MIArb
NEWSLETTER

The Newsletter of The Malaysian Institute of Arbitrators

INSTITUT PENIMBANGTARA MALAYSIA

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Note From President

Dear Members,

This is the second newsletter for 2014. This issue contains interesting and informative articles and covers the events organised and/or participated by MIArb since April 2014.

Time has just flown by.

After an eventful year, we bade farewell to Kevin Prakash, Ow Sau Pin, A. Mahadevan and Ooi Huey Miin as their term in Council ended in May 2014. At the Annual General Meeting (AGM) in June 2014, we welcomed Sudharsanan Thillainathan, Ranjeeta Kaur, Joshua Chong Wan Ken, S. Shanthi and Lynnda Lim Mee Wan who were elected into Council. Council also welcomed Karen Ng Gek Suan, who was co-opted at our Council meeting in August 2014.

In April 2014, MIArb had the honour of collaborating with the Kuala Lumpur Regional Centre for Arbitration (KLRCA) in organising a seminar on Ethics in International Arbitration. In July 2014, MIArb had the privilege of collaborating with the Society of Construction Law, Malaysia (SCL) in presenting the inaugural Annual Law Review. I can safely say that both collaborations were successful and we look forward to further collaborations in future.

We have continued with our series of "after-work" evening talks by inviting eminent speakers to share their wealth of knowledge and experience on a diverse range of topics with our members. This has become a regular feature of MIArb, for the continuous development and enrichment of our members.

There are many exciting events lined up. In January 2015, we will be having the Membership Upgrade Course for Associates who are desirous of making themselves eligible to be Members of MIArb. I am proud to announce that MIArb will be hosting the 9th Regional Arbitral Institutes Forum (RAIF) Conference in 2015.

Once again, I encourage all members to play an active role in the activities of MIArb and to support its endeavours of putting MIArb on the map of the arbitration circle, both domestically and internationally. With the contribution of all our members, we can take MIArb to the next level.

Lam Ko Luen
President

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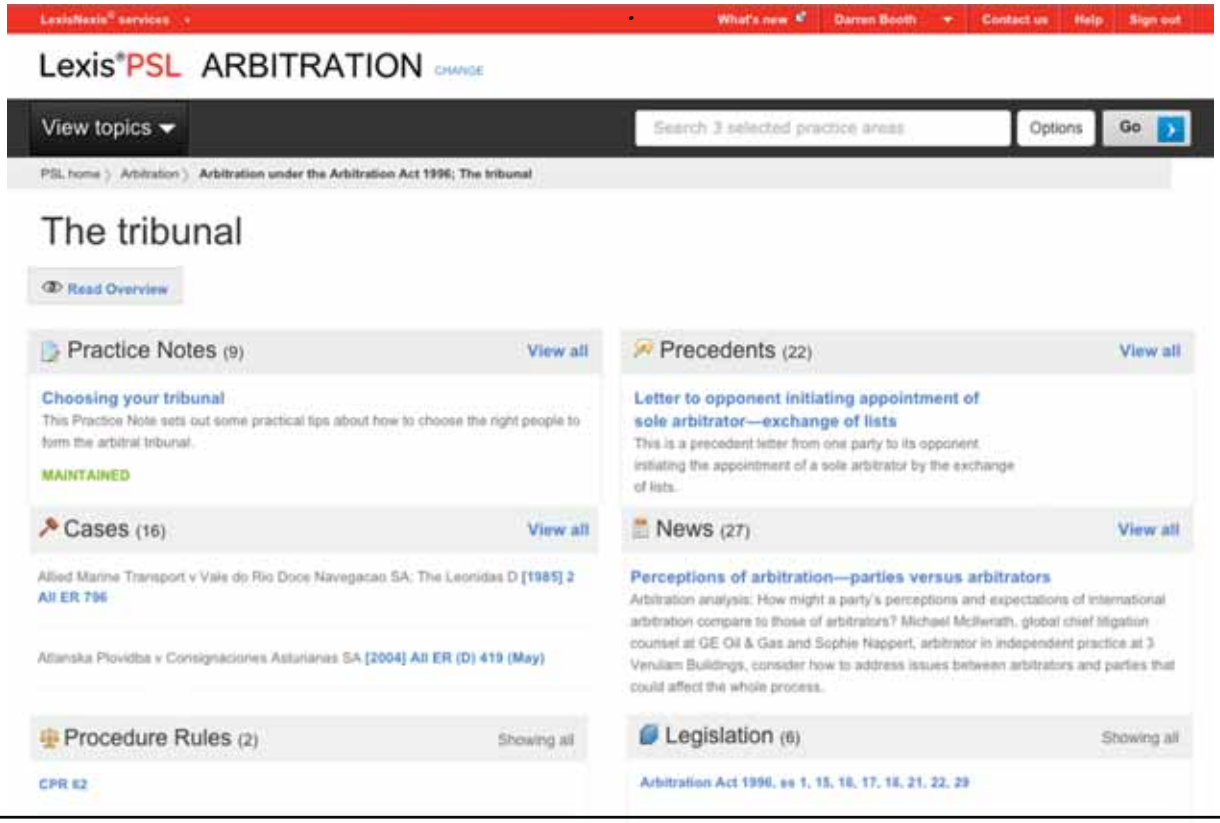
Topic Range of Arbitration Module

- Arbitration under th arbitration Act 1996
- Institutional and ad hoc arbitration
- International arbitration
- Industry- specific arbitration

Sample of Arbitration Module



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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.

9th RAIF Conference 2015

The Malaysian Institute of Arbitrators (MIArb) is proud to be the host of the 9th Regional Arbitral Institutes Forum (RAIF) Conference to be held in Kuala Lumpur in 2015.

RAIF

RAIF is a regional arbitral body established in 2007, to foster greater cooperation amongst the arbitral organisations in the region and to promote awareness and education in arbitration. The current member organisations of RAIF are MIArb, 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 the Indonesian Arbitrators Institute (IArbI).

The Conference

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, Indonesia in 2012 and The Philippines in 2013.

