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Malaysia

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Malaysia continues to strengthen its reputation as a modern pro-arbitration jurisdiction.

The Malaysian Arbitration Act 2005 (the 2005 Act), which came into force on 15 March 2006, repealed the Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985. The 2005 Act introduced a legislative framework in support of international arbitration in line with generally recognised principles of international arbitration law. Initial teething problems arising from the language of the 2005 Act were addressed by the Arbitration (Amendment) Act 2011 (the 2011 Amendment Act). The result is a strong statutory underpinning of the continuing development of international arbitration in Malaysia.

Following on from this legislative overhaul, Malaysian jurisprudence has, in recent years, been based on a firm commitment to the principle of minimal curial intervention. Moreover, the Malaysian courts readily draw on the case law from other pro-arbitration jurisdictions, thereby demonstrating a trans-national approach and sensitivity to the development of local law on the subject.

Complementing these developments is the Kuala Lumpur Regional Centre for Arbitration (KLRCA). The KLRCA was set up in 1978 by the Asian-African Legal Consultative Organisation to provide a neutral venue in the Asia-Pacific region for the arbitration of disputes in relation to trade, commerce and investment. Today, it hosts and administers domestic and international commercial arbitrations, and offers other dispute resolution processes, such as adjudication and mediation. The KLRCA projects itself as a developing, innovative and unique arbitration centre for international arbitration, and rightfully so. Since the appointment of an experienced practising arbitrator as the director of the KLRCA in 2010, the centre has grown by leaps and bounds. In 2014, the centre moved to larger, purpose-oriented premises. The KLRCA's rules are comparable to those of other major arbitration institutions. The main set of rules – the KLRCA Arbitration

Rules – incorporate the UNCITRAL Arbitration Rules (as revised in 2010). The KLRCA has a separate set of rules for expedited arbitrations (termed the Fast Track Arbitration Rules) as well as a set of rules that are specifically designed for the arbitration of disputes arising from commercial transactions premised on Islamic principles (the KLRCA i-Arbitration Rules). A central feature of the KLRCA i-Arbitration Rules is that they incorporate a reference procedure to a shariah advisory council or shariah expert whenever the arbitral tribunal has to form an opinion on a point related to shariah principles.

The 2005 Act

The primary source of law in relation to both international and domestic arbitration in Malaysia is the 2005 Act, as amended by the 2011 Amendment Act. The 2005 Act is modelled on the UNCITRAL Model Law on International Commercial Arbitration 1985 (the Model Law), with amendments as adopted in 2006. It also incorporates important articles from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 to which Malaysia is a signatory. As Malaysia is a common law jurisdiction, the 2005 Act is further supplemented by case law that interprets and applies its provisions. In this regard, the 2005 Act vests the power of judicial intervention in the High Court, which is itself defined under section 2 of the 2005 Act to encompass both the High Court of Malaya and the High Court in Sabah and Sarawak.[1]

Section 8 of the 2005 Act provides the foundation of the approach now taken by Malaysian law and the Malaysian courts to arbitration. It provides that '[n]o court shall intervene in matters governed by this Act, except where so provided in this Act'; thus espousing the Model Law philosophy of providing within the statute itself for all instances of potential court intervention in matters regulated by the statute.[2] Section 8 was discussed and applied by the High Court in *Twin Advance (M) Sdn Bhd v Polar Electro Europe BV*.[3] In that case, the plaintiff sought to set aside an arbitral award made in Singapore by arguing that the court had the inherent jurisdiction to set aside the Singapore-made award. The High Court rejected such a contention and held that the effect of section 8 is to 'exclude [the court's] general or residual powers or its inherent jurisdiction to vary the substantive provisions of the [2005 Act]'.[4]

The 2005 Act distinguishes between international and domestic arbitration, with the more 'interventionist' sections of the 2005 Act applying only to domestic arbitrations. International arbitration is defined, in general accordance with the Model Law provisions, as an arbitration where (i) one of the parties has its place of business outside Malaysia, (ii) the seat of arbitration is outside Malaysia, (iii) the substantial part of the commercial obligations are to be performed outside Malaysia, (iv) the subject matter of the dispute is most closely connected to a state outside Malaysia, or (v) the parties have agreed that the subject matter of the arbitration agreement relates to more than one state.[5] Parties to a domestic arbitration are free to opt in to the non-interventionist regime. Likewise, parties to an international arbitration may opt in to the interventionist regime.

