IGAB NEWS

Newsletter of the Chartered Institute of Arbitrators, Malaysia

IN THIS ISSUE

Message from the Chairman

Welcome to the first issue of 2021. We are in for an exciting year.

On 19th March 2021, the Malaysian branch will be co-organising the Introduction to International Arbitration course with other CIArb branches in the Asia Pacific region, namely the East Asia Branch, the Singapore Branch, the Thailand Branch and the Sri Lanka Branch. I record my sincere appreciation to the chairmen and team at these branches for putting this together.

This course will be conducted virtually, at prices and a time sensible to all geographic locations involved. There will be tutors and candidates from each of these regions. What candidates can expect to experience, possibly for the first time, is the way in which a CIArb calendar course is conducted by tutors in various regions. Candidates from these regions will also meet. No boundaries.

Message from the Chairman

Continued

We hope that this will be the first of many collaborations between branches, for the benefit of our members. After all, this is what CIArb is about. The global experience, and the global networking. But a single standard.

Separately, the Malaysian branch is engaging with the Asian International Arbitration Centre to set up practical courses for arbitrators and budding arbitrators. The idea is for experienced arbitrators to share their practical experience on real issues arising day-to-day in arbitrations. These are the finer points we may not read about in law books or journals, but the same points when grasped, will set apart an effective arbitrator.

The branch has also actively engaged with local institutions of higher learning to develop interest in alternative dispute resolution (ADR) amongst under-graduate and post-graduate students in the legal field. The need for ADR has become more acute in these times of movement controls. The increased usage of virtual platforms to resolve disputes will highlight the borderless character of ADR.

As my term as chairman of the Malaysian branch comes to an end, I would like to extend my gratitude to my committee for the support and work done. Developing the branch is a continuous task. There is unfinished business. There are new initiatives to be explored. The Malaysian branch will continue at it.

Warm wishes,

Foo Joon Liang
Chairman
Chartered Institute of Arbitrators, Malaysia Branch

Do provisions specifically vesting powers in the courts by the Companies Act 2016 render the subject matter of such provisions non-arbitrable?

BY KANG MEI YEE

In *Padda Gurtaj Singh v Tune Talk Sdn Bhd & 2 Ors [2020] MLJU 2158*, the High Court examined this issue in the context of the registration of shares under sections 106 and 107 of the Companies Act 2016 (Act 777). The High Court held that the non-registration of shares is arbitrable notwithstanding section 107 of Act 777 providing for a specific remedy by the courts.

About the case

The plaintiff is a shareholder of the 1st defendant company ("Company"). The 2nd defendant is the registered company secretary of the Company while the 3rd defendant is the corporate entity nominating the 2nd defendant to provide that service. The plaintiff and the 1st defendant are parties to a shareholders' agreement.

Do provisions specifically vesting powers in the courts by the Companies Act 2016 render the subject matter of such provisions non-arbitrable?

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The plaintiff instituted an originating summons against the defendants in the High Court, claiming that there was a concluded sale and purchase of 431,908 shares and that the shares have been transferred from another shareholder to himself. The plaintiff's case was premised on his allegation that the defendants failed to register the transfer of the shares. Therefore, he sought for an order to compel the defendants to register the transfer of the shares.

Without taking a further step in those proceedings, the Company filed an application to stay the proceedings based on section 10 of the Arbitration Act 2005 (Act 646), on the grounds that:

(a) there subsists an agreement to arbitrate in Clause 16 of the shareholders' agreement;

(b) the arbitration agreement is not null and void, inoperative or incapable of being performed; and

(c) the plaintiff's claim that the defendants have unlawfully failed, neglected and refused to register the shares is the subject envisaged in the arbitration agreement.

Do provisions specifically vesting powers in the courts by the Companies Act 2016 render the subject matter of such provisions non-arbitrable?

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Issue

The plaintiff did not contend that the arbitration agreement between the parties is null and void, inapplicable, inoperative or incapable of being performed. Thus, the High Court determined that there is only one issue in connection with the stay application, i.e. whether the matter in respect of which the plaintiff brings these
proceedings in court is within Clause 16 of the shareholders' agreement.

The High Court concluded that the non-registration of the transfer of the 431,908 shares is a subject matter of the arbitration agreement as contained in the shareholders' agreement.

In deliberation, the High Court also examined the following issues.

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Existence of a dispute

The Federal Court's decisions in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417* and *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd & Anor Appeal [2020] 4 CLJ 301* stand for the proposition that the courts need not determine if there is a dispute in existence in granting a stay under section 10(1) of Act 646. Yet, the Federal Court did in those cases go on to examine the substance of the disputes.

