



KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

Newsletter #21 / Jan-Mar 2016

- p.9 Investment Treaty Arbitration in Asia – What’s happening?
- p.17 Informal Agreements and Generation Y
- p.22 Corporate Dispute Resolution Policy: ADR as tool for Internal Dispute Management

KHAC
2016



KLRCAL International Investment Arbitration Conference Review p.13

KLRCAC SUMMER ACADEMY

ON INTERNATIONAL INVESTMENT LAW AND DISPUTE SETTLEMENT



Knowledge sharing and capacity building is a cornerstone of KLRCAC's policy with regard to investment arbitration. The KLRCAC commonly shares with various players, eclectic types of resources and expertise, and cultivates with them a dynamic information and discussion platform through seminars, conferences and numerous events.

Following the success of its first International Investment Arbitration Conference (KIIAC 2016) – the biggest ever held in Asia – in March 2016, the KLRCAC is proud to organise the first KLRCAC Summer Academy on International Investment Law and Dispute Settlement (the "Academy"). We are happy to announce that Clifford Chance (Singapore) is the official partner of the Academy. The KLRCAC is delighted to partner with Clifford Chance's experienced team with the view to promoting investment protection and investment law in the region.

The Academy will run from 25 to 29 July 2016 and is designed for government officials, lawyers, specialists, practitioners, professors, researchers and students. More specifically, it intends to provide participants with the essential theoretical and practical skills to understand and deal with investment disputes under bilateral and multilateral investment treaties.

The work of the Summer Academy will serve to develop research, complement academic education and promote dialogue between the academic and business worlds. In courses, seminars, workshops, particular importance is to be attached to ensuring that participants are aware of the rights and obligations under bilateral and multilateral investment treaties and are able to make full use of the opportunities for access to the dispute settlement procedures. The Academy entails an intensive one week course of study, with lectures by leading practitioners and experts from around the world.

The Academy will provide ample opportunities to engage in discussions and exchange ideas with experts and fellow participants working in the same field.

For more information, please contact 03 2271 1000 or email events@klrca.org

25-29 JULY 2016

9.30am–4.00pm

Seminar Room 1

KUALA LUMPUR REGIONAL CENTRE FOR
ARBITRATION, Bangunan Sulaiman,
Jalan Sultan Hishamuddin,
50000 Kuala Lumpur



Official Partner:

**C L I F F O R D
C H A N C E**

Supporting Institution:



Contents

Director's message 4

Visitor's gallery 5

_ANNOUNCEMENT

KLRC A CIPAA Circular 06 6

_NEWS

Diploma in International Commercial Arbitration 7

_FEATURE

**Investment Treaty Arbitration
in Asia – What's happening?** 9

By **Gordon Nardell QC**, Barrister, 39 Essex Chambers

_HIGHLIGHT

**KLRC A Hosts Malaysia's Inaugural International
Investment Arbitration Conference (KIIAC 2016)** 13

_FEATURE

**Informal Agreements
and Generation Y** 17

By **Andrew Merrilees & Mark Curties**, Hill International

_FEATURE

**Corporate Dispute Resolution
Policy: ADR as tool for Internal
Dispute Management** 22

By **Rammit Kaur**, Head of Legal Services, KLRC A

_FEATURE

Regulatory Raids – Are you prepared? 26

By **Shanthi Kandiah**, Partner, SK Chambers

_EVENTS

KLRC A Talk Series 30

_EVENTS

KLRC A around the globe 32

_LEGAL UPDATES

33

_EVENT CALENDAR

Save the date! 35

Newsletter #21 /
Jan-Mar 2016

PP6818/12/2012 (031379)

Published by:

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

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

T +603 2271 1000 F +603 2271 1010 E enquiry@klrca.org W www.klrca.org

The Centre invites readers to contribute articles and materials of interest for publication in future issues. Articles and materials that are published contain views of the writers concerned and do not necessarily reflect the views of the Centre.

Information in the newsletter has been compiled or arrived at from sources believed to be reliable and in good faith, but no representation, expressed or implied, is made as to their accuracy, completeness, or correctness. Accordingly the Centre accepts no liability whatsoever for any direct, indirect or consequential loss or damage arising from the use of information in this newsletter, reliance or any information contained herein, any error, omission or inaccuracy in any such information or any action resulting therefrom. This newsletter is also available on our website, <http://klrca.org/newsletters/>



Director's message



Dear distinguished friends,

Having completed another significant barrier pushing year in 2015, KLRC is looking to take the next step up in 2016. The past year provided KLRC with the perfect platform to raise the bar and showcase its ever-growing credentials through well organised world-class conferences, seminars and training courses. The Centre also strategically signed co-operation agreements with reputable local and international institutions that facilitated cross border knowledge sharing and market expansion, thus allowing KLRC to continue redefining the ADR scene in this region, as well as globally.

We started the month of January, teaming up with the Chartered Institute of Arbitrators (CI Arb) Malaysia Branch to conduct the Diploma in International Commercial Arbitration. This course was attended by more than 30 participants from many parts of the world with a faculty panel made up of distinguished and renowned international arbitrators.

Numerous other activities kicked off simultaneously in January and February with the Centre taking part in seminars and hosting evening talks; continuing our mission to impart knowledge on alternative dispute resolution (ADR) to legal practitioners and the general public. One of these talks included a successful collaboration with the four inns, 'The Honourable Society of Lincoln's Inn Alumni Association Malaysia', 'The Malaysia Inner Temple Alumni Association', 'The Malaysia Middle Temple Alumni Association', and 'The Malaysia Chapter of the Honourable Society of Gray's Inn'. This particular event attracted a capacity audience made up of eminent judges and senior legal practitioners from around the country that concluded with a spirited fellowship to end the evening.

Capping off an eventful first quarter was the inaugural KLRC International Investment Arbitration Conference (KIIAC 2016) that took place on 10 – 11 March. In the highlights section of this newsletter, you will find a dedicated review of KIIAC 2016 in pictures. Given the success of this event and the positive interest shown towards the subject matter, the KLRC will be rolling out its first ever KLRC Summer Academy in International Investment Law and Dispute Settlement in the coming months. Do stay tune for more information on this programme.

In the meantime, I would like to invite you to connect with us via social media and visit our website on a regular basis for the latest upcoming programmes, launches and ADR happenings, as we aspire to continue bringing you reputable and influential events to our shores.

Until the next issue, happy reading.

A handwritten signature in black ink, reading 'Sundra Rajoo'.

Datuk Professor Sundra Rajoo
Director of KLRC

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 **Japan Patent Attorneys Association**
12th January 2016



✍ Visit by **Thailand Arbitration Centre (THAC) & Sripatum University (Law Faculty)** 25th February 2016



✍ Visit by **University Sahid Jakarta (Law Faculty)**
2nd March 2016



✍ Visit by **Delegates of the Commercial Law Development Program (U.S Department of Commerce)** 15th March 2016



✍ Visit by **Erasmus University of Holland & Malaysian Dutch Business Council (MDBC)** 18th March 2016



✍ Visit by **KPUM: United Kingdom & Eire Malaysian Law Students' Union** 24th March 2016



KLRC CIPAA CIRCULAR 06

KLRC CIPAA CIRCULAR 06

CIRCULAR BY KLRC ON THE EXEMPTION OF GOVERNMENT CONSTRUCTION CONTRACTS AS SPECIFIED IN THE SECOND SCHEDULE OF THE CONSTRUCTION INDUSTRY PAYMENT & ADJUDICATION (EXEMPTION ORDER) 2014

Reference is made to **subparagraph 2(2)** of the **Construction Industry Payment & Adjudication (Exemption Order) 2014** (hereinafter referred to as “**Exemption Order**”), which makes the following order:

‘2. Exemption

- 2) Subject to subparagraph (3), a Government construction contract as specified in the Second Schedule is exempted from the application of subsections 6(3), 7(2), 10(1), 10(2), 11(1) and 11(2) of the Act from 15 April 2014 to 31 December 2015.’

The **Second Schedule** of the Exemption Order reads as follows:

‘A contract for any construction works as defined under the Act with the contract sum of twenty million ringgit (RM20, 000,000) and below.’

The above subparagraph 2(2) provides that the operative period of the Exemption Order upon a Government construction contract as specified in the Second Schedule shall lapse after 31st December 2015.

Accordingly, commencing 1st January 2016 and pursuant to subparagraph 2(2) of the Exemption Order, a Government construction contract as specified in the Second Schedule shall cease to be exempted from the provisions of subsections 6(3), 7(2), 10(1), 10(2), 11(1) and 11(2) of the Construction Industry Payment & Adjudication Act 2012.

Following the same, the procedures under subparagraph 2(3) of the Exemption Order shall also cease to apply to a Government construction contract as specified in the Second Schedule from 1st January 2016 onwards.

This Circular 06 will take effect on 1st January 2016.

Dated this 1st January 2016

Yours sincerely,



Datuk Professor Sundra Rajoo
Director of KLRC



_NEWS

Diploma in International Commercial Arbitration

9th – 17th January 2016

KLRCA and the Chartered Institute of Arbitrators (CIArb) Malaysia jointly organised the Diploma in International Arbitration 2016 course. The course held from 9 – 17 January was attended by more than 30 participants from many parts of the world with a faculty made up of distinguished and renowned international arbitrators.

Participants were 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.

The first half of the nine days comprised 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 dealt with Trade Law disputes, arbitration under Bilateral Investment Treaties and Free Trade Agreements and other specialist areas such as construction arbitration and maritime arbitration.



_FEATURE

Investment Treaty Arbitration in Asia – What’s happening?

By *Gordon Nardell QC*
Barrister, 39 Essex Chambers

Editorial Note:

This article is adapted from a presentation given by Gordon Nardell QC as part of KLRCA’s series of talks focusing on investor-State dispute resolution. The presentation, entitled “In the Seat: 60 Minutes with Gordon Nardell QC”, was held on 7 December 2015 at KLRCA’s seminar room.

The presentation also covered two further topics: the role of “soft law” as a source of legal principles in investor-State arbitration, and the relationship between the dispute resolution mechanism under the recently concluded TPPA and the “Investment Court” proposal under discussion in the current TTIP negotiations. A video recording of the talk is available at <https://www.youtube.com/watch?v=GH5O9Tjulcw>.

