, the substantive issues in question may then be remitted by the court to the tribunal that dismissed them for lack of jurisdiction is another question. It is not self-evident that a case in which the tribunal has terminated the arbitration for lack of jurisdiction should necessarily be dealt with in the same way as one where the tribunal has ruled as a preliminary question that it lacks jurisdiction to decide some of the substantive issues, but not all. Different solutions are found internationally, though national arbitration laws appear generally to be silent on the question.¹⁸

Even if a court were empowered to remit the substantive dispute to the previous tribunal, this would not necessarily oblige the latter to take up the dispute: see, in this regard, art 34(4) of the Model Law, which provides that, in pending setting aside proceedings, the court may suspend the proceedings in order to give the tribunal an “opportunity” to resume the arbitration. Where it is considered appropriate that the court should not give the tribunal such an opportunity - ie where court proceedings concerning a request for change of a negative ruling on jurisdiction are still pending - an amended art 34 could make clear that the current art 34(4) should not apply to such cases.

Moreover, arts 16 and 34 could also be amended to clarify that the court may consider it appropriate not to remit the substantive issues to the tribunal after the former has made its jurisdictional determination.

3. *The tribunal does not de jure consist of ‘arbitrators’ with any power of decision*

If art 16(3) of the Model Law were amended to apply to negative jurisdictional rulings, such a ruling would have res judicata effect unless appealed from within the thirty-day period currently provided for.¹⁹ It may seem illogical for tribunal members to conclude that they had no jurisdiction and at the same time to make a decision that is binding. A similar argument may be made to support the view that a negative ruling cannot constitute an ‘award’²⁰; indeed, the Hong Kong Report expresses the view that a negative ruling “by its nature is not an arbitral award”.²¹

The Hong Kong Draft Arbitration Bill’s provision that a negative jurisdictional ruling of the arbitral tribunal is final and subject to no appeal is modelled on art 1052 of the Netherlands Arbitration Act 1986.²² The prevailing view in The Netherlands follows reasoning to the effect that, without the existence of an arbitration agreement, the persons finding that they lack jurisdiction cannot be considered ‘arbitrators’, so that their decision can not be considered an ‘award’ and they cannot have any power to decide anything.²³

Any attempted solution to the effect that a negative jurisdictional ruling is final and binding is, however, far from logical. Logic dictates that where members of an

arbitral tribunal in question are not ‘arbitrators’, they would be unable to determine anything at all having any binding effect on the parties. Taking logic further, a claimant would be able to commence new arbitrations on the same substantive matter again and again in the hope of finding a tribunal that is prepared to find that it has jurisdiction, unless prevented from so doing by a statutory barring provision or an intervening binding court declaration as to jurisdiction.

Moreover, it is also contrary to logic that persons who are not considered to be ‘arbitrators’ should be given more power than persons who find that they have jurisdiction and therefore qualify as ‘arbitrators’, since a positive finding is subject to court review.

De lege ferenda, therefore, conceptual reasoning as to the true meaning of an ‘arbitrator’ is not by itself convincing with regard to the content of a statutory provision. Any legislature should instead consider the practical effects of the various available solutions when choosing which of them to enact.

4. *Court interference should be minimized, not extended*

An important purpose of arbitration is that arbitrators should generally have the final word, with minimal court interference. It is equally important - as evidenced by the New York Convention - that a promise to arbitrate should be upheld. The concept of judicial review of negative jurisdictional rulings conflicts with these objectives. It is, however, submitted that court interference in such cases is justified.

