MALAYSIA

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I. INTRODUCTION: ARBITRATION IN MALAYSIA— HISTORY AND INFRASTRUCTURE

A. History and Current Legislation on Arbitration

1. Historical evolution of law relating to arbitration

The island of Penang was founded in 1786. Penang subsequently became part of the Straits Settlements comprising Penang, Malacca and Singapore. In 1874, the British entered into treaty arrangements with the Sultans of the Malay States, and British protection was extended to the whole of Malaya and the British legal system was introduced to Malaya. The Arbitration Ordinance XIII of 1809 of the Straits Settlements was Malaysia's first piece of arbitration legislation. This Ordinance was then replaced in Penang and Malacca by The Arbitration Ordinance 1890. In 1950, the Arbitration Ordinance 1950 replaced the 1890 Arbitration Ordinance for all the States of the then Federation of Malaya. The 1950 Ordinance was based on the English Arbitration Act of 1889. British North Borneo and Sarawak adopted the English Arbitration Act of 1952 as their respective Ordinance in 1952. In 1963, North Borneo and Sarawak joined the Federation of Malaysia. On 1 November 1972, Malaysia adopted the arbitration laws prevailing in Sabah and Sarawak and it became known as the

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Arbitration Act 1952 (1952 Act), which is based on the English 1950 Act.

An amendment to the 1952 Act on 1 February 1980 gave special status to arbitrations held under the Convention on the Settlement of Investment Disputes between the States of Nationals and other States 1965 (ICSID) under the United Nations Commission of International Trade Law (UNCITRAL) and the Rules of Arbitration for the Regional Arbitration Centre for Kuala Lumpur (KLRCA) (now known as the Asian International Arbitration Centre (AIAC). There are omissions in the 2005 Act, and the arbitral community, including the Bar Council and Attorney-General's Chambers, collaborated to ensure that these omissions were enacted by the Arbitration (Amendment) Act 2011 (2011 Act) and came into force on 1 July 2011.

Pressure to replace the 1952 Act by the Malaysian Bar Council and the arbitral community with the Model Law resulted in the enactment of the Arbitration Act 2005 (2005 Act). The 2005 Act based largely on the Model Law and the New Zealand Arbitration Act of 1996, came into effect on 15 March 2006.

Two legislations were passed in 2018 which have made several key changes to arbitration in Malaysia under the scheme of the 2005 Act. The first being the Arbitration (Amendment) Act 2018 (No.1), which renamed the KLRCA to the Asian International Arbitration Centre (Malaysia) ("AIAC"), and that all legal references to the former KLRCA (under the 2005 Act and the existing KLRCA Rules) remains in full force subject to the change in name.

The second amendment in 2018 is the Arbitration (Amendment) Act 2018 (No.2) (the "2018 Amendment Act"), which had brought significant changes to the substantive rules of law on arbitration under the scheme of the 2005 Act and came into force on 8 May 2018.

The 2018 Amendment Act was passed with a view of ensuring that Malaysian arbitration laws reflect the the 2006 amendments to the UNCITRAL Model Law, and to mirror arbitral legislations of leading arbitral jurisdiction in the region and worldwide.

2. Current law

a) Overview

There are currently two Acts in force in Malaysia, namely the Arbitration Act 1952 which is based on the English Arbitration Act of 1950 and the 2005 Arbitration Act which is largely based on the Model Law and the New Zealand Arbitration Act of 1996, which came

into force on the 15th of March 2006. The 1952 Act has only residual relevance now, as it only applies to arbitrations commenced prior to the 15th of March 2006. The 2005 Act applies to arbitrations commenced after the 15th of March 2006. The 2011 Act has amended section 51(2) of the 2005 Act which now provides that the 1952 act is only to apply where arbitral proceedings were commenced prior to 15 March 2006.

The 1952 Act was amended on the 1st of February 1980, to incorporate a new Section 34, whereby the jurisdiction of the Malaysian courts was excluded in respect of arbitrations held under ICSID and UNCITRAL and the AIAC Rules.

Section 34 has been interpreted by the Malaysian courts as excluding interim relief such as security for costs[1] despite the wording of Article 26.3 of the AIAC Rules which provides for interim measures. The position has been clarified by the Court of Appeal in *Thye Hin Enterprises Sdn Bhd v. Daimlerchrysler Malaysia Sdn Bhd*[2] where the court stated that interim relief can be granted despite Section 34. The provisions of Section 34 were to cater for international arbitrations. However, the Malaysian courts have interpreted this Section as applicable to domestic arbitrations as well.

The 2005 Act applies to both domestic and international arbitrations. The Act is divided into four parts. Part I contains the definition section, including important definitions of international arbitration and domestic arbitration. Parts I, II and IV apply to all arbitrations. Part III, which contains the provisions for appeals from arbitration awards on points of law, applies only to domestic arbitrations unless the parties opt out. It does not apply to international arbitrations unless the parties opt in.

The 2018 Amendment Act makes several key amendments to the 2005 Act. These include:

- An expansive redefinition of 'arbitral tribunal' under Section 2 of the 2005 Act to ensure the enforceability of awards issued by an emergency arbitrator (Section 2);
- The right for parties to choose their representation under a new section 3A of the 2005 Act (Section 3);

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1 *Klockner Industries-Analagen GmbH v. Kien Tat Sdn Bhd* (1990) 3 MLJ page 183 at 185.

2 (2004) 3 CLJ page 591.

- An amendment to Section 4 of the 2005 Act to further define non-arbitrability (Section 4);
- The expansion of the formal validity of arbitration agreements, including those recorded through electronic communications under the amended Section 9 of the 2005 Act (Section 5);
- The expansion to the jurisdiction of the High Court (Section 11 of the 2005 Act) and the arbitral tribunal (Section 19 of the 2005 Act) to grant interim measures (Sections 6 and 7 respectively);
- The introduction of Chapter IV A of the UNCITRAL Model Law as amended in 2006 under the new Sections 19A – 19J of the 2005 Act (Section 8) to provide for the applicable rules and conditions for the granting and subsequent recognition and enforcement of interim measures and preliminary orders issued by an arbitral tribunal.;
- The amendment of the choice of law and choice of rules of law rules under Section 30 of the 2005 Act to mirror the provisions of Article 28 of the UNCITRAL Model Law as amended in 2006;
- An expansion of the powers of the arbitral tribunal in awarding interest under Section 33 of the 2005 Act (Section 10);
- The introduction of confidentiality clauses under new Sections 41A and 41B of the 2005 Act to set out the parties' duty of confidentiality and to provide for the confidentiality of court-related arbitration proceedings (Section 11); and
- The repeal of Sections 42 and 43 of the 2005 Act (which previously allowed parties to refer any question of law arising from an award to the High Court) (Sections 12 and 13).

b) Distinction between national and international arbitration

Section 3 of the 2005 Act makes the main distinction between international and domestic arbitrations and sets out the territorial limits and scope of the 2005 Act. This section incorporates the provision for opting-in and opting-out of Parts I, II and IV of the Act in respect of domestic and international arbitrations where the seat of the arbitration is in Malaysia. There is no equivalent provision to

Section 3 of the 2005 Act in the 1952 Act. The 1952 Act applies both to domestic and international arbitrations.

B. Arbitration Infrastructure and Practice in Malaysia

1. Major arbitration institutions

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) is an independent international institution. It was established on 17 October 1978 in Kuala Lumpur under the auspices of the Asian-African Legal Consultative Committee (the AALCC), in cooperation with and with the assistance of the Government of Malaysia, to provide a system for settlement of disputes on an integrated pattern in regard to international commercial transactions. The KLRCA has since been rebranded as the AIAC as of 2018.

It was a term of the agreement that the AIAC would function as an independent institution under the auspices of the AALCC. The AIAC has its own arbitration rules: the UNCITRAL rules as modified by the rules of the AIAC. The AIAC rules allow a great deal of flexibility in the conduct of arbitration proceedings, leaving wide discretion to the parties regarding the choice of arbitrators, the place of arbitration and the applicability of the procedural rules. The AIAC has been at the forefront of trying to encourage international arbitrations to be conducted in Malaysia and has been taking steps to make Malaysia and Kuala Lumpur, in particular, an international arbitration centre.

Arbitrations are also administered by professional bodies, such as the Malaysian Institute of Architects, the Institute of Engineers Malaysia, Institution of Surveyors Malaysia, the Malaysian International Chambers of Commerce, the Kuala Lumpur and Selangor Chinese Chambers of Commerce as well as commodity associations like the Malaysian Rubber Board and the Palm Oil Refiners Association of Malaysia.

Finally, the parties conducting arbitration in Malaysia are entitled to choose the rules of international institutions such as the ICC or LCIA rules.

2. Development of arbitration compared with litigation

Arbitration clauses are increasingly included by parties in their contracts to resolve disputes. This stems from the parties' desire to resolve disputes by experienced arbitrators who are specialists in

the subject matter of the dispute. The relative speed of resolution has also contributed to the adoption of arbitration.

Average duration[3]

Type of panel	Domestic	International
Sole Arbitrator	25.1 months	7.0 months
3-Member Panel	15.5 months	14.5 months
Fast Track Rules	6.0 months	5 months[4]

The position under the 2005 Act is that Malaysian courts are bound to stay any proceedings upon the application by either party to the contract if the dispute is the subject matter of an arbitration agreement between the parties.[5] This judicial support for arbitration had led to an increasing number of arbitrations in Malaysia. Arbitration clauses are frequently inserted into contracts relating to joint ventures, construction, energy, investments, intellectual property, telecommunications, sports and other commercial transactions.[6]

[3] AIAC, *2018 Annual Report: To The Road Ahead* (2019) at 26, *accessible at* https://admin.aiac.world/uploads/ckupload/ckupload_20191023032658_26.pdf (last accessed 23 April 2020).

[4] This figure is based on the KLRCA, *2017 Annual Report: Delivering the Future* (2018) at 33, *accessible at* https://www.aiac.world/wp-content/annualreport/KLRCA_Annual_Report_ 2017.pdf (last accessed 23 April 2020) as no Fast Track Arbitrations were concluded during the analysis period of the 2018 Annual Report.

[5] Affirmed by the Federal Court in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417.

[6] KLRCA, *2017 Annual Report: Delivering the Future* (2018) at 26, *accessible at* https://www.aiac.world/wp-content/annualreport/KLRCA_Annual_Report_ 2017.pdf (last accessed 24 August 2018).

II. CURRENT LAW AND PRACTICE

A. Arbitration Agreement

1. Types and validity of agreement

a) Clauses and submission agreements

An arbitration agreement is defined in section 2 of the 1952 Act as a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.[7]

Section 9(1) of the 2005 Act defines an 'arbitration agreement' as '*an agreement by the parties to submit all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not*'. Section 9(2) of the 2005 Act provides that an arbitration agreement may be in the form of an arbitration clause or in the form of a separate agreement.

Where parties do not have any prior agreement to arbitrate but agree to resort to arbitration after a dispute arises, such parties arbitrate based on a submission agreement. Oral agreements to arbitrate *per se* (which is not recorded in any form) is not formally valid.[8,9]

b) Minimum essential content

An arbitration agreement should be drafted in simple and clear terms to avoid uncertainty, risk of time and cost when challenges are raised. Further, defects in the drafting of the arbitration agreement may result in inconsistency, uncertainty and inoperability of the arbitration agreement. Standard arbitration clauses provided by the respective arbitral institutes are encouraged to be adopted.

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[7] *See for example Bina Puri Sdn Bhd v EP Engineering Sdn Bhd & Anor* [2008] 3 CLJ 741.

[8] *See Food Ingredients LLC v Pacific Inter-Link Sdn Bhd and another application* [2012] 8 MLJ 585 at [104]. Reversed by the Court of Appeal on other grounds in *Agrovenus LLP v Pacific Inter-Link Sdn Bhd and another appeal* [2014] 3 MLJ 638.

[9] *See, e.g., Vincent Tan Chee Yioun & Anor v Jan De Nul (Malaysia) Sdn Bhd & Anor (and 2 Other Appeals)* [2017] 5 AMR 733.

Datuk Professor Sundra Rajoo cites the below as exhaustive and comprehensive:[10]

(i) there should be a clear reference to arbitration;

(ii) the seat of the arbitration should be specified;

(iii) choice of the proper law should be indicated;

(iv) the agreement should indicate applicable procedural law and rules;

(v) how and by whom the arbitral tribunal is to be constituted;

(vi) what shall be the qualification and number of members of the arbitral tribunal;

(vii) the mode and manner of filing vacancies;

(viii) the language of the arbitral tribunal; and

(ix) privacy and confidentiality.

In the case of *Innotec Asia Pacific Sdn Bhd v Innotec GmBH,*[11] an issue arose as to whether the arbitration clauses as stipulated in the agreements between the parties were void for uncertainty. It was argued that "SIHK" referred to in the agreements could mean many different institutions and hence there was a serious question as to the venue of the arbitration. The High Court found on the facts of the case that "SIHK" referred to *Sudwestfalische Industrie – und Handelskammer* or the *Chamber of Industry and Commerce of Southern Westphalia*, by taking into account that the law of the agreements is German law. It has to be stressed that parties will need to take extra care in drafting arbitration clauses with clarity and certainty.

c) Form requirements

The 1952 Act and the 2005 Act apply only when there is a written agreement. There are, however, important differences in the definition of the phrase "written agreement" in the two Acts.

Section 2 of the 1952 Act stipulates that a written agreement is required to submit present and future disputes to arbitration, whether an arbitrator is named or not. Parties normally insert an arbitration

[10] Sundra Rajoo, "Law, Practice and Procedure of Arbitration" (Lexis Nexis 2003) at pages 71 to 72.
[11] [2007] 8 CLJ 304.

clause in their contractual arrangements. The 1952 Act does not specify a specific form for the arbitration clause. However, standard form contracts incorporating an arbitration clause are the norm in commercial contracts.

Section 9 of the 2005 Act defines an arbitration agreement as an agreement in writing to submit to arbitration all or certain disputes which have arisen or which may arise between parties in respect of a defined legal relationship whether contractual or not. This section is based on Article 7 of the Model Law.

d) Incorporation by reference

Under the 1952 Act, the writing requirement is satisfied where the document recognises, incorporates or confirms the existence of an agreement to arbitrate.[12] It may be gathered from a series of documents as well.[13]

Sections 9(2) to 9(5) of the 2005 Act illustrate what constitutes an agreement to arbitrate. The 2018 Amendment Act has widely broadened the types of agreement which could be considered to have been made 'in writing'. Following the coming into force of the 2018 Amendment Act, the sections provide for an agreement to be in writing where its content has been recorded in *any* form regardless of whether the agreement was made orally, by conduct or by any other means and no longer confined to documents signed by the parties or exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; and the requirement for such agreements to be made in writing could is satisfied if it is made electronically under a new Section 9 (4A) of the 2005 Act. An exchange of pleadings in which the existence of an arbitration agreement is acknowledged, can also constitute an arbitration clause. Section 9(5) also provides for an arbitration clause to be incorporated by reference in another document, for instance, a bill of lading may, by specific reference, incorporate an arbitration clause in a charter party.

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[12] *Bauer (M) Sdn Bhd v Daewoo Corp.* [1999] 4 MLJ 545 at 565.

[13] *See for example* the Court of Appeal's decision in *Bina Puri Sdn Bhd v EP Engineering Sdn Bhd & Anor* [2008] 3 CLJ 741 where it was held that it was settled law that an agreement must be in writing but it is not the law that it has to be signed and it suffices for there to be an agreement.

His Lordship Vincent Ng J explained Section 9 of the 2005 Act in the case of *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor*[14] as follows:

> Under s 9 of the 2005 Act, the term 'arbitration agreement' has assumed a much wider meaning to include an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not. And, though 'an arbitration agreement shall be in writing', there need not be a separate arbitration agreement per se, as it may be in the form of an arbitration clause in any written agreement or even in the form of an exchange of letters, telex, facsimile or any other means of communication or written record which evinces the fact that such an agreement existed between the parties.

The meaning of an agreement 'in writing' has been further amended under Section 5 of the 2018 Amendment Act, as it removes any references to documents signed by the parties and exchange of letters, telex, facsimile or any other means of communication or written record whatsoever. This amendment radically broadens the scope of an 'arbitration agreement' that satisfies the requirement to be in writing as any person or entity may now establish the existence of an arbitration agreement even in the absence of tangible, physical proof to that effect.

In 2013, the Federal Court in the case of *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd*[15] observed that there was no requirement under Sections 9(3) and (4) of the 2005 Act that an agreement which refers to a separate document containing an arbitration clause needed to be signed, and it is usually sufficient for the reference to be a general reference to the document containing the arbitration clause. Subsequently, the High Court in two cases have ruled that a particular reference must be clear so as to leave minimal ambiguity as to what the parties have intended to incorporate by reference.[16] In determining whether a particular document has been incorporated by reference, the Court of Appeal has clarified that is the

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[14] [2008] 1 MLJ 233 at 243.
[15] [2013] 5 MLJ 625.
[16] *See Mersing Construction and Engineering Sdn Bhd v Kejuruteraan Bintai Kindenko Sdn Bhd & Ors* [2011] 3 MLJ 264, HC; *CLLS Power System Sdn Bhd v Sara-Timur Sdn Bhd* [2015] 11 MLJ 485, HC

agreement containing the reference to the document that is to be construed and not the document containing the arbitration clause.[17]

However, it has been held that where a party's name does not appear in the arbitration agreement, an award rendered pursuant to arbitration proceedings without the presence of the said party may be liable to be set aside as of right.[18]

e) Law of the agreement

There are no specific provisions in the 1952 Act to determine the law applicable in arbitration agreements and the proper law is determined in accordance with the general principles regarding conflict of laws, namely the law chosen by the parties or in the absence of such choice, the law of the country with which the contract is most closely connected.

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[17] *See Best Re (L) Ltd v ACE Jerneh Insurance Berhad* [2015] 5 MLJ 513 CA.

