MIArb NEWSLETTER

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Note From President

Dear Members,

Greetings from the Malaysian Institute of Arbitrators. This is our first Newsletter for 2017.

We completed our first full year at the Bangunan Sulaiman Building and needless to say, it was a very good move for the Institute. Proximity with the KLRCA has helped increase communication with the KLRCA and its Director. The KLRCA has given us excellent support and assistance in all our activities. We are thankful.

In March 2016, the Institute collaborated again with The Institution of Engineers, Malaysia (DRP Subcommittee), Pertubuhan Akitek Malaysia and The Royal Institution of Surveyors, Malaysia to organise the Joint Courses on Alternative Dispute Resolution for Practitioners. The Course was a two-day seminar on arbitration, adjudication, mediation and included a discussion on common issues in construction contract management. The Institute conducted a course entitled 'Arbitration: Practical Aspects'.

We organised a talk on 'Finality to Awards in International Arbitration seated in Malaysia' in April 2016. Our past President, Mr Lam Ko Luen and Mr Ooi Huey Min led discussions on leading cases where arbitral awards were set aside in 2015 and early 2016.

In May 2016, the Institute held its 3rd Annual Review for 2015, which enjoyed very good attendance and participation. We had the honour and privilege of having The Honourable Dato' Mary Lim, Justice of the Court of Appeal deliver the keynote address. We had a stellar list of speakers who discussed notable developments and trends in adjudication and arbitration in 2015. The highlight of the event was an excellent debate on the Future of Arbitration in Malaysia.

We again assisted Brickfields Asia College's Diploma in facilitating the International Arbitration programme between June and August 2016. The course was well attended and we have received good feedback on the delivery of the course. We expect fresh intakes this year. A big thank you to our Vice President, Ms Hor Shirley for managing the Institute's participation in the course.

The Institute's Facebook page, launched in August 2015, has been quite the hit. We have certainly achieved our aim in increasing our daily reach and communication with our members through our page. The daily page visits have increased and usually spikes when a new case note is uploaded. Several case notes were uploaded on our page which covered important developments in 2016. My sincere thanks to Mr Gregory Das for contributing the case notes and for administering our Facebook page.

Finally, the Institute wishes all its members a Happy New Year. May this coming year bring all of you much peace, health and prosperity.

Kevin Prakash
President

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Contributions
MIArb welcomes articles and other materials of interest for publication in future issues of this newsletter. By contributing an article or other material of interest to MIArb, the contributor(s) warrant(s) that the same is original and not already published elsewhere either electronically or in print. MIArb reserves the right to edit or decline any materials submitted. Enquiries may be addressed to The Editor at info@miarb.com.

This newsletter is also available on our website: www.miarb.com.

Past Events 2016

January 2016
Courtesy Visits to the Offices of MBAM, CIDB, and CIOB

February 2016
Membership Upgrade Course

March 2016
Joint Courses on Alternative Dispute Resolution held jointly with IEM, PAM, and RISM

April 2016
Afternoon Talk on "Finality to Awards in International Arbitration seated in Malaysia – Arbitrators Beware!"

May 2016
The MIArb 3rd Annual Law Review

November 2016
RAIF Conference, Sydney

2017 MIArb Council

Challenging Domestic Arbitration Awards: The Section 37 and Section 42 Problem

by **Gregory Vinesh Das**
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Senior Associate, Shook Lin & Bok
Council Member of MIArb

Since the advent of the Arbitration Act 2005 ("the Act") in March 2006, there has been an uncertainty as to the interplay between Sections 37 and 42 of the Act in respect of a challenge to domestic arbitration awards. Two recent appellate court decisions have examined the interaction between the two provisions and have sought to provide the solution. These decisions are the focus of this article.

By background, Sections 37 and 42 provide the exclusive avenues through which an arbitral award can be challenged under the Act. They are reproduced as end-notes to this article.

By virtue of Section 3 of the Act, Section 37 has an automatic application to both domestic and international arbitrations. In respect of Section 42, the provision has an automatic application to a domestic arbitration unless otherwise agreed in writing between the parties. However, such an automatic application is reversed for an international arbitration such that Section 42 would not apply unless the parties have agreed in writing as to its application to the arbitration.

It would appear from a reading of Sections 37 and 42 that there is ex facie an overlap in the grounds upon which a challenge against an arbitral award under either of the two provisions can be made. This has often given rise to an uncertainty as to the circumstances under which a party should seek either a challenge under

It would appear from a reading of Sections 37 and 42 that there is ex facie an overlap in the grounds upon which a challenge against an arbitral award under either of the two provisions can be made.

Section 37 or a review pursuant to Section 42, or whether a two-pronged challenge against the award under both Sections 37 and 42 should be sought.

The recent Court of Appeal decisions of Kerajaan Malaysia v. Perwira Bintang Holdings Sdn. Bhd. [2015] 6 MLJ 126 ("Perwira Bintang Holdings") and Petronas Penapisan (Melaka) Sdn. Bhd. v. Ahmani Sdn. Bhd. [2016] 2 MLJ 697 ("Petronas Penapisan") have examined the interplay between the provisions.

Perwira Bintang Holdings involved a dual challenge against an arbitral award under Sections 37 and 42. The central complaint was that the arbitrator had acted in excess of his jurisdiction by deciding upon a matter that was not part of the issues that were referred to him for determination. In short, it was argued that the matter was "a new difference" not raised by either of the parties.

The Court of Appeal upheld the High Court's decision that set aside the part of the award that contained the findings on the issue that was beyond the terms of submission to the arbitrator. The Court of Appeal acknowledged that such complaints in respect of domestic arbitrations would fall under Section 37 (jurisdiction questions) and Section 42 (error on a substantive question of law) while recognising that the power to set aside part of the award or to vary it lies only under Section 42 (see para. 3.10).

In this regard, the only relief that was open to a party that institutes a Section 37 challenge was the setting aside of the arbitral award save for the narrow exception under Section 37(3) of the Act.

Accordingly, it rejected the Appellant's contention that the Respondent was precluded from relying upon the same grounds to found both its claims under Sections 37 and 42 in the following terms:-

"[62] Counsel for the appellant has, in the course of her submission, questioned whether it was right to duplicate the grounds under s 37 as grounds under s 42 of the Act. We are not persuaded why similar grounds cannot be raised under s 42, if all the requirements under the section can be fulfilled. Accordingly, we agree and affirm the findings and conclusions of the learned judge of the High Court …"

The other decision that examined the interaction between Sections 37 and 42 was the Petronas Penapisan case.

