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ARBITRATION

Arbitration procedures and practice in Malaysia: overview

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USE OF ARBITRATION AND RECENT TRENDS

1. How is commercial arbitration used and what are the recent trends?

Use of commercial arbitration and current trends

Commercial arbitration is commonly used in Malaysia as an alternative to litigation in resolving legal disputes. The surge in international trade and cross-border transactions has also seen the emergence of Malaysia as a popular regional and global venue for arbitration. The revitalised Kuala Lumpur Regional Centre for Arbitration (KLRCA), with its state of the art facilities, is also playing a major role in spurring the growth of international arbitration in Malaysia.

In recent years, the KLRCA has seen a steady rise in its caseload on a yearly basis. Before 2010, the number of cases registered with KLRCA was between ten and 20 cases per year. In 2012, KLRCA registered 85 new cases; by 2013 annual cases filed had risen to 156 and by the third quarter of 2014 the centre had already received 226 cases. According to KLRCA's statistics, almost 20% of the arbitration cases in 2013 were international, a marked increase from previous years.

The surge in popularity is largely attributed to a modernised arbitration legal framework and a supportive judiciary. Some of the notable developments are:

- The enactment of a completely new, updated Arbitration Act 2005 that replaced the earlier arbitration legislation. The Arbitration Act 2005 was updated by the Arbitration (Amendment) Act in 2011, which introduced limits on judicial interference and provides for the Director of the KLRCA's statutory authority and independence to appoint arbitrators.
- The most recent amendments to the Legal Profession Act 1976, that allow both foreign arbitrators and foreign lawyers to enter Malaysia to participate in arbitral proceedings and exempts foreign arbitrators from paying withholding tax on the fees earned.
- The KLRCA's introduction of a set of procedural rules known as the i-Arbitration Rules, the first of their kind in the world. These rules are sharia compliant and suitable for arbitration of disputes that arise out of an agreement premised on the principles of sharia.
- The courts have been supportive of arbitration, striving to uphold arbitration agreements and enforce arbitral awards.
- Improved arbitration facilities at KLRCA in the form of Sulaiman Building, which houses 19 hearing rooms, 22 breakout rooms, a business centre, a specialised ADR and construction law library, dining areas, a mini museum and an auditorium.

Advantages/disadvantages

The principal advantages of arbitration compared to court litigation are:

- Procedural flexibility in arbitral proceedings.
- There is autonomy in nominating arbitrators from a pool of experienced domestic and international arbitrators from diverse fields of expertise.
- Malaysia being a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), hence arbitral awards rendered in Malaysia are enforceable in 148 countries that are also signatories to this Convention.
- There is finality in arbitral awards with the judiciary adopting a largely non-interventionist approach.
- Confidentiality in proceedings is largely preserved as arbitration is a private procedure and publicity is rare.

The main disadvantages of arbitration are:

- The arbitral tribunal generally cannot compel a third party that is a stranger to the arbitration agreement to join the arbitration.
- The costs of arbitration compared to court-based proceedings can be substantial, despite the costs of arbitration proceedings in KLRCA being comparatively lower than other established international arbitral institutions.

LEGISLATIVE FRAMEWORK
Applicable legislation

2. What legislation applies to arbitration? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law)?

The main legislation applicable to both domestic and international arbitration in Malaysia is the Arbitration Act 2005 as amended by the Arbitration (Amendment) Act 2011 (Arbitration Act). The Act is closely modelled on the UNCITRAL Model Law.

Subject to some minor variations, Part II of the Arbitration Act, which contains sections 6 to 39, closely follows the subject headings and sequence of sections 3 to 36 of the Model Law. However, Part III and Part IV contain some sections that are not found in the Model Law.

The Act makes a distinction between domestic and international arbitration, stating:

- Parts I, II and IV of the Act apply to domestic arbitration and Part III applies unless the parties agree otherwise in writing (*section 3(2)*).
- Parts I, II and IV apply to international arbitration and Part III does not apply unless the parties agree otherwise in writing (*section 3(3)*).

Mandatory legislative provisions

3. Are there any mandatory legislative provisions? What is their effect?

The following are some examples of mandatory legislative provisions that apply in Malaysia:

- In respect of domestic and international arbitration, Parts I, II and IV of the Arbitration Act apply where the seat of arbitration is in Malaysia (*section 3*). Parts I, II and IV, contain provisions to promote the parties' freedom of choice. For example, parties are free to:
  - determine the number of arbitrators (*section 12(1)*);
  - agree on a procedure for appointing the arbitrator *(section 13(2)*);
  - agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. *(section 21(1)).*
- Any dispute on which parties have agreed to arbitrate under an arbitration agreement can be determined by arbitration unless it is contrary to public policy (*section 4*).
- A court must (*section 10(1)*):
  - stay proceedings that are the subject of an arbitration agreement; and
  - refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
- Parties must be treated equally and must be given a fair and reasonable opportunity to present their case (*section 20*).

4. Does the law prohibit any types of disputes from being resolved via arbitration?

The majority of disputes can be referred to arbitration in Malaysia. In *Fiona Trust & Holding Corporation and others v Privalov and others [2007] UKHL 40,* the UK House of Lords held that the starting point for the construction of an arbitration clause is the presumption that the parties, as rational businesspeople, are likely to have intended that any dispute arising from their relationship should be decided by the same tribunal.

