CIArb
evolving to resolve
100 Years

Berita Timbangtara

Newsletter of the Chartered Institute of Arbitratrs, Malaysia Branch

In This Issue

Message From The Editor

Year 2015 has been an exciting and eventful year marking the centenary of the CIArb. The Branch held its centenary celebrations on 24th October 2015 and we have included some of the pictures from the night in this issue. More photos will be uploaded onto the Malaysia Branch website.

Kicking off the first issue of the year, we are glad to introduce a new section in the Berita Timbangtara where we feature a short interview with a member of the Malaysia Branch. The Editorial Team hopes to conduct interviews with prominent individuals in the ADR industry that are also members of CIArb Malaysia. In this issue, we are particularly honoured to publish an interview with the CIArb President, Datuk Prof Sundra Rajoo and a senior member of the Malaysian Bar, Tan Sri Cecil Abraham.

Apart from the above, this issue also features the following:-

i. An article by Datuk Stephen Foo on Legal Representations in Arbitration Proceeding in Sabah;
ii. Case commentaries on Chain Cycle Sdn. Bhd. v Kerajaan Malaysia and WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd; and
iii. A summary of the Queen Mary University of London - 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration.

We would like to take this opportunity to thank all the authors for their contributions to this issue. We also welcome comments or feedback from members on ways to improve the newsletter.

We hope you enjoy reading the essays, articles and interviews in this issue of the Berita Timbangtara.

Serene Hiew
Editor

Editor
Serene Hiew

Publisher
The Chartered Institute of Arbitrators,
Malaysia Branch
Unit No.3 , 2nd Floor of Bangunan Sulaiman,
Jalan Sultan Hishamiddin,
50000 Kuala Lumpur, Malaysia.
Tel No.: +03-2271 1055
Fax No.: +03-2271 1056
Email: ciarbmb@gmail.com

Printer
Sincereprint MSC Sdn Bhd,
No. 31, Jalan Dang Wangi,
51000 Kuala Lumpur.

Chairman's Message

In keeping with the objects for which the Branch was established, the Malaysia Branch has continued in its efforts to promote the use of alternative dispute resolution ('ADR') by, amongst other things, conducting training courses leading to professional membership of the CIArb, and in holding various events for the benefit of its members.

In the early part of this year, the Branch has successfully conducted the Accelerated Route to Fellowship Course, the Introduction to International Arbitration Course, and also successfully collaborated with the Kuala Lumpur Regional Centre for Arbitration in the Diploma in International Commercial Arbitration Course that was held in Kuala Lumpur.

The Branch also provided training in award writing to the panel arbitrators of the Palm Oil Refiners' Association of Malaysia through a 'Workshop on Award Writing' that was successfully conducted in February 2016, and which was very well received.

At the student level, the Branch has embarked on providing a series of ADR Guest Lectures to 3rd year law students of ADR of the IIUM (International Islamic University Malaysia) on a weekly basis throughout the month of April 2016, and which will culminate in a Mock Arbitration at the IIUM. Through these events, the Branch is able to promote the benefits of student membership of the CIArb to the law students at the IIUM.

An exciting event to look forward to in 2016 is the International Young Members' Group ('YMG') Conference which is scheduled to take place in the latter part of this year in Kuala Lumpur, and which is being organised by the YMG members of the Branch.

In keeping with the latest development in arbitration in the country, an Evening Talk on 'Legal Representation Before Arbitral Tribunals in Sabah" was held in Kuala Lumpur, following the Federal Court's decision in December 2015 on the right of lawyers to appear in arbitration proceedings in Sabah. A very informative Talk was delivered by Datuk Stephen Foo, the Lead Counsel in the appeal before the Federal Court.

At the Chapter level, various events were held in Sabah, such as a Luncheon Talk by Jonathan Bellamy from Essex Chambers, London on 'Dealing with Bribery and Corruption in International Arbitration" and a Workshop on Mock Arbitration which was facilitated by Mr Yeung Man Sing, the past Chairman of the CIArb East Asia Branch, Hong Kong. In addition, an Introduction to Domestic Arbitration Course was conducted in Kota Kinabalu in April 2016 for those new to ADR.

In the midst of all these activities, the Branch has embarked on the process of forming a company limited by guarantee to comply with the Branch Model Rules, following the Resolution that was carried through by the members at the AGM in April 2015. All the relevant documents, including the Memorandum and Articles of Association had been submitted to the Companies Commission of Malaysia. The process of incorporation is progressing well. It is hoped that the process can be completed very soon, which will take the Branch to an exciting new phase and which we look forward to with great anticipation.

About us

The Chartered Institute of Arbitrators (CIArb) is a leading professional membership organisation representing the interests of alternative dispute practitioners worldwide.

With over 13,000 members located in more than 120 countries , CIArb supports the global promotion, facilitation and development of all forms of private dispute resolution.

As a not-for-profit, UK-registered charity, CIArb works in the public interest through an international network of 37 branches.

The CIArb Malaysia Branch, founded in 1993, has since been part of this prestigious organisation providing education and training for arbitrators. We provide support, advice and networking opportunities. Visit our website at: www.ciarb.org.my for more information.

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Loshini Ramarmuty
Rammit Kaur
Fakihah Azahari
Shanti Abraham

Secretariat

Thelma Ham
Unit No.3, 2nd Floor of
Bangunan Sulaiman,
Jalan Sultan Hishamiddin,
50000 Kuala Lumpur, Malaysia
Tel No. : +603-2271 1055
Fax No. : +603-2271 1056
Email : ciarbmb@gmail.com

Loshini Ramarmurthy,
Senior Legal Associate at Skrine

Mr. Tatvaruban Subramaniam,
Associate at Skrine

A commentary on the Malaysian Court of Appeal case of Chain Cycle Sdn. Bhd. v Kerajaan Malaysia

By Loshini Ramarmurthy, Senior Legal Associate at Skrine & Mr. Tatvaruban Subramaniam, Associate at Skrine

In Chain Cycle Sdn. Bhd. v Kerajaan Malaysia (Civil Appeal No.: W-01(C)(A)-379-09/2014) the Court of Appeal decided on an appeal against the decision of the High Court on an application to challenge an arbitrator's decision pursuant to section 42 of the Arbitration Act 2005 ("AA 2005").

Background Facts

In 1997 the Appellant had brought a proposal to build a laboratory plant to test a new thermal oxidation technology to treat Municipal Solid Waste (MSW) in Malaysia. A 2 ton laboratory plant was built in September 1997 at the complex of the Malaysian Institute of Nuclear Technology Research (MINT) and in 1998, the Appellant also obtained some funding from the Ministry of Science, Technology and Environment to continue with further research and development of the thermal oxidation concept.

On 7th January 2001, the Appellant and the Respondent entered into a contract for the design, construction, completion, testing and commissioning and guarantee for a solid waste treatment plant (the Contract) for a consideration of a lump sum of RM 21,910,600.00. This treatment plant was to be located in Labuan and was to employ a new technology called thermal oxidation process (TOP) that was proprietary to the Appellant.

The Contract contained certain performance specifications for the treatment plant, relating to the daily capacity of the plant to treat a specified tonnage of unsorted municipal waste, the duration of each burn and the rate of consumption of natural gas. The waste characteristics were specified in the Contract, and had been determined by the MINT, based on a survey conducted between November 1999 and July 2000.

After construction, the plant failed to meet performance specifications at the testing and commissioning phases. One of the arguments raised by the Appellant was that during the testing and re-commissioning phase, the processed waste was outside the parameters of the waste characteristics specified in the Contract and that this contributed to the failure of the plant to meet the performance specifications.

In May 2005, the Respondent terminated the Contract and gave notice of forfeiture of the Performance Bond.

The parties attempted without success to resolve the issues arising in between them. The Appellant then issued to the Respondent the Notice to Arbitrate on 30.06.2006. In response, the Respondent filed a counterclaim that alleged that the Appellant had itself breached the contract in view of the non-functional state of the plant. In the Final Award, the arbitrator upheld the Respondent's termination of the contract and dismissed the Appellant's claim and, further, allowed the Respondent's counterclaim.

High Court Proceedings

The Appellant then, pursuant to section 42 of the AA 2005 posed ten (10) questions for determination by the High Court arising from a Final Award published on 15.07.2013 by the arbitrator. In addition, the Appellant had applied for the Final Award to be set aside pursuant to section 37 of the AA 2005 on the ground that the Arbitrator relied in his analysis in the Final Award on cases that had not been put to the parties for their comments, and in so doing the Arbitrator breached the rules of natural justice.

