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ASIAN INTERNATIONAL ARBITRATION CENTRE (AIAC) — TRANSFORMATION, GROWTH AND PROSPECTS

by

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HISTORY AND BACKGROUND OF AIAC

The Asian International Arbitration Centre ('AIAC') was established on 17 April 1978 as an independent, supranational arbitral institution with its own juridical personality hosted in Malaysia. It was set up under the auspices of the then Asian-African Legal Consultative Committee ('AALCC') now known as the Asian-African Legal Consultative Organisation ('AALCO').[2]

The then Malaysian Prime Minister Tun Hussein Onn officially inaugurated the Regional Centre for Arbitration Kuala Lumpur ('RCAKL') on 17 October 1978. It was subsequently renamed as the Kuala Lumpur Regional

1 Founding President, Asian Institute of Alternate Dispute Resolution (2018 to date); Certified International ADR Practitioner (AIADR); Chartered Arbitrator (CIArb); Advocate & Solicitor; Architect and Town Planner; Director, Asian International Arbitration Centre (2010–2018); Chairman, Asian Domain Name Dispute Resolution Centre (2018); Deputy Chairman, FIFA Adjudicatory Chamber (2018); President, Chartered Institute of Arbitrators (2016); President, Asian Pacific Regional Arbitration Group (APRAG)(2011); Founding President, Society of Construction Law Malaysia; Founding President, Malaysian Society of Adjudicators; Founding President, Sports Law Association of Malaysia; sometime Visiting and Adjunct Professors at Universiti Teknologi Malaysia, Universiti Kebangsaan Malaysia, Universiti Sains Malaysia, University of Malaya. Hon LLD (Leeds Beckett).

2 This change of name was done at the 40th Annual Session in 2001.

Arbitration Centre ('KLRCA') in April 2010 and then to the Asian International Arbitration Centre (AIAC) on February 2018.[3]

The AALCO was established on 15 November 1956 as the outcome of the Bandung Conference, which took place from 18–24 April 1955 in Bandung, Indonesia. It was initially formed to serve as an advisory board to member states on matters relating to international law.

AALCO later assumed the role of assisting member states in drafting constitutions, model legislation and bilateral agreements upon request. It also provided expertise and assisted member states in the appointment of arbitrators and other matters relating to arbitral proceedings as well as capacity building in alternative dispute resolution ('ADR') and training of arbitrators in its regional centres.[4]

There are now 47 states who are members of AALCO.[5] The Secretariat of the organisation is located at its permanent headquarters in New Delhi. An elected Secretary-General heads it. The present Secretary-General, His Excellency Professor Dr Kennedy Garston is from Tanzania.

Deputy Secretaries-General and Assistant Secretaries-General are senior officers of member governments sent on secondment, assist the Secretary-General. Presently, the governments of the People's Republic of China, Islamic Republic of Iran and Japan have deputed their senior officials to the Secretariat. The regular staff of the Secretariat includes officials in professional and administrative categories.

The organisation also maintains permanent observer missions to the United Nations in New York and Vienna. One of the major achievements of

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3 In December 2017, the Malaysian Parliament passed the Arbitration (Amendment) Act 2018 to change the name of KLRCA to the Asian International Arbitration Centre (AIAC) by way of s 3 which made suitable changes to all written law and any other legal instrument. It was given Royal Assent on 29 December 2017 and *Gazetted* on 10 January 2018. It came into operation on 28 February 2018 by way of a Federal Government *Gazette* dated 27 February 2018, PU(B) 101. This was subsequent to the supplementary agreement between the Government of Malaysia and AALCO.

4 Sundra Rajoo and Philip Koh (eds), *Arbitration in Malaysia: A Practical Guide*, Sweet & Maxwell, 2016 at para [15.002].

5 Egypt, India, Indonesia, Iraq, Japan, Myanmar, Sri Lanka, Pakistan, Thailand, Ghana, Jordan, Sierra Leone, Iran, Kenya, Republic of Korea, Kuwait, Malaysia, Nigeria, Singapore, Syria, Nepal, Mauritius, Tanzania, Bangladesh, Gambia, DPR of Korea, Saudi Arabia, Turkey, Libya, Oman, Qatar, Somalia, United Arab Emirates, Republic of Yemen, Uganda, Cyprus, Mongolia, Senegal, People's Republic of China, Sudan, State of Palestine, Kingdom of Bahrain, Lebanon, Brunei Darussalam, South Africa, Cameroon and Socialist Republic of Vietnam. Australia and New Zealand have the status of Permanent Observers, cp. http://www.aalco.int/ (accessed 19 August 2020).

the AALCO in its programme in the economic field was the launching of its Integrated Scheme for Settlement of Disputes in the Economic and Commercial Transactions in 1978.[6]

Pursuant to that scheme, it was decided that Regional Arbitration Centres be established under the auspices of the AALCO, which would function as international institutions with the objectives to promote international commercial arbitration in the Asian-African regions.

It started with the establishment of regional centres for international commercial arbitrations in selected AALCO States. The rationale behind it was to encourage the setting of local arbitral centres in the Asian African region to hear disputes from member states to overcome foreign exchange issues, high costs and undue prolongation of arbitral proceedings in Western European places of arbitration.[7]

As such, the centres are to promote resolution of international commercial disputes using international arbitration under these Centres. Their mission was to assimilate the euro-centric practices of commercial arbitration within the cultural rubrics of the legal systems in the Asian and African region.

The objectives of the centres are:[8] (a) promoting international commercial arbitration in Asia and Africa; (b) coordinating and assisting the activities of arbitral institutions already existing in Asia and Africa; (c) rendering assistance in the conduct of ad hoc arbitrations especially those conduct under the UNCITRAL Arbitration Rules; (d) assisting in the enforcement of arbitral awards; and (e) conduct of arbitration proceedings administered under the auspices of the centres established by AALCO.

The AIAC was the first of the regional centres that have been established under the AALCO. The other centres are located in Cairo (Arab Republic of Egypt), Lagos (Nigeria), Tehran (Islamic Republic of Iran) and Nairobi (Republic of Kenya).[9]

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6 This decision was made at the 17th Annual Session in Bagdad in 1977.

7 Lim, PG, Kuala Lumpur Regional Centre for Arbitration, *INSAF The Journal of the Malaysian Bar*, 1983 at p 126.

8 Sundra Rajoo (Dr Thomas R Klotzel, Special Contributor), *UNCITRAL Model Law & Arbitration Rules: The Arbitration Act 2005 (Amended 2011 and the AIAC Arbitration Rules 2018*, 2019, Sweet & Maxwell at pp 706–707.

9 The 18th Annual Session at Doha in 1978 approved the setting up of regional arbitration centres at Kuala Lumpur and Cairo. Another three centres were set up subsequently in Lagos in 1989, Teheran in 2003 and Nairobi in 2006.

The establishment of the AIAC in Kuala Lumpur, Malaysia was formalised under a host country agreement between the AALCO and the government of Malaysia.[10] The government of Malaysia, as part of its international obligation, provides funding for the operation of the AIAC. It guarantees that the AIAC will run independently and ensure that its premises and archives are inviolate.

The AIAC is, therefore, accorded with certain privileges and immunities pursuant to the International Organisations (Privileges and Immunities) Act 1992 for the purposes of executing its functions as an independent international organisation.[11] The AIAC is the sole independent international arbitral institution in Malaysia. It is heavily relied upon and entrusted with the conduct of arbitrations. AIAC's key objectives includes: (a) to provide services for arbitration and other forms of alternative dispute resolution; (b) to promote international commercial arbitration in the Asia-Pacific area; (c) coordinating and assisting the activities of existing arbitral institutions, particularly those within Asia and Africa;(d) rendering assistance in the conduct of ad hoc arbitrations particularly those held under the UNCITRAL Arbitration Rules 1976 (revised in 2010) and the Malaysian Arbitration Act 2005; and (e) assisting in the enforcement of arbitral awards.[12]

However, AIAC is not the only body that administers arbitration in Malaysia. There are other professional and industry specific bodies in Malaysia that provide for and administer arbitrations under their auspices.

