The Asia-Pacific Arbitration Review 2021

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A Global Arbitration Review Special Report

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Welcome to *The Asia-Pacific Arbitration Review 2021*, a *Global Arbitration Review* special report. *Global Arbitration Review* is the online home for international arbitration specialists, telling them all they need to know about everything that matters.

Throughout the year, *GAR* delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live banner) and provides our readers with 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 37 pre-eminent regional practitioners.

Across 17 chapters and 112 pages, it offers an invaluable retrospective. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, with footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Australia, China, Hong Kong, India, Japan, Korea, Malaysia, Singapore and Vietnam. It also has overviews of construction and infrastructure disputes in the region (and how to avoid them), investment treaty arbitration (particularly its relevance to the Belt and Road Initiative), the impact of covid-19 on the art of damages calculation, and third-party funding.

Among the nuggets it contains:

- the common mistakes that contractors make when allocating risk in contracts and how to avoid them;
- a groundbreaking year for international arbitrations in Korea;
- the vogue among Asian states for including appeal mechanisms in their ISDS;
- how China's government has managed to open up the mainland market to institutions such as the ICC, without having to amend the national arbitration law;
- the end of natural-justice based challenges to awards in Singapore; and
- a handy table showing the position of third-party funding in eight Asian states.

And much, much more.

We hope you enjoy the volume. 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 2020

Malaysia: Federal Court clarifies limits of Arbitration Act

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 non-interference under Malaysian law.
- The arbitration agreement and the jurisdiction of the tribunal.
- The Malaysian approach to interim relief.
- The enforcement of and challenges to arbitration awards.

Referenced in this article

- The Malaysian Arbitration Act 2005.
- The AIAC Arbitration Rules.
- Jaya Sudhir Jayaram v Nautical Supreme.
- 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.
- Tune Talk v Padda Gurtaj Singh.
- Ajwa for Food Industries Co v Pacific Inter-link.
- Huawei Technologies (Malaysia) v Maxbury Communications.

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. The KLRCA 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 New

York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, to which Malaysia is a signatory. As Malaysia is a common law jurisdiction, the 2005 Act is further supplemented by case law that interprets and applies its provisions.

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'.

Boundaries of principle of non-interference

In *Jaya Sudhir Jayaram v Nautical Supreme Sdn Bhd*,[3] the Federal Court was called on to consider the boundaries of the 2005 Act. 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, each holding a 20 per cent and 80 per cent stake respectively. The object of the joint venture was to build and manage tug boats. The three respondents were party to a shareholders' agreement, which provided for the arbitration of disputes.

The appellant's case was that, subsequent to 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 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 re-litigation 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. It is suggested that an alternative order that may perhaps have struck a sufficient balance between the competing interests of the parties would have been for the injunction to be effective only pending the disposal of the court 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'[4] – represents the law in Malaysia.[5]

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.[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]

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. The application must 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 for 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*.[9] 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.

The seat of arbitration

In *The Government of India v Petrocon India Limited*,[10] 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.'[11]

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*,[12] 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 to the Court of 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 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. It is suggested that a better reading of the judgment is that it recognises that the concept of the 'seat' of arbitration is to anchor the arbitration to a curial law. 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 High Court in Sabah and Sarawak are concurrent with respect to matters related to the 2005 Act (irrespective of whether the arbitration is an international or a domestic one).

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. 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'. A party may therefore still wish to avail itself of 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*,[13] 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)*:[14]

> *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 had in addition 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 before the court, 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, as well as in demonstrating the balance struck by the courts in determining whether the threshold for restraining a call on 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. It remains to be seen how the pronouncements in *KNM Process Systems* will be applied by the lower courts.

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 Malayisa. Section 37(4) of the 2005 Act provides, inter alia, that an application for setting aside of an award may not be made after 90 days from the date that the award was issued. As was established in *Triumph City Development Sdn Bhd v Kerajaan Negeri Selangor Darul Ehsan*,[15] this is a strict limit, and the court does not have an inherent jurisdiction to set aside an award even if an application is made out of time:

> *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.*[16]

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.

