MIArb
NEWSLETTER

The Newsletter of The Malaysian Institute of Arbitrators

INSTITUT PENIMBANGTARA MALAYSIA

KDN No.: PP8686/07/2013(032886)

Note From President

Dear Members,

I took the reins from the very able Chang Wei Mun in June 2013 and it has been both challenging and rewarding. I have a very committed and supportive Council and Secretariat and it is both a privilege and an honour to be working with such good company.

This is the first newsletter produced by Victoria Loi, our Editor. I thank and congratulate her and all who have contributed for a job well done. There are several articles in this newsletter which I hope you will find informative and useful.

It has been busy.

For the uninitiated, The Malaysian Institute of Arbitrators ("MIArb") runs the Diploma in International Arbitration programme in collaboration with Brickfields Asia College ("the BAC-MIArb Diploma"). The programme has several intakes in a year and each intake typically runs over several weekends, culminating in a written assessment. My special thanks go to Ooi Huey Miin, Head of the BAC-MIArb Diploma Committee, who in addition to coordinating and lecturing extensively on the programme, has successfully undertaken the tremendous task of revising its syllabus. My thanks also go to Lai Sze Ching, Hor Shirley, Chang Wei Mun, Ow Sau Pin, Victoria Loi and Joshua Chong who have contributed in making the programme a success.

We have conducted a series of Short Courses on Construction Law and Alternative Dispute Resolution, in partnership with The Institution of Engineers, Malaysia (IEM), Pertubuhan Akitek Malaysia (PAM) and Royal Institution of Surveyors Malaysia (RISM). My thanks go to Lai Sze Ching for spearheading this.

We had a Membership Upgrade Course in January 2014. My thanks go to Jonathan Yoon for organising this and to all our lecturers and assessors for making it possible. The Membership Upgrade Course has also resulted in MIArb gaining additional Members.

We have had several short "after-work" evening talks by distinguished speakers on a diverse range of topics, ranging from the adjudication experience in the UK and Australia to the fundamentals of the upstream oil and gas contracts in Malaysia. My thanks go to Ow Sau Pin for organising this. We aim to make this a regular feature for the continuous development and enrichment of our members.

Council has met with the representatives of the various bodies which make up the arbitration and/or alternative dispute resolution community and I daresay that several collaborative efforts are in the pipeline.

There are many upcoming events lined up for this year. In May 2014 itself, we will be having the MIArb Fast-Track Fellowship Course for Members who wish to upgrade themselves to become Fellows of MIArb and the inaugural MIArb-The Society of Construction Law, Malaysia (SCL) Annual Law Review. **Do come and join us!**

Last but not least, I also wish to take this opportunity to encourage members to play an active role in the activities of MIArb and to assist in putting MIArb on the map of the arbitration circle, both domestically and internationally. I believe that with contributions from all our members, we can take MIArb to the next level.

Lam Ko Luen
President

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Ooi Huey Miin
Kalashini Sandrasegaran

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Singapore International Arbitration: Law & Practice

ISBN: 978-981-440-644-4

This will serve as a comprehensive commentary on the current state of international arbitration in Singapore. Singapore, having adopted the UNCITRAL Model Law and a party to the 1858 New York Convention and having a strong tradition of the rule of law, is growing rapidly as a centre for International Arbitration. Constantly ranked top in international surveys, the Singapore International Arbitration Centre's caseload had increased rapidly in the past decade. This book gathers the leading names in international arbitration and each have contributed to a topic of discussion covering various aspects of international arbitration in Singapore.

The Malaysian Arbitration Act 2005 (Amended 2011) – An Annotation

By the Kuala Lumpur Regional Centre for Arbitration

ISBN: 9789-67400-1421

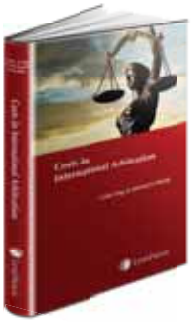
This title is the first publication & reference for an overview on Arbitration in Malaysia, the first publication updated with the 2011 legislative reforms. It starts with a commentary on the overall Malaysian experience in arbitration, relevant legislative reforms, the UNCITRAL Model Law, the 2011 legislative reforms and the use of case law, legislation and codes. It is then followed by an in-depth annotation of the Arbitration Act 2005 and explanatory notes of the UNCITRAL Model Law. In collaboration with the Kuala Lumpur Regional Centre for Arbitration, this should be the first point of reference for anyone wishing to understand how Arbitration works in Malaysia.

Asian International Arbitration Journal

General Editors: Lawrence Boo & Philip Chan

ISBN: AIAJ2013ISSUB

This is the first journal to provide commentary relating to arbitration across Asia. It comprises quality articles written by experts in their fields and carefully selected by two esteemed independent General Editors. It carries articles, notes on awards, legislation updates and book reviews, also the most current and accurate report on the development of arbitration in Asia. This journal is published twice a year in collaboration with the Singapore International Arbitration Centre.



Costs in International Arbitration

By Colin Ong & Michael O' Reilly

ISBN: 9789-8144-0615-4

Costs in International Arbitration, written by two well-known and experienced practitioners, is the first book to focus on the increasingly important and high profile topic of costs in international arbitration. It provides a comprehensive but accessible practical guide to the law relating to all aspects of costs in arbitration proceedings and will be an essential reference for all involved in international arbitration.

Singapore Arbitral Awards 2012

ISBN: 9789-8123-6956-7

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Contributions
Articles and other materials of interest for publication in future issues are welcomed. MIArb reserves the right to edit or decline any materials submitted.