[18] *See International Bulk Carriers Spa v CTI Group Inc.* [2014] 6 MLJ 851 where the central issues before the Court of Appeal were whether registration of an award would be valid when relevant documents were not produced before the court for purposes of registration and whether an award can be registered when the defendant's name does not appear in the arbitration agreement pursuant to sections 38 and 9 of the 2005 Act. It was not in dispute that the defendant was not a party to the relevant agreement, but the tribunal had ruled that the defendant was liable although the defendant did not participate in the arbitration proceedings. In finding that the defendant was not a signatory to the agreement in any manner or had any form of nexus as provided in section 9, the Court of Appeal held that in consequence the award cannot be registered. This was because section 38 of the 2005 Act required the production of the arbitration agreement and this requirement was not met since the defendant was not a signatory to the arbitration agreement. This case went on appeal to the Federal Court in *CTI Group Inc v International Bulk Carriers SPA* [2017] 5 MLJ 314. The Federal Court, in reversing the decision of the Court of Appeal, found that the applicant therein had discharged the burden imposed under Section 38(2) of the 2005 Act and therefore the High Court was correct in registering and enforcing the Award. The Federal Court further held that once an Order has been made by the High Court pursuant to Section 38 of the 2005 Act, an aggrieved party must apply to set aside the said Order pursuant to Section 39 of the 2005 Act (on the grounds set out in Section 39 of the 2005 Act) and not apply to set aside the Order under Section 38 of the 2005 Act. On the facts of this appeal, the setting aside application was made solely pursuant to Section 38 of the 2005 Act and therefore the Federal Court held that the High Court was correct in dismissing the application.

This is reflected in the 2005 Act. Section 30 of the 2005 Act provides for determining the *substantive law* of the arbitration proceedings (distinct from the *curial law* of the arbitration).[19] For domestic arbitrations, the parties had to resolve the dispute or differences in accordance with the substantive law of Malaysia.[20] This has been amended by the 2011 Act which recognises the right of the parties to choose the applicable substantive law and, in the absence of such choice, the substantive law of Malaysia will apply. For international arbitration, section 30(2) of the 2005 Act recognises the right of the parties to choose the applicable substantive law and in the absence of such choice, the arbitral tribunal will determine the applicable law in accordance with the conflict of law rules.[21] Section 30(5) further requires the arbitral tribunal to take into account the terms of the agreement and trade usages when deciding the dispute. The applicability of the substantive law of the arbitration proceedings in the context of a setting aside application was considered by the Federal Court in *The Government of India v Cairn Energy Pty Ltd & Ors*. Among the issues considered by the court was whether the substantive law of the arbitration proceedings would apply to a setting aside application. The court held that in dealing with challenges under section 37 of the 2005 Act, the challenge cannot be determined by reference to the substantive law of the contract, which in this case, was Indian law (the arbitration agreement concerned was governed by English law). However, as the seat of the arbitration was Kuala Lumpur, Malaysia, the curial law of the seat would apply.

The Federal Court's recent decision in *Thai-Lao Lignite Co Ltd & Anor v The Government of the Lao People's Democratic Republic* serves as a reminder that parties should ensure that the law governing the arbitration agreement be expressly specified, in default of which the law with the closest and most real connection to the arbitration agreement would apply, which in Malaysia is deemed to be the seat of the arbitration.[22] Therefore, in the absence of a stipulated governing law in the arbitration agreement and where the resulting arbitration is conducted and seated in Malaysia, the 2005 Act shall be applicable to the relationship between the arbitral tribunal and the Malaysian courts (i.e. *lex arbitrii*) *and* to the arbitration proceedings between the

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[19] Derived from Article 28 of the Model Law with changes.
[20] Section 30(1) of the 2005 Act.
[21] Section 30(4) of the 2005 Act.
[22] [2017] 6 AMR 219 at [187], [244] (Jeffrey Tan FCJ).

parties to the dispute (i.e. the curial law).[23] Additionally, a choice of law clause which seeks to cover non-contractual disputes submitted to arbitration which arose in connection with the agreement subjected to arbitration should be drafted widely to be identical to the contractual dispute resolution mechanism.[24]

2. Enforcing arbitration agreements

a) Applications to compel or stay arbitration

Section 6 of the 1952 Act gives the court power to stay proceedings where there is submission to arbitration. This power is discretionary. There has been some controversy over whether a conditional appearance or an unconditional appearance is required for stay. In the case of *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Sdn Bhd,*[25] the Court of Appeal did decide that Section 6 of the 1952 Act differed fundamentally from its equivalent in the English Arbitration Act 1956, namely Section 4(2), in the sense that the language contained in the English provision expressly excludes the entry of an appearance as constituting a step in the proceedings. It must be noted that under Section 6 of the 1952 Act, it is a requirement that the party applying for a stay has not taken a step in the proceedings. The Court of Appeal further decided that Section 6 of the 1952 Act makes no such qualification. In September 2000, the Federal Court, without giving written reasons, reversed the decision of the Court of Appeal.

The Court of Appeal in *Trans Resources Corp Sdn Bhd v Sanwell Corp,*[26] presumably unaware of the decision by the Federal Court, affirmed and followed its own decision in the *Interscope Versiacherung* case. This decision must be considered as "per incuriam". The Federal Court in *Sanwell Corporation v Trans Resources Corporation Sdn Bhd*[27] finally resolved the controversy with regard to the status of an unconditional appearance by determining that the filing of an unconditional appearance did not amount to a step in the proceedings.

If the requirements of Section 6 of the 1952 Act are satisfied, then the burden would "shift" to the party who filed the action in court to convince the court with reasons why the actions should be allowed to

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[23] *Ibid.*
[24] *Ibid.*
[25] [1999] 2 MLJ 529.
[26] [2001] 1 MLJ 380.
[27] [2002] 2 AMR 2257.

remain in Court. The Federal Court in the case of *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd*[28] stated:

> It is well known that if a party can satisfy the court that the conditions for the grant of stay under section 6 of the Act are satisfied, it does not ipso facto follow that he will be entitled, as of right to a stay, for the court still retains a discretion to refuse it. But generally, as the judge rightly recognized, the approach of the court will be that those who make a contract to arbitrate their disputes, should be held to their bargain for, in the oft-quoted words of Martin B in *Wickham v Hending*, 'A bargain is a bargain; and the parties ought to abide by it, unless a clear reason applies for their not doing so.'

The current approach by the Malaysian courts is basically to give effect to the consensual dispute resolution procedure pre-agreed unless there exists strong reasons to the contrary. Examples of what would amount to strong reasons have been identified in the case of *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat*[29] namely "those involving fraud or where there is, on a proper construction of the arbitration clause, no dispute that falls within its purview or where third party procedure under the rules of court will most probably be resorted to."

Under the 2005 Act, there are 2 principal methods by which the Malaysian court may give effect to an agreement to arbitrate – namely, to stay an action or to refer the dispute to arbitration pursuant to Section 10 of the Act. The Act provides that an application must be made before taking any steps in the action to stay the action. The courts must give effect to the mandatory requirements of Section 10 – namely that they have no discretion in the matter when it is an application for stay involving an international element. However, if the agreement is null and void, inoperative or incapable of being performed, then a stay may be obtained. The court may impose conditions when it grants stay such as providing security.[30] There have been many cases where it has been held to be mandatory for a stay of court proceedings when there is an arbitration agreement

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[28] [1994] 2 MLJ 97.

[29] [1995] 3 MLJ 273.

[30] *See for example Majlis Ugama Islam dan Adat Resam Melayu Pahang v Far East Holdings Bhd & Anor* [2007] 10 CLJ 318, where after the Court had granted a stay, a condition was imposed pursuant to Section 10(2), namely that the dispute be referred to the Director of the KLRCA for an appointment of an arbitrator as provided for under Section 13(5) of the 2005 Act.

under the new Act.[31] In *TNB Fuel Services Sdn Bhd v China National Coal Group Corp*,[32] the Court of Appeal had allowed an application for a stay of proceedings, even in circumstances where there was doubt as to the existence of an arbitration agreement. The Court opined that any jurisdictional issue was to be determined by the arbitral tribunal itself, and any recourse against the arbitral tribunal's decision on jurisdiction may then be referred to the courts.

In *PLB-KH Bina Sdn Bhd v Hunza Trading Sdn Bhd*, the Court of Appeal clarified that for a stay under Section 10 of the 2005 Act to be considered by the court, the party applying had to file for the same before taking any other step in the subject proceedings itself.[33]

In *Uba Urus Bina Asia Sdn Bhd v Quirk & Associates Sdn Bhd & Anor*, the High Court further asserted the importance of the court to order a stay under Section 10 where an arbitration agreement exists and decline to hear the dispute because the basic concept behind party autonomy requires the parties' agreement to arbitrate their disputes to be honoured and given effect.[34]

However, the specific wording employed in the arbitration award may be vital, at least on one instance, for the court to decide whether a stay should be ordered under Section 10 of the 2005 Act. In the context of whether it is mandatory for parties to refer a dispute to arbitration, precatory words such as 'may' instead of imperative words such as 'shall' connotes a discretion to any party to not refer the dispute to arbitration. Such an interpretation of an arbitration agreement was confirmed by the High Court in *Stellar Focus Sdn Bhd v Edgenta Mediserve Sdn Bhd*,[35] which held that an arbitration agreement does indeed confer a discretion to the parties as to the method of dispute resolution if it uses the word "may" and it follows

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[31] For example *see: Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233; *Majlis Ugama Islam dan Adat Resam Melayu Pahang v Far East Holdings Bhd & Anor* [2007] 10 CLJ 318; *Innotec Asia Pacific Sdn Bhd v Innotec* GmBH [2007] 8 CLJ 304; *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872; *Borneo Samudera Sdn Bhd v Siti Rahfizah Mihaldin & Ors* [2008] 5 CLJ 435; and *CMS Energy Sdn Bhd v Poson Corporation* [2008] 6 MLJ 561.

[32] [2013] 4 MLJ 857.

[33] [2014] MLJU 1427 at [47] (Varghese a/l George Varughese JCA).

[34] [2016] 4 CLJ 468 at [22] (Mary Lim J).

[35] [2016] MLJU 1467.

that the court is not required to stay proceedings under Section 10 of the 2005 Act in such disputes.[36]

One further requirement of section 10(1) of the 2005 Act is that the party seeking stay shall apply "*before taking any other steps in the proceedings*" and this provision is similar to section 6 of the 1952 Act discussed above. The question of "taking any other steps in the proceedings" was considered by the High Court in *ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd*.[37] In this case, the plaintiff's claim was for an agreed amount under a contract. Since the amount had been agreed and accepted by the parties, the Plaintiff argued that there was no dispute to refer to arbitration and commenced court proceedings. The defendant then applied for a stay of proceedings under section 10 of the 2005 Act on the ground that the defendant had a set-off under another contract which was to be resolved in arbitration proceedings. In granting the stay, the High Court held that a claim which is premised on a failure to pay according to a final account is a matter which fell within the terms of the arbitration agreement. The High Court also held that an admission of liability did not necessarily mean that there was no dispute to refer to arbitration, except perhaps in clear and unequivocal cases and only definitive, conscious and deliberate steps could be considered to be "taking any other step in the proceedings".

In *Press Metal Sarawak v Etiqa Takaful Bhd*, the Federal Court undertook an extensive interpretation of Section 10 of the 2005 Act by taking into consideration the position of the courts in England, Singapore and Hong Kong on the similar (but unidentical) provisions, and held that the court should lean more towards granting a stay pending arbitration under even in cases where the court could be in some doubt about the validity of the arbitration clause or where it is arguable whether the subject matter of the claim falls within or outside the ambit of the arbitration clause.[38] The threshold for a party to stay proceedings under Section 10 of the 2005 Act is therefore not a high one. The Federal Court also had the opportunity to elaborate on the stage at which an applicant may or may *not* make an application to stay proceedings under Section 10(1) of the 2005 Act. Accordingly, a stay of proceedings means a stay of proceedings which have already been filed in court and hence applicable only to proceedings which are

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[36] *Ibid,* at [22], [31] – [32] (Yeoh Wee Siam J).
[37] [2014] 10 MLJ 633.
[38] [2016] 5 MLJ 417 at [88] (Ramly Ali FCJ).

already filed in court.[39] An application for a stay of proceedings can only be filed by the defendant after the plaintiff has commenced proceedings in court, but before the defendant takes any other steps in the proceedings.[40]

In *Prestij Mega Construction Sdn Bhd v Keller (M) Sdn Bhd and another appeal*[41], the High Court recently held that a court has the inherent and residual jurisdiction to set aside an order granting a stay of proceedings pending arbitration when a party fails to comply with the order to initiate arbitration.

b) Anti-suit and other injunctions

In the case of *Innotec Asia Pacific Sdn Bhd v Innotec GmBH*[42] which involved a dispute between a Malaysian company and a German company in relation to a partnership contract and resellers agreement which contained a clause making reference to arbitration in Germany, which the German company had commenced. The Plaintiff filed an application for an injunction against the Defendant to restrain it from commencing and/or further proceeding with arbitration in Germany, whilst the Defendant filed an application for stay of proceedings pursuant to Section 10 of the 2005 Act. The Plaintiff contended that the Defendant's application for a stay was misconceived as the 2005 Act does not apply to arbitration held outside Malaysia.

The High Court dismissed the injunction and allowed the stay application. The learned Judge held that it was incorrect to suggest that the 2005 Act only applies to arbitration (domestic or otherwise) where the seat is in Malaysia. The learned Judge, Ramly Ali J held at 323 as follows:

> No Express Exclusion in s. 10
>
> The defendant submits that the jurisdiction to grant a stay is vested under s. 23, Court of Judicature Act ("CJA"). Any analysis must start on the footing that the courts do have a general jurisdiction to grant a stay of proceedings on whatever justifiable grounds. The question must then be whether s. 10 of the Arbitration Act 2005 excludes this general jurisdiction. The court is of the view that this is not the case. For there to

[39] *Ibid,* [107].
[40] *Ibid.*
[41] [2019] MLJU 1231.
[42] [2007] 8 CLJ 304.

be an exclusion of jurisdiction, express legislative provision to that effect must be enacted. An exclusion of jurisdiction necessarily compromises the right of access to justice and as such must be categorically provided for. (see: Danaharta Urus Sdn. Bhd. v. Kekatong Sdn. Bhd. [2004] 1 CLJ 701).

The language of s. 10 of the Arbitration Act 2005 does not exclude jurisdiction of the court to stay proceedings for the purpose of referring the matter to arbitration based on their agreement. Instead, the requirement to stay is generally mandatory.

Section 3 of the Arbitration Act 2005 merely dictates the application of certain Parts in the Act to both domestic and international arbitrations, where the seat of arbitration is in Malaysia. The language of the section is clear to this effect. However, s. 3 of the Act does not expressly exclude the power of the court to stay proceeding for the purpose of referring the dispute to international arbitration. It is therefore incorrect and erroneous on the part of the plaintiff to suggest that the Arbitration Act 2005, following s. 3, only applies to arbitration (domestic or otherwise) where the seat is in Malaysia and excludes international arbitration. The language of the section does not lend support to such interpretation.

The authors in The Arbitration Act 2005, UNCITRAL Model Law as applied in Malaysia have expressed the view that s. 10 of the Act should be construed widely so as to include the obligation to grant a stay of court proceedings in aid of a foreign arbitration so as to comply with Malaysia's treaty obligations under the New York Convention 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards). In this regard, the New York Convention 1958 requires a mandatory stay to be provided for where the arbitration is to be held in a Convention country. Both Malaysia and Germany are convention countries to the New York Convention 1958.

Even assuming s. 10 of the Arbitration Act 2005 is not applicable to international arbitration (where the seat is outside Malaysia), the court is of the view that there is nothing in the said Act to exclude the general power of the court (in Malaysia) to stay civil proceedings for any appropriate grounds including the ground to refer the dispute to an international arbitration

> (outside Malaysia) based on an agreement which had been agreed by the parties. The position is made clear if one is to take into consideration Malaysia's treaty obligations under the New York Convention 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) which requires a mandatory stay in aid of a foreign arbitration. Being the court of the country, it is the duty of this court to interpret our laws so as to comply with such Convention where Malaysia is a party, unless expressly prohibited by law.
>
> Be it under s. 10 of the Arbitration Act 2005 or under the New York Convention 1958, a stay of proceeding is mandatory in order to refer the parties or the dispute to arbitration. This is also in line with the judiciary's efforts to refer disputes to arbitration or other mediation process before the matter is dealt with by the court.

Contrastingly, in *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd & Ors*[43] the Plaintiff, a Malaysian company, filed an injunction application against two Defendants, both Thai-related companies, to restrain the Defendants from preventing the Plaintiff from obtaining shares in the 3rd Defendant, a Malaysian company, pending arbitration pursuant to the settlement agreement between the Plaintiff and the Defendants in Singapore. The issue requiring determination was whether the Court had jurisdiction, either statutory or inherent, to grant injunctive relief in respect of matters where the seat of arbitration was outside Malaysia. The Court held that it had no jurisdiction, statutory or inherent, powers to grant injunctive relief in matters where the seat of arbitration is outside Malaysia.[44] The learned Judicial Commissioner was of the view that jurisdiction of the High Court in the instant matter must be expressly provided by statute and did not agree with the approach taken by the learned Ramly Ali J in *Innotec Asia Pacific Sdn Bhd v Innotec GmBH*. The High Court has therefore provided two conflicting answers as to whether Malaysian courts have the power to grant injunctive relief in this regard under Section 10 of the 2005 Act, which has yet to be resolved by the apex courts.

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[43] [2008] 5 CLJ 654.

[44] It is to be noted that the appeal against the decision was dismissed by the Court of Appeal.

The amendment to the 2005 Act by the 2011 Act now expressly provides under the new section 10(4) that the High Court has jurisdiction to stay proceedings for an arbitration where the seat of arbitration is outside of Malaysia.

The recent Federal Court decision of *Jaya Sudhir A/L Jayaram v Nautical Supreme Sdn Bhd & Ors*[45] has brought the issue of anti-arbitration injunctions to the fore. The appellant, a non-party to an arbitration proceeding, sought an injunction to restrain the respondents from proceeding and continuining with an ongoing and parallel arbitration commenced by the first respondent against the second and third respondents and the Originating Summons suit.

