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Malaysia
INTERNATIONAL ARBITRATION

Contributing firm

Shearn Delamore & Co.

Mr Rabindra S Nathan

Partner | rabindra@shearndelamore.com

Ms K Shanti Mogan

Partner | shanti@shearndelamore.com

Mr Rodney Gomez

Partner | rodney@shearndelamore.com

This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in Malaysia.

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MALAYSIA
INTERNATIONAL ARBITRATION

1. What legislation applies to arbitration in your country? Are there any mandatory laws?

The Arbitration Act 2005 ("AA 2005") applies to arbitration in Malaysia. Parts I, II and IV of the AA 2005, comprising sections 1 to 5, sections 6 to 39 and sections 47 to 51, are of mandatory application in respect of both domestic and international arbitrations where the seat of arbitration is in Malaysia.

Examples of mandatory legislative provisions that apply in Malaysia are as follows:

- 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 or the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia (section 4, AA 2005).
- Parties must be treated with equality and each party must be given a fair and reasonable opportunity of presenting that party's case (section 20, AA 2005).
- Provisions which are aimed to promote the freedom of choice enjoyed by the parties. For example, the parties are free to:
    - determine the number of arbitrators (section 12(1), AA 2005);
    - agree on a procedure for the appointment of the arbitrator(s) (section 13(2), AA 2005);
    - agree on the procedure to be followed by the arbitral tribunal in conducting the arbitration (section 21(1), AA 2005).
- A court must 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 (section 10(1), AA 2005).

2. Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?

Malaysia is a signatory to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention").

The Government of Malaysia will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State. Malaysia further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Malaysian law.

3. What other arbitration-related treaties and conventions is your country a party to?

Malaysia is also a party to the Comprehensive Investment Treaty between members of the Association of Southeast Asia Nations as well as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 ("ICSID Convention").

4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

The law governing international arbitration in Malaysia is based on the UNCITRAL Model Law. Sections 3 to 36 of the UNICITRAL Model Law are closely followed in Part II of the AA, i.e. sections 6 to 39 of the AA 2005. Parts III and IV, however, contain new provisions which are not contained in the Model Law.

Part III provides for additional powers of the Malaysian High Court to intervene in arbitral proceedings and the

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confidentiality of information relating to arbitral proceedings and awards. Part III of the AA 2005 contains provisions that only apply to all domestic arbitrations. The default position is that Part III does not apply to international arbitrations. The parties will have to by way of an agreement opt-in for Part III to apply to international arbitrations. Part IV covers miscellaneous issues such as the liability of arbitrators and arbitral institutions and the enforceability of arbitration agreements against bankrupts.

Further, despite Parts I and II closely following the UNCITRAL Model Law, specific powers are provided to arbitrators in several sections of the AA 2005, which are not found in the UNCITRAL Model Law. For instance, the AA 2005 empowers the arbitral tribunal to grant security for costs as an interim measure (see Section 19E of the AA 2005) and to give directions for the speedy determination of a claim if the claimant fails to proceed with the claim (see Section 27(d) of the AA 2005). The AA 2005 also provides for specific powers of the arbitral tribunal in conducting the arbitration, which includes drawing on its own knowledge and expertise, ordering for the provision of further particulars, the granting of security for costs, fixing and amending time limits in which various steps in arbitral proceedings must be completed, ordering the discovery and production of documents or material within the possession or power of a party, ordering interrogatories to be answered, and ordering that any evidence be given on oath or affirmation (see Section 21 of the AA 2005).

To keep in line with the UNCITRAL Model Law framework, the AA 2005 was amended in 2018 by two major amendments. Firstly, the 2018 amendments introduce a range of supplementary provisions which enable the arbitral tribunals to grant interim measures. For instance, through the newly introduced sections, i.e. 19A to 19J, the arbitral tribunals will now be able to issue interim measures to maintain or restore the status quo pending the determination of the dispute, to take action that would prevent or refrain from taking action that is likely to cause imminent harm or prejudice to the arbitral process, to provide a means of preserving assets out of which a subsequent award may be satisfied, to preserve evidence that may be relevant and material to the resolution of the dispute, or to provide security for costs of the dispute. However, such new powers do not exceed that of the courts, who retain additional powers to grant arrest of property or bail or other security in respect of admiralty proceedings (section 10(2A) of the AA 2005). Moreover, Section 19J of the AA 2005 provides that the Malaysian High Court has the power to grant interim measures in relation to arbitration proceedings, irrespective of whether the seat of arbitrations in Malaysia.

5. Are there any impending plans to reform the arbitration laws in your country?

Prior to the 2018 Amendments to the AA 2005 ("**2018 Amendments**"), the courts had jurisdiction over arbitral awards under section 42 (References on questions of law) of the AA 2005. However, such jurisdiction was limited to domestic cases where the questions of law referred substantially affected the rights of one or more of the parties (this being a test introduced in the course of the 2011 Amendments). Moreover, due to a combined reading of sections 3(2), (3) and (4) of the AA 2005, section 42 of the AA 2005 would normally not have applied to international arbitrations, unless parties expressly agree otherwise in writing. The Federal Court nonetheless, in ***Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and Other Appeals*** **[2018] 1 MLJ 1** expanded the courts' jurisdiction in respect of any questions of law, thus undermining the principle of minimum court intervention. In view of the said Federal Court judgment, section 42 of the AA 2005 was repealed by the 2018 Amendments. With the deletion of section 42 of the AA 2005, the arbitral award, whether domestic or international, can now only be challenged under sections 37 and 39 of the AA 2005.

In August 2020, the Malaysian Bar Council proposed the reinstatement of a 'modified' section 42 of the AA 2005 for reviewing domestic arbitral awards on questions of law. Similar to the position adopted by many other common law jurisdictions, the proposal is that Malaysia should provide the right to seek review of domestic arbitral awards on questions of law, subject to first obtaining leave of court to file any such challenge.

6. What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?

There are several arbitral institutions in Malaysia, including the Institute of Engineers Malaysia ("**IEM**"), the Palm Oil Refiners Association of Malaysia ("**PORAM**") and the Malaysian Institute of Architects ("**PAM**"). The arbitration rules for IEM were updated in 2016. For PORAM, since the enactment of Arbitration Act 2005, an extensive review exercise was conducted on the PORAM Rules of Arbitration and Appeal, where the revised rules took into effect from 1st January 2012. The PAM Arbitration Rules, on the other hand, were revised in 2019.

However, the Asian International Arbitration Centre ("AIAC") is the main arbitral institution in Malaysia. The

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AIAC Arbitration Rules were last revised in 2021. The AIAC Arbitration Rules 2021 takes effect from 1st August 2021.

The recent revision includes significant changes to existing Malaysian arbitral practice and extends the AIAC's various efforts to improve the efficiency of arbitration. It also responds to the growing calls for enhanced cost and time savings and transparency in arbitration by introducing new procedures for summary determination, expedited procedure and the publication of AIAC arbitral awards.

The key revisions are, *inter alia*, highlighted as follows:

- Merging of Part I and Part II of the AIAC Arbitration Rules 2018 to ensure a harmonious and coherent set of procedural rules that are modelled on the UNCITRAL Model Law (as revised in 2013);
- Incorporation of a Fast Track Procedure to provide for expedited arbitrations and minimising the need for a standalone set of AIAC Fast Track Arbitration Rules (see Rule 8);
- Revisions to the process of appointing the Arbitral Tribunal, including a new provision on multi-party appointments (Rule 9);
- Revisions to the Emergency Arbitration provisions to enhance clarity (Rules 17 and 18);
- New provision on Summary Determination for the early dismissal of claims (Rule 19);
- Revisions to the consolidation provision, including a new provision for the consolidation of multi-contract disputes (Rule 22);
- Substantive revisions to the provisions on the closure and termination of proceedings, the technical review process, and the release, correction and interpretation of awards to enhance clarity (Rules 32 – 39)
- Revisions to the provisions relating to costs and deposits to enhance clarity (Rules 40 and 41); and
- Revisions to the confidentiality provision to reflect best practices (Rule 44).