The international consensus on court review of positive jurisdictional rulings may be explained by the importance of safeguarding a party’s fundamental right of access to litigation, where appropriate. A right to such review exists in the interests of the respondent in the face of a claimant’s possibly unjustified attempt to arbitrate. It is difficult to accept, however, that the claimant should not have a corresponding right with regard to negative rulings. Several jurisdictions have attempted to achieve such equality of treatment. The Paris Court of Appeal has held that the court’s power of review under French law with regard to positive jurisdictional rulings cannot be denied to the court in negative ruling cases, as a holding to the contrary would mean granting different guarantees to the parties.²⁴ Likewise, according to the travaux préparatoires to the Swedish Act, there must always, in principle, be a possibility of bringing questions of jurisdiction before a court, including cases where arbitrators have not ruled on substantive issues for want of jurisdiction.²⁵

“Court review of negative jurisdictional rulings cannot be regarded as arbitration unfriendly”

Court review of negative jurisdictional rulings cannot be regarded as arbitration unfriendly. An incorrect negative

ruling fails to recognize a valid and applicable arbitration agreement. The effect of a change to that ruling by a court is to subject the dispute to arbitration, as agreed, instead of court proceedings.

Not allowing court review of negative rulings implies that the right to litigate is more important than the right to arbitrate under an arbitration agreement. Many commentators, including the author, disagree, particularly with regard to international arbitration.

5. *The claimant still has the option of bringing his case to court*
As discussed earlier, the German Supreme Court has stated that the claimant in arbitral proceedings retains the option of going to the courts if the tribunal declines jurisdiction.²⁶ Similarly, the Singapore Court of Appeal has stated that the aggrieved party's substantive rights and claims are not in any way extinguished, prejudiced or affected, and that that party has the fullest liberty to pursue its claims in any forum where proper jurisdiction can be found.²⁷

The German Supreme Court's statement has been criticized, and rightly so (even though the Court's interpretation of the German Arbitration Law and art 34 of the Model Law was most probably correct), because arbitration clauses are often included in international contracts as a kind of compromise, whereby neither party is willing to submit to the jurisdiction of the home courts of the other party²⁸. This is also one of the main justifications for court review of negative rulings. The statements by the German and Singaporean courts may be true for domestic arbitrations, but a typical claimant in an international commercial arbitration may have legitimate reasons to disagree. A

claimant who has been denied the right to arbitrate an international dispute in a neutral third country, before an agreed panel of international arbitrators, may have good reasons for believing that his substantive rights will not be protected in the same way in one party's national courts. One of the principal reasons for arbitration agreements in international contracts is to avoid that risk.

6. *Further court review means further delay and cost*
This is not necessarily true with regard to court review of negative jurisdictional rulings. If the reviewing court at the seat of an international arbitration holds that the arbitrators had jurisdiction, such court decision is (per art 16(3) of the Model Law) subject to no appeal. Final resolution of the substantive dispute may well be achieved faster by arbitrators in a recommenced arbitration than by the otherwise competent national courts, with all the attendant risks of appeals.

Court review of positive rulings is available and further delay and costs are thus accepted in such cases. Thus, in any event and taking into account other arguments for court review of negative rulings, this counter-argument does not, in the author's view, carry much weight.

Ancillary matters

It may be advisable to provide expressly whether or not tribunals denying jurisdiction should have power to order the parties to pay costs. Section 37 of the Swedish Act provides, as an exception to the general costs rules, that if arbitrators declare that they do not have jurisdiction, the party who did not request arbitration should be liable for the tribunal's fees and expenses only in special circumstances. Alternative approaches might include providing a clear general power for the tribunal to order costs when it makes a ruling on jurisdiction otherwise than in an award, but to leave it to the tribunal to consider the most appropriate of that power in each case.

Conclusion

It is submitted that the laws of the leading seats for international arbitrations should provide for court review of both positive and negative jurisdictional rulings. Where jurisdictional objections are likely to arise in a particular dispute, a potential claimant may have good reasons for placing the arbitration at a seat where court review of negative rulings is available. His lawyer would then hesitate to recommend him to any jurisdiction that makes no such provision. Where a party who is negotiating an international contract contemplates agreeing to a proposed seat for potential arbitrations under the arbitration clause, a relevant consideration will be whether or not court review of negative jurisdictional rulings would be to his advantage and whether this is part of the law of the proposed seat.