This presumption applies unless the language of the clause makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. This approach has been widely endorsed by the Malaysian courts in several cases, including:

- *KNM Process Systems Sdn Bhd v Mission Newenergy Ltd [2013] 1 CLJ 993*.
- *The Government of India v Cairn Energy India Pty Ltd & Ors [2014] 9 MLJ 149*.
- *RUSD Investment Bank Inc & Ors v Qatar Islamic Bank & Ors [2015] LNS 231*.

There is no requirement that the dispute must be commercial in nature or arise out of a contractual relationship. For example, in *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394*, the Court of Appeal held that tortious disputes are arbitrable.

However, section 4(1) of the Arbitration Act specifically provides that a dispute cannot be referred to arbitration if the arbitration agreement is contrary to public policy. Therefore, disputes that may not be arbitrable include those involving:

- A criminal issue.
- Prosecution.
- An issue of public policy and public interest.
- A family law matter.
- Aspects of insolvency law.

Section 4(2) clarifies that although a court can have jurisdiction over a particular dispute this does not by itself mean that the matter is not capable of determination by arbitration.

Limitation

5. Does the law of limitation apply to arbitration proceedings?

The law of limitation applies to arbitral proceedings in the same way as it applies to other civil actions. Generally, time limitation exists by either:

- Statute.
- Contractual agreement between the parties.

The Limitation Act 1953 and any other written law relating to the limitation of actions applies to arbitrations (*section 30, Limitation Act 1953*). Therefore, in the absence of an agreement between the parties to refer a dispute to arbitration within a specified period, the general limitation period contained in the Limitation Act applies. For example, under section 6(1)(a) of the Limitation Act, the limitation period for an action founded on contract or tort would be six years from the date on which the cause of action accrued.

Parties are permitted to enter into an arbitration agreement that includes a clause requiring a dispute to be referred to arbitration within a specified period. The dispute must be referred to arbitration within that specified period unless the time limit is extended by the High Court under section 45 of the Arbitration Act. The High Court has the power to extend the time for starting arbitration proceedings if it is of the opinion that, in the circumstances of the case, undue hardship would otherwise be caused.

ARBITRATION ORGANISATIONS

6. Which arbitration organisations are commonly used to resolve large commercial disputes?

The most commonly used arbitration organisations in Malaysia include:

- The Kuala Lumpur Regional Arbitration Centre (KLRCA).
- Chartered Institute of Arbitrators (CIArb).
- The Malaysian Institute of Arbitrators (MIArb).

Of these, the KLRCA is the main organisation that administers international arbitrations in Malaysia.

See box, *Main arbitration organisations*.

JURISDICTIONAL ISSUES

7. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concept of kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

The doctrine of kompetenz-kompetenz applies in Malaysia through legislative enactment in section 18(1) of the Arbitration Act. The section corresponds with Article 16 of the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Arbitration Law).

There are two crucial aspects to the doctrine, which confirm:

- The arbitral tribunal can rule on its own jurisdiction without the need for support from the court.
- The courts will not prematurely determine the issue before the arbitral tribunal has had a chance to consider it.

The jurisdiction of the arbitral tribunal includes any objections to the existence or validity of the arbitration agreement. Two types of plea can be made to the arbitral tribunal (*section 18, Arbitration Act*):

- The arbitral tribunal does not have jurisdiction.
- The arbitral tribunal is exceeding the scope of its authority.

Appeal against an arbitral tribunal's ruling under section 18 of the Arbitration Act can be made to the High Court within 30 days after having received notice of that ruling (*section 18(8)*). Therefore, the arbitral tribunal's decision on the issue of jurisdiction is not final.

In *TNB Fuel Services Sdn Bhd v China National Coal Group [2013] 4 MLJ 857*, the Court of Appeal held that as the arbitral tribunal was fully constituted, it would be ready and able to hear and determine the respondent's jurisdictional challenge. This is consistent with, and reflects, the general attitude of the courts which is to lean in favour of arbitration (see, for example, *CMS Energy Sdn Bhd v Poscon Corp [2008] 6 MLJ 561*).

In *Chut Nyak Isham bin Byak Ariff v Malaysian Technology Development Corp Sdn Bhd & Ors [2009] 6 MLJ 729*, the High Court acknowledged the arbitral tribunal's competence to decide on its own jurisdiction without interference.

Furthermore, while an appeal is pending, the arbitral tribunal can continue the arbitral proceedings and make an award (*section 18(9), Arbitration Act*). The courts are unlikely to order a stay of the arbitral proceedings unless the arbitral tribunal has no jurisdiction.

ARBITRATION AGREEMENTS

Validity requirements

8. What are the requirements for an arbitration agreement to be enforceable?

Substantive/formal requirements

Section 9 of the Arbitration Act provides a statutory definition and form of an arbitration agreement. This section is largely modelled on Article 7 of the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Arbitration Law).

An arbitration agreement can be in the form of (*section 9, Arbitration Act*):

- An arbitration clause in an agreement.
- A separate agreement.

An arbitration agreement must be in writing (*section 9(3) , Arbitration Act*). An arbitration agreement is in writing where it is contained in:

- A document signed by the parties.
- An exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement.
- An exchange of statement of claim and defence in which the existence of an agreement to arbitrate is alleged by one party and not denied by the other.

