MIArb NEWSLETTER

The Newsletter of the Malaysian Institute of Arbitrators

INSTITUT PENIMBANGTARA MALAYSIA

KDN No.: PP8686/05/2012(030520)

Note From President

Dear Members,

It has been a very interesting year since I took office as president in June 2011. I wish to thank you for the privilege of serving you and look forward to serving you further for the rest of the year and next.

This newsletter contains an interesting array of articles and reports concerning the activities of the Institute which I hope you will find informative and stimulating.
We have had a successful conference on adjudication last year as well as a fast track fellowship programme.
We continue to work with the Brickfields Asia College in the Diploma in International Arbitration Course and our brand new website has already been launched.

Some of the events that we are planning for the future include a members upgrade course and another fast track fellowship programme. Those of you who wish to enhance your skills and upgrade your membership should not miss out on this. We will keep you informed of these events and others when the details have been confirmed.

The Annual General Meeting is fixed for 14 June 2012 at 6pm at the MIArb and I would encourage all of you to attend to understand more about the activities that have taken place over the past year and to give your views as to how we can serve you better. There are also vacancies in the Council to be filled at the AGM and I would urge Members to run for office to contribute to the growth of the Institute.

I would like to thank Shanthi our editor as well as the contributors for their hard work in coming up with and producing this newsletter. Please do not hesitate to contact the Editor or myself if you would like to contribute to the next newsletter.

I look forward to seeing you at the AGM.

Chang Wei Mun
President

Contents

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Calendar of Key Events 2011 - 2012

1. **29 & 30 October 2011**

Fast Track Fellowship Course

Venue: Hilton Hotel, Petaling Jaya

The 2-day course culminating in an Award writing examination was attended by 13 candidates, of whom 6 qualified after the course to apply for fellowship.

Lectures were conducted by Mr Sundra Rajoo, Mr Daniel Tan, Mr Chang Wei Mun and Mr Belden Premaraj.

2. **21 November 2011**

Conference on The Practice and Procedure of Adjudication

Venue: Prince Hotel Kuala Lumpur

The Conference was a tremendous success with overwhelming response from participants. The Conference highlighted the practice and procedure of adjudication as a means of dispute resolution and is intended to prepare the industry for the advent of compulsory statutory adjudication.

The speakers from SIArb were able to share detailed insights and their hands-on experience in payment disputes in the construction industry and the use of statutory adjudication to resolve such disputes.

We are grateful to SIArb who provided us with eminent and experienced speakers to share their experience with us. Our Vice President, Belden Premaraj, spoke on the Malaysian Construction Industry Payment & Adjudication Bill, which, as at time of printing, has been passed by Parliament and awaiting Royal Assent. Once the Construction Industry Payment and Adjudication Act 2012 is already in place, Council hopes to follow up with another conference.

3. **December 2011**

Upgrade of MIArb Website

We have much pleasure in informing you that MIArb launched its new website in December 2011. Our grateful thanks to the Malaysian Investment Development Authority (MIDA) for the SSCDF grant pursuant to which we were able to upgrade our website and kudos to our appointed web designer, Eskaywoo Communication Design Sdn Bhd, who completed the job within the planned time frame.

New features are an online listing of our panel of arbitrators, membership application procedures and forms, information on the Diploma in International Arbitration course run in collaboration with the Brickfields Asia College and council members' listing. Please visit the website at **www.miarb.com** for relevant announcements and other information. We welcome your feedback on any other information you would like to see on the website or how the website can be further improved.

4. **31 May 2012**

A talk on "Common Pitfalls in Claims – A Practical Perspective"

Speakers: Mr Garth McComb and Ms Ow Sau Pin

Venue: MIArb Secretariat

5. **14 June 2012, Thursday 6.00pm**

20th Annual General Meeting of the MIArb

Venue: MIArb Secretariat

The Conference on the Practice and Procedure of Adjudication

By Hor Shirley / MIArb Council Member / Associate, Messrs Raja, Darryl & Loh

For decades, payment default has always been seen as a chronic problem in the construction industry. It is the force of this chronic problem which has driven the players in the construction industry to engage with the government to enact legislation on adjudication to settle payment disputes arising from construction projects.

Now, after years of lamenting this chronic problem to forming working groups, to having roundtables and making recommendations by the relevant stakeholders, the construction industry finally sees the recent birth of the Construction Industry Payment and Adjudication Bill 2012 ("CIPAA"). As at the time of printing, CIPAA has been passed by Parliament and is awaiting Royal Assent.

The CIPAA introduces and imposes statutory adjudication on the construction industry on payment related disputes. As CIPAA does not allow parties to contract out of the provisions of CIPAA, all construction contracts which are made in writing that relate to construction works carried out either wholly or partly in Malaysia would be bound by this new regime of statutory adjudication.

The concept of statutory adjudication is not new to the construction industry especially in the international arena as it has long been introduced in countries like the United Kingdom, Australia, New Zealand, Hong Kong and Singapore.

The primary objective of CIPAA is to introduce a cheaper and speedy dispute resolution mechanism of adjudication in the construction industry. It is to ensure and to promote regular and prompt payment, to remove the conditional "pay when paid" arrangement, to alleviate the issue of cash flow shortage or the non-payment of progress payments which has always been a major hindrance by stifling the progress and completion of many construction projects.

To this end, adjudication has often time been labelled as 'pay now argue later' approach due to the temporarily binding nature of an adjudication decision.

This conference organised by MIArb which was held on 21 November 2011 before the CIPAA became law, was intended to equip the industry players with knowledge of how adjudication works to prepare them in anticipation of the day when CIPAA would come into force.

As the concept of statutory adjudication may be relatively new to many in the construction industry, MIArb felt that it would be advantageous and beneficial to invite some expert practitioners in adjudication from Singapore to share some valuable insights on the distinctive features, requirements, practical and procedural aspects and the strategies involved in adjudication.

These distinguished speakers shared their insights on how claims and applications are made, how they should be responded to, what happens at the hearing, what sort of directions are issued and how submissions are crafted. They also gave some insights as to the powers and duties of an adjudicator, what sort of matters adjudicators consider, what goes into adjudication determinations and how adjudication decisions are enforced.

Speakers

The speakers featured were:

Mohan Pillay

Mohan is the Joint Head of Singapore Joint Law Venture of Pinsent Masons MPillay LLP, Managing Partner of the Singapore constituent practice of MPillay, President of the Singapore Institute of Arbitrators, a Chartered Arbitrator & accredited Adjudicator on the Panels of the SIAC, SIArb and the KLRCA.

Belden Premaraj

Belden is the principal partner of M/s Belden, Vice President of the Malaysian Institute of Arbitrators, a council member of the Society of Construction Law, Malaysia and a member of the Malaysian ICC Committee on Arbitration. Belden sits on the Bar Council Committee on Arbitration and Sub-Committee on Construction Law. He is certified by the AOTS of Japan for Commercial Arbitration at Asian Countries. Belden is a Fellow of the Chartered Institute of Arbitrators, UK and the

Malaysian Institute of Arbitrators, is in the Panel of Arbitrators for the KLRCA and the Malaysian Institute of Arbitrators.

Johnny Tan
Johnny is the founding partner of LT&T Architects, a member of the panel of arbitrators of SIAC, KLRCA, HKIAC, DIAC, SIArb, AABD and SIA, an accredited adjudicator with the Singapore Mediation Centre (SMC) where he also sits on the Construction Adjudicator Accreditation Committee. Johnny also sits on the Board of Governors of the Singapore Polytechnic and chairs its School of Architecture and the Built Environment Advisory Committee.

Naresh Mahtani
Naresh was a founding partner of ATMD Bird & Bird LLP, at which firm he is now a practising consultant for projects and dispute resolution. He was a former Chairman of the Society of Construction Law, Singapore (2006-2008) and has served as council member in the Singapore Institute of Arbitrators and as CEO of the Law Society of Singapore for several years, an accredited Adjudicator with the Singapore Mediation Centre and is on various industry and international arbitration panels.

Raymond Chan
Raymond is a partner of Chan Neo LLP, a member of the Panel of Arbitrators of the SIAC as well as an Accredited Adjudicator with the Singapore Mediation Centre, the Honorary Legal Advisor to the Singapore Real Estate Developers Association, the Singapore Institute of Architects and the Singapore Institute of Surveyors and Valuers. He is active as an arbitrator and adjudicator and for the past 15 years, he was involved in the drafting of various Standard Forms of Building Contracts. He co-authored the textbooks Construction Law in Singapore and Malaysia (2nd Edition) and The Singapore Standard Form of Building Contract – An Annotation both published by Butterworths.

