

# Dispute resolution:

Understanding and getting it right

beyond law...we innovate solutions

**belden**

- Choices of Law
  - Substantive Law Governing Relationship  
(*Lex Causae* or *Lex Contractus*)
  - Jurisdictional Law Governing Forum of Dispute Resolution  
(*Lex Arbitri*)
  - Procedural Law Governing Procedure Applicable to the Dispute Resolution Process
  - Law/Rules Applicable when there is a Conflict of Laws (*Lex Loci*)

# Claims & Dispute Resolution

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- On-Project Dispute Resolution
  - Temporary Finality Through
    - Mediation
    - Adjudication
    - Dispute Review Board
    - Mini-Trial
  - No Final Resolution until Project completed or abandoned or termination
  - Allow for Limitation of Time to be Suspended until Final Resolution Option Available

# Dispute Resolution

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- Post Project Dispute Resolution
  - Cooling Down Period from Temporary Finality May Avoid Further Dispute
  - Forum of Dispute Resolution
- Compulsory Mediation (Pre-requisite to Arbitration)  
Arbitration
  - Choice of Seat v Choice of Place
  - Choice of Rules (Institutional or Ad Hoc)

# Dispute Resolution

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- Choice of Applicable Law/Conflict of Law Rules
- Model Law Adopted Jurisdictions
- International or Domestic?
- Rules of Evidence – IBA?
- Marriage between Common Law & Civil Law Systems
- Litigation in Host Country or Parties Principal Place of Business

# Scenario 1 Mediation

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- Contract provides for mediation – parties intend to try the peaceful approach to problem solving
- If contract silent, parties can still choose to mediate – after all, it is consensus that is needed
- Since mediation is ‘interest based resolutions’ – issues of jurisdiction and choice of law not critical
- Going back to the oldest form of dispute resolution – culture and knowledge of process
- Most, if not all, disputes can be resolved through mediation

# Scenario 1 Mediation

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- Payment certificate: Facilitative Method
  - Clear obligation of Owner to pay Contractor, so Mediator to identify underlying problem
  - Best Interest Approach:
    - Payment: Cash-flow otherwise cause slow down/termination
    - Delay concern: Acceleration and determine later who is culpable for delay : Contractor culpable - Contractor save LAD, Owner culpable – Owner pay for acceleration, Acceleration costly – reduce retention sum, Ultimately: Project completed & no excessive delay, Reputations Intact
- Uncertified works: Evaluative Method
  - QS Mediator needed or Expert Determiner

# Scenario 1 Mediation

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- Mediation works when:-
  - ❖ parties want to settle – commercially driven – forward looking
  - ❖ mediation is initiated as soon as impasse occurs – avoid problem festering and before parties develop an emotional commitment
  - ❖ appointing the right mediator – helps parties to find incentive to continue negotiation toward settlement
  - ❖ parties want to preserve business relationships – *'get on with business'*
  - ❖ parties are given the chance to actively participate in the creation of a solution and control of negotiations
  - ❖ it is amicable – always a win-win situation
  - ❖ It is confidential - parties speak openly



# Scenario 1 Adjudication

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- Conceived to resolve payment issues
- As and when each claim falls due
- Fast – 30 days
- Interim, until final resolution by Court/arbitration – can be concurrent

# Scenario 1 Adjudication

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- Onus on developer to be ready – stipulated period (20 days)
- Must state all set-offs in the payment response, otherwise no defence in adjudication
- Not limited to certified payments

# Scenario 1 Adjudication

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- Sub-contractor can demand adjudicated sum from owner although no privity
- Can ask for charging order over project site (but owner must be party)
- Tri-partite adjudication possible

# Enforcement Measures

## Adjudication

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- Suspension of works
- Slow down of works
- Execute as if Judgment Debt