Under section 9(5) of the Arbitration Act, a reference in an agreement to a document containing an arbitration clause should also be sufficient, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

Separate arbitration agreement

The arbitration agreement can take the form of either:

- An arbitration clause in a contract.
- A separate agreement.

Unilateral or optional clauses

9. Are unilateral or optional clauses, where one party has the right to choose arbitration, enforceable?

A unilateral or optional clause where one party has the right to choose arbitration is enforceable. In *Majlis Perbandaran Seremban v Maraputra Sdn Bhd [2004] 5 MLJ 469*, the Court held that clauses allowing only one party the right to refer matters to arbitration are not unusual and are valid and binding.

In *Swee Pte Ltd v Lim Kian Chai & Anor [1983] MLJ 353*, only the plaintiff could invoke arbitration and it was held that there was simply no arbitration provision on which the defendants could rely.

10. In what circumstances can a party that is not a party to an arbitration agreement be joined to the arbitration proceedings?

The general rule is that an arbitral tribunal cannot assume jurisdiction over parties who are not signatories to an agreement to arbitrate. However, a party to a contract containing an arbitration clause can assign its rights under the contract to a third party and the third party assignee is bound by the arbitration clause. A person who is not a signatory to the arbitration agreement can be added as a party with the signatories' consent.

11. In what circumstances can a party that is not a party to an arbitration agreement compel a party to the arbitration agreement to arbitrate disputes under the arbitration agreement?

Under Malaysian law, a non-party to an arbitration agreement cannot compel a party to arbitrate disputes under the arbitration agreement.

Separability

12. Does the applicable law recognise the separability of arbitration agreements?

An arbitration agreement is independent of the other terms of the contract (*section 18(2), Arbitration Act*). A decision by the arbitral tribunal that the agreement is itself null and void does not by itself mean an arbitration clause is invalid.

Breach of an arbitration agreement

13. What remedies are available where a party starts court proceedings in breach of an arbitration agreement or initiates arbitration in breach of a valid jurisdiction clause?

Court proceedings in breach of an arbitration agreement

It is mandatory for the court to stay any court proceedings that are the subject of an arbitration agreement in favour of arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed (*section 10(1), Arbitration Act*).

The Malaysian courts take a strict approach to parties that disregard an arbitration agreement and litigate in court. The courts permit court proceedings to continue only where the exceptions to section 10(1) of the Arbitration Act apply.

Arbitration in breach of a valid jurisdiction clause

If arbitration proceedings are started in breach of a valid jurisdiction clause, a party can object to the arbitral tribunal under section 18(3) of the Arbitration Act. The tribunal can then determine whether it has jurisdiction to hear the case. However, an objection to the arbitral proceedings cannot be raised after a statement of defence has been filed.

Where the arbitral tribunal rules that it has jurisdiction, any party can appeal to the High Court within 30 days after having received notice of that ruling (*section 18(8), Arbitration Act*).

14. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

If an arbitration agreement provides for Malaysia as the seat of arbitration, a Malaysian court can, in appropriate circumstances, grant an anti-suit injunction restraining a party from commencing court proceedings in other jurisdictions.

ARBITRATORS

Number and qualifications/characteristics

15. Are there any legal requirements relating to the number, qualifications and characteristics of arbitrators? Must an arbitrator be a national of, or licensed to practice in your jurisdiction in order to serve as an arbitrator there?

The Arbitration Act does not impose limits on who can be appointed as an arbitrator. This is consistent with the principle of autonomy, by which the parties are given freedom of choice to nominate an arbitrator. Parties can appoint a person of any nationality as arbitrator, as no person can be precluded from acting as arbitrator by reason of their nationality, unless the arbitration agreement states otherwise.

An arbitrator's appointment can be challenged if the arbitrator does not possess the qualifications agreed to by the parties (*section 14, Arbitration Act*).

The parties are also free to determine the composition of the arbitral tribunal in the arbitration agreement. If the parties fail to determine the number of arbitrators, the number of arbitrators in the arbitral tribunal will be (*section 12(2)*):

- Three arbitrators for an international arbitration.
- One arbitrator for a domestic arbitration.

Independence/impartiality

16. Are there any requirements relating to arbitrators' independence and/or impartiality?

A prospective arbitrator has a duty to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence (*section 14(1), Arbitration Act*). This duty to disclose subsists until the final award is given. These requirements apply to both domestic and international arbitrations.

Section 15 of the Arbitration Act sets out the procedure for challenging the independence or impartiality of an arbitrator. A challenge can be initiated within 15 days from becoming aware of either:

- The constitution of the tribunal.
- Any reasons for challenge stated under section 14(3) of the Act.

The challenge is made by sending a written statement of the reasons for the challenge to the arbitral tribunal.

If the challenge is unsuccessful, the challenging party can apply to the High Court for a decision on the challenge. The application to the High Court must be made within 30 days after receiving the notice of the rejection.

Independence and impartiality usually give rise to questions relating to the existence of a relationship between the arbitrators and one of the parties. In *MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd & Anor [2015] MLJU 477*, the court held that matters concerning the arbitrator's impartiality and independence must be determined by reference to both:

- The parties.
- The issues within a particular arbitration.

