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cies and individuals. The firm's global reach and network include member firms of the World Law Group, the World Services Group, the Employment Law Alliance and other international organisations and multilateral agencies.

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1. General

1.1 Prevalence of Arbitration

Litigation continues to be the primary method of resolving disputes in Malaysia, for both domestic and international disputes. This is not expected to change in the near future.

Domestic arbitration numbers are growing, whilst international arbitration numbers remain largely constant. Statistics from the Asian International Arbitration Centre (AIAC) show 12 registered international arbitrations with the AIAC in 2017 and ten in 2018. On the domestic front, the AIAC recorded 82 registered domestic arbitrations in 2017 and 80 in 2018. Up to June 2019, 56 new domestic arbitrations have been registered with the AIAC.

1.2 Trends

There has been an increase in construction disputes, which are increasingly resolved by adjudication – the AIAC recorded 708 registered adjudication matters in 2017, and 772 cases in 2018. As seen above, this has not affected the number of arbitrations registered with the AIAC.

A recent amendment to the Arbitration Act 2005 repealed section 42 of the Arbitration Act, which provides for parties to refer a question of law arising out of an arbitral award to the High Court. This is in line with the approach of minimal intervention in arbitral awards by the courts.

1.3 Key Industries

The AIAC statistics show that the construction sector (including engineering, infrastructure, architecture & design and quantity surveying) has experienced the most arbitration activity in recent years.

1.4 Arbitral Institutions

The arbitral institution most used for international arbitration in Malaysia is the AIAC.

The AIAC was previously known as the Kuala Lumpur Regional Centre for Arbitration, and was first established in 1978 under the Asian-African Legal Consultative Organisation as a not-for-profit, non-governmental international organisation aimed at promoting alternative dispute resolution in the Asian region. It was subsequently rebranded as AIAC on 7 February 2018.

The AIAC maintains its own rules of arbitration, known as the AIAC Arbitration Rules. Furthermore, the AIAC actively takes the initiative to modernise the AIAC Arbitration Rules in accordance with international trends in alternative dispute resolution proceedings in order to compete with the best arbitral institutions that Asia has to offer, contributing to its popularity in Malaysia.

For instance, the AIAC recently released the AIAC Arbitration Rules 2018 in light of the recent trends on costs and length optimisation of arbitration proceedings, and included provisions pertaining to the appointment of emergency arbitrators. It revised its Fast Track Arbitration Rules in 2018, which enable parties to obtain an award in a more efficacious and cost-effective manner.

The AIAC i-Arbitration Rules offer a practical solution for the settling of disputes arising out of or in connection with Shari'a-based commercial transactions, enabling the arbitral tribunal to refer a matter to the relevant Shari'a Advisory Council or Shari'a expert in respect of opinions on matters related to Shari'a principles.

2. Governing Legislation

2.1 Governing Law

The Arbitration Act 2005 governs international arbitration in Malaysia. Parts I, II and IV of the Arbitration Act 2005, comprising sections 1 to 5, sections 6 to 39 and sections 47 to 51, are of mandatory application in respect of international arbitration. Part III of the Arbitration Act 2005, comprising sections 40 to 46, does not apply to international arbitration unless the parties agree to opt in, in writing.

The Arbitration Act 2005 is based closely on the UNCITRAL Model Law. Part II of the Arbitration Act 2005 – containing sections 6 to 39 governing general provisions, provisions relating to arbitration agreements, the composition of arbitrators, the jurisdiction of the arbitral tribunal, conduct of arbitral proceedings, the making of awards and termination of proceedings, recourse against awards and the recognition and enforcement of awards – closely mirrors the subject headings and sequence of Articles 3 to 36 of the UNCITRAL Model Law.

In the context of international arbitration, there are no significant differences between the Arbitration Act 2005 and the UNCITRAL Model Law. However, specific powers are provided to arbitrators in several additions in the Arbitration Act 2005, which are not found in the UNCITRAL Model Law.

For instance, the Arbitration Act 2005 empowers the arbitral tribunal to grant security for costs as an interim measure and to give directions for the speedy determination of a claim if the claimant fails to proceed with the claim. The Arbitration Act 2005 provides expressly 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.