Party autonomy features strongly in the 2005 Act. Under the 2005 Act, parties are at liberty to make their own decisions on the seat of the arbitration,[6] the substantive law applicable to the dispute,[7] the number of arbitrators[8] and the procedure for their appointment,[9] the time for challenge of an arbitrator, and, subject to the provisions of the 2005 Act, the procedure to be followed by the arbitral tribunal in conducting the proceedings. Section 30(1) of the 2005 Act provides for the arbitral tribunal in an international arbitration to decide the dispute in accordance with the law as agreed upon by the parties as applicable to the substance of the dispute. In the event that parties to an international arbitration fail to agree on the applicable substantive laws, the arbitral tribunal shall apply the law determined by the conflict of laws rules.[10]

The arbitration agreement and the jurisdiction of the tribunal

Malaysia takes a broad approach to the construction of arbitration agreements. The Fiona Trust single-forum presumption – that 'rational businessmen are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal'[11] – represents the law in Malaysia.[12]

The doctrine of *Kompetenz-Kompetenz* is also recognised in Malaysia. Section 18(1) of the 2005 Act provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.[13] The doctrine has been applied by the courts in the cases of *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor*,[14] *Chut Nyak Isham bin Nyak Ariff v Malaysian Technology Development Corp Sdn Bhd & Ors*,[15] and *TNB Fuel Services Sdn Bhd v China National Coal Group Corp*.[16] Malaysian law also recognises the principle of separability; namely that the arbitration agreement is separate from the main contract in which it may be contained.[17] An arbitration agreement therefore will not be invalidated because of, for example, an illegality invalidating the main contract.[18]

Section 10 of the 2005 Act allows a party to apply to the High Court for a stay of legal proceedings if the subject matter of the dispute is subject to an arbitration agreement. Section 10 of the 2005 Act makes it mandatory for the High Court to grant a stay unless the arbitration agreement is null and void, inoperative or incapable of being performed. Moreover, the Malaysian courts recognise the principle that it is for the arbitrators to first decide on questions of jurisdiction, and not the courts. In the recent decision of *Press Metal Sarawak v Etiqa Takaful Bhd*,[19] the Federal Court specifically approved the following pronouncement of the Canadian Supreme Court in *Dell Computer Corporation v Union des Consommateurs*:[20]

> In a case involving an arbitration agreement, any challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator in accordance with the competence-competence principle, which has been incorporated into art. 943 C.C.P. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception, which is authorized by art. 940.1 C.C.P., is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record. Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding.

The Federal Court also specifically approved the following propositions, taken from the Singapore cases of *Dalian Hua Liang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd*[21] and *Tjong Very Sumito v Antig Investments*:[22]

> …if it was at least arguable that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered.
>
> …if the arbitration agreement provides for arbitration of "disputes" or "difference" or "controversies", then the subject matter of the proceedings in question would fall outside the terms of the arbitration agreement if (a) there was no "disputes" or "difference" or "controversy" as the case may be; or (b) where the alleged dispute is unrelated to the contract which contains the arbitration agreement.

The seat of arbitration

In *The Government of India v Petrocon India Limited,*[23] the Federal Court was faced with a question regarding the identification of the seat of arbitration in circumstances where the law applicable to the container contract was Indian law; but where the contract specified the 'venue' of the arbitration as Kuala Lumpur, while at the same time expressly providing that the 'arbitration agreement' was to be 'governed by' the 'laws of England'. The Court of Appeal had concluded that the juridical seat was London, because English law was chosen as the law of the arbitration.

The Federal Court disagreed and held that '…the seat of arbitration will determine the curial law that will govern the arbitration proceeding', and drew on English case law to come to the conclusion that '…there is a strong presumption that the place of arbitration named in the agreement will constitute the juridical seat.'[24]

The Federal Court expressly recognised that there was a distinction between the seat of arbitration for the purposes of identifying the curial law, and the physical or geographical place where the arbitration was held, considering that '[i]n the case of place of arbitration it can be shifted from place to place without affecting the legal seat of the arbitration.' The Court, however, held that the word 'venue' in the clause meant the juridical seat, reasoning that if it had merely been a reference to the geographical or physical seat, it would not have been necessary to have it inserted in the agreement; and that in any event the word 'venue' and 'seat' are often used interchangeably. Ultimately however, the Federal Court did not overturn the decision of the Court of Appeal, as it accepted the argument of the respondent that, on the facts of the case, the parties had subsequently expressly agreed to change the seat of the arbitration to London.