It is not enough to accuse an arbitrator of bias, a lack impartiality or independence, in one arbitration proceeding, and then use that as the basis for alleging bias against the same arbitrator in a different arbitration proceeding. This is regardless of the seriousness of the allegation in the first arbitration proceeding.

Appointment/removal

17. Does the law contain default provisions relating to the appointment and/or removal of arbitrators?

Appointment of arbitrators

Section 13 of the Arbitration Act sets out the default rules in relation to the appointment of arbitrators.

If the parties fail to agree on the appointment procedure, and the arbitration consists of three arbitrators, each party appoints one arbitrator, and the two appointed arbitrators then appoint the third arbitrator as the presiding arbitrator. If a party fails to appoint an arbitrator within 30 days of receiving a written request to do so from the other party, or the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment (or an extended period agreed by the parties), either party can apply to the Director of the Kuala Lumpur Regional Centre for Arbitration (KLRCA) to make an appointment.

Where the arbitral tribunal consists of one arbitrator and the parties fail to agree on the appointment, either party can apply to the Director of the KLRCA to make an appointment (*section 13(5), Arbitration Act*).

Removal of arbitrators

Section 15 of the Arbitration Act provides for the procedures for challenging the appointment of an arbitrator (*see Question 16*).

The Arbitration Act refers to the termination of an arbitrator's mandate, rather than the removal of arbitrator. Where an arbitrator becomes in law or in fact unable to perform the functions of that office, or for any other reasons fails to act without undue delay, the arbitrator's mandates terminates where (*section 16, Arbitration Act*):

- The parties agree on termination; or
- The arbitrator withdraws from office.

Where the arbitrator's mandate has been terminated, a substitute arbitrator must be appointed (*section 17(1), Arbitration Act*).

If a party disagrees with the termination, they can apply to the High Court to decide on the termination (*section 16(2), Arbitration Act*). There is no appeal from the decision of the High Court.

PROCEDURE

Commencement of arbitral proceedings

18. Does the law provide default rules governing the commencement of arbitral proceedings?

If the parties have not chosen a set of rules governing the commencement of arbitral proceedings, the only default provision that refers to and facilitates commencement of arbitral proceedings is section 23 of the Arbitration Act. Section 23 states that, subject to any agreement to the contrary, the arbitral proceedings relating to a particular dispute will commence when the respondent receives a written request for arbitration. Once the arbitral proceedings have been commenced, section 21 of the Arbitration Act applies. Section 21 provides for how to determine the rules of procedure if the parties fail to agree. See *Question 19*.

Applicable rules and powers

19. What procedural rules are arbitrators bound by? Can the parties determine the procedural rules that apply? Does the law provide any default rules governing procedure?

Applicable procedural rules

The general position is that parties are free to agree on the procedure to be followed by the arbitral tribunal provided the procedure does not contravene any provisions of the Arbitration Act (*section 21(1), Arbitration Act*).

Default rules

If the parties fail to agree on procedural rules, the arbitral tribunal can conduct the proceedings in a manner it considers appropriate (*section 21(2), Arbitration Act*).

The Arbitration Act provides that, in conducting the proceedings, the arbitral tribunal can:

- Determine the admissibility, relevance, materiality and weight of any evidence.
- Draw on its own knowledge and expertise.
- Order a party to provide further particulars following a statement of claim or statement of defence.
- Order security for costs.
- Fix and amend time limits within which various steps in the arbitral proceedings must be completed.
- Order the discovery and production of documents or materials within the possession or power of a party.
- Order interrogatories to be answered.
- Order that any evidence be given on oath or affirmation.
- Make such other orders as the arbitral tribunal considers appropriate.

EVIDENCE AND DISCLOSURE

20. If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

A party can apply to the arbitral tribunal for (*section 19, Arbitration Act*):

- Discovery of documents.
- Interrogatories.
- The giving of evidence by affidavit.

The arbitral tribunal can order:

- The discovery and production of documents or materials within the possession or power of a party (*section 21(3)(f), Arbitration Act*).
- Evidence to be given on oath or affirmation (*section 21(3)(h)*).

In some circumstances, with the approval of the arbitral tribunal, the parties can apply to the High Court for assistance in taking evidence. The High Court can order the attendance of

a witness to give evidence or to produce documents on oath or affirmation before an officer of the High Court or the arbitral tribunal (*section 29(2), Arbitration Act*).

As a general rule, there should be no discovery against a non-party to the arbitration proceedings (see *Christopher Martin Boyd v Deb Brata Das Gupta [1998] 6 MLJ 281*).

21. What documents must the parties disclose to the other parties and/or the arbitrator? How, in practice, does the scope of disclosure in arbitrations compare with disclosure in domestic court litigation? Can the parties set the rules on disclosure by agreement?

Scope of disclosure

The arbitral tribunal has the power to determine matters relating to disclosure of documents (*section 21(3)(e), Arbitration Act*). There are no specific rules governing the scope of disclosure under the Arbitration Act. However, initially at least, disclosure would include both those documents:

- Relied on by either party.
- Which the parties jointly agree to use.