In summary, the Appellant's questions of law put to the High Court arose out of the Arbitrator's construction and interpretation of the Contract and the Arbitrator's alleged failure to take into account relevant laws in making findings relating to the Respondent's counterclaim (assessment of damages).

In dealing with the application to refer questions of law pursuant to section 42 of the AA 2005, the learned Judicial Commissioner (High Court Judge) declined in net effect, to interfere with the Final Award. However, in determining the damages to be awarded, the learned High Court Judge found that the arbitrator had erred in law by selecting diminution in value as the measure of damages and added that the arbitrator would have been entitled to select diminution in value or loss of amenity as a measure of damages if it was the most reasonable measure of damages, but not because it afforded the easiest means by which the damages

may be ascertained. The learned High Court Judge also found that the choice of the measure of damage cannot however be determined by the availability of evidence to support the claim for damages. At the same time the learned High Court Judge was of the view that it would not be just to deny the counterclaim as the Respondent has suffered no small loss and was of the view that the most appropriate measure of damages would be reinstatement costs. Accordingly, the learned High Court Judge varied the Final Award by reducing the amount awarded to the Respondent under the counterclaim to from RM9, 238,770.00 to RM 4,619,385.00.

As for the Appellant's application to set aside the Final Award pursuant to section 37 of the AA 2005, the learned High Court Judge found that the correct proposition of law to be applied in the circumstance is that there must be prejudice suffered by the Appellant for there to be a breach of natural justice. The High Court Judge was of the view that there had been no prejudice suffered by the Appellant from the alleged breaches by the arbitrator and accordingly, dismissed the Appellant's application under section 37.

The Appeal

The Notice of Appeal filed before the Court of Appeal by the Appellant was against the whole of the decision of the learned High Court Judge. However in the Memorandum of Appeal and Submissions filed, the Appellant did not pursue its appeal against the learned High Court Judge's decision to dismiss the Appellant's application under section 37.

The Respondent had filed a cross-appeal against that part of the learned High Court Judge's decision varying the damages awarded on their counterclaim to the lower sum of RM 4,619,385.00.

Law on Section 42 of AA 2005

In the Court of Appeal, it was common ground between parties what would amount to a 'question of law' and the approach the Court should take in determining any questions of law referred to it pursuant to section 42 AA 2005 was now fairly settled with the decision of the High Court in Exceljade Sdn. Bhd. v Bauer (Malaysia) 2014 1 AMR 253 (Exceljade) and the endorsement of the approach therein identified by the subsequent Court of Appeal decision in Government of Malaysia v Perwira Bintang [2015] 1 CLJ 617 (Perwira Bintang).

The Court of Appeal referred to the three-stage process expounded in Chrysalis [1983] 1 WLR 149, quoted in Exceljade and affirmed in Perwira Bintang, and in particular the need to place emphasis one aspect of the process that is of particular significance to the issues at hand in the appeal:

> "23……It is that once the court dealing with a reference under section 42AA 2005, had under stage 2 of the process taken the view that the arbitral tribunal had understood, stated and applied the correct law, the court under stage 3 process had to consider further the range of possible correct answers open to the tribunal. If the answer preferred by the tribunal was well within such identified range, the court answering the question of law before it would not intervene, although the individual judge considering the question would have been inclined to come to a different conclusion"

The Court of Appeal also made reference to the overriding consideration pursuant to section 42(1A) AA 2005, namely to ensure that unless the question of law substantially affected the rights of one or more of the parties, the court was mandated to dismiss such reference.

The Appellant's Contentions

The Appellant's various contentions that the learned High Court Judge had misdirected himself on the questions of law posed to the court were advanced under the three major heads i.e., the nature of the contract, issues relating to testing and commissioning and the appropriate measure of damages.

The Nature of the Contract

In relation to the nature of the contractual relationship between the Appellant and the Respondent, the Appellant argued that the contract was in fact a Research and Development Project and not a Commercial contract.

In response, the Respondent contended that the question posed by the Appellant to the Court was in substance the same question that had been specifically posed to the Arbitrator for determination. Accordingly, it was not open to the court in the reference to re-examine that very same question. This principle has now come to be known as the 'Absalom Exception' (derived from the case of Absalom Ltd. v. Great Western (London) Garden Village Society Ltd. [1933] AC 592).

The Appellant's argument before the Court, was that the Absalom Exception no longer applied in light of the present section 42 of the AA 2005. It was urged upon the Court that the Absalom exception operated only where there was an error of law 'on the face of the award' and that pursuant to Exceljade, the primary consideration under section 42 now would be whether the question of law or error of law arose 'out of the award'.

It was also contended by the Appellant that the Absalom exception was in any event only recognised under common law (i.e. in the absence of statute law) because the power of the court under common law- parameters was a drastic one, that is, only to set aside the entire award when an error of law was discovered; there was no power to order any other relief. However under section 42, it was argued, as there was a range of relief open to the court to order, the court was not precluded from intervening where a question of law arising out of the award had been wrongfully decided by the arbitrator. For that reason, it was submitted that the learned High Court Judge should have given consideration to that question and not be restricted by the Absalom exception.

The Court of Appeal however, was not convinced that the Absalom exception was confined to situations where the court

was called upon to deal with 'error of law on the face of the award' only. The Court held that there was no valid reason why, in a situation under section 42, where "...any question of law arising out of an award" was before the court, such an exception or limitation ought not to also apply. Further, the Court of Appeal was of the view that the limitation as offered by the Absalom exception was still necessary and relevant even in a section 42 scenario as well so that the 'reference on question of law' was not turned into a wholesale 'appeal' against the decision of the arbitral tribunal. To allow the Appellant to re-litigate the issue would have the effect of opening the floodgates to allow what was in substance an appeal couched as a question of law.

PERFORMANCE SPECIFICATIONS AND CONDITION PRECEDENT

It was the Appellant's contention before the Court that the provision of types of waste for testing or determination of performance of the Plant had to conform to prescribed waste characteristics and this was a condition precedent that had to be fulfilled first for any testing to be acceptable.

The Respondent in turn argued that the Contract was a turnkey contract and it always remain the Appellant's responsibility to ensure that the completed Plant was capable of treating whatever waste that was collected; yet the plant had to still meet the specification stipulated with regard to the amount (quantity) of waste to be treated and the limits of energy consumption in the process.

The Court of Appeal held that the learned High Court Judge's decision not to set aside or otherwise interfere with the Award was sustainable and justified. According to the Court of Appeal, the learned High Court Judge had addressed the question posed to the court correctly from the perspective of the applicable legal principles as to what was or could have constituted the reasonable intention of the parties in the factual context of the matter. The conclusion reached was sound that there did not arise any 'condition precedent' in the circumstances, as canvassed by the Appellant.

TERMINATION OF THE CONTRACT

The Appellant contended that the Respondent could not invoke their right to determine the Contract without having completed a proper testing and commissioning of the TOP.

The Court of Appeal, however, did not find any error on the part of the learned High Court Judge's analysis that on the facts that have been established in the arbitration, the Respondent had a valid basis in law to invoke the termination clause to terminate the Contract independent of whether or not there was a proper testing completed. The Court of Appeal added that the Appellant's argument could only invariably lead to a totally unreasonable scenario, where the Respondent would be held captive and tied down to the Contract for an indeterminate period of time while the Appellant could delay until the terms for testing met the performance specification. The Court of Appeal did not view that to be the commercial intent behind the Contract.

SUBSTANTIAL PERFORMANCE

The Appellant also argued that the Respondent had unlawfully terminated the contract as the Appellant had substantially performed its contractual obligations. The Court of Appeal agreed with the analysis by the learned High Court Judge who noted that whether any substantial performance of Contract had actually been achieved was a question of fact and therefore could not be properly made a subject of a reference and what was only in issue before the court was whether the Arbitrator had correctly identified the law on substantial performance. The learned High Court Judge concluded that the Arbitrator had correctly identified the principles. Accordingly, the Court of Appeal found that the answer given by the High Court to the question posed by the Appellant was not in error at all.

QUANTUM OF DAMAGES

On the issue of damages, the Court of Appeal held that the determination of the quantum of damages by the Arbitrator was a determination of fact. The Arbitrator in coming to his determination had addressed his mind to the right principles of law. There was a range of possible measures of damage recognised and available in law open to the Arbitrator. The Arbitrator had applied the test of what would be a reasonable compensation in all the circumstances of the matter considering the particular complexity attached to this case, namely the fact that technology inherent in the TOP Plant exclusively belonged to the Appellant and rectification or replacement would prove to be difficult and costly.

