

NEWSLETTER

ISSUE N°14

APR - JUNE 2014

# klrcA

KUALA LUMPUR REGIONAL  
CENTRE FOR ARBITRATION

## SURGING AHEAD







# PRACTICAL DRAFTING AND DEFENDING OF ADJUDICATION CLAIMS

**7<sup>th</sup> Oct 2014**  
(Tuesday)

**8.30am – 5.15pm**

**KLRCA**

Bangunan Sulaiman  
Jalan Damansara  
50676 Kuala Lumpur

## PRACTICAL COURSE ON THE DRAFTING/FORMULATION, PRESENTATION AND DEFENDING OF ADJUDICATION CLAIMS UNDER CIPAA 2012

### CIPAA PRACTICAL COURSE PROGRAMME

- |         |  |
|---------|--|
| 8.30am  | Registration   |
| 8.45am  | Welcome Address by<br>Professor Datuk Sundra Rajoo,<br><i>Director, Kuala Lumpur Regional Centre for Arbitration</i>   |
| 9.00am  | Lecture on Modules<br>by Ir. Harbans Singh KS,<br><i>Professional and Chartered Engineer, Arbitrator, Adjudicator,<br/>Mediator, Advocate &amp; Solicitor (non-practising)</i><br>and Lam Wai Loon, <i>Partner, Skrine</i> |
| 11.00am | Break  |
| 11.15am | Workshop Session I   |
| 1.15pm  | Lunch  |
| 2.00pm  | Workshop Session II  |
| 4.00pm  | Break  |
| 4.15pm  | Q&A Session / Review of Workshop   |
| 5.15pm  | End  |

### PRINCIPAL TOPICS COVERED

- ▶ An Overview of the Adjudication Process: Practical Issues
- ▶ Preliminary Stage: How to make & respond to a claim per Sections 5 & 6
- ▶ Initiating the Adjudication Stage pursuant to Section 8
- ▶ How to select & appoint the Adjudicator per Sections 21-23
- ▶ Steps in commencing the actual proceedings
- ▶ Preparing the various submissions i.e. the Adjudication Claim, Response, Reply, etc. pursuant to Sections 9-11
- ▶ Miscellaneous issues i.e. practical scenarios, working tips, etc.

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A MESSAGE FROM OUR

# DIRECTOR



Dear distinguished friends,

Welcome to the second issue of the KLRCA Newsletter for the year 2014 as we inch ever closer towards the dawn of an exciting phase for the Centre - The much anticipated move to our new state-of-the-art facility, the Sulaiman Building that is located in the capital's historical enclave.

The midway point of this industrious and fruitful 2014 has unfolded upon ourselves rather instantaneously with a host of exciting activities and landmark events having taken place over the last quarter. A fascinating emulsification of the beautiful coasts and the scrumptious cuisines of Penang provided the backdrop for KLRCA's certification programmes in April; The Adjudication Training Programme and CI Arb's Diploma Course in International Arbitration. The month also brought a sigh of relief to all parties who have been shedding tears, sweat and blood over the past decade towards the implementation of the CIPAA Act 2012, as it was finally enforced on 15th April 2014. This is certainly a triumph to everyone associated with the construction industry in the country and is set to revolutionize its landscape all together.

Following up closely with the CIPAA Act coming into effect, KLRCA organized a prodigious conference in the heart of the city that attracted 1000 participants mainly made up of stakeholders within the construction community as well as other interested parties from the public. Eminent field experts took stage to fortify the attendees' understanding of the Act's regulations and implications.

Keeping true to our commitment of organizing more free talks on ADR from the world's elite speakers, KLRCA continued its

Talk Series by bringing spirited and timely arbitral related topics to life every fortnight. Building on these efforts, KLRCA also joined forces with the Olympic Council of Malaysia (OCM) to put together an enterprising seminar on Sports Arbitration in Malaysia as KLRCA anticipates its first ever Court of Arbitration for Sports (CAS) hearing to take place over the coming months.

The month of June proved to be a thrilling one as KLRCA successfully organized its inaugural International Arbitration Conference in Kuching, Sarawak. The conference saw over 35 world class speakers and close to 200 delegates from within and beyond the region gather under one roof to engage on intriguing arbitral topics affecting the present as well as forming roadmaps for the future. In this newsletter you will find comprehensive highlights from the conference.

KLRCA aspires to bring to you more quality programmes and rest assure we will be kicking it up a gear as final touches are done to the Sulaiman Building as it prepares to welcome a brand new era of arbitration in South East Asia as well as globally. Be sure to stay tuned as we open the doors of our new home to you in our next edition.

Until then, happy reading.

A handwritten signature in dark ink, appearing to read 'Sundra'.

Datuk Sundra Rajoo  
Director of KLRCA



Visit by The American Intellectual Property Law Association (AIPLA) & KASS International. Date: 17th Apr 2014

# Gallery

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



Visit by Minister of Justice Sri Lanka. Date: 27th Apr 2014



Visit by Nairobi Centre for International Arbitration (NCIA). Date: 24th June 2014





Conference (KLRCA)

# CIPAA in Practice

5th June 2014



In concomitance with the landmark enforcement of The Construction Industry Payment and Adjudication Act 2012 (CIPAA) on 15th April 2014, Kuala Lumpur Regional Centre for Arbitration (KLRCA) organized a mammoth conference titled 'CIPAA in Practice' to empower all parties related to the construction industry with knowledge and tools to comprehend the effective operation of this Act. The conference that was held in Renaissance Kuala Lumpur, saw more than 1000 delegates brave the morning's torrential downpour to take seat at the commodious grand ballroom to witness leading field experts present fortifying inputs on the Act's implementation.

This conference was the third of its kind following the successful inaugural CIPAA Conference back in 24th October 2012 and its follow up titled 'Getting Paid: CIPAA Updates' held earlier this year in February.

The conference was officially opened by the Minister in the Prime Minister's Department, Yang Berhormat Puan Hajah Nancy Haji Shukri, and was followed by presentations by renowned figures in the practice and law of adjudication such as Lam Wai Loon, Ir Harbans Singh and Kuhendran Thanalapasingam. An informative panel discussion moderated by KLRCA's Director Professor Datuk Sundra Rajoo concluded the conference

with a host of additional eminent speakers joining in.

Proceedings for the morning got under way with Professor Datuk Sundra Rajoo taking stage to deliver his keynote address. In expressing his delight of CIPAA 2012 being enforced, the director of KLRCA said "The coming into effect of CIPAA is very much welcomed and it is hoped that it will herald a new beginning for the construction industry. Most jurisdictions who have introduced statutory adjudication have reported nothing but success in revolutionising the way disputes are resolved in the construction industry."

## Events



Attendees of the conference were then given a brief and comprehensive chronology on how CIPAA 2012 came about when special distinguished guest, Tan Sri Yong Poh Kon; Past Co-Chair of Pemudah was invited on stage to share a few words. Tan Sri Yong who has been ever present through his perseverance and tenacity in advocating the act since it was mooted in 2003, spoke about the struggles and adversity that had to be overcome in ensuring the Act saw daylight.

Minister in the Prime Minister's Department, Hajah Nancy Shukri then

CIPAA Regulations & KLRCA Adjudication Rules". Attendees of the conference were taken through the exemption orders, important circulars and a detailed 10 point step by step guide on submitting a payment claim under CIPAA 2012.

After the networking break, the conference resumed with a session on "CIPAA: Issues in Implementation" by IR. Harbans Singh, a prominent Arbitrator, Adjudicator and Mediator. The animated Harbans captured the audience right from start through a series of light hearted comparisons on how CIPAA started to how it evolved into

practitioner and partner from Zul Rafique & Partners took charge of the final topic of the day by presenting on "Enforcing and Staying Adjudication Decisions". Several intriguing points were shared with the attendees, amongst them being CIPAA's 'relationship with other ADR processes', 'suspension or reduction of rate of progress of performance', 'direct payment from principal' and 'concurrent recourse'.

