MALAYSIA

Law and Practice

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CONTENTS

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.

Based on statistics from the Asian International Arbitration Centre (AIAC), the COVID pandemic did have an effect on the volume of domestic arbitration registrations over the last three years – with 117 domestic arbitrations in 2019, 89 domestic arbitrations in 2020 and 104 domestic arbitrations in 2021. With the easing up of COVID-related movement controls, the number of arbitrations is expected to increase markedly.

There has been a marginal increase in international arbitration registrations at the AIAC over the last three years. In 2019, the AIAC registered a total of eight international arbitration cases; in 2020, the AIAC registered a total of 11 international arbitration cases; and in 2021, the AIAC registered a total of 13 international arbitration cases. Again it is envisaged that the numbers will increase this year with the COVID-related restrictions having by and large been removed.

1.2 Impact of COVID-19

The key impact of the COVID-19 pandemic has been an increase in the number of international arbitrations using virtual solutions for the conduct of arbitration-related matters, ranging from meetings, conferences and substantive hearings.

In some instances, where parties/arbitral tribunals have been reluctant to conduct the substantive hearings virtually, the conduct of meetings and conferences has been conducted virtually, with the substantive hearings held in person. There has also been an increase in the number of domestic proceedings that adopted virtual solutions for the conduct of proceedings, particularly meetings and conferences.

However, quite a few arbitration hearings were postponed until the second half of 2021 to facilitate physical hearings. The general preference for physical hearings during the COVID pandemic has typically been attributable to the nature of the dispute, the volumes of documents that need to be referred to and the complexity of the subject matter.

COVID-19 Lockdowns

The biggest impact on arbitrations both international and domestic has been the government-imposed lockdown periods imposed in 2020 and 2021. This necessitated law firms, institutions such as AIAC and workspaces to close their premises. The AIAC was able to act on commencement and appointment requests during the lockdown; however, it could not be used as a neutral location for witnesses to take their oaths and give evidence in an otherwise virtual arbitration.

While parties, arbitrators and counsels were amenable to a virtual arbitration, they were opposed to witnesses testifying from their homes. With the movement control restrictions and closure of many establishments including the AIAC, this impacted the ability of witnesses to give evidence from a neutral venue in the year 2020 and part of 2021.

From September 2021 to date, arbitral hearings have proceeded smoothly with little or no impact from the pandemic.

1.3 Key Industries

AIAC statistics indicate that the majority of arbitrations registered in 2021–22 relate to construction contracts. This is largely consistent with the trend in previous years.

AIAC statistics do not indicate any particular industries that experienced decreased arbitration activity in 2021–22 as a result of the COVID-19 pandemic.

1.4 Arbitral Institutions

The arbitral institution most used for international arbitration in Malaysia is the Asian International Arbitration Centre (AIAC).

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

In 2021, the Affordable Arbitration and ADR Chambers PLT (AA-ADR Chambers) was established with the goal of promoting University cum Court Annexed Arbitration, ie where courts offer to the parties the option to opt, by mutual agreement, out of the court system and refer the dispute to arbitration. The chambers is targeted at arbitration and alternative dispute resolution solutions for matters filed in court where there is no agreement to arbitrate. The chambers provides all forms of domestic and international alternative dispute resolution services, including hearing rooms, administrative support and a panel list of arbitrators, mediators and other adjudicators.

AIAC's Initiatives

The AIAC maintains its own rules of arbitration, known as the AIAC Arbitration Rules. The AIAC takes the initiative to actively upgrade the AIAC Arbitration Rules from time to time in accordance with international trends to cater for best practices in the global environment.

The AIAC released the AIAC Arbitration Rules 2021 on 1 August 2021. The AIAC Arbitration Rules 2021 streamline proceedings and embrace the needs of a fast-evolving disputes climate with third-party funding, summary disposal of cases, enhancements to multi-party arbitrations and various other welcome changes.

The AIAC also released the AIAC i-Arbitration Rules, which offer a practical solution for the settling of disputes arising out of or in connection with Sharia-based commercial transactions, enabling the arbitral tribunal to refer to the relevant Sharia Advisory Council or Sharia expert for opinions on matters related to Sharia principles. The AIAC regularly updates its i-Arbitration rules, with the latest update being the AIAC i-Arbitration Rules 2021 released on 1 November 2021.

