

NEWSLETTER

ISSUE N°15

JUL - SEPT 2014

klrc

KUALA LUMPUR REGIONAL
CENTRE FOR ARBITRATION



STANDING TALL

REGIONAL RESOLUTION GLOBAL SOLUTION

CIArb 2015 DIPLOMA COURSE IN INTERNATIONAL COMMERCIAL ARBITRATION

klrca
REGIONAL RESOLUTION GLOBAL SOLUTION

Malaysia
Branch
CIArb
evolving to resolve

DATE

3 – 11 January 2015

VENUE

KLRCA Bangunan Sulaiman

Jalan Sultan Hishamuddin,
50000 Kuala Lumpur, Malaysia

Places are strictly limited

COST:

RM 20,800 / USD 6,750 includes
tuition, course notes, morning and
afternoon tea, lunch, midweek dinner,
course banquet *(without accommodation)*.

RM 24,900 / USD 8,080 includes all of
the above and 9 nights accommodation
with breakfast at the five-star Majestic
Hotel Kuala Lumpur.

The above cost is for all students and includes
the cost of the Practice and Procedure exam
but NOT the Award Writing exam which is
subject to an additional fee.

For registration, payment or
hotel bookings, please contact:

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This intensive residential course in international Commercial Arbitration is offered over nine days. Participants will be taught the practice of international commercial arbitration including all major forms of international arbitration and related dispute settling mechanism such as WIPO, WTO and investment Treaty Arbitration. Participants will gain the ability to appear in or act as an arbitrator in such arbitrators in different contexts.

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

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

On successful completion of the Diploma Course and Module 4 Award Writing Examination, candidates will be awarded a CIArb Diploma in International Commercial Arbitration.

The course will be held at the Kuala Lumpur Regional Centre for Arbitration in the newly refurbished Bangunan Sulaiman on Jalan Sultan Hishamuddin. A special rate for students requiring accommodation has been negotiated with the Five Star Majestic Hotel across the road from KLRCA. Both places are in very close proximity to Kuala Lumpur Railway station.

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Co-Course Director

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A MESSAGE FROM OUR DIRECTOR

Dear distinguished friends,

Welcome to the third issue of the KLRCA Newsletter for the year 2014 as we approach the tail end of another industrious and remarkable year. The much anticipated 'Big Move' happened this quarter as the Centre bid farewell to its home of twenty three years at 12, Jalan Conlay and said hello to its new premises - the newly refurbished heritage building, Bangunan Sulaiman.

The past four years have seen the Centre wake up from its slumber and reinvent itself through aggressive new branding strategies, revision of existing products and innovation of fresh world-class products. All these efforts led to exponential growth that saw the need for bigger premises to support KLRCA's burgeoning ambitions. In this issue, readers will be given an exclusive and detailed look at the state-of-the-art facilities available within the doors of Bangunan Sulaiman - a building five times larger than its predecessor.

Apart from the big move, it was business as usual as the Centre organised and took part in a host of alternative dispute resolution events across the country. With KLRCA being named as the Adjudication Authority in the Construction Industry Payment and Adjudication Act 2012 to resolve payment disputes in the construction industry, the Centre continued to empower relevant stakeholders and interested parties by carrying out a 'Practical Drafting & Defending of Adjudication Claims' course. Penang was once again a location of interest, as the Centre held a CIPAA Talk that attracted a packed function hall.

Closer back to the capital, KLRCA took part in the Global Islamic Finance Forum (GIFF) for the second time. The previous edition of GIFF proved to be a significant one, as it provided the Centre with the platform to unveil its i-Arbitration Rules back in 2012 - which has since gone on to win international accolades. This year's forum provided KLRCA with the opportunity to speak about the progress of the shariah compliant rules and successful methods of implementing it.

KLRCA also continued its Talk Series by bringing in numerous eminent local and international arbitration experts to share and discuss on recent developments in the industry. This quarter's focus was inclined towards the ADR scene in Latin America as geographical interest and reach in the region heats up.

The quarter's pinnacle saw the soft launch of KLRCA's new premises and the welcoming of the United Kingdom based 39 Essex Street Chambers into Bangunan Sulaiman. It is full steam ahead as KLRCA is set to officially launch its new premises in November. Stay tuned as we bring you coverage of the landmark event.

Until then, happy reading.



Professor Datuk Sundra Rajoo
Director of KLRCA





20th August 2014

Visit by The Chief Justice of Bangladesh



GALLERY

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



17th September 2014

Visit by Thailand Ambassador and Thailand Arbitration Centre (THAC)



25th September 2014

Visit by Inti College Nilai



15th July 2014

CIPAA TRAINING (KLRCA)

#1 PRACTICAL DRAFTING AND DEFENDING OF ADJUDICATION CLAIMS

KLRCA continued its commitment towards empowering the public and relevant stakeholders on pertinent aspects relating to the CIPAA 2012 Act that was enforced on 15th April 2014; by conducting a practical course on the drafting/formulation, presentation and defending of adjudication claims. This comprehensive one day course that was held at Renaissance Hotel, Kuala Lumpur attracted close to 80 participants that encompassed a mixture of in-house counsels from prominent organisations around the country, recently certified adjudicators, a large number of representatives from the construction industry as well as several members from the legal fraternity.

KLRCA's Director, Professor Datuk Sundra Rajoo began proceedings with an opening speech to welcome all participants. The speech covered a brief history of the CIPAA 2012 Act before reiterating the importance of understanding the fundamentals and effective methods of drafting a CIPAA claim. Ir Harbans Singh, an expert in Construction Law and Lam Wai Loon, a partner at Skrine who specializes in dispute resolution of building construction disputes took over the torch as they began a series of lectures that encompassed comprehensive CIPAA modules; An overview of the adjudication process, Preliminary stage: how to make and respond to a claim per sections 5 & 6, Initiating the adjudication stage pursuant to Section B, How to select and appoint the adjudicators per sections 21-23, Steps in commencing the actual proceedings and Preparing the various submissions (i.e adjudication claims, responses and replies).

Chong Thaw Sing, a renowned Chartered Arbitrator then took stage to present on 'Typical Payment Dispute Claim Scenarios'. He engaged the participants into an interesting case study, setting the tone and building momentum rather ideally towards the breakout workshop session that was to follow after a quick networking lunch. Participants soon found themselves grouped into separate breakout rooms for the workshop session upon returning to the function hall. Six groups were formed with a tutor being assigned to each one; Harbans Singh, Lam Wai Loon, Samrith Kaur, Daniel Tan, Chong Thaw Sing and Thayanathan Baskaran. Another case study was given with each group being allocated sufficient time to fill up the claims themselves. The tutors then took their respective stages once more to run through the answers with the participants while clarifying enquiries along the way.

A second workshop session began after the evening networking break with participants once more being handed a technical CIPAA case to tackle. Freshly armed with hands on experience from the earlier workshop, participants fortified their understanding of filling up CIPAA claims accurately and efficiently by finishing their assignments well within the time allocated. The CIPAA Training soon drew to a close with Professor Sundra joining all the six tutors on stage to chair the Q & A Session and Review slot.



21st July 2014

PROFESSOR DATUK SUNDRA RAJOO ELECTED AS FELLOW MEMBER OF THE ROYAL INSTITUTION OF CHARTERED SURVEYORS (RICS)

Professor Datuk Sundra Rajoo, KLRCA's Director recently accepted an exclusive invitation by the Royal Institution of Chartered Surveyors (RICS) to join the international professional body as a fellow based on his knowledge and experience in the spheres of land, property and construction.

The award was presented by Mr Kwan Hock Hai, Chairman of RICS Malaysia Board during the 'RICS Malaysia CPD Seminar - Presentation Ceremony & Buka Puasa Dinner' held on 21st July 2014 at the Armada Hotel, Petaling Jaya.



16th - 17th August 2014



KLRCA HOSTS LAWASIA MOOT

The Malaysian round of the 9th LAWASIA International Moot Competition 2014, was held from 16th - 17th August 2014, the fifth year in a row that KLRCA has hosted and sponsored the competition.

Vying for two spots to represent Malaysia at the International Rounds of the LAWASIA Moot Competition; close to one hundred students from local colleges and universities squared off in front of the learned judges in a hard fought legal battle with the KLRCA Rules being incorporated.

The winners went on to represent Malaysia at the international rounds in Bangkok, Thailand (2-6 October 2014)

List of winners.

Winner of the LAWASIA Malaysian Bar Challenge Trophy
 Champion: Team M1423 of Advance Tertiary College
 1st Runner-Up: Team M1422 of Inti International University

Spirit of LAWASIA Award
 Team M1404 of Universiti Utara Malaysia.

The Mah Weng Kwai Challenge Trophy for Best Mooter
 Janine Kimura from Team M1424 of Advance Tertiary College



WELCOME TO BANGUNAN SULAIMAN



Having just bid farewell to its adolescence years and maturing into early adulthood, Malaysia was twenty-one years old when the Asian-African Legal Consultative Organization (AALCO) signed a host country agreement to set up the first arbitration centre of its kind in the Asia region - The Kuala Lumpur Regional Centre for Arbitration (KLRCA). A lot has happened since that first agreement was signed in 1978 with the Centre going on to play an integral role in the shaping of the country's and region's alternative dispute resolution scene over the past three decades.

Progressing in stature and influence over those decades, the rise of KLRCA saw it evolve over three premises from being a three man operated fledgling centre to a twenty plus personnel operated established regional centre. KLRCA initially operated out of a pre-World War II colonial bungalow located on Jalan Clifford before eventually relocating thirteen years later to a larger premises nestled in Kuala Lumpur's Golden Triangle. No 12, Jalan Conlay became KLRCA's home for the next twenty three years as the capital's commercial hub provided the ideal setting for the Centre to further grow and enhance its name as

a reputable alternative dispute resolution centre within the region.

When Professor Datuk Sundra Rajoo became the first arbitration practitioner to take over KLRCA's Directorship in 2010, the Centre received a fresh injection of passion and life. An aggressive rebranding exercise was undertaken with new products introduced and existing ones enhanced. Within eighteen months, caseloads doubled and more companies started incorporating the KLRCA model clause into contracts that were made. Professor Datuk Sundra's bold and hands on approaches proved to be the catalyst that the Centre needed in driving its name back onto the international front.

As caseloads increased and regular evening talks and seminars on matters pertaining to alternative dispute resolution became a norm, KLRCA had progressively outgrown its premises at No 12, Jalan Conlay. The next phase in KLRCA's revival blueprint involved a much larger premise, which would be required to match the Centre's heightening ambition of becoming the region's premier alternative dispute resolution centre.



A series of discussions between the Prime Minister's Department and the Centre took place back in the year 2011 over several weeks and months before the iconic heritage building - Bangunan Sulaiman was identified as KLRCA's future home. Upon ironing out the formalities, a reputable architecture firm and a contractor were assigned to refurbish the 1930's building back to its

glory days while maintaining its art deco aesthetics and incorporating the state-of-the-art facilities required by an international arbitral centre. This exclusive coverage will provide readers with a behind the scenes look at Bangunan Sulaiman's transformation into KLRCA's majestic new home and an exhaustive listing of all its latest facilities.

Premises Of KLRCA



KLRCA's First Ever Premise
October 1978 – May 1991
 576 Persiaran Sultan
 Salahuddin (Jalan Clifford/
 Jalan Taming Sari)



KLRCA's Second Premise
May 1991 – August 2014
 No 12 Jalan Conlay

KLRCA moved to No. 12 Jalan Conlay on 10th May 1991- a large colonial bungalow consisting of 8 rooms, accommodating 3 arbitration rooms, a Library, a reception room, a general office, Secretary's room and the Director's room. In 1993, renovations were done to include two new counsel rooms.

The building was designed as one of the many types of government quarters (for housing the many government officers in the British administration), spread out along the streets in the vicinity back in 1925-1930. It is termed as a 'Colonial House' since the design uses the Colonialists favoured Palladian and Neo-Classical vocabulary adapted adequately to the climatic requirements of the region. The British authority at the Public Work Department administered the land where the quarters were built. After independence, the land was turned over to the Prime Minister's Department by the Kuala Lumpur local authority.

Building Name	Originally known as the “New Railway Offices”. Renamed “Suleiman House”
Contractor	Messrs Brossard Mopin
Site / Lot No	Damansara Road / Seksyen 70
Cost	\$736, 785 (Straits Dollars)
Subsequent Uses	From 1933, housed several different Government Offices including the Selangor Government, Education Department, Passport Office, National Registration Department, Inland Revenue Department, and Federal Territory Syariah Court



EVERYTHING YOU NEED TO KNOW ABOUT KLRCAs NEW HOME

Brief history of Bangunan Sulaiman

The construction on the building started in 1926 and was completed in 1930. When it first opened surplus accommodation in this new building was rented out to the Selangor Government to house some Government Departments. However, by the mid 1930's, the F.M.S Railways proposed to surrender 2,556 ft to the State of Selangor, and the former would become a tenant and only retain use of part of the building.

The monumental nature of this building is attested to by Dato' John M. Gullick who mentioned “...the 1920's produced few major new public buildings, two of the most substantial were the new school buildings on Petaling Hill for the Victoria Institution and the Sulaiman Building near the railway station.

The Sulaiman Building was named after Sultan Alauddin Sulaiman Shah (who reigned from 1865 to 1938). After its opening in 1930, it was officially named as Suleiman House. Recently it was commonly known as the ‘Kuala Lumpur Syariah Court’ which occupied it for over two decades starting in 1990.

The refurbishment works on the Sulaiman Building commenced in late November 2012 under the supervision of Jabatan Kerja Raya (JKR). Refurbishment works and the construction of the new car park and pavilion block were completed by the second quarter of 2014.

Art Deco Design

These buildings are landmarks that reflect the influence of our colonial past.

While the Railway Station and the Railway Offices are built in a typically British Raj style, Bangunan Sulaiman is different from an architectural perspective. It was one of the first public administration buildings in Kuala Lumpur to adopt Art Deco in its design philosophy.

