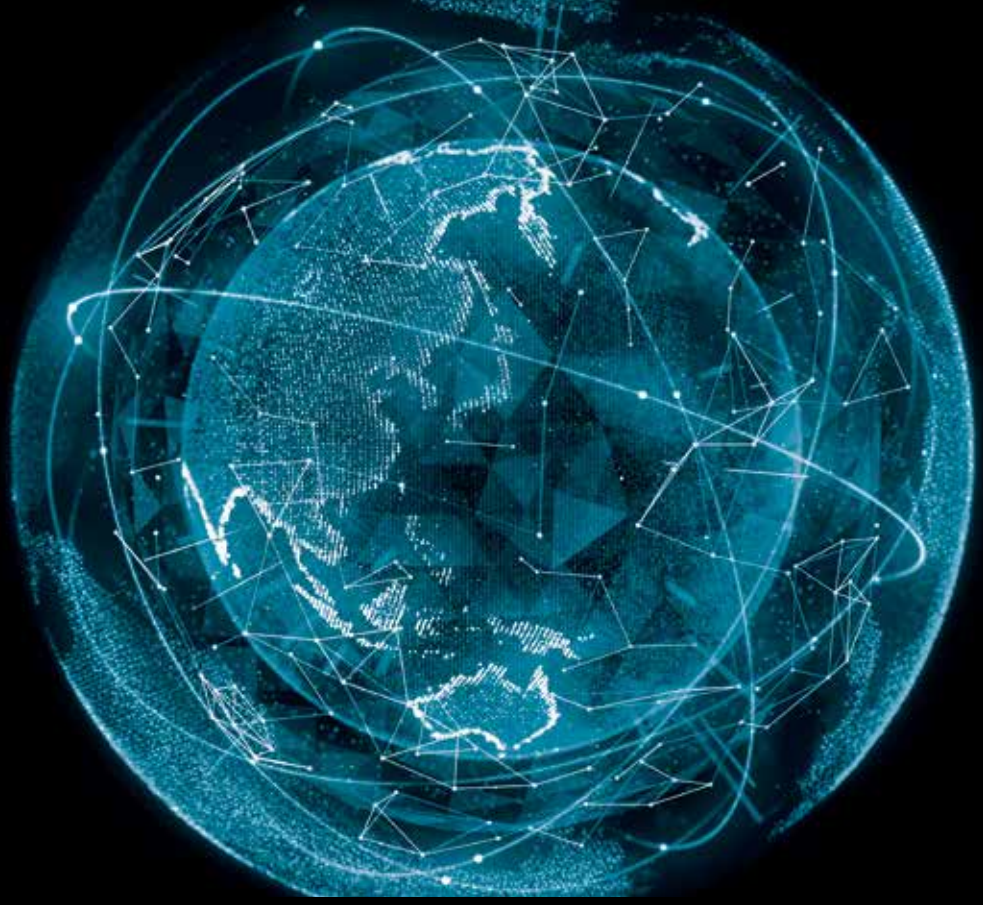

The Asia-Pacific Arbitration Review 2022

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The Asia-Pacific Arbitration Review 2022

A Global Arbitration Review Special Report

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Welcome to *The Asia-Pacific Arbitration Review 2022*, *a Global Arbitration Review* special report. For the uninitiated, *Global Arbitration Review* is the online home for international arbitration specialists the world over, telling them all they need to know about everything that matters.

Throughout the year, we deliver our readers pitch-perfect daily news, surveys and features; lively events (under our GAR Live and GAR Connect banners (GAR Connect for virtual)); and innovative tools and know-how products.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments in each region than the exigencies of journalism allow. *The Asia-Pacific Arbitration Review*, which you are reading, is part of that series.

It contains insight and thought leadership inspired by recent events, from 35 pre-eminent practitioners. Across 14 chapters and 92 pages, they provide us with an invaluable retrospective on the past year. All contributors are vetted for their standing and knowledge before being invited to take part.

The contributors' chapters capture and interpret the most substantial recent international arbitration events across the Asia-Pacific region, with footnotes and relevant statistics. Elsewhere they provide valuable background on arbitral infrastructure in different locales to help readers get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Australia, Hong Kong, India, Malaysia, Singapore, Sri Lanka and Vietnam and has overviews on construction and infrastructure disputes in the region (including the effect of covid-19), the state of ISDS and what to expect there, and trends in commercial arbitration, as well as contributions by four of the more dynamic local arbitral providers.

Among the nuggets this reader learned is that:

- force majeure is not necessarily the only option for project participants affected by covid-19, especially if the FIDIC suite is in the picture;
- Korea's diaspora is known as its *Hansang* and more 'international' arbitrators are now accepting KCAB appointments (the number of KCAB 'first-timers' is up by 23 per cent);
- it has become far easier for foreign counsel and arbitrators to conduct cases in Thailand;
- there have been some strongly pro-arbitration decisions from the Philippines and Vietnam of late;
- Sri Lanka's courts also seem to have turned a corner on avoiding excessive interference; and
- improvements in the arbitral environment in Vietnam are part of a concerted effort that began in 2015.

I also found answers to some other questions that had been on my mind, such as whether an increase in case numbers in the SIAC in 2020 was matched by an increase in the total value at stake there (spoiler alert: no), and a number of components I plan to consult when the need arises – including a summary of key decisions in Singapore; a long explainer on the background to the Amazon-Future dispute in India; and a fabulous chart deconstructing the arbitral furniture in Uzbekistan.