On the decision of the learned High Court Judge to reduce the sum awarded as damages, the Court of Appeal was of the view that the High Court Judge had stepped into the arena of the Arbitrator and had undertaken a reassessment, which the learned High Court Judge was not entitled to, unless there was in the first place a proper reference under section 42. The Court of Appeal was of the view that the power to 'vary' an award given by section 42 was clearly circumscribed by the opening words of section 42 itself where it had been restricted to "...any question of law arising out of an award." The Arbitrator was the master of facts and the court in exercising its powers under section 42 had to be wary to sieve out questions of fact 'dressed up' as question of law.

Accordingly, the Court of Appeal found merit in the Respondent's cross-appeal that the learned High Court Judge had misdirected himself when he interfered with and went on to reduce the award of damages determined by the Arbitrator and proceeded to restore the amount of damages ordered in the Final Award in favour of the Respondent.

CONCLUSION

It is apparent that this decision further affirms the judiciary's validation for finality in arbitral awards.

The Court of Appeal rightfully noted that there are two opposing schools of thought with regard to curial intervention in arbitral awards. On the one side are those who advocate a stance that there should be absolute judicial restraint and deference to the finality of an arbitral award and that the parties agreeing to arbitration were agreeing to the arbitrator getting it wrong and there should be total non-intervention by the civil courts. On the other end are those who argue that national courts, particularly in domestic arbitration, should not abdicate their sovereignty to have complete supervisory and appellate oversight over subordinate tribunals, which they equate the arbitral process to be one.

The Court of Appeal was of the view that the legislative intent behind allowing a reference to be brought on questions of law to the court appeared to be to cut a middle path between those divergent positions, namely, to allow the courts a limited role to re-examine issues or questions of law arising out of an award.

10 Questions with Datuk Professor Sundra Rajoo

► *Q1. What are the 3 (or more) points you would make in a lecture to newly admitted members of the bar?*

Newly admitted members of the bar would have to first come to terms that it is more competitive because there are more graduates and that it is not a small profession anymore. It is also very specialised and that there are very high standards. If you want to be a one-man show, you can be a one-man show but then you have to do everything. The only way to succeed at this is to specialise. The future is about specialisation.

If you work at a large firm then you will be in a particular department and then as you practice you will start to do certain things. Some people will do litigation and others conveyancing and so forth.

When you start off, you will need to find out what you want to do in the law because the law is very wide. Once you decide what you want to do then you must be very comfortable with it. You must be passionate about it. You must know what the work is about in detail and you will need to learn more about it. The learning does not stop because you have to actually read, you have to understand and attend seminars and conferences. At the end of it all, this learning goes towards producing excellent work either in the courts when you submit or when someone asks you for an opinion and you are able to provide them a structured and considered opinion.

My final point would cover ethical issues. They will be handling a lot of money. As practitioners, most often than not, they will come across clients with deep pockets. Temptation will be great when they see their clients making money very quickly and easily. They may think that this is the way and might lose sight on the reasons why they chose the legal profession. Integrity and principles will play a big part. Hold on to them.

► *Q2. What are some of the challenges faced by arbitrators now that were not present 8 to 10 years ago?*

Arbitration is no longer an amateur sport. It is requires accuracy, timeliness and people expect a great level of competence from an arbitrator. That is the main challenge. Then in the light of reporting, there is lot of information travelling swiftly in this age and time. If you do something, everyone knows. There is absolutely no room for errors

► *Q3. If you can give an advice to a member of the Branch who is sitting as an arbitrator for the first time, what would it be?*

You have to know what you are doing and what is expected from you. First thing is that you have been trained, you are a member of the branch and we assume you have done your fellowship and then you have gone through the hoops and you have the skill sets that can make you sit as an arbitrator.

You may be excellent on paper but because you are sitting for the first time it means you have no field experience at all. And it may be quite daunting in that sense which will lead to some degree of nervousness. This is normal. But you must overcome that nervousness. You must apply what you have learnt and work hard. And sometimes people will know that you are sitting for the first time. You might be anxious at the beginning but you must not show that. Embrace your surroundings and project calmness. You must go beyond book learning,

► *Q4. What are some of the goals that you hope to achieve for the CIArb this year?*

I actively aim to promote some initiatives to be implemented, to foster arbitration and good practice that will eventually promote the development and innovation of ADR in the world. While the development and the implementation of these strategies have a worldwide scope, but some do specifically look into Asian necessities. Chartered Institute of Arbitrators's scope is not merely focused on arbitration, but also on different branches of ADR, like mediation. In this respect, I could highlight the following initiatives:

a. Grant further accessibility to the membership itself. Currently the members' strength at 14,000, provides for a strong and steadfast network. To move towards increasing recognitions of Chartered Institute of Arbitrators membership in ADR institutions around the globe.
b. Focus on effective training and impartation of knowledge and setting standards.
c. Focus on new Chartered Institute of Arbitrators' initiatives and structure guides or practice notes in keeping with the new developments in a total ADR system and not restricted to arbitration only.
d. Provide more innovative education programs such as the INCIEF diploma to cater to the demands of the market in relation to Shariah compliant arbitration process.
e. Spread out more Chartered Institute of Arbitrators branches around the globe, looking into developing areas in Asia, South America or Africa. However, it is necessary to locate branches in different more diverse places to increase our presence and become more approachable for the user. The Malaysian and Singapore models are good examples to adopt.

► *Q5. Tell us about a CIArb event that you are most excited about at the moment.*

Each event is different and provides an enriching experience. We started the year by organising a very successful Diploma in International Commercial Arbitration Course right here in Malaysia. I was the Co-Course Director and had the pleasure of working together with several members from the Malaysia Branch as well as other international branch members.

I also spoke in San Francisco, at an event organised by the North America Branch, followed by a talk at the Academy of Law in Singapore. Then I recently delivered a speech at the East Asia Branch Annual Dinner in Hong Kong. It is continuous. I am excited about the whole year.

► *Q6 Is there any other career you would have enjoyed?*

My career has been very convoluted. To get here it took a long time. I found something that I enjoy, and that I am passionate about.

► *Q7. What aspect(s) of your ADR work do you enjoy most enjoyed?*

It is the interaction. It is also about the promotion of ADR and being part of the institutions that I have helped to build in the country.

► *Q8. Which is your favourite holiday destination?*

I treasure my visits to Penang. Of course Italy is nice for its architecture but I think it is so expensive with our currency. But if it is a local holiday it would definitely be Penang and Langkawi as they are really nice. If I were to single out other places from the Asian region, I would go with India and China.

► *Q9. Which book did you most enjoy reading or re-reading in the last 10 months?*

A book by Francis Pike called Hirohito's War. It is actually a recounting of the Pacific War from an overall point of view but the interpretations are very detailed. From the battles to the campaigns; suffering and sacrifices on both sides. You can see how great people can be when they are put through adversity.

Another book that I have recently read is by Rana Mitter. It is called Japan's War With China (1937 – 1945). This book sets out why China is where it is now, a global economic powerhouse. It is a story of extraordinary resistance, one that depicts the Chinese's determination to not be defeated and of the four years when China took on the might of the entire Japanese military. The sequence of events that took place during the Sino-Japanese War completely transformed and reshaped East Asia.

The rise of China is an interesting story that has always fascinated me and this book provided a comprehensive and non-partisan account of how that happened. I would recommend this book to anyone who is interested in the origins of modern day China.

► *Q10. What do you consider your greatest achievement in the course of your career?*

It has been a long journey to where I am now. I continue to seek out fresh challenges, set new goals and I just go on about completing my tasks and getting things done the best I can. That has always been the case. You always want to do your best and contribute to your community.

But if I were to list down my greatest achievement so far, it would be recruiting my people on merit and getting them to excel and show how it will be a prosperous nation if we harness all our good resources.

10 Questions with Tan Sri Dato' Cecil Abraham

In this section of the newsletter, we feature interviews with prominent members of the CIArb Malaysia Branch with regard to their personal experience in the ADR field, opinion on current topics and other lesser known aspects of these individuals. Tan Sri Dato' Cecil Abraham shares with us, amongst others, his views on the current challenges faced by lawyers, legal firms set up by junior lawyers and his dream dinner party guest list.