With the onset of the COVID-19 pandemic, the AIAC initiated a series of webinars on a wide range of topical issues relating to arbitration and other alternative dispute resolution processes. These webinars were well attended and serve to connect the AIAC both domestically and internationally with speakers and participants alike.

1.5 National Courts

The High Courts of Malaysia are designated to hear disputes related to international arbitration and domestic arbitrations for matters where they have jurisdiction under the Arbitration Act 2005. There are designated arbitration specialist courts that deal with arbitration-related matters arising typically from construction and commercial related arbitration disputes.

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, do not apply to international arbitrations unless the parties agree to opt in, in writing.

Comparison with UNCITRAL Model Law

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 and 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 sections of 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 (see Section 19E of the Arbitration Act 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 Arbitration Act 2005).

The Arbitration Act 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 Arbitration Act 2005).

2.2 Changes to National Law

There have been no amendments to the Arbitration Act 2005 since the 2018 Amendments. The 2018 Amendments brought the Arbitration Act 2005 further in line with the UNCITRAL Model Law, such as:

- clarification of the definition of an arbitration agreement that is “in writing”;
- the recognition that the requirement that an arbitration agreement is made in writing can be met by any electronic communication;
- the introduction of provisions dealing with the arbitral tribunal’s powers to grant interim measures; and
- the reinstatement of parties’ rights to choose any law or rules of law applicable to the substance of a dispute and the arbitral tribunal’s right to decide according to equity and conscience if so authorised by the parties.

The said amendments, among others, allowed the parties the right to choose representation by any representative and not merely a lawyer; further, it expanded the definition of “arbitral tribunal” to include emergency arbitrators.

Developments in 2021–22

The main development in 2021 was the introduction of the AIAC Arbitration Rules 2021. These Rules were launched in August 2021 and serve to replace all the previous editions of the Rules, unless otherwise agreed by the parties.

The latest revisions to the AIAC Arbitration Rules streamline the conduct of arbitration pro-

ceedings and serve to improve the efficiency of arbitration. They include significant changes to existing Malaysian arbitral practice through, among others, expanded joinder and consolidation rules, new procedures for summary determination and revisions to the emergency arbitration procedure, the publication of AIAC arbitral awards, legitimisation of third-party funding and the introduction of the list procedure for arbitral appointments.

3. THE ARBITRATION AGREEMENT

3.1 Enforceability

An arbitration agreement 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 (see Section 9 of the Arbitration Act 2005).

Forms of Arbitration Agreement

An arbitration agreement may be in the form of an arbitration clause contained in an agreement, in a standalone agreement or in a reference to another agreement that contains an arbitration clause.

In Pandan Etika Sdn Bhd v Liang Builders Sdn Bhd [2019] 1 LNS 1978, the High Court gave effect to an arbitration clause that had been incorporated by reference.

Arbitration Agreement Must Be in Writing

The arbitration agreement must be in writing (see Section 9(3) of the Arbitration Act 2005). 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 (see Section 9(4) of the Arbitration Act 2005). 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 usable for future reference (see Section 9(4A) of the Arbitration Act 2005). The signature of the parties is not a prerequisite to an arbitration agreement being enforced (see Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd [2013] 5 MLJ 625).

No Specific Words or Form Required

No specific words or form 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 (see Section 4 of the Arbitration Act 2005). 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.

Public Policy

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 Malaysian Federal Court judgment in Arch Reinsurance Ltd v Akay Holdings Sdn Bhd [2019] 1 CLJ 305).

The Arbitration Act 2005 does not identify 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; [2012] Ch 333; [2012] 1 All ER 414; [2012] 2 WLR 1008; [2012] 1 All ER (Comm) 1148; [2012] 1 BCLC 335; [2011] All ER(D) 197 (Jul)). 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 (see the Singapore Court of Appeal decision in Larsen Oil and Gas Pte Ltd v Petroprod Ltd [2011] 3 SLR 414). Malaysian courts would find such judicial findings to be persuasive.