It is a common practice for international arbitrations held in Malaysia to adopt the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules). Some significant features of the IBA Rules include:

- An obligation on the tribunal to consult the parties at the earliest appropriate time with a view to agreeing on an efficient, economical and fair process for taking evidence (*Article 2*).
- Confidentiality protections for documents (*Article 3(12)*):
  - produced by request;
  - submitted by a party in support of their case;
  - introduced by third parties.
- Guidance on disclosure of documents maintained in electronic form, which has become an increasingly important issue in international arbitration. The rules provide for the specific language relating to request of such documents (*Article 3(3)*).
- Specific provision governing the content of expert reports. This includes the requirement to describe the instructions given to the expert and a statement of his or her independence from the parties, legal advisers and tribunal (*Article 5*).
- Guidance on the issues of legal impediment or privilege, including the need to maintain fairness and equality particularly if the parties are subject to different legal or ethical rules (*Article 9(3)*).

Therefore a party to an arbitration can seek further discovery or specific discovery against another party and the arbitral tribunal can determine whether to allow the application.

In domestic court litigation, the Malaysian Rules of Court 2012 provide that the court can order a party to give discovery by creating and serving on the other party a list of documents including (*Order 24*):

- The documents on which the party relies or will rely.
- The documents that could adversely affect a party's own case or another party's case.
- The documents that support another party's case.

There are specific provisions within Order 24 for specific discovery or further and better discovery.

Where a party fails to comply with a discovery order, the court has wide discretionary powers to do the following (*Order 24, rule 16*):

- Dismiss the plaintiff's action if the plaintiff fails to make discovery.
- Strike out the defendant's defence if the defendant fails to make discovery.
- Enter a judgment in default of discovery by the defendant.

The IBA Rules provide a more prescriptive and succinct approach to disclosure in the course of arbitral proceedings. The objective is for the arbitral tribunal to engage with issues on disclosure from the outset. However, there are limits to the arbitral tribunal's power to order discovery. For example, an arbitral tribunal cannot order a third party to produce documents.

Apart from that, generally an arbitral tribunal can compel disclosure to the same extent as a court in Malaysia would be able to.

Validity of parties' agreement as to rules of disclosure

The parties can agree the rules on disclosure (*section 21(1), Arbitration Act*).

CONFIDENTIALITY

22. Is arbitration confidential? If so, what is the scope of that confidentiality and who is subject to the obligation (parties, arbitrators, institutions and so on)?

The Arbitration Act is silent on the confidentiality of the arbitral proceedings. However, Rule 15(1) of the KLRCA Arbitration Rules 2013 imposes obligations on the arbitral tribunal, the parties to the

arbitration, experts appearing in the arbitration and the KLRCA to keep confidential all matters relating to the arbitration proceedings. Confidentiality extends to the award, except where disclosure is necessary for the purposes of implementation and enforcement.

It is widely recognised that arbitration is different from litigation in terms of both:

- **Privacy of the proceedings.** Privacy is concerned with the rights of persons other than arbitrators, parties and witnesses to attend meetings and hearings to know about the arbitration.
- **Confidentiality of the process.** Confidentiality is the obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration. This obligation is not limited to documents that are in themselves confidential or to documents that contain material which is inherently confidential. It includes and extends to all documents generated in the course of arbitration *(see Jacob and Toralf Consulting Sdn Bhd & Ors v Siemens Industry Software GmbH & Co Kg & Ors [2014] 1 CLJ 919).*

In *Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc & Anor [2008] 5 MLJ 254*, the High Court made reference to the English principle that in the absence of an express term in an arbitration clause providing for

confidentiality, the presumption of confidentiality arises as an implied term by the very nature of the arbitral process itself.

COURTS AND ARBITRATION

23. Will the local courts intervene to assist arbitration proceedings seated in its jurisdiction?

Section 8 of the Arbitration Act expressly provides that no court may intervene in any matter governed by the Arbitration Act, unless otherwise provided. The Malaysian courts therefore do not have any inherent power to take over or intervene in arbitral proceedings where not provided for in the Arbitration Act.

This position is one that encapsulates the principles of parties' autonomy and minimalist intervention by courts of law (*Cobrain Holdings Sdn Bhd v GDP Special Projects Sdn Bhd [2010] 1 LNS 1834*). This case re-emphasised the principles that were enunciated in *Channel Tunnel Group Ltd v Balfour Beatty Construction [1993] AC 334* where it was held that when parties have contractually resorted to arbitration as a forum of choice, the court of law should be slow to interfere in the arbitration proceedings.

At any time before or during arbitral proceedings a party can apply to a High Court for any interim measure. The High Court can make the following orders (*section 11, Arbitration Act*):

- Security for costs.
- Discovery of documents and interrogatories.
- Giving of evidence by affidavit.
- Appointment of a receiver.
- Securing the amount in dispute.
- The preservation, interim custody or sale of any property that is the subject-matter of the dispute.
- Ensuring that any award that can be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party.
- An interim injunction or any other interim measure.

If an arbitral tribunal has already ruled on any matter that is relevant to the application, the High Court must treat any finding of fact made by the arbitral tribunal as conclusive.

In *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd [2010] 5 CLJ 83* the court held that the Arbitration Act seeks to prohibit courts from interfering with arbitration awards and the courts must refrain from interfering. However, the court can interfere if it involves obvious injustice.

The court can also intervene if the Director of the Kuala Lumpur Regional Centre for Arbitration has not made an appointment within 30 days from the request, where the parties have applied to the High Court for an appointment under section 13(7) of the Arbitration Act.

For information about the courts powers to issue injunctions see *Question 24, Risk of court intervention*.