Having the advantage of these two decisions from the highest court of the land, the High Court acknowledged that it need not delve into the dispute or controversy, and the merits of the underlying litigation are not of concern in a section 10 stay application. Nevertheless, the High Court came to the conclusion that some appreciation of the merits is necessary in order to ascertain whether the statutory prerequisites for a stay have been satisfied.

As such, the High Court held the view that it has to identify the substance of the dispute or controversy in the litigation before it can decide whether it has jurisdiction under section 10(1) of Act 646 to order the stay.

Do provisions specifically vesting powers in the courts by the Companies Act 2016 render the subject matter of such provisions non-arbitrable?

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Tiered dispute resolution clause

A part of Clause 16 of the shareholders' agreement reads, "Only if the Parties fail to or compromise within sixty (60) days from the date of written notice of dispute, the aggrieved Party shall seek arbitration as set forth in this Clause 16."

The plaintiff contended that there was no dispute/ controversy as there was no notice of dispute. Clause 16 therefore cannot be triggered.

The High Court agreed with the authorities on tiered dispute resolution clauses, in particular Justice Lim Chong Fong's decisions in *Cosmos Infratech Sdn Bhd v Melati Evergreen Sdn Bhd & Ors [2019] 1 LNS 1685* and *PBJV Group Sdn Bhd & Anor v PRPC Utilities and Facilities Sdn Bhd [2020] MLJU 1159*, which held that the non-fulfillment of a condition precedent to arbitration is immaterial to a stay application if there is a valid arbitration agreement.

The High Court was convinced that the non-existence of a notice of dispute or non-fulfillment of the condition precedent to arbitration is irrelevant in determining whether there was a dispute, claim or controversy that ought to be referred to arbitration.

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Arbitrability of non-registration of the shares in the light of sections 106 and 107 of Act 777

Clause 16.1 of the shareholders' agreement goes on to read:

"If any controversy, claim or dispute arises out of or in relation to this Agreement (including any question regarding its existence, validity or termination) or with respect to any breach thereof, the Parties shall seek to resolve the matter amicably through discussions between the Parties or by way of mediation. Only if the Parties fail to or compromise within sixty (60) days
from the date of written notice of dispute, the aggrieved Party shall seek arbitration as set forth in this Clause 16."

Upon examining the facts and interpreting Clause 16.1, the High Court held that the plaintiff's purchase of the 431,908 shares and the Company's refusal to register the transfer is a matter to be properly determined under the arbitration agreement as the dispute or controversy "arises out of or in relation to" the shareholders' agreement.

Do provisions specifically vesting powers in the courts by the Companies Act 2016 render the subject matter of such provisions non-arbitrable?

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The High Court however raised the following queries:

(1) whether sections 106 and 107 of Act 777 are subordinated to the arbitration agreement (assuming that it applies), in other words, the arbitration agreement has to yield to section 107?

(2) If the answer to the above is negative, whether the non-registration of the shares is arbitrable as envisaged by section 4 of Act 646?

Section 106 of Act 777 provides for registration of transfer or refusal of registration of shares by a company, and the punishment for its contravention. Section 107 of Act 777 gives power to the court to order a registration if the company refuses to register a transfer, provided the court is satisfied that the application is well founded.

The authorities cited before the High Court, particularly *Bridgehouse (Bradford No. 2) Ltd v BAE Systems plc [2020] EWCA Civ* 759, *Fulham Football Club (1987) Ltd v Richards [2012] 1 ALL ER* 414 and *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] SGCA 57, show the courts' inclination towards arbitrability despite the existence of distinct statutory provisions (except for statutory provisions serving the interest of creditors or third parties).

Do provisions specifically vesting powers in the courts by the Companies Act 2016 render the subject matter of such provisions non-arbitrable?

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The High Court agreed with the Company's position that sections 106 and 107 do not expressly preclude the arbitrability of non-registration of the shares, neither is it against public policy to arbitrate the matter.

The plaintiff also contended that the Company has potentially committed an offence under section 106(3) of Act 777 and if the High Court allows the Company's stay application, it would be ratifying and perpetuating the breach of the Companies Act statutory provisions and the illegal refusal to register the 431,908 shares. In response to this, the High Court referred to Hindustan Petroleum Corpn. Ltd v Pinkcity Midway Petroleums AIR 2003 SC 2881 and A. Ayyasamy v A. Paramasivam and Others (2016) 7 MLJ 396 SC cited by the Company which explained that "allegations of criminal wrongdoing or of statutory violation would not detract from the jurisdiction of the arbitral tribunal to resolve a dispute arising out of a civil or contractual relationship on the basis of the jurisdiction conferred by the arbitration agreement".

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Effect of the decision

This decision provides some guidance on whether the subject matter of an arbitration agreement is arbitrable when it is governed by statutory provisions empowering a remedy by the courts.

