

Dispute resolution

Minimal Curial Intervention through the lens of **Hindustan Oil**

Introduction

In **Hindustan Oil Exploration Company Limited v Hardy Exploration & Production (India) Inc** [2022] MLJU 617 (“**Hindustan Oil**”), the High Court has reaffirmed Malaysia’s adherence to the policy of minimal curial intervention in the context of international arbitration. The High Court, in dismissing an application to set aside an arbitral award, has accepted that section 37 of the **Arbitration Act 2005** (“AA 2005”) remains the only provision under which an arbitral award may be set aside.

Facts

The plaintiff, defendant and two others (“Parties”) entered into a Joint Operating Agreement (“JOA”) which was made pursuant to the Production Sharing Contract (“PSC”) between the Parties and the Government of India.

Pursuant to the PSC, the Government of India granted permission to the Parties to conduct petroleum operations in the Cauvery Basin (“Contract Area”). Under the JOA and the PSC, the defendant was responsible for the performance of the operating functions. The plaintiff and the other parties were required to share the expenditure incurred by the defendant in proportion to their respective participating interests.

The JOA also provided the following:

- The arbitration agreement is governed by English law;
- The venue of the arbitration is Kuala Lumpur, Malaysia; and
- The JOA is governed by Indian law.

In 2011, the Contract Area was shut down, giving rise to a dispute among the Parties as to their respective contribution towards the expenses the defendant incurred and continued

Legal Updates

JUNE 2022

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to incur in the performance of its obligations under the JOA and the PSC.

In the ad hoc arbitration, the majority of the Tribunal found for the defendant (“Majority Award”), holding inter alia that:

- The defendant’s claims against the plaintiff, construed in accordance with Malaysian Limitation laws (as opposed to Indian Limitation laws), were not time-barred (“Limitation laws Decision”);
- The defendant could recover costs incurred by it from the Joint Account of the Parties and from an award of a separate arbitration (“Joint Account and Samson Award Decisions”); and
- The Parties were to undertake a reconciliation of their cash contributions and expenditures to determine their respective contribution to the defendant’s costs; should a disagreement arise, the Parties may refer the same to the Tribunal (“Reconciliation Decision”).

High Court decision

The plaintiff sought to set aside the Majority Award by relying on sections 30 and 37 of the AA 2005. The plaintiff argued that the Tribunal had acted outside its jurisdiction contrary to the public policy of Malaysia and in breach of natural justice.

The High Court disagreed and dismissed the plaintiff’s application, holding that:

- The application of limitation laws was a question of law; it was within the remit of the Tribunal to decide. Even if the majority was wrong in this regard, the Court had no jurisdiction to substitute its own interpretation of the law and facts as this did not fall within the limited grounds under section 37 of the AA 2005.
- In respect of the Joint Account and Samson Award Decisions, the Tribunal similarly had jurisdiction in

rendering the same. The Court may not review the merits of the same as if it were an appellate court.

- In respect of the Reconciliation Decision, the plaintiff had not been seriously impacted given the availability of an avenue to address the Tribunal on the same. The High Court held that the plaintiff had failed to satisfy the requirements laid down in **Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd** [2020] 12 MLJ 198.

Conclusion

Hindustan Oil is a firm addition to the jurisprudence on the setting aside of arbitral awards in Malaysia. The threshold is high. The Court would not allow a party to relitigate issues that had been argued in the arbitration. That the arbitral award contains errors of law is no ground for the court to set it aside. Importantly, even if an arbitral award was rendered in breach of public policy or natural justice, it being set aside is not automatic; the court has a discretion to decide the same under section 37 of the AA 2005.

THIS CASE UPDATE WAS PREPARED BY WONG WEN SHENG.

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Financial Services

Revised policy on granting of credit facilities

Bank Negara Malaysia (“BNM”) has revised its policy document on granting of credit facilities which are applicable to licensed insurer under the **Financial Services Act 2013** and licensed takaful operator under the **Islamic Financial Services Act 2013** (each a licensed person).