Badan Warisan Malaysia's report, entitled “Conservation of Sulaiman Building, Kuala Lumpur”, describes Bangunan Sulaiman as such:

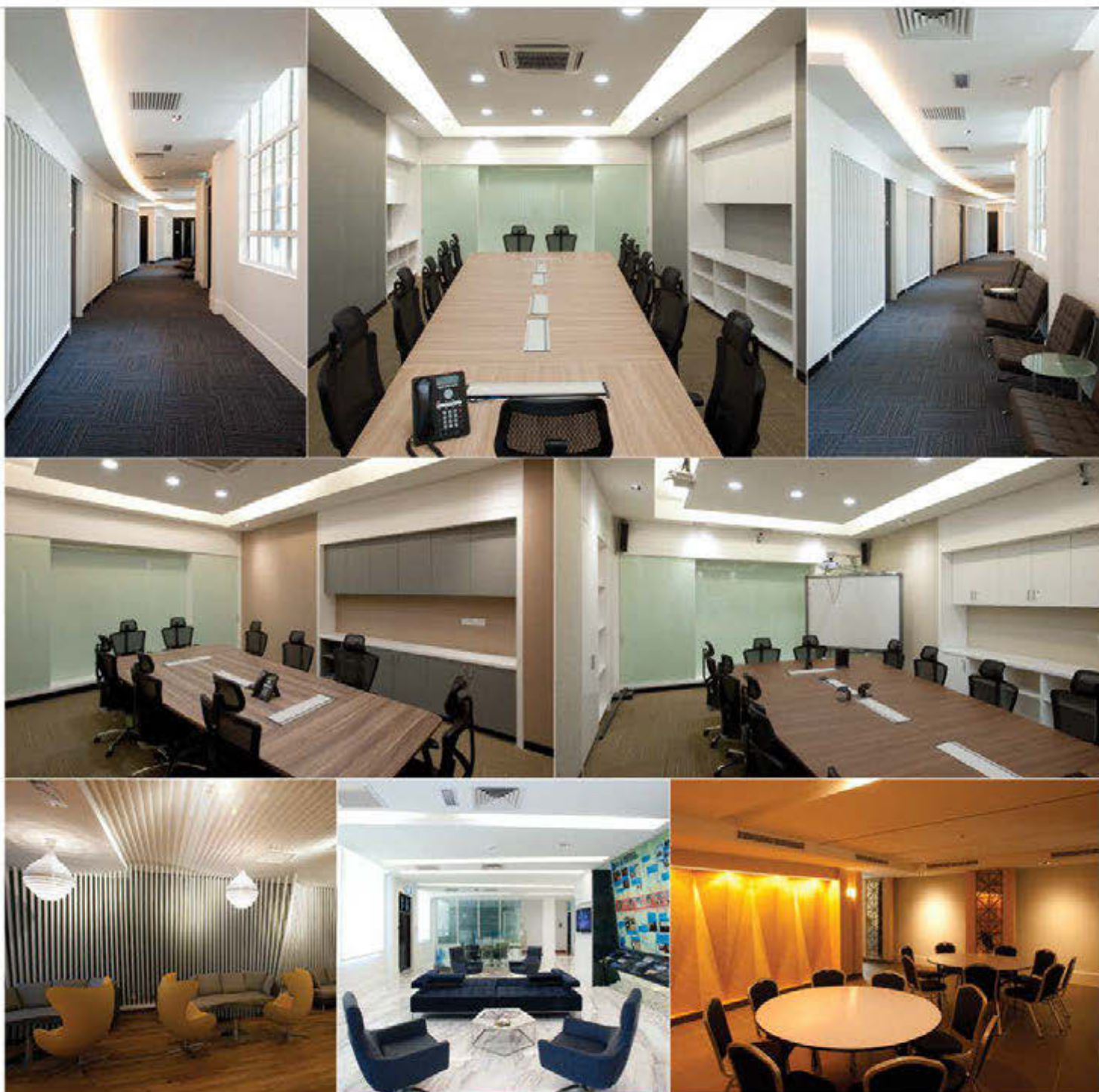
“From a frontal perspective, the building appears to be four storeys in height, as there is a lower floor located below street level. Primarily symmetrical in plan with a slight curve to address the curvature of the main street, the building is designed as a rectangular block with circulation corridors located around the perimeter.

“Four towers which contain staircases and toilets are placed at the corners of the building. At the front in the centre of the building an additional tower houses a staircase that wraps around a lift core. A single storey entrance portico protrudes from the building, marking the building's main entrance. At the front, low curved dwarf-walls form light-wells to provide natural lighting into the lower floor which is below ground level at the front but on grade at the rear.”

On 14 April 1983, Bangunan Sulaiman was gazetted as a heritage site under the Antiquities Act 1976 and the National Heritage Act 2005

State-Of-The-Art Facilities

- Extra Large Hearing Room with Court Recording & Transcription System (CRT)
- 19 World-Class Hearing Rooms
- 3 Large Hearing Rooms
(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
- 2 Consultation Rooms
- Auditorium
(Seating capacity : 182 pax)
- Seminar Room
(Classroom seating : 50 pax; Theatre seating : 80 pax)
- Garden Pavillion
- Business Centre
- Arbitrators' Lounge
- 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





IN THE SEAT:

**His Excellency Hugo Siblesz,
Secretary General of
the Permanent Court of
Arbitration (PCA)**

In this quarter's issue, The KLRCA Editorial Team establishes correspondence with the Permanent Court of Arbitration (PCA) located at the century old Peace Palace, The Hague to conduct an exclusive interview with the institution's Secretary General, His Excellency Hugo Siblesz.

H.E Hugo Siblesz recollects his earlier days of being in the international diplomacy scene and shares with us his thoughts on the importance of collaborative efforts between arbitral institutions.



Q How did your interest and career in law and foreign diplomacy begin?

For the Netherlands the world beyond its borders is by definition a vast one, explaining also its interest in the international rule of law in settling disputes. The combination of international law and foreign policy/diplomacy is therefore an obvious choice for a young Dutch student when determining his/her preferred subjects at university in anticipating a future career.

Q You were one of the youngest representatives in the Dutch Ministry of Foreign Affairs when you joined back in 1973. What were some of the challenges faced earlier on in your career and how quickly did you find your feet in the world of international diplomacy?

My main challenge was to find a proper balance between the world of international law and that of international diplomacy. Not everybody in the Ministry was convinced that international law is not just about lofty principles, but also an instrument in the service of a particular foreign policy. Foreign policy objectives should encompass at the same time the pursuit of human values and of national interests.

Q The Permanent Court of Arbitration (PCA) is the world's oldest institution for international dispute resolution. How did your appointment as PCA's Secretary General come about and how do you cope with the big expectations of heading such an esteemed institution?

After having consulted PCA member States, the Foreign Minister of the Netherlands, in his capacity of president of the Administrative Council, officially proposed my candidature, which was then approved unanimously by the Council. As the world's oldest intergovernmental institution for international dispute resolution,

the PCA is obliged to maintain a very high level of expertise in its field. Its international staff, together with the highly qualified arbitrators who choose to have the disputes they handle administered by the PCA, time and again meets, if not exceeds the expectations of the international community. In leading this esteemed institution, my role and that of my deputy is first and foremost to maintain that very high level of expertise.

Q The PCA thrives on the flexible mandate bestowed upon the institution. What are the benefits that PCA enjoys as opposed to other specialized centres within the industry?

The PCA has indeed been given a very flexible mandate, allowing it to deal with all sorts of disputes, involving any combination of parties, be they States, State-controlled entities, intergovernmental organizations or private persons or entities. PCA's involvement in this wide variety of disputes enables it to provide answers to all sorts of questions arising in the course of such procedures. In other words, this broad experience allows the PCA to be an extremely innovative organization.

Q The PCA is an international organization that encourages the resolution of disputes that involve states, state entities, intergovernmental organizations and private parties by assisting in the establishment of arbitration tribunals and facilitating their work. Apart from having a significant presence in Europe, how would you currently rate the institution's current involvement with the Asian region?

Although PCA's headquarters are in The Hague (the Netherlands), its vocation was and is to be a global institution. Most Asian countries, with the notable exception of Indonesia, are a PCA member State. Increasingly, PCA staff members and fellows are recruited from Asian countries. Of its present caseload

of some 96 cases, about one-third have a link with the Asian region, if only because the global economic activity has shifted to a large extent to the Asian region. The number of arbitrators from Asia increasingly reflects this development. And last but not least, the PCA is in the process of concluding host country agreements with a number of Asian countries, including Malaysia, enabling it to conduct its activities, such as hearings in a case, in those countries in one way or another.

Q With the alternative dispute resolution scene in Asia continuously developing at a ferocious pace, avenues to collaborate continue to increase in tandem as well. What are your thoughts on the potential collaborative opportunities available across Asia?

As stated above, PCA is seeking collaborative arrangements with both its member States in Asia and their arbitral institutions, such as the KLRCA. These arrangements are clearly mutually beneficial, and provide multiple opportunities both to strengthen PCA's footprint in Asia and to enhance KLRCA's attractiveness.

Q What are your views on the Malaysian arbitration scene? With KLRCA moving into its latest state-of-the-art building which happens to be one of the largest of its kind in the world, how much will it boost the local and regional arbitration landscape?

Obviously, KLRCA's new facilities provide it with extensive opportunities to give Malaysia its proper role in the field of arbitration. From our perspective, KLRCA should be able to attract additional cases as parties and tribunals become more familiar with the Malaysian arbitration scene, including important parameters like national legislation relevant to arbitration and its application by the domestic courts.

Q The PCA is well known for its capacity building and its advocacy towards the growth of trade and investment within the ADR industry. Should a host country agreement between PCA and Malaysia be struck in the near future – how much do you think Malaysia will be able to learn from PCA in terms of best practices and experience?

A host country agreement between the PCA and Malaysia would be beneficial to both parties. As far as PCA-activities to be conducted under such an agreement are concerned, much would depend on choices made by the tribunals it administers. PCA stands ready to share its best practices and experience with the Malaysian arbitral community, as it expects to learn from them.

Q What do you consider your greatest achievement in the course of your career?

As Director-general for Political Affairs of the Dutch Foreign Ministry I managed to serve three different Ministers without being sacked at least three times for giving them my unredacted opinion of the policy to be pursued.

Q Any words of wisdom that you would like to impart to future arbitrators?

Tomorrow's arbitrators are today's junior legal counsel. To reach the top a lot of stamina is required, in addition to the obvious intellectual requirements. Future arbitrators should also be aware that arbitration is increasingly being perceived in a very critical, if not outright negative way by NGOs and segments of the general public. Whether these criticisms are justified is another

matter altogether, but we have to acknowledge that arbitral awards can have quite significant effects on parties, including on the public purse of States. As a result, the behavior of arbitrators is under greater scrutiny than ever before, and arbitrators are the most important protectors of the system's legitimacy. Tomorrow's arbitrators must be prepared to proceed with diligence in carrying out their mandates, they must scrupulously assure their appearance of impartiality and independence, they should embrace a spirit of public service and be modest in their fee demands, and they must be aware of cultural and linguistic sensitivities of participants in international proceedings. Arbitrators cannot, of course, make the losing party a winner to please some NGOs, but a very thorough, serious and self-critical approach by arbitrators to their important role will do much to protect the legitimacy of the system.



H.E. Hugo Siblesz pictured here with Sumeet Kachwaha, a member of KLRCA's Advisory Board at the recent Kuching International Arbitration Conference held in June 2014. H.E. Hugo Siblesz was part of the panel of experts that presented on the topic, 'Promoting a Fair, Economical and Effective Arbitration Regime: The Role of Leading Arbitral Bodies.'

4th September 2014



GLOBAL ISLAMIC FINANCE FORUM (GIFF) 2014

RESOLVING DISPUTES IN ISLAMIC FINANCE THROUGH ARBITRATION



KLRCA returned to partake in the latest edition of the Global Islamic Finance Forum (GIFF 2014) - facilitating a session titled, 'Resolving Disputes in Islamic Finance through Arbitration'. The previous edition of the Global Islamic Finance Forum (GIFF) in 2012 proved to be a defining and significant one for the Kuala Lumpur Regional Centre for Arbitration (KLRCA) and the Islamic Finance landscape in Malaysia; as GIFF 2012 provided the platform for KLRCA to officially unveil its i-Arbitration Rules which has since gone on to receive international recognition and accolades.

Two eventful years on, Islamic Finance has seen the need for Shariah compliant Arbitration Rules grow in tandem with its significant rise globally. This session provided delegates with an encapsulating look at the use of Shariah law in resolving disputes and the benefits and importance of the i-Arbitration Rules.

KLRCA's Director, Professor Datuk Sundra Rajoo took stage to present his welcome remarks before Jen Li, KLRCA's Head of Legal Services took over the podium to talk on 'The Rise and rise of Arbitration'. The action thickened when Haji Mohd Rasheed Khan Mohd Idris, a Senior Counsel from Azmi & Associates with international Islamic Finance background; intrigued the crowd with his informative presentation titled, 'Islamic Arbitration in the World of Finance'.

The crowd continuously posed questions to the speakers as the morning went on. The final speaker for the day - Faris Shehabi, KLRCA's Deputy Head of Legal Services took to the floor to speak on, 'Practice and Procedure: The KLRCA i-Arbitration'. The enlightening session was capped off with an absorbing hour long panel discussion chaired by Professor Datuk Sundra.



DISPUTE BOARDS & ADJUDICATION IN MALAYSIA – AN INSIGHT INTO THE ROAD AHEAD

by **Professor Datuk Sundra Rajoo**,
Director of KLRCA

A paper presented at the DRBF 14th Annual International Conference on “Dispute Boards: Realising the Potential for Dispute Avoidance” at The Fullerton Hotel, Singapore on 17 May 2014.

1. INTRODUCTION

1.1 FIDIC[1] based Dispute Adjudication Boards (DABs) were introduced into the FIDIC Forms of Contract in 1999, thereby allowing parties to a construction contract the right of having **contractual adjudication**. Yet, some 15 years later, there is little evidence of such boards being used in the Asian region. In fact the majority of employers actually delete or reduce the DAB provisions.

1.2 When institutions such as the World Bank and many other banks now insist on the inclusion of dispute boards in contracts for any project funded by them and institutions such as the International Chamber of Commerce recommends their use, it is difficult to see why there is such apparent resistance in this region.

