

**ARBITRATION AND ITS DEVELOPMENT IN MALAYSIA**

by

DATUK SUNDRA RAJOO<sup>1</sup>**INTRODUCTION**

Arbitration is one of the methods of alternative dispute resolution ('ADR').<sup>2</sup> The importance of the history and origin of arbitration cannot be overstated. Pearl S Buck has stated that '[i]f you want to understand today, you have to search yesterday'. An examination of the background presents a platform for understanding the prevalence of certain practices in present-day Malaysia as compared to the position globally.

Similar to the ancient use of the mediation process in China and the *panchayat* system of village justice in India, the customary method of dispute resolution in Malaysia is associated with *adat*. It represents an archaic system of dispute resolution practised as customary rites.

The Shariah in Malaya dealt with personal and family law in Malaya and the coastal areas of Borneo. During the 15th Century, it evolved into Islamic dispute resolution practices like *shafa'a* and *tabkshim*. This form of a

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  - 2 It is sometimes referred to as external dispute resolution and includes mediation, conciliation, neutral evaluation, expert determination, mini-trials and last-offer arbitration (where disputing parties submit their final offers to an arbitral tribunal who must decide on one of the offers). The last method pushes the parties to make a reasonable offer and is intended to counter any tendency by the arbitral tribunal to make compromise decisions between the parties' offers as in John S Murray, et Al, Arbitration 240–243, Foundation Pr s2003.

peremptory type of arbitration used for dispute resolution was part of the long-standing arrangement of resolution of differences in the community.<sup>3</sup>

The *Quran*, *Sunnah* (the sayings and practices of Prophet Muhammad), *Ijma'* (consensus among recognised religious authorities) and *Qiyas* (inference by precedent) combine to form the Shariah. The Shariah provides a foundation of principles that apply to arbitration as well. Peremptory-like prescription for arbitration can be derived from the *Quran* and Prophetic traditions.

For example, in the following *Quranic* verse, arbitration was prescribed as the primary method to resolve a marital dispute:

If you fear a breach between them twain (husband and wife), appoint (two) arbitrators, one from his family and the other from her (family); if they both wish for peace, Allah will cause their reconciliation. Indeed, Allah is ever All-Knower, Well-Acquainted with all things. (Surah al-Nisa' (4):35).<sup>4</sup>

Another verse in the Quran states:

And if two factions among the believers should fight, then make settlement between the two. However, if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. Moreover, if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly.<sup>5</sup>

Arbitration in Islamic Law is limited essentially to property and personal matters where private rights are involved. Parties to a dispute relating to property can go for arbitration. The arbitration agreement has to be fulfilled as a matter of principle. Arbitration clauses are valid as they are necessary for the efficacy of the contract and are beneficial to both the parties.

In Malaya, the origin of the common law legal framework for arbitration as enacted by the dominant colonial power started with the Arbitration Ordinance XIII 1809 in the British-controlled Straits Settlement of Penang, Malacca and Singapore. Thereafter, all states of the Federation of Malaya adopted the Arbitration Ordinance 1950. This was subsequently replaced by the Arbitration Act 1952 ('the AA 1952') and later the Arbitration Act 2005 ('the AA 2005') followed by subsequent amendments in 2011 and 2018.

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3 See Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries* (2nd Ed *Kluwer Law International*, 1999).

4 Dato Syed Ahmad Idid and Umar A Oseni, *Appointing a Non-Muslim Arbitrator in Tabkim Proceedings: Polemics, Perceptions and Possibilities* [2014] 5 MLJ xvi.

5 Quran 49:9.

While arbitration is the focus of this article and is reflective of the developments in dispute resolution in Malaysia, the growth of other areas of ADR cannot be overlooked. They are indeed equally important. With the world of commerce rapidly innovating at a fast pace, dispute resolution has also had to evolve from dispute avoidance, dispute prevention, dispute management and finally when all fails into dispute resolution.

When arbitration is considered as conventional and rigid, there have been attempts to seek alternatives to it. Normally such ADR methods like mediation, conciliation and adjudication preceding arbitration are used as part of a multi-tiered dispute resolution regime. Such regimes were either set up by way of legislation or through institutional structures.

Even though in the international domain frameworks for domestic legislation are provided by international texts such as the UNCITRAL Model Law on International Commercial Conciliation (2002), this has not been necessarily the case in Malaysia. For example, the Mediation Act 2012 is a mere facilitative legislation without any bite.