Topics featured
The key topics discussed were:

Statutory Adjudication Regime in Singapore and Malaysia

1. Overview of Singapore Building and Construction Industry Security of Payment Act
   a) Introduction to Adjudication as a means of dispute resolution
   b) Distinctive Features
   c) Requirements of Adjudication
   d) Singapore Building and Construction Industry Security of Payment Act
2. Overview and comparison of the draft Construction Industry Payment and Adjudication legislation proposed by the Construction Industry Development Board and the Kuala Lumpur Regional Centre for Arbitration

Practice and Procedure of Adjudication

3. Application Procedure
   a) Payment Claims
   b) Payment Reponses
   c) Adjudication Applications
   d) Adjudication Responses

4. Adjudication Procedure
   a) Powers and Duties of an Adjudicator
   b) Directions
   c) Submissions
   d) Conference / Hearing

5. Adjudication Determination and Enforcement
   a) Matters to be Considered
   b) Essential Elements in a Determination
   c) Enforcement of an Adjudication Determination
   d) Consequences of non-compliance

At the end of each session, participants had the opportunity to engage in interactive sessions with the respective speakers. These sessions proved to be very interesting as the speakers shed further light on their actual experience in adjudication. Participants were able to comprehend and appreciate the practical aspects of a statutory adjudication regime.

The conference was well received and recorded an attendance of approximately 100 participants from various stakeholders within the construction community. Based on the feedback received from the participants, the conference was a success as it achieved the objective of providing an overview of the adjudication regime and highlighting its impact on the construction industry as a whole.

To this end, MIArb wishes to record its appreciation to the supporting organizations namely, Kuala Lumpur Regional Centre for Arbitration; Chartered Institute of Building; Persatuan Arkitek Malaysia; Chartered Institute of Arbitrators, Malaysia Branch; Royal Chartered Institution of Chartered Surveyors, Malaysia; The Institution of Engineers, Malaysia; and Master Builders Association Malaysia as well as to the organizations which have endorsed the conference with CPD points namely, Board of Engineers Malaysia, Board of Quantity Surveyors and Lembaga Arkitek Malaysia.

MIArb is looking forward to organizing more of these conferences in the near future. ■

Adjudication under the Construction Industry Payment and Adjudication Act 2012

Chang Wei Mun / President MIArb / Partner, Messrs Raja, Darryl & Loh

Although infrequent, adjudication has been used in this country for some time by the construction industry. In the past, adjudication has been contractual and therefore subject to the consent of the parties. This will change with the passing into law of the Construction Industry Payment and Adjudication Bill 2012. As at time of writing, this Bill has already been read and passed at the House of Representatives and the Senate. It is currently awaiting Royal Assent. Although the Bill will introduce various reforms to the construction industry, the most far reaching aspect of this would be the advent of compulsory statutory adjudication. This article is based on the assumption that the Bill will be enacted in its present form without any amendment. It may well be that as at the date of publication of this article, the Bill may have turned into an Act. Hereinafter the Bill for reasons of convenience only shall be referred to as the "Act".

The experience of various countries that have adopted similar legislation has shown that adjudication has revolutionized the way disputes are resolved in the construction industry. The Act allows a claimant to initiate and pursue adjudication against an unwilling party and an adjudication decision which will generally be rendered within 45 days from the date of the last pleading may be statutorily enforced in various ways. The object of this article is to discuss by way of introduction the effect of statutory adjudication brought about by the Act; how it works, how it can be used and how to prepare for it.

A. The Ambit of Adjudication under the Act

Section 2 provides that the Act and therefore statutory adjudication will be available in respect of:

(a) every *construction contract* made in writing;

(b) relating to *construction work*;

(c) carried out wholly or partly within the territory of Malaysia.

The ambit of the Act has been further enlarged due to the definitions of the words in italics in the preceding paragraph. In this connection:

(a) *construction work* has been defined to include inter-alia:
   (i) extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling and demolition work;
   (ii) works above and below ground level;
   (iii) electrical, mechanical, water, gas, oil, petrochemical or telecommunication work;
   (iv) any work which form an integral part of, or are preparatory to or temporary for these works including site clearance, soil investigation and improvement, earth moving, excavation, laying of foundation, site restoration and landscaping;
   (v) the procurement of construction materials, equipment or workers

(b) *construction contract* has been defined to be a construction work contract or a construction consultancy contract and in this connection:
   (i) a *construction work contract* is defined as a contract to carry out construction work; and
   (ii) a *construction consultancy contract* is defined as a contract to carry out consultancy services in relation to construction work and includes planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and project management services.

This gives the Act a very wide ambit and suggests that statutory adjudication is available to all parties:

(a) involved not only in the construction industry but extends to works in respect of the water, gas, oil, petrochemical and telecommunication industries as well;

(b) involved in this process including, not only contractors and sub-contractors, but also consultants, and suppliers of materials, equipment and manpower;

(c) even where only a small part of the works are in fact carried out in Malaysia.

Having said that, the ambit of a claim that may be made by way of adjudication seems to be restricted to only claims for payment for work done or services rendered under the express terms of a construction contract which is the definition of "payment" under section 4. Where this is concerned, section 27(1) of the Act limits the adjudicator's jurisdiction (which may only be extended by consent) to any dispute referred to adjudication under sections 5 and 6.

Under these sections, the only claim that may be referred to adjudication is a payment claim. This limitation is fortified by the words of section 5(2) which requires the payment claim to identify the provision in the construction contract and a description of the work or services to which the payment relates. In view of this, it is submitted that claims for loss and expense or damages for breach of contract may not be claimed in adjudication as they do not constitute payment for work done or services rendered.

However, there seems to be no restriction whatsoever as to the subject matter that may be raised as a defence to a payment claim in an adjudication. Section 6 which refers to the payment response and section 10 which refers to the adjudication response, do not place any restrictions on what may be raised in these responses by way of defences. As such, defences based on late completion, or defective or uncompleted work may well be raised.

Apart from this, section 3 provides that the Act does not apply to construction contracts entered into by a natural person for the construction of a building for his own occupation provided it is less than 4 storeys high.

B. The Appointment of the Adjudicator

The parties to an adjudication may by agreement appoint the adjudicator and if agreement cannot be reached, then the appointment shall be made by the Director ("Director") of the Kuala Lumpur Regional Centre for Arbitration ("KLRCA").

In either case the adjudicator may propose and negotiate his terms of appointment including the fee chargeable with the parties and he must within 10 working days of being notified of his appointment indicate his acceptance and terms of his appointment. If the adjudicator rejects his appointment or fails to indicate his acceptance within that period, another appointment may be made pursuant to section 21. If the adjudicator accepts the appointment but his terms of appointment and fee are not agreed upon, then the standard terms and fee stipulated by the KLRCA shall apply.

The parties to the adjudication are jointly and severally liable to pay the fee and expenses of the adjudicator and they shall contribute and deposit with the Director a reasonable proportion of the fee in equal share as directed by the adjudicator in advance as security. The adjudicator may require full payment to be deposited with the Director before releasing the adjudication decision.

C. The Time Table and Procedure of Adjudication

The Act provides for a timetable for filing the relevant documents and pleadings in an adjudication. A summary of this time table is stated below:

	Item	Section	Requirements	Time Limit
1.	**Payment Claim**	5	To state: (a) amount claimed and due date (b) cause of action and provision in contract relied on (c) description of work or services to which payment relates (d) statement that it is made under the Act	None
2.	**Payment Response**	6	(a) May admit or dispute partly or wholly (b) Attach payment of amount admitted (c) If fail to respond then it is deemed that the entire claim is disputed	10 working days from receipt of Payment Claim

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3.	**Notice of Adjudication**	7(2) and 8	State nature and description of dispute and remedy sought together with supporting documents	May serve on Respondent after expiry of time limited for Payment Response
4.	**Adjudication Claim**	9	State nature and description of dispute and remedy sought together with supporting documents	10 working days from receipt of acceptance of appointment by adjudicator under section 22(2) or 23(2)
5.	**Adjudication Response**	10	Answer the Adjudication Claim and include any supporting documents. If not filed, Claimant may proceed with the adjudication after time limited to do so	10 working days from receipt of Adjudication Claim
6.	**Adjudication Reply**	11	Reply to response and include any supporting documents	5 working days from receipt of Adjudication Response

A few matters are to be noted in respect of the above timetable:

(a) The adjudicator may under section 25(p) extend any time limit imposed for compliance as reasonably required.