Paulo Fohlin



Paulo Fohlin has extensive and continuous experience of arbitration and litigation as a lawyer in private practice since 1988, when he earned his LL M in Sweden and started working at one of Scandinavia's largest law firms, Vinge where he became a long-standing partner. He was admitted to the Swedish Bar Association in 1994. He co-founded the law firm Odebjer Fohlin based in Hong Kong in 2011. He acts as arbitrator, counsel and adviser in international disputes, including commercial arbitration and investment treaty disputes. His experience covers a variety of industry sectors and institutional arbitration rules. A Chartered Arbitrator (C.Arb), Fellow of the Chartered Institute of Arbitrators (FCIArb) and Foreign Lawyer of the Hong Kong Law Society, he is included on the panels and rosters of arbitrators of various arbitration institutes, including, inter alia, the Kuala Lumpur Regional Centre for Arbitration (KLRC), the Hong Kong International Arbitration Centre (HKIAC), the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA), the China International Economic and Trade Arbitration Commission (CIETAC) and the Beijing Arbitration Commission (BAC). Since 1999, in Euromoney Legal Media Group's Guide to the World's Leading Litigation Lawyers, he has regularly been recognised in leading international dispute resolution directories.

1. Editorial note: see <http://www.doj.gov.hk/eng/public/pdf/2007/arbitration.pdf>.
2. S Kröll, Recourse against Negative Decisions on Jurisdiction (2004) 20 Arb Int'l. 55 at 56-58, and at 63, discussing Case III ZB 44/O1 of 6 June 2002, CLOUT Case No 560, A/CN.9/SER.C/ABSTRACTS/49.
3. LGS Boo, Ruling on Arbitral Jurisdiction – Is that an Award?, (2007) 3 Asian International Arbitration Journal 125 at 136-141, discussing Case U-III-669-2003 (27 October 2004), CLOUT Case No 656, A/CN.9/SER.C/ABSTRACTS/60 (Croatia) and PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2006] 1 SLR 197, [2007] 1 SLR 597 (Singapore).
4. Clause 35(4) and (5) of the Hong Kong Draft Bill.
5. This is said without expressing any view as to whether the home State of the claimant would still be able to arbitrate the same issue against the host State under an arbitration clause in the treaty binding the signatory States.
6. For the avoidance of doubt, it should be noted that the decision is not 'preliminary' but final. It is the jurisdictional question that is called 'preliminary': cf. Boo (note 3 above) at 137.
7. Cf., inter alia, Kröll (note 2 above) at 55-72, and Boo (note 3 above) at 125-141.
8. Article 52(1)(b) of the ICSID Convention provides that a party may request annulment of an ICSID award on the ground that the arbitral tribunal has manifestly exceeded its powers. The request will be dealt with by an ad hoc committee of three persons in accordance with art 52(3).
9. Kröll (note 2 above) at 57-60 and Boo (note 3 above) at 135-136.
10. In March 2008, the Swedish Supreme Court set aside that part of an award, made in an investment arbitration between Petrobart and the Kyrgyz Republic, in which the tribunal dismissed the arbitration for lack of jurisdiction and ordered Petrobart to compensate the Republic for costs: see Supreme Court Case T 2113-06.
11. Kröll and Boo, op cit (notes 2 and 3 above).
12. Compania de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic (Decision on Annulment, Case No ARB/97/3, 2002); the ad hoc committee held that it is settled that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction it does not have but also if it fails to exercise a jurisdiction it does possess. See Kröll (note 2 above) at 68-69.
13. Cf Boo (note 3 above).
14. Kröll (note 2 above) at 60-61 and Boo (note 3 above) at 129-130.
15. Para 24.11.
16. Boo (note 3 above) at 138-140.
17. Proposition (Government Bill) 1998/99:35, Ny lag om skiljeförfarande (New Arbitration Act), p 238. See also (inter alia) L Heuman, Arbitration Law of Sweden: Practice and Procedure (2003), pp 521-522, and B Olsson & J Kvarth, Lagen om skilje förfarande, En kommentar (2000), pp 156-157.
18. Kröll (note 2 above) at 70-71.
19. This is an advantage of including negative rulings in art 16(3) and therefore an argument for such an amendment.
20. Kröll (note 2 above) at 63.
21. Report of the Committee on Hong Kong Arbitration Law, para 24.12.
22. Ibid, paras 24.14 and 24.15.
23. Kröll (note 2 above) at 58.
24. Ibid, pp 67-68, Swiss Oil Corp (Cayman Islands) v Société Petrograb and Republic of Gabon, Court of Appeal, Paris, 16 June 1988, XVI (1991) YB Comm Arb 133, subsequently confirmed in other cases.
25. Draft Bill, pp 76 and 172-174.
26. Kröll (note 2 above) at 57-58.
27. Boo (note 3 above) at 141.
28. Kröll (note 2 above) at 66-67.