SIArb hosted the 8th RAIF Conference in 2014 (see inside, pages 18 and 19).

More details about the 9th RAIF Conference will be available on our website: www.miarb.com.

Ethical Concerns in Relation to Arbitrators' Fees

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Introduction

More often than not, the absence of administrative fees alone makes *ad hoc* arbitrations a popular choice and here, the fees of arbitrators are fixed by the arbitrators themselves. While the main terms of fees are always agreed upfront, other aspects may not be agreed or even anticipated until it crops up along the way or towards the end of the arbitration process.

Questions like, *"what if arbitrators seek to charge cancellation fees for the opportunity cost of hearing dates cancelled at short notice"* and *"to what extent are arbitrators obliged to give a breakdown when they request a deposit from parties against their fees"*, are matters concerning arbitrators' ethical obligations towards parties. These inadvertently pose as risk factors in the event they are not done or handled in a proper manner.

The rising number of cases brought against arbitrators in relation to excessive fees being charged is evident of this issue needing greater attention.

The Issues

The root question here is, *"What are the ethical obligations of arbitrators in relation to fees in ad hoc arbitrations?"* This article will examine the following two key issues in an attempt to answer the question.

(1) Cancellation Fees

Imposing fees for the cancellation of hearing is not uncommon in arbitration. The matters to consider before this is done are, the notice period given for the cancellation and whether anything could be done to mitigate the costs linked to the cancellation (i.e. whether the arbitrator could have adjusted his or her work to avoid imposing a cancellation fee).

It is not unreasonable for arbitrators to seek fees for hearings cancelled. The problem that usually arises in *ad hoc* arbitration is that unless agreed, it is difficult to substantiate the arbitrator's entitlement to cancellation fees. The arbitrator may be obliged to show that he or she could not reschedule other work to fit into the cancellation period. Cancellation at a "short notice" is a different issue altogether, although it is arguable as to what constitutes "short notice". Cancellations with less than one week's notice may amount to "short notice" and as such likely to incur costs as it is not possible for the arbitrator to slot in alternative work. What constitutes "short notice" is ultimately a question of magnitude. There is no hard and fast rule. It is a question of what is reasonable in the circumstances.

The question is: can the parties in arbitration be made to bear cancellation fees? If cancellation fees are provided for in the arbitration agreement, then arguably there is no problem. The problem arises when cancellation fees are not set out in writing.

(2) Breakdown of Fees

A breakdown of fees is usually applicable if the arbitrator charges fees based on a cost per unit time.

Generally, arbitrators are hesitant to show a breakdown for hours spent on perusing documents and writing awards as this might indirectly reflect on competency. Further, charging for an excessive number of hours in deliberating and writing an award could expose an arbitrator as being unethical in carrying out his or her obligations. However, in writing an award, the arbitrator not only has to read and digest the submissions from both parties, he or she has a duty to write a cogent, complete, final and enforceable award. It is difficult to limit such a task to a fixed number of hours. Ultimately, whether an arbitrator has unfairly charged time to a matter depends on the complexity of the issues. A fairly transparent process would be to require the arbitrator in an *ad hoc* arbitration to produce a timesheet for time spent like the practice implemented by the Singapore International Arbitration Centre (SIAC).

Taking an advance or deposit is an element of securing arbitrators' fees. Generally, this is a sum paid at the beginning of the arbitration and paid to the arbitrator as earned. It should be placed into a trust or separate client's account and withdrawals should be completely itemised and explained in writing to the parties in arbitration. A good practice arbitrators may follow, other than itemising withdrawals, is to provide an accurate breakdown of hours spent and return any excess promptly to the parties.

The issue of fees in *ad hoc* arbitrations tends to exacerbate when the fees structure is on an hourly basis. It is recommended that contemporaneous recording of time and periodic billing that accounts for work done and fees earned are practised diligently. Keeping of "time sheets" recording accurate descriptions of work done and time units (even if the work is not hourly

driven) would be helpful in explaining the work done, if required. If proper accounts are kept, arbitrators are almost certain to stay clear from ethical concerns being raised in relation to their fees.

What can be done to address these Issues?

(1) Adopt Institutional Rules

The most popular rules for *ad hoc* arbitrations are the UNCITRAL Arbitration Rules ("**UNCITRAL Rules**").In *ad hoc* arbitrations, the parties execute their own arrangements without reference to institutional rules and are not subject to any supervision or administration by an arbitral institution. As UNCITRAL is not an arbitral institution, the UNCITRAL Rules are used in *ad hoc* arbitrations and were designed with international disputes in mind. There are no special provisions in the UNCITRAL Rules relating to administrative services or fee schedules.

Under the UNCITRAL Rules, the arbitral tribunal fixes its fees, which shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case. In this task, the arbitral tribunal may be assisted by an appointing authority. It should be noted that it is possible to have a different institution as an appointing authority when using any *ad hoc* arbitration rules such as the UNCITRAL Rules. Institutions such as the Hong Kong International Arbitration Centre (HKIAC) and SIAC allow the parties to adopt the use of the UNCITRAL Rules in their arbitration proceedings.

On the other hand, for arbitrations administered by the London Court of International Arbitration under the UNCITRAL Rules or other *ad hoc* rules or procedures agreed by the parties to the arbitration, there is a separate Schedule of Costs[1] effective since 1 January 2014.

In *ad hoc* arbitrations, where there is no agreement as to the institutional rules and appointing body, the parties may, via a tripartite agreement, provide for the rules of a particular institution to be followed or applied. *Ad hoc* arbitrations that are conducted without the benefit of an appointing and administrative authority are subject only to the parties' arbitration agreement and applicable national arbitration legislation. In other words, the parties run the arbitration themselves together with the arbitrator(s).

The "Ethics Standards for Neutral Arbitrators in Contractual Arbitration" (adopted by the Judicial Council of California, United States of America) have a very apt provision[2] which could be used as a guide by arbitrators to avoid issues relating to conduct and ethics.

