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Ninth Edition

Editor
James H Carter

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CONTENTS

PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2018

Chapter 27

MALAYSIA

Avinash Pradhan[1]

I INTRODUCTION

Malaysian arbitration law is underpinned by the Malaysian Arbitration Act 2005 (the 2005 Act). The 2005 Act introduced a legal framework for arbitration consistent with generally recognised principles of international arbitration law. The 2005 Act, which came into force on 15 March 2006, repealed the long-standing Arbitration Act 1952 (the 1952 Act) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985. Residual ambiguities arising from the interpretation and application of the 2005 Act were addressed by the Arbitration (Amendment) Act 2011 (the 2011 Amendment Act).

This modern statutory framework had provided fertile ground for the development of international arbitration in Malaysia. In this regard, the higher courts in Malaysia appear to have come to terms with the philosophical transition required by the legislature. Recent decisions demonstrate a strong commitment to the principle of minimal curial intervention inherent in the modern statutory framework.

Complementing these developments, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) had built up a significant reputation as a modern and efficient regional arbitration centre. The Centre had experienced transformational growth following the appointment of an experienced, practising arbitrator as its director in 2010. In 2014, the KLRCA moved into larger, more purpose-oriented premises that befit its reputation.

The past year has seen two significant developments to Malaysian arbitration law and practice. The first was with respect to the KLRCA. On 7 February 2018, the KLRCA was officially renamed the Asian International Arbitration Centre (AIAC). The name change, enabled through the passage of the Arbitration (Amendment) Act 2018 (First 2018 Amendment Act), is part of a larger rebranding for the centre, in line with its increasing recognition as an innovative hub for international alternative dispute resolution. The second is legislative reform through the Arbitration (Amendment) (No. 2) Act 2018 (Second 2018 Amendment Act). The Second 2018 Amendment Act came into force on 8 May 2018. It introduces a variety of changes to the Malaysian legislative framework, all with the central objective of keeping Malaysian arbitration law progressive and in line with modern developments in the norms of international arbitration.

This chapter discusses general principles of the Malaysian law on international arbitration, as well as recent developments relating to international arbitration law and practice in Malaysia.

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i The legal framework for international arbitration in Malaysia

The 2005 Act

The 2005 Act came into force on 15 March 2006. It is based on the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and is strongly influenced by the New Zealand Arbitration Act 1996.[2]

The 2005 Act, as amended by the 2011 Amendment Act, vests the power of judicial intervention in the institution of the 'High Court', which is defined under Section 2 of the 2005 Act to encompass both the High Court of Malaya and the High Court in Sabah and Sarawak.[3] Should parties wish to appeal a decision of a High Court, they have recourse to the Court of Appeal and subsequently the Federal Court, provided leave for such appeal is obtained.

One of the main differences between the 2005 Act and the 1952 Act is that 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 UNICTRAL Model Law provisions, as an arbitration where:

a one of the parties has its place of business outside Malaysia;
b the seat of arbitration is outside Malaysia;
c the substantial part of the commercial obligations are to be performed outside Malaysia;
d the subject matter of the dispute is most closely connected to a state outside Malaysia; or
e the parties have agreed that the subject matter of the arbitration agreement relates to more than one state.[4]

Parties to a domestic arbitration are free to opt into the non-interventionist regime. Likewise, parties to an international arbitration may opt into the interventionist regime.

The 2005 Act is divided into four parts. Part I deals with preliminary issues such as the commencement of arbitration and key definitions (Sections 1 to 5). Part II is where the essence of the Act (Sections 6 to 39) lies. Part III (Additional Provisions Relating to Arbitration) deals chiefly with judicial control over the arbitrations (Sections 40 to 46). There are provisions allowing a High Court to extend the time for the commencement of arbitration proceedings[5] or the delivery of an award.[6] However, Part III only applies to international arbitrations if and to the extent that the parties agree on its applicability.[7] Part IV addresses miscellaneous issues such as the liability of arbitrators and the immunity of arbitral institutions (Sections 47 to 51).

2 T Baskaran, 'Recent Amendments to the Malaysian Arbitration Act', Arbitration International (Vol. 28, Issue 3, Oxford University Press, 2012) (pp. 533–43) at p. 1.
3 Section 2 of the 2005 Act.
4 Section 2 of the 2005 Act.
5 Section 45 of the 2005 Act.
6 Section 46 of the 2005 Act.
7 Sections 3(3) and 3(4) of the 2005 Act.

The 2011 Amendment Act

The 2005 Act suffered a few teething difficulties. The 2011 Amendment Act, which came into force on 1 July 2011, was introduced to resolve these concerns. The key features of the 2011 Amendment Act are briefly set out below.