In Petronas Penapisan the principal ground of challenge against the arbitral award was that the arbitral tribunal had decided a matter that had not been pleaded or ventilated in arguments by either of the parties.

The Respondent alleged that the tribunal had erroneously increased the sum in damages awarded to the Appellant on account of inflation. The issue of inflation had not been pleaded or addressed in the course of submissions during the arbitration.

The Court of Appeal upheld the High Court's decision which varied the arbitral award on the issue of quantum and left undisturbed the tribunal's decision on liability (which went in the Appellant's favour).

The lead judgment of the Court of Appeal was delivered by Prasad Abraham JCA while Hamid Sultan JCA wrote a separate judgment in concurrence.

First, Prasad Abraham JCA held that even though the complaint in question fell within the scope of Section 37, the remedy to vary the award was only available under Section 42. In this regard, the only relief that was open to a party that institutes a Section 37 challenge was the setting aside of the arbitral

award save for the narrow exception under Section 37(3) of the Act.

His Lordship proceeded to find that the complaint amounted to "an issue of law ie whether an arbitral tribunal can impose a percentage based on inflation rates to represent the cost of work done without a plea on that point and no invitation for submissions on the same being called for from parties through their counsel."

Accordingly, it was held that Section 42 had been correctly invoked in the challenge and the arbitral award was appropriately varied under Section 42 by the High Court.

The concurring judgment of Hamid Sultan JCA was largely devoted to an analysis of the proper application of Sections 37 and 42.

First, his Lordship divided the complaints that would ordinarily fall within Sections 37 and 42 in the following compendious terms:-

"[29] An application to set aside an award under s 37 largely deals with issues relating to the award making process and has nothing to do with error of facts and/or law on the face of record unless the exception applies; such as public policy. An application under s 42 has nothing to do with the award making process but has everything to do with the award per se and error of law on the face of record which error substantially affects the rights of one or more of the parties."

According to the learned Judge, the complaint in issue was beyond the ambit of Section 42 and instead fell within "s 37(1)(a)(iv) and/or (v), etc, as the complaint is that the affected party was unable to present the case and it may follow that the award contains decisions on matters beyond the scope of submission to the arbitration or breach of natural justice, etc."

His Lordship then addressed the remedies that are available in a Section 37 challenge. The remarks were specifically premised on Sections 37(1)(a)(iv) and 37(1)(a)(v) as the provisions that relate to a challenge founded upon an arbitrator's enquiry into a matter that was beyond the scope of the submission before him.

An interesting observation made by Hamid Sultan JCA was that whenever an award is challenged on the grounds of a breach of Sections 37(1)(a)(iv) and/or (v), the applicant "must invite the court's attention to s 37(6) and cannot rely on s 42 as it will be an abuse of process, as he is relying on omission or excess of jurisdiction which is covered under s 37 and not s 42 of the AA 2005."

Lastly, in apparent contrast to the position in Perwira Bintang Holdings, his Lordship remarked that the courts should decline to decide upon a Section 42 application that is based on the same facts and grounds as a Section 37 challenge. This observation was stated as follows:-

"[32] In addition, once the applicant had chosen to rely on s 37 grounds as stated earlier that will mitigate a no-case under s 42. I do not think it will be a proper exercise of judicial power to entertain an application under s 42 when the applicant is relying on the same facts as advocated for a s 37 application. In my considered view, a trial court ought not to entertain an application under s 42 at all. I will explain this further.

[33] The threshold to satisfy s 42 requirements is very high and I will say in consequence of case laws, it is extremely high. That is to say, if a party cannot succeed under s 37, on the same facts and complaint the general jurisprudence will dictate an application under s 42 will be futile as s 37 relates to arbitral process and s 42 relates to arbitral award."

As a result, the correct approach to take where both Sections 37 and 42 are attracted has now become somewhat complex. The viewpoint that one must elect to either make an application under Section 37 or 42 where the same facts and grounds of challenge are relied upon is also not without difficulty.

A single subject of complaint against an award could give rise to differing grounds of challenge. For instance, a complaint related to the process by which the award was made

(which would ordinarily provide the basis for an application under Section 37) could also result in the formulation of a question of law that is amenable to review under Section 42. This position was accepted by Mohammad Ariff JCA in Perwira Bintang Holdings, where the complaint of the arbitrator determining a matter that was not referred to him had appropriately founded the challenge under both Sections 37 and 42.

Accordingly, the school of thought that preserves a party's ability to institute dual challenges under Sections 37 and 42 may be the more pragmatic approach and is to be preferred. It is then left to the Court to decide the question comprehensively. As observed in an earlier part of the judgment of Hamid Sultan JCA in Petronas Penapisan, Sections 37 and 42 in substance provide different bases for challenging an arbitral award. This on its own should mean that a litigant has the right to file a two-pronged challenge against an award where there is a sufficient basis to do so. If not, it would be to further curtail an already circumscribed right to impugn an arbitral award under the Act.

End Notes

1. Section 37 provides for the "setting aside" of an award in the following terms:-

"37 Application for setting aside.

(1) An award may be set aside by the High Court only if-

(a) the party making the application provides proof that-

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where-

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred-

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

(4) An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or, if a request has been made under section 35, from the date on which that request had been disposed of by the arbitral tribunal.

(5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(6) On an application under subsection (1) the High Court may, where appropriate and so requested by a party, adjourn the proceedings for such period of time as it may determine in order to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(7) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into the High Court or otherwise secured pending the determination of the application."

2. Section 42 provides for the challenge of an award on a question of law as follows:-

"42 Reference on questions of law.

(1) Any party may refer to the High Court any question of law arising out of an award.

(1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.

(2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.

(3) The High Court may order the arbitral tribunal to state the reasons for its award where the award-

(a) does not contain the arbitral tribunal's reasons; or

(b) does not set out the arbitral tribunal's reasons in sufficient detail.

(4) The High Court may, on the determination of a reference-

(a) confirm the award;

(b) vary the award;

(c) remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration; or

(d) set aside the award, in whole or in part.

(5) Where the award is varied by the High Court, the variation shall have effect as part of the arbitral tribunal's award.

(6) Where the award is remitted in whole or in part for reconsideration, the arbitral tribunal shall make a fresh award in respect of the matters remitted within ninety days of the date of the order for remission or such other period as the High Court may direct.

(7) Where the High Court makes an order under subsection (3), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from that order.