Introduction

The bar for contributions to KLRCA's seminars and publications on investor-State dispute resolution (ISDS) has been set high: in August and October last year, the Centre hosted seminars on the subject given by top practitioners Loretta Malintoppi of Eversheds and Lucy Reed of Freshfields Bruckhaus Deringer. Ms. Malintoppi's article in Newsletter #19 – *Is there an 'Asian way' for investor-State dispute resolution?* – offers some penetrating insights into current trends in the use of ISDS in Asia, in particular the unexpectedly low rate of investor-State claims relative to the number of investment treaties concluded in the region and in contrast to other parts of the world.

Rather than risk repetition of this wealth of recent material, this article examines two specific issues. First, drawing on the trend identified in Ms. Malintoppi's article, could the deficit in perceived legitimacy of investor-State arbitration in the region be partly a product of the dominance of non-Asian arbitrators on ISDS tribunals? What could be done to redress the balance? Second, how might developments in third party funding of arbitral claims affect ISDS in the region?

The import arbitrator: who's deciding Asian ISDS claims?

ISDS has evolved from an obscure branch of international law, of interest to only a handful of academics and practitioners, to a topic of intense political controversy. A series well-publicised high-value awards against southern American States in favour of (mostly) US and European multinationals, coupled with highly visible public debate on multilateral instruments such as TPPA and its Atlantic equivalents, CETA (Canada/EU) and TTIP (US/EU), have divided opinion on the legitimacy of ISDS as currently practised. This has prompted calls for change ranging from reform of the ISDS process to its outright abolition. Globally, several States have performed

a “hard exit” from investment treaties, or at any rate significantly altered their policy towards inclusion of ISDS provisions in future treaties. In the Asia-Oceania (AO) region, Indonesia and Australia are cases in point.¹

The 2015:2 Caseload Statistics published by the International Centre for Settlement of Investment Disputes (ICSID)² confirm the general trend apparent in previous data: use of ISDS among AO parties remains low relative to the number of investment treaties concluded by AO States. Despite AO States accounting for 16% of subsisting treaties globally, they are respondents to just 8% of registered claims.

One factor hardly likely to assist in overcoming legitimacy concerns about ISDS in the region is the paucity of Asian arbitrators among the membership of tribunals appointed to determine AO claims – that is, claims where the investor is domiciled in the AO region, the respondent is an AO State, or both. At global level, much ink has been spilled about the perceived problem of the “arbitral village”: the tendency for parties – both investors and States – to make repeat appointments of arbitrators from among a small pool of established practitioners.³ That tends to cement the dominance on ISDS tribunals of appointees of a limited range of nationalities.

ICSID's 2015:2 statistics confirm France, USA and UK as the “top three”

nationalities by appointment, with 181, 173 and 148 of their nationals respectively appointed to ICSID tribunals in cumulative registered cases to date.⁴ The highest place occupied by a nationality outside western Europe and the Americas features is Australia's 7th place, with 60 appointments, followed by New Zealand (14th place, 37 appointments) and Egypt (15th place, 31 appointments). No south or south-east Asian nationality appears until Singapore (29th place, 11 appointments).⁵

Even these statistics provide an incomplete picture because they do not reveal repeat appointments of particular individuals, nor nationality of arbitrator by “nationality” of dispute. To elicit that information it is necessary to further interrogate the ICSID statistics by reference to other information about individual disputes and tribunal constitution. Such an exercise was conducted in a valuable piece of research presented in Singapore in 2013.⁶ This revealed that the accolade of receiving four or more appointments was restricted to just 38 individuals worldwide. Of those, the top 11 were each of western European or north American nationality. In 12th place was a New Zealander with 8 appointments, and in 13th place an Australian with 6. No-one of Asian nationality appears until 38th place – a Singaporean with 4 appointments.

Turning specifically to AO disputes, the top three arbitrator nationalities were – tellingly – the same grouping as the global top three: US, UK and France.⁷ No nationality outside western Europe and the Americas featured until 13th

1 See eg. J. Kurtz, *Australia's Rejection of Investor-State Arbitration: Causation. Omission and Implication*, *ICSID Review* vol. 27 No. 1 (2012), 65.

2 <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20%28English%29.pdf>.

3 See for example the keynote address by George Kahale III at the 8th annual Juris Investment Treaty Arbitration Conference, Washington DC, 28.3.14, referring to a “small club” of ISDS arbitrators. This picks up a theme explored by Kahale in *Is Investor-State Arbitration Broken*, *Transnational Dispute Management*, October 2012 <http://www.curtis.com/siteFiles/News/Is%20Investor-State%20Arbitration%20Broken.pdf>. The prevalence of repeat appointments also underlies much current discussion of challenges to arbitrator impartiality in ISDS cases: Malintoppi, *op cit*, p. 14.

4 ICSID's 2015:1 Caseload Statistics feature the same “top three”, though in slightly different order: US 183, France 171, UK 94.

5 The remaining listed south-east Asian nationalities are Philippines (32nd place, 10 appointments), China (33rd, 9), Malaysia (40th, 8), Thailand (47th, 7) and Korea (63rd, 3).

6 Morgan Maguire (*Investor State Law Guide*), “Investment Treaty Arbitration in Asia and Oceania: A tour d'horizon”, 4th Annual Singapore International Investment Arbitration Conference, NUS Centre for International Law, December 2013.

7 28, 24 and 13 appointments respectively.



One need only view the spectacular rise of commercial arbitration in Asian centres to realise that there is anything but a shortage of arbitral talent here.



place (Egypt, 4 appointments). No Asian nationality could muster more than 3 appointments (India, Singapore and Thailand), with the remainder on 1 each (Bangladesh, China, Malaysia, Pakistan and Philippines).

At a time when Asian States have ceased to be largely capital-importing nations and have taken their place among the world's capital exporters, it is incongruous that they should continue to be such heavy importers of arbitral personnel. There are no doubt a variety of historical reasons for the preponderance of European and American practitioners in arbitral circles. These may include the long-standing presence of international trade and investment law in academia in those regions, and the head-start that their practitioners have enjoyed over their Asian colleagues in terms of their ability to participate, and so acquire a specialist reputation, in disputes arising in their regions.⁸ Be that as it may, the time has clearly come to break the cycle.

One need only view the spectacular rise of commercial arbitration in Asian centres to realise that there is anything but a shortage of arbitral talent here. Indeed there is much to be said for adjusting the balance of appointments to ISDS tribunals – often dominated by academic specialists in public international law – towards practitioners with commercial credentials. ISDS disputes increasingly turn on complex issues of fact and quantum, matters on which commercial lawyers are likely to have a particularly valuable contribution to make. There is undoubtedly a thirst for learning on the international law issues arising in ISDS, and it is excellent that KLRCA through its programme of events and publications is doing so much to satisfy it. It may be that a particular onus now rests with the foreign and trade ministries of Asian respondent states to take the lead in looking first to regional talent when choosing appointees.

⁸ Malintoppi, *op cit*, p. 17, suggests a similar reason for the relative underuse of ISDS by Asian parties.

Third party funding for ISDS?

Third party funding describes arrangements under which a person with no direct interest in a cause of action “invests” in the claim by contributing to the claimant’s legal costs in return for a share of the proceeds if the claim succeeds. Such arrangements arguably serve the interests of access to justice by assisting claimants who otherwise lack the resources to fund proceedings, but raise obvious questions of public policy⁹ and professional ethics. Their availability in common law jurisdictions depends on the stringency of applicable legal rules on third party “interference” in administration of justice (the long-standing principles of maintenance and champerty) and the enforceability of lawyers’ fee arrangements involving a contingency element. Rules of legal professional conduct also generally govern the acceptability of contingent fees, and cover other matters linked to third party funding such as conflicts of interest and control over the conduct of proceedings.

Third party funding is now a mainstream feature of commercial litigation – and increasingly, arbitration – in many jurisdictions (including England & Wales). But how does it operate in the ISDS context, and how compatible is the practice with legal and professional rules governing arbitral proceedings held in Asian jurisdictions?

The procedural rules governing most investor-State arbitrations (most frequently the ICSID¹⁰ or UNCITRAL rules¹¹) are silent on the funding source for a party’s legal costs – unsurprisingly, given that the current editions were drafted at a time when third party funding had yet to emerge on its present scale. A key concern is enforceability of any award of costs against the funded party, since reliance on third party

funding tends to imply an insufficiency of resources, and an arbitral tribunal lacks jurisdiction to award costs directly against the funder.

In commercial arbitration, the solution has generally been to require the funded party to post some form of security for costs with a sanction in default. After some debate, this approach has begun to find favour in investor-State arbitration, at any rate under the ICSID Convention. For some years, since a tribunal’s 1999 decision in *Maffezini v. Spain*¹², the power under the ICSID Convention and Rules to impose provisional measures¹³ has been recognised as enabling the tribunal to order security for the costs of proceedings, though only in “exceptional” circumstances. However, this power was not exercised until the 2014 decision in *RSM Production Corp. v. St. Lucia*,¹⁴ when the claimant’s reliance on third party funding was among the factors rendering the circumstances of that case “exceptional”.¹⁵ Subsequent ICSID cases have affirmed the related practice of ordering disclosure of third party funding arrangements.¹⁶

Insofar as the high cost of ISDS might operate as a deterrent to greater use of ISDS by Asian investors, effective access to third party funding might assist. That shifts the focus to the compatibility of these arrangements with the legal and professional rules governing costs funding in the jurisdictions where arbitral proceedings might be held. In general terms, the region’s common law jurisdictions have maintained a restrictive approach to third party funding and contingent fee arrangements in State court litigation, raising the question how far these restrictions do, and should, apply to arbitration.

In *Unruh v. Seeberger*¹⁷ the Hong Kong Final Court of Appeal largely reaffirmed the application of the rules of maintenance and champerty to litigation in the territory and declined to rule on whether those rules applied similarly to arbitration, preferring to leave that to the legislature. The Law Reform Commission of Hong Kong has now taken up the issue, producing a Consultation Paper in October 2015 containing a rigorous analysis of third party funding, including a comparative survey of several common and civil law jurisdictions.¹⁸ The paper identified a risk to Hong Kong’s competitiveness as a centre for international arbitration absent a clear legal and regulatory framework enabling properly regulated third party funding of arbitration costs. It invited submissions on possible changes to law and practice to achieve this.

Among other things the Law Reform Commission’s paper describes the position in Singapore, where the courts have maintained a similarly strict approach to the common law rules of maintenance and champerty, expressly confirming the latter’s application to international arbitration conducted

⁹ See Kahale, *Is Investor-State Arbitration Broken?* *Op. cit.*, pp 32-33 and the materials cited at fn. 72.

¹⁰ ICSID Arbitration Rules, revised 2003: <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF.htm>.

