MIArb NEWSLETTER

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Note From President

Dear Members,

Warm greetings to each and every one of you.

I hope that you enjoy reading this issue of the Institute's Newsletter, which covers an exciting and impactful 2018, notable highlights of which were the inaugural National Arbitration Conference 2018, the Conference on "Avoiding Disputes – Lessons from the Past" in collaboration with the Construction Industry Development Board (CIDB), the inaugural Continuing Professional Development (CPD) Seminar Series in collaboration with the Asian International Arbitration Centre (AIAC) featuring the Honourable Mr Justice Nantha Balan a/l E.S. Moorthy of the Kuala Lumpur High Court, the second installment of the Jonathan Yoon Debate Series, and the Institute's 5th Annual Law Review & Conference. Following on from an impressive 2018, the Institute ushered in 2019 with a New Year Party which was graced by members, both past and present, of the Malaysian Judiciary, including YA Dato' Mary Lim, YA Dato' Lee Swee Seng, YA Datuk Vazeer Alam, Datuk Dr Prasad Abraham, Dato' Varghese George Varughese, and Datuk John Louis O'Hara, as well as the Director (Acting) of the AIAC, Mr Vinayak Pradhan.

In this issue of the Newsletter, we feature an illuminating Q&A session conducted in November 2018 between our Editor, Ms. Dawn Wong, and the eminent Dato' Mahadev Shankar, retired Judge of the Court of Appeal. This interview captures Dato' Shankar's recollections of the beginnings of arbitration in Malaysia as well as his thoughts on the recent swathe of amendments to the Arbitration Act 2005. A debt of gratitude is due to Dato' Shankar for being so generous with his time and knowledge. Special thanks also goes out to our regular contributors and advertisers for their unwavering support of and commitment to the Institute.

It has been an ambitious year for the Institute. The Council has committed itself to: (i) building upon the initiatives undertaken in 2017/2018 to raise and enhance the status and value of the MIArb membership, (ii) strengthening the Institute's financial position, (iii) addressing the problem of delinquent members, and (iv) reviewing Rules of the Institute.

I am happy to report that the Institute has made tremendous strides in achieving its goals of providing the following:-

- a recognised and affordable gateway into the ADR profession.
- greater career opportunities, through qualifications that are credible and recognisable.
- effective and inexpensive opportunities for learning and education.
- regular social and networking opportunities.

Further, the Council has worked tirelessly to enhance the standing and profile of the Institute within Malaysia and internationally. Within Malaysia, the Council has sought to achieve this goal through partnerships and regular collaborations with the Malaysian Judiciary, the AIAC, the CIDB, industry bodies such as the Master Builders Association Malaysia (MBAM) and professional bodies such as the Institute of Engineers Malaysia (IEM), Persatuan Akitek Malaysia (PAM), and the Royal Institute of Surveyors Malaysia (RISM), as well as institutions of higher learning such as Universiti Malaya (UM) and Brickfields Asia College (BAC). Whereas internationally, the Council has sought to achieve this goal through regional groupings and collaborations such as the Regional Arbitral Institutes Forum (RAIF), in which the Institute plays a key and leading role.

I am happy to report that interest in the Institute and its activities has remained buoyant both from within and outside of Malaysia. In 2018, the Institute admitted a total of 14 Fellows, 30 Members, and 7 Associates.

I would like to extend my deepest gratitude to my fellow Council Members and Puan Raja Junaidah from the Secretariat for their efforts in making the 2018/2019 term a successful one for the Institute, and to all our members for their continued support. I also wish to acknowledge and thank my predecessors on the Council for laying sturdy foundations for the growth and development of the Institute, which is now in its 28th year. I am confident that the Institute will continue to grow from strength to strength in the years to come. In this respect, I extend the incoming Council the very best of wishes.

In closing and as I come to the end of my term as President, I wish to state that it has been a great pleasure and privilege for me to serve the Institute, in different capacities, over a total of 5 years and to have helmed the Institute over the past two 2 years.

Happy reading!

With all good wishes,

Sudhar Thillainathan
President
(2017 – 2019)

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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 in 2018

8 February 2018, AIAC
National Arbitration Conference 2018: Shaping the Future of Arbitration in Malaysia

5 April 2018, Vistana Hotel, Penang
Avoiding Disputes – Lessons from the Past

7 June 2018, AIAC
CPD Seminar Series: The Advantages of Alternative Dispute Resolution in the Resolution of Disputes

28 June 2018, AIAC
The Jonathan Yoon Debate Series

23 August 2018, AIAC
The Institute's 5th Annual Law Review & Conference

29 November 2018, Shangri-La Hotel, Jakarta
Regional Arbitral Institutes Forum (RAIF) Conference

6-7 December 2018, Shangri-La Rasa Sayang Resort & Spa, Penang
International Arbitration Conference 2018: Evolving Asia: New Frontiers in Dispute Resolution

2018-2019 MIArb Council

Q&A with Dato' Mahadev Shankar

For the second instalment of this exciting new series, it was an honour and a privilege for the Institute to interview Dato' Mahadev Shankar, retired Judge of the Court of Appeal, recipient of The Malaysian Bar Lifetime Achievement Award in 2014, and Honourary Fellow of the Institute.

You were called to the Bar of England and Wales in 1955 and to the Malayan Bar in 1956. Tell us about your early years at the Bar, during which time you were actively involved in general litigation and even handled criminal matters.

My time in active litigation only started after my Call, when I moved from Messrs Shearn Delamore & Co in Kuala Lumpur to Messrs Shearn Delamore & Co in Seremban. My master, Robert Humphrey Veere Ringtool, was a leading litigator, famous for his stammer. He was my mentor and taught me much of what I learned about advocacy and how to handle clients. I must give him total credit for grooming me to become the person I am.

At the time, 90% of the litigation were runners. Insurance companies felt that if we secured an acquittal in the criminal court, they would be immunised against damages in the civil court. There were of course other cases on trusts, wills,

property disputes, nuisance, and negligence, but these were few and far between. This was the situation from 1956 up to 1959, when I moved from Seremban to Kuala Lumpur.

Then, the quality and calibre of the work increased. I handled financial transactions, banking disputes, commercial cases, and was counsel to the Malayan Agricultural Producers Association. Much of the work I handled was against the unions and the All Malayan Estates Staff Union (AMESU).

I was also involved then in the Whitley Council, during which time we determined the salary scale for all postal workers throughout Malaysia.

The most critical matter I ever handled was in 1967 as a member of the Royal Commission, during which time I dealt with the reform of marriage and divorce laws in Malaysia. It was a historical turnabout because polygamy was outlawed and monogamy became the order of the day. The report submitted attracted a lot of attention and raised the hopes of the Malay female community – but our remit did not stretch quite that far, and we only dealt with non-Muslims.

Another notable matter I handled was in 1959, when I moved a Private Members Bill to help Malaysian women who had married husbands with foreign domicile. The old rule was that if a husband's domicile was not Malaysian, the local courts had no jurisdiction and divorce applications were refused. I had other cases where Malaysian women had married British soldiers. They couldn't afford to go to England, so they were in No Man's Land.

You were a part of the original committee to set up the KLRCA (now known as the AIAC) under the auspices of the Asian African Legal Consultative Organisation ("AALCO"). What was the state of ADR in Malaysia then as compared to the present day?

The original Arbitration Act passed here was in 1950 and there were some amendments made to that Act in 1952. The model for the Arbitration Act 1950 was the English statute. Everything was done in English. If the litigant in question did not speak English, we called upon an interpreter, including Mr Koh Pooi Kee, who happened to be the father of my great friend, Philip Koh. There were a miniscule number of arbitrations as such at the time. Mr Koh Pooi Kee, who was the senior Chinese interpreter in the High Court of Kuala Lumpur, gave me a masterclass on how to prepare for a trial by mastering all the factual features of the case in question. I would also like to acknowledge here my debt of gratitude to the court staff in the High Courts of the country, all of whom knew my father who was the private secretary to every Chief Justice from 1931 until 1958.