7. Is there a specialist arbitration court in your country?

There is no specialist arbitration court in Malaysia at this point of time. However, the High Court in Kuala Lumpur has designated divisions in the civil courts, i.e. construction and commercial courts to hear construction and commercial matters arising from arbitration in additional to ordinary construction and commercial matters.

8. What are the validity requirements for an arbitration agreement under the laws of your country?

Prior to the 2018 Amendments, section 9 of the AA 2005 requires an arbitration agreement to be signed by the parties. However, the definition of "arbitration agreement" was expanded by the 2018 Amendments so as to encompass agreements that are made or recorded by electronic means. The 2018 Amendments updated the AA 2005 to bring it in line with the latest revision of the UNCITRAL Model Law to make Malaysia a safe seat and to put the AA 2005 in line with other arbitration acts worldwide.

Section 9(1) of the AA 2005 defines an arbitration agreement as "*an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not*". An arbitration agreement is required to be in written form (Section 9(3) of the AA 2005). An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means (Section 9(4) of the AA 2005). In addition, the requirement that an arbitration agreement be in writing is met by any electronic communication that the parties make by means of data message if the information contained therein is accessible so as to be useable for subsequent reference (section 9(4A) of the AA 2005).

9. Are arbitration clauses considered separable from the main contract?

Section 18(2) of the AA 2005 provides that an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement and a decision by the arbitral tribunal that the agreement is null and void shall not *ipso jure* entail the invalidity of the arbitration clause.

A decision by an arbitral tribunal that the agreement is null and void does not invalidate the agreement to arbitrate (see ***Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor*** [2008] 1 MLJ 233 – High Court).

This position has also been applied in the recent case of ***Pandan Etika Sdn Bhd v Liang Builders Sdn Bhd*** [2019] 1 LNS 1978 where the Malaysian High Court gave effect to an arbitration clause that had been referentially incorporated into an agreement, regardless of the fact that the remaining aspects of the agreement could potentially be void for uncertainty.

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10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

There has not been any Malaysian case law in respect of the validation principle in the context of an arbitration agreement. However, we are of the view that the Malaysian courts would find the recent Supreme Court of the United Kingdom decision in ***Enka v Chubb*** [2020] UKSC 38 to be persuasive, i.e. that the Supreme Court recognised the validation principle applied if a putative governing law of the agreement, where none had been expressly chosen, would render all or part of the agreement ineffective. This rationale is in line with the validation principle implied in the scheme of the New York Convention to uphold and give effect to arbitration agreements.

11. Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?

There have been developments with regard to multi-party or multi-contract arbitration in respect of the arbitral institution rules in Malaysia.

The latest revisions of the AIAC Arbitration Rules 2021 allow a claimant to file a single notice of arbitration in respect of claims arising from multiple contracts between the same parties together with a consolidation request (Rule 22.4).

In multi-party arbitrations, Rule 9.7 of the AIAC Arbitration Rules 2021 streamlines the default mode of appointment of arbitrators in such arbitrations. Where an even-numbered tribunal is used, all claimants and respondents will nominate half the required number of arbitrators. For odd-numbered tribunals, all claimants and respondents will nominate an equal number of arbitrators who shall thereafter nominate a presiding arbitrator. If joint nomination fails, the entire Arbitral Tribunal shall be constituted by the Director. In this case, any nominated arbitrators shall be excluded from consideration and any appointed arbitrators shall be released, unless the parties agree to retain such nominations or appointments.

12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

Rule 21.1 of the AIAC Arbitration Rules 2021 provides that any party to an arbitration or an additional party may, no later than the filing of the statement of defence and counterclaim, or at any time thereafter provided there exists exceptional circumstances, request one or more additional parties to be joined as a party to the arbitration where:

(a) all parties to the arbitration and the additional party consent in writing to the joinder;

(b) such additional party is prima facie bound by the arbitration agreement that gives rise to the arbitral proceedings; or

(c) the participation of such additional party is necessary for the efficient resolution of the dispute and directly affects the outcome of the arbitral proceedings.

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

In the recent Federal Court's decision in ***Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors*** [2019] 5 MLJ 1, the plaintiff, who was not a party to the arbitration proceedings, had sought an injunction to restrain arbitration proceedings against the second, third and fourth defendants, who were parties to a pending arbitration proceeding. The questions that arose in this case were whether a non-party can apply for an injunction to restrain arbitration proceedings to safeguard his proprietary rights was subject to the provisions of the AA 2005.

The Federal Court held that the AA 2005 should not apply to a party who does not fall within the scope of the legislation. Where a non-party applies for an anti-arbitration injunction, the applicable test is that laid down in ***Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193*** (i.e. whether there are serious issues to be tried, where the balance of convenience lies, and whether damages are an adequate remedy), and the higher test in ***J Jarvis & Sons Limited v Blue Circle Dartford Estates Limited*** [2007] EWHC 1262 (i.e. that the injunction must not cause injustice to the claimant in the arbitration; the continuance of arbitration must be oppressive, vexatious, unconscionable and an abuse of process is of no relevance.

The Federal Court further held that where the dispute in the arbitration affects a non-party, priority should be

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given for the dispute to be litigated in court. In doing so, the Federal Court considered a 'fairness' test, in which the primary consideration on whether to grant the injunction to restrain the arbitration proceedings where the rights of a non-party thereto are involved, such that the non-party would not be left out in the cold and have his rights affected.

In this regard, the Federal Court may decline to give effect to the arbitration clause where the interests of third parties are involved or where there is a risk of parallel proceedings and inconsistent decisions arising out of the conduct of an arbitration.

13. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?

Section 4(1) of the AA 2005 provides that "*any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia*."

While there is no definite list of subject matters that are not capable of settlement by arbitration under Malaysian law, matters generally considered non-arbitrable include disputes in relation to matrimonial and family law matters, criminal offences (including bribery and corruption), winding-up and insolvency, competition laws and public interest.

In a recent dispute as regards the statutory right of a chargee to indefeasible title and to sell the charged security in the event of default by the chargor (provided by the National Land Code), the Federal Court in ***Arch Reinsurance Ltd v. Akay Holdings Sdn Bhd*** [2019] 5 MLJ 186 held that the dispute triggered by the statutory notice of demand in Form 16D was not arbitrable under Section 4 of the AA 2005 as the provisions of the National Land Code setting out the rights and remedies of parties under statutory charge over land are exhaustive and exclusive and any attempt to contract out of these rights are void as being contrary to public policy.

14. Are there any recent court decisions in your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

In ***Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic*** [2017] 9 CLJ 273, the Federal Court has established the general principle that where the seat of arbitration is Malaysia, the law applicable to the arbitration agreement is the law of Malaysia. This is the position in the absence of an express agreement or other contrary indications.

The general principle is that the law of the arbitration agreement should be determined by (i) express choice of the parties; (ii) failing which, by the implied choice of the parties and (iii) failing which, by the system of law having the closest and most real connection with the arbitration agreement.

15. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

Section 30(1) of the AA 2005 provides that the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.

For international arbitration, section 30(2) of the AA 2005 recognises the right of the parties to choose the applicable substantive law.

Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable [section 30(4) of the AA 2005].

The arbitral tribunal shall, in all cases, decide in accordance with the terms of the agreement and shall take into account the usages of the trade applicable to the transaction [section 30(5) of the AA 2005].

As such, the law applicable to the substance would often be determined by the agreement between the parties, failing which the arbitral tribunal would apply the conflict of laws rules which it considers applicable.