I hope you enjoy the volume and get as much from it as I did. If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
May 2021

Maintaining the policy of minimising curial intervention in Malaysia

Andre Yeap SC and Avinash Pradhan
Rajah & Tann Singapore LLP

In summary

This chapter explains the legal framework for arbitration in Malaysia. It discusses the key principles that underpin Malaysian arbitration law, as well as recent decisions of the Malaysian courts.

Discussion points

- The statutory framework for arbitration in Malaysia
- The boundaries of the principle of minimal curial interference
- The arbitration agreement and the jurisdiction of the tribunal
- Proceedings brought in breach of an arbitration clause
- Interim relief
- The enforcement of and challenges to arbitration awards

Referenced in this article

- The Malaysian Arbitration Act 2005
- The AIAC Arbitration Rules
- *Danieli & C v Southern HRC*
- *Jaya Sudhir Jayaram v Nautical Supreme*
- *Ragawang Corporation v One Amerin Residence*
- *Tindak Murni v Juang Setia*
- *The Government of India v Petrocon India Limited*
- *Sabanilam Enterprise v Masenang*
- *KNM Process Systems v Lukoil Uzbekistan*
- *Triumph City Development v Kerajaan Negeri Selangor Darul Ehsan*
- *Jan De Nul v Vincent Tan*
- *Johawaki Development v Majlis Agama Islam WP*
- *Master Mulia v Sigur Rus*
- *Ken Grouting v RKT Nusantara*

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

In 2018, there were two rounds of amendments to the 2005 Act. In early 2018, the Arbitration (Amendment) Act 2018 came into force (the First 2018 Amendment Act). Its purpose was to facilitate the rebranding of the Kuala Lumpur Regional Centre for Arbitration (KLRCA) to the Asian International Arbitration Centre (AIAC); the rebranding was itself driven by the centre's increasing recognition as a hub for international dispute resolution. On 8 May 2018, the Arbitration (Amendment) (No. 2) Act 2018 (the Second 2018 Amendment Act) came into force. The Second 2018 Amendment Act updated the 2005 Act to bring it in line with the latest revision of the UNCITRAL Model Law on International Commercial Arbitration 1985 (the Model Law). The Second 2018 Amendment Act also addressed various deficiencies in the 2005 Act that had been identified in case law.

The jurisprudence of the Malaysian courts has developed in tandem with the progressive attitude of the legislature and is strongly influenced by the general principle of minimal curial intervention. Moreover, the Malaysian courts readily draw on case law from other pro-arbitration jurisdictions, thereby demonstrating a transnational approach and sensitivity to the development of local law on the subject.

The KLRCA has similarly developed progressively. It was set up in 1978 by the Asian-African Legal Consultative Organization to provide a neutral venue in the Asia-Pacific region for the arbitration of disputes in relation to trade, commerce and investment. Today, as the rebranded AIAC, it hosts and administers domestic and international commercial arbitrations and offers other dispute resolution processes, such as adjudication and mediation. The AIAC is housed in purpose-oriented premises that contain all the trappings expected of a modern venue for international arbitration. The rebranding of the AIAC has a statutory underpinning – 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's rules are comparable to those of other major arbitration institutions. The main set of rules – the AIAC Arbitration Rules – incorporates the UNCITRAL Arbitration Rules. The AIAC has a separate set of rules for expedited arbitrations (termed the Fast Track Arbitration Rules) as well as a set of rules that are specifically designed for the arbitration of disputes arising from commercial transactions premised on Islamic principles (the AIAC i-Arbitration Rules). A central feature of the AIAC i-Arbitration Rules is that they incorporate a reference procedure to a shariah advisory council or shariah expert whenever the arbitral tribunal has to form an opinion on a point related to shariah principles.

The 2005 Act

The primary source of law in relation to both international and domestic arbitration in Malaysia is the 2005 Act, as amended by

the 2011 Amendment Act and the Second 2018 Amendment Act. As alluded to above, the 2005 Act is modelled on the UNCITRAL Model Law. It also incorporates important articles from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, to which Malaysia is a signatory. As Malaysia is a common law jurisdiction, the 2005 Act is further supplemented by case law that interprets and applies its provisions.

Section 8 of the 2005 Act provides the foundation of the approach now taken by Malaysian law and the Malaysian courts to arbitration. It provides that '[n]o court shall intervene in matters governed by this act, except where so provided in this act'; thus espousing the Model Law philosophy of providing within the statute itself for all instances of potential court intervention in matters regulated by the statute.[1]

The 2005 Act distinguishes between international and domestic arbitration, with the more 'interventionist' sections of the 2005 Act applying only to domestic arbitrations. International arbitration is defined, in general accordance with the Model Law provisions, as an arbitration where:

- one of the parties has its place of business outside Malaysia;
- the seat of arbitration is outside Malaysia;
- the substantial part of the commercial obligations are to be performed outside Malaysia;
- the subject matter of the dispute is most closely connected to a state outside Malaysia; or
- the parties have agreed that the subject matter of the arbitration agreement relates to more than one state.[2]

The interventionist regime in the 2005 Act is set out in Part III of the Act, which applies by default to domestic arbitrations but not international arbitrations. Parties to a domestic arbitration are free to opt out of the interventionist regime. Likewise, parties to an international arbitration may opt in to the interventionist regime.