The apotheosis of this conference saw a dedicated panel of eminent speakers take stage to answer a series of technical and critical questions surrounding the CIPAA 2012 Act's implementation. KLRCA's Director, Professor Datuk Sundra Rajoo who moderated the discussion panel was joined by the three speakers from the day's earlier sessions; Lam Wai Loon, Ir Harbans Singh and Kuhendran Thanalapasingham. Four other leading practitioners; Gananathan Pathmanathan, Chong Thaw Sing, Danial Tan Chun Hao and Tan Swee Im also took their seats on stage to weigh in with their professional



proceeded to officiate the opening of the conference. In echoing her support for the Act's implementation, she said "I hope with the CIPAA 2012 Act having come into effect, it will lay the foundation for a new exciting era for the construction and legal industries to build on."

The first topic of the day was handled by the industrious Lam Wai Loon, a partner at Skrine. He presented on "Understanding

what it is today. Harbans then went on to explain the categories of exemption and the jurisdictional problems that could arise through the Act's implementation. This second session was brought to a close with salient points being put forward on how such issues could be addressed effectively.

The enigmatic Kuhendran Thanalapasingham, an esteemed legal

and extensive views. Professor Datuk Sundra soon drew the session to a close just below the hour mark by reiterating the importance of the CIPAA 2012 Act to the construction industry in Malaysia and its respective stakeholders. He also assured the attendees that the only way to make sense of this change, is to embrace this revolutionary new mechanism as it brings with it a new positive beginning for the construction industry.



# KUCHING INTERNATIONAL ARBITRATION CONFERENCE KIAC 2014

**Reflecting The Past, Building The Future** | 19th – 21st June 2014

KLRCA's marquee program of the year, the much anticipated inaugural Kuching International Arbitration Conference [KIAC] 2014 saw a large turn out as 'The Godfathers', eminent and aspiring practitioners of the arbitration industry from around the globe as well as within the region, congregated in the exotic Island of Borneo to partake in a comprehensive three day symposium of deliberating the foundations of arbitration, scrutinizing the current state of the practice and forming roadmaps for the future.



The conference themed, 'Reflecting the Past, Building the Future' encompassed a balance of thought provoking discussions with exhilarating soirees, all emulsified in perfect tandem throughout the three days ensuring all delegates and speakers alike left Kuching with renewed avidity for arbitration along with freshly minted imprints of fond memories made over the course of the conference.



## Day 1

Thursday,  
19th June 2014

Having seen the cultured town of Kuching light up the night before as arbitrators from around the region trickled in via groups of fours and fives, many of whom who proceeded to acquaint themselves through collective dinner and drinks; day one of the conference saw a similar sense of buzzing within the town centre as more delegates flocked the registration counters in the conference's official hotel to check in for the enthralling adventures that awaited them. Delegates were then taken to their respective trails around the city and its outskirts to experience and complete the four trails; 'Survivor Course', 'Golf Tournament', 'Heritage Tour', and 'Semenggoh Wildlife Centre and Kayaking'.



## Highlight

### Trails

#### Trail 1: Survivor Course

Delegates that signed up for this trail were transported to the Permai Rainforest to partake in a gruelling 15 obstacle survivor course that went a long way in testing each candidate's body, mind and will. Teamwork amongst the newly acquainted delegates was the key ingredient to a successful day out on the course.



#### Trail 2: Golf Tournament

Championed by Ms. Tan Swee Im (Messrs Tan Swee Im, P.Y Hoh & Tai) and Mr. James Monteiro (Messrs James Monteiro), the golfers were whisked away to a golf and country club nestled between the plush Santubong mountain and the northern coastline of Kuching to compete in the KLRCA 2014 Mini Golf Tournament that promoted fair play and the spirit of camaraderie amongst fellow delegates.



#### Trail 3: Heritage Tour

This exciting Heritage trail encompassed walking through various parts of Kuching, whilst taking in the rich culture and embracing the environment that boasts of Sarawak's marvellous history. Amongst the many landmarks visited by the delegates were; the Tua Pek Kong Chinese temple, Chinese Historical Museum, Fort Margherita, the Brooke Memorial Monument, the Old Court House and the Sarawak Museum.





## Highlight

### Trail 4: Semenggoh Wildlife Centre & Kayaking Trip

The first part of this trail provided the delegates with a surreal and memorable experience drawing them closer to nature as the group ventured into an Orang Utan sanctuary to witness these fiercely adept creatures swinging from tree to tree. This exhilarating experience continued as the delegates were taken to the banks of Sarawak's majestic river to paddle themselves on a 14km ride into the heart of the state's rainforest.



## Social Event



International delegates and speakers continued to fly into Kuching as the conference moved up a gear with the hosting of its cocktail reception and welcome dinner at the 136 year old historical Old Courthouse. Professor Datuk Sundra Rajoo, KLRCA's Director

got proceedings started with his welcoming address which was then followed by the charming and evergreen Tan Sri Dato' V.C George taking stage on behalf of the evening's sponsors to deliver an entertaining opening speech.



# Day 2

Friday,  
20th June 2014

Day Two of the Kuching International Arbitration Conference got off to a ceremonious start as the Chief Justice of Malaysia, YAA Tun Arifin Bin Zakaria took time off from his busy schedule to officiate and launch KLRC's inaugural conference. His Excellency Professor Dr Rahmat Mohamad, Secretary General of Asian-African Legal Consultative Organization (AALCO) was also on hand to deliver the welcoming address.



Three gripping sessions were fitted into Friday's proceedings. All of which sparked a series of institutionalized and absorbing discussions as the tentative delegates engaged their respective speakers onto enterprising debates.



## Conference

### Session 1:

#### Rethinking the Notion of Confidentiality: The Need For Greater Arbitral Accountability

Moderator:

Mr Vinayak Pradhan

Speakers:

- Ms Sitpah Selvaratnam
- Professor Doug Jones
- Mr Michael Hwang S.C
- Mr Paul Hayes
- Mr Rajendra Navaratnam



### Session 2:

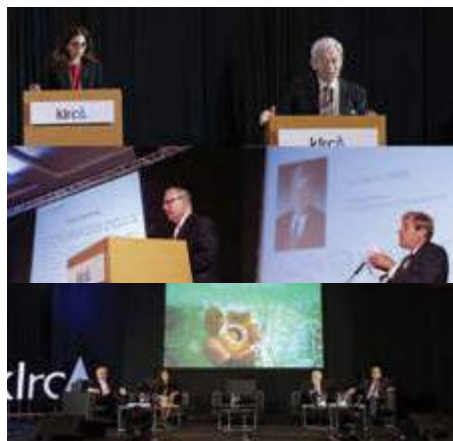
#### Balancing Party Autonomy In International Arbitration

Moderator:

Tan Sri Dato' Cecil Abraham

Speakers:

- Mr Peter M. Wolrich
- Mr Philip Yang
- Ms Shanti Mogan
- Mr John Wright



### Session 3:

#### Minimalist Judicial Intervention In Arbitration: Boon Or Bane?

Moderator:

Mr Michael A. Stephens

Speakers:

- The Honourable Sir Vivian Arthur Ramsey
- Dato' Dr Cyrus Das
- Dato' Mohamad Ariff bin Md Yusof





## Social Event

As the sun set over the picturesque Sarawak, delegates were treated to an exclusive entry into the globally acclaimed spectacle, The Rainforest World Music Festival; as a motorcade of highly powered touring bikes led the busses out of Kuching city centre and into Sarawak's Cultural Village at Mount Santubong. The conference delegates were taken up to the Bidayuh Long House for dinner followed by a front stage viewing of intriguing musical and dance performances from around the globe.





### Conference



## Day 3

Saturday,  
21st June 2014

It was back to some serious business on the morning of Day Three as delegates gathered once more at the conference hall to witness eminent speakers taking stage to deliver their sterling presentations.

