



ICLG

The International Comparative Legal Guide to: **International Arbitration 2019**

16th Edition

A practical cross-border insight into international arbitration work

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- **Preface** by Gary Born, Chair, International Arbitration Practice Group & Charlie Caher, Partner, Wilmer Cutler Pickering Hale and Dorr LLP

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The legal requirements of an arbitration agreement are provided under Section 9 of the Arbitration Act 2005 (“Arbitration Act”) which has been largely modelled on Article 7 of the UNCITRAL Model Law on International Commercial Arbitration 1985 (“UNCITRAL Model Law”).

Pursuant to Section 9(2) of the Arbitration Act, an arbitration agreement can take the form of either:

- (i) an arbitration clause in an agreement; or
- (ii) a separate agreement.

Section 9(3) of the Arbitration Act requires an arbitration agreement to be in writing. An arbitration agreement is deemed to be in writing if it is contained in:

- (i) a document signed by the parties;
- (ii) an exchange of letters, facsimile or other means of communication which provide a record of the agreement;
- (iii) an exchange of statement of claim and defence in which the existence of an agreement to arbitrate is alleged by one party and not denied by the other; or
- (iv) an electronic communication via e-mail, telegram, telex or telecopy made by the parties, if the information contained therein is accessible and usable for subsequent reference. (Section 9(4A) of the Arbitration Act).

1.2 What other elements ought to be incorporated in an arbitration agreement?

Ideally, an arbitration agreement should contain the following information:

1. the scope of the disputes to be referred to arbitration (Section 23 of the Arbitration Act);
2. the seat, language and venue of the arbitration (Sections 22 and 24 of the Arbitration Act);
3. the number of arbitrators (Section 12 of the Arbitration Act);
4. the procedure for the appointment of arbitrators (Section 13 of the Arbitration Act);
5. the procedure to be followed by the arbitral tribunal in conducting the proceedings (Section 21 of the Arbitration Act); and

6. the specific law for the arbitration clause (Section 30(1) of the Arbitration Act).

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Malaysian courts are generally pro-arbitration and are supportive of it. Malaysian courts generally do uphold arbitration agreements except where, under Section 10(1) of the Arbitration Act, an arbitration agreement is null and void or inoperative or incapable of being performed.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Arbitration Act 2005 as amended by the Arbitration (Amendment) (No.2) Act 2018.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The same legislation governs both domestic and international arbitration, but the following distinctions are made between both under Section 3(3) of the Arbitration Act:

- (i) Parts I, II and IV apply to both domestic and international arbitration.
- (ii) Part III applies to domestic arbitration unless parties agree otherwise in writing (Section 3(2)); but Part III does not apply to international arbitration unless the parties agree otherwise in writing.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The Arbitration Act is largely modelled on the UNCITRAL Model Law, subject to some variations.

Amongst others, some notable variations are:

- whereas the Arbitration Act makes a distinction between domestic and international arbitration when determining the number of arbitrators if parties fail to do so, the UNCITRAL Model Law does not;

- whereas Section 17 of the Arbitration Act expressly provides that any order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator shall not be invalid solely on the ground that there was a change in composition of the arbitral tribunal, the UNCITRAL Model Law does not;
- Section 11(a) of the Arbitration Act provides for an additional interim measure – “Security for costs” but the UNCITRAL Model Law does not; and
- the various matters covered in Part III and Part IV of the Arbitration Act have no real counterpart in the UNCITRAL Model Law.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

There are no mandatory rules governing international arbitration proceedings where the seat of arbitration is in Malaysia.

However, the restrictions provided in the Arbitration Act will apply; arbitration proceedings must not be contrary to public policy (Section 4 of the Arbitration Act), and parties to proceedings must be treated fairly and equally (Section 20 of the Arbitration Act).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is “arbitrable”?

Section 4 of the Arbitration Act provides that any dispute which the parties have agreed to submit to arbitration may 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. Therefore, disputes that may not be arbitrable include those involving:

1. a criminal issue;
2. prosecution;
3. an issue of public policy and public interest;
4. a family law matter; or
5. aspects of insolvency law.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes, by virtue of Section 18 of the Arbitration Act.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Section 10 of the Arbitration Act allows the other party to apply for a stay of proceedings and to require the dispute to be referred to arbitration. Malaysian courts take the approach that unless the exceptions to Section 10 (the arbitration agreement is null and void or incapable of being performed or inoperative) apply, or if the party applying for a stay has taken conscious steps to participate in the court proceedings, the court proceedings will be stayed in favour of arbitration.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal’s decision as to its own jurisdiction?