The Federal Court, at the outset, held that both Sections 8 and 10 of the 2005 Act do not apply to non-parties of arbitration proceedings. The Federal Court further found that the Court of Appeal has erred in applying the test set out in *J. Jarvis & Sons Limited v Blue Circle Dartfort Estates Limited*[46] in setting aside the injunction order. The test in *J. Jarvis* is inapplicable as the appellant was a non-party. Instead, the proper test to be applied is the one in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors*[47] which the appellant had satisfied. The anti-arbitration injunction was therefore reinstated.

There is now a clear recognition of a non-party's ability to apply for an anti-arbitration injunction to restrain arbitration proceedings between parties. A further implication of the decision is that the court appears to recognise that even parties to an arbitration can apply for an anti-arbitration injunction. This is notwithstanding the self restraint courts ought to exercise when intervening in the arbitral process.

3. Effects on third parties

The general rule is that an arbitration agreement is not binding on a non-party or strangers to the agreement. However, it is to be noted that a third party may be a person claiming under or through a party to an agreement such as: in the case of a novation of an agreement to a third party; guarantee; multiple parties which may give such a right to the third party to participate in the proceedings.[48]

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[45] *Jaya Sudhir A/L Jayaram v Nautical Supreme Sdn Bhd & Ors* (Civil Appeal No.: 02(i)-83-09/2018(W)).
[46] [2007] EWHC 1262 (TCC).
[47] [1995] 1 MLJ 193.
[48] *See* sections 6 and 17 of the 1952 Act.

In the situation of a guarantor, a party to the contract may not be able to commence arbitration against the guarantor directly as the guarantor is not a party to the arbitration agreement and it follows that the arbitration award against the principal will usually not be binding on the guarantor.[49] Perhaps, a guarantee should contain a clause to provide for participation by the guarantor in the arbitration proceedings between the principal and the contracting party and to honour the same to avoid the difficulties normally faced in such a situation.

Where assignment occurs, a party to a contract containing an arbitration clause can assign its rights under the contract to a third party and the third party then becomes the assignee and is bound by the arbitration clause.[50]

In 2010, the Court of Appeal in *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* stressed that the courts must not encourage the attempt by one party to circumvent an arbitration agreement and litigating a dispute in the court contrary to the express words of the arbitration agreement by naming one or more parties as co-defendants to the action.[51] The Court further affirms that where arbitration has been agreed upon by the contracting parties as the mechanism for dispute resolution, such an agreement must be honoured.[52]

In *Juaramedic Sdn Bhd v MRCB Engineering Sdn Bhd*, the High Court considered the effect of an arbitration clause in a main agreement on a third party who was not privy to the main agreement itself and who has subsequently entered into a separate agreement with a party who is privy to the main agreement.[53] Accordingly, where the separate or subordinate agreement that was entered into between a party to the main agreement and the third party refers to the arbitration clause in the main agreement and its applicability in the separate agreement, that arbitration clause is then intrinsically connected with the main agreement and hence 'imported' into the separate agreement.[54] On

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[49] *Daunt v Lazard* (1858) 27 LJ Ex 399; *Ex parte Young, ReKitchen* (1881) 17 Ch D 668; *Thermistocles Navegacion SA v Langton, the Queen Frederica* (1978) 2 Lloyd's Rep 164; *Saberno Pty Ltd v De Groot* (1992) 8 BCL 128; *Alfred McApline Construction v Unex Corp* [1994] NPC 16.

[50] *For example see Harris Adacom Corporation v Perkom Sdn Bhd* [1994] 3 MLJ 504.

[51] [2010] 5 MLJ 394 at [16] (KN Segara JCA).

[52] *Ibid.*

[53] [2017] 7 CLJ 720.

[54] *Ibid*, at [30].

such occasions, the third party is bound by the arbitration clause in the main agreement and must refer disputes to arbitration, *even where there remains some doubt as to whether the arbitration agreement of the main agreement was incorporated by reference into the separate or subordinate agreement* because the courts will lean in favour of arbitration.[55]

4. Multi-tiered dispute resolution clauses

Parties may sometimes agree to insert condition precedent clauses in their arbitration, which may have the effect of precluding any party from referring a dispute to arbitration where the contract stipulates that a party must fulfil several preconditions before there could be a valid reference to arbitration. In *Usahasama SPNB-LTAT Sdn Bhd v Abi Construction Sdn Bhd*,[56] the High Court was faced with such a condition precedent clause in a contract which stipulated that the defendant would have to first refer the dispute or differences to Superintending Officer named in the appendix for a decision before the dispute was referred to arbitration. The plaintiff stated that, as such, the notice of arbitration dated 12 February 2014 was premature and accordingly, the arbitrator had no jurisdiction to decide the dispute between the parties. The arbitrator dismissed the plaintiff's application, holding that he had the jurisdiction to decide the dispute between the parties. Dissatisfied, the plaintiff appealed under Section 18(8) of the 2005 Act 2005, on the basis that the defendant would have to first refer the dispute to the Superintending Officer before the dispute was referred to the arbitration in accordance with the condition precedent clause, which was mandatory.

In allowing the appeal, the High Court laid down several guidelines as to how condition precedent clauses within a contract are to be treated in the courts, as follows:

(1) A precondition or condition precedent is a condition that *must* be fulfilled before a right accrues. Once it is contractually agreed upon, the parties should be held to the bargain unless such an agreement is prohibited by law or that it is too vague for enforcement. It had not been suggested that there was a statutory prohibition in this case;[57]

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[55] *Ibid,* at [39].
[56] [2016] 7 CLJ 275.
[57] *Ibid,* [17] (Lee Swee Seng J).

(2) Where both parties had agreed contractually to a precondition to be fulfilled before there could be a valid reference to arbitration, the arbitrator concerned could not assume jurisdiction until and unless the contractually agreed conditions were fulfilled. (In this instance, the requirement that the contractor must first refer the dispute or difference to the employer's SO, the Managing Director of the plaintiff, for a decision before the dispute is referred to the arbitration in accordance with cls. 54(a) and (b) of the contract was clearly in the form of a condition precedent to cl. 54(c) and must be fulfilled beforehand. Moreover, there was no good reason not to hold them to the bargain struck.);[58] and

(3) Where there was a sufficiently clear reference to the Superintending Officer for a decision before proceeding to arbitration, as in the nature of a precondition or condition precedent, both the intention of the parties captured in the clear words the contract as well as public interest would operate to constrain the courts to enforce such a clause.[59]

5. Termination and breach

An arbitration agreement may be terminated by agreement, express or implied. Termination will only be inferred where:

(i) The clear inference to be drawn from the claimant's inactivity is that he did not wish to proceed provided that the respondent also agreed not to proceed;

(ii) The clear inference to be drawn from the respondent's inactivity is that he consented to the abandonment; and

(iii) These inferences do not conflict with the respondent's actual understanding of the position.[60]

B. Doctrine of Separability

The position at common law is that the subsequent termination of a principal contract does not by itself put an end to an arbitration

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[58] *Ibid*, [18] (Lee Swee Seng J).
[59] *Ibid*, [29] (Lee Swee Seng J).
[60] *See* Sundra Rajoo, Law, Practice and Procedure of Arbitration, Lexis Nexis (2003) p166.

clause contained in the principal contract. An arbitration clause is separable from the principal contract and is not affected by termination of the principal contract. However, there would therefore be no survival of the arbitration clause if the principal contract is void ab initio. The doctrine of separability is now part of Malaysian law through section 18(2) of the 2005 Act and remains unaffected by the 2018 Amendment Act.

C. Jurisdiction

1. Competence-Competence (also known as *kompetenz-kompetenz*)

Pursuant to Section 18 of the 2005 Act, the arbitral tribunal has the power to determine its own jurisdiction. This encompasses Article 16 of the Model Law. There is no equivalent provision in the 1952 Act. However, Article 23 of the AIAC Rules provides that an arbitrator can rule on his own jurisdiction. Arbitrations held under the AIAC Rules operate outside the 1952 Act by virtue of Section 34.

Two types of pleas may be raised by the challenging party pursuant to section 18 of the 2005 Act which is the non-existence of the arbitral tribunal's jurisdiction and the arbitral tribunal exceeding the scope of its existing authority.[61] The arbitral tribunal can rule on both either as a preliminary question or in an award on the merits.[62] It should also be noted that there are time-limits given in the 2005 Act to raise such objections.[63]

2. Interaction of national courts and tribunals

Under the 1952 Act, an arbitrator could not determine his own jurisdiction unless the parties gave him that power, and therefore his decisions on jurisdiction would not be binding on the parties.

The 2005 Act expressly incorporates the doctrine of Kompetenz-Kompetenz into Malaysian law. Section 18(1) of the 2005 Act recognises the notion of 'positive competence-competence' by enabling arbitral tribunals to "rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement"; whereas Section 10(1) of the 2005 Act embraces 'negative

[61] *See* sections 18(3) to (6) of the 2005 Act.
[62] Section 18(7) of the 2005 Act.
[63] *See* sections 18(3) and 18(5) of the 2005 Act.

competence-competence' by requiring domestic courts to stay proceedings and refer the parties to arbitration unless the arbitration agreement is deemed "null and void, inoperative or incapable of being performed".

The 2005 Act provides that the arbitrator can determine his own jurisdiction[64] and his decision on the issue of jurisdiction can be challenged in court by way of an appeal.[65] His Lordship Vincent Ng J explained Section 18 of the 2005 Act in the case of *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor*[66] as follows:

> The only conclusion I can draw from the import of this entirely new provision in s 10 when read with s 18 of the 2005 Act, is that with this new Act, Parliament has clearly given the arbitral tribunal much wider jurisdiction and powers. And, such powers would extend to cases even when its own jurisdiction or competence or scope of its authority, or the existence or validity of the arbitration agreement is challenged. A further point to note is that even when an arbitral tribunal holds that an agreement is null and void, it 'shall not ipso jure entail the invalidity of the arbitration clause' since 'an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement.' Most noteworthy is that even where its own jurisdiction or competence or its scope of authority is challenged, it may rule on such plea either as a preliminary question or in an award on the merits. And, where the tribunal rules against the challenge on such a plea as a preliminary question any party may appeal to the High Court against such ruling but while the appeal is pending the arbitral tribunal may continue with the arbitral proceedings and make an award. With the view to preventing any inordinate delay in resolution of disputes the Legislature has decreed that no further appeals shall lie from the High Court against a challenge on jurisdiction of an arbitral tribunal.

In *CMS Energy Sdn Bhd v Poson Corporation*,[67] the Honourable Judge Dato' Abdul Aziz Bin Abdul Rahim held that Section 18 confers on the arbitrator broad and wide powers to decide on the issues

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[64] Section 18(1).
[65] Section 18(8).
[66] [2008] 1 MLJ 233 at 244.
[67] [2008] 6 MLJ 561.

raised before it, not only in relation the substantive issues but also in relation to preliminary objections to its jurisdiction. Similarly in *Wintrip Maincon Sdn Bhd v Urun Plantations Sdn Bhd*,[68] it was held that the Court does not need to ensure that the dispute between the parties is a *bona fide* dispute, because, were for the court to embark on this exercise, this would involve the court in a critical examination of the claim, which is an act outside the scope of the 2005 Act as it is the arbitrator's duty to do so. In *Capping Corp Ltd & Ors v Aquawalk Sdn Bhd & Ors*[69], the Court of Appeal restated the regime under the 2005 Act which dictates minimal interference by the courts as reflected in Section 18 and gives the arbitrator the power to rule on his or her jurisdiction.

The incorporation of the doctrine of competence-competence into Malaysian law under Sections 10(1) and 18(1) of the 2005 Act has resulted in an extensive judicial deference to arbitrators on matters of jurisdiction as the courts are generally willing to order stays of court proceedings to enable arbitrators to determine jurisdictional questions *first*. This position is aptly summarised by the Court of Appeal in *TNB Fuel Servicers Sdn Bhd v China National Coal Group Corporation*[70] as follows:

> It is generally accepted that the effect of the amendment is to render a stay mandatory unless the agreement is null and void or impossible of performance. The court is no longer required to delve into the facts of the dispute when considering an application for stay. Indeed, following the decision of the court in *CMS Energy Sdn Bhd v Poscon Corp*, a court of law should lean towards compelling the parties to honour the 'arbitration agreement' even if the court is in some doubt about the validity of the 'arbitration agreement'. This is consistent with the 'competence principle' that the arbitral tribunal is capable of determining its jurisdiction, always bearing in mind that recourse can be had to the High Court following the decision of the arbitral tribunal…

It is noteworthy however that the domestic courts are inclined to undertake extensive determinations of arbitral jurisdiction where there are concurrent jurisdiction and arbitration clauses, particularly

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[68] [2007] 1 LNS 573.
[69] [2013] 6 MLJ 579.
[70] [2013] 4 MLJ 857.

where an arbitration clause is worded such as to potentially confer a mere *discretionary* right to arbitration as opposed to a *mandatory* one through the use of words such as "may".[71]

D. Arbitrability

1. Subjective arbitrability

a) Natural persons

The general rule is that all persons are bound by the contracts they enter into, the exceptions being minors or persons of unsound mind.[72] However, it should be noted that a minor may be bound by an arbitration clause if it is found to be for his benefit. It is arguable that the person who enters on his behalf, say a parent or guardian may bind the minor to the agreement.

b) Legal persons

Companies are bound by contracts they enter into and even if the purpose of the contract is outside the company's memorandum of association, the company may still be bound. Hence contracts entered into in good faith which contain arbitration clauses are enforceable against a company.[73]

c) State and state entities

Section 30 of the 1952 Act provides that the Act shall apply to any arbitration to which the Federal government or the government of any state is a party and as such the government is bound by the agreement like any other party to arbitration. The position is the same under section 30 of the 2005 Act.

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[71] *See Majlis Perbandaran Alor Gajah v Sunrise Teamtrade Sdn Bhd* [2014] 7 MLJ 570; *R Kathiravelu a/l Ramasamy v American Home Assurance Co Malaysia* [2009] 1 MLJ 572, CA. *See also China State Construction Engineering Corp Guangdong Branch v Madiford Ltd* [1992] 1 HKC 320 (Hong Kong) as a comparative study in UNCITRAL Model Law jurisdictions.

[72] Sections 11 and 12 of the Contracts Act 1950.

[73] However, it should be noted that once the company ceases to exist, any arbitration agreement entered into comes to an end – *see Baytur SA v Finagro Holding SA* [1992] QB 610.

The Attorney General has the necessary powers to represent the government in all legal proceedings and similarly can agree to bind the government. Under the 2005 Act, the Minister is defined to be the Minister charged with the responsibility for arbitration.[74]

2. Objective arbitrability

Under the 2005 Act, section 4(1) provides that "*any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy*". It should be noted that unlike the Model Law, arbitration agreements under the 2005 Act are not limited to commercial disputes. Further section 9(1) of the 2005 Act makes it clear that an arbitration agreement may include references which arise from a relationship "whether contractual or not" which may overcome the issues faced under the 1952 Act on whether tortious claims are arbitrable.

Following the 2018 Amendment Act, Section 4(1) of the 2005 Act now expressly declares that subject matters of disputes which are "not capable of settlement by arbitration under the laws of Malaysia" are non-arbitrable, in addition to non-arbitrable matters on public policy grounds.

The scope of arbitrability under Section 4 of the 2005 Act is not extensively litigated, with a notable case where the Court of Appeal held that fraud is an arbitrable dispute,[75] and in addition to several civil disputes including those relating to any act, duty or functions carried out by a statutory body in the exercise of its statutory powers.[76] In *Arch Reinsurance Ltd v Akay Holdings Sdn Bhd*,[77] the Federal Court held that matters falling within the scope of the summary determination procedure for defaults on a registered charge under the National Land

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[74] *See* Gazette notification issued on 8.3.2006, pursuant to section 1(2) of the 2005 Act.

[75] *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2015] 5 AMR 30.

[76] *Pendaftar Pertubuhan Malaysia v. Establishmen Tribunal Timbangtara Malaysia & Ors* [2011] 6 CLJ 684.

[77] *Arch Reinsurance Ltd v Akay Holdings Sdn Bhd* (Federal Court Civil Appeal No. 02(f)-9-03/2016(W)). A charge registered under the National Land Code gives the chargee an interest in the land with a statutory right to enforce its security by way of a sale of land under Sect. 253 of that Code, or by taking possession thereof under Sect. 271 in the event of the chargor's default. The legal title in the land remains vested in the registered proprietor of the land until the sale or taking of possession.

Code 1965 are non-arbitrable on public policy considerations, namely because the statutory right of the chargee to indefeasible title default and to sell the charged security in the event of default by the charger cannot be taken away by means of a private agreement between the parties.[78] However, save for the aforementioned cases, there remains a lack of judicial and legislative guidelines as to what claims are non-arbitrable on grounds of public policy.

It was suggested however that it is possible to identify potentially non-arbitrable disputes based on the facts of the case, the framing of the claim and the relief sought.[79] Claims with potential legal repercussions on a wide class of non-parties and claims which are remediable only by means of an exclusive judicial relief are non-arbitrable.[80]

E. Arbitral Tribunal

1. Status and qualifications of arbitrators

a) Number of arbitrators

(i) The 1952 Act

There is no definition of an arbitral tribunal in the 1952 Act. The parties have the freedom to agree upon a sole arbitrator or a number of arbitrators. The arbitration agreement would normally specify the number of arbitrators. If the parties fail to determine the number of arbitrators, or in other words, in the absence of an agreed number, Section 8 of the 1952 Act provides that every arbitration agreement shall be deemed to include a provision that the reference shall be to a single arbitrator.

(ii) The 2005 Act

The 2005 Act now preserves the parties' freedom to determine the number of arbitrators for reference of their dispute. Section 12 does not impose limits on who may be appointed as an arbitrator. The parties are free to choose their arbitral tribunal. Where the arbitration

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[78] *Ibid,* at [66].
[79] Dato' Nikin Nadkarni and Lim Tze Wei, "Jurisdiction" in Datuk Professor Sundra Rajoo and Philip Koh, *Arbitration in Malaysia: A Practical Guide* (Sweet and Maxwell Publications 2016) pp.170.
[80] *Ibid*, pp.171.

agreement or parties do not stipulate the number of arbitrators, a single arbitrator will constitute a tribunal.