The Second 2018 Amendment Act has significantly eroded the differences between the interventionist and non-interventionist regime by repealing sections 41 and 42 of the 2005 Act. 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 had permitted a party to refer a question of law arising out of an award to the High Court. Sections 41 and 42 were provisions applicable to the 'interventionist' domestic arbitration regime, which could have been opted in to by parties to an international arbitration. These provisions no longer form part of the 2005 Act. 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'.

The principle of non-interference

A recent case illustrative of the policy of minimal curial intervention is *Danieli & C Officine Mecchaniche SpA v Southern HRC Sdn Bhd*.[3] Danieli and Southern had entered into two contracts relating to the erection of a plant to produce steel coils. Both contracts contained provisions for arbitration in Singapore. Disputes arose between the parties, with Danieli contending that there had been a repudiation of the agreements and Southern contending that the agreements were to be rescinded on account of misrepresentations. The tribunal ultimately decided that the agreements were to be rescinded, that title to the Malaysian plant was to be transferred back to Danieli by Southern and that Southern was to pay Danieli a specified sum as restitution of the consideration paid under the rescinded agreements.

Subsequent to the award, Danieli took out an originating summons in the Malaysian courts, seeking a declaration that it was entitled to inspect the plant, and orders permitting and facilitating an inspection. Southern sought to strike out the originating summons, on the basis that the court had no jurisdiction to grant the relief sought. Danieli contended that the court had jurisdiction as: (i) Southern was incorporated in Malaysia and the plant was situated in Malaysia; (ii) Danieli was merely seeking to ascertain if the plant existed and its condition; (iii) the arbitration agreement had been honoured; and (iv) the application for inspection did not fall within the scope of the 2005 Act and was thus not a matter governed by the 2005 Act.

The High Court allowed the striking out. The Court noted that Danieli's application was 'intrinsically linked' to the tribunal's award. The Court, guided by the policy of judicial non-interference as encapsulated by section 8 of the 2005 Act, considered that the only cause of action available to Danieli, in light of the award, was the right to recognise and enforce the award by entry as a judgment of the High Court. The Court also observed that the real intent of Danieli's application was to procure evidence to assist Danieli in resisting enforcement of the award in Italy. In this regard, the Court held that it did not have jurisdiction to 'entertain [Danieli's] application which seeks to reopen matters already decided in arbitration or attempts to attack the award'. Indeed, if Danieli had concerns about the state of the Malaysian plant, those concerns ought to have been raised before the tribunal, and an order for inspection sought before the tribunal as a precondition to redelivery of the plant.

The Malaysian courts, however, recognise that there are boundaries to section 8 of the 2005 Act, particularly in circumstances where the rights of third parties may be affected. The Federal Court decision in the case of *Jaya Sudhir Jayaram v Nautical Supreme Sdn Bhd*[4] is instructive. The appeal arose out of a suit commenced by the appellant against the first to third respondents. The facts were that the third respondent had been set up as a joint venture company, with the first and second respondents as the initial shareholders, which held a 20 per cent and 80 per cent stake, respectively. The object of the joint venture was to build and manage tugboats. The three respondents were party to a shareholders' agreement, which provided for the arbitration of disputes.

The appellant's case was that, subsequent to the joint venture being set up, he participated as an investor in the joint venture. In this regard, the appellant claimed that there was a collateral understanding between him and the first and second respondents with respect to his participation, with the first respondent to ultimately hold only 20 per cent of the shares in the third respondent, and with the remaining shares to be held by the second respondent and the appellant. The appellant claimed that in furtherance of this agreement, 10 per cent of the shares in the third respondent were transferred from the second respondent to the appellant. The appellant commenced the instant court proceedings, seeking declarations relating to that collateral understanding and the ownership of the shares.

The first respondent's case in response was to deny the collateral understanding. The first respondent further alleged that the transfer of 10 per cent of shares to the appellant was a breach by the second respondent of the shareholders' agreement. The first respondent had commenced arbitration proceedings against the second and third respondents, seeking declarations in relation to

the shares in the third respondent. The first respondent had also commenced court proceedings against the appellant for inducing a breach of contract.

The appellant sought an interim injunction restraining the arbitration proceedings, while the respondents applied to stay the appellant's suit pending the arbitration. The High Court judge allowed the appellant's injunction application. However, the judge dismissed the respondents' stay application, holding that as the appellant was not a party to the shareholders' agreement, the appellant was not and could not be made a party to the arbitration proceedings. The Court of Appeal overturned the injunction ruling and held that the mandatory stay provisions in the Arbitration Act – section 10(1) read with 10(3) – could apply to persons who were non-parties to the arbitration proceedings.

The Federal Court allowed the appeal, reinstating the injunction and refusing the stay. The court noted that the appellant was not a party to the arbitration agreement, and concluded that the respondent could not rely on the provisions of the Act. The Federal Court also considered that it had the jurisdiction to restrain the arbitration proceedings between the first, second and third respondents. In doing so, the Federal Court embarked on an extensive review of various Commonwealth authorities, and ultimately accepted that the 'courts may decline to give effect to the exclusive jurisdiction clause or arbitration clause where interests of third parties are involved or where there is a risk of parallel proceedings and inconsistent decisions arising out of the conduct of an arbitration'.