The 1980s saw a significant shift both in the public and the private sectors on how legal disputes should be resolved. In 1983, the government decided to abolish all appeals to the Privy Council. The immediate consequence was that the court of final decision was in Malaysia. What happened next was a sense of loss on the part of litigants that there was no resort to a final court in London. A parallel development was the increasing intrusion of the government into the private sector. Tun Mahathir came in as Prime Minister in 1981 and focused on the development of our heavy industries and our infrastructure, as it was hoped that Malaysia would become industrially self-sufficient. This thrust from the government was met with some resistance and there were serious tensions between the executive and the judiciary which culminated in the landmark case of Berthelson v Minister of Home Affairs where Eusoffe Abdoolcader delivered a scathing judgment criticising the government for departing from the requirements of the rule of law and natural justice. The other problem voiced by Tun Mahathir was that the courts were becoming too intrusive and that executive decisions should be implemented without question. What we saw there was Article 121 of the Constitution being amended to provide that judicial power should no longer be vested in the judiciary, and that the courts should merely act as implementers of legislation. This was very quickly followed by the move to remove Tun Salleh Abas. The end

Arbitrators like to have total control of their decisions, while the courts have always tended to retain their dominion on points of law which the judiciary considers its own preserve.

result was a loss of confidence on the part of the public and the Bar in the ability of the judiciary to be as independent as it was before. Wherever important cases had to be decided, there was a shift to arbitration.

In the private sector, clauses were introduced to the effect that the seat of arbitration was to be Singapore. As far as the KLRCA was concerned, wherever contracts had been entered into with the government or a GLC as a party, naturally there would be attempts to insert clauses to the effect that the arbitration should be held in Malaysia. Some cases were sent to the KLRCA, but only those cases where the government had the bargaining power to insist that in the event of a dispute, the matter would be referred to the KLRCA. In the private sector, there was a sea change in the mode by which disputes were to be resolved. If the arbitration was held in Malaysia, the Arbitration Act as it then was made the award amenable to interference by the court if it was alleged that there was an error of law or misconduct on the part of the arbitrator. Pressure was exerted on the Bar that the old Arbitration Act should be cast aside in favour of a new Act in which prominence would be given to the UNCITRAL Rules. The bottom line was that there was a major shift by the late 1990s in all big disputes going to arbitration rather than the courts, which was only compounded by the delays in the courts. The overall result was that you had a groundswell of movement and campaigning to bring in the UNCITRAL Rules.

To summarise, it is true that arbitration is very much in vogue at the moment. But there are troubling features. If you litigate today, the process is relatively cheap in terms of the cost of litigation as the government funds it. The process is also open. There are constraints in terms of witnesses and evidence, and there is a benefit to the community if disputes are litigated in court. Disputes litigated in arbitration are viewed with some askance – it is all a secret. Secondly, the parties pay the arbitrators and so they are constrained from being bold – he who pays the piper calls the tune. These are worrying aspects.

Tell us two truths and one lie about yourself (in any order).

The word "truth" is not defined in the Evidence Act 1950 to which all evidence is subject in any trial, criminal or civil.

The presumption of innocence, a golden thread of English law, in the English sense of Woolmington v DPP is inapplicable in Malaysia.

I ate 42 ice creams in Honolulu upon arrival.

After your retirement from the Bench, you were actively involved in both domestic and international arbitrations. What aspects of your work as an arbitrator did you most enjoy?

I have always enjoyed an intellectual challenge and the issues that were raised in these arbitrations were all complex, both in terms of questions of law and of fact. In cases where I was the sole arbitrator, I found the experience very satisfying because the submissions that were made to me by the counsel on both sides were very well argued and compelling. In those international arbitrations where I was only one of three arbitrators and not the chairman, I found the experience of reconciling my viewpoints with the other two arbitrators also very enjoyable because I would start off by thinking that my viewpoint was the correct one, and invariably ended up concluding that my other two arbitrators had perspectives as valid as my own.

What do you currently see as the biggest challenge to ADR in Malaysia?

I think the biggest challenge is that the process is too costly and too complex with the result that only larger corporations tend to resort to the arbitral process or in cases where one or both parties have a reluctance to publicise the nature of their dispute. But having said that, I think that arbitration has a very bright future because we are going global. All our trade is global and if any disputes are likely to arise, they are likely to involve an outside party and generally speaking, I think arbitration is peculiarly suited to the needs of the mercantile community. ICSID is there and the general world situation today is so very precarious. Our major trading partner is China and there is also Brexit – all our trading partners are in a state of flux and we will be affected. In this atmosphere, we must nurture arbitration and do all we can to promote it.

You are well known for being a voracious reader. Which literary character do you most identify with and why?

I think I identify with Ulysses/ Odysseus, above all the others. My reasons are as follows. Firstly, he relied on his intelligence and cunning to resolve all the problems that he encountered. Secondly, he was a true sovereign in the sense that his only true allegiance was to the gods and not to any other human being. Thirdly, he captured my imagination when I was 11 (I found a highly sanitised version of "The Odyssey" during the Japanese Occupation when books were banned) and he never relinquished his hold on me after that. Of all his exploits, and there were many, his ingenuity and invention of the Trojan Horse to overcome an apparently insurmountable obstacle remains with us today.

The past few decades have seen substantial change to the arbitration statutes. You were involved in the drafting of the Arbitration Act 2005. What are your thoughts on the recent swathe of amendments to the Arbitration Act 2005; in particular, the repeal of Section 42?

There has always been a contest between the courts and arbitrators on the inviolability of arbitration awards. Arbitrators like to have total control of their decisions, while the courts have always tended to retain their dominion on points of law which the judiciary considers its own

preserve. When the Arbitration Act 2005 was passed, the right of a party especially in domestic arbitrations to refer a dispute on a point of law to the courts was preserved in Section 42 of the Arbitration Act 2005. However, commercial and financial competing interests to exclude the interference of the courts from the finality of arbitration awards carried the day and the amendment was passed. The result since the amendment is that arbitration awards in parallel with the UNCITRAL Rules can only be set aside, for example, where the award was procured by fraud or was otherwise against public policy (Section 37).

What are your thoughts on the shift in arbitration from Kuala Lumpur to Singapore? How can Malaysia evolve into a preferred, world-class venue for the conduct of ADR proceedings, and how can it compete with other ADR hubs on a global platform?

It is no longer correct to suggest that Singapore is still the preferred venue for arbitrations originating in Malaysia. It may have been thought that the parties were more likely to obtain an award which was free from direct or indirect interference from the state, which may be even more pronounced if a dispute involves government-linked companies or state-owned parties to whom most of the economic and commercial power had shifted. The KLRCA has now spread its reach by being rebranded as the Asian International Arbitration Centre. This extension in its stature as a regional centre was emphasised in the empowering Act of Parliament passed last year. Consequently, Malaysia is now probably an even more sought after seat of arbitration for international disputes. The amendment to Section 42 of the Arbitration Act 2005 preserving the inviolability of arbitration awards from court interference has further added to its attraction to disputants. One also needs to bear in mind that we are comparatively a smaller player in international commerce, as compared to American or European or even Chinese interests. The perception therefore is that Malaysian arbitrators are thought to be less likely to be influenced by the domination of the bigger players on the international scene. Another significant development is the training and educational facilities which are provided by the AIAC for adjudicators and chartered arbitrators. The bottom line is that the AIAC is already at the forefront of its sister organisations in the region. Another compelling feature is the comparative cost-effectiveness of Malaysia and the fact that English is the common language at all levels of Malaysian society.

Do you think that the advent of ADR as the preferred mode for dispute resolution may stultify the development of case law?

My answer is a resounding yes. The reason is very simple. The common law is a system of jurisprudence which has grown from the wisdom of those judges who have decided disputes in a particular way. This is the doctrine of precedent. Under the doctrine of precedent, we follow the wisdom of our predecessors unless the facts are so different that they require a new approach.

What that system does for the community is that it encourages stability, and it also promotes the knowledge of the people as to the proper course of conduct in any dispute. Arbitration, unfortunately, does not permit the publication of the reasons why a dispute has been decided the way it has been. Both the issues before the arbitrator and the decisions are private and restricted to the parties. The result is that no benefit seeps to the community - the benefit is only to those few individuals involved in the dispute. They are bound by the arbitrator's decision, but no one knows why. In that sense, it's a loss to the community. ■

The Moscow Stars – Charter Party Liens and Arbitration

by **Clive Navin Selvapandian**
Partner
Messrs Christopher & Lee Ong

1. The English Court's decision in The Moscow Stars[1] is a boon to all charterparty lien holders. The decision endorsed the ground-breaking judgment in Singapore's Five Ocean Corp[2] and thereby enriched a stream of jurisprudence that will only add to the popularity of maritime arbitration.

2. This article will examine the judgment of The Moscow Stars. It will argue that it – and by extension Five Ocean Corp – sheds light on the application of the Malaysian Arbitration Act 2005[3] and should therefore be of persuasive value in Malaysian courts.