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

Past Events 2013-2014

May 2013 – September 2013
Joint Short Courses on Construction Law and Alternative Dispute Resolution (ADR)

17.5.2013 & 18.5.2013
Construction Law

29.6.2013
Arbitration

23.9.2013
Adjudication

May 2013 – September 2013
Kuala Lumpur Regional Centre for Arbitration (KLRCA) Talk Series

29.5.2013
Privacy and Confidentiality in Arbitration

2.8.2013
An Arbitrator's Excess of Jurisdiction and Powers

28.8.2013
The Arbitration Clause: Common Pitfalls

20.9.2013
Challenges to Awards – The Malaysian Perspective

21.6.2013 – 22.6.2013
7th Regional Arbitral Institutes Forum (RAIF) Conference

15.7.2013
Courtesy Visit to Pertubuhan Akitek Malaysia (PAM)

19.8.2013
Evening Talk: Adjudication – the Experience from UK and Australia

16.12.2013
Courtesy Visit to the Kuala Lumpur Regional Centre for Arbitration (KLRCA)

18.1.2014 & 19.1.2014
The Membership Upgrade Course

22.1.2014
Visit by the Japan Association of Arbitrators

1.3.2014
Council Members of The Malaysian Institute of Arbitrators and The Chartered Institute of Arbitrators (Malaysia Branch) Meet Up

3.3.2014
Evening Talk: Fundamentals of the Upstream Oil and Gas Contracts

11.3.2014
Dialogue with The Society of Construction Law, Malaysia (SCL)

12.3.2014
Evening Talk: Too Many Parties and How Many Bites? Misjoinders and When A Challenge Should Be Mounted

28.4.2014
MIArb – KLRCA
Ethics in International Arbitration – Myth or the New Reality?

The Case of Mohamed Azahari Matiasin

Will the Right to Choose One's Representation in Sabah Be Limited?

by Nereen Kaur Veriah
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Prologue

An area of law which recently received judicial attention deals with the issue of whether an advocate and solicitor from West Malaysia has the right to represent parties in an arbitration held in Sabah. This article looks at that recent judicial decision in the case of ***Mohamed Azahari Matiasin.***

The Arbitration

The brief facts in this case are as follows. A dispute arising from a joint venture agreement between various individuals as the claimants and a company as the respondent was referred to arbitration in Sabah. The respondent appointed a Sabah Advocate as counsel and an Advocate and Solicitor called to the (West) Malaysian Bar as co-counsel. The claimants raised an objection to the continuance of the co-counsel on the grounds that the co-counsel was not a Sabah Advocate.

How did the High Court decide?

In view of the objection taken by the claimants, the respondent (hereinafter referred to as "the applicant") applied to the High Court [(2011) 2 CLJ 630] for, *inter alia*, a declaration that foreign advocates who are not advocates within the Sabah Advocates Ordinance 1953 (Sabah Cap. 2) ("the Ordinance") are not prohibited from representing parties to an arbitration proceeding in Sabah. The issue before the High Court was whether an advocate and solicitor from West Malaysia could appear and represent a party in an arbitration proceeding in Sabah.

One of the three arguments put forth by the applicant was this. Section 2 of the Ordinance did not confer unto Sabah Advocates exclusivity in representing parties in arbitration proceedings in Sabah. Section 2 of the Ordinance defines, "*to practice in Sabah*" as to perform:

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

Based on the above provision, the applicant argued that the legislature had only intended to confine the phrase "*to practice in Sabah*" to the same footing as the barristers and solicitors in England.

Following from this, it was argued that since members of the English Bar did not enjoy exclusivity to represent parties in arbitration proceedings, it ought to follow that Sabah Advocates did not enjoy exclusivity to represent parties in arbitration proceedings in Sabah.

The applicant also argued that the position taken in the case of ***Zublin Muhibah Joint Venture v Government of Malaysia*** (1990) 3 MLJ 125 should apply. There, the High Court of Malaya held that a foreign lawyer, seeking to appear and represent a party to an arbitration in West Malaysia, would not offend Section 37 of the Legal Profession Act 1976 as this Act did not apply to arbitration proceedings even if the foreign attorney might have taken action or

Based on the decision of the Court of Appeal, it would appear that advocates and solicitors from West Malaysia can now represent parties to arbitration proceedings in Sabah...it will be interesting to see how the apex Court decides this issue.

performed the duties which would normally be carried out by an advocate and solicitor in West Malaysia. The High Court there took the view that since an arbitral forum is a private tribunal, the actions of the foreign lawyer did not offend Section 37 of the Legal Profession Act 1976.

In reply, the Sabah Law Association cited the case of ***Datuk Haji Mohammed Tufail Bin Mahmod & Ors v Dato Ting Check Sii*** (2009) 4 MLJ 165, where the Federal Court there held that an advocate and solicitor from West Malaysia could not appear as counsel for an appeal heard in Putrajaya for a matter originating from the High Court of Sabah and Sarawak. The Federal Court in reaching its decision considered the language set out in Section 8 of the Sarawak Advocates Ordinance, namely:

> "*Subject to subsection (2) and to section 9, advocates shall have the exclusive right to practice in Sarawak and to appeal and plead in the Federal Court in Sarawak and the High Court, and in all Courts in Sarawak subordinate thereto in which advocates may appear, and, as between themselves, shall have the same rights and privileges without differentiation.*"

as well as Section 87 (9) of the Malaysia Act and Article 161B of the Federal Constitution. In so doing, the Federal Court in the case of ***Tufail*** held that advocates and solicitors of West Malaysia are restricted from appearing in cases arising from East Malaysia even if those cases are heard in West Malaysia.

In the case of Mohamed Azahari, the High Court Judge interpreted the statute (Section 8) and held that the phrase "*exclusive right to practice in Sabah*" means the exclusive rights to legal practice both "*in and outside*" courts. The High Court's interpretation meant that the Ordinance precluded a lawyer who is not called to the Sabah Bar from representing parties in arbitration proceedings in Sabah.

The High Court also held that even though an arbitration proceeding is a private hearing, it did not transform the legal work carried out by an advocate seeking to be admitted into non legal work. The learned Judge further took into account the policies in place when Sabah and Sarawak joined Malaysia. Amongst those policies were the protection of the trade of the East Malaysians, in particular advocates and solicitors. With this policy in mind, the High Court held that a person who is not a member of the Sabah Bar but is seeking to carry out work similar to that of a Sabah Advocate, must apply for ad hoc admission. The applicant appealed against part of the High Court's decision.

The Court of Appeal decided otherwise

The Court of Appeal [(2013) 7 CLJ 277], after hearing the arguments of the parties, allowed the applicant's appeal and held that the language in the Ordinance did not confer exclusivity to advocates and solicitors from Sabah in respect of arbitration proceedings in Sabah. Instead the Court of Appeal held that the words "*to practice in Sabah*" is tied on to the right of practice of barristers and solicitors in England. By that token, since barristers and solicitors in England do not have exclusivity over representation of parties in arbitration proceedings, it follows that Sabah Advocates similarly did not enjoy such exclusivity.