# Arbitration – Scenario 1

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- Seat of arbitration not specified
- Arbitral tribunal to determine seat [S. 22(2)]
- If seat –not Malaysia, Act does not apply [S.3(2) & (3)]
- So Act does not govern - a lacunae?
  - notice to arbitrate
  - appointment of arbitrators
  - power to determine seat

# Arbitration – Scenario 1

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- Determination of the seat
- Circumstances of the case + convenience of parties vs. choice of conflict of laws rules ?
- Conflict of laws rules of Malaysia
  - Place where dispute arises (breach) \*Malaysia
  - Choice of substantive law \*Australia
  - Where contract formed \*Unknown
- Likelihood - Malaysia

# Arbitration – Scenario 1

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- Issuance of notice to arbitrate
- Notice must be received [S. 23]
- Does the deeming provision apply? [S. 6]
- Email sent to existing email address - open to manipulation [S. 6 (2) ]
- Proper notice when applying to set aside? [S. 37 (1) (a) (iii)]

# Arbitration – Scenario 1

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- Appointment of 3 arbitrators
- Default procedure – party appoints 1 each, 3<sup>rd</sup> appointed by the 2 arbitrators [S. 13(3)]
- Default appointing authority – Director of KLIRCA
- Expedient & cheaper alternative to court appointment



# Arbitration – Scenario 1

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- Default Appointment Criteria – qualification, independence, impartiality and neutrality of nationality (for International arbitrations) [S.13(8)]
- Australian construction arbitrators – substantive law  
Australian & construction dispute
- Cost Considerations – Simple Dispute/Small Claim

# Arbitration – Scenario 1

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- Australian applicable law – is it valid?
- International vs. Domestic arbitrations
- French company registered in Malaysia – still a foreign company
- Definition of international arbitration
  - Place of business outside Malaysia
  - Performance outside Malaysia
  - Agreement that subject matter related to another nation

# Arbitration – Scenario 1

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- Definition of International arbitration
  - More than 1 place of business,
  - Place with the closest relationship with the arbitration agreement
- Closest relationship with the arbitration agreement = closest connection to the subject matter of dispute or performance

# Arbitration – Scenario 1

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- Both companies with place of business in Malaysia = domestic arbitration
- Domestic arbitration = no freedom on choice of substantive law [S. 30(1)]
- Australian choice of law invalid
- Malaysian law applicable
- Only in arbitration & only if seat - Malaysia

# Arbitration – Scenario 1

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- Closest relationship to arbitration agreement  
≠ closest to subject matter of  
dispute/performance
- Place of business to be based at the time of  
conclusion of agreement [S. 2(1)]
- Literal & purposive interpretation?

# Arbitration – Scenario 1

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- Preliminary Meeting
- Determine rules of procedure
- Parties free to agree before or at meeting
- Arbitrator can prescribe expedient & cost-effective procedure
- Arbitrator can use own knowledge & expertise with prior warning

# Arbitration – Scenario 1

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Expedient & Cost-Effective procedure

- Statement of issues with crucial documents vs. pleadings
- Terms of reference
- Initial skeletal legal submissions & authorities
- Disclosure of documents vs. discovery

# Arbitration – Scenario 1

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## Expedient & Cost-Effective procedure

- Expert evidence with leave
- Bifurcation of terms of reference – separate interim determinations
- Limited time hearing – chess-clock arbitration
- Tiered witness statements



# Arbitration – Scenario 1

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- Opportunity for interim award? [S. 2(1)]
- Owner's refusal to pay certified sums
  - No contractual basis
  - EOT not determined
- Position in Australian Law? – if disputed may prevent interim award
- Alternative bifurcation method
  - certified claim / uncertified claim

# Arbitration – Scenario 1

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- Interim Disposal – Case on Point of Law?
- Adopt document only based process
- Party Equality
- Fair & Reasonable Opportunity [S20]
- Full Opportunity [Art 18]

# Arbitration – Scenario 1

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- Uncertified claim – QS arbitrator  
(appropriate expertise)
- Draw on own knowledge & expertise
- Inspection of the works done – discretionary procedure
- Non-appropriate arbitral tribunal can appoint own expert

# Arbitration – Scenario 1

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- Cost Deterrent – the Certified Sums Unpaid
- 50-50 sharing of arbitrators and admin cost
- Domestic Arbitration – Arbitral Tribunal  
Determine Cost [S44(1)(a)]
- International Arbitration – Must Opt In/High  
Court Determines Cost?