(8) On a reference under subsection (1) the High Court may-

(a) order the applicant to provide security for costs; or

(b) order that any money payable under the award shall be brought into the High Court or otherwise secured pending the determination of the reference." ■

Staying of Court Proceedings

by **Ir. Oon Chee Kheng**
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Partner, CK Oon & Co

By popular reckoning, an arbitration agreement (or one which takes the form of an arbitration clause in an agreement) is binding on the parties to that agreement. It is to be construed and is to take effect just like any other agreement; there are no special rules governing this type of agreement. The question of its enforceability, however, is different.

In the usual course of events, an innocent party to an agreement (which has matured into an enforceable contract) can claim from the other party damages or compensation in the language of s. 74 of the Contracts Act 1950, when the other party has breached the agreement. To this writer's knowledge, there is however no reported case dealing with a party who sues the other party for compensation due to the other party's breach of an arbitration agreement. Even if the party does sue, it is opined that it will have an uphill task proving and quantifying his losses. After all, an arbitration agreement confers no substantive rights to the contracting parties. It only mandates the parties to their procedural rights of referring the disputes inter-se to a procedural process called arbitration for final resolution.

There is however statutory intervention in this regard. This intervention takes the form of s. 10(1) Arbitration Act 2005 (amended 2011) ("the Act"). This provision provides as follows:

"A court before which proceedings are brought in respect of a matter which is the subject matter of an arbitration agreement shall, where the party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

1 *Section 3 Interpretation Acts 1948 and 1967.*

"Court" in the said section must necessarily refer to a court of competent jurisdiction.[1]

For the operation of the provision to be successfully invoked, the provision must be subject to detailed scrutiny. An arbitration clause per se does not operate as a bar to commencing court proceedings.[2] It is only that the other party may make an application for the suit so commenced to be stayed.

It is not however that any "proceeding" which is brought before a "court" will be stayed; the proceeding must be "in respect of a matter which is the subject matter of an arbitration agreement". This calls into question the construction of the arbitration agreement itself.

Frequently, the arbitration clause will require all disputes or differences "arising out of the contract" between the two parties to be referred to arbitration. It is therefore the case that an action in court to enforce an adjudicator's decision made under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") cannot be stayed under s. 10 of the Act.[3]

The above has also been reinforced by the observation of Ramly Ali FCJ in Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd where His Lordship has stated the following:

"The existence of a valid arbitration clause in an agreement between the parties does not automatically make it operative; the arbitration clause will only be operative when the given dispute or difference falls within the ambit of the arbitration clause."[4]

The above, and indeed the very wording of s. 10 of the Act, also demands that there must be in existence an arbitration agreement between the two parties. This is also underscored by Mohd Hishamudin JCA when His Lordship, in delivering the judgment of the Court of Appeal in Duta Wajar Sdn Bhd v Pasukhas Construction Sdn Bhd & Anor observed:

"On the facts, we are of the view that there is no arbitration agreement in writing existing between the parties. If there is no arbitration agreement in existence between the parties, then the question of a stay of proceedings pending arbitration under s 10 of the Act does not arise."[5]

The arbitration agreement of course must satisfy the writing requirement.[6] The arbitration agreement must also not be "null and void, inoperative or incapable of being performed". This phrase, which finds its origin in the New York Convention and Model Law, has been

2 *Any provision that absolutely bars any party from enforcing his substantive rights in a court of law will be void: s. 29 Contracts Act 1950.*

3 *See also s. 37(1) of CIPAA. See also Foster Wheeler E & C (Malaysia) Sdn Bhd v Arkema Thiochemicals Sdn Bhd [2015] MLJU 1952 on the relationship of arbitration and adjudication under CIPAA, at [28].*

4 *[2016] 5 MLJ 417, 438 at [69].*

5 *[2012] 5 MLJ 27, 33 at [21]. See also the decision of Judith Prakash J in Malini v Knight Capital [2015] SGHC 225.*

judicially explained by Aziah Ali J (as Her Ladyship then was) in Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd and Anor.[7]

However, to ascertain if there is an arbitration agreement between the parties can itself be problematic. Duta Wajar has provided an example. It is trite that the arbitration agreement need not be expressly provided, or that it does not need to be a visible clause in an agreement. The arbitration agreement can be incorporated into the "defined legal relationship" of the parties by reference. Section 9(5) of the Act provides as follows:

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

In commenting on this s. 9(5) of the Act, the Federal Court has in Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd stated that the section:

"…addresses the situation where the parties, instead of including an arbitration clause in their agreement, include a reference to a document containing an arbitration agreement or clause. It also confirms that an arbitration agreement may be formed in that manner provided, firstly, that the agreement in which the reference is found meets the writing requirement and secondly, that the reference is such as to make that clause part of the agreement. The document referred to need not to be signed by the parties to the contract …"[8]

However, the reverse may cause surprise. In a situation where the contract between the parties seemingly contains no arbitration agreement, a stay of the proceedings commenced in court may still be ordered under s. 10 of the Act. This occurred in KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd.[9]

In KNM Process Systems, KNM had commenced legal action against Mission Biofuels for non-payment of a certain quantity of materials supplied by KNM which were required by Mission Biofuels. The supplies and deliveries of the materials were invoiced by KNM to Mission Biofuels. The two parties had earlier entered into an EPCC Contract for the construction, completion and commissioning of a biodiesel plant. KNM's delivery of the materials were not part of the EPCC Contract but the materials were for Mission Biofuels' own purpose of further testing the plant. An earlier court action under the EPCC Contract had been stayed under s. 10 of the Act. Despite there being no arbitration clause in the invoices or delivery notes, Mission Biofuels had successfully argued that the action be stayed under s. 10 of the Act. Mohamad Ariff Md Yusof J (as His Lordship then was), applied the principle in the then House of Lords' decision in Fiona Trust & Holding Corporation and Ors v Privalov and Ors.[10]

Another requirement is that the defendant in an action commenced in court must make the application for staying the court action before "taking any other steps in the proceedings". Mary Lim J (as Her Ladyship then was) refused the stay application in Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd[11] as the defendant had sought and was granted an extension of time to file a defence and Her Ladyship took the position that the act of seeking an extension of time to file a defence was a step taken in the court proceedings. The same learned judge had also in another High Court decision refused a stay application as the defendant in that case had issued a notice under O 24 r 10 of the Rules of Court 2012 which Her Ladyship held to have constituted a "step in the proceedings."[12]

6 *Section 9(3) of the Act.*

7 *[2008] 8 MLJ 873, 880 at [10] – [11].*

8 *[2013] 5 MLJ 625, 638 at [26]. See also the Court of Appeal's judgment in TNB Fuel Services Sdn Bhd v China National Coal Group Corp [2013] 4 MLJ 857, 867 at [18] – [19].*

9 *[2013] 1 CLJ 993.*

10 *[2007] 4 All ER 951.*

11 *[2009] MLJU 286.*

It has been repeatedly stressed that the use of the word "shall" deprives the Court of any discretion and that if the requirements of s. 10 are satisfied, it is mandatory for the Court to grant a stay of the court proceedings. Comparison and contrast are often made to the repealed s. 6 Arbitration Act 1952 which correspondingly used the non-mandatory word "may". It has also been argued before that the Court would still retain its inherent jurisdiction to grant or refuse to grant a stay. [1] It is a moot point if this type of argument can survive the provision in s. 8 of the Act.