In Arch Reinsurance Ltd v Akay Holdings Sdn Bhd [2019] 1 CLJ 305, the Malaysian Federal Court held that 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 is void as being contrary to public policy; and hence a dispute triggered by a statutory notice of demand under the National Land Code is not arbitrable under the Arbitration Act 2005. Based on this decision, the Malaysian courts have taken the position that where there are statutory provisions that exhaustively set out procedures involving the rights and remedies of parties, then that subject matter will most likely not be arbitrable.

The Tribunal's Powers to Determine Arbitrability

If the issue of whether a dispute is arbitrable or not is raised by any party, the arbitral tribunal has the power to rule on its own jurisdiction, which includes deciding whether a dispute is arbitrable. Within 30 days of receiving notice of the arbitral tribunal's ruling that there is jurisdiction, then any party may appeal to the High Court to decide the matter.

3.3 National Courts' Approach

Law of Arbitration Agreement

The conflict of laws rules are used by Malaysian courts with respect to determining the law governing arbitration agreements. The general principle is that, in the absence of an express choice of the governing law of the arbitration agreement or any contrary indication, the law that has the closest and most real connection with the arbitration agreement is the law of the seat of the arbitration, ie, the lex arbitrii (see the Malaysian Federal Court decision in Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic [2017] 9 CLJ 273).

Enforcement of Arbitration Agreements

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.

This was emphasised recently in the case of Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd & Another Appeal [2020] 4 CLJ 301. There, the issue before the Malaysian Federal Court was whether a judgment in default may be sustained when the plaintiff who obtained the judgment in default is bound by a valid arbitration agreement. The defendant raised disputes to be ventilated in arbitration pursuant to the arbitration clause. The Malaysian Federal Court held that a judgment in default cannot act as a bar to arbitration and, as such, set aside the judgment in default and granted a stay pending reference to arbitration.

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).

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 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.

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 Section 13 of 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 arbitrators in an international arbitration and one in a domestic arbitration (see Section 12 of the Arbitration Act 2005).

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 (see Section 13(3) of the Arbitration Act 2005). 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 (see Section 13(4) of the Arbitration Act 2005).

Where the arbitration consists of a sole arbitrator and the parties fail to agree on the arbitrator, either party may apply to the Director for the appointment of the sole arbitrator (see Section 13(5) of the Arbitration Act 2005).

Where the parties have agreed on the procedure for appointment of the arbitrator(s), and

(a) a party fails to act as required under such procedure; or (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 to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment (see Section 13(6) of the Arbitration Act 2005). The decision of the Director is final and non-appealable (see Section 13(9) of the Arbitration Act 2005).

The procedure for the appointment of arbitrator(s) is also provided for in Rule 9 of the AIAC Arbitration Rules 2021 where the parties agree to arbitrate under the AIAC Arbitration Rules.

Multi-party Arbitrations

Where there are multiple parties in an arbitration, where the arbitration consists of a sole arbitrator and the parties fail to agree on the arbitrator, any party may apply to the Director of the AIAC for the appointment of the sole arbitrator. The decision of the AIAC is final and non-appealable.

There is no default procedure in the Arbitration Act 2005 governing multi-party arbitrations where the number of arbitrators is three, as the Arbitration Act 2005 only states that "each party shall appoint one arbitrator". However, it is a common practice for multiple parties on the same side (whether as joint claimants or respondents) to jointly appoint an arbitrator.

Rule 9.7 of the AIAC Arbitration Rules 2021 addresses this and provides for claimants and respondents to jointly nominate half the number of arbitrators if there are two or more arbitrators and the number of arbitrators is an even number. In the case of three or more arbitrators and the number of arbitrators is an odd number, the claimants and respondents shall nominate an equal number of arbitrators who will together nominate a presiding arbitrator for the Director's confirmation. Failing such nomination, the Director shall appoint the presiding arbitrator.

If no agreement is reached on the joint nomination, the entire arbitral tribunal shall be constituted by the Director upon the request of any party. In this case, in the absence of agreement, the previously nominated and appointed arbitrators shall not form part of the tribunal, unless parties agree to retain such nominations and appointments.