¹¹ UNCITRAL Arbitration Rules, revised 2010: <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.

¹² ICSID ARB/97/7, Procedural Order No. 2, 28.10.99 <http://www.italaw.com/sites/default/files/case-documents/ita0477.pdf>.

¹³ ICSID Convention Art. 47; ICSID Arbitration Rules, r. 39. Both are framed in terms of a “recommendation” by the tribunal, but a decision under these provisions is generally accepted to be binding in effect: see para. 9 of the *Maffezini* order, above, and the jurisprudence cited in *Litigating International Investment Disputes: a Practitioner’s Guide* (Giorgetti, Ed., 2014) pp 199-200.

¹⁴ ICSID ARB/12/10, decision on St. Lucia’s request for security for costs, 13.8.14 (by a majority) <http://www.italaw.com/sites/default/files/case-documents/italaw3318.pdf>.

¹⁵ See the approach to disclosure of third party funding arrangements suggested in the assenting reasons of Dr. Gavan Griffith QC in *RSM*: “...once it appears that there is third party funding of an investor’s claims, the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made” (para. 18).

¹⁶ *Eurogas v. Slovak Republic* ICSID ARB/14/14, 17.3.14 https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC6411_En&caseId=C3604; *Muhammet Çap v. Turkmenistan* ICSID ARB/12/6, Procedural Order No. 3, 12.6.15 (with the reasons of Prof. Julian Lew QC addressing the potential for arbitrator conflict arising from the identity of the funder – see paras. 1, 4 and 9) http://res.cloudinary.com/lbresearch/image/upload/v1434533739/2015_06_12_po_3_re_tpf_tp_signed_175115_1035.pdf.

¹⁷ (2007) 10 HKCFAR 31.

¹⁸ *Consultation Paper: Third Party Funding for Arbitration* <http://www.hkreform.gov.hk/en/publications/tpf.htm>.

there.¹⁹ Although these issues do not appear to have been tested in Malaysia recently, it is – to put it at its very lowest – far from clear that a third party funding arrangement for arbitral proceedings held in the country, or in which members of the Malaysian Bar are instructed as counsel, would be enforceable as a matter of law,²⁰ or consistent with the obligations of members of the Bar under the Legal Profession Act 1976.

It would be unfortunate if the problem of arbitrator nationality, discussed above, were compounded by obstacles to Asian jurisdictions hosting investor-State arbitrations, and Asian practitioners appearing as counsel, flowing from the narrower availability of funding options relative to other jurisdictions – particularly those in Europe and North America.²¹ That is not to understate the real and understandable sensitivities surrounding the possible widespread adoption of third party funding for ISDS claims. Within any reform programme, it will of course be for each jurisdiction to strike its own balance between widening funding options and protecting public policy and professional ethics. But there seems a strong case for reform

initiatives at regional level. The arbitral institutions themselves have now begun to give impetus to the process. In February, the Singapore International Arbitration Centre published draft Investment Arbitration Rules containing provisions designed to accommodate third party funding – including broad powers to order security for costs and disclosure of funding arrangements.²²

Concluding remarks

This article has examined two areas in which the present state of law and practice of ISDS might have contributed to the slow growth, reported by others, in uptake of investment treaty claims in Asia. In the light of contemporary developments, such as KLRC's own education and training work, and moves towards reform of rules on third party funding, it will be interesting to see what trends are revealed by future editions of ICSID's Caseload Statistics and other material documenting Asian participation in ISDS.



ABOUT THE AUTHOR

Gordon Nardell QC handles European and worldwide disputes about major projects and supplies of services in the energy and related sectors including utilities, natural resources and waste. Much of his work involves renewable and conventional energy projects in Europe and Asia, acting in complex litigation and arbitration covering a range of, investment and contract claims, including disputes about offshore plant and equipment. Gordon also acts in disputes involving EU procurement, competition and State aid rules in regulated markets such as transport, telecoms and financial services. He is a Fellow of the Chartered Institute of Arbitrators.

Gordon is a former commercial litigation solicitor. In the 1990s he practised public international law at the Council of Europe. He moved to the Bar from the UK Parliamentary Counsel Office where he was a member of the drafting teams for the Competition Act 1998, Human Rights Act 1998 and Financial Services and Markets Act 2000. He continues to undertake Parliamentary and public affairs work in the UK and EU.

19 *Otech Pakistan Pvt Ltd v. Clough Engineering Ltd* [2001] 1 SLR (R) 989. See the discussion at paras. 4.133-4.143 of the paper. As noted at paras. 4.138-4.139, a 2011 review of Singapore's International Arbitration Act foreshadowed possible reform to accommodate third party funding, but the 2012 Amendment Act did not in the event, address this topic.

20 Since a champertous agreement is likely to fall foul of s. 24(e) of the Contracts Act 1950.

21 In 2013 Chief Justice Sundaresh Menon of Singapore memorably likened third party funding to the behaviour of corporate vulture funds, noting the risk of creating a secondary market in the contingent payment obligation of the respondent, with funders trading in "bundles" of claims of varying merit: "Some Cautionary Notes for an Age of Opportunity", Keynote address to Chartered Institute of Arbitrators, Penang, August 2013 <https://singaporeinternationalarbitration.files.wordpress.com/2013/08/130822-some-cautionary-notes-for-an-age-of-opportunity-1.pdf>.

22 Draft Rule 23(j) and (l). http://res.cloudinary.com/lbresearch/image/upload/v1454326502/siac_ia_rules_11116_1134.pdf.

_HIGHLIGHT

KLRC A HOSTS MALAYSIA'S INAUGURAL INTERNATIONAL INVESTMENT ARBITRATION CONFERENCE (KIIAC 2016)



The Kuala Lumpur Regional Centre for Arbitration (KLRC A) hosted its inaugural KLRC A International Investment Arbitration Conference (KIIAC 2016) in collaboration with the Institute of Malaysian and International Studies (IKMAS). The conference which ran from 10 – 11 March 2016 was held at the centre's premises, Bangunan Sulaiman.

The conference was held in conjunction with the launch of KLRC A's investment arbitration division. Investment arbitration, based on investment treaties such as the Trans-Pacific Partnership Agreement (TPPA) is set to make a huge impact in the Asia Pacific region.

"An increasing globalised world has induced deep and significant changes in South East Asian countries' policies regarding foreign investments," said Datuk Professor Sundra Rajoo, Director of the Kuala Lumpur Regional Centre for Arbitration.



He further stated that this has in turn created a continued growth of arbitration cases in Asia. This includes disputes brought by investors against States, both within and outside the region, have also been on the rise. Often, the best resolution to such disputes is via Asian arbitration centres, given their geographic proximity and cultural familiarity to Asian parties.

Gracing the launch were YB Puan Hajah Nancy Shukri, (Minister in the Prime Minister's Department), His Highness Prince Dr Bandar bin Salman bin Mohd Al Saud (Honorary President of the Gulf Arab States Lawyers Union), and His Excellency Dato' Professor Dr Rahmat Mohamad (Secretary-General, Asian-African Legal Consultative Organisation [AALCO]).



She added, "The most innovative aspect of a bilateral and multilateral investment treaty is the opportunity it provides to investors of capital exporting States to directly enforce against the Host-State substantive rights in respect of investments made in it. In addition, such investors are also provided with an agreed forum to redress alleged wrongs: a forum for dispute resolution (by arbitration) that excludes the National Courts of the country where the investment is made."

Twenty illustrious presenters ranging from eminent professors and renowned arbitrators from leading regional and international institutions took stage to deliver their expert thoughts and opinions whilst addressing the complex issues raised by investor-State arbitration, with a dedicated focus on the Asia Pacific region, following the signing of the Trans-Pacific Partnership Agreement (TPPA).

"Malaysia has been an active participant in a worldwide trend towards bilateral and multilateral investment agreements. Its first bilateral investment treaty was signed with Germany on 22 December 1960. Since then, the country has signed more than 70 bilateral investment treaties for the promotion and the protection of investments," said YB Puan Hajah Nancy Shukri, Minister in the Prime Minister's Department.

The one and a half day investment arbitration spectacle, kicked off with a keynote speech that was delivered by the highly respected academic and arbitrator, Brigitte Stern, Professor Emeritus of International Law at the Sorbonne Law School in Paris. This was followed by a full day of presentations and knowledge sharing discussions encompassing three interactive sessions; '*Promoting investments and administering investment disputes – tales from regional and international institutions*', '*Investment Arbitration – the practitioner's point of view*', and '*Doctrinal developments in investment arbitration*'.

Close to two hundred delegates, from across the world converged here in Kuala Lumpur to participate in this conference, widely labelled as one of biggest of its kind to be held in Asia. KIIAC 2016 provided an excellent opportunity for delegates to evaluate a wealth of global information and exchange insights pertaining to various facets of the investment arbitration spectrum including policy, governance, advocacy and research.





Session 1:

Promoting Investments and Administering Investment Disputes – Tales from Regional and International Institutions

MODERATOR:

Datuk Professor Sundra Rajoo, Director of the Kuala Lumpur Regional Centre for Arbitration (**KLRCA**)

SPEAKERS:

- + **Aissatou Diop**, Legal Counsel at the International Centre for Settlement of Investment Disputes (**ICSID**)
“ICSID’s 50th Anniversary – Progress and Prospects”
- + **Fedelma Claire Smith**, Legal Counsel at the Permanent Court of Arbitration (**PCA**)
“Provisional Measures in Investor-State Arbitration: PCA’s Experience”
- + **Abhinav Bhushan**, Director, South Asia, ICC Arbitration ADR (**ICC**)
“How Established Is Investment Arbitration in Asia?”
- + **João Ribeiro**, Head of UNCITRAL’s Regional Centre for Asia and the Pacific (**UNCITRAL**)
“The UNCITRAL Rules on Transparency”
- + **Dr. Sufian Jusoh**, Associate Professor at the Institute of Malaysian and International Studies (**IKMAS**)
“Dispute Settlement in the 2009 ASEAN Comprehensive Investment Agreement”
- + **Camilla Godman**, Director, Chartered Institute of Arbitrators (**CI Arb**) in Asia Pacific
“ISDS in the TTIP: EU’s proposed Investment Court System”
- + **Wolf Von Kumberg**, Full Member of the Arbitration, Mediation and Dispute Board Chambers (**ArbDB**)
“Mediation of Investor-State Disputes”

Session 2A:

Investment Arbitration – The Practitioner’s Point of View

MODERATOR:

Dr. Ioannis Konstantinidis,
Head of Investment Treaty Arbitration
and International Law, Kuala Lumpur
Regional Centre for Arbitration (**KLRCA**)

SPEAKERS:

- + **Andrew Pullen**, Counsel, Allen and Overy (Singapore)
“Investment Arbitration and Unmeritorious Claims”
- + **Olga Boltenko**, Senior Associate, Clifford Chance (Singapore)
“Investment Protection in the Oil and Gas Sector”
- + **Loretta Malintoppi**, Of Counsel, Eversheds (Singapore)
“Trans-Pacific Partnership Agreement: Investor-State Dispute Settlement Provisions”
- + **Constantinos Salonidis**, Senior Associate, Foley Hoag (Washington D.C.)
“Jurisdiction Ratione Temporis in Investment Treaty Arbitration”



Session 2B:

Investment Arbitration – The Practitioner's Point of View

MODERATOR:

Vinayak Pradhan, KLRC Advisory Board Member,
Consultant at SKRINE

SPEAKERS:

- + **Robert Volterra**, Partner, Volterra Fietta (London)
"Recent Developments in Investor-State Dispute Settlement"
- + **Paul Tan**, Partner, Rajah & Tann (Singapore)
"Renegotiating International Investment Agreements: Recent developments"
- + **Thayanathan Baskaran**, Partner, Zul Rafique & Partners (Kuala Lumpur)
"State-Owned Enterprises and Investment Arbitration"
- + **Robert Kirkness**, Senior Associate, Freshfields Bruckhaus Deringer (Singapore)
"Costs and Damages in Investment Treaty Arbitration"
- + **Alastair Henderson**, Managing Partner, Herbert Smith Freehills (Singapore)
"Enforcement of Investment Arbitration Awards in the Asia Pacific Region"
- + **Sudharsanan Thillainathan**, Partner, Shook Lin & Bok (Kuala Lumpur)
"Ethical Issues in Investment Arbitration: Myth or Reality?"



Session 3:

Doctrinal Developments in Investment Arbitration

MODERATOR:

Brigitte Stern, Professor Emeritus at the Sorbonne Law School (Paris)

SPEAKERS:

- + **Geneviève Bastid Burdeau**,
Professor Emeritus at the Sorbonne Law School, Paris
"The Institut de Droit international and Investment Treaty Arbitration"
- + **James Claxton**, Professor at Kobe University
"Counterclaims in Investor-State Arbitration"
- + **Dr. Jean Ho Qing**, Assistant Professor at the National University of Singapore
"The Evolution of Investment Contract Protection"
- + **Dr. Norfadhilah Mohd Ali**, Senior Lecturer, Faculty of Syariah and Law,
Islamic Science University of Malaysia
"Investment Arbitration and Shariah Law"
- + **Loukas Mistelis**, Professor at the School of International Arbitration –
Queen Mary University of London
"The Concept of Public Policy in Investment Arbitration"
- + **Dr. James Upcher**, Lecturer, Newcastle Law School, Newcastle University
*"The Connection between Rights and Remedies in
Provisional Measures"*



_FEATURE

Informal Agreements and Generation Y

By Andrew Merrilees & Mark Curties,
Hill International

Editorial Note:

*This article is published with permission
of Hill Construction Consultancy Pte Ltd,
Andrew Merrilees and Mark Curties.*



“In 2015, the number of emails sent and received per day total over 205 billion. This figure is expected to grow at an average annual rate of 3% over the next four years, reaching over 246 billion by the end of 2019”

Source: Email Statistics Report, 2015-2019, by The Radicati Group, Inc; Published March 2015

Introduction

Emails are the most common form of correspondence for businesses.

Informal communication and agreements; be they personal or contractual are commonplace and none more so than that witnessed in the construction industry.

An enforceable contract is formed when there is an offer by one party, acceptance by the other party, and consideration such as payment. Other conditions usually exist such as intention to create legally binding agreements and certainty to the terms. There is normally consensus ad idem: a meeting of the minds.

Two recent cases have considered whether email exchanges during informal negotiations are tantamount to a legally binding contract between the parties.

“Subject to Contract”

The use of these three words may decide if informal communications are indeed legally binding, where one of the parties makes unequivocally clear in the title of communications that they will not be bound to negotiations until a formal agreement is signed.

Traditionally, the Courts give weight to informal communications of offer and acceptance unless they are limited by “Subject to Contract.”

SEENEY AND ANOTHER V GLEESON DEVELOPMENTS LTD AND ANOTHER¹

The case was heard in the Technology and Construction Court (TCC), before the Honorable Mr. Justice Coulson, and which effectively concerned a property swap: Gleeson would build a new house for the Seeney's and then take possession of the existing and defective house that the Seeney's lived in.

The issue crystallised on 1 September 2011, when Mr. Richard Cavadino, a QS and mediator (engaged by Gleeson) wrote to Ms. Faye Whiteoak of Gleesons, and copied to Seeney's the following email:

“Subject: agreement with Mr. and Mrs. Seeney.

Hi Faye

Following our earlier discussions I can confirm that we have agreed with Mr and Mrs Seeney their net contribution to the extras on the building contract.

...

Total GBP30,000.”

In answers to questions from the court, the Claimants confirmed the above cited email evidenced a binding agreement that the value of extras ordered as at 1 September 2011 was GBP30,000.

The Defendants, Gleeson, maintained there was no binding agreement. They argued that this email should be read as if it had been titled “Subject to Contract”, and that agreement was conditional upon a signed binding contract between the parties. In the absence of such agreement, Gleeson were not bound by the amount of GBP30,000.

The law dictates that when deciding whether parties have reached agreement, the court needs to give due regard to the negotiations as a whole.

Mr. Justice Coulson stated “Whether they intend to be bound by such circumstances, or whether they intend to be bound only when the formal document is executed, depends on an objective appraisal of their words and conduct.”

In his analysis, the Honorable Mr. Justice Coulson pointed to the following reasons for concluding that the parties had reached a binding agreement on the value of the extra's being GBP30,000 as at 1 September 2011:

- The email of 1 September 2011 was not qualified or conditional in any way.
- The previous emails of Ms. Whiteoak did not indicate that any agreement of the final extra's bill was “Subject to Contract”.

- Ms. Whiteoak's emails referred to an agreement that had already been reached.
- The sequence that Ms. Whiteoak set out a previous email of 19 July 2011, said that the parties had to reach an agreed figure for the extra's, following which this and the specification would be appended to a new simple contract.
- Ms. Whiteoak's email of 3 August 2011 gave importance to Gleeson's agreeing the final value of extra's at that critical stage, prior to proceeding with the works, which they did.
- Both parties were in consensus on the importance of reaching an agreement that was binding in respect to the “current position”, as there may have been later developments and amendments after this date.
- Finally, Mr. Cavadino's email of 1 September 2011, had been undertaken in his role as mediator, and wherein the Courts are generally reluctant to undo agreements brokered by mediators.



¹ Seeney and another v Gleeson Developments Ltd and another [2015] EWHC 3244 (TCC)

MI-SPACE (UK) LTD V BRIDGWATER CIVIL ENGINEERING LTD²

The case heard before Mr. Justice Edwards-Stuart, dealt with a sub-contract between Mi-Space as the contractor and Bridgwater (BCE), as the sub-contractor, for undertaking groundworks for a residential building in Plymouth.

Mi-Space did not pay the sum claimed in the December 2014 application for payment, and following serving of notices, BCE suspended work as it was entitled to under the sub-contract.

Mi-Space advanced that a settlement was concluded by an exchange of emails on 3 March 2015. Mi-Space contended that it had made an offer by email, which was accepted by BCE in an email the same day.

Through its offer, Mi-Space proposed to make an interim payment on 6 March 2015 in the amount GBP79,862.62 plus VAT; and in return BCE would immediately withdraw its claim in the December 2014 application and return to site. Both of these events took place.

Mr. Caddick of BCE on 3 March 2015, confirmed by email to Mr. Acheson of Mi-Space the following:

"Nick Yes we are in agreement with this now. Can you carry on formalising the paperwork. Thanks for your efforts.

Dave."

Mi-Space issued a contract to BCE to formalise the agreement reached, however a few days later, Mr. Caddick conveyed that the deal was off and refused to sign.

Mr. Justice Edwards-Stuart's view of Mr. Caddick was that he had made a bargain on 3 March 2015 that later he came to regret, and looking for a way out he convinced himself that the email of 3 March 2015 was made on a "Subject to Contract" basis.

Both parties referred Mr. Justice Edwards-Stuart to the decision of the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH* [2010] 1 WLR 753; paragraph 45 of the judgment reads:

"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct."

It is therefore not only the mode of communications between parties that determine if they are bound to agreement; the conduct and behaviour of parties is material.

Mr. Justice Edwards-Stuart also stated, "issues such as this are notoriously fact-specific."

Ultimately in these cases the courts found that agreements had been reached between the parties by email exchanges.

A word of caution: be clear what has and has not been agreed in discussions. If during negotiations an agreement has not been reached, title the agreement as "Subject to Contract." Moreover, agreements do not necessarily have to be in writing, so vigilance should be used when making oral exchanges.

The Singaporean case of *Ong Hong Kiat v RIQ Pte Ltd* [2013] SGHC 131, ruled an acceptable agreement was reached regarding the transfer of shares during the exchange of text messages.

² *Mi-Space (UK) Ltd v Bridgwater Civil Engineering Ltd* [2015] EWHC 3360 (TCC)



Instructions in Writing

The standard forms of contracts in use in South-East Asia, principally Singapore and Malaysia, require instructions, either issued by the Contractor Administrator, Engineer, Architect or other Representatives on behalf of the Employer or Authority, to be in writing.

What constitutes writing?

As a general rule, a document will constitute an instruction in writing if it complies with the requirements of the contract.

Most standard forms of contracts contain provisions for giving instructions and how to deal with verbal instructions.

SINGAPORE

For example, the relevant clauses in Singapore's LTA Conditions of Contract (2005) include:

- Clause 2.1.3 [Duties and Powers of Engineer] "Any written instruction";
- Clause 15.2 [Engineer's Instructions] "written notice from the Engineer"; and
- Clause 57.1.1 [Variations in the Authority's Requirements] "ordered by the Engineer in writing."

The SIA Conditions of Building Contract Lump Sum (2010) are interesting as they refer to both written and verbal instructions.

Under the SIA forms, orders by the Architect are classified into 'directions' or 'instructions'.