Section 8 of the Arbitration Act stipulates that courts should be slow to intervene in arbitration proceedings.

However, where the arbitral tribunal rules on the preliminary question that it has jurisdiction, any party may, within 30 days of receipt of notice of such ruling, appeal to the High Court to decide the matter (Section 18(8) of the Arbitration Act). The High Court’s decision on the matter is deemed final. (Section 18(10) of the Arbitration Act).

Whilst the appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

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

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Section 30 of the Limitation Act 1953 provides that the Limitation Act 1953 shall apply to arbitration. Under Malaysian law, the rules relating to limitation are procedural as opposed to substantive, and a cause of action does not become extinguished upon a time bar setting in. It merely becomes subject to limitation being pleaded; in which case the claim will be defeated.

As such, in Malaysia, contractual claims must be brought within six years from the date the breach occurred and tort claims must be brought within six years from the date the damage occurred.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

In the case of an individual, once a bankruptcy order has been granted, no action or proceeding shall be proceeded or commenced against the debt except by leave of the court (Section 8(1)(a) of the Insolvency Act 1967). Nonetheless, an arbitration agreement shall be enforceable by or against a party who is a bankrupt if the person who has jurisdiction to administer the property of the bankrupt adopts the agreement (Section 49 of the Arbitration Act).

For proceedings against companies where a winding-up petition has been presented but a winding-up order has not been granted, the company, creditor or contributory may apply to the court for an order to stay or restrain proceedings (Section 470(1) of the Companies Act 2016).

However, where a winding-up order has been granted or an interim liquidator has been appointed (Section 471(1) of the Companies Act 2016), no action or proceeding shall be proceeded or commenced against the company except by leave of the court.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Pursuant to Section 30 of the Arbitration Act, parties have liberty to choose the law applicable to the substance of the dispute. The arbitral tribunal will then apply the principles of conflict of laws and determine which aspects of the substantive issues are governed by which laws, including by reference to any law chosen by the parties.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Where mandatory laws exist, they prevail over the law chosen by parties. An example is Section 29 of the Contracts Act 1950 which provides that a clause limiting the time available for a party to enforce his rights will be void. This would then apply regardless of the law chosen by the parties.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The law applicable to the arbitration agreement governs its validity, interpretation and effect.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

No. Section 13 of the Arbitration Act provides that parties have the autonomy to agree on a procedure for appointing the arbitrator.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Pursuant to Section 13 of the Arbitration Act, where parties fail to agree on the procedure for appointing the arbitrator, the following steps would normally ensue:

- 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 from the date of receipt of a request to do so in writing, or the two arbitrators fail to agree on the third arbitrator, within 30 days of their appointment or such extended period agreed, either party may apply to the Director of the Asian International Arbitration Centre ("AIAC") for the appointment of an arbitrator.
- Where the arbitration consists of a single arbitrator, either party may apply to the Director of the AIAC for the appointment of an arbitrator.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes. If the Director of the AIAC is unable to act or fails to act within 30 days from the request to appoint an arbitrator, any party may apply to the High Court for such appointment (Section 13(7) of the Arbitration Act).

The decision of the Director of the AIAC or the High Court is not appealable (Section 13(9) of the Arbitration Act).

This applies to both domestic and international arbitration for the purposes of the Arbitration Act.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

By virtue of Section 13(8) of the Arbitration Act, in deliberating the appointment, the Director of the AIAC or the High Court shall have due regard to:

1. any qualifications required of the arbitration by the parties' agreement;
2. other considerations that are likely to secure the appointment of an independent and impartial arbitrator; and
3. (for international arbitration) the advisability of appointing an arbitrator of a nationality other than those of the parties.

Section 14 of the Arbitration Act also provides that a person approached for the possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. This provision is similarly found in Article 11 of the AIAC's Arbitration Rules 2018 ("Arbitration Rules") and also applies to a prospective emergency arbitrator (Schedule 3(5) of the Arbitration Rules).

An arbitrator may be challenged if circumstances exist giving rise to justifiable doubts as to the arbitrator's impartiality or independence (Rule 5 and Article 12 of the Arbitration Rules).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Section 21 of the Arbitration Act provides that parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Where parties fail to agree, the arbitral tribunal shall conduct the arbitration in the manner it considers appropriate. This would apply to all arbitral proceedings sited in Malaysia.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

It is necessary for the claimant to send to the respondent, a written request to commence arbitration. There are no other procedural steps required by law save for those prescribed by the rules of the arbitral body chosen.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Foreign counsel may appear in arbitration proceedings.