Section 12 of the 2005 Act further provides that where the parties have failed to determine the number of arbitrators, there shall be three arbitrators in instances of international arbitrations and a single arbitrator in instances of domestic arbitrations. In practice, parties normally select an uneven number of arbitrators. The parties are also free to agree on a procedure for appointing the presiding arbitrator.

b) Legal Status

The appointment of an arbitrator constitutes a special type of contract between the arbitrator and the parties for the purpose of arbitrating upon the dispute between the parties. The contract is therefore based upon the contract between the parties to submit the matter to the arbitrator for arbitration of the dispute.

c) Qualifications and accreditation requirements

Neither Act imposes any special qualification requirements on arbitrators. Section 13 of the 2005 Act provides that no person shall be precluded by reason of nationality from acting as an arbitrator unless there is an agreement to the contrary. Arbitrators also do not need legal training. Parties may contractually agree that arbitrators shall have specific qualifications by specifying this in their arbitration agreement or clause. However, the decision of the High Court under the 1952 Act in *Salutory Avenue (M) Sdn Bhd v Malaysia Shipyard & Engineering Sdn Bhd & Anor* appears to suggest that as a matter of a *minimum standard*, an arbitrator must possess knowledge of the subject matter of the dispute concerned (in this instance, the shipbuilding industry).[81]

Under the 2005 Act, the High Court in *Sebiro Holdings Sdn Bhd v Bhag Singh & Anor* held that in the absence of any agreement between the parties on the qualifications to be possessed by the arbitrator, the appointment of an arbitrator cannot be challenged for any lack of qualifications.[82]

It should also be noted that by virtue of a new Section 37A which came into force in June 2014, there are now no restrictions under the

[81] [1999] 7 CLJ 514.
[82] [2014] 11 MLJ 761.

Legal Profession Act 1976 for international arbitrators and lawyers to participate in arbitral proceedings in Malaysia.

2. Appointment of arbitrators

a) Methods of appointment

The 1952 Act and 2005 Act provide autonomy to the parties to decide on matters relating to the appointment of the arbitral tribunal, subject to any rules of arbitration that may be adopted.

b) Appointing authorities

(i) The 1952 Act

Where the parties are unable to agree on the appointment of an arbitrator, they have to resort to Section 12 of the 1952 Act for the High Court to appoint the arbitrator. The identity of the arbitrator selected is left to the discretion of the High Court judge. The general practice is for both parties to file an affidavit suggesting names of suitable arbitrators or alternatively, to bring to the attention of the court the nature of the dispute so that a suitable and appropriate arbitrator can be appointed.

(ii) The 2005 Act

The procedure for appointment of arbitrators under the 2005 Act is set out in Section 13 of the 2005 Act. Section 13 also explains what is to happen in the event of a procedural failure or where no provisions are agreed upon. It corresponds with Article 11 of the Model Law and adopts a two-level approach to grant the parties autonomy in determining the procedure for appointment of arbitrators followed by any default mechanism if none has been agreed.

The parties are also generally given a free hand to agree on the procedure for the appointment of the arbitrator or arbitrators and this is provided for in Section 13(2) of the 2005 Act.

c) Effect of the refusal of one party to co-operate in the constitution of the arbitral tribunal

(i) The 1952 Act

The 1952 Act provides under Section 9(b) that where an arbitration agreement provides that the reference shall be to two arbitrators, one

to be appointed by each party, if on such a reference one party fails to appoint an arbitrator, after twenty-one clear days, the party who has appointed an arbitrator may request this arbitrator to act as sole arbitrator. If the party does so, the award of the arbitrator so appointed is binding on both parties as if he has been appointed by consent.[83]

The two party-appointed arbitrators would normally appoint the third arbitrator to constitute the tribunal. It often occurs, however, that a party may refuse to or fail to appoint his own arbitrator, resulting in inability to appoint the third arbitrator. The 1952 Act makes no provision for such a situation. In practice, an application is normally made to the court for the appointment of the second arbitrator who would then together with the party-appointed arbitrator appoint the third arbitrator. The arbitration agreement may however make provision for this.

(ii) The 2005 Act

Under Section 13 of the 2005 Act, where the parties fail to make provision for the appointment procedure in the arbitration agreement or if there is disagreement or if they refuse to exercise their rights to appoint a member of the arbitral tribunal, then the Director of the AIAC is given the power to appoint the arbitrator and he has to do so within 30 days, failing which the parties could then proceed to court to have the appointment made. There is statutory guidance in Section 13(8) of the 2005 Act as to how the Director should exercise his discretion in making any appointment. There is no right of appeal from the decision of the Director.

d) Resignation and its consequences

(i) The 1952 Act

Section 12(b) of the 1952 Act provides for cases where the arbitrator refuses to act, is incapable of acting or dies. The refusal to act is a question for the court and not for the arbitrator. It must be an actual refusal to act as arbitrator and not merely a refusal to act in a particular manner.

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[83] *Fima Palmbulk Services Sdn Bhd v Suruhanjaya Pelabuhan Pulau Pinang* [1988] 1 MLJ 269.

The word incapable in Section 12(b) refers to some incapacity arising after the date of the appointment or not known to the parties at that date. Subject to Section 25(1), the court is not entitled to treat an arbitrator as incapable if the parties rightly or wrongly considered him to be capable. The standard of capability is that of the parties who selected the arbitrator. Having selected him, they must take him for better or worse. However, the 1952 Act makes no provision for what is to happen if the arbitrator should fail or neglect to act. In such a situation, the court has the power to remove the arbitrator concerned and to replace him pursuant to Section 14(3)(a) and Sections 12(b) and (d) of the 1952 Act.

(ii) The 2005 Act

Article 14 of the Model Law, as codified under Section 16 of the 2005 Act, sets out an arbitrator's legal or physical inability to perform his functions as reasons for revoking his authority. Section 16(1) refers to arbitrator who is legally or physically unable to perform the functions entrusted to him or who for some reason fails to act without undue delay. The non-performing arbitrator can voluntarily withdraw from office or the parties can agree to terminate his mandate. Section 16(1) provides three grounds that constitute an arbitrator's inability: first, he is legally unable to perform his functions; secondly, he is factually unable to perform his functions; finally he fails to act without undue delay for other reasons.

'Failure to act without undue delay' would involve situations at one end of the spectrum where the arbitrator has "unequivocally and absolutely refused to act which has resulted in the creation of a vacancy" to a consideration of varying circumstances in the light of technical difficulties and the complexity of the case.

According to Section 16(1), an arbitrator's mandate terminates if he, after becoming unable to perform his functions in the manner described in the section, withdraws from his office or if the parties agree on the termination of his mandate. The arbitrator would be free from suit unless his act or omission is shown to have been in bad faith.

A party who disagrees with the termination of the mandate of the arbitrator may however challenge the termination under Section 16(2) of the 2005 Act by making an application to the High Court to decide on such termination. The decision of the High Court on this matter is non-appealable.

Section 16(3) states that if an arbitrator withdraws from his office for the reason listed in Sections 16(1) and (2), this shall not imply that

he accepts the validity of those grounds. This provision facilitates the withdrawal of the arbitrator and avoids lengthy disagreements.

3. Challenge and removal

a) Grounds for challenge

It is axiomatic that an arbitrator must be independent and impartial. The impartiality and independence of the arbitrator comes into prominence in circumstances where the arbitrator has an interest in the outcome of the dispute.

(i) The 1952 Act

The 1952 Act does not contain a specific requirement for disclosure, but it is advisable for arbitrators acting under the 1952 Act to disclose circumstances that may bring their impartiality or independence into question. The Court may exercise its statutory authority to remove an arbitrator under Section 25 of the 1952 Act if the arbitrator fails to be impartial.

(ii) The 2005 Act

Section 14 of the 2005 Act[84] provides that an arbitrator must be independent and impartial. Circumstances which will raise issues as to impartiality and independence include a personal, business or professional relationship with one party to a dispute or an interest in the outcome of the dispute.

Section 14(1) of the 2005 Act requires an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality. 'Justifiability' connoting that such doubts as to impartiality or independence must be sustainable upon judicial scrutiny.[85] This is a continuing duty from the time of appointment to the rendering of the award. The position under the 1952 Act, though not a statutory requirement, was that it is advisable for arbitrators acting under that Act also to disclose such circumstances.

Where the impartiality or independence of an arbitrator is challenged or brought into question, the procedure for doing so are stated under Section 15 of the 2005 Act. There is no equivalent provision in the 1952 Act. The procedure for challenge would normally

[84] In pari materia with Article 12 of the Model Law.
[85] *Ibid*, pp.130.

also be drafted in the Rules under which the parties have agreed to arbitrate. A party should exhaust those procedures before challenging the appointment of an arbitrator on grounds of the arbitrator's impartiality or independence in court. The normal grounds on which challenges are mounted are usually bias and conflict of interest. The test for bias is "real danger of bias".[86]

The applicable test in assessing an arbitrator's impartiality or independence include the 'reasonable suspicion' test; the 'real likelihood' test and the 'real danger of bias' test. Regardless of the different 'tests' employed, the existence of a 'justifiable doubt' needs to be measured objectively, although it has been held that actual bias or partiality need not be established.[87] The 'reasonable suspicion' test has been employed much more compared to the other two tests as it appears somewhat broader than the 'real likelihood' test and the 'real danger of bias' test.[88]

Where a challenge under Section 15 of the 2005 Act is unsuccessful, the challenging party may still apply to the High Court under Order 69 of the Rules of Court 2012 to make a decision on the challenge within thirty days after having received notice of the decision rejecting the challenge. However, the courts have stressed that a party challenging an arbitrator cannot make an application to the court to disqualify an arbitrator without first challenging an arbitrator under Section 15.[89]

b) Replacement of arbitrators

(i) The 1952 Act

Under Section 26(1) of the 1952 Act, the High Court may, on the application of any party to the arbitration agreement, appoint a person or persons to act as arbitrators in place of the person or persons who are removed by the High Court. Where the arbitrator removed is the sole arbitrator, or where the court removes all the arbitrators who have been appointed, the court may either appoint a sole arbitrator or

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[86] *MPPP v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor* (1999) 3 MLJ 1.

[87] *Country X v Company Q (Yearbook Commerical Arbotration)*, [XXII-1997] at pp.222-224.

[88] For the proper test on the appearance of bias, *see Hock Hua Bank (Sabah) Bhd v Yong Link Thin & Ors* [1995] 2 MLJ 213 at 226.

[89] *Tan Sri Dato' Professor Dr Lim Kok Wing v. Thurai Das a/l Thuraisingham & Anor* [2011] 9 MLJ 640; *Sebiro Holdings Sdn Bhd v. Bhag Singh & Anor* [2014] 11 MLJ 761.

order that the arbitration agreement ceases to have effect with respect to the dispute referred.

In theory, where an arbitrator is removed, the arbitration must begin completely afresh because the new arbitrator has a duty to deal with the whole dispute in all its aspects. However, the parties are free to agree on the question as to whether after replacement, the new arbitrator should continue with the proceedings from the point in time where the mandate of the original arbitrator terminated or commence the proceedings *de novo.*

In practice, parties may agree to use the pleadings and discovery or even allow the new arbitrator to take over the reference at the point where his predecessor left off. Once the arbitrator either in accordance with the agreement of the parties or in his own discretion decides that the hearing previously held may not be repeated, it would not be open to the party to question his decision.

(ii) The 2005 Act

Section 17 of the 2005 Act facilitates the appointment of a substitute arbitrator in the event that a member of the tribunal loses his mandate or has his mandate terminated in any other manner, listing the situations where a substitute arbitrator would be appointed, and the position of the arbitral proceedings where the arbitral tribunal has been reconstituted.

Section 17(1) provides that a substitute arbitrator shall be appointed in accordance with the provision of the 2005 Act in Section 13. As a general provision, Section 17(1) of the 2005 Act is stated more broadly than Sections 15 and 16 of the 2005 Act. It envisages the situation where an arbitrator resigns at any point in time, without his mandate having been terminated in accordance with Sections 15 and 16. Termination under Section 15 is where an arbitrator is challenged and the arbitral tribunal supports the challenge, or he withdraws from his office voluntarily, or both parties agree on the challenge. Termination under Section 16 concerns the case of an arbitrator's failure or impossibility to act and his mandate terminates upon withdrawal or upon the parties' agreement to terminate.

Section 17(2) deals with the effect the substitution of an arbitrator has on the proceedings, i.e. whether they need to be repeated or not. This section, read together with Section 21 of the 2005 Act, confirms that parties are free to determine the procedure to be followed in conducting the proceedings.

In the event the parties cannot agree, where the sole arbitrator or presiding arbitrator is replaced, Section 17(2)(a) provides that the substitute arbitrator will proceed *de novo*. In the case of other arbitrators being replaced, Section 17(2)(b) provides that the arbitral tribunal has the discretion to decide whether to rehear the matter from the start.

Section 17(3) permits the parties to agree to rescind any order or ruling of the arbitral tribunal made prior to the replacement of the arbitrator. However, if the parties disagree, the parties and the reconstituted arbitral tribunal will have to abide by the previous orders or rulings passed by the predecessor arbitral tribunal. The section provides that such orders or rulings shall not be invalid solely on the ground that a substitute arbitrator has been appointed.

The KLRCA Arbitration Rules were revised in October 2013 to provide for the appointment of emergency arbitrators. Schedule 2, Section 5 of the AIAC Arbitration Rules now allows parties to apply for emergency interim relief from the Director of the AIAC prior to the constitution of the arbitral tribunal. The emergency arbitrator duly appointed would be empowered to determine all applications for emergency interim relief pending the constitution of a proper arbitral tribunal. Emergency arbitrators are conferred generally wide powers to award *any* interim relief as is deemed necessary,[90] and any emergency interim relief so granted by the emergency arbitrator is to have the same effect as an award and would thus be binding on the parties, ceasable only if:

- An arbitral tribunal is not constituted within 90 days of the order;
- Upon the arbitral tribunal's final award; and
- If the claim is subsequently withdrawn.

The powers of emergency arbitrators were similarly enlarged by virtue of the amendments made to Section 19 of the 2005 Act since the coming into force of the 2018 Amendment Act, which will be discussed in detail below.

Decisions of the emergency arbitrators are not subject to appeal although modifications, variations or vacations may be made by the subsequent and properly established arbitral tribunal.

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[90] Schedule 2, para 10.

Subject to the renaming of the KLRCA to the AIAC, these rules remain in full force under Section 3 of the Arbitration (Amendment) Act 2018 (No.1).

F. Conducting the Arbitration

1. Law governing procedure

a) Notion and role of seat of arbitration

The choice of the seat of arbitration has a number of important legal consequences for the conduct of the proceedings. For example, under Section 30(1) of the 2011 Act, in respect of a domestic arbitration where the seat of arbitration is in Malaysia, the arbitral parties may decide the dispute in accordance with the substantive law of Malaysia. A consequence of having the seat of arbitration in Malaysia, where arbitral proceedings, including any hearings or other meetings, would be expected to be held, is that the High Court will intervene to lend support for issues arising under for example, Sections 13, 15, 16, 18 and 37 of the 2005 Act. Further, the seat of arbitration in Malaysia is determinative of the classification of international arbitration under section 2(2) of the 2005 Act. It is also relevant to note that section 33(4) of the 2005 Act provides that 'an award shall state its date and the seat of arbitration as determined in accordance with section 22 and shall be deemed to have been made at the seat'. Therefore, by the time the award is made, the seat must be identified since the award is required to state the seat. The determination of the seat of arbitration where the award is made is also of importance when seeking to enforce the award under Section 38 of the 2005 or determining whether it is a 'New York Convention award'.

As the Federal Court affirms in *Thai-Lao Lignite Co Ltd & Anor v The Government of the Lao People's Democratic Republic*,[91] the seat of arbitration establishes the lex arbitrii and the curial law of the arbitration, that *where the seat is Malaysia, the 2005 Act is the lex arbitrii*, that *where parties failed to designate the law applicable to the substance of the dispute, the arbitral tribunal shall apply the law determined by the conflict of laws rules, that under the conflict of laws rules, the law with the closest and most real connection to the arbitration agreement is the law applicable to the arbitration agreement*, that although the stipulation of Malaysia as the seat was not an express

[91] [2017] 6 AMR 219.

agreement that the law applicable to the arbitration agreement was the law of Malaysia, it is usually decisive in the determination of the law applicable to the arbitration agreement, and that, unless it is shown to be the contrary, the stipulation of Malaysia as the seat is a tacit agreement that the law applicable to the arbitration agreement is the law of Malaysia.[92]

b) Methods for selection of seat absent party choice

Section 22 of the 2005 Act provides for the seat of arbitration. The 1952 Act does not have a similar provision. Section 22 is almost a verbatim adoption of Article 20 of the Model Law except that the Model Law uses the term 'place of arbitration' and not 'seat of arbitration'. It provides for a two-tiered system which gives the parties freedom to choose the seat or arbitration (Section 22(1)). In case the parties fail to determine the seat of arbitration, the arbitral tribunal has the default power to determine the seat of arbitration, having regard to the circumstances of the case, including the convenience of the parties (Section 22(2)). This is subject to Section 22(3) of the 2005 Act which enables a tribunal to meet at any place "it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents" unless the parties agree otherwise; hence providing the parties with considerable flexibility.

c) Distinction of matters of substance and matters of procedure

The 2005 Act does not provide any rules governing the distinction between matters of substance and matters of procedure.

In *Scandinavian Bunkering (Singapore) Pte Ltd v MISC Bhd*, the Federal Court affirmed the common law conflict of law rule that issues relating to entitlement to heads of damages and remoteness of damages are matters of substance governed by the *lex causae*, whereas issues relating to the measure or quantification of damages is governed by the *lex fori*.[93] This matter did not relate to arbitral proceedings.

