# THE EXTENT OF COURT INTERVENTION IN ARBITRATION IN MALAYSIA AS A MODEL LAW JURISDICTION

by

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## INTRODUCTION

Minimum judicial intervention and maximum judicial support in arbitration is a hallmark and a well-recognised principle in almost all developed safe seats for arbitration. Court support and intervention in arbitration is a symbiotic relationship which cannot be eliminated altogether.

Article 5 of the UNCITRAL Model Law deals with the 'Extent of court intervention'. It is a mandatory provision of the UNCITRAL Model Law[2] and provides:

> In matters governed by this Law, no court shall intervene except where so provided in this Law.

The UNCITRAL Secretariat noted that the effect of the provision is to 'exclude any general or residual powers' given to the courts of the enacting State in statutes other than the UNCITRAL Model Law.[3] The Commission was of the opinion that intervention also included court action that may be categorised as assistance to the arbitration.[4]

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2 See *Noble China Inc v Lei Kat Cheong* [1998] CanLII 14708 (ON SC).

3 See *Seventh Secretariat Note*, A/CN.9/264, 228 at [2].

4 See *Summary Record*, A/CN.9/309, 237 at [40].

Thus, art 5 of the UNCITRAL Model Law serves to delineate the extent of permissible intervention in the great majority of cases so as to ensure that difficulties would arise only in marginal cases. Its purpose is to achieve certainty as to the limits and maximum amount of judicial intervention.

## SECTION 8 OF ARBITRATION ACT 2005

The scheme accepts that the arbitration legislation can set out all the permissible instances of court intervention in arbitral proceedings.[5] However, the underlying philosophy behind this is that the court will provide assistance and not interfere in arbitral proceedings.

S 8 of the Arbitration Act 2005[6] (Amended 2011 and 2018) ('AA 2005') is based on art 5 of the UNCITRAL Model Law. It also deals with the extent of court intervention in arbitration and provides that:

> No court shall intervene in matters governed by this Act, except where so provided in this Act.

Therefore, s 8 controls the extent of court's intervention in matters governed by the AA 2005. It limits court intervention strictly to such matters as are specifically provided in the AA 2005. Through this provision, the AA 2005 confirms its focus in giving precedence to party autonomy over court intervention in arbitration.

The wording of the section mandates special mention of provisions which provide the courts the right to exercise their powers in matters dealt with under the AA 2005.

The specific involvements of the court provided under the AA 2005 are:

(1) Section 10 (Arbitration agreement and substantive claim before court);

(2) Section 11 (Arbitration agreement and interim measures by High Court);

(3) Section 13(7) (Appointment of an arbitrator in certain situations);

(4) Section 15(3) (Challenges to an arbitrator);

(5) Section 18(8) (Appeals on the jurisdiction of the arbitral tribunal);

(6) Section 19H (Recognition and enforcement of interim measures);

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5 See *Official Records of the General Assembly, Fortieth Session, Supplement No 17 (A/40/17)*, Annex 61, 238.

6 (Act 646).

(7) Section 19I (Grounds for refusing recognition or enforcement of interim measures);

(8) Section 19J (Court-ordered interim measures);

(9) Section 29 (Court assistance in the taking of evidence);

(10) Section 37 (Application for setting aside);

(11) Section 38 (Recognition and enforcement of awards);

(12) Section 39 (Grounds for refusing recognition or enforcement of awards);

(13) Section 41 (Determination of preliminary point of law by court);

(14) Section 44 (Costs and expenses of an arbitration);

(15) Section 45 (Extension of time for commencing arbitration proceedings); and

(16) Section 46 (Extension of time for making award).

Before the enactment of the 2018 Amendments, additional jurisdiction was given to the High Court by:

(1) Section 42 (Reference on questions of law); and

(2) Section 43 (Appeal).

Both of these provisions were deleted by the 2018 Amendments with effect from May 8th 2018.

The AA 2005 specifically refers to the 'High Court' in all the instances where power to intervene is stipulated except for ss 8 and 10. In this regard, s 10 applications have to be made to the court where the existing proceedings have been instituted. Section 8 is addressed to all courts.

In 2011, amendment was made to s 8 of the AA 2005 by way of the Arbitration (Amendment) Act 2011[7] ('2011 Amendments') to make it consistent with art 5 of the UNCITRAL Model Law. Prior to the 2011 Amendments, s 8 read:

> Unless otherwise provided, no court shall intervene in any of the matters governed by this Act.

The current s 8 of the AA 2005 reads as follows:

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7 (Act A1395).

> No court shall intervene in matters governed by this Act, except where so provided in this Act.

Prior to the 2011 Amendments, the AA 2005 was silent on where the priority lay as between s 8 of the AA 2005 and the other provisions which provided for court intervention, whether statutory or inherent.

The purpose of the amendment was to bring the AA 2005 into line with art 5 of the UNCITRAL Model Law which clearly states that 'in matters governed by this law, no court shall intervene except where so provided in this law'.

The effect of the 2011 Amendments is to limit the application of other laws, both statutory and inherent, to matters not governed by the AA 2005 over the matters which it governs. This greatly reduces the areas of uncertainty, although there may still be controversy as to what matters are governed by the AA 2005.

