KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

Newsletter #19 / Jul–Sept 2015

IN THE SPOTLIGHT:

Investor-State Dispute Resolution

CIPAA

KLRCA ADJUDICATION TRAINING PROGRAMME

14–18 NOV 2015

8.30am-6.00pm

Seminar Room 1
Kuala Lumpur Regional Centre for Arbitration
Bangunan Sulaiman, Jalan Sultan Hishamuddin
50000 Kuala Lumpur

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

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

UNIT 1 The Application of Statutory Adjudication to the Construction Industry
Enables the participants to acquire knowledge and develop a better understanding of adjudication and the effects of the Construction Industry Payment and Adjudication Act (CIPAA) 2012 on the construction industry.

UNIT 2 The Practice & Procedure of Adjudication under the CIPAA
Gives participants a deeper knowledge of the important provisions of CIPAA and understand the necessary requirements of the adjudication process.

UNIT 2A CIPAA Regulations
Introduces participants to the Regulations of the Act which will give full effect and the better carrying out of the provisions of CIPAA 2012.

UNIT 3 Fundamentals of Construction Law
Introduces the participants to the Malaysian Legal System and provides the basic knowledge of construction law, which includes basic concepts of the law of contract, tort and evidence.

UNIT 4 The Construction Process
Introduces the participants to the basic knowledge of the construction process in particular procurement, processes and contractual arrangements.

UNIT 5 Writing Adjudication Decisions
Provides participants the skills necessary to write an adjudication decision in accordance with the provisions in CIPAA.

CPD POINTS

Bar Council Malaysia	*pending approval*
Board of Engineers Malaysia (BEM)	*pending approval*
Board of Architects Malaysia (LAM)	*pending approval*
Construction Industry Development Board (CIDB)	*20 CCD points*
Land Surveyors Board	*5 CPD points*
Board of Valuers, Appraisers and Estate Agents Malaysia (IPPEH)	*pending approval*
Board of Quantity Surveyors Malaysia (BQSM)	*pending approval*

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For more information please contact
Peter Fong, Deputy Head of Business Development
at **03 2271 1000** or email **cipatraining@klrca.org**

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Director's message

Dear distinguished friends,

Welcome to the third edition of the KLRCA Newsletter for the year 2015 as we find ourselves approaching the tail end of what has been an absorbing and remarkable year. Building on from the Centre's eventful first half of the year, the past quarter has been filled with a robust yet harmonious balance of back-to-back ADR related events that the KLRCA has organised and taken part in.

We started the month of July, journeying with our Muslim brothers and sisters as they observed the remaining weeks of the holy month of Ramadhan that culminated with the worldwide celebration of *Eid al-Fitr.* Several evening talks were held at an earlier time slot to ensure our friends could head back in time to break fast with their loved ones. The Centre also established a new Investment Treaty Arbitration and International Law department that is being headed by an experienced practitioner who recently joined us from London.

As such, you will notice a reoccurring theme in this quarter's edition; 'A Spotlight on Investor-State Dispute Resolution'. Following through from KLRCA's successful evening talks and the setting up of this new department, the Centre recently launched a new series in the month of August. Headlining the inaugural edition of this new investor-state dispute resolution focused series, "In The Seat: 60 Minutes" was Loretta Malintoppi. Her excellent presentation can be found in the form of a detailed and well-articulated article under the highlight section of this newsletter. Also taking place in August was the 'International Conference on Arbitration Discourse and Practices in Asia (ICAAD) 2015', that saw numerous scholars and practitioners from across the globe coming together to present research papers, explore and deliberate on current ADR issues.

The momentum picked on and led to KLRCA's busiest month of the year – September. Kicking off a chain of events was the world's first Diploma in Islamic Banking and Finance Arbitration Course, a joint effort between The Chartered Institute of Arbitrators (CIArb) and the Global University of Islamic Finance (INCEIF). Nestled in the midst of this course was the signing ceremony between KLRCA and CIArb that will see the latter launch their Asian Directorate Office in Bangunan Sulaiman, in the near future. Our editorial team, made the most of this opportunity by making CIArb Director General, Anthony Abrahams our interviewed personality of this quarter, as he sheds some light into the signing of the collaboration agreement and reviews CIArb's Centenary Celebrations. The Centre then teamed up with the Inter-Pacific Bar Association (IPBA) to host the inaugural IPBA Arbitration Day 2015. It continued to be a month of many firsts, as we wrapped up an industrious third quarter by rolling out the maiden edition of KLRCA's GST Guidelines, Practice and Procedure (Arbitration and Adjudication) Workshop.

In this quarter's newsletter, you will also find an insightful article by one of Malaysia's most influential and acclaimed author of legal books; Justice Datuk Dr Haji Hamid Sultan Bin Abu Backer, Judge, Court of Appeal Malaysia – as he shares with us a preview chapter from his upcoming book on International Arbitration set to be published in early 2016.

As we march on into the final quarter of this year, there is plenty more on offer in the ever-growing world of ADR. Stay tuned, as we continue to team up with famed institutions and personalities to bring you the best talks, articles and certification programmes that the industry can offer.

Until the next issue, happy reading.

Datuk Professor Sundra Rajoo
Director of KLRCA

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

Visitor's gallery

↙ Visit by **KDU University College** (Law Faculty)

9th July 2015

↙ Visit by **Monash Australia** (Summer Law Programme)

4th August 2015

↗ Visit by **Korean Commercial Arbitration Board** (KCAB)

20th July 2015

↙ Visit by **International Islamic University Malaysia** (Moroccan Delegates)

11th September 2015

↗ Visit by **Perdana University**

9th September 2015

_NEWS

CIArb Collaborates with KLRCA to Launch Asian Directorate Office

8th September 2015

Kuala Lumpur, 8 September – The Chartered Institute of Arbitrators (CIArb) and the Kuala Lumpur Regional Centre for Arbitration (KLRCA) have signed an agreement declaring their commitment to launching a CIArb Asian Directorate Office at KLRCA's premises in the prestigious Bangunan Sulaiman.

This is to be the first Regional Centre for CIArb outside London, which will assist both members and branches.

The collaborative agreement signed is focused on establishing a basis upon which both CIArb and the KLRCA may explore areas for co-operation in respect of the use of services provided by the KLRCA and the CIArb to both international and domestic parties. The agreement will also see both parties jointly organising seminars, conferences and educational programmes on arbitration and alternative dispute resolution from time to time.

↗ *From Left to Right:* Anthony Abrahams *(Director General of CIArb)*, Camilla Godman *(Regional Director for the Far East / Australasia)*, Datuk Professor Sundra Rajoo *(KLRCA Director and Deputy President of CIArb)*, Professor Dr Nayla Comair-Obeid *(Vice President of CIArb)*, Rammit Kaur *(Head of Legal Services, KLRCA)*

This agreement is timely given the continued growth of arbitration in the Far East which has increased the possibility for the use of Asian centres as seats and venues for commercial and investor state dispute arbitrations, given their geographic proximity and cultural familiarity to Asian parties.

Camilla Godman, Regional Director for the Far East and Australasia commented, "We are very excited to be launching CIArb's first regional office outside the United Kingdom at the KLRCA, enabling us to increase our offering to current members and future members in the Far East and Australasia. This is a significant milestone and we will continue to see ADR go from strength to strength in this region. We are grateful to the KLRCA and Datuk Sundra for giving us this opportunity".

Professor Datuk Sundra Rajoo, Director of KLRCA and current Deputy President of CIArb added, "This strategic alliance will undoubtedly create a dynamic synergy that will spark a greater frontier for the ADR landscape in this region".

CIArb Director General, Anthony Abrahams, concluded, "Twenty five percent of our membership is within this particular region. This region is a dynamic region which lends itself to a Regional Directorate. Looking forward to the future, I expect this region to grow exponentially as we provide resources to the branches and to the whole region for its development".

_PRESS RELEASE

Director of the Kuala Lumpur Regional Centre for Arbitration awarded honorary degree

KLRCA WOULD LIKE TO CONGRATULATE ITS DIRECTOR, DATUK PROFESSOR SUNDRA RAJOO ON HIS RECENT RECOGNITION OF BEING CONFERRED AN HONORARY DOCTORATE OF LAWS FROM THE LEEDS BECKETT UNIVERSITY, UNITED KINGDOM

23rd July 2015

Datuk Professor Sundra Rajoo, the Director of the Kuala Lumpur Regional Centre for Arbitration, was conferred an Honorary Doctorate from the Leeds Beckett University.

A former President of the Asia Pacific Regional Arbitration Group and recently elected President of the Chartered Institute of Arbitrators (CIArb) for the year 2016, Sundra is a chartered arbitrator and an advocate and solicitor of the High Court of Malaysia (Non Practising).

He holds a Masters degree in Construction Law and Arbitration from Leeds Beckett and, in addition to lecturing at a number of universities worldwide; he has also authored and co-authored a wealth of publications.

Sundra was awarded an Honorary Doctorate of Laws by the School of Built Environment and Engineering on July 23 for his contribution to law.

Upon receiving the honour from Sir Robert Murray, the university's Chancellor, he said: "My days in higher education were among my most memorable. It was a time of significant change, social revolution and meteoric expansion in Higher Education. I became part of the buzzing community at Leeds. A community that was full of exuberance, solidarity and fearlessness to reach the upper echelons of their respective fields."

"It was then that I first understood how many of one's achievements come from the inspiration, collaboration and support of many other people, colleagues and friends."

Speaking to the graduating students, he added: "Your professors have equipped you with the most powerful instrument on earth. They have taught you how to think, to analyze and keep learning all the rest of your lives. You have been cultivated and have been educated. Go forth and create something. Improve something. Set positive precedence for posterity. Change peoples lives for the better. Change the world."

A winner of the Annual Prize from the North-East Branch of The Chartered Institute of Arbitrators, Sundra has addressed many different types of disputes over a range of subject matters. He has degrees in five different academic disciplines spanning 'Housing, Building and Planning', 'Architecture', 'Town Planning', 'Construction Law and Arbitration' and 'Philosophy in Law', and has served the Malaysian arbitral landscape with great distinction.

Leeds Beckett University Vice Chancellor, Professor Susan Price, said: "Sundra Rajoo's passionate involvement and ceaseless contribution towards the alternative dispute resolution system in his native country has made his name synonymous with the renaissance of Malaysia's arbitration landscape in recent years. We are delighted to recognise Sundra's contribution to law with this Honorary Doctorate."

The ceremony took place at the University's Headingly Campus.

_NEWS

10th LawAsia International Moot Competition *(National Rounds)*

5th–6th September 2015

The Malaysian National Rounds for the 10th LAWASIA International Moot Competition was held from the 5th to 6th September 2015 at KLRCA's Bangunan Sulaiman. The centre is delighted to have continued its association and endorsement of this annual spectacle that showcases the future of Malaysia's legal industry.

A total of 25 teams consisting of 75 law students participated in the two-day competition. This year's challenging moot problem required the competitors to arbitrate a hypothetical dispute over a statue of great antiquity with origins in Nepal which found its way to the Australian Museum in Sydney and now on loan to the National Museum in Kuala Lumpur, Malaysia. The mooters had to resolve what laws or legal principles would establish Nepal's right to demand the return of the statue or Australia's right to retain it: Australian law, Nepalese law, International law or UN Conventions.

The team from Advance Tertiary College emerged as The Champion Team with team member Ms Lee Mei Xian winning The Mah Weng Kwai Challenge Trophy for Best Mooter.

_EVENTS

International Conference on Arbitration Discourse and Practices in Asia (ICAAD) 2015

20th–21st August 2015

↘ *From Left to Right:* Professor Vijay Bhatia, Professor Dr Azirah Hasim, Datuk Professor Sundra Rajoo

The Centre for ASEAN Regionalism University of Malaya (**CARUM**), Asia-Europe Institute (**AEI**) and the Kuala Lumpur Regional Centre for Arbitration (**KLRCA**) recently hosted an International Conference on Arbitration discourse and practices. Numerous scholars and practitioners from across the globe and from different disciplinary and profession backgrounds came together to present research papers, explore and deliberate the interrelations between discourses and practices in the field of arbitration in Asia.

KLRCA's Director, Datuk Professor Sundra Rajoo and Director of the Centre for ASEAN Regionalism University of Malaya, Professor Dr Azirah Hashim; jointly launched the conference on the opening day.

Professor Vijay Bhatia, who leads numerous research teams from more than 20 countries in projects surrounding the development of International Arbitration in Asia, started proceedings by delivering the event's keynote address. The rest of the conference saw over twenty expert researchers and practitioners in language and the law, presenting well written papers that contained collated data and analysis on the current affairs of the arbitration scene before sharing theories and ideas on improving the industry.

In summary, this conference investigated the extent to which the 'integrity' of arbitration principles typical of international commercial arbitration practice is maintained in various Asian contexts, focusing in particular on arbitration norms and practices as they are influenced by local juridical, cultural and linguistic factors from a number of different perspectives, such as legal, discourse analytical, as well as arbitration practice.

_EVENTS

Diploma in Islamic Banking & Finance Arbitration Course

5th–13th September 2015

↙ Candidates and lecturers of the CIArb-INCEIF Diploma Course in Islamic Banking & Finance Arbitration

The Chartered Institute of Arbitrators (CIArb) — the world-wide leader in training, accreditation and practice of alternative dispute resolution collaborated with the Global University of Islamic Finance (INCEIF) to present and carry out the globe's first Diploma in Islamic Banking and Finance Arbitration Course.

This landmark course was held at KLRCA's Bangunan Sulaiman and attracted candidates from a number of jurisdictions, including Indonesia, Nigeria, Kenya, Malaysia, China, the Middle East, Europe and the UK.

The course was delivered over nine intensive days through a combination of lectures, tutorials and discussion workshops dealing with Islamic Banking and Finance arbitration law. Leading the panel of subject matter experts were CIArb's Vice-President, Professor Dr. Nayla Comair-Obeid and Vice-Chairman of the Chartered Institute of Arbitrators (Cairo Branch), Professor Dr. Mohamed Abdel Wahab.

Supporting Professor Nayla and Professor Abdel Wahab in delivering this course were INCEIF's Professor Dr Ahcene Lahsasna, Professor Mohamed Ismail Shariff, Professor Dr. Saiful Rosly and CIArb's Rajendra Navaratnam.

Candidates are scheduled to sit for an exam in November 2015 followed by an award writing paper, in which upon passing, they will be eligible to apply and become Fellows of the famed century old institution.

↘ *Bottom Left:* The learned Professors taking the candidates through a tutorial session

↘ *Bottom Right:* CIArb's Director General, Anthony Abrahams addressing the candidates at the beginning of the course

Effective Dispute Settlement Mechanisms:

A Pre-requisite for Attracting and Protecting Foreign Investors – The Role of the Kuala Lumpur Regional Centre for Arbitration

*By **Ioannis Konstantinidis**, Head of Investment Treaty Arbitration and International Law, KLRCA*

A. INTRODUCTION TO FOREIGN INVESTOR PROTECTION REGIME

According to the 2015 World Investment Report, foreign direct investment flows to Asia grew by 9 per cent to USD465 billion in 2014.[1] Malaysia itself recorded RM35 billion net foreign direct investment inflows in 2014.[2] With the view to attracting and increasing foreign investments, Asian countries have taken a series of measures with regard to promoting and protecting foreign investments, including the signing of bilateral investment treaties (**BITs**).[3]

BITs are agreements between two States for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either State. By signing BITs, States establish the terms and conditions for investments by nationals and companies of one State in the jurisdiction of another. The nature of protection provided pursuant to a BIT between State A and State B is such that if an investor from State A makes an investment in State B, State B guarantees, pursuant to the BIT, certain levels of protection. This is typically accomplished through a combination of national treatment, fair-and-equitable treatment, and most-favored nation treatment.