KLRCAs New i-Arbitration Rules: Islamic Finance in the Global Commercial Arena (Part 2)

Introduction

This is the second in a three part series looking at the settlement of disputes in Islamic banking through commercial arbitration and the KLRCAs new i-Arbitration Rules (the Rules). The first paper, published in the Islamic Finance news Asia Supplements, examined the problems faced by Islamic finance users pertaining to dispute resolution and the role that the KLRCAs i-Arbitration Rules will play in providing solutions to those problems. Therein is also contained a breakdown of the Rules and how they function. This paper aims to shed light on the issue of governing law relating to Islamic banking instruments, and how to ensure settlement of disputes according to the law that is both appropriate and desirable by the users. The third and final paper in the series, to be published in the Islamic Finance news Middle East Supplements, will compare dispute resolution under the i-Arbitration Rules with traditional Islamic arbitration and some of the existing forums available.

The Regulation of Islamic Banking

One of the primary benefits and attractions of commercial arbitration as a dispute resolution mechanism is the ability for parties to select the procedural and substantive law applicable to their dispute. This is particularly important in Islamic finance, where the desired governing Shariah law is not necessarily delineated in legislation, but may be a school of Islamic jurisprudence as interpreted by an Islamic bank's Shariah advisory council or Shariah expert agreed as between the parties. By selecting the i-Arbitration Rules, parties are opting not only for a procedural law that is globally recognised and of the latest international standards, but also a mechanism by which they can ensure the correct and desired interpretation of Shariah law is applied to their dispute.



The first consideration for parties is whether any mandatory national legislation applies to their Islamic banking transaction. In countries such as Malaysia and Indonesia, jurisdiction over Islamic financial instruments is dealt with in legislation. The Central Bank of Malaysia is vested with legal powers to regulate and supervise the Malaysian financial system - including Islamic finance - through the Central Bank of Malaysia Act 2009, Financial Services Act 2013, Islamic Financial Services Act 2013 and others. Section 51 of the Central Bank of Malaysia Act 2009 establishes the Shariah Advisory Council; Islamic financial business is defined as “any financial business in ringgit or other currency which is subject to the laws enforced by the Bank and consistent with the Shariah”. The effect of this is that any Islamic financial transaction within Malaysia will come under the auspices of the Central Bank, and interpretation under its Shariah Advisory Council. The Securities Commission and its Shariah Advisory Council are vested with similar jurisdiction relating to securities and futures markets in Malaysia.

Not all countries adopt the legislative approach to Islamic finance described above. Other countries, most notably in the Middle East region, do not regulate Islamic financial services through their laws. Rather, Islamic banks and institutions are permitted to maintain their own Shariah advisory councils or boards. Such boards will determine the Shariah compliance of financial products through fatwas. Whilst this does afford some flexibility, as we shall see below it can also lead to ambiguity and enforcement problems given the numerous schools of thought present in Islamic jurisprudence.

Navigating Islamic and national laws: *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd & Ors*

Knowing the appropriate law to apply is the first consideration; crystallising that choice into an enforceable body of rules is the second. The English Court of Appeal case of *Beximco Pharmaceuticals* illustrates the problems inherent in defining the specific Shariah laws - and interpretation of that law - that will apply to a dispute.