Most commercial disputes often resort either to court or to arbitration. Other forms of ADR are gaining popularity. Although the AIAC is the leading arbitral body and ADR provider in Malaysia, it operates in a competitive environment where arbitrations, both domestic and international, and other niche forms of ADR, are also administered by other associations and professional bodies.

They include the Malaysian Institute of Architects ('PAM'), the Institution of Engineers Malaysia ('IEM'), the Institution of Surveyors Malaysia, the Malaysian International Chamber of Commerce, and the Kuala Lumpur and Selangor Chinese Chambers of Commerce, as well as commodity associations like the Malaysia Rubber Board and the Palm Oil Refiners Association of Malaysia ('PORAM').

With the rise in transactions in the capital markets, the Security Industry Dispute Resolution Centre ('SIDREC') was constituted to cater to the needs of disputes related to unit trusts, derivatives and other capital market products. Presently, all capital market intermediaries, which are corporations holding licences under the Capital Markets and Services Act 2007 to deal in securities and futures and engage in fund management, are members of SIDREC. SIDREC offers an evaluative dispute resolution mechanism. It is efficient and effective, based on the principles of fairness and reasonableness.

Another prominent ADR provider in Malaysia is the Financial Mediation Bureau ('FMB'), which was set up under an initiative taken by Bank Negara Malaysia to resolve disputes between financial service providers and their customers. The FMB's jurisdiction is limited to conventional and Islamic banking products and services, as well as insurance and takaful products and services.

Islamic finance, as an alternative to conventional banking, is a growing financial industry, with a unique set of commercial challenges and issues. The different basis and nature of Islamic finance mean that there are far fewer legal experts and judges with the requisite training and knowledge than in conventional finance.

The AIAC emerged as the first institution to constitute 'i-Arbitration Rules' to balance the principles of Islamic finance with arbitration. The AIAC's i-Arbitration Rules 2018 are Shariah-compliant and provide for, amongst other provisions, the power for the arbitral tribunal to seek reference from the Shariah Advisory Council or a Shariah Expert.<sup>6</sup>

The rise of sports in Malaysia has seen the emergence of multiple professional and amateur associations being formed to advocate and uphold the interests and well-being of their respective fields. The Sports Law Association of Malaysia which has no restrictions on foreign membership was formed to support the study and practice of sports law.

While the Sports Development Act 1997 was amended in 2018 to provide for a Sports Dispute Committee, the AIAC had been providing sports arbitration training with the attendant aim of encouraging the use of arbitration in sports-related disputes. It has also proposed an Asian Sports Arbitration Tribunal with its own arbitration rules and panel of sports law trained arbitrators to provide sports dispute resolution services.

Malaysia's maritime sector has a well-defined set of domestic and international maritime laws, regulations, standards and practices. However, the increasing complexity of the maritime sector has demanded a system that has a good grasp of the law to enable governments, industry players and other maritime stakeholders to ensure their interests are protected and not be overwhelmed by the vast and complex ecosystem of the maritime sector.

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<sup>6</sup> See the AIAC i-Arbitration Rules 2018, r 11. The Shariah Advisory Council was established in May 1997 as a part of Bank Negara Malaysia. The Central Bank of Malaysia Act 2009 (Act 701) stipulates the roles and functions of the Shariah Advisory Council.

The Malaysian maritime community welcomed the establishment of the International Malaysian Society of Maritime Law (‘IMSML’) in 2015. The idea of IMSML was mooted and promoted by AIAC, which now provides the premises for the IMSML’s secretariat. The eventual aim is to build capacity and provide ADR services for maritime disputes.

Malaysia has introduced statutory adjudication for payment disputes in the construction industry in the form of the Construction Industry Payment and Adjudication Act 2012 (‘the CIPAA’). It came into force on 15 April 2014. It has been a runaway success. The number of disputes being resolved under the CIPAA has continued to increase year by year.

The CIPAA applies to all construction contracts made in writing after 22 June 2012 including those entered by the Government of Malaysia. The procedure applies to construction contracts, and adjudicators are appointed by the AIAC unless otherwise chosen by the parties.

The adjudicator has 45 working days after the issue of a response to an adjudication claim (or a reply) in order to issue a written decision. The CIPAA has absorbed the most successful features of adjudication and security of payment legislation that have been enacted around the world.

Mediations are conducted by the FMB, the Malaysian Mediation Centre (‘MMC’), the AIAC and the Biro Bantuan Guaman (‘BBG’). Not all types of complaints can be referred to the FMB. Only claims involving Islamic banking and financial matters not exceeding RM100,000, and insurance and takaful product and services, can be referred.