# Arbitration – Scenario 1

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- Domestic arbitration (if not opted out)
  - challenge award on any question of law
- Remedies of the High Court
  - remit the award (whole or part)
  - set aside award ( whole or part)
  - vary the award

# Arbitration Scenario 1

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- Enforcement of Interim or Final Award
- Registration of Award Ex Parte
- Malaysia Seat– Domestic Arbitration & International Arbitration
- International Seat – New York Convention Countries
- Why not New York Convention Parties?

# Court Litigation Scenario 1

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## **Interim payment certificate**

- Summary judgment by Contractor possible – ‘temporary finality’ of certificate
- Process – relatively quick – no issue of defective works, no issue of delay as no certificate of non-completion

## **Under-certified works**

- Trial required – dispute on valuation of works
- Expert evidence necessary – technical nature of dispute

# Scenario 2 Mediation

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- Defective works
  - Owner entitled to set-offs for rectification of defects.
- “further estimated costs” – cannot be deducted by Owner as contract clause does not provide for it
- Ultimately, there is a trade-off; hence, no dispute
- Same problems with mediation, as highlighted
- Same comments on other Forums



# Scenario 2 Adjudication

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- Defective work
- Owner can initiate adjudication, when there are set-offs
- Consolidation of 2 adjudication proceedings possible

# Arbitration – Scenario 2

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- Similar problems as with Scenario 1
- Set-off on Incurred Cost- Valid?
- Right to Suspend - Valid?
- Malaysian law v Australian Law
- Legal position clear – arbitration is cost deterrent

# Arbitration – Scenario 2

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- Set-off on Estimated Cost – Valid?
- Malaysian Law v Australian Law
- Likely full hearing?
- Estimated Cost = Actual Cost, at time of hearing?
- Bifurcation – Incurred Cost/Estimated Cost

# Scenario 3 Mediation

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- On issues of delay, float and LAD, choice of mediator important.
  - If programming analysis done properly and updated, it is almost an exact science
- Mediator can identify events attributable to Owner controlled or caused delay. Then determine Contractor's entitlement to EOT. Invariably, Owner's claim for LAD is adjusted based only on delays caused by Contractor.

# Scenario 3 Adjudication

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- EOT refused, LAD deducted
- Issues too complex
- In owner's interest to ensure programs are updated – stipulated response time
- Independent experts may be appointed

# Scenario 3 Adjudication

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- What if adjudicator makes error?
- There is a review process
  - At enforcement stage
  - Through final agreed dispute resolution method (arbitration/Court)
  - For non-respondent owners, review by Court

# Arbitration – Scenario 3

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- Challenge on LAD = Challenge on EOT
- Unless procedural errors?
- Complex & thorough Analysis Required
  - Computerised Work Program V Bar Chart
  - Updated Work Program
  - Dual Maintained Work Program
  - Manipulation of Float
  - Mitigation – Resource Leveling & Rescheduling

# Arbitration – Scenario 3

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- Expertise Required to Determine
- Involvement of Expert Witnesses
- Expedient & Cost Effective Procedures Needed



# Arbitration – Scenario 3

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- Expedient & Cost Saving Procedures
  - expert joint meeting & inspections
  - joint report on agreed matters
  - list of disagreements
  - reports in response
  - hot-tubbing
  - Arbitral Tribunal Appointed Expert