Clause 1.(1) [Written and Verbal Directions and Instructions] states:

- "Comply with all written directions and instructions given in relation thereto by the Architect";
- "Any direction or instruction given verbally shall be deemed to have been given in writing, and have retrospective effect...provided that the Contractor confirms...and that the Architect does not...dissent from or withdraw the direction or instruction"; and
- "No claim will be permitted under this Contract based upon an order or request of the Architect unless expressed as a written direction or instruction or confirmed in writing to or by the Architect."

Similarly, the BCA's Public Sector Conditions of Contract (PSSCOC) (2014) provide for written and oral instructions at Clause 2.5 [Instructions by Supervising Officer]:

- "Instructions given by the Supervising Officer shall be in writing"; and
- "Provided that if for any reason the Supervising Officer considers it necessary to give any such instruction orally, the Contractor shall comply with such instructions."

MALAYSIA

The PAM Conditions of Contract [With Quantities] (2006) refers to Architect's Instructions ('AI's') at Clause 2.2:

- "All instructions issued by the Architect shall be in writing expressly entitled 'Architect's Instruction ("AI")'. All other forms of written instructions including drawings issued by the Architect shall be an AI."

In *S.C. Taverner and Co. Ltd v Glamorgan County Council [1941]*, the contract expressly stated that any alterations or additions that will cause additional expense; the contractor requires an order in writing signed by the clerk of the county council.

During the course of the works, the clerk issued numerous verbal instructions, in particular more expensive stonework that the contractor duly complied with and inevitably sought to recover later the additional cost of the works.

The court held that in the absence of any order in writing, as prescribed by the contract, the contractor's claim must fail.

It is essential therefore under the standard forms of contracts for instructions to be in writing otherwise they may be regarded as worthless.

This raises issues with other informal channels of communications in today's fast-paced and mobile environment.



Generation Y

The author is aware of projects, notably in Malaysia, where the aptly titled “Generation Y” frequently use more informal modes of communication such as text messages or the “WhatsApp” application to communicate instructions to parties or within project “Group Chats”.

The benefits of these latest informal modes of communication are clearly savings in time; however, complications arise by skimping on the necessary form and content of instructions in writing under the standard forms of contracts.

To protect the commercial interests of an organisation, it is essential that any instructions issued conform to the relevant contractual requirements. Failing to do so increases the risk of transmitting instructions that invariably have no value and which lead to claims for additional work and variations that are unproven.

To manage such technologically advanced modes of communications, for example on fast-track projects, it may be prudent to set-up from the outset a contracts database whereby every form or template that is prescribed under the contract is available.

Such templates could be hosted on a secure ‘Cloud’ and mobile platform, allowing instant access for download to mobile and tablet devices. The control documents within a database can be signed-off electronically within the same suite of applications by authorised representatives as the works progress.

Further, the parties may benefit from having similar Cloud-based repositories of project design documents. The approved staff being able to quickly locate, revise and annotate drawings, and even attach media such as site photographs, could significantly improve efficiency and co-ordination on site.

As the industry moves towards adopting a more collaborative approach, these packages provide the parties with access to a pool of shared documents, improving both intra-party and inter-party collaboration.

Ultimately they allow for the secure access, control and issuance of documents in an industry that is increasingly driven by instantaneous time constraints.



ABOUT THE AUTHORS

Andrew Merrilees, Chartered Quantity Surveyor, has over 20 years’ experience on major international building and civil engineering projects in the UK, Hong Kong, Macau, and the Middle East, representing Employers, Consultants, Contractors and Joint Ventures, providing a range of commercial and contractual advice, claims management, including preparation and defence, and arbitration, mediation and expert witness support services. Andrew is a practising associate of The Academy of Experts for the provision of expert services and he is currently engaged as Director for Hill’s Asia office.



Mark Curties is a Managing Consultant at Hill International. Mark is a delay analyst specialising in data management and analysis.





_FEATURE

Corporate Dispute Resolution Policy: ADR as tool for Internal Dispute Management

By Rammit Kaur,
Head of Legal Services, KLRCA

Editorial Note:

A paper derived from presentations delivered by KLRCA's Head of Legal Services, Rammit Kaur at the 2nd Annual Corporate Legal Excellence Conference (16th November 2015) and the Annual National Seminar on Directors Duties, Governance, Regulatory Updates and Current Issues 2016 (26th January 2016).

Internal conflict or disputes may create huge difficulties in the management of a corporation. Although not as documented as external disputes involving third parties, these internal disputes may be very harmful. These conflicts or disputes need to be nipped in its bud as it affects the working environment and effectiveness of key people. If not tackled early, it has the potential of crippling the functioning of a corporation.

One study in the United States (Anup Agrawal & Mark Chen)¹ on internal disputes in publicly traded U.S. companies over 1995-2006 reached the following conclusions:

- Share prices decline upon news of departure of directors, more so if an insider.
- Decline is sharper in magnitude if related to perceived 'agency' related problems, corporate strategy or financial decisions.
- Companies with boardroom disputes experience poor operating performance in years following the same.
- Diverts corporate & human resources.
- Obstructs the company's operations.
- Delays strategic decision-making.
- Undermines reputation.
- Weakens internal and external stakeholders' trust, leading to resignation of key officers and personnel.

The traditional approach of resolving internal disputes have been in the form of discussion between key management personnel and decision by the most superior in the hierarchy. The hierarchical approach may not be feasible in most corporate set up that are partnership based or joint venture types. It is also necessary to appreciate that conflict is healthy and should not be viewed negatively. The focus ought to be on the effective management of conflict or dispute and not avoidance of the same. In the traditional method, when one party is unhappy and when the dispute becomes non-negotiable, it will end up in resignation or termination of partnership or joint venture. It is at this stage that parties resort to legal remedies and it is usually too late to save the business which could have otherwise flourished to its full potential. It is for these reasons that countries all over the world are now actively adopting corporate dispute resolution policies within the framework of a corporation.

¹ Agrawal, Anup and Chen, Mark A., Boardroom Brawls: An Empirical Analysis of Disputes Involving Directors (July 1, 2008).

Alternative dispute resolution ('ADR') system offers many suitable mechanism and approaches, which a corporation could benefit by easily integrating within its internal corporate structure. The benefits of ADR includes the fact that it is voluntary and amicable, two essential features to ensure that disputes are resolved without any collateral damage to the corporation or its activities. Promoting the ADR culture within the fabric of an organisation at all levels definitely increases the possibility of amicable resolution of disputes at early stages.

Within the company structure, boards of directors can be a fertile ground for conflict as it involves people with vast experience and high expectations and it is natural to expect that leadership that ends up with problems in the hierarchy, struggle with being unified in their organizational mission. Further, not only conflict surfaces in big corporations, but also in small businesses especially in trendy start-ups. A feud between co-founders is one of the most common causes of failure in these businesses. Start-ups are usually very stressful and will test the best of relationships. Often there will be arguments over who controls what, who gets paid what, and which risks should be taken or avoided.

It is therefore essential to resolve these disputes not just expeditiously but with utmost confidentiality and privacy. The benefits of an efficacious solution are multi-fold, as many inter-personal issues also tend to add to the complexity of the dispute. Given the need of a continued and sustained relationship, an adversarial option such as litigation is most disadvantageous. In bigger corporations or listed corporations, this comes with the additional burden of disclosure requirements.

Reference to court of law may not be feasible as the range of remedy required may be limited and mostly compensatory in nature. A tailored ADR mechanism, particularly one that involves negotiation, mediation and arbitration, will be optimum.

ADR as we easily appreciate refers to a variety of processes that aim to settle a dispute through different ways apart from the conventional litigation. During the last decades, ADR have grown significantly, especially due to the following aspects:

1. Enforceability of decision with specific reference to arbitration - The New York Convention provides the users with a significant advantage to go for arbitration instead of litigation to settle their disputes. The enforceability of an award in any of the signatory countries is a huge improvement in securing commercial activities globally.

Other ADR fields, such as mediation, or negotiation, have maintained its growth, especially in common law jurisdictions. Even though the decision between the parties does not have that national and worldwide enforceable component, the parties have realized that the option of solving a dispute with the assistance of a neutral expert within a short period of time is beneficial, at least at the first instance.

2. Confidentiality – an ADR process is usually carried out in a confidential and private environment. It provides an avenue for the organisation to try to solve its issues within its closed doors without unnecessarily impacting its business value or review.
3. Time effectiveness – provides an organisation with some control over time and money owing to the fact that parties have a right to choose the neutral ADR expert(s) and the processes.

There are many other benefits of ADR from the corporate perspective:

- i. It enables the board members and other management members of the corporation to address and proceed to resolution of conflict at an early stage without much disclosure to the rest of the employees of the corporation.

By applying suitable internal mechanism to incorporate ADR, it enables a corporation to work on the culture of accepting or dealing with conflict, drawing the lines of acceptance and when it crosses the line, to provide a forum to manage the conflict accordingly.

The key here is providing a suitable forum for resolution.

- ii. Incorporation of ADR within the internal structures of an organization would directly mean applying a cost effective measure to resolution of conflict or dispute within the corporation. As briefly stated earlier, a corporation could financially suffer if conflicts are not managed timely and the information gets leaked to public.
- iii. ADR applies less formal methods such as informal meetings and discussions. It could easily be carried out in the boardroom. The flexibility of time and venue is a huge advantage.
- iv. Where resolution requires the involvement of a third party either as mediator or arbitrator, it will be a professional within the required field, with years of practical experience in the specific area of conflict or dispute. Most importantly, it's a neutral person having no connections with the corporation.
- v. This in turn will build a culture of effective conflict resolution and certainly help the corporation to deliver its full potential.

It is perhaps easy to appreciate the benefits of ADR for resolution of corporate disputes or boardroom disputes, what remains challenging is formulating and incorporating the appropriate ADR mechanism within the structures of an organization or a joint-venture vehicle company or even a large conglomerate. Each company will have its own unique circumstances, which becomes relevant while creating a sustainable ADR mechanism.

It is to address these issues, that evolution of an independent Corporate Dispute Resolution policy unique to the organisation is the need of the hour. In order to solve internal corporate issues in a win-win situation, a Corporate Dispute Resolution (CDR) policy should be implemented in each company, to be applicable when core conflicts shown, since it eases to settle the disputes. The alternative methods could be applied and the parties could arrange a solution quickly.

Senior management and directors of various companies face a plethora of disputes on a day-to-day basis. The ranges of disputes include management disputes, employment disputes and shareholders dispute. Most of these disputes can be resolved at an internal level with appropriate training and by possessing the necessary skill set. Failures to resolve these disputes end up being cumbersome, time consuming and expensive to the organisation and its Directors. It also affects the reputation and productivity of an organisation.