► *Q1. What are the 3 (or more) points you would make in a lecture to newly admitted members of the Bar?*

(a) Marshall the facts of the case;
(b) Make sure your legal submissions are updated.
(c) In your oral submissions, raise your primary argument at the outset and in closing submissions raise the issue you want the Court to remember.

► *Q2. What are some of the challenges faced by lawyers presently that were not or less common 10 years ago?*

(a) There is an urgency for the Judge to clear the backlog of cases. In this regard, the time allowed for hearing has been reduced. As such, lawyers do need to be able to succinctly put their case forward; and
(b) There was no case management of cases in the manner conducted today. As such lawyers today do need to know their case prior to the commencement of an action and must marshall the documents and material facts so as to be ready to comply with the strict case management directions handed down by the courts in Malaysia.

► *Q3. What is your view with regard to young and new lawyers who are setting up their law firm right after being called to the Malaysia Bar?*

I am of the view that they should work with a law firm for a few years before venturing out on their own. They should shadow senior counsel and learn the ropes properly before forming their own firm.

► *Q4. What aspect(s) of your ADR work do you enjoy most?*

I enjoy advocacy in our Appellate Courts and also sitting as an Arbitrator.

► *Q5. Which advocate(s) did you learn most from?*

My mentor is Dato' Mahadev Shankar. He was my pupil master and I was his junior on many a case.

► *Q6. Is there any other career you would have enjoyed?*

Yes, I would have liked to have been a professional golfer playing on the US PGA Tour or the European Tour, or a wine critic. Unfortunately, when I was growing up, one either became a doctor, lawyer or an accountant!

► *Q7. Which is your favourite holiday destination?*

I enjoy travelling to the United Kingdom but if one had to choose, Kaori Cliffs in New Zealand as well as the wine country in France, namely, Bordeaux and the Rhone Valley.

► *Q8. Which book did you most enjoy reading or re-reading in the last 10 months?*

I am now beginning to re-read a number of classics dating back to my school days.

► *Q9. If you were to select 2 places of interest in the country, which would be your top 2?*

The first would be Langkawi and the second, Sabah.

► *Q10. If you were to throw a year end dinner, who would be your guests (summoned from the past) and why?*

I would very much like to have Tan Sri Yusofee Abdoolcader at dinner. He was a former Supreme Court Judge in Malaysia whom I represented in the judicial crisis in Malaysia in 1988. He had a tremendous penchant for poetry and Latin and although a firm judge whilst on the bench, was good company at the dinners I had with him following his retirement from the bench.

It would also be nice to have Mahatma Gandhi, Martin Luther King and Sir Winston Churchill present given their differing views and ideology on politics, free speech, the Commonwealth, questions of equality, amongst others. I would also invite John Lennon given that the Beatles were the band of my youth.

It would also be nice to have Severiano Ballesteros and Ben Hogan at dinner given my fondness for golf.

Finally, it would be nice to have my late parents present as well for the simple reason that they are greatly missed.

It would be an eclectic bunch of individuals but conversation would certainly be scintillating.

Satshani Radhakrishnan,
Senior Associate,
Messrs Harold & Lam Partnership

Case Summary
SETTING ASIDE AN ADJUDICATION DECISION PURSUANT TO SECTION 15(A) AND (D) OF THE CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ("CIPAA")
A summary of WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd [2015] MLJU 1125

By Satshani Radhakrishnan, Senior Associate, Messrs Harold & Lam Partnership

Executive Summary

Section 15 of CIPAA sets out the grounds in which an aggrieved party may apply to the High Court to set aside an adjudication decision.

In WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd [2015] MLJU 1125, the High Court, in setting aside an adjudication decision, upheld the principle that an adjudication decision can be set aside where there has been a clear denial of the rules of natural justice and where the Adjudicator had acted in excess of his jurisdiction.

Salient Background Facts

WRP Asia Pacific Sdn Bhd ("WRP") engaged NS Bluescope Lysaght Malaysia Sdn Bhd ("Bluescope") to design, fabricate, deliver and install structural steel frame, steel roofing and walling at two factories. Dispute and differences arose between the parties relating to the contract. Bluescope issued a payment claim for work done that was not paid. WPR did not file any payment response and as such, was deemed to have disputed the payment claim. Bluescope then proceeded to serve a notice of adjudication followed by an adjudication claim. Thereafter, WRP filed its adjudication response and Bluescope filed an adjudication reply. The Adjudicator issued his adjudication decision in favour of Bluescope.

Bluescope applied for leave to enforce the adjudication decision whilst WRP applied to set aside the adjudication decision. WRP applied to set aside the adjudication decision broadly on the following two grounds:

a. That the Adjudicator had acted in excess of his jurisdiction; and
b. That there was a breach of natural justice.

Decision by the High Court

In dealing with WRP's application to set aside the adjudication decision, the High Court observed that the Courts must exercise considerable restraint when dealing with an application to set aside an adjudication decision. The High Court was of the view that an adjudication decision should only be set aside in rare and extreme circumstance in order to give effect to the provisional resolution of payment disputes in construction contracts. The High Court opined that statutory adjudication should not be "thwarted by an overly sensitive concern for procedural niceties" [Balfour Beatty Construction Ltd v Mayor & Burgess London Borough of Lambeth [2002] Adj LR 04/12].

The High Court, in determining WRP's application to set aside the adjudication decision, dealt with the following issues:

a. Jurisdiction of the Adjudicator;
b. Competency of the Adjudicator; and
c. Unilateral communication between the Adjudicator and Bluescope.

Jurisdiction of the Adjudicator

The High Court, in dealing with the issue on when must a challenge on an adjudicator's jurisdiction be raised and whether the principle of waiver and estoppel would operate if a challenge as to jurisdiction is only raised in Court, was of the view that a challenge on jurisdiction may be taken at any time.

When such a challenge is taken, the Adjudicator has a discretion as to whether to deal with the challenge at all or to simply proceed with the adjudication without dealing with the challenge in accordance to Section 27 (3) of CIPAA. In a situation where the Adjudicator deals with the challenge, regardless of the Adjudicator's decision on the challenge, the same challenge may

be taken again in an application to set aside under Section 15(d) of CIPPA.

The High Court held that the reason for holding this view is that given the tight timelines which the Adjudicator has to keep under CIPAA, a challenge on the jurisdiction of the Adjudicator is not waived merely because it was not taken during the adjudication proceedings or because the aggrieved party had participated in the adjudication proceedings. The High Court was of the view that in the adjudication proceedings, the Adjudicator should be allowed to get on with the substantive issues concerning the payment dispute given the strict and limiting conditions that the adjudication operates.

It should be noted that the approach taken by the High Court in this case is different to the approach taken in by the majority of the cases in the United Kingdom on the issue of jurisdiction. In the United Kingdom, the Courts in most cases held that if there is to be an objection on the jurisdiction of the Adjudicator, there must be an express or implied reservation by the aggrieved party of the jurisdictional challenge at the beginning stage of the adjudication proceedings.

The High Court in this case opined that in the context of CIPAA, the approach should be more flexible for the reasons set above.

Competency

WRP contended that the Adjudicator does not possess the experience and qualification and therefore is incompetent. The High Court in reviewing the competency standard and criteria of an Adjudicator as set out in Section 32 of CIPAA and Regulation 4 of CIPPA Regulation 2014 held that for a person to be eligible as an Adjudicator he or she must poses each and every criteria specified in the sub-regulation 4 (a) to (d).

The High Court decided that the term "working experience" in Regulation 4(a) of CIPPA Regulations 2014 means that the experience must be of the practical type in that the qualifications must be put into practice. Further, the High Court was of the view that a member of the academia or teaching industry does not fall under the meaning of "working experience". The High Court also affirmed that the "working experience" of an Adjudicator must be specifically in relation to the building and construction industry and the experience has to be in Malaysia.

However, it is important to note that the High Court in this case took note of the fact that Parliament recognised that other fields may be equally competent. Nonetheless, it is unclear what other fields are presently recognised by the KLRCA.

Having reviewed the facts of this matter, the High Court accepted that KLRCA must be taken to have seen fit to recognise this Adjudicator's "working experience" in what must be the "other field".

Unilateral Communication

WRP has alleged that the Adjudicator had unilaterally communicated with Bluescope when the Adjudicator had sent an email and a WhatsApp message to Bluescope without copying WRP in seeking clarification in respect of the dispute.