Based on the decision of the Court of Appeal, it would appear that advocates and solicitors from West Malaysia can now represent parties to arbitration proceedings in Sabah.

Leave to Appeal to the Federal Court

At the time this article was written, the Sabah Law Association had been granted leave to appeal to the Federal Court on the following question:-

> " *Whether Section 8(1) of the Advocates Ordinance 1953 (Sabah Cap. 2) read together with Section 2(1)(a) and (b) thereof confer exclusivity of right to practise by representing and appearing for any party in arbitration proceedings in the State of Sabah to Sabah Advocates?*"

Epilogue

It is this author's view that it will be interesting to see how the apex Court decides this issue i.e. to either streamline the position across Malaysia in respect of arbitration proceedings (by adopting the position taken in *Zublin*) or to have the position in West Malaysia and Sabah remain separate. ■

Alternative Dispute Resolution
What's the Real Alternative?

by Ooi Huey Miin
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Conflict is inevitable

No man is an island. The smaller community is a sub-subset of the larger but all exist by virtue of their plurality. In this plurality, there exists a plethora of relationships, personal, economic or regulatory which, within themselves, are inextricably intertwined.

With relationships come conflicts. While it may be easy to assume that nobody wants to be involved in conflict, the truth is somewhat different. A large segment of society thrives on conflict – disputes lawyers rely on conflict to sustain their very existence but they exist simply because demand warrants supply.

If we accept that society is built on relationships and no two individuals are alike, we must accept that conflict is inevitable. Conflict may be positive – arguing out a matter and weighing up different points of view often makes for better and more informed decision making. However, conflicts that fester without resolution become counterproductive.

The need for dispute resolution

Therefore conflicts or disputes need to be resolved. This is as applicable to neighbours in an apartment complex that may have differences over the acceptable decibel scale of noise emission as it is to sovereign states that may dispute each other's territorial boundaries.

With relationships come conflicts. ...conflicts that fester without resolution become counterproductive.

While the use of force, may seem an attractive method in resolving disputes (primarily for the party with access to the greater means of force), it is not without controversy for obvious reasons. Society has evolved; no doubt with the aid of developed legal systems that provide penal or other disincentives from the times where the more primal tendencies of our forefathers to deal with disputes by violent means prevailed.

Fundamentally however, the problem with resorting to force as a method of dispute resolution, to paraphrase the words of Dr. Martin Luther King Jr., is that violence begets violence and it therefore never truly resolves the conflict.

The alternatives

When disputing parties are unable to resolve their differences, the logical thing for them to do is to turn to "neutral" third parties to assist in the resolution of these difference or otherwise determine them. In relative modern times, the accepted path towards achieving final and binding determination of a civil or commercial dispute has been to seek a determination of the dispute by the courts, which would give or pronounce orders or decrees that carry the effect of enforcing or permitting further steps to be taken through the court process to enforce those determinations so as to "resolve" the same.

Problems associated with going to the courts, including the length of time the courts generally take to hear a matter, the rigidity or intricacy that comes with any court system that may impede the presentation of a disputing party's case, delays caused by interlocutory proceedings and the countless levels of appeals and the lack of familiarity by judges regarding the areas that disputes concern, have led parties to seek alternative methods of dispute resolution.

That is not to say that these alternative methods of dispute resolution are new innovations. They are simply refinements to conflict resolution mechanisms that have been utilized for as long as, if not longer than, the courts themselves have existed.

While arbitration is most commonly thought of as the primary method of alternative dispute resolution (in the sense that the determination of the dispute is done in a forum other than the courts), there are also the processes of mediation, conciliation, expert determination and adjudication or combined processes, such as the med-arb procedure (which combines mediation and arbitration).

Mediation is probably the most frequently used alternative dispute resolution process, although we may not realize it. Most people have daily experience in informally mediating disputes between family members, co-workers, neighbours or business partners.

In a formal setting, a mediator is professionally engaged by the disputing parties to undertake the task of bringing the parties to voluntarily agree to resolve their disputes.

A mediator's function is not to decide the parties' disputes but to facilitate settlement negotiations between disputing parties by assisting them to identify common ground or focus on their real needs (commercial or otherwise) and whether a satisfactory compromise may be reached, taking these factors into account.

A **conciliator** provides the same service as a mediator but his mandate goes a step further in that he is authorised by the parties to make a proposal to the disputing parties of what a fair settlement to the dispute may be.

Neither mediators nor conciliators determine disputes for the parties. Their role is ultimately facilitative. This may be contrasted with other forms of alternative dispute resolution where the third party tribunal is empowered by the parties to decide their disputes such as arbitration, expert determination and adjudication.

Arbitration is a process whereby disputing parties actually agree to refer their dispute to an arbitral tribunal for final and binding determination. Most jurisdictions have relatively developed laws relating to the conduct of arbitration and the summary enforcement (as a court judgment) of arbitral awards.

Mediation is probably the most frequently used alternative dispute resolution process, although we may not realize it.

While arbitration is the alternative dispute resolution process that is most similar to that of the courts, arbitral awards carry with them much wider cross jurisdictional enforcement options by virtue of international treaties such as the New York Convention of 1958. They are also generally subject to narrower grounds of challenge than decisions of a court of first instance. It is for this reason that arbitration remains the preferred dispute resolution process for cross-border commercial disputes.

Where parties to a commercial contract do not agree on the value of the subject matter of a transaction, there may be fall back provisions in their contract that permits or compels the reference that question to be answered by reference to **expert determination**, whereby an independent expert is engaged by the parties to decide the disputed value. The weight or effect of that determination would invariably depend on the parties' agreement but there is sufficient debate in various jurisdictions as to when an expert determination may fall within the boundaries of being an arbitration award and thereby be subject to the benefits and burdens of the laws relating to arbitration or *vice versa*.

There is also **adjudication** which is commonly referred to as "temporary dispute resolution" as it is a contractual (or sometimes statutory) process that permits parties to refer disputes that arise between them in an on-going contract for speedy "temporary" determination by a third party adjudicator to allow the contract to move forward while preserving rights to the parties to seek a final and binding determination of the same dispute by arbitration or the court process.

In Malaysia, the long awaited Construction Industry Payment and Adjudication Act 2012 ("CIPAA"), which prescribes a statutory regime for the adjudication of "payment claims" under written "construction contracts" finally came into force on 15 April 2014 and it is expected to have a material impact on the way in which payment disputes relating to construction projects are resolved.