These include the Malaysian Institute of Arbitrators; Malaysian Institute of Architects, the Institution of Engineers Malaysia, the Institution of Surveyors Malaysia, the Malaysian International Chamber of Commerce, the Kuala Lumpur and Selangor Chinese Chambers of Commerce, as well as commodity

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10 Initially, letters were exchange between the Government of Malaysia and AALCO in March 1978 by which Malaysia undertook to set up an independent arbitral centre in Kuala Lumpur under the sponsorship of AALCO. Its responsibilities included the provision of suitable premises, personnel, funding and other facilities for a period of three years. See Zakaria M Yatim, *The Regional Centre for Arbitration, Kuala Lumpur* [1978] 2 MLJ i. This was followed by a formal host country agreement in July 1981. In 1996 and 2013 saw the host country agreements between the Government of Malaysia and AALCO further enhanced to reinforce AIAC as an international organisation hosted in Malaysia.

11 International Organisations (Privileges and Immunities) Act 1992, ss 3 and 4; Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 PU(A) 120. See also *Regional Centre for Arbitration v Ooi Beng Choo & Anor* Case Ref No W-01–106 of 1998 (unreported); *Sundra Rajoo a/l Nadarajah v Menteri Hal Ehwal Luar Negara, Malaysia & Ors* [2020] 7 MLJ 42).

12 Karly Nairn & Patrick Heneghan, Arbitration World, 5th Ed, 2015, Report KLRCA by Sundra Rajoo at p 156.

associations like the Malaysian Rubber Board and the Palm Oil Refiners Association of Malaysia (PORAM) provide for and administer arbitrations, both domestic and international.

Despite serving as the main international arbitration institution, the AIAC also caters for domestic arbitrations in Malaysia and is also named as the default appointing authority under s 13(5) of the Arbitration Act 2005 (amended 2011 and 2018). Where parties are unable to agree on the appointment of the arbitral tribunal, or where the procedure for appointment fails for any reason, the AIAC makes such appointment upon receiving requests from parties.

As the AIAC maintains a large pool of arbitrators in its panel, the appointment is usually made within a period of 48 hours and, if at all, in less than five working days. In the event that the Director is unable to act or fails to act within 30 days, any party may apply to the High Court under s 13(7) of the Arbitration Act 2005 (Amended 2011 and 2018).

The AIAC is headed by a Director who reports directly to the Secretary General of the AALCO. The Director is assisted by an Advisory Board appointed by the Minister in the Prime Minister's Department in charge of legal affairs in consultation with the Secretary General of the AALCO. The role of the Advisory Board to provide strategic direction in its aim to be the preferred arbitration centre in the Asia Pacific as well as positioning Malaysia as an arbitration friendly destination.

AIAC'S ROLE IN THE GROWTH OF ALTERNATIVE DISPUTE RESOLUTION

One of the principal functions entrusted to the AIAC is the provision of facilities for the conduct of arbitrations and Alternative Dispute Resolution ('ADR') in general. The facilities for arbitration under the auspices of the AIAC are available for both administered and ad hoc matters, both local and international.

The AIAC is housed in a large colonial building, more popularly referred to as the 'Bangunan Sulaiman'. It is situated in the heart of Kuala Lumpur with efficient connectivity to Kuala Lumpur Sentral. This is the central intersection to several public rapid transport systems to the airport and the rest of Malaysia. The AIAC's Bangunan Sulaiman offers the services of 22 hearing rooms of varying sizes, 12 breakout rooms and two consultation rooms.

Other facilities and services include secretarial, photocopying, faxing, interpreters, transcribing and food catering. Most of the hearing rooms are fitted with a court recording and transcription system (CRT), which is made available at a party's request.

The facilities and services are also available for the conduct of ad hoc arbitrations. The AIAC will impose reasonable charges for the use of the hearing rooms and facilities depending on the size and types of room selected. The request or booking of the hearing rooms and other support facilities or services may easily be made through the AIAC's website.[13]

The AIAC also has arrangements with various institutions such as the Permanent Court for Arbitration, the World Bank's International Centre for Settlement of Investment Disputes and the Court of Arbitration for Sport for the provision of an alternate hearing venue.[14]

Arbitration proceedings under the auspices of these institutions may be held at the AIAC with limited administrative support. There also exist cooperation and strategic partnership agreements with several arbitral institutions mainly located in the Asia-Pacific Economic Area.

Those include Tokyo Maritime Arbitration Commission, Korean Commercial Arbitration Board, Indian Council of Arbitration, Japan Commercial Arbitration Association, Australian Centre for International Commercial Arbitration, Arbitration Centre of the Institute for the Development of Commercial Law and Practice, Sri Lanka, Foreign Trade Arbitration Court of the Mongolian Chamber of Commerce and Industry, Hong Kong International Arbitration Centre and Dubai International Arbitration Centre.

Other institutions from Europe, Russia and the United States followed such as the London based Islamic Finance Lawyers, the International Council of Arbitration for Sport, Switzerland, the Chinese International Economic and Trade Arbitration Commission and the Russian Arbitration Association.

In 2016, an agreement has been made with the Bangladesh International Arbitration Centre and a Memorandum of Understanding has been signed with the Sharjah International Commercial Arbitration Centre (Tahkeem).

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13 At https://aiac.world/bangunan-sulaiman.

14 Sundra Rajoo & Philip Koh (eds), *Arbitration in Malaysia: A Practical Guide*, Sweet & Maxwell, 2016 at para [20.074].

The International Chamber of Commerce and the Beijing International Arbitration Centre joined hands with AIAC in 2017.[15]

In recent years, especially after its re-branding in the years 2010 and 2018, the AIAC has grown from strength to strength and has successfully placed Malaysia on the global map of international commercial arbitration. The AIAC continuously improves and innovates its rules of procedure and practices. In 2011 it was accorded with world recognition for introducing the first set of international arbitration rules, which provide for the resolution of disputes with an element of Shariah law, the AIAC's i-Arbitration Rules.

The AIAC has been instrumental in the development and improvements to ADR legislation in the country, namely, the revision to the Malaysian Arbitration Act 2005 in 2011 and the Construction Industries Payment Adjudication Act 2012 ('the CIPAA 2012'). The AIAC is the sole administrative authority for the conduct of statutory adjudication under the CIPAA 2012.

The AIAC's rigorous efforts in creating awareness and garnering support from all stakeholders and the judiciary brought about a surge and increase in alternate dispute resolution case references from a mere 22 arbitration cases in 2010, 52 arbitration cases in 2011, 135 arbitration cases in 2012 (118 domestic and 17 international proceedings), 156 arbitration cases in 2013 (128 domestic and 28 international proceedings), 282 arbitration cases in 2014 (221 domestic and 61 international proceedings),[16] 103 arbitration cases in 2015,[17] 62 arbitration cases, 12 domain disputes including eight international cases, five domestic mediations in 2016,[18] 126 arbitration cases (109 domestic and 17 international), six domain disputes with two international cases as well as two administered mediations, one of which was international in 2017,[19] 75 arbitration cases in 2018 and 150 arbitration cases in 2019 (of which 98 administered cases).[20]

The outstanding growth in adjudication cases under the Construction Industry Payment and Adjudication Act 2012 started in 2015 with 84 cases,

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15 KLRCA Annual Report 2017, p 38 for a survey showing all existing collaborations at https://aiac.world/wpcontent/annualreport/.