The Judgment and the Issues

3. The judgment in The Moscow Stars was handed down by Mr Justice Males, as he was then known. Sir Stephen Martin Males is a commercial law and arbitration specialist. He practised for many years at 20 Essex Street – a leading commercial set – prior to his appointment as a Justice of the High Court of England and Wales.

4. The key issue before the court was this: Whether charterparty lien holders can exercise their lien to sell cargo on board a vessel whilst the underlying dispute is subject to arbitral proceedings?

5. Arguments at the hearing were divided into two heads. These are (i) whether the goods subject to the lien must also be the 'subject' of the arbitral proceedings; and, (ii) what circumstances might constitute 'good reason' for a quick sale of the cargo.

6. This article will discuss both issues. It will first discuss the circumstances that might call for a quick sale of the cargo, an inevitable requirement in applications of this nature. It will then discuss whether the goods must be the subject of arbitral proceedings (as distinct from them having nothing to do with the underlying dispute).

7. This article will lastly examine the interesting argument raised by the claimant in Five Ocean Corp – that the wording of Singapore's International Arbitration Act[4] permitting the preservation of property subject to a charterparty lien did in fact allow the court to sell the cargo.

The Facts

8. In The Moscow Stars, the claimant shipowner (the 'Claimant') time-chartered the vessel "MOSCOW STARS" to the defendant charterers, PDVSA, a Venezuelan state-owned company (the 'Defendant'). Cargo – 50,000 metric tones of crude oil in total

1 [2017] EWHC 2150 (Comm).

2 Five Ocean Corp v Cingler Ship Pte Ltd (PT Commodities & Energy Resources, Intervener) [2015] SGHC 311 (hereinafter known as 'Five Ocean Corp').

3 Act 646.

4 Cap 143A, 2002 Rev Ed.

- was loaded at Venezuela and the vessel was ordered to Freeport, the Bahamas, for discharge.

9. Due to the Defendant's failure to pay charterparty hire, however, the Claimant gave notice of exercise of a lien over the cargo. This was pursuant to the usual charterparty clause conferring shipowners with a lien over all sums due under the charter.[5] The vessel later sailed to Bullen Bay, Curacao, and remained there whilst awaiting the resolution of the dispute.

10. Parties commenced arbitration pursuant to the London arbitration clause contained in the charterparty. The Claimant sought and obtained permission from the arbitral tribunal to apply to the court for an order for the sale of the cargo.

11. Whilst awaiting the court's determination of its application, the Claimant is incurring all the usual costs of running the vessel, including the costs of supplying bunkers and paying the crew. These are costs that the Defendant was expected to foot, but has failed to do so.

12. The vessel is scheduled for inspections required by SOLAS[6] and her classification society and therefore has to be cargo-free by those inspection dates.

A Discussion of the Moscow Stars

What might constitute 'good reason' for a quick sale of the cargo?

13. In The Moscow Stars, it was a requirement in law that the cargo had to be of a perishable nature (which was not in fact the case) or that there was good reason for a quick sale. In other words, the Claimant had to show that their application was time-sensitive in order to succeed.

14. Similarly, the claimant in Five Ocean Corp had to demonstrate the urgency and necessity for the order of sale.

15. There is no similar requirement under the Arbitration Act 2005. But it is submitted that it is inevitable that applications of this nature under Malaysian law will allude to similar facts, given the rapid escalation of costs that

5 [See Lines 110 to 113 of the New York Produce Exchange Form 1946 and Lines 219 to 224 of the Baltime 2001 Form, for example.

6 The International Convention on the Safety of Life at Sea, generally regarded as the most important treaty concerning the safety of merchant ships.

comes with storing cargo on board a vessel for a prolonged period of time. This increase in costs should, it is submitted, be taken into account by the courts when weighing the merits of the application.

16. The Claimant in The Moscow Stars attempted to meet this requirement by pointing to the fact that the cargo had been on board the vessel for nine months and, in the absence of a sale order, will remain there for many months to come.

17. This prejudice, the Claimant argued, is compounded by the fact that the Claimant is not receiving hire but is incurring the expense of operating the vessel. Further, the vessel had to be cargo-free given that the deadlines to comply with SOLAS and Class requirements were fast approaching. The Claimant's stand was inevitably aided by the Defendant's concession that there was no viable storage possibility for the cargo.

18. In the same vein, the claimant in Five Ocean Corp pointed to the fact that overheating of the cargo – in that case, 77,000 mt of Indonesian steam coal – had been detected. Further, there was a risk that it would self-ignite if it continued to remain in the vessel's hold.

19. They also relied on the fact that monsoon season at the Bay of Bengal – where the vessel was situated – was exacerbating the already dire situation. The court in Five Ocean Corp also accepted the claimant's evidence that Indian law did not recognise their lien if the cargo was discharged in India.

20. Males J in The Moscow Stars accepted the Claimant's arguments that there was good reason for a quick sale. He was, it is submitted, particularly persuaded by the length of time that the cargo had been onboard the vessel and the risk that the dispute will drag on indefinitely if a sale order was not made.

Whether the goods must be the subject of arbitration proceedings?

21. The discussion under this heading turns on the provisions of the United Kingdom's Arbitration Act 1996.[7] The Arbitration Act 2005, prior to its latest amendments,[8] had similar wordings to the United Kingdom's Act.

22. The relevant provisions of section 44 of the Arbitration Act 1996 reads as follows:

"(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for purposes of and in relation to legal proceedings.

(2) Those matters are –

…

(b) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings –

(i) for the inspection, photographing, preservation, custody or detention of the property, or …

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

…

(d) the sale of any goods the subject of the proceedings; … ".

23. The Claimant relied on s44(2)(d) of the Arbitration Act 1996, thereby seemingly limiting the court's power to order the sale of the cargo to where they are "the subject of" the London arbitral proceedings.

7 Arbitration Act 1996 (c.23).

8 Arbitration Amendment (No. 2) Act 2018 (Act A1569), which enacts the provisions of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006).

24. The Defendant argued that unless the cargo was the "subject" of arbitral proceedings, the court's power cannot be exercised. An example proffered of the cargo being the "subject" of proceedings was a dispute over the ownership of the goods.

25. The Defendant said that the circumstances in which the power to sell cargo can be exercised was deliberately narrow, given its draconian effect of depriving a party of its ownership of cargo where the claimant's right is yet to be established.

26. In contrast, the Defendant pointed out, the orders contemplated in s44(2)(c) of the Arbitration Act 1996 – inspection, photographing, preservation, custody, detention, sampling, observation and experimentation – were much less intrusive and can therefore be made in more extensive circumstances.

27. They conceded, however, that where the cargo and its condition is a major issue in arbitration proceedings – due to it deteriorating significantly in condition and value – the cargo would inevitably become "the subject of the proceedings."

28. In reply, the Claimant argued that the Defendant's reading of the statute was too restrictive. They said that the phrase "goods the subject of the proceedings" meant no more than that the proceedings should relate to or concern the goods in question.

29. The court reached its conclusion by striking a middle-path. It held that there was a sufficient nexus between the cargo and the arbitral proceedings. This, it said, was because the lien is being exercised over the Defendant's goods as security for a claim being advanced in arbitration and, as a result, there is an impasse between the parties pending issuance of the arbitration award.

The Argument in Five Ocean Corp

30. The claimant in Five Ocean Corp argued that the property subject to the lien can be preserved by selling it.

31. This point is especially important in the Malaysian context as Five Ocean Corp was decided under s12(1)(d) of Singapore's International Arbitration Act,[9] which has similar provisions to the post-amendment Arbitration Act 2005.[10]

32. In making this argument, the claimant relied on the English decision of Cetelem SA[11] where the English Court of Appeal remarked that the court could preserve perishable cargo by selling it, thereby preserving the value of the cargo rather than the cargo itself.

33. The court in Five Ocean Corp accepted this argument and remarked that this argument was in keeping with the power conferred to the court under Order 29 Rule 4 of the Singapore Rules of Court[12] (similar to Order 29 Rule 4 of the Malaysian Rules of Court 2012), which permitted the sale of perishable property.

The Conclusion

34. The judgments in both The Moscow Stars and Five Ocean Corp augur well for the Malaysian maritime arbitration scene.

35. This is for two reasons: Firstly, they were decided under provisions similar to those found in the Arbitration Act 2005. And secondly, they have read those provisions in a pro-arbitration yet industry-friendly manner. The judgments successfully strike a balance between the competing parties and the various commercial considerations.

