

MALAYSIA

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I INTRODUCTION

Malaysia has joined the ranks of ‘pro-arbitration’ jurisdictions. Legislative reform in the form of the Malaysian Arbitration Act 2005 (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 The 2005 Act, which came into force on 15 March 2006, repealed the long-standing Arbitration Act 1952 (1952 Act) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985.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 have been addressed by the Arbitration (Amendment) Act 2011 (2011 Amendment Act).

This modern statutory framework has 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) has built a significant reputation as a modern and efficient regional arbitration centre. The KLRCA is a not-for-profit, non-governmental international arbitral institution that was established in 1978. It has experienced transformational growth following the appointment of an experienced, practising arbitrator as its director in 2010. The KLRCA provides institutional support for domestic and international arbitration and other alternative dispute resolution proceedings. In addition, the KLRCA offers hearing facilities and ancillary administrative services to tribunals operating *ad hoc* or under the auspices of another institution. The Centre is now located in purpose-oriented premises that are centrally located, and equipped with state-of-the-art facilities, including 22 hearing rooms.

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 permitting a party to refer to a high court any question of law arising out of an award,⁵ as well as allowing a high court to extend the time for the commencement of arbitration proceedings⁶ or the delivery of an award.⁷ However, Part III only applies to international arbitrations if and to the extent that the parties agree on its applicability.⁸ 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* (Volume 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 42 of the 2005 Act.

6 Section 45 of the 2005 Act.

7 Section 46 of the 2005 Act.

8 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.⁹

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.¹⁰ 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’.¹¹ Section 8 was discussed and applied by the High Court in *Twin Advance (M) Sdn Bhd v. Polar Electro Europe BV*.¹² 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]’.¹³

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.¹⁴

Section 10(4)¹⁵ and Section 11(3)¹⁶ 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’.¹⁷

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).¹⁸ This removes uncertainty created by an earlier High Court decision that suggested, on the basis

9 These reforms are discussed in greater detail below.

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

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

12 [2013]7 MLJ 811.

13 [2013]7 MLJ 811 at [39].

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

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

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

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

18 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.¹⁹

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.²⁰ 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.²¹

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,²² the substantive law applicable to the dispute,²³ the number of arbitrators²⁴ and the procedure for their appointment,²⁵ 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

19 *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.

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

21 Section 11(e) of the 2005 Act.

22 Section 22(1) of the 2005 Act.

23 Section 30(2) of the 2005 Act.

24 Section 12(1) of the 2005 Act.

25 Section 13(2) of the 2005 Act.

agree on the applicable substantive laws, the arbitral tribunal shall apply the law determined by the conflict of laws rules.²⁶

Malaysia has 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’²⁷ – has been approved and followed in Malaysia.²⁸

The doctrine of *Kompetenz-Kompetenz* is given recognition in Malaysia, both in the sense of confirmation that 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.²⁹ The doctrine has been applied by the courts in *Standard Chartered Bank Malaysia Bhd v. City Properties Sdn Bhd & Anor*,³⁰ *Chut Nyak Isham bin Nyak Ariff v. Malaysian Technology Development Corp Sdn Bhd & Ors*³¹ and, more recently, in *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp*.³²

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.³³

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.³⁴

The Malaysian courts have taken a pro-arbitration stance by interpreting this provision narrowly.³⁵ As opined by the court in *CMS Energy Sdn Bhd v. Poscon Corp*,³⁶ it is the ‘unmistakable

26 Section 30(4) of the 2005 Act.

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

28 *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.

29 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.

30 [2008] 1 MLJ 233.

31 [2009] 9 CLJ 32.

32 [2013] 1 LNS 288.

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

34 Section 10(1) of the 2005 Act.

35 *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.

36 [2008] 6 MLJ 561.

intention of the legislature that the court should lean towards arbitration proceedings'. In *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp.*,³⁷ the court confirmed the mandatory nature of Section 10. The learned Anantham Kasinather JCA stated that:

*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.*³⁸

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.*,³⁹ 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*,⁴⁰ 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.

37 [2013] 4 MLJ 857.

38 [2013] 4 MLJ 857, at Paragraph [24].

39 [2010] 3 CLJ 634.

40 [2014] 8 MLJ 883.

Powers to grant interim relief

Both the arbitral tribunal and the high court have the power to grant interim relief. Section 19 of the 2005 Act allows arbitral tribunals to grant orders that include security for costs and discovery of documents.