One last critical point on s. 10 of the Act may be raised. When the application made under s. 10 is allowed, the Court should only just grant the stay prayed for. Section 10 of the Act however has gone further to provide that the Court "… shall … refer the parties to arbitration …". Is it the residual action or the duty of the Court after having granted the stay of the court proceedings to supervise if the parties proceed to arbitration? Does the Court still have jurisdiction on the matter after having granted a stay, especially when by applying for a stay, the defendant is effectively stating its position that the Court has no jurisdiction in the dispute or difference which has been stayed? Further, is it mandatory for the defendant after having obtained a stay of the court proceedings to invoke the arbitration clause and initiate arbitral proceedings by serving a notice of arbitration? Does the defendant in the court proceedings then become a claimant in the arbitration proceedings? For that matter, does that mean that after having granted a stay, arbitration must proceed? Or do arbitration proceedings automatically set into motion and no further action by either party is required to invoke the arbitration agreement? This writer and his colleague had the unenviable experience of continually attending Court for case managements of a legal suit after having obtained a stay of the suit just to inform the Senior Assistant Registrar of the progress of the arbitration proceedings!

It is thus respectfully submitted that the provision to "refer the parties to arbitration" in s. 10 can be reviewed when the Act next comes up for review or amendment. ■

Does the Court still have jurisdiction on the matter after having granted a stay, especially when by applying for a stay, the defendant is effectively stating its position that the Court has no jurisdiction in the dispute or difference which has been stayed?

12 CLLS Power System Sdn Bhd v Sara Timur Sdn Bhd [2015] 11 MLJ 485. The learned judge also stated that the requirement of not taking steps in the proceedings before stay could be granted was "to preserve the defendant's position of non-submission to jurisdiction for the purpose of resolving the dispute or claim in question."

The applicability of IBA Guidelines on Conflicts of Interest in International Arbitration in the context of English Law

by Kalashini Sandrasegaran
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A recent English High Court decision in W Ltd v M SDN BHD (2016 EWHC 422 Comm) has dismissed a challenge to set aside two final awards pursuant to section 68 of the Arbitration Act 1996 ("AA") on the grounds of apparent bias by favouring the common law approach set out in Porter v Magill [2002] 2 AC 357 over the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines").

Facts of the Case

Mr David Haigh QC was appointed as sole arbitrator in relation to a dispute between the parties concerning a project in Iraq. The Claimant is a corporation incorporated in the British Virgin Islands. The Defendant is a corporation incorporated in Malaysia.

Mr Haigh QC is with Burnet Duckworth & Palmer LLP ("BDP"). He has been admitted to the Alberta Bar for 50 years and was appointed Queen's Counsel in 1984. Although Mr. Haigh QC is a partner in BDP, he had informed the Court that "[o]ver the past half dozen years or so, I have sat almost exclusively as an international arbitrator". He further informed the Court that he "[w]ould describe myself as essentially a sole practitioner carrying on my international practice with support systems in the way of secretarial and administrative assistance…" provided by BDP. At the time of Mr Haigh QC's appointment as arbitrator in the present matter, on or about May 2012, a company ("Q") was a client of BDP. M was a subsidiary of another company, P. After an announcement in June 2012, P acquired Q later in the year. Following the acquisition, BDP continued to provide legal services to Q, the services of which are to be inferred that BDP has earned substantial remuneration from Q for the work.

Mr Haigh QC made a statement of independence a month or so before the announcement of the acquisition of Q by P. Mr Haigh QC did conduct a conflict check and made some immaterial disclosures in the course of the proceedings. The conflict check system did not however alert him to the fact that the firm had Q as a client.

** Mohanadass Partnership represented M in the Arbitration between M and W.*

As the situation fell under the “Non-Waivable” category, the arbitrator cannot take up or proceed with the appointment. Neither could the parties agree to waive the said conflict.

Mr Haigh QC presided over the proceedings and made two awards, one dated 16 October 2014 and one dated 26 March 2015.

It was only after the final award on costs was rendered that the potential conflict of interest issue was discovered by W. Mr Haigh QC promptly responded to W's queries and stated that he had no knowledge of either BDP's work for Q or that P had acquired Q. He further stated he would have disclosed the potential conflict of interest to the parties had he known of the same earlier. He apologised for his lack of knowledge.

W applies to set aside the Awards

W then challenged the two awards pursuant to Section 68(2) AA by asserting that there was serious irregularity and apparent bias based on the circumstances of the case that fell within paragraph 1.4 of the Non-Waivable Red List of the IBA Guidelines. The IBA Guidelines suggest that justifiable doubts of the arbitrator's impartiality or independence "necessarily exist" if "the arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom". As the situation fell under the "Non-Waivable" category, the arbitrator cannot take up or proceed with the appointment. Neither could the parties agree to waive the said conflict.

W took the position, inter alia, given the nature of the conflict of interest and the publicity surrounding the acquisition of Q, the fair minded and informed observer would consider there to be a real possibility of bias, notwithstanding Mr Haigh QC's explanations as to his lack of knowledge. M, on the other hand, submitted that there could be no real possibility of apparent bias if the fair minded and informed observer would accept the arbitrator's statement as to his lack of knowledge of the alleged conflict.

W then challenged the two awards pursuant to Section 68(2) AA by asserting that there was serious irregularity and apparent bias based on the circumstances of the case that fell within paragraph 1.4 of the Non-Waivable Red List of the IBA Guidelines.

On the IBA Guidelines, M argued that that the IBA Guidelines are mere guidelines and do not override any applicable national law.

Decision of the High Court

Mr. Justice Knowles adopted the common law test and concluded "without hesitation" that "the fair minded and informed observer would say this was an arbitrator who did not know rather than this was an arbitrator whose credibility is to be doubted" [23].

