

MAHWENGGKAI & ASSOCIATES



■ **Dato' Mah Weng Kwai**
Consultant | Arbitrator | Mediator
Retired Judge of the Court of Appeal, Malaysia

CAREER HIGHLIGHTS

- 1971** Called to the English Bar as a Barrister-at-Law (Honourable Society of Lincoln's Inn, United Kingdom)
- 1972** Called to the Malaysian Bar
- 1972** Practising Advocate & Solicitor, Malaysia
- 1973** Magistrate, Magistrate's Court
- 1976** President of the Sessions Court; Senior Assistant Registrar of the High Court
- 1978** Deputy Public Prosecutor, Attorney-General's Chambers
- 1981** Sr Federal Counsel, Civil Division, Attorney-General's Chambers
- 1984** Admitted as a Barrister of the High Court of Canberra, Australia
- 1984** Admitted as a Barrister of the Supreme Court of New South Wales, Australia
- 1985** Master of Laws (Hons), University of Sydney, Australia
- 1985** Senior Assistant Parliamentary Draftsman, Attorney-General's Chambers, Malaysia
- 1985** Practising Advocate & Solicitor
- 1994** Honorary Fellow of the Senate, University of Sydney, Australia
- 1997** Secretary, Malaysian Bar
- 1999** Vice-President, Malaysian Bar
- 2001** President, Malaysian Bar
- 2001** Vice President, ASEAN Law Association
- 2001** Qualified Mediator, Malaysian Mediation Centre
- 2006** President, LAWASIA
- 2010** Judicial Commissioner, High Court of Malaya
- 2011** Judge, High Court of Malaya
- 2011** Hon. Treasurer, ASEAN Law Association
- 2012** Judge, Court of Appeal, Malaysia
- 2015** Panel Arbitrator & Mediator, Kuala Lumpur Regional Center for Arbitration
- 2015** Consultant, MahWengKwai & Associates



MahWengKwai & Associates

ADVOCATES AND SOLICITORS

- A: Level 10-1, Tower B, Menara Prima, Jalan PJU 1/39, Dataran Prima, 47301 Petaling Jaya, Selangor, Malaysia
- T: (603) 7887 2702
- F: (603) 7887 2703
- E: arbitration@mahwengkwai.com
- W: www.mahwengkwai.com

Languages spoken: English, Malay, Mandarin, Cantonese, Hokkien

“COMPANIES WHICH PLAN THEIR CONTRACTUAL INTERESTS AND OBLIGATIONS CAN AVOID HAVING TO RESOLVE DISPUTES ARISING FROM POOR CONTRACTUAL DOCUMENTATION, WHICH WILL INVARIABLY TAKE UP MORE TIME AND EXPENSE”

ALB: Dato' Mah, based on your experience as a litigator, judge and now an arbitrator, how can businesses reduce the likelihood of legal conflicts?

MWK: A well-drafted contract reduces uncertainty and the odds of disagreement. Legal counsel would do well to remember the 3P's in drafting agreements: properly identifying the Parties with capacity and *locus standi* to sue or be sued; accurately stating the Price and the terms of payment; and setting out in sufficient detail the Property or the goods/services to be delivered. Contracts should also specify who should be liable for what in the event of default, as things do not always go as planned.

I have noticed that when a problem arises in the performance of a contract, a fair amount of meetings and discussions often take place between the parties to resolve the issue. Meetings and telephone conversations should be confirmed in writing to maintain clarity and certainty. Otherwise, even the best contracts can be compromised by allegations of oral concessions and waivers by conduct.

ALB: The ASEAN Economic Community (AEC) becomes a reality on 31 Dec 2015. Can cross-border disputes be resolved effectively and efficiently by mediation?

MWK: The AEC will stimulate cross-border trade within the region. More business will inevitably result in more disputes. The cost of resolving a cross-border dispute is usually significantly higher than resolving a local dispute. Hence, a successful mediation can result in higher savings in terms of time and costs, when compared to litigation or arbitration.

Although parties can agree on mediation anytime, a mediation clause

in the contract is very effective in bringing parties together to negotiate a settlement with the assistance of a mediator. When choosing a mediator for intra-ASEAN disputes, parties can opt for a local mediator with a deeper knowledge of the local business environment, or a mediator from another ASEAN country who may appear more objective and impartial.

ALB: What are your views on arbitration for intra-ASEAN disputes?

MWK: Arbitration has significant advantages over litigation in the courts. Ordinarily, a dispute will be submitted to the jurisdiction of the courts where the contract is made or performed. However, parties may not want to submit to the jurisdiction of a particular country for a variety of reasons, including *inter alia* a disadvantaged legal position or the system may not be perceived to be as efficient and reliable.

Arbitration can help companies control their reputation risks as arbitration is confidential. With arbitration, companies have the additional option of selecting independent arbitrator(s) with the necessary expertise in their preferred jurisdiction and location.