(b) Notwithstanding that the adjudication claim, response and reply require supporting documents to be attached, the adjudicator retains the discretion under section 25 to order discovery and production of documents, and set deadlines for the production of documents. This suggests that further documents not already included in the pleadings may be admitted.

The adjudicator may under section 26(2) set aside the proceedings either wholly or partly on the ground that there has been non-compliance in respect of the adjudication proceedings or documents produced or make any order dealing with the proceedings as he deems fit. Subject to this any non compliance by the parties with the Act whether in terms of time limit, form or content or in any other respect shall be treated as an irregularity which shall not invalidate the proceedings. Presumably which course of action is taken will depend on the seriousness of the non compliance in question.

D. The Hearing and Making the Adjudication Decision

The adjudicator is obliged to act independently, impartially and in a timely manner and avoid incurring unnecessary expense. This is implied by virtue of section 24. In addition he must comply with the principles of natural justice.

Subject to the Act, the adjudicator has the power to establish the procedures in conducting the proceedings. Where the hearing is concerned, this includes drawing on his own knowledge and experience, limiting the hearing time allowed, order that evidence be given on oath and inquisitorially ascertaining the facts and law required for the decision. Section 12(9) provides that the Evidence Act 1950 shall not apply to adjudication proceedings.

Unless the parties agree to extend time, the adjudicator has 45 working days from the date the last pleading is served or if no adjudication response is served 45 days from the date it was supposed to be served, to deliver his decision. Except where his failure to deliver the decision within time is caused by the failure of the parties to deposit his fee and expenses with the Director, an adjudication decision not made within time is void and if so the adjudicator will not be entitled to his fee or expenses pursuant to section 19.

Unless dispensed with by the parties, the adjudication decision shall contain the reasons for the decision. The decision shall determine the amount and time and manner in which the adjudicated amount is payable. Section 18 also obliges the Adjudicator if an order for costs is made to order that costs are to follow the event and fix the quantum of costs to be paid.

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E. Challenging the Adjudication Decision

Once the adjudication decision is delivered, section 13 provides that it is binding and enforceable unless:

(a) set aside by the High Court;
(b) settled by way of a written agreement between the parties; or
(c) the dispute is finally decided by arbitration or by the court.

An application to set aside an adjudication decision may be made to the High Court based on one or more of the following grounds, namely:

(a) that the adjudication decision was improperly procured through fraud or bribery;
(b) there has been a denial of natural justice;
(c) the adjudicator has not acted independently or impartially; or
(d) the adjudicator has acted in excess of his jurisdiction.

It is to be noted that the merits or correctness of the adjudication decision is not a ground for setting it aside. Computational or typographical errors in the adjudication decision may be corrected at any time under section 12(7).

In the event that an application to set aside the adjudication decision has been made or the subject matter of the adjudication decision is pending final determination by arbitration or the Court, section 16(1) allows a party to apply to the High Court for a stay of the adjudication decision. Upon the hearing of such an application, the High Court will have the discretion to grant any of the following orders:

(a) stay the adjudication decision;
(b) order the whole or part of the adjudicated amount to be deposited with the Director of the KLRCA; or
(c) make any other order as it thinks fit.

F. The Enforcement of an Adjudication Decision

Section 28 of the Act provides for an application to be made to the High Court for an order to enforce the adjudication decision as if it is a judgment of the Court.
On such an application, the Court may make an order:

(a) in respect of the adjudication decision either wholly or partly; and
(b) in respect of interest on the adjudication amount payable.

Once such an Order is granted, execution proceedings may be commenced based on the modes of execution allowed under the Rules of the High Court 1980.

For practical purposes, the Act further offers alternative remedies to a party who has obtained an adjudication decision in his favour ("Winning Party"). In the event of non-payment of the adjudicated amount, the Winning Party may:

(a) suspend performance or reduce the rate of progress of performance of construction work or consultancy services; and/or
(b) seek direct payment from the principal of the party against whom the adjudication decision is made ("Losing Party").

F1. Suspension or Reduction of Rate of Progress of Performance

Section 29(1) of the Act provides that this remedy may be sought if the amount pursuant to an adjudication decision has not been paid wholly or partly after receipt of the adjudication decision.

The procedural requirement to be satisfied is for the Winning Party to issue a written notice of intention to suspend performance or reduce the rate of progress to the Losing Party if the adjudicated amount is not paid within 14 calendar days from the date of receipt of the notice.

The Winning Party will then be entitled to such remedy upon expiry of the stipulated 14 calendar days.

Section 29(4) of the Act provides safeguards for the Winning Party who exercises this right in that it provides that such party:

(a) would not be in breach of contract;
(b) would be entitled to a fair and reasonable extension of time to complete his obligations under the contract; and
(c) would be entitled to recover any loss and expense incurred as a result thereof.

However, it is also provided that the Winning Party who exercises such right shall resume performance or the rate of progress of performance in accordance with the contract within 10 working days after being paid the adjudicated amount or any amount determined by arbitration or the court.

F2. Direct Payment from Principal

Any party who acts as the principal ("Principal") of the Losing Party may now be compelled to make direct payment to the Winning Party of the amounts due under an adjudication decision pursuant to section 30 of the Act.

"Principal" is defined by the Act to mean:

> "a party who has contracted with and is liable to make payment to another party where that other party has in turn contracted with and is liable to make payment to a further person in a chain of construction contracts".

This definition will be wide enough to encompass employers or contractors who have entered into a construction contract with the Losing Party and who is liable to make payment under that contract. Under the circumstances provided for under section 30, Principals may be obliged to make direct payment to the Winning Party in respect of any monies which would otherwise have been paid to the Losing Party in order to satisfy amounts due under an adjudication decision.

A Winning Party may exercise such a remedy if the Losing Party has failed to pay the adjudicated amount, subject to the precondition that money is due or payable by the Principal to the Losing Party at the time of receipt of the request made by the Winning Party under section 30(1) for payment of the adjudicated amount.

Under the Act, the following procedures must be complied with:

(a) The Winning Party must make a written request for direct payment from the Principal of the Losing Party;
(b) Upon receipt of the written request, the Principal should serve a notice in writing on the Losing Party to require proof of payment and state that direct payment would be made after the expiry of 10 working days of service of the notice.

If such proof of payment requested is not forwarded to the Principal within the time limit stipulated, the Principal shall be obliged to pay the adjudicated amount directly to the Winning Party. Section 30(4) then entitles the Principal to recover the amount paid as a debt or set-off the same from any money due or payable to the Losing Party by the Principal.

It is to be noted that unless a stay is granted under section 16 of the Act, the Winning Party has the option of exercising any or all of the remedies provided in the Act concurrently to enforce the adjudication decision.

G. Some Conclusions

Although the Act provides for claims for payment to be limited to that in respect of work done or services rendered, statutory adjudication has been extended not only to the construction industry but includes works in respect of the water, gas, oil, petrochemical and telecommunication industries as well. Apart from contractors and sub-contractors, consultants and suppliers will also be able to proceed to make claims by way of adjudication.

Due to its summary approach, this method of dispute resolution should be quicker than litigation or arbitration which are the more traditional methods of formal dispute resolution. Adjudication should also be a simpler process which is easier to use.

It is anticipated that:

(a) the number of adjudications will increase and arbitrations should decrease;
(b) since adjudication can be commenced at any time (as opposed to arbitration where many standard form contracts provide that it can only be commenced upon completion of the works or termination), there may be multiple adjudications happening at the same time at various levels of the contractual chain;
(c) parties to a project may have to get used to "fighting" each other in adjudications whilst having to work together at the same time; and
(d) if payment of an adjudication decision is not made, enforcement by way of the suspension or slowing of works may give rise to other disputes at various other levels.

The experience of other countries which have adopted similar legislation has shown that adjudication will drastically change the way disputes are resolved in the industries to which they have been applied. The adjudication process will be shorter and more intense as compared to arbitration or litigation and multiple modes of enforcement have been made available. This should help the Act achieve its purpose which has been stated to be to "facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry …" ■

Time for Good Records

By Rodney Martin BSc LLB(Hons) MSc MRICS FCIArb FMIArb
Managing Director of Charlton Martin Consultants Sdn Bhd
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Contractors are often placed in the position of having to prepare claims for extensions of time and loss and expense which are then assessed by a third party on behalf of the Owner or Employer.