(2) Agree on Fees in Writing

The fear of parties in *ad hoc* arbitrations is usually that the arbitrator may take advantage by imposing high charges. One way this may be controlled is if the arbitrator's charges are put down in writing.

For example, parties are less likely to begrudge arbitrators for imposing cancellation charges if these were properly spelt out in the terms of appointment. However, more often than not, many details preceding the basic fees are not dealt with until they materialise.

Parties to an arbitration may desire for all possible billable events to be put in writing beforehand to avoid being caught by surprise later and to limit cost exposure. It is also usually coupled with the fear that parties may have of arbitrators that once they have been appointed, will abuse their rights when it comes to their fees.

1 *Section 2 deals with the fees and expenses of the Tribunal and section 2 (d) (iii) specifically refers to late postponement or cancellation of hearings and states as follows: "The tribunal may charge for time reserved but not used as a result of late postponement or cancellation of hearings, provided that the basis for such charge shall be advised in writing to, and approved by, the LCIA Court."*

2 *Standard 16 - Compensation:*

(a) An arbitrator must not charge any fee for services or expenses that is in any way contingent on the result or outcome of the arbitration.

(b) Before accepting appointment, an arbitrator, a dispute resolution provider organization, or another person or entity acting on the arbitrator's behalf must inform all parties in writing of the terms and conditions of the arbitrator's compensation. This information must include any basis to be used in determining fees; any special fees for cancellation, research and preparation time, or other purposes; any requirements regarding advance deposit of fees; and any practice concerning situations in which a party fails to timely pay the arbitrator's fees, including whether the arbitrator will or may stop the arbitration proceedings.

(Sub (b) amended effective July 1, 2014.) Standard 16 amended effective July 1, 2014. (See also "Comment to Standard 16")

The rising number of cases brought against arbitrators in relation to excessive fees being charged is evident of this issue needing greater attention.

In light of this, there should be a written agreement covering all terms. To the extent that all terms are not fully stated, the effect would be the same as not having an agreement. For example, parties could have agreed to a particular term, such as cancellation fees, but omitted it from the fee agreement. When this happens, parties should be open to curing the omission. The American Arbitration Association's (AAA) position on this point[3] is that the arbitrator has no right to insert the new term without the agreement of the parties.

Though the importance of the matter (e.g. the amount of the claim, whether the respondent has delivered his defence and the amount of counter-claim, if any) might be known to the arbitrator(s), it might not be easy for arbitrators to foresee the amount of time (for travelling, hearing dates etc.) and work demanded from them at the time of appointment. As such, covering all terms concerning the arbitrators' fees may seem impossible, but nevertheless one should not be deterred from doing so. A good practice for arbitrators thus would still be to spell out their terms of appointment including their fees in a manner as thorough as possible.

Conclusion

Setting, documenting and communicating the fees are of paramount importance. As seen from above, a good practice for arbitrators in *ad hoc* arbitrations is to adopt a standard practice of including provisions for scheduling of fees and to get parties' consent at the beginning of the arbitration. This would be beneficial to the arbitrator as well as the parties.

Generally, many perceive arbitrators' fees as being too expensive. Setting out the fees at the very beginning and having every billable item documented and communicated to the parties from time to time would benefit the arbitrator and serve as a safeguard in the event his or her fees are challenged. To the parties, this diminishes any surprise elements in the arbitrators' fees as they are kept reasonably informed throughout the process.

As we are all aware, there appears to be a recent increase in client dissatisfaction concerning excessive arbitrators' fees. The many cases decided on the point where parties have challenged arbitrators' fees reflect this as a growing problem. Adopting some of the recommendations above may minimise ethical concerns about arbitrators' fees, particularly in *ad hoc* arbitrations. ■

3 *Canon VII of the AAA Code of Ethics for Arbitrators in Commercial Disputes (Canons of Ethics for Arbitrators):*

An arbitrator should adhere to standards of integrity and fairness when making arrangements for compensation and reimbursement of expenses.

A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.

B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

(1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established;

(2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and

(3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

The New Show In Town

by Nick Powell
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I think I will like CIPAA. It brings with it options that were not available before. But it will also bring change. It will change how the dispute industry organises itself and how it evolves its dispute strategy. I am not convinced such changes will be painless.

Attack!

The analogy between a medieval siege and arbitration are too obvious to overlook. At the outset of any siege, an attacker needed to assemble an army of (either paid for or tithed) carpenters, blacksmiths and other trades have to be employed to build the siege machinery. Miners are also employed to tunnel under the defensive wall to collapse the same.

The defenders needed to be equally busy – laying in stores; securing a safe water supply; employing their own miners to *undermine* the attackers own tunnels and collapse them and (we must not forget) the opportunity to counterattack.

So whilst no siege was exactly the same (each depended on the strength and preparation of the attacker, but equally upon the resolve and preparation of the besieged) they did tend to proceed by a conventional set of Siege Rules.

Arbitration and dispute practitioners have not hesitated to learn from such tactics. The rules are now called something a little different, but the analogy for preparation (offensive and defensive) including the tunnelling, undermining and counterattacking still holds true.

Equally, arbitration is, for most parties, not their preferred choice of method to settle matters. It requires a massive investment in manpower, time and money that most parties prefer to spend elsewhere. Some parties simply don't have the ability to mount, sustain or defend a siege. Hence arbitration, like the medieval siege, is almost invariably the result of other settlement or domination tactics not having worked.

The Chinese military strategist, Sun Zhu, observed that you should only lay siege to a city when other options are not available. Arbitration (and formal litigation) is, for most parties, the option they take when no other exists.

Increasingly, parties to a dispute have felt that there should be other options for a binding (albeit usually a non-permanently binding) decision to be made by an independent third party. Typically the dispute system adopted is adjudication in some form. The UK enacted legislation in 1996[1], with Singapore enacting theirs in 2005[2].

I think I will like CIPAA. It brings with it options that were not available before. But it would also bring change.