The effect of the amendment, however, has not altered the purpose of s 8 of the AA 2005, which is to limit the court's intervention in arbitral matters. Although the wording slightly differs from art 5 of the UNCITRAL Model Law, the effect and application are precisely the same, namely to confine the jurisdiction of the court to the matters explicitly provided in the AA 2005.

Both the UNCITRAL Model Law and the AA 2005 demarcate the areas of court intervention emphasising the significant role of the courts in supporting arbitrations.

However, the debate oscillates on the balance between the right of seeking recourse from the courts *vis-a-vis* the parties' rights to resolve their disputes without the intervention of the courts. In many civil and common law jurisdictions, the courts are approaching the debate by endorsing party autonomy generally.[8]

## THE COURT'S INHERENT AND COMMON LAW POWERS UNDER ARBITRATION ACT 1952

The court's inherent powers are intrinsic to the court's functioning, supplementing those powers that the law authorizes. Common law powers are one of the primary sources for the development of the common law system.

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8 See Sundra Rajoo and Philip Koh, *Arbitration in Malaysia: A Practical Guide* (Sweet & Maxwell, 2016).

Common law power refers to the court's law-making authority by the use of precedents. Authority to intervene is broadly understood to arise out of the courts' inherent and common law powers. Therefore, any analysis of s 8 of the AA 2005 has to be made in light of these powers.

The scope of inherent and common law powers of the courts in Malaysia was not clear prior to the implementation of the AA 2005. It largely adopted the position in England.

The House of Lords in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd*[9] ('Bremer Vulkan') made the position clear that the supervisory jurisdiction that the High Court in England exercises over how arbitral tribunals conduct their proceedings is not an inherent jurisdiction but a statutory one; the only common law jurisdiction which existed was the anomalous jurisdiction to set aside an award of arbitrators for errors of law on the face of the award.

However, the English courts have long recognised a limited inherent jurisdiction to grant injunctions to stay arbitral proceedings without causing injustice to the claimant when the court is satisfied that continuance of the arbitration would be vexatious or oppressive or an abuse of the process of the court.[10]

The English courts have also recognised the limited inherent power of courts to grant a stay of court proceedings that exists independently from the statutory provision for stay and such power can be used to stay an action brought in breach of an arbitration agreement.[11]

Both approaches of recognising such limited inherent powers were applied for s 34 arbitrations under the Arbitration Act 1952[12] ('AA 1952') prior to the commencement of the AA 2005. The Court of Appeal in *Sarawak Shell Bhd v PPES Oil and Gas Sdn Bhd*[13] approved and followed the House of Lords decision in *Bremer Vulkan*, concluding that the High Court had no non-statutory power to intervene in arbitrations whether by way of inherent jurisdiction or at common law.

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9 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] 1 Lloyd's Rep 253; [1981] 1 All ER 289 at 296.

10 See *University of Reading v Miller Construction Ltd* (1994) 52 Con LR 31.

11 See Mustill and Boyd, *Commercial Arbitration* (2nd edn, Butterworths 1989) 461-462.

12 (Act 93) (Repealed).

13 *Sarawak Shell Bhd v PPES Oil and Gas Sdn Bhd* [1998] 2 AMR 1914 at 1922; [1998] 2 MLJ 20 at 25.

This was further reinforced by the courts in *Klockner Industries-Anlagen GMBH v Kien Tat Sdn Bhd & Anor*[14] and *Soilchem Sdn Bhd v Standard-Elektrik Lorenz AG*[15] where it was held that s 34 of the AA 1952 was meant to exclude the jurisdiction of the court; it cannot exercise its supervisory function over such arbitration.

The court in *Bina Jati Sdn Bhd v Sum Projects (Bros) Sdn Bhd*[16] ruled that it could invoke its inherent powers under O 92 r 4 of the Rules of the High Court 1980 to make any order as may be necessary to prevent injustice. It then used this power to intervene in s 34 arbitration under the AA 1952 and took over the arbitration proceedings.[17] The Federal Court refused leave to appeal in this case despite the conflicting rulings on the same question of law.

The words 'matters governed by this Act' should be construed liberally to exclude court intervention in keeping with the spirit of the UNCITRAL Model Law. The Federal Court in *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah*[18] recognised the same by setting limits on the operation of O 92 r 4 of the Rules of the High Court 1980 when it held:

> For the removal of doubt, it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

The Federal Court further explained: '... that the rules cannot interfere with the exercise of the inherent powers by the court so long as it deems it necessary to prevent any injustice or an abuse of its own process. It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent power'. Consequently, the issue of the extent of court intervention was left open and remained in a state of uncertainty prior to the commencement of the AA 2005.

## THE COURT'S INHERENT AND COMMON LAW POWERS UNDER ARBITRATION ACT 2005

The question of whether the inherent powers of the courts were applicable under the pre-2011 version of s 8 of the AA 2005 was tested.

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14 *Klockner Industries-Anlagen GMBH v Kien Tat Sdn Bhd & Anor* [1990] 3 MLJ 183.
15 *Soilchem Sdn Bhd v Standard-Elektrik Lorenz AG* [1993] 3 MLJ 68.
16 *Bina Jati Sdn Bhd v Sum Projects (Bros) Sdn Bhd* [2002] 1 AMR 666; [2002] 2 MLJ 71.
17 *Ibid* at [11].
18 *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah* [1988] 1 MLJ 178.