In line with decided cases, Mr. Justice Knowles held that the Guidelines do not bind the Court, but they can be of assistance. He proceeded to examine the Guidelines in detail. In this regard, although Mr. Justice Knowles recognised the IBA Guidelines' distinguished contribution in the field of international arbitration, he commented that a case-specific approach should be adopted in the present situation instead of a rigid application of the said Guidelines.

In line with decided cases, Mr. Justice Knowles held that the Guidelines do not bind the Court, but they can be of assistance.

In his decision, Mr. Justice Knowles went one step further to identify two weaknesses in the IBA Guidelines:

[34] …First, in treating compendiously (a) the arbitrator and his or her firm, and (b) a party and any affiliate of the party, in the context of the provision of regular advice from which significant financial income is derived. Second, in this treatment occurring without reference to the question whether the particular facts could realistically have any effect on impartiality or independence (including where the facts were not known to the arbitrator).

He was of the view that the IBA Guidelines were not 'yet correct'.

Conclusion

This decision has far reaching ramifications given that the IBA Guidelines are widely accepted as the authority governing situations such as the circumstance in this case. With London usually being adopted as a neutral arbitration seat in cross-border agreements, this decision has, to a certain extent, diluted the force of the IBA Guidelines in setting a uniform approach in dealing with conflict of interest situations in international arbitrations.

Mr. Justice Knowles had refused W's application for permission to appeal on the grounds that the proper forum for the determination of any issue regarding the IBA Guidelines was the International Bar Association, and not the Court of Appeal. It remains to be seen if there will be any future revisions to the Guidelines on account of this decision. ■

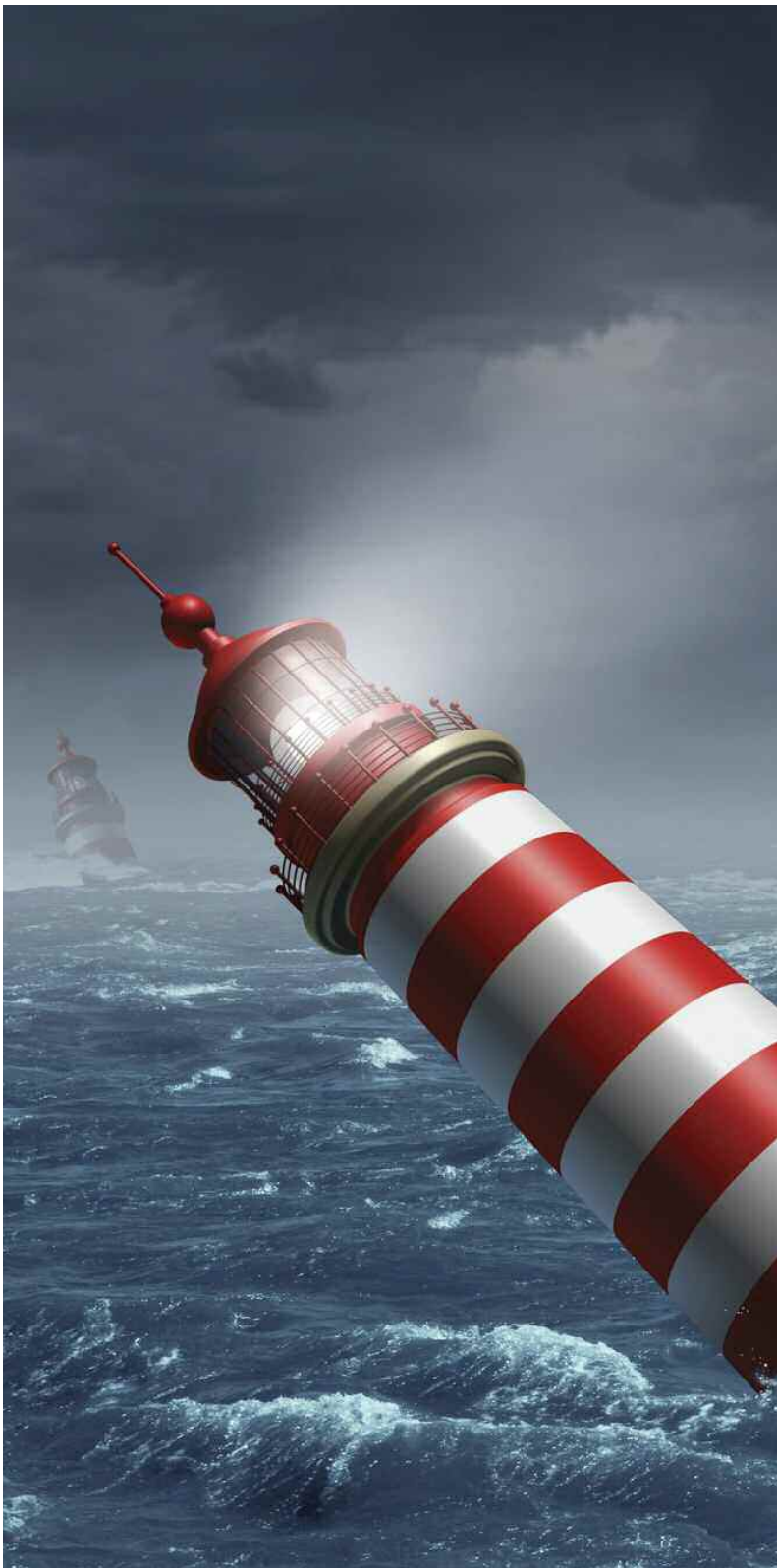
Trouble at Sea
Is The End in Sight?

by Trishelea Sandosam
LL.B (Hons), LL.M, Barrister-at-Law (Lincoln's Inn)
Senior Associate, Skrine

In arguably the most anticipated international arbitration award this year, the tribunal constituted to hear the South China Sea dispute involving the Republic of Philippines and the People's Republic of China ("Tribunal"), handed down its final award on 12 July 2016 ("Award"). The 5-member Tribunal unanimously held, amongst others, that China had no legal basis for its maritime claims in the South China Sea based on historic rights. The significance of this decision lies in its elucidation of rights under the United Nations Convention on the Law of the Sea ("UNCLOS") and because it comes at a time when there is much unresolved tension between countries like Malaysia and Vietnam on entitlements in the South China Sea. The South China Sea is prime "property" given its abundance of natural resources and importance in commercial shipping.

The Genesis

The arbitration was commenced by the Philippines in 2013. China, despite having ratified UNCLOS and the compulsory dispute mechanism resolution provided therein, refused to accept or participate in the arbitration. Nevertheless, the Tribunal was constituted pursuant to Annex VII of UNCLOS and the Permanent Court of Arbitration based in The Hague, Netherlands, was the registry in the proceedings.