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 arbitration proceedings. It is important to note the newly introduced Section 11(3), which states that such powers extend to international arbitrations where the seat of arbitration is not in Malaysia. This was intended to override the decision of the High Court (affirmed by the Court of Appeal) in *Aras Jalinan Sdn Bhd v. Tipco Asphalt Public Company Ltd & Ors* insofar as it held that the Court has no jurisdiction to grant interim measures for arbitrations with a seat outside Malaysia.⁴¹

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 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 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;

41 [2008] 5 CLJ 654.

- 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’.⁴² 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.’⁴³ 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*.⁴⁴ The High Court was faced with an application to set aside an arbitral award under Section 37 of the 2005 Act on the ground 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.

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

43 [2013] 2 CLJ 395 at [13].

44 [2014] 10 CLJ 22.

iii Local institutions

The KLRCA is the predominant arbitral institution in Malaysia. It has received international recognition as an experienced, neutral, efficient and reliable dispute resolution provider.⁴⁵

The status of the KLRCA 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 KLRCA plays an important role. For example, the Director may function as an appointing authority under the 2005 Act.⁴⁶

The KLRCA has an advisory board that dictates its strategic direction and formulates plans to position Malaysia as an arbitration-friendly destination. 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.⁴⁷

The KLRCA has three sets of rules of potential applicability to international arbitration:

a the KLRCA Arbitration Rules are based on the UNCITRAL Arbitration Rules (as revised in 2010) and are the main set of rules. They include provisions for the appointment of an emergency arbitrator for the purposes of granting emergency interim relief prior to the constitution of a tribunal.

b The KLRCA i-Arbitration Rules were first introduced in 2012, and the most recent version came into force on 24 October 2013. 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 KLRCA Arbitration Rules with a modification providing a specific procedure for referring questions to an independent shariah advisory council (SAC) or a shariah expert on appointment by the parties.⁴⁸ The i-Arbitration Rules make clear that the ruling of the SAC may relate only to 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.

c The KLRCA Fast-Track Arbitration Rules are robust rules designed for a quick award that:

- provide short timelines for the delivery of what are effectively full memorials in support of a claim and a defence (and counterclaim, if any);
- mandate documents-only arbitration where the aggregate amount of the claim or counterclaim in dispute is less than US\$75,000 or is unlikely to exceed US\$75,000; and
- where there are to be oral substantive hearings, for the conclusion of those hearings within 150 days of the date that the notice of arbitration is delivered.

45 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).

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

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

48 Rule 11 of the KLRCA i-Arbitration Rules.

The KLRCA 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 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 KLRCA. This applies *mutatis mutandis* to the Additional Arbitration and Conciliation Rules of ICSID.⁴⁹

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Following talks between the KLRCA and the Permanent Court of Arbitration (PCA) to make the KLRCA an alternative venue for PCA cases,⁵⁰ on 5 February 2017, the Permanent Court of Arbitration (PCA) and Malaysia signed a host country agreement. The agreement serves to facilitate the conduct of PCA proceedings in Malaysia.⁵¹

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 a memorandum of understanding with the Sharjah International Commercial Arbitration Centre on 7 December 2016. The agreement establishes a basis upon which both parties may explore areas for further cooperation in respect of the use of facilities and services on alternative dispute resolution provided by both institutions.⁵²

The KLRCA is also taking steps to update the KLRCA Arbitration Rules, and intends to release a set of revised rules later this year.

ii Arbitration developments in local courts

The case law of the past year continues to demonstrate that the Malaysian judiciary adopts a pro-arbitration and non-interventionist approach. Key developments are discussed below.

Seat of arbitration

In *The Government of India v. Petrocon India Limited*,⁵³ the Federal Court was confronted by the problem of the principles to be applied to identify the curial law of the arbitration proceedings where the law applicable to the container contract was Indian law; and 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 law of England. The Court of Appeal had concluded that the curial seat of the arbitration was London, because of the choice of English law as the law of the arbitration agreement.

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

50 See www.legalbusinessonline.com/reports/arbitration-asia-next-generation (accessed 1 May 2016).

51 See klrca.org/announcements-announcements-details.php?id=146 (accessed 4 May 2017).

52 See klrca.org/announcements-announcements-details.php?id=143 (accessed 4 May 2017).

53 [2016] MLJU 233.

The Federal Court disagreed. The Federal Court 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’,⁵⁴

The Federal Court expressly recognised 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 words ‘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 decision is welcome, in that it allows for a high degree of predictability in the identification of the curial law of the arbitration proceedings.