There are no rules governing the conduct of counsel (whether from Malaysia or a jurisdiction other than Malaysia) who appear in arbitration proceedings in Malaysia or outside of Malaysia.

However, if parties agree to adopt the IBA Guidelines on Party Representation in International Arbitration (2013), the conduct of counsel in arbitral proceedings will be subject to the counsel's home jurisdiction, the arbitral seat and the place where hearings physically take place.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Section 21(3) of the Arbitration Act sets out the powers conferred upon the arbitrators. In summary, an arbitrator is empowered to:

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

Further, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

An arbitrator also has the following duties:

1. Duty to treat parties equally and to give each party a fair and reasonable opportunity of presenting his/her case.
2. Duty to decide all issues.
3. Duty to act with diligence.
4. Duty to disclose all conflicts of interest and to act fairly and impartially.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The Legal Profession Act 1976 allows both foreign arbitrators and foreign lawyers to enter Malaysia to participate in arbitral proceedings.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Pursuant to Section 47 of the Arbitration Act, the liability of an arbitrator is largely limited in that the arbitrator shall not be liable for any act or omission in respect of anything done or omitted in the discharge of his functions as an arbitrator unless the act or omission is shown to have been in bad faith.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Pursuant to Section 8 of the Arbitration Act, the court shall only intervene in circumstances expressly provided for in the Arbitration Act, and this would include, *inter alia*:

1. The power to issue interim measures (Section 19 of the Arbitration Act).
2. The appointment of arbitrator(s) where the Director of the AIAC fails to do so within 30 days from the request (Section 13(7) of the Arbitration Act).
3. Deciding whether the arbitral tribunal has jurisdiction upon appeal by a party (Section 18(8) of the Arbitration Act).
4. Determining any question of law arising in the course of the arbitration (Section 41(1) of the Arbitration Act).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Section 19J of the Arbitration Act confers the arbitral tribunal the power to issue interim measures and may make the following orders for the party to:

1. Maintain or restore the *status quo* pending determination of the dispute.
2. Refrain from taking action likely to cause current/imminent harm or prejudice to the arbitral process.
3. Provide a means of preserving assets out of which a subsequent award may be satisfied.
4. Preserve evidence which may be relevant and material to the resolution of the dispute.
5. Provide security for costs.

Subject to the parties' agreement, the arbitral tribunal need not seek assistance from the court to do so.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Pursuant to Section 19J of the Arbitration Act, the High Court has the power to issue an interim measure in relation to arbitration proceedings, irrespective of whether the seat of arbitration is in Malaysia.

Section 11(1) of the Arbitration Act denotes that a party may apply to a High Court for any interim measure before or during arbitral proceedings and may make the following orders for the party to:

1. maintain or restore the *status quo* pending determination of the dispute;
2. refrain from taking action likely to cause current/imminent harm or prejudice to the arbitral process;
3. provide a means of preserving assets out of which a subsequent award may be satisfied;
4. preserve evidence which may be relevant and material to the resolution of the dispute; or
5. provide security for costs.

The parties request to a court does not affect the arbitral tribunal's jurisdiction.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

A party may apply to the court for any interim measure. However, applications for interim relief must be made to a competent court, i.e. by considering the seat of the arbitration or the nationality of the party. If such an application is made to a competent court, the court will then deliberate whether the power to grant interim relief should be exercised. The consideration of whether to grant interim relief will generally follow the approach laid down under Malaysian law.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Section 11(1)(h) of the Arbitration Act allows a party to apply for an interim injunction. It follows that Malaysian courts are empowered to issue an anti-suit injunction. However, to obtain an anti-suit injunction, a party must demonstrate that it is justifiable to interfere with the court's jurisdiction. In practice, Malaysian courts will generally grant such an injunction if there is a valid and enforceable arbitration agreement and the other party threatens to act inconsistently with it to commence foreign proceedings that are vexatious.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Yes; by virtue of Section 11(1)(e) of the Arbitration Act for the High Court and Section 19(2)(e) of the Arbitration Act for the arbitral tribunal.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