16 Karly Nairn & Patrick Heneghan, Arbitration World, 5th Ed, 2015, Report KLRCA by Sundra Rajoo, table at p 157.

17 KLRCA Annual Report 2015, p 9, https://klrca.org/annualreport/2015annual/.

18 KLRCA Annual Report 2016, p 16, https://klrca.org/annualreport/2016annual/.

19 KLRCA Annual Report 2017, p 26, https://aiac.world/wp-content/annualreport/.

20 Panorama of Arbitration in Malaysia: Developments in review; arbitrationblog.kluwerarbitration.com.

207 cases in 2016,[21] 765 cases between 16 April 2017–15 April 2018, 764 cases between 16 April 2018–15 April 2019.[22]

It is clear by the phenomenal growth of the case load in AIAC that the promotion strategies, service framework, facilities improvement and the rules done from 2010–2018 have worked well. Most arbitration agreements will have been agreed upon in contracts well before the emergence of disputes and differences between the parties. As it stands, it is clear that the momentum of growth was carried through onto 2019. It should continue for the next two or three years. Thereafter, whether this growth of case load continues, it is dependent on the economic environment together with the work expended to build up the Centre is done during this interregnum period. Only the future will tell.

The AIAC further provides a platform for the training and development of knowledge and understanding of arbitration and other forms of ADR. This is carried out effectively by collaborating with professional associations such as the Chartered Institute of Arbitrators in the United Kingdom for the conduct of the Diploma in International Commercial Arbitration course and with other internationally renowned universities and tertiary centres.

The Diploma in International Commercial Arbitration course has been conducted a number of times in recent years and the AIAC provides the venue, facilities and other resources. The Diploma is now a much sought-after course in this region as it has made it possible to gain knowledge and international qualifications for many busy practitioners in a much more convenient and cost-efficient manner.

As part of its mission of creating a pro-arbitration environment, the AIAC also sponsors members of the judiciary in training and courses on international commercial arbitration. This has assisted in pro-arbitration decisions by the courts and the increasing support from the courts in ensuring that disputes are adjudicated in accordance with the parties' preference of the mode of resolution.

The AIAC has also assisted a number of industries in advancing ADR as an effective mode of resolution and at the same time in building capacity by empowering practitioners with ADR knowledge and practice. The total number of persons who have attended its events since 2010 is in excess of 16,000. By 2017, AIAC was organising about 50 events a year. There were

21 KLRCA's CIPAA Report 2017 presented by the Director on 18 May 2016 at the CIPAA Conference 2016.

22 AIAC Report as presented by AIAC on 26 February 2020 Public Forum on CIPAA.

many international participants who joined in the AIAC events. This was unprecedented and gave Malaysia global recognition. From this commenced the infrastructure for local practitioners and professionals to compete outside, regionally and globally.

The AIAC worked hand-in-hand with industry practitioners and regulators in coming up with resources, awareness drives and expertise in industries such as construction, maritime, Islamic finance and banking and also sports. The AIAC provides resources and makes available its facilities in support of industries and also is responsible in putting together a think tank to support such initiatives and implementing them.

Most recently, the AIAC has moved into providing the knowledge base and building capacity of experts in the field of investment arbitration. With the number of bilateral and multilateral treaties being executed in this region, it is necessary to build capacity and expertise in this field of ADR.

In a radial move, a first for an arbitration institution, AIAC moved into dispute avoidance by offering the first standard form building contracts as drafted by its Expert Advisory Committee consisting of well-known construction professionals and lawyers led by the author. The current edition in force was completed in November 2018 and is known as the AIAC Standard Form of Building Contracts 2019. A special website allowed free editable downloads of the contracts anywhere in the world.

IMPROVEMENTS IN ARBITRAL LEGISLATIVE FRAMEWORK

On 30 December 2005, the Arbitration Act 2005 (Act 646) was enacted based on UNCITRAL Model law, incorporating the provisions of the New York Convention relating to the recognition and enforcement of international awards while repealing the earlier Arbitration Act 1952. It came into force on 15 March 2006.

The Arbitration Act 2005 was again amended in 2011 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.

On December 2017, the Malaysian Parliament passed the Arbitration (Amendment) (No 1) Act 2018 to change the name of KLRCA to the Asian International Arbitration Centre (AIAC). The Malaysian Parliament later passed the Arbitration (Amendment) (No 2) Act 2018 in April 2018 to

incorporate the UNCITRAL Model 2006 amendments with other changes to improve regional competitiveness of AIAC. Both the Amendment Acts received royal assent and came into operation on 28 February and 8 May 2018 respectively ('2018 amendments')

AIAC was actively involved and convened a Consultative Workshop on 20 January 2018 with stakeholders from public, private and regulatory sectors. It also included the Bar Council and Attorney General Chambers ('AGC'). The discussion and feedback form the Consultative was reflected on the participants' consensus to adopt the proposed amendments. The draft version of the 2018 amendments was presented to the AGC by the then Minister in charge of Legal Affairs in the Prime Minister's Department. AGC accepted all proposed amendments save for the provision on third-party funding. The Judiciary also accepted the amendments on the basis that law-making was for Parliament and its role was to interpret the law so passed.[23]

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.

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 —

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23 Sundra Rajoo (Dr Thomas R Klotzel, Special Contributor), *UNCITRAL Model Law & Arbitration Rules: The Arbitration Act 2005 (Amended 2011 and the AIAC Arbitration Rules 2018*, 2019, Sweet & Maxwell at p 40.

(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 and other appeals*[24] 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 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.

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.

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24 [2018] 1 MLJ 1.

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.

THE AIAC'S ARBITRATION RULES OF PROCEDURE

General

As an international arbitral institution, the AIAC has its own rules for conducting arbitration. The latest version of the AIAC rules came into effect on 9 March 2018 ('the AIAC Arbitration 2018 Rules'). The AIAC Arbitration 2018 Rules consists of the AIAC Rules (Part I) and the UNCITRAL Arbitration Rules (Part II) as modified by the AIAC Rules.

'Rule' refers to items of Part I of the AIAC Arbitration 2018 Rules whereas 'Article' makes reference to items of Part II of the AIAC Arbitration 2018 Rules which comprise the UNCITRAL Arbitration Rules (as revised in 2013). It is also interesting to note that the AIAC structures its rules by making modifications to the UNCITRAL Rules in a separate section whilst retaining the UNCITRAL Arbitration Rules in its original text.

This strategically aids the AIAC in the adoption of the most current version of the UNCITRAL Arbitration Rules and also in the supervision and administration of ad hoc arbitrations as and when directed by the Permanent Court for Arbitration. The English text of the AIAC Arbitration Rules prevails over other language versions.

The AIAC Arbitration 2018 Rules allow a great deal of flexibility in the conduct of proceedings of arbitration. The AIAC Arbitration 2018 Rules assure party autonomy by providing parties with a discretion with regard to the choice of arbitrators, the place of arbitration and the application of the procedural rules.

The AIAC introduced a number of innovations to the rules by introducing emergency arbitration and also making it clear that where the seat of arbitration is in Malaysia, s 41 — Determination of preliminary points of law by court, s 42 — Reference on questions of law (now repealed), s 43 — Appeal (now repealed) and s 46 — Extension of time for making award of the Arbitration

Act 2005 (amended 2011 and 2018) shall not apply.[25] In essence, Part III of the Arbitration Act 2005 provides the parties with an 'opt in' and 'opt out' provision.