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 (see Section 13(7) of the Arbitration Act 2005). 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 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

Grounds for Challenge of Arbitrators

An arbitrator may be challenged in two situations: if the circumstances give rise to justifiable doubts as to his or her impartiality or independence; or if he or she does not possess the quali-

fications agreed by the parties (see Section 14 of the Arbitration Act 2005).

Challenge Procedure

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 (see Section 15 of the Arbitration Act 2005).

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 decide on the challenge, within 30 days of receiving notice of the decision rejecting the challenge. The High Court's decision on the matter is final and non-appealable.

A similar procedure to initiate the challenge of an arbitrator is provided for in Rules 11.2 to 11.11 of the AIAC Arbitration Rules 2021.

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 or her impartiality or independence under the Arbitration Act 2005 without delay (see Section 14(2) of the Arbitration Act 2005).

Recently, 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, the High Court held that the Arbitration Act 2005 requires an arbitrator to be impartial, free from bias and independent as a matter of fact, and as perceived objectively by a "fair-minded and informed observer".

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. Section 4 of the Arbitration Act 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.

A wide approach to what is arbitrable is illustrated by the case of Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, where in addition to conventional commercial disputes, the Malaysian Court of Appeal held that tortious disputes are arbitrable.

Case Law

While there is no universally accepted test on public policy, matters that are naturally contrary to public policy and not capable of settlement by arbitration would include criminal proceedings, citizenship, legitimacy of a marriage, validity of a matter where the court is conferred sole jurisdiction to make specific orders or declarations such as grants of statutory licences, validity of the registration of trade marks or patents, copyrights, winding up of companies, bankruptcy of debtors and administration of estates (see the Singapore Court of Appeal decision in Larsen Oil and Gas Pte Ltd v Petroprod Ltd [2011] 3 SLR 414).

In general, the question of whether the subject matter is arbitrable is not determined by the jurisdictional limitations on the relief that may be granted by the arbitral tribunal (see Section 4(2) of the Arbitration Act 2005 and the UK Court of Appeal decision in Fulham Football Club (1987) Ltd v Richards and another [2011] EWCA Civ 855; [2012] Ch 333; [2012] 1 All ER 414; [2012] 2 WLR 1008; [2012] 1 All ER (Comm) 1148; [2012] 1 BCLC 335; [2011] All ER(D) 197 (Jul)).

However, this is not the position in Malaysia. The Malaysian courts have looked carefully at whether an arbitral tribunal can grant relief that is statutorily vested in a court. In Pendaftar Pertubuhan Malaysia v Establishmen Tribunal Timbangtara Malaysia & Ors [2011] 6 CLJ 684, the High Court held that disputes relating to any act, duty or functions carried out by a statutory body in the exercise of its statutory powers are not subject to arbitration.

Recently, in Arch Reinsurance Ltd v Akay Holdings Sdn Bhd [2019] 1 CLJ 305 the Malaysian Federal Court held that subject matter concerning a statutory notice of demand for order for sale of a charged property under the National Land Code 1965 is not arbitrable. This was applied by the High Court in FMC Petroleum Equipment (Malaysia) Sdn Bhd v FMC Wellhead Equipment Sdn Bhd [2019] MLJU 473.

5.2 Challenges to Jurisdiction

The principle of competence-competence is applicable in Malaysia with the enactment of Section 18(1) of the Arbitration Act 2005, ie, an arbitral tribunal can rule on a party's challenge to the tribunal's own jurisdiction. This was affirmed in Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417, where the Malaysian Federal Court held that the court must acknowledge the competency of an arbitral tribunal to decide on its own jurisdiction without interference.

5.3 Circumstances for Court Intervention

Pursuant to Section 18(7) of the Arbitration Act 2005, the arbitral tribunal may rule on a plea that it does not have jurisdiction or is exceeding the scope of its authority either as a preliminary question or in an award on the merits.

Positive Rulings on Jurisdiction

Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may appeal to the High Court within 30 days of receiving a notice of that ruling (see Section 18(8) of the Arbitration Act 2005). A decision of the High Court thereon is final and non-appealable (see Section 18(10) of the Arbitration Act 2005).