This was a decision concerning an appeal against a summary judgment given in favour of the Respondent, Shamil Bank of Bahrain, against the Appellants (five in all - two debtors and three guarantors). The Respondent was a bank applying Shariah principles in its banking activities, and had a Religious Supervisory Board including ‘recognised specialists qualified in Islamic jurisprudence, religious provisions and Islamic economy’. The Appellants together formed part of the Beximco group.

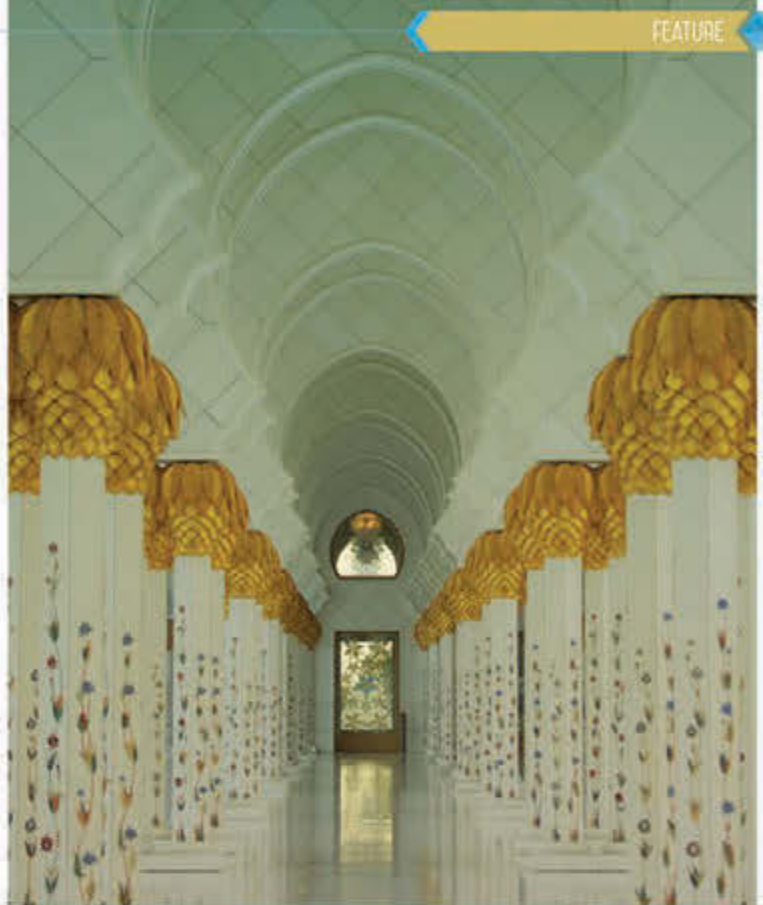
¹ *Beximco Pharmaceuticals Ltd & Ors v Shamil Bank of Bahrain EC* [2004] EWCA Civ 19

The Respondent Bank in 1995 and 1996 provided working capital facilities to the Beximco group in the form of two ‘Morabaha Financing Agreements’. The Morabaha Financing Agreements contained a governing law clause stating “Subject to the principles of Glorious Shariah, this Agreement shall be governed by and construed in accordance with the laws of England.” Broadly, Murabaha agreements take the form of sale of goods contracts, wherein the bank agrees to purchase goods in its own name and sell them to the borrower on a deferred basis payable in instalments. The goods are specified by the borrower, and the surplus between the original price and the deferred price forms the bank’s profit, replacing the Riba, or interest. It was noted that there are no standard forms for this kind of agreement; in practice the terms and conditions are agreed between the parties pursuant to the circumstances of the transaction. The Religious Supervisory Board ensures that the Murabaha agreements entered into by the bank comply with Shariah law as interpreted by the Board.

By 1999 the Beximco group was in default. After negotiations the facilities were refinanced and alternative arrangements entered into, including new guarantees. The new arrangements took the form of ‘Ijarah’ facilities, or rental agreements. The new arrangements took into account ‘accrued compensation’, due to the earlier defaults. An issue at Shariah law was thus raised, being whether the Ijarah facilities were legitimate or whether they took the place of a simple interest bearing loan facility. This was the key issue on which the Appellants sought to defend their case.