1.3 Malaysia is the latest country to introduce **statutory adjudication**. The Construction Industry Payment and Adjudication Act 2012 (“CIPAA”) received Royal Assent on 18th June 2012 and came into force on 15th April 2014. The procedure applies to construction contracts, and adjudicators are appointed by the Kuala Lumpur Regional Centre for Arbitration (“KLRCA”), being the adjudication authority under CIPAA. The adjudicator has 45 working days after issue of the response to the claim (or a reply) in order to issue a written decision.

1.4 The increased use of adjudication domestically in Malaysia as a result of local legislation is helping to make adjudication a frequently used procedure for the quick resolution of construction disputes.

1.5 This paper does not give a comprehensive treatment on CIPAA or FIDIC-DABs, but rather describes in general the mechanics of the Malaysian statutory adjudication procedure under CIPAA and distinguishes it from the Dispute Adjudication Board mechanism.

2. PRE-1999 - EARLY BACKGROUND OF “ADJUDICATION” IN THE MALAYSIAN CONSTRUCTION INDUSTRY

2.1 For decades prior to 1999, the only form of adjudication within the Malaysian Construction Industry had been carried out solely by the Contract Administrator[2] or also known as:

- The “Superintending Officer” or “S.O.” under JKR 203 Form of Contract (Malaysian Public Works Department)
- “Architect” under PAM Contract (Malaysian Institute of Architects)
- “Engineer” under IEM Contract (The Institution Of Engineers Malaysia)
- “Engineer” under the FIDIC Contract (before 1999)

2.2 For convenience, all the above persons will be referred to as the “Superintending Officer” or “SO” or “superintendent”, collectively and separately.

In the Malaysian JKR 203 Form of Contract, the Superintending Officer, who is also the Contract Administrator and an employee of the client, is the “adjudicator” in disputes between the Contractor and the Employer. This is similar to the position of the “adjudicator” in the Joint Contracts Tribunal Form of 1980 where the architect plays a dual role: that of the contract administrator and as an adjudicator when a dispute arises between the employer and the contractor.[3] To provide flexibility in the subsequent identification of the professional best suited to discharge the functions given to an architect or engineer under standard forms of contract, the term ‘superintending officer’ is often used to describe such a person and is being used to replace the terms ‘architect’ or ‘engineer’ in certain contracts.[4]

2.3 As the SO administers the contract between the employer and the contractor: it has been shown that under the contract and in common law, the SO generally has two duties; first, as an agent to the employer; and, secondly, as a certifier.[5] It is trite law that the certification duty of an SO, being a decision-making function, requires the certifier to act independently, fairly, impartially and professionally. This independent role arises notwithstanding the fact that the SO is employed by the employer to undertake such duties under the contract.

2.4 Contracts based on the JKR 203 Form of Contract usually provide for pre-arbitration resolution of disputes in general: a dispute or difference as described of whatsoever kind between the employer, the SO or the superintending officer’s representative and the contractor must in the first place be referred to the SO for his decision and this reference to the SO is a condition precedent to any reference to arbitration.

2.5 If the Contractor (or the Employer) disagrees with the SO’s decision, he may give notice of disagreement and require the dispute to be referred to Arbitration after completion, termination or abandonment of the Contract.

2.6 Notwithstanding a Party’s disagreement, the works have to be continued and the Parties must fulfil their contractual obligations in accordance with the Contract and SO’s decision leaving any outstanding dispute to be resolved another day. In most of the traditional forms of Contract (except FIDIC Forms of Contract) arbitration may commence only after completion, termination and

abandonment of Contract, except for certain type of disputes which may be arbitrated immediately, e.g. failure to pay or to issue interim certificates of payment, the consequences of war and hostilities, etc.

2.7 For some time this system worked well until around the 1980's, when the Construction Industry began to take the general view that it did not work well (mostly for the Contractor) as the SO could not be expected to be impartial due to the following:

- (a) SO is employed directly or as a Consultant by the Employer (or Owner).
- (b) SO issued the disputed decision or instruction in the first place, and usually could not be expected to change his earlier decision.

2.8 Findings of a study conducted by Mohd. Danuri et al.[6] show that the employer's undue influence is the main reason for an SO's failure to be fair and professional in performing his, or her duty. In addition, Ndekugri et al.[7] in their study have also discussed the problems with the traditional duality role of an engineer under the FIDIC's Standard Form of Contract or the "Red Book"; that is, as the employer's agent and as an independent third party, which has been the subject of persistent criticism. It is therefore well anticipated in the Malaysian construction industry that the deficiency in the contract administration practice provided in the contract itself may generally impede contractual justice, which makes construction disputes inevitable.

2.9 In this regard, it is suggested that the concept of FIDIC-DAB, although not presently existing in the form of a statute law, has been introduced in the construction industry of other major jurisdictions within this jurisprudential rationale generally to help promote contractual justice, and ultimately, to avoid construction dispute.

3. POST 1999 - DISPUTE ADJUDICATION BOARDS (DABS) WITHIN FIDIC FORM OF CONTRACTS

3.1 A brief background on Dispute Adjudication Boards; its use by Common Law and Civil Law jurisdictions and Multilateral Development Banks (MDBs)

3.1.1 Contractual Adjudication via FIDIC based Dispute Adjudication Boards (DABs) and their correlatives under the FIDIC Multilateral Development Banks (MDBs) harmonised version, Dispute Boards, have two purposes. They help avoid disputes and they decide on unavoidable disputes. Dispute avoidance is as important as dispute resolution.[8] This dualistic concept has a wide acceptance throughout the world and has to some extent become the international standard in the construction industry. It is used for public works and infrastructure projects[9], but also for privately financed projects, albeit in the private sector the reduced role of a dispute resolver prevails. The concept has also been tested in a Common Law and Civil Law context.

3.1.2 The basic and fundamental principle, which allows agreements on dispute adjudication is usually referred to as the principle of contractual freedom[10]. This principle is recognized worldwide, both in Common Law countries like Malaysia (Section 10, Contract Act 1950), India, Pakistan, Singapore and in Civil Law countries like Indonesia (see Article 1338, Civil Code), Philippines (see Article 1306, Civil Code), South Africa and Sri Lanka (Dutch Roman Common Law) or Vietnam (see Article 389 Civil Code). Contractual freedom typically includes the right of the parties to confer the right of determination of the performance upon a third person (see Article 1309 Civil Code Philippines).[11]

3.1.3 FIDIC Forms of Contract suggest either a three member or a one member Board (DAB), which shall be formed within twenty eight (28) days of commencement of work, by mutual agreement of the Parties. If the Parties fail to agree on the appointment of a member (or members) either party may file a request to the FIDIC President[12] in order to seek the appointment of any of the Board Members. The Board shall begin its activities following the signing of a Dispute Adjudication Board Agreement incorporating General Conditions of Dispute Adjudication Agreement and the Procedural Rules. The Board members are independent experts and not employees or agents of either the Employer or the Contractor. Board members shall not assign or subcontract any of their services or duties. The Board shall visit the Site and meet with representatives of the Parties and the Engineer at regular intervals, at times of critical construction events, at the written request of either party. The timing of Site visits shall be as agreed among the Employer, the Contractor, and the Board, but failing agreement shall be fixed by the Board. Site visits shall include an informal discussion of the status of the construction of the Works and an inspection of the Works. Upon joint request of the parties the Board may submit recommendations and opinions.[13]

3.1.4 Whenever a dispute will be referred to the DAB it will hear the case and make a decision within 84 days. Unlike an arbitral tribunal the Board is authorised to investigate the merits[14]. Normally hearings will be conducted at the Site. However, any other location

that would be more convenient and still provides all required facilities and access to necessary documentation may be utilized by the Board. The Board may also proceed without oral hearings. After the hearings are closed, the Board shall meet in private in order to reach a decision. The Board's decision, together with reasons, shall be served in writing to both Parties. The decision shall be based on the pertinent Contract provisions, applicable laws and regulations, and the facts and circumstances involved in the dispute.

3.1.5 FIDIC Boards have jurisdiction for all disputes which arise out of the Contract or in connection with the Contract. A Board may typically open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer (Red & Yellow Book) or Employer's Representative (Silver & Gold Book) as the case may be. A DAB decision shall be binding on the Parties who shall give prompt effect to the decision.

3.1.6 It shall be given in accordance with Sub Clause 20.4 of the FIDIC Conditions of Contract (1999).

3.1.7 Hence, unlike statutory adjudication under the Statutes in Malaysia, Singapore and Australia, FIDIC Boards have full jurisdiction on all matters including extension of Time for Completion claims and other matters. Arbitration panels have jurisdiction to enforce final and binding DAB decisions (see Sub-Clause 20.7 FIDIC 1999).

3.1.8 As of the past decade, Multilateral Development Banks have been seen to favour the incorporation of the FIDIC Conditions of Contract in their Standard Bidding Documents for Works. Currently they use the harmonised version of the Red Book which is based on a FIDIC licence. The Bank's DAB or DB policy is not yet very clear[15].

3.1.9 Pursuant to the World Bank Procurement Guidelines, the conditions of contract shall include provisions dealing with the applicable law and the forum for the settlement of disputes. International commercial arbitration has practical advantages over other methods for the settlement of disputes. Therefore, the World Bank recommends that Borrowers use arbitration in contracts for the procurement of goods and works. The Bank shall not be asked to name arbitrators[16]. In the case of works contracts, supply and installation contracts, and turnkey contracts, the dispute settlement provision shall also include mechanisms such as dispute review boards or adjudicators, which are designed to permit a speedier dispute settlement. Nowhere is it mentioned that DBs are required, albeit the Standard Bidding Documents include the related DB provisions as suggested by FIDIC, though the wording had been changed from Dispute Adjudication Board to Dispute Board.

An observation in practice however seems to suggest that multilateral development banks do not unanimously and clearly insist on the use of DBs. Frequently, Employers delete DB clauses arguing that they do not comply with the law. The truth is presumably that the banks have no clear policy on the eligibility of DB cost and that employers like to save cost without knowing the disadvantages of such practices.[17]

As a consequence of this, currently the Japan International Cooperation Agency (JICA) is working closely with the Asian Development Bank in a joint effort to promote the use of DBs within the region.

4. CONTRACTUAL ADJUDICATION - DAB IN FIDIC TYPES OF CONTRACTS

4.1 While in a FIDIC Contract the Superintending Officer ("SO"; in FIDIC Contract he is known as the "Engineer") remains as the Contract Administrator, he or she will not be tasked with adjudication in the event any dispute arises. This role as an "adjudicator" shall fall under the DAB.

4.2 The parties to the FIDIC Contract, being the Employer and Contractor, shall appoint the DAB via mutual agreement for the entire duration of the Contract with the DAB's fees being shared equally by both parties. Thus, with the shift of the "Adjudication" role from the SO to the DAB, difficulties relating to independence and impartiality is no longer an issue.

4.3 While the DAB's decision shall be temporary binding (if disputed by parties), works relating to the contract shall still continue as per the rendering of the DAB's decision. As an enforcement measure, the FIDIC Contract provides for contractual sanctions if the decision of the DAB is not implemented.

4.4 The FIDIC model of Contractual Adjudication therefore provides the following[18]:

- i) An impartial DAB
- ii) Temporary binding decisions of DAB (if disputed) to be referred to arbitration
- iii) DAB decisions to be implemented notwithstanding any reference to arbitration
- iv) DAB decision to be final and binding if not disputed within a time limit, as was the case with SO decisions prior to 1999 under FIDIC and other traditional forms of Contract.

4.5 Under FIDIC (before and after 1999), and dispute with the SO or

DAB's decision (either arising from the Employer or Contractor) can be referred to arbitration at any time and not necessarily deferred to a later day as in most other commonly used forms of Contract today.

4.6 After 1999, the FIDIC Form of Contracts incorporated an "amicable settlement" step (non-mandatory) before Parties go to arbitration. This however, does not alter the Dispute Management process, since settlement by amicable agreement is consensual, and this step was actually offered under the pre-1999 Forms, without it being "mandated" in the FIDIC Conditions of Contract. This option invites a certain amount of criticism, as it may be rendered superfluous due to the fact that Parties cannot be compelled to settle. In the event there is no will between the Parties to settle, this exercise may be rendered futile.[19]

4.7 Essentially, the pre-1999 and post-1999 dispute management processes are similar in principle, with the only difference being the introduction of the DAB which reviews the initial decision of the SO (in FIDIC, the Engineer) instead of the SO conducting a self-review of his or her decision. This aspect itself is a massive step up as it dispels any issues regarding impartiality and independence within the adjudication process.

4.8 A prominent feature of post-1999 FIDIC Forms of Contract is that arbitration does not form part of the Dispute Management process carried out by the DAB (or SO) as any preliminary Dispute Management process is completed once a decision is made on a dispute referred to a DAB.

4.9 Should the DAB's decision be disputed by any of the Parties, Arbitration proceedings may be commenced by either side of the Parties. The Arbitration proceeding shall then provide a final and binding award.[20]

5. STATUTORY ADJUDICATION - CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT (CIPAA)

5.1.1 One of the flaws existing within the FIDIC-DAB procedure is that it is only made available to contracts that are drafted based on the FIDIC model. In Malaysia however, many contracts especially those that consist of lower value contracts which adopt simplified formats, are bedevilled by disputes that mainly concern payment issues. These non-FIDIC based contracts contain no specific "adjudication" provisions (other than reference of the dispute to the SO). Some bespoke contracts do not even contain any provision offering any sort of dispute management or resolution process.

5.1.2 As a result of this limitation, some countries have gone ahead to enact statutory "Adjudication" provisions that to address cash flow problems. Such was required to that Contractors and Sub-Contractors were not deprived of "the life blood of the construction industry" as the works progress.[21] Countries which have enacted the adjudication statutes include the UK, Australia, New Zealand and Singapore.

5.1.3 Malaysia is the latest country to enact an adjudication statute, being the Construction Industry Payment and Adjudication Act (CIPAA) (hereinafter referred to as "the Act"), which was passed as law by the Parliament on 22 June 2012, and came into force on 15th April 2014.

5.1.4 The construction industry, in particular, the Construction Industry Development Board (CIDB) and Master Builders Association Malaysia (MBAM) and other related promoters have been instrumental in getting the government to enact this piece of legislation since 2003 to address the cash flow problems plagued by the industry.

