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MIArb NEWSLETTER

The Newsletter of The Malaysian Institute of Arbitrators

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

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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The tribunal

Read Overview

Practice Notes (9) — View all

Choosing your tribunal
This Practice Note sets out some practical tips about how to choose the right people to form the arbitral tribunal.
MAINTAINED

Precedents (22) — View all

Letter to opponent initiating appointment of sole arbitrator—exchange of lists
This is a precedent letter from one party to its opponent initiating the appointment of a sole arbitrator by the exchange of lists.

Cases (16) — View all

Allied Marine Transport v Vale do Rio Doce Navegacao SA, The Leonidas D [1985] 2 All ER 796

Atlanska Plovidba v Consignaciones Asturianas SA [2004] All ER (D) 419 (May)

News (27) — View all

Perceptions of arbitration—parties versus arbitrators
Arbitration analysis: How might a party's perceptions and expectations of international arbitration compare to those of arbitrators? Michael McIlwrath, global chief litigation counsel at GE Oil & Gas and Sophie Nappert, arbitrator in independent practice at 3 Verulam Buildings, consider how to address issues between arbitrators and parties that could affect the whole process.

Procedure Rules (2) — Showing all

CPR 62

Legislation (6) — Showing all

Arbitration Act 1996, ss 1, 15, 16, 17, 18, 21, 22, 29

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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

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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.

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

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].

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)*

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