The appointment of arbitrators

Sections 12 to 17 of the 2005 Act govern the appointment of arbitrators. The distinction between domestic and international arbitrations also determines the applicability of section 12(2) (found in Part II) of the 2005 Act. Section 12(2) provides that in the event that the parties to the arbitral proceedings fail to determine the number of arbitrators, the arbitral tribunal shall consist of three arbitrators in the case of an international arbitration and a single arbitrator in the case of a domestic arbitration.

The default procedures for the appointment of arbitrators are provided for under section 13 of the 2005 Act. Parties are, however, free to determine the procedures that are to be adopted with regard to the appointment of arbitrators. Arbitrators are expected to disclose circumstances that may result in a conflict of interest, as provided in section 14 of the 2005 Act.

In the event that the parties are unable to agree on the appointment of arbitrators, either party may apply to the director of the KLRCA to appoint the arbitrators. In the event that the director similarly fails to appoint the arbitrators, either party may then apply to the High Court for assistance in the appointments.

In the case of *Sebiro Holdings Sdn Bhd v Bhag Singh*,[25] the Court of Appeal was confronted with the question of whether the KLRCA director's appointment of an arbitrator was susceptible to challenge. Before the High Court, the appellant had sought, but failed to terminate, the appointment of the respondent as arbitrator on the grounds that he lacked geographical knowledge of Sarawak, which was the place of performance of the underlying contract. In dismissing its appeal, the Court of Appeal noted that 'the power exercised by the Director of the KLRCA under subsections 13(4) and (5) of [the 2005 Act] is an administrative power' and therefore '[his function] is not a judicial function where he has to afford the right to be heard to the parties before an arbitrator(s) is appointed'.[26] Following this, it was held that:[27]

> The Court cannot interpose and interdict the appointment of an arbitrator whom the parties have agreed to be appointed by the named appointing authority under the terms of the Contract, except in cases where it is proved that there are circumstances which give rise to justifiable doubt as the [arbitrator's] impartiality or independence or that the [arbitrator] did not possess the qualification agreed to by the parties.

On the facts, since there was no pre-agreement between the parties as to the arbitrator's qualification, the arbitrator could not be disqualified on the grounds argued by the appellant.

Interim relief

The scheme of the 2005 Act permits both the arbitrator and the courts to grant interim relief. Thus, section 19 of the 2005 Act permits arbitral tribunals to grant orders that include security for costs and discovery of documents. On the other hand, section 11 of the 2005 Act expressly confers powers on the High Court to make interim orders in respect of the matters set out in section 11(1)(a)–(h), which include an order to prevent the dissipation of assets pending the outcome of the arbitration proceedings. Section 11(3) of the

2005 Act expressly provides that such powers extend to international arbitrations where the seat of arbitration is not in Malaysia.

Awards

Section 2(1) of the 2005 Act defines an award as a decision of the arbitral tribunal on the substance of the dispute and this includes any final, interim or partial award and any award on costs or interest. Section 36(1) of the 2005 Act further provides that all awards are final and binding. Pursuant to section 33 of the 2005 Act, an award should state the reasons upon which the award is based unless the parties have otherwise agreed or the award is on agreed terms. Section 35 of the 2005 Act allows the tribunal to correct any clerical error, accidental slip or omission in an award; it also permits the tribunal to give an interpretation of a specific point or part of the award upon request by a party.

Sections 38 and 39 of the 2005 Act address the recognition and enforcement of awards. While section 38 sets out the procedure for recognising and enforcing awards, section 39 of the 2005 Act sets out the grounds on which the recognition or enforcement of an award will be refused.

The grounds for setting aside an award, and for refusing recognition or enforcement, are drawn from article V of the New York Convention – a party seeking to set aside or seeking to resist recognition or enforcement must show that:

- a party to the arbitration agreement was under an 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 the state in which the award was made;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- the award contains decisions on matters 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 (unless such agreement was in conflict with a provision of the 2005 Act from which the parties cannot derogate), or, failing such agreement, was not in accordance with the 2005 Act; or
- 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.

An award may also be set aside or recognition or enforcement refused where the award is in conflict with the public policy of Malaysia; or on the ground that the subject matter of the dispute is not arbitrable under Malaysian law. In this regard, section 4(1) of the 2005 Act expressly provides that 'any dispute that 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.'