The policy document sets out, including without limitation:

- it is deemed to have come into effect on 1 December 2015 and supersedes the earlier policy document dated 20 November 2015.
- a licensed person is required to obtain the prior written approval of BNM to:
 - A. act, or arrange with any person to act, as a guarantor for a credit facility granted to any person; and
 - B. grant a credit facility to any person specified in paragraph 7.2 thereof.
- the prior written approval of BNM is not required for the granting of a credit facility to a licensed person’s insurance or takaful agent.
- the purchase of corporate bonds and/or sukuk by a licensed person is not deemed as the granting of a credit facility.

Revised foreign exchange policy notices

On 1 June 2022, BNM issued revised Foreign Exchange Policy Notices (“FEP Notices”) which came into effect on the same date. The Foreign Exchange Notices which have been in effect since 15 April 2021 have been revoked and superseded. The key amendments introduced by BNM under the FEP Notices are as follows (which are not exhaustive):

Notice 1: Dealings in Currency, Gold and other Precious Metals

- A non-resident is allowed to buy or sell foreign currency against ringgit on spot basis and forward basis with an appointed overseas office (“AOO”) of the licensed onshore bank’s banking group for the purpose as set out in paragraph 6(1)(b) of Notice 1. Previously, a non-resident can only buy and sell foreign currency against ringgit on forward basis with AOO for (i) settlement of international trade of goods or services with a resident on a firm commitment or anticipatory basis; or (ii) other purpose of firm commitment basis.

Notice 2: Borrowing, Lending and Guarantee

- A non-bank resident guarantor is also permitted to provide financial guarantee in any amount to secure a borrowing obtained by a non-resident from a non-resident financial institution.
- A non-bank resident guarantor cannot give financial guarantee to secure foreign currency borrowing obtained by non-resident borrower from a non-resident financial institution if the underlying borrowing is or will be utilised by the resident guarantor.
- A non-bank resident guarantor cannot give financial guarantee to secure foreign currency borrowing obtained by non-resident borrower where the resident guarantor has entered a formal or informal arrangement to make repayment of the foreign currency borrowing other than under a call-upon¹ by the lender in the event of default².

¹ “Call-upon” of financial guarantee shall be initiated by the lender in writing to the resident guarantor. Resident guarantor may not initiate a “call-upon” of a financial guarantee.

² Event of default prior to a call-upon of a financial guarantee by the lender shall be treated by the lender in accordance with the requirements under IFRS 9 or any equivalent accounting standards adopted by the lender.

Notice 4: Payment and Receipt

- A resident is free to pay or receive foreign currency to or from another resident for settlement of a miscellaneous expense (that is a current account transaction of a reasonable amount of an infrequent nature, including holiday or medical expenses incurred abroad and payments for purchase of goods and services abroad) incurred outside Malaysia between a resident individual residing in Malaysia and a resident individual residing outside Malaysia.
- A resident individual is allowed to open a foreign currency account jointly with a non-resident individual. Previously, this permission is only limited to where the non-resident individual is an immediate family member.
- A non-resident is allowed to open a foreign currency account jointly with a resident individual. Previously, this permission is only limited to where the resident individual is an immediate family member.

Notice 7: Export of Goods

- A resident exporter with annual gross export of goods exceeding RM250 million is now only required to submit a report as and when required by BNM. Previously, the requirement is to submit a quarterly report to BNM.
- A resident exporter under paragraph 5 of Notice 7 that does not receive any proceeds from export of goods as referred to under paragraph 1(c) of Part A of Notice within 24 months from the date of shipment, shall notify BNM on the outstanding export of goods proceeds within 21 days after the end of each calendar year.

BNM issues exposure draft on Cloud Technology Risk Assessment Guideline (“CTRAG”)

On 3 June 2022, BNM issued an exposure draft setting out its proposed guidance to assess common key risks and consideration of control measures when cloud services are adopted by financial institutions. The guideline, when in force, will complement the Risk Management in Technology (“RMiT”) policy document.