The CDR policy of an organisation may encompass many forms and methods of ADR. ADR embraces a number of approaches and techniques. It could just be as simple as going in the door to try to work things out with the employee's supervisor, working up the chain of command, or discussing the issue with the Human Resources office. On the other hand, ADR could involve a committee set up within the company, mediation, peer review, and arbitration. These mechanisms may be viewed individually or as a group.

In short, the dispute resolution policy of every organisation should be tailor made, however the skill set and knowledge training should be imparted first to ensure that the organisation's policy is tailor made by the people who understand the organisation best, the Directors. The key to the success of the policy will also rely on the imparting of training of the necessary skills including the soft skills required.

The following are some of the accepted benefits of having a CDR policy which is tailor made to meet the needs of an organisation or the corporate climate of a country.

- Cost savings to both organisation and the parties.
- Time savings to both the organisation and the parties.
- Reduction in costs and time spent in managing complaints.
- Participation rates of the parties in the ADR process.
- Participation satisfaction with the fairness of the ADR processes.
- Settlement rates.
- Quality of settlement in terms of durability and creativity.
- Reduced workplace conflicts.
- Reduced rates of dispute recurrence.
- Impact on dispute environment.
- Impact on relationships between business partners and human resources.

The corporate policy of this nature has already been implemented in different countries, such as New Zealand, where it has been an absolute success. Keeping in mind, the rapid growth of companies and corporations in Malaysia, the KLRCA has sought to undertake various initiatives to successfully implement the same in Malaysia. As Malaysia's premier ADR dispute resolution provider and being a mission-based organization, we have currently taken lead in promoting the implementation of ADR within corporates and to disseminate knowledge relating to the same too.

It is further pertinent to note that a study by ACCA and KPMG shows that Malaysia is surging ahead in implementing corporate governance requirements. There is a consensus that the guidelines, framework and legal infrastructure are comprehensive, but, there is still room for improvement. Malaysia is leading other developing countries in corporate governance requirements, focused on the clarity,

degree of enforceability, number and type of instruments used by different markets. All this is clearly indicative of the fact that Malaysia is ready to take the next step forward in implementing a smooth mechanism for resolution of corporate disputes.

Further, in 2012, the authorities of Malaysia passed the Malaysian Code on Corporate Governance (MCCG)² that superseded the previous code of 2007. The new code sets out principles and recommendations on corporate governance, explaining how corporate governance should be addressed to become an integral part of their business.

This code follows the Securities Commission's Malaysia's five-year Corporate Governance Blueprint of 2011³, that provides the action plan to raise the standards of corporate governance in Malaysia. Some of the key elements this document focuses on includes enhancing the internal discipline, promote internationalization, and be more transparent are the pillars of such document.

The Malaysian Code on Corporate Governance⁴ sets out 8 principles to be taken into consideration:

1. Establish clear roles and responsibilities.
2. Strengthen composition.
3. Reinforce independence.
4. Foster Commitment.
5. Uphold integrity in financial reporting.
6. Recognise and manage risk.
7. Ensure timely and high quality disclosure.
8. Strengthen relationship between Company and shareholders.

² <http://www.sc.com.my/wp-content/uploads/eng/html/cg/cg2012.pdf>

³ http://www.sc.com.my/wp-content/uploads/eng/html/cg/cg2011/pdf/cg_blueprint2011.pdf

⁴ http://www.mia.org.my/new/downloads/circularsandresources/circulars/2012/21/MCCG_2012.pdf

While these serve as a reference point, implementation of an internal policy is an initiative that has to stem from within the echelons of the organization or a corporation itself. It also requires awareness and promotion of awareness within its employees to build trust in the system and increase usage. Culturally sensitive issues such as gender disparity should also be addressed. To bring out a change of work ethic and change in attitude is a long-winded process, but something that is imminent and has to commence at a more grass root level.

All change it is said must come within. As a first step, research has indicated that before even setting up a Corporate Dispute Resolution Policy, the following steps are to be identified:

1. Clarification of roles and responsibilities.
2. Seek or train a skilled board chairperson or management member.
3. Implement job evaluation.
4. Implement grievance procedure.
5. Establish a code of conduct for directors.
6. Deal with conflict openly when it arises.
7. Encourage good interpersonal communication practices.
8. Frame conflict as an exercise in "win-win" negotiation.

9. Celebrate agreements and new understandings.
10. Look to gender and cultural differences as a way out of a mess.
11. Draw out procedural steps for conflict resolution and when is appropriate to seek external assistance.
12. Implement escalated dispute resolution process and implementation protocols.
13. Establish understanding and links to appropriate institution to enable reference and request for external help when required.

As management are involved in obtaining a bird's eye view of the happenings of an organisation, it would also be incumbent upon managers and senior personnel to identify the following:

- understanding what is happening for example by checking on whether an actual conflict exists or it is only a dissent; and
- determining the nature of the conflict itself.

Usually at this stage of conflict or dispute, an independent, third party mediator is the most feasible and viable option available. This could also result in the speedy and effective resolution of disputes. The focus of ensuring the dispute itself remains confidential remains true during the entire course of the process.

The trend across the world suggests that in-house counsels and senior management plays a key role in the success of ADR. Corporations should look at investing in the training of ADR soft skills to its identified key members.

Malaysia is no stranger to innovation. In due course, the corporate fraternity in Malaysia will evolve to develop niche dispute resolution mechanisms that create a litigation free atmosphere within organisation. As a corollary this will ensure that stable development of companies, corporations and the economy of Malaysia. This cannot be achieved without the support and co-operation between all relevant stakeholders. It is now for corporations to look at corporate conflict and dispute resolution policy seriously and for the Companies Commission to include such policies as part its corporate governance compliance requirement.



Regulatory Raids – Are you prepared?

By **Shanthi Kandiah**, Partner, SK Chambers



Editorial Note:

The KLRCA held a talk titled, 'Bid Rigging – Are You At Risk?' on the 20th of January 2016. The presenters on that day were Shanthi Kandiah and Dr. Sivasangaran Nadarajah. In this quarter's newsletter, Shanthi shares with us her insights from another dialogue she recently moderated in which; Datuk C. Thavarajah and Geoffrey Williams, experienced investigators in local and international investigations from Malaysia and Australia respectively spoke on Responding to Raids by Regulatory Authorities.

When the regulators come knocking

....**UNANNOUNCED**, organisations should be prepared with trained staff and a clear set of procedures for them to follow.

"The reality is you won't have time to come up with a strategy on the day," said Geoff.

He drew an analogy with a fire alarm going off in a building without established protocols and trained employees. *"When people are not trained to handle a fire situation, they will be all over the place in panic. This is essentially the same for a raid. It is all about preparing yourself and managing the risk when such a situation arises,"* he explained.

Key Risks associated with a Raid

A raid is perhaps **the most disruptive and intrusive form of investigation by the authorities** and can do a lot of damage to an organisation's business activities.

"Many businesses are not even aware of the risks associated with a raid, let alone whether their systems and processes can handle unannounced or unexpected visits, said Shanthi Kandiah as she set the scene for the Talk.

"Potentially catastrophic damage to your business can result from speculation and misinformation surrounding a raid alone," she added.

Risks for the un-prepared organisation include the following:

- Inability to bring together a response team which has been trained on how to act and behave, and who to call should an investigation materialise;
- Excessive removal of documents outside the scope of a warrant, including electronic documents;
- Claims for legal professional privilege are not made or waived;
- Penalties (civil or criminal) for obstructing an investigation or concealing or destroying documents;

- In-adequate communication with employees on their obligation to cooperate and maintain confidentiality – e.g. employees should be warned against posting photographs and information about the raid as it affects corporate reputation and potentially exposes the company to liability for offences such as 'obstruction of justice' and 'tipping-off others';
- Poor management of external communications which may compromise corporate reputation with investors, customers and suppliers. Competitors may also exploit this vulnerability to 'steal' customers and suppliers.

"Be confident, accommodating, co-operative and do not panic", advised Datuk Thavarajah. "Even ill-founded worries or concerns will be apparent to seasoned investigators and suggest there is information being concealed," he cautioned.

NOT cooperating is NOT an option

“The power to conduct raids give an authority the right to search your premises without your consent,” explained Geoff Williams. *“The authorities are counting on the element of surprise to retrieve as much evidence as possible and to minimise the potential for destruction of evidence”.* To ensure a raid’s success, the authorities would have invested in considerable surveillance and espionage prior to the raid.

In most instances a judge would have granted to the authority the right to search premises in the form of a search warrant. But most if not all Malaysian authorities are empowered to conduct searches without warrants where there is a threat of destruction of evidence.

Resisting or obstructing a raid can only complicate your legal situation. The penalties are in most instances criminal and in some instances the law provides for personal liability for directors and senior company management. If one studies trends internationally, authorities are also becoming increasingly tough on perceived and actual failures to play by the rules during a raid, even in the case of accidental or unintentional obstruction.

Ensuring that proper procedures are in place during a raid has never been more important.

Expansive powers of search and seizure

In general authorities in Malaysia have broad powers to inspect corporate and residential premises, seize and copy documents, emails and other records, and interview employees.

Today an authority’s most important source of information is likely to be the company’s IT systems. The duty to cooperate includes giving a full explanation of a company’s organisation and IT environment.

Authorities can search a company’s entire IT environment. They can remove computers and hard drives, or image hard drives and servers, or run search words on site and limit seized documents to those that trigger results from search words.

A *raid-protocol-trained-IT assistant* can be a valuable asset to an organisation – namely to give the authorities what they are looking for while minimising the removal of expensive IT equipment. Datuk Thavarajah pointed out that regulatory authorities are not keen to seize unnecessary information either.

Where data is stored off site, the question arose whether access to this data is beyond the scope of the search warrant. The view expressed by both speakers suggests that so long as access to the data is available on site, passwords should be provided to give access.

Personal effects of employees at raid site may be fair game

The authorities may search desktops and laptops, as well as, among other things, employee iPhones, mobiles, tablets, or USB keys – anything that is on the premises. In practice, an authority is likely to regard any devices on the company’s premises as fair game, even those that are owned personally by employees. Objecting to this process is tantamount to obstruction as they may have an interest in verifying whether those devices contain any business-related information. Employees should be made aware that data protection and privacy are not valid reasons or defences to refuse authorities access to certain devices or electronic files or folders.