The 2005 Act deals with the issue of which law the arbitral tribunal should apply to the material facts of the dispute in Section 30, as derived

[92] *Ibid*, [244] (Jeffrey Tan FCJ).
[93] [2015] 3 MLJ 753.

from Article 28 of the Model Law with substantive changes. The procedural law is dealt with by the 2005 Act separately in Section 21.

Section 30(1) follows a similar provision found in Section 28(1)(a) of the Indian Arbitration and Conciliation Act 1996 and restricts party autonomy in domestic arbitrations (as distinguished from international arbitrations) where the seat of arbitration is in Malaysia. It mandates the arbitral tribunal only to apply the substantive law of Malaysia when deciding disputes in domestic arbitrations.

The reverse is the case in international arbitrations. Section 30(2) recognizes the right of the parties to subject their legal relationship to the law agreed by them. In international arbitration, Section 30(2) allows the parties to have as their first option the choice of the rules of substantive law that apply to the dispute under arbitration.

Where the parties have failed to designate such a choice, the arbitral tribunal will determine the applicable law in accordance with the rules of interaction of laws by virtue of the new Section 30(4) of the 2005 Act using the common law principles of conflict of laws.[94] This preserves the decision of *James Capel (Far East) Ltd v YK Fung Securities Sdn Bhd (Tan Koon Swan, Third Party)* where the Court asserted that a court must find an implied choice to be inferred from the contractrual terms or the surrounding circumstances. These inferences may include the choice of forum clause; terminology peculiar to a system of law; contractual currency; law with the 'closest and most real connection' to the transaction, such as the place of performance of the contract and the place where the contract was made.[95] If the inferences do not lead to the finding of an implied choice however, the courts would use the best 'localisation' or 'centre of gravity' approach, or the law of country which has the 'closest and most real connection' to the transaction.[96]

Section 30(5) of the 2005 Act additionally requires ther arbitral tribunal to take into account the terms of the agreement and trade usages when deciding the dispute.

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[94] Following Section 9 of the Arbitration (Amendment) Act 2018 (No.2).
[95] [1996] 1 AMR 930.
[96] *Ibid,* at 947.

2. Conduct of arbitration

a) Basic procedural principles or mandatory rules to be applied by the arbitral tribunal

The 1952 Act

The 1952 Act is silent on the issue of who should determine the procedure to be applied in arbitration. The principle of party autonomy dictates the procedure. Nevertheless, it is advisable for the parties to follow accepted and well-recognized arbitration rules.

The 2005 Act

Arbitration procedure is provided for in Sections 20 to 29 of the 2005 Act. The procedures are largely a matter for the arbitrator to decide, subject to any agreements that have been reached by the parties as provided for in Section 21.

b) Party autonomy and arbitrators' power to determine procedure

The parties to an arbitration are free to agree on the applicable procedures in an arbitration, subject to overriding rules of fairness.[97] Where the parties have failed to determine this however, the arbitral tribunal will have the prerogative to determine the matter of procedure,[98] which are considerably wide. The parties may choose institutional arbitration rules or conduct an ad-hoc arbitration.

c) Tribunal's power to issue procedural orders

Where the parties cannot agree on the procedure, the arbitrator becomes the master of the procedure subject to the rules of natural justice.

d) Oral hearing or proceeding on basis of written documents

Normally, hearings are held orally in respect of arbitrations unless the parties agree to a document-only arbitration. However, in the case of an arbitration under the 2005 Act as provided for in Section 26, the

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[97] *See Amalgamated Metal Corporation Ltd v Khoon Seng Co* [1977] 2 Lloyd's Rep 310 at 317.
[98] Arbitration Act 2005, s 21(2).

tribunal has the discretion to hold an oral hearing or conduct the arbitration on the basis of documents. The tribunal must hold an oral hearing if required by a party.

e) Submissions and notifications

(i) Contents and form of submissions

Section 25 of the 2005 Act, which corresponds with Article 23 of the Model Law, sets out the procedure for identifying the issues in dispute in a formal manner. There is a provision for each party to state the facts supporting its claim or defence and also to submit documents and other references to the evidence relied upon. There are also provisions for the parties to amend their pleadings. In practice, arbitrators in Malaysia tend to follow the provisions of Section 25 for parties to file Points of Claim followed by Points of Defence and Counterclaim and other written pleadings. The purpose of the Points of Claim is to identify the issues in dispute and the remedy required.

(ii) Legal deadlines (provided by law or set by the tribunal) and effect of non-compliance

Under the 2005 Act the tribunal can terminate proceedings if a claimant, without sufficient cause, fails to deliver its pleading within the time agreed by the parties or determined by the tribunal. However, if the respondent fails to deliver a defence or if a party fails to appear at the hearing or produce documents, the tribunal may proceed with the arbitration and hand down an Award.

(iii) Statutory requirements as to notifications during an arbitration

Unless the parties agree to the contrary, each party must be notified of the hearing. This would enable the parties to effectively prepare their case and to answer the case of the opponent (if any), to appear at the hearing and, to make their representation. If a party is not aware that a hearing of the arbitration is going to take place, the arbitral proceedings cannot be properly conducted.

If a meeting takes place before the oral hearing of the reference and one party is not given notice of the meeting and fails to attend, the award will not be invalidated provided that nothing was done at the meeting. If the proceedings are postponed for any reason, the arbitrator should communicate the date and time of the resumed

hearing to all the parties and not leave it to one party to notify the other.

Section 26(3) of the 2005 Act requires that the parties be given reasonable advance notice of any hearing or meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents. What is reasonable advance notice is dependent on the nature of the case and circumstances, such as the geographical distances involved.

f) Legal representation

There is also no requirement that the parties need to be represented by legally qualified persons.

As a result of amendments to the Legal Profession Act 1976, which came into effect on June 2014, there are no restrictions on international lawyers participating in arbitral proceedings held in the territory of Malaysia, except for arbitral proceedings held in the territory of the state of Sabah. In *Samsuri bin Baharuddin & 813 Ors v Mohamed Azahari bin Matiasin (and Another Appeal)*, the Federal Court held that the Advocates Ordinance 1953[99] conferred an exclusive right to Sabah advocates only to practise in Sabah, thus prohibiting foreign lawyers from representing parties to arbitration proceedings in Sabah.

The 2018 Amendment Act introduced Section 3A of the 2005 Act, which provides that a party to arbitral proceedings may be represented in such proceedings by any representative appointed by that party, unless otherwise agreed by the parties. The interplay between Section 3A and the decision of the Federal Court in interpreting the Advocates Ordinance 1953 remains to be seen.

3. Taking of evidence

a) Admissibility

Section 2 of the Evidence Act 1950 stipulates that the Evidence Act 1950 does not apply to arbitration proceedings. The High Court had further recognised that a departure from the rules set out in the Evidence Act 1950 does not amount to misconduct per se unless there is a violation of natural justice.[100]

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[99] (Cap 2) (Sabah).

[100] *Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd* [1998] 6 MLJ 545, HC at 552-553.

The arbitral tribunal normally decides issues of relevance, admissibility and the weight to be attached to the evidence tendered at the hearing. Section 21(3)(a) of the 2005 Act reinforces this position.[101]

Following its inception in 2010, the IBA Rules on Taking of Evidence in International Arbitration ("IBA Rules") are adopted by the parties as a guideline.[102]

As the tribunal is not bound by the general rules of evidence, most tribunals practically adopt a flexible approach to the admissibility of evidence that may genuinely assist the tribunal in determining the dispute.[103] Nevertheless, tribunals will consider the weight to be assigned to evidence of a questionable nature, such as hearsay evidence.[104]

Where a party comes into possession of fresh evidence that it considers beneficial to its case during a late stage of the evidentiary hearing, that party should apply for leave to introduce the said evidence without delay. If the party concerned was unable to obtain the said evidence prior to the conclusion of the hearing, the party should request that the proceedings be adjourned until the evidence is available, substantiating the request appropriately. If the evidence comes to light after the conclusion of the hearing but before the final award is delivered, the party should make an application to the tribunal to withhold the issuance of the award pending a further hearing on the matter of the new evidence.[105]

In considering a party's request for an adjournment or further hearing, the arbitrator has to decide if the evidence will be of real value, namely admissible, material and relevant to the case. An award can be challenged on the ground that a tribunal had wrongly excluded relevant evidence.[106]

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[101] *See also* the UNCITRAL Rules, Article 27(4).

[102] Dato' Malik Imtiaz Sarwar, Chan Wei June and Surendra Ananth, 'The Proceedings' in Rajoo and Koh, *Arbitration in Malaysia: A Practical Guide* (n.51) pp.204.

[103] Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbotration* (5th edn, 2009, Oxford University Press) pp.378-379.

[104] *Ibid*, pp.379.

[105] Dato' Malik Imtiaz Sarwar, Chan Wei June and Surendra Ananth, 'The Proceedings' (n.71) pp.205.

[106] *See also* the Arbitration Act 2005, s 37(2)(b), where a breach of natural justice is a basis for setting aside an arbitral award.

If the further evidence surfaced *after* the publication of the award, the arbitrator has no power to take any action as the proceedings are terminated.[107] A party in such circumstances may *arguably* seek recourse from the High Court for an order that the award be remitted for a further hearing as a measure of last resort, but the availability of such a discourse is yet to be conclusively determined by the High Court.[108]

b) Burden of proof

The burden of proving any fact is on the person who wishes to adduce such evidence.[109] Particularly, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

The adversarial approach, as opposed to the inquisitorial approach, is preferred for the conduct of arbitration proceedings. Mustill and Boyd state, 'certain types of dispute, such as those arising out of engineering and building contract, are commonly conducted in a manner comparable to proceeding in the High Court; and an arbitrator seized of such a dispute could not properly apply an informal procedure of the type recognized in shipping and commodity arbitrations, without first warning, and obtaining the consent of, the parties.

In fact, an arbitrator who takes the initiative and conducts an 'inquisitorial' rather than an 'adversarial' arbitration, for example, in conducting the examination of witness himself, runs the risk of being challenged on the basis of misconduct. The learned authors Redfern and Hunter express an alternate view that the parties by submitting to arbitrating under arbitration rules which give the arbitrator discretion to determine the procedure to be followed, confer power on the arbitrator to adopt either adversarial or inquisitorial procedures or a mixture as he thinks fit.

To a very large extent the parties are free to agree in the arbitration agreement what procedure should be adopted and what powers the arbitrator should have in the event of an arbitration taking place. Where the parties choose a high degree of informality based on the arbitrator's experience in a particular trade and are prepared to

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[107] Arbitration Act 2005, s 34(1).

[108] Dato' Malik Imtiaz Sarwar, Chan Wei June and Surendra Ananth, 'The Proceedings' (n.71) pp.205.

[109] *See also* the UNCITRAL Rules, Article 27(1).

abjure some of the opportunities to put their case across, different conditions apply.

c) Standards of proof

The standard of proof is set on a balance of probabilities. The arbitrator is to decide judicially based on proven facts and legitimate inferences. In Malaysia, fraud has to be proved beyond reasonable doubt.

d) Documentary evidence and privilege

(i) Form and kind of documents to be presented to the arbitral tribunal

The 1952 Act

Section 13(1) of the 1952 Act provides that unless a contrary intention is expressed and subject to any legal objection, every arbitration agreement shall be deemed to contain a provision that the parties to the reference shall produce before the arbitrator or umpire all documents within their possession or power respectively which may be required or called for.

The 2005 Act

The 2005 Act under Section 21(3)(g) empowers the arbitral tribunal to decide on disclosure of documents. In practice, the arbitral tribunal may decide whether and if so, which documents or classes of documents should be disclosed and at what stage.[110]

(ii) Privilege

The extent of the discovery process in arbitration will largely depend on its nature and the wishes of the parties.[111] Discovery is restricted where the private right to privacy and interest of the State as contained in privileged materials outweigh the general interest in disclosure. Privileged materials fall into three categories – privilege in

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[110] *See: Kirkawa Corp v Gatoil Overseas Inc, The Peter Kirk* (No 2) [1990] 1 Lloyd's Rep 158.

[111] *See Edward (inspector of Taxes) v Bairstow [1956]* AC 14 at 36, per Lord Radcliffe; *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema [1981]* 2 Lloyd's Rep 239; [1982] AC 724, per Lord Roskill.

respect of affairs of State; legal professional privilege; and communications for the compromise of a dispute. Bernstein, Tackaberry and Marriott state that in this regard, the rules in litigation are also applicable to arbitration.[112]

e) Production of documents

(i) The 1952 Act

There are no provisions under the 1952 Act giving powers to the arbitral tribunal to compel a party to produce any document which he could not be compelled to produce on the trial of an action (Section 13(4)). The power is under Sections 13(4) and 13(5) on the High Court to make such order and orders in respect of discovery of documents and interrogatories.

(ii) The 2005 Act

Section 21(3)(i) of the 2005 Act provides that the power conferred upon the arbitral tribunal shall include the power to make such orders as the arbitral tribunal considers appropriate. This is a general power of the arbitral tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree on any matter. Section 21(3)(i) makes it clear that arbitrators have the power to give directions at any time on any matter concerning the conduct of the arbitration and the fact that the arbitration will be conducted on this basis.

Further, Section 27(c) codifies the arbitral tribunal's power to proceed in the absence of the defaulting party where any party fails to appear or fails to produce documentary evidence. Such failure or non-production of documentary evidence does not sabotage the arbitral proceedings. In the circumstances, the arbitral tribunal may continue with the proceedings and in consequence make the award on the evidence before it. This section presupposes that the party has been requested to produce documentary evidence according to rules of procedure determined under Section 21, within a specified reasonable time.

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[112] Bernstein Tackaberry and Marriot, *Hanbook of Arbitration Practice,* 3rd Edn, 1998, paragraph 2.459, p 139.

f) Witnesses

(i) Ability of a person to act as a witness

All persons should be competent to testify except those who are (a) unable to understand the questions put to them, or (b) unable to give rational answers to those questions due to (i) tender age, (ii) extreme old age, (iii) disease, whether body or mind, or (vi) any other cause of the same kind. It has been shown from experience that choosing a witness is vital. In making that choice, an assessment of such witness in terms of credibility, memory, and coherency is desired.

(ii) Preparation of witnesses and limits thereof

The hearing is not unlike proceedings in court. The witness should be briefed on, for example, the various stages of witness examination and their purposes, the issues in the case, how questions will be asked and how exhibits will be tendered and the rules and procedure applicable. However, a witness must not be told what evidence he should give; nor can a witness be asked to vary the substance of his testimony as this would amount to procuring false testimony. However suggestions may be made to the witness in order for him to communicate the facts more effectively for example the use of different phrases or words so that the witness may be able to express himself more clearly, or that certain items of the testimony which are fundamental to the case should be given more emphasis.

(iii) Admissibility of written witness statements

It is common practice for the primary evidence of witnesses to be given in the form of affidavits or sworn witness statements or statements simply signed by the witness. It is for the arbitrator by directions to determine the timetable and procedure for the completion and exchange of witness statements. Section 21(3)(h) of the 2005 Act empowers the arbitral tribunal to direct that a party or witness be examined under oath or affirmation.

(iv) Entitlement of a party to have a hearing or cross-examination of witnesses

The witness will attend the hearing to be examined. If the witness fails to attend to give oral testimony this will affect the weight to be

given to his written evidence or, in an extreme case, may result in it being excluded.[113] Normally, if there is already a written witness statement, a witness is asked a few questions by the party calling him, so as to establish his identity and, possibly, his involvement in the matter of relevant expertise. Following the initial questioning of the witness by the party calling him, the witness will be tendered for cross-examination by the other parties and thereafter be re-examined. The evidence is given under oath or affirmation.

g) Experts

(i) Appointment and presentation of experts by the party or the arbitral tribunal

The arbitrator must follow any agreement by the parties as to the procedure to appoint an expert. The usual practice is to let each party, as opposed to the arbitrator, to adduce their own expert evidence if required and to allow examination of the expert witness after exchange of reports. The parties may determine whether they need to appoint an expert and provide him with oral or documentary information. The parties may adopt the rules provided in standard agreements generally used in a trade. Alternatively, the parties can authorize the arbitrator to appoint experts.

Sections 26 and 28 of the 2005 Act empowers the arbitral tribunal to appoint independent experts and to determine the manner in which experts and experts evidence are to be introduced before the tribunal, which are similarly reflected in the Rules of the KLRCA.[114] Section 26(5) of the 2005 Act deals with expert witnesses presented by each party in support of its case or to attack the arbitral tribunal or the other party's experts. The section provides that any expert report or evidentiary document on which the arbitral tribunal intends to rely in its award is also communicated to all the parties.

Section 28(1)(a) of the 2005 Act states that the arbitral tribunal may appoint one or more experts in order to report on specific issues, unless otherwise agreed by the parties.

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[113] Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* 3rd Edition, 1999, Sweet & Maxwell at p 322.

[114] AIAC UNCITRAL Arbitration Rules (Revised 2010), Article 17 read with Article 29.

(ii) Admissibility and role of expert witnesses

If the subject matter of the arbitration is one where the arbitrator can make up his own mind, expert evidence is not required. There may be situations in which an arbitrator is not in a position to form a correct judgment and require help of a specialist from another field on technical or scientific matters in order to understand issues which are outside the experience and knowledge of the arbitrator. For example, this may include investigations in respect of the evidence, or specific questions of law or engineering or commodity trade. Such issues may include issues of law, engineering, trade, etc. In this way, the arbitrator may direct a party to give relevant information to such experts or to produce any relevant documents, goods or other properties for his inspection or access if physical possession is not possible. Such evidence is admitted to enable the arbitrator to come to a proper decision.

The arbitral tribunal is empowered by Section 29(1) of the 2005 Act to appoint such an expert witness to report to it on specific issues to be determined by the arbitral tribunal, unless the parties agree otherwise. It would be appropriate for the arbitral tribunal to consult with the parties, providing them with the particulars of the intended appointee(s).