In Malaysia, the conflict of law rules is set out in ***James Capel (Far East) Ltd v YK Fung Securities Sdn Bhd (Tan Koon Swan, Third Party)*** [1996] 2 MLJ 97, where at the first instance, the court will consider whether there is an express choice of the governing law.

In the absence of an express choice, the court will identify an implied choice such as:

1. the presence of a choice of forum clause;
2. the use of terminology peculiar to a system of law;
3. where one party to a contract is a

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government; or
4. where both sides carry on business or live in the same country.

If an implied choice is so not found, the court will then adopt the system of law with which the transaction has the closest or most real connection with, by referring to relevant factors, amongst others:

1. the place of the performance of the contract;
2. the place where the contract was made; or
3. the site of the immovable property if such property is involved.

16. Have the courts in your country applied the UNIDROIT or any other transnational principles as the substantive law? If so, in what circumstances have such principles been applied?

The courts in Malaysia have not applied the UNIDROIT or any other transnational principles as the substantive law.

17. In your country, are there any restrictions in the appointment of arbitrators?

No. The parties to an arbitration agreement are free to decide on the arbitrator(s) and the number of arbitrators. It is explicitly provided in Section 13 of the AA 2005 that no person shall be precluded by reason of nationality from acting as an arbitrator, unless the parties agree otherwise.

18. Are there any default requirements as to the selection of a tribunal?

Section 12 of the AA 2005 provides for a tribunal of three arbitrators in international arbitrations, and one arbitrator in domestic arbitrations where the parties fail to determine the number of arbitrators.

Section 13(2) of the AA 2005 provides that the parties are free to agree on a procedure for appointing arbitrator or the presiding arbitrator.

Where the parties fail to agree on the procedure, and the arbitration consists of three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator as the presiding arbitrator (Section 13(3) of the AA 2005).

Where Section 13(3) above applies and (a) a party fails to appoint an arbitrator within thirty days of receipt of a request in writing to do so from the other party; or (b) the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment or such extended period as the parties may agree, either party may apply to the Director of the Asian International Arbitration Centre (Malaysia) for such appointment (Section 13(4) of the AA 2005).

Under section 13(5) of the AA 2005, where in an arbitration with a single arbitrator, (a) the parties fail to agree on the procedure referred to in section 13(2) of the AA; (b) the parties fail to agree on the arbitrator, either party may apply to the Director of the AIAC for the appointment of an arbitrator.

Section 13(6) of the AA 2005 provides that where the parties have agreed on the procedure for appointment of the arbitrator, (a) a party fails to act as required under such procedure; (b) the parties, or two arbitrators, are unable to reach an agreement under such procedure; or (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the Director of the Asian International Arbitration Centre (Malaysia) to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

The procedure for the appointment of arbitrator(s) can also be found in Rule 9 of the AIAC Arbitration Rules 2021 where the parties have agreed to arbitration under the AIAC Arbitration Rules.

19. Can the local courts intervene in the selection of arbitrators? If so, how?

Yes, but in very limited circumstances as provided under Section 13(7) of the AA 2005, where the Director of the AIAC is unable to act or fails to act under subsections (4), (5) and (6) within thirty days from the request, any party may apply to the High Court for such appointment.

In appointing an arbitrator the High Court shall have due regard to:-

(a) any qualifications required of the arbitrator by the agreement of the parties;

(b) other considerations that are likely to secure the appointment of an independent and impartial arbitrator; and

(c) in the case of an international arbitration, the advisability of appointing an arbitrator of a nationality other than those of the parties.

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20. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

Section 14(3) of the AA 2005 provides that:

"*An arbitrator may be challenged only if-*

(a) the circumstances give rise to justifiable doubts as to that arbitrator's impartiality or independence; or

(b) that arbitrator does not possess qualifications agreed to by the parties."

A party may challenge an arbitrator appointed by that party, or in whose appointment that party has participated, only for reasons which that party becomes aware of after the appointment has been made. (Section 14(4) of the AA 2005)

Section 15 of the AA 2005 states the challenge procedure as follows:

"(1) Unless otherwise agreed by the parties, any party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or of any reasons referred to in subsection 14(3), send a written statement of the reasons for the challenge to the arbitral tribunal.

(2) Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall make a decision on the challenge.

(3) Where a challenge is not successful, the challenging party may, within thirty days after having received notice of the decision rejecting the challenge, apply to the High Court to make a decision on the challenge.

(4) While such an application is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

(5) No appeal shall lie against the decision of the High Court under subsection (3)."

Similarly, under Rule 11.1 of the AIAC Arbitration Rules 2021, it provides that:

"*A Party may challenge an arbitrator, including an arbitrator nominated by that Party, if a Party is aware of existing circumstances, or later becomes aware of a change in circumstances, that:*

(a) gives rise to justifiable doubts as to the arbitrator's impartiality or independence; or

(b) indicates that the arbitrator does not possess any of the requisite qualifications which the Parties agreed to."

The similar procedure to initiate the challenge of an arbitrator can also be found in Rules 11.2 to 11.11 of the AIAC Arbitration Rules 2021.

21. Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators

The court has held that matters concerning an arbitrator's impartiality and independence must be determined by reference to the parties to and issues in the particular arbitration (***MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd & Anor*** [2015] MLJU 477). It is not enough to accuse an arbitrator for lack of independence or impartiality based on that arbitrator's lack of the same in another arbitration proceeding.

The ***MMC*** case is also referred in ***Low Koh Hwa @ Low Kok Hwa (practising as sole chartered architect at Low & Associates) v Persatuan Kanak-Kanak Spastik Selangor & Wilayah Persekutuan and another case*** [2021] 10 MLJ 262, where the High Court examined the arbitrator's duties of full and timeous disclosure of facts and circumstances which are likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. This case is set out in detail below.

22. Have there been any recent decisions in your concerning arbitrators' duties of disclosure, e.g., similar to the UK Supreme Court Judgment in Halliburton v Chubb?

In the recent case of ***Low Koh Hwa @ Low Kok Hwa (practising as sole chartered architect at Low & Associates) v Persatuan Kanak-Kanak Spastik Selangor & Wilayah Persekutuan and another case*** [2021] 10 MLJ 262, the High Court allowed an application to set aside an award on the basis that (i) arbitrator apparent bias resulted in the award being in conflict with the public policy of Malaysia, and (ii) a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award (section 37(1)(b)(ii) and (2)(b)(i) of the AA 2005.

The High Court confirmed that an arbitrator is under a continuing duty under AA 2005 to make full and timeous disclosure of facts and circumstances which are likely to give rise to justifiable doubts as to the arbitrator's

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impartiality or independence. This requires an arbitrator to "*disclose to the [p]arties all the relevant details which would enable a "fair-minded and informed observer" to decide objectively on whether there are justifiable doubts on the Arbitrator's impartiality and/or independence ... without delay*". The judge also adopted the UK Supreme Court Judgment in ***Halliburton v Chubb*** [2020] UKSC 38 in deciding that an arbitrator's failure to make disclosure is relevant to assessing whether there are justifiable doubts as to the arbitrator's impartiality.

The High Court considered that the applicable test for arbitrator apparent bias in Malaysia is the re-stated 'real possibility of apparent bias' test approved by Lord Hodge in ***Halliburton***, i.e. "*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*".

The High Court also viewed that the arbitrator had breached the full disclosure requirement and timeous disclosure requirement. As such, the association could not now rely on an invalid disclosure by the arbitrator regarding the arbitrator's relationship to advance any argument based on estoppel against Mr Low. Estoppel is an equitable doctrine which is applied by the court to achieve justice. The equitable estoppel doctrine should not be a ground for arbitrators to circumvent the full disclosure requirement and timeous disclosure requirement. If otherwise, the application of the equitable estoppel doctrine would cause an injustice or inequity in arbitration.