One common thread between all forms of alternative dispute resolution is that their invocation inevitably arises from an agreement for their use to settle or their disputes as an alternative (or sometimes precursor) to going to the courts. Such an agreement may be expressed or implied (for example by statute) and may be pre-determined by parties before their disputes arise (by the incorporation of alternative dispute resolution provisions in the underlying contract between the parties) or after.

Alternative dispute resolution procedures are generally welcomed by courts bogged down by backlog, which largely strive to uphold or give effect to valid agreements for their use.

...there is no magic formula...Every dispute resolution process has a valid utility which may vary depending on needs or requirements of the parties using it.

Back to Court?

That said, ultimately, if one party refuses or otherwise has valid grounds not to honour the result of the parties' chosen method of alternative dispute resolution, the parties will inevitably find themselves back in the courts. An agreement reached pursuant to a mediation or conciliation, an arbitration award or potentially, an adjudicator or expert's decision/determination that is not honoured will have to be enforced through the court process.

It may also be said that more progressive judiciaries have taken steps to remove the traditionally perceived impediments to invoking the court process as a first stop for the determination of disputes. Objectively considered, it may now, particularly in the context of a domestic commercial dispute, often appear to be the case in many jurisdictions that going to court may well be more efficient or cost effective than going to arbitration.

What's the real alternative?

Having outlined various method of dispute resolution i.e. the court process and its alternatives, it may be said that there is no magic formula or prescription as

to what form of dispute resolution will work best for parties that are in dispute. It would, for example, be naïve to think that CIPAA will alleviate the need for contractors to arbitrate or go to court or that the costs of dispute resolution will necessarily be reduced because of it.

What then are our real alternatives? Every dispute resolution process has a valid utility which may vary depending on needs or requirements of the parties using it. It must also be appreciated that dispute resolution processes (and their subsets or variants), regardless of their labels, have been developed and continue to evolve out of an underlying objective to see disputes resolved.

The best that can be done is to educate. Education of potential users of the various methods of dispute resolution processes available so that they may make informed decisions in choosing the manner in which their conflicts are resolved or at least determined. Education of the representatives, experts and tribunals that will be involved in the dispute resolution processes that the parties choose so that they may effectively play their roles and functions in giving effect to that choice.

You may disagree. If you do, we will have a dispute and a number of options to choose from as to how we wish for that dispute to be resolved…and if we cannot agree on those options, there are always the courts! ■

Section 37 of the Arbitration Act 2005 — Recent Decisions

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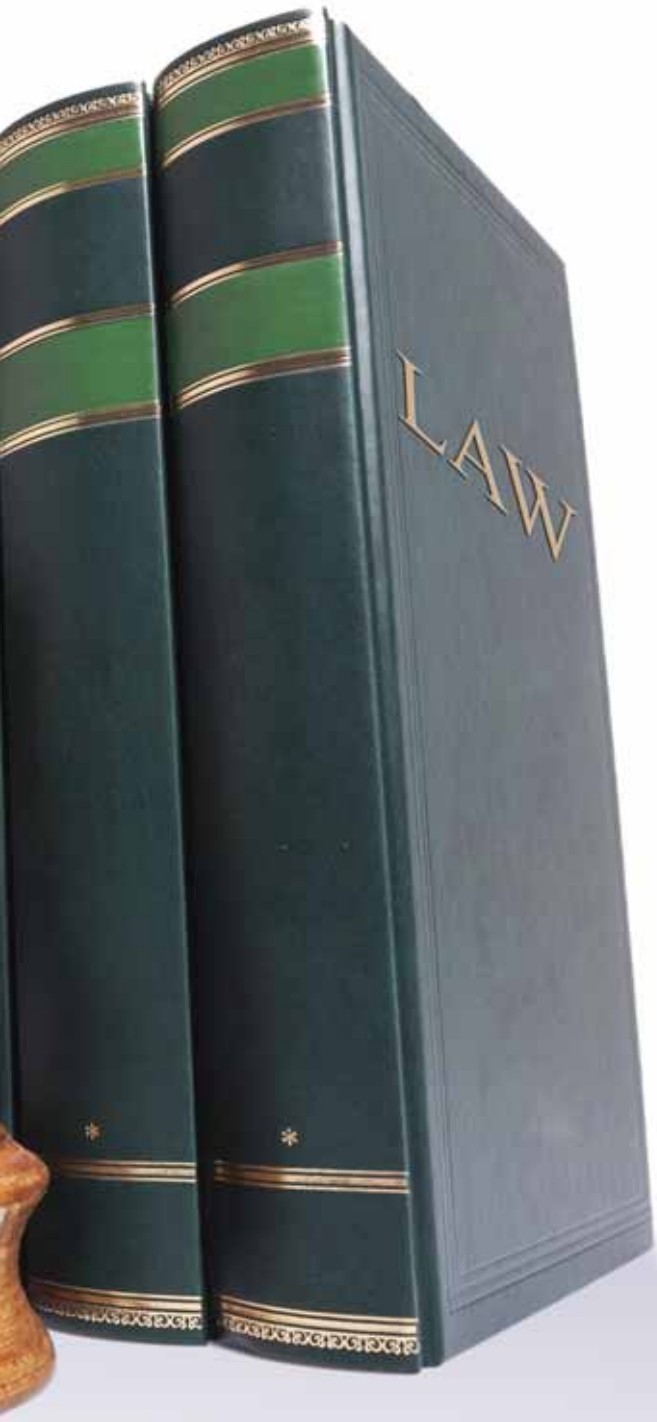
The recent decisions by the High Court and the Court of Appeal in the dispute between the Government of the Lao People's Democratic Republic and (1) Thai-Lao Lignite Co. Ltd & (2) Hongsa Lignite Co. Ltd are naturally worth examining primarily due the following twin grounds; (1) provides guidance in assessing application to set aside an arbitral award made out of time and; (2) upholds the jurisdiction parameters of an arbitral tribunal.

Background Facts

Thai-Lao Lignite Co. Ltd ("TLL") entered into a mining contract with the Government of the Lao People's Democratic Republic ("GOL") in 1992 through which the former was given the right to survey, locate and mine lignite in the region of Hongsa, Laos. The governing law of the contract was the law of Laos and the parties agreed that any dispute shall be referred to the Laotian Board of Economic Conciliation or Laotian Court or International Economic Dispute Settlement Organisation.