The Federal Court went on to hold that the primary consideration on whether to grant the injunction to restrain the arbitration proceedings where the rights of a non-party thereto are involved is 'what would be the fairest approach to all parties. The decision must not result in any party suffering a severe disadvantage and for the ends of justice to be met, the benefits must outweigh the advantage.' In this regard, the Federal Court agreed with the High Court judge that where the issues relate to any party who is not subject to the arbitration, priority should be given for the matter to be dealt with by the court, particularly given that the tribunal's decision would necessarily involve:

- a pronouncement of rights in respect of property that was the subject matter of both proceedings;
- the high degree of overlap of subject matter in the two proceedings; and
- the possibility of conflicting results (or, if a stay of the court proceedings were granted, the necessity for the relitigation of issues).

Given the facts of the case, the outcome is sensible. The court proceedings and the arbitration proceedings both involved questions that would have invariably related to the parties' competing proprietary rights in the shares, and it would not have made sense for the respondents' rights vis-à-vis each other to be determined without reference to the appellant's rights as determined by the court. The injunction granted against the arbitration proceedings absolutely prohibited the continuation of the arbitration proceedings.

The arbitration agreement and the tribunal's jurisdiction

Malaysia takes a broad approach to the construction of arbitration agreements. The *Fiona Trust* single-forum presumption – that 'rational businessmen are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal'[5] – represents the law in Malaysia.[6] Malaysian law also recognises the principle of separability; namely that the arbitration agreement is separate from the main contract in which it may be contained.[7] An arbitration agreement, therefore, will not be invalidated because of, for example, an illegality invalidating the main contract.[8]

The doctrine of competence-competence is also recognised in Malaysia. Section 18(1) of the 2005 Act provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. Section 18(8) of the 2005 Act provides that where the arbitral tribunal makes a positive ruling on a jurisdictional plea as a preliminary question, that ruling can be appealed to the High Court. However, the 2005 Act does not provide for appeals against negative jurisdictional rulings of a tribunal. In *Ragawang Corporation Sdn Bhd v One Amerin Residence Sdn Bhd*,[9] the tribunal had issued what on its face was described as an 'interim award', in which the tribunal determined, among other matters, that it did not have jurisdiction to decide certain of the plaintiff's claims. The plaintiff applied for those portions of the interim award to be set aside. The High Court noted that under section 18(8) of the 2005 Act, an appeal could only be lodged to the High Court against an arbitral tribunal's preliminary ruling that it had jurisdiction to decide a dispute. The High Court recognised that while a party could apply to set aside an arbitral award, a negative ruling on jurisdiction could not be treated as an 'award'. The High Court reasoned that an award, by definition under the 2005 Act, meant a decision of the arbitral tribunal on the substance of the dispute. While this could include a final, interim or partial award, and any award on costs or interest, it could not include a decision of an arbitral tribunal that was not concerned with the substance of the dispute. The tribunal's use of the term 'interim award' was of no consequence in this regard.

Proceedings brought in breach of an arbitration agreement

Section 10 of the 2005 Act allows a party to apply to the High Court for a stay of legal proceedings commenced in Malaysia, if the subject matter of the dispute falls within the ambit of an arbitration agreement. The application should be taken out before any other step is taken in the court proceedings. Where the applying party had utilised the court's process, such as by requesting an extension of time from the court to file its statement of defence, that would be construed as a step in the proceedings, as seen in *Mun Seng Fook v AIG Malaysia Bhd*.[10] Section 10 of the 2005 Act makes it mandatory for the High Court to grant a stay unless the arbitration agreement is null and void, inoperative or incapable of being performed.

In the case of *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd,*[11] the Federal Court was called upon to consider the position where the judgment had been entered in the Malaysian courts against a defendant in default of appearance, but where the subject matter of the judgment was a dispute that fell within the ambit of an arbitration agreement.

Under Malaysian civil procedure, a party against whom judgment in default has been obtained may apply for the judgment to be set aside. Such applications are usually heard in the first instance by a registrar of the High Court, and involve some enquiries regarding the merits of the defence to the claim. On the other hand, when the High Court is faced with an application under section 10 of the 2005 Act, the law is clear that the merits of the underlying dispute are wholly irrelevant to whether a stay is to be granted. However, it is arguable that as a matter of procedural logic,

an application under section 10 of the 2005 Act cannot be taken out until the judgment in default of defence has been set aside.

Tindak Murni concerned parties to a construction contract that contained an arbitration clause. The contractor commenced proceedings against the employer in the High Court, claiming payment on an architect's certificates. The employer made part payment of the amounts claimed, but asserted that there were defects in the work entitling the employer to set-off. The employer, however, did not enter an appearance within the requisite period, and judgment in default of appearance was obtained.

The employer took out an application to set aside the judgment in default, and was successful before the registrar, with the registrar holding that there were issues on the merits that justified a trial. The contractor appealed the decision of the registrar to the High Court; in the meantime, the employer applied for a stay of proceedings under section 10 of the 2005 Act. Both the appeal against the registrar's decision, and the application for a stay, were heard together by the High Court. The High Court dismissed the appeal against the registrar's decision, considering that there were issues or disputes of fact that required resolution at trial, and allowed the application for a stay.