# Arbitration – Scenario 3

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- Factual & Scientific Determination
- Legal Approach to Determination
- No Evidential Restrictions [S21(3)(a)]
- Award Less Likely to be Interfered

# Scenario 4 Mediation

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- Suspension issue
- Termination issue
- Site possession
- Capable of being resolved through mediation, but less likely
- With bad blood, animosity and a sense of self-righteousness, it degenerates into total war – mediation will not work

# Scenario 4 Mediation

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- Same problems with mediation, as highlighted
- Arbitration cannot work when a third party consultant is involved.
- Courts may be better placed to give interim protection relief (for Owner to secure vacant possession of site to continue works) and to deal with a third party (consultant) situation

# Scenario 4 Adjudication

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- Suspension, termination
- Capable of adjudication
- But decision on non-monetary issues may not be enforceable
- So, arbitration / Court decision still required

# Arbitration – Scenario 4

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- Complex & thorough Analysis Required
  - design deficiency
  - build-ability
  - temporary works & construction method
  - design intrusion on this area
  - non-payment & LAD v EOT analysis

# Arbitration – Scenario 4

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- Battle-lines drawn due to Termination
- Rights Based Dispute Resolution Required
- Expert Involvement – As in Scenario 3
- Evidential Rules not Applicable
- Factual & Scientific Determination
- Award Less Likely to be Interfered

# Arbitration – Scenario 4

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## Interim Measures

- Mandatory Injunction on Repossession of Site
- Arbitral Tribunal has power – interim custody orders [S19(1)(d)]
- Repossession of Site – must be made a subject matter of the arbitration



# Arbitration – Scenario 4

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## Interim Measures

- Time - Arbitral Tribunal to be Constituted
- Time - Arbitral Tribunal to determine Seat
- How Urgent? High Court may be better
- Concurrent Attempts Possible? [S11(2)]
- If Arbitral Tribunal decides, Court bound
- No Ex Parte Right – Repossession Inter Partes

# Arbitration – Scenario 4

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## Consultants Involvement Required

- Cannot Subpoena – Foreigners
- Only Solution – Arbitration against Contractor & Arbitration against Consultants
- No Concurrent Arbitration Clause
- Multi-Party Arbitration Problems – No 3<sup>rd</sup> Party Procedure
- Conflicting Determinations

# Arbitration – Scenario 4

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## Concurrent/Consolidated Arbitration

- Agreement of all Parties Required
- No power to Arbitral Tribunal or Court
- Domestic Arbitration (Opt Out) [S40]
- Indirect Inference of Empowerment?
- Still no Power to Court – Separate Tribunals?

# Court Litigation Scenario 4

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## Site possession

- Owner's recourse – interlocutory injunctive relief to compel Contractor to vacate site

## Termination

- Trial required – dispute on termination
- Expert evidence necessary – technical nature of dispute

## Consultant

- Owner can join Consultant as Third Party – indemnity in the event it is determined Consultant's design was inadequate

# Scenario 5 Mediation

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- Both parties have everything to lose
- Best environment to re-negotiate – pure compromise to save project and cut losses
- Mediation most suitable – commercial decision
- Settlement Agreement or new contract enforceable

# Scenario 5 Adjudication

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- Offer to re-design, no LAD condition
- Pure compromise
- Adjudication not suitable
- Adjudicator-Mediator?

# Arbitration – Scenario 5

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- Doors for Settlement Open
- Mediation – Arbitration
- Dangers of Mediator cum Arbitrator
- Mediator access to without prejudice matters
- Mediator's opinion = impartiality as Arbitrator

# Avenues for improvement in Court Process

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- Steps to expedite disposal of cases
- Greater use of power to refer technical issues to experts – speedy resolution
- Use Court Appointed Expert: Referee
- Court Appointed Arbitrator
- Greater use of power to control proceedings – punitive measures – speedy resolution
- Specialist courts / judges – technical cases
- Power – refer to mediation where suitable