36. Malaysian courts would do well, it is submitted, to adopt the reasoning – and the spirit – in which these judgments were written. ■

9 Cap 143A, 2002 Rev Ed.

10 See the new s19(2)(c) Arbitration Act 2005.

11 Cetelem SA v Roust Holdings Ltd [2005] 1 WLR 3555 at [65].

12 Cap 322, R 5, 2014 Rev Ed.

The Repeal of Section 42 of the Arbitration Act 2005: A Change Too Far?

by **Gregory Das**
Partner
Messrs Steven Thiru & Sudhar Partnership

1. Two seismic events occurred in the country in the middle of 2018. One was widely known but not the other. The 9th of May saw the first change of hands in the Federal Government since Independence. The lesser known event was the repeal of Section 42 of the Arbitration Act 2005 ("the Act") shortly before the general elections. The repeal did not make national headlines; however, it occasioned a sea change in the law of arbitration in the country. Much was said, both prior to and after the repeal, on the restraint the courts should exercise when reviewing arbitral awards. The question is whether the repeal as a remedy is an overkill that has upset the balance. This article proposes to argue in favour of the reinstatement of Section 42 in the Act to restore the balance.

2. Prior to the repeal of Section 42, Sections 37 and 42 were the exclusive avenues through which a domestic arbitral award could be challenged under the Act.

3. Section 42 prescribed the right to challenge an arbitral award by referring to the High Court "any question of law arising out of an award". The test was to demonstrate that the alleged error in the award gave rise to a "question of law" that "substantially affect[ed] the rights of one or more of the parties" (see the Federal Court in Far East Holdings Bhd. v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang [2018] 1 CLJ 693). An example of a Section 42 reference that succeeded can be seen in Petronas Penapisan (Melaka) Sdn. Bhd. v. Ahmani Sdn. Bhd. [2016] 3 CLJ 403 where the Court of Appeal upheld the High Court's variation of the quantum awarded by the tribunal as it was premised on an unpleaded point.

4. On the 6th of April 2018, at the final sitting of Parliament prior to 14th General Elections, the House of Representatives passed the Arbitration (Amendment) (No. 2) Bill. The Bill gained Royal Assent on the 27th of April 2018 and was gazetted on the 8th of May 2018 as the Arbitration (Amendment) (No. 2) Act 2018 ("the Amendment Act"). The Amendment Act repealed Section 42.

5. The Explanatory Statement to the Arbitration (Amendment) (No. 2) Bill described the legislative intent behind the amendment to be the promotion of "Malaysia's profile on [the] international and regional arena as a safe-seat and arbitration friendly jurisdiction"[1].

6. A series of arguments were, and have generally been, employed to justify the repeal of Section 42 from the Act.

7. First, was the contention that the scheme of the Act was to ensure minimal court intervention in arbitral proceedings. Section 8 of the Act would appear to reflect this

1 Explanatory Statement to the Arbitration (Amendment) (No. 2) Bill.

Section 42 prescribed the right to challenge an arbitral award by referring to the High Court "any question of law arising out of an award".

objective by providing that "No court shall intervene in matters governed by this Act, except where so provided in this Act". The sentiment of a minimalist approach commanded the broad assent of most in the judiciary when pronouncing upon challenges against arbitral awards[2].

8. Second, was the oft-cited reminder of the need to uphold party autonomy. The removal of Section 42 was perceived as ensuring less judicial interference and thereby preserving the intention of the contracting parties to resolve the dispute by way of arbitration and not the courts. Again, the courts have frequently recognized the concern of

2 Petronas Penapisan (Melaka) Sdn. Bhd. v. Ahmani Sdn. Bhd. [2016] 3 CLJ 403, Kerajaan Malaysia v. Perwira Bintang Holdings Sdn. Bhd. [2015] 1 CLJ 617 and Trident Engineering (M) Sdn. Bhd. v. Ssyangyong Engineering and Construction Co. Ltd. [2016] 6 MLJ 166.

safeguarding party autonomy in determining challenges against awards[3].

9. Third, was the argument that the dual mechanism under Sections 37 and 42 of the Act to set aside an arbitral award was open to abuse procedurally and was contrary to the concept of the finality of the award. Such concerns may have been given credence by the observations of the Court of Appeal in Kerajaan Malaysia v. Perwira Bintang Holdings Sdn. Bhd. [2015] 1 CLJ 617 that affirmed the possibility of a two-pronged challenge against an award under both Sections 37 and 42.

10. Fourth, it was contended that the repeal of Section 42 ensured the expeditious and efficient determination of the dispute first referred to arbitration. The speed and efficiency of arbitration has often been recognized as one of the cornerstones of the arbitral procedure. An example of how repeated court interference could defeat this objective is found in the English case of Transfield Shipping Inc. v. Mercator Shipping Inc [2009] AC 61 (commonly cited as "The Achilleas"). There the Supreme Court of the United Kingdom set aside the arbitral award two years after it was delivered.

11. Additionally, it was argued that the repeal of Section 42 would not result in the undue proscription of the supervisory jurisdiction of the courts. This jurisdiction remained intact in view of the existing provisions under the Act. These provisions included Section 4(1) (revised per the Amendment Act) (which permits non-arbitral matters to be resolved through mechanisms other than arbitrations), Section 11 (interim measures by the High Court), Section 19J (court – ordered interim measures irrespective of whether Malaysia is the seat of arbitration) and Section 37 (powers to set aside an award). Further, it was contended, that questions of law could still be referred to the courts pursuant to Section 41 for determinations of preliminary points of law in the arbitration.

12. However, this does not answer the consequences of the complete removal of Section 42. The reinstatement of Section 42 in one form or the other is warranted. The following are the arguments to support this position.

13. First, the repeal of Section 42 curtails an aggrieved party's right to access to the courts for relief. The removal of Section 42 has completely ousted a party's right to challenge an arbitration award on its merits in our jurisdiction. There is now only the right to challenge an award on limited and strictly procedural grounds under Section 37(1) of the Act.

14. This is a cause for serious concern. Arbitrators are not infallible as the proponents of the repeal seem to think. A perverse award on the merits that is replete with mistakes and contains faulty reasoning is now beyond challenge.

15. Moreover, arbitrators are not exempt from rule of law considerations. It has been recognized internationally that arbitration brings into focus aspects of the rule of law. In a speech delivered at the Chartered Institute of Arbitrators Centenary Celebration, the former President of the Supreme Court of the United Kingdom, Lord Neuberger stated as follows on the interplay between arbitration and the rule of law:

    "7. …Of course, arbitrators perform an essentially contract-based function for specific parties in private, whereas judges carry out a constitutional function for everyone in public, so the rule of law can be said to be central to the role of judges in a way that is not for arbitrators. However, that does not mean that arbitrators have no part to play in the rule of law or that the rule of law has no part to play in arbitration. Far from it.

    8. First, the nature of arbitration requires arbitrators to have many qualities of judges… Secondly, a practical point: if an arbitrator

3 Chain Cycle Sdn. Bhd. v. Kerajaan Malaysia [2016] 1 CLJ 218, Kerajaan Malaysia v. Perwira Bintang Holdings Sdn. Bhd. [2015] 1 CLJ 617 and Trident Engineering (M) Sdn. Bhd. v. Ssyangyong Engineering and Construction Co. Ltd. [2016] 6 MLJ 166.

acts inconsistently with fundamental rights, it is to be hoped that he will be out of a job. Thirdly, arbitrators resolve disputes between business people or national entities, and in both the commercial and diplomatic worlds, the rule of law is essential…Fourthly, given that arbitration is the remedy of choice for many commercial parties, there is a powerful case for saying that arbitration should be held to the same high standard we hold the court process, and that must include its rule of law credentials. Fifthly, over the past forty years national legislation and international conventions have famously given arbitrators ever increasing freedom and power by restricting interference by the courts with arbitrators' procedures and awards. Any increase in freedom of power carries a concomitant increase in responsibility, and an increase in arbitral powers must be accompanied by an increased responsibility to observe fundamental rights."[4]

16. Arbitration often brings issues of law into sharp focus in its proceedings. Although raised in a private arbitration, the issue may be of general importance. The repeal of Section 42 prevents the courts of law of any say.

17. It follows that the repeal of Section 42 is inhibitive of a coherent development of the common law in this jurisdiction. A body of case-law that may provide guidance on precedents is lost. Arbitration awards do not constitute precedents.