As a matter of practice, the expert or experts should submit a description of his or her qualifications and a statement of impartiality and independence to the tribunal and parties.[115] Parties should be given a reasonable period to enquire into the intended appointment and an opportunity to raise any objection on the expert's qualification, impartiality or independence after the appointment of the proposed expert where it becomes aware for the reasons of the objections after the appointment. However, the arbitral tribunal does *not* need express authorisation from the parties to make such appointments.[116]

Section 21(1)(b) sets out the parties' duty to submit any relevant information to the expert or to provide him access to the relevant documents, goods or other property for inspection. However, the expert himself has no power to request such information from the parties. It is the arbitral tribunal which administers the parties' duty by requesting them to submit the relevant evidence. This may be done at the time of finalizing the expert's term of reference. The default

[115] UNCITRAL Rules, Article 29(2).
[116] Sundra Rajoo and WSW Davidson, *The Arbitration Act 2005: UNCITRAL Model Law as Applied in Malaysia* (Sweet & Maxwell Asia, 2007) pp.128.

rules of Section 27(c) of the 2005 Act apply if a party fails to adhere to the arbitral tribunal's direction to produce such evidence. The arbitral tribunal may continue and make the award based on the evidence before it.

(iii) Influence of the parties upon the selection of questions to be submitted to the expert

Expert evidence is the opinion of an expert on any question or issue on which he is qualified to express his opinion. An expert is chosen not just on his paper qualification but for his practical familiarity with the subject matter. He may also be chosen by the parties for his fluency in presenting his opinion and on his ability to stand cross-examination in arbitration. Expert opinion evidence must be related to the facts and a factual foundation should be laid upon which the expert will base his opinion.

(iv) Independence and impartiality of the expert and the right to reject a proposed/appointed expert

It is expected that the expert will not compromise his professional integrity and independence but state his opinion based on facts which he has personally verified or for which there is credible evidence before the arbitrator.

The expert is appointed merely for his technical assistant or expert advice in order to understand complex technical matter, for arriving at a proper decision. The expert is not a part of the arbitral tribunal which must exercise its own judgment about the advice given to it by the expert. The expert's function is confined to giving impartial advice to the arbitrator on matters within his expertise.

(v) Oral examination of an expert in a hearing

There is some flexibility regarding how experts are to be examined. The first approach is for the experts to be heard after the witnesses of facts for each party have testified. Another approach is for the experts to be heard simultaneously on an agenda basis with each expert asked to comment and respond to the opinions of the other experts.

Section 28(2) of the 2005 Act further deals with the arbitral tribunal appointed experts. It allows for the possibility of participation by the expert in the hearing and for the parties to put questions to him during the proceedings. The arbitral tribunal is obligated to hold such hearings if any party so requests or can call for one on its own motion

if it considers it necessary. The parties are at liberty to present their own expert witnesses at this hearing. Alternatively, the parties can also agree that no such hearings be held. The procedure set out in Section 28(2) of the 2005 Act requires the expert to deliver its report either in a written form or orally. Thereafter, the expert presents himself at the hearing where the parties are allowed to interrogate him. The parties can present their own expert witnesses to testify on the same points.

However, the arbitral tribunal must arrive at its own decision and cannot delegate this to the expert.

While there is no explicit challenge procedure set out in both the 1952 Act and the 2005 Act against a biased arbitral tribunal appointed expert, it is possible, under the 2005 Act, for parties to utilise the challenge procedure specified for the arbitrators themselves under Sections 14 and 15 of the 2005 Act.

In Malaysia, witness conferencing for experts has been used.

4. Interim measures of protection

a) Jurisdiction for granting interim measures

Section 19(1)(d) of the 2005 Act clearly gives the arbitral tribunal a limited power to grant injunctive-type relief but limited only for 'the preservation, interim custody or sale of any property', which is the subject matter of the dispute.

b) Types of measures

(i) The 1952 Act

Under the 1952 Act, a party seeking interim orders from the arbitral tribunal has to look for the necessary powers either in the arbitration agreement itself or in the institutional rules which have been adopted as part of the arbitration agreement.

(ii) The 2005 Act

Prior to the 2018 Amendment Act, the arbitrator, in the course of the arbitral proceedings, is given the power to order interim measures under Section 19 of the 2005 Act. Arbitrators have the power to order discovery of documents within the possession and control of the parties. The arbitral tribunal also has various powers to ensure the proper conduct and regulation of the arbitral process. It is often

expressly conferred with powers to make orders or give directions regarding security for costs, the taking of evidence by affidavit, and preservation and interim measures to ensure that any award eventually handed down by the arbitral tribunal is not rendered ineffectual by the dissipation of assets. The arbitral tribunal has the power to order interim injunctions and other interim measures of relief. Moreover, the powers listed under section 19(1)(a),(b),(c) and (d) of the 2005 Act correspond with the parallel powers granted to the High Court under section 11(1)(a), (b), (c) and (f) of the 2005 Act, which are drafted in identical terms.

By contrast, the powers of the High Court which were formerly listed under section 11(1)(d), (e), (g) and (h) of the 2005 Act are excluded from the arbitral tribunal, unless expressly confirmed by the arbitration agreement, the rules of the relevant institutional body (if any) or the parties' subsequent agreement. Except in these circumstances, the arbitral tribunal therefore has no powers to make orders relating to:

(a) the appointment of a receiver;

(b) securing the amount in dispute;

(c) ensuring against dissipation of assets (Mareva type remedies);

(d) interim injunctions.

The coming into force of the 2018 Amendment Act carries major implications to the powers of the High Court and the arbitral tribunal to order interim measures, as Sections 6, 7 and 8 of the 2018 Amendment Act are specifically legislated to introduce a new statutory scheme in relation to the ordering of interim measures by the High Court and the arbitral tribunal under Sections 11 and 19 of the 2005 Act respectively.

(iii) Amendment to Section 19 of the 2005 Act

Section 7 of the 2018 Amendment Act was passed to confer the arbitral tribunal powers to grant interim measures which were previously vested only in the High Court. It amends Section 19(1) of the 2005 Act removes all references to the tribunal's powers to make orders or give directions regarding security for costs, the taking of evidence by affidavit, and preservation and interim measures in relation to properties which is the subject-matter of the dispute and further removes the prerequisite for a party to provide appropriate

security in connection with such measures at the discretion of the arbitral tribunal under Section 19(2). In its place, Section 19(1) now contains a general provision which authorises the arbitral tribunal to "grant interim measures" at the request of a party, and Section 19(2) now contains a different provision which defines interim measures for the purposes of the 2005 Act as "any temporary measure, whether in the form of an award or another form" ordered by the arbitral tribunal which "at any time prior to the issuance of the award by which the dispute is finally decided" to:

(a) Maintain or restore the status quo pending the determination of the dispute;

(b) Take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied;

(d) Preserve evidence that may be relevant and material to the resolution of the dispute;

(e) Provide security for the costs of the dispute.

Section 19(3) which refers to Sections 38 and 39 of the 2005 Act has been deleted altogether pursuant to Section 7(c) of the 2018 Amendment Act.

(iv) 2018 Amendments to Section 19 of the 2005 Act

The 2018 Amendment Act has enlarged the tribunal's powers to grant interim measures and are now contained in Sections 19A – 19J of the 2005 Act respectively.

The new Section 19A lists the conditions to be satisfied for the arbitral tribunal to order interim measures. First, the party requesting for measures under Sections 19(2)(a), (b) and/or (c) must establish that there is the possibility of a harm which cannot be adequately repared by an award of damages if the measure is not awarded, and that such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; second, it must be shown that there is a reasonable possibility that the requesting party will succeed on the merits of the claim, without prejudice to the arbitral tribunal's discretion to make any subsequent determination on the dispute.

Section 19A therefore introduces the balance of convenience test in awarding interim measures laid down in *American Cyanamid Co v Ethicon Ltd*[117] into arbitral proceedings.

In relation to an interim measure order under Section 19(2)(d), Section 19A further provides that it is for the arbitral tribunal to apply the conditions in the amended Sections 19(1) and (2) of the 2005 Act as it considers appropriate.

The new Section 19B provides for the application for preliminary orders and the conditions to be met for such orders to be granted. Accordingly, a party may request for an interim measure *together* with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested without having to give notice to any other party; unless the parties have agreed otherwise, and may be ordered only if the arbitral tribunal considers that prior disclosure of the request for interim measure to the party against whom the measure is directed risks frustrating the purpose of the interim measure. Section 19B(3) extends the conditions specified in Section 19A to any preliminary order provided that the harm to be assessed under Section 19A(1)(a) is the harm that is likely to result from the order being granted or otherwise.

The new Section 19C contains specific regime in relation to preliminary orders and sets out the safeguards for the party against whom the preliminary order is directed. Upon the determination of an application for a preliminary order, the arbitral tribunal is now obliged to immediately give notice to all parties of the request for the interim measure, the application for the preliminary order or the preliminary order and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto; and to provide an opportunity to the party against whom the preliminary order is directed to present its case at the earliest practicable time. Section 19C(2) further obliges the arbitral tribunal to immediately decide upon any objection to the preliminary order, and Section 19C(3) provides that a preliminary order shall expire after twenty days from the date of issuance, without prejudice to the arbitral tribunal's power to issue an interim measure which adopts or modifies the preliminary

[117] [1975] AC 396.

order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.[118]

Section 19C(5) confirms that any preliminary order referred to above shall be binding on the parties but not subject to enforcement by the High Court, and that such an order does not constitute an award.

The new Section 19D empowers the arbitral tribunal to modify, suspend or terminate an interim measure that it has granted upon an application of any party or on its own motion in exceptional circumstances (provided that prior notice is given to the parties). However, the extent of this power exercisable by the arbitral tribunal remains uncertain as it has not been adjudicated upon by the courts.

Section 19E replaces the old regime governing the provision of security under Section 19(2) of the 2005 Act with a broader statutory scheme which now *obliges* the arbitral tribunal to compel the party applying for a preliminary order to provide security in connection with the order unless it considers it inappropriate or unnecessary to do so,[119] in addition to the arbitral tribunal's previous powers to require the party requesting an interim measure to provide appropriate security in connection with the measure.[120]

Section 19F now imposes a duty of disclosure on any party (subject to the discretion of the arbitral tribunal) where there has been a material change in certain circumstances for the purposes of ensuring a just and fair decision in granting an interim measure. Section 19F(1) provides that the arbitral tribunal may require any party to immediately disclose any material changes in circumstances on the basis of which the interim measure or preliminary order was requested or applied or granted, and Section 19(2) places a continuing obligation on the party applying for a preliminary order to disclose all the circumstances to the arbitral tribunal that are likely to be relevant to the arbitral tribunal's determination on whether to grant or maintain the order until the party against whom the order has been requested has had an opportunity to present its case. Similarly, the extent of the circumstances that should be disclosed and the scope of powers exercisable by the arbitral tribunal under this new provision remain subject to interpretation by the courts.

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[118] Arbitration (Amendment) Act 2018 (No.2), Section 8 (reference to a new Section 19C(4) of the Arbitration Act 2005).
[119] *Ibid* (reference to a new Section 19E(2) of the Arbitration Act 2005).
[120] *Ibid* (reference to a new Section 19E(1) of the Arbitration Act 2005).

Section 19G now provides that the party who requests for an interim measure or preliminary order is liable to pay costs and damages if the party fails in such request or application, and the arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 19H now provides for the recognition and enforcement of an interim measure issued by an arbitral tribunal. Section 19H(1) provides that an interim measure issued by an arbitral tribunal is binding and enforceable upon an application to a court of competent jurisdiction irrespective of the country in which the measure was issued, unless the arbitral tribunal declares otherwise. The party who is seeking or has obtained recognition or enforcement of an interim must immediately inform the court of any termination, suspension or modification of that interim measure.[121] Additionally, if it considers proper to order as such, the said court may order the requesting party to provide appropriate security if the arbitral tribunal has not made a determination on the provision of security or where such a decision is necessary to protect the rights of third parties.[122]

Section 19I provides the grounds for the refusal to recognise or enforce an interim measure under Section 19H. At the request of the party against whom the measure is invoked, Section 19H(1)(a) provides 3 grounds for the High Court to refuse to recognise or enforce an interim measure measure, namely:

(i) A refusal by default under Sections 39(1)(a)(i), (ii), (iii), (iv), (v) or (vi) of the 2005 Act;

(ii) Non-compliance with the arbitral tribunal decision on the provision of security in connection with the interim measure; or

(iii) Termination or suspension of the said interim measure by the arbitral tribunal or a court of the State in which the arbitration had taken place or under the law of which that interim measure was granted.

Section 19I(b) further provides 2 other grounds for the High Court to refuse or enforce an interim measure if it finds that:

(i) The interim measure is incompatible with the powers conferred upon the Court, but the Court may decide to

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121 *Ibid* (reference to a new Section 19H(2) of the Arbitration Act 2005).
122 *Ibid* (reference to a new Section 19H(3) of the Arbitration Act 2005).

reformulate the interim measure to the extent necessary, without modifying its substance, to adapt it to the Court's powers and procedures for the purposes oif enforcing that interim measure; or

(ii) The grounds set forth under Section 39(1)(b)(i) or (ii) of the 2005 Act is applicable to the recognition and enforcement of the interim measure in the present case.

Section 19I(2) provides that any determination made by the High Court on any of the grounds as detailed above is only effective to the extent it concerns the application to recognise or enforce the interim measure, and the High Court where such a recognition or enforcement is sought is barred from undertaking a review of the *substance* of the interim measure under Section 19I(3) when making a determination on any of the grounds as detailed above.

Section 19J further clarifies that the High Court has the power to issue interim measures in relation to arbitration proceedings, whether the seat of arbitration is in Malaysia or otherwise. This power must be exercised in accordance with the procedures of the High Court, taking into consideration the specific features of international arbitration.[123] Where a party applies to the High Court for any interim measure and the arbitral tribunal has already ruled on any matter relevant to the application, Section 19J(3) provides that the High Court is treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes for the purposes of the application.

(v) 2018 Amendments to Section 11 of the 2005 Act

Section 6 of the 2018 Amendment Act has made several changes to the powers of the High Court listed to order interim measures. Similar to the changes made to the arbitral tribunal's powers in granting interim measures under Section 11, Section 6(b) removes all references to the High Court's powers to order security for costs; discovery of documents and interrogatories; giving of evidence by affidavit; appointment of a receiver; securing the amount in dispute, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court; the preservation, interim custody or sale of any property which is the subject-matter of the dispute; ensuring that any award which may be made in the

[123] *Ibid* (reference to a new Section 19J(2) of the Arbitration Act 2005).

arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and an interim injunction or any other interim measure (under Sections 11(1)(a) – (h) of the 2005 Act).

In its place, the new Section 11(1) of the 2005 Act provides that where a party applies to a High Court for any interim measure whether before or during arbitral proceedings, the High Court has the power to:

(a) Maintain or restore the status quo pending the determination of the dispute;

(b) Take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of an arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;

(d) Preserve evidence that may be relevant and material to the resolution of the dispute; or

(e) Provide security for the costs of the dispute.

c) Security for costs

Previously, a party may under Section 19(1)(c) request the arbitral tribunal to make an order with regards to security for costs. The arbitral tribunal can also require any party to provide appropriate security in connection with the ordered interim measure. It follows from the arbitration agreement that the interim measure must relate to the subject matter of the dispute and the order may only be addressed to the parties to the agreement.

The arbitral tribunal retains such powers following the coming into force of Sections 7 and 8 of the 2018 Amendment Act, now provided for under the new Sections 19(2)(e) and 19E of the 2005 Act.

In the absence of any case laws following the changes of the law, the extent of the powers exercisble by the arbitral tribunal to make such an order either remains unchanged, or even possibly widened in light of the overarching purpose of the 2018 Amendment Act to confer wider powers to the arbitral tribunal to order interim measures as a whole.

5. Interaction between national courts and arbitration tribunals

The 1952 Act

There is doubt as to whether the High Court has inherent power[124] to supervise the conduct of an arbitration[125] by the arbitrator. The High Court in Section 13(4) to (6) has the following powers, namely, security for costs, discovery of documents and interrogatories, the giving of evidence by affidavit, examination under oath of any witness, the preservation, interim custody or sale of any goods which are the subject matter of the reference, securing the amount in dispute in the reference, the detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorizing any of the purposes aforesaid or any persons to enter upon or into any land or building in the possession of any party to the reference or authorizing any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence and interim injunctions and the appointment of a receiver.

The Supreme Court in *Rimbunan Hijau Sdn Bhd v Sarawak Plywood (M) Sdn Bhd* held that the test for awarding interlocutory injunctions under *American Cynamid Co v Ethicon Ltd* does not apply to cases which are already pending an arbitrator's decision on certain issues submitted to him or her under the terms of an agreement executed between the parties.[126]

The High Court has also the jurisdiction pursuant to Section 22, to order an arbitrator to state a special case on any question of law arising in the course of the defence. This power may also be exercised by the arbitrator on his own initiative or at the request of a party.

The High Court may also, pursuant to Section 23 of the Act, remit an award to the arbitrator for reconsideration.

The 2005 Act

The basic tenet of the 2005 Act is that of non-interference by the court, unless there are express provisions allowing this.

Previously, the High Court, pursuant to old Section 11, has the power to grant interim measures in respect of security for costs,

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[124] *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd,* [1998] 2 MLJ page 20 at 25.
[125] *Bina Jati Sdn Bhd v Sum Projects Bros Sdn Bhd*, [2002] 2 MLJ page 71.
[126] [1985] 2 MLJ 377 at 380 (Syed Agil Barakbah SCJ).

discovery of documents and interrogatories, giving of evidence by affidavit, securing the amount in dispute, preservation, interim custody and sale of any property which is the subject matter of a dispute and ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets and interim injunctions. The arbitral tribunal was also given almost similar powers under the old Section 19 save that there is no power to grant an injunction or appoint receivers. The reason for this could be that with regard to the grant of injunctions and in particular Mareva injunctions, the power of the court is required for purposes of enforcement. Therefore the rationale appears to be to provide the parties with a choice in view of the concurrent nature of the powers set out in Sections 11 and 19. It is doubtful if a court has the power to also grant a Mareva injunction in respect of an international arbitration held elsewhere, where there are assets located in Malaysia.