The Tribunal proceeded to hear the Philippines' claims, empowered by Article 9, Annex VII of UNCLOS which allows a tribunal to continue proceedings in the absence of a party. However, in such case, the Tribunal "must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law".

The Chinese government, while never making any submissions before the Tribunal, expressed its views on the arbitration by issuing several public statements, diplomatic notes and most importantly, a position paper dated 7 December 2014 ("Position Paper"), where it challenged the Tribunal's jurisdiction to determine the Philippines' claim.

Did The Tribunal Have Jurisdiction?

In view of China's objection to jurisdiction and mindful of its obligation under Article 9, Annex VII, the Tribunal held a hearing on jurisdiction in 2015 where China's stance on jurisdiction was considered.

The Tribunal issued its award on jurisdiction on 29 October 2015 ("Jurisdiction Award"). In the Jurisdiction Award, the Tribunal found that it had jurisdiction to hear and determine the dispute before it, but deferred its decision on jurisdiction pertaining to several other claims by the Philippines until completion of the merits hearing.

The Tribunal ultimately decided in its Award that it had jurisdiction to hear all claims by the Philippines, except those concerning military activities. This is because China had made a declaration under Article 298 of UNCLOS in 2006 ("2006 Declaration") to exclude such categories of disputes from compulsory dispute settlement under UNCLOS.

It is important to note that despite China's contentions, this arbitration did not involve questions of sovereignty over land territory or delimitation of sea boundary. The Tribunal does not have jurisdiction to consider these issues as the former is not governed by UNCLOS and

the latter was also excluded by China in its 2006 Declaration.

The Award

#1 - China's Historic Claim Dashed

The Tribunal found that there was no basis for China's claim to historic rights based on its so-called 'nine-dash line'. The nine-dash line, as the name suggests, can simply be described as nine dashes drawn over the map of the South China Sea enclosing an area inside of which China claims maritime rights.

The Tribunal came to this finding after carefully considering the history of UNCLOS and deliberations on the issue of pre-existing rights to resources which took place during the drafting of the convention. The Tribunal found that UNCLOS provided for a detailed allocation of rights and maritime zones which superseded any historic rights alleged by China. The Tribunal also looked at historical records to ascertain the legitimacy of China's position that it enjoyed such historical rights prior to UNCLOS. The Tribunal held that while there was evidence to show that Chinese navigators and fishermen had use of the South China Sea, this was an exercise of freedom on the high seas rather than a "right"; and that there was no evidence before it to show that China had ever exercised exclusive control and exploitation of resources within the South China Sea.

#2 - Islands In The Sea? That's Not What They Are

The second question which the Tribunal was required to determine was the status of several features in the Spratley Islands and Scarborough Shoal which are claimed by China, and the maritime zones arising therefrom. The importance of determining the status of these features is that under UNCLOS, different features generate different maritime entitlements.

It is important to note that despite China's contentions, this arbitration did not involve questions of sovereignty over land territory or delimitation of sea boundary.

The Tribunal considered the status of reefs claimed by China and found that only 6 reefs were not low tide elevations, and therefore capable of generating a 12 nautical mile entitlement. In considering whether the reefs were low tide elevations or otherwise, the Tribunal, aware of the fact that several reefs had been modified as a result of China's activities, looked at the features in their natural condition as prescribed by Article 13 of UNCLOS and made reference to archival materials and historical hydrographic surveys to determine their natural condition.

The next consideration was whether these high tide features were islands or rocks. The latter does not generate a 200 nautical mile exclusive economic zone ("EEZ") or continental shelf under UNCLOS. An island is defined in UNCLOS as "a naturally formed area of land, surrounded by water, which is

above water at high tide". A rock on the other hand "cannot sustain human habitation or economic life of its own". The Tribunal held that none of the features were "islands" but were "rocks". The Tribunal also held that even if the Spratley Islands were viewed collectively as a unit, they could not generate maritime zones.

As all the features claimed by China could not generate an EEZ, the Tribunal was able to declare that certain sea areas were within the EEZ of the Philippines. This declaration was not equivalent to a delimitation of sea boundary as China did not have any overlapping rights in those areas.

Unlawful Conduct

The Tribunal was also asked to consider the lawfulness of several activities carried out by China in the South China Sea. The Tribunal found that China's activities were unlawful and contrary to the Philippines' sovereign rights in those areas. The findings are as follows:-

1. Following from the finding that certain areas were within the EEZ of the Philippines, China had unlawfully interfered with the Philippines' petroleum exploration at Reed Bank, prohibited fishing by the Philippines' vessels within the EEZ of the Philippines, failed to prevent Chinese fishermen from carrying out fishing activities within the EEZ of the Philippines, and constructed installations and artificial islands at Mischief Reef without the Philippines' authorisation.

2. China had violated its duty to respect the traditional fishing rights of fishermen from the Philippines by preventing these fishermen access to the Scarborough Shoal after May 2012.

3. China had breached its obligation to preserve and protect the marine environment as embodied in Articles 192 and 194 of UNCLOS by carrying out reclamation, construction of artificial islands, and by failing to exercise due diligence to stop the conduct of Chinese fishermen who carried out harvesting of endangered sea turtles, coral and clam on a wide scale in the South China Sea using methods that inflicted damage on the coral reef environment.

4. China had breached its obligations relating to maritime safety under UNCLOS and the International Regulations for Preventing Collisions at Sea, 1972 when its law enforcement vessels prevented the Philippines access to the Scarborough Shoal through risky and dangerous means in April and May 2012.

The Tribunal found that UNCLOS provided for a detailed allocation of rights and maritime zones which superseded any historic rights alleged by China.

The Tribunal found that China's activities were unlawful and contrary to the Philippines' sovereign rights in those areas.

#3 - Aggravating Behaviour

The Tribunal held that China had engaged in conduct during the currency of the arbitration which both aggravated and extended the dispute between parties, in breach of its international law obligations. Specifically, China had (a) built a large artificial island on Mischief Reef (a low-tide elevation in the EEZ of the Philippines) (b) inflicted permanent, irreparable harm to the coral reef habitat of Mischief Reef (c) engaged in large-scale island-building and construction and (d) permanently destroyed evidence of the natural condition of several features.

#4 – Declaration On Future Conduct

The Philippines had requested for a declaration that in future, China is to respect the rights and freedoms of the Philippines, comply with its duties under UNCLOS, and exercise its rights and freedoms with due regard to the rights and freedoms of the Philippines under UNCLOS.