The exposure draft, when issued, will apply to:

- banks, investment banks, insurers licensed under the **Financial Services Act 2013**;
- Islamic banks and takaful operators licensed under the **Islamic Financial Services Act 2013**;
- operators of designated payment systems and issuers of electronic money approved under the **Financial Services Act 2013** or the **Islamic Financial Services Act 2013**.

Any feedback to the exposure draft must be provided to BNM by 15 July 2022.

Revision to Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework

The Securities Commission Malaysia (“SC”) has made certain amendments to Part 3 *Corporate Bonds and Sukuk*, Part 4 *Asset Backed Securities* and Part 5 *Convertible Notes and Islamic Convertible Notes to Specific Registered Persons* on 30 May 2022.

The revisions made relate to post-issuance submissions to the SC as well as editorial amendments.

Amended Labuan Laws

The **Labuan Companies (Amendment) Act 2022** came into force on 10 June 2022 save for the removal of the following:

- (a) removal of the prohibition on dealings by a Labuan company in ringgit; and
- (b) the notification requirement by a Labuan company to notify the Labuan Financial Services Authority on its transactions with residents,

which are deemed to have come into operation on 1 January 2019.

The **Labuan Financial Services And Securities (Amendment) Act 2022** and **Labuan Islamic Financial Services And Securities (Amendment) Act 2022** are deemed to have come into force on 1 January 2019.

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Tax & Revenue

Income tax

The following Rules have recently been gazetted:

- (i) [Income Tax \(The Principal Hub Incentive Scheme\) Rules 2022](#) — gazetted on 24 May 2022 and have effect from year of assessment 2021; and
- (ii) [Income Tax \(Deduction for Expenditure in relation to Industry4WRD Vendor Development Programme\) Rules 2022](#) — gazetted on 30 May 2022 and deemed to have come into operation from year of assessment 2019.

The following audit frameworks have recently been published on the Inland Revenue Board's official website:

- [Rangka Kerja Audit Cukai](#) (presently available in Malay language only) — issued on 1 May 2022 to replace Rangka Kerja Audit Cukai dated 15 December 2019;
- [Rangka Kerja Audit Cukai Petroleum](#) (presently available in Malay language only) — issued on 1 May 2022 to replace Rangka Kerja Audit Cukai Petroleum dated 15 December 2019; and
- [Rangka Kerja Audit Cukai Kewangan dan Insurans](#) (presently available in Malay language only) — issued on 1 May 2022 to replace Rangka Kerja Audit Cukai Kewangan dan Insurans dated 18 November 2020.

Sales tax

The following Orders have recently been gazetted:

- (i) [Sales Tax \(Goods Exempted from Tax\) Order 2022](#) — gazetted on 31 May 2022 and has come into operation on 1 June 2022. The Sales Tax (Goods Exempted from Tax) Order 2018 has been revoked; and

- (ii) [Sales Tax \(Rates of Tax\) Order 2022](#) — gazetted on 31 May 2022 and has come into operation on 1 June 2022. The Sales Tax (Rates of Tax) Order 2018 has been revoked.

Excise duties

The following Orders have recently been gazetted:

- (i) [Excise Duties Order 2022](#) — gazetted on 23 May 2022 and has come into operation on 1 June 2022. The Excise Duties Order 2017 has been revoked;
- (ii) [Excise Duties \(Pangkor\) Order 2022](#) — gazetted on 30 May 2022 and has come into operation on 1 June 2022. The Excise Duties (Pangkor) Order 2019 has been revoked;
- (iii) [Excise Duties \(Tioman\) Order 2022](#) — gazetted on 31 May 2022 and has come into operation on 1 June 2022. The Excise Duties (Tioman) Order 2004 has been revoked;
- (iv) [Excise Duties \(Langkawi\) Order 2022](#) — gazetted on 31 May 2022 and has come into operation on 1 June 2022. The Excise Duties (Langkawi) Order 2020 has been revoked; and
- (v) [Excise Duties \(Labuan\) Order 2022](#) — gazetted on 31 May 2022 and has come into operation on 1 June 2022. The Excise Duties (Labuan) Order 2020 has been revoked.

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