Having considered the above, the judge was satisfied that the Arbitrator's failure to make full and timeous disclosure was material to the outcome of the arbitration, had a real impact on the Award, and were significant and had affected the Award. As a result, the High Court considered it appropriate to exercise its discretion to set aside the entire Award.

23. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

The situation of a truncated arbitral tribunal may be caused by various factors. It may arise when an arbitral tribunal during the course of the arbitral proceedings and before the rendering of the award does not remain the same at some point, meaning that one of the members of the tribunal is deceased, resigns or is removed either by agreement of the parties or by the Director pursuant to a challenge request in Rule 11 of the AIAC Arbitration Rules 2021.

In such a situation, a substituted arbitrator may be appointed pursuant to section 17 of the AA 2005. Any order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator shall not be invalid solely on the ground there has been a change in the composition of the arbitral tribunal, unless otherwise agreed by the parties (Section 17(3) of the AA 2005).

Rule 12.6 of the AIAC Arbitration Rules 2021 also provides that "*Save where a Final Award has been made, the reconstituted Arbitral Tribunal shall, after consulting the Parties, determine whether and to what extent any previous hearings or other procedural steps in the arbitration remain effective*."

24. Are arbitrators immune from liability?

Section 47 of the AA 2005 expressly provides that "*An arbitrator shall not be liable for any act or omission in respect of anything done or omitted to be done in the discharge of his functions as an arbitrator unless the act or omission is shown to have been in bad faith*."

In addition, Rule 45.1 of the AIAC Arbitration Rules 2021 provides that "*Neither the AIAC, its employees, the Director, the Arbitral Tribunal nor any tribunal secretary shall be liable for any act or omission related to the conduct of the arbitral proceedings governed under the AIAC Arbitration Rules*."

25. Is the principle of competence-competence recognized in your country?

Yes. Section 18(1) of the AA 2005 (which mirrors Article 16 of the Model Law) deals with the concept of competence-competence in Malaysia. Under section 18(1) of the AA 2005, the arbitral tribunal can rule on its own jurisdiction. The arbitral tribunal's powers to decide on its own jurisdiction or competence or the scope of its authority or the existence or validity of the arbitration agreement has been recognised by the Malaysian courts in ***Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd*** [2016] 5 MLJ 417; ***TNB Fuel Services Sdn Bhd v China National Coal Group Corp*** [2013] 4 MLJ 857.

26. What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?

Pursuant to section 10 of the AA 2005, it is mandatory for the Malaysian courts to stay any court proceedings which are the subject of an arbitration agreement in favour of arbitration. A stay will be refused if:

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- The party applying for a stay of proceedings has taken definite, conscious and deliberate steps to participate in the court proceedings.
- The arbitration agreement is null and void, inoperative or incapable of being performed.

This was confirmed by the Federal Court in ***Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd*** [2016] 5 MLJ 417 where it was held that in granting a stay under Section 10 of the AA 2005, the court only needs to consider whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed.

Besides granting a stay of the court proceedings, antisuit injunctions restraining a party from commencing court proceedings in other jurisdictions in breach of an arbitration agreement which provides Malaysia as the seat of arbitration may be granted by the local courts. This is premised on the rationale that strong reasons are required to displace the contractual obligation entered into in relation to an arbitration clause (***Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors*** [2019] 5 MLJ 1). In ***Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd*** [2007] 3 MLJ 316, the Court of Appeal held that there is no doubt that a court has jurisdiction and power to grant an anti-suit injunction whenever the interests of justice call for or demand it.

Nonetheless, there are circumstances where the courts have had to decline to apply Section 10 of the AA 2005 to order a stay of the court proceedings, and to not compel the parties to proceed with arbitration. Some of these circumstances are illustrated by the cases set out below.

For instance, in ***Jaya Sudhir*** (supra), where the case involves a non-party to the arbitration proceedings, the court held that the judicial policy of avoiding parallel proceedings, the risk of inconsistent findings and inconvenience to third parties, triumphs over the policy of upholding arbitration agreements.

In ***Protasco Bhd v Tey Por Yee And Another Appeal*** [2018] 5 CLJ 299, the Court of Appeal observed that section 10 of AA 2005 has no application on the stay of court proceedings sought by non-parties. However, the Court of Appeal has the discretion to exercise its inherent power to grant or refuse a stay as sought by non-parties. After considering the factual matrix of the case and balancing the relevant factors and interests of parties involved, the Court ordered for the stay of the court proceedings only in relation to parties to the arbitration, on condition that the proposed arbitration proceed only after the resolution of the court proceedings in relation to non-parties the arbitration. The objective of this ruling is to achieve "*a result which is manifestly just in all the circumstances of the case*".

In ***Kebabangan Petroleum Operating Co Sdn Bhd v Mikuni (M) Sdn Bhd & Ors*** [2021] 7 CLJ 544, the Court of Appeal also had to consider the issue of non-parties to an arbitration agreement in the context of a stay application pursuant to Section 10 of the AA 2005.

In refusing the stay application sought by the respondents, the Court of Appeal took into consideration that the first respondent (who was a party to the arbitration agreement) had by conduct abandoned its right to refer the matter to arbitration when it failed to pay the deposit for arbitration proceedings, thus rendering the arbitration agreement inoperative. The respondents had also taken steps to proceed with the civil suit in preference to arbitration by making a striking out application. In addition, the Court of Appeal ruled that the court proceedings against the second to fifth respondents (who were the directors of the first respondent) should not have been stayed on the basis that they were not parties to the arbitration agreement between the appellant and the first respondent.

27. How are arbitral proceedings commenced in your country? Are there any key provisions under the arbitration laws relating to limitation periods or time bars of which the parties should be aware?

In accordance with the principle of party autonomy, parties to an arbitration agreement are free to agree on the application of a set of rules published by an arbitration institution (Section 2(c) of AA 2005). Most arbitral institution rules provide for a provision regarding the commencement of an arbitration. For example, pursuant to Rules 5 and 7 the AIAC Arbitration Rules 2021 ("**AIAC Rules 2021**"), a notice of arbitration must be delivered to the respondent for the arbitration to commence.

If the parties have not agreed to any arbitration rules relating to commencement of an arbitration, then the default provisions of Section 23 of AA 2005 will be applicable. Section 23 of AA 2005 provides that an arbitration is deemed to have commenced as on the date that the request for the dispute to be referred to arbitration is received by the respondent. In addition to these requirements, such request for arbitration must also comply with Section 30(3) of the Limitation Act 1953.

Further, Section 30(1) of the Limitation Act 1953 provides that all limitation provisions under the

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Limitation Act 1953 are equally applicable to arbitration. The most relevant limitation period is that applicable in contract (see section 6(1)(a) of the Limitation Act 1953).

It is also worth noting section 45 of AA 2005, which allows the High Court to extend the time for the commencement of an arbitration, where the arbitration agreement specifies the time within which the arbitration is to be commenced.

28. In what circumstances is it possible for a state or state entity to invoke state immunity in connection with the commencement of arbitration proceedings?

In the case of ***Government of Malaysia v Nurhima Kiram Fornan & Ors*** [2020] MLJU 425, the High Court allowed the Government of Malaysia's application for, inter alia, an anti-arbitration injunction to restrain foreign arbitration proceedings on the basis of sovereign immunity.

In this respect, the Government of Malaysia ("**GoM**") sought:-

- to restrain the Defendants from proceeding with an arbitration commenced by the Defendants in Spain ("**Spanish Arbitration**") pursuant to a Deed of Cession 1878 ("**Deed**"); and
- for a declaration that (i) there is no arbitration agreement between the parties; (ii) there was no waiver of sovereign immunity by Malaysia in respect of the dispute; and (iii) that Malaysia is the natural and proper forum to resolve the dispute over territorial rights arising from the Deed.