The High Court in *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor*[19] held that:

> [t]he extent of the court's power to intervene under s 8 of the Act is limited to what is expressed in the said provision, which is, unless the Act provides otherwise the court cannot intervene ...[20]

The question before the court in *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Co Ltd*[21] was whether it had jurisdiction to grant interim relief in respect of foreign arbitrations seated outside of Malaysia under the then unamended s 8 of the AA 2005 which read as: '[u]nless otherwise provided, no court shall intervene in any of the matters governed by this Act'.

The court held that it had no jurisdiction, statutory or inherent or by the exercise of residual powers, to grant injunctive relief in matters where the seat of arbitration is outside Malaysia. It held that such power of intervention cannot be inferred, either from the invocation of inherent or residual common law powers or by an inference that what is not expressly forbidden is permissible.

The court further held that O 92 r 4 of the Rules of the High Court 1980 is merely a declaration of the High Court's inherent power and does not vest inherent jurisdiction in the High Court to grant injunctive relief. The court agreed that the said rule does not confer blanket jurisdiction in procedural and substantive matters.

Since the 2011 Amendments, the courts have repeatedly rejected the argument that a party can rely on the inherent powers of courts. It is now clear that inherent or common law powers cannot be invoked even if they can be shown to exist in any matter governed by the AA 2005.[22]

The court in *Twin Advance (M) Sdn Bhd v Polar Electro Europe BV*[23] held that the inherent jurisdiction should not be used to intermeddle with the

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19 *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872.
20 *Ibid* at [21].
21 *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Co Ltd* [2012] 1 MLJ 510.
22 Note that Courts of Judicature Act 1964 (Act 91) s 4 provides that 'in the event of any inconsistency or conflict between the Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail'. But nothing is said about subsequent statutory provisions and, by necessary implication it is arguable that the provisions of the Courts of Judicature Act 1964 cannot prevail over specific provisions of subsequent Acts.
23 *Twin Advance (M) Sdn Bhd v Polar Electro Europe BV* [2013] 1 AMCR 147; [2013] 7 MLJ 811.

jurisdictional aspect of arbitration. The court relied upon the decision of the Singapore High Court in *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush & Anor*[24] and went on to hold that:

> ... our s 8 of the AA 2005 which is akin to article 5 of the Model Law as adopted by the AA 2005 should similarly be interpreted in line with the Model Law that the court should exclude its general or residual powers or its inherent jurisdiction to indirectly vary the substantive provisions of AA 2005 which does not categorically provide or intend so.

The Court of Appeal in *Capping Corp Ltd & Ors v Aquawalk Sdn Bhd*[25] was required to consider whether the High Court was correct in holding that the execution of settlement agreements between disputing parties meant that the parties had abandoned their rights to commence arbitration proceedings under a shareholders' agreement with respect to a subsequent dispute. In allowing the appeal, the Court of Appeal held that:

> The arbitration regime is now governed by Arbitration Act 2005 which in our view dictates that the courts take a minimal interference approach and this is reflected in s 18 of the Arbitration Act 2005 which gives the arbitrator the power to rule on his own jurisdiction.[26]

The High Court in *Bumi Armada Navigation Sdn Bhd v Mirza Marine Sdn Bhd*[27] held that s 11 of the AA 2005 expressly allows for limited judicial intervention in that courts may grant interim (but not permanent) relief pending the disposal of arbitration.

However, the High Court confirmed that such interim relief must not 'deprive the parties of their freedom to contract and to agree to resolve disputes by way of arbitration'. Any interim measure granted must also not 'usurp the role and function of an 'arbitral tribunal' ... to decide the merits of the dispute'.[28]

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24 *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush & Anor* [2004] 2 SLR(R) 14. Justice Woo Bih Lih referred to UNCITRAL Model Law art 5 and explained that the effect of it was to 'exclude any general or residual powers' given to the court of the enacting State by statutes other than the UNCITRAL Model Law.

25 *Capping Corp Ltd & Ors v Aquawalk Sdn Bhd* [2013] 6 MLJ 579.

26 *Ibid* at [27].

27 *Bumi Armada Navigation Sdn Bhd v Mirza Marine Sdn Bhd* [2015] AMEJ 706; [2015] 5 CLJ 652.

28 *Ibid* at [46].

The Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and Other Appeals*[29] referred to s 8 of the AA 2005. The pertinent exceptions to s 8, including s 11, were noted. After referring to academic commentary,[30] the Federal Court held that s 8 of the AA 2005:

> [W]ould ... not exclude court intervention in any matter not regulated by [AA 2005]; matters which are not governed by the Model Law include the following areas: the inherent jurisdiction in the court to grant an injunction to stay arbitral proceedings; and the whole topic of confidentiality of arbitral proceedings.[31]

The AA 2005, unlike the UNCITRAL Model Law, expressly includes provisions relating to the stay of court proceedings. The AA 2005 also sets out limited exceptions when the court may refuse to grant the stay of court proceedings and in effect, stay the arbitral proceedings as in s 10 of the AA 2005. Further, the 2018 Amendments have introduced the concept of confidentiality into the AA 2005 (see ss 41A to 41B of the AA 2005).