Section 8 now makes clear the applicability of the Model Law philosophy of providing an exhaustive list within the statute itself of all instances where court intervention is permitted:[8] Section 8 of the 2005 Act now provides that 'No court shall intervene in matters governed by this Act, except where so provided in this Act', which is a change from 'Unless otherwise provided, no court shall intervene in any of the matters governed by this Act'.[9] Section 8 was discussed and applied by the High Court in *Twin Advance (M) Sdn Bhd v. Polar Electro Europe BV*.[10] In that case, the plaintiff sought to set aside an arbitration award made in Singapore by arguing that the Court had the inherent jurisdiction to set aside the Singapore-made award. The High Court rejected that 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]'.[11]

Section 10 was amended to remove, as a basis for an application to resist a stay of proceedings, the ground that there 'is in fact no dispute between the parties' with regard to the matters sought to be referred to arbitration.[12]

Section 10(4)[13] and Section 11(3)[14] were introduced, and make it clear that a High Court can order a stay of proceedings and grant interim orders in support of arbitrations notwithstanding that the seat of the arbitration or intended arbitration is not in Malaysia.

Section 39, which covers the grounds for refusing the recognition or enforcement of an international award, has been amended to remove, as an independent basis for challenge, the ground that the arbitration agreement under which the award was made was, failing any indication as to the law to which the parties' have subjected it, not valid under the laws of Malaysia. If the laws to which the parties have subjected the agreement to are not indicated, the validity of the agreement may be impugned not by reference to the law of Malaysia, but instead by reference to the law of 'the state where the award was made'.[15]

The 2011 Amendment Act also amended Section 51(2) of the Bahasa Malaysia text to remove an inconsistency with the English text. Both texts of the 2005 Act now clearly provide that the 1952 Act only applies in instances where the arbitration proceedings commenced before 15 March 2006 (i.e., the date the 2005 Act came into force).[16] This removes uncertainty created by an earlier High Court decision that suggested, on the basis

8 Paragraph 17 of the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial arbitration as amended in 2006.

9 Section 3 of the 2011 Amendment Act and Section 8 of the 2005 Act.

10 [2013]7 MLJ 811.

11 [2013]7 MLJ 811 at [39].

12 Section 4(a) of the 2011 Amendment Act and Section 10(1) of the 2005 Act.

13 Section 4(c) of the 2011 Amendment Act and S10(4) of the 2005 Act.

14 Section 5(b) of the 2011 Amendment Act and S11(3) of the 2005 Act.

15 Section 8(a) of the 2011 Amendment Act and Section 39 of the 2005 Act.

16 Section 10(a) of the 2011 Amendment Act and Section 51 of 2005 Act.

of the Bahasa Malaysia text, that the 1952 Act would continue to apply to an arbitration commenced after 15 March 2006, if commenced pursuant to an arbitration agreement entered into before that date.[17]

The Second 2018 Amendment Act

The Second 2018 Amendment Act has introduced a number of changes to the 2005 Act. The key changes are discussed below.

As regards the definitions under the 2005 Act, two key amendments have been made. First, the definition of an arbitral tribunal has been amended so as to extend to an 'emergency arbitrator', thereby allowing for the recognition of decisions of emergency arbitrators. Second, the definition of 'arbitration agreement' has been expanded so as to encompass agreements that are made or recorded by electronic means.

Amendments have also been made to allow for broader rights of representation in arbitrations under the 2005 Act. Specifically, Section 3A of the 2005 Act has been amended to allow for a party to arbitral proceedings to be 'represented in the proceedings by any representative appointed by the party'.

The provisions of the 2005 Act on interim measures have been overhauled, such that the 2005 Act is now fully in line with the UNCITRAL Model Law 2006. This includes the adoption of provisions with respect to the possibility of *ex parte* interim relief being granted by the arbitral tribunal. Thus, Section 19B(1) of the 2005 Act now provides that 'Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.' However, section 19C(6) of the Act makes clear that a preliminary order 'shall be binding on the parties but shall not be the subject to any enforcement by the High Court…' and that it 'shall not constitute an award.'

Further, pursuant to a new Section 19(J).(1), the High Court has the power to issue an interim measure in relation to arbitration proceedings irrespective of whether the seat of arbitration is in Malaysia, in keeping with the UNICTRAL Model Law. Of further significance is that Section 19(J)(3) expressly provides that '[w]here a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling the by the arbitral tribunal as conclusive for the purposes of the application.'

In addition, the Second 2018 Amendment Act has introduced Sections 41A and 41B to the 2005 Act. Section 41A provides that, subject to certain exceptions, the parties are prohibited from publishing, disclosing or communicating any information relating to the arbitral proceedings or an award made in those proceedings. Section 41B provides for proceedings under the 2005 Act to be heard otherwise than in open court.