Mistakes can prove costly – the basic message to all employees must be that it is company policy to cooperate.

Awareness of Rights

But while these powers are broad and onerous, companies should not sit back and compound a bad situation by being unprepared.

“Having a clear sense of what to expect (through scenario building and walk-throughs), what your rights are, and being alert to potential mistakes by authorities (e.g. wrong address on search warrants), are important ways in which you can protect your organisation,” said Shanthi.

Key rights include –

- The right to ensure that officials are who they claim to be;
- The right to study the search warrant to ensure that it states the right address and to determine its scope;
- The right to observe what is going on and what is taken – Key staff such as IT/Legal should be there to observe and document what is being taken – What are they focusing on? What are they taking? Are they staying within the limits of the search warrant?
- The right to have a list of documents taken – The list is likely to be vague and broad. References to “computers” or only stating the file reference without listing file contents, are routinely what is provided.





ANSWERING QUESTIONS DURING A RAID

Refusing to answer questions relating to a raid (e.g. location of files, password) may be viewed as an obstruction. However, in general a person is not required to answer questions pertaining to an investigation particularly answers to questions that may incriminate that person. There are notable exceptions to this right provided by the Malaysian Anti-Corruption Commission Act 2009 and the Anti-Money Laundering, Anti – Terrorism Financing and Proceeds of Unlawful Activities Act 2001. These laws appear to require answers from a person, even where it tends to incriminate him/her, failing which he/she runs the risk of having committed an offence.

LEGAL PROFESSIONAL PRIVILEGE

With regards to legally privileged documents, Geoff explained that the position in Australia is that a protocol is established to deal with documents that are privileged. When there is a dispute of documents being legally privileged, those documents will be placed in a sealed envelope with its status left to be determined by an independent third party. In relation to imaged data, the authorities would not view the data until the parties have agreed to a protocol for dealing with such data.

Datuk Thavarajah felt that the practice of establishing protocols for legally privileged documents in Malaysia is not commonplace. He also highlighted the practical difficulties in separating privileged information from others. Unless privileged communication is clearly identifiable, authorities may not agree to being denied access to such information. Marking privileged documents clearly with the words “Legally Privileged” or encrypting emails containing legal advice are potential strategies to safeguard privileged information.

Raid Response Strategy

A raid is a risk like any other risk the company is exposed to. As such a Raid Response Strategy should now be part of the Risk Management Toolkit for any business. Its goal should be to minimise the disruption to business operations so that organisations are able to resume business quickly, as well as to contain any fall out from the event.

A sound strategy will involve training for the following key personnel, said Shanthi Kandiah:

1. **Senior management team** – Senior management should be aware of regulatory authorities’ current strategies with regard to civil and criminal investigations, their search and arrest powers, what a raid looks like in practice (including the business recovery strategy), what the authorities can and cannot do and what a Raid Management toolkit should comprise.
2. **Selected staff who it is envisaged might deal with a raid in practice** – Training here would address in more detail at the practicalities of the raid and what it seeks to achieve. It will include an explanation and analysis of –
 - the search warrant
 - the powers of the authorities and the obligations of employees;
 - key actions in the first hour of a raid;
 - what to do or say in response to questions and requests by the authorities;
 - the importance of preserving evidence and what to advise staff to do;
 - what to do about legally privileged material; and
 - how to deal with other document and IT issues that arise in a raid and afterwards, so that businesses can be up and running again once the authorities have left the premises
 - proactively handling media and other external communications
3. **Security reception and administrative staff** – These staff will usually be the first people to be aware that a raid is happening. They should be advised on what to do, who to contact, how to deal with the authorities when they arrive.



Minimising the risk of being investigated

The afternoon concluded with both speakers agreeing that the ultimately the best strategy for any organisation is to minimise the risk of being investigated.

Datuk Thavarajah acknowledged that the balance of power in raids is skewed heavily in favour of the authorities, and felt it had to be so.

“They are walking into a potentially hostile environment, blind. They need these powers to do their job”.

Shanthi Kandiah summarised the key tenets of a credible compliance programme. Organisations should:

- Know the regulatory regimes that apply to their organization.
- Implement controls, policies and programs that ensure compliance and detect infringements – **if the risk mitigation system does not throw up issues, then the system needs to be revisited.** Do not assume that everyone is compliant!!
- Undertake periodic inspections to identify new risks, update programs accordingly.

Regulatory authorities can sniff out a bad compliance programme a mile away, said Datuk Thavarajah. They look for incentives within the system for compliance. *“If the messaging from the top, namely the board or senior management, is weak or for example if a frequent infringer is rewarded with large bonuses, these are tell-tale signs that system is not credible. It will not carry any mileage with the authorities,”* he added.

ABOUT THE AUTHORS

Shanthi Kandiah is Partner at SK Chambers (Advocates and Solicitors). Her corporate practice covers the full spectrum of multimedia laws, privacy and data protection matters, anti-bribery and corruption laws, as well as capital market laws and Exchange rules. She regularly advises corporations on regulatory matters in sectors such as media and telecommunications, FMCG, construction, pharmaceuticals and other service industries. She has assisted Malaysian multinationals in developing their global competition and regulatory law compliance policies. Formerly from the Securities Commission, Shanthi has co-authored country reports for the World Bank and OECD. She holds a Masters in Law from King's College, London, Bachelor of Laws from the University of London and a Postgraduate Diploma in Competition Economics also from King's College. She was admitted to the Malaysian Bar in 1993.

Datuk C. Thavarajah started his career in the Royal Malaysian Police Force in 1956 before joining the Anti - Corruption Agency in 1967. With over 25 years of experience in anti-corruption investigations, Datuk C. Thavarajah's was later sought to head Bank Negara Malaysia's Special Investigation Unit in 1992. In 1998, he continued to serve as a Bank Negara Malaysia nominee and held many executive positions such as Special Assistant at RHB Bank-Credit Control Department (1998-2004), an Executive Director at Sime Securities Sdn. Bhd.(1998-2005), a Director at Sime Securities Holding (1998-2007). Besides this, he served as an Independent Investigating Officer at the Competency Assessment Panel for the Malaysian Anti-Corruption Commission (2012). Datuk C. Thavarajah brings with him more than 50 years of investigation experience in the field of anti-corruption, criminal, white-collar crime, banking, stock broking and debt recovery litigation.

Geoff Williams is a highly regarded competition law specialist, having held the position of General Manager for Enforcement Operations NSW at the Australian Competition and Consumer Commission (ACCC). Geoff has over 25 years experience investigating enterprises from large multi-national enterprises to small enterprises. Geoff has managed investigations and litigated some of Australia's most significant competition law cases, including ACCC v Visy Industries, which was Australia' largest domestic cartel in the packaging industry. In 2013 he was seconded to the MyCC by ASEAN to provide competition law expertise and training. Geoff is currently engaged as a consultant to the ACCC's serious cartels group in investigating an international cartel. He holds a Bachelor of Laws from the University of Technology Sydney, which he obtained in 1991.

KLRC Talk Series

KLRC Talk Series returned in 2016 with numerous engaging talks by ADR experts. Below are talks that were held from January – March 2016.



PRACTICAL VIEWS ON DISPUTE PREVENTION AND RESOLUTION IN MAJOR INTERNATIONAL PROJECTS

Speakers: Pierre Genton & Paul-A Gelinas

Moderator: Ramdas Tikamdas

This talk was particularly dedicated to employers and contractors the so called “users” as well as their legal advisors and professionals involved in large infrastructure and industrial projects, and practitioners in the engineering and economic fields who can be called to participate actively in Dispute Board proceedings.

The speakers presented on ‘Advantages, Limits of Dispute Boards and the Key Role Played by the Parties’ and ‘Prevention Techniques versus Legal Proceedings, a trend?’



BID RIGGING – ARE YOU AT RISK?

Speakers: Shanthi Kandiah (SK Chambers) & Dr. Sivasangaran Nadarajah (Wong Hue Hoe & Co)

Moderator: Andrew Bryan Perera (Bryan Perera Quah & Partners)

Bid Rigging is a fraud; i.e. a procurement process scam. Simply put, when Bid Rigging occurs in a tender exercise, a buyer is cheated from obtaining goods or services at the best possible price or value proposition.

Consequently, Bid Rigging is not permitted by Law. For example, apart from criminal sanctions under the Penal Code and the Malaysia Anti-Corruption Commission Act 2009 the Competition Act 2010 too institutes serious penalties for such infringement – whereby an infringing enterprise can be fined up to 10% of its WORLDWIDE TURNOVER.

Recent global enforcement actions targeting Bid Rigging cartels have resulted in substantial fines, damages from private actions and even criminal sanctions against individuals leading to imprisonment. Similarly in Malaysia, crackdown against Bid Rigging is one of the priority enforcement objectives for the Malaysia Competition Commission (MyCC). Needless to say, there is the accompanying reputational damage and disruption to business operations.

This talk covered the areas below in detail:

- What is Bid Rigging? What are the types of Bid Rigging?
- How to minimise the risk of Bid Rigging when submitting joint bids?
- What steps should one undertake (as a tenderer and a procurer) to reduce the risk of Bid Rigging?
- How is Bid Rigging different from corruption in public procurement?
- How should a sound compliance program be structured?

26
JAN

MULTIPLICATION OF ARBITRAL INSTITUTIONS IN ASIA AND THE MIDDLE EAST – PROMOTING SYNERGIES AND COLLABORATION

Speakers: Mark Beer (Chief Executive and Registrar of the DIFC Courts)

Moderator: Dato' Mah Weng Kwai (Retired Court of Appeal Judge)

Panel Discussion: Tun Zaki Tun Azmi (Former Chief Justice of Malaysia & Judge of the DIFC Courts), Datuk Professor Sundra Rajoo (Director of KLRCA), Mark Beer (Chief Executive and Registrar of the DIFC Courts)

This talk was jointly hosted by:

- Kuala Lumpur Regional Centre for Arbitration,
- The Honourable Society of Lincoln's Inn Alumni Association Malaysia,
- The Malaysia Inner Temple Alumni Association,
- The Malaysia Middle Temple Alumni Association, and
- The Malaysia Chapter of the Honourable Society of Gray's Inn

29
JAN

REFLECTIONS ON CONSTRUCTION DISPUTES IN MEGA PROJECTS

Speakers: Chow Kok Fong

Moderator: Datuk Professor Sundra Rajoo (Director of KLRCA)

Disputes arising from large scale construction projects present a number of unique issues in adjudication and arbitration. While the disputes are varied, the sources of these disputes arise invariably from the same broad group of factors. Among this is the tendency of project team members to be over optimistic in planning and pricing assumptions and to allow potential problems to simmer too long. In this talk, the speaker shared some of his experiences from a number of matters involving such projects in recent years, in particular the approaches which he considers helpful in the analysis of these disputes.