Although each investment treaty is unique, a BIT will typically:

- define investment;
- set up grounds for admission to each country;
- determine the appropriate form of compensation, should any investments be expropriated;
- require national treatment, most-favoured-nation treatment, and fair-and-equitable treatment;
- provide for free transfer of funds; and
- set up dispute settlement mechanisms (for both individuals and States).
- BITs concluded by Asian States contain, in most cases, the above-mentioned elements.

In addition to their numerous bilateral arrangements, certain Asian States played a major role in the negotiation of the Comprehensive Investment Agreement that was signed by the members of the Association of Southeast Asian Nations in 2009 (the "**2009 ASEAN Agreement**").[4] The objective of the 2009 ASEAN Agreement is to further intensify the economic cooperation between and among the ASEAN Members States. The agreement's provisions on investment protection are in line with those included in the BITs concluded by Asian States. These include the assurances of national treatment, most-favoured-nation treatment, fair and equitable treatment, full protection and security, provision in respect of expropriation and compensation, and dispute settlement provisions.

B. PROVISIONS THAT ENSURE EFFICIENT DISPUTE SETTLEMENT

In case a dispute arises between an Asian State and foreign investors about a matter falling under a BIT, parties can resort to dispute settlement. Most BITs create a multi-facetted system of dispute settlement, which includes, *inter alia*, consultations and international arbitration. This pattern is followed by the 2009 ASEAN Agreement.

BITs normally prescribe consultations before allowing international arbitration. In order to oblige both parties to participate in such consultations, such provisions usually prescribe a minimum period of often six months during which parties need to negotiate in order to settle their dispute. Parties are often also free to rely on services of good will or conciliation by third parties. Enabling settlement of the dispute before resorting to arbitration is important, as it can result in an amicable settlement. If consultations do not lead to agreement, both the capital exporting State and the investors themselves can start legal procedures against the capital receiving State.

Most BITs contain an extensive set of rules for the international settlement of investment disputes. These provisions specify the bodies that will be called upon to settle the dispute and indicate the applicable law governing the dispute.

BITs often contain a list of potential tribunals that may be entrusted with the settlement of an investment dispute. The most popular *forum* is the International Centre for the Settlement of Investment Disputes ("**ICSID**") in

1 For more information, visit: http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf, p. 3.

2 For more information, visit: http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245.

3 For more information, visit: http://investmentpolicyhub.unctad.org/IIA.

4 For more information, please visit: http://www.asean.org/ and http://www.asean.org/resources/publications/asean-publications/item/asean-comprehensive-investment-agreement.

Washington.[5] Another option is *ad hoc* arbitration – most commonly under the rules developed by United Nations Commission on International Trade Law (the "**UNCITRAL Rules**") – which means that both parties will appoint a number of arbitrators who will form an *ad hoc* tribunal.

C. THE KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION (KLRCA): AN INDEPENDENT ARBITRAL INSTITUTION FOR THE ADMINISTRATION OF INVESTOR-STATE DISPUTES

The KLRCA is a longstanding partner of ICSID. ICSID is the world's leading institution devoted to international investment dispute settlement. It has extensive experience in this field, having administered the majority of all international investment cases. States have agreed on ICSID as a *forum* for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts.

Cognisant of the importance of dispute settlement under BITs, the KLRCA signed its first collaboration agreement with ICSID in 1979. The two institutions decided to further strengthen their collaboration by signing a new agreement in 2014 (the "**2014 agreement**"). In addition to fostering cooperation between the KLRCA and ICSID, the 2014 agreement provides, *inter alia*, that the KLRCA can be used as an alternative hearing venue for ICSID cases and participate in the administration of cases, should the parties to proceedings conducted under the auspices of ICSID desire to conduct proceedings at the seat of the KLRCA.[6]

Should parties to a dispute decide to resolve their investment dispute by referring the case to an *ad hoc* tribunal under the UNCITRAL Rules, the KLRCA has the experience to administer such a case. It should be recalled that the KLRCA Arbitration Rules, as has always been the case, draw extensively on the UNCITRAL Rules by including the UNCITRAL text in its entirety.

With regards to the 2009 ASEAN Agreement, it is worth mentioning that section B of the said agreement provides for the resolution of investment disputes between an investor and a member State. In particular, article 33 of the same section allows for such disputes to be referred, *inter alia*, to the KLRCA.

An effective administration of an investment arbitration matters to both foreign investors and States. The KLRCA, being an independent international body established under the auspices of the Asian African Legal Consultative Organisation, can cover all needs of the parties involved in investor-State arbitrations and is ready to assume its role in the resolution of investment disputes in the region.

ABOUT THE AUTHOR

Ioannis Konstantinidis is the Head of Investment Treaty Arbitration and International Law at the Kuala Lumpur Regional Centre for Arbitration (KLRCA). He has a BA from the University of Athens (Greece), an MA from the *Institut d'Études Politiques de Paris* (*Sciences Po, Paris,* France), an LLM (International Law and International Organisations) and a PhDc (International Law) from the Sorbonne Law School (*École de droit de la Sorbonne – Université Paris 1 Panthéon-Sorbonne, Paris,* France).

Prior to joining the KLRCA, Ioannis worked as an associate at a leading public international law/international arbitration firm in London, where he advised and represented sovereign States, State entities and companies on a wide range of contentious and non-contentious public international law and related dispute resolution issues, including the protection of foreign investments under international investment agreements, international trade, treaty interpretation, sovereign immunity, law of the sea and natural resources, land and maritime boundary issues, international energy disputes. He advised in connection with disputes heard at the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and at a multitude of *ad hoc* and institutional arbitral fora (including under UNCLOS, ICSID, PCA, and UNCITRAL Rules).

Before that, Ioannis worked at the International Tribunal for the Law of the Sea (ITLOS) and the United Nations (UN) - Division for Ocean Affairs and the Law of the Sea. He was also a Visiting Fellow at the Lauterpacht Centre for International Law (University of Cambridge) and at the Max Planck Institute for Comparative Public Law and International Law.

5 ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. For more information, visit: https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx

6 This applies *mutatis mutandis* to the Additional Arbitration and Conciliation Rules of ICSID.

_HIGHLIGHT

Is There An "Asian Way" For Investor-State Dispute Resolution?[1]

*By **Loretta Malintoppi**, Counsel, Eversheds LLP, Singapore*

Editorial Note:

The KLRCA recently introduced a new talk series this quarter with a focused look into the world of investor- state dispute resolution. Headlining the inaugural edition of this talk was Loretta Malintoppi.

The talk entitled - In The Seat: 60 Minutes with Loretta Malintoppi was held on the 25th of August 2015 at KLRCA's Seminar Room. This article is derived from Loretta's presentation.

A. Introduction[1]

Investment arbitration has grown exponentially since the mid-1990s, in parallel with the growth of international investment agreements – not only Bilateral Investment Treaties ("BITs"), but also, increasingly, regional agreements. BITs typically provide legal recourse to foreign investors in case of breaches of the obligations entered into by the host State. The definition of host State may, if certain conditions are present, also encompass State agencies or State organs. BITs may also be invoked in parallel with contracts or domestic legislation, offering further legal protection to foreign investors and thus may be used to supplement contractual provisions that may apply.

1 Loretta Malintoppi, Of Counsel, Eversheds LLP, Singapore. This article is derived from a speech delivered at the KLRCA Headquarters on 25 August 2015. The author is grateful to Kelly-Anne Packer and Alvin Yap of Eversheds LLP for their valuable assistance in preparing this article.

BITs are often described as a balancing act since, on the one hand, they are designed to promote investments into the host State and, on the other hand, they are supposed to protect the investments of foreign investors. One effect of this is that BITs are meant to preserve the sovereign prerogatives of the host State and its right to regulate in the public interest, while protecting at the same time the rights of foreign investors against State conduct in violation of the State's international obligations.

Most Asian BITs contain broad definitions of the notion of investment and in some instances spell out that the investment must be made, or "permitted", "in accordance with" the laws and regulations of the host State. For instance, a number of Malaysian BITs require that, with respect to investments made in the territory of Malaysia, the investment must be made in a project that has been approved in writing by the relevant Malaysian governmental authorities.

As to the definition of "investor", provisions most commonly include "nationals" and "companies" of a contracting State. The former are generally defined as nationals of a State pursuant to the laws or Constitution of that State and the latter as companies duly incorporated or constituted in accordance with the laws of that State. Sometimes an "investor" is more narrowly defined as a company having its seat and conducting its business in one of the contracting States. In some cases, the definition of "investor" is broadened to include associations and partnerships in which a national or company of one of the contracting States has a predominant interest[2], or individuals permanently residing in one of the contracting States.

Typically, BITs contain alternative dispute resolution mechanisms that follow a 3-step process:

1. amicable negotiation;
2. a "cooling-off" period (3-6 months); and
3. a dispute resolution "menu", including international arbitration.

The arbitral process in BITs generally lists the following options:

- arbitration at International Centre for Settlement of Investment Disputes (ICSID);
- arbitration at another institution[3]; and/or
- *ad hoc* arbitration, either using the UNCITRAL Rules or a procedure to be determined by the tribunal.

B. Main features of investment arbitration

MIXTURE OF PUBLIC INTERNATIONAL LAW AND COMMERCIAL ARBITRATION

By its very nature, investment arbitration blends together elements of private commercial law with principles of public international law since, typically, in these disputes private business interests and contractual undertakings are confronted with the obligations of States arising from international treaties.

NO RULE OF PRECEDENT

While there is no rule of precedent *stricto sensu* in investment arbitration, previous decisions of investment tribunals are nevertheless authoritative and are relied upon by tribunals and parties alike. Previous cases are thus referred to as a form of "*jurisprudence constante*".

Tribunals have uniformly stated that they are not bound by previous decisions and that each case must be examined in its own factual and legal context, while at the same time stressing that they may "consider such decisions whenever appropriate"[4] or consider them "at least as a matter of comparison and, if so considered by the Tribunal, of inspiration."[5]

INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS

The debate on the independence and the impartiality of arbitrators in investor-State arbitration continues to be lively. The apparent increase in challenges and disqualification requests – extending also to counsel – has led some to call for the adoption of a code of ethics for international arbitration practitioners in addition to a code of conduct for arbitrators. A number of rules, guidelines and codes of conduct have been adopted following the growth of challenges of arbitrators and related debates on the subject.

A review of challenge decisions made in investment arbitration cases shows that there exist certain issues that are unique to this field and do not have an equivalent in commercial arbitration.

These are notably those instances where "issue conflict" challenges are raised. This notion encompasses objections over the appointment of arbitrators made when the individual in question was also involved as counsel and advocate in another pending case involving related legal issues.

2 For example, the Sweden-India BIT dated 4 July 2000, the Austria-Philippines BIT dated 11 April 2002, the Finland-Egypt BIT dated 3 March 2004, the China-Norway BIT dated 21 November 1984 and the Italy-United Arab Emirates BIT dated 22 January 1995.

3 Article 33 of Section B of the 2009 ASEAN Comprehensive Investment Agreement allows for investor-State disputes to be referred, *inter alia*, to the KLRCA.

4 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction 14 November 2005, para. 76.

5 *AES Corporation v The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction 26 April 2005, para 31.

The rationale of a challenge in these circumstances is that, to the extent that a nominated arbitrator acts as counsel in a dispute that involves similar or the same legal questions and adopts in that context certain positions regarding those issues, he/she may not be able to maintain an unbiased approach in the case where he/she is called to act as an arbitrator.[6]

More recently, a new generation of "issue conflicts" has surfaced, represented by challenges based on the academic opinions previously expressed by arbitrators nominated by a party, which arguably showed preconceived positions with regard to some of the central issues of the arbitration.

A different permutation of this type of challenge is represented by challenges made on the basis of "repeat appointments" of arbitrators, i.e. situations where the same individual is appointed by the same party – or by the same counsel representing different parties – in several cases.[7] It has been argued that the potential threat to the arbitrator's independence and impartiality in these cases is two-pronged: on the one hand, the fact that the same arbitrator is repeatedly appointed by the same party (or counsel) may lead to procedural inequalities because the arbitrator may be privy to information that the other members of the tribunal do not have. On the other hand, this kind of situation may also indicate a close connection between the same individuals – or between the arbitrator and a particular party – and suggest the existence of potential bias as the arbitrator may be more inclined to rule in favour of the party to whom he/she "owes" the appointment.

THE APPLICABLE LAW

When it comes to the governing law, only in the absence of a choice by the parties are the arbitrators entitled to determine the applicable law.[8] Usually, failing a decision by the parties, the arbitrators decide whether it is more appropriate in a given case to apply the law of the host State (as required by the ICSID Convention) or principles and rules of international law, or a combination of both. In any event, international law always governs the interpretation of treaties, including BITs.

THE TREND TOWARDS TRANSPARENCY

One of the most interesting developments in the field of investment arbitration is the decline of confidentiality and the parallel raise of transparency or publicity of the proceedings. While a general presumption of confidentiality normally exists in international commercial arbitration, there is no general

6 Examples of these types of challenges are provided by the *Telekom Malaysia Berhad v. Republic of Ghana* ("*TMB/Ghana*") District Court of the Hague Case No. HA/RK 2004, 788, and *Eureko* bv v. *Poland,* The Court Of First Instance Of Brussels, R.G. 2006/1542/A, 22 December 2006.

7 Examples are: *Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/* (the decision on Disqualification of an Arbitrator is not publicly available) , *EnCana Corporation v. Republic of Ecuador,* Partial Award on Jurisdiction, 27 February 2004 and *Saba Fakes v. Republic of Turkey,* ICSID Case No. ARB/07/20 (Decision on Disqualification of an Arbitrator dated 26 April 2008 is not publicly available).

8 See Article 42(1) of the ICSID Convention, Art. 33(1) of the UNCITRAL Rules and Art. 22(1) of the SCC Rules.

obligation of confidentiality in investor-State dispute resolution. Notably, ICSID cases are registered by the Secretariat on an online docket, together with details such as the names of the parties, the date of registration of the claim and the names of the tribunal members. ICSID also publishes the *curricula vitae* of arbitrators appointed under its Rules with an indication of the cases they have sat in. This is done in order to assist parties in finding potential candidates to a case or to discover a possible conflict of interests. For example, an arbitrator's name may be combined with another arbitrator's name to show the ICSID cases in which the two were serving together. In addition, the *curricula vitae* contain the ICSID cases in which the person was acting as counsel.

In addition, ICSID awards are frequently published on the ICSID website or in the *ICSID Review: Foreign Investment Law Journal*. Publication is however subject to the consent of the parties. Art. 48(5) of the ICSID Convention in fact provides that "ICSID shall not publish the award without the consent of the parties". However, when parties do not agree to the publication of an award, the ICSID Secretariat may publish extracts of the legal reasoning pursuant to Rule 48(4) of the ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Rules"). Awards also seem to find their way into the public domain as they are often published in specialized websites shortly after they are rendered.

In April 2006, a number of changes were made to the ICSID Rules. These included amendments to the rules on access of third parties to proceedings and the publication of awards. The amendments did not, however, modify the parties' lack of obligation to make transparent the ICSID proceedings to which they are parties. Moreover, the ICSID Convention itself was not amended, and therefore the prohibition on the ICSID Secretariat publishing awards without the consent of the parties still stands.

With regard to the publication of awards, Rule 48(4) was modified so as to render it mandatory rather than permissive for the ICSID Secretariat to publish excerpts of the legal rules applied in awards and for such publication to occur "promptly". In relation to the publicity of hearings, Rule 32 of the ICSID Rules was amended in order to give more power to the tribunal to decide whether or not to open up the proceedings to third parties.

The key change for transparency purposes was the amendment of Rule 37 of the ICSID Rules which allows the submission of *amicus curiae* briefs, even without the consent of the parties. This rule was modified in order to reflect an emerging practice, started notably with the *Aguas Argentinas*[9] arbitration, the first ICSID case where a tribunal held that it had the power to accept *amici* submissions. The amendment clarifies that ICSID tribunals possess the power to allow non-disputing parties to participate in an arbitration even if the parties do not consent to such participation.