Section 4(2) of Act 646 provides that any written law that confers jurisdiction in respect of any matter on the courts of law but does not refer the determination of that matter to arbitration shall not, by itself, indicate that a dispute about the matter is not capable of determination by arbitration. The High Court's decision is consistent with this provision. The cases referred to by the High Court suggests that the arbitral tribunal's inability to grant certain relief would not in itself render the subject matter of the dispute non-arbitrable.

With the increasing use of arbitration agreements in commercial contracts, commercial parties ought to be mindful of its implications to their statutory rights, and jurisdiction available to their chosen forum for dispute resolution.

The plaintiff has appealed against this High Court's decision. The appeal is pending at the time of writing.

CIARB ACCREDITED COURSES

MARCH & APRIL 2021

ACCELERATED ROUTE TO MEMBERSHIP INTERNATIONAL ARBITRATION

16 March 2021

VIRTUAL MODULE 1 - LAW, PRACTICE & PROCEDURE INTERNATIONAL ARBITRATION

1 April 2021

For more information, please email ciarbmb@gmail.com

The Ghost of Section 42 of the Arbitration Act: Left in the Past or Looming in the Future?

BY MUAYYAD BIN KHAIRULMAINI

On 8 May 2018, the landscape of arbitration in Malaysia was changed with the coming into force of the Arbitration (Amendment) (No.2) Act 2018 ("**Amendment Act**"). Among others, the Amendment Act reinforced the principles of minimal court intervention and the finality of arbitral awards with the repeal of Section 42 of the Arbitration Act 2005 ("**the Act**"). While it has been more than two years since the Amendment Act has come into force, the issue on the applicability of Section 42 of the Act is still actively litigated.

In AMDAC (M) *Sdn Bhd v BYD Auto Industry Company Ltd [2020] 6 CLJ 625* ("**AMDAC**") and *Tokio Marine Insurans (M) Bhd v Hi-Poly Industries Sdn Bhd (Kuala Lumpur Originating Summons No. WA-24NCC(ARB)-39-09/2019)* ("T**okio Marine**"), the High Court was invited to determine the issue on whether a party could invoke the repealed Section 42 of the Act in relation to an arbitration commenced prior to the coming into force of the Amendment Act.

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Section 42 AA 2005 – In Memoriam

In brief, Section 42 of the Act allowed for parties to "*refer to the High Court any question of law arising out of an award*" provided that the question of law substantially affects the rights of one or more of the parties. The High Court is then empowered, upon determination of the reference, to confirm, vary or set aside (in whole or part) the award. The High Court may also remit the award to the arbitral tribunal for reconsideration.

In the Federal Court case of *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1* ("**Far East**"), the court held that judicial intervention is merited where there is a question of law arising out of an arbitral award that substantially affects the rights of the parties. This decision was deemed to have an effect of undermining the finality of arbitral awards. In his article, *Repeal of Section 42: The Question of Law Arising Out of an Award by the Amended Arbitration Act 2005 [2019] 6 MLJ civ*, Datuk Professor Sundra Rajoo stated the following on the decision in Far East:

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(a) That the Federal Court held that Section 42 of the Act did not provide that the "question of law" was to be the same as the one which the arbitral tribunal was asked to determine;

(b) As such every question of law arising from an award could be revisited by the courts at every level; and

(c) The Federal Court's decision had widened the scope of matters which could be considered as 'questions of law' as there was no express limitation on the types of questions covered under Section 42 of the Act.

Following Far East, a push was made to repeal Section 42 of the Act to remove a party's ability to make such references to the High Court. This would mean that the only recourse left for parties to set aside an arbitral award can now only be based on the limited grounds in Section 37 of the Act.

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AMDAC and Tokio Marine – Closing the door to Section 42 Challenges

AMDAC and Tokio Marine both dealt with cases where the arbitrations were commenced prior to the coming into force of the Amendment Act. The impugned decisions in both arbitrations were issued after the Amendment Act came into force. The Plaintiffs in both cases launched applications pursuant to Section 42 of the Act to refer questions of law to the High Court.

The High Court in both cases came to the same conclusion, but by different routes of reasoning. In essence, both cases held that notwithstanding when the arbitration was commenced, Section 42 challenges could no longer be invoked. The differing reasonings will be discussed below.

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AMDAC – Consideration of Parliament's Intentions

The brief facts in AMDAC are as follows. The claimant in the arbitration, BYD Industry Company Ltd ("**BYD**"), launched arbitral proceedings against AMDAC for a sum of RM4.5 million, which was subsequently allowed. In the same arbitration, AMDAC filed a counterclaim which was terminated by the arbitrator due to failure to pay the applicable costs and expenses set by the Kuala Lumpur Regional Centre for Arbitration ("**KLRCA**"). AMDAC then filed a Section 42 application to the High Court to refer questions of law to the High Court.