The Court ultimately dismissed the appeal, declining to classify ‘Sharia principles’ as an applicable system of law, referring to them as ‘not simply principles of law but principles which apply to other aspects of life and behaviour’, and citing the Rome Convention in support. The parties’ own expert witnesses acknowledged the uncertainty of Islamic jurisprudence on the subject of banking, and the divergent interpretations that were possible not just from country to country but from bank to bank, dependant on a bank’s own Shariah supervisory authority. The Court relevantly stated ‘most of the classical Islamic law on financial transactions is not contained as ‘rules’ or ‘law’ in the Qur’an and Sunnah but is based on the often divergent views held by established schools of law formed in a period roughly between 700 and 850 CE.’

Of note, the Court also commented on the interplay between the national laws of Bahrain (and other Arab states promoting Shariah principles) and Islamic jurisprudence, stating that ‘while embracing and encouraging Islamic banking practice as a national policy, the principles of Islamic law, in particular the prohibition of Riba, have not been incorporated into the commercial law of Bahrain and there is an absence of any legal prescription as to what does and does not constitute “Islamic” banking or finance.’ This approach to Riba is reflected in other key Arab financial centres, including Saudi Arabia, Qatar and Oman.



Applying Shariah law through the i-Arbitration Rules

The impact of the above is to highlight the uncertainty that parties may encounter when enforcing Shariah principles. The clear solution is to clearly regulate from the outset the specific provisions that will apply to any given contract or transaction. This can more comprehensively be achieved by agreeing on a given system or Shariah body that can govern and determine issues of Islamic jurisprudence within any given commercial transaction. The second takeaway is that Shariah principles may not ultimately cover the whole of a dispute; the law of a country may be called upon to fill any gaps. For this reason a strong framework is needed that can provide for such circumstances.

The KLRCA’s i-Arbitration Rules achieve both these aims. They provide a framework within which parties can choose the appropriate Shariah authority to govern any Shariah issues arising, and in doing so crystalize the rules that will apply. Concurrently, the rising importance of international commercial standards is incorporated through access to an experienced and renowned international arbitral institution, administering cases according to the latest practice, using up to date rules and providing an international panel of expert arbitrators.

² Per Lord Justice Potter at paragraph 40, quoting Morison J at first instance.

³ Per Lord Justice Potter at paragraph 30.

⁴ Per Lord Justice Potter at paragraph 4.



17th January 2014

ADNDRC **WORKSHOP**

The Asian Domain Name Dispute Resolution Centre or better known as ADNDRC conducted the ADNDRC Workshop on 17 January 2014 at Prince Hotel, Kuala Lumpur with the KLRCA. This workshop saw the participation of close to 70 participants both locally and internationally who aspire to master the theory and practice of deciding domain name disputes.

This day long workshop commenced with a session on - Introduction to the Domain Name System by Mr Khoo Guan Huat followed by a session on Uniform Domain Name Dispute Resolution Policy (UDRP) proceedings by Mr Alan Limbury and finally a session on Uniform Rapid Suspension System (URS) and Trademark Post Delegation Dispute Resolution (TM-PDDRP) by the Honourable Neil Brown QC.



18th January 2014

ADNDRC **CONFERENCE**

The following day after the ADNDRC Workshop was the ADNDRC Conference which took place in Sheraton Imperial Kuala Lumpur. The theme for this year's conference was "Rethinking Domain Name Dispute Resolution in the Era of New gTLDs".



Co-organised with the Hong Kong International Arbitration Centre (HKIAC), China International Economic and Trade Arbitration Commission (CIETAC) and Internet Address Dispute Resolution Committee (IDRC), this conference was participated by 50 delegates ranging from IP lawyers and Trademark/Patent consultants.