Various cases illustrate that the prevailing judicial philosophy is to take an extremely restrictive approach to permitting setting aside applications. In *Ajwa for Food Industries Co (Migop), Egypt v Pacific Inter-link Sdn Bhd & Another Appeal*, the Court of Appeal explained that 'the court should be slow in interfering with an arbitral award. The court should be restrained from interference unless it is a case of patent injustice which the law permits in clear terms to intervene.'[28] As regards the meaning of the term 'public policy' in this context, the courts have also been clear that the ground is extremely narrow and to be read restrictively. As stated by *Lee Swee Seng J in Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd*,[29] '[a]n error of law or fact does not engage the public policy of Malaysia…'[30] In this regard, it is clear that the Malaysian courts do not equate public policy in this context with a wide conception of the public interest; rather, the courts have applied the following test:[31]

> Although the concept of public policy of the State is not defined in the Act or the model law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would "shock the conscience"…, or is "clearly injurious to the public good or…

> wholly offensive to the ordinary reasonable and fully informed member of the public"… or where it violates the forum's most basic notion of morality and justice... This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law.[32]

On the other hand, if there is a breach of natural justice, the award is clearly liable to be set aside. A recent case in point is *Sime Darby Property Berhad v Garden Bay Sdn Bhd*.[33] The High Court was faced with an application to set aside an arbitral award. The dispute concerned a landscaping and turfing project. The claimant in the arbitration was the contractor for the project, while the respondent was the employer. The tribunal had found the claimant to be liable for rectification works instructed by the contract administrator, but then held that the parties had, by conduct, accepted the retention sum as a mode to allocate funds for rectification works and sought to limit the amount recoverable by the employer to that amount retained. This, however, was not the position taken by either party.

The Court set aside the award and held that '…if the Arbitrator had wanted to rely on her knowledge of what she understood to be the usual practice in construction contracts, then she should inform the parties about it and invite them to challenge such an understanding of usual practice.'[34] The Court, however, pointed out that this was not done, and that the Arbitrator had thus decided an 'issue not at play and not pleaded and in that pejorative sense, an "invented issue" and thus was in breach of natural justice in not allowing the parties to be heard on this new issue.'[35] Of significance is the High Court's view as to the test to be applied where there had been a breach of natural justice. The High Court considered that '[a]ny breach of natural justice not in the manner of a technical or inconsequential breach would be sufficient for the court to intervene under section 37(1)(b)(ii) read with section 37(2)(b) application to set aside.'[36]

However, it is also clear that the courts take a pragmatic approach to such applications, and will not be strung up by technicalities. This is clearly illustrated by the decision in *Tridant Engineering (M) Sdn Bhd v Ssangyong Engineering and Construction Co Ltd*.[37]

This was an appeal against a High Court decision to the effect that an award contained a decision on matters beyond the scope of the submission to arbitration. The respondent was the main contractor for a development in Johor. The appellant was a nominated subcontractor, who entered into two contracts with the respondent contractor, one for the installation of electrical services, and the other for extra-low voltage installation works. The dispute in the arbitration concerned a claim by the appellant for sums said to be due and owing. The respondent's position was that it was entitled to refuse payment on the basis of a 'pay when paid' clause in the contracts; and that in any event the appellant's claim was time-barred. The appellant's position was that a reasonable time to pay had lapsed and hence the respondent was liable to pay; as regards the limitation issue, the appellant's position was that time only started to run from the date reasonable steps had been taken by the respondent to be paid by the employer.

The arbitrator decided that the respondent's liability to pay was not contingent on the receipt of the sum from the employer. On the limitation issue, the arbitrator decided that there had been an acknowledgment of debt in a proof of debt filed with an insolvent entity who had an interest in the project, and that this resulted in a postponement of the limitation period pursuant to sections 26 and 27 of the Limitation Act 1953 (the Limitation Act).

The High Court decided that this latter aspect of the arbitrator's decision fell outside the scope of the reference to arbitration. It is noteworthy, in this regard, that the appellant had not placed any reliance on sections 26 and 27 of the Limitation Act in its pleadings.

The Court of Appeal reversed the decision of the High Court and noted that, although the relevant sections of the Limitation Act were not pleaded, the arbitrator had invited full submissions on the issue; moreover, there was no evidence that the respondent had protested against the arbitrator's introduction of the issue of postponement of the limitation period. Similarly, the respondent had not sought to introduce any further evidence.

The Court of Appeal considered, in this context, that the failure to plead was not fatal to the respondent's claims. There had been no breach of the rules of natural justice. Moreover, the Court of Appeal took an

extremely pragmatic approach to the question of whether the issue had been sufficiently engaged on the pleadings:

> [32] …even though sections 26 and 27 of the Limitation Act 1953 were not formally pleaded, the pleadings as they stood were adequate to put the Respondent on notice the issue of postponement of the limitation period. It was undisputed that the defence of the Respondent in the alternative was that the Appellant's claim was time barred by virtue of the Limitation Act and once that issue of limitation was put on the table so to speak, the Appellant was fully entitled to avail of any means to rebut the defence of limitation.