The UNCITRAL Rules, originally designed for use in commercial arbitration where the impetus for keeping arbitrations confidential is arguably greater than in investor-State disputes, do not include any transparency provisions in either the 1976 or the 2010 versions. In fact, with regard to the publication of awards, the UNCITRAL Rules are worded less permissively than even the ICSID Convention and the ICSID Rules, stating clearly that an award may be published "only with consent of the parties".[10] With regard to hearings, the UNCITRAL Rules provide that, absent the parties' consent, hearings are to be held *in camera*.[11]

With the adoption of the UNCITRAL Rules on Transparency in Treaty-Based investor-State Arbitration (the "UNCITRAL Transparency Rules") on 11 July 2013, which came into force on 1 April 2014, any presumption for confidentiality and privacy in investment treaty arbitration governed by the UNCITRAL Rules is effectively reversed.

The UNCITRAL Transparency Rules apply to treaty-based investor-State arbitrations conducted under the UNCITRAL Rules, as confirmed by an amendment to the UNCITRAL Rules which also came into force on 1 April 2014 and which ensures the link between the arbitral rules and the Transparency Rules.[12] However, the latter are not limited to arbitrations conducted under the UNCITRAL Arbitration Rules and are available for use in investor-State arbitrations initiated under other rules, or in *ad hoc* proceedings, if the parties so agree (Article 1(9) of the Transparency Rules).

ICSID AWARDS

A special feature of the ICSID system is that ICSID awards are final, binding and must be recognized by all contracting parties to the Convention as final judgments of their domestic courts.

In addition, a unique element provided by the Convention is the existence of a review of awards through an annulment mechanism. According to Article 52 of the Convention, ICSID awards may be annulled by an *ad hoc* committee if (i) the tribunal was not properly constituted, (ii) if the tribunal manifestly exceeded its powers, (iii) if there was corruption on the part of a member of a tribunal, (iv) if there was a serious departure from a fundamental rule of procedure or (v) if the award failed to state the reasons on which it was based.

The rather broad scope of review of some *ad hoc* committees has been criticised. Discussions are currently on-going about the possibility of introducing an appellate system.

9 *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in response to a Petition for Participation as Amicus Curiae dated 19 May 2005.

10 UNCITRAL Rules, Article 32(5).

11 See Art. 25(4) in the 1976 version, and Art. 28(3) in the 2010 version of the UNCITRAL Rules.

12 However, the UNCITRAL Transparency Rules are also available for use in investment treaty arbitrations to which other rules are applicable, or in *ad hoc* proceedings.

C. Some ISDS statistics

Over the years, the number of members to the ICSID Convention has grown steadily. However, there still are some significant absentees, such as India, Brazil and Mexico. In addition, Bangladesh, Myanmar, Laos and Vietnam are not member States. Thailand has signed but not ratified the Convention. Nonetheless, most countries from South and East Asia and the Pacific region, including China, Indonesia and Australia, are contracting States.

The growing number of BITs has been accompanied by a steady increase in investment arbitration cases, which has been particularly significant over the last ten years. UNCTAD statistics for 2014 show that the number of known investment arbitration cases is now over 600.[13]

Strikingly, the number of cases involving States and investors from the South and East Asia, and the Pacific region, remains relatively low to date.

According to the 2015 ICSID Caseload Statistics[14], the majority of the claims were initiated against Latin American States (26%, but most of these cases were initiated against two countries alone: Argentina and Venezuela), followed by Eastern Europe and Central Asia (25%), Sub-Saharan Africa (16%, but this figure has remained the same for some time), and Middle East and North Africa (10%). South and East Asia and the Pacific only represent 8% of the new claims, followed by Central America and the Caribbean (7%) North America (4%) and Western Europe (4%).

While most of the disputes were filed with ICSID, it appears from ICSID statistics that investors coming from South and East Asia and the Pacific were involved in only 4% of registered ICSID cases as of 1 October 2014. The data is based on the nationality of the investors at the time of registration.[15]

Based on reports by the specialized press, it seems that a number of "Asian" cases were introduced under the UNCITRAL Rules or in *ad hoc* proceedings but information regarding these cases is very limited.

Looking at the overall division of ICSID cases by sector, 26% concern oil, gas and mining, 14% electric power and other energy supplies, 10% transportation, and 7% construction. Recent ICSID statistics report that the disputes involving investors from South and East Asia and the Pacific concern a variety of economic sectors, although the majority arise from oil & gas and mining activities.[16]

While it is evident that Asian States and investors have been less active in investor-State arbitration than their Latin American or European counterparts, this appears to be changing, with a greater number of Asian host States being brought to arbitration by foreign investors. However, the changes are slow in coming. In particular, Asian investors still appear reluctant to initiate investment arbitrations.

A number of theories have been offered to explain this seeming under-representation by Asian parties in investor-State disputes. Fundamental differences in cultural approaches to disputes are most frequently invoked. It is said that the "Asian way" is to avoid conflict and prefer amicable settlement.

However, while there may be cultural differences, it does not explain why Asian parties do not shy away from commercial arbitration.

To use just one notable example, that of ICC arbitration, there is no shortage of arbitrations involving Asian parties. In the ICC context, the number of parties from South and East Asia in commercial arbitrations has remained stable over the last couple of years, with Asia and the Pacific accounting for nearly a quarter of all parties in ICC cases filed (24.1% in 2013, 21.1% in 2014). China (including Hong Kong) was the sixth most frequent nationality seen globally in 2014, with 73 parties (3.29% of all parties in 2014 filings), equivalent to around 1 in 30 cases worldwide.[17]

The year 2014 saw China maintain its position as the most frequent nationality in the South and East Asia region, due largely to continuing growth in the presence of parties from Mainland China (62 parties from Mainland China (21 claimants, 41 respondents); 11 from Hong Kong (6 claimants, 5 respondents). India was the next most frequent Asian nationality in 2014 (60 parties), followed by South Korea (35) and Singapore (33).

Asian States also appear ready to resort to arbitration or litigation before permanent judicial bodies for the settlement of disputes with other Asian states, as was for instance recently done by Malaysia and Singapore in the Annex VII arbitration on the *Railway* case,[18] Cambodia and Thailand in the second *Temple* case[19] before the International Court of Justice or by India and Pakistan in the *Kishenganga* arbitration,[20] and by Bangladesh and India and Bangladesh and Myanmar in their maritime disputes[21].

13 The largest number of cases filed in a single year (56) was actually in 2013 – in 2014 the figure dropped to 42. UNCTAD IIA Issues Note No. 1, February 2015 page 5, a copy of which is available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf

14 A copy is available at: https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20(English)%20(2)_Redacted.pdf

15 https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats_Special%20Focus%20Issue_SAR%20and%20EAP.pdf

16 See footnote 15.

17 2014 ICC Dispute Resolution Statistics, published in the ICC Dispute Resolution Bulletin, 2015, Issue 1, pp 8-10.

18 *Malaysia v The Republic of Singapore*, PCA CASE № 2012-01, 30 October 2014.

19 *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, International Court of Justice, Judgment dated 11 November 2013.

20 *The Islamic Republic of Pakistan v. The Republic of India (In The Matter Of The Indus Waters Kishenganga Arbitration)*, Award dated 20 December 2013.

21 *The People's Republic of Bangladesh v. The Republic of India*, Permanent Court of Arbitration, Award dated 7 July 2014; *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, International Tribunal for the Law of the Sea, 14 March 2012.

There may be more investment cases involving Asian parties that are kept "under the radar" or undisclosed, as there may be a certain preference for confidentiality or a hesitation by Asian parties to be seen as litigious or, in the case of claimant investors, to be seen as bringing a host State to litigation.

This impression seems to be confirmed by the fact that a number of "Asian" cases are informally known to exist, or reported in the specialized press, where no information at all is provided, except, at most, for the name of the parties, the arbitrators and the arbitration rules that govern the case. More often than not, these cases are brought under the UNCITRAL Rules and administered by the PCA. Interestingly, the PCA website lists 35 investor-State arbitrations (none of which concerns Southeast Asian States) and adds that it is acting as registrar in 37 additional cases without however disclosing any information about them. It may very well be that some cases involving Asian parties figure amongst these 37.

D. Why is Asia lagging behind in ISDS?

It remains puzzling why Asian cases appear to lag behind the rest of the world, particularly in light of the fact that in economic terms Asia has been, and will most likely continue to be for some decades, the fastest growing continent in the world.

When it comes to Asian investors, the relatively low number of cases brought may also be explained by the fact that investments from Asia have traditionally been made in relatively low-risk countries, thus reducing the potential for State intervention or interference with the investments. However, this is changing as investments from China, Korea and Japan are increasingly flowing into countries in Africa, Latin America and Eastern Europe.

From the investment treaty perspective, international investment agreements ("IIAs") continue to be negotiated and signed. Notably, there is no shortage of treaties involving Asian countries. Quite to the contrary. For instance, 11 of the 27 IIAs signed in 2014 involved at least one Asian State[22]. Some of these treaties however are more restrictive than their European counterparts (for instance China's first generation BITs) and afford less protection for breaches of substantive obligations. It is interesting for our purposes that six of the ten treaties involving an Asian State contain ISDS provisions.

Another reason for the slower growth of this field of dispute resolution in this region may be the fact that the development of investor-State dispute settlement, which is at the cross roads between public international law and private law, requires a certain sophistication and knowledge of complex legal issues. While Asia has no shortage of competent lawyers, international arbitration is still a recent phenomenon, and the learning curve of the professionals has not yet reached the same level that was achieved in Europe thirty years ago.

Moreover, investments into the Asian continent are also relatively new and there is inevitably a considerable lapse of time (often spanning several years) before disputes arise and decisions are considered and made as to the method of resolution of such disputes.

22 UNCTAD IIA Database: http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBIT.

So, there is reason to believe that it is only a matter of time before investment arbitration takes off in Asia and reaches the same (or similar) popularity that it has known in the rest of the world since the 1990s.

Looking at the global picture, there is remarkable growth of ISDS globally, but slower growth in this region. When it comes to States that are at the receiving end of ICSID cases, only 8% are East Asian States, according to ICSID statistics. As for claimants, the data is even lower than that concerning host States.

Turning to some UNCTAD data listing investor-State arbitrations involving Asian parties as of the end of 2014, it is significant to note that India has been involved in far more investor-State arbitrations than any other Asian State (and so its inclusion skews any trends which may apply to the South and East of Asia), even though it is not a contracting State of the ICSID Convention. The claims against India were brought under the UNCITRAL Rules.

India is the 8th most frequent host State involved in investor-State arbitrations globally, appearing as respondent in 16 reported cases to date and twice as the country of the investor. There have been 18 cases involving India to date compared to around 36 reported cases involving the South and East Asia region.

Adding India to the case statistics referred to in this article, would take the total number of "Asian" cases from 36 to 54 – an increase of 50%, which has a significant effect on the data (for example, not counting India, the number of cases to date in which UNCITRAL rules were applied is currently 28%, but if India is included (all UNCITRAL) this figure would rise to 50%). It follows that case statistics for India have been excluded from the data for purposes this presentation.

If we look at the data concerning the State of nationality of investors, no Asian State features amongst the most frequent nationalities.

E. Some insights regarding "Asian" ISDS

Looking at recent examples of investment arbitration involving one or more Asian parties, we are able to gain some interesting insights regarding investor-State disputes. At the same time, a number of conformities with global trends and practices can also be identified.

The first interesting aspect concerns the nationality of arbitrators in all ICSID cases to date. The only three countries from this region that appear on this list are Singapore, the Philippines and China. It is notable that, of the top 20 nationalities of arbitrators, conciliators and *ad hoc* Committee members appointed in all cases registered under the ICSID Convention and ICSID Additional Facility Rules (of which each "top 20" nationality has over twenty appointments), none are Asian.

Singapore is the most popular Asian state, at 28th most-appointed overall. However, even Singapore can still only claim only 11 appointments to date, compared with over 100 each for Western countries such as Switzerland, the United Kingdom, France and the United States.

It is noteworthy that Singapore, in spite of its size, has such a high number of nationals appointed in investor-State disputes. But on closer inspection, it appears that at least four of the appointments concern the same individual, Michael Hwang *S.C.*, who was appointed three times in cases where Indonesia is the Respondent state (twice by the government itself[23] and a third time as president by the two party-appointed arbitrators[24]) and once as sole arbitrator by the Secretary General of ICSID in a case involving Malaysia[25]. By contrast, a much larger country like China can claim only 9 appointments to date.

Interestingly, Asian arbitrators are not necessarily selected more often when the party making the appointment is also Asian.

There are however exceptions to this: Indonesia appointed an arbitrator from Sri Lanka (in the case brought against it by Rafat Ali Rizvi[26]) and an Indian arbitrator (in the case initiated by Al Warraq, a Saudi Arabian investor, under the Organisation of Islamic Cooperation Investment Agreement[27]). Thailand can claim two appointments, the first by Thailand itself, in the *Walter Bau* case[28], and the second by the International Court of Justice in *Yaung Chi Oo Trading v Myanmar*[29].

Another interesting question is whether any particular industry sectors can be identified as featuring more frequently in Asian investor-State disputes as opposed to the rest of the world.

Worldwide, the year 2014 saw a drop in the proportion of cases relating to oil, gas and mining, but this sector, together with the generation and supply of electricity, these remained the two most common industries involved in ISDS globally.

However, looking at the ICSID statistics for Asia, the distribution of cases by sector is quite different from the bigger, global picture. Whereas "Electric Power & Other Energy" and "Oil, Gas & Mining" are the two most common sectors in ICSID cases worldwide, it is the "Construction" and "Finance" sectors which give rise to the most disputes in the region.[30]

When it comes to the arbitration rules selected in Asian cases, the available data shows that ICSID or UNCITRAL Rules take the lion share, with only one case where the claimant opted for other arbitration rules, i.e. *Lee John Beck and Central Asian Development Corporation v. Kyrgyz Republic*[31], brought by a South Korean investor against Kyrgyzstan in 2013 under the arbitration rules of the Moscow Chamber of Commerce and Industry (MCCI).

There are in fact three cases involving Kyrgyzstan as the host State, with two of these cases initiated by a Chinese and a South Korean investor respectively (the third was brought by a Canadian investor). All were brought under the Moscow Convention for the Protection of Investment Rights 1997 rather than BITs, and interestingly, on each occasion it was the investors who chose the relatively unknown Moscow-based arbitration institution, while the host State, Kyrgyzstan, did not take part in the proceedings. In fast-track proceedings, three default awards were made against the State for an aggregate amount of US$150 million.

More specifically, of the 42 new known investor-State disputes filed in 2014:

- 33 were filed with ICSID (of which 3 cases were under the ICSID Additional Facility Rules);
- 6 under the UNCITRAL Rules;
- 2 under the Stockholm Chamber of Commerce Rules; and
- 1 under the International Chamber of Commerce (ICC) Arbitration Rules.

23 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40 (Initially started separately as two parallel cases, but later consolidated).

24 *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, 2011.

25 *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10.

26 *Rafat Ali Rizvi v. Republic of Indonesia*, ICSID Case No. ARB/11/13, July 16, 2013.

27 *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, 15 December 2014.

28 *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand*, UNCITRAL (formerly *Walter Bau AG (in liquidation) v. The Kingdom of Thailand*), 17 March 2011.

29 *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, 31 March 2003.

30 It should, however, be noted that the data set is quite small and so care should be taken not to place too much reliance or emphasis on this observation as just a couple of cases from one sector in future could completely alter the rankings.

31 The documents in this arbitration are in Russian and can be found at: http://www.italaw.com/sites/default/files/case-documents/italaw3256.pdf. There is no publicly available English translation of the Award.