18. It is useful to refer to Lord Diplock's speech in The Nema [1982] AC 724 which recorded the benefits of the court's supervisory function over arbitral awards in the development of the common law as follows:

    "It is only if parties to commercial contracts can rely upon a uniform construction being given to standard terms that they can prudently incorporate them in their contracts without the need for detailed negotiation or discussion. Such uniform construction of standard terms had been progressively established up to 1979, largely through decisions of the courts upon special cases stated by arbitrators. In the result English commercial law has achieved a degree of comprehensiveness and certainty that has made it acceptable for adoption as the proper law to be applied to commercial contracts wherever made by parties of whatever nationality."

19. For example, it was an appeal to the courts that enabled the English Court of Appeal in Halliburton v. Chubb Bermuda Insurance Ltd. [2018] EWCA Civ 817 to provide guidelines for arbitrators to follow when deciding to make disclosures of possible bias in arbitral proceedings.

20. It is important to note the observation of Lord Thomas (the former Lord Chief Justice of England and Wales) in a speech to the National Judges College, Beijing where he stated that, for example, the maritime industry had benefitted from traditionally declining to opt out of the appellate procedure to challenge arbitral awards. His Lordship reasoned that the shipping industry "valued the ability to appeal on points of law, in order to clarify points that have a wider importance to them than the immediate arbitration. In 2012-2015, the bulk of appeals from arbitration were shipping appeals. The benefits to the development and clarification of English maritime law have been considerable"[5].

21. In this jurisdiction, the Federal Court decision in Far East Holdings Bhd. is a clear example of the courts pronouncing upon matters of corporate law and commerce through a Section 42 challenge that would thereafter serve as guidance or precedents on the subject.

22. Further, it has to be acknowledged that the prospect of supervisory correction may enhance the standards of decision making in the arbitral process. The Federal Court

4 "Arbitration and the Rule of Law" by Lord Neuberger at the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 20 March 2015.

5 "Commercial Dispute Resolution: Courts and Arbitration" by Lord Thomas of Cwmgiedd at the National Judges College, Beijing, 6 April 2017.

in Thai-Lao Lignite Co. Ltd. v. Government of the Lao People's Democratic Republic [2017] 9 CLJ 273 stated as follows on the advantages of preserving the possibility of judicial intervention in arbitral awards:

"[239] … But we need to say this much. 'Support for arbitration' is not 'no disturbance'. There are always two sides to the same coin. The loser will call for 'disturbance'. If an arbitral award is a sacred cow and cannot be disturbed, that will not engender confidence in arbitration. 'No disturbance' may appear, at least superficially, to support arbitrators. But in truth, 'no disturbance' is anathema to arbitration. "Do not disturb' will kill confidence in arbitration. Once confidence is lost, both arbitration and arbitrators will be the worst for it. For arbitration to continue to be relevant, it must be accepted that arbitral awards are not sacrosanct. Arbitral awards will be reviewed by the supervisory court of the seat. Arbitration will be dead, in Malaysia and elsewhere, if a supervisory court will rubber stamp arbitral awards only."

23. In the United Kingdom, the sentiment has been to recognise the benefits of a complementary judicial and arbitral system. In a recent extra-judicial speech, the English Court of Appeal judge Lord Justice Gross expressed the need for a symbiotic relationship between the two systems in the post-Brexit age as follows:

"3. My theme tonight is that our Courts and London arbitration are complementary and mutually reinforcing, comprising a feature of the first importance for Legal UK. We need both as we seek to maintain and strengthen the global leadership position of London and English law post-Brexit…

…

22. Pulling the threads together, I do not see the courts and arbitration as engaged in a competition for work. I see the strength of Legal UK augmented by a strong court reinforcing thriving London arbitration, with London arbitration in turn increasing the attractions of English law and thus, ultimately, the English Courts. As I have said before, this is a mutually supportive relationship. The strength of one supports the strength of the other and vice versa…"[6]

24. There is also the factor of transparency in the arbitral process. It is often the case that an arbitration is a completely closed process. Lord Neuberger, in his speech at the Chartered Institute of Arbitrators Centenary Celebration, referred to the need for and the benefits of transparency in the arbitral process as follows:

"23. The credibility of arbitration, and therefore the self-interest of all those involved in arbitration, seems to me to point firmly in favour of more transparency. First, particularly these days, lack of openness is viewed with suspicion and concern by most sectors of society. Secondly, there is a real risk that, if there is no transparency, many arbitrators will feel relatively free to do what they want rather than to give effect to the law. This is a temptation which is particularly great now that it is so difficult to appeal an arbitration award. I would suggest that the four strongest external pressures on a judge to get the law right arise from the facts that (i) his decisions will be read, and therefore open to criticism, by anyone who wants to see them, and (ii) any decision which he makes can be appealed. The absence of (i) and the tiny risk of (ii) in the case of arbitrations could become a bit of a worry."

25. The revival of Section 42 would accord with promoting transparency in the arbitral process.

26. Yet another factor is the questionable contention that the Section 42 procedure was inimical to party autonomy. It must not be forgotten that the parties to the

6 *"Courts and Arbitration" by Lord Justice Gross at The Jonathan Hirst QC Commercial Law Lecture, 1 May 2018.*

contract chose the seat of arbitration and must therefore be taken to have submitted themselves to the jurisdiction of the court of the seat.

27. A caution against taking party autonomy to the fore was sounded by the recently retired Justice of the Supreme Court of the United Kingdom, Lord Mance, who said that "Parties can be taken generally to have submitted themselves to decisions of the court of the seat which has been chosen by them or by an institution chosen by them. Even decisions of other courts on identical issues merit consideration. In short, an increasingly inter-connected world needs mutually supportive and inter-related systems for the administration of law, not more legal systems. Arbitration already offers those engaging in it very substantial autonomy. Siren calls for complete or yet further autonomy should be viewed with skepticism."[7]

28. Locally, under the pre-amendment version of the Act, there was a clear 'opt – out' mechanism for Section 42. By virtue of Section 3 of the Act, Section 42 had an automatic application to a domestic arbitration unless otherwise agreed in writing between the parties. However, such an automatic application was 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.

29. Therefore, party autonomy was expressly preserved under the pre-amendment provisions of the Act. Parties were permitted to elect if they could avail themselves of the Section 42 procedure in the proceedings. Accordingly, it becomes difficult to accept the necessity of the repeal of Section 42 under the guise of protecting party autonomy.

30. It is submitted that there are compelling reasons for the reinstatement of the Section 42 procedure in some form or the other.

31. At the very least, in view of the benefits of some curial supervisory role in arbitral proceedings, a filter mechanism should be introduced in the Act in respect of a challenge against an arbitral award on its merits. This would be akin to the leave procedure in the United Kingdom[8], New Zealand[9] and Singapore[10] where a right of challenge may only be exercised upon the grant of leave of court.

32. In the present reformist outlook, the time is opportune to correct a grave mistake. The pendulum that was made to swing too far one way by the repeal must be reversed and brought back to balance for the future of the arbitration process. ■

The repeal of Section 42 curtails an aggrieved party's right to access to the courts for relief.

7 "Arbitration – a Law unto itself?" by Lord Mance at the 30th Annual Lecture organized by The School of International Arbitration and Freshfields Bruckhaus Deringer, 4 November 2015.

8 Section 69(1) of the Arbitration Act 1996 (UK).

9 Second Schedule Clause 5 of the Arbitration Act 1996 (New Zealand).

10 Section 49 of the Arbitration Act 2002 (Singapore).

The Federal Court Updates Malaysia's Approach Towards Liquidated Damages Clauses in Commercial Contracts: A Commentary

by **Thulasy Suppiah**
Senior Associate
Messrs Koh Dipendra Jeremiah Law

Black's Law Dictionary (10th Edition) defines liquidated damages as:-

> *"An amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches. If the parties to a contract have properly agreed on liquidated damages, the sum fixed is the measure of damages for a breach, whether it exceeds or falls short of the actual damages."*

By contrast, unliquidated damages are not damages that are pre-determined i.e. before a breach has taken place and therefore require a court or tribunal to determine the amount recoverable when a breach has occurred. Black's Law Dictionary defines unliquidated damages as:

> *"Damages that cannot be determined by a fixed formula and must be established by a judge or jury",*

Liquidated damages clauses are most common in sale and purchase agreements, construction contracts and in IT contracts. In commercial contracts, one of the primary purposes for inclusion is to moderate contracts where proving actual loss would be too onerous after a breach of contract has occurred thus making it unfair to the non-defaulting party.