In *Tune Talk Sdn Bhd v Padda Gurtaj Singh*,[17] the Court of Appeal considered the appellant's argument that an award providing only for a negative declaration could not be registered as a judgment under section 38 of the 2005 Act. The foundation of the argument was effectively that the Rules of Court relevant to applications under section 38 required that an applicant assert either that the award had not been complied with, or the extent to which it had not been complied with. The argument ran that, in the case of a negative declaration, this requirement could not be fulfilled, which in turn suggested that only positive awards could be the subject of an application under section 38. The appellant also placed reliance on authorities from other jurisdictions that suggested that only positive awards could recognised and enforced.

The Court of Appeal ultimately rejected the appellant's contentions, upholding the first-instance decision and making no distinction between positive and negative awards. The court considered that sections 38 and 39 of the 2005 Act were meant to be exhaustive and that there was no room for any other substantive requirements to be satisfied for the recognition and enforcement of an arbitration award. It further held that the Rules of Court were merely a procedural requirement, and that non-compliance with those requirements would not be fatal to the application for recognition and enforcement. As regards the authorities from other jurisdictions, the court held that, even if the cases stood for the propositions advanced by the appellant, there was no room for the importation of the principles in those cases in light of the scheme and provisions of the 2005 Act.

After having satisfied itself that the requirements of section 38(1) have been complied with and 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: *Tune Talk Sdn Bhd v Padda Gurtaj Singh*.[18] Furthermore, where a setting-aside application had already been dismissed under section 37, and the award is enforced under section 39, the losing party cannot relitigate the issues that had already been decided in the seting-aside action to resist enforcement as it was in *Mewaholeo Industries Sdn Bhd v Awan Timur Palm Oil Mills Resources (Johor) Sdn Bhd*.[19]

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.*

Various cases illustrate that the prevailing judicial philosophy is to take an extremely restrictive approach to permitting setting aside applications. In *Ajwa for Food Industries Co (Migop), Egypt v Pacific Inter-link Sdn Bhd & another appeal*, the Court of Appeal explained that 'the court should be slow in interfering with an arbitral award. The court should be restrained from interference unless it is a case of patent injustice which the law permits in clear terms to intervene.'[20]

In *Huawei Technologies (Malaysia) Sdn Bhd v Maxbury Communications Sdn Bhd*,[21] the Court of Appeal considered the effect of arguments that a tribunal had failed to deal with an issue referred to it, as a ground for challenging the award. The background facts were that the defendant, Huawei, had entered into an agreement with Maxis in relation to a broadband project. For the purposes of carrying out the project, Huawei entered into an agreement with the plaintiff, Maxbury. A dispute arose between Huawei and Maxbury, which was the subject of a settlement agreement. That settlement agreement contained an arbitration clause.

Maxbury subsequently commenced court proceedings against Huawei, alleging that there was a collateral understanding between Maxbury and Huawei that Maxbury would be provided with further work from Huawei and therefore entitled to further pay. Maxbury sought in this regard to place reliance on clause 4 of the Settlement Agreement. The court proceedings were stayed in favour of arbitration. In the arbitration, Huawei's case was that there was no such collateral understanding, and that clause 4 only contemplated that Huawei might in the future enter into further contracts for further work. It did not amount to a promise or representation that contracts would be awarded to it.

The arbitrator decided against Maxbury, and Maxbury sought to set aside the award, ostensibly relying on two grounds – first, under section 37 (1)(a)(iv) of the 2005 Act, namely that that the award dealt with 'a dispute not contemplated by or not falling

within the terms of the submission to arbitration'; second, under section 37(1)(b) of the 2005 Act, read with section 37(2)(b), namely, that the award was in conflict with public policy as a breach of the rules of natural justice had occurred during the arbitral proceedings or in connection with the making of the award. Maxbury's arguments were that the arbitrator dealt only with the claim that there was a collateral agreement, but did not deal, as he ought to have done, with the claim that clause 4 of the settlement agreement was breached.

The High Court allowed the application to set aside, but no detailed reasons were given.

On appeal, the Court of Appeal observed that the learned arbitrator had found that Maxbury's claim was premised on the purported collateral agreement and that the claim was not based in the alternative on clause 4 of the settlement agreement. In other words, Maxbury had failed to plead an alternative claim in breach of contract premised on the basis of clause 4.