These provisions of the Act provide an avenue for parties to make reference to the High Court for the determination of points of law in the course of an arbitral proceeding or arising from an award. This provision has been heavily criticised for providing an avenue for appeal against an arbitral award. By virtue of revision to the AIAC's Rules, arbitrations conducted under the auspices of the AIAC will not be subjected to the application of these provisions of the Arbitration Act.[26]

The AIAC Arbitration 2018 Rules also provide for a default position where parties have yet to, or fail to, agree on the seat of arbitration. This provides clarity and saves much of the arbitral tribunal's time in addressing the issue. Rule 7(1) of the AIAC Arbitration 2018 Rules also states that where parties fail to agree, the seat will be Kuala Lumpur, Malaysia unless the arbitral tribunal determines that another seat is more appropriate taking into consideration the circumstances of the matter.[27]

The AIAC imposes an administrative charge which covers the costs of servicing the arbitration; advising parties on the application of procedural rules of the AIAC and the UNCITRAL and, as provided in the AIAC Arbitration 2018 Rules, deciding on challenges to the arbitrators when questions on their impartiality or independence are raised; appointing arbitrators when requested; deciding on the amount of arbitrator's fees in accordance with its Schedule of Fees; and the collection and application of deposits.

In addition to its primary Arbitration Rules, the AIAC has also released niche sets of arbitration rules, such as the AIAC Fast Track Arbitration Rules (revised in 2018) to provide for expedited arbitral proceedings and the AIAC i-Arbitration Rules (revised in 2018) that are a set of Shariah-compliant rules with an objective to primarily deal with disputes with a Shariah component.

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25 Sections 42 and 43 were repealed by Arbitration (Amendment) (No 2) Act 2018 (Act A1569). See also Sundra Rajoo, *Repeal of Section 42: The question of law arising out of an award by the amended Arbitration Act 2005* [2019] 6 MLJ civ.

26 Sundra Rajoo & Philip Koh (eds), *Arbitration in Malaysia: A Practical Guide*, Sweet & Maxwell, 2016 at para [15.021].

27 Malaysian curial law is applicable as lex arbitri: see *Government of India v Petrocon India Ltd* [2016] 3 MLJ 435.

Request for arbitration

Parties who may wish to avail themselves of arbitration administration by the AIAC should make a written request to the Director of the AIAC stating the purpose, intimating at the same time that the parties have entered into an agreement under which they have agreed to refer their disputes and differences for settlement by arbitration under the auspices and the AIAC Arbitration 2018 Rules.

Rule 1(2) of the AIAC Arbitration 2018 Rules also states that the AIAC Arbitration 2018 Rules applicable to the arbitration will be those in force at the time of commencement of the arbitration unless the parties have expressly agreed otherwise.

The AIAC provides recommendation of the Model Clause for parties to adopt and incorporate in the contract or agreement between the parties. It further provides for a template of an arbitration agreement for parties to execute should they wish the AIAC to administer the arbitration of the dispute.

Where the parties to a contract have agreed in writing that disputes in relation to that contract are to be settled by arbitration in accordance with the specific AIAC Arbitration 2018 Rules for arbitration, then such disputes will be settled in accordance with such rules. The expedited or summary procedure is not provided as part of the AIAC's main arbitration rules. Parties have to enter into an agreement and state the relevant rules (for example, the AIAC's Fast Track Rules or the i-Arbitration Rules) specifically for its applicability.

The party intending to initiate an arbitration under the AIAC Arbitration 2018 Rules, is required pursuant to r 2(1) of the AIAC Arbitration 2018 Rules to submit to the Director of the AIAC a copy of the notice of arbitration, provide proof that the notice of arbitration is being or has been served on the other party and make payment of the applicable registration fee.

The AIAC will also seek confirmation that pre-conditions of the arbitration agreement between the parties, if any, have been fulfilled prior to the commencement of the arbitration. The AIAC only seeks such confirmation as part of its compliance process and is not obligated to investigate the truth of such confirmation.

Guidance on the contents of the notice of arbitration is contained in article 3 of the AIAC Arbitration 2018 Rules. Generally, the notice of arbitration contains an express demand that the dispute between the parties be referred to arbitration, identification of the parties involved, reference to the arbitration clause or submission agreement being invoked, reference to the

contract which is the subject matter of the dispute, the nature of the claim including the remedy sought by the party.

Under r 2(2) of the AIAC Arbitration 2018 Rules, the commencement of the arbitration is taken to be the day the Director receives all these documents along with the registration fee.

Administrative support

Administrative services and facilities are available to parties who have agreed to arbitrate under the AIAC Arbitration 2018 Rules. Rule 11 of the AIAC Arbitration 2018 Rules provide that the Director of the AIAC must, at the request of the arbitral tribunal or either party, make available, or arrange for, such facilities and assistance for the conduct of the arbitration proceedings as may be required, including suitable accommodation for sittings of the arbitral tribunal, secretarial assistance, transcription services, video conferencing and interpretation facilities.

The AIAC will also make available its facilities for ad hoc arbitrations and minimal administrative support to international arbitral institutions with which the AIAC has concluded cooperation agreements for the provision of mutual assistance in servicing arbitral proceedings. For example, such services have been provided at the AIAC in arbitrations held under the International Chamber of Commerce Rules and the rules of the International Centre for Settlement of Investment Disputes ('ICSID').

The Convention on the Settlement of Investment Disputes Act 1966 (Act 392) makes provision for the enforcement of awards in Malaysia rendered under the Convention on the Settlement of Investment Disputes between States and nationals of other States which was opened for signature in Washington on 18 March 1965 and is scheduled to the Act.

The Convention created ICSID, which is the only arbitral institution dealing on a specialised basis with disputes between private investors and States. The ICSID has entered into an agreement with the AIAC providing for 'reciprocal assistance in connection with proceedings conducted under the auspices of the ICSID and the Kuala Lumpur Centre respectively'.

Settling the fees of the arbitral tribunal and requesting deposits

The AIAC Arbitration 2018 Rules provide for a fixed schedule of fees for the arbitral tribunal and the AIAC's administrative costs.[28] There are two schedules in the AIAC Arbitration 2018 Rules, one for international arbitrations in US Dollars and the other for domestic Malaysian arbitrations in Ringgit Malaysia.

Under r 13(7) of the AIAC Arbitration 2018 Rules, the fees and costs are calculated on an ad valorem basis taking into account the total amount of dispute between the parties including both the sums of the claim and the counter-claim.

The AIAC Arbitration 2018 Rules do enable the arbitral tribunal to negotiate their own fee arrangement. Under r 13(4) of the AIAC Rule the arbitral tribunal, upon due appointment, to negotiate with the parties on a different set or term for its fees and this may only be done within a period of 30 days of the appointment. If within the said period of time, the arbitral tribunal manages to receive the parties' agreement, then the tribunal shall inform the Director of the AIAC about the same.

The arbitral tribunal may seek an extension of time should the parties need more time to consider the fee or the terms of payment proposed by the arbitral tribunal. In any event, should the parties and the arbitral tribunal fail to agree on the proposed fee or term, the Director of the AIAC will fix the fees in accordance with the Schedule of Fees as empowered under r 13(2) of the AIAC Arbitration 2018 Rules.

In instances where a claim or counterclaim does not specify a monetary value, the fees shall be settled by the Director of the AIAC in consultation with the tribunal and the parties.

The administrative fee of the AIAC is fixed in accordance with the schedule of fees. In the previous versions of the AIAC Arbitration 2018 Rules, the fees of the arbitral tribunal were fixed by the arbitral tribunal in consultation with the Director of the AIAC and further consultation with the parties.

This consultative process was abolished in the 2013 version of the Arbitration Rules which clarified that the fees would be fixed by default in accordance with the Schedule of Fees which the parties and the tribunal will also have the option to agree on a separate scale.

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28 AIAC offers a fee calculator on its website as regards to different proceedings at https://aiac.world/fee-calculator.

As an institution administering arbitration, one of AIAC's task is to function as the stakeholder of the arbitral tribunal's fees. A lot of attention and focus in the administration is given to the accounting process of the deposit taking, fixing of fees, management of expenses of the arbitral tribunal.