Hongsa Lignite Co. Ltd ("HLL") was formed by TLL and licensed by GOL to perform the necessary works. The aforesaid mining contract was then amended by a second mining contract in which the concession area was extended ("collectively referred to as the "Mining Contracts").

TLL and GOL subsequently entered into a Project Development Agreement ("PDA") through which GOL granted TLL a concession



Both the Court of Appeal and the High Court acknowledged that the courts have unfettered discretion to grant an extension of time to set aside the award based on the wording of Section 37 (4) itself.

to build a power plant to produce electricity. HLL was not a signatory to the PDA. The law governing the PDA was New York law while the seat of arbitration was Kuala Lumpur.

Disputes arose between parties when GOL terminated both the Mining Contracts and the PDA on the premise of non-performance. Despite only the termination of the PDA was challenged by both TLL and HLL, and not that of the Mining Contracts,the Arbitral Tribunal found in favour of TLL and HLL and further allowed the recovery of claim under the Mining Contracts by qualifying it as being "*due under total investment cost*" under the PDA.

GOL strenuously challenged the award; by disputing both enforcement attempts in numerous jurisdictions and by seeking to set aside the arbitral award here in Malaysia.

(i) Extension of Time

The Court of Appeal in Government of the Lao People's Democratic Republic ("Appellant") v. (1) Thai-Lao Lignite Co. Ltd & (2) Hongsa Lignite Co. Ltd ("Respondents")(Civil Appeal No. W-02 (NCC)-1287-2011) was invited to consider whether an extension of time to set aside an arbitral award should be granted based on the circumstances of the case and in the exercise of the court's discretion.

The application to set aside the arbitral award was filed by the Appellant some 9 months after the expiry of the 90 days' timeframe provided by Section 37(4) of the Arbitration Act

...the Court appears to favour a rather soft approach in exercising their discretion to extend time in applying to set aside an arbitral award in circumstances where a substantial injustice would be caused.

2005. The High Court judge had refused the application at first instance on the ground that the nine months delay was "*an inordinate delay*" and "*the grounds stated by the Respondent* (Appellant) *for the delay prima facie do not warrant the court to condone the delay*".

The Appellant sought to set aside the arbitral award on the premise that the arbitrators exceeded their jurisdiction pursuant to Section 37 (1) (a) (iv) and (v); by exercising jurisdiction over the Mining Contracts which were governed by the law of Laos and wrongly exercised jurisdiction over the 2nd Respondent whom was not a party to the PDA. The application to set aside the award carried a prayer to extend time to set aside the award. As the prayer to set aside was disallowed by the High Court judge, the entire application was then dismissed. The Appellant then appealed to the Court of Appeal.

Both the Court of Appeal and the High Court acknowledged that the courts have unfettered discretion to grant an extension of time to set aside the award based on the wording of section 37 (4) itself. The Court of Appeal specifically relied on item 8 of the Schedule to the Courts of Judicature Act and Order 3 Rule 5 (1) and (2) of the then Rules of the High Court 1980 (now Order 3 Rule 5(1) and (2) of the Rules of Court 2012) to support its position that the courts are accorded with the powers to enlarge the time prescribed by any written law.

The Court of Appeal however disagreed with the High Court's refusal to enlarge time and went on to identify aspects which should be evaluated in assessing the application for extension of time; being (1) length of the delay, (2) the reason for the delay, (3) the prospect of success and (4) the degree of prejudice if the application is granted.

In so doing, the Appellate Court appreciated that the Appellant is a foreign sovereign and that it is "*implicit in the nature of governmental functioning is procedural delay incidental to the decision making process*". It also acknowledged that one further factor which has to be considered is "*whether the applicant was acting reasonably in all the circumstances*". In assessing the Appellant's plight, the Court of Appeal found that the Appellant had not remained idle while the

time limit lapsed and was in fact actively fighting many fronts in other parts of the world by resisting enforcement. The application to set aside was filed as soon as it was made aware of the time limit and thus the Appellant should not be prejudiced in view that the delay was not deliberate.

It was ultimately decided that so long as there are "*good reasons to extend time as applied for bearing in mind the cogent reasons for the challenge*", it would be of great prejudice to the Appellant if the setting aside application was dismissed without considering its merits and also in view that the Respondents would not be prejudiced as it could be compensated. The Court of Appeal then remitted the matter to the High Court.

(ii) The Setting Aside Application

The High Court proceeded to hear the setting aside application on its merits and subsequently ordered a fresh arbitration of the matter as the Court found that the Tribunal had indeed exceeded its jurisdiction conferred upon it by the arbitration agreement, which then culminates in this appeal. The appeal to the Court of Appeal by TLL and HLL ("the Appellants") (Civil Appeal No. W-02 (NCC) (A)-96-01/2013) was dismissed whereby in its brief judgment released to date, the Appellate Court agreed with the findings of the High Court judge that the "*By assuming jurisdiction over disputes arising out of the mining agreement in an arbitration under the PDA, the Arbitral Tribunal had gone beyond the scope of the submission to arbitration. The consequence is that there is nothing left to be arbitrated and adjudicated at all under the mining agreement as the claimants/defendants under the PDA had obtained the whole of their reliefs.*"

Essentially, the courts found favour with the Respondent's position that the Mining Contracts and the PDA were separate contracts with different applicable laws and that the Act can only be extended to parties to an arbitration agreement. Also, the High Court made a specific finding that "*the doctrine of 'intended beneficiary' is not a recognised exception to the privity rule under the laws of Malaysia*".

As the court found that the Tribunal's findings to claims under the Mining Contracts and the PDA were inextricably linked and was impossible to be separated, it was decided that the whole award had to be set aside and was to be re-arbitrated by a new panel.

Conclusion

To conclude, the Court appears to favour a rather soft approach in exercising their discretion to extend time in applying to set aside an arbitral award in circumstances where a substantial injustice would be caused. The extent of the Court's inclination in exercising this discretion remains to be seen, especially in cases not involving foreign sovereigns, unlike this dispute. The Court of Appeal's position as to the jurisdiction of the arbitral tribunal clearly endorses the accepted position that an arbitration agreement should strictly be confined to parties to the agreement and the agreed subject matter of the same as it had always been the case. ■

The Court of Appeal's position as to the jurisdiction of the arbitral tribunal clearly endorses the accepted position that an arbitration agreement should be strictly confined to parties to the agreement and the agreed subject matter...