The New Show in Town

Malaysia has enacted its own legislation that came into force this year[3]. As the new show in town, it will take some time to bed in. It is not yet clear how far the boundaries will extend or how heavily the jurisdictional fences will be tested. For instance, how many of the usual suspects (prolongation, delay and disruption, acceleration, escalation, extension of time, liquidated damages, general damages, special damages and the like) will become proforma Payment Dispute issues covered by CIPAA? Equally to what extent will construction related businesses, however tenuous that relation, be able to avail themselves of the legislation?

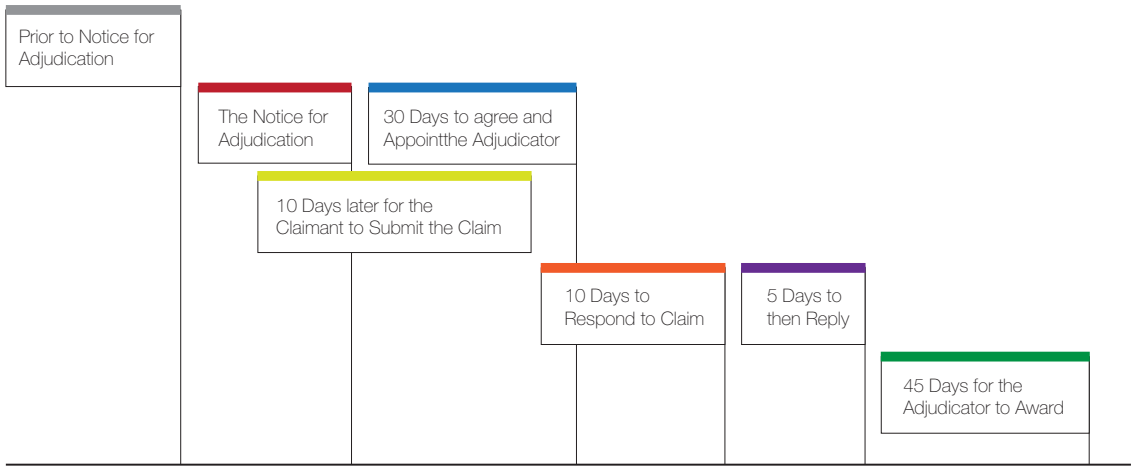
My suspicion is that there exists more than sufficient *talent* within the Malaysian dispute industry to place CIPAA as a very wide raging adjudication tool that will be able to cater for most, if not all, major construction related disputes about time and money.

1 *The Housing Grants Regeneration and Construction Act 1996*

2 *Building and Construction Industry (Security of Payment Act) 2004*

3 *Construction Industry Payment and Adjudication Act 2012 (CIPAA)*

Simplification of the CIPAA timeline



Note: Days = Working Days

Hence the question, if arbitration was (and remains) a siege, what will adjudication become?

It's an Ambush!

It appears to me that this question may not be particularly philosophical. Having just attended CLIC 2014[4], the quiet whispers around the room from other jurisdictions all echoed the same word. The *sotto voce* recounting of the individual adjudication experiences and practices were all very similar. Adjudication will be the ambush. The alternative and balance to arbitration's siege.

Malaysia needs no introduction to ambush. Its early history was partly shaped by the consequences of an ambush in 1951[5], which (under the parallel measures of the Briggs Plan for the Malayan Emergency) also pursued the retention and capture of *hearts-and-minds*. The tactics and results of which are still studied and evident today, and certainly not confined to Malaysia. The schematic above is a simplification of the CIPAA timeline.

It is fairly safe to say that few if any Claimants will wait for their 10-day slot to generate their claim document. Our experience is that claim documents of sufficient quality to succeed in major or complex disputes will take months to prepare.

Adjudication will be the *ambush*. The alternative and balance to arbitration's siege.

The modus for nearly every Claimant will be to prepare their claim, stress test it and maybe attempt to gain settlement using it far in advance of issuing the Notice. Even for Claims that are not driven by the Claimant's legal teams and appointed Counsel, every Claim will have legal input to some extent. Most Claims (and all factually complex claims) will have technical quantum documents compiled by the relevant professionals, with a *Claims Consultant*[6] often involved. Only after the claim document is ready, or very close to being ready, will the Adjudication Notice be served.

4 *Construction Law International Conference 2014*

5 *The ambush and assassination of Sir Henry Gurney*

6 *Sometimes the title differs, but the scope stays the same.*

Dead-zones in 2015

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
	Chinese New Year					Hari Raya Puasa		National Day & Hari Raya Haji			End of Year

The Respondent has to fall within one of two camps. One camp will be expecting the Notice and will have mounted preparations to one degree or another. For the other camp, the claim will be something of an unwelcome surprise. Not perhaps quite the door-gift they were expecting with the issuance of the certificate of final account, completion or making good defects of the project (or similar).

Regardless of which camp the Respondent falls into, they will only sight the actual claim document on Day 40, and will have to respond to the same by Day 50. However that timeline and philosophy is packaged and/or sold, it will be, and has always been, an ambush. But this ambush has legislative effect.

Similarly, the very Malaysian experience that *the jungle is neutral*[7] and which shaped the emergency tactics applies by analogy to the yearly calendar that the Public and Festive Holidays provide.

Malaysia has at least three logistically problematic time slots in any year, often more.

The end-of-year period, when most senior managers attempt to clear their leave entitlements and honour the family holiday commitments, is now an established business feature. Malaysia's two main festive holidays that affect the business cycle are Hari Raya Puasa and Chinese New Year, both of which follow a lunar calendar and so ambulate from year to year. Sarawak has Hari Gawai at the end May / early June that typically shuts down their construction industry for about two weeks. The festivals of Vesak and Deepavali do not usually have such a disruptive effect, but again much depends on their timing compared to other holidays.

However we *slice-and-dice* the Malaysian public or festival holiday calendar, there will be at least three periods every year when generating a comprehensive response to any Adjudication Notice and more importantly generating a robust and informative response to the Claim Document will be extremely difficult.The 2015 dead-zones are shown in the table above.