On the other hand, if the arbitral tribunal decides to address such plea in the award stage, then the parties may apply to the High Court under Section 37 of the Arbitration Act 2005 to set aside such award made by the arbitral tribunal.

The courts generally show a reluctance to intervene in issues regarding the jurisdiction of an arbitral tribunal. In Capping Corp Ltd & Ors v Aquawalk Sdn Bhd & Ors [2013] 6 MLJ 579, the Malaysian Court of Appeal held that under the Arbitration Act 2005, the courts are obliged to take a minimal interference approach, and such approach is reflected in Section 18 of the Arbitration Act 2005, where the arbitral tribunal is empowered to rule on its own jurisdiction.

Negative Rulings on Jurisdiction

The Arbitration Act 2005 provides for an appeal against an arbitral ruling that it has jurisdiction. The converse (ie, a negative ruling on jurisdiction) is not referenced as a ground for appeal under Section 18(8).

In PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR(R) 597, the Singapore

Court of Appeal accepted that pursuant to Article 16(3) of the UNCITRAL Model Law, a negative jurisdictional ruling by a tribunal is intended to be a final and binding decision between the parties, and is not appealable. While the Singapore International Arbitration Act was amended in 2012 to allow appeals to the High Court on a negative jurisdictional ruling, no such amendment has been made to the Arbitration Act 2005.

5.4 Timing of Challenge

Pursuant to Section 18(8) of the Arbitration Act 2005, if the arbitral tribunal rules on a plea as a preliminary question that it has jurisdiction, 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.

If the arbitral tribunal determines such plea in an award on the merits, the parties may, within 90 days from the date of receipt of the award, make an application to the High Court to set aside such award (see Section 37(4) of the Arbitration Act 2005).

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

In Malaysia, the standard of review by the courts on questions of arbitral jurisdiction is generally de novo. In Usahasama SPNB-LTAT Sdn Bhd v ABI Construction Sdn Bhd [2016] 7 CLJ 275, the High Court held that an appeal under Section 18(8) of the Arbitration Act 2005 involves a full rehearing of all issues afresh and uninfluenced by the prior decision of the arbitrator(s).

5.6 Breach of Arbitration Agreement

When there are court proceedings brought in breach of an arbitration agreement, it is mandatory for the Malaysian courts to stay such proceedings in favour of arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed (see Section 10 of the Arbitration Act 2005).

This was confirmed by the Malaysian 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 Arbitration Act 2005, the court only needs to consider whether there is in existence a binding arbitration agreement or clause between the parties, that is neither null and void nor inoperative or incapable of being performed. Referring to the Malaysian Court of Appeal's decision in TNB Fuel Services Bhd v China National Coal Group Corp [2013] 4 MLJ 857, the Malaysian Federal Court held that the question as to whether there is a dispute in existence is not a requirement to be considered as it is an issue to be decided by the arbitral tribunal.

This was reiterated in the recent case of Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd [2020] 3 MLJ 545, where the Malaysian Federal Court set aside a judgment in default based on underlying disputes that the parties were contractually bound to resolve by arbitration.

5.7 Jurisdiction Over 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 Malaysian Federal Court decision in Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1). This is subject to the newly introduced rules on joinder in the latest AIAC Arbitration Rules. For instance, Rule 21.1 of the AIAC Arbitration Rules 2021 permit an additional party to be joined as a party to the arbitration where all parties to the arbitration and the additional party consent in writing to the joinder, or where the participation of such additional

party is necessary for the efficient resolution of the dispute and directly affects the outcome of the arbitral proceedings.

6. PRELIMINARY AND INTERIM RELIEF

6.1 Types of Relief

Pursuant to Section 19(1) of the Arbitration Act 2005, an arbitral tribunal 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 under Section 19(2)(a) to (e) of the Arbitration Act 2005 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 the Arbitration Act 2005).

6.2 Role of Courts

The High Court has the power to issue any interim relief before or during arbitration proceedings (see the Malaysian Court of Appeal decision in KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC [2020] MLJU 85; [2020] 1 LNS 479). This is irrespective of whether the seat of arbitration is in Malaysia.