5.1.5 The Act allows for a party who is owed monies under a construction contract to promptly obtain payment from the non-paying party, based on assessment of the merits of the claim by an appropriately qualified and independent industry expert i.e. the Adjudicator.

5.1.6 The Act removes the pervasive and prevalent practice of conditional payment ('pay when paid', 'pay if paid' and 'back to back') and reduces payment default by establishing a cheaper and speedier system of dispute resolution in the form of adjudication.

5.1.7 The Act also provides for the recovery of payment upon the conclusion of the adjudication process in addition to a host of other remedies such as a right to reduce the rate of work progress or to suspend work or even to secure direct payment from the principal. It further provides default payment terms in the absence of provisions to that effect in the construction contract.

5.1.8 In general, all the abovementioned "adjudication" statutes use the issue of payment as a trigger point to invoke Adjudication. This inevitably leads to the necessity of the following issues raised in defence of non-payment, being:

- i) Quality of Work
- ii) Set-offs due to:
 - a) Liquidated and Ascertained Damages (LAD) and Extension of Time (EOT) issues
 - b) Defaults made good by Employer (e.g. defects,

insurances, DOSH, DOF, requirements, etc.)

5.1.9 CIPAA-based statutory adjudication plays a beneficial role by protecting weaker parties in construction contracts that do not provide for contractual "Adjudication" or other forms of dispute management or resolution mechanism as in the case of FIDIC and other standard forms.

5.2 Concurrent Actions under CIPAA-based Statutory Adjudication and FIDIC-based Contractual Adjudication

5.2.1 FIDIC based contractual adjudication is easily distinguishable from CIPAA based statutory adjudication; while the former provides for a single "Adjudication" Board, being the DAB from the beginning till the end of the Contract, the latter offers appointment of an Adjudicator on an ad-hoc basis for a dispute that arises.

5.2.2 The FIDIC-DAB procedure under its Adjudication Rules involves a strict requirement whereby the DAB shall visit the site relating to the dispute for familiarization with the nature and progress of the works throughout the execution of the Contract period at intervals of 70 to 140 days or as required. It is an "on-site" procedure.

5.2.3 Thus, as the procedure in CIPAA involves the Adjudicator being appointed on an ad-hoc basis, it has resulted in the Contract being confronted with multiple adjudications with multiple adjudicators.

5.2.4 The same can be said for any reference to arbitration (if an Adjudication decision is disputed) under both FIDIC and CIPAA (if the Contract has provision for arbitration), and Parties may have to deal with multiple arbitrations under different arbitral tribunals throughout the Contract period.[22]

5.2.5 This characteristic of CIPAA is possibly detrimental, due to duplicity and concurrency of actions that may take place. Duplicity and concurrency of actions may result in the construction and supervisory staff involved in the Dispute Management process to be preoccupied and diverted from their main purpose in the Works; ensuring the completion of the construction works within the construction period.

The following provision under CIPAA is relevant:

Section 37 of CIPAA reads as follows:

- (1) A dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court.
- (2) Subject to subsection (3), a reference to arbitration or the court in respect of a dispute which is being adjudicated shall not bring the adjudication proceedings to an end nor affect the adjudication proceedings. ...

5.2.6 The hierarchy of precedence of decisions under actions at Court, Arbitration and Adjudication are clear:

FIDIC-DAB - If a Party is not satisfied with the DAB decision, the dispute would progress to arbitration, and finally to court (if necessary).

CIPAA - A disputed "adjudication" decision may progress to arbitration if the parties are bound by an arbitration agreement; otherwise a dissatisfied party can take the matter to Court.

Under Section 37(1), a party may even commence arbitration or Court action **concurrently with the adjudication process**. What is not certain however is whether this position would still apply if there are contractual conditions which would bar such concurrent actions.

5.2.7 The reasoning behind the enacting of Section 37 is to ensure that the works continue as planned and not be impeded, as it gives effect to the premise of 'pay first, argue later' in order not to allow any constriction of the relevant parties' cash flow.

5.2.8 With reference to Subsection (2) of Section 37, while there may be concurrence of actions besides adjudication, it allows for CIPAA Adjudication to resolve cash flow problems within the 45 working days period allowed for the Adjudicator to deliver the adjudication decision under Section 12 of CIPAA. Thus, it is well anticipated that the adjudication decision may be rendered and be enforced much earlier as compared to the arbitration proceedings that are concurrently being held. Ultimately, CIPAA provides a binding decision on a payment dispute within a short time frame after referral, which can be enforced in the interim pending any subsequent or concurrent reference to another forum for review.

5.2.9 Comparatively, when it comes to arbitration, other commonly used forms such as the JKR 203 Form of Contract, PAM Contract and IEM Contract forms are far more unsatisfactory, in not allowing most types of disputes to be arbitrated or adjudicated until after the Works have come to an end.

6. ENFORCEMENT OF ADJUDICATION DECISIONS UNDER FIDIC AND CIPAA

6.1 For a DAB decision awarding a sum to a contractor under Sub-clause 20.4 of the FIDIC Red Book 1999 for which the employer has given a timely notice of dissatisfaction against the DAB decision, the

DAB decision has to be accepted and given effect to in the interim, pending further reference, in the event of disagreement, to arbitration or litigation.

6.2 Under the post-1999 FIDIC Red Book, remedies for non-compliance with DAB decisions are provided for under the Contract. Clause 16.1 provides that the Contractor can suspend or slow down progress for the works. The Owner could exercise the contractual remedy of deduction from payments due to the Contractor.

6.3 Similarly, Section 29(1) of CIPAA entitles the Claimant the right to suspend the performance, or reduce the rate of progress of performance if the adjudicated amount pursuant to an adjudication decision has not been paid wholly or partly after the receipt of the said decision under Section 12(6). Section 29 reads as follows:

- (1) A party may suspend performance or reduce the rate of progress of performance of any construction work or construction consultancy services under a construction contract if the adjudicated amount pursuant to an adjudication decision has not been paid wholly or partly after receipt of the adjudicated decision under subsection 12(6).
- (2) The party intending to suspend the performance or reduce the rate of progress of performance under subsection (1) shall give written notice of intention to suspend performance or reduce the rate of progress of performance to the other party if the adjudicated amount is not paid within fourteen calendar days from the date of receipt of the notice.
- (3) The party intending to suspend the performance or reduce the rate of progress of performance under subsection (1) shall have the right to suspend performance or reduce the rate of progress of performance of any construction work or construction consultancy services under a construction contract upon the expiry of fourteen calendar days of the service of the notice given under subsection (2).
- (4) The party who exercises his right under subsection (3) –
 - a) Is not in breach of contract;
 - b) Is entitled to a fair and reasonable extension of time to complete his obligations under the contract;
 - c) Is entitled to recover any loss and expenses incurred as a result of the suspension or reduction in the rate of progress of performance from the other party; and
 - d) Shall resume performance or the rate of progress of performance of the construction work or construction consultancy services under a construction contract in accordance with the contract within ten working days after having been paid the adjudicated amount or an amount as may be determined by arbitration or the court pursuant to subsection 37(1).

Use of the word “may” gives the Claimant discretion in exercising the said remedies which have to be in the alternative (note the employment of the term ‘or’).

6.4 Prior to the introduction of CIPAA, the stance taken was: unless there is an express provision in the construction contract permitting the contractor to slow down his work progress and/or suspend the same owing to the employer’s failure to make relevant payment due, any such action on his part can be tantamount to a breach of contract (see *Kah Seng Construction Sdn Bhd v Se/sin Development Sdn Bhd*[23] and also *Yong Mok Hin v United Malay States Sugar Industries Ltd*[24]). This has now been statutorily reversed by CIPAA 2012, in particular vide Section 29 (See especially Section 29(4)(a)). CIPAA provides vide Section 31(1) that a party (i.e. the Claimant) who has obtained an adjudication decision pursuant to the Act in his favour may, unless a stay is granted under Section 16, exercise any or all of the remedies provided in the said Act concurrently as a means of enforcing the adjudicator’s decision.

6.5 The said entitlements under Section 29 accrue in two situations, namely, when either the whole or part of the adjudicated amount has not been paid. Though appearing drastic, it is unlikely that the second situation will be effected by a prudent Claimant unless it is a serious or repetitive default on the employer’s part. However, the option is still there for him to exercise.

6.6 The Act however subjects the Claimant’s exercise of the said entitlements to strict procedural conditions and tight timelines although the precise timing for him to do so has not been expressly stipulated. Presumably, the Claimant has to act with due expedience; failing which he may, for all intents and purposes, be guilty of waiver or laches. If and when the Claimant decides to either suspend performance or reduce its rate, he must notify the respondent in writing of his intention to do so; the notice being served in accordance with the stipulations of Section 38 (Services of Notices and Documents). The Claimant is required to give the respondent a definite time which should not be more than 14 days of the receipt of the notice (see section 29(2)).[25]

6.7 In addition, under Section 28 of CIPAA, enforcement of an adjudication decision can be made through the Court. Section 28 reads:

- (1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.
- (2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.

However, a party may resist enforcement by invoking Section 16, which provides:

- (1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:
 - (a) an application to set aside the adjudication decision under Section 15 has been made; or
 - (b) the subject matter of the adjudication decision is pending final determination by arbitration or the court.
 - (2) The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.
- Thus, a Party may resist enforcement of Adjudication decisions by pleading one of the above grounds. This can defeat the very purpose



of CIPAA which is to sustain the flow of cash, being the ‘life blood’ of the construction industry, while the construction is in progress.[26]

6.8 On the other hand, Section 16(2) of CIPAA requires no **mandatory** security and it is left to the Court’s discretion. If no such security is ordered, it could occur that by the time (if) a favourable decision is finally made for the payee, he could find himself holding a valueless adjudication decision, arbitration award or court judgment. [27]

7. JURISDICTION OF ADJUDICATORS UNDER CIPAA

7.1 Section 27 of CIPAA, when read together with Sections 5 and 6, provides for the scope of the arbitrator’s jurisdiction:

- (1) Subject to subsection (2), the adjudicator’s jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.
- (2) The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator to decide on any other matter not referred to the adjudicator pursuant to sections 5 and 6.

7.2 Under Section 27(1), a references to Sections 5 and 6 of CIPAA are made. Section 5 provides for a payment claim to be initiated by the Claimant (or unpaid party). Therefore, to begin with the Adjudicator’s jurisdiction is about primarily about payment (or lack of payment).

7.3 Section 6 of CIPAA further extends the adjudicator’s jurisdiction

to look into other matters related to payment of the construction in dispute. Section 6 provides that the Respondent (or non-paying party) replies with a payment response in which he states the amount disputed and the reason why he is not paying (either in whole or in part). This would probably mean that the payment dispute would likely be attributed to the following related (or connected and incidental matters); defective works and set-off for LAD, or expenditure incurred on behalf of the unpaid party (usually the Contractor) such as insurances, direct payments to Sub-contractors and suppliers, etc.[28]

8. Distinguishing functions of both CIPAA Statutory Adjudication and FIDIC-DAB Contractual Adjudication

8.1 The principles are clear; the scope of FIDIC-DAB's functions and decisions do not fall under the provision of CIPAA. As a matter of fact, they are both creatures of polar opposites; with the DAB being an entity created entirely by Contract, not falling under CIPAA, and therefore is not governed by CIPAA.

8.2 The only similarity they share is in their namesake of "Adjudication". The term "Adjudication" was first used in FIDIC in 1999 to distinguish the function of DAB from "arbitration". Coincidentally, this term was later adopted by lawmakers for introducing statutory "Adjudication" i.e. Construction Industry Payment and Adjudication Act 2012 (CIPAA).

8.3 Perhaps a more distinct defining of the two processes ought to provide for more clarity and avoid confusion as to their scope and applicability; it has been suggested that other terms may more suited to replace the presently named Dispute Adjudication Board (DAB), e.g. "Dispute Management" (DM) and with it the "Dispute Management Board" (DMB).[29]

8.4 Such use of this new contractual term will in no way alter or detract from the function and effect of the presently-named DAB, as such function and effect are clearly spelled out in detail in the FIDIC Forms of Contract and its annexure on the Procedural Rules for DAB.[30]

9. SAVING OF RIGHTS AND EXEMPTIONS FROM APPLICATION OF CIPAA

9.1 Section 31(2) of CIPAA provides that the remedies provided by the Act are "... without prejudice to other rights and remedies available in the construction contract or any written law, including any penalty provided under any written law".

9.2 The effect of Section 31(2) of CIPAA is that FIDIC-DAB and its function as a contractual provision for Contract Management is not in conflict with CIPAA. However, enforcement of DAB decisions will fall back on the FIDIC contract provisions, and not under CIPAA.[31]

9.3 Section 40 of CIPAA states that the Minister may grant any exemption after considering the recommendation of the adjudication authority (hereby being the KLRCA). The enacting of this provision has caused much debate. Section 40 reads:

40.Exemption

The Minister may, upon considering the recommendation of the KLRCA, by order published in the Gazette, exempt –

- a) Any person or class of persons; or*
- b) Any contract, matter or transaction or any class thereof, From all or any of the provisions of this Act, subject to such terms and conditions as may be prescribed.*

The intention of such provision has been echoed by the recent proposal from the Malaysian Ministry of Works requesting for Government construction contracts worth RM20 million and less to be exempted from CIPAA application.

9.4 According to the Ministry of Works, it is seeking an "interim exemption" for such projects at the state and district level where the project management teams "need some time (about two years) to adjust to the requirements of the Construction Industry Payment and Adjudication Act 2012 (CIPAA)".[32] The said move has been met with heavy opposition stemming from the Malaysian Bar[33] and among major industry associations such as the Master Builders Association Malaysia (MBAM)[34] and Associated Chinese Chambers of Commerce and Industry of Malaysia (ACCCIM)[35], as the said exemptions would impact many small contractors when putting forward their claims against the Government. Industry experts believe the move will undermine a substantial basis of the legislation.

9.5 The Construction Industry Payment and Adjudication (Exemption) Order 2014 seeks to exempt two categories of Government construction contracts. The first category of Government construction contracts are contained in the First Schedule of the Exemption order, namely a contract for any construction works that involve emergency, unforeseen circumstances and that relate to national security or security related facilities.