2.2 Changes to National Law

The Arbitration Act 2005 was amended in 2018, bringing it closer in line with the UNCITRAL Model Law. These amendments include the following:

- the expansion of the definition of an arbitration agreement that is “in writing”;
- the recognition that electronic communication satisfies the requirement of a written arbitration agreement;
- the introduction of additional provisions dealing with the arbitral tribunal’s powers to grant interim measures and the power to impose conditions for such orders and preliminary orders;
- the recognition of parties’ right to choose rules of law applicable to the substance of a dispute regardless of whether the arbitration is domestic or international, and the arbitral tribunal’s right to decide according to equity and conscience if so authorised by the parties; and
- the recognition and enforcement of interim measures issued by the arbitral tribunal.

Further additions to the Arbitration Act 2005 include the following:

- express provision for representation by any representation (ie, non lawyers);
- the recognition of emergency arbitrators as part of the definition of an “arbitral tribunal”;
- express provision for arbitral tribunals to award simple or compound interest, and to award pre-award interest; and
- provisions providing for the confidentiality of arbitration proceedings and the award.

The court’s powers to grant interim measures were also revised, to bring them in line with the arbitral tribunal’s powers to grant interim measures.

The provisions allowing a party to refer a question of law arising out of an arbitral award to the High Court and subsequently to appeal the High Court’s decision to the Court of Appeal has been removed.

3. The Arbitration Agreement

3.1 Enforceability

The legal requirements for an arbitration agreement to be enforceable in Malaysia are that it must be an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not. The arbitration agreement may be in the form of an arbitration

clause in an agreement, in a separate agreement or a reference in an agreement to a document containing an arbitration clause.

The arbitration agreement must be in writing. This requirement of a written agreement may be met if its content is recorded in any form, including situations where the initial arbitration agreement or contract has been concluded orally, by conduct, or by other means. The requirement can also be met if the existence of an agreement is alleged by one party and not denied by the other in an exchange of statement of claim and defence. An arbitration agreement is deemed to be in writing if it is evidenced 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 future reference. The signature of the parties is not a prerequisite to an arbitration agreement being enforced.

No specific words or forms are required to be used to constitute an arbitration clause or an arbitration agreement; an electronic transmission referring to or implying the parties’ intention to submit to arbitration suffices, as long as there is an agreement to refer disputes to arbitration and the parties’ intention to arbitrate is clear and unequivocal (see the Malaysian Court of Appeal’s decision in *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656).

3.2 Arbitrability

Any dispute 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. The fact that any written law confers jurisdiction in respect of a matter on any court of law but does not refer to the determination of that matter by arbitration does not indicate that a dispute about that matter is not capable of determination by arbitration.

There is no universally accepted test on what is public policy; different courts and different tribunals may have different views as to the enforceability of contracts on the ground of public policy (see the Federal Court judgment in *Arch Reinsurance Ltd v Akay Holdings Sdn Bhd* [2019] 1 CLJ 305).

The Arbitration Act 2005 does not name any specific subject matter that cannot be referred to arbitration.

The question of whether a subject matter is arbitrable is not determined by jurisdictional limitations on the relief that may be granted (see the UK Court of Appeal decision in *Fulham Football Club (1987) Ltd v Richards and another* [2011] EWCA Civ 855).

Matters that may have public interest elements have been approved as being non-arbitrable in the Singapore courts,

such as citizenship, the legitimacy of a marriage, grants of statutory licences, the validity of the registration of trade marks or patents, copyrights, the winding up of companies, the bankruptcy of debtors and the administration of estates. It is likely that the Malaysian courts would find this persuasive (see the Singapore Court of Appeal decision in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2015] SGCA 57). If the question of whether a dispute is arbitrable is raised before an arbitral tribunal, the arbitral tribunal has the power to rule on its own jurisdiction, which would include whether or not a dispute is arbitrable. Within 30 days of receiving notice of the arbitral tribunal's ruling, any party may appeal to the High Court to decide the matter.

3.3 National Courts' Approach

Arbitration agreements are frequently enforced by the Malaysian courts. Where court proceedings are brought in respect of a matter that is the subject of an arbitration agreement and a party makes an application to stay the court proceedings, in view of the existence of a valid agreement to arbitrate, it is mandatory for the court to do so (see the Malaysian Federal Court's decision in *Press Metal Sarawak Sdn Bhd v Etika Takaful Sdn Bhd* [2016] 5 MLJ 417). There is no discretion for the Malaysian courts to refuse enforcement of an arbitration agreement when the arbitration agreement is not null and void, inoperative or incapable of being performed.

3.4 Validity

Malaysia applies the rule of separability of arbitration clauses contained in invalid agreements. An arbitration clause that forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement in which it is contained. 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).