#### Session 4 :

#### Balancing The Scale: The Rise And Fall Of Investor Treaty Arbitration

Moderator: Mr Philip Koh

Speakers:

- Mr Hiroyuki Tezuka
- Dr Eun Young Park
- Ms Eloïse Obadia
- Mr Patricio Grané Labat



#### Session 5 :

#### Focus Group: Arbitration In Practice

Moderator: Mr Christopher Leong

Speakers:

- Mr Ivan Loo
- Ms Rashda Rana
- Mr John Tackaberry QC
- Mr Wilfred Abraham
- Dr Thomas R. Klotzel



#### Session 6 :

#### Promoting A Fair, Economical And Effective Arbitration Regime: The Role Of Leading Arbitral Bodies

Moderator: Mr Lim Chee Wee

Speakers:

- Ms Ruth Stackpool-Moore
- Mr Kevin Nash
- Ms Sylvia Tee
- Professor Datuk Sundra Rajoo
- His Excellency Hugo Siblesz
- Dr Li Hu



An engaging series of spirited dialogues followed each session before proceedings for the evening were concluded with the closing remarks.

The conference inched towards its pinnacle as the delegates and speakers were whisked away for a sunset cruise along the majestic Sarawak River before continuing to gather at the resplendent waterfront bay of Kuching for the Gala Dinner. It was the quintessential conclusion to a wonderful and fruitful conference as delegates were treated to cultural performances by the local tribes and a live band. A joyous night of endless networking and merry making amongst the delegates that went on until dawn the following day ensured the Kuching International Arbitration Conference 2014 came to a very satisfactory close.

### Social Event



## In The Seat: **The Right Honourable Tun Arifin bin Zakaria, Chief Justice of Malaysia**

In this latest issue, The KLRCA Editorial Team heads over to the Palace of Justice located in the heart of the federal administrative centre of Malaysia, Putrajaya; to conduct an exclusive interview with The Right Honourable Tun Arifin bin Zakaria, Chief Justice of Malaysia. Tun Arifin who has been part of the Judicial and Legal Service of Malaysia since 1974, shares with us his journey to the top as well as his insights on the arbitration scene in this country.





**Q : Why did YAA Tun choose law as a career? Was it something that you always wanted to do?**

Back then there was not much of career guidance like we have these days. So it was more by chance that I ventured into law. Not so much out of my interest or parental wish at that particular moment. In fact when I went to the United Kingdom, it was for another degree course. I registered myself in the School of Political Science, until a friend in the law faculty suggested that law would be a better course. That was how I ended up in Law School - two weeks after enrolling for the Political Science course. Upon my return to Malaysia, I joined the judicial and legal service. My interest for law grew as I moved up the ranks over the years and I consider myself to be fortunate to have made it all the way to the top. I am grateful, glad and feel privileged to be in this position to serve the country in my capacity as Chief Justice of Malaysia.

**Q : You have served various capabilities in the Government of Malaysia both in the Judicial Office, as well as in the Legal Department; amongst a few - Magistrate, Senior Federal Counsel, Deputy Parliamentary Draftsman, High Court Judge of Malaya and Chief Judge of the High Court of Malaya. What kept your aspirations of reaching the highest peak in check? Was there a significant case, a significant experience early on or an inspirational mentor that spurred you on?**

As my new found love for law grew, I wanted to contribute to my country more and harboured the aspirations of becoming a High Court Judge. I served in many capacities and I enjoyed most of them especially when I served as the State Legal Advisor of Perak and Melaka. That exposed me to new experiences because by being a State Legal Advisor, it directly made me an ex-officio member of the state executive council. As a member of the state exco, this exposed me to high level political proceedings and state affairs. I ended up being in the thick of action with regards to all state matters and I found that to be most interesting and at times challenging. The excitement and the opportunity to enhance my legal skills kept me going. I was in the drafting division of the Attorney General's Chambers on two occasions which was something that I was very keen on honing. You draft the law and put it through parliament; it is an intriguing challenge - also to be able to impact the society.

I remember the most - when I was still at a very junior level, there were a lot of strikes going on in the country. The then Prime Minister the late Tun Hussein Onn, asked the Attorney General's Chambers to amend the labour related laws to address the problem facing the country. Within

three months we managed to amend those laws and there were less strikes after it was implemented. Under the new law, before the relevant parties can go on a strike they have to comply with the new procedures requiring them to give due notice. Previously, trade union leaders could just call for a strike which would eventually lead to disruptions in factories and industries around the country. After we amended all the relevant laws, the number of strikes subsided substantially.

In terms of inspirational figures; there were many along the way. I served under a number of the Attorney Generals and Chief Justices - all of them inspired me to work harder and strive for greater heights. The first one would be Tun Mohamed Salleh bin Abas (former Lord President of the Supreme [later Federal] Court of Malaysia). Tun Salleh was one of my first superiors. I joined the service when Tun Salleh was the Solicitor General. I then served under Tan Sri Abu Talib Othman who was also very inspiring despite being a strict boss - always ensuring that given tasks had to be completed on time. We worked really hard in those days and not forgetting; when I was the State Legal Advisor of Perak I served under Almarhum Sultan Azlan Shah. It was rather challenging at times, having to serve under all those great minds. High benchmarks to be met constantly.

**Q : You have been on top of the judiciary for quite some time now. What would you say has been your proudest achievement to date?**

I took over in 2011 as Chief Justice. As it was, we already started the reform of courts back in 2009 and I just continued with the reform. But my pride came when we delivered a decision which was well received by the public. One such case was the case *Tan Ying Hong v Tan Sian Sang & Ors* [2010] 2 CLJ 269 where we overturned the earlier decision of the Federal Court in *Adorna Properties Sdn. Bhd. v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241. There was insecurity with land titles through a ruling that the rightful owner of a property cannot get back a land after it has been sold to a third party for value without notice, even if the transfer was effected through forged document as in Boonsom's case. This means that innocent landowners could lose their titles through forgery. The situation was really bad. Everyone was waiting for this to be changed. It took several years for the change to take place. I wrote the main judgment reversing the decision in Boonsom.

Another interesting area was the backlog of cases. This ties back to the reform that I mentioned earlier. In 2009, most of the courts did not have a proper filing system. Everything was rather messy. Tun Zaki (the

former Chief Justice) and I went around the country, court by court to carry out stocktaking exercise (involving the physical counting of every file) to determine the exact number of cases pending in each court. We stressed on the need for proper filing system and the need to improve the security of the file room.

Throughout the reform we also increased the number of judges; to ensure cases are cleared in an efficient and timely manner. We set a timeline. For example, the High Courts and Sessions Court were to dispose cases within 9 months from the date of filing while in the Magistrates Courts, within 6 months. Once the timelines were set we then tracked the cases to ensure this practice was adhered to. Now we are able to track cases from all over the country and because of that we know whether the judges are efficient or otherwise; and if the cases are postponed, which party is responsible; the court or the lawyer or whoever. Up to now we are more or less current. I can take pride in saying that over 90% of cases have been completed within the timeline.

We have also ventured into computerization - our courts are now 100% computerized. In the old days judges had to take the note of proceedings in longhand - all evidence presented had to be taken down by hand. Word by word what the witnesses spoke had to be taken down. Now it is all recorded and then transcribed. It is much faster and certainly more efficient. Trials that used to take two to three weeks could now be reduced to 3-4 days. That's how much our disposal rate has improved.

Another big change that is worth mentioning - the courts are now more open and transparent. We are here to serve. For the past three years we have been publishing our annual reports. We have put all our statistics out there. Similarly, should anyone say that the cases are not moving because of a particular reason, they can always write in to the courts and we will attend to the query immediately.

**Q : How supportive has the government been in facilitating arbitration over the past 10 years in Malaysia? What future challenges do you foresee dawning upon the local arbitration scene as Malaysia shapes up to be a prime player in the Asian region?**

The government has always been supportive of arbitration. I believe we are the first in this region to have set up an arbitration centre (KLRC) but it is unfortunate that we are currently behind Singapore and Hong Kong in terms of popularity. Having seen the new director, Datuk Sundra who has taken a lot of initiatives to catapult the centre into the fray again and with the government continuously supporting this cause through funding and show of interest; KLRC will be



*'The Right Honourable Tun Arifin at the launch of the recent KLRCA Kuching International Arbitration Conference 2014. He is flanked by KLRCA Director - Professor Datuk Sundra Rajoo (left) and AALCO Secretary General - H.E. Professor Dr Rahmat Mohamad (right).'*

a force to reckon again - especially once it moves into its new state of the art building. Through KLRCA's many roadshows; Datuk Sundra has also gone on a few with members of the judiciary; to show that the judiciary is in support of arbitration. The way I look at it is simple; some might say the courts and arbitration are competing with each other - but no - arbitration is premised on parties' autonomy, parties choose to go for arbitration. To me if you choose to go for arbitration, you are bound by it. As far as the court is concerned, minimum interference or minimal intervention is allowed. The law is very clear so that's how I look at it. It complements the court's functions, otherwise the court will be over burdened with all those cases.