Assessing entitlement to extensions of time usually requires access to a massive amount of data on the average construction project and experience shows that there are usually not enough factual records to establish the entitlement being claimed. Apart from scarcity of records, the key management tool available to assess the impact of delays, the project schedule, is also frequently neglected for one reason or another or worse, it is abused to give a fictitious presentation of progress month on month going unchallenged by the party assessing this information.
Under such circumstances where there is a dearth of necessary information the parties tend more often than not to rely on their perceptions of what caused the critical delay or delays to the project when assessing extension of time claims under the Contract.
Where complex and expensive retrospective delay analysis is employed in support of a delay claim, the use of incomplete data can render such presentations as either of limited use or perhaps even totally irrelevant.

Such were the circumstances in the now much written about English case of Mirant Asia-Pacific Construction v Ove Arup [1].

Mirant, a design and build contractor engaged Ove Arup to carry out design work for a coal fired power station in the Philippines. Unfortunately, two of the boiler foundations failed during construction and Mirant brought a claim against Arup for losses it suffered in the amount of GBP63 million plus interest.
The dispute revolved around deciding which delays were on the critical path, which for anyone familiar with delay claims on construction projects is a very common conundrum. In this particular case, delays caused by the defective foundations were deemed by all and sundry to be the obvious source of the critical delay.
Although the design of the foundations may have actually been defective and the consequence of any defects may have caused a delay, Ove Arup said in their defense that any delay to the foundations was not the cause of the 5 month delay to the completion of the project (i.e. it was not the critical delay).
This was an easy claim to make of course, but a much more difficult one to prove. Although Mirant did acknowledge that there had been other concurrent delays, they claimed that without the dominant foundation delay the other delays would not in themselves have been critical.
So the judge had to decide which delays were dominant.

Faced with an unreliable project schedule it was necessary to dig deeper and examine other project records to decide whether the evidence given by the parties' respective Expert Witnesses was corroborated by the facts. It would have been too easy to go with the flow of opinion by those involved with the project and to side with the popular view that the foundations were responsible for the critical delay. There is a fair amount of logic to such a view at face value of course since foundation work must usually precede superstructure work and in this case boiler installation. In his pursuit of the truth, the judge found out a lot about retrospective delay analysis techniques to assist him in reaching his decision. The judge also praised one of the experts who pointed out the inadequacies of the project schedule records and therefore the need to look to other records.

Ultimately, the judge dismissed Mirant's claim because he was satisfied that sufficient evidence had been presented in support of Arup's position that the foundations delay was not actually the cause of the delayed completion of the project.

The reason I mention this particular case is that it is typical of so many projects where records are found to be wholly inadequate when a dispute arises and the parties find themselves in a formal dispute resolution forum. How different would things have been had Arup been able to demonstrate contemporaneously by reference to the latest detailed project schedule that the foundations delay was not in fact the critical delay? More importantly, efficient solutions to recover or reduce the effects of all delays, in the most economic manner could have been agreed and implemented there and then. The importance of maintaining accurate, detailed and relevant records can never be understated and the responsibility to achieve this must lie with both the Contractor and the Owner through the appointed consultants notwithstanding any express contractual obligations.
This is because either party may have cause to rely on such records in the event of a dispute. When will the time come when maintenance of relevant records throughout the project are policed to the point whereby such practice is the norm and not the exception? As a result of winning the case Arup were awarded costs in excess of 8 million Pounds Sterling. A cause for celebration no doubt but had adequate records been kept and agreed at the time then such expenditure, which Arup had to fight hard to win back, could have been avoided altogether. The lesson here is clearly the importance of maintaining good records to support the particular position being taken at any stage of a dispute and preferably at the beginning!

With regard to determining extensions of time and compensation for delay and disruption, the Society of Construction Law's Delay and Disruption Protocol[2] is a useful guide and is available to all. In its own words the Society says the Protocol "…exists to provide guidance to all parties to the construction process when dealing with time/delay matters. It recognizes that transparency of information and methodology is central to both dispute resolution and dispute avoidance." The Protocol is indeed packed with sensible recommendations and guidance and if adopted by the parties to a construction contract provides readily available methods of dealing with issues such as concurrency[3] and the use of float time[4] as part of the process of analyzing delays. However, although the Protocol has been around since October 2002 it does not appear to have been welcomed by the industry with open arms. A survey carried out around the time of the Mirant judgment entitled "Claims, Delay and Disruption and Determining Extensions of Time" by David W Bordoli[5], found that only 52% of all respondents to the survey knew that the Protocol existed. Of those that knew about it, 97% generally agreed with the Protocol's aims. When it came to a dispute, 42% of the respondents to the survey had mentioned it or had it mentioned to them but only 13% of all the respondents to the survey had been involved in projects where the contract had been amended to include the provisions of the Protocol.

In another much written about Scottish case, **City Inn Ltd v Shepherd Construction Ltd**[6], which concerned a dispute relating to the construction of a hotel, Shepherd claimed an extension of time of 11 weeks and a declaration that the completion date was April 14, 1999. City Inn contended that Shepherd was not entitled to any extension of time at all beyond the original contract completion date. The basis for this was twofold:

i) If the instructions issued by the architect had caused delays, then they were concurrent with delays arising from matters which were the contractor's responsibility; and
ii) The contractor did not comply with cl.13.8 of the contract, which set out the procedures to be followed by the contractor where an architect's instruction was likely to delay completion.

The case involved complex arguments, including the principles of calculating extensions of time and critical path analysis when there are concurrent events. The case was heard by Lord Drummond Young. Expert evidence on delay and the analysis/assessment of delay was a key aspect to the case. Generally, Lord Drummond Young preferred the approach of the Shepherd expert based upon a thorough examination of the construction process and the evidence of a key witness to the construction, instead of an as-built critical path analysis prepared by City Inn's expert. Both City Inn and Shepherd each relied upon the expert evidence of their programming experts, but only Shepherd led any witnesses of fact.

He found that both experts were well qualified to speak about the issues which arose, so that in choosing the evidence Lord Drummond Young was guided by the details of their evidence and the soundness of their respective views when compared against the known facts.

Shepherd's expert's evidence was based on the evidence of its witnesses, the diaries and weekly reports disclosed by City Inn and his discussion with City Inn's expert of the as-built programme prepared by City Inn's expert. Shepherd's expert had changed his views as more information became available and this was criticised by City Inn.

Only City Inn's expert carried out a full as-built critical path analysis of the project and he produced a filtered as-built programme. His analysis was based upon inspection of Shepherd's construction programme and the records of the project. It was accepted by City Inn that because of incomplete records this approach required an element of subjective judgement, which relied upon the knowledge and experience of its expert in programming in the construction industry. Lord Drummond Young concluded that the full as-built critical analysis by City Inn's expert was of doubtful value.

continued next page →

[1] Mirant Asia-Pacific Construction (Hong Kong) ltd v Ove Arup Partners International Ltd [2007] EWHC918(TCC)

[2] The SCL Protocol is available at www.eotprotocol.com

[3] Two or more delay events occurring within the same time period, each independently affecting the Completion Date.

[4] The length of time that a specific activity may be delayed without delaying the start of another activity scheduled to follow immediately after.

[5] Claims, Delay and Disruption and Determining Extensions of Time. Results of a Survey of the UK Construction Industry carried out as part of the research project "The Application of project Management Software for Planning and Scheduling in the Construction Industry. David W Bordoli, Andrew N Baldwin & Simon A Austin. November 2006

[6] City Inn Ltd v Shepherd Construction Ltd [2007] ScotCS CSOH190

Lord Drummond Young held that it was not possible to base any reliable conclusions upon the as-built critical path analysis. He said:

> "The major difficulty, it seems to me, is that in the type of programme used to carry out a critical path analysis any significant error in the information that is fed into the programme is liable to invalidate the entire analysis. Moreover, for reasons explained by [one of the experts], I conclude that it is easy to make such errors. That seems to me to invalidate the use of an as-built critical path analysis to discover after the event where the critical path lay, at least in a case were full electronic records are not available from the contractor."

In his opinion, Lord Drummond Young arrived at the conclusion that the decision maker's task when deliberating on extension of time claims under the particular relevant clause of the contract was to make a "judgment" and, ultimately, arrive at a "fair and reasonable" decision in respect of the extension of time. Where there was concurrency (i.e. where an excusable delay event and a contractor risk-event exist at the same time), in the absence of one event being a dominant delay, arriving at a fair and reasonable result may require apportionment.

Having set out these principles, Lord Drummond Young applied the facts and decided Shepherd was entitled to the 9 week extension of time which had been awarded by the adjudicator before him.
City Inn appealed[7].