The MMC offers a comprehensive range of services including professional mediation services, training in mediation, accreditation and maintenance of panel mediators, and the provision of consultancy services.

The BBG only provides mediation services for civil and Shariah cases. The Mediation Act 2012 came into force on 1 August 2012, with the main aim of promoting and facilitating the mediation of disputes for settlement in a fair, speedy, and cost-effective manner.

The Mediation Act 2012 does not provide for mandatory mediation. Parties can mediate concurrently with any civil court action or arbitration. The judiciary has set up its own mediation centre to cater for court-annexed mediation as set out in the Chief Justice’s Practice Direction.

The AIAC, apart from arbitration, also provides mediation services under the AIAC Mediation Rules 2018. The AIAC Mediation Rules 2018 is a set of

procedural rules covering all aspects of the mediation process to help parties resolve their domestic or international disputes.

As part of its improved services, the AIAC has produced the updated Arbitration Rules 2018 with the name change from KLRCA. The Rules are modern and up-to-date. It caters for most types of disputes or differences including investor-State disputes. As a result, it is one of the institutions in the region and globally to model its rules after the IBA Rules for Investor-State Mediation.

One of the more recent developments in ADR is that of Domain Name Dispute Resolution. The Asian Domain Name Dispute Resolution Centre ('ADNDRC') is one of only four providers in the world, and the first and only one located in Asia, to provide dispute resolution services for generic top-level domain names.

The ADNDRC (Kuala Lumpur office) is governed by the Uniform Domain Name Dispute Resolution Policy ('UDRP') and the Uniform Domain Name Dispute Resolution Policy Rules as well as the ADNDRC Domain Name Dispute Supplemental Rules adopted by the ADNDRC.

Only disputes over '.my' country code top-level domain name can be settled through domain name dispute resolution proceedings in Malaysia. This is because only '.my' country code top-level domain names can be registered in Malaysia with the Malaysian Network Information Centre ('MYNIC').

All domain name disputes are governed and administered in accordance with MYNIC's Domain Name Resolution Policy ('MYDRP'), Rules of the MYDRP and the AIAC Supplemental Rules. The Malaysian model of the UDRP is the Malaysian Network Information Centre's Domain Name Dispute Resolution Policy succinctly known as MYDRP. MYDRP was designed by MYNIC together with the Rules of the MYDRP and the Supplemental Rules for the AIAC.

## **THE DEVELOPMENT OF ARBITRATION LEGISLATION**

During the 19th Century, the English Common Law was introduced in what was then called Malaya. It began in the Straits Settlements of Penang, Malacca and Singapore and spread into the Federated and Unfederated Malay States as English colonial power expanded.

Likewise, the English Common Law followed British privateers and commercial trading companies that colonised the northern states of Borneo of Sarawak and Sabah. Later, the administrations of these states were taken over by the British authorities.

Arbitration in Malaysia can be traced back to as early as 1809 with the first arbitration legislation being Ordinance XIII of the Straits Settlement 1809 in the pre-independent states of Malaya, comprising what is now known as Penang, Malacca and Singapore.

The 1809 ordinance was replaced by the Arbitration Ordinance of 1890. Later in 1950, the Arbitration Ordinance 1950 (No 12 of 1950), which was based on the English Arbitration Act 1889 replaced the Arbitration Ordinance of 1890 for all Malayan states. The Arbitration Ordinance 1950 remained in force after the Declaration of Independence in 1957.

Subsequently, the English Arbitration Act 1950 was adopted by British North Borneo (now known as Sabah) in 1952 as its primary legislation on arbitration. The same was enacted as the Sarawak Ordinance No 5 of 1952. North Borneo (now known as Sabah) and Sarawak were incorporated into the Federation of Malaysia on 16 September 1963. Thereafter, the arbitration laws of Sabah and Sarawak became the backbone of Malaysian arbitration legislation.

This is because, pursuant to the Revision of Laws Act 1968, the Sarawak Ordinance No 5 of 1952 was extended to the rest of Malaysia and became the Malaysian AA 1952. The AA 1952, like its English precursor, was a model of clarity and simplicity. It was the *lex arbitri* until 2005.

Unfortunately, such longevity in an era of relentless economic change and growth revealed its shortcomings. The AA 1952 failed to maintain its early usefulness as promised by its simplicity and clarity. By the early 2000s, the general view was the need for reform.