**Q: What can be done to improve arbitration further in Malaysia?**

What KLRCA has been doing so far has been great for the country. Going on the road showcasing what KLRCA can offer - that needs to be continued. Then the other important thing is to have competent arbitrators in our country, local as well as international arbitrators that are able to fly in without much restrictions. Having said this, the facilities that we have must be conducive and the courts here must be supportive. Another important factor is price competitiveness. We must be able to compete with the rest of the world. I think UK and a few other jurisdictions are pricing themselves out. Singapore and Hong Kong are also getting more expensive. We can provide services that are equally as excellent at highly competitive rates.

The amendments to the Legal Profession Act 1976 also contribute to the positive growth of arbitration in Malaysia. Section 37A of the Legal Profession Act 1967 allows both foreign arbitrators and foreign lawyers to enter 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 Malaysia to conduct arbitral proceedings. This development leads to the opening of our doors to the world. All these initiatives are to facilitate and improve arbitration, making it easier for parties to arbitrate in Malaysia. Foreign arbitrators can even come into Malaysia without the need for a working visa.

**Q: In light with the recent enforcement of the CIPAA Act 2012 on 15th April 2014 and the setting up of specialised Construction Courts, many parties involved in the construction industry in Malaysia will breathe a sigh of relief. In the long run, how will Malaysia as a booming economic frontrunner in this region benefit from both these landmarks?**

It is without doubt, CIPAA 2012 will force a paradigm shift in the construction industry in Malaysia. The coming into force of the Act will introduce the concept of statutory adjudication in Malaysia, which is one of the dispute resolution mechanisms to settle payment dispute in timely manner between two contracting parties in the construction related cases. Currently, there is a rather chronic problem with regard to delayed and non-payment in the Malaysian construction industry and the figure, in Ringgit Malaysia, can run into billions. Due to a longer waiting period for settlement of payment disputes, contractors eventually suffer from cash flow problem which may also lead to delays in the completion of the construction projects. Adjudication is intended to be the simplest and fastest process to enable parties to obtain payment promptly based on the assessment of the merits of the claim by an independent industry expert, the adjudicator. It is akin to the concept 'pay now, argue later'. Through this method of dispute resolution, delayed and non-payment can be overcome. This can also facilitate the cash flow problems in the construction industry.

Alongside with the introduction of CIPAA, we also have the Specialist Construction Courts that have been gaining popularity. There is a steady increase in the number of cases filed. With Specialist Construction Courts, there can be greater consistency and more proper development of the law in this specialized area of law. The popularity of the Construction Court has apparently caused some concern because of the reputed speedier disposal of cases with less costs. It may seem as some kind of competition to the adjudication process introduced through CIPAA but as I see it - they complement each other which is good for the construction industry. The Malaysian Judiciary has always been supportive of ADR as a means of resolving dispute. Either way, CIPAA is definitely the way forward especially for the contractors. The little guys will definitely breathe a sigh of relief. They will no longer be strangled by the bigger fish as payment is due instantly before the dispute is looked into. I think CIPAA is the right way forward.

**Q: Any parting words for aspiring legal practitioners out there who harbour ambitions of holding a post of significance in serving their country within the judicial system sometime in the near future?**

Everyone has to play a part in ensuring that the justice system in the country works well. Whatever part you do, it is equally important. Our primary task is to deliver justice in whatever position; be it as counsel or as judge. Do our level best. My final words to the young practitioners; if you joined the legal profession for the money and the money is not coming in then you lose interest but if you joined the legal profession because of your love for law, you will keep on going no matter what happens because your burning desire will keep you going. Adversity will always be there, believe in yourself and they will be overcome with ease.



The fascinating fusion of the East and West coupled with the beautiful coasts and scrumptious cuisines of Penang provided the ideal background to two of KLRCA's latest programme offerings.

### **KLRCA Adjudication Training Programme**

10th – 14th April 2014,  
Sunway Hotel Penang

This programme that was opened to the public, especially those in the construction industry - trained aspiring adjudicators by providing them with the necessary and required skills to conduct adjudication proceedings. Participants were required to sit for an examination on the last day; with those passing the exam becoming 'Certified Adjudicators'



### **CIArb 2014 Diploma Course in International Commercial Arbitration**

19th – 27th April 2014,  
G Hotel Penang

This intensive nine day residential course in International Commercial Arbitration, saw budding arbitrators being taught the practice of international commercial arbitration that included all major forms of international arbitration and related dispute settling mechanisms such as WIPO, WTO and Investment Treaty Arbitration.



## KLRCAs continued its collaborative efforts with local institutions to bring comprehensive and timely seminars to life.

### KLRCAs – Malaysian Institute of Arbitrators (MIArb) Seminar

#### Ethics In International Arbitration – Myth or the new reality

28th April 2014, Royal Lake Club Kuala Lumpur

This seminar reviewed the current debate as to whether there are common ethical standards for international arbitration and the current standards that are out there. The speakers also outlined the position by referencing rules of the major institutions in international arbitration whilst providing practical guidance to both advocates and international arbitrators

##### Speakers:

Nigel Cooper Q.C, Quadrant Chambers, London  
Lai Jen Li, Acting Head of Legal, KLRCAs

##### Moderator:

Kevin Prakash,  
Vice President of the Malaysian Institute of Arbitrators (MIArb)



### KLRCAs – Olympic Council of Malaysia (OCM) Seminar

#### Sports Arbitration in Malaysia: The Way Forward

22nd May 2014, No 12 Jalan Conlay, KLRCAs

A handful of Malaysia's biggest sports dignitaries comprising of YAM Tunku Tan Sri Imran Tunku Ja'afar (President of Olympic Council Malaysia), Ahmad Shapawi Ismail (Sports Commissioner of Malaysia) and Dato' Low Beng Choo (Vice President of Olympic Council Malaysia) took stage to share and express their views on the promising progress of sports arbitration in the country as well as ways to further capitalize on its mammoth potential in the Asian region.

Topics that were covered during this half day seminar were; An overview: Dispute Resolution in Sports, Resolution of Disputes under the Sports Development Act and Sports Arbitration: A fair and progressive platform for the resolution of disputes.

##### Guest of Honour:

YAM Tunku Tan Sri Imran Tunku Ja'afar, President of Olympic Council Malaysia

##### Speakers:

Dato' Low Beng Choo,  
Vice President of the Olympic Council of Malaysia (OCM)

Ahmd Shapawi Ismail,  
Sports Commissioner of Malaysia, Ministry of Youth and Sports

Faris Shehabi,  
Deputy Head of Legal KLRCAs





# The Foundation of Extension of Time

**Shawn Chong Seow Nyee**

BSc (Hons) PGDip MSc MBA MSc  
MRICS MCIQB MRISM ICECA RegQS  
Adjudicator [KLRCRA]  
Director, Charlton Martin  
Consultants Sdn Bhd

## Introduction

“Extension of Time” is often a hotly contested issue in the construction industry and probably cause more disputes than any other issues in projects. The question of time is usually an essential element in any construction contracts. Construction contracts specify performance periods either by prescribing:

- the start and completion dates; or
- a specified number of days that the work shall be completed, calculated from the notice to proceed or commencement of work.

Contracts may also include interim milestone or sectional completion dates for certain portions of the works. These specified completion date(s) become a material part of the contract, and if the contractor fails to complete by the contracted date, then he is in breach and liable to pay damages to the employer. Damages for late completion are expressed as liquidated damages/delay damages.