All three appeal judges rejected City Inn's appeal and agreed that a critical path analysis was not essential to carry out the exercise of determining the extension of time due in a given situation (although it may be relevant). The appeal decision is thus a clear rejection of the argument that a critical path analysis is essential to demonstrate an extension of time entitlement. It must be for the decision maker to decide if such evidence is of assistance.
A claim will not necessarily fail in the absence of such evidence.
In this case Lord Drummond Young had concluded that City Inn's delay analysis was invalid because it was based on incomplete information.

This case suggests that common sense and experience should take priority and are perhaps more relevant in deciding extensions of time under construction contracts than too much importance being placed on the fact that complex delay analysis exercises have been carried out which often seem largely incomprehensible to anyone other than the experts. Nevertheless on the other hand, neither should this case be viewed as a green light to oversimplify the presentation of claims and avoid addressing the facts based on records where they are available. Shepherd succeeded in holding on to the 9 weeks originally granted by the adjudicator partly because the judge decided it was not possible to accurately recreate the critical path throughout the construction period. If accurate data is available and this has been fully utilised in any delay analysis undertaken, then the decision maker may decide that it is relevant in establishing the position claimed. Therefore a very practical question which might be asked of any delay or for that matter quantum expert engaged is whether in fact all the available factual data has been used, where relevant, in the analysis or evaluation being opined.
As blindingly obvious as this question may appear, unfortunately it cannot always be answered in the manner expected.

In the very recent Australian case of **Alstom Ltd v Yokogawa Pty Ltd & Another**[8] both parties appointed delay analysis experts who in turn both carried out analysis of the delays that had occurred to the renovation of a 60 year old power station in Port Augusta, South Australia. The experts each used different methodologies. One relied primarily on a Windows Analysis[9] utilising Alstom's monthly programmes. Nevertheless, the judge criticised the expert's work as being '….theoretical and subjective with little or no reference to contemporaneous materials….which might be used to verify the results of his Windows Analysis.'
The other expert however relied extensively on contemporaneous material and the judge considered his opinions '…were therefore grounded on facts rather than more abstract theory.'

All the judgements mentioned in this article which examine complex arguments concerning the principles of calculating extensions of time and the use of critical path analysis are likely to be persuasive authorities in the Malaysian courts.

Good records and lots of them can therefore be said to rule the day and this brings me back to the Mirant v Ove Arup case. In a foot note to his article covering the case, Tony Bingham[10] points out that Arup's argument was a good one to win because, having eventually successfully demonstrated that the delays to the project completion were not due to the two defective boiler foundations, Arup were awarded their GBP8 (RM40) million costs. This is a staggering sum by any standards. Of course such costs could have been avoided altogether along with Mirant's own costs in pursuing its claim if only adequate records had been available and used effectively at the time the dispute first arose during construction. The message must be very clear for any party or party representative to a construction contract – it is high time for good records. ■

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7 City Inn Ltd v Shepherd Construction Ltd [2010] ScotCS CSIH68

8 (No.7) [2012] SASC 49 delivered by The Honourable Justice Bleby on 2 April 2012

9 This approach looks at different schedule snapshots (windows) throughout the project and analyses the contractor versus owner responsibility for delaying the critical paths.

10 "Nothing if not critical", Tony Bingham, Building Magazine, 22 June 2007

Conference on The Practice and Procedure of Adjudication

21 November 2011

Prince Hotel Kuala Lumpur

1

The Speakers from left:- Belden Premaraj, Johnny Tan, Raymond Chan, Mohan Pillay, Chang Wei Mun and Naresh Mahtani

2

The President of MIArb, Chang Wei Mun, giving his Opening Address

3

Opening Address in motion

4

The conference participants enjoying a chat over lunch

5

The speakers and some of the council members of the MIArb together with Sundra Rajoo, Director of the KLRCA

6

President of the MIArb, Chang Wei Mun, thanking the President of the SIArb and speaker, Mohan Pillay

7

The conference participants

Challenges of Using Experts in Construction Dispute Resolution

Ow Sau Pin
B Sc (Hons) LLB (Hons) MRICS, MMIArb/ MIArb Council Member/ Associate Director Trett Consulting Kuala Lumpur

Who is an expert?

Experts are increasingly being used in arbitrations and other dispute resolution proceedings.
The most plausible explanation for this trend is that the issues facing the tribunal are increasingly complex and technical.

Fundamentally an expert needs to have a high standard of technical knowledge and practical experience in their professional field in order

(a) to analyse a particular set of events; and

(b) to impart the underlying principles of his/her analysis into a cogent and concise opinion for presentation to a tribunal.

It is of considerable advantage if an expert is actively working in addition to being an authority in the industry as he/she will have practical hands-on knowledge to put the issues in context and understand the norms in the industry.

Hence an appropriate expert would be someone who is competent in the field, has the relevant experience on the subject matter in dispute and suitably qualified to assist the tribunal in deciding the issues.

What exactly is the role of an expert?

In plain terms, an expert's role is to analyse complex technical issues and present them in a simpler manner to non-technical people (the tribunal and counsel) particularly when clarifying issues of causation.

An expert in a construction dispute is usually an engineer, architect or surveyor and to give credence to his/her testimony, he/she is usually a member of a recognised professional body. An expert is bound by the ethical conduct of the professional body of which he/she is a member. It is imperative that an expert does not do anything which compromises or impairs his/her independence, impartiality, objectivity and integrity[1].

The duty of an expert is owed to the tribunal and not the party that has engaged him/her and from which compensation will be obtained. This is an all-important principle more so to dispel a common perception in the industry that "an expert is no more than a hired gun", a perception more prevalent in cases of party-appointed experts rather than tribunal-appointed experts. But the "hired-gun" perception is only one of a handful of challenges that faces parties using experts in dispute resolution proceedings as we shall come to below.

Challenges

1. They cost a lot of money

In dispute resolution, it is not uncommon for any projects to be inundated with project records and documents that have steadily accumulated during the course of the work. An expert is required to come in cold to review the facts relevant to the issues which he/she has been instructed to give an opinion. Therefore his/her work is forensic in nature and the results of an expert's work are required to be presented in a manner that will usefully assist the tribunal.

It is often the case that an expert works with either an assistant or a team of assistants rather than by himself/herself. Although having an assistant or a team of assistants is commonly perceived as contributing to a higher cost of an expert report, the alternative will cost even more as explained below.

An expert has the overwhelming task of looking through countless files possibly up to the hundreds. But that will mean the fees will be extremely high and it will take a significant amount of time. An assistant or a team of assistants led by the appointed expert himself/herself could complete the task of processing information in a shorter period of time and commanding fees less than if the expert were to do all the work. That represents time and cost saving for work that is necessary but oftentimes involves a lot of legwork in verifying and collating material facts,a highly "scientific" process.

While it is undeniable that costs of experts in a dispute resolution

[1] *Part of the Code of Practice of the Academy of Experts which is a professional body for expert witnesses in the United Kingdom and around the world*

proceeding can be significant, a competent expert will be able to clarify the issues for the understanding and interpretation of the tribunal, which will in turn have a clearer basis to reach a more reliable decision on the matters in dispute. Hence the benefits of using an expert will usually justify the costs.

2. Whose report is it anyway?

The practice of using assistant(s) invariably invites the question – who is actually writing the expert report, the expert or his/her assistant(s)? The simple answer is that whilst assistant(s) may be involved, the expert takes accountability for every word and figure in his/her report.

The test of an expert report is ultimately how robust the report is in the face of cross-examination. As the report has to be the opinion of the expert himself/herself and not that of his/her assistant(s) he/she is leading, the expert has to plan his/her work in a manner that will enable all the material facts of the subject matter in dispute to be thoroughly investigated within reasonable time and costs. In doing so, the expert has to use his/her experience to narrow down the scope of investigation by say, the process of elimination. In this sense, an expert will lead his/her assistant(s) in collating the information by providing guidance for the areas of investigation.

For example, in an investigation on the causes of increased costs in a disruption claim, an expert would be looking for periods which indicate significant increases in level of expenditure that are not commensurate with the site activities at the time. An understanding what are the components of those additional costs during those periods will then provide the possible causes of cost overrun. This would eliminate the need to investigate periods that show no significant increase in costs and therefore are less or unlikely to be the result of any alleged disruption. The assistant(s) would then be directed by the expert to compile the types of cost expenditure that have been incurred during the periods that have been identified and thereby saving the costs of an expert report. This is largely the modus-operandi for delay analysis as well.

It is imperative for an expert to continue giving guidance to his/her assistant(s) in compilation of the factual matrix. He/she has also to randomly check and verify that the information collated is correct and able to withstand potential challenges. This process is not as random as it may appear, as priority will obviously be given to "big-ticket" items.