The Court of Appeal reversed the High Court on both the decision to set aside and the decision to stay. The Court of Appeal dealt first with the application to set aside the judgment in default, and in this regard, considered the merits of the defence advanced by the employer. The Court of Appeal embarked on an extensive examination of the law relating to certificates of payment, and concluded there was no meritorious defence available, and therefore decided that the judgment in default ought not to have been set aside. The Court went on to treat the decision on the appeal against the stay in favour of arbitration as consequential to its decision to set aside the judgment in default.

Leave to appeal to the Federal Court was granted on two questions of law. First, whether a judgment in default could be sustained where the plaintiff who obtained the judgment in default was bound by a valid arbitration clause and the defendant had raised disputes to be ventilated via arbitration pursuant to the arbitration clause. Second, whether the Court, in hearing an application to set aside the judgment in default where a valid arbitration clause bound the parties, ought to consider the merits of the matter or the existence of a dispute.

The Federal Court answered both questions in the negative and allowed the appeal, setting aside the judgment in default and granting the stay. The Federal Court held that section 10 of the 2005 Act remained applicable even where judgment in default had been entered, such that the Court remained bound to consider whether: (i) there was a subsisting agreement to arbitrate disputes; (ii) a step had been taken in the court proceedings; and (iii) the arbitration agreement was null, void or incapable of being performed. Where these criteria were satisfied, the Federal Court recognised that it would not be appropriate to enquire into the merits of the defence advanced, even in the context of an application to set aside a judgment in default. In this regard, the Federal Court further recognised that the commencement of court proceedings or litigation amounted to a breach, or even a repudiatory breach of an arbitration agreement, but unless and until such a breach had been accepted by the innocent party, the contract to arbitrate disputes remained valid and subsisting.

The seat of arbitration

In *The Government of India v Petrocon India Limited,*[12] the Federal Court was faced with a question regarding the identification of the seat of arbitration in circumstances where the law applicable to the container contract was Indian law, but where the contract specified the 'venue' of the arbitration as Kuala Lumpur, while at the same time expressly providing that the 'arbitration agreement' was to be 'governed by' the 'laws of England'. The Court of Appeal had concluded that the juridical seat was London, because English law was chosen as the law of the arbitration.

The Federal Court disagreed and held that 'the seat of arbitration will determine the curial law that will govern the arbitration proceeding', and drew on English case law to come to the conclusion that 'there is a strong presumption that the place of arbitration named in the agreement will constitute the juridical seat'.[13]

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

In *Sabanilam Enterprise Sdn Bhd v Masenang Sdn Bhd*,[14] the Court of Appeal was called on to consider the interaction between the federalist nature of Malaysia and the 2005 Act. The plaintiff had filed an originating summons in the Kota Kinabalu High Court seeking to set aside an arbitration award. The defendant countered with an application to strike out the summons on the grounds that the seat of arbitration was Kuala Lumpur. On this basis, the defendant asserted that the Kuala Lumpur High Court, and not the Kota Kinabalu High Court, was the proper supervisory court for the arbitration proceedings, and the Kota Kinabalu High Court lacked jurisdiction to hear the originating summons to set aside the award. The Kota Kinabalu High Court allowed the application, striking out the originating summons.

On appeal, the Court of Appeal held that, in light of the fact that the arbitration was a domestic arbitration, the 'seat' of the arbitration was irrelevant. The Court of Appeal went on to hold that there was one single curial law applicable, and under the Arbitration Act, the plaintiff had the right to challenge the award, and it was the duty of the court to determine that challenge and to do so promptly.

The reasoning of the Court of Appeal is of note. Based on one reading of the judgment, it is arguable that the primary consideration for the Court of Appeal was the fact that the arbitration was a domestic one and that in a domestic arbitration, the concept of a seat of arbitration is irrelevant. In this regard, the 2005 Act expressly vests the power of judicial intervention in the High Court, which is itself defined under section 2 of the 2005 Act to encompass both the High Court of Malaya and the High Court in Sabah and Sarawak. The provisions of the Act thus support the proposition that the jurisdictions of the High Court of Malaya and the High Court in Sabah and Sarawak are concurrent with respect to matters related to the 2005 Act.

Interim relief

The Second 2018 Amendment Act significantly amended the provisions of the 2005 Act on interim measures to bring the

legislation fully in line with the provisions of the UNCITRAL Model Law 2006.

The new provisions introduced through the Second 2018 Amendment Act also permit the tribunal to grant interim relief on an ex parte basis (a preliminary order). Thus, 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.*

The tribunal may grant such a preliminary order provided that it 'considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure'.

However, a fundamental difference remains between *inter partes* interim measures and preliminary orders. Section 19C(6) of the 2005 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' and would not be enforceable. As such, a party may still wish to avail itself of ex parte interim relief from the court.

In this regard, the 2005 Act permits both the arbitral tribunal and the courts to grant interim relief. Thus, 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)–(e) of the 2005 Act, which include orders to:

- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process; and
- provide a means of preserving assets out of which a subsequent award may be satisfied.

Section 11(3) of the 2005 Act expressly provides that such powers extend to international arbitrations where the seat of arbitration is not in Malaysia.

In *KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC*,[15] the Court of Appeal had the opportunity to consider the amended section 11, in the context of an application by a party to restrain calls on bank guarantees.