The principle of minimal intervention has also been upheld in other UNCITRAL Model Law jurisdictions.

The Singapore Court of Appeal in *Swift-Fortune Ltd v Magnifica Marine SA*[32] reinforced the private nature of resolving disputes through arbitration. With reference to s 12(1) of the International Arbitration Act,[33] which relates to the court's power to order interim measures, it was held that:

> Whilst the courts have long exercised a supervisory power over domestic arbitrators and arbitrations, they do not, under common law, have any inherent powers to assist such arbitrators in the gathering of evidence or in any other of the matters set out in s 12(1) of the IAA. The courts had to be given such powers by statute.[34]

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29 *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and Other Appeals* [2017] 8 AMR 313 at 356; [2018] 1 MLJ 1 at [114].

30 Specifically, the Federal Court referred to the following: 'Where a party seeks intervention is [*sic*] one of those situations, the court is permitted to intervene only in the manner prescribed by the model law, and in the absence of any express provision the court must not intervene at all. By contrast, where the situation is not of a type to which the model law is addressed, the court may intervene or decline to intervene in accordance with the provisions of the relevant domestic arbitration law': Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation, 1994) at 224.

31 [2018] 1 MLJ 1 at [114].

32 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629; [2006] SGCA 42.

33 (Cap 143A) (Singapore).

34 *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR(R) 323; [2006] SGHC 36 at [42].

The Singapore Court of Appeal in *NCC International AB v Alliance Concrete Singapore Pte Ltd*,[35] held that 'courts have a conspicuously circumscribed role in relation to all arbitration proceedings, whether pending or ongoing'. Citing *Halsbury's Laws of Singapore*, it was held that:

> The courts have supportive and limited supervisory functions over arbitrations held in Singapore. These functions are those granted by statute. There are no inherent supervisory powers at common law which the court could otherwise exercise.[36]

The Court of Appeal of Mombasa (Kenya) in *Tanzania National Roads Agency v Kundan Singh Construction Ltd*[37] declined an appeal from the High Court relating to its jurisdiction to recognize and enforce an international arbitral award.

The Court of Appeal noted that the Kenyan Arbitration Act does not provide any right of appeal in the case of international awards. Rather, it was held that art 5 of the UNCITRAL Model Law showed a clear and deliberate intention to limit court intervention in arbitration matters in order to protect the arbitral process from 'unpredictable or disruptive court interferences'.

The Indian Supreme Court in *McDermott International Inc v Burn Standard Co Ltd & Ors*,[38] considered the supervisory role of the courts under the Indian Arbitration and Conciliation Act 1996. It was held that the court's intervention:

> [I]s envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. ... So, scheme of the provision aims at keeping the supervisory role of the court at minimum level.

The Supreme Court of New South Wales in *TeleMates (previously Better Telecom) Pty Ltd v Standard SoftTel Solutions Pvt Ltd*[39] declined to grant orders relating to the jurisdiction of the arbitral tribunal. This was because the 30-day time period in art 16(3) of the UNCITRAL Model Law had expired. In

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35 *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565; [2008] SGCA 5.

36 *Ibid* at [20].

37 *Tanzania National Roads Agency v Kundan Singh Construction Ltd* UNCITRALCLOUT Case 1719, *Tanzania National Roads Agency v Kundan Singh Construction Limited* (Civil Appeal No 38 of 2013) (November 14, 2014) (Kenya).

38 *McDermott International Inc v Burn Standard Co Ltd & Ors* Civil Appeal No 4492 of 1998 (May 12, 2006).

39 *TeleMates (previously Better Telecom) Pty Ltd v Standard SoftTel Solutions Pvt Ltd* [2011] NSWSC 1365 (Australia).

reaching this conclusion, the Supreme Court emphasised that Arts 5 and 16 of the UNCITRAL Model Law reflected the underlying principles that 'disputes which the parties have submitted to arbitration should be speedily resolved and that intervention of the Court should be minimised'.[40]

The Quebec Court of Appeal in *Endorecherche Inc v Université Laval*[41] upheld the decision of the first instance court in finding that an order for document production made by the arbitral tribunal could only be challenged when an application was made for the homologation of the arbitrators' final decision. The Quebec Court of Appeal reinforced that the intervention of the ordinary courts during arbitral proceedings must be limited to exceptional cases, so as to preserve the autonomy of the arbitration and its efficient conduct.

The Alberta Court of Queen's Bench in *Western Oil Sands Inc v Allianz Insurance Co et al*[42] declined to issue orders granting a permanent stay of proceedings or the consolidation of previously instituted arbitration proceedings. The court held that it did not have jurisdiction to decide these matters, stating that for a court to have the requisite jurisdiction whilst respecting the arbitration process, it must be found in the relevant arbitration statute, and not in any other statute or rule governing court procedure.

Despite the established domestic and international jurisprudence, the Malaysian Court of Appeal, in *La Kaffa International Co Ltd v Loob Holding Sdn Bhd*[43] ('La Kaffa') recently delivered *obiter* remarks to the effect that the courts are not ousted of its inherent jurisdiction, or the power to order interim measures, under the AA 2005.