A further significant change engendered by the Second 2018 Amendment Act is the deletion of what were previously Sections 41 and 42 of the 2005 Act. Sections 41 and 42 had

17 *Putrajaya Holdings Sdn Bhd v. Digital Green Sdn Bhd* [2008] 7 MLJ 757; followed in *Hiap-Taih Welding & Construction Sdn Bhd v. Bousted Pelita Tinjar Sdn Bhd* (formerly known as Loagan Benut Plantations Sdn Bhd) [2008] 8 MLJ 471. Cf *Majlis Ugama Islam Dan Adat Resam Melayu Pahang v. Far East Holdings Bhd & Anor* [2007] 10 CLJ 318; *Total Safe Sdn Bhd v. Tenaga Nasional Bhd & TNB Generation Sdn Bhd* [2009] 1 LNS 420.

formed part of Part III of the Act – as explained above, Part III of the Act is only applicable to an international arbitration if and to the extent parties agree. Section 41 had permitted a party, with the consent of the other parties to the arbitration proceedings or alternatively the consent of the arbitral tribunal, to apply to the High Court for a determination of a question of law arising in the course of the arbitration, while Section 42 permitted a party to refer a question of law arising out of an award to the High Court. The AIAC has described the change as being motivated by the desire to 'make Malaysia a safe seat and to put the Act in line with other arbitration acts worldwide'.[18]

Admiralty proceedings

The 2005 Act had sought to accommodate the maritime industry by expanding the scope of the High Courts' powers to allow the arrest of ships or vessels for security. Under the 2011 Amendment Act, special provisions have been introduced in relation to admiralty proceedings. These provisions permit the court to order the retention of any property arrested or any bail or other security given, pending the determination of disputes in admiralty arbitrations, to satisfy any award that may be given in the arbitration proceedings. Alternatively, the court can also order that a stay of proceedings be conditional upon equivalent security being provided to meet the arbitration claim.[19] Further, an amendment to Section 11 clarifies that the court's powers to make interim orders 'to secure the amount in dispute' extends to the arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Courts.[20]

ii Key features of the law of international arbitration in Malaysia

The new statutory framework has achieved its aim of bringing Malaysia in line with the norms of international commercial arbitration.

General principles

The principle of party autonomy features prominently in the 2005 Act. Aside from the arbitration agreement being the foundation of the applicability of the statutory framework, parties are free to agree on various matters – for example, the seat of the arbitration,[21] the substantive law applicable to the dispute,[22] the number of arbitrators[23] and the procedure for their appointment,[24] the time for challenge of an arbitrator and, subject to the provisions of the 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.[25]

18 AIAC Announcement 'Amendments to the Arbitration Act 2005 (Act 646) Comes Into Effect' https://www.aiac.world/news/253 KLRCA, 'Newsletter, October–Dec 2012' (accessed 14 May 2018).

19 Section 10(2A) to (2C) of the 2005 Act.

20 Section 11(e) of the 2005 Act.

21 Section 22(1) of the 2005 Act.

22 Section 30(1) of the 2005 Act.

23 Section 12(1) of the 2005 Act.

24 Section 13(2) of the 2005 Act.

25 Section 30(4) of the 2005 Act.

Malaysia takes an expansive approach to the interpretation 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'[26] – has been approved and followed in Malaysia.[27]

The doctrine of *Kompetenz-Kompetenz* is given recognition in Malaysia, both in the sense of confirmation that the arbitrators may rule on their own jurisdiction, as well as discouraging the courts from deciding an issue before the arbitral tribunal has done so. Thus, Section 18(1) provides that an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of an arbitration agreement.[28] The doctrine has been applied by the courts in *Standard Chartered Bank Malaysia Bhd v. City Properties Sdn Bhd & Anor*,[29] *Chut Nyak Isham bin Nyak Ariff v. Malaysian Technology Development Corp Sdn Bhd & Ors*[30] and, more recently, in *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp*.[31]

A closely linked principle is that of separability. This relates to the concept that an arbitration agreement is separate from the main contract in which it may be contained. An arbitration agreement therefore will not be invalidated because of, for example, an illegality invalidating the main contract.[32]

Stay of proceedings

Section 10 of the 2005 Act allows a party to apply to the High Court for a stay of legal proceedings if the dispute is subject to an arbitration agreement. The High Court can only refuse to grant a stay when the arbitration agreement is null and void, inoperative or incapable of being performed.[33]

The Malaysian courts have taken a pro-arbitration stance by interpreting this provision narrowly.[34] As opined by the Court in *CMS Energy Sdn Bhd v. Poscon Corp*,[35] it is the 'unmistakable intention of the legislature that the court should lean towards arbitration proceedings'. In *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp*,[36] the Court confirmed the mandatory nature of Section 10. The Learned Anantham Kasinather JCA stated that:

26 *Fiona Trust & Holding Corporation and Others v. Privalov and Others* [2007] 4 All ER 951, at 957.

27 *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.

28 Section 18 also provides for the procedures and time limits for raising objections to the arbitral tribunal's jurisdiction. It also provides for an appeal to court (which shall have the final say) in regard to the arbitral tribunal's ruling on its jurisdiction.