All Standard Forms of Contract include provisions to extend time if the contractor has been delayed by certain defined risk events during the course of the contract. These provisions are commonly known as the Extension of Time (“EOT”) provisions. The events giving rise to an entitlement to an extension of time are usually set out in considerable detail in Standard Forms of Contract.

These events may be referred to as “Relevant Events”<sup>1</sup>, “Relevant Project Event”<sup>2</sup>, “events”<sup>3</sup>, “cause of delay”<sup>4</sup> or simply as “grounds”<sup>5</sup>. These contractually identified events represent excusable delays expressly provided for under the contract.

Excusable delays may be subdivided into compensable delays, which permit the recovery of both time and money, and non-compensable delays, allowing only the

recovery of time. A non-excusable delay provides no basis for recovery of either time or money, and the contractor may be liable for the resulting liquidated/delay damages claim from the employer.

A contractor is entitled to extra time for any excusable delays that occur during the execution of the works. It is however important to remember that delay does not automatically lead to an EOT. The delay event must affect the activities on the critical path, and thereby delay the project completion date.

## Baseline Schedule

The project schedule is the contractor’s plan which illustrates the order and priority in which the various works is intended to be performed. Once mutually agreed between the contracting parties, the project schedule is thereafter commonly referred to as the “Baseline schedule”.

Today, most construction project schedules are generated with critical path method (“CPM”). Critical path analysis is a technique that defines the shortest theoretical route through the sequence of programme activities, from project commencement to completion. A critical path is established by linking the various work activities on the programme and applying estimated durations to these activities and relationships.

The importance of the technique is that it distinguishes between those activities that are critical to the completion date and those that are not. In other words, delays to critical activities will affect the end date, whereas delays to non-critical activities may not.

The Baseline schedule provides the easiest means of monitoring the work. The Baseline schedule is the benchmark against

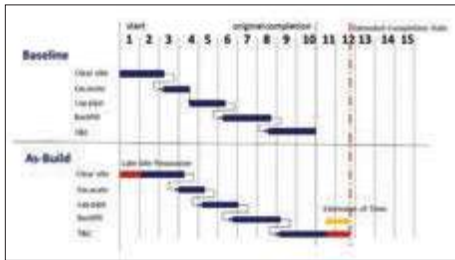
which performance may be measured by comparison of actual progress against the original plan.

In order to be capable of measuring the effect of the delay events against the original plan, the Baseline schedule must be network linked and able to react dynamically to change. For this reason, this basically excludes project schedules prepared as a simple unlinked bar chart, line of balance etc.

Aside from providing a “roadmap” on how and when the contractor will deliver the project defined in the project scope, the Baseline schedule serves various other functions, inter alia:

- (a) Demonstrates to the employer how the contractor intends to complete the project ;
- (b) Subcontractors and resource control;
- (c) Communicate procurement of major equipment/long lead time items;
- (d) Record progress;
- (e) Forecast changes and completion dates;
- (f) Provide a monitoring and control mechanisms to take corrective action;
- (g) Quantify delays for the purpose of award extension(s) of time;
- (h) Identify risks and facilitate risk management.

An essential part of any claim for extension of time is the requirement to demonstrate that the delay event actually had an effect on the time for completion. This is typically carried out by measuring the effect of the delay events (commonly referred to as “impacting”) onto the Baseline schedule.



The Baseline schedule provides the foundation of bedrock upon which all EOT claims are founded. It follows that if the Baseline schedule is defective or contain scheduling flaws, this will undermine the robustness and reliability of the EOT claim itself.

Consequently, it is pertinent that a schedule audit be conducted to verify the structural integrity of the Baseline schedule. The ideal period to carry out the audit will be prior to agreeing/accepting the Baseline schedule from the contractor. However, the audit may also be carried out at any point during the progress of the contract, or during the dispute resolution stage. At the most basic level, the schedule audit should verify that

the Baseline schedule meets the following criteria:

- (a) The full scope of the contract is represented in the schedule
- (b) The milestones dates comply with the contract provisions
- (c) Calendars used for schedule calculations reflect actual working day constraints and restriction prescribed in the contract
- (d) The data date should match the start date of the project
- (e) There is at least one continuous critical path that start at the first schedule activity and ends at the latest occurring activities in the network
- (f) The critical path duration should match the project duration
- (g) All activities have at least one predecessor (except for the start milestone), and one successor (except for the finish milestone)

An extensive schedule audit, professionally conducted, would verify the appropriateness of activities’ relationship types, logic construction, constraints, float, duration, activities, resources etc. Examination of the schedule architecture, performing critical path tests, ratios analysis, schedule density analysis etc. essentially provide employers with an objective assessment on the fitness of the Baseline schedule.

The schedule audit should be repeated at regular interval during the course of the project, upon submission of updated/ revised schedule, and when claims (e.g. Extension of Time claim, acceleration claim, and disruption claims) are submitted by contractors.

## Risk Adjusted Baseline Schedule

Project milestones, completion date(s) as well as critical paths are established by looking at the scheduled results. The dates in the schedule are specific and definitive. All project managers strive to ensure that activities were carried out according to the estimated durations. This is understandable as overrunning the dates in the schedule often carry with it adverse contractual implication.

Be that as it may, the problem all contractors and employers faced is that the dates in the schedule may not even be achievable. The fact is that the dates in the schedule are best guess estimate by the contractors, and not the accurate and definitive dates for future events indicated in the schedule.

Virtually all Baseline schedule submitted by contractors adhere to the mandated completion dates prescribed by employers in the tender document. The activities in the schedule are manipulated to fit within

the project duration stipulated, often when the scope, design and/or specification are incomplete. The certainty of durations assigned to activities together with the milestones dates give an aura of certainty which masked numerous uncertainties, assumptions and incomplete design status.

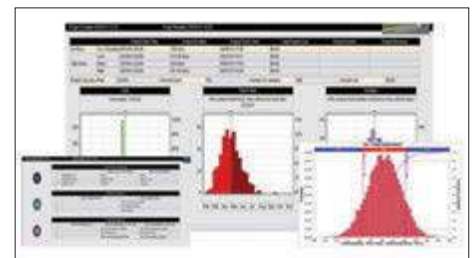
Consequently, prudent employers wishing to pro-actively manage and ensure timely completion of projects typically identify risks, claims positioning issues by risk-adjusting the Baseline schedule. This is carried out by identifying a list of risks for compilation into a risk register.

The identified risks are graded and ranked based on the “likelihood of occurrence” and “the relative impact of the potential event” before assigning the risks to individual activities in the baseline schedule.



A Monte Carlo simulation is commonly carried out to ascertain the uncertainty in the original Baseline schedule. Typically, this involves a simulation of between 5,000 to 10,000 iterations of “what if” scenarios in the computation. The results from the simulation provide an indication of the probability (or likelihood and confidence level) of achieving the dates and duration in the Baseline Schedule.

The results may be presented in various reports, providing the relevant party the information to formulate risk mitigation and contingency plans.





### Conclusion

Construction projects suffer more than other projects from time overrun (and the associated prolongation cost). For this reason, disputes on delays are predominantly dispute concerning which party should bear the responsibility and cost of the delay (i.e. who caused the delay, and is it compensable?).

In deciding this question, arbitral tribunal and/or courts look to the causes of the delay and to the expressed and implied obligations imposed by the contract. Determining the legal consequences that flow from a given delay, depend on correctly identifying the type of delay that has occurred. However, the issue of damages flowing from the events giving rise to liability and the substantiation is no less important.

An award of extension of time sets a new date for completion and postpones a contractor's liability to pay liquidated damages. Contrary to many misconception, the extension of time provision is intended to benefit the employer. They are included in the contract to enable time to be extended for delay events caused by the employer, thus protecting an employer's entitlement to liquidated damages.

If a contractor is prevented from completing by the contracted date on matters outside his responsibility, and there are no provisions to extend time, then time will be 'at large' and his obligation will be to complete in a reasonable time. Further, the liquidated damages provisions become unenforceable and the employer can only claim for general or unliquidated damages where he will need to prove his actual costs incurred or losses suffered.