The entire point of an ambush is that of speed and surprise. We anticipate that most Adjudication Claimants will time their Adjudication Notices so as to preserve and maximise the inherent advantages that adjudication gives them.

To what extent such tactics will be managed by the adjudicator fraternity has yet to be seen.

What is however clear is that, if your firm is likely to attract Adjudication Notices or if you are in the business of defending the same, you now have two options to preserve some kind of equilibrium.

If you endeavour to reduce the advantage that the adjudication ambush brings, not only must your systems be able to respond within its timelines, but you now also have to keep your office on a *war-footing* during public and festive holiday periods. The alternative is that you implement a system for claim preventive claim identification, closure or defence building, either of which is likely to bring some fairly substantial changes to the cost of project delivery and the project implementation process.

However we do it, adjudication's ambush has changed the game. The arbitration siege landscape, that we know and are familiar with, is now only one potential option.

May we live in interesting times. ■

7 *F. Spencer Chapman*

Setting Aside of Awards: Public Policy & Rules of Natural Justice

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1. Introduction

Once an arbitral tribunal publishes the award, the unsuccessful party is almost always aggrieved at having lost the war and having to satisfy the amount awarded. In some cases, the winning party may not be content with the award, as he considers the amount awarded as being too low. Generally, the parties are expected to abide by the award however disappointed they may be as they have agreed to be bound by the award. What then are the remedies available to an aggrieved party post-award? Generally, the remedies available may be classified into two types i.e.:

1. The passive remedy of resisting enforcement of the award (Section 39 of the Malaysian Arbitration Act 2005); and

2. The active remedy of seeking to set aside the award (Section 37 of the Malaysian Arbitration Act 2005).

The aggrieved party has either option to resist the award.

2. Passive Remedy

A party adopts a passive remedy when he does not take the initiative to attack the award, but simply lies in wait and counterattacks when his opponent seeks to enforce the award in court.

3. Active Remedy

In practice, it is uncommon for an aggrieved party to seek for redress by way of a passive remedy. The aggrieved party is usually unwilling to leave the award as it is until such time his opponent chooses to enforce it. In this regard, most laws will stipulate a time limit by which an aggrieved party may apply to set aside the award.

4. Public Policy under the UNCITRAL Model Law

Article 34(b)(ii) of the UNCITRAL Model Law ("the Model Law") states that an arbitral award may be set aside if the court of the seat of arbitration finds that the award is in conflict with the public policy of the country.

Public policy is not defined in the Model Law and can probably never be exhaustively defined. Each country has its own concept of what is 'public policy' which may differ from one country to another (e.g. gaming contracts). As such, there is a risk that one country may set aside an award that another country would regard as valid. However, most developed arbitral jurisdictions have similar conceptions of public policy. It is generally accepted that public policy denotes fundamental legal principles, a departure from which would be incompatible with the legal system[1]. The Canadian Superior Court of Justice of Ontario held that for an award to offend public policy, *"it must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario"*[2].

In Deutsche Schachtbauund Tiefbohrgesellschaft GmbH v Ras Al-Khaimah National Oil Co[3], Sir John Donaldson MR opined that with respect to 'public policy', it has to be shown that:

> *"…there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or possibly that enforcement would be wholly offensive to the ordinary, reasonable and fully informed members of the public on whose behalf the powers of the State are exercised."*

1 *See, for example, the decision of the Swiss Federal Supreme Court of September 18, 2001 [2002] Bull ASA 311*

2 *United Mexican States v Marvin Roy Feldman Karpa, File No 03-CV-23500, Ontario Superior Court of Justice, December 3, 2003*

3 *[1987] 3 WLR 1023 at 1035D*

However it must be emphasized that the concept of 'public policy' is very fluidic and is an ever-shifting conception. What may now be considered contrary to public policy may well become the norm later.

5. Setting Aside of Awards under the Malaysian Arbitration Act 2005

Section 37 of the Malaysian Arbitration Act 2005 ("the Act"), modeled after Article 34 of the Model Law (albeit, with minor changes), provides for applications to set aside arbitral awards. Section 37(1) provides for the various grounds on which an arbitral award may be set aside. Section 37(1)(a) provides six grounds where the onus is on the party making the application to provide proof. Whereas Section 37(1)(b) of the Act provides two grounds where the High Court may of its own volition set aside the award.

6. Public Policy

Section 37(1)(b)(ii) of the Act provides that an arbitration award may be set aside if the High Court finds that the *"award is in conflict with the public policy of Malaysia"*.

The term "public policy" is not defined in the Act but Section 37(2) provides several non-exhaustive situations where an award may be considered to be in conflict with the public policy of Malaysia:

> *"Without limiting the generality of sub-paragraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where-*
>
> *(a) the making of the award was induced or affected by fraud or corruption; or*
>
> *(b) a breach of the rules of natural justice occurred-*
>
> *i. during the arbitral proceedings; or*
>
> *ii. in connection with the making of the award."*

The opening phrase 'without limiting the generality of subparagraph (1)(b)(ii)' makes it clear that Section 37(2) is not intended to provide an exhaustive definition as to what amounts to conflict with the public policy of Malaysia.

Section 37(2) of the Act is not found in the Model Law, but a similar provision is found in the Singapore Arbitration Act 1994[4] and the New Zealand Arbitration Act 1996[5]. As such, the cases decided in New Zealand and Singapore may be of persuasive authority in the Malaysian courts. In Amaltal Corp Ltd v Maruha (NZ) Corp Ltd[6], the New Zealand Court of Appeal held that the term 'public policy' covered only *"fundamental principles of law and justice in substantive as well as procedural aspects"*.

In Downer-Hill Joint Venture v Government of Fiji[7], the New Zealand court held that a fundamental error of law or fact leading to a substantial miscarriage of justice can render an award contrary to public policy. However a high threshold needs to be satisfied and mere mistake is insufficient.