29 [2008] 1 MLJ 233.

30 [2009] 9 CLJ 32.

31 [2013] 1 LNS 288.

32 *Arul Balasingam v. Ampang Puteri Specialist Hospital Sdn Bhd (formerly known as Puteri Specialist Hospital Sdn Bhd)* [2012] 6 MLJ 104 at 110I–111A.

33 Section 10(1) of the 2005 Act.

34 *Chut Nyak Hisham Nyak Ariff v. Malaysian Technology Development Corporation Sdn Bhd* [2009] 9 CLJ 32; *Renault Sa v. Inokom Corporation Sdn Bhd & Anor and Other Applications* [2010] 5 CLJ 32 *AV Asia Sdn Bhd v. Measat Broadcast Network Systems Sdn Bhd & Anor* [2010] 1 LNS 1601; *Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd* [2010] 7 CLJ 785.

35 [2008] 6 MLJ 561.

36 [2013] 4 MLJ 857

> *The present form of s10 of the Arbitration Act 2005 is the result of the amendment to that section which came into force on 1 July 2011 (Act A1395). [...] The court is no longer required to delve into the facts of the dispute when considering an application for stay. Indeed, following the decision of the court in CMS Energy Sdn Bhd v. Poscon Corp, a court of law should lean towards compelling the parties to honour the 'arbitration agreement' even if the court is in some doubt about the validity of the 'arbitration agreement'. This is consistent with the 'competence principle' that the arbitral tribunal is capable of determining its jurisdiction, always bearing in mind that recourse can be had to the High Court following the decision of the arbitral tribunal.*[37]

A party seeking a stay should tread carefully, however, as taking a step in High Court proceedings may jeopardise the right to arbitration. In *Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Bhd*,[38] the High Court held that a stay will not be granted if the applicant has taken part in court proceedings. In *Lau King Kieng v. AXA Affin General Insurance Bhd and another suit*,[39] the court found that the defendants, by requesting an extension of time from the plaintiff, had in fact intimated their intention to deliver a statement of defence, thereby abandoning the right to arbitration.

Appointment, qualifications and challenges to the appointment of arbitrators

Sections 12 to 17 of the 2005 Act govern the appointment of arbitrators. Section 12 relates to the number of arbitrators, while Section 13 prescribes the procedure for the appointment of arbitrators. Section 12 states that if parties are unable to agree on the number of arbitrators, a sole arbitrator shall be appointed for domestic arbitrations, while three arbitrators shall be appointed for international arbitrations. Section 13 provides that parties can agree on the procedures that are to be adopted for the appointment of arbitrators, and also provides resolution mechanisms if parties are unable to agree.

Section 14 of the 2005 Act makes it mandatory for a potential arbitrator to disclose any circumstances that are likely to give rise to justifiable doubts as to his or her impartiality or independence, as this is a ground for challenging an arbitrator. It also states that an arbitrator may be challenged if he or she does not possess the qualifications agreed to by the parties. Hence, it is advisable that an appointed arbitrator should disclose any circumstances or interest in the outcome of the arbitration that would cast doubt on his or her impartiality and independence. Section 15 of the 2005 Act further provides for the procedures that are to be adopted when challenging an arbitrator.

Section 16 of the 2005 Act addresses the circumstances when an appointed arbitrator fails to act or when it becomes impossible for the arbitrator to act. Section 17 provides for matters relating to the appointment of a substitute arbitrator in the event of the foregoing.

In *Sebiro Holdings Sdn Bhd v. Bhag Singh*, the Court of Appeal considered the question of the extent to which the decision of the Director of the KLRCA to appoint arbitrators could be challenged. Before the High Court, the appellant 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.

37 [2013] 4 MLJ 857, at Paragraph [24].

38 [2010] 3 CLJ 634.

39 [2014] 8 MLJ 883.

In dismissing the appeal, the Court of Appeal noted that 'the power exercised by the Director of the KLRCA under subsections 13(4) and (5) of [the 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'. Following this, it was held that:

> *[…] 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.

Powers to grant interim relief

Malaysia has, by way of the Second 2018 Amendment Act, overhauled the provisions of the 2005 Act with respect to interim relief, by adopting the provisions of the UNICTRAL Model Law with respect to interim measures. As regards the powers of the High Court, 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) to (e), which includes orders for maintaining or restoring the status quo pending the determination of the dispute; taking action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process; the preservation of assets; the preservation of evidence; and the provision of security for the costs of the dispute. Section 11(3), which had been introduced by the 2011 Amendment Act, continues to state that such powers extend to international arbitrations where the seat of arbitration is not in Malaysia.

Arbitral awards

Section 2(1) of the 2005 Act defines an award as a decision of an arbitral tribunal on the substance of the dispute, and this includes any final, interim or partial award and any award on costs or interests. Section 36(1) of the 2005 Act further provides that all awards are final and binding.