An expert then uses the information or data verified and collated by his/her assistant(s) to address the instructions given in his/her terms of engagement. This is where an expert uses his/her experience and skills in providing rational explanations or eliminating any hypothetical proposition.

3. Conflicting factual evidence / legal positions

It is not unusual for an expert, upon preliminary investigation, to discover that the factual evidence on which the report is to be based does not quite turn out as expected. It is less common for facts to be disputed but rather it is how facts are to be interpreted that is usually the subject of a dispute.

In the event that an expert is not able to reasonably arrived at a conclusion, one of the reasons being the lack of records to prove one way or another, he/she should provide an alternative opinion based on the alternative interpretation to assist the tribunal who will consider such interpretation on its own terms before deciding one way or another.

In instances where different legal positions come into play, for example in issues of determination, the expert will do well to provide opinions (on quantum, for instance) based on the different legal positions as he/she will more likely be seen as independent and impartial.

An expert who does not acknowledge conflicts of evidence or legal positions and fails to address them will not be assisting the tribunal, let alone the party who has appointed him/her.

4. A counsel's nightmare

Upon completion of an expert report, the task of an expert is by no means completed. In fact perhaps the most challenging part of being an expert is giving evidence in the hearings. There is much work required from an expert prior to the hearings in getting reacquainted with intimate details of his/her own report, that of the opposing expert, the bundles of documents (recorded evidence) and all statements of other factual witnesses.

Whilst an expert may rely on his/her assistant(s) in producing the report, it is the expert alone who has to satisfactorily answer the questions posed by counsel. Apart from imparting a "big-picture" understanding of the issues to the tribunal during hearings, the expert also needs to be thoroughly and sufficiently clear where the facts upon which he/she has based his/her reports can readily be extracted for verification under examination.

An expert has to be satisfied that the material facts relied upon are correct to arrive at his/her persuasive and compelling conclusions. If the raw data and information used to produce an expert report are diminished by a counsel's challenge, the expert's opinion upon which those facts are premised will be undermined. Therefore it is imperative for an expert to be capable in leading the tribunal and counsel through his/her report and the bundles of documents supporting the report.

Obstinacy in the face of conflicting evidence is never helpful. An expert who fails to provide concession on his/her views when new evidence brought to light affects his/her conclusions will only reinforce the "hired gun" syndrome. Facts and experience aside, the demeanour of an expert will have a considerable impact on the tribunal's perception of the expert. An expert who takes on the role of an advocate and volunteers evidence not required reduces the weight a tribunal weight puts on his/her testimony.

An expert who is not well-versed with his/her report and cannot impart a clear understanding of the underlying principles of his/her report will be a nightmare for the counsel who instructed him/her, and a delight for the opposing counsel.

5. A tribunal's conundrum

As mentioned earlier, an expert will do well in offering the tribunal alternative opinion in the event of a conflict of facts or law. Nevertheless sometimes an expert does not do so and may then appear to be "unhelpful" to the tribunal.

Whilst this situation may occur, the expert is sometimes blameless. The reason could be due to the limiting instructions given to an expert by a disputing party in a party-appointed engagement. If an expert's instruction is to generally "review and reply" to the report of the opposing party without being required to provide an alternative view, an expert's testimony may not be of assistance to the tribunal as the tribunal will not have any alternative opinion to consider if it should accept any criticisms the expert may have.

When an expert is prevented from carrying out his/her duties to the tribunal due to limiting instructions, this raises even more doubts whether an expert should be used in the first place. One way to prevent this potential failing is to have a tribunal-appointed expert so that the tribunal can be more assured that the expert will address its concerns and issues in its terms of reference.

Alternatively party-appointed experts can be instructed by the tribunal to have joint meetings to collectively issue a joint statement of agreed facts, and to set out their differences. The tribunal may also choose to direct for witness conferencing of party-appointed experts (also known as hot-tubbing) which is a more effective method of conveying to the tribunal the experts' respective opinions and getting to the crux of why they disagree on some issues.

In the final analysis, whilst some challenges in using an expert may be overcome by innovative proceedings, most challenges may not even transpire if one sets out on the right foot by answering the following question correctly – "who shall be the expert for this dispute?" ■

Photos from the Fast Track Fellowship Course

29 & 30 October 2011
Hilton Hotel, Petaling Jaya

Fast Track Arbitration

Its Time Has Come?

Belden Premaraj / Vice President MIArb / Principal Partner, Belden Advocates & Solicitors

Introduction & Background

Arbitration has in the past, been compared to other more time and cost effective forums for alternative dispute resolution; such as contractual adjudication, dispute adjudication board, neutral evaluation or expert determination.
Arbitration was generally regarded by its users to be wanting, as it was a far costlier and more time consuming process of dispute resolution.
This mainly stemmed from the arbitration procedure itself, which made every effort to resemble a full-blown litigation process.

Of even more concern, was the lack of powers for arbitrators to control the arbitration process in a manner so as to achieve expediency unless the parties consented.
Any overtly proactive approach by arbitrators to hasten the arbitration process could be construed as being unfair, unreasonable and on some occasions even biased or partial against the party that wished to have a full opportunity to present its case.

In the international arbitration scene, common sense and financial acumen prevailed over parties.
Therefore, arbitrators were allowed to develop approaches that expedited the entire arbitration process.
The use of limited-time, chess-clock hearings, written submissions with minimal oral submissions, limited discovery, bifurcation of the issues to be determined and hot-tubbing of experts were all part of the armoury of an international arbitration process.
Legal representatives of parties were generally keen to consent to such processes, in order to evince an ability to perform to international standards. Hence these processes, soon developed into the norm for international arbitrations.

In contrast, domestic arbitrations were mired in lengthy procedural processes to start with and then commonly fell into delays, extensive interlocutory processes, full-blown disclosure drawn out discovery machinations and lengthy hearings.
All these delays, eventually led to a highly expensive and time consuming alternative dispute resolution process.
This was clearly not in the interest of the concerned parties.

In 2004, the Society of Construction Arbitrators UK launched a platform for expedited arbitrations commonly known as the “100-day Arbitration Procedure”. Prior to this procedure, there were a number of ad-hoc procedures stipulating various periods. These included too many extension flexibilities that contradicted the aim of expediency.
The 100-day Arbitration Procedure was not enthusiastically received and utilised since its primary aim for the construction industry was to offer an alternative to adjudication, rather than to complement the existing process.

In Malaysia, the first indication that expedient arbitration processes were to be encouraged and practised for domestic arbitrations came from the legislature vide the Arbitration Act 2005 under Section 20 on equal treatment of parties. In a legislation which primarily adopted the Model Law with modifications, the words used in Section 20 that reflect merely a need to give each party a “fair and reasonable opportunity” as compared to the version in the Model law which provided for “full opportunity” was clearly a refreshing outlook for the future of arbitration and a clear message.

Nevertheless, it took some considerable time after the legislation came into force before any organisation was willing to create procedures that would complement and ensure an expedited arbitration. In 2010, the Malaysian Institute of Arbitrators took up the challenge and in collaboration with the Kuala Lumpur Regional Centre for Arbitration, drafted the KLRCA Fast Track Rules 2010. These Rules provided for an arbitration process that would span a maximum period of 140 days (or 180 days if parties and arbitrator agreed).

However due to a perennial fear that complex disputes could never be resolved in such an expedited period, the KLRCA Fast Track Rules were then marketed for disputes below

RM1million. The rationale for this was that such lower monetary disputes, would not reflect such complexity that a hastened arbitration process might have difficulty handling.
The proposed limited usage of the KLRCA Fast Track Rules 2010 was clearly misplaced especially in the construction industry where end-users were calling for even more rapid forms of dispute resolution processes, such as adjudication.

Furthermore, the KLRCA Fast Track Rules were drafted primarily for domestic arbitration users and it only provided for the use of a single man arbitral tribunal so as to ensure that the expedited processes could be achieved. The primary draftsmen of the KLRCA Fast Track Rules 2010 recognised that in order to achieve the aim of an expedited process, the arbitral tribunal had to be sufficiently empowered by the rules. The arbitral tribunal needed to be able to force parties to adhere to such expedited rules and to enforce procedural techniques.