In response to the AMDAC's Section 42 challenge, BYD contended that the High Court no longer had the jurisdiction to entertain a Section 42 challenge upon the coming into force of the Amendment Act. In support of this, BYD argued that there was no accrued right under Section 42 of the Act. This is because the question of law must arise from the happening of a "trigger event", which in this case, is the publication of the award. As the award was issued after the coming into force of the Amendment Act, BYD argued that AMDAC was not entitled to a Section 42 challenge.

In response, AMDAC argued as follows. As the Amendment Act sought to take away a substantive right, it must not be read retrospectively. Counsel for AMDAC relied on the decision in *Lim Phin Kian v Kho Su Ming [1996] 1 MLJ 1*, where the Federal Court observed, inter alia that a statute divesting vested rights or affecting vested rights is to be construed prospectively.

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In his judgment in AMDAC, Nantha Balan J (as his Lordship then was) held the following:

(a) Contrary to BYD's position, AMDAC had the right to challenge an award that was to be given by the arbitrator. Such a right "*existed from the commencement of the arbitration proceedings and not upon the publication of the award*";

(b) However, it is imperative to take into consideration the intention of parliament in repealing Section 42. According to the Hansard debate, the repeal of Section 42 was to "*promote arbitration as an alternative form of dispute resolution*" and to promote Malaysia's profile as a safe-seat and arbitration-friendly jurisdiction; and

(c) It is important to emphasise the principle that Parliament does not legislate in vain.

His Lordship added that the clear legislative intention, as a reaction to Far East, was to do away of Section 42 challenges. His Lordship opined that it would be "*horrendous*" to think that this amendment was made whilst allowing awards made under arbitrations commencing prior to 8 May 2018 to institute a Section 42 challenge. Therefore, His Lordship held that it was Parliament's true intention for the repeal to apply retrospectively. Hence, AMDAC's complaints pursuant to Section 42 were dismissed *in limine*.

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It must be noted that, as at time of writing, the Court of Appeal, pursuant to an Order dated 21 September 2020, has affirmed the findings of the High Court. The Court of Appeal's Grounds of Judgment are not yet available.

Tokio Marine – No Vested Right to Refer Questions of Law

In Tokio Marine, the arbitration between parties was commenced on 1 June 2006 and an interim award on liability was issued on 1 November 2011. Communications then ensued on the Defendant's application to convene proceedings for the assessment of damages and determination of costs. After a long period of communication, on 23 October 2017, the Defendant's solicitors made an application "*to tax or settle the amount of such costs and expenses under the said Interim Award*". On 16 January 2019, owing to the lapse of over six years since the issuance of the Interim Award, the Plaintiff's solicitors raised the preliminary issue on "*whether it would accordingly be futile for the Tribunal to accede to the [Defendant's] aforesaid applications arising from the Interim Award which has been rendered unregistrable and unenforceable*".

The dispute here centered around the arbitrator's ruling dated 9 August 2019 where the arbitrator had dismissed the Plaintiff's preliminary objection ("**the Ruling**"). The Plaintiff then sought to invoke Section 42 of the Act to refer certain questions of law to the High Court.

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Similar to AMDAC, the Defendant argued that, owing to its repeal, the Plaintiff could no longer invoke Section 42 of the Act. As the Ruling had been made post the coming into force of the Amendment Act, the Plaintiff's application based on Section 42 was doomed to fail. In response the Plaintiff argued:

(a) Section 42 was in essence a right of appeal under the Act and the right under Section 42 would vest in parties at the point when the arbitration commenced;

(b) The repeal of Section 42 was not retrospective in nature;

(c) The right to invoke Section 42 had been vested in the Plaintiff before its repeal.

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In his determination in Tokio Marine, Darryl Goon J (as his Lordship then was) held:

(a) The repeal of Section 42 was not and was not intended to be retrospective. This is because the repeal was not expressed to be retrospective and nothing in the repeal of Section 42 "*admits of any implication that the repeal was intended to be retrospective*";

(b) A reference under Section 42 was not to be treated as analogous to an appeal in the court proceedings. The invocation of Section 42 is only vested in a party "*when an award is made and not before*". Therefore, applied prospectively, the right under Section 42 no longer existed at the time the Ruling was issued.

Conclusion – Different Paths to the Same Destination

The decisions in AMDAC and Tokio Marine arrived at the same conclusion, i.e. barring any challenge made under Section 42 of the Act. Nonetheless, both judges reached this conclusion by way of diametrically opposing justifications.

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Based on the AMDAC decision, the right under Section 42 is vested in a party at the commencement of the arbitration. However, this right would no longer be available as the true intention of Parliament was for the repeal to be effective retrospectively.

In contrast, Tokio Marine decided that the repeal was not to be applied retrospectively. However, the right under Section 42 of the Act was only available to parties upon the issuance of the award.