One of the grounds relied upon by the GoM is that despite the absence of any, or any valid or binding agreement between the parties to the Deed to refer disputes thereunder to arbitration, and despite the submission by the heirs of the Sultan of Sulu to High Court, the Superior Court of Justice in Madrid was moved by the 1st to 8th Defendants to appoint a sole arbitrator in the Spanish Arbitration without regard inter alia to established conflict of laws and forum selection rules, and in violation of the sovereign immunity of Malaysia.

The High Court also acknowledged the following arguments put forward by GoM: –

- The principle of sovereign immunity is a rule of customary international law recognised also by the Malaysian Courts;
- The Deed is not a trading or commercial agreement, but one relating to cession of land by a Sovereign to predecessors of what is now a Sovereign state. In such circumstances, Malaysia is absolutely immune from the proceeding in Spain;
- GoM as a Sovereign State cannot be forced to submit to the jurisdiction of the 9thDefendant (the sole arbitrator in the Spanish Arbitration). The dispute in the instant case which is over territorial rights in Sabah, is not arbitrable; and
- The sole arbitrator cannot assume jurisdiction over Malaysia without a waiver of sovereign immunity. The Spanish Arbitration is therefore a violation of GoM's right to sovereign immunity.

After considering the above, the High Court found as follows: –

- No waiver has been made by Malaysia of its sovereignty to any court of another nation including the Superior Court of Justice of Madrid or even before an arbitrator in relation to the Deed; and
- The 9thDefendant has no jurisdiction to deal with the alleged dispute as presented by the 1st to 8th There is no evidence whatsoever to indicate that GoM has submitted jurisdiction to the jurisdiction of the 9th Defendant.

Hence, this case suggests that a state or state entity may invoke state immunity in connection with the commencement of arbitration proceedings against claims brought by foreign entities concerning issues outside of commercial activity.

29. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

Parties are free to agree on the application of a set of rules published by an arbitration institution (Section 2(c) of AA 2005). Most arbitral institution rules include the consequences of default by the parties.

For example, Rule 30 of the AIAC Rules 2021 provides, *inter alia*, as follows:

- Should a respondent fail to deliver its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations;

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- Should a party, duly notified under the AIAC Rules 2021, fails to appear at a hearing, without showing sufficient cause, the arbitral tribunal may proceed with the arbitration; and
- Should a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so in accordance with the procedural order issued by the arbitral tribunal, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

If the parties have not agreed to any arbitration rules relating the consequences of default by the parties, Section 27 of AA 2005 provides for the manner in which the arbitral tribunal is to proceed in the event of a default by the parties, which are similar to those provided under the AIAC Rules 2021.

Further, most arbitral institution rules require advance deposits for the costs of the arbitration and a respondent may also opt not to participate in the arbitration by refusing to pay such deposits. This may be due to the respondent's financial constraints or even a tactic employed by the respondent to frustrate the arbitration process. In this respect, Rule 41 of the AIAC Rules 2021, *inter alia*, provides that AIAC shall afford the other party an opportunity to make full payment of the required deposits where a party fails to pay its share of the deposits. Should the other party opt not to make the required payments, then the arbitral tribunal may, after consultation with the director of AIAC, suspend or terminate the arbitral proceedings or any part thereof.

In this respect and pursuant to the recent Court of Appeal case of ***Kebabangan Petroleum Operating Co Sdn Bhd v Mikuni (M) Sdn Bhd & Ors*** [2021] 1 MLJ 693, should the arbitration proceedings be terminated pursuant to non-payment of the arbitration deposits by a respondent, it appears that a claimant may then proceed to pursue its claim against the respondent in the civil courts by reason that the arbitration agreement between the parties have become inoperative.

30. Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?

Generally, the arbitral tribunal cannot assume jurisdiction over individuals or entities that are neither party to an arbitration agreement nor signatories to the contract containing the arbitration agreement.

The AA 2005 itself is silent on third party joinder. However, pursuant to Rule 21 of the AIAC Rules 2021, joinder of non-parties to an arbitration is permitted where all parties to the arbitration and the additional party consent in writing to the joinder, where the additional party is bound by the arbitration agreement that gives rise to arbitral proceedings, or where the participation of the additional party is necessary for the efficient resolution of the dispute and directly affects the outcome of arbitral proceedings.

31. Can local courts order third parties to participate in arbitration proceedings in your country?

Based on AA 2005, there are no provisions conferring powers to the local/civil courts to compel a third party's participation in arbitration.

32. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?

Pursuant to Section 19(1) of AA 2005, an arbitral tribunal is permitted to grant interim measures at the request of either party to the arbitration agreement. Section 19(2)(a) to (e) of AA 2005 confer power upon the arbitral tribunal to grant the following interim reliefs:

- To order a party to maintain or restore the status quo pending determination of the dispute;
- To take action that would prevent current or imminent harm or prejudice to the arbitral process itself, or to refrain from taking action that is likely to cause such harm or prejudice;
- To provide a means of preserving assets out of which a subsequent award may be satisfied;
- To preserve evidence that may be relevant and material to the resolution of the dispute; or
- To provide security for the costs of the dispute.

An interim measure issued by an arbitral tribunal shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the court, irrespective of the country in which it was issued (see Section 19H of AA 2005).

The High Court has the power to issue interim relief before or during arbitration proceedings, irrespective of

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whether the seat of arbitration is in Malaysia.

Pursuant to Section 11 of AA 2005, the High Court may make the following orders:

- To maintain or restore status quo pending the determination of the dispute;
- To take action that would prevent current or imminent harm or prejudice to the arbitral process, or to refrain from taking action that is likely to cause such harm or prejudice;
- To provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security, pursuant to the admiralty jurisdiction of the High Court;
- To preserve evidence that may be relevant and material to the resolution of the dispute; or
- To provide security for the costs of the dispute.

It should be noted that the powers of the court to grant interim relief are slightly wider than the powers of an arbitral tribunal. In considering an order to provide a means of preserving assets out of which a subsequent award may be satisfied, the High Court has the power to order an arrest of property or bail or other security, pursuant to the admiralty jurisdiction of the High Court.

33. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

Yes.

Generally, the court possesses power to grant anti-suit and/or anti-arbitration injunctions under Section 11 of AA 2005 and/or its inherent jurisdiction.

In respect of anti-suit injunctions, please see the case of ***Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd*** [2007] 3 MLJ 316, where the Court of Appeal held that there is no doubt that a court has jurisdiction and power to grant an anti-suit injunction whenever the interest of justice call for or demand it.

In respect of anti-arbitration injunctions, please see the following cases: –

1. ***Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors***[2019] 5 MLJ 1, where the Federal Court allowed an anti-arbitration injunction sought by a non-party to an arbitration agreement. In reaching this decision, the Federal Court made a distinction between the test for the grant of an anti-arbitration injunction in an application:
    1. brought by the parties to an arbitration agreement (the higher threshold test as expounded in ***J Jarvis and Sons Ltd v Blue Circle Dartford Estates Ltd*** [2007] EWHC 1262 (TCC) i.e that the injunction must not cause injustice to the claimant in the arbitration; the continuance of arbitration must be oppressive, vexatious, unconscionable and an abuse of process); and
    2. by non-parties to an arbitration agreement (a lower threshold test as expounded in ***Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors*** [1995] 1 MLJ 193 i.e. whether there are serious issues to be tried, where the balance of convenience lies, and whether damages are an adequate remedy);
2. ***Federal Land Development Authority & Anor v Tan Sri Hj Mohd Isa bin Dato' Hj Abdul Samad & Ors***[2021] 8 MLJ 214, where the High Court allowed an anti-arbitration injunction sought by a non-party to an arbitration agreement, restraining one of the Defendants (Synergy Promenade Sdn Bhd (SPSB)) from taking any or further step to continue with the arbitration proceedings in AIAC. In this respect, the High Court granted the anti-arbitration injunction on the application brought by Federal Land Development Authority (FELDA) because the test for the grant of such injunction was of a lower threshold for non-parties to the arbitration agreement than that for parties to the arbitration agreement. FELDA was a non-party to the arbitration agreement and was able to satisfy the lower threshold test;
3. ***MISC Bhd v Cockett Marine Oil (Asia) Pte Ltd***[2021] MLJU 563, where the High Court allowed an anti-arbitration injunction to restrain the Defendant, from taking further steps in an arbitration proceedings commenced in London. In this respect, the High Court found that there was no arbitration agreement and therefore, the anti-arbitration injunction was granted against the Defendant; and
4. ***Government of Malaysia v Nurhima Kiram Fornan & Ors***[2020] MLJU 425, where the High Court allowed an anti-arbitration