These numbers are roughly in line with historical statistics for overall investment arbitrations filed in previous years.

Further, of the 36 reported disputes brought by Asian investors or against Asian States to date:

- 23 were filed with ICSID (of which 2 cases were under the ICSID Additional Facility Rules);
- 10 under the UNCITRAL Rules; and
- 1 under the Moscow Chamber of Commerce and Industry (MCCI) arbitration rules.

The absence of any International Chamber of Commerce ("ICC") or Stockholm Chamber of Commerce ("SCC") in Asian investor-State disputes is notable. With regard to the latter institution, it should be noted that no Asian States, apart from Japan, are contracting parties to the Energy Charter Treaty ("ECT"), one of the treaties mentioning arbitration under the SCC rules as a possible dispute resolution method.[32]

If one compares the figures regarding Asia with the rest of the world, Asia also has a much higher incidence of cases being brought under the UNCITRAL Rules in Asia, with around double the amount, proportionately (28% vs 14%), compared to global figures. As mentioned above, this may be as a result of a regional preference for confidentiality or a hesitation by Asian parties to be seen as litigious or, in the case of claimant investors, to be seen as bringing a host State to litigation.

In terms of the outcome of concluded cases, by the end of 2014, the total number of concluded cases reached 356. Of these, approximately:

- 37% (132 cases) were decided in favour of the State *(all claims dismissed either on jurisdictional grounds or on the merits)*;
- 25% (87 cases) ended in favour of the investor *(monetary compensation awarded)*;
- 28% (101 cases) settled;
- 8% (29 cases) were discontinued for reasons other than settlement or for unknown reasons; and
- in 2% (7 cases), a treaty breach was found, but no damages were awarded to the investor.

With regard to cases with an Asian element, by the end of 2014 the total number of reportedly concluded cases reached 28. Of these, approximately:

- 28% (10 cases) settled;
- 40% (10 cases) decided in favour of the State *(all claims dismissed either on jurisdictional grounds or on the merits)*;
- 24% (6 cases) ended in favour of the investor *(monetary compensation awarded)*;
- 4% (1 case) discontinued for reasons other than settlement or for unknown reasons; and
- in 4% (1 case), a treaty breach was found, but no damages were awarded to the investor.

It follows that the figures regarding the outcome of cases for Asia compared to the rest of the world are very similar. However, this data does not include central Asia and, most notably, India.

A final word about the types of legal issues that have been before investment tribunals in case involving countries from South and East Asia and the Pacific.

Historically, there has been a broad range of State measures challenged in ISDS cases, with 2012 and 2013 seeing cases involving, among other things, expropriation; changes to incentive schemes/regulatory frameworks; tax measures; and even allegedly wrongful criminal prosecution. The types of State conduct most commonly challenged by investors in 2014 concerned cancellations or alleged violations of contracts and revocation or denial of licences.

F. Conclusions

It should be stressed that most IIAs allow for confidential arbitration, so a number of cases may be unreported and the actual number of cases may be significantly higher. No hard conclusions may therefore be drawn from the statistics.

ISDS is still facing important challenges in the region.

First, the opposition to ISDS in the context of the Trans-Pacific Partnership Agreement ("TPPA") (notably from Australia) may affect future investment arbitrations in Asia.

While this remains for the time an open question, it is however important to recall that all the countries participating in the TPPA[33] have treaties containing ISDS and so this method of dispute resolution will hardly be a novelty for them.

The TPPA has been advertised to contain safeguards that will ensure that investment obligations are interpreted in a manner consistent with the intent of the State parties. These safeguards include, *inter alia*, full transparency, public participation, expedited review and dismissal of frivolous claims, denial of benefits for shell companies, interim review of arbitral awards by the parties to the arbitration, etc.

The second challenge faced by ISDS in Asia is that at least one Asian country, Indonesia, has announced that it wishes to terminate its BITs.

Since Indonesia's announcement that it intended to terminate the Netherlands–Indonesia BIT from the date of its expiration, i.e. 1 July 2015, and that it planned to terminate all of its 67 BITs, there has been widespread discussion as to the real intentions of the Indonesian government. It is to be presumed that, in part at least, Indonesia's defeat in the jurisdictional

32 The ECT specifies ICSID arbitration if both Parties are Contracting States to the ICSID Convention, ICSID AF if only one State is a party to the Convention, or either UNCITRAL or SCC proceedings if neither State is a party.

33 Canada, Chile, Mexico, Peru, Singapore, Vietnam, Australia, Brunei, Japan, Malaysia, the US and New Zealand.

stage of the ICSID arbitration *Churchill Mining v Indonesia*[34] (a significant claim, amounting to over US$1 billion, not including interest) may have motivated the Indonesian government to review its current treaty portfolio.

However, Indonesia's termination of its BITs would not mean a complete withdrawal from all investment protection obligations and mechanisms. Existing investors would continue to be protected by the "survival" or "sunset" clauses that have been included in many of the BITs. For example, in the case of the Netherlands–Indonesia BIT, the investments under the BIT will be protected by a period of 15 years after the BIT's termination. Further, even if all of its BITs were terminated, Indonesia would still be subject to its obligations under the ASEAN Comprehensive Investment Agreement ("ACIA") and the ASEAN–Australia–New Zealand Free Trade Agreement.

But the fact remains that this debate has nevertheless given rise to a view that Indonesia's actions indicate a wholesale rejection of ISDS. There is, as yet, no basis for this as Indonesia's public statements simply indicate that Indonesia is seeking to "update, modernize and balance its BITs". The official position is that Indonesia is allowing its BITs to "discontinue" so that it can renegotiate them. It has been suggested that Indonesia intends to renegotiate its BITs to provide greater capacity to regulate in the "public interest for health, the environment or financial reasons".[35]

As for the rest of the South and East Asia, only time will tell, but after years of disproportionately low levels of ISDS involving Asian parties, and notably Asian claimants, the recent caseload statistics and other factors highlighted herein seem to point to an increased uptake by investors in the region and may signal a change for the future.

A future increase in both Asian claimants and respondents in ISDS cases appears to be backed up by the most recent caseload statistics. The years 2014 and 2015 have seen utilisation of investment arbitration by investors from China, Korea and Japan, a factor which may be a sign of an improvement of the growing legitimacy and attraction of ISDS in the region.

Furthermore, Asian investors, particularly from the States mentioned above, are increasingly investing into countries such as Africa, Latin America and Eastern Europe, which may lead to a larger number of investment disputes in the future.

It follows that one can be moderately optimistic about future prospects for investment arbitration in this part of the world and, hopefully, for an important role to be played by the Kuala Lumpur Regional Centre for Arbitration in this field of dispute resolution.

34 See footnote 22.

35 Reported on 21 Aug 2014 in Kluwer Arbitration Blog (http://kluwerarbitrationblog.com/blog/2014/08/21/indonesias-termination-of-the-netherlands-indonesia-bit-broader-implications-in-the-asia-pacific/).

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FEATURE

in the seat

In this third issue for the year 2015, The KLRCA Editorial Team interviews the Director General of the Chartered Institute of Arbitrators (CIArb) ; Anthony Abrahams who was recently in Kuala Lumpur for the signing ceremony of the CIArb Asian Directorate Office at KLRCA (More on page 6) and for CIArb's inaugural Diploma in Islamic Banking and Finance Arbitration held in collaboration with the International Centre for Education in Islamic Finance (INCEIF) (More on page 9).

Anthony talks to us about the recent CIArb Centenary celebrations around the globe and the significance of setting up the institution's first Regional Centre outside of London in Asia.

Anthony Abrahams

Director General of the Chartered Institute of Arbitrators (CIArb)

The Chartered Institute of Arbitrators (CIArb) continues to be the leading professional membership organisation representing the interests of alternative dispute practitioners worldwide. What has changed since you joined the Institute as Director General back in April 2012? What would you say has been the key elements and factors that have elevated CIArb's membership base and image in recent years?

I think defining our Golden Thread enables us to move forward by defining our objectives in three elements. The first being education, training and qualification; the second the development of a learned society, and the third being the facilitation of ADR. Having identified these core topics and these core elements of our delivery; focusing on them has brought increased benefits. We are now developing our strategy going forward contained within four key pillars. The first is that we are looking to make sure that our brand is consistent across the globe, in other words when you attend a course or event in KLRCA, Lagos or Los Angeles – you will get the same gold standard product and service.

↗ At the Mid Course Dinner of the recently concluded CIArb-INCEIF Diploma in Islamic Banking & Finance Arbitration Programme.

The second pillar is to match the benefits of membership to the level of membership that you are at. In other words, someone coming into ADR for the first time will want more general knowledge and background to ADR and not necessarily the full depth of knowledge required to writing an award. That will come very much later in your career. So we want to match the level of the course and level of the education to the individual, and grow membership through that.

The third pillar is very important. Up to now we have concentrated on delivering qualifications for neutrals and practitioners. We are the only people who actually have a recognised qualification delivering accreditation as an arbitrator across the globe. But we realise there are far more people out there who need education in dispute avoidance and dispute management, who would never aspire to be arbitrators. We want to cater for them as well. And last but not least, we need to manage our income resources so that we can deliver the products and services to members and the ADR community and users.

CIArb is celebrating its 100th Anniversary this year with numerous debates and flagship conferences being held around the globe to mark the occasion. How positive has the response from members and the general ADR community been since the celebrations kicked off in Birmingham?

We looked at the events so that we can actually match the event to what that particular audience requires. Starting off with the Birmingham Conference, we very much went back to our roots. We originated in the Construction industry in England. We have a substantial number of surveyors, architects and engineers who constitute over a third of our membership, and we wanted to give them something that they could look at, that they would be interested in, and would assist them in the development of their particular careers. That worked extremely well in Birmingham.

We then moved on to Hong Kong, which looked very much more on the international aspect of arbitration as opposed to ADR in a wider sense and in particular how arbitration was developing within South East Asia. We had three Chief Justices who all gave keynote speeches. Their presentations have now been published and have attracted a considerable amount of interest across the globe.

The third flagship Centennial Conference was held in London itself, particularly aiming at what constitutes a safe seat. These were debated and published as the CIArb the London Centenary Principles. The Principles are not another set of model rules for an arbitral institution. The intention behind these Principles is to have key criteria which a country, arbitral institution, professional body or legal sector can refer to when deciding how they will respond to the challenge of providing effective and safe arbitration environment and facilities.

We then moved on to Africa, and again a very different conference there. That conference was the first time all our African branches have got together and cooperated to produce an event. We had a gathering in Zambia with contributions once more from a number

↗ Anthony pictured here with the media at the conclusion of 'The Signing Ceremony for the Location of the CIArb Asian Directorate Office at KLRCA's Sulaiman Building'

of Chief Justices; from Nigeria and from Zambia itself. We concentrated on learning from Africa, in other words accepting that we have come late into the ADR world and what the Africans have a lot to teach us. It was truly an absorbing conference, where one came to realise that the court structure is effectively the ADR structure for many African nations who still maintain the historic tribal methodology of resolving disputes. It was a fascinating insight and that created a lot of interest, which I strongly believe moving forward is going to be a springboard to grow the learned society throughout Africa in the wider context of ADR.

The final centenary celebratory conference will take us to Singapore where we will be launching our news rules and in particular the Guidelines that we have been developing. The Conference entitled, "The Age of Innovation: Addressing the Perils and Promises of Arbitration", will see the Chief Justice of Singapore and our Patron, Sundaresh Menon take the stage to deliver the event's keynote address.

The Institute recently appointed Camilla Godman as the new Regional Director for the Far East / Australasia and are in the midst of signing an agreement with the KLRCA with regards to the location of CIArb's Asian Directorate Office (The first Regional Centre for CIArb outside London) in Bangunan Sulaiman. How significant is this arrangement to the members and branches of this region, and the Institute itself?

There is the requirement for the development of a regional directorship and administration as we grow. We are now over 14,000 members, and across the globe we must maintain a balance between the knowledge that is held by our members who are volunteers and supporting them with a permanent infrastructure. Taking from them, their knowledge and then assisting them in actually developing their ideas into action; we need to have administrative support, we need to have facilities that can help them, so that we are not reliant on them when they have other priorities for instance in their professional lives. This also allows us to develop our products and deliver them in a timely manner. Choosing this region was frankly a no brainer, something over 25 per cent of our membership is based within this region. This region is a dynamic region, which lends itself to a Regional Directorate. The branches here when we first mooted the idea of a regional administration and directorship, were all keen that it should be in this area and so it was an easy choice to make at the end of the day. Looking forward it means there can be a focus on regional development as opposed to individual branch development. We can develop new areas such as Vietnam, Myanmar and to reinforce the development of our current branches by giving them a larger element of support to their work going forward. This is an exciting milestone for CIArb and looking forward to the future, I expect the region to grow exponentially as we provide resources to the branches and to the whole region for its development.

Datuk Professor Sundra is set to take over the Presidency of CIArb in 2016. Having played an integral role in injecting renewed drive and purpose into KLRCA's international endeavours in recent years, what can members and branches from across the world expect from his Presidency tenure next year?

They can expect vibrancy and enthusiasm; they can expect him to land on a frequent basis and present his vision of the future in a dynamic and energetic way which I think will take a lot of people by surprise. He's everywhere and you can barely go to a conference these days and not see him speaking there. So all of that will come together in his role as our president, which is an ambassadorial role and frankly we couldn't have had a better candidate for that role. I know that he will replicate the energy and passion for ADR which he espouses for KLRCA in his Presidential travels next year and in presenting the face of CIArb to the world.

> "I know that he will replicate the energy and passion for ADR which he espouses for KLRCA in his Presidential travels next year and in presenting the face of CIArb to the world."

The alternative dispute resolution landscape is constantly evolving given the fact that we live in a more globalised, more inter-connected, and information-intensive world, where changes in one part are transmitted rapidly to another. How do you see CIArb progressing in line with this constant evolution? Where do you see CIArb in the next fifty years? Would a 200th Anniversary celebration be a possibility for the Institute?

Yes there will certainly be a 200th Anniversary celebration and by that time, I expect the membership to have grown hugely but not just that, I would expect us to be at the forefront of the leading thought process and the development of techniques in dispute avoidance and then if there is a dispute – the management of that dispute.

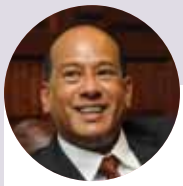
This is where I see our role going forward in helping parties, helping practitioners and helping the neutrals to actually develop techniques so that people come together as opposed to being forced apart by disputes. And as I said before, we have got the four pillars of our strategies and those are all designed to develop that concept of dispute resolution and dispute avoidance. The institution's 100th year anniversary is a landmark – something we celebrate looking backwards but much more importantly it is a springboard to look forward to develop our strategy, our products, to go particularly into education as well as the delivery of the qualifications and to match what people want and our products to that desire.

> This is where I see our role going forward in helping parties, helping practitioners and helping the neutrals to actually develop techniques so that people come together as opposed to being forced apart by disputes.

_FEATURE

Birds Eye View of International Arbitral Process: Malaysian Chapter

By ***Datuk Dr. Haji Hamid Sultan Bin Abu Backer,***
Judge, Court of Appeal Malaysia



INTRODUCTION BY DATUK PROFESSOR SUNDRA RAJOO

The Kuala Lumpur Regional Centre for Arbitration was established in 1978 by the Asian-African Legal Consultative Organisation (AALCO) with the objective of becoming the regional arbitration centre of choice for South East Asia in general and Malaysia in specific.

As such, the KLRCA was tasked with the duties of administering arbitration proceedings, both domestic and international in character, along with many other duties relating to dissemination of knowledge on ADR and arbitration, promoting the use of ADR domestically and internationally, to training in arbitration of legal practitioners, judges and other stakeholders.

In line with the Centre's endeavours to disseminate knowledge on ADR and arbitration, with KLRCA's quarterly newsletter being an ideal tool to facilitate such efforts; we make it our mission to source for industry related reading materials that have the capacity to enhance our existing comprehension of the subject matter.