The AA 1952 was decried as a product of a bygone era. Complaints arose regarding excessive court supervision which was viewed as a negative interference in the arbitral process (including in case management and the enforcement of the award). The net result was that the interweaving of court processes undermined the arbitral process.

In addition, the 1952 Act itself was deficient in promoting party autonomy, not providing the arbitral tribunal with sufficient powers to carry out its functions effectively. It did not deal sufficiently with interim measures. Its test

for the challenge against the arbitral tribunal was couched in terms of misconduct of the arbitral tribunal itself or misconduct in conducting the proceedings.

The notions of equality and due process were implied but not explicitly laid out. The grounds to challenge the arbitral tribunal were not rooted in the notions of justifiable doubts arising out of partiality or the lack of independence. This had to be constructed in the light of the availability of the UNCITRAL Model Law recommended for enactment as an adjunct to the New York Convention.

Malaysia's ratification of the New York Convention in 1985 constituted a milestone in that it became a modern arbitral jurisdiction for the enforcement of foreign arbitral awards. By then, the AA 1952 was an archaic anomaly. This did not dampen the increasing popularity of arbitration as arbitration agreements were being inserted in standard form contracts domestically and in international commercial matters involving transnational arrangements.

In turn, this led to more court applications and the resulting case law while generally, pro-arbitration did regularly throw up decisions which exposed the shortcomings of the AA 1952 for a modern economy. In addition, there were two separate enforcement regimes for domestic and international awards.

In 1978, the AIAC, then known as the Regional Centre for Arbitration, Kuala Lumpur ('RCAKL') was established under the auspices of the Asian-African Legal Consultative Organization ('AALCO'). It was the first regional centre established by AALCO in the Asia Pacific Region to provide institutional support as a neutral and independent venue for the conduct of domestic and international arbitration proceedings.

RCAKL was also established pursuant to a host country agreement with the Government of Malaysia. Being a non-profit, non-governmental and independent international body, interestingly, it was also the first arbitral centre in the world to adopt the UNCITRAL Arbitration Rules 1976.

At this point, it is pertinent to highlight that there was a solitary amendment in 1980 to introduce a new s 34 to the AA 1952, which created an odd divide based on the choice of regime dictated by the arbitration agreement ('1980 Amendment'). Section 34(1) of the AA 1952 stated:

Notwithstanding anything contrary in this Act or in any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes between States



and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration.

The 1980 Amendment totally excluded the operation of the AA 1952 and any written law for the two categories of arbitrations named in the section. All other institutional arbitrations, whether conducted under other institutional rules such as HKIAC, SIAC, ICC, and LCIA or conducted ad hoc, remained subject to the full supervisory jurisdiction of the Malaysian courts under the AA 1952. In effect, it re-emphasised the dichotomy between arbitrations conducted under the Centre and other types of arbitration.

The purpose of the 1980 Amendment was clearly to try to encourage the use of RACKL by parties who did not want the Malaysian courts to be involved in any form in their arbitral process except for enforcement.<sup>7</sup> There was then no opportunity for any party to invoke the court's jurisdiction, thereby causing delay and escalation of costs. There was no issue regarding interference by the court either in support of or in supervising the arbitral process.

In effect, the statutory exclusion of the AA 1952 under s 34 was based on the choice of arbitration rules provided for in the arbitration agreement. It did not require the parties to agree on the exclusion specifically. It was not only the AA 1952 which was not to apply but also 'other written law'.

In practice, the court's jurisdiction was totally ousted. In turn, there emerged concerns on whether Malaysian courts could play a supportive role in the arbitral process which was the hallmark of modern arbitral regimes. As it then stood, the courts could not intervene nor assist.

The lacunae were highlighted by situations where the arbitral tribunal did not always possess the powers like the court to ensure the arbitral proceedings were conducted properly and led to a fair and just award. An example of this was the production of witnesses by way of subpoena of the court in aid of arbitration.

This odd divide introduced by s 34 as per the 1980 Amendment did not follow the normal and logical divide between 'domestic' and 'international' arbitration, it followed the choice of regime in the arbitration agreement.

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<sup>7</sup> See PG Lim, *Practice and Procedure under the Rules of the Kuala Lumpur Regional Centre for Arbitration* [1997] 2 MLJ lxxiii.

The decision in *Jati Erat Sdn Bhd v City Land Sdn Bhd*<sup>8</sup> confirmed that the 1980 Amendment applied to any arbitration held under the then RCAKL Rules regardless of whether the parties were local or international (as compared to the earlier curiously reasoned decision of *Syarikat Yean Tat (M) Sdn Bhd v Ahli Bina Pamong Sari Sdn Bhd*<sup>9</sup> which seemed to suggest otherwise).