By contrast, the Singapore Court of Appeal in AJU v AJT[8] held that even if an arbitral tribunal's findings of law or fact are wrong, such errors would not *per se* engage the public policy of Singapore. However the court clarified that an erroneous finding of law by an arbitral tribunal as to the public policy of Singapore would be grounds for setting aside the award. In this case, the court followed the English Court of Appeal in Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd[9] and held that where an arbitral award was challenged on

4 *Singapore Arbitration Act 1994, section 24*

5 *New Zealand Arbitration Act 1996, section 34, First Schedule*

6 *[2004] 2 NZLR 614, CA*

7 *[2005] 1 NZLR 554*

8 *[2011] SGCA 41*

9 *[2000] 1 QB 288*

the basis of illegality in the underlying contract, the finding of fact by the arbitrator that the contract is not tainted with illegality will not be disturbed by the court. It was only in cases where the challenge was based on facts not placed and argued before the arbitral tribunal that the court would intervene and reopen the arbitral tribunal's findings.

In the Malaysian case of **Majlis Amanah Rakyat v Kausar Corporation Sdn Bhd**[10], the High Court, cited cases from Singapore and Hong Kong, and explained what amounts to public policy in Malaysia:

> *"In my view, the Malaysian Courts cannot surely ignore the above comparative jurisprudence in the interests of maintaining comity of nations and a uniform approach to the model law, so far as that is possible, to the concept of "public policy" in relation to foreign awards.*
>
> *.... the Defendant would need to proceed further to establish the conflict with the public policy of Malaysia in the narrow sense of something offending basic notions of morality and justice or something clearly injurious to the public good in Malaysia. I was of the opinion this threshold was not satisfied by the Defendant on the facts of this case." (emphasis added)*

7. Rules of Natural Justice

7.1 Definition

Section 37(2)(b) of the Act provides, *inter alia*, that an award is in conflict with the public policy of Malaysia where a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award. The term 'rules of natural justice' is not defined in the Act

Natural justice consists of two principal rules, expressed in Latin as *nemo judex in causa sua* (no man may be a judge in his own cause or rule against bias) and *audi alteram partem* (hear the other side). Generally, natural justice as it applies to arbitration comprises two broad propositions:

(a) that the arbitrator must be independent and act impartially; and

(b) that the arbitrator must act fairly and give the parties a reasonable opportunity to be heard, i.e. to ensure fairness in arbitral proceedings.

Lord Drummond Young in **Costain Ltd v Strathclyde Builders Ltd**[11] laid down several propositions when determining whether there is any breach of the rules of natural justice and held that the general principle is that each party must be given a fair opportunity to present its case. That is the overriding principle, and everything else is

...the concept of 'public policy' is very fluidic and is an ever-shifting conception. What may now be considered contrary to public policy may well become the norm later.

10 [2009] 1 LNS 1766

11 [2003] Scot CS 316, Scotland

subservient to it. His Lordship further held that it is impossible to lay down absolute or universal general rules, breach of which will necessarily make the award invalid.

7.2 Impartiality and bias

Parties may complain of actual or perceived impartiality and/or bias. Impartiality can occur as either actual lack or perceived lack of impartiality. Cases of actual impartiality are rare. It is far more common to allege perceived bias than actual bias.

There is no universal test on what amounts to 'perceived or apparent bias'. The New Zealand Court of Appeal in **Auckland Casino Ltd v Casino Control Authority**[12] followed the then English authority[13] and held that the test to be applied was whether there was "*a real danger of bias*". The court cited with approval the principle laid down by the House of Lords in **R v Grough**[14]. Lord Goff of Chiveley in **Grough** held:

> *"In conclusion I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias..... Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the Court should look at the matter through the eyes of a reasonable man, because the Court in cases such as these personifies the reasonable man; and in any event the Court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in Court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the Court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the Court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or with disfavour, the case of a party to the issue under consideration by him…" (emphasis added)*

This test was affirmed and applied in **Man O'War Stations Ltd v Auckland City Council**[15].

A slightly different and 'adjusted' test of 'a real possibility of bias' was subsequently applied by the New Zealand courts in **Erris Promotions Ltd v Commissioner of Inland Revenue**[16]. The Court of Appeal in this case acknowledged that the English test on perceived bias was reformulated by the House of Lords in **Porter v Magill**[17] as *"the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was*

12 *[1999] 1 NZLR 142, CA*
13 *R v Grough [1993] AC 646, HL*
14 *[1993] AC 646, at 670*
15 *[2001] 1 NZLR 552, CA*
16 *[2003] 16 PRNZ 1014, CA*
17 *[2002] 2 AC 357 at 499, para 103*

biased". The Supreme Court of New Zealand finally held that the test for apparent bias is *"a real possibility of bias"* in Saxmere Company Ltd v Wool Board Disestablishment Company Ltd[18]. Therefore a judge or an arbitrator should disqualify himself for impartiality *"if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide"*[19].

7.3 Procedural fairness

In Trustee of Rotoria Forest Trust v The Attorney-General[20], the New Zealand court laid down the following principles in order to determine procedural fairness:-

> *"(a) The arbitrators must observe the requirements of natural justice and treat each party equally.*
>
> *(b) The detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise.*
>
> *(c) As a minimum, each party must be given a full opportunity to present its case.*
>
> *(d) In the absence of express or implied provisions to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to present evidence and argument in support of its own case, test its opponent's case in cross-examination, and rebut adverse evidence and argument.*
>
> *(e) In the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.*
>
> *(f) The last principle extends to the arbitrator's own opinions and ideas if these were not reasonably foreseeable as potential corollaries of those opinions and ideas which were expressly traversed during the hearing."*

8. Conclusion

The Act has brought welcomed changes in relation to the setting aside of awards, particularly on the grounds that that the award is in conflict with the public policy of Malaysia and breach of the rules of natural justice. These concepts are however very fluidic and may open the floodgates for more applications to set aside awards based on these flimsy and fluidic procedural grounds. On a positive note, one may expect further case law which would develop and provide greater clarity in this area. ■

There is no universal test on what amounts to perceived or apparent bias.