The Features of the KLRCA Fast Track Arbitration Rules

Leaving it to the arbitral tribunal to create its own procedure to achieve the expedited period, would inevitably have resulted in clashes and disagreements. Therefore, the KLRCA Fast Track Rules provide a more rigid and structured procedure, which applies compulsorily for the parties who have adopted the rules. These rigid and structure procedures take the form of prescribing that:

- A Notice to Arbitrate must be accompanied by the Statement of Case and the relevant documentary evidence
- Fixed and rapid periods for agreement on the choice of arbitrator or the reference to KLRCA for KLRCA's appointment
- Fixed periods for the Statement of Defence/Counterclaim and Reply, all to be accompanied by documents to be lodged
- Fixed period for case management meeting or direction by the arbitral tribunal
- Fixed period for challenges to the documents lodged
- Fixed period for the other procedural steps to be performed
- Limited number of days for oral hearings
- Shorter period for conclusion of documents-only arbitration
- Fixed period for the conclusion of the normal oral hearings-based arbitration
- Fixed period for the issuance of the award
- Limited flexibility to extend time by consent of all parties and the arbitral tribunal
- Limited flexibility to extend period for issuance of the award

A major departure from the 100-day arbitration procedure is that the period prescribed for the conclusion of the arbitration and the issuance of the award runs from the date of the issuance of the notice to arbitrate, rather than when pleadings are closed.

The rules repeatedly call for the arbitral tribunal to be conscientious of its duty to ensure and to provide a just, but expeditious and economical final determination. In order to ensure that the arbitral tribunal is able to achieve this duty, the arbitral tribunal have been given wide powers.

These powers include:-

- Establishing such procedures within the discretion of the arbitral tribunal that would achieve this duty. Hence the arbitral tribunal is called upon to be proactive and to create a procedure that suits the circumstances but at the same time, procedures that could achieve the overriding need to be expeditious and economical
- A wide discretion on the type of procedure that is to be employed, while providing guidance for possible procedures that the arbitral tribunals may utilise to achieve the expeditious and economical requirements. The pertinent procedures in the arbitral tribunal's discretion include:-
  - Fixing a 14 day limit from time of close of pleading or from after the case management meeting for any and all interlocutory applications for interim directions and rulings to be made, and refusing any and all such interlocutory applications made thereafter (but with a limited discretion to consider such applications only if found necessary for the fair disposal of the arbitration but always subject to the KLRCA director's approval);
  - Limiting the documents that may be produced and having specific disclosure and discovery;
  - Fixing deadlines for compliance with directions which if not complied with, the arbitration is to proceed and no weight is to be attached to such compliance after the deadline;
  - Using own specialist knowledge provided parties have been given a fair opportunity to deal with the matters pertaining to the specialist knowledge;
  - Carrying out physical inspection of any matter related to the dispute;
  - Ascertaining the law and facts inquisitorially including questioning witnesses and experts;
  - Directing chess-clock limited time type of hearings within the fixed period allowed in the rules for the oral hearings;
  - Controlling the cross-examination of witnesses by determining areas of cross-examination that are not relevant and giving no weight to such cross-examination;
  - Ordering pre-hearing interrogatories to reduce time at the oral hearings;
  - Conferencing or hot-tubbing of witnesses or experts (re-arranging the order of witnesses or experts and the need for claimant's to close their case first before respondent's case commences by having oral hearings of both parties, witnesses or experts on any particular issue sequentially or concurrently);
  - Bifurcation or breaking up of the oral hearings to issue by issue;
  - Limiting the written submissions post oral hearings.

Equally pertinent, is the extremely low schedule of fees applicable when the rules have been utilised (subject always to parties agreeing to higher fees for an agreed arbitral tribunal). Therefore it is a huge incentive for parties to resolve their disputes in rapid time, especially with such low arbitral cost exposure.

Time for the Fast Track Approach to Arbitration

There have been various critics to the Fast Track approach to arbitrations which repeatedly claim that complex disputes are not suited to any controlled or inflexible process, let alone rapid processes. These are the same critics that raised these very same arguments, when there were forums held to debate the proposed statutory adjudication process.

However the time for debating whether complex disputes ought to be ventilated through a full and through process (which is usually lengthy and expensive), has come and gone. Court litigation in Malaysia has now evolved to a four to six month process for most commercial and civil disputes. Whilst there were teething problems when the expedited processes were first introduced in the Malaysian court, it has now become mainstay practice and it seems to be working in Malaysia. Compulsory statutory adjudication for the construction, engineering, oil and gas industries is next. The legislation on adjudication has currently been passed in Parliament and is awaiting royal assent.

Why then is it not time that parties adopt a fast track approach to arbitration? There is now even more reason for the adoption of a fast track approach to arbitration especially in the construction, engineering, oil and gas industries when the compulsory statutory adjudication legislation takes force. This is because arbitration may very well end up being the second legal process (or second bite at the cherry as some may put it) through which a particular dispute whether complex or otherwise, is ventilated and resolved albeit with finality, as compared to the temporary effect of the adjudication process.

Surely even the most vocal of all proponents calling for a full and thorough process cannot continue to see the need for this; especially after the very same dispute(s) have already been through an earlier ADR forum where the facts, documents and arguments were prepared and submitted, evidence given and queries or question posed, issues narrowed and clarity of thought on the subject matter of the dispute improved.

Currently the KLRCA statistics show that there has only been one Fast Track Arbitration under the KLRCA Fast Track Rules 2010, that has been conducted to date.
This was an arbitration pertaining to disputes arising from the construction industry. It had a claim and a counterclaim both exceeding RM1million. Yet it was concluded successfully within the time frame prescribed by the rules. It showed that fast track arbitration is clearly achievable, thus reinforcing that the time for the KLRCA Fast Track Arbitration has definitely arrived.

Fast Track Rules 2nd Edition 2012

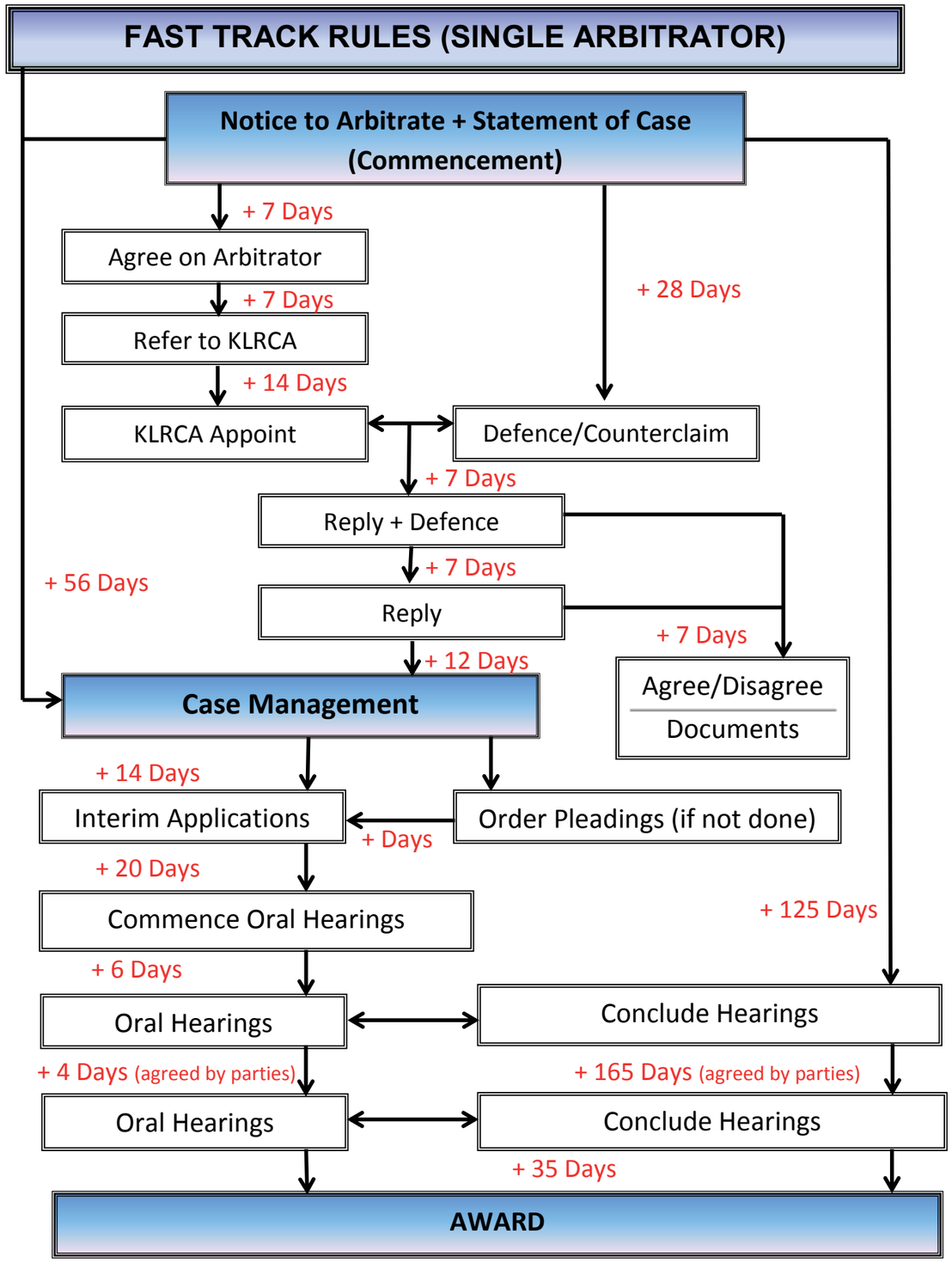
In recognition that the fast track approach to arbitration can equally apply to international arbitrations as well as domestic arbitrations, the Fast Track Rules 2010 have been revised to cater for international use. There are also other new provisions to refresh and clarify the process even further. Whilst maintaining the essence of the Fast Track Rules 2010, the pertinent revisions are as follows:-