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injunction to restrain the Defendants in this suit from taking further steps in an ad hoc arbitration proceedings commenced in Spain arising out of a Grant by the Sultan of Sulu of Territories and Lands on the mainland of the Island of Borneo in 1878 ("**Deed of Cession**"). The court granted the anti-arbitration injunction as there was no valid and enforceable arbitration agreement established in the Deed of Cession. Further, the anti-arbitration injunction was also granted as the Plaintiff, the Sovereign State of Malaysia, has immunity from judicial and arbitration proceedings and as such, cannot be forced to submit jurisdiction to the sole arbitrator.

34. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

In arbitration, the parties are free to agree on the procedure to be followed by the arbitral tribunal, including the approach to the collection and submission of evidence. In the submission of the statement of claim and the defence, the parties are free to submit with their statements any document that they consider to be relevant, or to add a reference to the documents or other evidence that they may submit. One of the examples of such procedural rules include the International Bar Association (IBA) Rules on Taking Evidence in International Arbitration.

Unless otherwise agreed by the parties, the arbitral tribunal retains the power to decide whether to hold oral hearings for the presentation of evidence or oral arguments, or to conduct the proceedings on the basis of documents and other materials. However, if there is an application to hold oral hearings at an appropriate stage of the proceedings, it is mandatory for the arbitral tribunal to do so.

The rules of evidence that apply to arbitral proceedings seated in Malaysia would depend on the applicable rules of evidence agreed between the parties. Where the parties fail to agree on the applicable rules of evidence, the arbitral tribunal may determine the rules of evidence regarding admissibility, relevance, materiality and weight in such manner as it considers appropriate.

In respect of the application of the rules of evidence in court, it is statutorily stipulated that the Evidence Act 1950 does not apply to proceedings before an arbitrator.

With the approval of the arbitral tribunal, the parties are empowered to make an application under Section 29(2) of AA 2005 to the High Court for assistance in taking evidence. The High Court has the power to order the attendance of a witness to give evidence or, where applicable, to produce documents on oath or before an officer of the High Court or any other person, including the arbitral tribunal.

Pursuant to the AIAC Rules 2021, the arbitral tribunal may order any party to produce any documents in its possession or control which the arbitral tribunal deems relevant to the case, and to supply these documents and/or copies thereof to the arbitral tribunal and the other parties.

35. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

It is implicit in AA 2005 that an arbitrator must be impartial; the requirement to disclose any circumstances that are likely to give rise to justifiable doubts regarding that person's impartiality or independence makes this clear. Good faith requirements are also mandated by AA 2005. Arbitrations pursuant to the Asian International Arbitration Centre are bound by the Asian International Arbitration Centre's Code of Conduct for Arbitrators, which references the International Bar Association Guidelines on Conflict of Interest in International Arbitration.

Advocates and solicitors in Malaysia who act as counsel in arbitration proceedings remain bound by the ethical codes and professional standards governing advocates and solicitors contained in the Legal Profession Act 1976.

36. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

Section 41A of AA 2005 provides that no party may publish, disclose or communicate any information relating to the arbitral proceedings under the arbitration agreement or an award made in those arbitral proceedings. This would include all pleadings, evidence, documents and the award, which will remain confidential and cannot be disclosed in subsequent proceedings.

There are three exceptions to this rule:

- Where the publication, disclosure or

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communication is made to protect or pursue a legal right or interest of the party, or to enforce or challenge the award in legal proceedings before a court or other judicial authority;
- If the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or
- If the publication, disclosure or communication is made to a professional or any other adviser of any of the parties.

The confidentiality obligation under Section 41A of AA 2005 does not, however, extend to non-parties of an arbitration proceeding (see ***Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd*** [2019] 10 MLJ 693)

The exceptions under the AIAC Rules 2021 are where disclosure is necessary for the implementation and enforcement of the award or to the extent that disclosure may be required of a party by a legal duty, or to protect or pursue a legal right, or to challenge an award in bona fide legal proceedings before a court or other judicial authority. Unlike the AA 2005, the exceptions pursuant to the AIAC Rules 2021 do not extend to a professional or any other adviser of any of the parties. The AIAC Rules 2021 extend confidentiality further, with the same applying equally to the Arbitral Tribunal, the Director, the AIAC, any tribunal secretary and any witness or expert appointed by the Arbitral Tribunal, and parties are required to seek an undertaking of confidentiality from those involved in the arbitration.

37. Are there any recent decisions in your country regarding the use of evidence acquired illegally in arbitration proceedings (e.g. 'hacked evidence' obtained through unauthorized access to an electronic system)?

There are no recent decisions in Malaysia regarding the use of evidence acquired illegally in arbitration proceedings.

38. How are the costs of arbitration proceedings estimated and allocated?

The costs of arbitration proceedings can be estimated with reference to the relevant arbitration rules adopted by the parties. For example, Rule 40.3 of the AIAC Rules 2021 provides that the Director of AIAC shall fix the arbitral tribunal's fees and AIAC's administrative fee pursuant to Schedule 1(A) (for international arbitrations (USD scale)) and Schedule 1(B) (for domestic arbitrations (RM scale)) of the AIAC Rules 2021, based on the amount in dispute comprising the value of any claims, counterclaims and set-offs.

Parties are entitled to recover such costs in an arbitration, especially where doing so is provided for in the arbitration agreement. The general principle in Malaysia in relation to the award of costs is for the arbitral tribunal to order costs in favour of the successful party and to award all reasonable costs incurred by that party during the arbitration. This would generally include legal fees and disbursements reasonably incurred by the party in respect of the arbitration.

39. Can pre- and post-award interest be included on the principal claim and costs incurred?

The arbitral tribunal has the discretion to award simple or compound interest from such date and rate as the arbitral tribunal considers appropriate.

The interest granted may also be for:

- any period, ending no later than the date of payment;
- of the whole or any part of sums awarded by the arbitral tribunal;
- sums paid before the date of the award; or
- costs awarded or ordered by the arbitral tribunal in the arbitral proceedings.

The AA 2005 does not limit the grant to simple interest or compound interest. This is dealt with in accordance with underlying contract and the substantive law.

40. What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?

The only legal requirement for the enforcement of an arbitral award is the production of a duly authenticated original award or a duly certified copy of the award, and the original arbitration agreement or a duly certified copy of the agreement. As long as this formal requirement is complied with, the court must grant recognition and enforcement of an arbitration award upon such an application being made (see the Court of Appeal's decision in ***Tune Talk Sdn Bhd v Padda***

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Gurtaj Singh [2020] 3 MLJ 184).

The legal requirements relating to the form, content and publication of an arbitral award are set out under Section 33 of AA 2005. In this respect, the arbitral award must be made in writing, signed by the arbitrator or a majority of all the members of the arbitral tribunal, state its date and seat of arbitration and, unless the parties have agreed otherwise or it is an award pursuant to a settlement, the award must also state the reasons upon which it is based.