9.6 The second category of Government construction contracts are contained in the Second Schedule of the Exemption order, namely construction contracts with the Government of the contract sum of

twenty million ringgit (RM20,000,000) and below. With regards to this second category, the exemption order merely exempts these contracts from the application of subsections 6(3), 7(2), 10(1), 10 (2), 11(1) and 11(2) of CIPAA 2012, and relates to the timeline for submissions and replaced with a set of longer timelines for such submissions. It is also a temporary exemption from 15 April 2014 to 31 December 2015 for this second category. However, the exemption order does not extend to construction contracts to which the Government is not a party.

9.7 Section 41 of CIPAA provides:

Nothing in this Act shall affect any proceedings relating to any payment dispute under a construction contract which had been commenced in any court or arbitration before the coming into operation of this Act.

For the purposes of administration of adjudication cases by the KLRCA under CIPAA, including the appointment of an adjudicator under CIPAA, the KLRCA takes the position that CIPAA applies to a payment dispute which arose under a construction contract on or after 15.4.2014, regardless of whether the relevant construction contract was made before or after 15.4.2014. In this regard, a payment dispute under a construction contract is said to have arisen when the non-paying party has, in breach of the contract, failed to make payment by the contractual due date for payment.

9.8 There also remains the question of whether parties to a Malaysian construction contract can opt to contract out of CIPAA, based on the doctrine of Freedom of Contract.

In hindsight, this does not seem possible especially when the Act is meant to be construed as a whole. However, as the Act has yet to be put into practice, it remains to be seen whether parties will execute such manoeuvre.[36]

10. EXAMPLES OF APPLICATION OF FIDIC-DABS IN MALAYSIA

10.1 The extent of implementation of DABs in the Malaysian construction industry has so far been scarce at best. As there remains a misconceived view that high costs are required towards maintaining the board, it has resulted in DABs being applied exclusively in several mega projects by the Malaysian government, namely the SMART tunnel project and BAKUN dam project.

10.2 SMART Tunnel Project - Arbitration Proceedings by Wayss & Freytag (Malaysia) Sdn Bhd Against MMCEG-GAMUDA Joint Venture (JV)

Under a Sub-Contract (TBM Tunnel Boring Contract, North Tunnel Drive) dated 16 April 2003, the JV awarded to Wayss & Freytag the contract to construct and complete the North Tunnel Drive of the SMART Project. Due to Wayss & Freytag's inordinate delay in the progress of its work, the JV terminated the Sub-Contract on 23 January 2006 in accordance with the terms and conditions of the said Sub-Contract.[37]

Following the said termination and in accordance with the terms and conditions of the Sub-Contract, both the JV and Wayss & Freytag submitted various claims against each other to be adjudicated by the Dispute Adjudication Board ("DAB"). The JV's total claim against Wayss & Freytag is for the sum of RM 161,211,524.80. Wayss & Freytag's total claim against the JV is for the sum of RM 153,818,256.63.

According to the DAB's decisions on the various claims submitted, the JV is to pay Wayss & Freytag a sum of RM 102,366,880.42.

Under the terms of the Sub-Contract, any party who is dissatisfied with the decisions of the DAB may issue a Notice of Dissatisfaction and require the matter to be referred to arbitration. The JV had issued several Notices of Dissatisfaction against the DAB's decisions and had duly commenced arbitration proceedings in that respect. Similarly, Wayss & Freytag had also issued Notices of Dissatisfaction against the DAB's decisions, and had issued a Notice of Arbitration to refer its claims to arbitration, in the sum of approximately RM151,279,445.58. On 16 April 2013, the arbitral tribunal issued its award giving the following directions:

- (i) That the JV's claim against Wayss & Freytag (Malaysia) Sdn Bhd's ("Wayss & Freytag") fails and is dismissed;
- (ii) That Wayss & Freytag's claim succeeds in substantial part and the JV shall pay Wayss & Freytag the sum of RM 96,297,229-03 together with interest thereon at 5% per annum from 16 April 2013; and
- (iii) That the JV shall pay Wayss & Freytag the sum of RM 9,000,000-00 as costs.

It is interesting to note from the above arbitration that the relevant Sub-Contract above allowed for the implementation of a Dispute Adjudication Board (DAB).

A DAB is **distinguishable** from a Dispute Review Board (DRB) in the following aspects:

- Where the DAB's decision is immediately binding on both parties, the DRB's decision only provides for non-binding recommendations on both parties to a project;
- The DAB procedure is more structured and formal;

- The DAB is given a longer time to provide its decision;
- A matter cannot be referred to DAB unless it is in dispute; and
- Any decisions of DAB is admissible in evidence in any subsequent arbitration proceeding.[38]

As compared to DRB and other dispute avoidance mechanisms, DAB is promoted by the FIDIC General Conditions of Contract and has been internationally recognised, as the World Bank makes it mandatory to use the form for all project financing.[39]

With that said, a DAB and DRB do share similarities in the aspect where both comprise of a panel of technical experts that becomes part of the project and are familiar with the project's contract and on-site progress.

10.3 *Mersing Construction and Engineering Sdn Bhd v Kejuruteraan Bintai Kindenko Sdn Bhd & Ors*[40]

In the instant case, the plaintiff was appointed by the 2nd defendant as a subcontractor for a Pipe Jacking and Manholes Subcontract for the construction of KL sewerage treatment plant project. The plaintiff was claiming from the 2nd defendant RM914,110.55 for work done under the subcontract. This was the second defendant's application for a stay of proceedings. In applying for a stay the second defendant submitted that it was settled law that if the parties agreed to refer to arbitration as provided in the agreement then the court ought to grant a stay of proceedings pursuant to s 10 of the Arbitration Act 2005

The 2nd defendant contended that under item 14 of the Appendix, all disputes must be referred to arbitration and therefore the present claim should be referred to arbitration. The plaintiff however submitted that the 2nd defendant had failed to discharge its burden to show that there is an arbitration clause in the main contract governing the dispute between them, since it had only exhibited the appendix to the main contract which was not signed by the parties.

Objecting to the stay the plaintiff submitted that even if the appendix to the main contract were to apply, the procedure for settlement of dispute referred to in the appendix to the main contract was to the Dispute Adjudication Board ('DAB') without any reference to the term 'arbitration'. In deciding whether to grant a stay the court had to determine whether the plaintiff's claim was subjected to any arbitration agreement.

The High Court held in dismissing the second defendant's application with costs as the Appendix to the Main Contract only made reference to a Dispute Adjudication Board for settlement of dispute. There was no reference of arbitration. Although the 2nd defendant's counsel pointed out that the FIDIC General Conditions of Contract offers for a dispute to be referred to arbitration should the DAB be unable to resolve it, the court held it could not make a decision based on that conjecture. In conclusion, the Appendix to the Main Contract only made reference to a DAB for settlement of dispute. There was no specific or express provision that the dispute will be referred to arbitration.

11. CONCLUSION

While both FIDIC-DAB and CIPAA based adjudication may have distinct disadvantages in application of their respective dispute management procedures, they both undoubtedly play vital roles within the jurisdictions they operate in. As adjudication today moves fast towards establishing itself as the preferred construction dispute resolution method, the primary objective shared between the two said mechanisms is simple; to ensure swift resolution of disputes so that the works may continue as planned and not be impeded.

Ultimately, it is anticipated that the effectiveness of such mechanisms in avoiding and resolving disputes may depend considerably on the attitudes and commitments of the contracting parties (i.e. the Employer, Contractor and Supervising Officer / Contract Administrator) to resolve any differences at the preliminary level, being the job site itself, through a less adversarial attitude.

[1] FIDIC = International Federation of Consulting Engineers (French: Fédération Internationale des Ingénieurs Conseils)

[2] Contractual and Statutory "Adjudication": Understanding the Main Differences - C.K. Khoo, January 2013

[3] Grace Xavier, "Globalization and International Dispute Resolution" [2003] 2 MLJ xxii *Malayan Law Journal Articles*

[4] See eg the PWD Conditions of Contract (Rev 10/1983) Forms 203/203A and the CIDB Form of Contract for Building Works (2000 Edn).

[5] *Perini Corp v Australia* 12 BLR 82; (1969) 2 NSW 530

[6] M.S. Mohd. Danuri, M.E. Che Munaaim, H. Abdul Rahman, S.B. Abd. Karim and L.P. Liew, "Study on the Contractors' Perceptions towards the Duties of Superintending Officer", in *Quantity Surveying International Convention* (Kuala Lumpur, 2007), pp. 204-12

[7] I. Ndekugri, N. Smith and W. Hughes, "The engineer under FIDIC's conditions of contract for construction" (2007) 25 *Construction Management and Economics* 791.

[8] FIDIC/MDB Approach in respect of Dispute Adjudication Boards - Dr. Götz Sebastian Hök, Berlin 2012

[9] For example, in Malaysia, a DAB was utilized in a government infrastructural contract known as the SMART Tunnel Project - See *Arbitration Proceedings by Wayss & Freytag (Malaysia) Sdn Bhd against MMCEG-GAMUDA Joint Venture (JV)*.

[10] Charret, A Common Law of Construction Contracts -or Vive la Différence?, [2012] ICLR 72 et s

[11] See also the comparative study of Tallon, *La détermination du Prix dans les Contrats*, 1989

[12] FIDIC holds a list of assessed adjudicators. The three days' assessment takes place every three years.

[13] FIDIC/MDB Approach in respect of Dispute Adjudication Boards - Dr. Götz Sebastian Hök, Berlin 2012

[14] As emphasised by the Court in: *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33 in citing Chern, *Dispute Boards*, 1st edition, at p. 192.

[15] FIDIC/MDB Approach in respect of Dispute Adjudication Boards - Dr. Götz Sebastian Hök, Berlin 2012

[16] It is understood, however, that officials of the International Centre for Settlement of Investment Disputes (ICSID) shall remain free to name arbitrators in their capacity as ICSID officials.

[17] FIDIC/MDB Approach in respect of Dispute Adjudication Boards - Dr. Götz Sebastian Hök, Berlin 2012

[18] Contractual and Statutory "Adjudication": Understanding the Main Differences - C.K. Khoo, January 2013

[19] Contractual and Statutory "Adjudication": Understanding the Main Differences - C.K. Khoo, January 2013

[20] Subject to the limited grounds of challenge available to parties at the High Court under the Malaysian Arbitration Act 2005.

[21] Contractual and Statutory "Adjudication": Understanding the Main

Differences - C.K. Khoo, January 2013

[22] Contractual and Statutory "Adjudication": Understanding the Main Differences - C.K. Khoo, January 2013

[23] [1997] 1 CLJ Supp 488

[24] [1966] 2 MLJ 286

[25] *Construction Law in Malaysia*, Sundra Rajoo & Harbans Singh K.S., Sweet & Maxwell Asia, 2012 Edition.

[26] Contractual and Statutory "Adjudication": Understanding the Main Differences - C.K. Khoo, January 2013

[27] Contractual and Statutory "Adjudication": Understanding the Main Differences - C.K. Khoo, January 2013

[28] Contractual and Statutory "Adjudication": Understanding the Main Differences - C.K. Khoo, January 2013

[29] Contractual and Statutory "Adjudication": Understanding the Main Differences - C.K. Khoo, January 2013

[30] Contractual and Statutory "Adjudication": Understanding the Main Differences - C.K. Khoo, January 2013

[31] Contractual and Statutory "Adjudication": Understanding the Main Differences - C.K. Khoo, January 2013

[32] 'Government seeks waiver for penalty on construction jobs worth RM20 million and below' - *The Star*, 19th February 2014 - Retrieved from <http://www.thestar.com.my/Business/Business-News/2014/02/19/New-Act-Govt-seeks-waiver-Small-contractors-said-to-be-most-affected-by-such-exemption>

[33] 'Malaysian Bar: Government should not be exempted from CIPAA' - *The Star*, 5th February 2014 - Retrieved from <http://www.thestar.com.my/News/Nation/2014/02/05/CIPAA-Bar-govt-exempt>

[34] 'No outright exemptions for government construction contracts' - *The Malaysian Reserve*, 25th February 2014 - Retrieved from <http://themalaysianreserve.com/main/news/corporate-malaysia/5487-no-outright-exemptions-for-govt-construction-contracts>

[35] 'Proposal to exempt government from CIPAA sends wrong message: ACCCIM' - *The Sun Daily*, 26th February 2014 - Retrieved from <http://www.thesundaily.my/news/968851>

[36] *Construction Law in Malaysia*, Sundra Rajoo & Harbans Singh K.S., Sweet & Maxwell Asia, 2012 Edition.

[37] *Stock Exchange Announcements - Arbitration Proceedings by Wayss & Freytag (Malaysia) Sdn Bhd Against MMCEG-GAMUDA Joint Venture* - 19 January 2009. Retrieved from <http://www.mmc.com.my/content.asp?menuid=100036&rootid=100002&AnnouncementId=404>

[38] Gerber, "Dispute Avoidance Procedures ('DAPs') (2001) 18 *International Construction Law Review* 122; Seifert, "International Construction Dispute Adjudication" (2005) 131 *Journal of Professional Issues in Engineering Education and Practice* 149.

[39] Seifert, "International Construction Dispute Adjudication" (2005) 132 *Journal of Professional Issues in Engineering Education and Practice* 149.

[40] [2011] 3 MLJ 264

15th August 2014

CIPAA TALK THE CONSTRUCTION INDUSTRY PAYMENT & ADJUDICATION ACT 2012 (PENANG)

The KLRCA reacquainted herself with the highly urbanised and industrialized city of Penang as the latest edition of the Construction Industry Payment & Adjudication Act 2012 (CIPAA 2012) Talk was held at the Bayview Hotel Georgetown. This was the first time KLRCA had "returned" to Penang since the enforcement of CIPAA 2012 on 15th April 2014. The last time a CIPAA talk was conducted in the northern state - was back in August 2012 after the Act had received its Royal Assent in June 2012.