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

- to maintain or restore the 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 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. Such power is not confined to the admiralty jurisdiction of the High Court; it extends to its civil jurisdiction under the Courts of Judicature Act 1967 (see the High Court decision in JANA DCS Sdn Bhd v TAR PH Family Entertainment Sdn Bhd and other cases [2022] 8 MLJ 201).

Emergency Arbitrators

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 redefined to include an emergency arbitrator.

Emergency arbitrators are prescribed 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 they are issued.

The AIAC Arbitration Rules provide additional powers to emergency arbitrators; virtual or documents-only emergency arbitration proceedings are permitted, as are ex parte proceedings. Emergency arbitrators are permitted to rule on their own jurisdiction.

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 determination of an appeal against the emergency arbitrator's ruling of an unsuccessful challenge to the arbitral tribunal.

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

6.3 Security for Costs

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

In determining the same, the courts of Malaysia have set out the following factors for consideration (Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd [2014] 3 CLJ 915):

- the financial status of the claimant;
- the persons who own or control the claimant;
- the amount of taxed costs that the respondents are likely to be awarded;
- substantial costs incurred prior to the application for security;
- whether there is an arguable case;
- whether the respondents could suffer irrevocable losses if no security is ordered; and
- whether there is evidence of third-party financing.

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 (see Section 21 of the Arbitration Act 2005). Such procedural rules can be ad hoc or institutional. The most commonly adopted institutional rules in Malaysia are the AIAC Arbitration Rules.

If parties fail to agree on the procedural rules, the arbitral tribunal will become the master of the proceedings, upon which it will be empowered to determine matters such as the time and place of proceedings, the time limits for pleadings and written submissions as well as the taking of evidence.

7.2 Procedural Steps

Regardless of the applicable procedural rules, the claimant is in law required to submit a statement of claim containing the facts supporting its claim, the points in issue and the relief or remedy sought from the arbitration after the commencement of arbitration and within the period of time agreed by the parties or determined by the arbitral tribunal. The respondent to the arbitration shall then state its 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

further 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 to conduct the proceedings on the basis of documents and other materials. If any party applies for the arbitral tribunal to hold oral hearings at an appropriate stage of the proceedings, it is mandatory for the arbitral tribunal to hold such oral hearings (see Section 26 of the Arbitration Act 2005).

7.3 Powers and Duties of Arbitrators

Powers of Arbitrators

In Malaysia, arbitrators are conferred 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 in **6.1 Types of Relief**;
- 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 the provision of further particulars in a statement of claim or statement of defence,
  - (d) order 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 timeline 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.

Duties of Arbitrators

When a potential arbitrator is approached in connection with his or her 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 his or her impartiality or independence.

Once the person is appointed as an arbitrator, he or she has a 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

Generally, parties to arbitral proceedings are permitted to be represented in arbitral proceedings by any representative appointed by the party. Section 37A of the Legal Profession Act 1976 provides that the restrictions on non-Malaysian qualified lawyers from practising in Malaysia

shall not apply to any person representing any party in arbitral proceedings.

However, it must be noted that the above principle is only applicable to arbitrations taking place in West Malaysia. In respect of arbitration proceedings in East Malaysia (Sabah & Sarawak), Sabah and Sarawak advocates are conferred exclusive right to practise in East Malaysia, and such exclusivity includes representation in arbitration proceedings (see Samsuri bin Baharuddin & Ors v Mohamed Azahari bin Matiasin and another appeal [2017] 2 MLJ 141 (Malaysian Federal Court)).

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 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 the Taking of 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.

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.

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.

8.3 Powers of Compulsion

With the approval of the arbitral tribunal, the parties are empowered to make an application under Section 29(2) of the Arbitration Act 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 Arbitration 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 provide 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 confidentiality obligation under Section 41A of the Arbitration Act 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 Arbitration 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. The AIAC Arbitration Rules extend confidentiality further, with the same applying equally to the arbitral tribunal, the Director of the AIAC, 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.