For this quarter's issue, we had the privilege of publishing a contribution by one of the country's most influential and acclaimed author of legal books and write ups; Justice Datuk Dr. Haji Hamid Sultan Bin Abu Backer, Judge, Court of Appeal Malaysia. Justice Hamid is also an Honorary Visiting Professor of Damodaran Sanjivayya National Law University, Visakhapatnam, India.

Justice Hamid's books; Janab's Key to Civil Procedure, Criminal Procedure, Law of Evidence, Practical Conveyancing and numerous others have all gone on to become widely used text books in universities around the country, as well as key references in libraries of local chambers and firms.

This article is a reproduction of Justice Hamid's proposed Second Chapter to his latest book titled Janab's Key to 'International Arbitration: Malaysian Chapter with Commentary to Malaysian Arbitration Act 2005'. – set to be published in early 2016.

I am certain, upon its official launch and release, Justice Hamid's simplified and comprehensive take on the arbitration world will go on to become a popular guide amongst students, practitioners and enthusiastic observers of the field.

NEW YORK CONVENTION 1958, UNCITRAL ARBITRATION RULES AND UNICTRAL MODEL LAW

> These case laws often miss the point that parties themselves have chosen arbitration as a dispute resolution mechanism

One simple approach to understand international arbitration process is to appreciate the scope and purpose of the New York Convention 1958 ("the New York Convention") and its nexus to the UNCITRAL Model Law 1985 (amended in 2006) ("the UNCITRAL Model Law") as well as the UNCITRAL Arbitration Rules 1976 (as revised in 2013) ("the UNCITRAL Arbitration Rules").

The New York Convention obliges contracting parties where applicable under the Convention to recognise and enforce an international arbitration award made in a 'foreign state', provided it is in compliance with terms set out in Articles I to V of the Convention.

The UNCITRAL Arbitration Rules were meant to provide procedural rules for the arbitral tribunal to follow, where the parties have agreed that the rules will be employed to achieve an award which will be recognised and enforced under the New York Convention. The Rules have no force of law but only assist as a mechanism to be employed by the parties and/or the arbitral tribunal to arrive at an award which will be in compliance of Articles I to V of the New York Convention for it to be recognised and enforced by the relevant States, where the enforcement of the award is made. The Rules in a nutshell are like civil procedural rules employed in the courts but with a specific reference to arbitration. The shortcoming of the Rules is that it does not give any jurisdiction or power to the arbitrator or court in the conduct of the arbitration proceedings. In essence, the Rules stand as a guideline only to the arbitral tribunal to conduct the arbitral process justly.

The UNCITRAL Model Law which came after the publication of the UNCITRAL Arbitration Rules 1976, in essence is a combination of the New York Convention, in particular the relevant parts in Articles I to V and the gist of procedural rules found in the UNCITRAL Arbitration Rules 1976. The UNCITRAL Model Law gives jurisdiction and power to the court as well as the arbitrator to ensure or assist the arbitral tribunal to deliver an award which will be recognised and/or enforced in the relevant State within the spirit and intent of the New York Convention.

When a State adopts the UNCITRAL Model Law, it is referred to as a 'Model Law State', and it becomes the procedural law for arbitration or the *lex arbitri* of that State, which assists and supervises the arbitral process through the State courts, when the seat of arbitration is in that State. The court's role is to assist and/or supervise the arbitral proceedings. Assist generally means to give force of law to the rules of procedure set out therein, for example, to provide interim measures, etc. To supervise means to ensure that the arbitral process is conducted according to the party autonomy concept as well as the specific provisions of the *lex arbitri*, or according to the rules of the institution the parties have agreed to or has become applicable by default, etc. The object of this jurisdiction and power is to ensure that the arbitral tribunal delivers an award capable of recognition and enforcement under the New York Convention.

The UNCITRAL Model Law also gives some limited jurisdiction and power to the arbitral tribunal to determine whether the subject matter is arbitrable and/or whether it has jurisdiction to hear the matter, etc., and also to hear objections such as impartiality and independence of the arbitrator, breach of natural justice, etc. to ensure that integrity of the arbitration process is not compromised and the arbitral tribunal award will be recognised and enforced in the relevant State.

The UNCITRAL Model Law gives ample power to the court to set aside the award if the award prima facie will not be sustainable under the New York Convention. In lieu of setting aside the award, the UNCITRAL Model Law allows the award to be sent back to the arbitral tribunal to enable the tribunal to deliver an award which will be enforceable under the New York Convention. The court has no powers to vary the award, though the Malaysian Arbitration Act 2005 ("AA 2005") allows an award to be varied in cases relating to domestic arbitration. The UNCITRAL Model Law has also sufficient procedural rules or guidelines for the conduct of the arbitration process. However, the procedural rules or guidelines are brief in nature as it presupposes parties themselves will choose appropriate procedural rules or rely on institutional rules, which in essence will be within the spirit and intent of UNCITRAL Arbitration Rules. Most of the institutional rules will be a replica of the UNCITRAL Arbitration Rules 1976 or its latest update, being the UNCITRAL Arbitration Rules 2013, with such modification as may be necessary as to the nature of the specialised arbitration the institution is involved in.

The real secret for effectively and expeditiously understanding international arbitration lies in (i) fully appreciating the contents stated in Articles I to V of New York Convention and its applicability based on case laws in various jurisdictions; (ii) understanding the working of the UNCITRAL Model Law in the right perspective to ensure the arbitral tribunal delivers an award which will be recognised and enforced in the relevant State; (iii) to understand the working of the UNCITRAL Arbitration Rules or its equivalent to ensure the arbitral tribunal conducts the proceeding justly, economically and expeditiously without breach of natural justice, etc.

The greatest obstacle in understanding international arbitration is related to the case laws in various jurisdictions which are perceived to be or not to be within the spirit and intent of the New York Convention and/or the UNCITRAL Model Law. These cases arguably employ circuitous jurisprudence to rule over an award at the enforcement stage, defeating a claimant's right against the common jurisprudence of justice, equity and good conscience. It is also at times disheartening to note that arbitration friendly countries, once in a while, come out with a judgment refusing recognition and enforcement, inconsistent with the spirit of its previous judgments and providing circuitous jurisprudence to justify its decision. These case laws often miss the point that parties themselves have chosen arbitration as a dispute resolution mechanism and have chosen the arbitrator of their choice, they have agreed to be bound by the decision of the arbitrator and they have agreed to the seat i.e. *lex arbitri*. If at all a respondent is unhappy with an award for breach of a New York Convention obligation, the respondent arguably should make an application to set aside the award at the seat itself within the time frame provided and not raise the issue at the enforcement stage, which in all circumstances must be seen as abhorrent to notions of justice, equity and fair play, which arguably no civilised courts should subscribe to, unless the objection is one which could not have been taken at the court of the seat or was taken in a partisan State and the court refused to set aside, or the award does not satisfy the New York Convention requirement stated in Articles I to IV as opposed to Article V.

It is also important to note under the New York Convention or the UNCITRAL Model Law, there is no provision to set aside or refuse recognition to an international arbitration award on the basis that the arbitral tribunal committed an error of fact and/or law when it is done within the jurisdiction of the arbitral tribunal. That is to say even when the arbitral tribunal on the face of record had committed an error of law, it is not a ground for setting aside or refusing recognition, unless the court is minded to employ 'public policy' concept to set aside the award. That being the jurisprudence, other grounds for refusing recognition at the enforcement stage must be considered as paltry and/or that the respondent to the award has waived its rights as it was not done at the seat court. This proposition is impliedly recognised in Article V of the New York Convention, as it says 'may' refuse recognition and enforcement and not 'shall'. The UNCITRAL Model Law prescribes to the proposition that an award cannot be set aside on the grounds the arbitral tribunal has committed an error of fact and/or law within its jurisdiction. Under the previous regimes relating to the *lex arbitri* in present Model Law States, the courts have set aside arbitral awards on the grounds of error of fact and/or law on the face of the award. There is no shortage of cases on this point in Malaysia, India, etc. under the previous arbitration regimes. Occasionally, we do come across judgments in Model Law states which set aside awards on the grounds of error of law and/or fact. These judgments must be read with caution, more so if they are in reliance of English cases, as the provision to intervene in an arbitration award under the English Arbitration Act 1996 is much wider and does not strictly follow the caveats placed in Model Law 1985.

NEW YORK CONVENTION 1958

It is crucial to appreciate Articles I to V of the New York Convention relate to issues such as (i) valid and enforceable arbitration agreement; (ii) dispute; (iii) arbitrability; (iv) and the ground which the respondent can rely on to refuse recognition and enforcement. These issues are often seen as preliminary issues which an arbitral tribunal must take cognisance of and deal with religious precision to ensure the award delivered will be recognised and enforced under the New York Convention. If the arbitral tribunal delivers an award which will be objectionable to any of the terms or grounds of Articles I to V of the New York Convention, the award may not be worth the paper it is written on. These four issues stated above are seen as jurisdictional issues of the arbitral tribunal and upon ventilation by the arbitrator, there is a right of application for setting aside before the courts under the UNCITRAL Model Law. The decision of the court is final and not appealable, but it will not prohibit the respondent from raising the issues at the enforcement stage, though arguably courts should not entertain the objection at the enforcement stage.

What is important to note is that Articles I to IV deal with substantive issues where the award will be seen as nullity, if the dispute is proceeded by way of arbitration. The grounds set out in Article V are matters where the enforcement court may allow enforcement even though the respondent has shown proof of its breach. Thus, it is important for a claimant not to proceed with arbitration to settle the dispute, when there are bona fide, valid and serious objections in relation to issues related to Articles I to IV of the New York Convention, as opposed to grounds in Article V, unless the award is expected to be enforced in countries which are perceived to be not arbitration friendly or do not have an independent and impartial judiciary.

There is also another caveat which the claimant must take cognisance of, where it relates to a dispute which may attract 'public policy' of the State the award is expected to be enforced in. For example, a Model Law country such as India takes serious cognisance of 'public policy' grounds in contrast to Singapore. In essence, it must be stated that if a prospective award has a real prospect of challenge as well as likelihood of not being able to be enforced in a particular State or any other State where the respondent has assets, arbitration may not be the right mode for dispute resolution. In consequence, Articles I to V of the New York Convention and its repetition in various parts of the UNCITRAL Model Law or provisions which attempt to check any breach of Articles I to V must be studied in detail to avoid the award being refused of recognition and enforcement.

The arbitrable issues and/or grounds in Articles I to V of the New York Convention which can defeat an award being enforced and the relevant issues to take note of can be summarised as follows:

i) Article I(1) – award must arise in relation to disputes between parties to international arbitration.

ii) Article I(3) –

   a. contracting states can choose to declare that only the award of another contracting state will be recognised and enforced (comity and reciprocity);

   b. declare that it will only apply to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state.

iii) Article II(1) – Arbitration agreement must be in writing in which parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

iv) Article II(2) – Arbitration agreement or clause must be in writing and signed by the parties or contained in exchange of letters or telegrams.

v) Article II(3) – Court is obliged to refer the dispute to arbitration upon the request of a party unless it finds the said arbitration agreement null and void, inoperative or incapable of being performed.

vi) Article III – State is obliged to recognise an arbitration award as binding and enforce it according to the rules of procedure. No substantial onerous conditions or higher fees or charges may be imposed in contrast to a domestic award.

vii) Article IV – The party applying in any State for recognition and enforcement of the award must supply a duly authenticated original award or a duly certified copy thereof. In addition, it must supply the original agreement stated in Article II or duly certified copy thereof. The Claimant, if the award is not in the official language of the relevant State, must supply a translation of these documents duly certified by an official or sworn translator or by a diplomatic or consular agent.

viii) Article V – recognition and enforcement may be refused if any of the following is proved:

   a. incapacity of one party to enter into the agreement;

   b. no proper notice given to a party of the appointment of arbitrator or of the arbitral proceedings or party was not given proper opportunity to present its case;

   c. the award deals with a dispute not contemplated by the parties or not falling within the terms of the submission to arbitration (the award can be saved if the infringing part can be separated);

   d. the composition of the arbitral tribunal was not according to agreement or law;

   e. the award has not yet become binding, or has been set aside by a competent authority;

   f. if the court finds the subject matter is not capable of settlement by arbitration.

   g. if the recognition and enforcement will be contrary to public policy.

It must be noted that the requirements stated in Articles I to IV are conditions precedent, which the enforcement court must take cognisance of before an international arbitration award can be recognised and enforced. Articles I to IV terms must be seen as independent terms by themselves and of mandatory criteria failing which the enforcement court can be perceived as not recognising the Convention obligation. The grounds for refusing recognition and enforcement under Article V must be treated as a separate chapter, though it may appear to have the effect of being inextricably interwoven with Articles I to IV. When it relates to Articles I to IV, if the court finds the terms stated therein have been breached, it will not qualify as a New York Convention Award. The award cannot be given recognition. In the case of Article V, if the respondent can prove one of the grounds stated in Article V, the court 'may' refuse enforcement and recognition.

It must also be noted that Articles I to V and the terms stated therein are always subject to interpretation of the court. No clear guidelines are available as to meanings of the terminologies or phrases. For example, Article II(3) uses the words 'null and void', 'inoperative', etc. A decision of a court in one State on this issue will not be accepted as a binding precedent, though courts of friendly countries may refer to it and treat it with respect. In addition, if the seat court finds the arbitration agreement is not 'null and void' and finally an arbitral tribunal delivers an award that does not necessarily mean the court in the country where enforcement is sought must recognise the decision of the seat court. The New York Convention has everything to do with recognition of an international arbitration award and not the judgment or decision of the seat court relating to the award. In essence, the New York Convention gives the court, where the party seeks recognition and enforcement of the award, to do an independent exercise to satisfy itself whether it is an international arbitration award, and if it finds the criteria stated in the Convention is satisfied, it will recognise and enforce the award.

It must be noted, conflicting decisions in international arbitration and the circuitous jurisprudence to justify that an award be not given recognition or ought to be set aside or the subject matter of the dispute should not proceed, arises in consequence of the broad terms employed in the New York Convention to allow the enforcement court wide powers to re-evaluate the framework and related matters to the dispute and if deemed fit not to give recognition and enforcement. In contrast, the UNCITRAL Model Law has been framed to ensure the seat court as well as the court which is involved with recognition and enforcement take cognisance that the 'international mandate' is that (i) there must be minimum interference by the courts; (ii) once there is clear intention of the parties to arbitrate, the UNCITRAL Model Law has provision to take care of other issues such as seat, governing, law, procedure, etc. as well as check-and-balance steps to deal with issues such as (a) arbitrability; (b) impartiality, independence and misconduct of an arbitrator during the course of proceeding with the supervisory support of the court to ensure the award will pass through all scrutiny of the terms set out in New York Convention, Articles I to V. Thus, once an award is delivered and is not set aside within the time frame provided for, it is the expectation of the fair minded international arbitral community to see that the award is recognised and enforced, unless the award arises from a seat which is not arbitration friendly and/or not recognised for its judicial independence, and/or is not a New York Convention award and/or State.