31
MAR

EFFICIENT ARBITRATION – LESSONS TO BE LEARNT FROM THE CIVIL LAW

Speakers: Dr. Christopher BOOG (Partner, Schellenberg Wittmer)

Moderator: Lim Chee Wee (Partner, SKRINE)

Much has been said in recent times about time and cost efficiency in international arbitration. Users and practitioners alike deplore the notion that arbitration has become a lengthy, costly process that is no longer more efficient than litigation. Institutional arbitration rules around the world have been amended in an attempt to address the issue. But does that suffice? – it is ultimately still the parties, guided by their counsel, and the arbitrators who determine the proceedings. It is here that techniques from the civil law are increasingly being used in international arbitrations to ensure the efficiency of the arbitral process both in terms of time and costs. The speaker, civil-law trained and practicing in both civil and common law jurisdictions, discussed some of these techniques and explained why they should be applied more frequently in common law-seated arbitrations.

KLRCA around the globe

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



1 18 January 2016

Datuk Professor Sundra Rajoo pictured here at a signing ceremony alongside Gamuda Engineering Sdn Bhd, the Malaysian Society of Adjudicators (MSA) and the Society of Construction Law Malaysia (SCL). This initiative will see the four organisations deliver in-house lectures and workshops based on real life contractual disputes and case law to build local talent from the industry.

2 22 January 2016

Datuk Professor Sundra Rajoo pictured here at a conference in San Francisco where he presented on, 'Dispute Resolution in Asia: Recent Developments & Future Directions.'

3 6 March 2016

Datuk Professor Sundra Rajoo delivering a presentation at the 2016 Shanghai International Arbitration Forum: 'One Belt One Road National Strategy by International Arbitration.'

4 25 March 2016

KLRC's Head of Legal Services, Rammit Kaur presenting at the Asian Law Students' Association (ALSA) UM Symposium 2016.

LEGAL UPDATES

Arbitration Case Law: Developments in Malaysia & The International Front

By KLRCA Legal Services

Best Re (L) Limited v Ace Jerneh Insurance Bhd

COURT COURT OF APPEAL (PUTRAJAYA)

CASE CITATION [2015] MLJU 0256

CASE NUMBER W-04(IM)(NCC)-379-12/2014

FACTS

Ace Jerneh (“the Insurer”) and Best Re (“the Reinsurer”) entered into three reinsurance agreements. These agreements did not expressly contain an arbitration clause. However, the agreements referred to an insurance policy (between the insured, and the Insurer) by stating “Extensions/clauses: as per Standard Extended Warranty Insurance Policy issued by [Insurer] as attached.”

When a dispute arose between the Insurer and Reinsurer, the Reinsurer filed and was granted an application to stay the proceedings at the Sessions Court pending reference of the matter to arbitration.

Upon appeal to the High Court, it was held that the arbitration clause did not automatically incorporate itself into the reinsurance agreements.

The Reinsurer then appealed to the Court of Appeal.

ISSUE

The only issue for determination was whether the High Court was right in deciding that reference to an arbitration agreement found in one agreement by way of a general reference was insufficient to incorporate the arbitration agreement into another contract.

HELD

The Court of Appeal acknowledged that the English courts have always adopted a strict approach. The Court referred to *Cigna Life Insurance Co of Europe SA-NV v Intercaser SA de Seguros y Reaseguros* [2001] Lloyd’s Rep IR 821 where the High Court held that, “the legal justification for this conclusion comes from the special position which these clauses have in English law. An agreement to arbitrate disputes is regarded as personal to the parties to the agreement and collateral to the main obligations.”

In assessing its stand, the Court considered Section 9(5) of the Malaysian Arbitration Act 2005 which states,

“A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement”.

The Court noted that Section 9(5) corresponded with Article 7(2) of the UNCITRAL Model Law and as such, compared Malaysia’s position to other common law jurisdictions with the Model Law framework.

The Court found that in recent decisions, jurisdictions with the Model Law have slowly departed from the English strict approach and adopted a general approach. The Hong Kong High Court in *Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd* [1994] 3 HKC 328 and the Singapore Court of Appeal in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd & Anor* [2014] 1 SLR 130 held that Article 7(2) of the Model Law was incompatible with the strict English approach. The Hong Kong court believed that incorporation should be determined based on ascertaining the parties’ intentions when they entered into the contract.

Based on the above analysis, the Court of Appeal decided in favour of the Reinsurer holding that it was important to recognise the growing global trend recommending arbitration and its obligation to enable business efficacy in the commercial world without disregarding all established principles of construction of documents and contracts.

W Limited v M Sdn Bhd

COURT	HIGH COURT
CASE CITATION	[2016] EWHC 422 (COMM)
CASE NUMBER	CL-2015-000344

FACTS

A dispute arose between the Claimant and the Defendant in relation to a project and an LCIA arbitration was commenced. A Canadian lawyer was appointed as the Sole Arbitrator.

The Claimant challenged the award of the Arbitrator under Section 68 of the English Arbitration Act 1996. Section 68 provides for the challenge of an award on grounds of serious irregularity, "which the court considers has caused or will cause substantial injustice to the applicant". The challenge on the award was over an issue of apparent bias of the Arbitrator based on alleged conflict of interest.

RELATIONSHIP OF THE ARBITRATOR WITH THE PARTIES

The Arbitrator was a partner with a law firm. It was however established that he worked almost exclusively as an arbitrator requiring only administrative and secretarial support from the law firm. It was stated that the Arbitrator had not participated in partnership matters of the firm and rarely attended partnership meetings.

After the appointment of the Arbitrator, a client company of the Arbitrator's law firm was acquired by Company P. It so happened that the Defendant was an existing subsidiary of Company P. As such, the Defendant and the law firm's client company became affiliates. The Arbitrator's law firm continued to provide legal services to its client and earned substantial remuneration from the work done.

The Claimant referred to paragraph 1.4 of the Non-Waivable Red List of the IBA Guidelines and purported that the Arbitrator's independence and impartiality was questionable. Paragraph 1.4 of the Guidelines state as follows,

"The arbitrator or his or her law firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom."

ISSUE

Whether the circumstances warrant the application of the Non-Waivable Red List of the IBA Guidelines and as such, whether the award of the Arbitrator ought to be set aside.

HELD

The Court ascertained that when the Arbitrator made checks for conflicts, the issue pertaining to the law firm's client was not drawn to his attention. The Arbitrator was not aware of the work done by the law firm for the client and of its acquisition by the Defendant's parent company. The Court stated that on considering these facts, the fair minded and informed observer would not conclude that there was a real possibility that the Arbitrator was biased or lacked independence or impartiality.

The Court then went on to examine the IBA Guidelines. The Court stated that from the present case, it could identify two weaknesses in the Guidelines. First, in treating compendiously the arbitrator and his or her firm, and a party and an affiliate of the party, in the context of the provision of regular advice from which significant financial income is derived. Second, in this treatment occurring without reference to the question of whether the particular facts could realistically have any effect on the impartiality or independence of the Arbitrator, especially when the facts were not known to the Arbitrator.

The Court stated that such a situation should not warrant inclusion in the Non-Waivable Red List and is appropriate for a case-specific judgement. The Court drew attention to the General Standard 2(d) which states, without qualification, that justifiable doubts "necessarily exist" as to the arbitrator's impartiality or independence "in any of the situations described in the Non-Waivable Red List". This is aggravated by Paragraph 2 of Part II that states that "acceptance of [a Non-Waivable Red List situation] cannot cure the conflict".

The Court stated that there were certain situations enumerated under the Waivable Red List which would seem potentially more serious than the circumstances of the present case.

In view of the aforesaid, the English High Court dismissed the Section 68 challenges to the awards.

Save the date!

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

MAY 2016

Date	18 MAY 2016
Event	CIPAA Conference
Organiser	KLRCA & The Malaysian Society of Adjudicators (MSA)
Venue	Bangunan Sulaiman

Date	26 MAY 2016
Event	KLRCA Talk Series: The Latest Trends in International Arbitration and Selecting the Right Tribunal For Your Case
Organiser	KLRCA
Venue	Bangunan Sulaiman

Date	28 MAY – 1 JUNE 2016
Event	KLRCA Certificate in Adjudication
Organiser	KLRCA
Venue	Bangunan Sulaiman

JUNE 2016

Date	17 JUNE 2016
Event	Critical Issues on International and Domestic Arbitration: Judges' Perspective
Organiser	KLRCA, The Honourable Society of Lincoln's Inn Alumni Association, Malaysia
Venue	Bangunan Sulaiman

JULY 2016

Date	25 – 29 JULY 2016
Event	KLRCA Summer Academy on International Investment Law and Dispute Settlement
Organiser	KLRCA, Official Partner – Clifford Chance, Supporting Organisation – IKMAS
Venue	Bangunan Sulaiman

SEPTEMBER 2016

Date	8 SEPTEMBER 2016
Event	2nd IPBA Asia Pac Arbitration Day
Organiser	IPBA & KLRCA
Venue	Bangunan Sulaiman

NOVEMBER 2016

Date	19 – 23 NOVEMBER 2016
Event	KLRCA Certificate in Adjudication
Organiser	KLRCA
Venue	Bangunan Sulaiman

KLRC CERTIFICATE IN ADJUDICATION

This programme is recognised by the
CIPAA Regulations as necessary
qualification to be a CIPAA
Adjudicator under CIPAA 2012

SAVE THE DATE!

19–23 NOV 2016

8.30am–6.00pm

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

KLRC Certificate in Adjudication is conducted by KLRC 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. This programme is recognised by the CIPAA Regulations as necessary qualification to be a CIPAA Adjudicator under CIPAA 2012.

CPD POINTS

Bar Council Malaysia

Board of Engineers Malaysia (BEM)

Board of Architects Malaysia (LAM)

Construction Industry Development Board (CIDB)

Land Surveyors Board

Board of Valuers, Appraisers and
Estate Agents Malaysia (IPPEH)

Board of Quantity Surveyors Malaysia (BQSM)

pending approval

pending approval

pending approval

pending approval

pending approval

pending approval

pending approval

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.

For more information please contact
Paul Savuriar at 03 2271 1000 or email cipatraining@klrca.org