For information about the appointment of an arbitrator see *Question 17*.

24. What is the risk of a local court intervening to frustrate an arbitration seated in its jurisdiction? Can a party delay proceedings by frequent court applications?

Risk of court intervention

Unless the parties have agreed to the contrary, no court can intervene in a matter governed by the Arbitration Act (*section 8, Arbitration Act*).

Before the Arbitration Act, Malaysian courts had applied a principle arising from English law that the court had inherent jurisdiction to grant an injunction to stay arbitral proceedings if to do so would not cause injustice to the claimant in the arbitration and the court was satisfied that continuing the arbitration would be vexatious, oppressive, or an abuse of the court process.

Malaysian courts now seem to have accepted that under the Arbitration Act, there is a clear and unmistakeable legislative intent requiring a court to facilitate arbitration proceedings to resolve a dispute that is subject to an arbitration agreement (*CMS Energy Sdn Bhd v Poson Corporation [2008] 6 MLJ 561*).

It appears that the courts are taking a strict approach to intervention in arbitral proceedings. In *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor [2008] 3 MLJ 872*, it was held that:

- The extent of the court's power is limited to what is expressed in section 8 of the Arbitration Act.
- The critical principle is that unless the Arbitration Act provides otherwise the court cannot intervene.

Delaying proceedings

Under section 10(1) of the Arbitration Act, arbitral proceedings can be commenced or continued and an award can be made while the issue is still pending in court. This ensures the continuity of the arbitration proceedings and avoids the arbitral proceedings being protracted.

INSOLVENCY

25. What is the effect on the arbitration of pending insolvency of one of more of the parties to the arbitration?

Where the party to an arbitration agreement is a bankrupt, if the person having jurisdiction to administer the property of the bankrupt, adopts the arbitration agreement, then the agreement is enforceable by or against that person (*section 49, Arbitration Act*).

There is no other provision within the Arbitration Act dealing with the impact of insolvency on arbitral proceedings. If a claimant in an arbitration becomes insolvent and is wound up, the liquidator must adopt the arbitration proceedings.

An issue arises as to whether a dispute relating to an issue under insolvency law itself can be arbitrated. There are no specific provisions stating that insolvency disputes are not arbitrable.

In relation to insolvency issues a balance must be struck between two competing policy issues:

- Any dispute that the parties have agreed to refer to arbitration is arbitrable unless the arbitration agreement is against public policy (*section 4, Arbitration Act*).
- An arbitral award can be set aside if the subject matter of the dispute is not arbitrable.

For a better understanding of the relationship between the concept of arbitrability and insolvency law see the Singapore Court of Appeal case *Larsen Oil and Gas Pte Ltd v Petroprod Ltd [2011] 3 SLR 414*. In that case, the Court made a distinction between disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that arise only at the onset of insolvency due to the operation of the insolvency regime.

The Court of Appeal in *Larsen Oil* stated that the overriding objective of the insolvency regime was to recover the losses of the company's creditors caused by the misfeasance or malfeasance of its former management. This objective could be compromised if a company's pre-insolvency management had the ability to restrict the options by which the company's creditors could enforce the statutory remedies designed to protect them against the company's management.

In Court of Appeal was of the view that the courts should treat disputes arising from operation of the statutory provisions of the insolvency regime as non-arbitrable, even if the parties expressly included them within the scope of the arbitration agreement. However, where the agreement is only to resolve the prior private disputes between the company and another party there will usually be no good reason not to observe the terms of the arbitration agreement.

The Singaporean decision in *Larsen Oil* is not binding on a Malaysian court, but the reasoning could be persuasive in Malaysia and a Malaysian court might well take a similar approach.

REMEDIES

26. What interim remedies are available from the tribunal?

Interim remedies

Unless the parties expressly agree otherwise, the arbitral tribunal has the power to order (*section 19, Arbitration Act*):

- Security for costs.
- Discovery of documents and interrogatories.
- Giving of evidence by affidavit.
- The preservation, interim custody, or sale of any property which is the subject matter of the dispute.

The arbitral tribunal can require appropriate security to be provided by any party in connection with the orders that are made. It is likely that this additional power is relevant to an order made under section 19(1)(d) of the Arbitration Act for injunctive-type relief.

In *Aras Jalinan v Tipco Asphalt Public Co Ltd & 2 Ors [2008] 5 CLJ 654*, the court interpreted section 11 of the Arbitration Act as not allowing it to grant interim relief for an international arbitration where the seat of arbitration was not in Malaysia. This decision led to an amendment to section 11. It has now been clarified in section 11(3) that the power of a court to grant interim relief extends even to an arbitration agreement where the seat is not Malaysia.

An arbitral tribunal has the power to order any interim measure that it deems necessary (*section 19. Arbitration Act*). Section 19 powers can only be invoked (*Thye Hin Enterprises Sdn Bhd v DaimlerChrysler Malaysia Sdn Bhd [2004] 5 AMR 562*):

- After the arbitral tribunal has been constituted.
- Before the arbitral proceedings have been terminated.

The interim remedies available from the tribunal only bind parties to the arbitral proceedings. If a party wishes to bind a third party, it must apply under section 11 of the Arbitration Act and obtain interim remedies from the court.