An interim measure issued by an arbitral tribunal shall be recognised as binding irrespective of the country in which it was issued. A party may apply to a competent court for the interim measure. If the court considers the enforcement to be proper, it may request for the party to provide appropriate security, if not already ordered by the arbitral tribunal, or make an order, where necessary, to protect the rights of third parties (Section 19H of the Arbitration Act). The discretion conferred is wide-ranging.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Section 2 of the Evidence Act 1950 provides that the Evidence Act 1950 shall not apply to proceedings before an arbitrator. However, in practice, the arbitrator is still required to follow the rules of natural justice and to provide each party a fair opportunity to present their case. Parties may also agree on a particular set of rules of evidence applicable to the arbitration proceedings.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Section 21(2) of the Arbitration Act provides that the arbitral tribunal has the power to conduct arbitration in such manner as it considers appropriate, and in practice, this would include securing the attendance of witnesses. Section 21(3) of the Arbitration Act confers the arbitral tribunal the power to order the discovery and production of documents within the possession of a party. The assistance of the national courts can also be sought to secure the attendance of a witness.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Prior to the 2018 Amendment to the Arbitration Act, the High Court of Malaya was empowered to make an order for the discovery of documents and interrogatories. The provision has been removed and this issue is yet to be addressed.

Section 29 of the Arbitration Act empowers the High Court to assist the arbitral tribunal with the taking of evidence. This includes issuing a subpoena to secure the attendance of a witness.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Witnesses need not be sworn in before the tribunal. However, the arbitral tribunal has the power to order evidence to be given on oath and affirmation (Section 21(3)(h) of the Arbitration Act).

Unless parties agree that no hearings shall be held, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or oral arguments. However, the parties may apply to the arbitral tribunal, during arbitration, for oral hearings to be held (Sections 26(1) and 26(2) of the Arbitration Act).

There is no express provision in the Arbitration Act on the production of written and/or oral witness testimony except that all documents supplied by one party or relied upon by the arbitral tribunal in making its decision shall be communicated to the parties (Sections 26(4) and 26(5) of the Arbitration Act).

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

There are generally two types of privilege:

1. Legal Professional Privilege. This extends to all communications between a party and their legal advisors for the purpose of any legal advice.
2. Litigation Privilege. This includes all communications between the lawyer, client and/or any third party which came into existence at the time when litigation or arbitration is contemplated or pending.

These two types of privilege may be waived by the party it belongs to. There are also “Without-Prejudice” Communications which are communications between parties or their agents which are *bona fide* attempts at settlements.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Pursuant to Section 33 of the Arbitration Act, an award shall:

1. Be made in writing.
2. Be signed by the arbitrator.
3. State the reasons it is based upon unless otherwise agreed.
4. State the date and seat of the arbitration.

After the award has been made, a copy of the signed award shall be delivered to each party.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Within 30 days of receipt or any other period agreed upon by the parties, a party may, upon notice to the other party, request the arbitral tribunal to correct any computation, clerical, typographical error or other error of similar nature in the award. Similarly, a party may also, upon notice to and with agreement of the other party, request the arbitral tribunal to give an interpretation of a specific point or part of the award (Section 35(1) of the Arbitration Act). The arbitral tribunal may also correct the award on its own initiative within 30 days from the date of the award (Section 35(3) of the Arbitration Act).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

An award is final and binding on the parties. Except as provided in the answer to question 9.2 above, the arbitral tribunal shall not vary, amend, correct, review, add to or revoke an award which has been made (Section 36 of the Arbitration Act). The only recourse to challenge an arbitral award is to apply to the High Court to set aside the award; an application must be made within 90 days of receipt of the award (Section 37(4) of the Arbitration Act).

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Sections 37–39, Part II of the Arbitration Act are mandatory provisions which apply to domestic and international arbitrations. Therefore, parties cannot, by agreement, exclude the grounds of challenge stipulated therein (Section 3 of the Arbitration Act).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

There are no provisions in the Arbitration Act allowing for appeal of an arbitral award, as an arbitral award is final and binding (Section 36 of the Arbitration Act). Parties may apply to set aside the award on grounds provided in Section 37 of the Arbitration Act or apply to refuse recognition or enforcement of the award under Section 39 of the Arbitration Act. These grounds are exhaustive and cannot be expanded by agreement.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

There are no provisions in the Arbitration Act allowing for a party to appeal an arbitral award.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Malaysia is a signatory to the New York Convention which came into force on 3 February 1986 in Malaysia. However, it is subject to the reciprocity reservation in that it will only enforce arbitration awards of other signatory states.

The Arbitration Act is the only national legislation on arbitration and recognition and enforcement of arbitration can be found under Sections 38 and 39 of the Arbitration Act.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Malaysia is also a signatory to the Convention on the Settlement of Investment Disputes and enacted the Convention of Investment Settlement Disputes Act in 1996.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The applicable procedural law in Malaysia which deals with procedures regarding the recognition and enforcement of an arbitral award can be found under Section 38 of the Arbitration Act.