The Court of Appeal considered therefore that 'the true nature of the complaint was that the arbitrator failed to consider an issue that he ought to have, and that was material and before him'. The Court of Appeal pointed out that such a complaint was 'directly at odds with s. 37(1)(a)(iv) which contemplates a situation where the arbitrator goes outside of the scope of matters falling for consideration in the arbitration, where the arbitrator strays from the purview of the dispute before him'. The Court of Appeal treated with approval the proposition that a tribunal that erroneously declines jurisdiction does not exceed its mandate in the meaning of article 34(2)(a)(iii) of the UNCITRAL Model Law:

> *It is therefore apparent that the fact that the arbitrator is accused of having failed to consider a material issue comprising an integral part of the dispute referred to arbitration does not form the basis for the contention that the arbitrator has exceeded the scope of the dispute referred to him for arbitration. Conceptually that is not an available avenue for an applicant under s. 37(1)(iv)(a) of the AA 2005.*

The Court of Appeal, however, also considered that the content of the award revealed that the arbitrator did indeed consider the issue of clause 4 'in the context in which the dispute was put and pleaded before him'. The Court of Appeal was ultimately of the view that Maxbury's claim was 'really an attempt to have the court review its claim on the substantive merits relating to the existence or otherwise of a collateral agreement'.

As regards Maxbury's alternative case on a breach of natural justice, the court simply concluded that there appeared to be 'no factual basis' for the complaint of breach of natural justice.

On the facts, the result is unsurprising. However, the decision does suggest some uncertainty on how Malaysian law will treat an application for annulment on *infra petita* grounds. The decision that section 37(1)(iv)(a) had no application to *infra petita* challenges is perhaps uncontroversial – Malaysia has no equivalent to section 68(2)d) of the Arbitration Act, which expressly provides that a 'failure by the tribunal to deal with all the issues that were put to it' may constitute serious irregularity warranting remission or the setting aside of the award. However, it is unclear whether the Court of Appeal would have been prepared to consider a true *infra petita* challenge under the rubric of a breach of natural justice. This is the approach taken in Singapore[22] and Switzerland; contrast the French approach, which does not accept that an award may be set aside on *infra petita* grounds.[23]

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 in the Association of Southeast Asian Nations and 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 [2019] 7 CLJ 395
4 *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2007] 4 All ER 951, at 957.
5 *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.
6 Section 18 of the 2005 Act also provides for the procedures and time limits for raising objections to the arbitral tribunal's jurisdiction. It also provides for appeal to court (which shall have the final say) in regard to the arbitral tribunal's ruling on its jurisdiction.
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 [2018] MLJU 310.
10 [2016] MLJU 233.
11 Ibid, at [35].
12 [2020] 2 CLJ 833
13 [2020] MLJU 85
14 [1994] 2 All ER 449
15 [2017] MLJU 1518.
16 Ibid, at [4]-[5].
17 [2019] 1 LNS 85
18 Ibid.
19 [2018] MLJU 2024.
20 [2013] 2 CLJ 395, at [13].
21 [2019] 6 CLJ 588
22 See, eg, *AKN v ALC* [2015] SGCA 18
23 See G Born, *International Commercial Arbitration*, 2nd ed., 2014, at p. 3,294.

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Rajah & Tann Singapore is one of the largest full-service law firms in Singapore and South East Asia. Over the years, the firm has been at the leading edge of law in Asia, having worked on many of the biggest and highest-profile cases in the region. The firm has a vast pool of talented and well-regarded lawyers dedicated to delivering the very highest standards of service across all the firm's practice areas.

The firm entered into strategic alliances with leading local firms across South East Asia and this led to the launch of Rajah & Tann Asia in 2014, a network of more than 600 lawyers. Through Rajah & Tann Asia, the firm has the reach and the resources to deliver excellent service to clients in the region including Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. The firm's geographical reach also includes Singapore-based regional desks focusing on Japan and South Asia. Further, as the Singapore member firm of the Lex Mundi Network, the firm is able to offer its clients access to excellent legal support in more than 100 countries around the globe.