18 *[2010] 1 NZLR 25, Supreme Court*

19 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd [2010] 1 NZLR 25, at 4*

20 *[1999] 2 NZLR 452*

8th Regional Arbitral Institutes Forum (RAIF) Conference

Hilton Hotel, Singapore

1 August 2014

On 1.8.2014, SIArb hosted the 8th RAIF Conference, followed by a gala dinner in Singapore. An important event which took place at the conference was the signing of a Memorandum of Understanding by the current RAIF member organisations.

Lam Ko Luen and Ranjeeta Kaur represented MIArb at this conference. Ko Luen presented the country report, focusing on the recent developments in the law and practice of arbitration in Malaysia. Ranjeeta, on the other hand, spoke on the topic of "Ethical Concerns – Searching Beyond the IBA Guidelines on Conflicts of Interest".

Photographs courtesy of SIArb

MIArb – KLRCA

Ethics in International Arbitration – Myth or the New Reality?

Royal Lake Club Kuala Lumpur

28 April 2014

This seminar was jointly organised by MIArb and KLRCA and presented by Nigel Cooper QC (Managing Partner, Quadrant Chambers) and Lai Jen Li (Deputy Head of Legal Services, KLRCA). Nigel's presentation focused on the ethics of counsel in international arbitration and the difficulties in having a single universal code to regulate international arbitration practitioners. Jen Li's presentation on the other hand, covered the Malaysian perspective of the subject, focussing on the steps taken by KLRCA in ensuring ethical standards in arbitration. The seminar was moderated by Kevin Prakash (Partner, Mohanadass Partnership) and drew a crowd of 38 people.

Source: KLRCA; photographs courtesy of KLRCA

The Fast-Track Fellowship Programme

17 May 2014 & 18 May 2014

This rigorous programme is targeted at Members of MIArb who are desirous of upgrading themselves to be Fellows of MIArb. The programme was conducted over the course of a weekend where candidates attended lectures in the morning and sat for written examinations (including award writing) in the afternoon. The modules covered in the programme were the Malaysian Arbitration Act and Jurisdiction of the Arbitrator; Arbitration Procedure, Preliminary Meetings and Interlocutory Applications; Arbitrators' Duties and Responsibilities, Ethics and Misconduct; and Award Writing. The programme was conducted by Chang Wei Mun, Daniel Tan and Chong Thaw Sing and coordinated by A. Mahadevan.

Evening Talk

Jurisdictional Challenges in International Arbitration... Pulling Oneself Up by One's Bootstraps

4 June 2014

Ng Jern-Fei
Barrister, Essex Court Chambers, London

Jern-Fei spoke on the subject of jurisdictional challenges in international commercial arbitration with reference to some of the recent court judgments, including that of the UK Supreme Court in *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan*, the Singapore Court of Appeal in *PT First Media TBK v. Astro Nusantara International BV & Others* and the US Supreme Court in *BG Group, PLC v. Republic of Argentina*.

Evening Talk

Competition Law in Malaysia

11 June 2014

Sudharsanan Thillainathan
Partner, Shook Lin & Bok, Kuala Lumpur

Sudhar spoke on the key provisions of the Malaysian Competition Act 2010 ("the Act") which came into force in 2012, highlighting the recent actions taken by the Malaysian Competition Commission (MyCC) against enterprises engaging in anti-competitive conduct and the implications of the Act on local businesses.

The Annual General Meeting (AGM) of MIArb

26 June 2014

At the AGM held on 26.6.2014, Sudharsanan Thillainathan (Vice President), Ranjeeta Kaur (Honourary Treasurer), Joshua Chong Wan Ken (Council Member), S. Shanthi (Council Member) and Lynnda Lim Mee Wan (Council Member) were elected into Council for the term 2014 – 2016.

Lam Ko Luen (President), Lai Sze Ching (Deputy President), Hor Shirley (Honourary Secretary), Chang Wei Mun (Immediate Past President), Jonathan Yoon Weng Foong (Council Member) and Victoria Loi Tien Fen (Council Member) continue to be in Council as their term runs from 2013 – 2015.

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

The Annual Law Review

19 July 2014

Following the Dialogue with SCL on 11.3.2014, MIArb and SCL collaborated and jointly presented "The Annual Law Review", focusing on recent developments in arbitration and construction law. Thayananthan Baskaran spoke on recent reported cases involving building and construction and Lam Wai Loon spoke on the CIPAA Regulations and the KLRCA Adjudication Rules. Victoria Loi and Joshua Chong, on the other hand, spoke on recent reported cases relating to arbitration.

Upcoming Events

19.11.2014

MIArb Evening Talk: Perspective on BIM – for Building Contractors

Speakers: *NV Kumaran, General Manager, Bina Initiatives Sdn. Bhd.*
Mike Tang, Technical Support Executive, Bina Initiatives Sdn. Bhd.

NV Kumaran and Mike Tang will demonstrate the effectiveness of Building Information Modelling (BIM), the latest intelligent 3D model-based process in planning, design, construction and management of buildings and infrastructure.

16.12.2014

MIArb Evening Talk: Human Factors in Project Management

Speaker: *Raj Kumar Dheri, Managing Director, R K Dhani Enterprise*

Raj Kumar Dheri will present an introductory talk on the core concepts and principles of Neuro Linguistic Programming (NLP) and how these (including communication methods and other soft skills) may be applied towards effective project management.

17.1.2015 – 18.1.2015

The Membership Upgrade Course

This 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 in arbitration to Associates of MIArb, who upon successful completion of the course and assessment, may apply to be upgraded to become Members of MIArb.

2015

9th Regional Arbitral Institutes Forum (RAIF) Conference

MIArb is proud to host the 9th RAIF Conference in Kuala Lumpur.