The underlying commercial contract to which guarantees related contained arbitration clauses. The appellant had obtained an ex parte injunction against the respondent and the issuing bank, restraining the calls, on the basis that the demands on the guarantees were fraudulent and unconscionable. The respondent applied to stay the court proceedings in favour of the arbitration proceedings. The stay was ultimately consented to by the appellant, and the parties agreed that the question of whether the injunction should be maintained would be determined by the courts. An originating summons was filed to determine whether interim injunctive orders restraining the calls on the guarantees should be granted under section 11 of the Arbitration Act.

At first instance, the High Court held that no strong case of fraud or unconscionability was made out; and found that the guarantees were unconditional and on demand in nature and that the respondent was entitled to call on them without proof of the underlying default.

The Court of Appeal reversed the High Court's decision, and granted the injunctions sought.

The Court of Appeal pointed out that section 11 – both before and after the 2018 Amendments – conferred discretion on the court to grant interim measures. The Court of Appeal considered that, in exercising the discretion, guidance could be drawn from the threefold classification in the dissenting judgment of Lord Mustill in the House of Lords' decision of *Coppe'e-Lavalin SA/NV v Ken-Ren Chemicals and Fertilisers Ltd (in liq); Voest-Alpine AG v Ken-Ren Chemicals and Fertilisers Ltd (in liq)*:[16]

> *With the first group the national court lends its support by ordering purely procedural steps which the arbitrators either cannot order or cannot enforce … The second group seeks to maintain the status quo pending the making of an award, so as to prevent one party from bringing about a change of circumstances adverse to the other which the arbitrators cannot adequately remedy … The third group consists of remedies designed to make sure that the award has the intended practical effect by causing one party to provide a fund to which recourse can be made by the other party if the first fails to honour an adverse award … Saisie conservatoire and Mareva injunctions are typical of this kind of relief.*

The Court of Appeal considered that the injunction sought was an interim measure falling within the second category of cases described by Lord Mustill, and that it was for the applicant to first show why the status quo needed to be maintained or restored, as the case may be.

The Court of Appeal considered that the test to be met, generally, was threefold:

- whether there is any bona fide serious issue to be tried;
- whether damages are an adequate remedy; and
- where the balance of convenience lies.

The Court of Appeal further considered that where the injunctive relief sought concerned performance bonds, guarantees and warranties, the applicant also had to show a strong prima facie case of fraud or unconscionability. However, the Court of Appeal cautioned that: 'the merits . . . of such an allegation is to be determined at the arbitration, and not by the Court. The Court, in fact, must avoid engaging or being caught up in protracted consideration of the merits of such dispute.' The Court of Appeal accepted that the threshold 'is high' and that 'the court must guard against abuses of process where contractual disputes are elevated and disguised as claims of fraud or unconscionability'.

Ultimately, the Court of Appeal considered the terms of the bonds and concluded that they were not properly characterised as unconditional and irrevocable demand bonds (notwithstanding their label). After reviewing the material, the Court concluded that the appellant's arguments were 'of strong persuasive force and not without basis, and that the balance lay in the appellant's favour to maintain status quo pending arbitration of the substantive dispute between the parties'.

The case is significant both in illuminating the court's approach to interim relief generally under section 11 of the 2005 Act, and in demonstrating the balance struck by the courts in determining whether the threshold for restraining a call on a bank guarantee has been met. There is a clear emphasis on a policy of deferring to the arbitral tribunal on issues of fact. There is also a suggestion that the courts may be prepared to take a lighter touch in delving into the details of the arguments and evidence on an application for an interim injunction.

On the other hand, the decision does make clear that the juridical foundation of the power to grant the injunction, and the tests informing the Court's grant of an injunction in a Malaysia-seated arbitration, remained anchored in the Malaysian tests for the grant of interim injunctive relief. Gary Born, in discussing

interim measures in international arbitration, suggests that 'international sources provide the appropriate standards for granting provisional measures in international arbitration'.[17] Born goes on to state that most international arbitral tribunals will order provisional measures only where the party requesting such relief has:

> *made showings of (a) a risk of serious or irreparable harm to the claimant; (b) urgency; and (c) no prejudgment of the merits, while some tribunals also require the claimant to establish (d) a prima facie case on the merits; (e) a prima facie case on jurisdiction; and (f) a balance of hardships weighing in its favour.*[18]

It remains to be seen whether the Malaysian courts will be more receptive to an internationalisation of the test for interim injunctive relief.

Awards

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

Section 37 of the 2005 Act addresses the setting aside of the award where the seat of arbitration is Malaysia. Section 37(4) of the 2005 Act provides, inter alia, that an application for the setting aside of an award may not be made after 90 days from the date that the award was issued. As was established in *Triumph City Development Sdn Bhd v Kerajaan Negeri Selangor Darul Ehsan*,[19] this is a strict limit, and the court does not have an inherent jurisdiction to set aside an award if an application is made out of time:

> *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.*[20]

Sections 38 and 39 of the 2005 Act address the recognition and enforcement of awards. While section 38 of the 2005 Act 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 court, when deciding whether or not to recognise and enforce the award under section 38(1), will have to consider, apart from the formal requirements therein, whether any of the grounds under section 39(1) of the Arbitration Act apply.