The uncertainty coupled with the anomalous dichotomy away from arbitral regimes in other developed jurisdictions set the stage for a wholesale reform of the arbitral regime itself.

### THE ARBITRATION ACT 2005

On 30 December 2005, Parliament enacted the AA 2005 (Act 646) which was based on the UNCITRAL Model Law. The AA 2005 repealed and replaced the AA 1952. It also incorporated provisions of the New York Convention relating to the recognition and enforcement of international awards. The AA 2005 came into force on 15 March 2006.

Thus, since 15 March 2006, all arbitral proceedings have been conducted under the AA 2005 which applies to all arbitrations commenced after its commencement date, including matters relating to the setting aside, recognition and enforcement of awards.

The AA 2005 categorised arbitrations into two types, namely international and domestic arbitrations. While the AA 2005 applies to both international and domestic arbitrations, Part III of the AA 2005 contains provisions that only apply to all domestic arbitrations. The default position is that Part III does not apply to international arbitrations. The parties will have to by way of an agreement opt-in for Part III to apply to international arbitrations. For domestic arbitrations, the parties can nevertheless agree expressly to opt out of Part III. This is regardless of whichever arbitration rules are involved.

Despite the change in the law, the High Court in *Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd*<sup>10</sup> decided that parties may choose whether to be governed by the previous enactment or the prevailing enactment. Unfortunately, it can be said that this is an example of the court's intervention in arbitration proceedings that appears not to be supportive of the AA 2005.

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8 [2001] MLJU 768; [2002] 1 CLJ 346.

9 [1996] 5 MLJ 469; [1995] 2 AMR 2058.

10 [2008] 7 MLJ 757; [2008] 3 AMR 177.

The facts show that the defendant in *Putrajaya Holdings* had carried out some works for the plaintiff company, and since the plaintiff defaulted in making payment and owed a debt to the defendant, the defendant commenced winding-up proceedings against the plaintiff, to which the plaintiff objected. The defendant then filed a defence and counterclaim.

There was an arbitration clause in the agreement. The plaintiff sought to stay the court proceedings, as it wanted to proceed to arbitration. Since the arbitration was commenced in 2007, the plaintiff naturally assumed that the AA 2005 would be the governing law. The defendant contended that the matter should be governed by the AA 1952.

The issue before the court was which statute was applicable. The salient issues to be considered were as follows: If the AA 2005 was to apply, then the defendant would not have been able to proceed with its court proceedings, and the matter would have had to go to arbitration. There was no provision under the AA 2005 for the court to set aside the proceedings, or to revoke the power of the arbitrator as provided for in s 25 of the AA 1952.

Under the AA 2005, the court could only stay proceedings if there was no arbitration agreement, or if there was no dispute that could be arbitrated. It appears that the High Court was dissatisfied with the removal of s 25 of the AA 1952 from the AA 2005. The court explained:

The changes in the new 2005 Act is very substantial as it oust [sic] the court's jurisdiction to interfere when the parties agree in writing to refer the dispute to arbitration and there is no similar provision to s 25(2) of the 1952 Act in the new 2005 Act. The defendant shall have not entered into the arbitration agreement with the plaintiff if the defendant were aware that it cannot refer the dispute to the court as provided under s 25(2) of the 1952 Act.

Although this reasoning seems inconsistent with the provisions of the AA 2005, it is tied back to a translation error perhaps because of misunderstanding or incompetency in translating ability as shown in the Bahasa Malaysia version when compared to the English version. The result was there was a discrepancy between the Bahasa Malaysia version and the English version of the AA 2005 as regards the commencement date.

Unfortunately, the court failed to appreciate that the English version of the AA 2005 was the authoritative text as it was declared so by the then Prime Minister under the National Language Acts 1963/67.<sup>11</sup>

An English representation of the Bahasa Malaysia version of s 51(2) of the AA 2005 would read as follows:

Where the arbitration agreement was made or the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted.

The court held that an arbitration even if commenced today, may fall within the ambit of the AA 1952 so long the arbitration agreement was executed before the coming into force of the AA 2005.

However, the approach has been remedied in *Majlis Ugama Islam dan Adat Resam Melayu Pahang v Far East Holdings Bhd & Anor*,<sup>12</sup> where the court held that although the subject arbitration clause referred to the AA 1952, the applicable legislation was the AA 2005. The ratio is that s 51 of the AA 2005 provided for the repeal of the AA 1952.