On an application in writing to the High Court, the applicant shall produce the duly authenticated original award and the original

arbitration agreement or duly certified copies of both. Thereafter, the award shall be recognised as binding and be enforced by entry of judgment. The award then becomes immediately enforceable.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The doctrine of *res judicata* prohibits parties from re-litigating in a court an issue which is already the subject of a final binding arbitration award.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Section 39(b)(ii) of the Arbitration Act provides that an award may be refused recognition and/or enforcement if it is in conflict with the public policy of Malaysia. Pursuant to Section 37(2) of the Arbitration Act, an award is contrary to public policy if:

1. the making of the award was induced or affected by fraud or corruption; or
2. a breach of the rules of natural justice occurred:
 - a. during the arbitral proceedings; or
 - b. in connection with making the award.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Section 41A of the Arbitration Act provides that arbitral proceedings in Malaysia are confidential and no party may publish, disclose or communicate any information relating to the arbitration proceedings or the award made.

However, pursuant to Section 41A(2) of the Arbitration Act, this confidentiality is not absolute and may be subject to the following exceptions:

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

Confidentiality is also provided for in Rule 16 of the AIAC Rules 2018.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

As mentioned in the answer to question 12.1 above, arbitration proceedings are confidential but are subject to exceptions.

Having regard to the above, information disclosed in arbitral proceedings can be referred to or relied on in subsequent proceedings only where it is necessary for the enforcement or implementation of an award, or for a challenge to the award, or for the discharge of a legal duty, or to protect or pursue a legal right.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The Arbitration Act does not provide for any limitation as to the types of remedies available in arbitration.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Unless otherwise agreed by the parties, the arbitral tribunal may award simple or compound interest from such date and at such rate as the arbitral tribunal considers appropriate for any period ending not later than the date of payment or the whole or part of the sum or costs awarded (Section 33(6) of the Arbitration Act).

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Yes, parties are entitled to recover fees and/or costs. There is no fixed basis on the manner in which costs are awarded. Parties may agree on how the fees and costs are to be paid, or failing which, the arbitral tribunal has the discretion to determine whether costs should follow the outcome of the arbitration, or for each party to bear their own costs (Section 44 of the Arbitration Act).

There is no express provision in the Arbitration Act stipulating costs must follow the event. The arbitral tribunal may look at the overall result of the proceedings, the conduct of the parties, proportionality and reasonableness when granting an award.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

No, an arbitral award is not subject to tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Funding claims are not allowed in Malaysia but the AIAC has announced that it will place greater focus on the revision of the Arbitration Act to allow third-party funding in Malaysia.

Section 112(1)(b) of the Legal Profession Act 1976 provides that lawyers shall not accept contingency fees.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, Malaysia is a signatory to the Convention on the Settlement of

Investment Disputes and enacted the Convention of Investment Settlement Disputes Act in 1996.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Malaysia has 54 BITs currently in force with various countries; there are another 12 which have yet to come into force.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to “most favoured nation” or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Malaysian BITs contain most-favoured-nation clauses. In essence, these clauses provide that a country accorded most-favoured-nation status shall receive fair and equitable treatment that is not less favourable than that accorded to investments made by investors of any other country.

Some Malaysian BITs also include compensation-for-losses clauses. This regulates the treatment of foreign investors in the event their investments suffer losses owing to war, revolution, state of national emergency or revolt, etc., by requiring Malaysia to provide most-favoured-nation treatment to the availability of compensation for such losses.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

In Malaysia, the doctrine of restrictive immunity applies in respect of actions within the trading or commercial activity of the foreign state (*acta jure gestionis*); this means that acts done within the trading or commercial activity are not immune. Where acts are within the sphere of the governmental or sovereign activity of the state (*acta jure imperii*), the doctrine of sovereign immunity applies and the courts should, by international comity, disclaim jurisdiction.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

No, there have been no noteworthy trends.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

There have been no recent steps.



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He has given expert testimony in international commercial arbitration and has acted as counsel in international arbitration proceedings in the AIAC, SIAC and HKIAC and in spin-off court proceedings in Malaysia, including but not limited to proceedings under the Arbitration Act 1952, Arbitration Act 2005 and the Convention on Recognition of Foreign Arbitral Awards Act 1985 and in respect of enforcement of multi-tiered dispute resolution clauses in the High Court and Court of Appeal.

He has also appeared in the High Court and Court of Appeal in reported cases involving issues of *res judicata* and issue estoppel arising from ICC arbitration awards.

He has been involved in court proceedings and domestic arbitration involving power purchase agreements (“PPA”) in Malaysia.

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