Attention is also paid to the application of the deposits towards payment of the fees and expenses to the arbitral tribunal with due verification processes and the return of unexpended funds to the parties. AIAC is also responsible to provide a detailed accounting when requested by the parties or the arbitral tribunal.

Pursuant to r 14(4) of the AIAC Arbitration 2018 Rules, the Director will prepare an estimate of the cost of arbitration upon the commencement of the arbitration and may request each party to deposit an equal amount as an advance for those costs.

Rule 14(3) of the AIAC Arbitration 2018 Rules also states that the arbitral tribunal is not entitled to commence the arbitration proceedings or any work until the provisional deposit is paid by the parties.[29] During the course of the arbitral proceedings, the Director may under r 14(5) of the AIAC Arbitration 2018 Rules request supplementary deposits from the parties.

If the required deposits are not paid in full, the Director will proceed to inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal, upon consultation with the Director of AIAC, may order the suspension or termination of the arbitral proceedings under r 14(7) of the AIAC Arbitration 2018 Rules.

The Director may apply the deposits toward the administrative costs of the AIAC and disbursements for the costs of arbitration under r 14(8) of the AIAC Arbitration 2018 Rules. After the award has been made, the Director of the AIAC must render an accounting to the parties of the deposits received and return any unexpended balance to the parties based on their respective contributions under r 14(10) of the AIAC Arbitration 2018 Rules.

Costs of the arbitration

Rule 13 and art 40 of the AIAC Arbitration 2018 Rules provide detailed guidance on the costs of the arbitration. The term 'costs' includes the following:

(a) the fees of the arbitral tribunal must be stated separately as to each

29 Sundra Rajoo and Philip Koh (eds), *Arbitration in Malaysia: A Practical Guide*, Sweet & Maxwell, 2016 at para [15.036].

arbitrator and be fixed by the tribunal itself pursuant to article 40(2)(a) of the AIAC Arbitration 2018 Rules. The fees of the arbitral tribunal must be reasonable in amount 'taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and other relevant circumstances of the case'. In the instance where the fees have been fixed by virtue of the parties' agreement with the arbitral tribunal, the scale provided for in the Schedule may be exceeded. There are other circumstances under the AIAC Arbitration 2018 Rules, which allow for the arbitral tribunal to make a request to the Director of the AIAC for an increase in fees to cater for exceptional circumstances. This is where the philosophy behind article 41(1) becomes applicable. It is to ensure that ultimately there is a duty to keep the fees within reasonable limits. This is also bearing in mind that arbitration is a service industry and exorbitant costs of arbitration threaten to de-popularise arbitration and discourage parties from arbitrating;

(b) the reasonable travel and other expenses incurred by the arbitrators pursuant to article 40(2)(b) of the AIAC Arbitration 2018 Rules;

(c) the reasonable costs of expert advice and of other assistance required by the arbitral tribunal pursuant to article 40(2)(c) of the AIAC Arbitration 2018 Rules;

(d) the reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal pursuant to article 40(2)(d) of the AIAC Arbitration 2018 Rules;

(e) the legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable pursuant to article 40(2)(e) of the AIAC Arbitration 2018 Rules;

(f) any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague pursuant to article 40(2)(f) of the AIAC Arbitration 2018 Rules; and

(g) any expenses reasonably incurred by the AIAC in connection with the arbitration as well as its administrative charges pursuant to rules 13(1) of the AIAC Arbitration 2018 Rules.

Appointment of the arbitrator

Where the parties have agreed to the AIAC Arbitration 2018 Rules, the Director of the AIAC shall be the appointing authority pursuant to r 4(1) of the AIAC Arbitration 2018 Rules. The rules recognise and give due regard to the

parties' agreement and/or to an appointment made by another appointing authority pursuant to the agreement between the parties pursuant to r 4(7) of the AIAC Arbitration 2018 Rules.

The appointment will, however, be regarded as a nomination from the parties and will be subjected to a confirmation process by the Director of the AIAC. As part of the confirmation process, the Director will cause a conflict check to be conducted and affirmations by the nominated arbitrator on its independence and impartiality and also availability to take conduct of the matter. The arbitrator is duly appointed on the date the Director confirms the nomination.

In terms of the number of arbitrators to be appointed, the AIAC Arbitration 2018 Rules provide for a default mechanism. Rule 4(3) of the AIAC Arbitration 2018 Rules state that the tribunal shall consist of three arbitrators in an international arbitration and a sole arbitrator in a domestic arbitration should the parties not agree on the number of arbitrators. Where the arbitration agreement between the parties provides for the number of arbitrators to be appointed, then the appointment will be made accordingly.

In the event the parties' agreement does not stipulate the procedure or the mode for appointment of the arbitral tribunal, r 4(4) of the AIAC Arbitration 2018 Rules provide for the same. In the instance of a tribunal with a sole arbitrator, the parties have 30 days from the date of service of the notice of arbitration to jointly nominate their arbitrator.

After the expiry of these 30 days, either party may request the Director to make such an appointment. In a three-member tribunal, the parties may nominate the first and the second arbitrators respectively. The Director of the AIAC will proceed to undertake the confirmation process. Once the appointment is official, both the first and second arbitrators will be invited to nominate the presiding arbitrator pursuant to r 4(5)(a) of the AIAC Arbitration 2018 Rules.

The AIAC Arbitration 2018 Rules, r 4(5)(b), further provide for a default mechanism: if within 30 days from the receipt of one party's notification of appointment of an arbitrator, the other party has not notified the first party of the arbitrator it has nominated for appointment, the first party may request the Director of the AIAC to appoint the second arbitrator.

Similarly, if the two appointed arbitrators are unable to nominate the presiding arbitrator within 30 days after their appointments, the Director of the AIAC will proceed to appoint the presiding arbitrator pursuant to r 4(5)(c) of the AIAC Arbitration 2018 Rules.

In making the appointment, the Director of the AIAC will apply considerations to the expertise of the arbitrators relevant to the complexity or the value of the dispute. If it is an international arbitration, considerations will further be made to ensure, where possible, that the arbitrator appointed is fluent in the language of the proceedings and is from a jurisdiction other than the nationalities of the parties pursuant to article (7) of the AIAC Arbitration 2018 Rules.

Challenge to arbitrators

Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if an arbitrator does not possess any requisite qualification agreed to by the parties pursuant to r 5(1) of the AIAC Arbitration 2018 Rules.

However, a party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made pursuant to r 5(2) of the AIAC Arbitration 2018 Rules.

A party who intends to challenge an arbitrator must send notice of his challenge within 15 days after the appointment of the challenged arbitrator has been notified to the challenging party or within 15 days after he becomes aware of the circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or independence pursuant to r 5(3) of the AIAC Arbitration 2018 Rules.

The challenge will be notified to the other party, to the arbitrator who is challenged, the other members of the arbitral tribunal and the Director of the AIAC. The notification must be in writing and must state the reasons for the challenge pursuant to r 5(4) of the AIAC Arbitration 2018 Rules.

When one party has challenged an arbitrator, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge pursuant to r 5(5) of the AIAC Arbitration 2018 Rules.

If, within 14 days from the date of the notice of the challenge, the other party does not agree to the challenge and the challenged arbitrator does not

withdraw, the decision on the challenge will be made by the Director of the AIAC pursuant to r 5(6) of the AIAC Arbitration 2018 Rules.[30]

If the other party agrees to the challenge, the arbitrator withdraws or the Director of the AIAC sustains the challenge, a replacement arbitrator shall be appointed pursuant to r 4 of the AIAC Arbitration 2018 Rules or as otherwise agreed by the parties pursuant to r 5(7).

In one challenge before the Director of the AIAC relating to a party-nominated arbitrator, the Director of the AIAC by way of a reasoned decision proceeded to allow the challenge. The Director of the AIAC found after due consideration of the facts and circumstances of the case and submissions of the parties that there were justifiable doubts as to the independence and impartiality of the arbitrator.