Penang has always been a favourite hunting ground for the KLRCA and this time it was no different as an enthusiastic crowd of around 150 people from various professions - legal, engineering, quantity surveying and architectural filled the function room to the brim. The talk received an additional boost from a significant number of walk-ins, who registered only on the morning of the 15th of August 2014.

The talk began at 2.00pm as Mr Palaniappan the Sub-committee Chairman for Arbitration & Adjudication of the Penang Bar, took stage to deliver his opening remarks. This was followed by Ms Lai Jen Li (Acting Head of Legal Services, KLRCA)'s presentation on 'CIPAA - The Past, Present & Future.'

Ms Lai was stepping in for KLRCA's Director, Professor Datuk Sundra Rajoo who was called away at the last minute to attend to pertinent matters back at the capital.

One of the Act's strongest spokesperson, Ir Harbans Singh was next to take stage as he presented on 'CIPAA 2012: Issues on Implementation.' Harbans was at his usual animated best as he captivated the audience with a lively interactive session. No stone was left unturned as he continuously gaged different portions of the audience to test their understanding and comprehension of the Act's implementation.

Following a brief networking break, Mr Lam Wai Loon took charge of the floor to present 'Understanding the CIPAA Regulations & KLRCA Adjudication Rules.' This session was a very informative and empowering one as Mr Lam took the participants through a meticulous step by step process of the adjudication process.

The fruitful talk session soon drew to a close as the crowd looked to fortify their understanding of CIPAA 2012's implementation by posing questions and concerns to the panel of speakers who took time to address each point in detail.



KLRCA TALK SERIES

KLRCA Talk Series continued into the third quarter of 2014 with more insightful and engaging talks by ADR experts. Below are talks that were held from July - September 2014.

Arbitration in Spain & Latin America (LATAM)

Speaker: Mr J. Felix de Luis, Legal 21 Abogados
Moderator: Ms Laura Jimenez Jaimez, KLRCA

KLRCA's Talk Series returned in the month of July, bringing with it an informative Spanish infused session. The evening talk titled - 'Arbitration in Spain and LATAM' was presented by J. Felix de Luis, a Managing Partner of a law firm based in Madrid. Moderating this session, was KLRCA's very own Spanish International Case Counsel, Laura Jimenez Jáimez.

The speaker, Felix de Luis started the session by showing the attendees a video of the current economic challenges faced by Spain and the austerity measures that have been taken to ensure it reemerges as an attractive hub for potential investors as well as for arbitration proceedings relating to Latin American components.

Upon the conclusion of the animated video, a presentation encompassing of five areas followed. The areas covered were; 'Legal Aspects in Spain and LATAM', 'Economic Aspects', 'Arbitration Courts in Spain and LATAM', 'Spanish Club of Arbitration, CEA' and 'Spain as a perfect venue for arbitration.' Felix then provided the attendees with a comprehensive overview on the three major Courts of Arbitration available in Spain; the Civil and Commercial Arbitration Court, Madrid Chamber of Commerce Arbitration Court and the Spanish Arbitration Court. The speaker also proceeded to elaborate on why Spain and Latin America have that harmonious link that allows for smoother proceedings. Amongst those points mentioned; the fact that both have over 500 years of history in common, common language as well as the same legal system. The talk edged towards its finale as Laura Jimenez took over to moderate the Question and Answer session that went on for close to forty minutes as a series of engaging questions were thrown to the speaker from the floor. The evening's proceedings concluded with a tea time networking session at the centre's coffee terrace.

24th July 2014



JULY - SEPTEMBER 2014



19th August 2014

Hybrid Process – Love Them or Despise Them?

Speaker : Mr Campbell Bridge SC,
7 Selbourne Chambers

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

Over recent years, KLRCA has been organizing dedicated evening talks pertaining to Alternative Dispute Resolution (ADR) matters on a regular basis. As KLRCA bids farewell to its premise of twenty three years - No 12, Jalan Conlay; it was only fitting that it conducted one final intriguing session as its curtain closer.

The talk titled 'Hybrid Processes - Love Them or Despise Them?' was presented by Campbell Bridge SC, a Senior Counsel, Mediator and Arbitrator from Sydney who has been retained as a mediator in several hundred Australian and international mediations held in Australia, Singapore and Indonesia in areas of medical indemnity, mining, insurance, commercial law and construction law. KLRCA had the pleasure of inviting Philip Koh, a well sought after speaker within the local and international arbitration scene, to moderate this absorbing evening session.

A packed room greeted both speaker and moderator as the session got underway at the 3pm mark. Campbell began proceedings by giving a brief overview on arbitration

and mediation before stating that even though both are fundamentally different, they are complimentary processes; with arbitration being essentially adversarial and mediation being essentially collaborative. "Hybrid processes try to strike balance between party autonomy and finality" he said. Philip who has established himself as an excellent moderator amongst the legal fraternity, started to flex his muscles as he brought the audience into Campbell's presentation which kick started an engaging interactive session between all parties within the room. This was no ordinary one way traffic between presenter and audience, as questions were thrown back and forth as Campbell dissected through his points with upmost conviction and clarity. Campbell's and Philip's chemistry on stage was a delight to watch at times - which made the session all the more entertaining and fruitful to partake in.

The evening's talk soon drew to a highly satisfactory close as both participants and presenters adjourned to the Centre's coffee terrace to network and further exchange views on the hybrid processes.

With KLRCA officially moving into its new premises, Bangunan Sulaiman on 25th August 2014 - the Centre's Talk Series is set to continue in one of the many state-of-the-art seminar rooms located at the historic Kuala Lumpur landmark. Do stay tune as a new dawn of exciting new talks are lined up for you.



22nd September 2014

Arbitration in Latin America - Challenges & Trends

Speaker : Mr Julio Bueno, Piheiro Neto Advogados

Moderator : Mr Thayanathan Baskaran,
Zul Rafique & Partners

The month of September brought along KLRCA's second Latin America themed talk in the space of three months. Geographic reach has been on the cards lately within the arbitration community - as interest in the developing South American segments begin to intensify.

Kicking off the first ever talk series session to be held at KLRCA's new premises, Bangunan Sulaiman - was Julio Bueno from Sao Paulo, Brazil. The insightful presentation touched on the growing complexity of Latin American international arbitration cases; the increasing number of arbitration involving multiplicity of parties, non-signatory parties, claims and cross-claims, and multi contract disputes; as well as the main pitfalls and the challenging jurisdictional matters that arbitrators face when confronted with complex disputes in Latin America.

The evening's proceedings came to a conclusion with a question and answer session that was moderated by Thayanathan Baskaran..

KLRCA SOFT LAUNCH AND WELCOMING OF 39 ESSEX STREET CHAMBERS TO BANGUNAN SULAIMAN

23rd September 2014



It was an evening to remember as the Bangunan Sulaiman, a gazetted heritage building located in the historical enclave of Kuala Lumpur; illuminated its surroundings with its bright lights, crisp and well manicured landscape and resplendent decorative ornaments to set the ideal tone for 'The Soft Launch of KLRCA's new premises'.

A group of around three hundred esteemed professionals from the arbitral and legal fraternity, locally and internationally attended the launch which also coincided with the opening of the 39 Essex Street Chamber's Malaysia Office in Bangunan Sulaiman. Guests were brought for a building tour to showcase the array of facilities that the newly refurbished 1920's Art Deco state-of-the-art building has to offer.





To signify the soft opening of the building and kick off proceedings for the evening, the Chief Justice of Malaysia, The Right Honourable Tun Arifin Bin Zakaria accompanied by other judges of the Federal Court, Court of Appeal and High Court of Malaya had gathered at the entrance to the lobby of Bangunan Sulaiman to cut a ribbon to mark the occasion. The dignitaries comprising of both judges and high officials from 39 Essex Street Chamber's were then taken for a personal tour by KLRCA's Director Professor Datuk Sundra Rajoo before being led to the newly constructed roof top pavillion which houses two fully functional seminar rooms accompanied by a lush garden themed courtyard.



With the courtyard filled, Datuk Sundra soon took stage to present his welcoming remarks before handing over the microphone to the Right Honourable Tun Arifin Bin Zakaria to deliver his keynote address for the evening. Upon sharing with the guests his admiration of the facilities and his hopes of seeing KLRCA becoming a central hub for arbitration in the region, Tun Arifin then handed the stage to 39 Essex Street's Joint Head of Chambers, Stephen Tromans QC to share a few words. With the opening of the Chambers' office in Bangunan Sulaiman, 39 Essex Street officially becomes the first British chambers to have a presence in Malaysia. Tromans expressed his delight at this historic landmark and went on to advocate continuous co-operation between all parties involved by saying, "We

are here to show our commitment to Malaysia and to continue to work ever more closely with our friends in the Malaysian legal community. That may be by way of co-counselling, and by offering what we believe is a good range of highly skilled and experienced arbitrators, adjudicators and mediators".

The evening's joyous proceedings continued well into the night as dignitaries and guests took the opportunity to catch up with familiar faces and expand their network through the many eminent arbitral and legal personalities who attended the launch. It was certainly an occasion to celebrate as the alternative dispute resolution scene in the country shapes up to play a larger role within the Asia region and subsequently beyond.



LAW COMMISSION OF INDIA REPORT ON AMENDMENTS TO THE INDIAN ARBITRATION AND CONCILIATION ACT 1996 AND THE MALAYSIAN PERSPECTIVE

by **Aastha Dua** (International Case Counsel, KLRCA)

The ever-increasing ties of trade and commerce between Malaysia and other South-East Asian nations have mandated that we keep abreast of the latest developments in arbitration law of our neighbouring jurisdictions. In this article, we highlight the changes recently suggested by the Law Commission of India, an advisory body to the Ministry of Law and Justice, to the law of arbitration in India; and see how the Malaysian Arbitration Act 2005 (amended in 2011) and the KLRCA Arbitration Rules (revised in 2013) have addressed those issues.

I. INTRODUCTION

The Law Commission of India was established in 1955 with the sole objective of recommending revisions to existing laws within the territory of India, designed to serve the changing needs of a pluralistic society.

Each Law Commission is appointed through a government order for a term of three years with distinct Terms of Reference. The Law Commissions are entrusted with the task of preparing reports in accordance with their Terms of Reference, which are then considered by the Ministry of Law and other concerned government departments, and are frequently submitted to the Parliament of India for its consideration.

The present (twentieth) Law Commission of India, established in 2012, was asked to, inter alia,

“A. Review/ Repeal of obsolete laws:

- ...ii. Identify laws which are not in harmony with the existing climate of economic liberalization and need change.*
- iii. Identify laws which otherwise require changes or amendments and to make suggestions for their amendment...*

C. Keep under review the system of judicial administration to ensure that it is responsive to the reasonable demands of the times and in particular to secure:

- ...ii. Simplification of procedure to reduce and eliminate technicalities and devices for delay so that it operates not as an end in itself but as a means of achieving justice...*

F. Revise the Central Acts of general importance so as to simplify them and to remove anomalies, ambiguities and inequities...

Keeping in view the aforementioned tasks entrusted to the Twentieth Law Commission of India (“the Law Commission”), it undertook a study for suggesting amendments to the Arbitration and Conciliation Act, 1996 (“the Indian Arbitration Act”), plagued by numerous ills, leading to an environment of mistrust in alternative dispute resolution in India. After years of careful deliberations involving all relevant stakeholders, the Law Commission submitted its final report (“the Report”) to the Indian Minister of Law and Justice in August 2014.

II. FINDINGS OF THE REPORT

A. Scheme of the Report

The Report consists of three chapters. Chapter I, entitled “Background to the Report” traces the history of arbitration

law in India, the scheme of the Indian Arbitration Act, and the many efforts of various departments of the government to amend and change the existing law.

Chapter II of the Report is titled “Introduction to the Proposed Amendments” in which the Law Commission proceeds to discuss in detail the chinks in the armour of the present arbitration environment in India along with a discourse on the suggested amendments to the Indian Arbitration Act.

Chapter III of the Report, “Proposed Amendments to the Arbitration and Conciliation Act, 1996” provides the actual text of the proposed amendments with a view to be submitted to the Parliament for conversion into a legislative bill.

B. Suggested improvements to the Indian Arbitration Act

i. Introduction

After a few pages of preliminary briefing, the Law Commission dives straight into the overwhelming waters of issues afflicting arbitration regime in India. The various problems tackled by the Report include the (lack of) institutional arbitration in India, exorbitant fees charged by ad-hoc arbitrators, the extent of judicial intervention in domestic and international arbitral proceedings, the power of arbitral tribunals to order interim measures, and neutrality of arbitrators, among many others.

ii. Institutional arbitration

The Law Commission’s concerns

- The minimal usage of institutional arbitration in India has disconcerted the Law Commission which explicitly laments in the Report the ubiquity of ad-hoc arbitrations. The Report notes that the Indian Arbitration Act does not promote the use of institutions which professionally aid and administer the arbitral process according to their own rules of procedure. To this end, the Law Commission has proposed an amendment to the Indian Arbitration Act providing for the judges of the High Courts and the Supreme Court of India, while exercising their power of appointment of arbitrators, to encourage the parties to submit their disputes to institutionalized arbitration.

- Recognizing the need of “emergency arbitrators”, the Report seeks to give the concept legislative sanction by broadening the definition of “arbitral tribunal” as given under the Indian Arbitration Act.

- The Report implores the Government to establish a body known as the Arbitral Commission of India with representation from all stakeholders of arbitration which could be entrusted with the task of spreading institutional arbitration in India.

The Malaysian perspective

- Malaysia, on the other hand, has a highly developed infrastructure of institutionalized arbitration, with the Kuala Lumpur Regional Centre for Arbitration (“the KLRCA”) being the preferred centre for domestic institutional arbitrations.

- The Malaysian Arbitration Act 2005 (amended in 2011) (“the Malaysian Arbitration Act”) which governs the law of arbitration in Malaysia gives explicit recognition to the KLRCA in terms of Section 13 “Appointment of Arbitrators” wherein the Director of the KLRCA is named as the default appointing authority, and has the power to take necessary measures including the power to appoint the arbitrator in situations enumerated below:

- when a party fails to appoint an arbitrator, or two arbitrators fail to appoint a third arbitrator, within thirty days of their respective appointments;
- where the parties fail to agree on a procedure to appoint the arbitrator or presiding arbitrator;
- where a party fails to act under the agreed procedure;
- where the parties or arbitrators are unable to reach an agreement under such procedure; and
- where a third party fails to perform its function under such procedure.