In determining whether to grant this declaration, the Tribunal noted the international law principle of 'pacta sunt servanda' as embodied in the Vienna Convention, that treaties are binding on parties to it and must be performed in good faith. The Tribunal further considered that both parties had in the past accepted that the provisions of UNCLOS would define and regulate their conduct and that the present dispute before it arose due to fundamental differences in understanding between both parties' rights and not any intention on the part of either party to infringe the rights of the other.

Given the international law principle that bad faith is not presumed, coupled with Article 11, Annex VII and Article 296 of UNCLOS which provides for compliance by parties to an award, the Tribunal was of the view that the declaration requested by the Philippines was unnecessary as it was "beyond dispute" that parties were obliged to comply with the provisions of UNCLOS and the Award in good faith.

Active Fact-Finding By The Tribunal

Apart from the significance of this case from a maritime perspective, the Tribunal's attitude to fact-finding has attracted attention and is discussed in an article[1] which will be of interest to arbitration practitioners generally. It was noted by the author that the Tribunal took a very active approach to fact-finding by appointing several experts and independently obtaining documents such as historic survey records, which is not common and was possibly attributable to the Tribunal's mindfulness of China's non-participation in the arbitration and its obligations under Article 9 of Annex VII; but given the interest surrounding the Award, similar active fact-finding may be exercised more commonly in future.

1 *Harry Ormsby, "Judicial fact-finding and the South China Sea arbitration", Kluwer Arbitration Blog <http://kluwerarbitrationblog.com/2016/09/06/judicial-fact-finding-and-the-south-china-sea-arbitration/>.*

The Ink Has Dried, What Now?

We currently have a well-reasoned, close to 500-page Award in the Philippines' favour. The landmark decision of the Tribunal is final, binding and must be complied with by the Philippines and China. This naturally begs the question – how does the Philippines enforce the Award against China?

Unfortunately, UNCLOS does not have a mechanism for enforcement. The Chinese government issued a statement on the same day as the award stating that it "solemnly declares that the award is null and void and has no binding force. China neither accepts nor recognizes it."

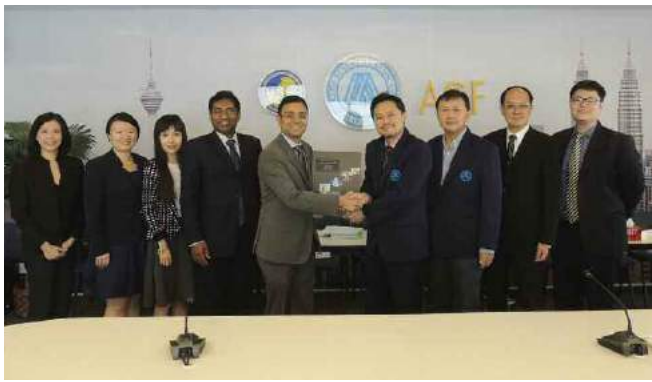
While this paints a very grim picture, recently in a visit to China, the President of the Philippines, Rodrigo Duterte and China's leader, Xi Jinping, agreed to resume direct talks on the South China Sea dispute. At the end of October 2016, international media reported that Philippine vessels were allowed to access and fish in the Scarborough Shoal for the first time in years, although this has been categorically denied by China.

What happens next is anyone's guess. The Tribunal has effectively laid down the law. It is left to be seen if China will comply. The lengths to which neighbouring countries in the region will go to assert and protect their rights under UNCLOS against China and against each other is difficult to predict. Perhaps there will be more thrilling awards to read. Perhaps there will be more conciliatory bilateral discussions. We can only wait with bated breath. ■

What happens next is anyone's guess. The Tribunal has effectively laid down the law. It is left to be seen if China will comply.

Courtesy Visits to the Offices of MBAM, CIDB, and CIOB

January 2016



Several Council Members of the MIArb visited the Master Builders Association Malaysia (MBAM) on 18 January 2016, the Construction Industry Development Board (CIDB) on 6 May 2016, and the Chartered Institute of Building Malaysia (CIOB) on 25 May 2016. The visits formed part of the MIArb's continued efforts in fostering good relations, with a view to creating greater exposure of the work carried out by the MIArb and exploring potential future collaborations. The MIArb is hopeful that more such visits will occur with regularity in the coming year.

Joint Courses on Alternative Dispute Resolution held jointly with IEM, PAM, and RISM

March 2016

The MIArb, in collaboration with Pertubuhan Akitek Malaysia, The Royal Institution of Surveyors, Malaysia and The Institution of Engineers, Malaysia (DRP Subcommittee) organised the Joint Courses on Alternative Dispute Resolution for Practitioners. The Course was a two-day seminar on arbitration, adjudication, and mediation and featured a discussion on common issues in construction contract management.

The MIArb managed the session on "Arbitration: Practical Aspects" and delivered three lectures titled "Introduction to Arbitration. Why Arbitrate?", "The Hearing Process, Procedure and Practice. Managing the Expert Witness", and "Enforcing the Arbitral Award". Speaking for the MIArb were the MIArb's President Mr Kevin Prakash, former Council Member Mr Joshua Chong, and Council Member Ms Sharon Chong.

Afternoon Talk on

"Finality to Awards in International Arbitration seated in Malaysia – Arbitrators Beware!"

April 2016

Held jointly with the KLRCA on 19 April 2016, the talk was well-received with an attendance of 40 participants who heard the MIArb's Immediate Past President, Mr Lam Ko Luen and former Council Member, Mr Ooi Huey Min, speak at length on section 37 of the Malaysian Arbitration Act 2005 and the developments of case law with regard to this particular section, which prompted spirited discourse and a host of thoughtful questions from a receptive audience.

The MIArb 3rd Annual Law Review

May 2016

The Annual Law Review is a favourite fixture on the MIArb calendar, and this year proved to be no exception. The Review was extended to a half day event, and featured leading practitioners who led in-depth and insightful discussions on recent cases in arbitration and adjudication in 2015.

The MIArb's President, Mr Kevin Prakash opened the event and the Honourable Dato' Mary Lim JCA delivered the keynote address. There were three distinct sessions for this Review. The discussion on arbitration was led by Mr Ooi Huey Min and Mr Thayananthan Baskaran and moderated by the MIArb's Immediate Past President, Mr Lam Ko Luen. The adjudication trio comprised of the MIArb's Vice President, Ms Hor Shirley, Mr Kamraj Nayagam and Mr Anilraj Verdamanickam, with Mr Ivan Loo moderating.