In order to successfully secure an Extension of Time, the contractor must establish the liability of the employer and the amount of its own damages, and prove the damages were caused by the acts giving rise to liability. The Baseline is the bedrock from which to measure the effect of delays. The contractor must demonstrate causation and ensure that its EOT claims are built upon the foundation of a robust Baseline schedule.

If the Baseline schedule is defective or contain scheduling flaws, this will undermine the robustness and reliability of the EOT claim itself. A schedule audit conducted at inception to verify the structural integrity of the Baseline schedule is an essential and integral step to timely completion. The audit may also be carried out at any point during the progress of the contract, or during the dispute resolution stage.

An extensive schedule audit, professionally conducted, would verify the appropriateness of activities' relationship types, logic construction, constraints, float, duration, activities, resources etc. Examination of the schedule architecture, performing critical path tests, ratios analysis, schedule density analysis etc. essentially provide employers with an objective assessment on the fitness of the Baseline schedule.

Virtually all Baseline schedule submitted by contractors adhere to the mandated completion dates prescribed by employers in the tender document. The activities in the schedule are manipulated to fit within the project duration stipulated, often when the scope, design and/or specification are incomplete. The certainty of durations assigned to activities together with the milestones dates give an aura of certainty which masked numerous uncertainties, assumptions and incomplete design status.

Consequently, prudent employers wishing to pro-actively manage and ensure timely completion of projects typically identify risks, claims positioning issues by risk-adjusting the Baseline schedule. This is carried out by identifying a list of risks for compilation into a risk register, assigning the risks to individual activities in the baseline schedule and conducting simulations. This provides the relevant party with vital management information to formulate appropriate risk mitigation and contingency plans.

In this author's opinion, having Baseline schedule professionally audited is the most pro-active effort contractors and/or employers could employed in their projects to ensure that projects start at the right footing. Prudent contractors and employers committed to timely completion further ensure that project risks are identified, risk adjusted in the Baseline schedule, tracked and risk management plans formulated.

The investment of ensuring the Baseline schedule is robust, built on solid bedrock of schedule logic provides contractors and employers the platform from which to communicate, record, report, monitor and control projects. Unforeseen events may be addressed contemporaneously instead of allowing them to develop into a dispute. When the schedule is used to make decisions, it plays a vital role in avoiding claims by facilitating an early resolution of issues.



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Shawn has over 26 years of diverse experience in the property and construction Industry. His experience on large scale projects covers many sectors, executed under various contractual arrangements, inter alia, Traditional Contracts, Management Contracting, Construction Management, Design & Build, Turnkey, BOT, PFI and PPP. Shawn specialises in the provision of dispute related services and project risk management and has been appointed as expert witness in adjudication, arbitration and litigation cases in Singapore and Malaysia.

He counsels employers, contractors and subcontractors in commercial, retail, office, residential, civil engineering, industrial park, power plants and airport projects and was recognised for his ability to effectively resolve complex and difficult commercial and contractual matters. The combination of his technical, quantity surveying, project management, IT, law and business administration skills enables him to assist clients in a broad range of issues and maximising the prospects of success in a cost-effective manner. Shawn regularly writes and contributes topical construction issues to professional journals and magazines.

- 1 PAM MC with quantities 2006
- 2 JCT Management Building Contract 2011
- 3 PWD Form 203A; PSSCOC D&B 2008
- 4 FIDIC suite of Standard Form of Contracts; PWD DB Rev2010; IEM Civil Engineering First Edition
- 5 SIA Lump Sum Contract, 8th Edition; Measurement 7th Edition; REDAS DB Contract
- 6 In conjunction with the method statement

## Events

# KLIRCA Talk Series

KLIRCA Talk Series continued into the second quarter of 2014 with more insightful and engaging talks by ADR experts.

Below are talks that were held from April - June 2014.

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## Topic: Interesting & Important Differences Between National Arbitration Laws

7 April 2014

Speaker: Mr Paulo Fohlin, Advokatfirman Odebjør Fohlin

Moderator: Mr Philip Koh, Messrs Mah - Kamariyah & Philip Koh



## Topic: New Frontiers in Sports Arbitration

24 April 2014

Speaker: Mr Paul Hayes, 39 Essex Street Chambers

Moderator: Dato' Low Beng Choo, Vice President Olympic Council Malaysia (OCM)



## Topic: Five Proposals How To Further Increase the Efficiency of International Arbitration Proceedings

5 May 2014

Speaker: Dr Andreas Respondek, Respondek & Fan

Moderator: Mr Wilfred Abraham, Zul Rafique & Partners





### Topic: Enforcement and / or Challenge of Dispute Board Decisions in Arbitration

19 May 2014

Speaker: Mr Claus Lenz, Rechtsanwaltskanzlei  
Lungerich, Lenz, Schuhmacher

Moderator: Ms Tan Swee Im, Tan Swee Im, P.Y Hoh & Tai



### Topic: How Do Arbitral Tribunal's Decide: Looking Inside The Black Box [Collaboration with King's College London]

14 June 2014

Speaker: David Caron, Dean of the Dickson Poon  
School of Law at King's College London

Moderator: The Honourable Mr Justice O'Hara, High  
Court of Malaya



### Topic: MCCA Seminar Series No. 3 Alternative Dispute Resolution

3 April 2014

Speaker: Mr Thavakumar Kandiahpillai,  
President of the Malaysian Corporate  
Counsel Association

Speaker: Mr Kuhendran Thanapalasingam,  
Zul Rafique & Partners

Speaker: Ms Lai Jen Li, Acting Head of Legal  
Services KLRCA

Speaker: Ms Stephanie Chin, Head of Legal  
Affairs and Commercial Division,  
Sarawak Energy Berhad (SEB)

Speaker: Ms Rammit Kaur Charan Singh,  
Former Head of Legal Services  
KLRCA

Moderator: Mr. Revandra Sinnetamby, General  
Counsel of a Malaysian Listed  
Company



# Islamic Finance *news* Middle East Supplements – KLRCA *i*-Arbitration Rules

(Part 3)

## Introduction

This is the final piece of a three part discussion, examining the resolution of disputes in Islamic banking and finance through commercial arbitration and the KLRCA's new *i*-Arbitration Rules (**the Rules**). The first paper, published in the Islamic Finance news Asia Supplements, contains a breakdown of the Rules and examines the problems faced by Islamic finance users. The second, published in the Islamic Finance news Capital Markets Supplements, looks at the selection of governing law and how parties are able to ensure the application of the correct and desired system of law. This final part will look firstly at the recently released and translated second edition of the *i*-Arbitration Rules, and secondly compare the Rules with Islamic arbitration options presently available in the Islamic banking industry.

## Revised Rules: the 2013 KLRCA *i*-Arbitration Rules

On the 24th of October 2013 the KLRCA launched the revised and translated editions of its core rules, including the second edition of the KLRCA *i*-Arbitration Rules. The Rules were translated into six languages – Arabic, Spanish, Korean, Mandarin, Bahasa Malaysia and Bahasa Indonesia – cementing the internationalization of KLRCA's Rules and services. The new edition of the *i*-Arbitration Rules brings into effect several revisions and additions, building on the theme of global application. The most notable changes are the removal of any reference to a specific jurisdiction, and the incorporation of an optional late payment charge mechanism permitting the arbitral tribunal to deal with the issue of default.

Revised Reference Procedure – Going Global Rule 11 (previously Rule 8) contains the procedure for reference of Shariah issues to a Shariah advisory council or expert. In the revised edition, there is no reference to a specific jurisdiction or authority. Rather, the

appropriate council or expert is determined according to the characteristics of the agreement and any underlying transaction, as well as the will of the parties. This reflects both the mandatory nature of banking and finance regulation and the consensual and flexible nature of international commercial arbitration.

In the Islamic Finance news Capital Markets Supplements we examined how the appropriate authority might be determined. Where there is governing legislation, as exists in Malaysia or Indonesia, there may be a statutory authority that can be called upon. Otherwise, it may be the bank or financial institution involved that maintains a Shariah advisory board, or ultimately the parties may agree on a Shariah expert to deal with such issues.