The importance of confidentiality of arbitration proceedings was emphasised by the Malaysian Federal Court in Siemens Industry Software GmbH & Co Kg (Germany) (formerly known as Innotec GmbH) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (M) & Ors [2020] 3 MLJ 1. There, the Federal Court held that the recognition and enforcement of an arbitration award by way of entry as a judgment of the High Court of Malaya and the High Court of Sabah and Sarawak ought to relate only to the dispositive parts of the said award and not to the entire award containing the reasoning, evidentiary and factual findings of the arbitral tribunal. To register the entire arbitral award would undermine the confidentiality of the arbitration proceedings.

10. THE AWARD

10.1 Legal Requirements

The arbitral award must be made in writing, be 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, also state the reasons upon which it is based (see Section 33 of the Arbitration Act 2005).

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 arbitrator must deliver the award within that time limit or give notice to extend the time limit where this is provided for under the arbitration agreement between the parties, failing which the award may be set aside (see Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd [2021] 2 CLJ 173 (Court of Appeal)).

The High Court may also extend the time limit, unless otherwise agreed by the parties (Section 46 of the Arbitration Act 2005). However, the High Court may only do so where there is an application made by the arbitrator or the parties and not on its own volition (see Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd [2021] 2 CLJ 173 (Malaysian Court of Appeal)).

Pursuant to the AIAC Arbitration 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. The time limit may be extended by the arbitral tribunal with the consent of the parties and upon consultation with the Director of the AIAC or unilaterally by the Director of the AIAC where it is deemed necessary.

10.2 Types of Remedies

The types of remedies that an arbitral tribunal may award are not limited by the Arbitration Act 2005 or the AIAC Arbitration 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; [2012] Ch 333; [2012] 1 All ER 414; [2012] 2 WLR 1008; [2012] 1 All ER (Comm) 1148; [2012] 1 BCLC 335; [2011] All ER(D) 197 (Jul)).

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 for arbitrations commencing after the statutory amendments came into force on 8 May 2018 (see UDA Land Sdn Bhd v Puncak Sepakat Sdn Bhd [2020] MLJU 892 (High Court)).

The position on whether the 2018 Amendments allow for pre-award interest to be claimed in arbitrations which commenced before the 2018 Amendments came into force is less clear. In UDA Land Sdn Bhd v Puncak Sepakat Sdn Bhd [2020] MLJU 893, arbitration proceedings commenced prior to the 2018 Amendments. However, the arbitrator granted pre-award interest based on the Arbitration Act 2005 post the 2018 Amendments. The plaintiff sought to set aside the arbitral award on the ground that the arbitrator acted in excess of his jurisdiction or power and denied the parties natural justice by failing to afford the parties the opportunity to submit on the applicability of the amended Arbitration Act 2005. The High Court allowed the plaintiff's application and held that the plaintiff had the accrued right upon commencement of the arbitration proceedings to have the arbitration conducted based on the Arbitration Act 2005

as it then stood (prior to the 2018 Amendments) pursuant to Section 30(1)(b) of the Interpretation Acts 1948 and 1967.

Notwithstanding UDA Land Sdn Bhd v Puncak Sepakat Sdn Bhd [2020] MLJU 893, there are authorities that suggest the contrary. In Food Corpn of India v Marastro Cia Naviera SA, The Trade Fortitude [1986] 3 All ER 500, the English Court of Appeal had to consider whether an arbitrator had the power to award pre-award interest when the statutory provisions at the time the arbitration agreement was entered into and when the arbitration commenced did not provide for the same. The Court of Appeal held it was an implied term of the arbitration agreement that an arbitrator should conduct the reference in accordance with the law at the time of the hearing, and accordingly had the power to award pre-award interest.

Further, in Lesotho Highlands Development Authority v Impregilo SpA and others [2006] 1 AC 221, the United Kingdom House of Lords stated in obiter that an arbitral tribunal's power to grant pre-award interest is a procedural right that is unaffected by the substantive law. In Lee Chow Meng v Public Prosecutor [1978] 1 LNS 88, the Malaysian Federal Court held that a statute dealing with procedure has retrospective effect. This also suggest that the 2018 Amendments allowing for pre-award interest apply retrospectively to arbitration proceedings commenced prior to the 2018 Amendments.

Whether pre-award interest may be awarded in arbitrations which commenced before the 2018 Amendments remains an open issue in Malaysia that may be clarified by decisions of the appellate courts in Malaysia in due course.