Notwithstanding the common conclusion, it remains to be seen how the Courts will seek to resolve the tension between the two decisions above. These disputes invariably raise issues of rights of parties and statutory interpretation, specifically in respect of amendments to legislation. These issues require further clarification from the apex court.

However, the status quo is that Section 42 challenges are no longer available regardless of when an arbitration was commenced. Until its final determination by the Federal Court, it would seem that the ghost of Section 42 of the Act may stick around to haunt us a little while longer.

CASE SUMMARY: KEN GROUTING SDN BHD v RKT NUSANTARA SDN BHD

BY SERENE HIEW

COURT OF APPEAL – CIVIL APPEAL NO. W-02(C)(A)-1560-07/2018 – W-02(C)(A)-1562 – 07/2018

KAMARDIN BIN HASHIM JCA, S. NANTHA BALAN JCA, LEE HENG CHEONG JCA

8 OCTOBER 2020

Arbitration — Dispute resolution — Setting aside — Application to set aside decision of arbitrator under s 37(1)(a)(vi) of the Arbitration Act 2005 ('the Act') — Arbitration Award – Failure to deliver arbitration award in time — Whether rules of arbitration are procedural or jurisdictional — Whether failure to raise objections constitute as waiver — Whether time may be extended by Court under s 46 of the Act

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The appellant, Ken Grouting ("**KEN**"), and the respondent, RKT Nusantara ("**RKT**") are parties to a building contract. By a letter of acceptance dated 11.7.2007, RKT as the Employer, had appointed Ken as the Contractor, for the construction an completion of substructure works for a 10 storey commercial building in Kuala Lumpur. According to the contract, the works were to commence on 1.8.2007 and complete on 8.4.2008. During the progression of the works, the completion date was extended to 28.5.2008. Pursuant to a meeting between the parties on 13.6.2008, KEN claimed that RKT had agreed to further extend the completion date to 31.7.2008. RKT refuted KEN's claim. The works were practically completed on 30.7.2008. On 28.10.2008, RKT deducted the sum of RM 392,000.00 as LAD from the monies due and payable to Ken pursuant to Interim Payment Certificates No. 8 and 9. Ken challenged RKT's claim for LAD.

In view of the disputes between the parties, Ken commenced arbitration proceedings by a Notice of Arbitration dated 26.8.2009. Article 21.3. of the PAM Rules stipulates that the Arbitrator shall deliver his award no later than 3 months from his receipt of the last closing statement from the parties. In the present case, the last closing statement from the parties was RKT's submission in reply dated 29.1.2016. As such, pursuant to Article 21.3 of the PAM Rules, the deadline for the arbitrator to deliver his award was 26.4.2016. Further, Article 21.3 also expressly provides that the time frame for the delivery of the award may be extended by notifying the parties. In the present case, the arbitrator did not issue any notification to extend the time. Thus the deadline for the delivery of the award is maintained on 26.4.2016.

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The arbitrator delivered his award on 10.3.2017, where an Award ("**the Original Award**") was decided in favour of the Ken. The Original Award was later amended on 7.4.2017 ("**the Amended Award**") substantially reducing the sum payable by RKT to Ken.

During the period from 26.4.2016 to 10.3.2017, neither of the parties objected to the late delivery of the arbitration award. However, after the award had been delivered, RKT notified that they are objecting the award by reason that the Original Award had been awarded beyond the time-line stipulated in the PAM Rules. At the same time, KEN applied to set aside the Amended Award and to reinstate the Original Award.

The matter was heard before the High Court where a decision in favour of RKT was entered. The Judge held that the Original Award was delivered in excess of jurisdiction.

CASE SUMMARY: KEN GROUTING SDN BHD v RKT NUSANTARA SDN BHD

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Issues

1. Whether rules of arbitration which stipulate that an award must be delivered by a certain date, are procedural or jurisdictional. Does the stipulation which allows the arbitrator to unilaterally extend time upon notification to the parties signify that the rules are to be construed as procedural.

2. Whether parties who fail to raise any objection after the deadline for delivery of the award had passed and before the award was in fact delivered, are deemed as having waived their right to challenge the award? Whether such failure to raise objection after the deadline for delivery of the award had passed and before the award is in fact delivered, amounts to a waiver.

3. Whether an arbitrator who delivers an award in breach of rules of arbitration which stipulate that the award must be delivered by a certain date and in further failing to extend the deadline albeit provided for in the rules, is an award which was delivered "without mandate or authority" and is therefore in excess of jurisdiction and may be set aside pursuant to s. 37(1)(a)(vi) of the Act on the grounds that "the arbitral procedure was not in accordance with the agreement of the parties".