The Court of Appeal was required to consider an Originating Summons requesting interim measures. The subject matter of the dispute was the breach of a franchising agreement. The Originating Summons requested both mandatory (return of property) and prohibitory orders (restraint of trade) pursuant to s 11 of the AA 2005, on the exercise of the inherent jurisdiction of the court. The Originating Summons was filed in Malaysia despite arbitration proceedings being on foot in Singapore.

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40 *Ibid* at [54].
41 *Endorecherche Inc v Université Laval* 2010 QCCA 232 (Canada).
42 *Western Oil Sands Inc v Allianz Insurance Co et al* 2004 ABQB 79 (Canada); (2004) AJ No 85 (Lexis).
43 *La Kaffa International Co Ltd v Loob Holding Sdn Bhd* [2018] MLJU 703.

The High Court allowed the mandatory orders and declined the prohibitory orders. It was held that the use of the word 'may' in the former s 11(1) of the AA 2005 meant that the court had the discretion to grant any interim measure under that provision. The High Court held that it could grant interim measures before or during an international arbitration but that any relief granted must be interim but not permanent in nature.

The High Court further held that any interim measures must support, assist, aid or facilitate the arbitration. It was also held that the court, in granting the interim measures, should not decide the merits of the dispute which are only to be decided by the arbitral tribunal agreed on by the parties.

The High Court added that reliance could not be placed on the court's inherent jurisdiction when deciding on the orders requested in the Originating Summons. This was because there was a clear statutory provision which dealt with interim measures (s 11 of the AA 2005). Further, the minimalist approach in s 8 of the AA 2005 required the court to exercise the powers conferred by s 11 of the AA 2005 without invoking its inherent jurisdiction. This decision was appealed to the Court of Appeal.

The Court of Appeal reasoned that some of the provisions in Parts II and III of the AA 2005 which authorised the court's intervention, inevitably required the court's consideration of its inherent jurisdiction to grant the reliefs (e.g. the grant of injunctions or stays).

Specifically, the Court of Appeal held that it was trite that s 8 of the AA 2005 advocated for a minimal intervention approach. However, this did not equate to a no-intervention at all approach in matters not specifically governed by the AA 2005.

The Court of Appeal further commented that:

> Under the Federal Constitution, the court is the supreme arbiter to decide what is right and wrong to sustain the rule of law in the country. Statutory provisions cannot take away the judicial role in totality.[44]

In this regard, the Court of Appeal commented that the former s 11(1) of the AA 2005 allowed a party to make an application for any form of interim measure, including one which involved the exercise of the High Court's

44 [2018] MLJU 703 at [26].

inherent jurisdiction. However, the Court of Appeal cautioned that, by virtue of s 8 of the AA 2005, courts would be slow to provide a relief that is not clearly spelt out in the AA 2005 itself.

The Court of Appeal's comments are misplaced for the following reasons.

Firstly, the principle of minimal intervention has been repeatedly recognised in Malaysia and internationally. As Gary Born has noted:

> This principle is fundamentally important to the efficacy of the international arbitral process, ensuring that an arbitration can proceed, pursuant to the agreement of the parties or under the direction of the tribunal, without the delays, second-guessing and other problems associated with interlocutory judicial review of procedural decisions.[45]

Secondly, national courts in common law jurisdictions have repeatedly and (almost) uniformly rejected requests for judicial intervention in the procedural conduct of international arbitrations.[46] In the Malaysian context, the *La Kaffa* decision is directly at odds with the High Court decision of *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd*.[47] In the latter decision, the court held that the jurisdiction of the High Court must be expressly provided by statute in cases where the seat of arbitration is outside Malaysia, and that the court has no inherent or residual powers to intervene in such arbitration matters.[48] With reference to the Court of Appeal's comments on the similarity between s 8 of the AA 2005 and art 5 of the UNCITRAL Model Law, the position taken in *La Kaffa* in this respect is not essentially different to that taken by the courts in other cases. The only significant difference between the UNCITRAL Model Law and the AA 2005 is that the former only applies to international commercial arbitration, whereas the AA 2005 applies to both international commercial arbitration and domestic arbitration.

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45 'Chapter 15: Procedures in International Arbitration' in Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) at 2189.

46 *Ibid* at p 2193. See also: *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm) at [63], [2007] 2 Lloyd's Rep 8 (Eng) (HC): '[I]t was well established under the old regime that the court did not have a general supervisory role over arbitrations at their interlocutory stage beyond that granted by the Arbitration Acts themselves'. In contrast, Arbitration Act 2005 s 8 and UNCITRAL Model Law art 5 are mandatory provisions.

47 *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd* [2012] 1 MLJ 510.

48 Specifically, it has been held that provisions such as Arbitration Act 2005 s 8 would not be applicable where the arbitration is being conducted outside Malaysia: see CLOUT Case 13: *Deco Automotive Inc v GPA Gesellschaft für Pressenautomation mbH* [1989] OJ No 1805; Sundra Rajoo, *Law, Practice and Procedure of Arbitration* (2nd edn, LexisNexis 2016) at 532.