- With such support by the federal legislation, it is no surprise that institutional arbitration in Malaysia is thriving. The KLRCA has seen the number of cases under its wing grow from a total of 22 in the year 2010 to 240 in 2014. The statistics tell a tale of stupendous growth in the market.

- *Emergency arbitrators* The KLRCA felt the need to introduce provisions for emergency arbitrators last year in a bid to attune the arbitration regime in Malaysia to international standards. The KLRCA Arbitration Rules were revised in October 2013 (“the KLRCA Rules”) to provide for the appointment of emergency arbitrators. The emergency arbitrator so appointed would be empowered to determine all applications for emergency interim relief until the constitution of the proper arbitral tribunal. Schedule 2 and Rule 12 of the KLRCA Arbitration Rules provide that the emergency interim relief so granted by the emergency arbitrator would have the same effect as that of an award and would be binding on the parties.

- Under the KLRCA Arbitration Rules, the decisions of the emergency arbitrators are not appealable. They may, however, be modified, varied or vacated by the subsequent arbitral tribunal after review.

iii. Fees of arbitrators

The Law Commission’s concerns

- The “arbitrary, unilateral and disproportionate fixation of fees” by ad-hoc arbitrators, specially retired judges of the higher courts, has rightly concerned the Law Commission,

which notes that some mechanism to rationalize the fee structure of arbitrators must be adhered to if arbitrations in India are to be cost effective.

- To resolve this issue, the Report recommends a model schedule of fees based on the fee schedule fixed by the Delhi High Court Arbitration Centre. The Law Commission suggests the empowerment of High Courts in India to frame appropriate rules for fixation of fees for arbitrators in domestic, ad-hoc matters.

The Malaysian perspective

- The system of payment of fees to the arbitrators in the KLRCA, and also in other Malaysian arbitration institutions, is largely streamlined due to the existence of particular rules regarding the same.
- The KLRCA Rules provide for a Schedule of Fees that becomes applicable to the arbitration unless the arbitral tribunal and the parties agree otherwise within a period of 30 days from the date of appointment of the arbitral tribunal.
- The arbitral tribunal’s fees under the Schedule of Fees is calculated on an ad valorem basis depending on the amount of the dispute.

iv. Adjournments

The Law Commission’s concerns

- The Report notes that frequent and baseless adjournments are the order of the day in Indian courts, and unfortunately, in Indian arbitrations as well. In ad-hoc arbitrations, the dates of hearing are spread out over a long period of time, frequently going up to a number of years, which consequently leads to increase in costs, and more importantly, denial of justice to the parties concerned.

- The Report suggests that the onus is on the arbitrators to “eschew purely formal sittings, which are meant only for compliances.” The arbitrators ought to hear and decide the matters within a reasonable period of time. Similarly, the duty to refrain from seeking frivolous adjournments and leading “long winded and irrelevant evidence” lies upon the counsels to the parties.

The Malaysian perspective

- The time efficiency of the arbitration proceedings has been given top priority under the KLRCA Rules. Although there are no restrictions on the total time taken to complete an arbitration under the KLRCA Rules, certain mechanisms have been put in place to ensure that advantage cannot be taken of this flexibility by mischief of the counsels.
- Under Rule 10 of the KLRCA Arbitration Rules, the arbitral tribunal is empowered to conduct the arbitration matter in any manner that it considers appropriate and may also limit the time available for each party to present its case.
- Under Rule 11, the arbitral tribunal is required to render the final award in the arbitration matter within a period of 3 months from the date of delivery of the closing oral submissions or written statements, as the case may be.
- Extensions of time are allowed only after specific approval of such extension by the Director of the KLRCA.
- Part II, Article 25 of the KLRCA Arbitration Rules provide

that the periods of time fixed by the arbitral tribunal for the communication of written statements, including the statement of claim and statement of defence, shall not exceed 45 days.

v. Judicial intervention

The Law Commission's concerns

- The Indian Arbitration Act, which is based on the UNCITRAL Model Law, seeks to remove the arbitration process from judicial intervention. However, to this end, the Indian Arbitration Act has been regrettably unsuccessful. The balance that must be struck between judicial intervention and judicial restraint in arbitration proceedings has long been lost in procedural wilderness.
- The Law Commission notes that there are two major reasons for delays caused to the arbitral process through intervention by the judiciary. One, because the courts in India are already overburdened and cannot sustain the short timelines required for resolving commercial disputes, and two, the limitations to judicial intervention as set out in the Indian Arbitration Act are not extensive, giving rise to a number of litigations relating to arbitration proceedings.
- The Report has recommended that the courts should follow the example of the Delhi High Court where dedicated benches exist for the hearing of arbitration related cases.
- An important amendment suggested by the Law Commission is related to the delegation of the power of appointment of arbitrators by the judges of the High Courts in India. The Law Commission has proposed that the existing scheme of power of appointment being vested in the Chief Justice be changed to being vested in the High Court or the Supreme Court, clarifying that the delegation of such power be not deemed a judicial act. This would provide for incentive to delegate such powers of appointment to “specialized, external persons or institutions”.
- The Report has also proposed that the courts ought to dispose of applications relating to setting aside of awards, which at present are kept pending for many years, expeditiously and in any event, within one year from the date of service of notice.
- In relation to the inclusion of the ground of patent illegality within the meaning of “public policy” to set aside arbitration awards, the Law Commission has proposed to restrict its usage only in the case of domestic arbitrations with seats in India.

The Malaysian perspective

- Fortunately for the stakeholders in the Malaysian arbitration industry, the courts of law in Malaysia have been highly supportive of the arbitral process and have adopted a policy of carefully exercised intervention in arbitration proceedings.
- The trend in the courts of Malaysia, as seen by many recent cases of the High Courts and the Federal Court, is one of minimal curial intervention. In the landmark case of *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83, 98, the Bench, including Hamid Sultan, JC stated that curial intervention would only be permitted in cases of “patent injustice”. Reiterating this stand, Abdul Malik Ishak, JCA, in *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 7 CLJ 785, 799-804 held that court intervention would be limited to those cases

where the courts exercise their “inherent jurisdiction”.

- The Malaysian courts only intervene to set aside the arbitral awards where the party seeking such an order brings its case within the defined parameters of Sections 37 and 42 of the Malaysian Arbitration Act.

- In terms of legislative changes, Section 8 of the Malaysian Arbitration Act, entitled “Extent of Court Intervention” was amended in 2011 to read,

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

Prior to the amendment, the section read in negative terms and started with, “unless otherwise provided,” the words which have now been deleted. The explanatory note to the Bill pertinent to this Section 8 stated that the purpose of this amendment was to limit court intervention to situations explicitly stated in the Malaysian Arbitration Act and to discourage the use by the courts of their inherent powers.

- The KLRCA also took measures to ensure that court intervention in arbitration measures is limited to certain peculiar situations. As mentioned earlier, the KLRCA released its revised Arbitration Rules in October 2013. In the new Rules, the KLRCA has inserted innovative provisions that provide certainty and minimize judicial intervention in the arbitral proceedings.

- Rule 1 has been amended to state that,

“Rule 1 General

1...ii) Where the seat of arbitration is Malaysia, Section 41, Section 42, Section 43 and Section 46 of the Malaysian Arbitration Act 2005 (Amended 2011) shall not apply.

Thus we can see that item ii) of Rule 1.1 provides for opting out of Sections 41, 42, 43 and 46 of the Malaysian Arbitration Act. These sections are included in Part III of the Malaysian Arbitration Act and provide for the right of the parties to apply to the High Court to determine preliminary points of law, any question of law arising out of an award, and to extend the time for making an award in an arbitration proceeding. The amended Rule 1 of the KLRCA Arbitration Rules does away with these provisions to add finality and certainty to an arbitral proceeding by minimizing judicial intervention and increasing party autonomy when the seat of arbitration is in Malaysia. The purpose of inserting this provision in the KLRCA Arbitration Rules is to bring the Rules closer to the UNCITRAL Model Law where appeals on points of law are not allowed.

- The provision relating to emergency arbitrator, as explained earlier, is also aimed to reduce the need for court intervention even before the constitution of the proper arbitral tribunal. For orders relating to interim measures, for example, preservation of assets and security for costs, the parties now do not need to approach the court and can get such orders from the emergency arbitrator appointed under the KLRCA Arbitration Rules.

vi. Powers of tribunal to order interim measures

The Law Commission's concerns

- Under Section 17 of the Indian Arbitration Act, the arbitral tribunal is empowered to order certain interim measures of protection to ensure that the parties do not need to approach the courts of law, for example injunctions, appointment of receivers etc.

- However, such interim orders of the arbitral tribunal have not been endowed with the enforcement mechanism available to an award, and as such cannot be enforced as an order of the court.
- To resolve this glaring defect, the Law Commission has recommended an amendment to the Indian Arbitration Act which would result in having such orders enforced like an order of the court.

The Malaysian perspective

- Section 19 of the Malaysian Arbitration Act outlines the power of the arbitral tribunal to order interim measures and states in broad terms that the parties can apply to the tribunal for interim orders.
- Section 19(3) goes on to state that the sections in the Malaysian Arbitration Act relating to recognition and enforcement of awards shall also apply to all orders made by the tribunal under Section 19 as if it were an award.

- The definition of “award” in Section 2 of the Malaysian Act reads as follows,

“award” means a decision of the arbitral tribunal on the substance of the dispute and includes any final, interim or partial award and any award on costs or interest...” (emphasis added)

So we can see that the Malaysian Arbitration Act provides adequately for the enforcement of interim awards and does not suffer from the defect as in the Indian law.

- Rule 7.1 of the KLRCA Arbitration Rules in conjunction with Part II, Article 26 also provides for grant of interim relief and states that the arbitral tribunal may grant interim measures at the request of a party.
- In fact, to facilitate the grant of emergency interim measures, the definition of “arbitral tribunal” under Rule 4.2 of the KLRCA Arbitration Rules was amended to include an emergency arbitrator. Rule 4.2 now reads,

“Arbitral tribunal” means a sole arbitrator or a panel of arbitrators and includes an emergency arbitrator appointed pursuant to Schedule 2.”

Therefore, the emergency interim measures granted by the emergency arbitrator are given the same protection as an interim award of a proper arbitral tribunal.

vii. *Neutrality of arbitrators*

The Law Commission’s concerns

- Accepting the fact that having independent and impartial members of the arbitral tribunal is a prerequisite for a

successful arbitration, the Report deplores the lack of conditions that expressly describe the justifiable doubts which can be raised as to the impartiality of the arbitrator. The test laid down by the Indian judiciary states that, it is not whether there is any “actual bias”, but whether circumstances exist which give rise to any “justifiable apprehension of bias”.

- The Law Commission has suggested remarkable amendments to the Indian Arbitration Act relating to the requirement of specific disclosures by the arbitrator even before his formal appointment in the particular matter. The Report has borrowed from the Red and Orange lists of the IBA Guidelines on Conflict of Interest in International Arbitration, regarding the existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Report also provides that, if circumstances as elaborated in the Red List of the IBA Guidelines exist, then the arbitrator will be rendered ineligible for appointment, notwithstanding any prior agreement between the parties to the contrary.

The Malaysian perspective

- The KLRCA has implemented certain measures to ensure that the arbitrators appointed in the tribunal are impartial and independent and there is no compromise to the justness of the arbitral proceedings.
- Before the formal appointment of an arbitrator to conduct the proceedings, the arbitrator acknowledges that he is impartial and has no interest in the subject matter of the proceedings or any relation to the parties by signing a formal “Statement of Independence” and a “Note on General Duties of Arbitral Tribunal”. The arbitrator is also provided with a Code of Conduct and Practice Guidelines 4 and 18 issued by the Chartered Institute of Arbitrators.

viii. *Others*

Apart from the abovementioned, the Report also tackles issues of costs, interest on sums awarded, arbitrability of fraud and other complicated issues of fact, automatic stay of enforcement of award upon admission of challenge, among many other general topics.

III. CONCLUSION

The 246th Report of the Law Commission of India on Amendments to the Arbitration and Conciliation Act 1996 is a comprehensive document that ruthlessly identifies the myriad concerns that deter the public from using arbitration as a means of resolving conflict, and applies resolute logic to propose means of resolving such concerns. It is a step in the right direction, however it remains to be seen if the government of India takes proactive measures to convert these recommendations into the law of the land.

From the above, it is clear that India faces many of the same challenges as stakeholders in Malaysia and the Asian region. However, it is important to note how those issues have been successfully dealt with. The KLRCA, in its current collection of Arbitration Rules, provides for many of the issues referred to herein. This has been complemented by the approach of the Government as well as the judiciary. The Arbitration Rules of the KLRCA makes provision for appointment of emergency arbitrators, limited periods of time for the appointment of arbitrators by the parties and the Director of the KLRCA, default provisions as to fees of the arbitrators and other costs involved, and interim relief by the tribunal, among others. As such, the KLRCA has addressed, through frequent updates to its Arbitration Rules, delays to the arbitration process and the costs of arbitration faced by the parties involved.

Guerrilla Tactics in International Arbitration

Editors:
Publisher:
Publishing Year:
ISBN:

Günther J. Horvath & Stephan Wilske
WOLTERS KLUWER
2013
978-90-411-4002-9



By Dr Thomas R. Klotzel

It was in 2005, when I read for the first time of a “terrorist or arbitration guerrilla” in a paper prepared by Michael Hwang for the Liber Amicorum in honour of Robert Briner. Since then, “guerrilla tactics” has become a buzzword in international arbitration to describe procedural misconduct ultimately aimed to derail the arbitration proceedings by exploiting certain inherent weaknesses of the consensual arbitral process in comparison to traditional state court procedures. It is the merit of the editors Günther J. Horvath, Vienna (Austria), and Stephan Wilske, Stuttgart (Germany), who are both renowned arbitration practitioners with a strong international background, to have gathered an august band of contributors to address a topic of great practical importance to the international arbitration community.