In this matter, the arguments advanced by the challenging party related to a series of previously repeated appointments by affiliates of the nominating party against the same challenging party. The arguments were that the arbitrator would have some knowledge of the evidence, arguments and outcome of previous arbitrations. The Director of the AIAC relied on extensive case law and the IBA Guidelines on Conflict of Interest in reaching the decision.

Jurisdiction of the arbitral tribunal

Article 23 of the AIAC Arbitration 2018 Rules governs the principle of separability in an arbitration agreement and also provides for the power of the tribunal to decide on its own jurisdiction (this is similar to the provisions of s 18 of the Arbitration Act 2005).

The AIAC Arbitration 2018 Rules further provide that the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given full opportunity to present his case. Rule 6 and article 17 of the AIAC Arbitration 2018 Rules ensure that the arbitral tribunal abides by the principles of natural justice.

A plea that the arbitral tribunal lacks jurisdiction may not be raised later than the submission of the statement of defence or counter-claim or set-off.

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30 Rule 5(4) requires a notice of challenge to be lodged together with a non-refundable fee of USD5,300 in international arbitration and RM10,600 in domestic arbitration. It is aimed at the party to consider carefully when making the challenge and to reduce abuse by filing frivolous challenges.

The arbitral tribunal, however, may allow a later plea if the delay is justified. The same rule applies to a plea that the arbitral tribunal is exceeding the scope of its jurisdiction, which is raised as soon as it transpires to the parties during the proceedings.

The AIAC Arbitration 2018 Rules accord the arbitral tribunal with the liberty to rule on these pleas either as a preliminary question or upon finalisation of the proceedings in the award on merits. A decision by the arbitral tribunal that the contract is null and void will not entail *ipso jure* the invalidity of the arbitration clause pursuant to article 23(1) of the AIAC Arbitration 2018 Rules.

In conducting the arbitration, the arbitrator has power to decide all issues including those where fraud, illegality or mistake are alleged as decided by the Court of Appeal of Malaysia in the case of *Sarawak Shell Bhd v Ppes Oil & Gas Sdn Bhd & Ors*.[31] The AIAC Arbitration 2018 Rules also accord the arbitral tribunal with the power to conduct the arbitration as it considers appropriate and to limit the time available for each party to present its case subject to parties' agreement.

Evidence

Article 27(1) of the AIAC Arbitration 2018 Rules provide guidance to the arbitral tribunal on how to deal with evidence. The AIAC Arbitration 2018 Rules provide that each party has the burden of proving the facts relied on to support his claim or defence in the arbitration.

The AIAC Arbitration 2018 Rules further provide that the arbitral tribunal may, at any time during the arbitral proceedings, require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal may determine pursuant to article 27(3) of the AIAC Arbitration 2018 Rules.

Evidence of witnesses is not required to be on oath or affirmation and may be presented in the form of written statements signed by them pursuant to article 27(2) of the AIAC Arbitration 2018 Rules. The arbitral tribunal has discretion to determine the admissibility, relevance, materiality and weight of the evidence offered pursuant to article27(4) of the AIAC Arbitration 2018 Rules.

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31 [1998] 2 MLJ 20.

The parties may annex to their pleadings all documents they deem relevant and indeed the statement of claim and defence should be, as far as possible, accompanied by all documents and other evidence relied upon.

In the course of the proceedings, the arbitral tribunal may, upon consultation with the parties appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal pursuant to article 29(1) of the AIAC Arbitration 2018 Rules.

The parties are obligated to provide the expert with relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production will be referred to the arbitral tribunal for decision pursuant to article 29(3) of the AIAC Arbitration 2018 Rules.

A copy of the expert's terms of reference, established by the arbitral tribunal, must be communicated to the parties pursuant to article 29(1) of the AIAC Arbitration 2018 Rules. Upon receipt of the expert's report, the arbitral tribunal must communicate a copy of the report to the parties.

The parties are also given equal opportunities to express, in writing, their opinion on the report pursuant to article 29(4) of the AIAC Arbitration 2018 Rules. Parties are also entitled to examine any document on which the expert has relied in his report.

At the request of either party, the expert, upon delivery of his report, may be heard at a hearing. This is where the parties through their representatives will have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points in issue pursuant to article 29(5) of the AIAC Arbitration 2018 Rules.

Interim measures of protection

The AIAC Arbitration 2018 Rules adopt the provision for the grant of interim relief by the arbitral tribunal under article 26 of the UNCITRAL Arbitration Rules. The only adaptation made under r 7 is the reference to the emergency arbitrator for the request of interim relief prior to the constitution of the arbitral tribunal.

Article 26 of the UNCITRAL Arbitration Rules defines an interim measure as a temporary measure granted by the arbitral tribunal prior to the issuance of an award by which the dispute is finally resolved.

At the request of either party, the arbitral tribunal may grant any interim measures it deems necessary to maintain or restore the status quo, prevent current or imminent harm or prejudice to the arbitral process, preserving assets and preserving evidence pursuant to article 26(2) of the AIAC Arbitration 2018 Rules.

The test for the granting of an interim measure is where: (a) the harm that would result from not applying the interim remedy would not be compensated by damages; and (b) there is a reasonable possibility that the applying party will succeed on the merits of the claim pursuant to article 26(3) of the AIAC Arbitration 2018 Rules.

The grant of an interim measures may be established in the form of an interim award. The arbitral tribunal is entitled to require security for the costs of such measures from the requesting party pursuant to article 26(6) of the AIAC Arbitration 2018 Rules.

The AIAC Arbitration 2018 Rules make it clear that a request for interim measures addressed by any party to a judicial authority will not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement pursuant to article 26(9) of the AIAC Arbitration 2018 Rules.

Emergency arbitrations

Rule 8(2) of the AIAC Arbitration 2018 Rules provides that a party in need of emergency interim relief prior to the constitution of the arbitral tribunal may apply for such relief pursuant to the procedures that have is set forth in Schedule 2 of the AIAC Arbitration 2018 Rules.

Schedule 3 paras 1, 2 and 3 of the AIAC Arbitration 2018 Rules lays down the procedures for appointment of the emergency arbitrator. A party in need of emergency relief may make an application for emergency interim relief to the Director of the AIAC, concurrent with, or after, the filing of the notice of arbitration, but prior to the constitution of the arbitral tribunal.

This application must include details such as the names and contact details of all parties, a description of the circumstances that gives rise to the application, reasons for the emergency relief, the arbitration agreement, a statement certifying that all parties to the dispute have been notified or an explanation that steps have been taken in good faith to notify the relevant parties. An application fee as stated in Schedule 2, s 5 of the AIAC Arbitration 2018 Rules must also be paid at the same time.

Upon the acceptance of the application for appointment of an emergency arbitrator, pursuant to Schedule 3, para 4 of the AIAC Arbitration 2018 Rules,

the Director of the AIAC is obligated to make the appointment of an emergency arbitrator within two days of the completed set of documents as required under Schedule 3 para 4 of the AIAC Arbitration 2018 Rules and notify the parties.

Prior to accepting the appointment, the emergency arbitrator is required to disclose to the Director of the AIAC any circumstances that may give rise to justifiable doubts as to his impartiality or independence. The time limit for a challenge to be made by a party is reduced to one day of notification of appointment or of the circumstances disclosed. All other time limits as described in r 5 of the AIAC Arbitration 2018 Rules are reduced to one day pursuant to Schedule 3, paras 5, 7 and 8 of the AIAC Arbitration 2018 Rules.

The emergency arbitrator so appointed is obliged to provide his reasoned order or award within 15 days from the date of his appointment notification to the parties. This time period can be extended by agreement of the parties or by the Director of the AIAC pursuant to Schedule 3, para 12 of the AIAC Arbitration 2018 Rules.