In construction and engineering contracts, for example, proof of actual loss is rarely a straight-forward exercise. Projects of varying scopes of works and magnitudes would frequently involve delays due to a variety of factors thus preventing any accurate assessment of damages suffered by the non-defaulting party or the use of any one specific methodology to arrive at a proximate value for actual loss suffered.

One imagines that in a commercial arrangement, parties would be informed of their rights and presumed to have entered into contract after being advised of potential risks and foreseeable financial losses in the event of a contractual default. However, in Malaysia, notwithstanding that liquidated damages clauses are usually a result of parties' prior informed agreement, it has not necessarily yielded favourable instances of the clause being enforceable in the event of contractual defaults. It is fairly easy to appreciate why unliquidated damages, unlike liquidated damages, require judicial assessment when a breach has occurred.

The Federal Court in Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817 ("Selva Kumar") set the course for courts and tribunals in determining the enforceability of liquidated damages and by adopting a very literal and restrictive interpretation of section 75 of the Contracts Act 1950 ("s.75"). S.75 in its entirety reads:-

Liquidated damages are a pre-defined or agreed, fixed amount based on a reasonable estimation of damages in the event of a breach at the time the parties enter into contract.

> *"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."*

Continuing with the legacy of prior case law on liquidated damages (SS Maniam v State of Perak [1957] MLJ 75; Wearne Brothers (M) Ltd v Jackson [1966] 2 MLJ 155 and Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89 (PC)), Selva Kumar further entrenched the default position that there was no distinction between penalties and liquidated damages and that a non-defaulting party seeking to enforce such a clause, would not be able to recover the contract stipulated sum simpliciter – the non-defaulting party bore the burden of proving the actual loss suffered or that the damages sought were reasonable compensation. Thus, with the burden of proving that the liquidated damages clause was reasonable in the first place residing squarely with the non-defaulting party, there has

been nary a decision or case where a pre-agreed liquidated damages clause was enforceable (with one notable exception: Keen Builders Sdn Bhd v Utara Dua (Malaysia) Sdn Bhd (Samudra (Malaysia) Sdn Bhd, Garnishee) [1998] 2 CLJ Supp 256).

That is set to change with the recent Federal Court decision in Cubic Electronics Sdn Bhd (In Liquidation) v Mars Telecommunications Sdn Bhd [2019] 2 CLJ 723 ("Cubic Electronics") which advocates a more progressive approach to liquidated damages clauses. The Federal Court in Cubic Electronics went to great lengths in setting out the considerations that ought to apply even if the case itself, at its core, involved the treatment of deposits and whether it is forfeitable per se or subject to the principles affecting liquidated damages clauses – the latter thus giving the court sufficient latitude to revisit (this now being the third Federal Court judgment since 1995) a fairly contentious area of commercial and civil litigation.

It is pertinent to note that Cubic Electronics did not overturn Selva Kumar or the later landmark Federal Court decision which reaffirmed Selva Kumar, Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 4 CLJ 569 ("Johor Coastal"). Instead, the Federal Court clearly stated that Selva Kumar was still good law and that it should not have been interpreted as having imposed a legal straitjacket in which proof of actual loss is the sole conclusive determinant of reasonable compensation and that reasonable compensation should not be confined to actual loss[i]. The court in Cubic Electronics recognised that heavy emphasis was placed on the non-defaulting party to prove actual damages or loss. It relied on the various commercial factors discussed in the landmark United Kingdom Supreme Court case of Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67 ("Cavendish Square") which formed the basis for including liquidated damages clauses in contracts.

The court in Cubic Electronics agreed with Cavendish Square and restated that concepts of 'legitimate interest' and 'proportionality' are relevant in determining what amounts to "reasonable compensation" under our s. 75[ii]. It recognised that commercial parties, unlike the ordinary man on the street, would usually have the benefit of legal advice and that contracts would materialise after parties have negotiated its terms. Commercial parties are presumed to have comparable bargaining power and must be taken to have mutually agreed to contractual clauses such as liquidated damages which are intended to pre-allocate risks and financial losses that are reasonably foreseeable in the event of a default.

Following Selva Kumar, it became all too easy for contract defaulters, even if the liquidated damages clause was reasonable, to escape from the liability to pay for damages...

i Para [65] of Cubic Electronics

ii Para [66] of Cubic Electronics

Cubic Electronics has chartered a new course for determining the enforceability of a liquidated damages clause, key points of which are summarised below:-

(a) Clear recognition that s. 75 does allow "reasonable compensation" irrespective of whether actual loss or damage is proven by the party seeking to claim liquidated damages i.e. the non-defaulting party[iii];

(b) The initial onus is on the non-defaulting party to establish that there was a breach of contract and that the contract has a damages clause with a pre-ascertained sum stipulated to be paid upon a breach having occurred[iv];

(c) If the defaulting party insists that the liquidated damages clause should not be enforced – then it is the defaulting party that bears the burden of proving that the damages clause is unreasonable or ought to demonstrate from available evidence what should constitute "reasonable compensation" instead[v]; and

(d) If a court is compelled to make a determination on whether the sum claimed is "reasonable compensation", it can be derived by comparing the amount that would be payable on breach with the loss that might be sustained if indeed the breach occurred. If there is no significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party, then it is a reasonable sum[vi].

Cubic Electronics went further by stating that to adopt a restrictive and literal interpretation of Selva Kumar/s.75 would undermine the objective of including a liquidated damages clause – only then, to subsequently insist that the non-defaulting party bears the onerous burden of proving such a clause was reasonable in the first place.

Any court or tribunal should be wary of any attempt to regulate contractual obligations, which parties entering into the contract are free to do as long as the clause does not violate any existing laws. An intervention is only warranted in cases where it is necessary to prevent a truly oppressive or unconscionable clause from operating. Following Selva Kumar, it became all too easy for contract defaulters, even if the liquidated damages clause was reasonable, to escape from the liability to pay for damages – after all, any complaint by a defaulter would only arise if he is imposed with the liability of having to fork out the pre-ascertained sums under the contract and this would necessarily impinge unfairly on the rights of the non-defaulter who has been exposed to financial loss or other forms of compensable risks.

Cubic Electronics ought to be credited for attempting to restore some balance in limiting circumstances for when judicial/arbitral intervention is truly warranted – that is, only when there is a need to relieve against a damages clause that is unconscionable, oppressive or excessive and not the damages clause itself. By doing so, it also cautions against unnecessarily intervening or regulating parties' rights to choose whether or not to include a liquidated damages clause since the default starting point should rightly be that all parties are presumed to have entered into contract on their own terms freely, deliberately and having accounted for their mutual interests.

What remains to be seen now is whether our courts and tribunals will be able to appropriately balance the legitimate interests of the parties and adopt a more progressive approach when dealing with the enforcement of liquidated damages clauses. ■

iii Para [69] and Para [74](vi) of Cubic Electronics

iv Para [70] and Para [74](vii) & (viii) of Cubic Electronics

v Supra

vi Para [68] of Cubic Electronics

PAST EVENTS

National Arbitration Conference 2018: Shaping the Future of Arbitration in Malaysia

8 February 2018, AIAC

On 8 February 2018, the Institute in collaboration with the AIAC hosted the inaugural National Arbitration Conference 2018. The Conference was co-chaired by Mr Sudharsanan Thillainathan, President of the Institute, and Ms Sharon Chong Tze Ying, Partner at Messrs Skrine and a former Council Member of the Institute.

The Conference was a tremendous success for all practitioners and users of arbitration in Malaysia. It was well-attended, positively received, and in alignment with the Institute's and the AIAC's ultimate aspirations to further enhance Malaysia's standing as a global arbitration hub.