The High Court was of the view that the Adjudicator should have made known of his communication with Bluescope to WRP and the Adjudicator was obliged under the rules of natural justice to offer WRP an opportunity to respond on the clarification requested the Adjudicator. Further, in this case, the clarification requested by the Adjudicator was the basis in which the findings were made and therefore, the High Court opined that there was a clear breach of natural justice as WRP was not given an opportunity to respond.

Further, the High Court also held that the Adjudicator had determined the adjudication dispute on matters which was not set out in the adjudication claim or in the payment claim. This is clearly contrary to the provisions of Section 27(1) of CIPAA and with that, the Adjudicator had exceeded his jurisdiction and had acted in breach of the rules of fair play.

Conclusion

The High Court held that it was unsafe to allow the adjudication decision to remain where there has been a clear denial of the rules of natural justice. Leaving the adjudication decision made under such conditions and circumstances would go against the basic tenets of justice. Section 25 of CIPAA which deals with the power of an Adjudicator was never intended and should never be used in a manner that is contrary to the rules of fair play. In the circumstances, the adjudication decision was set aside with no order as to costs.

Datuk Stephen Foo

Legal Representation before Arbitral Tribunals in Sabah

Paper presented by Datuk Stephen Foo at the Evening Talk by the CIArb Malaysia Branch on 25 February 2016

Historical Background

Prior to 1963, before the formation of Malaysia, Sabah (then known as North Borneo) was separate entity ruled as a Colony by the British. It had its own Government and its own Legislative Council which made its own laws to govern the country as a Colony. Thus, at the time when Malaysia was formed, Sabah had its own complete set of laws necessary for the smooth running of a Government. The Advocates Ordinance passed in 1953 is one of those laws passed by the Legislative Council for the regulation of legal practice in Sabah. Under the said Ordinance, Sabah Advocates have complete autonomy to regulate their own practice and are conferred exclusive right to practise in Sabah as well as to appear and plead before the courts in Sabah. Upon formation of Malaysia, under the Inter-Governmental Committee Report which sets out the Legislative Lists, Administrative Arrangements and Assurances accorded to Sabah in the new Federation, item 4(d) of Annex A thereof contains an assurance in respect of "Persons entitled to practice before the Courts in Sabah that: "Restriction on the lines of the existing Borneo legislation should be continued, so that practice at the local Bar would, subject to certain exceptions be restricted to resident advocates, until otherwise agreed by the Borneo Legislatures."
(1) Arising from the above assurance, it is provided in section 63 of the Malaysia Act as follows:

> "(1) In so far as any provision made by or under an Act of Parliament, by removing or altering a residence qualification, confers a right to practise before a court in the Borneo States or either of them on persons not previously having the right, that provision shall not come into operation until adopted in the States or State in question by an enactment of the Legislature.
> (2) This Article shall apply to the right to practise before the Federal Court when sitting in the Borneo States and entertaining proceedings on appeal from the High Court in Borneo or a judge thereof or proceedings under Clause (2) of Article 128 for the determination of a question which has arisen in proceedings before the High Court in Borneo or a subordinate court in a Borneo State."

Subsequently, this provision in the Malaysia Agreement was incorporated into the Federal Constitution as Article 161B as one of the safeguards/protections for Sabah.

Position in England

Before proceeding to deal with the position in Sabah, let us look at the position in England. It is not in dispute that in

England, legal representation in arbitration proceedings is one of the functions which may be performed by a Barrister or Solicitor in England but by virtue of section 36 of the UK Arbitration Act 1996, such function is not exclusive to Barristers and Solicitors in England. Section 36 of the UK Arbitration Act 1996 provides as follows:
"36. Legal or other representation
Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him."

Position in West Malaysia

In West Malaysia, the position is based mainly on the interpretation of section 35(1) and section 37 of the Legal Profession Act 1976 ("LPA") in the case of Zublin Muhibbah Joint Venture v. Government of Malaysia [1990] 3 MLJ 125.
Section 35(1) states as follows:

"Section 35 (1) of Legal Profession Act 1976
35. Right of Advocates and Solicitors
(1) Any advocate and solicitor shall subject to this Act and any other written law, have the exclusive right to appear and plead in all Courts of Justice in Malaysia according to the law in force in those Courts; and as between themselves shall have the same rights and privileges without differentiation"

In that case, in the course of an arbitration proceeding between the plaintiff and the defendant, the plaintiff required an American attorney to assist in the cross-examination of witnesses because of his wide experience involving the particular type of contract under arbitration. The defendant's counsel objected to the presence of the American attorney on the ground that he was not an advocate and solicitor under the LPA. On the request of the arbitrator, the plaintiff went to court to seek a declaration to sort out the objection.

It was held by the Court as follows:

> (1) An advocate and solicitor who is a qualified person under section 36(1) of the Legal Profession Act 1976 is given exclusive right by the law to appear and plead in all courts of justice in Malaysia. However, that

section does not give exclusive right to him nor prohibit him from appearing in other tribunals which are not courts of justice in this country. An unauthorised person is prohibited under pain of penalty from performing any of the acts mentioned in section 37 of the Act. However, section 37 of the Act is specific in the sense that those acts to be performed must be done in the courts in Malaysia, or relating to any proceedings in any court in Malaysia;

(2) An arbitral forum is not a court of justice in Malaysia as envisaged by the Legal Profession Act 1976. It is a private tribunal. Any person who assists a party in presenting his case may also attend before the arbitrator which is either provided for by the arbitration agreement or under section 13 of the Arbitration Act 1952;

(3) Even if the American attorney might have taken actions or performed the duties which normally are done by an advocate and solicitor in this country, he had done so not in or relating to a court in Malaysia, but only in or relating to an arbitration proceeding. His actions therefore did not offend section 37 of the Legal Profession Act 1976;

(4) The law governing arbitration proceedings in Malaysia is the Arbitration Act 1952 and the Legal Profession Act 1976 has no application to arbitration proceedings in West Malaysia.

Since it was held in the above case that arbitral tribunal is not a court of justice in Malaysia, the exclusive right conferred on advocates and solicitors by section 35(1) of the LPA does not apply to arbitral tribunals. Therefore, in West Malaysia, advocates and solicitors have no exclusive right to appear before arbitral tribunals.

Position in Sabah

Now, in Sabah, the position is based on the interpretation of the relevant provisions of the Sabah Advocates Ordinance which are found in section 8(1) read with section 2(1)(a) & (b) and in section 16(1) (a) thereof. The relevant provisions are reproduced as follows:

"Right to practise in Sabah

8 (1) Subject to subsection (2) and to section 9, advocates shall have the exclusive right to practise in Sabah and to appear and plead in the Federal Court in Sabah and in the High Court and all courts in Sabah subordinate thereto in which advocates may appear, and as between themselves shall have the same rights and privileges without differentiation."

"Interpretation

2(1) In this Ordinance-

"To practise in Sabah" means to perform in Sabah-

(a) any of the functions which in England may be performed by a member of the Bar as such; or

(b) any of the functions which in England may be performed by a Solicitor of the Supreme Court of Judicature as such;"

"Offences

16. (1) Any person not being entitled to practise in Sabah under the provisions of this Ordinance, who-

(a) acts as an advocate or agent for suitors, or who as such advocate sues out any writ or process, or commences, carries on, solicits or defends any action, suit or other proceedings in the name of any person or in his own name in any courts of Sabah, or draws or prepares any instrument relating to any proceedings in any of the courts in Sabah;

.....

shall be liable to a fine of five hundred ringgit."

Challenge in the High Court

Based on the above provisions of the Advocates Ordinance, Sabah advocates have always taken the position that legal representation before an arbitral tribunal is the exclusive right of Sabah advocates just like legal representation before any court of law whereby a non-Sabah lawyer is required to apply for ad hoc admission to appear until such position was challenged in the High Court in the case of Mohammed Azahari Bin Matiasin v. Sabah Law Association (represented by its President) and Samsuri Bin Baharuddin & 813 Others [Originating Summons No. K17-29-2010].

Briefly, in that case, in the arbitration proceedings between the claimants and the respondent arising from a dispute in a Joint Venture Agreement, the respondent's Sabah advocate engaged a West Malaysian advocate and solicitor as his co-counsel without applying for ad hoc admission. In the course of the proceedings, it was raised by the claimants' counsel that the co-counsel from West Malaysia being not a Sabah advocate must seek ad hoc admission to appear as co-counsel for the respondent. Due to objection raised by the claimants' counsel, the respondent's counsel ("the Applicant") applied to the High Court to seek a declaration that "foreign lawyers" who are not advocates within the meaning of the Sabah Advocates Ordinance are not prohibited from representing parties in arbitration proceedings as the Sabah Advocates Ordinance has no application to arbitration proceedings in Sabah and alternatively for an order that the West Malaysian advocate and solicitor be granted ad hoc admission to appear in the arbitration proceedings. Both the Sabah Law Association ("SLA") and the claimants in the arbitration proceedings objected to the Applicant's application.