The book is the 28th title in the series International Arbitration Law Library. It consists of six clearly structured chapters and starts with developing the categories of guerrilla tactics. Chapter 2 tackles the issue by looking at measures to counter guerrilla tactics from the perspective of counsel, the arbitral tribunal as well as institutional powers to ensure proper case management. The particularities when state entities are a party to arbitration proceedings are also addressed as is the role of state courts in assisting arbitral tribunals confronted with guerrilla tactics. Chapter 3 gives an excellent overview on experiences drawn from the different law families, i.e. common law, civil law and the post-socialist legal systems including pertinent aspects from Asian, African, Arabic-Islamic legal systems including Central and Eastern Europe, South-Eastern Europe and Turkey. Robert G. Volterra and Peter B. Rutledge show that international courts and institutions are not immune to guerrilla tactics. The same applies to the Court of Arbitration for Sport at Lausanne. The involvement of bar associations to exercise their disciplinary powers and its potential conflict with usual confidentiality obligations are addressed in Chapter 4 together with the use of diplomatic channels mainly in the field of ICSID arbitrations. Chapter 5 analyses the interplay of guerrilla tactics and international ethical standards or rules for counsel involved in the arbitral process. The closing Chapter 6 written by the editors gives a conclusion and outlook to effectively combat guerrilla tactics

from different angles by the application of different means. Each chapter is accompanied by a rich apparatus of footnotes giving broad references to doctrine and case law from all over the world. At its end, the book has five Appendices compiling existing international principles and ethical standards, such as the Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals as well as the New York Rules of Professional Conduct. A Table of Cases completes this outstanding publication.

In her contribution (§ 3.02 [A]), Hagit Elul looks at the fonts of arbitration terrorism which stems from the professional responsibility of an advocate to vigorously defend and zealously pursue the interests of the client. “Rambo lawyering” and the commercialization of the law resulting in a “win-at-all-costs” attitude lie at the heart of the phenomenon of guerrilla tactics. Whether the introduction of codes of conducts and other “para-regulatory” texts, the “sense and nonsense” of which has recently been the subject matter of a conference of the Swiss Arbitration Association in Bern will effectively foster international arbitration, remains to be seen. “Para-military forces” in form of standards against “arbitration guerrillas” disguised as zealous advocates - what a user hostile war theater! The book displays an impressive collection of war stories, anecdotes and hard cases combined with practical suggestions to control and maintain the integrity of the arbitral process. It is an invaluable source for setting alarms and gives useful guidance to all arbitration practitioners confronted with guerrilla tactics irrespective of the role they may have in an arbitral process exposed to abusive or even criminal activities by a participant. The risk that the book itself may be abused as a source of inspiration for the unexperienced arbitration lawyer exists. However, this is by far outweighed by the benefits for the practitioner who is enabled to better recognize guerrilla tactics and devise effective measures to counter them.

The Editors must be congratulated to this extraordinary work which should find its place into the library of every practitioner active in the area of international arbitration.

About The Contributor

Dr. Jur. Thomas R. Klötzel is an Attorney-at-Law and Partner of the law firm Thümmel, Schütze & Partner, Stuttgart; Registered Foreign Lawyer, Singapore, with Thümmel, Schütze & Partners LLP. His areas of specialization include knowledge of foreign legal systems comprise international procedural law, commercial arbitration, Convention on the International Sale of Goods, construction law, law of guarantee and Letters of Credit, joint ventures, concession and consortium agreements, international distribution law, licensing and technology transfer, patent litigation as well as elements of English law and its developments in India, Singapore and Malaysia. Dr. Klötzel has also handled cross-border M&A-transactions.



DEVELOPMENTS IN MALAYSIA & THE INTERNATIONAL FRONT

by **Adebayo Folahan Ajayi** (International Intern, KLRCA), **Andriy Stetsenko** (International Intern, KLRCA), **Smrithi Ramesh** (International Case Counsel, KLRCA) & **Laura Jimenez Jaimez** (Senior International Case Counsel, KLRCA)

Thai-Lao Lignite (Thailand) Co., Ltd.
& Hongsa Lignite (Lao Pdr) Co.,
Ltd., (Plaintiffs) v *Government of the Lao
People's Democratic Republic* (Defendant)

Court:

United States District Court, S.D. New York

Case Citation:

2014 WL 476239 (S.D.N.Y.)

Date of Judgment:

6th February 2014

Facts

This case arose from an arbitration award rendered in an arbitration seated at the Kuala Lumpur Regional Centre for Arbitration. The arbitration arose from a Project Development Agreement (PDA) which provided for mining operation rights granted by the Government of Laos to the two Plaintiff companies. The substantive law governing the contract was the law of New York. The Defendant terminated the contract and the Plaintiffs brought claims for improper termination and damages. A \$57million award was passed in favour of the Plaintiffs and confirmed in 2011. The Second Circuit Court of Appeals affirmed the Judgment and the United States Supreme Court denied certiorari. However, the Malaysian High Court in 2012 vacated the award on the grounds that it was not an arbitrable dispute.

The Defendant, meanwhile, initiated the proceedings to set aside the Award before the Malaysian High Court. The High Court set aside the Award and ordered the dispute to be re-arbitrated before the new arbitral tribunal. The Malaysian Court of Appeal affirmed the judgement. The Defendant filed a petition with the SDNY to vacate its previous judgement granting the Plaintiffs' motion to confirm the award.

Issue

The main issue at hand was the scope of the US Court to enforce an arbitral award made in another State which has also vacated that award. In addressing this issue, the Courts delved into the proper application of Art. V-1(e) of the New York Convention, whether they should refuse enforcement of an award previously set aside at the place of arbitration and the circumstances in which such award should still be enforced.

Held

The court vacated its judgement under the Art.V-1 (e) of the New York Convention. Plaintiff's request to require Defendant to post security as a condition for entry of any order vacating the judgment was denied.

The Courts analysed the existing precedents and position of law. It placed reliance on the *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C.Cir.2007) confirming that under Article V-1(e) of the New York Convention, Courts will usually not recognize an award if the State in which the award was made has vacated it. Then the Court considered what the exceptions to the general standard were. In doing so, the Court first ruled that the permissive word "may" gives it discretion to enforce even if it has been set aside. However it was discussed that this discretion is to be narrowly construed. The Court relying on *TermoRio* case, stated that discretion can be exercised when annulment of the award by the court of the seat is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought" or violates "basic notions of justice".

Applying the standard, the Court held that Plaintiff's arguments relate to weaknesses of the proceedings before the Malaysian courts but none of them amounts to "extraordinary circumstances" or a violation of "basic notions of justice." The motion to vacate was granted.

Impact

This judgment sought to reiterate the standard laid down in *TermoRio* applicable while enforcing an arbitral award previously annulled by the competent court at the seat of arbitration. It is interesting to note however that the Courts did not delve into the issue of contrast between foreign annulment judgment and decision of the forum where enforcement is sought. There is also no discussion of the issue of preclusion. As the US Courts had first ruled on arbitrability, should there be an exclusive effect accorded by the Malaysian Court? The Plaintiff has appealed and therefore the real impact analysis will be possible only upon the completion of the appeal.

FirstLink Investments Corp Ltd (Plaintiff)
 V
GT Payment Pte Ltd and others
 (Defendants)

Court:

Singapore High Court

Case Citation:

[2014] SGHCR 12

Date of Judgment:

19th June 2014

Facts

The Plaintiff Company, incorporated in Singapore registered itself on the First Defendant's website agreeing to be bound by the contract. The Second and Third Defendants herein are a software developing company and the managing director of the First Defendant respectively. The First Defendant suspended the Plaintiff's account pending investigation, when a personal payment was made using the account which contravened the terms. The Plaintiff claimed the monies transferred was proof of funds and subsequently a loan to the Defendants. Therefore, the Plaintiff commenced the court action against the Defendants. The Agreement, however, contained an arbitration clause referring to the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). The Defendants, however, applied for a stay of the court proceedings relying on the arbitration clause in the Agreement. The Plaintiff claimed that the clause is invalid as it is null and void, inoperative or incapable of being performed.

Issue

The operative issue was to determine the applicable standard for determining the validity of an arbitration agreement for the purposes of a stay of court proceedings.

Held

The Singapore High Court held that the Arbitration clause is valid and enforceable and governed by Swedish Law. In determining this, the Court also addressed the question of substantive law in case the provision is not expressly provided in the Agreement.

The Court reiterated the concept of "presumptive validity" of an arbitration agreement. The Court rationalized its departure from the established three stage inquiry as laid down in *SulAmerica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A.* [2012] 1 Lloyd's Rep 671. In determining substantive law, Courts have considered: (i) the express choice of law by the parties; (ii) the implied choice in the absence of an express choice; and (iii) where the parties had not made any choice, the proper law would be the law with which the arbitration agreement has its closest and most real connection. The Singapore High Court departed from the English position only to the extent to state that the English Court of Appeal created a rebuttable presumption that the express substantive law of the contract would be taken as the parties implied choice of the proper law governing the arbitration agreement. The Singapore High Court took the position that the implied choice of the parties is the law of the arbitration seat rather than the substantive law governing the Agreement. However it was not a generic position but one to be determined on the basis of facts of each of the cases.

Impact

This case is the first marked departure from the three stage inquiry of English law. It establishes the possibility of a new applicable standard for determining the validity of an arbitration agreement. It takes into consideration for the first time the possibility of breakdown of commercial relationships before the initiation of the dispute resolution process. Commercial parties should bear in mind the importance of choosing an arbitration clause and a jurisdiction clause. Failure to carefully choose the two could result in uncertainty, ambiguity and many unintended consequences.

DCEIL IMEX Bhd

V

Pembinaan Punca Cergas Sdn Bhd

Court:

High Court Malaya, Kuala Lumpur

Judgment By:

Nallini Pathmanathan J

Case Citation:

[2013] 1 Lns 591

Date of Judgment:

28th August 2013

Facts

The Appellant (Dceil Imex BHD) commenced Arbitration against the Respondent (Pembinaan Punca Cergas SDN BHD) under the Arbitration Act 2005 in relation to a dispute between the parties under a sub-contract. In the arbitration, the Appellant challenged the jurisdiction of the arbitrator but the arbitrator dismissed the challenge.

The Appellant filed an appeal under Section 18(8) of the Arbitration Act 2005 challenging the decision of the arbitrator on his jurisdiction. The High Court overturned the arbitrator's decision finding that the commenced arbitration and the appointment of the arbitrator was null and void therefore the arbitrator had no jurisdiction to continue with the Respondent's counterclaim.

The Respondent sought for and obtained leave to file an application to join the Appellant in a civil suit earlier filed by an assignee of the Appellant. In response, the Appellant applied to strike out the Respondent's counterclaim on the basis that the limitation period had expired. The Respondent then filed this application pursuant to Section 30(5) of the Limitation Act 1953 seeking to exclude the period between the date of commencement of the arbitration and 13 October 2010, date when the arbitration was declared null and void, for the purposes of computation of the limitation period for their counterclaim.

Issues

The main issues before the High Court was whether it had become 'functus officio' as regards the application of the Respondent since it had decided that the commenced arbitration and the appointment of the arbitrator was null and void. Moreover, whether Section 30(5) of the Limitation Act could be invoked in conjunction with a High Court Order made pursuant to Section 18(8) of the Act.

Held

The Court found that the policy behind Section 30 (5) of the Limitation Act is to assist a litigant who has initiated arbitration proceedings and subsequently that the arbitration had come to an end or ceased to exist, but at such a late stage that any attempt to re-initiate proceedings would result in a finding that the claim is time-barred under the Limitation Act.

Furthermore, the Court held that Section 30 (5) of the Limitation Act serves to effectively 'cut out' the entire time period of the arbitration as if it had not occurred, such that the litigant is left with as much time as he originally had at the onset of the arbitration for the purposes of computing time under the Limitation act in relation to his claim.

In regards to the second issue, the Court held that section 30(5) of the Limitation act presently refers to all instances of 'arbitrations' which are held to have ceased to exist.

Impact

This decision ensures that the Limitation Act would not work out an injustice for a disputant party who has been prevented from arbitrating its dispute by an Order of the court. The decision in this case demonstrates the importance of the exception in section 30(5) of the Limitation Act. In the absence of such an exception, disputing parties would be reluctant to submit their disputes to arbitration because in the event that the arbitration agreement/proceedings is invalidated, they would be foreclosed from litigating the same dispute before the courts.

Once arbitration has commenced, time ceases to run for the purposes of the Limitation Act. Therefore, in the calculation of time for the purposes of the Limitation Act, the entire duration of the arbitration including applications to court are excluded.



klrca EVENT CALENDAR

SAVE THE DATE!

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

OCTOBER

DATE : 30th October 2014
EVENT : KLRCA Talk – by David Bateson (Enforcement of Arbitral Awards in the Region)
ORGANIZER : KLRCA
VENUE : Bangunan Sulaiman

NOVEMBER

DATE : 4th November 2014
EVENT : KLRCA @ Bangunan Sulaiman – Official Launch by the Prime Minister of Malaysia
ORGANIZER : KLRCA
VENUE : Bangunan Sulaiman

DATE : 10th November 2014
EVENT : An Introduction to ICC Arbitration (Seminar)
(Speakers: Professor Datuk Sundra Rajoo, Rajendra Navaratnam, Chang Wei Mun, Vinayak Pradhan, Shanti Mogan & Tan Sri Dato' Cecil Abraham)
ORGANIZER : KLRCA
VENUE : Bangunan Sulaiman

DATE : 11th November 2014
EVENT : KLRCA Talk – by Professor Philip Yang, Honorary Chairman of HKIAC & KLRCA Advisory Board Member
(Important Contribution of Maritime Arbitration Cases to English Arbitration Law & Commercial Law in the Past 30 Years)
ORGANIZER : KLRCA
VENUE : Bangunan Sulaiman

DATE : 20th November 2014
EVENT : ICSID 101 : ICSID Practice & Current Trends in Investment Arbitration
ORGANIZER : KLRCA & International Centre for Settlement of Investment Disputes (ICSID)
VENUE : Bangunan Sulaiman

DATE : 27th November 2014
EVENT : KLRCA Talk – by Chan Leng Sun (Arbitrability: The Limits of Arbitration)
ORGANIZER : KLRCA
VENUE : Bangunan Sulaiman

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