After having satisfied itself that the requirements of section 38(1) have been complied with and that there are no grounds under section 39(1) for refusing to recognise and enforce the award, it is then mandatory for the court to recognise and enforce the award.[21] Furthermore, where a setting-aside application has already been dismissed under section 37, and the award is sought to be enforced under section 39, the losing party cannot relitigate the issues decided in the setting-aside action to resist enforcement.[22]

In the 2005 Act, the grounds for setting aside an award, and for refusing recognition or enforcement, are drawn from article V of the New York Convention. A party seeking to set aside or seeking to resist recognition or enforcement must show that:

- a party to the arbitration agreement was under an incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the state in which the award was made;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- the award contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties (unless such agreement was in conflict with a provision of the 2005 Act from which the parties cannot derogate), or, failing such agreement, was not in accordance with the 2005 Act; or
- the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

An award may also be set aside or have its recognition or enforcement refused where the award is in conflict with the public policy of Malaysia; or on the ground that the subject matter of the dispute is not arbitrable under Malaysian law. In this regard, section 4(1) of the 2005 Act (as amended in 2018) 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 or the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia.*

The 2005 Act provides for two specific circumstances where the award would be in conflict with Malaysian public policy: first, where the making of the award was induced or affected by fraud or corruption; second, where a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award. While the 2005 Act is clear that these two circumstances are not exhaustive, the courts have emphasised that a restrictive approach is to be taken in applying the concept of public policy outside the two specified circumstances. Thus, in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor*,[23] the Federal Court considered that 'in applying the concept [of public policy] for the purpose of setting aside an award . . . the concept of public policy ought to be read narrowly and more restrictively'.[24] The Federal Court went on to endorse the following pronouncement of the Court of Appeal in the case of *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd*:

> *[t]he concept of public policy must be one taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused.*[25]

The decision of the High Court in the case of *Johawaki Development Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan*[26] illustrates the circumstances that might suffice to engage the public policy ground for challenging an award. The dispute

concerned a joint venture agreement, between a company named Johawaki and the Federal Territory's Islamic Council, for the development of land. The arbitrator issued an award in favour of Johawaki. The Council's application to set aside the award was based on a number of grounds, including that the award was contrary to public policy as it resulted in Johawaki obtaining 'double recovery' in damages. In this regard, the Council argued that the arbitrator had awarded sums to Johawaki that compensated Johawaki for its 'expectation' interest (that is, by placing it in the financial position it would have been in had the contract been performed) as well as Johawaki's 'reliance' interest (that is, by compensating it for wasted expenditure incurred in entering into the contract). The Council pointed to a long-standing authority that made clear that a claimant had to elect between the two measures of damages, or would otherwise be overcompensated. Johawaki does not appear to have disputed – or to have been in a position to dispute, at the time of the setting-aside application – that it had claimed damages and the tribunal had awarded damages that resulted in overcompensation in this manner.

The High Court accepted that the Council had not raised, as an objection in the arbitration proceedings, that the damages sought by Johawaki gave rise to overcompensation. The High Court nonetheless concluded that it was a 'fundamental legal principle that a claimant cannot recover more than has been lost'. The Court therefore held that the award was in conflict with the public policy of Malaysia, and set aside the entire part of the award dealing with damages.

Breach of natural justice and the discretion to set aside

Another important decision to emerge from the Malaysian courts in the past year is that of the Federal Court in the case of *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd*.[27]

The case concerned an application to set aside an arbitral award. The High Court had found that the award had been made in breach of the rules of natural justice. However, the High Court had affirmed the award principally on the ground that the respondent had failed to show that it had suffered actual or real prejudice arising from the breach of the rules of natural justice. The Court of Appeal had allowed an appeal against the High Court's decision, holding that the breach of natural justice was of sufficient gravity to set aside the award. Leave was granted to appeal to the Federal Court, including on the question of whether the High Court, in exercising its jurisdiction under section 37 of the 2005 Act, was bound to set aside the award upon any of the grounds of challenge under section 37(1) or (2) being made out.

The Federal Court's answer was that the High Court was not so bound. The Federal Court held that the language of section 37(1) of the 2005 Act made clear that the High Court had residual discretion not to set aside an award even though a ground for setting aside under section 37(1) had been made out. The Federal Court, however, considered that the discretion was not absolute, and set out the following principles to guide the exercise of the discretion.

- The starting point for the High Court, when faced with the question of whether the discretion ought to be exercised, is that it ought to consider (i) which rule of natural justice was breached, (ii) how it was breached and (iii) in what way the breach was connected to the making of the award.
- The High Court ought to consider the seriousness of the breach. If the breach was relatively immaterial or was not likely to have affected the outcome, the award ought not to be set aside. Even if it found that there was a serious breach, the High Court could refuse to set aside the award if the breach would not have had any real impact on the result or if the arbitral tribunal would not have reached a different conclusion. On the other hand, where the breach was significant and might have affected the outcome, the award ought to be set aside. Indeed, the significance of the breach may be so great that the setting aside of the award would follow automatically, regardless of the effect on the outcome of the award.
- The exercise of the discretion was dependent on the nature of the breach and its impact; the materiality of the breach and the possible effect on the outcome are relevant factors for consideration. However, while materiality and causative factors had to be established, prejudice to the applicant was not a pre-requisite or requirement for the award to be set aside.