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

New Members / Upgrade for Session May 2014 to October 2014

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

Fellow	M/No.	Date Approved
1.Dato' Anantham a/l VSKasinather	F/111	21-08-2014
2.Mr Michael Allen Stephens	F/112	16-10-2014

Upgraded from Member to Fellow	M/No.	Date Approved
1.Ms Ranjeeta Kaur	F/110	16-07-2014

Member	M/No.	Date Approved
1.Mr Alex Ngu Sze Shae	M/403	15-05-2014
2.Mr Lee Eu Kong	M/406	16-07-2014
3.Ms Choo Choy Lan	M/408	21-08-2014
4.Ms Chong Tze Ying	M/409	21-08-2014
5.MsRasamalar a/p Gnanasundram	M/410	21-08-2014
6.Mr Syahzad bin Samad	M/411	25-09-2014
7.Ms Chine Wai Ting, Jacky	M/412	16-10-2014
8.Mr Leong Pei Koe	M/413	16-10-2014

Upgraded from Associate to Member	M/No.	Date Approved
1.Miss Chu Chai Yin	M/398	15-05-2014
2.Mr Joshua Chong Wan Ken	M/399	15-05-2014
3.Mr Sivanesan a/l Nadarajah	M/400	15-05-2014
4.Mr Chin Yoon Sin	M/401	15-05-2014

Upgraded from Associate to Member	M/No.	Date Approved
5.Mr Ngoh Wei Ching	M/402	15-05-2014
6.Mr Mohamed Ishak Abdul Hamid	M/404	16-07-2014
7.Mr Khoo Kwan Yee (Calvin)	M/405	16-07-2014
8.Mr Oon Chee Koon	M/407	16-07-2014

Associate	M/No.	Date Approved
1.Mr Wee Joon Hau	A/201	15-05-2014
2.Mr Alfred Fernandez	A/202	15-05-2014
3.Mr Law Lai Teng	A/203	21-08-2014
4.Ms Karen Ng GekSuan	A/204	21-08-2014

Affiliate	M/No.	Date Approved
1.Ms Yeo Lee Ling	AF/190	15-05-2014

Reinstatement of Membership	M/No.	Date Approved
1.Ms Lim Yiat Fong	M/094	15-05-2014

Resignation / Withdrawal	M/No.	Date Approved
1.Mr Lim Tze Her	M/356	21-08-2014
2.Miss Trisha Anita Menon	AF/189	16-10-2014

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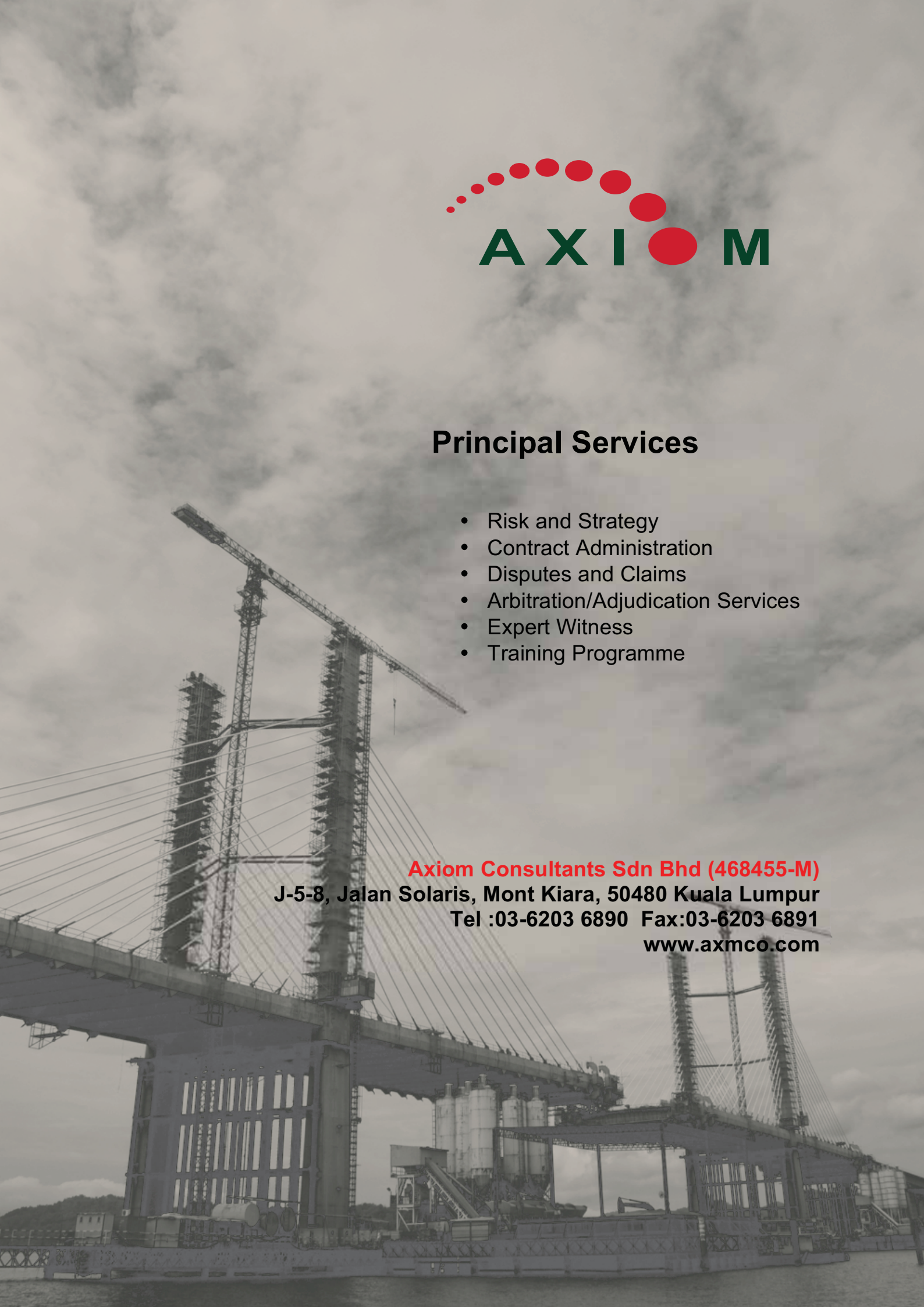

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