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. This is because the arbitrator is master of the facts, and the courts should not review the arbitral award on its merits (see the Malaysian Court of Appeal decision in Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn 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 the Arbitration Act 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 the Arbitration Act 2005 and Malaysian Bio-XCell Sdn Bhd v Lebas Technologies Sdn Bhd & Another Appeal [2020] 3 CLJ 534 (Malaysian Court of Appeal)).

These grounds are exhaustive (see Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal [2021] 1 MLJ 1 in respect of grounds to set aside an arbitral award, Tune Talk Sdn Bhd v Padda Gurtaj Singh [2020] 3 MLJ 184 in respect of grounds to oppose the recognition and enforcement of an arbitral award).

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 2005. 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 [2017] 9 CLJ 273, the Malaysian 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

A 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 Malaysian

Court of Appeal's decision in Tune Talk Sdn Bhd v Padda Gurtaj Singh [2020] 3 MLJ 184).

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.

The court has a discretion to adjourn the recognition and enforcement of an arbitration award in Malaysia pursuant to Section 39(2) of the Arbitration Act 2005 where the award is subject to ongoing set-aside proceedings at its seat (see Ipco (Nigerian National Petroleum Corp [2005] EWHC 726 (Comm); [2005] All ER (D) 385 (Apr) and Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd [2018] SGHC 132; [2019] 4 SLR 537). Recently, in Salconmas Sdn Bhd v Ketua Setiausaha Kementerian Dalam Negeri & Anor [2021] 7 MLJ 907, the High Court allowed an application by a defendant to stay proceedings to recognise and enforce an arbitration award pending the defendant's appeal to the Malaysian Court of Appeal against the High Court's decision partly dismissing its application to set aside the same arbitral award.

However, the courts do not not have the jurisdiction to permanently injunct an application to recognise and enforce an arbitral award on the basis that the award sum is allegedly not due (Southern HRC Sdn. Bhd. v Danieli Co., Ltd (WA-24NCC(ARB)-14-03/2022)).

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; conflict with 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. Thus, instances such as "patent injustice", "manifestly unlawful and unconscionable", "substantial injustice", "serious irregularity" and other similar serious flaws in the arbitral process and award would fall within the applicable concept of public policy (Jan De Nul (Malaysia) Sdn Bhd v Vincent Tan Chee Yioun [2019] 2 MLJ 413).

In Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198 the Malaysian Federal Court confirmed that the Malaysian courts may set aside an arbitration award that was made in breach of natural justice but this would only be done where the breach had material and causative effect on the outcome of the arbitration.

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 AIAC are bound by the Asian International

Arbitration Centre's Code of Conduct for Arbitrators, which references the IBA 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.

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 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.

The Common Law Position

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.

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. The AIAC Arbitration Rules sanction third-party funding insofar as the same is not precluded by relevant law or court order.

13.4 Consolidation

An arbitral tribunal may consolidate separate arbitral proceedings, provided that the parties agree to confer such power on the arbitral tribunal. Section 40 of the Arbitration Act 2005 confers express power on the arbitrator to consolidate proceedings in such circumstances.

The court will not be able to exercise this power to consolidate separate arbitral proceedings under Section 40 of the Arbitration Act 2005 (Ragawang Corporation Sdn Bhd v One Amerin Residence Sdn Bhd [2020] 1 LNS 895 (High Court)).

The AIAC Arbitration 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. 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, or 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.

13.5 Binding of 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.

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Shearn Delamore & Co is one of the largest award-winning, full-service law firms in Malaysia, with more than 100 lawyers and 280 support staff. The firm has the resources to manage complex cross-border transactions, projects and matters. It acts for MNCs, private equity, international organisations, government institutions and private clients; it is frequently instructed by international law firms. Shearn Delamore & Co's international resources and reach include its membership of the World Law Group, World Services Group, Employment Law Alliance and, in 2020, Drew Network Asia (DNA) – a regional platform to serve clients seeking legal advice within the ASEAN region. The firm's diverse experience and interdisciplinary collaborations enable it to provide clients with a complementary range of skills to meet their needs.

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