4. The Arbitral Tribunal

4.1 Limits on Selection

There are no limits set by the Arbitration Act 2005 on the parties' autonomy to select arbitrators in Malaysia. It is explicitly provided in the Arbitration Act 2005 that no person shall be precluded by reason of nationality from acting as an arbitrator, unless the parties agree otherwise.

4.2 Default Procedures

Where the parties' chosen method for selecting arbitrators fails, the default procedure depends on the number of arbitrators appointed – ie, one or three. In the context of international arbitration, where parties fail to determine the number of arbitrators, the default position is three arbitra-

tors in an international arbitration and one in a domestic arbitration.

Where 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. If a party fails to appoint an arbitrator within 30 days of receiving a request in writing to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment or within such extended period as the parties may agree, either party may apply to the Director of the AIAC for such appointment.

Where the arbitration consists of a sole arbitrator and the parties fail to agree on the arbitrator, either party may apply to the Director of the AIAC for the appointment of the sole arbitrator. The decision of the Director of the AIAC is final and non-appealable.

4.3 Court Intervention

Where the Director of the AIAC is unable to act or fails to act within 30 days when any party applies to him or her for the appointment of an arbitrator, any party may apply to the High Court for the appointment of the arbitrator. If such an application is made, the High Court is required to have due regard to any qualifications required of the arbitrator by the agreement of the parties, other considerations that are likely to secure the appointment of an independent and impartial arbitrator, and the advisability of appointing an arbitrator of a nationality other than those of the parties. The appointment of the arbitrator by the High Court in this manner is final and non-appealable.

The Malaysian High Court does not have any power under the Arbitration Act 2005 to intervene in the selection of arbitrators in any other manner.

4.4 Challenge and Removal of Arbitrators

An arbitrator may be challenged in two situations: if the circumstances give rise to justifiable doubts as to their impartiality or independence; or if they do not possess the qualifications agreed by the parties.

Under the default procedure governing the challenge or removal of arbitrators, any party who intends to challenge the appointment of an arbitrator shall send a written statement of the reasons for the challenge to the arbitral tribunal, within 15 days of becoming aware of the constitution of the arbitral tribunal or of any of the reasons referred to above.

Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. Where the challenge is not successful, the challenging party may apply to the High Court to make a decision on the challenge, within 30 days of receiv-

ing notice of the decision rejecting the challenge. The High Court's decision on the matter is final and non-appealable.

4.5 Arbitrator Requirements

It is a requirement that there should be no justifiable doubt as to an arbitrator's impartiality and independence. A person who is approached in connection with a possible appointment as arbitrator is required to disclose any circumstances that are likely to give rise to justifiable doubts as to his/her impartiality or independence under the Arbitration Act 2005.

This requirement is also captured in the AIAC Rules, pursuant to which an arbitrator – from the time of his or her appointment and throughout the arbitral proceedings – is required to disclose any circumstances that are likely to give rise to justifiable doubts as to his/her impartiality or independence to the parties and other arbitrators without delay.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

There are no specific subject matters that may not be referred to arbitration, under the Arbitration Act 2005. Where there is express statutory provision for a reference to court, for example in matters relating to the National Land Code, such matters may not be referred to arbitration.

Subject matters that are not capable of settlement by arbitration under the laws of Malaysia would include criminal proceedings, and issues of public policy and public interest. While not yet tested in the Malaysian courts, matters that may have public interest elements may possibly be excluded from arbitration, such as citizenship, the legitimacy of a marriage, the validity of a matter where the court is conferred sole jurisdiction to make specific orders or declarations such as grants of statutory licences, the validity of the registration of trade marks or patents, copyrights, the winding up of companies, the bankruptcy of debtors and the administration of estates (see the Singapore Court of Appeal decision in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2015] SGCA 57).

The question of whether the subject matter is arbitrable is not determined by jurisdictional limitations on the relief that may be granted (see the UK Court of Appeal decision in *Fulham Football Club (1987) Ltd v Richards* and another [2011] EWCA Civ 855). This authority was referenced and distinguished in the Malaysian Federal Court decision in *Arch Reinsurance Ltd v Akay Holdings Sdn Bhd* [2019] 1 CLJ 305, and in the High Court decision in *FMC Petroleum Equipment (Malaysia) Sdn Bhd v FMC Wellhead Equipment Sdn Bhd* [2019] MLJU 473 on the basis that the disputes in the two Malaysian cases were clearly covered by statutory provisions that provide for the inalienable access to courts.