Among the highlights of this conference were tackling online infringements in relation to new gTLDs, notable procedural issues in UDRP and update on the new trends of online infringement and domain name dispute resolution which were dealt with by renowned experts from the international arena.



ARBITRATION CASE LAW:

DEVELOPMENTS IN MALAYSIA

by **Laura Jimenez Jaimez**, International Case Counsel, KLRC, **Lin NA**, International Intern, KLRC

TAMAN BANDAR BARU MASAI SDN BHD v. *DINDINGS CORPORATIONS SDN BHD*

Court:

High Court Malaya, Kuala Lumpur

Case Citation:

[2010] 5 CLJ 83

Date of Judgment:

11TH SEPTEMBER 2009

Facts

The defendant, Dindings Corporation Sdn Bhd (Claimant in the arbitration), had commenced arbitration proceedings in relation to a dispute for works done as contractor for Taman Baru Masai Sdn Bhd (the plaintiff in the High Court proceedings, the Respondent in the arbitration).

A final award was made on 14 April 2009. The plaintiff filed an application to set aside and/or vary the arbitrator's award, submitting there were apparent and serious irregularities in the making of and on the face of the final award. The plaintiff brought the application under the Arbitration Act 1952, or in the alternative the Arbitration Act 2005.

The defendant contended that the plaintiff by conduct had agreed to the application of the 2005 Act and in consequence was estopped from raising the objection. The defendant also filed an application for registration and enforcement of the final award pursuant to s. 38 of the Arbitration Act 2005. The plaintiff objected to the defendant's application on the grounds that the final award dealt with a dispute not contemplated by or not falling within the terms of submission to arbitration.

Issues

There are two key issues at stake in this matter. Firstly, the main issue is whether the Arbitration Act 2005 applies to the case as the arbitration agreement was made on 24 June 2005 before the Arbitration Act 2005 came into force. Secondly, whether the arbitration commenced under the new Act was illegally commenced and in consequence the final award could not be enforced.

Held

The High Court of Malaya held that the provisions of the Arbitration Act 2005 were applicable notwithstanding the arbitration agreement was made before the AA 2005 came into force. In finding that court intervention was not warranted, the Court relied on the case *Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd* (foll) (at para 13) and stated that the final award of an arbitrator must be viewed in its totality and any error of law on the face of the award must be one that is patent and obvious as to render the award manifestly unlawful and unconscionable to subsist.

With respect to the jurisdiction of the arbitrator, in the instant case, the facts clearly showed that the issue dealt by the arbitrator was essentially within the subject matter of the arbitration agreement. In essence, if the issue is one which originates from the underlying contract the arbitrator is vested with jurisdiction. The Arbitration Act 2005 makes it compulsory for courts to respect the decision of arbitrators and only minimum intervention is allowed.

Consequently, the Court held that there was no error of law on the face of the final award for the High Court to review and that the defendant's application under Section 38 of the Arbitration Act 2005 was allowed with costs.

Impact

This case clarifies the applicability of the Arbitration Act 2005 to disputes commenced before it came into force. In addition, the standard of proof required before the courts will meddle with the recognition and enforcement of an arbitral award.

The approach of the High Court is of great importance in recognising the legitimacy of the finality of arbitral awards. The basic purpose of arbitration is to bring about cost-effective and expeditious resolution of disputes and further preventing multiplicity of litigation by giving finality to an arbitral award.

BG Group PLC

V.

Republic of Argentina

Court:

Supreme Court of the United States

Date of Judgment:

5TH MARCH 2014

Facts

BG Group, a British company, is a major shareholder of MetroGas which distributed natural gas in Buenos Aires. In 2001 and 2002 Argentina changed its regulations regarding gas tariffs. This change resulted in losses for MetroGas. BG Group thus initiated arbitration against the government of Argentina invoking the dispute resolution provision of the UK-Argentina Bilateral Investment Treaty. The arbitration was conducted in Washington, D.C. pursuant to the UNCITRAL Arbitration Rules.