Thirdly, it is well established that the language of s 8 of the AA 2005 is mandatory.[49] The basic test for determining the correctness of the High Court's intervention is to consider whether the AA 2005 specifically provides for the intervention in question.[50] Section 8 of the AA 2005 is silent on matters not governed by the AA 2005 and the provision certainly does not attempt to interfere in such matters. If the legislature intended to permit the courts to exercise inherent jurisdiction to grant interim measures, this would be explicitly stated in the AA 2005, and in particular, in either the former or current versions of s 11. In the absence of such, it can only be presumed that this was not the legislature's intent.

Fourthly, the Court of Appeal has allowed the appeal and granted the interim measure restraining the trade of the respondent. The Court of Appeal's reasoning was that in cases of a breach of an obligation, '[w]hen a claimant ... succeeds in a mandatory injunction ... the claimant will generally be able to secure a prohibitory injunction as well'.[51]

Whilst that may be the position in a traditional court proceedings, the same reasoning cannot apply in court proceedings where the subject matter of the dispute is concurrently submitted to arbitration. This is because in allowing the appeal and granting the prohibitory interim measures requested by the appellant, the Court of Appeal has in fact usurped the role of the arbitral tribunal. Indeed, a decision has been made on the merits of the dispute subject to arbitration and the relief granted is more permanent than interim in nature. As such, this decision cannot be cited as an applicable and good precedent in law.

In or about August 2018, the Federal Court granted leave to hear an appeal against the Court of Appeal's curious decision. The parties settled their dispute shortly thereafter. Until a similar issue is brought before the Federal Court, the status of Malaysian courts exercising their inherent jurisdiction in matters relating to the AA 2005 remains moot.

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49 See *Noble China Inc v Lei Kat Cheong* [1998] CanLII 14708 (ON SC) where the court analysed how to determine which articles of the UNCITRAL Model Law are mandatory and which are non-mandatory. Articles that do not use prescriptive language (ie 'may' instead of 'shall') are non-mandatory and can be derogated from.

50 *Vibroflotation AG v Express Builders Co Ltd* [1994] HKCFI 205.

51 *La Kaffa International Co Ltd v Loob Holding Sdn Bhd* [2018] MLJU 703 at [36].

## APPLICATION OF SECTION 8 BY THE MALAYSIAN COURTS

The Court of Appeal in *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd*[52] took the view that intervention of a court in an arbitration matter was permissible if a 'patent error of law' on the face of the award was made out.[53]

The plaintiff in *Magnificient Diagraph Sdn Bhd v JWC Ariatektura Sdn Bhd*[54] sought a declaration from the court for the claimants and the respondent to bear the arbitration costs and expenses. The court refused to interfere and opined that the issue was within the jurisdiction of the arbitral tribunal.

The court in *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor*,[55] interpreted the application of s 8 of the AA 2005 as follows:

> I'm of the opinion that the extent of the court's power to intervene is limited to what is expressed in the said provision, which is, unless the Act provides otherwise the court cannot intervene.

The courts have repeatedly confirmed that their intervention is limited by the AA 2005. The High Court in *Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd*[56] held that it can only intervene on matters specifically set out in s 37 of the AA 2005.

This represents a paradigm shift. The court in an arbitration falling under the AA 2005 would only intervene on matters specifically set out in s 37 of the AA 2005 where setting aside an award is concerned.

Similarly, the Court of Appeal in *SDA Architects v Metro Millennium Sdn Bhd*[57] made the same point as regards the issue of costs awarded by an arbitrator being reconsidered in court:

> The Act specifically states that costs and expenses of the arbitration shall be at the discretion of the arbitral tribunal. And to ensure that discretion is not made illusory, Section 8 c urtails the power of court to intervene in the discretionary

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52 *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791 (CA).
53 The court in *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793 cited this decision and held that '[t]his decision is a formidable authority in this area of law in contrast to earlier apex decisions'.
54 *Magnificient Diagraph Sdn Bhd v JWC Ariatektura Sdn Bhd* [2009] MLJU 583.
55 *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 2 AMR 467; [2008] 3 MLJ 872.
56 *Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd* [2012] 4 AMR 405; [2012] 5 MLJ 809; [2013] 4 CLJ 1172.
57 *SDA Architects v Metro Millennium Sdn Bhd* [2014] 2 MLJ 627; [2014] 3 CLJ 632 at 658.

> jurisdiction of the arbitrator. As the court's role to decide on costs or quantum had been specifically taken away by virtue of sections 8 and 44 of AA 2005 it is difficult even to fathom how the issue of costs in arbitral proceeding can be framed as a question of law for the determination of the High Court when the statute has specifically deprived the business of the High Court to deal with costs.

The Court of Appeal in *MTM Millenium Holdings Sdn Bhd v Pasukhas Construction Sdn Bhd & Anor*[58] held:

> It is now firmly established that the policy employed by the Courts is one of minimal intervention. This policy is nothing but an acknowledgement and respect accorded to the finality to the arbitral process agreed to by the disputing parties. Put in another way, the parties have agreed and preferred that their disputes to be settled outside the Court system and whatever decision that tribunal arrives at shall be final.

The court in *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd*[59] reinforced the position that s 8 of the AA 2005 provides for minimal judicial intervention. The court illustrated its approach by rejecting an application to resolve a dispute as to the number of arbitrators required for a particular arbitration.

The court in *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd*[60] further illustrated the minimalist approach. It held that the arbitral tribunal remained the sole determiner of fact. While their findings and application of legal principles may be questionable, the courts will not intervene so long as such findings and decisions are not perverse.