It bears remembering that a ruling obtained under Rule 11 will be treated as expert evidence and not interfere with the decision making powers of the tribunal. This preserves the international enforceability of any award rendered under the New York Convention, applicable in 149 countries.

## Late Payment Charges – Dealing with Default

Disputes containing issues of a Shariah nature conventionally have no mechanism of redress where there is default by the party against whom a decision has been made. This deprives the successful party of the benefit of his award and fails to deter the delay of payment, indirectly affecting the competitiveness of Islamic finance users compared to users of conventional finance. To rectify this disparity, the Shariah Advisory Councils of the Central Bank of Malaysia (Bank Negara) and the Malaysian Securities Commission jointly formulated a mechanism known as the late payment charge, based on the Shariah principles of *ta'widh*, corresponding to compensation on actual loss, and *gharamah*, referring to late payment. The late payment charge is calculated pursuant to a formula based on the overnight Islamic Interbank Rate of the Islamic Money Market, with the *ta'widh* portion recoverable by the party to whom



the payment is owed and the gharamah portion going to charity. The mechanism is outlined in guidelines issued by the Shariah Advisory Council of the Central Bank of Malaysia titled “*Shariah Resolutions in Islamic Finance*” and available on their website.

Rule 12 of the Rules includes the late payment charge as an optional mechanism that the tribunal may use in the case of default. The decision whether or not to apply the mechanism will depend on the principles applicable to the matter and the choice of the parties. Nevertheless, the option exists as a way of ensuring full compensation and preserving competitive standing.

### Existing Forums for Islamic Arbitration

Arbitration has been present in Islam since its inception. Prophet Muhammad (pbuh) himself acted as an arbitrator in various disputes. Islamic arbitration is practiced both on an ad hoc and institutional basis, and is offered through a variety of institutes such as the International Islamic Centre for Reconciliation and Arbitration (IICRA), Islamic Institute of Civil Justice, Independent Shariah Tribunals (in Nigeria, among other countries) and the Muslim Arbitration Tribunal (UK). The Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) likewise offers international accounting and banking standards, including for the conduct of Islamic arbitration.

There are limitations in this approach to arbitration. Islamic arbitration as practiced throughout history has involved a mix of what we know now as mediation, conciliation and arbitration, and as a result there is very little in the way of an accepted uniform practice when it comes to Islamic arbitration. Issues such as confidentiality, qualification of arbitrators and the role of arbitrators are not necessarily dealt with in any coherent uniform manner.

The IICRA, as a dedicated Islamic arbitration institution, offers arbitration services and expertise similar to conventional commercial arbitral institutions like the KLRCA. There are significant differences, however, in how those services are carried out. Following is a breakdown of the main differences.

### Scope

The most important difference lies in the scope of service offered by the different institutions. For the reasons explored above, the KLRCA does not attempt to offer blanket Islamic arbitration in line with what has been traditionally offered. Rather, the KLRCA seeks to augment its already established and internationally recognised commercial arbitration services by making them accessible to parties utilising Islamic banking in their business. The *i*-Arbitration Rules build on existing UNCITRAL Model Law principles by adding scope for determination of issues relating to Shariah principles through reference to the relevant Shariah council or expert, and allowing the remainder of the dispute to be resolved on commercial basis according to the governing legal principles agreed upon.



The IICRA by contrast, provides a forum for arbitration of disputes wholly in accordance with Shariah law. Under the IICRA, an arbitral panel is to disregard any applicable legal provisions selected by the parties where the application of same is not compatible with Islamic Shariah principles. In addition, the arbitral panel ‘*may invoke for the disputed issue whatever it deems appropriate from among the viewpoints of various schools of Islamic thought, rulings of Islamic Fiqh academies, and opinions of Sharia(h) supervisory boards at Islamic financial institutions. The Panel may choose to be guided by local or international commercial rules or conventions that are not at variance with the provisions of Islamic Sharia(h).*’<sup>1</sup> The IICRA maintains a specialised Shariah Advisory Committee to whom a draft award may be referred for review. The role of the Advisory Committee is to bring the attention of the arbitral panel to ‘*any violation of the principles and provisions of Islamic Sharia(h)*’<sup>2</sup>. This review of the Advisory Committee is applied to the whole of the award, and not only to specific issues. It should be noted that such recommendation is not binding on the arbitral panel.

Scope is where the main difference lies, and the differences in scope as applied by the two institutions are readily apparent. While the *i*-Arbitration Rules seek to isolate Islamic finance issues to which Shariah principles are to be applied, the IICRA uses Shariah principles to define the entire procedure.

### Venue and language of arbitrations

Other differences lie in the logistical details of how arbitrations are administered. Under the IICRA, the official language is Arabic, and while other languages may be agreed between the parties all written submissions and statements must attach an Arabic translation and all awards must be rendered in Arabic. Under the KLRCA, international arbitrations are carried out in English. In relation to venue, under the IICRA the Executive Committee reserves the right to reject any agreement for proceedings to be held outside the UAE. The KLRCA provides for proceedings to be held in any venue agreed by the parties.

### Who are these services most suited to, prospective parties and arbitrators

This is a direct consequence of the issues raised above. The holistic application of Shariah principles is by its nature more suited to local transactions, limited to parties within the Islamic finance community and preferably parties within the same jurisdiction<sup>3</sup>. This is reflected in the IICRA’s provisions regarding language and venue. Furthermore, the scope exercised by IICRA necessitates a narrow range of available arbitrators. Arbitrators included in the IICRA panel will need knowledge and experience in Shariah principles and likely a working knowledge of the Arabic language.

### A Global Solution

The *i*-Arbitration Rules are by design suitable for parties of all nationality. They are well suited to both domestic and international transactions and agreements and in line with leading international commercial arbitration standards. The KLRCA maintains a broad and extensive panel of arbitrators, including arbitrators with Shariah and Islamic finance expertise but also arbitrators of varying industry, jurisdictional and commercial experience. The result is the ability to provide parties utilising Islamic finance transactions with the same resources in resolving disputes that are available to other commercial entities around the world.

1 [http://www.iicra.com/en/misc\\_pages/detail/1a02c92ba3](http://www.iicra.com/en/misc_pages/detail/1a02c92ba3)

2 [http://www.iicra.com/en/misc\\_pages/detail/a0e81cbf49](http://www.iicra.com/en/misc_pages/detail/a0e81cbf49)

3 For the purpose of finding common ground regarding the appropriate Islamic authority and applicable interpretation of Islamic jurisprudence.

## Arbitration Case Law:

# Developments In Malaysia

By Shanti Mogan, Shearn Delamore & Co

## KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd

Court:  
High Court Kuala Lumpur

Case Citation:  
[2012] MLJU 1218

Judgment by:  
Mohamad Ariff J

### Case Summary

The Plaintiff sued the Defendant for payment in respect of the delivery of a certain quantity of Deacidified Palm Oil and Catalyst Resins and the processing fees in respect thereof. The Defendant argued that the matter was in relation to a contract containing an arbitration clause and thus filed an application to stay the proceedings under Section 10 of the Arbitration Act 2005.

In deciding whether the particular arbitration clause in question was wide enough to cover the dispute between the parties, the court considered the amended version of Section 10(1), as amended by the Arbitration (Amendment) Act 2011. The previous version of the Section read:

- (1) A court before which proceedings are brought in respect of a matter which is the subject of an Arbitration Agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that -
  - (a) that the Agreement is null and void, inoperative or incapable of being performed; or
  - (b) that there is in fact no dispute between the parties with regard to the matters to be referred.

The new subsection (1) reads:

- “(1) A court before which proceedings are brought in respect of a matter which is the subject of an Arbitration Agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the Agreement is null and void, inoperative or incapable of being performed.”

