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MOHANADASS PARTNERSHIP
Advocates & Solicitors

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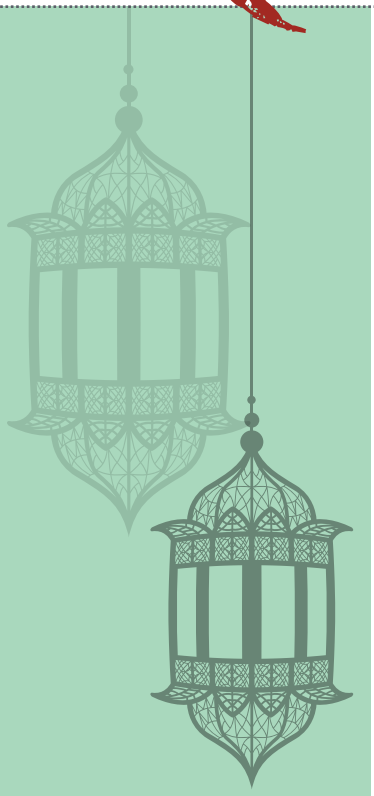
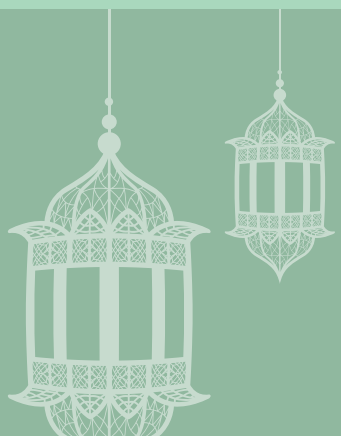


Eid Mubarak
From all of us at
MOHANADASS PARTNERSHIP
Advocates & Solicitors



MESSAGE FROM
MANAGING PARTNER

I am delighted to introduce the Firm's newsletter which will bring to you important developments in the law and the happenings at the Firm.

2016 sees a milestone in our growth with the coming on board of a new team of lawyers namely Sanjay Mohanasundaram as Partner, Senior legal assistant, Gobinath Karuppan and legal assistants, Wong Li-Wei and Adam Lee. Their entry further strengthens our position in the dispute resolution services sector.

Two international achievements of the Firm this year are also noteworthy. We successfully acted for a Malaysian company in an LCIA arbitration. The ensuing challenge in the High Court of England and Wales on grounds of Arbitrator's conflict was also successfully defended by lawyers in the United Kingdom instructed by us. The case is now reported as **W Ltd v. M Sdn Bhd [2016] EWHC 422 (Comm)** and is essential reading on the subject of the role of the IBA Guidelines in Arbitrator's conflicts of interest.

Closer to home, we also instructed counsel in Hong Kong, successfully enforcing an award which we obtained before a Kuala Lumpur seated panel. The case illustrates the reluctance of the enforcing Court to refuse enforcement where the Court of the seat has declined to set aside the award, even where an appeal was pending against the supervising Court's decision. This decision is reported as **T v. C [2016] HKCU 736.**

On a concluding note, Kuala Lumpur will again host the IPBA Asia-Pac Arbitration Day jointly with the KLRCA this year. This signature event will be held on 8.9.2016, and we are proud to be sponsors. I look forward to your participation in this event.

MOHANADASS KANAGASABAI

In order to cater for our recent expansion and to provide best services to our clients, we have moved to our new state of the art premises in The Vertical, Bangsar South City.

We are now located at

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NEW **PARTNER**

We have expanded our team with the addition of Mr. Sanjay Mohanasundram as a new partner. Sanjay was called to Malaysian Bar in 1995 and specializes in commercial and construction litigation and arbitration. Apart from appearing regularly in court, he is also on the KLRCA panel of arbitrators and regularly represents domestic and international clients in arbitrations domestically and internationally. He has been involved in numerous arbitrations in Dubai, London, Berlin, and Singapore where he either represented or advised clients on their project disputes and management of disputes. He has been ranked by Legal 500 and Chambers & Partners as amongst the preferred construction lawyers in Malaysia.