The court in *Kembang Serantau Sdn Bhd v Jeks Engineering Sdn Bhd*[61] commented on the merits of s 8 as follows:

> The significance of Section 8 cannot be overstated; that the Court's intervention is only where it is so provided. The matters that may be referred to arbitration, matters concerning procedure and the conduct of arbitrations, the role of the arbitrators and the involvement of the Court are all matters governed by the Act. Where the provisions do not provide for the intervention of the Court, the Court ought to decline intervention even if the Court would treat the matter differently if it was a non-arbitration matter. I am aware that this is quite a liberal

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58 *MTM Millenium Holdings Sdn Bhd v Pasukhas Construction Sdn Bhd & Anor* [2013] 1 LNS 1325 at [23].

59 *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd* [2015] 1 LNS 1094.

60 *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2014] AMEJ 1550; [2015] 1 CLJ 617.

61 *Kembang Serantau Sdn Bhd v Jeks Engineering Sdn Bhd* [2016] 2 CLJ 427 at [30].

> interpretation of Section 8 but given one of the basic principles of arbitration is party autonomy especially in international commercial arbitration, I am comfortable with that understanding. These matters are recognised as part of the bargain entered into out of parties' own free will. Parliament has seen fit to treat this lot of cases in a different manner. Absent fraud and complaints of corruption, I see no reason why such an approach is wrong or that the jurisprudence and approach of other like-minded Model Law jurisdictions are not persuasive.

Prior to the 2018 Amendments, the courts also had jurisdiction over arbitral awards under s 42 (References on questions of law) and s 43 (Appeal) of the AA 2005. However, such jurisdiction was limited to cases when the question of law referred to substantially affected the rights of one or more of the parties (this being a test introduced in the course of the 2011 Amendments).

The Federal Court judgment in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and Other Appeals*,[62] expanded the courts' jurisdiction in respect of any questions of law, thus undermining the principle of minimum court intervention. In view of the said Federal Court judgment, ss 42 and 43 of the AA 2005 were repealed by the 2018 Amendments. The detailed analysis of this judgment is provided in the commentary on the deletion of s 42 of the AA 2005 below.

The Federal Court of Malaysia in *Jaya Sudhir A/L Jayaram v. Nautical Supreme Sdn Bhd & Ors*[63] restrained parties to an agreement from participating in an arbitration, at the request of a stranger who is a non-party to the arbitration agreement,[64] so as to allow him to enforce his rights through litigation.[65]

The Court held that:

> ... Absurdity will thus inevitably ensue in the event that s 8 of Act 646 is held to be applicable to a non-party to any arbitration proceedings or arbitration agreement such as the applicant. Section 8 therefore does not apply to the appellant's claim in the instant suit and the injunction application.[66]

While it is uncommon for a party (or an alleged party) to arbitration agreement to apply to the local courts for anti-arbitration injunction, it is unheard of that

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62 *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and Other Appeals* [2018] 1 MLJ 1; [2017] 8 AMR 313.
63 *Jaya Sudhir A/L Jayaram v. Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1.
64 [2019] 5 MLJ 1 at [40].
65 [2019] 5 MLJ 1 at [19], [92], [98].
66 [2019] 5 MLJ 1 at [42].

a stranger, namely, a non-party to the arbitration agreement to be given an anti-arbitration injunction to restrain arbitral proceedings.

This decision may be contrary to the rules as enunciated in *s 8; Extent of court intervention: No court shall intervene in matters governed by this Act, except where so provided in the Act;* and s 9(1): Definition and form of Arbitration Agreement in 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes ...' in AA 2005 based on the Model Law that only parties to an arbitration agreement can partake or resist arbitration proceedings in the absence of any consent to a joinder by either the arbitration agreement or by the applicable arbitral institution rules.

## COMPARATIVE PERSPECTIVE

The courts have generally supported the principle of non-intervention that underlie the UNCITRAL Model Law. In particular, the courts have consistently interpreted art 5 of the UNCITRAL Model Law in favour of arbitration.[67]

Most national courts have supported the notion that in all matters governed by the UNCITRAL Model Law, court intervention would be appropriate only to the extent intervention is expressly granted by the UNCITRAL Model Law itself.[68]

The Singapore Court of Appeal in *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*[69] confirmed the limited powers of the court to declare an additional award a nullity. The court stated that in the light of s 47 of the Arbitration Act[70] of Singapore (consistent with art 5 of the UNCITRAL Model law), curial intervention had to be viewed as confined and the court shall not have jurisdiction to confirm, vary, set aside or remit an award except where so provided in the Arbitration Act.

The power of the courts to intervene in arbitration has been interpreted largely based on the seat in international arbitrations. In Malaysia, in the

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67 *Noble China Inc v Lei Kat Cheong* [1998] CanLII 14708 (ON SC).

68 *Vibroflotation AG v Express Builders Co Ltd* [1994] HKCFI 205; *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush & Anor* [2004] 2 SLR(R) 14; [2004] SGHC 26; *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565; [2008] SGCA 5.

69 *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125; [2012] SGCA 57.