ALB: Companies have a number of venues to choose from when arbitrating matters in ASEAN. Which jurisdictions do you see becoming more important post-AEC?

MWK: Arbitrations may be heard outside the jurisdiction where the dispute arose. A variety of factors may come into play when deciding where to resolve a dispute, including cost, having the necessary legislation in place, good infrastructure, expertise, management of the arbitral institute and the approach of the local courts to arbitral awards. The Singapore International Arbitration Centre (SIAC)

and Hong Kong International Arbitration Centre (HKIAC) are two leading Asian arbitration centres. In recent years, KLRCA has become well recognised for its affordability and facilities. Its fees are 20% lower than the likes of SIAC and HKIAC, making it more attractive to small medium enterprises (SMEs). See Table 1 for a summary of arbitration centres in the region.

ALB: What should parties look for in an arbitrator for intra-ASEAN disputes?

MWK: There is no substitute for experience in hearing and deciding disputes. However, in the ASEAN context, I think it is important that an arbitrator should have a good understanding and sincere appreciation of the cultural differences between ASEAN nations.

ALB: What is your personal experience in legal affairs in ASEAN?

MWK: As a past-president of LAWASIA, I have dealt with and am well acquainted with practicing lawyers and in-house counsel in the Asia Pacific region, especially in ASEAN. I have been active in the Asean Law Association since the 1970's and have had the pleasure of speaking at local forums and participating in Council Meetings and General Assemblies, which rotate among the ASEAN member countries. I am quite familiar with the legal issues and social norms within ASEAN, having visited all 10 ASEAN countries on business and vacation.

ALB: Raymond, what issues do you foresee for businesses in the region post AEC?

RM: ASEAN will remain a diverse region requiring conscious preparations to navigate the legal landscape of each market in the region. Unfortunately, many SME's are lacking in legal expertise and experience - resulting in a failure to recognise that a problem is a legal issue or that they even have a problem at all! As the backbone of the regional economy, SMEs should seek a trusted legal advisor when seeking to expand their business across ASEAN. SMEs need to be well-equipped to deal with issues such as access to finance, licensing and permits, tax regulations, employment and labour matters, land disputes, debt collection, dispute resolution and arbitration.

ALB: What regional capabilities does MahWengKwai & Associates have to represent clients involved in arbitration in the ASEAN region?

RM: MahWengKwai & Associates has been strengthening our arbitration and construction law teams in preparation for the AEC and increased cross-border investments. This year, we formally launched our arbitration practice group in conjunction with our 30th anniversary. Bringing invaluable expertise and experience, Dato' Mah Weng Kwai has joined the firm as a consultant after having served as a High Court judge in the New Commercial Courts and later as a Court of Appeal judge.



Raymond Mah
 Managing Partner
 Head of Dispute Resolution
 Advocate & Solicitor | Adjudicator

In March this year, aside from winning ALB's Litigation Law Firm of the Year Award, we were also nominated for the KLRCA Award Arbitration Law Firm of the Year, together with Skrine, Clifford Chance and Lee Hishammuddin Allen & Gledhill.

Our talented and multilingual team is well poised to assist clients with intra-ASEAN matters, be it on advisory, documentation or resolving disputes. We are a founding member of the League of Lawyers, an international network of law firms, with capable member firms in the ASEAN countries of Malaysia, Singapore, Thailand, Indonesia and Philippines as well as Australia and Europe.

Table 1: Comparative summary of the arbitration landscape in Hong Kong and ASEAN countries

Jurisdiction	Hong Kong	Singapore	Malaysia	Indonesia	Philippines	Thailand	Vietnam	Brunei	Laos	Myanmar	Cambodia
Arbitration institutions	Hong Kong International Arbitration Centre (HKIAC)	Singapore International Arbitration Centre (SIAC)	Kuala Lumpur Regional Centre of Arbitration (KLRCA)	BANI Arbitration Center (BANI)	Philippine Dispute Resolution Center, Inc (PDRIC)	Thailand Arbitration Center (THAC)	Vietnam International Arbitration Centre (VIAC)	Brunei Darussalam Arbitration Center	Laos International Arbitration Center	-	Cambodian National Arbitration Centre (NAC)
Legal System	Common Law	Common Law	Common Law	Civil Law ¹	Civil Law ²	Civil Law	Civil Law ³	Common Law	Civil Law ³	Common Law	Civil Law ³
Arbitration Act based on UNCITRAL Model law	✓	✓	✓	✗	✓	✓	✓	✓	✗	✗	✓
Signatories to the New York Convention	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Expedited arbitration procedure	✗	✓ <i>*disputes do not exceed SGD5m</i>	✓ <i>*disputes less than USD75k</i>	✗	✗	✗	✗	✗	✗	✗	✗
Construction adjudication	✓	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗

¹ formerly under Dutch legal system

² formerly under Spanish legal system

³ formerly under French legal system