Section 33 of the 2005 Act also provides that an award should be in writing and signed by the arbitral tribunal. If there is more than one arbitrator, the signatures of the majority would be sufficient provided that the reason for any omission is stated. Section 33 further provides that the award should state the reasons upon which it is based unless the parties to the arbitration had agreed otherwise or if the award is on agreed terms. The award shall also state the date and the seat of the arbitration.

Section 35 of the 2005 Act allows the arbitrator or umpire to correct any clerical error, accidental slip or omission in an award. Additionally, it also allows a party to request the tribunal to give an interpretation of a specific point or part of the award.

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 a party to the arbitration agreement was under an incapacity;

b 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;

c 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 its case;

d the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

e the award contains decisions on matters beyond the scope of the submission to arbitration;

f 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

g 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, if the High Court finds that the subject matter of the dispute is not arbitrable under Malaysian law; or if the award is in conflict with the public policy of Malaysia. 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'.

The Malaysian courts have been at pains to emphasise that a restrictive approach is to be taken to setting aside or refusing recognition or enforcement. It has been held that the provisions on setting aside must be narrowly interpreted to give effect to the 'spirit of the 2005 Act which is for all intent and purposes to promote one-stop adjudication in line with international practice'.[40] 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.'[41] Hence, to set aside an award, a claimant has to meet a high standard of proof.

In addition to the public policy ground, the defendant also argued that recognising and enforcing the award would amount to a breach of the rules of natural justice. In this respect, the Court held that since both parties had equal opportunity to be heard, there was no lack of fairness of procedure or breach of natural justice.

Another case that illustrates this restrictive approach is the High Court decision in *Chain Cycle Sdn Bhd v. Government of Malaysia*.[42] The High Court was faced with an application to set aside an arbitral award under Section 37 of the 2005 Act on the ground

40 *Ajwa for Food Industries Co (Migop), Egypt v. Pacific Inter-link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395 at [13].

41 [2013] 2 CLJ 395 at [13].

42 [2014] 10 CLJ 22.

that there had been a breach of the rules of natural justice. The applicant pointed to the fact that the arbitrator had referred in the award to three cases that had not been cited by the parties in their submissions. No prior notice had been given by the arbitrator to the parties that he intended to take those cases into consideration. Accordingly, the parties did not have an opportunity to consider or to make submissions on these cases.

The High Court dismissed the application. Of significance is the fact that the High Court recognised that an allegation of procedural unfairness or impropriety was insufficient in itself to set aside an award. The High Court held that to demonstrate that there had been a breach of natural justice, the procedural unfairness or impropriety had to result in prejudice to the applicant. The High Court held in this case that no prejudice had been suffered by the applicant.

iii Local institutions

As discussed above, the KLRCA has been rebranded as the AIAC. The AIAC is the predominant arbitral institution in Malaysia. As the KLRCA, it had had received international recognition as an experienced, neutral, efficient and reliable dispute resolution provider.[43]

The status of the AIAC as an independent arbitral institution for both domestic and international arbitrations is a clear policy under the 1952 Act and 2005 Act. The Director of the AIAC plays an important role. For example, the Director may function as an appointing authority under the 2005 Act.[44]

The AIAC continues to have an advisory board that advises the AIAC on its strategic direction. This board consists of members who were appointed by Minister Datuk Seri Mohamed Nazri Aziz in the Prime Minister's Department of Malaysia, effective from 15 August 2011. The current board is composed of five renowned international arbitrators and the Attorney-General of Malaysia.[45]

The AIAC has three sets of rules of potential applicability to international arbitration.

The first is the AIAC Arbitration Rules: these are based on the UNCITRAL Arbitration Rules (as revised in 2013) and are the main set of rules. The Rules include provisions for the appointment of an emergency arbitrator for the purposes of granting emergency interim relief prior to the constitution of a tribunal. The Rules were revised in 2018.

The second is the AIAC i-Arbitration Rules. First introduced in 2012, the most recent version came into force on 9 June 2017. These innovative Rules are specially designed to cater for disputes arising from commercial transactions that contain shariah elements or a premise based on shariah principles. The i-Arbitration Rules are based on the AIAC Arbitration Rules with modifications which include a specific procedure for referring questions to an independent shariah advisory council (SAC) or a shariah expert on appointment by the parties.[46] The i-Arbitration Rules make clear that the ruling of the SAC may relate only to

43 KLRCA, 'Newsletter, October–Dec 2012': klrca.org/announcements/klrca-newsletter-oct-dec-2012 (accessed 9 June 2015) at p. 20; Datuk Sundra Rajoo's Speech at the launch of KLRCA's Revised Rules 2013: klrca.org.my/speeches/datuk-sundra-rajoos-speech-at-the-launch-of-klrcas-revised-rules-2013 (accessed 9 June 2015).