Applications for a stay of proceedings

As pointed out above, 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. Under Section 10 of the 2005 Act, a stay is mandatory if the arbitration agreement is null and void, inoperative or incapable of being performed. Recent jurisprudence has made clear that it is for the arbitrators, and not the courts, to first decide on questions of jurisdiction. In *Press Metal Sarawak v. Etiqa Takaful Bhd*⁵⁵ (*Press Metal*), the Federal Court specifically approved the following pronouncement of the Canadian Supreme Court in *Dell Computer Corporation v. Union des Consommateurs*:⁵⁶

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.

54 At [35].

55 [2016] MLJU 404.

56 [2007] SCJ No. 34.

The Federal Court also relied on the following statements from the Singapore cases of *Dalian Hua Liang Enterprise Group Co Ltd v. Louis Dreyfus Asia Pte Ltd*⁵⁷ and *Tjong Very Sumito v. Antig Investments*:

[...] 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.

Press Metal exemplifies the non-interventionist approach, and makes clear that that approach applies to threshold jurisdictional questions in the context of stay applications.

Setting aside applications

Recent jurisprudence also makes clear that the courts take a restrictive approach in the treatment of setting aside applications. In *Ajwa for Food Industries Co (Migop), Egypt v. Pacific Inter-link Sdn Bhd & Another Appeal*, the Court of Appeal made clear that 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'.⁵⁸ 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. Thus, in *Asean Bintulu Fertilizer Sdn Bhd v. Wekajaya Sdn Bhd*,⁵⁹ Lee Swee Seng J stated that '[a]n error of law or fact does not engage the public policy of Malaysia'.⁶⁰

Nonetheless, 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*.⁶¹ 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 their 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, in setting aside the award, considered 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'.⁶² The Court 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

57 [2005] 4 SLR 646.

58 [2013] 2 CLJ 395 at [13].

59 [2016] MLJU 354.

60 At [44].

61 [2017] MLJU 145.

62 At [42].

to be heard on this new issue'.⁶³ 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 '[any breach of natural justice not in the manner of a technical or inconsequential breach would be sufficient for the court to intervene under a section 37(1)(b)(ii) read with section 37(2)(b) application to set aside'.⁶⁴

It will thus be of comfort to parties to know that the Malaysian courts do not provide a *carte blanche* to arbitrators, and that the courts do not give mere lip service to the principles of natural justice. However, it is also clear that the courts will not take an overly technical approach to questions of natural justice. This is demonstrated by *Trident Engineering (M) Sdn Bhd v. Ssangyong Engineering and Construction Co Ltd*.⁶⁵ 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 sub-contractor who entered into two contracts with the respondent for the installation of electrical services and 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, 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 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 High Court decision. The Court 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 took an extremely pragmatic approach to the question of 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

63 At [39].

64 At [25].

65 [2016] MLJU 5.

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*:⁶⁶

[...] 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.

A party seeking to set aside an arbitral award should pay close attention to the timelines. In *Kembang Serantau Sdn Bhd v. Jeks Engineering Sdn Bhd*,⁶⁷ the High Court was faced with an application that was filed outside the 90-day limitation period provided for under Section 37(4) of the Act. The High Court held that in light of the language of Section 37(4), as well as Section 8 of the Act – to the effect that '[n]o Court shall intervene in matters governed by this Act, except where so provided by this Act' – it had no retained powers to extend time.

Enforcement of foreign awards

In *Sintrans Asia Service Pte Ltd v. Inai Kiara Sdn Bhd*,⁶⁸ the Court of Appeal was faced with an issue concerning the enforcement of an award issued by a Singapore-seated tribunal. The award debtor sought to resist recognition and enforcement on four grounds:

- a* that the arbitration agreement was not valid under the law of the arbitration agreement and seat;
- b* that the award contained decisions beyond the scope of the submission to arbitration;
- c* that the dispute was not arbitrable; and
- d* that the award was in conflict with the public policy of Malaysia.

The Court of Appeal noted that pursuant to the arbitration agreement, the arbitration was to be conducted under Singapore law, and that the curial law in respect of the arbitration was also Singapore law. In this context, the Court of Appeal appears to have considered that because the jurisdictional question were not raised by the award debtor in the Singapore courts, the award debtor was thereby precluded from raising these issues in the Malaysian courts to challenge the arbitral award.

III OUTLOOK AND CONCLUSIONS

Malaysia continues on its path to becoming a leading regional centre for international arbitration. The 2005 Act, together with the 2011 Amendment Act, provides 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

66 [2012] SGC 35.

67 [2016] 1 AMR 261.

68 [2016] 2 MLJ 660.

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 KLRCA in promoting Malaysia as a cost-efficient centre for dispute resolution.

As it stands, Malaysia has all the components necessary 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 KLRCA, the future of arbitration in Malaysia is bright and can only get brighter.