In essence, the UNCITRAL Model Law stands to assist parties who genuinely seek to settle their dispute by arbitration, to provide them the support to ensure an award which will be recognised and enforced as per the New York Convention. It also gives the award debtor or purported award debtor every opportunity to ventilate his grievance on arbitrability and/or public policy, etc. as per the challenges he can take pursuant to Articles I to V of the New York Convention at the seat court itself. Arguably all Model Law countries are obliged to recognise and enforce the award as per the international mandate both pursuant to the UNCITRAL Model Law as well as New York Convention and should only refuse recognition and enforcement of the award in extremely rare occasions and only when it can be demonstrated that the claimant had abused the arbitration process which has materially prejudiced an innocent respondent. A mere 'passive' respondent who allows the arbitration process to proceed and attempts to preserve his rights to object at the time of recognition and enforcement stage, may arguably be treated to have waived his rights to object, as well as to be bound by the arbitral award when the seat of arbitration is a respected jurisdiction where the judiciary is reputed to be independent and impartial by the fair minded international arbitration community. English courts recognise the passive rights of respondent to object to the award at enforcement stage and have been followed in a few isolated cases in Model Law countries. Arguably, 'passive right' concept must be seen as an anathema in countries which have subscribed to the UNCITRAL Model Law, as the Model Law is meant to ensure the seat court supervises the arbitral tribunal as well as the integrity of the award upon the application of parties to ensure a New York Convention award, that is free from any infirmities under the Convention will be recognised and enforced in any contracting States.

ARBITRAL PROCEEDINGS, MODEL LAW AND AA 2005

COMMENCEMENT OF ARBITRATION PROCEEDINGS

To commence arbitration proceedings, there must be (a) a valid and enforceable arbitration agreement; (b) a dispute must have arisen; (iii) the subject matter of the dispute must be arbitrable. On the assumption that all the three criteria stated above are satisfied, the claimant can initiate the arbitration proceedings by issuing a written notice to arbitrate to the respondent. Unless otherwise agreed by the parties, the arbitration agreement shall commence upon the respondent receiving the written notice to arbitrate. [See article 21 Model Law; s.23 AA 2005].

APPOINTMENT OF ARBITRATOR

Arbitrators are usually appointed by the agreement of parties, or in the case the parties have chosen the arbitration proceedings to be administered by an arbitral institution and its rules, then the arbitrators will be appointed as per the rules. If the parties fail to agree on the appointment of the arbitrators but have agreed to the seat of the arbitration, then the arbitrators will be appointed by default as provided by the *lex arbitri* of the seat. For example, if Malaysia is the seat of arbitration, then either party may apply to the Director of the Kuala Lumpur Regional Centre for Arbitration (KLRCA) for such an appointment. If the Director of the KLRCA fails to make the appointment within the time frame provided, the parties may apply to the court. [See article 11 Model Law; s.13 AA 2005].

Difficulties may arise to appoint arbitrators if parties have not agreed to the seat of arbitration. In an arbitration friendly country, if the intention to arbitrate is clear between the parties, any party can approach the court for the appointment of the arbitrators in a country where the party takes the view should be the seat of the arbitration, taking into consideration the law relating to the dispute as well as the arbitration agreement. There are number of decisions which deal with the area of jurisprudence relating to 'pathological clause' (or uncertain terms) of arbitration agreement, in various jurisdictions. A 'pathological clause' may not lead the courts in non-arbitration friendly countries to order the matter to be arbitrated, and as such, the only remaining option will be to litigate the dispute in the courts which have jurisdiction to hear the matter.

Parties can agree to the number of arbitrators. Usually, there are three arbitrators for international arbitration and one arbitrator for domestic arbitration. The institutional rules, if parties have so agreed, may also provide for a single arbitrator in the case of international arbitration. [See article 10 Model Law; s.12 AA 2005].

In the case of a panel of three arbitrators in international arbitration, each party can choose their arbitrator usually referred to as a party appointed arbitrator. Both party appointed arbitrators then will choose the third arbitrator, often referred to as presiding arbitrator. [See article 11 Model Law; s.13 AA 2005].

All arbitrators are required to maintain their independence and impartiality throughout the proceedings, notwithstanding that they are party appointed arbitrators. Their role being quasi-judicial in nature, they are expected to conduct the proceedings justly, fairly and expeditiously without breach of natural justice. [See article 18 Model Law; s.20 AA 2005]. In most arbitration proceedings of a technical nature, the arbitrators appointed will usually be experts in the subject matter of the dispute. However, even though they may be experts, they are by the rules of natural justice, restrained from using their own expertise to determine matters without giving proper notice to the parties.

It is not just sufficient to appoint the arbitrator. The arbitrator must agree to the appointment as well as the reference, inclusive of the fees in writing, and it must be communicated to all the parties to the arbitration proceeding.

RESPONDENT'S OBJECTION TO ARBITRATION PROCEEDING

If the respondent takes the view that there is no valid arbitration or a dispute has not arisen or the subject matter is not arbitrable or the seat of the arbitration is not the right seat, it can be raised as a preliminary issue before the arbitral tribunal. These issues are often referred to as jurisdictional issues of the arbitral tribunal and the tribunal has jurisdiction to hear the objection and issue an interim award on jurisdiction. A party who is dissatisfied on the interim award relating to arbitral tribunal's jurisdiction can appeal to the court if provided for in the *lex arbitri*. That does not necessarily mean that the party cannot raise the same issue at the time when the claimant attempts to enforce the final award. There is no shortage of hotly disputed cases in this area of jurisprudence, and cases are not consistent relating to the legal principles in all Model Law jurisdictions. [See article 16 Model Law; s.18 AA 2005]. Cases from England on this area of jurisprudence must be read with caution as England is strictly not a Model Law country.

The other issue which may arise during the stage of preliminary objections may be related to what the applicable law the arbitral tribunal has to deal with in relation to the 'arbitration agreement', as well as the subject matter of the dispute, and to do so the arbitral tribunal may have to look at the law relating to the dispute, etc., inclusive of conflict of law rules. There are many cases in this area of jurisprudence, and the decisions in various jurisdictions are not consistent with other legal rulings. [See article 28 Model Law; s.30 AA 2005].

At times, whether there is a valid arbitration agreement in writing can be a disputed issue. It is an important pre-requisite for the claimant to establish that there is an arbitration agreement in writing and signed by the parties, as per the New York Convention. It can also be by exchange of letters, telex, telegrams, facsimile or other means of communication which provide a record of the agreement. There is no shortage of cases in respect of a valid and enforceable arbitration agreement. [See article 7 Model Law; s.9 AA 2005].

PRELIMINARY CONFERENCE

Once an arbitrator is appointed, he can call for a preliminary conference to find out the views of parties on all issues relating to the arbitration proceedings and the manner in which any objection should be dealt with, inclusive of the time frame to be settled in respect of various stages of the arbitration proceedings. The preliminary conference can be held by way of meeting with the parties or by teleconferencing, etc. Whatever has been agreed to in the preliminary conference can be reduced into writing, signed by all parties, including the arbitral tribunal, to be binding on all parties.

The agenda for the preliminary meeting should be as comprehensive as possible to get the consensus of the parties to justly, expeditiously and economically conduct the arbitration process. The agenda should ideally be to deal with:

a. Arbitrator's terms of appointment, inclusive of the fees and administrative expenses, security for costs for the arbitrators, etc.

b. To inspect the arbitration agreement as well as the contract between the parties to ascertain the arbitrator's jurisdiction and whether the respondent has any issues and if so, how they should be determined before the commencement of arbitral proceedings.

c. To find out whether any parties have any form of concern in respect of the arbitrator's impartiality, independence and/or qualification. If so, how the concern should be addressed before the commencement of arbitral proceedings in respect of the subject matter of the dispute.

d. To confirm the seat of arbitration and if there is a dispute, to determine how it should be dealt with.

e. To confirm the laws applicable to the arbitration proceedings. If there is a dispute, to determine how it should be dealt with.

f. To determine the language of the arbitration proceedings and all matters related to language, such as interpreters, etc.

g. To determine the mode of recording evidence and the issues such as transcribers, the issue of privacy and confidentiality of the proceedings inclusive of the witness, expert, etc. and other related matters.

h. To determine the costs of the arbitration proceedings as a whole and whether the parties have any proposal to cap costs as well as time frame, etc.

i. To determine the remedies and relief sought by the parties and the post and pre interest rate per annum for the award, inclusive of the currency the award should be made in.

j. To determine the procedure and evidence if parties have not selected any institutional rules, etc.

k. To determine the timetable for the whole hearing until the delivery of the award, including the filing of pleading, discovery, interrogatory, further and better particulars, the number of days of hearing, etc. and also the procedures for amendments and extension of time, etc.

l. To determine the issue relating to disclosure and discovery, etc. and the time frame and how to deal with its breach if any, taking into consideration that disclosure and discovery often slow down the arbitration process and that may affect the agreed time table and lead to added costs of the arbitration as well as the arbitrator's fees and expenses.

m. The mode of hearing, taking into consideration the value as well as the dispute. If the dispute is to the construction of the document, the need to give oral evidence

or affidavit evidence, etc. can be avoided. Even if the dispute relates to facts, oral evidence of the witnesses can be limited to the main witness and others may give evidence in the form of statutory declaration, etc. with a right to cross examine the witness, only if it is necessary. The issues relating to witness statement and expert witness and the time frame to file and serve can also be determined. Time saving measures will assist to expedite the arbitral process and reduce the costs and expense of the arbitration. The manner submission should be dealt with and the time frame can also be determined.

n. The issues relating to who is authorised to represent the parties may be a crucial factor to be determined. The manner of the authority letter to be issued and by whom may also be relevant to preserve the integrity of arbitration proceeding.

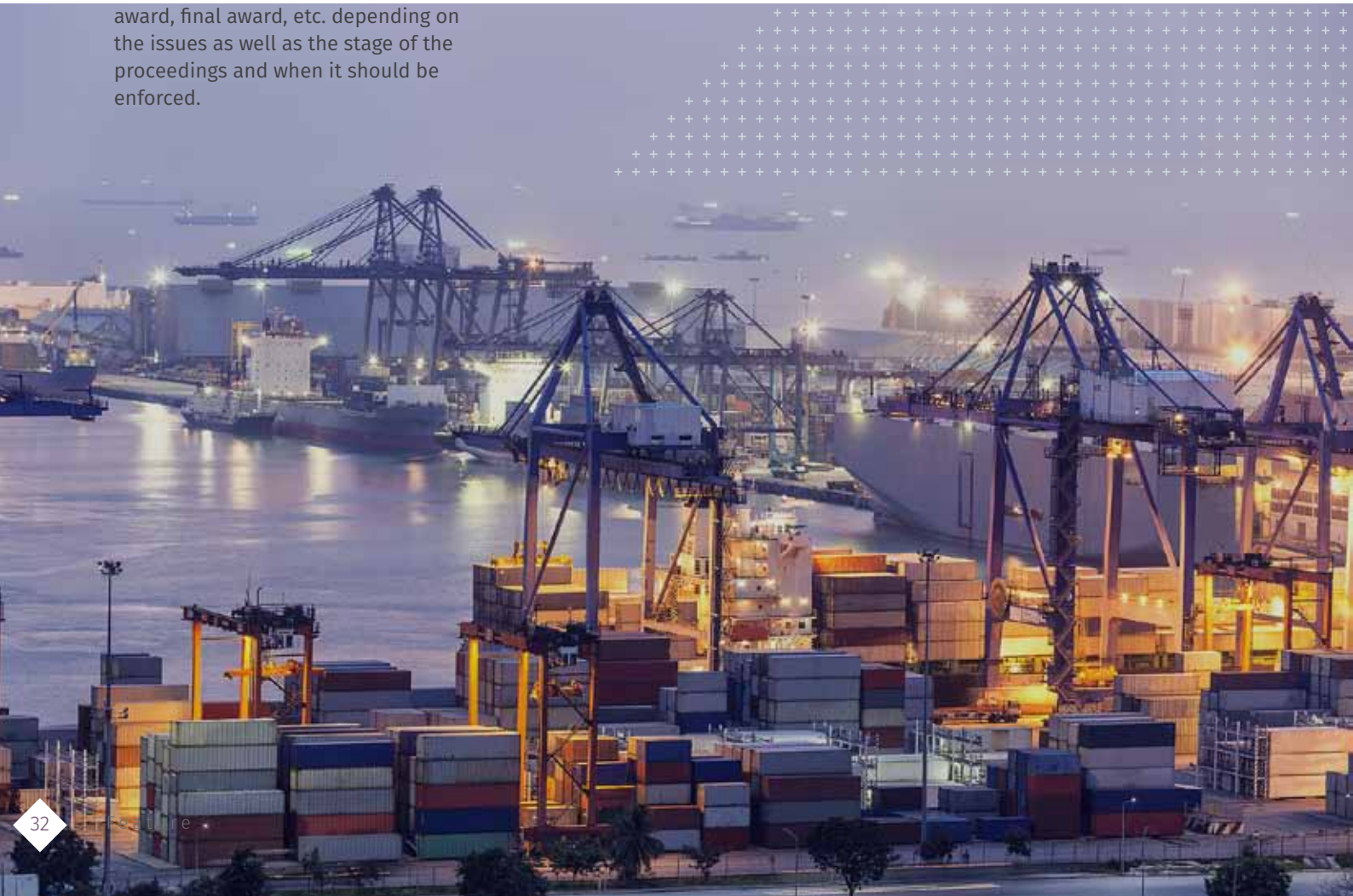
o. To determine the types of award the arbitral tribunal may issue and any agreement as to its enforceability, for example, interim award, partial award, final award, etc. depending on the issues as well as the stage of the proceedings and when it should be enforced.

It is always prudent for the arbitral tribunal to have a standard list relating to the agenda for the preliminary conference prepared in a comprehensive manner and sent to both parties in advance and ask them to come to consensus on the issues to save costs and time of the preliminary conference, as well as the arbitration proceeding.

POWERS OF THE ARBITRATOR

Unless otherwise agreed, the UNCITRAL Model Law gives power to the arbitral tribunal to make orders as to interim measures as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. AA 2005 gives only limited powers to the arbitral tribunal to order interim measures. They are for (a) security for costs; (b) discovery of documents and interrogatories; (c) giving of evidence by affidavit; (d) the preservation of interim custody or sale of any property which is the subject matter of the dispute. [See article 17 Model Law; s.19 AA 2005]. Similar interim measures orders can also be obtained in the High Court, pursuant to section 11 of AA 2005. In addition, the High Court has powers to (a) appoint receiver; (b) secure the amount in dispute; (c) to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; (d) grant interim injunction or any other interim measure.

As a general rule, the High Court has wider powers to grant interim measures order in contrast to the arbitral tribunal. An application generally will be made first to the arbitral tribunal, unless it is urgent and needs to be obtained ex-parte at which point it may be made to the High Court. If the arbitral tribunal has ruled on interim measures order, an application can still be made to the High Court. The High Court has to treat the findings of fact made by the arbitral tribunal conclusive for the purpose of the application. [See s.11 of AA 2005].



DETERMINATION OF RULES OF PROCEDURE

The parties are free to determine the procedure to be followed by the arbitral tribunal in conducting the proceedings. By default, the arbitral tribunal can conduct the proceedings as it deems appropriate. This power will include the power to determine the admissibility, relevancy, materiality and weight of any evidence. [See article 19 Model Law 1985]. Wider powers for the arbitral tribunal have been set out in section 21 of AA 2005.

[17] In exercising these powers the arbitral tribunal must be mindful that the parties shall be treated with equality and each party shall be given a fair and reasonable opportunity of presenting the party's case. [See article 18 Model Law 1985; s.20 AA 2005]. Failure to strictly comply with the rules of natural justice may render the award to be set aside and/or enforcement of the award may be denied by the court.

CHALLENGE AND/OR TERMINATION OF ARBITRATOR

An arbitrator can be challenged and removed if there are circumstances which give rise to justifiable doubts as to his impartiality or independence. [See articles 12 and 13 Model Law]. In Malaysia, the challenge first must be made before the arbitral tribunal and if it is not successful, it can be made before the High Court. The decision of the High Court is not appealable. A strict time frame is set out in relation to the challenge procedure. However, there is a continuing duty for the arbitrator to be independent and impartial throughout the proceedings. An application for challenge and recusal of the arbitrator can be taken at any time before the arbitral award is delivered, provided the time frame is not breached.