The enactment of the AA 2005 was a reform which was overdue. The AA 2005 at its original enactment was modelled extensively on the UNCITRAL Model Law and, for the most part, is applicable to both international and domestic arbitrations except for Part III. Although the AA 2005 was based on the UNCITRAL Model Law, the level of court intervention that was maintained by ss 41–43 in Part III was primarily aimed at domestic arbitrations. By so doing, it distinguished international and domestic arbitrations.

Given that it has been more than a decade since the commencement of the AA 2005, the jurisprudence surrounding the legislation has evolved as the courts have interpreted the various provisions of the AA 2005. Also, the AA 2005 was amended in 2011 and 2018. These amendments affect the law and practice of arbitration in Malaysia. This book analyses and comments on the various provisions of the AA 2005 as it stands with all amendments as of 8 May 2018.

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11 PU(B) 61/2006; see also Sundra Rajoo *Law Practice and Procedure of Arbitration — The Arbitration Act 2005 Perspective* [2009] 2 MLJ cxxxvi.

12 [2007] MLJU 523; [2007] 10 CLJ 318 (HC).

**THE 2011 AMENDMENTS TO THE ARBITRATION ACT 2005**

The Arbitration (Amendment) Bill 2010 was passed as the Arbitration (Amendment) Act 2011 (Act A1395). It came into force on 1 July 2011 ('2011 Amendments').

The amendments dealt largely with areas of ambiguity and inconsistency in the interpretation of the provisions of the AA 2005, bringing the clarity sought by the arbitral community. The 2011 Amendments modified ss 8, 10, 11, 30, 39, 42 and 51 of the AA 2005.

Section 8 was recast to restrict court intervention. The amended s 8 makes it clear that court intervention should be confined to situations specifically covered by the AA 2005. This thus excludes the application of common law or the inherent powers of the court.

The amendment to s 10 removes the court's power to stay arbitration proceedings where the court is satisfied that there is no dispute between the parties with regard to the matters to be referred to arbitration. The old provision placed an undue restriction on the arbitration process which was not contained in the UNCITRAL Model Law or the New York Convention.

In line with article 8A of the UNCITRAL Model Law, under the current s 10 of the AA 2005 the High Court is under the obligation to refer the parties to arbitration unless the High Court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. A further amendment was made through the inclusion of ss 10(2A)–10(2C) to deal specifically with admiralty proceedings.

This amendment enables the court to order that any property arrested, or bail or other security given, is to be retained as security for the satisfaction of any award that may be given in the arbitration proceedings, or to order that a stay of court proceedings be conditional upon equivalent security being provided for the satisfaction of any award that may be given in the arbitration proceedings.

The 2011 Amendments also introduced s 10(4), making it clear, in line with the UNCITRAL Model Law, that the curial powers of the High Court apply not only to Malaysian seated arbitrations but also to foreign seated arbitrations.

Section 11 of the AA 2005 was similarly amended to recognise the court's powers to order interim relief (particularly in admiralty proceedings) and to clarify that those powers applied both to arbitrations seated in Malaysia and elsewhere.

The 2011 Amendments to s 30 dispensed the arbitral tribunal from applying Malaysian law to the merits of the dispute where the parties to the dispute had agreed that the dispute was to be governed by the laws of a jurisdiction other than Malaysia. This amendment removed the mandatory imposition of Malaysian law in domestic arbitrations and upheld party autonomy to choose the substantive law applicable to the dispute.

The 2011 Amendments to s 42 of the AA 2005 imposed an obligation on the court to dismiss a question of law arising out of an arbitral award if the court finds that the question of law does not substantially affect the rights of one or more of the parties. This amendment created a threshold for reference to the High Court for appeals against arbitral awards on a question of law.

It has been found that the s 42(1A) requirement 'substantially affects the rights of one or more of the parties' has proved insufficient to restrict the use of the court system by parties to challenge the award issued in domestic arbitration.

In practice, the High Court and the Court of Appeal have valiantly attempted to interpret the scope of s 42 restrictively. However, it was ineffective in reducing litigation in challenging the finality of arbitration awards through the three tiers of appeal to the High Court, the Court of Appeal and the Federal Court. There have been complaints that domestic arbitration had effectively become the first instance hearing from which all awards can be challenged until the Federal Court.

The Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals*<sup>13</sup> decisively confirmed the same by expanding further the scope of matters which can be referred to the High Court pursuant to s 42 of the AA 2005. It essentially meant that every question of law arising out of an award could now be ventilated at and revisited by the courts starting from the High Court and moving up to the Federal Court.