As explored above, the amended Section 19 of the 2005 in its entirety has conferred widened powers to the arbitral tribunal which is now able to grant interim measures similar to the measures granted by the High Court. In addition, an extensive legislative scheme has been put in place which currently governs the procedures for the arbitral tribunal to grant such measures. The High Court retains the power to recognise and enforce interim measures issued by the arbitral tribunal. However, in the absence of any judicial determination, it remains unclear as to whether the changes brought under the 2018 Amendment Act have expanded the powers of the arbitral tribunal to grant injunctions or appoint receivers.

There is power in Section 40 for the court to order consolidation and concurrent hearings of arbitral proceedings. This would be exercised in the case of multi-party disputes where there is an agreement among the parties.

6. Multi-party situations

Under the 1952 Act, the arbitrator cannot order consolidation or concurrent hearings without the consent of the parties. Even the Courts may not have the power to intervene in such situations.[127]

Similarly, under section 40 of the 2005 Act, it is clear that unless the parties agree to confer such power on the arbitral tribunal, the

[127] *See for example Safege Consulting Engineers v Ranhill Bersekutu Sdn Bhd* [2005] 1 MLJ 689.

tribunal has no power to order consolidation of arbitration proceedings or concurrent hearings. However, it is arguable whether a court may appoint the same arbitral tribunal to hear the various disputes consecutively to avoid inconsistent findings and simultaneously save costs and time.

Under current arbitration rules in Malaysia, third parties enjoy the right to appoint their own arbitrator as enjoyed by the main parties to an arbitration proceeding. Article 10(1) of the consolidated AIAC Rules 2018 now provides that where three arbitrators are to be appointed under the procedure provided for under Article 9(1) and multiple Parties are involved in the case either as the claimant the respondent, the multiple Parties jointly, whether as claimant or as respondent, shall appoint an arbitrator unless the parties have agreed to a different method of appointing their arbitrators.

7. Effect of the insolvency of a party

a) The 1952 Act

Under Section 5(1) of the 1952 Act, a party to an arbitration agreement who is subsequently adjudged a bankrupt may, if the person having jurisdiction to administer the property adopts the agreement, commence or defend an arbitration. Under Section 5(2) of the 1952 Act, where such an agreement is not adopted by the person having jurisdiction to administer the property and the matter needs to be determined in connection with the bankruptcy proceedings, then any other party to the agreement or the Official Assignee of the bankrupt's estate may apply to the Court having jurisdiction over the bankruptcy proceedings for leave to refer the matter to arbitration in accordance with the agreement.

Where a company is being wound up, the liquidator may bring or defend proceedings and he may, by giving notice, disclaim any onerous property such as unprofitable contracts, and thereby disclaim any arbitration agreements within them. On being informed of the appointment of a liquidator, the arbitrator has no option but to issue directions to the parties indicating that the arbitration proceedings are temporarily stayed. Once the company is wound up and the liquidator has control of the company's assets, the liquidator has the power to commence an arbitration or continue with an existing one. If there is no response from the liquidator, the arbitrator may make a peremptory order stating that failure to comply may lead to the arbitration being terminated.

An administrative receiver when appointed takes the role of the board of directors. He cannot disclaim unprofitable contract but, bearing in mind the company's position, may repudiate them by merely failing to perform the company's obligations. The other party is entitled to damages but as unsecured creditor.

b) The 2005 Act

The 2005 Act under Section 49 re-enacts Section 5 of the 1952 Act in substantially the same terms.

G. Arbitration Award

1. Overview

(i) The 1952 Act

The 1952 Act does not define an award. Section 15 gives statutory recognition to two types of awards: final awards and interim awards.

An award has been defined in *Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd*[128] as a decision made by an arbitrator on a controversy submitted to him. Since the award must be on the controversy submitted for arbitration, the decision must be one that decides on all the issues involved in the dispute.

Mr Justice K C Vohrah in *MCIS Insurance Bhd v Associated Cover Sdn Bhd*[129] stated: "Under the Act, there is nothing, which prohibits an interim award from being made by an arbitrator unless a contrary intention is expressed in the arbitration agreement. The expression 'interim award' appearing in Section 15 is not defined anywhere in the Act. Nor is the expression 'award' defined. Whatever the expression used, whether 'award' 'final award', 'interim award' or 'temporary award' in the context of our law on arbitration, what is important to ascertain is whether it amounts to a decision on the questions referred for determination by the arbitrator; any form of words amounting to a decision of the questions referred to will be good as an award."[130]

[128] [1998] 6 MLJ page 545 at 551.
[129] [2001] 2 MLJ page 561 at 567.
[130] *Id.*, at 551.

(ii) The 2005 Act

Section 33 of the 2005 Act defines an award as a decision of the arbitral tribunal on the substance of the dispute and includes interim, additional, agreed and final award. The reference to interlocutory awards in the definition must of necessity mean that it includes interlocutory awards, which protect the interest of the parties or regulate the proper conduct of the arbitration prior to the determination of the merits of the dispute. Therefore, interlocutory orders which do not include the merits such as security for costs and discovery made by the tribunal in the course of the arbitration can be enforced with leave of the court.

The new Section 33(6) of the 2005 Act (as amended by Section 10 of the 2018 Amendment Act) now further provides that an arbitral tribunal may award simple or compound interest from a given date, at a set rate and with such rest as the tribunal considers appropriate "for any period ending no later than the date of payment of the whole or any part of:

(a) Any sum which is awarded by the arbitral tribunal in the arbitral proceedings;

(b) Any sum which is in issue in the arbitral proceedings but is paid before the date of the award; or

(c) Costs awarded or ordered by the arbitral tribunal in the arbitral proceedings."

In addition, a new Section 33(7) provides that the arbitral tribunal's powers to award interests is not prejudiced by the amended Section 33(6), and Section 33(8) clarifies that an award directing a sum to be paid shall carry interest from the date of the award at the same rate as a judgment debt.

The new Section 33(6) has the effect of reversing the decision of the Federal Court in *Far East Holdings Bhd v Majlis Ugama Islam dan Adat Resam Melayu Pahang*[131] which held that arbitral tribunals do *not* have implied powers to grant pre-award interests in arbitral disputes under the old Section 33(6) as the provision was silent on pre-award interests. The 2018 Amendment has therefore brought the scope of the arbitral tribunal's power to grant pre-award interests in line with international practice.

[131] [2018] 1 MLJ 1.

If during the arbitral proceedings the parties settle the dispute, the arbitral tribunal may record a settlement and hand it down as an arbitral award on agreed terms. The award has the same status and effect as an arbitral award on the merits.

2. Form requirements

a) Overview

The 1952 Act

Under the 1952 Act, there is no prescribed form for an award. It need not even be in writing but if it is not written, it gives rise to problems of enforcement. Generally, arbitral awards even under the 1952 Act are in writing but they need not contain reasons unless the parties have agreed that the arbitrator is to hand down a reasoned award. A court will only order the arbitrator to provide reasons if it was one of the terms of his appointment that a reasoned award is required. The award should be dated and should state the place of arbitration.

The 2005 Act

Section 33(1) of the 2005 Act, requires that the award should be in writing and signed by the arbitrator(s). Where there are three arbitrators, the signature of the majority of the members of the arbitral tribunal would suffice provided the reason for any omitted signature is stated. The award should state the reasons for the award unless the parties have stated otherwise or if the award is made on agreed terms. The award should also be dated and state the place of arbitration.

b) Essential content

The award should, apart from the substantive relief, which should be spelled out in the award, deal with all matters in dispute. The award should also be unambiguous and certain.

Prior to the 2018 Amendment Act, an arbitral tribunal has no power to award pre-award interest unless otherwise provided in the arbitration agreement, and post-award interest may only be awarded if pleaded by the parties in their respective statement of case or

counterclaim, as the case may be.[132] As explored above, this position has been effectively overturned under the new Section 33(6) of the 2005 Act.

3. Correction, supplementation, and amendment

Pursuant to Section 35 of the 2005 Act, a party may within 30 days of the receipt of the award, request that the arbitrator correct any errors in computation, clerical or typographical errors or any errors of a similar nature. The arbitrator can correct such errors on his own initiative. Under the 1952 Act, the arbitrator only has the power to correct clerical mistakes and errors arising from an accidental slip or omission, pursuant to Section 18.

The 2005 Act also gives the arbitral tribunal power, at the request of a party made within 30 days of the receipt of the award, to interpret the award on a specific point or part of the award with such interpretation forming part of the award.

There is no equivalent provision empowering interpretations of awards by the arbitrator under the 1952 Act.

H. Challenge and Other Actions against the Award

1. Appeal on the merits (awards made in Malaysia)

a) The 1952 Act

There is no procedure for an appeal of an award. The award may be set aside pursuant to Section 24(2) of the 1952 Act on grounds that there has been misconduct on the part of the arbitrator. The court, if satisfied that there was misconduct, may set aside or remit the award.

Misconduct is not defined under the 1952 Act. It normally involves objections of actual or possible unfairness. It is not misconduct for an arbitrator to arrive at an erroneous decision whether his error is one of fact or law. In *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority*,[133] Justice Raja Azlan Shah applied the following tests: (1) whether there exist grounds from which a reasonable person would think that there was a real likelihood that the arbitrator could not or would not fairly determine the issue; and (2) whether the arbitrator's conduct was such as to destroy the

[132] *Ibid.*
[133] [1971] 2 MLJ 210.

confidence of the parties, or either of them, in his ability to come to a fair and just conclusion. This case was cited with approval by the Court of Appeal in *Hartela Contractors Ltd. v Hartecon JV Sdn Bhd.*[134]

The award may also be set aside when there is some defect or error on the face of the award – or instance, not considering all the issues that have arisen, or a mistake has been corrected, or new evidence is available, which could not with reasonable diligence, have been discovered, or if the dispute has not been fully adjudicated and where the arbitrator has exceeded his jurisdiction.

b) The 2005 Act

Section 41 of the 2005 Act gives power for the determination of a point of law. This appears to be an attempt to replace the old statement of case procedure in Section 22 of the 1952 Act. Section 41, however, requires the consent of the parties or the arbitral tribunal.

Previously, Section 42 of the 2005 Act allows a party to make a reference to the High Court on questions of law arising out of an award. This section has no equivalent in the Model Law and is also out of line with the legislation in other jurisdictions. Section 42 of the 2005 Act was considered in *Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd.*[135] The High Court clarified that a court is not to sit in exercise of its appellate jurisdiction when dealing with a reference under section 42 of the 2005 Act. The High Court also clarified that while questions of law may arise from findings of fact, the courts are to take a restrictive approach in that only questions of law and not questions of fact or even mixed law and fact may be referred.

In determining whether a particular question is a proper and valid question of law, the Court of Appeal in *SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd*[136] held that the court should consider the propriety of the question in the context of the facts of the case as a whole, including the issues that had to be dealt with by the arbitrator.

It is also worth noting that the test to determine an error of law has been applied in the context of a Section 42 application. In *Telekom Malaysia Bhd v Eastcoast Technique (M) Sdn Bhd*,[137] Telekom had sought to refer questions of law under section 42 with a view to setting aside the award or having the award remitted to the arbitrator. In

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134 [1999] 2 MLJ 481.
135 [2013] 5 MLJ 98.
136 [2014] 2 MLJ 627.
137 [2014] 11 MLJ 525.

determining whether or not intervention was warranted, the High Court held that it may intervene in relation to any question of law that substantially affects the rights of one or more parties. The High Court then went on to apply the test to establish an error of law as expounded in the case of *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis*[138] and found that the arbitrator had erred in law on several instances and proceeded to set aside the award in its entirety.

The above sections are optional in that they apply to domestic arbitrations unless the parties opt out. In the case of international arbitrations, these sections would only apply if the parties specifically opt in. Also noteworthy of mention are the AIAC Arbitration Rules where Rule 1 now expressly states that sections 41 (Determination of preliminary point of law by court), 42 (Reference on questions of law), 43 (Appeal) and 46 (Extension of time for making award) of the 2005 Act shall not apply. The effect of this clause is to add finality and certainty to arbitral proceedings by curbing judicial interference and enhancing party autonomy where the seat of arbitration is in Malaysia.

Subsequently, the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang*[139] adopted a non-exhaustive guideline based on the tests employed by the English, Australian, Singapore, New Zealand and Canadian courts in determining a reference on a 'question of law' arising out of an arbitral award under Section 42. These include:

a) a question of law on matters relating to material rules of statute and common law; the interpretation of the relevant parts of the contract and the identification of those facts which must be taken into account when the arbitral tribunal arrives at a decision;

b) a question as to whether the decision of the tribunal was wrong (*The Chrysalis*);

c) a question as to whether there was an error of law, and not an error of fact (*Micoperi*): error of law in the sense of an erroneous application of law;

d) a question as to whether the correct application of the law inevitably leads to one answer and the tribunal has given another (*MRI Trading*);

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138 [1983] 2 All ER 658.
139 [2018] 1 MLJ 1.

e) a question as to the correctness of the law applied;

f) a question as to the correctness of the tests applied (*Canada v Southam*);

g) a question concerning the legal effect to be given to an undisputed set of facts (Carrier Lumber);

h) a question as to whether the tribunal has jurisdiction to determine a particular matter (*Premiums Brands*): this may also come under s 37 of the AA 2005; and

i) a question of construction of a document (*Intelek*).[140]

Additionally, the Federal Court clarified that Section 42 contemplates a less narrow interpretation of 'question of law', and that a less narrow interpretation of 'question of law' in Section 42 would not widen court intervention in international arbitration. But 'a point of law in controversy which has to be resolved after opposing views and arguments have been considered' is not a 'question of law' within the meaning of Section 42.[141][142]

Following *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang*, the 2018 Amendment Act has subsequently removed the right of a party to refer to the High Court on any questions of law arising out of an award, and parties may now apply to the High Court only to determine questions of law arising in the course of an arbitration provided under Section 41.

There is no appeals procedure against an award made in Malaysia under the 2005 Act. The only recourse is to set aside the award. The application to set aside an award has to be made within three months of receipt of the award. The grounds for setting aside such

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[140] *Ibid,* [150].

[141] *Ibid,* [152].

[142] In the Court of Appeal Civil Appeal No. W-01(C)(A)-395-11/2017 *Kerajaan Malaysia v Syarikat Ismail Ibrahim Sdn Bhd & Ors* which involved an application under Section 42 of the 2005 Act, Hamid Sultan JCA was critical of the decision in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang* on the basis that the Federal Court, in construing Section 42 of the 2005 Act, had relied upon authorities which were not related to Section 42 of the 2005 Act and the overall scheme of the 2005 Act. Whilst the other two other Justices of the Court of Appeal came to the same conclusion in respect to the appeal at hand, they did not share the reasoning nor were they critical of the decision *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang.*

an award are set out in Section 37 of the 2005 Act and include: the award is contrary to the public policy of Malaysia, fraud or a breach of the rules of natural justice. In *Twin Advance (M) Sdn Bhd v Polar Electro Europe BV,*[143] the High Court held that Section 37 is not applicable to arbitral awards of a foreign state or international award where the seat or place of arbitration is not in Malaysia.

The Malaysian courts have interpreted Section 37 of the 2005 Act narrowly in the interests of ensuring finality, conclusiveness and binding authority of an award made by an arbitral tribunal. In *Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd & Another Case*,[144] the High Court summarises the principles underlying the setting aside of awards under Section 37 of the 2005 Act as follows:

(a) That the court should be slow in interfering with an arbitral award, which award can only be set aside under the limited circumstances prescribed by Section 37 of the 2005 Act;[145]

(b) The applicant must first show the matters which are within the scope of the submission to arbitration. It then must prove that the award deals with a 'new difference' which is not within the scope of reference. Thirdly, if shown, whether such 'new difference' was irrelevant to the actual issues for determination. Fourthly, if so, whether the 'new difference' would have had a material impact on the final outcome as announced in the award. And if it would, finally, whether that part of the award inflicted by the 'new difference' may be separated from the other parts of the award to warrant only the part affected to be set aside under Section 37(3) of the 2005 Act (following the approach of the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597);[146] and also

(c) Not all breaches of the rules of natural justice will *ipso facto* mean that the arbitral award will be in conflict with public policy and liable to be set aside under Section 37(1)(b)(ii) of the Act, and *even if* it can be shown that there has been a breach of natural justice, the court retains the discretion

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143 [2013] 7 MLJ 811.
144 [2016] 4 CLJ 927, subsequently followed in *Intraline Resources Sdn Bhd v Exxonmobil Exploration and Production Malaysia Inc* [2017] MLJU 1299.
145 *Ibid*, [9].
146 *Ibid,* [10].

> whether to set aside the arbitral award for being in conflict with public policy under Section 37(1)(b)(ii). In order to set the arbitral award for being in conflict with public policy, it must be shown that the alleged breach of natural justice has caused *actual* prejudice to the aggrieved party.[147]

The Court of Appeal in two recent cases held that any parties who make an application under Section 37 of the 2005 Act without seeking appropriate direction pursuant Section 37(6) must be seen to be an abuse of process of the court and must be dismissed in limine unless the exception applies.[148]

The courts in Malaysia, in line with other UNCITRAL Model Law jurisdictions, have also adopted a narrow test in determining whether an award should be set aside on the ground that it is contrary to the public policy of Malaysia. In *Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd,*[149] the High Court adopted the exposition as to the substance and scope of "public policy" in the Singapore decision of *AJT v AJU*.[150] Thus, in order to succeed in setting aside an award on the ground that it would conflict with public policy, an applicant will first have to show that the tribunal had decided erroneously. Next, it will have to be shown that the error was of such nature that enforcement of the award would "shock the conscience", be "clearly injurious to the public good" or would contravene "fundamental notions and principles of justice".

The determination as to whether a breach of natural justice had occurred is fact-specific and must be encapsulated within the notion that every party has a right to be heard (*audi alteram partem*) and/or that no man should be a judge in his own cause (*nemo iudex in causa sua*).[151] The former includes where an arbitrator makes an award on an issue which was not presented in the arbitral proceedings and without inviting the parties to present on that issue.[152] Where an arbitrator discerns issues or findings of fact or law on his own accord

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147 *Ibid,* [58], [63] & [71].
148 *Garden Bay Sdn Bhd v Sime Darby Property Bhd* [2018] 2 MLJ 636 (CA); [31]; *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697 (CA) [31].
149 [2012] 5 MLJ 809.
150 [2010] 4 SLR 649.
151 *Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc & Anor* [2008] 5 MLJ 254 (HC) at [31].
152 *Sime Darby Property Bhd v Gardem Bay Sdn Bhd & Another Case* [2017] 6 CLJ 107.