44 See, for example, Section 13(5) and Section 13(6) of the 2005 Act.

45 Getting the Deal Through – Arbitration 2013 (Law Business Research, 2013), p. 52. See also klrca.org.my/about/advisory-board (accessed 9 June 2015).

46 Rule 11 of the KLRCA i-Arbitration Rules.

the issue submitted by the arbitral tribunal, and the SAC shall not have any jurisdiction in making discovery of facts, or in applying the ruling or formulating any decision relating to any fact of the matter that is solely for the arbitral tribunal to determine.

The third is the AIAC Fast-Track Arbitration Rules. These are robust rules designed for a quick award. The Fast-Track Arbitration Rules were revised in 2018.

The AIAC is also equipped to deal with investment treaty arbitration. The first collaboration agreement between the KLRCA and ICSID was signed in 1979. The two institutions decided to further strengthen their collaboration by signing a new agreement in 2014. In addition to fostering cooperation between the KLRCA and ICSID, the 2014 agreement provides that the KLRCA (now AIAC) can be used as an alternative hearing venue for ICSID cases should the parties to proceedings conducted under the auspices of ICSID desire to conduct proceedings at the seat of the AIAC. This applies *mutatis mutandis* to the Additional Arbitration and Conciliation Rules of ICSID.[47]

II THE YEAR IN REVIEW

i Developments affecting international arbitration

As discussed above, the most significant development in Malaysian arbitration law has been the Second 2018 Amendment Act. The amendments have resulted in an overhaul of the statutory provisions with respect to interim measures, the statutory recognition of emergency arbitrators and of electronic or electronically recorded arbitration agreements. There are now express powers for arbitral tribunals constituted under the Act to award interest for the pre-award period, and a codification of confidentiality obligations attaching to arbitration proceedings coupled with provisions that ensure court-related arbitration proceedings will be heard other than in open court.

Of further significance is the rebranding of the KLRCA to the AIAC – a welcome development that befits the KLRCA's growth in the past eight years as a centre for international arbitration. The rebranding has a statutory underpinning – of particular significance is that Section 3(1) of the First 2018 Amendment Act provides that '[a]ll references to the Kuala Lumpur Regional Centre for Arbitration in any written law or in any instrument, deed, title, document, bond, agreement or working arrangement subsisting immediately before the coming into operation of this Act shall, when this Act comes into operation, be construed as a reference to the Asian International Arbitration Centre (Malaysia).'

The AIAC has also recently updated its sets of arbitration rules. Key features of the new AIAC Arbitration Rules 2018 are provisions for the joinder of third parties as well as for consolidation, and for the technical review of awards before they are issued. In addition, the AIAC Arbitration Rules 2018 also create a self-contained code in relation to emergency arbitrators.

The AIAC's Fast Track Rules have also been modified. The 2018 Fast Track Rules, applicable by agreement of the parties, provide for short time limits – the proceedings under the Fast Track Rules are designed to last no longer than 180 days. A key feature of the rules is that the arbitral tribunal in principle has only 90 days from the start of the arbitration to conclude the oral hearing. Thereafter, the arbitral tribunal has a further 90 days to draft the award.

47 See klrca.org/rules/investor-state-arbitration (accessed 1 May 2016).

The AIAC has continued to take steps to position itself as a centre for investment treaty arbitration. 2017 saw the signing of a host country agreement between Malaysia and the Permanent Court of Arbitration, which will see the PCA establishing an office at the AIAC's premises for the conduct of its dispute resolution proceedings in Malaysia.[48]

The KLRCA also enjoys tie-ups with other organisations designed to further Malaysia as a recognised centre for international arbitration. For example, the KLRCA entered into memoranda of understanding with the International Court of Arbitration of the ICC in Paris, the Beijing Arbitration Commission, and the Cairo Regional Centre for International Commercial Arbitration.[49]

It is apparent from this activity that the AIAC is committed to establishing itself as a hearing venue for the resolution of both international and domestic disputes, including international investment disputes between investors and governments.

ii Arbitration developments in local courts

The past year has seen a number of significant decisions from the Malaysian courts. They are discussed below. It should be noted that these cases were decided before the coming into force of the Second 2018 Amendment Act. To the extent that the amendments are likely to affect the law as laid down in these decisions, this is highlighted.

Pre-award interest

A decision with far reaching implications was that in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals*.[50] In *Far East Holdings*, the Federal Court ruled that on a reading of Section 33(6) of the 2005 Act, an arbitral tribunal's powers under the 2005 Act did not extend to awarding interest for the pre-award period unless specifically provided for in the arbitration agreement. The decision in *Kejuruteraan Bintai Kindenko Sdn Bhd v. Serdang Baru Properties Sdn Bhd and another originating summons*,[51] illustrates the breadth of the issue: the High Court there held that even though the claims and counterclaims of the respective parties had included a treatment of the issue pre-award interest, the effect of Section 33(6) of the 2005 Act was to prevent the arbitrators from awarding interest for the pre-award period.