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13 [2018] 1 MLJ 1; [2017] 8 AMR 313.

There have been even further suggestions that there existed now the concurrent jurisdiction of the courts to set aside arbitral awards: both under ss 37 and 42.<sup>14</sup> The existence and the exercise of such concurrent jurisdiction undermined the principles of finality of awards and minimum court intervention which underpinned the enactment of the AA 2005.

As such, it was no surprise that, with the support of the Bar Council, various arbitral bodies and business institutions, Parliament dealt with the difficulties by passing the Arbitration (Amendment) (No 2) Act in 2018. It became operative on 8 May 2018.

### THE 2018 AMENDMENTS TO THE ARBITRATION ACT 2005

In December 2017, Parliament passed the Arbitration (Amendment) (No 1) Act 2018 to change the name of KLRCAs to the Asian International Arbitration Centre (AIAC). Parliament later passed the Arbitration (Amendment) (No 2) Act 2018 in April 2018. Both the Amendment Acts received royal assent and came into operation on February 28 and 8 May 2018 respectively ('2018 Amendments')

It is necessary to consider the background to the 2018 Amendments.

Pursuant to the 2018 Amendments, the definition of 'arbitral tribunal' in s 2 of the AA 2005 has been amended to include emergency arbitrators. Emergency arbitrator applications have become common practice in international arbitration. This is consonant with Schedule 3 to the AIAC Arbitration Rules and the AIAC i-Arbitration Rules which set out the procedure for emergency arbitrator proceedings.

With these amendments, it is expected that emergency arbitrator proceedings will be made more efficacious as the status of an emergency arbitrator and its orders or awards in relation to emergency relief is now recognised in the AA 2005 itself.

Following the coming into force of the amendments to s 2 of the AA 2005 and the introduction of the new s 19H into the AA 2005, the orders or awards granted by an emergency arbitrator would become enforceable.

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<sup>14</sup> See *Huawei Technologies (Malaysia) Sdn Bhd v Maxbury Communications Sdn Bhd* [2019] MLJU 1755 (CA) and *Bijak Teknik Sdn Bhd v Lembaga Pertubuhan Peladang* (Court of Appeal No W-02 (NCC)(A)-1429-07 of 2017).

Foreign lawyers are allowed under an unrestricted fly in and fly out provision in the Legal Profession Act 1976 to represent parties in arbitrations seated in Malaysia. According to s 37A of the Legal Profession Act 1976 introduced by the Legal Profession (Amendment) Act 2014 that came into force on 3 June 2014:

Sections 36 and 37 [of the Legal Profession Act that does not allow non-Malaysian qualified lawyers to practise] shall not apply to —

- (a) any arbitrator lawfully acting in any arbitral proceedings;
- (b) any person representing any party in arbitral proceedings; or
- (c) any person giving advice, preparing documents and rendering any other assistance in relation to or arising out of arbitral proceedings except for court proceedings arising out of arbitral proceedings.

The 2018 Amendments also introduced a new s 3A into the AA 2005 that provides for parties' freedom to choose any representative, not just a Malaysian lawyer or any foreign lawyer, to advise and represent their case in arbitral proceedings.

Such flexibility is necessary for commercial arbitrations. There may be situations where a party would prefer a representative with practical subject-matter expertise or even a foreign lawyer with whom they are more comfortable.

Such foreign representatives would be adept at responding to the queries of the arbitral tribunal. This can provide more choice to the parties when selecting their representative as opposed to appointing someone who is trained in the legal arts but requires the support of an expert witness to address such queries.

Section 3A of the AA 2005 can be considered to have enhanced the concept of party autonomy in arbitration — that is, the generally recognised concept that parties to an arbitration agreement are free to choose for themselves the law (or legal rules) applicable to that agreement. The new s 3A would also allow parties to arbitrations seated in Sabah or Sarawak to be represented by foreign legal practitioners or West Malaysian legal practitioners.

Section 4 of the AA 2005 has also been amended to make it explicit that the question of arbitrability not only requires consideration of public policy but also requires a consideration of whether the subject matter of the dispute is capable of settlement under the laws of Malaysia.



These amendments bring s 4 in line with the New York Convention and s 39 of the AA 2005, according to which the enforcement of an arbitral award may be refused, if the subject matter of a dispute is not capable of being settled by arbitration

The writing requirement in s 9 of the AA 2005 has been expanded to include arbitration agreements concluded orally or otherwise, provided that the contents are recorded in any form. The definition of writing has also been broadened to include electronic communication.