(*sua moto*), an arbitrator is obliged to invite the parties to address such issues or findings before making his award.[153]

Breach of the rules of natural justice as a ground for setting aside was considered in *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporation Sdn Bhd*[154] where the High Court held that since there is a mandatory requirement for proof under section 37 of the 2005 Act, general allegations without setting out the prejudice suffered and proof thereof would be insufficient. The High Court also observed that almost all rules of natural justice had been incorporated in the Federal Constitution, Acts of Parliament as well as the rules of court. A complaint of a breach of the rules of natural justice must therefore in almost all cases relate to a breach of the Federal Constitution, or any Act of Parliament or rules of court. In *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd*, the Court of Appeal held that section 37(1)(b)(ii) of the 2005 Act did not require an applicant to demonstrate proof of actual prejudice.[155]

Section 37(4) of the 2005 Act stipulates that an application to set aside an arbitral award may not be made after the expiry of ninety days from the date on which the party making the application had received the award or from the date on which a request under Section 35 had been disposed of by the arbitral tribunal. This has been interpreted to mean that the time limit to file an application to set aside is strict and is not subject to any extension of time.[156] However, the Court of Appeal in *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co, Ltd ("TLL"), A Thai Company & Anor* held that the time limit to apply to set aside an award can be extended under the rules of court.[157] Note that the Court of Appeal was not appraised of Section 8 of the 2005 Act, which limits court intervention except where so provided under the 2005 Act.

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153 *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd* [2018] 2 AMR 222.
154 [2010] 5 CLJ 83.
155 [2018] 2 AMR 222.
156 *JHW Reels Sdn Bhd v Syarikat Barcos Shipping Sdn Bhd* [2013] 7 CLJ 249; *Kembang Serantau Sdn Bhd v Jeks Engineering Sdn Bhd* [2016] 2 CLJ 427; *Triumph City Development Sdn Bhd v Kerajaan Negeri Selangor Darul Ehsan* [2017] MLJU 1518 (This case is pending appeal before the Court of Appeal).
157 [2011] 1 LNS 1903.

I. Protection of Confidentiality of Arbitration Proceedings

1. Prohibition of disclosure of information relating to arbitral proceedings and awards

The 2018 Amendment Act introduces a new Section 41A into the 2005 Act which prohibits any party from publishing, disclosing or communicating any information relating to the arbitral proceedings under the arbitration agreement or the award that was made in those arbitral proceedings, unless the parties have agreed otherwise. Exceptions to this rule arises where the publication, disclosure or communication is made to protect or pursue legal right or interest of the party or to enforce or challenge the award in those arbitral proceedings; where the publication, disclosure or communication is made to any governmental body, regulatory body, court or tribunal and the party is obliged by law to publish, disclose or communicate such information; and where the publication, disclosure or communication ismade to a professional or any other adviser of any of the parties.

The confidentiality provision was recently interpreted by the High Court in *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd*[158]. The defendant relied on Section 41A and raised a preliminary objection to the use of two documents prepared for the purpose of an arbitration involving the defendant. The defendant maintained that no consent was given by the defendant for the publication, disclosure or communication of either of the documents which were annexed to the plaintiff's affidavit in reply. The plaintiff himself was not a party to the arbitration. However, the defendant contended that the confidentiality extends even to a third party such as the plaintiff who was not a party to the arbitration based on common law.

The High Court dismissed the defendant's preliminary objection on the premise that the prohibition contained in Section 41A does not apply to non-parties to an arbitration. The statutory provision also supercedes any common law confidentiality principles attached to an arbitration. In any event, if the plaintiff was a party to the arbitration, the plaintiff could have availed himself of the exception contained in Section 41A(2)(a)(i) which stipulates that publication, disclosure or communication of information is allowed to protect or pursue a legal right or interest of a party.

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[158] [2019] 10 MLJ 693.

2. Proceedings to be heard otherwise than in open court

The 2018 Amendment Act also introduces a new Section 41B into the 2005 Act, which provides for court proceedings to be held otherwise than in an open court (*i.e.* proceedings *in camera)*, unless a party applies to the court to conduct such proceedings in an open court or where the court is satisfied that those proceedings ought to be heard in an open court in the circumstances. An order directing proceedings to be heard in open court is final.

III. RECOGNITION AND ENFORCEMENT OF AWARDS

The 1952 Act

Arbitral awards may, with the leave of the High Court, be enforced as a judgment of the High Court pursuant to Section 27. The 1952 Act does not set out grounds for refusing enforcement. However, the grounds for refusing enforcement would include grounds such as misconduct on the part of the arbitrator, ambiguity and uncertainty of the award, incompleteness and where the arbitrator has exceeded his/her jurisdiction. Moreover, when a party is not able to resort to summary procedure under Section 27, the party may enforce it by way of an action on the award.

The 2005 Act

Sections 38 and 39 deal with recognition and enforcement of foreign arbitral awards and the grounds for refusing recognition or enforcement. These sections apply both to awards sought to be enforced in Malaysia both in respect of domestic and foreign awards.

Section 38 sets out the procedure to enforce a foreign award.[159] The 2011 Act allows for awards made in an international arbitration with a seat in Malaysia to be enforceable.

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[159] The manner in which such an application is to be made is set out in Order 69 rule 8(1) of the Rules of Court 2012. The application may be made on an *ex parte* basis. In *Tune Talk Sdn Bhd v Padda Gurtaj Singh* [2019] MLJU 67, the Court of Appeal held that the provisions of Sections 38 and 39 are exhaustive and that there is no room for any other substantive requirements to be satisfied for the recognition and enforcement of an arbitral award. The Court of Appeal further held that the provisions of Order 69 rule 8(1) of the Rules of Court 2012 merely set out the procedural means to obtain enforcement

Prior to the 2011 Act, there had been a hiccup with regard to the enforcement of foreign arbitral awards in the Court of Appeal case of *Sri Lanka Cricket v World Sport Nimbus Pte Ltd.*[160] The court decided that gazette notification under section 2(2) of the New York Convention Act was a compulsory requirement for enforcement of a Convention award under that Act. [The Act omitted to gazette the convention countries. This Convention award handed down in Singapore was not enforced.]

The decision in *Sri Lanka Cricket* was eventually overruled by the Federal Court in *Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd*.[161] The Federal Court held that gazette notification under section 2(2) of the New York Convention Act could not be construed as a mandatory requirement before a Convention award made in a contracting state can be enforced in Malaysia. Therefore, in the absence of gazette notification, evidence could be led to show that a particular country is a contracting state.

In *Siemens Industry Software Gmbh & Co Kg (Germany) (formerly known as Innotec Gmbh) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (Malaysia) & Ors*[162], the Federal Court held that for the purposes of an application under Section 38, the recognition and enforcement of of an arbitratl award relate only to the dispositive portion of the said arbitral award and not the entire award. The Federal Court held that the entire arbitral award which embodies the witnesses' testimonies, the submission of the parties, the findings, reasoning and analysis of the arbitral tribunal is not necessary for the purposes of reigsration and enforcement under Section 38.[163] These parts of the arbitral award would only be relevant in an application to set aside the arbitral award under Section 39. In an application under Section 38, a court is not required to go behind the arbitral award and understand the arbitral tribunal's reasoning as having complied with the formal requirements of Section 38, the registration of the award is granted as of right.

Section 39, deals with grounds for refusing recognition or enforcement and it corresponds with Article 36 of the Model Law. The

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and recognition of the arbitral award. An act of non-compliance with the procedural requirements is therefore not absolutely fatal.

[160] (2006) 3 AMR 750.

[161] [2010] 2 MLJ 23.

[162] [2020] MLJU 363

[163] The Federal Court also held that such a position is consistent with the confidentiality of the arbitration process.

grounds for refusal for recognition are exhaustive and if none of these grounds are present, the award must be recognized. the area in which a dispute may arise is the question of public policy, it now appears that the Malaysian courts generally adopt a narrow interpretation of 'public policy' in relation to setting aside applications and the same interpretation has been held to be applicable to 'public policy' under section 39 of the 2005 Act.[164]

Under the 2005 Act, it does not appear from published decisions that a party may avail itself of a passive remedy in the event a party fails to raise a plea of no jurisdiction in the arbitral proceedings. In *Agrovenus LLP v Pacific Inter-Link Sdn Bhd and Another Appeal*, in proceedings brought under Sections 38 and 39 of the 2005 Act (relating to recognition and enforcement and refusal to accord recognition and enforcement), the Court of Appeal held that an award-debtor must be estopped from relying on a jurisdictional objection as a basis to refuse recognition or enforcement of an arbitral award in Malaysia.[165]

Subsequently, the Federal Court in *CTI Group Inc v International Bulk Carriers SpA* confirmed that grounds for refusal are exhaustive, and an application to refuse recognition must fail (and consequently an award must be recognised and enforced) where none of the grounds set out under Section 39 are present.[166]

The Court of Appeal in *Alami Vegetable Oil Products Sdn Bhd v Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd*[167] explains the differences between Sections 38 and 39 of the 2005 Act and the arguments that may be raised by a party in relation to these two provisions. First, Section 38 is a 'recognition procedure' to convert an arbitration award to a judgment and can only be done by the person holding an arbitration award. Therefore, it is impermissible to argue issues relating *to the award* or *merit of the award* under Section 38 as the merit of the award could not be an issue this provision.[168] Second, arguments relating to the award or merit of the award are permitted in an application under Section 39, which can only operate upon an application made by the respondent to the award.[169]

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[164] *See Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd* [2012] 5 MLJ 809 and the discussion under section 'H. Challenge and Other Actions against the Award' above.
[165] [2014] 3 MLJ 648.
[166] [2017] 6 AMR 344.
[167] [2016] 12 MLJ 169.
[168] *Ibid*, [2], [3], [9] (Hamid Sultan JCA).
[169] *Ibid*, [2] (Hamid Sultan JCA).

The Court of Appeal in *Alami Vegetable Oil* further added that it would be tantamount to an abuse of judicial process if a party had not taken the argument before the trial judge by a proper application under Section 39 of the 2005 Act should he seek to appeal the decision of the trial judge (which was the core issue in the instant case).[170] Parties and counsel would therefore be well-advised to be prudent and familiar with the core distinction between Sections 38 and 39 of the 2005 Act in making an application to recognise or enforce an arbitral award.

In specific relation to enforcement proceedings against the Government of Malaysia or a State Government within the Federation of Malaysia, a party seeking to enforce an award must apply for the issuance of a certificate pursuant to Section 33 of the Government Proceedings Act 1956.[171] An application for the certificate is to be made after the application under Section 38 of the 2005 Act is granted. In *Triumph City Development Sdn Bhd v Kerajaan Negeri Selangor*, the High Court held that once the provisions of Section 33(1) of the Government Proceedings Act 1956 are fulfilled, a certificate pursuant to the same shall be issued by the court. In the event that the Federal Government or a State Government refuses to comply with the judgment, the aggrieved party may thereafter apply for a mandamus order to compel payment by the Federal Government or State Government.[172]

IV. APPENDICES AND RELEVANT INSTRUMENTS

A. National Legislation

Arbitration Act 1952 [Act 93] (repealed
Arbitration Act 2005 [Act 646] (as last amended by Arbitration (Amendment) Act 2018 (No.2) (Act A1569))
Rules of Court, Order 69 [PU(A) 205/2012]
Reciprocal Enforcement of Judgments Act 1958 [Act 99]

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[170] *Ibid,* [14] (Hamid Sultan JCA).
[171] Originating Summons No. BA-24NCC(ARB)-03-07/2017. The decision of the High Court was upheld on appeal by the Court of Appeal in Civil Appeal No. B-01(NCC)(A)-19-01/2018.
[172] *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641.

Convention on the Settlement of Investment Disputes 1966

B. Major Arbitration Institutions

Asian International Arbitration Centre (*formerly Kuala Lumpur Regional Centre for Arbitration*)
Bangunan Sulaiman,
Jalan Sultan Hishamuddin,
50000 Kuala Lumpur, Malaysia.
Tel: +603 2271 1000
Fax: +603 2271 1010
www.aiac.world

The Malaysian Institute of Arbitrators
Room 11, Level 2,
Bangunan Sulaiman,
Jalan Hishamuddin,
50000 Kuala Lumpur, Malaysia
Tel: +603 2271 1063
Fax: +603 2271 1064
Email: info@miarb.com
http://www.miarb.com

Malaysian Institute of Architects (Pertubuhan Arkitek Malaysia)
99L, Jalan Tandok, Bangsar
59100 Kuala Lumpur, Malaysia
Tel: +603 2202 2866
Fax: +603 2202 2566
Email: info@pam.org.my
http://www.pam.org.my

The Institution of Engineers, Malaysia
Bangunan Ingenieur, Lot 60/62,
Jalan 52/4, Peti Surat 223 (Jalan Sultan),
46720 Petaling Jaya,
Selangor Darul Ehsan, Malaysia.
Tel: +603 7968 4001
Fax: +603 7957 7678
http://www.myiem.org.my

Royal Institution of Surveyors Malaysia
3rd Floor, Bangunan Juruukur,64 & 66, Jalan 52/4,

46200 Petaling Jaya, Selangor, Malaysia
Tel: +603 7955 1773 / 7956 9728
Fax: +603 7955 0253
Email: secretariat@rism.org.my
http://www.rism.org.my

Malaysian International Chamber of Commerce and Industry
C-8-8, 8th Floor, Block C
Plaza Mont' Kiara
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50480 Kuala Lumpur
Tel: +603 6201 7708
Fax: +603 6201 7705
E-mail: micci@micci.com
http://iccmalaysia.org.my/

Associated Chinese Chamber of Commerce & Industry of Malaysia
6th Floor, Wisma Chinese Chamber, 258, Jalan Ampang, 50450 Kuala Lumpur, Malaysia.
Tel: +603 4260 3090 / 3091 / 3092 / 3093 / 3094 / 3095
Fax: +603 4260 3080
Email: acccim@acccim.org.my
http://www.acccim.org.my

Malaysian Rubber Board
18th Floor Bangunan Getah Asli (Menara)
148 Jalan Ampang
50450 Kuala Lumpur, Malaysia.
Tel: +603 9206 2000
Fax: +603 2163 4492
http://www.lgm.gov.my

The Palm Oil Refiners Association of Malaysia (PORAM)
801C/802A, Block B, Executive Suites,
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Fax: +603-7492 0128
Email: poram@poram.org.my
www.poram.org.my

Security Industry Dispute Resolution Centre
Unit A-9-1, Level 9, Tower A, Menara UOA Bangsar,
No. 5, Jalan Bangsar Utama 1
59000 Kuala Lumpur, Malaysia
Tel: +603 2282 2280
Fax: +603 2282 3855
Email: info@sidrec.com.my
www.sidrec.com.my

C. Cases

Agrovenus LLP v Pacific Inter-Link Sdn Bhd and Another Appeal [2014] 3 MLJ 648

AJT v AJU [2010] 4 SLR 649

Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd [2013] 5 MLJ 625

Alami Vegetable Oil Products Sdn Bhd v Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd [2016] 12 MLJ 169

Alfred McApline Construction v Unex Corp [1994] NPC 16

Amalgamated Metal Corporation Ltd v Khoon Seng Co [1977] 2 Lloyd's Rep 310

American Cyanamid Co v Ethicon Ltd [1975] AC 396

Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd & Ors, [2008] 5 CLJ 654

Arch Reinsurance Ltd v Akay Holdings Sdn Bhd (Federal Court Civil Appeal No. 02(f)-9-03/2016(W))

Bauer (M) Sdn Bhd v Daewoo Corp. [1999] 4 MLJ 545

Baytur SA v Finagro Holding SA [1992] QB 610

Best Re (L) Ltd v ACE Jerneh Insurance Berhad [2015] 5 MLJ 513

Bina Jati Sdn Bhd v Sum Projects Bros Sdn Bhd, [2002] 2 MLJ page 71

Bina Puri Sdn Bhd v EP Engineering Sdn Bhd & Anor [2008] 3 CLJ 741

Borneo Samudera Sdn Bhd v Siti Rahfizah Mihaldin & Ors [2008] 5 CLJ 435

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

China State Construction Engineering Corp Guangdong Branch v Madiford Ltd [1992] 1 HKC 320

CLLS Power System Sdn Bhd v Sara-Timur Sdn Bhd [2015] 11 MLJ 485

CMS Energy Sdn Bhd v Poson Corporation [2008] 6 MLJ 561

Country X v Company Q (Yearbook Commerical Arbotration), [XXII-1997]

CTI Group Inc v International Bulk Carriers SpA [2017] 6 AMR 344.

Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd [2019] 10 MLJ 693

Daunt v Lazard (1858) 27 LJ Ex 399

Doleman & Sons v Osset Corp [1972] 3 KB 257

Edward (inspector of Taxes) v Bairstow [1956] AC 14

Ex parte Young, ReKitchen (1881) 17 Ch D 668

Far East Holdings Bhd v Majlis Ugama Islam dan Adat Resam Melayu Pahang [2018] 1 MLJ 1

Fima Palmbulk Services Sdn Bhd v Suruhanjaya Pelabuhan Pulau Pinang [1988] 1 MLJ 269

Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis [1983] 2 All ER 658

Garden Bay Sdn Bhd v Sime Darby Property Bhd [2018] 2 MLJ 636

Harris Adacom Corporation v Perkom Sdn Bhd [1994] 3 MLJ 504

Hartela Contractors Ltd. v Hartecon JV Sdn Bhd [1999] 2 MLJ 481

Hock Hua Bank (Sabah) Bhd v Yong Link Thin & Ors [1995] 2 MLJ 213

Innotec Asia Pacific Sdn Bhd v Innotec GmBH [2007] 8 CLJ 304

International Bulk Carriers Spa v CTI Group Inc [2014] 6 MLJ 851

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