NEW **PREMISES**

THIRD PARTY FUNDING: IS IT THE WAY FORWARD?

ARTICLE

Third party funding has lately drawn differing viewpoints from various quarters. The general consensus however appears to favour the traditional approach, with a clear reluctance to embrace a situation where a third party with no connection to the proceedings may fund a litigant's case in exchange for share of any sum awarded.

The classic case of ***British Cash & Parcel Conveyors v Lamson Store Service Co*** describes the concept of third party funding to comprise both maintenance and champerty. In the said case, the term "maintenance' is described as the wanton and officious intermeddling with the disputes of others in which the maintainer has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse. "Champerty", on the other hand, is really maintenance but with a share in the spoils of the litigation.

Contrary to the Malaysian position, it may be noted that the concept of third party funding is well developed in other Commonwealth jurisdictions, such as Australia, the United Kingdom, Canada, South Africa, and New Zealand. It is also widely practised in the United States.

For instance, in Australia, third party litigation funding arrangements are allowed as long as the arrangement does not cause any material risk of abuse of the court process. There does not appear to be any distinction between the principles governing third party funding of arbitration and what would apply for litigation

.

As a matter of law, third party funding is prohibited here in Malaysia. The High Court, in the case of ***Amal Bakti Sdn Bhd & Ors v Milan Auto (M) Sdn Bhd & Ors,*** refused to entertain a champerty agreement on grounds of public policy. See also of ***Mastika Jaya Timber Sdn Bhd v Shankra A/L Ram Pohumall*** where it's been held that public policy is offended by a champertous agreement because of its tendency to pervert the due course of justice. In Re Trepca Mines Ltd (No2) Lord Denning explained this public policy in the following oft cited passage at 219- 220:

"The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law."

In addition to the above, s.112 of the Legal Profession Act, 1976, which is applicable to advocates and solicitors practising in West Malaysia, provides that no advocate shall enter into any agreement which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding.

Despite the tilt towards the traditional approach described above, the concept of third party funding is gaining traction whereby it is seen as a means to assist a litigant in pursuing a meritorious claim. There is growing opinion that a litigant or even companies facing insolvency or bankruptcy should not be shut out from seeking justice due to want of funding.

Further, the ever increasing costs of court litigation and arbitration appear to be a contributing factor in favouring external funding. In particular, a litigant with limited funding may not be able to pursue or defend a claim in a complex international arbitration involving multiple parties, protracted discovery exercise and expensive expert testimony. Arbitration in particular, appears to be attractive to funders given the enforceability of arbitration awards across jurisdictions. An attractive middle ground perhaps may be to permit third party funding in arbitration alone.

The Malaysian Bar appears to adopt the position that the rule against maintenance and champerty is intended to uphold and ensure the professionalism of lawyers in the conduct of matters entrusted to them. This is to ensure that the administration of justice is not commercialised. This cautious approach underscores the Malaysian position thus far. I do agree with this position. The question however is whether we should look forward by adopting a less rigid approach to third party funding at least for arbitration.

As way forward, a thorough consultative process should to be taken by the various stakeholders to assess the utility of the third party funding model in Malaysia. Regulation would be key. While it remains of utmost importance that the principles of the profession are upheld without any compromise, we should consider embracing this change if we are to develop our arbitration practice here in Malaysia.

KEVIN PRAKASH

1. British Cash & Parcel Conveyors V Lamson Store Service Co [1908] 1 Kb 1006 At 1014.
2. British Cash At 1014
3. Per Lord Mustill In Giles V Thompson [1994] 1 Ac 142, 161
4. [2009] 5 Mlj 95
5. [2010] Mlju 301
6. [1963] Ch 199
7. David S. Abrams & Daniel L. Chen, *"A Market For Justice: A First Empirical Look At Third Party Litigation Funding"*, 15 U. Pa. J. Bus. L. 1075 (2013)

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

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

Facts of the Case

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

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

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

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

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

W applies to set aside the Awards

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

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

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

Decision of the High Court

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

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

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

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

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

Conclusion

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

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

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

KALASHINI SANDRASEGARAN