However, the recognition and enforcement of an arbitral award may be refused based on the grounds listed under Section 39(1) of AA 2005. This will be further elaborated below.

41. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

Generally, enforcement proceedings in the court can take about two to three months where there is no challenge to the arbitral award. If the enforcement proceedings are opposed, the proceedings can take up anywhere between six to nine months. There is no specific expedited procedure for enforcement proceedings under AA 2005. However, the enforcement proceedings may be filed together with a certificate of urgency, of which an early hearing date may be fixed by the Court provided that the Court is satisfied of the applicant's explanation for the urgency of such proceedings to be fixed as soon as possible.

Based on the Rules of Court 2012, an application for recognition and enforcement of an arbitral award is allowed to be made *ex parte*. Subsequently, the respondent may apply to set aside the *ex parte* order within fourteen days. The award shall not be enforced until the expiration of the fourteen-day period, or if the respondent applies within the period to set aside, until after the application made by the respondent has been finally disposed of.

42. Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?

Malaysian law does not provide for a different standard of review for recognition and enforcement of a foreign award compared with a domestic award. However, it should be noted that for an award from a foreign state to be recognized as binding and enforced, sections 38(1) and (4) of AA 2005 require the foreign state to be a party to the New York Convention.

43. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts

The types of remedies that an arbitral tribunal may award are not limited by the AA or the AIAC Rules. However, the type of remedies awarded are necessarily confined to the powers conferred on the arbitral tribunal by the parties in the agreement to arbitrate. Reliefs that form part of the exclusive jurisdiction of the court pursuant to statute may not be granted by an arbitral tribunal, even if the arbitral tribunal may decide on the subject matter of the dispute (see the UK Court of Appeal decision in Fulham Football Club (1987) Ltd v Richards and another [2011] EWCA Civ 855). In Malaysia, the case of **Fulham Football Club (1987) Ltd v Richards and another** [2011] EWCA Civ 855 was referred to in the Malaysian courts in the Federal Court case of ***Arch Reinsurance Ltd v. Akay Holdings Sdn Bhd*** [2019] 5 MLJ 186.

There is no limit to post-enforcement remedies once the arbitral award has been enforced. Section 38(1) of AA 2005 provides that an arbitral award shall be enforced by entry as a judgment of the Court. Hence, once the award has been entered as a judgment, it may be executed like any other judgment of the courts in Malaysia e.g garnishee proceedings, winding-up, bankruptcy etc.

It should be noted that an application to enforce an arbitral award must be made within six (6) years of the award being received and the judgment entered in terms of the award may then be executed within twelve (12) years (see **Christopher Martin Boyd v. Deb Brata Das Gupta** [2014] 9 CLJ 887 (Federal Court)).

44. Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?

An arbitral award made by an arbitral tribunal pursuant to an arbitration agreement is final, binding and conclusive, and is not appealable based on questions of fact or law. This is because the arbitrator is master of the facts, and the courts should not review the arbitral award on its merits (see the Court of Appeal decision in **Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn**

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Bhd and another appeal [2018] 4 MLJ 799).

The limited circumstances in which an arbitral award may be set aside, or its recognition and enforcement may be opposed, are on the following grounds:

- A party to the arbitration agreement was under any incapacity;
- The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of Malaysia;
- The party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings, or was otherwise unable to present their case;
- The award deals with a dispute that is not contemplated by or does not fall within the terms of the submission to arbitration;
- The award contains decisions on matters that are beyond the scope of the submission to arbitration;
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- The subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
- The award is in conflict with the public policy of Malaysia.

(See sections 37 and 39 of AA 2005)

Further, the recognition and enforcement of the arbitration award may be refused where the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made (see Section 39 of AA 2005 and ***Malaysian Bio-XCell Sdn Bhd v. Lebas Technologies Sdn Bhd & Another Appeal*** [2020] 3 CLJ 534 (Court of Appeal)).

Generally, parties intending to set aside an arbitral award or oppose recognition and enforcement of an arbitral award, shall make an application by way of originating summons to the High Court.

45. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

There is no right of appeal to an arbitral award. As stated above, an arbitral award however may be set aside, or its recognition and enforcement may be opposed.

There is no provision for parties to agree to exclude or expand the scope of challenge to the decision of the arbitral tribunal under the AA 2005.

46. To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

The provisions of the AA 2005, including the provisions of the enforcement of arbitral awards, bind the federal government or the government of any component state of Malaysia that are parties to an arbitration. Therefore, no defence of sovereign immunity can be raised by a state or state entity at the enforcement stage of arbitration.

47. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

Generally, an arbitral award pursuant to an arbitration agreement is only binding on the parties to the arbitration agreement. Further, the AA 2005 does not confer the right to a third party to challenge the recognition of an arbitral award.

48. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

There have not been any recent court decisions in Malaysia considering third party funding in connection with arbitration proceedings. The last reported court case in Malaysia concerning third party funding in connection with arbitration proceedings is ***Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd*** [2014] 3 CLJ 915, where the High Court took into consideration the fact that the defendant is reliant on third party funding in granting the application for security for costs as an interim measure pending arbitration proceedings.

In respect of other legal developments in Malaysia, the recent AIAC Rules 2021 sanctions third party funding insofar as the same is not precluded by a relevant law or court order. The AIAC Rules 2021 also empowers an arbitral tribunal to make necessary enquiries on the existence of third-party funding arrangements and require disclosure of such arrangements and change of circumstances throughout in the course of arbitral

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proceedings.

49. Is emergency arbitrator relief available in your country? Are decisions made by emergency arbitrators readily enforceable?

Emergency arbitrator relief is available in Malaysia. The AA 2005 expressly recognises the use of emergency arbitrators – the definition of "arbitral tribunal" in section 2 of the AA 2005 includes an emergency arbitrator.

Emergency arbitrators are prescribed with the same powers as any arbitrator under the AA 2005. This means that the decisions of emergency arbitrators are recognised as binding and are readily enforceable in accordance with the provisions of the AA 2005, as if made by any other arbitrator.

50. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

The AIAC Rules 2021 provides for an expedited procedure for claims where the amount of dispute is under USD500,000 for an international arbitration or less than RM2,000,000 for a domestic arbitration, known as the Fast Track Procedure. Arbitration under the Fast Track Procedure will take place before a sole arbitrator and proceed as a documents-only arbitration unless otherwise determined by the arbitrator after consulting the parties.

Prior to the AIAC Rules 2021, the Fast Track Procedure existed as a standalone set of arbitration institutional rules which are distinct from the AIAC Rules 2021, known as the AIAC Fast Track Arbitration Rules 2018.

Nevertheless, this expedited procedure is not often used in Malaysia. Based on the AIAC Annual Reports, in 2018, only one case used the AIAC Fast Track Arbitration Rules 2018 out of 66 administered arbitrations. In 2019, 3 cases used the AIAC Fast Track Arbitration Rules 2018 out of 98 administered arbitrations and in 2020, 3 cases used the AIAC Fast Track Arbitration Rules 2018 out of 69 administered arbitrations.

51. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?

Promotion of diversity in the choice of arbitrators and counsel have recently started gaining traction in Malaysia.

The AIAC has been active in promoting diversity in gender, age, race and ethnicity in respect of arbitrators in recent years. For instance, the AIAC has hosted "Diversity in Arbitration Weeks" in both the years 2020 and 2021, where the AIAC hosted webinars each day on topics relating to diversity in arbitration during the week.

In respect of diversity in respect of counsels, the Kuala Lumpur Bar has in 2020 set up a Gender Equality and Diversity Committee to lead the development, implementation and initiatives designed to support a non-discriminatory workplace culture at the Bar, identify and seek to address barriers and unconscious biases faced by members based on gender which may hamper equality of opportunity and educate members on best equality and diversity practices.

52. Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?