In *Jiwa Harmoni Offshore Sdn Bhd v Ishi Paower Sdn Bhd [2009] 1 LNS 849* it was said that if there is an overlap between the powers granted to the High Court under section 11(1) of the Arbitration Act and the powers granted to the arbitral tribunal under section 19 of the Arbitration Act, the High Court should not be troubled with interim applications in the first instance unless an interim order is necessary either to:

- Bind third parties.
- Effectively enforce the relief sought in cases where this cannot be done by an order from the arbitral tribunal

Ex parte

There is no specific provision in the Arbitration Act that governs ex parte interim relief. However, it is extremely unlikely that an arbitral tribunal would grant ex parte interim relief. Under Kuala Lumpur Regional Centre for Arbitration (KLRC) Rules, a party that needs emergency interim relief must make an application and notify all parties to the arbitration (*paragraph 1, Schedule 2, KLRCA Rules (Revised 2013)*).

Security

A party can apply to the arbitral tribunal to make an order for security for costs (*section 19(1)(a), Arbitration Act*). The arbitral tribunal has the power to order security for costs without the assistance of the courts.

27. What final remedies are available from the tribunal?

The arbitral tribunal can award all civil remedies that are within the scope of the Arbitration Act.

APPEALS

28. Can arbitration proceedings and awards be appealed or challenged in the local courts? What are the grounds and procedure? Can parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitral clause itself)?

Rights of appeal/challenge

The only recourse against an arbitral award is to apply to set it aside under section 37 of the Arbitration Act. The Arbitration Act does not contain any provisions enabling appeal against or rescission of an arbitral award.

Grounds and procedure

Setting aside an award. Section 37(1) of the Arbitration Act provides for the limited grounds on which an award can be set aside. The High Court can set aside an award where the party making the application provides proof that:

- A party to the arbitration agreement was under an incapacity.
- The arbitration agreement is not valid under the law.

- The party making the application was unable to present its case or was not given proper notice of:
  - the appointment of an arbitrator;
  - the arbitral proceedings.
- The award deals with a dispute not contemplated by the terms of the submission to arbitration.
- The award contains decisions on matters beyond the scope of the submission to arbitration.

Section 37(1)(b) of the Arbitration Act provides that the High Court can also set aside the arbitral award where it finds that:

- The subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia.
- The award is in conflict with the public policy of Malaysia.
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless the agreement was in conflict with a provision of the Arbitration Act.

The onus of proof is on the party that is making the application. The application to set aside an award must be made within three months of the award (*section 37(4), Arbitration Act*).

In *Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd and another application [2012] 5 MLJ 809*, the High Court held that the arbitrator's award under the Arbitration Act was largely immune from any interference by the court unless it was susceptible to being set aside under section 37 (*see above*).

Referring a question of law to the High Court. Section 42(1) of the Arbitration Act provides that any party can refer to the High Court any question of law arising out of an award. This section is limited to situations where the question of law arises out of the award itself and not out of the arbitration. Because section 42 falls under Part III of the Arbitration Act, by virtue of section 3(3) of the Arbitration Act, Part III will not apply to an international arbitration with a seat in Malaysia unless the parties agree.

Waiving rights of appeal

There is no right to appeal an arbitration award. However, while the position is not entirely clear, it appears that the right to set aside the award cannot be excluded.

29. What is the limitation period applicable to actions to vacate or challenge an international arbitration award rendered?

The Arbitration Act does not specifically provide for a limitation period in relation to an international arbitration award.

However, an application to set aside an arbitral award cannot be made more than 90 days from either (*section 37(4), Arbitration Act*):

- The date on which the party making the application received the award.
- If an application under section 35 for correction and interpretation of an award or for additional award had been made, the date on which the request was disposed of by the arbitral tribunal.

30. What is the limitation period applicable to actions to enforce international arbitration awards rendered outside your jurisdiction?

The enforcement procedures for both domestic and international arbitration awards are governed by section 38 of the Arbitration Act and Order 69 rule 8 of the Malaysian Rules of Court 2012.

International arbitral awards rendered outside the Malaysian jurisdiction are enforceable if they are issued from states that are parties to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

The Limitation Act and any other written law relating to the limitation of actions applies to arbitrations (*section 30, Limitation Act 1953*). Therefore, in the absence of an agreement between the parties to enforce the arbitration award within a specified period, the general limitation period contained in the Limitation Act applies.

COSTS

31. What legal fee structures can be used? Are fees fixed by law?

The legal fee structures commonly used are hourly rates and task-based billing. The rates charged by legal counsel largely depend on their experience and expertise and are not fixed by law.

Large commercial disputes are generally funded by the parties themselves. It is unclear whether third-party funding can be used.

Contingency fee or success fee arrangements are not permitted in Malaysia.

32. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

Cost allocation

The parties can enter into an agreement that dictates the allocation of costs of the arbitral proceedings. Unless otherwise agreed by the parties, the arbitral tribunal has the discretion to make an award of costs (*section 44, Arbitration Act*). The arbitrator can determine the costs in the absence of agreement between the parties (*see Magnificient Diagraph Sdn Bhd v JWC Ariatektura Sdn Bhd [2009] 1 LNS 622*).

A successful party can recover its costs, subject to the agreement between the parties and the discretion of the arbitral tribunal. However, the arbitral tribunal can apportion the costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case (*see Teong Piling Co V Asia Insurance Co Ltd [1994] 1 MLJ 444; SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd [2014] 2 MLJ 627*).