4. Whether s 18(5) of the Act is applicable in circumstances where the parties failed to raise objection after the deadline for delivery of the award had passed, and before the award is in fact delivered, and therefore precludes any challenge under s 37(1)(a)(vi) of the Act?

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5. Whether time may be extended by the Court under s 46 of the Act for delivery of the award, albeit there was no application by any of the parties, or by the arbitrator.

Held, appeal is dismissed with costs for the following reasons:

1. In light of the argument that was made by counsel for the appellant that the Article 23.1 is to be construed as a procedural provision without any jurisdictional content because of the ability of the arbitrator to extend time, the Court of Appeal compared the position of an arbitrator to that of a Judge sitting in a judicial review proceeding where the jurisdiction of the Court is predicated on a fixed timeline, which is subject to being extended in a fit and proper case.

2. It is trite that although the Court has the discretion to extend time for commencement of judicial review proceedings, time is nevertheless a jurisdictional matter. Consequently, in the present case, the Court of Appeal did not agree that the mere presence of the in-built contractual mechanism per Article 21.3 of the PAM Rules derogates from the arbitrator's duty to deliver the award within the time period stipulated in the same provision. The arbitrator's ability to unilaterally extend time upon notification to the parties does not ipso facto render these as a mere procedural provision *[para 123 – 128]*

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3. It is not an option for the arbitrator to be oblivious to, or be nonchalant to his duty and responsibility to deliver the award on time. The Arbitrator in this case had the option to extend time by the simple act of notifying the parties, but he chose not to do so. The Court of Appeal found the arbitrator's tardiness to be egregious and inexcusable *[para 130-131]*

4. As to the appellant's argument that the respondent has waived its right to challenge the award by not objecting to the late delivery of the award, the Court disagreed with the said argument. It was held that where the rules of arbitration stipulate that an award is to be delivered by a certain date, then if the time limit or deadline is reached, the authority or mandate of the arbitrator ceases and he no longer has the requisite jurisdiction to make a valid award. Article 21.3 is no longer at play and what the arbitrator ought to do is to seek the consent of the Parties to resurrect his mandate and jurisdiction or to move the court under S 46 of the Act *[para 133 & 138-139]*

CASE SUMMARY: KEN GROUTING SDN BHD v RKT NUSANTARA SDN BHD

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5. On the argument raised by KEN that the objection could have been raised earlier, the Court of Appeal held that parties are not under a duty to monitor the timelines or to remind or prompt the arbitrator about the timeline. Whilst there can be waiver on the part of the parties to the arbitration on what transpired in the proceedings, there can be no waiver with respect to the cessation of the arbitrator's mandate and jurisdiction in relation to the obligation to deliver the award on time or within an extended period *[see para 140 – 143]*

6. An award which is delivered in breach of the arbitration rules which stipulate that the award must be delivered by a certain may be set aside pursuant to s 37(1)(a)(vi) of the Act. *[see para 145]*

7. Although in the ordinary course of events, s 18(5) of the Act could be called in aid to preclude a party from seeing to mount a challenge under s 37(1)(a)(vi) of the Act, a challenge to the validity of an award which was delivered by the arbitrator in breach of the timeline stands on a different footing because of s46 of the Act. The failure of the parties to raise objection after the deadline for delivery of the award had passed and before the award is in fact delivered, does not preclude a challenge under s 37(1)(a)(vi) of the Act. S 18(5) of the Act is not applicable as the award is a nullity, until and unless it is extended by the consent of the parties or by an order of court under s 46 of the Act. *[see para 152 & 159]*

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8. The Court held that s 46 of the Act cuts right through the contractual provisions and/or conduct of the parties so that it becomes immaterial whether there was an in-built extension of time provision and whether any objection was raised by the parties before the award was delivered. The purpose of the provision is to underscores the jurisdictional dimension of Article 21.3 of the PAM Rules. If, for any valid reason, an arbitration award is delayed and time has not been extended, then it is up to the parties or arbitrator to move the court under s 46 of the Act so that time is extended for the delivery of the award. *[para 154 – 157]*