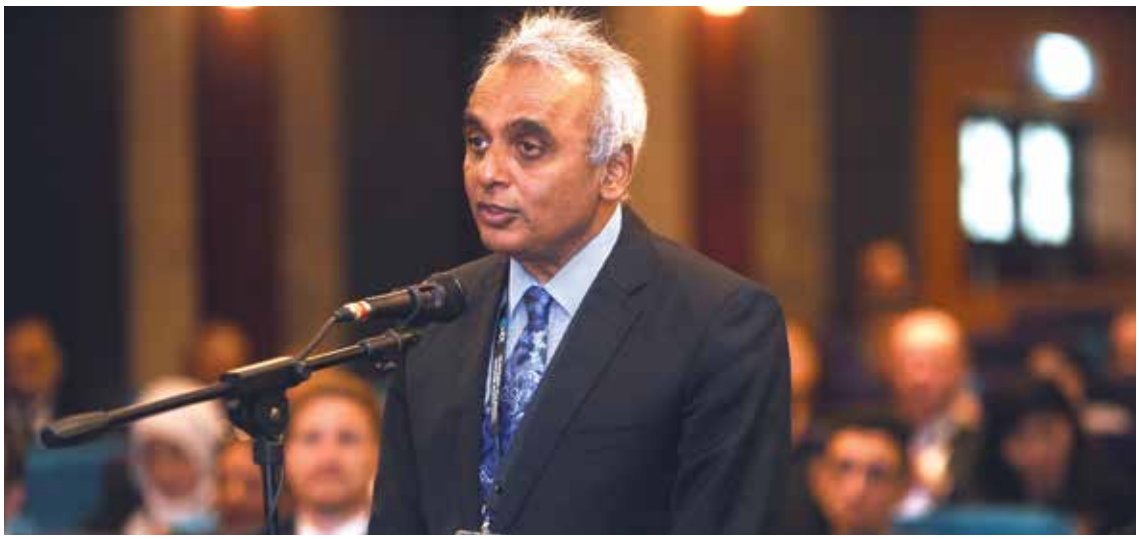
With the rapid evolution of arbitration in Malaysia, the landscape of arbitration has been transformed in the last decade. The Conference therefore provided a timely and unique opportunity for:

(a) reflection, open debate, critical thinking and insights on the future of arbitration in Malaysia;

(b) discussion of some of the current and topical issues affecting the practice of arbitration; and

(c) networking as well as reunion opportunities.

The Institute would like to extend its gratitude to all distinguished speakers; in particular, the former Chief Justice of Malaysia, Tun Dato' Seri Md Raus bin Sharif, the former Director of the AIAC, Datuk Professor Sundra Rajoo, International Judge of the Singapore International Commercial Court and Professor of Legal Practice at the University of Hong Kong, Professor Anselmo Reyes, and all



the moderators and panelists of the Conference for sharing their time, ideas, and views with the delegates.

A debt of gratitude is also owed to the Conference's generous sponsors for their financial support in funding the organisation of the Conference, and the Conference's publishing partner, The Malaysian Current Law Journal.

The following members of the Organising Committee worked tirelessly to ensure the success of the Conference: from the Institute, Ms Raja Junaidah Raja Aris, Mr Wong Wee Hong, Ms Karen Ong, Ms Shanthi Supramaniam, Mr Edward Kuruvilla, and Ms Dawn Wong Keng Jade, and from the AIAC, Mr Hedraan Dass, Mr Franz Dominic, Mr Paul Desmond Savuriar, and Ms Wan Syazulaikha.

Council Members Mr Edward Kuruvilla and Ms Dawn Wong Keng Jade served as joint masters of ceremonies.

Avoiding Disputes – Lessons from the Past

5 April 2018, Vistana Hotel, Penang

On 5 April 2018, the Institute, together with the Construction Industry Development Board (CIDB), the Royal Institute of Surveyors Malaysia (RISM), and the Master Builders Association Malaysia (MBAM), hosted "Avoiding Disputes - Lessons from the Past" at the Vistana Hotel in Penang. The guests of honour included Dato' Lim Chong Fong, Judge of the High Court of Pulau Pinang, Sr Mohd Zaid Zakaria of CIDB, Dato' Lau Wai Seang of RISM, Mr Oliver Wee of MBAM, and Mr Sudharsanan Thillainathan of the Institute. The Keynote Address was delivered by Dato' Lim Chong Fong.

Professor Sr Dr Wan Maimun Wan Abdullah gave the first presentation on "The Making of the CIDB Construction Law Report" and Ir Harbans Singh KS spearheaded a lively discussion on "Common Causes of Dispute". The third lecture on "Some Reflections on ADR for the Construction Industry" was led by Mr Sudharsanan Thillainathan, followed by "Don't litigate or arbitrate. Mediate!" presented by Mr Oliver Wee and Mr Chan Kheng Hoe. The final lecture was delivered by Dr Noushad Ali Naseem Ameer Ali, who spoke on construction contracts and drafting principles.

Council Member Ms Dawn Wong Keng Jade served as the master of ceremonies.


AVOIDING DISP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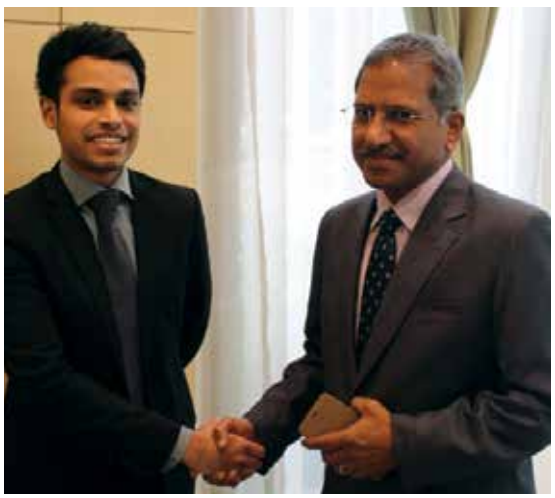
CPD Seminar Series: The Advantages of Alternative Dispute Resolution in the Resolution of Disputes

7 June 2018, AIAC

The Institute in collaboration with the AIAC kicked off its inaugural CPD Seminar Series with a lecture entitled "The Advantages of Alternative Dispute Resolution in the Resolution of Disputes" by the Honourable Mr Justice Nantha Balan a/l E.S. Moorthy of the Kuala Lumpur High Court. The Institute and the AIAC were honoured to begin the series with such a distinguished speaker and a committed supporter of ADR. The event was ably organised and moderated by the Institute's Vice President, Mr Gregory Das.

Judge Balan delivered a persuasive lecture expounding the benefits of ADR (in particular, mediation and conciliation) in resolving disputes, peppered with real-life examples and anecdotes of cases and situations he has encountered as a sitting Judge. The point was aptly illustrated by diagrams of a speedy and successful mediation, where the fate of the case lay entirely in the hands of the parties, juxtaposed with the rigmarole of a lengthy and convoluted litigation process, where it is a zero sum game with only winners and losers, with legal costs as the only constant.

In particular, Judge Balan explained why avoiding a discussion of the merits of the case is of vital importance if a mediation is to have any chance of success and welcomed questions from the floor on a variety of other issues, including whether or not the development of case law would be stultified if most cases before the courts are settled by way of ADR, and how to handle situations where intractable parties are determined to have their day in court. It is safe to say that the evening's audience, including the litigators, were roundly convinced of the appeal of ADR, and of why avoiding litigation is sometimes to be preferred. The evening concluded with an Exclusive Institute Networking Session and Cocktail Reception at the Pavilion of the AIAC.



The Jonathan Yoon Debate Series

28 June 2018, AIAC

The second installment of the Jonathan Yoon Debate Series featured Mr Ranjit Singh and Mr Nahendran Navaratnam (For the Motion) and Mr Yatiswara Ramachandran and Dato' Malik Imtiaz Sarwar (Against the Motion). The event was ably organised by the Institute's Vice President, Mr Gregory Das.

The Debate Motion was: "This House believes that the continuing duty of disclosure of an arbitrator under section 14(2) of the Arbitration Act 2005 (as interpreted in MMC Engineering Group Bhd. v. Wayss & Freytag (M) Sdn. Bhd. [2015] MLJU 477) is too limited."

The Motion was defeated in a closely fought contest, with Mr Yatiswara Ramachandran and Dato' Malik Imtiaz Sarwar prevailing. Dato' Bill Davidson, Dato' Dr Cyrus Das, the Institute's Past President Mr Mohanadass Kanagasabai, and the family of the late Mr Jonathan Yoon were in attendance.

Council Member Mr Nadeem Rafiq served as the master of ceremonies.

The Institute's 5th Annual Law Review & Conference

23 August 2018, AIAC

This year, the favourite and perennial fixture on the Institute's calendar was co-organised by the Institute's Honourary Treasurer, Mr Verghese Aaron Mathews and Council Member Ms Nereen Kaur Veriah, who put together an exciting programme featuring a host of distinguished speakers, both local and foreign, from the arbitration community.

The first session was entitled "An Annual Review of Select Decisions of the Appellate Courts Relating to the Arbitration Industry" and delivered by Dato' Varghese George Varughese, retired Judge of the Court of Appeal and Mr Lam Ko Luen, Partner at Messrs Shook Lin & Bok who discussed pivotal decisions and their subsequent effects on the corpus of arbitration law in Malaysia over the past year. The session was moderated by Ms Shanthi Mogan, Partner at Messrs Shearn Delamore & Co.