Cost calculation

There are no specific guidelines on the method for calculating a costs award.

The KLRCA Rules 2013 essentially comprise the UNCITRAL Arbitration Rules (2010) as modified by the KLRCA Rules 2013. Article 40 of the KLRCA Arbitration Rules states that costs include the following:

- The fees of the arbitral tribunal.
- The costs of expert advice and other assistance required by the arbitral tribunal.
- The legal costs incurred by the parties in relation to the arbitration.
- The fees of KLRCA.

Factors considered

An arbitral tribunal has discretion in awarding costs. In exercising its discretion in the award of costs a tribunal must act judicially and must apply the same costs principles applied in the High Court. The general rule is that costs follow event. However, in justifying a departure from the general rule, the tribunal may take into account the following factors:

- The conduct of the parties in the course of the arbitral proceedings; and
- The failure of a successful party to accept an offer made by the other party before or during the arbitral proceedings which would have left him in as good a position under the award.

ENFORCEMENT OF AN AWARD

Domestic awards

33. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts?

An arbitrator's award does not immediately entitle a successful party to levy execution against the assets of an unsuccessful party. The arbitral award must be converted into a court judgment or order. Until the High Court has given leave and the award is accepted and registered as a court judgment, an arbitrator's award is not final and binding and is liable to challenge (*see Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 CLJ 29*).

Application to the High Court to register an arbitral award as an enforceable judgment is made under section 38 of the Arbitration Act. The application is made ex parte and the applicant must produce the following:

- A duly authenticated original award or a duly certified copy of the award.
- The original arbitration agreement or a duly certified copy of the agreement.

The order for registration of the award must be served on the respondent, who is given 14 days to apply to set aside the registration. If an application to set aside registration is made, enforcement of the award is stayed pending determination that application.

Enforcement of the award is subject to section 39 of the Arbitration Act which provides the grounds for refusing recognition or enforcement. In the recent case of *Agrovenus LLP v Pacific Inter-Link Sdn Bhd and another appeal [2014] 3 MLJ 648*, the Court of Appeal held that the High Court was incorrect to have refused to recognise or enforce the award under section 39(1)(a) of the Arbitration Act when the respondent had failed to provide proof of why recognition or enforcement under section 38 ought to be refused.

Foreign awards

34. Is your jurisdiction party to international treaties relating to recognition and enforcement of foreign arbitration awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

Arbitral awards made in Malaysia are generally enforceable in other jurisdictions subject to the laws applicable in those jurisdictions. Malaysia is a party to the New York Convention.

35. To what extent is a foreign arbitration award enforceable?

An award made in respect of a domestic arbitration or an award from a foreign State is recognised as binding and is enforceable *(section 38(1), Arbitration Act*).

Under the Arbitration Act, a foreign State means a state that is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) *(section 38(4), Arbitration Act*). Therefore, only awards that are from States that are parties to the New York Convention can be recognised and enforced in Malaysia.

There is no procedural difference between enforcement of a foreign arbitration award and enforcement of a domestic arbitration award. The enforcement procedures for both types of award are governed by section 38 of the Arbitration Act. Application should be made by originating summons in the High Court (*see Question 33*).

Arbitral awards rendered in the United Kingdom and the United States are enforceable in Malaysia.

Length of enforcement proceedings

36. How long do enforcement proceedings in the local court take, from the date of filing the application to the date when the first instance court makes its final order? Is there an expedited procedure?

Generally, enforcement proceedings in local courts require about one to three months. However, where a respondent applies to set aside either the award or registration of the award under section 38 of the Arbitration Act (*see Question 33*), the proceedings could take substantially longer, possibly between three and nine months before they are disposed of in the High Court.

To expedite the procedure, an applicant can opt to file a certificate of urgency. However, this application must be based on cogent grounds.

REFORM

37. Are any changes to the law currently under consideration or being proposed?

The Arbitration Act 2005 was last amended in 2011 and there are currently no changes proposed.

MAIN ARBITRATION ORGANISATIONS

The Kuala Lumpur Regional Centre for Arbitration (KLRCA)

Main activities. The KLRCA was established to provide institutional support as a neutral and independent venue for the conduct of domestic and international arbitration proceedings in the Asia Pacific region.

W www.klrca.org.my

The Chartered Institute of Arbitrators (CIArb)

Main activities. The CIArb is a not-for-profit, UK registered charity working in the public interest through an international network of 37 branches. The CIArb provides a wide range of services and support to members and others involved in dispute resolution, and offers the only globally recognised professional qualification in arbitration.

W www.ciarb.org

The Malaysian Institute of Arbitrators (MIArb)

Main activities. The MIArb is a national body which was established in 1991 and comprises 12 council members. It is dedicated to facilitating the practice and study of arbitration and other alternative dispute resolution methods.

W www.miarb.com

ONLINE RESOURCES

Laws of Malaysia

W www.agc.gov.my

Description. The Laws of Malaysia website is maintained by the Attorney-General's Chambers of Malaysia and is generally up to date. It provides access to official and authentic publication of various legislation relevant to arbitration in Malaysia.

Malaysian Bar

W www.malaysianbar.org.my

Description. This is the Malaysian Bar's website, which includes the Rules of Court 2012.

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