- The prescribed maximum period for the conclusion of the arbitration process and the issuance of the award which was previously 140 days (max 180 days if all parties and the arbitral tribunal agree) has been revised to 160 days (max 200 days if all parties and the arbitral tribunal agree)
- The use of only a single person arbitral tribunal has been revised to allow a 3 person arbitral tribunal if parties agree, thus revising the fixed time frames for the appointment process
- The compulsory use of a document-only arbitration process (no oral hearings) for domestic arbitrations where the aggregate claim and/or counterclaim does not exceed RM150,000.00 for domestic arbitrations and USD75,000.00 for international arbitration but with a discretion to the arbitral tribunal to still proceed with oral hearings
- Specific rule on the independence and impartiality of the arbitral tribunal as a reflection of the requirements already stated in the Malaysian Arbitration Act 2005
- Specific rule of the applicable law and conflict of laws rules which reflect the requirements already stated in the Malaysian Arbitration Act 2005
- The power to consolidate various arbitrations with the consent of all the parties which reflect the powers already stated in the Malaysian Arbitration Act 2005

It is therefore believed that the KLRCA Fast Track approach to arbitration has now become compatible with all international standards and clearly offers end-users a definite effective, expeditious and economical alternative dispute resolution process.

continued next page →

The simplified mind-map below outlines the general process for the Fast Track Arbitration Rules 2nd Ed. 2012. ■



List of New Members/Upgrade for session July 2011 to May 2012

Fellow

		M/No.	Date Approved
1.	Mr Sanjay Mohanasundram	F/074	*18/08/2011*
2.	Mr Andre Ravindran S. Arul	F/080	*13/10/2011*
3.	Mr Chris Lim Su Heng	F/082	*16/02/2012*
4.	Mr Naresh Mahtani	F/083	*16/02/2012*
5.	Mr Edmund J Kronenburg	F/085	*17/05/2012*
6.	Mr Daniel Tan Chun Hao	F/086	*17/05/2012*

Upgraded from Member to Fellow

1.	Mr Mok Soon Cheong,KMN	F/075	*21/07/2011*
2.	Mr Jonathan Yoon Weng Foong	F/076	*21/07/2011*
3.	Mr Ang Choo Ming, Bobby	F/077	*21/07/2011*
4.	Ms S. Shanthi Supramaniam	F/078	*13/10/2011*
5.	Mr Lim Seng Chai	F/079	*13/10/2011*
6.	Mr Mahadevan a/l K. Arumugam	F/084	*19/04/2012*

Upgraded from Associate to Fellow

1.	Ms Elaine Yap Chin Gaik	F/081	*16/02/2012*

Member

1.	Mr Lye Kok Kuan	M/355	*17/11/2011*
2.	Ms Shirlena Yogeswaran	M/357	*17/11/2011*
3.	Mr Cheh Keng Soon	M/361	*16/02/2012*
4.	Mr Kailash Chander Jhinga *Advocate*	M/362	*19/04/2012*
5.	Mr Chung Ting Fai	M/363	*17/05/2012*

Upgraded from Affiliate to Member

1.	Ms Jesslyn Lim Wei-Lin	M/353	*21/07/2011*
2.	Mr Amrit Pal Singh	M/354	*21/07/2011*
3.	Mr Lim Tze Her	M/356	*21/07/2011*
4.	Mr Tiu Leong Kim	M/358	*16/02/2012*
5.	Mr Joshua Kuan Kai Wen	M/359	*16/02/2012*
6.	Miss Sabrina Mickagnes Lee Yan Cheng	M/360	*16/02/2012*
7.	Miss Prema Kesavan	M/364	*17/05/2012*

Associate

1.	Miss Hor Shirley	A/158	*21/07/2011*
2.	Ms Deivigarani a/p Krishna	A/159	*21/07/2011*
3.	Miss Ooi Mooi Chin	A/160	*18/08/2011*
4.	Mr Lee Teok Guah	A/161	*16/02/2012*
5.	Mr Chandra Segar a/l Kalimuthu	A/162	*16/02/2012*
6.	Mr Lio Chee Yeong	A/163	*16/02/2012*

Affiliate

		M/No.	Date Approved
1.	Mr Lau Kok Ming, Edmund	AF/123	*21/07/2011*
2.	Miss Tharshini Sivadass	AF/124	*21/07/2011*
3.	Mr Nivash Chespal Singh	AF/125	*21/07/2011*
4.	Miss Lau Yih Ying	AF/126	*18/08/2011*
5.	Miss Lau Yih Yun	AF/127	*18/08/2011*
6.	Miss Keeshantini Baskeran	AF/128	*18/08/2011*
7.	Miss Prithivee Maniam	AF/129	*8/08/2011*
8.	Miss Sin Yoke Hang	AF/130	*8/08/2011*
9.	Miss Nurul Kamilah Hanif	AF/131	*18/08/2011*
10.	Mr David Looi Siew Fatt	AF/132	*18/08/2011*
11.	Miss Nalini Nalusamy	AF/133	*18/08/2011*
12.	Miss Michelle Rajasooria	AF/134	*18/08/2011*
13.	Miss Priyadashini Sutharsan	AF/135	*18/08/2011*
14.	Miss Archanah Devi Nandy	AF/136	*18/08/2011*
15.	Mr Phuah Wil Liam	AF/137	*13/10/2011*
16.	Miss Chang Kuok Eng, Diana	AF/138	*17/11/2011*
17.	Miss Chong Sinyin	AF/139	*17/11/2011*
18.	Miss Christine Chan Ee Yin	AF/140	*17/11/2011*
19.	Ms Delphine Ranee Dawson	AF/141	*17/11/2011*
20.	Ms Chen Suh Lang, Jessie	AF/142	*17/11/2011*
21.	Mr Devandra Balasingam	AF/143	*17/11/2011*
22.	Mr Goh Chin Han	AF/144	*17/11/2011*
23.	Mr Foo Kwan Pheng, Jeffrey	AF/145	*17/11/2011*
24.	Ms K. Sheela T. Vinayaka Das	AF/146	*17/11/2011*
25.	Mr K Ganesan Kasee	AF/147	*17/11/2011*
26.	Miss Kong Huey Teing	AF/148	*17/11/2011*
27.	Miss Lavainyamalar Sithamparanathan	AF/149	*17/11/2011*
28.	Miss Lai Zhiu Khiok, Chrysandy	AF/150	*17/11/2011*
29.	Mr Lau Puong Xing	AF/151	*17/11/2011*
30.	Mr Mohd Prasad Hanif	AF/152	*17/11/2011*
31.	Ms Prema Kesavan	AF/153	*17/11/2011*
32.	Mr Ravikumar Narayan	AF/154	*17/11/2011*
33.	Mr Sim Ee Ern, Daniel	AF/155	*17/11/2011*
34.	Miss Shalini Selvam	AF/156	*17/11/2011*
35.	Miss Tan Lee Quin	AF/157	*17/11/2011*
36.	Mr Ng Weng Seng	AF/158	*16/02/2012*
37.	Miss Christine Sharmini Henry	AF/159	*16/02/2012*
38.	Mr Loganathan a/l P L Suppiah	AF/160	*16/02/2012*
39.	Mr Yip Xiao Heng	AF/161	*16/02/2012*
40.	Mr Khoo Kwan Yee	AF/162	*16/02/2012*
41.	Mr Jeremy Vinesh Anthony	AF/163	*16/02/2012*
42.	Mr Chen Siu Ming	AF/164	*16/02/2012*
43.	Mr Tan Yew Hong	AF/165	*19/04/2012*
44.	Miss Lye Ca-Ryn	AF/166	*19/04/2012*