Argentina submitted during the arbitration that the arbitral tribunal did not have jurisdiction as pursuant to Art. 8(2)(a) of the BIT, parties are required to seek resolution of the dispute in local (Argentine) courts prior to initiating arbitration. Since BG did not seek resolution in the Argentine court first, the tribunal did not have the jurisdiction to hear the dispute. This argument was rejected by the tribunal. The tribunal held that Argentina's own actions, making it almost impossible to challenge its actions in local courts, made it impossible for the BG Group to comply with the terms of Article 8(2)(a). The arbitration proceeded and a decision was made on the substantive claims in favour of BG, holding Argentina liable for some \$185 million in damages.

Argentina sought to set aside the award in the district court based on Article 10 (a)(4) of the Federal Arbitration Act on the ground that the tribunal did not have jurisdiction. The district court rejected this argument and confirmed the arbitral award. The case then went to the court of appeals. This time the court decided that the question whether the litigation requirement under Art. 8(2) was satisfied is a question for the courts and as opposed to the tribunal, and subsequently that the litigation requirement has not been fulfilled and thus the arbitration tribunal lacked jurisdiction.

BG Group then petitioned the appeal court decision and brought the case to the Supreme Court.

Held

Citing *Howsam v. Dean Witter Reynolds*, 537 U. S. 79, 84-5 (2002), the Supreme Court of the US held that while substantive questions regarding jurisdiction shall be reviewed by courts de novo, the procedural aspect of jurisdictional questions shall be decided by arbitrators rather than courts, subject to very limited grounds for review by the courts. The Court noted that the function of local litigation requirement under a dispute resolution clause is to determine when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitrate and thus found that litigation provision is consequently a purely procedural requirement. Since the arbitrators have decided on the procedural issue in BG's favor, the court gave high deference to this decision and confirmed the jurisdiction of the tribunal of the arbitral proceeding and reversed the appeal court decision.

Impact

The Court's decision reaffirmed the division of power between U.S. courts and arbitral tribunals over jurisdictional disputes. The Court reaffirmed its previous decisions that "procedural" requirements associated with an arbitration agreement are for the arbitrators to decide not the courts. Although this case concerns investment arbitration, the concept of giving deference to arbitral tribunals on procedural issues of jurisdiction is of great import for commercial arbitration as well, particularly given the prevalent use of multi-tiered arbitration clauses.



klrca EVENT CALENDAR

SAVE THE DATE!

The following are events in which KLRCA is organising or participating

MAY 2014

DATE	: 5TH MAY 2014
EVENT	: KLRCA TALK – BY DR. ANDREAS RESPONDEK (FIVE PROPOSALS HOW TO INCREASE THE EFFICIENCY OF INTERNATIONAL ARBITRATION PROCEEDINGS)
ORGANISER	: KLRCA
VENUE	: KLRCA, NO 12 JALAN CONLAY, KUALA LUMPUR
DATE	: 19TH MAY 2014
EVENT	: KLRCA TALK – BY MR CLAUS LENZ (ENFORCEMENT AND/OR CHALLENGES OF DISPUTE BOARDS DECISIONS IN ARBITRATION)
ORGANISER	: KLRCA
VENUE	: KLRCA, NO 12 JALAN CONLAY, KUALA LUMPUR
DATE	: 22ND MAY 2014
EVENT	: OCM SPORTS ARBITRATION TALK
ORGANISER	: KLRCA
VENUE	: KLRCA, NO 12 JALAN CONLAY, KUALA LUMPUR

JUNE 2014

DATE	: 5TH JUNE 2014
EVENT	: CIPAA CONFERENCE 2014 (2ND LEG)
ORGANISER	: KLRCA
VENUE	: RENAISSANCE HOTEL, KUALA LUMPUR
DATE	: 19TH – 22ND JUNE 2014
EVENT	: KUCHING INTERNATIONAL ARBITRATION CONFERENCE
ORGANISER	: KLRCA
VENUE	: PULLMAN HOTEL, KUCHING, SARAWAK

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

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

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

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

No visa and withholding tax imposed on arbitrators.

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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