For this, the emergency arbitrator is required to first establish a schedule for consideration of the application for emergency interim relief, as soon as possible, but in any event within two business days of his appointment. By virtue of the schedule, the emergency arbitrator shall provide parties with a reasonable opportunity of being heard. All powers vested in the arbitral tribunal shall extend to the emergency arbitrator under Schedule 3, para 10 of the AIAC Arbitration 2018 Rules.

The AIAC Arbitration 2018 Rules provide that the decision of the emergency arbitrator is final and may be revisited by the arbitral tribunal upon commencement of the arbitration proceedings. The arbitral tribunal may reconsider, modify or vacate the decision of the emergency arbitrator pursuant to Schedule 3, para 15 of the AIAC Arbitration 2018 Rules.

An order or award issued by the emergency arbitrator shall cease to be binding if the arbitral tribunal is not constituted within 90 days of such order or award or when the arbitral tribunal makes a final award or if the claim is withdrawn pursuant to Schedule 3, para 16 of the AIAC Arbitration 2018 Rules.

Technical Review and Awards

One of the main responsibilities of an arbitral institution is to ensure that the arbitration proceedings end with an enforceable award. The AIAC Arbitration 2018 Rules provide for the form and the effect of an award.

The AIAC Arbitration 2018 Rules state the requirement that an arbitrator needs to provide reasons for the award unless parties have agreed otherwise. Article 34(2) of the AIAC Arbitration 2018 Rules further establish the effect of an award, that it is final and binding and obligations on the parties to carry out all awards without delay.

The AIAC Arbitration 2018 Rules provide for procedures to enable parties to make request to the arbitral tribunal for interpretation of the award, correction of the award and/or for additional award. The timeline for such requests are limited to 30 days after the receipt of the award. For additional awards, the arbitral tribunal shall be required to render or complete its award within 60 days.

In its 2013 version, the AIAC modified the provisions of the UNCITRAL Arbitration Rules to further enhance the effect of an arbitral award rendered under its auspices. The AIAC Arbitration 2018 Rules provide that the parties irrevocably waive their rights to any form of appeal, review or recourse to any state or other judicial authority insofar as such waiver may be validly made.

This is to overcome any appeal avenue that may be provided by arbitration legislation. In the Malaysian context, s 42 of the Arbitration Act 2005 (now repealed) allows for appeal on points of law.

The AIAC also imposes timelines for the rendering of the award by the arbitral tribunal. This is to overcome the difficulty in previous matters where the arbitration took a long time to complete in view of the time taken by the arbitral tribunal to render its award. In the 1991 version of the Rules, a time limit of six months was given to the arbitral tribunal to write the final award.

The time limit sets in from the date the arbitral tribunal received the respondent's submissions. The time limit was reduced to three months in the 2010 and 2013 version of the Rules, with the time to start running from the date of the closing of oral submissions or written statements.

In the AIAC Arbitration 2018 Rules, the time limit is maintained at three months pursuant to r 12(2) and similarly the time would run from the closing of the final oral or written submissions. The arbitrator may request for extension of time with the agreement of the parties and upon consultation with the Director of the AIAC.

The Director of the AIAC ultimately retains the discretion pursuant to r 12(3) and 12(6) of the AIAC Arbitration 2018 Rules to extend the time for the rendering of the award, irrespective of the absence of party consent. This is to ensure that parties do not end up raising unnecessary technical objections

affecting the enforcement of the arbitration award. The AIAC is mindful of the overarching objective that a speedy award must be counterbalanced with an effective and just procedure.

Pursuant to r 12(2), the arbitral tribunal shall send a draft final award to the Director within three months for a technical review. The Director shall upon as soon as practicable daw the arbitral tribunal's attention to any perceived irregularity to the form of the award and any errors in the calculation of interest and costs pursuant to r 12(4). Rule 12 is silent on whether technical review apply to interim, preliminary or partial awards.

In the event if there are any errors, the arbitral tribunal shall resubmit the draft final award within ten days from the date the arbitral tribunal is notified of such irregularities; should there be no perceived errors, the Director shall notify the arbitral tribunal pursuant to r 12(5) that the technical review has been completed.

In rendering its award, the arbitral tribunal must furnish to the Director sufficient signed copies of the award made by it, whether interim, interlocutory, partial or final, which will only be released by the AIAC to the parties once the costs of the arbitration have been paid in full pursuant to r 12(7) of the AIAC Arbitration 2018 Rules.

Until then, the AIAC will hold the award in lien on behalf of the arbitral tribunal. The AIAC Arbitration 2018 Rules provide that the arbitration shall only be deemed concluded and the arbitral tribunal discharged upon the full settlement of the costs of the arbitration.

The arbitral tribunal and the parties must keep confidential all matters relating to the arbitration proceedings and the confidentiality obligation extends to the award itself, except where its disclosure is necessary for the purposes of implementation and enforcement pursuant to r 16 of the AIAC Arbitration 2018 Rules.

The AIAC Arbitration 2018 Rules also accord the tribunal with the power to award interest in the instance where the parties have not agreed to or requested for the same. The arbitral tribunal may award interest from the date on which the cause of action arose to the date of realisation of the award. This provides much clarity in the practice of arbitration. The arbitral tribunal has the discretion to determine the rate of interest.

Model arbitration clause

The AIAC proposes a model arbitration clause for the adoption by parties wishing to arbitrate under its rules is as follows:

> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the AIAC Arbitration 2018 Rules.

The parties are free to expand the model clause by adding a number of other points such as the number of arbitrators, language and applicable laws.

Arbitration under the AIAC i-Arbitration Rules

The AIAC i-Arbitration Rules (revised in 2018) ('the AIAC i-Arbitration 2018 Rules') mirror the AIAC Arbitration 2018 Rules with some distinctive features. Rule 11 lays down the procedure for reference to a Shariah Advisory Council or a Shariah Expert.

The AIAC i-Arbitration 2018 Rules state that whenever, the arbitral tribunal has to form an opinion on a point related to Shariah principles and has to decide on a dispute arising from a Shariah aspect, the arbitral tribunal may refer the particular issue to the relevant Council or Shariah Expert for its ruling.

Pursuant to r 11(4) and (6) of the AIAC i-Arbitration 2018 Rules, if the matter before the arbitral tribunal is entirely comprising Shariah principles, the arbitral tribunal shall adjourn the arbitration proceedings until a ruling has been pronounced by the Shariah Council or Shariah Expert.

Where there are other areas of the dispute, which are unrelated and may be dealt with separately from the issue referred to the council or expert, the arbitral tribunal shall continue to deliberate on those areas of the dispute.

The council or the expert will be required to make a ruling within 60 days from the date of reference. The reference may be initiated by the parties or the arbitral tribunal at any stage of the proceedings. Should the Shariah Council or the Shariah Expert fail to deliver its ruling within the period of 60 days, the arbitral tribunal may proceed to determine the dispute.

The AIAC i-Arbitration 2018 Rules make it clear that the ruling or any pronouncement by the Shariah Council or Shariah Expert is only insofar as to the application of the Shariah principle. The Shariah Council or the Shariah Expert shall not have any jurisdiction in making discovery of facts or applying to ruling to the facts. It is the arbitral tribunal who is the final adjudicator of the facts.

The AIAC i-Arbitration 2018 Rules provide for a comprehensive procedure for the appointment of the expert. Where the parties are not in agreement, the arbitral tribunal may proceed to make the appointment of the expert pursuant to article 29.

It is interesting to note that the AIAC Arbitration 2018 Rules accord the arbitral tribunal with the power to award interest, unless otherwise agreed by parties, for the period between the date on which the cause of action arose to the date of actual realisation of the award.