An enthusiastic discussion on the Future of Arbitration in Malaysia followed suit, ably conducted by Mr Mohanadass Kanagasabai, Mr Lim Chee Wee and Mr Nick White. A presentation on the newly launched International Malaysian Society of Maritime Law by its president, Ms Sitpah Selvaratnam was also made, following which the participants adjourned for cocktails and canapes; a most convivial end to another successful Review.

RAIF Conference

Sydney, Australia
November 2016

This year's annual Regional Arbitral Institutes Forum (RAIF) Conference was hosted by the Resolution Institute in Sydney, Australia on 25 November 2016. The RAIF Conference: Building the future of arbitration through innovation was held in conjunction with Sydney Arbitration Week 2016. The MIArb is one of the founding members of RAIF, a collaboration established in 2007 between the national arbitral institutes in the region. Aside from the MIArb, the other members of RAIF are the Resolution Institute of Australia and New Zealand, the Arbitration Association of Brunei Darussalam (AABD), the Hong Kong Institute of Arbitrators (HKIArb), the Indonesian Arbitrators Institute (IArbI), the Singapore Institute of Arbitrators (SIArb), and the Philippine Institute of Arbitrators (PIArb). RAIF has several objectives, all with the common thread of promoting the resolution of disputes by way of arbitration and other forms of alternative dispute resolution. The main objectives of RAIF are to develop a common arbitral culture, to enhance consistency in regional arbitration practice and to promote understanding and foster fellowship between the member institutes of RAIF. The key event of RAIF is its annual conference that its member institutes take turns to host.

The theme for RAIF 2016 was Building the future of arbitration through innovation. The MIArb's Deputy President, Mr Sudharsanan Thillainathan and Council Member, Ms Sharon Chong, attended on behalf of MIArb. The conference started off with welcome speeches by Donna Ross, Chair of the Conference Organising Committee, Gadigall people of the Eora nation and Mark Beech, Deputy Chair of the Resolution Institute. The opening address was delivered by the Supreme Court Justice of New South Wales Robert McDougall. In keeping with a tradition that goes to the very heart of RAIF, the presidents or representatives of the RAIF member institutes presented on the developments in arbitration in their respective jurisdictions during the session on 'Promotion, growth and practice of arbitration in the region'. Sudhar spoke about the Malaysian experience on 'Appeals on Questions of Law' in this session. This was followed by three round table discussions on 'Thinking outside the box – innovation in arbitration', a very interesting session 'Arbitration – the untapped potential in family law' and 'Controlling costs in arbitration – from beginning to end'. There were also sessions on 'Innovation in arbitration – the Singapore experience' and 'Navigating the minefields of corporate disputes – to litigate or arbitrate', presented by Sharon.

The MIArb thanks the Resolution Institute of Australia for their very warm welcome and the hospitality extended to the delegates. It was indeed a pleasure meeting with the representatives from the other RAIF member countries, listening to the latest developments in each of these member countries in their Country Reports and exchanging views and ideas with them on arbitration.

By: Sudharsanan Thillainathan and Sharon Chong

New Members/Upgrades for Session December 2015 to November 2016

The Malaysian Institute of Arbitrators extends a warm welcome to our new Fellows, Members, Associates and Affiliates.

Upgraded from Member to Fellow	M/No.	Date Approved
1.Ms Chu Ai Li	F/118	21-4-2016
2.Ms Victoria Loi Tien Fen	F/119	27-7-2016

Member	M/No.	Date Approved
1.Ms Yap Pei Ying	M/446	15-10-2015
2.Ms Ayesha Zia	M/447	15-10-2015
3.Dr Chan Yuan Eng	M/448	17-12-2015
4.Ms Patricia Chung Wei Leng	M/453	21-4-2016
5.Mr Nicholas William White	M/457	26-5-2016
6.Ms Tay Hwee Hoon, Janice	M/459	27-7-2016
7.Mr Pathmanathan Ramasamy	M/460	27-7-2016
8.Ms Chew Swee Wei	M/461	27-7-2016
9.Mr Iain Cameron Potter	M/462	27-7-2016
10.Mr Vineet Shrivastava	M/464	25-8-2016
11.Dr Chan Chee Ching	M/465	27-10-2016

Upgraded from Associate to Member	M/No.	Date Approved
1.Ms Nur Hidayah binti A Suhaimi	M/449	21-4-2016
2.Ms Poh Hwee Yin	M/450	21-4-2016
3.Mr Kim Tien Yuen	M/451	21-4-2016
4.Mr Chan Nam Onn	M/452	21-4-2016
5.Ms Nahzatul Ain binti Mohd Khalid	M/454	21-4-2016
6.Mr Neo Chi Siong	M/455	21-4-2016
7.Mr Lee Chee Leong, James	M/456	21-4-2016
8.Mr Gregory Vinesh Das	M/458	26-5-2016
9.Mr Verghese Aaron Mathews	M/463	25-8-2016

Associate	M/No.	Date Approved
1.Ms Michelle Ng Po Yi	A/231	18-2-2016
2.Mr Kwan Wing Sin	A/232	18-2-2016
3.Ms Ong Siew Mun, Kelly	A/236	21-4-2016
4.Ms Tie Ling Lin, Avelyn	A/237	21-4-2016
5.Ms Khoo Sin Lay	A/238	27-7-2016
6.Dato' Sri Sri Padmaraja a/l Varatharajah	A/239	27-7-2016
7.Ms Dawn Wong Keng Jade	A/240	27-7-2016
8.Ms Norhafizah Ahmad Powzi	A/242	25-8-2016
9.Mr Ong Hing Huat	A/243	25-8-2016
10.Ms Wong Jian Bei	A/244	27-10-2016

Upgraded from Affiliate to Associate	M/No.	Date Approved
1.Ms Koveladavei a/p Perumal	A/241	27-7-2016

Upcoming Events

23 February 2017
A talk on "Keeping Financial Experts Objective in Arbitral Proceedings"
Speaker: *Mr Iain Cameron Potter*

February 2017
Diploma in International Arbitration
(in collaboration with Brickfields Asia College)

February 2017
The MIArb Membership Upgrade Course

March 2017
Workshops on Alternative Dispute Resolution

19 April 2017
A talk by Mr Ben Olbourne

18 May 2017
The MIArb Annual Review and Conference

June 2017
The MIArb Annual General Meeting

For more information about the events on this page and other upcoming events organised by or participated in by the MIArb, visit our website: www.miarb.com.

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