The Applicant's Counsel advanced the following three grounds in support of his application:

First, he relied on Zublin's case which held that an arbitral forum is not a court of justice in Malaysia as envisaged by section 35(1) of the LPA. It is a private tribunal. As such, it is not caught by section 35(1) of the LPA. Similarly, he argued, since section 8(1) of the Sabah Advocates Ordinance is similar to section 35(1) of the LPA, it also does not apply to legal representation in arbitration proceedings in Sabah.

Secondly, it was argued that by virtue of the interpretation of the words "to practise in Sabah" in section 2(1) (a) & (b) of the Sabah Advocates Ordinance, which mean "to perform in Sabah any of the functions which in England may be performed by a member of the Bar as such; or any of the functions which in England may be performed by a Solicitor as such" it is intended to put Sabah advocates on the same footing as Barristers and Solicitors in England who have no exclusive right to appear in arbitration proceedings by virtue of section 36 of the UK Arbitration Act 1996.

Thirdly, it was submitted that based on policy ground in that Sabah must progress to the next level as a preferred place for arbitration consistent with the current trend in promoting arbitrations in Malaysia if foreign lawyers are not prohibited from representing parties in arbitration proceedings in Sabah.

On the first ground, the learned High Court Judge held that Zublin's case does not apply because the wording in section 35(1) of the LPA is not the same as the wording in section 8 (1) of the Sabah Advocates Ordinance as, apart from exclusive right to appear and plead in courts, there are these additional words of "to practise in Sabah" which are not found in section 35(1) of the LPA.

As regards second point, the learned Judge held that "the non-exclusivity of barristers' and solicitors' appearance in arbitration proceedings in England is not relevant to the issue at hand which concerns the exclusivity of legal practice in Sabah. The fact that that non-lawyers are allowed to appear in arbitration in England in no way has any bearing on what the words 'practice in Sabah' mean."

In response to the ground based on policy, the learned Judge opted to follow the established rule of interpreting statutes and that is to give words contained therein their natural meaning and construe that provision in the context of the whole statute and applying that trite principle he held that "the phrase exclusive right to practise in Sabah" means "that lawyers admitted to the Sabah Bar have exclusive right to legal practice in both 'in and outside' courts." Notwithstanding the above, the learned Judge said that even if he were to decide on policy ground, as between the policy advanced by the Applicant which is "[to] adopt the noble ideal of making State of Sabah a place of welcome for arbitration proceedings" and the policy advanced by SLA which is "to protect the State of Sabah from influx of foreign lawyers taking up employment", the learned Judge preferred to adopt the policy put forth by SLA because it has legal and historical basis based on the safeguards and assurances in Inter-Governmental Report and Malaysia Agreement which form the basis of Sabah's and Sarawak's participation in the formation of Malaysia, whereas the policy put forth by the Applicant has none.

The Applicant's application for ad hoc admission was also rejected on the ground that the claims in the arbitration proceedings are 'run of the mill' claims which any local qualified lawyer would be more than competent to prosecute especially as it relates to local Land Ordinance which is peculiar in Sabah only.

Decision of the Court of Appeal

Dissatisfied with the High Court's decision, the Applicant appealed to the Court of Appeal relying on the same arguments put forward by him in the High Court. The Court of Appeal allowed the appeal based the following reasoning:
"We agree with the submission of the appellant that by reason of the definition of the words ' to practise in Sabah' in section 2(1) of the Advocates Ordinance in Sabah, the exclusivity of right to practise for advocates in Sabah is tied up to exclusive right of practice of barristers and solicitors in England; and since barristers and solicitors in England have no exclusive right of representation before arbitration proceedings in England, it follows, therefore, that advocates in Sabah also have no exclusive right of representation at arbitration proceedings in the State of Sabah."

Appeal to the Federal Court

The case then went on appeal to the Federal Court after leave having been granted and the Federal Court's determination was sought on the following question of law:
"Whether section 8(1) of the Advocates Ordinance 1953 (Sabah Cap.2) read together with section 2(1) (a) & (b) thereof confers the exclusivity of right to practise by representing and appearing for any party in arbitration proceedings in Sabah on Sabah Advocates notwithstanding that Barristers and Solicitors in England do not have the exclusive right of representation in arbitration proceedings." From the outset, it should be noted that section 8(1) consists of two limbs. The first limb deals with "to practise in Sabah" and the second limb deals with "appearance in courts". Both limbs are preceded by the words "shall have exclusive right". That means the Sabah advocates "shall have exclusive right to practise in Sabah" as well as "shall have exclusive right to appear and plead in courts in Sabah". The exclusive right to appear in courts in Sabah was not an issue before the court in the proceedings. The issue was "the exclusive right to practise in Sabah". Does the expression "to practise in Sabah" include "appearance in arbitration proceedings in Sabah"? If it does, then "exclusive right to practise in Sabah" also includes "appearance in arbitration proceedings in Sabah". If it does not, then "exclusive right to practise in Sabah" does not extend to "appearance in arbitration proceedings in Sabah". Now, as stated above, "to practise in Sabah" is defined in section 2(1) (a) and (b) of the Sabah Advocates Ordinance as follows:
"to practice in Sabah" means "to perform in Sabah-

(a) any of the functions which in England may be performed by a member of the Bar; or
(b) any of the functions which in England may be performed by a Solicitor of the Supreme Court of Court of Judicature as such;

It was SLA's submission before the Federal Court that the Court of Appeal's reasoning to allow the appeal had erred on the following points:

(1) The Court of Appeal erred in relying solely on section 2(1) (a) and (b) of the Sabah Advocates Ordinance which is merely an interpretation provision to ground its decision that since Barristers and Solicitors in England do not have exclusive right of representation before arbitration proceedings in England, it follows, therefore, that Sabah advocates also have no exclusive right of representation in arbitration proceedings in Sabah;
(2) The Court of Appeal failed to consider and to give effect to section 8(1) of the Sabah Advocates Ordinance which expressly confers exclusive right "to practise in Sabah" upon Sabah advocates;
(3) The Court of Appeal failed to appreciate that the word "functions' used "functions may be performed" in section 2(1) (a) & (b) merely means "functions simpliciter" and does not include "exclusivity or

non-exclusivity" as the case may be, and, thus, "functions may be performed" and the fact of "exclusivity or non-exclusivity" are entirely two separate matters which cannot be lumped together as one;

(4) The tying up the non-exclusivity of appearance of Barristers and Solicitors in arbitration proceedings in England provided in section 36 of the UK Arbitration Act to appearance of Sabah advocates in arbitration proceedings in Sabah is in effect applying the said section in Sabah, when the said UK Act has no application in Sabah; and

(5) By so tying as aforesaid, the effect is to allow a non-applicable provision in a UK Act to override the express provision of section 8(1) of the Sabah Advocates Ordinance which confers exclusive right.

Point No.1

In respect of the first Point, as stated above, section 2(1) (a) & (b) is merely interpretation section which defines the expression "to practise in Sabah" used in the substantive part of the Ordinance, it cannot stand on its own. It has to be read together with the relevant provisions in the substantive part of the Ordinance which in this case is section 8(1). An interpretation provision does not create any substantive right. It merely defines words or phrases used in the other parts of any legislation. Substantive right is created by a substantive provision in the main body of a legislation. Furthermore, section 2(1)(a) & (b) does not make any reference to exclusive right to perform the functions as defined therein. Besides, the exclusive right conferred by section 8(1) cannot be taken away by an interpretation provision which merely defines the meaning of "to practise in Sabah" but does not enact substantive matter.

Point No. 2

The exclusive right to practise in Sabah is clearly conferred on Sabah advocates by section 8(1) of the Sabah Advocates Ordinance, but the Court of Appeal in coming to its decision had completely ignored section 8(1). Not a word was said about section 8(1) in the decision of the Court of Appeal quoted above. Thus, the Court of Appeal had failed to consider and give effect to section 8(1) which is the provision expressly conferring "exclusive right to practise in Sabah" upon Sabah advocates. Thus, the Court of Appeal had committed a serious error by relying solely on section 2(a) and (b) (which is merely a definition provision) without reading it together with substantive provision of section 8(1) to find that by virtue of that definition section since Barristers and Solicitors in England do not have exclusive right of representation in arbitration proceedings, it follows, therefore, that advocates in Sabah also do not have exclusive right of representation in arbitration proceedings in Sabah.