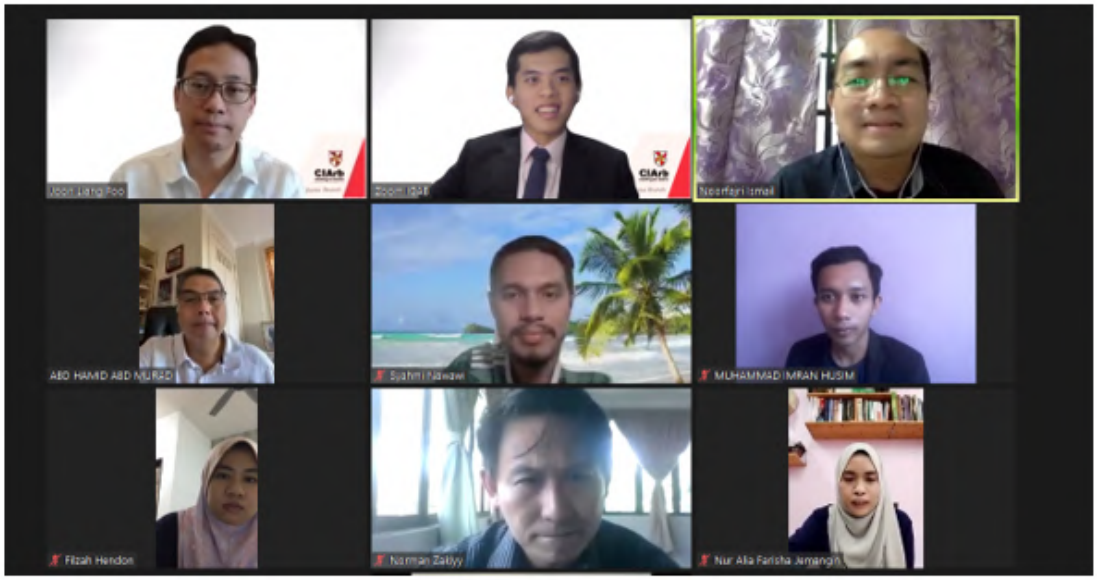
CIArb, Malaysia, Student Engagement Project, Session 1 on 26.1.2021 with Universiti Sains Islam Malaysia (USIM)

By Tasha Lim, ACIArb and Lim Chee Yong, ACIArb

On 26.1.2021, CIArb, Malaysia Branch, hosted a student engagement session where over 90 final-year students from Universiti Sains Islam Malaysia (USIM) gathered together in a collegial virtual setting.

The CIArb, Malaysia, Student Engagement Project is a unique endeavor which aims to introduce university students to CIArb's offerings and support available to students. Foo Joon Liang, FCIArb, current chairperson of CIArb, Malaysia Branch, and Dr. Noorfajri Ismail (FCIArb), senior lecturer at USIM, exchanged views on keeping abreast with alternative dispute resolution developments in an interactive Q&A session moderated by Lim Chee Yong (ACIArb). We further express our gratitude towards everyone involved in making the session a success.

Stay tuned for upcoming sessions in the following months!



CIArb, Malaysia, Student Engagement Project, Session 1 on 26.1.2021 with Universiti Sains Islam Malaysia (USIM)

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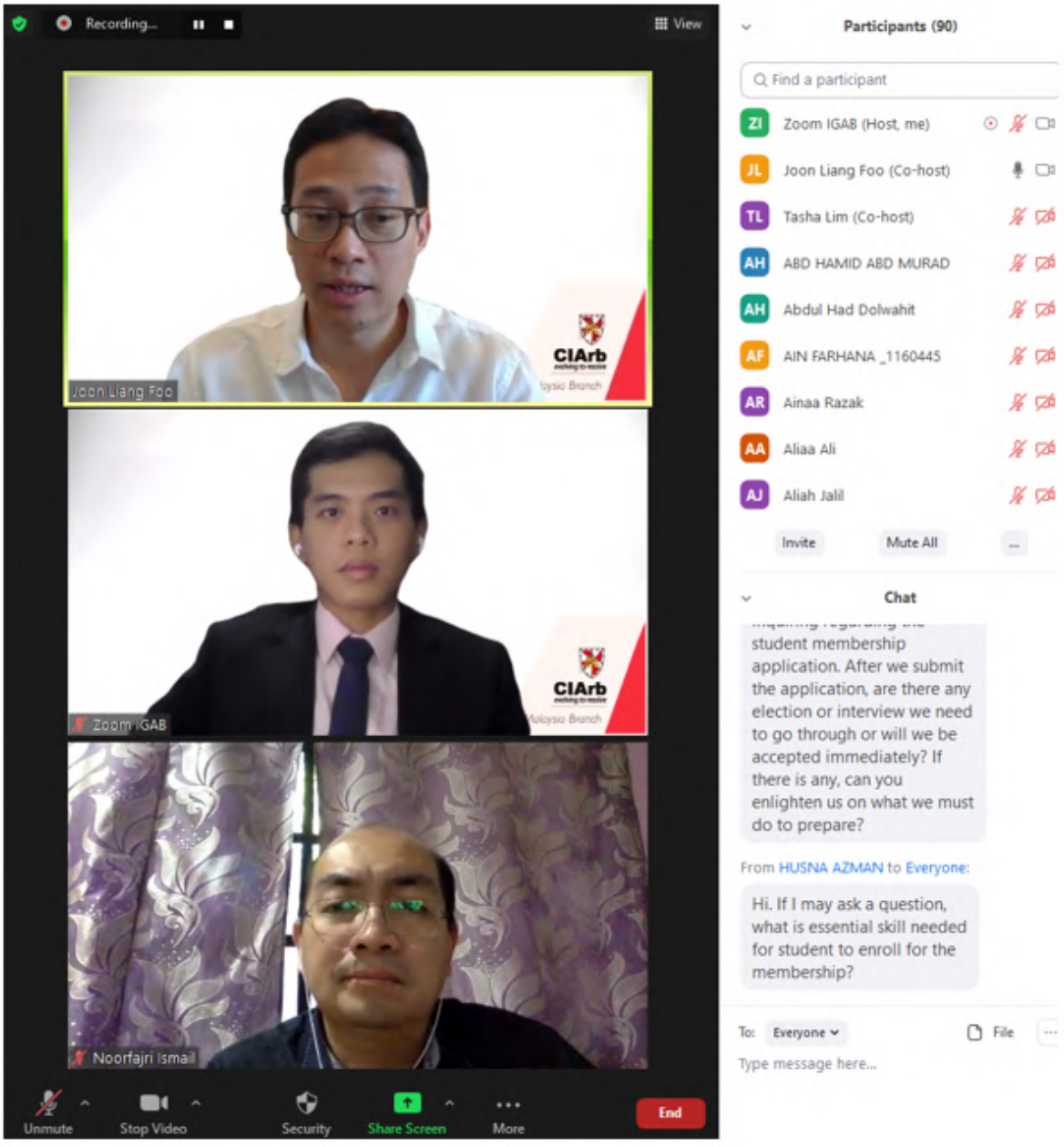