The decision reinforces the view that the Malaysian courts will be slow to set aside an award for breach of natural justice, and that they will enquire into the connection between the asserted breach of justice and the award. Immaterial breaches will not suffice. However, the decision also makes clear that the approach to be taken is fact-sensitive, and much will depend on the specifics of the breach and the circumstances of the case.

Delay in issuing the award

A further recent decision of significance is that of the Court of Appeal in *Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd*.[28]

The case concerned an award issued in an arbitration of disputes arising out of a building contract. The arbitration commenced in August 2009, with a sole arbitrator being appointed in December 2009.

The applicable rules to the arbitration were those of the Malaysian Architect's Association, commonly referred to as the PAM Rules. Rule 21.3 of the PAM Rules provides for a specific timeline for the delivery of the award, stipulating that 'the arbitrator shall deliver his award as soon as practical but not later than three months from his receipt of the last closing statements from the parties'. Rule 21.3 also provides that 'such time frame for delivery of the award may be extended by notification to the parties'.

The last closing statement in the arbitration was filed on 29 January 2016. Applying Rule 21.3 of the PAM Rules, the deadline for the arbitrator to deliver his award was thus the end of April 2016. The arbitrator did not meet this deadline and did not issue any notification extending the time for delivery of his award. The award was ultimately delivered on 10 March 2017. The arbitrator later amended the original award and issued the amended award on 7 April 2017. Neither party raised any objection, after April 2016 had passed, that the deadline for delivery of the award had expired.

On an application to set aside the award, the High Court held that the arbitrator, by failing to deliver the original award within the time frame stipulated in the PAM Rules and in further failing to extend the deadline before delivering his award, had exceeded his mandate or authority and the award was therefore in excess of jurisdiction. The High Court accordingly set aside the award.

On appeal, it was argued that Rule 21.3 of the PAM Rules did not relate to the arbitrator's jurisdiction, and was merely a procedural provision; and further, that by failing to object to the delay, the parties had waived the arbitrator's non-compliance with the

rules. The Court of Appeal disagreed. It held that the timeline in Rule 21.3 of the PAM Rules was part of the mandate to the arbitrator that he was to deliver the award within a particular period. The Court considered that it was 'not an option for an arbitrator who conducts an arbitration under a time-sensitive arbitral regime to ignore, or be oblivious to, or be nonchalant to his duty and responsibility to deliver the award on time'. The Court of Appeal, while recognising that, as a general principle, jurisdictional objections ought to be raised promptly, considered that this principle did not apply to a challenge on the basis that the arbitrator had breached an agreed timeline to deliver the award. The Court of Appeal considered pertinent that section 46 of the 2005 Act specifically permits an application to extend time for the delivery of the award. The Court reasoned that if no extension was sought under section 46, or an application for extension failed, the award was 'dead in the water'.

This decision is significant. A Malaysia-seated arbitral tribunal ought to be acutely aware that stipulations for the time the award is delivered (whether embodied in the arbitration agreement proper or in the arbitration rules) will be treated as going to the mandate of the tribunal. If the tribunal considers that it might not be able to meet such a deadline, it would be sensible to seek the agreement of the parties to an extension well in advance of the close of proceedings.

Conclusion

Malaysia continues its growth as a centre for arbitration. The 2005 Act provides a coherent modern legislative framework in line with international norms and best practices. As it stands, Malaysia has all the components in place to take off as a centre for international arbitration. Recent decisions of the country's domestic courts underscore the fact that the Malaysian judiciary is now distinctly pro-arbitration.

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

Notes

1 Paragraph 17 of the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration.
2 Section 2 of the 2005 Act.
3 [2021] 1 LNS 45
4 [2019] 7 CLJ 395.
5 *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2007] 4 All ER 951, at 957.
6 *Press Metal Sarawak v Etiqa Takaful Bhd* [2016] MLJU 404, *KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd* [2013] 1 CLJ 993. See also *PLB-KH Bina Sdn Bhd v Hunza Trading Sdn Bhd* [2014] 1 LNS 1074.
7 *Government of India v Petrocon India Limited* [2016] MLJU 233.
8 *Arul Balasingam v Ampang Puteri Specialist Hospital Sdn Bhd (formerly known as Puteri Specialist Hospital Sdn Bhd)* [2012] 6 MLJ 104 at 110I-111A.
9 [2020] 1 LNS 895.
10 [2018] 8 CLJ 394.
11 [2020] 4 CLJ 301.
12 [2016] MLJU 233.
13 At [35].
14 [2020] 2 CLJ 833.
15 [2020] MLJU 85.
16 [1994] 2 All ER 449.
17 Gary B Born, *International Commercial Arbitration* (3rd Edition), at 2647.
18 Gary B Born, *International Commercial Arbitration* (3rd Edition), at 2649.
19 [2017] 1 LNS 1511.
20 At [5].
21 *Tune Talk Sdn Bhd v Padda Gurtaj Singh* [2019] 1 LNS 85.
22 *Mewaholeo Industries Sdn Bhd v Awan Timur Palm Oil Mills Resources (Johor) Sdn Bhd* [2018] 1 LNS 2173.
23 [2019] 2 MLJ 413.
24 At [55].
25 [2018] 3 MLJ 608.
26 [2020] 1 LNS 528.
27 [2020] 9 CLJ 213.
28 [2021] 2 CLJ 173.

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