Point No. 3

The Court of Appeal had failed to appreciate that "functions" as referred to in section 2(1)(a) & (b) and "exclusivity or non-exclusivity" are entirely two different things and should not be lumped as one. The word, "functions" referred to in section 2(1)(a) & (b) merely means "functions simpliciter" i.e. "functions in itself" without more. Section 2(1)(a) & (b) does not specify whether the word "functions" referred therein is "exclusive" or "non-exclusive". Thus, the meaning of "functions" used in the said section does not include "exclusivity or non-exclusivity". Therefore, the Court of Appeal, in its decision, by not separating "functions" from "non-exclusivity", was reading "functions" to include "non-exclusivity", thus reading into the meaning of "functions" something which was not there. By so doing, the Court of Appeal had erred by going beyond its statutory duty of interpretation and had failed to give effect to the plain meaning of the word "functions" appearing in the said section 2(1)(a) & (b).

Point No. 4

In England, it is not in dispute that appearance in arbitration proceedings is one of the functions that may be performed by a Barrister or a Solicitor there. However, by virtue of section 36 of the U.K. Arbitration Act 1996, there is no exclusive right to perform such function. "Non-exclusivity" is not inherent in the definition of "to practise in Sabah". So long as "appearance in arbitration proceedings" is a function that may be performed by a Barrister or a Solicitor in England, then "appearance in arbitration proceedings" falls within the definition "to practise in Sabah" regardless whether it is "exclusive" or "non-exclusive". Therefore, if "appearance in arbitration proceedings" is "to practise in Sabah", it follows logically that "the exclusive right to practise in Sabah" conferred by section 8(1) of the Sabah Advocates Ordinance applies to "appearance in arbitration proceedings". As stated above, in England, the non-exclusivity of representation by Barristers and Solicitors in arbitration proceedings is by virtue of section 36 of the UK Arbitration Act which does not apply in Sabah or for that matter in Malaysia. Therefore, Court of Appeal was wrong to invoke a law providing for non-exclusivity in England which has no application in Sabah to apply advocates in Sabah.

Point No. 5

Thus, the decision of the Court of Appeal is in direct conflict with section 8(1) of the Sabah Advocates Ordinance which clearly provides that Sabah "advocates shall have the exclusive right to practise in Sabah", which includes "appearance in arbitration proceedings in Sabah". Since "the exclusive right to practise in Sabah" (including "appearance in arbitration proceedings in Sabah") is expressly provided in section 8(1) of the Advocates Ordinance, by tying up non-exclusivity of Barristers and Solicitors in England in appearance in arbitration proceedings (as provided in section 36 of the UK Act) to advocates in Sabah, the Court of Appeal was in effect allowing a provision of a law that is not applicable Sabah to over-ride or supersede the express provision of section 8(1) of the Sabah Advocates Ordinance. Thus, by so doing, the Court of Appeal's decision is clearly illogical, irrational and contrary to reason.

Section 16 (1) of Advocates Ordinance

The above position is consistent with section 16(1) of the Advocates Ordinance which punishes any person not entitled to practise in Sabah who acts as an advocate or agent for suitors (who would include parties to arbitration proceedings). A person not entitled to practise in Sabah would also include a non-Sabah lawyer appearing and representing a party in an arbitration proceeding without obtaining ad hoc admission.

Decision of the Federal Court

Based on the above reasoning and arguments, the Federal Court unanimously ruled in favour of SLA's position and answered the above question in the affirmative, which is to say, Sabah advocates have exclusive right to represent and appear for parties in arbitration proceedings held in Sabah notwithstanding that Barristers and Solicitors in England do not have such exclusive right. The grounds of decision of the Federal Court are still pending.

Exclusive Right Not Absolute

However, this exclusive right to practise in Sabah is not an absolute right because under section 10 of the Sabah Advocates Ordinance, application may be made by a duly qualified person to the Chief Judge of Sabah and Sarawak for ad hoc admission to practise in any particular case or matter subject to any conditions as he may think fit and the payment of the prescribed fee if such person has been instructed by a local advocate and having regard to all the circumstances he is of the opinion that it is in the interest of justice so to do. It is, however, up to the absolute discretion of the Chief Judge whether to grant or reject such an application.

Queen Mary University of London - 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration

The 2015 Survey 'Improvements and Innovations in International Arbitration', is the sixth carried out by the School of International Arbitration at Queen Mary University of London, as part of a major empirical investigation into arbitration practices and trends worldwide.

The dynamic and party-driven nature of international arbitration allows for dispute resolution processes that its users can tailor to their ever-changing needs. Stakeholders have proven remarkably innovative and, perhaps consequently, the system of international arbitration is constantly evolving. Collective feedback on these innovations is as indispensable as it is rare.

The 2015 International Arbitration Survey aims to fill this gap by reviewing the perceived effectiveness of past innovations and testing the viability of selected future developments. This article hopes to highlight the key findings of the survey. The full survey/research may be downloaded from the Quuen Mary University's webpage, http://www.arbitration.qmul.ac.uk/docs/164761.pdf

Executive Summary of the Survey

International arbitration is constantly evolving in response to the changing needs of its users. Its adaptability and party-driven nature allow for a system and processes that can be tailored as required. Stakeholders at all levels have proven ambitious in their aspirations to improve international arbitration further. For an innovation to be considered an improvement, however, a comprehensive evaluation of its effectiveness is required. Collective feedback mechanisms, which are essential stimulants to material improvements, are rare in a field of law where confidentiality is valued and practice is both diverse and dispersed globally.

The objective of this empirical study is to collate the views of a comprehensive range of stakeholders on improvements and innovations, both past and potential, in international arbitration. The survey was conducted over a six month period and comprised two phases: an online questionnaire completed by 763 respondents (quantitative phase) and, subsequently, 105 personal interviews (qualitative phase).

The Key Findings of the Survey

1. Views on International Arbitration

- 90% of respondents indicate that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other forms of ADR (34%).
- "Enforceability of awards" is seen as arbitration's most valuable characteristic, followed by "avoiding specific legal systems," "flexibility" and "selection of arbitrators".
- "Cost" is seen as arbitration's worst feature, followed by "lack of effective sanctions during the arbitral process", "lack of insight into arbitrators' efficiency" and "lack of speed".
- The majority of respondents do not favour an appeal mechanism on the merits in either commercial or investment treaty arbitration.
- A growing concern in international arbitration is a perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully ("due process paranoia").

2. Preferred and Improved Seats

- The five most preferred and widely used seats are London, Paris, Hong Kong, Singapore and Geneva.
- The primary factor driving the selection of a seat is its reputation and recognition.
- Respondents' preferences for certain seats are predominantly based on their appraisal of the seat's established formal legal infrastructure: the neutrality and impartiality of the legal system; the national arbitration law; and its track record for enforcing agreements to arbitrate and arbitral awards.
- Respondents expressed the view that the most improved arbitral seat (taken over the past five years) is Singapore, followed by Hong Kong.

Queen Mary University of London - 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration

3. Preferred and Improved Institutions

- The five most preferred arbitral institutions are the ICC, LCIA, HKIAC, SIAC and SCC.
- Respondents' preferences for certain institutions are predominantly based on an assessment of the quality of their administration and their level of 'internationalism'. Institution-specific distinguishing features are considered to be less important.
- An institution's reputation and recognition is essential to its commercial appeal. Respondents will select an institution because of its reputation and their previous experiences of that institution.
- Respondents expressed the view that the most improved arbitral institution (taken over the past five years) is the HKIAC, followed by the SIAC, ICC and LCIA.
- Respondents feel that arbitral institutions could contribute to the improvement of international arbitration by publishing data not only on the average length of their cases, but also on the time taken by individual arbitrators to issue awards. Respondents also welcome increased transparency in institutional decision-making on the appointment of, and challenges to, arbitrators.