The arbitral tribunal may award a late payment charge by applying the principles of *ta'widh* (refers to compensation) and *gharamah* (refers to penalty for late payment) and/or in any other way that the arbitral tribunal considers appropriate pursuant to r 6(g)(i) of the AIAC i-Arbitration 2018 Rules.

All other procedures and conduct under the AIAC i-Arbitration 2018 Rules reflect those under the AIAC Arbitration 2018 Rules, including the incorporation of the UNCITRAL Arbitration Rules 2010 in its entirety and rules on emergency arbitrators.

The model arbitration clause of the AIAC i-Arbitration Rules as follows:

> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the AIAC i-Arbitration Rules.

Arbitration under the AIAC Fast Track Arbitration Rules

The AIAC provides for a separate set of rules with expedited arbitration referred to as the AIAC Fast Track Arbitration Rules ('Fast Track Rules'). The Fast Track Rules enable the parties to adopt a fast track procedure for their arbitrations at the outset. This is unlike many other institutional rules where the expedited procedure is provided as part of the main arbitration rules.

The Fast Track Rules provide for arbitral proceedings in which the total amount in dispute is below a certain threshold to proceed by way of documents-only pursuant to r 16(3) of the Fast Track Rules.

Pursuant to r 16(3) of the Fast Track Rules, where the aggregate amount of claim and counter-claim is less than USD75,000 or is unlikely to exceed this figure in an international arbitration, or if this aggregate amount is RM150,000 or is unlikely to exceed this figure in a domestic arbitration, then the arbitration by default proceeds as a documents-only arbitration. However, oral hearings may be held if the arbitral tribunal deems it necessary.

Rule 4 of the Fast Track Rules provide for expedited procedures for appointment of the arbitral tribunal. The default number of arbitrators in a fast track arbitration is one. Parties are free to appoint a sole arbitrator within seven days from the date of commencement of the arbitration, failing which, the Director of the AIAC will proceed to appoint the arbitrator.

Time limits are imposed for submissions by the parties pursuant to rr 2, 12, 13 and 21(1) of the Fast Track Rules. Rule 2(2) states that the arbitration is deemed commenced once the Director is in receipt of all the documents as stated in r 2(1) of the Fast Track Rules

The Fast Track Rules limit the time for the arbitral tribunal to render its award pursuant to r 19 of the Fast Track Rules. The time limit for the arbitrator to render the award is within 90 days from the date of commencement of the arbitration pursuant to rr 19(3) and 21(1)(g) of the Fast Track Rules.

The fees of the arbitral tribunal and the AIAC administrative costs are fixed pursuant to a fee schedule appended to the Fast Track Rules. Pursuant to Schedule 1, para 1 of the Fast Track Rules, the AIAC's administrative cost is 20% of the arbitral tribunal's fees. The fees are collected in advance as security by the Director of the AIAC.

Should either party fail to deposit its portion within 14 days of being requested to do so by the Director, the arbitral tribunal may either proceed with the arbitration or it may suspend or terminate the arbitration or any part thereof. In the event the arbitral tribunal decides to proceed with the matter, the award rendered will be kept at the AIAC and held on lien until the payment is made by either party,

The model arbitration clause to the AIAC Fast Track Arbitration Rules is as follows:

> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the AIAC Fast Track Arbitration Rules.

PROSPECTS

Since 2010, the AIAC has spearheaded the growth of arbitration and other alternative dispute resolution methods like statutory adjudication, domain name dispute resolution and mediation in Malaysia. It created capacity by promoting various training programmes in sports arbitration, maritime law as well as arbitration and conciliation in the region and beyond.

It has been a period of tremendous effort, growth and recognition for AIAC. Its ADR case load pre-2010 was a mere 22 whereas by 2019, it has increased to over 900 plus cases per year. Its developmental programmes were planned for the short, medium and long term with enough programmes set out for each year. The total number of persons who have attended its events since 2010 is in excess of 16,000.

By 2017, it was organising about 50 events a year. AIAC moved into dispute avoidance by offering the first standard form building contracts, a first for an arbitration institution. A special website allowed free editable downloads of the contracts anywhere in the world. With AIAC's growing innovations in the realm of domestic and international arbitrations as well as Malaysia's geostrategic position squarely on the Road of China's Belt and Road Initiative, AIAC has the potential to consolidate as a seat to be reckoned with in the Asia-Pacific region.

In discussing the work of AIAC in the past, the Chief Justice of Malaysia in her keynote speech at the China-ASEAN Forum on 13 November 2019 summarised the past achievements of AIAC as follows:

> the significant role of AIAC cannot be understated [and] the work it has done in the past has greatly improved the arbitration scheme in Malaysia [by not only its] tremendous job in establishing its own set of rules that parties may feel free to adopt... [but] drafting of rules aide, the AIAC constantly undertakes efforts to efforts to ensure that our arbitration laws remain up to date.[32]

Unfortunately, the considerable international and domestic adverse publicity caused by the events starting from 19 November 2018.[33] The events and subsequent action by the former Attorney General, the Honourable Tommy Thomas and the former Government of Malaysia and now continuing, has raised issues about Malaysia's commitment to the Rule of Law. The Rule of Law means that one is subject to clearly defined laws and legal principles rather than the irrational actions of the authorities. In AIAC's case, it means adherence and upholding the sanctity of the host country agreement between AALCO and the Government of Malaysia as one of the foundational instruments of AIAC.

The events in 2018 have not abated and are continuing to date including the escalated dispute with AALCO on systematic and continued breaches of the host country agreement. The resultant non-recognition and revocation of the Acting Director status in 2019 by AALCO and the position of Director left vacant from 8 March 2020 have cast a pallor over the future prospects of AIAC. These are fundamental issues which need to be resolved with a commitment to the Rule of Law by all concerned.

The events have thrown a long shadow upon the prospect of AIAC of becoming an international hub for now. It has taken the shine off AIAC. There

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32 Panorama of Arbitration in Malaysia: Developments in review; arbitrationblog.kluwerarbitration.com.

33 *Sundra Rajoo a/l Nadarajah v Menteri Hal Ehwal Luar Negeri Malaysia & Ors* [2020] 3 AMR 187. See also Putrajaya magistrate court's ruling on 21 November 2018.

is now a need to revamp the cordial relationship between all stakeholders of AIAC; promote the AIAC as the trusted, independent and neutral hub for ADR services within the region and beyond; and address the existing negative consequences emanating from the continual breach of the host country agreement.

It will take some amount of persuasion, consistent posturing and real actions by all relevant parties including the Government of Malaysia, AALCO and AIAC before AIAC itself can capitalise on its potential, re-emerge again to take its rightful place as a trusted ADR hub in the region.

The momentum created in the decade starting from 2010–2018 may not be sustained if the already announced innovative schemes like the AIAC as the dispute resolution hub outside of China's Belt and Road initiative under ICDPASO[34] and Asian Sports Tribunal to fill the lacuna in resolution of sports disputes in Asia are not implemented. The present momentum created from 2010–2018 can only go so far before it slows down.

The same programmes and mere talk shop webinars cannot be repeated continuously as the novelty will wear out. There has to be real impact plans which have to be executed with gusto. The neutrality and independence of the centre is paramount. It means that conflicted parties and individuals cannot be involved in the administration of the centre especially they or their employees are directly using or participating in the centre's dispute resolution services.

There is no time for complacency. Otherwise, the period of 2010–2018 will be seen as the glory period of KLRCA/AIAC before decline sets in. Basking in old glories does not answer the challenge of the present. The real challenge is to continue the growth trajectory and promote safe seat principles in Malaysia so that AIAC becomes a trusted and long-term provider of dispute prevention, avoidance and resolution services in Asia.

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34 International Commercial Dispute Prevention and Settlement Organisation (ICDPASO) is intended to be by its cross-border, multi-party and non-governmental character to be the international institution based in China promoting consensus-based dispute resolution in the Belt and Road region.