The mandate of the arbitrator can also be terminated when in law or fact the arbitrator is unable to perform the functions of his office, or fails to act without undue delay or if parties agree to the termination, etc. If the arbitrator refuses to accept the termination, an application can be made to the court. The decision of the High Court in Malaysia is not appealable. [See article 14 Model Law; s.16 AA 2005].

When the mandate of the arbitrator terminates, a substitute arbitrator can be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced or by the agreement of the parties. [See article 15 Model Law 1985; s.17 AA 2005]. The ruling of the arbitrator before his termination will be valid.

AWARD

It is trite that an award is final and binding with some room for amendment, etc. as provided for by the *lex arbitri* and subject to the respondent's right to set aside the award or object to its enforcement. [See article 33 Model Law 1985; s.35 and 36 AA 2005]. When it relates to a domestic award, the High Court in Malaysia has additional powers to remit the award in whole or part for reconsideration in relation to a question of law to the arbitral tribunal provided it fulfils certain conditions [See s.42 of AA 2005]. When it relates to an international or domestic award, the court can remit the award to the arbitral tribunal to resume the arbitration proceedings or take such other action to eliminate the grounds for setting aside the award.

CHALLENGES IN ARBITRAL PROCEEDINGS AND AWARD

The main challenges in relation to arbitration proceedings can be summarised as follows:

a. Challenge as to the jurisdiction of the arbitral tribunal, which include matters stated earlier in respect of the arbitration agreement, arbitrability as well as the applicable law and/or rules, etc. This part of the challenge and the final outcome largely depend on case laws. It is an area of jurisprudence, those in the study, practice and administration of arbitration proceedings must be familiar with and also appreciate that even though the challenges are not successful during the stage of arbitration proceedings, these challenges may be mounted to set aside the award or stop the enforcement of the award.

b. The second challenge during the arbitration proceedings will be in relation to the impartiality and independence of the arbitrator as well as his qualification and also the termination of the arbitrator. The case laws in this area of jurisprudence is not as complex as the former. However, the challenge if not successful may also be mounted to set aside the award as well as to stop the award being enforced.

The third challenge may arise when the respondent seeks a stay of court proceedings if one party to the arbitration agreement has initiated an action in the High Court when there is a valid and enforceable arbitration agreement in existence. [See article 8 Model Law 1985; s.10 AA 2005].

The award itself can be challenged at two stages. The first stage will be on an application to set aside the award. [See article 34 Model Law 1985; s.37, 42 AA 2005]. The next stage is at the recognition and enforcement stage of the award. [See articles 35 and 36 Model Law 1985; s.38 and 39 AA 2005]. This is an important area of jurisprudence that those in the study, practice and administration of arbitration proceedings must also be familiar with. Other than the challenges stated, the law on international arbitration as well as domestic arbitration is quite straight forward and is time and cost effective in contrast to litigation.

The focus in international arbitration by the claimant or his counsel will be to make sure that the claimant secures an award which will not be impinged by the respondent on any of the grounds set out in Articles 1 to V of the New York Convention 1958. Getting an award which will not obtain recognition and enforcement of the court in the relevant

jurisdiction will entail irreparable loss and damage to the claimant to the advantage of the respondent. In the case of domestic arbitration, Articles 1 to V of the New York Convention are not relevant. However, the claimant must take cognisance of sections 37, 38, 39 and 42 of AA 2005 which allows the court to intervene and set aside the award or refuse recognition and/or enforcement.

The distinction in judicial approach in respect of the award in international and domestic arbitration is that (a) in international arbitration as a general rule the court cannot intervene to set aside the award on the grounds the award is bad for error of law and/or fact. The court is not concerned with the award but only with the jurisdiction of the arbitral tribunal and its decision making process in arriving at the award. (b) In domestic arbitration in Malaysia, in addition to what has been stated in the paragraph above, the court may intervene on the grounds of error in the award and set it aside, vary or remit it back to the arbitrator for reconsideration. Such an approach cannot be taken by the court in international arbitration, as per the Model Law 1985 and AA 2005, unless parties to international arbitration having a seat of arbitration in Malaysia have opted for part III of AA 2005. [1]

1 This part of the Chapter is written without any citations. The relevant citations, cases and principles are discussed in Chapter Three and Four.

ABOUT THE AUTHOR

Justice Datuk Dr. Haji Hamid Sultan bin Abu Backer, a Judge of Court of Appeal Malaysia, is an Honorary Visiting Professor of Damodaran Sanjivayya National Law University, Visakhapatnam, India; a barrister and a fellow of the Chartered Institute of Arbitrators. He is a graduate in economics and also an honours and masters degree holder from University of London in Insurance, Shipping and Syariah Law. He also holds post graduate diplomas in Islamic Banking and Finance and also in Syariah Law and Practice from International Islamic University Malaysia. He was a member of the Malaysian Bar Council for more than 6 years and has served as Chairman in various committees. He has been invited as a visiting Scholar of University of Sheffield in United Kingdom and also participates in various other activities of Universities such as examiner of PhD thesis, external examiner, Guest Speaker, etc. He has written on various subjects, inclusive of Civil Procedure, Criminal Procedure, Evidence, Conveyancing, Islamic Banking and many more areas, on commercial law. His books grace the libraries of law firms and the chamber of judges. His books are not only used as text books in all institutions of higher learning offering law but also used by all who are involved in the practice and administration of law in Malaysia. His doctorate thesis was on Civil Procedure and Justice.

_EVENTS

IPBA Asia Pacific Arbitration Day 2015

14th September 2015

A flurry of international events took place at the Centre's premises, Bangunan Sulaiman in the month of September. One particular conference that garnered a significant amount of interest and publicity was the inaugural IPBA Asia Pacific Arbitration Day 2015 that was jointly hosted with the KLRCA.

The Inter-Pacific Bar Association (IPBA), a preeminent legal association in this region currently boasts an extensive membership base made up of over 1,400 business and commercial lawyers from over 65 jurisdictions worldwide. Drawing from its unique 22 specialist committees and one ad hoc committee covering all areas of law of interest, the conference organising team led by Mohanadass Kanagasabai was able to orchestrate a timely and substantive programme that saw numerous illustrious speakers and guests attending the event.

Session 1: The Application of Conflicts of Law Rules to Arbitral Disputes

Panelists:

- Mr. Christopher To (Christopher Wing To, Hong Kong)
- Mr. Lionel Persey QC (Quadrant, London)
- Prof. Benjamin Hughes (Seoul National University, Korea)
- Mr. Chan Leng Sun SC (Baker & McKenzie. Wong & Leow, Singapore)
- Mr Mohan Pillay (Pinsent Masons MPillay, Singapore)

Session 2: Costs of Arbitration and Third Party Funding

Panelists:

- Ms. Tan Ai Leen (SIAC, Singapore)
- Mr. Richard Keady (Bird & Bird, Hong Kong)
- Dr. Anton G. Maurer (CMS Hasche Sigle, Germany)
- Ms. Shanti Mogan (Shearn Delamore, Kuala Lumpur)
- Mr. Kevin Prakash (Mohanadass Partnership)

Delivering the conference's keynote address was The Right Honourable Lord Justice Jack Beatson, Lord Justice of Appeal. The rest of the event consisted of four sessions that explored themes such as conflicts of law and privilege in differing legal systems and whether the application of international standards and the increased adoption of transnational laws is a good thing to achieve certainty and uniformity in these areas. Other topics discussed in detail were; third party funding in the context of managing escalating costs in arbitration and sensibilities affecting multi-party and multi-contract dispute resolution,

Session 3: The Operation of Confidentiality and Privilege in International Arbitration

Panelists:

- Mr. Sudharsanan Thillainathan (Shook Lin & Bok, Kuala Lumpur)
- Ms. Marion Smith QC (Essex Chambers, London)
- Mr. Francis Xaview SC (Rajah & Tann, Singapore)
- Dr. Bernhard Meyer (MME Partners, Zurich)
- Mr. Sivakumar Kanagasabai (Skrine)

Session 4: Multifaceted Contemporary Issues in Maritime Dispute Resolution

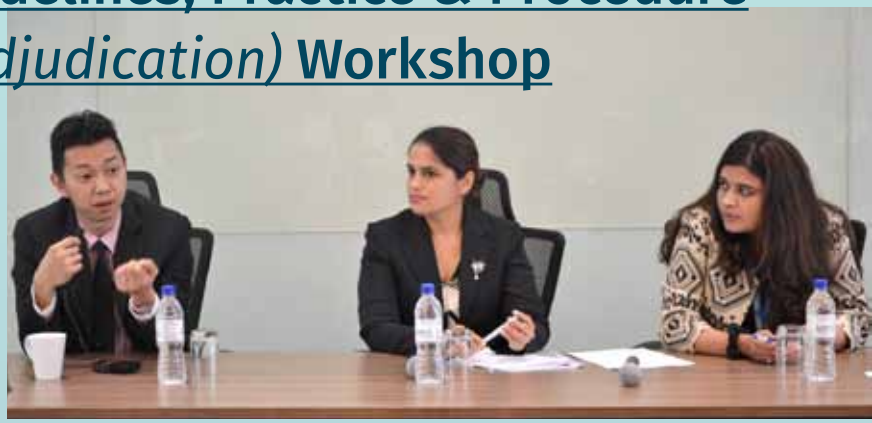
Panelists:

- Datuk Nallini Pathmanathan (Court of Appeal, Malaysia)
- Ms. Sitpah Selvaratnam (Tommy Thomas, Kuala Lumpur)
- Ms. Poonam Melwani QC (Quadrant, London)
- Ms. Mary Thomson (Pacific Chambers, HK & Stone Chambers, London)
- Mr. Ooi Thian Seng (Oon & Bazul, Singapore)

↘ Keynote Address by The Rt Hon Lord Justice Jack Beatson

KLRCA's GST Guidelines, Practice & Procedure *(Arbitration & Adjudication)* Workshop

30th September 2015



The Centre wrapped up an industrious third quarter by successfully rolling out the inaugural edition of 'KLRCA's GST Guidelines, Practice and Procedure Workshop'.

With the introduction of this Workshop Series which will be a quarterly spectacle, it allows the Centre to interact with arbitrators, adjudicators, lawyers, in-house counsels, accountants, finance managers and parties in various alternative dispute resolution proceedings in KLRCA; and provide them with a practical and detailed analysis of international best practices, templates and procedures used at KLRCA. This Practice and Procedure Workshop also serves as a continuous learning forum for stakeholders.

As globalisation continues to sculpt the alternative dispute resolution landscape; practices and procedures across jurisdictions are revised and updated to ensure they evolve in tandem with the progression that takes place. Newly introduced policies and enforcement of Acts stimulate the necessity of such revisions and timely updates.

It was with this notion that this quarterly workshop was coined. In line with the Centre's responsibility to provide our valued stakeholders with the latest set of information; hours were spent on revisiting, analysing, dissecting, realigning and improving the Centre's Practices and Procedures.

In addition to introducing an updated, simplified and concise version of KLRCA's Practices and Procedures, the inaugural edition of this workshop series was centred around an area that has generated numerous enquiries and concern since its enforcement nationwide – the recent implementation of the Goods and Services Tax.

Proceedings for the day were broken down into two halves; the first half covering matters pertaining to GST and the second half consisting of two separate 'Practice and Procedure' sessions catering for adjudicators and arbitrators that ran simultaneously.

Experienced tax consultant, Chris Yee Chun Lin from Crowe Horwath's GST Division took charge of the workshop's first session, 'The Implications and Implementation of GST for Arbitrators and Adjudicators'. Chris presented a detailed explanation of issues surrounding; 'adjustments to provisional and preliminary advance deposits', 'impact on foreign arbitrators', 'impact on interim payment prior to issuance of award', 'differences between tax invoice and commercial invoice', and 'proceedings that span GST appointed date'.

KLRCA's Head of Legal Services, Rammit Kaur then took over to deliver her presentation on, 'GST Implementation Guidelines of Arbitration and Adjudication'. The first half of the workshop drew to a close with Chris Yee joining Miss Kaur on a discussion panel that drew numerous questions and feedback from the floor.

Participants were segregated into two function halls upon returning from a networking lunch. KLRCA's Senior International Case Counsel, Smrithi Ramesh headed the workshop for the Arbitrators, while Senior Case Counsel, Suganthy David led the workshop for the Adjudicators. Proceedings for the day ended on a positive and satisfactory note, through the well received concluding panel discussions.

- *Bottom Left:* Smrithi Ramesh and Rammit Kaur heading the discussion session for the arbitrators
- *Bottom Right:* Suganthy David and Danaindran Rajendran overseeing the discussion session with the adjudicators

_EVENTS

KLRCA Talk Series

KLRCA Talk Series continued with numerous engaging talks by ADR experts. Below are talks that were held from July–September 2015

9 jul

MEDIATING A NATURAL DISASTER CLAIM

Speakers: Jonathan Wood (Head of International Arbitration, Reynolds Porter Chamberlain [RPC])

Moderator: Steven Thiru (Senior Partner, Messrs Shook Lin & Bok and Current President of Malaysia Bar Council)

Attendees were taken through Jonathan's account of the Istanbul-Ankara Highway incident caused by a major earthquake in Turkey that occurred in 1999. A collapsed tunnel disrupted construction and caused major losses, leading to huge claims being brought against the international insurance market. Jonathan provided the attendees with an insight into how mediation came to be the most effective way to resolve the dispute, and some of the features that emerged from the unusually lengthy mediation process, that lead to an ICC arbitration in Zurich and Commercial Court proceedings in England.

NEW SERIES!

25 aug

IN THE SEAT: 60 MINUTES WITH LORETTA MALINTOPPI, "IS THERE AN ASIAN WAY FOR INVESTOR-STATE DISPUTE RESOLUTION

Speakers: Loretta Malintoppi (Of Counsel, Eversheds)

Moderator: Christopher Leong (Managing Partner, Chooi & Company)

KLRCA introduced a brand new series in the month of August, with a special focus towards the investment treaty arbitration industry. Highlighting the inaugural 'In The Seat' talk was investor-state dispute resolution expert, Loretta Malintoppi. Attendees were given recent examples of investment arbitrations involving Asian components, with further analysis on peculiarities involved, underlying investment treaties, the composition of the tribunals, the way the cases were decided, and the kind of treaty violations.

27 jul

THE IMPORTANCE AND DEVELOPMENT OF INTERNATIONAL ARBITRATION IN THE ASIA PACIFIC REGION

Speakers: Ernest Yang (Partner, DLA Piper)

Moderator: Datuk Professor Sundra Rajoo (Director, KLRCA)

This talk examined the development of international arbitration in the Asia Pacific and the benefits of resolving the disputes locally. Ernest devoted a portion of the talk discussing the importance of cultural awareness in arbitration proceedings (especially in fact finding) and how the failure to appreciate cultural differences may lead to perceptions of impartiality.

28 aug

ADJUDICATOR'S JURISDICTION: PAYMENT REPONSE, COUNTERCLAIMS AND THE EFFECTS OF THE BINA PURI CONSTRUCTION CASE

Speakers: Belden Premaraj (Partner, Messrs Belden)

Moderator: Gananathan Pathmanathan (Partner, Messrs Gananthan Loh)

Topics related to CIPAA matters continue to generate a huge interest amongst stakeholders of the construction industry. This event registered a record attendance for a KLRCA Evening Talk as 200 participants filled the Centre's auditorium to hear learned adjudicator and arbitrator, Belden Premaraj present on new findings and developments centering around the CIPA Act that came into effect back in 15th April 2014.

KLRCA around the globe

The Centre continued to enhance its international standing through its presence at conferences and training workshops held at home and around the globe.

1 **8 July 2015**
KLRCA Senior International Case Counsel, Smrithi Ramesh (3rd from left) partaking in a panel discussion during the 'In-House Congress 2015', Manila edition.

2 **19 August 2015**
KLRCA International Case Counsel, Aastha Dua (Centre) pictured here with fellow panellists at the 'ADR: A Better Choice for Construction Disputes' seminar in Bangkok.