In any event, the lacuna in the 2005 Act with respect to pre-award interest has now been cured by the Second 2018 Amendment Act. Following the amendments,[52] Section 33(6) now provides that the arbitral tribunal 'may, in the arbitral proceedings before it, award simple or compound interest'.

Incorporation of arbitration clauses by reference

The past year had also seen various judgments concerned with the incorporation of arbitration agreements by reference.

It is settled Malaysian law that an arbitration clause can be incorporated by reference:[53]

48 See aiac.world/news/177 (accessed 15 May 2018).

49 See aiac.world/news/177 (accessed 15 May 2018).

50 [2018] 1 MLJ 1.

51 [2017] MLJU 1332.

52 Section 10 of the Second 2018 Amendment Act.

53 *Cooperative Rabobank UA (Singapore Branch) v. Misc Bhd & Anor* [2017] MLJU 2076, at Paragraph [14]-[19].

> *According to section 9(5) of [the 2005 Act], an arbitration agreement may come into existence by reference... the agreement itself need not have an arbitration clause in it as long as the agreement refers to an arbitration clause in another document and the agreement is in writing and the reference incorporates the said clause into the agreement...*
>
> *… There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required.*

The High Court in *TH Heavy Engineering Bhd v. Daba Holdings (M) Sdn Bhd (formerly known as Dugwoo (M) Sdn Bhd)*,[54] on a review of case law summarised the applicable legal principles in the following terms. First, while case law is relevant, the determination of whether an arbitration agreement has been incorporated via reference is a matter of construction and turns on the facts of each particular case. Second, while no specific forms or words need be used to incorporate an arbitration agreement into a contract, and the document to be incorporated need not be signed by the parties, there must on the other hand be evidence of a clear intention to submit to arbitration. Third, where the document containing the arbitration agreement is specifically identified in the contract, either directly or indirectly, that is generally sufficient and the document need not be specifically attached to the contract. On the other hand, where a document is only referred to in general, broad and unspecific terms, attaching it to the contract would be prudent, as its absence might point to an absence of evidence of the parties' intent to arbitrate.

The High Court in *Thien Seng Chan Sdn Bhd v. Teguh Wiramas Sdn Bhd & Anor*[55] affirmed the position that the document containing the arbitration clause need not be signed by the parties in order for the clause to be treated as having been agreed to. The High Court further considered how arbitration agreements are to be construed where the contract provides for a multi-tiered dispute resolution. Firstly, where a contract only expressly mentions mediation as a method of dispute resolution, but incorporates an arbitration agreement indirectly by reference to another document, the court will uphold the arbitration agreement:[56]

> *It is only too obvious that much as parties may want to first try to resolve their disputes through mediation, there may be times when resolution through mediation fail. Whilst hoping for the best, one must be prepared for the worst. The [incorporated arbitration agreement] takes over where mediation is terminated.*

Secondly, where a contract provides that the parties agree to submit to the jurisdiction of the courts for the purpose of any action or proceedings arising out of the contract, this cannot be taken to preclude the operation of the arbitration agreement within or incorporated into the same contract:[57]

> *The Court must proceed on the basis that the parties did not intend to contradict themselves in the same document expressing their contractual obligations and intentions...*

54 [2018] 7 MLJ 1.

55 [2017] MLJU 1117.

56 Ibid. At Paragraph [44].

57 Ibid. At Paragraph [59] – [61].

…There is thus no conflict in the 2 clauses but a complementarity leading to a convergence of interest and purpose where the aid of the Court shall be called upon if necessary for matters pending arbitration for example in cases of injunctive reliefs and even for matters after arbitration as in an enforcement of the award.

Effect of winding-up proceedings

The Malaysian courts also had the opportunity to consider the opportunity to consider the interaction between winding up proceedings and an application for a stay under the 2005 Act. In *NFC Labuan Shipleasing I Ltd v. Semua Chemical Shipping Sdn Bhd*,[58] the High Court found that (1) a winding-up petition is not a substantive claim that is contemplated by Section 10 of the 2005 Act, but a statutory right that may be invoked and exercised at any time in accordance with the law on winding up, and cannot be modified or diluted by Section 10, and (2) a winding-up petition is not a claim for payment, but a *sui generis* proceeding with different reliefs and end results from a civil proceeding subject to arbitration, and is therefore not susceptible to a stay pending arbitration.

Application to set aside and complaints of a breach of natural justice

Recent cases continue to demonstrate that Malaysia continues to take an extremely restrictive approach to setting-aside applications. A case in point is *Sime Darby Property Berhad v. Garden Bay Sdn Bhd*.[59] 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 High Court had set aside the award, holding 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.' 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'.[60] 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'.[61]

However, the Court of Appeal (in *Garden Bay Sdn Bhd v. Sime Darby Property Bhd*)[62] subsequently allowed an appeal against the High Court's decision. The Court of Appeal placed emphasis on Section 37(6) of the 2005 Act, which provides the High Court with the power to '…adjourn the proceedings…to allow the arbitral tribunal an opportunity to resume the

58 [2017] MLJU 900.