Short Courses on Construction Law and Alternative Dispute Resolution (ADR)

Jointly organised with The Institution of Engineers Malaysia (IEM), Pertubuhan Akitek Malaysia (PAM) and Royal Institution of Surveyors Malaysia (RISM)

Wisma IEM, Petaling Jaya

Construction Law

17 & 18 May 2013

Ir. Lai Sze Ching conducted this two-day course, which kick-started the series of Short Courses on Construction Law and ADR, a collaborative effort by IEM, PAM, RISM and MIArb. The course focused on the fundamentals of construction law and practice, namely the laws of contract and tort and on addressing common pitfalls in construction management. A total of 35 participants attended this course.

Arbitration

29 June 2013

Chang Wei Mun, Lam Ko Luen, Ooi Huey Miin, Sr. Ong Hock Tek and Sanjay Mohanasundram conducted this one-day course. The course focused on the essentials on arbitration and offered participants an insight into the practice and procedures of arbitration from a practical and real world perspective. As part of the course, a mock arbitration was conducted, with Chang Wei Mun, A. Mahadevan and Joshua Chong as members of the arbitral tribunal, Ooi Huey Miin as Counsel and Lai Sze Ching and Hor Shirley as witnesses. A total of 38 participants attended this course.

Adjudication

21 September 2013

Ann Quah Ean Lin and Ir. Harbans Singh K. S conducted this one-day course. The course focused on the background and scope of the Construction Industry Payment and Adjudication Act 2012 (CIPAA) and the legal implications of CIPAA to the construction industry. A total of 41 participants attended this course.

Photographs courtesy of IEM

Kuala Lumpur Regional Centre for Arbitration (KLRCA) Talk Series

KLRCA, Jalan Conlay, Kuala Lumpur
May 2013 – September 2013

KLRCA extended a warm welcome to MIArb to participate in a series of ADR talks at the KLRCA. The talks were very well received.

Privacy and Confidentiality in Arbitration
by Chang Wei Mun

29 May 2013

An Arbitrator's Excess of Jurisdiction and Powers
by Ooi Huey Miin

2 August 2013

The Arbitration Clause: Common Pitfalls
by Kevin Prakash

28 August 2013

Challenges to Awards – The Malaysian Perspective
by Lam Ko Luen

20 September 2013

Photographs courtesy of KLRCA

7th Regional Arbitral Institutes Forum (RAIF) Conference

Shangri-La Hotel, Cebu, The Philippines

21 & 22 June 2013

MIArb is a member of the Regional Arbitral Institutes Forum (RAIF), a regional arbitral body founded in 2007. The other members of RAIF are the Institute of Arbitrators & Mediators Australia (IAMA), the Arbitration Association of Brunei Darussalam (AABD), the Hong Kong Institute of Arbitrators (HKIArb), the Singapore Institute of Arbitrators (SIArb), the Philippine Institute of Arbitrators (PIArb) and BANI Arbitration Center (recently replaced with the Indonesian Arbitrators Institute (IArbI)). RAIF was established to, *inter alia*, foster greater cooperation amongst the arbitral organisations in the region and to promote awareness and education in arbitration.

The key event of RAIF is its annual conference, which its member organisations take turns and pride to host. The inaugural RAIF Conference was held in Singapore in 2007, followed by Brunei in 2008, Hong Kong in 2009, Malaysia in 2010 and Indonesia in 2012.

PIArb hosted the 7th RAIF Conference in Cebu, The Philippines, in 2013 and Kevin Prakash and Ooi Huey Miin represented MIArb at this conference. Kevin presented the country report, touching upon, *inter alia*, adjudication and the introduction of the Construction

Industry Payment and Adjudication Act 2012 (CIPAA) in Malaysia. Huey Miin, on the hand, spoke about the Latest Developments and Challenges in Arbitrating Energy Disputes.

The RAIF Conference has come full circle. SIArb will be hosting the 8th RAIF Conference in Singapore, slated to happen on 1.8.2014.

Photographs courtesy of PIArb

Evening Talk

Adjudication – the Experience from UK and Australia

19 August 2013

Rashda Rana
Barrister, Arbitrator, Mediator, 39 Essex Street, London; President of CIArb, Australia; Vice Chair of SCL, Australia

Rashda spoke on the lessons which may be drawn from the experiences of adjudication in the United Kingdom and Australia, including whether the system has worked as envisaged, what has been the effects of adjudication on other forms of dispute resolution or litigation and the desirability or otherwise of the rough and ready nature of the method of adjudication on perceptions of justice by industry players.

The Membership Upgrade Course

18 & 19 January 2014

The **Membership Upgrade Course** is an intensive two-day course with an assessment programme designed and organised by MIArb to impart key and relevant knowledge of the practice and procedures of arbitration to the Associates of MIArb, who upon successful completion of the course and assessment may apply to be upgraded to become Members of MIArb. The course and/or assessment were conducted by Lam Ko Luen, Lai Sze Ching, Rajendra Navaratnam, Rueben Mathiavaranam, Ooi Huey Miin, Ow Sau Pin, Elaine Yap, James Monteiro, Jonathan Yoon, A. Mahadevan and Victoria Loi. A total of 28 participants attended the Course.

Evening Talk

Fundamentals of the Upstream Oil and Gas Contracts

3 March 2014

Thavakumar Kandiahpillai

Vice President, Legal Affairs, President & Group CEO's Office, Sapura Kencana Petroleum Berhad; President, Malaysian Corporate Counsel Association

Thavakumar spoke on the dynamics of the oil and gas industry and provided an introductory insight into the contractual challenges commonly encountered in upstream oil and gas contracts in balancing the competing interests of the parties involved.

Evening Talk

Too Many Parties and How Many Bites?

Misjoinders and When A Challenge Should Be Mounted

12 March 2014

Chan Leng Sun SC
Head, Dispute Resolution, Baker & McKenzie. Wong & Leow, Singapore; President, SIArb

Leng Sun spoke on the Singapore Court of Appeal decision in PT First Media v Astro [2013] SGCA 57 which grappled with the question of joinder and the consequences of a misjoinder in deciding whether an arbitration award could ultimately be enforced in Singapore.