4. Reducing Time and Cost

- The procedural innovation perceived as most effective at controlling time and cost in international arbitration is a requirement for tribunals to commit to a schedule for deliberations and delivery of final awards.
- 92% of respondents favour inclusion of simplified procedures in institutional rules for claims under a certain value: 33% would have this as a mandatory feature and 59% as an optional feature.
- Few respondents have experience with emergency arbitrators and some expressed concerns about the enforceability of emergency arbitrator decisions. 46% of respondents would, at present, look to domestic courts for urgent relief before the constitution of the tribunal, versus 29% who would opt for an emergency arbitrator. Nonetheless, 93% favour the inclusion of emergency arbitrator provisions in institutional rules.
- Respondents believe that arbitration counsel could be better at working together with opposing counsel to narrow issues and limit document production, encouraging settlement (including the use of mediation) during an arbitration, and not 'overlawyering'.
- When arbitration and mediation are used in conjunction, it appears that a minimal overlap between the two processes is preferred.
- It is inconclusive what effect conventions on enforcement of mediation agreements and settlement agreements resulting from mediations might have in practice, particularly in terms of encouraging the use of mediation.

5. Soft law and Guidelines

- Respondents generally have a positive perception of guidelines and soft law instruments in international arbitration. These instruments are seen to supplement existing rules and laws, and to provide guidance where little or none exists.
- 70% of respondents are of the opinion that there is currently an adequate amount of regulation in international arbitration.
- Of various specific instruments put to respondents, the IBA Rules on the Taking of Evidence and the IBA Guidelines on Conflicts of Interest were the most widely known, the most frequently used and the most highly rated.

6. Role and Regulation of Specific Actors

- A clear majority of respondents think that tribunal secretaries (68%) and third party funding (71%) are areas which require regulation.
- A small majority of respondents (55%) think that the conduct of arbitrators requires more regulation.
- Tribunal secretaries are widely used in international arbitration: 82% of respondents have either used their services or have seen them used. Most respondents (72%) believe that arbitral institutions should offer the services of tribunal secretaries. A vast majority do not consider it appropriate for tribunal secretaries to conduct substantive or merits-related tasks.
- Respondents are generally of the opinion that it should be mandatory in international arbitration for claimants to disclose any use of third party funding and the identity of the funders involved, but not the full terms of any funding agreement.

The Editorial team is grateful to Mr. Yip Xiao Heng for his assistance in preparing this article

The Young Members Group of the Chartered Institute of Arbitrators, Malaysia Branch welcomed year 2016 by hosting a New Year Gathering on 8 January 2016. The event drew young members from various industries and professions. It was also an honour to have the event attended by the regional director, Ms. Camilla Godman, and the president of ArbitralWomen, Ms. Rashda Rana QC, who both had taken time off from their busy schedule to meet, dine and wine with the young members.

In November 2015, some of the young members were pleased to have attended last year's international annual YMG conference, which celebrated 100 years since CIArb was established. The conference was held at none other than the building of the International Chamber of Commerce (ICC), Paris. At the welcome reception, the Director General of CIArb, Mr. Anthony Abrahams, proudly announced that the YMG of CIArb Malaysia Branch will be hosting the YMG Regional Conference this year. We are very excited and honoured to be given the opportunity to host the FIRST regional conference. The Regional Conference will be a one-day event at the second half of year 2016. The programme is structured in a way that participants will be able to choose its preferred workshop, depending on their interests. It will be an excellent opportunity for the young professionals who are involved in alternative dispute resolution in the region to meet and network and stay current with the latest trends. We feel that the YMG Regional Conference will also provide a great platform to the young professionals for professional development. If you are interested in sponsoring the Regional Conference, please do not hesitate to contact us at ciarbmb@gmail.com.my

On a domestic level, we continue to host meetings and events. We are always interested in hearing from colleagues who may be able to attend and speak at events.

Last but not least, Thank You to the YMG committee members for their hard work and to all those who have been supportive of YMG Malaysia branch for making year 2015 yet another successful one.

More events to follow throughout the year, so keep an eye out on YMG's Facebook at https://www.facebook.com/YMGMalaysia or the "CIArb Young Members Group (YMG)" LinkedIn page at https://www.linkedin.com/grp/home?gid=8150124

24th October 2015

CIArb Malaysia Branch, Centenary Dinner

Mandarin Oriental Kuala Lumpur

CIArb Malaysia Branch, Centenary Dinner

CIArb Malaysia Branch, Centenary Dinner

CIArb Malaysia Branch, Centenary Dinner

26th February 2016

Evening Talk by Datuk Stephen Foo entitled "Legal Representation before Arbitral Tribunals in Sabah"

KLRCA

27th February 2016

ICC Arbitration, Young Arbitrator's Forum

Brickfields Asia College

9 to 16 January 2016

Diploma Course in International Commercial Arbitration 2016

Kuala Lumpur Regional Centre for Arbitration

12-13 March 2016

Accelerated Route to Fellowship

Park Royal Hotel, Kuala Lumpur

Tutors: Mr. Leon Weng Seng, Ms. Catherine Chau, Mr. David Cheah, Dr Wong

Seated L - R): **Mr Donation Felix Dorairaj; Dr Wong Fook Keong; Mr David Cheah Ming Yew; Ms Ranjeeta Kaur; Mr Leon Weng Seng; Ms Catherine Chau; Ms. Sharon Chong; Ms Janice Tay; Ms Lee Seung Min; Ms Ng Gek Suan**

(Standing L - R): **Mr Kevin Prakash; Mr Ravi Nekoo; Mr Wong Chun Keat; Ms Jocelyn Lim; Ms Chan Sock Mun; Ms Lim Mee Wan; Capt. Abdul Razak Hashim; Mr Sivanesan Nadarajah; Ms Marjolien van Her-van Tilburg; En Imaduddin Suhaimi; Ms Sophia Feng Pu; Mr Hiroki Aoki; Ms Becky Leong; Capt. Jesslyn Lim Wei Lin; Ms Preetha Pillai**

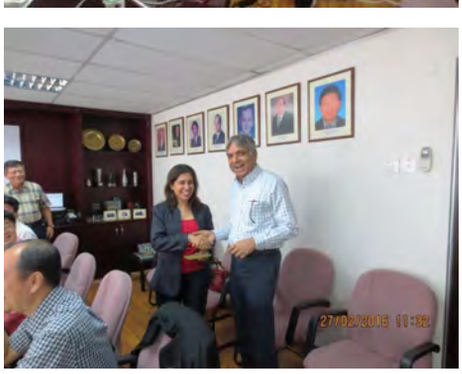
Accelerated Route to Fellowship

27 Feb 2016

Workshop on Award Writing

PORAM

Tutors: Samrith Kaur, Rajendra Navaratnam, Leon Weng Seng, and Catherine Chau.



Young
Members
Group
CIArb
Malaysia

Save the date!

1st CIArb YMG REGIONAL CONFERENCE

19th August 2016

Kuala Lumpur, Malaysia

► JOIN CIArb

You can join in two ways. The fastest and easiest method is to complete and submit an application online at **www.ciarb.org/join-us/personal-details.**

Applying online is split into easy steps and will take around 10 minutes to complete.

Alternatively, you can apply in writing by downloading an application form and posting it back to us.

If you have any questions or would like assistance with an application, please contact our secretariat **Tel: +603-2271 1055 or Email: ciarbmb@gmail.com.**

INDIVIDUAL MEMBERSHIP

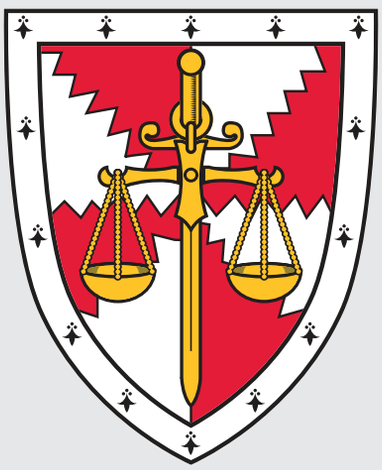
At CIArb we understand that our members come to us from a great variety of backgrounds. We therefore offer three different grades of membership (Associate, Member, and Fellow) depending on your particular skills, knowledge and experience. With the help of our world-renowned training scheme, there are many opportunities to upgrade to another level of membership as your ADR experience develops.

Young Members Group (YMG)

The Young Members Group (YMG) is open to all members aged 40 years and under. Its activities will be designed to be relevant to all CIArb members aged 40 years and under.

STUDENT MEMBERSHIP

CIArb offers a student affiliateship scheme for all students with an interest in alternative dispute resolution (ADR), studying at universities or other higher education institutions throughout the world. Student affiliateship is free to join and is open to anyone studying at a University or other educational institution who is not otherwise qualified to join the CIArb at any other membership grade.



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