There have not been any recent court decisions in Malaysia considering the setting aside of an award that has been enforced in another jurisdiction, nor has there been any recent court decisions in Malaysia considering the enforcement of an award that has been set aside in another jurisdiction.

53. Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption? Which party bears the burden of proving corruption?

There have not been any recent Malaysian court decisions relating to corruption. The last Malaysian court decision dealing with this issue is the High Court case of ***MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd & Anor [2015] MLJU 477***, where the plaintiffs applied to set aside an arbitral award on the ground that the 2nd defendant, who was part of the arbitral tribunal had not disclosed the fact that he was charged with an offence of soliciting a bribe in another arbitration. The High Court held whilst no court would hesitate to set aside an award that has been made in instances of bribery or corruption, such

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corruption must have induced or affected the making of the award. The High Court dismissed the plaintiff's application and found that the plaintiff has failed to demonstrate the same other than the fact that the 2nd defendant was a person of possibly bad character and unfit to sit as arbitrator.

Section 37 of the AA 2005 and Section 39 of the AA 2005 provides that one of the grounds to set aside an award and refuse recognition of an arbitration award respectively, is for the High Court to find that the award is in conflict with the public policy of Malaysia, with one of the examples being where the making of the arbitral award is induced or affected by fraud or corruption. Therefore, the burden would ordinarily lie on the party applying to set aside the award or resisting enforcement of the award to prove corruption.

54. Have there been any recent court decisions in your country considering the judgment of the Court of Justice of the European Union in Slovak Republic v Achmea BV (Case C-284/16) with respect to intra-European Union bilateral investment treaties or the Energy Charter Treaty? Are there any pending decisions?

There have not been any recent court decisions or pending decisions in Malaysia considering the judgment of the Court of Justice of the European Union in Slovak Republic v Achmea BV (Case C-284/16).

55. Have there are been any recent decisions in your country considering the General Court of the European Union's decision Micula & Ors (Joined Cases T-624/15, T-694/15 and T-694.15), ECLI:EU:T:2019:423, dated 18 June 2019? Are there any pending decisions?

There have not been any recent court decisions or pending decisions in Malaysia considering the General Court of the European Union's decision Micula & Ors (Joined Cases T-624/15, T-694/15 and T-694.15), ECLI:EU:T:2019:423, dated 18 June 2019.

56. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

During the period of the COVID-19 pandemic in Malaysia, arbitral institutions have successfully held virtual hearings with the witnesses testifying from a neutral venue, for instance, at the AIAC, or elsewhere to prevent the risk of transmission.

For in-person hearings, in accordance with the requirement of social distancing dictated by Malaysia's Ministry of Health, the attendees at an in-person hearing are closely monitored to ensure the minimum distance is maintained.

The AIAC has also incorporated developments regarding virtual hearings into the AIAC Rules 2021, as set out below.

57. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

The AIAC has incorporated developments regarding virtual hearings into the AIAC Rules 2021, which provide for, amongst others:

- Without affecting the seat of arbitration, the parties and the Arbitral Tribunal are at liberty to agree to have meetings, conferences, deliberations, and hearings take place in person or virtually at a place or venue other than the seat of arbitration.
- The Arbitral Tribunal may direct that any witness, including an expert witness, be examined virtually, or, after consulting with the parties, direct that the entire hearing be conducted virtually.
- The AIAC may, at the request of the Arbitral Tribunal or other party, make available or arrange for virtual hearing facilities in the conduct of arbitral proceedings as required.

58. In your country, does the insolvency of a party affect the enforceability of an arbitration agreement?

The insolvency of a party does not affect the enforceability of an arbitration agreement. Section 49 of the AA 2005 expressly states that where a party to an arbitration agreement is a bankrupt and the person having jurisdiction to administer the property of the bankrupt adopts the agreement, the arbitration agreement shall be enforceable by or against that person.

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In respect of arbitration agreements which have not been adopted by and the person having jurisdiction to administer the property of the bankrupt adopts the agreement, arbitration agreements may be enforced via an application to the High Court, who may also direct any matter in connection with or for the purpose of bankruptcy proceedings to be referred to arbitration if:

- the matter is one to which the arbitration agreement applies;
- the arbitration agreement was made by a person who has been adjuged bankrupt before the commencement of the bankruptcy proceedings; and
- the person having jurisdiction to administer the property does not adopt the agreement.

Any party to the arbitration agreement or any person having jurisdiction to administer the property of the bankrupt may make such an application to the High Court.

59. Is your country a Contracting Party to the Energy Charter Treaty? If so, has it expressed any specific views as to the current negotiations on the modernization of the Treaty?

Malaysia is not a Contracting Party to the Energy Charter Treaty.

60. Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?

Thus far, there has not been any recent legal developments in Malaysia in respect of climate change whether in litigation nor arbitration. In respect of statute, Malaysia has primarily relied on Environmental Quality Act 1974 which only provides for criminal liability and prosecution for those who have breached the same, but not civil liability / causes of action. However, there has been talk from the Environment and Water Ministry about a new Climate Change Act in Malaysia which is still in the early stages of development in April 2021. It remains to be seen whether the new Climate Change Act, once introduced would open up legal developments with regard to disputes on climate change.

In respect of human rights, several high-profile litigation cases sparking debates pertaining to human rights have been recently decided by the courts of Malaysia, albeit not arising out of arbitration:

- In January 2021, the Malaysian Federal Court have ruled that a travel ban imposed by the Malaysian Immigration Department on an individual on claims that she had disparaged the government was unlawful.
- In February 2021, the Malaysian Federal Court held an online news portal in contempt for five comments posted by readers despite the same being removed minutes after being brought to the online news portal's attention based on Section 114A of the Evidence Act 1950 which creates a presumption that the host, administrator, or editor of the website on which content appears is liable for publishing that content. This has raised concerns regarding the chilling of freedom of speech in Malaysia.
- In September 2021, the Malaysian High Court ruled that children born overseas to Malaysian mothers with foreign spouses should be automatically conferred citizenship, after holding that Article 14(1)(b) together with the Second Schedule, Part II, Section 1(b) which provides that every person born outside Malaysia whose father is a citizen and was born in Malaysia is a Malaysian citizen, must be read in harmony with Article 8(2) of the Federal Constitution which prohibits gender-based discrimination.

61. Has your country expressed any specific views concerning the work of the UNCITRAL Working Group III on the future of ISDS?

Malaysia is a member state for the UNCITRAL Working Group III, and the AIAC is an invited non-governmental organization of the sessions organized by the UNCITRAL Working Group III since the UNCITRAL Working Group III's 38th session on 20 – 24 January 2020.

To date, neither Malaysia nor the AIAC has individually expressed any specific views or provided any comments concerning the drafts on reform options released by the UNCITRAL Working Group III on the future of ISDS.

However, some of the work of the UNCITRAL Working Group III has been reflected in the AIAC Rules 2021. For instance, the new Rule 19 in the AIAC Rules 2021 provides for a summary determination procedure to dismiss, in whole or in part, a claim, counterclaim or defence where the same is manifestly without merit. The introduction of the same addresses concerns raised that the excess cost and duration of Investor-State Dispute Settlement is attributed to the absence of a mechanism

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to address frivolous or unmeritorious cases. A further example is the introduction of an express provision in the AIAC Rules 2021 that the use of third-party funding does not affect nor preclude the adoption of the AIAC Rules 2021 in an arbitration unless provided otherwise by a relevant law or Court. This reflects the general view of the UNCITRAL Working Group III that flexibility should be provided as third-party funding could permit access to justice to those with insufficient resources.

Contributors

Mr Rabindra S Nathan
Partner
rabindra@shearndelamore.com

Ms K Shanti Mogan
Partner
shanti@shearndelamore.com

Mr Rodney Gomez
Partner
rodney@shearndelamore.com

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