5.2 Challenges to Jurisdiction

The principle of competence-competence is applicable in Malaysia – an arbitral tribunal can rule on a party's challenge to the tribunal's own jurisdiction. The Arbitration Act 2005 confers the power upon the arbitral tribunal to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement (see *Chut Nyak Isham bin Byak Ariff v Malaysian Technology Development Corp Sdn Bhd & Ors* [2009] 6 MLJ 729, where the High Court acknowledged the arbitral tribunal's competence to decide on its own jurisdiction without interference from the court).

5.3 Circumstances for Court Intervention

Where the arbitral tribunal rules on a plea that the arbitral tribunal does not have jurisdiction or is exceeding the scope of its authority, any party may appeal to the High Court, within 30 days of receiving a notice of that ruling.

The courts generally show a reluctance to intervene in issues regarding the jurisdiction of an arbitral tribunal.

5.4 Timing of Challenge

Parties have the right to go to court to challenge the jurisdiction of the arbitral tribunal, within 30 days of receiving a notice of the arbitral tribunal's ruling on the issue.

Thereafter, when an award has been rendered by the arbitral tribunal, the parties may apply to set aside the award of the arbitral tribunal by challenging the jurisdiction of the arbitral tribunal on the following grounds:

- the arbitration agreement is not valid;
- the award deals with a dispute not contemplated by or not falling within the terms of the arbitration;
- the award contains decisions on matters that are beyond the scope of the submission to arbitration;
- 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.

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

In *PT First Media TBK v Astro Nusantara International BV and others* and another appeal [2014] SLR 372, the Singapore Court of Appeal held that a *de novo* standard of review is to be applied when a court reviews the decision of an arbitral tribunal on its own jurisdiction. In doing so, the Singapore Court of Appeal applied the authority of *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, which is the leading statement on the standard of curial review to be applied under the New York Convention. It is likely that the Malaysian courts would find this authority persuasive.

The general standard of review by an appellate court in Malaysia for purely legal questions is a *de novo* review, where the appellate court is not required to give deference to the rulings of the trial judge (see *P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523).

5.6 Breach of Arbitration Agreement

A court before which proceedings are brought in respect of a matter that is the subject of an arbitration agreement shall, where a party makes an application, stay those proceedings and refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.

If proceedings are brought in breach of an arbitration agreement between the parties, where an application is made by one of the parties to stay court proceedings and refer the parties to arbitration, the Malaysian courts generally do not allow court proceedings to continue (see *TNB Fuel Services Bhd v China National Coal Group Corp* [2013] 4 MLJ 857, where the Court of Appeal held that where an application is made by a party pursuant to section 10 of the Arbitration Act 2005, it is mandatory for the court to grant such an application, unless the agreement is null and void or impossible of performance. This was affirmed by the Federal Court in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417).

5.7 Third Parties

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 Arbitration Act 2005 does not apply to non-parties to an arbitration agreement (see the Federal Court decision in *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] MLJU 523).

6. Preliminary and Interim Relief

6.1 Types of Relief

An arbitral tribunal in Malaysia is permitted to grant interim measures at the request of either party to the arbitration agreement. The 2018 amendments to the Arbitration Act 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 is recognised as binding and, unless provided by the arbitral tribunal, shall be enforced upon application to the court, irrespective of the country in which it is issued.

6.2 Role of Courts

The High Court has the power to issue interim relief in relation to arbitration proceedings, irrespective of whether or not the seat of arbitration is in Malaysia.

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 granting 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 the arrest of property or bail or other security, pursuant to the admiralty jurisdiction of the High Court.

Pursuant to the 2018 Amendments, the Arbitration Act 2005 now recognises the use of emergency arbitrators, and the definition of “arbitral tribunal” under the Act has been defined to include an emergency arbitrator.

Emergency arbitrators are prescribed with the same powers as the arbitral tribunal. The decisions of emergency arbitrators are recognised as binding, and can be enforced upon application to the court, irrespective of the country in which it is issued.

The Malaysian courts do not have the power to intervene in arbitration proceedings once an emergency arbitrator has been appointed, except in situations specifically provided by the Arbitration Act 2005, such as deciding on an appeal against the decision on an unsuccessful challenge to the emergency arbitrator.

Interim relief by the courts is permissible both before and after an emergency arbitrator has been appointed.

6.3 Security for Costs

Malaysian law allows both courts and arbitral tribunals to make an order for security for costs as an interim measure upon an application for such.

7. Procedure

7.1 Governing Rules

The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitration.