CIArb Strategy 2021 to 2023

The Chartered Institute of Arbitrators (CIArb) is committed to promoting all forms of effective dispute resolution and the benefits that brings to society and economies across the world.

Our commitment to effective dispute resolution will ultimately enable us to:

- Realise our vision of a world where disputes are resolved promptly, effectively, and creatively using a variety of techniques;
- Deliver on our mission to be the inclusive global thought leader on all forms of dispute resolution, promoting and facilitating the creative and effective resolution of disputes, supporting equality, diversity, and inclusion, and ensuring practitioners are highly trained and comply with professional standards and ethical rules.

Strategic Aim 1: **Globally promote the constructive resolution of disputes**

In summary – We will:

- Promote the benefits of constructively resolving disputes and the value this brings to society and to the economy;
- Differentiate CIArb members' expertise resulting from their CIArb training and compliance with professional standards and ethical rules;
- Train non-members to understand the benefits of using effective dispute resolution, encouraging them to use such methods to resolve disputes at work; and
- Work collaboratively, partnering to promote all forms of effective dispute resolution across the globe.

Strategic Aim 2: **Be a global, inclusive thought leader**

In summary – We will:

- Influence those with a key role in shaping dispute resolution across the world by being recognised as the thought leader on all forms of effective dispute resolution and as the home for all dispute resolution professionals, irrespective of discipline;
- Reinforce the rule of law and access to justice by raising global awareness and support any projects which use all forms of effective dispute resolution;
- Enable greater access to all forms of effective dispute resolution through the use of innovation and technology;
- Identify through horizon scanning, trends affecting all forms of effective dispute resolution; and
- Raise professional standards by continuously developing guidance and rules.

Strategic Aim 3: **Develop and support an inclusive global community of diverse dispute resolvers**

In summary – We will:

- Support our members' career progression by providing accessible, relevant, and high-quality training and development, enabling them to innovate, differentiate, and compete in changing markets;
- Grow our membership by targeting the provision of information, products, and services;
- Respond to the diverse and individual needs of our members by building our understanding of their roles, career stage, priorities, and specialisms;
- Support our branches to grow, network, develop expertise, and share information through active communication and engagement;
- Highlight the significant contribution of CIArb members; and
- Encourage and support equality, diversity, and inclusion, enabling the best candidates to join CIArb and the dispute resolution progression regardless of their background.

How we will measure our success and impact:

- Report our results against detailed outcome measures;
- Measure our success by asking our members how they think we are doing.

Directors of IGAB (Year 2020-2021)

Foo Joon Liang
Chairman

Choon Hon Leng
Deputy Chairman

Shanti Abraham

Ranjeeta Kaur

Serene Hiew

Ir. Ang Kok Keng

Cheah Ming Yew
(David)

Wong Wai Chin
(Crystal)

Directors of International Group of Arbitrators Berhad (IGAB)

Foo Joon Liang
Choon Hon Leng
Ir. Ang Kok Heng
Serene Hiew
Ranjeeta Kaur
David Cheah
Shanti Abraham
Crystal Wong

Contact Us
email: ciarbmb@gmail.com
Tel: 03-2271 1055

Editorial Team
Serene Hiew
Pan Yan Teng