Meets and Visits

Courtesy Visit to Pertubuhan Akitek Malaysia (PAM)

15 July 2013

Wisma Bandar, Kuala Lumpur

From left to right: A. Mahadevan, Ar. Thirilogachandran, Lai Sze Ching, Ar. Chan Seong Aun, Lam Ko Luen, Ar. Hj. Abd Halim Suhor, Kevin Prakash, Victoria Loi

Courtesy Visit to the Kuala Lumpur Regional Centre for Arbitration (KLRCA)

16 December 2013

Jalan Conlay, Kuala Lumpur

From left to right: (Back row) Jonathan Yoon, A. Mahadevan, Faris Shehabi, Lai Sze Ching, Laura Jimenez Jaimez (Front row) Kevin Prakash, Lam Ko Luen, Professor Datuk Sundra Rajoo, Lai Jen Li, Suganthy David

Visit by the Japan Association of Arbitrators

22 January 2014

Secretariat, The Malaysian Institute of Arbitrators

From left to right: Yip Xiao Heng, Hiroki Aoki, Yoshimi Ohara, Lam Ko Luen, Hor Shirley, Joshua Chong.

Council Members of The Malaysian Institute of Arbitrators and The Chartered Institute of Arbitrators (Malaysia Branch) Meet Up

1 March 2014

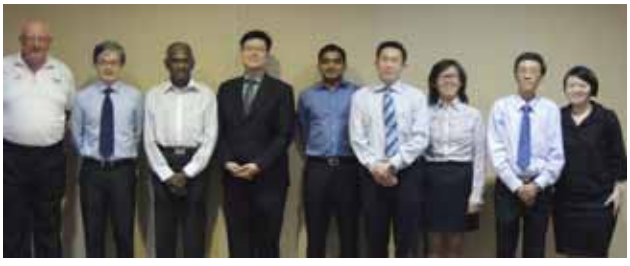
Grand Imperial Restaurant, Sri Hartamas, Kuala Lumpur

From left to right: (Standing) Joshua Chong, Ho June Khai, Jonathan Yoon, Leon Weng Seng, R. Jayasingam, A. Mahadevan, Victoria Loi, Kuhendran Thanapalasingam (Sitting) Lai Sze Ching, David Cheah, Lam Ko Luen, Kevin Prakash

Dialogue with The Society of Construction Law, Malaysia (SCL)

11 March 2014

Secretariat, The Malaysian Institute of Arbitrators



From left to right: Richard Moss, Ivan Loo, A. Mahadevan, Joshua Chong, Thayananthan Baskaran, Lam Ko Luen, Tan Swee Im, Lai Sze Ching and Victoria Loi

Upcoming Events

17.5.2014 and 18.5.2014
MIArb Fast-Track Fellowship Course

This Course is targeted at Members of MIArb who wish to upgrade themselves to be Fellows of MIArb.

24.5.2014
MIArb – The Society of Construction Law, Malaysia (SCL) Annual Law Review

MIArb and SCL are collaborating and jointly presenting a seminar focusing on the developments in arbitration and construction laws in 2013.

4.6.2014
MIArb Evening Talk: Jurisdictional Challenges in International Arbitration: Pulling Oneself Up by One's Bootstraps

Speaker: Ng Jern-Fei, Barrister, Essex Court Chambers

Jern-Fei will speak on jurisdictional challenges in international commercial arbitration with reference to several recent Court judgments

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11.6.2014
MIArb Evening Talk: Competition Law in Malaysia

Speaker: Sudharsanan Thillainathan, Partner, Shook Lin & Bok, Kuala Lumpur

Sudhar will speak on key provisions of the Malaysian Competition Act 2010 which came into effect in 2012, the implications it has on businesses and recent developments.

1.8.2014
8th Regional Arbitral Institutes Forum (RAIF) Conference

The 8th RAIF Conference is set to take place in Singapore and will be organised by the Singapore Institute of Arbitrators (SIArb).

23.8.2014
MIArb Adjudication Workshop

Speakers: Rashda Rana, Barrister, Arbitrator, Mediator, 39 Essex Street,
Oon Chee Kheng, Partner, Messrs. C. K. Oon & Co.

This workshop aims to give participants an insight into the practical aspects of construction adjudication and a step-by-step guide on its process.

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

New Members/Upgrade for Session May 2013 to April 2014

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

Fellow	M/No.	Date Approved
1.Mr. Rueben Mathiavaranam	F/107	19-09-2013
2.Ms. Samrith Kaur	F/109	16-01-2014

Upgraded from Member to Fellow	M/No.	Date Approved
1.Mr. Gary Hng Aik Meng	F/108	23-12-2013

Member	M/No.	Date Approved
1.Mr. Tan Kok Seng	M/381	15-08-2013
2.Ms. Heng See Imm	M/382	15-08-2013
3.Ms. Cilia Chong	M/383	19-09-2013
4.Ms. Uma Rani Sockalingam	M/385	21-11-2013
5.Ms. Rajini Saudranrajan	M/386	23-12-2013
6.Mr. Noor Saidi bin Johan Noor	M/387	16-01-2014
7.Mr. Ahmad Ridha bin Abd Razak	M/388	26-02-2014
8.Mr. Loh Chang Woo	M/389	26-02-2014

Upgraded from Associate to Member	M/No.	Date Approved
1.Mr. Chong Heap Yih	M/390	02-04-2014
2.Mr. Tony Tan Kai Loon	M/391	02-04-2014
3.Mr. Choo Heng Huat	M/392	02-04-2014
4.Mr. Pang Bak Kiang	M/393	02-04-2014
5.Mr. Chee Tsei Hoong	M/394	02-04-2014
6.Mr. Yeoh Seong Mok	M/395	02-04-2014
7.Mr. Chandragesan a/l Kadaply	M/396	02-04-2014
8.Mr. Tan Meng Yue	M/397	02-04-2014

Upgraded from Affiliate to Member	M/No.	Date Approved
1.Mr. Devandra Balasingam	M/384	21-11-2013

Associate	M/No.	Date Approved
1.Miss Lee Zhi Mei	A/172	16-05-2013
2.Mr. Yap Chua Soon	A/173	16-05-2013
3.Mr. Tan Chi Sian	A/174	16-05-2013
4.Miss Chu Chai Yin	A/175	16-05-2013
5.Mr. Wong Sean Yee	A/176	15-08-2013