The Court of Appeal in this context endorsed the following proposition, drawn from the Singapore decision in *PT Prima International Development v Kempinski Hotels SA*:[38]

> …any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded.

Conclusion

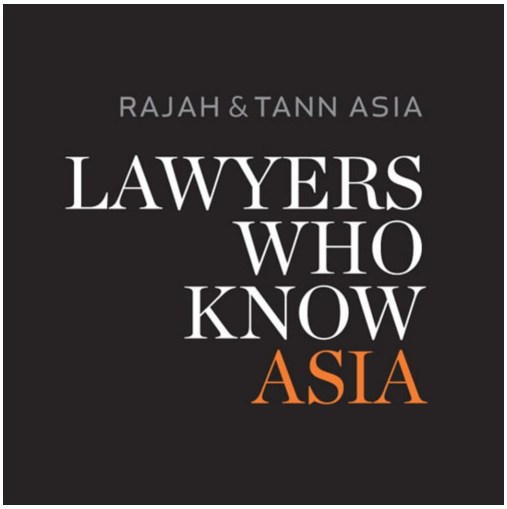
Malaysia continues its growth as a centre for arbitration. The 2005 Act provides a coherent modern legislative framework in line with international norms and best practices. As it stands, Malaysia has all the components in place to take off as a centre for international arbitration. Recent decisions of the country's domestic courts underscore the fact that the Malaysian judiciary is now distinctly pro-arbitration – as Datuk Professor Sundra Rajoo, director of the KLRCA, has stated: '[t]he courts have been enforcing awards and more importantly, supporting awards. They give interim measures and they also support arbitral awards and applications from arbitrations that are seated outside Malaysia.'[39]

Given the current arbitral landscape and the progressive and innovative approach taken by the KLRCA in promoting Malaysia as a cost-efficient centre for dispute resolution, the country is poised to tap into the significant growth of international arbitration in the Association of Southeast Asian Nations and Asia-Pacific region. The right foundations are in place, and the future remains bright.

Notes

1. Section 2 of the 2005 Act.
2. Paragraph 17 of the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration.
3. [2013]7 MLJ 811.
4. [2013]7 MLJ 811 at [39].
5. Section 2 of the 2005 Act.
6. Section 22(1) of the 2005 Act.
7. Section 30(2) of the 2005 Act.
8. Section 12(1) of the 2005 Act.
9. Section 13(2) of the 2005 Act.
10. Section 30(4) of the 2005 Act.
11. *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2007] 4 All ER 951, at 957.
12. *Press Metal Sarawak v Etiqa Takaful Bhd* [2016] MLJU 404, *KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd* [2013] 1 CLJ 993. see also *PLB-KH Bina Sdn Bhd v Hunza Trading Sdn Bhd* [2014] 1 LNS 1074.
13. Section 18 also provides for the procedures and time limits for raising objections to the arbitral tribunal's jurisdiction. It also provides for appeal to court (which shall have the final say) in regard to the arbitral tribunal's ruling on its jurisdiction.
14. [2008] 1 MLJ 233.
15. [2009] 9 CLJ 32.
16. [2013] 1 LNS 288.
17. *Government of India v Petrocon India Limited* [2016] MLJU 233.

18. *Arul Balasingam v Ampang Puteri Specialist Hospital Sdn Bhd* (formerly known as *Puteri Specialist Hospital Sdn Bhd*) [2012] 6 MLJ 104 at 110I-111A.
19. [2016] MLJU 404.
20. [2007] SCJ No. 34.
21. [2005] 4 SLR 646.
22. [2009] 4 SLR 732.
23. [2016] MLJU 233.
24. At [35].
25. [2015] 4 CLJ 409.
26. Ibid, at paragraph 17.
27. Ibid, at paragraph 21.
28. [2013] 2 CLJ 395 at [13].
29. [2016] MLJU 354.
30. At [44].
31. *Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd* [2012] 5 MLJ 809.
32. Taken from *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, at [59] (internal citations omitted).
33. [2017] MLJU 145.
34. At [42].
35. At [39].
36. At [25].
37. [2016] MLJU 5.
38. [2012] SGCA 35.
39. www.legalbusinessonline.com/reports/arbitration-asia-next-generation.



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