Session 2 featured an interactive panel discussion between Mr Francis Xavier SC from Singapore, Mr Rana Sajjad from Pakistan, Mr Ratan K Singh from India, and Dr Christopher To from Hong Kong. The session was moderated by Ms Elaine Yap, Principal at Messrs Elaine Yap Law Office. Each panellist focused on recent decisions and legislative developments in arbitration from their respective countries and discussed the impact of those decisions.

2018 heralded a new era of arbitration in Malaysia with significant amendments being made to the Arbitration Act 2005, including the repeal of Section 42. The long-awaited third session, entitled "The Removal of Section 42 of the Arbitration Act. The Way Forward" was presented by Datuk Professor Sundra Rajoo, Dato' Nitin Nadkarni, and the Institute's President, Mr Sudharsanan Thillainathan, with Mr Ong Chee Kwan moderating. The speakers welcomed polemic views from the floor, of which there were many. It was an exciting and impassioned note on which to end yet another fruitful Annual Review & Conference.

Council Member Ms Dawn Wong Keng Jade served as the master of ceremonies.










Regional Arbitral Institutes Forum (RAIF) Conference

29 November 2018, Shangri-La Hotel, Jakarta

The theme of this year's RAIF Conference was "Enhancing Regional Arbitration Cooperation: Emerging and Current Issues". The key topics were as follows: Current Hot Topics in Construction Disputes, Liability Issues in Commercial Maritime Disputes, Code of Ethics and Conflict of Interest in Arbitration, and ADR: Setting Aside and Refusal of Enforcement of Foreign Awards – Law and Issues.

The Institute's President, Mr Sudharsanan Thillainathan, the Institute's Honourary Secretary, Ms Wan Syarihah Razman, and Council Member Mr Anish Wadia were in attendance.

International Arbitration Conference 2018: Evolving Asia: New Frontiers in Dispute Resolution

6-7 December 2018, Shangri-La Rasa Sayang Resort & Spa, Penang

The International Group of Arbitrators (formerly the Chartered Institute of Arbitrators' Malaysia Branch) hosted the International Arbitration Conference 2018 at the Shangri-La Rasa Sayang Resort & Spa in Penang on 6-7 December 2018. The Conference was graced by industry stalwarts and eminent practitioners, and featured panel discussions covering the following topics:

(i) Regional Development in ADR, which charted the bold and unprecedented steps Asia has taken in ADR;

(ii) Third Party Funding in Asia, which covered the third party funding legislation recently introduced in Hong Kong and Singapore, and debated whether or not the rest of Asia should introduce TPF into their respective jurisdictions;

(iii) Investment Arbitrations in Asia and the impact of the Trans-Pacific Partnership Agreement on Dispute Resolution in Asia, which discussed claims being brought by disgruntled foreign investors following the growth of Foreign Direct Investment flows; and

(iv) Evolving Roles of Experts in International Arbitration, which dealt with the way in which experts are called upon in a wide variety of capacities to unravel complex issues, as well as the development of technology in this area.

Honourary Treasurer Mr Verghese Aaron Mathews and Council Members Ms Dawn Wong Keng Jade and Mr Nadeem Rafiq were in attendance.

New Members/Upgrades for Session June 2017 to December 2018

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

Affiliate to New	M/No.	Date Joined
1. Kristen Toh Gim Phaik	A/195	26 July 2018

Upgraded from Affiliate to Associate	M/No.	Date Joined
1. RA Ganapathy	A/251	24 August 2018
2. Tai Khai Meng	A/259	25 January 2018
3. Selvasangeetha Salvarajoo	A/262	26 April 2018

Associate to New	M/No.	Date Approved
1. Loke Wy Yan, Christina	A/252	24 August 2017
2. Shaun Adrian Perera	A/253	28 September 2017
3. Ng Wei Wei	A/254	28 September 2017
4. Lim Wei Lun	A/255	28 September 2017
5. Wong Ser Reen	A/256	1 November 2017
6. Ong Hui Chuen, Esther	A/257	1 November 2017
7. Neoh Wen Wan	A/258	25 January 2018
8. Lam Chia Yen	A/260	3 January 2018
9. Zhang Biao	A/261	26 April 2018
10. Chua Lay Hoon	A/263	26 April 2018
11. Tang Xin Yi	A/264	26 July 2018
12. Nadeem Muhd Rafiq Thangaraj	A/265	26 July 2018
13. Gan Hsien Yang	A/266	25 October 2018
14. Samuel Oh	A/267	13 December 2018

Upgraded from Associate to Member	M/No.	Date Approved
1. Dawn Wong Keng Jade	M/480	14 June 2017
2. Nereen Kaur Veriah	M/482	20 July 2017
3. Wong Ser Reen	M/499	27 March 2018
4. Ong Hing Huat, Paul	M/500	27 March 2018
5. Neoh Wen Wan	M/501	27 March 2018
6. Shaun Adrian Perera	M/505	26 July 2018

Member to New	M/No.	Date Approved
1. Lee Chor Teik, Richard	M/485	25 January 2018
2. Anthony Ngeh Koh She	M/486	25 January 2018
3. Abbygail Fam Swee May	M/487	25 January 2018
4. Graig Micheal Smith	M/488	25 January 2018
5. Lim Yong Hong	M/489	25 January 2018
6. Mak Hon Pan	M/490	25 January 2018

7. Andrew Heng Yeng Hoe	M/491	1 March 2018
8. Han Li Meng	M/492	1 March 2018
9. Rubini Murugesan	M/493	1 March 2018
10. Yew Yuh Hui	M/494	27 March 2018
11. Chan Yen Yee	M/495	27 March 2018
12. Tang Siew Ting	M/496	27 March 2018
13. Low Soon Kuan, Sr	M/497	27 March 2018
14. Yeong Kok Foo	M/498	27 March 2018
15. Ng Shou Guan, Andrew	M/502	27 March 2018
16. Clive Navin Selvapandian	M/503	24 May 2018
17. Nava Prassana Krishnan	M/504	24 May 2018
18. Ng Shu Wun, Todd	M/506	26 July 2018
19. Prabagaran Gopalakrishnan	M/507	24 August 2018
20. Hiew Chee Seng	M/508	24 August 2018
21. Fung Jian Chuan	M/509	24 August 2018
22. Chin Ngat Mun	M/511	27 September 2018
23. Ann Sheridin Velsine	M/512	27 September 2018
24. Yat Weng Cheong	M/513	27 September 2018
25. Masrul Ridzan Taha	M/514	27 September 2018
26. Lim Vin Sern	M/515	27 September 2018
27. Leelawathi Veerasegaran	M/516	27 September 2018
28. Even Lee Sian Wen	M/517	27 September 2018
29. Mak Ho Wang	M/518	27 September 2018
30. Arush Khanna	M/519	13 December 2018

Upgraded from Associate/Member to Fellow	M/No.	Date Approved
1. Lim Mee Wan, Lynnda	F/122	24 August 2017
2. Tay Hwee Hoon, Janice	F/125	26 April 2018
3. Nik Hasbi Fathi	F/127	24 May 2018
4. Nereen Kaur Veriah	F/128	24 May 2018
5. Imaduddin Suhaimi	F/129	24 May 2018
6. Lai Sze Ching	F/143	22 November 2018

Fellow to New	M/No.	Date Approved
1. Shaun Tan Cheng Hong	F/121	2 August 2018
2. Fong Shiu Man, David	F/123	1 March 2018
3. Anish Wadia	F/124	29 March 2018
4. Chung Sheuan Seen	F/126	26 April 2018
5. Rebecca Tai Anderson	F/130	24 May 2018
6. Norliza Rasool Khan	F/131	26 July 2018
7. Sarkunan G Subramaniam	F/132	26 July 2018
8. Ratan Kumar Singh	F/133	24 August 2018
9. Raj R Panchatia	F/134	24 August 2018
10. Shaunak Jashwant Thacker	F/135	24 August 2018
11. Peter Michael Harold Godwin	F/136	227 September 2018
12. Arne Fuchs LLM (GWU)	F/137	27 September 2018
13. Paul Hames Hayes QC	F/138	27 September 2018
14. Dr Andrea Colorio	F/139	27 September 2018
15. Matilde Rota	F/140	27 September 2018
16. Dato' Sunil Abraham	F/141	27 September 2018
17. Aniz Ahmad Amirudin	F/142	27 September 2018