70 (Cap 10).

absence of a provision equivalent to art 1(2) of the UNCITRAL Model Law, courts have consistently upheld the limited jurisdiction of courts to intervene in arbitrations pursuant to art 1(3).

The Canadian court in *Deco Automotive Inc v GPA Gesellschaft für Pressenautomation mbH*[71] dealt with the applicability of art 5 of the UNCITRAL Model Law to arbitrations seated outside the relevant state. It held that in an arbitration with seat outside of Canada, pursuant to art 1(2), art 5 was not applicable. Therefore, the court had the power to exercise jurisdiction.

The Hong Kong position is similar to that in Canada. The Supreme Court of Hong Kong in *Transorient Shipping Ltd v The Owners of the Ship or Vessel 'Lady Muriel'*[72] held that the court had jurisdiction to provide assistance to international arbitrations seated outside their jurisdiction.

However, the court may intervene in matters that are not governed by the UNCTIRAL Model Law. The court in *Carter Holt Harvey Ltd v Genesis Power Ltd*[73] held that if there is no arbitration agreement, then the UNCITRAL Model Law is not engaged at all and it is open to the court whether to grant an injunction staying the arbitration.

The Court of Appeal, Abuja Judicial Division, Nigeria in *Nigerian Agip Exploration Ltd v Nigerian National Petroleum Corporation and Oando, 125 & 134 Ltd*[74] considered the issue of the applicability of inherent powers. It refused to exercise its inherent powers to interfere in arbitration proceedings outside the specific instances permitted. It held that there should be no interference by a domestic court in an arbitration except in the specific instances provided.

The Alberta Court of Queen's Bench in *Western Oil Sands Inc v Allianz Insurance Co et al*[75] while deciding an application for consolidation of arbitral proceedings refused to accept the broader interpretation of the inherent powers of the court given the limited powers of interference granted to the courts under art 5 of the UNCITRAL Model Law.

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71 *Deco Automotive Inc v GPA Gesellschaft für Pressenautomation mbH* CLOUT Case No 383, Ontario District Court, Canada, October 27, 1989.

72 *Transorient Shipping Ltd v The Owners of the Ship or Vessel 'Lady Muriel'* CLOUT Case No 692, unreported.

73 *Carter Holt Harvey Ltd v Genesis Power Ltd* [2006] NZHC 114.

74 *Nigerian Agip Exploration Ltd v Nigerian National Petroleum Corporation and Oando, 125 & 134 Ltd* Suit No CA/A/628/2011, Judgment delivered on February 25, 2014.

75 *Western Oil Sands Inc v Allianz Insurance Co et al* 2004 ABQB 79 (Canada); (2004) AJ No 85 (Lexis).

While courts have interpreted art 5 of the UNCITRAL Model Law to limit courts' intervention, they have not interpreted it to limit the support that courts can provide to arbitral tribunals.

The court in *China Ocean Shipping Co, Owners of the M/V Fu Ning Hai v Whistler International Ltd, Charterers of the M/V Fu Ning Hai*[76] dealt with a situation where a party had refused to disclose its place of business in order to avoid posting security for costs of the arbitration and the arbitral tribunal lacked the power to grant such orders. The court assisted the arbitral tribunal by making appropriate orders. The court held that art 5 of the UNCITRAL Model Law did not prevent the court from doing so as the issue of security for costs was not a matter governed by the UNCITRAL Model Law.

However, the courts are cautious with providing judicial assistance when there is a risk of abuse of that assistance by either of parties. A party in the Singapore case of *ALC v ALF*[77] applied to court for the issuance of a subpoena in order to compel the person named to disclose documents or answer questions on documents. The arbitral tribunal in that case had earlier rejected such a request. Consequently, the court application was rejected and the applicant was considered as having abused process.

## CONCLUSION

Section 8 of the AA 2005 adheres to the principle of minimal judicial intervention with respect to arbitral proceedings. As will be discussed further, the 2018 Amendments, namely, the deletion of ss 42 and 43 of the AA 2005, reinforced the principles of minimum court intervention. This has brought Malaysia alongside other jurisdictions which have subscribed to the UNCITRAL Model law in favour of internationality and uniformity to commercial arbitration practice.

The courts' minimalist interference goes towards supporting arbitration, showing respect for autonomy, confidentiality, commerciality, and a host of multifarious reasons why many corporate entities opt for arbitration in lieu of litigation.[78]

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76 *China Ocean Shipping Co, Owners of the M/V Fu Ning Hai v Whistler International Ltd, Charterers of the M/V Fu Ning Hai* [1999] HKCFI 693.

77 *ALC v ALF* [2010] SGHC 231.

78 See *The Government of India v Cairn Energy India Pty Ltd & Ors* [2014] 1 AMCR 760 ; [2014] 9 MLJ 149.

Section 8 of the AA 2005 stipulates that any intervention by the courts must be pursuant to express statutory provision. It ends any argument as to the existence of a sweeping inherent power for the court to take over or interfere in arbitrations where such power is not provided for in the AA 2005.

The power of intervention may not be inferred, either from the invocation of inherent or residual common law powers, or by an inference that what is not expressly forbidden is permissible. In so doing, s 8 of the AA 2005 is in tandem with art 5 of the UNCITRAL Model Law as applied in other UNCITRAL Model Law jurisdictions.