The court held that in light of the amended section, it was no longer possible to argue that in respect of the controversy between the parties, that there was no “dispute” with regard to the matter to be referred to arbitration. The court stated that this was a test which invited unnecessary ambiguity. The test therefore is limited to what is in the section, i.e.: whether the matter before the court is the subject of an arbitration agreement or otherwise. This is in contrast to the Singaporean cases of *Tjong Very Sumito and Others v Antig Investments Pte Ltd* CA [2009] 4 SLR 732 where the court held that if a party “makes an unequivocal admission extending to both liability and quantum, then there was no dispute mandatorily referable to arbitration; and the claimant might apply to a court for summary judgment. In the *Tjong* case, the Court of Appeal held that if the admission was challenged by the defendant with any semblance of credibility, the court will inclined towards deciding that a ‘dispute’ has arisen and order a stay of the court proceedings. Similar sentiments were also put forward in the Singapore High Court case of *Merrill Lynch Pierce, Fenner & Smith Inc v Prem Ramchand Harjani* [2009] SGHC 133. Here, the court even said that a “mere refusal to pay an amount that was indisputably due would not constitute a dispute entitling the defaulting party to arbitration and might amount to an abuse of process”. It remains to be seen whether in a situation where there is an arbitration clause but clearly no dispute, the Malaysian appellate Courts will consider the Singapore approach.



## Arbitration Case Law:

# Developments In Malaysia

By Shanti Mogan, Shearn Delamore & Co

## TNB Fuel Services Sdn Bhd v China National Coal Group Corp

Court:  
Court of Appeal

Case Citation:  
[2013] 4 MLJ 857

Judgment by:  
Zaharah Ibrahim, Anantham  
Kasinather and Mah Weng Kwai JJCA

### Case Summary

The appellant had called for tenders for a long term supply of coal. The respondent submitted its bid which was accepted by the appellant. The appellant then issued a letter of acceptance which laid out terms of award. Subsequently, the respondent failed to supply the coal that it had promised the appellant. In response, the appellant served a notice of arbitration on the respondent. The respondent applied by originating summons to the High Court for a declaration that no arbitration agreement existed. It also applied for and successfully obtained an injunction restraining the appellant from proceeding with the arbitration proceedings. While the appellant's appeal to the Court of Appeal against the injunction order was pending, the summons was struck off when the respondent failed to comply with an order for security for costs. The respondent then filed another originating summons in the High Court seeking similar orders as in its previous action and also an injunction application to once again stop the arbitration proceedings. The appellant filed a stay application under Section 10 of the Arbitration Act 2005 to stay the respondent's action. The High Court granted the second injunction application and dismissed the stay application. The appeal was against the judgment of the Court in allowing the injunction and refusing stay.

The Court of Appeal set aside the High Court orders granting the injunctions restraining the appellant from proceeding with the arbitration proceedings and the order refusing a stay in relation to the arbitration proceedings. It also ordered further proceedings to be stayed pursuant to s 10 of the Arbitration Act 2005. The court gave consideration to Section 10 as well as Section 8 of the Arbitration Act 2005. The latter in its new form (i.e.: post the 2011 amendments introduced by the Arbitration (Amendment) Act 2011 states:

*“No court shall intervene in matters governed by this Act, except where so provided in this Act”.*

This is in contrast with the previous version which stated “Unless

otherwise provided, no court shall intervene in any of the matters governed by this Act”. The court noted that the effect of the amendment is to render a stay of court proceedings mandatory unless the agreement is null and void or impossible of performance. It also noted that the court is no longer required to delve into the facts of the dispute when considering an application for stay. A court of law should thus gear towards compelling parties to honour an arbitration agreement even if the court is in some doubt about the validity of the ‘arbitration agreement’ as this would be in accordance with the ‘competence principle’, ie: that an arbitral tribunal is competent to determine its own jurisdiction.

# SAVE THE DATE!

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

## Event #1

### ▼ #1 PRACTICAL DRAFTING AND DEFENDING OF ADJUDICATION CLAIMS

Date : 5th July 2014

Organiser : KLRCA

Venue : Renaissance Hotel, Kuala Lumpur

## Event #2

### ▼ KLRCA TALK - BY MR J. FELIX DE LUIS (ARBITRATION IN SPAIN AND LATIN AMERICA)

Date : 24th July 2014

Organiser : KLRCA

Venue : KLRCA, No 12 Jalan Conlay, Kuala Lumpur

## Event #3

### ▼ ADJUDICATION TRAINING COURSE

Date : 9th – 13th August 2014

Organiser : KLRCA

Venue : Majestic Hotel, Kuala Lumpur

## Event #4

### ▼ CIPAA TALK

Date : 15th August 2014

Organiser : KLRCA

Venue : Bayview Hotel Penang

## Event #5

### ▼ LAW ASIA MOOT COMPETITION

Date : 15th – 17th August 2014

Organiser : Law Asia (Host – KLRCA)

Venue : KLRCA, No 12 Jalan Conlay, Kuala Lumpur

## Event #6

### ▼ KLRCA TALK - BY MR CAMPBELL BRIDGE (MEDIATION & ARBITRATION)

Date : 19th August 2014

Organiser : KLRCA

Venue : KLRCA, No 12 Jalan Conlay, Kuala Lumpur

## Event #7

### ▼ KLRCA NEW BUILDING SOFT LAUNCH & THIRTY NINE ESSEX STREET OFFICIAL LAUNCH (Joint Reception)

Date : 23rd September 2014

Organiser : KLRCA & 39 Essex Street

Venue : KLRCA, Sulaiman Building

## Event #8

### ▼ #1 PRACTICAL DRAFTING AND DEFENDING OF ADJUDICATION CLAIMS

Date : 7th October 2014

Organiser : KLRCA

Venue : KLRCA, Sulaiman Building





Coming Soon...

The top photograph shows a modern interior space with walls covered in horizontal wood slats. Several round white tables are arranged, each surrounded by white, intricately designed chairs. The ceiling features a grid of recessed lighting and track lighting fixtures. A large, curved teal graphic element separates this image from the one below.



# WE ARE RELOCATING!

New Address: **Bangunan Sulaiman**  
Jalan Damansara, 50676 Kuala Lumpur

New Tel. No.: **+603 2271 1000**

New Fax. No.: **+603 2271 1010**

We are pleased to announce the relocation of KLRCA's premise as we continue to embark on our quest to serve you better and to be the preferred dispute resolution centre in the Asia-Pacific region.

Effective **25<sup>th</sup> AUGUST 2014** we will be in operation at Bangunan Sulaiman. Please kindly take note of our new office address and new phone numbers displayed above.

We would like to take this opportunity to express our appreciation for your continued patronage and support and look forward to welcoming you at our new state-of-the-art premise.

Best regards,



**PROFESSOR DATUK SUNDRA RAJOO**  
Director, KLRCA





# ONE OF THE LARGEST ADR CENTRES IN THE WORLD

The KLRCA's Bangunan Sulaiman is a 5 floor heritage building which is five times larger than the centre's previous premises. Together with the annex building which houses two large seminar rooms, a garden pavilion and car park, it boasts a total floor space of 16430 square meter.

## STATE-OF-THE-ART FACILITIES:

**Extra Large Hearing Room with  
Court Recording & Transcription System (CRT)**  
Seating capacity : 50 pax

### 19 World-Class Hearing Rooms:

- **3 Large Hearing Room**  
seating capacity: 22 pax  
1 large hearing room with CRT
- **10 Medium Hearing Rooms**  
seating capacity: 14 pax  
1 medium room with CRT
- **6 Small Hearing Rooms**  
seating capacity: 10 pax

### 15 Breakout Rooms

**Business Centre – A One-Stop Resource Centre**

**Auditorium (Seating capacity: 182 pax)**

**Private Dining Room**

**Outdoor Dining Area**

**Ample Covered Car Park Spaces**

**Specialised Alternative Dispute Resolution (ADR) and  
Construction Law Library**

**Ultra-modern Video Conferencing Equipment**

**Well Equipped for Training, Seminars and Conferences**



***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.



**A MALAYSIAN  
HERITAGE  
BUILDING WITH  
STATE-OF-  
THE-ART  
FACILITIES**

**KLRCA 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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