59 [2017] MLJU 145.

60 Ibid. at Paragraph [39].

61 Ibid. at Paragraph [25].

62 [2017] MLJU 1998.

arbitral proceedings.' The Court of Appeal considered that the effect of this subsection, read in light of the other provisions of the 2005 Act, entailed that it was incumbent on a party applying to set aside an award to simultaneously move the Court under Section 37(6) of the 2005 Act. The failure of the applicant to apply for a reference to the tribunal under Section 37(6) of the 2005 Act was, in the view of the Court of Appeal, fatal to its case.

The decision is surprising. It is not uncommon for jurisdictions to provide the Court hearing a setting-aside application with the power to suspend setting-aside proceedings in order for the tribunal to be given the opportunity to eliminate the grounds advanced in support of the application. The Court of Appeal's decision is novel in that it suggests that it is mandatory for the applicant to move the Court for such a suspension. A party seeking to set aside an arbitral award under the 2005 Act would be well advised to consider a simultaneous application for the Court to direct the Tribunal to cure the matter giving rise to the complaint. In this regard, it is noteworthy that the Court of Appeal went so far as to suggest that a failure to couple a setting-aside application with a Section 37(6) application could constitute an abuse of process.

In *Intraline Resources Sdn Bhd v. Exxonmobil Exploration and Production Malaysia Inc*,[63] the High Court commented that the mechanism of Section 37 of the 2005 Act was not to be abused by applicants, and reiterated that the threshold for judicial intervention under Section 37 of the 2005 Act was high:[64]

> *...In order to uphold and respect party autonomy the Courts can only intervene in limited circumstances as defined in the statute, focusing on a fair process and on the right of the parties to the arbitration to a decision that is within the true ambit of their consent to have their dispute arbitrated, and plainly do not extend to the realm of vindicating the merits or correctness of the decisions of the arbitral tribunal. Courts cannot entertain setting aside applications which are in truth a manifestation of the desire of the regretful losing party in arbitration to be given another opportunity to argue the merits of its case.*

Time limits for setting-aside applications

Section 37(4) of the 2005 Act provides, *inter alia*, that an application for setting aside of an award may not be made after 90 days from the date that the award was issued. As was recently established in *Triumph City Development Sdn Bhd v. Kerajaan Negeri Selangor Darul Ehsan*,[65] this is a strict limit, and the court does not have an inherent jurisdiction to set aside an award even if an application is made out of time:[66]

> *...If the parties are allowed to go to court to challenge arbitration awards even if it is made out of time, then there is no point for the parties to have undergone arbitration process.... It defeats the very purpose of having arbitration as the chosen mode of dispute resolution contractually agreed to by the parties. This is the reason why the court should be strict in entertaining this kind of application.*

63 [2017] MLJU 1299.

64 Ibid. at Paragraph [90].

65 [2017] MLJU 1518.

66 Ibid. at Paragraph [4] – [5].

III OUTLOOK AND CONCLUSIONS

Malaysia continues in its path to becoming a leading regional centre for international arbitration. The 2005 Act, together with the 2011 Amendment Act and the Second 2018 Amendment Act, provide a coherent modern legislative framework supportive of the norms and general principles of international arbitration. Augmenting this, the Malaysian courts have subscribed to the facilitation of international arbitration in Malaysia by making clear that the principle of minimal curial intervention forms the starting point of any analysis under the 2005 Act. These developments have been complemented by the progressive and innovative approach taken by the AIAC in promoting Malaysia as a cost-efficient centre for dispute resolution.

As it stands, Malaysia has all the components in place to take off on the international arbitration scene. It is poised to tap into the significant growth of international arbitration in ASEAN and the Asia-Pacific region. With proper support from the government, the courts and the stewardship of the AIAC, the future of arbitration in Malaysia is bright and can only get brighter.

Appendix 1

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Avinash Pradhan is a partner of Rajah & Tann Singapore LLP and of Christopher & Lee Ong, Malaysia. Avinash's practice encompasses a broad spectrum of commercial and corporate disputes. He is familiar with conducting international arbitrations at the major arbitral institutions as well as *ad hoc* arbitration, and with proceedings in both the Singapore and Malaysian courts. He has substantial experience of cross-border disputes and disputes involving a conflict between international arbitration proceedings and court litigation, and is adept at formulating and applying for urgent interim relief, including freezing and anti-suit injunctions. Avinash was recently named as one of Singapore's most influential lawyers under the age of 40 by the *Singapore Business Review*, and has been recognised in the 2017 and 2018 editions of *Best Lawyers International* as one of Singapore's leading lawyers in the field of international arbitration.

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