Associate	M/No.	Date Approved
6.Mr. Nik Hasbi Fathi	A/177	15-08-2013
7.Dr. Mohamed Ishak Abdul Hamid	A/178	19-09-2013
8.Mr. Vinodh a/l Mariappa	A/179	19-09-2013
9.Mr. Chong Heap Yih	A/180	17-10-2013
10.Mr. Chandragesan a/l Kadaply	A/181	17-10-2013
11.Mr. Chin Yoon Sin	A/182	23-12-2013
12.Mr. Choo Heng Huat	A/183	23-12-2013
13.Mr. Wan Ahmad Kamal bin Wan Ahmad	A/184	23-12-2013
14.Mr. Goh Wooi Beng	A/185	23-12-2013
15.Mr. Tony Tan Kai Loon	A/186	23-12-2013
16.Mr. Sivanesan a/l Nadarajah	A/187	23-12-2013
17.Mr. Pang Bak Kiang	A/188	16-01-2014
18.Mr. Arief Sempurno	A/189	16-01-2014
19.Mr. Mak Chee Seng	A/190	16-01-2014
20.Mr. Chee Tsei Hoong	A/191	16-01-2014
21.Mr. Khoo Kwan Yee	A/192	16-01-2014
22.Mr. Ngoh Wei Ching	A/193	16-01-2014
23.Ms. Marlina Amir Hamzah	A/194	26-02-2014
24.Ms. Nazliyah binti Mansor	A/195	26-02-2014
25.Ms. Fakihah Azahari	A/196	26-02-2014
26.Ms. Siti Razasah bt Abd. Razak	A/197	26-02-2014
27.Ms. Nazira bt Abdul Rahim	A/198	26-02-2014
28.Ms. Yusmawati bt Ab. Llah	A/199	26-02-2014
29.Mr. Eddy Azhar bin Othman	A/200	26-02-2014

Affiliate	M/No.	Date Approved
1.Mr. Tan Yew Lun	AF/188	15-08-2013
2.Miss Trisha Anita Menon	AF/189	26-02-2014

Resignation	M/No.	Date Approved
1.Mr. Tan Cheng Siong	M/165	23-12-2013
2.Mr. Koh Leong Chye	A/152	23-12-2013
3.Mr. Seumas Tan Nyap Tek	M/0142	16-01-2014
4.Ms. Lim Yiat Fong	M/094	16-01-2014

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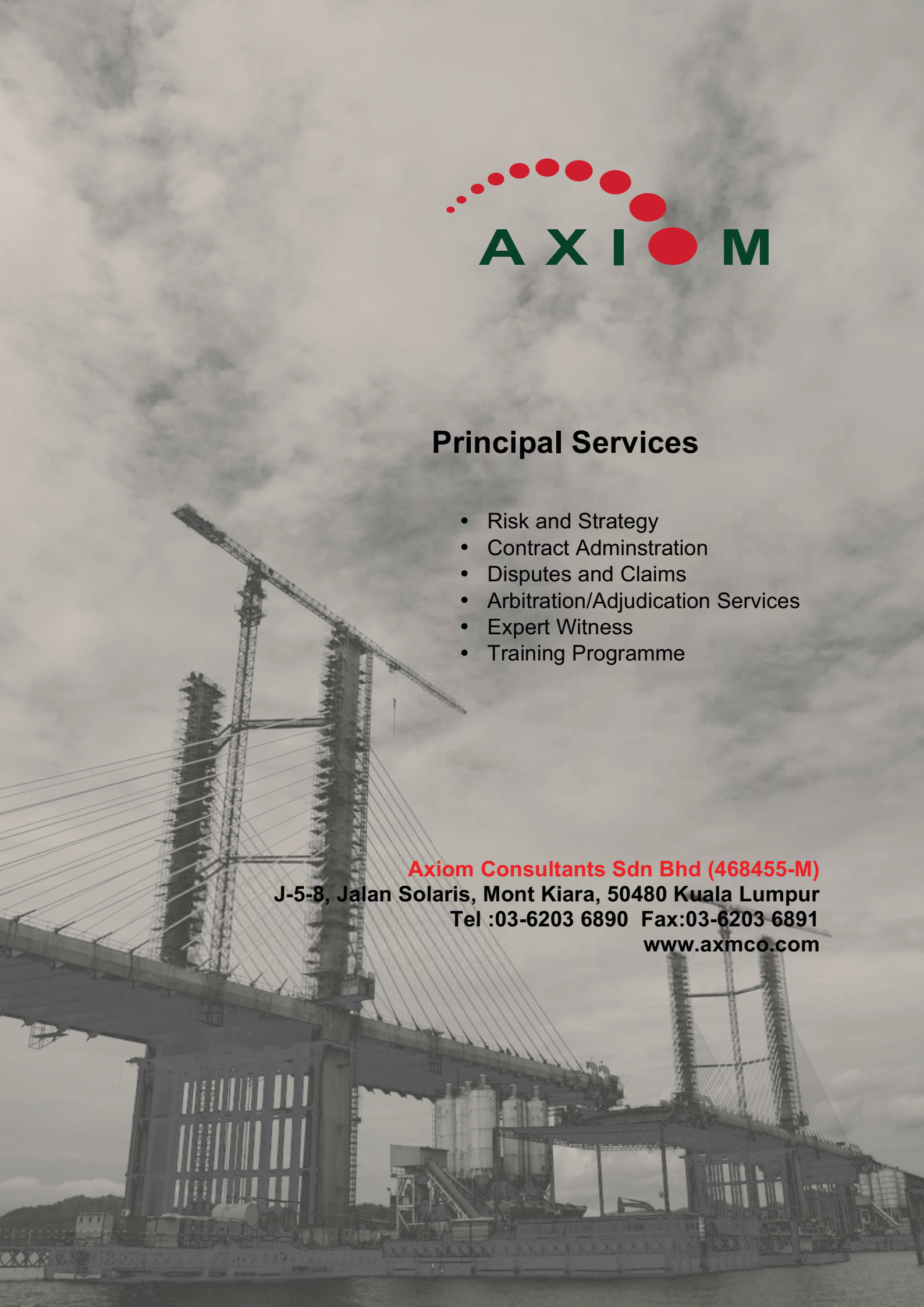

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