The inclusion of electronic communications in the definition of written arbitration agreement promotes alternative dispute resolution as a go-to method for parties engaged in the business of electronic commerce (ie e-commerce), especially those with businesses in the recently established Malaysian Digital Free Trade Zone.

Historically, powers to order interim measures were reserved to national courts only. However, one of the most important improvements in the 2006 revision of the UNCITRAL Model Law was the introduction of the comprehensive framework for interim measures to balance the powers of arbitral tribunals and national courts and to ensure efficient and effective resolution of disputes.

The 2018 Amendments follow the UNCITRAL Model Law framework by amending ss 11 and 19 of the AA 2005 and adding new ss 19A–19J. Now, arbitral tribunals will be able to issue the specified interim measures, just as the Malaysian courts are able to do so. However, these changes make it clear that the power of arbitral tribunals cannot and do not exceed the power available to the courts.

To the contrary, the courts retained additional powers to grant interim measures, namely, arrest of property or bail or other security pursuant to the admiralty jurisdiction. This deviation from the UNCITRAL Model Law regime, albeit minor, is of great importance to the development of the Malaysian maritime industry.

The overhauled provisions on interim measures do also deal with the issue of recognition and enforcement of interim measures and provide for safeguards for parties against whom such measures are sought. As noted above, this brings much greater clarity in the enforcement process of interim measures, including those granted by an emergency arbitrator.

Section 30 now follows article 28 of the UNCITRAL Model Law. This is a significant departure from the former expression of this provision. The wording of the AA 2005 prior to the amendments was restrictive and questioned the parties' right to apply foreign law in arbitration proceedings.

Section 30 now does not distinguish between domestic and international arbitrations. It requires the arbitral tribunal to decide disputes in accordance with the rules of law chosen by the parties to govern the substance of the dispute.

It has become the norm that a party is entitled to be compensated for the loss of opportunity to use money that is not paid in the form of interest (both pre-and post-award).

However, the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang*<sup>15</sup> upheld the Court of Appeal's judgment that the AA 2005 does not empower the arbitral tribunal to give pre-award interest. As such, the right to pre-award interest is restricted to situations where the arbitral tribunal is empowered by the arbitration agreement or by arbitral institution rules.

The amended s 33 of the AA 2005 reinstates the powers of the arbitral tribunal to award interest. It is in line with the law in England, Singapore and Hong Kong.

The arbitral tribunal is now explicitly empowered to award either simple or compound interest at such rate and with such rest as considered appropriate for any period prior to the date of payment of: (a) the sum ordered by the arbitral tribunal; (b) the sum in issue before the arbitral tribunal but paid before the date of the award; or (c) costs awarded or ordered by the arbitral tribunal.

The 2018 Amendments have also introduced confidentiality provisions, analogous to Hong Kong's Arbitration Ordinance (Cap 609), through the new ss 41A and 41B.

Finally, and most importantly, the 2018 Amendments have repealed ss 42 and 43 of the AA 2005. The repeal of s 42 of the Act has two important implications.

Firstly, parties will no longer be able to bring questions of law before the High Court after an award has been rendered. Rather, if the parties, or the

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15 [2018] 1 MLJ 1; [2017] 8 AMR 313.

arbitral tribunal, require clarification on a question of law, they will have recourse to the High Court during arbitral proceedings pursuant to s 41 of the AA 2005.

Secondly, s 37 of the AA 2005 is now the only recourse parties may have in seeking to set aside an award. This is the provision which has been used by Malaysian courts to set aside arbitral awards. The grounds for setting aside an award under s 37 is similar to the grounds under article 34 of the UNCITRAL Model Law and the relevant provision of the New York Convention.

## CONCLUSION

Arbitration in Malaysia is here to stay. The recent developments are indicative of the approach taken by the jurisdiction to address shortcomings, improve the arbitral process and strengthen the finality of arbitral awards.

The 2018 Amendments make Malaysia a safe seat for domestic and international arbitration. Ultimately, it is hoped that more international commercial arbitration will be attracted to Malaysia. Also, it will be more attractive to use arbitration domestically to resolve disputes thereby reducing the case burden in the courts and bringing tangible benefits to the country.

Also, the name change of KLRCA to AIAC is intended to enable the Centre to take a more international approach in offering its services. Given that the arbitral regime has now been overhauled and Malaysia is in tandem with the leading arbitral seats, it is likely that both domestic and international commercial arbitrations will thrive in Malaysia.