7.2 Procedural Steps

After the commencement of arbitration, the claimant has to submit a statement of claim containing the facts supporting his claim, the points in issue and the relief or remedy sought from the arbitration, within the period of time agreed by the parties or determined by the arbitral tribunal. The respondent to the arbitration shall then state his defence in respect of the particulars set out by the claimant.

Together with the submissions of the parties' statement of claim and defence, the parties may submit any document they consider relevant, or add a reference to the documents or other evidence that they may submit.

The arbitral tribunal will then decide whether to hold oral hearings for the presentation of evidence or oral arguments, or whether the proceedings shall be conducted on the basis of documents and other materials. If any party applies to hold oral hearings at the appropriate stage of the proceedings, it is mandatory for the arbitral tribunal to hold such an oral hearing.

7.3 Powers and Duties of Arbitrators

In Malaysia, arbitrators have the following powers:

- to rule on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement;
 - to order interim measures as described under **6.1 Types of Relief**, above;
 - to conduct the arbitration in such manner as they consider appropriate if no procedure is agreed upon by the parties, which includes the powers to:
 - (a) determine the admissibility, relevance, materiality and weight of any evidence;
 - (b) draw on their own knowledge and expertise;
 - (c) order for the provision of further particulars in a statement of claim or statement of defence;
 - (d) order for the provision of security for costs;
 - (e) fix and amend the time limits within which various steps in the arbitral proceedings must be completed;
 - (f) order the discovery and production of documents or materials within the possession or power of a party;
 - (g) order the interrogatories to be answered;
 - (h) order that any evidence be given on oath or affirmation; and
 - (i) make any such orders as the arbitral tribunal considers appropriate;
- to determine the seat of arbitration, the language to be used in arbitration proceedings and the time line to submit pleadings, submissions, etc, where the parties fail to agree on these points; and
 - to appoint one or more experts to report on specific issues to be determined by the arbitral tribunal, and to require a party to give the expert any relevant information or to produce or provide access to any relevant documents, goods or other property for the expert's inspection.

When a potential arbitrator is approached in connection with their possible appointment as an arbitrator, that person has a duty to disclose any circumstances that are likely to give rise to justifiable doubts as to their impartiality or independence.

Once the person is appointed as an arbitrator, they have the duty to treat the parties with equality, and to give the parties a fair and reasonable opportunity to present their case. The arbitrator is also under a duty to act in good faith at all times of the arbitration. In making an award, arbitrators are also duty bound to state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given, or if the award is on agreed terms pursuant to a settlement.

7.4 Legal Representatives

There are no particular qualifications or requirements for legal representatives appearing in a Malaysian seat of arbitration.

Parties to arbitral proceedings are permitted to be represented in arbitral proceedings by any representative appointed by the party. The Legal Profession Act 1976 provides that the restrictions on non-Malaysian qualified lawyers to practise in Malaysia shall not apply to any person representing any party in arbitral proceedings.

8. Evidence

8.1 Collection and Submission of Evidence

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 docu-

ment that they consider to be relevant, or to add a reference to the documents or other evidence that they may submit.

The arbitral tribunal retains the power to decide whether to hold oral hearings for the presentation of evidence or oral arguments, or whether the proceedings shall be conducted 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.

8.2 Rules of Evidence

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.

8.3 Powers of Compulsion

With the approval of the arbitral tribunal, the parties are empowered to make an application 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.

In the AIAC rules, 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.

9. Confidentiality

9.1 Extent of Confidentiality

The 2018 Amendments introduced section 41A of the Arbitration Act 2005, to reinforce the confidentiality of arbitration proceedings, which 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 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 exceptions under the AIAC Rules 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 Arbitration Act, the exceptions pursuant to the AIAC Rules do not extend to a professional or any other adviser of any of the parties.

10. The Award

10.1 Legal Requirements

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.

There is no time limit provided by Malaysian law on the delivery of the award, but the time for making an award may be limited by the arbitration agreement entered into between the parties. If there is a time limit, the High Court may extend that time, unless otherwise agreed by the parties.

Pursuant to the AIAC Rules, the arbitral tribunal is required to submit a draft of the final award to the Director of the AIAC within three months after the proceedings are declared to be closed for a technical review.

10.2 Types of Remedies

The types of remedies that an arbitral tribunal may award are not limited by the Arbitration Act 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).