3 **9 September 2015**
KLRCA's Head of Legal Services, Rammit Kaur speaking at the 2015 Construction Contract Management Conference held in PWTC, Kuala Lumpur.

4 **6 – 7 September 2015**
Datuk Professor Sundra Rajoo pictured here at the 2015 Taipei International Conference on Arbitration and Mediation.

5 **10 September 2015**
Datuk Professor Sundra Rajoo in action at the 2nd Annual MDA Collective Wisdom Lecture in Johannesburg.

Datuk Sundra's presentation was covered in the latest edition of the 'South African Property Review' magazine. (next page)

Construction industry prompt payment regulations

When there are too many exemptions to the regulations, they will not work, according to Malaysian expert. We find out more.

"The SA regulations are well crafted and the development of alternative dispute resolution will assist the construction industry to grow by providing binding guiding principles accepted by individuals, corporations and state owned entities,"

Prof Sundra Rajoo

Vaughan Hattingh director MDA Consulting

Datuk Professor Sundra Rajoo, guest presenter at the second annual MDA Collective Wisdom lecture in Johannesburg, advised that, "The development of alternative dispute resolution for the construction industry has important potential to help the industry to grow, but the proposed regulations should not allow many exemptions, particularly from state-owned companies."

Prof Rajoo is an expert on the Malaysian equivalent of the cidb Prompt Payment Regulations, the Construction Industry Payment and Adjudication Act (CIPAA) which was adopted in 2012 and implemented just over a year ago. The proposed guidelines have been under development in South Africa since 2013. They were tabled by the Construction Industry Development Board (cidb) and released for public comment in May this year. The regulations are likely to be implemented by year end.

Prof Rajoo, "Malaysia's experience was that the state initially wanted to be exempted from the Act, but this would not have made any sense, given that a large percentage of projects in the construction industry are undertaken by state-owned companies (SOCs) and it is an important driver of the economy. Government argued that SOCs are too large to adhere to the principles of the Act, but luckily the counter-argument prevailed: that no entity – SOC or otherwise – should enter into a contract if they can't manage it."

In just over a year since the implementation of CIPAA in Malaysia, the number of matters registered has more than tripled. Of these, most were settled in considerably less time. The majority of claimants were contractors and subcontractors, while respondents are mostly main contractors and employers. The most common types of adjudication disputes involve final accounts, interim payments and payment of professional fees.

Vaughan Hattingh, director and adjudication practitioner with MDA Consulting, says there are many lessons from Malaysia as well as the UK, Singapore and Hong Kong, that can be applied in South Africa. "The SA regulations are well crafted and the development of alternative dispute resolution will assist the construction industry to grow by providing binding guiding principles accepted by individuals, corporations and state owned entities," he said.

Prof Rajoo advised South Africa to focus on the competence of adjudicators and ensure that strict timelines provided in the regulations are adhered to. "Adjudication is quick and rough justice. Ideally you need construction professionals heavily represented on the panel of adjudicators, not just legal practitioners," he said.

According to Hattingh, the local construction industry has questioned whether there are sufficiently qualified and competent adjudicators and whether adjudicators' decisions will be enforceable. "We are in a good position, as South Africa's courts have been robust in enforcing adjudication decisions. While training in construction adjudication will likely receive greater focus, existing training programmes have helped to improve dispute resolution skills in the construction sector."

Hattingh was involved in the development of the course and course material for a certificate programme in Construction Adjudication at the Centre for Continuing Education at the University of Pretoria.

Industry, legal practitioners and especially contractors and subcontractors have welcomed adjudication as an effective means of resolving payment disputes in Malaysia. "The aggrieved parties have embraced the flow of money in the construction industry and this is expected to increase as awareness of this new right to recourse grows," commented Prof Rajoo.

While Malaysia's experience bodes well for better cash flow in South Africa's construction industry, Prof Rajoo says there is still a long road ahead. "It was an arduous journey from the conception of the CIPAA in Malaysia, to getting it gazetted and eventually implemented. The process is ongoing – as new scenarios appear, additions and amendments follow to ensure the Act's effectiveness."

_LEGAL UPDATES

Arbitration Case Law: Developments in Malaysia & The International Front

By KLRCA Legal Services

Aircraft Support Industries Pty Ltd (appellant) v William Hare UAE (respondent) LLC

COURT	NEW SOUTH WALES COURT OF APPEAL IN AUSTRALIA
CASE CITATION	[2015] NSWCA 229
DATE OF JUDGMENT	AUGUST 11, 2015

FACTS

This case was adjudicated before the New South Wales Court of Appeal in Australia. Aircraft Support Industries Pty Ltd ("Aircraft Support") entered into a subcontract with William Hare UAE LLC ("Hare"), for Hare to do construction work the Abu Dhabi airport. The parties had accepted a letter ("Letter Agreement") provided by Aircraft Support, detailing the accepted amount to be paid for the construction work. The Letter Agreement stated two retention payments were to be paid, with the second payment being due in January 2012, which was not paid.

Hare referred the matter to arbitration. On May 1, 2014, the arbitral tribunal awarded the amount claimed by Hare, with an additional $50,000 with respect to a 'discount' granted by Hare in its final account in the Letter Agreement. Hare applied to have the awards enforced pursuant to s. 8(2) of the International Arbitration Act 1974 (Cth) ("the Act"). The trial judge ordered that but refused to enforce the additional amount on the ground that it would constitute a "failure to provide natural justice to Aircraft Support." However, he held that the balance of the award could be severed and enforced. Aircraft Support appealed against the orders.

ISSUES

The Court of Appeals addressed two main issues, which were raised by Aircraft Support:

The first was whether there would be a denial of natural justice when the award was made, so as to severe it and enforce only a part of it.

Aircraft Support had argued that the trial court failed to deal with the contention that the Letter Agreement was not a formally executed variation of the Subcontract, and hence unenforceable. Aircraft Support also argued that there had been a breach of natural justice in holding that the Letter Agreement was a binding standalone agreement, and hence could be enforced. In response to this argument, the trial judge had concluded that Aircraft Support's contention had not been articulated or developed during the arbitration.

The Court of Appeal stated that in the context of an international arbitration, it was necessary to show "real practical unfairness and real practical injustice to the party resisting enforcement in order to decline to enforce an award under s 8 (7A) of the Act or Article 36 of the Model Law." The appellant had made no attempt to "demonstrate practical unfairness or injustice." Therefore, there was no failure on part of the arbitrators to not address the issue, nor did they fail to give adequate reasons for their award, and hence there had been no breach of natural justice.

The second issue was whether, assuming there was no denial of natural justice in making the award for the retention monies, this part of the award was incapable of severance and hence unenforceable because of the denial of natural justice with respect to the $50,000 discount.

Aircraft Support argued that the trial judge erred in finding that as a matter of statutory construction, the references to 'award' in s 8 of the Act, which dealt with the circumstances in which a court may refuse to enforce an award, did not extend to partial enforcement, so that the award cannot be severed and partly enforced.

The Court of Appeal stated that s 8(7A) "neither expressly, nor by necessary implication, imposes such a restriction. The section, in its terms, simply clarifies the circumstances in which an award can be said to be contrary to public policy." The Court of Appeal cited Australian and international cases supporting this interpretation. *Evans v National Pool Equipment* (1972) 2 NSWLR 410 cited and applied a statement from the 8th ed of *Russell on Arbitration* (Francis Russell, Edward Pollock and Herbert Russell, *A Treatise on the Power and Duty of an Arbitrator: and The Law of Submissions and Awards* (8th ed 1900, Stevens)), that stated when "the bad portion is clearly separate and divisible, the residue can be enforced."

Citing the interpretation of the *Arbitration Act 1996* (UK), the Court stated that that legislation also contained provisions similar to section 8 of the Act. With respect to this legislation, the courts in the UK had held that there was nothing that prevented part enforcement in the language of the New York Convention or the legislation. Furthermore, it also did not mean that where part of the award is set aside, no part of the award should be enforced. Therefore, the Court of Appeal held that the award could be partially enforced, and no injustice would flow from that.

HOLDING

Aircraft Support's appeal was dismissed. The Court of Appeal unanimously upheld the lower court's decision, which had refused to enforce part of the award, and held that the remainder could be severed and enforced.

IMPACT

Commentators have remarked that this judgement removed any uncertainty about "Australia's pro-arbitration stance. This decision is in line with "centuries old power" to "partially enforce awards where no injustice flows as a result."

By KLRCA Legal Services

AQZ v ARA

COURT	SINGAPORE HIGH COURT
CASE CITATION	[2015] SGHC 49
DATE OF JUDGMENT	FEBRUARY 13, 2015

FACTS

This case was decided by the Singapore High Court. The plaintiff/supplier was a mining and commodity trading company, and the defendant/buyer was the Singapore subsidiary of an Indian trading conglomerate. The parties entered into an agreement for the shipment of coal. The arbitration agreement in the contract for the first shipment (the "Contract") stated:

> "16. *ARBITRATION*
>
> *Any dispute, difference or disagreement between the parties arising under or in relation to this Contract, including (but not limited to) any dispute, difference or disagreement as to the meaning of the terms of this Contract or any failure to agree on any matter required to be agreed upon under this Contract shall, if possible, be resolved by negotiation and mutual agreement by the parties within 30 (thirty) days. Should no agreement be reached, then the dispute shall be finally settled by arbitration upon the written request of either party hereto in accordance with the rules of conciliation and arbitration of the Singapore International Arbitration Centre (SIAC) by three arbitrators in English Language. The result of all such arbitration shall be final and binding for the parties and for all purposes.*"

A dispute arose over the second shipment, wherein the Buyer alleged that there was an oral agreement about the terms of the second shipment, which was varied and recorded in two draft contracts that were sent to the Supplier. The Supplier contended that there had been no agreement for the second shipment, so it did not make the delivery.

The two draft contracts also contained the same arbitration clause as above, and the Buyer commenced arbitration under the SIAC Rules (2010Edn). The arbitration separately addressed jurisdiction and liability. There was a sole arbitrator and he granted an interim award on jurisdiction and liability, upholding his jurisdiction, and finding in favour of the Buyer with regard to liability.

The Supplier appealed to the Singapore High Court ("Court") against the interim award under Section 10(3) of the International Arbitration Act ("IAA"), read with Article 16(3) of the UNCITRAL Model law on International Commercial Arbitration set out in the First Schedule of the IAA ("Model Law") or (in the alternative) set aside under Section 3(1) of the IAA read with Article 34(2)(a)(iv) of the Model Law (i.e. arbitral procedure not in accordance with the agreement of the parties).

ISSUES

A. Does the Court have to re-hear the jurisdiction challenge because of the "de novo" nature of a hearing on jurisdiction?

The supplier contended that the application to set aside the arbitration award on grounds of jurisdiction should be decided through a *de novo* hearing. The Supplier wanted the Court to conduct a complete "retrial and/or rehearing."

The Court stated that it could undertake a de novo hearing. However, that did not mean that oral evidence and cross-examination would be allowed in every application. As held in a previous case, Insigma Technology Co Ltd v Alstom Technology Ltd [2009] 1 SLR(R) 23 at [21], witnesses who have already been heard by the tribunal "will only be called back when necessary." Furthermore, every application does not require a rehearing, but the law contemplates that the matter be resolved by "affidavit evidence."

B. Should the Supplier have used Article 16(3) or Article 34(2) of the Model Law to challenge jurisdiction?

The second issue addressed by the Court questioned the avenue the Supplier should have used in the challenge. The Court reviewed the drafting history, and stated that the drafters of the Model Law did not intend an award "that deals with the merits of the dispute (however marginally) to be subject to challenge under Art 16(3) of the Model Law." Art 16(3) was a balance between preventing parties from delaying arbitration proceedings, and courts overriding a tribunal's authority by ruling on its jurisdiction. *See* Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (A/40/17, 3-21 June 1985) at 157-158.

Therefore, since the case at hand marginally addressed the merits of the interim award as well, the Supplier could not appeal against it under Article 16(3) of the Model Law.

C. Does the requirement that an arbitration agreement be "in writing" mean that a unilateral written record by one party, which is not acknowledged by the other party, will suffice?

The Court considered parliamentary records on the question of whether the IAA should incorporate the 2006 revisions to the UNCITRAL Model Law, and the UNCITRAL Secretariat's drafting history on the 2006 revisions of the 'in writing' agreement. The Court then stated that the reasoning behind expanding the definition of "in writing" was to eliminate the need to sign the arbitration agreement. This was because of the increasingly impractical nature of this requirement in the commercial context, and the need for commercial flexibility trumping the need for certainty. Therefore, a record maintained by one party, namely the Buyer, would suffice.

D. Was the arbitration in accordance with the parties' agreement given that a sole arbitrator was appointed instead of three arbitrators?

The Court stated that a "purposive approach should be taken in interpreting the arbitration agreement (read with the SIAC Rules (2010 Edn)). It stated that the SIAC Chairman has the discretion to decide whether to appoint one or three arbitrators. Even though the arbitration clause stated that there would three arbitrators, the Court held that the Supplier had failed to show that it had suffered prejudice as a result of the interim award being awarded by one arbitrator.

HELD

The Singapore High Court upheld the interim award in favour of the Buyer.

EVENT CALENDAR

save the date!

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

OCTOBER 2015

Date	**6 OCTOBER 2015**
Event	KLRCA Talk Series: Differences Between Civil Law and Common Law from the Perspective of a Construction Lawyer
Organiser	KLRCA
Venue	Bangunan Sulaiman

Date	**8 OCTOBER 2015**
Event	KLRCA Talk Series: May the Odds Be Ever In Your Favour
Organiser	KLRCA
Venue	Bangunan Sulaiman

Date	**13 OCTOBER 2015**
Event	In the Seat: 60 Minutes with Lucy Reed
Organiser	KLRCA
Venue	Bangunan Sulaiman

Date	**26 OCTOBER 2015**
Event	KLRCA Talk Series: Witness Preparation in International Arbitration
Organiser	KLRCA
Venue	Bangunan Sulaiman

NOVEMBER 2015

Date	**14 – 18 NOVEMBER 2015**
Event	KLRCA Adjudication Training Programme
Organiser	KLRCA
Venue	Bangunan Sulaiman

Date	**25 NOVEMBER 2015**
Event	KLRCA Talk Series: Recent Developments in International Arbitration & ADR
Organiser	KLRCA
Venue	Bangunan Sulaiman

DECEMBER 2015

Date	**1 DECEMBER 2015**
Event	ADNDRC Conference
Organiser	KLRCA & ADNDRC
Venue	Bangunan Sulaiman

JANUARY 2016

Date	**9 – 17 JANUARY 2016**
Event	Diploma in International Commercial Arbitration
Organiser	KLRCA & CIArb
Venue	Bangunan Sulaiman

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REGIONAL RESOLUTION GLOBAL SOLUTION

Malaysia Branch
CIArb

CIArb 2016
DIPLOMA COURSE IN
INTERNATIONAL COMMERCIAL ARBITRATION

DATE

9 – 17 January 2016

VENUE

Kuala Lumpur Regional Centre for Arbitration

Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia

Places are strictly limited

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 settlement mechanisms such as WIPO, WTO and investment Treaty Arbitration. Participants will gain the ability to appear as counsel or act as an arbitrator in such arbitrations in different contexts.

The first half of the nine days comprises a series of lectures covering the fundamentals of international commercial arbitration. They follow and analyse legal concepts and issues arising during the course of an arbitration., The latter half of the Course deals with Trade Law disputes, arbitration under Bilateral Investment Treaties and Free Trade Agreements and other specialist areas such as construction arbitration and maritime arbitration.

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

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

COST:

RM 22,048 / USD 7,155 includes GST, tuition, course notes, morning and afternoon tea, lunch, midweek dinner, course banquet *(without accommodation).*

RM 26,394 / USD 8,565 includes GST, 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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