10.3 Recovering Interest and Legal Costs

Parties are entitled to recover interest and legal costs in an arbitration, especially where doing so is provided for in the

arbitration agreement. The arbitral tribunal has the discretion to award simple or compound interest from such date, rate and rest 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 2018 amendments to the Arbitration Act 2005 make it possible for both pre-award and post-award interest to be claimed. The Arbitration Act 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.

The general principle 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.

11. Review of an Award

11.1 Grounds for Appeal

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.

The arbitral award may be set aside, or its recognition and enforcement may be opposed, on the following limited 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.

11.2 Excluding/Expanding the Scope of Appeal

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 Arbitration Act 2005.

11.3 Standard of Judicial Review

Judicial review of an arbitral award is not intended to review the merits of the case but instead to confine itself to the limited grounds in the Arbitration Act. The standard of review is intended to be deferential rather than de novo. Having said that, in the *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd, A Thai Co and Anor* [2013] 3 MLJ 409, the Federal Court equally held that its role was not to rubber stamp arbitral awards.

12. Enforcement of an Award

12.1 New York Convention

Malaysia has been a signatory to the New York Convention on the Recognition of Foreign Arbitral Awards 1958 since 1985. This requires courts of contracting states to recognise and enforce arbitral awards made in other contracting states.

The commitment to the New York Convention is reflected in the provisions of the Arbitration Act 2005.

12.2 Enforcement Procedure

The party seeking to enforce an arbitral award may make an application to the High Court in Malaysia. Upon such an application, the award will be recognised as binding and will be enforced by entry as a judgment in terms of the award. The award to be enforced may be made in respect of an arbitration where the seat of arbitration is in Malaysia or a foreign state.

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 Gurtaj Singh* [2019] 1 LNS 85).

Nevertheless, if the party against whom the enforcement of the award is invoked provides proof that the arbitral award has been set aside or suspended by a court of the country in which the award was made or under the law under which the award was made, the High Court may refuse the recognition or enforcement of the award.

The provisions of the Arbitration Act 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.

12.3 Approach of the Courts

The public policy considerations that domestic courts apply in refusing to enforce foreign arbitral awards are based not on domestic public policy, but on international norms; public policy is defined as violating the most basic notions of morality and justice, or as that which would shock the public conscience or be injurious to the public good (*Jan De Nul (Malaysia) Sdn Bhd v Vincent Tan Chee Yioun* [2019] 2 MLJ 413).

13. Miscellaneous

13.1 Class-action or Group Arbitration

The possibility of class action arbitration or group arbitration remains untested in Malaysia.

13.2 Ethical Codes

It is implicit in the Arbitration Act 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 the Arbitration Act 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.

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13.3 Third-party Funding

The Arbitration Act 2005 is silent on whether third-party funding or champerty is permissible in Malaysia; there are currently no explicit rules enabling either.

There is a restriction on champerty or third-party funding in the Legal Profession Act 1976, which expressly prohibits its advocates and solicitors in Malaysia from purchasing or agreeing to purchase an interest that is the subject matter of a client in a contentious proceeding, or from entering into any agreement that stipulates or contemplates payment only in the event of success in such suit, action or proceeding.

There is also a common law restriction on champertous agreements as being against public policy – see the UK Court of Appeal case of *Re Trepca Mines Ltd (No 2)* [1962] 3 All ER 351, and *Otech Pakistan Ltd v Clough Engineering Ltd* [2007] 1 SLR 989, where the Singapore Court of Appeal held that champerty applied to agreements to assist litigants in arbitration proceedings in the same way it applied when the proceedings concerned were before the court.

As such, whilst there are no express rules or restrictions on third-party funders, the common law position on champertous agreements suggests that express regulation is recommended before third party funding is accepted in international arbitrations with a Malaysian seat.

13.4 Consolidation

An arbitral tribunal may consolidate separate arbitral proceedings, provided that the parties agree to confer such power on the arbitral tribunal. The Arbitration Act confers express power on the arbitrator to consolidate proceedings in such circumstances.

The AIAC Rules provide for consolidation in wider circumstances, with it being permitted even where there is no agreement by the parties, if all claims in the arbitration are made under the same arbitration agreement, or, where the claims are made under more than one arbitration agreement, the disputes arise in connection with the same legal relationship and the Director deems the arbitration agreements to be compatible.

13.5 Third Parties

Generally, an arbitral award pursuant to an arbitration agreement is only binding on the parties to the arbitration agreement. The national court does not have the ability to bind foreign third parties. There is a provision for the reciprocal enforcement of foreign judgments with some Commonwealth jurisdictions, but this relates only to monetary judgments.